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OF
BOUVIER'S
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COMPLETE IN ONE VOLUME



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• COMPLETE IN ONE VOLUME •



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REVISED AND BROUGHT TO DATE
WITH THE ADDITION OF MORE THAN SIX THOUSAND
NEW TITLES AND DEFINITIONS

By

WILLIAM EDWARD BALDWIN

*Editor, Baldwin's Law Dictionary; General Code of Ohio; Texas Statutes;
Official Statutes of Kentucky; Official Codes of Practice of Kentucky;
Baldwin's Civil Practice Manual For Ohio; Insurance Law of
New York and Banking Law of New York*



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PREFACE

JOHAN BOUVIER was admitted to practice in the Court of Common Pleas of Fayette County, Pennsylvania, in 1818. Four years later he was admitted as an attorney of the Supreme Court of that state. It is believed that work on the first edition of BOUVIER'S LAW DICTIONARY was undertaken between 1822 and 1827, for we read in the preface to that edition that Judge Bouvier attributes its publication "to the difficulties which the author experienced in his admission to the bar."

For years it has been the ambition of the editor to produce BOUVIER'S LAW DICTIONARY in *one compact volume*. This work is the fruition of that idea. The work has been thoroughly revised and contains more than six thousand new titles and definitions.

By the use of Bible paper, a three column page, and by the insertion of hundreds of cross references, the production of a one volume edition has been made possible, notwithstanding the revision and enlargement of the work. The cross references decrease the bulk of the book by avoiding unnecessary duplication, and increase its value by knitting the work into a more compact and practical whole.

No attempt has been made to make an "encyclopedia" of this edition by inclusion of long excerpts from court decisions, or of matter which properly belongs in the standard text books and in the larger encyclopedias of law, such as Corpus Juris, and the American and English Encyclopedia of Law. On the contrary, it has been the purpose of the editor to produce a book as practical as possible by making the definitions and explanations clear and concise; by giving particular attention to the ancient words and terms so necessary to the law student; and by including definitions judicially construed and interpreted by the courts, many of which are from the decisions of the Supreme Court of the United States.

In commemoration of the one hundred years' service of Judge Bouvier's work, this revision is designated the *CENTURY edition*.

The editor knows only too well that there must necessarily be some imperfections in a book which covers so large a field. The work, however, represents a sincere effort to produce a useful volume, and, for what it may be worth, it is offered not only to the bench and bar, but also to the layman who may have occasional use for such a work.

WILLIAM EDWARD BALDWIN.

Sept. 23, 1926
New York City

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To
ROBERTA LUCKETT BALDWIN
*who for ten years encouraged
the editor in the idea*

A LAW DICTIONARY.

A TABLE OF ABBREVIATIONS WILL BE FOUND UNDER THE TITLE **ABBREVIATION**.

A.

A. The first letter of the alphabet.

It is used to distinguish the first page of a folio, the second being marked "b," thus: Coke, *Litt.* 114 a, 114 b. It is also used as an abbreviation for many words of which it is the initial letter. See **ABBREVIATION**.

In *Latin phrases* it is a preposition, denoting *from, by, in, on, of, at*, and is of common use as a part of a title.

In *French phrases* it is also a preposition, denoting *of, at, to, for, in, with*.

The article "a" is not necessarily a singular term, it is often used in the sense of "any," and is then applied to more than one individual object; 141 Mass. 266; 101 N. Y. 453; 60 Ia. 225; sometimes as *the*; 23 Ch. Div. 595.

Among the Romans this letter was used in criminal trials. The judges were furnished with small tables covered with wax, and each one inscribed on it the initial letter of his vote: A (*absolvo*) when he voted to acquit the accused; C (*condemno*) when he was for condemnation; and N L (*non liquet*), when the matter did not appear clearly, and he desired a new argument.

The letter A (*l. a. antiquo*, "for the old law") was inscribed upon Roman ballots under the *Lex Tabellaria*, to indicate a negative vote; *Tayl. Civ. Law*, 191, 192.

A. U. C. See **ANNO URBIS CONDITE**; **AB URBE CONDITA**; **ANNO DOMINI**.

A CONFECTIONE (L. Lat.). From the making.

A CONSILIIS (Lat. *consilium*, advice). A counsellor. The term is used in the civil law by some writers instead of a *responsis*. *Spelm. Gloss. Apocrisarius*.

A DATU (L. Lat.). From the date.

A DROIT (L. Fr.). To right; to do right; to answer in law.

A FORTIORI (Lat.). With stronger reason; much more.

A JUDGE OR JUSTICE OF THE PEACE. A provision in the Statutes authorizing "a judge or justice of the peace" to issue search warrants, was intended to authorize *any* judge to issue the warrant. 84 Ky. 538, 2 S. W. 123.

A LATERE (Lat. *latus*, side). Collateral. Used in this sense in speaking of the succession to property. *Bract.* 20 b, 62 b. Without right. *Bract.* 42 b.

Apostolic; having full powers to represent the Pope as if he were present. *Du Cange, Legati a latere*; 4 Bla. Com. 306.

A ME (Lat. *ego*, I). A term denoting direct tenure of the superior lord. 2 Bell, H. L. Sc. 133.

Unjustly detaining from me. He is said to withhold a *me* (from me) who has ob-

tained possession of my property unjustly. *Calvinus, Lex*.

To pay a *me*, is to pay from my money.

A MENSA ET THORO (Lat. from table and bed, but more commonly translated, from bed and board). A kind of divorce, which is rather a separation of the parties by law, than a dissolution of the marriage. This species of divorce is practically abolished in Massachusetts, by statute 1870, c. 404. See 2 Bish. M. & D. § 1693; 1 *id.* §§ 67-70, 1496, 1497; *Lloyd on Div.* 12. See **DIVORCE**.

A NATIVITATE. From birth. *Burrill; Reg. orig.* 266b.

A ORE (L. Fr.). At present; now. *Retornable a ore*; returnable immediately.

A PERTE (L. Fr.). To lose. *A perte e a gayne*; to lose and to gain.

A POSTERIORI (Lat.). From the effect to the cause; from what comes after.

A PRENDRE (Fr. to take, to seize). Rightfully taken from the soil. 5 Ad. & E. 764; 1 N. & P. 172; 4 Pick. 145.

Used in the phrase *proft a prendre*, which differs from a right of way or other easement which confers no interest in the land itself. 5 B. & C. 221; 2 Washb. R. P. 25.

A PRIORI (Lat.). From the cause to the effect; from what goes before.

A QUO (Lat.). From which. A court *a quo* is a court from which a cause has been removed. The judge *a quo* is the judge in such court. 6 Mart. La. 520. Its correlative is *ad quem*.

A RENDRE (Fr. to render, to yield). Which are to be paid or yielded. *Profits à rendre* comprehend rents and services; *Hammond, Nisi P.* 192.

A RETRO (Lat.). In arrear.

A RUBRO AD NIGRUM (Lat. from red to black). From the (red) title or rubric to the (black) body of the statute. It was anciently the custom to print statutes in this manner; *Erskine, Inst.* 1, 1, 49.

A VINCULO MATRIMONII (Lat. from the bond of matrimony). A kind of divorce which effects a complete destruction of the marriage contract. See **DIVORCE**.

AB (Lat.). From, by, of.

AB ACTIS (Lat. *actus*, an act). A notary; one who takes down words as they are spoken. *Du Cange, Acta*; *Spelm. Gloss. Cancellarius*.

A reporter who took down the decisions or *acta* of the court as they were given.

AB ANTE (Lat. *ante*, before). In advance.

A legislature cannot agree *ab ante* to any modification or amendment to a law which a third person may make; 1 Sumn. 308.

AB ANTECEDENTE (Lat. *antece-*
dens). Beforehand. 5 M. & S. 110.

AB EXTRA (Lat. *extra*, beyond, without). From without. 14 Mass. 151.

AB INCONVENIENTI (Lat. *inconve-*
niens). From hardship; from what is inconvenient. An argument *ab inconvenienti* is an argument drawn from the hardship of the case.

AB INITIO (Lat. *initium*, beginning). From the beginning; entirely; as to all the acts done; in the inception.

An estate may be said to be good, an agreement to be void, an act to be unlawful, a trespass to have existed, *ab initio*; *Plowd.* 6 a; 11 East 386; 10 Johns. 283, 369; 1 Bla. Com. 440. See *Ad. Eq.* 186. *Webb's Poll. (Torts)* Wald's ed. 477. See **TRESPASS**; **TRESPASSER**.

Before. Contrasted in this sense with *ex post facto*, 2 Shars. Bla. Com. 308; or with *postea*, *Calvinus, Lex., Initium*.

AB INITIO MUNDI (Lat.). From the beginning of the world.

AB INTESTAT. Intestate. 2 Low. Can. 219. *Merlin, Repert.*

AB INTESTATO (Lat. *testatus*, having made a will). From an intestate. Used both in the common and civil law to denote an inheritance derived from an ancestor who died without making a will; 2 Shars. Bla. Com. 490; *Story, Conf. L.* 480.

AB INVITO (Lat. *invitum*). Unwillingly. See **INVITUM**.

AB IRATO (Lat. *iratus*, an angry man). By one who is angry. A devise or gift made by a man adversely to the interest of his heirs, on account of anger or hatred against them, is said to be made *ab irato*. A suit to set aside such a will is called an action *ab irato*; *Merlin, Repert. Ab irato*.

AB URBE CONDITA. From the city's construction [Rome]; interchangeable with *Anno Urbis Condite*; both usually abbreviated A. U. C. *Stand. Dict.* See **ANNO URBIS CONDITE**; **ANNO DOMINI**.

ABACTOR (Lat. *ab* and *agere*, to lead away). One who stole cattle in numbers. *Jacob, Law Dict.* One who stole one horse, two mares, two oxen, two she-goats, or five

rams. *Abigeus* was the term more commonly used to denote such an offender.

ABADENGO. Spanish Law. Lands, town, and villages belonging to an abbot and under his jurisdiction. All lands belonging to ecclesiastical corporations, and as such exempt from taxation; *Escriche, Dicc. Raz.*

Lands of this kind were usually held in mortmain, and hence a law was enacted declaring that no land liable to taxation could be given to ecclesiastical institutions ("*ningun Realengo non pase a abadengo*"), which is repeatedly insisted on.

ABALIENATIO (Lat. *alienatio*). The most complete method used among the Romans of transferring lands. It could take place only between Roman citizens. *Calvinus, Lex., Abalienatio*; *Burr. Law. Dic.*

ABAMITA (Lat.). The sister of a great-great-grandfather; *Calvinus, Lex.*

ABANDON. See **ABANDONMENT.**

ABANDONEE. One to whom property is relinquished or abandoned. An insurer of property which has become a total loss. *English.*

ABANDONMENT. The relinquishment or surrender of rights or property by one person to another.

In Civil Law. The act by which a debtor surrenders his property for the benefit of his creditors; *Merlin, Repert.*

By Husband or Wife. The act of a husband or wife who leaves his or her consort wilfully, and with an intention of causing perpetual separation.

When a wife voluntarily "leaves her husband," and lives in adultery, by voluntarily adopting the adulterous relation in the husband's enforced protracted absence from his home, it is an "abandonment." 110 Ky. 328, 61 S. W. 360. See **DESERTION.**

Of Homestead. A person occupying homestead lets the premises to tenant at will, naming price at which he would sell, and then leaves to earn a livelihood, but with intention to return, held there was no proof of abandonment; 75 Ia. 631. One whose dwelling was destroyed by fire applied to another for material to rebuild, saying if aid was refused he must abandon his homestead right, held that this was insufficient to justify a finding that the homestead had been abandoned; 39 Minn. 193. Temporary absence, but with intention to reoccupy, will not forfeit homestead; 56 Ark. 621. In California to constitute abandonment of homestead, required declaration to that effect, signed, acknowledged and recorded. Mere removal with or without intention of returning does not constitute abandonment; 71 Cal. 325; 100 U. S. 104; 29 Minn. 20.

Removal from state permanently and residence elsewhere, terminates right of homestead, although laid off and allowed before such removal; 91 Ga. 367.

Criminal Law. Where a man indicted for seduction under a statute, marries the prosecuting witness and the prosecution is suspended, and later he deserts his wife, upon such "abandonment" the prosecution shall be renewed. 154 Ky. 201, 157 S. W. 372.

In Insurance. The transfer by an assured to his underwriters of his interest in the insured subject, or the proceeds of it, or claims arising from it; so far as the subject is insured by the policy, in order to recover as for a total loss; *Tyser, Mar. Ins.* § 20.

The term is used only in reference to risks in navigation; but the principle is applicable in fire insurance, where there are remnants, and sometimes also under stipulations in life policies in favor of creditors; 2 Phil. Ins. §§ 1490, 1514, 1515; 3 Kent 265; 16 Ohio St. 200; 6 East 72.

The doctrines which have obtained in marine insurance of constructive total loss and abandonment, salvage and general

average, are not applicable in fire insurance; *May, Ins.* § 421 a; 39 Ark. 264.

The object of abandonment being to recover the whole value of the subject of the insurance, it can occur only where the subject itself, or remains of it, or claims on account of it, survive the peril which is the occasion of the loss; 2 Phil. Ins. §§ 1507, 1516; 2 Pars. *Mar. Ins.* 120; 36 Eng. L. & Eq. 198; 3 Kent 321; 3 Bing. N. C. 266. In such case the assured must elect, immediately on receiving intelligence of a loss, whether to abandon, and not delay for the purpose of speculating on the state of the markets; 2 Phil. Ins. § 1667. He may have a reasonable time to inspect the cargo, but for no other purpose; 3 Kent 320. He must give notice promptly to the insurer of his intention; five days held too late; 5 M. & S. 47; see L. R. 5 C. P. 341. Notice of the abandonment of a vessel need not be given to insurers or reinsurers where there is a constructive total loss; 2 Beach. Ins. §§ 955, 956; 15 Q.-B. D. 11; and delay in giving notice, if it does not prejudice the insurer, will not affect the rights of the insured; 24 Fed. Rep. 279. In cases of actual total loss, notice of abandonment is unnecessary; *Tyser, Mar. Ins.* § 33.

In America, it appears that the right of abandonment is to be judged by the facts of each particular case as they existed at the time of abandonment; 3 Mas. 27; 2 Phil. Ins. § 1536; 12 Pet. 378. In England, the abandonment may be effected by subsequent occurrences, and the facts at the time of action brought determine the right to recover; 4 M. & S. 394; 2 Burr. 1198. But this rule has been doubted in England; 2 Dow 474; 3 Kent 324.

By the doctrine of constructive total loss, a loss of over one-half of the property insured, or damage to the extent of over one-half its value, by a peril insured against, may be turned into a total loss by abandonment; 2 Beach. Ins. § 948; 3 Johns. Cas. 182; 1 Gray 154. This does not appear to be the English rule; 9 C. B. 94; 1 H. of L. 513. See 4 Am. L. Reg. 481; 1 Gray 371.

The right is waived by commencing repairs; 2 Pars. *Mar. Ins.* 140; *Tyser, Mar. Ins.* § 26, 3 Mas. 429; 3 Wend. 658; 5 Cow. 63; 4 App. Cas. 755; but not by temporary repairs; 2 Phil. Ins. §§ 1540; but is not lost by reason of the enhancement of the loss through the mere negligence or mistakes of the master or crew. It is too late to abandon after the arrival *in specie* at the port of destination; 2 Pars. *Mar. Ins.* 128; 4 H. of L. 24; 15 Wend. 453. See 3 S. & R. 25. An inexpedient or unnecessary sale of the subject by the master does not strengthen the right; 2 Phil. Ins. §§ 1547, 1555, 1570. But the fact that the master only takes steps for the safety or recovery of the thing insured, will not deprive the owners of the right to abandon; *Tyser, Mar. Ins.* § 28. See **SALVAGE**; **TOTAL LOSS.**

No notice of abandonment is necessary where owner loses his rights in a vessel by sale under decree of court of competent jurisdiction, in consequence of peril insured against; 13 App. Cas. 160.

Abandonment may be made upon information entitled to credit, but if made speculatively upon conjecture, it is null.

In the absence of any stipulation on the subject, no particular form of abandonment is required; it may be in writing or oral, in express terms or by obvious implication (but see 1 Campb. 541); but it must be absolute and unconditional, and the ground for it must be stated; 2 Phil. Ins. §§ 1678, 1679 *et seq.*; 1 Curt. C. C. 148; 4 Dall. 272; 18 Pick. 88; see 9 Metc. 354; 9 Mo. 406. Acceptance may cure a defect in abandonment, but is not necessary to its validity; 2 Phil. Ins. § 1689. Nor is the underwriter obliged to accept or decline. He may, however, waive it; 2 Phil. Ins. § 1698. But it is not subject to be defeated by subsequent events; 2 Phil. Ins. § 1704; 3 Mas. 27, 61, 429; 4 Cran. 29; 9 Johns. 21. See *supra*. And the subject must be transferred free of encumbrance except expense for salvage; 1 Gray 154; 5 Cow. 68. See **TOTAL LOSS.**

In Maritime Law. The act by which the owner of a ship surrenders the ship and freight to a creditor who has become such by contracts made by the master.

The effect of such abandonment is to release the owner from any further responsibility. The privilege in case of contracts is limited to those of a maritime nature; *Pothier, Chart. Part. sec. 2, art. 2, § 51*; *Code de Commerce, lib. 2, tit. 2, art. 216*. Similar provisions exist in England and the United States to some extent; 1 Par. *Mar. Law*, 395; 5 Sto. 465; 5 Mich. 368. Under the Act of Congress of 1851, March 3 (Rev. Stat. U. S. § 4285), the liability of the shipowners for a collision may be discharged by surrendering and assigning the vessel and freight to a trustee for the benefit of the parties injured, though these have been diminished in value by the collision; when they are totally destroyed, it would seem that the owners are discharged; 13 Wall. 104; 8 Blatchf. 14; overruling 14 Gray 288; 6 Phila. 479. This is not the case under the English statutes. 2 My. & Cr. 489; 15 M. & W. 391; 2 B. & Ad. 2. Insurers notified that vessel is abandoned to them, after which owner and master take no steps to save vessel, does not relieve the insurers of liability on policy of insurance; 42 Fed. Rep. 169. See **ABANDONMENT FOR TORTS.** A schooner was stranded and crew taken off by life-saving crew, the master expecting to return on board, and with no intention of abandoning her; a tug took schooner in tow to New York, and it was held that salvage service should be allowed; 39 Fed. Rep. 331.

Of Public Highway. Non-user of public alley for over 40 years in connection with affirmative acts of abandonment, justifies a finding that it cease to be a public highway; 130 N. Y. 618; 56 Hun 288. Encroachment on public highway outside of travelled track and use thereof by a private party for 10 years did not necessarily show abandonment of the highway; 84 Mich. 54.

Of Public Lands. Failure to pay interest on school lands for 15 years with no assertion of ownership will prevent assertion of title as against subsequent purchaser from the state who has been in possession of property for 10 years; 25 Neb. 420.

Of Public Use. Discontinuance of the use of property for public purposes, as the abandonment of a railroad, public highway, or public land. Just what constitutes such an abandonment is a question to be determined from the circumstances of each particular case. *Lewis, Eminent Domain* (3rd ed.). § 862.

Of R. R. Station. To move the stopping place of interurban cars three or four hundred feet, the better to serve the public, is not an "abandonment" of the station. 143 Ky. 520, 136 S. W. 1018.

Of Rights. The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person, but with an intention to abandon; 14 M. & W. 789; 9 Metc. 395; 2 Flip. 309. Mere non-user does not necessarily or usually constitute an abandonment; 10 Pick. 310; 3 Strobb. 224; 5 Rich. 405; 16 Barb. 150; see *Tud. Lead. Cas.* 130; 2 Washb. R. P. 88.

Abandonment is properly confined to incorporeal hereditaments, as legal rights once vested must be divested according to law, though equitable rights may be abandoned; 2 Wash. C. C. 106; 25 Pa. 259; 32 *id.* 401; 15 N. H. 412; see 1 Hen. & M. 429; and an abandonment combined with sufficiently long possession by another party destroys the right of the original owner; 10 Watts 192; 2 Metc. Mass. 32; 31 Me. 381; see also 8 Wend. 480; 3 Ohio 107; 3 Pa. 141.

There may be an abandonment of an easement; 5 Gray 409; 6 Conn. 298; 10 Humphr. 165; 16 Wend. 531; 16 Barb. 184; 3 B. & C. 332; of a mill site; 23 Pick. 216; 34 Me. 394; 4 M'Cord 96; 7 Bingh. 682; an

application for land; 2 S. & R. 378; of an improvement; 3 S. & R. 319; of a trust fund; 3 Yerg. Tenn. 258; of an invention or discovery; 1 Stor. 280; 4 Mas. 111; property sunk in a steamboat and unclaimed; 12 La. An. 745; a mining claim; 6 Cal. 510; a right under a land warrant; 28 Pa. 271. An easement acquired by grant is not lost by non-user; 160 Mass. 361.

The burden of proof rests on the party claiming abandonment of an easement; 137 N. Y. 317.

The question of abandonment is one of fact for the jury; 2 Washb. R. P. 82; 49 N. Y. 346; 77 N. C. 186; 16 Pa. 320.

The effect of abandonment when acted upon by another party is to divest all the owner's rights; 6 Cal. 510; 11 Ill. 588. Consult 2 Washb. R. P. 56, 82, 85, 253. See also Curtis, Pat. §381; Walk. Patents §87; Ewell, Fixt.; Thomp. Homest.; Dicey, Dom. 90.

ABANDONMENT FOR TORTS. In Civil Law. The relinquishment of a slave or animal who had committed a trespass to the person injured, in discharge of the owner's liability for such trespass or injury. If this were done, the owner could not be held to any further responsibility. Just. Inst. 4, 8, 9.

A similar right exists in Louisiana; 11 La. An. 396.

ABANDUM, or ABANDONUM. Anything sequestered, proscribed, or abandoned. Jacob.

ABARNARE (Lat.). To discover and disclose to a magistrate any secret crime. *Leues Canuti*, cap. 10.

ABATAMENTUM (Lat. *abatare*). An entry by interposition. Co. Litt. 277. An abatement. Yelv. 151.

ABATARE. To abate. Yelv. 151.

ABATE. See ABATEMENT.

ABATEMENT (Fr. *abattre*, L. Fr. *abater*), to throw down, to beat down, destroy, quash. 5 Shars. Bla. Com. 168; 6 Conn. 140.

In Chancery Practice. A suspension of all proceedings in a suit, from the want of proper parties capable of proceeding therein.

It differs from an abatement at law in this; that in the latter the action is entirely dead and cannot be revived; but in the former the right to proceed is merely suspended, and may be revived by a supplemental bill in the nature of a bill of revivor; 3 Bla. Com. 301; 21 N. H. 246; Sto. Eq. Pl. § 30 n.; § 354; Ad. Eq. 408; Mitt. Eq. Pl. by Jeremy 57; Edw. Receiv. 19; 5 Lea 244; where interest is transmitted by act of law, as to personal representative or heir a simple bill of revivor may be used; Story, Eq. Pl. § 364; 2 J. J. Mar. 303; 4 Pick. 139; but where by virtue of act of party, as to devisee, an original bill in the nature of a bill of revivor must be used; 3 Bibb 377; 3 Mas. 308.

Generally speaking, if any property or right in litigation is transmitted to another, he is entitled to continue the suit, or at least have the benefit of it, if he be plaintiff; Edw. Receiv. 19; 9 Paige, Ch. 410; or it may be continued against him, or at least perfected, if he be defendant; Story, Eq. Pl. §§ 332, 442; 7 Paige, Ch. 290. See PARTIES.

Death of a trustee does not abate a suit, but it must be suspended till a new one is appointed; 5 Gray 162; 64 Hun 635.

The death of the owner of the equity of redemption abates a foreclosure suit; 58 Fed. Rep. 552.

There are some cases, however, in which a court of equity will entertain application notwithstanding the suit is suspended; thus, proceedings may be had to preserve property in dispute; 2 Paige, Ch. 365; to pay money out of court where the right is clear; 6 Ves. 250; or upon consent of parties; 2 Ves. 399; to punish a party for breach of an injunction; 4 Paige, Ch. 163; to enroll a decree; 2 Dick. 612; or to make an order

for the delivery of deeds and writings; 1 Ves. 185.

Although abatement in chancery suspends proceedings, it does not put an end to them; a party therefore imprisoned for contempt is not discharged, but must move that the complaint be revived in a specified time or the bill be dismissed and himself discharged; Barb. Ch. Pr. 527; Dan. Ch. Pr. 6th Am. ed. *1548. Nor will a receiver be discharged without special order of court; 1 Barb. 329; Edw. Rec. 19.

All declinatory and dilatory pleas in equity are said to be pleas in abatement, or in the nature thereof; see Story, Eq. Pl. § 708; Bea. Eq. 55; Coop. Eq. Pl. 236. And such pleas must be pleaded before a plea in bar, if at all; Story, Eq. Pl. § 708; see 7 Johns. Ch. 214; 20 Ga. 379. See PLEA.

In Contracts. A reduction made by the creditor, for the prompt payment of a debt due by the payer or debtor. Weskett, Ins. 7.

Of Freehold. The unlawful entry upon and keeping possession of an estate by a stranger, after the death of the ancestor and before the heir or devisee takes possession. It is a species of ouster by intervention between the ancestor or devisee and the heir or devisee, thus defeating the rightful possession of the latter; 3 Bla. Com. 167; Co. Litt. 277 a.; Fin. Law 195; Cruise, Dig. B. 1, 60.

By the ancient laws of Normandy, this term was used to signify the act of one who, having an apparent right of possession to an estate, took possession of it immediately after the death of the actual possessor, before the heir entered. Howard, *Anciennes Loies des Français*, tome 1, p. 539.

Of Legacies. The reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies.

When the estate of a testator is insufficient to pay both debts and legacies, it is the rule that the general legacies must abate proportionally to an amount sufficient to pay the debts; 8 Pick. 478; 106 Mass. 100; 97 Pa. 187.

If the general legacies are exhausted before the debts are paid, then, and not till then, the specific legacies abate, and proportionally; 2 Bla. Com. 513 and note; Bacon, Abr. Leg. H.; Kop. Leg. 205, 294; 2 Brown, Ch. 19; 2 P. Wms. 383; 1 Ves. Sen. 584; 40 Mo. 290; 63 Pa. 312.

In Revenue Law. The deduction from, or the refunding of, duties sometimes made at the custom house, on account of damages received by goods during importation or while in store. See Act of Congress, Mar. 2, 1799, § 52, R. S. § 2394.

Of Nuisances. The removal of a nuisance. 3 Bla. Com. 5; Poll. Torts 210. See NUISANCE.

In Pleading at Law. The overthrow of an action caused by the defendant pleading some matter of fact tending to impeach the correctness of the writ or declaration, which defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way. Stephen, Pl. 47; Pepper, Pl. 15; Webb, Poll. Torts; 3 Bla. Com. 301; 1 Chit. Pl. (6th Lond. ed.) 446; Gould, Pl. ch. 5, § 65.

It has been applied rather inappropriately as a generic term to all pleas of a dilatory nature; whereas the word dilatory would seem to be the more proper generic term, and the word abatement applicable to a certain portion of dilatory pleas; Com. Dig. Abt. B; 1 Chit. Pl. 440 (6th Lond. ed.); Gould, Pl. ch. 5, § 65. In this general sense it has been used to include pleas to the jurisdiction of the court. See JURISDICTION.

AS TO THE PERSON OF THE PLAINTIFF AND DEFENDANT. It may be pleaded, as to the plaintiff, that there never was such a person *in rerum natura*; 1 Chit. Pl. (6th Lond. ed.) 448; 6 Pick. 370; 5 Watts 423;

19 Johns. 308; 14 Ark. 27; 5 Vt. 93 (except in ejectment; 19 Johns. 308); and by one of two or more defendants as to one or more of his co-defendants; Archb. C. P. 312. That one of the plaintiffs is a fictitious person, to defeat the action as to all; Com. Dig. Abt. E, 10; 1 Chit. Pl. 448; Archb. C. P. 304. This would also be a good plea in bar; 1 B. & P. 44. That the nominal plaintiff in the action of ejectment is fictitious, is not pleadable in any manner; 4 M. & S. 301; 10 Johns. 269. A defendant cannot plead matter which affects his co-defendant alone; 40 Me. 336; 4 Zab. 333; 34 N. H. 243; 21 Wend. 457.

Certain legal disabilities are pleadable in abatement, such as *outlawry*; Bac. Abr. Abt. B; Co. Litt. 128 a; *attainder* of treason or felony; 3 Bla. Com. 301; Com. Dig. Abt. E. 3; also *premunire* and *excommunication*; 3 Bla. Com. 301; Com. Dig. Abt. E. 5. The law in reference to these disabilities can be of no practical importance in the United States; Gould, Pl. ch. 5, § 82.

Alienage. That the plaintiff is an alien friend is pleadable only in some cases, where, for instance, he sues for property which he is incapacitated from holding or acquiring; Co. Litt. 129 b; Busb. N. C. 250. By the common law, although he could not inherit, yet he might acquire by purchase, and hold as against all but the sovereign. Accordingly he has been allowed in this country to sue upon a title by grant or devise; 1 Mass. 256; 7 Cra. 608; but see 6 Cal. 250; 26 Mo. 426. The early English authority upon this point was otherwise; Bac. Abr. Abt. B, 3, Aliens D; Co. Litt. 129 b. He is in general able to maintain all actions relating to personal chattels or personal injuries; 3 Bla. Com. 384; Cowp. 161; Bac. Abr. Aliens D; 2 Kent 34; Co. Litt. 129 b. But an alien enemy can maintain no action except by licence or permission of the government; Bac. Abr. Abt. B, 3, Aliens D; 46; 1 Id. Raym. 282; 2 Stra. 1082; 6 Term 53, 49; 6 Binn. 241; 9 Mass. 363, 377; 3 M. & S. 533; 2 Johns. Ch. 508; 1 S. & R. 315. This will be implied from the alien being suffered to remain, or to come to the country, after the commencement of hostilities without being ordered away by the executive; 10 Johns. 69. See 28 Eng. L. & Eq. 319. The better opinion seems to be that an alien enemy cannot sue as administrator; Gould, Pl. ch. 5, § 44.

Corporations. A plea in abatement is the proper manner of contesting the existence of an alleged corporation plaintiff; Wright, Ohio 12; 1 Mass. 485; 1 Md. 502; 33 Pa. 356; 28 N. H. 93; 1 Pet. 450; 5 id. 231. To a suit brought in the name of the "Judges of the County Court," after such court has been abolished, the defendant may plead in abatement that there are no such judges; 2 Bay, S. C. 519; Beach, Priv. Corp. 783.

Coverture of the plaintiff is pleadable in abatement; Com. Dig. Abt. E, 6; Bac. Abr. Abt. G; Co. Litt. 132; 3 Term 681; 1 Chit. Pl. 439; 7 Gray 338; though occurring after suit brought; 3 Bla. Com. 316; Bac. Abr. Abt. 9; 4 S. & R. 238; 17 Mass. 342; 6 Term 295; and see 1 E. D. Sm. 273; but not after plea in bar, unless the marriage arose after the plea in bar; 15 Conn. 569; but in that case the defendant must not suffer a continuance to intervene between the happening of this new matter, or its coming to his knowledge, and his pleading it; 4 S. & R. 238; 1 Bailey 389; 2 Wheat. 111; 14 Mass. 295; 1 Blackf. 238; 10 S. & R. 208; 7 Vt. 508; 3 Bibb 246. And it cannot be otherwise objected to if she sues for a cause of action that would survive to her on the death of her husband; 12 M. & W. 97; 9 C. B. 153; 10 S. & R. 208. Where she sues, not having any interest, the defence is one of substance, and may be pleaded in bar, by demurrer, or on the general issue; 4 Term 361; 1 Salk. 114; 1 H. Bla. 108; Cro. Jac. 644, whether she sues jointly or alone. So also

where coverture avoids the contract or instrument, it is matter in bar; 14 S. & R. 379.

Where a *feme covert* is sued without her husband for a cause of action that would survive against her, as upon a contract made before, or a tort committed after, marriage, the coverture is pleadable in abatement; 3 Term 626; and not otherwise; 9 M. & W. 299; Com. Dig. Abt. F, 2. If the marriage takes place pending the action, it cannot be pleaded: 3 Ld. Raym. 1525; 5 Me. 445; 2 M'Cord 469. It must be pleaded by the *feme* in person; 2 Saund. 209 b. Any thing which suspends the coverture suspends also the right to plead it; Com. Dig. Abt. F, 2, § 3; Co. Litt. 133 b; 1 B. & P. 358, n. (f); 15 Mass. 81; 6 Pick. 29. Marriage of female defendant in error after writ has been duly served, will not abate suit, but it will proceed as if she were still unmarried; 30 Fla. 210.

Death of the plaintiff before purchase of the writ may be pleaded in abatement; 1 Archb. C. P. 304; Com. Dig. Abt. E, 17; 3 Ill. 507; 1 W. & S. 438; 14 Miss. 205; 2 M'Mull. 49. So may the death of a sole plaintiff who dies pending his suit at common law; Bac. Abr. Abt. F; 4 Hen. & M. 410; 3 Mass. 296; 2 Root 57; 9 Mass. 422; 2 Rand. Va. 454; 2 Me. 127. Otherwise now by statute, in most cases, in most if not all the states of the United States, and in England since 1852. The personal representatives are usually authorized to act in such cases. If the cause of action is such that the right dies with the person, the suit still abates. By statute 8 & 9 Wm. IV. ch. 2, sect. 7, which is understood to enact the common-law rule, where the form of action is such that the death of one of several plaintiffs will not change the plea, the action does not abate by the death of any of the plaintiffs pending the suit. The death of the lessor in ejectment never abates the suit; 8 Johns. 495; 23 Ala. n. s. 193; 13 Ired. 43, 489; 1 Blatchf. 393. On death of plaintiff in ejectment his heirs are properly substituted on defendant's petition; 158 Pa. 497.

On death of administrator bringing suit it may be revived by his administrator or by administrator *de bonis non*; 92 Tenn. 514. In Missouri an action for personal injuries cannot be revived by the administrator after plaintiff's death; 97 Mo. 79. In Maryland an action by husband to recover damages for the killing of his wife, abates on his death; 70 Md. 319.

On the death of one of three partners plaintiff the remaining two may prosecute to final judgment in their own names; 93 Ala. 173.

The death of sole defendant pending an action abates it; Bac. Abr. Abt. F; Hayw. 509; 2 Binn. 1; Giln. 145; 4 M'Cord 160; 7 Wheat. 530; 1 Watts 229; 4 Mass. 480; 8 Me. 129; 11 Ga. 151. But where one of several co-defendants dies pending the action, his death is in general no cause of abatement, even by common law; Cro. Car. 426; Bac. Abr. Abt. F; Gould, Pl. ch. 5, § 93. If cause of action is such as would survive against the survivor or survivors, the plaintiff may proceed by suggesting the death upon the record; 24 Miss. 192; Gould, Pl. ch. 5, § 93. Where one of several plaintiffs or defendants in error dies, the suit does not abate or require a revival in the Supreme Court; 96 Mo. 316. The inconvenience of abatement by death of parties was remedied by 17 Car. II. ch. 8, and 8 & 9 Wm. III. ch. 2, ss. 6, 7. In the United States, on the death of a sole defendant, his personal representatives may be substituted if the action could have been originally prosecuted against them; Gould, Pl. ch. 5, § 95. The right of action against a tort-feasor dies with him; and such death should be pleaded in abatement; 3 Cal. 370. Many exceptions to this rule exists by statute.

Infancy is pleadable in abatement to the person of the plaintiff, unless the infant appear by guardian or *prochein ami*; Co. Litt. 135 b; 2 Saund. 117; 3 Bla. Com.

301; Bac. Abr. Infancy, K. 2; 7 Johns. 379; 2 Conn. 357; 3 E. D. Sm. 296; 8 Pick. 552. He cannot appear by attorney, since he cannot make a power of attorney; 8 Saund. 212; 3 N. H. 845; 8 Pick. 552; 4 Halst. 381; 2 N. H. 487; 7 Johns. 373. The death of the next friend bringing suit for minors does not abate suit, nor does the attainment of majority by minors; 68 Miss. 698. Where an infant sues as co-executor with an adult, both may appear by attorney, for, the suit being brought in *autre droit*, the personal rights of the infant are not affected, and therefore the adult is permitted to appoint an attorney for both; 8 Saund. 212; 1 Rolle, Abr. 288; Cro. Eliz. 542. At common law, judgment obtained for or against an infant plaintiff who appears by attorney, no plea being interposed, may be reversed by writ of error; 1 Rolle, Abr. 287; Cro. Jac. 441. By statute, however, such judgment is valid, if for the infant; 8 Saund. 212 (n. 5).

Imprisonment. A sentence to imprisonment in New York, either of plaintiff or defendant, abates the action by statute; 2 Johns. Cas. 408; 1 Duer 664; but see 8 Bosw. 617.

Lunacy. A lunatic may appear by attorney, and the court will on motion appoint an attorney for him; 18 Johns. 185. But a suit brought by a lunatic under guardianship shall abate; Brayt. 18.

Misjoinder. The joinder of improper plaintiffs may be pleaded in abatement; Com. Dig. Abt. E, 15; Archb. C. P. 304; 1 Chit. Pl. 8. Advantage may also be taken, if the misjoinder appear on record, by demurrer in arrest of judgment, or by writ of error. If it does not appear in the pleadings, it would be ground of non-suit on the trial; 1 Chit. Pl. 66. Misjoinder of defendants in a personal action is not subject of a plea in abatement; 18 Ga. 509; Archb. C. P. 68, 310. When an action is thus brought against two upon a contract made by one, it is a good ground of defence under the general issue; Clayt. 114; 2 Day 273; 11 Johns. 104; 1 Esp. 363; for in such case the proof disproves the declaration. If several are sued for a tort committed by one, such misjoinder is no ground of objection in any manner, as of co-defendants in actions *ex delicto*, some may be convicted and others acquitted; 1 Saund. 291. In a real action, if brought against several persons, they may plead several tenancy; that is, that they hold in severalty, not jointly; Com. Dig. Abt. F, 12; or one of them may take the entire tenancy on himself, and pray judgment of the writ; Com. Dig. Abt. F, 13. Misjoinder of action is waived unless taken before defence; 51 Ark. 235.

Misnomer of plaintiff, where the misnomer appears in the declaration, must be pleaded in abatement; 1 Mass. 76; 15 id. 469; 10 S. & R. 257; 10 Humphr. 512; 9 Barb. 202; 22 N. H. 470. It is a good plea in abatement that the party sues by his surname only; Harp. 49; 1 Tayl. No. C. 148; Coxe 138. A mistake in the Christian name is ground for abatement; 13 Ill. 570. In England the effect of pleas in abatement of misnomer has been diminished by statute 3 & 4 Wm. IV. ch. 42, s. 11, which allows an amendment at the cost of the plaintiff. The rule embodied in the English statute prevails in this country.

If the defendant is sued or declared against by a wrong name, he may plead the mistake in abatement; 3 Bla. Com. 302; 3 East 167; Bac. Abr. D; and in abatement only, 5 Mo. 118; 3 Ill. 290; 14 Ala. 256; 8 Mo. 291; 1 Metc. Mass. 151; but one defendant cannot plead the misnomer of another, Com. Dig. Abt. F, 18; Archb. C. P. 312; 1 Nev. & P. 26.

The omission of the initial letter between the Christian and surname of the party is not a misnomer or variance; 5 Johns. 84. As to *idem sonans*, see 18 East 83; 16 id. 110; 2 Taunt. 400. Since oyer of the writ

has been prohibited, the misnomer must appear in the declaration; 1 Cow. 37. Misnomer of defendant was never pleadable in any other manner than in abatement; 5 Mo. 118; 3 Ill. 290; 14 Ala. 256; 8 Mo. 291; 1 Metc. Mass. 151. In England this plea has been abolished; 3 & 4 Wm. IV. ch. 42, s. 11. And in the States, generally, the plaintiff is allowed to amend a misnomer. The misnomer of one of two defendants, as to his Christian name, if material at all when sued as a firm, must be taken advantage of by plea in abatement; 8 Watts 485.

In criminal practice the usual pleas in abatement are for misnomer. If the indictment assigns to the defendant no Christian name, or a wrong one, no surname, or a wrong one, he can only object to this matter by a plea in abatement; 2 Gabb. Cr. L. 327. As to the evidence necessary in such case, see 1 M. & S. 453; 1 Campb. 479; 3 Greenl. Ev. § 221.

Non-joinder. If one of several joint tenants sue, Co. Litt. 180 b; Bacon, Abr. *Joint Tenants*, K; 1 B. & P. 73; one of several joint contractors, in an action *ex contractu*, Archb. C. P. 48, 58; one of several partners, 16 Ill. 340; 19 Pa. 273; Gow, Partn. 150; Coll. Partn. § 649; one of several joint executors who have proved the will, or even if they have not proved the will 10; Ark. 166; 1 Chit. Pl. 12, 13; one of several joint administrators, *id.* 13; the defendant may plead the non-joinder in abatement; Com. Dig. Abt. E; 1 Chit. Pl. 12. The omission of one or more of the owners of the property in an action *ex delicto* is pleaded in abatement; 22 Vt. 388; 10 Ired. 169; 2 Cush. 180; 13 Pa. 497; 11 Ill. 22. Dormant partners may be omitted in suits on contracts to which they are not privy; 4 Wend. 628; 8 S. & R. 55; 6 Pick. 352; 3 Cow. 85. A non-joinder may also be taken advantage of in actions *ex contractu*, at the trial, under the general issue, by demurrer, or in arrest of judgment, if it appears on the face of the pleadings; 4 Wend. 496.

Non-joinder of a person as defendant who is jointly interested in the contract upon which the action is brought can only be taken advantage of by plea in abatement; 5 Term 651; Tr. & H. Fr. 215; 1 East 20; 3 Campb. 50; 18 Johns. 459; 2 Iowa 161; 24 Conn. 531; 26 Pa. 458; 24 N. H. 128; 8 Gill 59; 19 Ala. n. s. 340; 2 Zab. 372; 9 B. Monr. 30; 23 Ga. 600; unless the mistake appear from the plaintiff's own pleadings, when it may be taken advantage of by demurrer or in arrest of judgment; 1 Saund. 271; 18 Johns. 459; 1 B. & P. 72. Non-joinder of a co-tenant may be pleaded when the suit respects the land held in common; 44 Me. 92. When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties separately or jointly. 1 Chit. Pl. 43; 1 Saund. 153, n. 1; Brayt. 22. In actions of tort the plaintiff may join the parties concerned in the tort, or not, at his election; 1 Saund. 291; 7 Price, Exch. 408; 3 B. & P. 54; Gould, Pl. ch. 2, § 118. The non-joinder of any of the wrong-doers is no defence in any form of action.

When husband and wife should be sued jointly, and one is sued alone, the non-joinder may be pleaded in abatement; Archb. C. P. 309. Non-joinder of co-executors or co-administrators may be pleaded in abatement; Com. Dig. Abt. F. The form of action is of no account where the action is substantially founded in contract; 6 Term 369; 5 id. 651. The law under this head has in a great measure become obsolete in many of the States, by statutory provisions making contracts which by the common law were joint, both joint and several.

Pendency of another action must be pleaded in abatement and not in bar; 156 Mass. 418; 88 Ga. 294; 98 Ala. 614. Prior pendency of an action unless both are in same jurisdiction is not cause for abatement; 16 R. I. 388. Pendency of suit in state court is no ground for plea in abatement to suit upon same cause in the Federal

court; 61 Fed. Rep. 190; 16 How. 104. Pendency of prior suit in one state cannot be pleaded in abatement of suit for same cause and same parties in another state; 48 Minn. 408. Pendency of a suit in a foreign country between the same parties and for same cause would not bar or abate an action; 60 N. Y. Super. Ct. 68; 50 Minn. 405; 3 Tex. Civ. App. 293. A good answer to plea in abatement of pendency of prior suit, is that such action has been dismissed since trial of second action began; 83 Cal. 270; 45 Minn. 103; 117 Mo. 530; 45 La. Ann. 502.

Privilege of defendant from being sued may be pleaded in abatement; 9 Yerg. 1; Bac. Abr. Abt. C. See **PRIVILEGE**. A peer of England cannot, as formerly, plead his peerage in abatement of a writ of summons; 2 Wm. IV. ch. 39. It is a good cause of abatement that the defendant was arrested at a time when he was privileged from arrest; 2 N. H. 483; 4 T. B. Monr. 539; or that he was served with process when privileged from suits; 2 Wend. 586; 1 South. N. J. 366; 1 Ala. 276. The privilege of defendant as member of the legislature has been pleaded in abatement; 4 Day 139.

For cases where the defendant may plead non-tenure, see Archb. C. P. 310; Cro. Eliz. 559; 33 Me. 343.

Where he may plead a disclaimer, see Archb. C. P.; Com. Dig. Abt. F, 15; 2 N. H. 10.

PLEAS IN ABATEMENT TO THE COUNT required oyer of the original writ; and, as this cannot now be had, these pleas are, it seems, abolished; 1 Chit. Pl. 405 (6th Lond. ed.); Saund. Pl. *Abatement*.

PLEAS IN ABATEMENT OF THE WRIT.—In general, any irregularity, defect, or informality in the terms, form, or structure of the writ, or mode of issuing it, is a ground of abatement; Gould, Pl. ch. 5, s. 133. Among them may be enumerated want of date, or impossible date; want of venue, or, in local actions, a wrong venue; a defective return; Gould, Pl. ch. 5, s. 133. Oyer of the writ being prohibited, these errors cannot be objected to unless they appear in the declaration, which is presumed to correspond with the writ; 6 Fla. 724; 3 B. & P. 399; 14 M. & W. 161. The objection then is to the writ through the declaration; 1 B. & P. 643; there being no plea to the declaration alone, but in bar; 2 Saund. 209; 10 Mod. 210. A variance between writ and declaration may properly be pleaded in abatement; 11 Ill. 573; 23 Miss. 193.

Such pleas are either to the form of the writ, or to the action thereof.

Those of the first description were formerly either for matter apparent on the face of the writ, or for matter *dehors*; Com. Dig. Abt. H, 17.

Pleas in abatement to the form of the writ were formerly allowed for very trifling errors apparent on the face of the writ; 1 Stra. 556; 14 Raym. 1541; 2 B. & P. 395, but since oyer has been prohibited have fallen into disuse; Tidd, Pr. 636.

Pleas in abatement of the form of the writ are now principally for matters *dehors*, Com. Dig. Abt. H, 17; Gilbert, C. P. 51, existing at the time of suing out the writ, or arising afterwards; such as misnomer of the plaintiff or defendant in Christian name or surname; Tidd, Pr. 637.

Pleas in Abatement to the Action of the Writ are that the action is misconceived, as if assumpsit is brought instead of account, or trespass when case is the proper action; 1 Show. 71; Tidd, Pr. 579; or that the right of action had not accrued at the commencement of the suit; 2 Lev. 197; Cro. Eliz. 325; Hob. 199; Com. Dig. Action, E, 1. But these pleas are unusual, since advantage may be taken for the same reasons on demurrer or under the general issue; Gould, Pl. ch. 5, s. 137; 1 C. & M. 492, 768. It may also be pleaded in abatement that there is another action pending; Com. Dig. Abt.

H, 24; Bac. Abr. Abt. M; 1 Chit. Pl. 443.

Variance. Where the count varies from the writ, or the writ varies from the record or instrument on which the action is brought, it is pleadable in abatement; 2 Wils. 35, 395; Cro. Eliz. 722; 1 H. Bla. 249; 17 Ark. 254; 17 Ill. 529; 25 N. H. 521. If the variance is only in matter of mere form, as in time or place, when that circumstance is immaterial, advantage can be taken only by plea in abatement; 8 Ind. 354; 10 Ill. 75; Yelv. 120; Latch 173; Gould, Pl. ch. 5, s. 97. But if the variance is in matter of substance, as if the writ sounds in contract and the declaration in tort, advantage may also be taken by motion in arrest of judgment; 28 N. H. 90; Hob. 279; Cro. Eliz. 722. Pleas under this head have been virtually abolished by the rule refusing oyer of the writ; and the operation of this rule extends to all pleas in abatement that cannot be proved without examination of the writ; Gould, Pl. ch. 5, s. 101. It seems that oyer of the writ is allowed in some of the states which retain the old system of pleading, as well as in those which have adopted new systems. In such states these rules as to variance are of force; 28 N. H. 90; 17 Ill. 529; 22 Ala. n. s. 588; 23 Miss. 198; 8 Ind. 354; 35 N. H. 172; 17 Ark. 154; 1 Harr. & G. 164; 1 T. B. Monr. 85; 11 Wheat. 280; 12 Johns. 430; 4 Halst. 284.

QUALITIES OF PLEAS IN ABATEMENT. The defendant may plead in abatement to part, and demur or plead in bar to the residue, of the declaration; 1 Chit. Pl. 453 (6th Lond. ed.); 2 Saund. 210. The general rule is that whatever proves the writ false at the time of suing it out shall abate the writ entirely; Gilb. C. P. 247; 1 Saund. 286 (n. 7).

As this plea delays the ascertainment of the merits of the action, it is not favored by the courts; the greatest accuracy and precision are therefore required; and it cannot be amended; 2 Saund. 298; Co. Litt. 392; 13 M. & W. 474; 2 Johns. Cas. 412; 8 Bingh. 416; 44 Me. 432; 18 Ark. 236; 1 Hemp. 215; 27 Ala. n. s. 678. It must contain a direct, full, and positive averment of all the material facts; 80 Vt. 76; 35 N. H. 172; 4 R. I. 110; 37 Me. 49; 28 N. H. 18; 24 Ala. n. s. 329; 1 Mich. 254. It must give enough so as to enable the plaintiff by amendment completely to supply the defect or avoid the mistake on which the plea is founded; 4 Term 224; 1 Saund. 274 (n. 4); 1 Day 28; 3 Mass. 24; 1 Hayw. 501; 2 Ld. Raym. 1178; 1 East 634.

It must not be double or repugnant; 5 Term 437; 3 M. & W. 607. It must have an apt and proper beginning and conclusion; 3 Term 186; 2 Johns. Cas. 312; 10 Johns. 49; 2 Saund. 209. The whole matter of complaint must be covered by the plea; 2 B. & P. 420. It cannot be pleaded after making full defence; 1 Chit. Pl. 441 (6th Lond. ed.).

As to the form of pleas in abatement, see 23 Vt. 211; 1 Chit. Pl. (6th Lond. ed.) 454; Com. Dig. Abt. I, 19; 2 Saund. 1 (n. 2).

As to the time of pleading matter in abatement. It must be pleaded before any plea to the merits, both in civil and criminal cases, except in cases where it arises or comes to the knowledge of the party subsequently; 6 Metc. 224; 21 Vt. 52; 40 Me. 218; 22 Barb. 244; 14 Ark. 445; 35 Me. 121; 15 Ala. 675; 13 Mo. 547; 28 Ill. App. 32; and the right is waived by a subsequent plea to the merits; 14 How. 505; 15 Ala. 673; 19 Conn. 498; 1 Ia. 165; 4 Gill 166; 11 Wall. 658. See **PLEA PUIS DARREIN CONTINUANCE**.

Demurrer to complaint for insufficiency of facts, waives all matter in abatement; 17 Oreg. 393.

Of the Affidavit of Truth. Every dilatory plea must be proven to be true, either by affidavit, by matter apparent upon the record, or probable matter shown to the court to induce them to believe it; 3 & 4 Anne, ch. 16, s. 11; 3 B. & P. 397; 3 Nev. & M. 260; 30 Vt. 177; 1 Curt. 494; 17 Ala. 30; 1 Chand. 16; 1 Swan 391; 1 Ia. 165. It is not necessary that the affidavit should be made by

the party himself; his attorney, or even a third person, will do; 1 Saund. Pl. & Ev. 3 (5th Am. ed.). The plaintiff may waive an affidavit; 5 Dowl. & L. 737; 16 Johns. 307. The affidavit must be coextensive with the plea; 3 Nev. & M. 260, and leave nothing to be collected by inference; Say. 293. It should state that the plea is true in substance and fact, and not merely that the plea is a true plea; 3 Stra. 705; 1 Browne 77; 3 Dall. 184.

Plea in abatement on account of non-joinder of joint promissors need not be verified by oath in Rhode Island; 16 R. I. 343.

JUDGMENT ON PLEAS IN ABATEMENT. If issue be joined on a plea in abatement, a judgment for the plaintiff upon a verdict is final; Tidd, Pr. 641; 1 Str. 532; 1 Bibb 234; 6 Wend. 649; 8 Cush. 301; 3 N. H. 233; 2 Pa. 361; 3 Wend. 258; but judgment for plaintiff upon a demurrer to a plea in abatement is not final, but merely *responded ouster*; Ld. Raym. 609; 16 Mass. 147; 14 N. H. 371; 1 Blackf. 383. After judgment of *responded ouster*, the defendant has four days' time to plead, commencing after the judgment has been signed; 8 Bingh. 177. He may plead again in abatement, provided the subject-matter pleaded be not of the same degree, or of any preceding degree or class with that before pleaded; Com. Dig. Abt. I, 3; 1 Saund. Pl. & Ev. 4 (5th Am. ed.); Tidd, Pr. 641.

If the plea is determined in favor of the defendant either upon an issue of law or fact, the judgment is that the writ or bill be quashed; Yelv. 112; Bac. Abr. Abt. P; Gould, Pl. ch. 5, § 159; 2 Saund. 211 (n. 3).

See further on the subject of abatement of actions, Com. Dig. Abt.; Bac. Abr. Abt.; 1 Saund. Pl. & Ev. 1 (5th Am. ed.); Grah. Fr. 224; Tidd, Pr. 636; Gould, Pl. ch. 5; 1 Chit. Pl. 443 (6th Lond. ed.); Story, Eq. Pl. 1-70; 1 Am. & Eng. Enc. 9; Shipman, Common Law Pl. § 160.

Of Taxes. A diminution or decrease in the amount of tax imposed upon any person. The provisions for securing this abatement are entirely matters of statute regulation; 5 Gray 365; 4 R. I. 313; 30 Pa. 227; 18 Ark. 380; 18 Ill. 812; and vary in the different States.

ABATOR. One who abates or destroys a nuisance. One who, having no right of entry, gets possession of the freehold to the prejudice of an heir or devisee, after the time when the ancestor died, and before the heir or devisee enters. Litt. § 397; Perk. Conv. § 383; 2 Prest. Abs. 296, 300. See Ad. Ej. 43; 1 Washb. R. P. 225.

ABATUDA. Anything diminished; as *moneta abatuda*; which is money clipped or diminished in value. Cowel.

ABAVIA. A great-great-grandmother.

ABAVITA. Used for *abamita*, which see.

ABAVUNCULUS. A great-great-grandmother's brother. Calvinus, Lex.

ABAVUS. A great-great-grandfather, or fourth male ascendant.

ABBACY. The government of a religious house, and the revenues thereof, subject to an abbot, as bishoprick from bishop. Jacob.

The dignity, or term of office of an abbot. Stand Dict.

ABBAT, or ABBOT. Specifically, a spiritual lord or governor, having the rule of a religious house. Jacob. Loosely, a bishop whose see was formerly an abbey; the head of a parish that has two or more clergymen. Stand. Dict. A title at one

time given to many princes and noblemen. Tayler.

ABBEY. A society of religious persons, having an abbot or abbess to preside over them.

ABBREVIATION. A shortened form of a word, obtained by the omission of one or more letters or syllables from the middle or end of the word.

The abbreviations in common use in modern times consist of the initial letter or letters, syllable or syllables, of the word. Anciently, also, contracted forms of words, obtained by the omission of letters intermediate between the initial and final letters were much in use. These latter forms are now more commonly designated by the term *contraction*.

Abbreviations are of frequent use in referring to text-books, reports, etc., and in indicating dates, but should be very sparingly employed, if at all, in formal and important legal documents. See *C. & P.* 51; *9 C.* 48. No part of an indictment should contain any abbreviations except in cases where a *fac-simile* of a written instrument is necessary to be set out. 1 East 180, n. The variety and number of abbreviations are so nearly illimitable as the ingenuity of man can make them; and the advantages arising from their use are, to a great extent, counterbalanced by the ambiguity and uncertainty resulting from the usually inconsiderate selection which is made.

The following list is believed to contain all abbreviations in common use. Where a shorter and a longer abbreviation are in common use, both are given.

- A. American; see Am.; anonymous
- A. a. B. b. "A" front; "B" back of a leaf.
- A. B. Anonymous Reports at end of Benloe's Reports, commonly called New Benloe.
- A. C. Appeal Cases, English Chancery; Law Reports Appeal Cases.
- A. C. [1891] A. C. English Appeal Cases; Law Reports, 8d Series, 1891.
- [1892] A. C. Same for 1892, etc.
- A. D. Anno Domini; in the year of our Lord.
- A. G. Attorney General.
- A. K. Marsh. A. K. Marshall's Reports, Kentucky.
- A. L. J. Albany Law Journal.
- A. Moo. A. Moore's Reports, in Bosanquet & Puller.
- A. P. B. or Ashurst MSS. L. I. L. Ashurst's Paper-books; the manuscript paper-books of Ashurst, J., Buller, J., Lawrence, J., and Dampier, J., in Lincoln's Inn Library.
- A. R. Anno Regni; in the year of the reign.
- A. S. Acta of a Sederunt, Ordinances of the Court of Session, Scotland.
- A. & A. Corp. Angell & Ames on Corporations.
- A. & E. Adolphus & Ellis's Reports, English King's Bench.
- A. & E. Encyc. American and English Encyclopedia of Law.
- A. & E. N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited Q. B.
- A. & F. Flet. Amos & Ferrard on Fictures.
- Ab. Abridgment.
- Ab. Adm. Abbott's Admiralty Reports, U. S. Dist. Court, South Dist. N. Y.
- Ab. App. Dec. Ab. C. App. or Ab. N. Y. Ct. App. Abbott's New York Court of Appeals Decisions.
- Ab. Eq. Cas. Equity Cases Abridged, English Chancery.
- Ab. N. Y. Dig. Abbott's Digest of New York Reports and Statutes, various New York courts.
- Ab. N. Y. Fr. or Ab. Pr. Abbott's Practice Reports, various New York courts.
- Ab. N. Y. Pr. N. S. or Ab. Pr. N. S. Abbott's Practice Reports, New Series, various New York courts.
- Ab. Nat. Dig. Abbott's National Digest.
- Ab. New Cas. Abbott's New Cases, various New York courts.
- Ab. Pl. Abbott's Pleadings under the Code.
- Ab. Pr. Abbott's Practice Reports, New York.
- Ab. Sh. Abbott (Lord Tenterton) on Shipping.
- Ab. U. S. Abbott's Reports, United States District and Circuit Courts.
- Ab. U. S. Fr. Abbott's United States Courts Practice.
- Ab. U. S. R. C. P. Abdy's Roman Civil Procedure.
- Ab. Abridgement.
- Ab. Cas. Eq. or Ab. Eq. Cas. Equity Cases, Abridged, English Chancery.
- Ab. Absolute.
- Acc. Accord or Agrees.
- Act. Acton's Reports, Prize Causes, English Prize Council.
- Act. Cas. Monro's Acta Cancellaria.
- Act. Pr. C. Acton's Reports, Prize Causes, English Prize Council.
- Act. Reg. Acta Regia.
- Ad. Cas. Sales. Adams' Cases on the Law of Sales.
- Ad. Con. Addison on Contracts.
- Ad. E. Adams on Ejectment.
- Ad. & EU. Adolphus & Ellis's Reports, English King's Bench.
- Ad. & E. N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited Q. B.
- Ad. Eq. Adams's Equity.
- Ad. In. Ad Insuper, at near the end.
- Ad. Torta. Addison on Torts.
- Ad. Rom. Ant. Adams's Roman Antiquities.
- Ad. Add. Addison's Reports, Pennsylvania.
- Ad. Abr. Addison's Abridgment of the Penal Statutes.
- Ad. Con. Addison on Contracts.

- Add. Eccl. Addams's Ecclesiastical Reports, English.
- Add. Pa. Addison's Reports, Pennsylvania.
- Add. Torta. Addison on Torts.
- Addams. Addams's Ecclesiastical Reports, English.
- Adj. Adjudged, Adjudured.
- Adjournal, Books of. The Records of the Court of Justiciary, Scotland.
- Adm. Admiralty.
- Admr. & Ecc. English Law Reports, Admiralty and Ecclesiastical.
- Admr. Administrator.
- Admr. Administratrix.
- Adolph. & E. Adolphus & Ellis's Reports, English King's Bench.
- Adolph. & E. N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited Q. B.
- Ada. Ad sectam, at suit of.
- Adv. Advocate.
- Adye C. M. Adye on Courts-Martial.
- Aelf. C. Canons of Aelfric.
- Ag. Pat. Agnew on Patents.
- Ag. St. of Fr. Agnew on the Statute of Frauds.
- Agra. H. C. Agra High Court Reports, India.
- Al. Aleyn's Select Cases, English King's Bench.
- Al. Tel. Cas. Allen's Telegraph Cases, American and English.
- Al. & Nap. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
- Ala. Alabama Reports.
- Ala. N. S. Alabama Reports, New Series.
- Ala. Sel. Cas. Alabama Select Cases, by Shepherd.
- Alb. Arb. Albert Arbitration Lord Cairns's Decisions.
- Alb. L. J. or Alb. Law Jour. Albany Law Journal.
- Alc. Alcock's Registry Cases, Irish.
- Alc. & N. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
- Ala. Alden's Condensed Pennsylvania Reports.
- Ala. C. Conf. Aldred's Cases on Contracts.
- Ala. Hist. Aldridge's History of the Courts of Law.
- Ala. Ind. Alden's Index of U. S. Reports.
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- Alex. Ch. Fr. Alexander's Chancery Practice.
- Aleyn. Aleyn's Select Cases, English King's Bench.
- Allison Prac. Allison's Practice of the Criminal Law of Scotland.
- Allison Princ. Allison's Principles of ditto.
- All. & Mor. Ty. Allen & Morris's Trial.
- All. (N. B.) or Allen (N. B.) Allen's Reports, New Brunswick Supreme Court.
- All. Ser. Allen's Series. Indian Law Reports.
- All. Sher. Allen on Sheriffs.
- Allen. Allen's Reports, Massachusetts.
- Allen (N. B.) Allen's Reports, New Brunswick.
- Allen Tel. Cas. Allen's Telegraph Cases.
- Alleyne L. D. of Mar. Alleyne's Legal Degrees of Marriage Considered.
- Aln. Part. Allnat on Partition.
- Am. America, American, or Americana.
- Am. Bar Asso. American Bar Association.
- Am. C. L. J. American Civil Law Journal, New York.
- Am. Ch. Dig. American Chancery Digest.
- Am. Corp. Cas. Withrow's American Corporation Cases.
- Am. Crim. Rep. American Criminal Reports, by Hawley.
- Am. Dec. American Decisions.
- Am. Dig. American Digest.
- Am. Insolv. Rep. American Insolvency Reports.
- Am. Jur. American Jurist, Boston.
- Am. L. Cas. or Am. Lead. Cas. American Leading Cases (Hare & Wallace's).
- Am. L. Elect. American Law of Elections.
- Am. L. J. or Am. Law Jour. American Law Journal (Hall's), Philadelphia.
- Am. L. J. S. or Am. Law Jour. N. S. American Law Journal, New Series, Philadelphia.
- Am. L. J. (O.) American Law Journal, Ohio.
- Am. L. M. or Am. Law Mag. American Law Magazine, Philadelphia.
- Am. L. Rec. or Am. Law Rec. American Law Record, Cincinnati.
- Am. L. R. or Am. Law Reg. American Law Register, Philadelphia.
- Am. L. Reg. & Rev. American Law Register and Review, Philadelphia.
- Am. L. Rep. or Am. Law Rep. American Law Reporter, Dayton, Iowa.
- Am. L. Rep. or Am. Law Rev. American Law Review, St. Louis.
- Am. L. T. or Am. Law Times. American Law Times, Washington, D. C.
- Am. L. T. Bank. American Law Times Bankruptcy Reports.
- Am. L. T. R. American Law Times Reports.
- Am. Lawy. American Lawyer, New York City.
- Am. Lead. Cas. Hare & Wallace's American Leading Cases.
- Am. Pl. Ass. American Pleadings Assistant.
- Am. Prob. American Probate Reports.
- Am. R. or Am. Rep. American Reports.
- Am. Rail. Cas. Smith and Bates's American Railway Cases.
- Am. Rail. E. American Railway Reports.
- Am. Rep. American Reports (selected cases), Albany.
- Am. St. Rep. American State Reports.
- Am. St. P. American State Papers.
- Am. Them. American Themis, New York.
- Am. Ty. M. Cas. Cox's American Trade Mark Cases.
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- Ames Cas. Pl. Ames's Cases on Pleading.
- Ames Cas. Trusts. Ames's Cases on Trusts.
- Ames & Sm. Cas. Torta. Ames & Smith's Cases on Torts.
- Amos & F. Amos and Ferrard on Fictures.
- Amos Jur. Amos's Science of Jurisprudence.
- Am. Anonymous.
- And. Anderson's Reports, English Common Pleas and Court of Wards.
- And. Ch. Ward. Anderson on Church Wards.
- And. Com. Anderson's History of Commerce.
- Andr. Andrews' Reports, English King's Bench.
- Andr. Pr. Andrews' Precedents of Leases.
- Ang. Angell's Reports, Rhode Island Reports.
- Ang. Adv. Eng. Angell on Adverse Enjoyment.
- Ang. Ass. Angell on Assignments.
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- Ang. High. Angell on Highways.
- Ang. Ins. Angell on Insurance.
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- Ang. & A. Corp. Angell and Ames on Corporations.
- Ang. & Dur. (R. I.) Angell & Durfee's Rhode Island Reports.
- Ang. & D. High. Angell and Durfee on Highways.
- Ann. Queen Ann; as 1 Ann. c. 7.
- Ann. C. Annals of Congress.
- Ann. de la Pro. Annales de la Propriété Industrielle.
- Ann. de Leg. Annuaire de Legislation Etrangere, Paris.
- Ann. Jud. Annuaire Judiciaire, Paris.
- Ann. Reg. Annual Register, London.
- Ann. Reg. N. S. Annual Register, New Series, London.
- Anndy. Annaly's Reports, English. Commonly cited Cas. temp. Hardw., but sometimes as Ridgway's Reports.
- Annes. Ins. Annesly on Insurance.
- Anon. Anonymous.
- Anon. Contr. Anson on Contracts.
- Anst. Anstruther's Reports, English Exchequer.
- Anth. Abr. Anthon's Abridgment of Blackstone's Commentaries.
- Anth. Ill. Dig. Anthony's Illinois Digest.
- Anth. L. S. Anthon's Law Student.
- Anth. N. P. Anthon's Nisi Prius Cases, New York.
- Anth. Prec. Anthon's Precedents.
- Anth. Shep. Anthon's edition of Sheppard's Touchstones.
- Ant. Justin. Apud Justinum, or Justinian's Institutes.
- App. Appeal. Apposition. Appendix.
- App. Appleton's Reports, Maine.
- App. Cas. English Law Reports, Appeal Cases.
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- App. Cas. (Beng.). Sevestre & Marshall's Bengal Reports, India.
- App. Cas. Rep. Bradwell's Illinois Appeal Court Reports.
- App. N. Z. Appeal Reports, New Zealand.
- App. Rep. Ont. Appeal Reports, Ontario.
- App. Evid. Appleton on Evidence.
- App. Appendix.
- Ar. Arrête.
- Arbuth. Arbuthnot's Select Criminal Cases, Madras.
- Arch. Court of Arches.
- Archb. B. L. Archbold's Bankrupt Law.
- Archb. C. P. Archbold's Civil Pleading.
- Archb. Cr. L. Archbold's Criminal Law.
- Archb. Cr. P. Archbold's Criminal Pleading.
- Archb. Cr. P. by Rom. Archbold's Criminal Pleading, by Pomeroy.
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- Archb. Pr. by Ch. Archbold's Practice, by Chitty.
- Archb. Pr. C. P. Archbold's Practice, Common Pleas.
- Archb. Pr. K. B. Archbold's Practice, King's Bench.
- Archb. Sum. Archbold's Summary of the Laws of England.
- Archer. Archer's Reports, Florida Reports, vol. 2.
- Ariz. Arizona Territory Supreme Court.
- Arg. Arguendo, in arguing, in the course of reasoning.
- Arg. Inst. Institution au Droit Français, par M. Argou.
- Ark. Arkansas Reports.
- Ark. L. J. Arkansas Law Journal, Fort Smith.
- Ark. Rev. Sta. Arkansas Revised Statutes.
- Ark. Arley's Scotch Reports.
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- Art. Article.
- Art. Cas. Cont. Ashley's Cases on Contracts.
- Ashton. Ashton's Opinions of the United States

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Ash. Ash's Tables.
Ashm. Ashmead's Reports, Pennsylvania.
Asso & Man. Inst. Asso and Manuel's Institutes of the Laws of Spain.
Asp. Mar. L. Cas. Aspinall's Maritime Law Cases.
Ass. Liber Assissarius, Part 5 of the Year Books.
Ass. de Jervu. Assizes of Jerusalem.
Ass. Ent. Aston's Entries.
Atch. Atcheson's Reports, Navigation and Trade, English.
Atth. Mar. Set. Attherly on Marriage Settlements.
Attk. Attkyn's Reports, English Chancery.
Attk. Ch. Pr. Attkyn's Chancery Practice.
Attk. Con. Attkyn on Conveyancing.
Attk. P. T. Attkyn's Parliamentary Tracts.
Attk. Tit. or Attk. M. T. Attkyn on Marketable Titles.
Atl. Rep. Atlantic Reporter.
Ats. At suit of.
Atw. Atwater's Reports, Minnesota.
Atty. Attorney.
Atty. Gen. Attorney-General.
Aus. Jur. Australian Jurist, Melbourne.
Aust. Juris. Austin's Province of Jurisprudence.
Austin C. C. R. Austin's County Court Reports, English.
Austr. Jur. Australian Jurist, Melbourne.
Austr. L. T. Australian Law Times, Melbourne.
Auth. Authentic, in the authentic; that is, the Summary of some of the Novels in the Civil Law inserted in the Code under such a title.
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Azuni Mar. Lav. Azuni on Maritime Law.

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B. Bar. Bench and Bar, Chicago.
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B. N. F. Buller's Nisi Prius.
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B. P. C. Brown's Parliamentary Cases.
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B. R. Bancus Regis; the King's Bench.
B. R. American Law Times Bankruptcy Reports.
B. Reg. Bankruptcy Register, New York.
B. R. Act. Booth's Real Action.
B. R. H. Cases in King's Bench, temp. Hardwicke.
Brun. Brunner's Collected Cases, United States Circuit Court.
B. S. Upper Bench.
B. Tr. Bishop's Trials.
B. & A. or B. & Ald. Barnewall and Alderson's Reports, English.
B. & Ad. Barnewall and Adolphus's Reports, English.
B. & Aust. Barron and Austin's Election Cases, English.
B. & B. Ball and Beatty's Reports, Irish Chancery.
B. & B. Broderip and Bingham's Reports, English.
B. & Barr. The Bench and Bar, Chicago.
B. & C. Barnewall & Cresswell's Reports, English.
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B. & H. Lead. Cas. Bennett & Heard's Leading Cases on Criminal Law.
B. & L. Browning & Lushington's Reports, English Admiralty.
B. & L. Prec. Bullen & Leake's Precedents of Pleading.
B. & P. Bosanquet & Puller's Reports, English.
B. & P. N. R. Bosanquet & Puller's New Reports, English.
B. & S. Best & Smith's Reports, English.
Bab. Aus. Babington on Auctions.
Bab. Set-off. Babington on Set-off.
Bac. Abr. Bacon's Abridgment.
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Bac. El. Bacon's Elements of the Common Law.
Bac. Gov. Bacon on Government.
Bac. Lav Tr. Bacon's Law Tracts.
Bac. Lease. Bacon on Leases and Terms of Years.
Bac. Lib. Reg. Bacon's Liber Regis, vel Thesaurus Regis, Ecclesiastical Abridgment.
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Bail Ct. Rep. Saunders & Cole's Bail Court Reports.
Bailey. Bailey's Law Reports, South Carolina.

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Bak. Bur. Baker's Law Relating to Burials.
Bak. Corp. Baker on Corporations.
Bak. Quar. Baker's Law of Quarantine.
Bald. Baldwin's Reports, U. S. 3d Circuit.
Bald. Con. Bald. C. V. Baldwin on the Constitution.
Balf. Balfour's Practice of the Law of Scotland.
Ball. & B. Ball & Beatty's Reports, Irish Chancery.
Ball Cas. Tort. Ball's Cases on Torts.
Ball. Lim. Ballantine on Limitations.
Balt. L. Tr. Baltimore Law Transcript.
Banc. Sup. Bancus Superior, or Upper Bench.
Bank. Ct. R. Bankrupt Court Reporter, New York.
Bank. Inst. Banker's Institutes of Scottish Law.
Bank. Reg. National Bankruptcy Register, New York.
Bank. Rep. American Law Times Bankruptcy Reports.
Bank. & Ins. R. Bankruptcy and Insolvency Reports, English.
Banker's Law. J. Banker's Law Journal.
Banker's Mag. Banker's Magazine, New York.
Banker's Mag. (Lon.) Banker's Magazine, London.
Banks. Banks's Reports, Kansas.
Bann. Bannister's Reports, English Common Pleas.
Bann. Lim. Banning on Limitation of Action.
Bar. Bar Reports, in all the courts, English.
Bar. Ex. Jour. Bar Examination Journal, London.
Barb. or Barb. S. C. Barbour's Reports, Supreme Court, New York.
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Barber. Barber's Reports, Arkansas.
Barne. Barnardiston's Reports, English King's Bench.
Barn. Ch. Barnardiston's Chancery Reports, English.
Barn. Sh. Barnes's Sheriff.
Barn. & A. or Barn. & Ald. Barnewall & Alderson's Reports, English.
Barn. & Ad. Barnewall & Adolphus's Reports, English King's Bench.
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Barl. Conv. Barton's Elements of Conveyancing.
Barl. Elect. Cas. Bartlett's Congressional Election Cases.
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Bat. Sp. Per. Batten on Specific Performance.
Batem. Ag. Bateman on Agency.
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Bates Ch. Fr. Bates's Chancery Practice.
Bates Ch. E. Beame's Costs in Equity.
Bea. Eq. Pl. Beame's Equity Pleading.
Bea. Ne Execut. Beame on the Writ of Ne Execut.
Bea. Ord. Beame's Orders in Chancery.
Bea. Pl. Eq. Beame's Pleas in Equity.
Beas. Beasley's Reports, New Jersey Equity.
Beatt. Beatty's Reports, Irish Chancery.
Beaum. B. of S. Beaumont on Bills of Sale.
Beaum. Ins. Beaumont on Insurance.
Beav. Beavan's Reports, English.
Beav. R. & C. Cas. Beavan's Railway and Canal Cases.
Beaves. Beaves's Lex Mercatoria.
Bec. Cr. Beccaria on Crimes and Punishments.
Beck's Med. Jur. Beck's Medical Jurisprudence.
Beck. See Adm. Beck's Admiralty Reports, U. S. Dist. Court, South Carolina.
Be C. C. R. Bee's Crown Cases Reserved, English.
Bel. Bellewe's Reports, English King's Bench temp. Richard II.
Beling & Van. (Ceylon). Beling & VanderStraalen's Ceylon Reports.
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Bel. C. Cas. Bellais's Civil Cases, Bombay; Bellais's Criminal Cases, Bombay.
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Bel. Cas. Bell's Cases, Scotch Court of Session.

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Bell. Dell. U. L. Beller's Delineation of Universal Law.
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Bell Dict. Dec. Bell's Dictionary of Decisions, Court of Session, Scotland.
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Bellewe. Bellewe's Reports, English King's Bench, temp. Richard II.
Bellewee Cas. Bellewe's Cases, temp. Henry VIII.; Brooke's New Cases; Petit Brooke.
Bellingh. Tr. Report of the Bellingham Trial.
Belt Sup. Ves. Belt's Supplement to Vesey Senior's Reports.
Belt Ves Sen. Belt's Edition of Vesey Senior's Reports.
Ben. or Bt. Benedict's Reports, U. S. Dist. Court, 2d Circuit.
Ben. Adm. Benedict's Admiralty Practice.
Ben. Av. Benedict's Averages.
Ben. Just. Benedict on Justices of the Peace.
Ben. F. I. Cas. Bennett's Fire Insurance Cases.
Ben. Ins. Cas. Bennett's Insurance Cases.
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Bend. Bendloe's or New Benloe's Reports, English Common Pleas, Ed. of 1661.
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Benj. Sales. Benjamin on Sales.
Benl. Benloe's Reports, English Common Pleas.
Benl. in Ashe. Benloe's Reports, at the end of Ashe's Tables.
Benl. in Keil. Benloe's Report at the end of Keilway's Reports.
Benl. New. Benloe's Reports, English Common Pleas, Ed. of 1661.
Benl. Old. Benloe's Reports, English Common Pleas, of Benloe & Dalison, Ed. of 1669.
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Benn. (Cal.) Bennett's Reports, California.
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Bev. (Ceylon). Beven's Ceylon Reports.
Bibb. Bibb's Reports, Kentucky.
Bick. Bicknell's Reports, Nevada.
Bick. & H. (Nev.) Bicknell & Hawley's Nevada Reports.
Bick. (In.) Bicknell's Reports, India.
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Big. Bignall's Reports, India.
Big. Bills & N. Bigelow on Bills and Notes.
Big. Eq. Bigelow on Equity.
Big. Estop. Bigelow on Estoppel.
Big. Frauds. Bigelow on Frauds.
Big. Jarm. Will. Bigelow's Edition of Jarman on Wills.
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Big. Over-ruled Cas. Bigelow's Over-ruled Cases.
Big. Placita. Bigelow's Placita Anglo-Normanica.
Bigg Cr. L. Bigg's Criminal Law.
Bign. Bignall's Reports, India.
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Bill. Av. Billing on the Law of Awards.
Bing. Bingham's Reports, English Common Pleas.

Bing. Des. Bingham on Descent.
Bing. Inf. Bingham on Infancy.
Bing. Judg. Bingham on Judgments and Executions.
Bing. L. & T. Bingham on Landlord and Tenant.
Bing. N. P. C. Bingham's New Cases, English Common Pleas.
Bing. & Colv. Rents. Bingham & Colvin on Rents, etc.
Binn. Binn's Reports, Pennsylvania.
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Bish. Cr. Proc. Bishop on Criminal Procedure.
Bish. Mar. & D. Bishop on Marriage and Divorce.
Bish. Mar. Wom. Bishop on Married Women.
Bish. St. Cr. Bishop on Statutory Crimes.
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Biss. Part. Bissett on Partnership.
Bl. Bitt. Bittleston's Reports in Chambers, Q. B.
Bl. C. C. Bittleston's English Practice Cases.
Bl. W. & P. Biddleston, Wise & Parnell's Reports.
Bk. Judg. Book of Judgments, by Townsend.
Bl. Black's Reports. U. S. Supreme Court.
Bl. C. C. Blackford's Reports. U. S. Circuit Court, 2d Circuit.
Bl. Com. Blackstone's Commentaries.
Bl. D. Blount's Law Dictionary.
Bl. D. & O. Blackham, Dundas & Osborne's Reports, Ireland.
Bl. H. Henry Blackstone's Reports, English.
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Bl. Pr. Ca. Blackford's Prize Cases, U. S. Dist. of N. Y.
Bl. R. or Bla. Wm. William Blackstone's Reports, English.
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Bla. W. W. Blackstone's Reports.
Bla. H. H. Blackstone's Reports.
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Blackf. Blackford's Reports, Indiana.
Blackst. Com. Blackstone's Commentaries.
Blackst. R. Wm. Blackstone's Reports, English.
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Blak. Ch. Pr. Blake's Chancery Practice, New York.
Blan. Annu. Blaney on Life Annuities.
Blan. Lim. Blanshard on Limitations.
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Bl. N. S. or Bligh N. S. Bligh's Reports, New Series, English House of Lords.
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Blount Tr. Blount's Impachment Trial.
Bo. R. Act. Booth on Real Actions.
Boh. Dec. Bohun's Declarations.
Boh. Eng. L. Bohun's English Lawyer.
Boh. Priv. Lon. Bohun's Privilegia Londini.
Boil. Code N. Boileux's Code Napoleon.
Bomb. H. Ct. Rep. Bombay High Court Reports.
Bomb. Sel. Cas. Bombay Select Cases.
Bomb. Ser. Bombay Series Indian Law Reports.
Bond. Bond's Reports. U. S. Courts, Southern Dist. of Ohio.
Bone Prec. Bone's Precedents on Conveyancing.
Bonney Ins. Bonney on Insurance.
Books S. Books of Sederunt.
Boor. Boorham's Reports, California.
Boote Ch. Fr. Boote's Chancery Practice.
Boote S. Boote's Suit at Law.
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Borth. Borthwick on Libel and Slander.
Bos. & P. or Bos. & Pul. Bosanquet & Puller's Reports, English Common Pleas.
Bos. & P. N. R. or Bos. & Pul. N. R. Bosanquet & Puller's New Reports, English Common Pleas.
Bot. Law Rep. Boston Law Reporter.
Bot. Pol. Rep. Boston Police Court Reports.
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Bouv. Inst. Th. Institutiones Theologicae, auctore J. Bouvier.
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Boyd Adm. Boyd's Admiralty Law.
Boyd Sh. Boyd's Merchant Shipping Laws.
Boyle Char. Boyle on Charities.
Br. British. Brooke. Brown. Brownlow. See Bro.
Br. Bracton de Legibus et Consuetudinibus Anglie.
Br. Abr. Brooke's Abridgment.
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Br. Reg. Braithwaite's Register.
Br. Syn. Brown's Synopsis of Decisions, Scotch Court of Session.
Br. & R. Ecc. Broderick & Freemantle's Ecclesiastical Cases, English.
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Brandt Div. Brandt on Divorce Causes.
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Brayt. Brayton's Reports, Vermont.
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Brice U. V. Brice's Ultra Vires.
Bridg. J. Bridgmore's Reports, English Common Pleas.
Bridg. Conv. Bridgman on Conveyancing.
Bridg. Leg. Bib. Bridgman's Legal Bibliography.
Bridg. O. Orlando Bridgman's Reports, English Common Pleas.
Bridg. Refl. Bridgman's Reflections on the Study of the Law.
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Bright. N. P. Brightly's Nisi Prius Reports, Pennsylvania.
Bright. Purd. Brightly's Edition of Purdon's Digest of Laws of Pennsylvania.
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Bright. U. S. Dig. Brightly's United States Digest.
Brish. (Minn.). Brishin's Minnesota Reports.
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Brook. Brook, C. C., or Brook, Marsh. Brookenbrough's Reports of Marshall's Decisions, U. S. Circuit Court, 4th Circuit.
Brook. Cas. Brookenbrough's Cases, Virginia Cases, vol. 2.
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- Bru. or Bruce.* Bruce's Reports, Scotch Court of Session.
- Bruce M. L.* Bruce's Military Law, Scotland.
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- Buch. Rep.* Buchanan's Reports, Cape of Good Hope.
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- Buff Super. Ct. (N. Y.).* Buffalo Superior Court Reports.
- Bull. N. P.* Buller's Law of Nisi Prius.
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- Bulling. Eccl.* Bullingbrooke's Ecclesiastical Law.
- Bulst.* Bulstrode's Reports, English King's Bench.
- Bump Bkcy.* Bumps Bankruptcy Practice.
- Bump Fed. Proc.* Bump's Federal Procedure.
- Bump Fr. Conv.* Bump on Fraudulent Conveyances.
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- Bur.* Burrow's Reports, English King's Bench.
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- Burge Conf. Law.* Burge on the Conflict of Laws.
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- Burge Mar. Int. L.* Burge on Maritime International Law.
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- Burke Tr.* Burke's Celebrated Trials.
- Burlam. Nat. Law.* Burlamaqui's Natural and Politic Law.
- Burm. L. R.* Burmah Law Reports.
- Burn.* Burnett's Reports, Wisconsin.
- Burn. Cr. L.* Burnett on the Criminal Law of Scotland.
- Burn Dict.* Burn's Law Dictionary.
- Burn Ec. L.* Burn's Ecclesiastical Law.
- Burn Jus.* Burn's Justice of the Peace.
- Burr.* Burrow's Reports, English King's Bench temp. Mansfield.
- Burr. Ass.* Burrill on Assignments.
- Burr. Circ. Ev.* Burrill on Circumstantial Evidence.
- Burr. Dict.* Burrill's Law Dictionary.
- Burr. Prac.* Burrill's Practice.
- Burr. Sett. Cas.* Burrow's Settlement Cases.
- Burr. Taxation.* Burroughs on Taxation.
- Burr Tr.* Burr's Trial.
- Burt. Bankr.* Burton on Bankruptcy.
- Burt. Cas.* Burton's Collection of Cases and Opinions.
- Burt. Parl.* Burton's Parliamentary Diary.
- Burt. R. P.* Burton on Real Property.
- Busb.* Busbee's Law Reports, North Carolina Reports, vol. 44.
- Busb. Eq.* Busbee's Equity Reports, North Carolina, vol. 45.
- Bush.* Bush's Reports, Kentucky.
- Bussu. & Wal. Pr.* Buswell & Walcott's Practice, Massachusetts.
- Butl. Co. Litt.* Butler's Notes to Coke on Littleton.
- Butl. Hor. Jur.* Butler's Horæ Juridicæ Subsecivæ.
- Byles, Bills.* Byles on Bills.
- Bynk. Jur.* Bynkershoek Questions Juris Prædicti.
- Bynk. War.* Bynkershoek on the Law of War.
- Byth. Conv.* Bythewood's Conveyancing.
- Byth. Prec.* Bythewood's Precedents.
- C. Codex Juris Civilis.* Code. Chancellor. Chancery. Chapter. Cases.
- C. of S. Ca. 1st Series.* Court of Session Cases, First Series. By Shaw, Dunlop & Bell. Ct. Sess. (Sc.).
- C. of S. Ca. 2d Series.* Court of Session Cases, Second Series. By Dunlop, Bell & Murray. Ct. Sess. (Sc.).
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- C. A. Court of Appeal; Court of Arches; Chancery Appeals.*
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- C. C. & B. B.* Capi Corpus and Bail Bond.
- C. C. & C.* Capi Corpus et Committitur.
- C. C.* Comyn's Digest.
- C. d'Et.* Conseil d'Etat.
- C. E. Gr.* C. E. Green's Chancery Reports, New Jersey Ch. Rep. vols. 2-4.
- C. F.* Code Forester.
- C. H. Rec.* City Hall Recorder (Rogers), New York City.
- C. H. Rep.* City Hall Reporter (Lomas), New York City.
- C. H. & A.* Carron, Hammerton & Allen's New Session Cases, English.
- C. I.* Constitutions Imperiales.
- C. Instr. Cr.* Code Instruction Criminelle.
- C. J.* Chief Justice.
- C. J. C.* Couper's Juristiciary Cases, Scotland.
- C. J. Can.* Corpus Juris Canonici.
- C. J. Civ.* Corpus Juris Civilis.
- C. J. C. P.* Chief Justice of the Common Pleas.
- C. J. K. B.* Chief Justice of the King's Bench.
- C. J. Q. B.* Chief Justice of the Queen's Bench.
- C. J. U. B.* Chief Justice of the Upper Bench.
- C. L.* Common Law. Civil Law.
- C. L. J.* Central Law Journal, St. Louis, Mo.
- C. L. J.* Canada Law Journal, Toronto.
- C. L. J. N. S.* Canada Law Journal, New Series, Toronto.
- C. L. N.* Chicago Legal News.
- C. L. P. Act.* English Common Law Procedure Act.
- C. L. R.* Common Law Reports, English.
- C. M. R.* Crompton, Meeson & Roscoe's Reports, English Exchequer.
- C. N.* Code Napoléon.
- C. N. P.* Cases at Nisi Prius.
- C. N. P. C.* Campbell's Nisi Prius Cases, English.
- C. O.* Common's Orders.
- C. P.* Code of Procedure. Common Pleas. Code Penal.
- C. P. C.* Cooper's Practice Cases, English.
- C. P. Coop.* C. P. Cooper's Reports, English.
- C. P. C.* Code de Procédure Civile.
- C. P. Div.* Common Pleas Division, English Law Reports.
- C. P. Rept.* Common Pleas Reporter, Scranton, Penna.
- C. P. U. C.* Common Pleas Reports, Upper Canada.
- C. S.* Scotch Court of Session.
- C. t. K.* Cases tempore King.
- C. t. N.* Cases tempore Northington.
- C. t. Talb.* Cases tempore Talbot.
- C. T.* Constitutions Tiberti.
- C. Theod.* Codex Theodosiani.
- C. W. Dudl. Eq.* C. W. Dudley's Equity Reports, South Carolina.
- C. & A.* Cooke & Alcock's Reports, Irish King's Bench and Exchequer.
- C. & C.* Coleman and Caine's Cases, New York.
- C. & D.* Corbett & Daniell's Election Cases, English.
- C. & D. C. C.* Crawford & Dix's Criminal Cases, Irish.
- C. & D. A. C.* Crawford & Dix's Abridged Cases, Irish.
- C. & F.* Clark & Finnelly's Reports, English House of Lords.
- C. & H. Dig.* Coventry & Hughes's Digest.
- C. & J.* Crompton & Jervis's Reports, English Exchequer.
- C. & K.* Carrington & Kirwan's Reports, English Nisi Prius.
- C. & L. C. C.* Cane & Leigh's Crown Cases.
- C. & M.* Crompton & Meeson's Reports, English Exchequer.
- C. & Marsh.* Carrington & Marshman's Reports, English Nisi Prius.
- C. & O. R. R. C.* Cas. Carrow & Oliver's Railway and Canal Cases.
- C. & P.* Carrington & Payne's Reports, English Nisi Prius.
- C. & R.* Cockburn & Rowe's Reports, English Election Cases.
- Ca. Case.* Placita. Cases.
- Ca. resp.* Capias and respondendum.
- Ca. sa.* Capias and satisfaciendum.
- Cadw. Dig.* Cadwalader's Digest of Attorney-Generals' Opinions.
- Cadw. Gr. Rents.* Cadwalader on Ground Rents.
- Cal.* Caine's Reports, Supreme Court, N. Y.
- Cal. Cas.* Caine's Cases Court of Errors, N. Y.
- Cal. Inst.* Calli or Gail Institutions.
- Cal. Lex. Mer.* Caine's Lex Mercatoria.
- Cal. Pr.* Caine's Practice.
- Cal. Vlieg.* Caine's Vliegheum.
- Cairns Dec.* Cairns' Decisions, Reilly, English.
- Cal. California Reports.*
- Cal. L. J.* California Law Journal, San Francisco.
- Cal. Leg. Adv.* Calcutta Legal Advertiser, India.
- Cal. Leg. Obs.* Calcutta Legal Observer.
- Cal. Leg. Rec.* California Legal Record, San Francisco.
- Cal. Pr. C.* Hart's California Practice.
- Cal. S. D. A.* Calcutta Sudder dewanny Adawlut Reports.
- Cal. Ser.* Calcutta Series Indian Law Reports.
- Cal. Sew.* Callis on Sewers.
- Cal. W. R.* Calcutta Weekly Reporter, India.
- Cal. L. O.* Calcutta Legal Observer.
- Cal. & Cald. M. Cas.* Caldecott's Reports, English Justices of the Peace Cases.
- Cald. Arb.* Caldwell on Arbitration.
- Cald. Sett. Cas.* Caldecott's Settlement Cases.
- Call.* Call's Reports, Virginia.
- Call. Mil. L.* Callan's Military Laws.
- Call. Sew.* Callis on Sewers.
- Calltn.* Calthorpe's Reports, English King's Bench.
- Calth. Coph.* Calthorpe on Copholds.
- Calv. Lex.* Calvinus Lexicon Juridicum.
- Calv. Par.* Calvert on Parties to Suits in Equity.
- Cam.* Cameron's Reports, Upper Canada Queen's Bench.
- Cam.* Camden's Britannia.
- Cam. Duc.* Camera Ducata Duchy Chamber.
- Cam. Scacc.* Camera Scaccaria, Exchequer Chamber.
- Cam. Stell.* Camera Stellata, Star Chamber.
- Cam. & N.* Cameron & Norwood's Reports, North Carolina Conference Reports, vol. 3.
- Camp.* Campbell's Reports, English Nisi Prius.
- Camp. Dec. or Camp. Dec.* Campbell's Reports of Tanny's Decisions, U. S. Circuit Court.
- Camp. L. d. Ch.* Campbell's Lives of the Lord Chancellors.
- Camp. N. P.* Campbell's Reports, English Nisi Prius.
- Camp. Neg.* Campbell on Negligence.
- Can.* Canon. Canada.
- Can. L. J.* Canada Law Journal, Toronto.
- Can. L. J. (L. C.).* Lower Canada Law Journal, Montreal.
- Can. L. T.* Canadian Law Times, Toronto, Canada.
- Can. Mun. J.* Canadian Municipal Journal.
- Canad. Mo.* Canadian Monthly.
- Cane & L.* Cane & Leigh's Crown Cases Reserved.
- Can. S. C. Rep.* Canada Supreme Court Reports.
- Cap.* Capitulum. Chapter.
- Cape Law J.* Cape Law Journal, Grahamstown, Cape of Good Hope.
- Car.* Carolus; thus 13 Car. II., signifies the thirtieth year of the reign of King Charles II.
- Car. Cr. H.* Carrington's Criminal Law.
- Car. H. & A.* Carrow, Hamerton, & Allen's Reports, English Session Cases.
- Car. L. Jour.* Carolina Law Journal, Charleston, S. C.
- Car. L. Rep.* Carolina Law Repository, Raleigh, N. C.
- Car. O. & B.* Carrow, Oliver & Bevan's Railway and Canal Cases.
- Car. & Kir.* Carrington & Kirwan's Reports, English Nisi Prius.
- Car. & Mar.* Carrington & Marshman's Reports, English Nisi Prius.
- Car. & O.* Carrow & Oliver's Railway and Canal Cases.
- Car. & P.* Carrington & Payne's Reports, English Nisi Prius.
- Carp.* Carpenter's Reports, California.
- Carp. P. C.* Carmichael's Patent Cases.
- Carr. Cas.* Carran's Summary Cases, India.
- Carter.* Carter's Reports, English Common Pleas.
- Carr. (Ind.).* Carter's Reports, Indiana.
- Carta de For.* Carta de Foresta.
- Carth.* Carthew's Reports, English King's Bench.
- Cartm. Trade M. Cas.* Cartmell's Trademark Cases.
- Cartw. Const. Cas.* Cartwright's Constitutional Cases.
- Cary.* Cary's Reports, English Chancery.
- Cary Part.* Cary on Partnership.
- Cas.* Casey's Reports, Pennsylvania.
- Cas. App.* Cases on Appeal to the House of Lords.
- Cas. Arg. & Dec. Ch.* Cases Argued and Decreed in Chancery, English.
- Cas. B. K.* Cases Banco Regis. Modern Reports, vol. 19.
- Cas. B. H. Holt.* Cases and Resolutions (of settlements; not Holt's K. B. Reports).
- Cas. C. L.* Cases in Crown Law.
- Cas. Ch.* Select Cases in Chancery.
- Cas. Ch. 1, 2, 3.* Cases in Chancery temp. Car II.
- Cas. Eq.* Cases in Equity, Gilbert's Reports, English.
- Cas. Eq. Abr.* Cases in Equity. Abridged, English.
- Cas. H. of L.* Cases in the English House of Lords, 1814-1819.
- Cas. K. B.* Cases in King's Bench (8 Modern Reports).
- Cas. K. B. t. Hardw.* Cases temp. Hardwicke, W. Kelynge's Reports, English King's Bench.
- Cas. L. & Eq.* Cases in Law and Equity, Modern Reports, vol. 10.
- Cas. in P. or Cas. Parl.* Cases in Parliament.
- Cas. Pr.* Cases of Practice in the Court of the King's Bench from Eliz. to 14 Geo. III.
- Cas. Pr. (Cooke).* Cooke's Practice Cases, English Common Pleas.
- Cas. Pr. C. P.* Cases of Practice, English Common Pleas.
- Cas. Pr. K. B.* Cases of Practice, English King's Bench.
- Cas. R.* Casey's Reports, Pennsylvania State Reports, vols. 25-30.
- Cas. S. C. (Cape of G. H.).* Cases in the Supreme Court, Cape of Good Hope.
- Cas. Self Def.* Cases on Self Defence, Horrihan & Thompson's.
- Cas. Sett.* Cases of Settlement, King's Bench.
- Cas. Six Chr.* Cases in the Six Circuits, Ireland.
- Cas. t. Ch. II.* Cases temp. Charles II., in vol. 3 of Reports in Chancery.
- Cas. t. F.* Cases tempore Finch, English Chancery.
- Cas. t. Geo. I.* Cases tempore George I., English Chancery, Modern Reports, vols. 8 and 9.
- Cas. t. H.* Cases tempore Hardwicke, English King's Bench, Ridgway's Reports, Annyal's Reports.
- Cas. t. Holt.* Cases tempore Holt, English King's Bench, Holt's Reports.
- Cas. t. Lee (Philmore's).* Cases temp. Lee, English Ecclesiastical.
- Cas. t. King.* Cases tempore King, English Chancery, Mosely's Reports.
- Cas. t. Mac.* Cases tempore Macclesfield, Modern Reports, vol. 10, Lucas's Reports.
- Cas. t. Nap.* Cases tempore Napier, Irish.
- Cas. t. North.* Cases temp., Northington (Eden's English Chancery Reports).
- Cas. t. Plunk.* Cases tempore plunkett, Irish Chancery.
- Cas. t. Q. A.* Cases tempore Queen Anne, Modern Reports, vol. 11.
- Cas. t. Sugd.* Cases tempore Sugden, Irish Chancery.
- Cas. t. Tal.* Cases tempore Talbot, English Chancery, Forrester's Reports.

Cas. t. Wm. III. Cases tempore William III., Modern Reports, vol. 12.
Cas. Tak. & Adj. Cases Taken and Adjudged, English Chancery.
Cas. Wm. I. Bigelow's Cases, William I. to Richard I.
Cas. w. Op. or Cas. & Op. Cases with Opinions of Eminent Counsel.
Cas. Cas. Cases' Reports, Pennsylvania State Reports, vols. 25-36.
Castle Com. Castle on Law of Commerce.
Cav. Money Sec. Cavanaugh's Law of Money Securities.
Cav. Deb. Cavendish's Debates, House of Commons.
Cane & L. Cane & Leigh's Crown Cases Reserved.
Cawl. Cawley's Laws against Recusants.
Cay Abr. Cay's Abridgment of the Statutes.
Centr. Cr. C. R. Central Criminal Court Reports, English.
Centr. L. J. Central Law Journals, St. Louis, Mo.
Ceyl. Leg. Misc. Ceylon Legal Miscellany.
Ch.
 [1891] *Ch.* English Chancery Cases; Law Reports, 1st Series, 1891.
 [1892] *Ch.* Same for 1892, etc.
Ch. App. Cas. Chancery Appeal Cases Law Reports.
Ch. Burn. J. Chitty Burn's Justice.
Ch. Cal. Chancery Calendar.
Ch. Cas. Cases in Chancery.
Ch. Cas. Ch. Choice Cases in Chancery.
Ch. Cham. (Ont.). Chancery Chambers' Reports, Ontario.
Ch. Div. Chancery Division Law Reports.
Ch. J. Chief Justice, Chief Judge.
Ch. Pra. Chancery Practice.
Ch. Pre. Precedents in Chancery.
Ch. R. or Ch. Repts. Reports in Chancery.
Ch. Sent. Chancery Sentinel, Saratoga, New York.
Ch. & Cl. Cas. Cripp's Church and Clergy Cases.
Chal. Op. Chalmers' Colonial Opinions.
Chamb. Chambers' Reports, Upper Canada.
Chamb. Ch. Jur. Chambers' Chancery Jurisdiction.
Chamb. L. & T. Chambers on Landlord and Tenant.
Chan. Chancery's Reports, Michigan.
Chance Chance on Powers.
Chand. N. H. Chandler's Reports, New Hampshire, vols. 30 and 34-44.
Chand. (Wis.). Chandler's Report, Wisconsin.
Chand. Cr. Tr. Chandler's American Criminal Trials.
Chapl. Cas. Crim. L. Chaplin's Cases on Criminal Law.
Char. Merc. Charta Mercatoria.
Charl. Pr. Cas. Charley's Practice Cases (Judicature Act).
Charl. R. P. Stat. Charley's Real Property Statutes.
Charl. T. U. P. Charlton's Reports, Georgia.
Charl. R. M. R. M. Charlton's Reports, Georgia.
Chase. Chase's Decisions by Johnson, U. S. 4th Circuit.
Chase Tr. Chase's Trial by the U. S. Senate.
Cher. Cas. Cherokee Case.
Chest. Cas. Case of the City of Chester, on Quo Warranto.
Chev. Cheves's Law Reports, South Carolina.
Ches. Ch. or Chev. Eq. Cheves's Chancery Reports, South Carolina.
Chic. L. B. Chicago Law Bulletin, Illinois.
Chic. L. J. Chicago Law Journal.
Chic. L. Rec. Chicago Law Record.
Chic. L. T. Chicago Law Times.
Chic. Leg. News. Chicago Legal News.
Chipp. Contr. Chipman on Contracts.
Chipp. D. Chipman's Reports, Vermont.
Chin. N. N. Chipman's Reports, Vermont.
Chit. App. Chitty on Apprentices and Journey-men.
Chit. Arch. Pr. Chitty's Archbold's Practice.
Chit. B. C. Chitty's Bail Court Reports, English.
Chit. Bills. Chitty on Bills.
Chit. Bla. Com. Chitty's Blackstone's Commentaries.
Chit. Burn's J. Chitty Burn's Justice.
Chit. Car. Chitty on Carriers.
Chit. Com. L. Chitty on Commercial Law.
Chit. Contr. Chitty on Contracts.
Chit. Cr. L. Chitty on Criminal Law.
Chit. Des. Chitty on the Law of Descent.
Chit. Eq. Dig. Chitty's Equity Digest.
Chit. F. Chitty's Forms.
Chit. G. P. Chitty's General Practice.
Chit. Jr. Bills. Chitty Junior on Bills.
Chit. L. of N. Chitty's Law of Nations.
Chit. Med. Jur. Chitty on Medical Jurisprudence.
Chit. Pl. Chitty on Pleading.
Chit. Pra. Chitty's General Practice.
Chit. Pre. Chitty's Precedents in Pleading.
Chit. Prev. Chitty's Privileges of the Crown.
Chit. Rep. Chitty's Reports, English Bail Court.
Chit. Stat. Chitty's Statutes of Practical Utility.
Chitt. Chitty's Reports, English Bail Court.
Cho. Cas. Ch. Choice Cases in Chancery.
Chr. Pr. W. Christie's Precedents of Wills.
Chr. Rep. Chamber Reports, Upper Canada.
Christ. B. L. Christian's Bankrupt Laws.
Churchill & Br. Sh. Churchill and Bruck on Sheriffs.
Cin. Law Bul. Cincinnati Law Bulletin, Cincinnati, Ohio.
Cin. Mun. Dec. Cincinnati Municipal Decisions.
Cin. Rep. or Cinc. (Ohio). Cincinnati Superior Court Reports.
C. C. A. Circuit Court of Appeals, United States.
Circ. Ct. in Eq. Circuit Court in Equity.
C. C. Rep. City Courts Reports, New York City.
City Hall Rec. Rogers's City Hall Recorder, New York.
City Hall Rep. Lumas's City Hall Reporter, New York.
City Rec. City Record, New York.

Civ. Code. Civil Code.
Civ. Pro. (N. Y.). Civil Procedure Reports, New York.
Cl. App. Clark's Appeal Cases, English House of Lords.
Civ. Proc. R. New York Civil Procedure Reports.
Cl. Ass. Clerk's Assistant.
Cl. Ch. Clark's Chancery Reports, N. Y.
Cl. Col. Clark's Colonial Law.
Cl. Cr. L. Clark on Criminal Law.
Cl. Elec. Clarke on Elections.
Cl. Extr. Clarke on Extradition.
Cl. Home R. Clerk Home Scotch Reports.
Cl. Ins. Clarke on Insurance.
Cl. B. L. Clarke's Early Roman Law.
Cl. & Fin. Clark & Finnely's Reports, English House of Lords.
Cl. & H. Clarke & Hall's Congressional Election Cases.
Clan. H. & W. Clancy on Husband and Wife.
Clan. Mar. Wom. Clancy on Married Women.
Clar. Parl. Chr. Clarendon's Parliamentary Chronicle.
Clark. Clark's Appeal Cases, English House of Lords.
Clark. (Ala.). Clark's Reports, Alabama Reports, vol. 58.
Clark Lease. Clark's Inquiry into the Nature of Leases.
Clark (Pa.). Clark's Pennsylvania Law Journal Reports.
Clark & Fin. Clark & Finnely's Reports, English House of Lords.
Clark & Fin. N. S. Clark & Finnely's Reports, New Series, English House of Lords.
Clarke. Clarke's Notes of Cases, Bengal.
Clarke (Iowa). Clarke's Reports, Iowa.
Clarke (Mich.). Clarke's Reports, Michigan.
Clarke (N. Y.). Clarke's New York Chancery Reports.
Clarke Adm. Pr. Clarke's Admiralty Practice.
Clarke Bills. Clarke on Bills, Notes, and Checks.
Clarke Ch. R. Clarke's Chancery Reports, New York.
Clarke Cr. L. Clark on Criminal Law, Canada.
Clarke Ins. Clarke on Insurance, Canada.
Clarke Not., or R. & O. Clarke's Notes of Cases, in his Rules and Orders, Bengal.
Clarke Pra. Clarke's Praxis.
Clarke & H. Elec. Cas. Clarke & Hall's Cases of Contested Elections in Congress.
Clay. Clayton's Reports, English York Assize.
Clay. Conv. Clayton's Conveyancing.
Clem. Corp. Sec. Clemens on Corporate Securities.
Cletr. Us et Cout. Cléirac, Us et Coutumes de la Mer.
Clerk Home. Clerk Home's Decisions, Scotch Court of Session.
Clerke Dig. Clerke's Digest, New York.
Clerke Pr. Clerke's Praxis Admiraltatis.
Clerke Rud. Clerke's Rudiments of American Law and Practice.
Clev. Bank. Cleveland on the Banking System.
Clev. L. Rec. Cleveland (Ohio) Law Record.
Clev. L. Rep. Cleveland Law Reporter.
Cliff. & R. Clifford & Richard's English Locus Standi Reports.
Cliff. & St. Clifford & Stephens' English Locus Standi Reports.
Cliff. Clifford's Reports, U. S. 1st Circuit.
Cliff. El. Cas. Clifford's Election Cases.
Cliff. Ent. Cliff's Entries.
Clint. Dig. Clinton's Digest, New York Reports.
Clode & V. Clode & Spencer's Digest.
Clode. Clode's Martial Law.
Clow L. C. on Torts. Clow's Leading Cases on Torts.
Clus. P. T. Cluskey's Political Text Book.
Co. County. Company.
Co. Coke's Reports. English King's Bench.
Co. B. L. Cooke's Bankrupt Law.
Co. Cop. Cooke's Copyholder.
Co. Ct. Cas. County Court Cases, English.
Co. Ct. Ch. County Court Chronicle, English.
Co. Ct. Rep. County Court Reports, Pa.
Co. Cts. Cooke on Courts (4th Inst.).
Co. Ent. Cooke's Entries.
Co. Inst. Cooke's Institutes.
Co. Litt. Coke on Littleton (1st Inst.).
Co. M. C. Coke's Magna Charta (2d Inst.).
Co. P. C. Coke's Pleas of the Crown (3d Inst.).
Co. Pal. County Palatine.
Co. Pl. Cooke's Pleadings (sometimes published separately).
Co. Rep. Cooke's Reports, English King's Bench.
Cobb. Cas. Int. L. Cobbett's Cases on International Law.
Cobb. Cobb's Reports, Georgia.
Cobb. Parl. Hist. Cobbett's Parliamentary History.
Cobb. Pol. Reg. Cobbett's Political Register.
Cobb Slav. Cobb on Slavery.
Cochr. Cochran's Reports, Nova Scotia.
Cock. Nat. Cockburn on Nationality.
Cock. & Rowe. Cockburn and Rowe's English Election Cases.
Cooke (Ala.). Cooke's Reports, Alabama Reports, N. S., vols. 16-18.
Cooke (Fla.). Cooke's Reports, Florida Reports, vols. 14-16.
Cooke Const. His. Cooke's Constitutional History.
Cooke Pr. Cooke's Practice in the U. S. Courts.
Cod. Codex Justinian.
Cod. Jur. Civ. Codex Juris Civilis; Justinian's Code.
Code Civ. Code Civil, or Civil Code of France.
Code Comm. Code de Commerce.
Code F. Code de Famille.
Code I. Code d'Instruction Criminelle.
Code La. Civil Code of Louisiana.
Code Nap. Code Napoléon; Civil Code.
Code P. Code Pénal.
Code Pro. Code de Procedure Civile.
Code Rep. Code Reporter, New York.
Code Rep. N. S. Code Reports, various New York courts.
Coke. Coke's Reports, English King's Bench.

Coke Inst. Coke's Institutes.
Coke Lit. Coke on Littleton.
Col. L. J. Colonial Law Journal, New Zealand.
Col. Column.
Col. Colorado Reports.
Col. Cas. Coleman's Cases, New York.
Col. & Cai. Cas. Coleman & Caines's Cases, New York.
Colb. Pr. Colby's Practice.
Coldw. Coldwell's Reports, Tennessee.
Cole. Cole's Reports, Iowa.
Cole. Cas. Pr. Coleman's Cases, New York.
Cole. Dig. Colbrook's Digest of Hindoo Law.
Cole Eject. Cole's Law and Practice in Ejectment.
Cole Inf. Cole on Criminal Information.
Cole & C. Coleman & Caines's Cases, New York.
Collyer. Collyer's Reports, English Chancery.
Col. Caus. Cel. Collection des Causes Célèbres, Paris.
Coll. Contrib. Collier's Law of Contributories.
Coll. Id. Collinson on the Law concerning Idiots.
Coll. Jur. Collectanea Juridica.
Coll. Min. Collier on Mines.
Coll. Part. Collyer on Partnership.
Coll. Parl. Cas. Colles's Parliamentary Cases.
Coll. Pat. Collier on the Law of Patents.
Colles. Colles's Parliamentary Cases.
Collin. Lun. Collinson on Lunacy.
Colq. Colquhoun's Reports (1 Modern Reports).
Colq. C. L. Colquhoun's Civil Law.
Colq. R. Colquhoun's Reports (1 Modern).
Colt. Coltnau, Reg. App. Cas.
Colt. Reg. Cas. Coltnau, Registration Cases.
Colum. Law T. Columbia Law Times.
Com. Communes, or Extravagantes Communes.
Com. Commissioner; Commentary.
Comyn's Reports, English King's Bench and Common Pleas.
Com. B. English Common Bench Reports, by Manning, Granger & Scott.
Com. B. N. S. English Common Bench Reports, New Series, by Manning, Granger & Scott.
Com. Cont. Comyn on Contracts.
Com. Dig. Comyn's Digest.
Com. Jour. Journals of the House of Commons.
Com. Law. Commercial Law. Common Law.
Com. Law. R. Common Law Reports, English Common Law Courts.
Com. Law. Rep. Common Law Reports (Spottiswood's), All the Courts.
Com. L. & T. Comyn on Landlord and Tenant.
Com. P. Div. Common Pleas Division, Law Reports.
Com. P. Repr. Common Pleas Reporter, Scrantontown, Penna.
Com. U. Comyn on Usury.
Com. & Leg. Rep. Commercial and Legal Reporter, Nashville, Tenn.
Comb. Comberbach's Reports, English King's Bench.
Com. Blackstone's Commentaries.
Coms. Comstock's Reports, New York Ct. of Appeals Reports, vols. 1-4.
Coms. Ec. Comstock on Executors.
Comyn. Comyn's Reports, English King's Bench and Common Pleas.
Con. Conover's Reports, Wisconsin Reports, vols. 16-38.
Con. Dia. Connor's Digest.
Con. Par. Connell on Parishes.
Con. & Law. Connor & Lawson's Reports, Irish Chancery.
Con. & Sim. Connor & Simonton's Equity Digest.
Cond. Condensed.
Cond. Ch. R. Condensed Chancery Reports.
Cond. Ec. R. Condensed Ecclesiastical Reports.
Cond. Eschl. R. Condensed Eschequer Reports.
Cond. Rep. U. S. Peter's Condensed United States Reports.
Condy Mar. Marshall's Insurance, by Condy.
Condy. Cameron & Norwood's Conference Reports, North Carolina.
Conf. Chart. Confirmatio Chartarum.
Cong. Elect. Cas. Congressional Election Cases.
Congr. Globe. Congressional Globe, Washington.
Congr. Rec. Congressional Record, Washington.
Conk. Adm. Conkling's Admiralty.
Conk. Jur. & Pr. or Conk. Pr. Conkling's Jurisdiction and Practice, U. S. Courts.
Conn. Connecticut Reports.
Connolly. Connolly, New York Surrogate.
Conr. Conroy's Custodian Reports, Irish.
Cons. del Mare. Consolato del Mare.
Cons. Ord. in Ch. Consolidated General Orders in Chancery.
Consist. Haggard's Consistory Court Reports, English.
Const. Constitution.
Const. Oth. Constitutions Othoni.
Const. S. C. Treadway's Constitutional Reports, South Carolina.
Const (N. S.) S. C. Mill's Constitutional Reports, New Series, South Carolina.
Const. U. S. Constitution of the United States.
Consuet. Feud. Consuetudines Feudorum, or the Book of Forms.
Cont. Contra.
Cooke. Cooke's Practice Cases, English Common Pleas.
Cooke (Tenn.). Cooke's Reports, Tennessee.
Cooke Agr. T. Cooke on Agricultural Tenancies.
Cooke B. L. Cooke's Bankrupt Law.
Cooke Cop. Cooke's Law of Copyhold Enfranchisement.
Cooke Def. Cooke's Law of Defamation.
Cooke I. A. Cooke's Inclosure Act.
Cooke Pr. Cas. Cooke's Practice Reports, English Common Pleas.
Cooke & Al. Cooke & Alcock's Reports, Irish King's Bench.
Cooke & H. Cooke & Harwood's Charitable Trust Acts.
Cooley. Cooley's Reports, Michigan.
Cooley Const. L. Cooley on Constitutional Law.
Cooley Const. Lim. Cooley on Constitutional Limitations.
Cooley Taz. Cooley on Taxation.

- Cooley Torts. Cooley on Torts.
 Coop. Cooper's Reports, English Chancery temp. Eldon.
 Coop. (Tenn.). Cooper's Reports, Tennessee.
 Coop. C. & P. R. Cooper's Chancery and Practice Reporter, Upper Canada.
 Coop. C. C. or Coop. Cas. Cooper's Chancery Cases temp. Cottenham.
 Coop. Eq. Pl. Cooper's Equity Pleading.
 Coop. Inst. or Coop. Jus. Cooper's Institutes of Justinian.
 Coop. Pr. Cas. Cooper's Practice Cases, English Chancery.
 Coop. Med. Jur. Cooper's Medical Jurisprudence.
 Coop. I. Brough. Cooper's Reports temp. Brougham, English Chancery.
 Coop. I. Cotten. Cooper's Cases, temp. Cottenham, English Chancery.
 Coop. I. Eld. Cooper's Reports temp. Eldon, English Chancery.
 Cooper. Cooper's Reports, English Chancery temp. Eldon.
 Coote Adm. Coote's Admiralty Practice.
 Coote L. & T. Coote's Landlord and Tenant.
 Coote Mort. Coote on Mortgages.
 Coote Pro. Fr. Coote's Probate Practice.
 Coote & Tr. Coote & Tristram's Probate Court Practice.
 Cop. Copinger on Copyright.
 Cop. Ind. Pr. Copinger's Index to Precedents.
 Copp Land Off. Bull. Copp's Land Office Bulletin.
 Copp U. S. Min. Dec. Copp's U. S. Mining Decisions.
 Copp U. S. Min. L. Copp's U. S. Mineral Land Law.
 Corb. & Dan. Corbett & Daniel's Parliamentary Election Cases.
 Cord Mar. Wom. Cord on Married Women.
 Cord D. Cornish on Purchase Deeds.
 Corn. Dia. Cornwell's Digest.
 Corn. Uses. Cornish on Uses.
 Corn. Rem. Cornish on Remainders.
 Cornu. Tab. Cornwall's Table of Precedents.
 Corp. Jur. Civ. Corpus Juris Civilis.
 Corry. Corryton's Reports, Calcutta.
 Corvin. Corvinus's Elementa Juris Civilis.
 Corry. Corryton on Copyright.
 Cory. Fay. Cory on Patents.
 Cot. Abr. Cotton's Abridgment of the Records.
 Coul. & F. Waters. Coulson & Forbes on Waters.
 Counsellor. The Counsellor, New York City.
 County Ct. Rep. County Court Reports, English.
 County Ct. Rep. N. S. County Court Reports, New Series, English.
 County Cts. & Bankr. Cas. County Courts and Bankruptcy Cases.
 County Cts. Ch. County Courts Chronicle, London.
 Coup. Couper's Justiciary Reports, Scotland.
 Court Cl. U. S. Court of Claims Report.
 Court J. & Dist. Ct. Rec. Court Journal and District Court Record.
 Court Sess. Cas. Court of Session Cases, Scotland.
 Court. & MacL. Courtney and Maclean's Scotch Appeals (6-7 Wilson and Shaw).
 Cov. Ev. Coventry on Evidence.
 Cow. Cowen's Reports, New York.
 Cow. Dig. Cowell's (East) Indian Digest.
 Cow. Inst. Cowell's Institutes of Law.
 Cow. Cr. Cowen's Criminal Reports, New York.
 Cowell. Cow. Dic. or Cow. Int. Cowell's Law Dictionary; Cowell's Interpreter.
 Cowp. Cowper's Reports, English King's Bench.
 Cox. Cox Ch., or Cox Eq. Cox's Reports, English Chancery.
 Cox (Ark.). Cox's Reports, Arkansas.
 Cox Am. Tr. M. Cas. Cox's American Trademark Cases.
 Cox C. C. or Cox Cr. Cas. Cox's Criminal Cases, English.
 Cox Elect. Cox on Ancient Parliamentary Elections.
 Cox Gov. Cox's Institutions of the English Government.
 Cox J. S. Cox on Joint Stock Companies.
 Cox J. S. Cas. Cox's Joint Stock Cases.
 Cox M. C. Cox's Magistrate Cases.
 Cox, McC. & H. Cox, McCrae and Hertlett's County Court Reports, English.
 Cox & Atk. Cox and Atkinson's Registration Appeals.
 Coxe. Coxe's Reports, New Jersey Law Reports, vol. 1.
 Coxe & Melm. Coxe & Melmoth MSS. Cases on Fraud, in May on Fraudulent Conveyances.
 Cr. Craig's Jus Feudale, Scotland.
 Cr. or Cra. Cranch's Reports, Supreme Court U. S.
 Cr. or Cra. C. C. Cranch's Reports U. S. Circuit Court, Dist. of Columbia.
 Cr. Cas. Res. Crown Cases Reserved, Law Reports.
 Cr. Pat. Dec. Cranch's Patent Decisions.
 Cr. & St. Craige and Stewart, House of Lords (Sc.) Reports.
 Cra. Cranch's Reports, U. S. Supreme Court.
 Cra. C. C. Cranch's Reports, U. S. Circ. Court, Dist. of Col.
 Crabb Conv. Crabb's Conveyancing.
 Crabb Com. L. Crabb on the Common Law.
 Crabb Dig. Crabb's Digest of Statutes from Magna Charta to 9 & 10 Victoria.
 Crabb Hist. Crabb's History of the English Law.
 Crabb R. P. Crabb on the Law of Real Property.
 Crabbie. Crabbie's Reports, District Court of U. S. Eastern District of Penna.
 Craig Fr. Craig's Practice.
 Craig & P. Craig and Phillip's English Chancery.
 Craig & St. Craigie, Stewart and Paton's English House of Lords, Appeals from Scotland.
 Craik. Craik's English Causes Celebres.
 Cranch. Cranch's Reports, U. S. Supreme Court.
 Cranch C. C. Cranch's Reports, U. S. Circuit Ct., District of Columbia.
 Cranch Pat. Dec. Cranch's Patent Decisions.
 Craze. & D. Crawford and Dix's Reports, Irish Circuit Cases.
 Craze, & D. Abr. C. Crawford and Dix's Abridged Cases, Ireland.
 Creasy (Ceylon). Creasy's Ceylon Reports.
 Creasy Col. C. Creasy's Colonial Constitutions.
 Creasy Int. L. Creasy on International Law.
 Cresw. Ins. Cas. Cresswell's Insolvency Cases, English.
 Crim. Con. Criminal Conversation, Adultery.
 Crim. Law Mag. Criminal Law Magazine, Jersey City, N. J.
 Crim. L. Rec. Criminal Law Recorder.
 Crim. Rec. Criminal Recorder, Philadelphia.
 Crim. Rec. (Eng.). Criminal Recorder, London.
 Crisp Ch. Cas. Crisp's Church Cases.
 Crisp Ecc. L. Crisp's Ecclesiastical Law.
 Critch. Critchfield's Reports, Ohio.
 Cro. Croke's Reports, English King's Bench.
 Cro. Sometimes refers to Keilway's Reports, published by Serri. Croke.
 Cro. Car. Croke's Reports temp. Charles I. (8 Cro.).
 Cro. Elis. Croke's Reports temp. Elizabeth I. (1 Cro.).
 Cro. Jac. Croke's Reports temp. James I. (8 Cro.).
 Crockford. English Maritime Law Reports, published by Crockford.
 Crock. Notes. Crocker's Notes on Common Forms.
 Crock. Sher. Crocker on Sheriffs.
 Cromp. Star Chamber Cases by Crompton.
 Cromp. Cts. Crompton on Courts.
 Cromp. Exch. R. Crompton's Exchequer Reports, English.
 Cromp. J. C. Crompton's Jurisdiction of Courts.
 Cromp. M. & R. Crompton, Meeson and Roscoe's Reports, English Exchequer.
 Cromp. & J. Crompton and Jervis's Reports, English Exchequer.
 Cromp. & M. Crompton & Meeson's Reports, English Exchequer.
 Crowe. Pat. Cas. Cresswell's Patent Cases.
 Cross Lien. Cross on Liens.
 Crown C. C. Crown Circuit Companion.
 Crowth. (Ceylon). Crowthier's Ceylon Reports.
 Cruise Dig. or Cruise R. P. Cruise's Digest of the Law of Real Property.
 Cruise Titles. Cruise on Titles of Honor.
 Cruise Uses. Cruise on Uses.
 Crump Mar. Ins. Crump on Marine Insurance.
 Ct. of App. Court of Appeals.
 Ct. of Cl. Court of Claims Reports, U. S.
 Ct. of Err. Court of Error.
 Ct. of Gen. Sess. Court of General Sessions.
 Ct. of Sess. Court of Session.
 Ct. of Spec. Sess. Court of Special Sessions.
 Cul. Culpabiles, Guilty.
 Cull. B. L. Cullen's Bankrupt Law.
 Cum. C. L. Cumlin's Civil Law.
 Cummins. Cummins's Reports, Idaho.
 Cun. Cunningham's Reports, English King's Bench.
 Cun. Bills of Ex. Cunningham on Bills of Exchange.
 Cun. Dict. Cunningham's Dictionary.
 Cur. Adv. Vult. Curia Advisare Vult.
 Cur. Phil. Curia Philippica.
 Cur. Scacc. Curia Scaccariae.
 Cur. Can. Curia Cancellerarie.
 Current Com. Current Comment and Legal Miscellany.
 Curry. Curry's Reports, Louisiana Reports, vols. 6-13.
 Curt. Curtel's Ecclesiastical Reports, English.
 Curt. Ad. Dig. Curtis's Admiralty Digest.
 Curt. C. C. Curtis's Reports, U. S. Circuit Court, 1st Circuit.
 Curt. Com. Curtis's Commentaries.
 Curt. Cond. Curtis's Condensed Reports, U. S. Supreme Court.
 Curt. Cop. Curtis on Copyrights.
 Curt. Dec. Curtis's U. S. Courts Decisions, Condensed.
 Curt. Dig. Curtis's Digest.
 Curt. Ecc. Curtis's Ecclesiastical Reports, English.
 Curt. Eq. Prec. Curtis's Equity Precedents.
 Curt. Jur. Curtis on the Jurisdiction of the U. S. Courts.
 Curt. Mer. S. Curtis on Merchant Seamen.
 Curt. Pat. Curtis on Patents.
 Curro. Curwen's Overruled Cases, Ohio.
 Curro. Aba. Tit. Curwen on Abstracts of Title.
 Cush. Cushing's Reports, Massachusetts.
 Cush. El. Cas. Cushing's Election Cases, Massachusetts.
 Cush. Parl. L. Cushing's Parliamentary Law.
 Cush. Trust. L. Cushing on Trustee Process, or Foreign Attachment.
 Cushman. Cushman's Reports, Mississippi Reports, vols. 28-29.
 Cust. de Norm. Custome de Normandie.
 Cutl. Cutler on Naturalization.
 Cutl. Ins. L. Cutler's Insolvent Laws of Massachusetts.
 Cut. Pat. Cas. Cutler's Trademark and Patent Cases, 11 vols.
 D. Decree. Decret. Dictum.
 D. Digest, particularly the Digest of Justinian.
 D. Dictionary, particularly Morison's Dictionary of the Law of Scotland.
 D. B. Domesday Book.
 D. C. District Court.
 D. C. L. Doctor of the Civil Law.
 D. Chip. D. Chipman's Reports, Vermont.
 D. Dec. Dix's School Decisions, New York.
 D. F. & J. De Gex, Fisher, and Jones's Reports, English Chancery.
 D. J. & S. De Gex, Jones, and Smith's Reports, English Chancery.
 D. M. & G. De Gex, Macnaghten, and Gordon's Reports, English Chancery.
 D. N. S. Dowling's Reports, New Series, English Bail Court Reports.
 D. P. Domus Procuerum, House of Lords.
 D. P. B. Dampier Paper Book. See A. P. B.
 D. Pr. Darling's Practice, Court of Session.
 D. P. C. Dowling's Practice Cases, Old Series.
 D. S. Deputy Sheriff.
 D. S. B. Debit sans breve.
 D. & B. C. C. Dearesly and Bell's Crown Cases Reserved, English.
 D. & C. Dow and Clark's English House of Lords.
 D. & C. Dow and Clark's English House of Lords (Parliamentary Cases).
 D. & C. or D. & Chit. Deacon and Chitty's Bankruptcy Cases, English.
 D. & E. Durnford and East, English King's Bench.
 Term Reports.
 D. & De Gex and Jones's Reports, English Chancery.
 D. & J. B. De Gex and Jones's English Bankruptcy Reports.
 D. & L. Dowling and Lowndes's English Bail Court Reports.
 D. & M. Davidson and Merivale's Reports, English Queen's Bench.
 D. & P. Dennison and Pearce's Crown Cases.
 D. & R. Dowling and Ryland's Reports, English King's Bench.
 D. & R. M. C. Dowling and Ryland's Magistrate Cases.
 D. & R. N. P. C. Dowling and Ryland's Nisi Prius Cases.
 D. & S. Doctor and Student.
 D. & Sm. Drew and Smales' English V. C. Reports.
 D. & Sw. Deane and Swabey, English Ecclesiastical Reports.
 D. & W. Drury and Walsh's Reports, Irish Chancery.
 D. & War. Drury and Warren's Reports, Irish Chancery.
 Dag. Cr. L. Dagge's Criminal Law.
 Dak. Dakota Reports.
 Dal. Dalison's Reports, English Common Pleas (Benloe & Dalison).
 Dale Ecc. Dale's Ecclesiastical Reports, English.
 Dall. Dallas's Reports, U. S. Supreme Court and Pennsylvania Courts.
 Dall. L. Dallas's Laws of Pennsylvania.
 Dall. Sty. Dallas's Styles, Scotland.
 Dall. (Tex.). Dallas's Texas Reports.
 Dall. Tex. Dig. Dallas's Texas Digest.
 Dallam. Dallam's Decisions, Texas Supreme Court.
 Dalr. Dalrymple's Cases, Scotch Court of Session.
 Dalr. Ent. Dalrymple on the Polity of Entails.
 Dalr. F. L. or Dalr. Feud. Pr. Dalrymple on Feudal Property.
 Dalr. Ten. Dalrymple on Tenures.
 Dall. Just. Dalton's Justice.
 Dall. Sh. Dalton's Sheriff.
 Daly. Daly's reports, New York Common Pleas.
 D'An. D'Anvers' Abridgment.
 Dan. Daniel's Reports, English Exchequer.
 Dan. Ch. Pr. Daniel's Chancery Practice.
 Dan. Neg. Inst. Daniel's Negotiable Instruments.
 Dan. Ord. Danish Ordinances.
 Dan. T. M. Daniels on Trademarks.
 Dan. & Ltd. Danson & Lloyd's Mercantile Cases.
 Dana. Dana's Reports, Kentucky.
 Dane Abr. Dane's Abridgment.
 Danner. Danner's Reports, Alabama Reports, vol. 42.
 Dan. & Ltd. Danson & Lloyd's Mercantile Cases.
 D'Anv. Abr. D'Anvers' Abridgment.
 Darb. & B. Darby & Bosanquet on Limitations.
 Dart Vend. Dart on Vendors and Purchasers.
 Dart. Col. Cas. Report of Dartmouth College Case.
 Das. Dasent's Reports, Common Law Reports, vol. 8.
 Dass. Dig. Dassel's Digest Kansas Reports.
 Dav. Davies's Reports, Irish King's Bench.
 Dav. (U. S.). Davelis's Reports, U. S. Dist. of Maine (2d Ware).
 Dav. Con. Davidson's Conveyancing.
 Dav. Jus. Davis's Justice of the Peace.
 Dav. Pat. Cas. Davies's Patent Cases, English Courts.
 Dav. Prec. Davidson's Precedents in Conveyancing.
 Dav. & M. Davidson & Merivale's Reports, English Queen's Bench.
 Davia. Davila's Reports, U. S. Dist. of Maine.
 Davis Build. Davis's Law of Building.
 Dav. Eng. Ch. Can. Davis's English Church Canon.
 Davis Rep. Davis's Reports, Sandwich Island.
 Daw. Arr. Dawe on the Law of Arrest in Civil Cases.
 Daw. Land. Pr. Dawe's Epitome of the Law of Landed Property.
 Daw. Real Pr. Dawe's Introduction to the Knowledge of the Law on Real Estates.
 Day. Day's Reports, Connecticut.
 Day Elect. Cas. Day's Election Cases.
 Day Fr. Day's Common Law Practice.
 Dayt. Surr. Dayton on Surrogates.
 De Bois. Halluc. De Boismont on Hallucinations.
 De Burgh Mar. Int. L. De Burgh on Maritime International Law.
 De Colyar's Quar. De Colyar's Law of Quarantine.
 D'Ewes. D'Ewes's Journal and Parliamentary Collection.
 De G. De Gex's Reports, English Bankruptcy.
 De G. F. & J. De Gex, Fisher, & Jones's Reports, English Chancery.
 De G. F. & J. B. App. De Gex, Fisher, & Jones's Bankruptcy Appeals, English.
 De G. J. & S. De Gex, Jones, & Smith's Reports, English Chancery.
 De G. J. & S. Bankr. De Gex, Jones, & Smith's Bankruptcy Appeals, English.
 De G. M. & G. De Gex, Macnaghten, & Gordon's Reports, English Chancery.
 De G. M. & G. Bankr. De Gex, Macnaghten, & Gordon's Bankruptcy Appeals, English.
 De G. & J. De Gex & Jones's Reports, English Chancery.

ABBREVIATION

- De G. & J. Bankr.* De Gex & Jones's Bankruptcy Appeals.
De G. & Sm. De Gex & Smale's Reports, English Chancery.
De H. M. L. De Hart on Military Law.
De L. Const. De Lolme on the English Constitution.
Dea. & Sw. Deane & Swabey's Reports, English Ecclesiastical Courts.
Deac. Bankr. Deacon on Bankruptcy.
Deac. & Chit. Deacon & Chitty's English Bankruptcy Cases.
Deady. Deady's Reports, U. S. Dist. of Oregon.
Dean Med. Jur. Dean's Medical Jurisprudence.
Deane, Deane's. Reports, Vermont.
Deane Comv. Deane's Conveyancing.
Deane Ecc. Deane's Ecclesiastical Reports, English.
Deane N. Deane on Neutrals.
Dears. Dearsly's Crown Cases Reserved.
Dears. & B. Dearsly & Bell's Crown Cases Reserved.
Deas & And. Deas & Anderson's Scotch Court of Session Cases.
Deb. Jud. Debates on the Judiciary.
Dec. Com. Pat. Decisions of the Commissioner of Patents.
Dec. Joint Com. Decisions of the Joint Commission.
Dec. t. H. & M. Decisions in Admiralty *tempore* Hay & Marriott.
Defl. Defendant.
Dege. Dege's Parson's Companion.
Del. Delaware Reports.
Del. Ch. Delaware Chancery Reports.
Del. Cr. Cas. Delaware Criminal Cases, by Houston.
Del. El. Cts. Delane's Election Decisions.
Deleg. Court of Delegates.
Delehanty. Delehanty's New York Miscellaneous Reports.
Dem. Demare's New York Surrogate Reports.
Demol. C. N. Demolombe's Code Napoléon.
Den. or Denio. Denio's Reports, New York.
Den. C. C. Denison's Crown Cases.
Dens. Denslow Michigan Reports.
Denver L. J. Denver Law Journal.
Denver L. N. Denver Legal News.
Des., Dess., or Dessaus. Dessausse's Reports, South Carolina.
Dest. Cal. Dig. Desty's California Digest.
Desty Com. & Nav. Desty on Commerce and Navigation.
Desty Fed. Const. Desty on the Federal Constitution.
Desty Fed. Proc. Desty's Federal Procedure.
Desty Sh. & Adm. Desty on Shipping and Admiralty.
Dev. or Dev. C. Ch. Devereux's Reports, U. S. Court of Claims.
Dev. Eq. Devereux's Equity Reports, North Carolina, vols. 16-17.
Dev. L. Devereux's Law Reports, North Carolina, vols. 12-15.
Dev. (N. C.) Devereux's Law Reports, North Carolina, 1825-1834, 4 vols.
Dev. & B. Eq. Devereux & Battle's Equity Reports, North Carolina, vols. 21-22.
Dev. & B. L. Devereux & Battle's Law Reports, North Carolina, vols. 18-20.
Dewitt. Dewitt's Reports, Ohio.
Di. (or Dy.) Dyer's Reports, English King's Bench.
Dial. de Scac. Dialogus de Scaccario.
Dibo F. Dibo's Forms of Memorials.
Dice (Ind.). Dickinson's Reports.
Dicey Dom. Dicey on Domicil.
Dicey Part. Dicey on Parties to Actions.
Dick. Dickens's Reports, English Chancery.
Dick. Ch. Proc. Dickinson's Chancery Proceedings.
Dick. Pr. or Dick. Qr. Sess. Dickinson's Practice of the Quarter and other Sessions.
Dickson Ev. Dickson's Law of Evidence.
Dict. Dictionary.
Dig. Digest of Writs.
Dig. Digest, particularly the Digest of Justinian.
Digby R. P. Digby on Real Property.
Dill. Dillon's Report, U. S. 8th Circuit.
Dill. Mun. Corp. Dillon on Municipal Corporations.
Diri. Dirleton's Decisions, Scotch Court of Session.
Dim. Disney's Reports, Superior Court of Cincinnati, Ohio.
Dim. Gam. Disney's Law of Gaming.
Div. Division, Courts of the High Court of Justice.
Div. & Matr. C. Divorce and Matrimonial Causes Court.
Doct. Pl. Doctrina Placidanda.
Doct. & Stud. Doctor and Student.
Dods. Dodson's Reports, English Admiralty Courts.
Dons. or Domat. Domat on Civil Law.
Dons. Proc. Domus Proceurum, in the House of Lords.
Domesd. Domesday Book.
Donn. Donnelly's Reports, English Chancery.
Dor. (Quebec). Dorion's Quebec Queen's Bench Reports.
Doug. Douglas's Reports, English King's Bench.
Doug. (Mich.). Douglass's Reports, Michigan.
Doug. El. Cts. Douglas's Election Cases, English.
Dow or Dow P. C. Dow's Cases, English House of Lords.
Dow & C. or Dow N. S. Dow & Clark's Cases, English House of Lords.
Dowl. Dowling's English Bail Court Reports.
Dowl. N. S. Dowling's English Bail Court Reports, New Series.
Dowl. Pr. C. Dowling's Reports, English Practice Cases.
Dowl. Pr. C. N. S. Dowling's Reports, New Series, English Practice Cases.
Dowl. & L. Dowling & Lowndes's English Bail Court and Practice Cases.
Dowl. & Ry. Dowling & Ryland's Reports, English King's Bench.
Dowl. & Ry. M. C. Dowling & Ryland's Magistrate Cases, English.
Dowl. & Ry. N. P. Dowling & Ryland's Nisi Prius Cases, English.
Downt. Downton & Luder's Election Cases, English.
Drake Att. Drake on Attachments.
Draper. Draper's Reports, Upper Canada King's Bench.
Drew. or Drewry. Drewry's Reports, English Chancery.
Drew. (Fla.). Drew's Reports, Florida.
Drew. Inj. Drewry on Injunctions.
Drewry T. M. Drewry on Trademarks.
Dreio. & S. or Drewry & Sm. Drewry & Smale's Reports, English Chancery.
Drinkw. Drinkwater's Reports, English Common Pleas.
Drone Copyr. Drone on Copyrights.
Drury. Drury's Reports, Irish Chancery.
Drury t. Nap. Drury's Reports in the time of Napier, Irish Chancery.
Drury & Wal. Drury & Walsh's Reports, Irish Chancery.
Drury & War. Drury & Warren's Reports, Irish Chancery.
Du C. Du Cange's Glossarium.
Duane Road L. Duane on Road Laws.
Dub. Dubitatur, Dubitante.
Dud. or Dud. Ga. Dudley's Reports, Georgia.
Dud. Ch. or Dud. Eq. Dudley's Equity Reports, South Carolina.
Dud. L. or Dud. S. C. Dudley's Law Reports, South Carolina.
Duer. Duer's Reports, New York Superior Court, vols. 8-13.
Duer Const. Duer's Constitutional Jurisprudence.
Duer Ins. Duer on Insurance.
Duer Mar. Ins. Duer on Marine Insurance.
Duer Repr. Duer on Representation.
Dugd. Orig. Dugdale's Originales Juridiciales.
Dugd. Sum. Dugdale's Summons.
Duke or Duke Uses. Duke on Charitable Uses.
Duncan's Man. Duncan's Manual of Entail Procedure.
Dunl. Dunlop, Bell, & Murray's Reports, Scotch Court of Session (Second Series, 1838-62).
Dunl. Adm. Pr. Dunlop's Admiralty Practice.
Dunl. B. & M. Dunlop, Bell, & Murray's Reports, Scotch Court of Session (Second Series, 1838-62).
Dunl. F. Dunlop's Forms.
Dunl. L. Penn. Dunlop's Laws of Pennsylvania.
Dunl. L. U. S. Dunlop's Laws of the United States.
Dunl. Paley Ag. Dunlop's Paley on Agency.
Dunl. Pr. Dunlop's Practice.
Duponc. Duponceau on the Constitution.
Duponc. Jur. Duponceau on Jurisdiction.
Dur. Dr. Fr. Duranton's Droit Français.
Durf. (R. L.) Durfee's Reports, Rhode Island.
Durie Sc. Durie's Reports, Scotch Court of Session.
Durnf. & E. Durnford & East's Reports, English King's Bench; Term Reports.
Dutch. Dutcher's Reports, New Jersey Law.
Duv. (Can.). Duvall's Canada Supreme Court Reports.
Duv. Duvall's Reports, Kentucky.
Dwar. Dwaris on Statutes.
Dwight. Dwight's Charity Cases, English.
Dyer. Dyer's Reports, English King's Bench.
E. Easter Term, King Edward.
E. East's Reports, English King's Bench.
E. B. Ecclesiastical Compensations or "Bots."
E. B. & E. Ellis. Blackburn, and Ellis's Reports, English Queen's Bench.
E. B. & S. Best & Smith's Reports, sometimes so cited.
E. C. L. English Common Law Reports.
E. D. S. E. D. Smith's Reports, New York Common Pleas.
E. E. English Exchequer.
E. E. E. English Ecclesiastical Reports.
E. I. Ecclesiastical Institutes.
E. I. C. East India Company.
E. L. & Eq. English Law and Equity Reports.
E. of Cov. Earl of Coventry's Case.
E. P. C. East's Pleas of the Crown.
E. E. East's Reports, English King's Bench.
E. T. Easter Term.
E. & A. Spink's Ecclesiastical and Admiralty Reports.
E. & A. R. Error and Appeal Reports, Ontario.
E. & B. Ellis & Blackburn's. Reports, English Queen's Bench.
E. & L. Ellis & Ellis's. Reports, English Queen's Bench.
Eag. T. Eagle's Commutation of Tithes.
Eag. & Yo. Eagle & Young's Title Cases.
Ea. or East. East's Reports, English King's Bench.
East P. C. East's Pleas of the Crown.
East. Rep. East's Reports.
East. N. of C. East's Notes of Cases, India.
Ec. & Ad. Spink's Ecclesiastical and Admiralty Reports.
Ecl. Ecclesiastical.
Ecol. Law. Ecclesiastical Law.
Ecol. Rep. Ecclesiastical Reports.
Ecol. Stat. Ecclesiastical Statutes.
Ed. Edition, Edited, King Edward.
Elen. Elen's Reports, English Chancery.
Elen B. L. Elen's Bankrupt Law.
Elen Inj. Elen on Injunctions.
Elen Pen. L. Elen's Penal Law.
Edgar's. Edgar's Reports, Scotch Court of Session.
Edw. C. Canons enacted under King Edgar.
Edict. Edicts of Justinian.
Edin. L. J. Edinburgh Law Journal.
Edinb. L. J. Edinburgh Law Journal.
Edm. Exch. Pr. Edmund's Exchequer Practice.
Edm. Sel. Cas. Edmund's Select Cases, New York.
Edw. King Edward; thus 1 Edw. I. signifies the first year of the reign of King Edward I.
Edw. (Mo.). Edwards's Reports, Missouri.
Edw. Abr. Edwards's Abridgment of Cases in Privy Council.
Edw. Adm. Edwards's Admiralty Reports, English.
Edw. Bail. Edwards on Bailments.
Edw. Bill. Edwards on Bills.
Edw. Ch. Edwards's Chancery Reports, New York.
Edw. Jur. Edwards's Jurymen's Guide.
Edw. Lead. Dec. Edwards's Leading Decisions in Admiralty; Edwards's Adm. Reports.
Edw. Part. Edwards on Parties to Bills in Chancery.
Edw. Pr. Cas. Edwards's Prize Cases.
Edw. Rec. Edwards on Receivers in Chancery.
Edw. S. Act. Edwards on the Stamp Act.
Elr. Lambert's. Elranchman (Hughes).
El. B. & E. Ellis. Blackburn, & Ellis's Reports, English Queen's Bench.
El. B. & S. Ellis, Best, & Smith's. Reports, English Queen's Bench.
El. & B. Ellis & Blackburn's. Reports, English Queen's Bench.
El. & M. Ellis & Ellis's. Reports, English Queen's Bench.
Elchic. Elchies's Dictionary of Decisions, Scotch Court of Session.
Eliz. Queen Elizabeth.
Ell. Deb. Ellis's Debates.
Ell. D. & Cr. Ellis on Debtor and Creditor.
Ell. Ins. Ellis on Insurance.
Ell. Dig. Minn. Eller's Digest, Minnesota Reports.
Elm. Dig. Elmer's Digest, N. J.
Elm. Dilap. Elmes on Ecclesiastical and Civil Dilapidation.
Elvyn. Parl. Elsyng on Parliaments.
El. Ten. of Kent. Elton's Tenures of Kent.
Elw. Med. Jur. Elwell's Medical Jurisprudence.
Emer. Ins. Emerigon on Insurance.
Emer. Mar. Loans. Emerigon on Maritime Loans.
Enc. Pl. & Pr. Encyclopædia of Pleading & Practice.
Encycl. Encyclopædia.
Eng. English Reports, Arkansas.
Eng. Adm. R. English Admiralty Reports.
Eng. C. C. or Cr. Cas. English Crown Cases (American reprint).
Eng. Ch. English Chancery Reports.
Eng. C. L. or Eng. Com. L. R. English Common Law Reports.
Eng. Ecol. English Ecclesiastical Reports.
Eng. Exch. English Exchequer Reports.
Eng. Ir. App. English Law Reports, English and Irish Appeal Cases.
Eng. Jud. Cases in the Court of Session by English Judges.
Eng. L. & Eq. R. English Law and Equity Reports.
Eng. Plead. English Pleading.
Eng. R. & C. Cas. English Railroad and Canal Cases.
Eng. Rep. English Reports, Notes by Moak.
Eng. Sc. Ecc. English and Scotch Ecclesiastical Reports.
Entries, Antient. Rastell's Entries.
Entries, New Book of. Sometimes refers to Rastell's Entries, and sometimes to Coke's Entries.
Entries, Old Book of. Liber Intrationum.
Eod. Eodem.
Eq. Equity.
Eq. Ab. or Eq. Ca. Abr. Equity Cases Abridged.
Eq. Cas. Equity Cases, vol. 9, Modern Reports.
Eq. Draft. Equity Draftsman (Hughes).
Eq. Rep. Equity Reports, English Chancery and Appeals from Colonial Courts, printed by Spottiswoode.
Err. & App. Error and Appeals Reports, Upper Canada.
Ersk. Inst. Erskine's Institutes of the Law of Scotland.
Ersk. Prin. Erskine's Principles of the Law of Scotland.
Esp. Espinasse's Reports, English Nisi Prius.
Esp. Ev. Espinasse on Evidence.
Esp. N. P. Espinasse's Nisi Prius Law.
Esp. Pen. Ev. Espinasse on Penal Evidence.
Esquire. Esquire.
Et al. Et alii, and others.
Euer. Euer's Doctrina Placidandi.
Eunom. Wynne's Eunomus.
Europ. Arb. European Arbitration, Lord Westbury's Decisions.
Ev. Evidence.
Evans. Evans's Reports, Washington Territory.
Evans Ag. Evans on Agency.
Evans Pl. Evans on Pleading.
Evans Pothier. Evans's Pothier on Obligations.
Evans R. L. Evans's Road Laws of South Carolina.
Evans Stat. Evans's Collection of Statutes.
Evans Tr. Evans's Trial.
Ewell's Evans Ag. Ewell's Evans on Agency.
Ewell Fixt. Ewell on Fixtures.
Ewell Lead. Cas. Ewell's Leading Cases on Infancy, etc.
Ex. & H. Dig. (Minn.). Ewell and Hamilton's Digest, Minnesota Reports.
Ex. Exchequer Reports, English.
Ex. or Err. Executor.
Ex. Com. Extravagantes Communes.
Ex. D. English Law Reports, Exchequer Division.
Exam. The Examiner.
Ex rel. Ex relatione.
Exch. Exchequer Reports, English (Welsby, Hursthouse & Gordon's Reports).
Exch. Cas. Exchequer Cases, Scotland.
Exch. Chamb. Exchequer Chamber.
Exch. Div. Exchequer Division, English Law Reports.
Exec. Execution. Executor.

- Exp.* Ex parte. Expired.
Expl. Explained.
Ext. Extended.
Extor. Mar. Diccal. Extor's Maritime Diccalogie.
Eyre. Eyre's Reports, English King's Bench.
temp. William III.
- F.* Finals.
F. Consuetudines Feudorum.
F. Fitzherbert's Abridgment.
F. B. C. Fonblanque's Bankruptcy Cases.
F. B. R. Full Bench Rulings, Bengal.
F. B. R. N. W. P. Full Bench Rulings, North-west Provinces, India.
F. C. Faculty of Advocates Collection, Scotch Court of Session Cases.
F. C. R. Fearnie on Contingent Remainders.
F. Dict. Kames and Woodhouselee's Dictionary, Scotch Court of Session Cases.
F. N. B. Fitzherbert's Natura Brevium.
F. R. Forum Romanorum.
F. & F. Foster and Finlason's Reports, English Nisi Prius.
F. & Fitz. Falconer and Fitzherbert's Election Cases.
F. & S. Fox and Smith's Reports, Irish King's Bench.
F. & W. Pr. Freud and Ward's Precedents.
Fac. Col. Faculty of Advocates Collection, Scotch Court of Session Cases.
Fairf. Fairfield's Reports, Maine.
Falc. Falconer's Reports, Scotch Court of Session.
Falc. & Fitz. Falconer and Fitzherbert Election Cases.
Fam. Cas. Cr. Ev. Famous Cases of Criminal Evidence, by Phillips.
Far. Farresley's Reports, English King's Bench, Modern Reports, vol. 7.
Farr Med. Jur. Farr's Elements of Medical Jurisprudence.
Farr. Pow. Farwell on Powers.
Faw. L. & T. Fawcett's Landlord and Tenant.
Fearne Rem. Fearne on Contingent Remainders.
Fed. The Federalist.
Fed. Rep. The Federal Reporter, all U. S. C. C. & D. C. and C. A. Cases, St. Paul, Minn. District, Circuit and Circuit Court of Appeals Reports.
Fell Guar. Fell on Mercantile Guarantees.
Fent. (New Zealand). Fenton's New Zealand Reports.
Fer. Fixt. Amos and Ferard on Fixtures.
Ferguson's Reports. Scotch Consistorial Court.
Ferg. M. & D. Ferguson on Marriage and Divorce.
Ferg. Proc. Ferguson's Common Law Procedure Cases, Ireland.
Ferg. Ry. Cas. Ferguson's Five Years' Railway Cases.
Fern. Dec. Decretos del Fernando, Mexico.
Ferr. Hist. Civ. L. Ferriere's History of the Civil Law.
Ferr. Mod. Ferriere's Dictionnaire de Droit et de Pratique.
Fess. Pat. Fessenden on Patents.
Fy. Pandects of Justinian.
Fi. fa. Fieri Facias.
Field Com. Law. Field on the Common Law of England.
Field Corp. Field on Corporations.
Field Ev. Field's Law of Evidence, India.
Field Int. Code. Field's International Code.
Field Pen. L. Field's Penal Law.
Fil. Filiger's Writs.
Fin. Finch's Reports, English Chancery.
Fin. Law. Finch's Law.
Fin. Pr. Finch's Precedents in Chancery.
Fin. Ren. Finlay on Renewals.
Finch Cas. Cont. Finch's Cases on Contract.
Finl. Dig. Finlay's Digest and Cases, Ireland.
Finl. L. C. Finlason's Leading Cases on Pleadings, etc.
Finl. Mart. L. Finlason on Martial Law.
Finl. Rep. Finlason's Reports of the Gurney Case.
Finl. Ten. Finlason on Land Tenures.
Fish. Fisher's Patent Cases.
Fish. Cop. Fisher on Copyrights.
Fish. Dig. Fisher's Digest, English Reports.
Fish. Mort. Fisher on Mortgages.
Fish. Pat. Cas. Fisher's Patent Cases, U. S. Circuit Courts.
Fish. Pat. Rep. Fisher's Patent Reports, U. S. Supreme and Circuit Courts.
Fish. Pr. Cas. Fisher's Prize Cases, U. S. Courts, Penna.
Fitz. Abr. Fitzherbert's Abridgment.
Fitz. G. FitzGibbon's Reports, English.
Fitz. N. B. Fitzherbert's Natura Brevium.
Fl. Fleta. Commentarius Juris Anglicani.
Fla. Florida Reports.
Flan. & K. Flanagan and Kelly's Reports, Irish Rolls Court.
Fland. Ch. J. Flanders's Lives of the Chief Justices.
Fland. Const. Flanders on the Constitution.
Fland. Fire Ins. Flanders on Fire Insurance.
Fland. Mar. L. Flanders on Maritime Law.
Fland. Ship. Flanders on Shipping.
Flipp. Flippin's Reports, U. S. Circ. Cts.
Foelix Dr. Int. Foelix's Droit International Privé.
Fogg. Fogg's Reports, New Hampshire.
Fol. Folio.
Fol. Foley's Poor Laws and Decisions, English.
Fol. Dict. Kames and Woodhouselee's Dictionary, Scotch Court of Session Cases.
Foley Poor L. Foley's Poor Laws and Decisions, English.
Folw. Laws. Folwell's Laws of the United States.
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Fonb. N. R. Fonblanque's New Reports, English Bankruptcy.
- Roote Int. Jur.* Foote on Private International Jurisprudence.
For. Forrester's Reports, English Exchequer.
For. Pla. Brown's Formulae Placitandi.
Foran C. C. P. Q. Foran's Code of Civil Procedure, Quebec.
Forb. Forbes's Decisions, Scotch Court of Session.
Forb. Inst. Forbes's Institutes of the Law of Scotland.
Form. Forman's Reports, Illinois.
Form. Pla. Brown's Formulae Placitandi.
Forr. Forrester's Reports, English Chancery, Cases temp. Talbot.
Forrest. Forrest's Reports, English Exchequer.
For. Cas. & Op. Forsyth's Cases and Opinions on Constitutional Law.
Fora. Comp. Forsyth's Composition with Creditors.
Fora. His. Forsyth's History of Trial by Jury.
Fora. Trial by Jury. Forsyth's History of Trial by Jury.
Fortes. Fortescue's Reports, English Courts.
Fortes. de Laud. Fortescue de Laudibus Legum Angliæ.
Forum. The Forum, by David Paul Brown.
Forum L. R. Forum Law Review, Baltimore.
Fost. Foster's Legal Chronicle Reports, Pennsylvania.
Fost. Foster's Reports and Crown Law, England.
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Fost. Elem. or Post. Jur. Foster's Elements of Jurisprudence.
Fost. S. F. Foster on the Writ of Scire Facias.
Fost. & Fin. Foster and Finlason's Reports, English Nisi Prius Cases.
Fount. Fountainhall's Reports, Scotch Court of Session.
Fowl. L. Cas. Fowler's Leading Cases on Collieries.
Fox. Fox's Decisions, Circuit and District Court, Maine (Haskell's Reports).
Fox Reg. Cas. Fox's Registration Cases.
Fox & Sm. Fox & Smith's Reports, Irish King's Bench.
Fr. Fragment, or Excerpt, or Laws in Titles of Pandects.
Fr. Ch. Freeman's English Chancery Reports; Freeman's Mississippi-Chancery Reports.
Fr. E. C. Fraser's Election Cases.
Fr. Ord. French Ordinances.
Fr. Maz. Francis's Maxims of Equity.
Franc. Char. Francis's Law of Charities.
Franc. Francis's Reports, Scotch Consistorial Court.
Franc. Franchillon's Judgments. County Courts.
Franc. Francis's Reports, Colorado.
Fraser Dom. Rel. Fraser on Personal and Domestic Relations.
Fraser El. Cas. Fraser's Election Cases.
Fraser or Fraser Adm. Fraser's Admiralty Cases, Scotland.
Fred. Ode. Frederician Ode, Prussia.
Freem. Ch. Freeman's Reports, English Chancery (see Freeman).
Freem. Coten. & Pur. Freeman on Cotennancy and Partition.
Freem. Ex. Freeman on Executions.
Freem. Judg. Freeman on Judgments.
Freem. K. R. Freeman's Reports, English King's Bench (see Freeman).
Freem. (Ill.). Freeman's Reports, Illinois.
Freem. (Miss.). Freeman's Chancery Reports, Mississippi.
French. French's Reports, New Hampshire.
Fry Cont. Fry on the Specific Performance of Contracts.
Full B. R. Full Bench Rulings, Bengal (or North-west Provinces).
Fult. Fulton's Reports, Bengal.
- G.* King George; thus 1 G. I. signifies the first year of the reign of King George I.
G. Gale's Reports, English Exchequer.
G. B. Great Britain.
G. Gr. George Greene's Reports, Iowa.
G. M. Dudl. G. M. Dudley's Reports, Georgia.
G. R. General Statutes.
G. & D. Gale & Davidson's Reports, English Exchequer.
G. & J. Glyn & Jameson's Reports, English Courts.
Gill & Johnson's Maryland Reports.
Ga. Georgia Reports.
Ga. Dec. Georgia Decisions, Superior Courts.
Ga. L. J. Georgia Law Journal.
Ga. L. Rep. Georgia Law Reporter.
Ga. Sup. Supplement to 33 Georgia Reports.
Gab. Cr. L. Gabbett's Criminal Law.
Gaii. Gaii Institutionum Commentarii.
Gaius. Gaius's Institutes.
Galb. Galbraith's Reports, Florida Reports, vols. 9-11.
Galb. & M. Galbraith & Meek's Reports, Florida Reports, vol. 12.
Gale. Gale's Reports, English Exchequer.
Gale E. Gale on Easements.
Gale Stat. Gale's Statutes of Illinois.
Gale & Dav. Gale and Davidson's English King's Bench.
Gale & W. Gale and Whately on Easements.
Gall. or Galtia. Gallison's Reports, Circuit Ct. U. S. 1st Circuit.
Gall. Cr. Cas. Gallick's Reports of French Criminal Cases.
Gall. Hist. Col. Gallick's Historical Collection of French Criminal Cases.
Gall. Int. L. Gallaudet on International Law.
Gard. N. Y. Rep. Gardener's New York Reporter, New York.
Garden. Gardenhire's Reports, Missouri.
Gardn. P. Cas. Report of the Gardner Peacage Case.
Gay. (La.). Gayarre's Louisiana Reports.
Gaz. E. Gazette of Bankruptcy, London.
Gaz. & Bank. Ct. Rep. Gazette and Bankrupt Court Reporter, New York.
Gazz. Bank. Gazzam on Bankruptcy.
- Geld. & M.* Geldart and Maddock's Reports.
Geld. & O. (Nova Scotia). Geldert and Oxley's Decisions, Nova Scotia.
Gen. Ar. Geneva Arbitration.
Gen. Ord. General Orders.
Gen. Ord. in Ch. General Order of the High Court of Chancery.
Gen. Sess. General Sessions.
Gen. Term. General Term.
Geo. King George. See G.
Geo. Georgia Reports.
Geo. Coop. George Cooper's English Chancery Cases, temp. Eldon.
Geo. Dec. Georgia Decisions.
Geo. Dig. George's Mississippi Digest.
Geo. Lib. George on Libel.
Geo. George's Reports. Mississippi.
Ger. Real. Est. Gerard on Titles to Real Estate.
Gib. Cod. Gibson's Codex Juris Ecclesiastici Anglicani.
Gibb. D. & N. Gibbons on Dilapidations and Nuisances.
Gibbs Jud. Chr. Gibbs's Judicial Chronicle.
Gibbs. Gibbs's Reports, Michigan.
Gibbs. Gibbs's Decisions, Scotland.
Giff. Giffard's Reports, English Chancery.
Giff. & H. Giffard and Henning's Reports, English Chancery.
Gil. (Minn.). Gillilan's Minnesota Reports.
Gib. Gilbert's Reports. English Chancery.
Gib. Cas. Gilbert's Cases in Law and Equity, English Chancery and Exchequer.
Gib. Ch. Gilbert's Reports. English Chancery.
Gib. C. P. Gilbert's Common Pleas.
Gib. Dev. Gilbert on Devices.
Gib. Dist. Gilbert on Distress.
Gib. Ex. Gilbert on Executions.
Gib. Exch. Gilbert's Exchequer.
Gib. Ev. Gilbert on Evidence.
Gib. For. Rom. Gilbert's Forum Romanum.
Gib. K. B. Gilbert's King's Bench.
Gib. Lex. Pres. Gilbert's Lex Praetoria.
Gib. Railw. L. Gilbert's Railway Law.
Gib. Rep. Gilbert's Reports, English Chancery.
Gib. Rem. Gilbert on Remainders.
Gib. Rents. Gilbert on Rents.
Gib. Repl. Gilbert on Replevin.
Gib. Ten. Gilbert on Tenures.
Gild. (N. M.). Gildersleeve's New Mexico Reports.
Gill. Gill's Reports, Maryland.
Gill Pol. Rep. Gill's Police Court Reports, Boston, Mass.
Gill & J. Gill & Johnson's Reports, Maryland.
Gilm. Gilmore's Reports, Scotch Court of Session.
Gilm. (Ill.). Gilman's Reports, Illinois.
Gilm. (Va.). Gilmer's Reports, Virginia.
Gilm. & Fal. Gilmore and Falconer's Reports, Scotch Court of Session.
Gilp. Gilpin's Reports, U. S. Dist. Court, East District of Penna.
Gir. W. C. Girard Will Case.
Gl. Glossa. a gloss or interpretation.
Glanv. Glanville de Legibus.
Glanv. El. Ca. Glanville's Election Cases.
Glanc. Glascock's Reports, Irish.
Glancf. Glascock on Evidence.
Glenn. Glenn's Reports, Louisiana Annual.
Glyn & Jam. Glyn and Jameson's Bankruptcy Cases, English.
Godb. Godbolt's Reports, English King's Bench.
Gods. Eas. Goddard on Easements.
Godfr. & S. Godofroi and Short on Law of Railway Companies.
Godolph. Abr. Godolphin's Abridgment of Ecclesiastical Law.
Godolph. Adm. Jur. Godolphin on Admiralty Jurisdiction.
Godolph. Leg. Godolphin's Orphan's Legacy.
Godolph. Rep. Can. Godolphin's Repertorium Caponicum.
Gods. Pat. Godson on Patents.
Goeb. Proc. Ct. Cas. Goebel's Probate Court Cases.
Gog. Or. Goguet's Origin of Laws.
Goland. Goland's French Code of Commerce.
Goldes. Goldesborough's Reports, English King's Bench.
Gold. Eq. Goldsmith's Equity Practice.
Gord. Dig. Gordon's Digest of the Laws of the U. S.
Gord. Tr. Gordon's Treason Trials.
Gosf. Gosford's Reports, Scotch Court of Session.
Goud. R. L. Goudsmit's Roman Law.
Gould Pl. Gould on Pleading.
Gouldsb. Gouldsborough's Reports, English King's Bench.
Gour. Wash. Dig. Gourick's Washington Digest.
Gow or Gov N. P. Gow's Nisi Prius Cases, English.
Gow Part. Gow on Partnership.
Gr. Cas. Grant's Cases, Pennsylvania.
Grah. Fr. Graham's Practice.
Grah. & Wat. N. T. Graham & Waterman on New Trials.
Grain Hip. Grain's Ley Hipotecaria, of Spain.
Grand Cout. Grand Coutumier de Normandie.
Grang. Granger's Reports, Ohio.
Grant. Grant's Chancery Reports, Ontario.
Grant Bank. Grant on Banking.
Grant Cas. or Grant (Pa.). Grant's Cases, Pennsylvania Supreme Court.
Grant Ch. Pr. Grant's Chancery Practice.
Grant Corp. Grant on Corporations.
Grant (Jamaica). Grant's Jamaica Reports.
Grant U. C. Grant's Upper Canada Chancery Reports.
Gratt. Grattan's Reports, Virginia.
Gray. Gray's Reports, Massachusetts.
Gray Cas. Prop. Gray's Cases on Property.
Gray Perp. Gray on Perpetuities.
Gray's Inn J. Gray's Inn Journal.

Grayd. F. Graydon's Forms.
 Greau. R. C. or Greave. Russ. Greave's Edition of Russell on Crimes.
 Green Bag. A legal Journal, Boston.
 Green's Brice's U. V. Green's Edition of Brice's Ultra Vires.
 Green Cr. L. Rep. Green's Criminal Law Reports, U. S.
 Green C. E. C. E. Green's Reports, New Jersey Equity, vols. 16-27.
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 Green Sc. Cr. Cas. Green's Criminal Cases, Scotland.
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 Greenh. Sh. Greenhow's Shipping Law Manual.
 Greenl. Greenleaf's Reports, Maine.
 Greenl. Cr. Greenleaf's Cruise on Real Property.
 Greenl. Ev. Greenleaf on Evidence.
 Greenl. Cr. Cas. Greenleaf's Over-ruled Cases.
 Greenw. Courts. Greenwood on Courts.
 Greenw. & M. Greenwood & Martin's Police Guide.
 Grein. Dig. Greiner's Digest, Louisiana.
 Gren. (Ceylon). Grenier's Ceylon Reports.
 Gressley. G. G. Gressley's Equity Evidence.
 Grey Deb. Grey's Debates in Parliament.
 Griff. P. R. Cas. Griffith's English Poor Rate Cases.
 Griff. Cr. Griffith on Arrangements with Creditors.
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 Griff. Inst. Griffith's Institutes of Equity.
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 Grimke Ez. Grimke on Executors and Administrators.
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 Gro. B. et P. or Gro. de J. B. Grotius de Jure Belli et Pacis.
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 Gude Pr. Gude's Practice on the Crown Side of the King's Bench.
 Guern. Eq. Jur. Guernsey's Key to Equity Jurisprudence.
 Gundry. Gundry Manuscripts in Lincoln's Inn Library.
 Guthrie. Guthrie's Sheriff Court Cases, Scotland.
 Guy Med. Jur. Guy on Medical Jurisprudence.
 Guy Rép. Guy's Répertoire de la Jurisprudence.
 Gwillm. Gwillim's Tithe Cases, English Courts.
 H. Hilary Term.
 H. King Henry; thus 1 H. I. signifies the first year of the reign of King Henry I.
 H. a. Hoc anno.
 H. Bla. Henry Blackstone's Reports, English.
 H. C. House of Commons.
 H. Ct. R. N. W. P. High Court Reports, North West Province, India.
 H. H. C. L. Hale's History of the Common Law.
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 H. L. House of Lords.
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 H. L. F. Hall's Legal Forms.
 H. L. Rep. Clark and Finnely's House of Lords Reports, New Series.
 H. P. C. Hale's Pleas of the Crown.
 H. T. Hilary Term.
 h. t. Hoc titulum, or hoc titulo.
 h. v. Hoc verbum, or his verbis.
 H. B. Hudson and Brooke's Reports, Irish King's Bench.
 H. & C. Hurlstone and Coltman's Reports, English Exchequer.
 H. & D. Lalor's Supplement to Hill and Denio's Reports, New York.
 H. & Disb. Pr. Holmes and Disbrow's Practice.
 H. & G. Harris and Gill's Reports, Maryland.
 H. & H. Horn and Hurstone's Reports, English Exchequer.
 H. & J. Harris & Johnson's Reports, Maryland.
 H. & J. Forms. Hayes and Jarman's Forms of Wills.
 H. & J. Ir. Hayes and Jones's Reports, Irish Exchequer.
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 H. & M. Ch. Hemming and Miller's Chancery Reports, English.
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 H. & R. Harrison and Rutherford's Reports, English Common Pleas.
 H. & S. Harris and Simrall's Mississippi Reports.
 H. & T. Hall and Twell's Reports, English Chancery.
 H. & W. Harrison and Wollaston's Reports, English King's Bench.
 H. & W. Hurlstone and Walmesley's Reports, English Exchequer.
 Ha. & Tw. Hall and Twell's Reports, English Chancery.
 Hab. Corp. Habeas Corpus.
 Hab. fa. poss. Habere facias possessionem.
 Hab. fa. seis. Habere facias seisinam.
 Had. Haddington's Reports, Scotch Court of Session.
 Hadl. Hadley's Reports, New Hampshire.

Hadl. Int. R. L. Hadley's Introduction to the Roman Law.
 Hag. (Utah). Hagan's Utah Reports.
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 Halst. Ev. Halsted's Digest of the Law of Evidence.
 Ham. Hamilton's Reports, Scotch Court of Session.
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 Hamn. Part. Hammond on Parties to Action.
 Hamn. Pl. Hammond's Principles of Pleading.
 Hamn. & J. Hammond and Jackson's Reports, Georgia, vol. 45.
 Han. Hannay's Reports, New Brunswick.
 Han. Ent. Hansard's Entries.
 Han. Horae. Hanover on the Law of Horses.
 Hand. Hand's Reports, New York Court of Appeals, vols. 40-45.
 Hand Ch. Pr. Hand's Chancery Practice.
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 Handy. Handy's Reports, Cincinnati, Ohio.
 Hammer. Hammer's Lord Kenyon's Notes, English King's Bench.
 Hann. Hannay's Reports, New Brunswick.
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 Hare. Hare's Reports, English Chancery.
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 Hare Dis. or Hare Tw. Hare on Discovery of Evidence.
 Hare & W. Hare & Wallace's American Leading Cases.
 Harg. Hargrove's Reports, North Carolina Reports.
 Harg. C. B. M. Hargrave's Collection, British Museum.
 Harg. Co. Litt. Hargrave's Notes to Coke on Littleton.
 Harg. Coll. Hargrave's Judicial Arguments and Collection.
 Harg. Exer. Hargrave's Jurisconsult Exercitationes.
 Harg. Jud. Arg. Hargrave's Judicial Arguments.
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 Harr. Ch. Harrison's Chancery Reports, Michigan.
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 Harr. Con. La. R. Harrison's Condensed Louisiana Reports.
 Harr. Dig. Harrison's Digest of English Common Law Reports.
 Harr. Ent. Harris's Book of Entries.
 Harr. Proc. Harrison's Common Law Procedure Act.
 Harr. & G. Harris and Gill's Reports, Maryland.
 Harr. & J. Harris and Johnson's Reports, Maryland.
 Harr. & McH. Harris and McHenry's Reports, Maryland.
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 Hart. Dig. Hartley's Digest of Laws, Texas.
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 Hast. Med. Jur. Haslam's Medical Jurisprudence.
 Hast. Hastings' Reports, Maine Reports.
 Hast. Tr. Sp. Speeches in the trial of Warren Hastings, Ed. by Bond.
 Hats. Pr. Hatsell's Parliamentary Precedents.
 Hav. Ch. Rep. Haviland's Chancery Reports, Prince Edward Island.
 Haw. Hawkins; Hawaiian Reports.
 Hawaii. Hawaii (Sandwich Island) Reports.
 Haw. Am. Cr. Rep. Hawley's American Criminal Reports.
 Haw. W. Cas. Howe's Will Case.
 Hawk. Rev. Hawkins's Reports, Louisiana Annual.
 Hawk. Abr. or Hawk. Co. Litt. Hawkins's Coke upon Littleton.
 Hawk. P. C. Hawkins's Pleas of the Crown.
 Hawk. W. Hawkins on Construction of Wills.
 Hawks. Hawk's Reports, North Carolina.
 Hawl. (Nev.). Hawley's Nevada Reports and Digest.
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 Hay. Hayes's Reports, Irish Exchequer.
 Hay Acc. Cas. Hay's Cases of Accident or Negligence.
 Hay. Conv. Hayes's Conveyancer.
 Hay (Calc.). Hay's Reports, Calcutta.
 Hay. Est. or Hay. U. D. & F. Hayes on the Law of Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates.
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 Haz. Pa. Reg. Hazard's Pennsylvania Register.
 Haz. U. S. Reg. Hazard's United States Register.
 Haz. & Roch. M. War. Hazlitt and Roche on Maritime Warfare.
 Head. Head's Reports, Tennessee.
 Heard Civ. Pl. Heard's Civil Pleading.
 Heard Cr. L. Heard's Criminal Law, Massachusetts.
 Heard Cr. Pl. Heard's Criminal Pleading.
 Heard L. & St. Heard on Libel and Slander.
 Heath. Heath's Reports, Maine.
 Heath Max. Heath's Maxims.
 Heck. Cas. Hecker's Leading Cases on Warranty.
 Hein. Heineccius Opera.
 Heisk. Heiskell's Reports, Tennessee.
 Helm. Helm's Reports, Nevada Reports.
 Hem. & Mil. Hemming and Miller's Reports, English Chancery.
 Hening. (Miss.). Hemmingway's Mississippi Reports.
 Hemp. Hempstead's Reports, U. S. 9th Circuit and Dist. of Ark.
 Hen. King Henry; thus 1 Hen. I. signifies the first year of the reign of King Henry I.
 Hen. Bla. Henry Blackstone's Reports, English.
 Hen. For. Law. Henry on Foreign Law.
 Hen. La. Dig. Hennen's Louisiana Digest.
 Hen. Mar. Cas. Henry's Manumission Cases.
 Hen. Va. J. P. Hening's Virginia Justice of the Peace.
 Hen. & M. Hening and Munford's Reports, Virginia.
 Hepb. Hepburn's Reports, California.
 Hepb. (Pa.). Hepburn's Pennsylvania State Reports.
 Her. Herne's Pleader.
 Her. Char. U. Herne's Law of Charitable Uses.
 Her. Estop. Herman on Estoppel.
 Her. Ex. Herman on Executions.
 Her. Hist. or Her. Jur. Heron's History of Jurisprudence.
 Het. Hetley's Reports, English Common Pleas.

Heyle Imp. D. Heyle's United States Import Duties.
Heywo. Et. Heywood on Elections.
Hig. Dig. Pat. Cas. Higgin's Digest of Patent Cases.
High. Bail. Highmore on Bail.
High Ct. R. High Court Reports, N. W. Province, India.
High Inj. High on Injunction.
High Leg. Rem. High on Legal Remedies.
High. Law. Highmore on Lunacy.
High. Mortm. Highmore on Mortmain.
High Rec. High on Receivers.
Hil. T. Hilary Term.
Hildy M. Ins. Hildy on Marine Insurance.
Hill (N. Y.). Hill's Reports, New York.
Hill (S. C.). Hill's Reports, South Carolina.
Hill (S. C.) Eq. Bul. South Carolina Court of Appeals, in Chancery.
Hill. Abr. Hilliard's Abridgment of the Law of Real Property.
Hill. Am. Jur. Hilliard's American Jurisprudence.
Hill. Am. Law. Hilliard's American Law.
Hill. B. & Ins. Hilliard on Bankruptcy and Insolvency.
Hill Ch. or Hill Eq. Hill's Chancery Reports, South Carolina.
Hill Ch. Pr. Hill's Chancery Practice.
Hill. Contr. Hilliard on Contracts.
Hill. Pict. Hill on Pictorial Evidence.
Hill. Inj. Hilliard on Injunction.
Hill. Mort. Hilliard on Mortgages.
Hill. N. T. Hilliard on New Trials.
Hill. R. P. Hilliard on Real Property.
Hill. Sales. Hilliard on Sales.
Hill. Tax. Hill on the Law of Taxation.
Hill. Tort. Hilliard on Torts.
Hill Tr. Hill on Trustees.
Hill. Vend. Hilliard on Vendors.
Hill & D. (N. Y.). Hill and Denio's New York Reports.
Hill & Den. Sup. Lator's Supplement to Hill and Denio's Reports, New York.
Hillyer. Hillyer's Reports, California Reports.
Hil. E. Hilton's Reports, Common Pleas, New York.
Hind. Pat. Hindemarch on Patents.
Ho. Lord Cas. House of Lords Cases (Clark's).
Hob. Hobart's Reports, English Common Pleas and Chancery.
Hodg. R. Hodgkin's Reports, English Common Pleas.
Hod. Rail. Hodge on the Law of Railways.
Hodg. Fl. Cas. (Ont.). Hodgkin's Election Cases.
Hoff. Hoffman's Reports, U. S. Dist. of California.
Hoff. (N. Y.) or Hoff. Ch. Hoffman's Chancery Reports, New York.
Hoff. Ch. Pr. Hoffman's Chancery Practice.
Hoff. Ecc. L. Hoffman's Ecclesiastical Law.
Hoff. Land Ca. Hoffman's Land Cases, California.
Hoff. Lead. Cas. Hoffman's Leading Cases, Commercial Law.
Hoff. Leg. St. Hoffman's Legal Studies.
Hoff. Max. Ch. Hoffman's Master in Chancery.
Hoff. Outl. Hoffman's Outlines of Legal Studies.
Hoff. Publ. Pap. Hoffman's Public Papers, New York.
Hoff. Ref. Hoffman on Referees.
Hog. Hogan's Reports, Irish Rolls Court.
Hog. Sh. Tr. Hogan's Pennsylvania State Trials.
Hogue. Hogue's Reports, Florida.
Hol. Inst. Holland's Institutes of Justinian.
Holc. D. & Cr. Holcombe's Law of Debtor and Creditor.
Holc. Dig. Holcombe's Digest.
Holc. Eq. Jur. Holcombe's Equity Jurisprudence.
Holc. Lead. Cas. Holcombe's Leading Cases on Commercial Law.
Holl. (Minn.). Hollinshead's Minnesota Reports.
Holm. Holmes' Reports, U. S. Circuit Court, 1st Circuit.
Holt. Holt's Reports, English King's Bench.
Holt Adm. Holt's Admiralty Cases. (Rule of the Road at Sea).
Holt Ch. C. Holt's Equity V. C. Court.
Holt. L. Dic. Holthouse's Law Dictionary.
Holt Eq. Rep. Holt's Equity Reports, English.
Holt. N. P. Holt's New Prius Reports, English Courts.
Holt Rule of R. Holt's Rule of the Road at Sea.
Holt Sh. Holt on Shipping.
Holthouse Dic. Holthouse's Law Dictionary.
Home. Clerk Home's Reports, Scotch Court of Session.
Hook Ex. Hook on Executors.
Hook. Hooker's Reports, Connecticut.
Hoonahan. Hoonahan's Scinde Reports, India.
Hope. Hope's Reports, Scotch Court of Session.
Hope Min. Pr. Hope's Minor Practicks, Scotland.
Hopk. Hopkinson's Works.
Hopk. Adm. Dec. Hopkinson's Admiralty Decisions, Pennsylvania.
Hopk. Ch. Hopkin's Chancery Reports, New York.
Hopk. Mar. Ins. Hopkins on Marine Insurance.
Hopw. & C. Hopwood and Coltman's English Registration Appeal Cases.
Hopw. & P. Hopwood and Philbrick's English Registration Appeal Cases.
Horn & H. Horn and Hurstone's Reports, English Exchequer.
Horne Mir. Horne's Mirror or Justices.
Horr. & T. Cas. Horrigan and Thompson's Cases on Self Defence.
How. Y. B. (Horwood's). Year-Books of Edward I.
Howard Ang.-Sax. Laws. Howard's Anglo-Saxon Laws and Ancient Laws of the French.
Howard Dict. Howard's Dictionary of the Customs of Normandy.
Hough Am. Con. Hough on the American Constitution.
Hough C. M. Hough on Court Martial.
Housd. Fr. Housman's Precedents in Conveyancing.

House of L. House of Lords, House of Lords Cases.
Houst. Houston's Reports, Delaware.
Houst. Cr. Cas. Houston's Criminal Cases, Delaware.
Houst. on St. in Tr. Houston on Stoppage in Transitu.
Hov. Fr. Hovenden on Frauds.
Hov. Sup. Ves. Hovenden's Supplement to Vesey, Junior's, Reports.
How. Howard's Reports, U. S. Supreme Court.
How. (Miss.). Howard's Reports, Mississippi.
How. App. Cas. or How. (N. Y.). Howard's Reports, N. Y. Court of Appeals.
How. Cr. Tr. Howison's Criminal Trials, Virginia.
How. Pop. Cas. Howard's Popery Cases, Ireland.
How. Fr. R. Howard's Practice Reports, New York.
How. St. Tr. Howell's State Trials.
How. U. S. Howard's Reports, U. S. Supreme Court.
Howe Pr. Howe's Practice, Massachusetts.
Hub. Leg. Dir. Hubbell's Legal Directory.
Hubb. Hubbard's Reports, Maine.
Hud. & B. Hudson and Brooke's Reports, Irish King's Bench.
Hud. & Will. Dig. (U. S.). Hudson and William's United States Digest.
Hugh. Hughes's Reports, U. S. Circuit Court, 4th Circuit.
Hugh. (Ky.). Hughes's Reports, Kentucky.
Hugh. Abr. Hughes's Abridgment.
Hugh. Con. Hughes's Precedents in Conveyancing.
Hugh. Ent. Hughes's Book of Entries.
Hugh. Ins. Hughes on Insurance.
Hugh. Will. Hughes on Wills.
Hugh. Write. Hughes on Writs.
Hum. (Tenn.). Humphrey's Tennessee Reports.
Hume. Hume's Decisions, Scotch Court of Session.
Hume Com. or Hume Cr. L. Hume's Commentaries on Criminal Law of Scotland.
Humph. Humphrey's Reports, Tennessee.
Humph. R. P. Humphrey on Real Property.
Hun. Hun's Reports, New York Supreme Ct. 81.
Hunt or Hunt Ann. Cas. Hunt's Collection of Annuity Cases.
Hunt Bound. Hunt's Law of Boundaries and Fences.
Hunt Fr. Conv. Hunt on Fraudulent Conveyances.
Hunt Mer. Mag. Hunt's Merchants' Magazine, New York.
Hunt Rom. L. Hunter on Roman Law.
Hurd Hab. Corp. Hurd on Habeas Corpus.
Hurd Pers. Lib. Hurd on Personal Liberty.
Hurlst. & C. Hurlstone and Coltman's Reports, English Exchequer.
Hurlst. & G. Hurlstone and Gordon's Reports, English Exchequer; Exchequer Reports.
Hurlst. & N. Hurlstone and Norman's Reports, English Exchequer.
Hurlst. & W. Hurlstone and Walmsley's Reports, English Exchequer.
Husb. Mar. Wom. Husband on Married Women.
Hust. L. T. Huston on Land Titles in Pennsylvania.
Hut. Hutton's Reports, English Common Pleas.
Hutch Car. Hutchinson on Carriers.
Hux. Judg. Huxley's Judgments.
Hyde. Hyde's Reports, India.
I. The Institutes of Justinian.
I. A. Irish Act.
I. C. C. Interstate Commerce Commission Reports.
I. C. L. R. Irish Common Law Reports.
I. C. R. Irish Chancery Reports.
I. E. R. Irish Equity Reports.
I. J. C. Irvine's Justiciary Cases, Scotch Justiciary Court.
I. Jur. Irish Jurist, Dublin.
I. Jur. N. S. Irish Jurist, New Series, Dublin.
I. L. T. Irish Law Times, Dublin.
I. O. U. Iowa you.
I. P. Institutes of Polity.
I. R. C. L. Irish Reports, Common Law Series.
I. R. Eq. Irish Reports, Equity Series.
I. R. R. Internal Revenue Record, New York.
I. T. R. Irish Term Reports, by Ridgway, Lapp and Schoale.
Ia. Iowa Reports.
Id. or Id. *Idem* or *Idem*. The same.
Ida. Idaho Reports.
Il Cons. del Mar. Il Consolato del Mare. See Consolato del Mare, in the body of this work.
Ill. Illinois Reports.
Ill. App. Illinois Appellate Court Reports.
Imp. C. P. Impey's Practice, Common Pleas.
Imp. K. B. Impey's Practice, King's Bench.
Imp. Pl. Impey's Pleadings Guide.
Imp. Pr. C. P. Impey's Practice in Common Pleas.
Imp. Pr. K. B. Impey's Practice in King's Bench.
Imp. Sh. Impey's Office of Sheriff.
In Dom. Proc. In the House of Lords. See *Dom. Proc.*
In f. In fine. At the end of the title, law, or paragraph quoted.
In pr. In principio. At the beginning of a law, before the first paragraph.
In sum. In summa. In the summary.
Ind. Indiana Reports.
Ind. App. Law Reports, Indian Appeals.
Ind. App. Sup. Indian Appeals Supplement, P. C.
Ind. Jur. India Jurist, Calcutta.
Ind. L. Mag. Indiana Law Magazine.
Ind. L. R. (East) Indian Law Reports.
Ind. L. R. All. Allahabad Series of Indian Law Reports.
Ind. L. Reg. Indiana Legal Register, Lafayette.
Ind. L. Reg. Indiana Legal Register.
Ind. L. Rep. Indiana Law Reporter.
Ind. Super. Indiana Superior Court Reports

(Wilson's).
Ind. T. Indian Territory.
Ind. Com. L. Indermaur's Principles of the Common Law.
Ind. L. C. Com. L. Indermaur's Leading Common Law Cases.
Ind. L. C. Eq. Indermaur's Leading Equity Cases.
Index Rep. Index Reporter.
Inf. Infra. Beneath or below.
Inq. Dig. Ingersoll's Digest of the Laws of the U. S.
Ingr. Roc. Ingersoll's Roccus.
Ingr. Insoiv. Ingraham on Insolvency.
Inj. Injunction.
Ins. Insurance.
Ins. L. J. Insurance Law Journal, New York and St. Louis.
Ins. L. Mon. Insurance Law Monitor, New York.
Ins. Rep. Insurance Reporter, Philadelphia.
Inst. Institutes; when preceded by a number denoting a volume (thus 1 Inst.), the reference is to Coke's Institutes; when followed by several numbers (thus Inst. 4, 4, 1), the reference is to the Institutes of Justinian.
Inst. Cler. Instructor Clericals.
Inst. Conn. Com. Interstate Commerce Commission Reports.
Inst. Jur. Angl. Institutiones Juris Anglicani, by Doctor Cowell.
Int. Com. Rep. Interstate Commerce Reports.
Int. Rev. Rec. Internal Revenue Record, New York.
Iowa. Iowa Reports.
Iowa Univ. L. Bul. Iowa University Law Bulletin.
Ir. Irish.
Ir. C. L. or Ir. L. N. S. Irish Common Law Reports.
Ir. Ch. or Ir. Ch. N. S. Irish Chancery Reports.
Ir. Cir. Irish Circuit Reports.
Ir. Ecd. Irish Ecclesiastical Reports, by Millward.
Ir. Eq. Irish Equity Reports.
Ir. Jur. Irish Jurist, Dublin.
Ir. L. Irish Law Reports.
Ir. L. T. Irish Law Times and Solicitors' Journal, Dublin.
Ir. L. T. Rep. Irish Law Times Reports.
Ir. Law Rec. Irish Law Recorder.
Ir. Law & Ch. Irish Law and Equity Reports, New Series.
(1894) 182 Ir. R. Irish Reports.
Ir. Law & Eq. Irish Law and Equity Reports, Old Series.
Ir. Law Rec. Irish Law Recorder.
Ir. Law Rep. N. S. Irish Common Law Reports.
Ir. R. C. L. Irish Reports, Common Law Series.
Ir. R. Eq. Irish Reports, Equity Series.
Ir. Reg. & Land Cos. Irish Registry and Land Cases.
Ir. Rep. Reg. App. Irish Reports, Registration Appeals.
Ir. Rep. Reg. & L. Irish Reports, Registry and Land Cases.
Ir. St. Tr. Irish State Trials (Ridgeway's).
Ir. T. R. Irish Term Reports (Ridgeway, Lapp and Schoale's).
Ired. L. Iredell's Law Reports, North Carolina.
Ired. Dig. Iredell's Digest.
Ired. Eq. Iredell's Equity Reports, North Carolina.
Irv. Irvine's Justiciary Cases, Scotch Justiciary Court.
Ir. Ersk. Ivory's Notes on Erskine's Institutes.
J. Justice.
J. Institutes of Justinian.
J. Adv. Gen. Judge Advocate General.
J. C. Juris Consultus.
J. C. P. Justice of the Common Pleas.
J. et J. De Justitia et Jure.
J. Glo. Juncta Glossa.
JJ. Justices.
J. J. Mar. J. J. Marshall's Reports, Kentucky.
J. K. B. Justice of the King's Bench.
J. Kel. J. Kelyng's Reports, English King's Bench.
J. P. Justice of the Peace.
J. P. Sm. J. P. Smith's English King's Bench Reports.
J. S. Gr. (N. J.). J. S. Green's New Jersey Reports.
J. Q. B. Justice of the Queen's Bench.
J. U. B. Justice of the Upper Bench.
J. & H. Johnson and Hemming's Reports, English Chancery.
J. & La T. Jones and La Touche's Reports, Irish Chancery.
J. & W. Jacob and Walker's Reports, English Chancery.
Jac. King James; thus 1 Jac. i. signifies the first year of the reign of King James I.
Jac. Jacob's Reports, English Chancery.
Jac. Int. Jacob's Introduction to the Common, Civil and Canon Law.
Jac. Dict. or Jac. L. D. Jacob's Law Dictionary.
Jac. Fish. Dig. Jacob's Fisher's Digest.
Jac. L. G. Jacob's Law Grammar.
Jac. Lex Mer. Jacob's Lex Mercatoria, or the Merchant's Companion.
Jac. Sea Law. Jacobson's Law of the Sea.
Jac. & W. Jacob and Walker's Reports, English Chancery.
Jack. Jackson's Reports, Georgia.
Jack. Tex. App. Jackson's Texas Court of Appeals Reports.
Jackson & Lumpkin (Ga.). Jackson & Lumpkin's Georgia Reports.
James. James's Reports, Nova Scotia.
James. Const. Con. Jameson on Constitutional Conventions.
James Op. James's Opinions, Charges, etc., London, 1820.
James Sel. Cas. James's Select Cases, Nova Scotia.
James & Mont. Jameson and Montagu's English

Bankruptcy Reports (in 2 Glyn and Jameson).
Jan. Angl. Jani Anglorum.
Jar. Ch. Pr. Jarman's Chancery Practice.
Jar. Fov. Dev. Fowell on Devises, with Notes by Jarman.
Jarman.
Jar. Preg. Bythewood and Jarman's Precedents.
Jar. Wills. Jarman on Wills.
Jard. Tr. Jardine's Criminal Trials.
Jarm. Ch. Pr. Jarman's Chancery Practice.
Jarm. Fov. Dev. Fowell on Devises, with Notes by Jarman.
Jarm. Wills. Jarman on Wills.
Jarm. & By. Conv. Jarman and Bythewood's Conveyancing.
Jctus. Jurisconsultus.
Jebb Cr. Cas. or Jebb Ir. Cr. Cas. Jebb's Irish Criminal Cases.
Jebb & B. Jebb and Bourke's Reports, Irish Queen's Bench.
Jebb & S. Jebb and Symes's Reports, Irish Queen's Bench.
Jeff. Jefferson's Reports, Virginia.
Jeff. Man. Jefferson's Parliamentary Manual.
Jenk. Jenkin's Reports, English Exchequer.
Jenn. Jennison's Reports, Michigan.
Jer. Eq. Jur. Jeremy's Equity Jurisdiction.
Jur. Juris. Journal of Jurisprudence.
J. de La T. Jones and La Touche's Reports, Irish Chancery.
John. & H. Johnson and Hemming's Reports, English Chancery.
Johns. Johnson's Reports, New York Supreme Court.
Johns. Bills. Johnson on Bills of Exchange, etc.
Johns. Cas. Johnson's Cases, New York Supreme Court.
Johns. Ch. Johnson's Chancery Reports, New York.
Johns. Ch. Johnson's Reports, English Chancery.
Johns. Ch. (Md.) or Johns. Dec. Johnson's Maryland Chancery Decisions.
Johns. Ch. (N. Y.) or Johns. Ch. Cas. Johnson's Chancery Reports, New York.
Johns. Ch. Err. Johnson's Reports, N. Y. Court of Errors.
Johns. Eccl. Law. Johnson's Ecclesiastical Law.
Johns. (Md.). Johnson's Maryland Reports.
Johns. (New Zealand). Johnson's New Zealand Reports.
Johns. Tr. Johnson's Impeachment Trial.
Johns. U. S. Johnson's Reports, U. S. 4th Circuit, Chase's Decisions.
Johns. V. Ch. Cas. Johnson's Cases in Vice-Chancellor Wood's Court.
Johns. & H. Johnson and Hemming's Reports, English Chancery.
Johnst. Inst. Johnston's Institutes of the Law of Spain.
Johnst. N. Z. Johnston's Reports, New Zealand.
1 Jon. Wm. Jones's Reports, English King's Bench and Common Pleas.
2 Jon. Thos. Jones's Reports, English King's Bench and Common Pleas.
Jon. (Ala.). Jones's Reports, Alabama, 62.
Jon. (Mo.). Jones's Reports, Missouri.
Jon. (N. C.). Jones's Law Reports, North Carolina.
Jon. (N. C.) Eq. Jones's Equity Reports, North Carolina.
Jon. (Pa.). Jones's Reports, Pennsylvania.
Jon. (U. C.). Jones's Reports, Upper Canada.
Jon. B. & W. Jones, Barclay, and Whitteley's Reports, Missouri, vol. 31.
Jon. Bailm. Jones's Law of Bailments.
Jon. Corp. Sec. Jones on Corporate Securities.
Jon. Eq. Jones's Equity Reports, North Carolina.
Jon. Ecch. Jones's Reports, Irish Exchequer.
Jon. Inst. Jones's Institutes of Hindoo Law.
Jon. Intr. Jones's Introduction to Legal Science.
Jon. Ir. Ecch. Jones's Reports, Irish Exchequer.
Jon. L. O. T. Jones on Land Office Titles.
Jon. Mort. Jones on Mortgages.
Jon. Railw. Sec. Jones on Railway Securities.
Jon. Salv. Jones on Salvage.
Jon. T. Thos. Jones's Reports, English King's Bench and Common Pleas. Sometimes cited as 2 Jones.
Jon. W. Wm. Jones's Reports, English King's Bench and Common Pleas. Sometimes cited as 1 Jones.
Jon. & C. Jones and Cary's Reports, Irish Exchequer.
Jon. & La T. Jones and La Touche's Reports, Irish Chancery.
Jon. & S. Jones and Spencer's Reports, New York City Superior Court, vols. 33-46.
Jones. See *Jon.*
Jones, B. & W. (Mo.). Jones, Barclay and Whitteley's Reports, Missouri Supreme Court (31 Missouri).
Jord. P. J. Jordan's Parliamentary Journal.
Jour. Jur. Journal of Jurisprudence (Hall's), Philadelphia.
Jour. Jur. (Sc.). Journal of Jurisprudence and Scottish Law Magazine, Edinburgh.
Jour. Law. Journal of Law, Philadelphia.
Jour. Trib. Com. Journal des Tribunaux de Commerce, Paris.
Joy Chal. Joy on Challenge to Jurors.
Joy Ec. Acc. Joy on the Evidence of Accomplices.
Jud. Judgments, Judicial, Jurisdiction.
Jud. Book of Judgments, English Courts.
Jud. Chr. Judicial Chronicle.
Jud. Com. of P. C. Judicial Committee of the Privy Council.
Jud. Repos. Judicial Repository, New York.
J. & Sw. (Jamaica). Judah and Swan's Reporter, Jamaica.
Jur. The Jurist Reports in all the Courts, London.
Jur. Eccl. Juris Ecclesiasticus.
Jur. Mar. Molloy's De Jure Maritimo.
Jur. N. S. The Jurist, New Series, Reports in all the Courts, London.
Jur. N. Y. The Jurist or Law and Equity Reporter, New York.

Jur. Ros. Roscoe's Jurist, London.
Jur. Sc. Scottish Jurist, Court of Session, Scotland.
Jur. Soc. P. Juridical Society Papers, London.
Jur. St. Juridical Stylus, Scotland.
Jur. Wash. D. C. The Jurist, Washington, D. C.
Jurisp. The Jurisprudent, Boston.
Jus Nav. Rhod. Jus Navale Rhodium.
Jus. Inst. Justinian's Institutes.
Jus. Itin. Jus Itinerarium or of Assire.
Jus. P. The Justice of the Peace, London.
Jus. S. L. Justice's Sea Law.
Jus. T. Justice of Trailbaston.
A. B. King's Bench.
K. C. King's Council.
K. C. R. Reports tempore King, English Chancery.
K. & G. R. C. Keane and Grant's Registration Appeal Cases.
K. & J. Kay and Johnson's Reports, English Chancery.
K. & O. Knapp and Ombler's Election Cases, English.
Kam. or Kam. Dec. Kames's Decisions, Scotch Court of Session.
Kam. Eluc. Kames's Elucidations of the Law of Scotland.
Kam. Eg. Kames's Principles of Equity.
Kam. Ess. Kames's Essays.
Kam. Hist. L. Tr. or Kam. L. T. Kames's Historical Law Tracts.
Kam. Rem. Dec. Kames's Remarkable Decisions, Scotch Court of Session.
Kam. Sel. Dec. Kames's Select Decisions, Scotch Court of Session.
Kam. Tr. Kames's Historical Law Tracts.
Kan. or Kane. Kansas Reports.
Kay. Kay's Reports, English Chancery.
Kay Sh. Kay on Shipping.
Kay & J. Kay and Johnson's Reports, English Chancery.
K. B. (U. C.). King's Bench Reports, Upper Canada.
K. C. R. Reports temp. King, English Chancery.
K. & B. Dig. Kerford's and Box's Victorian Digest.
Kan. C. L. Rep. Kansas City Law Reporter.
Kan. L. J. Kansas Law Journal.
Kan. Univ. Lawy. Kansas University Lawyer, Lawrence.
Keane & G. R. C. Keane and Grant's Registration Appeal Cases.
Keat. Fam. Sett. Keating on Family Settlements.
Kebl. or Keble. Keble's Reports, English King's Bench.
Kebl. J. Keble's Justice of the Peace.
Kebl. Stat. Keble's Statutes of England.
Keen. Keen's Reports, English Rolls Court.
Keen. Cas. Qua. Cont. Keener's Cases on Quasi Contracts.
Keil. or Keilw. Keilway's Reports, English King's Bench.
Kel. Ga. Kelly's Reports, Georgia Reports, vols. 1-8.
Kel. J. or 1 Kel. J. Kelly's Reports, English Crown Cases.
Kel. W. or 2 Kel. W. Kelly's Reports, English Chancery and King's Bench.
Kel. & C. Kelly and Cobb's Reports, Georgia.
Kelth. Norm. L. D. Keltham's Norman French Law Dictionary.
Kelly. Kelly's Reports, Georgia.
Kelly & C. Kelly and Cobb's Reports, Georgia.
Ken. Kentucky. See *Ky.*
Ken. (N. C.). Kenan's North Carolina Reports.
Ken. Gloss. Kennet's Glossary.
Ken. Imp. Kennet on Improvements.
Kent. or Kent Com. Kent's Commentaries on American Law.
Keny. Kenyon's Notes, English King's Bench.
Kern. Kernan's Reports, New York Ct. of Appeals, vols. 11-14.
Kerr. Kerr's Reports, Indiana.
Kerr (N. B.). Kerr's Reports, New Brunswick.
Kerr Act. Kerr on Actions at Law.
Kerr Anc. L. Kerr on Ancient Lights.
Kerr Disc. Kerr on Discovery.
Kerr Extra. Kerr on Inter-state Extradition.
Kerr Fr. Kerr on Fraud and Mistake.
Kerr Inj. Kerr on Injunction.
Kerr Rec. Kerr on Receivers.
Keyes. Keyes's Reports, New York Ct. of Appeals. Sometimes cited as vols. 30-41 N. Y.
Keyes F. I. C. Keyes on Future Interest in Chattels.
Keyes F. I. L. Keyes on Future Interest in Lands.
Keyes Rem. Keyes on Remainders.
Kilk. Kilkerran's Reports, Scotch Court of Session.
King. King's Reports, Louisiana Annual.
Kirby. Kirby's Reports, Connecticut.
Kirt. Sur. Pr. Kirtland on Practice in Surrogates' Courts.
Kn. or Knapp. Knapp's Reports, English Privy Council.
Kn. A. C. or Knapp A. C. Knapp's Appeal Cases.
Kn. & M. or Knapp & M. Knapp and Moore's Reports, English Privy Council.
Kn. & O. or Knapp & Omb. Knapp and Ombler's Election Cases.
Knowles. Knowles's Reports, Rhode Island.
Kulp. Kulp's Reports, Pennsylvania.
Ky. Kentucky Reports.
Ky. Dec. Kentucky Decisions, Sneed's Reports.
Ky. L. Rep. Kentucky Law Reporter.
Kyd M. B. Kyd on the Law of Awards.
Kyd Bills. Kyd on Bills of Exchange.
Kyd Corp. Kyd on Corporations.
L. Law. Lol. Liber.
L. Alam. Law of the Alamanni.
L. Baurer. Law of the Bavarins.
L. C. Lord Chancellor; Lower Canada; Leading Cases.
L. C. B. Lord Chief Baron.

L. C. C. C. Lower Canada Civil Code.
L. C. C. P. Lower Canada Civil Procedure.
L. C. Eq. White and Tudor's Leading Cases in Equity.
L. C. G. Local Court's Gazette, Toronto.
L. C. J. Lord Chief Justice.
L. C. J. or L. C. Jur. Lower Canada Jurist, Montreal.
L. C. L. J. Lower Canada Law Journal, Montreal.
L. C. R. Lower Canada Reports.
L. F. Leges Forestarum.
L. Fr. Law French.
L. H. C. Lord High Chancellor.
L. I. Legal Intelligence, Philadelphia.
L. I. L. Lincoln's Inn Library.
L. J. House of Lords Journal.
L. J. Lord Justices Court.
L. J. The Law Journal, London.
L. J. (M & W.). Morgan and William's Law Journal, London.
L. J. (Su.). Smith's Law Journal, London.
L. J. or L. J. O. S. Law Journal Reports, in all the Courts.
L. J. Adm. Law Journal Reports, New Series, English Admiralty.
L. J. App. Law Journal Reports, New Series, English Appeals.
L. J. Bankr. Law Journal Reports, New Series, English Bankruptcy.
L. J. C. or L. J. C. P. Law Journal Reports, New Series, English Common Pleas.
L. J. Chan. Law Journal Reports, New Series, English Chancery.
L. J. Eccl. Law Journal Reports, New Series, English Ecclesiastical Court.
L. J. Ecch. Law Journal Reports, New Series, English Exchequer.
L. J. H. L. Law Journal Reports, New Series, English House of Lords.
L. J. M. C. or L. J. Mag. Cas. Law Journal Reports, New Series, English Magistrates Cases.
L. J. Mat. Cas. Law Journal Reports, New Series, Divorce and Matrimonial Causes.
L. J. N. S. Law Journal, New Series, London.
L. J. Notes Cases. Law Journal Notes of Cases.
L. J. Prob. or L. J. P. C. Law Journal Reports, New Series, English Privy Council.
L. J. P. D. & A. Law Journal Reports, New Series, English Probate, Divorce, and Admiralty.
L. J. Prob. Law Journal Reports, New Series, English Probate.
L. J. B. Law Journal Reports, New Series, English Queen's Bench.
L. J. Rep. Law Journal Reports.
L. J. Rep. N. S. Law Journal Reports, New Series.
L. J. U. C. Law Journal, Upper Canada.
LL. Laws.
L. L. Law Latin. Local Law.
L. Library. Law Library, Philadelphia (reprint of English treatises).
L. L. N. S. Law Library, New Series.
L. Lat. Law Latin.
L. M. & P. Lowndes, Maxwell, and Pollock's Reports, English Bail Courts.
L. Mag. Law Magazine, London.
L. Mag. & L. R. Law Magazine and Law Review, London.
L. Mag. & R. Law Magazine and Review, London.
L. N. Liber Niger, or the Black Book.
L. O. Local Observer, London.
L. P. B. Lawrence's Paper Book. See *A. P. B.*
L. P. C. Lord of the Privy Council.
L. R. Law Reporter, Law Reports, Law Review.
L. R. Law Recorder, Reports in all the Irish Courts.
L. R. A. Lawyer's Reports Annotated.
L. R. & E. Law Reports, English Admiralty and Ecclesiastical.
L. R. App. Cas. Law Reports, English Appeal Cases.
L. R. Burm. Law Reports, British Burmah.
L. R. C. C. R. Law Reports, English Crown Cases Reserved.
L. R. C. P. Law Reports, English Common Pleas.
L. R. C. P. D. Law Reports, Common Pleas Division, English Supreme Court of Judicature.
L. R. Ch. Law Reports, English Chancery Appeal Cases.
L. R. Ch. D. Law Reports, Chancery Division, English Supreme Court of Judicature.
L. R. E. & Ir. App. Law Reports, English and Irish Appeal Cases.
L. R. Eq. Law Reports, English Equity.
L. R. Ex. or L. R. Ecch. Law Reports, English Exchequer.
L. R. Ex. D. Law Reports, Exchequer Division, English Supreme Court of Judicature.
L. R. H. L. Law Reports, English and Irish Appeal Cases, House of Lords.
L. R. H. L. Sc. Law Reports, Scotch and Divorce Appeal Cases, House of Lords.
L. R. Ind. App. Law Reports, Indian Appeals.
L. R. Ir. Law Reports, Ireland.
L. R. N. S. W. Law Reports, New South Wales.
L. R. P. C. Law Reports, English Privy Council, Appeal Cases.
L. R. P. Div. Law Reports, Probate, Divorce, and Admiralty Division, English Supreme Court.
L. R. P. & D. Law Reports, English Probate and Divorce.
L. R. Q. B. Law Reports, English Queen's Bench.
L. R. Q. B. Div. Law Reports, Queen's Bench Division, English Supreme Court of Judicature.
L. R. S. A. Law Reports, South Australia.
L. R. Sc. Div. App. Cas. Scotch and Divorce Appeal Cases, Law Reports.
L. R. Sess. Cas. English Law Reports, Session Cases.
L. R. Stat. Law Reports, Statutes.
L. Rep. (Mont.) Law Reporter (Montreal).
L. Repos. Law Repository.
L. Rev. & Quart. J. Law Review and Quarterly Journal.
L. Ripar. Law of the Riparians.

- L. S.* Locus sigilli, place of the seal.
L. Solic. Solicitor.
L. Stu. Mag. N. S. Law Student's Magazine, New Series.
L. T. The Law Times, Scranton, Pa.
L. T. L. The Law Times, London.
L. T. B. American Law Times Bankruptcy Reports.
L. T. J. Law Times Journal.
L. T. N. S. or *L. T. Rep. N. S.* Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
L. T. R. Law Times Reports, in all the Courts.
L. V. Rep. Lehigh Valley Reporter, Pennsylvania.
L. & B. Ins. Dig. Littleton and Blatchley's Insurance Digest.
L. & C. C. C. Leigh and Cave's Crown Cases, English.
L. & E. Rep. Law and Equity Reporter, New York.
L. & E. English Law and Equity Reports, Boston Edition.
L. & G. t. Plunk. Lloyd and Gould's Cases tempore Plunkett, Irish Chancery.
L. & G. t. Sug. Lloyd and Gould temp. Sugden, Irish Chancery.
L. & M. Lowndes and Maxwell's Reports, English Bail Court.
L. & T. Longfield and Townsend's Reports, Irish Exchequer.
L. W. or L. & Welsb. Lloyd and Welsby's Mercantile Cases, English Courts.
La. Lane's Reports, English Exchequer.
La. Louisiana Reports.
La. Ann. Louisiana Annual Reports.
La. L. J. Louisiana Law Journal, New Orleans, 1834.
La. L. J. (Schm.). Louisiana Law Journal (Schmidt's), New Orleans.
La. Laure des Ser. Traité des Servitudes réelles, par M. La Laure.
La. T. R. Martin's Louisiana Term Reports, vols. 2-13.
Lab. Labatt's Reports, U. S. District Ct., California.
Lac. Dig. Ry. Dec. Lacey's Digest of Railway Decisions.
Lack. Leg. R. Lackawana Legal Record, Scranton, Pa.
Lal. R. P. Lalor on Real Property.
Lalor. Lalor's Supplement to Hill and Denio's Reports, New York.
Lamb. Archai. Lambard's Archæologia.
Lamb. Eiren. Lambard's Eirenarchia.
Lanc. B. The Lancaster Bar, Pennsylvania.
Lanc. L. Rev. Lancaster Law Review.
Land. Est. C. Landed Estates Court.
Lanc. Lane's Reports, English Exchequer.
Lang. Eq. Pl. Langdell's Summary of Equity Pleading.
Lang. Lead. Cas. Langdell's Leading Cases on Contracts.
Lang. L. C. Sales. Langdell's Leading Cases on Sales.
Lans. Lansing's Reports, New York Supreme Court Reports, vols. 1-7.
Lans. Ch. or Lans. Sel. Cas. Lansing's Select Chancery Cases, New York.
Laper. Dec. Laperrière's Speaker's Decisions, Canada.
Lat. or Latch. Latch's Reports, English King's Bench.
Lath. Lathrop's Reports, Massachusetts.
Lauder. (Lauder of Fountainhall's Scotch Session Cases.
Laur. Prim. Laurence on the Law and Custom of Primogeniture.
Lauss. Eq. Laussat's Equity in Pennsylvania.
Lav. Bul. Law Bulletin, San Francisco.
Lav. Chron. Law Chronicle, London.
Lav. Chron. Law Chronicle, Edinburgh.
Lav. Con. Lawson on Contracts.
Lav. Ex. J. Law Examination Journal, London.
Lav. Fr. & Lat. Dict. Law French and Latin Dictionary.
Lav. Int. Law Intelligence.
Lav. Jour. Law Journal. See *L. J.*
Lav. Jour. (M. & W.). Morgan and Williams's Law Journal, London.
Lav. Jour. (Smith's). J. P. Smith's Law Journal, London.
Lav. Jur. Law's Jurisdiction of the Federal Courts.
Lav. Lib. Law Library, Philadelphia (reprint of English treatises).
Lav. Lib. N. S. Law Library, New Series, Philadelphia.
Lav. Mag. Law Magazine, London.
Lav. News. Law News, St. Louis, Mo.
Lav. Pat. Dig. Law's Digest of Patent, Copyright and Trade-mark Cases.
Lav. Pl. Lawes's Treatise on Pleading in Assumpsit.
Lav. Pr. Law's Practice in the Courts of the U. S.
Lav. Quart. Rev. Law Quarterly Review, London.
Lav. Rec. Law Recorder, Reports in all the Irish Courts.
Lav. Ren. Law Reports. See *L. R.*
Lav. Rep. Law Reporter, Boston.
Lav. Rep. N. S. Monthly Law Reporter, Boston.
Lav. Rep. (Tor.). Law Reporter, Toronto.
Lav. Repos. Carolina Law Repository, North Carolina.
Lav. Rev. Law Review, London.
Lav. Rev. Qu. Law Review Quarterly, Albany, N. Y.
Lav. Rev. & Qu. J. Law Review and Quarterly Journal, London.
Lav. Stu. Mag. Law Students' Magazine, London.
Lav. Times. Law Times, Cases in all the English Courts.
Lav. Times N. S. or Lav. Times Rep. N. S. Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
Lav. Times (Scranton). Law Times, Scranton, Pa.
Lav. Weekly. Law Weekly, New York.
Lav. & Mag. Mag. Lawyers' and Magistrates' Magazine, London.
Laves C. Lawes on Charter Parties.
Laves Pl. Lawes on Pleading.
Lawm. Lawrence's Reports, Ohio.
Laws. Cas. Crim. L. Lawson's Leading Cases in Criminal Law.
Laws. Cas. Eq. Lawson's Leading Cases in Equity and Constitutional Law.
Lead. Cas. Simp. Lawson's Leading Cases Simplified.
Lawson Cont. Lawson on Contracts.
Laws. R. & Rem. Lawson, Rights and Remedies.
Lay. Lay's Reports, English Chancery.
Id. Ken. Kenyon's Reports, English King's Bench.
Raym. Raymond's Reports, English King's Bench.
Lea or Lea B. J. Lea's Reports, Tennessee.
Leach or Leach C. C. Leach's Crown Cases, English Courts.
Leach Cas. Leach's Club Cases, London.
Lead. Cas. Eq. White and Tutor's Leading Cases in Equity.
Leake Contr. Leake on Contracts.
Lec. Elm. Leçons Élémentaires du Droit Civil Romain.
Le Droit C. Can. Le Droit Civil Canadian, Montreal.
Lee or Lee Cas. Ecc. Lee's Cases, English Ecclesiastical Courts.
Lee (Cal.). Lee's Reports, California.
Lee Abs. Lee on Abstracts of Title.
Lee Cas. t. H. or Lee & H. Lee's Cases tempore Hardwicke, English King's Bench.
Lee Dict. or *Lee Fr.* Lee's Dictionary of Practice.
Lef. Dec. Lefevre's Parliamentary Decisions, reported by Bourke.
Lefroy. Lefroy's English Railroad and Canal Cases.
Leges.
Leg. Adv. Legal Adviser, Chicago, Ill.
Leg. Bibl. Legal Bibliography, by J. G. Marvin.
Leg. Burg. Leges Burgorum, Scotland.
Leg. Chron. Legal Chronicle, Pottsville, Pa.
Leg. Chron. Rep. Legal Chronicle Reports, Pennsylvania.
Leg. Exam. Legal Examiner, London.
Leg. Exam. N. S. Legal Examiner, New Series, London.
Leg. Exam. & L. C. Legal Examiner and Law Chronicle, London.
Leg. Exam. & Med. J. Legal Examiner and Medical Jurist, London.
Leg. Exam. W. R. Legal Examiner, Weekly Reporter, London.
Leg. Exch. Legal Exchange, Des Moines, Iowa.
Leg. G. Legal Guide, London.
Leg. Gaz. Legal Gazette, Philadelphia.
Leg. Gaz. Rep. Legal Gazette Reports, Pennsylvania Courts.
Leg. Inq. Legal Inquirer, London.
Leg. Int. Legal Intelligence, Philadelphia.
Leg. News. Legal News, Montreal.
Leg. Obs. Legal Observer, London.
Leg. Oler. The Laws of Oléron.
Leg. Op. Legal Opinions, Harrisburg, Penna.
Leg. Out. Legge on Outlawry.
Leg. Rec. Rep. Legal Record Reports.
Leg. Rem. Legal Remembrancer, Calcutta High Court.
Leg. Rep. Legal Reporter, Nashville, Tenn.
Leg. Rep. (Ir.). Legal Reporter, Irish Courts.
Leg. Rev. Legal Review, London.
Leg. Rhod. Laws of Rhodes.
Leg. T. Cas. Legal Tender Cases.
Leg. Ult. The Last Law.
Leg. Wisb. Laws of Wislay.
Leg. Y. B. Legal Year Book, London.
Leg. & Ins. Rept. Legal and Insurance Reporter, Philadelphia.
Legg. Legget's Reports, Scinde, India.
Legul. The Leggeian, London.
Lehigh Val. L. Rep. Lehigh Valley Law Reporter.
Leigh. Leigh's Reports, Virginia.
Leigh N. P. Leigh's Nisi Prius Law.
Leigh & C. Leigh and Cave's Crown Cases, English Courts.
Leigh & D. Conv. Leigh and Dalzell on Conversion of Property.
Leith R. P. St. Leith's Real Property Statutes, Ontario.
Le Mar. Le Marchant's Gardner Peerage Case.
Leo or Leon. Leonard's Reports, English King's Bench.
Lester. Lester's Reports, Georgia.
Lest. P. L. C. Lester's Decisions in Public Land Cases, U. S. 1880-70.
Lester Supp. or Lester & B. Lester & Butler's Supplement to 33d Georgia Reports.
Lew. Levinz's Reports, English King's Bench.
Lew. Lewis's Reports, Nevada.
Lew. C. C. Lewin's Crown Cases, English Courts.
Lew. Cr. Law. Lewis's Criminal Law of the U. S.
Lew. L. Cas. on L. L. Lewis's Leading Cases on Public Land Law.
Lew. L. T. in Phila. Lewis on Land Titles in Philadelphia.
Lew. Perp. Lewis on the Law of Perpetuities.
Lew. Pr. Lewis's Principles of Conveyancing.
Lew. Stocks. Lewis's Stocks, Bonds, etc.
Lew. Tr. Lewin on Trusts.
Lew. Cust. Lex Customaria.
Lex Man. Lex Manerium.
Lex Mer. or Lex Mer. Red. Lex Mercatoria, by Beaves.
Lex Mer. Am. Lex Mercatoria Americana.
Lex Parl. Lex Parliamentaria.
Ley. Ley's Reports, English Court of Wards and other Courts.
Lib. Liber, Book.
Lib. Ass. Liber Assisarum (Part 5 of the Year Books).
Lib. Ent. Old Book of Entries.
Lib. Feud. Liber Feudorum; Consuetudines Feudorum, at end of Corpus Juris Civilis.
Lib. Intr. Liber Intratumum: Old Book of Entries.
Lib. L. & Eq. Library of Law and Equity.
Lib. Niger. Liber Niger, or the Black Book.
Lib. Pl. Liber Placidandi, Book of Pleading.
Lib. Reg. Register Books.
Lib. Rub. Liber Ruber, the Red Book.
Lib. Ten. Liber Tenementum.
Liebt. Civ. Lib. Lieber on Civil Liberty and Self-Government.
Life & Acc. Ins. Life and Accident Insurance Reports (Bigelow's).
Lig. Dig. Ligon's Digest (Alabama).
Lil. Lilly's Reports or Entries, English Court of Assize.
Lil. Abr. Lilly's Abridgment.
Lil. Reg. Lilly's Practical Register.
Lind. Jur. Lindley's Jurisprudence.
Lind. Part. Lindley on Partnership.
Lit. Littleton's Reports, English Common Pleas and Exchequer.
Lit. s. Littleton, section.
Lit. Ten. Littleton's Tenures.
Litt. (Ky.). Littell's Reports, Kentucky.
Litt. Sel. Cas. Littell's Select Cases, Kentucky.
Litt. & B. Littleton and Blatchley's Digest of Insurance Decisions.
Liv. Livre. Book.
Cas. Livingston's Cases in Error, New York.
Liv. Jud. Op. Livingston's Judicial Opinions, New York.
Liv. L. Mag. Livingston's Law Magazine, New York.
Liv. L. Reg. Livingston's Law Register, New York.
Liverm. Ag. Livermore on Principal and Agent.
Liverm. Diss. Livermore's Dissertation on the Contrariety of Laws.
Liz. & Exch. Lizars' Scotch Exchequer Cases.
Ll. Leges. Laws.
Llo. Ch. St. Lloyd's Chitty's Statutes.
Llo. T. M. Lloyd on Trademarks.
Llo. & G. t. P. Lloyd and Gould's Reports, tempore Plunkett, Irish Chancery.
Llo. & G. t. S. Lloyd and Gould's Reports, tempore Sugden, Irish Chancery.
Llo. & W. Lloyd & W. or *Llo. & W. Mer. Cas.* Lloyd and Welsby's Mercantile Cases, English King's Bench.
Loc. cit. Loco citato, in the place cited.
Loc. Ct. Gaz. Local Courts and Municipal Gazette, Toronto, Ont.
Lock. Rev. Cas. Lockwood's Reversed Cases, New York.
Lofft. Lofft's Reports, English King's Bench.
Lof. Comp. Logan's Compendium of English, Scotch and Ancient Roman Law.
Lois des Batim. Lois des Bâtimens.
Lom. C. H. Rep. Lomas's City Hall Reporter, New York.
Lom. Dig. Lomax's Digest of the Law of Real Property in the U. S.
Lond. Jur. London Jurist, Reports in all the Courts.
Lond. Jur. N. S. London Jurist, New Series.
Lond. I. Mag. London Law Magazine.
Long Quint. Year Book, part 10.
Longf. & T. Longfield and Townsend's Reports, Irish Exchequer.
Lor. Inst. Loring's Institutes.
Lor. & Russ. Loring & Russell, Election Cases, Massachusetts.
Lords Jour. Journal of the House of Lords.
Lorenz (Ceylon). Lorenz's Ceylon Reports.
Louis. Code. Civil Code of Louisiana.
Love, Wills. Lovelass on Wills.
Low. Lowell's Decisions, U. S. Dist. of Massachusetts.
Low. Can. Jur. Lower Canada Jurist, Montreal.
Low. Can. L. J. Lower Canada Law Journal.
Low. Can. Repts. Lower Canada Reports.
Low. C. Seign. Lower Canada Seigneurial Reports.
Lowm. Av. Lowndes on Average.
Lowm. Col. Lowndes on Collisions at Sea.
Lowm. Leg. Lowndes on Legacies.
Lowm. & M. Lowndes and Maxwell's Bail Court Reports, English.
Lowm. M. & P. Lowndes, Maxwell and Pollock's Bail Court Reports, English.
Lube Eq. Lube on Equity Pleading.
Luc. Lucas's Reports, English (10 Modern).
Lud. El. Cas. Luder's Election Cases, English.
Ludd. Ludden's Reports, Maine.
Lum. Cas. or Lum. P. L. Cas. Lumley's Poor Law Cases.
Lum. Parl. Pr. Lumley's Parliamentary Practice.
Lum. Set. Lumley on Settlements and Removal.
Lush. or Lush. Adm. Lushington's Admiralty Reports, English.
Lush. P. L. Lushington on Prize Law.
Lush. Pr. Lush's Practice.
Lut. Lutwyche's Reports, English Common Pleas.
Lut. Elec. Cas. Lutwyche's Election Cases, English.
Lut. Ent. Lutwyche's Entries.
Lut. R. C. Lutwyche's Registration Cases.
Luz. L. J. Luzerne Law Journal.
Luz. L. T. Luzerne Law Times.
Luz. Leg. Ob. Luzerne Legal Observer, Carbondale, Pa.
Luz. Leg. Reg. Luzerne Legal Register, Wilkes-barre, Pa.
Lynd. Prov. Lyndwood's Provinciales.
Lyne. Lyne's Reports, Irish Chancery.
M. Queen Mary; thus 1 M. signifies the first year of the reign of Queen Mary.
M. Michaelmas Term. Mortgage.
M. Morrison's Dictionary of Decisions, Scotch Court of Session.
M. Session Cases, 3d Series, Scotland (Macpherson).

- Ac. See Mc.*
Ac. Cos. Magistrate's Cases.
M. C. C. Moody's Crown Cases.
M. D. & D. Montague, Deacon and DeGex's Reports, English Bankruptcy.
M. G. & S. Manning, Granger and Scott's Reports, English Common Pleas, Common Bench Reports, vols. 1-8.
M. L. Mercian Law.
M. L. J. Memphis Law Journal, Tennessee.
M. L. R. Maryland Law Record, Baltimore.
M. M. R. Mitchell's Maritime Register, London.
M. P. C. Moore's Privy Council Cases, English.
M. R. Master of the Rolls.
MS. Manuscript, Manuscript Reports.
M. St. More's Notes on Stair's Institutes.
M. T. Michaelmas Term.
M. & Agr. Montagu and Ayrton's Reports, English Bankruptcy.
M. & B. Montagu and Bligh's Reports, English Bankruptcy.
M. & C. Mylne and Craig's Reports, English Chancery.
M. & C. Banker. Montagu and Chisty's Bankruptcy Reports, English.
M. & G. Manning and Granger's Reports, English Common Pleas.
M. & Gel. Maddock and Gelhart's Reports, English Chancery.
M. & G. Macnaghten and Gordon's Reports, English Common Pleas.
M. & H. Murphy and Hurlstone's Exchequer Reports.
M. & K. Mylne and Keen's Reports, English Chancery.
M. & M. Moody and Malkin's Reports, English Nisi Prius.
M. & McAd. Montague and McArthur's Reports, English Bankruptcy.
M. & P. Moore and Payne's Reports, English Common Pleas and Exchequer.
M. & R. Manning and Ryland's Reports, English King's Bench.
M. & R. M. C. Manning and Ryland's Magistrate Cases, English King's Bench.
M. & Rob. Moody and Robinson's Nisi Prius Cases, English Courts.
M. & S. Maule and Selwyn's Reports, English King's Bench.
M. & S. or M. & Scott. Moore and Scott's Reports, English Common Pleas.
M. & W. Meeson and Welsby's Reports, English Exchequer.
M. & Y. Martin and Yerger's Reports, Tennessee.
McAll. McAllister's Reports, U. S. Dist. of California.
McArth. McArthur's Reports, Dist. of Columbia.
McArth. C. McArthur on Courts Martial.
McAr & Mackey. MacArthur and Mackey, Reports of District of Columbia Supreme Court.
McArth. Pat. Cas. MacArthur, Patent Cases, District of Columbia.
McCalon. McCahan's Reports, Supreme Court of Kansas and U. S. Courts, Dist. of Kansas.
McCall Pr. McCall's Precedents.
McCart. McCarter's Chancery Reports, New Jersey Equity, vols. 14-15.
McClain Cas. Car. McClain's Cases on Carriers.
McClell. McClelland's Reports, English Exchequer.
McClell. Pro. Pr. McClellan's Probate Practice.
McClell. & Y. McClelland and Young's Reports, English Exchequer.
McCook. McCook's Reports, Ohio.
McCord Ch. McCord's Law Reports, South Carolina.
McCord Ch. McCord's Chancery Reports, South Carolina.
McCork. McCorkle's Reports, North Carolina, vol. 65.
McCr. Elect. McCrary's American Law of Electricity.
McCrary. McCrary, United States Circuit Court Reports.
McCull. Dict. McCullough's Commercial Dictionary.
McDon. Inst. McDonald's Institutes of the Law of Scotland.
McGill, Sc. Sess. McGill's Manuscript Decisions, Scotch Court of Session.
McGloin. McGloin's Reports, Louisiana Court of Appeals.
McKinn. Jus. McKinney's Justice.
McKinn. Phil. Ev. McKinnon's Philosophy of Evidence.
McL. or McLean. McLean's Reports, U. S. Circuit Court, 7th Circuit.
McMas. R. L. McMaster's Railroad Law, New York.
McMull. McMullan's Law Reports, South Carolina.
McMull. Ch. or McMull. Eq. McMullan's Chancery Reports, South Carolina.
McNagh. Elem. McNaghten's Elements of Hindoo Law.
Macas. Macassey's Reports, New Zealand.
Macc. Cas. Macca's Breach of Promise Cases.
Maccles. Macclesfield's Reports (10 Modern).
Macf. Macfarlane's Reports, Scotch Jury Courts.
Macf. Pr. Macfarlane's Practice of the Court of Session.
Mack. C. L. Mackelday on Civil Law.
Mack. Cr. L. Mackenzie on the Criminal Law of Scotland.
Mack. Inst. Mackenzie's Institutes of the Law of Scotland.
Mack. Obs. Mackenzie's Observations on Acts of Parliament.
Mack. Rom. L. Mackenzie's Studies in Roman Law.
Mackey. Mackey's Supreme Court Reports, District of Columbia.
Mack. Dec. Macleaurin's Decisions, Scotch Courts.
Mack. Sh. Macleachlan Merchant Shipping.
Mack. & R. Maclean and Robinson's Scotch Appeals.
Macn. Macnaghten's (W. H.) Reports, India.
Macn. C. M. Macnaghten on Courts Martial.
Macn. F. F. Macnaghten's Reports, India.
Macn. Nul. Macnamara on Nullities and Irregularities in the Practice of the Law.
Macn. & G. Macnaghten and Gordon's Reports, English Chancery.
Macomb C. M. Macomb on Courts Martial.
Macph. Macpherson's Cases, Court of Session Cases, 8d Series.
Macph. Inf. Macpherson on Infancy.
Macq. Deb. Macqueen's Debates on Life Peerage Question.
Macq. H. L. C. Macqueen's House of Lords Cases, Appeals from Scotland.
Macq. H. & W. Macqueen on Husband and Wife.
Macq. M. & D. Macqueen on Marriage and Divorce.
Macr. P. Cas. Macrory's Patent Cases.
Macr. & H. Macrae and Hertalet's Insolvency Cases.
Mad. Ech. Madox's History of the Exchequer.
Mad. Form. Madox's Formulæ Anglicarum.
Mad. H. Ct. Rep. Madras High Court Reports.
Mad. Jur. Madras Jurist, India.
Mad. Papers. Madison's (James) Papers.
Mad. S. D. R. Madras Sudder Dewany Reports.
Mad. Sel. Madras Select Decrees.
Madd. Maddock's Reports, English Chancery.
Madd. Ch. Fr. Maddock's Chancery Practice.
Madd. & G. Maddock and Geldart's Reports, English Chancery (vol. 6, Maddock's Reports).
Mag. The Magistrate, London.
Mag. Cas. Magistrate Cases, Edited by Bittleston, Wise and Parnell.
Mag. Char. Magna Charta.
Mag. Ins. Magen on Insurance.
Mag. (Md.) or Magr. Magruder's Reports, Maryland, vols. 1-2.
Maine. Maine Reports.
Maine Anc. L. Maine on Ancient Law.
Maine Vil. Com. Maine on Village Communities.
Mai. Malynes's Lex Mercatoria.
Mail. Ent. Mallory's Modern Entries.
Man. Manning's Reports, English Court of Revision.
Man. El. Cas. Manning's Election Cases.
Man. Ech. Pr. Manning's Exchequer Practice.
Man. Gr. & S. Manning, Granger and Scott's Reports, English Common Pleas.
Man. & G. Manning and Granger's Reports, English Common Pleas.
Man. & R. Manning and Ryland's Reports, English King's Bench.
Man. & R. Mag. Cas. Manning and Ryland's Magistrate Cases, English King's Bench.
Man. Fines. Manley on Fines.
Mann. or Mann. (Mich.). Manning's Reports, Michigan Reports, vol. 1.
Mann. Com. Manning's Commentaries on the Law of Nations.
Manning. Manning's Unreported Cases, Louisiana.
Manson. Manson's English Bankruptcy Cases.
Manum. Cas. Manumission Cases, New Jersey (Bloomfield's).
Manw. Manwood's Forrest Laws.
Mar. Maritime.
Mar. March's Reports, English King's Bench.
Mar. Br. March's Translation of Brook's New Cases.
Mar. L. Cas. or Mar. L. Rep. Maritime Law Cases (Crockford's), English.
Mar. L. Cas. N. S. or Mar. L. Rep. N. S. Maritime Law Reports, New Series (Aspinall's), English.
Mar. Rec. B. Martin's Rectal Book.
Mar. Reg. Mitchell's Maritime Register, London.
Marine Ct. R. Marine Court Reporter (McAdam's), New York.
Mark. El. Markley's Elements of Law.
Marr. Adm. Marriott's Reports, English Admiralty.
Marsh. Marshall's Reports, English Common Pleas.
Marsh. (Ky.) or Marsh. A. K. A. K. Marshall's Reports, Kentucky.
Marsh. Calc. Marshall's Reports, Calcutta.
Marsh. Dec. Brockenbrough's Reports, Marshall's U. S. Circuit Court Decisions.
Marsh. Ins. Marshall on Insurance.
Marsh. J. J. J. Marshall's Reports, Kentucky.
Marsh. Op. Marshall's (Chief Justice) Constitutional Opinions.
Mart. (Cond. La.). Martin's Condensed Louisiana Reports.
Mart. (Ga.). Martin's Reports, Georgia.
Mart. (Ind.). Martin's Reports, Indiana.
Mart. or Mart. (La.). Martin's Reports, Louisiana.
Mart. Law Nat. Martin's Law of Nations.
Mart. N. S. or Mart. (La.) N. S. Martin's Reports, New Series, Louisiana.
Mart. (N. C.). Martin's Reports, North Carolina.
Mart. & Y. Martin and Yeager's Reports, Tennessee.
Marv. Av. Marvin on General Average.
Marv. Leg. Bibl. Marvin's Legal Bibliography.
Marv. Salv. or Marv. Wr. & S. Marvin on Wreck and Salvage.
Maryland. Maryland Reports, 1851-1896.
Mas. Mason's Reports, U. S. Circuit Court, 1st Circuit.
Mass. Massachusetts Reports.
Mass. L. R. Massachusetts Law Reporter, Boston.
Mass. Dr. Com. Masse's Le Droit Commercial.
Math. Ev. Matthews on Presumptive Evidence.
Mats. Matson's Reports, Connecticut.
Matth. (W. Va.). Matthews's Reports, West Virginia Reports, vol. 6.
Matth. Com. Matthews's Guide to Commissions in Chancery.
Matth. Dig. Matthews's Digest.
Mau. & Pol. Sh. Maude and Pollock's Law of Shipping.
Mau. & Sel. Maule and Selwyn's Reports, English King's Bench.
Maug. Lit. Pr. Maughan on Literary Property.
Max. Maxims.
Maxw. Int. Sta. Maxwell on the Interpretation of Statutes.
May Const. Hist. May's Constitutional History of England.
May Crim. L. May's Criminal Law.
May Fr. Conv. May on Fraudulent Conveyances.
May Hist. May's Constitutional History of England.
May Ins. May on Insurance.
May. Merg. Mayhew on Merger.
May P. L. May's Parliamentary Law.
Maymo Inst. Maymo's Romani et Hispani Juris Institutiones.
Mayn. Maynard's Reports, 1st Year Book.
Mayne Dam. Mayne on Damages.
Mayo Just. Mayo's Justice.
Mayo & Moul. Mayo and Moulton's Pension Laws.
Mc. Maryland Reports.
Mc. Ch. Maryland Chancery Decisions, by Johnson.
Mc. L. Rec. Maryland Law Record, Baltimore.
Mc. L. Rep. Maryland Law Reporter, Baltimore.
Mc. L. Rev. Maryland Law Review.
Me. Maine Reports.
Mechem Ag. Mechem on Agency.
Meck. Cas. Ag. Mechem's Cases on Agency.
Med. Jur. Medical Jurisprudence.
Med. Leg. J. Medico-Legal Journal, New York City.
Medd. Meddaugh's Reports, Michigan.
Med. & Wels. Meeson & Welsby's Reports, English Exchequer.
Meigs. Meigs's Reports, Tennessee.
Mesa. L. J. Memphis Law Journal, Tennessee.
Menz. Menzie's Reports, Cape of Good Hope.
Mer. or Meriv. Merivale's Reports, English Chancery.
Merc. Cas. Mercantile Cases.
Merch. Dict. Merchant's Dictionary.
Merl. Quest. Merlin, Questions de Droit.
Merl. Répert. Merlin's Répertoire de Jurisprudence.
Metc. or Metc. (Mass.). Metcalf's Reports, Massachusetts Reports, vols. 49-50.
Metc. (Ky.). Metcalf's Reports, Kentucky.
Metc. Contr. Metcalf on Contracts.
Meth. Ch. Cas. Report of the Methodist Church Property Case.
Mich. Michigan Reports.
Mich. Cir. Ct. Rep. Michigan Circuit Court Reporter.
Mich. L. J. Michigan Law Journal.
Mich. Lawyer. Michigan Lawyer, Detroit, Mich.
Mich. L. Michigan Lawyer, Detroit, Mich.
Mich. L. J. Michigan Law Journal, Detroit, Mich.
Mich. Leg. News. Michigan Legal News.
Mich. N. P. Michigan Nisi Prius Cases (Brown's).
Mich. Rev. St. Michigan Revised Statutes.
Mich. T. Michaelmas Term.
Middlex. Sit. Middlesex Sittings at Nisi Prius.
Miles. Miles's Reports, Pennsylvania.
Mill. Mill's Constitutional Reports, South Carolina.
Mill. (La.). Miller's Reports, Louisiana.
Mill. (Md.). Miller's Reports, Maryland.
Mill. Civ. L. Miller's Civil Law.
Mill Const. Mill's Constitutional Reports, South Carolina.
Mill. Dec. U. S. Miller's Decisions, U. S. Supreme Court Reports, Condensed (Continuation of Curties).
Mill. Dec. or Mill. Op. Miller's Decisions, U. S. Circuit Court (Woolworth's Reports).
Mill. Ins. Miller's Elements of the Law of Insurance.
Mill. Part. Miller on Partition.
Mill. & C. Bills. Miller and Collier on Bills of Sale.
Mills Em. D. Mills on Eminent Domain.
Min. or Minw. Ecccl. Milward's Reports, Irish Prerogative, Ecclesiastical.
Min. Minor's Reports, Alabama.
Min. Dig. Minot's Digest, Massachusetts.
Min. Ev. Minutes of Evidence.
Min. Minnesota Reports.
Min. Ct. Rep. Minnesota Court Reporter.
Min. Law J. Minnesota Law Journal, St. Paul, Minn.
Minor. Minor's Reports, Alabama.
Mir. Jus. Horne's Mirror of Justices.
Mir. Parl. Mirror of Parliament, London.
Mir. Fat. Off. Mirror of the Patent Office, Washington, D. C.
Mirch. D. & S. Mirchall's Doctor and Student.
Misc. R. Miscellaneous Reports, New York.
Miss. Mississippi Reports, 1851-1896.
Miss. St. Cas. Mississippi State Cases.
Mitch. M. R. Mitchell's Maritime Register, London.
Mittf. Eq. Pl. Mitford on Chancery Pleading.
Mittf. & Ty. Eq. Pl. Mitford and Tyler's Practice and Pleading in Equity.
M'Mul. Ch. (S. C.). M'Mullan's South Carolina Equity Reports.
M'Mul. L. (C. S.). M'Mullan's South Carolina Law Reports.
Mo. J. B. Moore's Reports, English Common Pleas.
Mo. Missouri Reports, 1821-1896.
Mo. App. Missouri Appeal Reports, 1876-96.
Mo. Bar. Missouri Bar, Jefferson City.
Mo. Jur. Monthly Jurist, Bloomington, Ill.
Mo. Law Mag. Monthly Law Magazine, London.
Mo. Law Rep. Monthly Law Reporter, Boston.
Mo. Leg. Exam. Monthly Legal Examiner, New York.
Mo. W. J. Monthly Western Jurist, Bloomington, Ill.
Mob. Mobley, Contested Election Cases, U. S. House of Representatives, 1882-9.
Mod. Modern Reports, English Courts.
Mod. Cas. Modern Cases (6 Modern Reports).
Mod. Cas. L. & Eq. Modern Cases in Law and Equity (8 and 9 Modern Reports).
Mod. Ent. Modern Entries.
Mod. Int. Modius Intrandi.
Mol. Molloy's Reports, Irish Chancery.
Mol. de J. M. Molloy de Jure Maritimo.
Moly. Molyneux's Reports, English Courts, temp. Car. I.

- Mon. or Monagh.* Monaghan's Unreported Cases, S. C. of Pennsylvania.
- Mon. or Monr. or Mon. T. B.* T. B. Monroe's Reports, Kentucky.
- Mon. B. or Monr. B.* Ben Monroe's Reports, Kentucky.
- Mont.* Montana Reports.
- Mont. or Mont. B. C.* Montagu's Reports, English Bankruptcy.
- Mont. Cas.* Montriou's Cases in Hindoo Law.
- Mont. Cond. Rep.* Montreal Condensed Reports.
- Mont. Comp.* Montagu on the Law of Composition.
- Mont. D. & De G.* Montagu, Deacon and De Gex's Reports, English Bankruptcy.
- Mont. Dig. or Mont. Eq. Pl.* Montagu's Digest of Pleadings in Equity.
- Mont. Inst.* Montriou's Institutes of Jurisprudence.
- Mont. L. Rep. Super. Ct.* Montreal Law Reports, Superior Court.
- Mont. Set-Off.* Montagu on Set-Off.
- Mont. & A.* Montagu and Ayrton's Reports, English Bankruptcy.
- Mont. & B.* Montagu and Bligh's Reports, English Bankruptcy.
- Mont. & C.* Montagu and Chitty's Reports, English Bankruptcy.
- Mont. & McA.* Montagu and McArthur's Reports, English Bankruptcy.
- Montesque.* Montesquieu's Spirit of Laws.
- Mo. Moore, K. B.*
- Montg. Co. L. Rep.* Montgomery County Law Reporter.
- Month. J. L.* Monthly Journal of Law, Washington.
- Mont. L. R.* Montreal Law Reports.
- Mo. Francis Moore's Reports, English.* When a volume is given, it refers to J. B. Moore's Reports, English Common Pleas.
- Moo. A.* Moore's Reports, English (1st Bosanquet and Puller's Reports, after page 470).
- Moo. C. Cas.* Moody's Crown Cases, English Courts.
- Moo. C. P. J. B.* Moore's Reports, English Common Pleas.
- Moo. I. App.* Moore's Reports, English Privy Council, Indian Appeals.
- Moo. J. B. J. B.* Moore's Reports, English Common Pleas.
- Moo. P. C. Cas.* Moore's Privy Council Cases, English.
- Moo. P. C. Cas. N. S.* Moore's Privy Council Cases, New Series, English.
- Moo. Tr.* Moore's Divorce Trials.
- Moo. & M.* Moody and Mackin's Nisi Prius Cases, English Courts.
- Moo. & P.* Moore and Payne's Reports, English Common Pleas.
- Moo. & R.* Moody and Robinson's Nisi Prius Cases, English Courts.
- Moo. & Sc.* Moore and Scott's Reports, English Common Pleas.
- Moore (Ark.)* Moore's Reports, Arkansas.
- Moore & W.* Moore and Walker's Reports, Texas, vols. 22-24.
- Mor. or Mor. Dict. Dec.* Morison's Dictionary of Decisions, Scotch Court of Session.
- Mor. Dig.* Morley's Digest of the Indian Reports.
- Mor. Min. Rep.* Morrison's Mining Reports.
- Morrell.* Morrell's Bankruptcy Cases.
- More St.* More's Notes on Stair's Institutes, Scotland.
- Morg. Ch. A. & O.* Morgan's Chancery Acts and Orders.
- Morg. & W. L. J.* Morgan and Williams's Law Journal, London.
- Morr.* Morris's Reports, Iowa.
- Morr. (Bomb.)* Morris's Reports, Bombay.
- Morr. (Cal.)* Morris's Reports, California.
- Morr. (Jamaica.)* Morris's Reports, Jamaica.
- Morr. (Miss.)* Morris's Reports, Mississippi.
- Morr. Rept.* Morris on Replein.
- Morr. St. Cas.* Morris's State Cases, Mississippi.
- Morris & Har.* Morris and Harrington's Sudder Dewanny Adawlut Reports, Bombay.
- Morse Arb. & Aw.* Morse on Arbitration and Award.
- Morse Bk.* Morse on Banks and Banking.
- Morse Exch. Rep.* Morse's Exchequer Reports, Canada.
- Morse Tr.* Morse's Famous Trials, Boston.
- Mort.* Morton's Reports, Bengal.
- Mos. Mosley's Reports, English Chancery.*
- Mos. Mon.* Moses on Mandamus.
- Mout. Ch. (N. Y.)* Moulton's New York Chancery Practice.
- Moy. Ent.* Moyle's Book of Entries.
- Moz. & W.* Mozley and Whitley's Law Dictionary.
- MS.* Manuscript.
- Mumf. (Jamaica.)* Mumford's Jamaica Reports.
- Mun. Municipal.*
- Munf. Mumford's Reports, Virginia.*
- Munic. & P. L.* Municipal and Parish Law Cases, English.
- Mur. & H.* Murphy and Hurlstone's Reports, English Exchequer.
- Murph.* Murphy's Reports, North Carolina.
- Murr. Murray's Reports, Scotch Jury Court.*
- Murr. Over. Cas.* Murray's Overruled Cases.
- Murray (Ceylon).* Murray's Ceylon Reports.
- Murray (New South Wales).* Murray's New South Wales Reports.
- Mut. (Ceylon).* Mutukisna's Ceylon Reports.
- Myers Fed. Dec.* Myers's Federal Decisions.
- Myt. & C.* Mylne and Craig's Reports, English Chancery.
- Myt. & K.* Mylne and Keen's Reports, English Chancery.
- Myrick.* Myrick's Probate Court Reports, San Francisco, Cal.
- N. Novelle.* The Novels or New Constitutions.
- N. A.* Non allocator.
- N. B.* Nulla bona.
- N. B.* New Brunswick Reports.
- N. Benl.* New Benloe's Reports, English King's Bench, Edition of 1661.
- N. B. R.* National Bankruptcy Register, New York.
- N. C. Ecc.* Notes of Cases, English Ecclesiastical and Maritime Courts.
- N. C.* North Carolina Reports.
- N. C. Conf.* North Carolina Conference Reports.
- N. C. Ecc.* Notes of Cases in the Ecclesiastical and Maritime Courts.
- N. C. Str.* Notes of Cases, by Strange, Madras.
- N. C. Law Repos.* North Carolina Law Repository.
- Nat. Corp. Rep.* National Corporation Reporter.
- N. C. Term. R.* North Carolina Term Reports (2 Taylor).
- N. Chip.* N. Chipman's Reports, Vermont.
- N. D.* North Dakota Reports.
- N. E.* New Edition.
- N. E. Rep.* Northeastern Reporter.
- N. Eng. Rep.* New England Reporter.
- N. E. I.* Non est inventus.
- N. F.* Newfoundland Reports.
- N. H.* New Hampshire Reports.
- N. H. & C.* Nicholl, Hare and Carrow's English Railway Cases.
- N. J.* New Jersey Reports.
- N. J. Ch. or N. J. Eq.* New Jersey Equity Reports.
- N. J. Law.* New Jersey Law Reports.
- N. J. L. J.* New Jersey Law Journal, Somerville.
- N. J.*
- N. L. Nelson's Lutwyche's Reports, English Common Pleas.*
- N. L. L.* New Library of Law, etc., Harrisburg, Pa.
- N. L. L.* New Library of Law and Equity, English.
- N. of Cas.* Notes of Cases, English Ecclesiastical and Maritime Courts.
- N. of Cas. Madras.* Notes of Cases at Madras.
- N. Mex.* New Mexico Territorial Courts.
- N. P.* Nisi Prius. Notary Public. Nova Placita. New Practice.
- N. P. C.* Nisi Prius Cases.
- N. R.* New Reports, English Common Pleas, Bosanquet and Puller's Reports.
- N. R.* Not reported.
- N. S.* New Series. Nova Scotia Reports.
- N. S. W. L. R.* New South Wales Law Reports.
- N. T. Repts.* New Term Reports, Q. B.
- N. W. Law Rev.* Northwestern Law Review, Chicago, Ill.
- N. W. P.* North West Provinces Reports, India.
- N. W. Repr.* North Western Reporter, St. Paul.
- N. Y.* New York Reports, Court of Appeals.
- N. Y. Ch. Sent.* New York Chancery Sentinel.
- N. Y. City H. Rec.* New York City Hall Recorder.
- N. Y. Code Rept.* New York Code Reporter, New York City.
- N. Y. Code Repts.* N. S. New York Code Reports, New Series, New York City.
- N. Y. Cr.* New York Criminal Reports.
- N. Y. Daily. L. Gaz.* New York Daily Law Gazette.
- N. Y. Elec. Cas.* New York Contested Election Cases.
- N. Y. Jud. Rep.* New York Judicial Repository, New York (Bank's).
- N. Y. Jur.* New York Jurist.
- N. Y. L. J.* New York Law Journal, New York City.
- N. Y. Law Gaz.* New York Law Gazette, New York City.
- N. Y. Law Rev.* New York Law Review, Ithaca, N. Y.
- N. Y. Leg. N.* New York Legal News.
- N. Y. Leg. Obs.* New York Legal Observer, New York City (Owen's).
- N. Y. Leg. Reg.* New York Legal Register, New York City.
- N. Y. Misc.* New York Miscellaneous Reports.
- N. Y. Mo. Law Bull.* New York Monthly Law Bulletin, New York City.
- N. Y. Mun. Gaz.* New York Municipal Gazette, New York City.
- N. Y. Pr. Rep.* New York Practice Reports.
- N. Y. Rec.* New York Record.
- N. Y. Reg.* New York Daily Register, New York City.
- N. Y. Repr.* New York Reporter (Gardener's).
- N. Y. Sup.* New York Supplement, St. Paul, Minnesota.
- N. Y. St. Rep.* New York State Reporter, 1888-1889.
- N. Y. Sup. Ct.* New York Superior Court Reports.
- N. Y. Supr. Ct. Repts.* New York Supreme Court Reports.
- N. Y. Supr. Ct. Repts. (T. & C.).* New York Supreme Court Reports, by Thompson and Cook.
- N. Y. Term R.* New York Term Reports, by Caines.
- N. Y. Them.* New York Themis, New York City.
- N. Y. Trans.* New York Transcript, New York City.
- N. Y. Trans. N. S.* New York Transcript, New Series, New York City.
- N. Y. Week. Dig.* New York Weekly Digest, New York City.
- N. Z. Jur.* New Zealand Jurist, Dunedin, N. Z.
- N. Z. or N. Z. Rep.* New Zealand Reports, Court of Appeals.
- N. Z. App. Rep.* New Zealand Appeal Reports.
- N. Z. Col. L. J.* New Zealand Colonial Law Journal.
- N. & H.* Nott and Huntington's Reports, U. S. Court of Claims Reports, vols. 1-7.
- N. & Hop.* Nott and Hopkins's Reports, U. S. Court of Claims Reports, vols. 8-29.
- N. & M.* Neville and Manning's Reports, English King's Bench.
- N. & McC.* Nott and McCord's Reports, South Carolina.
- N. & P.* Neville and Perry's Reports, English Queen's Bench.
- Nal. St. P.* Nalton's Collection of State Papers.
- Nam. Dr. Com.* Namur's Cour de Droit Commercial.
- Napt.* Napton's Reports, Missouri.
- Nas. Inst.* Nasmith's Institutes of English Law.
- Nat. Brev.* Natura Brevium.
- Nat. Bk. Cas.* National Bank Cases, American.
- Nat. Corp. Rep.* National Corporation Reporter, Chicago.
- Nat. Reg.* National Register, Edited by Mead, 1818.
- Nal. Newfoundland Reports.*
- Neal F. & F.* Neal's Feasts and Fasts.
- Neb.* Nebraska Reports, 1871-1896.
- Nell (Ceylon).* Nell's Ceylon Reports.
- Nels.* Nelson's Reports, English Chancery.
- Nels. Abr.* Nelson's Abridgment.
- Nels. Fol. Rep.* Reports temp. Finch, Edited by Nelson.
- Nels. Lex Maner.* Nelson's Lex Manerlorum.
- Nels. Rights Cler.* Nelson's Rights of the Clergy.
- Nem. con.* Nemine contradicente.
- Nem. dis.* Nemine dissente.
- Nev.* Nevada Reports, 1865-1899.
- Nev. & M.* Neville and Manning's Reports, English King's Bench.
- Nev. & M. M. Cas.* Neville and McNamara's Reports, English.
- Nev. & M. R. & C. Cas.* Neville and McNamara's Railway and Canal Cases.
- Nev. & P.* Neville and Perry's Reports, English Common Pleas.
- Nev. & P. M. Cas.* Neville and Perry's Magistrate Cases, English.
- New Ann. Reg.* New Annual Register, London.
- New Benl.* New Benloe's Reports, English King's Bench, Edition of 1661.
- New Br.* New Brunswick Reports.
- New M. Cas.* New Magistrate Cases, English Courts.
- New Pr. Cas.* New Practice Cases, English Courts.
- New Rep.* New Reports, English Common Pleas.
- Bosanquet and Puller's Reports.*
- New Sess. Cas.* Carrow, Hamerton and Allen's Reports, English Courts.
- New York.* See N. Y.
- Newb.* Newberry's Admiralty Reports, U. S. District Courts.
- Newf.* Newfoundland Reports.
- Newl. Contr.* Newland on Contracts.
- Newm. Conv.* Newman on Conveyancing.
- Nich. Adult. Bast.* Nicholas on Adulterine Bastardy.
- Nich. H. & C.* Nicholl, Hare and Carrow's English Railway and Canal Cases, vols. 1-2.
- Nient Cul.* Nient culpable, Not guilty.
- Niles Reg.* Niles's Register, Baltimore.
- Nix. F.* Nixon's Forms.
- No. Cas. Ecc. & M.* Notes of Cases in the English Ecclesiastical and Maritime Courts.
- No. N.* Nova Narrationes.
- No. M. Cas.* Nolan's Magistrate Cases, English.
- Nol. Sett.* Nolan's Settlement Cases.
- Non. Cul.* Non culpabilis, Not guilty.
- Non. Fr.* Norman French.
- Nor. L. C. Ind.* Norton's Leading Cases on Inheritance, India.
- Norr.* Norris's Reports, Pennsylvania.
- Norr. Peake.* Norris's Peake's Law of Evidence.
- North.* Northington's Reports, English Chancery, Eden's Reports.
- North. Co. Rep.* Northampton County Reporter, Pennsylvania.
- North W. L. J.* Northwestern Law Journal.
- Northwest. Rep.* Northwestern Reporter, St. Paul, Minn.
- Not. Cas. Ecc. & M.* Notes of Cases in the English Ecclesiastical and Maritime Courts.
- Not. Cas. Madras.* Notes of Cases at Madras.
- Nott. Mech. L. L.* Nott on the Mechanics' Lien Law.
- Nott & H.* Nott and Huntington's Reports, U. S. Court of Claims Reports, vols. 1-17.
- Nott & Hop.* Nott and Hopkins's Reports, U. S. Court of Claims, vols. 8-29.
- Nott & McC.* Nott and McCord's Reports, South Carolina.
- Nov. Den.* Denizart Collection de Decisions Nouvelles.
- Novu. Rev.* Nouvelle Revue de Droit Francais, Paris.
- Nov.* Novelle. The Novels, or New Constitutions.
- Nov. Rec.* Novissimi Recopilacion de las Leyes de Espana.
- Nov. Sc.* Nova Scotia Supreme Court Reports.
- Nova Scotia L. R.* Nova Scotia Law Reports.
- Nov. Noy's Reports, English Courts.*
- Noy Max.* Noy's Maxims.
- Noyes Char. U.* Noyes on Charitable Uses.
- O. Ordonnance.*
- O. Ohio Reports.* Otto's Reports, U. S. Supreme Court Reports, vols. 91-107.
- O. B. Session Papers of the Old Bailey.*
- O. B. S.* Old Bailey Sessions.
- O. B. C.* Old Benloe's Reports, English Common Pleas (Benloe, of Benloe and Dalison, Edition of 1669).
- O. Bridg.* Orlando Bridgman's Reports, English Common Pleas.
- O'Brien M. L.* O'Brien's Military Law.
- O. C. O'Phans Court.*
- O. C. Old Code.* (Louisiana Civil Code of 1808.)
- O. G. Official Gazette, U. S. Patent Office, Washington, D. C.*
- O. Mal. & H.* O'Malley and Hardcastle's Election Cases.
- O. N. B.* Old Natura Brevium.
- O. Neal Neg. L.* O'Neal's Negro Law of South Carolina.
- O. S.* Old Series.
- O. St.* Ohio State Reports.
- O. & T.* Oyer and Terminer.
- Oct. Str.* Strange's Reports, English Courts, Octavo Edition.
- Off. Br.* Officina Brevium.
- Off. Ez.* Wentworth's Office of Executors.
- Off. Gaz. Pat. Off.* Official Gazette, U. S. Patent Office, Washington, D. C.
- Off. Min.* Officer's Reports, Minnesota.
- Ogd.* Ogden's Reports, Louisiana Annual.

- Ohio. Ohio Reports.
Ohio C. C. Ohio Circuit Court Reports.
Ohio L. J. Ohio Law Journal.
Ohio Leg. N. Ohio Legal News, Norwalk, Ohio.
Ohio N. P. Ohio Nisi Prius Reports.
Ohio Prob. Ohio Probate Court Reports.
Ohio R. Cond. Ohio Reports, Condensed.
Ohio St. Ohio State Reports.
Oke Mag. Syn. Oke's Magisterial Synopsis.
Okla. Oklahoma Territorial Reports.
Ol. Con. Oliver's Conveyancing.
Ol. Prec. Oliver's Precedents.
Olc. or Olc. Adm. Olcott's Admiralty Reports.
U. S. So. Dist. of N. Y.
Oldr. Oldright's Reports, Nova Scotia.
Oliph. Oliphant on Law of Horses.
Oliv. B. & L. Oliver, Beavan and Lefroy's Reports, English Railway and Canal Cases, vols. 5-7.
Oll. B. & Fitz. (New Zealand). Oliver, Bell and Fitzgerald's New Zealand Reports.
Oll. Bell & Fitz. Sup. Oliver, Bell and Fitzgerald (Supreme Ct. N. Z.).
Onsl. N. P. Onslow's Nisi Prius.
Ont. Ontario Reports.
Ont. App. Rep. Ontario Appeal Reports, Canada.
Ont. Fr. Ontario Practice Reports.
Op. Att.-Gen. (U. S.). Opinions of the Attorney-Generals, United States.
Op. Att.-Gen. N. Y. Opinions of the Attorney-Generals, New York (Stickle's Compilation).
Or. Oregon Reports.
Ord. Ord on Usury.
Ord. Amst. Ordinance of Amsterdam.
Ord. Ant. Ordinance of Antwerp.
Ord. Brib. Ordinance of Bribe.
Ord. Ch. Orders in Chancery.
Ord. Cla. Lord Clarendon's Orders.
Ord. Copenh. Ordinance of Copenhagen.
Ord. Ct. Orders of Court.
Ord. Flor. Ordinances of Florence.
Ord. Gen. Ordinances of Genoa.
Ord. Hamb. Ordinance of Hamburg.
Ord. Königs. Ordinance of Königsberg.
Ord. Leg. Ordinances of Leghorn.
Ord. de la Mer. Ordonnance de la Marine de Louis XIV.
Ord. Port. Ordinances of Portugal.
Ord. Prus. Ordinances of Prussia.
Ord. Rott. Ordinances of Rotterdam.
Ord. Swe. Ordinances of Sweden.
Ord. U. Ord on the Law of Usury.
Ord. Jud. Ins. Ordonnances on Judicial Aspects of Insanity.
Ordr. Med. Jur. Ordonnances' Medical Jurisprudence.
Oreg. Oregon's Reports.
Orf. M. L. Orfila's Medicina Legale.
Orf. Bridg. Orlando Bridgman's Reports, English Common Pleas.
Ork. T. R. Orleans Term Reports, vols. 1 and 2, Martin's Reports, Louisiana.
Orm. Ormond's Reports, Alabama, N. S.
Ort. R. L. Ortolan's History of Roman Law.
Otto. Otto's Reports, Supreme Court, U. S.
Ought. Oughton's Ord. Edicendum.
Out. Overbridge's Reports, Pennsylvania.
Over. Overton's Reports, Tennessee.
Ow. or Owen. Owen's Reports, English King's Bench and Common Pleas.
Owen (New South Wales). Owen's New South Wales Reports.
P. Easter Term.
P. 1891, or 1891 P. English Law Reports, Probate Division, 1891.
P. C. Privy Council. Prize Court. Probate Court.
P. C. Parliamentary Cases. Pleas of the Crown. Practice Cases. Prize Cases.
P. C. Precedents in Chancery. Procedure Civile.
P. C. Penal Code. Political Code.
P. C. Act. Probate Court Act.
P. C. App. Privy Council Appeals, English Law Reports.
P. C. C. Privy Council Cases.
P. C. L. J. Pacific Coast Law Journal, San Francisco.
P. C. R. Parker's Criminal Reports, New York.
P. C. Rep. Probate Court Reports, English.
P. D. English Law Reports, Probate Division.
P. Div. Probate Division, English Law Reports.
P. E. I. Rep. Prince Edward Island Reports (Haviland's).
P. F. S. P. F. Smith's Reports, Pennsylvania.
P. L. Pamphlet Laws. Public Laws. Poor Laws.
P. L. Com. Poor Law Commissioners.
P. L. J. Pennsylvania Law Journal.
P. L. J. Pittsburgh Legal Journal, Pa.
P. L. R. Pennsylvania Law Record, Philadelphia.
P. N. P. Pease's Nisi Prius Cases.
P. O. Cas. Perry's Oriental Cases, Bombay.
P. P. Parliamentary Papers.
P. A. P. Precedents of Private Acts of Parliament.
P. R. Pennsylvania Reports, by Penrose and Wms.
P. R. Parliamentary Reports.
P. R. Pyke's Reports, Canada.
P. R. C. P. Practical Register in Common Pleas.
P. R. Ch. Practical Register in Chancery.
P. R. U. C. Practice Reports, Upper Canada.
P. E. & D. Power, Rodwell and Dew's Election Cases, English.
P. S. R. Pennsylvania State Reports.
P. W. or P. Wms. Peere Williams's Reports, English.
P. & C. Prideaux and Cole's Reports, English Courts.
P. & K. Perry and Knapp's Election Cases.
P. & M. Philip and Mary; thus P. & M. signifies the first year of the reign of Philip & Mary.
P. & R. Pigott and Rodwell's Election Cases, English.
P. & W. Penrose and Watt's Pennsylvania Reports.
Pa. Pennsylvania State Reports.
Pa. Co. Ct. R. Pennsylvania County Court Reports.
Pa. Dist. R. Pennsylvania District Reports.
Pa. L. G. or Pa. Leg. Gaz. Legal Gazette Reports (Campbell's), Pennsylvania.
Pa. L. J. or Pa. Law Jour. Pennsylvania Law Journal, Philadelphia.
Pa. L. J. Rep. or Pa. Law Jour. Rep. Pennsylvania Law Journal Reports (Clark's Reports).
Pa. La. Rec. or Pa. Law Rec. Pennsylvania Law Record, Philadelphia.
Pa. St. Pennsylvania State Reports.
Pac. Coast L. J. Pacific Coast Law Journal, San Francisco.
Pac. Law Mag. Pacific Law Magazine, San Francisco.
Pac. Law Repr. Pacific Law Reporter, San Francisco.
Pac. Rep. Pacific Reporter, St. Paul.
Page Div. Page on Divorce.
Paig. Paige, or Paige C. A. Paige's Chancery Reports, New York.
Paige Cas. Dom. Rel. Paige's Cases in Domestic Relations.
Paige Cas. Part. Paige's Cases in Partnership.
Paine. Paine's Reports, U. S. Circ. Ct., 2d Circuit.
Pal. Ag. Paley on Agency.
Pal. Conv. Paley on Summary Convictions.
Palmer. Palmer's Reports, English King's Bench.
Palmer. Pr. Lord. Palmer's Practice in the House of Lords.
Palmer. (Vt.). Palmer's Vermont Reports.
Pamph. Pamphlets.
Papy. Papy's Reports, Florida.
Par. Parker's Reports, English Exchequer.
Par. Paragraph.
Par. W. C. Parish Will Case.
Par. & Fom. M. J. Paris and Fonblanque on Medical Jurisprudence.
Pard. Pardessus's Cours de Droit Commercial.
Pard. Lois Mar. Pardessus's Lois Maritimes.
Pard. Serv. Pardessus's Traites des Servitudes.
Parker. Parker's Reports, English Exchequer.
Park. Cr. Cas. or Park. Cr. Rep. Parker's Criminal Reports, New York.
Park Dow. Park on Dower.
Park Ins. Park on Insurance.
Park. Hist. Ch. Parker's History of Chancery.
Park. (N. H.). Parker's New Hampshire Reports.
Park. Rev. Cas. Parker's English Exchequer Reports (Revenue Cases).
Park. Pr. Ch. Parker's Practice in Chancery.
Park. Sh. Parker on Shipping and Insurance.
Parl. Cas. Parliamentary Cases. House of Lords.
Parl. Hist. Parliamentary History.
Parl. Reg. Parliamentary Register.
Pars. Bills & N. Parsons on Bills and Notes.
Pars. Cas. Parsons's Select Equity Cases, Pennsylvania.
Pars. Com. Parsons's Commentaries on American Law.
Pars. Con. Parsons on Contracts.
Pars. Costs. Parsons on Costs.
Pars. Dec. Parsons's Decisions, Massachusetts.
Pars. Eq. Cas. Parsons's Select Equity Cases, Pennsylvania.
Pars. Essays. Parsons's Essays on Legal Topics.
Pars. Ins. Parsons on Marine Insurance.
Pars. Law Bus. Parsons's Law of Business.
Pars. Mar. Ins. Parsons on Marine Insurance.
Pars. Mar. L. Parsons on Maritime Law.
Pars. Merc. L. Parsons on Mercantile Law.
Pars. Notes & B. Parsons on Notes and Bills.
Pars. Part. Parsons on Partnership.
Pars. Sh. & Adm. Parsons on Shipping and Admiralty.
Pars. Wills. Parsons on Wills.
Pas. Terminus Paschas. Easter Term.
Pasch. Paschal's Reports, Texas.
Pasch. Ann. Comst. Paschal's Annotated Constitution of the U. S.
Pat. App. Cas. Paton's Scotch Appeal Cases, English House of Lords. Craigie, Stewart and Paton's Reports.
Pat. Com. Paterson's Compendium of English and Scotch Law.
Pat. Dec. Patent Decisions.
Pat. H. L. S. See Pat. App. Cas.
Pat. Law Rev. Patent Law Review, Washington, D. C.
Pat. Off. Gaz. Official Gazette, U. S. Patent Office, Washington, D. C.
Pat. St. Ex. Paterson's Law of Stock Exchange.
Pat. & H. or Patton & H. Patton and Hean's Reports, Virginia.
Pat. & Mur. Paterson and Murray's Reports, New South Wales.
Pat. App. Cas. Paterson's Scotch Appeal Cases.
Pat. St. Ex. Paterson's Law of Stock Exchange.
Patr. El. Cas. Patrick's Election Cases, Upper Canada.
Paul. Par. Off. Paul's Parish Officer.
Pay. Munic. Rights. Payne on Municipal Rights.
P. D. Probate Division. Law Reports.
Peach. Mar. Sett. Peachey on Marriage Settlements.
Peak. Peak's Nisi Prius Cases, English Courts.
Peak. Add. Cas. Peak's Additional Cases, Nisi Prius, English.
Peak. Ev. Peaks on Evidence.
Peak. N. P. Cas. Peak's Nisi Prius Cases, English.
Pear. Pearson's Reports, Pennsylvania.
Pearce C. C. Pearce's Crown Cases, English.
Peck. (Ill.). Peck's Reports, Illinois Supreme Court (1-33 Illinois).
Peck or Peck (Tenn.). Peck's Reports, Tennessee.
Peck. El. Cas. Peckwell's Election Cases, English.
Peck. (Ill.). Peck's Reports, Illinois.
Peck Mun. L. Peck's Municipal Laws of Ohio.
Peck. Eng. El. Cas. Peckwell's English Election Cases.
Peere Wms. or Peere Williams. Peere Williams's Reports, English Unanous.
Pemb. J. & O. Pemberton's Judgments and Orders.
Penn. Pennington's Reports, New Jersey Law.
Penn. Pennsylvania State Reports.
Penn. Bla. Pennsylvania Blackstone, by John Reed.
Penn. Co. Ct. Rep. Pennsylvania County Court Reports.
Penn. Dist. Rep. Pennsylvania District Reports.
Penn. L. G. or Penn. Leg. Gaz. Pennsylvania Legal Gazette Reports (Campbell's).
Penn. L. J. or Penn. Law Jour. Pennsylvania Law Journal, Philadelphia.
Penn. L. J. R. or Penn. Law Jour. Rep. Pennsylvania Law Journal Reports (Clark's).
Penn. L. R. or Penn. Law Rec. Pennsylvania Law Record, Philadelphia.
Penn. Pr. Pennsylvania Practice, by Troubat and Haly.
Penn. R. Pennsylvania Reports.
Penn. St. Pennsylvania State Reports.
Penn. Pennington's Reports, New Jersey.
Penny. Pennypacker. Pennsylvania Supreme Court Reports.
Penr. & W. Penrose and Watt's Pennsylvania Reports.
Penrud. Anal. Penruddock's Analysis of the Criminal Law.
Peo. L. Adv. People's Legal Adviser, Utica, N. Y.
Per. Or. Cas. Perry's Oriental Cases, Bombay.
Per. & T. Perry on Trusts and Trustees.
Per. & Dav. Perry and Davison's Reports, English Queen's Bench.
Per. & K. El. Cas. Perry and Knapp's Election Cases, English.
Perk. Prof. Bk. Perkins's Profitable Book.
Perp. Pat. Perkins on Patents.
Perry. Sir Erskine Perry's Reports, in Morley's (East) Indian Digest; Perry's Oriental Cases.
Pet. Peters's Reports, U. S. Supreme Court.
Pet. Adm. Peters's Admiralty Decisions, U. S. Dist. of Pa.
Pet. Brooke. Petit Brooke or Brooke's New Cases, English King's Bench (Bellew's Cases temp. Hen. VIII.).
Pet. C. C. Peters's Reports, U. S. Circuit Court, 8d Circuit.
Peters. Peters's Reports, U. S. Supreme Court.
Peters Adm. Peters's Admiralty Decisions, U. S. Dist. of Pa.
Peters C. C. Peters's Reports, U. S. Circuit Court, 8d Circuit.
Petersd. Abr. Petersdorff's Abridgment.
Petersd. B. Petersdorff on the Law of Bail.
Petersd. L. of N. Petersdorff on the Law of Nations.
Petersd. Pr. Petersdorff's Practice.
Peth. Int. Petheram on Interrogatories.
Petit Br. Petit Brooke.
Ph. or Phil. Phillips's Reports, English Chancery.
Phalen. Phalen's Criminal Cases.
Phear W. Phear on Rights of Water.
Phila. Philadelphia Reports, Common Pleas of Philadelphia County.
Phill. Copyr. Phillips on Copyright.
Phill. Phillimore's Reports, English Ecclesiastical Courts.
Phill. Cr. L. Phillimore's Study of the Criminal Law.
Phill. Dom. Phillimore on the Law of Domicil.
Phill. Eccl. Phillimore on Ecclesiastical Law.
Phill. Eccl. Judg. Phillimore's Ecclesiastical Judgments.
Phill. El. Cas. Phillips's Election Cases.
Phill. Eq. Phillipp's Equity Reports, North Carolina.
Phill. Ev. Phillips on Evidence.
Phill. Ex. Phillimore on Evidence.
Phill. Fam. Cas. Phillips's Famous Cases in Circumstantial Evidence.
Phill. Ins. Phillips on Insurance.
Phill. Insan. Phillips on Insanity.
Phill. Int. Phillimore on International Law.
Phill. Jur. Phillimore on Jurisprudence.
Phill. Law (N. C.). Phillips's Law Reports, North Carolina.
Phill. Mech. Liens. Phillips on Mechanics' Liens.
Phill. Prin. Jur. Phillimore's Principles and Maxims of Jurisprudence.
Phill. Priv. L. Phillimore's Private Law among the Romans.
Phill. Rom. L. Phillimore's Study and History of the Roman Law.
Phill. St. Tr. Phillips's State Trials.
Phillim. See Phill.
Pick. Pickering's Reports, Massachusetts.
Pickle. Pickle's Reports, Tennessee.
Pierce R. R. Pierce on Railroads.
Pig. Rec. Pigott on Common Recoveries.
Pig. & R. Pigott and Rodwell's Registration Appellate Cases, English.
Pike. Pike's Reports, Arkansas.
Pin. Pinney's Reports, Wisconsin.
Pist. Piston's Reports, Mauritius.
Pit. Tr. Pitcairn's Ancient Criminal Trials, Scotland.
Pit. S. Pitman on Suretyship.
Pitt. L. J. or Pitts. Leg. Jour. Pittsburg Legal Journal, Pittsburg, Penn.
Pitt. Repts. Pittsburgh Reports, Pennsylvania Courts (reprinted from the Journal).
Pl. Placit. Generalia.
Pl. C. Placita Coronae (Pleas of the Crown).
Pl. Com. Plowden's Commentaries or Reports, English King's Bench.
Pl. U. Plowden on Usury.
Platt Cov. Platt on the Law of Covenants.
Platt Lease. Platt on Leases.
Plowd. or Plowd. Com. Plowden's Commentaries or Reports, English King's Bench.
Plowd. Crim. Com. Tr. Plowden's Crim. Com. Trials.
Pléb. Plébiscite.
Plff. Plaintiff.
Plum. Contr. Plumtre on Contracts.
Po. Ct. Police Court.
Pol. Pollexfen's Reports, English King's Bench.
Pol. Contr. Pollock on Contracts.

- Poll. Doc. Pollox on Production of Documents.
 Poll. Dig. Part. Pollock's Digest on the Law of Partnership.
 Poll. Lead. Cas. Pollock's Leading Cases.
 Poll. & Matit. Pollock & Matland's History of English Law.
 Poll. Part. Pollock on Partnership.
 Pals. Int. or Pals. Law of Nat. Polson on Law of Nations.
 Pom. Com. L. Pomeroy's Constitutional Law of the U. S.
 Pom. Contr. Pomeroy on Contracts.
 Pom. Mun. L. Pomeroy's Municipal Law.
 Poore Const. Poore's Federal and State Constitutions.
 Pope C. & E. Pope on Customs and Excise.
 Poph. Popham's Reports, English King's Bench.
 2 Poph. Cases at the end of Popham's Reports.
 Port. Porter's Reports, Alabama.
 Port. (Ind.). Porter's Reports, Indiana.
 Posey. Unreported Commissioner Cases, Texas.
 Post. Post's Reports, Michigan.
 Post (Mo.). Post's Reports, Missouri, vol. 64.
 Post. Dict. Postlethwaite's Commercial Dictionary.
 Poth. Conf. Pothier on Contracts.
 Poth. Cuv. Pothier's Œuvres.
 Poth. Obl. Pothier on Obligations.
 Poth. Pand. Pothier's Pandects.
 Poth. Part. Pothier on Partnership.
 Poth. Proc. Civ. Pothier de la Procédure Civile.
 Potter Corp. Potter on Corporations.
 Potter's Dwar. St. Potter's Dwarrior on Statutes.
 Potts L. D. Potts's Law Dictionary.
 Pow. Am. L. Powell's American Law.
 Apr. Fr. Powell's Appellate Proceedings.
 Pow. Con. Powell on Contracts.
 Pow. Conv. Powell on Conveyancing.
 Pow. Dev. Powell on Devises.
 Pow. Ev. Powell on Evidence.
 Pow. Mort. Powell on Mortgages.
 Pow. Power. Powell's Reports.
 Pow. Pr. Powell's Precedents in Conveyancing.
 Pow. R. & D. Power, Rodwell and Dew's Election Cases, English.
 Poynt. M. & D. Poynter on Marriage and Divorce.
 Pr. Ch. Precedents in Chancery (Finch's).
 Pr. Cl. Prerogative Court.
 Pr. Dec. Kentucky Decisions, by Sneed.
 Pr. Exch. Price's Exchequer Reports, English.
 Pr. Falc. President Falconer's Reports, Scotch.
 Pr. L. Private Law or Private Laws.
 Pr. Reg. B. C. Practical Register in the Bail Court.
 Pr. Reg. C. P. Practical Register in the Common Pleas.
 Pr. Reg. Ch. Practical Register in Chancery (Styles's).
 Pr. St. Private Statutes.
 Pr. & Div. Probate & Divorce.
 Pract. The Practitioner.
 Prat. Cas. Prater's Cases on Conflict of Laws.
 Prat. H. & W. Prater on the Law of Husband and Wife.
 Pratt B. S. Pratt on Beneficial Building Societies.
 Pratt C. W. Pratt on Contraband of War.
 Preb. Dig. Preble Digest, Patent Cases.
 Prec. Ch. Precedents in Chancery.
 Pref. Preface.
 Prel. Preliminary.
 Pres. Pr. Preston's Court.
 Pres. Abs. Preston on Abstracts.
 Pres. Conv. Preston on Conveyancing.
 Pres. Est. Preston on Estates.
 Pres. Leg. Preston on Legacies.
 Pres. Merg. Preston on Mergers.
 Pres. Shep. T. Preston's Sheppard's Touchstone.
 Price or Price Exch. Price's Reports, Exchequer, English.
 Price Liens. Price on Liens.
 Price P. P. Price's Notes of Points in Exchequer Practice.
 Price R. Est. Price on Acts relating to Real Estate (Pa.).
 Price & St. Price and Stuart Trade-mark Cases.
 Prick. (Id.). Prickett's Idaho Reports.
 Prid. Chu. Gui. Prideaux's Churchwarden's Guide.
 Prid. Prec. Prideaux's Precedents in Conveyancing.
 Prid. & C. Prideaux and Cole's Reports, English, New Sessions Cases, vol. 4.
 Prin. Principium. The beginning of a title or law.
 Prin. Dec. Kentucky Decisions, printed by Sneed.
 Prior Lim. Prior on Construction of Limitations.
 Pritch. Ad. Dig. Pritchard's Admiralty Digest.
 Pritch. M. & D. Pritchard on Marriage and Divorce.
 Priv. Lond. Customs or Privileges of London.
 Pro. L. Province Law.
 Pro. quer. Pro querens term. For the plaintiff.
 Prob. & Adm. Div. Probate and Admiralty Division, Law Reports.
 Prob. & Div. Probate and Divorce, Law Reports.
 Prob. & Matr. Probate and Matrimonial Cases.
 Proc. Ch. Proceedings in Chancery.
 Proc. Fr. Practice in France.
 Profit Corp. Profit on Corporations.
 Profit. Jury Tr. Profit on Jury Trials.
 Profit. Not. Profit on Notaries.
 Profit. Wills. Profit on Wills.
 Proud. Dom. Pub. Proudhon's Domaine Public.
 Proud. Land Dec. (U. S.). Proudfitt's United States Land Decisions.
 Puff. Puffendorf's Law of Nature and Nations.
 Pugm. Pugmley's Reports, New Brunswick.
 Pugs. & Bur. Pugsley and Burbridge's Reports, New Brunswick.
 Pull. Attor. Pulling on the Law of Attorneys.
 Pula. Pulfers's Reports, Maine.
 Pult. Pulton de Pace Regis.
 Purd. Dig. Pa. Purdon's Digest of Pennsylvania Laws.
 Purd. Dig. U. S. Purdon's Digest of United States Laws.
 Puter. Pl. Puterbaugh's Pleading.
 Pyke. Pyke's Reports, Lower Canada, King's Bench.
 Q. Question. Quorum.
 Q. Attach. Quoniam Attachamenta.
 Q. B. Court of Queen's Bench.
 Q. B. Queen's Bench Reports, Adolphus and Ellis's Reports, N. S., English.
 Q. B. English Law Reports, Queen's Bench Division, 1881.
 Q. B. Div. Queen's Bench Division, English Law Reports.
 Q. B. U. C. Queen's Bench Reports, Upper Canada.
 Q. C. Queen's Counsel.
 Q. L. R. Quebec Law Reports.
 Q. S. Quarter Sessions.
 Q. t. Quit tam.
 Q. v. Quod vide; Which see.
 Q. Vict. Statutes of Province of Quebec (Reign of Victoria).
 Q. War. Quo Warranto.
 Qu. cl. fr. Quare clausum fregit (q. v.).
 Qu. L. Jour. Quarterly Law Journal, Richmond, Va.
 Qu. L. Rev. Quarterly Law Review, Richmond, Va.
 Quebec L. Rep. Quebec Law Reports.
 Queens. L. J. Queensland Law Journal.
 Queens. L. R. Queensland Law Reports.
 Quin. Quincy's Reports, Massachusetts.
 Quinti. Quinto. Year Book, 5 Hen. V.
 Quo War. Quo Warranto.
 R. Resolved. Repealed. Revised. Revision.
 Rolls.
 R. King Richard; thus 1 R. III. signifies the first year of the reign of King Richard III.
 R. Rawle's Reports, S. C. of Pennsylvania.
 R. A. Regular Appeals. Registration Appeals.
 R. C. Rescriptum.
 R. C. Record Commission. Railway Cases.
 R. C. C. R. Revenue, Civil and Criminal Reporter, Calcutta.
 R. I. Rhode Island Reports.
 R. J. & P. J. Revenue, Judicial and Police Journal, Calcutta.
 R. L. Roman Law. Revised Laws.
 R. L. & S. Ridgway, Lapp and Schoales's Reports, Irish King's Bench.
 R. L. & W. Roberts, Learning and Wallis's County Court Reports, English.
 R. M. Charl. R. M. Charlton's Reports, Georgia.
 R. S. Revised Statutes.
 R. S. L. Reading on Statute Law.
 R. P. Cas. Real Property Cases, English.
 R. P. & W. (Pa.). (Rawle) Penrose and Watt's Pennsylvania Reports.
 R. R. & Can. Cas. Railway and Canal Cases, English.
 R. t. F. Reports tempore Finch, English Chancery.
 R. t. Hardw. Reports tempore Hardwicke, English King's Bench.
 R. t. Holt. Reports tempore Holt, English King's Bench.
 R. & B. Cas. Redfield and Bigelow's Leading Cases on Bills and Notes.
 R. & M. or R. & My. Russell and Mylne's Reports, English Chancery.
 R. & M. C. C. Ryan and Moody's Crown Cases Reserved, English.
 R. & M. N. P. Ryan and Moody's Nisi Prius Cases, English.
 R. & R. C. C. Russell and Ryan's Crown Cases Reserved, English.
 Raff. Pens. Man. Raff's Pension Manual.
 Railw. Cas. Railway Cases.
 Railw. & C. Cas. Railway and Canal Cases, English.
 Railw. & Corp. Law J. Railway and Corporation Law Journal.
 Ram A. Ram on Assets.
 Ram Cas. P. & E. Ram's Cases of Pleading and Evidence.
 Ram F. Ram on Facts.
 Ram Judgm. Ram on Science of Legal Judgment.
 Ram W. Ram on Exposition of Wills.
 Rand. Randolph's Reports, Virginia.
 Rand. (Kan.). Randolph's Reports, Kansas.
 Rand. (La.). Randolph's Reports, Louisiana Annual Reports, vols. 7-11.
 Rand. Perp. Randall on Perpetuities.
 Raney. Raney's Reports, Florida.
 Rang. Dec. Sparks Rangoon Decisions, British Burmah.
 Rank P. Rankin on Patents.
 Rast. Rastell's Entries and Statutes.
 Ratt. L. C. Rattigan's Leading Cases on Hindoo Law.
 Ratt. R. L. Rattigan's Roman Law.
 Rawle. Rawle's Reports, Pennsylvania.
 Rawle Const. Rawle on the Constitution.
 Rawle Cov. Rawle on Covenants for Title.
 Rawle Eq. Rawle's Equity in Pennsylvania.
 Ray Med. Jur. Ray's Medical Jurisprudence of Insanity.
 Ray Men. Path. Ray's Mental Pathology.
 Raym. or Raym. Ld. Raymond's Reports, English King's Bench.
 Raym. B. of Ex. Raymond on Bill of Exceptions.
 Raym. Ch. Dig. Raymond's Chancery Digest.
 Raym. Ent. Raymond's Book of Entries.
 Raym. T. T. Raymond's Reports, English King's Bench.
 Rayn. Rayner's Tithe Cases, Exchequer.
 Real Est. Rec. Real Estate Record, New York.
 Rec. Recorder.
 Rec. Com. Record Commission.
 Rec. Dec. Vaux's Recorder's Decisions, Philadelphia.
 Red. E. L. Reddie's Roman Law.
 Redes. Pl. Mitford's Chancery Pleading.
 Redf. Redfield's Surrogate Court Reports, N. Y.
 Redf. Am. Railw. Cas. Redfield's American Railway Cases.
 Redf. Bailm. Redfield on Carriers and Bailments.
 Redf. L. Cas. Wills. Redfield's Leading Cases on Wills.
 Redf. Pr. Redfield's Practice, New York.
 Redf. Railw. Redfield on Railways.
 Redf. R. Cas. or Redf. Railw. Cas. Redfield's American Railway Cases.
 Redf. Surr. Redfield's Surrogate Court Reports, N. Y.
 Redf. Wills. Redfield on Wills.
 Redf. & Big. L. Cas. Redfield and Bigelow's Leading Cases on Notes and Bills.
 Reding. Redington's Reports, Maine.
 Redm. Redman on Arbitrations and Awards.
 Red Fraud or Red Lead. Cas. Reed's Leading Cases in Law of Statute of Frauds.
 Reeve Des. Reeve on Descents.
 Reeve Dom. R. Reeve on Domestic Relations.
 Reeve Eng. L. or Reeve H. E. L. Reeve's History of the English Law.
 Reeve Sh. Reeve on the Law of Shipping and Navigation.
 Reg. The Daily Register, New York City.
 Reg. Brew. Register of Writs.
 Reg. Cas. Registration Cases.
 Reg. Deb. (Gales). Register of Debates in Congress, 1789-91 (Gales's).
 Reg. Deb. (G. & S.). Register of Debates in Congress, 1824-37 (Gales and Scatton's).
 Reg. Gen. Regule Generales.
 Reg. Jud. Registram Judiciale.
 Reg. Lib. Register Book.
 Reg. Maj. Books of Regiam Majestatem.
 Reg. Orig. Registrum Originale.
 Reg. Pl. Regula Placitandi.
 Rep. Repealed. Reports. Répertoire.
 Rep. Coke's Reports, English King's Bench.
 Rep. The Reporter, Boston, Mass.
 Rep. (N. Y.) or Rep. (Wash.). The Reporter, Washington and New York.
 Rep. Cas. Madr. Reports of Cases, Dewanny Adawlut, Madras.
 Rep. Cas. Pr. Reports of Cases of Practice (Cooke's).
 Rep. Ch. Reports in Chancery.
 Rep. Ch. Pr. Reports on the Chancery Practice.
 Rep. Com. Cas. Reports of Commercial Cases, Bengal.
 Rep. Const. Reports of the Constitutional Court of South Carolina.
 Rep. Cr. L. Com. Reports of Criminal Law Commissioners.
 Rep. de Jur. Répertoire de Jurisprudence, Paris.
 Rep. de Jur. Com. Répertoire de Jurisprudence Commerciale, Paris.
 Rep. du Not. Répertoire du Notariat, Paris.
 Rep. Ec. C. C. Répétitions Ecrites sur le Code Civil.
 Rep. Eq. Guilbert's Reports in Equity, English.
 Rep. in Ch. Reports in Chancery, English.
 Rep. t. Q. A. Reports tempore Queen Anne (11 Modern).
 Rep. Sel. Cas. in Ch. Kelynge's (W.) Reports, English Chancery.
 Rep. t. Finch. Reports tempore Finch, English Chancery.
 Rep. t. Hard. Reports tempore Hardwicke, English King's Bench.
 Rep. t. Holt. Reports tempore Holt, English King's Bench.
 Rep. t. O. Br. Reports temp. O. Bridgman, 1660-67. C. P.
 Rep. t. Talb. Reports tempore Talbot, English Chancery.
 Rep. t. Coke's Reports, English King's Bench.
 Repr. The Reporter, Boston, Mass.
 Res. Cas. Reserved Cases.
 Ret. Brew. Retorna Brevium.
 Rettie. Rettie's Scotch Court of Session Cases (4th Series).
 Rev. Reversed. Revised. Revenue.
 Rev. Cas. Revenue Cases.
 Rev. Crit. La Révue Critique, Montreal.
 Rev. Crit. de Leg. Révue Critique de Legislation, Paris.
 Rev. de Leg. Révue de Legislation, Montreal.
 Rev. Dr. Int. Révue de Droit International, Paris.
 Rev. Dr. Leg. Révue de Droit Legislation, Paris.
 Rev. Leg. La Révue Légale, Sorel, Quebec.
 Rev. Stat. Revised Statutes.
 Reyn. Reynold's Reports, Mississippi.
 Reyn. Steph. Reynolds's Stephens on Evidence.
 Rho. L. Rhodian Law.
 Rice. Rice's Law Reports, South Carolina.
 Rice Ch. Rice's Chancery Reports, South Carolina.
 Rice Dig. Pat. Rice's Digest of Patent Office Decisions.
 Rich. Richardson's Law Reports, South Carolina.
 Rich. (N. H.). Richardson's Reports, New Hampshire Reports, vols. 8-5.
 Rich. Cas. Ch. Richardson's Cases in Chancery South Carolina.
 Rich. Ch. or Rich. Eg. Richardson's Chancery Reports, South Carolina.
 Rich. N. S. Richardson's Reports, New Series, South Carolina.
 Rich. Pr. C. P. Richardson's Practice Common Pleas.
 Rich. Pr. K. B. Richardson's Practice in the King's Bench.
 Rich. P. R. C. P. Richardson's Practical Register, Common Pleas.
 Rich. & Hook. Richardson & Hook's American Street Railway Decisions.
 Rich. & W. Richardson and Woodbury's Reports, Massachusetts, vol. 2.
 Ridg. Ridgway's Reports, English Chancery and King's Bench.
 Ridg. App. Ridgway's Appeal Cases, Ireland.
 Ridg. L. & S. Ridgway, Lapp and Schoales's Reports (Irish Term Reports).
 Ridg. P. C. Ridgway's Appeal Cases, Ireland.
 Ridg. St. Tr. Ridgway's State Trials, Ireland.
 Riley. Riley's Law Reports, South Carolina.
 Riley Ch. or Riley Eq. Riley's Chancery Reports, South Carolina.
 Riv. Ann. Reg. Rivington's Annual Register.

ABBREVIATION

- Rob. Robinson's Reports, English House of Lords, Scotch Appeals.
 Rob. (Cal.). Robinson's Reports, California.
 Rob. (Hawaii). Robinson's Hawaiian Reports.
 Rob. (La.). Robinson's Reports, Louisiana.
 Rob. (La. Ann.). Robinson's Reports, Louisiana Annual, vols. 1-4.
 Rob. (Mo.). Robert's Reports, Missouri.
 Rob. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24-30.
 Rob. (Nev.). Robinson's Reports, Nevada Reports, vol. 1.
 Rob. (Va.). Robinson's Reports, Virginia.
 Rob. Adm. or Rob. Chr. Chr. Robinson's Reports, English Admiralty.
 Rob. Adm. & Fr. Roberts on Admiralty and Prize.
 Rob. App. Robinson's Scotch Appeals, English House of Lords.
 Rob. Chr. Adm. Chr. Robinson's Reports, English Admiralty.
 Rob. Conscr. Cas. Robert's Conscription Cases, Texas.
 Rob. Ecc. Robertson's Ecclesiastical Reports, English.
 Rob. Ent. Robinson's Entries.
 Rob. Eq. Robert's Principles of Equity.
 Rob. Fr. Roberts on Frauds.
 Rob. Fr. Conv. Roberts on Fraudulent Conveyances.
 Rob. Gavell. Robinson on Gavalkind.
 Rob. Jr. or Rob. Wm. Wm. Robinson's Reports, English Admiralty.
 Rob. Jus. Robinson's Justice of the Peace.
 Rob. Mar. (N. Y.). Robertson & Jacob's New York Marine Court Reports.
 Rob. Pr. Robinson's Practice.
 Rob. S. L. Robertson's Reports, Sandwich Islands.
 Rob. Sc. App. Robinson's Scotch Appeals, English House of Lords.
 Rob. St. Fr. Roberts on the Statute of Frauds.
 Rob. U. C. Robinson's Reports, Upper Canada.
 Rob. Wm. Adm. Wm. Robinson's Reports, English Admiralty.
 Rob. Wills. Roberts on Wills.
 Rob. & J. Robert and Jackson's Reports, Texas Reports, vols. 25-27.
 Robb Pat. Cas. Robb's Patent Cases.
 Robert. Robertson's Scotch Appeals, English House of Lords.
 Robt. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24-30.
 Roc. Ins. Roccos on Insurance.
 Roc. Mar. L. Roccos on Maritime Law.
 Roc. & H. Bank. Roche and Hazlett on Bankruptcy.
 Rockw. Sp. & Mex. L. Rockwell's Spanish and Mexican Law.
 Rodm. (Ky.). Rodman's Kentucky Reports, vols. 7-22.
 Roelk. Man. Roelker's Manual for Notaries and Bankers.
 Rog. Ecc. Rogers's Ecclesiastical Law.
 Rog. Rec. Rogers City Hall Records, New York.
 Roll. or Rolle. Rolle's Reports, English King's Bench.
 Rolle Abr. Rolle's Abridgment.
 Rolls Ct. Rep. Rolls Court Reports, English.
 Rom. Romilly's Notes of Cases, English Chancery.
 Rom. Cr. L. Romilly's Criminal Law.
 Root. Root's Reports, Connecticut.
 Rop. H. & W. Roper on Husband and Wife.
 Rog. Leg. Roper on Legacies.
 Rop. Prop. Roper on Property.
 Rop. Rev. Roper on Revocation of Wills.
 Rorer Int. St. L. Rorer on Inter-State Law.
 Rorer Jud. Sales. Rorer on Judicial Sales.
 Rosc. Bills. Roscoe on Bills and Notes.
 Rosc. Civ. Ev. Roscoe on Civil Evidence.
 Rosc. Cr. Ev. Roscoe on Criminal Evidence.
 Rosc. Jur. Roscoe's Jurist, London.
 Rosc. N. P. Roscoe on Nisi Prius Evidence.
 Rosc. Pl. Roscoe on Pleading.
 Rosc. R. Ac. Roscoe on Real Actions.
 Rosc. St. D. Roscoe on Stamp Duties.
 Rose. Rose's Reports, English Bankruptcy.
 Rose Land. Cas. Rose's Leading Cases on Commercial Law.
 Ross V. & P. Ross on Vendors and Purchasers.
 Rot. Chart. Rotulus Chartarum.
 Rot. Cur. Reg. Rotuli Curie Regie.
 Rot. Parl. Rotulus Parliamentarie.
 House Cop. Rouse's Copyhold Enfranchisement Manual.
 Rouse Pr. Mort. Rouse on Precedents of Mortgages.
 Rowe. Rowe's Reports, English Parliamentary and Military Cases.
 Rowe Sci. Jus. Rowe's Scintilla Juris.
 Rowell. Rowell's Reports, Vermont.
 Rowell. Rowell's Contested Election Cases, U. S. House of Representatives, 1893-1891.
 Royle Stock Sh. Royle on the Law of Stock Shares, etc.
 Rub. Law Repts. Rent Law Reports, India.
 Rub. Rubric.
 Ruff. Ruffin's Reports, North Carolina (vol. 1, Hawk's Reports).
 Ruffh. or Ruffh. St. Ruffhead's Statutes-at-Large of England.
 Russ. Russell's Reports, Iowa.
 Russ. Stat. Rummington's Statutes-at-Large of England.
 Russ. Rushworth's Historical Collection.
 Russ. Russell's Reports, English Chancery.
 Russ. Arb. Russell on Arbitrators.
 Russ. Cr. Russell on Crimes.
 Russ. Elec. Cas. Russell's Election Cases, Nova Scotia.
 Russ. & Ches. Russell and Chesley's Reports, Nova Scotia.
 Russ. & Ches. Eq. Russell and Chesley's Equity Reports, Nova Scotia.
 Russ. & Geld. Russell and Geldert's Reports, Nova Scotia.
 Russ. & M. Russell and Mylne's Reports, English Chancery.
 Russ. & P. Russell and Ryan's Crown Cases Reserved, English.
 Rutger Cas. Rutger-Waddington Case, New York City, 1784 (First of New York Reports).
 Ruth. Inst. or Ruth. Nat. L. Rutherford's Institutes of Natural Law.
 Ry. Cas. Railway Cases, Reports of.
 Ry. & P. Rymer's Foedera, Conventiones, etc.
 Ry. & M. C. C. Ryan and Moody's Crown Cases Reserved, English.
 Ry. & M. N. P. Ryan and Moody's Nisi Prius Reports, English.
 S. Section.
 S. Shaw and Dunlop's Reports, Scotch Court of Session (1st Series).
 S. App. Shaw's Appeal Cases, Scotland.
 S. A. L. R. South Australian Law Reports.
 S. B. Upper Bench.
 S. C. Same Case. Senatus-Consulti. Session Cases. Superior Court. Supreme Court.
 S. C. South Carolina Reports.
 S. C. C. Select Chancery Cases.
 S. C. E. Select Cases relating to Evidence.
 S. C. Rep. Supreme Court Reports.
 S. D. A. or S. L. D. Sudder Dewanny Adawlut Reports, India.
 S. D. S. South Dakota Reports.
 S. E. Rep. Southeastern Reporter.
 S. F. A. Sudder Foujdaree Adawlut Reports, India.
 S. J. Solicitors' Journal.
 S. Just. Shaw's Justiciary Cases, Scotch.
 S. L. Session Law. Solicitor at Law. Statute Law.
 S. L. C. App. Stuart's Lower Canada Appeal Cases.
 S. L. Ev. Select Laws relating to Evidence.
 S. L. J. Scottish Law Journal, Edinburgh.
 S. L. E. Southern Law Review, St. Louis.
 S. L. E. Scottish Law Reporter, Edinburgh.
 S. P. Same Point. Same Principle.
 S. S. Synopsis Series of U. S. Treasury Decisions.
 S. S. C. Sanford's Reports, New York City Superior Court Reports, vols. 5-7.
 S. T. Teinde. Shaw's Teinde Cases, Scotch Courts.
 S. V. A. R. Stuart's Vice-Admiralty Reports, Lower Canada.
 S. W. L. J. Southwestern Law Journal, Nashville, Tenn.
 S. W. Rep. Southwestern Reporter.
 S. & B. Smith and Baitly's Reports, Irish King's Bench.
 S. & D. Shaw and Dunlop's Scotch Court of Session (1st Series).
 S. & L. Schoales and Lefroy's Reports, Irish Chancery.
 S. & M. or S. & M. L. Shaw and Maclean's Appeal Cases, English House of Lords.
 S. & M. or S. & Mar. Smedes and Marshall's Reports, Mississippi Court Reports, vols. 9-22.
 S. & M. Ch. or S. & Mar. Ch. Smedes and Marshall's Chancery Reports, Mississippi.
 S. & R. Sergeant and Rawle's Reports, Pennsylvania.
 S. & S. Simon and Stuart's Reports, English Chancery.
 S. & Sc. Sausse and Scully's Reports, Irish Chancery.
 S. & Sm. Searle and Smith's Reports, English Probate and Divorce Cases.
 S. & T. Swaby and Tristram's Reports, English Probate and Divorce Cases.
 Salk. Salkeld's Reports, English Courts.
 Salm. Abr. Salmon's Abridgment.
 San Fr. L. J. San Francisco Law Journal, California.
 San. U. Sanders on Uses and Trusts.
 Sand. Eq. Sand's Suit in Equity.
 Sand. Essays. Sanders's Essays.
 Sand. Inst. or Sand. Jus. Sandar's Institutes of Justinian.
 Sand. U. & T. Sanders on Uses and Trusts.
 Sandf. Sandford's Reports, New York City Superior Court Reports, vols. 2-7.
 Sandf. Ch. Sandford's Chancery Reports, New York.
 Sandf. Ent. Sandford on Entails.
 Sandf. St. Pap. Sandier's State Papers.
 Sanf. (Ala.). Sanford's Reports, Alabama.
 Sant. de Assec. Santerna, de Assecuracionibus.
 Sar. Ch. Sen. Saratoga Chancery Sentinel.
 Sau. & Sc. Sausse and Scully's Reports, Irish Chancery.
 Saund. Saunders's Reports, English King's Bench.
 Saund. Bank. Pr. Saunders's Bankrupt Practice.
 Saund. Neg. Saunders on the Law of Negligence.
 Saund. Pl. Saunders on Civil Pleading.
 Saund. & C. Saunders and Cole's Reports, English Bail Court.
 Sausse & Sc. Sausse and Scully's Reports, Irish Chancery.
 Sav. Savile's Reports, English Common Pleas.
 Sav. Dr. Rom. Savigny, Droit Romain.
 Sav. His. Rom. L. Savigny's History of the Roman Law.
 Sav. Obl. Savigny on Obligations.
 Sav. Priv. Int. L. Savigny on Private International Law.
 Sav. Priv. Trial of the Savannah Privateers.
 Sav. Sawyer's Reports, U. S. Circuit Court, 9th Circuit.
 Sax. or Saxt. Ch. Saxton's Chancery Reports, New Jersey Equity Reports, vol. 1.
 Say. Sayer's Reports, English King's Bench.
 Say. Costa. Sayer on Costa.
 Say. Pr. Say's Practice in Texas.
 Sc. Scott's Reports, English Common Pleas.
 Sc. Scitcet. That is to say.
 Sc. Jur. Scottish Jurist, Edinburgh.
 Sc. L. J. Scottish Law Journal, Glasgow.
 Sc. L. M. Scottish Law Magazine, Edinburgh.
 Sc. L. R. Scottish Law Reporter, Edinburgh.
 Sc. Sess. Cas. Scotch Court of Session Cases.
 Scac. Scaccaria Curia, Court of Exchequer.
 Seam. Scammon's Reports, Illinois.
 Scan. Mag. Scandium Magnatum.
 Sch. & Lef. Schoales and Lefroy's Reports, Irish Chancery.
 Schalck (Jam.). Schalck's Jamaica Reports.
 Scheiff. Pr. Scheiffer's Practice.
 Schm. C. L. Schmidt's Civil Law of Spain and Mexico.
 Schm. L. J. Schmidt's Law Journal, New Orleans.
 Schoul. Bailm. Schouler on Bailments, including Carriers.
 Schoul. Dom. Rel. Schouler on Domestic Relations.
 Schoul. Per. Pr. Schouler on Personal Property.
 Schuyll Leg. Rec. Schuyllkill Legal Record, Pottsville, Pa.
 Sci. fa. Soire facias.
 Sci. fa. ad dis. deb. Soire facias ad disprobandum debitum.
 Scit. Scitcet. That is to say.
 Sco. Scott's Reports, English Common Pleas.
 Sco. Costs. Scott on Costs.
 Sco. Int. Scott's Intestate Laws.
 Sco. N. R. Scott's New Reports, English Common Pleas.
 Sco. Nat. Scott on Naturalization of Aliens.
 Sco. & J. Tel. Scott and Jarnigan on the Law of Telegraphs.
 Scot. Scotland. Scottish.
 Scot. Jur. Scottish Jurist, Edinburgh.
 Scot. L. J. Scottish Law Journal, Glasgow.
 Scot. L. M. Scottish Law Magazine, Edinburgh.
 Scot. L. R. Scottish Law Reporter, Edinburgh.
 Scot. L. F. Scranton Law Times, Penn. vlvian.
 Scrat. Life Ass. Scratchley on Life Assurance.
 Scrib. Dow. Scribner on Dower.
 Scriv. Cop. Scriven on Copyholds.
 Seab. V. & P. Seaborne on Vendors and Purchasers.
 Seale & Sm. Seale and Smith's Reports, English Probate and Divorce.
 Seat. F. Ch. Seaton's Forms in Chancery.
 Seb. T. M. Sebastian on Trademarks.
 Sec. Section.
 Sec. leg. Secundum legem, According to law.
 Sec. reg. Secundum regem, According to rule.
 Sedg. L. Cas. Sedgwick's Leading Cases on the Measure of Damages.
 Sedg. Meas. D. Sedgwick on the Measure of Damages.
 Sedg. St. L. Sedgwick on Statutory and Constitutional Law.
 Seign. Seigniorial Reports, Quebec.
 Sel. Cas. or Sel. Cas. Ch. Select Cases in Chancery, English.
 Sel. Cas. A. S. Law. Select Cases in Anglo-Saxon Law.
 Sel. Cas. D. A. Select Cases, Sudder Dewanny Adawlut, India.
 Sel. Cas. Ev. Select Cases in Evidence, English.
 Sel. Cas. N. F. Select Cases, Newfoundland Courts.
 Sel. Cas. N. W. P. Selected Cases, Northwest Provinces, India.
 Sel. Cas. N. Y. Select Cases, Yates et al., New York.
 Sel. Cas. with Opin. Select Cases with Opinions.
 Sel. Ch. Cas. Select Cases in Chancery, English.
 Sel. Dec. Bomb. Selected Decisions, Sudder Dewanny Adawlut, Bombay.
 Sel. Dec. Mad. Selected Decrees, Sudder Adawlut, Madras.
 Sel. L. Cas. Select Law Cases.
 Seld. or Seld. (N. Y.). Selden's Reports, New York Ct. of Appeals Reports, vols. 5-10.
 Seld. Notes. Selden's Notes of Cases, New York Court of Appeals.
 Self. Tr. Selfridge's Trial.
 Sell. Pr. Sellon's Practice in the King's Bench.
 Selw. N. P. Selwin's Nisi Prius.
 Selw. & Barn. The first part of Barnwell and Alderson's Reports.
 Serg. Attach. Sergeant on Attachment Law, Pa.
 Serg. Const. L. Sergeant on Constitutional Law.
 Serg. Land. L. Sergeant on the Land Laws of Pennsylvania.
 Serg. Mech. L. L. Sergeant on Mechanics' Lien Law.
 Serg. & Rawle. Sergeant and Rawle's Reports, Pennsylvania.
 Sess. Cas. Session Cases, English King's Bench.
 Sess. Cas. Sc. Session Cases, Scotch Court of Session.
 Sess. Pap. C. C. C. Session Papers, Central Criminal Court.
 Sess. Pap. O. B. Session Papers, Old Bailey.
 Set. Dec. or Set. F. Dec. Seton's Forms of Equity Decrees.
 Sett. Cas. Settlement Cases.
 Sev. Sevestre's Reports, Calcutta.
 Sev. S. D. A. Sevestre's Sudder Dewanny Adawlut Reports, Bengal.
 Sh. Shaw's Reports, Scotch Court of Session (1st Series).
 Sh. App. Shaw's Appeal Cases, English House of Lords, Appeals from Scotland.
 Sh. Dig. Shaw's Digest of Decisions, Scotland.
 Sh. Jus. Shaw's Justiciary Cases, Scotland.
 Sh. W. & C. Shaw, Wilson and Courtney's Reports, English House of Lords, Scotch Appeals (Wilson and Shaw's Reports).
 Sh. & Dunl. Shaw and Dunlop's Reports, First Series, Scotch Court of Session.
 Sh. & Mac. Shaw and Maclean's Appeal Cases, English House of Lords.
 Shand. Shand's Reports, South Carolina.
 Shand Pr. Shand's Practice, Court of Session.
 Sharp. Sharpstein's Digest of Life and Accident Insurance Cases.
 Sharn. Bia. Com. Sharnwood's Blackstone's Commentaries.
 Sharn. Comm. Law. Sharnwood on Commercial Law.
 Sharn. Leg. Eth. Sharnwood's Legal Ethics.
 Sharn. Law Lec. Sharnwood's Law Lectures.
 Sharn. & B. R. P. Cas. Sharnwood & Budd Real Property Cases.
 Shaw. Shaw's Reports, First Series, Scotch Court of Session.

- Shaw (Vt.). Shaw's Reports, Vermont.
Shaw App. Shaw's Appeal Cases, English House of Lords, Appeals from Scotland.
Shaw Dig. Shaw's Digest of Decisions, Scotch Courts.
Shaw Jus. Shaw's Justiciary Cases, Scotch Justiciary Courts.
Shaw, W. & C. Shaw, Wilson and Courtney's Reports, English House of Lords, Scotch Appeals (Wilson and Shaw's Reports).
Shaw & Dunl. Shaw and Dunlop's Reports, First Series, Scotch Court of Session.
Shaw & MacL. Shaw and Maclean's Scotch Appeal Cases, English House of Lords.
Shearm. & Red. Neg. Shearman and Redfield on the Law of Negligence.
Sheld. Sheldon's Reports, Superior Court of Buffalo, N. Y.
Shelf. Copy. Shelford on Copyholds.
Shelf. J. S. Co. Shelford on Joint Stock Companies.
Shelf. Lun. Shelford on Lunacy.
Shelf. M. & D. Shelford on Marriage and Divorce.
Shelf. Mort. Shelford on Mortmain.
Shelf. Railw. Shelford on Railways.
Shelf. R. Pr. Shelford's Real Property Statutes.
Shep. Shepherd's Reports, Alabama.
Shep. Sel. Cas. Shepherd's Select Cases, Alabama.
Shep. Touch. Sheppard's Touchstone.
Shepl. Shepley's Reports, Maine.
Shepp. Abr. Sheppard's Abridgment.
Shepp. Act. Sheppard's Action upon the Case.
Shepp. Cas. Sheppard's Cases on Slander.
Shepp. Touch. Sheppard's Touchstone.
Sher. Ct. Rep. Sheriff Court Reports, Scotland.
Ship. Gaz. Shipping Gazette, London.
Shipp. Shipp's Reports, North Carolina.
Shir. Shirley's Reports, New Hampshire.
Shir. L. C. Shirley's Leading Crown Cases.
Shortt Copy. Shortt on Copyrights.
Show. Shower's Reports, English King's Bench.
Show. P. C. Shower's Parliamentary Cases.
Sick. Sickle's Reports, N. Y. Court of Appeals.
Sick. Min. Laws & D. Sickle's Mining Laws and Decisions.
Sid. Siderfin's Reports, English King's Bench.
Sid. Gov. Sidney on Government.
Sieye. Sieye Traité sur l'Adultère.
Silvern. N. Y. Silvernall's New York Court of Appeals.
Silvern. N. Y. Sup. Ct. Silvernall's New York Supreme Court.
Sim. Simon's Reports, English Chancery.
Sim. Dig. Simond's Digest of Patent Office Decisions.
Sim. Int. Simon on the Law of Interpleader.
Sim. N. S. Simon's Reports, New Series, English Chancery.
Sim. Pat. L. Simond's Manual of Patent Law.
Sim. Pr. Ct. M. Simon's Practice of Courts Martial.
Sim. R. A. Simon's Law relating to Railway Accidents.
Sim. & Stu. Simon and Stuart's English Chancery Reports.
Sinclair. Sinclair MS. Scotch Court of Session.
Six Circ. Cas. Cases on the Six Circuits, Irish N. P.
Skene Verb. Sign. Skene's De Verborum Significatione.
Skillm. Skillman's New York Police Reports.
Skin. Skinner's Reports, Missouri.
Skinn. Skinner's Reports, English King's Bench.
Slade. Slade Reports, Vermont.
Sloan Leg. Reg. Sloan's Legal Register, New York.
Sm. Smith's Reports, English King's Bench.
Sm. (E. D.). E. D. Smith's Reports, New York Common Pleas.
Sm. (Ind.). Smith's Reports, Indiana.
Sm. (K. B.). Smith's Reports, English King's Bench.
Sm. (Me.). Smith's Reports, Maine.
Sm. (N. H.). Smith's Reports, New Hampshire.
Sm. (N. Y.). Smith's Reports, New York Court of Appeals Reports, vols. 15-27.
Sm. (Pa.) or Sm. (P. F.). Smith's Reports, Pennsylvania State Reports, vols. 51-81.
Sm. (Wis.). Smith's Reports, Wisconsin.
Sm. Act. Smith's Actions at Law.
Sm. C. G. M. Smith's Circuit Courts-Martial Reports, Maine.
Sm. Ch. Pr. Smith's Chancery Practice.
Sm. Cont. Smith on Contracts.
Sm. E. D. E. D. Smith's Reports, New York Common Pleas.
Sm. Eng. Smith's Reports, English King's Bench.
Sm. Eq. Smith's Manual of Equity.
Sm. Ex. Int. Smith on Executive Interest.
Sm. For. Med. Smith's Forensic Medicine.
Sm. Forms. Smith's Forms of Procedure.
Sm. L. C. Smith's Leading Cases.
Sm. L. C. Comm. L. Smith's Leading Cases on Commercial Law.
Sm. L. J. Smith's Law Journal.
Sm. L. & T. Smith on Landlord and Tenant.
Sm. Law of Prop. Smith on Real and Personal Property.
Sm. Lead. Cas. Smith's Leading Cases.
Sm. Mast. & S. Smith on Master and Servant.
Sm. Merc. L. Smith's Mercantile Law.
Sm. Pat. Smith on Patents.
Sm. Prob. L. Smith's Probate Law and Practice.
Sm. Real & P. Pr. Smith on Real and Personal Property.
Sm. Rec. Smith's Law of Receivers.
Sm. Repar. Smith's Law of Reparation.
Sm. Stat. L. Smith's Statutory and Constitutional Law.
Sm. & B. Railw. Cas. Smith and Bates's Railway Cases, American Courts.
Sm. & Bat. Smith and Batty's Reports, Irish King's Bench.
Sm. & G. Smale and Giffard's Reports, English Chancery.
Sm. & M. Smedes and Marshall's Reports, Mississippi Reports, vols. 9-22.
Sm. & M. Ch. Smedes and Marshall's Chancery Reports, Mississippi.
Sm. & S. Dig. Vict. Smith & Skinner's Digest of Victorian Reports.
Sm. & Sod. L. & T. Smith and Soden on Landlord and Tenant.
Smale & Giff. Smale and Giffard's Reports, English Chancery.
Smedes & M. Smedes and Marshall's Reports, Mississippi Reports, vols. 9-22.
Smedes & M. Ch. Smedes and Marshall's Chancery Reports, Mississippi.
Smith. See Sm.
Smout. Notes of cases in Smout's Collection of Orders, Calcutta.
Smy. Smythe's Reports, Irish Common Pleas and Exchequer.
Sn. or Sneed. Sneed's Reports, Tennessee.
Sneed Dec. or Sneed Ky. Sneed's Kentucky Decisions.
Snell Eq. Snell's Principles of Equity.
Snow Cas. Int. L. Snow's Cases on International Law.
Snyder Rel. Corp. Snyder on Religious Corporations.
So. Austr. L. R. South Australian Law Reports.
So. Car. South Carolina Reports.
So. Car. Const. South Carolina Constitutional Reports.
So. Car. L. J. South Carolina Law Journal, Columbia.
So. L. J. Southern Law Journal and Reporter, Nashville, Tenn.
So. L. E. Southern Law Review, Nashville, Tenn.
So. L. R. N. S. Southern Law Review, New Series, St. Louis, Mo.
So. L. T. Southern Law Times.
So. Rep. Southern Reporter.
So. West. L. J. Southwestern Law Journal, Nashville, Tenn.
Sol. Gen. Solicitor General.
Sol. J. Solicitor's Journal, London.
Sol. J. & R. Solicitor's Journal and Reporter, London.
South. Southard's Reports, New Jersey Law.
South. L. J. & Rep. Southern Law Journal and Reporter, Nashville, Tenn.
South. L. Rev. Southern Law Review, Nashville, Tenn.
South. L. Rev. N. S. Southern Law Review, New Series, St. Louis, Mo.
Sp. A. Special Appeal.
Sp. Laws. Sp. Laws, by Montesquieu.
Sp. T. Special Term.
Spear Extr. Spear's Law of Extradition.
Spear. Spear's Reports, South Carolina.
Spear Ch. or Spear Eq. Spear's Chancery Reports, South Carolina.
Spel. Spelman's Glossary.
Spel. Feud. Spelman on Feuds.
Spenc. Spencer's Reports, New Jersey Law.
Spenc. (Minn.). Spencer's Reports, Minnesota.
Spence Eq. Jur. Spence's Equitable Jurisdiction.
Spence Or. L. Spence's Origin of Laws.
Spens Sel. Cas. Spens's Select Cases, Bombay.
Spink. Spink's Reports, English Admiralty and Ecclesiastical.
Spink P. C. Spink's Prize Cases, English.
Spoon. Spooner's Reports, Wisconsin.
Spott. Spottiswoode's Reports, Scotch Court of Session.
Spott. C. L. Rep. Spottiswoode's Common Law Reports.
Spott. Eq. Rep. Spottiswoode's English Equity Reports.
Spott. St. Spottiswoode's Styles, Scotland.
Spr. Sprague's Decisions, U. S. Dist. Court, Massachusetts.
St. State. Statutes at Large.
St. Story's Reports, U. S. Circuit Court, 1st Circuit.
St. Stair's Reports, Scotch Court of Session.
St. Abm. Statham's Abridgment.
St. Armand. St. Armand on the Legislative Power of England.
St. Cas. Stillingfleet's Ecclesiastical Cases, English.
St. Ch. Cas. Star Chamber Cases.
St. Clem. St. Clement's Church Case, Philadelphia.
St. Eco. Cas. Stillingfleet's Ecclesiastical Cases, English.
St. Inst. Stair's Institutes of the Law of Scotland.
St. Marks. St. Mark's Church Case, Philadelphia.
St. P. State Papers.
St. Rep. State Reports.
St. Tr. State Trials.
Stair. Stair's Reports, Scotch Court of Session.
Stair Inst. Stair's Institutes of the Laws of Scotland.
Stair Pr. Stair's Principles of the Laws of Scotland.
Stant. Stanton's Reports, Ohio.
Star Ch. Cas. Star Chamber Cases.
Star Cr. Cr. Starke on Criminal Law.
Star Cr. Pl. Starke on Criminal Pleading.
Starke. Starke on Evidence.
Starke Jury Tr. Starke on Trial by Jury.
Starke. N. P. Starke's Reports, English Nisi Prius.
Starke. Slan. Starke on Slander and Libel.
Starke. Statute at Large.
Stat. Glo. Statute of Gloucester.
Stat. Marl. Statute of Marlbridge.
Stat. Mer. Statute of Merton.
Stat. Westm. Statute of Westminster.
Stat. Winch. Statute of Winchester.
State Tr. State Trials.
State Tr. Abr. Statham's Abridgment of the Law.
Staunf. P. C. & Pr. Staunford's Pleas of the Crown and Prerogative.
Stearn R. A. Stearn on Real Actions.
Steph. Com. Stephen's Commentaries on English Law.
Steph. Const. Stephens on the English Constitution.
Steph. Cr. L. Stephen on Criminal Law.
Steph. Dig. Stephen's Digest, New Brunswick Reports.
Steph. Elect. Stephens on Elections.
Steph. Ev. Stephen's Digest of Evidence.
Steph. N. P. Stephens's Nisi Prius.
Steph. Pl. Stephen on Pleading.
Stev. & Ben. Av. Stevens and Benecke on Average and Insurance.
Stew. (Ala.). Stewart's Reports, Alabama.
Stew. Adm. or Stew. V. A. Stewart's Vice-Admiralty Reports, Nova Scotia.
Stew. (N. J.). Stewart's Reports, New Jersey Equity Reports, vols. 28-33.
Stew. & Port. Stewart and Porter's Reports, Alabama.
Stiles. Stiles's Reports, Iowa.
Stillingfl. Ecc. Stillingfleet's Ecclesiastical Cases, English.
Sto. Story's Reports, U. S. Circuit Courts, 1st Circuit.
Sto. & H. Cr. Ab. Storer and Heard on Criminal Abortion.
Stock. Stockton's Reports, New Jersey Equity.
Stock. (Md.). Stockett's Reports, Maryland.
Stock Non. Com. Stock on the Law of Non-Competes Mentis.
Stokes L. of A. Stokes on Liens of Attorneys.
Stone B. B. S. Stone on Benefit Building Societies.
Stor. & H. Cr. Ab. Storer and Heard on Criminal Abortion.
Story. Story's Reports, U. S. Circuit Court, 1st Circuit.
Story Ag. Story on Agency.
Story Bailm. Story on Bailments.
Story Bills. Story on Bills.
Story Comm. Story's Commentaries.
Story Conf. L. Story on Conflict of Laws.
Story Const. Story on the Constitution.
Story Contr. Story on Contracts.
Story Eq. Jur. Story's Equity Jurisprudence.
Story Eq. Pl. Story's Equity Pleading.
Story L. U. S. Story's Law of the United States.
Story Part. Story on Partnership.
Story Prom. N. Story on Promissory Notes.
Story Sales. Story on Sales of Personal Property.
Stra. or Strange. Strange's Reports, English Courts.
Str. H. L. Strange's Hindoo Laws.
Str. N. C. Strange's Notes of Cases, Madras.
Straac. de Mer. Straacha de Mercatura, Navius Assecurationibus.
Strah. Dom. Strahan's Translation of Domat's Civil Law.
Stringf. Stringfellow's Reports, Missouri.
Strob. Strobhart's Law Reports, South Carolina.
Strob. Ch. or Strob. Eq. Strobhart's Equity Reports, South Carolina.
Stu. or Stuart. Stuart, Milne and Peddie's Reports, Scotch Court of Session.
Stu. App., Stu. K. B., or Stu. L. C. Stuart's Reports, Lower Canada King's Bench.
Stu. Adm. or Stu. V. A. Stuart's Vice-Admiralty Reports, Lower Canada.
Stu. M. & P. Stuart, Milne and Peddie's Reports, Scotch Court of Session.
Sty. Styles's Reports, English King's Bench.
Sty. Pr. Reg. Styles's Practical Register.
Sud. Dew. Adul. Sudder Dewanny Adulat Reports, India.
Sud. Dew. Rep. Sudder Dewanny Reports, N. W. Provinces, India.
Sugd. Est. Sugden on the Law of Estates.
Sugd. Pou. Sugden on Powers.
Sugd. Pr. Sugden on the Law of Property.
Sugd. Pr. St. Sugden on Property Statutes.
Sugd. Vend. & P. Sugden on Vendors and Purchasers.
Sull. and Tit. Sullivan on Land Titles in Massachusetts.
Sull. Lect. Sullivan's Lectures on Constitution and Laws of England.
Sum. Summa, the summary of a law.
Sum. Sumner's Reports, U. S. Circuit Court, 1st Circuit.
Sup. Superseded. Superior. Supreme.
Sup. or Supp. Supplement.
Supp. Ves. Jr. Supplement to Vesey, Junior's Reports.
Supr. Ct. Rep. Federal & Supreme Court Reporter. All the Federal Courts, 1857-1896.
Surr. Surrogate.
Suth. Sutherland's Reports, Calcutta.
Suth. P. C. J. Sutherland's Privy Council Judgments.
Suth. W. Rep. Sutherland's Weekly Reporter, Calcutta.
Swab. Adm. Swabey's Admiralty Reports, English.
Swab. & Trist. Swabey and Tristram's Reports, English Probate and Divorce.
Swan. Swan's Reports, Tennessee.
Swan. Ex. Cas. Swan on the Jurisdiction of Ecclesiastical Courts.
Swan Just. Swan's Justice.
Swan Pl. & Pr. Swan's Pleading and Practice.
Swan Pr. Swan's Practice.
Swans. Swanston's Reports, English Chancery.
Sweeny. Sweeney's Reports, New York Superior Court Reports, vols. 31-32.
Sweet M. Setl. Cas. Sweet's Marriage Settlement Cases.
Sweet Pr. Conv. Sweet's Precedents in Conveyancing.
Swift Dig. Swift's Digest, Connecticut.
Swift Sys. Swift's System of the Laws of Connecticut.
Swint. Jus. Cas. Swinton's Justiciary Cases, Scotland.
Swind. Des. Swinburne on the Law of Descents.
Swind. Mar. Swinburne on Marriage.
Swind. Spo. Swinburne on Spousals.
Swind. Wills. Swinburne on Wills.
Syd. App. Sydney on Appeals.
Syme. Syme's Justiciary Cases, Scotland.

ABBREVIATION

Syn. Ser. Synopsis Series of the U. S. Treasury Decisions.

T. Tempore. Title. Trinity Term.

T. B. Monroe. T. B. Monroe's Reports, Kentucky Court of Appeals.

T. Jones. T. Jones's Reports, English King's Bench and Common Pleas.

T. L. Terme de la Ley.

T. E. Teste Rege.

T. E. Term Reports. English King's Bench (Durnford and East's Reports).

T. R. E. Tempore Regis Edwardi.

T. Raym. T. Raymond's Reports, English King's Bench.

T. T. Trinity Term.

T. U. P. Charlton. T. U. P. Charlton's Reports, Georgia.

T. & C. Thompson and Cook's Reports, New York Supreme Court.

T. & G. Tyrwhitt and Granger's Reports, English Exchequer.

T. & M. Temple and Mew's Reports, English Criminal Appeal Cases.

T. & P. Turner and Phillips's Reports, English Chancery.

T. & R. Turner and Russell's Reports, English Chancery.

Tait Ev. Tait on Evidence.

Talb. Cases tempore Talbot, English Chancery.

Taml. Tamlyn's Reports, English Chancery.

Taml. Ev. Tamlyn on Evidence.

Taml. T. Y. Tamlyn on Term of Years.

Tam. Dec. or Tency. Tanager's Decisions, by Campbell, U. S. Circuit, 4th Circuit.

Tann. Tanner's Reports, Indiana.

Tap. or Tapp. Tappan's Nisi Prius Reports, Ohio.

Tap. C. M. Tapping's Copyholder's Manual.

Tap. Man. Tapping on the Writ of Mandamus.

Tapp. M. & C. Tapp on the Law of Maintenance and Champerty.

Tas-Lang. Const. His. Taswell-Langmead's Constitutional History of England.

Taunt. Taunton's Reports, English Common Pleas.

Tay. Taylor's Reports, Upper Canada King's Bench.

Tayl. (J. L.). Taylor's Reports, North Carolina Term Reports.

Tayl. (U. C.). Taylor's Reports, Upper Canada King's Bench.

Tayl. Bank. L. Taylor on the Bankruptcy Law.

Tayl. Civ. L. Taylor on Civil Law.

Tayl. Ev. Taylor on Evidence.

Tayl. Gov. Taylor on Government.

Tayl. L. & T. Taylor on Landlord and Tenant.

Tayl. Law Glos. Taylor's Law Glossary.

Tayl. Med. Jur. Taylor's Medical Jurisprudence.

Tayl. Poi. Taylor on Poisons.

Tayl. Wills. Taylor on Wills.

Tech. Dict. Crabb's Technological Dictionary.

Tel. The Telegram, London.

Temp. & M. Temple and Mew's Reports, English Criminal Appeal Cases.

Tenn. Ch. Tennessee Chancery Reports (Cooper's).

Tenn. Leg. Rep. Tennessee Legal Reporter, Nashville.

Term. Term Reports, English King's Bench (Durnford and East's Reports).

Term N. C. Term Reports, North Carolina, by Taylor.

Terr. Terrell's Reports, Texas.

Terr. & Wal. Terrell and Walker's Reports, Texas Reports, vols. 38-51.

Tex. Texas Reports.

Tex. App. Texas Court of Appeals Reports.

Tex. Cr. App. Texas Criminal Appeals.

Tex. Civ. App. Texas Civil Appeals.

Tex. L. J. Texas Law Journal, Tyler, Texas.

Tex. Unrep. Cas. Texas Unreported Cases, Supreme Court.

Th. B. & N. Thomson on Bills and Notes.

Th. Br. Thesaurus Brevium.

Th. C. Theodor Capitula et Fragmenta.

Th. Dig. Theodor's Digest.

Th. Ent. Thompson's Entries.

Thach. Cr. Cas. Thacher's Criminal Cases, Massachusetts.

Thayer Cont. L. Thayer's Cases on Constitutional Law.

Thayer Cas. Ev. Thayer's Select Cases on Evidence.

Them. La Themis, Montreal.

Themis. The American Themis, New York.

Theo. Pr. & S. Theobald on Principle and Surety.

Theo. Wills. Theobald on Construction of Wills.

Thes. Brev. Thesaurus Brevium.

Thom. Thomas's Reports, Nova Scotia.

Thom. (W.). Thomas's Reports, Wyoming.

Thom. Bull. Thomson on Bills and Notes.

Thom. Co. Litt. Thomas's Edition of Coke upon Littleton.

Thom. L. C. Thomas's Leading Cases on Constitutional Law.

Thom. Mort. Thomas on Mortgages.

Thom. Sc. Acta. Thomson's Scottish Acts.

Thom. Sel. Dec. Thomson's Select Decisions, Nova Scotia.

Thom. U. Jur. Thomas on Universal Jurisprudence.

Thom. & Fr. Thomas & Franklin's Reports, Maryland & Co., vol. 1.

Thomp. (Cal.). Thompson's Reports, California Reports, vols. 39-40.

Thomp. (N. S.). Thompson's Reports, Nova Scotia.

Thomp. B. B. S. Thompson on Benefit Building Societies.

Thomp. Car. Thompson on Carriers.

Thomp. Ch. Jur. Thompson on Charging the Jury.

Thomp. Corp. Thompson on Corporations.

Thomp. Ent. Thompson's Entries.

Thomp. High. Thompson on the Law of Highways.

Thomp. Home. & Exem. Thompson on Homestead and Exemption.

Thomp. Liab. Off. Thompson's Cases on Liability of Officers of Corporations.

Thomp. Liab. Stock. Thompson on Liability of Stockholders.

Thomp. N. B. Cas. Thompson's National Bank Cases.

Thomp. Neg. Thompson's Cases on Negligence.

Thomp. Rem. Thompson's Provisional Remedies.

Thomp. Tenn. Cas. Thompson's Tennessee Cases.

Thomp. & C. Thompson and Cook's Reports, New York Supreme Court.

Thorn. Thornton's Notes of Cases Ecclesiastical and Maritime, English.

Thorn. Conv. Thornton's Conveyancing.

Throop Ag. or Throop V. Ag. Throop on Verbal Agreements.

Tichb. Tr. Report of the Tichborne Trial, London.

Tidd Pr. Tidd's Practice in the King's Bench.

Tiff. Tiffany's Reports, New York Court of Appeals Reports, vols. 28-39.

Tiff. & B. Tr. Tiffany and Bullard on Trusts and Trustees.

Tiff. & S. Pr. Tiffany and Smith's Practice, New York.

Till. Prec. Tillinghast's Precedents.

Till. & Sh. Pr. Tillinghast and Shearman's Practice.

Till. & Yates App. Tillinghast and Yates on Appeals.

Tinw. Tinwald's Reports, Scotch Court of Session.

T. Title.

Tobey. Tobey's Reports, Rhode Island.

Toll. Ez. Toller on Executors.

Tomk. Inst. or Tomk. R. L. Tompkins's Institutes of Roman Law.

Tomk. & J. R. L. Tompkins and Jeckens's Roman Law.

Toml. Tomlin's Election Evidence Cases.

Toml. L. D. Tomlin's Law Dictionary.

Toml. Supp. Br. Tomlin's Supplement to Brown's Parliamentary Cases.

Tor. Deb. Torbuck's Reports of Debates.

Toth. Tothill's Reports, English Chancery.

Touss. Toussaint's Touchstone.

Toull. Dr. Civ. Toullier's Droit Civil Français.

Town. St. & L. Townsend on Stander and Libel.

Town. St. Tr. Townsend's Modern State Trials.

Town. Sum. Proc. Townsend's Summary Proceedings by Landlords against Tenants.

Tr. Translation, Translator.

Tr. & H. Fr. Troubat and Haly's Practice, Pennsylvania.

Tr. & H. Prec. Troubat and Haly's Precedents of Indictments.

Train. & H. Prec. Train and Heard's Precedents of Indictments.

Trans. App. Transcript Appeals, New York.

Trat. Jur. Mer. Tratade de Jurisprudencia Mercantil.

Trav. Tw. L. of N. Travers Twiss on the Law of Nations.

Treadw. Treadway's Reports, South Carolina (Constitutional Reports).

Treb. Jur. de la Med. Trebuchet, Jurisprudence de la Médecine.

Trem. Tremaine's Pleas of the Crown.

Trev. Taz. Suc. Trevor on Taxes on Succession.

Tri. Bish. Trial of the Seven Bishops.

Tri. per Pais. Trials per Pais.

Trib. Civ. Tribunal Civil.

Trib. de Com. Tribunal de Commerce.

Trin. or Trin. T. Trinity Term.

Tripp. Dakota Reports, vol. 5.

Trop. Dr. Civ. Trolong's Droit Civil.

Troub. Lim. Part. Troubat on Limited Partnerships.

Troub. & H. Fr. Troubat and Haly's Practice, Pennsylvania.

Tru. Railw. Rep. Truman's Railway Reports.

Tuck. Tucker's Surrogate Reports, New York.

Tuck. Tucker's Court of Appeals, D. of Col., vols. 1-2.

Tuck. & Cl. Tucker and Clephane's Reports, D. of Col., vol. 21.

Tuck. Bla. Com. Blackstone's Commentaries, by Tucker.

Tuck. Lect. Tucker's Lectures.

Tuck. Pl. Tucker's Pleadings.

Tuck. Sel. Cas. Tucker's Select Cases, Newfoundland Courts.

Tud. Char. Tr. Tudor on Charitable Trusts.

Tud. L. Cas. or Tud. L. Cas. M. L. Tudor's Leading Cases on Mercantile Law.

Tud. L. Cas. R. P. Tudor's Leading Cases on Real Property.

Turn. App. Turner's Appeal Reports, Ontario.

Turn. (Ark.). Turner's Reports, Arkansas, vols. 33-43.

Turn. Ch. Pr. Turner on Chancery Practice.

Turn. Fr. Turnbull's Practice, New York.

Turn. & Ph. Turner and Phillip's Reports, English Chancery.

Turn. & Rus. Turner and Russell's Reports.

Tutt. Tuttle's Reports, California.

Tutt. & Carp. Tuttle and Carpenter's Reports, California Reports, vol. 52.

Twiss L. of Nat. Twiss's Law of Nations.

Tyler. Tyler's Reports, Vermont.

Tyler Bound. & Fences. Tyler's Law of Boundaries and Fences.

Tyler Ecc. Tyler on American Ecclesiastical Law.

Tyler Ej. Tyler on Ejectment and Adverse Enjoyment.

Tyler Fixt. Tyler on Fixtures.

Tyler Inf. Tyler on Infancy and Coverture.

Tyler Us. Tyler on Usury.

Tyng. Tyng's Reports, Massachusetts.

Tyrwh. Tyrwhitt's Reports, English Exchequer.

Tyrv. & G. Tyrwhitt and Granger's Reports, English Exchequer.

U. B. Upper Bench.

U. B. Prec. Upper Bench Precedents tempore Car. I.

U. C. Upper Canada.

U. C. App. Upper Canada Appeal Reports.

U. C. C. P. Upper Canada Common Pleas Reports.

U. C. Cham. Upper Canada Chambers Reports.

U. C. Chan. Upper Canada Chancery Reports.

U. C. E. & A. Upper Canada Error and Appeals Reports.

U. C. L. J. Upper Canada Law Journal, Toronto.

U. C. S. S. Upper Canada Queen's Bench Reports, Old Series.

U. C. Pr. Upper Canada Practice Reports.

U. C. Q. B. Upper Canada Queen's Bench Reports.

U. C. Q. B. O. S. Upper Canada Queen's Bench Reports, Old Series.

U. K. United Kingdom.

U. S. United States Reports.

U. S. App. United States Appeals, Circuit Courts of Appeals.

U. S. Crim. Dig. United States Criminal Digest, by Waterman.

U. S. Dig. Abbott's United States Digest.

U. S. Eq. Dig. United States Equity Digest.

U. S. Jur. United States Jurist, Washington, D. C.

U. S. L. Int. United States Law Intelligencer (Angell's), Providence and Philadelphia.

U. S. L. J. United States Law Journal, New Haven and New York.

U. S. L. M. or U. S. Law Mag. United States Law Magazine (Livingston's), New York.

U. S. R. S. United States Revised Statutes.

U. S. Reg. United States Register, Philadelphia.

U. S. Stat. United States Statutes at Large.

U. S. Sup. Ct. Rep. United States Supreme Court Reporter.

Ulm. L. Rec. Ulman's Lawyer's Record, New York.

Ulp. Ulpian's Fragments.

Underh. Torts. Underhill on Torts.

Up. Can. See U. C.

Upt. Mar. W. & Pr. Upton on Maritime Warfare and Prize.

Url. Trust. Urling on Trustees.

Utah. Utah Reports.

V. Versus. Victoria, Victorian.

V. A. C. or V. Adm. Vice-Admiralty Court.

V. C. Vice-Chancellor. Vice-Chancellor's Court.

V. C. Rep. Vice-Chancellor's Reports, English.

V. O. De Verborum Obligationibus.

V. S. De Verborum Significatione.

V. & B. Vesey and Beames's Reports, English Chancery.

V. & S. Vernon and Scriven's Reports, Irish King's Bench.

Va. Virginia Reports.

Va. Cas. Virginia Cases.

Va. L. J. Virginia Law Journal, Richmond.

Va. R. Gilmer's Reports, Virginia.

Val. Com. Valen's Commentaries.

Vall. Jr. L. Vallencey's Ancient Laws of Ireland.

Van Hey. Eq. Van Haythusen's Equity Draftsman.

Van Hay. Mar. Ev. Van Haythuyser on Maritime Evidence.

Van K. Van Koughnet's Reports, Upper Canada C. P. Reports, vols. 15-21.

Van Ness. Van Ness's Reports, U. S. District Courts, New York.

Van Sant. Eq. Pr. Van Santvoord's Equity Practice.

Van Sant. Pl. Van Santvoord's Pleadings.

Van Sant. Prec. Van Santvoord's Precedents.

Vatt. Vattel's Law of Nations.

Vaugh. Vaughan's Reports, English Common Pleas

prudence of Louisiana.

Fr. or Vroom. Vroom's Reports, New Jersey Law Reports, vols. 30-56.
Vs. Versus.
Vt. Vermont Reports.

W. King William; thus *W. I.* signifies the first year of the reign of King William I.
W. Statute of Westminster.
W. Bla. William Blackstone's Reports, English King's Bench and Common Pleas.

W. C. C. Washington's Circuit Court Reports U. S., 3d Circuit.

W. Coast Rep. West Coast Reporter.

W. Ent. Whitch's Book of Entries.

W. H. Chron. Westminster Hall Chronicle, London.

W. H. & G. Welsby, Hurlstone and Gordon's Reports, English Exchequer Reports, vols. 1-9.

W. J. Western Jurist, Des Moines, Iowa.

W. Jones. Wm. Jones's Reports, English Courts.

W. Kel. Wm. Kelynge's Reports, English King's Bench and Chancery.

W. L. Gaz. Western Law Gazette, Cincinnati, O.

W. L. Jour. Western Law Journal, Cincinnati, O.

W. L. M. Western Law Monthly, Cleveland, O.

W. L. R. Washington Law Reporter, Washington, D. C.

W. N. Weekly Notes, London.

W. N. Cas. Weekly Notes of Cases, Philadelphia.

W. P. Cas. Wallaston's Practice Cases.

W. R. Weekly Reporter, London.

W. R. Calc. Southland's Weekly Reporter, Calcutta.

W. Rep. West's Reports temp. Hardwicke, English Chancery.

W. T. R. Weekly Transcript Reports, New York.

W. Ten. Wright's Tenures.

W. Ty. R. Washington Territory Reports.

W. Va. West Virginia Reports.

W. W. & D. Willmore, Wallaston and Davison's Reports, English Queen's Bench.

W. W. & H. Willmore, Wallaston and Hodge's Reports, English Queen's Bench.

W. & Buh. West & Buhler's Collection of Futwaha, India.

W. & M. William & Mary.

W. & M. Woodbury and Minot's Reports, U. S. Circuit Court, 1st Circuit.

W. & S. Watts and Sergeant's Reports, Pennsylvania.

W. & S. App. Wilson and Shaw's Scotch Appeals, English House of Lords.

Wa. Wales.

Wa. Watts's Reports, Pennsylvania.

Waddi Dig. Waddillie's Digest of English Ecclesiastical Cases.

Wade Notice. Wade on the Law of Notice.

Wade Retro. L. Wade on Retroactive Laws.

Wait Act. & Def. Wait's Actions and Defence.

Wait St. Rep. Wait's State Papers of the U. S.

Wait. Railw. Walford on Railways.

Walk. (Mich.). Walker's Reports, Michigan Chancery.

Walk. (Miss.). Walker's Reports, Mississippi Reports, vol. 1.

Walk. (Tex.). Walker's Reports, Texas Reports, vol. 25.

Walk. Am. L. Walker's Introduction to American Law.

Walk. Bank. L. Walker on Banking Law.

Walk. Ch. Cas. Walker's Chancery Cases, Michigan.

Walk. Com. L. Walker's Theory of the Common Law.

Walk. Wills. Walker on Wills.

Walker. Walker's Unreported Cases, S. C. of Pennsylvania.

Wall. Wallace's Reports, U. S. Supreme Court.

Wall. C. C. Wallace's Reports, U. S. Circuit Court, 3d Circuit.

Wall. Jun. Wallace, Junior's, Reports, U. S. Circuit Court, 3d Circuit.

Wall. Pr. Wallace's Principles of the Laws of Scotland.

Wallis. Wallis's Reports, Irish Chancery.

Walsh. Walsh's Registry Cases, Ireland.

Ward (Ohio). Warden's Reports, Ohio State.

Ward Nat. Ward on the Law of Nations.

Ward & Sm. Warden and Smith's Reports, Ohio State Reports, vol. 8.

Ware. Ware's Reports, U. S. District Court, Maine.

Warr. Bla. Warren's Blackstone.

Warr. L. S. Warren's Law Studies.

Wash. Washington State Reports.

Wash. (Va.). Washington's Reports, Virginia.

Wash. C. C. Washington's Reports, U. S. Circuit Court, 3d Circuit.

Wash. L. Rep. Washington Law Reporter, Washington, D. C.

Wash. Ty. Washington Territory Reports.

Washb. Cr. L. Washburn on Criminal Law.

Washb. Easem. Washburn on Easements and Servitudes.

Washb. R. P. Washburn on Real Property.

Wash. (G. H.). Watermeyer's Cape of Good Hope Supreme Court Reports.

Wat. Cr. Proc. Waterman's Criminal Procedure.

Wat. Jus. Waterman's Justice.

Wat. Set-Off. Waterman on Set-Off, etc.

Wat. Tres. Waterman on Trespass.

Watermeyer. Watermeyer's Cape of Good Hope Supreme Court Reports.

Watk. Con. Watkins's Conveyancing.

Watk. Cophy. Watkins's Cophoids.

Wats. Arb. Watson on Arbitration.

Wats. Comp. or Wats. Eq. Watson's Compendium of Equity.

Wats. Const. Hist. Watson's Constitutional History of Canada.

Wats. Part. Watson on Partnership.

Wats. Sher. Watson on Sheriffs.

Watts. Watts's Reports, Pennsylvania.

Watts (W. Va.). Watts's Reports, West Virginia.

Watts & Ser. Watts and Sergeant's reports, Pennsylvania.

Web. Pat. Webster on Patents.

Web. Pat. Cas. Webster's Patent Cases, English Courts.

Webb. Webb's Reports, Kansas.

Webb, A. B. & W. Webb, A. Beckett and Williams's Reports, Victoria.

Webb, A. B. & W. Eq. Webb, A. Beckett and Williams's Equity Reports, Victoria.

Webb, A. B. & W. I. P. & M. Webb, A. Beckett and Williams's Insolvency, Probate and Matrimonial Reports, Victoria.

Webb, A. B. & W. Min. Webb, A. Beckett and Williams's Mining Cases, Victoria.

Webb, & D. Webb and Duval's Reports, Texas.

Webb. Pat. Cas. Webster's Patent Cases, English Courts.

Wedg. Gov. & Laws. Wedgwood's Government and Laws of the U. S.

Weekl. Cin. L. B. Weekly Cincinnati Law Bulletin.

Weekl. Dig. Weekly Digest, New York.

Weekl. Jur. Weekly Jurist, Illinois.

Weekl. L. Rec. Weekly Law Record.

Weekl. L. Rev. Weekly Law Review, San Francisco, Cal.

Weekl. No. Weekly Notes of Cases, London.

Weekl. No. Cas. Weekly Notes of Cases, Philadelphia.

Weekl. Repr. Weekly Reporter, London.

Weekl. Trans. Repts. Weekly Transcript Reports, New York.

Weeks Att. at Law. Weeks on Attorneys at Law.

Weeks D. A. Inj. Weeks, Damnum Absque Injuria.

Weeks Dep. Weeks on the Law of Deposition.

Weight, M. & L. Weightman's Marriage and Legitimacy.

Welf. Eq. Pl. Welford on Equity Pleading.

Wellw. Abr. Wellwood's Abridgment of Sea Laws.

Wells L. & F. Wells's Questions of Law and Facts.

Wells Res. Ad. & St. D. Wells on Res Adjudicata and Stare Decisis.

Wells Sep. Pr. of Mar. Wom. Wells on Separate Property of Married Women.

Welsby, H. & G. Welsby, Hurlstone & Gordon's Reports, English Exchequer Reports, vols. 1-9.

Welsh. Welsh's Registry Cases, Ireland.

Wend. Wendell's Reports, New York Supreme Court.

Wendt Mar. Leg. Wendt on Maritime Legislation.

Went. Ex. or Went. Off. Ex. Wentworth on Executors.

Went. Pl. Wentworth on Pleadings.

Week. Ins. Weskett on Insurance.

West. West's Reports, English Chancery, tempore Hardwicke.

West Coast Rep. West Coast Reporter.

West H. L. West's Reports, English House of Lords.

West. Jur. Western Jurist, Des Moines, Iowa.

West. L. J. or West. Law Jour. Western Law Journal, Cincinnati, Ohio.

West. L. Mo. or West. Law Mo. Western Law Monthly, Cleveland, Ohio.

West. L. O. or West. Leg. Obs. Western Legal Observer, Quincy, Ill.

West. L. T. Western Law Times.

West. Rep. Western Reporter, St. Paul.

West. T. Cas. Western's Tithes Cases.

West. Va. West Virginia Reports.

West. H. West's Reports, English Chancery, tempore Hardwicke.

West. Conf. Westlake on Conflict of Laws.

Westm. Statute of Westminster.

Weston. Weston's Reports, Vermont.

Weth. (U. C.). Wethey's Upper Canada Reports, Queen's Bench.

Wh. or Whart. Wharton's Reports, Pennsylvania.

Wh. Wheaton's Reports, U. S. Supreme Court.

Wh. Cr. Cas. Wheeler's Criminal Cases, New York.

Wh. & T. L. Cas. White and Tudor's Leading Cases, Equity.

Whart. or Wh. Wharton's Reports, Pennsylvania.

Whart. Ag. Wharton on Agency and Agents.

Whart. Conf. Wharton on Conflict of Laws.

Whart. Conv. Wharton's Conveyancing.

Whart. Cr. Law. Wharton's Criminal Law.

Whart. Ev. Wharton's Evidence.

Whart. Hom. Wharton on Homicide.

Whart. Law. Dic. or Whart. Lex. Wharton's Law Lexicon.

Whart. Prec. Wharton's Precedents of Indictments.

Whart. St. Tr. Wharton's State Trials of the United States.

Whart. & St. Med. Jur. Wharton and Stille's Medical Jurisprudence.

Wheat. Wheaton's Reports, U. S. Supreme Court.

Wheat. Cap. & Pr. Wheaton on Maritime Captures and Prizes.

Wheat. Hist. L. of N. Wheaton's History of the Law of Nations.

Wheat. Int. L. Wheaton's International Law.

Wheel. Wheelock's Reports, Texas.

Wheel. Abr. Wheeler's Abridgment.

Wheel. Br. Cas. Wheelock's Bridge Case.

Wheel. Cr. Cas. Wheeler's Criminal Cases, New York.

Wheel. Cr. Rec. Wheeler's Criminal Recorder, New York.

Whish. L. D. Whishaw's Law Dictionary.

Whit. Eq. Pr. Whitworth's Equity Precedents.

Whit. War. P. Whiting on War Powers under the Constitution.

White. White's Reports, West Virginia.

White L. L. White's Land Law of California.

White Rec. White's Recopilacion.

White Supp. White on Supplement and Revivor.

White & T. L. Cas. White and Tudor's Leading Cases, Equity.

Whitm. Pat. Cas. Whitman's Patent Cases.

Whitm. Pat. L. Whitman's Patent Laws.

Whitm. Pat. Law Rev. Whitman's Patent Law Review, Washington, D. C.

Whitt. Whittlesey's Reports, Missouri.

Wig. Disc. Wigram on Discovery.

Wig. Wills. Wigram on Wills.

Wight. Wightwick's Reports, English Exchequer.

Wight El. Cas. Wight's Election Cases, Scotland.

Wilc. Wilcox's Reports, Ohio.

Wilc. Cond. Wilcox's Condensed Reports, Ohio.

Wilc. Mun. Corp. Wilcox on Municipal Corporations.

Wild. Int. L. Wildman's International Law.

Wild. S. C. & P. Wildman on Search, Capture and Prize.

Wilde Sup. Wilde's Supplement to Barton's Conveyancing.

Wilk. Leg. Ang. Sax. Wilkins's Leges Anglo-Saxonice.

Wilk. Lim. Wilkinson on Limitations.

Wilk. P. & M. Wilkinson, Paterson and Murray's Reports, New South Wales.

Wilk. Prec. Wilkinson's Precedents in Conveyancing.

Wilk. Pub. Funds. Wilkinson on the Law Relating to Public Funds.

Wilk. Repl. Wilkinson on Replevin.

Wilk. Ship. Wilkinson on Shipping.

Wilk. & O. Wilkinson and Owen's Reports, New South Wales.

Wilk. & Pat. Wilkinson and Paterson's Reports, New South Wales.

Will. (Mass.). Williams's Reports, Massachusetts Reports, vol. 1.

Will. (Peere). Peere Williams's Reports, English Chancery.

Will. (Vt.). Williams's Reports, Vermont.

Will. Ann. Reg. Williams's Annual Register, New York.

Will. Auct. Williams on the Law of Auctions.

Will. Bankt. L. Williams on the Bankrupt Law.

Will. Williams on Executors.

Will. Just. Williams's Justice.

Will. L. D. Williams's Law Dictionary.

Will. Per. Pr. Williams on Personal Property.

Will. Real As. Williams on Real Assets.

Will. Real Pr. Williams on Real Property.

Will. Saund. Williams's Notes to Saunders's Reports.

Will. & Br. Adm. Jur. Williams and Bruce on Admiralty Jurisdiction.

Willard Eq. Willard's Equity.

Willard Ex. Willard on Executors.

Willard Real Est. & Con. Willard's Real Estate and Conveyancing.

Willc. Const. Wilcock's Office of Constable.

Willc. L. Med. Pr. Wilcock's Law relating to the Medical Profession.

Willc. Mun. Corp. Willocks on Municipal Corporations.

Willcs. Willes's Reports, English King's Bench and Common Pleas.

Williams. Williams's Reports, Massachusetts.

Williams, Peere. Peere Williams's Reports, English Chancery.

Willis Eq. Willis on Equity Pleadings.

Willis Int. Willis on Interrogatories.

Willis Trust. Willis on Trustees.

Willm. W. & D. Willmore, Wallaston and Davison's Reports, English Queen's Bench.

Willm. W. & H. Willmore, Wallaston and Hodge's Reports, English Queen's Bench.

Wills Cir. Ev. Willis on Circumstantial Evidence.

Willm. Willmot's Notes of Opinions and Judgments, English King's Bench.

Wils. Wilson's Reports, English King's Bench and Common Pleas.

Wils. (Cal.). Wilson's Reports, California.

Wils. (Ind.). Wilson's Reports, Indiana Supreme Court Reports.

Wils. (Oreg.). Wilson's Reports, Oregon.

Wils.

ABBREVIATORS

Wms. Real Pr. Williams on Real Property.
Wms. Saund. Williams's Notes to Saunders's Reports.
Wms. & Br. Adm. Jur. Williams and Bruce on Admiralty Jurisdiction.
Wolf. Inst. Wolfius' Institutione Juris Naturae et Gentium.
Wolf. & B. Wolferstan and Bristow's Election Cases.
Wolf. & D. Wolferstan and Dew's Election Cases.
Wood. Woodlaster's Reports, English Ball Court.
Wood. Wood's Reports, U. S. Circuit Court, 5th Circuit.
Wood (H.). Hutton Wood's Decrees in Tithe Cases, English.
Wood Civ. L. Wood's Institutes of the Civil Law.
Wood Com. L. Wood's Institutes of the Common Law.
Wood Cons. Wood on Conveyancing.
Wood Fire Ins. Wood on Fire Insurance.
Wood Inst. Eng. L. Wood's Institutes of English Law.
Wood Man. Wood on Mandamus.
Wood Mast. & St. Wood on Master and Servant.
Wood Mayne Dam. Wood's Mayne on Damages.
Wood Nuis. Wood on Nuisances.
Woodb. & M. Woodbury and Minot's Reports, U. S. Circuit Court, 1st Circuit.
Woodd. Jur. Wooddeson's Elements of Jurisprudence.
Woodd. Lect. Wooddeson's Lectures on the Laws of England.
Woodf. L. & T. Woodfall on Landlord and Tenant.
Woodf. Parl. Deb. Woodfall's Parliamentary Debates.
Woodm. Cr. Cas. Woodman's Criminal Cases, Boston.
Woodm. & T. on For. Med. Woodman and Tidy on Forensic Medicine.
Woodr. & Woods C. C. Woods's Reports, U. S. Circuit Court, 3d Circuit.
Wood C. C. Woolworth's Reports, U. S. Circuit Courts, 8th Circuit.
Woolr. Com. Woolrych on Commons.
Woolr. Comm. L. Woolrych on Commercial Law.
Woolr. P. W. Woolrych on Party Walls.
Woolr. Sew. Woolrych on Sewers.
Woolr. Waters. Woolrych on Law of Waters.
Woolr. Ways. Woolrych on Law of Ways.
Woolr. Window L. Woolrych on Law of Window Lights.
Wools. Div. Woolsey on Divorce.
Wools. Int. L. Woolsey's International Law.
Woolw. Int. L. Woolworth's Reports, U. S. Circuit Court, 8th Circuit.
Woolw. (Neb.). Woolworth's Reports, Nebraska Reports, vol. 1.
Word. Elect. Wordsworth's Law of Election.
Word. Elec. Cas. Wordsworth's Election Cases.
Word. Min. Wordsworth on the Law of Mining.
Word. Jur. Worthington on the Powers of Juries.
Word. Prec. Wills. Worthington's Precedents for Wills.
Wr. or Wr. Pa. Wright's Reports, Pennsylvania State Reports, vols. 37-50.
Wr. Ch. or Wr. Ohio. Wright's Chancery Reports, Ohio.
Wr. Cr. Cons. Wright on Criminal Conspiracies.
Wr. W. P. Wright's New Reports, Ohio.
Wr. Ten. Wright on Tenures.
Wy. Wyoming Territory Reports.
Wyatt P. R. Wyatt's Practical Register in Chancery.
Wyatt, W. & A. B. Wyatt, Webb and A'Beckett's Reports, Victoria.
Wyatt, W. & A. B. Eq. Wyatt, Webb and A'Beckett's Equity Reports, Victoria.
Wyatt, W. & A. B. I. P. & M. Wyatt, Webb and A'Beckett's Insolvency, Probate and Matrimonial Reports, Victoria.
Wyatt, W. & A. B. Min. Wyatt, Webb and A'Beckett's Mining Cases, Victoria.
Wyatt & W. E. Wyatt and Webb's Reports, Victoria.
Wyatt & W. E. P. & M. Wyatt and Webb's Insolvency, Probate and Matrimonial Reports, Victoria.
Wyatt & W. Min. Wyatt and Webb's Mining Cases, Victoria.
Wym. Wymann's Reports, Bengal.
Wynne. Wynne's Bovill Patent Case.
Wythe Ch. Wythe's Chancery Reports, Virginia.
Y. B. Year Book.
Y. & C. Young and Collyer's Reports, English Exchequer and Equity.
Y. & C. C. C. Young and Collyer's Chancery Cases, English.
Y. & J. Young and Jervis's Reports, English Exchequer.
Yale Law J. Yale Law Journal.
Yates Sel. Cas. Yates's Select Cases, New York.
Yeates. Yeates's Reports, Pennsylvania.
Yelv. Yelverton's Reports, English King's Bench.
Yerg. Yergers's Reports, Tennessee.
Yool Waste. Yool on Waste, Nuisance and Treasures.
Young. Young's Reports, Minnesota.
Young M. L. Cas. Young's Maritime Law Cases, English.
Young. Young's Reports, English Exchequer Equity.
Young & Coll. Young and Collyer's Reports, English Exchequer Equity.
Young & Coll. Ch. Young and Collyer's Chancery Cases, English.
Young & Jer. Young and Jervis's Reports, English Exchequer.
Zab. Zabrickie's Reports, New Jersey Law.
Zach. Dr. Civ. Zacharie's Droit Civil Français.
Zinn L. C. Zinn's Leading Cases on Trusts.
Zouch Adm. Zouch's Admiralty Jurisdiction.

ABBREVIATORS. Ecol. law. Officers whose duty it is to assist in drawing up

the Pope's briefs, and reducing petitions into proper form, to be converted into **Papal Bulls**.

ABBROCHMENT. Old Eng. law. The forestalling of a market or fair.

ABBUTALS. See **ABUTALS**.

ABDICATION. A simple renunciation of an office; generally understood of a supreme office.

James II. of England, Charles V. of Germany, and Christiana, Queen of Sweden, are said to have abdicated. When James II. of England left the kingdom, the Commons voted that he had *abdicated* the government, and that thereby the throne had become vacant. The House of Lords preferred the word *deserted*; but the Commons thought it not comprehensive enough, for then the king might have the liberty of returning.

ADDITION. An additory or hiding place, for hiding and preserving goods, plate, or money; a chest in which relics were kept. Jacob.

ABDUCTION. Forcibly taking away a man's wife, his child, or his maid. 3 Bla. Com. 189-141; 98 N. C. 567.

The unlawful taking or detention of any female for purposes of marriage, concubinage, or prostitution. 4 Steph. Com. 84.

In some states the fact that a female taken for concubinage was not chaste is no defence; 115 Mo. 480; 96 Cal. 315; the law presumes a woman's previous life to have been chaste, and the burden of proof to show otherwise rests on the defendant; 90 Ill. 274; 6 Park. Cr. 129; 8 Barb. 608.

The remedy for taking away a man's wife by a suit by the husband for damages, and the offender was also answerable to the king; 3 Bla. Com. 139.

If the original removal was without consent, subsequent assent to the marriage does not change the nature of the act.

It is stated to be the better opinion, that if a man marries a woman under age, without the consent of her father or guardian, that act is not indictable at common law; but if children are taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication, for the purpose of marrying them, though the parties themselves consent to the marriage, such criminal means will render the act an offence at common law; 1 East, Pl. Cr. 458; 1 Rus. Cr. 962; Rosc. Cr. Ev. 260.

A mere attempt to abduct is not sufficient; 6 Park. Cr. 129.

Solicitation or inducement is sufficient, and the taking need not be by force; 37 Hun 190; 90 Ill. 274; 46 Mich. 442.

ABEARANCE. Behavior; as a recognition to be of good abearance, signifies to be of good behavior. 4 Bla. Com. 251, 256.

ABEREMURDER. In old Eng. law. An apparent, plain, or downright murder. It was used to distinguish a wilful murder from chance-medley, or manslaughter. Spel.; Cowel; Blount.

ABET. In crim. law. To encourage or set another on to commit a crime. This word is always applied to aiding the commission of a crime. To abet another to commit a murder, is to command, procure, or counsel him to commit it. Old Nat. Brev. 21; Co. Litt. 475. See **ADVISE**, **ENCOURAGE**.

ABETTOR. An instigator, or setter on; one that promotes or procures the commission of a crime. Old Nat. Brev. 21.

The distinction between abettors and accessories is the presence or absence at the commission of the crime; Cowel; Fleta, lib. 1, cap. 34. Presence and participation are necessary to constitute a person an abettor; 4 Sharsw. Bla. Com. 33; Russ. & R. 99; 9 Bingh. N. C. 440; 13 Mo. 382; 1 Wis. 159; 10 Pick. 477; 61 Ill. 333; 26 Ind. 406; 64 Barb. 299; 21 Ga. 220.

ABEYANCE (Fr. *abayer*, to expect). In expectation, remembrance, and contemplation of law; the condition of a freehold when there is no person in being in whom it is vested.

In such cases the freehold has been said to be in *nubibus* (in the clouds), and in *gremio legis* (in the bosom of the law). It has been denied by some that there is such a thing as an estate in abeyance;

Ferne, Cont. Rem. 513. See also the note to 2 Sharsw. Bla. Com. 107; 1 P. Wms. 516.

The law requires that the freehold should never, if possible, be in *abeyance*. Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance; 9 S. & R. 367; 3 Plowd. 29 a, b, 35 a; 1 Washb. R. P. 47.

It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; 93 U. S. 212.

A glebe, parsonage lands, may be in abeyance, in the United States; 9 Cra. 47; 2 Mass. 500; 1 Washb. R. P. 48. So also may the franchise of a corporation; 4 Wheat. 691. So, too, personal property may be in abeyance or legal sequestration, as in case of a vessel captured at sea from its captors until it becomes invested with the character of a prize; 1 Kent 102; 1 U. S. Rob. Adm. 139; 3 id. 97, n. See generally, also, 5 Mass. 555; 15 id. 464.

ABIATICUS (Lat.). A son's son; a grandson in the male line. Spel. Sometimes spelled *Aviaticus*. Du Cange, *Avius*.

ABIDE. When used as to an order of court, it means to perform, to execute, to conform to such order. A. & E. Encyc. As, to abide the judgment of the court; 7 Tex. App. 38; abide by an award; 6 N. H. 162; 48 N. H. 36; or abide the decision; 108 Mass. 585.

Abide by an Award. To await the award without revoking the submission. It can never be construed to mean that the defendant should not be at liberty to dispute the validity of any award that might be made. *Id.*; 6 N. H. 162.

Abide the Judgment. It was held that a provision to abide the judgment and orders of the court did not mean that the plaintiff or his sureties should pay or satisfy the judgment, but that he should surrender himself to the custody of the court. *Id.*; 37 Kan. 9.

ABIDING BY. In Scotch law. A judicial declaration that the party abides by the deed on which he founds, in an action where the deed or writing is attacked as forged. Unless this be done, a decree that the deed is false will be pronounced. Pat. Comp. It has the effect of pledging the party to stand the consequences of founding on a forged deed. Bell, Dict.

ABIDING CONVICTION. In this phrase, the word "abiding" has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of conviction would leave the mind of a juror free from a "reasonable doubt" (*q. v.*), if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. 120 U. S. 439.

ABIGEATORES. See **ABIGEUS**.

ABIGEATUS. The offence of driving away and stealing cattle in numbers. See **ABIGEUS**.

ABIGEL. See **ABIGEUS**.

ABIGERE. See **ABIGEUS**.

ABIGERE (Lat. *abigere*). One who steals cattle in numbers.

This is the common word used to denote a stealer of cattle in large numbers, which latter circumstance distinguishes the *abigeus* from the *fur*, who was simply a thief. He who steals a single animal may be called *fur*; he who steals a flock or herd is an *abigeus*. The word is derived from *abigere*, to lead or drive away, and is the same in signification as *Abactor* (*q. v.*), *Abigatores*, *Abigatores*, *Abiget*. Du Cange; Guyot, Rép. Univ.; 4 Bla. Com. 239.

A distinction is also taken by some writers depending upon the place whence the cattle are taken; thus, one who takes cattle from a stable is called *fur*. Calvinus, Lex, *Abiget*.

ABILITY. May be construed to mean a person's pecuniary ability, including his

capacity or skill to earn or acquire money as well as property actually owned by him. 24 Wis. 522. Has also been held to refer only to property actually owned. 9 Cal. 475. 1 A. & E. Ency. L. (2nd ed.), 185. See TENTERDEN'S ACT.

"Ability," within the rule that, to be entitled to commission, the broker must procure a customer able, etc., means that he must have the money (ability) at the time to pay cash, and not merely property on which he could raise money. 164 N. W. 335, cited by Walker, Real Est. Agen. 926.

ABJUDICATION (Lat. *abjudicare*). A removal from court. Calvinus, Lex. It has the same signification as *fortis-judicatio* both in the civil and canon law. Co. Litt. 100 b. Calvinus, Lex.

Used to indicate an adverse decision in a writ of right: Thus, the land is said to be *abjudged* from one of the parties and his heirs. 2 Poll. & Maitl. 62.

ABJURATION (Lat. *abjuratio*, from *abjurare*, to forswear). A renunciation of allegiance, upon oath.

In Am. law. Every alien, upon application to become a citizen of the United States, must declare on oath or affirmation before the court where the application is made, amongst other things, that he doth absolutely and entirely renounce and *abjure* all allegiance and fidelity which he owes to any foreign prince, state, etc., and particularly, by name, the prince, state, etc., whereof he was before a citizen or subject. Rawle, Const. 98; Rev. Stat. U. S. § 2155.

In Eng. Law. The oath by which any person holding office in England was formerly obliged to bind himself not to acknowledge any right in the Pretender to the throne of England; 1 Bla. Com. 368; 18 and 14 W. III. c. 6. Repealed by 30 and 81 Vic. c. 59.

It also denotes an oath abjuring certain doctrines of the church of Rome.

In the ancient English law, it was a renunciation of one's country and taking an oath of perpetual banishment. A man who had committed a felony, and for safety fled to a sanctuary, might within forty days confess and take the oath of abjuration and perpetual banishment; he was then transported. This was abolished by stat. 21 Jac. I. c. 28; Ayliffe, Parg. 14; Burr. L. Dic. Abjuration of the Realm; 4 Bla. Com. 332.

But the doctrine of abjuration has been referred to, at least, in much later times; 4 Sharsw. Bla. Com. 56, 124, 332; 11 East 301; 2 Kent 156, n.; Termes de la Ley.

In medieval justice, every consecrated church was a sanctuary. If a malefactor took refuge therein, he could not be extracted; he had a choice between *abjuring* the realm and submitting to trial. If he chose the former he left England, bound by his oath never to return. His lands were escheated, his chattels were forfeited, and if he came back he was an outlaw; 2 Poll. & Maitl. 588; *Réville, L'Abjuration regni, Revue historique*. 7 Vol. 50, p. 1.

ABLE. In an Act, which provides that the broker's commissions are earned when, during the agency, he finds a purchaser ready, "able" and willing to buy, etc., means financially able. 71 S. E. 745, cited by Walker, Real Est. Agen. 548.

ABLE BODIED. Imports an absence of those palpable and visible defects which evidently incapacitate a person for performing the ordinary duties of a soldier, and does not imply an absolute freedom from all physical ailments. 1 A. & E. Ency. L. (2nd ed.), 185; 10 Vt. 148; 26 Conn. 57.

ABLEGATI. Papal ambassadors of the second rank, who are sent with a less extensive commission to a court where there are no nuncios. This title is equivalent to *envoy*, which see.

ABNEPOS (Lat.). A great-great-grandson. The grandson of a grandson or granddaughter. Calvinus, Lex.

ABNEPTIS (Lat.). A great-great-granddaughter. The granddaughter of a grandson or granddaughter. Calvinus, Lex.

ABODE. Where a person dwells; it is the criterion determining the residence of a legal voter, and which must be with the present intention not to change it. 71 Pa. 302; 78 Ill. 181.

Permanent Abode. The criterion of the residence required to constitute a legal voter. It means nothing more than a domicile, a home, which the party is at liberty to leave as interest or whim may dictate, but without any present intention to change it. 10 A. & E. Ency. 2nd ed., 598; 78 Ill. 170.

Place of Abode. Usually means the place of residence. A man's residence, where he lives with his family and sleeps at night, is always his place of abode in the full sense of that expression. The phrase contemplates residence, implies permanence, and does not mean a place of temporary sojourn. 22 A. & E. Ency., 2nd ed., 831; 23 Kan. 425. What is a person's place of abode is rather a question of fact than of law. *Id.*; 21 L. J. C. P. 48.

See CHANGE OF ABODE.

See DOMICIL; RESIDENCE.

ABOGADO (Sp.). A counselor at law; advocate. Stand. Dict. See BOZERO.

ABOLITIO. Leave to discontinue an accusation.

ABOLITION (Lat. *abolitio*, from *abolere*, to utterly destroy). The extinguishment, abrogation, or annihilation of a thing.

In the civil, French and German law, abolition is used nearly synonymously with pardon, remission, grace. Dig. 39. 4. 3. 3. There is, however, this difference: *grace* is the generic term; *pardon*, according to those laws, is the clemency which the prince extends to a man who has participated in a crime, without being a principal or accomplice; *remission* is made in cases of involuntary homicides, and self-defence. *Abolition* is different: it is used when the crime cannot be remitted. The prince then may, by letters of abolition, remit the punishment, but the infamy remains, unless letters of abolition have been obtained before sentence. *En cycl. de D'Alembert*.

ABORDAGE (Fr.). The collision of vessels.

If the collision happen in the open sea, and the damaged ship is insured, the insurer must pay the loss, but is entitled in the civil law, at least to be subrogated to the rights of the insured against the party causing the damage. *Ordonnance de la Marine* de 1681, Art. 8; *Jugements d'Oléron*; Emer. Ins. c. 128, 14.

ABORTION. The expulsion of the fetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life.

Its natural and innocent causes are to be sought either in the mother—as in a nervous, irritable temperament, disease, malformation of the pelvis, immoderate venereal indulgence, a habit of miscarriage, plethora, great debility; or in the fetus or its dependencies; and this is usually disease existing in the ovum, in the membranes, the placenta, or the fetus itself.

The criminal means of producing abortion are of two kinds. *General*, or those which seek to produce the expulsion through the constitution of the mother, which are venesection, emetics, cathartics, diuretics, emmenagogues, comprising mercury, savin, and the *secale cornutum* (spurred rye, ergot), to which much importance has been attached; or *local or mechanical* means, which consist either of external violence applied to the abdomen or loins, or of instruments introduced into the uterus for the purpose of rupturing the membranes and thus bringing on premature action of the womb. The latter is the more generally resorted to, as being the most effectual. These local or mechanical means not unfrequently produce the death of the mother, as well as that of the fetus.

At common law, an attempt to destroy a child *en ventre sa mere* appears to have been held in England to be a misdemeanor; Rosc. Cr. Ev. 4th Lond. ed. 280; 1 Russ. Cr. 8d Lond. ed. 671. At an early period it was held to be murder, in case of death of the child; 2 Whart. Cr. L. § 1220. In this country, it has been held that it is not an indictable offence, at common law, to administer a drug, or perform an operation upon a pregnant woman with her consent, with the intention and for the purpose of causing an abortion and premature birth of the fetus of which she is pregnant, by means of which an abortion is in fact caused, unless, at the time of the administration of such drug or the performance of such operation, such woman was *quick* with child; 11 Gray 85; 2 Zabr. 52; 3 Clarke 274; 15 Iowa 177; 49 N. Y. 86; 78 Ky. 264; 83 Me. 48; 22 N. J. L. 52; 82 N. C. 653; 11 Humph. 159. A case in Kentucky citing all the earlier cases holds that this is the rule at common law, and must prevail in the absence of statute; 10 Cent. L. J. 388. But in Pennsylvania a contrary

doctrine has been held; 13 Pa. 631; 6 Pa. 29. Wharton supports the latter doctrine on principle. See, also, 116 Mass. 343.

The former English statutes on this subject, the 43 Geo. III. c. 58, and 9 Geo. IV. c. 61, § 14, distinguished between the case where the woman was quick and was not quick with child; and under both acts the woman must have been pregnant at the time; 1 Mood. Cr. Cas. 216; 3 C. & P. 605. The terms of the act (24 and 25 Vict. c. 100, s. 62) are, "with intent to procure the miscarriage of any woman whether she be with child or not." See 1 Den. Cr. Cas. 18; 2 C. & K. 298.

When, in consequence of the means used to secure an abortion, the death of the woman ensues, the crime is murder; 41 Wis. 309; 9 Metc. 268; 1 Hale, P. C. 430; 1 East's P. C. 280. And if a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it less murder; 2 C. & K. 784.

A woman who takes a potion given to her to cause a miscarriage, is not an accomplice with the person administering it; 39 N. J. L. 598. On a trial for criminal malpractice the party on whom the operation has been performed is not an accomplice; 155 Mass. 274.

In New York if a person advises a woman to take medicine to procure a miscarriage the crime of abortion is not complete unless the advice is acted on; 133 N. Y. 267.

Consult 1 Beck. Med. Jur. 288-331, 429-435; Rosc. Cr. Ev. 190; 1 Russ. Cr. 3d Lond. ed. 671; 1 Briand, *Méd. Leg.* pt. 1, c. 4; 2 Whart. & Still. Med. Jur. § 84 et seq.; 1 Whart. Cr. L. 10th ed. § 592; 2 With. & Beech. Med. Jur. 97; 2 Hamilton, Leg. Med. 467; 2 Luff. For. Med. 172; Reese, Med. Jur. 458.

ABORTIVE TRIAL. Used "when a case has gone off, and no verdict has been pronounced without the fault, contrivance, or management of the parties." Jebb & B. 51.

ABORTUS. The fruit of an abortion; the child born before its time, incapable of life. See ABORTION; BIRTH; BREATH; DEAD-BORN; GESTATION; LIFE.

ABOUT. It means almost or approximately; near in time, quantity, number, quality or degree. The import of the qualifying word "about" is simply, that the actual quantity is a near approximation to that mentioned, and its effect is to provide against accidental variations; 115 U. S. 168. When there is a material and valuable variation, a court of equity upon a petition for specific performance will give the word its proper effect; 40 Ohio St. 341.

ABOUTISSEMENT (Fr.). An abutment or abutment. See Guyot. Répert. Univ. *Aboutissans*.

ABOVE. Higher; superior. As, court above, bail above.

ABPATRUS (Lat.). A great-great-uncle; or, a great-great-grandfather's brother. Du Cange, *Patrui*. It sometimes means uncle, and sometimes great-uncle.

ABRIDGE. In Practice. To shorten a declaration or count by taking away or severing some of the substance of it. Brooke, *Abr. Abridgment*; Comyn, *Dig. Abridgment*; 1 Viner, *Abr.* 109.

To *abridge a plaintiff* is to strike out a part of the demand and pray that the tenant answer to the rest. This was allowable generally in real actions where the writ was *de libero tenemento*, as assize, dower, etc., where the demandant claimed land of which the tenant was not seized. See 1

Wms. Saund. 207, n. 2; 2 *id.* 24, 830; Brooke, *Abr. Abridgment*; 1 Pet. 74; Stearns, *Real Act.* 204.

ABRIDGEMENT. An epitome or compendium of another and larger work, wherein the principal ideas of the larger work are summarily contained.

Copyright law. When fairly made, it may justly be deemed, within the meaning of the law, a new work, the publication of which will not infringe the copyright of the work abridged. The abridgment must be something more than a mere copy of the whole or parts of the original. It must be the result of independent labor other than copying, and there must be substantial fruits of authorship on the part of the maker; Drone, *Coppr.* 158; Chamier, *Coppr.* 127, 128; Copinger, *Coppr.* 85, 101; Bewes, *Coppr.* 13; 4 McLean 306; 2 Am. L. T. R. N. S. 402; 1 Bro. C. C. 450; Amb. 402; 1 Yo. & C. 301; 12 Ves. 470; 8 Jur. 183. See 16 U. C. B. 409; 4 Cliff. 79. For a discussion of this subject in which it is maintained that an abridgment is piratical, see Drone, *Coppr.* 44. See, also, 5 Am. L. T. R. 158; L. R. 8 Exch. 1.

An injunction will be granted against a mere colorable abridgment; 2 Atk. 143; 1 Bro. Ch. 451; 5 Ves. 709; Loft 765; Amb. 403; 1 Story 11; 3 *id.* 6; 1 Y. & C. Ch. 298; 2 Kent 382.

Abridgments of the law or digests of adjudged cases serve the very useful purpose of an index to the cases abridged; 5 Coke 25. Lord Coke says they are most profitable to those who make them; Co. Litt., in preface to the table at the end of the work. With few exceptions, they are not entitled to be considered authoritative. See 2 Wils. 1, 2; 1 Burr. 364; 1 W. Bla. 101; 3 Term 64, 241; and an article in the North American Review, July, 1826, p. 8, for an account of the principal abridgments, which was written by the late Justice Story, and is reprinted in his "Miscellaneous Writings," p. 79; Warren, *Law Stud.* 778.

ABROGATION. The destruction of or annulling a former law, by an act of the legislative power, or by usage.

A law may be abrogated, or only derogated from: it is abrogated when it is totally annulled; it is derogated from when only a part is abrogated; *derogatur legi, cum pars detrahatur*; *abrogatur legi, cum prorsus tollitur*. Dig. 50. 17. 1. 102. *Lex rogatur dum fertur* (when it is passed); *abrogatur dum tollitur* (when it is repealed); *derogatur idem dum quoddam ejus caput aboletur* (when any part of it is abolished); *subrogatur dum aliquid ei adicitur* (when anything is added to it); *abrogatur denique, quoties aliquid in ea mutatur* (as often as anything in it is changed). Dupin, *Proleg. Jur.* art. iv.

Express abrogation is that literally pronounced by the new law either in general terms, as when a final clause abrogates or repeals all laws contrary to the provisions of the new one, or in particular terms, as when it abrogates certain preceding laws which are named.

Implied abrogation takes place when the new law contains provisions which are positively contrary to the former laws, without expressly abrogating such laws; for it is a maxim, *posteriora derogant prioribus*; 10 Mart. La. 172, 560; and also when the order of things for which the law had been made no longer exists, and hence the motives which had caused its enactment have ceased to operate; *ratione legis omnino cessante, cessat lex*; Toullier, Dr. Civ. Fr. tit. prel. § 11, n. 151; Merlin, *Répert. Abrogation*.

ABSCOND. To go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process.

A person who departs from his usual place of abode secretly or suddenly, or retires or conceals himself from public view in order to avoid legal process; 2 Sneed 152; 2 Root 133.

ABSCONDING DEBTOR. One who absconds from his creditors.

The statutes of the various states, and the decisions upon them, have determined who shall be treated in those states, respectively, as absconding debtors, and liable to be proceeded against as such. A person who has been in a state only

transiently, or has come into it without any intention of settling therein, cannot be treated as an absconding debtor; 2 Cal. 318; 15 Johns. 196; nor can one who openly changes his residence; 3 Verg. 414; 5 Conn. 117; 43 Ill. 185. For the rule in Vermont, see 2 Vt. 499; 6 *id.* 614. It is not necessary that the debtor should actually leave the state; 7 Md. 299. It is essential that there be an intention to delay and defraud creditors. The fact of converting a large amount of goods into money by auction sales, at a sacrifice and clandestinely, furnishes a reasonable presumption that debtor intended to abscond or absent himself to avoid service of process upon him; 33 Mo. 296.

ABSENCE. The state of being away from one's domicile or usual place of residence.

A presumption of death arises after the absence of a person for seven years without having been heard from; Peake, *Ev. c.* 14, § 1; 2 Stark. *Ev.* 457, 458; Park, *Ins.* 433; 1 W. Bla. 494; 1 Stark. 121; 2 Campb. 113; 4 B. & Ald. 422; 4 Wheat. 150, 173; 15 Mass. 305; 12 Johns. 141; 1 Hardin 479; 71 Me. 72; 45 N. H. 467; 45 Barb. 124; 42 Pa. 159. One who is dead is not absent; 71 Me. 452.

In Louisiana a curator is appointed under some circumstances to take charge of the estate of those who are out of the state, during their absence; La. Civ. Code, art. 50, 51.

ABSENT. Not present. Laboring under legal disability. English. The word "absent" does not necessarily mean merely physically absent, but such an absence as renders one incapable for the time being, of performing some particular act. 114 Ky. 646; 120 Ky. 89.

A debtor, going out of the State and remaining away for four months, must be regarded as "absent" from the State and as ground for attachment. 4 Met. (Ky.) 289.

ABSENTEE. A landlord who resides in a country other than that from which he draws his rents. The discussions on the subject have generally had reference to Ireland. McCulloch, *Polit. Econ.*; 33 British Quarterly Review, 455. Also where a person has left his residence in a state, leaving no one to represent him.

ABSOILE. To pardon; to deliver from excommunication. Staunford, *Pl. Cr.* 72; Kelham. Sometimes spelled *Assole*, which see.

ABSOLUTE (Lat. *absolvere*). Complete, perfect, final; without any condition or incumbrance; as an absolute bond (*simplex obligatio*) in distinction from a conditional bond; an absolute estate, one that is free from all manner of condition or incumbrance. See **CONDITION**.

A rule is said to be absolute when on the hearing it is confirmed and made final. A conveyance is said to be absolute, as distinguished from a mortgage or other conditional conveyance; 1 Powell, *Other* 125.

Absolute rights are such as appertain and belong to particular persons merely as individuals or single persons, as distinguished from relative rights, which are incident to them as members of society; 1 Sharsw. Bla. Com. 123; 1 Chit. Pr. 32.

Absolute property is where a man hath solely and exclusively the right and also the occupation of movable chattels; distinguished from a qualified property, as that of a bailee; 2 Sharsw. Bla. Com. 388; 2 Kent 347.

It may be used in the sense of vested; 17 Fed. Rep. 65; 29 Conn. 20.

ABSOLUTE IMPOSSIBILITY. See **IMPOSSIBILITY**.

ABSOLUTE OWNER. See **OWNER**; **PROPERTY**.

ABSOLUTE PREDESTINATION. "Absolute predestination" means that God foreknew and predestined all things whatsoever that may come to pass, whether with reference to the material universe or the salvation of souls—that is, God predestined all things which happen. 112 Ky. 512, 66 S. W. 289.

ABSOLUTE PROPERTY. See **ABSOLUTE**; **PROPERTY**; **OWNER**.

ABSOLUTELY. Completely, wholly;

without qualification; without reference or relation to, or dependence upon, any other person, thing, or event. To give property to a person absolutely, is to create such person the absolute and uncontrolled owner of it. But it has been held that the word absolutely, in a will, may be so far qualified by accompanying expressions as to convey only a limited interest. Burrill; 2 Pen. St. R. 120, 133.

ABSOLUTION. In Civil Law. A sentence whereby a party accused is declared innocent of the crime laid to his charge.

In Canon Law. A juridical act whereby the clergy declare that the sins of such as are penitent are remitted. The formula of absolution in the Roman Church is absolute; in the Greek Church it is deprecatory; in the Reformed Churches, declaratory. Among Protestants it is chiefly used for a sentence by which a person who stands excommunicated is released or freed from that punishment. *Encyc. Brit.*

In French Law. The dismissal of an accusation.

The term *acquittal* is employed when the accused is declared not guilty, and *absolution* when he is recognized as guilty but the act is not punishable by law or he is exonerated by some defect of intention or will; Merlin, *Répert.*

ABSOLUTISM. In Politics. That government in which public power is vested in some person or persons, unchecked and uncontrolled by any law or institution.

The word was first used at the beginning of this century, in Spain, where one who was in favor of the absolute power of the king, and opposed to the constitutional system introduced by the Cortes during the struggle with the French, was called *absolutista*. The term Absolutist spread over Europe, and was applied exclusively to absolute monarchism; but absolute power may exist in an aristocracy and in a democracy as well. Dr. Lieber, therefore, uses in his works the term Absolute Democracy for that government in which the public power rests unchecked in the multitude (practically speaking, in the majority).

ABSQUE (Lat.). Without.

ABSQUE ALIQUO INDE REDDENDO (Lat. without reserving any rent therefrom). A term used of a free grant by the crown. 2 Rolle, *Abr.* 502.

ABSQUE HOC (Lat.). Without this. See **TRAVERSE**.

ABSQUE IMPETITIONE VASTI (Without impeachment of waste). A term indicating freedom from any liability on the part of the tenant or lessee to answer in damages for the waste he may commit. See **WASTE**.

ABSQUE TALI CAUSA (Lat. without such cause). In Pleading. A form of replication in an action *ex delicto* which works a general denial of the whole matter of the defendant's plea of *de injuria*. Gould, *Pl. c.* 7, § 10.

ABSTENTION. In French Law. The tacit renunciation of a succession by an heir. Merlin, *Répert.*

ABSTRACT OF A FINE. A part of the record of a fine, consisting of an abstract of the writ of covenant and the concord; naming the parties, the parcel of land, and the agreement. 2 Bla. Com. 851.

ABSTRACT OF A TITLE. Aneptome, or brief statement of the evidences of ownership of real estate.

An abstract should set forth briefly, but clearly, every deed, will, or other instrument, every recital or fact relating to the devolution of the title, which will enable a purchaser, or mortgagee, or his counsel, to form an opinion as to the exact state of the title.

In England this is usually prepared at the expense of the owner; 1 Dart, *Vend.* 279. The failure to deliver an abstract in England relieves the purchaser from his contract in law; *id.* 805. It should run back for sixty years; or, since the Act of 38 and 39 Vict. c. 78, forty years prior to the intended sale, etc.

In the United States, where offices for registering deeds are universal, and con-

veyancing much less complicated, abstracts are much simpler than in England, and are usually prepared at the expense of the purchaser, etc., or by his conveyancer.

Where an abstract of title is made for a vendor, warranted to be true and perfect, the vendee refusing to take the property without it, the company was held liable for omissions in it; 89 Tenn. 431. Where the register of deeds records full satisfaction instead of a partial release on the margin of the mortgage record, a person relying on the marginal entry is guilty of negligence; 51 Minn. 282.

See Whart. Law Dict.; Ward. Abstr.; 7 W. Va. 390.

ABSURDITY. Within the rule of construction that the legislature will not be presumed to have intended an absurdity is meant not only that which is physically impossible, but also that which is morally so; and that is to be regarded as morally impossible which is contrary to reason, or, in other words, which could not be attributed to a man in his right senses. 1 Amer. & Eng. Ency. 2nd ed., 221; 81 Mo. 585.

ABUSE. Everything which is contrary to good order established by usage. Merlin, Répert.

Among the civilians, abuse has another significance; which is the destruction of the substance of a thing in using it. For example, the borrower of wine or grain *abuses* the article borrowed by using it, because he cannot enjoy it without consuming it.

ABUSE OF A FEMALE CHILD. An injury to the genital organs in an attempt at carnal knowledge, falling short of actual penetration. 58 Ala. 376. See RAPE.

ABUT. To reach, to touch.

In old law, the ends were said to abut, the sides to adjoin. Cro. Jac. 184.

To take a new direction; as where a bounding line changes its course. Spelman, Gloss. *Abutture*. In the modern law, to bound upon. 2 Chit. Pl. 660.

ABUTTALS (Fr.). The buttings or boundings of lands, showing to what other lands, highways, or places they belong or are abutting. Termes de la Ley.

ABUTTER. One whose property abuts, is contiguous or joins at a border or boundary, as where no other land, road or street intervenes.

ABUTTING OWNER. One who owns land upon or along a street or highway, whether his title extends to the center of the street or stops at the street line. Lewis, Eminent Domain.

ABUTTING PROPERTY. A lot adjoining or bordering on the street improved is "abutting property." 103 Ky. 546, 45 S. W. 769.

AC ETIAM (Lat. and also). The introduction of the statement of the real cause of action, used in those cases where it was necessary to allege a fictitious cause of action to give the court jurisdiction, and also the real cause in compliance with the statutes. It was first used in the K. B., and was afterwards adopted by Lord C. J. North in addition to the *clausum fregit* writs of his court upon which writs of *capias* might issue. He balanced awhile whether he should not use the words *neo non* instead of *ac etiam*. It is sometimes written *acetiā*. 2 Stra. 922. This clause is no longer used in the English courts. 2 Will. IV. c. 39. See Burgess, Ins. 149-157; 3 Bla. Com. 288.

AC ETIAM BILLÆ. And also to a bill. See AC ETIAM.

ACADEMY. A society of men associated for the promotion of some art; a grammar school; a seminary of learning. English.

ACCEDAS AD CURIAM (Lat. that you go to court). In Eng. Law. An original writ issuing out of chancery and directed to the sheriff, for the purpose of removing a replevin suit from the Hundred Court or Court Baron before one of the superior

courts of law. It directs the sheriff to go to the lower court, and there cause the plaintiff to be recorded and to return, etc. See Fitzherbert, Nat. Brev. 18; Dy. 169.

ACCEDAS AD VICE COMITEM (Lat. that you go to the sheriff). In Eng. law. A writ directed to the coroner, commanding him to deliver a writ to the sheriff, when the latter, having had a *pone* delivered him, suppressed it. Reg. Orig. 83.

ACCELERATION. The shortening of the time for the vesting in possession of an expectant interest. Wharton.

ACCEPTANCE (Lat. *accipere*, to receive). The receipt of a thing offered by another with an intention to retain it, indicated by some act sufficient for the purpose. 2 Parsons, Contr. 221.

The element of receipt must enter into every acceptance, though receipt does not necessarily mean in this sense some actual manual taking. To this element there must be added an intention to retain. This intention may exist at the time of the receipt, or subsequently; it may be indicated by words, or acts, or any medium understood by the parties; and an acceptance of goods will be implied from mere detention, in many instances.

An acceptance involves very generally the idea of a receipt in consequence of a previous undertaking on the part of the person offering to deliver such a thing as the party accepting is in some manner bound to receive. It is through this meaning that the term acceptance, as used in reference to bills of exchange, has a relation to the more general use of the term. As distinguished from assent, acceptance would denote receipt of something in compliance with, and satisfactory fulfillment of, a contract to which assent had been previously given. See Assent.

Under the statute of frauds (29 Car. II. c. 3) delivery and acceptance are necessary to complete an oral contract for the sale of goods, in most cases. In such cases it is said the acceptance must be absolute and past recall; 2 Exch. 390; 5 Railw. Cas. 496; 1 Pick. 278; 10 *id.* 326; 16 Wall. 146. If an article is found defective, but is retained and used, it is a sufficient acceptance; 3 N. Y. Misc. R. 296. If goods are delivered to a third person by order of the purchaser they are deemed to have been received and accepted by the latter through his agent; 88 Ga. 578. Where a verbal contract was made for the sale of goods to be delivered at a specified point where purchaser was to pay freight for the seller, it was held that the acceptance by the carrier and possession of freight after reaching its destination, was not such an acceptance by purchaser as would take it out of the statute; 64 Vt. 147. As to how far a right to make future objections invalidates an acceptance, see 3 B. & Ald. 521; 10 Q. B. 111; 6 Exch. 903.

In Insurance. Acceptance of abandonment in insurance is in effect an acknowledgement of its sufficiency, and perfects the right of the assured to recover for a total loss if the cause of loss and circumstances have been truly made known. No particular form of acceptance is requisite, and the underwriter is not obliged to say whether he accepts; 2 Phil. Ins. § 1689. An acceptance may be a constructive one, as by taking possession of an abandoned ship to repair it without authority so to do; 2 Curt. 322; or by retaining such possession an unreasonable time, under a stipulation authorizing the underwriter to take such possession; 16 Ill. 235.

Acceptance of rent destroys the effect of a notice to quit for non-payment of such rent; 4 B. & Ald. 401; 13 Wend. 530; 11 Barb. 33; 1 Bush 418; 2 N. H. 163; 19 Vt. 587; and may operate as a waiver of forfeiture for other causes; 3 Co. 64; 1 Wms. Saund. 287 c. note; 3 Cow. 220; 5 Barb. 339; 3 Cush. 325.

Negotiable Instrument Law. "Acceptance" means an acceptance completed by delivery or notification. Miller's Ky. Negotiable Instrument Law, § 190.

Negotiable Instruments. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an "acceptance." 162 Ky. 551, 172 S. W. 955.

The "acceptance" of a check by the bank on which it is drawn, is the signification by the bank of its assent to the order of the

drawer. The acceptance of the check, like its certification, in order to be binding on the bank, must be in writing and signed by it. 162 Ky. 551, 172 S. W. 955.

Of Bills of Exchange. An engagement to pay the bill in money when due. 4 East 73; 19 Law Jour. 297; Byles, Bills 288.

Acceptances are said to be of the following kinds:

Absolute, which is a positive engagement to pay the bill according to its tenor.

Conditional, which is an undertaking to pay the bill on a contingency.

The holder is not bound to receive such an acceptance, but if he does receive it, must observe its terms; 4 M. & S. 406; 2 Wash. C. C. 485; Dan. Neg. Inst. 411. For some examples of what do and what do not constitute conditional acceptances, see 6 C. & P. 213; 3 C. B. 341; 15 Miss. 245; 7 Me. 138; 10 Ala. n. 533; 1 Strob. 271; 4 W. & S. 346; 105 Mass. 401; 10 C. B. n. 214; 44 Ga. 513; 78 Ill. 406; 62 Me. 406; 14 Cal. 407; 86 Neb. 844; 65 Hun 625; 87 Minn. 191; 39 W. Va. 462.

Express or absolute, which is an undertaking in direct and express terms to pay the bill.

Implied, which is an undertaking to pay the bill inferred from acts of a character which fairly warrant such an inference.

Where one receives certain goods and sells them, knowing that a draft has been drawn on him for their price, the retaining of the proceeds is equivalent to an acceptance of the draft; 133 Ill. 234.

If the payee writes upon a bill of exchange drawn upon him the words "payable the 15th day of May, 1888," and signs it, it constitutes a qualified acceptance; 37 Minn. 191.

Partial, which is one varying from the tenor of the bill.

An acceptance to pay part of the amount for which the bill is drawn. 1 Strange 214; 2 Wash. C. C. 485; or to pay at a different time, 14 Jur. 396; 25 Miss. 376; Molloy, b. 2, c. 10, § 20; or at a different place, 4 M. & S. 402, would be partial.

Qualified, which are either conditional or partial, and introduce a variation in the sum, time, mode, or place of payment; 1 Dan. Neg. Inst. 414.

Supra protest, which is the acceptance of the bill after protest for non-acceptance by the drawee, for the honor of the drawer or a particular indorser.

When a bill has been accepted *supra protest* for the honor of one party to the bill, it may be accepted *supra protest* by another individual for the honor of another; Beawes, Lex Merc. *Bills of Exchange*, pl. 62; 5 Camp. 447.

The acceptance must be made by the drawee or some one authorized to act for him. The drawee must have capacity to act and bind himself for the payment of the bill, or it may be treated as dishonored. See ACCEPTOR SUPRA PROTEST; 2 Q. B. 16. As to when an acceptance by an agent, an officer of a corporation, etc., on behalf of the company, will bind the agent or officer personally, see 6 C. B. 766; 9 Exch. 154; 4 N. Y. 206; 8 Pick. 56; 11 Me. 267; 2 South. 828; see also 17 Wend. 40; 5 B. Monr. 51; 2 Conn. 660; 19 Me. 352; 16 Vt. 220; 7 Miss. 371.

The acceptance and delivery of negotiable paper on Sunday is void between the parties, but if dated falsely as of another day, it is good in the hands of an innocent holder; 76 Ga. 218.

It may be made before the bill is drawn, in which case it must be in writing; 3 Mass. 1; 15 Johns. 6; 2 Wend. 545; 1 Bail. 522; 2 Green 239; 2 Dana 95; 5 B. Monr. 8; 15 Pa. 453; 2 Ind. 488; 3 Md. 265; 1 Pet. 264; 2 Wheat. 66; 2 McLean 462; 2 Blatchf. 335. See 1 Story 23; 43 Minn. 260. It may be made after it is drawn and before it comes due, which is the usual course, or after it becomes due; 1 H. Bla. 313; 2 Green 339; or even after a previous refusal to accept; 5 East 514; 1 Mas. 176. It must be made within twenty-four hours after presentment, or the holder may treat the bill as dishonored; Chit. Bills. 212, 217. And upon refusal to accept, the bill is at once dishonored, and should be protested; Chit. Bills. 217.

It may be in writing on the bill itself or on another paper; 4 East 91; 97 N. C. 1; and it seems that the holder may insist on

having a written acceptance, and in default thereof consider the bill as dishonored: 1 Dan. Neg. Inst. 406; or it may be oral: 6 C. & P. 318; 1 Wend. 523; 2 Green 339; 1 Rich. 249; 2 Metc. 53; 23 N. H. 153; 115 Mass. 874; 91 U. S. 406; 75 Ill. 595; 11 Moore 320. An acceptance by telegraph has been held good: 87 Ill. 93; 109 Mass. 414; 39 Fed. Rep. 163; 41 Fed. Rep. 351; 47 Fed. Rep. 867; 51 Fed. Rep. 163; but must now be in writing, in England, New York, Missouri and Pennsylvania; Stat. 19 & 20 Vict. c. 97, § 6; 55 Mo. App. 81; 57 id. 566; 156 Pa. 414; 161 id. 199. The usual form is by writing "accepted" across the face of the bill and signing the acceptor's name: 1 Pars. Contr. 223; 1 Man. & R. 90; but the drawee's name alone is sufficient, or any words of equivalent force to accepted. See Byles, Bills 147; 1 Ath. 611; 1 Man. & R. 90; 21 Pick. 307; 9 Gill 350. So if the drawee writes the word "accept" and signs his name; 29 Neb. 697. The drawee cannot make his acceptance after the bill has been delivered to the holder's agent, though it had not been communicated to the holder; 152 Mass. 84. See 54 N. J. L. 599.

A parol promise to accept a bill of exchange, upon sufficient consideration, binds the acceptor; 149 U. S. 116; 91 U. S. 121; 75 Ill. 595; 85 id. 551; 11 M. & W. 383; 71 Tex. 81; 99 N. C. 49; 9 Wash. 639. Where the holder of an overdue bill of exchange by parol agreement accepts pay in instalments, the failure of acceptor to carry out his contract does not release the drawer; 2 Pa. Dist. R. 279.

Consult Bayley, Byles, Chitty, Parsons, Story, on Bills; Pars. Contr.; Dan. Neg. Inst.

Of a Dedication. If an offer to dedicate land for a street is not formally accepted, to constitute an acceptance, the use by the public must be shown to have been under claim of right; 81 Cal. 524; but if there is a failure to accept within a reasonable time, no rights are acquired in a platted street which a city failed to use for years; 84 Mich. 54. Where land is described as bounded on a certain street and so sold, it is at least an offer of dedication, and it is a sufficient acceptance if in a resolution of the city council they accept as public all streets which have been dedicated by the owners; 83 Cal. 623. Where a city constructs sewers through land dedicated for a street and files liens against abutting property-holders for the improvements, it is an acceptance of the dedication; 152 Pa. 494; or where the public use the street and the city repairs it; 37 N. E. Rep. (Ind.) 133.

A common law as well as a statutory dedication must be completed by acceptance, and a failure to accept will prevent the opening of a street as against a person in possession for years; 31 Ill. App. 284.

See **CONDITIONAL ACCEPTANCE**; **BANKER'S ACCEPTANCE**; **GENERAL ACCEPTANCE**; **TRADE ACCEPTANCE**.

ACCEPTILATIO. In Roman law, the verbal release of a verbal contract, with a declaration that an obligation had been fulfilled, which had not. Black; Sand. Inst. (5th ed.) 386; see also Hunter's Rom. L. (2nd ed.) 639. See **ACCEPTILATIO**; **STIPULATIO**; **STIPULATIO AQUILIANA**.

ACCEPTATION. In Civil Law. A release made by a creditor to his debtor of his debt, without receiving any consideration. Ayl. Pand. tit. 26, p. 570. It is a species of donation, but not subject to the forms of the latter, and is valid unless in fraud of creditors. Merlin, Répert.

Acceptation may be defined *verborum conceptio qua creditor debitori, quod debet, acceptum fert*; or, a certain arrangement of words by which, on the question of the debtor, the creditor, wishing to dissolve the obligation, answers that he admits as received what in fact he has not received. The acceptance is an imaginary payment; Dig. 46. 4. 1, 19; Dig. 2. 14. 27, 9; Inst. 3. 80. 1.

ACCEPTOR. One who accepts a bill of exchange. 3 Kent 75.

The party who undertakes to pay a bill of exchange in the first instance.

The drawee is in general the acceptor;

and unless the drawee accepts, the bill is dishonored. The acceptor of a bill is the principal debtor, and the drawer the surety. He is bound, though he accepted without consideration and for the sole accommodation of the drawer. By his acceptance he admits the drawer's handwriting; for before acceptance it was incumbent upon him to inquire into the genuineness of the drawer's handwriting; 5 Kent 75; 5 Burr. 1384; 1 W. Bla. 396; 4 Dall. 204.

The drawee by acceptance only vouches for the genuineness of the signature of the drawer and not of the body of the instrument; 64 N. Y. 316; 40 N. Y. 323; 63 Ala. 519.

ACCEPTOR SUPRA PROTEST. One who accepts a bill which has been protested, for the honor of the drawer or any one of the endorsers.

Any person, even the drawee himself, may accept a bill *supra protest*; Byles, Bills *262, and two or more persons may become acceptors *supra protest* for the honor of different persons. A general acceptance *supra protest* is taken to be for the honor of the drawer; Byles, Bills *263. The obligation of an acceptor *supra protest* is not absolute but only to pay if the drawee do not; 16 East 391. See 3 Wend. 491; 19 Pick. 220; 8 N. H. 66. An acceptor *supra protest* has his remedy against the person for whose honor he accepted, and against all persons who stand prior to that person. If he takes up the bill for the honor of the endorser, he stands in the light of an endorsee paying full value for the bill, and has the same remedies to which an endorsee would be entitled against all prior parties, and he can, of course, sue the drawer and endorser; 1 Ld. Raym. 574; 1 Esp. 112; 3 Kent 75; Chit. Bills 312. The acceptor *supra protest* is required to give the same notice, in order to charge a party, which is necessary to be given by other holders; 19 Pick. 220.

If a bill is accepted and is subsequently dishonored, the acceptor cannot then accept for the honor of the endorser, as he is already bound; 13 Ves. Jr. 180.

ACCESS. Approach, or the means or power of approaching.

Sometimes by access is understood sexual intercourse; at other times, the opportunity of communicating together so that sexual intercourse may have taken place, is also called access.

In this sense a man who can readily be in company with his wife is said to have access to her; and in that case her issue are presumed to be his issue. But this presumption may be rebutted by positive evidence that no sexual intercourse took place; 1 Turn. & R. 141.

Parents are not allowed to prove non-access for the purpose of bastardizing the issue of the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law; Bull. N. P. 113; 2 Munf. 242; 3 Hawks 323; 3 Hayw. 221; 1 Grant, Cas. 877; 3 Pal. Ch. 129; 75 Pa. 436; 70 N. C. 263.

The modern doctrine is that children born in lawful wedlock (when there has been no divorce *a mensa et thoro*) are presumed legitimate, but this presumption may be rebutted by evidence (not that of the parents) tending to show that intercourse could not have taken place, impotency, etc. Where there were opportunities for intercourse, evidence is generally not allowed to establish illegitimacy; 2 Greenl. Ev. §§ 150, 151, and n. See 9 Beav. 552; 1 Whart. Ev. §§ 608; 2 id. § 1298; 1 Bish. Mar. & Div. §§ 1170, 1179.

Non-access is not presumed from the mere fact that husband and wife lived apart; 1 Gale & D. 7. See 3 C. & P. 215; 1 Sim. & S. 153; 1 Greenl. Ev. § 28.

ACCESSARY. In Criminal Law. He who is not the chief actor in the perpetration of the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed.

An *accessary before the fact* is one who, being absent at the time of the crime committed, yet procures, counsels, or commands another to commit it; 1 Hale, Pl.

Cr. 615. With regard to those cases where the principal goes beyond the terms of the solicitation, the approved test is, "Was the event alleged to be the crime to which the accused is charged to be accessory, a probable effect of the act which he counselled?" 1 F. & F. Cr. Cas. 242; Rosc. Cr. Ev. 181. When the act is committed through the agency of a person who has no legal discretion or a will, as in the case of a child or an insane person, the incitor, though absent when the crime was committed, will be considered, not an accessory, for none can be accessory to the acts of a madman, but a principal in the first degree; 1 Hale, Pl. Cr. 514; 12 Wheat. 469. But if the instrument is aware of the consequences of his act, he is a principal in the first degree, and the employer, if he is absent when the act is committed, is an accessory before the fact; 1 R. & R. Cr. Cas. 363; 1 Den. Cr. Cas. 37; 1 C. & K. 539; or if he is present, as a principal in the second degree; 1 Fost. Cr. Cas. 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent.

An *accessary after the fact* is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; 4 Bla. Com. 37.

No one who is a principal can be an accessory; but if acquitted as principal he may be indicted as an accessory after the fact; 14 R. I. 283.

In certain crimes, there can be no accessories; all who are concerned are principals, whether they were present or absent at the time of their commission. These are treason, and all offences below the degree of felony; 4 Bla. Com. 35; Hawk. Pl. Cr. b. 2, c. 29, § 16; 1 Whart. Cr. L. § 223; 2 Den. Cr. Cas. 453; 5 Cox, Cr. Cas. 521; 2 Mood. Cr. Cas. 276; 8 Dana 28; 20 Miss. 58; 3 Gray 448; 14 Mo. 137; 18 Ark. 198; 4 J. J. Marsh. 122; 67 Ill. 587; 90 Ala. 588; 45 Fed. Rep. 851. Such is the English law; but in the United States it appears not to be determined as regards the cases of persons assisting traitors. Sergeant, Const. Law 382; 4 Cranch 472, 501; U. S. v. Fries, 3 Dall. 515. See 2 Wall. Jr. 134, 139; 16 Wall. 147; 12 Wall. 847. That there cannot be an accessory in cases of treason, see Davis, Cr. L. 38. *Contra*, 1 Whart. Cr. L. § 224.

It is evident there can be no accessory when there is no principal; if a principal in a transaction be not liable under our laws, no one can be charged as a mere accessory to him; 1 Woodb. & M. 221; 28 Tex. App. 526. But see 6 Ohio Cr. Ct. R. 331.

Where two persons are indicted, one as principal and the other as aider or abettor, the latter may be convicted as principal, where the evidence shows he was the perpetrator of the deed; 92 Ky. 1.

By the rules of the common law, an accessory cannot be tried, without his consent, before the conviction of the principal; Fost. Cr. Cas. 360. This is altered by statute in most of the states. This rule is said to have been the outcome of strict medieval logic. The trial of the accused being by sacred or supernatural processes, it would be a shame to the law if the principal were acquitted after the accessory had been hanged. 2 Poll. & Maitl. 508.

But an accessory to a felony committed by several, some of whom have been convicted, may be tried as accessory to a felony committed by these last; but if he be indicted and tried as accessory to a felony committed by them all, and some of them have not been proceeded against; it is error; 7 S. & K. 491; 10 Pick. 484. If the principal is dead, the accessory cannot, by the common law, be tried at all; 16 Mass. 423.

One indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offence, notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter only; 46 Ohio St. 457.

See also Whart. Crim. Law; Desty, Crim.

Law; Bishop, Crim. Law; Whart. Cr. Ev.; Roscoe, Cr. Ev.

ACCESSION (Lat.) An increase or addition; that which lies next to a thing, and is supplementary and necessary to the principal thing; that which arises or is produced from the principal thing. Calvinus, Lex.

A manner of acquiring the property in a thing which becomes united with that which a person already possesses.

The doctrine of property arising from accessions is grounded on the rights of occupancy. It is said to be of six kinds in the Roman law.

First. That which assigns to the owner of a thing its products, as the fruit of trees, the young of animals.

Second. That which makes a man the owner of a thing which is made of another's property, upon payment of the value of the material taken. See La. Civ. Code, art. 491. As where wine, bread, or oil is made of another man's grapes or olives; 2 Bla. Com. 404; 10 Johns. 288.

Third. That which gives the owner of land new land formed by gradual deposit. See ALLUVION.

Fourth. That which gives the owner of a thing the property in what is added to it by way of adorning or completing it; as if a tailor should use the cloth of B. in repairing A.'s coat, all would belong to A.; but B. would have an action against both A. and the tailor for the cloth so used. This doctrine holds in the common law; 7 Moore 20; Poph. 38; Brooke, Abr. *Proprietas* 23.

Fifth. That which gives islands formed in a stream to the owner of the adjacent lands on either side.

Sixth. That which gives a person the property in things added to his own, so that they cannot be separated without damage. Guyot, Répert. Univ.

An accessory obligation, and sometimes also the person who enters into an obligation as surety in which another is principal. Calvinus, Lex.

ACCESSION. The right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accessory, either naturally or artificially. 2 Kent 360; 2 Bla. Com. 404.

If a man hath raised a building upon his own ground with the material of another, or, on the contrary, if a man shall have built with his own materials upon the ground of another, in either case the edifice becomes the property of him to whom the ground belongs; for every building is an accession to the ground upon which it stands; and the owner of the ground, if liable at all, is only liable to the owner of the materials for the value of them; Inst. 2. 1. 29, 30; 2 Kent 362. And the same rule holds where trees, vines, vegetables, or fruits are planted or sown in the ground of another; Inst. 2. 1. 31, 32.

The building of a rail fence on another's land vests the rails in the owner of the land; 12 Ired. 297. And see 7 Johns. 473; 33 Me. 404.

If the materials of one person are united by labor to the materials of another, so as to form a single article, the property in the joint product is, in the absence of any agreement, in the owner of the principal part of the materials by accession; 7 Johns. 473; 5 Pick. 177; 6 id. 209; 33 Me. 404; 16 Conn. 323; Inst. 2. 1. 26; 15 Mass. 242; 22 Mich. 311; 21 Pick. 305; 49 N. Y. 35. But a vessel built of materials belonging to different persons, it has been said, will belong to the owner of the keel, according to the rule, *proprietas totius navis carinae causam sequitur*; 2 Kent 361; 6 Pick. 209; 7 Johns. 473; 11 Wend. 139. It is said to be the doctrine of the civil law, that the rule is the same though the adjunction of materials may have been dishonestly contrived; for, in determining the right of property in such a case, regard is had only to the things joined, and not to the persons, as where the materials are changed in species; Wood Inst. 93; Inst. 2. 1. 25. And see ADJUNCTION.

The tree belongs to the owner of the land on which the root is, and its fruit is to the owner of the tree; 1 Ld. Raym. 737; although limbs overhang a neighbor's land; 46 Barb. 337. The original title to ice is in the possessor of the water where it is formed; 41 Mich. 313; 33 Ind. 402.

Where, by agreement, an article is manufactured for another, the property in the article, while making and when finished,

vests in him who furnished the whole or the principal part of the materials; and the maker, if he did not furnish the same, has simply a lien upon the article for his pay; 2 Denio 268; 10 Johns. 268; 15 Mass. 243; 4 Ired. 102; 49 Mich. 641; 21 Barb. 92; 52 Me. 63.

The increase of an animal, as a general thing, belongs to its owner; 80 Mo. 154; 55 Me. 184; 64 Ill. 238; but, if it be let to another, the person who thus becomes the temporary proprietor will be entitled to its increase; 8 Johns. 435; Inst. 2. 1. 38; 55 Me. 184; 33 Mo. 154; 46 Mich. 131; though it has been held that this would not be the consequence of simply putting a mare to pasture, in consideration of her services; 2 Pa. 166. The increase of a female animal held under a bailment or executory contract belongs to the bailor or vendor until the agreed price is paid; 55 Me. 118; 56 Ala. 400. The Civil Code of Louisiana, following the Roman law, makes a distinction in respect of the issue of slaves, which, though born during the temporary use or hiring of their mothers, belong not to the hirer, but to the permanent owner; Inst. 2. 1. 37; and see 31 Miss. 557; 4 Sneed 99; 2 Kent 361; 11 How. 396. But the issue of slaves born during a tenancy for life belong to the tenant for life; 7 Harr. & J. 257.

If there be a sale, mortgage, or pledge of a chattel, carried into effect by delivery or by a recording of the mortgage where that is equivalent to a delivery, and other materials are added, afterwards, by the labor of the vendor or mortgagor, these pass with the principal by accession; 12 Pick. 38; 1 R. 1. 511.

If, by the labor of one man, the property of another has been converted into a thing of different species, so that its identity is destroyed, the original owner can only recover the value of the property, in its unconverted state, and the article itself will belong to the person who wrought the conversion, if he wrought it believing the material to be his own. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine; Inst. 2. 1. 25; 4 Denio 332; Year B. 5 H. VII. 15; Brooke, Abr. *Property* 23; or bricks out of clay; 29 Neb. 227.

But, if there be a mere change of form or value, which does not destroy the identity of the materials, the original owner may still reclaim them or recover their value as thus improved; Brooke, Abr. *Property* 23; F. Moore 20; 2 N. Y. 379; 9 Barb. 440. So, if the change have been wrought by a wilful trespasser, or by one who knew that the materials were not his own; in such case, however radical the change may have been, the owner may reclaim them, or recover their value in their new shape; thus, where whiskey was made out of another's corn, 2 N. Y. 379; shingles out of another's trees, 9 Johns. 362; coals out of another's wood, 6 Johns. 168; 12 Ala. N. S. 590; leather out of another's hides, 21 Barb. 92; in all these cases, the change having been made by one who knew the materials were another's, the original owner was held to be entitled to recover the property, or its value in the improved or converted state. And see 6 Hill 425; 2 Rawle 427; 5 Johns. 349; 21 Me. 287; 11 Metc. 493; Story, Bailm. § 40; 1 Brown, Civ. and Adm. Law, 240, 241.

An aerolite which falls from the sky and is imbedded in the soil to a depth of 3 feet is the property of the owner of the land on which it falls, rather than of the person who finds it; 86 Ia. 71.

In International Law. The absolute or conditional acceptance, by one or several states, of a treaty already concluded between other sovereignties. Merlin, Répert. *Accession*.

There are two kinds of accession. Accession means, firstly, the formal entrance of a third State into an existing treaty so that such State becomes a party to the treaty with all rights and duties arising therefrom. Such accession can take place only with the consent of the original contract-

ing parties, and accession always constitutes a treaty of itself. Very often the contracting parties stipulate expressly that the treaty shall be open to the accession of a certain State. And the so-called law-making treaties, as the Declaration of Paris or the Geneva Convention, for example, regularly stipulate the option of accession of all such States as have not been originally contracting parties.

But there is, secondly, another kind of accession possible. For a State may enter into a treaty between other States for the purpose of guarantee (q. v.). This kind of accession makes the acceding State also a party to the treaty; but the rights and duties of the acceding State are different from the rights and duties of the other parties, for the former is a guarantor only, whereas the latter are directly affected by the treaty. 1 Oppenheim, Int. Law, § 532. See ADHESION.

ACCESSORY. Any thing which is joined to another thing as an ornament, or to render it more perfect.

For example, the halter of a horse, the frame of a picture, the keys of a house, and the like, each belong to the principal thing. The sale of the materials of a newspaper establishment will carry with it, as an accessory, the subscription list; 2 Watts 111; but a bequest of a house would not carry the furniture in it, as accessory to it. Domat, Loix Civ. Part 2, liv. 4, tit. 2, s. 4, n. 1. *Accessory non ducit, sed sequitur principale.* Co. Litt. 152, a.

See ACCESSION; ADJUNCTION; APPURTENANCES. Used also in the same sense as ACCESSORY, which see.

ACCESSORY ACTIONS. In Scotch Law. Those which are in some degree subsidiary to others. Bell Dict.

ACCESSORY CONTRACT. One made for assuring the purpose of the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgages, and pledges.

It is a general rule that payment or release of the debt due, or the performance of a thing required to be performed by the first or principal contract, is a full discharge of such accessory obligation; Pothier, Ob. 1, c. 1, s. 1, art. 2, n. 14; id. n. 182, 186; see 8 Mass. 551; 5 Metc. 310; 7 Barb. 22; 2 Barb. Ch. 119; 1 Hill & D. 65; 6 Pa. 228; 24 N. H. 484; 3 Ired. 397; and that an assignment of the principal contract will carry the accessory contract with it; 7 Pa. 280; 17 S. & R. 400; 5 Cow. 202; 5 Cal. 515; 4 Iowa 434; 24 N. H. 484.

If the accessory contract be a contract by which one is to answer for the debt, default or miscarriage of another, it must, under the statute of frauds, be in writing, and disclose the consideration, either explicitly, or by the use of terms from which it may be implied; 5 M. & W. 128; 5 B. & Ad. 1109; 6 Bingh. 201; 8 Cush. 156; 15 Pa. 27; 13 N. Y. 232; 4 Jones, N. C. 287; 62 Mich. 454. Such a contract is not assignable so as to enable the assignee to sue thereon in his own name; 21 Pick. 140; 5 Wend. 307. A pledge of property to secure the debt of another does not come within the statute of frauds; 76 Cal. 171.

An accessory contract of this kind is discharged not only by the fulfilment or release of the principal contract, but also by any material change in the terms of such contract, by the parties thereto; for the surety is bound only by the precise terms of the agreement he has guaranteed; 2 Nev. & P. 126; 9 Wheat. 680; 1 Eng. L. & Eq. 1; 3 Wash. C. C. 70; 12 N. H. 320; 13 id. 240. Thus, the surety will be discharged if the right of the creditor to enforce the debt be suspended for any definite period, however short; and a suspension for a day will have the same effect as if it were for a month or a year; 2 Ves. Sen. 540; 2 White & T. Lead. Cas. 707; 5 Ired. Eq. 91; 3 Denio 512; 2 Wheat. 253; 28 Vt. 209. But the surety may assent to the change, and waive his right to be discharged because of it; 14 N. H. 240; 2 McLean 99; 5 Ohio 510; 8 Me. 121.

If a valuable consideration passes at the time to the promisor, a verbal promise to pay the debt of another is a new and original undertaking, and not within the statute

ACCESSORY OBLIGATIONS

of frauds; 85 Tenn. 224; 85 Ala. 127; 63 Mich. 377.

If the parties to the principal contract have been guilty of any misrepresentation, or even concealment, of any material fact, which, had it been disclosed, would have deferred the surety from entering into the accessory contract, the security so given is voidable at law on the ground of fraud; 5 Bingh. N. C. 156; B. & C. 605; 1 B. & P. 419; 9 Ala. N. S. 42; 2 Rich. 590; 10 Clark & F. 936. A surety ceases to be liable for default of a firm after it has been changed by the addition of new members; 148 Ill. 453. The party giving a letter of guarantee is not bound until it is accepted; 7 Pet. 125.

So the surety will be discharged should any condition, express or implied, that has been imposed upon the creditor by the accessory contract, be omitted by him; 8 Taunt. 208; 14 Barb. 123; 6 Cal. 24; 27 Pa. 317; 9 Wheat. 680; 17 Wend. 179, 422. If a surety alters the original contract to his own prejudice, he is presumed to consent thereto and is not discharged; 9 C. C. A. 366.

An accessory contract to guarantee an original contract which is void, has no binding effect; 7 Humphr. 261; and see 27 Ala. N. S. 291.

ACCESSORY OBLIGATIONS. In Scotch Law. Obligations to antecedent or primary obligations, such as obligations to pay interest, etc. Erskine, Inst. lib. 3, tit. 3, § 60.

ACCIDENT (Lat. *accidere*,—ad, to, and *cadere*, to fall). An event which, under the circumstances, is unusual and unexpected by the person to whom it happens.

The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency. The burning of a house in consequence of a fire made for the ordinary purposes of cooking or warming the house is an accident of the first kind; the burning of the same house by lightning would be an accident of the second kind; 1 Fombl. Eq. 374, 375, n.; 32 Conn. 85; 76 N. C. 322.

In Equity Practice. Such an unforeseen event, misfortune, loss, act, or omission as is not the result of any negligence or misconduct in the party; Francis, Max. 87; Story, Eq. Jur. § 78.

An occurrence in relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law; Jeremy, Eq. 353. This definition is objected to, because, as accidents may arise in relation to other things besides contracts, it is inaccurate in confining accidents to contracts; besides, it does not exclude cases of unanticipated occurrence resulting from the negligence or misconduct of the party seeking relief. See also 1 Spence, Eq. Jur. 628. In many instances it closely resembles **MISTAKE**, which see.

In general, courts of equity will relieve a party who cannot obtain justice at law in consequence of an accident which will justify the interposition of a court of equity.

The jurisdiction which equity exerts in case of accident is mainly of two sorts: over bonds with penalties to prevent a forfeiture where the failure is the result of accident; 2 Freem. Ch. 123; 1 Spence, Eq. Jur. 629; 25 Ala. N. S. 452; 9 Ark. 533; 4 Paige, Ch. 148; 4 Munf. 68; 48 Pa. 450; as sickness; 1 Root 298, 310; or where the bond has been lost; 5 Ired. Eq. 331; but if the penalty be liquidated damages, there can be no relief; Merwin, Eq. § 409. And, second, where a negotiable or other instrument has been lost, in which case no action lay at law, but where equity will allow the one entitled to recover upon giving proper indemnity; 1 Ves. Ch. 338; 16 id. 430; 4 Price 176; 7 B. & C. 90; 101 Mass. 370; Bispham's Eq. § 177. In some states it has been held that a court of law can render judgment for the amount, but requires the defendant to give a bond of indemnity; 34

Conn. 546; 8 Conn. 431; 10 Cush. 421. Relief against a penal bond can now be obtained in almost all common-law courts; Merwin, Eq. § 411.

The ground of equitable interference where a party has been defeated in a suit at law to which he might have made a good defence had he discovered the facts in season, may be referred also to this head; 2 Rich. Eq. 63; 3 Ga. 226; 7 Humphr. 130; 18 Miss. 502; 6 How. 114. See 4 Ired. Eq. 178; but in such case there must have been no negligence on the part of the defendant; 18 Miss. 103; 7 Humphr. 130; 1 Morr. 150; 7 B. Monr. 120.

Under this head equity will grant relief in cases of the defective exercise of a power in favor of a purchaser, creditor, wife, child, or charity, but not otherwise; Bisph. Eq. § 182. So also in other cases, viz., where a testator cancels a will, supposing that a later will is duly executed, which it is not; where boundaries have been accidentally confused; where there has been an accidental omission to endorse a promissory note, etc.; *id.* § 183.

It is exercised by equity where there is not a plain, adequate, and complete remedy at law; 44 Me. 206; but not where such a remedy exists; 9 Gratt. 379; 5 Sandf. 612; and a complete excuse must be made; 14 Ala. N. S. 342.

See **INEVITABLE ACCIDENT**; **MISTAKE**; **ACT OF GOD**.

See **INSURANCE**, **ACCIDENT INSURANCE**; **UNAVOIDABLE ACCIDENT**.

ACCIDENT INSURANCE. An insurance against injury or loss of life which, applied to a particular class of risks, depends upon essentially the same principles as other insurance. 1 A. & E. Encyc. 87. See 10 Ex. R. 45; 23 L. J. Ex. 249; 23 Hun 187; Bliss, Life Ins.; 7 Am. L. Rev. 588. It is more analogous to fire than life insurance, since it is a provision for indemnity, except in the case of death by accident; Niblack, Ben. Soc. & Acc. Ins. §§ 363-420.

See **INSURANCE**, *Industrial Insurance*.

ACCIDENTAL. The term "accidental," used in its ordinary, popular sense, means "happening by chance; unexpectedly taking place; not according to the usual course of things;" or not as expected. 131 U. S. 109.

Death—Insurance Policy. Where one was waylaid and assassinated for purpose of robbery his death was "accidental." Also death by hanging at the hands of a mob was held to be an "accident" within the meaning of a policy against injuries, through external, violent and accidental means. 99 Ky. 445; 36 S. W. 169; 87 Ky. 300, 8 S. W. 572.

Means. Where one, by the act of another, receives an injury which he had no agency in bringing on himself, and which was not foreseen by him, from which death results it is a death through "accidental means" within the meaning of a policy of insurance against death through "external, violent and accidental means." 87 Ky. 300, 8 S. W. 570.

ACCIDENTAL INJURY. If an injury was unforeseen, unexpected, not brought about through any agency designedly, or was without foresight, or was a casualty, or mishap not intended to befall one, then the occurrence was "accidental." 99 Ky. 445, 36 S. W. 170.

ACCIDENTAL or VIOLENT DEATH. See **DEATH**.

ACCOMENDA. A contract which takes place when an individual intrusts personal property with the master of a vessel, to be sold for their joint account.

In such case, two contracts take place: first, the contract called *mandatum*, by which the owner of the property gives the master power to dispose of it; and the contract of partnership, in virtue of which the profits are to be divided between them. One party runs the risk of losing his capital, the other his labor. If the sale produces no more than first cost, the owner takes all the proceeds; it is only the profits which are to be divided; Emerigon, Mar. Loans, s. 5.

ACCOMMODATION PAPER. Pro-

missory notes or bills of exchange made, accepted, or endorsed without any consideration therefor.

Such paper, in the hands of the party to whom it is made or for whose benefit the accommodation is given, is open to the defence of want of consideration, but when taken by third parties in the usual course of business, is governed by the same rules as other paper; 2 Kent 86; 1 Bingh. N. C. 267; 1 M. & W. 212; 33 Eng. L. & Eq. 282; 2 Duer 33; 26 Vt. 19; 5 Md. 389; 150 Pa. 409.

Where an accommodation note is purchased from the payee at a usurious rate, it is void as against the accommodation maker, though it was represented as business paper; 8 N. Y. Misc. Rep. 323.

An endorsement on accommodation paper may be withdrawn before it is discounted unless rights in the meantime for valuable consideration have attached to others; 88 Va. 1001.

ACCOMMODATUM. See **COMMODATUM**.

ACCOMPLICE (Lat. *ad* and *complere*—con, with, together, *placare*, to fold, to wrap,—to fold together).

In Criminal Law. One who is concerned in the commission of a crime.

The term in its fullest includes in its meaning all persons who have been concerned in the commission of a crime, all *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact; Post. Cr. Cas. 341; 1 Russ. Cr. 21; 4 Bla. Com. 331; 1 Phil. Ev. 28; Merlin, Répert. *Complice*.

It has been questioned, whether one who was an accomplice to a suicide can be punished as such. A case occurred in Prussia where a soldier, at the request of his comrade, had cut the latter in pieces; for this he was tried capitally. In the year 1817, a young woman named Leruth received a recompense for aiding a man to kill himself. He put the point of a bistoury on his naked breast, and used the hand of the young woman to plunge it with greater force into his bosom; hearing some noise, he ordered her away. The man, receiving effectual aid, was soon cured of the wound which had been inflicted, and she was tried and convicted of having inflicted the wound, and punished by ten years imprisonment. Lepage, *Science du Droit*, ch. 2, art. 3, § 5. The case of Saul, the King of Israel, and his bearer (1 Sam. xxxi. 4), and of David and the Amalekites (2 Sam. i. 2-10), will doubtless occur to the reader.

In Massachusetts, it has been held, that if one counsels another to commit suicide, he is principal in the murder; for it is a presumption of law, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise, as, for example, that it was received with scoff or manifestly rejected and ridiculed at the time; 13 Mass. 369. See 7 Bost. Law Rep. 215.

It is now finally settled, that it is not a rule of law, but of *practice* only, that a jury should not convict on the unsupported testimony of an accomplice. Therefore, if a jury choose to act on such evidence only, the conviction cannot be quashed as bad in law. The better practice is for the judge to advise the jury to acquit, unless the testimony of the accomplice is corroborated, not only as to the circumstances of the offence, but also as to the participation of the accused in the transaction; and when several parties are charged, that it is not sufficient that the accomplice should be confirmed, as to one or more of the prisoners; to justify a conviction of those prisoners with respect to whom there is no confirmation; 7 Cox, Cr. Cas. 20; Dears. Cr. Cas. 555; 10 Cush. 535. See 1 Fost. & F. 588; Greenl. Ev. § 111; 127 Mass. 424; 84 Amer. Rep. 391, 408.

An accomplice is a competent witness for the prosecution; 53 Fed. Rep. 536; he is not incompetent when indicted separately; 115 Mo. 452. Though the evidence of an accomplice uncorroborated is sufficient, it should be received with caution; 53 Fed. Rep. 536; 117 Mo. 302; 52 Kan. 335. See **KING'S EVIDENCE**.

ACCORD. In Contracts. An agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account; generally used in the phrase "accord and satisfaction." 2 Greenl. Ev. 28; 3 Bla. Com. 15; Bacon, Abr. *Accord*; 5 Md. 170. It may be pleaded to all actions except real actions; Bacon, Abr. *Accord* (B) 50 Miss. 257.

It must be *legal*. An agreement to drop a criminal prosecution, as a satisfaction for an assault and imprisonment, is void; 5 East 294; 14 Ala. 429; 99 Mass. 1. See 2 Wils. 341; Cro. Eliz. 541.

It must be *advantageous* to the creditor, and he must receive an actual benefit therefrom which he would not otherwise have had; 2 Watts 325; 2 Ala. 476; 3 J. J. Marsh 497; 83 Ind. 529. Restoring to the plaintiff his chattels, or his land, of which the defendant has wrongfully dispossessed him, will not be any consideration to support a promise by the plaintiff not to sue him for those injuries; Bacon, Abr. *Accord*, A.; 1 Stra. 426; 2 Litt. Ky. 49; 5 Day 360; 1 Root 426; 1 Wend. 164; 14 *id.* 116. The payment of a part of the whole debt due is not a good satisfaction, even if accepted; 2 Greenl. Ev. § 28; 2 Pars. Contr. 199; 4 Mod. 88; 3 Bingh. N. C. 454; 10 M. & W. 367; 12 Price, Ex. 188; 1 Zab. 391; 5 Gill 189; 20 Conn. 559; 70 N. C. 573; 6 Heisk. 1; 1 Metc. 276; 27 Me. 362; 37 J. L. 358; 70 N. C. 573; 118 Mass. 482; 2 Pa. Dist. R. 497; otherwise, however, if the amount of the claim is disputed; Cro. Eliz. 429; 3 M. & W. 651; 5 B. & Ald. 117; 1 Ad. & E. 106; 21 Vt. 223; 4 Gill 406; 4 Denio 166; 65 Barb. 161; 43 Conn. 455; 56 Ga. 494; 52 Miss. 494; 12 Metc. n. 551; 56 Vt. 609; 37 Barb. 393; 141 Mass. 502; 49 Mo. App. 556; or contingent; 14 B. Monr. 451; or there are mutual demands; 6 El. & B. 691; and if the negotiable note of the debtor, 15 M. & W. 23, or of a third person, 2 Metc. 283; 20 Johns. 76; 14 Wend. 116; 13 Ala. 553; 4 B. & C. 506; 51 Ala. 349, for part, be given and received, it is sufficient; or if a part be given at a different place, 29 Miss. 139, or an earlier time, it will be sufficient, 18 Pick. 414; and, in general, payment of part suffices if any additional benefit be received; 30 Vt. 424; 26 Conn. 392; 27 Barb. 485; 4 Jones 518; 4 Iowa 219; 44 Conn. 541. Acceptance by several creditors, by way of composition of sums respectively less than their demands, held to bar actions for the residue; 37 Iowa 410. And the receipt of specific property, or the performance of services, if agreed to, is sufficient, whatever its value; 19 Pick. 273; 5 Day 360; 51 Ala. 349; provided the value be not agreed upon; 65 Barb. 161; but both delivery and acceptance must be proved; 1 Wash. C. C. 328; 3 Blackf. 354; 1 Dev. & B. 565; 8 Pa. 106; 16 *id.* 450; 4 Eng. L. & Eq. 185.

It must be *certain*. An agreement that the defendant shall relinquish the possession of a house in satisfaction, etc., is not valid, unless it is so agreed at what time it shall be relinquished; Yelv. 125. See 4 Mod. 88; 2 Johns. 342; 3 Lev. 129; 2 Iowa 553; 1 Hempst. 315; 103 Mass. 140.

It must be *complete*. That is, everything must be done which the party undertakes to do; Comyns, Dig. *Accord*, B. 4; 2 Raym. 203; Cro. Eliz. 46; 9 Co. 79, b; 14 Eng. L. & Eq. 296; 2 Iowa 553; 5 N. H. 136; 5 Johns. 386; 16 *id.* 86; 1 Gray 245; 8 Ohio 393; 7 Blackf. 582; 14 B. Monr. 459; 2 Ark. 45; 44 Me. 121; 29 Pa. 179; 8 Md. 188; 50 Tex. 113; 64 Me. 563; but this performance may be merely the substitution of a new undertaking for the old by way of novation if the parties so intended; 2 Pars. Contr. 194 n.; 24 Conn. 613; 23 Barb. 546; 7 Md. 259; 16 Q. B. 1039; it is a question for the jury whether the agreement or the performance was accepted in satisfaction; 16 Q. B. 1039; and in some cases it is sufficient if performance be tendered and refused; 2 Greenl. Ev. § 31; 2 B. & Ad. 328; 3 *id.* 701. An accord with tender of satisfaction is not sufficient, but it must be executed; 3 Bingh. N. C. 715; 16 Barb. 598; 23 Wend. 341; 56 Ill. 96; 44 Me. 121; 37 Barb. 433; 151 Pa. 415; 5 R. L. 219; but where there is a sufficient consideration to support the agreement, it may be that a tender, though unaccepted, would bar an action; Story, Contr. § 1357; 3 Johns. Cas. 243. Satisfaction without accord is not sufficient; 9 M. & W. 596; nor is accord without satisfaction; 3 B. & C. 257.

Where there is a dispute as to the value of the services and a check is sent for part with a statement that it was to be in full satisfaction, the debt, which was unliquidated, was satisfied by the retention of the check; 138 N. Y. 231.

It must be *by the debtor or his agent*; 3 Wend. 66; 2 Ala. 84; and if made by a stranger, will not avail the debtor in an action at law; Stra. 592; 3 T. B. Monr. 302; 6 Johns. 37. See 6 Ohio St. 71. His remedy in such a case is in equity; Cro. Eliz. 541; 3 Taunt. 117; 5 East 294. In case of a disputed claim, an agreement to pay part to a third person in satisfaction of the whole is a good consideration; 7 Ohio Cir. Ct. R. 204.

Accord with satisfaction, when completed, has two effects: it is a payment of the debt; and it is a species of sale of the thing given by the debtor to the creditor, in satisfaction; but it differs from it in this, that it is not valid until the delivery of the article, and there is no warranty of the thing thus sold, except perhaps the title; for in regard to this it cannot be doubted, that if the debtor gave on an accord and satisfaction the goods of another, there would be no satisfaction. But the intention of the parties is of the utmost consequence; 30 Vt. 424; as the debtor will be required only to execute the new contract to that point whence it was to operate a satisfaction of the pre-existing liability.

An accord and satisfaction may be rescinded by subsequent agreement; 58 N. W. Rep. (Minn.) 982; 54 Mo. App. 66; or it may be avoided on account of fraud; 88 Ga. 594; 81 Wis. 160.

In America accord and satisfaction may be given in evidence under the general issue, in *assumpsit*, but it must be pleaded specially in debt, covenant, and trespass; 2 Greenl. Ev. 15th ed. § 29. In England it must be pleaded specially in all cases; Rosc. N. P. 569. See PAYMENT.

ACCOUCHEMENT. The act of giving birth to a child. It is frequently important to prove the filiation of an individual; this may be done in several ways. The fact of the accouchement may be proved by the direct testimony of one who was present, as a physician, a midwife, or other person; 1 Bouvier, Inst. n. 314.

ACCOUNT. A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation. 1 Metc. 216; 1 Hempst. 114; 32 Pa. 202.

A statement of the receipts and payments of an executor, administrator, or other trustee, of the estate confided to him.

An *open account* is one in which some term of the contract is not settled by the parties, whether the account consists of one item or many; 1 Ala. N. S. 62; 6 *id.* 438; 73 Wis. 545.

A form of action, called also *account render*, in which such a statement, and the recovery of the balance which thereby appears to be due, is sought by the party bringing it.

In Practice. In Equity. Jurisdiction concurrent with courts of law is taken over matters of account; 9 Johns. 470; 1 J. J. Marsh. 82; 2 Cai. Cas. 1; 1 Yerg. 360; 1 Ga. 376, on three grounds: mutual accounts; 13 Beav. 575; dealings so complicated that they cannot be adjusted in a court of law; 1 Sch. & L. 305; 2 Hou. L. Cas. 28; 2 Leigh 6; 1 Metc. 216; 15 Ala. N. S. 34; 17 Ga. 558; the existence of a fiduciary relation between the parties; 1 Sim. Ch. N. S. 578; 4 Gray 227; 1 Story, Eq. Jur. 8th ed. § 459, a.

In addition to these peculiar grounds of jurisdiction, equity will grant a discovery in cases of account on the general principles regulating discoveries; 8 Ala. N. S. 743; 4 Sandf. 112; 35 N. H. 339, and will afterwards proceed to grant full relief in many cases; 1 Madd. 86; 6 Ves. 136; 10 Johns. 587; 5 Pet. 495.

Equitable jurisdiction over accounts applies to the *appropriation of payments*; 1 Story, Eq. Jur. 8th ed. §§ 459-461; *agency*; 2 McCord, Ch. 469; including factors, bail-

iffs, consignees, receivers, and stewards, where there are mutual or complicated accounts; 1 Jac. & W. 185; 9 Beav. 284; 17 Ala. N. S. 667; *trustees' accounts*; 1 Story, Eq. Jur. § 465; 2 M. & K. 664; 9 Beav. 284; 1 Stockt. 218; 4 Gray 227; administrators and executors; 22 Vt. 50; 14 Mo. 116; 3 Jones, Eq. 316; 32 Ala. N. S. 314; see 23 Miss. 361; guardians, etc.; 31 Pa. 318; 9 Rich. Eq. 311; 33 Miss. 553; *tenants in common*, joint tenants of real estate or chattels; 4 Ves. 752; 1 Ves. & B. 114; partners; 1 Hen. & M. 9; 3 Gratt. 364; 3 Cush. 331; 23 Vt. 576; 4 Sneed 238; 1 Johns. Ch. 305; *directors of companies*, and similar officers; 1 Y. & C. 326; *apportionment* of apprentice fees; 2 Bro. Ch. 78; 13 Jur. 596; or rents; 2 P. Will. 176, 501; see 1 Story, Eq. Jur. § 480; *contribution* to relieve real estate; 3 Co. 12; 2 Bos. & P. 270; 1 Johns. Ch. 409, 425; 7 Mass. 355; 1 Story, Eq. Jur. § 487; *general average*; 2 Abbott, Shipp. pl. 3, c. 8, § 17; 4 Kay & J. 367; 2 Curt. 69; *between sureties*; 1 Story, Eq. Jur. § 492; *liens*; Sugd. Vend. 7th ed. 541; 8 Paige, Ch. 182, 277; *rents and profits* between landlord and tenant; 1 Sch. & L. 305; 4 Johns. Ch. 287; in case of *torts*; Bacon, Abr. *Accomp.* B. a levy; 1 Ves. Sen. 250; 1 Eq. Cas. Abr. 285; and in other cases; 3 Gratt. 330; *waste*; 1 P. Will. 407; 6 Ves. 88; 1 Bro. Ch. 194; 6 Jur. N. S. 809; 4 Johns. Ch. 169; *tithes and mortgages*; Com. Dig. *Chaucery* (3 C.), *Distress* (M. 13).

Equity follows the analogy of the law, in refusing to interfere with stated accounts; 2 Sch. & L. 629; 3 Bro. Ch. 639, n.; 19 Ves. 180; 13 Johns. Ch. 578; 3 McLean, 83; 4 Mas. 143; 3 Pet. 44; 9 *id.* 405. See ACCOUNT STATED.

At Law. The action lay against bailiffs, receivers, and guardians, in socage only, at the common law, and, by a subsequent extension of the law, between merchants; 11 Co. 89; 12 Mass. 149.

Privy of contract was required, and it did not lie by or against executors and administrators; 1 Wms. Saund. 216, n.; Willes 208, until statutes were passed for that purpose, the last being that of 3 & 4 Anne, c. 16; 1 Story, Eq. Jur. § 445.

In several states of the United States, the action has received a liberal extension; 13 Vt. 517; 7 Pa. 175; 25 Conn. 137; 5 R. I. 402. Thus, it is said to be the proper remedy for one partner against another; 3 Binn. 317; 10 S. & R. 230; 2 Conn. 425; 4 Vt. 137; 3 Barb. 419; 1 Cal. 448; for money used by one partner after the dissolution of the firm; 18 Pick. 299; though equity seems to be properly resorted to where a separate tribunal exists; 1 Hen. & M. 9; 1 Johns. Ch. 305. And see 1 Metc. 216; 1 Iowa 240.

In other states, reference may be made to an auditor by order of the court, in the common forms of actions founded on contract or tort, where there are complicated accounts or counter-demands; 6 Pick. 193; 8 Conn. 499; 13 N. H. 275; 1 Tex. 646. See AUDITOR. In the action of account, an interlocutory judgment of *quod computet* is first obtained; 2 Greenl. Ev. § 36; 11 Ired. 391; 12 Ill. 111, on which no damages are awarded except *ratione interplacitationis*; Cro. Eliz. 83; 5 Binn. 564.

The account is then referred to an auditor, who now generally has authority to examine parties, 4 Fost. 198 (though such was not the case formerly), before whom issue of law and fact may be taken in regard to each item, which he must report to the court; 2 Ves. 388; 5 Binn. 433; 5 Vt. 543; 26 N. H. 139. Only the controverted items need be proved in an action on a verified account; 26 S. W. Rep. (Tex.) 141.

A final judgment *quod recuperet* is entered for the amount found by him to be due; and the auditor's account will not be set aside except upon a very manifest case of error; 5 Pa. 413; 1 La. Ann. 380. See AUDITOR.

In case of mutual accounts the statute of limitations commences to run from the date of the last item on either side; 2 Wood, Lim. 714; where the last item of a mutual running account is within six years from the

commencement of a suit, the statute does not apply; 155 Pa. 260; 115 Mo. 581; but in Vermont the debt runs from the date of the last credit, and not from the last debit; 65 Vt. 287.

If the defendant is found in surplussage, that is, is creditor of the plaintiff on balancing the accounts, he cannot in this action recover judgment for the balance so due. He may bring an action of debt, or, by some authorities, a sci. fa., against the plaintiff, whereon he may have judgment and execution against the plaintiff. See Palm. 512; 1 Leon. 219; 3 Kebl. 362; 1 Rolle, Abr. 599, pl. 11; Brooke, Abr. Accord, 62; 1 Rolle 87.

As the defendant could wage his law; 2 Wms. Saund. 65 a; Cro. Eliz. 479; and as the discovery, which is the main object sought, 5 Taunt. 431, can be more readily obtained and questions in dispute more readily settled in equity, resort is generally had to that jurisdiction in those states where a separate tribunal exists, or under statutes to the courts of law; 18 Vt. 345; 13 N. H. 275; 8 Conn. 199; 1 Metc. (Mass.) 216.

The fact that one possesses an open account in favor of another is not presumptive evidence of the holder's ownership; 111 N. C. 74. In a statement of account it is not necessary to say "E. & O. E."; that is implied; 6 El. & Bl. 69.

See LIQUIDATED ACCOUNT.

ACCOUNT BOOK. A book kept by a merchant, trader, mechanic, or other person, in which are entered from time to time the transactions of his trade or business. Such books, when regularly kept, may be admitted in evidence. Greenl. Ev. §§ 115-118; 160 Mass. 328; 129 N. Y. 498.

ACCOUNT CURRENT. An open or running account between two parties.

ACCOUNT DUTY. Duty imposed by the Rev. Act, 1881, s. 38 upon personal property above the value of £100 passing at death by way of *donatio mortis causa*, joint investment, voluntary settlement, or under a policy of insurance kept up for a donee, or passing by voluntary disposition within three years before death. It was meant to apply to property which was not subject to probate duty. The rate of the duty varied with the value of the property from 2 per cent. to 3 per cent. The duty is not payable, in respect of deaths since 1st August, 1894, upon any property upon which estate duty (*q. v.*) is payable. Nearly all property subject to account duty is subject also to estate duty. Byrnes's L. Dict.; Hanson, Death Duties 6th Ed., pp. 76-78 See **DEATH DUTIES**.

ACCOUNT IN BANK. See **BANK ACCOUNT**.

ACCOUNT STATED. An agreed balance of accounts. An account which has been examined and accepted by the parties. 2 Atk. 251.

An account cannot become an account stated with reference to a debt payable on a contingency; 76 Cal. 96. Although an item of an account may be disputed, it may become an account stated as to the items admittedly correct; 53 Mo. App. 263.

In Equity. Acceptance may be inferred from circumstances, as where an account is rendered to a merchant, and no objection is made, after sufficient time; 1 Sim. & S. 333; 3 Johns. Ch. 569; 7 Cra. 147; 1 McCord, Ch. 156; 2 Md. Ch. Dec. 483; 10 Barb. 213.

Such an account is deemed conclusive between the parties; 2 Bro. Ch. 62, 310; 2 Ves. 566, 837; 20 Ala. n. s. 747; 3 Johns. Ch. 587; 1 Gill 850; 3 Jones, Eq. 109; to the extent agreed upon; 1 Hopk. Ch. 239; unless some fraud, mistake, or plain error is shown; 1 Johns. Ch. 550; 1 McCord, Ch. 156; and in such case, generally, the account will not be opened, but liberty to surcharge or falsify will be given; 9 Ves. 265; 1 Sch. & L. 192; 7 Gill 119.

At Law. An account stated is conclusive as to the liability of the parties, with reference to the transactions included in it; 3 Johns. Ch.; except in cases of fraud or manifest error; 1 Esp. 159; 24 Conn. 591;

4 Wis. 219; 5 Fla. 478. See 4 Sandf. 311; 83 Va. 432.

Acceptance by the party to be charged must be shown by the one who relies upon the account; 10 Humphr. 238; 12 Ill. 111. The acknowledgment that the sum is due is sufficient; 2 Term 480; though there be but a single item in the account; 13 East 249; 5 M. & S. 65.

Acceptance may also be inferred from retaining the account a sufficient time without making objection; 7 Cr. 147; 3 W. & S. 109; 10 Barb. 213; 4 Sandf. 311; see 22 Pa. 454; and from other circumstances; 1 Gill 234. The rule that delay in objecting to an account stated is an acquiescence also applies to corporations; 2 Blatchf. 354.

If the parties had already come to a disagreement when the account is rendered, assent cannot be inferred from silence; 33 Fed. Rep. 635; the acceptance need not be in express terms; 65 Mo. 658; 81 N. Y. 268.

A definite ascertained sum must be stated to be due; 9 S. & R. 241.

It must be made by a competent person, excluding infants and those who are of unsound mind; 1 Term 40; and an infant or an insane person is not concluded by an account stated; 1 Chit. Cont. 187.

Husband and wife may join and state an account with a third person; 2 Term 483; 16 Eng. L. & Eq. 290.

An agent may bind his principal; 3 Johns. Ch. 569; but he must show his authority; 4 Wend. 394; 13 Hun 392. Partners may state accounts; and an action lies for the party entitled to the balance; 4 Dall. 434; 1 Wash. C. C. 435; 16 Vt. 169.

The acceptance of the account is an acknowledgment of a debt due for the balance, and will support assumpsit. It is not, therefore, necessary to prove the items, but only to prove an existing debt or demand, and the stating of the account; 16 Ala. n. s. 742; 74 Cal. 60.

Facts known to a party when he settles an account stated cannot be used later to impeach it; 53 Mo. App. 610; and it should not be set aside except for clear showing of fraud or mistake; 51 Fed. Rep. 117; 66 Hun 626; 53 Mo. App. 610.

ACCOUNTANT. One who is versed in accounts. A person or officer appointed to keep the accounts of a public company.

He who renders to another or to a court a just and detailed statement of the property which he holds as trustee, executor, administrator, or guardian. See 16 Viner, Abr. 155.

ACCOUNTANT, CERTIFIED. See **CERTIFIED PUBLIC ACCOUNTANT**.

ACCOUNTANT, CERTIFIED PUBLIC. See **CERTIFIED PUBLIC ACCOUNTANT**.

ACCOUNTANT, CHARTERED. A member of the Chartered Institute of Accountants of England and Wales. Stand. Dict.

ACCOUNTANT GENERAL. An officer of the English Court of Chancery, by whom the moneys paid into court are received, deposited in bank, and disbursed. The office appears to have been established by an order of May 26, 1725, and 12 Geo. I. c. 32, before which time the effects of the suitors were locked up in the vaults of the Bank of England, under the care of the masters and two of the six clerks; 1 Smith, Ch. Pr. 22.

ACCOUNTS. "Concerns and accounts" are merely mercantile and technical words, and should be understood in relation to the business of the parties employing them. 1 J. J. Mar. 82.

ACCUPLE. To unite; to marry.

ACCREDIT. In International Law. To acknowledge.

Used of the act by which a diplomatic agent is acknowledged by the government near which he is sent. This at once makes his public character known, and becomes his protection. It is used also of the act by which his sovereign commissions him.

ACCRESCEERE (Lat.). To grow to; to be united with; to increase.

The term is used in speaking of islands which are formed in rivers by deposit; Calvinus, Lex.; 3 Kent 428.

In Scotch Law. To pass to any one. Bell, Dict.

It is used in a related sense in the common-law phrase *jus accrescendi*, the right of survivorship; 1 Washb. R. P. 426.

In Pleading. To commence; to arise; to accrue. *Quod actio non accredit infra sex annos*, that the action did not accrue within six years; 3 Chit. Pl. 914.

ACCRETION (Lat. *accrescere*, to grow to). The increase of real estate by the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of the owner. 3 Washb. R. P. 5th ed. 50.

The term *alluvion* is applied to the deposit itself, while *accretion* rather denotes the act.

If an island in a non-navigable stream results from accretion, it belongs to the owner of the bank on the same side of the *filum aque*; 3 Washb. R. P. 60; 2 Bla. Com. 261, n.; 3 Kent 428; Hargrave, Law Tracts 5; Hale, de Jur. Mar. 14; 3 Barn. & C. 91, 107; 6 Cow. 537; 4 Pick. 268; 17 Vt. 387.

"It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself;" 94 U. S. 337; 35 Cent. L. J. 368. As a general rule, such accretions do not belong to the riparian owner; 29 S. W. (Tex.) 681; 31 S. W. (Mo.) 592; 22 S. W. (Tex.) 122; 117 Mo. 33; but if after an avulsion, an accretion forms within the original land line, it belongs to the riparian owner, though separated from the main land by a slough; 28 S. W. Rep. 746.

An accretion formed on the other side of a public street which bounds the property of an individual belongs to the street, if the fee of that is in the public; 112 Mo. 525; 21 S. W. (Mo.) 202. A reliction formed by the gradual drying up of a lake belongs to the riparian owners; 32 Pac. (Utah) 690; 61 N. W. (S. D.) 749; but not one formed by artificial drainage; 61 N. W. (Ia.) 250. See **TERRITORIAL PROPERTY**.

ACCROACH. To attempt to exercise royal power. 4 Bla. Com. 76.

A knight who forcibly assaulted and detained one of the king's subjects till he paid him a sum of money was held to have committed treason on the ground of accroachment; 1 Hale, Pl. Cr. 80.

In French Law. To delay. Whishaw.

ACCRUE. To grow to; to be added to, as the interest accrues on the principal. *Accruing costs* are those which become due and are created after judgment; as the costs of an execution. See 91 Ill. 95.

To arise, to happen, to come to pass; as the statute of limitation does not commence running until the cause of action has accrued. 1 Bouvier, Inst. n. 861; 2 Rawle 277; 10 Watts 363; Bacon, Abr. *Limitation of Actions* (D, 3).

An estate tax accrued when, by the terms of the Act of 1916, it became due. 256 U. S. 635.

Cause of action accrues when a suit may first be legally instituted upon it. 264 U. S. 644, citing 98 U. S. 474; 104 U. S. 223; 122 U. S. 617.

ACCRUER, CLAUSE OF. A clause in a deed or will to tenants in common, providing that the survivor or survivors shall receive the shares of the other tenant or tenants on the latter's decease; extends only to the original, not to accrued shares, unless (as is ordinarily the case) it is otherwise expressly stated. English; Anderson.

ACCUMULATIVE JUDGMENT. A second or additional judgment or sentence given against or passed upon one who has already been convicted, to go into effect after the expiration of the first.

ACCUMULATIVE SENTENCES. A second or additional judgment given against one who has been convicted, the

execution or effect of which is to commence after the first has expired.

Thus, where a man is sentenced to an imprisonment for six months on conviction of larceny, and afterwards he is convicted of burglary, he may be sentenced to undergo an imprisonment for the latter crime, to commence after the expiration of the first imprisonment; this is called an accumulative judgment. And if the former sentence is shortened by a pardon, or by reversal on a writ of error, it expires, and the subsequent sentence takes effect, as if the former had expired. See *People v. Metc*, 581. Where an indictment for misdemeanor contained four counts, the third of which was held on error to be bad in substance, and the defendant, being convicted on the whole indictment, was sentenced to four successive terms of imprisonment of equal duration, one on each count, it was held that the sentence on the fourth count was not invalidated by the insufficiency of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count; 15 Q. B. 694.

Upon an indictment for misdemeanor containing two counts for distinct offences, the defendant may be sentenced to imprisonment or penal servitude for consecutive terms of punishment, although the aggregate of the punishments may exceed the punishment allowed by law for one offence, and this rule is in many states prescribed by statute; 1 Bish. New Crim. Proc. § 1327 (2); Whart. Cr. Pl. & Pr. § 932; 50 Kans. 299; 37 Neb. 454; 29 S. W. (Tex.) 174; 39 Pac. (Utah) 498. But it may in some cases be the means of perpetrating great injustice. See *O'Neil v. Vermont*, 144 U. S. 323, where a justice of the peace imposed a fine of \$6038, and on failure to pay it, a sentence of nearly 30 years' imprisonment, for selling intoxicating liquors. The Supreme Court of the United States refused to interfere. See 31 Am. L. Reg. 619.

Upon an indictment for perjury charging offences committed in different suits, the defendant, upon conviction, may be sentenced to distinct punishments, although the suits were instituted with a common object; 5 Q. B. Div. 490.

In New York, it has been held that where upon trial of an indictment—containing several counts—charging separate and distinct misdemeanors, identical in character, a general verdict of guilty is rendered, or a verdict of guilty upon two or more specified counts, the court has no power to impose a sentence or cumulative sentences exceeding in the aggregate what is prescribed by statute as the maximum punishment for one offence of the character charged; 60 N. Y. 569; but this case stands alone, and has been rejected by every court to which it has been cited as authority. See 1 Bish. New Cr. Proc. § 1327 (2); 6 App. Cas. 241.

ACCUSATION. In Criminal Law. A charge made to a competent officer against one who has committed a crime or misdemeanor, so that he may be brought to justice and punishment.

A neglect to accuse may in some cases be considered a misdemeanor. (Disprison (which see); 1 Brown, Civ. Law 247; 2 id. 388; Inst. lib. 4, tit. 18. It is a rule that no man is bound to accuse himself or testify against himself in a criminal case; 7 Q. B. 126. A man is competent, though not compellable, to prove his own crime; 14 Mees. & W. 266. See EVIDENCE; INTEREST; WITNESS.

ACCUSE. To make a charge against a person of the commission of a crime, or of gross misconduct; usually spoken of the formal preferring of a charge before an officer or tribunal competent to proceed towards the punishment of the offender. Abbott. To make a charge, not necessarily by a formal, legal complaint. 47 Conn. 182.

ACCUSED. One who is charged with a crime or misdemeanor. See 30 Mich. 468.

ACCUSER. One who makes an accusation.

ACCUSTOMED. Held that there was no variance between "accustomed" to navigate the river and "usually" navigating the river. 1 Am. & Eng. Ency. 2nd ed. 482; 16 N. J. L. 137. In a deed conveying the privilege to rebuild and repair a dam, and to pass and repass, in the use of the same, "over the accustomed way" it was held that the right of way must be regarded as limited to the last accustomed way. Id.; 41 Conn. 308.

ACEQUIA. A canal as for irrigation; trench; drain. Stand. Dict.

ACHAT. In French Law. A purchase.

It is used in some of our law-books, as well as *achetor*, a purchaser, which in some ancient statutes means purveyor. Stat. 36 Edw. III.; Merlin, Rép.

ACHERSET. An ancient English measure of grain, supposed to be the same with our quarter, or eight bushels.

ACKNOWLEDGMENT. The act of one who has executed a deed, in going before some competent officer or court and

declaring it to be his act or deed.

The acknowledgment is certified by the officer or court; and the term acknowledgment is sometimes used to designate the certificate.

The function of an acknowledgment is two-fold: to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The same purposes may be accomplished by a subscribing witness going before the officer or court and making oath to the fact of the execution, which is certified in the same manner; but in some states this is only permitted in case of the death, absence, or refusal of the grantor. In some of the states a deed is void except as between the parties and their privies, unless acknowledged or proved.

Nature of. In most states the act is held to be a judicial one, while in some it is held to be a ministerial act.

Who may take. An officer related to the parties; 6 N. Y. 422; 81 N. Y. 474. The presumption is that the officer took it within his jurisdiction; 16 La. Ann. 100; 19 Me. 274; 60 Mo. 93; and that it was duly executed; 71 Hun 227.

A notary cannot take acknowledgment in another county than the one within which he was appointed and resides; 38 How. Pr. 312; nor the attorney of record; 4 How. Pr. 153; 11 N. B. R. 289; 24 Wend. 91; 37 Miss. 482; 15 B. Mon. 106; nor if his term has expired; 78 Mo. 452; 78 Ala. 542. In Pennsylvania, by a recent statute, a notary may act anywhere within the state; 1898, June 6; Acts, 1898, p. 323.

One cannot take an acknowledgment of a deed in which he has any interest; 20 Me. 413; 13 Mich. 329; 2 Sandf. 630; 54 Miss. 351; 38 Tex. 645; 7 Watts 227. *Contra*, 14 Bank. Reg. 513; 75 Va. 491; 51 Mo. 589; 88 Ill. 263; 43 Ark. 420.

Sufficiency of. Certificate need only substantially comply with the statute. The fact of acknowledgment and the identity of the parties are the essential parts, and must be stated; 8 Cal. 461; 21 Miss. 373; 13 Miss. 470; 9 Mo. 514. Important words omitted cannot be supplied by intendment; 20 Ark. 190; 11 Conn. 129; 17 Iowa 528; 5 Biss. 160. In the following cases it was held that the statute must be strictly complied with; 24 Mich. 145; 66 Ala. 600; 96 Pa. 427; 5 Biss. 160; 30 Ill. 103; 8 M. & McH. 321. Where notary takes the acknowledgment and attaches his seal, but fails to sign his name, it is not sufficient; 127 Ill. 449.

Effect of. Only purchasers for value can take advantage of defects; 46 Mo. 472; 61 Mo. 196.

An acknowledged deed is evidence of seizin in the grantee, and authorizes recording it; 82 Mass. 48.

An unacknowledged deed is good between the parties and subsequent purchasers with actual notice; 8 Kan. 112; 82 Mass. 49; 46 Mo. 404, 472, 483.

The certificate will prevail over the unsupported denial of the grantor; 65 Ill. 605.

Identification of Grantor. An introduction by a common friend is sufficient to justify officer in making certificate; 8 Wall. 513. *Contra*, 48 Barb. 568; 4 Col. 211.

A notary imposed upon by a personation is liable only for clear negligence. It is a legal presumption that he acted on reasonable information, and his absence of memory as to details of what occurred does not destroy that presumption; 10 W. N. C. Pa. 392.

The certificate is not invalidated by want of recollection of the officer; 30 N. J. Eq. 394; nor by mistake in, or omission of, the date; 62 Mo. 516; 45 Md. 389; 61 Tex. 677; 32 Wis. 154.

Correction. Where a notary fails to set forth the necessary facts, he may correct his certificate, and may be compelled by mandamus, but equity has no jurisdiction to correct it; 51 Mo. 150; 63 Cal. 286; 71 Ill. 636. *Contra*, 6 N. Y. 422.

See generally paper by Judge Cooley, 4 Amer. Bar. Assoc. 1881.

ACKNOWLEDGMENT MONEY. In English Law. A sum paid by tenants of copyhold in some parts of England, as a recognition of their superior lords. Cowel; Blount. Called a fine by Blackstone; 2 Sharsw. Bla. Com. 98.

ACOLYTE. An inferior church servant, who, next under the sub-deacon, followed and waited upon the priests and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance. Spelman; Cowel.

ACQUAINTED. When used with reference to a paper to which a certificate or affidavit is attached, it indicates a substantial knowledge of the subject-matter thereof. 5 Mo. App. 101; 14 Blatchf. 90.

To be "personally acquainted with" and to "know personally" are, in a formula such as the following, equivalent phrases: "Personally appeared before me . . . the within-named bargainer, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." 95 U. S. 710.

ACQUEREUR. In Canadian law. one who purchases the title to land. Stand. Dict.

ACQUEST. An estate acquired by purchase. 1 Reeves, Hist. Eng. Law 56.

ACQUETS. In Civil Law. Property which has been acquired by purchase, gift, or otherwise than by succession. Immovable property which has been acquired otherwise than by succession. Merlin, Rép.

The profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the joint industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations, made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both.

This is the signification attached to the word in Louisiana; La. Civ. Code 2371. The rule applies to all marriages contracted in that state, or out of it, when the parties afterward go there to live, as to acquets afterward made there. The acquets are divided into two equal portions between the husband and wife, or between their heirs at the dissolution of their marriage.

The parties may, however, lawfully stipulate there shall be no community of profits or gains; but have no right to agree that they shall be governed by the laws of another country; 3 Mart. La. 581; 17 id. 571; La. Civ. Code. See 2 Kent 153, n.

As to the sense in which it is used in Canada, see 2 Low. Can. 175.

ACQUIESCENCE. A silent appearance of consent. Worcester, Dict. Failure to make any objections.

It is to be distinguished from avowed consent, on the one hand, and from open discontent or opposition, on the other. It amounts to a consent which is impliedly given by one or both parties to a proposition, a clause, a condition, a judgment, or to an act whatever.

When a party is bound to elect between a paramount right and a testamentary disposition, his acquiescence in a state of things which indicates an election, when he was aware of his rights, will be *prima facie* evidence of such election. See 2 Rop. Leg. 439; 1 Ves. 335; 12 id. 186; 3 P. Wms. 315. The acts of acquiescence which constitute an implied election must be decided rather by the circumstances of each case, than by any general principle; 1 Swans. 382, note, and the numerous cases there cited.

Acquiescence in the acts of an agent, or one who has assumed that character, will be equivalent to an express authority; 2 Kent 478; Story, Eq. Jur. § 255; 4 Wash. C. C. 559; 4 Mas. 296; 3 Pet. 69, 81; 6 Mass. 193; 1 Johns. Cas. 110; 3 Cow. 281.

Mere delay in repudiating an agent's unauthorized contract will not ratify it, but is evidence from which the jury may so infer; 3 Tex. Civ. App. 37; but the disapproval must be within a reasonable time; 45 La. Ann. 847; and if payment has been made to an agent after his authority has been revoked, the presumption is that he has accounted to the principal when there is long-continued silence on the latter's

part; 150 U. S. 520.

ACQUIETANDIS PLEGIIS. A writ of justices, formerly lying for the surety against a creditor who refuses to acquit him after the debt has been satisfied. Reg. of Writs 158; Cowel; Blount.

ACQUIRE (Lat. *ad. for.* and *querere*, to seek). To make property one's own.

It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition.

ACQUISITION. The act by which a person procures the property in a thing. The thing the property in which is secured.

Original acquisition is that by which a man secures a property in a thing which is not at the time he acquires it, and in its then existing condition, the property of any other individual. It may result from occupancy; 2 Kent 289; accession; 2 Kent 293; intellectual labor—namely, for inventions, which are secured by patent rights; and for the authorship of books, maps, and charts, which is protected by copyrights; 1 Bouv. Inst. 508, n.

Derivative acquisitions are those which are procured from others, either by act of law or by act of the parties. Goods and chattels may change owners by act of law in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy; or by act of the parties, as by gift or sale.

An acquisition may result from the act of the party himself, or those who are in his power acting for him, as his children while minors; 1 N. H. 28; 1 U. S. L. J. 513. See Dig. 41. l. 53; Inst. 2. 9. 3.

ACQUIT. To free, clear or deliver from accusation.

ACQUITTAL. In Contracts. A release or discharge from an obligation or engagement.

According to Lord Coke, there are three kinds of acquittal, namely: by deed, when the party releases the obligation; by prescription; by tenure; Co. Litt. 100 a.

In Criminal Practice. The absolution of a party charged with a crime or misdemeanor.

The absolution of a party accused on a trial before a traverse jury. 1 Nott & McC. 36; 3 McCord, 461.

Acquittals in fact are those which take place when the jury, upon trial, finds a verdict of not guilty.

Acquittals in law are those which take place by mere operation of law; as where a man has been charged merely as an accessory, and the principal has been acquitted; Coke, 2 Inst. 364.

An acquittal is a bar to any future prosecution for the offence alleged in the first indictment.

If accused is placed upon trial under a valid indictment before a legal jury, and the latter is discharged by the court without good cause and without defendant's consent, it is equivalent to an acquittal; 26 Ind. 346; 14 Ohio 295; 6 S. & R. 777; Park. Cr. Rep. 676.

When a prisoner has been acquitted, he becomes competent to testify either for the government or for his former co-defendants; 7 Cox, Cr. Cas. 341, 342. And it is clear, that where a married defendant is entirely removed from the record by a verdict pronounced in his favor, his wife may testify either for or against any other persons who may be parties to the record; 12 M. & W. 49, 50, per Alderson, B.; 8 Carr. & P. 284; 2 Tayl. Ev. 3d ed. § 1280. See JEOPARDY.

ACQUITTANCE. In Contracts. An agreement in writing to discharge a party from an engagement to pay a sum of money. It is evidence of payment, and differs from a release in this, that the latter must be under seal, while an acquittance need not be under seal. Pothier, Oblig. n. 781. See 3 Salk. 298; Co. Litt. 212 a, 273 a; 1 Rawle 391.

ACQUITTED. See ACQUITTAL.

ACRE. A quantity of land containing one hundred and sixty square rods of land, in whatever shape. Serg. Land Laws of Penn. 185; Cro. Eliz. 476, 665; 6 Co. 67; Poph. 55; Co. Litt. 5 b. The word formerly signified an open field; whence *acre-fight*, a contest in an open field. Jacob, Dict.

The measure seems to have been variable in amount in its earliest use, but was fixed by statute at a remote period. As originally used, it was applicable especially to meadow-lands; Cowel.

ACRE RIGHT. The share of a citizen of a New England town in the common lands. The value of each acre was a fixed quantity in each town, but varied in different towns. A 10-acre lot or right in a certain town was equivalent to 113 acres of upland and 12 acres of meadow, and a certain exact proportion was maintained between the acre right and salable lands. Richardson, Messages and Papers of the President, X, 230.

ACT (Lat. *agere*, to do; *actus*, done). Something done or established.

In its general legal sense, the word may denote something done by an individual, as a private citizen, or as an officer; or by a body of men, as a legislature, a council, or a court of justice; including not merely physical acts, but also decrees, edicts, laws, judgments, resolves, awards, and determinations. Some general laws made by the Congress of the United States are styled joint resolutions, and these have the same force and effect as those styled acts.

An instrument in writing to verify facts. Webster, Dict.

It is used in this sense of the published acts of assembly, congress, etc. In a sense approaching this, it has been held in trials for treason that letters and other written documents were acts; 1 Fost. Cr. Cas. 198; 2 Stark. 116.

In Civil Law. A writing which states in a legal form that a thing has been done, said, or agreed. Merlin, Répert.

Private acts are those made by private persons as registers in relation to their receipts and expenditures, schedules, acquittances, and the like. Nov. 73, c. 2; Code 7. 32. 6; 4. 21; Dig. 22. 4; La. Civ. Code art. 2231 to 2254; 8 Toullier, *Droit Civ. Français* 94.

Acts under private signature are those which have been made by private individuals, under their hands. An act of this kind does not acquire the force of an authentic act by being registered in the office of a notary; 11 Mart. 243; 5 Mart. N. S. 693; 3 La. Ann. 419; unless it has been properly acknowledged before the officer by the parties to it; 5 Mart. N. S. 196.

Public acts are those which have a public authority, and which have been made before public officers, are authorized by a public seal, have been made public by the authority of a magistrate, or which have been extracted and been properly authenticated from public records.

In Evidence. The act of one of several conspirators, performed in pursuance of the common design, is evidence against all of them. And see TREASON; PARTNER; PARTNERSHIP; AGENT; AGENCY.

In Legislation. A statute or law made by a legislative body.

General or public acts are those which bind the whole community. Of these the courts take judicial cognizance.

Private or special acts are those which operate only upon particular persons and private concerns.

The recitals of public acts are evidence of the facts recited, but in private acts they are only evidence against the parties securing them; 17 Wall. 32. When the meaning is doubtful, the title may be considered; 23 Wall. 374. Punctuation is no part of a statute; 105 U. S. 77.

Explanatory acts should not be enlarged by equity; Comb. 410; although such acts may be allowed to have a retrospective operation; Dupin, *Notions de Droit* 145. 8. If an act of assembly expire or be repealed while a proceeding under it is *in fieri* or pending, the proceeding becomes abortive; as a prosecution for an offence; 7 Wheat. 552; or a proceeding under insolvent laws;

1 W. Bla. 451; 3 Burr. 1456; 6 Cranch 208; 9 S. & R. 283.

A bill signed by the President of the United States after the usual adjournment of Congress for the winter holidays, but within ten days from the time when it was presented to him, was duly approved within the intent and meaning of the Constitution; 29 Ct. Cls. 523.

Judicial Act. An act performed by a court touching the rights of parties or property brought before it by voluntary appearance, or by the prior action of ministerial officers; in short by ministerial acts. 17 Ind. 173.

See IN ACCORDANCE WITH THIS ACT.

ACT OF BANKRUPTCY. An act which subjects a person to be proceeded against as a bankrupt.

In England, the bankruptcy acts of 1883 and 1890 enumerate the following acts of bankruptcy:

By traders and non-traders alike, conveyance of property to trustees for the benefit of creditors generally; fraudulent conveyance, gift, delivery, or transfer of property; fraudulent preference; departure out of England; remaining out of England; execution levied without paying the same; declaration of inability to pay debts; departure from his dwelling house; otherwise absenting himself; beginning to keep house; service of bankruptcy notice by creditor, without compliance on his part; notice of suspension.

As to conveyance of property to trustees for benefit of creditors generally, see Williams on Bankt. L. 3. As to fraudulent conveyance, gift, delivery, or transfer of property; 1 Sm. L. C. 1; 86 L. J. Q. B. 289; 1 Ad. & E. 456. As to departure out of England; 1 Q. B. 51; 8 Camp. 349. See generally Williams, Roche, Hazlitt. In the United States see, as to the Act of 1867 (now repealed), Bump, Bankruptcy.

ACT OF ELIZABETH. See Act of SUPREMACY.

ACT OF GOD. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonably to have been expected. L. R. v. C. P. D. 423. See also L. R. 10 Ex. 255. The civil law employs, as a corresponding term, *vis major*.

The term generally applies, broadly, to natural accidents, such as those caused by lightning, earthquakes, and tempests; Story, Bailm. § 511; 2 Ga. 349. A severe snow-storm, which blocked up railroads, held within the rule; 40 Mo. 491. So where fruit-trees were frozen, in transit it was held to be by the act of God, unless there had been improper delay on the part of the carrier; 63 Mo. 230. Also where fruit is in transit; 102 Mass. 276. The freezing of a canal or river held within the rule; 14 Wend. 213; 23 id. 306; 4 N. H. 259; 44 N. Y. 437. A frost of extraordinary severity (11 Ex. 781; s. c. 28 L. J. Ex. 212) and an extraordinary fall of snow (28 L. J. Ex. 51) have been held to be the act of God. A sudden failure of wind has been held to be an act of God; 6 Johns. 160 (but this case has been doubted; 1 Sm. L. C. Am. ed. 417; and Kent, Ch. J., substantially dissenting; see also 21 Wend. 190). Also a sudden gust of wind or tempest; 11 Ill. 579; 95 Pa. 237. Losses by fire have not generally been held to fall under the act of God; 1 T. R. 83; 6 Seld. 431; 69 Ill. 285. s. c. 18 Am. R. 613; 76 Ill. 542 (the Chicago fire); (though otherwise when the fire is caused by lightning, 26 Me. 181); but where a distant forest fire was driven by a tornado, to where a carrier's cars were on the track awaiting a locomotive, their destruction was held to be by the act of God; 57 Pa. 234; but see 2 Tex. 115, *contra*. When a flood had risen higher than ever before, destruction of goods thereby was held to be by act of God; 80 N. Y. 630, or where there is a flood; 147 Pa. 343; 64 Pa. 106. The bursting of a boiler does not come within the act of God; 5 Strob. 119. See 28 Barb. 403; 12 Md. 9; 4 Stew. & P. 382; 26 Mo. 323. If water in a spring failed by reason of drought, there is no breach of contract for its supply; 93 Pa. 502. If a person is thrown from his horse and injured, the resulting illness was considered an act of God; 37 N. Y. 586.

In a late and well-considered English case, 1 C. P. D. 34, 423; 34 L. T. R. n. s. 827; s. c. 18 Am. R. 618; 14 Alb. L. J. 164; Cockburn, C. J., held, in an action for the loss of a horse on shipboard, that if a carrier "uses all the known means to which prudent and experienced carriers usually have recourse, he does all that can be reasonably required of him, and if under such circumstances he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God." The accident, to come within the rule, must be due entirely to natural causes without human intervention; *ibid.*, also 2 Zab. 373; 1 Murphy 173; 2 Bailey 37, 42.

The term is sometimes defined as equivalent to

inevitable accident (2 Sm. & M. 572; 2 Ga. 349), but incorrectly, as there is a distinction between the two; although Sir William Jones proposed the use of inevitable accident instead of *Act of God*; Jones, Bailm. 104. See Story, Bailm. § 25; 2 Bla. Com. 128; 2 Crabb, R. P. § 2167; 4 Dougl. 287; 51 Wend. 190; 10 Miss. 572; 5 Blackf. 232.

Where the law casts a *duty* on a party, the performance shall be excused if it be rendered impossible by the act of God; *lex neminem cogit ad impossibilia*; 1 Q. B. D. 548; but where the party by his own contract engages to do an act, it is deemed to be his own fault that he did not thereby provide against contingencies, and exempt himself from responsibilities in certain events; and in such case (that is, in the instance of an absolute general contract) the non-performance is not excused by an inevitable accident, or other contingency, although not foreseen by, nor within the control of, the party; Chit. Contr. 272, 3; 3 M. & S. 267; 7 Mass. 325; L. R. 5 C. P. 586; L. R. 4 Q. B. 134; Leake, Contr. 683.

Certain contracts are construed as containing an implied exception of impossible events, and even general words in the contract will not be held to apply to the possibility of the particular contingency which afterwards happened; Leake, Contr. 702; L. R. 4 Q. B. 135; 70 Ill. 527; 41 N. Y. 62. So if a bail bond to render a debt is discharged by the debtor's death before default; W. Jones 29. Contracts for strictly personal services, marriage, etc., are discharged by death or incapacity; 3 B. & S. 835; Cro. Eliz. 532; 2 M. & S. 408; L. R. 6 Ex. 269; 79 Pa. 324; 86 N. C. 91; as where a singer could not sing by reason of ill-health. So, when one employed a bailiff for six months, and died, the contract was held dissolved; L. R. 4 C. P. 744. So of contracts of partnership.

See BAILMENT; COMMON CARRIER; PERIL OF THE SEA; SPECIFIC PERFORMANCE.

ACT OF GRACE. In Scotch Law. A statute by which the incarcerating creditor is bound to alimment his debtor in prison, if such debtor has no means of support, under penalty of a liberation of his debtor if such alimment be not provided. Paterson, Comp.

This statute provides that where a prisoner for debt declares upon oath, before the magistrate of the jurisdiction, that he has not wherewith to maintain himself, the magistrate may set him at liberty. If the creditor, in consequence of whose diligence he was imprisoned, does not alimment him within ten days after intimation for that purpose; Stat. 1696, c. 32; Ersk. Prin. 4.

ACT OF HONOR. An instrument drawn up by a notary public, after protest of a bill of exchange, when a third party is desirous of paying or accepting the bill for the honor of any or all of the parties to it.

The instrument describes the bill, recites its protest, and the fact of a third person coming forward to accept, and the person or persons for whose honor the acceptance is made. The right to pay the debt of another, and still hold him, is allowed by the law merchant in this instance, and is an exception to the general rule of law; and the right can only be gained by proceeding in the form and manner sanctioned by the law; 3 Dan. Ky. 534; Bayley, Bills; Sewell, Banking.

ACT OF INDEMNITY. A statutory enactment passed for the protection or relief of anyone who, acting in good faith, has inadvertently committed some illegal act subjecting him to penalty. Stand. Dict.

ACT OF INSOLVENCY. Such an act as shows a person or corporation to be insolvent. English. See INSOLVENCY.

ACT IN PAIS. An act performed out of court, and which is not a matter of record.

A deed or an assurance transacted between two or more private persons in the country, that is, according to the old common law, upon the very spot to be transferred, is matter in pais. 2 Bla. Com. 294.

ACT ON PETITION. A form of summary proceeding formerly in use in the High Court of Admiralty, in England, in which the parties stated their respective cases briefly, and supported their statements by affidavit. 2 Dods. Adm. 174, 184; 1 Hagg. Adm. 1, note.

The suitors of the English Admiralty were, under

the former practice, ordinarily entitled to elect to proceed either by act on petition, or by the ancient and more formal mode of "plea and proof;" that is, by libel and answer, and the examination of witnesses; W. Rob. Adm. 169, 171, 172. The pleadings in admiralty causes, with a few exceptions, are now the same as in the other divisions of the High Court. See Smith, Adm. Law & Pr. (4th ed.) 146.

ACT OF SETTLEMENT. In English Law. The statute of 12 & 13 Will. III. c. 2, by which the crown of England was limited to the present royal family. 1 Bla. Com. 128; 2 Steph. Com. 290.

ACT OF SUPREMACY. Either of two English acts, the first in the reign of Henry VIII, the second in that of Elizabeth, throwing off the yoke of Rome, and declaring the British sovereign to be supreme head of British ecclesiastical matters. The second of these acts is sometimes called the ACT OF ELIZABETH. Jacob; Stand. Dict.

ACT OF UNIFORMITY. A statute enacted in the reign of Charles II, decreeing that in every place of public worship, the book of common prayer, as then recently revised, should be used, and otherwise ordaining a uniformity in religious services. Burrill; 3 Steph. Com. 104.

ACT OF UNION. A statute of the reign of Queen Anne, whereby the kingdoms of England and Scotland were formally united into one kingdom, under one king, and one parliament, with the preservation, however, of their separate state churches. 1 Bla. Com. 96, 97.

ACTA DIURNA (Lat.). A formula often used in signing. Du Cange.

Daily transactions, chronicles, journals, registers. I do not find the thing published in the *acta diurna* (daily records of affairs): Tacitus, Ann. 3, 3; Ainsworth, Lex.; Smith, Lex.

ACTA PUBLICA (Lat.). Things of general knowledge and concern; matters transacted before certain public officers. Calvinus, Lex.

ACTING. Performing; serving; attending to the duties of an office; as, the acting-executor, partner, commissioner of patents, reporter of decision. Anderson. Attached to an officer's title, designates not an appointed incumbent, but merely a *locum tenens* who is performing the duties of an office to which he does not himself claim title. Id.; 16 Ct. Cl. 514.

ACTIO. In Civil Law. A specific mode of enforcing a right before the courts of law: e. g. *legis actio*; *actio sacramenti*. In this sense we speak of actions in our law, e. g. the action of debt. The right to a remedy, thus: *ex nudo pacto non oritur actio*; no right of action can arise upon a naked pact. In this sense we rarely use the word action; 3 Ortolan, Inst. § 1830; 5 Savigny, System 10; Mackelley, Civ. L. (13th ed.) § 193.

The first sense here given is the older one. Justinian, following Celsus, gives the well-known definition: *Actio nihil aliud est, quam jus persequendi in iudicio, quod sibi debetur*, which may be thus rendered: An action is simply the right to enforce one's demands in a court of law. See Inst. Jus. 4, 6, de *Actioibus*.

In the sense of a specific form of remedy, there are various divisions of *actiones*.

Actiones civiles are those forms of remedies which were established under the rigid and inflexible system of the civil law, the *jus civile*. *Actiones honorarie* are those which were gradually introduced by the prætors and ædiles, by virtue of their equitable powers, in order to prevent the failure of justice which too often resulted from the employment of the *actiones civiles*. These were found so beneficial in practice that they eventually supplanted the old remedies, of which in the time of Justinian hardly a trace remained; Mackelley, Civ. L. § 194; 5 Savigny, System.

Directæ actiones, as a class, were forms of remedies for cases clearly defined and recognized as actionable by the law. *Utilis actiones* were remedies granted by the magistrate in cases to which *actio directa* was applicable. They were framed for the

special occasion, by analogy to the existing forms, and were generally fictitious; that is, they proceeded upon the assumption that a state of things existed which would have entitled the party to an *actio directa*, and the cause was tried upon this assumption, which the other party was not allowed to dispute; 5 Savigny, System § 215.

Again, there are *actiones in personam* and *actiones in rem*. The former class includes all remedies for the breach of an obligation, and are considered to be directed against the person of the wrong-doer. The second class comprehends all remedies devised for the recovery of property, or the enforcement of a right not founded upon a contract between the parties, and are therefore considered as rather aimed at the thing in dispute, than at the person of the defendant; Mackelley, Civ. L. § 195; 5 Savigny, System § 206; 3 Ortolan, Inst. § 1952.

In respect to their object, actions are either *actiones rei persequende causa comparatæ*, to which class belong all *in rem actiones*, and those of the *actiones in personam*, which were directed merely to the recovery of the value of a thing, or compensation for an injury; or they are *actiones penales*, called also *actiones ex delicto*, in which a penalty was recovered of the delinquent, or *actiones mixtæ*, in which were recovered both the actual damages and a penalty in addition. These classes, *actiones penales* and *actiones mixtæ*, comprehended cases of injuries, for which the civil law permitted redress by private action, but which modern civilization universally regards as crimes; that is, offences against society at large, and punished by proceedings in the name of the state alone. Thus, theft, receiving stolen goods, robbery, malicious mischief, and the murder or negligent homicide of a slave (in which case an injury to property was involved), gave rise to private actions for damages against the delinquent; Inst. 4, 1. *De obligationibus quæ ex delicto nascuntur*; id. 2. *De bonis in rapto*; id. 3. *De lege Aquilia*. And see Mackelley, Civ. L. § 196; 5 Savigny, System § 210.

In respect to the mode of procedure; *actiones in personam* are divided into *stricti juris*, and *bonæ fidei actiones*. In the former the court was confined to the strict letter of the law; in the latter something was left to the discretion of the judge, who was governed in his decision by considerations of what ought to be expected from an honest man under circumstances similar to those of the plaintiff or defendant. Mackelley, Civ. L. § 197 a.

It would not only be foreign to the purpose of this work to enter more minutely into a discussion of the Roman *actio*, but it would require more space than can here be afforded, since in Savigny's System there are more than a hundred different species of *actio* mentioned, and even in the succinct treatise of Mackelley nearly eighty are enumerated.

In addition to the works cited in passing may be added the Introduction to Sandars' Justinian, which may be profitably consulted by the student.

To this brief explanation of the most important classes of *actiones* we subjoin an outline of the Roman system of procedure. From the time of the twelve tables (and probably from a much earlier period) down to about the middle of the sixth century of Rome, the system of procedure was that known as the *actiones legis*. Of these but five have come down to us by name; the *actio sacramenti*, the *actio per judicis postulationem*, the *actio per condictionem*, the *actio per manus injectionem*, and the *actio per pignoris captionem*. The first three of these were actions in the usual sense of the term; the last two were modes of execution. The *actio sacramenti* is the best known of all, because from the nature of the questions decided by means of it, which included those of status, of property *ex jure Quiritium*, and of successions; and from the great popularity of the tribunal, the *centumviri*, which had cognizance of these questions, it was retained in practice long after the other actions had succumbed to a more liberal system of procedure. As the *actio sacramenti* was the longest-lived, so it was also the earliest, of the *actiones legis*; and it is not only in many particulars a type of the whole class, but the other species are conceived to have been formed by successive encroachments upon its field. The characteristic feature of this action was the *sacramentum*, a pecuniary deposit made in court by each party, which was to be forfeited by the loser. Subsequently, however, the parties were allowed, instead of an actual deposit, to give secur-

ity in the amount required, etc. Our knowledge of all these actions is exceedingly slight, being derived from the fragments of the earlier jurisprudence preserved in literary works, laboriously pieced together by commentators, and the numerous gaps filled out by aid of ingenious and most copious conjectures. They bear all the characteristics of a system that has been the origin in a barbarous or semi-barbarous age, among a people little skilled in the science of jurisprudence, and having no acquaintance with the refined distinctions and complex business transactions of civilized life. They were all of that rigid, tyrannical, and unrelaxing character, and habit, but lively imaginations. They abounded in sacramental words and significant gestures, and, while they were inflexibly rigid in their application, they possessed a character almost sacred, so that the mistake of a word or the omission of a gesture entailed the loss of a suit. In the nature of things, such a system could not maintain itself against the advance of civilization, bringing with it increased complications in all the relations of man to man; and accordingly we find that gradually, but sensibly, and in a regular manner, the system of Justinian not a trace of it existed in practice. See 3 Ortolan, *Justinian 486 et seq.*

About the year of Rome 607 began the introduction of the system known as the procedure *per formulam* or *ordinaria iudicia*. An important part of the population of Rome consisted of foreigners, whose disputes with each other or with Roman citizens could not be adjusted by means of the *actiones leges*, these being entirely confined to questions of the strict Roman law, which could only arise between Roman citizens.

the supply of the want of a forum for foreign residents, the magistrate, the *praetor peregrinus*, was constituted with jurisdiction over this class of suits, and from the procedure established by this new court sprang the formulary system, which proved so convenient in practice that it was soon adopted in suits where both parties were Roman citizens, and gradually threw aside its case after course from the *legis actiones*, until few questions were left in which that cumbersome procedure continued to be employed.

Important feature of the formulary system, though not peculiar to that system, was the distinction between the *iura* and the *iudicium*, between the magistrate and the judge. The magistrate was invested with the civil authority, *imperium*, and that authority was exercised over every state of the lawsuit. He was the source of the law, the law inherent in the supreme power; he called the parties, heard their conflicting statements, and referred the case to a special tribunal of one or more persons, *iudex*, *arbiter*, *recuperatores*. The function of the judge was to render a decision, to pronounce judgment thereon, in conformity with a special authorization to that effect conferred by the magistrate. Here the authority of the judge ended; if the defeated party refused to comply with the judgment, the magistrate was obliged to order the magistrate to enforce the judgment. From this it would appear that the functions of the judge or judges under the Roman system corresponded in many respects with those of the jury at common law. The only essential difference of fact was that to them by the magistrate, and the judge decides the issue eliminated by the pleadings; and, the decision made, their functions ceased, like those of the jury.

As to the amount at stake, the magistrate, in cases admitting it, had the power to fix the sum in dispute, and then the judge's duties were confined to the simple question whether the sum specified was due the plaintiff or not; and if he increased or diminished this amount he subjected himself to an action for damages. In other cases, instead of a precise sum, the magistrate fixed a *maximum* sum, beyond which the judge could not go in ascertaining the amount due; but in most cases the magistrate left the amount entirely to the discretion of the judge.

The directions of the magistrate to the judge were made up in a brief statement called the *formula*, which gives its name to this system of procedure. The composition of the formula was governed by well-established rules. When complete, it consisted of four parts, though some of these were frequently omitted, and it was composed of two or three classes of actions. The first part of the formula called the *demonstratio*, recited the subject submitted to the judge, and consequently the facts of which he was to take cognizance. It varied of course according to the nature of the case, but in each class of cases had a fixed, and appropriate, form. This form, in an action by a vendor against his vendee, was as follows: "*Quod Aulus Agerius Numerio Negidius hominem vendidit*" or, in case of a bailment, "*Quod Aulus Agerius apud Numerium Negidium hominem deposuit*." In this was stated the claim of the plaintiff, as founded upon the facts set out in the *demonstratio*. This, in a question of contracts, was in these words: "*Il partem Numerium Negidius Aulo Agerio meum mandavit custodire, etc.*" when the magistrate fixed the amount; or, "*Quidquid partem Numerium Negidium Aulo Agerio dare facere oportere*," when he left the amount to the discretion of the judge. In a claim of property the words were "*Quidquid Aulus Agerius in possessione Auli Agerii esse*." The third part of the complete formula was the *adjudicatio*, which contained the authority to the judge to award to one party a right of property belonging to the other. It was in these words: "*Quantum ad rem oportet, iudex Titius Agerius Aulo Agerio iudicet*." The fourth part, the *condemnatio*, which gave the judge authority to pronounce his decision for or against the defendant. It was as follows: "*Iudex, Numerium Negidium Aulo Agerio sestertium X milia condemnna*; si non pareat, *absolvo*," or "*Quantum ad rem oportet, iudex Titius Agerius Aulo Agerio sestertium X milia condemnna*; si non pareat, *absolvo*," when the magistrate fixed a maximum; or, "*Quantum ea res erit, tantum pecuniam, iudex, Numerium Negidium Aulo Agerio condemnna*; si non pareat, *absolvo*," when it was left to the discretion of the judge.

Of these parts, the *intentio* and the *condemnatio* were always employed: the *demonstratio* was sometimes found unnecessary, and the *adjudicatio* only occurred in three species of actions—*familie eriscundæ communi dividundo*, and *finium regundorum*—which were actions for division of an inheritance, actions of partition, and suits for the rectification of boundaries.

On the boundary between the two is the *formula* in their simplest form; but they are often enlarged by the insertion of clauses in the *demonstratio*, the *intentio*, or the *condemnatio*, which were useful or necessary in certain cases: these clauses are called *adijectiones*. When such a clause was inserted for the benefit of the defendant, it was called an *exceptio* or defence, the claim set out in the *intentio*, it was called an *exceptio*. To this the plaintiff might have an answer, which, when inserted, constituted the *replicatio*, and so on to the *duplicatio* and *triplicatio*. These clauses like the *intentio* in which they were inserted, were all framed conditionally, and not, like the common-law, in the affirmative. Thus, *si in causa X milia dare oportere (intentio); si in ea res nihil dolo malo Auli Ageris facitum sit neque falsi (exceptio); Si non, etc.* (replicatio).

In preparing the *formula*, the plaintiff presented to the magistrate his *demonstratio, intentio, etc.*, which were probably drawn in due form under the advice of jurisconsult; the defendant then presented his *adjectiones*, the plaintiff responded with his replications and so on. The magistrate might modify these, or insert new *adjectiones*, at his discretion. After this discussion *in iure, pro tribunali*, the magistrate reduced the results to form, and sent the *formula* to the judge, before whom the parties were confined to the case thus settled. See 8 Ortolan, Justinian, §§ 1909 *et seq.*

The procedure by which a *formula* was supplanted in course of time by a third system, *extraordinaria iudicia*, which in the days of Justinian had become universal. The essence of this system consisted in the magistrate referring the case to the *judex*. The magistrate decided the case himself, and the distinction between the *jus* and the *judicium* was practically abolished. This new system commenced with usurpation by the magistrates, in the extension of the *formula* to *judicia* which were not included from the time of the *leges actiones*, to cases not originally within its scope. Its progress may be traced by successive enactments of the emperors, and was so gradual that, even when it had commenced, the *formula* continued to be used. It was not until the emperor continued to reduce to writing a sort of formula representing the result of the pleadings. In time, however, this last roll of the former practice was abolished by an imperial constitution. Thus the *formula* was swept away, and the *actio* was reduced to *jurisconsilia*, was swept away, and carried with it in its fall all those refinements of litigation in which they had so much delighted. Thereforth the distinctions between the forms of actions were no longer observed, and the *actio* was reduced to the signification of a form, came to mean a *right*, *jus persequendi in judicio quod sibi debetur*.

See Ortolan, Hist. no. 802 *et seq*; *id.* Instit. nos. 1888-2067; 5 Savigny, System § 6; Sandars, Justinian. Introduction: *Genus* by Abdy & Walker.

an, introduction; Gaitis, of Aody & Walker. The recent English work speaks of the English "formula" as a "peculiarly English" formula, but also in a certain sense very Roman.¹ It was not "invented" in one place by some all-wise legislator but "grew up little by little." The age of its rapid growth was between 1154 and 1272. The similarity between the Roman and English formulaary systems is so patent that it has naturally aroused the suggestion that one must have been the model for the other. But this is not the case. Between 1154 and 1250, or thereabouts, the old Roman law in its medieval form exercised a powerful influence on some of the English rules. But the differences in the system were as remarkable as the resemblances. Thus the *Pretor* heard both parties before he composed his formula, while the chancellor issues the writ before he hears the defendant's story. It is usually the plaintiff who pleads the terms of action, and therefore not mere rubrics, but the substance of the law. There were in common use some thirty or forty actions between which there were large differences. 3 Poll. & Maitl. Hist. Eng. Law 235.

ACTIO ARBITRARIA. An action depending on the discretion (*arbitrium*) of the judge. In them, unless the defendant makes amends to the plaintiff at the judge's discretion gives up, for instance, the thing, or produces it, or pays, or surrenders the slave in a case of wrong doing (*ex noxali causa*)—he must be condemned. Hunter Rom. Law, 2d Ed., 987. (J. 4. 631.)

ACTIO BONÆ FIDEI (Lat. an action of good faith). In Civil Law. A class of actions in which the judge might at the trial, *ex officio*, take into account any equitable circumstances that were presented to him affecting either of the parties to the action. 1 Spence, Eq. Jur. 210.

ACTIO CIVILIS. See **ACTIO.**
ACTIO COLUMNIAE. An action for

ACTIO COLUMNIAE. An action for damages for mischievously and without reason attacking the freedom of any one. Hunter Rom. Law, 2d Ed. 185; or to restrain the plaintiff from prosecuting trumped up charges. Hunter Rom. Law, 2d Ed. 1020.

ACTIO COMMODATI CONTRA-
RIA. In Civil Law. An action by the
 borrower against the lender, to compel the
 execution of the contract. Pothier, *Prêt d*

Usage n. 75.

ACTIO COMMODATI DIRECTA. In Civil Law. An action by a lender against a borrower, the principal object of which is to obtain a restitution of the thing lent. Pothier, *Prêt à Usay*: nn. 65, 68.

ACTIO COMMUNI DIVIDENDO.
In Civil Law. An action for a division of the property held in common. Story, Partn. Bennett ed. § 352.

ACTIO CONDUCTIO INDEBITATA. In Civil Law. An action by which the plaintiff recovers the amount of a sum of money or other thing he paid by mistake. Pothier, *Promutuum* n. 140; Merlin, Rép.

ACTIO EX CONDUCTO. In Civil Law. An action which the bailor of a thing for hire may bring against the bailee, in order to compel him to re-deliver the thing hired. Pothier, *du Contr. de Louage* n. 59; Merlin, *Rép.*

ACTIO CONFESSORIA. This action tries the right to the servitude; the form was either, it is my right to do what you have prevented; or, it is not your right to do what you have begun. Hunter Rom. Law, 2d Ed., 425.

ACTION. See **ACTIO EX CONTRACTU.**

ACTIO DAMNI INJURIA. A general phrase, in Roman civil law, corresponding to the modern "action for damages." Abbott; Hunter Rom. Law.

ACTIO EX DELICTO. See ACTION.
ACTIO DEPOSITI CONTRARIA.
 In Civil Law. An action which the depository has against the depositor, to compel him to fulfil his engagement towards him. Pothier, *Du Dépôt* n. 69.

ACTIO DEPOSITI DIRECTA. In Civil Law. An action which is brought by the depositor against the depositary, in order to get back the thing deposited. Pothier, *Du Dépôt* n. 60.

ACTIO DIRECTA. See **ACTIO.**

ACTIO DE DOLO MALO. An action for fraud. The action was penal, and at first prescribed in a single year, but the period was extended by Constantine to two years. *Huner's Rom. Law*, 2d Ed., 648.

ACTIO EMPTI. This was an action by which the seller could be compelled to perform his obligations or pay compensation. By this action also were enforced all special agreements (*pacta*) made in the contract of sale. Hunter Rom. Law, 2d Ed., 504, 505.

ACTIO EX EMPTO. An action of purchase, or upon purchase.

ACTIO AD EXHIBENDUM. In Civil Law. An action instituted for the purpose of compelling the person against whom it was brought to exhibit some thing or title in his power.

It was always preparatory to another action, which lay for the recovery of a thing movable or immovable; 1 Merlin, *Quest. de Droit* 84.

ACTIO EX FACTO. An action of fact, or upon fact.

ACTION IN FACTUM. In Civil Law. An action adapted to the particular case which had an analogy to some *actio in ius* which was founded on some subsisting acknowledged law. 1 Spence, Eq. Jur. 212. The origin of these actions is strikingly similar to that of actions on the case at common law. See CASE.

ACTIO FAMILIÆ ERISCUN. DÆ. In Civil Law. An action for the division of an inheritance. Inst. 4. 6. 20. Bracton 100 b.

ACTIO FURTI. See RES ADIRATAE.

ACTIO HONORARIA. An honorary action. Hunter Rom. Law, 2d Ed., 42.

ACTIO JUDICATI. In Civil Law. An action instituted, after four months had elapsed after the rendition of judgment, in which the judge issued his warrant to seize, first, the movables, which were sold within eight days afterwards; and then the immovables, which were delivered in pledge to the creditors, or put under the care of a curator, and if, at the end of two months, the debt was not paid, the land was sold. Dig. 42. 1; Code, 8. 84.

According to some authorities, if the defendant then utterly denied the rendition of the former judgment, the plaintiff was driven to a new action, conducted like any other action, which was called *actio iudicati*, and which had for its object the determination of the question whether such a judgment had been rendered. The exact meaning of the term is by no means clear. See Savigny, Syst. 805, 411; 8 Orolan, Just. § 2038.

ACTIO LEGIS AQUILAE. An action for injury to property; it could be brought for injury to immovables as well as to moveables. Hunter Rom. Law, 2d Ed., 332.

ACTIO EX LOCATO. An action against one who hired a thing, by the one who owns it, for any damage to the thing hired. Hunter Rom. Law, 2d Ed., 505.

ACTIO MANDATI. In Civil Law. An action founded upon a mandate. Dig. 17. 1.

ACTIO MIXTA. See ACTION; MIXED ACTION.

ACTIO NON. In Pleading. The declaration in a special plea "that the said plaintiff ought not to have or maintain his aforesaid action thereof against" the defendant (in Latin, *actionem non habere debet*).

It follows immediately after the statement of appearance and defence; 1 Chit. Plead. 531; 2 id. 421; Stephens, Plead. 394.

ACTIO NON ACCREVIT INFRA SEX ANNOS (Lat.). The action did not accrue within six years.

In Pleading. A plea of the statute of limitations, by which the defendant insists that the plaintiff's action has not accrued within six years. It differs from *non assumpsit* in this: *non assumpsit* is the proper plea to an action on a simple contract, when the action accrues on the promise; but when it does not accrue on the promise, but subsequently to it, the proper plea is *actio non accrevit*, etc.; Lawes, Plead. 733; 5 Binn. 200, 203; 2 Salk. 423; 2 Saund. 63 b.

ACTIO NON ULTERIUS. A name given in English pleading to the distinctive clause in the plea to the further maintenance of the action; introduced in place of the plea *puis darrein continuance*. Steph. Pl. 64, 65, 401; Black, Law Dict.

ACTIO DE PECULIO. In Roman law, an action to which fathers and masters were liable on the contracts of their children and servants to the extent of their separate estate. English.

ACTIO DE PECUNIA CONSTITUTA. An action which may be brought against anyone that has engaged to pay money, either for himself, or for another, without any stipulation coming in. Hunter's Rom. Law, 2d Ed., 566.

ACTIO PERSONALIS. A personal action. The proper term in the civil law is *actio in personam*.

ACTIO PERSONALIS MORITUR CUM PERSONA (Lat.). A personal action dies with the person.

In Practice. A maxim which formerly expressed the law in regard to the surviving of personal actions.

To render the maxim perfectly true, the expression "personal actions" must be restricted very much within its usual limits. In the most extensive sense, all actions are personal which are neither real nor mixed, and in this sense of the word personal the

maxim is not true. A further distinction, moreover, is to be made between personal actions actually commenced and pending at the death of the plaintiff or defendant, and causes of action upon which suit might have been, but was not, brought by or against the deceased in his lifetime. In the case of actions actually commenced, the old rule was that the suit abated by the death of either party. But the inconvenience of this rigor of the common law has been modified by statutory provisions in England and the states of this country, which prescribe in substance that when the cause of action survives to or against the personal representatives of the deceased, the suit shall not abate by the death of the party, but may proceed on the substitution of the personal representatives on the record by *scire facias*, or in some states, by simple suggestion of the facts on the record. See 6 Wheat. 260. And this brings us to the consideration of what causes of action survive.

CONTRACTS.—It is clear that, in general, a man's personal representatives are liable for his breach of contract on the one hand, and, on the other, are entitled to enforce contracts made with him. This is the rule; but it admits of a few exceptions; 6 Me. 470; 2 D. Chippm. 41.

No action lies against executors upon a covenant to be performed by the testator in person, and which consequently the executor cannot perform, and the performance of which is prevented by the death of testator; 3 Wils. Ch. 90; Cro. Eliz. 553; 1 Rolle 359; 24 Fed. Rep. 533; as if an author undertakes to compose a work, or a master covenants to instruct an apprentice, but is prevented by death. See Wms. Exec. 1467. But, for a breach committed by deceased in his lifetime, his executor would be answerable; Cro. Eliz. 553; 1 M. & W. 423, per Parke, B.; 19 Pa. 234.

As to what are such contracts, see 2 Perr. & D. 251; 10 Ad. & E. 45; 1 M. & W. 423; 30 Ga. 886; 86 N. C. 586. But whether the contract is of such a nature is a mere question of construction, depending upon the intention of the parties; Cro. Jac. 232; 1 Bingham. 225; unless the intention be such as the law will not enforce; 19 Pa. 233, per Lowrie, J.

Again, an executor, etc., cannot maintain an action on a promise made to deceased where the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate, as a breach of promise of marriage; 2 M. & S. 408; 4 Cush. 408; 55 Me. 142. Nor will an action for breach of promise of marriage survive against the executor of the promisor where no special damage is alleged; 133 Mass. 359; 106 Mass. 339. And as to the right of an executor or administrator to sue on a contract broken in the testator's lifetime, where no damage to the personal estate can be stated, see 2 Cr. M. & R. 588; 5 Tyrwh. 985, and the cases there cited.

Divorce proceedings being a personal action, death of either of the parties before decree abates the proceedings and the court will not require the executor to become a party in order to answer the wife's demand for additional allowance for counsel fees; 60 Md. 185.

The fact whether or not the estate of the deceased has suffered loss or damage would seem to be the criterion of the right of the personal representative to sue in another class of cases, that is, where there is a breach of an implied promise founded on a *tort*. For where the action, though in form *ex contractu*, is founded upon a *tort* to the person, it does not in general survive to the executor. Thus, with respect to injuries affecting the life and health of the deceased; all such as arise out of the unskillfulness of medical practitioners; or the imprisonment of the party occasioned by the negligence of his attorney, no action, generally speaking, can be sustained by the executor or administrator on a breach of the implied promise by the person employed to exhibit a proper portion of skill and attention; such cases being in substance actions for injuries to the person; 2 M. & S. 415, 416;

8 M. & W. 854; 58 N. H. 532; 58 N. H. 517. And it has been held that for the breach of an implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue without stating that the testator sustained some actual damage to his estate; 4 J. B. Moore 532. But the law on this point has been considerably modified by statute.

On the other hand, where the breach of the implied promise has occasioned damage to the personal estate of the deceased, though it has been said that an action in form *ex contractu* founded upon a *tort* whereby damage has been occasioned to the estate of the deceased, as debt against the sheriff for an escape, does not survive at common law, 1 Ga. 514 (though in this case the rule is altered in that state by statute), yet the better opinion is that, if the executor can show that damage has accrued to the personal estate of the deceased by the breach of an express or implied promise, he may well sustain an action at common law, to recover such damage, though the action is in some sort founded on a *tort*; Wms. Exec. 676; citing, *in extenso*, 2 Brod. & B. 102; 4 J. B. Moore 532. And see 3 Woodd. Lect. 78. So, by waiving the *tort* in a trespass, and going for the value of the property, the action of *assumpsit* lies as well for as against executors; 1 Bay 58.

A claim for money paid as usury survives against the estate of the person to whom it was paid; 27 Vt. 386.

In the case of an action on a contract commenced against joint defendants one of whom dies pending the suit, the rule varies. In some of the states the personal representatives of the deceased defendant may be added as parties and the judgment taken against them jointly with the survivors; 27 Miss. 455; 9 Tex. 519. In others the English rule obtains which requires judgment to be taken against the survivors only; and this is conceived to be the better rule, because the judgment against the original defendants is *de bonis propriis*, while that against the executors is *de bonis testatoris*; 119 Mass. 361. Where action is pending against two partners, and the death of one is not suggested before judgment, the judgment is a lien on the partnership assets and binds the surviving partner personally; 18 S. E. Rep. (S. C.) 368.

In an action commenced against directors, where one dies after the suit commenced, his executor need not be joined; 158 Pa. 614.

TORTS.—The ancient maxim which we are discussing applies more peculiarly to cases of *tort*. It was a principle of the common law that, if an injury was done either to the person or property of another for which damages only could be recovered in satisfaction,—where the declaration imputes a *tort* done either to the person or property of another, and the plea must be *not guilty*,—the action died with the person to whom or by whom the wrong was done. See Wms. Exec. 668; 3 Bla. Com. 302; 1 Saund. 216, 217, n. (1); 3 Woodd. Lect. 73; Viner, Abr. Executors 123; Comyn, Dig. Administrator, B. 13.

But if the goods, etc., of the testator taken away continue in specie in the hands of the wrong-doer, it has long been decided that *replevin* and *detinue* will lie for the executor to recover back the specific goods, etc.; W. Jones 173, 174; 1 Saund. 217, note (1); 1 Hempst. 711; 10 Ark. 504; or, in case they are sold, an action for money had and received will lie for the executor to recover the value; 1 Saund. 217, n. (1). And actions *ex delicto*, where one has obtained the property of another and converted it, survive to the representatives of the injured party, as *replevin*, *trespass de bonis asport.* But where the wrong-doer acquired no gain, though the other party has suffered loss, the death of either party destroys the right of action; 3 Mass. 351; 6 How. 11; 1 Bay 58; 4 Mass. 480; 1 Root 216.

Successive innovations upon this rule of the common law have been made by various statutes with regard to actions which survive to executors and administrators.

The stat. 4 Ed. III. c. 7, gave a remedy to

executors for a trespass done to the personal estate of their testators, which was extended to executors of executors by the stat. 25 Ed. III. c. 5. But these statutes did not include wrongs done to the person or freehold of the testator or intestate; Wms. Exec. 670. By an equitable construction of these statutes, an executor or administrator shall now have the same actions for any injury done to the personal estate of the testator in his lifetime, *whereby it has become less beneficial to the executor or administrator, as the deceased himself might have had, whatever the form of action may be*; 1 Saund. 217, n. (1); 1 Carr. & K. 271; W. Jones 173, 174; 2 M. & S. 416; 5 Co. 27 a; Cro. Car. 297; 2 Brod. & B. 103; 1 Stra. 212; 2 Brev. 27.

And the laws of the different states, either by express enactment or by having adopted the English statutes, give a remedy to executors in cases of injuries done to the personal property of their testator in his lifetime. Trover for a conversion in the lifetime of the testator may be brought by his executor; T. U. P. Charlt. 261; 4 Ark. 173; 11 Ala. N. s. 859. But an executor cannot sue for expenses incurred by his testator in defending against a groundless suit; 1 Day 285; nor in *Alabama* (under the Act of 1826) for any injury done in the lifetime of deceased; 15 Ala. 109; nor in *Vermont* can he bring *trespass on the case*, except to recover damages for an injury to some specific property; 20 Vt. 244. And he cannot bring *case* against a sheriff for a false return in testator's action; *ibid.* But he may have *case* against the sheriff for not keeping property attached, and delivering it to the officer holding the execution in his testator's suit; 20 Vt. 244, n.; and *case* against the sheriff for the default of his deputy in not paying over to testator money collected in execution; 22 Vt. 108. An action in the nature of an action on the *case* for injuries resulting from breach of carrier's contract to transport a passenger safely, survives to the personal representative; 85 Ky. 547. In *Maine*, an executor may revive an action against the sheriff for misfeasance of his deputy, but not an action against the deputy for his misfeasance; 30 Me. 194. So, where the action is merely penal, it does not survive; Cam. & N. 72; as to recover penalties for taking illegal fees by an officer from the intestate in his lifetime; 7 S. & R. 183. But in such case the administrator may recover back the excess paid above the legal charge; *ibid.*

Under the common law an action to recover a penalty or forfeiture dies with the person; 38 Fed. Rep. 80. The action will not abate upon death of the relator, if it is brought by the State upon an official bond; 98 N. C. 500.

The stat. 3 & 4 W. IV. c. 42, § 2, gave a remedy to executors, etc., for injuries done in the lifetime of the testator or intestate to his real property, which case was not embraced in the stat. Ed. III. This statute has introduced a material alteration in the maxim *actio personalis moritur cum persona* as well in favor of executors and administrators of the party injured as against the personal representatives of the wrong-doer, but respects only injuries to personal and real property; Chit. Pl. Parties to Actions in form *ex delicto*. Similar statutory provisions have been made in most of the states. Thus, *trespass quare claviusum fregit* survives in *North Carolina*, 4 Dev. & B. 68; 3 Dev. 153; in *Maryland*, 1 Md. 102; in *Tennessee*, 3 Sneed 128; in *Missouri*, 114 Mo. 309; and in *Massachusetts*, 21 Pick. 250; even if action was begun after the death of the injured party; 22 Pick. 495; in *New Jersey*, 38 N. J. L. 296. *Proceedings to recover damages for injuries to land by overflowing* survive in *North Carolina*, 7 Ired. 20; and *Virginia*, 11 Gratt. 1. *Altiter* in *South Carolina*, 10 Rich. 92; and *Maryland*, 1 Harr. & M'H. 224. *Ejectment* in the U. S. circuit court does not abate by death of plaintiff; 22 Vt. 659. In *Illinois* the statute law allows an action to executors only for an injury to the personality, or personal wrongs, leaving injuries to realty as at common law; 18 Ill. 403.

Injuries to the person. In cases of injuries to the person, whether by assault, battery, false imprisonment, slander, negligence, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action at common law can be supported either by or against the executors or other personal representatives; 3 Bla. Com. 303; 2 M. & S. 408; 95 U. S. 756; 25 Conn. 265; 23 Ind. 138; 16 Mich. 180; 87 Ill. 333; 85 Ky. 547. Case for the seduction of a man's daughter; 9 Ga. 69; *case for libel*; 5 Cush. 544; and for malicious prosecution; 5 Cush. 543; are instances of this. But in one respect this rule has been materially modified in England by the stat. 9 & 10 Vict. c. 93, known as Lord Campbell's Act, and in this country by enactments of similar purport in many of the states. These provide for the case where a wrongful act, neglect, or default has caused the death of the injured person, and the act is of such a nature that the injured person, had he lived, would have had an action against the wrong-doer. In such cases the wrong-doer is rendered liable, in general, not to the executors or administrators of the deceased, but to his near relations, husband, wife, parent, or child. In the construction given to these acts, the courts have held that the measure of damages is in general the pecuniary value of the life of the person killed to the person bringing suit, and that vindictive or exemplary damages by reason of gross negligence on the part of the wrong-doer are not allowable; Sedg. Damages.

Pennsylvania, New Jersey, New York, Massachusetts, Connecticut, Louisiana, Delaware, Georgia, and some other states, have statutes founded on Lord Campbell's Act. In *Massachusetts*, under the statute, an action may be brought against a city or town for damages to the person of deceased occasioned by a defect in a highway; 7 Gray 544; but it is otherwise in *South Carolina*; 29 S. C. 161. In *Ohio* it is considered to be an action "for a nuisance" and abates at the death of the party injured; 46 Ohio 442. But where the death, caused by a railway collision, was instantaneous, no action can be maintained under the statute of *Massachusetts*; for the statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising the right; 9 Cush. 108. But the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the person injured; 9 Cush. 478. For the law in *New York*, see 16 Barb. 54; 15 N. Y. 432; in *Missouri*, 18 Mo. 163; in *Connecticut*, 24 Conn. 575; in *Maine*, 45 Me. 209; in *Pennsylvania*, 44 Pa. 175; in *Georgia*, 87 Ga. 294.

If the deceased was guilty of contributory negligence, then no action is maintainable; 7 Baxter 239.

In some of the states the statutes vest the right of action in the personal representatives, but the damages recovered accrue to the benefit of the widow and next of kin; 18 Ill. 349; 21 Wis. 305; 38 Vt. 294.

Damages may be recovered by the parents in an action for death of minor child; 83 Ill. 237; 75 Ill. 468; 24 Md. 271; 47 N. Y. 317; 38 Wis. 618; 54 Pa. 495; but there must have been a prospect of some pecuniary benefit had the child lived; 11 Q. B. D. 160; 71 Mo. 164; 8 H. & N. 211.

Actions against the executors or administrators of the wrong-doer. The common-law principle was that if an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person by whom the wrong was committed; 1 Saund. 216 a, note (1); 1 H. & M'H. 224. And where the cause of action is founded upon any *malfeasance* or *misfeasance*, is a *tort*, or arises *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, and many other cases of

the like kind, where the declaration imputes a tort done either to the person or the property of another, and the plea must be *not guilty*, the rule of the common law is *actio personalis moritur cum persona*; and if the person by whom the injury was committed die, no action of that kind can be brought against his executor or administrator. But now in England the stat. 3 & 4 W. IV. c. 42, § 2, authorizes an action of trespass, or trespass on the case, for an injury committed by deceased in respect to property real or personal of another. And similar provisions are in force in most of the states of this country. Thus, in *Alabama*, by statute, *trover* may be maintained against an executor for a conversion by his testator; 11 Ala. N. s. 859. So in *New Jersey*, 1 Harr. 54; *Georgia*, 17 Ga. 495; and *North Carolina*, 10 Ired. 169.

In *Virginia*, by statute, *detinue* already commenced against the wrong-doer survives against his executor, if the chattel actually came into the executor's possession; otherwise not; 6 Leigh 42, 344. So in *Kentucky*, 5 Dana 34. *Replevin* in *Missouri* does not abate on the death of defendant; 21 Mo. 115; nor does an action on a *replevin bond* in *Delaware*, 5 Harr. (Del.) 331. It has, indeed, been said that where the wrong-doer has secured no benefit to himself at the expense of the sufferer, the cause of action does not survive, but that where, by means of the offence, property is acquired which benefits the testator, then an action for the value of the property survives against the executor; 6 How. 11; 8 Mass. 321; 5 Pick. 285; 20 Johns. 43; 1 Root 216; 4 Halst. 173; 1 Bay 58; and that where the wrong-doer has acquired gain by his wrong, the injured party may waive the *tort* and bring an action *ex contractu* against the representatives to recover compensation; 5 Pick. 285; 4 Halst. 173.

But this rule, that the wrong-doer must have acquired a gain by his act in order that the cause of action may survive against his representatives, is not universal. Thus, though formerly in *New York* an action would not lie for a fraud of deceased which did not benefit the assets, yet it was otherwise for his fraudulent performance of a contract; 20 Johns. 43; and now the statute of that state gives an action against the executor for every injury done by the testator, whether by force or negligence, to the property of another; Hill & D. 116; as for fraudulent representations by the deceased in the sale of land; 19 N. Y. 464; or wasting, destroying, taking, or carrying away personal property; 2 Johns. 227. In *Massachusetts*, by statute, a sheriff's executors are liable for his official misconduct; 7 Mass. 317; 13 *id.* 454, but not the executors of a deputy sheriff; *ibid.* So in *Kentucky*; 9 B. Monr. 135. And in *Missouri*, for false return of execution; 10 Mo. 234. In *Missouri* an action against a constable for unnecessary assault in arresting the relator, abates with the death of the principal, and also as against his sureties; 48 Mo. App. 421. Under the statute of *Ohio*, *case* for injury to property survives; 4 McLean 599; under statute in *Missouri*, trespass; 15 Mo. 619; and a suit against an owner for the criminal act of his slave; 23 Mo. 401; in *North Carolina*, deceit in sale of chattels; 1 Car. Law Rep. 529; and the remedy by petition for damages caused by overflowing lands; 1 Ired. 24; in *Pennsylvania*, by statute, an action against an attorney for neglect; 24 Pa. 114; and such action has been maintained in England; 3 Stark. 154; 1 Dowl. & R. 80. In *California* an action for damages by reason of false representations as to value of land, resulting in an exchange, passes to the personal representatives; 54 Fed. Rep. 320.

But in *Texas* the rule that the right of action for torts unconnected with contract does not survive the death of the wrong-doer, has not been changed by statute; 12 Tex. 11. And in *California* trespass does not lie against the representatives of the wrong-doer; 3 Cal. 370; nor in *Alabama* does it survive against the representatives of defendant; 19 Ala. 181; and an action for malicious prosecution does not survive

defendant's death; 121 Mass. 550. *Detinue* does not survive in *Tennessee*, whether brought in the lifetime of the wrong-doer or not; 3 Yerg. 133; nor in *Missouri*, under the stat. of 1835; 17 Mo. 362. *Trespass for mesne profits* does not lie against personal representatives in *Pennsylvania*; 5 Watts 474; 3 Pa. 93; nor in *New Hampshire*; 20 Vt. 326; nor in *New York*; 2 Bradf. N. Y. 80; but the representatives may be sued on contract; *ibid.* But this action lies in *North Carolina*, 3 Hawks 390, and *Vermont*, by statute; 20 Vt. 326. In *Virginia* an action on the case for false representation, does not survive against the defendant's executor; 17 How. 212. *Trespass for crim. con.*, where defendant dies pending the suit, does not survive against his personal representatives; 9 Pa. 128. Where an action of trespass is brought by a widow for killing her husband, it abates with death of defendant; 14 Pa. Co. Ct. R. 398.

Where the intestate had falsely pretended that he was divorced from his wife, whereby another was induced to marry him, the latter cannot maintain an action against his personal representatives; 81 Pa. 533; 106 Mass. 341. *Case for nuisance* does not lie against executors of a wrong-doer; 1 Bibb 246; 73 Ill. 214; nor for fraud in the exchange of horses; 5 Ala. N. S. 369; nor, under the statute of *Virginia*, for fraudulently recommending a person as worthy of credit; 17 How. 212; nor for negligence of a constable, whereby he failed to make the money on an execution; 3 Ala. N. S. 366; nor for misfeasance of constable; 20 Me. 462; nor against the personal representatives of a sheriff for an escape, or for taking insufficient bail bond; 4 Harr. N. J. 42; nor against the administrators of the marshal for a false return of execution, or imperfect and insufficient entries thereon; 6 How. 11; nor does *debt* for an escape survive against the sheriff's executors; 1 Caines 124; *aliter* in *Georgia*, by statute; 1 Ga. 514. An action against the sheriff to recover penalties for his failure to return process does not survive against his executors; 13 Ired. 483; nor does an action lie against the representatives of a deceased postmaster for money feloniously taken out of letters by his clerk; 1 Johns. 396. See ABATEMENT.

ACTION IN PERSONAM. (Lat. an action against the person).
A personal action.

This is the term in use in the civil law to denote the actions which in the common law are called personal. In modern usage it is applied in English and American law to those suits in admiralty which are directed against the person of the defendant, as distinguished from those *in rem* which are directed against the specific thing from which (or rather the proceeds of the sale of which) the complainant expects and claims a right to derive satisfaction for the injury done to him; 2 Pars. Mar. Law, 663.

ACTION PIGNERATITIA. An action for the return of a thing pledged after the obligation for which it was given has been discharged. Hunter Rom. Law, 2d Ed., 439.

ACTION PRÆSCRIPTIS VERBIS. In Civil Law. A form of action which derived its force from continued usage or the *responsa prudentium*, and was founded on the unwritten law. 1 Spence, Eq. Jur. 212.

The distinction between this action and an *actio in factum* is said to be, that the latter was founded not on usage or the unwritten law, but by analogy to or on the equity of some subsisting law; 1 Spence, Eq. Jur. 212.

ACTION REALIS (Lat.). A real action. The proper term in the civil law was *Rei Vindicatio*; Inst. 4. 6. 3.

ACTION IN REM. An action against the thing. See ACTION IN PERSONAM.

ACTION REDHIBITORIA. In Civil Law. An action to compel a vendor to take back the thing sold and return the price paid. See REDHIBITORY ACTIONS.

ACTION RESCISSORIA. In Civil Law. An action for rescinding a title acquired by prescription in a case where the party bringing the action was entitled to exemption from the operation of the prescription.

ACTION PRO SOCIO. In Civil Law. An action by which either partner could compel his co-partners to perform the partnership contract. Story. Partn., Bennett ed. § 352; Pothier, Contr. de Société, n. 84.

ACTION EX STIPULATU. An action to enforce a stipulation. Abbott; Hunter Rom. Law.

ACTION STRICTI JURIS (Lat. an action of strict right). An action in which the judge followed the formula that was sent to him closely, administered such relief only as that warranted, and admitted such claims as were distinctly set forth by the pleadings of the parties. 1 Spence, Eq. Jur. 218.

ACTION DE TIGNO INJUNCTO. An action for the value of material, by the owner thereof, which material had been used by another in his building. The statute gave an action for double its value. Hunter Rom. Law, 2d Ed., 276.

ACTION UTILIS. An action for the benefit of those who had the beneficial use of property, but not the legal title; an equitable action. 1 Spence, Eq. Jur. 214.

It was subsequently extended to include many other instances where a party was equitably entitled to relief, although he did not come within the strict letter of the law and the formula appropriate thereto.

ACTION VENDITI. In Civil Law. Where a person selling seeks to secure the performance of a special obligation found in a contract of sale or to compel the buyer to pay the price through an action. Hunter, Roman Law 332.

This was a remedy of the seller, by which he could compel the buyer to observe his duties, whether those were inherent in the contract, or added by special agreement as part of the sale. Hunter Rom. Law, 2nd ed., 305.

ACTION EX VENDITO. An action upon sale; an action which a seller is entitled to maintain against a buyer, to recover the price of a thing sold and delivered.

ACTION VI BONORUM RAPTORUM. See RES ADIRATAE.

ACTION VULGARIS. In Civil Law. A legal action; a common action. Sometimes used for *actio directa*. 1 Mackeldey, Civ. L. 189.

ACTION (Lat. *agere*, to do; to lead; to conduct). A doing of something; something done.

In Practice. The formal demand of one's right from another person or party, made and insisted on in a court of justice. In a quite common sense, action includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person or party of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

In the Institutes of Justinian an action is defined as *jus persequendi in judicio quod sibi debetur* (the right of pursuing in a judicial tribunal what is due one's self); Inst. 4. 6. In the Digest, however, where the signification of the word is expressly treated of, it is said, *Actio generaliter sumitur; vel pro ipso jure quod quis habet persequendi in judicio quod sibi vel debetur; vel pro hac ipsa persecutione seu juris exercitio* (Action in general is taken either as that right which each one has of pursuing in a judicial tribunal his own or what is due him; or as the pursuit itself or exercise of the right); Dig. 50. 16. 16. Action was also said *continere formam agendi* (to include the form of proceeding); Dig. 1. 2. 10.

This definition of action has been adopted by Mr. Taylor (Civ. Law, p. 50). These forms were prescribed by the prætors originally, and were to be very strictly followed. The actions to which they applied were said to be *stricti juris*, and the slightest variation from the form prescribed was fatal. They were first reduced to a system by Appian Claudius, and were surreptitiously published by his clerk, Cneius Flavius. The publication was so pleasing to the people that Flavius was made a tribune of the people, a senator, and a curule edile (a somewhat more magnificent return than is apt to await the labors of the editor of a modern book of forms); Dig. 1. 2. 5.

These forms were very minute, and included the form for pronouncing the decision.

In modern law the signification of the right of pursuing, etc., has been generally dropped, though it is recognized by Bracton, 98 b; Coke, 2d Inst. 40; 3 B. & Com. 116; while the two latter senses of the exercise of the right and the means or method of

its exercise are still found.

The vital idea of an action is, a proceeding on the part of one person as actor against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or the law.

Subordinate to this is now connected in a quite common use, the idea of the answer of the defendant or person proceeded against; the adding evidence by each party to sustain his position; the adjudication of the court upon the right of the plaintiff; and the means taken to enforce the right or recompense the wrong done, in case the right is established and shown to have been injuriously affected.

Actions are to be distinguished from those proceedings, such as writ of error, *scire facias*, mandamus, and the like, where, under the form of proceedings, the court, and not the plaintiff, appears to be the actor; 6 Binn. 9. And the term is not regularly applied, it would seem, to proceedings in a court of equity; 8 S. C. 417; 71 Pa. 170.

In the Civil Law.

Civil Actions.—Those personal actions which are instituted to compel payments or do some other thing purely civil. Pothier, *Introd. Gen. aux Coutumes* 110.

Criminal Actions.—Those personal actions in which the plaintiff asks reparation for the commission of some tort or injury which he or those who belong to him have sustained.

Mixed Actions are those which partake of the nature of both real and personal actions; as, actions of partition, actions to recover property and damages. Just. Inst. 4, 6, 18–20; Domat, *Suppl. des Lois Civiles* liv. 4, tit. 1, n. 4.

Mixed Personal Actions are those which partake of both a civil and a criminal character.

Personal Actions are those in which one person (actor) sues another as defendant (reus) in respect of some obligation which he is under to the actor, either *ex contractu* or *ex delicto*, to perform some act or make some compensation.

Real Actions.—Those by which a person seeks to recover his property which is in the possession of another.

In the Common Law.

The action properly is said to terminate at judgment; Co. Litt. 289 a; Rolle, Abr. 291; 3 Bla. Com. 116; 3 Bouvier, Inst. n. 2639.

Civil Actions.—Those actions which have for their object the recovery of private or civil rights, or of compensation for their infringement.

Criminal Actions.—Those actions prosecuted in a court of justice, in the name of the government, against one or more individuals accused of a crime. See 1 Chitty, Crim. Law.

Local Actions.—Those civil actions which can be brought only in the county or other territorial jurisdiction in which the cause of action arose. See LOCAL ACTION.

Mixed Actions.—Those which partake of the nature of both real and personal actions. See MIXED ACTION.

Personal Actions.—Those civil actions which are brought for the recovery of personal property, for the enforcement of some contract, or to recover damages for the commission of an injury to the person or property. See PERSONAL ACTION.

Real Actions.—Those brought for the specific recovery of lands, tenements, or hereditaments. Steph. Pl. 8. See REAL ACTION.

Transitory Actions.—Those civil actions the cause of which might well have arisen in one place or county as well as another. See TRANSITORY ACTION.

In French Law. Stock in a company; shares in a corporation.

ACTION OF BOOK DEBT. A form of action resorted to in the states of Connecticut and Vermont for the recovery of claims, such as are usually evidenced by a book account. 1 Day 105; 4 *id.* 105; 2 Vt. 368. See 1 Conn. 75; 11 *id.* 205.

ACTION ON THE CASE. This was a remedy given by the common law, but it appears to have existed only in a limited form and to a certain extent until the statute of Westminster 2d. In its most comprehensive signification it includes *assumpsit* as well as an action in form *ex delicto*; at present when it is mentioned it is usually

understood to mean an action in form *ex delicto*.

It is founded on the common law or upon acts of Parliament, and lies generally to recover damages for torts not committed with force, actual or implied; or having been occasioned by force where the matter affected was not tangible, or the injury was not immediate but consequential; or where the interest in the property was only in reversion, in all of which cases trespass is not sustainable: 1 Chit. Pl. 183. See CASE; ASSUMPT; EX DELICTO.

ACTION FOR INJURY TO PERSON OR CHARACTER. Limitation—*Venue*. The words "action for injury to person" as generally used, include not only such injuries as result from trespass, but also such as result from a breach of contract obligation. But it will not apply to a physician for negligence or want of skill in the treatment of patients. 110 Ky. 660, 62 S. W. 489.

ACTION ON AN INSTRUMENT TRANSFERABLE BY DELIVERY. An action by an indorsee of a lost note against the payee is an "action on an instrument transferable by delivery" only, within § 7, Civil Code. 137 Ky. 682, 126 S. W. 356.

ACTION FOR MONEY. An "action for money" includes an action for the recovery of damages as well as of money due by contract. Section 732, sub-section 8, Civil Code.

ACTION REDHIBITORY. See REDHIBITORY ACTION.

ACTION RESCISSORY. See RESCISSORY ACTIONS.

ACTION OF A WRIT. A phrase used in the old books, where a defendant pleaded some matter tending to show that the plaintiff had no cause to have the writ brought, although it might be that he might have another writ or action for the same matter.

ACTIONABLE. For which an action will lie. 3 Bla. Com. 23.

Where words in themselves are actionable, malicious intent in publishing them is an inference of law; 2 Greenl. Ev. § 418. See LIBEL; SLANDER.

ACTIONABLE PER SE. Actionable in themselves.

Actionable Words. "Actionable words" are of two kinds: (1) those that are actionable in themselves, without proof of special damage or injury; and (2) those that are actionable only by reason of some special damage or injury sustained by the party slandered. 145 Ky. 461, 140 S. W. 661.

At Common Law, "actionable words *per se*" were such as imputed a felony; but many public offenses were felonies at the common law which are mere misdemeanors by more enlightened American statutory law. The general rule is, that any words which charge a person with an indictable offense, which is punishable by an infamous or corporal punishment, or which involves moral turpitude, are actionable in themselves. 78 Ky. 118.

Libel and Slander. Where the words spoken impute unfitness to perform the duties of the office or employment, or prejudice one in his profession or trade, they are "actionable *per se*" and it is not necessary to allege and prove special damages. 155 Ky. 3, 159 S. W. 610.

ACTIONARY. A commercial term used in Europe to denote a proprietor of shares or *actions* in a joint stock company.

ACTIONES NOMINATÆ (Lat. named actions).

In English Law. Those writs for which there were precedents in the English Chancery prior to the statute 13 Edw. I. (Westm. 2d) c. 34.

Prior to this statute, the clerks would issue no writs except in such actions. Steph. Pl. 8; 17 S. & R. 195. See CASE; ACTION.

ACTIONS (Fr.). See ACTION, In French

law.

ACTIONS. See MORAL ACTIONS.

ACTIONS ORDINARY. In Scotch Law. All actions which are not rescissory. Ersk. Inst. 4, 1, 18.

ACTON BURNELL. An ancient English statute, so called because enacted by a parliament held at the village of Acton Burnell. 11 Edw. 1.

It is otherwise known as *statutum mercatorum* or *de mercatoribus*, the statute of the merchants. It was a statute for the collection of debts, the earliest of its class, being enacted in 1288.

A further statute for the same object, and known as *De Mercatoribus*, was enacted 13 Edw. I. (c. 3). See STATUTE MERCHANT.

See CARTA MERCATORIA.

ACTOR (Lat. *agere*). In Civil Law. A patron, pleader, or advocate. Du Cange; Cowel; Spelman.

Actor ecclesiæ.—An advocate for a church; one who protects the temporal interests of a church. *Actor villicæ* was the steward or head-bailiff of a town or village. Cowel.

One who takes care of his lord's lands: Du Cange.

A guardian or tutor. One who transacts the business of his lord or principal; nearly synonymous with agent, which comes from the same word.

The word has a variety of closely-related meanings, very nearly corresponding with manager. Thus, *actor domini*, manager of his master's farm; *actor ecclesiæ*, manager of church property; *actores provinciarum*, tax-gatherers, treasurers, and managers of the public debt.

A plaintiff; contrasted with *reus*, the defendant. *Actores regis*, those who claimed money of the king. Du Cange, *Actor*; Spelman, Gloss.; Cowel.

ACTRIX (Lat.). A female actor; a female plaintiff. Calvinus, Lex.

ACTS. See PUBLIC ACTS.

ACTS OF COURT. Legal memoranda made in the admiralty courts in England, in the nature of pleas.

For example, the English court of admiralty disregards all tenders except those formally made by acts of court; Abbott, Shipp. 408; Dunlop, Adm. Pr. 104, 105; 4 C. Rob. Adm. 103; 1 Hagg. Adm. 157.

ACTS OF SEDERUNT. In Scotch Law. Ordinances for regulating the forms of proceeding, before the court of session, in the administration of justice, made by the judges, who have the power by virtue of a Scotch Act of Parliament passed in 1540. Erskine, Pract. book 1, tit. 1, § 14.

ACTUAL. It is something real, in opposition to constructive or speculative, something "existing in act." 31 Conn. 218.

ACTUAL CASH VALUE. In Insurance. The term means the sum of money the insured goods would have brought for cash, at the market price, at the time when, and place where, they were destroyed by fire. 4 Fed. Rep. 59. See INSURANCE.

The amount of cash goods will bring in the market. English.

ACTUAL COST. In the Revenue Act of 1799 means the actual price paid for the goods by the party in the case of a real *bona fide* purchase, and not merely the market value of the goods. 1 Am. & Eng. Ency. 2nd ed., 602; 1 Fed. Cas. 398.

ACTUAL DAMAGES. The damages awarded for a loss or injury actually sustained; in contradistinction from damages implied by law, and from those awarded by way of punishment. See DAMAGES.

ACTUAL DELIVERY. It is held commonly to apply to the ceding of the corporal possession by the seller or his servants, and the actual apprehension of corporal possession by the buyer or his servant, or by some person authorized by him to receive the goods as his representative for the purpose of custody or disposal, but not for mere conveyance. 1 Rawle 19.

Delivery is actual where the bailor makes

a manual transfer of the property to the bailee, as where shoes are left with a cobbler for repairs, or a package delivered to an expressman, etc. 4 Elliot, Contr. 241-2. Cf. CONSTRUCTIVE DELIVERY; DELIVERY BY OPERATION OF LAW.

The giving real possession of the things sold, to the vendee, or his servants or special agents who are identified with him in law, and represent him. 1 Am. & Eng. Ency. 2nd ed., 602; 1 Rawle (Pa.) 19.

ACTUAL POSSESSION. "Actual possession" exists in the immediate occupancy of the party. 98 Ky. 342, 32 S. W. 947.

ACTUAL RESIDENCE. One's "actual residence" must be his abiding place. 87 Ky. 246, 8 S. W. 440.

ACTUAL SETTLER. The word "actual" expresses a settlement completed, not simply contemplated or possible. The words "actual settlers" indicate no particular individuals. They describe a class or body of individuals without habitation or name. As Judge Wolverton, in his opinion in the District Court (186 Fed. Rep. 861, 910) said: "There could be no actual settler until an actual habitation was established upon some specific parcel of this land. Logically, no one is a *cestui que trust* (q. v.) under the theory until and unless he becomes such a settler." 238 U. S. 432, 434.

The term "actual settler" implies a settler upon a designated tract of land. 5 Dana (Ky.) 547.

One who cuts a few logs from vacant and unappropriated land, and made a small clearing thereon, was not an actual settler. 12 S. W. 758.

ACTUARIUS (Lat.). One who drew the acts or statutes.

One who wrote in brief the public acts.

An officer who had charge of the public baths; an officer who received the money for the soldiers, and distributed it among them; a notary.

An *actor*, which see. Du Cange.

ACTUARY. The manager of a joint stock company, particularly an insurance company. Penny Cyc.

A clerk, in some corporations vested with various powers.

In Ecclesiastical Law. A clerk who registers the acts and constitutions of the convocation.

ACTUM (Lat. *agere*). A deed; something done.

Datum relates to the time of the delivery of the instrument; *actum*, the time of making it; *factum*, the thing made. *Gestum*, denotes a thing done without writing; *actum*, a thing done in writing.

Du Cange. *Actus*.

ACTUS (Lat. *agere*, to do; *actus*, done).

In Civil Law. A thing done. See ACTUM.

In Roman Law. A servitude which carried the right of driving animals and vehicles across the lands of another.

It included also the *iter*, or right of passing across on foot or on horseback.

In English Law. An act of parliament. 8 Coke 40.

A foot and horse way. Co. Litt. 56 a.

AD (Lat.). At; by; for; near; on account of; to; until; upon.

AD ABUNDANTIOREM CAUTE LAM (Lat.). For greater caution.

AD ALIUD EXAMEN (Lat.). To another tribunal. Calvinus, Lex.

AD ALIUM DIEM (L. Lat.). At another day.

AD ASSISAM CAPIENDAM. To take an assize.

AD ASSISAS CAPIENDAS. To hold the assizes. Tayler.

AD AUDIENDAM CONSIDERATIONEM CURIAE. To hear the judgment of the court. Burrill.

AD AUDIENDUM ET DETERMINANDUM. To hear and determine. 4 Bla. Com. 278.

AD BARRAM VOCATUS. Called to the bar. Burrill.

AD CAMPI PARTEM. For a share of the field or land for champert. Cyc. L. Dict.; Fleta, 2, 36, 4.

AD COLLIGENDUM. See ADMINISTRATION.

AD COMMUNE NOCUMENTUM. To the common nuisance (or grievance) Taylor.

AD COMMUNEM LEGEM. At common law. An obsolete writ at common law, brought by a reversioner for the recovery after a life tenant's death, of land which had been wrongfully alienated by him. Abbott; M. & W.

AD COMPARENDUM. To appear.

AD COMPARENDUM, ET AD STANDUM JURI. To appear and to stand to the law, or abide the judgment of the court. Burrill.

AD CULPAM. See AD VITAM AUT CULPAM.

AD CUSTAGIA. At the costs. Toul-lier; Cowel; Whishaw.

AD CUSTUM. At the cost. 1 Sharsw. Bla. Com. 314.

AD DAMNUM (Lat. *damne*). To the damage.

In Pleading. The technical name of that part of the writ which contains a statement of the amount of the plaintiff's injury.

The plaintiff cannot recover greater damages than he has laid in the *ad damnum*; 2 Greenl. Ev. § 260.

AD DIEM. At the day; on the very day Anderson.

AD EVERSIONEM JURIS NOS-TRI. To the overthrow of our right. Taylor.

AD EXCAMBIUM (Lat.). For exchange; for compensation. Bracton, fol. 12 b, 37 b.

AD EXHEREDITATIONEM. To the disinherit, or disinheriting.

The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhereditationem*, etc.; 3 Bla. Com. 228; Fitzherbert, Nat. Brev. 55.

AD FACIENDUM ATTORNATUM To appoint an attorney. Taylor.

AD FACIENDUM, SUBJICIENDUM, ET RECIPIENDUM. To do, submit, and receive. Taylor.

AD FACTUM PRÆSTANDUM. In Scotch Law. The name given to a class of obligations of great strictness.

A debtor *ad fac. præst.* is denied the benefit of the act of grace, the privilege of sanctuary, and the *cessio bonorum*; Erskine, Inst. lib. 3, tit. 3, § 62; Kames, Eq. 216.

AD FIDEM. In allegiance. 2 Kent 56. Subjects born in allegiance are said to be born *ad fidem*.

AD FILUM AQUÆ. To the thread of the stream; to the middle of the stream. 2 Cush. 207; 4 Hill (N. Y.) 369; 2 N. H. 869; 2 Washb. R. P. 632; 3 Kent 428; 9 Cush. 552.

A former meaning seems to have been, to a stream of water. Cowel; Blount. *Ad medium filum aquæ* would be etymologically more exact; 2 Eden, Inj. 260, and is often used; but the common use of *ad filum aquæ* is undoubtedly to the thread of the stream; 8 Sumn. 170; 1 M'Cord 580; 3 Kent 431; 20 Wend. 149; 4 Pick. 273; 28 N. H. 195.

AD FILUM VIE (Lat.). To the middle of the way. 8 Metc. Mass. 260.

AD FIRMAM. To farm.

Derived from an old Saxon word denoting rent.

according to Blackstone, occurring in the phrase, *dedi concessi et ad firmam tradidi* (I have given, granted, and to farm let): 2 Bla. Com. 817. *Ad firmam nocte* was a fine or penalty equal in amount to the estimated cost of entertaining the king for one night. Cowel. *Ad feodi firmam*, to fee farm. Spelman, Gloss.; Cowel.

AD GAOLES DELIBERANDAS. To deliver the gaols. Burrill. See GAOL-DELIVERY; GENERAL GAOL-DELIVERY COURTS OF ASSIZE AND NISI PRIUS.

AD HOC. On this (subject). Anderson.

AD INQUIRENDUM (Lat. for inquiry).

In Practice. A judicial writ, commanding inquiry to be made of anything relating to a cause depending in court.

AD INSTANTIAM. At the instance.

AD INTERIM (Lat.). In the mean time.

An officer is sometimes appointed *ad interim*, when the principal officer is absent, or for some cause incapable of acting for the time.

AD JURA LEGIS. See AD JURA REGIS.

AD JURA REGIS, or AD JURA LEGIS. In old English law, a writ brought by the King's clerk against those who would eject him from a living, to the prejudice of the King's title. Jacob; Taylor.

AD LARGUM. At large: as, title at large; assize at large. See Dane, Abr. c. 144, art. 16, § 7.

AD LITEM (Lat. *lites*). For the suit.

Every court has the power to appoint a guardian *ad litem*; 2 Kent 229; 2 Bla. Com. 427.

AD LUCRANDUM VEL PERDENDUM. For gain or loss.

AD MAJORAM CAUTELAM (Lat.). For greater caution.

AD MANUM (L. Lat.). At hand; ready for use.

AD MINUS (L. Lat.). At the least. That he may at least be held to the extent of his interest.

AD NOCUMENTUM (Lat.). To the hurt or injury.

In an assize of nuisance, it must be alleged by the plaintiff that a particular thing has been done, *ad nocumentum liberi tenementi sui* (to the injury of his freehold); 3 Bla. Com. 221.

AD OMISSA VEL MALE APPRETIATA. Pertaining to omitted or badly estimated things.

Where the executor confirmed has either omitted out of the inventory any effects belonging to the deceased, or has estimated them below their just values, the only remedy left to any person interested is to apply to the commissary, that he himself may be confirmed executor to the deceased, *ad omissa vel male appretiata*. 3 Erskine, Institute IX, 36.

Where one applies for a confirmation *ad male appretiata*, it is competent to him to prove by witnesses that the goods confirmed in the principal testament are undervalued.

He who applies to be executor *ad omissa vel male appretiata* must call the principal executor as a party.

If there be ground to presume fraud, a testament *ad omissa vel male appretiata*, is not, like a principal testament, divided into *legitima*, *relict's* part, etc., but carries the whole subjects contained in it to him who is thus deemed executor, in so far as his interest in the executory extends, to the utter exclusion of the executor in the principal testament. *Id.*; Robertson, 16 Feb. 1703, M 3498.

AD OPUS. For the benefit or use. **AD OPUS ET USUM.** For the benefit and use. Burrill.

AD OSTIUM ECCLESIE (Lat.). At the church-door.

One of the five species of dower formerly

recognized at the common law. 1 Washb. R. P. 149; 2 Bla. Com. 132. See DOWER.

AD PIOS USUS. For pious purposes. Taylor.

AD PROSEQUENDUM. To prosecute. Taylor.

AD PUNCTUM TEMPORIS. At a moment.

AD QUÆRIMONIAM. On complaint of.

AD QUEM (Lat.). To which.

The correlative term to a *quo*, used in the computation of time, definition of a risk, etc., denoting the end of the period or journey.

The *terminus a quo* is the point of beginning or departure, the *terminus ad quem*, the end of the period or point of arrival.

AD QUOD DAMNUM (Lat.). What injury.

A writ issuing out of and returnable into chancery, directed to the sheriff, commanding him to inquire by a jury what damage it will be to the king, or any other, to grant a liberty, fair, market, highway, or the like.

The name is derived from the characteristic words denoting the nature of the writ, to inquire how great an injury it will be to the king to grant the favor asked; Whishaw, Fitzherbert, Nat. Brev. 221; Termes de la Ley.

AD RATIONEM PONERE. To cite a person to appear.

AD RECTUM. To right; to answer the law. As *HEBREANT EOS AD RECTUM*, they shall have them to answer the law, or to make satisfaction. Burrill; Bract. fol. 124b.

AD RESPONDENDUM. To make answer. It is used in certain writs to bring a person before the court in order to make answer, as in *habeas corpus ad respondendum* or *capias ad respondendum*.

AD SATISFACIENDUM. To satisfy. It is used in the writ *capias ad satisfaciendum* and is an order to the sheriff to take the person of the defendant to satisfy the claims of the plaintiff. See *CAPIAS AD SATISFACIENDUM*.

AD SECTAM. At the suit of.

It is commonly abbreviated. It is used where it is desirable to put the name of the defendant first, as in some cases where the defendant is filing his papers; thus, *Roe ads. Doe*, where Doe is plaintiff and Roe defendant. It is found in the indexes to cases decided in some of our older American books of reports, but has become pretty much disused.

AD TERMINUM QUI PRÆTERIT. A writ of entry which formerly lay for the lessor or his heirs, when a lease had been made of lands and tenements, for a term of life or years, and, after the term had expired, the lands were withheld from the lessor by the tenant, or other person possessing the same. Fitzherbert, Nat. Brev. 201.

The remedy now applied for holding over is by ejectment, or, under local regulations, by summary proceedings.

AD TUNC ET IBIDEM. In Pleading. The technical name of that part of an indictment containing the statement of the subject-matter "then and there being found." Bacon, Abr. *Indictment*, G. 4; 1 No. C. 93.

In an indictment; the allegation of time and place must be repeated in the averment of every distinct material fact; but after the day, year, and place have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words *ad tunc et ibidem*, and the effect of these words is equivalent to an actual repetition of the time and place. The *ad tunc et ibidem* must be added to every material fact in an indictment; Saund. 95. Thus, an indictment which alleged that J. S. at a certain time and place made an assault upon J. N., *et cum cum gladio felonice percussit*, was held bad, because it was not said, *ad tunc et ibidem percussit*; Dy. 88, 90. And where, in an indictment for murder, it was stated that J. S. at a certain time and place, having a sword in his right hand, *percussit* J. N., without saying *ad tunc et ibidem percussit*, it was held insufficient; for the time and place laid related to the having the sword, and consequently it was not said when or where the stroke was given; Cro. Eliz. 738; 2 Hale, Pl. Cr. 178. And where the indictment charged that A. B. at N., in the county aforesaid, made an assault upon C. D. of F. in the county aforesaid, and him *ad tunc et ibidem quodam gladio percussit*, this indictment was held to be bad, because two places being named

before, if it referred to both, it was impossible; if only to one, it must be to the last, and then it was insensible: 2 Hale, Pl. Cr. § 180.

AD ULTIMAM VIM TERMINORUM. To the most extended import of the terms. Burrill; 2 Eden 54.

AD VALOREM (Lat.). According to the valuation.

Duties may be specific or *ad valorem*. *Ad valorem* duties are always estimated at a certain per cent. on the valuation of the property; 3 U. S. Stat. L. 732; 24 Miss. 501.

AD VITAM AUT CULPAM. For life or until misbehavior.

Words descriptive of a tenure of office "for life or good behavior," equivalent to *quamdiu bene se gesserit*.

ADD. To join or unite, as one thing to another, or as several particulars, so as to increase the number, augment the quantity, enlarge the magnitude, or so as to form into one aggregate. 1 Am. & Eng. Ency. 2nd ed., 608; 119 Ind. 476.

ADDICERE (Lat.). In Civil Law. To condemn. Calvinus, Lex.

Addictio denotes a transfer of the goods of a deceased debtor to one who assumes his liabilities; Calvinus, Lex. Also used of an assignment of the person of the debtor to the successful party in a suit.

ADDITION (Lat. *additio*, an adding to). Whatever is added to a man's name by way of title or description, as additions of mystery, place, or degree. Cowel; Termes de la Ley; 10 Wentw. Pl. 371; Salk. 5; 2 Ld. Raym. 988; 1 Wils. 244.

Additions of estate are esquire, gentleman, and the like.

These titles can, however, be claimed by none, and may be assumed by any one. In *Nash v. Battersby* (2 Ld. Raym. 986; 6 Mod. 80), the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurred, and it was held ill; for, said the court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

Additions of mystery are such as scrivener, painter, printer, manufacturer, etc.

Additions of place are descriptions by the place of residence, as A. B. of Philadelphia, and the like. See Bacon, Abr. *Addition*; Doctr. Plac. 71; 2 Vinet, Abr. 77; 1 Lilly, Reg. 39; 1 Metc. Mass. 151.

The statute of additions extends only to the party indicted. An indictment, therefore, need not describe, by any addition, the person upon whom the offence therein set forth is alleged to have been committed; 2 Leach, Cr. Cas. 4th ed. 861; 10 Cush. 402. And if an addition is stated, it need not be proved; 2 Leach, Cr. Cas. 4th ed. 547; 2 Carr. & P. 230. But where a defendant was indicted for marrying E. C., "widow," his first wife being alive, it was held that the addition was material; 1 Mood. Cr. Cas. 303; 4 C. & P. 579. At common law there was no need of addition in any case; 2 Ld. Raym. 988; it was required only by stat. 1 Hen. V. c. 5, in cases where process of outlawry lies. In all other cases it is only a description of the person, and common reputation is sufficient; 2 Ld. Raym. 849. No addition is necessary in a *Homine Replegiando*; 2 Ld. Raym. 987; Salk. 5; 1 Wils. 244, 245; 6 Co. 67.

Addition in the law of mechanics' liens. An addition erected to a former building to constitute a building within the meaning of the mechanics' lien law must be a lateral addition. It must occupy ground without the limits of the building to which it constitutes an addition; so that the lien shall be upon the building formed by the addition, and not the land upon which it stands. An alteration in a former building by adding to its height, or its depth, or to the extent of its interior accommodations, is an alteration merely, and not an addition; 27 N. J. L. 132. See LIEN.

"Additional security" imports a security, which, united with or joined to the former one, is deemed to make it, as an aggregate, sufficient as a security from the beginning. Abbott; 53 Miss. 626.

Distinguished from Amendment. (*q. v.*) In "addition" the added parts remain

independent. By "amendment" there is change, and it may be, improvement. 249 U. S. 330.

The words "addition" and "amendment," as applied to statutes, may or may not have the same meaning, according to the purpose, *Id.*

In French Law. A supplementary process to obtain additional information; Guyot, *Répert.*

ADDITIONAL. This term embraces the idea of joining or uniting one thing to another, so as thereby to form one aggregate. We add by bringing things together; 53 Miss. 645.

ADDITIONALES. Additional terms or propositions to be added to a former agreement.

ADDITIONS. Insurance. An engine room and its contents located at a distance of 22 feet from a mill, connected therewith by a shaft for transmitting power and by a spout for carrying shavings is an "addition" within the terms of a policy covering plaintiff's building and its "additions." 119 S. W. 1191.

ADDLED PARLIAMENT. The English Parliament that sat from April 5, 1614, to June 7, 1614. It was dissolved by James I. before any legislation had been effected. Stand. Dict.

ADDRESS. In Equity Pleading. That part of a bill which contains the appropriate and technical description of the court where the plaintiff seeks his remedy. Cooper, Eq. Plead. 8; Barton, Suit in Eq. 26; Story, Eq. Plead. § 26; Van Heyth. Eq. Draft. 2.

In Legislation. A formal request addressed to the executive by one or both branches of the legislative body, requesting him to perform some act.

It is provided as a means for the removal of judges who are deemed unworthy longer to occupy their situations, although the causes of removal are not such as would warrant an impeachment. It is not provided for in the Constitution of the United States; and even in those states where the right exists it is exercised but seldom, and generally with great unwillingness.

ADELANTADO. In Spanish Law. The military and political governor of a frontier province. His powers were equivalent to those of the president of a Roman province. He commanded the army of the territory which he governed, and, assisted by persons learned in the law, took cognizance of the civil and criminal suits that arose in his province. This office has long since been abolished.

ADEMPTION (Lat. *ademptio* from *adimere*, to take away). The extinction or withholding of a legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke.

The question of ademption of a *general* legacy depends entirely upon the intention of the testator, as inferred from his acts under the rules established in law. Where the relations of the parties are such that the legacy is, in law, considered as a portion, an advancement during the life of the testator will be presumed an ademption, at least, to the extent of the amount advanced; 5 M. & C. 29; 3 Hare 509; 10 Ala. N. S. 72; 12 Leigh 1; and see 3 C. & F. 154; 18 Ves. 151, 153; but not where the advancement and portion are not *ejusdem generis*; 1 Bro. Ch. 555; 1 Roper, Leg. 875; or where the advancement is contingent and the portion certain; 2 Atk. 493; 3 M. & C. 874; or where the advancement is expressed to be in lieu of, or compensation for, an interest; 1 Ves. 257; or where the bequest is of uncertain amount; 15 Ves. 513; 4 Bro. Ch. 494; but see 2 Hou. L. Cas. 181; or where the legacy is absolute and the advancement for life merely; 2 Ves. sen. 38; 7 Ves. 516; or where the devise is of real estate; 3 Y. & C. 397. See 8 Del. Ch. 239.

Where deposits are made in a bank by a father for the use of his daughter and in her name, and the passbook is delivered to

her, it will not work an ademption of a pecuniary legacy, although deposits are made partly after the execution of the will; 113 N. Y. 560.

But where the testator was not a parent of the legatee, nor standing *in loco parentis*, the legacy is not to be held a portion, and the rule as to ademption does not apply; 2 Hare 424; 2 Story, Eq. Jur. § 1117; except where there is a bequest for a particular purpose and money is advanced by the testator for the same purpose; 2 Bro. Ch. 166; 1 Ball & B. 303; see 6 Sim. 528; 3 M. & C. 359; 2 P. Will. 140; 1 Pars. Eq. Cas. 139; 15 Pick. 133; 1 Rop. Leg. c. 6; a legacy of a sum of money to be received in lieu of an interest in a homestead, is satisfied by money amounting to the legacy during testator's lifetime; 118 Ind. 147.

The ademption of a *specific* legacy is effected by the extinction of the thing or fund, without regard to the testator's intention; 3 Bro. Ch. 432; 2 Cox, Ch. 182; 3 Watts 338; 1 Rop. Leg. 329; and see 6 Pick. 48; 16 *id.* 133; 2 Halst. 414; 8 Pa. Co. Ct. 454; but not where the extinction of the specific thing is by act of law and a new thing takes its place; Forrest 226; Ambl. 59; or where a breach of trust has been committed or any trick or device practised with a view to defeat the specific legacy; 2 Vern. Rathby ed. 748, n.; 8 Sim. 171; or where the fund remains the same in substance, with some unimportant alterations; 1 Cox, Ch. 427; 3 Bro. Ch. 416; 3 M. & C. 296; as a lease of ground rent for 99 years after a devise of it; 25 Atl. Rep. (Md.) 511; or where the testator lends the fund on condition of its being replaced; 2 Bro. Ch. 113.

Republication of a will may prevent the effect of what would otherwise cause an ademption; 1 Rop. Leg. 851.

A specific legacy which has been adeemed will not be revived by a republication of the will after the ademption; 151 Mass. 76.

ADEQUATE CAUSE. In Criminal Law. Such a cause as would commonly produce a degree of anger, rage, resentment, or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, etc., are not adequate causes; 2 Tex. App. 100.

In Criminal Law. Such cause as prevents an ordinary mind from reflecting before committing an act. English.

In Definition of Manslaughter in the Texas Penal Code. Such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. 1 Am. & Eng. Ency. 2nd ed. 632; 2 Tex. App. 100. Held that it depends upon the particular circumstances of each case. *Id.*; 7 Tex. App. 396. Assault and batter is an adequate cause. *Id.*; 9 Tex. App. 319.

ADEQUATE PROVOCATION. Provocation is adequate when it is such as is reasonably calculated to excite defendant's passion beyond his power of control, and where there is no evidence of premeditation or other proof of malice, then "adequate provocation" will negative malice and entitle the accused to an instruction on voluntary manslaughter. 163 Ky. 249, 173 S. W. 761.

ADEU, or ADIEU. Without day. A common term in the English Year Books implying final dismissal from court. Literally, "to God." Burrill. See ALER A DIEU; ALER SANS JOUR.

ADFINES, AFFINES (Lat.). Relations, or connections by marriage; so-called, because the families (*cognationes*), of the husband and wife are connected by the marriage.

ADHERING (Lat. *adherere*, to cling to). Cleaving to, or joining; as, adhering to the enemies of the United States.

The constitution of the United States, art. 3, § 2.

defines treason against the United States to consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

A citizen's cruising in an enemy's ships with a design to capture or destroy American ships, would be an adhering to the enemies of the United States; 4 State Trial-328; Salk. 634; 2 Gilbert, Ev. Loft ed. 798.

If war be actually levied, that is, a body of men be actually assembled for the purpose of effecting by force a treasonable enterprise, all those who perform any part, however minute, or however remote from the scene of action, and who are leagued in the general conspiracy, are to be considered as traitors; 4 Cra. 126.

ADHESION. Adhesion is defined as such entrance of a third State into an existing treaty as takes place either with regard only to a part of the stipulations or with regard only to certain principles laid down in the treaty. Whereas through accession a third State becomes a party to the treaty with all the rights and duties arising from it, through adhesion a third State becomes a party only to such parts or principles of the treaty as it has adhered to. But it must be specially observed that the distinction between accession and adhesion is one made in theory, to which practice frequently does not correspond. Often treaties speak of accession of third States where in fact adhesion only is meant, and *vice versa*. Thus, article 6 of the Hague Convention with respect to the laws and customs of war on land stipulates the possibility of future *adhesion* of non-signatory Powers, although accession is meant. See **ACCESSION**.

ADIT. A horizontal entry to a mine. Anderson.

ADITUS (Lat. *adire*). An approach; a way; a public way. Co. Litt. 56 a.

ADJACENT. Next to, or near.

Two of three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining; 1 Cooke 128; 7 La. Ann. 76. See **ADJOINING VICINITY**.

ADJECTIVE LAW. One of the two kinds of rules constituting law, namely, those rules which provide remedies for infringement of rights and failure to perform duties. Those rules of procedure by which substantive law (*q. v.*) is given concrete application to persons and events. They emanate from both legislatures and courts. There is no clear line of division between substantive and adjective law. Hicks, Mater. & Meth. Leg. Res. 35.

In Statute Law: All statutes regulating administrative and court procedure. *Id.* 52.

In Case Law: All decisions interpreting administrative regulations, codes of procedure and court rules. *Id.* 77.

ADJOINING. The word in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent. 52 N. Y. 397. The words "along" and "adjoining" are used as synonymous terms and as used in a statute imply contiguity, contact; 67 Mo. 58.

In popular use seems to have no fixed meaning. Frequently expresses nearness. *Id.*; 3 Park. Cr. R. 72. What is "adjacent" may be separated by the intervention of a third object. What is "adjoining" must touch in some part. What is "contiguous," strictly speaking, should touch along one side. *Id.*; *ibid.* Towns contiguous at their corners are adjoining. *Id.*; 31 N. Y. 293. The whole yard of a house, though divided by a street, from which it is fenced off, is adjoining or appurtenant to the house. *Id.*; 101 Mass. 25. See **APPURTAINING**.

ADJOURN (Fr. *adjourner*). To put off; to dismiss till an appointed day, or without any such appointment. See **ADJOURNMENT**.

ADJOURNATUR (Lat. from *adjournare*, to adjourn). It is adjourned. A word with which the old reports very frequently conclude a case. Burrill; 1 Ld. Raym. 6. 2.

ADJOURNED TERM. A continuation of a previous or regular term. 4 Ohio St. 473; 22 Ala. N. S. 27. The Massachusetts General Statutes, c. 112, § 26, provide for holding an adjourned law term from time to time.

ADJOURNMENT. The dismissal by some court, legislative assembly, or properly authorized officer, of the business before them, either finally (which, as popularly used, is called an adjournment *sine die*, without day), or to meet again at another time appointed (which is called a temporary adjournment).

The constitution of the United States, art. 1, s. 5, 4, directs that "neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting." See Comyns, Dig.; Viner. Abr.; Dict. de Jur.

In Civil Law. A calling into court; a summoning at an appointed time. Du Cange. See **RISE**.

ADJOURNMENT DAY. In English Practice. A day appointed by the judges at the regular sittings for the trial of causes at *nisi prius*.

ADJOURNMENT DAY IN ERROR. In English Practice. A day appointed some days before the end of the term at which matters left undone on the affirmand day are finished. 2 Tidd, Pract. 1224.

ADJOURNMENT FROM DAY TO DAY. Saturday to Monday. If the law authorized a court, or the proceedings of any tribunal or officer, to be adjourned from day to day, an adjournment from Saturday till Monday shall be legal. Section 455 Kentucky Statutes.

ADJOURNMENT IN EYRE. The appointment of a day when the justices in eyre mean to sit again. Cowel; Spelman, Gloss.; 1 Bla. Com. 186.

ADJUDGE. To decide judicially; to adjudicate; sometimes, to declare or deem, but not implying any judgment of a judicial tribunal. Anderson. As in a statute declaring that "all lotteries are hereby adjudged to be common nuisances." *Id.*; 11 N. J. L. 218.

ADJUDICATAIRE. In Canadian Law. A purchaser at a sheriff's sale. See 1 Low. Can. 241; 10 *id.* 325.

ADJUDICATIO. See **FORMULE**.

ADJUDICATION. In Practice. A judgment; giving or pronouncing judgment in a case.

In Scotch Law. A process for transferring the estate of a debtor to his creditor. Erskine, Inst. lib. 2, tit. 12, §§ 39-55; Bell., Dict. Shaw ed. 944.

It may be raised not only on a decree of court, but also where the debt is for a liquidated sum. The execution of a summons and notice to the opposite party prevents any transfer of the estate. Every day is entitled to share with the first creditor, and, after ten years' possession under his adjudication, the title of the creditor is complete; Paterson, Comp. 1187, n. The matter is regulated by statute 1672, c. 19, Feb. 26. See Erskine, lib. 2, c. 12, §§ 15, 16.

ADJUNCTION (Lat. *adjungere*, to join to).

In Civil Law. The attachment or union permanently of a thing belonging to one person to that belonging to another. This union may be caused by *inclusion*, as if one man's diamond be set in another's ring; by *soldering*, as if one's guard be soldered on another's sword; by *sewing*, as by employing the silk of one to make the coat of another; by *construction*, as by building on another's land; by *writing*, as when one writes on another's parchment; or by *painting*, as when one paints a picture on another's canvas.

In these cases, as a general rule, the accessory follows the principal: hence those things which are attached to the things

of another become the property of the latter. The only exception which the civilians made was in the case of a picture, which, although an accession, drew to itself the canvas, on account of the importance which was attached to it; Inst. 2. 1. 84; Dig. 41. 1. 9. 2. The common law implicitly adopts the civil law doctrines. See 2 Bla. Com. 404.

ADJUNCTS. Additional judges sometimes appointed in the Court of Delegates of England, *q. v.* See Shelford, Lun. 310; 1 Hagg. Eccl. Rep. 384; 2 Hagg. Eccl. Rep. 84; 3 Hagg. Eccl. Rep. 471.

ADJURNAMENTUM (L. Lat.). In old European law. A summoning to court at a certain day; the assignment of a certain day to appear in court.

ADJUST. Of a liquidated account or claim, to pay; of an unliquidated account or claim, to determine what is due. Often used in conjunction with the word settle (*q. v.*). 61 Conn. 568.

ADJUSTMENT. In Insurance. The determining of the amount of a loss. 2 Phillips, Ins. §§ 1814, 1815.

There is no specific form essentially requisite to an adjustment. To render it binding, it must be intended, and understood by the parties to a policy, to be absolute and final. It may be made by indorsement on the policy, or by payment of the loss, or the acceptance of an abandonment; 2 Phillips, Ins. § 1815; 4 Burr. 1966; 1 Campb. 134, 274; 4 Taunt. 725; 13 La. 13; 4 Mete. 270; 22 Pick. 191. It must be made with full knowledge of all the facts material to the right of the insured to recover, and the adjustment can be impeached only for fraud or mistake of such material fact; 14 R. I. 247. If there is fraud by either party to an adjustment, it does not bind the other; 2 Phill. Ins. § 1316; 2 Johns. Cas. 235; 3 Campb. 319. If one party is led into a material mistake of fact by fault of the other, the adjustment will not bind him; 2 Phill. Ins. § 1817; 2 East 469; 2 Johns. 157; 8 *id.* 334; 4 *id.* 331; 9 *id.* 405; 2 Johns. Cas. 233.

It is a sufficient adjustment if the party employed by an insurance company goes upon the premises, makes calculations, and states the loss; 18 Ill. App. 570.

The amount of a loss is governed by that of the insurable interest, so far as it is covered by the insurance. See **INSURABLE INTEREST**; **ABANDONMENT**; **MAY, Insurance**.

ADMEASUREMENT OF DOWER. In Practice. A remedy which lay for the heir on reaching his majority, to rectify an assignment of dower made during his minority, by which the doweress had received more than she was legally entitled to. 2 Bla. Com. 136; Gilbert, Uses 379.

The remedy is still subsisting, though of rare occurrence. See 1 Washb. R. P. 225, 226; 1 Pick. 314; 2 Ind. 336.

In some of the states, the special proceeding which is given by statute to enable the widow to compel an assignment of dower, is termed an admeasurement of dower.

See, generally, **DOWER**; Fitzherb. Nat. Brev. 148; Bacon, Abr. *Dower*, c; Co. Litt. 39 a; 1 Washb. R. P. 225, 226.

ADMEASUREMENT OF PASTURE. In Practice. A remedy which lay in certain cases for surcharge of common of pasture.

It lay where a common of pasture appurtenant or in gross was certain as to number; or where one had common appendant or appurtenant, the quantity of which had never been ascertained. The sheriff proceeded, with the assistance of a jury of twelve men, to admeasure and apportion the common as well of those who had surcharged as those who had not, and, when the writ was fully executed, returned it to the superior court. Termes de la Ley.

The remedy is now abolished in England; 3 Sharsw. Bla. Com. 239, n.; and in the United States; 3 Kent 419.

ADMILTENDO CLERICO. An old English writ granted to one who has recov-

ered his right to a presentation, and addressed to the bishop or his metropolitan, requiring him to admit and institute the clerk or presentee of the plaintiff. *Termes de la Ley*; Wharton.

ADMINICLE. That which is brought in as aid or support to something else: something corroborative. In *Scotch Law*. Any writing or deed introduced for the purpose of proof of the tenor of a lost deed to which it refers. *Erskine, Inst. lib. 4, tit. 1, § 55*; *Stair, Inst. lib. 4, tit. 32, §§ 6, 7*.

In *English Law*. Aid; support. *Stat. 1 Edw. IV. c. 1*.

In *Civil Law*. Imperfect proof. *Merlin, Répert.*

ADMINICULAR. See **ADMINICLE**.

ADMINICULAR EVIDENCE. In *Ecclesiastical Law*. Evidence brought in to explain and complete other evidence. *2 Lee, Eccl. 595*.

ADMINISTERING POISON. An offence of an aggravated character, punishable under the various statutes defining the offence.

The *stat. 9 G. IV. c. 31, s. 11*, enacts "that if any person unlawfully and maliciously shall administer, or attempt to administer, to any person, or shall cause to be taken by any person, any poison or other destructive thing, or any such offender, etc. In a case which arose under this statute, it was decided that, to constitute the act of administering the poison, it was not absolutely necessary that there should have been a delivery to the party poisoned, but that if he took it from a place where it had been put for her by the defendant, and any part of it went into her stomach, it was administering; *4 Carr. & P. 369*; *1 Mood. Cr. Cas. 114*; *86 Ga. 267*; *86 Va. 365*; *23 Ohio St. 146*; *34 N. Y. 223*.

The *statute 7 Will. IV. & 1 Vict. c. 85* enacts that "Whoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison, or other noxious thing," shall be guilty of felony. Upon an indictment under this section, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute; *1 Dears. & B. 127, 164*. It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended, but it must also appear that the drug administered was either a "poison" or a "noxious thing."

ADMINISTRATION (Lat. *administrare*, to assist in).

Of Estates. The management of the estate of an intestate, or of a testator who has no executor. *2 Bla. Com. 494*; *1 Williams, Ex. 401*. The term is applied broadly to denote the management of an estate by an executor, and also the management of estates of minors, lunatics, etc., in those cases where trustees have been appointed by authority of law to take charge of such estates in place of the legal owners.

At common law, the real estate of an intestate goes to his heirs; the personal, to his administrator. The fundamental rule is that all just debts shall be paid before any further disposition of the property; *Coke 2d Inst. 201*. Originally, the king had the sole power of disposing of an intestate's goods and chattels. This power he early transferred to the bishops or ordinaries; and in England it is still exercised by their legal successors, the ecclesiastical courts, who appoint administrators and superintend the administration of estates; *4 Burns, Eccl. Law, 291*; *2 Conbl. Eq. 323*; *1 Williams, Ex. 402*.

No administration of an estate is necessary where the heirs are all of age and agree to a settlement, and there are no creditors; *50 Mo. App. 85*.

Ad colligendum. That which is granted for collecting and preserving goods about to perish (*bona peritura*). The only power over these goods is under the form prescribed by statute.

Ancillary. That which is subordinate to the principal administration, for collecting the assets of foreigners. It is taken out in the country where the assets are locally situate; *1 Williams, Ex. [362]* *6th Am. ed. note (u)*—cases cited; *88 Pa. 131*; *11 Mass. 250, 263*; *44 Ill. 202*; *32 Barb. 190*; *57 Howard Pr. 208*.

It will not be granted in Minnesota on the petition of a now resident creditor, there being no domestic ones, in order to collect shares of a corporation; *45 Minn. 242*. An administrator in one state can sue as such in another unless ancillary letters are taken out, but this may be done after the bill is

filed, by amendment; *42 Fed. Rep. 618*.

One who is both ancillary and domiciliary administratrix of the same estate, cannot be called on in one jurisdiction to account for assets received in the other; *19 S. E. Rep. (S. C.) 616*.

Caterorum. That which is granted as to the residue of an estate, which cannot be administered under the limited power already granted; *1 Wms. Ex. 7th Am. ed. *449*; *3 Hagg. 62*; *4 Hagg. Eccl. 382, 386*; *4 M. & G. 398*; *1 Curt. Eccl. 286*.

It differs from administration *de bonis non* in this, that in *caterorum* the full power granted is exercised and exhausted, while in the other the power is, for some cause, not fully exercised.

Cum testamento annexo. That which is granted where no executor is named in the will, or where the one named dies, or is incompetent or unwilling to act. Such an administrator must follow the statute rules of distribution, except when otherwise directed by the will; *Willard, Ex. 2 Bradf. 22*; *4 Mass. 634*; *6 How. 59, 60*. The residuary legatee is appointed such administrator rather than the next of kin; *2 Phil. 54, 310*; *1 Ventr. 217*; *4 Leigh 153*; *3 Add. 353*; *1 Williams, Ex. 6th Am. ed. (462) notes (h) (i)*.

De bonis non. That which is granted when the first administrator dies before having fully administered. The person so appointed has in general the powers of a common administrator; *Bacon, Abr. Executors, B. 1*; *Rolle, Abr. 907*; *23 Miss. 47*; *27 Ala. 273*; *9 Ind. 343*; *4 Sneed 411*; *31 Miss. 519*; *29 Vt. 170*; *11 Md. 412*; *6 Metc. 197, 198*.

A residuary legatee has sufficient interest in an estate to request the appointment of an administrator *d. b. n.* to collect debts, whether it will make the estate solvent or not; *63 Conn. 218*.

De bonis non cum testamento annexo. That which is granted when an executor dies leaving a part of the estate unadministered. *Comyns, Dig. Adm. B. 1*; *3 Cush. 23*; *4 Watts 34, 33, 39*. It cannot be based on a will made in a foreign country if invalid there because of defective execution; *13 Pa. Co. Ct. 81*.

Durante absentia. That which subsists during the absence of the executor and until he has proved the will. In England, by statute, such an administration is raised during the absence of the executor, and is not determined by the executor's dying abroad; *4 Hagg. Eccl. 360*; *8 Bos. & P. 26*; see *5 Rawle 264*.

Durante minori etate. That which is granted when the executor is a minor. It continues until the minor attains his lawful age to act, which at common law is seventeen years; *Godolph. 102*; *5 Coke 29*. When an infant is sole executor, the statute *38 Geo. III. c. 87, s. 6* provides that probate shall not be granted to him until his full age of twenty-one years, and that *adm. cum test. annexo* shall be granted in the mean time to his guardian or other suitable person. A similar statute provision exists in most of the United States. This administrator may collect assets, pay debts, sell *bona peritura*, and perform such other acts as require immediate attention. He may sue and be sued; *Bacon, Abr. Executor, B. 1*; *Cro. Eliz. 718*; *2 Bla. Com. 503*; *5 Coke 29*; *35 N. H. 484, 498*.

Where there are no creditors or heirs of age, the tutor of minor heirs has a right to take possession of succession property and administer their interests in it; *48 La. Ann. 247*.

Foreign administration. That which is exercised by virtue of authority properly conferred by a foreign power.

The general rule in England and the United States is that letters granted abroad give no authority to sue or be sued in another jurisdiction, though they may be ground for new probate authority; *5 Ves. 44*; *9 Cranch 151*; *12 Wheat. 169*; *2 Root 463*; *20 Mart. La. 238*; *1 Dall. 456*; *1 Binn. 63*; *27 Ala. 273*; *9 Tex. 18*; *21 Mo. 434*; *29 Miss. 127*; *4 Rand. 158*; *10 Yerg. 283*; *5 Me. 261*; *85 N. H. 484*; *4 McLean C. C. 577*; *15 Pet. 1*; *13 How. 458*; *42 Fed. Rep. 618*; *9 N. Y. S. 433*. Hence, when persons

are domiciled and die in one country as A, and have personal property in another as B, the authority must be had in B, but exercised according to the laws of A; *Story, Conf. Laws 23, 447*; *15 N. H. 187*; *15 Mo. 118*; *5 Md. 467*; *4 Bradf. 151, 249*; *27 Ct. Cls. 529, 539*; and see *DOMICIL*.

There is no legal privity between administrators in different states. The principal administrator is to act in the intestate's domicil, and the ancillary is to collect claims and pay debts in the foreign jurisdiction and pay over the surplus to his principal; *2 Metc. Mass. 114*; *3 Hagg. Eccl. 199*; *6 Humph. 116*; *21 Conn. 577*; *19 Pa. 476*; *3 Day 74*; *1 Blatchf. & H. 309*; *23 Miss. 199*; *2 Curt. Eccl. 241*; *1 Rich. 116*.

An administrator appointed in Michigan cannot sue a resident of New York in the U. S. Circuit Court in that state when he had not taken out letters of administration in New York; *139 U. S. 156*.

But some courts hold that the probate of a will in a foreign state, if duly authenticated, dispenses with the necessity of taking out new letters in their state; *5 Ired. 421*; *2 B. Monr. 12*; *18 id. 592*; *4 Call 89*; *15 Pet. 1*; *7 Gill 95*; *12 Vt. 589*; *147 U. S. 557*. So it has been held that possession of property may be taken in a foreign state, but a suit cannot be brought without taking out letters in that state; *2 Ala. 429*; *18 Miss. 607*; *2 Sandf. Ch. 173*. In Arizona suit may be brought upon a foreign judgment without taking out new letters of administration; *33 Pac. Rep. (Ariz.) 555*. See **CONFLICT OF LAWS**.

Pendente lite. That which is granted pending the controversy respecting an alleged will or the right of appointment. An officer of the court is appointed to take care of the estate only till the suit terminates; *2 P. Will. 589*; *2 Atk. 286*; *2 Lee 253*; *1 Hagg. Eccl. 313*; *26 N. H. 533*; *9 Tex. 13*; *16 Ga. 13*; *18 N. J. L. 15*. He may maintain suits, but cannot distribute the assets; *1 Ves. sen. 325*; *2 Ves. & B. 97*; *1 Ball & B. 192*; *7 Md. 282*; *31 Pa. 465*; *51 Mo. 193*. The executor named in the will is not the proper person to appoint when he is the largest beneficiary under the will, and he is charged with influencing testator; *9 N. Y. S. 743*.

Public. That which the public administrator performs. This happens in many of the states by statute in those cases where persons die intestate, without leaving any who are entitled to apply for letters of administration; *3 Bradf. 151*; *4 id. 252*.

The authority of a public administrator to take charge of an estate cannot be collaterally questioned; *109 Mo. 90*; *67 Miss. 484*.

Special. That which is limited either in time or in power. Such administration does not come under the statutes of *31 Edw. III. c. 11*, and *21 Hen. VIII. c. 5*, on which the modern English and American laws are founded. A judgment against a special administrator binds the estate; *1 Sneed 430*; although there is no property but merely a right of action, and if there is delay in granting the administration, a special administrator might be appointed where immediate settlement could be made; *91 Mich. 450*.

Jurisdiction over administrations is in England lodged in the ecclesiastical courts, and these courts delegate the power of administering by letters of administration. In the United States, administration is a subject charged upon courts of civil jurisdiction. A perplexing multiplicity of statutes defines the powers of such courts in the various states. The public officer authorized to delegate the trust is called surrogate, judge of probate, register of wills, etc.; *Williams, Ex. 237*, notes; *8 Cranch 536*; *12 Gratt. 85*; *1 Watts & S. 396*; *11 Ohio 257*; *22 Ga. 431*; *29 Miss. 127*; *2 Gray 228*; *2 Jones N. C. 387*. In some states, these courts are of special jurisdiction, while in others the power is vested in county courts; *2 Kent 410*; *9 Dana 91*; *4 Johns. Ch. 552*; *4 Md. 1*; *11 S. & R. 433*; *7 Paige, Ch. 112*; *1 Green N. J. 480*; *1 Hill, N. Y. 130*; *5 Miss. 638*; *12 id. 707*; *30 id. 472*.

Death of the intestate must have taken place, or the court will have no jurisdiction. A decree of the court is prima facie evidence of his death, and puts the burden of disproof upon the party pleading in abatement; 3 Term 180; 26 Barb. 883; 18 Ohio 268; 150 U. S. 84.

The formalities and requisites in regard to valid appointments and rules, as to notice, defective proceedings, etc., are widely various in the different states. Some of the later cases on the subject are these: 26 Mo. 332; 28 Vt. 819; 28 Ala. n. s. 164, 218; 29 id. 510; 1 Bradf. 182; 2 id. 200; 16 N. Y. 180; 4 Ind. 355; 10 id. 60; 18 Ill. 59; 31 Miss. 430; 12 La. Ann. 44; 88 Cal. 478; 43 La. Ann. 458; 92 Mich. 423. If letters appear to have been unduly granted, or to an unfaithful person, they will be revoked; 9 Gill 463; 12 Tex. 100; 18 Barb. 24; 14 Ohio 268; 4 Sneed 263; 6 Metc. 370.

The personal property of a decedent is appropriated to the payment of his debts, so far as required, and, until exhausted, must be first resorted to by creditors. And, by certain statutes, courts may grant an administrator power to sell, lease, or mortgage land, when the personal estate of the deceased is not sufficient to pay his debts; 1 Bradf. 10, 182, 234; 2 id. 50, 122, 157; 29 Ala. n. s. 210, 542; 4 Mich. 308; 4 Ind. 408; 18 Ill. 519. The court may direct lands to be sold in order to pay taxes levied against decedent's property; 25 S. W. Rep. (Ky.) 594. The purchasers at such a sale get as full a title as if they had been distributees; but no warranty can be implied by the silence of the administrator; 2 Stockt. 206; 20 Ga. 588; 13 Tex. 322; 30 Miss. 147, 502; 31 id. 348, 430; 82 Tex. 58. And a fraudulent sale will be annulled by the court; 16 N. Y. 174; 2 Bradf. 200. See ASSETS.

Insolvent estates of intestate decedents are administered under different systems prescribed by the statutes of the various states: 4 R. I. 41; 34 N. H. 124, 381; 35 id. 484; 1 Sneed 351; 3 Johns. Ch. 58. See, generally, Crosswell; Hallett; Raff; Redfield; Schouler; Toller; Williams; Willard; Werner on Executors; Blackstone; Kent; Story, Conflict of Laws; DOMICIL; CONFLICT OF LAWS.

Of Government. The management of the executive department of the government.

Those charged with the management of the executive department of the government. See LIMITED ADMINISTRATION.

ADMINISTRATOR. A person authorized to manage and distribute the estate of an intestate, or of a testator who has no executor.

In English law, administrators are the officers of the Ordinary appointed by him in pursuance of the statute, and their title and authority are derived exclusively from the ecclesiastical judge, by grants called letters of administration. Williams, Ex. 331. At first the Ordinary was appointed administrator under the statute of Westm. 2d. Next, the 31 Edw. III. c. 11, required the Ordinary to appoint the next of kin and the relations by blood of the deceased. Next, under the 21 Hen. VIII., he could appoint the widow or next of kin, or both, at his discretion.

The appointment of the administrator must be lawfully made with his consent, and by an officer having jurisdiction. If an improper administrator be appointed, his acts are not void ab initio, but are good, usually, until his power is rescinded by authority. But they are void if a will had been made, and a competent executor appointed under it; 8 Cra. 23; 1 Dane, Abr. 556-561; 73 N. Y. 292. But, in general, anybody can be administrator who can make a contract. An infant cannot; 4 Mass. 348; a femme covert may, with her husband's permission; 4 Bac. Abr. 67; 3 Salk. 21; 65 Pa. 311; 34 Ala. 40. Improvident persons, drunkards, gamblers, and the like, are disqualified by statute; 6 N. Y. 443; 14 id. 449; 30 N. J. 106.

Persons holding certain relations to the intestate are considered as entitled to an appointment to administer the estate in established order of precedence; 3 Redf. 512.

Order of appointment.—First in order of appointment.—The husband has his wife's

personal property, and takes out administration upon her estate. But in some states it is not granted to him unless he is to receive the property eventually. So the widow can ordinarily claim sole administration, though in the discretion of the judge it may be refused her, or she may be joined with another; 2 Bla. Com. 504; Williams, Ex. 342; 18 Pick. 26; 10 Md. 52; 56 Ala. 270; 2 Pa. Dist. R. 742. The widow is entitled to preference though she was not living with her husband at the time; 11 Pa. Co. Ct. R. 601; 12 id. 339.

Second in order of appointment are the next of kin. Kinship is computed by the civil-law rule. The English order, which is adopted in some states, is, first, husband or wife; second, sons or daughters; third, grandsons or granddaughters; fourth, great-grandsons or great-granddaughters; fifth, father or mother; sixth, brothers or sisters; seventh, grandparents; eighth, uncles, aunts, nephews, nieces, etc.; 1 Atk. 454; 1 P. Will. 41; 2 Add. Eccl. 352; 24 Eng. L. & Eq. 593; 13 La. Ann. 610; 2 Kent 514; 56 Ala. 539.

In New York the order is, the widow; the children; the father; the brothers; the sisters; the grandchildren; any distributee being next of kin; 1 Bradf. 64, 200, 259; 2 id. 281, 322; 4 id. 13, 173; 3 Redf. 512. See 5 Misc. Rep. 176.

When two or three are in the same degree, the probate judge or surrogate may decide between them; and in England he is usually guided by the wishes of the majority of those interested. This discretion, however, is controlled by certain rules of priority concerning equigradual parties, which custom or statute has made. Males are generally preferred to females, though from no superior right. Elder sons are preferred to younger, usually, and even when no doctrine of primogeniture subsists. So solvent persons to insolvent, though the latter may administer. So business men to others. So unmarried to married women. So relations of the whole blood to those of the half blood. So distributees to all other kinsmen.

The appointment in all cases is voidable when the court did not give a chance to all parties to come in and claim it. In Massachusetts an administrator cannot be appointed within thirty days, so as to deprive the widow and the next of kin. In general, see Williams, Ex. 251; 1 Salk. 36; 15 Barb. 302; 6 N. Y. 443; 5 Cal. 63; 4 Jones (N. C.) 274; 87 Pa. 163.

Third in order of appointment.—Creditors and, ordinarily, first the largest one have the next right; 67 Law T. (N. S.) 503. To prevent fraud, a creditor may be appointed when the appointee of the two preceding classes does not act within a reasonable time. In the United States a creditor may make oath of his account to prove his debt, but no rule establishes the size of the debt necessary to be proved before appointment; 1 Cush. 525. After creditors, any suitable person may be appointed. Generally, consuls administer for deceased aliens; but this is by custom only, and in England there is no such rule.

Where all the persons applying for appointment are equally qualified, and competent, the court must appoint the one having a prior right under the statute, and it has no discretion; 21 Nev. 462.

Co-administrators, in general, must be joined in suing and in being sued; but, like executors, the acts of each, in the delivery, gift, sale, payment, possession, or release of the intestate's goods, are the acts of all, for they have joint power; Bac. Abr. Exec. C. 4; 11 Vin. Abr. 358; Comyns, Dig. Administration (B. 12); 1 Dane, Abr. 389; 2 Litt. (Ky.) 315; 56 Ala. 173. If one is removed by death, or otherwise, the whole authority is vested in the survivors; 6 Yer. 167; 5 Gray 841; 29 Pa. 265. Each is liable only for the assets which have come to his own hands, and is not liable for the torts of others except when guilty of negligence or connivance; 1 Strange 20; 2 Ves. 267; 8 Watts & S. 143; 8 Ga. 388; 5 Conn. 19; 24 Pa. 413; 4 Wash. C. C. 186; 3 Sandf. Ch. 99; 3 Rich. Eq. (So. C.) 132. As to the

several powers of each, see 10 Ired. 263; 9 Paige, Ch. 53; 35 Me. 279; 4 Ired. 271; 28 Pa. 471; 20 Barb. 91; 16 Ill. 529.

A husband who has the right to administer may have a co-administrator appointed with him; 113 N. C. 545.

A note payable to two administrators for a debt due the estate may be transferred by the endorsement of one; 15 R. I. 121; a surviving administrator has full power to act alone; 8 Tex. Civ. App. 596.

The duty of an administrator is in general to do the things set forth in his bond; and for this he is generally obliged to give security; Williams, Ex. 439, Am. Notes; 4 Yerg. 20; 5 Gray 67. He must publish a notice of his appointment, as the law directs. Usually he must render an inventory. In practice, book accounts and unliquidated damages are not inventoried, but debts evidenced by mercantile paper, bonds, notes, etc., are; 1 Stockt. 572; 23 Pa. 223.

He must collect the outstanding claims and convert property into money; 2 Kent 415; 18 Miss. 404; Tam. 279; 1 Mylne & C. 8; 6 Gill & J. 171; 4 Edw. Ch. 718; 4 Fla. 112; 20 Barb. 100; 25 Miss. 422; 57 Ind. 198; 82 Penn. 193; but he cannot occupy or lease the lands of the estate, or receive rents or profits therefrom, as these descend to the heir; 131 Pa. 584. As to what constitutes assets, see ASSETS.

For this purpose he acquires a property in the assets of the intestate. His right is not a personal one, but an incident to his office; 9 Mass. 74, 352; 16 N. Y. 278. He owns all his intestate's personal property from the day of death, and for any cause of action accruing after that day may sue in his own name; Williams, Ex. 747; 4 Hill (N. Y.) 57; 17 Vt. 176; 4 Mich. 170, 132; 26 Mo. 76; 64 Vt. 511. This happens by relation to the day of death; 12 Metc. 425; 7 Jur. 492; 18 Ark. 424; 34 N. H. 407. An administrator is a trustee, who holds the legal property but not the equitable. If he is a debtor to the estate, and denies the debt, he may be removed; but if he inventories it, it is cancelled by the giving of his bond; 11 Mass. 268.

He may declare, as administrator, whenever the money when received will be assets; and he may sue on a judgment once obtained, as if the debt were his own. He may summon supposed debtors or holders of his intestate's property to account, and has the right to an investigation in equity. He may also bind the estate by arbitration; 4 Harr. (N. J.) 457; 35 Me. 357; 38 Pa. 239. He may assign notes, etc. See 35 N. H. 421; 28 Vt. 661; 2 Stockt. 320; 29 Miss. 70; 3 Ind. 369; 18 Ill. 116; 28 Pa. 459; 2 Patt. & H. Va. 462; 1 Sandf. N. Y. 132. Nearly all debts and actions survive to the administrator. But he has no power over the firm's assets, when his intestate is a partner, until the debts are paid; 1 Bradf. 24, 165; he should merely refer in his inventory to the intestate's interest in the partnership without attempting to give the items of property, as he can have no control over it until the affairs of the partnership are settled; 63 Mich. 355. He must pay the intestate's debts in the order prescribed by law. There is no universal order of payment adopted in the United States; but debts of the last sickness and the funeral are preferred debts everywhere; Bacon, Abr. Ex. L. 2; Williams, Ex. 679, 1213; 2 Kent 416; 4 Leigh 35; 10 B. Monr. 147; 7 Ired. Eq. 62; 23 Miss. 228; 28 N. J. Eq. 327; 29 Ill. App. 184.

Next to these, as a general rule, debts due the state or the United States are privileged. This priority of the United States only extends to the net proceeds of the property of the deceased, and therefore the necessary expenses of the administration are first paid. The act of burial and its accompaniments may be done by third parties, who have a preferred claim therefor, if reasonable; 3 Nev. & M. 512; 8 Ad. & E. 348; 4 Sawy. 199. But the amount is often disputed; 1 B. & Ad. 260; R. M. Charl. 56. A claim for costs recovered by a creditor in an action to establish his claim is entitled to priority over the debts of the

estate; 8 N. Y. S. 652. If the administrator pays debts of a lower degree first, he will be liable out of his own estate in case of a deficiency of assets; 2 Kent 419. If he pays decedent's debts from his own funds he is entitled to repayment from the proceeds of lands originally liable for such debt; 22 S. W. Rep. (Ky.) 321.

The statute prescribes a fixed time within which the administrator must ascertain the solvency of the estate. During this time he cannot be sued, unless he waives the right; 2 Nott & McC. 259; 2 Duer 160; 6 McLean, C. C. 443. And if the commissioner deems the estate insolvent, parties dissatisfied may resort to a court and jury. If the administrator makes payments erroneously, supposing the estate to be solvent, he may recover them, it being a mistake of facts; 3 Pick. 261; 2 Gratt. 319.

The administrator may plead the statute of limitations, but he is not bound to do so, if satisfied that the debt is just; 15 S. & R. 231; 9 Dowl. & R. 407; 11 N. H. 208; 3 Metc. Mass. 369; 9 Mo. 262; 28 Ala. n. s. 484; 10 Md. 242; 23 Pa. 95; 8 How. 402; 10 Humphr. 301; 4 Fla. 481. He is, in some states, chargeable with interest, first, when he receives it upon assets put out at interest; second, when he uses them himself; third, when he has large debts paid him which he ought to have put out at interest; 5 N. H. 497; 1 Pick. 530; 13 Mass. 232; but he is not liable where he has funds which he holds pending legal proceedings to determine the rights of the remaindermen; 3 Misc. Rep. 170. In some cases of need, as to relieve an estate from sale by the mortgagee, he may lend the estate-money and charge interest thereon; 10 Pick. 77. The widow's support is usually decreed by the judge. But the administrator is not liable for the education of infant children, or for mourning-apparel for relatives and friends of the deceased; 11 Paige, Ch. 265; 11 S. & R. 16.

He must distribute the residue among those entitled to it, under direction of the court and according to law; 6 Ired. 4; 86 Pa. 149, 363; 3 Redf. 461. But if he recognizes a claim as proper to be paid, and subsequently finds that there is no legal foundation for it, it is not binding upon the estate; 74 Md. 249. And even after action brought against him by a creditor he may apply the assets in payment of the debt of another creditor; 24 Q. B. Div. 364. In Iowa valid claims that have been approved, though not formally filed, are entitled to be paid in the order with those properly filed; 80 Ia. 750.

The great rule is, that personal property is regulated by the law of the domicile. The rights of the distributees vest as soon as the intestate dies, but cannot be sued for till the lapse of the statute period of distribution. See 118th Novel of Justinian, Cooper's trans. 393; 2 P. Will. 447; 2 Story, Eq. Jur. § 1205; 20 Pick. 670; 12 Cush. 282; 31 Miss. 556. See DISTRIBUTION; CONFLICT OF LAWS.

The liability of an administrator is in general measured by the amount of assets. On his contracts he may render himself liable personally, or as administrator merely, according to the terms of the contract which he makes; 7 Taunt. 581; 7 B. & C. 450; 78 Tex. 519. But to make him liable personally for contracts about the estate, a valid consideration must be shown; 3 Sim. 543; 2 Brod. & B. 460. And, in general, assets or forbearance will form the only consideration; 5 My. & C. 71; 9 Wend. 273; 13 id. 557. But a bond of itself imports consideration; and hence a bond given by administrators to submit to arbitration is binding upon them personally; 8 Johns. 120; 22 Miss. 161. He may compromise a suit brought for the widow and next of kin, for the death of the intestate; 26 N. E. Rep. (Ill.) 653. In general, he is not liable when he has acted in good faith, and with that degree of caution which prudent men exhibit in the conduct of their own affairs; 2 Ashm. 437. The liability of an administrator for taxes on decedent's estate is not personal but official, and such liability is assumed by his successor; 93 Cal. 465. It is

the duty of an administrator to intervene in proceedings for the sale of land in which his intestate had an interest; 31 Ill. App. 483.

An administrator cannot ratify decedent's void transactions, nor make any contracts for him; 62 Mich. 349.

An administrator is liable for torts and for gross negligence in managing his intestate's property. This species of misconduct is called in law a *devastavit*; 2 Williams, Ex. 1529; 4 Hayw. 134; 1 Dev. Eq. 516; 18 Oreg. 168. Such is negligence in collecting notes or debts; 2 Green. Ch. 300; 131 Pa. 584; an unnecessary sale of property at a discount; 8 Gratt. 140; paying undue funeral expenses; 1 B. & Ad. 260; 2 Carr. & P. 207; and the like mismanagements. So he may be liable for not laying out assets for the benefit of the estate, or for turning the money to his own profit or advantage. In such cases he is answerable for both principal and interest. In England he may be charged with increased interest for money withheld by fraud; 2 Cox, Ch. 113; 4 Ves. 620; and he is sometimes made chargeable with compound interest in this country; 10 Pick. 77. Finally, a refusal to account for funds, or an unreasonable delay in accounting, raises a presumption of a wrongful use of them; 5 Dana 70; 6 Gill & J. 186; Williams, Ex. 1567. If he receives rents and profits of land for a long period without accounting, he is liable to the heirs for the reasonable rental value of the land for the entire period; 111 N. C. 297.

An administrator receives no compensation in England; 3 Mer. 24; but in this country he is paid in proportion to his services, and all reasonable expenses are allowed him; 84 Pa. 303. Additional allowance may be made where extraordinary services have been rendered; 96 Cal. 522. An administrator cannot pay himself. His compensation must be ordered by the court; 58 Ind. 374. If too small a compensation be awarded him, he may appeal; 1 Edw. Ch. 195; 4 Whart. 95; 11 Md. 415; 3 Cal. 287; 7 Ohio St. 143; 3 Redf. 465. Allowance by a probate court cannot be impeached in a court of equity unless fraud or deception has been practiced; 53 Fed. Rep. 977. He cannot buy the estate, or any part of it, when sold by a common auctioneer to pay debts; but he may when the auctioneer is a state officer, and the sale public and *bona fide*; 2 Patt. & H. 71; 9 Mass. 75; 4 Ind. 355; 6 Ohio St. 189.

ADMINISTRATRIX. A woman to whom letters of administration have been granted and who administers the estate.

When an administratrix marries, that fact does not prevent her from suing as such; 103 Cal. 268; nor does the marriage of a *feme sole* annul her appointment; 19 S. E. Rep. (S. C.) 610.

A woman who administers; especially, one who administers the estate of an intestate; a female administrator. Webster.

ADMIRAL (Fr. *amiral*). A high officer or magistrate that hath the government of the king's navy, and the hearing of all causes belonging to the sea. Cowel. See ADMIRALTY.

By statute of July 25, 1866, the active lists of line-officers of the navy of the United States were divided into ten grades, of which the highest is that of admiral, and the next that of vice-admiral. By statute of Jan. 24, 1873, these grades ceased to exist when the offices became vacant, and the highest rank is rear-admiral.

ADMIRALTY. A court which has a very extensive jurisdiction of maritime causes, civil and criminal.

On the revival of commerce after the fall of the Western empire, and the conquest and settlement by the barbarians, it became necessary that some tribunal should be established, that might hear and decide causes that arose out of maritime commerce. The rude courts established by the conquerors had properly jurisdiction of controversies that arose on land, and of matters pertaining to land, that being at the time the only property that was considered of value. To supply this want, which was felt by merchants, and not by the government or the people at large, on the coast of Italy and the northern shores of the Mediterranean, a court of consuls was

established in each of the principal maritime cities. Contemporaneously with the establishment of these courts grew up the customs of the sea, partly borrowed, perhaps, from the Roman law, a copy of which had at that time been discovered at Amalfi, but more out of the usage of trade and the practice of the sea. These were collected from time to time, embodied in the form of a code, and published under the name of the *Consolato del Mare*. The first collection of these customs is said to be as early as the eleventh century; but the earliest authentic evidence we have of their existence is their publication, in 1266, by Alphonso X., King of Castile; 1 Pardessus, *Lois Maritimes*, 201. See 2 Kent 16.

On Christmas of each year the principal merchants made choice of judges for the ensuing year, and at the same time of judges of appeal, and their courts had jurisdiction of all causes that arose out of the custom of the sea, that is, of all maritime causes whatever. Their judgments were carried into execution, under proper officers, on all movable property, ships as well as other goods, but an execution from these courts did not run against land; *Ordonnance de Valentin*, 1283, c. 1, § 22, 23.

When this species of property came to be of sufficient importance, and especially when trade on the sea became gainful and the merchants began to grow rich, their jurisdiction in most maritime states was transferred to a court of admiralty; and this is the origin of admiralty jurisdiction. The admiral was originally more a military than a civil officer, for nations were then more warlike than commercial; *Ordonnance de Louis XIV.*, liv. 1; 2 Brown, Civ. & Adm. Law, c. 1. The court had jurisdiction of all national affairs transacted at sea, and particularly of prize; and to this was added jurisdiction of all controversies of a private character that grew out of maritime employment and commerce; and this, as nations grew more commercial, became in the end its most important jurisdiction.

The admiralty is, therefore, the successor of the consular courts, which were emphatically the courts of merchants and sea-going persons. The most trustworthy account of the jurisdiction thus transferred is given in the *Ordonnance de Louis XIV.*, published in 1681. This was compiled under the inspiration of his great minister Colbert, by the most learned men of that age, from information drawn from every part of Europe, and was universally received at the time as an authoritative exposition of the common maritime law; Valin, *Preface to his Commentaries*, § 3 Kent 16. The changes made in the *Code de Commerce* and in the other maritime codes of Europe are unimportant and inconsiderable. This ordinance describes the jurisdiction of the admiralty courts as embracing all maritime contracts and torts arising from the building, equipment, and arming of vessels, their manning and victualling, the engagement of the crews and their employment, whether by charter-party or bill of lading, and from bottomry and insurance. This was the general jurisdiction of the admiralty: it took all the consular jurisdiction which was strictly of a maritime nature and related to the building and employment of vessels at sea.

In English Law. The court of the admiral.

This court was erected by Edward III. It was held by the Lord High Admiral, whence it was called the High Court of Admiralty, or before his deputy, the Judge of the Admiralty, by which latter officer it has for a long time been exclusively held. It sat as two courts, with separate commissions, known as the Instance Court and the Prize Court, the former of which was commonly intended by the term admiralty. At its origin the jurisdiction of this court was very extensive, embracing all maritime matters. By the statutes 13 Rich. II. c. 5, and 15 Rich. II. c. 3, especially as explained by the common-law courts, their jurisdiction was much restricted. A violent contest existed between the admiralty and common-law courts resulted in the establishment of the restriction, which continued until the statutes 3 & 4 Vict. c. 65, and 9 & 10 Vict. c. 90, materially enlarged its powers. See 2 Pars. Mar. Law 473, n. 1; Kent, Lect. XVII. § 2; Smith, 41 & 42; 188; 12 Wheat. 611; 1 Baldw. 544; Davis 33. This court was abolished by the Judicature Act of 1873, and its functions transferred to the High Court of Justice, the Probate, Divorce, and Admiralty Divisions.

The civil jurisdiction of the court extends to torts committed on the high seas, including personal batteries and false representations; 4 C. Rob. Adm. 73; 62 Fed. Rep. 469; 66 Fed. Rep. 1013; but not where the injury was received on land, though the wrongful act was done on a ship; 63 Fed. Rep. 1009; 66 Fed. Rep. 62; collision of ships; Abbott, Shipp. 230; restitution of possession from a claimant withholding unlawfully; 2 B. & C. 244; 1 Hagg. 81, 240, 342; 2 Dods. Adm. 38; Edw. Adm. 242; 3 C. Rob. Adm. 93, 133, 213; 4 id. 275, 287; 5 id. 155; cases of piratical and illegal taking at sea and *contracts* of a maritime nature, including suits between part owners; 1 Hagg. 306; 3 id. 299; 1 Ld. Raym. 223; 2 id. 1235; 2 B. & C. 248; for mariners' and officers' wages; 2 Ventr. 181; 3 Mod. 379; 1 Ld. Raym. 632; 2 id. 1206; 2 Str. 858, 937; 1 id. 707; pilotage; Abbott, Shipp. 193, 200; wharfage; 2 D. C. App. 51; towage, 66 Fed. Rep. 347; bottomry and respondentia bonds; 6 Jur. 241; 3 Hagg. Adm. 66; 3 Term 267; 2 Ld. Raym. 982; Rep. temp. Holt, 48; and salvage claims; 2 Hagg. Adm. 3; 3 C. Rob. Adm. 355; 1

W. Rob. Adm. 18; 65 Fed. Rep. 1002. It has no jurisdiction over an action *in personam* against a pilot for damages arising from a collision between ships on the high seas, due to his negligence; [1892] 1 Q. B. 273.

The criminal jurisdiction of the court has been transferred to the Central Criminal Court by the 4 & 5 Will. IV. c. 38. It extended to all crimes and offences committed on the high seas, or within the ebb and flow of the tide, and not within the body of a county. A conviction for manslaughter committed on a German vessel, by reason of negligent collision with an English vessel, within two and a half miles of the English coast, whereby a passenger on the English vessel was lost, is not within the jurisdiction of the English criminal courts; 46 L. J. M. C. 17.

The first step in the process in a plenary action may be the arrest of the person of the defendant, or of the ship, vessel, or furniture; in which cases the defendant must find bail or *fidejussors* in the nature of bail, and the owner must give bonds or stipulations equal to the value of the vessel and her immediate earnings; or the first step may be a motion to the defendant. In 1840, the form of proceeding in this court was very considerably changed. The advocates, surrogates, and proctors of the Court of Arches were admitted to practice there; the proceedings generally were assimilated to those of the common-law courts, particularly in respect of the power to take *viva voce* evidence in open court; power to compel the attendance of witnesses and the production of papers; to ordering issues to be tried in any of the courts of Nisi Prius, and allowing bills of exception on the trial of such issues, and the grant of power to admiralty to direct a new trial of such issues; to make rules of court, and to commit for contempt. The judge may have the assistance of a jury, and in suits for collision he usually decides upon his own view of the facts and law, after having been assisted by, and hearing the opinion of, two or more Trinity Brethren.

A court of admiralty exists in Ireland; but the Scotch court was abolished by 1 Will. IV. c. 69. See VICE-ADMIRALTY COURTS.

In American Law. A tribunal exercising jurisdiction over all maritime contracts, torts, injuries, or offences. 2 Pars. Mar. Law 508.

The court of original admiralty jurisdiction in the United States is the United States District Court. From this court causes could formerly be removed, in certain cases, to the Circuit, and ultimately to the Supreme Court. After a somewhat protracted contest, the jurisdiction of admiralty has been extended beyond that of the English admiralty court, and is said to be coequal with that of the English court as defined by the statutes of Rich. II., under the construction given them by the contemporaneous or immediately subsequent courts of admiralty; 2 Pars. Mar. Law 508; Bened. Adm. § 7, 8. See 2 Gall. C. C. 398; Daveis 98; 3 Mas. C. C. 28; 3 Stor. C. C. 244; 2 id. 176; 12 Wheat. 611; 2 Cranch 406; 4 id. 444; 3 Dall. 297; 6 How. 344; 17 id. 899, 477; 18 id. 267; 19 id. 82, 239; 20 id. 296, 583.

So much of the foregoing as relates to appeals from Circuit and District Courts of the United States to the Supreme Court has been changed by chap. 517, 1 Sup. Rev. Stats., so that appeals may be taken direct from those courts to the Supreme Court from the final sentences and decrees in prize causes; in other admiralty cases appeals will lie from Circuit and District Courts to the Circuit Courts of Appeals, the decision of the latter courts being final. In certain cases, however, the decisions of the Circuit Courts of Appeals may be reviewed by the Supreme Court, for which see COURTS OF THE UNITED STATES.

It extends to the navigable rivers of the United States, whether tidal or not, the lakes, and the waters connecting them; 4 Wall. 455, 411; 8 Wall. 15; 12 How. 443; 7 Wall. 624; 11 id. 185; 16 id. 522; 40 Fed. Rep. 765; to a stream tributary to the lakes, but lying entirely within one state; 1 Brown, Adm. 334; to a ferry-boat plying between opposite sides of the Mississippi River; 5 Biss. 200; to a steam ferry-boat

to carry railway cars across the Mississippi; 48 Fed. Rep. 312; to an artificial ship-canal connecting navigable waters within the jurisdiction; 2 Hughes 12; to the Welland canal; 1 Brown, Adm. 170; Newb. 101. See as to Erie canal, 8 Ben. 150; to the Detroit River, out of the jurisdiction of any particular state and within the territorial limits of Canada; 150 U. S. 249. The Judiciary Act of 1789 (R. S. § 563), while conferring admiralty jurisdiction upon the Federal courts, saves to suitors their common-law remedy, which has always existed for damages for collision at sea; 102 U. S. 118; where a vessel is outside of the territorial limitation of the civil process of a court, jurisdiction by stipulation or consent of the master, cannot be obtained for the purpose of a libel *in rem*; 41 Fed. Rep. 109.

Admiralty has jurisdiction of a libel by mariners for wages against a vessel plying on navigable waters, even though lying entirely within one state; 2 Am. L. Rev. 455; but see 3 id. 610, where all the cases on admiralty jurisdiction by reason of locality are fully treated. Also for services as engineer on a tug-boat; 46 Fed. Rep. 290.

Its civil jurisdiction extends to cases of salvage; 2 Cranch 240; 1 Pet. 511; 12 id. 72; 2 Low. 302; 50 Fed. Rep. 574; 59 id. 177; bonds of bottomry, respondentia, or hypothecation of ship and cargo; 1 Curt. C. C. 340; 3 Sumn. 228; 1 Wheat. 96; 4 Cranch 328; 8 Pet. 538; 18 How. 63; seamen's wages; 1 Low. 203; 2 Pars. Mar. Law 509; 49 Fed. Rep. 651; seizures under the laws of impost, navigation, or trade; 1 U. S. Stat. at Large, 76; 4 Biss. 156; 11 Blatch. 416; Chase, Dec. 503; 6 Biss. 505; cases of prize or ransom; 3 Dall. 6; charter-parties; 1 Sumn. 551; 2 id. 589; 2 Stor. C. C. 81; Ware 149; contracts of affreightment between different states or foreign ports; 2 Curt. C. C. 271; 2 Low. 173; 2 Sumn. 567; Ware 188, 263, 322; 6 How. 344; and upon a canal-boat without powers of propulsion, upon an artificial canal; 21 Int. Rev. Rec. 221; but not to coal barges, not licensed or enrolled; 46 Fed. Rep. 204; for injury to vessel in passing through a drawbridge over a navigable river; 40 Fed. Rep. 765; 45 Fed. Rep. 280; but not against schooner for damages done to drawbridge; 55 Fed. Rep. 546; but see also, *contra*, 60 Fed. Rep. 560; contracts for conveyance of passengers; 16 How. 469; 1 Blatchf. 560, 569; 1 Abbott, Adm. 48; 1 Newb. 494; contracts with material-men; 4 Wheat. 438; 6 Ben. 564; see 20 How. 393; 21 Bost. Law Rep. 601; jettisons, maritime contributions, and averages; 6 McLean 573; 7 How. 729; 19 id. 162; 21 Bost. Law Rep. 87, 96; pilotage; 1 Mas. C. C. 508; 10 Pet. 108; 12 How. 269; see 2 Paine C. C. 131; 9 Wheat. 1, 207; 13 Wall. 236; 1 Low. 177; 1 Sawy. 463; 5 Ben. 574; R. M. Charlt. 302, 314; 8 Metc. 332; 4 Bost. Law Rep. 20; contracts for wharfage; 95 U. S. 68; 5 Ben. 60, 74; 15 Blatch. 473; to injuries to a vessel by reason of a defective dock; 45 Fed. Rep. 588; but not to injuries to wharves; 1 Brown, Adm. 356; contracts for towage; 5 Ben. 73; surveys of ship and cargo; Story, Const. § 1665; Bened. Adm. § 299; 5 Mas. 465; 10 Wheat. 411; but see 2 Pars. Mar. Law 511, n.; and generally to all assaults and batteries, damages, and trespasses, occurring on the high seas; 2 Pars. Mar. Law see 2 Sumn. 1; Chase, Dec. 145, 150; 5 Ben. 63; for injury to seamen in consequence of negligence of master or owner; 43 Fed. Rep. 592; 46 Fed. Rep. 400; contract for supplies to a vessel; 43 Fed. Rep. 639; id. 569; but see 53 Fed. Rep. 599; 46 id. 397; but not for supplies to a pile-driver; 69 Fed. Rep. 1005; for labor and material in completing and equipping a new vessel after she has been launched and named; 46 Fed. Rep. 797; but not to contracts to procure insurance; 53 Fed. Rep. 603; nor to reform a policy of marine insurance; 56 Fed. Rep. 159. It also extends to actions for damages for death caused by collision on navigable waters; 55 Fed. Rep. 98; and for injury to a seaman from the explosion of a steamtug boiler due to negligence; 46 Fed. Rep. 400; or to a laborer, working in the hold of a

vessel, from a piece of timber sent without warning down a chute by a person working on a pier; 69 Fed. Rep. 146. It also extends to a bath-house built on boats but designed for transportation; 61 Fed. Rep. 692. A contract for launching a vessel, where the vessel has been stranded a quarter of a mile up the beach by a storm, is a maritime contract, for which the vessel is liable *in rem*; 48 Fed. Rep. 569. The wrongful arrest and imprisonment of seamen who have deserted and are found on shore is not a maritime tort; 60 Fed. Rep. 912.

Its criminal jurisdiction extends to all crimes and offences committed on the high seas or beyond the jurisdiction of any country. The criminal jurisdiction of the U. S. courts is extended to the Great Lakes by 26 St. L. 424. The open waters of the Great Lakes are high seas within the meaning of R. S. § 5346; 150 U. S. 249. See, as to jurisdiction generally, the article UNITED STATES COURTS.

A civil suit is commenced by filing a libel, upon which a warrant for arrest of the person, or attachment of his property if he cannot be found, even though in the hands of third persons, or a simple motion to appear, may issue; or, in suits *in rem*, a warrant for the arrest of the thing in question; or two or more of these separate processes may be combined. Thereupon bail or stipulations are taken if the party offer them.

In most cases of magnitude, oral evidence is not taken; but it may be taken, and it is the general custom to hear it in cases where smaller amounts are involved. The decrees are made by the court without the intervention of a jury.

A suit *in rem* and a suit *in personam* may be brought concurrently in the same court, when arising on the same cause of action; 40 Fed. Rep. 590; 44 id. 102.

In criminal cases the proceedings are similar to those at common law.

Consult the article UNITED STATES COURTS; Conkling; Dunlap, Adm. Prac.; Sergeant; Story, Const.; Abbott, Sh.; Parsons, Mar. Law; Kent; Flanders, Sh.; Kay, Sh.; Henry's Adm. Jur. & Proceed.; and the following cases, viz.: 2 Gall. 398; 5 Mas. 465; Daveis 93; 4 How. 447; 12 id. 443; 20 id. 296, 393, 583; 21 id. 244, 248; 23 id. 209, 491. See LIENS.

ADMIRALTY, FIRST LORD OF THE. The first member of the body of commissioners who are at the head of the British Navy, and perform certain of the duties that formerly rested with the Lord High Admiral. The First Lord is a member of Parliament, and usually of the Cabinet. Stand. Dict.

ADMISSIBLE. Such as may be admitted, conceded, or allowed; worthy or capable of being entertained or admitted. Applied, in law, usually to evidence, which is designated as admissible or inadmissible. Stand. Dict. See under EVIDENCE.

ADMISSION (Lat. *ad*, to, *mittere*, to send).

In Practice. The act by which attorneys and counsellors become recognized as officers of the court and are allowed to practise. The qualifications required vary widely in the different states. See an article in 15 Am. L. Rev. 295; also a learned report to Amer. Bar Assn. by Mr. Carleton Hunt, published in Rep. of 2d An. Meeting, 1879, and the reports of same for 1893-1896.

It is an encroachment upon the judiciary for the legislature to say that attorneys shall be admitted in specified cases, the question being a judicial, and not a legislative one; 123 Pa. 527.

As to the admission of women, see 16 Colo. 441.

In Corporations or Companies. The act of a corporation or company by which an individual acquires the rights of a member of such corporation or company.

In trading and joint-stock corporations no vote of admission is requisite; for any person who owns stock therein, either by original subscription or by transfer, is in gen-

ADMISSIONS

eral entitled to, and cannot be refused, the rights and privileges of a member; 3 Mass. 364; Dougl. 524; 1 Mann. & R. 529.

All that can be required of the person demanding a transfer on the books is to prove to the corporation his right to the property. See 8 Pick. 90.

In a mutual insurance company it has been held that a person may become a member by insuring his property, paying the premium and deposit-money, and rendering himself liable to be assessed according to the rules of the corporation; 2 Mass. 318.

ADMISSIONS. In Evidence. Confessions or voluntary acknowledgments made by a party of the existence or truth of certain facts.

As distinguished from confessions, the term is applied to civil transactions and to matters of fact in criminal cases where there is no criminal intent. See **CONFESSIONS**.

As distinguished from consent, an admission may be said to be evidence furnished by the party's own act of his consent at a previous period.

Direct, called also *express*, admissions are those which are made in direct terms.

Implied admissions are those which result from some act or failure to act of the party.

Incidental admissions are those made in some other connection, or involved in the admission of some other fact.

As to the *parties* by whom admissions must have been made to be considered as evidence:—

They may be made by a party to the record, or by one identified in interest with him; 9 B. & C. 535; 7 Term 563; 1 Dall. 65. Not, however, where the party of record is merely a nominal party and has no active interest in the suit; 1 Campb. 392; 2 id. 561; 2 Term 763; 3 B. & C. 421; 5 Pet. 580; 5 Wheat. 277; 7 Mass. 181; 9 Ala. n. s. 791; 20 Johns. 142; 5 Gill & J. 184; nor by one of several devisees on a contest of a will for incapacity and undue influence; 98 Mich. 183.

They may be made by one of several having a joint interest, so as to be binding upon all; 2 Bingh. 306; 8 id. 309; 3 B. & C. 36; 1 Stark. 488; 2 Pick. 581; 8 id. 291; 4 id. 382; 1 McCord 541; 1 Johns. 8; 7 Wend. 441; 4 Conn. 336; 8 id. 268; 7 Me. 26; 5 Gill & J. 144; 1 Gall. 635. Mere community of interest, however, as in case of co-executors; 1 Greenl. Ev. § 176; Steph. Ev. Art. 17; 4 Cowen, 493; 16 Johns. 277; trustees, 3 Esp. 101; co-tenants; 4 Cowen 483; 15 Conn. 1; is not sufficient. Admissions of one of several defendants against his interests will be receivable in evidence against him only; 88 Ga. 541.

The interest in all cases must have subsisted at the time of making the admissions; 2 Stark. 41; 4 Conn. 544; 14 Mass. 245; 5 Johns. 412; 1 S. & R. 526; 9 id. 47; 12 id. 328. Admissions made by one subsequently appointed administratrix, are not admissible against her when suing as such nor against her successor in office; 46 Ill. App. 307; 41 id. 419; 65 Hun 404.

They may be made by any person interested in the subject-matter of the suit, though the suit be prosecuted in the name of another person as a *cestui que trust*; 1 Wils. 257; 1 Bingh. 45; but see 3 N. & P. 598; 6 M. & G. 261; or by an indemnifying creditor in an action against the sheriff; 7 C. & P. 629.

They may be made by a third person, a stranger to the suit, where the issue is substantially upon the rights of such a person at a particular time; 1 Greenl. Ev. § 181; 2 Stark. 42; or one who has been expressly referred to for information; 1 Campb. 366, n.; 3 C. & P. 532; or where there is a privity as between ancestor and heir; 5 B. & Ad. 225; 1 Bingh. n. c. 430; assignor and assignee; 54 Taunt. 16; 2 Pick. 536; 2 Me. 242; 10 id. 244; 3 Rawle 437; 2 McCord 241; 17 Conn. 399; intestate and administrator; 3 Bingh. n. c. 291; 1 Taunt. 141; grantor and grantee of land; 4 Johns. 280; 7 Conn. 319; 4 S. & R. 174; and others. Letters written by a third person at defendant's request about the matter in controversy, are admissible; 45 Ill. App. 872.

They may be made by an agent, so as to bind the principal; Story, Ag. §§ 134-137; Steph. Ev. 17; declarations of an architect to the contractor in directing operations are admissible against the owner in an action for price of work and material; 133 N. Y. 298; so far only, however, as the agent has authority; 1 Greenl. Ev. § 114; Tayl. Ev. 533-536 (8th ed.); 83 Ala. 542; 62 Mich. 424; 114 N. Y. 415; and not, it would seem, in regard to past transactions; 6 Mees. & W. Exch. 58; 11 Q. B. 46; 7 Me. 421; 4 Wend. 394; 7 Harr. & J. 104; 19 Pick. 220; 8 Metc. 142. Declarations of agent not in the course of the business of the agency, will not prove agency or ratification; 48 Ill. App. 659. One cannot prove agency by the declarations of an alleged agent only; 7 Misc. Rep. 165; nor will acts and conduct of an alleged agent not acquiesced in by the principal, establish agency; 39 S. C. 525.

Thus, the admissions of the wife bind the husband so far only as she has authority in the matter; 4 Campb. 92; 1 Carr. & P. 621; 7 Term 112; and so the formal admissions of an attorney bind his client; 7 C. & P. 6; 1 M. & W. 508; but not a necessarily fatal admission unintentionally made; 155 Pa. 429; nor when not within the scope of his authority; 69 Hun 28; and see 2 C. & K. 216; 3 C. B. 608. Declarations of a husband in the absence of his wife are not admissible to affect the title of his wife to personal property; 160 Pa. 273; nor will his admissions affect the wife's separate estate; 82 Tex. 290.

Implied admissions may result from assumed character; 1 B. & Ald. 677; 2 Campb. 513; from conduct; 2 Sim. & S. 600; 6 C. & P. 241; 9 B. & C. 78; 9 Watts 441; from acquiescence, which is positive in its nature; 1 Sumn. 814; 4 Fla. 340; 3 Mas. 81; 2 Vt. 276; from possession of documents in some cases; 5 C. & P. 75; 25 State Tr. 120.

In civil matters, constraint will not avoid admissions, if imposition or fraud were not made use of.

Admissions made in treating for an adjustment cannot be given in evidence; 33 Mo. 323; 117 Mass. 55; 13 Ga. 406; 40 N. Y. Sup. Ct. 8; whether made "without prejudice" or not; 2 Whart. Ev. § 1090; 15 Md. 510; but they may be as to independent facts; 117 Mass. 55; 44 N. H. 223.

Admissions of one in possession of lands, made to others than the owner, are to be considered in determining whether his possession is adverse to the owner; 4 Tex. Civ. App. 291.

Judicial admissions; 1 Greenl. Ev. § 205; 2 Campb. 341; 5 Mass. 365; 5 Pick. 285, those which have been acted on by others; 9 Rob. La. 243; 17 Conn. 355; 13 Jur. 253; and in deeds as between parties and privies; 4 Pet. 1; 6 id. 611; are conclusive evidence against the party making them.

Declarations and admissions are admissible to prove partnership, if made by alleged partners; 8 Misc. Rep. 502; admission of one that he is in partnership with another, is not binding on the latter; 50 Mo. App. 124.

It frequently occurs in practice, that, in order to save expenses as to mere formal proofs, the attorneys on each side consent to admit, reciprocally, certain facts in the cause without calling for proof of them.

These are usually reduced to writing, and the attorneys shortly add to this effect, namely, "We agree that the above facts shall on the trial of this cause be admitted, and taken as proved on each side;" and signing two copies now called "admissions" or "stipulations," in the cause, each attorney takes one; Gresley, Eq. Ev. 88.

In Pleading. The acknowledgment or recognition by one party of the truth of some matter alleged by the opposite party.

In Equity.

Partial admissions are those which are delivered in terms of uncertainty, mixed up with explanatory or qualifying circumstances.

Plenary admissions are those which admit the truth of the matter without qualification, whether it be asserted as from in-

formation and belief or as from actual knowledge.

AT LAW.

In all pleadings in confession and avoidance, admission of the truth of the opposite party's pleading is made. Express admissions may be made of matters of fact only.

The usual mode of making an express admission in pleading is, after saying that the plaintiff ought not to have or maintain his action, etc., to proceed thus, "Because he says that, although it be true that," etc., repeating such of the allegations of the adverse party as are meant to be admitted; Lawes, Civ. Pl. 143, 144. See 1 Chitty, Pl. 600; Archb. Civ. Pl. 215.

Pleadings which have been withdrawn from a court of law may be offered in evidence subject to explanation, to prove admissions of the pleader; 42 Ill. App. 375; admissions contained in original answer are not conclusive, where an amended answer has been filed excluding such matter; 23 S. W. Rep. (Tex.) 1002; the plea of the general issue admits the corporate existence of the plaintiff corporation; 127 Ill. 332; and in many states, in a suit against a firm or corporation, the partnership or corporate existence is taken as admitted unless denied by affidavit filed with the pleas; where the complainant sets a plea down for argument without reply, he admits its truth, but denies its sufficiency; 35 Fed. Rep. 833.

Allegations of the complaint not denied by the answer are to be taken as true; 129 U. S. 233.

ADMITTANCE. In English Law. The act of giving possession of a copyhold estate. It is of three kinds; namely, upon a voluntary grant by the lord, upon a surrender by the former tenant, and upon descent. 2 Bla. Com. 366-370.

ADMITTENDO IN SOCIUM. In English Law. A writ associating certain persons to justices of assize. Cowel.

ADMIXTURE. See **ACCESSION**; **CONFUSION OF GOODS**.

ADMONTIO TRINA. See **TRINA ADMONTIO**.

ADMONITION. A reprimand from a judge to a person accused, on being discharged, warning him of the consequences of his conduct, and intimating to him that, should he be guilty of the same fault for which he has been admonished, he will be punished with greater severity. Merlin, *Répert.*

The admonition was authorized as a species of punishment for slight misdemeanors. See **VERBAL ADMONITIONS**.

ADNEPOS. The son of a great-great-grandson. Calvinus, Lex.

ADNEPTIS. The daughter of a great-great-granddaughter. Calvinus, Lex.

ADNOTATIO (Lat. notare). A subscription or signing.

In the civil law, casual homicide was excused by the indulgence of the emperor, signed with his own sign-manual, called *adnotatio*; Code, 9. 16. 5; 4 Bla. Com. 187.

ADOLESCENCE. That age which follows puberty and precedes the age of majority. It commences for males at fourteen, and for females at twelve years completed, and continues until twenty-one years complete. Wharton.

ADOPTION. The act by which a person takes the child of another into his family, and treats him as his own.

A juridical act creating between two persons certain relations, purely civil, of pater- nity and filiation. 6 Demolombe, § 1.

Adoption was practised in the remotest antiquity, and was established to console those who had no children of their own. Cicero asks, "Quod est jus adoptionis? nempe ut is adoptat, qui neque procreare jam liberus possit, et cum potuerit, ut expectet." At Athens, he who had adopted a son was not at liberty to marry without the permission of the magistrates. Gaius, Ulpian, and the Institutes of Justinian only treat of adoption as an act creating the paternal power. Originally, the object of adoption was to introduce a person into the family and to acquire the paternal power over him. The

adopted took the name of the adopter, and only preserved his own adjectively, as *Scipio Aemilianus*; *Cæsar Octavianus*, etc. According to Cicero, adoptions produced the right of succeeding to the name, the property, and the lars: "*hereditas nominis, pecunie, sacrorum secuta sunt*;" *Pro Dom.* §§ 13, 35.

The first mode of adoption was in the form of a law passed by the *comitia curiata*. Afterwards, it was effected by the *manipulus*, *adnatio*, *adrogatio*, *in iure cessio*; by means of the first the paternal authority of the father was dissolved, and by the second the adoption was completed. The *manipulatio* was a solemn sale made to the *emptor* in presence of five Roman citizens (who represented the five classes of the Roman people), and a *libripens*, or scalesman, to weigh the piece of copper which represented the price. By this sale the person sold became subject to the *manipulus* of the purchaser, who then emancipated him; whereupon he fell again under the paternal power; and in order to exhaust it entirely it was necessary to repeat the *manipulatio* three times: *at pater filium trinumundabit, filius a patre liber esto*. After the paternal power was thus dissolved, the party who desired to adopt the son instituted a fictitious suit against the purchaser who held him in *manipulus*, alleging that the person belonged to him or was subject to his paternal power; the defendant not denying the fact, the pretor rendered a decree accordingly, which constituted the *cessio in iure*, and completed the adoption. *Adoptantur autem, cum a parente in cuius potestate sunt, tertia manipulatio in iure ceduntur, atque ad eo, qui adoptat, opud eum opud quem legis actio est, vindicantur*; *Gell.* 5. 19.

Towards the end of the Republic another mode of adoption had been introduced by custom. This was by a declaration made by a testator, in his will, that he considered the person whom he wished to adopt as his son: in this manner Julius Cæsar adopted Octavius.

It is said that the adoption of which we have been speaking was limited to persons *alieni iuris*. But there was another species of adoption, called *adrogatio*, which applied exclusively to persons who were *sui iuris*. By this adrogation a *pater-familias*, with all who were subject to his *patria potestas*, as well as his whole estate, entered into another family, and became subject to the paternal authority of the chief of that family. *Quæ species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, inquit eum quem adoptaturus sit, si iurum filium esse, et si, qui adoptatur rogatur, an id fieri patiatur; et populus rogatur an id fieri jubeat*; *Gaius*, 1. 90. The formulae of these interrogations are given by Cicero, in his oration *pro Dom.* 20: "*Felicitas, jubeatis, Quirites, uti Lucius Valerius Lucus filio tam jure legæque filius sibi sit, quam si ex eo patre matreque familia ejus natus esset, utique eo vitæ necisque in eum potestas sit uti patriendo filio est; hoc ita ut dicit vos, Quirites rogo*." This public and solemn form of adoption remained unchanged, with regard to adrogation, until the time of Justinian; up to that period it could only take place *populi auctoritate*. According to the Institutes, 1. 11. 1, adrogation took place by virtue of a rescript of the emperor, "*principali rescripto*, which only issued *causa cognita*;" and the ordinary adoption took place in pursuance of the authorization of the magistrate, "*impero magistratus*."

The effect of the adoption was also modified in such a manner, that if a son was adopted by a stranger, *extranea persona*, he preserved all the family rights resulting from his birth, and at the same time acquired all the family rights produced by the adoption.

In the United States, adoption is regulated by the statutes of the several states. See 1 Am. & Eng. Enc. of Law, 204-207. In Louisiana, where the civil law prevails, it was abolished by the Code of 1808, art. 35, p. 50. See 13 La. Ann. 517. In many of the continental states of Europe it is still permitted under various restrictions.

When an infant child has been released to another, such release is not revocable without sufficient legal reasons; 54 Ga. 10; and unless proceedings to revoke are made promptly, it will be fatal to their maintenance; 101 Ind. 840.

For legal status of adopted children, see 31 Cent. L. J. 67.

ADOTIPULATOR. In ancient Roman law, an accessory party to a promise, who received the same promise as his principal did, and could equally receive and exact payment, even if his principal were dead. *Black*; *Sand. Inst.* (5th ed.), 348. See also *Hunter's Rom. Law* (2nd ed.), 563. See *STIPULATOR*; *STIPULATOR*.

ADPROMISSOR (Lat. *promittere*). One who binds himself for another; a surety; a peculiar species of *fidejussor*. *Calvinus, Lex*.

The term is used in the same sense in the Scotch law. The cautionary engagement was undertaken by a separate act; hence, one entering into it was called *adpromissor* (promisor in addition to). *Erskine, Inst.* 3. 3. 1.

ADROGATION. In Civil Law. The adoption of one who was *impubes*, that is, if a male, under fourteen years of age; if

a female, under twelve. *Dig.* 1. 7. 17. 1.

ADSCRIPTI (Lat. *scribere*). Joined to by writing; ascribed; set apart; assigned to; annexed to.

ADSCRIPTI GLEBÆ. Slaves who served the master of the soil; who were annexed to the land, and passed with it when it was conveyed. *Calvinus, Lex*.

These *servi adscripti* (or *adscriptitii*) *glebæ* held the same position as the *villains* regardant of the Normans; 2 Bla. Com. 98. See 1 Poll. & Mait. 372.

ADSCRIPTITII (Lat.). A species of slaves. See 1 Poll. & Mait. 372.

Those persons who were enrolled and liable to be drafted as legionary soldiers. *Calvinus, Lex*.

ADSESSORES (Lat. *sedere*). Side judges. Those who were joined to the regular magistrates as assistants or advisers; those who were appointed to supply the place of the regular magistrates in certain cases. *Calvinus, Lex*.

ADULT. In Civil Law. A male infant who has attained the age of fourteen; a female infant who has attained the age of twelve. *Domat, Liv. Prel. tit. 2, § 2, n. 8*.

In Common Law. One of the full age of twenty-one. *Swanst. Ch.* 553.

ADULTER (Lat.). One who corrupts; one who corrupts another man's wife.

Adulter solidorum. A corrupter of metals; a counterfeit. *Calvinus, Lex*.

ADULTERA (Lat.). A woman who commits adultery. *Calvinus, Lex*.

ADULTERATED BUTTER. Adulterated butter, as defined by § 4 of the Act of May 9, 1902, includes: (1) a grade produced by treatment of different lots of butter to which a chemical or other substance is added to deodorize it or to remove rancidity; (2) a butter product with which is mixed a foreign substance to lessen its cost; and (3) "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream."

In 1907, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Regulations No. 9, which contain the following: "The definition of adulterated butter as contained in the Act of May 9, 1902, does not fix the normal content of moisture permissible. This being the case, it becomes necessary to adopt a standard for moisture in butter, which shall in effect represent the normal quantity. It is therefore held that butter having 16 per cent or more of moisture contains an abnormal quantity and is classed as adulterated butter." 265 U. S. 319.

ADULTERATION. The act of corrupting or debasing; the act of mixing something impure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind. See 16 M. & W. 644; 2 Ired. L. 40.

As to the police powers of a state in making regulations for the protection of health and the prevention of fraud, see 127 U. S. 678. In England and in most of the United States, there are laws punishing the adulteration of, or sale of adulterated, food products, beverages, and drugs, either in general, or specifically. See *Laws N. H.* 1891, c. 39; [1892], 1 Q. B. 220. E.g., cheese, *Laws Wis.* 1891, c. 264; honey, *Laws Minn.* 1893, c. 21; *Laws Vt.* 1890, c. 52; *lard*, *Act Pa.* 1891, June 8, P. L. 213; 81 Iowa 642; *milk*, 153 Mass. 159; 155 Mass. 442; 157 Mass. 460; 159 Mass. 8; 160 Mass. 538; 12 N. Y. S. 828; 65 Hun 582; 123 N. Y. 70; 68 Hun 841; 85 Hun 71; 1 D. R. (Pa.) 51; *olive oil*, *Stat. Cal.* 1891, c. 47; and *vinegar*, *Laws Kans.* 1891, c. 1; *Laws Mo.* 1891, p. 218; *Act Pa.* 1891, June 11, P. L. 297; *Laws Wis.* 1891, c. 394; 40 N. E. Rep. (Ohio) 1001.

Adulterations of food, when wilful, are punishable by the laws of most countries. In Paris, malpractices connected with such adulteration are investigated by the Conseil de Salubrité, and punished. In Great Britain, numerous acts have been passed

for the prevention of adulterations; they are usually punished by a fine determined by a summary process before a magistrate. In Pennsylvania, the adulteration of articles of food and drink, and of drugs and medicines, is, by a statute of March 31, 1860, made a misdemeanor punishable by fine or imprisonment, or both.

ADULTERATOR (Lat.). A corrupter; a counterfeit.

Adulterator monetæ. A forger. *Du Cange*.

ADULTERINE. The issue of adulterous intercourse.

Those are not deemed adulterine who are begotten of a woman openly married through ignorance of a former wife being alive.

Adulterine children are regarded more unfavorably than the illegitimate offspring of single persons. The Roman law refused the title of natural children, and the canon law discouraged their admission to orders.

ADULTERINE GUILDS. Companies of traders acting as corporations, without charters, and paying a fine annually for the privilege of exercising their usurped privileges. *Smith, Wealth of Nat.* book 1, c. 10; *Wharton, Dict.* 2d Lond. ed.

ADULTERINUS (Lat.). Illicit; unlawful; illegitimate; spurious; false or forged.

ADULTERIUM. A fine imposed for the commission of adultery. *Barrington, Stat.* 62, n.

ADULTERY. The voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. *Bishop, Mar. & D.* § 415; 6 Metc. 248; 36 Me. 261; 11 Ga. 56; 2 Strobb. Eq. 174.

Unlawful voluntary sexual intercourse between two persons, one of whom at least is married, is the essence of the crime in all cases. In general, it is sufficient if either party is married; and the crime of the married party will be adultery, while that of the unmarried party will be fornication; 1 Yeates 6; 2 Dall. 124; 5 Jones N. C. 416; 37 Ala. n. s. 23; 35 Me. 235; 7 Gratt. 561; 6 id. 673; 33 A. 78. In Massachusetts, however, by statute, and some of the other states, if the woman be married, though the man be unmarried, he is guilty of adultery; 21 Pick. 509; 2 Blackf. 318; 18 Ga. 264; 9 N. H. 515; and see 1 Harr. N. J. 389; 29 Ala. 318. In Connecticut, and some other states, it seems that to constitute the offence of adultery it is necessary that the woman should be married; that if the man only is married, it is not the crime of adultery at common law or under the statute, so that an indictment for adultery could be sustained against either party; though within the meaning of the law respecting divorce it is adultery in the man. Cohabitation with a man after marriage is not adultery, unless the woman knows of such marriage; 90 Ala. 78; 83 id. 55; it is not necessary to prove omission on prosecution for adultery; 157 Mass. 416.

It is not, by itself, indictable at common law; 4 Bla. Com. 65; *Whart. Cr. Law* 1717; 5 Rand. 627, 634; but is left to the ecclesiastical courts for punishment. In the United States it is punishable by fine and imprisonment under various statutes, which generally define the offence.

Parties to the crime may be jointly indicted; 2 Metc. 190; or one may be convicted and punished before or without the conviction of the other; 5 Jones 416.

As to civil remedies, see *CRIM. CON.*

ADVANCE. To supply beforehand; to loan before the work is done or the goods made. 7 Otto 117.

To provide (support) for children, as before the distribution of an estate.

To raise the market value of, as to advance the price of goods. *Stand. Dict.*

ADVANCEMENT. A gift by anticipation from a parent to a child of the whole or a part of what it is supposed such child will inherit on the death of the parent. 6 Watts 87; 4 S. & R. 833; 17 Mass. 359; 11 Johns. 91; *Wright* 389; 83 Va. 859. The doctrine applies only to intestate estates, and it proceeds upon the natural presumption, in the absence of a will, that the conveyance is a gift in anticipation of the parent's death, and that he intended equality; but a subsequent disposal by will rebuts the presumption; 8 Del. Ch. 239, per Bates, Ch.

A gift to a husband by wife's father is considered an advancement to the wife; 83 Va. 352; but it is a question of fact, where

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decendent in his lifetime made a conveyance to his son-in-law; 65 Hun 625.

An advancement can only be made by a parent to a child; 5 Miss. 356; 2 Jones 137; Biph. Eq. 84; or in some states, by statute, to a grandchild; 4 Kent 419; 4 Watts 82; 4 Ves. 437.

The intention of the parent is to decide whether a gift is intended as an advancement; 23 Pa. 85; 11 Johns. 91; 2 McCord, Ch. 103. See 26 Vt. 665.

A mere gift is presumptively an advancement, but the contrary intention may be shown; 23 Ga. 574; 8 Ired. 121; 18 Ill. 167; 3 Jones 190; 3 Conn. 31; 6 *id.* 356; 1 Mass. 527; 82 Va. 352; 83 *id.* 643; 133 Ind. 294. The maintenance and education of a child, or the gift of money without a view to a portion or settlement in life, is not deemed an advancement; 5 Rich. Eq. 15; 23 Conn. 516. If security is taken for repayment, it is a debt and not an advancement; 21 Pa. 283; 29 *id.* 298; 23 Ga. 531; 22 Pick. 508; and see 17 Mass. 98, 359; 2 Harr. & G. 114. Payment of a son's debts will be considered an advancement; 85 Tenn. 430; or the payment by the father as surety of the notes of his son who had no estate; 92 Ky. 556.

No particular formality is requisite to indicate an advancement; Stat. 22 & 23 Car. II. c. 10; 1 Madd. Ch. Pr. 507; 4 Kent 418; 16 Vt. 197; unless a particular form of indicating such intention is prescribed by statute as requisite; 4 Kent 418; 1 Gray 587; 5 *id.* 341; 5 R. I. 255, 457.

Where a father divides his property equally between two sons, conveying to one his share, it is considered an advancement where no deed is delivered to the other; 73 Ia. 733.

The effect of an advancement is to reduce the distributive share of the child by the amount so received, estimating its value at the time of receipt; 1 S. & R. 422; 21 Mo. 347; 3 Yerg. 112; 5 Harr. & J. 459; 1 Wash. Va. 224; 3 Pick. 450; in some states the child has his option to retain the advancement and abandon his distributive share; 9 Dana 193; 4 Ala. N. S. 121; to abandon his advancement and receive his equal share of the estate; 12 Gratt. 33; 15 Ala. N. S. 85; 26 Miss. 592; 28 *id.* 674; 18 Ill. 167; but this privilege exists only in case of intestacy; 1 Hill, Ch. 10; 3 Yerg. 95; 8 Sandf. Ch. 520; 5 Paige, Ch. 450; 14 Ves. Ch. 338. See ADEPTION.

It is not chargeable with interest; 31 Pa. 337; until the settlement of the estate.

ADVANCES. Payments made to the owner of goods by a factor or agent, who has or is to have possession of the goods for the purpose of selling them.

An agent is entitled to reimburse himself from the proceeds of the goods, and has a lien on them for the amount paid; Liverm. Ag. 33; 19 Oreg. 35; and an action over for the balance, against his principal, if the sales are insufficient to cover the advances; 23 Pick. 40; 3 N. Y. 62; 12 N. H. 239; 2 Pars. Contr. 466; 2 Bouvier, Inst. n. 1340; 150 Pa. 481; 44 Fed. Rep. 845; but he must first exhaust the property in his hands; 27 Atl. Rep. (R. I.) 507. Where to save himself from loss the factor buys the goods himself, the consignee may elect whether he will ratify the sale or demand the value of the goods; 37 S. C. 402.

It also refers to a case where money is paid before, or in advance of, the proper time of payment; it may characterize a loan or a gift, or money advanced to be repaid conditionally; 10 Barb. 73; 51 *id.* 613; 97 U. S. 117.

ADVANTAGE. Held to be synonymous with "preference and priority." 1 Am. & Eng. Ency. 2nd ed., 786; 4 Wash. 451.

ADVENA (Lat. *venire*). In Roman law. One of foreign birth, who has left his own country and settled elsewhere, and who has not acquired citizenship in his new locality; often called *albanus*. Du Cange.

ADVENT. The period commencing on Sunday falling on St. Andrew's day (30th of November), or the nearest Sunday to it, and continuing till Christmas. Blount.

It took its name from the fact that it immediately preceded the day set apart to commemorate the birth or coming (advent) of Christ. Cowel; Termes de la Ley.

Formerly, during this period, "all contentions at law were omitted." But, by statute 13 Edw. I. (Westm. 2) c. 48, certain actions were allowed.

ADVENTITIOUS (Lat. *adventitius*). That which comes incidentally, or out of the regular course.

ADVENTITIUS (Lat.). Foreign; coming from an unusual source.

Adventitia bona are goods which fall to a man otherwise than by inheritance.

Adventitia dos is a dowry or portion given by some friend other than the parent.

ADVENTURE. Sending goods abroad under charge of a supercargo or other agent, which are to be disposed of to the best advantage for the benefit of the owners. The goods themselves so sent.

In Marine Insurance. It is used synonymously with "perils"; it is often used by writers to describe the enterprise or voyage as a "marine adventure" insured against; 14 Fed. Rep. 233.

ADVENTURER. One who adventures; one who engages in hazardous enterprises; one who seeks occasions for adventures, or is fond of taking risks. Worcester.

ADVERSE ENJOYMENT. The possession or exercise of an easement or privilege under a claim of right against the owner of the land out of which the easement is derived. 2 Washb. R. P. 42.

Such an enjoyment, if open, 4 M. & W. 500; 4 Ad. & E. 369, and continued uninterrupted, 9 Pick. 251; 8 Gray 441; 17 Wend. 564; 26 Me. 440; 20 Pa. 331; 2 N. H. 255; 9 *id.* 454; 2 Rich. 136; 11 Ad. & E. 788; 153 Pa. 294, for the term of twenty years, raises a conclusive presumption of a grant, provided that there was, during the time, some one in existence, in possession and occupation, who was not under disability to resist the use; 2 Washb. R. P. 48.

ADVERSE POSSESSION. The enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion or color of right on the part of the possessor. 3 East 394; 1 Pick. 466; 2 S. & R. 527; 3 Pa. 132; 8 Conn. 440; 2 Aik. Vt. 364; 9 Johns. 174; 18 *id.* 40, 355; 5 Pet. 402; 4 Bibb 550; 43 Ala. 643. The intention must be manifest; 86 N. Y. 348; 6 Metc. 360. There can be no adverse possession against a state; 84 Va. 701.

When such possession has been actual, 3 S. & R. 517; 7 *id.* 192; 2 Wash. C. C. 478, and has been adverse for twenty years, of which the jury are to judge from the circumstances, the law raises the presumption of a grant; Angell, Wat. Cour. 85, *et seq.* But this presumption arises only when the use or occupation would otherwise have been unlawful; 3 Me. 120; 6 Cow. 617, 677; 8 *id.* 589; 4 S. & R. 456. The statute does not run against the rights of a reversioner pending an intervening life estate; 37 Minn. 338; 86 Ky. 240; 37 W. Va. 634.

As to the history of the English doctrine of possessory title to real estate founded on prescription, see 4 Del. Ch. 643, per Bates, Ch.

Evidence of adverse possession must be strictly construed and every presumption is in favor of the actual owner; 73 Wis. 463.

The adverse possession must be "actual, continued, visible, notorious, distinct, and hostile;" 6 S. & R. 21; 69 Tex. 275; 84 Ky. 124; 149 Mass. 201; 95 Mich. 410; 150 U. S. 597. See note to Nepean v. Doe, 2 Sm. Lead. Cas. 597; Angell, Lim. 392, 393.

To make the possession of one tenant in common adverse, it must be with acts of exclusive ownership of an unequivocal character; 97 Mo. 426; 37 Minn. 338; 93 N. C. 307; 74 Ia. 359. One claiming by adverse possession cannot avail himself of the previous possession of another person

with whose title he is in no way connected; 71 Tex. 438; 70 *id.* 347; 38 Minn. 122.

In 55 Miss. 671 it is said that there must be a claim of ownership; but see 41 N. J. L. 527.

When both parties claim under the same title; as, if a man seised of certain land in fee have issue two sons, and die seised, and one of the sons enter by abatement into the land, the statute of limitations will not operate against the other son; for when the abator entered into the land of his father, before entry made by his brother, the law intends that he entered claiming as heir to his father, by which title the other son also claims; Co. Litt. s. 396.

There can be no adverse possession between husband and wife while the marital relation continues to exist; 37 Ala. 536; 61 Cal. 169; 70 Ga. 809; 53 Mich. 575.

When the possession of the one party is consistent with the title of the other; as, where the rents of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustee, such possession being consistent with and secured to the *cestui que trust* by the terms of the deed, the receipt was held not to be adverse to the title of the trustee; 8 East 248. See 69 Mo. 117. When trust property is taken possession of by a trustee, it is the possession of the *cestui que trust* and cannot be adverse until the trust is disavowed or denied, and this fact is brought to the knowledge of the *cestui que trust*; 126 Ill. 58.

When, in contemplation of law, the claimant has never been out of possession; as, where Paul devised lands to John and his heirs, and died, and John died, and afterwards the heirs of John and a stranger entered, and took the profits for twenty years; upon ejectment brought by the devisee of the heir of John against the stranger, it was held that the perception of the rents and profits by the stranger was not adverse to the devisee's title; for when two men are in possession, the law adjudges it to be the possession of him who has the right; 1 Id. Raym. 329;

When the occupier has acknowledged the claimant's title; as, if a lease be granted for a term, and after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse. See 1 B. & P. 542; 8 B. & C. 717; 2 Bouvier, Inst. n. 2193, 2194, 2351.

The title by adverse possession for such a period as is required by statute to bar an action, is a fee-simple title, and is as effective as any otherwise acquired; 17 Wash. L. Rep. 53.

An action for the recovery of lands in the District of Columbia is barred in twenty years, and a claim to ownership, and an open, visible, continuous, and exclusive possession for that period, gives title to the occupant; 144 U. S. 533, 548. When there has been a severance of the title to the surface and that to the minerals beneath it, adverse possession of the surface will not affect the title to the minerals; 170 Pa. 33; 172 Pa. 381.

ADVERTISEMENT (Lat. *advertere*, to turn to).

Information or knowledge communicated to individuals or the public in a manner designed to attract general attention.

A notice published either in handbills or in a newspaper.

The law in many instances requires parties to advertise in order to give notice of acts which are to be done; in these cases, the advertisement is in general equivalent to notice. But there are cases in which such notice is not sufficient, unless brought home to the actual knowledge of the party. Thus, notice of the dissolution of partnership by advertisement in a newspaper printed in the city or county where the business is carried on, although it is of itself notice to all persons who have had no previous dealings with the firm, yet it is not notice to those who have had such previous dealings; it must be shown that persons of the latter class have received actual notice; 4 Whart. 484. See 17 Wend. 526;

22 *id.* 183; Lind. Part. *222; 2 Ala. N. S. 502; 8 Humphr. 418; 3 Bingh. 2. It has been held that the printed conditions of a line of public coaches are sufficiently made known to passengers by being posted up at the place where they book their names; 8 W. & S. 373; 8 Esp. 271. An advertisement by a railroad corporation in a newspaper in the English language of a limitation of its liability for baggage is not notice to a passenger who does not understand English; 16 Pa. 68.

An ordinary advertising sheet is not a newspaper for the purpose of advertisement as required by law, and when notice is required to be published in two newspapers, English papers are presumed to be intended; 1 Pittsb. 225; the posting up of a page of a newspaper, containing a large number of separate advertisements, will not be considered a handbill; 1 Pittsb. 224.

When an advertisement contains the terms of sale, or description of the property to be sold, it will bind the seller; and if there be a material misrepresentation, it may avoid the contract, or at least entitle the purchaser to a compensation and reduction from the agreed price.

Advertisements published *bona fide* for the apprehension of a person suspected of crime, or for the prevention of fraud, are privileged. Thus, an advertisement of the loss of certain bills of exchange, supposed to have been embezzled, made in the belief that it was necessary either for the purposes of justice with a view to the discovery and conviction of the offender, or for the protection of the defendant himself against the liability to which he might be exposed on the bills, is privileged, if these were the defendant's only inducements; Heard, Lib. & Sland. § 181.

A sign-board, at a person's place of business, giving notice of lottery-tickets being for sale there, is an "advertisement"; and, if erected before the passage of a statute making the advertising of lottery-tickets penal, a continuance of it is within the statute; 5 Pick. 42.

The publication of summons is valid, although one of the days was a national holiday; 50 Minn. 457.

ADVERTISING. To publish notice of; to issue a written or printed account of. 1 A. & E. Ency., 2nd Ed., 892.

In Real Estate Law. In a contract to pay for the services of a real estate broker in "showing and advertising" land, the term "advertising" held to mean the publication of a notice in a newspaper, or otherwise, of the fact that the land is for sale. *Id.*, 38 Ill. App. 397.

ADVERTISING MATTER. Labels are not "advertising matter" within the meaning of the Statute requiring a corporation to print the word "incorporated" upon all advertising matter used by it. 96 S. W. 476.

ADVICE. Information given by letter by one merchant or banker to another in regard to some business transaction which concerns him. Chit. Bills 185.

ADVISARE, ADVISARI (Lat.). To advise; to consider; to be advised; to consult.

Occurring often in the phrase *curia advisari vult* (usually abbreviated *cur. adv. vult* or *C. A. V.*), the court wishes to consider of the matter. When a point of law requiring deliberation arose, the court, instead of giving an immediate decision, ordered a *cur. adv. vult* to be entered, and then, after consideration, gave a decision. Thus, from amongst numerous examples, in *Clement vs. Chivris*, 2 B. & C. 172, after the account of the argument we find *cur. adv. vult*; then, "on a subsequent day judgment was delivered," etc.

ADVISE. To give counsel, or recommend a plan or course; also, to give notice. Abbott.

The word "advise" as used in a statute relating to the duties of the city attorney, is used in its broad sense, and means that the city attorney shall be the legal adviser of the various city boards, and is not entitled to extra compensation therefor. 149 Ky. 674, 149 S. W. 985.

The words encourage, aid or abet, counsel, "advise" or assist may be, and frequently are, used to describe the offense of a person who, not actually doing the felonious act, by his will contributed to or procured it done. 90 Ky. 651, 14 S. W. 685; 95 Ky. 361, 25 S. W. 596.

ADVISEDLY. Soberly; heedfully; deliberately. Worcester. With forethought or advice; not hastily. Stand. Dict.

ADVICEMENT. Consideration; deliberation; consultation.

ADVISORY. Having power to advise, as an advisory board; containing counsel or a suggestion, but not mandatory or conclusive, as an advisory opinion. Stand. Dict.; 101 U. S. 252.

ADVOCATE. An assistant; adviser; a pleader of causes.

Derived from *advocare*, to summon to one's assistance; *advocatus* originally signified an assistant or helper of any kind, even an accomplice in the commission of a crime; Cicero, *Pro Cæcina*, c. 8; Livy, lib. ii. 55; iii. 47; Tertullian, *De Idolatr.* cap. xxiii.; Petron. *Satyr.* cap. xv. Secondly, it was applied to one called in to assist a party in the conduct of a suit; Inst. i. 11, d. 50, 18, *de eoz. cogn.* Hence, a pleader, which is its present signification.

In Scotch and Ecclesiastical Law. An officer of the court, learned in the law, who is engaged by a suitor to maintain or defend his cause. Advocates, like counsellors, have the exclusive privilege of addressing the court either orally or in written pleadings; and, in general, in regard to duties, liabilities, and privileges, the same rules apply *mutatis mutandis* to advocates as to counsellors. See COUNSELLOR.

In the English ecclesiastical and admiralty courts, advocates had the exclusive right of acting as counsel. They were incorporated (8 Geo. III.) under the title of "The College of Doctors of Law Exercent in the Ecclesiastical and Admiralty Courts." In 1857, on the creation of the new court of probate and matrimonial causes, this college was empowered to surrender its charter and sell its real estate.

In Scotland all barristers are called advocates.

Lord Advocate.—An officer in Scotland appointed by the crown, during pleasure, to take care of the king's interest before the courts of session, judiciary, and exchequer. All actions that concern the king's interest, civil or criminal, must be carried on with concurrence of the lord advocate. He also discharges the duties of public prosecutor, either in person or by one of his four deputies, who are called *advocates-depute*. Indictments for crimes must be in his name as accuser. He supervises the proceedings in important criminal cases, and has the right to appear in all such cases. He is, in fact, secretary of state for Scotland, and his principal duties are connected directly with the administration of the government.

Inferior courts have a *procurator fiscal*, who supplies before them the place of the lord advocate in criminal cases. See 2 Bankt. Inst. 492.

College or Faculty of Advocates.—A corporate body in Scotland, consisting of the members of the bar in Edinburgh. A large portion of its members are not active practitioners, however; 2 Bankt. Inst. 486.

Queen's Advocate.—A member of the College of Advocates, appointed by letters patent to advise the crown on questions of civil, canon, and ecclesiastical law. He takes precedence next after the solicitor general.

Church or Ecclesiastical Advocates.—Pleaders appointed by the church to maintain its rights.

In Ecclesiastical Law. A patron of a living; one who has the advowson, *advocatio*. Tech. Dict.; Ayliffe, Par. 53; Dane, Abr. c. 81, § 20; Erskine, Inst. 79, 9.

Those persons whom we now call patrons of churches, and who reserved to themselves and their heirs a license to present on any avoidance. The term originally belonged to the founders of churches and convents and their heirs, who were bound to protect their

churches as well as to nominate or present to them. But when the patrons grew negligent of their duty or were not of ability or interest in the courts of justice, then the religious began to retain law advocates, to solicit and prosecute their causes. Spelm.; Jacob, Law Dict.

A person admitted by the Archbishop of Canterbury to practise in the court of arches in the same manner as barrister in the common law courts. Rap. and Law. Law Dict.

ADVOCATI (Lat.). In Roman Law. Patrons; pleaders; speakers.

Originally the management of suits at law was undertaken by the *patronus* for his *cliens* as a matter of duty arising out of their reciprocal relation. Afterwards it became a profession, and the relation, though a peculiarly confidential one while it lasted, was but temporary, ending with the suit. The profession was governed by very stringent rules: a limited number only were enrolled and allowed to practise in the higher courts—one hundred and fifty before the *praefectus praetorio*; Dig. 8, 11; Code 2, 7; fifty before the *pref. aug. and dux Aegyptiacus* at Alexandria; Dig. 8, 13; etc., etc. The enrolled advocates were called *advocati ordinarii*. Those not enrolled were called *adv. supernumerarii* or *extraordinarii*, and were allowed to practise in the inferior courts; Dig. 8, 13. From their ranks vacancies in the list of *ordinarii* were filled; *Ibid.* The *ordinarii* were either *fiscales*, who were appointed by the crown for the management of suits in which the imperial treasury was concerned, and who received a salary from the state; or *privati* whose business was confined to private causes. The *advocati ordinarii* were bound to lend their aid to every one applying to them, unless a just ground existed for a refusal; and they could be compelled to undertake the cause of a needy party; 1, 7, C. 2, 6. The *supernumerarii* were not thus obliged, but, having once undertaken a cause, were bound to prosecute or defend it with diligence and fidelity.

The client must be defended against every person, even the emperor, though the *advocati fiscales* could not undertake a cause against the *fiscus* without a special permission; ll. 1 et 2, C. 2, 9; unless such cause was their own, or that of their parents, children, or ward; 1, 10, pr. C. 11, D. 3, 1.

An advocate must have been at least seventeen years of age; 1, 1, § 3, D. 3, 1; he must not be blind or deaf; 1, 1, § 8 et 5, D. 3, 1; he must be of good repute, not convicted of an infamous act; 1, 1, § 8, D. 3, 1; he could not be advocate and judge in the same cause; 1, 6, pr. C. 2, 6; he could not even be a judge in a suit in which he had been engaged as advocate; 1, 17, D. 2, 1; 1, 14, C. 1, 51; nor after being appointed judge could he practise as advocate even in another court; 1, 14, pr. C. 1, 51; nor could he be a witness in the cause in which he was acting as advocate; 1, ult. D. 22, 5; 23 Glück, Pand. p. 161, *et seq.*

He was bound to bestow the utmost care and attention upon the cause, *nihil studii reliquies, quod sibi possibile est*; 1, 14, § 1, C. 3, 1. He was liable to his client for damages caused in any way by his fault; 5 Glück, Pand. 110. If he had signed the *concepti*, he was responsible that it contained no matter punishable or improper; Boehmer, Cons. et Decis. t. ii. p. 1, resp. cviii. no. 5. He must clearly and correctly explain the law to his clients, and honestly warn them against transgression or neglect thereof. He must frankly inform them of the lawfulness or unlawfulness of their cause of action, and must be especially careful not to undertake a cause clearly unjust, or to let himself be used as an instrument of chicanery, malice, or other unlawful action; 1, 6, §§ 3, 4, C. 2, 6; 1, 13, § 9; 1, 14, § 1, C. 3, 1. In pleading, he must abstain from invectives against the judge, the opposite party or his advocate; 1, 6, § 1, C. 2, 6. Should it become necessary or advantageous to mention unpleasant truths, this must be done with the utmost forbearance, and in the most moderate language; 5 Glück,

Pand. 111. Conscientious honesty forbade his betraying secrets confided to him by his client or making any improper use of them; he should observe inviolable secrecy in respect to them; *ibid.*; he could not, therefore, be compelled to testify in regard to such secrets; 1. ult. D. 22, 5.

If he violated the above duties, he was liable, in addition to compensation for the damage thereby caused, to fine, or imprisonment, or suspension, or entire removal from practice, or to still severer punishment, particularly where he had been guilty of a *prævaricatio*, or betrayal of his trust for the benefit of the opposite party; 5 Glück, Pand. 111.

Compensation.—By the *lex Cincia*, A. U. C. 549, advocates were prohibited from receiving any reward for their services. In course of time this became obsolete. Claudius allowed it, and fixed ten thousand sesterces as the maximum fee. Trajan prohibited this fee, called *honorarium*, from being paid before the termination of the action. This, too, was disregarded, and prepayment had become lawful in the time of Justinian; 5 Glück, Pand. 117. The fee was regulated by law, unless the advocate had made a special agreement with his client, when the agreement fixed the amount. But a *pactum de quota litis*, i. e., an agreement to pay a contingent fee, was prohibited, under penalty of the advocate's forfeiting his privilege of practising; 1. 5, C. 2, 6. A *palmarium*, or conditional fee in addition to the lawful charge and depending upon his gaining the cause, was also prohibited; 5 Glück, Pand. 120 et seq. But an agreement to pay a *palmarium* might be enforced when it was not entered into till after the conclusion of the suit; 1. 1, § 12, D. 50, 13. The compensation of the advocate might also be in the way of an annual salary; 5 Glück, Pand. 122.

Remedy.—The advocate had the right to retain papers and instruments of his client until payment of his fee; 1. 26, Dig. 3, 2. Should this fail, he could apply for redress to the court where the cause was tried by petition, a formal action being unnecessary; 5 Glück, Pand. 122.

Anciently, any one who lent his aid to a friend, and who was supposed to be able in any way to influence a judge, was called *advocatus*.

Causidicus denoted a speaker or pleader merely; *advocatus* resembled more nearly a counsellor, or still more exactly, *causidicus* might be rendered *bar-ister*, and *advocatus* *attorney*, or *solicitor*, though the duties of an *advocatus* were much more extended than those of a modern attorney; Du Cange; Calvinus, Lex.

A witness.

ADVOCATI ECCLESIAE. Advocates of the church.

These were of two sorts: those retained as pleaders to argue the cases of the church and attend to its law-matters; and advocates, or patrons of the advowson; Cowel; Spelman, Gloss.

ADVOCATI FISCI. In Civil Law. Those chosen by the emperor to argue his cause whenever a question arose affecting his revenues. Calvinus, Lex.; 3 Bla. Com. 27.

ADVOCATIA. In Civil Law. The functions, duty, or privilege of an advocate. Du Cange, *Advocatia*.

ADVOCATION. In Scotch Law. The removal of a cause from an inferior to a superior court by virtue of a writ or warrant issuing from the superior court. See BILL OF ADVOCATION; LETTER OF ADVOCATION.

ADVOCATUS. A pleader; a narrator. Bracton, 412 a, 872 b.

ADVOWSON. A right of presentation to a church or benefice.

He who possesses this right is called the patron or advocate. When there is no patron, or he neglects to exercise his right within six months, it is called a *lapse*, and a title is given to the ordinary to collate to a church; when a presentation is made by one who has no right, it is called a *usurpation*.

Advowsons are of different kinds; as *advowson appendant*, when it depends upon a manor, etc.; *advowson in gross*, when it belongs to a person and not to a manor; *advowson presentative*, where the patron pre-

sents to the bishop; *advowson donative*, where the king or patron puts the clerk into possession without presentation; *advowson collative*, where the bishop himself is a patron; *advowson of the moiety of the church*, where there are two several patrons and two incumbents in the same church; a *moiety of advowson*, where two must join the presentation of one incumbent; *advowson of religious houses*, that which is vested in the person who founded such a house. 2 Bla. Com. 21; Mirehouse, *Advowsons*; Comyns, Dig. *Advowson, Quare Impedit*; Bacon, Abr. *Simony*; Burns, Eccl. Law. See 2 Poll. & Maitl. 185.

ADVOWTRY. In English Law. The crime committed by a woman who, having committed adultery, continued to live with the adulterer. Cowel; Termes de la Ley.

ÆDES (Lat.). In Civil Law. A dwelling; a house; a temple.

In the country everything upon the surface of the soil passed under the term *ædes*. Du Cange; Calvinus, Lex.

ÆDILE (Lat.). In Roman Law. An officer who attended to the repairs of the temples and other public buildings; the repairs and cleanliness of the streets; the care of the weights and measures; the providing for funerals and games; and regulating the prices of provisions. Ainsworth, Lex.; Smith, Lex.; Du Cange.

ÆDLITIUM EDICTUM (Lat.). In Roman Law. That provision by which the buyer of a diseased or imperfect slave, horse, or other animal was relieved at the expense of the vendor who had sold him as sound knowing him to be imperfect. Calvinus, Lex.

ÆEL (Norman). A grandfather. Spelled also *æeul*, *ayle*. Kelham.

ÆEQUITES. Equity, justice, reason. Named by Cicero as one of the sources of law. Hunter's Rom. L. (2nd ed.), 119.

ÆEQUUM ET BONUM. That which is equitable and just. The basis, in Roman law, of much of the *jus gentium*, and *jus naturale*. Hunter's Rom. L. (2nd ed.) 36. See *JUS NATURALE*.

ÆES ALIENUM (Lat.). In Civil Law. A debt.

Literally translated, the money of another; the civil law considering borrowed money as the property of another, as distinguished from *res sum*, one's own.

ÆESTIMATIO CAPITIS (Lat.). The value of a head. The price to be paid for taking the life of a human being.

King Athelstan declared, in an assembly held at Exeter, that mulcts were to be paid *per æestimationem capitia*. For a king's head (or life), 90,000 thuringe; for an archbishop's or prince's, 15,000; for a priest's or thane's, 2000; Leg. Hen. 1.

ÆETAS INFANTILIS PROXIMA (Lat.). The age next to infancy. Often written *ætas infantie proxima*. This lasted until the age of twelve years; 4 Bla. Com. 23. See AGE.

ÆETAS PUBERTATIS PROXIMA (Lat.). The age next to puberty. This lasted until the age of fourteen, in which there might or might not be criminal responsibility according to natural capacity or incapacity. Under twelve, an offender could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. 4 Bla. Com. ch. ii. See AGE.

ÆEFAIRE (Fr.). Law-suit. Wes. Fr. Eng. Dict.

ÆEFFECT. To have an effect upon; to lay hold of, to act upon, impress or influence. It is often used in the sense of acting injuriously upon persons and things. 93 U. S. 84.

ÆEFFECTIO. The making over, pawning, or mortgaging a thing to assure the payment of a sum of money, or the discharge of some other duty or service. Crabb, Techn. Dict.

ÆEFFECTIO. An affection of an organ, e. g., of the liver, ordinarily understood to mean some chronic disease of that organ. It is not, however, strictly a medical term, but a general expression, which, by itself, might include acute as well as chronic disease of the organ. In an insurance policy held to mean that the ordinary operations of the organ were seriously disturbed or its vital power materially weakened. 112 U. S. 257. See ILLNESS; DISEASE.

ÆEFFECTUS (Lat.). Movement of the mind; disposition; intention.

One of the causes for a challenge of a juror is *propter affectum*, on account of a suspicion of bias or favor; 3 Bla. Com. 363; Co. Litt. 158.

ÆEFFECTER. In English Law. To fix in amount; to liquidate.

To affect an amercement.—To establish the amount which one amerced in a court-leet should pay.

To affect an account.—To confirm it on oath in the exchequer. Cowel; Blount; Spelman.

ÆEFFECTORS. In Old English Law. Those appointed by a court-leet to mulct those punishable, not by a fixed fine, but by an arbitrary sum called amercement. Termes de la Ley; 4 Bla. Com. 373.

ÆEFFECTANCE (Lat. *affidare, ad, fidem, dare*, to pledge to).

A plighting of troth between man and woman. Littleton, § 39.

An agreement by which a man and woman promise each other that they will marry together. Pothier, *Traité du Mar.* n. 24. Marriage. Co. Litt. 34 a. See Dig. 23, 1, 1; Code, 5, 1, 4.

ÆEFFECTIANT. A deponent.

ÆEFFECTARE (Lat. *ad fidem dare*). To pledge one's faith or do fealty by making oath. Cowel.

Used of the mutual relation arising between landlord and tenant; 1 Washb. R. P. 19; 1 Bla. Com. 387; Termes de la Ley, *Fealty*. Affidavit is of kindred meaning.

ÆEFFECTATUS. One who is not a vassal, but who for the sake of protection has connected himself with one more powerful. Spelman, Gloss.; 2 Bla. Com. 46.

ÆEFFECTAVIT (Lat.). In Practice. A statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath or affirmation.

It differs from a deposition in this, that in the latter the opposite party has an opportunity to cross-examine the witness, whereas an affidavit is always taken *ex parte*; Gressley, Eq. Ev. 413; 8 Blatch. 456.

An affidavit includes the oath, and may show what facts the affiant swore to, and thus be available as an oath, although unavailable as an affidavit; 28 Wis. 460.

By general practice, affidavits are allowable to present evidence upon the hearing of a motion, although the motion may involve the very merits of the action; but they are not allowable to present evidence on the trial of an issue raised by the pleadings. Here the witnesses must be produced before the adverse party. They are generally required on all motions to open defaults or to grant delay in the proceedings and other applications by the defendant addressed to the favor of the court.

Formal parts.—An affidavit must intelligibly refer to the cause in which it is made. The strict rule of the common law is that it must contain the exact title of the cause. This, however, is not absolutely essential; 80 Ill. 307. If not entitled in the cause it cannot be considered in opposition to motion for preliminary injunction; 62 Fed. Rep. 124.

The place where the affidavit is taken must be stated, to show that it was taken within the officer's jurisdiction; 1 Barb. Ch. Pr. 601; if the officer fails to append to his signature to the jurat the name of the county for which he is appointed, if it already appears in the caption, it will not be defective; 94 Mich. 617. The deponent must sign the affidavit at the end; 11 Paige, Ch. 173. The jurat must be signed by the officer with the addition of his official title. In

the case of some officers the statutes conferring authority to take affidavits require also his seal to be affixed.

In the absence of a rule of court or statute requiring it, if affiant's name appears in an affidavit as the person who took the oath, the subscription to it by affiant is not necessary; 47 Minn. 405; or if his name is omitted in the body of the verification but it is properly signed, it is sufficient; 5 Misc. Rep. 219. If the notary fails to attach his seal to an affidavit of an assignee in insolvency, it is not void; 159 Mass. 193; if he omits to add his name in the jurat in affidavit for writ of certiorari, the court may permit it to be done *nunc pro tunc*; 58 N. W. Rep. (Wis.) 771; and if he omits to add his title it is not invalid; 143 Mass. 380.

In general, an affidavit must describe the deponent sufficiently to show that he is entitled to offer it; for example, that he is a party, or agent or attorney of a party, to the proceeding; 7 Hill 177; 4 Denio 71, 258; and this matter must be stated, not by way of recital or as mere description, but as an allegation in the affidavit; 3 N. Y. 41; 8 id. 158. See SUPPLEMENTAL AFFIDAVIT.

AFFIDAVIT OF DEFENCE. In Practice. A statement made in proper form that the defendant has a good ground of defence to the plaintiff's action upon the merits.

The statements required in such an affidavit vary considerably in the different states where they are required. In some, it must state a ground of defence; 1 Ashm. 4; Troub. & H. Pr. § 369; 138 Pa. 974; 137 id. 197; Br. Pr. 22-37; in others, a simple statement of belief that it exists is sufficient. Called also an affidavit of merits, as in Massachusetts. See as to its salutary effect, 30 Pa. 387; 1 Grant 190.

It must be made by the defendant, or some person in his behalf who possesses a knowledge of the facts; 1 Ashm. 4. In a suit against a corporation an affidavit of defence made by a mere stockholder should set out some reason why it is not made by an officer or director; 127 Pa. 164.

The effect of a failure to make such affidavit is, in a case requiring one, to default the defendant; 8 Watts 367. It was first established in Philadelphia by agreement of members of the bar; 3 Binn. 423; and afterwards by act of assembly. A law permitting judgment in default of such an affidavit is constitutional; 99 Mass. 104; 86 Pa. 225.

AFFIDAVIT TO HOLD TO BAIL. In Practice. An affidavit which is required in many cases before a person can be arrested.

Such an affidavit must contain a statement, clearly and certainly expressed, by some one acquainted with the fact, of an indebtedness from the defendant to the plaintiff, and must show a distinct cause of action; Selwyn, Pr. 105; 1 Chit. Pl. 165. See BAIL.

AFFILARE. To put on record; to file. 8 Coke 319; 2 M. & S. 202.

AFFILIATION. In French Law. A species of adoption which exists by custom in some parts of France.

The person affiliated succeeded equally with other heirs to the property acquired by the deceased to whom he had been affiliated, but not to that which he inherited.

In Ecclesiastical Law. A condition which prevented the superior from removing the person affiliated to another convent. Guyot, Répert.

AFFINES (Lat. *finis*.) In Civil Law. Connections by marriage, whether of the persons or their relatives. Calvinus, Lex.

From this word we have affinity, denoting relationship by marriage; 1 Bla. Com. 434.

The singular, *affinis*, is used in a variety of related significations—a boundary; Du Cange; a partner or sharer, *affinis culpa* (an aider or one who has knowledge of a crime); Calvinus, Lex.

AFFINITAS. In Civil Law. Affinity.

AFFINITAS AFFINITATIS. That connection between parties arising from marriage which is neither consanguinity nor affinity.

This term intends the connection between the kinsmen of the two persons married, as, for example, the husband's brother and the wife's sister; Erskine, Inst. 1. 6. 8.

AFFINITY. The connection existing, in consequence of marriage, between each of the married persons and the kindred of the other. 45 N. Y. Super. Ct. 84.

It is distinguished from consanguinity, which denotes relationship by blood. Affinity is the tie which exists between one of the spouses with the kindred of the other; thus, the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, etc., are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity.

A person cannot, by legal succession, receive an inheritance from a relation by affinity; neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of affinity are computed in the same way as those of consanguinity. See 1 Bla. Com. 435; Pothier, Traité du Mar. pt. 3, c. 3, art. 2; Inst. 1, 10, 6; Dig. 38, 10, 4, 3; 1 Phill. Eccl. 210; 5 Mart. La. 296.

AFFIRM (Lat. *affirmare*, to make firm; to establish).

To ratify or confirm a former law or judgment. Cowel.

Especially used of confirmations of the judgments of an inferior by an appellate tribunal.

To ratify or confirm a voidable act of the party.

To make a solemn religious asseveration in the nature of an oath. See AFFIRMATION.

AFFIRMANCE. The confirmation of a voidable act by the party acting, who is to be bound thereby.

The term is in accuracy to be distinguished from *ratification*, which is a recognition of the validity or binding force as against the party ratifying, of some act performed by another person; and from *confirmation*, which would seem to apply more properly to cases where a doubtful authority has been exercised by another in behalf of the person ratifying; but these distinctions are not generally observed with much care; 1 Pars. Contr. 248.

This term is also applied to the ratification, or upholding of a judgment of a lower court by an appellate court. A dismissal of an appeal for want of prosecution is not an affirmance; 14 N. Y. 60.

Express affirmance takes place where the party declares his determination of fulfilling the contract; Dudl. Ga. 208.

A mere acknowledgment that the debt existed, or that the contract was made, is not an affirmance; 10 N. H. 561; 2 Esp. 628; 1 Ball. 22; 9 Conn. 330; Hawks 535; 1 Pick. 203; Dudl. Ga. 208; but it must be a direct and express confirmation, and substantially (though it need not be in form) a promise to pay the debt or fulfill the contract; 8 Wend. 479; 4 Bay 57; 12 Conn. 560; 8 N. H. 574; 2 Hill 130; 19 Wend. 80; 1 Pars. Contr. 248; Bingham Int., 1st Am. ed. 69.

Implied affirmance arises from the acts of the party without any express declaration; 15 Mass. 220. See 10 N. H. 194; 11 S. & R. 305; 1 Pars. Contr. 243; Ans. Contr. 338; 1 Bla. Com. 466, n. 10.

AFFIRMANCE-DAY-GENERAL. In the English Court of Exchequer, is a day appointed by the judges of the common pleas, and barons of the exchequer, to be held a few days after the beginning of every term for the general affirmance or reversal of judgments. 2 Tidd, Pract. 1091.

AFFIRMANT. In Practice. One who makes affirmation instead of making oath that the evidence which he is about to give shall be the truth, as if he had been sworn.

He is liable to all the pains and penalty of perjury, if he shall be guilty of wilfully and maliciously violating his affirmation. See PERJURY.

AFFIRMATION. In Practice. A solemn religious asseveration in the nature of an oath. 1 Greenl. Ev. § 371.

Quakers, as a class, and other persons who have conscientious scruples against taking an oath, are allowed to make affirmation in any mode which they may declare to be binding upon their consciences, in confirmation of the truth of testimony which they are about to give; 1 Act. 21, 46; Cowp. 340, 350; 1 Leach Cr. Cas. 54; 1 Ry. & M. 7; 6 Mass. 232; 16 Pick. 153; Buller, N. P. 232; 1 Greenl. Ev. § 371. See oaths and affirmations in Great Britain and Ireland, etc., reviewed in 25 Law J. 109.

AFFIRMATIVE. That which establishes; that which asserts a thing to be

true.

It is a general rule of evidence that the affirmative of the issue must be proved; Buller, N. P. 298; Peake, Ev. 2. But when the law requires a person to do an act, and the neglect of it will render him guilty and punishable, the negative must be proved, because every man is presumed to do his duty, and in that case they who affirm he did not must prove it; Buller, N. P. 298; 1 Rolle 83; Comb. 57; 3 Bos. & P. 307.

AFFIRMATIVE PREGNANT. In Pleading. An affirmative allegation implying some negative in favor of the adverse party.

For example, if to an action of assumpsit, which is barred by the act of limitations in six years, the defendant pleads that he did not undertake, etc., within ten years, a replication that he did undertake, etc., within ten years would be an affirmative pregnant; since it would impliedly admit that the defendant had not promised within six years. Such a plea should be demurred to; Gould, Pl. c. 6, §§ 29, 37; Steph. Pl. 381; Lawes, Civ. Pl. 113; Bacon, Abr. Pleas (n. 6).

AFFIRMATIVE STATUTE. A statute in affirmative language; a statute directing some act to be done, or declaring what shall be done.

AFFIX. To attach, append, annex; fasten; join. Stand. Dict. See FIXTURES, for chattels affixed to real estate.

AFFORCE THE ASSIZE. To compel unanimity among the jurors who disagree.

It was done either by confining them without meat and drink, or, more anciently, by adding other jurors to the panel, to a limited extent, securing the concurrence of twelve in a verdict. See Bracton, 185 b, 292 a; Fleta, book 4, c. 9, § 2.

The practice is now discontinued.

AFFRANCHISE. To make free.

AFFRAY. In Criminal Law: The fighting of two more persons in some public place to the terror of the people.

It differs from a riot in not being premeditated; for if any persons meet together upon any lawful or innocent occasion, and happen on a sudden to engage in fighting, they are not guilty of a riot, but an affray only; and in that case none are guilty except those actually engaged in it; Hawk. Pl. Cr. book 1, c. 65, § 3; 4 Bla. Com. 146; 1 Russell, Cr. 271; 2 Bish. Cr. L. 1150.

Fighting in a private place is only an assault; 1 C. M. & R. 757; 1 Cox, Cr. Cas. 177; it must be in a public place and the indictment need not describe it; 83 N. C. 649; 20 Tex. 431; 8 Humph. 84.

AFFRECTAMENTUM (Fr. *fret*). Affreightment.

The word *fret* means tons, according to Cowel. *Affreightmentum* was sometimes used. Du Cange.

AFFREIGHTMENT. The contract by which a vessel, or the use of it, is let out to hire. See FREIGHT; GENERAL SHIP.

AFORESAID. Before mentioned; already spoken of or described.

Whenever in any instrument a person has once been described, all future references may be made by giving his name merely and adding the term "aforesaid" for the purpose of identification. The same rule holds good also as to the mention of places or specific things described, and generally as to any description once given which it is desirable to refer to.

Where a place is once particularly described in the body of the indictment, it is sufficient afterwards to name such place, and to refer to the venue by adding the word "aforesaid," without repeating the whole description of the venue; 1 Gabbett, Cr. Law 212; 5 Term 616.

AFORETHOUGHT. In Criminal Law. Premeditated; prepense.

The length of time during which the accused has entertained the thought of committing the offence is not very material, provided he has in fact entertained such

thought; he is thereby rendered criminal in a greater degree than if he had committed the offence without premeditation. See *MALICE AFORETHOUGHT*; *PREMEDITATION*; 2 Chit. Cr. Law, 785; 4 Bla. Com. 199; Post. Cr. Cas. 132, 291, 292; Cro. Car. 131; Palm. 545; W. Jones, 198; 4 Dall. 146; 25 Ark. 446; 2 Mason 91.

AFTER. Behind, following, subsequent to an event or date.

There is no invariable sense, however, to be attached to the word, but like "from," "succeeding," "subsequent," and similar words, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations and is used in different senses, as it will in the particular case effectuate the intention of the parties. Its true meaning must be collected from its context and subject-matter in any particular case; 18 Conn. 27.

Further off; exclusive of; subject to. *Anderson*; Where time is to be computed "after" a day that day is excluded. *Id.*; 2 Wall. (U. S.) 190. In the devise to A, "after" providing for B—subject to, after taking out, deducting or appropriating. *Id.*; 9 Pet. 470. Does not necessarily refer to time; may refer to order in point of right or enjoyment. "After settling my estate" is equivalent to "subject to the settlement." *Id.*; 11 Pick. 378. See *From*.

AFTERMATH. The second crop of grass.

A right to have the last crop of grass or pasture. 1 Chit. Prac. 181.

AFTERNOON. Subsequent to or following noon or midday; generally used of the earlier part of that time as distinguished from evening. 1 A. & E. (2nd ed.) 924.

The word has two senses. It may mean from noon to midnight, or it may mean the earlier part of that time as distinguished from evening. *Id.*; 2 El. & Bl. 447.

AGAINST. In opposition to; opposed; contrary to; adversely to. *Anderson*. The particular meaning of the word "against" depends, to a very considerable extent, on the connection in and the purposes for which it is used. 1 Am. & Eng. Ency. 2nd ed., 925; 54 Ind. 63. To testify against does not mean on opposite sides of the suit, but as having opposite interests in the suit. *Id.*; 32 W. Va. 124.

AGAINST THE FORM OF THE STATUTE. Technical words which must be used in framing an indictment for a breach of the statute prohibiting the act complained of.

The Latin phrase is *contra formam statuti*.

AGAINST THE WILL. Technical words which must be used in framing an indictment for robbery from the person. 1 Chit. Cr. Law 244.

In the statute of 13 Edw. I. (Westm. 2d) c. 34, the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing *against her will*. Per *Tindal*, C. J., and *Parke*, B., in the addenda to 1 Den. Cr. Cas. 1. And in England this statute definition was adopted by all the judges; Bell, Cr. Cas. 63, 71.

AGARD. Award. *Burrill*; *Dict.*

AGE. That period of life at which the law allows persons to do acts or discharge functions which for want of years they were prohibited from doing or undertaking before.

The full age of twenty-one years is held to be completed on the day preceding the twenty-first anniversary of birth; 1 Bla. Com. 464; 1 Kebl. 589; 1 Salk. 44; 1 Ld. Raym. 84; 3 Harr. Del. 537; 4 Dana 597; 6 Ind. 447.

Males, before fourteen, are said not to be of discretion; at that age they may consent to marriage and choose a guardian. Twenty-one years is full age for all private purposes, and they may then exercise their rights as citizens by voting for public officers, and are eligible to all offices, unless otherwise provided for by law.

Females, at twelve, arrive at years of discretion, and may consent to marriage; at fourteen, they may choose a guardian; and twenty-one, as in males, is full age, when they may exercise all the rights which belong to their sex. The age of puberty for both sexes is fourteen.

As to the age of consent in prosecution for rape, see *RAPE*.

In the United States, at twenty-five, a man may be elected a representative in congress; at thirty, a senator; and at thirty-five, he may be chosen president. He is liable to serve in the militia from eighteen to forty-five inclusive, unless exempted for some particular reason. In England no one can be chosen member of parliament till he has attained twenty-one years; nor be ordained a priest under the age of twenty-four; nor made a bishop till he has completed his thirtieth year. The age of serving in the militia is from sixteen to forty-five years. The law, according to Blackstone, recognizes no minority in the heir to the throne.

In Roman Law. A person must have attained the age of forty to be a member of the legislative body; twenty-five to be a judge of a tribunal *de premiere instance*; twenty-seven, to be its president, or to be judge or clerk of a *cour royale*; thirty, to be its president or *procureur-général*; twenty-five, to be a justice of the peace; thirty, to be judge of a tribunal of commerce, and thirty-five, to be its president; twenty-five, to be a notary public; twenty-one, to be a testamentary witness; thirty, to be a juror. At sixteen, a minor may devise one-half of his property as if he were a major. A male cannot contract marriage till after the eighteenth year, nor a female before full fifteen years. At twenty-one, both males and females are capable to perform all the acts of civil life; *Touillier*, *Droit Civ.* liv. 1, Intr. n. 188.

In Roman Law. Infancy (*infantia*) extended to the age of seven; the period of childhood (*puertitia*), which extended from seven to fourteen, was divided into two periods; the first, extending from seven to ten and a half, was called the period nearest childhood (*ætas infantie proxima*); the other, from ten and a half to fourteen, the period nearest puberty (*ætas pubertati proxima*); puberty (*pubertas*) extended from fourteen to eighteen; full puberty extended from eighteen to twenty-five; at twenty-five, the person was *major*. See *Taylor*, *Civ. Law* 254; *Leçon El. du Droit Civ.* 22.

AGE-PRAYER. A statement made in a real action to which an infant is a party, of the fact of infancy and a request that the proceedings may be stayed until the infant becomes of age.

It is now abolished; stat. 11 Geo. IV.; 1 Will. IV. c. 37, § 10; 1 Lilly, Reg. 54; 3 Bla. Com. 300.

AGENCY. A relation between two or more persons, by which one party, usually called the agent or attorney, is authorized to do certain acts for, or in relation to the rights or property of, the other, who is denominated the principal, constituent, or employer. Prof. Joel Parker, *MS. Lect.* 1851.

A contract by which one person, with greater or less discretionary power, undertakes to represent another in certain business relations. *Whart.* Ag. 1.

The right on the part of the agent to act, is termed his authority or power. In some instances the authority or power must be exercised in the name of the principal, and the act done is for his benefit alone. In others, it may be executed in the name of the agent, and if the power is coupled with an interest on the part of the agent, it may be executed for his own benefit; Prof. Joel Parker, *Harvard Law School Lect.* 1853.

The creation of the agency, when express, may be either by deed, in writing not by deed, or by a verbal delegation of authority; 2 Kent 612; 9 Ves. 250; 11 Mass. 27, 97, 388; 1 Binn. 450; 4 Johns. C. 667.

When the agency is not express, it may be inferred from the relation of the parties and the nature of the employment, without proof of any express appointment; 2 Kent

618; 15 East 400; 1 Wash. Va. 19; 5 Day 556. Where relations exist which will constitute agency, it will be such whether the parties understand it to be or not; 72 Tex. 115. The admissions of a supposed agent cannot prove the existence of the agency; 23 Ill. App. 116; 48 *id.* 659; 35 Kan. 391; 70 Hun 568; 51 Minn. 141; 116 Mo. 51.

In most of the ordinary transactions of business the agency is either conferred verbally, or is implied from circumstances. But where the act is required to be done in the name of the principal by deed, the authority to the agent must also be by deed, unless the principal be present and verbally or impliedly authorize the agent to fix his name to the deed; 1 Liverm. Ag. 35; *Paley*, Ag. 157; *Story*, Ag. § 49, 51; 5 Binn. 613; 1 Wend. 424; 9 *id.* 54, 68; 13 *id.* 525; 14 S. & R. 331.

The authority may be *general*, when it extends to all acts connected with a particular business or employment; or *special*, when it is confined to a single act; *Story*, Ag. § 17; *Mech.* Ag. 284, 285; 21 Wend. 279; 9 N. H. 263; 3 Blackf. 436; 82 Cal. 1. If the powers are special, they form the limits of the authority; if general, they will be more liberally construed, according to the necessities of the occasion and the course of the transaction.

The agency must be antecedently given, or subsequently adopted; and in the latter case there must be an act of recognition, or an acquiescence in the act of the agent from which a recognition may be fairly implied; 2 Kent 614. If, with full knowledge of what the agent has done, the principal ratify the act, the ratification will be equivalent to an original authority,—according to the maxim, *omnis rati habitio retrotrahitur et mandato æquiparatur*; *Paley*, Ag. 172; 4 Ex. 798. The ratification relates back to the original making of the contract; 31 L. J. Ex. 163; 67 Fed. Rep. 973; except as to intermediate vested rights; 4 Ct. Cl. 511; 49 Ill. 59; 43 Mo. 113; 12 Minn. 255. It must be ratified in its entirety; 31 N. Y. 611; 1 Oreg. 115; 45 Ga. 153; 27 Mo. 163; 31 Iowa 547; 24 Neb. 653; 15 So. Rep. (La.) 16; and subject to the charges imposed by the agent; 9 H. L. C. 391. If the principal accepts the benefit of a contract, he is responsible for the fraudulent representations of the agent, although made without authority; 85 Tenn. 139; 40 Minn. 476; 78 Cal. 490; 157 Mass. 248; 65 Hun 182; 144 Pa. 398. An intention to ratify may be presumed from the silence of the principal who has received a letter from the agent informing him of what has been done on his account; 12 Wall. 358; 2 Biss. 255; 105 Mass. 551; 49 Pa. 457; 69 *id.* 426; 21 Mich. 374; 37 Ill. 442; 26 Iowa 88; 27 Tex. 120; 13 Colo. 69; or from any acts inconsistent with a contrary presumption; 26 Me. 84; 69 Pa. 426; 59 Ill. 23; 12 Kan. 135; or from a suit by the principal; 56 Me. 564; 21 Ark. 539; 28 Ill. 135; 9 B. & C. 59; 12 Wall. 681; 12 Johns. 300; 3 Cow. N. Y. 281; 4 Wash. C. C. 549; 14 S. & R. 80; or by adoption of a submission to arbitration, although the agent exceeded his authority; 57 Conn. 105; or by keeping and enforcing a mortgage, obtained by an agent for the release of another mortgage; 63 Mich. 599. Ratification can only take place where the agent professed to act for the person ratifying; 5 B. & C. 909; *Leake*, Cont. 470. Thus a forged signature to a note cannot be ratified; L. R. 6 Ex. 89; *contra*, 46 Me. 176; 32 Ill. 387; 33 Conn. 95; 42 Pa. 143; *Whart.* Ag. § 71. A principal cannot ratify the acts of his agent where he has no knowledge of such acts; 71 Md. 200; 76 Ia. 129. The acts of the agent must be disapproved within a reasonable time after notice, or the principal will be considered as having ratified them by his silence; 45 La. Ann. 847.

The business of the agency may concern either the property of the principal, of a third person, of the principal and a third person, or of the principal and the agent, but must not relate solely to the business of the agent. A contract in relation to an illegal or immoral transaction cannot be the foundation of a legal agency; 1 Liverm.

Ag. § 6. 14.

The termination of the agency may be by a countermand of authority on the part of the principal, at the mere will of the principal; and this countermand may, in general, be effected at any time before the contract is completed; Story, Ag. §§ 463, 465; 53 Pa. 256; 46 *id.* 426; Whart. Ag. § 94; 141 U. S. 627; even though in terms irrevocable, provided there is no valid consideration, and the agent has not an interest in the execution of the authority entrusted to him; Story, Ag. §§ 476, 477; but when a contract has been made with contingent compensation for agency it cannot be revoked; 118 N. Y. 586. But when the authority or power is coupled with an interest, or when it is given for a valuable consideration, or when it is a part of a security, then, unless there is an express stipulation that it shall be revocable, it cannot be revoked; Story, Ag. §§ 476, 477; 2 Kent 643, 644; 8 Wheat. 174; 10 Paige 205; 34 N. Y. 24; 53 Pa. 212; 3 Const. 62; 2 Mas. C. C. 244, 342; 35 Fed. Rep. 22. When the authority has been partially executed by the agent, if it admit of severance, or of being revoked as to the part which is unexecuted, it may be revoked as to that part; but if it be not thus severable, and the agent by its execution in part will sustain damage, it cannot be revoked as to the unexecuted part unless the agent be fully indemnified; Story, Ag. § 466. This revocation may be by a formal declaration publicly made known, by an informal writing, or by parol; or it may be implied from circumstances, as, if another person be appointed to do the same act; Story, Ag. § 474; 5 Binn. 305; 6 Pick. 198. See 11 Allen 208. It takes effect from the time it is made known, and not before, both as regards the agent and third persons; Story, Ag. § 470; 2 Kent 644; Poll. Contr. 93; 11 N. H. 397; 7 Ct. of Cl. 535; 44 Ill. 114; 35 Vt. 179; 95 U. S. 48; 38 Conn. 197. When one is not notified of revocation of agent's authority, he is justified in acting upon the presumption of its continuance; 128 U. S. 374; 75 Cal. 159; 82 Va. 712.

The determination may be by the renunciation of the agent either before or after a part of the authority is executed; Story, Ag. § 478; it should be observed, however, that if the renunciation be made after the authority has been partly executed, the agent by renouncing it becomes liable for the damages which may thereby be sustained by his principal; Story, Ag. § 478; Jones, Bailm. 101; 4 Johns. 84; or by operation of law, in various ways. And the agency may terminate by the expiration of the period during which it was to exist and to have effect; as, if an agency be created to endure a year, or until the happening of a contingency, it becomes extinct at the end of the year, or on the happening of the contingency; Story, Ag. § 480.

The determination may result from the marriage of a principal, if a *feme sole*; 46 Mo. App. 1; the insanity of the principal; 10 N. H. 156; 8 Wheat. 174; *bankruptcy*; Story, Ag. § 482; 16 East 382; Baldw. C. C. 58; or death; 75 Cal. 349; Story, Bailm. § 209; 2 Kent 645. In England and most of the United States this revocation is instantaneous, even as to third parties without notice; L. R. 4 C. P. 744; 84 Ill. 286; 10 M. & W. 1; 5 Pet. 319; 12 N. H. 145; 25 Ind. 182; 2 Humph. 350; 31 Ala. 274; 29 Tex. 204; 28 Cal. 645; 17 Iowa 78; 9 Wend. 452. No notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent has entered with third persons, who are ignorant of principal's death; 113 N. Y. 600; 64 Hun 194; if an order is sent by mail the day before principal died and is filled in ignorance of the death, the contract is binding as of the date on which the order was mailed; 93 Ala. 173; but notice is necessary in Pennsylvania, Missouri, and, in some cases, in Ohio; 4 W. & S. 282; 26 Mo. 313; 8 Ohio St. 520; and under the civil law; Whart. Ag. § 101; but not when the authority is coupled with an interest; 53 Pa. 266; 4 Campb. 325; 8 Wheat. 174; 10 Paige 201; see 4 Pet. 332; or from the insanity; Story,

Ag. § 487; *bankruptcy*; 5 B. & Ald. 27, 81; or death of the agent; 2 Kent 643; though not necessarily by marriage or bankruptcy; Story, Ag. §§ 485, 486; 12 Mod. 383; 3 Burr. 1469, 1471; from the extinction of the subject-matter of the agency, or of the principal's power over it, or by the complete execution of the trust; Story, Ag. 499.

As to revocation by lunacy of principal, see 4 Q. B. D. 661; s. c. 19 Am L. Reg. 106, with Judge Bennett's note reviewing cases. As to revocation by death of principal, see *id.* 401.

See AGENT.

AGENCY, COMMERCIAL. See MERCANTILE AGENCY.

AGENCY, MERCANTILE. See MERCANTILE AGENCY.

AGENTS (Lat. *agere*, to do; to conduct). A conductor or manager of affairs.

Distinguished from *factor*, a workman.

A plaintiff. Fleta, lib. 4, c. 15, § 8.

AGENT (Lat. *agens*; from *agere*, to do).

One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it; 1 Livermore, Ag. 67; 2 Bouvier, Inst. 3. See Co. Litt. 207; 1 B. & P. 816.

The term is one of a very wide application, and includes a great many classes of persons to which distinctive appellations are given; as, factors, brokers, attorneys, cashiers of banks, auctioneers, clerks, supercargoes, consignees, ships' husbands, masters of ships, and the like. The terms agent and attorney are often used synonymously. Thus, a letter or power of attorney is constantly spoken of as the formal instrument by which an agency is created; Paley, Ag. Dunl. ed. 1, n.

Who may be.

Many persons disqualified from acting for themselves, such as infants (117 Mass. 479; 1 A. K. Marsh. 460), persons attainted or outlawed, aliens (19 La. Ann. 482; see 18 Wall. 106; 42 N. Y. 54; 62 Ill. 61), slaves, and others, could act as agents in the execution of a naked authority; Whart. Ag. § 14; Mechem, Ag. § 57; 45 Ala. 656; 1 Hill S. C. 270; Co. Litt. 252 a; Story, Ag. § 4. A *feme covert* may be the agent of her husband, and as such, with his consent, bind him by her contract or other act; 47 Ala. 624; 16 Vt. 633; 3 Head 471; 64 Hun 88; 70 Ga. 385; 101 N. Y. 77; 78 Ala. 31; 58 Md. 528; but she cannot contract for the sale of his land without express authority; 141 Ill. 454; see 70 Pa. 181; and she may be the agent of another in a contract with her husband; Bacon, Abr. *Authority*, B; 6 N. H. 124; 3 Whart. 369; 16 Vt. 653; Story, Ag. § 7. But although she is in general competent to act as the agent of a third person; 7 Bingh. 565; 1 Esp. 142; 2 *id.* 511; 4 Wend. 465; 110 Mass. 97; 24 Miss. 121; 42 Barb. 194; it is not clear that she can do so when her husband expressly dissents, particularly when he may be rendered liable for her acts; Story, Ag. § 7. See 78 Ala. 31. The husband may be agent for the wife; 151 Mass. 11; 61 Hun 624; 87 Mich. 278; 94 *id.* 268; 3 Ind. App. 415; by virtue of his relations alone he has no implied power to act; 46 Ia. 696; 26 *id.* 297; 54 Miss. 700; or a son may be the agent of his father; 87 Mich. 629. Persons *non compos mentis* cannot be agents for others; Whart. Ag. § 15 (but see Ewell's Evans, Agency * 10; 4 Exch. 7; s. c. Ewell, Lead. Cas. on Disabilities 614; as to cases when one deals with a lunatic, not knowing of his lunacy. See, also, 55 Ill. 63; 34 Ind. 181; 14 Barb. 488; 23 Iowa 433; 48 N. H. 133; 6 Gray 279; 23 Ark. 417; 24 Ind. 288; 38 N. J. L. 536; 4 Q. B. D. 661); nor can a person act as agent in a transaction where he has an adverse interest or employment; 2 Ves. Ch. 317; 11 Cl. & F. 714; 3 Beav. 783; 2 Campb. 203; 2 Chit. Bail. 205; 30 Me. 431; 24 Ala. n. s. 358; 8 Denio 575; 19 Barb. 595; 20 *id.* 470; 6 La. 407; 7 Watts 472; 113 Mass. 133; 40 Mich. 375; 87 Ohio St. 396; Mechem, Ag. § 66; and whenever the agent holds a fidu-

ciary relation, he cannot contract with the same general binding force with his principal as when such a relation does not exist; Story, Ag. § 9; 1 Story, Ec. Jur. §§ 308, 328; 4 M. & C. 134; 14 Ves. 290; 3 Sumn. 476; 2 Johns. Ch. 251; 11 Paige 588; 5 Me. 420; 6 Pick. 198; 4 Conn. 717; 10 Pet. 269.

Extent of authority.

The authority of the agent, unless the contrary clearly appears, is presumed to include all the necessary and usual means of executing it with effect; 5 Bingh. 442; 2 H. Bla. 618; 10 Wend. 218; 6 S. & R. 146; 11 Ill. 177; 9 Metc. 91; 22 Pick. 85; 15 Miss. 363; 9 Leigh Va. 387; 11 N. H. 424; 6 Ired. 252; 10 Ala. n. s. 386; 21 *id.* 488; 1 Ga. 418; 1 Sneed 497; 8 Humphr. 509; 15 Vt. 155; 2 McLean 543; 8 How. 441; 15 Conn. 347; 90 N. C. 101; 15 La. Ann. 247; 43 Mich. 364; 93 N. Y. 495; 87 Ind. 187. Where, however, the whole authority is conferred by a written instrument, its nature and extent must be ascertained from the instrument itself, and cannot be enlarged by parol evidence; 1 Taunt. 347; 5 B. & Ald. 204; 7 Rich. 45; 1 Pet. 264; 3 Cranch 415; 45 Mo. 528; 39 *id.* 228; and parol evidence cannot be used to contradict the writing; Bish. Cont. § 169.

Generally, in *private* agencies, when an authority is given by the principal; 7 N. H. 253; 1 Dougl. Mich. 119; 11 Ala. n. s. 755; 1 B. & P. 229; 3 Term 592; to two or more persons to do an act, and no several authority is given, all the agents must concur in doing it in order to bind the principal, though one die or refuse; 3 Pick. 232; 6 *id.* 198; 12 Mass. 185; 23 Wend. 324; 6 Johns. 39; 9 W. & S. 56; 10 Vt. 532; 12 N. H. 226; 1 Gratt. 226; 53 N. Y. 114; 57 Ill. 180; 25 Ia. 115; 11 Ala. 755; 10 Wis. 271.

The words jointly and severally, and jointly or severally, have been construed as authorizing all to act jointly, or each one to act separately, but not as authorizing any portion of the number to do the act jointly; Paley, Ag. Lloyd ed. 177, note; 5 B. & Ald. 628. But where the authority is so worded that it is apparent the principal intended to give power to either of them, and execution by a part will be valid; Co. Litt. 49 b; Dyer 62; 5 B. & Ald. 628; 25 Ia. 115; 53 N. Y. 114. And generally, in commercial transactions, each one of several agents possesses the whole power. For example, on a consignment of goods for sale to two factors (whether they are partners or not), each of them is understood to possess the whole power over the goods for the purposes of the consignment; 20 Pick. 59; 24 *id.* 13; see 53 N. Y. 114. In public agencies an authority executed by a majority will be sufficient; 1 Co. Litt. 181 b; Comyns, Dig. *Attorney*, c. 15; Bacon, Abr. *Authority*, C; 1 Term 592; 10 Wis. 271; 11 Ala. 755; 154 Mass. 277.

A mere agent cannot, generally, appoint a sub-agent, so as to render the latter directly responsible to the principal; 9 Co. 75; 2 M. & S. 298, 301; 1 Younge & J. 387; 4 Mass. 597; 12 *id.* 241; 1 Hill 501; 13 B. Monr. 400; 12 N. H. 226; 3 Story, 411; 72 Pa. 491; 28 Wend. 425; 11 How. 209; 23 Tex. 163; 34 Miss. 63; 71 Wis. 292; 21 N. H. 149; 114 Mass. 631; 50 Ala. 347; but may when such is the usage of trade, or is understood by the parties to be the mode in which the particular business might be done; 9 Ves. 234; 1 M. & S. 484; 2 *id.* 301; 6 S. & R. 386; 1 Ala. n. s. 849; 9 Johns. Ch. 167; 51 N. Y. 117; 16 Mass. 396; 28 Tex. 163; 8 Bing. N. Cas. 814; or when necessity requires it; 1 Cush. 177; 1 Ala. 249; 8 Johns. Ch. 167; and also if agent is given all the powers the principal might have exercised; 87 Mich. 278; but not if the agency is of such a nature as to be personal to the agent; 88 Ala. 884; or if it requires special skill, discretion, or judgment; 12 Mass. 237; 1 Hill 501; 75 N. C. 534; 4 McLean 259.

Duties and liabilities.

The particular obligations of an agent vary according to the nature, terms, and end of his employment; Paley, Ag. § 8; 2 Ld. Raym. 517. He is bound to execute the orders of his principal whenever, for a valu-

able consideration, he has undertaken to perform them; 5 Cow. 128; 20 Wend. 321. When his authority is limited by instructions, it is his duty to adhere faithfully to those instructions; Paley, Ag. § 3, 4; 3 B. & P. 75; 5 *id.* 269; 3 Johns. Cas. 36; 1 Sandf. 111; 26 Penn. 394; 14 Pet. 494; 25 N. J. Eq. 203; 48 Ga. 128; 3 W. Va. 133; 31 Ill. 200; 37 Ill. App. 124; Mechem, Ag. § 473; but cases of extreme necessity and unforeseen emergency constitute exceptions to this rule; 1 Story 45; 4 Binn. 361; 5 Day 556; 26 Pa. 394; 4 Campb. 83; 13 Allen 363; 21 N. Y. 386; 45 Ill. 186; and where the agent is required to do an illegal or an immoral act; 6 C. Rob. Adm. 207; 7 Term 157; 11 Wheat. 258; 14 Johns. (N. Y.) 119; 57 Ind. 54; 6 Heisk. 45; he may violate his instructions with impunity; Story, Ag. §§ 193, 194, 195. If he have no specific instructions, he must follow the accustomed course of the business; 1 Gall. C. C. 360; 11 Mart. La. 636. Where parties carry on business in name of another, they are justified in employing an attorney to defend a suit in the name of such person; 38 Minn. 32. When the transaction may, with equal advantage to the principal, be done in two or more different ways, the agent may in general do it in either, provided a particular mode has not been prescribed to him; 1 Liverm. Ag. 103. He is to exercise the skill employed by persons of common capacity similarly engaged, and the same degree of diligence that persons of ordinary prudence are accustomed to use about their own affairs; 6 Taunt. 495; 10 Bingh. 57; 1 Johns. 364; 20 Pick. 167; 6 Metc. 13; 24 Vt. 149; 57 Mo. 93; 66 Ill. 136; 21 Wall. 178; 38 Miss. 242; 147 Pa. 523; 11 M. & W. 113; 27 N. H. 460; 89 N. Y. 535; 23 Me. 97; 69 Ill. 155. It is his duty to keep his principal informed of his doings, and to give him reasonable notice of whatever may be important to his interests; 5 M. & W. 527; 4 W. & S. 305; 1 Story 43, 56; 4 Rawle 229; 6 Whart. 9; 13 Mart. La. 214, 365. He is also bound to keep regular accounts, and to render his accounts to his principal at all reasonable times, without concealment or overcharge; 22 Tex. 708; 22 La. Ann. 599; 9 Iowa 589; 52 Ill. 512; 17 Mass. 145; 52 Ill. 512; 22 La. Ann. 599.

As to their principals, the liabilities of agents arise from a violation of duties and obligations to them by exceeding his authority, by misconduct, or by any negligence, omission, or act by the natural result or just consequence of which the principal sustains a loss; Paley, Ag. § 7, 71; 74 Mech. Ag. 454 *et seq.*; 1 B. & Ad. 415; 6 Hare 366; 12 Pick. 328; 20 *id.* 167; 11 Ohio 363; 13 Wend. 518; 125 Pa. 123; 27 N. H. 460; 105 Mass. 477; 89 N. Y. 535. And joint agents who have a common interest are liable for the misconduct and omissions of each other, in violation of their duty, although the business has, in fact, been wholly transacted by one with the knowledge of the principal, and it has been privately agreed between themselves that neither shall be liable for the acts or losses of the other; Paley, Ag. § 52, 53; 7 Taunt. 403; 3 Wils. 73; 51 N. Y. 373.

One undertaking to settle a debt for another cannot purchase it on his own account; 45 N. J. Eq. 306; and a sale by agent of principal's property to himself is void at the option of the principal; 84 Ky. 565; 77 Cal. 126; and a sale of land by agent to his wife is voidable; 128 Ill. 136.

An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission, and becomes indebted to his principal for any profit made by his breach of duty; 74 Fed. Rep. 94.

The degree of neglect which will make the agent responsible for damages varies according to the nature of the business and the relation in which he stands to his principal. The rule of the common law is, that where a person holds himself out as of a certain business, trade, or profession, and undertakes, whether gratuitously or otherwise, to perform an act which relates to

his particular employment, an omission of the skill which belongs to his situation or profession is imputable to him as a fraud upon his employer; Paley, Ag. Lloyd ed. 7, note 4. But where his employment does not necessarily imply skill in the business he has undertaken, and he is to have no compensation for what he does, he will not be liable to an action if he act *bona fide* and to the best of his ability; 1 Liverm. Ag. 336, 339, 340. See 11 M. & W. 113.

As to third parties, generally, when a person having full authority is known to act merely for another, his acts and contracts will be deemed those of the principal only, and the agent will incur no personal responsibility; Paley, Ag. § 368, 369; 2 Kent 629, 630; Poll. Contr. 94; 15 East 62; 3 P. Wms. 277; 6 Binn. 324; 13 Johns. 58, 77; 15 *id.* 1; 37 Fed. Rep. 852. But when an agent does an act without authority, or exceeds his authority, and the want of authority is unknown to the other party, the agent will be personally responsible to the person with whom he deals; Story, Ag. § 264; Mech. Ag. 542, 550; 2 Taunt. 385; 7 Wend. 315; 8 Mass. 178. In case the agent conducts the business in his own name, for the benefit and with the property of the principal, the latter cannot escape liability for the purchase price of goods by a secret limitation on the agent's authority to purchase; 124 Pa. 291; 19 Pitts. L. J. N. S. 425; 90 Mich. 125. If the agent having original authority contract in the name of his principal, and it happen that at the time of the contract, unknown to both parties, his authority was revoked by the death of the principal, the agent will not be personally responsible; Story, Ag. § 265 a; 10 M. & W. 1; but no notice of the death is necessary to relieve the estate of the principal from responsibility, those dealing with an agent assuming the risk that his authority may be terminated without notice to them; 113 N. Y. 600.

An agent will be liable on a contract made with him when he expressly, or by implication, incurs a personal responsibility; Story, Ag. §§ 156-159, 269; 85 Ala. 211; 21 Conn. 627; 8 M. & W. 834; 2 *id.* 440; as, if he make an express warranty of title, and the like; or if, though known to act as agent, he give or accept a draft in his own name; 5 Taunt. 74; 1 Mass. 27, 54; 2 Duer 260; 2 Conn. 453; 5 Whart. 288; 114 N. Y. 535; 81 Ga. 175; and public as well as private agents may, by a personal engagement, render themselves personally liable; Paley, Ag. § 381. If he makes a contract, signs a note, or accepts a draft as "agent," without disclosing his principal, he becomes personally liable unless the person with whom he is dealing has knowledge of the character and extent of the agency or the circumstances of the transaction are sufficient to inform him; 1 Am. L. C. 766, 767; 61 Pa. 69; 79 *id.* 298; 12 Colo. 161; 86 Ky. 590; 44 La. Ann. 209; 63 Law T. 765; 42 Ill. 238; 36 *id.* 82; 48 Ga. 96; 71 N. Y. 348; 139 Mass. 275; 9 Fed. Rep. 423. In general, although a person contract as agent, yet if there be no other responsible principal to whom resort can be had, he will be personally liable; as, if a man sign a note as "guardian of A. B.," an infant, in that case neither the infant nor his property will be liable, and the agent alone will be responsible; 2 Brod. & B. 460; 5 Mass. 299; 6 *id.* 58; 8 Cowen 81; 2 Wheat. 45; 84 N. C. 680; 5 East 147. The fact that a person may sue an agent in a contract made with him does not prevent suit from being brought against principal when he is discovered; 123 Pa. 95. The case of an agent of government, acting in that capacity for the public, is an exception to this rule, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation; it not being presumed that a public agent meant to bind himself individually; Paley, Ag. § 376, 377; and see 5 B. & Ald. 34; 1 Brown, Ch. 101; 6 Dowl. & R. 122; 7 Bingh. 110; 1 Cra. 345; 48 N. J. L. 22; 3 Dall. 384. Masters of ships, though known to contract for the owners of the ships and not for themselves, are liable for the contracts they make for repairs, unless they negative their

responsibility by the express terms of the contract; Paley, Ag. § 388; 15 Johns. 293; 16 *id.* 89; 11 Mass. 34. As a general rule, the agent of a person resident in a foreign country is personally liable upon all contracts made by him for his employer, whether he describe himself in the contract as agent or not, this being the usage of trade, and it being presumed that the credit was given to him and not to his principal; 15 East 68; 9 B. & C. 78; L. R. 9 Q. B. 572; 35 Md. 396; 15 East 62; 23 Wend. 244; 33 Me. 106; 5 W. & S. 9; 3 Hill, N. Y. 72; but this presumption may be rebutted by proof of a contrary agreement; 11 Ad. & E. 589, 594, 595; and does not apply to agents in a different state within the U. S.; 23 Ind. 63. An agent for a foreign principal now stands upon the same grounds as those acting for domestic employers; 38 La. Ann. 485; 109 Mass. 187; 23 How. 49; 14 Ad. & El. N. S. 405; L. R. 9 Q. B. 572.

An agent is personally responsible where money has been paid to him for the use of his principal under such circumstances that the party paying it becomes entitled to recall it. In such cases, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal *fresh credit* upon the faith of it, it may be recovered from the agent; Story, Ag. § 300; 3 M. & S. 344; 7 Johns. 179; 1 Wend. 173; and if, in receiving the money, the agent was a wrong-doer, he will not be exempted from liability by payment to his principal; Paley, Ag. § 393, 394; 1 Campb. 396. If his principal was not entitled to it, but the agent pays it to him after notice not to do so, the agent is liable therefor; 63 Hun 636.

With regard to the liability of agents to third persons for torts, there is a distinction between acts of misfeasance or positive wrongs, and nonfeasances or mere omissions of duty. In the former case, the agent is personally liable to third persons, although authorized by his principal; Story, Ag. § 311; Paley, Ag. § 396; 1 Wils. 323; 1 B. & P. 410; 28 Me. 464; 37 Minn. 120; 87 Ind. 549; 67 Barb. 47; 47 Mich. 569; 136 Mass. 229; 91 Ill. 297; but see 83 Ala. 333; while in the latter he is, in general, solely liable to his principal; Story, Ag. § 308; Paley, Ag. § 396, 397, 398; Story, Bailm. §§ 400, 404, 507; 34 La. Ann. 1123; 16 Fed. Rep. 87; 62 Me. 552.

A principal is liable civilly for the neglect, fraud, deceit, or other wrongful act of his general agent, though personally innocent of the fraud; 58 Mo. 380; 132 Mass. 335; 121 Ill. 140; 91 U. S. 45; 83 Mich. 315.

But this rule does not apply to special agents; 152 Mass. 112. If a special agent makes false representations on the subject of the transaction in order to influence the other party to enter into the contract, the principal is responsible for the deceit; 23 Wend. 260; Webb's note to Poll. Torts 393.

Where the principal receives and retains the benefit of a contract obtained through the fraud of his agent, he is liable to an action for deceit; *id.* 384; 63 Pa. 87.

For an independent fraud by an agent not within the scope of his agency, the principal is not responsible; Webb, Poll. Torts 684, citing 36 Barb. 655.

As to misrepresentations by an agent, the rules are thus given in Poll. Torts 384:

Where the principal knows the representation to be false and authorizes the making of it, he is clearly liable; the agent is liable or not according as he does or does not himself believe the representation to be true.

Where the principal knows the contrary of the representation to be true and it is made by the agent in the general course of his employment, but without specific authority, if the agent does not believe his representation to be true, he commits a fraud in the interest of the principal and the principal is liable; 6 M. & W. 373. If the agent does believe the representation to be true, an action would probably lie against the principal; though see 14 App. Ca. 337, s. c. 58 L. J. Ch. 864. In the latter class of cases there is no doubt that the other

contracting party may rescind; Poll. Torts 384.

The principal and agent are both liable where a tortious act was committed by the agent; 3 Ind. App. 491.

Where the sub-agents are appointed, if the agent has either express or implied authority to appoint a sub-agent, he will not ordinarily be responsible for the acts or omissions of the substitute; 2 B. & P. 488; 2 M. & S. 301; 1 Wash. C. C. 479; 8 Cow. 198 (but only for negligence in choosing the substitute; Whart. Negl. § 277; Mech. Ag. § 197); and this is especially true of public officers; 1 Ld. Raym. 646; Cowp. 754; 15 East 384; 7 Cra. 242; 9 Wheat. 720; 8 Wend. 403; 3 Hill 531; 22 N. H. 252; 18 Ohio 523; 1 Pick. 418; 4 Mass. 378; 8 Watts 455; but the sub-agent will himself be directly responsible to the principal for his own negligence or misconduct; Story, Ag. §§ 201, 217 a; 2 Gall. C. C. 565; 8 Cow. 198.

Rights and privileges.

As to his principal, an agent is ordinarily entitled to compensation for his services, commonly called a commission, which is regulated either by special agreement, by the usage of trade, or by the presumed intention of the parties; Story, Ag. §§ 324, 326; 8 Bingh. 65; 1 Caines 349; 2 id. 857; 36 Fed. Rep. 217; 38 Ill. 443. In general, he must have faithfully performed the whole service or duty before he can claim any commissions; Story, Ag. §§ 329, 331; 1 C. & P. 384; 4 id. 289; 7 Bingh. 99; 16 Ohio 412; 47 Fed. Rep. 361. The right to commissions accrues on orders for the sale of articles where there is absence of warranty as to responsibility of parties giving the orders, when they are accepted and the goods forwarded; 37 Fed. Rep. 760. See 3 Wash. St. 737. The right to commissions accrues where the agent has a purchaser who accepts property and is ready to perform a contract of sale, although the principal refuse to be bound by authority of agent; 147 Mass. 417; 44 Ill. App. 113. Also if vendor releases the purchaser from his obligation; 43 Ill. App. 21. He may forfeit his right to commissions by gross unskillfulness, by gross negligence, or gross misconduct, in the course of his agency; 3 Campb. 451; 7 Bingh. 569; 12 Pick. 328; as, by not keeping regular accounts; 8 Ves. 48; 11 id. 358; 17 Mass. 145; 2 Johns. Ch. 108; by violating his instructions; by willfully confounding his own property with that of his principal; 9 Beav. 284; 5 B. & P. 136; 11 Ohio 363; by fraudulently misapplying the funds of his principal; Chit. Com. L. 222; by embarking the property in illegal transactions; or by doing anything which amounts to a betrayal of his trust; 12 Pick. 328, 332, 334; 20 Gratt. 672; 21 Iowa 326; L. R. 9 Q. B. 490; 98 Mass. 348; 25 Conn. 886; 52 Ill. 512; 9 Kans. 320; 29 Cal. 142; 71 Pa. 206; 44 La. Ann. 888.

The agent has a right to be reimbursed his advances, expenses, and disbursements reasonably and in good faith incurred and paid, without any default on his part, in the course of the agency; 5 B. & C. 141; 3 Binn. 295; 11 Johns. 439; 4 Halst. Ch. 657; 127 N. Y. 151; 45 Ga. 501; 57 id. 362; 86 Pa. 120; 69 Ill. 575. And also to be paid interest on such advancements and disbursements whenever it may fairly be presumed to have been stipulated for, or to be due to him; 15 East 223; 3 Campb. 487; 7 Wend. 315; 3 Caines 226; 3 Binn. 295. But he cannot recover for advances and disbursements made in the prosecution of an illegal transaction, though sanctioned by or even undertaken at the request of his principal; Story, Ag. § 344; 3 B. & C. 639; 17 Johns. 142; and he may forfeit all remedy against his principal even for his advances and disbursements made in the course of legal transactions by his own gross negligence, fraud, or misconduct; 12 Wend. 362; 12 Pick. 328, 332; 20 id. 167; 65 Ind. 32; nor will he be entitled to be reimbursed his expenses after he has notice that his authority has been revoked; 2 Term 113; 8 id. 204; 3 Brown, Ch. 814.

The agent may enforce the payment of a debt due him from his principal on account of the agency, either by an action at law or by a bill in equity, according to the nature of the case; and he may also have the benefit of his claim by way of set-off to an action of his principal against him, provided the claim is not for uncertain damages, and is in other respects of such a nature as to be the subject of a set-off; Story, Ag. §§ 350, 385; 4 Burr 2133; 6 Cow. 181; 11 Pick. 482. He may recover actual damages sustained in an action brought at the end of the term for breach of contract; 61 N. Y. 362; 78 id. 192; 78 Ind. 422; 15 Ad. & El. N. s. 576; 44 Ohio St. 226. He has also a lien for all his necessary commissions, expenditures, advances, and services in and about the property entrusted to his agency, which right is in many respects analogous to the right of set-off; Story, Ag. § 373; Mech. Ag. 1032; 40 N. H. 88, 511; 67 Ill. 139; 8 Iowa 211; 30 Miss. 578; but it is only a particular lien; 9 Cush. 215; 8 Engl. (Ark.) 437; 8 H. L. Cas. 838; 22 Me. 138; 42 id. 50; 8 Iowa 207; 30 Mo. 581; 86 Pa. 486. Factors have a general lien upon the goods of their principal in their possession, and upon the price of such as have been lawfully sold by them, and the securities given therefor; 2 Kent 640; 26 Wend. 387; 10 Paige, Ch. 205; 60 Wis. 406; 37 Conn. 378; 2 McLean 145; 8 How. 384; 52 Ill. 307; 63 N. Y. 598. There are other cases in which a general lien exists in regard to particular classes of agents, either from usage, from a special agreement of the parties, or from the peculiar habit of dealing between them: such, for example, as insurance brokers, bankers, common carriers, attorneys-at-law, and solicitors in equity, packers, calico-printers, fullers, dyers, and wharfingers; Story, Ag. §§ 379-384. See LIEN.

As to third persons, in general, a mere agent who has no beneficial interest in a contract which he has made on behalf of his principal cannot support an action thereon; 1 Liverm. Ag. 215; 22 Pa. 522. An agent acquires a right to maintain an action upon a contract against third persons in the following cases: *First*, when the contract is in writing, and made expressly with the agent, and imports to be a contract personally with him; as, for example, when a promissory note is given to the agent, as such, for the benefit of the principal, and the promise is to pay the money to the agent *eo nomine*; in such case the agent is the legal plaintiff, and alone can bring an action; Story, Ag. §§ 393, 394, 396; 5 Pick. 322; 16 id. 381; 5 Vt. 500; Dicey, Parties 134; 5 Pa. 520; 27 id. 97; 13 Gray 64; 8 Conn. 60; 99 Mass. 378; 121 U. S. 451; 105 N. Y. 653; L. R. 6 Q. B. 361; and it has been held that the right of the agent in such case to sue in his own name is not confined to an express contract; thus, it has been said that one holding, as mere agent, a bill of exchange, or promissory note, indorsed in blank, or a check or note payable to bearer, may yet sue on it in his own name; Paley, Ag. Dunl. ed. 361, note; 30 Ala. 482; 39 Me. 205; 9 Ind. 260; 8 Mass. 103. *Second*, the agent may maintain an action against third persons on contracts made with them, whenever he is the only known and ostensible principal, and consequently, in contemplation of law, the real contracting party; Russ. Fact. & B. 241, 244; Story, Ag. § 393; Dicey, Parties 136-138; 5 Pa. 41; 9 Vt. 407; 5 B. & Ad. 389; as, if an agent sell goods of his principal in his own name, as though he were the owner, he is entitled to sue the buyer in his own name; 12 Wend. 413; 5 M. & S. 888; 29 Md. 232; 4 Bing. 2; and, on the other hand, if he so buy, he may enforce the contract by action. The renunciation of the agent's contract by the principal does not necessarily preclude the agent from maintaining an action, but he will still be entitled to sue the party with whom he has contracted for any damages which he may have sustained by reason of a breach of contract by the latter; Russ. Fact. & B. 243, 244; 2 B. & Ald. 962. *Third*, the right of the agent to sue in his own

name exists when, by the usage of trade or the general course of business, he is authorized to act as owner, or as a principal contracting party, although his character as agent is known; Story, Ag. § 393. *Fourth*, where the agent has made a contract in the subject-matter of which he has a special interest or property, he may enforce his contract by action, whether he held himself out at the time to be acting in his own behalf or not; 1 Liverm. Ag. 215-219; Story, Ag. § 393; 27 Ala. N. s. 215; Dicey, Parties 139; 22 Pa. 522; 53 N. H. 519; 99 Mass. 383; for example, an auctioneer who sells the goods of another may maintain an action for the price, though the sale be on the premises of the owner of the goods, because the auctioneer has a possession coupled with an interest; 2 Esp. 493; 1 H. Bla. 81, 84, 85. But this right of the agent to bring an action in his own name is subordinate to the rights of the principal, who may, unless in particular cases where the agent has a lien or some other vested right, bring a suit himself, and suspend or extinguish the right of the agent; Story, Ag. § 403; 3 Hill 72, 73; 6 S. & R. 27; 4 Campb. 194; 5 M. & Sel. 385; 99 Mass. 383; 105 N. Y. 653.

An agent may maintain an action of trespass or trover against third persons for injuries affecting the possession of his principal's property; and when he has been induced by the fraud of a third person to sell or buy goods for his principal, and he has sustained a personal loss, he may maintain an action against such third person for such wrongful act, deceit, or fraud; Story, Ag. §§ 414, 415; 9 B. & C. 206; 3 Campb. 320; 1 H. Bla. 81; 1 B. & Ald. 59. But his remedy for mere torts is confined to cases like the foregoing, where his "right of possession is injuriously invaded, or where he incurs a personal responsibility, or loss, or damage in consequence of the tort"; Story, Ag. § 416. See 28 Mich. 366.

Gifts procured by agents and purchases made by them from their principals should be scrutinized with vigilant and close scrutiny; 129 U. S. 663.

A sub-agent employed without the knowledge or consent of the principal has his remedy against his immediate employer only, with regard to whom he will have the same rights, obligations, and duties as if the agent were the sole principal. But where sub-agents are ordinarily or necessarily employed in the business of the agency, the sub-agent can maintain his claim for compensation both against the principal and the immediate employer, unless the agency be avowed and exclusive credit be given to the principal, in which case his remedy will be limited to the principal; 6 Taunt. 147; 4 Wend. 285; 16 La. Ann. 127; 6 S. & R. 386; 3 Johns. 167.

A sub-agent will be clothed with a lien against the principal for services performed and disbursements made by him on account of the sub-agency, whenever a privity exists between them; Story, Ag. § 388; Mech. Ag. 693; 2 Campb. 218, 597; 2 East 523; 6 Wend. 475; 22 Me. 138. If he is appointed without the express or implied authority of the principal, he can acquire no lien; Story, Ag. § 389; 1 East 335; 4 Campb. 348. He will acquire a lien against the principal if the latter ratifies his acts, or seeks to avail himself of the proceeds of the sub-agency, though employed by the agent without the knowledge or consent of the principal; Story, Ag. § 389; 2 Campb. 218, 597, 598; 4 id. 348, 353; 22 Me. 138. He may avail himself of his general lien against the principal by way of substitution to the rights of his immediate employer, to the extent of the lien of the latter; 1 East 335; 2 id. 523, 529; 7 id. 7; 6 Taunt. 147; 2 M. & S. 298; 2 id. 301; 6 Taunt. 147. And there are cases in which a sub-agent who has no knowledge or reason to believe that his immediate employer is acting as an agent for another will have a lien on the property for his general balance; 2 Livermore, Ag. 87-92; Paley, Ag. 148, 149; Story, Ag. § 390; 4 Campb. 60, 349, 353.

See INSURANCE AGENT; AGENCY.

Consult Livermore, Paley, Ross, Story,

Wharton, Mechem, *Agency*; Addison, Chitty, Parsons, *Story, Contracts*; Cross, Lien; Kent, *Commentaries*; Bouvier, *Institutes*.

In Real Estate Law. One who is given power to examine property and determine whether a trade for other property should be made, and who is not employed simply to bring the parties together, is an agent and not a broker. 197 Ill. App. 199, cited by Walker, *Real Est. Agen. 2*. In practice the distinction drawn has disappeared. *Id.*

Generally agents of a corporation are not agents for the stockholders and cannot contract for them. 254 U. S. 493.

Within the meaning of § 41 of the Crim. Code, a person employed as an inspector by the Emergency Fleet Corporation is not an agent of the United States. 254 U. S. 491.

See COMMERCIAL TRAVELER, FOREIGN MINISTER, PRINCIPAL AND AGENT, PROCURING CAUSE, ETC.

AGENT AND PATIENT. A phrase indicating the state of a person who is required to do a thing, and is at the same time the person to whom it is done; as, when a man is indebted to another, and he appoints him his executor, the latter is required to pay the debt in his capacity of executor, and entitled to receive it in his own right; he is then *agent and patient*. *Termes de la Ley*.

AGER (Lat.). In Civil Law. A field; land generally.

A portion of land enclosed by definite boundaries.

Used like the word *acre* in the old English law, denoting a measure of undetermined and variable value; Spelman, *Gloss.*; Du Cange; 8 Kent 441.

AGGRAVATION (Lat. ad, to, and gravis, heavy; aggravare, to make heavy). That which increases the enormity of a crime or the injury of a wrong.

In Criminal Law. One of the rules respecting variances is, that cumulative allegations, or such as merely operate in *aggravation*, are immaterial, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record. This rule runs through the whole criminal law, that it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified; per Lord Ellenborough, 2 Campb. 583; 4 B. & C. 329; 21 Pick. 525; 4 Gray 18; 7 *Id.* 49, 331; 1 Tayl. Ev. § 215; 1 Bish. Cr. L. 600. Thus, on an indictment for murder the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation; Co Litt. 282 a.

In Pleading. The introduction of matter into the declaration which tends to increase the amount of damages, but does not affect the right of action itself. Steph. Pl. 257; Gould, Pl. 42; 12 Mod. 597. See 8 Am. Jur. 287-318.

An example of this is found in the case where a plaintiff declares in trespass for entering his house, and breaking his close, and tossing his goods about; the entry of the house is the principal ground and foundation of the action, and the rest is only stated by way of aggravation; 3 Wils. 294; 12 Vt. 107; and this matter need not be proved by the plaintiff or answered by the defendant.

See ALIA ENORMIA.

AGGREGATE. Consisting of particular persons or items, formed into one body. See CORPORATION.

AGGREGATIO MENTUM. A meeting of at least two minds in the same intention. Elliot, *Contr.*, p. 4, 26. See AGREEMENT; CONTRACT.

AGGRESSOR. One who begins a quarrel or dispute, either by threatening or striking another. No man may strike another because he has been threatened, or in consequence of the use of any words.

AGGRIEVED. Damned; injured; exposed to loss of property or rights. Many of the statutes declaring a right to appeal or bring error give it to the party aggrieved by the judgment. In this connection the

word means some party to the proceeding sought to be reviewed, whose substantial rights of person or property are prejudiced by the decision below, assuming it erroneous. Abbott. The party aggrieved is the party against whom an appealable order or judgment has been entered. *Id.*; 17 Cal. 250. A party is *aggrieved* by a decree of a judge of probate, only when it operates on his property or affects his interests directly. *Id.*; 34 Me. 41. *Aggrieved*, in a statute providing for a review of the admeasurement of dower, cannot be applied to a person not a party to the judgment. *Id.*; 64 N. C. 110. *Aggrieved* applies only to one whose pecuniary interest is affected by the decree, or whose right of property may be established or divested thereby. *Id.*; 25 N. J. Eq. 503.

The "parties aggrieved" are those against whom an appealable order or judgment has been entered; 17 Cal. 260. One cannot be said to be aggrieved unless error has been committed against him; 67 Mo. 95; 6 Metc. 197; 25 N. J. Eq. 503; 4 Q. B. Div. 90.

AGIO. A term used in commercial transactions to denote the difference of price between the value of bank-notes or other nominal money and the coin of the country.

AGISTMENT. The taking of another person's cattle into one's own ground to be fed, for a consideration to be paid by the owner. See AGISTOR.

AGISTOR. One who takes in horses or other animals to pasture at certain rates. *Story, Bailm.* § 443.

He is not, like an innkeeper, bound to take all horses offered to him, nor is he liable for any injury done to such animals in his care, unless he has been guilty of negligence, or from his ignorance, negligence may be inferred; Holt 547. See 49 Mo. App. 470; 2 Tex. Civ. App. 188.

In the absence of an express contract, as to the kind of feed and the degree of care to be taken, he is bound to provide reasonable feed and use ordinary care to protect cattle; 30 Neb. 532.

As to whether he is entitled to a lien, see 3 Hill 485, and LIEN. Where a number of animals are taken to pasture for an agreed compensation, one of them cannot be taken away without payment for all, the party having a lien on each for the amount due on all; 140 Pa. 238; 34 Neb. 482. The lien of agistor is prior to claim of assignee of overdue notes secured by mortgage on the horses; 36 Ill. App. 214.

AGNATES. In Scotch Law. Relations on the father's side.

AGNATI. In Civil Law. The members of a Roman family who traced their origin and name to a common deceased ancestor through the male line, under whose paternal power they would be if he were living.

They were called *agnati-agnati*, from the words *ad eum nati*. Ulpianus says: "*Aggnati autem sunt cognati virilis sexus ab eodem orti: nam post suos et consanguineos statim mihi proximus est consanguineus mei filius, et ego ei: patris quoque frater qui patris appellatur; deincepsque ceteri, at qui sunt, hinc orti in infinitum.*" Dig. 38, 16, De suis, 2, § 1. Thus, although, the grandfather and father being dead, the children become *sui juris*, and the males may become the founders of new families, still they all continue to be agnates; and the agnatio spreads and is perpetuated not only in the direct but also in the collateral line. Marriage, adoption, and adoption also create the relationship of the agnatio. In the Sentences of Paulus, the order of inheritance is stated as follows: *Intestatorum hereditas, lege Duodecim Tabularum primum suis hereditibus, deinde agnatis et aliquando quoque gentibus deferetur.*

They are distinguished from the cognati, those related through females. See COGNATI.

AGNATIO (Lat.). In Civil Law. A relationship through males; the male children.

Especially spoken of the children of a free father and slave mother; the rule in such cases was *agnatio sequitur ventrem*; Du Cange.

AGNOMEN (Lat.). A name or title which a man gets by some action or peculiarity; the last of the four names sometimes given a Roman. Thus, Scipio Africanus (the African), from his African victories. Ainsworth, *Lex.*; Calvinus, *Lex.* See NOMEN.

AGRARIAN LAWS. In Roman Law. Those laws by which the commonwealth disposed of its public land, or regulated the possession thereof by individuals were termed Agrarian Laws.

The greater part of the public lands acquired by conquest were laid open to the possession of any citizen, but the state reserved the title and the right to resume possession. The object of many of the agrarian laws was to limit the area of public land of which any one person might take possession. The law of Cassius, a. c. 486, is the most noted of these laws.

Until a comparatively recent period, it has been assumed that these laws were framed to reach private property as well as to restrict possession of the public domain, and hence the term agrarian is, in legal and political literature, to a great degree, fixed with the meaning of a confiscatory law, intended to reduce large estates and increase the number of landholders. Harrington, in his "*Oceana*," and the philosophers of the French Revolution, have advocated agrarian laws in this sense. The researches of Heyne, Op. 4, 351; Niebuhr, *Hist. vol. II. trans.*; and Savigny, *Das Recht des Besitzes*, have redeemed the Roman word from the burden of this meaning.

AGREEMENTUM. Agreement.

Spelman says that it is equivalent in meaning to *aggregatio mentium*, though not derived therefrom.

AGREE. In the most general sense, to unite in mental action; to exchange assents; to concur in opinion or purpose. *Agreed* is applied to persons who are thus united in purpose or opinion. In this sense, while the term does not imply any exchange of promises, it does import a conference or exchange of views; persons are not said to agree because they think alike merely, but because they consciously concur in each other's thought.

When the context or connection shows that the word is used with reference to any mutual dealings or arrangements for determining the future action of the parties, *agree* means, properly, to exchange promises; to unite in an engagement that something shall be done or omitted. Whether *agree* imports a consideration is disputed: the true view seems to be that it properly imports more than promise, followed by assent; implies reciprocal promises, though not necessarily promises which would form legal consideration. *Id.* See AGREEMENT.

AGREÉ. In French law, a solicitor practising solely in the tribunals of commerce. Black.

AGREED. A term used to indicate the consent or agreement of both parties; united in opinion or being in harmony; it is a technical term and synonymous with contracted.

AGREED CASE. An agreed case is a formal written statement of all the material facts of a real controversy which might be the subject of a civil action between two or more parties, signed by them for the purpose of submission to a court to obtain rulings of law thereon, enforceable by judgment. (1 Ency. of Pl. and Pr. 385.) This is sometimes called a "case made," or a "case stated," or the submission of a controversy. 5 Am. & Eng. Encyc. 2nd ed., 750.

A proceeding similar to this, and described as another method of finding a species of special verdict, is that in which trial is had by jury, and they find a special verdict generally for the plaintiff, but subject, nevertheless, to the opinion of the judge of the court above, upon a special case made by the counsel on both sides with regard to a matter of law. This method has the advantage over a special verdict, that it is attended with much less expense, and obtains a more speedy decision. *Id.*; 3 Bla. Com. 378. This proceeding is called "case stated" or "special case."

AGREED ORDER. The only difference between an "agreed order" and one which is made in the due course of the proceedings in the action, is that in the one case it is agreed to, and in the other it is made as authorized by law. 12 B. Mon. (Ky.) 440.

AGREEMENT. A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. Comyn, *Dig. Agreement*, A 1; Plowd. 5 a, 6 a.

Aggregatio mentium.—When two or more minds are united in a thing done or to be done.

It ought to be so certain and complete that either party may have an action on it, and there must be a *quid pro quo*; Dane, Abr. c. 11.

The consent of two or more persons concurring, the one in parting with, the other in receiving, some property, right, or benefit; Bacon, Abr. An act in the law whereby two or more persons declare their assent as to any act or thing to be done or forbore by some or one of those persons for the use of the others or other of them. Poll. Contr. 2.

"The expression by two or more persons of a common intention to affect the legal relations of those persons;" Anson, Contr. 3.

An agreement "consists of two persons being of the same mind, intention, or meaning concerning the matter agreed upon;" Leake, Contr. 12. See Poll. Contr. 2, 3.

"Agreement" is seldom applied to specialties; "contract" is generally confined to simple contracts; and "promise" refers to the engagement of a party without reference to the reasons or considerations for it, or the duties of other parties; Pars. Contr. 6.

An agreement ceases to be such by being put in writing under seal, but not when put in writing for a memorandum; Dane, Abr. c. 11.

It is a wider term than "contract;" Anson, Contr. 4; an agreement might not be a contract, because not fulfilling some requirement of the law of the place in which it is made.

A promise or undertaking.

This is the loose and inaccurate use of the word; 5 East 10; 3 B. & B. 14; 3 N. Y. 335.

The writing or instrument which is evidence of an agreement.

This is a loose and evidently inaccurate use of the term. The agreement may be valid, and yet the written evidence thereof insufficient; as, if a promissory note be given for twenty dollars, the amount of a previous debt, where the note may generally be neglected and the debt collected by means of other evidence; or, again, if a note good in form be given for an illegal consideration, in which case the instrument is good and the agreement void.

Conditional agreements are those which are to have full effect only in case of the happening of certain events, or the existence of a given state of things.

Executed agreements are those where nothing further remains to be done by the parties.

Executed agreements take place when two or more persons make over their respective rights in a thing to one another, and thereby change their property therein either presently and at once, or at a future time upon some event that shall give it full effect without either party trusting to the other. Such an agreement exists where a thing is bought, paid for, and delivered.

Executory agreements are such as rest on articles, memorandums, parol promises or undertakings, and the like, to be performed in the future, or which are entered into preparatory to more solemn and formal alienations of property; Powell, Contr.

An executed agreement always conveys a *chose in possession*, while an executory one conveys a *chose in action* only.

Express agreements are those in which the terms are openly uttered and avowed by the parties at the time of making.

Implied agreements are those which the law supposes the parties to have made although the terms were not openly expressed.

Thus, every one who undertakes any office, employment, or duty impliedly contracts to do it with integrity, diligence, and skill; and he impliedly contracts to do whatever is fairly within the scope of his employment; 6 Scott 761. Implied promises, or promises in law, only exist where there is no express stipulation between the parties touching the same matter for *expressum facit cessare tacitum*; 2 Bla. Com. 444; 2 Term 105; 7 Scott 60; 1 N. & P. 683.

The parties must agree or assent. There must be a definite promise by one party accepted by the other; 3 Johns. 534; 12 *id.* 190; 9 Ala. 69; 29 Ala. N. S. 864; 4 R. I. 14; 2 Dutch. 268; 3 Halst. 147; 29 Pa. 358; 49 Ill. App. 141. There must be a communication of assent by the party accepting; a mere mental assent to the terms in his own mind is not enough; L. R. 2 App. Ca. 691. See 102 Mo. 309. But the assent need not be formally made; it can be inferred from the party's acts; L. R. 6 Q. B. 607;

L. R. 10 C. P. 307; 90 Ala. 529. They must assent to the same thing in the same sense; 4 Wheat. 225; 1 Sumn. 218; 2 Woodb. & M. 359; 7 Johns. 240; 18 Ala. 605; 9 M. & W. 535; 4 Bing. 660; L. R. 6 Q. B. 597. The assent must be mutual and obligatory; there must be a request on one side, and an assent on the other; 5 Bingh. N. C. 75; 150 Mass. 248. Where there is a misunderstanding as to the date of performance there is no contract, for want of mutual assent; 42 La. Ann. 107; or where there is a misunderstanding as to the manner of payment; 53 Mo. App. 582. The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provision, and it must not qualify them by any new matter; 1 Pars. Contr. 400; and even a slight qualification destroys the assent; 5 M. & W. 535; 2 Sandf. 133. The question of assent when gathered from conversations is for the jury; 1 Cush. 89; 13 Johns. 294.

A sufficient consideration for the agreement must exist; 2 Bla. Com. 444; 2 Q. B. 851; 5 Ad. & E. 548; 7 Brown, Ch. 550; 7 Term 350; as against third parties this consideration must be good or valuable; 10 B. & C. 606; Chit. Contr. 28; as between the parties it may be equitable only; 1 Pars. Contr. 491.

But it need not be adequate, if only it have some real value; 3 Anstr. 732; 2 Sch. & L. 895, n. a; 9 Ves. 246; 16 East 372; 11 Ad. & E. 983; 1 Metc. Mass. 84; 117 N. Y. 515; 48 Ohio St. 562; refraining from use of tobacco and liquor for a period is sufficient consideration for a promise to pay the party a sum of money; 124 N. Y. 538. If the consideration be illegal in whole or in part, the agreement will be void; 6 Dana 91; 3 Bibb 500; 9 Vt. 23; 5 Pa. 452; 22 Me. 488; 32 S. C. 149; 27 Mo. App. 649; 80 Ia. 738. A contract to regulate the price of commodities at a certain specified amount is a contract in restraint of trade, without consideration and cannot be enforced; 63 Law T. 455; 96 Cal. 510; so also if the consideration be impossible; 5 Viner, Abr. 110, *Condition*; Co. Litt. 206 a; Shepp. Touchst. 164; L. R. 5 C. P. 588; 2 Lev. 161. See CONSIDERATION.

The agreement may be to do anything which is lawful, as to sell or buy real estate or personal property. But the evidence of the sale of real property must generally be by deed, sealed; and in many cases agreements in regard to personal property must be in writing. See STATUTE OF FRAUDS.

The construction to be given to agreements is to be favorable to upholding them, and according to the intention of the parties at the time of making it, as nearly as the meaning of the words used and the rules of law will permit; 1 Pars. Contr. 7; 2 Kent 555; 1 H. Bla. 569, 614; 30 Eng. L. & E. 479; 5 Hill 147; 40 Me. 43; 10 A. & E. 325; 19 Vt. 202. This intent cannot prevail against the plain meaning of words; 5 M. & W. 535. Neither will it be allowed to contravene established rules of law.

And that the agreement may be supported, it will be construed so as to operate in a way somewhat different from that intended, if this will prevent the agreement from failing altogether; 22 Pick. 376; 9 Wend. 611; 16 Conn. 474; but the meaning of the contracting parties is their agreement; 101 U. S. 396.

Agreements are construed most strongly against the party proposing (*i. e., contra proferentem*); 6 M. & W. 662; 2 Pars. Contr. 20; 3 B. & S. 929; 7 R. I. 26. See CONTRACTS.

The effect of an agreement is to bind the parties to the performance of what they have thereby undertaken. In case of failure, the common law provides a remedy by damages, and equity will in some cases compel a specific performance.

The obligation may be avoided or destroyed by *performance*, which must be by him who was bound to do it; and whatever is necessary to be done for the full discharge of this duty, although only incidental to it, must be done by him; 11 Q. B. 368; 4 B. & S. 556; 48 Iowa 462; 89 Wis. 553; by *tender* of exact performance according to the terms of the contract, which is sufficient when the other party refuses to

accept performance under the contract; 6 M. & G. 610; Benj. Sales 563; Ans. Contr. 274; an agreement to pay a sum of money upon receipt of certain funds, is not broken on refusal to pay on receipt of part of the funds; 62 N. H. 419; by *acts of the party* to be benefited, which prevent the performance, or where some act is to be done by one party before the act of the other, the second party is excused from performance, if the first fails; 15 M. & W. 109; 8 Q. B. 358; 6 B. & C. 325; 10 East 359; by *rescission*, which may be made by the party to be benefited, without any provision therefor in the agreement, and the mere acquiescence of the other party will be evidence of sufficient mutuality to satisfy the general rule that rescission must be mutual; 4 Pick. 114; 5 Me. 277; 7 Bingh. 266; 1 W. & S. 442; rescission, before breach, must be by agreement; Anson, Contr. 247; Leake, Contr. 787; 7 M. & W. 55; 2 H. & N. 79; 6 Exch. 39; by *acts of law*, as confusion, merger; 29 Vt. 412; 4 Jones, N. C. 87; *death*, as when a master who has bound himself to teach an apprentice dies; *inability* to perform a personal service, such as singing at a concert; L. R. 6 Exch. 269; or *extinction* of the subject-matter of the agreement. See also ASSENT; CONTRACT; DISCHARGE OF CONTRACTS; PARTIES; PAYMENT; RESCISSION.

Implied Agreement. The "implied agreement" contemplated by the Dent Act (c. 94, 40 Stat. 1272) as the basis of compensation, is not an agreement "implied in law," more aptly termed a constructive or *quasi* contract, where, by fiction of law a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement "implied in fact," founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. 198 U. S. 229, 234; 156 U. S. 552, 566; 182 U. S. 516, 530; 248 U. S. 121, 129; 261 U. S. 597.

AGREEMENT FOR INSURANCE.

An agreement often made in short terms preliminary to the filling out and delivery of a policy with specific stipulations.

Such an agreement, specifying the rate of premium, the subject, and risk, and amount to be insured, in general terms, and being assented to by the parties, is binding; 4 Rob. N. Y. 150; 2 Curt. 277; 19 N. Y. 305. It is usually in writing, but may be by parol or by parol acceptance of a written proposal; 2 Curt. C. C. 524; 19 How. 318; 31 Ala. 711; 4 Abb. Pr. Rep. 179; 50 N. Y. 402; 11 N. H. 356. It must be in such form or expression that the parties, subject, and risk can be thereby distinctly known, either by being specified or by references so that it can be definitely reduced to writing; 1 Phillips, Ins. §§ 6-14 *et seq.*; 2 Pars. Marit. Law 19; 19 N. Y. 305.

Such an agreement must have an express or implied reference to some form of policy. The ordinary form of the underwriters in like cases is implied, where no other is specified or implied; 56 Pa. 256; 7 Taunt. 157; 2 C. & P. 91; 3 Bingh. 265; 8 B. & Ad. 906; 33 Iowa 325; 76 *id.* 609; 2 Curt. 277; 36 Wis. 509; May, Ins. § 23.

Where the agreement is by a communication between parties at a distance, an offer by either will be binding upon both on a despatch by the other of his acceptance within a reasonable or the prescribed time, and prior to the offer having been countermanded; 1 Phil. Ins. § 17, 21; 27 Pa. 263. See INSURANCE POLICY.

AGRICULTURE. The cultivation of soil for food products or any other useful or valuable growths of the field or garden; tillage, husbandry; also, by extension, farming, including any industry practised by a cultivator of the soil in connection with such cultivation, as breeding and rearing of stock, dairying, etc. The science that treats of the cultivation of the soil. Stand. Dict.

In its general sense, is the cultivation of the ground for the purpose of procuring

vegetables and fruits for the use of man and beast; or, the act of preparing the soil, sowing and planting seeds, dressing the plants, and removing the crops. In this sense the word includes gardening or horticulture, and the raising or feeding of cattle and other stock. In a more common and appropriate sense—that species of cultivation which is intended to raise grain and other field crops for man and beast; "husbandry." Anderson; 7 Heisk. 515.

A person is actually engaged in the science of agriculture when he derives the support of himself and family in whole or in part from the tillage and cultivation of fields; it must be something more than a garden, though it may be less than a field, and the uniting of any other business with this is not inconsistent with the pursuit of agriculture; 22 Pa. 193. See 62 Me. 526; 7 Heisk. 515.

AGRICULTURAL HOLDING. In the English Agricultural Holdings Act of 1908. Any land held by the tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord. The term includes any land so used, even though there is held along with it other land not so used (Act of 1920, s. 24), but only where both parcels of land are held on a contract of tenancy commencing after the commencement of the Act of 1920. Byrne. See AGRICULTURAL HOLDINGS ACTS.

AGRICULTURAL HOLDINGS ACTS. The Agricultural Holdings Acts, 1908 and 1913, and Part II. of the Agricultural Act, 1920 (collectively entitled the Agricultural Holdings Acts, 1908 to 1920), form a code which confer on an out-going tenant of a holding many advantages (out of which he cannot contract himself) with regard to (1) Compensation for improvements; (2) Compensation for disturbance; (3) Compensation for damage by game; (4) Fixtures erected by him; (5) Distress; (6) Length of notice to quit; (7) the cultivation of his holding and various other matters. Byrne. See AGRICULTURAL HOLDING.

AGRICULTURAL PRODUCT. That which is the direct result of husbandry and culture of the soil. The term embraces the product in its natural, unmanufactured condition. 2 Am. & Eng. Ency. 2nd ed., 26; 40 Kan. 284. Therefore, flour, being the product of manufacture, is not within the meaning of the term "agricultural product." *Id.*; *ibid.*

AGRICULTURAL SOCIETY. An aggregate corporation organized under legislative authority by the voluntary consent and active procurement of its members, and having for its object the promotion of agriculture and all kindred arts. (Spelling, Priv. Corp., § 24.) It is generally held to be a private corporation, though some courts give it a public or quasi-public character. 2 Am. & Eng. Ency. 2nd ed., 13, 19.

AID. See ADVISE. ENCOURAGE.

AID AND COMFORT. Help; support; assistance; counsel; encouragement.

The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial construction; but see 97 U. S. 39, as to their meaning in the Act of Congress, March 12, 1863. See also 92 U. S. 137; 13 Wall. 128; 12 id. 347; 16 id. 147; 7 Ct. of Cl. 386; 2 id. 38. They import help, support, assistance, countenance, encouragement. The voluntary execution of an official bond of a commissioned officer of the Confederacy from motives of personal friendship, is giving aid and comfort; 9 Wall. 539; as is the giving of mechanical skill to build boats for the Confederacy; 3 Ct. of Cl. 172. The word *aid*, which occurs in the stat. Westminster, I. c. 14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act (and he adds, what is not applicable to the crime of treason), who are not present when the act is done. See also 1 Burn. Just. 5, 6; 4 Bla. Com. 37, 38.

To constitute aid and comfort it is not essential that the effort to aid should be successful and ac-

tually render assistance; 4 Sawy. 472.

AID BONDS. See BONDS.

AID OF THE KING. The aid that might be sought of the King by his tenants when sued by others in respect to the land held of the King. Abbott; Termes de la Ley.

AID PRAYER. In English Law. A petition to the court calling in help from another person who has an interest in the matter in dispute. For example, a tenant for life, by the curtesy, or for years, being impleaded, may pray aid of him in reversion; that is, desire the court that he may be called by writ, to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. Fitzh. Nat. Brev. 50; Cowel.

AIDER. One who aids or promotes the commission of a crime; an accessory before or at the fact; a principal in the second degree.

AIDER BY VERDICT. In Pleading. The presumption which arises after verdict, whether in a civil or criminal case, that those facts, without proof of which the verdict could not have been found, were proved, though they are not distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in reasonable intendment.

The rule is thus laid down, that where a matter is so essentially necessary to be proved, that had it not been in evidence the jury could not have given such a verdict as that recorded, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by the verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict that it was so restrained at the trial; 1 Maule & S. 234, 237; 1 Saund. 6th ed. 227, 228; 1 Den. Cr. Cas. 356; 2 Carr. & K. 868; 13 Q. B. 790; 1 id. 911, 912; 2 M. & G. 405; 2 Scott, New Rep. 459; 9 Dowl. 409; 13 M. & W. 377; 6 C. B. 136; 9 id. 364; 6 Metc. 334; 6 Pick. 409; 16 id. 541; 2 Cush. 316; 6 id. 524; 17 Johns. 439, 458; 24 Ill. App. 364; 29 Mo. App. 53; 134 Ill. 586; 2 Ind. App. 391.

AIDING AND ABETTING. In Criminal Law. The offence committed by those persons who, although not the direct perpetrators of a crime, are yet present at its commission, doing some act to render aid to the actual perpetrator thereof. 4 Bla. Com. 84; Russ. & R. 363, 421; 1 Ired. 440; 1 Woodb. & M. 221; 10 Pick. 477; 26 Miss. 299. See 9 Cent. L. J. 206; 90 Mich. 362. And they are principals in the crime; 45 Fed. Rep. 851; 54 N. J. Law 247.

A principal in the second degree is he who is present aiding and abetting the fact to be done. 1 Hale, Pl. Cr. 615; 1 Bish. Cr. L. 643 (4). See 41 N. H. 407; 1 Metc. (Ky.) 413; 28 Ga. 604; 13 Tex. 713; 26 Ind. 496; 2 Nev. 226; 2 Brev. 338.

Actual presence is not necessary; it is sufficient to be so situated as to come readily to the assistance of his fellows; 13 Mo. 382.

One cannot be convicted as aider and abettor unless the principal is jointly indicted with him, or if indicted alone, the indictment should give the name and description of the principal; 84 Ky. 229; and the one charged as an abettor may be convicted as principal; 92 Ky. 1; and the abettor may be convicted of murder in the second degree, though the principal has been acquitted; 113 N. C. 716; 52 Kan. 79.

The aider and abettor in a misdemeanor is chargeable as principal; 160 Mass. 300; 58 Fed. Rep. 1000.

AIDS. In English Law. A species of tax payable by the tenant of lands to his superior lord on the happening of certain events.

They were originally mere benevolences granted

to the lord in certain times of danger and distress, but soon came to be claimed as a right. They were originally given in three cases only, and were of uncertain amount. For a period they were demanded in additional cases; but this abuse was corrected by Magna Charta (of John) and the stat. 25 Edw. I. (*confirmatio chartarum*), and they were made payable only,—to ransom the lord's person, when taken prisoner; to make the lord's eldest son a knight; to marry the lord's eldest daughter, by giving her a suitable portion. The first of these remained uncertain; the other two were fixed by act of parliament (25 Edw. III. c. 11) at twenty shillings each, being the supposed twentieth part of a knight's fee; 2 Bla. Com. 64. They were abolished by the 12 Car. II. c. 24; 2 Bla. Com. 77, n. See 1 Poll. & Maitl. 330.

AIEL (spelled also *Ayel*, *Aile*, and *Ayle*). A writ which lieth where the grandfather was seized in his demesne as of fee of any lands or tenements in fee simple the day that he died, and a stranger abeth or entereth the same day and dispossesseth the heir. Fitzh. Nat. Brev. 222; Spelm. Gloss.; Termes de la Ley; 3 Bla. Com. 186; 2 Poll. & Maitl. 57.

AIELESSE (Norman). A grandmother. Kelham.

AILE. A corruption of the French word *aieul*, grandfather. See AIEL.

AIR. That fluid transparent substance which surrounds our globe.

No property can be had in the air; it belongs equally to all men, being indispensable to their existence. But this must be understood with this qualification, that no man has a right to use the air over another man's land in such a manner as to be injurious to him. To poison or materially to change the air, to the annoyance of the public, is a nuisance; Cro. Car. 510; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Strange 686; Dane, Abr. Index; see NUISANCE.

An easement of light and air coming over the land of another cannot be acquired by prescription in most of the United States; 17 Am. L. Reg. 440, note; 111 Mass. 119; 2 Watts 327; 54 N. Y. 439; 5 W. Va. 1; 2 Conn. 597; 16 Ill. 217; 25 Tex. 238; 5 Rich. 311; 26 Me. 426; 11 Md. 23; 10 Ala. N. s. 63; 63 Ill. App. 478. In Delaware the English doctrine is recognized as having been included in the constitutional adoption of the common law; Clawson v. Primrose, 4 Del. Ch. 643; s. c. 15 Am. Law Reg. N. s. 6, and note; see 2 Washb. R. P. 62 *et seq.* Servitude of light and air through windows in a wall cannot be acquired by prescription against the owner of the lot adjacent, unless he is able to assert the right to have them closed; 44 La. Ann. 493; 156 Mass. 89; though the rule is otherwise in England; 8 E. & B. 39.

Upon a conveyance the right to air over the grantor's remaining land is implied in grantee; 34 Md. 1; s. c. 11 Am. L. Reg. 24; but in other states only where it is an easement of necessity; 18 Am. L. Reg. 646; Washb. Easem. 618; 58 Ga. 268; 5 W. Va. 1. When it is never implied, see 115 Mass. 204; 10 Barb. 537; 33 Pa. 371; 51 Ind. 316. The right would not be implied in the grantor; 24 Iowa 35; s. c. 7 Am. L. Reg. 336, note; L. R. 2 C. P. D. 13. The lessee of a building has no implied right to the use of the light and air from surrounding land although owned by the lessor; 146 Ill. 481.

AISIAMENTUM (spelled also *Esamentum*). An easement. Spelman, Gloss.

AJUAR. In Spanish Law. The jewels and furniture which a wife brings in marriage.

AJUTAGE (spelled also *Adjutage*). A conical tube used in drawing water through an aperture, by the use of which the quantity of water drawn is much increased.

When a privilege to draw water from a canal, through the forebay or tunnel, by means of an aperture, has been granted, it is not lawful to add an *ajutage*, unless such was the intention of the parties; 2 Whart. 477.

ALABAMA (Indian for "here we rest"). One of the United States of America, being the ninth admitted into the Union. It was formerly a part of Georgia, but in 1798 the territory now included in the states of Ala-

bama and Mississippi was organized as a territory called Mississippi, which was cut off from the Gulf coast by Florida, then Spanish territory, extending to the French possessions in Louisiana. During the war of 1812, part of Florida lying between the Perdido and Pearl rivers was occupied by United States troops and afterwards annexed to Mississippi territory, forming part of the present state of Alabama, which was occupied principally by Creek Indians. The country becoming rapidly settled by the whites, the western portion was admitted into the Union as the state of Mississippi, and, by act of Congress of March 3, 1817, the eastern portion was organized as the territory of Alabama; 3 U. S. Stat. L. 371.

An act of Congress was passed March 2, 1819, authorizing the inhabitants of the territory of Alabama to form for themselves a constitution and state government. In pursuance of that act, the constitution of the state of Alabama was adopted by a convention which met at Huntsville, July 3, and adjourned August 2, 1819.

Alabama was the fourth state to withdraw from the Union. In Dec., 1860, this state sent delegations to the other southern states urging them to withdraw from the Federal Union, and a convention assembled at Montgomery, Jan. 7, 1861, which on Jan. 11 adopted an ordinance of secession. From that time until the close of the war it formed one of the Confederate states. The state ratified the fifteenth amendment of the Federal Constitution Nov. 16, 1870, and thereafter its senators and representatives were admitted to Congress.

ALABAMA CASE. The ship *Alabama* was built at Liverpool, during the American Civil War, for use by the Confederate States as a warship. She left British waters without being equipped with her guns, which were put into her at the Azores. She subsequently destroyed a number of merchant ships belonging to the Northern States. The United States Government, which had ineffectually endeavored to induce the British Government to prevent her leaving British waters, subsequently claimed damages for her depredations from the British Government; and ultimately, under the Treaty of Washington, concluded May 8, 1871, between the two governments the amount of damages was fixed at £3,229,166 by an international tribunal at Geneva. It was agreed in the treaty that the tribunal should be bound by the following rules:—

"A neutral government is bound—(1st) To use due diligence to prevent the fitting out, arming or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, for warlike use; (2nd) Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men; (3rd) To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

These rules have since been part of international law. Byrnes.

ALARMING. Intimidating, "alarming," and disturbing, imply the use of physical force or menace, and involve a breach of the peace. 79 Ky. 441.

ALASKA. This territory was first visited by a Russian exploring expedition under command of Vitus Bering in 1741, and after his return and the dissemination of his reports of the abundance of fur-bearing animals found there, the country soon became settled by Siberian traders. In 1799 Russia granted a monopoly of the entire fur trade to the Russian American Fur Company; whose charter, being twice renewed, finally expired in 1864, when that country began negotiations for the sale of Alaska to the United States.

A treaty ceding the Russian possessions in North America to the United States was concluded March 30, 1867, and ratified May

28, 1867, by which Alaska was sold to the United States for seven million two hundred thousand dollars in gold; 15 U. S. Stat. L. 539.

At first violations of the laws prescribed for the territory of Alaska, within its limits, were prosecuted in any of the district courts of the United States in California, Oregon or Washington; § 1957 R. S.

Under the treaty with Russia, ceding Alaska and the subsequent legislation of Congress, Alaska has been incorporated into the United States and the Constitution is applicable to that Territory. 197 U. S. 516.

ALBA FIRMA. White rents; rents reserved payable in silver, or white money.

They were so called to distinguish them from *reditus nigræ*, which were rents reserved payable in work, grain, and the like. Coke, 3d Inst. 19.

ALBINATUS JUS. See **JUS ALBINATUS**.

ALCALDE. In Spanish Law. A judicial officer in Spain, and in those countries which have received the body of their laws from those of Spain. His powers and duties are similar to those of a justice of the peace.

ALCOHOL. See **INTOXICATING LIQUOR**.

ALDERMAN (equivalent to senator or senior).

In English Law. An associate to the chief civil magistrate of a corporate town or city.

The word was formerly of very extended significance. Spelman enumerates eleven classes of aldermen. Their duties among the Saxons embraced both magisterial and executive power, but would seem to have been rather an appellation of honor, originally, than a distinguishing mark of office. Spelman, Gloss.

Aldermannus civitatus burgi seu castelle (alderman of a city, borough, or castle). 1 Bla. Com. 476, n.

Aldermannus comitatus (alderman of the county), who is thought by Spelman to have held an intermediate place between an earl and a sheriff; by others, held the same as the earl. 1 Bla. Com. 116.

Aldermannus hundredi seu wapentacii (alderman of a hundred or wapentake). Spelman.

Aldermannus regis (alderman of the king) was so called, either because he was appointed by the king, or because he gave the judgment of the king in the premises allotted to him.

Aldermannus totius Anglie (alderman of all England). An officer of high rank whose duties cannot be precisely determined. See Spelman, Gloss.

The aldermen of the city of London were probably originally the chiefs of guilds. See 1 Spence, Eq. Jur. 54, 56. For an account of the selection and installation of aldermen of the guild merchant of a borough, see 1 Poll. & Maitl. 648.

In American Cities. The aldermen are generally a legislative body, having limited judicial powers as a body, as in matters of internal police regulation, laying out and repairing streets, constructing sewers, and the like; though in many cities they hold separate courts, and have magisterial powers to a considerable extent.

Consult Spelman, Gloss.; Cowell; 1 Sharsw. Bla. Com. 116; Reeve, Hist. Eng. Law; Spence, Eq. Jur.

ALE. See **INTOXICATING LIQUOR**.

ALE SILVER. A rent or tribute formerly paid each year to the Lord Mayor of London by those who sold ale within the liberty of the city. Cunningham; Cowell.

ALEATOR (Lat. *alea*, dice). A dice-player; a gambler.

"The more skilful a player he is, the wickeder he is." Calvinus, Lex.

ALEATORY CONTRACT. In Civil Law. A mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to some of them, depend on an uncertain event. La. Civ. Code, art. 2951. See 8 La. Ann. 488; May, Ins. § 5.

The term includes contracts, such as insurance, annuities, and the like. See **MARGIN**; **OPTION**.

ALE-CONNER (also called *ale-taster*). An officer appointed by the court-leet, sworn to look to the assize and goodness of ale and beer within the precincts of the leet. Kitchin, Courts 46; Whishaw.

An officer appointed in every court-leet, and sworn to look to the assize of bread, ale,

or beer within the precincts of that lordship. Cowell.

This officer is still continued in name, though the duties are changed or given up 1 Crabb, Real Prop. 501.

ALER A DIEU, or ALER ADEU. A phrase in old English law having the same meaning as *aler sans jour*. To be dismissed from court; literally, "to go to God." Burrell. See **ALER SANS JOUR**.

ALER SANS JOUR (Fr. *aller sans jour*, to go without day).

In Practice. A phrase formerly used to indicate the final dismissal of a case from court.

The defendant was then at liberty to go, without any day appointed for his subsequent appearance; Kitchin, Courts 146.

ALFET. The vessel in which hot water was put, for the purpose of dipping a criminal's arm in it up to the elbow in the ordeal by water. Cowell.

ALLIA. In another way; in a different manner. Also, other things. Burt, Lat.-Eng. Dict.

ALLIA ENORMIA (Lat. other wrongs).

In Pleading. A general allegation, at the end of a declaration, of wrongful acts committed by the defendant to the damage of the plaintiff. In form it is, "and other wrongs then and there did against the peace," etc. Under this allegation, damages and matters which naturally arise from the act complained of may be given in evidence; 2 Greenl. Ev. § 678; including battery of servants, etc., in a declaration for breaking into and entering a house; 6 Mod. 127; 2 Term 166; 7 Harr. & J. Md. 68; and all matters in general which go in aggravation of damages merely, but would not of themselves be ground for an action; Bull. N. P. 89; 3 Mass. 232; 6 Munf. 308.

But matters in aggravation may be stated specially; 15 Mass. 194; Gilm. 227; and matters which of themselves would constitute a ground of action must be so stated; 1 Chit. Pl. 348; 17 Pick. 284. See generally 1 Chit. Pl. 648; Bull. N. P. 89; 2 Greenl. Ev. §§ 268, 273, 278; 2 Salk. 643; Peake, Ev. 505. See **AGGRAVATION**.

ALIAS (Lat. *alius*, another). In Practice. Before; at another time; otherwise.

The term is sometimes used to indicate an assumed name. See **ALIAS DICTUS**.

An *alias* writ is a writ issued where one of the same kind has been issued before in the same cause.

The second writ runs, in such case, "we command you as we have before commanded you" (*sicut alias*), and the Latin word *alias* is used to denote both the writ and the clause in which it or its corresponding English word is found. It is used of all species of writs.

No waiver can make an *alias* attachment writ good and it is unauthorized; 37 Ill. App. 385; an *alias* execution should not issue on return of the original which had been delivered long prior thereto, except it be shown that it had been delivered to an officer during its life, and had not been satisfied; 37 Ill. App. 319.

ALIAS DICTUS (Lat. otherwise called). A description of the defendant by adding to his real name that by which he is known in some writing on which he is to be charged, or by which he is known. 4 Johns. 118; 2 Caines 362; 3 id. 219.

ALIBI (Lat. elsewhere). Presence in another place than that described.

When a person, charged with a crime, proves (*se eadem die fuisse alibi*) that he was, at the time alleged, in a different place from that in which it was committed, he is said to prove an *alibi*, the effect of which is to lay a foundation for the necessary inference that he could not have committed it. See Bracton 140.

This proof is usually made out by the testimony of witnesses, but it is presumed it might be made out by writings; as if the party could prove by a record, properly authenticated, that on the day or at the time in question he was in another place.

It has been said that this defence must be subjected to a most rigid scrutiny, and that

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it must be established by a preponderance of proof; 30 Vt. 877; 5 Cush. 124; 20 Pa. 429; 81 Ill. 585; 24 Iowa 570; 62 *id.* 40. See remarks of Shaw, C. J., in Webster's Case, and 2 Alison's Cr. L. of Scotland, 624; Bish. Crim. L. 1061-1068. In many states the defence is established if the evidence raises in the minds of the jury a reasonable doubt as to the guilt of the defendant; 100 Mo. 628; 28 Fla. 511; 94 Ala. 14; 64 Cal. 253; 70 Ga. 651; 62 Ia. 40; 50 Ind. 190; 50 Mich. 233; and if the testimony tends to prove an *alibi*, failure to instruct thereon is error; 85 Ga. 666. An instruction that an *alibi* need not be established beyond a reasonable doubt, but it should be to the satisfaction of the jury, is correct; 117 N. Y. 480; 28 Tex. App. 566; 107 Ill. 162; 81 Mo. 185; 67 Ga. 349. It is peculiarly liable to be supported by perjury and false testimony of all sorts. There must be satisfactory proof that the prisoner could not have been at the place where the crime was committed, but the proof need not be higher than is required as to other facts; 59 Ga. 142. See 48 Iowa 583; 69 Cal. 552.

ALIEN (Lat. *alienus*, belonging to another; foreign). A foreigner; one of foreign birth.

In England, one born out of the allegiance of the king.

In the United States, one born out of the jurisdiction of the United States, and who has not been naturalized under their constitution and laws. 2 Kent 50. The children of ambassadors and ministers at foreign courts, however, are not aliens. And see 10 U. S. Stat. 604. Persons born in a foreign country of American parents, who, though residing there, still claim citizenship, are citizens of the United States; 50 Fed. Rep. 310; so if the father only is a citizen; Rev. St. § 1993. An alien woman by marriage with a citizen of the United States becomes a citizen; but the converse, that a citizen woman by marriage with an alien becomes an alien, is not law; 56 Fed. Rep. 556. The right to exclude or to expel aliens in war or in peace is an inherent and inalienable right of every sovereign and independent nation; 149 U. S. 698; and in the United States, Congress may exclude aliens altogether from its territory and prescribe the conditions upon which they may come to this country, and may have its policy in that respect enforced exclusively through executive officers without judicial intervention; 13 Wall. 457; 130 U. S. 581; 142 *id.* 651; 158 U. S. 438.

An alien cannot in general acquire title to real estate by descent, or by other mere operation of law; 7 Co. 25 a; 1 Vent. 417; 3 Johns. Cas. 109; Hard. 61; 133 U. S. 265; and if he purchase land, he may be divested of the fee, upon an inquest of office found; but until this is done he may sell, convey, or devise the lands and pass a good title to the same; 4 Wheat. 453; 12 Mass. 143; 6 Johns. Ch. 365; 7 N. H. 475; 1 Washb. R. P. 49. The disabilities of aliens in respect to holding lands are removed by statute in many of the states of the United States; in *Alabama*, wholly; Rev. Code, 1886, § 1914; in *Arizona*, as our citizens in the alien's country; Rev. Stat. 1887, § 1472; in *Arkansas*, wholly; S. & H. Dig. 1894, § 247; *California*, wholly, if resident; if non-resident, must appear and claim within five years; Civ. Code, 1885, § 671; *Colorado*, wholly; Laws, 1891, p. 20; *Connecticut*, if resident, wholly; if non-resident, only for certain purposes; Gen. Stat. 1888, § 15; *Delaware*, after declaration of intention to become citizens; Rev. Code, 1893, c. 81, § 1; all conveyances to aliens prior to Feb. 1, 1892, are legalized; Laws, 1893, ch. 769; *Florida*, wholly; Const. 1837, Decl. of Rights, § 18; *Georgia*, wholly, so long as alien government is at peace with U. S.; Rev. Code, 1882, § 1661; *Idaho*, wholly, after declaration of intention to become a citizen of the United States; Laws, 1890-1891, p. 108; *Illinois*, wholly, after declaration of intention to become a citizen of the United States, but non-residents, not; Myers, Rev. Stat. 1895, p. 95; *Indiana*, wholly; 2 Burns, Rev. Stat. 1894, § 3389;

see § 3328; *Iowa*, residents, wholly; non-residents, not; Miller, Rev. Code, 1888, p. 708; *Kansas*, resident, for six years, after having declared intention to become a citizen of the U. S. with forfeiture of citizenship not acquired within that time; non-residents, not at all; Laws, 1891, ch. iii.; *Kentucky*, not being an enemy, wholly, after declaration of intention to become a citizen of U. S.; a resident alien may hold for twenty-one years for actual residence, occupation or business purposes, a non-resident alien may take and hold by descent or devise, but must alienate within eight years thereafter; B. & C. Stat. 1894, §§ 334, 337, 338; *Louisiana*, under the civil law; incapable of taking by will or inheritance; 2 Dom. Civ. L. § 2503; but incapacity ceases with naturalization; *id.* § 2511; *Maine*, wholly; Rev. Stat. 1884, c. 73, § 2; *Maryland*, wholly, if not enemies; Pub. Gen. L. 1888, art. iii. § 1; *Massachusetts*, wholly; Pub. Stat. 1882, c. 126, § 1; *Michigan*, wholly, if *bona fide* residents; Const. art. xviii. § 18; see Stat. 1882, § 5775; *Minnesota*, after declaration only, unless actual settlers; Wenzell, Stat. 1894, § 5875; *Mississippi*, wholly, if resident; Ann. Code, 1892, § 2439; *Missouri*, wholly, Rev. Stat. 1889, § 342; *Montana*, inherit as in Idaho, no provision as to conveyance of real estate *inter vivos*; Booth, Civil Code, 1895, § 1867; *Nebraska*, residents, wholly; Const. art. i. § 25; non-residents, not; Comp. Stat. 1895, § 4161; *Nevada*, wholly, except Chinese; Gen. Stat. 1885, § 2655; *New Hampshire*, wholly, if resident; Pub. Stat. 1891, c. 17, § 16, p. 378; *New Jersey*, wholly, Rev. Stat. 1877, c. 1, § 1; *New York*, to a very limited extent; 4 Thr. Rev. Stat. p. 2420; *North Carolina*, wholly; Code, 1883, § 7; *North Dakota*, wholly; Rev. Code, 1895, §§ 3277, 3758; *Ohio*, wholly; Rev. Stat. 1892, § 4173; *Oregon*, wholly; Hill's Ann. L. 1892, § 2988; *Pennsylvania*, up to five thousand acres, or \$20,000 net annual income; Act 1861, 1 P. & L. Dig. 119, § 11; *Rhode Island*, wholly; Rev. Stat. 1882, c. 172, § 6, p. 442; *South Carolina*, wholly; Rev. Stat. 1893, 1880; *South Dakota*, wholly; Code, 1887, §§ 2686, 3417, Laws, 1890, p. 233; *Tennessee*, wholly; Code, 1884, § 2804; *Texas*, *bona fide* residents, wholly; non-residents, hold only for ten years; Suppl. Sayle's Tex. Civ. Stat. 1892, arts. 10a-10e; *Utah*, remains under the laws as to territories, *post*, no statute having been passed since its admission as a state; *Vermont*, every person of good character, who comes to settle, having first taken the oath of allegiance to the state; Const. § 39; no prohibition as to aliens and no provisions as to forfeiture; 23 Vt. 433; *Virginia*, wholly; Code, 1887, § 42; *Washington*, wholly as to those who have declared their intention; Const. art. ii. § 33; see Hill's Ann. Stat. & Code, 1891, § 2955; *West Virginia*, wholly; Const. art. ii. § 5; Code, 1891, c. 70, p. 632; *Wisconsin*, wholly, as to residents, partly as to non-residents; S. & B. Ann. Stat. 1889, § 2200; *Wyoming*, wholly, as to residents; Const. art. i. § 29.

It is unlawful for any alien person or corporation to acquire, hold or own real estate or any interest therein in any of the territories of the United States, or in the district of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts, except where the right to hold and dispose of lands in the United States is secured by existing treaties with such foreign countries. Corporations of which more than twenty per cent. of the stock is held by aliens come within the same category; 24 U. S. Stat. L. 476; 1 R. S. Suppl. p. 556.

Foreign governments and their representatives may own real estate for legations or residences in the district of Columbia; 25 Stat. L. 45; 1 R. S. Suppl. 582.

An alien has a right to acquire personal estate, make and enforce contracts in relation to the same; he is protected from injuries and wrongs to his person and property, his relative rights and character; he may sue and be sued; 7 Co. 17; Dyer 2 b; 1 Cush. 531; 2 Sandf. Ch. 586; 2 Woodb.

& M. 1; 5 Sawy. 573; 8 Otto 491; 16 Wall. 147; 21 Minn. 175.

He may be an executor or administrator unless prohibited by statute; 9 Wis. 309; 1 Schouler's Exrs. 270, 537; 2 Murph. 268.

An alien, even after being naturalized, is ineligible to the office of president of the United States, and in some states, as in New York, to that of governor; he cannot be a member of congress till the expiration of seven years after his naturalization. An alien can exercise no political rights whatever; he cannot, therefore, vote at any political election, fill any office, or serve as a juror. See Bryce, Am. Com.; 6 Johns. 332. The disabilities of aliens may be removed, and they may become citizens, under the provisions of the acts of Congress of April 14, 1802, c. 28; March 3, 1813, c. 184; March 23, 1816, c. 32; May 26, 1824, c. 186; May 24, 1828, c. 116. See 2 Curt. 98; 1 Woodb. & M. 323; 4 Gray 559; 33 N. H. 89. A native of Japan of the Mongolian race cannot become naturalized; 62 Fed. Rep. 126. Where a certificate of naturalization misnames the person, the true name may be proved by parol; 135 Ill. 591.

Upon the admission of a territory into the Union, Congress may effect a collective naturalization of its foreign-born inhabitants as citizens of the United States; 143 U. S. 135.

An alien owes a temporary local allegiance, and his property is liable to taxation. See CHINESE; NATURALIZATION.

As to alien enemies, see that title.

OF ESTATES. To alienate; to transfer.

ALIEN ENEMY. One who owes allegiance to the adverse belligerent. 1 Kent 73.

He who owes a temporary but not a permanent allegiance is an alien enemy in respect to acts done during such temporary allegiance only; and when his allegiance terminates, his hostile character terminates also; 1 B. & P. 163.

Alien enemies are said to have no rights, no privileges, unless by the king's special favor, during time of war; 1 Bla. Com. 372; Bynkershoek 195; 8 Term 166. But the tendency of modern law is to give them protection for person and property until ordered out of the country. If resident within the country, they may sue and be sued; 2 Kent 63; 10 Johns. 69; 6 Binn. 241; 50 Ill. 186; they may be sued as non-resident defendants; 11 Wall. 259; 30 Md. 512; and may be served by publication, even though they had no actual notice, being within the hostile lines; 37 Md. 25. Partnership with a foreigner is dissolved by the same event that makes him an alien enemy; 6 Wall. 532.

ALIEN IMMIGRANTS. In a number of cases in the Federal District and Circuit Courts, it was held that the provisions of the Act of March 3, 1891, and the Acts that preceded it, relating to the exclusion and deportation of persons arriving in the United States from foreign countries, were confined in their operation to "alien immigrants"; and that this term did not include aliens previously resident in this country, who had temporarily departed with the intention of returning. 232 U. S. 86; 51 Fed. Rep. 275, etc.

ALIENAGE. The condition or state of an alien.

ALIENATE. To convey; to transfer. Co. Litt. 118 b. *Alien* is very commonly used in the same sense; 1 Washb. R. P. 55.

ALIENATION. See RESTRAINT OR ALIENATION.

ALIENATION. Of Estates. The transfer of the property and possession of lands, tenements, or other things, from one person to another. *Termes de la Ley*.

It is particularly applied to absolute conveyances of real property; 1 N. Y. 290, 294.

Alienations by deed may be by conveyances at common law, which are either *original* or *primary*, being those by means of which the benefit or estate is created or first arises; or *derivative* or *secondary* conveyances, being those by which

the benefit or estate originally created is enlarged, restrained, transferred, or extinguished; or they may be by conveyances under the statute of uses. The original conveyances are the following: feoffment, gift, grant, lease, exchange, partition. The derivative are, release, confirmation, surrender, assignment, defeasance. Those deriving their force from the statute of uses are, covenants to stand seised to uses, bargains and sale, lease and release, deeds to lead or declare the uses of other more direct conveyances, deeds of revocation of uses; 2 Bla. Com. c. 20; 2 Washb. R. P. 600. See 1 Demb. Land Titles 320; 1 Devlin, Deeds 115; CONVEYANCE; DEED. *Alienations by matter of record* may be: by private acts of the legislature; by grants, as by patents of lands; by fines; by common recovery.

As to alienations by devise, see DEVISE; WILL.

In Medical Jurisprudence. A generic term denoting the different kinds of aberration of the human understanding. 1 Beck, Med. Jur. 535.

ALIENATION OF AFFECTION. Estrangement of affection. The act of making one person indifferent or distant in affection to another. The phrase is often used in reference to alienating the affection of a wife from her husband (or vice versa) by a third party.

It is well settled that either husband or wife, in order to recover damages from a third party for alienating the affections of the other, must show that such third party took an active and intentional part in causing the estrangement. 2 Schouler, Mar. & Div., 6th ed., 1587.

ALIENATION OFFICE. In English Law. An office to which all writs of covenants and entries were carried for the recovery of fines levied thereon.

ALIENEE. One to whom an alienation is made.

ALIENI GENERIS (Lat.). Of another kind.

ALIENI JURIS (Lat.). Subject to the authority of another. An infant who is under the authority of his father or guardian, and a wife under the power of her husband, are said to be *alieni juris*. See SUI JURIS.

ALIENIGENA (Lat.). One of foreign birth; an alien. 7 Coke 31.

ALIENOR. He who makes a grant or alienation.

ALIGNMENT. The act of adjusting to a line, or the state of being so adjusted. In engineering, the ground plan of a road or other work as distinguished from its profile. 68 Conn. 507.

The line to which an adjustment is made, or the persons or things arranged in line. Stand. Dict.

ALIMENT. In Scotch Law. To support; to provide with necessities. Paterson, Comp. §§ 845, 850.

Maintenance; support; an allowance from the husband's estate for the support of the wife. Paterson, Comp. § 893.

In Civil Law. Food and other things necessary to the support of life; money allowed for the purpose of procuring these. Dig. 50. 16. 43.

In Common Law. To supply with necessities. 3 Edw. Ch. 194.

ALIMENTA (Lat. alere, to support). Things necessary to sustain life.

Under the appellation are included food, clothing, and a house; water also, it is said, in those regions where water is sold; Calvinus, Lex.; Dig. 50. 16. 43.

ALIMONY. The allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance. 2 Bish. Marr. & D. 351; Lloyd, Div. 213; 55 Me. 21; 36 Ga. 286.

It is also commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree

of divorce. 107 Mass. 432; 9 N. H. 309; 38 Vt. 243; 28 Ind. 291.

Alimony pendente lite is that ordered during the pendency of a suit.

Permanent alimony is that ordered for the use of the wife after the termination of the suit during their joint lives.

To entitle a wife to permanent alimony, the following conditions must be complied with. First, a legal and valid marriage must be proved; 1 Rob. Eccl. 484; 3 Add. Eccl. 484; 4 Hen. & M. 507; 10 Ga. 477; 5 Sess. Cas. N. s. Sc. 1288; 24 Ill. App. 165. Second, by the common law the relation of husband and wife must continue to subsist; for which reason no alimony could be awarded upon a divorce *a vinculo matrimonii*, or a sentence of nullity; 1 Lee, Eccl. 621; 1 Blackf. 360; 1 La. 440; Saxt. 96; 13 Mass. 264; 18 Me. 308; 4 Barb. 295; 1 Gill & J. 463; 8 Yerg. 67. This rule, however, has been very generally changed by statute in this country; 2 Bish. M. & D. § 376. Third, the wife must be separated from the bed and board of her husband by judicial decree; voluntary separation, for whatever cause, is insufficient. And, as a general rule, the alimony must be awarded by the same decree which grants the separation, or at least in the same suit, it not being generally competent to maintain a subsequent and independent suit for that purpose; 9 Watts 30; 27 Miss. 630, 692; 21 Conn. 185; 1 Blackf. 360; 8 Yerg. 67. The right to alimony need not be determined in the suit for divorce, if such right is reserved in the judgment; 138 N. Y. 272. Fourth, the wife must not be the guilty party; 1 Paige, Ch. 276; 2 Ill. 242; Wright, Ohio 514; 6 B. Monr. 496; 11 Ala. n. s. 763; 24 N. H. 564; 40 Ill. App. 73; 133 Ind. 123; but in some states there are statutes in terms which permit the court, in its discretion, to decree alimony to the guilty wife; 2 Bish. M. & D. 378; [1892] Prob. Div. 1; Lloyd, Div. 222; and continued adultery of wife after divorce, is no ground for vacating a previous order allowing her permanent alimony; 35 Ill. App. 544.

In California, a divorce having been decreed against a non-resident, an order for alimony and for custody of children was vacated on appeal. 83 Am. Law Rev. (July, 1896) 604, q. v. for an elaborate discussion and criticism of this ruling.

Alimony pendente lite is granted much more freely than permanent alimony, it being very much a matter of course to allow the former, unless the wife has sufficient separate property, upon the institution of a suit; 1 Hagg. Eccl. 778; 1 Curt. Eccl. 444; 2 B. Monr. 142; 2 Paige, Ch. 8; 11 id. 166; 40 Ill. App. 202; 37 id. 491; either for the purpose of obtaining a separation from bed and board; 1 Edw. Ch. 255; a divorce *a vinculo matrimonii*; 9 Mo. 539; 18 Me. 308; 1 Bland, Ch. 101; or a sentence of nullity, and whether the wife is plaintiff or defendant. The reason is, that it is improper for the parties to live in matrimonial cohabitation during the pendency of such a suit, whatever may be its final result; 1 Sandf. Ch. 483. She need only show probable ground for divorce to entitle her to alimony; 24 Ill. App. 431. Upon the same principle, the husband who has all the money, while the wife has none, is bound to furnish her, whether plaintiff or defendant, with the means to defray her expenses in the suit; otherwise, she would be denied justice; 2 Barb. Ch. 146; Walk. Ch. 421; 2 Md. Ch. Dec. 335, 393. See 1 Jones, N. C. 523. This alimony ceases as soon as the fault of the wife is finally determined; 37 Mo. App. 207.

Alimony is not a sum of money nor a specific proportion of the husband's estate given absolutely to the wife, but it is a continuous allotment of sums payable at regular intervals, for her support from year to year; 6 Harr. & J. 485; 9 N. H. 309; 9 B. Monr. 49; 6 W. & S. 85; 75 N. C. 70; 12 Fla. 449; 62 Barb. 109; but in some states statutory allowances of a gross sum have been given to the wife under the name of alimony; see 9 N. H. 309; 21 Conn. 185; 9 Ohio 37; 47 id. 544; 107 Mass. 428; 40 Mich. 493; 78 Ill. 402; 36 Wis. 362; 23 Ind. 370; 19 Kan.

159; 83 Cal. 460; if in gross it should not ordinarily exceed one-half the husband's estate; 37 Mo. App. 471. It must accrue to her as wife a maintenance separate from her husband; an absolute title in specific property, or a sale of a part of the husband's estate for her use, cannot be decreed or confirmed to her as alimony; 3 Hagg. Eccl. 522; 7 Dana 181; 6 Harr. & J. 485; 4 Hen. & M. 587; 6 Ired. 293. Nor is alimony regarded, in any general sense, as the separate property of the wife. Hence she can neither alienate nor charge it; 4 Paige, Ch. 509; if she suffers it to remain in arrear for more than one year, she cannot generally recover such arrears; 3 Hagg. Eccl. 322; if she saves up anything from her annual allowance, upon her death it will go to her husband; 6 W. & S. 85; 12 Ga. 201; if there are any arrears at the time of her death, they cannot be recovered by her executors; 8 Sim. 321; 8 Term 545; 6 W. & S. 85; as the husband is only bound to support his wife during his own life, her right to alimony ceases with his death; 1 Root 849; 4 Hayw. 75; 4 Md. Ch. Dec. 289; 33 W. Va. 695; 23 Ill. App. 558; and as it is a maintenance for the wife living separate from her husband, it ceases upon reconciliation and cohabitation. So also its amount is liable at any time to be increased or diminished at the discretion of the court; 8 Sim. 315, 321, n.; 6 W. & S. 85; and the court may insert a provision in the decree allowing any interested party to thereafter request a modification of the amount allowed on account of changed conditions; 59 Hun 621. The preceding observations, however, respecting the nature and incidents of alimony should be received with some caution in this country, where the subject is so largely regulated by statute; 10 Paige, Ch. 20; 7 Hill 207.

In respect to the amount to be awarded for alimony, it depends upon a great variety of considerations and is governed by no fixed rules; 4 Gill 105; 7 Hill N. Y. 207; 1 Green, Ch. 90; 1 Iowa 151; 10 Ga. 477. The ability of the husband, however, is a circumstance of more importance than the necessity of the wife, especially as regards permanent alimony; and in estimating his ability his entire income will be taken into consideration, whether it is derived from his property or his personal exertions; 3 Curt. Eccl. 3, 41; 1 Rich. Eq. 232; 2 B. Monr. 370; 5 Pick. 427; 1 R. I. 212; 28 Neb. 843; 48 Mo. App. 668. But if the wife has separate property; 2 Phill. 40; 2 Add. Eccl. 1, or derives income from her personal exertions, this will also be taken into account. If she has sufficient means to support herself in the rank of life in which she moved, she is entitled to no alimony; 49 Mich. 504; 75 N. C. 70; 1 Curteis, Eccl. 444; 2 Hagg. Consis. 203. The method of computation is, to add the wife's annual income to her husband's; consider what, under all the circumstances, should be allowed her out of the aggregate; then from the sum so determined deduct her separate income, and the remainder will be the annual allowance to be made her. There are various other circumstances, however, beside the husband's ability, to be taken into consideration: as, whether the bulk of the property came from the wife, or belonged originally to the husband; 2 Litt. Ky. 337; 4 Humphr. 510; 101 Ill. 416; or was accumulated by the joint exertions of both, subsequent to the marriage; 11 Ala. n. s. 763; 3 Harr. Del. 143; whether there are children to be supported and educated, and upon whom their support and education devolves; 3 Paige, Ch. 267; 3 Green, Ch. 171; 2 Litt. 337; 10 Ga. 477; 68 Hun 37; 100 Ill. 570; 65 Me. 407; 65 Ga. 476; the nature and extent of the husband's delictum; 3 Hagg. Eccl. 657; 2 Johns. Ch. 391; 4 Des. Eq. 183; 24 N. H. 564; the demeanor and conduct of the wife towards the husband who desires cohabitation; 7 Hill 207; 5 Dana 499; 15 Ill. 145; 95 Ala. 443; the condition in life, place of residence, health, and employment of the husband, as demanding a larger or smaller sum for his own support; 1 Hagg. Eccl. 526, 532; the condition in life, circum-

stances, health, place of residence, and consequent necessary expenditures of the wife; 5 Pick. 427; 4 Gill 105; 11 Ala. N. S. 763; the age of the parties; 6 Johns. Ch. 91; 4 Gill, Md. 105; 29 Ind. 488; and whatever other circumstances may address themselves to a sound judicial discretion.

So far as any general rule can be deduced from the decisions and practice of the courts, the proportion of the joint income to be awarded for permanent alimony is said to range from one-half, where the property came from the wife (2 Phill. 235), to one-third, which is the usual amount; 29 L. J. Mat. Cas. 106; 4 Gill 105; 8 Bosw. 640; 44 Ind. 150; 44 Ala. 437; or even less; 37 Ind. 164; 68 Ill. 17; 38 Ind. 189. In case of alimony *pendente lite*, it is not usual to allow more than about one-fifth, after deducting the wife's separate income; Lloyd, Div. 212; 2 Bish. Mar. Div. & Sep. §§ 945-951; and generally a less proportion will be allowed out of a large estate than a small one; for, though no such rule exists in respect to permanent alimony, there may be good reasons for giving less where the question is on alimony during the suit; when the wife should live in seclusion, and wants only a comfortable subsistence; 2 Phill. Eccl. 40. See 4 Thomp. & C. 574; 36 Iowa 383; 39 Ind. 188; 29 Wis. 517.

ALIO INTUITU (Lat.). Under a different aspect. See **DIVERSO INTUITU**.

ALITER (Lat.). Otherwise; as otherwise held or decided.

ALIUNDE (Lat.). From another place. Evidence *aliunde* (i. e. from without the will) may be received to explain an ambiguity in a will. 1 Greenl. Ev. § 291. The word is also used in the same sense with respect to the admission of evidence to modify or explain other documents, generally treated as conclusive. It was thus frequently employed in connection with the electoral commission of 1877 which determined the disputed presidential election in the United States.

ALL. Completely, wholly, the whole amount, quantity or number.

It is frequently used in the sense of "each" or "every one of;" 143 Mass. 442; 144 Id. 100; and is a general rather than a universal term, to be understood in one sense or the other according to the demands of sound reason; 18 Pa. 391; 9 Ves. Jr. 137.

May mean "each" or "every one." Anderson; 143 Mass. 442. In the acts of legislatures, as in common parlance, "all," being a general rather than a universal term, is to be understood in one sense or the other according to the demands of sound reason. *Id.*, 18 Pa. 391.

(a.) The whole, extent, duration, quality, or degree of; the whole; any whatever; every.

(adv.) Wholly; completely; altogether; entirely; quite; very. Webster.

The word "any" in a will giving executors power to convert real property into money, means "all." 110 S. W. 835.

The word "all" in a will, imports, according to any consistent construction, all those among whom the advancements mentioned were to be equalized. 3 Ky. Opin. 377.

Back Pay and Emoluments. "All back pay and emoluments" as used in an act of Congress includes forage, rations, and pay for servants to which the officer would have been entitled under the statutes had he remained in the army, and in adjusting under the statute those items should not have been excluded because the officer was not actually in service of the United States. 226 U. S. 374.

Bills or Notes. The words "all bills or notes" in the charter of a bank include bills of exchange. 2 Litt. 389.

Land, of My. "All of my land" is a description by necessary implication and common understanding, referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law

constitutes a title. 114 Ky. 855, 72 S. W. 38, 24 R. 1641.

Legatees. In a will providing that all the legatees must accept the legacies in full satisfaction of all claims against his estate, the term "all legatees" means each of them. 142 Ky. 472, 134 S. W. 906.

Persons Interested. The words those having an interest in it, and, "all persons interested" in the property who have not united in the petition shall be summoned to answer, etc., refer to persons owning an interest in the land under the same title, and are the only persons necessary to be made parties to such an action. 93 S. W. 1061.

Proper Relief. Under a prayer for "all proper relief," the court is warranted in fixing the equities as shown by the pleadings and proof. 161 Ky. 374, 170 S. W. 986.

Real and Personal Estate of Every Description, Other. A deed of assignment which named specifically certain property, real and personal, as being transferred, and ended with the words, "also all other real and personal estate of every description," was sufficient to pass a contingent remainder. 114 Ky. 540, 71 S. W. 509.

Rest and Residue—In Will. "All the rest and residue" means what remains for distribution, according to law, that is, what is left after payment of debts. 2 J. J. Marsh. (Ky.) 201.

ALL FAULTS. A term in common use in the trade. A sale of goods with "all faults," in the absence of fraud on the part of the vendor, covers all such faults and defects as are not inconsistent with the identity of the goods as the goods described; 118 Mass. 242; 5 B. & Ald. 240.

The meaning of selling with *all faults*, is that the purchaser shall make use of his eye and understanding to discover what faults there are. 2 Am. & Eng. Ency., 2nd ed., 147; 4 Taunt. 779. The phrase "with all faults" cannot be limited to all such faults or defects as the thing described ordinarily has. That would deprive it of force entirely. Its meaning is, such faults or defects as the article sold might have, retaining still its character and identity as the article described. *Id.*; 118 Mass. 242. For example, in the sale of a copper-fastened vessel "with all faults," the term meant such faults as a copper-fastened vessel might have, but that it would not cover the sale of a vessel not copper fastened. *Id.*; 5 B. & Ald. 240.

ALL FOURS. A metaphorical expression, signifying that a case agrees in all its circumstances with another.

ALL AND SINGULAR. All, without possibility of exception; all, collectively and individually. Stand. Dict.

ALLEGATA. A word which the emperors formerly signed at the bottom of their rescripts and constitutions; under other instruments they usually wrote *signata* or *testata*. Encyc. Lond.

ALLEGATA ET PROBATA (Lat.), things alleged and proved). The allegations made by a party to a suit, and the proof adduced in their support.

It is a general rule of evidence that the *allegata* and *probata* must correspond; that is, the proof must at least be sufficiently extensive to cover all the allegations of the party which are material; 1 Greenl. Ev. § 51; 2 Sumn. 206; 3 Mart. N. S. La: 636.

ALLEGATION. The assertion, declaration, or statement of a party of what he can prove.

In Ecclesiastical Law. The statement of the facts intended to be relied on in support of the contested suit.

It is applied either to the libel, or to the answer of the respondent, setting forth new facts, the latter being, however, generally called the *defensive allegation*. See 1 Browne, Civ. Law 472, 473, n.

ALLEGATION OF FACULTIES. A statement made by the wife of the property of her husband, for the purpose of obtaining alimony. 11 Ala. N. S. 763; 3 Tex. 168.

To such an allegation the husband makes answer, upon which the amount of alimony is determined; 2 Lee, Eccl. 593; 3 Phill. Eccl. 387; or she may produce other proof, if necessary in consequence of his failure to make a full and complete disclosure; 2 Hagg. Cons. 199; Lloyd, Div. 276; 3 Knapp 42; 2 Bish. M. & Div. § 1082.

ALLEGIANCE (Lat. *alligare*, to bind to). The tie which binds the citizen to the government, in return for the protection which the government affords him. The duty which the subject owes to the sovereign, correlative with the protection received.

The true and faithful obedience which the subject of every state owes to the state or its head in return for the protection which the state affords him. There are four kinds: (1) natural allegiance of the subject born; (2) acquired allegiance, growing out of some act or circumstance other than birth, such as denization or naturalization; (3) local allegiance, resulting from the protection given to an alien friend residing within the state no matter for how short a time; (4) legal allegiance, resulting from an actual personal oath taken by the subject, an oath which by the common law could be tendered to every one who had attained the age of twelve years. Taylor, Int. Pub. Law 217.

Acquired allegiance is that binding a citizen who was born an alien, but has been naturalized.

Local or actual allegiance is that which is due from an alien while resident in a country, in return for the protection afforded by the government. From this are excepted foreign sovereigns and their representatives, naval and armed forces when permitted to remain in or pass through the country or its waters.

Natural allegiance is that which results from the birth of a person within the territory and under the obedience of the government. 2 Kent 42.

Allegiance may be an absolute and permanent obligation, or it may be a qualified and temporary one; the citizen or subject owes the former to his government or sovereign, until by some act he distinctly renounces it, whilst the alien domiciled in the country owes a temporary and local allegiance continuing during such residence; 16 Wall. 154.

At common law, in England and America, natural allegiance could not be renounced except by permission of the government to which it was due; 1 Bla. Com. 370, 371; 1 East, Pl. Cr. 81; 3 Pet. 99, 242; but see 8 Op. Att.-Gen. U. S. 139; 9 Id. 356. Held to be the law of Great Britain in 1868; Cockb. Nationality. It was otherwise in the civil law and in most continental nations. After many negotiations between the two countries, the rule has been changed in the United States by act of July 27, 1868, and in England by act of May 14, 1870. Whether natural allegiance revives upon the return of the citizen to the country of his allegiance is an open question; Whart. Conf. L. § 6. See Cockb. Nationality; Webster, Citizenship; Webster, Naturalization; 2 Whart. Int. L. Dig. ch. vii.; Whart. Conf. L.; 18 Am. L. Reg. 595, 565; Lawrence's Wheat. Int. L. App. See **NATURALIZATION**; **EXPATRIATION**.

ALLEGING DIMINUTION. The allegation in an appellate court of some error in a subordinate part of the *nisi prius* record. Black's Dict.

On a certiorari an allegation of diminution is filed to require the court below to send up a part of the record which is omitted in the transcript upon which the appeal is to be heard. An allegation of diminution is frequently made where the record of a judgment obtained before a justice of the peace is removed by certiorari to a superior court having appellate or supervisory jurisdiction of it.

ALLEVIARE. To levy or pay an accustomed fine, Wharton; Cowell.

ALLIANCE (Lat. *ad*, to, *ligare*, to bind). The union or connection of two persons or families by marriage; affinity.

In International Law. A contract, treaty, or league between two sovereigns or states, made to insure their safety and

common defence.

Defensive alliances are those in which a nation agrees to defend her ally in case she is attacked.

Offensive alliances are those in which nations unite for the purpose of making an attack, or jointly waging the war against another nation.

ALLISION. Running one vessel against another.

To be distinguished from collision, which denotes the running of two vessels against each other. The distinction is not very carefully observed, but collision is used to denote cases strictly of allision.

ALLOCATION. An allowance upon an account in the English Exchequer. Cowel.

Placing or adding to a thing. Encyc. Lond.

ALLOCATIONE FACIENDA. In English Law. A writ directed to the lord treasurer and barons of the exchequer, commanding that an allowance be made to an accountant for such moneys as he has lawfully expended in his office.

ALLOCATO COMITATU. A new writ of exigent allowed before another county court, if a former has not been fully served or complied with. Jacob; Fitz. Exig.

ALLOCATUR (Lat., it is allowed).

A Latin word formerly used to denote that a writ or order was allowed. See 2 Halst. N. J. 38.

A word denoting the allowance by a master or prothonotary of a bill referred for his consideration, whether touching costs, damages, or matter of account. Lee, Dict.; Archb. Pr. 129.

ALLOCATUR EXIGENT. A writ of exigent which issued in a process of outlawry, upon the sheriff's making return to the original exigent that there were not five county courts held between the *teste* of the original writ and the return day. 1 Tidd, Pr. 128.

ALLOCUTION. The formal address of the judge to the prisoner, asking him why sentence should not be pronounced. 2 Am. & Eng. Ency., 2nd ed., 149; 27 Mo. 326.

ALLOD, ALOD. Same as ALLODIUM.

ALLODARI. Those who own allodial lands.

Those who have as large an estate as a subject can have. Coke, Litt. 1; Bacon, Abr. Tenure, A.

ALLODIAL. Held in allodium; the antithesis of feudal. See ALLODIUM.

ALLODIAN, or ALODIAN. Rare for ALLODIAL or ALODIAL. Stand. Dict.

ALLODIUM (Sax. *a*, privative, and *lode* or *leude*, a vassal; that is, without vassalage).

An estate held by absolute ownership, without recognizing any superior to whom any duty is due on account thereof. 1 Washb. R. P. 5th ed. *16.

It is used in opposition to *feodum* or *sef*, which means property, the use of which was bestowed upon another by the proprietor, on condition that the grantee should perform certain services for the grantor, and upon the failure of which the property should revert to the original possessor. See 1 Poll. & Mait. 45.

In the United States the title to land is essentially allodial, and every tenant in fee-simple has an absolute and unqualified dominion over it; yet in technical language his estate is said to be in fee, a word which implies a feudal relation, although such a relation has ceased to exist in any form, while in several of the states the lands have been declared to be allodial; 44 Pa. 492; 2 id. 191; 10 Gill & J. 443; 10 Peters 717; but see 7 Cush. 92; 3 Sharsw. Bla. Com. 77, n.; 1 Washb. R. P. 5th ed. *41, 42; Sharswood's Lecture on Feudal Law, 1870. In some states, the statutes have declared lands to be allodial. See also 28 Wis. 367.

In England there is no allodial tenure, for all land is held mediately or immediately of the king; but the words *tenancy in fee-simple* are there properly used to express the

most absolute dominion which a man can have over his property; 3 Kent, Com. *487; Cruise, Prelim. Dis. c. 1, § 18; 2 Bla. Com. 105.

ALLONGE (Fr.). A piece of paper annexed to a bill of exchange or promissory note, on which to write endorsements for which there is no room on the instrument itself. Pardessus, n. 343; Story, Prom. Notes, §§ 121, 151; Tied. on Com. Paper 264.

ALLOPATHIC PRACTICE. See MEDICINE.

ALLOT. See ALLOW.

ALLOTMENT. A share or portion; that which is allotted. The division or distribution of land. The act of assigning by lot. That which is allotted; a share, a portion. Stand. Dict.

Allotment system. A system in England of assigning small portions of land, from the eighth of an acre to four or five acres, to be cultivated by day-laborers after their ordinary day's work. Brande.

ALLOTMENT CERTIFICATE, or LETTER OF ALLOTMENT. A letter of advice to a shareholder or subscriber to shares in a registered company, acquainting him with the number of shares allotted him and dates when payments for them are due. Stand. Dict.

ALLOTMENT NOTE. A writing by a seaman, making an assignment of part of his wages in favor of a relative. Abbott; M. & W. See ALLOTMENT.

ALLOTMENT SYSTEM. In England, a practice, started under the feudal system, of assigning land in small portions to agricultural workers, at a small rental. Abbott; Blackstone. In American history, the guaranty by treaty of certain lands to the Indians. 6 Pet. (N. S.) 582.

ALLOW. To permit, consent to, or approve; as to allow an appeal or a marriage; to allow an account. Also, to give a fit portion out of a larger property or fund; as to allow a wife alimony. Abbott.

Allow usually means to substitute something by way of compensation for another thing, while *allot* is a proper term for a direction to set apart a portion of specific property. *Id.*, 41 Ala. 586.

ALLOWANCE. The share or portion given to a married woman, child, trustee, etc. 45 Ala. 204. The term is ordinarily only another name for a gift or gratuity to a child or other dependent; 8 R. I. 170.

A portion or amount granted for some purpose, as by custom, military regulation, operation of law, or judicial decree. The act of sanctioning or conceding. The recognition of modifying circumstances. Stand. Dict.

ALLOY (spelled also *alloy*). An inferior metal used with gold and silver in making coin.

The amount of alloy to be used is determined by law, and is subject to changes from time to time.

ALLUVIO MARIS (Lat.). Soil formed by the washing-up of earth from the sea. Schultes, Aq. Rights 188.

ALLUVION. That increase of the earth on a shore or bank of a river, or to the shore of the sea, by the force of the water, as by a current or by waves, or from its recession in a navigable lake, which is so gradual that no one can judge how much is added at each moment of time. Inst. l. 2, t. 1, § 20; 3 B. & C. 91; Code Civil Annoté, n. 556; Ang. Watercourses 53; 9 Cush. 551; 64 Ill. 58; Gould, Waters § 155.

Conversely, where land is submerged by the gradual advance of the sea, the sovereign acquires the title to the part thereby covered and it ceases to belong to the former owner; 11 Oregon 217; 5 Mees. & W. 327; 4 C. P. D. 438; 84 N. Y. 218; Gould, Waters § 155.

The proprietor of the bank increased by alluvion is entitled to the addition, this be-

ing regarded as the equivalent for the loss he may sustain from the breaking-in or encroachment of the waters upon his land; 8 Washb. R. P. 5th ed. *451; 2 Md. Ch. Dec. 485; 1 Gill & J. 249; 4 Pick. 273; 17 id. 41; 1 Hawk. 56; 6 Mart. La. 19; 11 Ohio 311; 18 La. 122; 5 Wheat. 380; 48 N. H. 9; 64 Ill. 56; 26 Ohio St. 40; 55 N. Y. 437; 18 Iowa 549; 23 Wall. 46; 4 id. 502; 134 U. S. 178; 10 Pet. 662; 35 Fed. Rep. 188; 42 Md. 348; 43 id. 23; The increase is to be divided among riparian proprietors by the following rule: measure the whole extent of their ancient line on the river, and ascertain how many feet each proprietor owned on this line; divide the newly-formed river-line into equal parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line, and then draw lines from the points at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly-formed shore. In applying this rule, allowance must be made for projections and indentations in the old line; 17 Pick. 41; 9 Me. 44; 51 N. H. 496; 17 Vt. 387; see 19 Mich. 325; 18 How. 150; 1 Black 209; 114 Ill. 313. Where the increase is instantaneous, it belongs to the sovereign, upon the ground that it was a part of the bed of the river of which he was proprietor; 17 Ala. 9; 2 Bla. Com. 269; the character of *alluvion* depends upon the addition being imperceptible; 3 B. & C. 91; 26 Wall. 46; 18 La. 122.

Sea-weed which is thrown upon a beach, as partaking of the nature of alluvion, belongs to the owner of the beach; 7 Metc. 322; 2 Johns. 322; 3 B. & Ad. 967; 40 Conn. 382; 43 N. H. 609; 68 N. Y. 459; 84 id. 215; 7 Jur. N. S. 926; 1 Alc. & Nap. 348. But sea-weed below low-water mark on the bed of a navigable river belongs to the public; 9 Conn. 38; 40 id. 332; 17 N. H. 527; 5 Day 22.

The doctrine as to alluvion is equally applicable to tide-waters, non-tidal rivers and lakes; Gould, Waters § 155; 94 U. S. 324; 23 Wall. 46; 64 Ill. 56; 61 Mo. 345; 58 Ind. 248; 4 C. P. D. 438; 7 H. & N. 151.

Alluvion differs from avulsion in this, that the latter is sudden and perceptible; 23 Wall. 46. See AVULSION. And see 2 Ld. Raym. 737; Cooper, Inst. l. 2, t. 1; Ang. Waterc. § 53; Phill. Int. Law 255; 2 Am. L. J. 282, 393; Ang. Tide Waters 249; Inst. 2. 1. 20; Dig. 41. 1. 7; id. 39. 2. 9; id. 6. 1. 23; id. 41. 1. 5. For an interesting English case involving the *jus alluvion*, see address of M. Crackanthorpe before Am. Bar. Assn. Report 1896. See ACCRETION.

ALLY. A nation which has entered into an alliance with another nation. 1 Kent 69.

A citizen or subject of one of two or more allied nations. 4 C. Rob. Adm. 251; 6 id. 205; 2 Dall. 15; Dane, Abr. Index.

ALMANAC. A book or table containing a calendar of days, weeks, and months, to which various statistics are often added, such as the times of the rising and setting of the sun and moon, etc. Whewell.

The court will take judicial notice of an almanac; 47 Conn. 179; 55 Md. 11; 41 N. J. L. 39; 61 Cal. 404.

ALMARIA, or ARMARIA. The archives, or muniments of a church or library. Jacob. See MONUMENTS.

ALMONER, or ALMNER. An officer of the King's house, usually a bishop, whose business it is to distribute the King's alms, to visit, and relieve of their wants, the sick, the poor, and other necessitous people. Jacob. Known as the Lord High Almoner. Stand. Dict.

ALMS. Any species of relief bestowed upon the poor.

That which is given by public authority for the relief of the poor. Shelf. Mortm. 802, note (X); Hayw. Elect. 263; 1 Dougl. El. Cas. 370; 2 id. 107.

ALMSFLOH, or ALMESFLOH. Alms money, same as Peter-pence. Jacob. See PETER-PENCE.

ALMSHOUSE. A house appropriated

to the use of the poor. *Anderson*; 36 *Hun* (N. Y.) 311.

ALNAGER (spelled also *Ulnager*). A public sworn officer of the king, who, by himself or his deputy, looks to the assize of woollen cloth made throughout the land, and to the putting on the seals for that purpose ordained. *Statute 17 Ric. II. c. 2*; *Cowel*; *Blount*; *Termes de la Ley*.

ALNETUM. A place where alder-trees grow. *Domesday Book*; *Cowel*; *Blount*.

ALODIARI. Same as *ALLODARI*.

ALODIUM. Same as *ALLODIUM*.

ALONE. For the exclusive use of; exclusively. *English*.

ALONG. It means "by," "on," or "over," according to the subject-matter and context. 34 *Conn.* 425; 67 *Mo.* 58; 1 *B. & Adol.* 448.

In proximity to, as along the route of a railway. 91 *U. S.* 472. Through, in the direction of. *Stand. Dict.* Sometimes synonymous with adjoining. 2 *A. & E. Ency.* 2nd ed., 176; 67 *Mo.* 58. Up to, extending to, reaching to. "Along a line" does not signify that an object must be on the line, but rather the reverse; along, in this sense, is used as the equivalent of up to, extending to, reaching to. *Id.*; 71 *Ga.* 619.

ALONG A HIGHWAY. Where land is sold bounded on a highway, or upon or along a highway, the thread or center line of the same is presumed to be the limit and boundary of such land, in strict analogy with the case of a stream of water not navigable; and the same rule applies to a private street, as well in the city as in the country, opened by the grantor, upon which he sells house-lots bounding upon it. 8 *Bush* (Ky.) 680.

ALSO. In wills, most frequently points out the beginning of a new devise or bequest. Imports no more than "item," and may mean the same as "moreover," but not the same as "in like manner." *Anderson*; 4 *Rawle* 68-70.

Likewise or in the same manner. 6 *B. Mon.* (Ky.) 80.

ALTA LIGEANTIA. Natural allegiance. See *ALLEGIANCE*.

ALTA PRODITIO. High treason.

ALTA VIA. The highway.

ALTARAGE. In Ecclesiastical Law. Offerings made on the altar; all profits which accrue to the priest by means of the altar. *Ayliffe*, Par. 61.

ALTER OR AMEND. Where an act of the Legislature incorporated a theological institute with seven trustees, reserving the power to amend the charter, the Legislature had no power to "alter or amend" the act incorporating the trustees by adding to the number of trustees, without their consent. 15 *B. Mon.* (Ky.) 341.

ALTERATION. A change in the terms of a contract or other written instrument by a party entitled under it, without the consent of the other party, by which its meaning or language is changed.

The term is properly applied to the change in the language of instruments, and is not used of changes in the contract itself. And it is in strictness to be distinguished from the act of a stranger in changing the form or language of the instrument, which is called a *spoliation*. This latter distinction is not always observed in practice, however.

Also sometimes applied to a change made in a written instrument, by agreement of the parties; but this use of the word is rather colloquial than technical. Such an alteration becomes a new agreement, superseding the original one; *Leake*, Cont. 490.

The definition to be given the word "alteration" is no different in the case of a government obligation than the alteration of a private obligation. 257 *U. S.* 41.

An alteration avoids the instrument; 11 *Coke* 27; 5 *C. B.* 181; 4 *Term* 320; 8 *Cowen* 71; 2 *Haist.* 175; 28 *Tex. App.* 419; 121 *Ind.* 135; but not, it seems, if the alteration

be not material; 2 *N. H.* 543; 10 *Conn.* 192; 5 *Mass.* 540; 20 *Vt.* 217; 3 *Ohio St.* 445; 5 *Nebr.* 238, 439; 12 *N. H.* 466; 18 *Colo.* 69. The insertion of such words as the law supplies is said to be not material; 15 *Pick.* 239; 29 *Me.* 298. As to whether tearing and putting on a seal is material, see 2 *Pick.* 451; 4 *Gilm.* 411; 11 *M. & W.* 778; 1 *Pars. Contr.* 8th ed. *27; 2 *id.* *721. The question of materiality is one of law for the court; 1 *N. H.* 95; 2 *id.* 543; 11 *Me.* 115; 13 *Pick.* 165; 5 *Miss.* 231; 77 *Ga.* 463; and depends upon the facts of each case; *L. R.* 1 *Ex. D.* 176. The principle seems to be that a party "is discharged from his liability, if the altered instrument, supposed to be genuine, would operate differently to the original instrument, whether it be or not to his prejudice." *Anson*, *Contr.* 2d *Am. ed.* *327; 5 *E. & B.* 89. For instances, see 74 *N. Y.* 307; 39 *Mich.* 182; 57 *Ala.* 379; 51 *Iowa* 473; 66 *Ind.* 331; 69 *Mo.* 429; 126 *Pa.* 347; 46 *Minn.* 531. Alteration of a deed will not defeat a vested estate or interest acquired under the deed; 11 *M. & W.* 800; 2 *H. Bla.* 259; 23 *Pick.* 231; 1 *Me.* 73; 1 *Watts* 236; 3 *Barb.* 404; see 18 *Vt.* 466; but as to an action upon covenants, has the same effect as alteration of an unsealed writing; 11 *M. & W.* 800; 23 *Pick.* 231; 2 *Barb. Ch.* 119. As to filling up blanks in deeds, see 6 *M. & W.* 200; 5 *Mass.* 598; 20 *Pa.* 12; 4 *M'Cord* 239; 7 *Cow.* 484; 2 *Dana* 142; 2 *Wash. Va.* 184; 2 *Ala.* 517; 10 *Am. Dec.* 267.

The same rule as to alterations applies to negotiable promissory notes as to other instruments; 40 *Minn.* 531; 40 *Alb. L. J.* 8. The unauthorized insertion of "or bearer" in a note, if made innocently, will not make the note void; 81 *Me.* 44; but the insertion of "or order" will avoid; 20 *S. W. Rep.* (Tex.) 53; the fraudulent detaching a stub containing conditions favorable to maker, from a note, avoids the note; 85 *Tenn.* 271. As to the burden of proof in the case of alterations of note; 32 *Cent. L. J.* 8.

A spoliation by a third party without the knowledge or consent of a party to the instrument will not avoid an instrument even if material, if the original words can be restored with certainty; 2 *Pars. Contr.* 8th ed. *721, and note 1; *id.* 718, note 1; 1 *Greenl. Ev.* § 566; 50 *Ark.* 358; but the material alteration of an instrument by a stranger, while it is in the custody of the promisee, avoids his rights under it; 11 *Coke* 27 b; *L. R.* 10 *Ex.* 330; because one who "has the custody of an instrument made for his benefit, is bound to preserve it in its original state;" 13 *M. & W.* 353; 3 *E. & B.* 687; *Leake*, Cont. 425; but see 23 *Pick.* 231.

When a note was given by a corporation payable to its manager's wife for his salary, an alteration making it payable to the manager himself is material; 73 *Fed. Rep.* 925.

Where there has been manifestly an alteration of a parol instrument, the party claiming under it is bound to explain the alteration; 6 *Cush.* 314; 9 *Pa.* 186; 11 *N. H.* 395; 2 *La.* 290; 3 *Har. Del.* 404; 8 *Miss.* 414; 7 *Barb.* 564; 6 *C. & P.* 273; see 11 *Conn.* 531; 9 *Mo.* 705; 2 *Zabr.* 424; 5 *Harr. & J.* 36; 20 *Vt.* 205; 13 *Me.* 386; 134 *Pa.* 31. As to the rule in case of deeds, see *Co. Litt.* 225 b; 1 *Kebl.* 22; 5 *Eng. L. & Eq.* 349; 1 *Zabr.* 280.

Under the common law the rule of evidence was to presume erasures and alterations of written instruments to have been made at the time of, or anterior to, their execution, the law presuming the honesty of purpose and action until the contrary is shown; 63 *Mo.* 66; 13 *Me.* 386; 22 *Wend.* 388; 22 *N. J. L.* 424.

ALTERNAT. A usage among diplomats by which the rank and places of different powers, who have the same right and pretensions to precedence, are changed from time to time, either in a certain regular order, or one determined by lot. In drawing up treaties and conventions, for example, it is the usage of certain powers to alternate, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place; *Wheat. Int. Law* § 157; *Pol. Int. Law* 319.

ALTERNATIVE. Allowing a choice between two or more things or acts to be done.

In contracts, a party has often the choice which of several things to perform. A writ is in the alternative which commands the defendant to do the thing required, or show the reason wherefore he has not done it; *Finch* 267; 3 *Bla. Com.* 273. Under the common-law practice, the first *mandamus* is an alternative writ; 3 *Bla. Com.* 111; but in modern practice this writ is often dispensed with and its place is taken by a rule to show cause. See *MANDAMUS*.

ALTERNATIVE RELIEF. See *RELIEF*.

ALTUS NON TOLLENDI. In Civil Law. A servitude by which the owner of a house is restrained from building beyond a certain height.

ALTUS TOLLENDI. In Civil Law. A servitude which consists in the right, to him who is entitled to it, to build his house as high as he may think proper. In general, every one enjoys this privilege, unless he is restrained by some contrary title.

ALTO ET BASSO. High and low.

This phrase is applied to an agreement made between two contending parties to submit all matters in dispute, alto et basso, to arbitration. *Cowel*.

ALUM MERE. The high sea.

ALUMNUS. A foster-child.

Also a graduate from a school, college, or other institution of learning.

ALVEUS (Lat.). The bed or channel through which the stream flows when it runs within its ordinary channel. *Calvinus, Lex*.

Alveus derelictus, a deserted channel. 1 *Mackeldey, Civ. Law* 280.

AMALGAMATION. Union of different races, or diverse elements, societies, or corporations, so as to form a homogeneous whole or new body; interfusion; intermarriage; consolidation; coalescence; as the amalgamation of stock. *Stand. Dict.*

In England it is used in the case of the merger of two incorporated societies or companies. See *MERGER*.

AMALPHITAN TABLE. A code of sea laws compiled for the free and trading republic of Amalphi toward the end of the eleventh century. 3 *Kent* 9.

It consists of the laws on maritime subjects which were or had been in force in countries bordering on the Mediterranean; and, on account of its being collected into one regular system, it was for a long time received as authority in those countries. 1 *Azuni, Mar. Law* 370.

AMBACTUS (Lat. *ambire*, to go about). A servant sent about; one whose services his master hired out. *Spelman, Gloss*.

AMBASSADOR. In International Law. A public minister sent abroad by some sovereign state or prince, with a legal commission and authority to transact business on behalf of his country with the government to which he is sent.

Extraordinary are those employed on particular or extraordinary occasions, or residing at a foreign court for an indeterminate period. *Vattel, Droit des Gens*, l. 4, c. 6, §§ 70-79.

Ordinary are those sent on permanent missions.

An ambassador is a minister of the highest rank.

The United States, until recently, were represented by ministers plenipotentiary, never having sent a person of the rank of an ambassador in the diplomatic sense; 1 *Kent* 39, n. This was changed, however, and on March 1, 1893, a law was passed authorizing the President to designate as ambassadors the representatives of the United States to such countries as he might be advised were so represented or about to be represented in the United States. In consequence of this provision the United States is now represented by ambassadors in Great Britain, Germany, France, and Italy; 27 *Stat. L.* 496.

Ambassadors, when acknowledged as such, are exempted absolutely from all allegiance, and from all responsibility to the

laws; Pol. Int. Law 208; 7 Cranch 188. If, however, they should be so regardless of their duty, and of the object of their privilege, as to insult or openly to attack the laws of the government, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall, or they may be dismissed, and required to depart within a reasonable time. By fiction of law, an ambassador is considered as if he were out of the territory of the foreign power; and it is an implied agreement among nations, that the ambassador, while he resides in the foreign state, shall be considered as a member of his own country, and the government he represents has exclusive cognizance of his conduct and control of his person; Grotius, b. 2, c. 18, §§ 1-6.

Ambassadors' children born abroad are held not to be aliens; 7 Coke 18 a. The persons of ambassadors and their domestic servants are exempt from arrest on civil process; 1 Burr. 401; 3 id. 1731; Cas. temp. Hardw. 5; Stat. 7 Anne, c. 12; Act of Cong. April 30, 1790, § 25.

Consult 2 Wash. C. C. 435; 7 Cra. 138; 1 Kent 14, 38, 182; 1 Bla. Com. 253; Ruth-erford, Inst. b. 2, c. 9; Vattel, b. 4, c. 8, § 118; Grotius, l. 2, c. 8, §§ 1, 2; 4 Wash. C. C. 531; 1 Bald. 234; as to exemption of household furniture, see 24 Q. B. Div. 368; 2 Wash. C. C. 435. See FOREIGN MINISTER.

AMBDDEXTER (Lat.). Skilful with both hands.

Applied anciently to an attorney who took pay from both sides, and subsequently to a juror guilty of the same offence; Cowel.

AMBIGUITY (Lat. *ambiguitas*, indistinctness; duplicity). Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument.

Latent is that which arises from some collateral circumstance or extrinsic matter in cases where the instrument itself is sufficiently certain and intelligible. 56 Me. 107; 60 N. H. 377; 131 Mass. 179; 83 N. Y. 518.

Patent is that which appears on the face of the instrument; that which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction upon it, placing itself in the situation of the parties, cannot ascertain therefrom the parties' intention. 4 Mass. 205; 4 Cra. 167; 1 Greenl. Ev. §§ 292-300; Ans. Contr. 248; 1 Mason 9; 69 Ala. 140; 50 Iowa 429; 8 Lea 499.

The term does not include mere *inaccuracy*, or such uncertainty as arises from the use of peculiar words, or of common words in a peculiar sense; Wigr. Wills 174; 3 Sim. 24; 3 M. & G. 452; 8 Metc. 576; 13 Vt. 36; see 21 Wend. 651; 8 Bing. 244; and intends such expressions as would be found of uncertain meaning by persons of competent skill and information; 1 Greenl. Ev. § 298.

Latent ambiguities are subjects for the consideration of a jury, and may be explained by parol evidence; 1 Greenl. Ev. § 301; and see Wigram, Wills 48; 2 Starkie, Ev. 565; 1 Stark. 210; 5 Ad. & E. 302; 6 id. 153; 3 B. & Ad. 728; 8 Metc. 576; 7 Cowen 202; 1 Mas. 11. *Patent* ambiguity cannot be explained by parol evidence, and renders the instrument as far as it extends inoperative; 4 Mass. 205; 7 Cra. 167; Jarm. Wills, 6th Am ed. *400. See 89 Ga. 298; 44 Mo. App. 320; 35 N. J. L. 307; 59 Iowa 444; 50 N. H. 349; 23 Barb. 285; 47 Mich. 283; 46 Ill. 247.

AMBIT. A boundary line.

AMBITUS (Lat.). A space beside a building two and a half feet in width, and of the same length as the building; a space two and a half feet in width between two adjacent buildings; the circuit, or distance around. Cicero; Calvinus. Lex.

AMBULANCE. A vehicle fitted for conveying the sick and wounded; sometimes used as a moving or field hospital; in war-time, regarded, with its attendants and equipments, as *quasi* neutral. Stand Dict.; Taylor, Int. Pub. Law 536.

AMBULATORY (Lat. *ambulare*, to

walk about). Movable; changeable; that which is not fixed.

Ambulatoria voluntas (a changeable will) denotes the power which a testator possesses of altering his will during his lifetime.

AMBUSH. The noun means, 1st, the act of attacking an enemy unexpectedly from a concealed station; 2d, a concealed station, where troops or enemies lie in wait to attack by surprise; an ambuscade; 3d, troops posted in a concealed place, for attacking by surprise. The verb *ambush* means to lie in wait, to surprise, to place in ambush. 46 Ala. 142.

AMELIORATIONS. Betterments. 6 Low. Can. 294; 9 id. 508.

AMENABLE. Responsible; subject to answer in a court of justice; liable to punishment. Liable to answer; responsible; answerable; liable to be called to account. 1 Duval (Ky.) 17.

AMEND. To free from error or deficiency; to correct an error; to supply a deficiency. See AMENDMENT.

AMENDE HONORABLE. In English Law. A penalty imposed upon a person by way of disgrace or infamy, as a punishment for any offence, or for the purpose of making reparation for any injury done to another, as the walking into church in a white sheet, with a rope about the neck and a torch in the hand, and begging the pardon of God, or the king, or any private individual, for some delinquency.

In French Law. A punishment somewhat similar to this, and which bore the same name, was common in France; it was abolished by the law of the 25th of September, 1791; Merlin, Répert.

AMENDMENT. In Legislation. An alteration or change of something proposed in a bill or established as law.

Thus the senate of the United States may amend money-bills passed by the house of representatives, but cannot originate such bills. The constitution of the United States contains a provision for its amendment; U. S. Const. art. 5.

In Practice. The correction, by allowance of the court, of an error committed in the progress of a cause.

Amendments, at common law, independently of any statutory provision on the subject, are in all cases in the discretion of the court, for the furtherance of justice. Under statutes in modern practice, they are very liberally allowed in all formal and most substantial matters, either without costs to the party amending, or upon such terms as the court think proper to order.

An amendment, where there is something to amend by, may be made in a criminal as in a civil case; 12 Ad. & E. 217; 2 Pick. 550. But an indictment, which is a finding upon the oaths of the grand jury, can only be amended with their consent before they are discharged; 2 Hawk. Pl. Cr. c. 25, §§ 97, 98; 13 Pick. 200; 17 R. I. 370; but see 68 Miss. 231. In many states there are statutory provisions relative to the amendment of indictments; 60 Hun 577; 44 La. Ann. 330. A bill of exceptions when signed and filed becomes a part of the record and may be amended like any other record; 53 Ark. 250; 49 N. J. Law 36; 35 Ill. App. 370; 116 Mo. 358.

An information may be amended after demurrer; 4 Term 457; 4 Burr. 2568. At common law a mistake in an information may be amended at any time; 24 Atl. Rep. (Vt.) 250. Cf. ADDITION.

See CONSTITUTION, AMENDMENT OF.

AMENDS. A satisfaction given by a wrong-doer to the party injured, for a wrong committed. 1 Lilly, Reg. 81.

By statute 24 Geo. II. c. 44, in England, and by similar statutes in some of the United States, justices of the peace, upon being notified of an intended suit against them, may tender amends for the wrong alleged as done by them in their official character, and, if found sufficient, the tender bars the action; 5 S. & R. 209, 517; 4 Binn. 20;

6 id. 83.

AMENTIA. A mental deficiency which is congenital or very early acquired. Bridges, Outline Ab. Psych. 127. See DEMENTIA; PSYCHOSIS; INSANITY.

AMERCEMENT. In Practice. A pecuniary penalty imposed upon an offender by a judicial tribunal.

The judgment of the court is, that the party be at the mercy of the court (*est in misericordia*), upon which the *officers*—or, in the superior courts, the coroner—liquidate the penalty. As distinguished from a fine, at the old law an *amercement* was for a lesser offence, might be imposed by a court not of record, and was for an uncertain amount until it had been assessed. Either party to a suit who failed was to be amerced *pro clamore fidei* (for his false claim); but these *amercements* have been long since disused; 4 Bla. Com. 879; Bacon, Abr. Fines and Amercements.

The officers of the court, and any person who committed a contempt of court, was also liable to be amerced.

Formerly, if the sheriff failed in obeying the writs, rules, or orders of the court, he might be amerced; but this practice has been generally superseded by attachment. In some of the United States, however, the sheriff may, by statutory provision, be amerced for making a return contrary to the provision of the statute; 1 Salk. 56; 3 id. 33; Coxe 136, 169; 2 South 433; 3 Halst. 270; 3 id. 334; 1 Green, N. J. 159, 341; 2 id. 350; 1 Ohio 275; 6 id. 452; Wright, Ohio 720; 3 Ired. 407; 5 id. 385; Cam. & N. 477; or if he fails to make a return within the proper time; 7 Ohio Cir. Ct. 55. See RANSOM.

AMERCEMENT ROYAL. The amercement of a sheriff, coroner, or other officer of the King for abuse in office. Termes de la Ley. See AMERCEMENT.

AMERICAN. Of or pertaining to the continent of America, or western hemisphere, and the contiguous seas and islands, or any part of this region; or of pertaining in particular to the United States. Stand. Dict.

As applied to people, pertains to descendants of Europeans born in America, particularly the United States. 53 Conn. 493.

AMERICAN EMPIRE. See EMPIRE.

AMERICAN LLOYDS. See LLOYD'S INSURANCE.

AMEUBUSSEMENT. A species of agreement which by a fiction gives to immovable goods the quality of movable. Merl. Rép.; 1 Low. Can. 25, 58.

AMI (Fr.). A friend. See PROCHIN AMY.

AMICABLE ACTION. In Practice. An action entered by agreement of parties on the dockets of the courts.

This practice prevails in Pennsylvania. When entered, such action is considered as if it had been adversely commenced and the defendant had been regularly summoned.

See CASE STATED.

AMICUS CURIAE (Lat. a friend of the court).

In Practice. A friend of the court. One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken; such as a case not reported or which the judge has not seen or does not, at the moment, recollect; 2 Co. Inst. 178; 2 Viner, Abr. 475. This custom cannot be traced to its origin, but is immemorial in the English law. It is recognized in the Year Books, and it was enacted in 4 Hen. IV. (1403) that any stranger as "*amicus curie*" might move the court, etc. Under the Roman system the *Judei*, "especially if there was but one, called some lawyer to assist him with their counsel," "*sibi advocavit ut in consilio adessent*," Cic. Quint. 2 Gell. xiv. 2; Suet. Lib. 38. There was in that day also the "*amicus consilarii*," who was ready to make suggestions to the advocate, and this "*amicus*" was called a "*ministrator*," Cic. de Orat. II. 75. With many others this custom of the Romans became incorporated in the English system, and it was recognized throughout the earlier as well as the later periods of the common law. At first suggestions could come

AMITA

only from the barristers or counsellors, although by the statute of Hen. IV. a "by-stander" had the privilege. The custom included *instructing, warning, informing, and moving* the court. The information so communicated may extend to any matter of which the court takes judicial cognizance; 8 Coke 15. But it is not the function of *amicus curiae* to take upon himself the management of a cause; 56 N. H. 416.

Any one as *amicus curiae* may make application to the court in favor of an infant, though he be no relation; 1 Ves. Sen. 313; and see 11 Gratt. 656; 11 Tex. 698; 2 Mass. 215. Any attorney as *amicus curiae* may move the dismissal of a fictitious suit; 21 Nev. 127; or one in which there is no jurisdiction; 2 Mass. 215; or move to quash a vicious indictment, for in case of trial and verdict judgment must be arrested; Comber 13; or suggest an error which would prevent judgment when the absence of the party prevented a motion in arrest; 2 Show. 297. They may be allowed a reasonable compensation to be taxed by the court; 27 Mo. App. 633.

The term is sometimes applied to counsel heard in a cause because interested in a similar one; 11 Gratt. 656; 2 Brook. 461; and occasionally to strangers suggesting the correction of errors in the proceedings; Year Books 4; Hen VI. 16; Thal. Dig. lib. 13. c. 14; Hard. 85; 11 Mod. 137; 109 U. S. 68. See also 11 Pitts. L. J. 321.

AMITA (Lat.). An aunt on the father's side.

Amita magna. A great-aunt on the father's side.

Amita major. A great-great-aunt on the father's side.

Amita maxima. A great-great-great-aunt, or a great-great-grandfather's sister. Calvinus, Lex.

AMITINUS. The child of a brother or sister; a cousin; one who has the same grandfather, but different father and mother. Calvinus, Lex.

AMITTERE CURIAM (Lat. to lose court).

To be excluded from the right to attend court. Stat. Westm. 2, c. 44.

AMITTERE LIBERAM LEGEM. To lose the privilege of giving evidence under oath in any court; to become infamous, and incapable of giving evidence. Glanville 2.

If either party in a wager of battle cried "craven" he was condemned *amittere liberam legem*; 3 Bla. Com. 340.

AMNESTY. An act of oblivion of past offences, granted by the government to those who have been guilty of any neglect or crime, usually upon condition that they return to their duty within a certain period. *Express amnesty* is one granted in direct terms.

Implied amnesty is one which results when a treaty of peace is made between contending parties. Vattel, 1, 4, c. 2, §§ 20-22.

Amnesty and pardon are very different. The former is an act of the sovereign power, the object of which is to efface and to cause to be forgotten a crime or misdemeanor; the latter is an act of the same authority, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed; 7 Fed. 160. Amnesty is the abolition and forgetfulness of the offense; pardon is forgiveness. A pardon is given to one who is certainly guilty, or has been convicted; amnesty, to those who may have been so.

Their effects are also different. That of pardon is the remission of the whole or a part of the punishment awarded by the law,—the conviction remaining unaffected when only a partial pardon is granted; an amnesty, on the contrary, has the effect of destroying the criminal act, so that it is as if it had not been committed, as far as the public interests are concerned.

Their application also differs. Pardon is always given to individuals, and properly only after judgment or conviction; amnesty may be granted either before judgment or afterwards, and it is in general given to whole classes of criminals, or supposed criminals, for the purpose of restoring tranquillity in the state. But sometimes amnesties are limited, and certain classes are excluded from their operation.

The term *amnesty* belongs to international law, and is applied to rebellions which, by their magnitude, are brought within the rules of international law, but has no technical meaning in the common law, but is a synonym of *oblivion*, which, in the

English law, is the synonym of *pardon*; 10 Ct. Cl. 397.

As to amnesty proclamation of 29th May, 1865, see 7 Ct. Cl. 444.

The general amnesty granted by President Johnson on Dec. 25, 1868, does not entitle one receiving its benefits to the proceeds of his property previously condemned and sold under the act of 17th July, 1862, the proceeds having been paid into the treasury; 95 U. S. 147. As to amnesty in cases arising out of the rebellion; 6 Wall. 766; 4 id. 333; 13 id. 128, 154; 16 id. 147; 7 Ct. Cl. 398, 443, 501, 595; 8 id. 457.

AMONG. Mingled with or in the same group or class.

In the phrase, "commerce among the several states" the word "among" means intermingled with. A thing which is among others, is intermingled with them. 9 Wheaton (U. S. 194).

AMORTISE. To alien lands in mortmain.

AMORTISSEMENT. See **AMORTIZATION**.

AMORTIZATION. An alienation of lands or tenements in mortmain.

The reduction of the property of lands or tenements to mortmain.

AMOTION (Lat. *amovere*, to remove; to take away).

An unlawful taking of personal chattel, out of the possession of the owner, or of one who has a special authority in them.

A turning out the proprietor of an estates in realty before the termination of his estate. 3 Bla. Com. 198, 199.

In Corporations. A removal of an official agent of a corporation from the station assigned to him, before the expiration of the term for which he was appointed. 8 Term 356; 1 East 562; 6 Conn. 532; Beach, Priv. Corp. 184; Dill, Mun. Corp. 4th ed. § 238.

The term is distinguished from *disfranchisement*, which deprives a member of a public corporation of all rights as a corporator. *Expulsion* is the usual phrase in reference to loss of membership of private corporations. The term seems in strictness not to apply properly to cases where officers are appointed merely during the will of the corporation, and are superseded by the choice of a successor, but, as commonly used, includes such cases.

The right of amotion of an officer for just cause is a common-law incident of all corporations; 1 Burr. 517; 2 Kent 297; 1 Dill. Mun. Corp. 4th ed. § 251; 80 W. Va. 491; 85 La. Ann. 1075; 89 N. C. 125; 1 Ves. Jr. 1; 1 Burr. 517; and in case of mere ministerial officers appointed *durante bene placito*, at the mere pleasure of those appointing him, without notice; Willcock, Mun. Corp. 253; 23 Mo. 22; see 1 Ventr. 77; 2 Show. 70; 11 Mod. 403; 9 Wend. 894; 149 Mass. 443. Notice and an opportunity to be heard are requisite where the appointment is *during good behavior*, or the removal is for a specified cause; 33 Pa. 478; 8 B. Monr. 643; 3 Dutch. 265; 32 Ind. 74; 13 Mich. 346; 10 H. L. Cas. 404. Mere acts, which are a cause for amotion, do not create a vacancy till the amotion takes place; 2 Green, N. J. 832; 5 Ind. 77; 12 Pick. 244.

Directors themselves have no implied power to remove one of their own number from office even for cause; nor to exclude him from taking part in their proceedings; Beach, Pr. Corp. § 223; Taylor, Corp. § 650.

The causes for amotion are said by Lord Mansfield (1 Burr. 538) to be:—"first, such as have no immediate relation to the office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise (but indictment and conviction must precede amotion for such causes, except where he has left the country before conviction; 1 B. & Ad. 938); second, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his office; third, such as are offences not only against the duty of his office, but also matter indictable at common law;" Dougl. 149; 2 Binn. 448;

50 Pa. 107; 11 Mod. 379.

Sufficient grounds of removal:—*poverty and inability to pay taxes*; 3 Salk. 229; *total desertion of duty*; Bull. N. P. 206; 1 Burr. 541; *as to neglect of duty*, see Eng. & Am. Corp. § 427; 3 Kyd 65; 1 B. & Ad. 936; 4 Burr. 2004; 2 Stra. 819; 1 Vent. 146; *habitual drunkenness*; 3 Salk. 231; 8 Bulst. 190; *official misconduct*, in the office; 4 Burr. 1999. See 1 Q. B. 751.

Insufficient grounds of removal:—*bankruptcy*; 2 Burr. 723; *casual intoxication*; 8 Salk. 231; 1 Rolle 409; *old age*; 2 Rolle 11; *threats, insulting language, or libel upon the mayor or officers*; 11 Coke 93; 11 Mod. 270; 1 C. & P. 257; 10 Ad. & E. 874; 2 Perry & D. 498.

The Q. B. in England will see that a right of amotion of an officer is lawfully exercised; but it will not control the discretion of the corporation, if so exercised; L. R. 5 H. L. 636 (1872).

Consult Angell & A. Corp. §§ 408, 423-433; Willco. Mun. Corp.; 6 Conn. 533; 6 Mass. 462; 50 Pa. 107; Dill. Mun. Corp. § 238 et seq.; Beach, Pr. Corp. § 184; Beach, Pub. Corp. § 190; 80 W. Va. 491.

AMOUNT. As used in a statute, relating to appeals to the Circuit Court, applies only to a judgment for money. 129 Ky. 347, 111 S. W. 377.

In Controversy. The interest due upon a debt at the time the action was commenced constituted a part of the "amount in controversy." 18 B. Mon. (Ky.) 225.

AMOUNT COVERED. **In Insurance**. The amount that is insured, and for which underwriters are liable for loss under a policy of insurance.

It is limited by that specified in the policy to be insured, and this limit may be applied to an identical subject only, as a ship, a building, or life; or to successive subjects, as successive cargoes on the same ship, or successive parcels of goods transmitted on a certain canal or railroad during a specified period; and it may also be limited by the terms of the contract to a certain proportion, as a quarter, half, etc., of the value of the subject or interest on which the insurance is made; 2 Phillips, Ins. c. xiv. sect. 1, 2; 10 Ill. 285; 16 B. Monr. 242; 2 Dutch. N. J. 111; 6 Gray 574; 13 La. Ann. 246; 84 Me. 487; 39 Eng. L. & Eq. 228.

AMOUNT OF LOSS. **In Insurance**. The diminution, destruction, or defeat of the value of, or of the charge upon, the insured subject to the assured, by the direct consequence of the operation of the risk insured against, according to its value in the policy, or in contribution for loss, so far as its value is covered by the insurance. 2 Phill. Ins. c. xv., xvi., xvii.; 2 Pars. Mar. Law, c. x. § 1, c. xi., xii.; 1 Gray 371; 26 N. H. 889; 5 Du. N. Y. 1; 1 Dutch. N. J. 506; 6 Ohio St. 200; 5 R. I. 426; 2 Md. 217; 7 Ell. & B. 172; Beach, Ins. 1293.

AMOVEAS MANUS (Lat. that you remove your hands). After office found, the king was entitled to the things forfeited, either lands or personal property; the remedy for a person aggrieved was by "petition," or "monstrans de droit," or "traverses," to establish his superior right. Thereupon a writ issued, *quod manus domini regis amoveantur*; 3 Bla. Com. 260.

AMPARO (Span.). A document protecting the claimant of land till properly authorized papers can be issued. 1 Tex. 790.

AMPLIATION. **In Civil Law**. A deferring of judgment until the cause is further examined.

In this case, the judges pronounced the word *amplius*, or by writing the letters N. L. for *non liquet*, signifying that the cause was not clear. It is very similar to the common-law practice of entering *cur. adv. vult* in similar cases.

In French Law. A duplicate of an acquittance or other instrument.

A notary's copy of acts passed before him, delivered to the parties.

AMY (Fr.). Friend. See **PROCHEIN** **AMY**.

DAY, JOUR ET WASTE. See YEAR, DAY AND WASTE.

ANALOGY. The similitude of relations which exist between things compared. See 63 Ga. 58.

Analogy has been declared to be an argument or guide in forming legal judgments, and is very commonly a ground of such judgments; 3 Bingh. 265; 4 Burr. 1962, 2022, 2068; 6 Ves. 675; 3 Swanst. 561; 3 P. Will. 391; 3 Bro. Ch. 639, n.

ANARCHY. The absence of all political government; by extension, Confusion in government.

It is the absence of government; it is a state of society where there is no law or supreme power. 122 Ill. 253.

ANASTASIAN RESCRIPT, THE. See LEX ANASTASIANA.

ANATHEMA. In Ecclesiastical Law. A punishment by which a person is separated from the body of the church, and forbidden all intercourse with the faithful.

It differs from excommunication, which simply forbids the person excommunicated from going into the church and communicating with the faithful.

ANATOCISM. In Civil Law. Taking interest on interest; receiving compound interest.

ANCESTOR. One who has preceded another in a direct line of descent; an ascendant.

A former possessor; the person last seised. *Termes de la Ley*; 2 Bla. Com. 201.

In the common law, the word is understood as well of the immediate parents as of those that are higher; as may appear by the statute 25 Edw. III., *De nativ ultra mare*, and by the statute 6 Ric. II. c. 6, and by many others. But the civilians' relations in the ascending line, up to the great-grandfather's parents, and those above them, they term *maiores*, which common lawyers aptly expound *antecessores* or ancestors, for in the descendants of like degree they are called *posteriores*; Cary, Litt. 45. The term *ancestor* is applied to natural persons. The words *predecessors* and *successors* are used in respect to the persons composing a body corporate. See 2 Bla. Com. 309; Bacon, Abr.; Ayliffe, Pand. 58; Reeve, Descents.

It designates the ascendants of one in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters; 31 Barb. 659.

ANCESTRAL. What relates to or has been done by one's ancestors; as homage ancestral, and the like.

That which belonged to one's ancestors. *Ancestral estates* are such as come to the possessor by descent. 3 Washb. R. P. 5th ed. 411, 412.

ANCHOR. A measure containing ten gallons.

The instrument used by which a vessel or other body is held. See 2 Low. 220; 106 Eng. Com. L. R. 852; 77 N. Y. 443; 19 Hun 284.

ANCHORAGE. A toll paid for every anchor cast from a ship in a port.

Such a toll is said to be incident to almost every port; 1 W. Bla. 413; 4 Term 260; and is sometimes payable though no anchor is cast; 2 Chit. Com. Law 16.

ANCIENT DEEDS. See ANCIENT WRITINGS.

ANCIENT DEMESNE. Manors which in the time of William the Conqueror were in the hands of the crown and are so recorded in the Domesday Book. Fitzh. Nat. Brev. 14, 56.

Tenure in *ancient demesne* may be pleaded in abatement to an action of ejectment; 2 Burr. 1046.

Tenants of this class had many privileges; 2 Bla. Com. 99.

ANCIENT HOUSE. One which has stood long enough to acquire an easement of support. 3 Kent 437; 2 Washb. R. P. 5th ed. *74, *76. See SUPPORT; EASEMENT.

ANCIENT LIGHTS. Windows or openings which have remained in the same place and condition twenty years or more. 5 Harr. & J. 477; 12 Mass. 157, 220.

In England, a right to unobstructed light and air through such openings is secured by mere user for that length of time under the

same title.

In the United States, such right is not acquired without an express grant, in most of the states; 2 Washb. R. P. 5th ed. 62, 63; 3 Kent 446, n. See 11 Md. 1; 5 Del. Ch. 578; 19 Wend. 309; 37 Ala. 501; 26 Me. 436; 115 Mass. 204; and cases under AIR; LIGHT AND AIR. This same doctrine has been upheld in Illinois and Louisiana; 16 Ill. 217; 35 La. Ann. 469. But see 4 Del. Ch. 643; s. c. 24 Am. Law Reg. 6 and note.

ANCIENT READINGS. Essays on the early English statutes. Co. Litt. 280.

ANCIENT RECORDS. See ANCIENT WRITINGS.

ANCIENT RENT. The rent reserved at the time the lease was made, if the building was not then under lease. 3 Vern. 542.

ANCIENT WRITINGS. Deeds, wills, and other writings, more than thirty years old.

They may, in general, be read in evidence without any other proof of their execution than that they have been in the possession of those claiming rights under them; Taylor, Ev. 111; 1 Phill. Ev. 273; 1 Greenl. Ev. § 141; 1 Rice. Ev. §§ 31, 82, 214, 215; 2 Bingh. N. C. 183, 200; 12 M. & W. 205; 8 Q. B. 158; 11 id. 884; 1 Price 225; 7 Beav. 93; 4 Wheat. 213; 5 Pet. 319; 9 id. 663; 3 Johns. 292; 2 Nott & M'C. 55, 400; 4 Pick. 160; 16 Me. 27; 27 Fed. Rep. 170; 120 N. Y. 109; 76 Tex. 363; 81 id. 614; 139 Mass. 244; 47 Fed. Rep. 154; 91 Ga. 577; 73 Ill. 109. As to the admission of duplicate copies, see 71 Hun 295.

ANCIENTS. Gentlemen in the Inns of Courts who are of a certain standing.

In the Middle Temple, all who have passed their readings are termed *ancients*. In Gray's Inn, the *ancients* are the oldest barristers; besides which, the society consists of benchers, barristers, and students; in the Inns of Chancery, it consists of *ancients*, and students or clerks.

ANCIENTY. Eldership; seniority. Used in the statute of Ireland, 14 Hen. VIII.; Cowel.

ANCILLARY (Lat. *ancilla*, a hand-maid). Auxiliary, subordinate.

As it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives its final determination; 3 Bla. Com. 98.

Used of deeds, and also of an administration of an estate taken out in the place where assets are situated, which is subordinate to the principal administration, which is that of the domicile; 1 Story, Eq. Jur. 13th ed. § 583.

ANCIPITIS USUS (Lat.). Useful for various purposes.

As it is impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from its immediate destination; 1 Kent 140.

AND. In order for the court to ascertain the intention of the legislature in the construction of statutes, they are often compelled to construe "or" as meaning "and," and again "and" as "or." 3 Wallace (U.S.) 447.

The word "and" not construed as "or" in an indictment for selling liquor to a minor. The offense defined in the statute is a sale "without the written consent or request of the father," etc. 6 Bush (Ky.) 92.

In construing a devise the word "or" will be changed to "and" when necessary to effectuate the true intention of the testator. 91 Ky. 547, 16 S. W. 361.

And Company. The words "and company" added to the name of a defendant will not affect a judgment against him. 80 S. W. 518.

His Children. A deed conveying land to V "and his children," to have and to hold to him "and his children" conveys to V the fee and not merely the life interest. 51 S. W. 173.

Including. The words "and including" following a description do not necessarily mean "in addition to," but may refer to a part of the thing described. 221 U. S. 452.

Parallel or Competing. "Parallel or competing" do not mean "parallel and competing." 144 Ky. 324, 138 S. W. 291.

ANDROLEPSY. The taking by one nation of the citizens or subjects of another in order to compel the latter to do justice to the former. Wolffius, § 1164; Molloy, *de Jure Mar.* 26.

ANECIUS (Lat. Spelled also *æcnecius*, *enitius*, *æneas*, *eneyus* Fr. *aisne*). The eldest-born; the first-born; senior, as contrasted with the *puis-ne* (younger); Burrill, Law Dict. 99; Spelman, Gloss. *Æsnecia*.

ANGARIA. In Roman Law. A service or punishment exacted by government.

They were of six kinds, viz.: maintaining a post-station where horses are changed; furnishing horses or carts; burdens imposed on lands or persons; disturbance, injury, anxiety of mind; the three or four-day periods of fasting observed during the year; saddles or yokes borne by criminals from county to county, as a disgraceful mode of punishment among the German or Franks; Du Cange, *verb. Angaria*.

In Feudal Law. Any troublesome or vexatious personal service paid by the tenant to his lord. Spelman, Gloss.

ANGARY, RIGHT OF. In International law, the right or practice of a belligerent of using, or even destroying if necessary, subject to liability for just compensation, neutral property within his territory or in the territory of his military occupancy. Taylor, Int. Pub. Law 702; Maxey, Int. L. 763.

ANGEL. An ancient English coin, of the value of ten shillings sterling. Jacobs, Law Dict.

ANGILD (Sax.). The bare, single valuation or estimation of a man or thing, according to the legal estimates.

The terms *twigild*, *trigild*, denote twice, thrice, etc., *angild*. *Leges Ina*, c. 20; Cowel.

ANHLOTE (Sax.). The sense is, that every one should pay, according to the custom of the country, his respective part and share. Spelman, Gloss.

ANIENS. Void; of no force. Fitzherbert, Nat. Brev. 214.

ANIENT (Fr. *anéantir*). Abrogated, or made null. Littleton, § 741.

ANIMAL. Any animate being which is not human, endowed with the power of voluntary motion.

Domitæ are those which have been tamed by man; domestic.

Feræ naturæ are those which still retain their wild nature.

A man may have an absolute property in animals of a domestic nature; 2 Mod. 319; 2 Bla. Com. 390; but not so in animals *feræ naturæ*, which belong to him only while in his possession; 3 Binn. 546; 3 Caines 175; 7 Johns. 16; 13 Miss. 383; 8 Blackf. 498; 2 B. & C. 934; 4 Dowl. & R. 518. Yet animals which are sometimes *feræ naturæ* may be tamed so as to become subjects of property; as an otter; 65 N. C. 615; s. c. 6 Am. Rep. 744; pigeons which return to their house or box; 2 Den. Cr. Cas. 361, 362, n.; 4 C. & P. 131; 9 Pick. 15; or pheasants hatched under a hen; 1 Post. & F. 350. And the flesh of animals *feræ naturæ* may be the subject of larceny; 3 Cox, Cr. Cas. 572; 1 Den. Cr. Cas. 501; Temple. & M. 196; 2 C. & K. 981; 65 N. C. 615.

It was not larceny at common law to steal dogs or other inferior animals that did not serve for food; 4 Bla. Com. 235; 78 N. C. 481; 1 Greene 106. See note in 15 Am. Rep. 356. In America, dogs are generally regarded as a species of property; 31 Conn. 121; 100 Mass. 136; and when all personal property is subject to larceny, they are generally regarded as subject thereto; 9 Baxt. 53; 86 N. Y. 365. See 1 Am. & Eng. Encyc. of Law, 573. In Pennsylvania they are expressly declared to be subjects of larceny; Act Pa. 1893, May 25; P. L. 136, § 7. Summary proceedings for the destruction of dogs kept contrary to municipal regulations are entirely within legislative power; 69 Miss. 34.

The owner of a mischievous animal, known to him to be so, is responsible, when

he permits him to go at large, for the damages he may do; 3 Esp. 482; 4 Campb. 198; 1 B. & Ald. 620; 2 Cro. M. & R. 496; 5 C. & P. 1; 99 U. S. 645; 105 Mass. 71; 35 Ind. 178; 75 Ill. 141; 38 Wis. 900; Tayl. Ev. 613; 1 Q. B. 110; 62 Hun 619; 64 id. 636; 155 Pa. 225; 161 id. 98; 37 Fed. Rep. 317; he is liable although not negligent in the matter of his escape from a close; 42 Ill. App. 186. And any person may justify the killing of ferocious animals; 9 Johns. 233; 13 id. 312; 11 Chic. Leg. N. 295; 35 Neb. 638. The owner of such an animal may be indicted for a common nuisance; 1 Russ. Crimes 643; Burn, Just. Nuisance; O.

The keeper of an animal *feræ naturæ* is liable for any injury it may cause, unless he can disprove negligence (which need not be averred in the declaration); 88 Barb. 14; 35 Ind. 178; 41 Cal. 138; 9 Q. B. 101. The owner of any animal, tame or wild, is liable for the exercise of such dangerous tendencies as generally belong to its nature, but not of any not in accordance with its nature, unless the owner or keeper knew, or ought to have known, of the existence of such dangerous tendency; Whart. Negl. § 923. To recover for damages inflicted by a ferocious dog, it is not necessary actually to prove that it has bitten a person before; L. R. 2 C. P. 1; 126 Mass. 511; 65 N. Y. 54.

The common-law requirement that the owner of domestic cattle must keep them on his own premises (42 Ill. App. 561) does not apply to a region like the Black Hills; 6 Dak. 86.

See on the general subject of *Animals*, 20 Alb. L. J. 6, 104; 2 id. 101; 1 Thomps. Negl. 173 et seq.

ANIMALS OF A BASE NATURE. Those animals which, though they may be reclaimed, are not such that at common law a larceny may be committed of them, by reason of the baseness of their nature.

Some animals which are now usually tamed come within this class, as dogs and cats; and others which, though wild by nature and often reclaimed by art and industry, clearly fall within the same rule, as bears, foxes, apes, monkeys, ferrets, and the like; Coke, 3d Inst. 109; 1 Hale, Pl. Cr. 511, 512; 1 Hawk. Pl. Cr. 38, § 86; 4 Bla. Com. 286; 2 East, Pl. Cr. 614. See 1 Wms. Saund. 84, note 2.

ANIMO (Lat.). With intention.

Quo animo, with what intention. *Animo cancellandi*, with intention to cancel; 1 Powell, Dev. 608. *Animo furandi*, with intention to steal; 4 Sharw. Bla. Com. 290; 1 Kent 183; *lucrandi*, with intention to gain or profit; 3 Kent 337; *manendi*, with intention to remain; 1 Kent 76; *morandi*, with intention to stay, or delay; *republicandi*, with intention to republish; 1 Powell, Dev. 609; *revertendi*, with intention to return; 2 Sharw. Bla. Com. 392; *revocandi*, with intention to revoke; 1 Powell, Dev. 595; *testandi*, with intention to make a will.

ANIMO ET CORPORE. By the mind, and by the body; by the intention, and by the physical act.

ANIMO FELONICO. With felonious intent.

ANIMUS (Lat., mind). The intention with which an act is done.

ANIMUS CANCELLANDI. An intention to destroy or cancel. See CANCELLATION.

ANIMUS CAPIENDI. The intention to take. 4 C. Rob. Adm. 126, 155.

ANIMUS FURANDI. The intention to steal.

In order to constitute larceny, the thief must take the property *animo furandi*; but this is expressed in the definition of larceny by the word felonious; Coke, 3d Inst. 107; Hale, Pl. Cr. 503; 4 Bla. Com. 290. See 3 Russell, Crimes 96; 3 Tyl. Com. 273; Rapalje, Larceny, § 18. When the taking of property is lawful, although it may afterwards be converted *animo furandi* to the taker's use, it is not larceny; Bacon, Abr. Felony C. 14 Johns. 284; Ry. & M. 180, 137; 55 Mo. 83; [1895] 3 Ir. 709; Prin. of Pen. Law c. 23, § 3, pp. 279, 281.

ANIMUS LUCRANDI. The intention to gain or profit. See ANIMO.

ANIMUS MANENDI. The intention of remaining.

To acquire a domicile, the party must have his abode in one place, with the intention of remaining there; for without such intention no new domicile can be gained, and the old will not be lost. See DOMICIL.

ANIMUS MORANDI. The intention

of delaying, hindering, or disturbing. Taylor. See ANIMO.

ANIMUS RECIPIENDI. The intention of receiving.

A man will acquire no title to a thing unless he possesses it with an intention of receiving it for himself; as, if a thing be bailed to a man, he acquires no title.

ANIMUS REPUBLICANDI. The intention of republishing. R. & L. Dict. See ANIMO.

ANIMUS RESTITUENDI. An intention of restoring. Fleta, lib. 3, c. 2, § 3.

ANIMUS REVERTENDI. The intention of returning.

A man retains his domicile if he leaves it *animo revertendi*; 3 Rawle 312; 4 Bla. Com. 225; 2 Russ. Cr. 9th Amer. ed. 23; Poph. 42, 52; 4 Coke 40. See DOMICIL.

ANIMUS REVOCANDI. An intention to revoke.

ANIMUS TESTANDI. An intention to make a testament or will.

This is required to make a valid will; for, whatever form may have been adopted, if there was no *animus testandi*, there can be no will. An idiot, for example, can make no will, because he can have no intention; Beach, Wills 77.

ANN. In Scotch Law. Half a year's stipend, over and above what is owing for the incumbency, due to a minister's relict, or child, or next of kin, after his decease. Whishaw.

ANNALES. A title given to the Year Books. Burrill, Law Dict. Young cattle; yearlings. Cowel.

ANNATES. In Ecclesiastical Law. First-fruits paid out of spiritual benefices to the pope, being the value of one year's profit.

ANNEXXATION. (Lat. *ad*, to, *nequare*, to bind). The union of one thing to another.

It conveys the idea, properly, of fastening a smaller thing to a larger; an incident to a principal. It has been applied to denote the union of Texas to the United States.

Actual annexation includes every movement by which a chattel can be joined or united to the freehold. Mere juxtaposition, or the laying on of an object, however heavy, does not amount to annexation; 14 Cal. 64.

Constructive annexation is the union of such things as have been holden parcel of the realty, but which are not actually annexed, fixed, or fastened to the freehold. Sheppard, Touchst. 469; Amos & F. Fixt. 3d ed. See FIXTURES.

ANNI NUBILIS (Lat. marriageable years). The age at which a girl becomes by law fit for marriage, the age of twelve.

ANNICULUS (Lat.). A child a year old. Calvinus, Lex.

ANNO DOMINI (Lat. the year of our Lord; abbreviated A. D.). The computation of time from the birth of Jesus Christ.

The Jews began their computation of time from the Creation; the Romans, from the founding of Rome; the Mohammedans, from the Hegira, or flight of the Prophet; the Greeks reckoned by Olympiads; but Christians everywhere reckon from the birth of Jesus Christ.

In a complaint, the year of the alleged offence may be stated by means of the letters "A. D.," followed by words expressing the year; 4 Cush. 506. But an indictment or complaint which states the year of the commission of the offence in figures only, without prefixing the letters "A. D.," is insufficient; 5 Gray 91. The letters "A. D.," followed by figures expressing the year, have been held sufficient in several states; 3 Vt. 481; 1 Greene, Ia. 418; 35 Me. 489; 1 Bennett & H. Lead. Cr. Cas. 512; but the phrase, or its equivalents, may be dispensed with; 12 Q. B. 384; 2 Cart. Ind. 91; 23 Minn. 67; but see 1 Breese 4. See Whart. Préc. 4th ed. (2) n. g.

ANNO URBIS CONDITAE. In the year of the building of the city [Rome]; usually abbreviated A. U. C. Stand. Dict. See AB URBE CONDITA; ANNO DOMINI.

ANNONA (Lat.). Barley; corn; grain; a yearly contribution of food, of various kinds, for support.

Annona porcum, acorns; *annona frumentum hordeo admixtum*, corn and barley mixed; *annona panis*, bread, without reference to the amount. Du Cange; Spelman, Gloss.; Cowel.

The term is used in the old English law, and also in the civil law quite generally, to denote anything contributed by one person towards the support of another; as, *si quis mancipio annonam dederit* (if any shall have given food to a slave); Du Cange; Spelman; Gloss.

ANNONÆ CIVILES. Yearly rents issuing out of certain lands, and payable to monasteries.

ANNOTATION. In Civil Law. The answers of the prince to questions put to him by private persons respecting some doubtful point of law. See RESCRIPT. Summoning an absentee; Dig. 1. 5.

The designation of a place of deportation. Dig. 32. 1. 3.

ANNONYANCE. See NUISANCE.

ANNUAL ASSAY. An annual trial of the gold and silver coins of the United States, to ascertain whether the standard fineness and weight of the coinage is maintained.

At every delivery of coins made by the coinor to a superintendent, it is made the duty of the superintendent, in the presence of the assayer, to take indiscriminately a certain number of pieces of each variety for the annual trial of coins, the number for gold coins being not less than one piece for each one thousand pieces, or any fractional part of one thousand pieces delivered; and for silver coins, one piece for each two thousand pieces, or any fractional part of two thousand pieces delivered. The pieces so taken shall be carefully sealed up in an envelope, properly labelled, stating the date of the delivery, the number and denominations of the pieces enclosed, and the amount of the delivery from which they were taken. These sealed parcels containing the reserved pieces shall be deposited in a pyx, designated for the purpose at each mint, which shall be under the joint care of the superintendent and assayer, and be so secured that neither can have access to its contents without the presence of the other; and the reserved pieces of the envelopes from the coinage of each mint shall be transmitted quarterly to the mint at Philadelphia. A record shall also be kept of the number and denomination of the pieces so delivered, a copy of which shall be transmitted quarterly to the director of the mint; Sect. 40, Act of Feb. 12, 1875; U. S. Rev. Stat. § 3539.

To secure a due conformity in the gold and silver coins to their respective standards and weights, it is provided by law that an annual trial shall be made of the pieces reserved for this purpose at the mint and its branches, before the judge of the district court of the United States for the eastern district of Pennsylvania, the comptroller of the currency, the assayer of the assay office at New York, and such other persons as the president shall from time to time designate for that purpose, who shall meet as assay commissioners, on the second Wednesday in February annually, at the mint in Philadelphia, to examine and test, in the presence of the director of the mint, the fineness and weight of the coins reserved by the several mints for this purpose, and may continue their meetings by adjournment, if necessary; and if a majority of the commissioners shall fail to attend at any time appointed for their meeting, the director of the mint shall call a meeting of the commissioners at such other time as he may deem convenient, and if it shall appear that these pieces do not differ from the standard fineness and weight by a greater quantity than is allowed by law, the trial shall be considered and reported as satisfactory; but if any greater difference from the legal standard or weight shall appear, this fact shall be certified to the president of the United States, and if, on a view of the circumstances of the case, he shall so decide, the officer or officers implicated in the error shall be thenceforward disqualified from holding that respective offices; § 42, Act of Feb. 12, 1875 (U. S. Rev. Stat. § 3547) *id.* §§ 49, 50 (R. S. §§ 3548, 3549). As to the standard weight and fineness of the gold and silver coins of the United States, see sections of the last cited Act. The limit of allowance for wastage is fixed; § 43, Act of Feb. 12, 1875; R. S. § 3548.

For the purpose of securing a due conformity in the weight of the coins of the United States, the brass Troy pound weight procured by the minister of the United States (Mr. Gallatin) at London, in the year 1827, for the use of the mint, and now in the custody of the director thereof, shall be the standard Troy pound of the mint of the United States, conformably to which the coinage thereof shall be regulated; and it is made the duty of the director of the mint to procure and safely keep a series of standard weights corresponding to the aforesaid Troy pound, and the weights ordinarily employed in the transactions of the mint shall be regulated according to such standards at least once in every year under his inspection, and their accuracy tested annually in the presence of the assay commissioners on the day of the annual assay; Act of Feb. 12, 1875; R. S. § 3548.

In England, the accuracy of the coinage is reviewed once in about every four years; no specific

period being fixed by law. It is an ancient custom or ceremony, and is called the *Trial of the Pyx*; which name it takes from the pyx or chest in which the specimen-coins are deposited. These specimen-pieces are taken to be a fair representation of the whole money coined within a certain period. It having been notified to the government that a trial of the pyx is called for, the lord chancellor issues his warrant to summon a jury of goldsmiths, who, on the appointed day, proceed to the Exchange Office, Whitehall, and there, in the presence of several privy councillors and the officers of the mint, receive the charge of the lord chancellor as to their important functions, who requests them to deliver to him a verdict of their finding. The jury proceed to Goldsmiths' Hall, London, where assaying apparatus and all other necessary appliances are provided, and the sealed packages of the specimen-coins being delivered to them by the officers of the mint, they are tried by weight, and then a certain number are taken from the whole and melted into a bar, from which the assay trials are made, and a verdict is rendered according to the results, which have been ascertained; Encyc. Brit. titles Coinage, Mint, Money, Numismatics.

See ASSAY.

ANNUAL INCOME. The annual receipts from property. See INCOME.

ANNUAL RENT. In Scotch Law. Interest.

To avoid the law against taking interest, a yearly rent was purchased; hence the term came to signify interest; Bell, Dict.; Paterson, Comp. §§ 19, 20.

ANNUALLY. Yearly; returning every year.

As applied to interest it is not an undertaking to pay interest at the end of one year only, but to pay interest at the end of each and every year during a period of time, either fixed or contingent; 6 Gray 164.

The word "annual" as used in a contract was construed as meaning, refusing to perform further, not to rescind or avoid. 220 U. S. 321.

As applied to the payment of interest, means not the payment of interest at the end of one year only, but at the end of each and every year, during a period of time, either fixed or contingent. Abbott; 6 Gray 163.

ANNUITY (Lat. annuus, yearly). A yearly sum stipulated to be paid to another in fee, or for life or years, and chargeable only on the person of the grantor; Co. Litt. 144 b; 2 Bla. Com. 40; Lumley, Ann. 1; 5 Mart. La. 182; Dav. Ir. 14; 24 N. J. Eq. 358; 23 Barb. 216.

An annuity is different from a rent-charge, with which it is sometimes confounded,—the annuity being chargeable on the person merely, and so far personality; while a rent-charge is something reserved out of realty, or fixed as a burden upon the estate in land; 2 Bla. Com. 40; Rolle, Abr. 226; 10 Watts 127. An annuity in fee is said to be a personal fee; for, though transmissible, as is real estate of inheritance; Amb. Ch. 782; Challis, R. P. 46; liable to forfeiture as a hereditament; 7 Coke, 34 a; and not constituting assets in the hands of an executor, it lacks some other characteristics of realty. The husband is not entitled to curtesy, nor the wife to dower, in an annuity; Co. Litt. 32 a. It cannot be conveyed by way of use; 2 Wils. 224; is not within the statute of frauds, and may be bequeathed and assigned as personal estate; 2 Ves. Sen. 70; 4 B. & Ald. 59; Roscoe, Real Est. 68, 85; 3 Kent 460.

To enforce the payment of an annuity, an action of annuity lay at common law, but when brought for arrears must be before the annuity determines; Co. Litt. 285. In case of the insolvency or bankruptcy of the debtor, the capital of the constituted annuity becomes exigible; La. Civ. Code, art. 2769; 4 Geo. IV. c. 16, §§ 54, 108; 5 Ves. 708; 1 id. 763; 1 Belt, Supp. Ves. 308, 431. See 1 Rop. Leg. 588; CHARGE.

ANNUL. To abrogate, nullify, or abolish; to make void.

It is not a technical word and there is nothing which prevents the idea from being expressed in equivalent words; 23 Mo. 24.

May mean to refuse to perform further, not rescind or avoid. 220 U. S. 328.

ANNULUS ET BACULUS (Lat. ring and staff). The investiture of a bishop was *per annulum et baculum* by the prince's delivering to the prelate a ring and pastoral staff, or crozier. 1 Sharsw. Bla. Com. 378; Spelman, Gloss.

ANNUM, DIEM ET VASTUM. See YEAR, DAY, AND WASTE.

ANNUS LUCTUS (Lat.). The year of mourning. Code, § 9, 2.

It was a rule among the Romans; and also the Danes and Saxons, that the widows should not marry *infra annum luctus* (within the year of mourning); 1 Bla. Com. 457.

ANNUS UTILIS. A year made up of available or serviceable days. Brissonius; Calvinus, Lex.

ANNUUS REDITUS. A yearly rent; annuity. 2 Sharsw. Bla. Com. 41; Reg. Orig. 158 b.

ANONYMOUS. Without name.

Books published without the name of the author are said to be anonymous. Cases in the reports of which the names of the parties are not given are said to be anonymous.

ANSWER. In Equity Pleading. A defence in writing, made by a defendant to the charges contained in a bill or information filed by the plaintiff against him in a court of equity.

In case relief is sought by the bill, the answer contains both the defendant's defence to the case made by the bill, and the examination of the defendant, on oath, as to the facts charged in the bill, of which discovery is sought; Gresley, Eq. Ev. 19; Jeremy's Mitf. Eq. Pl. 15, 16. These parts were kept distinct from each other in the civil law; their union, in chancery, has caused much confusion, in equity pleading; Langd. Eq. Pl. 41; Story, Eq. Pl. § 850; Dan. Ch. Pl. & Pr. *711.

As to the form of the answer, it usually contains, in the following order: the title, specifying which of the defendants it is the answer of, and the names of the plaintiffs in the cause in which it is filed as answer; 8 Ves. 79; 11 id. 62; 1 Russ. 441; see 17 Ala. N. S. 89; a reservation to the defendant of all the advantages which might be taken by exception to the bill, which is mainly effectual in regard to other suits; Beames, Eq. Pl. 46; 1 Hempst. 715; 4 Md. 107; the substance of the answer, according to the defendant's knowledge, remembrance, information, and belief, in which the matter of the bill, with the interrogatories founded thereon, are answered, one after the other, together with such additional matter as the defendant thinks necessary to bring forward in his defence, either for the purpose of qualifying or adding to the case made by the bill, or to state a new case on his own behalf; a general traverse or denial of all unlawful combinations charged in the bill, and of all other matters therein contained not expressly answered.

The answer must be upon oath of the defendant, or under the seal of a corporation defendant; Bish. Eq. 9; 21 Ga. 161; 1 Barb. 22; see 8 Gill 170; 1 Dan. Ch. Pl. & Pr. *734; 10 Ia. 264; unless the plaintiff waives the right; Story, Eq. Pl. § 824; 10 Cush. 58; 2 Gray, 431; 6 Wall. 299; 14 N. J. Eq. 306; 40 Ill. 527; in which case it must be generally signed by the defendant; 6 Ves. 171, 285; 10 id. 441; Cooper, Eq. Pl. 326; 10 Ia. 264; and must be signed by counsel; Story, Eq. Pl. § 876; unless taken by commissioners; 4 McL. 136; 1 Dan. Ch. Pl. & Pr. *732.

As to substance, the answer must be full and perfect to all the material allegations of the bill, confessing and avoiding, denying or traversing, all the material parts; Comyns, Dig. Chancery, K, 2; 28 N. H. 440; 6 Rich. Eq. 1; 10 Ga. 449; 21 N. J. Eq. 31; 24 Beav. 421; not literally merely, but answering the substance of the charge; Mitf. Eq. Pl. 309; 28 Ala. N. S. 289; 16 Ga. 442; 1 Halst. Ch. 60; and see 2 Stockt. Ch. 267; must be responsive; 3 Halst. Ch. 17; 13 Ill. 318; 21 Vt. 326; and must state facts, and not arguments, directly and without evasion; Story, Eq. Pl. § 852; 7 Ind. 661; 24 Vt. 70; 4 Ired. Eq. 390; 9 Mo. 605; without scandal; 19 Me. 214; 18 Ark. 215; or impertinence; 3 Story 13; 6 Beav. 558; 4 McL. 202; 8 Blackf. 124. See 10 Sim. 345; 17 Eng. L. & Eq. 509; 22 Ala. N. S. 231; 6 Paige 239; 24 Fed. Rep. 823; 39 N. J. Eq. 76; 1 Swanst. 228; 6 Ves. 456.

Under the modern English practice the form of the answer has been much sim-

plified; 15 & 16 Vict. c. 86, § 17. Under the General Orders of 1852 a form was adopted, though scarcely necessary in view of the absence of all technicality; 2 Dan. Ch. Pr. ed. of 1865, 724; 3 id. 2139. In the United States generally the answer has been simplified, but the variations from the old practice consist mainly in dividing the answer into numbered paragraphs, adjusting its general form to the bill as now drawn (see BILL), and in omitting the clause reserving exceptions (though in practice this is very frequently retained), and the clause denying combination, retaining merely, to form an issue on them, a general traverse of all allegations not expressly answered.

A material allegation in a bill, which is neither expressly admitted or denied, is deemed to be controverted; 133 Ill. 197; 44 Ill. App. 145.

Insufficiency of answer is a ground for exception when some material allegation, charge, or interrogatory is unanswered or not fully answered; 1 Md. Ch. Dec. 358; 7 How. 726; 6 Humphr. 18. See 10 Humphr. 280; 11 Paige 543; 40 Fed. Rep. 384; 1 Dan. Ch. Pl. & Pr. 760; 16 Vt. 179.

Where the defendant in equity suffers a default he does not admit facts not alleged in the bill nor conclusions of the pleader from the facts stated; 24 Ill. App. 219.

An answer may, in some cases, be amended; 2 Bro. Ch. 143; 2 Ves. 85; to correct a mistake of fact; Amb. 292; 1 P. Wms. 207; but not of law; Amb. 65; nor any mistake in a material matter except upon evidence of surprise; 36 Me. 124; 3 Sumn. 583; 1 Bro. Ch. 319; and not, it seems, to the injury of others; Story, Eq. Pl. § 904; 1 Halst. Ch. 49. The court may permit an answer to be amended even after the announcement of the decision of the cause; 46 N. J. Eq. 543. A supplemental answer may be filed to introduce new matter; 6 McL. 459; 7 Mackey 8; or correct mistakes; 2 Coll. 133; 15 Ala. N. S. 634; 7 Ga. 99; 8 Blackf. 24; which is considered as forming a part of the original answer. See DISCOVERY; Mitf. Eq. Pl. 244, 254; Cooper, Eq. Pl. 312, 327; Beames, Eq. Pl. 34. The 60th Equity Rule S. C. of U. S. provides for amendments.

For an historical account of the instrument, see 2 Brown, Civ. Law 371, n.; Barton, Suit in Eq. See also Langdell's learned Summary of Equity 41.

In Practice. The declaration of a fact by a witness after a question has been put, asking for it. See SUPPLEMENTAL ANSWER.

ANTAPOCHA (Lat.). An instrument by which the debtor acknowledges the debt due the creditor, and binds himself. A copy of the *apocha* signed by the debtor and delivered to the creditor. Calvinus, Lex.

ANTE-FACTUM (Lat.). In the Roman Law. A thing done before; a previous act or fact.

ANTE JURAMENTUM (Lat.; called also Juramentum Calumniae). The oath formerly required of the parties previous to a suit,—of the plaintiff that he would prosecute, and of the defendant that he was innocent. Jacobs, Dict.; Whishaw.

ANTE LITEM MOTAM. Before suit brought.

ANTE-NUPTIAL. Before marriage; before marriage, with a view to entering into marriage.

ANTE-NUPTIAL CONTRACT. A contract made before marriage.

The term is most generally applied to a contract entered into between a man and woman in contemplation of their future marriage, and in that case it is called a marriage contract.

A wife may waive any and all right to any portion of the estate of her husband by an ante-nuptial contract, and this is binding on her unless fraud, advantage, or collusion can be shown; 39 Ill. App. 145. An ante-nuptial agreement that the wife shall claim no right of dower does not deprive

her of her distributive share in the husband's personal property; 54 N. W. Rep. (Iowa) 215. A contract by which each agreed to make no claim to the property of the one dying first is void so far as dower is concerned, as it makes no provision in lieu thereof; 51 Mo. App. 237.

Conveyances made by one of two persons about to be married, usually called marriage settlements.

They are usually made on the prospect of marriage, for the benefit of the married pair, or one of them, or for the benefit of some other persons; as their children. They may be of either personal or real estate. Such settlements vest the property in trustees upon specified terms, usually, for the benefit of the husband and wife during their joint lives, and then for the benefit of the survivor for life, and afterwards for the benefit of children.

Ante-nuptial agreements of this kind will be enforced in equity by a specific performance of them, provided they are fair and valid and the intention of the parties is consistent with the principles and policy of law; 8 Blackf. 284; 4 R. I. 276; 28 Penn. 73; 7 Pet. 348; 9 How. 196. Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid both against creditors and purchasers; 22 Ca. 402. A wife may waive any and all right to any portion of her husband's estate by ante-nuptial contract, where no fraud, collusion, overreaching, or advantage is shown; 39 Ill. App. 145.

A conveyance by the husband or wife prior to marriage, which, if permitted, would deprive the other of his or her marital rights in the property conveyed.

After an elaborate examination of the subject of equitable relief against ante-nuptial agreements and a review of the English and American authorities, Bates, Ch., held that the husband will be protected against a voluntary conveyance or settlement, by his intended wife, of all her estate, to the exclusion of the husband, made pending an engagement of marriage, without his knowledge, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not; and that the wife's dower will be protected against the voluntary conveyance of the husband, made pending a marriage engagement, under the same circumstances in which the husband is relieved against an ante-nuptial settlement by the wife; 3 Del. Ch. 99.

ANTEDATE. To put a date to an instrument of a time before the time it was written.

ANTENATI (Lat. born before). Those born in a country before a change in its political condition such as to affect their allegiance.

The term is ordinarily applied by American writers to denote those born in this country prior to the Declaration of Independence. It is distinguished from *postnati*, those born after the event.

As to the rights of British *antennati* in the United States, see Kirby 413; 2 Halst. 305, 337; 2 Mass. 236, 244; 9 *id.* 460; 2 Pick. 394; 2 Johns. Cas. 29; 4 Johns. 75; 1 Munf. 218; 6 Call. 60; 3 Binn. 75; 4 Cra. 321; 3 Pet. 99. As to their rights in England, see 7 Coke 1, 27; 2 B. & C. 779; 5 *id.* 771; 1 Wood, Lect. 382.

ANTHROPOMETRY. The measurement of the human body. Stand. Dict. See BERTILLON SYSTEM.

ANTICHRESIS (Lat.). In Civil Law. An agreement by which the debtor gives to the creditor the income from the property which he has pledged, in lieu of the interest on his debt. Guyot, *Répert.*; Story Bailm. § 344.

It is analogous to the Welsh mortgage of the common law. In the French law, if the income was more than the interest, the debtor was entitled to demand an account of the income, and might claim any excess; La. Civ. Code, 3085. See Dig. 20. 1. 11; *id.* 18. 7. 1; Code, 8. 28. 1; 11 Pet. 351; 1 Kent 137; 23 La. Ann. 668.

ANTICIPATION (Lat. *ante*, before, *capere*, to take). The act of doing or taking

a thing before its proper time.

In deeds of trust there is frequently a provision that the income of the estate shall be paid by the trustee as it shall accrue, and not by way of anticipation. A payment made contrary to such provision would not be considered as a discharge of the trustee; Bisp. Eq. 104.

ANTI-MANIFESTO. The declaration of the reasons which one of the belligerents publishes, to show that the war as to him is defensive. Wolffius § 1187.

ANTINOMIA. In Roman Law. A real or apparent contradiction or inconsistency in the laws. Merlin, *Répert.*

It is sometimes used as an English word, and spelled Antinomy.

ANTIQUA CUSTUMA (L. Lat. ancient custom). The duty due upon wool, wolfells, and leather, under the statute 3 Edw. I.

The distinction between *antiqua* and *nova custuma* arose upon the imposition of a new and increased duty upon the same articles, by the king, in the twenty-second year of his reign; Bacon, Abr. *Smuggling*, C. 1.

ANTIQUA STATUTA. Also called *Vetera Statuta*. English statutes from the time of Richard First to Edward Third. Reeves, Hist. Eng. Law 237.

ANTIQUARE. In Roman Law. To resolve a former law or practice; to reject or vote against a new law; to prefer the old law. Those who voted against a proposed law wrote on their ballots the letter "A," the initial of *antiquo*, I am for the old law; Calvin; Black, Dict.

ANTIQUITIES. Things belonging to ancient times, as monuments, dress, customs, and the like. Stand. Dict.

ANTITHEIARIUS. In Old English Law. A man who endeavors to discharge himself of the crime of which he is accused, by retorting the charge on the accuser. He differs from an approver in this, that the latter does not charge the accuser, but others; Jacobs, Law Dict.

ANTI-TRUST ACT. An act of Congress approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, "providing that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several States is illegal, and that persons who shall monopolize or shall attempt to monopolize, or combine or conspire with other persons to monopolize trade and commerce among the several States, shall be guilty of a misdemeanor." 156 U. S. 2.

ANY. Used in the sense of "some;" one out of many; an indefinite number.

It is synonymous with "either;" 3 Wheel. Crim. Law Cas. 508; and is given the full force of "every" or "all;" 43 Mo. 254; 4 Q. B. D. 409; 91 U. S. 265.

Frequently used in the sense of "all" or "every," and when thus used it has a very comprehensive meaning. 2 A. & E. Ency., 2nd ed., 414. For example, it has been held that "any" contract is sufficiently comprehensive to include special contracts as well as contracts which arise by implication. 91 U. S. 265.

But like all other general words, its meaning is frequently restrained and limited by the context or subject matter. For example, by "any evidence" has been held not to mean a mere scintilla, but such as taken alone would justify the jury in inferring the fact. *Id.*, 416, 417; 107 Pa. St. 539.

Intoxicating Beverage. The term "any intoxicating beverage" embraces all intoxicants of a liquid nature. 47 S. W. 587.

Person Interested. In a statute using the words "any person interested" in defining who are proper or necessary parties to probate proceedings, any person who claims title under an heir of the testator may become a party to such proceedings, and may appeal from a judgment of probate. 111 Ky. 660, 64 S. W. 441. See ALL.

ANY HOUSE. The words "or any other house whatever" should be held to embrace

a church building. 86 Ky. 12, 4 S. W. 687.

ANY TERM OF YEARS. In Criminal Law. In Massachusetts, this term, in the statutes relating to additional punishment, means a period of time not less than two years. 14 Pick. 40, 86, 90, 94.

ANOTHER. In the clause to deprive another of any money or property, or cause him to be injured in his estate, the word "another" embraces the State, and its meaning is not limited to individuals by the subsequent use of the personal pronoun. 92 Ky. 630, 18 S. W. 833.

APANAGE. In French Law. A portion set apart for the use and support of the younger ones, upon condition, however, that it should revert, upon failure of male issue, to his original donor and his heirs. Spelman, Gloss.

APARTMENT. A part of a house occupied by a person, while the rest is occupied by another, or others. 7 M. & G. 95; 6 Mod. 214; Woodf. L. & T. 1st Am. ed. 600.

The occupier of a part of a house, who has a key of the outer door, the landlord not residing in or occupying any portion of the premises, is entitled to vote; per *Maule, J.*, "Apartments is a proper description of the premises so occupied;" 7 M. & G. 95.

The occupier of part of a house, where the landlord resides on the premises and retains the key of the outer door, is a mere lodger, and is not a person occupying "as owner or tenant;" 7 M. & G. 85.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other, the several apartments shall be rated as distinct mansion houses; but if the owner live therein, all the untenanted apartments shall be considered as parts of his house; 6 Mod. 214.

By the lease of apartments in a building, in a town, for the purpose of trade, the lessee takes only such interest in the subjacent lands as is dependent upon the enjoyment of the apartments rented and necessary thereto; and if they are totally destroyed by fire, this interest ceases; 42 Ala. 356. See 34 W. N. C. (Pa.) 353; s. c. 3 Pa. Dist. 291.

In an indictment for "entering a room or apartment, with the intention to commit larceny," it is right to charge the ownership of the room to be his who rented it from one who had the general supervision and control of the whole house, and occupied the same as a lodger; 38 Cal. 187.

A small building on the same lot with a dwelling-house, at the distance of forty-five rods from it, with a passageway between them, is not an apartment or dependence of the dwelling-house, though the same person occupies the whole lot, including the house and building. A license, therefore, to the occupant, which authorizes him to sell spirituous liquors at his dwelling-house, will not justify him in selling them at the small building; 10 Pick. 293.

APERTA BREVIA. Open, or unsealed writs. Taylor. See *PATENTES BREVIA*; *PATENT WRIT*.

APEX JURIS (Lat. the summit of the law). A term used to indicate a rule of law of extreme refinement. A term used to denote a stricter application of the rules of law than is indicated by the phrase *summum jus*. 2 Caines 117; 2 Story 143; 5 Conn. 334; 1 Burr. 341; 14 East 522; 2 Pars. Notes and B. ch. 25, § 11. See, also, Co. Litt. 3046; Wing. Max. 19; MAXIMS.

APHASIA. Loss of the power of using words properly, of comprehending them when spoken or written, or of remembering the nature and uses of familiar objects. *Sensory aphasia* or *apraxia* is an inability to recognize the use or import of objects or the meaning of words, and includes word blindness and word deafness. *Motor aphasia* is a loss of memory of the effort necessary to pronounce words, and often includes *agraphia*, or the inability to write words of the desired meaning.

APICES LITIGANDI. Subtleties of litigation; sharp technical points or captious objections in pleading or practice. English.

APOCÆ (Lat.). A writing acknowledging payments; acquittance.

It differs from acceptance in this, that acceptance imports a complete discharge of the former obligation whether payment be made or not; apocæ, discharge only upon payment being made. Calvinus, Lex.

APOCRISARIUS (Lat.). In Civil Law. A messenger; an ambassador.

Applied to legates or messengers, as they carried the messages (*ambasciari*) of their principals. They performed several duties distinct in character, but generally pertaining to ecclesiastical affairs.

A messenger sent to transact ecclesiastical business and report to his superior; an officer who had charge of the treasury of a monastic edifice; an officer who took charge of opening and closing the doors. Du Cange; Spelman, Gloss.; Calvinus, Lex.

Apoerisarius Cancellarius. An officer who took charge of the royal seal and signed royal despatches.

Called, also, *secretarius, consiliarius* (from *consilium* giving advice); *referendarius*; a *consilii* (from his acting as counsellor); a *respondi*, or *responsalis*.

APOGRAPHIA. In Civil Law. An examination and enumeration of things possessed; an inventory. Calvinus, Lex.

APOPLEXY. In Medical Jurisprudence. The group of symptoms arising from hemorrhage into the substance of the brain or from the lodgment of a minute clot in one of the cerebral arteries.

The symptoms consist usually of sudden loss of consciousness, muscular relaxation, lividity of the face and slow stertorous respiration, lasting from a few hours to several days. On the return of consciousness there is found paralysis of some of the voluntary muscles, very frequently of the muscles of the face, arm, and leg upon one side, giving the symptom of hemiplegia. There is usually more or less mental impairment.

The mental impairment presents no uniform characters, but varies indefinitely, in extent and severity, from a little failure of memory, to an entire abolition of all the intellectual faculties. The power of speech is usually more or less affected; it may be a slight difficulty of utterance, or an inability to remember certain words or parts of words, or an entire loss of the power of articulation. This feature may arise from two different causes—either from a loss of the power of language, or a loss of power in the muscles of the larynx. This fact must be borne in mind by the medical jurist, and there can be little difficulty in distinguishing between them. In the latter, the patient is as capable as ever of reading, writing, or understanding spoken language. In the former, he is unable to communicate his thoughts by writing, because they are disconnected from their articulate signs. He recognizes their meaning when he sees them, but cannot recall them by any effort of the perceptive powers. This affection of the faculty of language is manifested in various ways. One person loses all recollection of the names of persons and things, while other parts of speech are still at command. Another forgets everything but substantives, and only those which express some mental quality or abstract idea. Another loses the memory of all words but yes or no. In these cases the patient is able to repeat the words on hearing them pronounced, but, after a second or third repetition, loses them altogether.

See **APHASIA**.

Wills and contracts are not unfrequently made in that equivocal condition of mind which sometimes follows an attack of apoplexy or paralysis; and their validity is contested on the score of mental incompetency. In cases of this kind there are, generally, two questions at issue, viz., the absolute amount of mental impairment, and the degree of foreign influence exerted upon the party. They cannot be considered independently of each other. Neither of them alone might be sufficient to invalidate an act, while together, even in a much smaller degree, they would have this effect.

In testing the mental capacity of paralytics, reference should be had to the nature of the act in question. The question is not, had the testator sufficient capacity to make a will? but, had he sufficient capacity to make the will in dispute? A capacity which might be quite adequate to a distribution of a little personal property among a few near relatives would be just as clearly inadequate to the disposition of a large estate

among a host of relatives and friends possessing very unequal claims upon the testator's bounty. Here, as in other mental conditions, all that is required is mind sufficient for the purpose, neither more nor less. See **DIMENTIA**; **DELIRUM**; **IMBECILITY**; **MANIA**. In order to arrive at correct conclusions on this point, we must be careful, among other things, not to confound the power to appreciate the terms of a proposition with the power to discern its relations and consequences.

In testing the mental capacity of one who has lost the power of speech, it is always difficult, and often impossible, to arrive at correct results. If the person is able and willing to communicate his thoughts in writing, his mental capacity may be clearly revealed. If not disposed to write, he may communicate by constructing words and sentences by the help of a dictionary or block letters. Failing in this, the only other intellectual manifestation possible is the expression of assent or dissent by signs to propositions made by others. Any of these means of communication, other than that of writing, must leave us much in the dark respecting the amount of intellect possessed by the party. If the act in question is complicated in its relations, if it is unreasonable in its dispositions, if it bears the slightest trace of foreign influence, it cannot but be regarded with suspicion. If the party has only the power of assenting or dissenting, it must always be impossible to decide whether this does not refer to the terms rather than the merits of the proposition; and, therefore, an act which bears no other evidence than this of the will of the person certainly ought not to be established. Besides, it must be considered that a will drawn up in this manner is, actually, not the will of the testator, since every disposition has originated in the minds of others; Ray, Med. Jur. 363. The phenomena and legal consequences of paralytic affections are extensively discussed in 1 Paige, Ch. 171; 1 Hagg. Eccl. 502, 577; 2 id. 84; 1 Curt. Eccl. 789; Parish Will Case, 4 vols. N. Y. 1858. And see **DEATH**; **INSANITY**.

APOSTASY. Total renunciation of one's religion. Stand. Dict. Formerly, the renunciation, by a Christian, of Christianity, considered a crime in early history, and accordingly punished. 4 Bla. Conn. 43.

APOSTLES. Brief letters of dismissal granted to a party who takes an appeal from the decision of an English court of admiralty, stating the case, and declaring that the record will be transmitted. 2 Brown, Civ. and Adm. Law 438; Dig. 49. 6.

This term was used in the civil law. It is derived from *apostolos*, a Greek word, which signifies one sent, because the judge from whose sentence an appeal was made, sent to the superior judge these letters of dismissal, or apostles; Merlin, *Repert. mot Apôtres*; 1 Pars. Marit. Law 745; 1 Blachf. 663.

APOSTOLI. In Civil Law. Certificates of the inferior judge from whom a cause is removed, directed to the superior. Dig. 49. 6. See **APOSTLES**.

Those sent as messengers. Spelman, Gloss.

APOTHECARY. "Any person who keeps a shop or building where medicines are compounded or prepared according to prescriptions of physicians, or where medicines are sold, shall be regarded as an apothecary." 14 Stat. L. 119, § 23.

The term "druggist" properly means one whose occupation is to buy and sell drugs without compounding or preparation. The term is more limited in meaning than "apothecary"; 28 La. Ann. 767.

In the most usual and familiar sense, one who vends drugs or medicines as his trade or business. 2 A. & E. Ency. 2nd ed., 422. In the strictest sense, one who prepares and sells drugs for medicinal purposes, as distinguished from an ordinary druggist (*q. v.*) whose occupation is merely to buy and sell drugs. *Id.*; 9 Bush (Ky.) 569. In America, however, the term "apothecary" is used

synonymously with "druggist," and the business of pharmacist, apothecary and druggist is all one. *Id.*; 41 Minn. 78. See **DRUGGIST**.

APPARATOR (Lat.). A furnisher; a provider.

The sheriff of Bucks had formerly a considerable allowance as *apparator comitatus* (apparator for the county); Cowel.

APPARATUS. See **NECESSARY APPARATUS**.

APPARENT (Lat. *apparens*). That which appears; that which is manifest; what is proved. It is required that all things upon which a court must pass should be made to appear, if matter in pais, under oath; if matter of record, by the record. It is a rule that those things which do not appear are to be considered as not existing: *de non apparentibus et non existentibus eadem est ratio*; Broom, Max. 20. What does not appear does not exist: *quod non apparet, non est*; 8 Cow. 600; 1 Term 404; 12 M. & W. 316.

In case of homicide when the term "apparent danger" is used it means such overt actual demonstration, by conduct and acts, of a design to take life or do some great personal injury as would make the killing apparently necessary for self-preservation; 44 Miss. 762.

APPARITOR (Lat.). An officer or messenger employed to serve the process of the spiritual courts in England and summon offenders. Cowel. See **PARITOR**.

APPARURA (Lat.). In Old English Law. Furniture or implements.

Curavie apparura, plough-tackle. Cowel; Jacob, Dict.

APPEAL (Fr. *appeler*, to call). In Criminal Practice. A formal accusation made by one private person against another of having committed some heinous crime. 4 Bla. Com. 312.

Anciently, appeals lay for treason as well as felonies; but appeals for treason were abolished by statutes 5 Edw. III. c. 9, 25 Edw. III. c. 24, and 1 Hen. IV. c. 14, and for all other crimes by the statute 5 Geo. III. c. 46.

An appeal lay for the heir male for the death of his ancestors; for the widow while unmarried for the death of her husband; and by the party injured, for certain crimes, as robbery, rape, mayhem, etc.; Co. Litt. 287 b; 2 Bish Cr. Law 1001, note, par. 4.

It might be brought at any time within a year and a day, even though an indictment had been found. If the appellee was found innocent, the appellant was liable to imprisonment for a year, a fine, and damages to the appellee.

The appellee might claim *wager of battle*. This claim was last made in the year 1818 in England; 1 B. & Ald. 405. And see 2 W. Bla. 718; 5 Burr. 2643, 2793; 4 Sharsw. Bla. Com. 312-318, and notes.

In Practice. The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial; Ellsworth, C. J., 3 Dall. 321; 7 Cra. 110; 10 Pet 205; 14 Mass. 414; 1 S. & R. 78; 1 Binn. 219; 3 id. 48.

It is a civil-law proceeding in its origin, and differs from a writ of error in this, that it subjects both the law and the facts to a review and a retrial, while a writ of error is a common-law process which removes matter of law only for re-examination; 7 Cra. 111.

On an appeal the whole case is examined and tried, as if it had not been tried before, while on a writ of error the matters of law merely are examined, and judgment reversed if any errors have been committed; Dane, *Abbr. Appeal*. The word is used, however, in the sense here given both in chancery and in common-law practice; 16 Md. 282; 30 How. 198; and in criminal as well as in civil law; 3 Ind. 569; 6 Fla. 679.

An appeal generally supersedes the judgment of the inferior court so far that no action can be taken upon it until after the final decision of the cause; 26 Barb. 55; 5 Fla. 284; 4 Iowa 230; 5 Wis. 185; 106 Ill. 147; 4 Mass. 107; 86 N. Y. 162. A decree is final for the purposes of an appeal to the Supreme court when it terminates the litigation

APPEAL AND ERROR

between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined; 108 U. S. 24; 106 *id.* 3; 106 *id.* 429. Before an appeal can be prosecuted by one of several defendants the case should be determined as to all; 145 U. S. 611. In equity cases all parties against whom a joint decree is rendered must join in an appeal, if any be taken; and when only one takes an appeal, and there is nothing in the record to show that the others were applied to and refused to appeal, and no order is entered by court, on notice, granting him a separate appeal, his appeal cannot be sustained; 158 U. S. 123.

It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court; 104 U. S. 415.

The rules of the various states regulating appeals are too numerous and various, and too much matters of mere local practice, to be given here. See Bliss, Code Pleading. For the practice in federal courts, see Phil. Pr. in S. C. of U. S.; Rev. Stat. U. S. title Judiciary; Fost. Fed. Pr.; Field, Fed. Courts; and COURTS OF THE UNITED STATES.

In Legislation. The act by which a member of a legislative body who questions the correctness of a decision of the presiding officer, or "chair," procures a vote of the body upon the decision. In the House of Representatives of the United States the question on an appeal is put to the House in this form: "Shall the decision of the chair stand as the judgment of the House?" Rob. R. of O. 14, 66.

If the appeal relates to an alleged breach of decorum, or transgression of the rules of order, the question is taken without debate. If it relates to the admissibility or relevancy of a proposition, debate is permitted, except when a motion for the previous question is pending.

APPEAL AND ERROR. An appeal brings up questions of fact as well as of law, but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact. 205 U. S. 407 citing the following cases: 3 Dall. 321; 11 Wall. 193; 101 U. S. 569; 112 U. S. 502; 112 U. S. 670; 151 U. S. 658; 187 U. S. 327.

APPEAR. The word "seem" is synonymous with the word "appear."

The word "appear" or "appearing" is one of frequent use in judicial proceedings, (and is sometimes used in statutes referring to them), as meaning clear to the comprehension, when applied to matters of opinion or reasoning, and satisfactorily or legally known or made known, when used in reference to facts or evidence. 6 B. Mon. (Ky.) 165.

APPEARANCE. In Practice. A coming into court as party to a suit, whether as plaintiff or defendant.

The formal proceeding by which a defendant submits himself to the jurisdiction of the court. Tr. & H. Prac. 226, 271.

Appearance anciently meant an actual coming into court, either in person or by attorney. It is so used both in the civil and the common law. It is indicated by the word "comes," "and the said C. D. comes and defends," and, in modern practice, is accomplished by the entry of the name of the attorney of the party in the proper place on the record, or by filing bail where that is required. It was a formal matter, but necessary to give the court jurisdiction over the person of the defendant.

A time is generally fixed within which the defendant must enter his appearance; usually the *quarto die post*. If the defendant failed to appear within this period, the remedy in ancient practice was by distress infinite when the injuries were committed without force, and by capias or attachment when the injuries were committed against the peace, that is, were technical trespasses. But, until appearance, the courts could go no further than apply this process to secure appearance. See *Pro-*

In modern practice, a failure to appear generally entitles the plaintiff to judgment against the defendant by default.

It may be of the following kinds:—

Compulsory.—That which takes place in consequence of the service of process.

Conditional.—One which is coupled with conditions as to its becoming general.

De bene esse.—One which is to remain an appearance, except in a certain event. See *DE BENE ESSE*.

General.—A simple and absolute submission to the jurisdiction of the court.

Gratis.—One made before the party has been legally notified to appear.

Optional.—One made where the party is not under any obligation to appear, but does so to save his rights. It occurs in chancery practice, especially in England.

Special.—That which is made for certain purposes only, and does not extend to all the purposes of the suit.

Subsequent.—An appearance by the defendant after one has already been entered for him by the plaintiff. See Dan. Ch. Pr.

Voluntary.—That which is made in answer to a subpoena or summons, without process; 1 Barb. Ch. Pr. 77.

How to be made.—On the part of the plaintiff no formality is required. On the part of the defendant it may be effected by making certain formal entries in the proper office of the court, expressing his appearance; 5 W. & S. 215; 2 Ill. 250; 15 Ala. 352; 6 Mo. 50; 17 Vt. 531; 2 Ark. 26; or, in case of arrest, is effected by giving bail; or by putting in an answer; 4 Johns. Ch. 94; 21 Cal. 51; 28 Wis. 257; or a demurrer; 6 Pet. 323; 10 Ind. 550; 7 Ohio 233; or notice to the other side; 4 Johns. Ch. 94; or motion for continuance; 2 Greene 464; or taking an appeal; 2 Grant 422; 13 Ohio 563; appearance and offer to file answer; 40 Mo. 110; or motion to have interlocutory order set aside; 11 Wis. 401.

A general appearance waives all question as to the service of process and is equivalent to a personal service; 34 Fed. Rep. 817; 78 Ga. 215; 79 *id.* 532; 85 Ala. 593; an appearance in a federal court waives the defence that the defendant was not served in the district of which he was an inhabitant; 39 Fed. Rep. 23; 47 *id.* 705. A general notice of appearance in a United States court may be amended so as to make it special; 38 Fed. Rep. 273. Objection cannot be taken to the jurisdiction of the court after pleading to the merits of the action; 145 U. S. 593; 59 Conn. 117.

By whom to be made.—In civil cases it may in general be made either by the party or his attorney; and in those cases where it is said that the party must appear in person, it is sufficient if it is so entered on the record; although, in fact, the appearance is by attorney; 2 Johns. 192; 14 *id.* 417. The unauthorized appearance of an attorney will not give the court jurisdiction; 12 Colo. 46; 84 Me. 239.

An appearance by attorney is, in strictness, improper where a party wishes to plead to the jurisdiction of the court, because the appointment of an attorney of the court admits its jurisdiction; 1 Chit. Pl. 398; 2 Wms. Saund. 209 b; and is insufficient in those cases where the party has not sufficient capacity to appoint an attorney. Thus an idiot can appear only in person, and as a plaintiff he may sue in person or by his next friend. An infant cannot appoint an attorney; he must, therefore, appear by guardian or prochein ami.

A lunatic, if of full age, may appear by attorney; if under age, by guardian only. 2 Wms. Saund. 335; *id.* 232 (a), n. (4).

A married woman, when sued without her husband, should defend in person; 1 Wms. Saund. 209 b. And see 1 Chit. Pl. 398.

The effect of an appearance by the defendant is, that both parties are considered to be in court.

In criminal cases the personal appearance of the accused in court is often necessary. See 2 Burr. 931; *id.* 1796; 1 W. Bla. 198. The verdict of the jury must, in all cases of treason and felony, be delivered in open

court, in the presence of the defendant. In cases of misdemeanor, the presence of the defendant during the trial is not essential; Bacon, Abr. Verdict, B; Arch, Cr. Pl. 14th ed. 149.

No motion for a new trial is allowed unless the defendant, or, if more than one, the defendants, who have been convicted, are present in court when the motion is made; 3 M. & S. 10, note; 17 Q. B. 503; 2 Den. Cr. Cas. 373, note. But this rule does not apply where the offence of which the defendant has been convicted is punishable by a fine only; 2 Den. Cr. Cas. 459; or where the defendant is in custody on criminal process; 4 B. & C. 329. On a charge of felony, a party suing out a writ of error must appear in person to assign errors; and it is said that if the party is in custody in the prison of the county or city in which the trial has taken place, he must be brought up by *habeas corpus*, for the purpose of this formality, which writ must be moved for on affidavit. This course was followed in 2 Den. Cr. Cas. 287; 17 Q. B. 317; 8 E. & B. 54; 1 D. & B. 375.

Where a defendant is not liable to personal punishment, but to a fine, sentence may be pronounced against him in his absence; 1 Chit. Cr. L. 695; 2 Burr. 931; 3 *id.* 1780. See COMMON APPEARANCE.

APPEARANCE, CONDITIONAL. See COMMON APPEARANCE.

APPEARANCE, SPECIAL. See COMMON APPEARANCE.

APPELLANT. In Practice. He who makes an appeal from one jurisdiction to another.

APPELLATE JURISDICTION. In Practice. The jurisdiction which a superior court has to re-hear causes which have been tried in inferior courts. See JURISDICTION.

APPELLATIO (Lat.). An appeal.

APPELLEE. In Practice. The party in a cause against whom an appeal has been taken.

APPELLOR. A criminal who accuses his accomplices; one who challenges a jury.

APPENDAGE. Something added as an accessory to or the subordinate part of another thing. 28 N. J. Law 26; 21 Kans. 536.

APPENDANT (Lat. ad, to, pendere, to hang). Annexed or belonging to something superior; an incorporeal inheritance belonging to another inheritance.

Appendant in deeds includes nothing which is substantial corporeal property, capable of passing by feoffment and livery of seisin. Co. Litt. 321; 4 Coke 86; 3 B. & C. 150; 6 Bingh. 150. A matter appendant must arise by prescription; while a matter appurtenant may be created at any time; 2 Viner, Abr. 594; 3 Kent 404.

APPENDITIA (Lat. appendere, to hang at or on). The appendages or pertinances of an estate; the appurtenances to a dwelling, etc.; thus, *pent-houses* are the *appenditia domus*.

APPERTAINING. Belonging to; also usually occupied, used, of lying with, as land with a messuage. 2 Am. & Eng. Ency. 2nd ed., 431; Plowd. 170. The words "appertaining" and "adjoining" are not synonymous. As descriptive words in a deed, "adjoining" usually imports contiguity; "appertaining" use, occupancy. One thing may appertain to another without adjoining or touching it. *Id.*; 55 Vt. 478. It was held that business appertaining to minors, meant business peculiar to minors, and, therefore, did not include partition. *Id.*; 18 S. C. 339.

APPLIANCE. While the word "appliance" has been defined "as a thing applied or used as a means to an end, an apparatus or device," steps by which an entrance is made to a railroad car is not an appliance within the meaning of the rule. 163 Ky. 45, 173 S. W. 161.

A step by which entrance into a railroad car is effected, and which is permanently

attached to the car, is not an appliance, within the meaning of a rule of the railroad company, which provides that the conductor of a freight train is to keep the caboose clean, and all the tools and "appliances" in their places, and in good order. 163 Ky. 42, 173 S. W. 161.

APPLICATION (Lat. *applicare*). The act of making a request for something. A written request to have a certain quantity of land at or near a certain specified place. 3 Binn. 21; 5 id. 151.

The use or disposition made of a thing.

In Insurance. The preliminary statement made by a party applying for an insurance on life, or against fire. It usually consists of written answers to interrogatories proposed by the company applied to, respecting the proposed subject. It corresponds to the "representations" preliminary to maritime insurance. It is usually referred to expressly in the policy as being the basis or a part of the contract, and this reference creates in effect a warranty of the truth of the statements. In an action on a policy, the application and policy must be construed as one instrument; 61 N. Y. Super. Ct. 287. If the policy does not make the answers a part of the contract, this will have only the effect of representation; May, Ins. § 159; 60 Pa. 331. To constitute a warranty it must be made a part of the policy; 67 Tex. 69. A mere reference in the policy to the application does not make its answers warranties; it is a question of intention; 7 Wend. 72; 22 Conn. 235; 18 Ind. 352; the courts tend to consider the answers representations, rather than warranties, except in a clear case; 98 Mass. 381; 31 Iowa 216; 4 R. I. 141. An oral misrepresentation of a material fact will defeat a policy on life or against fire, no less than in maritime insurance on the ground of fraud; 1 Phill. Ins. § 650. Misrepresentation as to one of several buildings all being in one policy cannot defeat a recovery on another; 121 Ind. 570. See REPRESENTATION; MISREPRESENTATION.

Of Purchase-Money. The disposition made of the funds received by a trustee on a sale of real estate held under the trust.

Where there is a general power to sell for debts, or debts and legacies, the purchaser need not look to the application of the purchase-money; 2 Rawle 392; 13 Pick. 393; 1 Beas. 69; 5 Ired. Eq. 357; 3 Mas. 178; so as to legacies where there is a trust for reinvestment; 8 Wheat. 421; 6 Ohio 114; where the trust is to pay specified debts, the purchaser must see to the application of the purchase-money; 3 Mas. 178; 10 Pa. 267; 1 Pars. Eq. 57; 6 Gill. 487. See note to *Elliot v. Merryman*, 1 Lead. Cas. Eq. 74; *Perry, Trusts*; *Adams, Eq.* *156. The doctrine is abolished in England by 23 & 24 Vict. c. 145, § 29, and is of little importance in the United States; *Biap. Eq.* 278, 279.

Of Payments. See APPROPRIATION.

APPOINT. A word applied to the nomination of an individual or the constituting of an agent or deputy. It is never employed to convey an estate. 2 Am. & Eng. Ency. 2nd ed., 473; *Charlt. (Ga.)* 403. The words "nominate," "select," "designate," "choose," would either of them be equivalent to "appoint" if used in that sense. *Id.*; 63 N. Y. 519.

APPOINTEE. A person who is appointed or selected for a particular purpose; as, the appointee under a power is the person who is to receive the benefit of the power.

APPOINTMENT. The designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust.

The making out a commission is conclusive evidence of an appointment to an office for holding which a commission is required; 1 Cra. 137; 10 Pet. 343. For discussion of constitutional and statutory limitations of executive and legislative functions in respect to appointments to office, see 30 Amer. &

Eng. Corp. Cas. 321, note.

The governor cannot make a valid appointment to an office which at the time is rightfully held by an incumbent whose term has not expired; 124 Ind. 515.

As distinguished from an election, it seems that an appointment is generally made by one person, or a limited number acting with delegated powers, while an election is made by all of a class.

The word is sometimes used in a sense quite akin to this, and apparently derived from it as denoting the right or privilege conferred by an appointment; thus, the act of authorizing a man to print the laws of the United States by authority, and the right thereby conveyed, are considered such an appointment, but the right is not an office; 17 S. & R. 29, 223. And see 3 id. 157; *Cooper, Justin*. 599, 604.

In Chancery Practice. The exercise of a right to designate the person or persons who are to take the use of real estate. 2 Washb. R. P. 302.

By whom to be made.—It must be made by the person authorized; 2 Bouv. Inst. § 1923; who may be any person competent to dispose of an estate of his own in the same manner; 4 Kent 324; including a married woman; 1 Sugd. Pow. 182; 3 C. B. 578; 5 id. 741; 3 Johns. Ch. 523; 2 Dall. 201; 8 How. 27; even though her husband be the appointee; 21 Pa. 72; or an infant, if the power be simply collateral; 2 Washb. R. P. 5th ed. *317. And see Sugd. Pow. 8th ed. 177, 910. Where two or more are named as donees, all must in general join; 2 Washb. R. P. 5th ed. *322; 14 Johns. 553; but where given to several who act in a trust capacity, as a class, it may be by the survivors; 10 Pet. 564; 13 Metc. Mass. 220; *Story, Eq. Jur.* § 1062, n. When such a right is devolved upon two executors and two others are named as successors in case of their death, no others can execute the trust so long as any one of the four is living and has not declined the trust, and an administrator c. t. a. will be liable to suit by the succeeding trustee for trust property with which he intermeddles; 147 U. S. 557.

How to be made.—A very precise compliance with the directions of the donor is necessary; 2 Ves. Ch. 231; 1 P. Will. 740; 3 East 410, 480; 1 Jac. & W. Ch. 93; 6 Mann. & G. 386; 8 How. 30; having regard to the intention, especially in substantial matters; *Tudor, Lead. Cas.* 306; 2 Washb. R. P. 5th ed. *318; *Ambl. Ch.* 555; 3 Ves. Ch. 421. It may be a partial execution of the power only, and yet be valid; 4 Cruise, Dig. 205; or, if excessive, may be good to the extent of the power; 2 Ves. Sen. 640; 3 Dru. & W. 339. It must come within the spirit of the power; thus, if the appointment is to be *to and amongst* several, a fair allotment must be made to each; 4 Ves. Ch. 771; 2 Vern. Ch. 513; otherwise, where it is made to such as the donee may select; 5 Ves. Ch. 857.

The effect of an appointment is to vest the estate in the appointee, as if conveyed by the original donor; 2 Washb. R. P. 5th ed. *320; 2 Crabb. R. P. 726, 741; 2 Sugd. Pow. 22; 11 Johns. 169. See POWER. Consult 2 Washb. R. P. 5th ed. *298, 337; *Tudor, Lead. Cas.*; *Chance, Pow.*; 4 Greenl. Cruise, Dig. In Pennsylvania where the appointer, after an estate for life, is a lineal descendant of the donor, there is no collateral inheritance tax; 2 Chest. Co. R. 246.

APPOINTOR. One authorized by the donor, under the statute of uses, to execute a power. 2 Bouv. Inst. n. 1923.

APPORTIONMENT. The division or distribution of a subject-matter in proportionate parts. Co. Litt. 147; 1 Swanst. 37, n.; 1 Story, Eq. Jur. 13th ed. § 475 a.

Of Contracts. The allowance, in case of the partial performance of a contract, of a proportionate part of what the party would have received as a recompense for the entire performance of the contract. See generally *Ans. Contr.* 201.

Where the contract is to do an entire thing for a certain specified compensation, there can be no apportionment; 9 B. & C. 92; 2 Pars. Contr. 320; 82 Pa. 267; 44 Cal. 18; 88 Conn. 290; 4 Heisk. 690; 1 Story, Eq. §§ 470 et seq.; 1 Washb. R. P. 183, 549, 555; 2 id. 302; but see *contra*, 36 Tex. 1. A contract for the sale of goods is entire; 9 B. &

C. 386; 60 Pa. 182; 6 Oreg. 248; but where there has been a part delivery of the goods, the buyer is liable on a *quantum valebat* if he retain the part delivered; 9 B. & C. 386; 10 id. 441; 18 Pick. 555 (but *contra* in New York and Ohio; 13 Wend. 258; 16 Ohio 238); though he may return the part delivered and escape liabilities. A contract consisting of several distinct items, and founded on a consideration apportioned to each item, is several; 66 Pa. 351. The question of entirety is one of intention, to be gathered from the contract; 2 Pars. Contr. 8th ed. *517. Where no compensation is fixed, the contract is usually apportionable; 3 B. & Ad. 404; *Cutter v. Powell*, 2 Sm. Lead. Cas. note (q. v. on this whole subject).

Annuities, at common law, are not apportionable; 6 Metc. 194; 6 Vt. 430; 2 P. W. 501; so that if the annuitant died before the day of payment, his representative is entitled to no proportionate share of the annuity for the time which has elapsed since last payment; 37 N. J. Eq. 126; 16 Q. B. 357; 12 Ves. 484; 71 Ind. 526; 13 Hun 147; 13 Phila. 185; but by statute 11 Geo. II. it was enacted that annuities, rents, dividends, etc., and all other payments of every description made payable at fixed periods, should be apportioned; 2 P. Wms. 501; 2 W. Bla. 843; 17 S. & R. 173; 3 Kent 471. This has been adopted by statute or decision in many of the states.

Wages are not apportionable where the hiring takes place for a definite period; 6 Term 320; 5 B. & P. 651; 1 E. G. 755; 19 Pick. 528; 12 Metc. Mass. 286; 28 Ill. 257; 34 Me. 102; 13 Johns. 365; 14 Wend. 257; 12 Vt. 49; 1 Ind. 257; 19 Ala. n. s. 54; 44 Conn. 333. See 2 Pick. 332; 17 Me. 38; 11 Vt. 273; 3 Denio 175; *contra*, 6 N. H. 481.

Of Incumbrances. The ascertainment of the amounts which each of several parties interested in an estate shall pay towards the removal or in support of the burden of an incumbrance.

As between a tenant for life and the remainderman, the tenant's share is limited to keeping down the interest; but not beyond the amount of rent accruing; 46 Vt. 45; 31 E. L. & E. 345; if the principal is paid, the tenant for life must pay a gross sum equivalent to the amount of all the interest he would pay, making a proper estimate of his chances of life; 1 Washb. R. P. 5th ed. *96; 1 Story, Eq. Jur. 13th ed. § 487. See 2 Dev. & B. Eq. 179; 5 Johns. Ch. 482; 10 Paige, Ch. 71, 158; 13 Pick. 158; 27 Barb. 49.

Of Rent. The allotment of their shares in a rent to each of several parties owning it.

The determination of the amount of rent to be paid when the tenancy is terminated at some period other than one of the regular intervals for the payment of rent.

An apportionment of rent follows upon every transfer of a part of the reversion; 17 Mass. 439; 32 Wend. 121; 22 Pa. 144; see 18 N. Y. 529; or where there are several assignees, as in case of a descent to several heirs; 3 Watts 394; 13 Ill. 25; 25 Wend. 456; 10 Coke 128; *Comyn, Land. & Ten.* 422; where a levy for debt is made on a part of the reversion, or it is set off to a widow for dower; 1 Rolle, Abr. 237; but whoever owns at the time the rent falls due is entitled to the whole; 7 Md. 368; 3 Metc. Mass. 76; 1 Washb. R. P. 5th ed. *98, 337. See *Williams, Ex.* 7th Am. ed. *730. If a tenancy at will is terminated between two rent days by a conveyance of the premises from the landlord to a third person, the tenant is not liable and the rent cannot be apportioned; 132 Mass. 346.

Rent is not, at common law, apportionable as to time; *Smith, Land. & T.* 134; *Taylor, Land. & T.* §§ 384-387; 3 Kent 470; 5 W. & S. 432; 13 N. H. 343; 3 Bradf. Surr. 359. It is apportionable by statute 11 Geo. II. c. 19, § 15; and similar statutes have been adopted in this country to some extent; 1 Washb. R. P. 5th ed. *289; 13 N. H. 343; 14 Mass. 94; 1 Hill, Abr. c. 16, § 50. In the absence of express statute or agreement, it is not; 121 Mass. 178.

Consult also 3 Kent 469, 470; 1 Pars. Contr. 8th ed. *516, 517; 1 Story, Eq. Jur.

13th ed. 475 a; Wms. Exec. 709. See LAND-LORD AND TENANT.

Of Representatives. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced to the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state: Art. 14, § 2, U. S. Const.; Story, Const. 1963.

The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand; but each state shall have at least one representative; U. S. Const. Art. 1, § 2.

The Revised Statutes of the United States provide that from and after March 3, 1893, the house of representatives shall be composed of three hundred and fifty-six members, and provide the number to which each state is entitled. Upon the admission of a new state, the representatives to be assigned to it are in addition to the above three hundred and fifty-six. The admission of Utah, under this provision, makes the present number three hundred and fifty-seven; Rev. Stat. U. S. 1 Suppl. 888.

Under the present constitution, apportionments of representatives have been made as follows. The first house of representatives consisted of sixty-five members, or one for every thirty thousand of the representative population. By the census of 1790, it consisted of one hundred and six representatives, or one for every thirty-three thousand; by the census of 1800, one hundred and forty-two representatives, or one for every thirty-three thousand; by the census of 1810, one hundred and eighty-three representatives, or one for every thirty-five thousand; by the census of 1820, two hundred and thirteen representatives, or one for every forty thousand; by the census of 1830, two hundred and forty-two representatives, or one for every forty-seven thousand seven hundred; by the census of 1840, two hundred and twenty-three representatives, or one for every seventy thousand six hundred and eighty; by the census of 1850, and under the act of May 23, 1850, the number of representatives was increased to two hundred and thirty-three, or one for every ninety-three thousand four hundred and twenty-three of the representative population; Sheppard's Const. Text Book 65; Acts 30 July, 1852, 10 Stat. 25; May 11, 1858, 11 Stat. 285; 14 Feb. 1859, 11 Stat. 383. Under the census of 1860, the ratio was ascertained to be for one hundred and twenty-four thousand one hundred and eighty-three, upon the basis of two hundred and thirty-three members; but by the act of 4th March, 1862, the number of representatives was increased to two hundred and forty-one. This, by the act of 1872, Feb. 2, Rev. Stat. U. S. 1878, § 20, 21, was increased to two hundred and ninety-two members, and by act of 1891, Feb. 7, Rev. Stat. U. S. Supp. p. 888, the number was increased to three hundred and fifty-six.

APPOSAL OF SHERIFFS. In English Law. The charging them with money received upon account of the Exchequer. 22 & 23 Car. II. Covel.

APPOSER. In English Law. An officer of the Exchequer, whose duty it was to examine the sheriffs in regard to their

accounts handed in to the exchequer. He was also called the foreign apposer.

APPOSTILLE. In French Law. An addition or annotation made in the margin of a writing. Merlin, Répert.

APPRAISE. To fix or ascertain the value of a thing; to state a thing's just value, usually in writing; to estimate at a fair price, by virtue of a conferred authority so to do. R. & L. Diet.

APPRAISEMENT. A just valuation of property.

Appraisements are required to be made of the property of persons dying intestate, of insolvents, and others; an inventory (q. v.) of the goods ought to be made, and a just valuation put upon them. When property real or personal is taken for public use, an appraisalment of it is made, that the owner may be paid its value.

APPRAISER. In Practice. A person appointed by competent authority to appraise or value goods or real estate.

APPRECIATE. To appreciate one's relation to another held to mean ability to estimate justly his relation to that person, e. g., a father's relation to his daughter. 2 Am. & Eng. Ency. 2nd ed., 487; 125 Ill. 33.

APPREHEND. To understand, conceive, believe. 2 Am. & Eng. Ency. 2nd ed., 487; 25 Ga. 531. The word strictly construed means the seizure or taking hold of a man. *Id.*; 47 L. T. 631. And in that case, it was held that the word apprehend would not be limited to taking hold of a man who was not already in custody. A person already in custody may be apprehended. *Id.*; *ibid.*

APPREHENSION. In Practice. The capture or arrest of a person on a criminal charge.

The term apprehension is applied to criminal cases, and arrest to civil cases; as, one having authority may arrest on civil process, and apprehend on a criminal warrant. See ARREST.

APPRENTICE. A person bound in the form of law to a master, to learn from him his art, trade, or business, and to serve him during the time of his apprenticeship. 1 Bla. Com. 426; 2 Kent 211; 3 Rawle 307; 4 Term 735; Bouvier, Inst. Index.

Formerly the name of apprentice *en la ley* was given indiscriminately to all students of law. In the reign of Edward IV. they were sometimes called *apprenticii ad barras*. And in some of the ancient law-writers the terms apprentice and barrister are synonymous; Coke, 3d Inst. 214; Eumomius, Dial. 2, § 53, p. 153.

APPRENTICESHIP. A contract by which one person who understands some art, trade, or business, and is called the master, undertakes to teach the same to another person, commonly a minor, and called the apprentice, who, on his part, is bound to serve the master, during a definite period of time, in such art, trade, or business.

The term during which an apprentice is to serve. Pardessus, *Droit Comm.* n. 34.

A contract of apprenticeship is not invalid because the master to whom the apprentice is bound is a corporation; [1891] 1 Q. B. 75.

At common law, an infant may bind himself apprentice by indenture, because it is for his benefit; 5 M. & S. 257; 5 D. & R. 339. But this contract, both in England and in the United States, on account of its liability to abuse, has been regulated by statute, and is not binding upon the infant unless entered into by him with the consent of the parent or guardian (the father, if both parents be alive, being the proper party to such consent; 8 W. & S. 339), or by the parent and guardian for him, with his consent, such consent to be made a part of the contract; 2 Kent 261; 8 Johns. 328; 2 Pa. 977; 43 Me. 458; 12 N. H. 437; 4 Leigh 493; 4 Blackf. 387; or, if the infant be a pauper, by the proper authorities without his consent; 3 S. & R. 158; 32 Me. 299; 3 Jones, N. C. 21; 15 B. Monr. 499; 30 N. H.

104; 5 Gratt. 285. The contract need not specify the particular trade to be taught, but is sufficient if it be a contract to teach such manual occupation or branch of business as shall be found best suited to the genius or capacity of the apprentice; 9 Barb. 309; 1 Sandf. 672. Where the apprentice is bound to accept employment only from the master, but there is no covenant by the latter to provide employment, and the contract may be terminated only by him, it is invalid as being unreasonable and not for the benefit of the child; 45 Ch. Div. 430. In a common indenture of apprenticeship the father is bound for the performance of the covenants by the son; Dougl. 500; 3 B. & Ald. 59. But to an action of covenant against the father for the desertion of the son, it is a sufficient answer that the master has abandoned the trade which the son was apprenticed to learn, or that he has driven the son away by cruel treatment; 4 Eng. L. & Eq. 413; 3 Pick. 357.

This contract must generally be entered into by indenture or deed; 1 Salk. 68; 4 M. & S. 383; 10 S. & R. 416; 1 Vt. 69; 18 Conn. 337; and is to continue, if the apprentice be a male, only during minority, and if a female, only until she arrives at the age of eighteen; 2 Kent 264; 5 Term 715. An apprenticeship other than one entered into by indenture in conformity with the statute is not binding; 40 Mo. App. 44. The English statute law as to binding out minors as apprentices to learn some useful art, trade, or business, has been generally adopted in the United States, with some variations which cannot be noticed here; 2 Kent 264.

The duties of the master are to instruct the apprentice by teaching him the knowledge of the art which he has undertaken to teach him, though he will be excused for not making a good workman if the apprentice is incapable of learning the trade, the burden of proving which is on the master; 2 Dana 181; 5 Metc. Mass. 37; 1 Dev. & B. 402; Wood, Mast. & Serv. § 49. He ought to watch over the conduct of the apprentice, giving him prudent advice and showing him a good example, and fulfilling towards him the duties of a father, as in his character of master he stands *in loco parentis*. He is also required to fulfill all the covenants he has entered into by the indenture. He must not abuse his authority, either by bad treatment or by employing his apprentice in menial employments wholly unconnected with the business he has to learn, or in any service which is immoral or contrary to law; 4 Clark & F. 234; Wood, Mast. & Serv. § 60, n. 8; 1 Mass. 172; but may correct him with moderation for negligence and misbehavior; 1 Ashm. 267; 4 Keb. 661, pl. 50; 1 Wheel. Cr. Cas. 502. He cannot dismiss his apprentice except by consent of all the parties to the indenture; 1 S. & R. 380; 13 Pick. 110; 3 Burr. 766, 801; 1 Carr. & K. 629; or with the sanction of some competent tribunal; 2 Pick. 451; 8 Conn. 14; 1 Bail. 209; even though the apprentice should steal his master's property, or by reason of incurable illness become incapable of service, the covenants of the master and apprentice being independent; 2 Pick. 451; 2 Dowl. & R. 465; 1 B. & C. 460; 5 Q. B. 447. If the apprentice proves to be an habitual thief, held that he may be properly dismissed; [1891] 1 Q. B. 431. He cannot remove the apprentice out of the state under the laws of which he was apprenticed, unless such removal is provided for in the contract or may be implied from its nature; and if he do so remove him, the contract ceases to be obligatory; 6 Binn. 203; 6 S. & R. 526; 2 Pick. 357; 13 Metc. Mass. 80; 12 Me. 815; 1 Houst. 527. An infant apprentice is not capable in law of consenting to his own discharge; 1 Burr. 501; 3 B. & C. 484; nor can the justices, according to some authorities, order money to be returned on the discharge of an apprentice; Stra. 69; *contra*, Salk. 67, 68, 490; 11 Mod. 110; 12 id. 498, 553. After the apprenticeship is at an end, the master cannot retain the apprentice on the ground that he has not fulfilled his con-

tract, unless specially authorized by statute.

An *apprentice* is bound to obey his master in all his lawful commands, take care of his property, and promote his interest, endeavor to learn his trade or business, and perform all the covenants in his indenture not contrary to law. He must not leave his master's service during the terms of his apprenticeship; 6 Johns. 274; 2 Pick. 357. The apprentice is entitled to payment for extraordinary services when promised by the master; 1 Am. L. Jour. 308; see 1 Whart. 113; and even when no express promise has been made, under peculiar circumstances; 2 Cranch 240, 270; 3 C. Rob. Adm. 287; but see 1 Whart. 113. Upon the death of the master, the apprenticeship, being a personal trust, is dissolved; 1 Salk. 66; Strange 284; 1 Day 30.

To be binding on the apprentice, the contract must be made as prescribed by statute; 5 Cush. 417; 5 Pick. 250; but if not so made, it can only be avoided by the apprentice himself; 9 Barb. 309; 8 Johns. 328; 5 Strobb. 104; and if the apprentice do elect to avoid it, he will not be allowed to recover wages for his services, the relation being sufficient to rebut any promise to pay which might otherwise be implied; 12 Barb. 473; 2 id. 208; but see 13 Metc. Mass. 80. The master will be bound by his covenants, though additional to those required by statute; 10 Humphr. 179.

Where an apprentice is employed by a third person without the knowledge or consent of the master, the master is entitled to all his earnings, whether the person who employed him did or did not know that he was an apprentice; 6 Johns. 274; 3 N. H. 274; 7 Me. 457; 1 E. D. Smith 408; 1 Sandf. 711; but in an action for harboring or enticing away an apprentice, a knowledge of the apprenticeship by the defendant is a prerequisite to recovery; 2 Harr. & G. 182; 1 Wend. 378; 1 Gilm. 46; 5 Ired. 216. He has a right of action against any one injuring his apprentice causing a loss of his service; 117 Mass. 641; 11 Ad. & El. 301.

Apprenticeship is a relation which cannot be assigned at common law; 5 Binn. 423; Dougl. 70; 3 Keble 519; 18 Ala. n. s. 99; Busb. 419; Wood, Mast. & Serv. § 44; 1 Ld. Raym. 683; though, if under such an assignment the apprentice continue with his new master, with the consent of all the parties and his own, it will be construed as a continuation of the old apprenticeship; Dougl. 70; 4 Term 373; 19 Johns. 113; 5 Cow. 363; 2 Bail. 93. But in Pennsylvania and some other states the assignment of indentures of apprenticeship is authorized by statute; 1 S. & R. 249; 3 id. 161; 6 Vt. 430. See, generally, 2 Kent 261-266; Bacon, Abr. *Master and Servant*; 1 Saund. 313, n. 1, 2, 3, and 4. The law of France on this subject is strikingly similar to our own; Pardessus, *Droit Comm.* nn. 518, 522.

APPRIZING. In Scotch Law. A form of process by which a creditor formerly took possession of the estates of the debtor in payment of the debt due.

It is now superseded by adjudications.

APPROACH. The right of visit or visitation to determine the national character of the ship approached for that purpose only. 1 Kent 153.

APPROBATE AND REPROBATE. In Scotch Law. To approve and reject.

The doctrine of *approve and reprobate* is the English doctrine of election. A party cannot both *approve and reprobate* the same deed; 4 Wils. & S. Hou. L. 460; 1 Ross, Lead. Cas. 617; Pat. Comp. 710; 1 Bell, Comm. 146.

APPROPRIATION. In Ecclesiastical Law. The perpetual annexation of an ecclesiastical benefice which is the general property of the church, to the use of some spiritual corporation, either sole or aggregate.

It corresponds with *impropriation*, which is setting apart a benefice to the use of a lay corporation. The name came from the custom of monks in England to retain the churches in their gift and all the profits of them in *proprio usu* to their own immediate benefit. 1 Burns, Eccl. Law 71.

To effect a good appropriation, the king's license and the bishop's consent must first be obtained. When the corporation having the benefice is dissolved, the parsonage becomes inappropriate at common law; Co. Litt. 46; 1 Bla. Com. 385; 1 Hagg. Eccl. 162. There have been no appropriations since the dissolution of monasteries. For the form of an appropriation, see Jacob, *Introduct.* 411.

Of Payments. The application of a payment made to a creditor by his debtor, to one or more of several debts.

The debtor has the first right of appropriation; 1 Mer. 605; 2 B. & C. 72. No precise declaration is required of him, his *intention* (12 N. J. Eq. 233, 312), when made known, being sufficient; 7 Blackf. 286; 10 Ill. 449; 1 Fla. 409; 7 Beav. 10; 30 Ind. 429; 58 Ga. 176; 39 Wis. 300; 74 Ill. 238; Taney 460; 59 Ala. 345; 62 Ind. 128; 54 N. H. 395. Still, such facts must be proved as will lead a jury to infer that the debtor did purpose the specific appropriation claimed; 14 East 232, 243, n.; 4 Ad. & E. 840; 8 W. & S. 320; 2 Hall 185; 10 Leigh 481; 1 Ga. 241; 17 Mass. 575; 5 Ired. 551; 2 Rob. 2, 27; 13 Vt. 608; 36 Me. 222; 4 J. J. Marsh. 621; 4 Gill & J. 361. An entry made by the debtor in his own book at the time of payment is an appropriation, if made known to the creditor; but otherwise, if not made known to him. The same rule applies to a creditor's entry communicated to his debtor; 3 Dowl. & R. 549; 8 C. & P. 704; 2 B. & C. 65; 5 Denio 470; 11 Barb. 80. The appropriation must be made by the debtor at or before the time of payment; suit fixes the appropriation; 14 Cal. 446; 7 Wash. 521. The intention to appropriate may be referred to the jury on the facts of the transaction; 5 W. & S. 542.

The creditor may apply the payment, as a general rule, if the debtor does not; 4 Cra. 316; 7 How. 681; 20 Pick. 339; 25 Pa. 411; 1 McCord 308; 5 Day 166; 1 Mo. 315; 2 Ill. 196; 54 Ga. 174; 39 Wis. 300; 32 Ark. 645; 54 N. H. 345; 7 Wash. 521; 74 Hun 176; 78 Wis. 475; 79 Ga. 130. In the absence of directions the creditor may apply credits to the least secure items of his claim; 6 Kulp. 336. But there are some restrictions upon this right. The debtor must have known and waived his right to appropriate. Hence an agent cannot always apply his principal's payment. He cannot, on receipt of money due his principal, apply the funds to debts due himself as agent, selecting those barred by the statute of limitations; 8 Dowl. Bail 503; 1 Mann. & G. 54; 5 N. H. 237. But on an agent's appropriations, see 5 Bligh. n. s. 1; 3 B. & Ad. 320; 9 Pick. 325; 1 La. Ann. 333; 19 N. H. 479; 29 Miss. 139. A prior legal debt the creditor must prefer to a posterior equitable debt. Where only one of several debts is valid and lawful, all the payments must be applied to this, irrespective of its order in the account; 27 Vt. 187. Whether if the equitable be prior it must first be paid, see 9 Cow. 420; 2 Stark. 74; 1 C. & M. 33; 6 Taunt. 597.

If the creditor is also trustee for another creditor of his own debtor, he must apply the unappropriated funds *pro rata* to his own claims and those of his *cestui que trust*; 18 Pick. 361. But if the debtor, besides the debts in his own right, owe also debts as executor or administrator, the unappropriated funds should first be applied to his personal debt, and not to his debts as executor; 2 Str. 1194; 4 Harr. & J. 566; 14 N. H. 333; 2 Dowl. Parl. Cas. 477. A creditor cannot apply unappropriated funds to such of his claims as are *illegal* and not recoverable at law; 3 B. & C. 165; 4 M. & G. 860; 4 Dowl. & R. 783; 2 Deac. & C. 534; 11 Cush. 44; 14 N. H. 431. But in the case of some debts illegal by statute—namely, those contracted by sales of spirituous liquors—an appropriation to them has been adjudged good; 2 Ad. & E. 41; 1 M. & R. 100; 34 Me. 113. And the debtor may always elect to have his payment applied to an illegal debt.

If some of the debts are barred by the *statute of limitations* the creditor cannot first apply the unappropriated funds to them, and thus revive them and take them out of the statute; 2 Cr. M. & R. 728; 2 C. B. 476; 31 Eng. L. & Eq. 555; 13 Ark. 754;

1 Gray 630. Still, a debtor may waive the bar of the statute, just as he may apply his funds to an illegal debt; and the creditor may insist, in the silence of the debtor, unless other facts controvert it, that the money was paid on the barred debts; 5 M. & W. 300; 26 N. H. 85; 25 Pa. 411. See 81 Mo. App. 180. Proof of such intent on the debtor's part may be deduced from a mutual adjustment of accounts before the money is sent, or from his paying interest on the barred debt. But, in general, the creditor cannot insist that a part-payment revives the rest of the debt. He can only retain such partial payment as has been made; 1 Gray 630. It has been held that the creditor may first apply a general payment to discharging any one of several accounts all barred, and by so doing he will revive the balance of that particular account, but he is not allowed to distribute the funds upon all the barred notes, so as to revive all; 19 Vt. 26. See *LIMITATIONS*.

Wherever the payment is not *voluntary*, the creditor has not the option in appropriation, but he must apply the funds received ratably to all the notes or accounts. This is the rule wherever proceeds are obtained by judicial proceedings. So, in cases of assignment by an insolvent debtor, the share received by a creditor, a party to the assignment, must be applied *pro rata* to all his claims, and not to such debts only as are not otherwise secured; 10 Pick. 129; 1 M. & G. 54; 1 Miss. 526; 12 N. H. 320; 22 Me. 295; 1 Sandf. 416. See 22 La. Ann. 289; 29 Fla. 655.

A creditor having several demands may apply the payments to a debt not secured by sureties, where other rules do not prohibit it; 11 Metc. 185. Where appropriations are made by a receipt, *prima facie* the creditor has made them, because the language of the receipt is his; Dav. Dist. Ct. 146.

It is sufficiently evident from the foregoing rules that the principle of the Roman law which required the creditor to act for his debtor's interest in appropriation more than for his own, is not a part of the common law; 6 W. & S. 9. The nearest approach to the civil-law rule is the doctrine that when the right of appropriation falls to the creditor he must make such an application as his debtor could not reasonably have objected to; 21 Vt. 456; 20 Miss. 631. See *IMPUTATION*.

The law will apply part-payments in accordance with the justice and equity of the case; 9 Wheat. 720; 12 S. & R. 301; 2 Vern. 24; 6 Cra. 28, 253, 264; 5 Mas. 82; 1 Abb. App. Dec. 295; 2 Del. Ch. 333; Taney 460.

Unappropriated funds are always applied to a debt due at the time of payment, rather than to one not then due; 2 Esp. 666; 1 Bibb 334; 5 Gratt. 57; 9 Cow. 420; 5 Mas. 11; 27 Ala. n. s. 445; 10 Watts 255; 4 Wisc. 442; 47 Ark. 111. But an express agreement with the debtor will make good an appropriation to debts not due; 23 Pick. 305. The creditor should refuse a payment on an account not yet due, if he be unwilling to receive it; but if he do receive it he must apply it as the debtor directs; 40 Me. 335; 59 Ala. 345. A payment is applied to a certain rather than to a contingent debt, and, therefore, to a debt on which the payer is bound directly, rather than to one which binds him collaterally; 22 Me. 295; 1 Smedes & M. Ch. 331. And where the amount paid is precisely equal to one of several debts, a jury is authorized to infer its intended application to that debt; 8 Wend. 403; 3 Caines 14; 1 Woodb. & M. 150. Where one holds two notes, one of which is secured, and he receives further security with express agreement that he may apply proceeds thereof to either note, he may make such application to the unsecured note notwithstanding the objection of second mortgagee; 3 C. C. App. 418. Where a creditor is secured by both chattel and real estate mortgages he may apply proceeds of sale of chattels first to chattel mortgage and then to payment of debts otherwise secured; 97 Mich. 526.

The law, as a general rule, will apply a

payment in the way most beneficial to the debtor at the time of payment; 50 Miss. 175; 78 Pa. 98. This rule seems to be similar to the civil-law doctrine. Thus, *e. g.*, courts will apply money to a mortgage debt rather than to a simple contract debt; see 12 Mod. 559; 2 Harr. & J. 402; 10 Humphr. 238; 12 Vt. 246; 9 Cow. 747, 765; 1 Md. Ch. Dec. 160; 25 Miss. 95. In the absence of specific appropriation, the law will apply payments to unsecured indebtedness in preference to the secured; 52 Minn. 532. Yet, on the other hand, in the pursuit of equity, courts will sometimes assist the creditor. Hence, of two sets of debts, courts allow the creditor to apply unappropriated funds to the debts least strongly secured; 1 Freem. Ch. 502; 18 Miss. 113; 15 Conn. 438; 10 Ired. 165; 2 Rich. Eq. 63; 13 Vt. 15; 6 Cra. 8; 11 Leigh 512; 14 Ark. 86; 4 Gratt. 53; 15 Ga. 321; 9 Cow. 747, 765; 43 Fed. Rep. 580.

Interest. Payments made on account are first to be applied to the interest which has accrued thereon. And if the payment exceed the amount of interest, the balance goes to extinguish the principal; 1 Dev. 341; 11 Paige, Ch. 619; 1 Strobb. Eq. 426; 16 Miss. 338; 10 Tex. 216; 3 Sandf. Ch. 603; 5 Ohio 260; 2 Fla. 445; 3 W. & S. 17; 4 Neb. 190; 130 Ind. 231. Funds must be applied by the creditor to a judgment bearing interest, and not to an unliquidated account; 4 T. B. Monr. 389; nor to usurious interest; 22 La. Ann. 418; 34 Ohio St. 142.

Priority. When no other rules of appropriation intervene, the law applies part-payments to debts in the order of time, discharging the oldest first; 3 Woodb. & M. 150, 390; 1 Bay 497; 40 Me. 378; 10 Barb. 183; 4 Harr. & J. 351; 7 Gratt. 86; 27 Vt. 478; 9 Watts 386; 27 Ala. n. s. 445; 46 Vt. 448; 39 Iowa 330; 116 Mass. 874; 58 Fed. Rep. 425. Where the payment is upon an account, the law will apply it to the oldest items; 48 Fed. Rep. 690. So strong is this priority rule that it has been said that equity will apply payments to the earliest items, even where the creditor has security for these items and none for later ones; 6 N. Y. 147. But this is opposed to the prevailing rule.

Sureties. The general rule is that neither debtor nor creditor can so apply a payment as to affect the liabilities of sureties, without their consent; 12 N. H. 320; 1 McLean 493; 16 Pet. 121; Gilp. 106. Where a principal makes general payments, the law presumes them, *prima facie*, to be made upon debts guaranteed by a surety, rather than upon others; though circumstances and intent will control this rule of surety, as they do other rules of appropriation; 1 C. & P. 600; 8 Ad. & E. 855; 10 J. B. Moore 362; 4 Gill & J. 361; 5 Leigh 329.

Continuous accounts. In these, payments are applied to the earliest items of account, unless a different intent can be inferred; 4 B. & Ad. 766; 1 Nev. & M. 742; 4 Q. B. 792; 9 Wheat. 720; 3 Sumn. 98; 23 Me. 24; 28 Vt. 498; 4 Mass. 386; 5 Metc. Mass. 263; 19 Conn. 191; 53 Ill. 414; 27 Ala. 445; 32 Ga. 1; 26 S. W. Rep. (Tex.) 141; 58 N. W. Rep. (Minn.) 38. Where one is indebted on two different accounts and money is paid without directions, the creditor may apply it to the later account; 155 Mass. 366; 17 Colo. 80; or he may apply half the amount paid on each of two debts, where neither is barred by the statute of limitations; 111 Mo. 264.

Partners. Where a creditor of the old firm continues his account with the new firm, payments by the latter will be applied to the old debt, *prima facie*, the preceding rule of continuous accounts guiding the appropriations. As above, however, a different intent, clearly proved, will prevail; 5 B. & Ad. 925; 2 id. 39; 2 B. & Ald. 39; 3 Younge & C. 625; 3 Dowl. & R. 252; 3 Moore & S. 174; 6 W. & S. 9. When a creditor of the firm is also the creditor of one partner, a payment by the latter of partnership funds must be applied to the partnership debts. Yet circumstances may allow a different application; 1 Mood. & M. 40; 10 Conn. 175; 1 Rice 291; 2 A. K. Marsh. 277; 28 Me. 91; 2 Harr. Del. 172. See 82 Tex. 29. And so, unappropriated

payments made by a party indebted severally and also jointly with another to the same creditor, for items of book-charges, are to be applied upon the several debts; 33 Me. 428.

The rules of appropriation, it has now been seen, apply equally well whether the debts are of the same or of different orders, and though some are specialties while others are simple contracts; 2 Vt. 606; 4 Cra. 317; 15 Ga. 221; 22 Pa. 492; 2 Hayw. 385. As to the time during which the application must be made in order to be valid, there is much discrepancy among the authorities, but perhaps a correct rule is that any time will be good as between debtor and creditor, but a *reasonable* time only when third parties are affected; 6 Taunt. 597; 3 Green, N. J. 314; 20 Me. 457; 1 Bail. Eq. 430; 1 Overt. 488; 4 Ired. Eq. 42; 12 Vt. 249; 10 Conn. 184.

When once made, the appropriation cannot be changed but by common consent; and rendering an account, or bringing suit and declaring in a particular way, is evidence of an appropriation; 1 Wash. Va. 128; 2 Rawle 316; 2 Wash. C. C. 47; 12 Ill. 159; 28 Me. 91; 15 So. Rep. (Ala.) 568. If debtor receives without objection an account rendered, he cannot afterward question the imputation; 43 La. Ann. 1042; 43 Minn. 298.

Consult Burge, Suretyship 126; 2 Par. Contr. Payment; 1 Am. Lead. Cas. 330; 14 Am. Dec. 604, n.; 2 Cr. M. & R. 723; 2 Sumn. 99; 2 Stor. 243; 31 Me. 497; 3 Ill. 347; 2 J. J. Marsh. 414; 6 Dana 217; 1 M'Mull. 82, 310; 1 M'Cord, Ch. 818; 9 Paige, Ch. 165; 7 Ohio 21; 29 Tex. 419.

Of Government. No money can be drawn from the treasury of the United States but in consequence of appropriations made by law; Const. art. 1, s. 9. Under this clause of the constitution it is necessary for congress to appropriate money for the support of the federal government and in payment of claims against it; and this is done annually by acts of appropriation, some of which are for the general purposes of government, and others special and private in their nature. These general appropriation bills, as they are commonly termed, extend to the 30th of June in the following year, and usually originate in the house of representatives, being prepared by the committee of ways and means; but they are distinct from the bills for raising revenue, which the constitution declares shall originate in the house of representatives. A rule of the house gives appropriation bills precedence over all other business, and requires them to be first discussed in committee of the whole. Where money once appropriated remains unexpended for more than two years after the expiration of the fiscal year in which the act shall have been passed, such appropriations are deemed to have ceased and determined, and the moneys so unexpended are immediately thereafter carried to the "surplus fund," and it is not lawful thereafter to pay them out for any purpose without further and specific appropriations by law. Certain appropriations, however, are excepted from the operation of this law, viz.: moneys appropriated for payment of the interest on the funded debt, or the payment of interest and reimbursement according to contract of any loan or loans made on account of the United States; as likewise moneys appropriated for a purpose in respect to which a longer duration is specially assigned by law. No expenditure is allowed in any department in any year in excess of the appropriation for that year; Rev. St. 1878, §§ 3660-3692; 7 Opinions of Attorney-Generals, 1.

See Bryce, Am. Com. 176; Von Holtz, Cons. Law 131; Story, Const. 958. The term "appropriation" was also used in 13 Stat. at L. 381, to include all taking and use of property by the army and navy in the course of the war not authorized by contract with the government; 9 Wall. 45; 13 id. 623; 4 Ct. Cl. 389.

The taking and use of property by the army or navy in course of war, not authorized by contract with the government. 76 U. S. 49.

APPROVE. To increase the profits upon a thing.

Used of common or waste lands which were enclosed and devoted to husbandry; 3 Kent 406; Old Nat. Brev. 79.

While confessing crime one's self, to accuse another of the same crime.

It is so called because the accuser must prove what he asserts; Staundf. Pl. Cr. 142; Crompton, Jus. Peace 250.

To vouch. To appropriate. To improve. Kelham.

APPROVE OF. The words "approve of" and "consent to" do not, singly or combined, express the idea of willful contribution to or procurement of a felonious act, which is necessary to constitute guilt. 90 Ky. 654, 14 S. W. 684. See CONSENT TO.

APPROVED. The word "approved," as used in an instruction holding accused liable if he was voluntarily present and approved of the killing, such voluntary presence and approval means more than the mere consent in the usual and ordinary acceptance of that word. 7 Ky. Opin. 576.

APPROVED ENDORSED NOTES. Notes endorsed by another person than the maker, for additional security; the endorser being satisfactory to the payee.

Public sales are generally made, when a credit is granted, on approved endorsed notes. The meaning of the term is that the purchaser shall give his promissory note for the amount of his purchases, endorsed by another, which, if approved of by the seller, shall be received in payment. If the party approver of the notes, he consents to ratify the sale; 20 Wend. 431.

APPROVER. In English Criminal Law. One confessing himself guilty of felony, and accusing others of the same crime to save himself. Crompton, Inst. 250; Coke, 3d Inst. 129; 26 Ill. 173; 26 id. 344; 1 Cowper 331.

Such an one was obliged to maintain the truth of his charge, by the old law; Cowel. The approver must have taken place before plea pleaded; 4 Bla. Com. 330.

Certain men sent into the several counties to increase the farms (rents) of hundreds and wapentakes, which formerly were let at a certain value to the sheriffs. Cowel.

Sheriffs are called the king's approvers. Termes de la Ley.

Approvers in the Marches were those who had license to sell and purchase beasts there.

APPROXIMATE. See PROXIMATE.

APPURTENANCES. Things belonging to another thing as principal, and which pass as incident to the principal thing. 10 Pet. 25; Angell, Wat. C. 7th ed. § 153 a; 1 S. & R. 169; 5 id. 110; Cro. Jac. 121; 1 P. Wms. 603; Cro. Jac. 526; 2 Coke 32; Co. Litt. 5b, 56 a, b; 1 Plowd. 171; 2 Saund. 401, n. 2; 1 B. & P. 371; 1 Cr. & M. 439; 4 Ad. & E. 761; 2 Nev. & M. 517; 74 Pa. 25. See 13 Am. Dec. 657.

The word has a technical signification, and, when strictly considered, is employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. When thus used, to constitute an appurtenance there must exist a propriety of relation between the principal or dominant subject and the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature or quality as to be capable of union without incongruity; 53 N. H. 508.

Thus, if a house and land be conveyed, everything passes which is necessary to the full enjoyment thereof and which is in use as incident or appurtenant thereto; 1 Sumn. 492. Under this term are included the curtilage; 2 Bla. Com. 17; a right of way, 4 Ad. & E. 749; water-courses and secondary easements, under some circumstances; Angell, Wat. C. 7th ed. § 153 a; a turbary, 3 Salk. 40; and generally, anything necessary to the enjoyment of a thing; 4 Kent 468, n.; 81 N. Y. 557; 55 id. 98; but it is the general rule that land cannot pass as appurtenant to land; 49 Barb. 501; 10 Pet. 25; 2 Murph. 341; but it may be *aliter* to give

effect to the intent of a will; 9 Pick. 298; and in Pennsylvania where first purchasers of 5000 acres from the proprietary obtained city lots, incident to their purchase, it was held that the lots passed as appurtenant to a grant of 5000 acres; 4 Yeates 142; also flats pass as appurtenant to the fast land on a river front; 18 W. N. C. (Pa.) 73; and the land covered by the water-power will pass as appurtenant to a saw-mill; 74 Pa. 25. See also 5 Pa. 126; 110 Pa. 370.

The mere use of the term "appurtenances," without more, will not pass a right of way established over one portion of land merely for convenience of the owner, it not being a way of necessity; 68 N. Y. 62; S. C. 23 Am. Rep. 149.

If a house is blown down, a new one erected there shall have the old appurtenances; 4 Coke 86. The word appurtenances in a deed will not usually pass any corporeal real property, but only incorporeal easements, or rights and privileges; Co. Litt. 121; 8 B. & C. 150; 6 Bingh. 150; 1 Chit. Pr. 153, 4; 2 Washb. R. P. 317, 327; 3 *id.* 418. See APPENDANT.

Appurtenances of a ship include whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to her owner. Ballast was held no appurtenance; 1 Leon. 46. Boats and cable are such; 17 Mass. 405; also, a rudder and cordage, 5 B. & Ald. 943; 1 Dods. Adm. 273; fishing-stores, 1 Hagg. Adm. 109; chronometers, 6 Jur. 910; see 15 Me. 421. For a full and able discussion of the subject of appurtenances to a ship, see 1 Pars. Marit. Law 71-74; see 2 Sawy. 201. "Appurtenances" used in the right to levy and collect taxes on a "bridge and its appurtenances," included the approaches to the bridge or any buildings erected by the Bridge Company within the corporate limits of the city. 154 Ky. 578, 157 S. W. 1105.

APPURTENANT. Belonging to; pertaining to.

The thing appurtenant must be of an inferior nature to the thing to which it is appurtenant; 2 Bla. Com. 19; 1 Plowd. 170; 1 Sumn. 21; 41 Md. 523. A right of common may be appurtenant, as when it is annexed to lands in other lordships, or is of beasts not generally commonable; 2 Bla. Com. 33. Such can be claimed only by immemorial usage and prescription.

APUD ACTA (Lat.). Among the records; acts. This was one of the verbal appeals so called by the French commentators, and was obtained by simply saying, *appello*.

AQUA (Lat.). Water. It is a rule that water belongs to the land which it covers when it is stationary. *Aqua cedit solo* (water follows the soil); 2 Bla. Com. 18; Co. Litt. 4.

But the owner of running water cannot obstruct the flow to the injury of an inheritance below him. *Aqua currit et currere debet* (water runs, and ought to run); 3 Kent 439; 26 Pa. 413; 2 Washb. R. P. 340.

AQUÆ DUCTUS. In Civil Law. A servitude which consists in the right to carry water by means of pipes or conduits over or through the estate of another. Dig. 8. 3. 1; Inst. 2. 3; Lalaure, *Des Serv.* c. 5, p. 23.

AQUÆ HAUSTUS. In Civil Law. A servitude which consists in the right to draw water from the fountain, pool, or spring of another. Inst. 2. 3. 2; Dig. 8. 3. 1. 1.

AQUÆ IMMITTENDÆ. In Civil Law. A servitude which frequently occurs among neighbors.

It is the right which the owner of a house, built in such a manner as to be surrounded with other buildings, so that it has no outlet for its waters, has to cast water out of his windows on his neighbor's roof, court, or soil. Lalaure, *Des Serv.* 23. It is recognized in the common law as an easement of drip; 15 Barb. 95; Gale & Whately, *Easements*. See EASEMENTS.

AQUAGIUM (Lat.). A water-course. Cowal.

Canals or ditches through marshes. Spel-

man. A signal placed in the *aquagium* to indicate the height of water therein. Spelman.

AQUATIC RIGHTS. Rights which individuals have in water.

AQUILIAN LAW, THE. See LEX AQUILIA.

ARALIA (Lat. *arare*). Land fit for the plough. Denoting the character of land, rather than its condition. Spelman. Kindred in meaning *arare*, to plough; *arator*, a ploughman; *aratrum terre*, as much land as could be cultivated by a single *arator*; *araturia*, land fit for cultivation.

ARBITER. A person bound to decide according to the rules of law and equity, as distinguished from an arbitrator, who may proceed wholly at his own discretion, so that it be according to the judgment of a sound man. Cowel.

This distinction between arbiters and arbitrators is not observed in modern law. Russell, *Arbitrator* 112. See ARBITRATOR.

See, generally, Morse, Arb. 99.

One appointed by the praetor to decide by the equity of the case, as distinguished from the *judex*; who followed the law. Calvinus, Lex.

One chosen by the parties to decide the dispute; an arbitrator. Bell, Dict.

ARBITRAGE. The simultaneous buying and selling of the same thing in different markets, as London, Amsterdam and New York, in order to make a profit from the difference between quotations in such markets: said chiefly of such traffic in bills of exchange, stocks, and bonds. Stand. Dict.

ARBITRAMENT AND AWARD.

A plea to an action brought for the same cause which had been submitted to arbitration and on which an award had been made. Watson, Arb. 256.

ARBITRARILY. An unreasonable exercise of discretion by a license board in refusing a saloon license is within the rule authorizing an appeal in case the discretion of the board has been "arbitrarily" exercised. 132 Ky. 502, 118 S. W. 947.

ARBITRARY PUNISHMENT. In Practice. That punishment which is left to the decision of the judge, in distinction from those defined by statute.

ARBITRATION (Lat. *arbitratio*). In Practice. The investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators, or referees. Worcester, Dict.; 3 Bla. Com. 16.

Compulsory arbitration is that which takes place when the consent of one of the parties is enforced by statutory provisions.

Voluntary arbitration is that which takes place by mutual and free consent of the parties.

It usually takes place in pursuance of an agreement (commonly in writing) between the parties, termed a submission; and the determination of the arbitrators or referee is called an award; see SUBMISSION; AWARD; but a parol submission is good at common law; 62 Mich. 157.

A submission to arbitration made pending an action thereon, operates as a discontinuance of the suit; 76 Cal. 378; and it is a bar to any future action thereon; 122 Ind. 103. If the submission is not made under an order of court, the award cannot be made a judgment of the court unless it be by consent; 97 N. C. 39.

At common law it was either *in pais*,—that is, by simple agreement of the parties,—or by the intervention of a court of law or equity. The latter was called arbitration by rule of court; 3 Bla. Com. 16.

Besides arbitration at common law, there exists arbitration, in England as well as the United States, under various statutes, to which reference is made for local peculiarities.

Most of them are founded on the 9 & 10 Will. III. c. 15, and 3 & 4 Will. IV. ch. 42, § 49, by which it is allowed to refer a matter in dispute, not then in court, to arbitrators, and agree that the submission be made a rule of court. This agreement, being proved on the oath of one of the witnesses thereto, is enforced as if it had been made at first under a rule of court; 3 Bla. Com. 18; Kyd, Aw. 22. Par-

ticular reference may be made to the statutes of Pennsylvania, in which state the legislation on the subject of arbitration has been extensive and peculiar.

Any matter may be determined by arbitration which the parties may adjust by agreement, or which may be the subject of a suit at law. Crimes, however, and perhaps actions (*qui tam*) on penal statutes by common informers, cannot be made the subject of adjustment and composition by arbitration. See SUBMISSION.

Any person who is capable of making a valid and binding contract with regard to the subject may, in general, be a party to a reference or arbitration. Every one is so far, and only so far, bound by the award as he would be by an agreement of the same kind made directly by him. For example, the submission of a minor is not void, but voidable. See SUBMISSION.

At common law it is entirely voluntary, and depends upon the agreement of the parties, to waive the right of trial in court by a jury.

An agreement for arbitration at the request of either party is not a defence to suit, where no arbitration has been demanded; 25 Neb. 505.

A submission to arbitration is subject to revocation before an award; 126 Ill. 72; 35 Fed. Rep. 22; 139 Mass. 463; 3 Story 800; 91 Pa. 232; and it is also revoked by the death of one of the parties; 36 Fed. Rep. 408.

In Pennsylvania, however, there exist compulsory arbitrations. Either party in a civil suit or action, or his attorney, may enter at the prothonotary's office a rule of reference, wherein he shall declare his determination to have arbitrators chosen on a day certain, to be mentioned therein, not exceeding thirty days, for the trial of all matters in variance in the suit between the parties. A copy of this rule is served on the opposite party.

On the day appointed, they meet at the prothonotary's and endeavor to agree upon arbitrators. If they cannot, the prothonotary makes out a list, on which are inscribed the names of a number of citizens, and the parties alternately strike, each, one of them from the list, beginning with the plaintiff, until only the number agreed upon, or fixed by the prothonotary, are left who are to be the arbitrators. A time of meeting is then agreed upon, or appointed by the prothonotary if the parties cannot agree; at which time the arbitrators, having been sworn or affirmed justly and equitably to try all matters in variance submitted to them, proceed to hear and decide the case. Their award is filed in the office of the prothonotary, and has the effect of a judgment, subject, however, to appeal, which may be entered at any time within twenty days from the filing of such award. Act of 16th June, 1836; Pamphl. Law 715; see, also, act of 1874.

This is somewhat similar to the arbitrations of the Romans. There the praetor selected, from a list of citizens made for the purpose, one or more persons, who were authorized to decide all suits submitted to them, and which had been brought before him. The authority which the praetor gave them conferred on them a public character, and their judgments were without appeal. Toullier, *Droit Civ. Fr.* liv. 3, t. 3, c. 4, n. 820.

See, generally, ARBITRATOR; SUBMISSION; AWARD.

Consult Caldwell; Stephens; Watson, Arbitration; Russell, Arbitrator; Billings; Kyd; Loring; Reed, Awards; Bacon, Abridgment; Morse, Arb.

For arbitration between nations, see INTERNATIONAL ARBITRATION.

For arbitration of labor disputes, see LABOR ARBITRATION. See FISHERIES ARBITRATION; INTERNATIONAL ARBITRATION.

ARBITRATOR. In Practice. A private extraordinary judge, to whose decision matters in controversy are referred by consent of the parties. Worcester, Dict.

Referee is of frequent modern use as a synonym of arbitrator, but is in its origin of broader significance and less accurate than arbitrator.

Appointment. Usually, a single arbitrator is agreed upon, or the parties each

ARBITRATOR

appoint one, with a stipulation that, if they do not agree, another person, called an umpire, named, or to be selected by the arbitrators, shall be called in, to whom the matter is to be referred; *Cald. Arb.* 99; 9 B. & C. 624; 3 B. & A. 248; 5 B. & Ad. 488; 9 Ad. & E. 690; 6 Harr. & J. 403; 17 Johns. 405; 2 M'Corr 279; 4 Rand. 375; 15 Vt. 548; 2 Bibb 88; 4 Dall. 471; 9 Ind. 150; 61 Hun 625; 9 Wall. 76. In general, any objection to the appointment of an arbitrator or umpire will be waived by attending before him; 2 Eng. L. & Eq. 284; 9 Ad. & E. 679; 1 Jac. & W. 511; 3 Ind. 277; 9 Pa. 254, 487; 10 B. Monr. 536; one who goes to trial before a referee without requiring an oath waives the oath; 97 U. S. 581; 58 Hun 608; 7 Cush. 247.

Any person selected may be an arbitrator, notwithstanding natural incapacity or legal disability, as infancy, coverture, or lunacy; *Wats. Arb.* 71; *Russ. Arb.* 107; *Viner, Abr. Arbitration*, A, 2; 8 Dowl. 879; 1 Pet. 238; 7 W. & S. 142; 26 Miss. 127; *contra*, *Comyns, Dig. Abatement*, B, C; *West, Symb. Compromise*, p. 164; *Brooke, Abr.*; 11 Q. B. 7; or disqualification on account of interest, provided it be known to the parties at the time of making the submission; 9 Bingh. 673; 3 Vern. Ch. 251; 1 Jac. & W. 511; 1 Cal. 147; 1 Bibb 148; 14 Conn. 26; 26 Miss. 127; 27 Me. 251; 2 E. D. Smith 32. In the civil law the rule was otherwise; *Donat, Civ. Law*, § 1112, D. 9. 1. In 123 Mass. 190, the award of an arbitrator, who had been counsel in a former case for the party in whose favor he found, was held valid, although the fact was not known to the other party; and so of an arbitrator, who knew one of the parties intimately, and had heard his version of the facts before, and expressed an opinion thereon; 123 Mass. 129; or the parties to a contract may submit their differences to an employé of one of them and his decision shall be final as between them; 24 Fla. 560. The fact that the referee was a stockholder of the company will not render the submission invalid; 112 Mo. 463.

The proceedings. Arbitrators proceed on the reference as judges, not as agents of the parties appointing them; 1 Ves. Ch. 238; 9 id. 69. They should give notice of the time and place of proceeding to the parties interested; 3 Atk. 529; 8 Md. 208; 6 Harr. & J. 403; 3 Gill 31; 24 Miss. 346; 23 Wend. 638; 12 Metc. Mass. 293; 1 Dall. 81; 17 Conn. 309; 2 N. H. 97; 6 Vt. 666; 3 Rand. 2; *Hard*, 46; 32 Me. 455, 518; 126 Ill. 250; 64 Cal. 103; 8 Pet. 178; 55 Iowa 722. They should all conduct the investigation together, and should sign the award in each other's presence; 4 Me. 468; 23 Ill. 56; 35 Me. 281; 129 Mass. 345; 23 Barb. 304; but a majority is held sufficient; 1 Wash. 448; 11 Johns. 402; 3 R. L. 192; 20 Pa. 384; 3 Dutch. 175; 9 Ind. 150; 14 B. Monr. 292; 21 Ga. 1; 149 Mass. 367. An award by two of three arbitrators is binding; 64 Va. 800; 86 Ky. 23; *contra*, 76 Iowa 187.

In investigating matters in dispute, they are allowed the greatest latitude; 9 Bingh. 679; 1 B. & P. 91; 1 Sandf. 681; 1 Dall. 161; 6 Pick. 148; 10 Vt. 79; 2 Bay 370; 1 Bail. 46. But see 1 Halst. 386; 1 Wash. Va. 193; 4 Cush. 111; 2 Johns. Cas. 224; 1 Binn. 458. They are judges both of law and of fact, and are not bound by the rules of practice adopted by the courts; 1 Ves. Ch. 369; 1 Price 81; 13 id. 533; 1 Swanst. 53; 1 Taunt. 52, n.; 6 id. 255; 2 B. & Ald. 692; 8 id. 239; 4 Ad. & E. 847; 17 How. 344; 2 Gall. 61; 7 Metc. Mass. 316, 486; 36 Me. 19, 108; 2 Johns. Ch. 276, 368; 5 Md. 353; 19 Pa. 431; 21 Vt. 99, 250; 25 Conn. 66; 16 Ill. 34, 99; 12 Gratt. 554; 7 Ind. 49; 2 Cal. 64, 122; 23 Miss. 272; 98 N. Y. 388; 79 N. C. 360; 79 Ky. 211; 60 N. H. 76. Thus, the witnesses were not sworn in Hill & Den. 110; 28 Vt. 776. They may decide *ex equo et bono*, and need not follow the law; the award will be set aside only when it appears that they meant to be governed by the law but have mistaken it; 3 East 18, 351; 2 C. B. 705; 2 Gall. 61; 1 Dall. 487; 6 Pick. 148; 6 Metc. Mass. 181; 21 Vt. 250; 4 N. H. 357; 1 Hall 598. See 19 Mo. 373; 109 N. C. 103; but if they decide a

matter honestly and fairly according to their judgment, the award will not be set aside because they decide the facts erroneously, or were mistaken in the law they applied to them, or decide on an erroneous theory; 40 Minn. 164; 57 Conn. 105; 70 Md. 405; 75 Ia. 385; 17 How. 344.

Under submissions *in pais*, the attendance of witnesses and the production of papers was entirely voluntary at common law; 1 Dowl. & L. 676; 2 Sim. & S. 418; 2 C. & P. 550. It was otherwise when made under a rule of court. Various statutes in England and the United States now provide for compelling attendance.

Duties and powers of. Arbitrators cannot delegate their authority; it is a personal trust; *Morse, Arb. & Aw.* 166; *Cro. Eliz.* 726; 6 C. B. 258; 4 Dall. 71; 7 S. & R. 228; 1 Wash. C. C. 448; 83 Va. 601; 24 Pa. 411; 99 Mass. 459. The power ceases with the publication of the award; 9 Mo. 30; and death after publication and before delivery does not vitiate it; 21 Ga. 1. They cannot be compelled to make an award; in which respect the common law differs from the Roman; *Story, Eq. Jur.* § 1457; *Kyd, Aw.* 2d ed. 100; or to disclose the grounds of their judgment; 3 Atk. 644; 7 S. & R. 448; 5 Md. 253; 19 Mo. 373.

An arbitrator may retain the award till paid for his services, but cannot maintain assumpsit in England without an express promise; 4 Esp. 47; 2 M. & G. 847, 870; 3 Q. B. 466, 928. But see 1 Gow. 7; 1 B. & P. 93. In the United States he may, however; 1 Den. 188; 29 N. H. 48.

A submission to arbitration by one of several parties without the consent of the others, whether by rule of court or otherwise, is illegal and void; 36 Fed. Rep. 408.

The powers and duties of arbitrators are now regulated very fully by statute, both in England and the United States. See SUBMISSION, and also ARBITRATION; *Morse, Arb.* 99.

ARBITRIUM (Lat.). Decision; award; judgment.

For some cases the law does not prescribe an exact rule, but leaves them to the judgment of sound men; or in the language of Grotius, *lex non exacte definit, sed arbitrio boni viri permittit*; 1 Bla. Com. 61. The decision of an arbiter is *arbitrium*, as the etymology indicates; and the word denotes, in the passage cited, the decision of a man of good judgment who is not controlled by technical rules of law, but is at liberty to adapt the general principles of justice to the peculiar circumstances of the case.

ARBOR (Lat.). A tree; a plant; something larger than an herb; a general term including vines, osiers, and even reeds. The mast of a ship. *Brissonius*. Timber. *Ainsworth*; *Calvinus*, Lex.

Arbor civilis. A genealogical tree. *Coke*, *Inst.*

A common form of showing genealogies is by means of a tree representing the different branches of the family. Many of the terms in the law of descent are figurative, and derived hence. Such a tree is called, also, *arbor consanguinitatis*.

ARCARIUS (Lat. arca). A treasurer; one who keeps the public money. *Spelman*, *Gloss.*

ARCHAIONOMIA. The name of a collection of Saxon laws published during the reign of the English Queen Elizabeth, in the Saxon language, with a Latin version by Mr. Lambard. Dr. Wilkins enlarged this collection in his work entitled *Leges Anglo-Saxonice*, containing all the Saxon laws extant, together with those ascribed to Edward the Confessor, in Latin; those of William the Conqueror, in Norman and Latin; and of Henry I., Stephen, and Henry II., in Latin. See LAMBARDE.

ARCHBISHOP. In Ecclesiastical Law. The chief of the clergy of a whole province.

He has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has also his own diocese, in which he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal authority; 1 Bla. Com. 380; 1 Ld. Raym. 541.

ARCHDEACON. In Ecclesiastical Law. A ministerial officer subordinate to the bishop.

In the primitive church, the archdeacons were

employed by the bishop in the more servile duties of collecting and distributing alms and offerings. Afterwards they became, in effect, "eyes to the overseers of the Church;" *Cowel*.

His jurisdiction is ecclesiastical, and immediately subordinate to that of the bishop throughout the whole or a part of the diocese. He is a ministerial officer; 1 Bla. Com. 383.

ARCHDEACON'S COURT. In English Law. The lowest court of ecclesiastical jurisdiction in England.

It is held before a person appointed by the archdeacon, called his official. Its jurisdiction is limited to ecclesiastical causes arising within the archdeaconry. It had until recently, also, jurisdiction of matters of probate and granting administrations. In ordinary cases, its jurisdiction is concurrent with that of the Bishop's Court; but in some instances cases must be commenced in this court. In all cases, an appeal lies to the Bishop's Court; 24 Hen. VIII. c. 12; 3 Bla. Com. 84.

ARCHES COURT. See COURT OF ARCHES.

ARCHIVES (archivum arcebum). The Rolls; any place where ancient records, charters, and evidences are kept. In libraries, the private depository. *Cowel*; *Spelman*, *Gloss.*

The records need not be ancient to constitute the place of keeping them the Archives.

ARCHIVIST. One to whose care the archives have been confided.

ARCTA ET SALVA CUSTODIA (Lat.). In safe and close custody or keeping.

When a defendant is arrested on a *capias ad satisfaciendum* (ca. sa.), he is to be kept *arcta et salva custodia*; 3 Bla. Com. 415.

ARDENT SPIRITS. As used in some statutes, particularly in Virginia, includes any liquor which will affect the manner, muscular movement, general appearance, or behavior of any person who drinks a sufficient amount of it, so as to make such effect apparent. *Thorpe*, National and State Prohibition, 158; 133 Va. 645.

ARE CHARGED. Words which, applied to the estate of a covenantor, as distinguished from "he will charge," create a clear charge upon the covenantor's lands. *A. & E. Enc. of Law*; 2 Ball & B. 223.

AREA. An enclosed yard or opening in a house; an open place adjoining to a house. 1 Chit. Pr. 176.

ARENALES. In Spanish Law. Sandy beaches.

ARENTARE (Lat.). To rent; to let out at a certain rent. *Cowel*
Arentatio. A renting.

ARGENTARIII (Lat. argentum). Money-lenders.

Called, also, *nummularii* (from *nummus*, coin) *mensarii* (lenders by the month). They were so called whether living in Rome or in the country towns, and had their shops or tables in the forum. *Argentarius* is the singular. *Argentarium* denotes the instrument of the loan, approaching in sense to our note or bond.

Argentarius miles was the servant or porter who carried the money from the lower to the upper treasury to be tested. *Spelman*, *Gloss.*

ARGENTUM ALBUM (Lat.). Unstamped silver; bullion. *Spelman*, *Gloss.*; *Cowel*.

ARGENTUM DEI (Lat.). God's money; God's penny; money given as earnest in making a bargain. *Cowel*.

ARGUMENT. Proof or the means of proving, or inducing belief; a course or process of reasoning; an address to a jury or a court; *Anderson's Dict. Law*. An effort to establish belief by a course of reasoning.

When a controverted question of fact is to be submitted to a jury for its determination either party has an absolute right to be heard in argument thereon. The power of the court is limited to imposing reasonable restrictions as to the time to be occupied. *Id.*; 29 Kan. 529.

What is a Reasonable Time For. A reasonable time should always be allowed for argument, and what is a reasonable time must of necessity be left almost entirely to the discretion of the trial court, but in a homicide case, where there are a large number of witnesses and much conflicting evidence, an hour is not sufficient time in which to enable counsel to present his case. 161 Ky. 441, 170 S. W. 149.

In a civil case ten minutes was held too short and a reversible error. 161 Ky. 384, 170 S. W. 946.

ARGUMENT AB INCONVENIENTI. An argument arising from the inconvenience which the opposite construction of the law would create.

It is to have effect only in a case where the law is doubtful; where the law is certain, such an argument is of no force. Bacon, *Abbr. Baron and feme H.*

ARGUMENTATIVE. By way of reasoning.

A plea must be (among other things) direct and positive, and not argumentative; 3 Bla. Com. 308; Steph. Pl. Andrew's ed. § 301; McK. Pl. 34.

ARIBANNUM. A fine for not setting out to join the army in obedience to the summons of the king.

ARIMANNI (Lat.). The possessors of lands holden or derived from their lords. Clients joined to some lord for protection. By some, said to be soldiers holding lands from a lord; but the term is also applied to women and slaves. Spelman, Gloss.

ABISE. To proceed; to issue; to spring. 2 Am. & Eng. Ency. 2nd ed., 826; 2 Sawy. (U. S.) 405. In this case the court said: "A case arising in the land or naval forces *** appears to us to be a case proceeding, issuing, or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service." *Id.*; *ibid.* The word "arising" refers to the present time or time to come, but cannot with any propriety relate to time past, and embrace former transactions. *Id.*; 3 Cranch (U. S.) 413. As used in provisions of the United States Constitution, conferring jurisdiction upon United States courts, the words "arising under" mean "growing out of, created by, or brought into being by," the laws of the United States. *Id.*; 2 Fed. Cas. 728. "Cases arising in a justice's court" is synonymous with "actions originally commenced" in that court. *Id.*; 18 N. Y. 127.

ARISTOCRACY. A government in which a class of men rules supreme.

Aristotle classified governments according to the person or persons in whom the supreme power is vested: In monarchies or kingdoms, in which one rules supreme; in aristocracies, in which a class of men rules supreme; and in democracies, in which the people at large, the multitude, rule. The term aristocracy is derived from the Greek word *aristos*, which, although finally treated as the superlative of *ayabos*, good, originally meant the strongest, the most powerful; and in the compound term aristocracy it meant those who wielded the greatest power and had the greatest influence, the privileged ones. The aristocracies in ancient Greece were, in many cases, governments arrogated by violence. If the number of ruling aristocrats was very small, the government was called an oligarchy. Aristotle says that in democracies the "demagogues lead the people to place themselves above the laws, and divide the people, by constantly speaking against the rich; and in oligarchies the rulers always speak in the interest of the rich. At present," he says, "the rulers, in some oligarchies, take an oath, 'And I will be hostile to the people, and advise, as much as is in my power, what may be injurious to them.'" (Politics, v. ch. 9.) There are circumstances which may make an aristocracy unavoidable; but it has always this inherent deficiency, that the body of aristocrats, being set apart from the people indeed, yet not sufficiently so, as the monarch is (who, besides, being but one, must needs rely on the classes beneath him), shows itself severe and harsh so soon as the people become a substantial portion of the community. The struggle between the aristocratic and the democratic element is a prominent feature of the middle ages; and at a later period it is equally remarkable that the crown, in almost every country of the European continent, waged war, generally with the assistance of the commonalty, with the privileged class, or aristocracy. The real aristocracy is that type of government which has nearly entirely vanished from our cis-Caucasian race; although the aristocratic element is found, like the democratic element, in various degrees, in most of the existing governments. The term aristocracy is at present frequently used for the body of privileged persons in the government of any institution, for instance, in the church. In the first French Revolution, Aristoc-

rat came to mean any person not belonging to the levellers, and whom the latter desired to pull down. The modern French communists use the slang term *Aristo* for aristocrat. The most complete and consistently developed aristocracy in history was the Republic of Venice, a government considered by many early publicists as a model: it illustrated, however, in an eminent degree, the fear and consequent severity inherent in aristocracies. See GOVERNMENT; ABSOLUTISM; MONARCHY.

ARISTO-DEMOCRACY. A form of government where the power is divided between the great men of the nation and the people.

ARIZONA. One of the United States of America; being admitted in 1912.

This region was first visited by the Spanish in 1539, and was afterwards explored under the direction of the viceroy of Mexico in 1540; nothing was done, however, towards settling the country until the year 1580, when a military post was established by the Spanish on the site of the present city of Tucson. Under the untiring efforts of the Jesuits, an unbroken line of settlements sprung up from Tucson to the Sonora line, the northern boundary of Mexico, a distance of about one hundred miles; but owing to the frequent attacks of the Indians, and the Mexican revolution of 1821, these settlements were abandoned. The first United States settlers were persons on their way to California in 1849. The United States acquired, by the treaty of Guadalupe Hidalgo, Feb. 2, 1848, a large extent of country from Mexico, including California and the adjacent territories, and by the Gadsden purchase, Dec. 30, 1853, another large tract south of the former. Until 1893, the territory of New Mexico included Arizona and also about 12,255 acres, which were detached and included in Nevada. Arizona was organized as a separate territory by the act of congress of Feb. 24, 1893, U. S. Stat. at Large, 664. By this act, the territory embraces "all that part of the territory of New Mexico situated west of a line running due south, from the point where the southwest corner of the territory of Colorado joins the northern boundary of the territory of New Mexico, to the southern boundary of the territory of New Mexico." "The frame of government was substantially the same as that of New Mexico, and the laws of New Mexico were substantially extended to Arizona.

In accordance with an act of Congress, in June, 1906, inhabitants of Arizona and New Mexico voted on the question of uniting the territories into a single state to be called Arizona. The vote of New Mexico was favorable to union and statehood, but Arizona defeated it.

In June, 1910, President Taft approved an enabling act providing for the admission of Arizona and New Mexico as separate states. Encyc. Britannica.

The constitution prepared by the constitutional convention was probably the most radical instrument ever formulated for the administration of a state. President Taft objected to the recall of judges and the objectionable section was eliminated on Dec. 12, 1911.

A resolution formally admitting Arizona was signed Feb. 14, 1912. New Int. Encyclo. See New Mexico.

ARKANSAS. One of the United States of America; being the twelfth admitted to the Union.

It was formed of a part of the Louisiana territory, purchased of France by the United States, by treaty of April 30, 1803, and from that time until 1812 it formed part of the Louisiana Territory; from 1812 to 1819 it was part of the Missouri Territory. By act of congress of March 2, 1819, a separate territorial government was established for Arkansas; 3 Stat. L. 498. It was admitted to the Union by act of congress of June 20, 1836, and the first constitution of the state was adopted on the 30th January, 1836. The state passed an ordinance of secession, May 6, 1861. It was restored to the Union under the reconstruction acts of Congress, June 22, 1867. The constitution of March 13, 1868, representing the reconstruction legislation of the period, made extensive changes in the state organization, and was superseded in 1874 by the adoption of another which more nearly resembled that existing before the war. This was ratified by a popular vote on the 18th October, 1874, and went into effect October 30, 1874.

ARLES. Earnest.

Used in Yorkshire in the phrase *Arles-penny*. Cowell. In Scotland it has the same signification. Bell, Dict.

ARM OF THE SEA. A portion of the sea projecting inland, in which the tide ebbs and flows.

It includes bays, roads, creeks, coves, ports, and rivers where the water flows and refluxes. An arm of the sea is considered as extending as far into the interior of a country as the water of fresh rivers is propelled backward by the ingress and pressure of the tide; Angell, Tide Wat. 2d ed. 78; 7 Pet. 324; 2 Dougl. 441; 6 Clark & F. 628; Olc Adm. 18. Arms of the sea, so closely embraced by land that a man standing on one shore can reasonably discern with the naked eye objects and what is done on the opposite shore, are within county limits; Bish. Cr. L. § 146; 2 East, P. C. 805; Russ. & R. 243. Lord Coke said (Owen 122) that the admiral has no jurisdiction when a man may see from one side to another. This was followed by Cockburn, C. J., in Reg. v.

Keyn. L. R. 2 Ex. 164, 168. See CREEK; HAVEN; NAVIGABLE; PORT; RELICTION; RIVER; ROAD.

ARMARIA. See ALMARIA.

ARMED. Furnished with weapons of offence or defence; furnished with the means of security or protection. Webster's Dict.

The fact that there was on board a vessel but one musket, a few ounces of powder, and a few balls, would not make her an armed vessel; 2 Cra. 121.

ARMED PEACE. See PEACE, ARMED.

ARMIGER (Lat.). An armor-bearer; an esquire. A title of dignity belonging to gentlemen authorized to bear arms. Kennet, Paroch. Antiq.; Cowel.

In its earlier meaning, a servant who carried the arms of a knight. Spelman, Gloss.

A tenant by scutage; a servant or valet; applied, also to the higher servants in convents. Spelman, Gloss; Wishaw.

ARMISTICE. A cessation of hostilities between belligerent nations for a considerable time.

It is either partial and local, or general. It differs from a mere suspension of arms, which takes place to enable the two armies to bury their dead, their chiefs to hold conferences or pourparlers, and the like. Vattel, *Droit des Gens*, l. 3, c. 16, § 233. The terms truce and armistice are sometimes used in the same sense. See TRUCE.

ARMS. Any thing that a man wears for his defence, or takes in his hands, or uses in his anger, to cast at or strike at another. Co. Litt. 161 b, 162 a; Cramp. Just. P. 65; Cunning. Dict.

The constitution of the United States, Amend. art. 2, declares that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This is said to be not a right granted by the constitution, and not dependent upon that instrument for its existence. The amendment means no more than that this right shall not be infringed by congress; it restricts the powers of the national government, leaving all matters of police regulation, for the protection of the people, to the states; 92 U. S. 535.

An act forbidding the carrying of pistols, dirks, etc., is not repugnant to this article; the "arms" referred to are the arms of a soldier, etc.; 35 Tex. 473. A statute prohibiting the wearing of concealed deadly weapons is constitutional; 7 Pa. 470; 3 Heisk. 165; 53 Ga. 472; 31 Ark. 455; 7 Blackf. 578; 31 Ala. 387; contra, 2 Litt. 90. See Story, Const. 5th ed. § 1395; Rawle, Const. 125.

One who carries a pistol concealed in a satchel supported and carried by a strap over his shoulder, is guilty of carrying a concealed weapon about his person, although the satchel is locked and the key is in his pocket; 94 Ala. 79; 86 Ga. 255. The fact that one carries a concealed weapon for the purpose of selling it does not excuse his act; 19 S. E. Rep. N. C. 364; nor does the fact that he has repaired it and is returning it in his pocket; 63 Miss. 347; contra, 39 Mo. App. 47. The carrying of a pistol in the pocket for target practice does not constitute the offence of carrying a concealed weapon; 39 Mo. App. 127.

Signs of arms, or drawings, painted on shields, banners, and the like. Heraldic bearings.

The arms of the United States are described in the resolution of congress of June 20, 1782.

ARMY. A large force of armed men designed and organized for military service on land.

The term "army" or "armies" has never been used by congress to include the navy or marines; 2 Sawy. 205. See TROOPS.

ARPENNUS. A measure of land of uncertain amount. It was called arpent also. Spelman, Gloss; Cowel.

In French Law. A measure of different amount in each of the sixty-four provinces. Guyot, Répert. *Arpenteur*.

The measure was adopted in Louisiana; 6 Pet. 763.

ARPENT. A quantity of land containing a French acre; 4 Hall, L. J. 518.

ARPENTATOR. A measurer or sur-

veyor of land.

ARRA. In Civil Law. Earnest; evidence of a completed bargain.

Used of a contract of marriage, as well as any other. Spelled, also, *Arrha*, *Arre*; Calvinus Lex.

ARRAIGN. To call a prisoner to the bar of the court to answer the matter charged in the indictment. 2 Hale, Pl. Cr. 216. To set in order. An assize may be arraigned; Littleton, § 242; 3 Mod. 273; *Termes de la Ley*; Cowel.

ARRAIGNMENT. In Criminal Practice. Calling the defendant to the bar of the court, to answer the accusation contained in the indictment.

The first step in the proceeding consists in calling the defendant to the bar by his name, and commanding him to hold up his hand.

This is done for the purpose of completely identifying the prisoner as the person named in the indictment. The holding up his hand is not, however, indispensable; for if the prisoner should refuse to do so, he may be identified by any admission that he is the person intended; 1 W. Bl. 33. See Archb. Cr. Pl. 123.

The second step is the reading the indictment to the accused person.

This is done to enable him fully to understand the charge to be produced against him. The mode in which it is read is, after saying, "A B, hold up your hand," to proceed, "you stand indicted by the name of A B, late of, etc., for that you, on, etc.," and then go through the whole of the indictment.

The third step is to ask the prisoner, "How say you (A B), are you guilty, or not guilty?"

Upon this, if the prisoner confesses the charge, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, the confession is recorded, and nothing further is done till judgment. If, on the contrary, he answers, "Not guilty," that plea is entered for him, and the clerk or attorney-general replies that he is guilty; when an issue is formed; 1 Mass. 95; see 4 Bla. Com. c. xxv. The holding up of the hand is no longer obligatory in England, though still maintained in some of the United States with the qualification that if the defendant refuses to hold up his hand, but confesses that he is the person named, it is enough; Whart. Cr. Pl. & Fr. 6th ed. § 699. In cases where arraignment of the defendant is required, a failure to arraign is fatal; 64 Ind. 159; 31 Mich. 471; 3 Pitt. 1. (W. Bl. 367; 1 Lex. App. 408; 13 Cal. 480. See contra, 12 Kan. 350. In cases of a mistrial (58 Ga. 35), or removal to another court (39 Md. 355), there need not be a fresh arraignment.

If the defendant, when called upon, makes no answer, and it is a matter of doubt whether or not he is mute of malice, the court may direct a jury to be forthwith impanelled and sworn to try whether the prisoner is mute of malice or *ex visitatione Dei*; and such jury may consist of any twelve men who may happen to be present. If a person is found to be mute *ex visitatione Dei*, the court in its discretion will use such means as may be sufficient to enable the defendant to answer, and to try whether he can make his answer; and if this is found impracticable, a plea of not guilty will be entered, and the trial proceed. But if the jury return a verdict that he is mute fraudulently and wilfully, the court will pass sentence as upon a conviction; 1 Mass. 103; 10 Metc. Mass. 222; Archb. Cr. Pl. 123; Carrington, Cr. Law 57; 3 C. & K. 121; Rose, Cr. Ev. 8th ed. 199. See the case of deaf persons, who could not be induced to plead; 1 Leach, Cr. Cas. 451; of a person deaf and dumb; 1 Leach, Cr. Cas. 102; 14 Mass. 207; 7 C. & P. 508; 6 Cox, Cr. Cas. 386; 3 C. & K. 328; 1 Honst. Del. Cr. Cas. 291.

ARRAMEUR. An ancient officer of a port, whose business was to load and unload vessels.

There were formerly, in several ports of Guyenne, certain officers, called *arrameurs*, or stowers, who were master-carpenters by profession, and were paid by the merchants, who loaded the ship. Their business was to dispose right, and stow closely, all goods in casks, boxes, bundles, or otherwise; to balance both sides, to fill up the vacant spaces, and manage everything to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers, but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also *acquirers*, who were very ancient officers, as may be seen in the Theodosian code, *Unica de Scaccaria Portus Romæ*, lib. 14. Their business was to load and unload vessels loaded with merchandise, and to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise; 1 Pet. Adm. App. xxv.

ARRANGEMENT. Setting in order. 2 Am. & Eng. Ency. 2nd ed., 830; 1 El. & Bl. 540. In that case the court held that from the context the words "arrangements by deed" might include compositions with creditors. *Id.*; *ibid.* May import an agreement in writing. *Id.*; 7 Q. B. Div. 125.

ARRANGEMENT, DEED OF. A term used in England to express an assignment for the benefit of creditors. See DEED OF ARRANGEMENT.

ARRAS. In Spanish Law. The donation which the husband makes to his wife, by reason or on account of marriage, and in consideration of the *dote*, or portion, which he receives from her. Aso & Man. Inst. b. 1, t. 7, c. 3.

The property contributed by the husband *ad sustinenda onera matrimonii* (for bearing the expenses).

The husband is under no obligation to give arras; but it is a donation purely voluntary. He is not permitted to give in arras more than a tenth of his property. The arras is the exclusive property of the wife, subject to the husband's usufruct during his life; Burge, Conf. Laws 417.

ARRAY. In Practice. The whole body of jurors summoned to attend a court, as they are *arrayed* or *arranged* on the panel. See CHALLENGES; Dane, Abr. Index; 1 Chit. Cr. Law 536; Comyns, Dig. Challenge, B.

ARRAY, COMMISSIONER OF. See ARRAYER.

ARRAYER. One of the officers who, in medieval England, were from time to time commissioned to go into the counties to muster, array, and set in military order, the inhabitants; a commissioner of array. Stand. Dict.; Wharton.

ARREARAGES. Arrears.

ARREARS (Fr.). The remainder of an account or sum of money in the hands of an accountant. Any money due and unpaid at a given time. Cowel; Spelman, Gloss.

"In arrear" means overdue and unpaid. 64 Miss. 157.

ARRECT. To accuse. *Arrectati*, those accused or suspected.

ARREST (Fr. arrêter, to stay, to stop, to detain). To deprive a person of his liberty by legal authority. The seizing a person and detaining him in the custody of the law. See Baldw. 234.

As ordinarily used, the terms arrest and attachment coincide in meaning to some extent; though in strictness, as a distinction, an arrest may be said to be the act resulting from the service of an attachment. And in the more extended sense which is sometimes given to attachment, including the act of taking, it would seem to differ from arrest in that it is more peculiarly applicable to a taking of property, while arrest is more commonly used in speaking of persons.

The terms are, however, often interchanged when speaking of the taking a man by virtue of legal authority. Arrest is also applied in some instances to a seizure and detention of personal chattels, especially of ships and vessels; but this use of the term is not common in modern law.

In Civil Practice. The apprehension of a person by virtue of a lawful authority to answer the demand against him in a civil action.

One of the means which the law gives the creditor to secure the person of his debtor while the suit is pending, or to compel him to give security for his appearance after judgment; La. Civ. Code art. 211. Acts which amount to a taking into custody are necessary to constitute an arrest; but there need be no actual force or manual touching the body: it is enough if the party be within the power of the officer and submit to the arrest; Cas. temp. Hardw. 301; 5 B. & P. 211; Bull. N. P. 62; 2 N. H. 318; 8 Dana, 190; 3 Harr. Del. 416; 1 Harp. 453; 8 Me. 127; 1 Wend. 215; 21 Ala. 240; 20 Ga. 369; 2 Blackf. 294; but mere words without submission are not sufficient; 2 Hale, Pl. Cr. 129; 13 Ark. 79; 13 Fred. 448. 102 N. C. 129.

Whom to be made by. It must be made by an officer having proper authority. This is, in the United States, the sheriff, or one of his deputies, general or special (see United States Digest, Sheriff, and the statutes of the various states), or by a mere assistant of the officer, if he be so near as to be considered as acting, though he do not actually make the arrest; Cowp. 65.

The process of the United States courts is executed by a marshal. As to the power of the sergeant-at-arms of a legislative body

to arrest for contempt or other cause, see 1 Kent 236, and notes; Bost. Law Rep. May, 1860. An order of the United States House of Representatives declaring a witness before one of its committees in contempt for not answering certain questions, and ordering his arrest and imprisonment, is void and affords no defence to the sergeant-at-arms in an action for false imprisonment against him; 103 U. S. 168, q. v. for a full discussion of the subject and review of the cases.

Who is liable to. All persons found within the jurisdiction are liable to arrest, with the exception of certain specified classes, including ambassadors and their servants, 1 B. & C. 554; 3 D. & R. 25, 833; 4 Sandf. 619; 4 Dall. 331; attorneys at law; barristers attending court or on circuit, 1 H. Bla. 636; see 19 Ga. 608; 1 Phila. 217; 8 Sim. 377; 16 Ves. 412; 18 Johns 52; bail attending court as such, 1 H. Bla. 636; 1 Maule & S. 688; bankrupts until the time for surrender is passed, and under some other circumstances, 8 Term 475, 534; 2 Ben. 38; bishops (but not in U. S.); consuls-general, 9 East 447; though doubtful, and the privilege does not extend to consuls; 1 Taunt. 106; 3 Maule & S. 284; 6 Ben. 556; clergymen, while performing divine service; Bacon, Abr. *Trépass*; electors attending a public election; 3 Conn. 537; executors sued on the testator's liability; heirs sued as such; hundredors sued as such; insolvent debtors lawfully discharged; 3 Maule & S. 595; 19 Pick. 280; and see 4 Taunt. 631; 5 Watts 141; 7 Metc. Mass. 257; not when sued on subsequent liabilities or promises, 6 Taunt. 563; see 4 Harr. Del. 240; Irish peers, stat. 39 & 40 Geo. III. c. 67, § 4; judges on process from their own court, 8 Johns. 381; 1 Halst. 419; but see 6 N. J. L. 419; marshal of the King's Bench; members of congress and state legislatures while attending the respective assemblies to which they belong; 4 Dall. 341; 4 Day 133; 2 Bay 406; 3 Gratt. 237; 1 Pa. 85, 115; 2 Johns. Cas. 222; 8 R. I. 453; militia men while engaged in the performance of military duty; officers of the army and militia, to some extent; 4 Taunt. 557; but see 8 Term, 105; 1 Dall. 295; 3 Ga. 397; 16 Iowa 600; 40 N. Y. 133; parties to a suit attending court; 11 East 439; Coxe 142; 2 Va. Cas. 381; 4 Dall. 387; 6 Mass. 245, 264; 12 Ill. 61; 5 Rich. 523; 1 Wash. C. C. 186; 1 Pet. C. C. 41; see 1 Brev. N. C. 177; 29 Ga. 217; 5 Cra. 677; including a court of insolvency, 2 Marsh. 57; 6 Taunt. 336; 1 V. & B. 316; 5 Gray 538; a reference, 1 Cai. 115; 1 Rich. 194; the former president of a foreign republic while residing in one of the U. S.; 7 Hun 596; but a party arrested on a criminal charge, and discharged on bail, may be arrested on civil process before he leaves the court room; 73 N. C. 394; soldiers, 8 Dana 190; 3 Ga. 397; sovereigns, including, undoubtedly, governors of the states; the *Warden of the Fleet*; witnesses attending a judicial tribunal; 3 B. & Ald. 252; 7 Johns. 538; 3 Harr. Del. 517; by legal compulsion, 6 Mass. 264; 9 S. & R. 147; 6 Cal. 32; 3 Cow. 381; 2 Penn. N. J. 516; see 4 T. B. Monr. 540; women, Wright, Ohio 455; but see 2 Abb. N. C. 193; 18 N. Y. 1; and perhaps other classes, under local statutes; married women, on suits arising from contracts, 1 Term 486; 6 *id.* 451; 7 Taunt. 55; but the privilege may be forfeited by her conduct, 1 B. & P. 8; 5 *id.* 380; and the grounds of these early decisions are necessarily affected by the modern statutes permitting married women to contract and sue and be sued as if *sole*, but although the Pennsylvania act of 1887 in section 2 authorizes her so to be sued on her contract and for all torts, it has been held that a married woman is notwithstanding that section privileged from arrest under a *capias*; 2 W. N. C. (Pa.) 274. Reference must be had in many of the above cases to statutes for modifications of the privilege. In all cases where the privilege attaches in consideration of an attendance at a specified place in a certain character, it includes the stay and a reasonable time for going and returning; 2 W. Bl. 1113; 4 Dall. 329; 2 Johns. Cas. 222; 6 Blackf. 278; 3 Harr. Del. 517;

1 Wash. 186; but not including delays in the way; 3 B. & Ald. 252; 4 Dall. 329; or deviations; 19 Pick. 260. A person brought from one state into another under federal process in an extradition proceeding, and discharged therefrom, cannot be arrested under civil process until he has reasonable time to return to the state from which he came; 41 Fed. Rep. 472.

When and where it may be made. An arrest may be made in any place, except in the actual or constructive presence of court, and the defendant's own house; 4 Bla. Com. 288; 6 Taunt. 246; Cowp. 1 (*contra*, 73 N. C. 394); and even there the officer may break inner doors to find the defendant when the outer door is open; 5 Johns. 352; 8 Taunt. 250; Cowp. 2. See 10 Wend. 300. It cannot be made on Sunday or any public holiday; Stat. 29 Car. II. c. 7; *contra*, 6 Blackf. 447.

An officer with a proper writ may lawfully stop a train to arrest the railroad engineer running it; 20 Ohio L. J. 464; 60 Vt. 588.

Discharge from arrest on meane process may be obtained by giving sufficient bail, which the officer is bound to take; 1 Bingham. 103; 3 Maule & S. 283; 6 Term 355; 15 East 320; but when the arrest is on final process, giving bail does not authorize a discharge.

If the defendant otherwise withdraw himself from arrest, or if the officer discharge him, without authority, it is an escape; and the sheriff is liable to the plaintiff. See ESCAPE. If the party is withdrawn forcibly from the custody of the officer by third persons, it is a rescue. See RESCUE.

Extended facilities are offered to poor debtors to obtain a discharge under the statutes of most if not all of the states of the United States. In consequence, except in cases of apprehended fraud, as in the concealment of property or an intention to abscond, arrests are infrequently made. See, as to excepted cases, 19 Conn. 549; 28 Me. 45.

Generally. An unauthorized arrest, as under process materially irregular or informal; 26 N. H. 268; 6 Barb. 654; 5 Ired. 72; 3 H. & M'H. 113; 3 Yerg. 392; 36 Me. 366; 2 R. I. 436; 1 Conn. 40; 13 Mass. 286; see 20 Vt. 321; or process issuing from a court which has no general jurisdiction of the subject-matter; 10 Coke 68; 2 Wils. 275, 384; 10 B. & C. 28; 8 Q. B. 1620; 1 Gray 1; 4 Conn. 107; 1 Ill. 18; 7 Ala. 518; 2 Fla. 171; 3 Dev. 471; 4 B. Monr. 230; 21 N. H. 262; 9 Ga. 73; 37 Me. 130; 3 Cra. 448; 1 Curt. C. 311; and see 5 Wend. 170; 16 Barb. 268; 5 N. Y. 881; 3 Binn. 215; is void; but if the failure of jurisdiction be as to person, place, or process, it must appear on the warrant, to have this effect; Bull. N. P. 83; 5 Wend. 175; 3 Barb. 17; 12 Vt. 681; 6 Ill. 401; 1 Rich. 147; 2 J. J. Marsh. 44; 1 Conn. 40; 6 Blackf. 249, 344; 3 Munf. 458; 13 Mo. 171; 3 Binn. 38; 8 Metc. Mass. 326; 1 R. I. 464; 1 Mood. 281; 3 Burr. 1766; 1 W. Bla. 555. The arrest of the wrong person; 2 Scott N. S. 86; 1 M. & G. 775; 2 Taunt. 400; 8 N. H. 406; 4 Wend. 555; 9 id. 319; renders the officer liable for a trespass to the party arrested. See 1 Bennett & H. Lead. Crim. Cas. 180-184.

In Criminal Cases. The apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime.

The word *arrest* is said to be more properly used in civil cases, and *apprehension* in criminal. Thus, a man is arrested under a *capias ad respondendum*, and apprehended under a warrant charging him with larceny.

Who may make. The person to whom the warrant is addressed is the proper person in case a warrant has been issued, whether he be described by name; Salk. 176; 24 Wend. 418; 2 Ired. 201; or by his office; 1 B. & C. 288; 2 D. & R. 444; 7 Exch. 827; 6 Barb. 654. See 1 Mass. 488. But, if the authority of the warrant is insufficient, he may be liable as a trespasser. See *supra*. A known officer need not show a warrant in making an arrest, but a special officer must if it is demanded; 100 N. C.

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Any peace officer, as a justice of the peace, 1 Hale, Pl. Cr. 86; sheriff, 1 Saund. 77; 1 Taunt. 46; coroner, 4 Bla. Com. 292; constable, 32 Eng. L. & Eq. 783; 36 N. H. 246; or watchman, 3 Taunt. 14; 8 Campb. 420; may without a warrant arrest any person committing a felony in his presence; 6 Binn. 318; Sullivan, Lect. 402; 3 Hawkins, Pl. Cr. 164; 17 Ill. 78; 75 Mo. 281; 17 Ga. 194; or committing a breach of the peace, during its continuance or immediately afterwards; 1 C. & P. 40; 82 Eng. L. & Eq. 186; 3 Wend. 384; 1 Root, Conn. 66; 2 Nott. & M'C. 475; 1 Pet. C. C. 390; or if he is sufficiently near to hear what is said and the sound of the blows, although he cannot see for the darkness; 107 N. C. 812; 30 Ga. 430; 11 Ohio St. 550; 70 N. C. 10; 61 Pa. 352; or even to prevent the commission; and such officer may arrest any one whom he reasonably suspects of having committed a felony, whether a felony has actually been committed or not; 8 Campb. 420; 5 Cush. 281; 6 Humphr. 53; 6 Binn. 316; 3 Wend. 350; 1 N. H. 54; whether acting on his own knowledge or facts communicated by others; 6 B. & C. 635; but not unless the offence amount to a felony; 73 Ill. 78; 5 Exch. 378; 5 Cush. 281; 11 id. 246, 415. See Russ. & R. 329; 85 Ky. 123. But a constable cannot arrest for an ordinary misdemeanor without a warrant, unless present at the time of the offence; 50 N. J. L. 189; 54 N. Y. Super. Ct. 380; 61 Mich. 445; 154 Mass. 25; 44 Mo. App. 513. As to the power to make arrest without a warrant, see 30 Cent. Law J. 356, note. See FELONY.

A private person who is present when a felony is committed, 1 Mood. 93; 3 Wend. 353; 12 Ga. 293; or during the commission of a breach of the peace; 10 C. & F. 28; 25 Vt. 261; or sees another in the act of carrying away property he has stolen; 36 Fed. Rep. 168; may and should arrest the felon, and may upon reasonable suspicion that the person arrested is the felon, if a felony has been committed; 4 Taunt. 34, 35; 1 Price, Exch. 525; 45 Fed. Rep. 851; but in defence to an action he must allege and prove the offence to have been committed; 1 M. & W. 516; 6 C. & P. 684, 723; 3 Wend. 353; 5 Cush. 281; and also that he had reasonable grounds for suspecting the person arrested; 3 Campb. 35; 2 Q. B. 169; 1 Eng. L. & Eq. 566; 25 id. 550; 6 Barb. 84; 9 Pa. 187; 6 Binn. 316; 6 Blackf. 406; 18 Ala. 195; 5 Humphr. 357; 12 Pick. 324; 4 Wash. C. C. 82. And see 3 Strobh. 546; 8 W. & S. 308; 2 C. & P. 361, 565; 1 Benn. & H. L. Cas. 148-7; 73 Ill. 100. As to arrest to prevent the commission of crimes, see 2 B. & P. 260; 9 C. & P. 262. Where a private party attempts to make an arrest for riot on the order of a justice after offenders have dispersed, he becomes a trespasser and may be resisted; 107 N. C. 948. A private detective, in pursuit of a fugitive from justice in another state, cannot arrest without a warrant by merely procuring a policeman to make the arrest; 35 Fed. Rep. 116; nor can such detective forcibly detain the defendant to await a legal order of arrest; 10 N. Y. Sup. 449. As to arrest by hue and cry, see HUE AND CRY. As to arrest by military officers, see 7 How. 1.

Who liable to. Any person is liable to arrest for crime, except ambassadors and their servants; 3 Mass. 197; 27 Vt. 762; 7 Wall. 483.

No legal arrest of a voter can be made on election day for cause relating to his suffrage; 38 Fed. Rep. 108.

When and where it may be made. An arrest may be made at night as well as by day; and for treason, felony, breach of the peace, or generally for an indictable offence, on Sunday as well as on other days; 16 M. & W. 172; 13 Mass. 547; 24 Me. 158. And the officer may break open doors even of the criminal's own house; 10 Cush. 501; 14 B. Monr. 305 (even to arrest a person therein, not the owner; 120 Mass. 190); although he must first demand admission and be refused after giving notice of his business; Russell on Cr. 840; 15 Gray 74; 1 Root 184; as may a private person in

fresh pursuit, under circumstances which authorize him to make an arrest; 4 Bla. Com. 293.

In must be made within the jurisdiction of the court under whose authority the officer acts; 1 Hill, N. Y. 377; 2 Cra. 187; 8 Vt. 194; 3 Harr. Del. 416; and see 4 Maule & S. 361; 1 B. & C. 288; and jurisdiction for this purpose can be extended to foreign countries only by virtue of treaties or express laws of those countries; 1 Bish. Cr. Law § 598; Wheat. Int. Law, 8d Eng. ed. § 118; 10 S. & R. 125; 12 Vt. 631; 1 W. & M. 66; 1 Barb. 248; 1 Park. Crim. 108, 429. And see, as between the states of the United States, 5 How. 215; 5 Metc. Mass. 586; 4 Day 121; R. M. Charlt. 120; 2 Humphr. 258. As to arrest in a different county; 41 Ind. 181. As to what constitutes an arrest; 2 Thomp. & C. 224; 100 Mass. 79; 21 Ala. 240; 50 Vt. 728; 22 Mich. 266.

Manner of making. An officer authorized to make an arrest, whether by warrant or from the circumstances, may use necessary force; 2 Bish. Cr. Law 37; 9 Port. Ala. 195; 3 Harr. Del. 568; 24 Me. 158; 16 Barb. 268; 4 Cush. 60; 7 Blackf. 64; 2 Ired. 52; 4 B. & C. 596; 43 Tex. 93 (but he may not strike except in self-defence); he may kill the felon if he cannot otherwise be taken; see 7 C. & P. 140; 2 Mood. & R. 39; 73 Ill. 78; see 1 Hugh. 560; and so may a private person in making an arrest which he is enjoined to make; 4 Bla. Com. 293; and if the officer or private person is killed, in such case it is murder. In making an arrest for misdemeanor, an officer can kill or inflict bodily harm upon the person only when he is placed in like danger; 11 Ky. L. Rep. 67; 55 Ark. 502. Reading a warrant and directing the defendant to appear, is not an arrest; 82 Ill. 495; but see 76 Tex. 141. Arresting the body and exhibiting the process is enough; 50 Vt. 728.

When an offender is not resisting but fleeing, an officer in making an arrest for a misdemeanor has no right to kill or shoot, although he may do so in case of felony; 85 Ky. 480.

See JUSTIFICATION.

ARREST OF JUDGMENT. In Practice. The act of a court by which the judges refuse to give judgment, because upon the face of the record it appears that the plaintiff is not entitled to it.

A motion for arrest of judgment must be grounded on some objection arising on the face of the record itself; 44 La. Ann. 969; 45 Ill. App. 511; and no defect in the evidence or irregularity at the trial can be urged in this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which is not aided by the verdict, is a ground for arresting the judgment. In criminal cases, an arrest of judgment is founded on exceptions to the indictment. In civil cases whatever is alleged in arrest of judgment must be such matter as would on demurrer have been sufficient to overturn the action or plea. In the applicability of the rule there is no difference between civil and criminal cases; 60 Pa. 367. Although the defendant himself omits to make any motion in arrest of judgment, the court, if, on a review of the case, it is satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment; 1 East 148. Where a statute upon which an indictment is founded was repealed after the finding of the indictment, but before plea pleaded, the court arrested the judgment; 18 Q. B. 761; Dears. 3. See also 8 Ad. & E. 496; 1 Russ. & R. 429; 11 Pick. 350; 12 Cush. 501. If the judgment is arrested, all the proceedings are set aside, and judgment of acquittal is given; but this will be no bar to a new indictment; Comyns. Dig. Indictment, N.; 1 Bish. Cr. Law 998.

Where a judgment rendered has been reversed, and a new trial granted, which is had upon the same indictment in the same

court, a motion in arrest of judgment on the ground of a former acquittal of a higher offence charged in the indictment, is good where such facts appear in the record; 12 So. Rep. (Fla.) 525.

ARRESTANDIS BONIS NE DISSIPENTUR. In English Law. A writ for him whose cattle or goods, being taken during a controversy, are likely to be wasted and consumed.

ARRESTEE. In Scotch Law. He in whose hands a debt, or property in his possession, has been arrested by a regular arrestment.

If, in contempt of the arrestment, he make payment of the sum or deliver the goods arrested to the common debtor, he is not only liable criminally for breach of the arrestment, but he must pay the debt again to the arrester; Erskine, Inst. 3. 3. 6.

ARRESTER. In Scotch Law. One who sues out and obtains an arrestment of his debtor's goods or movable obligations. Erskine, Inst. 3. 6. 1.

ARRESTMENT. In Scotch Law. Securing a criminal's person till trial, or that of a debtor till he give security *judicio sisti*. The order of a judge, by which he who is debtor in a movable obligation to the arrester's debtor is prohibited to make payment or delivery till the debt due to the arrester be paid or secured. Erskine, Inst. 3. 6. 1; 1. 2. 12.

Where arrestment proceeds on a depending action it may be loosed by the common debtor's giving security to the arrester for his debt, in the event it shall be found due; Erskine, Inst. 3. 6. 7.

ARRET (Fr.). A judgment, sentence, or decree of a court of competent jurisdiction.

The term is derived from the French law, and is used in Canada and Louisiana.

Saisie arrêt is an attachment of property in the hands of a third person. La. Code Pr. art. 209; 2 Low. C. 77; 5 id. 198, 218.

ARRETTED (*arrestatus*, i. e. *ad rectum vocatus*).

Convened before a judge and charged with a crime.

Ad rectum malefactorum is, according to Bracton, to have a malefactor forthcoming to be put on his trial.

Imputed or laid to one's charge; as, no folly may be *arretted* to any one under age. Bracton, 1. 3, tr. 2, c. 10; Cunningham, Dict.

ARRHÆ. Money or other valuable things given by the buyer to the seller, for the purpose of evidencing the contract; earnest.

There are two kinds of arrhæ: one kind given when a contract has only been proposed; the other when a sale has actually taken place. Those which are given when a bargain has been merely proposed, before it has been concluded, form the matter of the contract, by which he who gives the arrhæ consents and agrees to lose them, and to transfer the title to in the opposite party, in case he should refuse to complete the proposed bargain; and the receiver of arrhæ is obliged on his part to return double the amount to the giver of them in case he should fail to complete his part of the contract; Pothier, *Contr. de Vente*, n. 488. After the contract of sale has been completed, the purchaser usually gives arrhæ as evidence that the contract has been perfected. Arrhæ are therefore defined *quod ante pretium datur, et fidem fecit contractus, facti totiusque pecunie solvenda*. Id. n. 508; Cod. 4. 45. 2.

ARRIAGE AND CARRIAGE. Services of an indefinite amount formerly exacted from tenants under the Scotch law. Bell, Dict.

ARRIER BAN. A second summons to join the lord, addressed to those who had neglected the first. A summons of the inferiors or vassals of the lord. Spelman, Gloss.

To be distinguished from *aribannum*.

ARRIERE FIEF (Fr.). An inferior fief granted out of a superior.

ARRIVAL. The act of coming to or reaching a place. 2 A. & E. Ency. (2nd ed.), 915.

As used in the Wilson Law means delivery of the goods to the consignee, and not merely reaching their destination. 203 U. S. 272.

Ships. To be an arrival, the vessel must

have dropped its anchor or moored. 2 A. & E. Ency., id.; 17 Mass. 190. A vessel driven ashore by stress of weather has not arrived. (Ref. U. S. Rev. Stat., § 2867.) Id.; 39 Fed. Rep. 765.

Distinguished from Enter. Arrive and enter are not synonymous, and there certainly may be an arrival without an actual entry or attempt to enter. Id.; 5 Mason (U. S.) 120.

ARRIVE. To come to a particular place; to reach a particular or certain place. See cases in Leake, Contr., and in Abb. Dict.; 1 Brook. 411; 2 Cush. 489; 8 B. & C. 119; 5 Mason 182; 9 How. 372.

ARROGATION. The adoption of a person *sui juris*. 1 Brown, Civ. Law 119; Dig. 1. 7, 5; Inst. 1. 11. 3.

ARSER IN LE MAIN. (Burning in the hand.) The punishment inflicted on those who received the benefit of clergy. *Termes de la Ley*.

ARSON (Lat. *ardere*, to burn). The malicious burning of the house of another. Co. 3d Inst. 66; Bish. Cr. L. § 415; 4 Bl. Com. 220; 2 Pick. 320; 16 Cush. 479; 7 Gratt. 619; 9 Ala. 175; 7 Blackf. 168; 1 Leach, Cr. Cas. 218; 51 Cal. 319; 12 Bush 243; Ch. Cr. Law 226; but it is not arson to demolish the house first and then burn the material; 25 Tex. App. 199.

In some states by statute there are degrees of arson. The house, or some part of it, however small, must be consumed by fire; 9 C. & P. 45; 16 Mass. 105; 5 Ired. 350. Where the house is simply scorched or smoked and the fire is not communicated to the building the crime of arson is not complete; 30 Tex. App. 346. The question of burning is one of fact for the jury; 1 Mood. Cr. Cas. 398; 5 Cush. 427.

It must be *another's* house; 1 Bish. Cr. Law § 389; but *alter* under the N. H. statute; 51 N. H. 176; but if a man set fire to his own house with a view to burn his neighbor's, and does so, it is, at least, a great misdemeanor; 1 Hale, Pl. Cr. 568; 2 East, Pl. Cr. 1027; W. Jones 351; 2 Pick. 325; 34 Me. 428; 2 N. & M'C. 36; 8 Gratt. 624; 5 B. & Ad. 27. See 1 Park. Cr. Cas. 560; 2 Johns. 105; 7 Blackf. 168; 32 Vt. 58. If he sets fire to a schoolhouse with the intention of burning an adjoining dwelling, which actually happens, he is guilty of arson; 29 S. W. Rep. (Ky.) 221.

The house of another must be burned, to constitute arson at common law; but the term "house" comprehends not only the very mansion-house, but all out-houses which are parcel thereof, though not contiguous to it, nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, mill-house, and the like, being within the curtilage, or same common fence, as the mansion itself; 4 C. & P. 245; 20 Conn. 245; 16 Johns. 203; 3 Ired. 570; 3 Rich. 242; 5 Whart. 427; Cl. Cr. Law 221; 4 Leigh 683; 4 Call 109; 88 N. C. 656; 71 N. Y. 561; 26 Ohio St. 420. And it has also been said that the burning of a barn, though no part of the mansion, if it has corn or hay in it, is felony at common law; 1 Hale, P. C. 567; 4 C. & P. 245; 5 W. & S. 385; *contra*, 81 Ill. 505. In Massachusetts, the statute refers to the dwelling-house strictly; 10 Cush. 478. Where a prisoner set fire to his cell, in order to effect an escape, held, not arson; 18 Johns. 115; but see 1 Whart. Cr. L. 9th ed. § 829; 8 Call 109; 49 Ala. 30; 2 Idaho 1182; 32 Tex. Cr. R. 534. The burning must have been both malicious and wilful; Roscoe, Cr. Ev. 8th ed. 289; 2 East, Pl. Cr. 1019, 1031; 1 Bishop, Cr. L. § 259; 28 Miss. 100; 68 id. 339. And generally, if the act is proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary is proved; 1 Russ. & R. Cr. Cas. 26; Cl. Cr. Law 229. On a charge of arson for setting fire to a mill, an intent to injure or defraud the mill-owners will be conclusively inferred from the wilful act of firing; 1 Russ. & R. Cr. Cas. 207; 2 B. & C. 264. But this doctrine can only arise where the act is wilful, and therefore, if the fire appears to be the result of accident, the party who is the cause of it will not

be liable; 53 Ga. 33; 47 Ill. 533.

In some states by statute a wife may be guilty of arson by burning a husband's property; 1 Ind. App. 146.

It is a felony at common law, and originally punishable with death; Co. 3d Inst. 66; 2 East, Pl. Cr. 1015; 5 W. & S. 385; but this is otherwise, to a considerable extent, by statute; 8 Rich. S. C. 276; 4 Dev. 305; 4 Call 109; 5 Cra. C. C. 73. If homicide result, the act is murder; 1 Green, N. J. 381; 1 Bish. Cr. Law 361. See **CRIMES**.

It is not an indictable offence at common law to burn one's own house to defraud insurers; 1 Whart. Cr. L. 9th ed. § 843; otherwise in some states by statute; 51 N. H. 176; 19 N. Y. 537; 83 Cal. 160.

ARSURA. The trial of money by heating it after it was coined. Now obsolete.

ART. A principle put in practice and applied to some art, machine, manufacture, or composition of matter. 4 Mas. 1; see Act of Cong. July 8, 1870.

Copper-plate printing on the back of a bank-note is an art for which a patent may be granted; 4 Wash. C. C. 9; see, also, 1 Fisher 133; 7 Wall. 295; 15 How. 267; as to "lost arts," 10 How. 477. See **SCIENCE**.

ART AND MYSTERY OF TANNING BUSINESS. The phrase will include the art of currying, or not, according to the general sense in the place where it is used. 2 Dana (Ky.) 131.

ART AND PART. In Scotch Law. The offence committed by one who aids and assists the commission of a crime, but who is not the principal or chief actor in its actual commission. An accessory. A principal in the second degree. Paterson, Comp.

A person may be guilty, art and part, either by giving advice or counsel to commit the crime; or by giving warrant or mandate to commit it; or by actually assisting the criminal in the execution. In the more atrocious crimes, it seems agreed that the adviser is equally punishable with the criminal, and that, in the slighter offences, the circumstances arising from the adviser's lesser age, the jocular or careless manner of giving the advice, etc., may be received as pleas for softening the punishment.

One who gives a mandate to commit a crime, as he is the first spring of the action, seems more guilty than the person employed as the instrument in executing it.

Assistance may be given to the committer of a crime, not only in the actual execution, but previous to it, by furnishing him, with a criminal intent, with pison, arms, or other means of perpetrating it. That sort of assistance which is not given until after the criminal act, and which is commonly called abetting, though it be itself criminal, does not infer art and part of the principal crime; Erskine, Inst. 4. 4. 10.

ARTICLE. A distinct part of a writing or instrument consisting of two or more particulars.

ARTICLED CLERK. See **CLERK**.

ARTICLES (Lat. *articulus*, *artus*, a joint). Divisions of a written or printed document or agreement.

A specification of distinct matters agreed upon or established by authority or requiring judicial action.

The fundamental idea of an article is that of an object comprising some integral part of a complex whole. See Worcester, Dict. The term may be applied, for example, to a single complete question in a series of interrogatories; the statement of the undertakings and liabilities of the various parties to an agreement in any given event, where several contingencies are provided for in the same agreement; a statement of a variety of powers secured to a branch of government by a constitution; a statement of particular regulations in reference to one general subject of legislation in a system of laws; and in many other instances resembling these in principle. It is also used in the plural of the subject made up of these separate and related articles, as, articles of agreement, articles of war, the different divisions generally having, however, some relation to each other, though not necessarily a dependence upon each other.

In Chancery Practice. A formal written statement of objections to the credibility of witnesses in a cause in chancery, filed by a party to the proceedings after the depositions have been taken and published.

The object of articles is to enable the party filing them to introduce evidence to discredit the witnesses to whom the objec-

of the contracting parties severally set out; the agreement that the parties do by the instrument enter into a partnership, expressed in such terms as to distinguish it from a covenant to enter into partnership at a subsequent time; the date, and necessary stipulations, some of the more common of which follow.

The commencement of the partnership should be expressly provided for. The date of the articles is the time, when no other time is fixed by them; 5 B. & C. 108; Lindl. Partn. 2d Am. ed. *201, *412; 31 Ala. 123; 20 Me. 413; 10 Paige 82; if not dated, parol evidence is admissible to show that they were not intended to take effect at the time of their execution; 17 C. B. 625.

The duration of the partnership should be stated. It may be for life, for a limited period of time, or for a limited number of adventures. When a term is fixed, it endures until that period has elapsed; when no term or limitation is fixed, the partnership may be dissolved at the will of either partner; 17 Ves. 298; 3 Ross. L. C. Com. Law, 611; 51 Ind. 478; 76 N. Y. 373; Lindl. Partn. 2d Am. ed. *121, *413; see 150 Pa. 20. Dissolution follows immediately and inevitably on the death of a partner; Pars. Partn. § 342; 31 Minn. 186; but provision may be made for the succession of the executors or administrators or a child or children of a deceased partner to his place and rights; 2 How. 560; 8 Am. L. Rev. 641; 12 La. Ann. 626; 9 Ves. Ch. 500; 7 Pet. 586. Where a provision is made for a succession by appointment, and the partner dies without appointing, his executors or administrators may continue the partnership or not, at their option; 1 McClell. & Y. 679; Coll. Ch. 157. A continuance of the partnership beyond the period fixed for its termination, in the absence of circumstances showing intent, will be implied to be upon the basis of the old articles; 5 Mas. 176, 185; 15 Ves. Ch. 218; 1 Moll. Ch. 466; but it will be considered as at will, and not as renewed for a further definite period; 17 Ves. 807.

Persons dealing with a partnership are not bound by any stipulation as to its dissolution or continuance, unless they have actual notice before completing contracts with the firm; 78 Ga. 168; 148 Mass. 498.

The nature of the business and the place of carrying it on should be very carefully and exactly specified. Courts of equity will grant an injunction when one or more of the partners attempt, against the wishes of one or more of them, to extend such business beyond the provision contained in the articles; Story, Partn. § 193; Lindl. Partn. 2d Am. ed. *412; 33 N. H. 9; 4 Johns. Ch. 573; Pars. Partn. § 149.

The name of the firm should be ascertained. The members of the partnership are required to use the name thus agreed upon, and a departure from it will make them individually liable to third persons or to their partners, in particular cases; Lindl. Partn. 2d Am. ed. *413; 2 Jac. & W. 266; 9 Ad. & E. 314; Story, Partn. §§ 102, 136, 142, 202; 45 Barb. 260.

The management of the business, or of some particular branch of it, is frequently intrusted by stipulation to one partner, and such partner will be protected in his rights by equity; Story, Partn. §§ 172, 182, 193, 202; and see La. Civ. Code art. 2838; Pothier, *Société*, n. 71; Dig. 14, l. 1, § 18; Pothier, Pand. 14, l. 4; or it may be to a majority of the partners, and should be where they are numerous. See PARTNERS.

The manner of furnishing capital and stock should be provided for. When a partner is required to furnish his proportion of the stock at stated periods, or pay by instalments, he will, where there are no stipulations to the contrary, be considered a debtor to the firm; Story, Partn. § 203; 1 Swanst. 89. As to the fulfilment of some conditions precedent by a partner, such as the payment of so much capital, etc., see Lindl. Partn. 2d Am. ed. *416; 1 Wms. Saund. 320 a. Sometimes a provision is inserted that real estate and fixtures belonging to the firm

shall be considered, as between the partners, not as partnership but as several property; 1 App. Cas. 181; 42 Ark. 390; 76 Ind. 157; 36 N. J. Eq. 569. In cases of bankruptcy, this property will be treated as the separate property of the partners; Collyer, Partn. 6th ed. §§ 905, 909; 5 Ves. 139; 3 Madd. 63.

The apportionment of profits and losses should be provided for. The law distributes these equally, in the absence of controlling circumstances, without regard to the capital furnished by each; Pars. Partn. 173; Story, Partn. 24; 3 Kent 28; 6 Wend. 263. But see 7 Bligh 432; 5 Wils. & S. 16; 20 Beav. 98; 15 Ohio 390.

Very frequently the articles provide for the division of profits and determine the proportion in which each partner takes his share. There is nothing to prevent their making any bargain on this subject that they see fit to make; Pars. Partn. § 172.

Periodical accounts of the property of the partnership may be stipulated for. These, when settled, are at least *prima facie* evidence of the facts they contain; 7 Sim. 239. It is proper to stipulate that an account settled shall be conclusive; Lindl. Partn. 2d Am. ed. *420, *421.

The expulsion of a partner for gross misconduct, bankruptcy, or other specified causes may be provided for; and the provision will govern, when the case occurs. See 10 Hare 493; L. R. 9 Ex. 190; Pars. Partn. 169, n; 28 Pa. 304.

A settlement of the affairs of the partnership should always be provided for. It is generally accomplished in one of the three following ways: first, by turning all the assets into cash, and, after paying all the liabilities of the partnership, dividing such money in proportion to the several interests of the parties; or, second, by providing that one or more of the partners shall be entitled to purchase the shares of the others at a valuation; 20 Beav. 442; or, third, that all the property of the partnership shall be appraised, and that after paying the partnership debts it shall be divided in the proper proportions. The first of these modes is adopted by courts of equity in the absence of express stipulations; Lindl. Partn. 2d Am. ed. (Ewell) *420, *430; Story, Partn. § 207; 8 Sim. 529; but see 6 Madd. 146; 3 Hare 581. Where partnership accounts have been fully settled, an express promise by one to pay the balance due to another is not necessary; 78 Cal. 225.

Submission of disputes to arbitration is provided for frequently, but such a clause is nugatory, as no action will lie for a breach; Story, Partn. § 215; and (except in England, under Com. L. Proc. Act, 1854) it is no defence to an action relative to the matter to be referred. Pars. Partn. 170; see Lindl. Partn. 2d Am. ed. (Ewell) *451. Where the settlement of partnership accounts is made by arbitrators without fraud, it will not be disturbed; 13 S. W. Rep. (Ky.) 109.

The article should be executed by the parties, but need not be under seal. See PARTNERS; PARTNERSHIP.

ARTICLES OF THE PEACE. A complaint made before a court of competent jurisdiction by one who has just cause to fear that an injury to his person or property is about to be committed or caused by the party complained of, alleging the causes of his belief, and asking the protection of the court.

The object of articles is to compel the party complained of to find sureties of the peace. This will be granted when the articles are on oath; 1 Str. 537; 12 Mod. 243; 12 Ad. & E. 590; unless the articles on their face are false; 2 Burr. 806; 2 id. 1922; or are offered under suspicious circumstances; 2 Str. 895; 1 W. Bla. 238. Their truth cannot be controverted by affidavit or otherwise; but exception may be taken to their sufficiency, or affidavits for reduction of the amount of bail tendered; 2 Str. 1202; 13 East 171.

ARTICLES OF BOUP. In Scotch Law. The conditions under which property is offered for sale at auction. Paterson, Comp.

ARTICLES OF SET. In Scotch Law.

An agreement for a lease. Paterson, Comp.

ARTICLES OF WAR. The code of laws established for the government of the army.

The term is used in this sense both in England and the United States. The term also includes the code established for the government of the navy. See Rev. Stat. U. S. § 1342, as to the army, and § 1624, as to the navy; MARTIAL LAW.

ARTICULATE ADJUDICATION. In Scotch Law. Separate adjudication for each of several claims of a creditor.

It is so made in order that a mistake in accumulating one debt need not affect the proceedings on other claims which are correctly accumulated.

ARTICULI CLERI. Articles of the clergy. The title of a statute passed in the reign of Edward II., for the purpose of adjusting the questions of jurisdiction then existing between the ecclesiastical and temporal courts. The statute known as *circumspecte agatis* (q. v.) passed in the reign of Edward I., dealt with the same subject. Burrill; Reeves Hist. Eng. Law.

ARTIFICER. One who buys goods in order to reduce them by his own art, or industry, into other forms, and then to sell them. 3 T. B. Mon. 335.

The term applies to those who are actually and personally engaged or employed to do mechanical work or the like, and not to those taking contracts for labor to be done by others; 7 El. & Bl. 135.

One by whom anything is made. 2 Am. & Eng. Ency. 2nd ed., 947; 4 Strobb. (S. C.) 365. A skilled workman. Id.; 13 Q. B. Div. 332. One is no less an artificer because he is at liberty to employ other workmen under him. Id.; 14 C. B. N. S. 554.

ARTIFICIAL. Having its existence in the given manner by virtue of or in consideration only of the law.

Artificial person. A body, company, or corporation considered in law as an individual.

ARTIFICIAL PRESUMPTIONS. Presumptions which derive from the law a technical or artificial operation and effect, beyond their mere natural tendency to produce belief; and operate uniformly, without applying the process of reasoning on which they are founded to the circumstances of the particular case.

ARURA. Day's work at ploughing.

AS (Lat.). A pound.

It was composed of twelve ounces. The pounds were reckoned (as may be seen in the law, *Servum de hereditibus*, Inst. lib. xii. *Pandect*) as follows: *uncia*, 1 ounce; *sextans*, 3 ounces; *triens*, 3 ounces; *quadrans*, 4 ounces; *quincunx*, 5 ounces; *semita*, 6 ounces; *septunx*, 7 ounces; *bes*, 8 ounces; *dodrans*, 9 ounces; *destrans*, 10 ounces; *denun*, 11 ounces.

The whole of a thing; *solidum quid*.

Thus, as signified the whole of an inheritance: so that an heir *ex asse* was an heir of the whole inheritance. An heir *ex triente*, *ex semisse*, *ex besse*, *ex destunce*, was an heir of one-third, one-half, two-thirds, or eleven-twelfths.

AS DOWER. "As dower" and "in lieu of dower" are often used interchangeably. 112 S. W. 911.

AS FAR AS THE LAW ALLOWS. An entry to extend in a certain direction "as far as the law allows," and to extend back for quantity, must be surveyed three times as long as wide. Hughes (Ky.) 176.

AS GOOD AS. A title bond binding the vendors "to have as good a deed as can be had to all the boundary claimed by them," imports an obligation by the vendors to make a good title and warrant it generally. 89 Ky. 75, 11 S. W. 807.

AS PROVIDED. There is a distinction between the words "as provided" and "in the manner provided"; the former may be controlled by express limitation in the statute while the latter must not be so controlled. 228 U. S. 536.

AS SOON AS. See *SOON*.

AS SOON AS I CAN. A promise to pay as soon as the debtor possibly can, is in the contemplation of law a promise to pay presently. 1 Bibb (Ky.) 397.

ASCENDANTS (Lat. *ascendere*, to ascend, to go up to, to climb up to). Those from whom a person is descended, or from whom he derives his birth, however remote they may be.

Every one has two ascendants at the first degree, his father and mother; four at the second degree, his paternal grandfather and grandmother, and his maternal grandfather and grandmother; eight at the third. Thus, in going up we ascend by various lines, which fork at every generation. By this progress sixteen ascendants are found at the fourth degree; thirty-two, at the fifth; sixty-four, at the sixth; one hundred and twenty-eight, at the seventh, and so on. By this progressive increase, a person has at the twenty-fifth generation thirty-three million five hundred and fifty-four thousand four hundred and thirty-two ascendants. But, as many of the ascendants of a person have descended from the same ancestor the lines which were forked reunite to the first common ancestor, from whom the other descend, and this multiplication, thus frequently interrupted by the common ancestors, may be reduced to a few persons.

ASCERTAIN. To render definite or fixed: as, to ascertain the relief due. Anderson; 2 Bl. Com. 65, 465. To make sure or certain; to establish, determine, settle. *Id.*; Worcester. Also, to acquire information as to a fact; to become possessed of knowledge respecting an event or transaction; to learn the truth as to a matter capable of proof. *Id.*

ASCRIPITTIUS. One enrolled; foreigners who have been enrolled. Among the Romans, ascriptitii were foreigners who had been naturalized, and who had in general the same rights as natives. Nov. 22, c. 17; Cod. 11, 47. *Ascriptitii* is the plural.

ASIDE, SET. To annul, vacate, make void. Anderson; 61 Mo. 171. To defeat the effect or operation of. *Id.*; 116 Ill. 250.

ASPHYXIA. In Medical Jurisprudence, Suspended animation produced by non-conversion of the venous blood of the lungs into arterial.

This term applies to the situation of persons who have been asphyxiated by submersion or drowning; by breathing mephitic gas; by suspension or strangulation. In a legal point of view, it is always proper to ascertain whether the person who has thus been deprived of his senses is the victim of another, whether the injury has been caused by accident, or whether it is the act of the sufferer himself. See 1 Hamilton, Leg. Med. 113, 120; 1 Wh. & St. Med. Jur. 584.

ASPORTATION (Lat. *asportatio*). The act of carrying a thing away; the removing a thing from one place to another.

ASSART, ESSART. In Old English Law, The act of grubbing up woodland and making it fit for cultivation, considered an offence if done without a license. The land itself thus treated was also called assart, or assarted land. To assart meant to pull up by the roots, to clear. Burrill; Jacob.

ASSART, RENTS. Rent formerly paid to the crown, in England, for forest lands assarted Jacob. See *ASSART*. New Dict.

ASSASSINATION. Murder committed for hire, without provocation or cause of resentment given to the murderer by the person upon whom the crime is committed. Erskine, Inst. b. 4, t. 4, n. 45.

A murder committed treacherously, with advantage of time, place, or other circumstances.

ASSAULT. An unlawful offer or attempt with force or violence to do a corporal hurt to another.

Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril. *Bish. Cr. Law* 548.

Aggravated assault is one committed with the intention of committing some additional crime. *Simple assault* is one committed with no intention to do any other injury.

Assault is generally coupled with battery, and for the excellent legal reason that they generally go together; but the assault is rather the initiation or offer to commit the act of which the battery is the consummation. An assault is included in every battery; 1 Hawk. Pl. Cr. c. 62, § 1.

Where a person is only assaulted, still the form of the declaration is the same as where there has been a battery, "that the defendant assaulted and beat, bruised, and wounded the plaintiff;" 1 Saund. 6th ed. 14 a. The word "ill-treated" is frequently inserted: and if the assaulting and ill-treating are justified in the plea, although the beating, bruising, and wounding are not, yet it is held that the plea amounts to a justification of the battery; 7 Taunt. 689; 1 J. B. Moore 490. So where the plaintiff declared, in trespass, for assaulting him, seizing and laying hold of him, and imprisoning him, and the defendant pleaded a justification under a writ of *capias*, it was held, that the plea admitted a battery; 3 M. & W. 28. But where in trespass for assaulting the plaintiff, and throwing water upon him, and also wetting and damaging his clothes, the defendant pleaded a justification as to assaulting the plaintiff and wetting and damaging his clothes, it was held, that, though the declaration alleged a battery, yet the matter justified by the plea did not amount to a battery; 8 Ad. & E. 602; 3 Nev. & P. 564.

Any act causing a well-founded apprehension of immediate peril from a force already partially or fully put in motion is an assault; 4 C. & P. 849; 9 *id.* 483, 628; 110 Mass. 407; 1 *Ired.* 125, 375; 11 *id.* 475; 1 S. & R. 347; 3 Strobb. 137; 9 Ala. 79; 2 Wash. C. C. 435; unless justifiable. But if justifiable, then it is not necessarily either a battery or an assault. Whether the act, therefore, in any particular case is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was justifiable cause. If, therefore, the evidence fails to show the act to have been unjustifiable, or leaves that question in doubt, the criminal act is not proved, and the party charged is entitled to an acquittal; 2 Metc. Mass. 24, 25; 1 Gray 63, 64. Any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with ability to commit a battery, is an assault; 25 Tex. App. 244; 85 Ala. 11; 49 Mich. 527; 1 Wash. 435; but an approach with gesticulations and menaces was held not an assault; 88 Va. 1017; words are not legal provocation to justify an assault and battery; 17 S. E. Rep. (S. C.) 691; 64 Vt. 212. It is an assault where one strikes at another with a stick without hitting him; 1 Hawk. Pl. Cr. 110. Shooting into a crowd is an assault upon each member of the crowd; 49 Ark. 156; an officer is guilty of an assault in shooting at a fleeing prisoner, who had been arrested for misdemeanor, whether he intended to hit the prisoner or not; 106 N. C. 728.

If a master take indecent liberties with a female scholar, without her consent, though she does not resist, it is an assault; R. & R. Cr. Cas. 130; 6 Cox, Cr. Cas. 64; 9 C. & P. 732; 6 Tex. App. 249. So, if a medical practitioner unnecessarily strips a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault, if he assisted to take off her clothes; 1 Moody 19; 1 Lew. 11. Where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bond fide* belief that such was the case, it was held that he was properly convicted of an assault; 1 Den. Cr. Cas. 580; 4 Cox, Cr. Cas. 230; Templ. & M. 218. But an attempt to commit the misdemeanor of having carnal knowledge of a girl between ten and twelve years old; is not an assault, by reason of the consent of the girl; 8 C. & P. 574, 589; 9 *id.* 213; 2 Mood. 123; 7 Cox, Cr. Cas. 145. And see 1 Den. Cr. Cas. 377; 2 C. & K. 957; 8 Cox, Cr. Cas. 266. But it has been held that one may be convicted of an assault upon the person of a girl under ten years of age with intent to commit a rape, whether she consented or resisted; 70 Cal. 467. One is not guilty of an assault if he takes hold of a woman's hand and puts his arm around her shoulder, unless he does so without her consent or with an intent to injure her; 21 Tex. App. 454. One is guilty of assault and battery who delivers to another a thing to be eaten, knowing that it contains a foreign substance and concealing

the fact, if the other, in ignorance, eats it and is injured; 114 Mass. 203; but see 2 Mood. & R. 581; 2 C. & K. 912; 1 Cox, Cr. Cas. 231; 50 Barb. 128. An unlawful imprisonment is also an assault; 1 Hawk. Pl. Cr. c. 62, § 1. A negligent attack may be an assault; Whart. Cr. L. 9th ed. § 608, n. See Steph. Dig. Cr. L. 5th ed. § 248.

A teacher has a right to punish his pupils for misbehavior; but this punishment must be reasonable and proportioned to the gravity of the pupil's misconduct; and must be inflicted in the honest performance of the teacher's duty, not with the mere intent of gratifying his private ill-will or malice. If it is unreasonable and excessive, is inflicted with an improper weapon, or is disproportioned to the offence for which it is inflicted, the teacher will be guilty of an assault; 113 Ind. 276; 19 N. C. 385; 113 N. C. 635; s. c. 18 S. E. Rep. 250; 23 S. E. Rep. (N. C.) 431; 25 S. W. Rep. (Tex.) 125. The punishment must be for some specific offence which the pupil has committed, and which he knows he is punished for; 50 Ia. 145. If a person over the age of twenty-one voluntarily attends school, he thereby waives any privilege which his age confers, and may be punished for misbehavior as any other pupils; 45 Ia. 248. A teacher has no right, however, to punish a child for neglecting or refusing to study certain branches from which the parents of the child have requested that it might be excused, or which they have forbidden it to pursue, if those facts are known to the teacher. The proper remedy in such a case is to exclude the pupil from the school; 50 Ia. 145; 35 Wis. 59.

The teacher has in his favor the presumption that he has only done his duty, in addition to the general presumption of innocence; 113 Ind. 276; 50 Ia. 145; and in determining the reasonableness of the punishment, the judgment of the teacher as to what was required by the situation should have weight, as in the case of a parent under similar circumstances. The reasonableness must, therefore, be determined upon the facts of each particular case; 113 Ind. 276. When a proper weapon has been used, the character of the chastisement, as regards its cruelty or excess, must be determined by considering the nature of the offence for which it was inflicted, the age, physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher; 113 Ind. 276; 14 Tex. App. 61; and since the legitimate object of chastisement is to inflict punishment by the pain which it causes, as well as the degradation it implies, it does not follow that chastisement was cruel or excessive because pain was caused or abrasions of the skin resulted from the use of a switch by the teacher; 113 Ind. 276.

A teacher will be liable for prosecution, if he inflict such punishment as produces or threatens lasting mischief, or if he inflict punishment, not in the honest performance of duty, but under the pretext of duty to gratify malice; 19 N. C. 385; 23 S. E. Rep. (N. C.) 431. But a charge to the jury that "malice means bad temper, high temper, quick temper; and if the injury was inflicted from malice, as above defined, then they should convict the defendant," is erroneous; for malice may exist without temper, and may not exist although the act be done while under the influence of temper, bad, high or quick. General malice, or malice against all mankind, "is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty, and fatally bent on mischief." Particular malice is "ill-will, grudge, a desire to be revenged on a particular person." This distinction should be explained to the jury, and the term "malice" should be accurately defined; 23 S. E. Rep. (N. C.) 431. See *BATTERY*; *CORRECTION*.

ASSAULT AND BATTERY. Mere acts of negligence do not constitute an "assault and battery" within the meaning of a statute, even when trespass would lie. 94

Ky 433, 22 S. W. 650. See ADEQUATE CAUSE.

ASSAY. See ANNUAL ASSAY.

ASSAY OFFICE. An establishment, or department, in which the manipulations attending the assay of bullion and coins are conducted.

Assay offices are established at New York, Boise City, Idaho, and Charlotte, North Carolina (R. S. §§ 3495 *et seq.*); and also at Helena, Mont. (18 Stat. L. 45), and St. Louis, Mo. (21 Stat. L. 323). Sec. 3553 provides that the business of the United States assay office at New York shall be in all respects similar to that of the mints, except that bars only, and not coin, shall be manufactured therein; and no metals shall be purchased for minor coinage. All bullion intended by the depositor to be converted into coins of the United States, and silver bullion purchased for coinage, when assayed, parted, and refined, and its net value certified, shall be transferred to the mint at Philadelphia, under such directions as shall be made by the Secretary of the Treasury, at the expense of the contingent fund of the mint, and shall be there coined, and the proceeds returned to the assay office.

Sec. 3558 provides that the business of the mint of the United States at Denver, while conducted as an assay office, that of the United States assay office at Boise City, and that of any other assay offices hereafter established, shall be confined to the receipt of gold and silver bullion, for melting and assaying, to be returned to depositors of the same, in bars, with the weight and fineness stamped thereon.

The assay office is also subject to the laws and regulations applied to the mint; R. S. § 3563.

ASSECURARE (Lat.). To assure; to make secure by pledges, or any solemn interposition of faith. Spelman, Gloss.; Cowel.

ASSECURATION. In European Law. Assurance; insurance of a vessel, freight, or cargo. Opposition to the decree of Grenoble. Ferriere.

ASSECURATOR. An insurer.

ASSEDATION. In Scotch Law. An old term, used indiscriminately to signify a lease or feu-right. Bell's Dict.; Erskine, Inst. lib. 2, tit. 6, § 20.

ASSEMBLY. The meeting of a number of persons in the same place.

Political assemblies are those required by the constitution and laws: for example, the general assembly, which includes the senate and house of representatives. The meeting of the electors of the president and vice-president of the United States may also be called an assembly.

Popular assemblies are those where the people meet to deliberate upon their rights these are guaranteed by the constitution. U. S. Const. Amend. art 1.

Unlawful assembly is the meeting of three or more persons to do an unlawful act, although they may not carry their purpose into execution. Cl. Cr. Law. 341.

It differs from a riot or rout, because in each of the latter cases there is some act done besides the simple meeting. See 1 Ired. 30; 9 C. & P. 431; 5 id. 154; 1 Bish. Cr. Law § 335; 2 id. §§ 1256, 1259.

ASSENT. Approval of something done. An undertaking to do something in compliance with a request.

In strictness, *assent* is to be distinguished from *consent*, which denotes a willingness that something about to be done, *acceptance*, compliance with, or receipt of, something offered; *ratification*, rendering valid something done without authority; and *approval*, an expression of satisfaction with some act done for the benefit of another beside the party approving. But in practice the term is often used in the sense of acceptance and approval. Thus, an offer is said to be assented to, although properly an offer and acceptance complete an agreement. It is apprehended that this confusion has arisen from the fact that a request, assent, and concurrence of the party requesting complete a contract as fully as an offer and acceptance. Thus, it is said there must be a request on one side, and assent on the other, in every contract; 5 Bingh. n. c. 75; and this assent becomes a promise enforceable

by the party requesting, when he has done anything to entitle him to the right. Assent thus becomes in reality (so far as it is assent merely, and not acceptance) an offer made in response to a request. Assent and approval, as applied to acts of parliament and of congress, have become confounded, from the fact that the bills of parliament were originally requests from parliament to the king. See 1 Bla. Com. 133.

Express assent is that which is openly declared. *Implied assent* is that which is presumed by law.

Unless express dissent is shown, acceptance of what it is for a person's benefit to take, is presumed, as in the case of a conveyance of land; 2 Vent. 201; 3 Mod. 296; 3 Lev. 284; 3 B. & Ald. 81; 1 Binn. 502; 5 S. & R. 523; 14 id. 296; 12 Mass. 461; 2 Hayw. 234; 4 Day 395; 20 Johns. 184; 15 Wend. 656; 4 Halst. 161; 6 Wt. 411; the assent (or acceptance) of the grantee to the delivery of a deed by a person other than the grantor, vests the title in him from the time of the delivery by the grantor to that third person; 9 Mass. 307; 8 Metc. Mass. 436; 9 Ill. 176; 5 N. H. 71; 4 Day 66; 20 Johns. 187; 2 Ired. Eq. 557; 5 B. & C. 671; a devise which draws after it no charge or risk of loss, is presumed to have been accepted by the devisee; 17 Mass. 73; 3 Munf. 345; 4 id. 332; 8 Watts 9. See 1 Wash. C. C. 70.

Assent must be to the same thing done or offered in the same sense; 1 Sumn. C. C. 218; 3 Johns. 534; 7 id. 470; 18 Ala. 605; 3 Cal. 147; 4 Wheat. 225; 5 M. & W. 575; it must comprehend the whole of the proposition, must be exactly equal to its extent and provisions, and must not qualify them by any new matter; 5 M. & W. 535; 4 Whart. 369; 3 Wend. 459; 11 N. Y. 441; 1 Metc. Mass. 93; 1 Pars. Contr. 400.

In general, when an assignment is made to one for the benefit of creditors, the assent of the assignee will be presumed; 1 Binn. 502, 518; 6 W. & S. 339; 8 Leigh 272, 281. But see 24 Wend. 280; 12 Wis. 243.

ASSERT. To maintain or defend by words or measures; to vindicate. 56 Com. 559, quoting Webster's Dict.

To state positively or plainly; declare the truth of. Stand. Dict.

ASSESS. To rate or fix the proportion which every person has to pay of any particular tax.

To tax.

To adjust the shares of a contribution by several towards a common beneficial object according to the benefit received.

To fix the value of; to fix the amount of.

ASSESSMENT. Determining the value of a man's property or occupation for the purpose of levying a tax.

Determining the share of a tax to be paid by each individual.

Laying a tax.

Adjusting the shares of a contribution by several towards a common beneficial object according to the benefit received.

See SPECIAL ASSESSMENT.

The term is used in this latter sense in New York, distinguishing some kinds of local taxation, whereby a peculiar benefit arises to the parties, from general taxation; 11 Johns. 77; 3 Wend. 268; 4 Hill 70; 4 N. Y. 419.

Of Damages. Fixing the amount of damages to which the prevailing party in a suit is entitled.

It may be done by the clerk through its proper officer, the clerk or prothonotary, where the assessment is a mere matter of calculation, but must be by a jury in other cases. See DAMAGES.

In Insurance. An apportionment made in general average upon the various articles and interests at risk, according to their value at the time and place of being in safety, for contribution for damage and sacrifices purposely made, and expenses incurred for escape from impending common peril. 2 Phill. Ins. c. xv.

It is also made upon premium notes given by the members of mutual fire insurance companies, constituting their capital, and being a substitute for the investment of the paid up stock of a stock company; the liability to such assessments being regulated

by the charter and the by-laws; May, Ins. § 549; Beach, Ins. Law 10; 14 Barb. 374; 9 Cush. 140; 13 Minn. 135; 36 N. H. 252; 15 Abb. Pr. 66; 186 Pa. 499. A member of a mutual insurance company, who has paid something on a premium note, can be assessed for further losses to the face of the note only; 82 Wis. 488. The right to assess is strictly construed, the notes being merely conditional promises to pay; 40 Mo. 89; 19 Ia. 502; 23 Barb. 656; May, Ins. § 557.

ASSESSMENT COMPANY. See INSURANCE, Assessment Insurance.

ASSESSMENT INSURANCE. See INSURANCE.

ASSESSORS. Those appointed to make assessments.

In Civil and Scotch Law. Persons skilled in law, selected to advise the judges of the inferior courts. Bell, Dict.; Dig. 1. 22; Cod. 1. 51.

ASSETS (Fr. *assez*, enough).

All the stock in trade, cash, and all available property belonging to a merchant or company.

The property in the hands of an heir, executor, administrator, or trustee, which is legally or equitably chargeable with the obligations which such heir, executor, administrator, or other trustee is, as such, required to discharge.

Assets enter mains. Assets in hand. Such property as at once comes to the executor or other trustee, for the purpose of satisfying claims against him as such. *Termes de la Ley.*

Equitable assets. Such as can be reached only by the aid of a court of equity, and which are to be divided, *pari passu*, among all the creditors; 2 Fonblanque 401; Willis, Trust. 118.

Legal assets. Such as constitute the fund for the payment of debts according to their legal priority.

Assets per descent. That portion of the ancestor's estate which descends to the heir, and which is sufficient to charge him, as far as it goes, with the specialty debts of his ancestors; 2 Williams, Ex. 7th Am. ed. *1553.

Personal assets. Goods and personal chattels to which the executor or administrator is entitled.

Real assets. Such as descend to the heir, as an estate in fee-simple.

In the United States, generally, by statute, all the property of the deceased, real and personal, is liable for his debts, and, in equity, is to be applied as follows, when no statute prescribes a different order of application, exhausting all the assets of each class before proceeding to the next: *First*, the personal estate not specifically bequeathed; *second*, real estate devised or ordered to be sold for the payment of debts; *third*, real estate descended but not charged with debts; *fourth*, real estate devised, charged generally with the payment of debts; *fifth*, general pecuniary legacies *pro rata*; *sixth*, real estate devised, not charged with debts; 4 Kent 421; 2 Wh. & T. Lead. Cas. 72.

With regard to the distinction between reality and personality in this respect, growing crops go to the administrator; 7 Mass. 34; 6 N. Y. 597; 135 Ill. 257; he is entitled to a crop of cotton, the cultivation of which was practically completed at intestate's death, although it was harvested and sold by the heirs; 95 Ala. 304. See 96 Ala. 586; so do nurseries, though not trees in general; 1 Metc. Mass. 423; 4 Cush. 380; as do bricks in a kiln; 22 Pick. 110; so do buildings held as personal property by consent of the land-owner; 9 Gill & J. 171; so do chattels real, as interests for years and mortgages; and hence the administrator must bring the action if the mortgagor die before foreclosing; 3 A. K. Marsh. 249; so does rent, provided the intestate dies before it is due; oil produced after testator's death and accruing as royalty, being the consideration for the lease, is not of the corpus but a part of the income of the estate; 188 Pa. 606. Fixtures go to the heir; 2 Smith,

Lead. Cas. 99; 11 H. & G. 114; 2 Pet. 187; 6 Me. 187; 20 Wend. 628; 9 Conn. 67. And see **FIXTURES** as to what are fixtures. In copyrights and patents the administrator has right enough to get them extended and beyond the customary time; 4 How. 646, 712. When realty is personalty as between executor and legatees, see 78 Hun 186. Where land is sold in partition, and one dies before the proceeds are distributed, his share passes as personalty to his administrator; 54 Mo. App. 286. Land which an executor is directed to sell is personalty; 6 Ves. 520; 8 Ves. 547; 161 Pa. 444; but a naked discretionary power of sale will not work a conversion until it is exercised; 186 Pa. 14; 160 *id.* 65; 160 *id.* 441. Where the right of eminent domain has been exercised it converts the land into personalty in Pennsylvania; 8 D. R. Pa. 187; but not in New Jersey; 29 Atl. Rep. (N. J.) 592. The wife's paraphernalia he cannot take from her, in England, for the benefit of the children and heirs, but he may for that of creditors. In the United States; generally, the wearing apparel of widows and minors is retained by them, and is not assets. So among things reserved is the widow's quarantine, *i. e.* forty days of food and clothing; 5 N. H. 495; 10 Pick. 430. In Pennsylvania, a statute gives the widow and children \$300 for their support in preference even to creditors.

Where the assets consist of two or more funds, and at law a part of the creditors can resort to either fund, but the others can resort to one only, courts of equity exercise the authority to marshal (as it is called) the assets, and by compelling the more favored creditors to exhaust first the fund upon which they have the exclusive claim, or, if they have been satisfied without the observance of this rule, by permitting the others to stand in their place, thus enable such others to receive more complete satisfaction; Bishp. Eq. §43; 1 Story, Eq. Jur. §§ 558 et seq.; Williams, Excs. 7th Am. ed. *1585; 4 Johns. Ch. 17; 1 P. Wms. 679; 1 Ves. Ch. 812; 5 Cra. 85; 1 Johns. Ch. 412; 19 Ga. 513; 1 Wis. 48.

A claim against the United States is not a local asset in the district of Columbia; 27 Ct. of Cl. 529.

See **MARSHALLING OF ASSETS**. See, generally, Williams, Ex.; Toller, Ex.; 2 Bla. Com. 510, 511; 3 Viner, Abr. 141; 11 *id.* 239; Gordon, Decedents; Ram, Assets. See **QUICK ASSETS**.

ASSEVERATION. The proof which a man gives of the truth of what he says, by appealing to his conscience as a witness.

It differs from an oath in this, that by the latter he appeals to God as a witness of the truth of what he says, and invokes him, as the avenger of falsehood and perjury, to punish him if he speak not the truth. See **AFFIRMATION**; **OATH**.

ASSIGN. To make or set over to another. Cowel; 2 Bla. Com. 326; 5 Johns. 391.

To appoint; to select; to allot. 3 Bla. Com. 58.

To set forth; to point out; as, to assign errors. Fitzherbert, Nat. Brev. 19.

ASSIGN. An assign within an act is one who becomes invested with the entryman's right in the land through the voluntary act of the latter. 225 U. S. 219.

ASSIGNATION. In Scotch Law. Assignment, which see.

ASSIGNEE. One to whom an assignment has been made.

Assignee in fact is one to whom an assignment has been made in fact by the party having the right.

Assignee in law is one in whom the law vests the right; as, an executor or administrator. See **ASSIGNMENT**.

ASSIGNMENT (Law Lat. *assignatio*, from *assigno*,—*ad* and *signum*,—to mark for; to appoint to one; to appropriate to).

In **Contracts**. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.

A transfer by writing, as distinguished from one by delivery.

The transfer of the interest one has in *lands and tenements*, and more particularly applied to the unexpired residue of a term or estate for life or years; Cruise, Dig. tit. xxxii. (Deed) c. vii. § 15; 2 Woodd. Lect. 170, 171; 1 Steph. Com. 11th ed. 507. The deed by which the transfer is made is also called an assignment; Comyns, Dig.; Bacon, Abr.; Viner, Abr.; La. Civ. Code, art. 2612; Angell, Assign.; 1 Am. Lead. Cas. 78, 85; 4 Cruise, Dig. 160.

What may be assigned. Every demand connected with a right of property, real or personal, is assignable. Every estate and interest in lands and tenements may be assigned, as also every present and certain estate or interest in incorporeal hereditaments, even though the interest be future, including a *term of years* to commence at a subsequent period; for the interest is vested *in present*, though only to take effect *in futuro*; Perkins s. 91; Co. Litt. 46 b; *rent* to grow due (but not that in arrear, 8 Cow. 206); a *right of entry* where the breach of the condition *ipso facto* terminates the estate; 2 G. & J. 173; 4 Pick. 1; a *right to betterments*; 9 Me. 62; the *right to cut trees*, which have been sold on the grantor's land; Hob. 173; 1 Greenl. Ev. § 27; Cruise, Dig. tit. 1, § 45, n.; 7 N. H. 522; 6 Me. 81, 200; 18 Pick. 569; 9 Leigh 548; 11 Ad. & E. 34; a cause of action for cutting timber on another's land; 46 Wis. 118; a *right in lands* which may be perfected by *occupation*; 4 Yerg. 1; 1 Cooke 67. But no right of entry or re-entry can be assigned; 2 Yerg. 84; Littleton § 347; 2 Johns. 1; 1 Cra. 423; 1 Dev. & B. 819; nor a *naked power*; though it is otherwise where it is coupled with an interest; 2 Mod. 317.

To make an assignment valid at law, the subject of it must have an existence, actual or potential, at the time of the assignment; 7 Ohio St. 432; 15 Mees. & W. 110; 13 Mete. 17; 42 Ala. 255. But courts of equity will support an assignment not only of interests in action and contingency, but of things which have no present, actual, or potential existence, but rest in mere possibility only; 2 Story, Eq. Jur. 13th ed. §§ 1040 b, 1053; Fearn, Cont. Rem. 527; 20 Johns. 380; as an heir's possibility of inheritance; 4 Sneed 258; see 1 Ch. Rep. 29; 33 N. J. Eq. 614; 91 Pa. 96; 5 Wheat. 283. The assignment of personal property is chiefly interesting in regard to choses in action and as to its effect in cases of insolvency and bankruptcy. Assignments by debtors for the benefit of creditors are regulated by statute in nearly all the states of the United States. See collection of statutes in Moses, Insolv. Laws. A chose in action cannot be transferred at common law; 10 Co. 49; Litt. 266 a; Chit. Bills 6; Comyns, Dig. *Chancery* (2 H); 3 Cow. 623; 2 Johns. 1; 15 Mass. 388; 1 Cra. 367; 5 Wis. 17; 5 Halst. 20. But the assignee may sue in the assignor's name, and the assignment will be considered valid in equity. See *infra*.

In equity, as well as law, some choses in action are not assignable; for example, an *officer's pay*, or commission; 2 Anstr. 533; 1 Ball. & B. Ch. 387; 1 Swanst. 74; 3 Turn. & R. 459; see 13 Mass. 290; 15 Ves. Ch. 139; or the *salary of a judge*; 10 Humphr. 342; 5 Moore, P. C. C. 219; or *claims for fishing* or other bounties from the government; or *rights of action for fraud or tort* as a right of action for *assault*; or in *trover*; 12 Wend. 297 (*aliter* of a right of action in *replevin*; 24 Barb. 382); or of the *sale of fish not yet caught*; 108 Mass. 350; a *cause of action for deceit* is assignable; 44 Mo. App. 338; and it seems that all rights of action which would survive to the personal representatives, may be assigned; 22 Barb. 110; 7 How. 492; 34 Pa. 299; 44 N. H. 424; 7 Misc. Rep. 663; so if a right of action against a common carrier for not delivering goods; 44 N. H. 424; or for injury to goods; 87 Va. 185. An assignment of wages to be earned in the future will be upheld in equity; 80 Me. 367; but see 1 Gray 105; 2 Pa. Co. C. Rep. 465; but the assignment by a master in chancery of his

unearned fees is void; 86 Fed. Rep. 147; as is the assignment by an executor of his fees before they are ascertained and fixed; 141 N. Y. 9. A cause of action for *malicious prosecution* is not assignable even after verdict; 22 Cal. 174; 1 Pet. 193, 213; 3 E. D. Smith, 246; 23 Barb. 110; 8 Litt. 41; 9 S. & R. 244; 6 Madd. 59; 2 M. & K. 592; nor is a right to recover damages for false imprisonment; 47 Minn. 557; nor any *rights pendente lite*. Nor can *personal trusts* be assigned; 127 U. S. 379; as the *right of a master* in his apprentice; 11 B. Monr. 60; 8 Mass. 299; 8 N. H. 472; or the *duties of a testamentary guardian*; 12 N. H. 437; 1 Hill, N. Y. 875; nor a *contract for the performance of personal services*; 4 Litt. 9. An invention may be sold by parol; 120 N. Y. 218; every patent or interest therein is assignable; Rev. St. U. S. § 4598; an assignment of a contingent remainder for a valuable consideration, while void in law, is enforceable in equity; 110 N. C. 6. In the assignment of a chose in action it is essential that it be delivered; 84 Va. 731; a partial assignment of choses in action is good in equity, although the legal title remains in the assignor; 69 Tex. 625; the assignment of a fractional part of a claim is good, where the party who is to pay does not object; 151 Mass. 199; 142 *id.* 366.

The assignment of bills of exchange and promissory notes by general or special endorsement constitutes an exception to the law of transfer of choses in action. When negotiable (*i. e.*, made payable to order), they were made transferable by the statute of 3 & 4 Anne; they may then be transferred by endorsement; the holder can sue in his own name, and the equitable defences which might have existed between the promisor and the original promisee are cut off; Chit. Bills, Perkins ed. 1854, 8, 11, 225, 229, n. (3) and cases cited; 11 Barb. 637, 639; Burrill, Ass. 2d ed. 3, nn. 1, 2; 26 Miss. 577; Hard. 563; where a payee endorses a note to third party adding a guaranty of payment, the contract and guaranty are assignable; 43 Minn. 466. The assignee of a bill of lading has only such rights as the consignee would have had; 81 Ga. 792; an assignee stands in the place of his assignor and takes simply his assignor's rights; 71 Md. 200.

The most extensive class of assignments are the general assignments in trust made by insolvent and other debtors for the payment of their debts. In most of the states of the United States these are regulated by state statutes.

The right of an insolvent debtor to make an assignment for the benefit of his creditors exists at common law, independent of statute, and when good in the state where executed is good in every state; 66 Tex. 372. Where the assignment is valid under the laws of one state it will pass a debt to the assignor due under contract made there with a citizen of another state, though the assignment is void in such other state; 19 Abb. N. C. 399.

An assignment takes effect upon delivery; 160 Pa. 466.

A debtor making an assignment for the benefit of his creditors may legally choose his own trustees, and the title passes out of him to them; 21 Barb. 65; 1 Binn. 514; 18 Ark. 85, 123; 24 Conn. 180; 1 Sand. Ch. 253. The assent of creditors will ordinarily be presumed; 29 Ala. n. s. 112; 4 Mass. 183, 206; 8 Pick. 113; 2 Conn. 633; 9 S. & R. 244; 8 Me. 411.

In some states the statutes provide that the assignment shall be for the benefit of all creditors equally, in others preferences are legal. Independently of bankrupt and insolvent laws, or laws forbidding preferences, priorities and preferences in favor of particular creditors are allowed. Such preference is not considered inequitable, nor is a stipulation that the creditors taking under it shall release and discharge the debtor from all further claims; 4 Mass. 206; 41 Me. 277; 9 Ind. 88; 4 Wash. C. C. 232; 13 S. & R. 132; 4 Zabr. 162; 2 Cal. 107; 16 Ill. 435; 17 Ga. 430; 2 Paine 180; 15 Johns. 571; 11 Wend. 187; 7 Md. 88, 881; 29 Ala.

ASSIGNMENT

266; 5 N. H. 118; 11 Wheat. 78; 8 Conn. 505; 26 Miss. 423; 6 Fla. 62; 6 R. I. 338; 1 Am. L. Cas. 71; 110 Pa. 156; 133 U. S. 670; 123 N. Y. 544; 58 Hun 602; 43 Fed. Rep. 716. See **PREFERENCES**.

How made. It used to be held that the instrument of assignment must be of as high a character and nature as the instrument transferred; but now a parol (usually written) assignment may transfer a deed, if the deed be at the same time delivered; 1 Dev. 354; 2 Jones 224; 13 Mass. 304; 15 id. 481; 26 Me. 284, 448; 17 Johns. 284, 292; 19 id. 342; 1 E. D. Smith 414. 5 Ad. & E. 107; 4 Taunt. 326; 1 Ves. Sen. Ch. 332, 348; 2 id. 6; 1 Madd. Ch. 53; 1 Harr. & J. 114, 274; 2 Ohio 56, 221; 11 Tex. 273; 26 Ala. n. s. 292. When the transfer of personal chattels is made by an instrument as formal as that required in the assignment of an interest in lands, it is commonly called a *bill of sale* (which see); 2 Steph. Com. 11th. ed. 59. See as to the distinction, 5 W. & S. 36. In most cases, however, personal chattels are transferred by mere note or memorandum, or, as in the case of negotiable paper, by mere endorsement; 3 E. D. Smith 555; 6 Cal. 247; 28 Miss. 56; 15 Ark. 491.

The proper technical and operative words in assignment are "assign, transfer, and set over;" but "give, grant, bargain, and sell," or any other words which show the intent of the parties to make a complete transfer, will work an assignment; Watkins, Con., Preston ed. b. 2, c. ix.; 13 Sim. 469; 31 Beav. 351; 1 Ves. 381; 20 Mo. 577.

No consideration is necessary to support the assignment of a term; 1 Mod. 263; 3 Munf. 556; 2 E. D. Smith 469. Now, by the statute of frauds, all assignments of chattels *real* must be made by deed or note in writing, signed by the assigning party or his agent thereunto lawfully authorized by writing; 1 B. & P. 270. If a tenant assigns the whole or a part of an estate for a part of the term, it is a sub-lease, and not an assignment; 1 Gray 325; 2 Paige, Ch. 68; 2 Ohio 369; 1 Washb. R. P. 5th ed. *327.

Effect of. During the continuance of the assignment, the assignee is liable on all covenants running with the land, but may rid himself of such continuing liability by transfer to a mere beggar; 2 H. Bla. 183; 5 Coke 16; Ans. Contr. 232; 1 B. & P. 21; 2 Bridgman Eq. Dig. 138; 1 Vern. Ch. 87; 2 id. 103; 8 Ves. Ch. 95; 1 Sch. & L. 310; 1 Ball & B. 238; Dougl. 56, 183; (but a conveyance to an irresponsible person to avoid paying a ground-rent accruing on the land conveyed held not to release the original covenantor; 54 Pa. 30). By the assignment of a right all its accessories pass with it: for example, the collateral security, or a lien on property, which the assignor of a bond had, will pass with it when assigned; 1 Stockt. 592; 5 Litt. 248; 4 B. Monr. 539; 1 Pa. 454, 280; 9 Cow. 747; 2 Yerg. 84; 29 Iowa 339; 68 N. C. 225; 13 Mass. 204; 18 Pa. 294; 40 N. Y. 181; 13 Ill. 457. So, also, what belongs to the thing by the right of accession is assigned with it; 7 Johns. Cas. 90; 6 Pick. 360; 31 N. H. 562.

An assignee for the benefit of creditors takes the property assigned subject to all existing valid liens and equities against the assignor; 20 Oreg. 517.

The assignee of a chose in action in a court of law must bring the action in the name of the assignor in whose place he stands; and everything which might have been shown in defence against the assignor may be used against the assignee; 18 Eng. L. & Eq. 83; 42 Me. 221; 6 Ga. 119; 15 Barb. 506; 3 N. H. 82, 539; 2 Wash. Va. 283; 5 Mass. 201, 214; 10 Cuth. 92; 28 Miss. 488; 13 Ill. 486; 1 Stockt. 146; 7 Conn. 399; 4 Litt. 435; 9 Ala. 60; 3 Cra. 342; 1 Wheat. 236; 2 Pa. 261, 463; 1 Bay 173; 1 McCord 219; 5 Mas. 215; 1 Paine 525; 3 McLean 147; 3 Hayw. 199; 1 Humphr. 155; 11 Md. 251; 1 Bisph. Eq. 226; but in many states the assignee of a chose in action may sue in his own name; 23 Wis. 267; 30 N. Y. 83; 46 Mo. 603; 11 Ohio 874; 9 Iowa 100; 7 Black 522; it is no

objection to suit by an assignee of an account in his name that no consideration for the assignment is shown; 99 Mo. 103; and where a party assigns her interest in a suit for negligence to her attorneys by way of security, there is no reason why suit should be carried on in her name; 78 Mich. 681. In a court of equity the assignee may sue in his own name, but he can only go into equity when his remedy at law fails; 1 Ves. Ch. 331, 409; 1 Yo. & C. 481; 1 Pick. 495; 4 Rand. 392; 30 Me. 419; 2 Johns. Ch. 441; 8 Wheat. 268. Such an assignment is considered as a declaration of trust; 10 Humphr. 342; 3 P. Will. 199; 5 Pet. 597; 1 Wheat. 235; see 5 Paige, Ch. 539; 6 Cra. 335; but all the equitable defences exist; 1 Binn. 429; 8 Wheat. 268. It has been held that the assignee of a chose in action does not take it subject to equities of third persons of which he had no notice; 44 Ill. App. 516.

A valid assignment of a policy of insurance in the broadest legal sense, by consent of the underwriters, by statute, or otherwise, vests in the assignee all the rights of the assignor, legal and equitable, including that of action; but the instrument, not being negotiable in its character, is assignable only in equity, and not even so, if it has, as it sometimes has, a condition to the contrary; 8 Md. 244, 341; 8 Cush. 393; 10 id. 350; 28 Barb. 116; 17 N. Y. 391; 25 Ala. n. s. 353; 80 N. H. 231; 3 Sneed 565; 42 Me. 221; 26 Conn. 165; 31 Pa. 488; 18 Eng. L. & Eq. 427; 22 id. 590; 93 Mich. 184. Where the policy does not provide that an assignment without the consent of the company renders it void, a parol assignment is valid; 57 Hun 589. Upon transfer of a policy, in case of loss, the assignee may in some states maintain action in his own name; 105 N. C. 283; but this is usually when there is a statutory provision; and if there be none suit must be in the name of the assignor; 3 Kent, Com. 261; 1 Binn. 429. In marine policies, custom seems to have established a rule different from that of the common law, and to have made the policies transferable with the subject matter of insurance; May, Ins. § 377.

Assignments are peculiarly the objects of equity jurisdiction; 2 Bligh 171, 189; 9 B. & C. 300; 7 Wheat. 556; 4 Johns. Cas. 529, 205, 119, 129; and *bona fide* assignments will in most cases be upheld in equity courts; 8 Me. 17; Paine 525; 1 Wash. C. C. 424; 14 S. & R. 137; T. U. P. Charlt. 280; 12 Johns. 343; but champerty and maintenance, and the purchase of lawsuits, are inquired into and restrained in equity as in law, and fraud will defeat an assignment. By some of the state statutes regulating assignments, the assignee may bring an action in his own name in a court of law, but the equities in defence are not excluded. See 6 Ohio 271; 6 Yerg. 572; 3 Dana 142; 2 Pet. 239; 1 Miss. 69.

All assignments and transfers of any claim upon the United States, or of any part or share thereof, or interest therein, whatever may be the consideration therefor, are null and void, unless freely made after the allowance of such claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof; § 3477 Rev. Stat. But this does not apply to the passing of such claims to heirs, devisees, or assignees in bankruptcy; 97 U. S. 392.

For inalienability of choses in action see 3 Harv. Law Rev. 337; as to assignment of government claims: 24 Amer. Law Rev. 442. See **GENERAL ASSIGNMENT**.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. See **GENERAL ASSIGNMENT**.

ASSIGNMENT OF DOWER. The act by which the share of a widow in her deceased husband's real estate is ascertained and set apart to her.

The assignment may be made *in pais* by the heir or his guardian, or the devisee or other persons seized of the lands subject to dower; 2 Penning. 621; 19 N. H. 240; 23 Pick. 80, 88; 4 Ala. n. s. 160; 4 Me. 67; 2

Ind. 388; Tudor, Lead. Cas. 51; or it may be made after a course of judicial proceedings, where a voluntary assignment is refused. In this case the assignment will be made by the sheriff, who will set off her share by metes and bounds; 2 Bla. Com. 136; 1 Washb. R. P. 229. The assignment should be made within forty days after the death of the husband, during which time the widow shall remain in her husband's mansion-house. See 20 Ala. n. s. 662; 7 T. B. Monr. 337; 5 Conn. 463; 1 Washb. R. P. 222, n. 227. The share of the widow is usually one-third of all the real estate of which the husband has been seized during coverture; and no writing or livery is necessary in a valid assignment, the dower being *in*, according to the view of the law, of the seisin of her husband. The assignment of dower in a house may be of so many rooms, instead of a third part of the house; 88 Va. 529. The remedy of the widow, when the heir or guardian refuses to assign dower, is by a writ of dower *unde nihil habet*; 4 Kent 63. A conveyance by a widow of her right of dower before it has been allotted does not vest the legal title in the grantee, and she is a necessary party to enforce the allotment; 16 S. E. Rep. (S. C.) 416; see 109 N. C. 674. If the guardian of a minor heir assign more than he ought, the heir on coming of age may have the writ of admeasurement of dower; 2 Ind. 336; 1 Pick. 314; Co. Litt. 34, 35; Fitzh. Nat. Br. 184; Finch 314; Stat. Westm. 2 (13 Edw. I.) c. 7; 1 Washb. R. P. 222-250; 1 Kent 63, 69.

ASSIGNMENT OF ERRORS. In Practice. The statement of the case of the plaintiff in error, on a writ of error, setting forth the errors complained of.

It corresponds with the declaration in an ordinary action; 2 Tidd, Pr. 1168; 3 Steph. Com. 11th ed. 623. All the errors of which the plaintiff complains should be set forth and assigned in distinct terms, so that the defendant may plead to them; 18 Ala. 186; 15 Conn. 83; 4 Miss. 77.

The ruling of a trial court must be specified in the assignment, in order to question it on appeal; 131 Ind. 468; as where no errors are assigned in the record, no question is presented for the appellate court for review; 44 Ill. App. 293; 85 id. 571; 146 Pa. 61; 1 Colo. App. 333; 126 Ind. 544.

ASSIGNOR. One who makes an assignment; one who transfers property to another.

In general, the assignor can limit the operation of his assignment, and impose whatever condition he may think proper; but when he makes a general assignment in trust for the use of his creditors, he can impose no condition whatever which will deprive them of any right; 14 Pick. 123; 15 Johns. 151; 7 Cow. 735; nor any condition forbidden by law, as giving preference when the law forbids it.

ASSIGNS. Assignees; those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, "heirs, administrators, and assigns;" 8 R. I. 36.

ASSISA (Lat. *assidere*). A kind of jury or inquest. *Assisa veritatis in iuratum*. The assize has been turned into a jury.

A writ: as, an assize of *novel disseisin*, assize of common pasture.

An ordinance: as, *assisa panis*. Spelman, Gloss.; Littleton § 234; 8 Sharw. Bla. Com. 402.

A fixed specific time, sum, or quantity. A tribute; tax fixed by law; a fine. Spelman, Gloss.

Assisa armorum. A statute ordering the keeping arms.

Assisa cadere. To be nonsuited. Cowell; 8 Bla. Com. 403.

Assisa continuanda. A writ for the continuation of the assize to allow the production of papers. Reg. Orig. 217.

Assisa de foresta. Assize of the forest, which see.

Assisa mortis d'ancestoris. Assize of

mort d'ancestor, which see.

Assisa panis et cerevisie. Assize of bread and ale; a statute regulating the weight and measure of these articles.

Assisa proroganda. A writ to stay proceedings where one of the parties is engaged in a suit of the king. Reg. Orig. 208.

Assisa ultime presentationis. Assize of *darrein presentment*, q. v.

Assisa venalium. Statutes regulating the sale of certain articles. Spelman, Gloss.

ASSISORS. In Scotch Law. Jurors.

ASSIST. See ADVISE.

ASSISTANCE. The word "assistance," as used in a statute relating to special assistance to the attorney-general means the same thing as "assistants." 112 S. W. 641.

ASSISTANCE, WRIT OF. SEE WRIT OF ASSISTANCE.

ASSIZE (Lat. *assidere*, to sit by or near, through the Fr. *assisa*, a session).

In English Law. A writ directed to the sheriff for the recovery of immovable property, corporeal or incorporeal. Cowel; Littleton § 234.

The action or proceedings in court based upon such a writ. Magna Charta c. 12; Stat. 13 Edw. I. (Westm. 2) c. 25; 3 Bla. Com. 57, 252; Sellon, Pract. Intro. xii.

Such actions were to be tried by special courts, of which the judicial officers were justices of assize. See COURTS OF ASSIZE AND NISI PRIUS. This form of remedy is said to have been introduced by the parliament of Northampton (or Nottingham, A. D. 1176), for the purpose of trying titles to land in a more certain and expeditious manner before commissioners appointed by the crown than before the suitors in the county court of the king's justices in the Aula Regia. The action is properly a mixed action, whereby the plaintiff recovers his land and damages for the injury sustained by the disseisin. The value of the action as a means for the recovery of land led to its general adoption for that purpose, those who had suffered injury not really amounting to a disseisin alleging a disseisin to entitle themselves to the remedy. The scope of the remedy was also extended so as to allow the recovery of incorporeal hereditaments, as franchises, estovers, etc. It gave place to the action of ejectment, and is now abolished, having been previously almost, if not quite, entirely disused. Stat. 3 & 4 Will. IV. c. 27, § 36. Stearns, Real Act. 187.

A jury summoned by virtue of a writ of assize.

Such juries were said to be either *magna* (grand), consisting of sixteen members and serving to determine the right of property, or *parva* (petit), consisting of twelve and serving to determine the right to possession. Mirror of Just. lib. 2.

This sense is said by Littleton and Blackstones to be the original meaning of the word; Littleton § 234; 3 Bla. Com. 185. Coke explains it as denoting originally a session of justices; and this explanation is sanctioned by the etymology of the word. Co. Litt. 153 b. It seems, however, to have been early used in all the senses here given. The recognitors of assize (the jurors) had the power of deciding, upon their own knowledge, without the examination of witnesses, where the issue was joined on the very point of the assize; but collateral matters were tried either by a jury or by the recognitors acting as a jury, in which latter case it was said to be turned into a jury (*assise vertitur in iuratum*). Benth. Real Act. 213; Stearns, Real Act. 187; 3 Bla. Com. 402. The term is no longer used, in England, to denote a jury.

The verdict or judgment of the jurors or recognitors of assize; 3 Bla. Com. 57, 59.

A court composed of an assembly of knights and other substantial men, with the baron or justice, in a certain place, at an appointed time. Grand Coutum. cc. 24, 25.

An ordinance or statute. Littleton § 234; Reg. Orig. 239. Anything reduced to a certainty in respect to number, quantity, quality, weight, measure, etc. 2 Bla. Com. 42; Cowel; Spelman, Gloss. *Assisa*. See the articles immediately following.

In Scotch Law. The jury, consisting of fifteen men, in criminal cases tried in the court of justiciary. Paterson, Comp.; Bell, Dict.

ASSIZE OF CLARENDON. A statute or ordinance passed in the reign of Henry II, by which those who were accused of any heinous crime, and were unable to purge themselves, and must abjure the realm, had liberty of forty days to stay and try to get aid from their friends toward their sustenance in exile. Burrill; Bract. fol. 136.

ASSIZE OF DARREIN PRESENTMENT. A writ of assize which formerly lay when a man or his ancestors under whom he claimed presented a clerk to a benefice, who was instituted, and afterwards upon the next avoidance, a stranger presented a clerk and thereby disturbed the real patron. 3 Sharsw. Blac. Com. 245; Stat. 13 Edw. I. (Westm. 2) c. 5. It has given way to the remedy by *quare impedit*.

ASSIZE OF FRESH FORCE. A writ of assize which lay where the disseisin had been committed within forty days. Fitzh. Nat. Brev. 7.

ASSIZE OF MORT D'ANCESTOR. A writ of assize which lay to recover possession of lands against an abator or his alienee.

It lay where the ancestor from whom the claimant derived title died seised; Cowel; Spelman, Gloss.; 3 Bla. Com. 185.

ASSIZE OF NORTHAMPTON. See NORTHAMPTON, STATUTE OF.

ASSIZE OF NOVEL DISSEISIN. A writ of assize which lay where the claimant had been lately disseised. The action must have been brought subsequent to the next preceding session of the eyre or circuit of justices, which took place once in seven years; Co. Litt. 153; Booth, Real Act. 210.

ASSIZE OF NUISANCE. A writ of assize which lay where a nuisance had been committed to the complainant's freehold.

The complainant alleged some particular fact done which worked an injury to his freehold (*ad nocummentum liberi tenementi sui*), and, if successful, recovered judgment for the abatement of the nuisance and also for damages; Fitzh. Nat. Brev. 183; 3 Bla. Com. 221; 9 Co. 55; Tr. & Ha. Pr. 1776.

ASSIZE OF UTRUM. A writ of assize which lay for a person to recover lands which his predecessor had improperly allowed the church to be deprived of. 3 Bla. Com. 257.

ASSIZES. Sessions of the justices or commissioners of assize.

These assizes are held twice in each year in each of the various shires of England, with some exceptions, by virtue of several commissions, for the trial of matters of fact in issue in both civil and criminal cases. They still retain the ancient name in popular language, though the commission of assize is no longer issued. 3 Steph. Com. 11th ed. 373. See ASSIZE; NISI PRIUS; COMMISSION OF ASSIZE; COURTS OF ASSIZE AND NISI PRIUS.

ASSIZES DE JERUSALEM. A code of feudal law prepared at a general assembly of lords after the conquest of Jerusalem, A. D. 1099.

It was compiled principally from the laws and customs of France. It was reduced to form by Jean d'Iblyn, *Comte de Japhe et Ascalon*, about the year 1290. 1 Fournel, *Hist. des. Av.* 49; 2 Dupin, *Prof. des Av.* 674; Steph. Pl. Andr. ed. App. xi.

ASSOCIATE. An officer in each of the superior courts of common law in England whose duty it was to keep the records of his court, to attend its *nisi prius* sittings, and to enter the verdict, make up the *posita*, and deliver the record to the party entitled thereto. Abbott, Law Dict.

A person associated with the judges and clerk of assize in commission of general jail delivery. Mozley & W. Dict.

The term is frequently used of the judges of appellate courts, other than the presiding judge or chief justice.

ASSOCIATED PRESS. A corporation organized under the laws of the state of Illinois in 1892. The object of its creation was, "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same; to purchase, erect, lease, operate and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals: to

make and deal in periodicals and other goods, wares, and merchandise. It has about eighteen by-laws with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of the newspapers, and the only business of the corporation is that enunciated in its charter, and is mainly buying, gathering and accumulating news and furnishing the same to persons and corporations who have entered into contract thereof. It may furnish news to persons and corporations other than those who are its stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers, other than its stockholders, who have entered into contracts with it for procuring news. 184 Ill. 442-3.

It is a private corporation which from the time of its organization and establishment in business, sold its news reports to various newspapers who became members. By gathering news for the sole purpose of publication, it has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. *Id.*, 449.

ASSOCIATION (Lat. *ad*, to, and *sociare*—from *socius*, a companion).

The act of a number of persons uniting together for some purpose.

The persons so joining.

In the United States this term is used to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some enterprise; Abbott, L. Dict.

In English Law. A writ directing certain persons (usually the clerk and his subordinate officers) to associate themselves with the justices and sergeants for the purpose of taking the assizes. 3 Bla. Com. 59.

ASSOIL (spelled also *assoile*, *assoiltye*). To set free; to deliver from communication. Stat. 1 Hen. IV. c. 7; Cowel.

ASSUMPSIT (Lat. *assumere*, to assume, to undertake; *assumpsit*, he has undertaken).

In Contracts. An undertaking, either express or implied, to perform a parol agreement. 1 Lilly, Reg. 132.

Express assumpsit is an undertaking made orally, by writing not under seal, or by matter of record, to perform an act or to pay a sum of money to another.

Implied assumpsit is an undertaking presumed in law to have been made by a party, from his conduct, although he has not made any express promise.

The law presumes such an undertaking to have been made, on the ground that everybody is supposed to have undertaken to do what is, in point of law, just and right; 2 Burr. 1008; L. J. 11 C. P. 100; 8 C. B. 545; Leake, Contr. 75; 5 Ind. App. 183. Such an undertaking is never implied where the party has made an express promise; 2 Term 100; 10 Mass. 192; 20 Am. Jur. 7; nor ordinarily against the express declaration of the party to be charged, 1 Me. 125; 13 Pick. 165; nor will it be implied unless there be a request or assent by the defendant shown; 20 N. H. 490; 1 Greenl. Ev. § 107; though such request or assent may be inferred from the nature of the transaction; 1 Dowl. & L. 984; 15 Conn. 53; 28 Vt. 401; 2 Dutch. 49; or from the silent acquiescence of the defendant; 22 Am. Jur. 2; 14 Johns. 378; 2 Blatchf. 843; or even contrary to fact on the ground of legal obligation; 1 H. Blac. 90; 3 Campb. 298; 6 Mod. 171; 14 Mass. 327; 4 Me. 258; 20 Am. Jur. 9; 13 Johns. 490; no promise to pay is implied from a mere use of personal property with the permission of the owner; 1 Ariz. 240; and to recover for the use of one's name as an indorser, there must at least be proof of a contract therefor; 141 Pa. 58.

In Practice. A form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; 7 Term 351; 3 Johns. Cas. 60.

It differs from *debt*, since the amount claimed need not be liquidated (see *DARR*), and from *convent*, since it does not require a contract under seal to support it. See *COVENANT*. See 4 *Coke* 91; 4 *Burr* 1008; 14 *Pick* 428; 2 *Metc.* 181. *Assumpsit* is one of the class of actions called actions upon the case, and in the older books is called action upon the case upon *assumpsit*. *Comyns*, Dig.

Special assumpsit is an action of assumpsit brought upon an express contract or promise.

General assumpsit is an action of assumpsit brought upon the promise or contract implied by law in certain cases. See 2 *Sm. Lead. Cas.* 14; *Tr. & Ha. Pr.* 1490.

The action should be brought by the party from whom the consideration moved; 1 *Ventr.* 318; 3 *B. & P.* 149, n.; 14 *East* 582; 4 *B. & C.* 664; 3 *Pick.* 83, 92; 8 *Johns.* 58; 1 *Pet. C. C.* 169; or by the person for whose benefit it was paid; 15 *Me.* 285, 443; 1 *Rich. S. C.* 263; 5 *Blackf.* 179; 17 *Ala.* 333; against the party who made the undertaking; suing the principal to recall money paid to the agent. See 4 *Burr.* 1984; 1 *Sumn.* 277, 317. It lies for a corporation; 2 *Lev.* 252; 1 *Campb.* 466; and against it, in the United States; 7 *Cra.* 297; 12 *Wheat.* 68; 17 *N. Y.* 449; 30 *Mo.* 452; 9 *Tex.* 69; 8 *Pick.* 178; 14 *Johns.* 118; 2 *Bay* 109; 1 *Ark.* 180; 8 *Halst.* 182; 3 *S. & R.* 117; but not in England formerly (because a corporation could not contract by parol), unless by express authority of some legislative act, or in actions on negotiable paper; 1 *Chit. Pl.* *119; 4 *Bingh.* 77; but now corporations are liable in many cases on contracts not sealed, and generally in executed contracts, up to the extent of the benefit received; 6 *A. & E.* 846; *L. R.* 10 *C. P.* 409; *Brice, Ultra Vires*, 3d ed. 693.

Assumpsit will lie at the suit of a third party on a contract made in his favor in most of the United States; 93 *U. S.* 143; 85 *Pa.* 235 (but see 3 *id.* 330); 20 *N. Y.* 258 (but see 69 *N. Y.* 280); 85 *Ill.* 279; 43 *Wis.* 319. *Contra*, 107 *Mass.* 39; 15 *N. H.* 129. See discussion in 15 *Am. L. Rev.* 281, and 4 *N. J. L. J.* 197.

A promise or undertaking on the part of the defendant, either expressly made by him or implied by the law from his actions, constitutes the gist of the action. A sufficient consideration for the promise must be averred and shown; 21 *Am. Jur.* 258, 283; though it may be implied by the law; 7 *Johns.* 29, 321; 14 *Pick.* 210; as in case of negotiable promissory notes and bills, where a consideration is presumed to exist till its absence is shown; 6 *Vt.* 165; and see *Story, Pr. Notes*.

The action lies for—

Money had and received to the plaintiff's use, including all cases where one has money, or that which the parties have agreed to treat as money; 1 *Greenl. Ev.* 8117; 2 *N. H.* 333; 6 *Cow.* 297; 8 *Gill & J.* 333; 89 *Ga.* 799; 127 *Mass.* 476; 62 *Ala.* 46; 96 *Ind.* 253; in his hands which in equity and good conscience he is bound to pay over, including bank-notes; 18 *East* 20, 130; 17 *Mass.* 560; 7 *Cow.* 662; 32 *Ala.* 523; promissory notes; 9 *Pick.* 293; 16 *Me.* 285; 7 *Johns.* 132; 11 *N. H.* 218; 6 *Blackf.* 378; notes payable in specific articles; 7 *Wend.* 311; and some kinds of evidences of debt; 3 *Campb.* 199; 8 *Wend.* 641; 17 *Mass.* 560; 4 *Pick.* 71; but not goods, except under special agreement; 1 *East* 1; 7 *S. & R.* 246; 3 *B. & P.* 559; 1 *Y. & J.* 380; 1 *Dougl.* 117; whether delivered to the defendant for a particular purpose which he refuses to apply it; 3 *Price* 68; 3 *Day* 252; 4 *Cow.* 607; 1 *D. Chipm.* 101; 1 *Harr. Del.* 446; see 2 *Bingh.* 7; 17 *Mass.* 575; or obtained by him through fraud; 1 *Salk.* 28; 4 *Mass.* 483; 4 *Conn.* 350; 30 *Vt.* 277; 4 *Ind.* 43; or by tortious seizure and conversion of the plaintiff's property; 10 *Pick.* 161; and see *Cowp.* 414; 1 *Campb.* 285; 8 *Bingh.* 43; or by duress, imposition, or undue advantage or other involuntary and wrongful payment; 6 *Q. B.* 276; 3 *N. H.* 508; 20 *Johns.* 299; 7 *Me.* 135; 12 *Pick.* 206; 26 *Barb.* 29; 4 *Ind.* 49; 24 *Conn.* 88; 10 *Pet.* 187; 28 *Vt.* 370; see 2 *Jac. & W.* 249; or for a security which turns out to be a forgery, under some circumstances; 3 *B. & C.* 428; 26 *Conn.* 23; 30 *Pa.* 527; 4 *Ohio St.* 623; or

paid under a mistake of facts; 9 *Bingh.* 647; 15 *Mass.* 208; 1 *Wend.* 355; 6 *Yerg.* 488; 26 *Barb.* 423; 4 *Gray* 888; see 2 *Term* 648; 15 *Me.* 45; 20 *Wend.* 174; 18 *B. Monr.* 793; or upon a consideration which has failed; 3 *B. & P.* 181; 17 *Mass.* 1; 2 *Johns.* 455; 20 *id.* 24; 9 *Cal.* 338; 4 *Gill & J.* 463; 18 *S. & R.* 259; 4 *Conn.* 350; 10 *Ind.* 172; 15 *Tex.* 224; see 18 *B. Monr.* 523; or under an agreement which has been rescinded without partial performance; 3 *C. & P.* 514; 1 *Vt.* 159; 30 *id.* 432; 5 *Ohio* 286; 15 *Mass.* 319; 5 *Johns.* 85; *Mart. & Y.* 20, 203; 2 *N. & M'C.* 65; 20 *N. H.* 102; or on common counts for breach of warranty upon the ground that the money was paid without consideration; 74 *Mich.* 318; or the owner of stolen money may recover the amount against one with whom it was deposited by the thief, who, after notice, pays it to a third person; 127 *Pa.* 284; interest paid by mistake on judgment which did not bear interest is recoverable back; 84 *Ky.* 463; or where a factor disobeys instructions and sells grain, deposits made by principal may be recovered; 114 *Ill.* 196; or to recover purchase money under void contract for sale of lands; 49 *Mo.* App. 361; or to recover money advanced as prepayment of services to be rendered under contract, where contract is not performed; 58 *Hun* 611; or where one receives money for a specific purpose, but to which he does not apply it, keeping it for himself; 55 *Hun* 505.

Money paid for the use of another, including negotiable securities; 4 *Pick.* 414; 3 *N. H.* 366; 3 *Johns.* 206; 5 *Rawle* 91, 98; 2 *Vt.* 213; 6 *Me.* 331; see 7 *Me.* 355; 1 *Wend.* 424; 7 *S. & R.* 238; 11 *Johns.* 464; where the plaintiff can show a previous request; 20 *N. H.* 490; or subsequent assent; 12 *Mass.* 11; 1 *Greenl. Ev.* § 118; 53 *Conn.* 175; 39 *Mo.* App. 376; or that he paid it for a reasonable cause, and not officiously; 5 *Esp.* 171; 8 *Term* 310; 3 *M. & W.* 607; 16 *Mass.* 40; 93 *Cal.* 372, 376; 2 *Bosw.* 516; 14 *Q. B. D.* 811; *L. R.* 3 *C. P.* 58; *Keen. Qua. Cont.* 388; but a mere voluntary payment of another's debt will not make the person paying his creditor; 1 *N. Y.* 472; 1 *Gill & J.* 433, 497; 5 *Cow.* 603; 3 *Ala.* 500; 4 *N. H.* 138; 20 *id.* 490.

Money lent, including negotiable securities of such a character as to be essentially money; 11 *Jur.* 157, 289; 6 *Mass.* 189; 15 *Pick.* 212; 7 *Wend.* 311; 3 *Gill & J.* 369; 11 *N. H.* 218; 18 *Me.* 296; 3 *J. J. Marsh.* 87; 21 *Ga.* 384; see 10 *Johns.* 418; 1 *Hawks* 195; 9 *Ohio* 5; 16 *M. & W.* 449; actually loaned by the plaintiff to the defendant himself; 1 *Dane, Abr.* 196.

Money found to be due upon an account stated, called an *insimul computassent*, for the balance so found to be due, without regard to the nature of the evidences of the original debt; 3 *B. & C.* 196; 4 *Price* 260; 12 *Johns.* 227; 6 *Mass.* 358; 6 *Metc.* *Mass.* 127; 7 *Watts* 100; 11 *Leigh* 471; 10 *N. H.* 532; 149 *Pa.* 207.

Goods sold and delivered either in accordance with a previous request; 9 *Conn.* 379; 6 *Harr. & J.* 273; 1 *Bosw.* 417; 33 *Pa.* 506; 35 *N. H.* 477; 28 *Vt.* 668; 133 *Pa.* 346; or where the defendant receives and uses them; 6 *J. J. Marsh.* 441; 12 *Mass.* 185; 41 *Me.* 565; although tortiously; 3 *N. H.* 384; 1 *Mo.* 430, 643. See 5 *Pick.* 285; *TROVER*.

Work performed; 11 *Mass.* 37; 19 *Ark.* 671; 1 *Hempst.* 240; 94 *Ala.* 194; 43 *Conn.* 226; 97 *N. Y.* 293; and materials furnished; 7 *Pick.* 131; with the knowledge of the defendant; 20 *Johns.* 28; 1 *M'Cord* 22; 19 *Ark.* 671; so that he derives benefit therefrom; 27 *Mo.* 308; 11 *Ired.* 84; whether there be an express contract or not. Also, where there is an express promise to pay for extra work, although the contract requires that the estimate should be in writing; 96 *Ala.* 348. As to whether anything can be recovered where the contract is to work a specified time and the labor is performed during a portion of that time only, see 29 *Vt.* 219; 25 *Conn.* 188; 6 *Ohio St.* 505; 1 *Sneed* 622; 24 *Barb.* 174; 23 *Mo.* 238. Services performed by relatives for one in his lifetime, but in the absence of an ex-

press or implied contract for payment, cannot be recovered for after his death; 31 *Ill.* App. 340. One may recover for work and material on an implied assumpsit although the work is destroyed before its completion; 153 *Mass.* 517.

Use and occupation of the plaintiff's premises under a parol contract express or implied; 7 *J. J. Marsh.* 6; 13 *Johns.* 240; 4 *Day* 28; 11 *Pick.* 1; 4 *Hen. & M.* 161; 3 *Harr. N. J.* 214; 1 *How.* 153; 80 *Vt.* 277; 31 *Ala.* n. s. 412; 41 *Me.* 446; 3 *Cal.* 196; 4 *Gray* 329; but not if it be tortious; 2 *N. & M'C.* 156; 3 *S. & R.* 500; 10 *Gill & J.* 149; 6 *N. H.* 298; 14 *Ohio* 244; 10 *Vt.* 502; see 20 *Me.* 525; 76 *Ala.* 394; 80 *Mo.* 199; or where defendant enters under a contract for a deed; 6 *Johns.* 46; 3 *Conn.* 203; 4 *Ala.* 294; 7 *Pick.* 301; 2 *Dana* 295. The relation of landlord and tenant must exist expressly or impliedly; 1 *Dutch.* 298; 6 *Ind.* 412; 19 *Ga.* 313.

And in many other cases, as, for instance, for a breach of promise of marriage; 2 *Mass.* 73; 2 *Overt.* 233; to recover the purchase-money for land sold; 14 *Johns.* 162, 210; 20 *id.* 338; 3 *M'Cord* 421; and, specially, upon wagers; 2 *Chit. Pl.* 114; feigned issues; 2 *Chit. Pl.* 116; upon foreign judgments; 11 *East* 124; 3 *Term* 493; 8 *Mass.* 273; 5 *Johns.* 132; but not on a judgment obtained in a sister state; 1 *Bibb* 361; 19 *Johns.* 162; 11 *Me.* 94; 14 *Vt.* 92; 2 *Rawle* 431; and see 2 *Brev. N. C.* 99; money due under an award; 9 *Mass.* 198; 21 *Pick.* 247; where the defendant has obtained possession of the plaintiff's property by a tort for which trespass or case would lie; 10 *Pick.* 161; 3 *Dutch.* 43; 5 *Harr. Del.* 39; 21 *Ga.* 526; or, having rightful possession, has tortiously sold the property; 12 *Pick.* 452, 120; 1 *J. J. Marsh.* 543; 3 *Watts* 277; 3 *Dana* 552; 1 *N. H.* 151; 4 *Call* 451; 2 *Gill & J.* 326; 3 *Wis.* 649; or converted it to his own beneficial use; 4 *Term* 211; 3 *M. & S.* 191; 13 *Mass.* 454; 7 *Pick.* 193; 1 *N. H.* 451; 29 *Ala.* 332; 41 *Me.* 565; 1 *Hempst.* 240; 3 *Sneed* 454; 3 *Ia.* 599; or where a sheriff pays money to subsequent lienor by order of court, which order is subsequently reversed, the attaching creditor may recover of the lienor; 132 *N. Y.* 363; or where one purchases a bond relying on the seller's recommendation that it is good, when in fact it is worthless; 96 *Mich.* 261.

The action may be brought for a sum specified in the promise of the defendant, or for the definite amount of money ascertained by computation to be due, or for as much as the services, etc., were worth (called a *quantum meruit*), or for the value of the goods, etc. (called a *quantum valent*). The value of services performed under a contract void by the statute of frauds is recoverable on *quantum meruit*; 20 *Nev.* 168; 40 *Kans.* 367; a city is liable for water supplied after termination of the contract; 110 *N. C.* 449; one hired to do work, but who is wrongfully stopped, may recover on *quantum meruit* what the labor is worth, regardless of its value to the other party; 83 *Mich.* 263.

The form of the action, whether general or special, depends upon the nature of the undertaking of the parties, whether it be express or implied, and upon other circumstances. In many cases where there has been an express agreement between the parties, the plaintiff may neglect the special contract and sue in general assumpsit. He may do this: first, where the contract is executed; 4 *B. & P.* 355; 5 *B. & C.* 628; 18 *Johns.* 451; 19 *Pick.* 496; 11 *Wheat.* 237; 3 *T. B. Monr.* 405; 7 *Vt.* 228; 5 *Harr. & G.* 45; 3 *M'Cord* 421; 18 *Ga.* 384; and is for the payment of money; 2 *Munt.* 344; 1 *J. J. Marsh.* 394; 3 *T. B. Monr.* 405; 1 *Bibb* 395; 4 *Gray* 292; though if a time be fixed for its payment, not until the expiration of that time; 1 *Stark.* 229; second, where the contract, though only partially executed, has been abandoned by mutual consent; 7 *Term* 181; 12 *Johns.* 274; 16 *Wend.* 632; 16 *Me.* 288; 11 *Rich. S. C.* 52; 7 *Cal.* 150; see 29 *Pa.* 83; or extinguished and rescinded by some act of the defendant; 11 *Me.* 317; 2 *Blackf.* 167; 20 *N. H.* 457; see 4 *Cra.* 239;

third, where that which the plaintiff has done has been performed under a special agreement, but not in the time or manner agreed, but yet has been beneficial to the defendant and has been accepted and enjoyed by him; 1 Bingham, 34; 13 Johns, 94; 14 Mass. 282; 5 Gill & J. 240; 8 Yerg. 411; 12 Vt. 625; 23 Mo. 228; 8 Ind. 59, 72; 5 Mich. 449; 3 Ia. 90; 3 Wis. 328. See 1 Greenl. Ev. § 104; 2 Sm. Lead. Cas. 14; 31 Pa. 218.

A surety who has paid money for his principal may recover upon the common counts, though he holds a special agreement of indemnity from the principal; 1 Pick. 118. But in general, except as herein stated, if there be a special agreement, special assumpsit must be brought thereon; 14 B. Monr. 177; 22 Barb. 239; 2 Wis. 34; 14 Tex. 414.

The declaration should state the contract in terms, in case of a special assumpsit; but, in general, assumpsit contains only a general recital of consideration, promise, and breach. Several of the common counts are frequently used to describe the same cause of action. Damages should be laid in a sufficient amount to cover the real amount of the claims; see 4 Pick. 194; 2 Const. S. C. 339; 4 Munf. 95; 2 N. H. 289; 1 Ill. 286; 4 Johns. 280; 5 S. & R. 519; 6 Conn. 176; 2 Bibb 429; 43 Vt. 195; 23 W. Va. 617.

Non assumpsit is the usual plea under which the defendant may give in evidence most matters of defence; Conn. Dig. Pleader (2 G. 1). Under that plea it may be shown that no such promise as alleged was made or is implied, or that the promise if made was void *ab initio*; but defences which from their nature admit a promise and set up a subsequent performance or avoidance as, e. g. payment, set off, statute of limitations should be pleaded specially, in the absence of statutory definition of the effect of the general plea, which exists in many states. Where there are several defendants, they cannot plead the general issue severally; 6 Mass. 444; nor the same plea in bar severally; 13 Mass. 152. The plea of not guilty is defective, but is cured by verdict; 8 S. & R. 541; 4 Call 451.

See, generally, Bacon, Abr.; Comyns, Dig., *Action upon the case upon assumpsit*; Dane, Abr.; Viner, Abr.; 1 Chit. Pl.; Lawes, Assump.; 1 Greenl. Ev.; Lawson, Encyc. of Pl. & Pr.; Sm. Lead. Cas., note to *Lamp-leigh v. Braithwaite*; COVENANT; DEBT; JUDGMENT.

ASSOCIATION. See CLUB.

ASSOCIATION, ARTICLES OF
See ARTICLES OF ASSOCIATION.

ASSOCIATION THEORY. In Negligence. The "association theory" means, that the master will not be excused for negligence resulting in injury to one servant which is inflicted by a fellow-servant unless the servants are so engaged and situated as that each by carefulness and attention in the performance of his duties may protect himself from injury caused by the negligence of the person with whom he is working. 152 Ky. 484, 153 S. W. 753; 139 Ky. 43, 129 S. W. 319.

ASSOCIATIONS. By c. 441 of the Acts of 1909, the trustees of "voluntary associations under a written instrument or declaration of trust the beneficial interest under which is divided into transferable certificates of participation or shares," are required to file copies of the instrument of trust with designated public officers; and by c. 184 of the Acts of 1916, such associations may be sued for debts, obligations, or liabilities, and their property may be subjected to attachment and execution as if they were corporations. 265 U. S. 147. See CORPORATION TAX LAW.

ASSUME. To take to or upon one's self. Anderson. A person who assumes a lease takes to himself or accepts the obligations and the benefits of the lessor under the contract. *Id.*; 44 Ohio St. 314. Assumed may be used in the sense of claimed; as, in

saying that assumed facts must be proved before the main fact can be inferred. *Id.*; 62 Wis. 63.

ASSUMED RISK. "Assumed risk" is one that grows out of the contract between the master and servant by which the servant agrees to assume all of the ordinary risks and dangers incidental to the work in which he is to be engaged. 162 Ky. 373, 172 S. W. 698.

The doctrine of "assumed risk" arises out of the contractual relations between the master and servant, and it cannot be presumed that the servant contracts to risk the hazards and dangers to himself, arising from the gross negligence of a superior, or the negligence of a master. 162 Ky. 366, 172 S. W. 698.

The doctrine of "assumed risk" has been extended until now it is well established that a servant cannot recover from the master for injuries inflicted by the negligence of a fellow servant in the same grade of employment engaged in the same field of labor, and associated or working with the injured servant, however gross the negligence of the fellow servant may be. 127 Ky. 741, 106 S. W. 795.

ASSUMPTION OF RISK. The automatic assumption, by a person voluntarily and uncompensatingly entering an employment, of all the risks and hazards ordinarily and usually incident to such employment, and those incident to all dangers and defects of the employment which, to a person of his experience and understanding, are or ought to be patent and obvious, or which have been pointed out to him, and not complained of by him. This does not include the risks incident to latent defects and dangers of which he has no knowledge and of which he is not warned, nor does it include those arising out of the negligence of the master or his superintendent. 20 A. & E. Ency. L. (2nd ed.), 109-134. See MASTERS' LIABILITY; SERVANT'S LIABILITY.

A miner does not assume the "risk" unless obviously perilous. 160 Ky. 673, 170 S. W. 14.

"Assumption of risk" rests upon the intelligent acquiescence and knowledge of the danger and appreciation of the risk naturally incident to the employment or arising from a particular situation in which the work is done. It negatives the *prima facie* liability of the master, and does not involve the aggravation or creation of the peril by misconduct of the servant. It is generally held to grow out of the contract of employment, and of the maxim *volenti non fit injuria*. 159 Ky. 687, 167 S. W. 933.

ASSURANCE. In Conveyancing. Any instrument which confirms the title to an estate.

Legal evidence of the transfer of property. 2 Bla. Com. 294.

The term *assurances* includes, in an enlarged sense, all instruments which dispose of property, whether they be the grants of private persons, or not; such as fines and recoveries, and private acts of the legislature. Eunom. Dial. 2, s. 5.

In Commercial Law. Insurance.

ASSURANCE, DISENTAILING.
See DISENTAILING DEED.

ASSURANCES, COMMON. See IN PAIS.

ASSURED. A person who has been insured by some insurance company, or underwriter, against losses or perils mentioned in the policy of insurance.

The party whom the underwriters agree to indemnify in case of loss; 1 Phill. Ins. sect. 2. He is sometimes designated in maritime insurance by description, and not by name, as in a policy "for whom it may concern;" 3 Rich. Eq. 274; 40 Me. 181; 6 Gray 192; 27 Pa. 268; 83 N. H. 9; 13 Md. 315.

ASSURER. An insurer; an underwriter.

ASSYTHEMENT. In Scotch Law. Damages awarded to the relative of a murdered person from the guilty party, who has not been convicted and punished. Paterson, Comp.

The action to recover it lies for the personal representatives; 26 Scott. Jur. 156; and may be brought by collateral relations; 27 Scott. Jur. 450.

ASTRARIUS HAERES. In old English Law. An heir who, with his family, was put, by his living ancestor, in actual possession of the latter's house. Cunningham.

ASTRICT. In Scotch Law. To assign to a particular mill.

Used of lands the occupants of which were bound to grind at a certain mill. Bell, Dict.; Paterson, Comp. n. 290; Erskine, Inst. 2, 9, 18, 32.

ASTRIHILLET. In Saxon Law. A penalty for a wrong done by one in the king's peace. The offender was to replace the damage twofold. Spelman, Gloss.

ASYLUM. An institution for the protection and relief of unfortunates, as an asylum for the poor, for the deaf and dumb, or for the insane. 3 Am. & Eng. Ency. 2nd ed., 167; 6 Neb. 297. As applied to a fugitive from justice seeking asylum in a foreign country, means not only place, but also shelter, security, protection. *Id.*; 12 Blatchf. 395. In international law, asylum means a place where the matter may not be tried. *Id.*; 5 B. & S. 645.

A refuge; sanctuary; a charitable institution. 3 Bush (Ky.) 391.

AT. A preposition which may be used to denote a fixed and definite point in time or space, or merely nearness to that point; may also indicate direction toward; according to the context, may assume the meaning of in, within, through, during, to the extent of, and various other prepositions and phrases. Stand. Dict.; Thom. Ken. Wds. & Phs.; Anderson.

The word "at" is not invariably used to denote a fixed and definite time or place, but is sometimes used to mean about, or near to, the time or place stated. *At the house* may, and often does, mean about or near the house; but in the case of a note or bill payable at the Northern Bank of Kentucky, at the expiration of sixty days from date, it would hardly be argued, on the authority of Webster or Worcester, that the legal requirements of the contract would be satisfied by a demand of payment anywhere about or near to the bank, or near to or within a reasonable time after the expiration of the period of sixty days. In the construction of a will giving a legatee the right of election to be exercised at the death of the testator, it would undoubtedly be held that the right might be exercised within a reasonable time after the event, because the more rigid interpretation of the words would be obviously inconsistent with the intention of the testator, and would necessarily and inevitably defeat the exercise of such right. 1 Duvall (Ky.) 96. Covenant to deliver tobacco "at" a warehouse does not require the covenantor to put it in the house. 5 B. Mon. (Ky.) 372.

AT ISSUE. See MATTER IN ISSUE.

AT LARGE. In full, as for proceedings to be recorded at large, instead of by memoranda. In general, not limited, or specific. Representing a State or district in its entirety, as a delegate, elector, or Congressman at large. Applicable to all of a territory, as statutes at large. Unconfined, as an animal running at large. Undecided, open to discussion, as the subject was left at large. Anderson; Stand. Dict.

AT LAW. According to the course of the common law. In the law.

AT LEAST. In Computation of Time. A much vexed question is whether the addition of the phrases "at least" or "not less than" demands clear or entire days, for if such be the case, both the termini must

AT LIBERTY

be excluded. On principle it would seem that "three days" means the same as "at least three days," and it is held in most jurisdictions in the United States that where "at least" or "not less than" is added, the *terminus a quo* will be excluded, and, the *terminus ad quem* included; in accordance with the usual rule. 28 A. & E. Ency. (2nd ed.), 220; 68 Fed. Rep. 781.

AT LIBERTY. It was error for the court in instructing the jury as to the plaintiff's compensation to use the words you are "at liberty" to take into consideration disgrace, shame, etc., as the jury should have been told that they should take into consideration in forming that part of their verdict such of the elements named as they believed from the evidence existed. 67 S. W. 6.

AT OR NEAR. A distance of four miles in the scheme of the Union Pacific Railroad may be reasonably within the expression "at or near." 222 U. S. 237.

The averment that she was killed "at or near" the private crossing should be construed that she was killed at a place on the track other than the crossing. 116 Ky. 144, 75 S. W. 277.

AT RANDOM. One who intentionally shot at a dog, or shot a dog, was not in any sense of the word, guilty of shooting "at random." 50 S. W. 843.

AT THE END. In a statute requiring that a will be signed "at the end," or close thereof, it was held a substantial compliance, where a will was written on a sheet of legal-cap paper, and there not being room at the bottom of the sheet for the testator's signature, he wrote his name on the ruled line which runs from the top to the bottom of the paper near the left margin, the name being written thereon beginning at the bottom. There was a small space above his name as written, that is, between his name and the extreme left margin of the sheet, but this was not so unreasonable a blank space as to render the signature insufficient. 162 Ky. 771, 173 S. W. 127.

ATAMITA (Lat.). In Civil Law. A great-great-great-grandfather's sister.

ATAVUNCULUS (Lat.). In Civil Law. A great-great-great-grandfather's brother.

ATAVUS. In Civil Law. The male ascendant in the fifth degree.

ATHA. In Saxon Law. (Spelled also *Atta*, *Athe*, *Atte*.) An oath. Cowel; Spelman, Gloss.

Athes, or *Athas*, a power or privilege of exacting and administering an oath in certain cases. Cowel; Blount.

ATHEIST. One who denies or does not believe in the existence of a God.

Such persons are, at common law, incapable of giving testimony under oath, and, therefore, incompetent witnesses. Bull. N. P. 292. See 1 Atk. Ch. 21; 2 Cow. 431, 433, n.; 5 Mas. 19; 13 Vt. 362; 17 Ill. 541. To render a witness competent, there must be superadded a belief that there will be a punishment for swearing falsely, either in this world or the next; 14 Mass. 184; 1 Greenl. Ev. § 370; Tayl. Ev. 1175. See 7 Conn. 63; 18 Johns. 98; 17 Wend. 460; 2 W. & S. 262; 26 Pa. 274; 10 Ohio 121. The disability resulting from atheism has been wholly or partly removed in many of the states of the United States; 1 Greenl. Ev. § 369, n. See, generally, 1 Sm. L. Cas. 737.

ATILIAN LAW, THE. See LEX ATILIA.

ATILUM (Lat.). Tackle; the rigging of a ship; plough-tackle. Spelman, Gloss.

ATINIAN LAW, THE. See LEX ATINIA.

ATMATERTERA (Lat.). In Civil Law. A great-great-great-grandmother's sister.

ATTACHE. One attached to the suite of an ambassador; one attached to a foreign legation. R. & L. Diet.

ATTACHIARE. To attach a person or property; to seize. Burrill. See DETACH-ARE.

ATTACHMENT. Taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it.

A writ for the accomplishment of this purpose. This is the more common sense of the word.

It is in its nature, but not strictly, a proceeding *in rem* in which the process is to be served on the thing itself, and the mere possession of the thing, by the service of process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever; Drake, Att. § 4 a; 39 Pa. 50; 55 Mo. 128.

Of Persons. A writ issued by a court of record, commanding the sheriff to bring before it a person who has been guilty of contempt of court, either in neglect or abuse of its process or of subordinate powers; 3 Bla. Com. 280; 4 id. 283; or disregard of its authority in refusing to do what is enjoined; 1 Term 266; or by openly insulting the court; Saund. Pl. Cr. 73 b; 4 Bla. Com. 283; 3 id. 17. It is to some extent in the nature of a criminal process; Stra. 441. See 5 Halst. 63; 1 Cow. 121, n.; 1 Term 266; Cowp. 594; Willes 292.

Of Property. A writ issued at the institution or during the progress of an action, commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of the defendant to satisfy the demands of the plaintiff.

In General.

The original design of this writ was to secure the appearance of one who had disregarded the original summons, by taking possession of his property as a pledge; 3 Bla. Com. 280.

By an extension of this principle, in the New England states, property attached remains in the custody of the law after an appearance, until final judgment in the suit. See 7 Mass. 127. In some states attachments are distinguished as foreign and domestic,—the former issued against a non-resident of the state, the latter against a resident. Where this distinction is preserved, the foreign attachment enures solely to the benefit of the party suing it out; while the avails of the domestic attachment may be restored by other creditors, who come into court and present their claims for that purpose.

It is a distinct characteristic of the whole system of remedy by attachment, that it is—except in some states where it is authorized in chancery—a special remedy at law, belonging exclusively to a court of law, and to be resorted to by other creditors, who come into court and present their claims for that purpose.

In the New England states the attachment of the defendant's property, rights, and credits is an incident of the summons in all actions *ex contractu*. This is called Trustee Process, *q. v.* Elsewhere throughout the country the writ issues only upon cause shown by affidavit. And in most of the states its issue must be preceded by the execution by or on behalf of the plaintiff of a cautionary bond to pay the defendant all damage he may sustain by reason of the attachment. The grounds upon which the writ may be obtained vary in the different states. Wherever an affidavit is required as the basis of the attachment, it must verify the plaintiff's cause of action, and also the existence of some one or more of the grounds of attachment prescribed by the local statute as authorizing the issue of the writ.

The remedy by attachment is allowed in general only to a creditor. In some states, under special statutory provisions, damages arising *ex delicto* may be sued for by attachment; but the almost universal rule is otherwise. The claim of an attaching creditor, however, need not be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of a jury. It is sufficient if the demand arise on contract.

and that the contract furnish a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury by their verdict to find it; 3 Cal. 323; 2 Wash. C. C. 362; 8 Gill 192; 1 Leigh 285; 11 Ala. 941; 4 Mart. La. 517; 2 Ark. 415; 3 Ind. 374; 3 Mich. 277.

In some states an attachment may, under peculiar circumstances, issue upon a debt not yet due and payable; but in such cases the debt must possess an actual character to become due in future, and not be merely possible and dependent on a contingency, which may never happen; 15 Ala. 455; 13 La. 62; 1 Handy 442. An attachment can be sued out in equity against an absconding debtor by the accommodation maker of a negotiable note not yet due; 37 W. Va. 847.

Corporations, like natural persons, may be proceeded against by attachment; 9 N. H. 394; 15 S. & R. 173; 1 Rob. Va. 573; 47 Ga. 676; 14 La. 415; 4 Humphr. 369; 9 Mo. 421; 8 Porter 404; 22 Ill. 9. It will lie against a corporation for the conversion of its own stock; 3 Misc. Rep. 66.

Representative persons, such as heirs, executors, administrators, trustees, and others, claiming merely by right of representation, are not liable to be proceeded against, as such, by attachment; 1 Johns. Cas. 373; 4 Day 87; 3 Halst. 179; 3 Green, N. J. 183; 2 Dall. 73, 97; 1 Harp. 125; 23 Ala. 369; 1 Mart. La. 202, 380; 1 Cra. 352, 469; 41 Barb. 45; 32 Ga. 356; 33 La. Ann. 9; 11 R. I. 286.

The levy of an attachment does not change the estate of the defendant in the property attached; 1 Pick. 485; 3 McLean 354; 1 Rob. La. 443; 32 Me. 233; 6 Humphr. 151; 1 Swa. 208; 3 B. Monr. 579. Nor does the attaching plaintiff acquire any property thereby; 1 Pick. 485; 3 Brev. S. C. 23; 2 S. & R. 221; 2 Harr. & J. 96; 9 N. H. 488; 2 Penning. 997. Nor can he acquire through his attachment any higher or better rights to the property attached than the defendant had when the attachment was levied, unless he can show some fraud or collusion by which his rights are impaired; 31 Me. 177.

The levy of an attachment constitutes a lien on the property or credits attached; 1 M'Cord 480; 8 Miss. 658; 16 Pick. 264; 10 Johns. 129; 3 Ark. 509; 17 Conn. 278; 14 Pa. 326; 12 Leigh 406; 10 Gratt. 284; 59 Ala. 311; 2 La. Ann. 311; 11 Humphr. 569; Cooke, Tenn. 254; 1 Swa. 208; 1 Ind. 206; 7 Ill. 463; 23 Me. 60; 14 N. H. 509; 1 Zab. 214; 21 Vt. 599, 620; 37 id. 945; 1 Day 117; 23 Mo. 85; 15 Ia. 141; 7 Colo. 107; 33 Tex. 297. But, as the whole office of an attachment is to seize and hold property until it can be subjected to execution, this lien is of no value unless the plaintiff obtain judgment against the defendant and proceed to subject the property to execution.

Where two or more separate attachments are levied simultaneously on the same property, they will be entitled each to an aliquot part of the proceeds of the property; 19 Pick. 544; 1 Cow. 215; 3 Monr. 201; 67 Me. 28; 53 Vt. 305; 17 N. Y. 498; see 4 Humphr. 113; 26 Pa. 351; 3 Dev. L. 265. Where several attachments are levied successively on the same property, a junior attaching creditor may impeach a senior attachment, or judgment thereon, for fraud; 7 N. H. 594; 24 id. 384; 4 Rich. S. C. 561; 6 Gratt. 96; 3 Ga. 140; 4 Abb. Fr. 393; 3 Mich. 531; but not on account of irregularities; 3 M'Cord 201, 345; 4 Rich. S. C. 561; 2 Bail. 209; 9 Mo. 398; 5 Pick. 503; 13 Barb. 412; 9 La. Ann. 8.

By the levy of an attachment upon personality the officer acquires a special property therein, which continues so long as he remains liable therefor, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner upon the attachment being dissolved, but no longer; 6 Johns. 195; 15 Mass. 310; 1 N. H. 289; 3 Me. 322; 28 Vt. 546; 6 Nev. 136; 2 Saunders 47; 1 Black 101; 47 N. H. 164; 76 Me. 484. For any violation of his possession, while his liability for the property continues, he may maintain trover, trespass,

and replevin; 9 Mass. 104; 1 Pick. 232, 289; 5 Vt. 181; 23 N. H. 46; 2 Me. 270; 3 Foster 46; 28 Mo. App. 69.

As it would often subject an officer to great inconvenience and trouble to keep attached property in his possession, he is allowed in the New England states and New York to deliver it over, during the pendency of the suit, to some responsible person, who will give an accountable receipt for it, and who is usually styled a receiver or bailee, and whose possession is regarded as that of the officer, and, therefore, as not discharging the lien of the attachment. This practice is not authorized by statute, but has been so long in vogue in the states where it prevails as to have become a part of their systems, and to have given rise to a large mass of judicial decisions; Drake, Att. § 344.

In many states provisions exist, authorizing the defendant to retain possession of the attached property by executing a bond with sureties for the delivery thereof, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the court may direct. This bond, like the bailment of attached property, does not discharge the lien of the attachment; 20 Miss. 622; 6 Ala. N. S. 45; 7 Mo. 411; 7 Ill. 468; 10 Pet. 400; 10 Humphr. 434. Property thus bonded cannot be seized under another attachment, or under a junior execution; 6 Ala. N. S. 45; 7 B. Monr. 651; 4 La. 304.

Provisions also exist in many states for the dissolution of an attachment by the defendant's giving bond and security for the payment of such judgment as the plaintiff may recover. This is, in effect, merely Special Bail. From the time it is given, the cause ceases to be one of attachment, and proceeds as if it had been instituted by summons; 2 Bibb 221; 7 Ill. 468; 3 McCord 347; 19 Ga. 436; Drake, Att. § 312.

An attachment is dissolved by a final judgment for the defendant; 4 Mass. 99; 23 Pick. 465; 2 Aik. 299; 2 G. Greene 505; 3 id. 157. It may be dissolved, on motion, on account of defects in the plaintiff's proceedings, apparent on their face; but not for defects which are not so apparent; 17 Miss. 516. Every such motion must precede a plea to the merits; 2 Dev. & B. 502; Harr. 38, 156; 7 Mart. La. 368; 4 Jones, N. C. 241; 26 Ala. N. S. 670; 75 id. 339; 66 Miss. 161; 48 Pa. 161. The death of the defendant *pendente lite* is held in some states to dissolve the attachment; 7 Mo. 421; 5 Cranch 507; 7 R. I. 72; 11 id. 621; 7 La. Ann. 39; 63 Ala. 414; 72 id. 151 (but not after judgment; 4 S. & R. 557). And so the civil death of a corporation; 8 W. & S. 207; 11 Ala. N. S. 472. Not so, however, the bankruptcy of the defendant; 21 Vt. 599; 23 Me. 60; 14 N. H. 509; 15 id. 227; 10 Metc. Mass. 320; 1 Zab. 214; 18 Miss. 348; 93 Ill. 77.

In those states where under a summons property may be attached if the plaintiff so directs, the defendant has no means of defeating the attachment except by defeating the action; but in some states, where an attachment does not issue except upon stated grounds, provision is made for the defendant's contesting the validity of the alleged grounds; while in other states it is held that he may do so, as a matter of right, without statutory authority; 3 Caines 257; 7 Barb. N. Y. 656; 12 id. 265; 1 Dall. 165; 1 Yeates 277; 1 Green, N. J. 131, 250; 3 Harr. & M'H. 535; 2 Nott & M'C. 130; 3 Sneed 536; 6 Blackf. 232; 1 Ill. App. 25.

As by custom of London.

This writ reached the effects of the defendant in the hands of third persons. Its effect is simply to arrest the payment of a debt due the defendant, to him, and to compel its payment to the plaintiff, or else to reach personal property in the hands of a third person. It is known in England and in most of the states of the United States as *garnishment*, or the garnishee process; but in some, as the trustee process and factorizing, with the same characteristics. As affects the garnishees, it is in reality a suit by the defendant in the plaintiff's name; 22 Ala. N. S. 831; Hempst. 662.

Garnishment is an effectual attachment of the defendant's effects in the garnishee's hands; 6 Cra. 187; 8 Mass. 436; 14 N. H. 129; Busb. 3; 5 Ala. N. S. 514; 21 Miss.

284; 6 Ark. 391; 4 McLean 535; 41 Kan. 297, 596. It is essentially a legal remedy; and through it equities cannot be settled between the defendant and the garnishee; 5 Ala. N. S. 442; 71 id. 26; 13 Vt. 129; 15 Ill. 89; 75 id. 544; 7 R. I. 15; 120 Mass. 86; 62 Mo. 17. The plaintiff, through it, acquires no greater rights against the garnishee than the defendant has, except in cases of fraud; and he can hold the garnishee only so long as he has, in the attachment suit, a right to enforce his claim against the defendant; 3 Ala. 132; 1 Litt. 274; 35 Conn. 310; 13 R. I. 518; 83 Ill. 55; 5 Pet. 641. No judgment can be rendered against the garnishee until judgment against the defendant shall have been recovered; 3 Ala. N. S. 114; 5 Mart. N. S. La. 307; 14 La. Ann. 374; 23 Ga. 186; 41 Vt. 50; 19 Mo. 71.

The basis of a garnishee's liability is either an indebtedness to the defendant, or the possession of personal property of the defendant capable of being seized and sold under execution; 7 Mass. 438; 3 Me. 47; 2 N. H. 93; 9 Vt. 295; 11 Ala. N. S. 273. And to be a subject of garnishment, the claim must be one for which the principal defendant can maintain an action at law, if due at the time or to become due thereafter; 62 Mich. 316; 23 Neb. 56. The existence of such indebtedness, or the possession of such property, must be shown affirmatively, either by the garnishee's answer or by evidence *alunde*; 9 Cush. 530; 1 Dutch. 625; 2 Iowa 154; 9 Ind. 587; 21 Mo. 30. The demand of the defendant against the garnishee, which will justify a judgment in favor of the plaintiff against the garnishee, must be such as would sustain an action of debt, or *indebitatus assumpsit*; 27 Ala. N. S. 414.

A non-resident of the state in which the attachment is obtained cannot be held as garnishee, unless he have in that state property of the defendant's in his hands, or be bound to pay the defendant money, or to deliver him goods, at some particular place in that state; 10 Mass. 343; 21 Pick. 263; 6 N. H. 497; 6 Vt. 614; 4 Abb. Pr. 72; 2 Cra. 622; 33 Me. 414; 57 Vt. 627; 13 R. I. 196; 33 Mo. 110. A debt may be attached in any state where the debtor can be found if the law of the forum authorize attachments; 50 Minn. 405.

No person deriving his authority from the law, and obliged to execute it according to the rules of the law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority; 8 Mass. 246. Hence it has been held that an administrator cannot, in respect of moneys in his hand as such, be charged as garnishee of a creditor of his intestate; 11 Me. 185; 2 Harr. Del. 349; 5 Ark. 55, 188; unless he have been, by a proper tribunal, adjudged and ordered to pay a certain sum to such creditor; 5 N. H. 374; 3 Harr. Del. 267; 10 Mo. 374. Nor is an executor chargeable as garnishee in respect of a legacy bequeathed by his testator; 7 Mass. 271; 1 Conn. 385; 3 N. H. 67; 2 Whart. 332; 4 Mass. 443. Nor is a guardian; 4 Metc. Mass. 486; 6 N. H. 399. Nor is a sheriff, in respect of money collected by him under process; 3 Mass. 289; 7 Gill & J. 421; 1 Bland, Ch. 443; 1 Murph. 47; 2 Spear 34, 378; 2 Ala. N. S. 253; 1 Swan 208; 9 Mo. 378; 3 Cal. 363; 4 Me. 532; or where it was taken from a prisoner for safekeeping; 18 S. W. Rep. (Tex.) 195; this is not so, however, in some states; 92 Ala. 102; 31 Neb. 811. Nor is a clerk of a court, in respect of money in his hands officially; 1 Dall. 354; 2 Hayw. 171; 3 Ired. 365; 7 Humphr. 132; 7 Gill & J. 421; 3 Hill, S. C. 12; Bail. Eq. 360. It is attachable under trustee process when his only duty is to pay the money to the defendant; 60 Vt. 581. Nor is a trustee of an insolvent, or an assignee of a bankrupt; 5 Mass. 183; 7 Gill & J. 421. Nor is a government disbursing officer; 7 Mass. 259; 3 Pa. 368; 7 T. B. Monr. 439; 3 Sneed 379; 4 How. 20.

A debt not due may be attached in the hands of the garnishee, but he cannot be required to pay the same until it becomes due; 6 Me. 263; 1 Yeates 255; 4 Mass. 235;

1 Harr. & J. 536; 3 Murph. 256; 1 Ala. N. S. 395; 17 Ark. 492.

The defendant in an action of tort cannot be garnished before the recovery of final judgment; 80 Ga. 595. When the wages of a fisherman are to be paid within thirty days after the arrival of the vessel in port, they are liable to garnishment though the thirty days have not expired; 47 Fed. Rep. 912.

In most of the states, the garnishee responds to the proceedings against him by a sworn answer to interrogatories propounded to him; which in some states is held to be conclusive as to his liability, but generally may be controverted and disproved, though in the absence of contradictory evidence always taken to be true. In order to charge the garnishee upon his answer alone, there must be in it a clear admission of a debt due to, or the possession of money or other attachable property of, the defendant; 2 Miles 243; 22 Ga. 52; 2 Ala. 9; 6 La. Ann. 122; 19 Miss. 348; 7 Humphr. 112; 3 Wis. 300; 2 Greene 125; 12 Ill. 358; 2 Cra. 543; 9 Cush. 530; 1 Dutch. 625; 9 Ind. 537; 21 Mo. 30.

Whatever defence the garnishee could set up against an action by the defendant for the debt in respect of which it is sought to charge the garnishee, he may set up in bar of a judgment against him as a garnishee. If his debt to the defendant be barred by the statute of limitation, he may take advantage of the statute; 2 Humphr. 137; 10 Mo. 557; 9 Pick. 144; 37 Pa. 491; 44 Mo. 85; 120 U. S. 506; 14 Colo. 54. He may set up a failure of consideration; Wright 724; 2 Const. S. C. 456; 1 Murph. 463; 7 Watts 12; and may plead a set-off against the defendant; 7 Pick. 166; 25 N. H. 369; 19 Vt. 644.

If by a court having jurisdiction a judgment be rendered against a garnishee, and he satisfy the same under execution, it is a full defence to an action by the defendant against him for the property or debt in respect of which he was charged as garnishee; though the judgment may have been irregular, and reversible on error; 3 B. Monr. 502; 4 Zab. 674; 13 Ill. 358; 1 Ia. 86; 2 Ala. 180; 23 Vt. 516; 32 Pa. 412; 25 Ill. 63.

An attachment plaintiff may be sued for a malicious attachment; and the action will be governed by the principles of the common law applicable to actions for malicious prosecution; 1 Dill. 589; 12 Fed. Rep. 266; 3 Call 446; 17 Mass. 190; 9 Conn. 309; 1 Penning. 631; 4 W. & S. 201; 9 Ohio 103; 4 Humphr. 169; 3 Hawks 545; 9 Rob. La. 418; 14 Tex. 662; 34 Ala. 336; 36 id. 710; 30 Wis. 356.

See Drake, Att.; Wade, Att.

ATTACHMENT OF PRIVILEGE.

In English Law. A process by which a man, by virtue of his privilege, calls another to litigate in that court to which he himself belongs, and who has the privilege to answer there.

A writ issued to apprehend a person in a privileged place. *Termes de la Ley.*

ATTAINDER. That extinction of civil rights and capacities which takes place whenever a person who has committed treason or felony receives sentence of death for his crime. 1 Steph. Com. 408; 1 Bish. Cr. L. § 641.

Attainder by confession is either by pleading guilty at the bar before the judges, and not putting one's self on one's trial by a jury, or before the coroner in sanctuary, when, in ancient times, the offender was obliged to abjure the realm.

Attainder by verdict is when the prisoner at the bar pleads not guilty to the indictment, and is pronounced guilty by the verdict of the jury.

Attainder by process or outlawry is when the party flies, and is subsequently outlawed. Coke, Litt. 891.

The effect of attainder upon a felon is, in general terms, that all his estate, real and personal, is forfeited; that his blood is corrupted, and so nothing passes by inheritance to, from, or through him; 1 Wms.

Saund. 361, n.; 6 Coke 63 a, 68 b; 2 Rob. Eccl. 547; 22 Eng. L. & Eq. 598; that he cannot sue in a court of justice; Co. Litt. 130 a. See 2 Gabbett, Cr. Law; 1 Bish. Cr. Law. § 641.

In England, by statute 33 & 34 Vict. c. 23, attainer upon conviction, with consequent corruption of blood, forfeiture, or escheat, is abolished.

In the United States, the doctrine of attainer is now scarcely known, although during and shortly after the Revolution acts of attainer were passed by several of the states. The passage of such bills is expressly forbidden by the constitution.

Under the Confiscation Act of July 17, 1862, which imposed the penalty of confiscation of property as a punishment for treason and rebellion, all that could be sold was a right to the property seized, terminating with the life of the person for whose offence it was seized; 9 Wall. 839 See BILL.

ATTAINT. Attainted, stained, or blackened.

A writ which lies to inquire whether a jury of twelve men gave a false verdict. Bracton, l. 4. tr. 1, c. 134; Fleta, l. 5, c. 22, § 8.

This latter was a trial by jury of twenty-four men empanelled to try the goodness of a former verdict. 3 Bla. Com. 351; 3 Gilbert, Ev. Lofft. ed. 1146. See ASSIZE.

ATTEMPT (Lat. *ad*, to, *tentare*, to strive, to stretch).

In Criminal Law. An endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. 5 Cush. 367; 26 Ga. 493.

An intent to do a particular criminal thing combined with an act which falls short of the thing intended. 1 Bish. Cr. Law § 728; 14 Ga. 55; 14 Ala. n. s. 411 56 Barb. 126; 49 Miss. 685.

If one tries to pick a pocket, he is guilty of an attempt to steal, without any proof as to whether there was anything in the pocket; 24 Q. B. Div. 357; 61 Law J. Mag. Cas. 116; 123 N. Y. 254.

To constitute an attempt, there must be an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences; 3 Harr. Del. 571; 18 Ala. n. s. 532; 1 Park. Cr. Cas. 327; 9 Humphr. 455; 9 C. & P. 518; 8 id. 541; 1 Crawford & D. 156, 186; 1 Bish. Cr. Law § 731; Clark Cr. Law 104, 111; an act apparently adapted to produce the result intended; Whart. Cr. L. § 182; 11 Ala. 57; 12 Pick. 173; 5 Cush. 365; 18 Ohio 32; 65 N. C. 334; 32 Ind. 220; 4 Wash. C. C. 738; 2 Va. Cas. 356; 6 C. & P. 403; 9 id. 79, 483; 1 Leach 19 (though some cases require a complete adaptation; 1 Bish. Cr. L. 749); an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution; 1 F. & F. 511; including solicitations of another; 2 East 5; 4 Hill, N. Y. 133; 7 Conn. 216, 266; 3 Pick. 26; 2 Dall. 884; but mere solicitation, not directed to the procurement of some specific crime, is not an attempt; Whart. Cr. L. 179; see Clark, Cr. Law 115; and the crime intended must be at least a misdemeanor; 1 Crawford & D. 149; 1 C. & M. 661, n.; 1 Dall. 39. An abandoned attempt, there being no outside cause prompting the abandonment, is not indictable; Whart. Cr. L. § 187.

In England an indictment has been upheld upon a criminal intent coupled with an act (procuring dies for counterfeiting) which fell short of an attempt under their statute; 33 E. L. & E. 533. See 1 Bish. Cr. L. § 724.

An attempt to commit a crime was not in itself a crime, in the early common law.

ATTEMPT TO COMMIT RAPE. "Attempt to commit rape" embraces every element of the crime except the actual intercourse. 110 S. W. 311.

ATTEMPT TO INTRODUCE INTO COMMERCE OF UNITED STATES. The expression—to attempt to introduce into the commerce of the United States—includes more than to attempt to enter merchandise, and as used in the Act of August 5, 1909, c. 6, § 36 Stat. 11, 97, it covers fraudulent invoices made by consignors in foreign countries. 231 U. S. 358.

ATTENDANT. One who owes a duty or service to another, or in some sort depends upon him. *Termes de la Ley*.

ATTENDANT TERMS. Long leases or mortgages so arranged as to protect the title of the owner.

Thus, to raise a portion for younger children, it was quite common to make a mortgage to trustees. The powers of these trustees were generally to take possession of the estate, or to sell a part of the term if the portions were not duly paid. If the deed did not become *ipso facto* void, upon payment of the portion, a release was necessary from the trustees to discharge the mortgage. If this was not given, the term became an outstanding satisfied term. The purchaser from the heir then procured an assignment of the term to trustees for his benefit, which then became a satisfied term to attend the inheritance, or an attendant term. These terms were held attendant by the courts, also, without any assignment, and operated to defeat intermediate alienations to some extent. There were other ways of creating outstanding terms besides the method by mortgage; but the effect and general operation of all these were essentially the same. By reason of the want of notice, by means of registration, of the making of charges, mortgages, and conveyances of lands, this mode of protecting an innocent purchaser by means of an outstanding term to attend the inheritance came to be very general prior to the 8 & 9 Vict. c. 112, § 2, which abolished all such terms as soon as satisfied. 1 Washb. R. P. 311; 4 Kent 96-99.

ATTENTAT. Any thing whatsoever wrongfully innovated or attempted in the suit by the judge *a quo*, pending an appeal. Used in the civil and canon law; 1 Add. Eccl. 22, note; Ayliffe, Parerg. 100.

ATTENTION. The phrase "the bill shall have attention" made by a drawee to the drawer of a bill held not to amount to an acceptance of the bill. 2 B. and Ald. 113, 115.

ATTEMINARE (Lat.). To put off to a succeeding term; to prolong the time of payment of a debt. Stat. Westm. 2, c. 4; Cowel; Blount.

ATTEMINING. The granting a time or term for the payment of a debt.

ATTEMPOLEMENT. In Canon Law. A making terms; a composition, as with creditors. 7 Low. C. 272, 306.

ATTEST. To witness or testify. To bear witness to; to witness by observation and signature. To witness the execution of an instrument, and to subscribe the name in testimony of such fact.

To bear witness to, usually in writing, as to signify, by the subscription of one's name, that one has witnessed the execution of a particular instrument. To certify to the verity of, to vouch for. Anderson. See ATTESTATION; ATTESTING WITNESS.

ATTESTATION (Lat. *ad*, to, *testari*, to witness).

The act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness. 3 P. Wms. 254; 2 Ves. Ch. 454; 3 A. K. Marsh. 146; 17 Pick. 373.

Deeds, at common law, do not require attestation in order to be valid; 2 Bla. Com. 307; 3 Dane, Abr. 354; 12 Metc. 15; 3 Washb. R. P. 572; 7 Allen 149; and there are several states where at common law it was not necessary; 1 S. & R. 73; 1 Hayw. 205; 13 Ala. 321; 12 Metc. 157. In many of the states there are statutory requirements on the subject, and where such exist they must be strictly complied with. One witness is necessary. 1 Idaho, Maryland, Nebraska, Nevada (if signed by mark only), New York (as to delivery), North Carolina, Utah, and Wyoming, and in Mississippi one is sufficient; 17 Miss. 325; two are required in Connecticut, Florida, Kentucky, Michigan, Minnesota, New Hampshire, Ohio, Oregon, South Carolina, Vermont, Wash-

ington, and Wisconsin; and also in Georgia, one being the officer taking the acknowledgment; and in Louisiana, two male witnesses besides the officer; and in Tennessee, Texas, and Virginia two are required if there be no acknowledgment. In Maine and Massachusetts one witness is required when there is no acknowledgment, and in Alabama, one when the signature is by mark. In Arkansas, California, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, New Jersey, North Dakota, Pennsylvania, Rhode Island, South Dakota, and West Virginia, no witness is required. In Delaware and the District of Columbia there is no statute, but by almost if not absolutely unvarying custom there is at least one witness. In the Territories there is no legislation requiring it, but it is generally safe to have two witnesses, one being the officer taking the acknowledgment, when it is not practicable to consult local statutes. See 8 Conn. 289; 2 A. K. Marsh. 429; 13 N. H. 88; 6 Wheat. 527; 1 McLean 520; 5 Ohio 119; M'Mull. 373; 8 Minn. 525; 11 Minn. 443; 2 Greenl. Ev. § 275, n.; 4 Kent 457. The requisites are not the same in all cases as against the grantor and as against purchasers; 2 A. K. Marsh. 529. See 3 N. H. 88; 13 id. 38.

The attesting witness need not see the grantor write his name: if he sign in the presence of the grantor, and at his request, it is sufficient; Jar. Wills 87-91; 2 B. & P. 217.

Wills must be attested by competent or credible witnesses; 2 Greenl. Ev. § 691; 9 Pick. 350; 1 Burr. 414; 4 Burn, Eccl. Law 116; who must subscribe their names attesting in the presence of the testator; 7 Harr. & J. 61; 3 Harr. & M. H. 457; 1 Leigh 6; 1 Maule & S. 294; 2 Curt. Eccl. 320; 3 id. 118; Carth. 79; 2 Greenl. Ev. § 678; 84 Ala. 53; 114 Mo. 536. And see 13 Gray 103; 12 Cush. 342; 1 Ves. Ch. 11; 2 Washb. R. P. 682; but he need not sign in their presence; 64 Md. 138; 91 Tenn. 183. The term "presence" in a statute requiring the subscription of witnesses to a will to be made in the presence of the testator, means "conscious presence;" 85 Va. 546. In the attestation of wills devising land, three witnesses are requisite in Connecticut, Georgia, Maine, Massachusetts, New Hampshire, South Carolina, Vermont and District of Columbia; two are sufficient in Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Arizona, Indian Territory, New Mexico, and Oklahoma. In Louisiana, for a will not executed before a notary, there must be five witnesses of the place of probate or seven of other places. No subscribing witnesses are required in Pennsylvania except in the case of wills making gifts to charity.

A person may attest a will by making his mark, although the person who writes his name fails to sign his own name as a witness to the mark; 61 Ark. 48. Persons signing as witnesses must do so after the testator has signed the will; 87 Ga. 379. If a will is signed by only two witnesses where three are required as to realty, it is inoperative as to the realty but valid as to the personalty; 32 Fla. 18.

ATTESTATION CLAUSE. That clause wherein the witnesses certify that the instrument has been executed before them, and the manner of the execution of the same.

The usual attestation clause to a will is in the following formula, to-wit: "Signed, sealed, published, and declared by the above-named A. B. as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as the witnesses thereto, in the presence of the said testator and of each other." That of deeds is generally in these words: "Sealed and delivered in the presence of us."

ATTESTATION AND SUBSCRIPTION. Distinguished. *Attestation* is the act of the senses, *subscription* is the act of the hand; the one is mental, the other mechanical, and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification. There may be a perfect attestation in fact, without subscription. 1 B. Mon. (Ky.) 117.

ATTESTING WITNESS. One who, upon being required by the parties to an instrument, signs his name to it to prove it, and for the purpose of identification. 3 Campb. 232; 115 Mass. 599.

ATTESTOR. One who bears witness to, or vouches for. Stand. Dict. See **ATTEST**; **ATTESTATION**; **ATTESTING WITNESS**.

ATTILE. The rigging or furniture of a ship. Jacob; Fleta 1. 25.

ATTORN. To turn over; to transfer to another money or goods; to assign to some particular use or service. Kennett, Paroch. Antiq. 283.

Used of the part taken by the tenant in a transfer of lands: 2 Bla. Com. 228; Littleton § 561. Now used of assent to such a transfer: 1 Washb. R. P. 23. The lord could not alien his land without the consent of the tenant, nor could the tenant assign without the consent of his lord; 2 Bla. Com. 27; 1 Spence, Eq. Jur. 137; 1 Washb. R. P. 23, n. Attornment is abolished by various statutes; 1 Washb. R. P. 336; Wms. R. P. 288, 366.

A tenant cannot attorn to another than his landlord, and become tenant of the former, without first surrendering possession to the person under whom he holds; 78 Ga. 142.

To transfer services or homage.

Used of a lord's transferring the homage and service of his tenant to a new lord. Bract. 81, 82; 1 Sullivan, Lect. 227.

ATTORNATO FACIENDO VEL RECIPIENDO. An ancient English writ commanding the sheriff of a county court or hundred court to admit an attorney come to appear for a person that owed suit to the court. Jacob.

ATTORNEY. One put in the place, turn, or stead of another, to manage his affairs; one who manages the affairs of another by direction of his principal. Spelman, Gloss.; *Termes de la Ley*.

One who acts for another by virtue of an appointment by the latter. Attorneys are of various kinds.

Attorney in fact. A person to whom the authority of another, who is called the constituent, is by him lawfully delegated.

This term is employed to designate persons who act under a special agency, or a special letter of attorney, so that they are appointed *in factum*, for the deed, or special act to be performed; but in a more extended sense it includes all other agents employed in any business, or to do any act or acts *in pais* for another. Bacon, Abr. *Attorney*; Story, Ag. § 25.

All persons who are capable of acting for themselves, and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of a proper age, and femes covert, may act as attorneys of others; Co. Litt. 53 a; 1 Esp. 142; 2 id. 511.

Attorney-at-law. An officer in a court of justice, who is employed by a party in a cause to manage the same for him.

Appearance by an attorney has been allowed in England from the time of the earliest records of the courts of that country. They are mentioned in Glanville, Bracton, Fleta, and Britton; and a case turning upon the party's right to appear by attorney is reported; Y. B. 17 Edw. III. p. 8, case 23. In France such appearances were first allowed by letters patent of Philip le Bel, a. d. 1290; 1 Fournel, *Hist. des Avocats*, 42, 92; 2 Leizel, *Contumes* 14. It respects the nature of their functions, and of their duties, as well to the court as to the client, that no one can, even by consent, be the attorney of both the litigating parties in the same controversy; Farr. 47. The name of attorney is given to those officers who practise in courts of common law; solicitors, in courts of equity; and proctors, in courts of admiralty and in the English ecclesiastical courts.

It is an encroachment upon the judiciary for the legislature to declare that a court shall admit attorneys in specified cases, such admissions being judicial and not legislative questions; 123 Pa. 327.

As a general rule the eligibility of persons to hold the position of attorney-at-law is settled by local legislation or by rule of court. It has been held that, excepting where permitted by special statute, women cannot act as attorneys-at-law in the various states; 55 Ill. 535; 16 Wall. 130; and the supreme court of the United States will not issue a mandamus to compel a state court to admit a woman to practise law before such court, upon the ground that she has been denied a privilege or immunity belonging to her as a citizen of the United States, in contravention of the constitution; 154 U. S. 116; but the general trend of authority now is that women may be admitted to practise as attorneys; 184 Ind. 605; 29 Atl. (N. H.) 559; 8 D. R. (Pa.) 299; but any woman of good standing at the bar of the supreme court of any state or territory or of the District of Columbia for three years, and of good moral character, may become a member of the bar of the supreme court of the U. S.; Act Feb. 15, 1879. In North Carolina, unnaturalized foreigners cannot be licensed as attorneys; 3 Hawks 355; Weeks, Att. at Law 79, note.

The business of attorneys is to carry on the practical and formal parts of the suit; 1 Kent 307. See, as to their powers, 2 Supp. to Ves. Jr. 241, 254; 3 Chit. Bla. Com. 23, 338; Bacon, Abr. *Attorney*; 3 Pa. 74; 3 Wils. 374; 16 S. & R. 363; 14 id. 307; 7 Cra. 452; 1 Pa. 264. In general, the agreement of an attorney-at-law, within the scope of his employment, binds his client; 1 Salk. 86; as, to amend the record, 1 Binn. 75; to refer a cause, 1 Dall. 164; 6 Binn. 101; 7 Cra. 436; 3 Taunt. 486; not to sue out a writ of error, 1 H. Bl. 21, 23; 2 Saund. 71 a, b; 1 Term 388; to strike off a *non pros.*, 1 Binn. 469; to waive a judgment by default, 1 Archb. Pr. 26; or waive a jury trial; 99 N. C. 53. But the act must be within the scope of his authority. He cannot, for example, without special authority, purchase lands for the client at sheriff's sale; 2 S. & R. 21; 11 Johns. 464; or extend the time for payment of money to release a judgment in ejectment, entered by consent; 127 Pa. 71; or compromise a claim; 122 Pa. 1; 47 Mo. App. 1; or satisfy a judgment for less than is due; 66 Tex. 336.

In the absence of fraud, the client is concluded by the acts, and even by the omissions, of his attorney; 23 Tex. 109; 14 Minn. 333; 22 Cal. 200; Weeks, Att. at Law 375.

In general, he has all the powers exercised by the forms and usages of the court in which the suit is pending; Weeks, Att. at Law 374.

The principal duties of an attorney are—to be true to the court and to his client; to manage the business of his client with care, skill, and integrity; 4 Burr. 2061; 1 B. & Ald. 202; 2 Wils. 325; 1 Bingham 347; Mech. Ag. 824; to keep his client informed as to the state of his business; to keep his secrets confided to him as such. And he is privileged from disclosing such secrets when called as a witness; Tayl. Ev. 782; 29 Vt. 701; 4 Mich. 414; 16 N. Y. 180; 21 Ga. 201; 40 E. L. & Eq. 353; 38 Me. 581. See **CLIENT**; **CONFIDENTIAL COMMUNICATION**. His first duty is the administration of justice, and his duty to his client is subordinate to that; 36 Fed. Rep. 242. If an attorney while employed by one secretly seeks employment on the other side, promising to give information acquired during such employment, he will be disbarred; 38 Fed. Rep. 24; but an attorney who learns from his client, in a professional consultation, or in any other manner, that the latter intends to commit a crime, it seems, is bound by a higher duty to society and to the party to be affected to disclose it; 52 Conn. 323.

For a violation of his duties an action will, in general, lie; 3 Cal. 308; 2 Greenl. Ev. §§ 145, 146; and in some cases he may be punished by attachment. Official misconduct may be inquired into in a summary manner, and the name of the offender stricken from the roll; 18 B. Monr. 472; 13 Wall. 333; 17 Am. Dec. 194. Consult 4 Wall. 333.

An attorney is not an insurer of the result in a case in which he is employed, and only

ordinary care and diligence can be required of him; 73 Mich. 381. The authority of an attorney is revoked by the death of the client, and he cannot proceed further in the cause without a new retainer from the proper representative; 96 Mo. 303; 78 Cal. 99.

An attorney is entitled to two kinds of liens for his fees, one upon the papers of his client in his possession, called a retaining lien, and the other upon a judgment or fund recovered, called a charging lien; 112 N. Y. 157; 128 Ill. 631; 76 Ga. 639. See 85 Tenn. 506; 137 N. Y. 605. See **LIEN**; **CHAMPERTY**.

ATTORNEY'S CERTIFICATE. In English Law. A certificate of the commissioners of stamps that the attorney therein named has paid the annual duty. This must be renewed yearly; and the penalty for practising without such certificate is fifty pounds; Stat. 37 Geo. III. c. 90, §§ 26, 28, 30. See also 7 & 8 Vict. c. 73, §§ 21-26; 16 & 17 Vict. c. 63.

ATTORNEY IN FACT. A private or express attorney appointed for some particular or definite purpose not connected with a proceeding at law. 2 Elliot, Contr., 1166. See **ATTORNEY**.

ATTORNEY-GENERAL. In English Law. A great officer, under the king, made by letters patent, whose office is to exhibit informations and prosecute for the crown in matters criminal; to file bills in the exchequer in any matter concerning the king's revenue. Others may bring bills against the king's attorney; 3 Bla. Com. 27; *Termes de la Ley*.

In American Law. In each state there is an attorney-general, or similar officer, who appears for the people, as in England the attorney-general appears for the crown.

ATTORNEY-GENERAL OF THE UNITED STATES. An officer appointed by the president.

His duties are to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and give his advice upon questions of law when required by the president, or when requested by the heads of any of the departments, touching matters that concern their departments; Act of 24th Sept. 1789. He is a member of the cabinet and under the act of congress of Jan. 19, 1866, U. S. Rev. Stat. 1 Supp. 487, is the fourth in succession, after the vice-president, to the office of president in case of a vacancy.

ATTORNEY, LETTER OF. See **LETTER OF ATTORNEY**; **POWER OF ATTORNEY**.

ATTORNMENT. See **ATTORN**.

AU BESOIN. (Fr. in case of need. "Au besoin chez Messieurs — a —.") "In case of need, apply to Messrs. — at —.")

A phrase used in the direction of a bill of exchange, pointing out the person to whom application may be made for payment in case of failure or refusal of the drawee to pay; Story, Bills § 65.

AUBAINE. See **DROIT D'AUBAINE**.

AUCTION. A public sale of property to the highest bidder. See 213 Am. L. Reg. U. S. 1; 19 Cent. L. J. 247; 11 Ir. L. Times 643; Bateman, Auct.

The manner of conducting an auction is immaterial, whether it be by public outcry or by any other manner. The essential part is the selection of a purchaser from a number of bidders. In a case where a woman continued silent during the whole time of the sale, but when any one bid she gave him a glass of brandy, and when the sale broke up, the person who received the last glass of brandy was taken into a private room and he was declared to be the purchaser, this was adjudged to be an auction; 1 Dowl. Bailm. 115.

Auctions are generally conducted by persons licensed for that purpose. A bidder may be employed by the owner, if it be done *bonâ fide* and to prevent a sacrifice of the property under a given price; 1 Hall 655; 19 Mo. 420; 11 Paige, Ch. 431; 3 Stor. 622;

37 Fed. Rep. 125; but where bidding is fictitious, and by combination with the owner to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale; Poll. Contr. 539; 8 How. 134; 3 Stor. 611; 11 Ill. 234; 2 Dev. 126; 3 Metc. Mass. 884; 3 Gilm. 529. But see 2 Kent 539, where this subject is considered. And see 6 J. B. Moore 316; 3 B. & B. 116; 3 Bingh. 368; 15 M. & W. 367; 13 La. 287; 23 N. H. 360; 6 Ired. Eq. 278, 430; 14 Pa. 446. Unfair conduct on the part of the purchaser will avoid the sale; 6 J. B. Moore 216; 3 B. & B. 116; 3 Stor. 623; 20 Mo. 290; 2 Dev. 126. See 3 Gilm. 529; 11 Paige, Ch. 431; 7 Ala. N. S. 189; 25 Pa. 413; 49 Mo. 536; 25 Ill. 173. Where a buyer addressed the company assembled at an auction and persuaded them that they ought not to bid against him, the purchase by such buyer was held void; 3 B. & B. 116. Where a sale is "without reserve" neither the vendor nor any one on his behalf can bid, and the property must go to the highest bidder; 15 M. & W. 367; see 23 N. H. 360. Error in description of real estate sold will avoid the sale if it be material; 4 Bingh. N. C. 463; 8 C. & P. 469; 1 Y. & C. 658; 3 Jones & L. 506; but an immaterial variation merely gives a case for deduction from the amount of purchase-money; 2 Kent 437; 6 Johns. 38; 11 id. 525; 2 Bay 11; 3 Cra. 270. A bid may be retracted by the auctioneer or the bidder before acceptance has been signified; 3 Term 148; 4 Bingh. 653; 6 Hare 443; 28 L. J. Q. B. 18; Benj. Sales § 270. Sales at auction are within the Statute of Frauds; 2 B. & C. 945; 7 East 558; 2 Pick. 63; 43 Me. 158; 6 Cal. 75; 3 Duer (N. Y.) 395; Black. S. 2. In Louisiana a bid made at an auction sale, although formally accepted, is not a complete sale, but only a promise of sale, which gives a right of action for breach or a claim for specific performance; 45 La. Ann. 108; elsewhere, it is complete, at common law. See Bateman, Auctions 180.

AUCTION SALES The means of converting things into money under urgent circumstances, of settling estates of deceased persons, and the like, so that the interest both of the individual and of the public requires them to be conducted with freedom and fairness and agreements contravening these interests are void. 109 Ky. 525, 59 S. W. 856.

AUCTIONARIUS (Lat.). A seller; a registrator; a retailer; one who bought and sold; an auctioneer, in the modern sense, Spelman, Gloss. One who buys poor, old, worn-out things to sell again at a greater price. Du Cange.

AUCTIONEER. A person authorized by law to sell the goods of others at public sale; one who conducts a public sale or auction; 5 Mass. 505; 19 Pick. 482. He is the agent of the seller; Ans. Contr. 346; 3 Term 148; 2 Rich. 464; 1 Pars. Contr. 418; 3 Cra. 251; and of the buyer, for some purposes at least; 4 Ad. & E. 792; 7 East 558; 3 Ves. & B. 57; 4 Johns. Ch. 659; 16 Wend. 28; 4 Me. 1, 253; 6 Leigh 16; 2 Kent 539; 21 Gratt. 678; 43 Vt. 653; 23 Mo. 423; up to the moment of sale he is agent for the vendor exclusively; it is only when the bidder becomes the purchaser that the agency for the buyer begins; Benj. Sales § 270. He is the agent of both parties at a public sale within the Statute of Frauds; 7 East 558; 7 Taunt. 38; 11 Ohio 109; 43 Vt. 655; Benj. Sales § 268; but not if he sells goods at a private sale; 1 H. & C. 484. The memorandum must be made at the time of the sale; 53 Me. 394; 5 Mas. 414. An auctioneer employed to sell goods in his possession ordinarily has authority to receive payment for them, but if he acts as a mere creditor or broker for a principal who retains possession, he would not have such authority; Benj. Sales § 741. He has a special property in the goods, and may bring an action for the price; 1 H. Bla. 81; 7 Taunt. 237; 19 Ark. 566; 5 S. & R. 19; 1 Ril. S. C. 287; 16 Johns. 1; 1 E. D. Sm. 590; see 5 M. & W.

645; 3 C. & P. 352; 5 B. & Ad. 568; and has a lien upon them for the charges of the sale, his commission, and the auction-duty; 15 Mo. 184; 2 Kent 536. He must obtain the best price he fairly can, and is responsible for damages arising from a failure to pursue the regular course of business, or from a want of skill; 3 B. & Ald. 616; Cowp. 395; 2 Wils. 325; and where he sells goods as the property of one not the owner, is liable for their value to the real owner; 7 Taunt. 237; 20 Wend. 21; 22 id. 285; 5 Mo. 323; and if he sells goods with notice that they were obtained by fraud of another, he is liable to the real owner; 57 Fed. Rep. 685. And see 2 Harr. Del. 179. For false representation or breach of contract, the vendee of land sold at auction has a right of action against the vendor as well as the auctioneer to recover a deposit paid at the time of sale; 19 N. Y. Sup. 224.

AUCTOR. In Roman Law. An auctioneer.

In auction sales, a spear was fixed upright in the forum, beside which the seller took his stand; hence goods thus sold were said to be sold *sub hasta* (under the spear). The catalogue of goods was on tablets called *auctionaria*.

AUDIENCE (Lat. *audire*, to hear). A hearing.

It is usual for the executive of a country to whom a minister has been sent, to give such minister an audience. And after a minister has been recalled, an audience of leave usually takes place.

AUDIENCE COURT. In English Law. A court belonging to the archbishop of Canterbury, and held by him in his palace for the transaction of matters of form only, as the confirmation of bishops, elections, consecrations, and the like. This court has the same authority with the court of arches, but is of inferior dignity and antiquity. The dean of the arches is the official auditor of the audience. The archbishop of York has also his audience court. *Termes de la Ley*.

AUDITA QUERELA (Lat.).

In Practice. A form of action which lies for a defendant to recall or prevent an execution, on account of some matter occurring after judgment amounting to a discharge, and which could not have been, and cannot be, taken advantage of otherwise. 12 Mass. 268. If in a justice's suit the defendant is out of the state at the time of the service of the writ and remains away until after the return day and has no notice of suit, judgment by default may be set aside by *audita querela*; 65 Vt. 158; but not unless the action was on its face appealable; 66 Vt. 616.

It is a regular suit, in which the parties appear and plead; 17 Johns. 484; 12 Vt. 56, 435; 30 id. 420; 8 Miss. 109; 12 Wall. 305; and in which damages may be recovered if execution was issued improperly; Brooke, Abr. *Damages* 38; but the writ must be allowed in open court, and is not of itself a *supersedeas*; 2 Johns. 227; 9 Phila. 125.

It is a remedial process, equitable in its nature, based upon facts, and not upon the erroneous judgments or acts of the court; 2 Wms. Saund. 148, n.; 10 Mass. 103; 14 id. 448; 17 id. 159; 1 Aik. 363; 24 Vt. 211; 2 Johns. Cas. 227; 1 Overt. 425. And see 7 Gray 206.

It lies where an execution against A has been taken out on a judgment acknowledged by B without authority, in A's name; Fitzh. Nat. Brev. 233; and see Cro. Eliz. 233; and generally for any matters which work a discharge occurring after judgment entered; Cro. Car. 443; 3 Root 178; 10 Pick. 439; 25 Me. 304; see 5 Coke 86 b; and for matters occurring before judgment which the defendant could not plead through want of notice or through collusion or fraud of the plaintiff; 4 Mass. 485; 5 Rand. 639; 2 Johns. Cas. 258; 1 W. N. C. 304.

It may be brought after the day on which judgment might have been entered, although it has not been; 1 Rolle, Abr. 306, 431, pl. 10; 1 Mod. 111; either before or after execution has issued; Kirb. 187.

It does not lie for matter which might have been, or which may be, taken advantage of by a writ of error; 1 Vt. 433; 10 id. 87; in answer to a *scire facias* of the plaintiff; 1 Salk. 264; nor where there is or has been a remedy by plea or otherwise; T. Raym. 89; 13 Mass. 270; 13 id. 453; 11 Cush. 35; 6 Vt. 243; 12 Wall. 305; see 17 Mass. 158; nor where there has been an agreement to accept a smaller sum in payment of a larger debt, while any part of the agreement continues executory; 48 Pa. 477; nor to show that a confessed judgment was to be collateral security only; 9 Phila. 125; nor where a judgment is erroneous in part without a tender of the legal part of the judgment; 66 Vt. 675; nor against the commonwealth; 8 Phila. 237.

In modern practice it is usual to grant the same relief upon motion which might be obtained by *audita querela*; 4 Johns. 191; 11 S. & R. 274; and in some of the states the remedy by motion has entirely superseded the ancient remedy; 5 Rand. 639; 2 Hill, S. C. 298; 6 Humphr. 210; 18 Ala. 773; 13 B. Monr. 256; 3 Mo. 129; 8 S. & R. 239; while in others *audita querela* is of frequent use as a remedy recognized by statute; 17 Vt. 118; 66 Vt. 616, 675; 7 Gray 206; 9 Allen 572.

AUDITOR (Lat. *audire*, to hear). An officer of the government, whose duty it is to examine the accounts of officers who have received and disbursed public moneys by lawful authority.

In Practice. An officer of the court, assigned to state the items of debit and credit between the parties in a suit where accounts are in question, and exhibit the balance. 1 Metc. 218.

They may be appointed by courts either of law or equity. They are appointed at common law in actions of account; Bacon, Abr. *Account*, F; and in many of the states in other actions, under statute regulations; 6 Pick. 193; 14 N. H. 427; 3 R. I. 60.

Appearing before an auditor and examining witnesses without objection constitutes a waiver of the necessity of the auditor's taking an oath before entering on his duties; 134 Ill. 247; 97 U. S. 581; 22 Hun 125. An order of reference is proper where an accounting is necessary and the questions of law involved have been disposed of; 63 Hun 633. Where a trial has been commenced before a jury and the defendant consents to an accounting and the discharge of the jury, he cannot afterwards object to the order of reference because it requires the auditor to pass on disputed questions of law and fact; 28 N. E. Rep. (Ill.) 743.

They have authority to hear testimony; 4 Pick. 283; 5 Metc. Mass. 373; 5 Vt. 363; 2 Bland, Ch. 45; 17 Conn. 1; 69 Me. 568; 60 id. 325; in their discretion, 27 N. H. 244, in some states, to examine witnesses under oath; 6 N. H. 508; 11 id. 501; 38 id. 418; 1 Bland, Ch. 463; to examine books; 19 Pick. 81; 17 Conn. 1; see 14 Vt. 214; and other vouchers of accounts; 11 Metc. Mass. 297.

The auditor's report must state a special account; 4 Yeates 514; 2 Root 12; 4 Wash. C. C. 42; 45 Pa. 67; 18 Vt. 141; 14 N. H. 427; giving items allowed and disallowed; 5 Vt. 70; 1 Ark. 355; 15 Tex. 7; but it is sufficient if it refer to the account; 2 South. 791; but see 27 Vt. 673; and are to report exceptions to their decision of questions taken before them to the court; 2 South. 791; 5 Vt. 546; 5 Binn. 433; and exceptions must be taken before them; 4 Cra. 308; 5 Vt. 546; 7 Pet. 625; 1 Miss. 43; 15 Tex. 7; 22 Barb. 89; 24 Miss. 88; 37 Ala. 394; 69 Ca. 667; unless apparent on the face of the report; 5 Cra. 313. See 19 Pa. 221.

In some jurisdictions, the report of auditors is final as to facts; Kirb. 553; 2 Vt. 369; 1 Miss. 43; 13 Pa. 188; 5 R. I. 338; 15 Tex. 7; 40 Me. 387; unless impeached for fraud, misconduct, or very evident error; 5 Pa. 413; 71 id. 25; 40 Me. 387; but subject to any examination of the principles of law in which they proceeded; 2 Day 116. In others it is held *prima facie* correct; 12 Mass. 412; 6 Gray 376; 1 La. Ann. 380; 14 N. H. 427; 21 id. 188; and

evidence may be introduced to show its incorrectness; 1 La. Ann. 380; 24 Miss. 83; 18 Ark. 609; see 103 Pa. 603; 24 Conn. 584; and in others it is held to be of no effect till sanctioned by the court; 1 Bland, Ch. 463; 12 Ill. 111.

When the auditor's report is set aside in whole or in part, it may be referred back; 4 B. Monr. 71; 4 Pick. 283; 5 Vt. 363; 26 id. 722; 1 Litt. 124; 12 Ill. 111; 24 N. H. 198; 71 N. C. 370; 59 Wis. 48; 34 Hun 532; or may be rectified by the court; 1 Smedes & M. 543; 7 Colo. 79; or accepted if the party in favor of whom the wrong decision was made remits the item.

Where the report is referred back to the auditor, the whole case is reopened, and all parties are bound to take notice; 76 Pa. 30; see 26 Vt. 722; 62 Mo. 202.

Where two or more are appointed, all must act; 20 Conn. 381; unless the parties consent that a part act for all; 1 Tyl. 407.

AUDITORS OF THE IMPREST.

Officers of the English Exchequer, who formerly had charge of auditing the accounts of the King's customs, naval and military expenses, etc. Jacob.

AUGMENTATION. The increase arising to the crown's revenues from the suppression of monasteries and religious houses and the appropriation of their lands and revenues.

A court erected by Henry VIII., which was invested with the power of determining suits and controversies relating to monasteries and abbey lands.

The court was dissolved in the reign of Mary, but the office of augmentations remained long after; Cowel.

A share of the great tithes temporarily granted to the vicars by the appropriators, and made perpetual by statute 29 Car. II. c. 8.

The word is used in a similar sense in the Canadian law.

AULA. In Old English Law. A hall or court. Burrill; Spelman.

AULA REGIA (called frequently *Aula Regis*). The king's hall or palace.

In English Law. A court established in England by William the Conqueror in his own hall.

It was the "great universal" court of the kingdom; from the dismemberment of which are derived the present four superior courts in England, viz. the High Court of Chancery, and the three superior courts of common law, to-wit, The Queen's Bench, Common Pleas, and Exchequer. It was composed of the king's great officers of state resident in his palace and usually attendant on his person; such as the lord high constable and lord marshal (who chiefly presided in matters of honor and of arms), the lord high steward and lord great chamberlain, the steward of the household, the lord chancellor (whose peculiar duty it was to keep the king's seal, and examine all such writs, grants, and letters as were to pass under that authority), and the lord high treasurer, who was also the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justices or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice in matters of great moment and difficulty. These, in their several departments, transacted all secular business, both civil and criminal, and all matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitibus justiciaribus totius Angliæ*, who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. This court was bound to follow the king's household in all his expeditions; on which account the trial of common causes in it was found very burdensome to the people, and accordingly the 11th chapter of *Magna Charta* enacted that "*communia placita non sequantur curiam regis, sed teneantur in aliquo certo loco*," which certain place was established in Westminster Hall (where the *aula regia* originally sat, when the king resided in that city), and there it has ever since continued, under the name of Court of Common Pleas, or Common Bench. It was under the reign of Edward I. that the other several officers of the chief justiciar were subdivided and broken into distinct courts of judicature. A court of chivalry, to regulate the king's domestic servants, and an august tribunal for the trial of delinquent peers, were erected; while the barons reserved to themselves in parliament the right of reviewing the sentences of the other courts in the last resort; but the distribution of common justice between man and man was arranged by giving to the court of chancery juris-

diction to issue all original writs under the great seal to other courts; the exchequer to manage the king's revenue, the common pleas to determine all causes between private subjects, and the court of king's bench retaining all the jurisdiction not cantoned out to the other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes. 3 Steph. Com. 397-400, 405; 3 Bla. Com. 38-40; Bracton, l. 3, tr. 1, c. 7; Fleta, Abr. 2, cc. 2, 8; Gilbert, Hist. C. Pleas, Intro. 18; 1 Reeve, Hist. Eng. Law 48.

AULIC COUNCIL. In the Old German Empire. The emperor's privy council, forming one of the two supreme courts of the several states. After the dissolution of the old empire in 1806, the name was applied to the Council of State of the Austrian Empire. Stand. Dict.

AUNCEL WEIGHT. An ancient manner of weighing by means of a beam held in the hand. *Termes de la Ley*; Cowel.

AUNT. The sister of one's father or mother; she is a relation in the third degree. See 2 Comyn, Dig. 474; Dane, Abr. c. 126, a. 3, § 4.

AUSTRALIAN WOOL. See Wool.

AUTER. Another. See AUTER ACTION PENDANT.

AUTER, or AUTRE DROIT. Another's right. Occurs usually in the form, *en autre droit*, in another's right. Applied to an administrator, executor, guardian, or other representative of another's rights or interest. Anderson.

AUTER or AUTRE VIE. The life of another. Usually in the form *per auter vie*, for the life of another, applied to a tenant or tenancy limited by the life of another person than the grantee. Anderson; 2 Bla. Com. 120. See under TENANT, TENANT FOR LIFE; see also CESTUI QUE VIE.

AUTER ACTION PENDANT (L. Fr. another action pending).

In Pleading. A plea that another action is already pending.

This plea may be made either at law or in equity; 1 Chit. Pl. 393; Story, Eq. Pl. § 736.

The second suit must be for the same cause; 2 Dick. 611; 5 Cal. 48; 8 id. 207; 2 Dutch. 461; 18 Ga. 604; 25 Penn. 314; 26 Vt. 673; 4 Blackf. 156; 100 Ind. 416; but a writ of error may abate a suit on the judgment; 2 Johns. Cas. 312; and if in equity, for the same purpose; 2 M. & C. Ch. 602; see 1 Conn. 154; and in the same right; Story, Eq. Pl. § 739. The criterion by which to decide whether two suits are for the same cause of action is, whether the evidence, properly admissible in the one, will support the other; 5 Cr. C. C. 393. See 18 Wall. 679.

The suits must be such that the same judgment may be rendered in both; 17 Pick. 510; 19 id. 523. They must be between the same parties; 26 Ala. n. s. 720; 13 B. Monr. 197; 18 Vt. 138; 5 Tex. 127; in person or interest; 21 N. H. 570; 1 Grant, Cas. 359; 2 Bail. 362; 2 J. J. Marsh. 281. The parties need not be precisely the same; 5 Wis. 151.

A suit for labor is not abated by a subsequent proceeding *in rem* to enforce a lien; 4 Ill. 201. See 1 B. Monr. 257. A suit in trespass is temporarily barred by a previous proceeding *in rem*, to enforce a forfeiture under laws of U. S.; 3 Wheat. 314.

The prior action must have been in a domestic court; 4 Ves. Ch. 357; 1 S. & C. 491; 9 Johns. 221; 12 id. 9; 2 Curt. C. C. 559; 22 Conn. 435; 8 Tex. 351; 13 Ill. 486; 92 U. S. 548; 69 Ill. 655; 18 N. H. 123; see 10 Pick. 470; 8 McCord 388; 44 Pa. 326; 9 Dana 422; 86 Ga. 676; but a foreign attachment against the same subject-matter may be shown; 5 Johns. 101; 9 id. 221; 7 Ala. n. s. 151; 1 Pa. 442; 5 Litt. 349; see 8 Mass. 456; 7 Vt. 124; 1 Hall 137; 8 Misc. Rep. 325; 50 Minn. 405; but it will not avail where there was no appearance in the attachment suit or no personal service on the party attached; 138 N. Y.

209; and of the same character; 22 Eng. L. & Eq. 62; 10 Ala. n. s. 887; Story, Eq. Pl. 736; thus a suit at law is no bar to one in equity; 8 B. Monr. 428; 56 Pa. 413; 27 Cal. 104; nor is the pendency of a bill in equity a bar to an action at law; 156 Mass. 418; 16 Vt. 234; unless there be concurrent jurisdiction; 22 Law Rep. 74; but the plaintiff may elect, and equity will enjoin him from proceeding at law if he elect to proceed in equity; 2 Dan. Ch. Pr. § 4; Story, Eq. Pl. § 742; Bisp. Eq. § 363; but he will not be required to elect in such case, unless the suit at law is for the same cause, and the remedy at law is co-extensive, and equally beneficial with the remedy in equity; 22 N. H. 29. A suit in the circuit court having jurisdiction will abate a suit in the state court, if in the same state; 12 Johns. 99; and so will a suit in a state court abate one in a U. S. circuit court; 4 McLean 233; but not unless jurisdiction is shown; 1 Curt. C. C. 494; 3 McLean 221; 8 Sumn. 165; and not unless the suit is pending for the same cause, and between the same parties, in the same state in which the circuit court is sitting; 93 U. S. 548; 4 Dill. 524; 111 N. Y. 644.

The pendency of another suit for the same equitable relief, in another court of co-ordinate jurisdiction, is a bar to a motion for an injunction; 27 Pa. 380; and such pendency may be pleaded in abatement of an action at common law for the same cause; 76 Pa. 481.

In general, the plea must be in abatement; 1 Grant, Cas. 359; 20 Ill. 637; 5 Wis. 151; 3 McLean 221; 93 Ala. 614; 88 Ga. 294; 156 Mass. 418; 15 Ga. 276; but in a penal action at the suit of a common informer, the priority of a former suit for the same penalty in the name of a third person may be pleaded in bar, because the party who first sued is entitled to the penalty; 1 Chit. Pl. 443; 1 Pa. 442; 2 J. J. Marsh. 281.

It must be pleaded in abatement of the subsequent action in order of time; 1 Wheat. 215; 20 Ill. 637; 5 Wis. 151; 1 Hempst. 708; 3 Gilman. 498; 17 Pick. 510; 19 id. 13; 21 Wend. 339.

It must show an action pending or judgment obtained at the time of the plea; 2 Dutch. 461; 11 Tex. 259; 1 Mich. 254; but it is sufficient to show it pending when the second suit was commenced; 5 Mass. 79; 1 id. 495; 2 N. H. 36; 3 Rawle 320; the court first acquiring concurrent jurisdiction retains it to the exclusion of the other; 84 Va. 612; when both suits are commenced at the same time, the pendency of each may be pleaded in abatement of the other, and both be defeated; 9 N. H. 545; 8 Conn. 71; 3 Wend. 258; 4 Halst. 58; 7 Vt. 124; 68 Hun 155; and the plaintiff cannot avoid such a plea by discontinuing the first action subsequently to the plea; 1 Salk. 329; 2 Ld. Raym. 1014; 5 Mass. 174; 3 Dana 157; *contra*, 1 Johns. Cas. 397; 26 Vt. 673; 15 Ga. 270; 49 Iowa, 183; 62 Penn. 112; 117 Mo. 530. And a prior suit discontinued before plea pleaded in the subsequent one will not abate such suit; 13 B. Monr. 197; 7 Ala. n. s. 601; 45 Minn. 102; nor will it if a nonsuit is entered *nunc pro tunc*, to make it of a date before the commencement of the second action; 102 U. S. 290. It may be pleaded in abatement of the action in the inferior court, and must aver appearance, or at least service of process; 1 Vern. 318. Suing out a writ is said to be sufficient at common law; 1 Hempst. 218; 7 Ala. n. s. 601. See LIS PENDENS.

It must be shown that the court entertaining the first suit has jurisdiction; 17 Ala. n. s. 430; 22 N. H. 21; 1 Curt. C. C. 494. It is a sufficient defence to an action that the plaintiff has pleaded the identical claim on which the action was brought as a set-off in a pending suit brought by the defendant; 154 Pa. 111.

It must be proved by the defendant by record evidence; 1 Hempst. 218; 22 N. H. 21; 2 id. 381; 17 Ala. 469; 5 Mass. 174; 1 Cr. C. C. 288; see 52 Mo. App. 301. It is said that if the first suit be so defective that no recovery can be had, it will not

abate the second; 15 Ga. 370; 5 Tex. 127; 20 Conn. 510; 1 Root, Conn. 353; 21 Vt. 362; 3 Pa. 434; 8 Mass. 456.

A prior indictment pending does not abate a second for the same offence; 5 Ind. 533; 3 Cush. 279; Thach. Cr. Cas. 513. See 1 Hawks 78.

When a defendant is arrested pending a former suit or action in which he was held to bail, he will not, in general, be held to bail if the second suit be for the same cause of action; Graham, Pr. 98; Troubat & H. Pr. 44; 4 Yeates 206; under special circumstances, in the discretion of the court, a second arrest will be allowed; 2 Miles 99, 100, 141; 14 Johns. 347. Pendency of one attachment will abate a second in the same county; 15 Miss. 333.

See, generally, Gould, Stephen, and Chitty on Pleading; Story, Mitford, and Beames on Equity Pleading; Bacon, Abr. *Abatement*, *Bail in Civil Cases*.

AUTER DROIT. In right of another.

AUTHENTIC ACT. In Civil Law. An act which has been executed before a notary or other public officer authorized to execute such functions, or which is testified by a public seal, or has been rendered public by the authority of a competent magistrate, or which is certified as being a copy of a public register. Nov. 78, c. 2; Cod. 752, 6. 4. 21; Dig. 23. 4.

An act which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, free, male, and aged at least fourteen years; or of three witnesses, if the party be blind. La. Civ. Code, art. 2231. If the party does not know how to sign, the notary must cause him to affix his mark to the instrument. La. Civ. Code, art. 2231. The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved to be a forgery. *Id.*, art. 2233. See *Merlin, Répert.*

AUTHENTICAE. See *LIBER AUTHENTICARUM*.

AUTHENTICATION. In Practice. A proper or legal attestation.

Acts done with a view of causing an instrument to be known and identified.

Under the constitution of the United States, congress has power to provide a method of authenticating copies of the records of a state with a view to their production as evidence in other states. For the various statutes on the subject, see *FOREIGN JUDGMENT*; *RECORDS*.

AUTHENTICS. A collection of the Novels of Justinian, made by an unknown person.

They are entire, and are distinguished by their name from the epitome made by Julian. See 1 Mackeldey, Civ. Law § 72.

A collection of extracts made from the Novels by a lawyer named Irnier, and which he inserted in the code at the places to which they refer. These extracts have the reputation of not being correct. *Merlin, Répert. Authentique*.

AUTHENTICUM. See *LIBER AUTHENTICARUM*.

AUTHOR (Lat. *auctor*, from *augere*, to increase, to produce).

One who produces, by his own intellectual labor applied to the materials of his composition, an arrangement or compilation new in itself. 2 Blatchf. 39.

When a person has conceived the design of a work, and has employed others to execute it, the creation of the work may be so far due to his mind as to make him the author; 7 C. B. n. s. 268; but he is not an author who merely suggests the subject, and has no share in the design or execution of the work; 17 C. B. 432; Drone, Copyright 236. See *COPYRIGHT*.

AUTHOR. Of Newspaper. The "author" is the person whose mind composed the words, sentences and ideas, which have been impressed by printing upon paper, for the purpose of giving them publicity. 6 J. J. Mar. (Ky.) 13.

AUTHORITIES. Enactments and opinions relied upon as establishing or declaring the rule of law which is to be applied in any case.

The opinion of a court, or of counsel, or of a text-writer upon any question, is usually fortified by a citation of authorities. In respect to their general relative weight, authorities are entitled to precedence in the order in which they are here treated.

The authority of the constitution and of the statutes and municipal ordinances are paramount; and if there is any conflict among these the constitution controls, and courts declare a statute or ordinance which conflicts with the former to be so far forth of no authority. See *CONSTITUTIONAL LAW*; *STATUTES*.

The decisions of courts of justice upon similar cases are the authorities to which most frequent resort is to be had; and although in theory these are subordinate to the first class, in practice they do continually explain, enlarge, or limit the provisions of enactments, and thus in effect largely modify them. The word authorities is frequently used in a restricted sense to designate citations of this class. See 23 A. & E. Encyc. of Law 19; Chamberlain, *Stare Decisis*.

An authority may be of any degree of weight, from that of absolute conclusiveness down to the faintest presumption. As to the considerations which affect the weight of an adjudged case as an authority, see *PRECEDENT*; *OPINION*.

The opinions of legal writers. Of the vast number of treatises and commentaries which we have, comparatively few are esteemed as authorities. A very large number are in reality but little more than digests of the adjudged cases arranged in treatise form, and find their chief utility as manuals of reference. Hence it has been remarked that when we find an opinion in a text-writer upon any particular point, we must consider it not merely as the opinion of the author, but as the supposed result of the authorities to which he refers; and if on examination of those authorities they are found not to establish it, his opinion is disregarded; 3 B. & P. 301. Where, however, the writer declares his own opinion as founded upon principle, the learning and ability of the writer, together with the extent to which the reasons he assigns commend themselves to the reader, determine the weight of his opinion. A distinction has been made between writers who have and who have not held judicial station; Ram, Judgments 93. But this, though it may be borne in mind in estimating the learning and ability of an author, is not a just test of his authority. See 8 Term 64, 241.

The opinions of writers on moral science, and the codes and laws of ancient and foreign nations, are resorted to in the absence of more immediate authority, by way of ascertaining those principles which have commended themselves to legislators and philosophers in all ages. See *CODE*. Lord Coke's saying that common opinion is good authority in law, Co. Litt. 186 a, is not understood as referring to a mere speculative opinion in the community as to what the law upon a particular subject is; but to an opinion which has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and upon which course of action important individual rights have been acquired or depend; 3 Barb. Ch. 528, 577. As to the mode of citing authorities, see *ABBREVIATIONS*; *CITATION OF AUTHORITIES*.

AUTHORITY. In Contracts. The lawful delegation of power by one person to another.

Authority coupled with an interest is an authority given to an agent for a valuable consideration, or which forms part of a security.

Express authority is that given explicitly, either in writing or verbally.

General authority is that which authorizes the agent to do everything connected with a particular business. Story, Ag. § 17.

It empowers him to bind his employer by all acts

within the scope of his employment; and it cannot be limited by any private order or direction not known to the party dealing with him. Paley, Ag. 190, 200, 201.

Limited authority is that where the agent is bound by precise instructions.

Special authority is that which is confined to an individual transaction; Story, Ag. § 19; 15 East 400, 408; 6 Cow. 354.

Such an authority does not bind the employer, unless it is strictly pursued; for it is the business of the party dealing with the agent to examine his authority; and therefore, if there be any qualification or express restriction annexed to it, it must be observed; otherwise, the principal is discharged; Paley, Ag. 202.

Naked authority is that where the principal delegates the power to the agent wholly for the benefit of the former.

A naked authority may be revoked; an authority coupled with an interest is irrevocable.

Unlimited authority is that where the agent is left to pursue his own discretion.

Authority by law. An agency may be created by law, as in those cases where the law authorizes a wife to pledge her husband's credit, even against his will, it creates a compulsory agency, and her request is his request; Mechem, Ag. § 82; 134 Mass. 418.

Delegation of. An authority may be delegated by deed for any purpose whatever; for whenever an authority by parol would be sufficient, one by deed will be equally so. When the authority is to do something which must be performed through the medium of a deed, then the authority must also be by deed, and executed with all the forms necessary to render the instrument perfect; unless, indeed, the principal be present, and verbally or impliedly authorize the agent to fix his name to the deed; as, if a man be authorized to convey a tract of land, the letter of attorney must be by deed; Whart. Ag. § 48; Paley, Ag., Lloyd ed. 157; Story, Ag. §§ 48, 51; 65 N. C. 688; 14 S. & R. 331; 2 Pick. 345; 6 Mass. 11; 1 Wend. 424; 12 id. 525; 67 Ill. 161; 11 Ohio 233; 46 Mich. 610; 72 Ind. 48. But a written authority is not required to authorize an agent to sign an unsealed paper, or a contract in writing not under seal, even where a statute makes it necessary that the contract, in order to bind the party, shall be in writing, unless the statute positively requires that the authority shall also be in writing; Paley, Ag., Lloyd ed. 161; 3 Kent 618, 614; Story, Ag. § 50; 1 Chitty, Com. Law 213; Mech. Ag. 311; 6 Ves. Ch. 250; 9 Ired. 74; 29 Mo. 439; 13 N. Y. 587; 21 Mich. 374; 44 N. J. L. 126; 67 Ala. 336; 84 Ill. 263; 65 N. C. 688.

For most purposes, the authority may be either in writing not under seal, or verbally, or by the mere employment of the agent; or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name; Paley, Ag. 2, 161. The exigencies of commercial affairs render such an appointment indispensable; Story, Ag. § 47; Dig. 3. 3. 1. 1; Pothier, *Pand.* 3. 3. n. 3; Domat 1. 15, § 1, art. 5; 3 Chitty, Com. Law 5, 194, 195; 7 Term 350. The authority given must have been possessed by the person who delegates it, or it will be void; and it must be of a thing lawful, and be otherwise capable of being delegated, or it will not justify the person to whom it is given; Dig. 102; Keilw. 83; 5 Coke 80. The authority may be conferred merely by letter; 86 Mo. 178; 99 U. S. 688; 17 Ill. 441.

An authority is to be so construed as to include not only all the necessary and proper means of executing it with effect, but also all the various means which are justified or allowed by the usages of trade; Story, Ag. §§ 58, 60; 6 S. & R. 146; 10 Wend. 218; 11 Ill. 177.

Exercise of. An agent who has bare power or authority from another to do an act must execute it himself, and cannot delegate his authority to a sub-agent; for the confidence being personal, it cannot be assigned to a stranger; Story, Ag. § 13; Mech. Ag. 184-197; 2 Kent 633. But the principal may, in direct terms, authorize his agent to delegate the whole or any portion of his authority to another. Or the

power to appoint a sub-agent may be implied, either from the terms of the original authority, from the ordinary custom of trade, or from the fact that it is indispensable in order to accomplish the end; Paley, Ag., Dunlop ed. 175; Story, Ag. § 14; 9 Ves. Ch. 234, 251, 252. See DELEGATION.

When the authority is particular, it must, in general, be strictly pursued, or it will be void, unless the variance be merely circumstantial; Co. Litt. 49 b, 181 b, 303 b; 6 Term 591; 2 H. Bla. 623. As if it be to do an act upon condition, and the agent does it absolutely, it is void; and *vice versa*. If a person do less than the authority committed to him, the act is void; but if he does that which he is authorized, and more, it is good for that which is warranted, and void for the rest. Both of these rules, however, may have many exceptions and limitations; Paley, Ag. 178, 179. An authority given by the act of the principal to two or more persons cannot be executed by one, though one die or refuse; Paley, Ag. 177; Co. Litt. 112 b, 181 b; unless coupled with an interest; Mechem, Ag. § 77; 61 N. Y. 317; 57 Ill. 180; it being in such case construed strictly, and understood to be joint and not several; Story, Ag. § 42; 3 Pick. 232; 6 id. 198; 6 Johns. 89; 23 Wend. 324; 10 Vt. 532; 12 N. H. 226; 9 W. & S. 56. And an authority given to three jointly and severally is not, in general, well executed by two; but it must be done by one, or by all; Co. Litt. 181 b; Bacon, Abr. Authority, C; 1 B. & P. 229, 234; 3 Term 592. Where authority is conferred upon two or more agents, to represent their principal, the agency will be presumed to be joint, and it can be performed by them only jointly, when no intent appears that it may be otherwise executed; Mechem, Ag. § 77; 25 Iowa 115; 12 Mass. 185; 57 Ill. 180; 53 N. Y. 114. These rules apply to an authority of a private nature, saving in commercial transactions, which form an exception. Where, however, the authority is of a public nature, it may be executed by a majority; 24 Pick. 13; 9 Watts 466; 9 S. & R. 99.

As to the form to be observed in the execution of an authority, where an agent is authorized to make a contract for his principal in writing, it must, in general, be personally signed by him; Story, Ag. § 146; 1 Y. & J. 387; 9 Mer. 235, 251, 252. It is a rule that an act done under a power of attorney must be done in the name of the person who gives the power, and not merely in the attorney's name, though the latter be described as attorney in the instrument; Story, Ag. § 147; 11 Mass. 27, 29; 16 Pick. 847, 350; 7 Wend. 68; 10 id. 87, 271; 9 N. H. 263, 269, 370. But it matters not in what words this is done, if it sufficiently appear to be in the name of the principal. "For A B" (the principal), "C D" (the attorney), has been held to be sufficient; Story, Ag. § 153; 6 B. Monr. 612; 3 Blackf. 55; 7 Cush. 215. The strict rule of law in this respect applies, however, only to sealed instruments; and the rule is further modified, even in such cases, where the seal is not essential to the validity of the instrument; Story, Ag. §§ 148, 154; 8 Pick. 56; 17 Pet. 161. An authority must be executed within the period to which it is limited; 4 Campb. 279; Russell, Fact. & Brok. 315.

Destruction of. In general, an authority is revocable from its nature, unless it is given for a valuable consideration, or is part of a security, or coupled with an interest; Story, Ag. §§ 476, 477; 2 Kent 643; 2 Mass. 244, 342; 32 Cal. 609; 73 Ala. 372; 56 Vt. 467; 58 Md. 226; 63 Pa. 97; Mechem, Ag. § 204. An authority to sell on commission is not coupled with an interest but is revocable; 73 Ala. 372; 86 Ill. 142; 53 Pa. 266; and the fact that an authority is expressed as being irrevocable will not make it so; 73 Ala. 372; 86 Ill. 142; 53 Pa. 266; 70 Cal. 296; 58 Md. 226. It may generally be revoked at any moment before the actual exercise of it; Story, Ag. §§ 463, 465; and although the agent is appointed under seal, it has been held that his authority may be revoked by parol; Story,

Ag. § 463; 8 Ired. Law 74; 6 Pick. 198. The revocation may be express, as by the direct countermand of the principal, or it may be implied. The death of the principal determines the authority; 50 Miss. 353; 46 Vt. 728; 32 Ala. 404; 25 Ind. 182. See AGENCY.

The authority may be renounced by the agent before any part of it is executed, or when it is in part executed; but in either case, if the agency is founded on a valuable consideration, the agent, by renouncing it, makes himself liable for the damages which his principal may sustain thereby; Story, Ag. § 478; Story, Bailm. § 202; Mechem, Ag. § 233. If by the express terms of the commission the authority of the agent be limited to a certain period, it will manifestly cease so soon as that period has expired. The authority of the agent is *ipso facto* determined by the completion of the purpose for which it was given. If the agency is indefinite in duration, the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal; Mechem, Ag. § 233; 37 Mich. 481; 46 Pa. 426.

See, generally, 3 Viner, Abr. 416; Bacon, Abr.; 1 Salk. 95; Comyns, Dig. this title and the titles there referred to; 1 Rolle, Abr. 330; 2 id. 9; Wharton, Agency; Mechem, Agency; ATTORNEY, AGENCY, AGENT, PRINCIPAL.

In Governmental Law. Theright and power which an officer has, in the exercise of a public function, to compel obedience to his lawful commands. A judge, for example, has authority to enforce obedience to his lawful orders.

An officer with authority, is an officer commanded in a matter of public concern. 256 U. S. 8 citing 20 Md. 468. See VALIDITY OF AUTHORITY.

AUTOCRACY. A government where the power of the monarch is unlimited by law.

AUTOMOBILE. In an act, an automobile was held to be a carriage. It is a vehicle which can carry passengers or inanimate matter and so is such a carriage as the legislature had in view in the use of that word in the statute. 187 Mass. 53. But in a later case it was held that only in a broad sense is an automobile a carriage. It is more properly a machine than a carriage, its features as a piece of machinery being far more striking than those which it possesses as a carriage. 197 Mass. 245.

An "automobile" is an eminently dangerous article within the meaning of the rule of law holding manufacturers liable for defects in such articles. 145 Ky. 617, 140 S. W. 1047.

"Automobiles" will be classed as stage coaches, where they are used by a stage coach line in the place of stage coaches. 109 S. W. 319.

One Invited to Ride in Private Automobile Is a Licensee. A person invited to ride in the private automobile of another is a licensee, and the duty of the person giving the invitation is to refrain from doing any negligent acts by which the danger of riding in the automobile is increased, or a new danger created. The duty of the owner to his guest is to use ordinary care not to increase the danger of the guest, or create any new danger. Such licensee can recover for only the active negligence of the licensor. 158 Ky. 154, 164 S. W. 319.

AUTONOMY (Greek, *αὐτονομία*). The state of independence.

The autonomos was he who lived according to his own laws,—who was free. The term was chiefly used of communities or states, and meant those which were independent of others. It was introduced into the English language by the divines of the seventeenth century, when it and its translation—self-government—were chiefly used in a theological sense. Gradually its translation received a political meaning, in which it is now employed almost exclusively. Of late the word autonomy has been revived in diplomatic language in Europe, meaning independence, the negation of a state of political influence from without or foreign powers. See Lieber, Civ. Lib.

AUTREFOIS ACQUIT (Fr. formerly acquitted).

In Criminal Pleading. A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and acquitted of the same offence.

The constitution of the United States, Amend. art. 5, provides that no person shall be subject for the same offence to be put twice in jeopardy of life or limb. This is simply a re-enactment of the common-law provision. The same provision is to be found in the constitution of almost all if not of every state in the Union, and if not in the constitution the same principles are probably declared by legislative act; so that they must be regarded as fundamental doctrines in every state; 2 Kent 12. See 5 How. 410; 9 Wheat. 579; 2 Gall. 364; 2 Sumn. 19; 2 McLean 114; 4 Wash. C. C. 408; 9 Mass. 494; 2 Pick. 521; 2 Johns. Cas. 301; 18 Johns. 187; 5 Litt. 240; 1 Miss. 184; 4 Halst. 256. See, however, 6 S. & R. 577; 1 Hayw. 241; 13 Yerg. 582; 16 Ala. 188; Whart. Crim. Pl. § 490.

The court, however, must have been competent, having jurisdiction and the proceedings regular; Whart. Cr. Pl. § 438; 29 Tex. App. 48; 91 Ky. 200; but see 89 Ala. 172.

To be a bar, the acquittal must have been on trial; 5 Rand. 669; 11 N. H. 156; 4 Blackf. 156; 6 Mo. 645; 5 Harr. Del. 488; 14 Tex. 260; see 1 Hayw. 241; 14 Ohio 295; and by verdict of a jury on a valid indictment; 4 Bla. Com. 335; 1 Johns. 66; 1 Va. Cas. 312; 6 Ala. 341; 4 Mo. 376; 26 Pa. 513; 6 Md. 400; 39 Mo App. 187. In Pennsylvania and some other states, the discharge of a jury, even in a capital case, before verdict, except in case of absolute necessity, will support the plea; 3 Rawle 498; 80 N. C. 377; but the prisoner's consent to the discharge of a previous jury is a sufficient answer; 15 Pa. 468. In the United States courts and in some states, the separation of the jury when it takes place in the exercise of a sound discretion is no bar to a second trial; Whart. Cr. Pl. § 499; Clark, Cr. Law 373; 126 Ind. 71; 142 U. S. 148; as where the jury is discharged because of the sickness of a juror; 85 Cal. 383; 2 N. D. 531; see 91 Ga. 831; or because they failed to agree; 144 U. S. 263; 111 N. C. 695.

There must be an acquittal of the offence charged in law and in fact; 1 Va. Cas. 188, 288; 5 Rand. 669; 13 Mass. 457; 2 id. 172; 29 Pa. 323; 6 Cal. 543; 82 Wis. 571; but an acquittal is conclusive; 6 Humphr. 410; 3 Cush. 212; 16 Conn. 54; 7 Ga. 422; 8 Blackf. 533; 3 Brev. 421; 6 Mo. 644; 7 Ark. 169; 1 Bail. 651; 2 Halst. 172; 11 Miss. 751; 3 Tex. 118; 1 Denio 207. See 1 N. H. 257. If a *nolle prosequi* is entered without the prisoner's consent after issue is joined and the jury sworn, it is a bar to a subsequent indictment for the same offence; 85 Ga. 570; but the jeopardy does not begin until the jury is sworn, prior to that a *nol. pros.* may be entered without prejudice; 43 La. Ann. 514; a *nol. pros.* of two of three indictments is no bar to a prosecution under the third; 91 Ala. 25. In Missouri the conviction of murder in the second degree, under an indictment for murder in the first degree, constitutes no bar to trial and conviction for murder in the first degree, upon new trial, when first verdict has been set aside; 89 Mo. 312.

Proceedings by state tribunals are no bar to court-martial instituted by the military authorities of the United States; 3 Opin. Atty-Genl. 750; 6 id. 413; but a judgment of conviction by a military court, established by law in an insurgent state, is a bar to a subsequent prosecution by a state court for the same offence; 97 U. S. 509.

The plea must set out the former record, and show the identity of the offence and of the person by proper averments; Hawk. Pl. Cr. b. 2, c. 36; 1 Chit. Cr. L. 463; 16 Ark. 568; 24 Conn. 57; 6 Dana 295; 5 Rand. 669; 17 Pick. 400.

The true test by which the question, whether a plea of *autrefois acquit* or *autrefois convict* is a sufficient bar in any particular case, may be tried is, whether the

evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first; 1 Bish. Cr. L. 1012-1047; 3 Leach 708; 1 B. & B. 473; 3 B. & C. 502; 2 Conn. 54; 12 Pick. 504; 13 La. Ann. 243; 45 id. 936. Thus, if a prisoner indicted for burglariously breaking and entering a house and stealing therein certain goods of A is acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house and stealing other goods of B. Per Buller, J., 2 Leach 718, 719; 21 Tex. App. 406.

The plea of *autrefois acquit* involves questions of mixed law and fact, and is properly referred to the jury when not demurrable on its face; 45 La. Ann. 936.

The plea in the celebrated case of Regina v. Bird, 5 Cox, Cr. Cas. 12; Templ. & M. 438; 2 Den. Cr. Cas. 224, is of peculiar value as a precedent. See Train & H. Prec. Ind. 481; 32 Cent. Law J. 406.

AUTREFOIS ATTAINT (Fr. formerly attained). In Criminal Pleading. A plea that the defendant has been attained for one felony, and cannot, therefore, be criminally prosecuted for another; 4 Bla. Com. 336; 13 Mod. 109; R. & R. 268. This is not a good plea in bar in the United States, nor in England in modern law; 1 Bish. Cr. L. § 692; 3 Chit. Cr. L. 464; Stat. 7 & 8 Geo. IV. c. 28, § 4. See Mart. & Y. 123; 10 Ala. 475; 1 Bay 334.

AUTREFOIS CONVICT (Fr. formerly convicted). In Criminal Pleading. A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and convicted of the same.

This plea is substantially the same in form as the plea of *autrefois acquit*, and is grounded on the same principle, viz.: that no man's life or liberty shall be twice put in jeopardy for the same offence; Whart. Cr. Pl. § 435; 1 Bish. Cr. Law §§ 651-680; 1 Green, N. J. 362; 1 McLean 429; 7 Ala. 610; 2 Swan 493; 43 Wis. 395.

A plea of *autrefois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to another indictment for the same offence; Cooley's Const. Lim. 326-328; 1 Ariz. 56; 10 Mart. 549; 64 Cal. 260; 112 N. C. 857; otherwise, if the reversal were not for insufficiency in the indictment nor for error at the trial, but for matter subsequent, and *dehors* both the conviction and the judgment; 25 N. Y. 407; 26 id. 167. A prior conviction by judgment before a justice of the peace, and a performance of the sentence pursuant to the judgment, constitute a bar to an indictment for the same offence, although the complaint on which the justice proceeded was so defective that his judgment might have been reversed for error; 3 Metc. Mass. 328; 8 id. 532. Where a person has been convicted for failing to support his wife and being disorderly, it is no bar to a second prosecution on a similar charge, where at the time of the second offence he was not in prison on account of his first sentence; 126 N. Y. 647. Where one has been convicted of an assault but discharged without sentence on giving security for good behavior, he cannot afterwards be convicted on an indictment for the same assault; 24 Q. B. Div. 423. See **AUTREFOIS ACQUIT**.

AUTER VIE. The life of another; a tenant *pur auter vie* is one holding during or for the life of another. 2 Bla. Com. 120.

AUXILIUM (Lat.). An aid; tribute or services paid by the tenant to his lord. *Auxilium ad filium militem faciendum, vel ad filium maritandum*. (An aid for making the lord's son a knight, or for marrying his daughter.) Fitzh. Nat. Brev. 62.

AUXILIUM CURIE. An order of the court summoning one party, at the suit and request of another, to appear and warrant something. Kennett, Par. Ant. 477.

AUXILIUM REGIS. A subsidy paid to the king. Spelman.

AUXILIUM VICE COMITI. An ancient duty paid to sheriffs. Cowel; Whishaw.

AVAILABLE. Capable of being used; valid or advantageous. As to available means, see 13 N. Y. 218.

Suitable to the purpose; as, an available defence or plea; also, admitting of early conversion into ready money. Anderson.

Available means are anything which can readily be converted into money; all that class of securities known in the mercantile world as representatives of value easily convertible into money; not necessarily, nor primarily, money itself. *Id.*; 13 N. Y. 218-9.

AVAIL OF MARRIAGE. In Scotch Law. A certain sum due by the heir of a deceased ward vassal, when the heir became of marriageable age. Erskine, Inst. l. 2, t. 5, § 18.

AVAILS. Profits or proceeds, as the avails of a sale at auction. Webst. Dict.

With reference to wills it applies to the proceeds of an estate after the debts have been paid; 34 N. Y. 201; 3 id. 276.

AVAIL. In Canadian Law. An act of suretyship or guarantee on a promissory note. 1 Low. C. 221; 9 id. 360.

AVARIA, AVARIE. Average; the loss and damage suffered in the course of a navigation. Pothier, *Marit. Louage* 105.

AVENAGE. In Old English Times. A certain quantity of oats paid by a tenant to his landlord as rent, or in lieu of some other duties. Cunningham & Cowell.

AVENTURE. A mischance causing the death of a man, as by drowning, or being killed suddenly without felony. Co. Litt. 391; Whishaw.

AVER. To assert. See **AVERTMENT**. To make or prove true; to verify. The defendant will offer to *aver*. Cowel; Co. Litt. 362 b.

Cattle of any kind. Cowel, *Averia*; Kelham.

Aver et tenir. To have and to hold. *Aver corn*. A rent reserved to religious houses, to be paid in corn. Corn drawn by the tenant's cattle. Cowel.

Aver-land. Land ploughed by the tenant for the proper use of the lord of the soil. Blount.

Aver-penny. Money paid to the king's averages to be free therefrom. *Termes de la Ley*.

Aver-silver. A rent formerly so called. Cowel.

AVERT ET TENER. To have and to hold.

AVERA. Formerly a day's work of a ploughman, once valued at 8d. Jacob.

AVERAGE. In Insurance. Is general, particular, or petty.

GENERAL AVERAGE (also called gross) consists of expense purposely incurred, sacrifice made, or damage sustained for the common safety of the vessel, freight, and cargo, or the two of them, at risk, and is to be contributed for by the several interests in the proportion of their respective values exposed to the common danger, and ultimately surviving, including the amount of expense, sacrifice, or damage so incurred in the contributory value; 2 Phill. Ins. § 1269 et seq.; and see *Code de Com.* tit. xi.; Aluzet, *Trait des Av. cxx.*; 2 Curt. C. C. 59; 9 Cush. 415; 73 Pa. 98; 9 Wall. 203; D. Riley, Gen. Av.; 2 Pars. Mar. Law, ch. xi.; Stevens, Av.; Benecke, Av.; Pothier, Av.; *Lex Rhodia*, Dig. 14. 2. 1. General average is recoverable for loss by jettison; 19 C. B. N. S. 563; for ship's stores used to fire the donkey-engine which worked the pumps; 7 L. R. Exch. 39; 2 Q. B. D. 91, 295; and for damage to a cargo caused by pouring on water to extinguish a fire; 8 Q. B. D. 653; 46 Fed. Rep. 297; 53 id. 270; 59 J. 161.

Indemnity for general average loss is usually stipulated for in policies against the risks in navigation, subject, however, to di-

vers modifications and conditions; 2 Phill. Ins. §§ 1275, 1279, 1408, 1409. Under maritime policies in the ordinary form, underwriters are liable for the contributions made by the insured subject for loss by jettison of cargo, sacrifice of cables, anchors, sails, spars, and boats, expense of temporary repairs, voluntary stranding, compromise with pirates, delay for the purpose of refitting; 2 Phill. Ins. c. xv. sect. ii.; 1 Pars. Ship. & Adm. 351. The general rule for the adjustment of general average is, that the amount made good in respect of property sacrificed is brought in as contributing ratably with the property preserved so that the former pays the same proportion of general average as the latter; Loundes, Gen. Av. p. 391.

Insurance is not a part of the owner's interest in a ship, and in case of general average, for the purpose of increasing the fund to be distributed; the insurance received by him should not be added to the value of what was saved; 52 Fed. Rep. 320; 118 U. S. 463; id. 507, 520.

Average particulier (also called partial loss) is a loss on the ship, cargo, or freight, to be borne by the owner of the subject on which it happens, and is so called in distinction from general average; and, if not total, it is also called a partial loss; 2 Phill. Ins. c. xvi.; Stevens, pt. 1, c. 2; Arnold, Mar. Ins. 953; *Code de Com.* l. 2, t. 11, a. 403; Pothier, Ass. 115; Benecke & S. Av., Phill. ed. 341.

It is insured against in marine policies in the usual forms on ship, cargo, or freight, when the action of peril is extraordinary, and the damage is not mere wear or tear; and, on the ship, covers loss by sails split or blown away, masts sprung, cables parted, spars carried away, planks started, change of shape by strain, loss of boat; breaking of sheathing or upper works or timbers, damage by lightning or fire, by collision or stranding, or in defence against pirates or enemies, or by hostile or piratical plunder; 2 Phill. Ins. c. xvi.; 21 Pick. 456; 11 id. 90; 7 id. 159; 7 C. & P. 597; 8 id. 323; 1 Conn. 289; 9 Mart. 276; 18 La. 77; 5 Ohio 306; 6 id. 70, 456; 3 Cranch 218; 1 Cow. 265; 4 id. 223; 5 id. 63; 4 Wend. 255; 11 Johns. 315.

Particular average on freight may be by loss of the ship, or the cargo, so that full freight cannot be earned; but not if the goods, though damaged, could have been carried on to the port of destination; 2 Phill. Ins. c. xvi. sect. iii.; 9 id. 21; 15 Mass. 341; 23 Pick. 405; 2 McLean 423; 1 Story 842; 2 Gill 410; 12 Johns. 107; 18 id. 205, 208; 1 Binn. 547.

Particular average on goods is usually adjusted at the port of delivery on the basis of the value at which they are insured, viz.: the value at the place of shipment, unless it is otherwise stipulated in the policy; 2 Phill. Ins. §§ 145, 146; 2 Wash. C. C. 136; 2 Burr. 1167; 2 East 58; 12 id. 689; 3 B. & P. 308; 3 Johns. Ch. 217; 4 Wend. 45; 1 Caines 543; 1 Hall 619; 20 Pa. 312; 86 E. L. & Eq. 198; 3 Taunt. 162. See **SALVAGE**; **LOSS**.

A particular average on profits is, by the English custom, adjusted upon the basis of the profits which would have been realized at the port of destination. In the United States the adjustment is usually at the same rate as on the goods the profits on which are the subject of the insurance; 2 Phill. Ins. §§ 1773, 1774; 2 Pars. Ins. 399; 2 Johns. Cas. 86; 3 Day 108; 1 Johns. 433; 3 Pet. 223; 1 Sumn. 451; 8 Miss. 63; 1 S. & R. 115; 6 R. I. 47.

PETTY AVERAGE consists of small charges which were formerly assessed upon the cargo, viz.: pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, pier-money. Le Guidon, c. 5, a. 13; Weyt, de A. 3, 4; Weskett, art. Petty Av. 13; 2 Phill. Ins. § 1269, n. 1; 2 Arnould, Mar. Ins. 927.

The doctrine of general average which has obtained in maritime insurance is not applicable to fire insurance; May on Ins. § 421 a.

AVERIA (Lat.). Cattle; working cattle. *Averia caruæ* (draft-cattle) are exempt from distress; 3 Bla. Com. 9; 4 Term 566.

AVERIIS CAPTIS IN WITHER-NAM. In English Law. A writ which lies in favor of a man whose cattle have been unlawfully taken by another, and driven out of the country where they were taken, so that they cannot be replevied.

It issues against the wrong-doer to take his cattle for the plaintiff's use. *Reg. Brev.* 82.

AVERMENT. In Pleading. A positive statement of facts, as opposed to an argumentative or inferential one. *Cowp.* 383; *Bacon, Abr. Plead.* B.

Averments were formerly said to be general and particular; but only particular averments are found in modern pleading. 1 Chit. Pl. 277.

Particular averments are the assertions of particular facts.

There must be an averment of every substantive material fact on which the party relies, so that it may be replied to by the opposite party.

Negative averments are those in which a negative is asserted.

Generally, under the rules of pleading, the party asserting the affirmative must prove it; but an averment of illegitimacy, 2 Selwyn, Nisi P. 709, or criminal neglect of duty, must be proven; 2 Gall. 48; 10 Johns. 345; 1 Mass. 54; 10 East 211; 3 Campb. 10; 3 B. & P. 302; 1 Greenl. Ev. § 80.

Immaterial and impertinent averments (which are synonymous, 5 D. & R. 209) are those which need not be made, and, if made, need not be proved. The allegation of deceit in the seller of goods in an action on the warranty is such an averment; 2 East 446; 17 Johns. 92.

Unnecessary averments are statements of matters which need not be alleged, but which, if alleged, must be proved. *Carth.* 200.

General averments are almost always of the same form. The most common form of making particular averments is in express and direct words, for example: And the party avers, or in fact saith, or although, or because, or with this that, or being, etc. But they need not be in these words; for any words which necessarily imply the matter intended to be averred are sufficient.

See, in general, 3 Viner, Abr. 357; *Bacon, Abr. Plead.* B, 4; *Comyns, Dig. Pleader.* C, 50, C, 67, 68, 69, 70; 1 Wms. Saund. 235 a, n. 8; 3 *id.* 352, n. 3; 1 Chit. Pl. 308; *Archb. Civ. Pl.* 163.

AVERRARE. To carry goods in a wagon, or upon loaded horses. *Jacob.*

AVERSIO (Lat.). An averting; a turning away. A sale in gross or in bulk.

Letting a house altogether, instead of in chambers; 4 Kent 517.

Aversio periculi. A turning away of peril. Used of a contract of insurance; 3 Kent 263.

AVERT. In an instruction containing the phrase "no other safe means to 'avert' the then real, or, to him, apparent danger," the word "avert" was not equivalent to escape, which has been frequently condemned in instructions. 59 S. W. 516.

Unless one has apparent and safe means of "averting" danger, he is excusable for acting in his own self-defense. 110 Ky. 348, 61 S. W. 733.

AVERUM (Lat.). Goods; property. A beast of burden. *Spelman, Gloss.*

AVET. In Scotch Law. To abet or assist. *Tomlin, Dict.*

AVIATICUS (Lat.). In Civil Law. A grandson.

AVIATION LAW. Laws, written or unwritten, pertaining to the problems of aviation, such as the legal status of air space lying above land or water; the national and private ownership of such space; the right of aviators to pass through it; the regulation of the use and operation of air vehicles; the liability of aviators for injury that may be

attributable to their use and operation; and so forth, not to mention the laws pertaining to aerial warfare.

Aerial law still rests greatly on conjecture, and is a matter of continual dispute, but in general, it has been held that a nation has complete and exclusive dominion over the space superjacent to its territory and to the water in the neighborhood of its shores; likewise, that an individual owner of land owns the fee in the superjacent space; that aviators have, however, by custom established a right of passage through such space, but that they are liable for all injury that may be attributable to the operation of their vehicles. *David's, Law of Motor Vehicles*, pp. 282-316.

AVIZANDUM. In Scotch Law. To make *avizandum* with a process is to take it from the public court to the private consideration of the judge. *Bell, Dict.*

AVOCAT (Fr.). Barrister, pleader, lawyer. *Wes. Fr. Eng. Dict.*

AVOIDANCE. A making void, useless, or empty.

In Ecclesiastical Law. It exists when a benefice becomes vacant for want of an incumbent.

In Pleading. Repelling or excluding the conclusions or implications arising from the admission of the truth of the allegations of the opposite party. See *CONFESSION* and *AVOIDANCE*.

AVOIRDPOIS (Fr.). The name of a system of weight.

This kind of weight is so named in distinction from the Troy weight. One pound avoirdupois contains seven thousand grains Troy; that is, fourteen ounces, eleven pennyweights, and sixteen grains Troy; a pound avoirdupois contains sixteen ounces; and an ounce sixteen drachms. Thirty-two cubic feet of pure spring-water, at the temperature of fifty-six degrees of Fahrenheit's thermometer, make a ton of two thousand pounds avoirdupois, or two thousand two hundred and forty pounds net weight. *Dane, Abr. c. 211, art. 12, § 6.* The avoirdupois ounce is less than the Troy ounce in the proportion of 72 to 70; though the pound is greater. *Encyc. Amer. Avoirdupois.* For the derivation of this phrase, see *Barrington, Stat.* 206. See the Report of Secretary of State of the United States to the Senate, February 22, 1821, pp. 44, 72, 76, 79, 81, 87, for a learned exposition of the whole subject.

AVOUCHER. See *VOUCHER*.

AVOUÉ (Fr.). Attorney, solicitor. *Wes. Fr. Eng. Dict.*

AVOW. In Practice. To acknowledge the commission of an act and claim that it was done with right. 3 Bla. Com. 150.

To make an avowry. For example, when replevin is brought for a thing distrained, and the party taking claims that he had a right to make the distress, he is said to avow. See *Fleta*, l. 1, c. 4, § 4; *Cunningham, Dict.*; *AVOWRY*; *JUSTIFICATION*.

AVOWANT. One who makes an avowry.

AVOWEE. In Ecclesiastical Law. An advocate of a church benefice.

AVOWRY. In Pleading. The answer of the defendant in an action of replevin brought to recover property taken in distress, in which he acknowledges the taking, and, setting forth the cause thereof, claims a right in himself or his wife to do so. *-Lawes*, Pl. 35.

A justification is made where the defendant shows that the plaintiff had no property by showing either that it was the defendant's or some third person's, or where he shows that he took it by a right which was sufficient at the time of taking though not subsisting at the time of answer. The avowry admits the property to have been the plaintiff's, and shows a right which had then accrued, and still subsists, to make such caption. See *Gilbert, Distr.* 176-178; 2 W. Jones 25.

An avowry is sometimes said to be in the nature of an action or of a declaration, so that privity of estate is necessary; *Co. Litt.* 320 a; 1 S. & R. 170. There is no general issue upon an avowry; and it cannot be traversed cumulatively; 5 S. & R. 377. Alienation cannot be replied to it without notice; for the tenure is deemed

to exist for the purposes of an avowry till notice be given of the alienation; *Hamm. Part.* 131.

The object of an avowry is to secure the return of the property, that it may remain as a pledge; see 2 W. Jones 25; and to this extent it makes the defendant a plaintiff. It may be made for rents, services, tolls; 3 Dev. 478; for cattle taken, damage feasant, and for heriots, and for such rights wherever they exist. See *Gilbert, Distr.* 176 *et seq.*; 1 Chit. Pl. 426; *Comyns, Dig. Pleader*, 3 K.

AVOWTERER. In English Law. An adulterer with whom a married woman continues in adultery. *Termes de la Ley.*

AVOWTRY. In English Law. The crime of adultery.

AVULSION (Lat. *avellere*, to tear away). The removal of a considerable quantity of soil from the land of one man, and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water. 2 Washb. R. P. 452.

In such case the property belongs to the first owner. *Bract.* 221; *Hargr. Tract. de Jure Mar.*; *Schultes, Aq. Rights* 115; 28 Wkly. L. Bull. (Ohio) 104; 40 Neb. 792.

AVUNCULUS. In Civil Law. A mother's brother; 2 Bla. Com. 230.

AWAIT. To lay in wait; to waylay.

AWARD (Law Latin, *awarda*, *awardum*, Old French, *agarda* from *a garder*, to keep, preserve, to be guarded, or kept; so called because it is imposed on the parties to be observed or kept by them. *Spelman, Gloss.*)

The judgment or decision of arbitrators, or referees, on a matter submitted to them.

The writing containing such judgment. *Cowel*; *Termes de la Ley*; *Jenk.* 137; *Billings, Aw.* 119; *Watson, Arb.* 174; *Russell, Arb.* 234.

Requisites of. To be conclusive, the award should be consonant with and follow the submission, and affect only the parties to the submission; otherwise, it is an assumption of power, and not binding; *Lutw.* 530 (*Onyons v. Cheese*); *Stra.* 903; *Rep. Finch* 141; 24 E. L. & Eq. 346; 8 *Beav.* 361; 13 Johns. 27, 268; 17 Vt. 9; 3 N. H. 82; 13 Mass. 396; 11 Cush. 37; 18 Me. 251; 40 *id.* 194; 25 Conn. 71; 3 *Harr. Del.* 22; 5 Pa. 274; 12 Gill & F. 156, 456; *Litt.* 83; 13 Miss. 172; 25 Ala. 351; 7 *Cra.* 599. See 11 Johns. 61; 1 *Call* 500; 7 Pa. 134; 50 N. J. Eq. 103; 27 Ill. 374. Where it exceeds the terms of the submission, it is not void, where the judge on confirmation excludes as much as is incompetent; 38 S. C. 80; but it is so where damages are allowed in a lump sum, in which are included matters not submitted to them; 21 N. E. Rep. (N. Y.) 393.

It must be final and certain; *Morse, Arb.* 383; 5 *Ad. & E.* 147; 2 S. & S. 130; 3 S. & R. 340; 2 Pa. 206; 9 Johns. 43; 22 *Wend.* 125; 4 Cush. 317, 396; 13 Vt. 53; 40 Me. 194; 2 *Green, N. J.* 333; 4 *Md. Ch. Dec.* 199; 1 *Gilm.* 92; 2 *Patt. & H.* 443; 3 *Ohio* 266; 5 *Blackf.* 128; 4 *id.* 489; 1 *Ired.* 406; 3 *Fla.* 431; 1 *Ark.* 206; 4 *Ill.* 428; 75 *id.* 24; 2 *Fla.* 157; 13 *Miss.* 712; 53 *id.* 587; 2 *M'Ord* 279; 5 *Wheat.* 394; 12 *id.* 377; 62 *Hun* 568; 50 N. Y. 228; 74 *id.* 108; 64 N. C. 332; 103 *Mass.* 167; 54 Ala. 78; and see 4 *Conn.* 50; 6 Johns. 39; 6 *Mass.* 46; conclusively adjudicating all the matters submitted; 6 *Md.* 135; 1 *M'Mull.* 302; 2 *Cal.* 299; 5 *Wall.* 419; 83 *Me.* 71; and stating the decision in such language as to leave no doubt of the arbitrator's intention, or the nature and extent of the duties imposed by it on the parties; 2 *Cal.* 299, and cases above. An award reserving the determination of future disputes; 6 *Md.* 135; an award directing a bond without naming a penalty; 5 *Coke* 77; *Rolle, Abr. Arbitration* 2, 4; an award that one shall give security for the performance of some act or payment of money, without specifying the kind of security, are invalid; *Viner, Abr. Arbit.* 2, 12; *Bacon, Abr. Arbit.* E. 11, and cases above. So is one that finds that a party is entitled to receive his final payment and fails to ascertain

AWARD

the amount; 184 N. Y. 85.

It must be possible to be performed, and must not direct anything to be done which is contrary to law; 1 Ch. Cas. 87; 2 B. & Ald. 528; Kirb. 253; 1 Dall. 364; 4 id. 298; 4 Gill & J. 298; 13 Johns. 264; 99 Mass. 585. It will be void if it direct a party to pay a sum of money at a day past, or direct him to commit a trespass, felony, or an act which would subject him to an action; 2 Chit. 594; 1 M. & W. 573; or if it be of things nugatory and offering no advantage to either of the parties; 6 J. B. Moore 713.

It must be without palpable or apparent mistake; 2 Gall. 61; 3 B. & P. 371; 1 Dall. 487; 6 Metc. 131. For if the arbitrator acknowledges that he made a mistake, or if an error (in computation, for instance) is apparent on the face of the award, it will not be good; 4 Zabr. 647; 2 Stockt. 45; 2 Dutch. 130; 32 N. H. 289; 11 Cush. 549; 18 Barb. 344; 2 Johns. Ch. 399; 27 Vt. 241; 8 Md. 208; 4 Cal. 345; 5 id. 430; 115 Mass. 40. 77 Ill. 515; 12 R. I. 324; for, although an arbitrator may decide contrary to law, yet if the award attempts to follow the law, but fails to do so from the mistake of the arbitrator, it will be void; 3 Md. 353; 15 Ill. 421; 26 Vt. 416, 630; 4 N. J. 647; 17 How. 344.

An award may be in part good and in part void, in which case it will be enforced so far as valid, if the good part is separable from the bad; 10 Mod. 204; 12 id. 587; Cro. Jac. 664; 8 Taunt. 697; 1 Wend. 326; 5 Cow. 197; 13 Johns. 264; 2 Caines 235; 1 Me. 300; 42 id. 83; 7 Mass. 399; 19 Pick. 300; 11 Cush. 37; 6 Green, N. J. 247; 1 Rand. 449; 1 Hen. & M. 67; Hard. 318; 5 Dana 492; 26 Vt. 345; 2 Swan 213; 2 Cal. 74; 4 Ind. 248; 6 Harr. & J. 10; 5 Wheat. 894; 50 N. J. Eq. 103.

As to form, the award should, in general, follow the terms of the submission, which frequently provides the time and manner of making and publishing the award. It may be by parol (oral or written), or by deed; 3 Bulstr. 311; 20 Vt. 189. It should be signed by all the arbitrators in the presence of each other; 54 Fed. Rep. 439; 76 Ia. 187. See 44 Ill. App. 638; 47 N. J. Eq. 532; *contra*, 84 Va. 800; 86 Ky. 23. Where the submission requires the concurrence of the three arbitrators, recovery cannot be had where but two sign, though the third says it is right, but refuses to sign; 148 Pa. 372. See ARBITRATOR.

An award will be sustained by a liberal construction, *ut res magis valeat quam pereat*; 2 N. H. 126; 2 Pick. 534; 4 Wis. 181; 8 Md. 208; 8 Ind. 310; 17 Ill. 477; 29 Pa. 251; Reed Aw. 170.

Effect of. An award is a final and conclusive judgment between the parties on all the matters referred by the submission; 107 N. C. 156; 113 Mass. 235; 57 Ind. 221; 60 N. H. 278; 59 Pa. 379. It transfers property as much as the verdict of a jury, and will prevent the operation of the statute of limitations; 3 Bla. Com. 16; Morse, Arb. Law 487; 1 Freem. Ch. 410; 4 Ohio 310; 5 Cow. 383; 15 S. & R. 166; 1 Cam. & N. 93. See 65 Vt. 178. A parol award following a parol sub-

mission will have the same effect as an agreement of the same form directly between the parties; 37 Me. 72; 15 Wend. 99; 27 Vt. 241; 16 Ill. 34; 5 Ind. 220; 1 Ala. 278; 6 Litt. 264; 2 Coxe 369; 7 Cra. 171.

The right of real property cannot thus pass by mere award; but no doubt an arbitrator may award a conveyance or release of land and require deeds, and it will be a breach of agreement and arbitration bond to refuse compliance; and a court of equity will sometimes enforce this specifically; 1 Ld. Raym. 115; 3 East 15; 6 Pick. 148; 4 Dall. 120; 16 Vt. 450, 592; 15 Johns. 197; 2 Caines 320; 4 Rawle 411, 430; 11 Conn. 340; 18 Me. 251; 28 Ala. n. s. 475; 71 N. C. 493; 47 N. H. 305. Where there is a controversy as to the claims embraced within a mortgage, and the award merely fixes the amount due, it does not vest the legal title to the mortgaged property in the mortgagor; 97 Ala. 615.

Arbitrament and award may be regularly pleaded at common law or equity to an action concerning the same subject-matter, and will bar the action; Watson, Arb. 256; 12 N. Y. 9; 41 Me. 355. To an action on the award at common law, in general, nothing can be pleaded *dehors* the award; not even fraud; 23 Barb. 187; 28 Vt. 81, 776; *contra*, 9 Cush. 560. Where an action has been referred under rule of court and the reference fails, the action proceeds.

Enforcement of. An award may be enforced by an action at law, which is the only remedy for disobedience when the submission is not made a rule of court, and no statute provides a special mode of enforcement; 6 Ves. 815; 19 id. 431; 5 B. & Ald. 507; 4 B. & C. 103; 1 D. & R. 106; 3 C. B. 745. Assumpsit lies when the submission is not under seal; 33 N. H. 27; and *debt* on an award of money and on an arbitration bond; 18 Ill. 437; *covenant* where the submission is by deed for breach of any part of the award, and *case* for the non-performance of the duty awarded. *Equity* will enforce specific performance when all remedy fails at common law; Com. Dig. *Chancery*, 2 K; Story, Eq. Jur. § 1458; Morse, Arb. 603; 2 Hare 198; 4 Johns. Ch. 405; 4 Ill. 453; 3 P. Wms. 137; 1 Brown, P. C. 411. But see 1 T. & R. 187; 5 Ves. 846.

An award under a rule of court may be enforced by the court issuing execution upon it as if it were a verdict of a jury, or by attachment for contempt; 7 East 607; 1 Stra. 593. By the various state statutes regulating arbitrations, awards, where submission is made before a magistrate, may be enforced and judgment rendered thereon.

Amendment and setting aside. A court has no power to alter or amend an award; 1 Dutch. 130; 5 Cal. 179; 12 N. Y. 9; 41 Me. 355; 109 N. C. 103; but may recommit to the referee in some cases; 11 Tex. 18; 39 Me. 105; 26 Vt. 361; 18 Can. S. C. R. 338.

An award will not be disturbed except for very cogent reasons. It will be set aside for *misconduct*, corruption, or irregularity

of the arbitrator, which has or may have injured one of the parties; 2 Eng. L. & Eq. 184; 5 B. & Ad. 488; 1 Hill & D. 103; 12 Gratt. 535; 14 Tex. 56; 28 Pa. 514; 29 Vt. 72; it will not be set aside because one of the arbitrators was a relative; 59 Hun 617; so where one, after publishing his award, admits that it had been improperly obtained from him; [1891] 1 Ch. 558; it will be set aside for *error in fact*, or in attempting to follow the law, apparent on the face of the award; see *supra*, ARBITRATOR; for *uncertainty* or inconsistency; for an *exceeding* of his authority by the arbitrator; 23 Pick. 417; 4 Denio 191; where it is made solely at the direction of one of the parties and not upon the arbitrator's own judgment; 44 Fed. Rep. 151; when it is *not final* and conclusive, without reserve; when it is a *nullity*; when a party or witness has *been at fault*, or has made a mistake; or when the arbitrator acknowledges that he has made a mistake or error in his decision.

Where arbitrators have once made an award they are *functus officio* and cannot afterwards make a second award, though the first was void because of defects; 134 N. Y. 85; 137 id. 290.

Equity has jurisdiction to set aside an award, on any of the enumerated grounds, when the submission cannot be made a rule of a common-law court.

In general, in awards under statutory provisions, as well as in those under rules of court, questions of law may be reserved for the opinion of the court, and facts and evidence reported for their opinion and decision. See ARBITRATION.

AWAY-GOING CROP. A crop sown before the expiration of a tenancy, which cannot ripen until after its expiration, to which, however, the tenant is entitled. Broom, Max. 306. See EMBLEMENTS.

AWM. An ancient measure used in measuring Rhenish wines. *Termes de la Ley*. Its value varied in the different cities. Spelled also *Aume*. Cowel.

AYANT CAUSE. In French Law. This term, which is used in Louisiana, signifies one to whom a right has been assigned, either by will, gift, sale, exchange, or the like; an assignee. An *ayant cause* differs from an heir who acquires the right by inheritance. 8 Toulhier, n. 245.

AYLE. In Old English Law. Grandfather; a grandfather. The name of a writ which lay when a man's grandfather or grandmother was seized of lands in fee simple on the day of his or her death; and a stranger entered on that day, and abated, or dispossessed the heir of his inheritance.

AYUNTAMIENTO. In Spanish Law. A congress of persons; the municipal council of a city or town. 1 White, Rec. 416; 12 Pet. 442, notes.

B.

B. The second letter of the alphabet. It is used to denote the second page of a folio, and also as an abbreviation. See A; ABBREVIATIONS.

B. B. Bail bond. See C. C. ET B. B.

BABY ACT. A term of reproach originally applied to the disability of infancy when pleaded by an adult in bar of recovery upon a contract made while he was under age, but extends to any plea of the statute of limitations. Anderson's Dict. L.

BACHELERIA. In old England, the yeomanry, as distinguished from the baronage. Jacob.

BACHELOR. A man who has not been married.

One who has taken the first university degree in any of the faculties. In history, a knight of inferior power who fought under another. Stand. Dict.

BACK-BOND. A bond of indemnification given to a surety.

In Scotch Law. A declaration of trust; a defeasance; a bond given by one who is apparently absolute owner, so as to reduce his right to that of a trustee or holder of a bond and disposition in security. Paterson, Comp.

BACK PAY. See ALL BACK PAY AND EMOLUMENTS.

BACK TAXES. The term "back taxes" as used in a statute, refers to taxes on which the ordinary process of collection has been exhausted. 132 Ky. 306, 116 S. W. 712.

BACK-WATER. That water in a stream which, in consequence of some obstruction below, is detained or checked in its course, or re-flows.

The term is usually employed to designate the water which is turned back, by a dam erected in the stream below, upon the wheel of a mill above, so as to retard its revolution.

Every riparian proprietor is entitled to the benefit of the water in its natural state. Another such proprietor has no right to alter the level of the water, either where it enters or where it leaves his property. If he claims either to throw the water back above, or to diminish the quantity which is to descend below, he must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or an uninterrupted enjoyment for twenty years. If he cannot maintain his claim in either of these ways, he is liable to an action on the case for damages in favor of the injured party, or to a suit in equity for an injunction to restrain his unlawful use of the water; 1 Sim. & S. 190, 203; 1 B. & Ad. 258, 874; 9 Coke 59; 1 Wils. 178; 6 East 203; 5 Gray 460; 11 Metc. Mass. 517; 25 Pa. 519; 1 Rawle 218; 7 W. & S. 9; 4 Day 244; 24 Conn. 15; 7 Cow. 266; 2 Johns. Ch. 162; 5 N. H. 232; 62 id. 447; 2 Gilm. 285; 27 La. An. 501; 74 N. C. 501; 4 Ill. 432; 3 Green, N. J. 116; 3 Vt. 308; 4 Eng. L. & Eq. 265; 4 Mas. 400 (per Story, J.); 56 Me. 197; 7 Ga. 809. But he must show some actual, appreciable damage; 1 Rich. S. C. 444; 11 id. 153; *contra*, 4 Ga. 241; 42 Pa. 67. See 2 Scam. 67.

A riparian owner who obstructs a stream, impeding the usual flow of water or that caused by ordinary freshets and causing land to be overflowed, becomes liable; 155 Pa. 523. Where a railroad maintains a dam which causes water to overflow adja-

cent land, it is liable, although the dam was originally constructed by the county under authority of the legislature; 112 Mo. 6. At common law a railroad company must construct and maintain its road across a watercourse so as not to injure adjacent lands; 43 Ill. App. 78; 157 Pa. 622.

An action on the case to recover damages for flowing land is local, and must, therefore, be brought in the county where the land lies; 25 N. H. 525; 23 Wend. 484; 2 East 497.

In Massachusetts and some other of the states, acts have been passed giving to the owners of mills the right to flow the adjoining lands, if necessary to the working of their mills, subject only to such damages as shall be ascertained by the particular process prescribed, which process is substituted for all other judicial remedies; Angell, Wat. Cour. c. ix.; 12 Pick. 467; 4 Cush. 245; 4 Gray 581; 5 Ired. 338; 11 Ala. 472; 39 Me. 246; 42 id. 150; 3 Wis. 603; 86 Ky. 44. These statutes, however, confer no authority to flow back upon existing mills; 22 Pick. 312; 23 id. 216. See DAMAGES; INUNDATION; WATERCOURSE.

BACKADATION. A consideration given to keep back the delivery of stock when the price is lower for time than for ready money. Wharton, Dict. 2d Lond. ed.; Lewis, Stocks, etc. Sometimes called *Backwardation*.

BACKBEAR. The act of carrying on the back. Used specifically, in forest law, in reference to the case of a person caught carrying on his back game unlawfully killed. Stand. Dict. The same, in old English law, as backberend (*q. v.*), which was used in reference to any thief caught with stolen goods on his back. Jacob.

BACKBEREND (Sax.). Bearing upon the back or about the person.

Applied to a thief taken with the stolen property in his immediate possession. Bracton. l. 3, tr. 2, c. 32. Used with *handhabend*, having in the hand.

BACKING. Indorsement. Indorsement by a magistrate.

Backing a warrant becomes necessary when it is desired to serve it in a county other than that in which it was first issued. In such a case the indorsement of a magistrate of the new county authorizes its service there as fully as if first issued in that county. The custom prevails in England, Scotland, and some of the United States. See 2 N. Y. Rev. Stat. 590, § 5; 2 Rob. Mag. Assist. 572.

BACKSIDE. A yard at the back part of or behind a house, and belonging thereto.

The term was formerly much used both in conveyances and in pleading, but is now of infrequent occurrence except in conveyances which repeat an ancient description. Chitty, Pr. 177; 2 Ld. Raym. 1399.

BACKWARDATION. See BACKADATION.

BAD. Vicious, evil, wanting in good qualities; the reverse of good. See 127 Mass. 487; 4 Wend. 537.

When applied to "character," the jury must say whether want of chastity or of honesty was imputed. Anderson; 127 Mass. 490.

In pleading, means materially defective; ill; not good; as, a bad plea, bad pleading, a bad count. *Id.*

False, faulty; as, bad grammar. *Id.*

BAD CONDUCT. Persistent violation of a rule of the employer requiring employes to keep their street clothing in a dressing-room maintained for that purpose and away from machinery at which the men work, constitutes "bad conduct" within the provision of a contract of employment, call-

ing for discharge for "bad conduct." 146 Ky. 156, 142 S. W. 214.

BAD PLACE. At Mine. A "bad place" within the meaning of a contract is a place in the roof which cannot be made reasonably safe by the ordinary propping usually done by the miner himself. 157 Ky. 306, 162 S. W. 1139.

BAD TITLE. See TITLE.

BADGE. A mark or sign worn by some persons, or placed upon certain things, for the purpose of designation.

Some public officers, as watchmen, policemen, and the like, are required to wear badges that they may be readily known. It is used figuratively when we say, possession of personal property by the seller is a badge of fraud.

BADGE OF FRAUD. A term used relatively to the law of fraudulent conveyances made to hinder and defraud creditors. It is defined as a fact tending to throw suspicion upon a transaction, and calling for an explanation. Bump, Fr. Conv. 31.

When such a fact appears, its effect is to require more persuasive proof of the payment of the consideration and the good faith of the parties than would ordinarily be required; 11 Ala. 207. It is not fraud of itself, but evidence to establish a fraudulent intent; 5 Fla. 305; 13 Wis. 495.

The following have been held to be badges of fraud: *indebtedness* on the part of the grantor; 23 How. 477; 29 Iowa 161; 7 Cow. 301; 25 Pa. 509; 26 Ark. 20; the *expectation* of a suit; 17 Iowa 498; 42 Tex. 116; 28 Md. 505; 62 Pa. 62; 24 Wis. 410; *false recitals* in the deed; 18 Vt. 460; 26 N. Y. 373; *inadequacy* of consideration; 54 Ill. 269; 14 Johns. 493; 27 Miss. 167; 10 N. J. Eq. 333; 24 Ind. 228; 52 N. Y. 274; 23 Tex. 77; 65 Pa. 456; 70 Me. 258; 23 N. J. Eq. 14; 59 Mo. 537; 8 Wall. 362; 34 Miss. 576; 12 Wend. 41; *false statement of the consideration*; 26 N. Y. 378; 64 N. C. 374; 8 Dana 103; *secrecy*; 5 Fla. 9; 20 How. 448; 42 Mo. 531; 21 Barb. 85; *concealment* in the deed, not recording it and leaving it in the hands of the grantor; 14 Johns. 493; 44 Pa. 43; 12 Blatch. 256; 17 B. Monr. 779; 30 Mich.; *failure to record a mortgage by agreement*; 30 N. E. Rep. (Ind.) 952; 69 Miss. 687; *a secret trust* between the grantor and grantee; 3 Coke 80; 7 Watts 434; 16 N. J. Eq. 299; *retention of possession* of land by the grantor; 7 Cow. 301; 23 How. 477; 42 Mo. 551; 31 Me. 93; 6 Wall. 78; 17 Cal. 327; 51 Ga. 18; mere delay to record a deed executed for a good consideration by an insolvent to his son, where there is no evidence that the son knew of the insolvency, is not a badge of fraud; 81 Wis. 142; but in general anything in the transaction out of the usual course of such transactions is held to be such, 13 La. Ann. 595; Bump, Fr. Conv. 50.

BADGER. To worry or persecute persistently (one who cannot escape), as to badger a witness.

To subject to the "badger game" (*q. v.*). [Prov. Eng.] A licensed huckster. Stand. Dict.

A term originally applied in old England to one who bought corn or victuals in one place, and carried them to another to sell them at a profit; a legitimate pursuit if the badger held a license, and agreed not to do anything contrary to the statutes against forestallors, engrossers, and regrators. Jacob.

BADGER GAME. In the United States, the decoying of persons, as by conspiracy, into compromising positions or houses

of ill repute, for purposes of blackmail and robbery. *Stand. Dict.*

BAG. In old England, an uncertain quantity of goods and merchandise, from three to four hundred. *Jacob.*

BAGAVEL. A certain tribute or toll upon all manner of wares brought to the city of Exeter to be sold, to be applied towards the paving of the streets, repairing the walls, and maintaining the city. The collection of the toll was granted to the citizens of Exeter by charter by Edward 1st, and was commonly called in old English, begavel, beuhgavel, and chipping-gavel. *Wharton; Antiq. of Exeter.*

BAGGAGE. Such articles of apparel, ornament, etc., as are in daily use by travellers, for convenience, comfort, or recreation. "It includes whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or ultimate purpose of the journey;" per *Cockburn, C. J.*, in *L. R. 6 Q. B. 612*; only such articles of necessity or convenience as are generally carried by passengers for their personal use; 3 *Ohio Dec. 193*; 6 *Misc. Rep. 388*.

It was formerly held that carriers are not liable, as common carriers, for baggage unless a distinct price was paid for their carriage; 1 *Salk. 2821*; and see 3 *H. & C. 185*; but the rule is now otherwise in England and America; *L. R. 6 Q. B. 612*; 19 *Wend. 281*; 26 *id. 591*; 19 *Ill. 556*; 6 *Ohio 858*.

This term has been held to include jewelry carried as baggage, and which formed a part of female attire, the plaintiff being on a journey with his family; 4 *Bingh. 218*; 8 *Pa. 451*. A watch, carried in one's trunk, is proper baggage; 10 *Ohio 145*; 1 *Newb. 494*; but see 9 *Humphr. 621*; 18 *Mass. 275*; the surgical instruments of an army surgeon; 12 *Wall. 262*; valuable laces carried by a foreign woman of rank, for which the jury found in \$10,000 damages; 100 *U. S. 24*; one revolver, but not two; 56 *Ill. 212*; an opera glass; 33 *Ind. 379*; bedding of a poor man moving with his family; 85 *Vt. 604*; 4 *Misc. Rep. 266*; such articles as are ordinarily carried by travellers in valises; 42 *Mo. App. 134*; but not money, even to a reasonable amount; 6 *Hill, N. Y. 566*; 22 *Ill. 278*; intended for trade, business, or investment, or for transportation, and not intended for the passenger while travelling; 70 *Cal. 169*; *Civil Code Cal. § 2181*; *contra*, 98 *Mass. 371*; nor samples of merchandise; 18 *C. B. N. s. 818*; 98 *Mass. 83*; 6 *Hill, N. Y. 596*; 59 *Hun 625*; 66 *id. 456*; 126 *Mass. 121*; 35 *Ohio St. 541*; 52 *Kan. 398*; nor jewelry bought for presents; 4 *Bosw. 225*; 85 *Cal. 329*; nor for a stock of jewelry carried by a salesman to be sold (checked, without saying anything as to its contents, and there being nothing to indicate its contents, and railroad company's agent having checked it without inquiries); 148 *U. S. 627*; nor a feather-bed not intended for use on the journey; 106 *Mass. 146*; nor a lawyer's papers and bank notes to be used by him in conducting a case; 19 *C. B. N. s. 321*; nor trunks containing stage properties, costumes, paraphernalia, and advertising matters of a theatrical company, unless accepted as baggage, but the carrier, though without fault, is liable for the destruction of the trunks where its agent checked them as baggage with full knowledge that they contained, besides personal apparel, stage costumes and properties; 26 *Pac. R. 230*; *S. C. 20 Oreg. 392*. Books for reading or amusement; 6 *Ind. 242*; a harness-maker's tools, valued at ten dollars; and a rifle; 10 *How. Fr. 330*; 14 *Pa. 129*; and a rifle, revolver, two gold chains, two gold rings, and a silver pencil case; 32 *Up. Can. Q. B. 66*; and a carpet; 41 *Mo. 503*; are considered baggage. An illustrated catalogue, the individual property of a travelling salesman, prepared by himself, at his own expense, necessary for his convenience and use in his business, and carried with him on his trips, is personal baggage; and a recovery for it may

be had against one engaged in transferring baggage from depots to hotels, through whose fault a valise containing the catalogue was lost; 121 *Ind. 226*.

But if a carrier know that merchandise is included among baggage, and do not object, he is liable to the same extent as for other goods taken in the due course of his business; 8 *E. D. Smith 571*; 8 *Exch. 30*; but he must have actual knowledge; 13 *C. B. N. s. 818*; *L. R. 6 Q. B. 612*; 73 *Ill. 348*; 41 *Miss. 671*; 53 *N. Y. 429*; 29 *S. W. Rep. 196*. See 72 *Hun 5*. And see **COMMON CARRIERS**.

Where a passenger on second-class car delivered a dog to baggage-master and declined to pay for carrying it; at the plaintiff's destination, the baggage-master refused to deliver the dog, without the payment of a sum of money, and it was carried past the destination and lost, by the negligence of the baggage-master, it was held, that plaintiff could recover because of his ignorance of a rule as to a payment for conveying his dog on the train; 10 *S. W. Rep. 282*.

Under Code Iowa, §§ 1308, 2184, the limitation of the liability of a railroad company for wearing apparel in a passenger's baggage to the value of \$100, by a provision printed in the ticket, is ineffectual, and where the contract for transportation is made in another state, to be executed in Iowa, it will be presumed, in the absence of proof to the contrary, that the law of that state is to the same effect; 49 *N. W. Rep. 77*; a provision in the ticket, limiting liability for loss of baggage to \$100, where goods of the value of \$300 were stolen from the baggage while in company's possession, did not relate to loss or damage from any particular cause, but to the amount of loss only, and the jury were entitled to find negligence on the part of the railroad company, and they were liable for the full amount lost; 30 *N. E. Rep. (Ind.) 424*. Baggage carried by a woman, not a pauper, coming from Germany to the United States, consisting of clothing for herself and her two children, together with some bed feathers and covering of the value of \$355, is reasonable in quantity and value, and therefore a provision in the transportation ticket, limiting the carrier's liability for loss of baggage to \$50, is invalid, and will not defeat a recovery for loss of such baggage; 4 *Misc. Rep. 266*.

A baggage check merely indicating designation of baggage beyond terminus of issuing carrier's route does not prove a contract to carry to such destination; 13 *Misc. Rep. 32*. The issuance of a baggage check by a carrier to a passenger is not a contract by the carrier to deliver the baggage at such a point, but simply a means of identification of the baggage at the end of the route; 66 *Hun 202*.

BAIL (*Fr. bailler*, to deliver).

In Practice. Those persons who become sureties for the appearance of the defendant in court.

To deliver the defendant to persons who, in the manner prescribed by law, become securities for his appearance in court.

To become bail for another.

The word is used both as a substantive and a verb, though more frequently as a substantive, and in civil cases, at least, in the first sense given above. In its more ancient signification, the word includes the delivery of property, real or personal, by one person to another. Bail in actions was first introduced in favor of defendants, to mitigate the hardships imposed upon them while in the custody of the sheriff under arrest, the security thus offered standing to the sheriff in the place of the body of the defendant. Taking bail was made compulsory upon the sheriffs by the statute 23 *Hen. VI. c. 9*, and the privilege of the defendant was rendered more valuable and secure by successive statutes, until by statute 12 *Geo. I. c. 29*, made perpetual by 21 *Geo. II. c. 3*, and 19 *Geo. III. c. 70*, it was provided that arrests should not be made unless the plaintiff made affidavit as to the amount due, and this amount be endorsed on the writ; and for this sum and no more the sheriff might receive bail.

In the King's Bench, bail above and below were both exacted as a condition of releasing the defendant from the custody in which he was held from the time of his arrest till his final discharge in the suit. In the Common Bench, however, the origin of bail above seems to have been different, as the *capias* on which bail might be demanded was of effect only to bring the defendant to court, and after appearance

he was theoretically in attendance, but not in custody. The failure to file such bail as the emergency requires, although no arrest may have been made, is, in general, equivalent to a default.

In some of the states the defendant when arrested gives bail by bond to the sheriff, conditioned to appear and answer to the plaintiff and abide the judgment and not to avoid, which thus answers the purpose of bail above and below; 1 *Me. 336*; 1 *N. H. 173*; 2 *Id. 380*; 2 *Mass. 484*; 13 *id. 94*; 2 *N. & M. C. 569*; 2 *Hill, So. C. 386*; 4 *Dev. 40*; 18 *Ga. 314*. And see 2 *South. 811*. In criminal law the term is used frequently in the second sense given, and is allowed except in cases where the defendant is charged with the commission of the more heinous crimes.

Bail above. Sureties who bind themselves either to satisfy the plaintiff his debt and costs, or to surrender the defendant into custody, provided judgment be against him in the action and he fail to do so; *Sellon, Pr. 137*.

Bail to the action. Bail above.

Bail below. Sureties who bind themselves to the sheriff to secure the defendant's appearance, or his putting in bail to the action on the return-day of the writ. It may be demanded by the sheriff whenever he has arrested a defendant on a bailable process, as a prerequisite to releasing the defendant.

Civil bail. That taken in civil actions.

Common bail. Fictitious sureties formally entered in the proper office of the court.

It is a kind of bail above, similar in form to special bail, but having fictitious persons, John Doe and Richard Roe, as sureties. Filing common bail is tantamount to entering an appearance. 3 *Bla. Com. c. xix*.

Special bail. Responsible sureties who undertake as bail above.

Requisites of. A person to become bail must, in England, be a freeholder or householder; 2 *Chitt. Bail 96*; 5 *Taunt. 174*; *Loft 148*; must be subject to process of the court, and not privileged from arrest either temporarily or permanently; 4 *Taunt. 249*; 1 *D. & R. 127*; 15 *Johns. 535*; 20 *id. 129*; *Kirb. 209*; see 3 *Rich. S. C. 49*; must be competent to enter into a contract; must be able to pay the amount for which he becomes responsible, but the property may be real or personal if held in his own right; 2 *Chit. Bail 97*; 11 *Price 158*; and liable to ordinary legal process; 4 *Burr. 2526*. And see 1 *Chit. 286, n.*; 2 *How. Pr. 105*; 19 *Wend. 132*.

Persons not excepted to as appearance bail cannot be objected to as bail above; 1 *Hen. & M. 22*; and bail, if of sufficient ability, should not be refused on account of the personal character or opinions of the party proposed; 4 *Q. B. 468*; 1 *B. & H. Lead. Cr. Cas. 236*.

When it may be given or required. In civil actions the defendant may give bail in all cases where he has been arrested; *Petersd. B. 17, 37*; 7 *Johns. 187*; and bail below, even, may be demanded in some cases where no arrest is made; 1 *Harr. & J. 538*; 2 *M'Cord 250*; but where a statute forbids the taking of bail, an order of court authorizing it will not entitle a party thereto or make it valid; 31 *Ill. App. 594*.

Bail above is required under some restrictions in many of the states in all actions for considerable amounts; 2 *M'Cord 385*; either common; 2 *Yeates 429*; 1 *Spenc. 494*; 13 *Ill. 551*; which may be filed by the plaintiff, and judgment taken by default against the defendant if he neglects to file proper bail, after a certain period; 8 *Johns. 359*; 4 *Cow. 61*; 2 *South. 684*; 4 *Wash. C. 127*; or special, which is to be filed of course in some species of action and may be demanded in others; 1 *M'Cord 472*; 17 *Mass. 176*; 1 *Yeates 280*; 13 *Johns. 805*, 425; 1 *Wend. 808*; 4 *H. & M. H. 155*; 2 *Brev. 218*; but in many cases only upon special cause shown; *Coxe 277*; 8 *Halst. 811*; 2 *Caines 47*; 1 *Browne, Pa. 297*; 8 *Binn. 288*; 4 *Rand. 152*.

The existence of a debt and the amount due; 8 *S. & R. 61*; 2 *Whart. 499*; 1 *Mo. 346*; 1 *Leigh 476*; 1 *Penning. 46*; 1 *Blackf. 112*; 2 *Johns. Cas. 105*; 8 *Ga. 128*; 10 *Mo. 278*; in an action for debt, and, in some forms of action, other circumstances must be shown by affidavit to prevent a discharge on common bail; 5 *Halst. 831*; 7 *Cow. 518*; 1 *Barb. 247*; 1 *Blackf. 112*; 8

Leigh 411; 16 Ohio 304; 13 Ga. 357; see 1 Pet. C. C. 352; 2 Wash. C. C. 198; 4 *id.* 325. It is a general rule that a defendant who has been once held to bail in a civil case cannot be held a second time for the same cause of action; Tidd, Pr. 184; 8 Ves. Ch. 594; 4 Yeates 206; 2 Rich. S. C. 336; but this rule does not apply where the second holding is in another state; 14 Johns. 846; 2 Cow. 626; 3 N. H. 43; 2 Dall. 330; 4 M'Cord 485. See 1 Halst. 131. And see also 1 Dall. 188; 2 Wash. C. C. 157; 1 Pet. C. C. 404; 3 Conn. 523; 3 Gill & J. 54; as to the effect of a discharge in insolvency.

In criminal cases the defendant may in general claim to be set at liberty upon giving bail, except when charged with the commission of a capital offence; 4 Bla. Com. 297; 6 Mo. 640; 59 *id.* 599; 1 M'Mull. 456; 3 Strobb. 272; 18 Ala. 390; 96 *id.* 110; 9 Dana 38; 9 Ark. 222. See 87 Mich. 497; 57 Miss. 39; 34 La. Ann. 61; 79 Ind. 600. One charged with murder should not be discharged on habeas corpus, unless the evidence before the committing magistrate was so insufficient that a verdict thereon requiring capital punishment would be set aside; 64 Cal. 152; 83 Ala. 114; 86 *id.* 620; 65 Miss. 187; and even in capital offences a defendant may be bailed in the discretion of the court, in the absence of constitutional or statutory provisions to the contrary; 6 Gratt. 705; 11 Leigh 665; 19 Ohio 139; 8 Barb. 158; 19 Ala. N. S. 561; 1 Cal. 9; 30 Miss. 673; 16 Mass. 423; 8 B. Monr. 3. Except under extraordinary circumstances, one convicted of felony will not be admitted to bail pending an appeal; 89 Cal. 79; 60 Barb. 480; 40 Tex. 451; 24 Ga. 391. Where one is indicted for a capital offence, the burden rests on him to show that the proof of his guilt is not evident, on an application for bail; 31 Tex. Crim. R. 422.

For any crime or offence against the United States, not punishable by death, any justice or judge of the United States, or commissioner of a circuit court to take bail, or any chancellor, judge of the supreme or superior court, or first judge of any court of common pleas, or mayor of any city of any state, or any justice of the peace or magistrate of any state, where the offender may be found, may take bail; Act Sept. 24, 1789, § 33, Mar. 2, 1793, § 4; and, after commitment by a justice of the supreme or judge of district court of the United States, any judge of the supreme or superior court of any state (there being no judge of the United States in the district to take such bail) may admit the person to bail if he offer it.

When the punishment by the laws of the United States is death, bail can be taken only by the supreme or circuit court, or by a judge of the district court of the United States.

As to the principle on which bail is granted or refused in cases of capital offences in the Queen's Bench, see 1 E. & B. 1, 8; Dearsli. Cr. Cas. 51, 60.

The proceedings attendant on giving bail are substantially the same in England and all the states of the United States. An application is made to the proper officer, 4 Rand. 498, and the bond or the names of the bail proposed filed in the proper office, and notice is given to the opposite party, who must except within a limited time, or the bail justify and are approved. If exception is taken, notice is given, a hearing takes place, the bail must justify, and will then be approved unless the other party oppose successfully; in which case other bail must be added or substituted. A formal application is, in many cases, dispensed with, but a notification is given at the time of filing to the opposite party, and, unless exceptions are made and notice given within a limited time, the bail justify and are approved. If the sum in which the defendant is held is too large, he may apply for mitigation of bail.

The bail are said to enter into a recognizance when the obligation is one of record, which it is when government or the defendant is the obligee; when the sheriff is the obligee, it is called a bail bond. See

BAIL BOND; RECOGNIZANCE.

Unless authorized by statute, it is illegal for an officer or magistrate to receive money in lieu of bail for the appearance of a person accused of a crime; 49 Ohio St. 257.

Mitigation of excessive bail may be obtained by simple application to the court; 13 Johns. 425; 1 Wend. 107; 3 Yeates 83; and in other modes; 17 Mass. 116; 1 N. H. 374. Exacting excessive bail is against the constitution of the United States, and was a misdemeanor at common law; U. S. Const. Amend. art. 8; 1 Brev. 14; 4 Cranch 518.

The liability of bail is limited by the bond; 9 Pet. 329; 2 Va. Cas. 334; 5 Watts 539; 2 N. J. 533; by the *ac etiam*; 1 Cov. 601; see 5 Conn. 588; 5 Watts 539; by the amount for which judgment is rendered; 2 Speers 664; and special circumstances in some cases; 1 N. & M'C. 64; 1 M'Cord 128; 4 *id.* 315; 2 Hill. S. C. 336. And see BAIL BOND; RECOGNIZANCE.

The powers of the bail over the defendant are very extensive. As they are supposed to have the custody of the defendant, they may, when armed with the bail piece, arrest him, though out of the jurisdiction of the court where they became bail, and in a different state; 1 Baldw. 578; 3 Conn. 84, 421; 8 Pick. 138; 7 Johns. 145; 109 N. C. 775; may take him while attending court as a suitor, or at any time, even on Sunday; 4 Yeates 123; 4 Conn. 170; may break open a door if necessary; 7 Johns. 145; 4 Conn. 166; may command the assistance of the sheriff and his officers; 8 Pick. 138; and may depute their power to others; 3 Harr. 568. Where the defendant has been surrendered by his sureties pending an appeal, a reasonable time and opportunity should be given him to get another bond; 112 Mo. 231.

To refuse or delay to bail any person is an offence against the liberty of the subject, both at common law and by statute, but does not entitle the person refused to an action unless malice be shown; 4 Q. B. 468; 13 *id.* 240; 1 N. H. 374.

In Canadian Law. A lease. See Merlin, Répert. Bail.

Bail *emphyteiotique*. A lease for years, with a right to prolong indefinitely; 5 Low. C. 381. It is equivalent to an alienation; 6 Low. C. 58.

See JUMPING BAIL.

BAIL BOND. In Practice. A specialty by which the defendant and other persons become bound to the sheriff in a penal sum proportioned to the damages claimed in the action, and which is conditioned for the due appearance of such defendant to answer to the legal process therein described, and by which the sheriff has been commanded to arrest him.

The defendant usually binds himself as principal with two sureties; but sometimes the bail alone bind themselves as principals, and sometimes also one surety is accepted by the sheriff. The bail bond may be said to stand in the place of the defendant so far as the sheriff is concerned, and, if properly taken, furnishes the sheriff a complete answer to the requirement of the writ, directing him to take and produce the body of the defendant. A bail bond is given to the sheriff, and can be taken only where he has custody of the defendant on process other than final, and is thus distinguished from recognizance, which see.

The sheriff can take the bond only when he has custody of the defendant's body on process other than final.

When a bail bond, with sufficient securities and properly prepared, is tendered to the sheriff, he must take it and discharge the defendant; Stat. 23 Hen. VI. c. 10, § 5.

The requisites of a bail bond are that it should be under seal; 1 Term 418; 7 *id.* 109; 2 Hayw. 16; 3 T. B. Monr. 60; 6 Rand. 101; should be to the sheriff by the name of the office; 1 Term 422; 4 M'Cord 175; 1 Ill. 51; 4 Bibb 505; 4 Gray 800; conditioned in such manner that performance is possible; 3 Lev. 74; 3 Campb. 181; 1 South. 319; for a proper amount; 2 Va. Cas. 334; 2 Penning. 707; for the defendant's appearance at the place and day named in the writ; 1 Term 418; 1 Ala. 289; 4 Me. 10; 4 Halst. 97; 2 Munf. 448; 2 Brev. 304; see BAIL; and should describe

the action in which the defendant is arrested with sufficient accuracy to distinguish it; Harl. 501; 10 Mass. 20; 5 *id.* 542; 9 Watts 43; but need not disclose the nature of the suit; 6 Term 702. A bail bond which fails to specify the charge which the principal is to answer is void and the defect cannot be remedied by testimony; 58 Hun 368. The sureties must be two or more in number to relieve the sheriff; 2 Bingh. 227; 9 Mass. 482; 12 *id.* 129; 1 Wend. 103; see 5 Rich. S. C. 347; and he may insist upon three, or even more, subject to statutory provisions on the subject; 5 M. & S. 223; but the bond will be binding if only one be taken; 2 Metc. Mass. 490; 8 Johns. 358; 2 Over. 178; 2 Pick. 284; Petersd. B. 264.

Putting in bail to the action; 5 Burr. 2683, and waiver of his right to such bail by the plaintiff; 5 S. & R. 419; 11 *id.* 9; 7 Ohio 210; 4 Johns. 185; 6 Rand. 165; 2 Day 190; or a surrender of the person of the defendant, constitute a performance or excuse from the performance of the condition of the bond; 1 B. & P. 326; 1 Baldw. 148; 1 Johns. Cas. 329, 334; 9 S. & R. 24; 14 Mass. 115; 2 Strobb. 439; 6 Ark. 219; see 4 Wash. C. C. 317, 333; 109 N. C. 775; as do any other matters which may be classed as changes in the circumstances of the defendant abating the suit; Dougl. 45; 1 N. & M'C. 215; 2 Mass. 485; 1 Over. 224; including a discharge in insolvency; 2 Bail. S. C. 492; 1 Harr. & J. 156; 2 Johns. Cas. 403; 2 Mass. 481; 1 Harr. N. J. 367, 466; 3 Gill & J. 64; see 1 Pet. C. C. 484; 4 Wash. C. C. 317; matters arising from the negligence of the plaintiff; 2 East 305; 2 B. & P. 558; 6 Term 363; or from irregularities in proceeding against the defendant; 2 Tidd, Pr. 1182; 3 Bla. Com. 292; 3 Yeates 389; 4 Yerg. 181; 1 Green, N. J. 209; 1 Harr. Del. 134. Where the recognizance is for the appearance of a prisoner, and he does appear and pleads guilty, it cannot be forfeited for failure to appear subsequently to answer the sentence; 44 Mo. App. 375.

In those states in which the bail bond is conditioned to abide the judgment of the court as well as to appear, some of the acts above mentioned will not constitute performance. See RECOGNIZANCE. The plaintiff may demand from the sheriff an assignment of the bail bond, and may sue on it for his own benefit; Stat. 4 Anne, c. 16, § 20; Watson, Sher. 99; 1 Sellon, Pr. 126, 174; 6 S. & R. 545; 2 Jones, N. C. 353; see 3 Munf. 121; unless he has waived his right so to do; 1 Caines 55; or has had all the advantages he would have gained by entry of special bail; 4 Binn. 344; 2 S. & R. 284. See 1 P. A. Bro. 238, 250.

As to the court in which suit must be brought, see 4 M'Cord 370; 1 Hill, S. C. 604; 13 Johns. 424; 9 *id.* 80; 6 S. & R. 543; 1 Ga. 315.

The remedy is by *scire facias* in Massachusetts, New Hampshire, North Carolina, South Carolina, Tennessee, Texas, and Vermont; 15 Pick. 339; 2 N. H. 359; 2 Hayw. 223; 9 Yerg. 223; 2 Brev. 84, 318; 21 Vt. 409; 22 *id.* 249; 6 Tex. 337. The United States is not restricted to the remedies provided by the laws of a state in enforcing a forfeited bond taken in a criminal case, but may proceed according to the common law; 54 Fed. Rep. 221. See JUSTIFICATION.

BAIL COURT (now called the Practice Court). In English Law. A court auxiliary to the court of Queen's Bench at Westminster, wherein points connected more particularly with pleading and practice were argued and determined.

It heard and determined ordinary matters, and disposed of common motions; Holthouse, Law Dict.; Wharton, Law Dict. 2d Lond. ed. It has been abolished.

BAIL-DOCK. At the Old Bailey, London, a small room taken from one of the corners of the court, and left open at the top, in which are put some malefactors during trials. Stand Dict.

BAIL PIECE. A certificate given by a judge or the clerk of a court, or other per-

son authorized to keep the record, in which it is certified that the bail became bail for the defendant in a certain sum and in a particular case. It was the practice, formerly, to write these certificates upon small pieces of parchment, in the following form:—

In the court of —, of the Term of —, in the year of our Lord —, City and County of —, ss.

Theunis Thew is delivered to bail, upon the taking of his body, to Jacobus Vanzant, of the city of —, merchant, and to John Doe, of the same city, yeoman.

SMITH, JR. { At the suit of
Attor'y for Deft. { PHILIP CARSWELL.
Taken and acknowledged the — day of —, A. D. —, before me. D. H.
See 3 Bla. Com. App.; 1 Sellon, Pr. 139.

BAILABLE ACTION. An action in which the defendant is entitled to be discharged from arrest only upon giving bond to answer.

BAILABLE PROCESS. Process under which the sheriff is directed to arrest the defendant and is required by law to discharge him upon his tendering suitable bail as security for his appearance. *A capias ad respondendum* is bailable; not so a *capias ad satisfaciendum*.

BAILEE. In Contracts. One to whom goods are bailed; the party to whom personal property is delivered under a contract of bailment.

His duties are to act in good faith, and perform his undertaking, in respect to the property intrusted to him, with the diligence and care required by the nature of his engagement.

When the bailee alone receives benefit from the bailment, as where he borrows goods or chattels for use, he is bound to exercise extraordinary care and diligence in preserving them from loss or injury; Story, Bailm. § 237; 3 Pars. Contr. 95; 37 N. Y. 284; 37 Ill. 250; 27 Mo. 549; but he is not an insurer; 9 C. & P. 383; see 44 Barb. 442.

When the bailment is mutually beneficial to the parties, as where goods or chattels are hired or pledged to secure a debt, the bailee is bound to exercise ordinary diligence and care in preserving the property; Edw. Bailm. § 284; 42 Ala. 145; 58 Me. 275; 3 Brewst. 9; 6 Cal. 643.

When the bailee receives no benefit from the bailment, as where he accepts goods, chattels, or money to keep without recompense, or undertakes gratuitously the performance of some commission in regard to them, he is answerable only for the use of the ordinary care which he bestows upon his own property of a similar nature; Edw. Bailm. § 43. See 17 Mass. 479; 14 S. & R. 275; it has been held that such a bailee would be liable only for gross neglect or fraud; 40 Miss. 473; 23 Ark. 61; 57 Pa. 247; 7 Cow. 278; 84 Neb. 426; 154 Pa. 296. The case must have relation to the nature of the property bailed; 2 Stra. 1099; 1 Mas. 132; 1 Sneed 248. Where a gratuitous bailee of corporate stock without authority delivers it to the company, which converts the same to its use, he is liable for its value; 87 Mich. 209.

These differing degrees of negligence have been doubted. See BAILMENT.

The bailee is bound to redeliver or return the property, according to the nature of his engagement, as soon as the purpose for which it was bailed shall have been accomplished. Nothing will excuse the bailee from delivery to his bailor, except by showing that the property was taken from him by law, or by one having a paramount title, or that the bailor's title had terminated; 36 N. Y. 47, 403; 18 Vt. 186; 35 Barb. 191. He cannot dispute his bailor's title; Edw. Bailm. § 73; 6 Mackey 255; 29 Mo. App. 233; nor can he convey title as against the bailor, although the purchaser believes him to be the true owner; 46 Mo. App. 313.

The bailee has a special property in the goods or chattels intrusted to him, sufficient to enable him to defend them by suit against all persons but the rightful owner. The depositary and mandatary acting gratuitously, and the finder of lost property, have

this right; Edw. Bailm. § 245; 13 Johns. 147.

A bailee with a mere naked authority, having a right to remuneration for his trouble, but coupled with no other interest, may support trespass for any injury amounting to a trespass done while he was in the actual possession of the thing; Edw. Bailm. 37; 13 Wend. 63; 35 Me. 55; 46 N. Y. 291. A bailee may recover in trover for goods wrongfully converted by a third person; 47 Ill. App. 87.

A bailee for work, labor, and services, such as a mechanic or artisan who receives chattels or materials to be repaired or manufactured, has a lien upon the property for his services; 2 Pars. Contr. 145, 146; 3 id. 270-273; 6 Denio 628; 10 Wend. 318; 15 Mass. 242. Other bailees, innkeepers, common carriers, and warehousemen, also, have a lien for their charges.

See also Schouler, Bailm.; Coggs v. Bernard, Sm. Lead. Cas.; BAILMENT.

BAILIE. In Scotch Law. An officer appointed to give infetment.

In certain cases it is the duty of the sheriff, as king's bailie, to act; generally, any one may be made bailie, by filling in his name in the precept of sasine.

A magistrate possessing a limited criminal and civil jurisdiction. Bell, Dict.

BAILIFE, or BAILIFF (L. Fr.). A bailiff; a ministerial officer, with duties similar to those of a sheriff. The judge of a court. A municipal magistrate. Burrill.

BAILIFF. A person to whom some authority, care, guardianship, or jurisdiction is delivered, committed, or intrusted. Spelman, Gloss.

A sheriff's officer or deputy. 1 Bla. Com. 344.

A magistrate, who formerly administered justice in the parliaments or courts of France, answering to the English sheriffs as mentioned by Bracton.

There are still bailiffs of particular towns in England; as, the bailiff of Dover Castle, etc.; otherwise, bailiffs are now only officers or stewards, and are *bailiffs of liberties*, appointed by every lord within his liberty, to serve writs, etc.; *bailiffs errant or itinerant*, appointed to go about the country for the same purpose; *sheriff's bailiffs*, sheriff's officers to execute writs; these are also called *bound bailiffs*, because they are usually bound in a bond to the sheriff for the due execution of their office; *bailiffs of court-baron*, to summon the court, etc.; *bailiffs of husbandry*, appointed by private persons to collect their rents and manage their estates; *water bailiffs*, officers in port towns for searching ships, gathering tolls, etc. Bacon, Abr.

A person acting in a ministerial capacity who has by delivery the custody and administration of lands or goods for the benefit of the owner or bailor, and is liable to render an account thereof. Co. Litt. 271; 2 Leon. 245; Story, Eq. Jur. § 446; 25 Conn. 149.

The word is derived from the old French *bailleur*, to deliver, and originally implied the delivery of real estate, as of land, woods, a house, a part of the fish in a pond; Ow. 20; 2 Leon. 194; Keilw. 114 a, b; 37 Edw. III. c. 7; 10 Hen. VII. c. 30; but was afterwards extended to goods and chattels. Every bailiff is a receiver, but every receiver is not a bailiff. Hence it is a good plea that the defendant never was receiver, but as bailiff, 18 Edw. III. 16. See Cro. Eliz. 82, 83; 2 And. 62, 96; Fitzh. Nat. Br. 134 F; 6 Coke 48 a, b.

From a bailiff are required administration, care, management, skill. He is, therefore, entitled to allowance for the expense of administration, and for all things done in his office according to his own judgment without the special direction of his principal, and also for casual things done in the common course of business; 1 Rolle, Abr. 125, §§ 1, 7; Co. Litt. 89 a; Com. Dig. E, 12; Brooke, Abr. Acc. 18; but not for things foreign to his office; Brooke, Abr. Acc. 26, 88; Plowd. 282 b, 14; Com. Dig. Acc. E, 13; Co. Litt. 172. Whereas a mere receiver, or a receiver who is not also a bailiff, is not entitled to allowance for any expenses; Brooke, Abr. Acc. 18; 1 Rolle, Abr. 119; Com. Dig. E, 13; 1 Dall. 340.

A bailiff may appear and plead for his principal in an assize; "and his plea commences" thus: "J. S., bailiff of T. N., comes," etc., not "T. N., by his bailiff J. S., comes," etc. Co. 2d Inst. 415; Keilw. 117 b. As to what matters he may plead, see Co. 2d Inst. 414.

BAILIFF, HIGH. See HIGH BAILIFF.

BAILIWICK. The jurisdiction of a sheriff or bailiff. 1 Bla. Com. 344.

A liberty or exclusive jurisdiction which was exempted from the sheriff of the county, and over which the lord appointed a bailiff, with such powers within his precinct as the under-sheriff exercised under the sheriff of the county. Whishaw, Lex.

BAILLEW DE FONDS. In Canadian Law. The unpaid vendor of real estate.

His claim is subordinate to that of a subsequent hypothecary creditor claiming under a conveyance of prior registration; 1 Low. C. 1, 6; but is preferred to that of the physician for services during the last sickness; 9 Low. C. 497. See 7 Low. C. 469; 9 id. 182; 10 id. 379.

BAILLI. In Old French Law. One to whom judicial authority was assigned or delivered by a superior; Black, L. Dict.

The term was applied both to those high officers who were appointed to act as judges in different districts of the kingdom, and to the inferior officers who presided in the lord's courts. Burrill.

BAILLIE, or BAILLY (L. Lat.). A bailwick (*q. v.*); jurisdiction; province. Burrill.

BAILMENT (Fr. *bailier*, to put into the hands of; to deliver).

A delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished. Prof. Joel Parker, MS. Lect. Dane Law School, 1851.

The right to hold may terminate, and a duty of restoration may arise, before the accomplishment of the purpose; but that does not necessarily enter into the definition, because such duty of restoration was not the original purpose of the delivery, but arises upon a subsequent contingency. The party delivering the thing is called the bailor; the party receiving it, the bailee.

Various attempts have been made to give a precise definition of this term, upon some of which there have been elaborate criticisms, see Story, Bailm. 4th ed. § 2, n. 1, exemplifying the maxim, "*Omnis definitio in lege periculosa est*;" but the one above given is concise, and sufficient for a general definition.

Some of these definitions are here given as illustrating the elements considered necessary to a bailment by the different authors cited.

A delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. Story, Bailm. § 2. See Merin, Répert. Bail.

A delivery of goods in trust upon a contract, either expressed or implied, that the trust shall be faithfully executed on the part of the bailee. 2 Bla. Com. 451. See id. 393.

A delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purposes of the bailment shall be answered. 2 Kent 559.

A delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered. Jones, Bailm. 1.

A delivery of goods in trust on a contract, either expressed or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed. Jones, Bailm. 117.

According to Story, the contract does not necessarily imply an undertaking to redeliver the goods; and the first definition of Jones here given would seem to allow of a similar conclusion. On the other hand, Blackstone, although his definition does not include the return, speaks of it in all his examples of bailments as a duty of the bailee; and Kent says that the application of the term to cases in which no return or delivery or redelivery to the owner or his agent is contemplated, is extending the definition of the term beyond its ordinary acceptance in the English law. A consignment to a factor would be a bailment for sale, according to Story; while according to Kent it would not be included under the term bailment.

Sir William Jones has divided bailments into five sorts, namely: *depositum*, or deposit; *mandatum*, or commission without recompense; *commodatum*, or loan for use without pay; *pignori acceptum*, or pawn; *locatum*, or hiring, which is always with reward. This last is subdivided into *locatio rei*, or hiring, by which the hirer gains a temporary use of the thing; *locatio operis faciendi*, when something is to be done to the thing delivered; *locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another.

Jones, Bailm. 86. See these several titles.

A better general division, however, for practical purposes, is into three kinds. *First*, those bailments which are for the benefit of the bailor, or of some person whom he represents. *Second*, those for the benefit of the bailee, or some person represented by him. *Third*, those which are for the benefit of both parties.

There are three degrees of care and diligence required of the bailee, and three degrees of the negligence for which he is responsible, according to the purpose and object of the bailment, as shown in those three classes; and the class serves to designate the degree of care, and of the negligence for which he is responsible. Thus, in the first class the bailee is required to exercise only slight care, and is responsible, of course, only for gross neglect. In the second he is required to exercise great care, and is responsible even for slight neglect. In the third he is required to exercise ordinary care, and is responsible for ordinary neglect. See *BAILEE*.

There is a supplementary class, founded upon the policy of the law, in which the bailee is responsible for loss without any neglect on his part, being as it were, with certain exceptions, an insurer of the safety of the thing bailed. Prof. Joel Parker, M.S. Lect. Dane Law School, 1851.

It has been held in some cases that there are, properly speaking, no degrees of negligence (though the above distinctions have been generally maintained in the cases; Edw. Bailm. § 61; 11 M. & W. 113; 16 How. 474; 24 N. Y. 207; L. R. 1 C. P. 612; see 5 Am. L. Rev. 38, and Edw. Bailm. § 6.

When a person receives the goods of another to keep without recompense, and he acts in good faith, keeping them as his own, he is not answerable for their loss or injury. As he derives no benefit from the bailment, he is responsible only for bad faith or gross negligence; Edw. Bailm. § 43; Schoul. Bailm. 35; 99 Mass. 605; 2 Ad. & E. 256; 81 Pa. 95; 28 Ohio 388; 17 Mass. 479; 11 Mart. La. 462; 38 Me. 55; 3 Mas. 132, n.; 2 C. B. 877; 4 N. & M. 170; 34 Neb. 426; 59 Mo. 240. See *STORY*, Bailm. § 64; 6 C. Rob. Adm. 316; 97 U.S. 92; 87 Mich. 209; 31 W. Va. 858; 15 La. Ann. 280; 35 Mo. 487; 90 N. C. 493. But this obligation may be enlarged or decreased by a special acceptance; 2 Kent 565; *STORY*, Bailm. § 83; Willes 118; 2 Ld. Raym. 910; 3 Hill. N. Y. 9; 17 Barb. 515; and a spontaneous offer on the part of the bailee increases the amount of care required of him; 2 Kent 565. Knowledge by the bailee of the character of the goods; Jones, Bailm. 38; and by the bailor of the manner in which the bailee will keep them; 38 Me. 55; are important circumstances.

A bank (National or otherwise) accustomed to keep securities, whether authorized to do so by its charter or not, is liable for their loss by gross carelessness; 100 U. S. 699; 79 Pa. 106; 26 Iowa 562; 69 Mass. 605; 58 Ga. 369; 17 Mass. 479; 148 Ill. 179; 137 U. S. 604; see 60 N. Y. 273; *contra*, 50 Vt. 389. A National Bank has power under the act of congress to receive such deposits; 100 U. S. 699.

So when a person receives an article and undertakes gratuitously some commission in respect to it, as to carry it from one place to another, he is only liable for its injury or loss through his gross negligence. It is enough if he keep or carry it as he does his own property; 6 C. Rob. Adm. 141; 3 Mas. 132; 6 N. H. 587; 1 Const. S. C. 117; Edw. Bailm. § 78 *et seq.*, and cases above. A treasurer of an association who receives no compensation is only liable for gross negligence in paying out funds as he is a gratuitous bailee; 154 Pa. 296.

As to the amount of skill such bailee must possess and exercise, see 2 Kent 509; *STORY*, Bailm. § 174; 8 B. Monr. 415; 11 Wend. 25; 7 Mart. 460; 3 Fla. 27; 11 M. & W. 113; and more skill may be required in cases of voluntary offers or special undertakings; 2 Kent 573.

The borrower, on the other hand, who receives the entire benefit of the bailment,

must use extraordinary diligence in taking care of the thing borrowed, and is responsible for even the slightest neglect; Edw. Bailm. § 135; 2 Pars. Contr. 115; 7 La. 253; 27 N. Y. 234; 2 Ld. Raym. 909; 27 Mo. 549; 5 Dana 173; 4 N. M. 170. See 37 Ill. 250; 78 *id.* 40.

He must apply it only to the very purpose for which it was borrowed; 2 Ld. Raym. 915; *STORY*, Bailm. § 232; cannot permit any other person to use it; 1 Mod. 210; 5 Ind. 546; 16 Johns. 76; cannot keep it beyond the time limited; 5 Mass. 104; and cannot keep it as a pledge for demands otherwise arising against the bailor; 2 Kent 574. See 9 C. & P. 383; 32 Ia. 161.

In the third class of bailments under the division here adopted, the benefits derived from the contract are reciprocal: it is advantageous to both parties. In the case of a pledge given on a loan of money or to secure the payment of a debt, the one party gains a credit and the other security by the contract. And in a bailment for hire, one party acquires the use of the thing bailed and the other the price paid therefor: the advantage is mutual. So in a bailment for labor and services, as when one person delivers materials to another to be manufactured, the bailee is paid for his services and the owner receives back his property enhanced in value by the process of manufacture. In these and like cases the parties stand upon an equal footing: there is a perfect mutuality between them. And therefore the bailee can only be held responsible for the use of ordinary care and common prudence in the preservation of the property bailed; Edw. Bailm. § 384; 13 Johns. 211; 9 Wend. 60; 5 Bingh. 217; 4 Dana 217; 21 Tex. 148; 6 Ga. 213; 10 Cush. 117. See 150 Pa. 91. A bailee for hire is supposed to take such care of property as a reasonably prudent man would of his own; 139 Ill. 41. See *HIRE*; *PLEDGE*.

The common law does not recognize the rule of the civil law that the bailor for hire is bound to keep the thing in repair, and in the absence of provision the question as to which party is bound to repair depends largely on custom and usage; 50 Fed. Rep. 837.

The depositary or mandatary has a right to the possession as against everybody but the true owner; *STORY*, Bailm. § 93; 6 Whart. 418; 12 Ired. 74; 4 E. L. & Eq. 438; see 12 Pa. 229; but is excused if he delivers it to the person who gave it to him, supposing him the true owner; 17 Ala. 216; and may maintain an action against a wrong-doer; 1 B. & Ald. 59; 2 B. & Ad. 817; 37 Minn. 54. A borrower has no property in the thing borrowed, but may protect his possession by an action against the wrong-doer; 2 Bingh. 173; 7 Cow. 752. As to the property in case of a pledge, see *PLEDGE*.

In bailments for storage, for hire, the bailee acquires a right to defend the property as against third parties and strangers, and is answerable for loss or injury occasioned through his failure to exercise ordinary care. See *TRESPASS*; *TROVER*.

As to the lien of warehousemen and wharfingers for their charges on the goods stored with them, see *LIEN*, and Edw. Bailm. § 350.

The hire of things for use transfers a special property in them for the use agreed upon. The price paid is the consideration for the use: so that the hirer becomes the temporary proprietor of the things bailed, and has the right to detain them from the general owner for the term or use stipulated for. It is a contract of letting for hire, analogous to a lease of real estate for a given term. Edw. Bailm. § 325. See *HIRE*.

In a general sense, the hire of labor and services is the essence of every species of bailment in which a compensation is to be paid for care and attention or labor bestowed upon the things bailed. The contracts of warehousemen, carriers, forwarding and commission merchants, factors, and other agents who receive goods to deliver, carry, keep, forward, or sell, are all of this nature, and involve a hiring of

services. In a more limited sense, a bailment for labor and services is a contract by which materials are delivered to an artisan, mechanic, or manufacturer to be made or wrought into some new form. The title to the property here remains in the party delivering the goods, and the workman acquires a lien upon them for his services bestowed upon the property. Cloth delivered to a tailor to be made up into a garment, a gem or plate delivered to a jeweller to be set or engraved, a watch to be repaired, may be taken as illustrations of the contract. The owner, who does not part with his title, may come and take his property after the work has been done; but the workman has his lien upon it for his reasonable compensation.

The duties and liabilities of common carriers and innkeepers, under the contract implied by law, are regulated upon principles of public policy, and are usually considered by themselves; 5 Bingh. 217; 3 Hill 488. See those titles.

Consult Jones, Edwards, Schouler, *STORY*, on Bailments; 2 Kent; Parsons, *Contracts*; note to *Coggs v. Bernard*, Sm. Lead. Cas.; 2 A. & E. Encyc. 40. See *LIEN*.

As to warehouse receipts, see that title.

See *SAFE-DEPOSIT COMPANIES*.

BAILOR. He who bails a thing to another.

The bailor must act with good faith towards the bailee; *STORY*, Bailm. §§ 74, 76, 77; permit him to enjoy the thing bailed according to contract; and in some bailments, as hiring, warrant the title and possession of the thing hired, and, probably, keep it in suitable order and repair for the purpose of the bailment; *STORY*, Bailm. §§ 388-392.

BAIR-MAN. In Scotch Law. A poor insolvent debtor.

BAIRN'S PART. See *LEGITIM.* In Scotch Law. Children's part; a third part of the defunct's free movables, debts deducted, if the wife survive, and a half if there be no relic.

BAIT. To attack with violence; to provoke and harass; to harass by the help of others, *eg.* to bait a boar with mastiffs. 3 A. & E. Encyc. (2nd ed.) 765. Baiting animals prohibited by 12 & 13 Vict., c. 92, § 3. *Id.*

BAITING. To bait is to attack with violence; to provoke and harass. 2 A. & E. Encyc. 63; L. R. 9 Q. B. 380.

BALÆNA. A large fish, called by Blackstone a whale. Of this the king had the head and the queen the tail as a perquisite whenever one was taken on the coast of England. Prynne, Ann. Reg. 127; 1 Bla. Com. 221.

BALANCE. The amount which remains due by one of two persons, who have been dealing together, to the other, after the settlement of their accounts.

In the case of mutual debts, the balance only can be recovered by the assignee of an insolvent or the executor of a deceased person. But this mutuality must have existed at the time of the assignment by the insolvent, or at the death of the testator.

It is often used in the sense of residue or remainder; 23 S. C. 269; 3 Ired. 155.

The term *general balance* is sometimes used to signify the difference which is due to a party claiming a lien on goods in his hands for work or labor done, or money expended in relation to those and other goods of the debtor; 3 B. & P. 485; 3 Esp. 268; 45 Mo. 573.

The phrase "net balance" as applied to the proceeds of the sale of stock means in commercial usage the balance of the proceeds after deducting the expenses incident to the sale; 71 Pa. 74.

See *NET BALANCE*.

BALANCE OF POWER. A constitution subsisting between neighboring states more or less connected with one another, by virtue of which no one among them can injure the independence or essential rights of another, without meeting with effectual

resistance on some side, and consequently exposing itself to danger. Chevalier von Gentz, quoted by Taylor, Int. Pub. Law 98. Four conditions necessary as a basis of such an equilibrium: (1) that no state must ever become so powerful as to coerce all the rest; (2) that every state which infringes the conditions is liable to be coerced by others; (3) that the fear of coercion should keep all within the bounds of moderation; and (4) that a state having attained a degree of power to defy the union should be treated as a common enemy. *Id.*

BALANCE SHEET. A statement made by merchants and others to show the true state of a particular business. A balance sheet should exhibit all the balances of debits and credits, also the value of merchandise, and the result of the whole.

BALDIO. In Spanish Law. Vacant land having no particular owner, and usually abandoned to the public for the purposes of pasture. The word is supposed to be derived from the Arabic *Balt*, signifying a thing of little value. For the legislation on the subject, see Escriche, Dicc. Raz.

BALE. A quantity or pack of goods or merchandise, wrapped or packed in cloth and tightly corded. Wharton.

A bale of cotton means a ball compressed so as to occupy less space than if in a bag. 2 Car. & P. 525.

BALIUS. In Civil Law. A teacher; one who has the care of youth; a tutor; a guardian. Du Cange, *Bayultis*; Spelman, Gloss.

BALIVA (spelled also *Balliva*). Equivalent to *Balivatus*. *Balivia*, a bailiwick; the jurisdiction of a sheriff; the whole district within which the trust of the sheriff was to be executed. Cowel. Occurring in the return of the sheriff, *non est inventus in balliva mea* (he has not been found in my bailiwick); afterwards abbreviated to the simple *non est inventus*; 3 Bla. Com. 283.

BALIVO AMOVENDO (L. Lat. for removing a bailiff). A writ to remove a bailiff out of his office.

BALLAST. That which is used for trimming a ship to bring it down to a draft of water proper and safe for sailing. 13 Wall. 674.

See NECESSARY BALLAST.

BALLASTAGE. A toll paid for the privilege of taking up ballast from the bottom of the port. This arises from the property in the soil; 2 Chitty, Comm. Law 16.

BALLIUM. A fortress, or bulwark. Jacob.

BALLOT. Originally a ball used in voting; hence, a piece of paper, or other thing used for the same purpose; whole amount of votes cast.

The act of voting by balls or tickets. Webster.

A ballot or ticket is a single piece of paper containing the names of the candidates and the offices for which they are running; 28 Cal. 136. See ELECTION.

BALNEARIUM (Lat.). Those who stole the clothes of bathers in the public baths. 4 Bla. Com. 239; Calvinus, Lex.

BAN. In Old English and Civil Law. A proclamation; a public notice; the announcement of an intended marriage. Cowel. An excommunication; a curse; publicly pronounced. A proclamation of silence made by a crier in court before the meeting of champions in combat. Cowel. A statute, edict, or command; a fine, or penalty.

An open field; the outskirts of a village; a territory endowed with certain privileges. A summons; as *erriere ban*. Spelman, Gloss.

In French Law. The right of announcing the time of moving, reaping, and gathering the vintage, exercised by certain seigniorial lords. Guyot, *Rép. Univ.*

BANALITY. In Canadian Law. The right by virtue of which a lord subjects his vassals to grind at his mill, bake at his oven, etc. Used also of the region within which this right applied. Guyot, *Rép. Univ.* It prevents the erection of a mill within the seigniorial limits; 1 Low. C. 31; whether steam or water; 3 Low. C. 1.

BANC (Fr. bench). The seat of judgment; as, *banc le roy*, the king's bench; *banc le common pleas*, the bench of common pleas.

The meeting of all the judges, or such as may form a quorum, as distinguished from sittings at *Nisi Prius*; as, "the court sit in *banc*." Cowel. In England, under 33 Vict. c. 6, § 4, any of the superior courts may hold sittings in *banc* in two divisions at the same time, and may be assisted by the judges of the other courts. Mozeley & Wh. Law Dict. See BANK.

BANCI NARRATORES. In Old English Law. Advocates; counters; sergeants. Applied to advocates in the common pleas courts. 1 Bla. Com. 24; Cowel.

BANCUS (Lat.). A bench; the seat or bench of justice; a stall or table on which goods are exposed for sale. Often used for the court itself.

A full bench, when all the judges are present. Cowel; Spelman, Gloss.

The English court of common pleas was formerly called *Bancus*. Viner, Abr. Courts (M). See BENCH; COMMON BENCH.

BANCUS REGINÆ (Lat.). The Queen's Bench.

The English court of King's Bench is so called during the reign of a queen. Burrill; 3 Steph. Ccm. 403.

BANCUS REGIS (Lat.). The king's bench; the supreme tribunal of the king after parliament. 3 Bla. Com. 41.

In banco regis, in or before the court of king's bench.

The king has several times sat in his own person on the bench in this court, and all the proceedings are said to be *coram rege ipso* (before the king himself). Still, James I. was not allowed to deliver an opinion although sitting *in banco regis*. Viner, Abr. Courts (H L); 3 Bla. Com. 41; Co. Litt. 71 C.

BANDIT. A man outlawed; one under ban.

BANE. A malefactor. Bracton, l. 1, t. 8, c. 1.

BANISHMENT. In Criminal Law. A punishment inflicted upon criminals, by compelling them to quit a city, place, or country for a specified period of time, or for life. See 4 Dall. 14. See EXPULSION.

BANK (Anglicized form of *bancus*, a bench). The bench of justice.

A "bank" is an institution of a quasi public character. It is chartered by the government for the purpose *inter alia* of holding and safely keeping the moneys of individuals and corporations. It receives such moneys upon an implied contract to pay the depositor's checks upon demand. 69 S. W. 760.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not. Miller's Ky. Negotiable Inst's Law § 190.

Sittings in bank (or *banc*). An official meeting of four of the judges of a common-law court. Wharton, Lex. 2d Lond. ed.

Used of a court sitting for the determination of law points, as distinguished from *nisi prius* sittings to determine facts; 3 Bla. Com. 28, n.

Bank le Roy. The king's bench. Finch, 198.

In Commercial Law. A place for the deposit of money.

An institution, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes, —usually known by the name of bank notes, —or to perform some one or more of these functions. See 15 N. Y. 166; 79 id. 440; 15 Johns. 358; 3 Wall. 295; 12 Mich. 389.

It was the custom of the early money-changers to transact their business in public places, at the doors of churches, at markets, and, among the Jews, in the temple (Mark xi. 15). They used tables or benches for their convenience in counting and assorting their coins. The table so used was called *banc*, and the traders themselves, bankers or benchers. In times still more ancient, their benches were called *cumbii*, and they themselves were called *cambiators*. Du Cange, *Cambii*.

Banks are said to be of three kinds, viz.; of deposit, of discount, and of circulation; they generally exercise all these functions; 17 Wall. 118. See NATIONAL BANKS.

BANK ACCOUNT. A fund which merchants, traders, and others have deposited into the common cash of some bank, to be drawn out by checks from time to time as the owner or depositor may require.

The statement of the amount deposited and drawn, which is kept in duplicate, one in the depositor's bank book and the other in the books of the bank.

BANK-CREDIT. Scots Law. A credit with a bank, established by depositing a permanent security on which money may be drawn by check up to an agreed amount; cash-credit. Stand. Dict.

BANK NOTE. A promissory note, payable on demand to the bearer, made and issued by a person or persons acting as bankers and authorized by law to issue such notes. The definition is confined to notes issued by incorporated banks in 2 Dan. Neg. Inst. § 1664. See 2 Pars. Bills & N. 88. Bank bills and bank notes are equivalent terms, even in criminal cases; 4 Gray 416. The power thus to issue is not inherent or essential in banking business, and is not necessarily implied from the conference of a general power to do banking business. It must be distinctly, and in terms conferred in the incorporating act, or it will not be enjoyed. Morse, Banking, c. viii.; 11 Op. Att.-Gen. 334.

For many purposes they are not looked upon as common promissory notes, and as such mere evidences of debt, or security for money. In the ordinary transactions of business they are recognized by general consent as cash. The business of issuing them being regulated by law, a certain credit attaches to them, that renders them a convenient substitute for money; 2 Hill, N. Y. 241; 1 id. 13.

The practice is, therefore, to use them as money; and they are a good tender, unless objected to; 9 Pick. 542; 19 Johns. 322; 8 Ohio 169; 11 Me. 475; 5 Yerg. 199; 6 Ala. N. S. 226; 3 T. R. 554; 7 id. 64; 5 Dowl. & R. 289. See 3 Halst. 172; 4 N. H. 296; 4 Dev. & B. 435. They pass under the word "money" in a will, and, generally speaking, they are treated as cash; 19 Johns. 115; 7 id. 476; 6 Hill, N. Y. 840; but see 29 Ind. 495, as to their receipt by a sheriff in payment of an execution. When payment is made in bank notes, they are treated as cash and receipts are given as, for cash; 1 Ohio 189, 524; 15 Pick. 177; 5 G. & J. 158; 3 Hawks 328; 5 J. J. Marsh. 643; 12 Johns. 200; 1 Sch. & L. 318, 319; 1 Rep. Leg. 3; 28 Gratt. 605; 1 Burr. 452. It has been held that the payment of a debt in bank notes discharges the debt; 1 W. & S. 92; 11 Ala. 280; 2 Dan. Neg. Inst. § 1676; 1 Gratt. 359. See 13 Wend. 101; 11 Vt. 516; 9 N. H. 365; 2 Hill, S. C. 509; but not when the payer knew the bank was insolvent. The weight of authority is against the doctrine of the extinguishment of a debt by the delivery of bank notes which are not paid, when duly presented, in reasonable time. But it is undoubtedly the duty of the person receiving them to present them for payment as soon as possible; 2 Pars. Bills & N. 94; 11 Wend. N. Y. 9; 11 Vt. 516; 9 N. H. 365; 10 Wheat. 333; 6 Mass. 182; 18 Barb. 545; 10 Ohio St. 188; 22 Me. 88; 7 Wis. 185; 6 B. & C. 373.

Bank notes are governed by the rules applicable to other negotiable paper. They are assignable by delivery; Rep. t. Hard. 53; Dougl. 236. The holder of a note is entitled to payment, and cannot be affected by the fraud of a former holder, unless he

is proved privy to the fraud; 1 Burr. 452; 4 Rawle 185; 10 Cush. 488; 2 Dan. Neg. Instr. § 1680; 33 Conn. 278. The *bond fide* holder who has received them for value is protected in their possession even against a real owner from whom they have been stolen. Payment in forged bank notes is a nullity; 7 Leigh 617; 2 Hawks 326; 3 Pa. 330; 5 Conn. 71; but the taker of such must give prompt notice that they are counterfeit, and offer to return them; 11 Ill. 137. But where the bank itself receives notes purporting to be its own, and they are forged, it is otherwise; 10 Wheat. 333. See 6 B. & C. 373. If a note be cut in two for transmission by mail, and one half be lost, the *bond fide* holder of the other half can recover the whole amount of the note; 6 Wend. 378; 6 Munf. 166; 4 Rand. 186; Dan. Neg. Instr. § 1696.

At common law, as choses in action, bank notes could not be taken in execution; Hardw. Cases 53; 1 Archb. Pr. 258; 9 Cro. Eliz. 746. The statute laws of the several states, or custom, have modified the common law in this respect, and in many of them can be taken on execution; 4 N. H. 198; 15 Pick. 178; 20 *id.* 352; 35 Vt. 430. This is the case in New York; but they are not to be sold; 10 Barb. 157, 596. Consult Story, Bills; Story, Notes; Parsons, Notes and Bills; Byles, Bills; 2 Dan. Neg. Instr.; Bigelow, Neg. Instr.; note to Miller & Race, Sm. Lead. Cas.

BANKABLE. In Mercantile Law. Bank notes, checks, and other securities for money received as cash by the banks in the place where the word is used.

In the United States, the notes issued by the national banks have taken the place of those formerly issued by banks incorporated under state laws. The circulation of these notes being secured by United States bonds, deposited with the treasurer of the United States, they are received as bankable money in all the states without regard to the locality of the bank issuing them. See Act June 3, 1864, U. S. Rev. Stat. § 5133; 8 Wall. 533.

BANKER. A "banker" is a dealer in capital; an intermediate party between the borrower and the lender. 44 S. W. 963.

BANKERS' ACCEPTANCE. A draft or bill of exchange of which the acceptor is a bank or banker engaged generally in the business of granting bankers' acceptance credits. 241 N. Y. 231. Cf. TRADE ACCEPTANCE.

BANKER'S NOTE. A promissory note given by a private banker or banking institution, not incorporate, but resembling a bank note in all other respects. 6 Mod. 29; 3 Chit. Comm. Law 590; 1 Leigh, N. P. 338.

BANK STOCK. The shares of a bank's capital. Stand. Dict.

BANKING. See CAPITAL USED IN BANKING.

BANKRUPT. Originally and strictly, a trader who secretes himself or does certain other acts tending to defraud his creditors. 2 Bla. Com. 471.

A broken-up or ruined trader. 3 Stor. 453.

By modern usage, an insolvent person.

A person who has done or suffered to be done some act which is by law declared to be an act of bankruptcy.

The word is from the Italian *banca rota*, the custom being in the middle ages to break the benches or counters of merchants who failed to pay their debts. Voltaire, Dict. Phil. voc. sig. Banqueroute, Saint Bennet Dict. Faillite.

In the English law there were two characteristics which distinguished bankrupts from insolvents: the former must have been a trader and the object of the proceedings against, not by, him. Originally the bankrupt was considered a criminal; 2 Bla. Com. 471; and the proceedings were only against fraudulent traders; but this distinction has been abolished by the later English bankruptcy acts, although in some respects traders and non-traders continued to be put on a different footing; Mozl. & W. Law Dict. As used in American law, the distinction between a bankrupt and an in-

solvent is not generally regarded. Act of Congress of March 2, 1867, and Act of June 22, 1874 (both now repealed). On the continent of Europe the distinction between bankrupt and insolvent still exists; Holtz, Encyc. voc. sig. Bankerott. Under the constitution of the United States the Federal government has power to pass a uniform bankrupt law. The meaning of bankrupt as used in the constitution was not the technical early English one, but was commensurate with insolvent; 5 Hill, N. Y. 317. In the first bankrupt law of Apr. 4, 1800, repealed Dec. 19, 1803, the word bankrupt was used in the old English sense. The distinction, however, became less observed; Marshall, C. J., in 4 Wheat. 122; 2 Kent 390; and was finally abandoned and broken down by the act of Aug. 19, 1841, which was a union of both species of laws, including "all persons whatsoever." The constitutionality of the voluntary part of the act was much contested, but was fully sustained; 5 Hill, N. Y. 317; 4 N. Y. 283. (For the reasons assigned *contra*, see 5 Hill, N. Y. 327.)

The only substantial difference between a strictly bankrupt law and an insolvent law lies in the circumstance that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. In the general character of the remedy there is no difference, however much the modes by which the remedy may be administered may vary. But even in the respect named there is no difference in this instance. The act of congress (1867) was both a bankrupt act and an insolvent act by definition, for it afforded relief upon the application of either the debtor or the creditor, under the heads of voluntary and involuntary bankruptcy; 37 Cal. 222.

A state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law; 4 Wheat. 209; 12 Wheat. 213.

A state bankrupt law so far as it attempts to discharge the contract is unconstitutional; 4 Wheat. 209; *id.* 122; 6 Wheat. 131; whether passed before or after the debt was created; 4 Wheat. 209; or where the suit was in a state of which both parties were citizens, and in which they resided until suit, and where the contract was made; 6 Wheat. 131; but a bankrupt or insolvent law of a state which discharges the person of the debtor and his further acquisitions of property is valid, though a discharge under it cannot be pleaded in bar of an action by a citizen of another state in the courts of the U. S. or of any other state; 12 Wheat. 213. Every state law is a bankrupt law in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors; and it is especially such if it causes the debtor to be discharged from his contracts, so far as it can do so; 1 How. 265 and note. When the U. S. statute is in effect also an insolvent law acting upon the same persons and cases as the state insolvent law, the latter is suspended when the U. S. statute goes into operation; 1 How. 265; 2 Sto. 326; but if the state court has acquired jurisdiction under a state statute, and is actually settling the debts and distributing the assets of the insolvent before or at the date at which the Federal law takes effect, it may proceed to a final conclusion of the case; 4 Metc. Mass. 401; 37 Cal. 208.

The act (R. S. § 5132) providing for the punishment of the offence of obtaining goods under false pretences, if the guilty party has proceedings in bankruptcy commenced against him within three months thereafter, is inoperative to render such act an offence, because it is an attempt to make an offence by subsequent act that which was not such at the time it was committed; 95 U. S. 670. See INSOLVENCY.

BANKRUPT LAWS. Laws relating to bankruptcy.

The English Bankrupt Laws, which originated with the statute 34 & 35 Henry VIII. c. 4, were first mainly directed against the criminal frauds of

traders. The bankrupt was treated as a criminal offender; and, formerly, the not duly surrendering his property under a commission of bankruptcy, when summoned, was a capital felony. The bankrupt laws are now, and have for some time past been regarded as a connected system of civil legislation, having the double object of enforcing a complete discovery and equitable distribution of the property of an insolvent trader, and of conferring on the trader the reciprocal advantage of security of person and a discharge from all claims of his creditors. By the General Bankrupt Act (Geo. IV. c. 10) the former statutes were consolidated and many important alterations introduced. A subsequent statute, 1 & 2 Will. IV. c. 56, changed the mode of proceeding by constituting a Court of Bankruptcy, and removing the jurisdiction of bankrupt cases in the first instance from the Court of Chancery to that of Bankruptcy, reserving only an appeal from that court to the lord chancellor as to matters of law and equity and questions of evidence; and other important alterations were introduced. This statute was followed by the 5 & 6 Will. IV. c. 23, and by the 5 & 6 Vict. c. 123, which further modified the law and the organization of the courts. The numerous statutes relating to bankruptcy were again consolidated by the Bankruptcy Law Consolidation Act (1849); and this was amended in a few particulars by the 15 & 16 Vict. c. 77, and by the Bankruptcy Act, 1854. A further amendment of the law of bankruptcy, known as the "Bankruptcy Act 1861," 24 & 25 Vict. c. 134, abolished the Court for the Relief of Insolvent Debtors, and transferred its jurisdiction to the Court of Bankruptcy. By this act, non-traders were made subject to the law of bankruptcy. By the "Bankruptcy Amendment Act, 1868," 31 & 32 Vict. c. 104, further changes were made. This has been followed by the "Bankruptcy Act, 1869," 32 & 33 Vict. c. 71, which comprises all the statute law relating to bankrupts, except the provisions for the punishment of fraudulent debtors, which are contained in the Debtors' Act, 1860, 33 & 34 Vict. c. 62. Robson, Bank. These acts have been amended and consolidated by the Bankruptcy Act, 1883, and its various amendments. See 1 Chitty, Eng. Stat. tit. Bankruptcy.

The French Bankrupt Law (law of 1838, still in force) declares that all traders who stop payment and are in a state of insolvency are required immediately to register the fact that they have stopped payment in the Tribunal of Commerce, and file their balance sheet; and a decree of insolvency is declared by the tribunal upon the trader's declaration or on application of creditors. Prior voluntary conveyances and mortgages, pledges, etc., for antecedent debts are void, and all subsequent deeds to those having notice are voidable. The former French law (Code of 1807) is still important, as being the basis of the system in many other continental nations, and it is an excellent treatise on the subject.

Bankrupt laws were passed in the United States in 1800, 1841, and 1867, but repealed after a brief existence, the last act by Act of Congress, June 7, 1878, the repeal to take effect on September 1, 1878, and not to affect pending cases. See INSOLVENCY.

BANKRUPTCY. The state or condition of a bankrupt. See INSOLVENCY.

BANLEUCA. A certain space surrounding towns or cities, distinguished by peculiar privileges. Spelman, Gloss. It is the same as the French *banlieue*.

BANLIEU. In Canadian Law. See BANLEUCA.

BANNER. A piece of fabric either suspended from a pole by a cross-bar, or hung from or stretched between horizontal ropes, and bearing some motto or device; often carried in processions as the ensign of a society, order, or party. Any standard, regardless of shape; a flag, as of a nation, army, or the like. Figuratively, any moral symbol or standard. Stand. Dict.

BANNERET. A degree of honor next after a baron's, when conferred by the king; otherwise, it ranks after a baronet. 1 Bla. Com. 403.

BANNIRE. See MANNIRE.

BANNITUS. One outlawed or banished. Calvinus, Lex.

BANNS OF MATRIMONY. Public notice or proclamation of a matrimonial contract, and the intended celebration of the marriage of the parties in pursuance of such contract, to the end that persons objecting to the same may have an opportunity to declare such objections before the marriage is solemnized. Cowel; 1 Bla. Com. 439; Pothier, *Du Mariage* p. 2, c. 2.

BANNUM. A ban.

BAR. To Actions. A perpetual destruction of the action of the plaintiff

It is the *exceptio peremptoria* of the ancient authors. Co. Litt. 303 b; Steph. Pl. App. xxviii. It is always a perpetual destruction of the particular action to which it is a bar, *Doctrina Plac.* xxiii. § 1, p. 129; and it is set up only by a plea to the action, or in chief. But it does not always operate as a permanent obstacle to the plaintiff's right of action.

He may have good cause for an action, though not for the action which he has brought; so that, although that particular action, or any one like it in nature and based on the same allegations, is forever barred by a well-pleaded bar, and a decision thereon to the defendant's favor, yet where the plaintiff's difficulty really is that he has misconceived his action, and advantage thereof, he taken under the general issue (which is in bar), he may still bring his proper action for the same cause; Gould, Pl. c. v. § 137; 6 Coke 7, 8. Nor is final judgment on a demurrer, in such a case, a bar to the proper action, subsequently brought; Gould, Pl. c. ix. § 46. And where a plaintiff in one action fails on demurrer from the omission of an essential allegation in his declaration, which allegation is supplied in the second suit, the judgment in the first is no bar to the second; for the merits shown in the second declaration were not decided in the first; Gould, Pl. c. ix. § 45; c. v. § 138.

Another instance of what is called a temporary bar is a plea (by executor, etc.) of *plene administravit*, which is a bar until it appears that more goods come into his hands, and then it ceases to be a bar to that suit, if true before its final determination, or to a new suit of the same nature: *Doctrina Plac. c. xxiii. § 1*, p. 130; 4 East 508.

Where a person is bound in any action, real or personal, by judgment on demurrer, confession, or verdict, he is barred, that is, debarred, as to that or any other action on the like nature or degree, from the same thing forever. But the effect of such a bar is different in personal and real actions.

In *personal actions*, as in debt or account, trover, replevin, and for torts generally (and all personal actions), a recovery by the plaintiff is a perpetual bar to another action for the same matter. He has had one recovery; *Doctr. Plac. c. lxviii. § 1*, p. 412. So where a defendant has judgment against the plaintiff, it is a perpetual bar to another action of like nature for the same cause (like nature being here used to save the cases of misconceived action or an omitted averment, where, as above stated, the bar is not perpetual). And inasmuch as, in personal actions, all are of the same degree, a plaintiff against whom judgment has passed cannot, for the subject thereof, have an action of a higher nature: therefore he generally has in such actions no remedy (no manner of avoiding the bar of such a judgment) except by taking the proper steps to reverse the very judgment itself (by writ of error, or by appeal, as the case may be), and thus taking away the bar by taking away the judgment; 6 Coke 7, 8. (For occasional exceptions to this rule, see authorities above cited.)

In *real actions*, if the plaintiff be barred as above by judgment on a verdict, demurrer, confession, etc., he may still have an action of a higher nature, and try the same right again; Lawes, Plead. 39, 40; Stearns, Real Act. See, generally, Bacon, Abr. *Abatement*, n.; *Plea in bar*; 3 East 348-366.

In *Practice*. A particular part of the court-room.

As thus applied, and secondarily in various ways, it takes its name from the actual bar, or enclosing rail, which originally divided the bench from the rest of the court-room, as well as from that bar, or rail, which then divided, and now divides, the space including the bench, and the place which lawyers occupy in attending on and conducting trials, from the body of the court-room.

Those who are authorized to appear before the court and conduct the trial of causes.

Those who, as advocates or counsellors, appeared as *speakers* in court, were said to be "called to the bar," that is, called to appear in presence of the court, as *barristers*, or persons who stay or attend at the bar of court. Richardson, Dict. *Barrister*. By a natural transition, a secondary use of the word was applied to the persons who were so called, and the advocates were, as a class, called "the bar." And in this country, since attorneys, as well as counsellors, appear in court to conduct causes, the members of the legal profession, generally, are called the bar, and in this sense are employed the terms "members of the bar" and "admission to the bar."

The court, in its strictest sense, sitting in full term.

Thus, a civil case of great consequence was not left to be tried at *nisi prius*, but was tried at the "bar of the court itself," at Westminster; 3 Bia. Com. 352. So a criminal trial for a capital offence was had "at bar," 4 id. 351; and in this sense the term at bar is still used. It is also used in this sense, with a shade of difference (as not distinguishing *nisi prius* from full term, but as applied to any term of the court), when a person indicted for crime is called "the prisoner at the bar," or is said to stand at the bar to plead to the indictment. See Merlin, *Répert. Barreau*; 1 Dupin, *Prof. d'Av.* 451.

In *Contracts*. An obstacle or opposition. Thus, relationship within the prohibited degrees, or the fact that a person is already married, is a bar to marriage.

BAR ASSOCIATIONS. Associations of members of the bar have been organized in a majority of the states and territories, and similar associations exist in many of the counties in various states, especially in Pennsylvania, where they are chiefly Library Associations'. The oldest association of the kind is the Law Association of Philadelphia, organized in 1802. The American Bar Association, to which all members of the bar of the United States in good standing who have been such for at least five years are eligible, was organized at Saratoga, New York, in August, 1878, and has held annual meetings ever since. The National Bar Association, based upon representation from state and local associations, was organized in May, 1888, and held its last meeting in December, 1891.

A list of State and County Bar Associations is printed in the Annual Report of the American Bar Association, and a list of the State and Territorial Associations is given in the monthly issue of "the American Lawyer," New York.

BAR FEE. In English Law. A fee taken by the sheriff, time out of mind, for every prisoner who is acquitted. Bacon, Abr. *Extortion*. Abolished by stats. 14 Geo. III. c. 26; 55 Geo. III. c. 50; 8 & 9 Vict. c. 114.

BARBER. One who makes a business of shaving, also of trimming and dressing the beard and hair. Stand. Dict. At one time in London, the barbers were incorporated with the surgeons, but not to practise surgery, except for the drawing of teeth. Jacob.

BARBICANAGE. Money paid to support a barbian or watch-tower.

BARE. Naked; absence of a covering; unaccompanied. A bare trustee is one whose trust is to convey, and the time has arrived for a conveyance by him; or a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction; 1 Ch. Div. 281.

BARE TRUSTEE. A person to whose fiduciary office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction, and has been requested by them so to convey it. 3 A. & E. Ency. (2nd ed.) 852; Dart on Vendors and Purchasers (5th ed.) 517.

A trustee whose trust is to convey, and the time has arrived for a conveyance by him. *Id.*; 1 Ch. Div. 279.

A trustee without a beneficial interest *Id.*; Jessel, M. R. (Ref. Eng. Land Trans Act 1875; Bankruptcy Act; Ven. and Pur Act 1874.)

BAREBONE'S PARLIAMENT. The first Parliament of Oliver Cromwell, derisively named by the Royalists for a prominent, fanatic member, a leather-dealer called Praise-God Barebone. Stand Dict.

BARGAIN. It signifies a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them. 5 Mass. 358.

A mutual agreement. If there is any distinction between the words bargain and agreement, it is that bargain more prominently brings into view the mutuality of contract than does agreement. Abbott; 6 Conn. 91. Bargain involves the idea of a mutual act of two persons, even more strongly than agreement. The latter is sometimes used in the sense of promise or engage. But bargain is seldom used, unless to denote a mutual contract or undertaking *Id.*; 17 Mass. 122. See **TIME BARGAIN**.

BARGAIN AND SALE. A contract

or bargain by the owner of land, in consideration of money or its equivalent paid, to sell land to another person, called the bargainee, whereupon a use arises in favor of the latter, to whom the seisin is transferred by force of the statute of uses. 2 Washb. R. P. 123; Bisp. Eq. 419.

Upon principles of equity any agreement, supported by a valuable consideration, to the effect that an estate or interest in land should be conveyed, as it might be especially enforced in the court of chancery, was held to entitle the purchaser to the use or beneficial ownership according to the terms and intent of the agreement, without any legal conveyance; and accordingly the vendor was held to be or stand seised to the use of the purchaser. Such transaction, as creating a use executed by the statute, became technically known as a *bargain and sale*. As a bargain and sale thus would have been effectual to convey a legal estate under the statute by mere force of the agreement without any writing or formality, it was thought expedient to add some formal conditions to the operation of the statute upon it; and it was enacted by a statute of the same session of parliament, 27 Hen. VIII. c. 16, to the effect that no estate of freehold shall pass by reason only of a bargain and sale, unless made by *writing indented, sealed, and enrolled* in manner and place therein provided. This statute applied only to estates of freehold, and a use for a term of years might still be created within the statute of uses by mere bargain and sale without deed or enrolment. Leake, Land Laws 108.

This is a very common form of conveyance in the United States. In consequence of the consideration paid, and the bargain made by the vendor, of which the conveyance was evidence, a use was raised at once in the bargainee. To this use the statute of uses transferred and annexed the seisin, whereby a complete estate became vested in the bargainee; 2 Washb. R. P. 123 *et seq.*

All things, for the most part, that may be granted by any deed may be granted by bargain and sale, and an estate may be created in fee, for life, or for years; 2 Coke 54; Dy. 309.

There must have been a valuable consideration; 5 Ired. 30; 7 Vt. 523; 13 B. Monr. 30; 9 Ala. 410; 1 Harr. & J. 527; 1 W. & S. 395; 16 Johns. 515; Cro. Car. 529; 1 Cruise, Dig. 107; Tiedem. R. P. § 776; but its adequacy is immaterial; thus a rent of one peppercorn was held sufficient; 2 Mod. 249. See Leake, Land Laws 109; the consideration need not be expressed; 10 Johns. 639. See Washb. R. P.; 1 Sandf. Ch. 259; 19 Wend. 339; 7 Vt. 522; 68 Pa. 460; 103 Mass. 533; 1 Mo. 553; 2 Over. 261.

The proper and technical words to denote a bargain and sale are *bargain and sell*; Mitch. R. P. 425; but any other words that are sufficient to raise a use upon a valuable consideration are sufficient; 2 Wood, Conv. 15; as, for example, *make over and grant*; 3 Johns. 484; *release and assign*; 8 Barb. 463. See 2 Washb. R. P. 620; Shepp. Touchst. 222.

An estate *in futuro* may be conveyed by deed of bargain and sale; 9 Wend. 611; 4 H. & N. 277; 52 Me. 141; 34 N. H. 460; 102 Mass. 533; 10 Pa. 348; 20 Johns. 87; 28 S. C. 125; 83 Ga. 587; *contra*, 27 Pick. 376; 18 id. 397; 82 Me. 329; 2 Washb. R. P. *417; but not at common law; note to Doe v. Tranmar, 2 Sm. Lead. Cas. 473, where the cases are discussed.

Consult Gilbert on Uses, Sugden's edition; Washb. R. P.; Greenl. Cruise, Dig.; Tiedem. R. P.

BARGAINEE. The grantee of an estate in a deed of bargain and sale. The person to whom property is tendered in a bargain.

BARGAINOR. The person who makes a bargain; he who is to deliver the property and receive the consideration.

BARGE. Lighters or a flat bottom boat for loading or unloading ships; or a boat used for pleasure. See 5 Fed. Rep. 813; 42 N. C. Q. B. 307.

A flat-bottomed boat without means of

propulsion, used for the transportation of large quantities of merchandise, cars, etc., by being towed. Also, a similar boat used for pleasure. English.

BARLEY. A species of grain. See 4 C. & P. 552; 14 Mo. 9.

BARN--STABLE. Distinction. Primarily, a "barn" is a building for the storage of grain and fodder, and a "stable" is a building for lodging and feeding horses and other domestic animals, but in this country the words are used interchangeably. 57 S. W. 614

BARO. A man, whether slave or free. *Si quis homicidium perpetraverit in barone libero seu servo*, if any one shall have perpetrated a murder upon any man, slave or free. A freeman or freedman; a strong man; a hired soldier; a vassal; a feudal client

Those who held of the king immediately were called barons of the king.

A man of dignity and rank; a knight. A magnate in the church. A judge in the exchequer (*baro scaccarii*).

The first-born child. A husband. The word is said by Spelman to have been used more frequently in its latter sense; Spelman, Gloss.

It is quite easy to trace the history of *baro*, from meaning simply man, to its various derived significations. Denoting a man, one who possessed the manly qualities of courage and strength would be desirable as a soldier, or might misuse them as a robber. One who possessed them in an eminent degree would be the man; and hence *baro*, in its sense of a title of dignity or honor, particularly applicable in a warlike age to the best soldier. See, generally, Bacon, Abr.; Comyns, Dig.; Spelman, Gloss. *Baro*.

BARON. A general title of nobility. 1 Bla. Com. 398; a particular title of nobility, next to that of viscount. A judge of the exchequer. Cowel; 1 Bla. Com. 44. A husband.

In this sense it occurs in the phrase *baron et feme* (husband and wife); 1 Bla. Com. 432; and this is the only sense in which it is used in the American law, and even in this sense it is now but seldom found.

A freeman. It has essentially the same meanings as *Baro*, which see.

BARON ET FEMME. Man and woman; husband and wife.

It is doubtful if the words had originally in this phrase more meaning than man and woman. The vulgar use of *man* and *woman* for husband and wife suggests the change of meaning which might naturally occur from man and woman to husband and wife. Spelman, Gloss.; 1 Bla. Com. 442.

BARONAGE. In English law, the collective body of the barons, or of the nobility at large. Burrill; Spelman.

BARONET. An English title of dignity. It is an hereditary dignity, descendible, but not a title of nobility. It is of very early use. Spelman, Gloss.; 1 Bla. Com. 403.

BARONS OF THE CINQUE PORTS. See CINQUE PORTS.

BARONS OF THE EXCHEQUER. The judges of the exchequer. See EXCHEQUER.

BARONY. The dignity of a baron; a species of tenure; the territory or lands held by a baron. Spelman, Gloss.

BARRATOR. One who commits barratry.

BARRATRY (Fr. *barat*, *baraterie*, robbery, deceit, fraud). Sometimes written *Barretry*. Bla. Com.

In Criminal Law. The offence of frequently exciting and stirring up quarrels and suits, either at law or otherwise. 4 Bla. Com. 134; Co. Litt. 368; 8 W. 36 b.

An indictment for this offence must charge the offender with being a common barrator; 1 Sid. 283; Train & H. Prec. 55; and the proof must show at least three instances of offending; 15 Mass. 227; 1 Cush. 2, 3; 1 Bail. 379; 53 Pa. 243; 55 Cal. 126; 51 Barb. 580.

An attorney is not liable to indictment for maintaining another in a groundless action; 1 Bail. 379. See 2 Bish. Cr. Law

§ 63; 2 id. §§ 57-61; 9 Cow. 587; 15 Mass. 229; 11 Pick. 432; 13 id. 362; 1 Bail. 379; 2 Saund. 308 and note.

The purchase of a single claim, with the intention of suing upon it, does not amount to barratry; to constitute the offence there must be a practice of fomenting suits; Chase's Bla. Com. 905, n. 7; 51 Barb. 580.

In Maritime Law and Insurance. An unlawful or fraudulent act, or very gross and culpable negligence, of the master or mariners of a vessel in violation of their duty as such, and directly prejudicial to the owner, and without his consent; Roccus, h. t.; Abbott, Ship. 167, n.; Pars. Mar. L. 239 *et seq.*; 2 Stra. 581; 2 Ld. Raym. 349; 7 Term 505; 2 Caines 87; 223; 1 Johns. 229; 13 id. 451; 2 Binn. 274; 3 Cra. 139; 9 Allen 217; 5 Day 1; 3 Wheat. 163; 4 Dall. 294; 2 M. & S. 173; 5 B. & Ald. 597; 1 Campb. 434; 2 Cush. 511; 3 Pet. 230. It is said that the term implies an intentional injury; it does not embrace cases of negligence; 4 Daly 1. A part owner of a ship who is its master may be guilty of barratry towards his co-owners; 62 Me. 363; 62 Hun 4. It extends, in addition to grosser cases of barratry, to the following:—sailing out of a port without paying port dues, whereby the cargo is forfeited; 6 Term 379; disregarding an embargo; 1 Term 127; or a blockade; 6 Taunt. 375; and when a master was directed to make purchases, and went into an enemy's settlement to trade (though it could be done there to better advantage), whereby the ship was seized, it was held barratry; L. R. 1 Q. B. 162; even though he thought thereby to benefit the owner. When a master is entitled to use his discretion, his conduct will not constitute barratry, unless he goes against his better judgment; 1 Stark. 240. See L. R. 3 C. P. 476. The grossest barratries, as piratically or feloniously seizing or running away with the vessel or cargo, or voluntarily delivering the vessel into the hands of pirates, or mutiny, are capital offences by the laws of the United States; Act of Congress, April 30, 1790, 1; Story's Laws U. S. 84. Barratry is one of the risks usually insured against in marine insurance; 3 Kent, Lacy's ed. 305, n. 50. See INSURABLE INTEREST.

BARREL. A measure of capacity, equal to thirty-six gallons.

BARREN MONEY. A debt which bears no interest.

BARREN TRUST. See NAKED TRUST. **BARRENNESS.** The incapacity to produce a child.

This, when arising from impotence which existed at the time the relation was entered into, is a cause for dissolving a marriage; 1 Foderé, Méd. Leg. § 254.

BARRISTER. In English Law. A counsellor admitted to plead at the bar.

Inner barrister. A serjeant or queen's counsel who pleads within the bar. See BENCHER.

Outer or Utter barrister. One who pleads without the bar. See UTTER BARRISTER. *Vacation barrister.* A counsellor newly called to the bar, who is to attend for several long vacations the exercises of the house.

In the old books, barristers are called *apprentices*, *apprentitii ad legem*, or *ad barras* (from which the term barrister was derived), being looked upon as learners, and not qualified until they obtain the degree of serjeant. Edmund Plowden, the author of the Commentaries, a volume of elaborate reports in the reigns of Edward VI., Mary, Philip and Mary, and Elizabeth, describes himself as an apprentice of the common law. See generally, Weeks on Attys. § 29.

BARTER. A contract by which parties exchange goods for goods.

It differs from a sale in that a barter is always of goods for goods; a sale is of goods for money, or for money and goods. In a sale there is a fixed price; in a barter there is not. See Benj. Sales 1; 4 Biss. 122; 12 Bush 241; 37 Ark. 418.

There must be delivery of goods to complete the contract.

If an insurance be made upon returns from a country where trade is carried on by barter, the valuation of the goods in return shall be made on the cost of those given in barter, adding all charges; Wes-

kett, Ins. 42. See 8 B. & Ald. 616; 3 Campb. 351; Cowp. 118; 1 Dougl. 24. n.; 4 B. & P. 151; Troplong, *De l'Echange*. See SALE.

BARTON. In Old English Law. The demesne land of a manor; a farm distinct from the mansion.

BAS CHEVALIERS. Knights by tenure of a base military fee, as distinguished from bannerets, who were the chief or superior knights. Kennett, Paroch. Ant.; Blount.

BASE COIN. Debased, adulterated, or alloyed coin. Black; 6 Ark. 540.

BASE COURT. In old English law, any inferior court that is not one of record, as the court baron. Jacob.

BASE FEE. A fee which has a qualification annexed to it, and which must be determined whenever the annexed qualification requires.

A grant to A and his heirs, tenants of Dale, continues only while they are such tenants; 2 Bla. Com. 109. See 94 Ill. 93.

The proprietor of such a fee has all the rights of the owner of a fee-simple until his estate is determined. Plowd. 557; 1 Washb. R. P. 62; 1 Prest. Est. 431; Co. Litt. 1 b.

BASE SERVICES. Such services as were unworthy to be performed by the nobler men, and were performed by the peasants and those of servile rank. 2 Bla. Com. 62; 1 Washb. R. P. 25.

BASEBALL. A game played with bat and ball, particularly in the United States; also, the ball used in the game. Stand. Dict.

BASEMENT. In the United States, the ground floor of a building, beneath the principal story, wholly or partly sunk below the level of the ground, but, unlike a cellar, fitted for household, manufacturing, or commercial purposes; better lighted and fitted than a cellar. An English basement is on the street-level. Stand. Dict.

BASILEUS. See IMPERATOR.

BASILICA. An abridgment of the Corpus Juris Civilis of Justinian; translated into Greek and first published in the ninth century.

The emperor Basilus, finding the Corpus Juris Civilis of Justinian too long and obscure, resolved to abridge it, and under his auspices the work was commenced A. D. 897, and preceded to the fortieth book, which at his death remained unfinished. His son and successor, Leo Philosophus, continued the work, and published it, in sixty books, about the year 893. Constantine Porphyrogenitus, younger brother of Leo, revised the work, rearranged it, and republished it, A. D. 947. From that time the laws of Justinian ceased to have any force in the eastern empire, and the Basilica were the foundation of the law observed there till Constantine XII., the last of the Greek emperors, under whom, in 1453, Constantinople was taken by Mahomet the Turk, who put an end to the empire and its laws. Histoire de la Jurisprudence; Etienne, Intr. à l'Etude du Droit Romain, § 53. The Basilica were translated into Latin by J. Cujas (Cujacius), Professor of Law in the University of Bourges, and published at Lyons, 22d of January, 1568, in one folio volume.

BASOCHE. A French society or guild of clerks of the provincial Parliaments and the Parliament of Paris, having many privileges, and suppressed in 1790. It began early in the 14th century, taking the form of a mock monarchy, and having as its officers a king, chancellor, referendary, attorney-general, and masters of requests. It issued coin, administered justice, and gave plays which were the origin of the French comedy. Stand. Dict.

BASTARD (*bas* or *bast*, abject, low, base, *aerd*, nature).

One born of an illicit connection, and before the lawful marriage of its parents.

One begotten and born out of lawful wedlock. 2 Kent 208.

One born of an illicit union. La Civ. Code, art. 29, 199.

The second definition, which is substantially the same as Blackstone's, is open to the objection that it does not include with sufficient certainty those cases where children are born during wedlock but are not the children of the mother's husband.

The term is said to include those born of

parties under disability to contract marriage, as slaves; 30 Tex. 115.

A child is a bastard if born before the marriage of his parents, but he is not a bastard if born after marriage, although begotten before; 1 Bla. Com. 455, 456; 8 East 210; 13 Ired. 502. By the civil law and by the statute law of many of the states, a subsequent marriage of the parents legitimates children born prior thereto. The rule prevails substantially in Arkansas, Alabama, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, Texas, Vermont, and Virginia, with somewhat varying provisions in the different states; 2 Kent 210; but under the common law this is not so; 85 Ins. 397; 129 Mass. 243. See *HEIR*.

A child is a bastard if born during coverture under such circumstances as to make it impossible that the husband of his mother can be his father; Nich. Adult. Bast. 249; 19 Mart. La. 548; Hard. 479; 6 How. 550; 4 Term 356; 2 M. & K. 349; 78 N. C. 439; 43 Miss. 392; 32 N. J. Eq. 277; 38 Pa. 439; 23 N. Y. 90; but in England the presumption of legitimacy holds if the husband had any opportunity of sexual access during the natural period of gestation, and the question for the jury is not was the husband the father, but could he have been; 1 Broom & H. Com. 562; and such is the rule in the United States; 1 Barb. Ch. 375; 29 Pa. 420; 62 Wis. 512; Chase's Bla. Com. 172, n. 13. It is, however, held that a strong moral impossibility, or such improbability as to be beyond a reasonable doubt, is sufficient; 2 Brock. 256; 3 Paige, Ch. 139; 15 Ga. 160; 13 Ired. 502. The presumption of legitimacy of a child born in wedlock is so strong that it cannot be overcome by proof of the adultery of the wife while cohabiting with her husband, much less by the mere admission of the adulterer; 83 Me. 23. As to who may be admitted to prove non-access, see 3 E. L. & Eq. 100; 2 Munf. 442; 15 Barb. 236; 15 N. H. 45; 29 Pa. 420. See 1 Burge, Col. Law 57; 1 Bla. Com. 458; Gardner Peage Case, Le Marchant's report; 5 C. & F. 163; 12 La. Ann. 853. Neither husband nor wife are competent for this purpose; 60 Wis. 583; 75 Pa. 436; 70 N. C. 269; 44 N. H. 587; 1 Q. B. 444; 5 Ad. & E. 180.

A child is a bastard if born beyond a competent time after the coverture has determined; Co. Litt. 123 b; Hargrave & B. note; 2 Kent 210.

The principal right which a bastard child has is that of maintenance from his parents; 1 Bla. Com. 458; La. Civ. Code § 254; (though not from his father at common law; Schoul. Dom. Rel. *384); which may be secured by the public officers who would be charged with the support of the child, by a peculiar process, or in some cases by the mother; 2 Kent 215. A bastard has no inheritable blood at common law; but he may take by devise if described by the name he has gained by reputation; 1 Ves. & B. 423; 3 Dana 233; 4 Pick. 98; 4 Des. 434. See 5 Ves. Ch. 530. In many of the states, by statute, bastards can inherit from and transmit to their mothers real and personal estate under some modifications; 2 Kent 213; Schoul. Dom. Rel. *381; 82 Tex. 18; see 112 Ill. 234; 82 Ind. 519; and in Utah it can inherit from its father; 137 U. S. 682. Whether a person claiming an inheritance in real estate is the lawful child of the last owner is to be determined by the *lex rei sitæ*; 129 Mass. 243.

Nearly all of the states have statutory provisions relative to bastardy proceedings and as to the liability of the father criminally as well as to the care of the child.

In bastardy proceedings, evidence of improper relations of the prosecutrix with other men than the defendant, but not during the period of gestation, is incompetent; 34 Ill. App. 40; 80 Iowa 553; 33 Neb. 358.

Bastardy complaints are civil actions; 85 Me. 285; they abate on the death of the respondent before trial and during the pendency of the proceedings; 85 Me. 224. See *HEIR*.

BASTARD EIGNE. Bastard elder.

By the old English law, when a man had a bastard son, and he afterwards married the mother, and by her had a legitimate son, the first was called a bastard eigne, or, as it is now spelled, *ainé*, and the second son was called *puisné*, or since born, or sometimes he was called *muller puisné*. See 2 Bla. Com. 243.

BASTARDA. A female bastard. Calvinus, Lex.

BASTARDY. The offence of begetting a bastard child. The condition of a bastard.

BASTARDY PROCESS. The statutory mode of proceeding against the putative father of a bastard to secure a proper maintenance for the bastard.

BASTON. In Old English Law. A staff or club.

In some old English statutes the servants or officers of the wardens of the fleet are so called, because they attended the king's courts with a red staff.

BATONNIER. The chief of the French bar in its various centers, who presides in the council of discipline. Black; Arg. Fr. Merc. Law, 546.

BATTEL. See *WAGER OF BATTEL*.

BATTERY. Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. 2 Bish. Cr. L. § 71; Clark, Cr. L. 199; 17 Ala. 540; 9 N. H. 491.

It is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him; 43 Ind. 153. The slightest touching of another in anger is a battery; 60 Ga. 511.

It must be either wilfully committed, or proceed from want of due care; Stra. 596; Plowd. 19; 3 Wend. 391. Hence an injury, be it ever so small, done to the person of another in an angry, spiteful, rude, or insolent manner, 9 Pick. 1, as by spitting in his face, 6 Mod. 172, or on his body, 1 Swint. 597, or any way touching him in anger, 1 Russell, Cr. 751; 17 Tex. 515; or throwing water on him, 3 N. & P. 564, or violently jostling him, see 4 H. & N. 481, or where one riding a bicycle recklessly runs against a person standing with his back partially towards him, when by the exercise of slight care it could be avoided; 117 Ind. 450, is a battery in the eye of the law; 1 Hawk. Pl. Cr. 263. See 1 Selwyn, N. P. 53. And anything attached to the person partakes of its inviolability; if, therefore, A strikes a cane in the hands of B, it is a battery; 1 Dall. 114; 1 Pa. 380; 1 Hill, S. C. 46; 4 Denio 453; 4 Wash. C. C. 534; 1 Baldw. 600. Whether striking a horse is striking the driver, see 43 Ind. 146.

A battery may be justified on various accounts.

As a salutary mode of correction. A parent may correct his child (though if done to excess, it is battery; 121 Mass. 66; 54 Ga. 281; 62 Ill. 354); a guardian his ward; 43 Tex. 167; a master his apprentice; 24 Edw. IV.; 4 Gray 36; 2 Dev. & B. 385; a teacher his scholar, within reason; 45 Iowa 248; 68 N. C. 322; 40 Barb. 541; 37 N. E. Rep. (Ind.) 558; and a superior officer, one under his command; Keilw. 136; Buller, N. P. 19; Bee, Adm. 161; 1 Bay 3; 14 Johns. 119; 15 Mass. 365. And see Cowp. 173; 15 Mass. 347; 3 C. & K. 142; but a master, ordinarily, not his servant; 1 Ashm. 267; 6 Tex. App. 133; and the mate of a steamboat has no legal right to enforce his orders by beating one of the crew; 35 Fed. Rep. 152. See *ASSAULT*; *BEAT*.

As a means of preserving the peace, in the exercise of an office, under process of court, and in aid of an authority at law. See *ARREST*.

As a necessary means of defence of the person against the plaintiff's assaults in the following instances: in defence of himself, his wife, 3 Salk. 46, his child, and his servant, Ow. 150 (but see 1 Salk. 407); but he is not justified in using force against a man to prevent his wife leaving him at the persuasion of such other; 98 N. C. 685. So, likewise, a person may defend any member of his family against an assault as he could himself, the wife may justify a bat-

tery in defending her husband, the child its parent, and the servant his master; 3 Salk. 46; 114 Mass. 295; 62 Ill. 354; 13 Mich. 314; 25 Gratt. 837; 22 W. Va. 800; 30 Miss. 619; Webb, Poll. Torts, 255 and note. In these situations, the party need not wait until a blow has been given; for then he might come too late, and be disabled from warding off a second stroke or from protecting the person assailed. Care, however, must be taken that the battery do not exceed the bounds of necessary defence and protection; for it is only permitted as a means to avert an impending evil which might otherwise overwhelm the party and not as a punishment or retaliation for the injurious attempt; Stra. 593; 1 Const. S. C. 84; 4 Vt. 629; 4 J. J. Marsh. 578; 2 Whart. Cr. Law § 618; Poll. Torts 255. The degree of force necessary to repel an assault will naturally depend upon, and be proportioned to, the violence of the assailant; but with this limitation any degree is justifiable; 1 Ld. Raym. 177; 11 Humphr. 200; 2 N. Y. 193; 1 Ohio St. 66; 23 Ala. 17, 28; 14 B. Monr. 614; 16 Ill. 17; 5 Ga. 85.

Evidence justifying an assault and battery is not admissible under a general denial; 160 Mass. 296.

A battery may likewise be justified in the necessary defence of one's property; 12 Vt. 437; 69 N. Y. 101. If the plaintiff is in the act of entering peaceably upon the defendant's land, or, having entered, is discovered, not committing violence, a request to depart is necessary in the first instance; 2 Salk. 641; 80 Ill. 92; see 121 Mass. 309; 99 Cal. 481; and if the plaintiff refuses, the defendant may then, and not till then, gently lay hands upon the plaintiff to remove him from the close, and for this purpose may use, if necessary, any degree of force short of striking the plaintiff, as by thrusting him off; Skinn. 28. See 24 Neb. 235. If the plaintiff resists, the defendant may oppose force to force; 8 Term 78; 2 Metc. 23; 1 C. & P. 6. But if the plaintiff is in the act of forcibly entering upon the land, or, having entered, is discovered subverting the soil, cutting down a tree, or the like, 2 Salk. 641, a previous request is unnecessary, and the defendant may immediately lay hands upon the plaintiff; 8 Term 78. A man may justify a battery in defence of his personal property without a previous request, if another forcibly attempt to take away such property; 2 Salk. 641. One from whom property has been wrongfully taken may regain the momentarily interrupted possession by the use of reasonable force, especially after demanding possession; 148 Mass. 529. As to the rights of railroad superintendents over the station-houses of the company in this respect, see 7 Metc. 596; 12 id. 482; 4 Cush. 608; 6 Cox, Cr. Cas. 461.

BATTURE (Fr. shoals, shallows). An elevation of the bed of a river under the surface of the water; but it is sometimes used to signify the same elevation when it has risen above the surface. 6 Mart. La. 19, 216. See 18 La. R. 123; 33 La. Ann. 551.

The term *battures* is applied principally to certain portions of the bed of the river Mississippi, which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.

BAWDY-HOUSE. A house of ill-fame, kept for the resort and unlawful commerce of lewd people of both sexes. 5 Ired. 603.

It must be reputed of ill-fame; 17 Conn. 467; but see 4 Cra. 338, 372; 64 Me. 529; 29 Wis. 435; may be a single room; 1 Salk. 382; 2 Ld. Raym. 1197; 46 N. H. 61; 81 Conn. 172; and more than one woman must live or resort there; 5 Ired. 603. It need not be kept for lucre; 21 N. H. 345; 97 Mass. 225; 18 Vt. 70. Such a house is a common nuisance; 1 Russell, Cr. 299; Bacon, Abr. *Nuisances*; and the keeper may be indicted, and, if a married woman, either alone or with her husband; 1 Bish. Crim. L. 500 (2); 1 Metc. 151. One who assists in establishing such a house is guilty of an indictable misdemeanor; 2 B. Monr. 417; including a lessor who has knowledge; 3 Pick. 26; 6 Gill 42½. See 29 Mich. 269;

50 Mo. 535. A charge of keeping a bawdy-house is actionable, because it is an offence which is indictable at common law as a common nuisance; 13 Johns. 275; 5 M. & W. 249; and exemplary damages may be allowed against a person permitting it to be kept upon his property; 71 Tex. 765. The reputation of the house and its visitors is sufficient proof; 17 Fla. 183. A single act of lewdness by defendant with a man in her house will not make it a house of prostitution; 75 Mich. 127; nor is it a crime to let rooms to prostitutes for quiet and decent occupation, or to permit a house to be visited by disreputable people for proper and innocent purposes; 15 R. I. 24.

BAY. An enclosure, or other contrivance, to keep in the water for the supply of a mill, so that the water may be able to drive the wheels of such mill. Stat. 27 Eliz. c. 19 (This is generally called a fore-bay.)

A bending or curving of the shore of the sea or of a lake, so as to form a more or less inclosed body of water. 14 N. H. 477.

BAY WINDOW. A window projecting from the wall of a building so as to form a recess or bay within and, properly speaking, rising from the ground or basement, with straight sides only; but the term is also ordinarily applied to such projecting windows with curved sides, properly called bow windows, and also to projecting windows supported from the building, above the ground, properly called oriel windows.

The footways of streets being under municipal control, the authorities may determine the extent to which the sidewalks may be obstructed by such projections beyond the building line; 136 Pa. 519; s. c. 27 W. N. C. 5; their erection will not be enjoined by a court of equity if it appear that they will cause no appreciable injury, either by the finding of the master to that effect; *id.*; or from the affidavits submitted on an application by the attorney general to prevent the erection as a public nuisance; 5 Del. Ch. 499. Equity will not interfere in such cases at suit of a private person; 1 W. N. C. (Pa.) 529; 4 *id.* 10; but will at suit of the attorney general to prevent the erection of bay windows extending over the street; 10 W. N. C. (Pa.) 10; 39 Leg. Int. 108; and a second story bay window is a nuisance and will be restrained; 100 Pa. 182.

BAYOU. A stream which is the outlet of a swamp near the sea. Applied to the creeks in the lowlands lying on the Gulf of Mexico.

BEACONAGE. Money paid for the maintenance of a beacon. Comyns, Dig. Navigation (H).

BEADLE (Sax. *beodan*, to bid). A church servant chosen by the vestry, whose business it is to attend the vestry, to give notice of its meetings, to execute its orders, to attend upon inquests, and to assist the constables. See **BEDEL**.

BEARER. One who bears or carries a thing.

If a bill or note be made payable to bearer, it will pass by delivery only, without indorsement; and whoever fairly acquires a right to it may maintain an action against the drawer or acceptor.

It has been decided that the bearer of a bank note, payable to bearer, is not an assignee of a chose in action within the eleventh section of the judiciary act of 1789, c. 20, limiting the jurisdiction of the circuit court; 3 Mas. 308.

BEARERS. Such as bear down or oppress others; maintainers.

BEARING DATE. Words frequently used in pleading and conveyancing to introduce the date which has been put upon an instrument.

When in a declaration the plaintiff alleges that the defendant made his promissory note on such a day, he will not be considered as having alleged that it bore date on that day, so as to cause a variance between the declaration and the note produced bearing a different date; 2 Greenl.

Ev. § 160; 2 Dowl. & L. 759.

BEAST. Any four-footed animal which may be used for labor, food, or sport; as opposed to man; any irrational animal. Webster. A cow is a beast; 6 Humph. 285; and so is a horse; 8 Bush 587; and a hog; 10 Iowa 115; but a dog was held not to be; 1 Minn. 292; but see 133 Mass. 241.

BEASTS OF THE CHASE. Properly, the buck, doe, fox, martin, and roe, but in a common and legal sense extending likewise to all the beasts of the forest, which beside the others are reckoned to be the hind, hare, bear, and wolf, and, in a word, all wild beasts of venery or hunting. Co. Litt. 232; 2 Bla. Com. 39.

BEASTS OF THE FOREST. See **BEASTS OF THE CHASE.**

BEASTS OF THE WARREN. Hares; coney, and roes. Co. Litt. 233; 2 Bla. Com. 39.

BEAT OR BEATING. To strike or hit repeatedly, as with blows.

To beat, in a legal sense, is not merely to whip, wound, or hurt, but includes any unlawful imposition of the hand or arm. The slightest touching of another in anger is a battery. 60 Ga. 511.

The beating of a horse by a man refers to the infliction of blows; 101 Mass. 35. See **BATTERY**.

BEATING THE BOUNDS. Perambulation. An annual survey of boundaries, as of a parish or an estate, to see that they are unchanged or still in existence. Perambulation was popularly called processioning and beating the bounds, because the procession of officials making the survey was usually accompanied by the parish boys, who struck the boundaries with peeled willow wands. This ancient ceremony was observed annually on Holy Thursday or Ascension Day in parts of the British empire and the United States even in the 19th century. Stand. Dict.

BEAUPLEADER (L. Fr. *fair plead-*ing). A writ of prohibition directed to the sheriff or another, directing him not to take a fine for beaupleader.

There was anciently a fine imposed called a fine for beaupleader, which is explained by Coke to have been originally imposed for bad pleading. Coke, 3d Inst. 128. It was set at the will of the judge of the court, and reduced to certainty by consent, and annually paid. Comyns, Dig. prerogative (D. 62). The statute of Marlebridge (52 Hen. III.) c. 11, enacts, that neither in the circuit of justices, nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading*; namely, for not pleading fairly or aptly to the purpose. Upon this statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand the fine; and it is a prohibition or command not to do it. New Nat. Brev. 586; Fitz. Nat. Brev. 270a; Hall, Hist. Comm. Law, c. 7. Mr. Beave explains it as a fine paid for the privilege of a fair hearing; 2 Reeve, Eng. Law 70. This latter view would perhaps derive some confirmation from the connection in point of time of this statute with Magna Charta, and the resemblance which the custom bore to the other customs against which the clause in the charter of *nulli vendemus*, etc., was directed. See Comyns, Dig. Prerogative (D. 51, 52); Cowel; Coke, 2d Inst. 122, 123; Crabb, Eng. Law 159.

BECOME VOID. To "become void" and to "be determined" are not convertible phrases. The former, however, differs from the latter only as a species differs from its genus, and must therefore be included in it; for to say that a thing "has become void," necessarily implies that it has in effect been terminated or brought to an end; but the expression applies only to its end or termination in one specific mode. 4 Bibb (Ky.) 548. See **DETERMINED** and **BECOME VOID**.

BED. The channel of a stream; the part between the banks worn by the regular flow of the water. See 13 How. 426.

The phrase divorce from *bed and board*, contains a legal use of the word synonymous with its popular use.

BED-ALE, or BID-ALE. See **BIDALE**.

BEDHOUSE. In old England, a charity hospital, or almshouse, the occupants of which, known as bedesmen, were required to pray for the founders and benefactors. Cunningham.

BEDEL. In English Law. A crier or messenger of court, who summons men to appear and answer therein. Cowel. An inferior officer in a parish or liberty.

A subordinate officer of a university who walked with a mace before one of the officers on ceremonial occasions and performed other minor duties ordinarily.

A herald to make public proclamations. Cent. Dict.

The more usual spelling is **BEADLE**, *q. v.*

BEDELARY. The jurisdiction of a *bedel*, as a bailiwick is the jurisdiction of a bailiff. Co. Litt. 234 b; Cowel.

BEDEREPE. A service which certain tenants were anciently bound to perform, as to reap their landlord's corn at harvest. Said by Whishaw to be still in existence in some parts of England. Blount; Cowel; Whishaw.

BEDESMAN. One who prays for another. Specifically, in old England, an occupant of a bedehouse (*q. v.*); in Scotland, a privileged or licensed beggar, receiving public alms. Stand. Dict.

BEDEWERI. A term once applied, in England, to bandits, profligate or excommunicated persons. Cunningham.

BEEF This word is used frequently to mean an animal of the cow species and not beef prepared for market. A beef or one beef is an expression frequently used to designate an animal fit for use as beef, instead of designating it as a steer, a heifer, an ox, or a cow. 40 Tex. 135.

BEER. A malt liquor of the lighter sort and differs from ordinary beer or ales, not so much in its ingredients as in its processes of fermentation.

An alcoholic liquor made from any farinaceous grain, but generally from barley, which is first malted and ground, and its fermentable substance extracted by hot water. 3 A. & E. Ency 2nd ed., 907; 51 Fed Rep. 812. A fermented liquor made from any malted grain, with hops and other bitter flavoring matters. *Id.*; 32 Kan 480, quoting Webster.

Lager Beer. A malt liquor of the lighter sort, and differs from ordinary beers or ales not so much in its ingredients as in its processes of fermentation. *Id.*; 11 R. I. 592.

A court will take judicial cognizance, without evidence, that lager beer is a malt liquor; 11 R. I. 592; 55 Ala. 160; *contra*, 24 Fla. 363. See **INTOXICATING LIQUOR**; **STILL BEER**.

BEES are animals *feræ nature* while unreclaimed; 3 Binn. 546; 13 Miss. 333. See Inst. 2. 1. 14; Dig. 41. 1. 5. 2; 7 Johns. 11; 2 Bla. Com. 392. If while so unreclaimed they take up their abode in a tree, they belong to the owner of the soil, but not so if reclaimed and they can be identified; 15 Wend. 550. See 1 Cow. 243; 2 Dev. 162.

BEGAVEL. See **BAGAVEL**.

BEGGAR. One who obtains his livelihood by asking alms. The laws of several of the states punish begging as an offence. See **TRAMP**.

BEGIN. To take, the first step in, to open, as to begin a case; to give origin to, as to begin a movement; intransitively, to come into existence. Stand. Dict. See **OPEN**; **OPENING**.

In § 28 of the Immigration act of March 3, 1903, which states that "nothing contained in this act shall affect any prosecution begun under any existing act or any acts hereby amended, but such prosecution . . . shall proceed as if this act had not been passed," is not limited in its application to prosecutions or proceedings which had been "begun" before the passage of the act, but applies to those hereafter begun under the old law, based on acts committed before its repeal or amendment. 133 Fed. 201.

The word "begun" as here employed is not the preterit of "begin," expressing that verb in its past tense; it is the past participle performing solely the function of a connect-

tive. *Id.*, 204.

BEGOTTEN. "To be begotten" means the same as "begotten," embracing all those whom the parent shall have begotten during his life, *quos procreaverit*. 1 Maule & S. 185; 1 S. & R. 877.

Procreated. English.

BEGUN. In § 28 of immigration act of March 3, 1903 which states that "nothing contained in this act shall affect any prosecution or other proceeding, criminal or civil, begun under any existing act, etc.," is not limited in its application to prosecutions or proceedings which had been "begun" before the passage of the act, but applies to those hereafter begun under the old law, based on acts committed before its repeal or amendment. 133 Fed. 201.

The word "begun" as here employed is not the preterit of begin, expressing that verb in its past tense; it is the past participle performing solely the function of a connective. *Id.*, 204. See **BEGIN**.

BEHALF. Benefit, support, defence, or advantage.

The interest (of any one); always preceded by in, on, or upon. Stand. Dict. It was held, however, that a witness called and examined by a party was testifying "in his behalf," even though against his interest 65 Ill. 272

BEHAVIOR. Manner of having, holding, or keeping one's self; carriage of one's self, with respect to propriety, morals, and the requirements of law. Surety to be of good behavior is a larger requirement than surety to keep the peace; Dalton c. 123; 4 Burns, Just. 355.

BEHETRIA (Arabic, without nobility or lordship).

In Spanish Law. Lands situated in districts and manors in which the inhabitants had the right to select their own lords.

Behetrias were of two kinds: *Behetrias de entre parientes*, when the choice was restricted to a relation of the deceased lord; and *Behetrias de mar a mar*, when the choice was unrestricted.

The lord, when elected, enjoyed various privileges, called *Yantar*, *Conducho*, *Martinego*, *Marzadaga*, *Infurcion*, etc., which see. These contributions were intended for his maintenance, the construction of his dwelling, the support of his family and his followers, etc.; Escriche, Dicc. Raz.; Sempere y Guarinos, *Vinculos y Mayarazgos*, p. 67, etc. See also on this subject *Fuero Viejo de Castilla*, b. 1, tit. 8; *Las Partidas*, tit. 25, p. 4; *El Ordenamiento de Alcalá* in different laws in tit. 32. See likewise book 6, tit. 1, of the *Novissima Recopilacion*.

BEHOOF (Sax.). Use; service; profit; advantage. In occurs in conveyances.

BELGIUM. The government of Belgium is a limited constitutional monarchy, women and their descendants being excluded from the succession. In default of male heirs, the king may, with the consent of the chambers, nominate his successor. There is a responsible ministry. The legislature is vested in the king and two chambers. The chamber of representatives are elected by universal suffrage. The senate consists of 76 members who are also elected. The chambers can be prorogued and dissolved by the king, and they meet annually and must sit for at least 40 days. The judicial system is in the main similar to that of France.

BELIEF. Conviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others.

Belief may evidently be stronger or weaker according to the weight of evidence adduced in favor of the proposition to which belief is granted or refused; 4 S. & R. 137; 1 Greenl. Ev. §§ 7-13. See 1 Stark. Ev. 41; 2 Powell, Mortg. 555; 1 Ves. Ch. 95; 12 *id.* 80; Dy. 53; 2 W. Bla. 881; 8 Watts 406; 38 Ind. 504; 9 Gray 274; 9 Cal. 62; 10 Pet. 171.

BELIEVE. See **FIRMLY BELIEVE**.

BELLIGERENCY. The condition of a people who are recognized to be a *de facto* state or government and to be making war for their independence. Before they can be recognized as belligerents they must have some sort of political organization and

be carrying on what in international law is regarded as legal war. There must be an armed struggle between two political bodies, each of which exercises *de facto* authority over persons within a determined territory, and commands an army which is prepared to observe the ordinary laws of war. It is not enough that the insurgents have an army; they must have an organized civil authority directing the army.

The exact point at which revolt or insurrection becomes belligerency is often extremely difficult to determine; and belligerents are not usually recognized by nations unless they have some strong reason or necessity for doing so, either because the territory where the belligerency is supposed to exist is contiguous to their own, or because the conflict is in some way affecting their commerce or the rights of their citizens. Thus in 1875 President Grant refused to recognize the Cubans as belligerents, although they had been maintaining hostilities for eight years, because they had no real and palpable political organization manifest to the world, and because, being possessed of no seaport, their contest was solely on land and without the slightest effect upon commerce; Whart. Dig. Int. Law 406. One of the most serious results of recognizing belligerency is that it frees the parent country from all responsibility for what takes place within the insurgent lines; Dana's Wheaton, note 15, page 35.

When revolutionists have no organized political government and it becomes necessary to recognize them in some way so as to avoid dealing with them as pirates or to warn citizens from taking part with them, it has been supposed that they could be recognized as insurgents, and this would create in the law a new heading of insurgency as a milder form of belligerency. The distinction, however, has not been fully recognized in international law; 33 Albany Law Journal 125. See Dana's Wheaton, note 15; Calvo, *Droit Int.* 4th ed. vol. 1, p. 238; Hall's International Law, 3d ed. p. 31; Walker's Science of International Law, p. 115; Wharton's Digest of International Law, vol. 1, p. 333; 4 American State Papers, Foreign Relations 1.

BELLIGERENT. Actually at war. 44 Ill. 142.

Applied to nations; Wheaton, Int. Law 380 *et seq.*; 1 Kent 89.

It is not necessary that there should be war between separate and independent powers. The parties to a civil war may be belligerents; 37 N. Y. 178. See **WAR**; **BELLIGERENCY**.

BELONG. In statutes referring to inhabitaney, the poor, etc., the word designates the place of a person's legal settlement, not merely his place of residence. Anderson; 19 Conn. 564.

Belonging to. In the Pennsylvania statute defining arson, includes all structures (as, for example, a barn) so near a dwelling-house on the same premises as to endanger the safety of the house in case of fire. *Id.*; 93 Pa. 195.

BELOW. Inferior; preliminary. The court below is the court from which a cause has been removed. See **BAIL**.

BENCH. A tribunal for the administration of justice.

The judges taken collectively, as distinguished from counsellors and advocates, who are called the bar.

The term, indicating originally the seat of the judges, came to denote the body of judges taken collectively, and also the tribunal itself. The *jus banchi*, says Spelman, properly belongs to the king's judges, who administer justice in the last resort. The judges of the inferior courts, as of the barons, are deemed to judge *piano pede*, and are such as are called in the civil law *pedanei judices*, or by the Greeks *κατωδικασται*, that is *humil judicantes*. The Greeks called the seats of their higher judges *βυρανε*, and of their inferior judges *βαλπε*. The Romans used the word *sedes* and *tribunalia* to designate the seats of their higher judges, and *subsellia* to designate those of the lower. See Spelman, Gloss. *Bancus*; 1 Reeve, Eng. Law 40, 4th ed.

The court of common pleas in England was formerly called *Bancus*, the Bench, as distinguished from *Bancus Regis*, the King's Bench. It was also

called *Communis Bancus*, the Common Bench; and this title is still retained by the reporters of the decisions in the court of Common Pleas. Mention is made in the Magna Charta '*de justiciariis nostris de Banco*,' which all men know to be the justices of the court of Common Pleas, commonly called the Common Bench, or the Bench." Vinet, *Abr. Courts* (n. 3).

BENCH WARRANT. An order issued by or from a bench, for the attachment or arrest of a person. It may issue either in case of a contempt, or where an indictment has been found.

BENCHER. A senior in the Inns of Court, intrusted with their government or direction.

The benchers have the absolute and irresponsible power of punishing a barrister guilty of misconduct, by either admonishing or rebuking him, by prohibiting him from dining in the hall, or even by expelling him from the bar, called disbarring. They might also refuse admission to a student, or reject his call to the bar. Wharton, Lex.

BENEFICE. An ecclesiastical preferment.

In its more extended sense, it includes any such preferment; in a more limited sense, it applies to rectories and vicarages only. See **BENEFICIUM**.

BENEFICIAL ASSOCIATION. An organized union of persons, which, through the mutual cooperation of the members, furnishes to such members or to their families, relatives, dependents, or other designated beneficiaries, upon a specified contingency, aid, protection, benefits, or profits. Same as benevolent association. 3 Am. & Eng. Encyc. L. (2nd ed.) 1043.

BENEFICIAL INTEREST. Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.

A *cestui que trust* has the beneficial interest in a trust estate while the trustee has the legal estate. If A makes a contract with B to pay C a sum of money, C has the beneficial interest in the contract.

BENEFICIAL POWER. It is used in New York and has for its object the donee of the power, and is to be executed solely for his benefit, in contradistinction to *trust powers*, which have for their object persons other than the donee and are to be executed solely for their benefit. 73 N. Y. 234.

BENEFICIAL SOCIETIES. Voluntary associations for mutual assistance in time of need and sickness, and for the care of families of deceased members. Niblack, Ben. Soc. and Accid. Ins. These associations are the successors of the ancient guilds and form in substance a very effective system of co-operative life insurance. The payment to the beneficiary is not a gift, but a right arising from the contract of membership, and when the conditions of membership have been fulfilled may be enforced at law; *id.* ch. xxvi.; and the suspension of a subordinate lodge will not defeat a recovery unless legally done; 173 Pa. 302.

BENEFICIARY. A term suggested by Judge Story as a substitute for *cestue que trust*, and adopted to some extent. 1 Story, Eq. Jur. § 321.

In Insurance. The person named in the policy to whom the insurance is payable upon the happening of the event insured against.

BENEFICIO PRIMO (more fully *beneficio primo ecclesiastico habendo*). A writ directed from the king to the chancellor, commanding him to bestow the benefice which shall first fall in the king's gift, above or under a certain value, upon a particular and certain person. *Reg. Orig.* 307.

BENEFICIUM (Lat. *beneficere*). A portion of land or other immovable thing granted by a lord to his followers for their stipend or maintenance.

A general term applied to ecclesiastical livings. 4 Bla. Com. 107; Cowel.

In the early feudal times, grants were made to

continue only during the pleasure of the grantor, which were called *munera*; but soon afterwards these grants were made for life, and then they assumed the name of *beneficia*. Dalrymple, Feud. Pr. 190. Pomponius Laetus, as cited by Hotoman, *De Feudis*, c. 3, says, "That it was an ancient custom, revived by the Emperor Constantine, to give lands and villas to those generals, prefects, and tribunes who had grown old in enlarging the empire, to supply their necessities as long as they lived, which they called *parochial* parishes, etc. But between (*feuda*) fiefs or feuds and (*parochia*) parishes there was this difference, that the latter were given to old men, veterans, etc., who, as they deserved well of the republic, were sustained the rest of their life (*publico beneficio*) by the public benefaction; or, if any war afterwards arose, they were called out not so much as soldiers as leaders (*magistri militum*). Feuds (*feuda*), on the other hand, were usually given to robust young men who could sustain the labors of war. In later times, the word *parochia* was appropriated exclusively to ecclesiastical persons, while the word *beneficium* (*militare*) continued to be used in reference to military fiefs or fiefs."

In Civil Law. Any favor or privilege. **BENEFICIUM CLERICALE.** Benefit of clergy, which see.

BENEFICIUM COMPETENTIAE. In Scotch Law. The privilege of retaining a competence belonging to the obligor in a gratuitous obligation. Such a claim constitutes a good defence in part to an action on the bond. Paterson, Comp.

In Civil Law. The right which an insolvent debtor had, among the Romans, on making cession of his property for the benefit of his creditors, to retain what was required for him to live honestly according to his condition. 7 Toullier, n. 258.

BENEFICIUM DIVISIONIS. In Scotch and Civil Law. A privilege whereby a co-surety may insist upon paying only his share of the debt along with the other sureties. In Scotch law this is lost if the cautioners (sureties) bind themselves "conjunctly and severally." Erskine, Inst. lib. 3, tit. 3, § 63.

BENEFICIUM ORDINIS. In Scotch and Civil Law. The privilege of the surety allowing him to require that the creditor shall take complete legal proceedings against the debtor to exhaust him before he calls upon the surety. 1 Bell, Com. 347.

BENEFIT. Profit, fruit, or advantage. The acceptance of the benefits of a contract or agreement estops a party from denying its validity; 102 Mo. 149; 139 Pa. 198; 151 Mass. 324; 62 Hun 269; 131 Ind. 23; 94 Mich. 429; 52 Fed. Rep. 627; 100 U. S. 55.

BENEFIT ASSOCIATION. See BENEFICIAL ASSOCIATION.

BENEFIT OF CESSION. In Civil Law. The release of a debtor from future imprisonment for his debts, which the law operates in his favor upon the surrender of his property for the benefit of his creditors. Pothier, *Procéd. Civ.* 5 ième part. c. 2, § 1.

This was something like a discharge under the insolvent laws, which releases the person of the debtor, but not the goods he may acquire afterwards. See *BANKRUPT; CESSIO BONORUM; INSOLVENCY*.

BENEFIT OF CLERGY. In English Law. An exemption of the punishment of death which the laws impose on the commission of certain crimes, on the culprit demanding it. By modern statutes, benefit of clergy was rather a substitution of a more mild punishment for the punishment of death.

A clergyman was exempt from capital punishment *toties quoties*, as often as from acquired habit, or otherwise, he repeated the same species of offence; the laity, provided they could read, were exempt only for a first offence; for a second, though of an entirely different nature, they were hanged. Among the laity, however, there was this distinction: peers and peeresses were discharged for their first fault without reading, or any punishment at all; commoners, if of the male sex and readers, were branded in the hand. Women commoners had no benefit of clergy. It occasionally happened, in offences committed jointly by a man and a woman, that the law of gavelkind was parodied—

"The woman to the bough,
The man to the plough."

Kelyng reports, "At the Lent Assizes for Winchester (18 Car. II.) the clerk appointed by the bishop to give clergy to the prisoners, began to give it to an

old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked on the book at all; and yet the bishop's clerk, upon the demand of '*legit*?' or '*non legit*?' answered '*legit*.' And thereupon I told him I doubted he was mistaken, and had the question again put to him; whereupon he answered again, something angrily, '*legit*.' Then I bid the clerk of assizes not to record it, and I told the person that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the court; and so I caused the prisoner to be brought near, and delivered him the book, when he confessed that he could not read. Whereupon I told the person that he had unrepented more that day than he could preach up again in many days, and I fined him five marks." An instance of humanity is mentioned by Donne, of a culprit convicted of a non-clergyable offence prompting a convict for a clergyable one in reading his *neck-verse*. In the very curious collection of *prolegomena* to Coryat's Crudities are commendatory lines by Inigo Jones. The famous architect wrote,

"Whoever on this book with scorn would look,
May he at sessions crave, and want his book."

This section is taken from Ruins of Time exemplified in Hale's Pleas of the Crown, by Amos, v. 24. And see, further, 1 Salk. 61.

If a clerk in holy orders committed a crime in the thirteenth century he could not be tried for it in a lay court. At the request of his bishop he was handed over for trial to the ecclesiastical court. This court might imprison for life but could not draw a drop of blood. Degradation was the usual punishment. Not only the higher ecclesiastics but those in minor orders stood outside the criminal law. The king's justices reduced the practice to an illogical absurdity. They required no proof of a person's sacred character; to read a line in a book was sufficient, and the same verse was said to be used on each prisoner; 1 Soc. Eng. 327. It was Ps. li. 1, *Miserere mei, Deus*; called the "neck-verse."

Benefit of clergy was afterwards granted, not only to the clergy, as was formerly the case, but to all persons. The benefit of clergy seems never to have been extended to the crime of high treason, nor to have embraced misdemeanors inferior to felony. It has been usually acknowledged as belonging to the common law of most of the United States; 1 Bish. Cr. L. 938. See 1 Chit. Cr. L. 667; 4 Bla. Com. ch. 28; 1 Bish. Cr. Law § 936. But this privilege is now abolished in England, by stat. 7 & 8 Geo. IV. c. 28, s. 6.

By the act of congress of April 30, 1790, it is provided, § 30, that the benefit of clergy shall not be used or allowed upon conviction of any crime for which, by any statute of the United States, the punishment is, or shall be declared to be, death.

BENEFIT OF DISCUSSION. In Civil Law. The right which a surety has to cause the property of the principal debtor to be applied in satisfaction of the obligation in the first instance. La. Civ. Code, arts. 3014-3020.

BENEFIT OF DIVISION. In Civil Law. The right of one of several joint sureties, when sued alone, to have the whole obligation apportioned amongst the solvent sureties, so that he need pay but his share. La. Civ. Code, arts. 3014-3020.

BENEFIT OF INVENTORY. In Civil Law. The privilege which the heir obtains of being liable for the charges and debts of the succession, only to the value of the effects of the succession, by causing an inventory of these effects within the time and manner prescribed by law. La. Civ. Code, art. 1025; Pothier, *des Success.* c. 3, s. 3, a. 2. See also Paterson, Comp. as to the Scotch law upon this subject.

BENERETH. An ancient service which the tenant rendered to his lord with his plough and cart. Tomk.; Lamb. Itin., p. 222; Co. Lit. 86.

BENEVOLENCE. A voluntary gratuity given by the subjects to the king. Cowel.

Benevolences were first granted to Edward IV.; but under subsequent monarchs they became anything but voluntary gifts, and in the Petition of Rights (3 Car. I.) it is made an article that no benevolence shall be extorted without the consent of parliament.

The illegal claim and collection of these benevolences was one of the prominently alleged causes of the rebellion of 1640. 1 Bla. Com. 140; 4 id. 439; Cowel.

BENEVOLENT ASSOCIATION. See BENEFICIAL ASSOCIATION.

BENEVOLENTIA REGIS HABENDA. The form of purchasing the king's pardon and favour, in ancient fines and sub-

missions, to be restored to estate, title, or place. Tomlin; Paroch. Antiq. 172.

BENHURST. A remedy for the inhabitants of Berkshire to levy money recovered against them on the statute of hue and cry. Cunningham; 39 Eliz., c. 25.

BEQUEATH. To give personal property by will to another. 13 Barb. 106. The word may be construed *devise*, so as to pass real estate; Wigram, Wills 11; or *devise and bequeath*; 119 Mass. 525; 36 Me. 216; 13 Barb. 109.

BEQUEST. The word "bequest" is commonly defined as a gift of personal property by will; but it is not necessarily confined to gratuity. Thus it was held in 3 Keyes (N. Y.) 486, that "Every bequest of personal property is a legacy, including those made in lieu of dower, and in satisfaction of an indebtedness, as well as those which are wholly gratuities. . . . And when it is said that a legacy is a gift of chattels, the word is not limited in its meaning to a gratuity, but has the more extended signification, the primary one given by Worcester in his dictionary, 'a thing given, either as a gratuity or as a recompense.'" 263 U. S. 184.

A bequest to a person as executor is considered as given upon the implied condition that the person named shall, in good faith, clothe himself with the character. *Id.*, 185.

"Bequests" in a will was held not to be used in a technical sense, and included certain items only. 110 S. W. 853. See *DEVISE*.

BERCARIA. A sheep-fold. A tan-house or heath-house, where barks or rinds of trees are laid to tan. Domesday; Co. Litt. 56.

BERCARIUS, BERCATOR. A shepherd.

BERTILLON SYSTEM. A system of anthropometry, or body measurement, used for identification, particularly of criminals invented by Alphonse Bertillon. Stand Dict.

BESAILE, BESAYLE. The great-grandfather, *proavus*. 1 Bla. Com. 186.

BESIDES. An addition; over and above; outside of and separate from. 4 Am. & Eng. Ency. 2nd ed., 3; 103 N. Y. 177. When provisions are made for children besides an eldest son, no children take unless there be a son; *secus*, if the phrase is "other than." *Id.*; 4 Dr. & War. 235.

BEST EVIDENCE. Means the best evidence of which the nature of the case admits, not the highest or strongest evidence which the nature of the thing to be proved admits of: e. g. a copy of a deed is not the best evidence: the deed itself is better. Gilbert, Ev. 15; Stark. Ev. 437; Tayl. Ev. 365; 1 Greenl. Ev., Lewis, ed. § 82; 65 Me. 487; 2 Campb. 605; 1 Pet. 591; 7 id. 100; 145 Pa. 418; 15 Q. B. 782. See 33 Mich. 53.

The rule requiring the best evidence to be produced is to be understood of the best legal evidence; 2 S. & R. 34; 3 Bla. Com. 368, note 10, by Christian. It is relaxed in some cases, as e. g. where the words or the act of the opposite party avow the fact to be proved. A tavern-keeper's sign avows his occupation; taking of tithes avows the clerical character. 2 S. & R. 440; 1 Saund. Pl. 49. And see 1 Greenl. Ev. §§ 82, 83; 1 Bish. Cr. Pr. § 1080.

Letterpress copies of letters are the best secondary evidence of their contents; 87 Cal. 409. Where a note and the deed of trust given to secure it differ in describing the payee of the note, the note will prevail as evidence over the deed of trust; 108 Mo. 336.

BESTIALITY. It is a connection between a human being and a brute of the opposite sex. Buggery seems to include both sodomy and bestiality; 10 Ind. 356. See *SODOMY*.

BET. Election. A wager or "bet" upon an election does not necessarily mean

only a bet or wager on the success of either candidate, but a bet or wager on or about, or in relation to the election to be held, for these officers, in any form, by which undue exertions may be stimulated to operate upon, influence or control the free and unbiased exercise of the right of voting. 4 B. Mon. (Ky.) 1.

A "bet" upon the vote of a county in a general election or of a precinct in a district or county election, would, according to the common understanding and the intent of a statute, be a bet upon an election. 15 B. Mon. (Ky.) 533.

BETHUGAVEL. See BAGAVEL.

BETROTHMENT. A contract between a man and a woman, by which they agree that at a future time they will marry together.

The contract must be mutual; the promise of the one must be the consideration for the promise of the other. It must be obligatory on both parties at the same instant, so that each may have an action upon it, or it will bind neither; 1 Salk. 24; Carth. 467; 5 Mod. 411; 1 Freem. 95; 3 Kebl. 148; Co. Litt. 79 a, b.

The parties must be able to contract. If either be married at the time of betrothment, the contract is void; but the married party cannot take advantage of his own wrong, and set up a marriage or previous engagement as an answer to the action for the breach of the contract, because this disability proceeds from the defendant's own act; 1 Ld. Raym. 387; 3 Inst. 89; 1 Sid. 112; 1 Bla. Com. 432.

The performance of this engagement, or completion of the marriage, must be accomplished within a reasonable time. Either party may, therefore, call upon the other to fulfil the engagement, and, in case of refusal or neglect to do so within a reasonable time after request made, may treat the betrothment as at an end, and bring action for the breach of the contract; 2 C. & P. 631. For a breach of the betrothment without a just cause, an action on the case may be maintained for the recovery of damages. It may be maintained by either party; Carth. 467; 1 Salk. 24.

BETTER EQUITY. The right which, in a court of equity, a second incumbrancer has who has taken securities against subsequent dealings to his prejudice, which a prior incumbrancer neglected to take although he had an opportunity. 1 Chanc. Prec. 470, n.; 4 Rawle 144.

BETTERMENTS. Improvements made to an estate. It signifies such improvements as have been made to the estate which render it better than mere repairs. 11 Me. 482; 23 *id.* 110; 24 *id.* 192; 13 Ohio 308; 10 Yerg. Tenn. 477; 13 Vt. 533; 17 *id.* 109. The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc. To entitle one to betterments depends upon his *bona fide* supposition that he bought the title in fee; 31 Vt. 300; 64 *id.* 527.

The measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner or could not profitably be used by him; 98 N. C. 526.

BETTING. The act of making a wager; a species of gambling.

A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain; 81 N. Y. 539.

The states, generally, make this a crime and have statutes providing for the punishment of betting on cards, horse-races, cocking-mains and the like.

BETWEEN. In the intermediate space of, without regard to distance; from one to another; belonging to two as a mutual relation.

The words "between A. & B." in a deed excludes the termini mentioned therein; 1 Mass. 93, but see 31 N. J. L. 212.

"Between" when properly predicative of time is intermediate. "Between two days" was exclusive of both; 16 Barb. 352. See 12 Iowa 186.

The preposition primarily indicates an intermediate space of place or time which excludes, and cannot include, that to which it refers, but in common use does not always exclude the places or times to which it relates. 4 A. & E. Ency. L. 2nd ed., 8; 5 Met. (Mass.) 439, etc.

May indicate a state of intermediateness in relation to qualities or conditions, as well as places or times, as between sour and sweet. Or may mean with relation to both of; involving the joint or reciprocal action or participation of both of, as a combat between two persons. Stand. Dict.; 5 Met. (Mass.) 439.

Refers properly to two, and no more, but sometimes used colloquially in the sense of "among," as referring to more than two objects. 4 A. & E. Ency. L., 2nd ed., 10.

BEYOND SEA. Out of the kingdom of England; out of the state; out of the United States.

"Beyond seas" means, generally, without the jurisdiction of the state or government in which the question arises; 1 Show. 91; 32 E. L. & Eq. 84; 3 Cra. 174; 3 Wheat. 341; 1 H. & M.H. 350; 14 Pet. 141; 2 McCord 331; 13 N. H. 79; 24 Conn. 432; 52 N. H. 41; 6 Allen 423.

The courts of Pennsylvania have decided that the phrase means "out of the United States;" 9 S. & R. 288. The same construction has been given to it in Missouri, Illinois, Michigan, Iowa, and North Carolina; 1 Dev. 16; 97 U. S. 639; 20 Mo. 580; 2 Greene (Ia.) 602; 24 Ill. 169. In Massachusetts, Maryland, Georgia, New Hampshire, Indiana, Ohio, Alabama, Arkansas, and South Carolina, it has been decided to mean out of the state; 1 Pick. 263; 1 Harr. & J. 350; 2 McCord 331; 3 Bibb 510; 3 Wheat. 541; 14 Pet. 141; 3 Cra. 173; 13 N. H. 86; 8 Blackf. 515; 6 Ohio 126; 23 Ala. 486; 8 Ark. 489. See also 1 Johns. Cas. 76; and to this effect is the very uniform current of authorities.

In the various statutes of limitation the term "out of the state" is now generally used. And the United States courts adopt and follow the decisions of the respective states upon the interpretation of their respective laws; 11 Wheat. 361. What constitutes absence out of the state within the meaning of the statute is wholly undeterminable by any rule to be drawn from the decisions. It seems to be agreed that temporary absence is not enough; but what is a temporary absence is by no means agreed. Ang. Lim. § 200, n. Any place in Ireland was held to be "beyond the sea," under 21 Jac. I. c. 16; Show. 91; but this is changed by stat. 3 & 4 William IV. c. 27, which enacted that no part of the United Kingdom of Great Britain and Ireland, nor of the Channel Islands, should be deemed to be beyond seas within the meaning of the acts of limitation.

BIAS. A particular influential power which sways the judgment; the inclination or propensity of the mind towards a particular object.

Justice requires that the judge should have no bias for or against any individual, and that his mind should be perfectly free to act as the law requires.

There is, however, one kind of bias which the courts suffer to influence them in their judgments: it is a bias, favorable to a class of cases, or persons, as distinguished from an individual case or person. A few examples will explain this. A bias is felt on account of convenience; 1 Ves. Sen. 13, 14; 3 Atk. 524. It is also felt in favor of the heir at law, as when there is an heir on one side and a mere volunteer on the other; Willes 570; 1 W. Bla. 266; Ambl. 645; 1 Ball & B. 309; 1 Wils. 310. On the other hand, the court leans against double portions for children; McClell. 356; 13 Price

599; against double provisions, and double satisfactions; 3 Atk. 421; and against forfeitures; 3 Term 172. As to jurors, see 2 Ga. 173; 12 Ga. 444. See, generally, 1 Burr. 419; 1 B. & P. 614; 3 *id.* 456; 2 Ves. Ch. 648; 1 Turn. & R. 350.

BICYCLE. A two-wheeled vehicle propelled by the rider.

Riding a bicycle in the ordinary manner on the public highway for convenience, business, or pleasure is lawful. The highway is intended for public use, and a person driving a horse thereon has no rights superior to a person riding a bicycle; 58 Minn. 555. A bicycle is a vehicle and is entitled to the rights of the road equally with a carriage or other vehicle. 120 Ind. 46; 117 *id.* 450; and a person riding a bicycle on the highway at such a pace as to injure passers by may be convicted of furiously driving a carriage under act 5 & 6 Wm. IV. c. 50, s. 78; L. R. 4 Q. B. Div. 228. They are vehicles, and may be lawfully used upon streets; their proper place is the roadway, rather than the sidewalk; and their use may be regulated by the legislature; 24 A. & E. Ency. 119; 18 A. & E. Corp. Cas. 514; 47 Alb. L. J. 404; 29 Cent. L. J. 412; 33 East, L. J. 263; 16 R. I. 371; their riders must pay toll; 167 Pa. 582; they may be left standing in the street while the owner is calling at a residence or place of business, as any other vehicle may; 3 D. R. (Pa.) 811; 4 *id.* 409.

Riding a bicycle in the middle of the highway at a speed of fifteen miles an hour and within twenty-five feet of horses going in an opposite direction is not negligence which will render the rider of the bicycle liable for injury caused to the occupants of the carriage by the horses taking fright; but it must be shown that the acts done by the rider of the bicycle were done at a time or in a manner or under circumstances which show a disregard of the rights of others; 120 Ind. 46.

By the Indiana act of 1881 riding a bicycle upon the public sidewalk is unlawful and the rider is liable for an injury inflicted upon a foot-passenger, although the act was unintentional. One who rudely and in such a reckless manner as to show a disregard of the consequences rides his bicycle against a person standing on the sidewalk is liable as for an assault and battery, the intent being implied; 117 Ind. 450. At the Lewes Assizes in England one convicted of recklessly riding a bicycle was sentenced to four months hard labor; Reg. v. Parker, cited in 30 Leg. Adviser (Ill.) 699.

Statutes have been passed in most of the states declaring bicycles vehicles, and that they have the same rights on the highway as other vehicles. In Vermont, Connecticut, and other states acts have been passed which make it unlawful to ride bicycles on the sidewalk.

In Pennsylvania it was held that the act of 1889, which declared that bicycles were vehicles and had the same rights as vehicles on the highway and were subject to the same restrictions, made riding a bicycle on the sidewalk a misdemeanor under an earlier act under which the malicious riding or driving of any horse on the sidewalk is a criminal offence; 170 Pa. 40.

An innkeeper is liable for damages where a bicycle belonging to a guest is stolen from the yard of the inn; 23 Ir. L. T. & S. J. 297.

In Ohio by statute it is unlawful to remove any bicycle left unprotected or to deface or injure a bicycle in any way; act, April 27, 1893.

By a New York act of 1896 railroads are obliged to carry bicycles free of charge when the owner travels on the same train and pays his own fare.

In Texas (1891) and New Jersey (1890) acts have been passed for the incorporation of bicycle clubs. As to whether a bicycle is a vehicle or not within the meaning of a life insurance policy, see 102 Law Times 252.

See, generally, 51 Leg. Int. Pa. 300, 352, 358, 424. See also 47 Alb. L. J. 404; 33 Cent. L. J. 262; Elliot, Roads and Streets 636; 26

Ir. L. T. & S. J. 480.

BID. An offer to pay a specified price for an article about to be sold at auction.

An offer to perform a contract for work and labor or supplying materials at a specified price.

BIDALE, or BIDALL (*bidden*, Sax., to pray or supplicate). An invitation to friends to drink ale at the house of some poor man who hopes thereby to be relieved by charitable contribution. It is something like "house-warming," i. e., a visit of friends to a person beginning to set up housekeeping. Wharton; 26 Hen. VIII., c. 6.

BIDDER. One who offers to pay a specified price for an article offered for sale at a public auction; 11 Ill. 254; or one who offers to perform a contract for work and labor, or supplying materials at a specified price.

The bidder has a right to expressly withdraw his bid at any time before it is accepted, which acceptance is generally manifested by knocking down the hammer; Benj. Sales 50, 73; 3 Term 148; 3 Johns. Cas. 29; 6 Johns. 194; Sugd. Vend. 29; Bab. Auct. 30, 43; see 38 Me. 302; 2 Rich. S. C. 464; 4 Bing. 653; or the bid may be withdrawn by implication, as by an adjournment of the sale before the article under the hammer is knocked down; 6 Pa. 486; 8 *id.* 408.

The bidder is required to act in good faith, and any combination between him and others, to prevent a fair competition, would avoid the sale made to himself; 3 B. & B. 116; 5 Rich. S. C. 541; 38 Ga. 696; 23 N. H. 360; 8 How. 134. But there is nothing illegal in two or more persons agreeing together to purchase a property at sheriff's sale, fixing a certain price which they are willing to give, and appointing one of their number to be the bidder; 6 W. & S. 123; 3 Hilm. 529; 11 Paige, Ch. 431; 15 How. 494; 3 Stor. 623.

In Pennsylvania the writ of mandamus will not lie to compel city authorities to award a contract to the lowest bidder, where, in the exercise of their discretion, they have decided that the faithful performance of the contract requires a judgment and skill which he does not possess, notwithstanding his pecuniary ability to furnish good security; 82 Pa. 343. See AUCTIONS.

BIENNIALY. In a statute this term signifies not duration of time, but a period for the happening of an event; 9 Hun 573.

Derived from the Latin *bis*, twice, and *annus*, year, meaning the happening or taking place of anything once in two years. 4 Am. & Eng. Ency. 2nd ed., 33; 42 Mo. 506. Biennially does not, in its ordinary and proper use, signify duration of time, but defines a period for the happening of some event. *Id.*; 9 Hun. (N. Y.) 573.

BIENS (Fr. goods). Property of every description, except estates of freehold and inheritance. Sugd. Vend. 495; Co. Litt. 119 b; Dane, Abr.

In the French law, this term includes all kinds of property, real and personal. Biens are divided into *biens meubles*, movable property; and *biens immeubles*, immovable property. The distinction between movable and immovable property is recognized by them, and gives rise, in the civil as well as in the common law, to many important distinctions as to rights and remedies. Story, Conf. Laws, § 13, note 1.

BIGAMIST. A man or woman who, having contracted a bigamous marriage, and become the husband or wife, at one time, of two or more wives or husbands, maintains that relation and status. 114 U. S. 16; Act of Mar. 22, 1882. (An act to amend § 5352 of the Revised Statutes of the United States in reference to bigamy, and for other purposes.) See POLYGAMY.

BIGAMUS. In Civil Law. One who had been twice married, whether both wives were alive at the same time or not. One who had married a widow.

Especially used in ecclesiastical matters as a reason for denying benefit of the clergy. *Termes de la Ley*.

BIGAMY. The wilfully contracting a

second marriage when the contracting party knows that the first is still subsisting.

The state of a man who has two wives, or of a woman who has two husbands, living at the same time.

When the man has more than two wives, or the woman more than two husbands, living at the same time, then the party is said to have committed polygamy; but the name of bigamy is more frequently given to this offence in legal proceedings. 1 Russell, Cr. 187.

According to the canonists, bigamy is threefold, viz.: (*vera, interpretativa et similitudinaria*) real, interpretative, and similitudinaria. The first consisted in marrying two wives successively (virgins they may be), or in once marrying a widow; the second consisted, not in a repeated marriage, but in marrying *v. g. meretricem vel ab alio corruptam* a harlot; the third arose from two marriages, indeed, but the one metaphorical or spiritual, the other carnal. This last was confined to persons initiated in sacred orders, or under the vow of continence. De Ferrari's Tract. Juris Canon. tit. xxi. See also Bacon, Abr. Marriage.

In England this crime is punishable by the stat. 24 & 25 Vict. c. 100, § 57, which makes the offence felony; but it exempts from punishment the party whose husband or wife shall continue to remain absent for seven years before the second marriage without being heard from, and persons who shall have been legally divorced. The statutory provisions in the United States against bigamy or polygamy are in general similar to, and copied from, the statute of 1 Jac. I. c. 11, which was supplied by the act of 24 & 25 Vict. c. 100, excepting as to the punishment. The several exceptions to this statute are also nearly the same in the American statutes; but the punishment of the offence is different in many of the states; 2 Kent 69.

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries, and the First Amendment to the constitution declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was never intended to be a protection against legislation for the punishment of such crimes; 133 U. S. 335.

If a woman, who has a husband living, marries another person, she is punishable, though her husband has voluntarily withdrawn from her and remained absent and unheard of for any term of time less than seven years, and though she honestly believes, at the time of her second marriage, that he is dead; 7 Metc. 472. See a discussion of this case by Mr. Bishop, in which he dissents from its ruling, in 4 So. L. J. (N. S.) 153; Clark, Cr. L. 311. Also, 12 Am. L. Rev. 471. The same rule applies also to the marriage of the husband, where he believes the wife to be dead; 62 Ala. 141; 18 Bush 318. The same rule now obtains in England, after some conflict of opinion; 14 Cox C. C. 45; but *quære*, if her belief were founded on positive evidence; Steph. Dig. Cr. Law, art. 34, n. 9. On the trial of a woman for bigamy whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage she knew that he was alive, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them. It was held that upon this finding the conviction could not be supported; 1 Deansl. & B. Cr. Cas. 98. If a man is prosecuted for bigamy, his first wife cannot be called to prove her marriage with the defendant; T. Raym. 1; 44 Ala. 24; 15 Low. Can. J. 21; nor it seems even to prove that the first marriage was invalid; 4 Up. Can. Q. B. 588; but see as to this last point, 2 Whart. Cr. L. § 1709. The first marriage may be proved by the admissions of the prisoner; 103 U. S. 304; 46 Ind. 175. And see 1 Park. Cr. Cas. 378. When the first marriage is proved to the satisfaction of the court, the second husband is admissible as a witness for or against the defendant; Whart. Cr. Ev. § 397; 3 Ired. 346; 12 Minn. 476; 4 Up. Can. (Q. B.) 588; 103 U. S. 304. Admissions of a prior marriage in a foreign country are sufficient without proof of cohabitation or other corroborating circumstances to establish the marriage; 110 N. C. 500.

It is no defence that polygamy is a re-

ligious belief; 1 Utah 226; 98 U. S. 145; 103 U. S. 304.

Where the first marriage was made abroad, it must be shown to have been valid where made; 5 Mich. 349. Reputation and cohabitation are not sufficient to establish the fact of the first marriage; 1 Park. Cr. Cas. 378. If the second marriage be in a foreign state, it is not bigamy; 2 Park. Cr. Cas. 195; except by statute; 36 E. L. & Eq. 614. The second marriage need not be a valid one; 1 C. & K. 144. Where the first marriage was not performed according to the statute and there is no evidence of subsequent cohabitation of the parties the second marriage is not bigamy; 85 Mich. 123.

For discussion of cases and authorities see 33 Cent. L. J. 394.

BILAN. A book in which bankers, merchants, and traders write a statement of all they owe and all that is due to them. A balance sheet. 3 Mart. La. N. s. 446. The term is used in Louisiana, and is derived from the French. 5 *id.* 158.

BILATERAL CONTRACT. A contract in which both the contracting parties are bound to fulfil obligations reciprocally towards each other. *Leg. Elem.* § 781. See CONTRACT.

BILGED. The state of a ship in which water is freely admitted through holes and breaches made in the planks of the bottom, occasioned by injuries, whether the ship's timbers are broken or not. 3 Mas. 39.

BILINE. Collateral.

BILINGUIS. Using two languages.

A term formerly applied to juries half of one nation and half of another. Plowd. 2.

BILL, Attainder. A "bill of attainder" is a legislative act, passed for the special purpose of attainting particular individuals of treason, or felony, or inflicting pains and penalties beyond or contrary to the common law. 1 Dana (Ky.) 509.

In Chancery Practice. A complaint in writing addressed to the chancellor, or judges of the court exercising chancery jurisdiction, containing the names of the parties to the suit, both complainant and defendant, a statement of the facts on which the complainant relies, and the allegations which he makes, with an averment that the acts complained of are contrary to equity, and a prayer for relief and proper process.

Its office in a chancery suit is the same as a declaration in an action at law, a libel in a court of admiralty, or an allegation in the spiritual courts.

A bill formerly consisted of nine parts, which contained the *address*, to the chancellor, court, or judge acting as such; the *names* of the plaintiffs and their descriptions, but the statement of the parties in this part of the bill merely is not sufficient; 2 Ves. & B. 327; the *statement* of the plaintiff's case, called the *stating part*, which should contain a distinct though general statement of every material fact to which the plaintiff means to offer evidence; 1 Brown, Ch. 94; 3 Swanst. 472; 3 P. Wms. 276; 2 Atk. 96; 1 Vern. 483; 11 Ves. Ch. 240; 2 Hare 264; 6 Johns. 565; 1 Woodb. & M. 34; Story, Eq. Pl. § 265 a; a *general charge* of confederacy; the *allegations* of the defendant's pretences, and charges in evidence of them; the *clause* of jurisdiction and an averment that the acts complained of are contrary to equity; a *prayer* that the defendant may answer the interrogatories, usually called the *interrogating part*; the *prayer for relief*; the *prayer for process*; 2 Madd. 166; 4 Halst. Ch. 143; 1 Mitf. Eq. Pl. 41; Beach, Mod. Eq. Pr. 87.

By the twenty-first of the Rules of Practice for the Courts of Equity of the United States, it is provided that the plaintiff in his bill shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud

the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law. By the rule the 4th, 5th, and 6th parts of the bill as above stated are dispensed with. And see Story, Eq. Pl. § 29. And this seems to be now the more common practice, except where fraud and combination are to be specifically charged; 27 N. H. 506. By the repeal, at December Term, 1850, of Equity Rule 40 of the United States Supreme Court the interrogating part of the bill was dispensed with, and thereafter it has been "unnecessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant wishes to obtain a discovery." In practice the bill in the United States courts as now commonly used is substantially the old English form with the omissions thus permitted by these rules. In England and in most, if not all, of the States, including those having a separate court of chancery, the formal style of the old English bill has fallen entirely into disuse. The form used and generally provided for by rule of court, is a concise and consecutive statement of the plaintiff's case in numbered paragraphs, stripped of technical phrases and verbiage, concluding with prayers, consecutively numbered, for answer, for account, if incidental or appropriate to the relief sought, for the special relief sought, as payment of sums found due, specific performance, &c., for injunction, if required, for other relief, and for process.

The bill must be signed by counsel; 4 C. E. Green 180; Equity Rule 24, U. S. S. C.; 1 Dan. Ch. Pr. *312; and the facts contained therein, so far as known to the complainant, must in some cases be supported by affidavit annexed to the bill; Story, Eq. Pl. § 47; 2 Edw. Ch. 190; 1 Dan. Ch. Pr. *393; these are cases where some preliminary relief is required or bills praying for the production of documents, incident to relief at law, or for relief in equity on a lost instrument; *id.* *393 and cases cited in notes; so, bills to perpetuate testimony must have an affidavit of the circumstances under which the testimony is likely to be lost; *id.* *394, n. 3; and bills of interpleader must have an affidavit of no collusion; *id.* *394, n. 4. A bill filed by a corporation need not be under seal; 1 Md. Ch. Dec. 371; 4 Halst. Ch. 186; 87 W. Va. 82; so also of a bill brought by a municipal corporation; 20 L. R. A. 161.

A bill filed by a woman need not show whether she is married or single; 13 So. Rep. (Ala.) 426.

Bills are said to be original, not original, or in the nature of original bills.

Original bills are those which do, and which do not, pray for relief. Story, Eq. Pl. § 17.

Those which pray for relief are either bills praying the decree or order touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right, which is the most common kind of bill; Mitf. Eq. Pl., Jerem. ed. 84-37; 1 Dan. Ch. Pr. 305 *et seq.*

Those which do not pray for relief are either to perpetuate testimony; to examine witnesses *de bene esse*; or for discovery.

Bills not original are either supplemental; of revivor; or of *revivor and supplement*.

Those of revivor and supplement are either a *cross bill*; a *bill of review*; a *bill to impeach a decree*; to *suspend the operation*, or *avoid the decree for subsequent matter*; to *carry a decree into effect*; or *partaking of the qualities of some one or all of them*. See Mitf. Eq. Pl. 35-37; Story, Eq. Pl. §§ 18-21. Beach Mod. Eq. Pr.

For an account of these bills, consult the various titles.

As a Contract. An obligation; a deed whereby the obligor acknowledges himself to owe unto the obligee a certain sum of money or some other thing, in which, he sides the names of the parties, are to be considered the sum or thing due, the time place, and manner of payment or delivery thereof. It may be indented or poll, and with or without a penalty. West, Symb. §§ 100, 101.

This signification came to include all contracts evidenced by writing, whether specialties or parol, but is no longer in use except in phrases, such as bill payable, bill of lading.

In Legislation. A special act passed by the legislature in the exercise of a quasi judicial power. Thus, bills of attainder, bills of pains and penalties, are spoken of. See BILL OF ATTAINDER; BILL OF PAINS AND PENALTIES.

The draft of a law submitted to the consideration of a legislative body for its adoption; 26 Pa. 450. By the constitution of the United States, all bills for raising revenue must originate in the house of representatives; but the senate may propose or concur with amendments as on other bills. Every bill, before it becomes a law, must be approved by the president of the United States, or within ten days returned, with his objections, to the house in which it originated. Two-thirds of each house may then enact it into a law. Similar provisions are copied in the constitutions of most of the states; U. S. Const. art 1, § 7. As to the mode of passing bills in congress, see Sheph. Const. 94; 2 Story, Const. § 893.

In Mercantile Law. The creditor's written statement of his claim, specifying the items.

It differs from an account stated in this, that a bill is the creditor's statement; an account stated is a statement which has been assented to by both parties.

In England it has been held that a bill thus rendered is conclusive against the party making it out against an increase of charge on any of the items contained in it; and strong evidence as to items; 1 B. & P. 49. But in New York it has been held that merely presenting a bill, no payment or agreement as to the amount being shown, does not conclude the party from suing for a larger sum; 16 N. Y. 389.

Negotiable Instruments Law. "Bill" means bill of exchange. Miller's Ky. Negotiable Inst's Law § 190.

Revenue, for Raising. The terms "bills for raising revenue" are confined to bills to levy taxes in the strict sense of the word, and do not embrace bills for other purposes which incidentally create revenue, unless so framed as to draw money from the people, with no other advantage or benefit to them except the general protection which belongs to the citizen under our form of government as a matter of common right. 81 Ky. 400. See ALL Bills or Notes.

See FIRST BILL.

BILL OF ADVENTURE. A writing signed by a merchant, ship-owner, or master to testify that goods shipped on board a certain vessel are at the venture of another person, he himself being answerable only for the produce.

BILL OF ADVOCATION. In Scotch Law.

A petition in writing, by which a party to a cause applies to the supreme court to call the action out of the inferior court to itself.

BILL IN AID OF EXECUTION. A bill to execute a decree is a bill assuming as its basis the principle of the decree and seeking merely to carry it into effect. (1) For example, such a bill may be filed where an omission has been made in consequence of all the facts not being distinctly on record, or where, owing to the neglect of parties to proceed under a decree, their rights have become embarrassed by subsequent events, and a new decree is necessary to ascertain them (Mitf. 95); or where a decree has been made by an inferior court of equity, the jurisdiction of which is not equal to enforce it.

The distinguishing feature of a bill of this class is, that it must carry out the principle of the former decree. It must take that principle as its basis, and must seek merely to supply omissions in the decree or proceedings, so as to enable the court to give effect to its decision.

A supplemental bill may be filed as well after as before a decree; and if after, may be either in aid of a decree, that it may be carried into full execution, or that proper directions may be given upon some matters omitted in the original bill or not put in issue by it on the defence made to it: Adams, Doctrine of Equity 415; 3 Md. Ch. 306; 4 Baxt. 479.

Bills to carry decrees into execution. Sometimes, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of the court. This happens generally in cases, where the parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events, that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party; or who does not claim under any party to the original decree; but who claims in a similar interest; or who is unable to obtain the determination of his own rights, till the decree is carried into execution. Or it may be brought by or against any person, claiming as assignee of a party to the decree. Story, Equ. Pleadings § 429; Mitf. Eq. Pl. by Jeremy, 95; Cooper, Eq. Pl. 98, 99.

BILL OF ATTAINDER. An act of the legislature, declaring the attainder of certain persons named in it.

BILL TO CARRY A DECREE INTO EXECUTION. In Equity Practice. One which is filed when, from the neglect of parties or some other cause, it may become impossible to carry a decree into execution without the further decree of the court. Hinde, Ch. Pr. 68; Story, Eq. Pl. § 429.

BILL OF CERTIORARI. In Equity Practice. One praying for a writ of certiorari to remove a cause from an inferior court of equity; Cooper, Eq. 44. Such a bill must state the proceedings in the inferior court, and the incompetency of such court by suggestion of the reason why justice is not likely to be done—as distances of witnesses, lack of jurisdiction, etc.,—and must pray a writ of certiorari to remove the record and the cause to the superior court. Wyatt, Pr. Reg. 82; Harrison, Ch. Pr. 49; Story, Eq. Pl. § 298. It is rarely used in the United States.

BILL CHAMBER. In Scotch Law. A department of the court of session in which petitions for suspension, interdict, etc., are entertained. It is equivalent to sittings in chambers in the English and American practice. Paterson, Comp.

BILL OF CONFORMITY. In Equity Practice. One filed by an executor or administrator, who finds the affairs of the deceased so much involved that he cannot safely administer the estate except under the direction of a court of chancery. This bill is filed against the creditors, generally, for the purpose of having all their claims adjusted, and procuring a final decree settling the order of payment of the assets. 1 Story, Eq. Jur. 440.

BILL OF COSTS. In Practice. A statement of the items which form the total amount of the costs of a suit or action. It must be taxed by the proper officer of the court, and is demandable as a matter of right before the payment of the costs. See COSTS; TAXING COSTS.

BILL OF CREDIT. Paper issued by the authority of a state on the faith of the state, and designed to circulate as money. 11 Pet. 257.

Promissory notes or bills issued by a state government, exclusively, on the credit of

the state, and intended to circulate through the community for its ordinary purposes as money, redeemable at a future day, and for the payment of which the faith of the state is pledged; 4 Kent 408.

The constitution of the United States provides that no state shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. U. S. Const. art. 1, § 10. This prohibition, it seems, does not apply to bills issued by a bank owned by the state but having a specific capital set apart; Cooley, Const. Lim. 84; 2 McCord 12; 4 Ark. 44; 11 Pet. 257; 13 How. 12; but see 4 Pet. 410; 2 Ill. 87; nor does it apply to notes issued by corporations or individuals which are not made legal tender; 4 Kent 408; nor to coupons on state bonds, receivable for taxes and negotiable, but not intended to circulate as money; 114 U. S. 270. But it does apply to a state warrant containing a direct promise to pay the bearer the amount stated on its face, and which is intended to circulate as money; 49 Ark. 554. As to the power of usurping governments to bind the public faith for the redemption of notes issued by a revolutionary power, see 35 Ga. 330.

In Mercantile Law. A letter sent by an agent or other person to a merchant, desiring him to give credit to the bearer for goods or money. Comyns, *Dig. Merchant*, F. 3; 8 Burr. 1667; 13 Miss. 491; 4 Ark. 44; R. M. Charl. 151.

BILL OF DEBT. An ancient term including promissory notes and bonds for the payment of money. Comyns, *Dig. Merchant*, F. 2.

BILL OF DISCOVERY. In Equity Practice. One which prays for the discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power. Hinde, Ch. Pr. 20; Blake, Chanc. Pract. 37.

It does not seek for relief in consequence of the discovery (and this constitutes its characteristic feature), though it may ask for a stay of proceedings till discovery is made; 2 Story, Eq. Jur. § 1483; Bishp. Eq. § 557; and such relief as does not require a hearing before the court, it is said, may be part of the prayer; Eden, Int. 78; 19 Ves. Ch. 576; 4 Madd. 247; 5 id. 218; 1 Sch. & L. 316; 1 Sim. & S. 83.

It is commonly used in aid of the jurisdiction of a court of law, to enable the party who prosecutes or defends a suit at law to obtain a discovery of the facts which are material to such prosecution or defence; Hare, Discov. 119; 9 Paige, Ch. 580, 622, 637; 2 Dan. Ch. Pr. 1556; Langd. Eq. Pl. § 167. A defendant in equity may obtain the same relief by a cross bill; Langd. Eq. Pl. § 128.

The plaintiff must be entitled to the discovery he seeks, and can only have a discovery of what is necessary for his own title, as of deeds he claims under, and not to pry into that of the defendant; 2 Ves. Ch. 445. See Mitf. Eq. Pl. 53; Cooper, Eq. Pl. 53; 1 Madd. Ch. Pr. 196; Beach, Mod. Eq. Pr. 90, 335. See Hare; Wigram, Disc. It will not lie in Texas to compel a judgment debtor to disclose assets on which execution may be levied; 86 Tex. 386.

There has been much controversy as to whether the defendant is entitled to discovery to aid him in preparing his answer; Langd. Eq. Pl. § 129.

The bill must show a present and vested title and interest in the plaintiff, and what that title and interest are; 8 Metc. 395; 1 Vern. 105; Story, Eq. Jur. § 1490; 3 Ves. Sen. 247; 7 Ired. Eq. 239; with reasonable certainty; 3 Ves. 343; must state a case which will constitute a just ground for a suit or a defence at law; 3 Johns. Ch. 47; 2 Paige, Ch. 601; 1 Bro. Ch. 96; 3 id. 155; 13 Ves. Ch. 240; must describe the deeds and acts with reasonable certainty; 3 Ves. Ch. 343; 17 Ala. n. s. 794; Story, Eq. Pl. § 320; must state that a suit is brought, or about to be, and the nature thereof must be given with reasonable certainty; 5 Madd. 18; 8 Ves. Ch. 398; must show that the defendant has some interest; 1 Ves. & B. 550; 3 Barb. Ch. 484; and, where the right arises from privity of estate, what

that privity is; Mitf. Eq. Pl., Jeremy ed. 189; it must show that the matter is material, and how; 9 Paige, Ch. 188, 580, 622; 3 Rich. Eq. 148; and must set forth the particulars of the discovery sought; 2 Caines, Cas. 296; 1 Y. & J. 577. And see Story, Eq. Pl. § 17. Adverse examination before trial of a defendant will not be permitted for the purpose of discovering a cause of action; 3 Misc. Rep. 514. A defendant is not bound to make response to interrogatories in the body of a reply to his answer; 18 S. W. Rep. (Ky.) 1084. And see Story, Eq. Pl. § 17.

A bill asking for discovery but waiving answer under oath is not demurrable for want of an affidavit and cannot be treated as a bill for discovery; 15 R. I. 341; if the oath has been waived, the defendant is not excused from answering, but he loses the benefit of his own declarations while his admissions are evidence against him; 41 Fed. Rep. 369.

It will not lie in aid of a criminal prosecution, a mandamus, or suit for a penalty; 2 Ves. Ch. 398; 2 Paige, Ch. 399; Story, Eq. Jur. § 1494; Hare, Disc. 116; 1 Pom. Eq. Jur. § 197.

BILL OF EXCEPTIONS. A written statement of objections to the decision of a court upon a point of law, made by a party to the cause, and properly certified by the judge or court who made the decision.

The object of a bill of exceptions is to put the decision objected to upon record for the information of the court having cognizance of the cause in error. Bills of exceptions were authorized by statute Westm. 2d (13 Edw. I.), c. 31, the principles of which have been adopted in all the states of the Union, though the statute has been held to be superseded in some, by their own statutes. It provides for compelling the judges to sign such bills, and for securing the insertion of the exceptions upon the record. They may be brought by either plaintiff or defendant. Bills of exceptions have been abolished in England by the "Supreme Court of Judicature Act, 1873," § 6 and 37 Vict. c. 66.

In what cases. In the trial of civil causes, wherever the court, in making a decision, is supposed by the counsel against whom the decision is made to have mistaken the law, such counsel may tender exceptions to the ruling, and require the judge to authenticate the bill; 3 Bla. Com. 372; 3 Cra. 300; 7 Gill & J. 335; 24 Me. 420; 3 Jones N. C. 185; 19 N. H. 372; see 154 Pa. 582; including the receiving improper and the rejecting proper evidence; 1 Ill. 162; 9 Mo. 166; 6 Gray 479; 17 Tex. 62; 41 Me. 149; and a failure to call the attention of the jury to material matter of evidence, after request; 2 Cow. 479; and including a refusal to charge the jury in a case proper for a charge; 4 Cra. 60; 62; 2 Aik. 115; 2 Blatchf. 1; 5 Gray 101; but not including a failure to charge the jury on points of law when not requested; 151 U. S. 78; 2 Pet. 15; 6 Wend. 274; 1 Halst. 132; 2 Blatchf. 1; 11 Cush. 123; 38 Me. 227; and including a refusal to order a special verdict in some cases; 1 Call 105. It can be taken to the action or want of proper action of the trial court, upon any proceeding in the progress of the trial from its commencement to its conclusion and when properly presented can be considered by the court on writ of error; 149 U. S. 67.

An exception cannot be taken to the decision of the court upon matters resting in its discretion; 34 Me. 300; 13 Vt. 459; 6 Wend. 277; 4 Pick. 302; 17 Ill. 339; 8 Miss. 164; 19 Vt. 457; 41 id. 611; 20 N. H. 121; 5 R. I. 138; nor upon any theory announced by the court, unless such be expressed in particular language; 149 U. S. 17; nor for the refusal of a non-suit; 77 Pa. 20; nor where the record shows a fatal error, as want of jurisdiction; 78 Mo. 172; nor, generally, in cases where there is a right of appeal; 4 Pick. 93; 10 id. 34; 13 Vt. 430; 1 Me. 291. See 19 Pick. 191; though the practice in some states is otherwise.

In criminal cases, at common law, judges are not required to authenticate exceptions; 1 Chitty, C. L. 622; 13 Johns. 90; 20 Barb. 587; 1 Va. Cas. 264; 2 Watts 285; 2 Sumn. 19; 16 Ala. 187; but statutory provisions have been made in several states authoriz-

ing the taking of exceptions in criminal cases; Graham, Pr. 768, n.; 1 Leigh 598; 14 Pick. 370; 20 Barb. 587; 7 Ohio 214; 2 Dutch. 463; 5 Mich. 36; 29 Pa. 429.

When to be taken. The bill must be tendered at the time the decision is made; 9 Johns. 345; 5 N. H. 386; 2 Me. 336; 5 Watts 69; 6 J. J. Marsh. 247; 2 Harr. N. J. 291; 2 Ark. 14; 8 Mo. 284, 656; 21 Ala. 851; 2 Miss. 572; 12 La. Ann. 118; 4 Ia. 504; 4 Tex. 170; and it must, in general, be taken before the jury have delivered their verdict; 8 S. & R. 211; 10 Johns. 312; 5 T. B. Monr. 177; 11 N. H. 251; 9 Mo. 291, 355; 8 Ind. 107; 17 Ill. 166; 25 Tex. App. 557; 100 N. C. 519. See 7 Wend. 34; 9 Conn. 545.

In the circuit court of appeals no exceptions to rulings at a trial will be considered, unless taken at the trial, embodied in a bill of exceptions, presented to the judge at the same term or at a time allowed by rule of court made at the term, or by a standing rule of court, or by consent of the parties, and except under extraordinary circumstances must be allowed and filed with the clerk during the same term; 56 Fed. Rep. 188. See 150 U. S. 156; 149 id. 262.

In practice, however, the point is merely noted at the time, and the bill is afterwards settled; Bull. N. P. 315; T. Raym. 405; 11 S. & R. 270; 5 N. H. 386; 3 Cow. 32; 5 Miss. 272; 2 Swan 77; 21 Mo. 122; see 18 Ill. 664; 3 A. K. Marsh. 360; 1 Ala. 66; 2 Dutch. 463; but in general before the close of the term of court; 3 Humphr. 372; 8 Mo. 727; 1 W. & S. 480; 6 How. 260; see 18 Ala. 441; 9 Ill. 445; 5 Ohio 51; and then must appear on its face to have been signed at the trial; 9 Wheat. 651; 2 Sumn. 19; 6 Wend. 268; 3 Ark. 451. A bill may be sealed by the judge after the record has been removed, and even after the expiration of his term; 1 Iowa 364. See 4 Pick. 223; 7 Mo. 250. If presented to and signed by a judge after the close of term, and the record does not show any order or consent so to do, the supreme court will affirm the judgment; 149 U. S. 262.

Formal proceedings. The bill must be signed by the judge or a majority of the judges who tried the cause; 8 Cow. 746; 3 Hen. & M. 219; 4 J. J. Marsh. 543; 2 Me. 336; 2 Ala. 269; Wright, Ohio 73; 29 Vt. 187; 22 Ga. 163; upon notice of time and place when and where it is to be done; Bull. N. P. 316; 3 Cow. 766; 1 Ind. 389; 2 Ga. 211, 262. As to the course to be pursued in case of the death of the judge before authentication, see 7 D. & L. 252; 2 Duer 607; 44 Ill. App. 515; 80 Wis. 148. Where the bill is presented for signature within the prescribed time, one will not be prejudiced by the refusal or neglect of the judge to sign it within the prescribed time; 129 Ill. 123; 41 Mich. 726. The bill need not be sealed; U. S. Rev. Stat. § 953; but must be signed by the judge, and the initials "A. B." are not the signature of the judge and do not constitute a sufficient authentication; 125 U. S. 240.

Facts not appearing on the bill are not presumed; 11 Ala. 29; 4 Monr. 126; 5 Rand. 666; 3 Rawle 101; 1 Pick. 37; 2 Miss. 315; 5 Fla. 457; 7 Cra. 270. See 146 U. S. 325. For decisions as to the requisite statements of fact and law, see 1 Aik. 210; 3 Jones, N. C. 407; 2 Harr. & J. 376; 2 Leigh 340; 4 Hen. & M. 270; 5 Ala. 71; 29 Ala. n. s. 322; 7 Ohio St. 22; 20 Ga. 125; 4 Mich. 478; 4 Ia. 340; 17 Ill. 234; 22 Mo. 321; 2 Pet. 15; 7 Cra. 270; 4 How. 4.

Effect of. The bill when sealed is conclusive evidence as to the facts therein stated as between the parties; 3 Burr. 1765; 3 Dall. 38; 6 Wend. 276; in the suit to which it relates, but no further; 23 Miss. 156; see 1 T. B. Monr. 6; and all objections not appearing by the bill are excluded; 8 East 280; 3 Binn. 168; 7 Halst. 160; 1 Pick. 37; 14 id. 370; 10 Wend. 254; 2 Me. 397; 25 id. 79; 1 Leigh 36; 10 Conn. 146; 6 W. & S. 343; 8 Miss. 671; 12 Gill & J. 64; 10 Vt. 255; 7 Mo. 288; 11 Wheat. 199; 3 How. 553; 75 Ia. 689. And see 17 Ala. 659; 2 Ark. 506; 10 Yerg. 499; 30 Vt. 238. But see 4 Hen. & M. 200. In the absence of a bill of exceptions pointing out the alleged

errors, the appellate court will not revise the instructions unless fundamentally erroneous; 25 Tex. App. 602, *607. An exception to conclusions of law admits the findings of fact; 115 Ind. 560; 117 *id.* 188.

It draws in question only the points to which the exception is taken; 5 Johns. 467; 1 Green, N. J. 216; 10 Conn. 75, 146. It does not of itself operate as a stay of proceedings; 18 Wend. 509; 19 Ga. 588. See 5 Hill, N. Y. 510.

A stipulation, if it can be understood, may answer in place of a bill of exceptions; 73 Wis. 557.

If the judge's rulings and the grounds of objection thereto appear of record, the right of the party excepting is fully preserved without the retention of a bill; 40 La. Ann. 809. If the judge has certified and filed the record containing the evidence, exceptions, and charge, he is not compelled to sign a second or separate bill for the party excepting; 161 Pa. 329. Where the error is apparent upon the record it need not be presented by a bill of particulars; 141 U. S. 616. See **FAST BILL OF EXCEPTIONS**.

BILL IN EQUITY or CHANCERY.

A complaint in writing, under oath, in the nature and style of a petition, addressed to the chancellor, or judge or judges of a court of equity, setting forth all the facts and circumstances upon which the complaint is founded, and praying for such equitable relief, or for such decree as the party may conceive himself entitled to, or the court may deem proper to grant.

BILL OF EXCHANGE. A written order from one person to another, directing the person to whom it is addressed to pay to a third person a certain sum of money therein named. Byles, Bills 1.

An open (that is unsealed) letter addressed by one person to another directing him, in effect, to pay, absolutely and at all events, a certain sum of money therein named, to a third person, or to any other to whom that third person may order it to be paid, or it may be payable to bearer or to the drawer himself. 1 Dan. Neg. Inst. 26.

A bill of exchange may be negotiable or non-negotiable. If negotiable, it may be transferred either before or after acceptance.

The person making the bill, called the drawer, is said to draw upon the person to whom it is directed, and undertakes implicitly to pay the amount with certain costs if he refuse to comply with the command. The drawee is not liable on the bill till after acceptance, and then becomes liable as principal to the extent of the terms of the acceptance; while the drawer becomes liable to the payee and indorsees conditionally upon the failure of the acceptor to pay. The liabilities between indorsers and indorsees are subject to the same rules as those of indorsers and indorsees on promissory notes. Regularly, the drawee is the person to become acceptor; but other parties may accept, under special circumstances.

A *foreign* bill of exchange is one of which the drawer and drawee are residents of countries foreign to each other. In this respect the states of the United States are held foreign as to each other; 10 Pet. 572; 12 Pick. 483; 15 Wend. 527; 3 A. K. Marsh. 488; 1 Hill, S. C. 44; 4 Leigh 37; 15 Me. 136; 49 Ala. 242, 266; 4 Dana 138; 9 N. H. 558; 4 Wash. C. C. 148; 183 U. S. 438; 112 *id.* 696; 41 Me. 302; 1 Dan. Neg. Inst. § 9. But see *contra*, 5 Johns. 384, and see 6 Mass. 182.

An *inland* bill is one of which the drawer and drawee are residents of the same state or country; 25 Miss. 143. As to whether a bill is considered as foreign or inland when made partly in one place and partly in another, see 5 Taunt. 529; 8 *id.* 679; Gow 58; 1 Maule & S. 87. Defined by statute 19 & 20 Vict. c. 97, § 7.

The distinction between inland and foreign bills becomes important with reference to the question whether protest and notice are to be given in case of non-acceptance. See 3 Kent 95; **PROTEST**.

The *parties* to a bill of exchange are the drawer, the drawee, the acceptor, and the payee. Other persons connected with a bill in case of a transfer as parties to the transfer are the indorser, indorsee, and holder. See those titles. It sometimes happens that one or more of the apparent parties to a bill are fictitious persons. The rights of a *bond*

fide holder are not thereby prejudiced where the payee and indorser are fictitious; 2 H. Bla. 78; 3 Term 174, 481; 1 Campb. 130; 19 Ves. Ch. 311; 40 N. H. 26; Benj. Chal. Dig. § 85; or even where the drawer and payee are both fictitious; 10 B. & C. 488; and all the various parties need not be different persons; 18 Ala. 76; 1 Story 22. The qualifications of parties who are to be made liable by the making or transfer of bills are the same as in case of other contracts. See **PARTIES; FICTITIOUS PAYEE**.

The bill must be *written*; 1 Pardessus, 344; 2 Stra. 955. See 53 Tex. 636.

It should be properly *dated*, both as to place and time of making; Beawes, *Lex Merc.* pl. 3; 2 Pardessus, n. 333; 1 B. & C. 398. But it is not essential to the validity of a bill; 1 Dan. Neg. Inst. § 82; 32 Me. 524; Story, Bills § 87; 30 Vt. 11; 7 Cow. 337. If not dated, it will be considered as dated at the time it was made; 32 Ind. 375; 71 N. Y. 441; 25 Mo. App. 174. Bills are sometimes ante or post-dated for convenience; 8 S. & R. 425; 91 Pa. 315; 33 La. Ann. 1461; 24 Hun 281.

The *superscription* of the sum for which the bill is payable will aid an omission in the bill, but is not indispensable; 2 East Pl. Cr. 951; 1 R. I. 398; 10 Q. B. Div. 30; 98 Mass. 12.

The *time* of payment should be expressed; but if no time is mentioned it is considered as payable on demand; 2 B. & C. 157; 61 Me. 376; 25 Mo. App. 174; 81 *id.* 278; 146 Mass. 22; 110 Pa. 318; 72 Ga. 25; L. R. 3 Q. B. 578. In Massachusetts it must be payable at a definite time or at such a time as can be made definite upon election of the holder; 119 Mass. 137; 133 *id.* 151.

The *place* of payment may be prescribed by the drawer; Beawes, *Lex Merc.* pl. 3; 8 C. B. 493; or by the acceptor on his acceptance; Chitty, Bills 172; 3 Jur. 34; 7 Barb. 652; but is not as a general practice, in which last case the bill is considered as payable as to be presented at the usual place of business of the drawee, 11 Pa. 456, at his residence, where it was made, or to him personally anywhere; 10 B. & C. 4; M. & M. 381; 4 C. & P. 85; 39 Ohio St. 67.

Such an *order* or request to pay must be made as demands a right, and not as asks a favor; M. & M. 171; and it must be absolute, and not contingent; 1 R. & R. 193; 2 B. & Ald. 417; 5 Term. 482; 4 Wend. 275; 11 Mass. 14; 13 Ala. 205; 8 Halst. 262; 6 J. J. Marsh. 170; 1 Ohio 272; 9 Miss. 393; 5 Ark. 401; 1 La. Ann. 48; 10 Tex. 155. Mere civility in the terms does not alter the legal effect of the instrument.

The word *pay* is not necessary; *deliver* is equally operative; 2 Ld. Raym. 1397; 8 Mod. 364; as well as other words; 9 C. B. 570; but they must be words requiring *payment*; 10 Ad. & E. 98: "*il vous plaira de praye*" is, in France, the proper language of a bill; Pailliet, Man. 841.

Each of the duplicate or triplicate (as the case may be) bills of a set of foreign exchange contains a provision that the particular bill is to be paid only if the others remain at the time unpaid; see 2 Pardessus, n. 342; and all the parts of the set constitute but one bill; 7 Johns. 42; 2 Dall. 184. A bill should *designate the payee*; 26 E. L. & Eq. 404; 36 *id.* 165; 11 Barb. 241; 18 Ga. 55; 30 Miss. 122; 16 Ill. 169; and see 1 E. D. Smith, 1; 8 Ind. 18; but when no payee is designated, the holder by indorsement may fill the blank with his own name; 2 Maule & S. 90; 4 Campb. 97; see 6 Ala. N. S. 86; and if payable to the bearer it is sufficient; 3 Burr. 1526.

To make it negotiable, it must be payable to the order of the payee or to the bearer, or must contain other equivalent and operative words of transfer; Ld. Raym. 1545; 6 Term 123; 9 B. & C. 409; 1 D. & C. 275; 1 Dall. 194; 3 Caines 187; 2 Gill 348; 1 Harr. Del. 33; 3 Humphr. 612; 1 Ga. 236; 1 Ohio 272; 29 Pa. 530; otherwise in some states of the United States by statute, and in Scotland; 10 B. Mour. 286; 1 Bell, Com. 401. See 83 Ill. 218. But in England and the United States negotiability is not essential to the validity of a bill; 8 Kent 78; Big. Bills & N. 12; 6 Term 128; 6 Taunt. 828; 9

Johns. 217; 10 Gill & J. 299; 81 Pa. 506; 9 Wall. 544; though it is otherwise in France; Code de Comm. art. 110, 188; 2 Pardessus, n. 339. The fact that the bill provides that it shall bear interest from date in case of failure to pay at maturity, will not affect its negotiability as the rule that it must be for a sum certain applies to the principal and not interest; 44 Mo. App. 129; nor a provision that a higher rate of interest shall be paid after default; 62 N. W. Rep. (S. D.) 953; nor will its negotiability be affected by a stipulation in it to pay a reasonable attorney's fee; 11 Mont. 285; 38 Ill. App. 805; 63 N. W. Rep. (Nebr.) 37; 32 Pac. Rep. (Or.) 768; *contra*, 88 Mo. App. 667; 61 N. W. Rep. (N. D.) 473; 84 Pa. 407; 92 *id.* 227.

The *sum* for which the bill is drawn should be written in full in the body of the instrument, as the words in the body govern in case of doubt; 5 Bingh. n. C. 425; 8 Blackf. 144; 1 R. I. 398; the marginal figures are not a part of the contract, but a mere memorandum; 1 R. I. 398; 98 Mass. 12.

The amount must be fixed and certain, and not contingent; 2 Salk. 375; 2 Miles 442; 59 La. 345; 13 Phila. 473; 52 Mich. 525; 99 U. S. 446. It must be payable in money, and not in merchandise; 7 Johns. 321, 461; 4 Cow. 452; 11 Me. 398; 6 N. H. 159; 7 Conn. 110; 1 N. & M'C. 254; 3 Ark. 72; 8 B. Monr. 168; 36 Barb. 307; see 7 Miss. 52; and is not negotiable if payable in bank bills or in *currency* or other substitutes for legal money of similar denominations; 2 McLean 10; 3 Wend. 71; 7 Hill N. Y. 359; 11 Vt. 268; 8 Humphr. 171; 7 Mo. 595; 5 Ark. 481; 13 *id.* 12; 2 Rose 225; 10 S. & R. 94; 14 Pet. 293; 42 Ala. 108; held otherwise in 15 Ohio 118; 17 Miss. 457; 9 Mo. 697; 6 Ark. 255; 1 Tex. 13, 246, 503; 4 Ala. n. s. 88, 140; 123 U. S. 112; 61 Md. 309.

It is not necessary, however, that the money should be current in the place of payment, or where the bill is drawn; it may be in the money of any country whatever; 27 Mich. 198; 23 Wend. 71; 12 Fed. Rep. 478; 1 Dan. Neg. Inst. § 58. But it is necessary that the instrument should express the specific denomination of money when payable in the money of a foreign country, in order that the courts may be able to ascertain its equivalent value; otherwise it is not negotiable; 1 Dan. Neg. Inst. § 58. As to bills payable in Confederate money, see 8 Wall. 12; 19 *id.* 548; 94 U. S. 434; and that title.

Value received is often inserted, but is not of any use in a negotiable bill; 2 McLean 218; 3 Metc. Mass. 363; 15 Me. 131; 3 Rich. S. C. 418; 5 Wheat. 277; 4 Fla. 47; 31 Pa. 506; 34 Vt. 402; 3 M. & S. 351.

A *direction* to place to the account of some one, drawer, drawee, or third person, is often added, but is unnecessary; Comyns, Dig. Merchant, F. 5; 1 B. & C. 398.

As per advice, inserted in a bill, deprives the drawee of authority to pay the bill until advised; Chitty, Bills 162.

It should be *subscribed* by the drawer, though it is sufficient if his name appear in the body of the instrument; 1 Ld. Raym. 1376; 1 Iowa 231; 27 Ala. n. s. 515; see 12 Barb. 27; and should be *addressed* to the drawee by the Christian name and surname, or by the full style of the firm; 2 Pardessus, n. 335; Beawes, *Lex Merc.* pl. 3; Chitty, Bills 186.

Provision may be made by the drawer, and inserted as a part of the bill, for applying to another person, for a return without protest, or for limiting the damages for re-exchange, expense, etc., in case of the failure or refusal of the drawee to accept or to pay; Chitty, Bills 188.

A *bona fide* holder of a bill negotiated before maturity merely as a security for an antecedent debt is not affected, without notice, by equities or defences between the original parties; 102 U. S. 14.

A certificate, made and payable in a state out of a particular fund, and purporting to be the obligation of a municipal corporation, is not governed by the law merchant, and is open in the hands of subsequent holders to the same defences as ex-

isted against the original payee; 155 U. S. 513.

See **INDORSEMENT**; **INDORSER**; **INDORSEE**; **ACCEPTANCE**; **PROTEST**; **DAMAGES**.

Consult Bayley; Byles; Chitty; Cunningham; Edwards; Kyd; Marius; Parsons; Pothier; Story on Bills; Big. Neg. Instr.; Daniels, Neg. Instruments; 3 Kent 75; 1 Ves. Jr. 86, 514, Supp.; Merlin, *Répert. Lettre et Billet de Change*.

BILL FOR FORECLOSURE. In Equity Practice. One which is filed by a mortgagee against the mortgagor, for the purpose of having the estate sold, thereby to obtain the sum mortgaged on the premises, with interest and costs. 1 Madd. Ch. Pr. 528. See **FORECLOSURE**.

BILL OF GROSS ADVENTURE. In French Maritime Law. Any written instrument which contains a contract of bottomry, respondentia, or any other kind of maritime loan. There is no corresponding English term. Hall, Marit. Loans 182, n. See **BOTTOMRY**; **GROSS ADVENTURE**; **RESPONDENTIA**.

BILL OF HEALTH. In Commercial Law. A certificate, properly authenticated, that a certain ship or vessel therein named comes from a place where no contagious distempers prevail, and that none of the crew at the time of her departure were infected with any such distemper.

It is generally found on board ships coming from the Levant, or from the coasts of Barbary where the plague prevails; 1 Marsh. Ins. 408; and is necessary whenever a ship sails from a suspected port, or where it is required at the port of destination; Holt 167; 1 Bell, Comm. 5th ed. 553.

In Scotch Law. An application of a person in custody to be discharged on account of ill health. Where the health of a prisoner requires it, he may be indulged, under proper regulations, with such a degree of liberty as may be necessary to restore him; 2 Bell, Com. 5th ed. 549; Paterson, Comp. § 1129.

BILL IMPEACHING A DECREE FOR FRAUD. In Equity Practice. This must be an original bill, which may be filed without leave of court; 1 Sch. & L. 355; 2 id. 576; 1 Ves. Ch. 120; 3 Bro. Ch. 74; 1 T. & R. 178.

It must state the decree, the proceedings which led to it, and the ground on which it is impeached; Story, Eq. Pl. § 428.

The effect of the bill, if the prayer be granted, is to restore the parties to their former situation, whatever their rights. See Story, Eq. Pl. § 428 Mitf. Eq. Pl. 84.

BILL OF INDICTMENT. In Practice. A written accusation of one or more persons of a crime or misdemeanor, lawfully presented to a grand jury. If twelve or more members of the jury are satisfied that the accused ought to be tried, the return is made, A true bill; but when no sufficient ground is shown for putting the accused on trial, a return is made, Not a true bill, or, Not found; formerly, *Ignoramus*, and this phrase is still sometimes used. See **TRUE BILL**.

BILL OF INFORMATION. In Equity Practice. One which is instituted by the attorney-general or other proper officer in behalf of the state or of those whose rights are the objects of its care and protection. It is usually termed simply an information, or information in equity.

If the suit immediately concerns the right of the state, the information is generally exhibited without a relator. If it does not immediately concern those rights, it is conducted at the instance and under the immediate direction of some person whose name is inserted in the information and is termed the relator. In case a relator is concerned, the officers of the state are, not further concerned than as they are instructed and advised by those whose rights the state is called upon to protect and establish. In such case the attorney-general simply determines *in limine* whether the suit is one proper to be instituted in his

name, and the subsequent proceedings are usually conducted by the solicitor of the relator at the cost of the latter. Blake, Ch. Pl. 50. See Harrison, Ch. Pr. 151; Mitf. Eq. Pl. (by Tyler) 196; **INFORMATION**.

BILL OF INTERPLEADER. In Equity Practice. One in which the person exhibiting it claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. Cooper, Eq. Plead. 43; Mitf. Eq. Pl. 32; 24 Barb. 154; 19 Ga. 513.

An interpleader is a proceeding in equity for the relief of a party against whom there are, at law, separate and conflicting claims, whether in suit or not, for the same debt, duty, or thing, and where a recovery by one of the claimants will not, at law, protect the party against a recovery for the same debt or duty by the other claimant. It is out of this latter circumstance that the equity to relief arises; *per* Bates, Ch., 3 Del. Ch. 165, 176; 2 Paige 209; and where the facts present a proper case for an interpleader, equity will not entertain a bill simply to restrain one of the parties claiming the fund in controversy from prosecuting his claims until the other party has failed to establish his claim; 3 Del. Ch. 165; but leave will be granted to amend by making it a bill of interpleader by adding proper parties, bringing the fund into court, and filing the affidavit denying collusion; *id.*

A bill exhibited by a third person, who, not knowing to whom he ought of right to render a debt or duty or pay his rent, fears he may be hurt by some of the claimants, and therefore prays that they may interplead, so that the court may judge to whom the thing belongs, and he be thereby safe on the payment; Pract. Reg. 78; Harrison, Ch. Pr. 45; Edwards, Inj. 893; Beach, Mod. Eq. Pr. 147; 2 Paige, Ch. 199, 570; 6 Johns. Ch. 445; 3 Jones, N. C. 83; 125 Ind. 523; 29 Mo. App. 1.

A bill of the former character may, in general, be brought by one who has in his possession property to which two or more lay claim; 31 N. H. 354; 24 Barb. 154; 11 Ga. 103; 23 Conn. 544; 12 Gratt. 117; 15 Ark. 389; 18 Mo. 380; 63 Hun 634; 72 id. 638; 47 Mo. App. 336; 24 Q. B. Div. 275.

Such a bill must contain the plaintiff's statement of his rights, negating any interest in the thing in controversy; 3 Story, Eq. Jur. § 821; and see 3 Sandf. Ch. 571; but showing a clear title to maintain the bill; 3 Madd. 277; 5 id. 47; and also the claims of the opposing parties; 4 Paige, Ch. 384; 8 id. 339; 7 Hare 57; 49 Mo. App. 608; that the adverse title of the claimants is derived from a common source is sufficient; 118 N. Y. 648; must have annexed to it the affidavit of the plaintiff that there is no collusion between him and either of the parties; 31 N. H. 354; must contain an offer to bring money into court if any is due, the bill being demurrable, if there is failure, unless it is offered or else actually produced; Mitf. Eq. Pl. 49; Barton, Suit in Eq. 47, n. 1; 17 Civil Proc. R. 448; must show that there are persons in being capable of interpleading and setting up opposing claims; 18 Ves. Ch. 377; it is also demurrable if upon its face it shows that one of the defendants has no claim to the debt due from the complainant; 61 Fed. Rep. 401.

These proceedings should not be brought except when there is no other way for one to protect himself, and in order to maintain the action, it is necessary to show that the plaintiff has not acted in a partisan manner as between the claimants; 89 Wis. 64.

It should pray that the defendants set forth their several titles, and interplead, settle, and adjust their demands between themselves. It also generally prays an injunction to restrain the proceedings of the claimants, or either of them, at law; and in this case the bill should offer to bring the money into court; and the court will not, in general, act upon this part of the prayer unless the money be actually brought into court; Beach, Mod. Eq. Pr. 144; 4

Paige, Ch. 384; 6 Johns. Ch. 445.

In the absence of statutes, such a bill does not ordinarily lie, except where there is privity of some sort between all the parties, and where the claim by all is of the same nature and character; 7 Sim. 391; 3 Beav. 579; Story, Eq. Jur. § 807; 24 Vt. 639; 2 Ind. 469. The granting of an order of interpleader is within the judicial discretion; 2 Misc. Rep. 441.

The decree for interpleader may be obtained after a hearing is reached, in the usual manner; 1 T. & R. 30; 4 Bro. Ch. 297; 2 Paige Ch. 570; or without a hearing, if the defendants do not deny the statements of the bill; 16 Ves. Ch. 203; Story, Eq. Pl. § 297 a.

A bill in the nature of a bill of interpleader will lie in many cases by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons; Story, Eq. Pl. § 297 b; 2 Paige, Ch. 199; 3 Jones, N. C. 38.

In a bill of interpleader the complainant being indifferent between the parties, the duty of his solicitor is ended as such, when the bill is filed and he has no interest in the decree except that the bill shall be adjudged to be properly filed. The solicitor may then appear for one of the parties, but only by leave of the court, which will be granted only upon consideration of the special circumstances of the facts of the case and the conclusion that the case is a proper one for granting the leave; 4 Del. Ch. 534, note; 2 id. 297; and see 7 Allen 72. See **INTERPLEADER**.

BILL OF LADING. In Common Law. The written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. Loughborough, J., 1 H. Bla. 359. See Leggett, Bills of Lading.

A written acknowledgment of the receipt of certain goods and an agreement for a consideration to transport and to deliver the same at a specified place to a person therein named or his order. See Porter, Bills of Lading. See also 14 Wall. 596.

It is at once a receipt and a contract; 122 U. S. 79; Schouler, Pers. Prop. 408.

A memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order on board of his ship or vessel, therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order (the dangers of the sea excepted) at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same; 1 Term 745; Abb. Sh. 216; Code de Comm. art. 281.

A similar acknowledgment made by a carrier by land.

A through bill of lading is one where a railroad contracts to transport over its own line for a certain distance carloads of merchandise or stock, there to deliver the same to its connecting lines to be transported to the place of destination at a fixed rate per car-load for the whole distance; 16 S. W. Rep. (Tex.) 775.

It should contain the name of the shipper or consignor; the name of the consignee; the names of the vessel and her master; the places of shipment and destination; the price of the freight, and, in the margin, the marks and numbers of the things shipped. Jacobsen, Sea Laws.

Though it is not necessary that the shipper should sign the bill of lading, yet if its terms restrict the carrier's common-law liability, his assent thereto must be shown. This assent need not be express, it is sufficiently indicated by an acceptance of the bill of lading containing the restrictions; Port. B. of L. 157; 36 Conn. 63; 1 Fed. Rep. 232; 16 Mich. 79; 21 Wis. 152; 45 Iowa 476. Where the bill contains a clause limiting the liability of each connecting road to loss or injury suffered while on its line, and is accepted by the shipper, there is a limitation of the liability which binds all the parties, although the shipper could not read, and did not know of the limitation

in the bill; 89 Ala. 376; 107 Mo. 475; 109 id. 433. See 78 Ala. 597.

It is usually made in three or more original parts, one of which is sent to the consignee with the goods, one or more others are sent to him by different conveyances, one is retained by the merchant or shipper, and one should be retained by the master. Abbott, Shipp. 217; 2 Dan. Neg. Inst. § 1735. Where one is marked "original" and the other "duplicate," the latter is in effect an original; 82 Tex. 195.

It is regarded as so much merchandise; 101 U. S. 557. At common law it is *quasi* negotiable; 44 Conn. 579; 1 T. R. 63; 1 Sm. L. C. 1048; and in many of the states is made so by statute.

It is also assignable by endorsement, whereby the assignee becomes entitled to the goods subject to the shipper's right of stoppage in transitu, in some cases, and to various liens; Port. B. of L. 438; 65 Fed. Rep. 848. See LIENS; STOPPAGE IN TRANSITU.

But the assignee obtains by such assignment only the title of his assignor, and the negotiability is mostly the quality of transferability by endorsement and delivery which enables the rightful assignee to sue in his own name; 101 U. S. 557; 57 Ga. 110; 115 Mass. 224; 44 Mo. App. 498. It is only negotiable so far that the owner may transfer it by endorsement or assignment so as to vest the legal title in the assignee; 86 Ky. 176.

It is considered to partake of the character of a written contract, and also of that of a receipt. In so far as it admits the character, quality, or condition of the goods at the time they were received by the carrier, it is a mere receipt, and the carrier may explain or contradict it by parol; but as respects the agreement to carry and deliver, it is a contract, and must be construed according to its terms; 6 Mass. 422; 3 N. Y. 323; 9 id. 529; 25 Barb. 16; 1 Abb. Adm. 209, 397. The shipowners are estopped to deny that the quantity of goods mentioned therein was received; 19 Q. B. D. 333; 1 C. & E. 207; but they are not bound by a bill of lading reciting that goods have been received for shipment, if none such have been received; 10 C. B. 665; 16 C. B. 103; 2 L. R. Exch. 267; 2 L. R. Sc. 128; 105 U. S. 7; 3 Allen 103; 22 Ohio 118; 44 Md. 11; 52 Mo. 880; *contra*, 20 Kans. 519; 10 Neb. 556; 65 N. Y. 111. See, also, The Delaware, 14 Wall. 596. Where a bill of lading is given, and accepted without objection, it is the real contract by which the mutual obligations of the parties is to be governed and not any prior agreement; 43 Fed. Rep. 681.

Under the admiralty law of the United States, contracts of affreightment, entered into with the master in good faith and within the apparent scope of his authority as master, bind the vessel to the merchandise for the performance of such contracts in respect to the property shipped on board, irrespective of the ownership of the vessel, and whether the master be the agent of the general or special owner; but bills of lading for property not shipped, and designed to be instruments of fraud, create no lien on the interest of the general owner, although the special owner was the perpetrator of the fraud; 18 How. 182. And see 19 How. 82; 2 West. L. Monthly 456. Mr. Justice Clifford held that a vessel was liable *in rem* for the loss of goods caused by the explosion of the boiler of a lighter employed by the master in conveying goods to the vessel; 23 Bost. Law R. 277.

A clean bill of lading is one which contains nothing in the margin qualifying the words in the bill of lading itself; 61 Law T. 330. Under a "clean" bill of lading in the usual form (*viz.*, one having no stipulation that the goods shipped are to be carried on deck), there is a contract implied that the goods shall be carried under the deck; and parol evidence to the contrary will not be received; 14 Wend. 23; 3 Gray 97. But evidence of a well-known and long-established usage is admissible, and will justify the carriage of goods in that manner; Ware 322.

Exceptions in a bill of lading are to be construed most strongly against the shipowner. As between the shipowner and the shipper, the bill of lading only can be considered as the contract; 157 U. S. 124.

BILL TO MARSHAL ASSETS. See ASSETS.

BILL TO MARSHAL SECURITIES. See MARSHALLING SECURITIES.

BILL OF MIDDLESEX. In old practice, a form of civil process, peculiar to the English Court of King's Bench, and by which personal actions in that court were formerly commenced. It was originally always founded on a plaint or bill of trespass, filed, or supposed to be filed in court, and was a kind of *capias* directed to the sheriff of the county of Middlesex, and commanding him to take the defendant and have him before the king at Westminster, on a day prefixed, to answer to the plaintiff of a plea of trespass. The court out of which it was issued usually sat in the county of Middlesex. It was abolished by the statute 2 Will. IV., c. 39. Burrill.

BILL OF MORTALITY. An official record of the deaths in a place or district during a given time. Usually used in the plural, signifying, primarily, a series of records of deaths instituted in London at about the time of the visitations of the plague, near the commencement of the 17th century; secondarily, the district or region of these records. Abbott.

BILL IN NATURE OF A BILL IN REVIEW. In Equity Practice. One which is brought by a person not bound by a decree, praying that the same may be examined and reversed; as where a decree is made against a person who has no interest at all in the matter in dispute, or had not an interest sufficient to render the decree against him binding upon some person claiming after him.

Relief may be obtained against error in the decree by a bill in the nature of a bill of review. This bill in its frame resembles a bill of review except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill may require; 1 Harrison, Ch. Pr. 143.

BILL IN NATURE OF A BILL OF REVIVOR. In Equity Practice. One which is filed when the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery. In the case of a devise of real estate, the suit is not permitted to be continued by bill of revivor; 1 Chanc. Cas. 123, 174; 3 Chanc. Rep. 39; Mosel. 44.

In such cases, an original bill, upon which the title may be litigated, must be filed, and this bill will have so far the effect of a bill of revivor that if the title of the representative by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by bill of revivor; 1 Vern. 437; 2 id. 548, 673; 2 Brown, P. C. 520; 1 Eq. Cas. Abr. 83; Miff. Eq. Pl. 71.

BILL IN NATURE OF A SUPPLEMENTAL BILL. In Equity Practice. One which is filed when the interest of the plaintiff or defendant, suing or defending, wholly determines, and the same property becomes vested in another person not claiming under him. Hinde, Ch. Pr. 71.

The principal difference between this and a supplemental bill seems to be that a supplemental bill is applicable to such cases only where the same parties or the same interests remain before the court; whereas an original bill in the nature of a supplemental bill is properly applicable where new parties, with new interests arising from events occurring since the institution of the suit, are brought before the court; Cooper, Eq. Pl. 73; Story, Eq. Pl. § 345. For the exact distinction between a bill of review and a supplemental bill in the nature of a bill of review, see 2 Phill. Ch. 706; 1 Macn. & G. 397; 1 Hall & T. 437.

BILL FOR A NEW TRIAL. In Equity Practice. One filed in a court of equity praying for an injunction after a judgment at law when there is any fact

which renders it against conscience to execute such judgment, and of which the injured party could not avail himself in a court of law, or, if he could, was prevented by fraud or accident, unmixed with any fault or negligence of himself or his agents. Mitford, Eq. Pl. 131; 2 Story Eq. Pl. § 887. Bills of this description are not now generally countenanced; 1 Johns. Ch. 432; 6 id. 479.

BILL OBLIGATORY. A bond absolute for the payment of money. It is called also a single bill, and differs from a promissory note only in having a seal; 2 S. & R. 115. See Read, Pl. 236; West, Symb.

BILL OF PAINS AND PENALTIES. A special act of the legislature which inflicts a punishment less than death upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. 2 Woodd. Lect. 625. It differs from a bill of attainder in this, that the punishment inflicted by the latter is death. The clause in the constitution prohibiting bills of attainder includes bills of pains and penalties; Story, Const. § 1338; Hare, Am. Con. L. 549; 4 Wall. 323; 85 Ga. 285. See 6 Cr. 138.

BILL OF PARCELS. An account containing in detail the names of the items which compose a parcel or package of goods. It is usually transmitted with the goods to the purchaser, in order that if any mistake has been made it may be corrected.

BILL OF PARTICULARS. In Practice. A detailed informal statement of a plaintiff's cause of action, or of the defendant's set-off. It is an account of the items of the claim, and shows the manner in which they arose.

The plaintiff is required, under statutory provisions, which vary widely in the different states, to file a bill of particulars, either in connection with his declaration; 2 Penning. 636; 3 Pick. 449; 1 Gray 466; 4 Rand. 458; 11 Conn. 302; 4 Miss. 46; 1 Speers 298; Dudl. 16; 2 Iowa 595; 67 Hun 649; see 125 Ind. 323; or subsequently to it, upon request of the other party; 2 Bail. 416; 4 Dana 219; 5 Ark. 197; 3 Ill. 217; 5 Blackf. 316; 3 McLean 289; 1 Cal. 437; upon an order of the court, in some cases; 3 Johns. 248; 19 id. 268; 1 N. J. 436; 76 Hun 434; in others, without such order.

He need not give particulars of matters which he does not seek to recover; 4 Exch. 486; nor of payments admitted; 4 Abb. Pr. 289. See 6 Dowl. & L. 556.

The plaintiff is concluded by the bill when filed; 9 Gill 146; and where he gives notice at the trial that he intends to rely only upon the count for an account stated, the notice operates as an amendment of the pleadings and an abandonment of the bill of particulars; 141 Ill. 442.

The defendant, in giving notice or pleading set-off, must give a bill of particulars; failing to do which, he will be precluded from giving any evidence in support of it at the trial; 17 Wend. 20; 7 Blackf. 462; 8 Gratt. 557.

The court may order the defendant to file a bill of particulars where he alleges matter by way of counterclaim; 64 Hun 632; where he interposes the defence of payment it will not be required; 60 Hun 582.

The bill must be as full and specific as the nature of the case admits in respect to all matters as to which the adverse party ought to have information; 16 M. & W. 773; but need not be as special as a count on a special contract. The object is to prevent surprise; 9 Pet. 541; 5 Wend. 51; 5 Ark. 197. See 3 Pick. 449; 5 Pa. 41. If the bill is not sufficiently explicit, application should be made to the court for a more specific one, as the objection cannot be made on the trial; 90 Mich. 432; 51 Minn. 512.

It is not error to refuse to strike out part of a bill of particulars; 129 Ind. 859.

According to ancient practice, a defect in a pleading in a divorce suit may in some states, and in England, be cured by filing a bill of particulars; but this will not supply the want of a more definite allegation; 12

P. D. 19; 4 Swab. & T. 63; 64 Pa. 470; 77 Pa. 81; 107 Mass. 329; 83 Ill. 206; 25 Vt. 713. This is not proper under the Code system, however; and has been abandoned in the Code states, except New York; 89 Minn. 370. See 61 N. Y. 398; 17 N. Y. Supp. 195; 12 Misc. Rep. 457.

BILL PAYABLE. In Mercantile Law. A bill of exchange accepted, or a promissory note made, by a merchant, whereby he has engaged to pay money. It is so called as being payable by him. An account is usually kept of such bills in a book with that title, and also in the ledger. See Parsons, Notes and Bills.

BILL OF PEACE. In Equity Practice. One which is filed when a person has a right which may be controverted by various persons, at different times, and by different actions.

In such a case, the court will prevent a multiplicity of suits by directing an issue to determine the right, and ultimately grant an injunction; 1 Madd. Ch. Pr. 166; Blake, Ch. Pr. 48; 2 Story, Eq. Jur. § 552; 2 Johns. Ch. 281; 8 Cra. 426; L. R. 2 Ch. 8; Bisph. Eq. 415. Such a bill cannot usually be maintained until the right of the complainant has been established at law; Bisph. Eq. § 417; and it must be filed on behalf of all who are interested in establishing the right; *id.*

Another species of bill of peace may be brought when the plaintiff, after repeated and satisfactory trials, has established his right at law, and is still in danger of new attempts to controvert it. In order to quiet the possession of the plaintiff, and to suppress future litigation, courts of equity, under such circumstances, will interfere, and grant a perpetual injunction; 2 Johns. Ch. 281; 8 Cra. 426; Mitf. Eq. 143; Eden, Inj. 356; 56 Mo. 407; 5 Ohio 522. A bill will lie to enjoin a defendant from interfering with plaintiff's tenants; 25 Md. 153. A bill to quiet title can be filed only by a party in possession, against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and as a prerequisite to such bill it is necessary that the plaintiff's title should have been established by at least one successful trial at law; 155 U. S. 314. See a full discussion in 20 Am. L. Reg. (N. S.) 561.

BILL PENAL. In Contracts. A written obligation by which a debtor acknowledges himself indebted in a certain sum, and binds himself for the payment thereof, in a larger sum.

Bonds with conditions have superseded such bills in modern practice; Steph. Pl. 265, n. They are sometimes called bills obligatory, and are properly so called; but every bill obligatory is not a bill penal: Compyns, Dig. Obligations, D; Cro. Car. 515. See 2 Ventr. 106, 198.

BILL TO PERPETUATE TESTIMONY. In Equity Practice. One which is brought to secure the testimony of witnesses with reference to some matter which is not in litigation, but is liable to become so.

It differs from a bill to take testimony *de bene esse*, inasmuch as the latter is sustainable only when there is a suit already depending; it is desirable if it contain a prayer for relief; 1 Dick. Ch. 98; 2 P. Wms. 182; 2 Ves. Ch. 497; 2 Madd. 87. And see 1 Sch. & L. 816.

It must show the subject-matter touching which the plaintiff is desirous of giving evidence; Rep. temp. Finch 391; 4 Madd. 8, 10; that the plaintiff has a positive interest in the subject-matter, which may be endangered if the testimony in support of it be lost, as a mere expectancy, however strong, is not sufficient; 6 Ves. Ch. 260; 1 Vern. 105; 15 Ves. Ch. 136; Mitford, Eq. Pl. 51; Cooper, Eq. Pl. 52; 3 J. J. Marsh. 260; Beach, Mod. Eq. Pr. 150; that the defendant has, or pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject-matter of the proposed testimony; Cooper, Pl. 56; Story, Eq. Pl. § 302; and some ground of necessity for perpetuating the evidence; Story, Eq. Pl. § 303; Mitf. Eq. Pl. 52, 148, n.; Cooper, Eq. Pl. 53. See

20 Ga. 777; 1 Dick. 14.

The bill should describe the right in which it is brought with reasonable certainty, so as to point the proper interrogations on both sides to the true merits of the controversy; 1 Vern. 312; Cooper, Eq. Pl. 56; and should pray leave to examine the witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated; Mitf. Eq. Pl. 52.

BILL OF PRIVILEGE. In English Law. The form of proceeding against an attorney of the court, who is not liable to arrest. Brooke, Abr. *Bille*; 12 Mod. 163.

It is considered a privilege for the benefit of clients; 4 Burr. 2113; 2 Wils. 44; Dougl. 381; and is said to be confined to such as practise; 2 Maule & S. 605. But see 1 Bos. & P. 4; 2 Lutw. 1667. See, generally, 3 Sharsw. Bla. Com. 289, n.

BILL OF PROOF. In English Practice. The claim made by a third person to the subject-matter in dispute between the parties to a suit in the court of the mayor of London. 2 Chitty, Pr. 492; 1 Marsh. 233.

BILL TO QUIET POSSESSION AND TITLE. In Equity Practice. Also called a bill to remove a cloud in title, and though sometimes classed with bills *quia timet* or for the cancellation of void instruments, they may be resorted to in other cases when the complainant's title is clear and there is a cloud to be removed; 131 U. S. 352; 62 Vt. 411; 81 Ill. 424; the latter may be said to exist whenever in ejectment by the holder of the adverse title any evidence would be required to defeat a recovery; 25 Fla. 53.

Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require; 5 Allen 602; 113 Pa. 510; 2 Story, Eq. § 694.

Equity will entertain a bill to adjust the claims, or to settle the priorities of conflicting claimants, where there is thereby created a cloud over the title, which would prevent the sale of the land at a fair market price; Big. Eq. 236; to restrain the collection of an illegal tax; *ibid.*; to set aside deeds, etc., which may operate as a cloud upon the legal title of the owner; whether they be void or voidable, and whether the character of the instrument appears on its face or not; 33 Miss. 292; 6 Pet. 95; but it has been recently held that equity will not interfere to remove an alleged cloud upon title to land, if the instrument or proceeding constituting such alleged cloud is absolutely void upon its face, so that no extrinsic evidence is necessary to show its invalidity; nor if the instrument or proceeding is not thus void on its face, but the party claiming, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity; 158 U. S. 375.

In a suit brought in the circuit court of the United States, to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, an order may be made upon a defendant not residing in the district or found therein, and not appearing *gratis*, to appear and answer, plead or demur by a certain day; 18 Stat. L. 472, c. 137, § 8; 131 U. S. 832; but such suit will affect only the property concerned; *id.* See BILL OF PEACE; BILLS *QUIA TIMET*.

BILL *QUIA TIMET*. In Equity Practice. A bill to guard against possible future injuries and to conserve present rights from possible destruction or serious impairment. The limits of the application of the remedy are not clearly defined, but it rests on the principle of relieving the party and his title from some claim or liability which

may, if enforced, entail serious loss. Such a bill may be filed when a person is entitled to property of a personal nature after another's death, and has reason to apprehend it may be destroyed by the present possessor; or when he is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen or be occasioned by the neglect, inadvertence, or culpability of another; or when he seeks to be relieved against an invalid title, claim, or incumbrance which has been created by the act of another. See 3 Daniell, Ch. Pr. 1961, n. Another illustration of the application of the remedy is in case of a counterbond; although the surety is not troubled for the money, after it becomes payable, a decree for its payment may be had against the principal, or when a trustee has incurred liability as the holder of shares for another under a covenant of indemnity, against liability; L. R. 7 Ch. 395.

Upon a proper case being made out, the court will, in one case, secure the property for the use of the party (which is the object of the bill), by compelling the person in possession of it to give a proper security against any subsequent disposition or wilful destruction; and, in the other case, they will quiet the party's apprehension of future inconvenience, by removing the causes which may lead to it; 1 Madd. Ch. Pr. 218; 2 Story, Eq. Jur. §§ 825, 851. See 9 Gratt. 398; 11 Ga. 570; 8 Tex. 337; 2 Md. Ch. Dec. 157, 442; 4 Edw. Ch. 228; Bisph. Eq. 568; BILL TO QUIET POSSESSION AND TITLE; BILL *QUIA TIMET*; BILL OF PEACE.

BILL RECEIVABLE. In Mercantile Law. A promissory note, bill of exchange, or other written security for money payable at a future day, which a merchant holds. So called because the amounts for which they are given are receivable by the merchant. They are entered in a book so called, and are charged to an account in the ledger under the same title, to which account the cash, when received, is credited. See Pars. N. & B.

BILL OF REVIEW. In Equity Practice. One which is brought to have a decree of the court reviewed, altered, or reversed.

It is only brought after enrolment; 1 Ch. Cas. 54; 3 P. Wms. 371; 5 Rich. Eq. 421; 2 Story, Eq. Pl. § 408; and is thus distinguished from a bill in the nature of a bill in review, or a supplemental bill in the nature of a bill in review; 5 Mas. 303; 2 Sandf. Ch. 70; Gilbert, For. Rom. c. 10, p. 182.

It must be brought either for error in point of law; 2 Johns. Ch. 488; Cooper, Eq. Pl. 89; or for some new matter of fact, relevant to the case, discovered since publication passed in the cause, and which could not, with reasonable diligence, have been discovered before; 7 Fed. Rep. 533; 22 Wall. 60; 95 U. S. 99; 2 Johns. Ch. 488; see 3 Johns. 124; 1 Hempst. 118; 27 Vt. 638; 25 Miss. 207; or to correct an error apparent on the face of a decree in the original suit; where there are no disputed questions of fact; 97 Ala. 451; and it is in apt time if filed within two months after entry of the decree; 145 Ill. 433. It cannot be filed without leave of court; 6 Rich. Eq. 364; which is not granted as of course; 1 Jones, Eq. 10. It will not lie where the original decree has been affirmed on appeal; 53 Fed. Rep. 854; or where the new evidence merely confirms facts already proved or tends to impeach witnesses already examined; 89 Va. 885. Nor will it lie for assignees of plaintiff in the original suit; 89 Va. 524.

Where one proceeds to a decree after discovering facts on which a new claim is founded, he cannot afterwards file a supplemental bill in the nature of a bill of review on such new facts; 42 Ill. App. 664.

BILL OF REVIVOR. In Equity Practice. One which is brought to continue a suit which has abated before its final consummation, as, for example, by death, or marriage of a female plaintiff.

It must be brought by the proper representatives of the person deceased, with reference to the property which is the subject-matter; 4 Sim. 318; 2 Faigee, Ch. 358;

Story, Eq. Pl. § 354.

BILL OF REVIVOR AND SUPPLEMENT. In Equity Practice. One which is a compound of a supplemental bill and bill of revivor, and not only continues the suit, which has abated by the death of the plaintiff, or the like, but supplies any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case. 5 Johns. Ch. 334; Mitf. Eq. Pl. 32, 74; Beach, Mod. Eq. Pr. 515; 13 Ves. 161; 36 N. H. 141; 3 Paige 204.

BILL OF RIGHTS. A formal and public declaration of popular rights and liberties. The English Bill of Rights is a statute passed in 1689, affirming and asserting certain rights of the British people. See Hallam, Hist. See 1 Bla. Com. 128. In the United States, such bills have been incorporated with the constitutions of many of the states; *id.*, Chase's note 3; 2 Kent, Lect. xxiv.

BILL OF SALE. In Contracts. A written agreement under seal, by which one person transfers his right to or interest in goods and personal chattels to another.

It is in frequent use in the transfer of personal property, especially that of which immediate possession is not or cannot be given.

In England a bill of sale of a ship at sea or out of the country is called a *grand bill of sale*; but no distinction is recognized in this country between grand and ordinary bills of sale; 4 Mas. 661. The effect of a bill of sale is to transfer the property in the thing sold.

By the maritime law, the transfer of a ship must generally be evidenced by a bill of sale; 1 Mas. 306; and by act of congress, every sale or transfer of a registered ship to a citizen of the United States must be accompanied by a bill of sale, setting forth, at length, the certificate of registry; Rev. Stat. U. S. § 4170. Where the bill is insufficient under the statute, the executor of the seller can be compelled to reform it; 17 R. I. 454. And this bill of sale is not valid except between the parties or those having actual notice, unless recorded; Rev. Stat. § 4192.

A contract to sell, accompanied by delivery of possession, is, however, sufficient; 16 Mas. 336; 8 Pick. 86; 16 id. 401; 7 Johns. 308. See 4 Johns. 54; 4 Mas. 615; 1 Wash. C. C. 226; 16 Pet. 215; 47 Mo. App. 262.

Bills of sale are regulated in England by the *BILLS OF SALE ACT*, 41 & 42 Vict. c. 31, and its amendments, 45 & 46 Vict. c. 43; 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35. See 1 Chitty, Eng. Stat. See *GENERAL ASSIGNMENT*.

BILL OF SIGHT. A written description of goods, supposed to be inaccurate, but made as nearly exact as possible, furnished by an importer or his agent to the proper officer of the customs, to procure a landing and inspection of the goods. It was allowed by an English statute where the merchant is ignorant of the real quantity and quality of goods consigned to him, so as to be unable to make a proper entry of them.

BILL, SINGLE. In Contracts. A written unconditional promise by one or more persons to pay to another person or other persons, therein named, a sum of money at a time therein specified. It is usually under seal, and may then be called a bill obligatory; 2 S. & R. 115. It has no condition attached, and is not given in a penal sum; Comyns, Dig. *Obligation*, C. See 8 Hawks, 10, 465.

BILL OF SUFFERANCE. In English Law. A license granted to a merchant, permitting him to trade from one English port to another without paying customs.

BILL TO SUSPEND A DECREE. In Equity Practice. One brought to avoid or suspend a decree under special circumstances. See 1 Ch. Cas. 3, 61; 2 id. 8; Mitf. Eq. Pl. 85, 86.

BILL TO TAKE TESTIMONY DE BENE ESSE. In Equity Practice. One which is brought to take the testimony

of witnesses to a fact material to the prosecution of a suit at law which is actually commenced, where there is good cause to fear that the testimony may otherwise be lost before the time of trial. See 1 S. & S. 83; 2 Story, Eq. Jur. § 1813, n.; 13 Ves. 56.

It lies, in general, where witnesses are aged or infirm; Cooper, Eq. Pl. 57; Ambl. 65; 13 Ves. Ch. 56, 261; propose to leave the country; 2 Dick. 454; Story, Eq. Pl. § 303; or there is but a single witness to a fact; 1 P. Wms. 97; 2 Dick. 648.

The one at whose instance the deposition is taken has no control over it, and if he directs the commissioner to withhold it because he is surprised by the testimony, the court will order its return; 44 Fed. Rep. 246.

BILLA CASSETUR (Lat. that the bill be quashed or made void). A plea in abatement concluded, when the pleadings were in Latin, *quod billa cassetur* (that the bill be quashed). 3 Bla. Com. 303; Grah. Pr. 611.

BILLA EXCAMBII. A bill of exchange.

BILLA EXONERATIONIS. A bill of lading.

BILLA VERA (Lat.). A true bill.

In Practice. The form of words indorsed on a bill of indictment, when proceedings were conducted in Latin, to indicate the opinion of the grand jury that the person therein accused ought to be tried. See *TRUE BILL*.

BILLET DE CHANGE. In French Law. A contract to furnish a bill of exchange. A contract to pay the value of a bill of exchange already furnished. Guyot, *Répert. Univ.*

Where a person intends to furnish a bill of exchange (*lettre de change*), and is not quite prepared to do so, he gives a *billet de change*, which is a contract to furnish a *lettre de change* at a future time. Guyot, *Répert. Univ.*; Story, *Bills* § 2.

BINDING OUT. A term applied to the contract of apprenticeship.

The contract must be by deed, to which the infant, as well as the parent or guardian, must be a party, or the infant will not be bound; 8 East 25; 3 B. & Ald. 584; 8 Johns. 328; 2 Yerg. 546; 4 Leigh 493; 4 Blackf. 437; 12 N. H. 438. See also 18 Conn. 337; 13 Barb. 286; 10 S. & R. 416; 1 Mas. 172; 1 Vt. 69; 1 Ashm. 267; 1 Mas. 78.

BINDING OVER. The act by which a magistrate or court hold to bail a party accused of a crime or misdemeanor.

The binding over may be to appear at a court having jurisdiction of the offence charged, to answer, or to be of good behavior, or to keep the peace.

BIPARTITE. Of two parts. This term is used in conveyancing; as, this indenture bipartite, between A, of the one part, and B, of the other part.

BIRRETUM, BIRRETUS. A caper coif used formerly in England by judges and sergeants at law. Spelman, Gloss.; Cunningham, Law Diet.

BIRTH. The act of being wholly brought into the world.

The conditions of live birth are not satisfied when a part only of the body is born. The whole body must be brought into the world and detached from that of the mother, and after this event the child must be alive; 5 C. & P. 329; 7 id. 814. The circulating system must also be changed, and the child must have an independent circulation; 5 C. & P. 539; 9 id. 164; Tayl. Med. Jur. 591.

But it is not necessary that there should have been a separation of the umbilical cord. That may still connect the child with its mother, and yet the killing of it will constitute murder; 7 C. & P. 814; 9 id. 25. See 1 Beck, Med. Jur. 478; 1 Chit. Med. Jur. 438; GASTATION; LIFE.

BISAILE. See *BESAIL*.

BISHOP. In England, an ecclesiastical officer, who is the chief of the clergy of his

diocese, and is the next in rank to an archbishop. A bishop is a corporation sole. 1 Bla. Com. 469. In the United States it is the title of a high ecclesiastical officer in the Roman Catholic, Protestant Episcopal and Methodist Episcopal and some other churches. In the first two he is the head of a diocese.

BISHOP'S COURT. In English Law. An ecclesiastical court held in the cathedral of each diocese, the judge of which is the bishop's chancellor.

BISHOPRIC. In Ecclesiastical Law. The extent of country over which a bishop has jurisdiction; a see; a diocese.

BISSEXTILE. The day which is added every fourth year to the month of February, in order to make the year agree with the course of the sun.

By statute 21 Hen. III., the 28th and 29th of February count together as one day. This statute is in force in some of the U. S.; 43 Ind. 35; 4 Pa. 515. See 10 Cent. L. J. 158.

It is called *bissextile*, because in the Roman calendar it was fixed on the *sixth* day before the calends of March (which answers to the twenty-fourth day of February), and this day was counted *twice*: the first was called *bissextus prior*, and the other *bissextus posterior*; but the latter was properly called *bissextile* or *intercalary* day.

BITCH. This word, when applied to a woman, does not, in its common acceptation, import whoredom in any of its forms, and therefore is not slanderous; 50 Ind. 336; 20 Wis. 252.

The female of the dog or other canine animal, and of some other carnivores, as of the otter and puma. Also, wench; hussy; an abusive epithet often implying lewdness. Stand. Dict.

Neither the word "bitch" nor "slut" amounts to a charge of crime or a want of chastity so as to render one liable on indictment to some infamous punishment, and are not actionable *per se*. 155 Ky. 102. Words spoken of a married woman ("that she is a dirty 'bitch'; that she has no character, and is no account," are not actionable, common not import that she was a whore, a and do prostitute, or guilty of fornication and adultery. 101 Ky. 593.

BLACK ACRE. A term used by the old writers to distinguish one parcel of land from another, to avoid ambiguity, as well as the inconvenience of a full description.

It is a mere name of convenience, adopted, as "A" and "B" are, to distinguish persons, for things under like circumstances.

BLACK ACT. In English Law. The act of parliament; 9 Geo. II. c. 22.

This act was passed for the punishment of certain marauders who committed great outrages disguised and with faces blackened. It was repealed by 7 & 8 Geo. IV. c. 11. See 4 Sharsw. Bla. Com. 245. It is held not to be a part of the common law in Georgia; T. U. P. Charl. 167.

BLACK BOOK OF THE ADMIRALTY. An ancient book compiled in the reign of Edward III. It has always been deemed of the highest authority in matters concerning the admiralty. It contains the laws of Oleron, at large; a view of the crimes and offences cognizable in the admiralty; ordinances and commentaries on matters of prize and maritime torts, injuries, and contracts; 2 Gall. 404. It is said by Selden to be not more ancient than the reign of Henry VI. Selden, *de Laud. Leg. Ang.* c. 32. By other writers it is said to have been composed earlier. It has been republished (1871) by the British government, with an introduction by Sir Travers Twiss.

BLACK BOOK OF THE EXCHEQUER. The name of a book kept in the English exchequer, containing a collection of treaties, conventions, charters, etc.

BLACK CAP. A part of the judicial full dress, and is worn by the judges on occasions of especial state. It is a vulgar error that the head dress thus worn by the judge in pronouncing the sentence of death

is assumed as an emblem of the sentence. R. & L. Dict.; Wharton.

BLACK DAMP. "Black damp" is commonly known as carbonic acid gas, or dead air, with the property of oxygen exhausted, which causes suffocation by excluding oxygen from the lungs.

White damp, or carbon monoxide, has the effect to destroy the hemoglobin of the red corpuscles, or the oxygen-carrying property of the blood, which produces a weakening of the physical and mental powers and often results in death. 160 Ky. 732, 170 S. W. 19; 160 Ky. 206, 169 S. W. 692.

BLACK PEOPLE. See COLORED PEOPLE.

BLACK RENTS. Rents reserved in work, grain, or baser money than silver. Whishaw.

BLACK ROD, GENTLEMAN USHER OF THE. A chief officer of the Queen, deriving his name from the Black Rod of office which he carries, on the top of which reposes a golden lion. During the session of Parliament he attends on the Peers, and to his custody all Peers impeached for any crime or contempt are first committed. Wharton; Black Book, 255.

BLACKLEG. A person who earns his living by frequenting race courses and places where games of chance are played, getting the best odds and giving the least he can, but not necessarily cheating. 4 A. & E. Ency. (2nd ed.) 577.

Blackleg and Scab. The words "detestable scabs and black legs" were used to mean that plaintiff and his associates were detestable cheats and gamblers, and these words were so understood by their acquaintances and the public generally; the effect of such publication was to bring them into the contempt, hatred, ridicule, disgrace and odium of their acquaintances and the public.

The ordinary meaning of the word "blackleg" is a swindler, a dishonest gambler. It also means a strike-breaker. In the latter sense it is used as a term of opprobrium by working men. 159 Ky. 608, 167 S. W. 891.

BLACKLIST. To list persons to be held under suspicion or censure, or who are of unsound credit, or who have joined in a strike, etc. Stand. Dict.

Of Employees. The combination of a number of employers to prevent the employees discharged by one of them from obtaining employment. 4 A. & E. Ency. (2nd ed.) 577. See BOYCOTT.

BLACKMAIL. Rents reserved, payable in work, grain, and the like.

Such rents were called black mail (*reditus nigri*) in distinction from white rents (*blanche firmes*), which were rents paid in silver.

A yearly payment made for security and protection to those bands of marauders who infested the borders of England and Scotland about the middle of the sixteenth century and laid the inhabitants under contribution. Hume, Hist. Eng. vol. i. 478; vol. ii. App. No. 8; Cowel.

In common parlance, the term is equivalent to, and synonymous with, extortion—the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose the weaknesses, the follies, or the crimes of the victim. 17 Abb. Pr. 226.

Threats by defendant to accuse another of a crime, with intent, himself, to commit the crime of extortion, accompanied by success in obtaining money from that other.

That such other person was endeavoring to induce defendant to receive money, for the purpose of accusing him of extortion, and so could not have been moved by fear, will not prevent his conviction for an attempt at extortion; 144 N. Y. 119; under an act declaring it a crime to threaten a

person with a criminal prosecution, for the purpose of extorting money, it is immaterial that the person making the threats believed that the person threatened had committed the crime; 75 Hun 26; where threats of prosecution for perjury were made maliciously and with intent to compel the one threatened to do an act against his will, the offence is complete; and it is immaterial whether the one threatened was guilty of perjury; 61 N. W. R. (Mich.) 18. In a prosecution under an act providing for the punishment of one who, for the purposes of extortion, sends a letter expressing or implying, or adapted to imply, any threat, and the letter threatens to make a charge against the person to whom it is sent, the truth or falsity of the charge is immaterial; 95 Cal. 640; the act making it an offence to accuse one of crime "with intent to extort or gain any chattel, money, or valuable security, or any pecuniary advantage whatsoever," does not cover the case of an owner who demands a reasonable compensation for property criminally destroyed, and accompanies his demand with a threat to accuse the defendant of the crime, and, where the owner of property so destroyed is indicted for extortion, it is error to charge that it is immaterial whether the accusation made by him was true or false; 47 Ohio St. 556. A charge of soliciting sexual intercourse with the wife of another is a charge of immoral conduct, which, if true, would tend to disgrace one and subject him to the contempt of society, and threatening to make such charge is black mail; 24 N. E. R. (Ind.) 342.

A conviction on indictment under Iowa Code § 3871, relating to the offence of making malicious threats with intent to extort money, cannot be sustained by evidence that defendant, a constable, had a search warrant for the premises of the complaining witnesses; that he notified them of the fact, and signified his willingness, for a bribe, to refrain from making search, that the witnesses accordingly gave him money, and that he assured them the matter would be dropped; 76 Ia. 189.

On a trial for maliciously threatening to accuse another of burning a building, with intent to extort money, evidence of the truth of the charge is inadmissible on the question of malice or of intent, or to impeach the prosecuting witness; 18 N. E. R. (Mass.) 577.

BLADA. Growing crops of grain. Spelman, Gloss. Any annual crop. Cowel. Used of crops, either growing or gathered. Reg. Orig. 94 b; Coke, 2d Inst. 81.

BLANC SEIGN. It is a paper signed at the bottom by him who intends to bind himself, give acquittance, or compromise at the discretion of the person whom he entrusts with such *blanc seign*, giving him power to fill it with what he may think proper, according to agreement. This power is personal and dies with the attorney. 6 Mart. (La.) 718.

BLANCH HOLDING. In Scotch Law. A tenure by which land is held.

The duty is generally a trifling one, as a pepper-corn. It may happen, however, that the duty is of greater value; and then the distinction received in practice is founded on the nature of the duty. Stair. Inst. sec. iii. lib. 3, § 33. See Paterson, Comp. 15; 2 Bla. Com. 42.

BLANCHE FIRME. A rent reserved, payable in silver.

BLANK. A space left in a writing, to be filled up with one or more words to complete the sense.

When a blank is left in a written agreement which need not have been reduced to writing, and would have been equally binding whether written or unwritten, it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to explain the blank. And where a written instrument which was made professedly to record a fact is produced as evidence of that fact which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof; 1 Phil. Ev. 475; 1

Wils. 215; 7 Vt. 522; 6 id. 411. Hence a blank left in an award for a name was allowed to be supplied by parol proof; 2 Dall. 180. But where a creditor signs a deed of composition, leaving the amount of his debt in blank, he binds himself to all existing debts; 1 B. & Ald.

It is said that a blank may be filled by consent of the parties and the instrument remain valid; Cro. Eliz. 626; 1 Ventr. 185; 11 M. & W. 468; 1 Me. 84; 5 Mass. 538; 19 Johns. 396; 21 Oreg. 211; though not, it is said, where the blank is in a part material to the operation of the instrument as an instrument of the character which it purports to be; 6 M. & W. 200; 2 Dev. 879; 1 Yerg. 69; 2 N. & M'C. 125; 1 Ohio 365; 6 Gill & J. 250; 2 Brock. 64; 1 Greenl. Ev. 567; at least, without a new execution; 2 Pars. Cont. 8th ed. *724. But see 17 S. & R. 438; 22 Pa. 12; 7 Cow. 484; 22 Wend. 348; 2 Ala. 517; 2 Dana 142; 4 M'Cord 239; 2 Wash. Va. 164; 9 Cra. 28; 4 Bingh. 123. If a blank is left in a policy of insurance for the name of the place of destination of a ship, it will avoid the policy; Molloy, b. 2, c. 7, s. 14; Park. Ins. 23; Wesk. Ins. 42. See cases in note to 10 Am. Rep. 268.

Leaving blanks in a note and chattel mortgage as to the amount and the delivery of the instruments in that condition, create an agency in the receiver to fill them in the manner contemplated by the maker; 50 Mo. App. 190. As between the parties to a deed it is not void because it did not contain the grantee's name when acknowledged, if it was afterwards written in by the grantor; 50 N. J. Eq. 177.

A transfer of shares by deed executed in blank, as to the name of the purchaser, or the number of the shares, is void in England, though sanctioned by the usage of the stock exchange; 4 D. & J. 559; 2 H. & C. 175. But the rule is otherwise in New York, Pennsylvania, Massachusetts, and Connecticut; 20 Wend. 91; 22 id. 348; 50 Pa. 67 (but see 38 Pa. 98); 103 Mass. 306; 30 Conn. 274. See the subject discussed in Lewis on Stocks 50. As to blanks in notes, see 33 Ariz. Rep. 130.

BLANK BAR. See COMMON BAR.

BLANK INDORSEMENT. An indorsement which does not mention the name of the person in whose favor it is made.

Such an indorsement is generally effected by writing the indorser's name merely on the back of the bill; Chit. Bills 170. A note so indorsed is transferable by delivery merely, so long as the indorsement continues blank; and its negotiability cannot be restricted by subsequent special indorsements; 1 Esp. 180; Peake 225; 15 Pa. 268. See 3 Campb. 339; 1 Pars. Contr. 8th ed. *241; INDORSEMENT.

BLANKET POLICY. In Insurance. A policy which contemplates that the risk is shifting, fluctuating, or varying, and is applied to a class of property, rather than to any particular article or thing; Black, Dict.; 1 Wood, Ins. § 40. See 93 U. S. 541. See POLICY.

BLANKET TERRITORY. The extensive region lying west of the Mississippi and south of the Arkansas River is known in the lumber trade as the "blanket territory." It is called "blanket territory," because a "blanket" rate on logs and lumber is made from all shipping points within the territory to points beyond. That is, the rate is the same regardless of the distance hauled within the territory, which extends about 400 miles from north to south and 300 from east to west. 245 U. S. 138.

BLASPHEMY. In Criminal Law. To attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does. A false reflection uttered with a malicious design of reviling God. Emlyn's Pref. to vol. 8, St. Tr.; 20 Pick. 244.

An impious or profane speaking of God or of sacred things; reproachful, contemptuous, or irreverent words uttered impiously against God or religion. Blasphemy cognizable by common law is defined by Black-

stone to be "denying the being or providence of God, contumelious reproaches of our Saviour Christ, profane scoffing at the Holy Scripture, or exposing it to contempt or ridicule;" by Kent as "maliciously reviling God or religion."

In general blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect, and confidence due to him as the intelligent creator, governor, and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being; as "calumny" usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such; 80 Pick. 211, 212, per Shaw, C. J.

The offence of publishing a blasphemous libel, and the crime of blasphemy, are in many respects technically distinct, and may be differently charged; yet the same act may, and often does, constitute both. The latter consists in blaspheming the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world; and this may be done by language orally uttered, which would not be a libel. But it is not the less blasphemy if the same thing be done by language written, printed, and published; although when done in this form it also constitutes the offence of libel; 20 Pick. 213, per Shaw, C. J.; Heard, Lib. & Sl. § 336.

In most of the United States, statutes have been enacted against this offence; but these statutes are not understood in all cases to have abrogated the common law; the rule being that where the statute does not vary the class and character of an offence, but only authorizes a particular mode of proceeding and of punishment, the sanction is cumulative and the common law is not taken away. And it has been decided that neither these statutes nor the common-law doctrine is repugnant to the constitutions of those states in which the question has arisen; Heard, Lib. & Sl. § 843; 20 Pick. 206; 11 S. & R. 394; 8 Johns. 290; 4 Sandf. 156; 2 Harr. Del. 553; 2 How. 127.

In England, all blasphemies against God, the Christian religion, the Holy Scriptures, and malicious revilings of the established church, are punishable by indictment; 1 East, Pl. Cr. 3; 1 Bish. Cr. L. 498; 5 Jur. 529. See 7 Cox, Cr. Cns. 79; 1 B. & C. 26; 2 Lew. 237.

In France, before the 25th of September, 1791, it was a blasphemy, also, to speak against the holy virgin and the saints, to deny one's faith, to speak with impiety of holy things, and to swear by things sacred; Merlin, *Répert.* The law relating to blasphemy in that country was repealed by the code of 25th of September, 1791; and its present penal code, art. 262, enacts that any person who, by words or gestures shall commit any outrage upon objects of public worship, in the places designed or actually employed for the performance of its rites, or shall assault or insult the ministers of such worship in the exercise of their functions, shall be fined from sixteen to five hundred francs, and be imprisoned for a period not less than fifteen days nor more than six months.

The civil law forbade the crime of blasphemy; such, for example, as to swear by the hair of the head of God; and it punished its violation with death. *Si enim contra homines facte blasphemie impunita non relinquuntur, multo magis qui ipsum Deum blasphemant digni sunt supplicia sustinere.* (For if slander against men is not left unpunished, much more do those deserve punishment who blaspheme God.) Nov. 77. l. 1 § 1.

In Spain it is blasphemy not only to speak against God and his government, but to utter injuries against the Virgin Mary and the saints. *Senen Vilanova y Mañes, Materia Criminal, forense*, Observ. 11, cap. 3, n. 1. See CHRISTIANITY.

BLASTING. A mode of rending rock and other solid substances by means of explosives.

One blasting in a harbor under contract with the United States is not liable for injuries to a house by the pulsations of the air and the vibration of the earth, unless he is negligent; 134 N. Y. 156. Where a railroad in blasting on its own land exercises due care and uses charges of no greater force than necessary, it is not liable for injuries to adjoining property, resulting merely from the incidental jarring; 140 N. Y. 267.

BLIND. The condition of one who is deprived of the faculty of seeing.

Persons who are blind may enter into contracts and make wills like others; Carth. 53; Barnes 19, 23; 3 Leigh 32. When an attesting witness becomes blind, his handwriting may be proved as if he were dead; 1 Starkie, Ev. 341. But before proving his handwriting the witness must be produced, if within the jurisdiction of the court, and examined; 1 Ld. Raym. 734; 1 Mood. & R. 258; 2 id. 262.

It is not negligence for a blind man to travel along a highway; 52 N. H. 244. See as to negligence by persons of defective senses, 8 Am. L. Reg. N. S. 513.

BLOCKADE. In International Law. The actual investment of a port or place by a hostile force fully competent, under ordinary circumstances, to cut off all communication therewith, so arranged or disposed as to be able to apply its force to every point of practicable access or approach to the port or place so invested. See Deane, Blockades; Polson, Blockades; Westlake, Blockades.

Nature and character. Blockades may be either military or commercial, or may partake of the nature of both. As military blockades they may partake of the nature of a land or land and sea investment of a besieged city or seaport, or they may consist of a masking of the enemy's fleet by another belligerent fleet in a port or anchorage where commerce does not exist. As commercial blockades, they may consist of operations against an enemy's trade or revenue, either localized at a single important seaport, or as a more comprehensive strategic operation, by which the entire sea frontier of an enemy is placed under blockade; Snow, Lect. Int. Law 148. A blockade, being an operation of war, any government, independent or *de facto*, whose rights as a belligerent are recognized, can institute a blockade as an exercise of those rights.

National sovereignty confers the right of declaring war; and the right which nations at war have of destroying or capturing each other's citizens, subjects, or goods, imposes on neutral nations the obligation not to interfere with the exercise of this right within the rules prescribed by the law of nations. A declaration of a siege or blockade is an act of sovereignty; 1 C. Rob. Adm. 146; but a direct declaration by the sovereign authority of the besieging belligerent is not always requisite; particularly when the blockade is on a distant station; for its officers may have power, either expressly or by implication, to institute such siege or blockade; 6 C. Rob. Adm. 367.

In case of civil war, the government may blockade its own ports; Wheat. Int. Law 365; 3 Binn. 252; 3 Wheat. 365; 7 id. 306; 4 Cr. 272; 2 Black 635; 3 Scott 225; 24 Bost. L. Rep. 276, 335.

The act of congress of July 13, 1861, prohibiting all commercial intercourse between the loyal and the revolted states, was a mere municipal regulation, though familiarly called a blockade; 3 Ware 276.

Efficiency. In international jurisprudence it is a well-settled principle that the blockading force must be present and of sufficient force to be effective, and a mere notification of one belligerent that the port of the other is blockaded, sometimes termed a paper blockade, is not sufficient to establish a legal blockade. A blockade may be made effective by batteries on shore as well as by ships afloat, and, in case of inland ports,

may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter; 2 Wall. 135. In 1856 the declaration of Paris prescribed blockades to be obligatory must be effective, that is to say, maintained by a sufficient force to shut out the access of the enemy's ships and other vessels in reality. The United States, although not a party to this declaration, has upheld the same doctrine since 1781, when, by ordinance of Congress, it was declared that there should be a number of vessels stationed near enough to the port to make the entry apparently dangerous; Journals of Congress, vol. vii. p. 186. By the convention of the Baltic Powers in 1780, and again in 1801, the same doctrine was promulgated, and in 1871, by treaty between Italy and the United States, a clearer and more satisfactory definition of an effective blockade was agreed upon, as follows: "It is expressly declared that such places only shall be considered blockaded as shall be actually invested by naval forces capable of preventing the entrance of neutrals, and so stationed as to create an evident danger on their part to attempt it."

The government of the United States has uniformly insisted that the blockade should be made effective by the presence of a competent force stationed and present at or near the entrance of the port; 1 Kent *145, and the authorities by him cited. And see 1 C. Rob. Adm. 80; 4 id. 66; 1 Act. Prize Cas. 64; and Lord Erskine's speech, 8th March, 1808, on the orders in council, 10 Cobbett, Parl. Deb. 949, 950. But "it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind (if the suspension and the reason of the suspension are known), that will be sufficient in law to remove a blockade;" 1 C. Rob. Adm. 86, 154. But negligence or remissness on the part of the cruisers stationed to maintain the blockade may excuse persons, under certain circumstances, for violating the blockade; 3 C. Rob. Adm. 156; 1 Act. Prize Cas. 59.

Neutrals. To involve a neutral in the consequences of violating the blockade, it is indispensable that he should have due notice of it. This information may be communicated to him in two ways: either actually, by a formal notice from the blockading power, or constructively, by notice to his government, or by the notoriety of the fact; 2 Black 635; 6 C. Rob. Adm. 397; 2 id. 110, 128; 1 Act. Prize Cas. 61. Formal notice is not required; any authentic information is sufficient; 1 C. Rob. Adm. 334; 5 id. 77, 286; Edw. Adm. 203; 3 Phill. Int. Law 397; 24 Bost. L. Rep. 276; Hall, Int. L. 648; it is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it begins; 2 Black 630.

Generally the mouth of a river, roadstead, or portion of the coast may be blockaded, but if the river is the natural highway by which to reach neutral territory it cannot be thus interfered with. So during the American Civil War the Rio Grande could not be blockaded; Snow, Lect. Int. Law 152.

Breach. A violation may be either by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade. Also placing himself so near a blockaded port as to be in a condition to slip in without observation, is a violation of the blockade, and raises the presumption of a criminal intent; 6 C. Rob. Adm. 30, 101, 182; 7 Johns. 47; 1 Edw. Adm. 202; 4 Cra. 185; 3 Wall. 88. The sailing for a blockaded port, knowing it to be blockaded, is held by the English prize courts to be such an act as may charge the party with a breach of the blockade; British instructions to their fleet in the West India station, Jan. 5, 1804; and the same doctrine is recognized in the United States; 5 Cra. 335; 9 id. 440; 1 Kent *150; 3 Wall. 514; 3 Phill. Int. Law 397; Hall, Int. L. 632; 24 Bost. L. Rep. 276. See 4 Cra. 185; 6 id. 29; 2 Johns. Cas. 180, 469; 10 Moore, P. C. 53.

But in the course of long voyages, sailing for a blockaded port, contingently, might be permitted, if inquiry were afterwards made at convenient ports; 6 Cra. 29; 5 Rob. 76; 2 Wash. C. C. 243; but the ordinance of 1781 authorized the condemnation of vessels "destined" to any blockaded port, without any qualification based upon proximity or notice. A neutral vessel in distress may enter a blockaded port; 7 Wall. 354.

Penalty. When the ship has contracted guilt by a breach of the blockade she may be taken at any time before the end of her voyage; but the penalty travels no further than the end of her return voyage; 2 C. Rob. Adm. 128; 3 id. 147; 6 Wall. 552. When taken, the ship is confiscated; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship; and the burden of rebutting the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owners, rests with them; 1 C. Rob. Adm. 67, 130; 3 id. 173; 4 id. 93; 1 Edw. Adm. 39. See, generally, 2 Bro. Civ. & Adm. Law 314; Chit. Com. L. tit. Blockade; Chitty, L. of N. 128, 147; 1 Kent 143; Marshall, Ins. See also the declaration respecting Maritime Law, signed by the plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, at Paris, April 16, 1856; Appendix to Phill. Int. Law. 3d Ed. ed. 850; Wheat. Int. Law; Vattel, Law of Nations; Snow, Lect. Int. Law 148.

See PACIFIC BLOCKADE.

BLOOD. Relationship; stock; family. 1 Roper, Leg. 103; 1 Belt, Suppl. Ves. 365. Kindred. Bacon, Max. Reg. 18.

Brothers and sisters are said to be of the whole blood if they have the same father and mother, and of the half-blood if they have only one parent in common. 5 Whart. 477. See 76 Ill. 166; 13 Ves. 107.

See FULL BLOOD.

BLOOD STAINS. Blood stains, as those found upon the person or clothing of the party accused, have always been recognized among the ordinary *indicia* of crime. 4 Am. & Eng. Ency. 2d ed., 587; 35 N. Y. 60. That a spot or stain is blood may be testified to by any witness who has observed it, and who is able from such observation to state the fact; it is unnecessary that he should be able to give an expert opinion. *Id.*; 49 Cal. 485 *et al.* But the opinion of an expert on a question of blood stain may be competent evidence. Thus expert testimony is admissible to show that upon examination by means of the microscope, certain spots were found to be of human as distinguished from animal blood. *Id.*; 43 Me. 132 *et al.* Moreover, it is competent for experts to testify as to the direction of the flow of the blood as indicated by the appearance of the stain. *Id.*; *ibid.* But where experts were sought to be introduced to give their opinions as to the relative position of two combatants as indicated by the blood marks upon the shirt of one of them, the admission of the testimony was refused upon the ground that the question was not one of science, but of common sense as to which the jury must judge for themselves. *Id.*; 58 Miss. 370. Articles, such as a piece of clothing or a stick belonging to the defendant, having spots on them resembling blood, are competent evidence to go to the jury. *Id.*; 33 W. Va. 319; 67 Ga. 460.

BLOODHOUND. A large smooth-coated hound, remarkable for its keen sense of smell, and ability to keep on the same scent; sometimes employed in tracing fugitive criminals. Stand. Dict.

BLOODWIT. An amercement for bloodshed. Cowel. The privilege of taking such amercements. Skene.

A privilege or exemption from paying a fine or amercement assessed for bloodshed. Cowel; Kennett, Paroch. Ant.; *Termes de la Ley*.

BLUE LAWS. A name often applied to severe laws for the regulation of religious and personal conduct in the colonies of Connecticut and New Haven; hence any rigid Sunday laws or religious regulations.

The best account of the Blue Laws is by Trumbull, "The True Blue Laws of Connecticut and New Haven, and the False Blue Laws invented by the Rev. Sam'l Peters, etc." The latter reference is to a collection without credit. See also Hinman; Schmucker, Blue Laws; Barker, Hist. & Antiq. of New Haven; Peters, Hist. Conn.; Fiske, Beginnings of New England 238.

BLUE SKY LAWS. Laws that have been enacted in about half the states of this country for the purpose of protecting the public "against the imposition of unsubstantial schemes and the securities based upon them," deriving their name from the fact that they are aimed at "speculative schemes which have no more basis than so many feet of blue sky." Fletcher, 7 Cyclopaedia Corporations, 7714; 242 U. S., 550.

BOARD OF SPECIAL INQUIRY. A board consisting of three members selected from the immigrant officials in the service for prompt determination of cases of aliens detained. Such boards have the authority to determine whether an alien who has been duly held shall be allowed to land or be deported. They keep records, and the decision of any two members of a board prevails and is final, subject to appeal by the alien or a dissenting member through the Commissioner of Immigration at the port of arrival and Commissioner General of Immigration, to the Secretary of the Treasury whose decision shall then be final. The board is an instrument of the executive power, not a court, and the duties of the members are administrative. 202 U. S. 283-285.

BOARD OF SUPERVISORS. A county board of representatives of towns or townships, under a system existing in some states, having charge of the fiscal affairs of the county.

This system originated in the state of New York, and has been adopted in Michigan, Illinois, Wisconsin, and Iowa. The board, when convened, forms a deliberative body, usually acting under parliamentary rules. It performs the same duties and exercises like authority as the COUNTY COMMISSIONERS or BOARD OF CIVIL AUTHORITY in other states. See, generally, Haines's Township Laws of Mich., and Haines's Town Laws of Ill. & Wis.

BOARDER. One who makes a special contract with another person for food with or without lodging. 7 Cush. 424; 36 Iowa 651. To be distinguished from a guest of an innkeeper; Story, Bailm. § 477; 26 Vt. 343; 26 Ala. N. S. 371; 7 Cush. 417. See Edwards, Bailments § 456.

In a boarding-house, the guest is under an express contract, at a certain rate, for a certain time; but in an inn there is usually no express engagement; the guest, being on his way, is entertained from day to day according to his business, upon an implied contract; 2 E. D. Smith 148; 24 How. Pr. 62; 1 Lans. 484. If a person comes upon a special contract to board and sojourn at the inn, he is not, in the sense of the law, a guest, but a "boarder." 9 B. Mon. (Ky.) 75.

BOAT. A boat does not pass by the sale of a ship and appurtenances; Molloy, b. 2, c. 1, § 8; Beaves, *Lex Merc.* 56; 2 Root 71; Park. Ins. 8th ed. 126. But see 17 Mass. 405; 2 Marsh. 727. Insurance on a ship covers her boats; 24 Pick. 172; 1 Mann. & R. 392; 1 Pars. Marit. Law 72, n.

BOC (Sax.). A writing; a book. Used of the *land-books*, or evidences of title among the Saxons, corresponding to modern deeds. These bocs were destroyed by William the Conqueror. 1 Spence, Eq. Jur. 22; 1 Washb. R. P. 17, 21. See 1 Poll. & Maitl. 472, 571; 2 id. 12, 86.

BOC HORDE. A place where books, evidences, or writings are kept. Cowel. These were generally in monasteries. 1 Spence, Eq. Jur. 22.

BOC LAND. Allodial lands held by written evidence of title.

Such lands might be granted upon such terms as the owner should see fit, by greater or less estate, to take effect presently, or at a future time, or on the happening of any event. In this respect they differed essentially from feuds. 1 Washb. 5th ed. R.

P. 17; 4 Kent 441.

BODY. A person. Used of a natural body, or of an artificial one created by law, as a corporation.

A collection of laws; that is, the embodiment of the laws in one connected statement or collection, called a body of laws.

In practice when the sheriff returns *cepi corpus* to a capias, the plaintiff may obtain a rule, before special bail has been entered, to bring in the body; and this must be done either by committing the defendant or entering special bail. See DEAD BODY.

BODY CORPORATE. A corporation. This is an early and undoubtedly correct term to apply to a corporation. Co. Litt. 250 a; Aylife, Par. 196; Ang. Corp. § 6.

BOLIVIA. A republic of South America. It has a president who is elected by universal suffrage for four years and a ministry of five members. It has a congress of two houses, both elective. It is divided into seven judicial districts, each having a superior court composed of five members to which is attached an attorney-general. It has district judges, judges of instruction. The supreme court is the highest judicial authority in the republic.

BONA (Lat. bonus). Goods; personal property; chattels, real or personal; real property.

Bona et satalla (goods and chattels) includes all kinds of property which a man may possess. In the Roman law it signified every kind of property, real, personal, and mixed; but chiefly it was applied to *real estate*, chattels being distinguished by the words *efficia, movabiles, etc.* *Bona* were, however, divided into *bona mobilia* and *bona immobilia*. It is taken in the civil law in nearly the sense of *biens* in the French law. See NULLA BONA.

BONA CONFISCATA. Goods confiscated or forfeited to the imperial *fisc* or treasury. 1 Bla. Com. 299.

BONA FELONUM (Lat.). Goods of felons; the goods of one convicted of felony.

BONA FIDE HOLDER. A purchaser of a note for value complete and regular on its face, without notice of defects, is a "bona fide holder." 152 Ky. 336, 153 S. W. 450. See BONA FIDE HOLDER FOR VALUE.

BONA FIDE HOLDER FOR VALUE. A holder in good faith; honestly; without fraud, deceit, or collusion; in ignorance of the right or claim of a third party. 4 A. & E. Ency. (2nd ed.) 615. See HOLDER IN DUE COURSE.

BONA FIDE HOUSEKEEPER. A married woman living with her fifteen year old son apart from her husband but undivorced from him, is a *bona fide* housekeeper, and is entitled to a homestead exemption. The fact that her husband is contributing to her support does not affect her status. 77 S. W. 382.

BONA FIDE POSSESSOR. Where a man shall be said to be a "*bona fide* possessor," is, where the person possessing, is ignorant of all the facts and circumstances relating to his adversary's title. 4 T. B. Mon. (Ky.) 60.

BONA FIDE PURCHASER. One who buys property of another without notice that some third person has a right to, or interest in, such property, and pays a full and fair price for the same at the time of such purchase, or before he has notice of the claim or interest of such other in the property. 4 Am. & Eng. Ency. (2nd ed.) 615; 65 Barb. (N. Y.) 231. See PURCHASER FOR VALUE AND WITHOUT NOTICE.

A "*bona fide* purchaser" for a valuable consideration is one who in good faith buys the land and pays therefor. 135 Ky. 94, 121 S. W. 981.

BONA FIDES. Good faith, honesty, as distinguished from *mala fides* (bad faith). *Bona fide.* In good faith. See PURCHASER FOR VALUE WITHOUT NOTICE.

BONA FORISFACTA. Forfeited goods. 1 Bla. Com. 299.

BONA FUGITIVORUM (Lat.). Goods of fugitives; the proper goods of him who flies for felony.

BONA GRATIA. Voluntarily; by mutual consent. Used of a divorce obtained by the agreement of both parties.

BONA GUSTURA. Good behavior.

BONA MOBILIA. In Civil Law. Movables. Those things which move themselves or can be transported from one place to another; which are not intended to make a permanent part of a farm, heritage, or building.

BONA NOTABILIA. Chattels or goods of sufficient value to be accounted for.

Where a decedent leaves goods of sufficient amount (*bona notabilia*) in different dioceses, administration is granted by the metropolitan, to prevent the confusion arising from the appointment of many different administrators; 2 Bla. Com. 59; Rolle, Abr. 98; Williams, Ex. 7th ed. The value necessary to constitute property *bona notabilia* has varied at different periods, but was finally established at £5, in 1603.

BONA PATRIA. In Scotch Law. An assize or jury of countrymen or good neighbors. Bell, Dict.

BONA PERITURA. Perishable goods. An executor, administrator, or trustee is bound to use due diligence in disposing of perishable goods, such as fattened cattle, grain, fruit, or any other article which may be worse for keeping; Bacon, Abr. *Executors*; 1 Rolle, Abr. 910; 5 Co. 9; Cro. Eliz. 518; 3 Munf. 288; 1 Beatt. Ch. 5, 14; Dane, Abr. Index. A carrier is in general not liable for injuries to perishable goods occurring without his negligence; 7 L. R. Ch. 573; 1 C. P. D. 423. He may discriminate in favor of such goods, if pressed by a rush of business; 60 Ill. 284; 33 Mich. 6; 20 Wis. 594. See **PERISHABLE GOODS**.

BONA VACANTIA. Goods to which no one claims a property, as shipwrecks, treasure-trove, etc.; vacant goods.

These *bona vacantia* belonged, under the common law, to the finder, except in certain instances, when they were the property of the king. 1 Sharsw. Bla. Com. 295, n.

BONA WAVIATA. Goods waived or thrown away by a thief in his fright for fear of being apprehended. By common law such goods belonged to the sovereign. 1 Bla. Com. 296.

BOND. An obligation in writing and under seal. 2 S. & R. 502; 11 Ala. 19; 1 Harp. 424; 1 Blackf. 241; 6 Vt. 40; 1 Baldw. 129.

It may be single—*simplex obligatio*—as where the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day named, or it may be *conditional* (which is the kind more generally used), that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force, as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money, borrowed of the obligee, with interest, which principal sum is usually one-half of the *penal* sum specified in the bond.

There must be proper parties; and no person can take the benefit of a bond except the parties named therein; Hob. 9; 14 Barb. 59; except, perhaps, in some cases of bonds given for the performance of their duties by certain classes of public officers; 4 Wend. 414; 8 Md. 287; 4 Ohio n. s. 418; 7 Cal. 551; 1 Grant, Cas. 359; 8 Ind. 431. A man cannot be bound to himself even in connection with others; 5 Cow. 688. See 3 Jones, Eq. N. C. 311. But if a bond is given by the treasurer of a corporation to the directors as a class, of which he is one, it is not for that reason invalid; 87 Ill. App. 403. If the bond run to several persons jointly, all must join in suit for a breach, though it be conditioned for the performance of different things for the benefit of each; 2 N. Y. 388.

The instrument must be in writing and sealed; 1 Baldw. 129; 6 Vt. 40; but a sealing sufficient where the bond is made is held sufficient though it might be an insufficient sealing if it had been made where it is sued on; 2 Caines 362. The signature and seal

may be in any part of the instrument; 7 Wend. 345. See 69 Miss. 221. An instrument not under seal is not a bond and will not satisfy a statute requiring an appeal bond; 48 Mo. App. 626; although in the body thereof it is recited that the parties there to have set their hands and seals; 25 Fla. 734.

It must be delivered by the party whose bond it is to the other; 13 Md. 1; 5 Gray 440; 11 Ga. 286; 70 Md. 109. See 37 N. H. 306; Bacon, Abr. *Obligations*, C. But the delivery and acceptance may be by attorney; 10 Ind. 1. The date is not considered of the substance of a deed; and therefore a bond which either has no date or an impossible one is still good, provided the real day of its being dated or given, that is, delivered, can be proved; 2 Bla. Com. 304; Comyns, Dig. *Feit*, B. 3; 3 Call. 309. There is a presumption that a deed was executed on the day of its date; Steph. Dig. Ev. Art. 87; 5 Denio 290.

The condition is a vital part of a conditional bond, and generally limits and determines the amount to be paid in case of a breach; 7 Cow. 224; but interest and costs may be added; 12 Johns. 350; 2 Johns. Cas. 340; 1 E. D. Sm. 250; 1 Hempst. 271. The recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach. So far as interest is payable by the terms of the contract, and until default made, it is limited by the penalty; but after breach it is recoverable, not on the ground of contract, but as damages, which the law gives for its violation; 18 N. Y. 35. See 124 Pa. 58. The omission from a statutory bond of a clause which does not affect the rights of the parties, and imposes no harder terms upon the obligors, does not invalidate it; 53 Pa. 198.

Where a bond is for the performance of an illegal contract the parties are not bound thereon; 89 Ala. 179.

On the *forfeiture* of the bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interfered, and would not permit a man to take more than in conscience he ought, viz.: his principal interest, and expenses in case the forfeiture accrued by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And the like practice having gained some footing in the courts of law, the statute 4 & 5 Anne, c. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due with interest and costs, even though the bond were forfeited and a suit commenced thereon, should be a full satisfaction and discharge; 2 Bla. Com. 340.

All of the obligors in a joint bond are presumed to be principals, except such as have opposite their names the word "security;" 82 Va. 751.

If in a bond the obligor, *binds himself*, without adding his heirs, executors, and administrators, the executors and administrators are bound, but not the heir; Shepard, Touchst. 369; for the law will not imply the obligation upon the heir; Co. Litt. 209 a.

If a bond lie *dormant* for twenty years, it cannot afterwards be recovered; for the law raises a presumption of its having been paid, and the defendant may plead *solvit ad diem* to an action upon it; 1 Burr. 434; 4 id. 1963. And in some cases, under particular circumstances, even a less time may found a presumption; 1 Term 271; Cowp. 109. The statute as to the presumption of payment after twenty years is in the nature of a statute of limitations. It is available as a bar to an action to recover on the instrument, but not where the party asks affirmative relief based upon the fact of payment; 12 N. Y. 409; 14 id. 477.

Promissory notes held on a third person are "bonds" since all written instruments are raised to the dignity of sealed instruments, and such notes pass under a devise of bonds. 144 Ky. 794, 139 S. W. 968. See

LOTTERY BOND.

FORTHCOMING BOND. A bond conditioned that a certain article shall be forthcoming at a certain time or when called for.

GENERAL MORTGAGE BOND. A bond secured upon an entire corporate property, parts of which are subject to one or more prior mortgages.

HERITABLE BOND. In Scotch Law, a bond for a sum of money to which is joined a conveyance of land or of heritage, to be held by the creditor in security of the debt.

INCOME BONDS. Bonds of a corporation the interest of which is payable only when earned and after payment of interest upon prior mortgages.

LOYD'S BOND. A bond issued for work done or goods delivered and bearing interest. This was a device of an English barrister named Lloyd, by which railway and other companies did, in fact, increase their indebtedness without technically violating their charter provisions prohibiting the increase of debt.

MUNICIPAL BOND, q. v.

RAILWAY AID BONDS are issued by municipal corporations to aid in the construction of railways. The power to subscribe to the stock of railways, and to issue bonds in pursuance thereof, does not belong to towns, cities, or counties, without special authority of the legislature, and the power of the latter to confer such authority, where the state constitution is silent, has been a much-contested question. The weight of the very numerous decisions is in favor of the power, although in several of the states the constitutions, or amendments thereof, prohibit or restrict the right of municipal corporations to invest in the stock of railway or similar corporations; 21 Pa. 147; 47 id. 189; 20 Wall. 655, 660; 92 Ill. 111; 111 Mass. 454, 460; 99 U. S. 86; 103 id. 634; 122 id. 306; 147 id. 91; 148 id. 393; 149 id. 122; 152 id. 473; 154 id. 546; 155 id. 4; 62 Fed. Rep. 718; 54 id. 823; 62 id. 775; 63 id. 76; 13 Cent. L. J. 297; Dill. Mun. Corp. 4th ed. § 508; Beach, Pub. Corp. 895; Pierce, Railr. 87; and articles in 20 Am. L. Reg. 737; 26 id. 209, 608.

The recital in bonds issued by a municipal corporation in payment of a subscription to railroad stock, that they were issued "in pursuance of an act of the legislature . . . and ordinances of the city council . . . passed in pursuance thereof," does not put a *bona fide* purchaser for value upon inquiry as to the terms of the ordinances under which the bonds were issued, nor does it put him on inquiry whether a proper petition of two-thirds of the residents had been presented to the common council before it subscribed for the stock; 161 U. S. 434; and recitals in county bonds, that they are issued in pursuance of an order of the court, etc., as a subscription to the capital stock, estop the county issuing them as against an innocent purchaser from showing that the bonds are void because in fact issued as a donation to the railroad company, whereas the statute only authorized a subscription to its stock; 73 Fed. Rep. 927; where a county, under authority from the state, issued its bonds in payment of a subscription to stock in a railway company, made upon a condition which was never complied with, and which was subsequently waived by the county, and received and held the certificates and paid interest on its bonds and refunded them under legislative authority, the bonds originally issued were held valid in the hands of a *bona fide* holder for value before maturity; 161 U. S. 359; where there is a total want of power to subscribe for such stock and to issue bonds in payment, a municipality cannot estop itself by admissions or by issuing securities in negotiable form, nor even by receiving and enjoying the proceeds of such bonds; *id.*; where a municipality is empowered to subscribe, whether with or without conditions, as it may think fit, and the conditions are such as it chooses to impose, a municipality can waive such self-imposed conditions, provided the waiver is made by the municipality itself and not by its mere agents; *id.*

STRAW BOND. A bond upon which is used either the name of fictitious persons, or those unable to pay the sum guaranteed; generally applied to insufficient bail bonds, improperly taken, and designated by the term "straw bail."

See **JOINT**; **JOINT AND SEVERAL BOND**.

BOND DIVIDEND. See **STOCK**; **DIVIDEND**.

BONDAGE. A term which has not obtained a juridical use distinct from the vernacular, in which it is either taken as a synonym with *slavery*, or as applicable to any kind of personal servitude which is involuntary in its continuation.

The propriety of making it a distinct juridical term depends upon the sense given to the word *slavery*. If *slave* be understood to mean, exclusively, a natural person who, in law, is known as an object in respect to which legal persons may have rights of possession or property, as in respect to domestic animals and inanimate things, it is evident that any one who is regarded as a legal person, capable of rights and obligations in other relations, while bound by law to render service to another, is not a slave in the same sense of the word. Such a one stands in a legal relation, being under an obligation correlative to the right of the person who is by law entitled to his service, and though not an object of property, nor possessed or owned as a chattel or thing, he is a person bound to the other, and may be called a *bondman*, in distinction from a *slave* as above understood. A greater or less number of rights may be attributed to persons bound to render service, but such use is made under many forms. Where the rights attributed are such as can be exhibited in very limited spheres of action only, or are very imperfectly protected, it may be difficult to see wherein the condition, though nominally that of a legal person, differs from chattel slavery. Still, the two conditions have been plainly distinguishable under many legal systems, and even as existing at the same time under one source of law. The Hebrews may have held persons of other nations as slaves of that chattel condition which anciently was recognized by the laws of all Asiatic and European nations; but they held persons of their own nation in bondage only as legal persons capable of rights, while under an obligation to serve. Cobb's Hist. Sketch, ch. 1. When the serfdom of feudal times was first established, the two conditions were coexistent in every part of Europe (*ibid.* ch. 7), though afterwards the bondage of serfdom was for a long period the only form known there until the revival of chattel slavery, by the introduction of negro slaves into European commerce, in the sixteenth century. Every villain under the English law was clearly a legal person capable of some legal rights, whatever might be the nature of his services. Co. Litt. 123 b; Coke, 3d Inst. § 45. But at the first recognition of negro slavery in the jurisprudence of England and her colonies, the slave was clearly a natural person, known to the law as an object of possession or property for others, having no legal personality, who therefore, in many legal respects, resembled a thing or chattel. It is true that the moral responsibility of the slave and the duty of others to treat him as an accountable human being and not as a domestic animal were always more or less clearly recognized in the criminal jurisprudence of England and her colonies in that condition a mingling of the qualities of person and of thing, which has led to many legal contradictions. But while no rights or obligations, in relations between him and other natural persons such as might be judicially enforced by or against him, were attributed to him, there was a property in his condition as *chattel slavery*, even though the term itself implies that there is an essential distinction between such a person and natural things, of which it seems absurd to say that they are either free or not free. The phrases *natur rerum, tanquam boni*, and *tanquam mali*, used by older writers, in language of the villain could not be thus characterized; and there is no historical connection between the principles which determine the existence of the one and those which sanctioned the other. The law of English villenage furnished no rules applicable to negro slavery in America. 5 Rand. 686, 688; 3 Hill Ch. S. C. 369; 9 Ga. 561; 1 Hurd, Law of Freedom and Bondage, cc. 4, 5. Slavery in the colonies was entirely distinct from the condition of those white persons who were held to service for years, which was involuntary in its continuance, though founded in most instances on contract. These persons had legal rights, not only in respect to the community at large, but also in respect to the person to whom they owed service.

In the American slaveholding states before the Civil War, the moral personality of those held in the customary slavery was recognized by jurisprudence as to the extent which makes it difficult to say whether, there, slaves were by law regarded as things and not legal persons (though subject to the laws which regulate the title and transfer of property), or whether they were still things and property in the same sense and degree in which they were so formerly. Compare laws and authorities in Cobb's Law to Negroes, ch. 1, § 1, v. 7. The Emancipation Proclamation of January 1, 1863, and the subsequent amendments to the constitution of the United States, have rendered the views entertained by jurists on the subject purely speculative, as slavery has ceased to exist within the borders of the republic.

The Emancipation Proclamation was issued by President Lincoln as commander-in-chief of the army and navy of the United States during the existence of armed rebellion, and by its terms purported to be nothing more than "a fit and necessary war measure for suppressing said rebellion." By virtue of this power, it was therein ordered and de-

clared that all persons held as slaves within certain designated states, and parts of states, were and henceforward should be free, and that the executive government of the United States, including the military and naval authorities thereof, should recognize and maintain the freedom of said persons. The proclamation was not meant to apply to those states or parts of states not in rebellion.

The constitutionality of this measure has been a subject of some doubt, the prevailing opinion being that it could be supported as a war measure alone, and apply where the slaveholding territory was actually subdued by the military power of the United States; 16 Wall. 68. In South Carolina, it has been held that slavery was not abolished by the Emancipation Proclamation, and the same view was sustained in Texas; 15 S. C. Eq. 895; 31 Tex. 504. In Louisiana, 30 La. Ann. 199; and Alabama, 43 Ala. 598, the opposite view is held. But see 44 Ala. 70. In Mississippi the question of the time when slavery was abolished is left open; 48 Miss. 103.

The provisions of Amendment XIII. to the constitution, proclaimed Dec. 18, 1865, may fairly be considered as the definite settlement of the question of slavery in the United States. It declares, "1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation." See **SLAVE**.

BONDED WAREHOUSE. A government warehouse, or one under the control of the government, where imported merchandise may be stored under bond pending the payment of duties thereon. The goods are abandoned to the government if at the end of three years the duties are still unpaid. 95 U. S. 192; 24 A. & E. Ency. L. (2nd ed.) 912.

BONIFICATION OF TAX. Remission of a tax by the German Government originally imposed on merchandise when sold by manufacturers for consumption or sale in the markets of Germany. The remission is made when the goods are purchased in bond or consigned while in bond for exportation to a foreign country. It is a special advantage extended by the government in aid of manufacturers and trade, having the same effect as a bonus or drawback (*q. v.*), as distinguished from a rebate. 169 U. S. 23.

BONIS NON AMOVENDIS. A writ addressed to the sheriff, when a writ of error has been brought, commanding that the person against whom judgment has been obtained be not suffered to remove his goods till the error be tried and determined. Reg. Orig. 181.

BONITARIAN OWNERSHIP. In old Roman law, a species of equitable ownership as distinguished from strict legal or queritarian ownership; recognized by the praetor, and protected by him; called *dominium bonitarium*. Hunter's Rom. L. (2nd ed.) 263; Black. See **QUERITARIAN OWNERSHIP**.

BONO ET MALO. A special writ of jail delivery, which formerly issued of course for each particular prisoner. 4 Bla. Com. 270.

BONUS. A premium paid to a grantor or vendor.

A sum exacted by the state from a corporation as a consideration for granting a charter; in such case it is clearly distinguished from a tax; 21 Wall. 456; 107 Pa. 112.

A consideration given for what is received. Extraordinary profit accruing in the operation of a stock company or private corporation. 10 Ves. Ch. 185; 7 Sin. 634; 2 Spence, Eq. Jur. 569.

An additional premium paid for the use of money beyond the legal interest. 3 Pars. Contr. 8th ed. *114, 150; 24 Conn. 147. It is not a gift or gratuity, but is paid for some services or consideration and is in addition to what would ordinarily be given; 16 Wall. 452.

In its original sense of good, the word was formerly much used. The jury was to be composed of twelve good men (*boni homines*); 3 Bla. Com. 349; *bonus judex* (a good judge). Co. Litt. 246.

BONUS BONDS. Bonds issued as a bonus to the subscribers to the stock of a corporation. 2 Fletch. Corp. § 991. See **STOCK**.

BONUS STOCK. See **STOCK**.

BOOK. A general name given to every literary composition which is printed, but

appropriately to a printed composition bound in a volume. See **COPYRIGHT**.

A manuscript may, under some circumstances, be regarded as a "book;" 17 Pa. C. C. R. 161; 8 L. J. Ch. 105. See **CORPORATION**, *Producing of*; **PERIODICAL PUBLICATIONS**.

BOOK-LAND. In English Law. Land, also called charter-land, which was held by deed under certain rents and fee services, and differed in nothing from free socage land. 2 Bla. Com. 90. See 2 Spelman, English Works 233, tit. *Of Ancient Deeds and Charters*; **BOO-LAND**.

BOOK OF ACTS. The records of a surrogate's court.

BOOK OF ADJOURNAL. In Scotch Law. The records of the court of judicatory.

BOOK OF RATES. An account or enumeration of the duties or tariffs authorized by parliament. 1 Bla. Com. 816; Jacob, Law Dict.

BOOK OF RESPONSES. In Scotch Law. An account which the director of the Chancery keeps particularly to note a seizure when he gives an order to the sheriff in that part to give it to an heir whose service has been returned to him. Wharton, Lex.

BOOKS. Merchants, traders, and other persons who are desirous of understanding their affairs, and of explaining them when necessary, keep a day-book, a journal, a ledger, a letter-book, an invoice-book, a cash-book, a bill-book, a bank-book, and a check-book. See these several articles.

It is a cause for refusing a discharge under the insolvent laws, in some of the states, that merchants have not kept suitable books.

BOOKS OF SCIENCE. In Evidence. Scientific books, even of received authority, are not admissible in evidence before a jury; 5 C. & P. 73; 1 Gray 337; 8 Ind. 430; 117 Mass. 122; s. c. 19 Am. Rep. 401; 8 Bosw. 18; 2 Carl. 617; 1 Greenl. Ev. § 440, a; except to contradict an expert who bases his opinion upon them; 110 Ill. 219; standard medical works with explanation of technicalities are admissible; 2 Ind. 617; 87 Ala. 139; 29 id. 558. Counsel may read such books to the jury in their argument; 46 Conn. 330 (two judges dissenting); *contra*, 1 Gray 337; 50 N. H. 159; 44 Cal. 65; 5 Bradw. 481. In 20 Tex. 398 and 1 Chand. 178, it was held that the admission of such evidence was in the discretion of the court. See also 24 Alb. L. J. 286, 284, 357; 26 Am. Law Rev. 390. See 20 Tex. 398; 8 Gray 430; 102 Ind. 529; 87 Cal. 13.

The law of foreign countries may be proved by printed books of statutes, reports, and text writers, as well as by the sworn testimony of experts; so held, in a learned opinion by Lowell, J., in the U. S. C. C. 2 Fow. 142. See 14 Hun 400; 163 Pa. 245; 35 S. W. Rep. (Tex.) 1070; *contra*, but without authority, 50 Fed. Rep. 73. A scientific witness may testify to the written foreign law, with or without the text of the law before him; 11 Cl. & F. 85, 114; 8 Q. B. 208. It has been said that foreign law must always be proved by an expert; 2 Phil. Ev. 428; 1 Greenl. Ev. 496, 498; but see Westl. Pr. Int. Law, 8d ed. § 356; but the court may in its discretion require the printed book of law to be produced in order to corroborate the witness; 106 U. S. 546.

BOOM. An enclosure formed upon the surface of a stream or other body of water, by means of spars, for the purpose of collecting or storing logs or timber; 10 Am. & Eng. Corp. Cas. 399; A. & E. Encyc.

In logging, a chain or barrier of floating logs to retain timber or saw-logs behind or within it. To obstruct by means of a boom, as to boom a river. To collect or pen within a boom. Stand. Dict.

BOOM COMPANY. A company formed for the purpose of improving

streams for the floating of logs, by means of booms and other contrivances, and for the purpose of running, driving, booming, and rafting logs. 10 Am. & Eng. Corp. Cas. 399; A. & E. Encyc.

BOON-DAYS. Certain days in the year on which copyhold tenants were bound to perform certain services for the lord. Called, also, due-days. Whishaw.

BOOTLEGGER. Any person who shall by himself, or his employee, servant or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or leave in a place for another to secure, any intoxicating liquor as herein defined, with intent to sell or dispose of the same by gift or otherwise, or who shall within this state, in any manner, directly or indirectly, solicit, take, or accept any order for the sale, shipment, or delivery of intoxicating liquor, in violation of law, shall be termed a bootlegger. Thorpe, National and State Prohibition, 196; 191 N. W. 357; 195 Iowa 43.

Under the Volstead Act, bootlegging is not a crime, but only a nuisance. See NATIONAL PROHIBITION ACT.

BOOTY. The capture of personal property by a public enemy on land, in contradistinction to *prize*, which is a capture of such property by such an enemy on the sea.

After booty has been in complete possession of the enemy for twenty-four hours, it becomes absolutely his, without any right of postliminy in favor of the original owner, particularly when it has passed *bona fide* into the hands of a neutral; 1 Kent 110. The right to the booty, Pothier says, belongs to the sovereign; but sometimes the right of the sovereign, or of the public, is transferred to the soldiers, to encourage them; Pothier, *Droit de Propriété*, p. 1, c. 2, a. 1, § 2; 2 Burl. Nat. & Pol. Law, pt. 4, o. 7, n. 13.

BORDAGE. A species of base tenure by which *bordlands* were helds. The tenants were called *bordarii*. These *bordarii* would seem to have been those tenants of a less servile condition, who had a cottage and land assigned to them on condition of supplying their lord with poultry, eggs, and such small matters for his table. Whishaw; Cowel.

BORDEREAU. In French law, a note enumerating the purchases and sales which may have been made by a broker or stockbroker; also applied to the statement given to a banker with bills for discount or coupons to receive. Black; Arg. Fr. Merc. 547.

BORDLANDS. The demesnes which the lords keep in their hands for the maintenance of their board or table. Cowel.

BORDLODE. The rent or quantity of food which the *bordarii* paid for their lands. Cowel.

BOEG (Sax.). Suretyship.

Borgbriche (violation of a pledge or suretyship) was a fine imposed on the *borg* for property stolen within its limits.

A tithing in which each one became a surety for the others for their good behavior. Spelman, Gloss.; Cowel; 1 Bla. Com. 115.

BORN. See BIRTH.

It is now settled according to the dictates of common sense and humanity, that a child *en ventre sa mere*, for all purposes for his own benefit, is considered as absolutely born; 5 S. & R. 40.

If an infant is born dead or at such an early stage of pregnancy as to be unable to live it is to be considered as never born; 2 Paige, Ch. 35.

BOROUGH. A town; a town of note or importance. Cowel. An ancient town. Littleton § 164. A town which sends burgesses to parliament, whether corporate or not. 1 Bla. Com. 115; Whishaw.

A corporate town that is not a city. 1 M. & G. 1; Cowel. In its more modern English acceptation, it denotes a town or

city organized for purposes of government. 3 Steph. Com. 11th ed. 33.

It is impossible to reconcile the meanings of this word given by the various authors cited, except upon the supposition of a change of requirements necessary to constitute a borough at different periods. The only essential circumstance which underlies all the meanings given would seem to be that of a number of citizens bound together for purposes of joint action, varying in the different boroughs, but being either for representation or for municipal government.

In American Law. In Pennsylvania, the term denotes a political division, or organized for municipal purposes; and the same is true of Connecticut and New Jersey. Sav. Bor. L. 4; 23 Conn. 128; see also 18 Ohio St. 496; 1 Dill. Mun. Corp. § 41, n.

In Scotch Law. A corporation erected by charter from the crown. Bell, Dict.

BOROUGH COURT OF LIVERPOOL. See PASSAGE COURT.

BOROUGH COURTS. In English Law. Private courts of limited jurisdiction held in particular districts by prescription, charter, or act of parliament, for the prosecution of petty suits. 19 Geo. III. c. 70; 3 Will. IV. c. 74; 3 Bla. Com. 80.

BOROUGH ENGLISH. A custom prevalent in some parts of England, by which the youngest son inherits the estate in preference to his older brothers. 1 Bla. Com. 75.

The custom is said by Blackstone to have been derived from the Saxons, and to have been so called in distinction from the Norman rule of descent; 2 Bla. Com. 83. A reason for the custom is found in the fact that the elder children were usually provided for during the life of the parent as they grew up, and removed, while the younger son usually remained. See, also, Bacon, Abr.; Comyns, Dig. *Borough English*; *Termes de la Ley*; Cowel. The custom applies to socage lands; 2 Bla. Com. 83.

BORROW. While often used in the sense of obtaining a thing to be returned in specie, is not limited to that sense. There may be a borrowing where an equivalent is paid annually in the form of interest, though the contract be perpetual and the loan irredeemable. Anderson; 39 Leg. Int. 98. "Borrowing" imports a promise or understanding that what is borrowed will be repaid or returned, the thing itself or something like it of equal value, with or without compensation for the use of it. To borrow is reciprocal with "to lend." *Id.*; 78 N. Y. 177. The word is often used in the sense of returning the thing borrowed in species, as to borrow a book, or any other thing to be returned again. But it is evident where money is borrowed the identical money loaned is not to be returned, because if this is so, the borrower would derive no benefit from the loan. In the broad sense of the term it means a contract for the use of money. 13 Neb. 88; 78 N. Y. 177.

The word "borrowed" imports necessarily an obligation to return the thing borrowed or its value. 7 J. J. Mar. (Ky.) 324.

The words "I have borrowed" so much money used in a writing import a promise to repay it; a paper in which the signer used the words, without any other stipulation to pay, is a note for the direct payment of money. 6 Dana (Ky.) 341.

BORROWER. He to whom a thing is lent at his request.

In general he has the right to use the thing borrowed, himself, during the time and for the purpose intended between the parties. He is bound to take extraordinary care of the thing borrowed; to use it according to the intention of the lender; to restore it in proper condition at the proper time; Story, Bailm. § 268; Edw. Bailm. 135; 2 Kent 446. See BAILMENT.

BOSCAGE. That food which wood and trees yield to cattle.

To be quit of boscase is to be discharged of paying any duty of wind-fall wood in forest; Whishaw; Manwood, For. Laws.

BOSCUS. Wood growing; wood; both high wood or trees, and underwood or coppice. The high wood is properly called *saltus*. Cowel; Spelman, Gloss.; Co. Litt. 5 a.

BOTE. A recompense or compensation. The common word to *boot* comes from this word. Cowel. The term is applied as well to making repairs in houses, bridges, etc., as to making a recompense for slaying a man or stealing property. *House bote*, materials which may be taken to repair a house; *hedge bote*, to repair hedges; *brig bote*, to repair bridges; *man bote*, compensation to be paid by a murderer. Bote is known to the English law also under the name of *Estover*; 1 Washb. R. P. 5th ed. *99; 2 Bla. Com. 35.

BOTTOMRY. In Maritime Law. A contract in the nature of a mortgage, by which the owner of a ship, or the master, as his agent, borrows money for the use of the ship, and for a specified voyage, or for a definite period, pledges the ship (or the keel or bottom of the ship, *pars pro toto*) as a security for its repayment, with maritime or extraordinary interest on account of the marine risks to be borne by the lender; it being stipulated that if the ship be lost in the course of the specified voyage, or during the limited time by any of the perils enumerated in the contract, the lender shall also lose his money. 2 Hagg. Adm. 48; 2 Sumn. 157; Abb. Sh. 13th ed. 152.

Bottomry differs materially from an ordinary loan. Upon a simple loan the money is wholly at the risk of the borrower, and must be repaid at all events. But in bottomry the money, to the extent of the enumerated perils, is at the risk of the lender during the voyage on which it is loaned, or for the period specified. Upon an ordinary loan only the usual legal rate of interest can be reserved; but upon *bottomry* and *respondentia* loans any rate of interest, not grossly extortionate, which may be agreed upon, may be legally contracted for.

When the loan is not made upon the ship, but on the goods laden on board and which are to be sold or exchanged in the course of the voyage, the borrower's personal responsibility is deemed the principal security for the performance of the contract, which is therefore called *respondentia*, which see. And in a loan upon *respondentia* the lender must be paid his principal and interest though the ship perish, provided the goods are saved. In most other respects the contracts of *bottomry* and of *respondentia* stand substantially upon the same footing. See further, 10 Jur. 845; Thornt. 285, 512; 2 W. Rob. Adm. 83-85; 3 Mas. 225.

Bottomry bonds may be given by a master appointed by the charterers of the ship, by masters necessarily substituted or appointed abroad, or by the mate who has become master, as *heres necessarius*, on the death of the appointed master. 1 Dod. 278; 3 Hagg. Adm. 18; 3 Sumn. 246. But while in a port in which the owners, or one of them, or a recognized agent of the owners, reside, the master, as such, has no authority to make contracts affecting the ship, and a bottomry bond executed under such circumstances is void; 1 Wash. C. C. 49; 22 Eng. L. & Eq. 623; 31 L. J. Adm. 81. Unless, it has been held in an English case, he has no means of communicating with the owners; 1 Dod. 273. See 7 Moore's P. C. C. 398. The master has authority to hypothecate the vessel only in a foreign port; but in the jurisprudence of the United States all maritime ports, other than those of the state where the vessel belongs, are foreign to the vessel; 1 Cliff. 308; 1 Blatch. & H. 66, 90.

The owner of the vessel may borrow upon bottomry in the vessel's home port, and whether she is in port or at sea; and it is not necessary to the validity of a bond made by the owner that the money borrowed should be advanced for the necessities of the vessel or her voyage; 1 Pars. Ins. 210; 2 Sumn. 157; 1 Paine 671; 2 Dods. Ad. R. 461. But it may well be doubted, whether when money is thus borrowed by the owner for purposes other than necessities or uses of the ship, and a bottomry bond in the usual form is given, a court of admiralty has jurisdiction to enforce the lien; Bee 348. As a contract made and to be performed on land, and having no necessary connection with the business of navigation, it is probable that it would not now be deemed a maritime contract, but would take effect and be enforced as a common-law mortgage. See Abb. Shipp. 13th ed. 152, and Perkins's notes; 1 Wash. C. C. 293; 20 How. 393; Bee 433; 1 Swab. 269. But see 1 Paine 671; 1 Pet. Adm. 295.

If the bond be executed by the master of the vessel, it will be upheld and enforced only upon proof that there was a necessity

for the loan, and also for pledging the credit of the ship; as the authority of the master to borrow money on the credit of the vessel rests upon the necessity of the case, and only exists under such circumstances of necessity as would induce a prudent owner to hypothecate his ship to raise money for her use; 3 Hagg. Adm. 66, 74; 8 Sumn. 228; 1 Wheat. 96; 1 Paine 671; Abb. Sh. 13th ed. 163; Bee 120. His authority is not confined, however, to such repairs and supplies as are absolutely and indispensably necessary, but includes also all such as are reasonably fit and proper for the ship and the voyage; 1 Pars. Ins. 215; 10 Wall. 192, 204; 9 id. 129; 17 id. 666.

If the master could have obtained the necessary supplies or funds on the personal credit of himself or of his owner, and this fact was known to the lender, the bond will be held invalid; 3 Wash. 290; 3 Sumn. 257. And if the master borrows on bottomry without apparent necessity, or when the owner is known to be accessible enough to be consulted upon the emergency, the bond is void, and the lender can look only to the personal responsibility of the master; 3 W. Rob. Adm. 243, 265. For the fact that the advances were necessary, and were made on the security of the vessel, is not, in any instance, to be presumed; 3 Wash. C. C. 290. And moneys advanced to the master without inquiry as to the necessity of the advance, or seeing to the proper application, have been disallowed; 33 Eng. L. & Eq. 602. It may be given after the advances have been made, in pursuance of a prior agreement; 8 Pet. 538. If given for a larger sum than the actual advances, in fraud of the owners or underwriters, it vitiates the bond and avoids the bottomry lien even for the sum actually advanced; 18 How. 63; 1 Curt. C. C. 341. See 1 Wheat. 96; 8 Pet. 538.

The contract of bottomry is usually in form a bond (termed a bottomry bond) conditioned for the repayment of the money lent, with the interest agreed upon, if the ship safely accomplishes the specified voyage or completes in safety the period limited by the contract; 2 Sumn. 157. See 36 Fed. Rep. 919. Sometimes it is in that of a bill of sale, and sometimes in a different shape; but it should always specify the principal lent and the rate of maritime interest agreed upon; the names of the lender and borrower; the names of the vessel and of her master; the subject on which the loan is effected, whether of the ship alone, or of the ship and freight; whether the loan is for an entire or specific voyage or for a limited period, and for what voyage or for what space of time; the risks the lender is contented to bear; and the period of repayment. It is negotiable; 5 C. Rob. Adm. 102; 1 Newb. Adm. 514; 5 Jur. n. s. 632. Where the bond covers "the vessel, her tackle, apparel, furniture, and freight as per charter-party," demurrage previously earned is not freight; 157 Mass. 132.

In case a highly extortionate or wholly unjustifiable rate of interest be stipulated for in a bottomry bond, courts of admiralty will enforce the bond for only the amount fairly due, and will not allow the lender to recover an unconscionable rate of interest. But in mitigating an exorbitant rate of interest they will proceed with great caution. For the course pursued where the amount of interest was accidentally omitted, see 1 Swab. 240. Fraud will induce a court of equity to set aside a bottomry bond, in England; 8 Sim. 358; 3 M. & C. 451, 453, n.

Where the express contract of bottomry is void for fraud, no recovery can be had, on the ground of an implied contract and lien of advances actually made; 1 Curt. C. C. 340; 18 How. 63. But a bottomry bond may be good in part and bad in part; 3 Mas. 255; Ware 249; Olc. 55. And it has been held in England that fraud of the owner or mortgagor of a vessel, which might render the voyage illegal, does not invalidate a bottomry bond to a *bond fide* lender; L. R. 1 Adm. & Ec. 13.

Not only the ship, her tackle, apparel, and furniture (and the freight, if specifically pledged), are liable for the debt in case

the voyage or period is completed in safety, but the borrower is also, in that event, personally responsible. See 2 Bla. Com. 457; Marsh. Ins. b. 2, c. 1; Code de Comm. art. 311; 157 Mass. 132. But only, it would seem, in cases in which such responsibility has been especially made a condition of the bond; 6 Am. L. Rev. 763; 48 Barb. 269.

The borrower on bottomry is affected by the doctrines of seaworthiness and deviation; 3 Kent 360; Phillips, Ins. sec. 988, 989; and if, before or after the risk on the bottomry bond has commenced, the voyage or adventure is voluntarily broken up by the borrower, in any manner whatsoever, whether by a voluntary abandonment of the voyage or adventure, or by a deviation or otherwise, the maritime risks terminate, and the bond becomes presently payable; 2 Sumn. 157; 3 Kent 360. But maritime interest is not recoverable if the risk has not commenced.

But in England and America the established doctrine is that the owners are not personally liable, except to the extent of the fund pledged which has come into their hands; 8 Pet. 538, 554; 1 Hagg. Adm. 1, 13. If the ship or cargo be lost, not by the enumerated perils of the sea, but by the fraud or fault of the borrower or master, the hypothecation bond is forfeited and must be paid.

The risks assumed by the lender are usually such as are enumerated in the ordinary policies of marine insurance. If the ship be wholly lost in consequence of these risks, the lender, as before stated, loses his money; but the doctrine of constructive total loss does not apply to bottomry contracts; 1 Arn. Ins. 115; 1 Maule & S. 30; 9 Eng. L. & Eq. 553; 23 L. T. R. Ex. 371; 2 Alb. L. J. 92; 3 Story 465. See 13 C. B. 443; 1 Low. 390.

It is usual in bottomry bonds to provide that, in case of damage to the ship (not amounting to a total loss) by any of the enumerated perils, the lender shall bear his proportion of the loss, viz.: an amount which will bear the same proportion to the whole damage that the amount lent bears to the whole value of the vessel prior to the damage. Unless the bond contains an express stipulation to that effect, the lender is not entitled to take possession of the ship pledged, even when the debt becomes due; but he may enforce payment of the debt by a proceeding *in rem*, in the admiralty, against the ship; under which she may be arrested, and, in pursuance of a decree of the court, ultimately sold for the payment of the amount due. And this is the ordinary and appropriate remedy of the lender upon bottomry; though he has also, as a general rule, his remedy by action of covenant or debt at common law upon the bond; Tyl. Mar. Loans 782. It was held in Mississippi that state legislatures have no authority to create maritime liens, or confer jurisdiction on state courts to enforce such liens by proceedings *in rem*. Such jurisdiction is exclusively in the courts of admiralty of the United States; 9 Am. L. Reg. N. S. 683; 49 Ala. 436. See 7 Wall. 624.

In entering a decree in admiralty upon a bottomry bond, the true rule is to consider the sum lent and the maritime interest as the principal, and to allow common interest on that sum from the time such principal became due; 3 Mas. 255; 2 Arn. Ins. 6th ed. 40, 41. Where money is necessarily taken up on bottomry to defray the expenses of repairing a partial loss, against which the vessel is insured, the underwriter (although he has nothing to do with bottomry bond) is liable to pay his share of the extra expense of obtaining the money, in that mode, for the payment of such expenses; 12 Pet. 378.

The lien or privilege of a bottomry-bond holder, like all other maritime liens, has, ordinarily, preference of all prior and subsequent common-law and statutory liens, and binds all prior interests centering in the ship; 4 Cra. 328. It holds good (if reasonable diligence be exercised in enforcing it) as against subsequent purchasers and common-law incumbrancers; but the lien of a bottomry bond is not indelible, and, like

other admiralty liens, may be lost by unreasonable delay in asserting it, if the rights of purchasers or incumbrancers have intervened; 9 Wheat. 409; 16 Bost. L. Rep. 264; 17 id. 93, and authorities there cited; 2 W. & M. 48; 1 Swab. 269; 1 Cliff. 308; 5 Rob. Adm. 94. The lien extends to the fund recoverable for the ship's tortious destruction; 59 Fed. Rep. 621. The rules under which courts of admiralty marshal assets claimed to be applicable to the payment of bottomry and other maritime liens and of common-law and statutory liens, will be more properly and fully considered in the article Maritime Liens, which see. But it is proper here to state that, as between the holders of two bottomry bonds upon the same vessel in respect to different voyages, the later one, as a general rule, is entitled to priority of payment out of the proceeds of the vessel; 1 Dod. 201; Olc. 55; 17 Bost. L. Rep. 93; 1 Paine 671.

Seamen have a lien, prior to that of the holder of the bottomry bond, for their wages for the voyage upon which the bottomry is founded, or any subsequent voyage; but the owners are also personally liable for such wages, and if the bottomry-bond holder is compelled to discharge the seamen's lien, he has a resulting right to compensation over against the owners, and has been held to have a lien upon the proceeds of the ship for his reimbursement; 8 Pet. 538; 1 Abb. Adm. 150; 1 Hagg. Adm. 62. And see 1 Swab. 261; 1 Dod. 40; 4 Cranch 328.

Under the laws of the United States, bottomry bonds are only *quasi* negotiable, and except in cases subject to the principle of equitable estoppel, the indorsee takes only the payee's right; 87 Fed. Rep. 436.

The act of congress of July 29, 1850, declaring bills of sale, mortgages, hypothecations, and conveyances of vessels invalid against persons other than the grantor or mortgagor, his heirs and devisees, not having actual notice thereof, unless recorded in the office of the collector of the customs where such vessel is registered or enrolled, expressly provided that the lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of that act. See Pars. Mar. Law; Abbott, Shipping, with Story and Perkins's notes; Hall's translation of Emerigon's Essay on Maritime Loans, with the Appendix; Tyler, Usury (pt. iii. Mar. Loans); Marsh. Ins. book 2; 3 Kent 49; 8 Pet. 538; 1 Hagg. Adm. 179; 2 Pet. Adm. 295; 54 Fed. Rep. 188. See NAUTICA PECUNIA.

BOUGHT NOTE. A written memorandum of a sale, delivered by the broker who effects the sale, to the vendee; Story, Ag. § 28; 11 Ad. & E. 589; 8 M. & W. 884.

Bought and sold notes are made out usually at the same time, the former being delivered to the vendee, the latter to the vendor. When the broker has not exceeded his authority, both parties are bound thereby; 4 Esp. 114; 2 Campb. 337; 1 C. & P. 388; 5 B. & C. 436; 6 id. 117; 1 Bell, Com. 4th ed. 347, 477. Where the same broker acts for both parties, the notes must correspond; 1 Holt, N. P. 172; 5 B. & C. 436; 4 Q. B. 737; 17 id. 103; 3 Wend. 459; 2 Sandf. 133. The broker, as to this part of the transaction, is agent for both parties; 2 H. & N. 210; 16 Gray 442; 71 Fa. 69. Whether a memorandum in the broker's books will cure a disagreement, see 9 M. & W. 802; 1 M. & R. 368; 17 Q. B. 115; 1 H. & N. 484; but it is said to be the better opinion that the signed entry in the broker's book constitutes the real contract between the parties; Whart, Ag. § 720; Mech. Ag. 932; 1 C. P. D. 777; 20 L. J. Q. B. 529; 9 M. & W. 802; but it may be shown that the entry was in excess of the broker's authority; 4 L. R. Ir. 94; that the bought and sold notes do not constitute the contract, see 17 Q. B. 115. Where there is a variance between the bought and sold notes, and no entry of the transaction, there is no contract; Whart Ag. § 721; 17 Q. B. 115. A bought note will take the case out of

the Statute of Frauds, if there is no variance; 16 C. B. N. S. 11. See a full discussion in Benj. Sales § 276; Tiedman, Sales § 79.

BOUND BAILIFF. A sheriff's officer, who serves writs and makes arrests. He is so called because bound to the sheriff for the due execution of his office; 1 Bla. Com. 345.

BOUNDARY. Any separation, natural or artificial, which marks the confines or line of two contiguous estates. 3 Toullier, n. 171.

The term is applied to include the objects placed or existing at the angles of the bounding lines, as well as those which extend along the lines of separation.

A natural boundary is a natural object remaining where it was placed by nature.

A river or stream is a natural boundary, and the centre line of the stream is the line; 12 Johns. 222; 6 Cow. 579; 1 Rand. 417; 3 id. 33; 4 Pick. 268; 1 Halst. 1; 4 Mass. 240; 9 N. H. 461; 1 Tayl. 136; 11 Miss. 360; 5 Harr. & J. 245; 154 Mass. 270. And see 2 Conn. 481; 17 Johns. 185; 4 Ill. 510; 3 Ohio 495; 4 Pick. 199; 14 S. & R. 71; 11 Ala. 436; 4 Mo. 343; 1 M. & C. 580; 11 Ohio 138; 1 Whart. 124; 63 Pa. 210; where a natural pond is the boundary, the line is the natural shore; but where an artificial pond, the thread of the stream; 13 Pick. 231; 9 N. H. 461; 10 Me. 224; 15 id. 198; 16 id. 257; 62 id. 38; 45 Mo. App. 335; 134 N. Y. 335; 61 N. W. Rep. (Iowa) 250; where a meandered lake, the middle thereof; 61 N. W. Rep. (S. D.) 479; where the seashore, the line is at low water mark; 3 Johns. 262; 5 Gray 335; 18 id. 254; 2 Wall. 337; 133 N. Y. 227. So where one of the great lakes is the boundary; 34 Ohio St. 429; or a navigable lake; see 50 Minn. 438. A grant of land bounded by navigable tide-water carries no title to land below high water mark; 63 Hun 169.

Where land is bounded by the sea, and the latter suddenly recedes, leaving considerable space uncovered, this new land, under the royal prerogative, becomes the property of the king. But if the dereliction be gradual, and by imperceptible degrees, then the land gained belongs to the adjacent owner, for *de minimis non curat lex*; 2 Bla. Com. 262; 8 Barn. & C. 91, and cases cited. Similarly, where a stream forming the boundary between two owners gradually changes its course, it continues to mark the line; but if the change be sudden and immediate, the boundary remains in the old channel; 2 Bla. Com. 262; 3 Tex. App. 323; 26 Ohio St. 40; 4 Neb. 437; 11 Wall. 336.

When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. 202 U. S. 49, quoting Mr. Justice Field. See THALWEG.

An artificial boundary is one erected by man.

The ownership, in case of such boundaries, must, of course, turn mainly upon circumstances peculiar to each case; 5 Taunt. 20; 3 id. 138; 8 B. & C. 269; generally extending to the centre; 4 Hill, N. Y. 369; 6 Conn. 471. A tree standing directly on the line is the joint property of both proprietors; 12 N. H. 454; otherwise, where it only shades so near that the roots penetrate; 1 M. & M. 112; 2 Rolle 141; 3 Greenl. Ev. § 617. Land bounded on a highway extends to the centre-line, though a private street; 3 Cush. 535; 1 Sandf. 333, 344; 26 Pa. 233; 87 Tenn. 322; 85 Ky. 101; 64 Hun 832; unless the description excludes the highway; 15 Johns. 424; 11 Conn. 60; 1 Allen 448; 8 Washb. R. P. 5th ed. § 635.

Boundaries are frequently denoted by monuments fixed at the angles. In such case the connecting lines are always presumed to be straight, unless described to be otherwise; 16 Pick. 235; 6 T. B. Monr. 179; 3 Ohio 332; 1 McL. 519; 2 Washb. R. P. 5th ed. § 632. A practical surveyor may testify whether, in his opinion, certain marks on trees, piles of stones, or other marks on the ground were intended as monuments of boundaries; 10 Weekly Notes of Cases (Pa.) 321.

The following is the order of marshalling boundaries: first, the highest regard is had to natural boundaries; 100 N. C. 212; 75 Iowa 365; 121 Pa. 537; 35 Fed. Rep. 248; 71 Md. 9; 69 Tex. 445; second, to lines actually run and corners marked at the time of the grant; third, if the lines and courses of an adjoining tract are called for, the lines will be extended, if they are sufficiently established, and no other departure from the deed is required, preference being given to marked lines; fourth, to courses and distances; 1 Greenl. Ev. § 301, n.; 49 Minn. 268. See 3 Murph. 82; 4 Hen. & M. 125; 6 Wheat. 582; 8 Me. 61; 1 McL.

518; 3 Rob. La. 171; 8 Pa. 154; 85 id. 117; 38 W. Va. 1; 145 Ill. 98.

Courses and distances give way to monuments, but they must be of a permanent character, and the place where they are at the time of the conveyance must be satisfactorily located; 79 Cal. 54; 92 id. 623; 91 Mich. 29; 106 Mo. 231. When a description in a deed by metes and bounds conflicts with a description by reference to plats, the former governs; 76 Ia. 652.

Parol evidence is often admissible to identify and ascertain the locality of monuments called for by a description; 13 Pick. 267; 19 id. 445; and where the description is ambiguous, the practical construction given by the parties may be shown; 1 Metc. Mass. 378; 7 Pick. 274. Common reputation may be admitted to identify monuments, especially if of a public or quasi-public nature; 2 Washb. R. P. 5th ed. § 636; 1 Greenl. Ev. § 145; Tayl. Ev. 144; 1 Hawks 118; 1 McL. 45, 518; 10 N. H. 43; 2 A. K. Marsh. 158; 9 Dana 322, 465; 1 Dev. 340; 6 Pet. 341; 8 Leigh 697; 3 Ohio 282. And see 10 S. & R. 281; 10 Johns. 377; 7 Gray 174; 5 E. & B. 166; 6 Litt. 9; 50 Tex. 371; 73 Mich. 259; 49 Minn. 268; 92 Cal. 623. On a conflict of boundaries between deeds from the same person, the one that was first executed controls; 10 Ky. L. Rep. 960. Where there are two conflicting monuments, and one corresponds with the courses and distances, that one should be taken and the other rejected as surplusage; 118 Mo. 349.

Lost Corner or Line. A "lost corner" or "line of a boundary" may be found by extending the line from the known or proven corners of the courses called for, until they come together and the point of intersection is the lost corner. 143 Ky. 152, 136 S. W. 150.

It is a primary rule in establishing "lost corners" to go to known corners or the survey and reverse the calls, and in this way find or locate the lost corners. 143 Ky. 759, 137 S. W. 768.

What are "boundaries" is a matter of law for the court; where they are, a matter of fact for the determination of the jury, under proper instructions from the court. 162 Ky. 391, 172 S. W. 677.

The determination of the boundaries of the states of the Union is placed by the constitution in the supreme court of the United States; 12 Pet. 557; 4 How. 591; 11 Wall. 39. This position was taken by Justice Taney, who held that a controversy between states, or between individuals, in relation to the boundaries of a state, falls within the province of the court where the suit is brought to try a right of property in the soil, or any other right which is properly the subject of judicial cognizance and decision; but not a contest for rights of sovereignty and jurisdiction between states over any particular territory. This he held to be a political question; 12 Pet. 752. All the cases of boundary disputes between states which arose prior to the constitution and were tried under the articles of confederation, by courts specially constituted by Congress, are collected in 181 U. S. App. II. See UNITED STATES COURTS.

Consult, generally, Washb. R. P.; 1 Greenl. Ev. §§ 145, 301; 28 A. L. Reg. 546.

BOUNDED TREE. A tree marking or standing at the corner of a field or estate.

BOUNTY. An additional benefit conferred upon, or a compensation paid to, a class of persons.

It differs from a reward, which is usually applied to a sum paid for the performance of some specific act to some person or persons. It may or may not be part of a contract. Thus, the bounty offered a soldier would seem to be part of the consideration for his services. The bounty paid to fishermen is not a consideration for any contract, however. See 8 Allen 80; 27 Md. 320; 39 How. Fr. 431.

A premium offered or given to induce men to enlist into the public service. 39 How. Fr. 431. See MILITARY BOUNTY. LAND.

BOURSE. An exchange or meeting place for merchants. English. A stock-exchange; money-market. Wessey, Fr. Dict.

BOURSE DE COMMERCE. In the French law, an aggregation by government, of merchants, captains of vessels, exchange agents, and courtiers, the two latter being nominated by the government, in each city which has a bourse (q. v.). R. & L. Dict.; Brown.

BOUWERIE. A farm.

BOUWMASTER. A farmer.

BOVATA TERRÆ. As much land as one ox can cultivate. Said by some to be thirteen, by others eighteen, acres in extent. Skene; Spelman, Gloss.; Co. Litt. 5 a.

BOYCOTT. A confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution, and vengeance of the conspirators. 84 Va. 940; 11 Va. Law Jour. 329.

The term seems to have been derived from an incident that occurred in Ireland. Captain Boycott, an Englishman, who was agent of Lord Erne and a farmer of Lough Mask, served notices upon the lord's tenants, and they in turn, with the surrounding population, resolved to have nothing to do with him, and, as far as they could prevent it, not to allow any one else to have. His life appeared to be in danger, and he had to claim police protection. His servants fled from him, and the awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him, and no one would supply him with food. He and his wife were compelled to work in their own fields with the shadows of armed constabulary ever at their heels; Justin MacCarthy's "England under Gladstone." See 35 Alb. L. Jour. 348; 18 L. R. Ir. 430.

A combination to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, they will cause similar loss to them. Such a combination is unlawful. 15 Q. B. D. 476; 23 Q. B. D. 598; [1893] A. C. 25; [1893] 1 Q. B. 715; 106 Mass. 1; 32 N. J. L. 151; 55 Conn. 46; 147 Mass. 212; 77 Md. 396; 45 Fed. Rep. 185; 54 Fed. Rep. 730; 30 Atl. Rep. (N. J.) 891.

A boycott is not unlawful, unless attended with some act in itself illegal; 54 Minn. 223; 38 Pac. Rep. (Oreg.) 547. Combinations, in the nature of boycotts, which have been held to be unlawful conspiracies are:—to compel a member of a labor union to pay a fine assessed against him for working in a mill with steam machinery by preventing his obtaining employment; 5 Cox, C. C. 162; to obstruct an employer in the conduct of his business; 64 Mich. 252; 10 Cox, C. C. 592; to coerce an employer to conduct his business with reference to apprentices and delinquent members according to the demand of the union, by injuring his business through notices to customers and material men that dealings with him would be followed by similar measures against them; 23 Wkly. L. B. (Ohio) 48; to prevent the employment of a granite cutter declared by a labor union to be a "scab"; 59 Vet. 273; 32 N. J. L. 151; to compel an employer to discharge non-union men; 55 Ct. 46; 4 N. Y. Crim. Rep. 403; id. 429; 5 id. 509; to induce employes to leave their employment and prevent others from entering it; 107 Mass. 555; to induce workmen to quit in a body to enforce the demands of a labor union; 30 Fed. Rep. 48; parading in front of a factory with banners to induce workmen to keep away; 147 Mass. 212; gathering around a place of business and following employes to and from work, and collecting about their boarding-places with threats, intimidation, and ridicule; 152 Pa. 595. Such besetting of works is called picketing.

Boycotts may be restrained by injunction; 26 Fed. Rep. 803; a violation of which is punishable as a contempt; 64 Fed. Rep. 724; 158 U. S. 564. In several states there are statutes on the subject, some of them merely declaratory of the common law, and others, more drastic, which extend the doctrine to new acts and circumstances; Wis. Laws, 1887, 287; 1895, 240; R. S. 446 a; R. I. 242, 40; Me. R. S. 1888, 126, 18; N. Y. P. C. 168; Minn. 6423; Ill. 38, 73; Tenn. 1887, 208, 1; Ga. Code § 4498; Tex. P. C. 279, 289, 295, and 304; La. 1894, 149; Minn. 6423; Mon. P. C. 323; N. J. R. S. p. 261, § 191; p. 1296, § 9; and others cited in Stimson's Handbook of Labor Law.

See, generally, Moses, Strikes; Stimson's Handbook of Labor Law in the U. S.; STRIKES.

BOYCOTT, PRIMARY. A combination to refrain from dealing with the person aimed at, or to advise or by peaceful means persuade his customer's to refrain. 254 U. S. 466.

BOYCOTT, SECONDARY. A combination not merely to exercise primary boycott (*q. v.*), but also to exercise coercive pressure upon customers, actual or prospective, in order to cause them to withhold or withdraw patronage through fear of loss or damage to themselves. 254 U. S. 466. See PICKETING.

BOZERO. On Spanish Law. Advocate; one who pleads the causes of others, either suing or defending. *Las Partidas*, part. 3, tit. v., l. 1-6.

Called also *abogados*. Amongst other classes of persons excluded from this office are minors under seventeen, the deaf, the dumb, friars, women, and infamous persons. White, New Rec. 274.

BRANCH. A portion of the descendants of a person, who trace their descent to some common ancestor, who is himself a descendant of such person.

The whole of a genealogy is often called the *genealogical tree*; and sometimes it is made to take the form of a tree, which is in the first place divided into as many branches as there are children, afterwards into as many branches as there are grandchildren, then great-grandchildren, etc. If, for example, it be desired to form the genealogical tree of Peter's family, Peter will be made the trunk of the tree; if he has had two children, John and James, their names will be written on the first two branches, which will themselves shoot out into as many smaller branches as John and James have children; from these others proceed, till the whole family is represented on the tree. Thus the origin, the application, and the use of the word branch in genealogy will be at once perceived.

BRANDING. An ancient mode of punishment by inflicting a mark on an offender with a hot iron. It is generally disused in civil law, but is a recognized punishment for some military offences.

It is also used with reference to the marking of cattle for the purpose of identification.

BRANDY. It is judicially known that whiskey or "brandy" is a spirituous liquor. 70 S. W. 695.

BRANKS. An instrument of punishment formerly made use of in some parts of England for the correction of scolds, which it was said to do so effectually and so very safely that it was looked upon by Dr. Plots, in his History of Staffordshire, p. 389, "as much to be preferred to the ducking-stool, which not only endangers the health of the party, but also gives the tongue liberty 'twixt every dip, to neither of which is this liable; it brings such a bridle for the tongue as not only quite deprives them of speech, but brings shame for the transgression and humiliation thereupon before it is taken off."

BRASS KNUCKLES. A weapon worn on the hand for the purposes of offence or defence, so made that in hitting with the fist considerable damage is inflicted.

It is called "brass knuckles" because it was originally made of brass. The term is now used as the name of the weapon without reference to the metal of which it is made; 3 Lea 575.

BRAZIL. A republic of South Amer-

ica. The present constitution of the republic of Brazil (1890) is copied in great part from that of the United States. It has a president and vice-president elected through an electoral college for six years, a senate elected by the state legislatures for nine years, and a chamber of deputies elected by the people for three years. It has a supreme federal tribunal of fifteen judges appointed for life and a federal judicial system. It has a federal district for the national capital.

BREACH. In Contracts. The violation of an obligation, engagement, or duty.

A *continuing* breach is one where the condition of things constituting a breach continues during a period of time, or where the acts constituting a breach are repeated at brief intervals; F. Moore 242; Holt 178; 2 Ld. Raym. 1125.

In Pleading. That part of the declaration in which the violation of the defendant's contract is stated.

It is usual in assumpsit to introduce the statement of the particular breach, with the allegation that the defendant, contriving and fraudulently intending craftily and subtly to deceive and defraud the plaintiff, neglected and refused to perform, or performed, the particular act, contrary to the previous stipulation.

In debt, the breach or cause of action complained of must proceed only for the non-payment of money previously alleged to be payable; and such breach is very similar whether the action be in debt on simple contract, specialty, record, or statute, and is usually of the following form: "Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of — dollars, above demanded, nor any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, to the damage of the said plaintiff — dollars, and therefore he brings suit," etc.

The breach must obviously be governed by the nature of the stipulation; it ought to be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect; Comyns, Dig. *Pleader*, C, 45-49; 2 Wms. Saund. 181 b, c; 6 Cra. 127. And see 5 Johns. 168; 8 *id.* 111; 4 Dall. 136; 2 Hen. & M. 446; Steph. Pl., And. ed. 115.

When the contract is in the disjunctive, as on a promise to deliver a horse by a particular day, or to pay a sum of money, the breach ought to be assigned that the defendant did not do the one act nor the other; 1 Sid. 440; Hardr. 320; Comyns, Dig. *Pleader*, C.

BREACH OF CLOSE. Every unwarrantable entry upon the soil of another is a breach of his close; 3 Bla. Com. 209.

BREACH OF COVENANT. A violation of, or a failure to perform the conditions of, a bond or covenant. The remedy is in some cases by a writ of covenant; in others, by an action of debt; 3 Bla. Com. 156.

BREACH OF THE PEACE. A violation of public order; the offence of disturbing the public peace. One guilty of this offence may be held to bail for his good behavior. An act of public indecency is also a breach of the peace. The remedy for this offence is by indictment.

Persons who go out on a "strike" and then linger about the place of their former employment, hooting at others taking their places, may be bound over to keep the peace; 11 Pa. Co. C. R. 481. One may disturb the peace while on his own premises by the use of violent language to a person lawfully there; 53 Mo. App. 126.

BREACH OF POUND. The breaking any pound or place where cattle or goods distrained are deposited, in order to take them back. 3 Bl. Com. 146.

BREACH OF PRISON. An unlawful escape out of prison. This is of itself a misdemeanor; 1 Russell, Cr. 378; 4 Bla.

Com. 129; 2 Hawk. Pl. Cr. c. 18, s. 1; 7 Conn. 752. The remedy for this offence is by indictment. See ESCAPE.

BREACH OF PROMISE OF MARRIAGE. See PROMISE OF MARRIAGE.

BREACH OF TRUST. The wilful misappropriation, by a trustee, of a thing which had been lawfully delivered to him in confidence.

The distinction between larceny and a breach of trust is to be found chiefly in the terms or way in which the thing was taken originally into the party's possession; and the rule seems to be, that whenever the article is obtained upon a fair contract not for a mere temporary purpose, or by one who is in the employment of the deliverer, then the subsequent misappropriation is to be considered as an act of breach of trust. This rule is, however, subject to many nice distinctions. 15 S. & R. 93, 97. It has been adjudged that when the owner of goods parts with the possession for a particular purpose, and the person who receives them avowedly for that purpose has at the time a fraudulent intention to make use of the possession as a means of converting the goods to his own use, and does so convert them, it is larceny; but if the owner part with the property, although fraudulent means have been used to obtain it, the act of conversion is not larceny; Allison, Princ. c. 12, p. 387.

In the Year Book 21 Hen. VII. 14, the distinction is thus stated:—"Pigot. If I deliver a jewel or money to my servant to keep, and he flees or goes from me with the jewel, is it felony? Cutler said, Yes; for so long as he is with me or in my house, that which I have delivered to him is adjudged to be in my possession; as my butler, who has my plate in keeping, if he flees with it, it is felony. Same law, if he who keeps my horse goes away with him. The reason is, they are always in my possession. But if I deliver a horse to my servant to ride to market, or the fair, and he takes the horse and sells it, for he comes lawfully to the possession of the horse by delivery. And so it is if I give him a jewel to carry to London, or to pay one, or to buy a thing, and he flees with it, it is not felony; for it is out of my possession, and he comes lawfully to it. Pigot. It can well be; for the master in these cases has an action against him, viz., 'Detinue, or Account.'" See this point fully discussed in Stanford, Pl. Cr. lib. 1. See also Year B. Edw. IV. fol. 9; 52 Hen. III. 7; 21 Hen. VII. 15. See BREAKING BULK.

BREAK. See THROUGH ROUTE.

BREAKING. Parting or dividing by force and violence a solid substance, or piercing, penetrating, or bursting through the same.

In cases of burglary and housebreaking, the removal of any part of the house, or of the fastenings provided to secure it, with violence and a felonious intent.

The breaking is actual, as in the above case; or constructive, as when the burglar or housebreaker gains an entry by fraud, conspiracy, or threats; Whart. Cr. L. 759; 2 Russell, Cr. 2; 2 Chit. Cr. L. 1092; 1 Hale, Pl. Cr. 553; Allison, Princ. 282, 291; 68 N. C. 207; 98 *id.* 629; 82 Pa. 306; 85 *id.* 54; 158 Mass. 18; lifting a latch in order to enter a building is a breaking; 82 Iowa 93. In England it has been decided that if the sash of a window be partly open, but not sufficiently so to admit a person, the raising of it so as to admit a person is not a breaking of the house; 1 Mood. 178; followed in 105 Mass. 588. See 98 Mich. 26. No reasons are assigned. It is difficult to conceive, if this case be law, what further opening will amount to a breaking. But see 1 Moody 327, 377; 1 B. & H. Lead. Cr. Cas. 524-540; BURGLARY.

It was doubted, under the ancient common law, whether the breaking out of a dwelling-house in the night-time was a breaking sufficient to constitute burglary. Sir M. Hale thinks that this was not burglary, because *fregit et exivit, non fregit et intravit*; 1 Hale, Pl. Cr. 554; 82 Pa. 324; see 55 Ala. 123. It may, perhaps, be thought that a breaking out is not so alarming as a breaking in, and, indeed, may be a relief to the minds of the inmates; they may exclaim, as Cicero did of Catiline, *Magnò me metu liberabitis, dummodo inter me atque tē murus intersit*. But this breaking was made burglary by the statute 12 Anne, c. 1, § 7 (1718). The getting the head out through a skylight has been held to be a sufficient breaking out of a house to complete the crime of burglary; 1 Jebb 99. The statute of 12 Anne is too recent to be binding as a part of the common law in all of the United States; 2 Bishop, Crim. Law § 99; 1 B. & H. Lead. Cr. Cas. 540-544.

BREAKING BULK. In Criminal Law. The doctrine of breaking bulk pro-

ceeds upon the ground of a determination of the privy of the bailment by the wrongful act of the bailee. Thus, where a carrier had agreed to carry certain bales of goods, which were delivered to him, to Southampton, but carried them to another place, broke open the bales, and took the goods contained in them feloniously and converted them to his own use, the majority of the judges held that if the party had sold the entire bales it would not have been felony; "but as he broke them, and took what was in them, he did it without warrant," and so was guilty of felony; 13 Edw. IV. fol. 9. If a miller steals part of the meal, "although the corn was delivered to him to grind, nevertheless if he steal it it is felony, being taken from the rest;" 1 Rolle, Abr. 73, pl. 16; 1 Pick. 375. This construction involves the absurd consequence of its being felony to steal part of a package, but a breach of trust to steal the whole.

In an early case in Massachusetts, it was decided that if a wagon-load of goods, consisting of several packages, is delivered to a common carrier to be transported in a body to a certain place, and he, with a felonious intent, separates one entire package, whether before or after the delivery of the other packages, this is a sufficient breaking of bulk to constitute larceny, without any breaking of the package so separated; 4 Mass. 580. But this decision is in direct conflict with the English cases. Thus, where the master and owner of a ship steals a package out of several packages delivered him to carry, without removing anything from the particular package; 1 Russ. & R. 92; or where a letter-carrier is entrusted with two directed envelopes, each containing a 5*l.* note, and delivers the envelopes, having previously taken out the two notes; 1 Den. Cr. Cas. 215; or where a drover separates one sheep from a flock entrusted to him to drive a certain distance; 1 Jebb 51; this is not a breaking of bulk sufficient to terminate the bailment and to constitute larceny; 2 Bish. Cr. L. 860, 868. The Larceny Act of 1861, 24 & 25 Vict. c. 96, § 3, has met the difficulty of deciding this class of cases in England, by providing that a bailee of any chattel, money, or valuable security, who fraudulently takes the same, although not breaking bulk, shall be guilty of larceny.

BREAKING DOORS. Forcibly removing the fastenings of a house so that a person may enter. See **ARREST**.

BREATH. In Medical Jurisprudence. The air expelled from the chest at each expiration.

Breathing, though a usual sign of life, is not conclusive that a child was wholly born alive; as breathing may take place before the whole delivery of the mother is complete; 5 C. & P. 329. See **BIRTH**; **LIFE**; **INFANTICIDE**.

BREHON LAW. The ancient system of Irish law; so named from the judges, called Brehons, or Breitheamhuin. Its existence has been traced from the earliest period of Irish history down to the time of the Anglo-Norman invasion. It is still a subject of antiquarian research. An outline of the system will be found in Knight's English Cyclopædia, and also in the Penny Cyclopædia. See 4 Encyc. Brit. 252. See **LEX BREHONIA**.

BREPHOTROPHI. In Civil Law. Persons appointed to take care of houses destined to receive foundlings. *Clef des Lois Rom. Administrateurs*.

BRETHREN. It is used in the sense of brother.

It may be legitimately used in addressing mixed multitudes, although such use is unusual; it may include a daughter; 1 Rich. Eq. 78.

This term in the limitation over a child's share in a will has been construed to include the daughters of the testator. 4 Am. & Eng. Ency. 2nd ed., 906; 1 Rich. Eq. (S. C.) 78. The word is a noun of multitude, and may undoubtedly be so employed. *Id.*

BRETHREN OF TRINITY HOUSE. See **ELDER BRETHREN**.

BRETTS AND SCOTTS, LAWS OF THE. A code or system of laws in use among the Celtic tribes of Scotland down to the beginning of the fourteenth century, and then abolished by Edward I. of England. A fragment only is now extant. See Acts of Parl. of Scotland, vol. 1, pp. 299-301, Edin. 1844. It is interesting, like the Brehon laws of Ireland, in a historical point of view.

BREVE (Lat. *breve*, *brévis*, short). A writ. An original writ. Any writ or precept issuing from the king or his courts.

It is the Latin term which in law is translated by "writ." In the Roman law these *brevia* were in the form of letters; and this form was also given to the early English *brevia*, and is retained to some degree in the modern writs. Spelman, Gloss. The name *breve* was given because they stated briefly the matter in question (*rem que est breviter narrat*). It was said to be "shaped in conformity to a rule of law" (*formatum ad similitudinem regulæ juris*); because it was requisite that it should state facts against the respondent bringing him within the operation of some rule of law. The whole passage from Bracton is as follows: "*Breve quidem, cum sit formatum ad similitudinem regulæ juris quia breviter et paucis verbis intentionem proferentes exponit, et explanat sicut regula juris, rem que est breviter narrat. Non tamen ita breve esse debent, quin rationem et vim intentionis continent.*" Bracton 418 b, § 2. It is spelled *briefe* by Brooke. Each writ soon came to be distinguished by some important word or phrase contained in the brief statement, or from the general subject-matter; and this name was in turn transferred to the form of action, in the prosecution of which the writ (or *breve*) was procured. Stephen, Pl. 9. See **WRIT**. It is used perhaps more frequently in the plural (*brevia*) than in the singular, especially in speaking of the different classes of writs.

Consult Cowel; Bracton, 108, 413 b; Fleta; Fitzherb. Nat. Brev.; Steph. Pl.; Sharsw. Bla. Com.

BREVE INNOMINATUM. A writ containing a general statement only of the cause of action.

BREVE DE MINIS. See **SECURITATE PACIS**.

BREVE NOMINATUM. A writ containing a statement of the circumstances of the action.

BREVE ORIGINALE. An original writ.

BREVE DE RECTO. A writ of right. The writ of right patent is of the highest nature of any in the law. Cowel; Fitzherb. Nat. Brev.

BREVE TESTATUM. A written memorandum introduced to perpetuate the tenor of the conveyance and investiture of lands. 2 Bla. Com. 307.

It was prepared after the transaction, and depended for its validity upon the testimony of witnesses, as it was not sealed. Spelman, Gloss.

In Scotch Law. A similar memorandum made out at the time of the transfer, attested by the *pares curiæ* and by the seal of the superior. Bell, Dict.

BREVET. In French Law. A warrant granted by government to authorize an individual to do something for his own benefit.

Brevet d'invention. A patent.

In American Law. A commission conferring on a military officer a degree of rank specified in the commission, without, however, conveying a right to receive corresponding pay. See 14 Wall. 552.

BREVIAT (Lat.). Writs. The plural of *breve*, which see.

BREVIAT ANTICIPANTIA (Lat.). Writs of prevention. See **QUIA TIMET**.

BREVIAT DE CURSU (Lat.). Writs of course. See **BREVIAT FORMATA**.

BREVIAT FORMATA (Lat.). Certain writs of approved and established form which were granted of course in actions to which they were applicable, and which could not be changed but by consent of the great council of the realm. Bracton 413 b.

All original writs, without which an action could

not anciently be commenced, issued from the chancery. Many of these were of ancient and established form, and could not be altered; others admitted of variation by the clerks according to the circumstances of the case. In obtaining a writ, a precept was issued by the party demandant, directed to the proper officer in chancery, stating the substance of his claim. If a writ already in existence and enrolled upon the Register was found exactly adapted to the case, it issued as of course (*de cursu*), being copied out by the junior clerks, called *cursitores*. If none was found, a new writ was prepared by the chancellor and subjected to the decision of the grand council, their assent being presumed in some cases if no objection was made. In 1250 it was provided that no new writs should issue except by direct command of the king or the council. The clerks, however, it is supposed, still exercised the liberty of adapting the old forms to cases new only in the instance, the council, and its successor (in this respect, at least), parliament, possessing the power to make writs new in principle. The strictness with which the common-law courts, to which the writs were returnable, adhered to the ancient form, gave occasion for the passage of the Stat. Westm. 2, c. 24, providing for the formation of new writs. Those writs which were contained in the Register are generally considered as pre-eminently *brevia formata*.

Consult 1 Reeve, Eng. Law 319; 2 *id.* 203; 1 Spence, Eq. Jur. 226, 239; Woodd. Lect.; 8 Co. Introd.; 9 *id.* Introd.; Co. Litt. 73 b, 304; Bract. 105 b, 413 b; Fleta, lib. 2, c. 2, c. 15; 8 Term 63; 17 S. & R. 194.

BREVIAT JUDICIALIA (Lat.). Judicial writs. Subsidiary writs issued from the court during the progress of an action, or in execution of the judgment.

They were said to vary according to the variety of the pleadings and responses of the parties to the action; Bract. 413 b; Fleta, lib. 2, c. 13, § 3; Co. Litt. 54 b, 73 b. The various forms, however, became long since fixed, and the power of the courts to alter them; 1 Rawle 52. Some of these judicial writs, especially that of *capias*, by a fiction of the issue of an original writ, came to supersede original writs entirely, or nearly so. See **ORIGINAL WRIT**.

BREVIAT MAGISTRALIA. Writs framed by the masters in chancery. They were subject to variation according to the diversity of cases and complaints. Bracton, 413 b; Fleta, lib. 2, c. 13, § 4.

BREVIAT TESTATA. See **BREVIAT TESTATUM**.

BREVIARIUM ALARICI. See **LEX ROMANA VISIGOTHORUM**.

BREVIARIUM ALARICIANUM. A compilation made by order of Alaric II. and published for the use of his Roman subjects in the year 506.

It was collected by a committee of sixteen Roman lawyers from the Codex Gregorianus, Hermogenianus, and Theodosianus, some of the later novels, and the writings of Gaius, Paulus, and Papinianus; 1 Mackeldey, Civ. Law § 59. See **LEX ROMANA VISIGOTHORUM**.

BREVIATE. An abstract or epitome of a writing. Holthous.

BREVIBUS ET ROTULIS LIBERANDIS. A writ or mandate directed to a sheriff, commanding him to deliver to his successor the county and the appurtenances, with all the briefs, rolls, remembrances, and other things belonging to his office.

BRIBE. In Criminal Law. The gift or promise, which is accepted, of some advantage as the inducement for some illegal act or omission; or of some illegal emolument, as a consideration for preferring one person to another, in the performance of a legal act.

BRIBERY. In Criminal Law. The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity. Co. 3d Inst. 149; 1 Hawk. Pl. Cr. c. 67, s. 2; 4 Bla. Com. 139; 2 Russ. Cr. 122; Clark, Cr. L. 335; 33 N. J. L. 102; 10 Ia. 212.

The term bribery now extends further, and includes the offence of giving a bribe to many other classes of officers; it applies both to the actor and receiver, and extends to voters, cabinet ministers, legislators, sheriffs, and other classes; 2 Whart. Cr. L. § 188. The offence of the giver and the receiver of the bribe has the same name. For the sake of distinction, that of the former—viz. the briber—might be properly denominated active bribery; while that

of the latter—viz.: the person bribed—might be called passive bribery.

Bribery at elections for members of parliament has always been a crime at common law, and punishable by indictment or information. It still remains so in England, notwithstanding the stat. 24 Geo. II. c. 14; 3 Burr. 1340, 1589. So is payment or promise of payment for votes at an election of an assistant overseer of a parish; 16 Cox, C. C. 737. To constitute the offence, it is not necessary that the person bribed should in fact vote as solicited to do; 3 Burr. 1236; or even that he should have a right to vote at all; both are entirely immaterial; 3 Burr. 1590; 33 N. J. 102.

Bribery of an office-holder, accomplished or attempted, is made a felony in the person giving or offering the bribe in New York, Pennsylvania, Maryland, West Virginia, Arkansas, Texas, Colorado, Alabama, Florida, and Louisiana; and in the following states it is a felony in the office-holder to receive or offer to receive a bribe viz.:—New York, Maryland, West Virginia, Arkansas, Texas, Nevada, and Louisiana.

An attempt to bribe, though unsuccessful, has been holden to be criminal, and the offender may be indicted; 2 Dall. 384; 4 Burr. 2500; Co. 3d Inst. 147; 2 Campb. 229; 2 Wash. Va. 88; 33 N. J. L. 102; 1 Va. Cas. 138; 2 id. 460; 8 W. N. C. (Pa.) 212. In Illinois a proposal by an officer to receive a bribe, though not bribery, was held to be an indictable misdemeanor at common law; 21 Am. L. Reg. 617 (with note by Judge Redfield); s. C. 65 Ill. 58. Keeping open house for the entertainment of the members of the legislature is not bribery; 97 Mich. 136.

On the trial of an officer for bribery for taking unlawful fees, a corrupt intent must be proved; 107 N. C. 921.

Bribery of a voter consists in the offering of a reward or consideration for his vote or his failure to vote; 32 Vt. 546; 73 Me. 91; 86 Pa. 105; 65 Ill. 58; 70 Mo. 12; 15 Q. B. 870; 1 M. & R. 265.

BRIBOUR. One who pilfers other men's goods; a thief. See Stat. 28 Edw. II. c. 1.

BRIDGE. A structure erected over a river, creek, stream, ditch, ravine, or other place to facilitate the passage thereof; including by the term both arches and abutments. 3 Harr. N. J. 109; 15 Vt. 438; 55 Ga. 609. A railway viaduct, designed only for the passage of engines and cars, is not a "bridge," within the statutory meaning of that word; 1 Wall. 116. See 7 Nev. 294; 40 N. J. L. 305.

Bridges are either public or private. Public bridges are such as form a part of the highway, common, according to their character as foot, horse, or carriage bridges, to the public generally, with or without toll; 2 East 342; though their use may be limited to particular occasions, as to seasons of flood or frost; 2 Maule & S. 293; 4 Campb. 189. They are established either by legislative authority or by dedication.

By legislative authority. By the Great Charter (9 Hen. III. c. 15), in England, no town or freeman can be compelled to make new bridges where never any were before, but by act of parliament. Under such act, they may be erected and maintained by corporations chartered for the purpose, or by counties, or in whatever other mode may be prescribed; Woolrych, Ways 196. In this country it is the practice to charter companies for the same purpose, with the right to take tolls for their reimbursement; 4 Pick. 341; or to erect bridges at the state's expense; or by general statutes to impose the duty of erection and maintenance upon towns, counties, or districts; 2 W. & S. 495; 5 Gratt. 241; 2 Ohio 508; 23 Conn. 416; 14 B. Monr. 92; 5 Cal. 426; 1 Mass. 153; 12 N. Y. 52; 2 N. H. 518; 59 Me. 80; 85 Pa. 163; 78 id. 457; 47 N. J. Law 89. For their erection the state may take private property, upon making compensation, as in case of other highways; Ang. Highw. § 81; the rule of damages for land so taken being not its mere value for agricultural purposes, but its value for a bridge site, minus the benefits derived to the owner from the erection; 17 Ga. 80.

The right to erect a bridge upon the land of another may also be acquired by mere parol license, which, when acted upon, becomes irrevocable; 11 N. H. 102; 14 Ga. 1. But see 4 R. I. 47. The franchise of a toll bridge or ferry may be taken, like other property, for a free bridge; 6 How. 507; 23 Pick. 380; 4 Gray 474; 28 N. H. 195; and, when vested in a town or other public corporation, may be so taken without compensation; 10 How. 511.

A new bridge may be erected, under legislative authority, so near an older bridge or ferry as to impair or destroy its value, without compensation, unless the older franchise be protected by the terms of its grant; 11 Pet. 420; 7 Pick. 344; 6 Paige, Ch. 554; 1 Barb. Ch. 547; 3 Sandf. Ch. 625; 8 Bush 81; 2 Dill. 392; 21 Can. S. C. R. 456; 3 Wall. 51; but, unless authorized by statute, a new bridge so erected is unlawful, and may be enjoined as a nuisance; 3 Bla. Com. 218, 219; 4 Term 566; 2 Cr. M. & R. 432; 6 Cal. 590; 3 Wend. 610; 3 Ala. 211; 11 Pet. 261, Story, J.; and if the older franchise, vested in an individual or private corporation, be protected, or be exclusive within given limits, by the terms of its grant, the erection of a new bridge or ferry, even under legislative authority, is unconstitutional, as an act impairing the obligations of contract; 7 N. H. 35; 17 Conn. 40; 10 Ala. n. s. 37. See 21 Can. S. C. R. 456. The entire expense of a bridge erected within a particular town or district may be assessed upon the inhabitants of such town or district; 10 Ill. 405; 28 Conn. 416. The absolute control of navigable streams in the United States is vested in congress; Miller, Const. U. S. 457; but in the absence of legislation by congress a state has the right to erect a bridge over a navigable river within its own limits; 3 Wall. 713; 4 Pick. 460; 1 N. H. 467; 5 McL. 425; 35 Me. 325; 22 Conn. 198; 27 Pa. 303; 15 Wend. 113; and so may a county; 12 Pa. Co. Ct. R. 669; although in exercising this right, care must be taken to interrupt navigation as little as possible; 43 Me. 198; 3 Hill 621; 22 Eng. L. & Eq. 240; 4 Harr. Del. 544; 4 Ind. 36; 2 Gray 339; 6 McL. 70, 209.

The erection of a bridge entirely within a state across a navigable river running partly within and partly without the state is not a matter so directly connected with interstate commerce as to be under the exclusive control of congress, and in the absence of congressional action the state has authority to regulate the same; 53 Fed. Rep. 16.

A state has no power to fix tolls on a bridge connecting it with another state, thereby regulating charges on interstate commerce without the consent of congress or the concurrence of such other state. The chief justice and three associate justices concurred on the ground that concurrent acts of the state incorporating the bridge company and authorizing it to fix tolls constituted a contract between the corporation and both states which could not be altered by one state without the consent of the other; 154 U. S. 204, 224. The power of erecting a bridge, and taking tolls thereon, over a navigable river forming the boundary between two states, can only be conferred by the concurrent legislation of both; 13 N. J. Eq. 46; 17 N. H. 200.

A bridge is no less a means of commercial intercourse than a navigable stream, and the state power may properly determine whether the interruption to commerce occasioned by the bridge be not more than compensated by the facilities which it affords. And if the bridge be authorized in good faith by a state, the Federal courts are not bound to enjoin it. However, congress, since its power to regulate commerce is supreme, may interpose whenever it may see fit, by general or special laws, and may prevent the building of a bridge, or cause the removal of one already erected; 3 Wall. 713, 732; 2 Wall. 403; 4 Blatchf. 74, 395; 10 Wall. 454; or it may authorize the erection of a bridge over a navigable river, although it may partially

obstruct the free navigation; 76 N. Y. 475. So railroads, having become the principal instruments of commerce, were as much under the control of congress as navigable streams, and a railroad bridge might be authorized by congress; 1 Woolw. 150; which has power directly or through a corporation created for the purpose to construct bridges over navigable waters between states, for the purpose of interstate commerce by land; 153 U. S. 525; the bridge across East River between New York and Brooklyn is authorized by acts of New York and of congress and cannot be declared to be a public nuisance, even though it may injuriously affect the business of a warehouseman on the banks of the river above the bridge; 109 U. S. 385. See also on the subject at large Miller, Const. U. S. Lect. ix. For any unnecessary interruption the proprietors of the bridge will be liable in damages to the persons specially injured thereby, or to have the bridge abated as a nuisance, by injunction, though not by indictment; such bridge, although authorized by state laws, being in contravention of rights secured by acts of congress regulating commerce; 13 How. 518; 1 W. & M. 401; 5 McL. 425; 6 id. 70, 237.

Dedication. The dedication of bridges depends upon the same principles as the dedication of highways, except that their acceptance will not be presumed from mere use, until they are proved to be of public utility; Ang. Highw. 3d ed. § 164; Thomp. Highw. 55; 5 Burr. 2594; 2 W. Bla. 685; 2 N. H. 513; 18 Pick. 312; 23 Wend. 466; 3 M. & S. 526. See 84 Ill. 279; 22 Kan. 438; HIGHWAYS.

Repairation. At common law, all public bridges are *prima facie* repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges; 13 East 95; 2 id. 342; 14 E. L. & Eq. 116; Bacon, Abr. *Bridges*, p. 533; 5 Burr. 2594. In this country, the common law not prevailing, the duty of repair is imposed by statute, generally, upon towns or counties; 9 Conn. 32; 2 N. H. 513; 12 N. Y. 52; 60 Ind. 800; 77 Pa. 317; 6 Ill. 567; 15 Vt. 438; 3 Ired. 402; 13 Pick. 60; 59 Me. 80; 3 Oreg. 424; 130 Mass. 528; 108 id. 128; 110 Mass. 565; or chartered cities; 17 Minn. 308; 47 Iowa 348; except that bridges owned by corporations or individuals are repairable by their proprietors; 4 Pick. 341; 1 Spenc. 323; 6 Johns. 90; 24 Conn. 491; and that where the necessity for a bridge is created by the act of an individual or corporation in cutting a canal, ditch, or railway through a highway, it is the duty of the author of such necessity to make and repair the bridge; 6 Mass. 458; 23 Wend. 446; 14 id. 58; 86 N. C. 287; 85 Pa. 336; 85 Wis. 679; where a bridge is rebuilt at county expense, but over which it has no control or care and on which it expends no money thereafter, it does not become liable to maintain or repair it; 71 Mich. 572. The parties chargeable must constantly keep the bridge in such repair as will make it safe and convenient for the service for which it is required; Hawk. Pl. Cr. c. 77, s. 1; 9 Dana 403; 6 Johns. 189; 1 Aik. 74; 8 Vt. 189; 23 Wend. 234. See 85 Ill. 439; 47 Iowa 348; 68 Pa. 408; 13 Hun 293; 38 Vt. 666.

Remedies for non-repairation. If the parties chargeable with the duty of repairing, neglect so to do, they are liable to indictment; Hawk. Pl. Cr. c. 77, s. 1; Ang. Highw. § 275; 1 Hill, N. Y. 50; 28 N. H. 195; 9 Pick. 142; 3 Ired. 411; Thomp. Highw. 806. It has also been held that they may be compelled by mandamus to repair; 5 Cal. 548, 556; 1 Hill 50; 14 B. Monr. 92; 3 Zabz. 214. But see 12 A. & E. 427; 3 Campb. 222; 39 Kan. 700. If a corporation be charged with the duty by charter, they may be proceeded against by *quo warranto* for the forfeiture of their franchise; 23 Wend. 254; or by action on the case for damages in favor of any person specially injured by reason of their neglect; 1 Spenc. 323; 18 Conn. 32; 6 Johns. 90; 6 Vt. 496; 6 N. H. 147; 4 Pick. 341; 2 Ind. App. 311. And a similar action is given by

statute, in many states, against public bodies chargeable with repair; 14 Conn. 475; 10 N. H. 130; Ang. Highw. 3d ed. § 286 *et seq.*; 133 Ind. 39. A city is liable to an action for damages caused by a failure to maintain a bridge as required by law; 38 Fed. Rep. 202. In Georgia counties are not liable for injuries from defects in free bridges or ferries; 77 Ga. 249.

Tolls. The law of travel upon bridges is the same as upon highways, except when burdened by tolls. See **HIGHWAYS**. The payment of tolls can be lawfully enforced only at the gate or toll-house; 15 Me. 402. Where by the charter of a bridge company certain persons are exempted from payment, such exemption is to be liberally construed; 10 Johns. 467; 7 Cow. 33; 2 Murph. 372; 2 Cow. 419; 4 Rich. Eq. 459.

Bridges, when owned by individuals, are real estate; 4 Watts 341; 1 R. I. 165; 74 N. Y. 365; and also when owned by the public; yet the freehold of the soil is in its original owner; Co. 2d Inst. 705. The materials of which they are formed belong to the parties who furnished them, subject to the public right of passage; and when the bridge is taken down or abandoned become the property of those who furnished them; 6 East 154; 6 S. & R. 229.

A private bridge is one erected for the use of one or more private persons. Such a bridge will not be considered a public bridge although it may be occasionally used by the public; 12 East 203-4; 3 Sandf. C. 625; 1 Rolle, Abr. 388, *Bridges*, pl. 2; 2 Inst. 701; 1 Salk. 359. The builder of a private bridge over a private way is not indictable for neglect to repair, though it be generally used by the public; 3 Hawks 193. See 7 Pick. 344; 11 Pet. 539; 6 Hill 516; 23 Wend. 466. See 5 So. L. Rev. 731.

See **RAILROAD BRIDGE**.

BRIEF (Lat. *brevis*, L. Fr. *briefe*, short). In Ecclesiastical Law. A papal rescript sealed with wax. See **BULL**.

In Practice. A writ. It is found in this sense in the ancient law authors.

An abridged statement of the party's case. A trial brief properly and thoroughly prepared should contain a *statement of the names of the parties*, and of their residence and occupation, the character in which they sue and are sued, and wherefore they prosecute or resist the action; an abridgment of all the pleadings; a regular, chronological, and methodical *statement of the facts*, in plain common language; a *summary of the points or questions in issue*, and of the proof which is to support such issues, mentioning specially the names of the witnesses by which the facts are to be proved, or, if there be written evidence, an abstract of such evidence; the *personal character* of the witnesses, whether the moral character is good or bad, whether they are naturally timid or over-zealous, whether firm or wavering; of the *evidence of the opposite party*, if known, and such facts as are adapted to oppose, confute, or repel it.

This statement should be perspicuous and concise. The object of a brief is to inform the person who tries the case of the facts important for him to know, to present his case properly where it has been prepared by another person—as is the general practice in England, and to some extent in this country—or as an aid to the memory of the person trying a case when he has prepared it himself.

A brief on *error or appeal* is a legal argument upon the questions which the record brings before the appellate court. These are written or printed and vary somewhat according to the purposes they are to subserve.

The rules of most of the appellate courts require the filing of printed briefs for the use of the court and opposing counsel at a time designated for each side before hearing. In the rules of the supreme court and circuit court of appeals of the United States the brief is required to contain a concise statement of the case, a specification of errors relied on, including the substance of evidence, the admission or rejection of which is to be reviewed, or any extract from a charge excepted to, and a brief of argument exhibiting clearly the points of

law or fact to be discussed, with proper reference to the record or the authorities relied upon. When a statute is cited, so much as is relied on should be printed at length. Such a brief will generally be sufficient to answer the requirements of any of the courts in the several states whose rules require printed briefs.

BRIEF OF TITLE. In Practice. An abridged and orderly statement of all matters affecting the title to a certain portion of real estate.

It should give the effective parts of all patents, deeds, indentures, agreements, records, and papers relating to such estate, with sufficient fullness to disclose their full effect, and should mention incumbrances existing, whether acquired by deed or use. All the documents of title should be arranged in chronological order, noticing particularly in regard to deeds, the date, names of parties, consideration, description of the property, and covenants. See 1 Chit. Fr. 304, 463; 14 Am. L. Reg. n. s. 529. See **ABSTRACT OF TITLE**.

BRIGBOTE (Sax.). A contribution to repair a bridge.

BRINGING MONEY INTO COURT. The act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty, or of an interpleader. See **PAYMENT INTO COURT**.

BRINGING THE SELLER AND PURCHASER TOGETHER. In Real Estate Law. Bringing the minds of two parties to an agreement resulting in the sale and purchase of land, whether the broker introduced the parties to each other or not. 83 Neb. 694, cited by Walker, Real Est. Agen. (2nd ed.) 74.

BRITISH COLUMBIA. A province of the Dominion of Canada. It is governed by a lieutenant-governor, an executive council of five, and an assembly of 27 members. The seat of government is Victoria. Justice is administered by a chief justice and four puisne judges.

BROCADE. The wages or commissions of a broker. His occupation is also sometimes called brocade.

BROCARIUS, BROCATOR. A broker; a middle-man between buyer and seller; the agent of both transacting parties. Used in the old Scotch and English law. Bell, Dict.; Cowel.

BROCELLA. A thicket, or covert, of bushes and brushwood. *Brouse* is said to be derived hence. Cowel.

BROKER. See **MONEY BROKER**. See **STOCK-JOBBER**.

BROKERAGE. The trade or occupation of a broker; the commissions paid to a broker for his services.

BROKERS. Those who are engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern. Paley, Agency 13. See Comyns, Dig. *Merchant*, C. See **BROKER**.

A broker is, for some purposes, treated as the agent of both parties; but, in the first place, he is deemed the agent only of the person by whom he is originally employed, and does not become the agent of the other until the bargain or contract has been definitely settled, as to the terms, between the principals, when he becomes the agent of both parties for the purpose of executing the bought and sold notes; Paley, Ag. Lloyd ed. 171, note p.; 1 Y. & J. 337; 15 Metc. 366; Whart. Ag. § 715; 71 Pa. 60; 5 B. & Ald. 383; 37 Mo. 663; 35 W. 663; 30 La. Ann. 210.

A commission merchant differs from a broker in that he may buy and sell in his own name without disclosing his principal, while the broker can only buy or sell in the name of his principal. A commission merchant has a lien upon the goods for his charges, advances, and commissions, while the broker has no control of the property and is only responsible for bad faith; 38 Fed. Rep. 695.

Bill and Note Brokers negotiate the purchase and sale of bills of exchange and promissory notes.

They are paid a commission by the seller of the securities; and it is not their custom to disclose the names of their principals. There is an implied warranty that what they sell is what they represent it to be; and should a bill or note sold by them turn out to be a forgery, they are held to be responsible; but it would appear that, by showing a payment over to their principals, or other special circumstances attending the transaction proving that it would be inequitable to hold them responsible, they would be discharged; Edw. Fact. & Bro. § 10; 5 R. I. 318; contra, 30 Me. 424; 4 Duer 79.

Exchange Brokers negotiate bills of ex-

change drawn on foreign countries, or on other places in this country.

It is sometimes part of the business of exchange brokers to buy and sell uncurrent bank notes and gold and silver coins, as well as drafts and checks drawn or payable in other cities; although, as they do this at their own risk and for their own profit, it is difficult to see the reason for calling them brokers. The term is often thus erroneously applied to all persons doing a money business.

Insurance Brokers procure insurance, and negotiate between insurers and insured.

Merchandise Brokers negotiate the sale of merchandise without having possession or control of it, as factors have.

Pawnbrokers lend money in small sums, on the security of personal property, generally at usurious rates of interest. They are licensed by the authorities, and excepted from the operation of the usury laws.

Real Estate Brokers. Agents employed to buy or sell real estate, to negotiate exchanges thereof, to procure leases, options and loans are usually termed brokers. Mechem on Ag. Sec. 934, cited by Walker, Real Est. Agen. 4. One who is engaged for others on a commission to negotiate contracts relative to property, with the custody of which he has no concern. 110 Ill. 186, cited by *id.* A salaried agent, not acting for a fee or commission, is not a broker. 99 P. 657, cited by *id.*

Ship Brokers negotiate the purchase and sale of ships, and the business of freighting vessels. Like other brokers, they receive a commission from the seller only.

Stock Brokers. Those employed to buy and sell shares of stocks in incorporated companies, and the indebtedness of governments.

In the larger cities, the stock brokers are associated together under the name of the *Board of Brokers*. See **STOCK EXCHANGE**. This Board is an association admission to membership in which is guarded with jealous care. Membership is forfeited for default in carrying out contracts, and rules are prescribed for the conduct of the business, which are enforced on all members. The purchases and sales are made at sessions of the Board, and are all officially recorded and published by an officer of the association. Stock brokers charge commission to both the buyers and sellers of stocks.

See Story, Ag. § 28; Malynes, *Lex Merc.* 143; Liverm. Ag.; Chit. Com. Law; Whart. Ag.; Benj. Sales; Lewis, Stock Exchange; Bid. Stock Brokers; Mechem, Ag.

BROTHEL. A bawdy-house; a common habitation of prostitutes.

Such places have always been deemed common nuisances in the United States, and the keepers of them may be fined and imprisoned. Till the time of Henry VIII. they were licensed in England, but that prince suppressed them. See Coke, 2d Inst. 205; **BAWDY-HOUSE**. For the history of these pernicious places, see Merlin, *Rép. mot. Bordel*; Parent Duchatellet, *De la Prostitution dans la Ville de Paris*, c. 5, § 1; *Histoire de la Législation sur les Femmes publiques*, etc., par M. Sabatier.

BROTHER. He who is born from the same father and mother with another, or from one of them only.

Brothers are of the whole blood when they are born of the same father and mother, and of the half-blood when they are the issue of one of them only. In the civil law, when they are the children of the same father and mother, they are called *brothers permain*; when they descend from the same father but not the same mother, they are called *brothers consanguine*; when they are the issue of the same mother, but not the same father, they are *uterine brothers*. A *half-brother* is one who is born of the same father or mother, but not of both; one born of the same parents before they were married, a *left-sided brother*; and a bastard born of the same father or mother is called a *natural brother*. See **BLOOD**; **HALF-BLOOD**; **LINE**; Merlin, *Rép. Frère*; *Dict. de Jurisp. Frère*; Code 3. 28. 27; Nov. 84, præf.; Dane, Abr. Index; 44 U. C. Q. B. 536; 3 Mas. 366; 2 Pet. 88; 52 N. Y. 67.

To obtain a conviction of the crime of incest, under a statute forbidding the marriage of brother and sister, it is not necessary to show legitimacy of birth; 84 Ia. 547.

BROTHER-IN-LAW. The brother of a wife, or the husband of a sister.

There is no *relationship*, in the former case, between the husband and the brother-in-law, nor in the latter, between the brother and the husband of the sister: there is only *affinity* between them. See Vaugh. 302, 320.

BROTHERHOOD AND GUESTLING, COURT OF. In English history, the joint meeting of two assemblies, called the Brotherhood, and the Guestling, each representing the Cinque Ports (*q. v.*) of England. Stand. Dict.

BRUISE. In Medical Jurisprudence. An injury done with violence to the person, without breaking the skin: it is nearly synonymous with *contusion* (*q. v.*). 1 Ch. Fr. 38. See 4 C. & P. 381, 487, 558, 565.

BUBBLE ACT. The name given to the statute 6 Geo. I. c. 18, which was passed in 1719, and was intended "for restraining several extravagant and unwarrantable practices therein mentioned." See 2 P. Wms. 219.

BUCKET SHOP. An establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets, or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in. 203 U. S. 536 quoting Cent. Dict.

A "bucket shop" is a place where grain, provisions, etc., are posted on blackboards as they come in on the ticker; the shop buys or sell indifferently, and its transactions amount to mere wagers on the prices of commodities. 84 Ky. 664, 2 S. W. 484.

BUDDY. In Mining. A term used by coal miners to designate the miner who works with them, helper, assistant. 159 Ky. 335; 144 Ky. 173, 137 S. W. 859.

BUGGERY. See *SODOMY*.

BUILDING. An edifice, erected by art, and fixed upon or over the soil, composed of stone, brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed. Every building is an accessory to the soil, and is therefore real estate: it belongs to the owner of the soil; Cruise, Dig. tit. 1, s. 46; but a building placed on another's land by his permission is the personal estate of the builder; 2 Bla. Com. 17.

BUILDING ASSOCIATIONS. Co-operative associations, usually incorporated, established for the purpose of accumulating and loaning money to their members upon real estate security. It is usual for the members to make monthly payments upon each share of stock, and for those who borrow money from the association to make such payments in addition to interest on the sum borrowed. When the stock, by successive payments and the accumulation of interest, has reached par, the mortgages given by borrowing members are cancelled, and the non-borrowing members receive in cash the par of their stock. See Endlich, Build. Assoc.; Wrigh. Build. Assoc.

A stockholder who actively or passively concurs in the management of the affairs of a building association must bear his share of the losses during his membership resulting from such management; 20 D. C. 455.

In considering the question of usury in a loan from a building association, payments made by the borrower as dues are not to be considered as interest, as such payments are made in order to acquire an interest in the property of the association and not for the use of money; 52 Fed. Rep. 618; a premium bid for a loan cannot be allowed as a cloak for usury; 86 Tex. 476.

Fines imposed for default in payment of dues and interest cannot be collected by foreclosure of a mortgage given to secure payment of an amount borrowed, unless it has been agreed that this may be done; 51 N. J. Eq. 272.

BUILDING CONTRACT. A building, construction or working contract is one which relates to the erection, construction, or repair of some edifice or other work or structure. 4 Elliott, Contr. § 3630.

BUILDING PERMIT. A permit issued by the proper municipal authority to

construct or alter any building, structure, wall, platform, staging or flooring, or any part thereof, or any plumbing and drainage. Such permit usually requires the approval of the superintendent of buildings. N. Y. Building Code.

The enactment of an ordinance directing and regulating the construction of buildings in cities, and requiring a permit from the city thereof, is an exercise of police power. That power is vital and indispensable. Without it cities and towns could not exist. 62 W. Va. 667.

BUILDING RESTRICTIONS. Limitations in reference to the erection of structures. They are of several kinds: (1) restrictions against erection of any structure, the aim of which is to prevent the erection of any structure whatever upon the land; (2) restrictions as to style of architecture, the cost of the structure, the material of construction, and the height of the building; (3) limitations as to the position of the building on the lot, or its distance from the street; (4) restrictions concerning the use to which the building shall be put. Such restrictions are usually to secure the certainty of the premises being occupied for residential purposes only. 5 A. & E. Ency. (2nd ed.) 6 et seq.

BULK. Merchandise which is neither counted, weighed, nor measured.

A sale by bulk is a sale of a quantity of goods such as they are, without measuring, counting, or weighing. La. Civ. Code, art. 3522, n. 6.

BULL. A letter from the pope of Rome, written on parchment, to which is attached a leaden seal impressed with the images of Saint Peter and Saint Paul.

There are three kinds of apostolical rescripts—the *brief*, the *signature*, and the *bull*; which last is most commonly used in legal matters. Bulls may be compared to the edicts and letters-patents of secular princes: when the bull grants a favor, the seal is attached by means of alken strings; and when to direct execution to be performed, with wax cords. Bulls are written in Latin, in a round and Gothic hand. Ayliffe, Par. 183; Ayliffe, Pand. 21; Merlin, Répert.

BULLA. A seal used by the Roman emperors, during the lower empire; and which was of four kinds; gold, silver, wax and lead. (See *SPELMAN*).

A letter, brief or charter, sealed with such a seal (*litterae bullatae*). Burrill; Spelman.

A brief, mandate or bull of the pope, having usually a leaden, but sometimes a golden seal. *Id.* Blount; Cowell.

BULLETIN. An official account of public transactions on matters of importance. In France, it is the registry of the laws.

BULLION. The term bullion is commonly applied to uncoined gold and silver, in the mass or lump.

It includes, *first*, grains of gold, whether large or small, the former being called lumps, or nuggets, the latter, gold dust; *second*, amalgams, in which quicksilver has been used as an agent to collect or segregate the metals; silver thus collected, and from which the quicksilver has been expelled by pressure and heat, is called *plata pura*; *third*, bars and cakes; *fourth*, plate, in which is included all articles for household purposes made of gold or silver; *fifth*, jewelry, or personal ornaments, composed of gold or silver, or both. The term bullion also includes—*sixth*, foreign coins; for, as foreign coins are not a legal tender, or, in other words, not *money*, it follows that they are only pieces of gold or silver at the mint. Such coins, when received on deposit, are treated as other deposits of gold or silver; they are weighed, and their fineness is ascertained by assay, and their value determined by their weight and fineness.

When bullion is brought to the mint for coinage, it is received by the superintendent. From the weight of the bullion and the report of the assayer, he computes the value of each deposit and also the amount of the charges or deductions, of all which he gives a detailed memorandum to the depositor, together with a certificate of the net amount of the deposit which is counter-

signed by the assayer. When the coins or bars which are the equivalent of any deposit of bullion are ready for delivery, they are paid to the depositor or his order by the superintendent; and the payments shall be made, if demanded, in the order in which the bullion shall have been brought to the mint, and in the denomination of coins delivered, the treasurer shall comply with the wishes of the depositor, unless when impracticable or inconvenient to do so. Act of Congress, Feb. 12, 1873, c. 131, § 45; Rev. Stat. U. S. § 3506; 3529. By act of Feb. 12, 1873, c. 181, § 66 (Rev. Stat. U. S. 3495), the different mints of the United States are those of Philadelphia, San Francisco, New Orleans, Carson, and Denver; the assay offices are at New York, Boise City, Idaho, Charlotte, North Carolina, Helena, Montana, and St. Louis.

The business of the assay office in New York is in all respects similar to that of the mints, except that bars only and not coin are manufactured therein, and no metal is purchased for minor coinage; Act of Feb. 12, 1873, Rev. Stat. U. S. § 3553; that of other assay offices is confined to the receipt of gold and silver bullion for melting and assaying, to be returned to the depositors in bars with weight and fineness stamped thereon; Rev. Stat. § 3558.

BULLION FUND. A deposit of public money at the mint and its branches. The object of this fund is to enable the mint to make returns of coins to private depositors of bullion without waiting until such bullion is actually coined. If the bullion fund is sufficiently large, depositors are paid as soon as their bullion is melted and assayed and the value ascertained. It thus enables the mint to have a stock of coin on hand to pay depositors in advance. Such bullion becomes the property of the government, and, being subsequently coined, is available as a means of prompt payment to other depositors; Act of June 22, 1874, Rev. Stat. U. S. § 8545.

BUNDLE. To sleep on the same bed without undressing; applied to the custom of a man and woman, especially lovers, thus sleeping. A. & E. Ency. See 2 Cal. 219; 3 Clark (Pa. L. J. Rep.) 169.

BUNDLING. A custom at one time prevalent in some sections of the United States, of young unmarried men and women, especially lovers, sleeping together in the same bed without undressing. A. & E. Ency. L. (2nd ed.) 5, 19.

BUOY. A piece of wood, or an empty barrel, or other thing, moored at a particular place and floating on the water, to show the place where it is shallow, to mark the channel, or to indicate the danger there is to navigation.

The act of congress approved the 26th September, 1850, enacts "that all buoys along the coasts, in bays, harbors, sounds, or channels, shall be colored and numbered, so that, passing up the coast or sound, or entering the bay, harbor, or channel, red buoys, with even numbers, shall be passed on the starboard hand, black buoys, with uneven numbers, on the port hand, and buoys with red and black stripes on either hand. Buoys in channel-ways to be colored with alternate white and black perpendicular stripes."

BURDEN OF PROOF. The duty of proving the facts in dispute on an issue raised between the parties in a cause. See 16 N. Y. 66; 64 Ind. 461; 100 Mass. 487.

Burden of proof is to be distinguished from *prima facie* evidence or *prima facie* case. Generally, when the latter is shown, the duty imposed upon the party having the burden will be satisfied; but it is not necessarily so. 6 Cusb. 384; 11 Metc. 460; 22 Ala. 30; 7 Blackf. 497; 1 Gray 61.

The burden of proof lies upon him who substantially asserts the affirmative of the issue; 1 Greenl. Ev. § 74; Tayl. Ev. 283, 341; 7 E. L. & Eq. 508; 3 M. & W. 510; but where the plaintiff grounds his case on negative allegations, he has the burden; 1 Term 141; 2 M. & S. 395; 1 C. & P. 230; 5 B. & C. 758; 1 Me. 134; 2 Pick. 103; 100 Mass. 487; 141 Id. 123; 1 Greenl. Ev. § 81; 107 Ind. 527. As a general rule the burden of proof is upon the plaintiff to establish the facts alleged as the cause of action; 79

Cal. 77; 74 Ia. 670; 73 id. 649; 84 Ala. 88; 78 Ga. 641; but in certain forms of action the burden may by the pleadings be shifted to the defendant.

In criminal cases, on the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, will fall, in criminal proceedings, on the prosecuting party, though in order to convict he must necessarily have recourse to negative evidence; 1 Tayl. Ev. 8th ed. §§ 113, 371; 12 Wheat. 460. The burden of proof is throughout on the government, to make out the whole case; and when a *prima facie* case is established, the burden of proof is not thereby shifted upon the defendant, and he is not bound to restore himself to that presumption of innocence in which he was at the commencement of the trial; 1 B. & H. Lead. Cr. Cas. 352; 153 Mich. 63; 62 Ia. 150; 78 Ala. 366; 48 Mich. 31. See 9 Metc. 93; 2 Gratt. 594; 1 Wright, Ohio 20; 5 Yerg. 340; 16 Miss. 401; but as every man is presumed to be sane till the contrary is shown, the burden of establishing the defence of insanity rests upon the defendant; Whart. Cr. Ev. 9th ed. § 336; Bailey, Onus Prob. 148; 4 Cra. C. C. 514; 7 Gray 583; the Pomeroy case in Massachusetts before Gray, J., reported in Whart. Hom. 753, Append.; 20 Cal. 518; 20 Gratt. 860; 3 C. & K. 138; 76 Pa. 414; 53 Mo. 267; 26 Ark. 332; 47 Cal. 134; *contra*, 63 Ala. 807; s. c. 35 Am. Rep. 30, and note; 6 Tex. App. 490; 66 Ind. 94; 16 N. Y. 58; 75 N. Y. 159; 88 N. Y. 81; 56 Miss. 269; 17 Mich. 8; 3 Heisk. 348; 40 Ill. 352.

In criminal cases, where the defence of insanity is interposed, the question of the burden of proof becomes somewhat complex, and there has resulted some confusion from the tendency of courts to deal with the subject from a restricted point of view. It is technically true as stated that the burden is primarily upon the defendant because of the presumption of sanity. It has, however, been held, in many cases, that, after proof casting doubt upon the sanity of the prisoner, the burden is shifted to the prosecution, which, after all, must show an offence committed as charged and by a person fully responsible for his acts. The true rule probably is that the prosecution may rest on the presumption of sanity, without evidence, until the defence has seriously challenged it, and then upon the whole evidence the burden remains upon the prosecution to satisfy the jury beyond a reasonable doubt, to the benefit of which the prisoner is entitled on this as on every other point; 160 U. S. 469, where a large number of cases are cited in argument. See also 3 W. & B. Med. Jur. 509, and cases cited in notes, and Guiteau's Case, 10 Fed. Rep. 161.

BUREAU (Fr.). A place where business is transacted.

In the classification of the ministerial officers of government, and the distribution of duties among them, a bureau is understood to be a division of one of the great departments of which the secretaries or chief officers constitute the cabinet.

BURGAGE. A species of tenure, described by old law-writers as but tenure in socage, where the king or other person was lord of an *ancient borough*, in which the tenements were held by a rent certain.

Such boroughs had, and still have, certain peculiar customs connected with the tenure, which distinguished it from the ordinary socage tenure. These customs are known by the name of Borough-English; and they alter the law in respect of descent, as well as of dower, and the power of devising. By it the youngest son inherits the lands of which his father died seised. A widow, in some boroughs, has dower in respect to all the tenements which were her husband's; in others, she has a moiety of her husband's lands so long as she remains unmarried; and with respect to devises, in some places, such lands only can be devised as were acquired by purchase; in others, estates can only be

devised for life; 2 Bla. Com. 82; Glanv. b. 7, c. 3; Littleton § 162; Cro. Car. 411; 1 Salk. 243; 2 Ld. Raym. 1024; 1 P. Wms. 63; Fitzh. Nat. Brev. 150; Cro. Eliz. 415.

BURGATOR. One who breaks into houses or enclosed places, as distinguished from one who committed robbery in the open country. Spelman, Gloss. *Burglaria*.

BURGESS. A magistrate of a borough. Blount. An officer who discharges the same duties for a borough that a mayor does for a city. The word is used in this sense in Pennsylvania.

An inhabitant of a town; a freeman; one legally admitted as a member of a corporation. Spelman, Gloss. A qualified voter. 3 Steph. Com. 192. A representative in parliament of a town or borough. 1 Bla. Com. 174.

BURGESS ROLL. A list of those entitled to new rights under the act of 5 & 6 Will. IV. c. 74; 3 Steph. Com. 11th ed. 84, 38.

BURGH, or BURG, or BURH. An old term signifying a small walled town or place of privilege. Some authorities make it also equivalent to borough. The word appears as an affix in the names of some cities and towns, as Edinburgh, Pittsburg; also in a few compound words, such as burgbote, burgmote etc. Abbott.

(Sax. *burgh*, hill; Goth. *berg*.) In ancient times, towns were built on hills; afterwards removed into the valleys because of the scarcity of water. Cunningham.

BURGHMOTE. In Saxon Law. A court of justice held twice a year, or oftener, in a *burg*. All the thanes and free owners above the rank of ceorls were bound to attend without summons. The bishop or lord held the court. Spence, Eq. Jur.

BURGLAR. One who commits burglary.

He that by night breaketh and entereth into the dwelling-house of another. Wilmot, Burgl. 3.

BURGLARIOUSLY. In Pleading. A technical word which must be introduced into an indictment for burglary at common law. The essential words are "feloniously and burglariously broke and entered the dwelling-house in the night-time"; Whart. Cr. Pl. 9th ed. § 265.

No other word at common law will answer the purpose, nor will any circumlocution be sufficient; 4 Co. 39; 5 id. 121; Cro. Eliz. 920; Bacon, Abr. *Indictment* (C, C); 35 W. Va. 280. But there is this distinction: when a statute punishes an offence, by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offence named, at common law. But this is not necessary when the statute describes the whole offence, and the indictment charges the crime in the words of the statute. Thus, an indictment which charges the statute crime of burglary is sufficient, without averring that the crime was committed "burglariously"; 4 Metc. 357. See 29 Tex. 47; 64 Hun 72.

BURGLARY. In Criminal Law. The breaking and entering the house of another in the night-time, with intent to commit a felony therein, whether the felony be actually committed or not; Co. 3d Inst. 63; 1 Hale, Pl. Cr. 549; 1 Hawk. Pl. Cr. c. 38, s. 1; 4 Bla. Com. 224; 2 East, Pl. Cr. c. 15, s. 1, 8th ed. 359; 2 Russ. Cr. 2; Rosc. Cr. Ev. 252; 1 Coke 441; 7 Mass. 247; 1 Whart. Cr. L. 9th ed. § 758; 40 Ala. 384.

In what place a burglary can be committed. It must, in general, be committed in a mansion-house, actually occupied as a dwelling; but if it be left by the owner *animo revertendi*, though no person resides in it in his absence, it is still his mansion; Foster, 7; 3 Rawle 207; 10 Cush. 478. See DWELLING-HOUSE. But burglary may be committed in a church, at common law. And under the statutes of some of the states,

it has been held that it could be committed in a store over which were rooms in which the owner lived; 71 N. Y. 561. A shoe-shop in a room connected with the dwelling is a part of it; 98 Mich. 26; a wheat house; 1 Lea 444; a railroad depot; 51 Vt. 287; a stable; 94 Ill. 456; but not a mill-house, seventy-five yards from the owner's dwelling, and not shown to be appurtenant; 3 Cox 581; Co. 3d Inst. 64. It must be the dwelling-house of another person; 2 Bish. Cr. Law § 90; 2 East, Pl. Cr. 502. See 4 Dev. & B. 423; 12 N. H. 42; 1 R. & R. 525; 1 Mood. 42. A storehouse in which a clerk sleeps to protect the property is a dwelling; 90 N. C. 730; 68 id. 207; 2 Cra. 21.

At what time it must be committed. The offence must be committed in the night; for in the daytime there can be no burglary; 4 Bla. Com. 224; 1 C. & K. 77; 16 Conn. 32; 10 N. H. 105. For this purpose it is deemed night when by the light of the sun a person cannot clearly discern the face or countenance of another; 1 Hale, Pl. Cr. 550; Co. 3d Inst. 62; Clark, Cr. L. 237; 1 C. & P. 297; 7 Dane, Abr. 134. This rule, it is evident, does not apply to moonlight; 4 Bla. Com. 224; 2 Russ. Cr. 32; 10 N. H. 105; 6 Miss. 20; 111 N. C. 690. The breaking and entering need not be done the same night; 1 R. & R. 417; but it is necessary that the breaking and entering should be in the night-time; for if the breaking be in daylight and the entry in the night, or vice versa, it is said, it will not be burglary; 1 Hale, Pl. Cr. 551; 2 Russ. Cr. 32. But *quære*, Wilmot, Burgl. 9. See Comyns, Dig. *Justices*, P. 2; 2 Chit. Cr. Law 1092. In some states by statute the breaking and entering in the daytime with intent to commit a misdemeanor or felony is burglary; 3 Wash. St. 131; 111 Mo. 257.

The means used. There must be both a breaking and an entry or an exit. An actual breaking takes place when the burglar breaks or removes any part of the house, or the fastenings provided for it, with violence; 1 Bish. Cr. Law 91. Breaking a window, taking a pane of glass out, by breaking or bending the nails or other fastenings; 1 C. & P. 300; 9 id. 44; 1 R. & R. 341, 499; 1 Leach 406; 52 Ala. 376; cutting and tearing down a netting of twine nailed over an open window; 8 Pick. 354, 384; 36 N. E. Rep. (Ind.) 278; raising a latch, where the door is not otherwise fastened; 1 Stra. 481; 8 C. & P. 747; Cox 429; 1 Hill, N. Y. 336; 25 Me. 500; 1 Houst. Cr. Cas. 367, 402; 1 Lea 444; 34 Ohio 426; 81 Iowa 93; picking open a lock with a false key; putting back the lock of a door, or the fastening of a window, with an instrument; lowering a window fastened only by a wedge or weight; 1 R. & R. 355, 451; 117 Mo. 395; 52 Ala. 376; or opening a door when not locked or bolted; 77 Ga. 762; *contra*, 13 S. W. Rep. (Tex.) 609; 20 Iowa 413; 34 Ohio St. 426; 22 Mich. 229; 68 Ala. 96; 68 Ill. 271; turning the key when the door is locked in the inside, or unloosing any other fastening which the owner has provided; lifting a trap-door; 1 Mood. 377; but see 4 C. & P. 231; are several instances of actual breaking. But removing a loose plank in a partition wall was held not a breaking; 1 Mass. 476. According to the Scotch law, entering a house by means of the true key, while in the door, or when it had been stolen, is a breaking; Alison, Pr. 284. See 1 Swint. Just. 433. Constructive breakings occur when the burglar gains an entry by fraud; 1 Cr. & D. 202; Hob. 62; 18 Ohio 308; 9 Ired. 463; 82 Pa. 306; 85 id. 54; by conspiracy or threats; 1 Russ. Cr. Graves ed. 792; 2 id. 2; 2 Chit. Cr. Law 1093; 98 N. C. 629. Where one is let into a store in the night-time on pretence of making a purchase and while in he unbolts a door and admits his accomplice, who secretes himself on the inside and afterwards steals, both may be convicted of breaking and entering; 158 Mass. 18. Where a window is slightly raised in the daytime so as to prevent the bolt from being effectual, it would not prevent the subsequent breaking and entering in the night-time through the window

from being burglary; 98 Mich. 26. The breaking of an inner door of the house will be sufficient to constitute a burglary; 1 Hale, Pl. Cr. 553; 1 Stra. 481; 8 C. & P. 747; 1 Hill & D. 63; 2 Bish. Cr. Law § 97; and it is not necessary that such breaking be accompanied with an intention to commit a felony in the very room entered; 5 Pa. 66. It is error to charge that the entry through an open door in the nighttime with intent to steal is burglary; 21 S. W. Rep. (Tex.) 380.

Any, the least entry, with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient to constitute the offence; Co. 3d Inst. 64; 4 Bla. Com. 227; Bacon, Abr. Burglary (B); Comyns, Dig. Justices, P. 4; 40 Ala. 384; 50 id. 153; 43 Tex. 276; 111 Mass. 395; 44 Mich. 305. Where a person enters a chimney of a storehouse intending to go down such into the store to steal, he is guilty of burglary; 97 Ala. 81. But the introduction of an instrument, in the act of breaking the house, will not be sufficient entry unless it be introduced for the purpose of committing a felony; 1 Leach 406; 1 Mood. 183; 1 Gabb. Cr. Law 174. The whole physical frame need not pass within; 2 Bish. Cr. Law § 92; 1 Gabb. Cr. Law 176. See 1 R. & R. 417; 7 C. & P. 432; 9 id. 44; 4 Ala. n. s. 643.

There was, at common law, doubt whether breaking out of a dwelling-house would constitute burglary; 4 Bla. Com. 227; 1 B. & H. Lead. Cr. Cas. 540; but it was declared to be so by stat. 12 Anne, c. 7, § 3, and 7 & 8 Geo. IV. c. 29, § 11. The better opinion seems to be that it was not so at common law; 82 Pa. 324; Whart. Cr. L. 9th ed. § 771; *contra*, 49 Conn. 489; s. c. 21 Am. Rep. 665. As to what acts constitute a breaking out, see 1 Jebb 99; 8 C. & P. 747; 1 Russ. Cr. Graves ed. 792; 1 B. & H. Lead. Cr. Cas. 540-544.

The intention. The intent of the breaking and entry must be felonious; if a felony, however, be committed, the act will be *prima facie* evidence of an intent to commit it; 1 Gabb. Cr. Law 192. See 31 Tex. Cr. R. 359; 43 N. H. 485; 65 Cal. 225. See 6 R. I. 195; 20 Pick. 356; 63 Ala. 143. If the breaking and entry be with an intention to commit a trespass, or other misdemeanor, and nothing further is done, the offence will not be burglary; 7 Mass. 245; 16 Vt. 551; 96 Cal. 289; 1 Hale, Pl. Cr. 560; East, Pl. Cr. 509, 514, 515; 2 Russ. Crimes 33. Consult Bishop, Chitty, Clark, Wharton, Gabbett, Russell, on Criminal Law; Bennett & Heard, Lead. Cr. Cas.; Wilmot, Digest of Burglary.

BURGOMASTER. In Germany, this is the title of an officer who performs the duties of a mayor.

BURH. See BURGH.

BURIAL. The act of interring the dead.

No burial is lawful unless made in conformity with the local regulations; and when a dead body has been found, it cannot be lawfully buried until the coroner has holden an inquest over it. In England it is the practice for coroners to issue warrants to bury, after a view. The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial. 2 Den. Cr. Cas. 325. See DEAD BODY.

BURIAL INSURANCE. See INSURANCE.

BURKING-BURKISM. Murder committed with the object of selling the cadaver for purposes of dissection, particularly and originally by suffocating or strangling the victim.

So named from William Burke, a notorious practitioner of this crime, who was hanged at Edinburgh in 1829. It is said that the first instance of his name being thus used as a synonym for the form of death he had inflicted on others occurred when he himself was led

to the gibbet, the crowd around the scaffold shouting "Burke him." Black.

BURLAW COURTS. In Scotch Law. Assemblages of neighbors to elect burlaw men, or those who were to act as rustic judges in determining disputes in their neighborhood. Skene; Bell, Dict.

BURNING. See ACCIDENT; FIRE.

BURNING IN THE HAND. When a layman was admitted to benefit of the clergy he was burned in the hand, "in the brawn of the left thumb," in order that he might not claim the benefit twice. This practice was finally abolished by stat. 19 Geo. III. c. 74; though before that time the burning was often done with a cold iron; 12 Mod. 448; 4 Bla. Com. 267. See BENEFIT OF CLERGY.

BURYING-GROUND. A place appropriated for depositing the dead; a cemetery. In Massachusetts, burying-grounds cannot be appropriated to roads without the consent of the owners. Mass. Gen. Stat. 244. So in Pennsylvania by acts passed in 1849 and 1861. See CEMETERY.

BUSHEL. The Winchester bushel, established by the 13 Will. III. c. 5 (1701) was made the standard of grain. A cylindrical vessel, eighteen and a half inches in diameter, and eight inches deep inside, contains a bushel; the capacity is 2145.42 cubic inches. The bushel established by the 5 & 6 Geo. IV. c. 74, is to contain 218.192 cubic inches. This measure has been adopted in many of the United States. In New York the heaped bushel is allowed, containing 2815 cubic inches; in Connecticut, the bushel holds 2198 cubic inches; in Kentucky, 2150½; in Indiana, Ohio, Mississippi, and Missouri, it contains 2150.4 cubic inches. Dane, Abr. c. 211, a. 12, s. 4. See the whole subject discussed in report of the Secretary of State of the United States to the Senate, Feb. 22, 1821.

BUSINESS. That which occupies the time, attention, and labor of men for the purpose of livelihood, for profit, but it is not necessary that it should be the sole occupation or employment. The doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business, yet a series of such acts would be so considered. 50 Ala. 130; 23 N. Y. 244.

A very comprehensive term which embraces everything about which a person can be employed. 220 U. S. 111.

See PRINCIPAL PLACE OF BUSINESS. See CARRYING ON BUSINESS.

BUSINESS HOURS. The time of the day during which business is transacted. In respect to the time of presentment and demand of bills and notes, business hours generally range through the whole day down to the hours of rest in the evening, except when the paper is payable at a bank or by a banker; 2 Hill, N. Y. 835. See 15 Me. 67; 17 id. 230; Byles, Bills 283.

The term "usual business hours" does not mean the time an employer may require his agent's services, but those of the community generally; 18 Minn. 164.

BUSINESS SERVICES. The words "business services," as used in a telephone franchise fixing the maximum rate, mean the ordinary services between business men and other citizens within the radius specified in the ordinance granting the franchise. 135 Ky. 221, 122 S. W. 126.

BUT. "But" is an appropriate term to indicate the intention of those who use it, to limit or restrain the sense or effect of something which had before been said, and throughout the whole of it, a negative phraseology is employed. 5 Litt. (Ky.) 164.

BUTLERAGE. A certain portion of every cask of wine imported by an alien, which the king's butler was allowed to take.

Called also prisage; 2 Bulstr. 254. Anciently, it might be taken also of wine im-

ported by a subject; 1 Bla. Com. 315; *Termes de la Ley*; Cowel.

BUTT. A measure of capacity, equal to one hundred and eight gallons; also denotes a measure of land. Jac. Dict.; Cowel. See MEASURE.

BUTTALS. The bounding lines of land at the end; abutments, which see.

BUTTS. The ends or short pieces of arable lands left in ploughing. Cowel.

BUTTS AND BOUND. The lines bounding an estate. The angles or points where these lines change their direction. Cowel; Spelman, Gloss. See ABUTTALS.

BUYING A NOTE. Distinguished from Discounting. "Buying a note" as distinguished from discounting a note, is used when the seller does not indorse the note and is not accountable for its payment. 13 Ky. L. R. 777.

BUYING TITLES. The purchase of the rights of a disseisee to lands of which a third person has the possession.

When a deed is made by one who, though having a legal right to land, is at the time of the conveyance disseised, as a general rule of the common law, the sale is void: the law will not permit any person to buy a quarrel, or, as it is commonly termed, a pretended title. Such a conveyance is an offence at common law and by a statute of 32 Hen. VIII. c. 9. This rule has been generally adopted in the United States, and is affirmed by expressed statute in some of the states; 8 Washb. R. P. 5th ed. *596. In the following states the act is unlawful, and the parties are subject to various penalties in the different states: in *Connecticut*, 4 Conn. 575; *Georgia*, 29 Ga. 124; *Indiana*, 23 Ind. 432; 8 Blackf. 366; *Kentucky*, 1 Dana 566; 2 id. 374; see 2 Litt. 225, 393; 4 Bibb. 424; *Massachusetts*, 5 Pick. 356; 6 Metc. 407; *Mississippi*, 26 Miss. 599; *New Hampshire*, 12 N. H. 291; *New York*, 24 Wend. 87; see 4 Wend. 474; 7 id. 53, 152; 8 id. 629; 11 id. 442; *North Carolina*, 1 Murph. 114; 4 Dev. 495; *Ohio*, Walker, Am. Law 297, 351; *Vermont*, 6 Vt. 198; see 38 Vt. 204, 553.

By the transaction, the grantor does not lose his estate; 5 Pick. 348; 101 Mass. 179. As to what constitutes adverse possession, see 29 Me. 128.

In *Illinois*, 53 Ill. 279; *Missouri*, Rev. Stat. 119; *Pennsylvania*, 2 Watts 272; *Ohio*, 9 Ohio 96; *Wisconsin*, 14 Wis. 471; *South Carolina*, 12 Rich. 420; *Maine*, Rev. Stat. c. 73, § 1; *Michigan*, 21 Mich. 82; such sales are valid. See CHAMPERTY.

BY. Near, beside, passing in presence, and it also may be used as exclusive. 3 P. & W. 48.

When used descriptively in a grant it does not mean in immediate contact with, but near to the object to which it relates. It is a relative term, meaning, when used in land patents, very unequal and different distances; 6 Gill 121.

BY-BIDDING. Bidding with the connivance or at the request of the vendor of goods by auction, without an intent to purchase, for the purpose of obtaining a higher price than would otherwise be obtained.

By-bidders are also called *puffers*, which see. It has been said that the practice is probably allowable if it be done fairly, with an intention only to prevent a sale at an unduly low price; 4 B. Monr. 630; 11 Paige, Ch. 439; 3 Story 622; 15 M. & W. 371; 1 Pars. Contr. 418; 11 S. & R. 86. A bidder is required to act in good faith and any combination to prevent a fair competition would avoid the sale; 3 B. & B. 116; 5 Rich. 541; 88 Ga. 696; 23 N. H. 360; 8 How. 153. See BID; AUCTION.

Lord Mansfield held that the employment of a single puffer was a fraud; Cowp. 395; this rule was afterwards relaxed, in equity only, so as to allow a single bidder; 12 Ves. 477. The rule was stated in L. R. 1 Ch. 10, to be, that a single puffer will vitiate a sale in law, but may be allowed in equity; though either at law or in equity, such bidding is permissible upon notice at the sale. By 30 and 31 Vict. c. 48, the rule in equity

was declared to be the same as at law. See L. R. 9 Eq. 60. Lord Mansfield's opinion has been followed in Pennsylvania; 14 Pa. 446, per Gibson, C. J., overruling 11 S. & R. 86. In New Hampshire; 28 N. H. 360. In Louisiana; 18 La. 287. In New Jersey it seems that if there is a *bona fide* bid next before that of the buyer, the bidding of puffers will not avoid the sale (so held also in 8 Story 611); but it is intimated that it would be a better rule to forbid puffing; 20 N. J. Eq. 159. Kent favors Lord Mansfield's rule; 2 Kent *540. The employment of a puffer to enhance the price of property sold is a fraud; 17 Hun 373. So held in 8 How. 378. Exceptions to the rule may occur when it does not appear that the buyer paid more than the value of the property or he had determined to bid; 6 Fred. Eq. 430. A purchaser thus misled must restore the property as soon as he discovers the fraud; 33 Penn. 251; 8 Story 611, 631. In 3 Metc. Mass. 384, the validity of the sale is held to depend upon the *animus* with which the puffing is carried on. In Massachusetts where a sale is advertised to be "without reserve" or "positive," the secret employment of by-bidders renders the sale voidable by the buyer; Usher, Sales § 286; 114 Mass. 187. See 11 Irish Law Times 643.

BY BILL. Actions commenced by *capias* instead of by original writ were said to be *by bill*. 3 Bla. Com. 285, 286. See 5 Hill 218.

The usual course of commencing an action in the King's Bench is by a bill of Middlesex. In an action commenced *by bill* it is not necessary to notice the form or nature of the action; 1 Chit. Pl. 283.

BY ESTIMATION. A term used in conveyances. In sales of land it not unfrequently occurs that the property is said to contain a certain number of acres *by estimation*, or so many acres, *more or less*. When these expressions are used, if the land fall short by a small quantity, the purchaser will receive no relief. In one case of this kind, the land fell short two-fifths, and the purchaser received no relief; 2 Freem. 106; 20 Ohio 453; 9 Gill 446; 1 Call 301; 4 Mas. 419; 4 H. & M. 184; 6 Binn. 106; 1 S. & R. 166; 2 Johns. 37; 15 *id.* 471; 2 Mass. 392; 1 Root 528. The meaning of these words has never been precisely ascertained by judicial decision. See Sugden, Vend. 231-236, where he applies the rule to contracts *in fieri*. But this distinction was not accepted in 99 Mass. 334, where it was said that the Americans do not encourage litigation

by reason of variation in the quantity of land sold, unless the quantity was of the essence of the contract, and the cases cited under the articles **MORE OR LESS**; **SUBDIVISION**.

BY-LAW MEN. In an ancient deed, certain parties are described as "yeomen and *by-law men* for this present year in Easinguold." 6 Q. B. 60.

They appear to have been men appointed for some purpose of limited authority by the other inhabitants, as the name would suggest, under by-laws of the corporation appointing.

BY-LAWS. Rules and ordinances made by a corporation for its own government. See 7 Barb. 539.

The power to make by-laws is usually conferred by express terms of the charter creating the corporation. When not expressly granted, it is given by implication, and it is incident to the very existence of a corporation; Brice, *Ultra Vires*, 3d ed. 6; Moraw. Priv. Corp. 491. When there is an express grant, limited to certain cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication; 2 P. Wms. 207; Ang. Corp. 177. The power of making by-laws is to be exercised by those persons in whom it is vested by the charter; but if that instrument is silent on that subject, it resides in the members of the corporation at large; 1 Harr. & G. 324; 4 Burr. 2515, 2521; 6 Bro. P. C. 519; 51 Ind. 4; 12 Wend. 183; 17 Mass. 29; 33 N. H. 424; and the power to repeal them also exists; 7 Dowl. & R. 267; 18 Vt. 511; 12 East 22. The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and among themselves; 99 Mass. 70.

The constitution of the United States, and acts of congress made in conformity to it, the constitution of the state in which a corporation is located, and acts of the legislature constitutionally made, together with the common law as there accepted, are of superior force to any by-law; and such by-law, when contrary to either of them, is therefore void whether the charter authorizes the making of such by-law or not; because no legislature can grant power larger than that which it possesses; 7 Cow. 585, 604; 11 Wall. 369; 31 Me. 573; 35 Pa. 151; 24 Wis. 21; 31 Mich. 458; 9 Nev. 325; 1 Q. B. D. 12. By-laws must not be inconsistent with the charter; Green's Brice,

Ultra Vires, 15.

By-laws must be reasonable; 3 Daly 20; 3 Whart. 238; 2 Mo. App. 96; and not retrospective; 9 Cal. 112; 31 Mich. 458; they bind the members; 43 Me. 192; 76 Ala. 567; 78 N. Y. 179; 70 Ga. 341; 99 Mass. 68; but a by-law void as against strangers or non-assenting members, may be good as a contract against assenting members; 19 Johns. 456; 9 Ala. n. s. 738; 8 Metc. 321. See 24 N. J. Law 440. It has been held that third parties dealing with corporations are not bound to take notice of their by-laws; 12 Cush. 1; 3 Mas. 505; see 1 Woolw. 400; where a distinction was raised between by-laws made by the corporation and those made by the directors, so far as relates to notice to third parties; but, *contra*, 52 Barb. 399.

See, generally, Ang. Corp. c. 9; Beach, Corp.; Green's Brice, *Ultra Vires*; Field, Corporations; Morawetz, Corp.; Thompson, Corp.; Spelling, Corp.; Boisot, By-laws; Bacon, Abr.; 4 Viner, Abr. 301; Dane, Abr. Index; Comyns, Dig.

Comparison with Municipal Ordinance. The word "by-law" originally meant an ordinance. "By" was the Scandinavian word for town; originally, therefore, a by-law was simply a town law. What are generally styled municipal ordinances in America are usually known and designated as by-laws in English cases. (7 Ad. & El. 405.) But, by-laws are rules prescribed by the members of a private corporation and have no binding force upon any one except by express or implied assent (58 Miss. 435), and in this they are distinguished from a municipal ordinance (*q. v.*). 1 Thomp. Corp. 2nd ed., 1193, 1194.

BY REASON OF. The words "by reason of" are equivalent to "by virtue of" 206 U. S. 119.

BY THE BYE. In Practice. Without process. A declaration is said to be filed by the bye when it is filed against a party already in the custody of the court under process in another suit. This might have been done, formerly, where the party was under arrest and technically in the custody of the court; and even giving common bail was a sufficient custody in the King's Bench; 1 Sellon, Pr. 228; 1 Tidd. Pr. 419. It is no longer allowed; Archbold, New Pr. 293.

BY VIRTUE OF. See **BY REASON OF**

C.

C. The third letter of the alphabet. It was used among the Romans to denote condemnation, being the initial letter of *condemno*. See **A**.

In Rhode Island as late as 1785 it was branded on the forehead as part of the punishment for counterfeiting; Anderson, Dict. Law.

C. C. Abbreviation for *cepi corpus*; chief commissioner; circuit, city, or county court; chancery, civil, criminal, or crown cases; civil code. Anderson. See **CEPI**; **CAPIAS AD RESPONDENDUM**.

C. C. et B. B. *Cepi corpus* and bail bond. See **CEPI**; **CAPIAS AD RESPONDENDUM**.

C. C. & C. *Cepi corpus et committitur*, I have arrested and committed the defendant. Anderson. See **CAPIAS AD SATISFACIENDUM**; **CEPI**.

C. F. & I. Abbreviations sometimes used in commercial transactions for cost, freight, and insurance. When so used they mean the actual cost of the goods ordered and commission, with the premium of insurance and the freight; Benj. Sales § 887; L. R. 5 Ex. 179. See **C. I. F.**

C. I. F. Cost, insurance, and freight. The designation of a sales contract in which the price quoted and agreed upon covers not only the cost of the goods at the point of shipment, but their insurance and freight to the point of destination. A form of contract which has become very common, especially in international commerce. Formerly designated more frequently as **C. F. & I.** Williston, Sales, § 280.

C. O. D. Collect on delivery. Where goods shipped are thus marked, the carrier in addition to his ordinary liabilities, and responsibilities is to collect the amount specified by the consignor, and for failure to return to him, either the price or the goods, he has a right of action on the contract against the carrier. See 59 Ind. 264; 73 Me. 278; 55 Ill. 140; 55 N. Y. 206.

These initials have acquired a fixed and determinate meaning, which courts and juries may recognize from their general information; 73 Me. 278.

C. P. A. Certified public accountant (*q. v.*).

CA. SA. *Capias Ad Satisfaciendum* (*q. v.*).

CABALLERIA. In Spanish Law. A quantity of land, varying in extent in different provinces. In those parts of the United States which formerly belonged to Spain, it is a lot of one hundred feet front, two hundred feet depth, and equivalent to five peonias. 2 White, New Recop. 49; 12 Pet. 444, n.; Escribiche, Dioc. Raz.

A measure of land used in Mexican land grants containing 105.75 acres. 161 U. S. 219. See **CORDEL**; **HECTARE**; **SITIO**; **VARA**.

CABINET. Certain officers who, taken collectively, form a council or advisory board; as the cabinet of the president of the United States, which is composed of the secretary of state, the secretary of the treasury, the secretary of the interior, the secretary of war, the secretary of the navy, the secretary of agriculture, the attorney-general, and the postmaster-general.

In case of the removal, death, resignation or inability of both the president and vice-president of the United States, then the members of the cabinet shall act as president until such disability is removed or a president elected, in the following order: the secretary of state, secretary of

the treasury, secretary of war, attorney-general, postmaster-general, secretary of the navy, and secretary of the interior; 24 Stat. L. p. 1.

These officers are the advisers of the president. They are also the heads of their respective departments; and by the constitution (art. 2, sec. 2) the president may require the opinion in writing of these officers upon any subject relating to the duties of their respective departments. These officers respectively have, under different acts of congress, the power of appointing many inferior officers charged with duties relating to their departments. See Const. art. 2, sec. 2.

The cabinet meets frequently at the executive mansion, by direction of the president. No record of its doings is kept; and it has, as a body, no legal authority. Its action is advisory merely; and the president and heads of departments in the execution of their official duties are entitled to disregard the advice of the cabinet and take the responsibility of independent action.

In England, a board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation. It is the connecting link between the legislative and the executive powers. The nominal prime minister is chosen by the legislature and the real prime minister for most purposes—the leader of the house of commons—almost without exception is so chosen; Bagehot, Eng. Const.

The king, under the English constitution, is irresponsible; or, as the phrase is, the king can do no wrong. The real responsibility of government in that country, therefore, rests with his ministers, who constitute his cabinet. The king may dismiss his ministers if they do not possess his confidence; but they are seldom dismissed by the king. They ordinarily resign when they cannot command a majority in favor of their measures in the house of commons.

The first lord of the treasury, the lord chancellor, the principal secretaries of state, and the chancellor of the exchequer, are always of the cabinet; but in regard to the other great officers of state the practice is not uniform, as at times they hold and at others do not hold seats in the cabinet. The British cabinet usually consists of from ten to fifteen persons. See Knight's Pol. Dict. title Cabinet; Bagehot, English Constitution; 1 Bryce, Am. Com. 81.

CABOOSE CAR. A "caboose car" is a car attached to the rear of a freight train fitted up for the accommodation of the conductor, brakemen and chance passengers. 117 Ky. 345, 78 S. W. 168.

CABOTAGE. Spanish Law. Coastwise navigation; coast pilotage; coasting-trade. Stand. Dict.

Navigation along the coast, or from port to port, without stretching out to sea. Worcester.

The French term for coasting-trade, a coast-pilotage. It is probably derived from *cabot*, a small boat, with which the name Cabot may be connected; the conjecture that the word comes from *cabo*, the Spanish for cape, and means "sailing from cape to cape," has little foundation.

CACHEXIA. The final stage of MORPHINOMANIA (*q. v.*).

CACICAZGOS. In Spanish Law. Lands held in entail by the caciques in Indian villages in Spanish America.

CADASTRE. The official statement of the quantity and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property; 12 Pet. 428, n.; 3 Am. St. Pap. 679.

CADERE. (Lat.). To fall; to fail; to end; to terminate.

The word was generally used to denote the termination or failure of a writ, action, complaint, or attempt: as, *cadit actio* (the action fails), *cadit assisa* (the assise abates), *cadere causa* or *a causa* (to lose a cause). Abate will translate *cadere* as often as any other word, the general signification being, as stated, to fail or cease. *Cadere ab actione* (literally, to fall from an action), to fail in an action; *cadere in partem*, to become subject to a division.

To become; to be changed to; *cadit assisa in juratum* (the assize has become a jury). Calvinus, Lex.

CADET. A younger brother. One trained for the army or navy. See **NAVAL CADETS**.

CADI. A Turkish civil magistrate.

CADUCA (Lat. *cadere*, to fall).

In Civil Law. An inheritance; an escheat; every thing which falls to the legal heir by descent.

By some writers *bona caduca* are said to be those to which no heir succeeds, equivalent to escheats. Du Cange.

CADUCARY. Relating to or of the nature of escheat, forfeiture or confiscation. 2 Bla. Com. 245; Black, Dict.

See **CADUCIARY**. (Old form, as used in 2 Bla. Com. 245.)

CESARIAN OPERATION. A surgical operation whereby the fetus, which can neither make its way into the world by the ordinary and natural passage, nor be extracted by the attempts of art, whether the mother and fetus be yet alive, or whether either of them be dead, is by a cautious and well-timed operation taken from the mother with a view to save the lives of both, or either of them.

If this operation be performed after the mother's death, the husband cannot be tenant by the curtesy; since his right begins from the birth of the issue, and is consummated by the death of the wife; but if mother and child are saved, then the husband would be entitled after her death. Wharton.

CAETERIS PARIBUS. Other things being equal. Black.

CAETERIS TACENTIBUS. The others being silent; the other judges expressing no opinion. A phrase in the old reports. Burrill; Comb. 186.

CÆTERORUM. See **ADMINISTRATION**.

CALCULATED. The word "calculated" was used as synonymous with the words "fitted," "adapted" or "suited." 40 S. W. 245.

CALEFAGIUM. A right to take fuel yearly. Blount.

CALENDAR. An almanac.

Julius Cæsar ordained that the Roman year should consist of three hundred and sixty-five days, except every fourth year, which should contain three hundred and sixty-six—the additional day to be reckoned by counting the 24th day of February (which was the 6th of the calends of March) twice. See **BISSEXTILE**. This period of time exceeds the solar year by eleven minutes or thereabouts, which amounts to the error of a day in about one hundred and thirty-one years. In 1582 the error amounted to eleven days or more, which was corrected by Pope Gregory. Out of this correction grew the distinction between Old and New Style. The Gregorian or New Style was introduced into England in 1752, the 2d day of September (O. S.)

of that year being reckoned as the 14th day of September (N. S.).

A list of causes pending in a court; as court calendar.

In Criminal Law. A list of prisoners, containing their names, the time when they were committed and by whom, and the cause of their commitments.

CALENDAR OF CAUSES. A list of litigated causes, prepared by the clerks of courts of record, a short time previous to the commencement of each term or sittings, containing the title of each cause, the nature of the action, the date of the issue, and the names of the attorneys for the respective parties. It is intended for the use of the court and bar, on the trial or hearing.

CALIFORNIA. The eighteenth state admitted to the Union.

In 1524 a Portuguese navigator in the Spanish service discovered the Gulf of California and penetrated into the mainland, but no settlement was made until about a century afterwards, when the Franciscan Fathers planted a mission on the site of San Diego; other settlements soon followed, and in a short time the country was entirely under the control of the priests, who accumulated great wealth. The Spanish power in the territory now constituting California was overthrown by the Mexican revolution in 1822, and the secular government by the priests was abolished. By the treaty of Guadalupe Hidalgo, May 30, 1848, terminating the war between the United States and Mexico, the latter country ceded to the United States for \$15,000,000 a large tract of land including the present states of California, Nevada, and Utah, and part of Colorado and Wyoming, and of the present territories of Arizona and New Mexico, and the whole tract was called the territory of New Mexico.

The commanding officer of the U. S. forces exercised the duties of civil governor at first, but June 3, 1849, Brigadier-General Riley, then in command, issued a proclamation for holding an election, and on 1, 1849, for delegates to a general convention to frame a state constitution.

The convention met at Monterey, Sept. 1, 1849; adopted a constitution on October 10, 1849, which was ratified by a vote of the people, November 18, 1849. At the same time an election was held for governor and other state officers, and two members of congress.

The first legislature met at San Jose, December 15, 1849. General Riley, on December 20, 1849, resigned the administration of civil affairs to the newly elected officers under the constitution, and shortly thereafter two United States senators were elected.

In March, 1850, the senators and representatives submitted to congress the constitution, with a memorial asking the admission of the state into the American Union.

On September 9, 1850, congress passed an act admitting the state into the Union on an equal footing with the original states, and allowing her two representatives in congress until an apportionment according to an actual enumeration of the inhabitants of the United States. The third section of the act provides for the admission, upon the express condition that the people of the state, through their legislation or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall not pass any law or do any act whereby by the title of the United States to any right to dispose of the same shall be impaired or questioned, and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and that in no case shall non-resident proprietors who are citizens of the United States be taxed higher than residents; and that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, and without any tax, impost, or duty therefor.

Congress passed an act, March 3, 1851, to ascertain and settle the private land claims in the state of California. By this act a board of commissioners was created, before whom every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, was required to present his claim, together with such documentary evidence and testimony of witnesses as he relied upon. From the decision of this board an appeal might be taken to the district court of the United States for the district in which the land was situated. Both the board and the court, on passing on the validity of any claim, were required to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim was derived, the principles of equity, and the decisions of the supreme court of the United States.

A large part of the best agricultural lands of the state was claimed under Spanish and Mexican grants. The evidence in support of these grants was in many instances meagre and unsatisfactory, and the amount of litigation arising therefrom was enormous and has not yet wholly ceased. The board of commissioners, having completed its work, went out of existence.

By an act passed September 22, 1850, congress declared all laws of the United States not locally inapplicable, in force within the State.

The constitution adopted in 1849 was amended November 4, 1856, and September 3, 1862, and on January 1, 1880, was superseded by the present constitution, which had been framed by a convention March 3, 1879, and adopted by popular vote May 7, 1879.

CALL. An agreement to sell, in the

language of New York stock brokers. 181 U. S. 264.

CALL DAY. In England, the day set apart in each term in the Inns of Court to admit students to practise at the bar. Stand. Dict.

CALL PATENT. A "call patent" is one whose corners are all stakes, or all but one, or whose lines are not run out and marked at the time. 142 Ky. 561, 134 S. W. 900.

CALLING. See ORDINARY CALLING.

CALLING THE PLAINTIFF. In Practice. A formal method of causing a nonsuit to be entered.

When a plaintiff perceives that he has not given evidence to maintain his issue, and intends to become nonsuited, he withdraws himself; whereupon the clerk is ordered to call the plaintiff, and on his failure to appear he becomes nonsuited. The phrase "let the plaintiff be called," which occurs in some of the earlier state reports, is to be explained by reference to this practice. See 3 Bla. Com. 376; 2 C. & P. 408; 5 Mass. 226; 7 Md. 227; 4 Wash. C. C. 67.

CALLING TO THE BAR. Confering the degree or dignity of barrister upon a member of the inns of court. Holthouse, Dict.

CALUMNIA (Lat.). Calumny, malice, or ill design; a false accusation; a malicious prosecution.

CALUMNIÆ JUSJURANDUM (Lat.). The oath against calumny.

Both parties at the beginning of a suit, in certain cases, were obliged to take an oath that the suit was commenced in good faith and in a firm belief that they had a good cause. Bell, Dict. The object was to prevent vexatious and unnecessary suits. It was especially used in divorce cases, though of little practical utility; Bishop, Marr. & Div. § 863; 2 Bishop, Marr. Div. & Sep. §§ 264, 265. A somewhat similar provision is to be found in the requirement made in some states that the defendant shall file an affidavit of merits.

CALUMNIATORS. In Civil Law. Persons who accuse others, whom they know to be innocent, of having committed crimes.

CALVO DOCTRINE. That doctrine which answers in the negative the long discussed question of whether governments are responsible or not for the losses and injuries encountered by aliens in times of internal disturbances or civil wars. The following is an excerpt from "Le Droit International Théorique et Pratique" par Carlos Calvo, III. §§ 1280, 1297 in which arguments are set forth in support of the Calvo Doctrine.

To admit, in a measure, the responsibility of governments, that is to say, the principle of indemnity, would be to create an exorbitant and disastrous privilege, essentially favorable to powerful states, and harmful to weaker nations, and to establish an unjustifiable inequality between citizens and foreigners. On the other hand, by sanctioning the doctrine which we combat, there would be inflicted, although indirectly, a powerful blow to one of the constitutional elements of the independence of nations, namely, that of territorial jurisdiction; here, in truth, lies the real meaning, the true significance of such frequent recourse to diplomatic channels to solve questions whose nature and the circumstances under which they are produced relate them to the exclusive domain of ordinary tribunals. The principle which we uphold rests not only upon theory and practice; it has several years ago entered into the realm of the conventional right of peoples. Thus it is seen to be formally consecrated by the majority of the treaties which South-American republics have concluded in the last instance with European powers; let it suffice for us to cite conventions of commerce and of navigation, which were signed by Venezuela with the Netherlands (1855), Sardinia (1858), and with the Hanseatic cities.

Resuming our idea regarding this matter we are led to conclude:

(1) That the principle of indemnity and of diplomatic intervention in favor of aliens because of injuries suffered in cases of civil war has never been and is not now admitted by any nation of Europe or of America.

(2) That the governments of powerful nations which exercise or impose this claimed right in dealing with relatively weak states commit an abuse of power and of force that nothing could justify, and that is as much opposed to their own legislation as it is to international practice and to political agreements.

CAMBIO. Exchange.

CAMBIPARTIA. Champerty.

CAMBIPARTICEPS. A champertor.

CAMBIST. A person skilled in exchange; one who deals or trades in promissory notes or bills of exchange; a broker.

CAMBIIUM. Change, exchange. Applied in the civil law to exchange of lands, as well as of money or debts. Du Cange.

Cambium reale or manuale was the term generally used to denote the technical common-law exchange of lands; *cambium locale, mercantile, or trajec-titum*, was used to designate the modern mercantile contract of exchange, whereby a man agrees, in consideration of a sum of money paid him in one place, to pay a like sum in another place. Pothier, *de Change*, n. 12; Story, Bills § 2.

CAMERA. The Judge's chamber in Serjeant's Inn. Wharton; Ken Gloss. See IN CAMERA.

CAMERA, IN. See IN CAMERA.

CAMERA REGIS. In old English law a chamber of the king; a place of peculiar privileges especially in a commercial point of view. The city of London was so called. Year Book, p. 7, Hen. VI. 27; Burrill, Law, Dic.

CAMERA SCACCARII. The Exchequer Chamber. Spelman, Gloss.

CAMERA STELLATA. The Star Chamber.

CAMERARIUS. A chamberlain; a keeper of the public money; a treasurer. Spelman, Gloss. *Cambellarius*; 1 Perr. & D. 243.

CAMINO. In Spanish Law. A road or highway. Las Partidas, pt. 3, tit. 2, l. 6.

CAMPARTUM. A part or portion of a larger field or ground, which would otherwise be in gross or in common. Champerty.

CAMPERTUM. A cornfield; a field of grain. Cowel; Whishaw.

CAMPUM PARTIRE. To divide the land. The phrase used in a bargain of champerty (q. v.). 4 Bla. Com. 135.

CAMPUS (Lat. a field). In old European law an assembly of the people so called from being held in the open air, in some plain capable of containing a large number of persons. 1 Robertson's Charles V. App. n. 38.

In feudal or old English law a field or plain. Burrill, Law Dict.

CANADA. The name given to a confederation of all the British possessions in North America except Newfoundland.

CANAL. An artificial cut or trench in the earth, for conducting and confining water to be used for transportation. See 18 Conn. 394.

Public canals originate under statutes and charters enacted to authorize their construction and to protect and regulate their use. They are in this country constructed and managed either by the state itself, acting through the agency of commissioners, or by companies incorporated for the purpose. These commissioners and companies are armed with authority to appropriate private property for the construction of their canals, in exercising which they are bound to a strict compliance with the statutes by which it is conferred. Where private property is thus taken, it must be paid for in gold and silver; 8 Blackf. 246. Such payment need not precede or be contemporaneous with the taking; 20 Johns. 735; 4 Zabr. 587; 8 Blackf. 266; though, if postponed, the proprietor of the land taken is entitled to interest; 5 Denio 401; 1 Md. Ch. Dec. 248. The following cases relate

to the rules to be observed in estimating the amount of damage to be awarded for private property taken or injured by the construction of canals; 7 Blackf. 209; 1 Watts & S. 346; 1 Pa. 462; 15 Barb. 457, 627; 24 id. 362; 4 Wend. 647; 1 Spenc. 249; 14 Conn. 148; 16 id. 98; 1 Sneed 239; 1 Sumn. 46. A city through which a canal passes cannot construct levees along its banks and recover the cost thereof from the canal company; 45 La. Ann. 6.

After the appropriation of land for a canal, duly made under statute authority, though the title remains in the original owner until he is paid therefor, he cannot sustain an action against the party taking the same for any injury thereto; 19 Barb. 263, 370; 4 Wend. 647; 20 Johns. 735; 7 Johns. Ch. 314; 19 Pa. 456. But if there be a deviation from the statute authority, the statute is no protection against suits by persons injured by such deviation; 4 Denio 356; 1 Sumn. 46; 2 Dow. 519; Coop. Ch. 77. Appraisers appointed to assess damages for land taken have no authority to entertain claims not presented in the mode and within the time prescribed by statute; 9 Barb. 496; 11 N. Y. 314. But though a special remedy for damages be given by a statute authorizing the construction of a canal, the party injured thereby is not barred of his common-law action; 24 Barb. 159; 5 Cow. 163; 16 Conn. 98. But see, to the contrary, 12 Mass. 466; 1 N. H. 359. The legislature has the exclusive power to determine when land may be taken for a canal or other public use, and the courts cannot review its determination in that respect; 9 Barb. 350; 8 Blackf. 266.

In navigating canals, it is the duty of the canal-boat to exercise due care in avoiding collisions, and in affording each other mutual accommodation; and for any injury resulting from the neglect of such care the proprietors of the boats are liable in damages; 1 Sher. & Redf. Neg. 404; 19 Wend. 399; 6 Cow. 698; 1 Pa. 44. The proprietors of the canal will be liable for any injury to canal-boats occasioned by a neglect on their part to keep the canal in proper repair and free from obstructions; 7 Mass. 189; 7 Metc. 276; 13 Gratt. 541; 8 Dana 161; 7 Ind. 462; 20 Barb. 620; 11 A. & E. 223. Where a state exercises control over a canal, it is liable for injuries caused by an officer's negligence in failing to repair bridges over it; 127 N. Y. 397. In regard to the right of the proprietors of canals to tolls, the rule is that they are only entitled to take them as authorized by statute, and that any ambiguity in the terms of the statute must operate in favor of the public; 2 B. & Ad. 792; 2 M. & G. 134; 9 How. 172; 6 Cow. 567; 21 Pa. 131. A canal constructed and maintained at private expense is like a private highway over which the public is permitted to travel, but in which it obtains no vested right; 95 Mich. 389. For other cases relating to various points arising under statutes in regard to canals, see 8 Blackf. 352; 12 Mass. 403; 7 B. Monr. 160; 4 Zab. 62, 555; 11 Pa. 202; 1 Gill 222; 17 Barb. 193; 110 N. Y. 232; 23 Ill. App. 159; 55 N. J. Law 178. See Railway.

CANCEL. To cancel a paper is to cross or deface it with cross-marks or other obliterations; to blot or obliterate. The term is also used figuratively in the sense of to annul or to destroy. 5 A. & E. Ency. (2nd ed.) 128. See CANCELLATION; ANNUL.

CANCELLARIA. Chancery; the court of chancery. *Curia cancellaria* is also used in the same sense. See 4 Bla. Com. 46; Cowel.

CANCELLARIUS (Lat.). A chancellor.

In ancient law, a janitor or one who stood at the door of the court and was accustomed to carry out the commands of the judges; afterwards a secretary; a scribe; a notary. Du Cange.

In early English law, the keeper of the king's seal.

The office of chancellor is of Roman origin. He appears at first to have been a chief scribe or secretary, but was afterwards invested with judicial

power, and had superintendence over the other officers of the empire. From the Romans the title and office passed to the church; and therefore every bishop of the Catholic church has, to this day, the title of chancellor, the principal judge of his consistory. In ecclesiastical matters it was the duty of the *cancellarius* to take charge of all matters relating to the books of the church, acting as librarian; to correct the laws, comparing the various readings, and also to take charge of the seal of the church, affixing it when necessary in the business of the church.

When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. In all he seems to have had a supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner; and when seals came into use, he had the custody of the public seal.

According to Du Cange it was under the reign of the Merovingian kings in France that the *cancellarius* first obtained the dignity corresponding with that of the English chancellor, and became keeper of the king's seal.

In this latter sense only of keeper of the seal, the word chancellor, derived hence, seems to have been used in the English law; 3 Bla. Com. 46.

The origin of the word has been much disputed; but it seems probable that the meaning assigned by Du Cange is correct, who says that the *cancellarius* were originally the keepers of the gate of the king's tribunal, and who carried out the commands of the judges. Under civil law the duties were varied, and gave rise to a great variety of names, as *notarius*, *a notis*, *abactis*, *secretarius*, *a secretis*, *a cancellis*, *a responsis*, generally derived from their duties as keepers and correctors of the statutes and decisions of the tribunals.

The transition from the keeper of the seal of the church to keeper of the king's seal would be natural and easy in an age when the clergy were the only persons of education sufficient to read the documents to which the seal was to be appended. And this latter sense is the one which has remained and been perpetuated in the English word Chancellor. See Du Cange, Spelman, Gloss.; Spence, Eq. Jur. 78; 3 Bla. Com. 46.

It was an evolution which passed through several stages, the first of which had its origin in the period when the king was actually as well as theoretically the fountain of justice and equity. At first he personally heard their complaints and administered justice to his subjects.

It was, however, after the growth of the population had increased the applications to the king for the redress of grievances to such an extent as to require him to seek assistance that the officer afterwards called chancellor appeared. He was then a scribe to whom were referred the complaints made, and it was his duty to determine if they should be entertained and the form of writ adapted to the case. Thus what was afterwards the primary duty of the chancellor was devolved upon this officer, called the *referendarius*, and known by this title according to Selden, during the reign of Ethelbert and subsequent kings to Edred. To separate and protect them from the suitors this officer and his assistants sat by a lattice, the laths of which were called *cancelli*, and to this commentators ascribe the origin of the word *cancellarius*, which was used in the reign of the Confessor and is not clearly traced to an earlier date. At that time little more appears than that he was an officer who issued writs, but during Anglo-Saxon times he seems to have been little more; and the charter of Westminster shows his precedence at that time to have been after two archbishops, nine bishops, and seven abbots, though now the lord chancellor is second only after the royal family. True, it is said by Ingulphus that Edward the Elder appointed Torquatil the chancellor, and that whatever business of the king, spiritual or temporal, required a decision, should be decided by his advice and decree, and, being so decided, the decree should be held irrevocable; Spence, Eq. Jur. 78, n. Nevertheless there does not seem to have been at that period a conception of the office as one maintained for the exercise of judicial functions. According to Pollock and Maitland, "even in Edward I's reign it is not in our view a court of justice; it does not hear and determine causes. It was a great secretarial bureau, a home office, a foreign office, and a ministry of justice;" 1 Hist. Eng. Law 172.

But whatever the origin of the title, it is not difficult to apprehend the development of the janitor or keeper of the gate, acting as intermediary between the suitor and the king or judge, into the officer whose judgment was relied on in dealing with the petition, and how the original scribe or *referendarius*, exercising at first clerical functions, but selected for them because it required legal learning to discharge them, gradually developed into the chancellor of modern conception, holding the seal and representing the conscience of the king. The fact that it is an evolution is clear, however obscure and difficult to trace are some of its successive stages. See 4 Co. Inst. 78; Dugdale Orig. Jur. fol. 34; and generally Selden, Discourses; Underwilt, King's Peace; 3 Steph. Com. 346; 1 Poll. & Maitl. 172; 1 Stubbs, Const. Hist. 381; Campbell, Lives of the Lord Chancellors, vol. 1. See CANCELLOR.

CANCELLATION. The act of crossing out a writing. The manual operation of tearing or destroying a written instrument; 1 Eq. Cas. Abr. 409; Roberts, Wills 367, n.

The statute of frauds provides that the revocation of a will by cancellation must be by the "testator himself, or in his presence and by his direction and consent." This provision is in force in many of the United States; 1 Jarm. Wills, 83 Am. ed.

*113 n.; Beach, Wills 98. In order that a revocation may be effected, it must be proved to have been done according to the statute; 25 N. Y. 79; 31 Pa. 246; 66 Mo. 579; 46 Ala. 216; declarations of a testator are not sufficient; 2 W. & S. 455; 26 Md. 95; 2 Johns. 81.

Cancelling a will, *animo revocandi*, is a revocation; and the destruction or obliteration need not be complete; 3 B. & Ald. 489; 2 W. Bla. 1043; 4 Mass. 462; 2 N. & M'C. 472; 5 Conn. 168; 4 S. & R. 567. It must be done *animo revocandi*; Schoul. Wills 384; 62 Ill. 368; 6 Mo. 177; and evidence is admissible to show with what intention the act was done; 7 Johns. 394; 9 Mass. 307; 4 Conn. 550; 8 Vt. 373; 1 N. H. 1; 4 S. & R. 297; 3 Hen. & M. 502; 1 Harr. & M'H. 162; 4 Kent 531; 57 Me. 449; 25 Mich. 505; 2 Rich. 184; 32 Ga. 156. Accidental cancellation is not a revocation; 3 Stockt. 156. Where the first few lines of a will were cut off, the remainder, which was complete, was admitted to probate; L. R. 2 P. & D. 206. Partial cancellation, with proof of an *animus revocandi*, will revoke a will; 2 Miss. 336; and when more than one-third of the items were cancelled, leaving the remainder unintelligible and repugnant, the will was held to be revoked; 38 Atl. Rep. (Md.) 408. Where the testator wrote on his will "This will is invalid," held a revocation; 2 Conn. 67. Cancellation by an insane man will not revoke a valid will; 54 Barb. 274; 7 Humphr. 92. See 1 Pick. 635; 1 Rich. 80.

In Louisiana it requires a written instrument executed with formalities to revoke a will, hence placing it among waste paper and refusal to receive it after attention was called to it, and an unsuccessful attempt to make a new will, were held to be no cancellation; 47 La. Ann. 329.

There may be a partial obliteration, which works a revocation *pro tanto*; 34 Barb. 140; 123 Mass. 102; 62 Ill. 368; 48 Ohio St. 211; and a careful interlineation is not a cancellation; 55 Pa. 424. A cancellation by pencil is enough; 2 D. & B. 311; 6 Hare 39; L. R. 2 P. & D. 256; 133 Pa. 245. Where a will is found among a testator's papers, torn, there is a presumption of revocation; 41 Vt. 125; 50 Mo. 28; 40 Conn. 587; 11 Wend. 227. Where after a person's death a will is found in an unsealed envelope which had been in his possession up to the time of his death and with lines drawn through his signature, the presumption is that he himself drew the lines for the purpose of revoking the will; 64 Hun 635.

Merely cancellation of a deed does not divest the grantee's title; Devlin, Deeds 300, 305; 9 Pick. 108; 33 Ala. 264; 18 Cal. 49; 4 Conn. 550; 41 Ill. App. 223; even though done before recording; 24 Me. 312; but it might practically have that effect between the parties by estoppel; 50 N. H. 143; or by reason of the destruction of the only evidence of the transaction; 14 Ia. 400; 4 Wis. 12.

On a bill in equity for the re-execution of lost securities, which were held by a decedent in his lifetime and after his death were not found among his papers, a party alleging their destruction or cancellation by the decedent is bound to prove the fact to the satisfaction of the court. The absence of the papers raises no presumption of such destruction or cancellation; nor is mere proof of an intention to destroy or cancel, or of the declaration of such intention, alone sufficient; 2 Del. Ch. 219.

CANDIDATE (Lat. *candidatus*, from *candidus*, white. Said to be from the custom of Roman candidates to clothe themselves in a white tunic).

One who offers himself, or is offered by others, for an office.

One who seeks office is a candidate; it is not necessary that he should have been nominated for it; 112 Pa. 624.

CANON. In Ecclesiastical Law. A prebendary, or member of a chapter. All members of chapters except deans are now entitled *canons*, in England. 2 Steph. Com. 11th ed. 687, n.; 1 Bla. Com. 382.

CANON LAW. A body of ecclesiastical law, which originated in the church of Rome, relating to matters of which that church has or claims jurisdiction.

A canon is a rule of doctrine or of discipline, and is the term generally applied to designate the ordinances of councils and decrees of popes. The position which the canon law obtains beyond the papal dominions depends on the extent to which it is sanctioned or permitted by the government of each country; and hence the system of canon law as it is administered in different countries varies somewhat.

In the wording of a canon it is not enough to admonish or to express disapprobation; its wording must be explicitly permissive or prohibitory, backed by the provision, expressed or admittedly understood, that its infringement will be visited with punishment. Cent. Dict.; The Churchman, lvi. 462.

Though this system of law is of primary importance in Catholic countries alone, it still maintains great influence and transmits many of its peculiar regulations down through the jurisprudence of Protestant countries which were formerly Catholic. Thus, the canon law has been a distinct branch of the profession in the ecclesiastical courts of England for several centuries; but the recent modifications of the jurisdiction of those courts have done much to reduce its independent importance.

The *Corpus Juris Canonici* is drawn from various sources—the opinions of the ancient fathers of the church, the decrees of councils, and the decretal epistles and bulls of the holy see, together with the maxims of the civil law and the teachings of the Scriptures. These sources were first drawn upon for a regular ecclesiastical system about the time of Pope Alexander III. In the middle of the twelfth century, when one Gratian, an Italian monk, animated by the discovery of Justinian's Pandects, collected the ecclesiastical constitutions also into some method in three books, which he entitled *Concordia Discordantium Canonum*. These are generally known as *Decretum Gratiani*.

The subsequent papal decrees to the time of the pontificate of Gregory IX. were collected in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII. about the year 1298, which is called *Sextus Decretalium*. The Clementine Constitution, or decrees of Clement V., were in like manner authenticated in 1317 by his successor, John XXII., who also published twenty constitutions of his own, called the *extravagantes Joannis*, so called because they were in addition to, or beyond the bounds of, the former collections, as the additions to the civil law were called Novels. To these have since been added some decrees of later popes, down to the time of Sixtus IV., in five books, called *Extravagantes communes*. And all these together—Gratian's Decrees, Gregory's Decretals, the Sixth Decretals, the Clementine Constitutions, and the Extravagants of John and his successors—form the *Corpus Juris Canonici*, or body of the Roman canon law; 1 Bl. Com. 82; *Encyclopédie*, *Droit Canonique*, *Droit Public Ecclésiastique*; Dict. du Jur. *Droit Canonique*; Erskine, Inst. b. 1, t. 1, s. 10. See, in general, Ayliffe, Far. Jur. Can. Ang.; Shelford, Marr. & D. 19; Preface to Burn, Eccl. Law, Tyrwhitt ed. 22; Hale, Civ. L. 26; Bell's Case of a Putative Marriage, 208; Dict. du *Droit Canonique*; Stair, Inst. b. 1, t. 1, 7; 1 Poll. & Matl. 90.

CANON LAW OF ENGLAND. A kind of national canon law, composed of legatine and provincial constitutions enacted in England prior to the reformation, and adapted to the exigencies of the English church and kingdom. 1 Bl. Com. 82.

CANONRY. An ecclesiastical benefice attaching to the office of canon. Holthouse, Dict.

CANONS, HONORARY. See HONORARY CANONS.

CANONS OF INHERITANCE. The legal rules by which inheritances are regulated, and according to which estates are transmitted by descent from the ancestor to the heir. 2 Bl. Com. 208.

CANONS OF JUDICIAL ETHICS. See ETHICS, LEGAL.

CANONS OF PROFESSIONAL ETHICS. See ETHICS, LEGAL.

CANT. Cant, or litation, is a mode of dividing property held in common by two or more persons. 5 Am. & Eng. Ency. 2nd ed., 131. It is a judicial sale made at the request of the parties, and it may be avoided by the consent of all those interested, in the same manner in which any other contract or agreement may be avoided, which is entered into by consent. *Id.*; 9 Martin (La.) 88.

CANTERBURY, ARCHBISHOP OF. In English Ecclesiastical Law.

The primate of all England; the chief ecclesiastical dignitary in the church; his customary privilege is to crown the kings and queens of England. By 25 Hen. VII. c. 21, he has the power of granting dispensations in any case not contrary to the Holy Scriptures and the law of God where the pope used formerly to grant them, which is the foundation of his granting special licenses to marry at any place or time, etc. Wharton.

CANTRED. A hundred, a district containing a hundred villages. Used in Wales in the same sense as hundred in England. Cowel; *Termes de la Ley*.

CANULEIAN LAW, THE. See LEX CANULEIA.

CANVASS. The act of examining the returns of votes for a public officer. This duty is usually intrusted to certain officers of a state, district, or county, who constitute a board of canvassers. The determination of the board of canvassers of the persons elected to an office is *prima facie* evidence only of their election. A party may go behind the canvass to the ballots, to show the number of votes cast for him. The duties of the canvassers are wholly ministerial; 8 Cow. 102; 20 Wend. 14; 1 Mich. 362; 15 Ill. 492. A canvassing board has no power to go behind the returns and inquire into the legality of the votes; 91 Mich. 438; 36 Neb. 9, 91. In making a recount they have no authority to throw out the vote of a precinct or ward on the ground of fraud, as their power is merely ministerial; 94 Mich. 505. See 5 Misc. Rep. 575.

CANVASSING BOARD. See CANVASS.

CAP. As used in Mining. A "cap" is a square piece of plank or block wedged between the top posts and the roof to better hold the roof. 160 Ky. 671, 170 S. W. 14. See PROP.

CAPACITY. Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law; as, the capacity to devise, to bequeath, to grant or convey lands; or to take and hold lands; to make a contract, and the like. 2 Comyns, Dig. 294; Dane, Abr. See ESTIMATE.

CAPAX DOLI (Lat. capable of committing crime). The condition of one who has sufficient mind and understanding to be made responsible for his actions. See DISCRETION.

CAPE. A judicial writ now abolished, touching a plea of lands and tenements. The writs which bear this name are of two kinds—namely, *cape magnum*, or grand cape, and *cape parvum*, or petit cape. The *cape magnum*, was the writ for possession where the tenant failed to appear. The petit cape is so called not so much on account of the smallness of the writ as of the latter; it was the shorter writ issued when the plaintiff prevailed after the tenant had appeared. Fleta, l. 6, c. 55, § 40. For the difference between the form and the use of these writs, see 2 Wms. Saund. 45 c, d; Fleta, l. 6, c. 55, § 40.

CAPE COLONY. A colony of Great Britain at the southern extremity of Africa. It is a responsible government of which the executive is vested in a governor and council appointed by the Crown. Its legislature has two chambers. The legislative council consisting of 22 members elected for seven years and house of assembly of 76 members elected for five years. The supreme court consists of a chief justice and eight puisne judges. Sessions are held in three places and circuit courts sit in the country districts. The Roman-Dutch law, modified by colonial statute law, is chiefly used.

CAPERS. Vessels of war owned by private persons, and different from ordinary privateers only in size, being smaller. Beawes, *Lex Merc.* 280.

CAPIAS (Lat. *capere*, to take; *copias*, that you take). In Practice. A writ directing the sheriff to take the person of the defendant into custody.

It is a judicial writ, and issued originally only to enforce compliance with the summons of an original writ or with some judgment or decree of the court. It was originally issuable as a part of the original process in a suit only in case of injuries committed by force or with fraud, but was much extended by statutes. See ARREST; BAIL. Being the first word of distinctive significance in the writ, when writs were framed in Latin, it came to denote the whole class of writs by which a defendant's person was to be arrested. It was issuable either by the court of Common Pleas or King's Bench, and bore the seal of the court.

Consult Sellon, Practice, Introd.; Spence, Eq. Jur.; BAIL; BREVE; ARREST; and the titles here following.

CAPIAS AD AUDIENDUM JUDICIUM. In Practice. A writ issued, in a case of misdemeanor, after the defendant has appeared and is found guilty, to bring him to judgment if he is not present when called. 4 Bla. Com. 368.

CAPIAS AD COMPUTANDUM. In Practice. A writ which issued in the action of account rendered upon the judgment *quod computet*, when the defendant refused to appear in his proper person before the auditors and enter into his account.

According to the ancient practice, the defendant might, after arrest upon this process, be delivered on mainprize, or, in default of finding mainprisors, was committed to the Fleet prison, where the auditors attended upon him to hear and receive his account. The writ is now disused.

Consult Thesaurus Brevium 88, 89, 40; Coke, Entries 46, 47; Rastell, Entries 14 b. 15.

CAPIAS PRO FINE. In Practice. A writ which issued against a defendant who had been fined and did not discharge the fine according to the judgment.

The object of the writ was to arrest a defendant against whom a plaintiff had obtained judgment, and detain him until he paid to the king the fine for the public misdemeanor, coupled with the remedy for the private injury sustained. In all cases of forcible torts; 11 Coke 49; 5 Mod. 285; falsehood in denying one's own deed; Co. Litt. 131; 8 Coke 60; unjustly claiming property in replevin, or contempt by disobeying the command of the king's writ, or the express prohibition of any statute; 8 Coke 60. It is now abolished; 3 Bla. Com. 368.

CAPIAS AD RESPONDENDUM. In Practice. A writ commanding the officer to whom it is directed "to take the body of the defendant and keep the same to answer the plaintiff," etc.

This is the writ of *capias* which is generally intended by the use of the word *capias*, and was formerly a writ of great importance. For some account of its use and value, see ARREST; BAIL.

According to the course of the practice at common law, the writ bears teste, in the name of the chief justice, or presiding judge of the court, on some day in term-time, when the judge is supposed to be present, not being Sunday, and is made returnable on a regular return day.

If the writ has been served and the defendant does not give bail, but remains in custody, it is returned C. C. (*cepi corpus*); if he have given bail, it is returned C. C. B. B. (*cepi corpus, bail bond*); if the defendant's appearance have been accepted, the return is, "C. C., and defendant's appearance accepted." See 1 Archb. Pr. 67.

CAPIAS AD SATISFACIENDUM. In Practice. A writ directed to the sheriff or coroner, commanding him to take the person therein named and him safely keep so that he may have his body in court on the return day of the writ, to satisfy (*ad satisfaciendum*) the party who has recovered judgment against him.

It is a writ of execution issued after judgment, and might have been issued against a plaintiff against whom judgment was obtained for costs, as well as against the defendant in a personal action. As a writ at common law it lay in all cases where a *capias ad respondendum* lay as a part of the mesne process. Some classes of persons were, however, exempt from arrest on mesne process who were liable to it on final. It was a very common form of execution, until within a few years, in many of the states; but its efficiency has been destroyed by statutes facilitating the discharge of the debtor, in some states, and by statutes prohibiting its issue, in others, except in specified cases. See ARREST; PRIVILEGE. It is commonly known by the abbreviation *ca. sa*.

It is tested on a general teste day, and returnable on a general return day.

It is executed by arresting the defendant and keeping him in custody. He cannot be discharged upon bail or by consent of the sheriff. See *ESCAPE*. And payment to the sheriff is held in England not to be sufficient to authorize a discharge. He might be discharged by showing irregularities in the writ; 8 D. P. C. 291; 4 *id.* 6.

The return made by the officer is either C. C. & C. (*cepi corpus et committitur*), or N. E. I. (*non est inventus*). The effect of execution by a ca. sa. is to prevent suing out any other process against the lands or goods of the person arrested, at common law; but this is modified by statutes in the modern law. See *EXECUTION*.

Consult Archbold; Chitty; Sellon, Practice; 8 Bla. Com. 414.

CAPIAS UTILIGATUM. In Practice. A writ directing the arrest of an outlaw.

If general, it directs the sheriff to arrest the outlaw and bring him before the court on a general return day.

If special, it directs the sheriff, in addition, to take possession of the goods and chattels of the outlaw, summoning a jury to determine their value.

It was a part of the process subsequent to the capias, and was issued to compel an appearance where the defendant had absconded and a capias could not be served upon him. The outlawry was readily reversed upon any plausible pretext, upon appearance of a party in person or by attorney, as the object of the writ was then satisfied. The writ issued after an outlawry in a criminal as well as in a civil case. See 3 Bla. Com. 284; 4 *id.* 320.

CAPIAS IN WITHERNAM. In Practice. A writ directing the sheriff to take other goods of a distrainer equal in value to a distress which he has formerly taken and still withholds from the owner beyond the reach of process.

When chattels taken by distress were decided to have been wrongfully taken and were by the distrainer *eloigned*, that is, carried out of the county or concealed, the sheriff made such a return. Thereupon this writ issued, thus putting distress against distress.

Goods taken in *withernam* are irrepleviable till the original distress be forthcoming; 3 Bla. Com. 148.

CAPITA (Lat.). Heads, and figuratively entire bodies, whether of persons or animals. Spelman.

An expression of frequent occurrence in laws regulating the distribution of the estates of persons dying intestate. When all the persons entitled to shares in the distribution are of the same degree of kindred to the deceased person (e. g. when all are grandchildren), and claim directly from him in their own right, and not through an intermediate relation, they take *per capita*, that is, equal shares, or share and share alike. But when they are of different degrees of kindred (e. g. some the children, others the grandchildren or the great-grandchildren of the deceased), those more remote take *per stirpem*, or *per stripes*, that is, they take respectively the shares their parents or other relation standing in the same degree with them of the surviving kindred entitled, who are in the nearest degree of kindred to the intestate) would have taken had they respectively survived the intestate. Reeve, Descent, Introd. xxvii; also, 1 Roper, Leg. 136, 139. See *PER CAPITA*; *PER STIRPES*; *STIRPES*.

CAPITAL. In Commerce. The sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership, and also the fund of a trading company. McCulloch; Abb. Dict.

Capital signifies the actual estate, whether in money or property, owned by an individual or corporation; 23 N. Y. 192; it is the fund upon which it transacts its business, which would be liable to its creditors, and in case of insolvency pass to a receiver; 28 Barb. 318; it does not include money borrowed temporarily; 21 Wall. 284. See, also, 31 Conn. 306; 7 Blackf. 295; 5 Blatch. 315; 18 Wend. 605.

Moneyed capital, as used in an act respecting state taxation of national bank stock, includes shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money; 121 U. S. 157. It includes money in the hands of an individual invested in loans or other securities; 23

Wall. 480; 121 U. S. 157. See *MONEYED CAPITAL*; *INVESTED CAPITAL*. As distinguished from income, see *INCOME*. See *CASH CAPITAL*.

CAPITAL CRIME. One for which the punishment of death is inflicted.

CAPITAL PUNISHMENT. The punishment of death.

The subject of capital punishment has occupied the attention of enlightened men for a long time; particularly since the middle of the last century, and none deserves to be more carefully investigated. The right of punishing its members by society is admitted; but how far this right extends, by the laws of nature or of God, has been much disputed by theoretical writers, although it cannot be denied that most nations, ancient and modern, have deemed capital punishment to be within the scope of the legitimate powers of government. Beccaria contends with zeal that the punishment of death ought not to be inflicted in time of peace, nor at other times, except in cases where the laws can be maintained in no other way. Beccaria, chap. 28.

The ancient method of administering the law was by retribution or the vindication of the law upon the offender, and in England, as late as the reign of Geo. III., there were about two hundred offences punishable by death, among which were cutting down a tree, robbing a rabbit warren, harboring an offender against the revenue acts, stealing in a dwelling-house to the amount of forty shillings, or in a shop, goods to the amount of five shillings, counterfeiting the stamps that were used for the sale of perfumery, etc. Owing to the efforts of Sir Samuel Romilly, and later of Sir James Mackintosh, the old criminal code was succeeded by a new and wiser course of legislation, and since the statute of 1861 there are but four crimes now punishable in England by death. See, also, 2 Poll. & Maitl. 450; *CRIMES*; *EXECUTION*.

CAPITAL STOCK. The sum, divided into shares, which is raised by mutual subscription of the members of a corporation. It is said to be the sum upon which calls may be made upon the stockholders, and dividends are to be paid; 1 Sandf. Ch. 280; Beach, Priv. Corp. 116; 4 Zabr. 195; Ang. & A. Corp. §§ 151, 556; 9 Yerg. 490; 18 Wis. 281. The term is used to indicate the amount of capital which the charter provides for, and not the value of the property of the corporation; 23 N. J. L. 195; or the original amount upon which a corporation commences; 3 Rich. 346. See 30 Ark. 693 (*contra*, under an Illinois revenue statute; 33 Ill. 602); the entire sum agreed to be contributed to the enterprise, whether paid in or not; 40 Ga. 98.

It has been held to mean the amount paid in, not the amount subscribed; 52 Penn. 177; 40 La. 98; *contra*, 8 Ga. 486; nor that named in the articles of association; 17 Hun 475. See 1 Thomp. Corp. § 1060. See *STOCK*.

Distinguished from Shares. The capital stock of a corporation is the capital upon which the business is to be undertaken and is represented by property of every kind acquired by the company, while the *shares* are mere certificates representing a subscriber's contribution to the capital stock and measuring his interest in the company. This distinction is obvious, although the words "stock" and "shares" are sometimes used synonymously. 216 U. S. 420.

In Statutes, relating to taxation, however, sometimes drawn without regard to the technical meaning of the words, the courts will construe "capital stock" to mean the actual property of the corporation, when necessary to carry out the intent of the statute. *Id.*

Held, that in the Act of 1918, in which the tax upon an association is based upon the average value of its "capital stock," including surplus and undivided profits, these words are not to be given a technical meaning, but should be interpreted, in their entirety, and, in the absence of a fixed share capital, as equivalent to the capital invested in the business, that is, the net value of the property owned by the association and used in its business. *Id.*

In the Technical Sense. The capital stock of a corporation is a sum fixed by its corporate character as the amount paid or to be paid in by the stockholders for the prosecution of the business of the corporation and the benefit of its creditors. 265 U. S. 162; 1 Cook on Corporations, 7th ed., 38.

CAPITAL USED IN BANKING. Capital may be employed in banking although it is not used strictly as working capital and none of it is used in making loans

or directly in other banking transactions. Money of a banker held in the vault or with depositaries as a reserve is employed in banking as much as money loaned to customers. Capital invested in securities may be employed in banking even if its sole use is to give to the banker the credit which attracts depositors or to make it possible for him otherwise to raise money with which banking operations are conducted. And if such securities serve to give credit, they will continue, also in the legal sense, to be capital used in the banking business, even if they are designated by the company as assets of another department and physically segregated as such. Compare 99 U. S. 97. If a company is engaged exclusively in banking, all of its capital, however invested, may reasonably be held to be capital employed in banking without enquiry into the particular use to which it is put. Cf. 116 Fed. 774; 128 Fed. 262. 259 U. S. 301.

CAPITALE. See *JUDICIUM CAPITALE*.

CAPITALIS JUSTICIARIUS. The chief justiciary; the principal minister of state, and guardian of the realm in the king's absence.

This office originated under William the Conqueror; but its power was greatly diminished by Magna Charta, and finally distributed among several courts by Edward I. Spelman, Gloss.; 3 Bla. Com. 98.

CAPITANEUS. He who held his land or title directly from the king himself.

A commander or ruler over others, either in civil, military, or ecclesiastical matters.

A naval commander. This latter use began A. D. 1264. Spelman, Gloss. *Capitaneus, Admiratus*.

CAPITATION (Lat. caput, head). A poll-tax. An imposition yearly laid upon each person.

The constitution of the United States provides that "no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration, therebefore directed to be taken." Art. I, s. 9, n. 4. See 3 Dall. 171; 5 Wheat. 317.

CAPITATION TAX. See *HEAD MONEY*.

CAPITE. See *IN CAPITE*.

CAPITIS DEMINUTIO (sometimes written *deminutio*). (Lat.). The loss of a status or civil qualification; the change of a man's former condition (*prioris status mutatio*).

CAPITULA. Collections of laws and ordinances drawn up under heads or divisions. Spelman, Gloss.

The term is used in the civil and old English law, and applies to the ecclesiastical law also, meaning chapters or assemblies of ecclesiastical persons. Du Cange.

CAPITULA CORONÆ. Specific and minute schedules, or *capitula itineris*.

CAPITULA ITINERIS. Schedules of inquiry delivered to the justices in eyre before setting out on their circuits, and which were intended to embrace all possible crimes.

CAPITULA DE JUDEIS. A register of mortgages made to the Jews. 2 Bla. Com. 343; Crabb, Eng. Law 130.

CAPITULA RURALIA. See *KAL-ENDAE*.

CAPITULARY. In French Law. A collection of laws and ordinances orderly arranged by divisions.

The term is especially applied to the collections of laws made and published by the early French emperors.

The execution of these capitularies was intrusted to the bishops, courts, and *missi regis*; and many copies were made. The best edition of the Capitularies is said by Butler to be that of Baluze, 1677; Co. Litt. 191 a, Butler's note 77.

In Ecclesiastical Law. A collection of laws and ordinances orderly arranged by divisions. A book containing the beginning and end of each Gospel which is to be read every day in the ceremony of saying mass. Du Cange.

CAPITULATION. The treaty which determines the conditions under which a fortified place is abandoned to the commanding officer of the army which besieges it.

On surrender by capitulation, all the property of the inhabitants protected by the articles is considered by the law of nations as neutral, and not subject to capture on the high seas by the belligerent or its ally; 3 Dall. 8.

In Civil Law. An agreement by which the prince and the people, or those who have the right of the people, regulate the manner in which the government is to be administered. Wolffius, § 989.

CAPITULUM (Lat.). A leading division of a book or writing; a chapter; a section. Tert. Adv. Jud. 9. 19. Abbreviated, Cap.

(Lat. little head; dimin. of *caput*, a head.) An assembly of ecclesiastical persons. A congregation of clergymen under one dean in a cathedral church. *Id.*; Co. Litt. 96.

CAPITUR PRO FINE. See **CAPIAS PRO FINE.** See also, Wharton, Dict.

CAPTAIN (Lat. capitaneus; from caput, head). The commander of a company of soldiers.

The term is also used of officers in the municipal police in a somewhat similar sense: as, captain of police, captain of the watch.

The master or commander of a merchant-vessel, or a vessel of war.

A subordinate officer having charge of a certain part of a vessel of war.

In the United States, the commander of a merchant-vessel is, in statutes and legal proceedings and language, more generally termed *master*, which title see. In foreign laws and languages he is frequently styled *patron*.

The rank of captain in the United States navy is next above that of commander; and captains are generally appointed from this rank in the order of seniority. The president has the appointing power, subject to the approval and consent of the senate.

CAPTATION. In French Law. The act of one who succeeds in controlling the will of another, so as to become master of it. It is generally taken in a bad sense.

It was formerly applied to the first stage of the hypnotic or mesmeric trance.

Captation takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those services and officious little presents, which are usual among friends, and by all those means which ordinarily render us agreeable to others. When these attentions are unattended by deceit or fraud, they are perfectly fair, and the captation is lawful; but if, under the mask of friendship, fraud is the object, and means are used to deceive the person with whom you are connected, then the captation is fraudulent, and the acts procured by the captator are void.

CAPTION (Lat. capere, to take). A taking, or seizing; an arrest. The word is no longer used in this sense.

The heading of a legal instrument, in which is shown when, where, and by what authority it was taken, found, or executed.

In the English practice, when an inferior court, in obedience to the writ of certiorari, returned an indictment into the king's bench, it was annexed to the caption, then called a schedule, and the caption concluded with stating that "it is presented in manner and form as appears in a certain indictment thereto annexed," and the caption and indictment were returned on separate parchments; 1 Wms. Saund. 809, n. 2.

In some of the states, every indictment has a caption attached to it, and returned by the grand jury as part of their presentment in each particular case; and in this respect a caption differs essentially from that of other tribunals, where the separate indictments are returned without any caption, and the caption is added by the clerk of the court, as a general caption embracing all the indictments found at the term; 3 Gray 454; 4 Id. 5; 6 Cush. 174.

LETTERS OF CAPTION. In Scotch Law. A writ (now obsolete) issued at the instance of a creditor and containing the command that the officer shall take and imprison the debtor until the debt be paid. Cent. Dict.

PROCESS CAPTION. In Scotch Law. A summary warrant of incarceration for the purpose of forcing back a process. *Id.*

In Criminal Practice. The object of the caption is to give a formal statement of the proceedings, describe the court before which the indictment is found, and the time when and place where it was found; Hall, Int. L. 413; 3 Gray 454; and the jurors by whom it was found; Whart. Cr.

Pl. § 91. Thus particulars must be set forth with reasonable certainty; 6 McLean 66; 39 Me. 78; 20 Ala. 33. It must show that the *venire facias* was returned and from whence the jury came; Whart. Cr. Pl. § 91. The caption may be amended in the court in which the indictment was found; 6 McLean 156; 101 Mass. 83; 78 Pa. 122; even in the supreme court; 4 Halst. 357; 2 McCord 301. It is no part of the indictment; 3 Gray 454; 37 N. H. 196; 37 N. Y. 117; 24 Ala. 672.

In Depositions. The caption should state the title of the cause, the names of the parties, and at whose instance the depositions are taken; 2 Cra. 123; 34 Me. 208. See 1 Hemp. 701. See Weeks, Depositions.

For some decisions as to the forms and requisites of captions, see 1 Murph. 281; 1 Brev. 169; 8 Yerg. 514; 1 Hawks 354; 6 Mo. 469; 2 Ill. 456; 6 Blackf. 299; 6 Miss. 20.

CAPTIVE. A prisoner of war. Such a person does not by his capture lose his civil rights.

CAPTOR. One who has taken property from an enemy: this term is also employed to designate one who has taken an enemy.

Formerly, goods taken in war were adjudged to belong to the captor; they are now considered to vest primarily in the state or sovereign, and belong to the individual captors only to the extent that the municipal laws provide. Captors are responsible to the owners of the property for all losses and damages, when the capture is tortious and without reasonable cause in the exercise of belligerent rights. But if the capture is originally justifiable, the captors will not be responsible, unless by subsequent misconduct they become trespassers *ab initio*; 1 C. Rob. Adm. 93, 96. See 2 Gall. 374; 1 Id. 274; 1 Pet. Adm. 116; 1 Mas. 14.

CAPTURE. The taking of property by one belligerent from another.

To make a good capture of a ship, it must be subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.

Goods floating from a wreck are not subject to appropriation by the first taker, and the word capture has no application in such case; 8 Fed. Rep. 232.

Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board. The former is the capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to deprive the owner of it. Capture is deemed lawful when made by a declared enemy lawfully commissioned and according to the laws of war, and unlawful, when it is against the rules established by the law of nations; Marsh. Ins. b. 1, c. 12, s. 4. All captures *jure belli* are made for the government; 10 Wheat. 306; 1 Kent 100. See 1 Curt. C. C. 266.

Capture, in technical language, is a taking by military power; seizure, a taking by civil authority; 35 Ga. 344.

See, generally, 1 Kent 100 *et seq.*; Story, Const. §§ 1168-1177; Wheat. Int. Law, 3d Eng. ed.; Archb. Cr. Fr. & Pl. 235; Phillimore, Int. Law; 2 Caines, Cas. 158; 14 Johns. 227; 6 Mass. 197; 4 Cra. 43; 11 Wheat. 1; 2 How. 210; Paine 129; 6 Wall. 10; 8 C. P. 670; 51 Me. 476; 47 Pa. 187; 11 Ct. of Cl. 456; PRIZE.

CAPUT (Lat. head).

In Civil Law. Status; a person's civil condition.

According to the Roman law, three elements concurred to form the *status* or *caput* of the citizen, namely, liberty, *libertas*, citizenship, *civitas*, and family, *familia*.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur. This definition of liberty has been translated by Dr. Cooper, and all the other English translators of the Institutes, as follows: "Freedom, from which we are denominated free, is the natural power of acting as we please, unless prevented by force or by the law." This, although it may be a literal, is certainly not a correct, translation of the text. It

is absurd to say that liberty consists in the power of acting as we think proper, so far as not restrained by force; for it is evident that even the slave can do what he chooses, except so far as his volition is controlled by the power exercised over him by his master. The true meaning of the text is "Liberty (from which we are called free) is the power which we derive from nature of acting as we please, except so far as restrained by physical and moral impossibilities." It is obvious that a person is perfectly free though he cannot reach the moon nor stem the current of the Mississippi; and it is equally clear that true freedom is not impaired by the rule of law not to appropriate the property of another to ourselves, or the precept of morality to behave with decency and decorum.

Civitas—the city—reminds us of the celebrated expression, "*civis sum Romanus*," which struck awe and terror into the most barbarous nations. The citizen alone enjoyed the *jus quiritium*, which extended to the family ties, to property, to inheritance, to wills, to alienations, and to engagements generally. In striking contrast with the *civis* stood the *peregrinus hostis, barbarus*. *Familia*—the family—conveyed very different ideas in the early period of Roman jurisprudence from what it does in modern times. Besides the singular organization of the Roman family, explained under the head of *pater familias*, the members of the family were bound together by religious rites and sacrifices, — *sacra familias*.

The loss of one of these elements produced a change of the *status*, or civil condition; this change might be threefold; the loss of liberty carried with it that of citizenship and family, and was called the *maxima capitis deminutio*; the loss of citizenship did not destroy liberty, but deprived the party of his family, and was denominated *media capitis deminutio*; when there was a change of condition by adoption or abrogation, both liberty and citizenship were preserved, and this produced the *minima capitis deminutio*. But the loss or change of the *status*, whether the great, the less, or the least, was followed by serious consequences; all obligations merely civil were extinguished; those purely natural continued to exist. Gaius says, *Eas obligationes quæ naturalem præstationem habere intelliguntur, palam est capitis diminutione non perire, quia civilis ratio naturalia jura corrumpere non potest.* Unsurprisingly, therefore, the diminution of the head: *amittitur usufructus capitis diminutione*. D. 8. 6. § 23. It also annulled the testament: "*Testamenta jure facta infirmantur, cum is qui fecerit testamentum capite deminuitur sit.*" Gaius 2, § 143. *Capitis deminutio* means that the citizen, to which the person whose *status* has been lost or changed belongs, has lost a head, or one of its members. See Ratt. Roman Law.

At Common Law. A head.

Caput comitatus (the head of the county). The sheriff; the king. Spelman, Gloss.

A person; a life. The upper part of a town. Cowel. A castle. Spelman, Gloss.

Caput anni. The beginning of the year. Cowel.

CAPUT LUPINUM (Lat.). Having a wolf's head.

Outlaws were anciently said to have *caput lupinum*, and might be killed by any one who met them, if attempting to escape; 4 Bla. Com. 330. In the reign of Edward III. this power was restricted to the sheriff when armed with lawful process; and this power, even, has long since disappeared, the process of outlawry being resorted to merely as a means of compelling an appearance; Co. Litt. 128 b; Bla. Com. 284; 1 Reeve's Hist. Eng. Law 471.

CAPUTAGIUM. Head-money; the payment of head-money. Spelman, Gloss.; Cowel.

CAR CLEANER. A "car cleaner" is one whose duty is to sweep out cars upon their arrival at certain points. 153 Ky. 676, 166 S. W. 190.

CAR-TRUST ASSOCIATION. An association of persons formed under an instrument in writing, for the purpose of buying, selling, and leasing railroad rolling stock; an unincorporated association, the nominal capital of which is represented by certificates of stock, whose owners are shareholders in the association. 5 A. & E. Ency. L. (2nd ed.) 747. See **CAR-TRUST LEASES**.

CAR-TRUST LEASES. A peculiar species of security by which the manufacturers of railway rolling stock, in substance and effect, sell the cars to railway companies of doubtful solvency, by a species of conditional sale known as a "car trust," under which they reserve title, and in form only lease them to such companies. 5 A. & E. Ency. L. (2nd ed.) 747. See **CAR-TRUST ASSOCIATION**.

CAR-TRUST SECURITIES. A phrase used commercially to indicate a class of investment securities based upon the conditional sale or hire of railroad cars or locomotives to railroad companies with a reservation of title in the vendor or bailor until the property is paid for. See **ROLLING STOCK**. See **CAR-TRUST LEASES**.

CARAT. The weight of four grains, used by jewellers in weighing precious stones. Webster.

CARCAN. In French Law. An instrument of punishment, somewhat resembling a pillory. It sometimes signifies the punishment itself. Biret, Vocab.

CARCER (Lat.). A prison or goal. Strictly, a place of confinement or detention and safe keeping, and not of punishment.

CARDINAL. In Ecclesiastical Law. The title given to one of the highest dignitaries of the church of Rome.

Cardinals are next to the pope in dignity: he is elected by them and out of their body. There are cardinal bishops, cardinal priests, and cardinal deacons. See Fleury, *Hist. Ecclési.* liv. xxxv. n. 17, li. n. 19; Thomassin, part. ii. liv. i. c. 53, part. liv. i. c. 79, 80; Loiseau, *Traité des Ordres*, c. 3, n. 81; André Drouot Canon.

CARDINAL POINTS. In an agreement that the surveys should be made in squares to the "cardinal points," is meant the cardinal points of the magnetic needle, which is the popular meaning of the expression. 2 Bibb. (Ky.) 352.

CARDS. In Criminal Law. Small rectangular pasteboards, on which are figures of various colors, used for playing certain games. The playing of cards for amusement is not forbidden; nor is gaming for money, at common law; Bish. Stat. Cr. § 504.

Cards are a gambling device; 19 Mo. 877; 12 Wis. 434.

As to POSTAL CARDS, see POSTAGE.

CARE. Charge or oversight; implying responsibility for safety and prosperity. Webster, Dict.

It is used with reference to the degree of care required of bailees and carriers. For the utmost care, see 21 Md. 275; 8 Barb. 368; extraordinary care, 54 Ill. 19; great care, 8 Barb. 368; especial care, 2 Bradw. 116; proper and reasonable care, 28 Ill. 380; 25 Conn. 443; 52 Ala. 606; due care, 11 Ired. L. 640; 10 Allen 532; 10 id. 20; ordinary care, 52 N. H. 528; 35 N. Y. 9; 10 R. I. 22; slight care, 17 Cal. 97; 20 N. Y. 65; 8 Ohio St. 1. See DEGREE OF CARE. See REASONABLE CARE.

CARELESSLY AND WANTONLY. The words "carelessly and wantonly" mean respectively, the absence of that degree of care an ordinarily prudent person would use under like and similar circumstances, and the doing of an act in reckless disregard of the consequences thereof, or of its effect upon the person or life of another. 112 Ky. 96, 65 S. W. 163.

CARETA (spelled, also, *Carreta* and *Carrecta*). A cart; a cart-load.

In Magna Charta (9 Hen. III. c. 21) it is ordained that no sheriff shall take horses or carts (*carreta*) without paying the ancient liverly therefor.

CARGO. In Maritime Law. The entire load of a ship or other vessel. Abbott, Shipp.; 1 Dall. 197; Merlin, *Répert.*; 2 Gill & J. 136.

This term is usually applied to goods only, and does not include human beings; 1 Phill. Ins. 185; 4 Pick. 429. But in a more extensive and less technical sense it includes persons; thus, we say, A cargo of emigrants. See 7 M. & G. 723, 744; 113 U. S. 49.

CARLISLE TABLES. Life and annuity tables compiled at Carlisle, England, about 1870. Used by actuaries and others. Black, L. Dict.

CARMACK ACT. An amendment of the Hepburn Act of June 29, 1906, regulating liability of interstate carriers. It supersedes all state regulations on the same subject. 226 U. S. 513.

CARNAL KNOWLEDGE. Sexual connection. 97 Mass. 59; 22 Ohio St. 541. The term is generally, if not exclusively, applied to the act of a male.

In the statutes relating to abuse or carnal knowledge of a female child of tender age, the word abuse includes the words carnally know, and the latter term also includes the former, as there could be no carnal knowledge of such a child by a man capable of

committing rape, without injury; 58 Ala. 376.

CARNALLY KNEW. In Pleading. A technical phrase usual in an indictment to charge the defendant with the crime of rape.

According to the early English authorities these words were considered essential; Comyns, Dig. *Indictment*; 1 Ch. Cr. L. 243; 1 Hale, P. C. 632; but Chitty afterwards says that it does not seem so clear; 8 Ch. Cr. L. 812; and the settled opinion seems to be that the words "carnally knew" are included in the term "rapuit" and are therefore unnecessary; 2 Hawk. P. C. c. 25, § 56; 2 Stark. Cr. Pl. 481, n. (e); but it is safer not to omit them; id.: 1 Ch. Cr. L. 243; 1 East, P. C. 448; 1 Arch. Cr. Pr. & Pl. 8th ed. 999, n. (1); 3 Russell, Cr. 6th ed. 230. These authorities would apply in states in which the offence is described simply as the crime of rape, but in those states where the crime is designated by the words "did ravish and carnally know" it would on general principles of criminal pleading be safer to use the exact words of the statute. The use of the words "carnally knew" will not supply the omission of the word "ravished"; 1 Hale, P. C. 628, 632; 3 Russell, Cr. 6th ed. 230. See 23 Ohio St. 545; 58 Ala. 378.

CARRIAGE. See AUTOMOBILE.

CARRIER. One who undertakes to transport goods from one place to another; 2 Pars. Contr. 8th ed. *163.

A person or corporation who undertakes to transport or convey goods, or property, or persons, from one place to another, gratuitously or for hire, by land or by water. 1 Moore, Carriers 2nd ed. 1.

They are either *common* or *private*. Private carriers incur the responsibility of the exercise of ordinary diligence only, like other bailees for hire; Story, Bailm. § 495; 1 Wend. 272; 1 Hayw. 14; 2 Dana 430; 2 B. & P. 417; 2 C. B. 877. Special carriers of goods are not insurers and are only liable for injuries caused by negligence; 90 Mich. 125. A carrier's liability attaches the moment goods are delivered to him; 46 Mo. App. 574; 56 Ark. 279. See COMMON CARRIERS. See DELIVERING CARRIER.

Forwarding. In a bill of lading stipulating that the liability of a "forwarding carrier" for loss shall cease on delivery to the connecting carrier, and that of a delivering carrier on delivery at the station of delivery, the term forwarding carrier applies to all carriers who transport goods to the delivering carrier, and the term delivering carrier to the carrier who actually delivers the goods at their destination. 127 Ky. 304, 105 S. W. 443, 32 R. 174.

By Railroad. In the Transportation Act, 1920, the term "carrier" is defined to mean "(1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, . . . and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates." 265 U. S. 292.

CARRIER, COMMON. See COMMON CARRIER.

CARRIER, PRIVATE. See PRIVATE CARRIER.

CARRIES WITH IT. The expression "carries with it" means any interest that the note, bill, or other evidence of debt may carry by operation of law. 89 Ky. 126, 9 S. W. 506.

CARRUCA. In Roman civil law, a four-wheeled vehicle used for riding. Burrill.

CARRYING AWAY. In Criminal Law. Such a removal or taking into possession of personal property as is required in order to constitute the crime of larceny.

The words "did take and carry away" are a translation of the words *cepit et asportavit*, which were used in indictments when legal processes and records were in the Latin language. But no single word in our language expresses the meaning of *asportavit*. Hence the word "away," or some

other word, must be subjoined to the word "carry," to modify its general signification and give it a special and distinctive meaning. 7 Gray 45.

Any removal, however right, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient; 2 Bish. Cr. Law § 609; 1 Dearl. 431; Coxe 439. Thus, to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her hair; 1 Leach 320; to remove sheets from a bed and carry them into an adjoining room; 1 Leach 222, n.; to take plate from a trunk, and lay it on the floor with intent to carry it away; id.; to remove a package from one part of a wagon to another, with a view to steal it; 1 Leach 236; have respectively been held to be felonies. But nothing less than such a severance will be sufficient; 2 East, Pl. Cr. 556; 1 Ry. & M. 14; 4 Bla. Com. 231; 2 Russ. Cr. 96; Clarke, Cr. L. 242, 260.

CARRYING CONCEALED WEAPONS. See ARMS.

CART. A carriage for luggage or burden, with two wheels, as distinguished from a wagon, which has four wheels. Worcester, Dict.; Brande. The vehicle in which criminals are taken to execution. Johnson.

The term has been held to include four-wheeled vehicles, to carry out the intent of a statute; 23 Ala. N. S. 621.

CART BOTE. An allowance to the tenant of wood sufficient for carts and other instruments of husbandry. 2 Bla. Com. 35.

CARTA. A charter, which title see. Any written instrument.

In Spanish Law. A letter; a deed; a power of attorney. *Las Partidas*, pt. 3, t. 18, l. 30.

CARTA MERCATORIA. This charter (also known as the *Statutum de Nova Custuma*) was granted by Edward I. in 1303 to certain foreign merchants. In return for certain customs duties it gave them extensive rights of trading, free from pannage and other municipal dues, and the right to a jury *e medietate lingue* in all pleas other than such as were capital. The charter is given at pp. 205-209 of Vol. II., Pt. I. of No. 12 of the Rolls Series.

The earlier statute of *Adon Burrell* (q. v.) applied only to English merchants. Byrne.

CARTE BLANCHE. The signature of one or more individuals on a white paper, with a sufficient space left above it to write a note or other writing.

In the course of business, it not unfrequently occurs that, for the sake of convenience, signatures in blank are given with authority to fill them up. These are binding upon the parties. But the blank must be filled up by the very person authorized; 6 Mart. La. 707. See Chit. Bills 70; 2 Pa. 200; BLANK.

CARTEL. An agreement between two belligerent powers for the delivery of prisoners or deserters, and also a written challenge to a duel.

Cartel ship. A ship commissioned in time of war to exchange prisoners, or to carry any proposals between hostile powers; she must carry no cargo, ammunition, or implements of war, except a single gun for signals. The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations; 4 C. Rob. Adm. 357. See Merlin, *Répert.*; Dane, Abr. c. 40, a. 6, § 7; 1 Kent 68; 8 Phill. Int. Law 161; 1 Pet. C. C. 106; 3 C. Rob. Adm. 141; 6 id. 336; 1 Dods. Adm. 60.

CARTMEN. Persons who carry goods and merchandise in carts, either for great or short distances, for hire.

Cartmen who undertake to carry goods for hire as a common employment are common carriers; 8 C. & K. 61; Edw. Bailm.

600; Story, Bailm. § 496. And see 2 Wend. 327; 1 M'Cord 444; 3 Bail. 421; 2 Vt. 92; 1 Murph. 417; & Bac. Abr. Carriers, A.

CARTULARY. A place where papers or records are kept. R. & L. Dict. Also, a collection of charters, deeds or records. A copy of deeds or records. A copy of a register or record. An officer in charge of records. English.

CARUA. See CARUCA.

CARUCA. A plow. A four-wheeled carriage. A team for a plow, of four oxen abreast.

CARUCAGE. A taxation of land by the *caruca* or *carue*. The act of plowing.

The *caruca* was as much land as a man could cultivate in a year and a day with a single plow (*caruca*). *Carucage*, *caruagge*, or *caruagge* was the tribute paid for each *caruca* by the *carucarius*, or tenant. Spelman, Gloss; Cowel.

CARUCATA, CARUCATE, CARVAGE, OR CARVE. A certain quantity of land used as the basis for taxation. A cartload. As much land as may be tilled by a single plow in a year and a day. Skene, *de verb. sig.* A plow land of one hundred acres; Ken. Gloss. The quantity varies in different countries from sixty to one hundred and twenty acres. Whart. Tex. See Littleton, Ten. cclxii.

It may include houses, meadow, woods, etc. It is said by Littleton to be the same as *acca*, but has a much more extended signification. Spelman, Gloss; Blount; Cowel.

CARUE. A carve (of land); a ploughland. Burrill. See CARUCAGE; CARUCATA.

CASE. A question contested before a court of justice. An action or suit at law or in equity. 1 Wheat. 352.

Within the meaning of § 2 of Article III of the U. S. Constitution, a case is a complaint of a plaintiff "brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." 258 U. S. 129. See 32 Fed. 241, 255, quoted in 219 U. S. 346, 356.

A case arising under a treaty, within U. S. Const. art. 3, § 2; is a suit in which the validity or construction of a treaty of the United States is drawn into question; 2 Sto. Const. § 1647; and under the judiciary act of 1789, § 25, the U. S. supreme court exercises an appellate jurisdiction in such cases decided by a state court only when the decision of the latter is against the title, right, privilege, or exemption set up or claimed by the party seeking to have the decision reviewed; 1 Wheat. 356. The decision of the state court against the claimant must be upon the construction of the treaty; if it rests upon other grounds it is not a case arising under a treaty, and the supreme court is without any jurisdiction; 5 Cra. 544; 11 How. 529; 12 id. 111. See also as to cases under treaties; 6 Cra. 286; 3 Wall. 304; 8 id. 650; 20 id. 523; 29 Ct. of Cl. 62; id. 144; id. 288; 31 S. W. Rep. (Tex.) 1064.

In Practice. A form of action which lies to recover damages for injuries for which the more ancient forms of action will not lie. Steph. Pl., And. ed. § 52.

Case, or, more fully, action upon the case, or trespass on the case, includes in its widest sense *assumpsit* and *trespass*, and distinguishes a class of actions in which the writ is framed according to the special circumstances of the case, from the ancient actions, the writs in which, called *brevia formata*, are collected in the *Registrum Brevium*.

By the common law, and by the statute Westm. 2d, 13 Edw. I. c. 34, if any cause of action arose for which no remedy had been provided, a new writ was to be formed, analogous to those already in existence which were adapted to similar causes of action. The writ of trespass was the original writ most commonly resorted to as a precedent; and in process of time the term trespass seems to have been so extended as to include every species of wrong causing an injury, whether it was *malfeasance*, *misfeasance*, or *nonfeasance*, apparently for the purpose of enabling an action on the case to be brought in the king's bench. It thus includes actions on the case for breach of a parol undertaking, now called *assumpsit* (see *ASSUMPSIT*), and actions based upon a finding and subsequent unlawful conversion of property, now called *trover* (see *TROVER*), as well as many other actions upon the case which seem to have been derived from other originals than the writ of trespass, as nuisance, deceit, etc.

And, as the action had thus lost the peculiar char-

acter of a technical trespass, the name was to a great extent dropped, and actions of this character came to be known as actions on the case.

As used at the present day, case is distinguished from *assumpsit* and *covenant*, in that it is not founded upon any contract, express or implied; from *trover*, which lies only for unlawful conversion; from *detinue* and *replevin*, in that it lies only for injuries committed without force, or for forcible injuries which damage the plaintiff consequently only, and in other respects. See 3 Reeves, Eng. Law 84; 1 Spence, Eq. Jur. 287; 1 Chit. Pl. 123; 3 Bla. Com. 41; Poll. Tort 645; 5 Term 648.

A similar division existed in the civil law, in which upon nominate contracts an action distinguished by the name of the contract was given. Upon innominate contracts, however, an action *præscriptis verbis* (which lay where the obligation was one already recognized as existing at law, but to which no name had been given), or *in factum* (which was founded on the equity of the particular case), might be brought.

The action lies for:

Torts not committed with force, actual or implied; 2 Ired. 38; 3 Gratt. 366; 20 Vt. 151; 8 Ga. 190; as, for malicious prosecution; 6 Munf. 27, 118; 11 G. & J. 80; 7 B. Monr. 545; 21 Ala. N. S. 491; 30 Mo. App. 524; 92 Mich. 428; 8 Conn. 537; 6 M. & W. 270; see MALICIOUS PROSECUTION; fraud in purchases and sales; 1 T. B. Monr. 215; 17 Wend. 193; 22; Ala. 501; 3 Cush. 407; 17 Pa. 293; 4 Strobb. 69; 15 Ark. 109; 18 Ill. 299; 92 Mich. 304; conspiracy to defame; 111 Pa. 335.

Torts committed forcibly where the matter affected was *not tangible*; 2 Conn. 529; 2 Vt. 68; as, for obstructing a private way; 14 Johns. 383; 5 H. & J. 467; 18 Pick. 110; 23 Pa. 348; 2 Dutch. 308; disturbing the plaintiff in the use of a pew; 1 Chit. Pl. 43; injury to a franchise.

Torts committed forcibly when the injury is consequential merely, and not immediate; 6 S. & R. 348; 6 H. & J. 230; 4 D. & B. 146; 81 Mich. 21; as, special damage from a public nuisance; Willes 71; 5 Blackf. 35; 1 Rich. S. C. 444; 3 Barb. 42; 8 Cush. 300; 4 McLean 339; 12 Pa. 81; 3 Md. 431; acts done on the defendant's land which by immediate consequence injure the plaintiff; 8 Cush. 595; 8 B. Monr. 458; 35 Me. 271; 2 N. Y. 159, 163; 17 Ohio 489; 12 Ill. 20; 22 Vt. 83; 21 Conn. 213; 3 Md. 431. See 5 Rich. S. C. 583; 59 Ala. 454; 5 Fla. 472; 12 N. J. L. 257.

Injuries to the relative rights; 1 Halst. 322; 1 M'Cord 207; 3 S. & R. 215; 2 Murph. 61; 7 Ala. 169; 6 T. B. Monr. 296; 7 Blackf. 578; 3 Den. 381; enticing away servants and children; 1 Chit. Pl. 137; 4 Litt. 25; 15 Barb. 499; 1 Yeates 586; seduction of a daughter or servant; 5 Me. 546; 2 Greene 520; or wife; 164 Pa. 580. See 6 Munf. 587; 1 Gilm. 33; SEDUCTION ON. Also for criminal conversation with spouse, by husband; 99 Cal. 649; 52 Ill. App. 597; 99 Mich. 250; but not by wife against another woman; 62 N. W. Rep. (Minn.) 438; for alienation of affection of spouse, by husband; 36 Pac. Rep. (Colo.) 609; 29 Atl. (Vt.) 252; or the wife; 40 N. E. Rep. (Ind. App.) 276, 1119; 29 Misc. Rep. 82; 8 Wash. St. 81; 60 N. W. Rep. (Ia.) 202; 62 N. W. Rep. (Mich.) 833. See HUSBAND; WIFE.

Injuries which result from negligence; 1 Cush. 475; 23 Me. 371; 1 Den. 81; 2 Ired. 138; 18 Vt. 620; 2 Strobb. 156; 4 Rich. 223; 9 Ark. 85; 24 Miss. 93; 20 Pa. 337; 13 B. Monr. 219; 15 Ill. 366; 3 Ohio St. 172; see 5 Den. 255; 20 Vt. 529; 19 Conn. 507; 29 Me. 307; 2 Mich. 259; though the direct result of actual force; 4 B. & C. 223; 14 Johns. 432; 17 Barb. 94; 3 N. H. 465; 11 Mass. 137; 2 Harr. Del. 443; 2 Ired. 206; 18 Vt. 605; 7 Blackf. 342; 1 R. I. 474; Cooley, Torts 515.

Wrongful acts done under a legal process regularly issuing from a court of competent jurisdiction; 9 Conn. 141; 11 Mass. 500; 6 Me. 421; 2 Litt. 234; 6 Dana 321; 3 G. & J. 377; 13 Ga. 260; 6 Cal. 399; 95 Ala. 213; 276 Ill. 224. See 3 S. & R. 142; 12 id. 210.

Wrongful acts committed by the defendant's servant without his order, but for which he is responsible; 3 Cush. 300; 8 Wend. 474; 9 Humphr. 757; 13 B. Monr. 219; 2 Ohio St. 536; 17 Ill. 580.

The infringement of rights given by statute; 15 Conn. 526; 7 Mass. 169; 23 Me. 371; 9 Vt. 411; 2 Woodb. & M. 337.

Injuries committed to property of which

the plaintiff has the reversion only; 4 Gray 197; 24 Conn. 15; 2 Green 8; 1 Johns. 511; 3 Hawks 246; Busb. 30; 2 Murph. 61; 2 N. H. 430; 5 Pa. 118; 8 id. 523; 2 Dougl. 184; 4 Harr. Del. 181; 21 Vt. 103; 1 Dutch. 97, 255; 41 Me. 104; as where property is in the hands of a bailee for hire; 8 East 593; 3 Hawks 246; 8 B. Monr. 515; also where grantor destroys an unrecorded deed placed in his hands for safekeeping by the grantee; 102 N. C. 519.

As to the effect of intention, as distinguishing case from trespass, see 1 M'Mull. 864; 7 Blackf. 342; 4 Den. 464; 4 Barb. 225; 30 Me. 173; 18 Ired. 50; 26 Ala. N. S. 633. In some states the distinction is expressly abolished by statute; 25 Me. 86; 8 Blackf. 119; 3 Sneed 20; 1 Wis. 852.

The declaration must not state the injury to have been committed *vi et armis*; 3 Conn. 64 [yet after verdict the words *vi et armis* (with force and arms) may be rejected as surplusage; Harp. 122]; and should not conclude *contra pacem*; Com. Dig. Action on the Case (C, 3).

Damages not resulting necessarily from the acts complained of must be specially stated; 3 Strobb. 373; 32 Me. 578; 5 Cush. 104; 9 Ga. 160; 4 Chandl. Wis. 20. Evidence which shows the injury to be trespass will not support case; 5 Mass. 560; 16 id. 451; 8 Johns. 468; 4 Barb. 596; 3 Md. 431. See 2 Rand. 440; 8 Blackf. 119.

The plea of not guilty raises the general issue; 2 Ashm. 150. Under this plea almost any matter may be given in evidence, except the statute of limitations; and the rule is modified in actions for slander and a few other instances; 1 Wms. Saund. 130, n. 1; Willes 20.

The judgment is that the plaintiff recover a sum of money ascertained by a jury for his damages sustained by the commission of the grievances complained of in the declaration; 2 Ired. 221; 18 Vt. 620; 18 Conn. 494; with costs. See, generally, 2 Wait, Act. & Def. ch. xxxiv., as to cases in which this action will lie.

CASE AGREED ON. A statement of facts in writing, agreed upon between the parties to an action, and submitted to the court without trial, in order to obtain an opinion or decision upon the points of law arising on such facts. This is sometimes called a case stated. See AGREED CASE.

CASE CERTIFIED. Where there is a difference of opinion between the judges of the circuit court, they may certify the question to the supreme court of the United States, but it must be a distinct point or proposition of law so clearly stated that it can be answered without regard to the other issues of law or fact in the case; 128 U. S. 426; 131 id. 55, 58. It must not involve the whole case and must be a question of law only; 128 U. S. 426; nor can a case be certified in advance of a regular trial; 131 U. S. 55.

CASE or CONTROVERSY. A case or controversy, in order that the judicial power of the United States may be exercised thereon, implies the existence of present possible adverse parties whose contentions are submitted to the court for adjudication. 219 U. S. 347; 2 Dall. (U. S.) 431.

CASE LAW. The body of law created by judicial decisions, as distinguished from law derived from statutory and other sources.

As distinguished from Statute Law (*q. v.*). Law which is found in decided cases; another name for the common law. The whole field of case law may be divided into two classes: (1) case law proper, which includes cases decided by regularly organized courts of justice (*e. g.* court of first instance, courts of intermediate appellate jurisdiction, courts of last resort); (2) subordinate case law, including ruling of boards and commissions, or administrative officers, and opinions of legal officers of the government.

Case law, like statute law, deals with both kinds of law, substantive and adjective law (*q. v.*), the greater part being substantive law. Both grand divisions of law, public

and private law, are also embraced in case law, the larger portion, perhaps, being devoted to private law. Although the possible scope of case law and statute law are identical, in practice the scope of the former is broader than that of the latter. Hicks Mater. & Meth. Leg. Res. 76-78. See **STATUTE LAW**; **COMMON LAW**.

CASE, LAW OF THE. See **LAW OF THE CASE**.

CASE MADE. A statement of facts in relation to a disputed point of law, agreed to by both parties and submitted to the court *without a preceding action*. This is only found in the Code states. See 99 Ala. 253; 22 S. E. Rep. (N. C.) 9; 89 S. C. 237. See **AGREED CASE**.

CASE TO MOVE FOR NEW TRIAL. A case prepared by the party against whom a verdict has been given, upon which to move the court to set aside the verdict and grant a new trial.

CASE, SPECIAL. See **AGREED CASE**.

CASE STATED. In Practice. A statement of all the facts of a case, with the names of the witnesses, and a detail of the documents which are to support them. A brief.

A case stated is a substitute for a verdict, resorted to for convenience and to save the expense of a trial, its purpose being not to make evidence for a jury, but to supersede the action of a jury altogether, by imparting to facts ascertained by consent the judicial certainty requisite to enable the court to pass upon the law, and give judgment on the whole; and its existence is consequently inconsistent with an issue to draw the facts again into contest. 5 Am. & Eng. Ency. 2nd ed., 750-1; 4 Watts (Pa.) 312.

A substitute for a special verdict, adopted for convenience to save the labor and expense of finding the same facts by the jury in the form of a special verdict. *Id.*; 8 W. & S. (Pa.) 44. See **AGREED CASE**.

An agreement in writing, between a plaintiff and defendant, that the facts in dispute between them are as therein agreed upon and set forth. 3 Whart. 143.

Some process of this kind exists, it is presumed, in all the states for the purpose of enabling parties who agree upon the facts to dispense with a formal trial to ascertain what is already known, and secure a decision upon the law involved merely. These agreements are called also *agreed cases*, *cases agreed on*, *agreed statements*, etc. In chancery, also, when a question of mere law comes up, it is referred to the king's bench, or common pleas, upon a case stated for the purpose; 3 Sharw. Bla. Com. 463, n.; 6 Term 313.

The case stated usually embodies a written statement of the facts in the case consented to by both parties as correct, and submitted to the court by their agreement, that a decision may be rendered upon the court's conclusions of law on the facts stated, without a trial by jury.

The facts being thus ascertained, it is left for the court to decide for which party is the law. As no writ of error lies on a judgment rendered on a case stated; Dane, Abr. c. 137, art. 4, § 7; it is usual in the agreement to insert a clause that the case stated shall be considered in the nature of special verdict. In that case, a writ of error lies on the judgment which may be rendered upon it. But a writ of error will also lie on a judgment on a case stated, when the parties have agreed to it; 8 S. & R. 529; and it is usual to include such a provision.

There must be a pending action, in which the case is stated; 4 D. R. (Pa.) 490; it must state all the facts; and cannot refer to outside documents; 132 Pa. 545; the court must decide on the case stated, not on the report of a master subsequently appointed; 132 Pa. 578; and cannot go outside of the case stated in deciding it; 148 Pa. 282; *id.* 441; 149 Pa. 302; if no right of appeal is reserved, the decision of the court is final; 153 *id.* 625.

Where a controversy is submitted to a court upon a case stated, but which fails to recite that it is submitted for its opinion on the law and judgment, the court is with-

out jurisdiction to render judgment; 77 Md. 412. Where an agreed statement was made by the parties under a mistake of facts, it was a proper subject of amendment; 8 Wash. St. 420.

CASE SYSTEM. A method of teaching or studying the science of the law by a study of the cases historically, or by the inductive method. It was introduced in the Law School of Harvard University in 1869-70 by Christopher C. Langdell, Dane Professor of Law. It is usually based upon printed collections of selected cases arranged historically or chronologically under appropriate titles. The system is not necessarily based upon the exclusive use of cases, but the cases are made the basis of instruction. Text books may be used for the purpose of reference and collateral reading, and are so used by many teachers under this system.

The reasons for the adoption of this system of instruction are given in a paper read before the Section of Legal Education of the American Bar Association in 1894, by Professor W. A. Keener, formerly of Harvard University, now of the Law School of Columbia University:

"1. That law, like other applied sciences, should be studied in its application, if one is to acquire a working knowledge thereof. 2. That this is entirely feasible for the reason that while the adjudged cases are numerous the principles controlling them are comparatively few. 3. That it is by the study of cases that one is to acquire the power of legal reasoning, discrimination and judgment, qualities indispensable to the practising lawyer. 4. That the study of cases best develops the power to analyze and to state clearly and concisely a complicated state of facts, a power which, in no small degree, distinguished the good from the poor and indifferent lawyer. 5. That the system, because of the study of fundamental principles, avoids the danger of producing a mere case lawyer, while it furnishes, because the principles are studied in their application to facts, an effectual preventive of any tendency to mere academic learning. 6. That the student, by the study of cases, not only follows the law in its growth and development, but thereby acquires the habit of legal thought, which can be acquired only by the study of cases, and which must be acquired by him either as a student, or after he has become a practitioner, if he is to attain any success as a lawyer. 7. That it is the best adapted to exciting and holding the interest of the student, and is, therefore, best adapted to making a lasting impression upon his mind. 8. That it is a method distinctly productive of individuality in teaching and of a scientific spirit of investigation, independence, and self-reliance on the part of the student."

Reprinted in 28 Am. L. Rev. 709. See also 2 *id.* 705; 24 *id.* 211; 27 *id.* 801; 2 Harv. L. Rev. 203, 418; 9 *id.* 169; Reports American Bar Association, 1895, 1896.

CASH. That which circulates as money, including bank bills, but not mere bills receivable. The provision of the limited partnership acts requiring "actual cash payment" by the special partner is not complied with by the delivery to the firm of promissory notes, which are received and treated as cash; 5 Allen 91; nor of credits, 62 N. Y. 513; nor of post-dated checks, 69 *id.* 148; though regular checks of third parties, conceded to represent cash, have been allowed; 34 Pa. 344.

Ready money, money in hand, either in current coin or other legal tender, or in bank bills or checks paid and received as money, and does not include promises to pay money in the future. A sale on credit is not, ordinarily speaking, and in the absence of any evidence of usage, a sale for cash. 136 U. S. 263.

Cash price is the price of articles paid for in cash at the time of purchase, in distinction from the barter and credit prices. A sale for cash is a sale for money in hand; 24 N. J. L. 101.

CASH-BOOK. A book in which a

merchant enters an account of all the cash he receives or pays. An entry of the same thing ought to be made, under the proper dates, in the journal. The object of the cash-book is to afford a constant facility to ascertain the true state of a man's cash. Pardessus, n. 87.

CASH CAPITAL. Where a town charter authorizes the taxation of all personal property and chooses in action, the term "cash capital" applies to money owing and on interest, as well as to money in the hands of the person assessed. 10 Ky. Opin. 861.

CASH DIVIDEND. A dividend by a corporation out of the earnings or profits, which may be taken in cash or applied in payment of the increase of stock to which the stockholder is entitled to subscribe, is a "cash dividend," to be treated, so far as it represents profits accumulated after the creation of the trust for a life tenant and remainderman, as income belonging to the life tenant, and not to the remainderman. 148 Ky. 407, 147 S. W. 25.

CASH REGISTER. Cash register records, introduced to sustain testimony of a party to a transaction, held inadmissible. 13 Yale L. J. 397; 85 N. Y. Supp. 745.

CASH VALUE. See **ACTUAL CASH VALUE**.

CASHIER. An officer of a moneyed institution, or of a private person or firm, who is entitled by his office to take care of the cash or money of such institution, person, or firm.

The cashier of a bank is usually intrusted with all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly, or through subordinate officers, all moneys and notes of the bank; delivers up all discounted notes and other securities; signs drafts on corresponding banks, and, with the president, the notes payable on demand issued by the bank; and, as an executive officer of the bank, transacts much of its general business. He is the chief executive officer of the bank; Morse, Bank, § 152; and the criterion of his authority is that as an officer he transacts its business but does not regulate and control it; *id.*

He need not be a stockholder; indeed, some bank charters prohibit him from owning stock in the bank. He usually gives security for the faithful discharge of his trusts. It is his duty to make reports to the proper state officer (in banks incorporated under the national bank act to the comptroller of the currency; U. S. R. S. § 5210,) of the condition of the bank, as provided by law; and false statements are punishable, and render the cashier liable for any damage resulting to third parties therefrom; Bank Mag. July, 1860.

In general, the bank is bound by the acts of the cashier within the scope of his authority, express or implied; 1 Pet. 46, 70; 8 Wheat. 300, 361; 10 Wall. 604; 8 Mas. 505; 1 Holmes 396; 1 Ill. 45; 1 T. B. Monr. 179; 62 N. W. Rep. (Mich.) 722. It is bound by the act of the cashier in drawing checks in its name, though with the intent to defraud the bank and apply the proceeds to his own use; 67 Hun 378. He may endorse to himself and sue on a note payable to the bank; 99 Mo. 102. But the bank is not bound by a declaration of the cashier not within the scope of his authority; as if, when a note is about to be discounted by the bank, he tells a person that he will incur no risk nor responsibility by becoming an indorser on such note; 6 Pet. 51; 8 *id.* 12. See 95 U. S. 557; 58 How. P. 267; 17 Mass. 1; Story, Ag. § 114; Whart. Ag. § 694; 3 Am. L. Rev. 612; 3 Halst. 1; 12 Wheat. 183; 1 W. & S. 161; 1 Pars. Eq. Cas. 240. He has no authority to accept certificates of the capital stock of an insurance company in payment of a debt due the bank; 37 Neb. 197; 55 *id.* 631.

Where a cashier does acts on behalf of a bank which are not against public policy or criminal, when once executed in whole or part, they are binding on the bank, as it

cannot enjoy the benefits and escape the liabilities; 33 Ill. App. 653; and a cashier of a bank has authority to have the paper of the bank rediscounted, in the usual course of business; 63 N. W. Rep. (Mich.) 722; and when the cashier of a bank instituted an action in the name of the bank commenced by capias issued on his affidavit, alleging his connection with the bank, it will be presumed that he has authority to do so; 56 N. W. Rep. 9; s. c. 96 Mich. 426. A banking corporation, whose charter does not otherwise provide, may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing in the records of the proceedings of the directors, and where the cashier has so acted for a series of years without objection, the bank is estopped to deny his authority; 110 U. S. 7.

He has no authority to bind the bank by a pledge of its credit to secure a discount of his own notes for the benefit of a corporation in which he was a stockholder; 66 Fed. Rep. 691; s. c. 14 C. C. A. 61; nor has he authority to sell property belonging to the bank; 34 Pac. Rep. 403; s. c. 52 Kan. 109; nor has he power to bind the bank to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it; 56 Fed. Rep. 959; nor to assign collaterals belonging to himself, which were given to secure a loan to another person for the cashier's benefit; 19 S. E. (Ga.) Rep. 38.

The power of a bank cashier to transfer notes and securities held by the bank can be questioned only by the bank or its representative; 63 N. W. Rep. (Minn.) 398.

In Military Law. To deprive a military officer of his office. See Art. of War art. 14.

CASSARE. To quash; to render void; to break. Du Cange.

CASSATION. In French Law. A decision emanating from the sovereign authority, by which a decree or judgment in the court of last resort is set aside or annulled. See *COUR DE CASSATION*.

CASSETUR BREVIE (Lat. that the writ be quashed). In Practice. A judgment sometimes entered against a plaintiff at his request when, in consequence of allegations of the defendant, he can no longer prosecute his suit with effect.

The effect of such entry is to stop proceedings, and exonerate the plaintiff from liability for future costs, leaving him free to sue out new process; 3 Bla. Com. 303. See Gould, Pl. c. 5, § 139; 5 Term 684.

CAST. To defeat in a civil action. Webster.

To transfer, invest with, place upon, as to cast an estate upon an heir. Anderson; 36 Cal. 332.

In old English practice, to allege, offer, or present as to cast an essoin or excuse for the failure of a party to appear in court. Burrill; 3 Steph. Com. 659.

CASTELLAIN, CASTELLANUS. The keeper or captain of a fortified castle; the constable of a castle. Spelman, Gloss.; *Termes de la Ley*; Blount.

CASTELLORUM OPERATIO. In Old English Law. Service or labor done by inferior tenants for the building and upholding of castles and public places of defence.

Towards this some gave their personal service, and others, a contribution of money or goods. This was one branch of the *trinoda necessitas*; 1 Bla. Com. 238; from which no lands could be exempted under the Saxons; though immunity was sometimes allowed after the conquest; Kennett, Paroch. Ant. 114; Cowel.

CASTIGATORY. An engine used to punish women who have been convicted of being common scolds. It is sometimes called the trebuchet, tumbrel, ducking-stool, or cucking-stool. This barbarous punishment has perhaps never been inflicted in the United States; 12 S. & R. 225.

CASTING-VOTE. The privilege

which the presiding officer possesses of deciding a question where the body is equally divided. The vice-president of the United States, as president of the senate, has the casting-vote when that body is equally divided, but cannot vote at any other time; Const. I. 3. This is a provision frequently made, though in some cases the presiding officer, after giving his vote with the other members, is allowed to decide the question in case of a tie; 48 Barb. 608.

CASTRATION. In Criminal Law. The act of gelding. When this act is maliciously performed upon a man, it is a mayhem, and punishable as such, although the sufferer consented to it; 2 Bish. Cr. Law § 1001, 1008. By the ancient law of England the crime was punished by retaliation, *membrum pro membro*; Co. 3d Inst. 118. It is punished in the United States, generally, by fine and imprisonment. The civil law punished it with death; Dig. 74. 8. 4. 2. For the French law, vide Code Pénal art. 316. The consequences of castration, when complete, are impotence and sterility; 1 Beck, Med. Jur. 72.

CASU CONSIMILI. See *CONSIMILI CASU*.

CASU PROVISO (Lat. in the case provided for). In Practice. A writ of entry framed under the provisions of the statute of Gloucester (6 Edw. I.) c. 7, which lay for the benefit of the reversioner when a tenant in dower aliened in fee or for life.

It seems to have received this name to distinguish it from a similar writ framed under the provisions of the statute Westm. 2d (18 Edw. I.) c. 24, where a tenant by curtesy had alienated as above, and which was known emphatically as the writ *in consimili casu*.

The writ is now practically obsolete. Fitzh. Nat. Brev. 205; Dane, Abr. Index.

CASUAL EJECTOR. In Practice. The person supposed to perform the fictitious ouster of the tenant of the demandant in an action of ejectment. See *EJECTMENT*.

CASUAL POOR. See *POOR*.

CASUALTIES OF SUPERIORITY. In Scotch Law. Certain emoluments arising to the superior lord in regard to the tenancy.

They resemble the incidents to the feudal tenure at common law. They take precedence of a creditor's claim on the tenant's land and constitute a personal claim also against the vassal. Bell, Dict. They have very generally disappeared. Pat. Comp. 29.

CASUALTY. Inevitable accident. Unforeseen circumstances not to be guarded against by human agency, and in which man takes no part. Story, Bailm. § 240; 1 Pars. Contr. 543; 2 Whart. Negl. 8th ed. *159, 160; Edw. Bailm. 532. See 17 C. B. n. s. 51; 56 Wis. 98.

That which happens without design or without being foreseen. 129 Ky. 477, 112 S. W. 602.

CASUALTY INSURANCE. See *INSURANCE*.

CASUS FÖDERIS (Lat.). In International Law. A case within the stipulations of a treaty.

The question whether, in case of a treaty of alliance, a nation is bound to assist its ally in war against a third nation, is determined in a great measure by the justice or injustice of the war. If manifestly unjust on the part of the ally, it cannot be considered as *casus fœderis*. Grotius, b. 2, c. 26; Vattel, b. 2, c. 12, § 168.

See 1 Kent 49; 3 Cow. 264.

CASUS FORTUITUS (Lat.). An inevitable accident. A loss happening in spite of all human effort and sagacity. 3 Kent 217, 300; Whart. Negl. § 513, 553.

It includes such perils of the sea as strokes of lightning, etc. A loss happening through the agency of rats was held an unforeseen, but not an inevitable, accident. 1 Curt. C. C. 148. The happening of a *casus fortuitus* excuses ship-owners from liability for goods conveyed; 3 Kent 216; L. R. 1 C. P. D. 143.

CASUS MAJOR (Lat.). An unusual accident. Story, Bailm. § 240.

CASUS OMISSUS (Lat.). A case which is not provided for. When such cases arise in statutes which are intended to provide for all cases of a given character which may arise, the common law governs; 5 Co. 88; 11 East 1; 2 Binn. 279; 2 Sharsw. Bla. Com. 260; Broom, Max. 46. A *casus omissus* may occur in a contract as well as in a statute; 2 Bla. Com. 260.

CAT. A whip sometimes used for whipping criminals. It consists of nine lashes tied to a handle, and is frequently called cat-o-nine-tails. It is used where the whipping-post is retained as a mode of punishment and was formerly resorted to in the navy.

CATALLA OTIOSA (Lat.). Dead goods, and animals other than beasts of the plow, *averia carucae*, and sheep. 3 Bla. Com. 9; Bract. 217 b.

CATALLUM. A chattel.

The word is used more frequently in the plural, *catalla*, but has then the same signification, denoting all goods, movable or immovable, except such as are in the nature of fess and freeholds. Cowel; Du Cange.

CATANEUS. A tenant *in capite*. A tenant holding immediately of the crown. Spelman, Gloss.

CATCHING BARGAIN. An agreement made with an heir expectant for the purchase of his expectancy at an inadequate price.

In such cases the heir is, in general, entitled to relief in equity, and may have the contract rescinded upon terms of redemption; 1 Vern. 167, 320, n.; 2 Cox 80; 2 Ch. Cas. 136; 1 P. Wms. 312; 1 Cro. Car. 7; 2 Atk. 133; 2 Swanst. 147, and the cases cited in the note; 1 Fonbl. Eq. 140; 1 Belt, Supp. Ves. Jr. 66; 2 *id.* 361; L. R. 8 Ch. Ap. 494; L. R. 10 Eq. 641. It has been said that all persons dealing for a reversionary interest are subject to this rule; but it may be doubted whether the course of decisions authorizes so extensive a conclusion, and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir; 2 Swanst. 143, n. See 1 Ch. Pr. 112, 113, n., 458, 826, 838, 839. A mere hard bargain is not sufficient ground for relief.

The English law on this subject has been so altered by stat. 31 and 32 Vic. c. 4, that, while before that act slight inadequacy of consideration was sufficient to set the contract aside, at present only positive unfairness will be relieved against; Bishp. Eq. § 221, and cases cited. See *Chesterfield v. Janssen*, 1 Lead. Cas. in Eq. 773, and notes. The contract may be for a loan, sale, annuity, or mortgage; 16 Ves. 513; L. R. 10 Ch. Ap. 389; 26 Beav. 644; 47 Mich. 94.

CATCHPOLE. A name formerly given to a sheriff's deputy, or to a constable, or other officer whose duty it is to arrest persons. He was a sort of sergeant. The word is not now in use as an official designation; Minshew.

CATER COUSIN. A very distant relation. Bla. Law Tracts 6.

CATHEDRAL. In Ecclesiastical Law. A tract set apart for the service of the church.

After the establishment of Christianity, the emperors and other great men gave large tracts of land whereon the first places of public worship were erected,—which were called *cathedrae*, cathedrals, sees, or seats, from the clergy's residence thereon. And when churches were afterwards built in the country, and the clergy were sent out from the cathedrals to officiate therein, the cathedral or head seat remained to the bishop, with some of the chief of the clergy as his assistants.

CATHOLIC CREDITOR. In Scotch Law. A creditor whose debt is secured on several parts or all of his debtor's property. Such a creditor is bound to take his payment with reference to the rights of the secondary creditors, or, if he disregards their rights, must assign over to them his claims. This rule applies where he collects his debts of a cautioner (surety). Bell, Dict.

CATHOLIC EMANCIPATION ACT. The act 10 Geo. IV. c. 7. This act

relieves from disabilities and restores all civil rights to Roman Catholics, except that of holding ecclesiastical offices and certain high state offices. The previous legislation which by gradual stages led up to the final removal of these disabilities is to be found in the acts of 18 Geo. III. c. 60; 81 Geo. III. c. 33; and 43 Geo. IV. c. 7. 2 Steph. Com. 721.

CATTLE. A collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats, and swine. Web. Dict.; 21 Wall. 299.

In its limited sense it is used to designate the different varieties of horned animals, but it is also frequently used with a broader signification as embracing animals in general which serve as food for man. Pigs have been held to be included within the words "any cattle." (R. & R. Crown Cases 77.) Furthermore, the word has been construed so as to embrace animals not used for food (Moody's Crown Cases, 3.) 21 Wall. (U. S.) 299.

A railroad engineer cannot take chances of an animal's getting off the track, where he has an opportunity of avoiding all possibility of an injury; 10 So. Rep. (Miss.) 41. It is immaterial whether the stock was legally at large or not, where the road is not fenced; 5 Ind. App. 86; but where not legally at large and the company is under no legal obligation to fence its road, it will only be responsible for gross, wanton, or wilful negligence in causing injury to stock; 45 Mo. App. 123. See 41 Ill. App. 561. The law does not presume negligence from the mere fact that stock was killed or injured by a railroad company; 49 Fed. Rep. 798. See ANIMAL.

CATTLE GATE. A customary proportionate right of pasture enjoyed in common with others. The right is measured not by the number of cattle to be pastured, but by reference to the rights of others and the whole amount of pasture. 34 E. L. & Eq. 511; 1 Term 187.

CATTLE-GUARD. The term means such an appliance as will prevent animals from escaping from enclosures in which they are confined over the railroad track, and going upon lands of others, adjoining the right of way. 108 Ky. 47, 55 S. W. 716.

CAUSA (Lat.). A cause; a reason. A condition; a consideration. Used of contracts, and found in this sense in the Scotch law also. Bell, Dict.

A suit; an action pending. Used in this sense in the old English law.

Property. Used thus in the civil law in the sense of *res* (a thing). *Non porcellum, non agnellum nec aliam causam* (not a hog, not a lamb, nor other thing). Du Cange.

By reason of.

Causa proxima. The immediate cause.

Causa remota. A cause operating indirectly by the intervention of other causes.

In its general sense, *causa* denotes anything operating to produce an effect. Thus, it is said, *causa causantis causam est causati* (the cause of the thing causing is the cause of the thing caused). 4 Gray 398; 4 Campb. 284. In law, however, only the direct cause is considered. See 9 Co. 60; 12 Mod. 689; *CAUSA PROXIMA NON REMOTA SPECTATUR*.

CAUSA JACTATIONIS MARI-TAGII (Lat.). A form of action which anciently lay against a party who boasted or gave out that he or she was married to the plaintiff, whereby a common reputation of their marriage might ensue. 3 Bla. Com. 33.

CAUSA MATRIMONII PRELO-CUTI (Lat.). A writ lying where a woman has given lands to a man in fee-simple with the intention that he shall marry her, and he refuses so to do within a reasonable time, upon suitable request. Cowel. Now obsolete. 3 Bla. Com. 188, n.

CAUSA MORTIS DONATIO. See DONATIO CAUSA MORTIS.

CAUSA PATET (Lat.). The reason is open, obvious, plain, clear, or manifest.

CAUSA PROXIMA NON REMOTA SPECTATUR (Lat.). The direct and not

the remote cause is considered.

In many cases important questions arise as to which, in the chain of acts tending to the production of a given state of things, is to be considered the responsible cause. It is not merely distance of place or of causation that renders a cause remote. The cause nearest in the order of causation, without any efficient concurring cause to produce the result, may be considered the direct cause. In the course of decisions of cases in which it is necessary to determine which of several causes is so far responsible for the happening of the act or injury complained of, what is known as the doctrine of proximate cause is constantly resorted to in order to ascertain whether the act, omission, or negligence of the person whom it is sought to hold liable was in law and in fact responsible for the result which is the foundation of the action.

The rule was formulated by Bacon, and his comment on it is often cited: "It were infinite for the law to judge the cause of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree;" Max. Reg. 1. Its subsequent development has resulted rather in its application to new conditions than in deviation from the principle as originally stated. Proximate cause, it may be generally stated, is such adequate and efficient cause as, in the natural order of events, and under the particular circumstances surrounding the case, would necessarily produce the event; and this having been discovered, is to be deemed the true cause, unless some new cause not incidental to, but independent of, the first, shall be found to intervene between it and the first. Sh. & Redf. Neg. § 10; Thomas, J., in 4 Gray 412; Story, J., in 14 Pet. 99; 2 Phil. Ins. § 1097; *id.* § 1131; 82 Ind. 426; 115 *id.* 51; 52 N. H. 528; Webb's Poll. Torts 29. A proximate cause must be the act or omission of a responsible human being, such as in ordinary natural sequence immediately results in the injury; Whart. Neg. § 73: it is a cause which in natural sequence, undisturbed by any independent cause, produces the result complained of; 160 Pa. 359; and the result must be the natural and probable consequence such as ought to have been foreseen as likely to flow from the act complained of; 112 Pa. 574; 147 *id.* 44; 14 Allen 290. The practical consideration which the courts have in view is to find a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue; Sh. & Redf. Neg. 9. Negligence for example is not actionable unless it is the proximate cause of the injury complained of, but because it is impossible to trace back the chain of causes indefinitely, the law stops at the first link in the chain of causation and looks to the person who is the proximate cause of the injury; *id.*

For example, where a train was forty-five minutes late when a gust of wind threw it from the track and injured a passenger; it was held that though the train would have escaped the gust of wind had it been on time, yet the accident was neither the natural nor probable consequence of the delay, and only an independent force took advantage of it and the company was not liable to the passenger; 3 Neb. 44. So when a horse hitched to a defective hitching-post was frightened by the running away of another horse, and broke the post and ran over a person in the street, the latter could not recover against the owner of the post for the defect in the post as the cause of the injury; 83 Ill. 347.

The act of a third person intervening will not excuse, if such act ought to have been foreseen; 111 Mass. 136; but where the defendant sold gunpowder to a child, and the parents took charge of it and let the child have some, the sale was held too remote as a cause of injury to the child by an explosion; 103 Mass. 507; on the other hand an injury from a railway accident, having been the direct cause of a diseased condition which resulted in paralysis, was

held to be the proximate cause of the latter; 50 N. W. Rep. (Minn.) 927; but where by reason of injury in a collision a passenger became disordered in mind and body and eight months after committed suicide, in a suit for damages against the railroad company it was held that his own act was the proximate cause of his death; 105 U. S. 249.

Consequences which follow in unbroken sequence, without an intervening sufficient cause, from the original wrong, are natural; and for them the original wrongdoer is responsible, even though he could not have foreseen the particular results, provided that by the exercise of ordinary care he might have foreseen that some injury would result; Webb's Poll. Torts 36, note and cases cited; 99 N. Y. 158.

In order to displace an apparent efficient cause and to prevent it from being treated as the proximate cause, an intervening event must be wholly independent of the first. If the act in which the defendant is engaged is one which circumstances indicate may be dangerous to others, and the event whose occurrence is necessary to make the act injurious can readily be seen as likely to occur under the circumstances, it will not be considered an independent intervening cause and the defendant is liable; 53 Pa. 436; a woman's illness caused by fright from the shooting of a dog in her presence is not such a consequence as would be supposed naturally to follow the act; 36 Minn. 90.

If two causes operate at the same time to produce a result which might be produced by either, they are concurrent causes, and in such case each is a proximate cause, but if the two are successive and unrelated in their operation, one of them must be proximate and the other remote; 149 Pa. 222. As an illustration of concurrent causes, where lumber was negligently piled, and remained a long time in that condition, and was caused to fall by the negligence of a stranger, the negligence in piling concurring with the negligence of the stranger, was the direct and proximate cause; 41 Cal. 87.

Where the intervening cause which displaces a prior one is the negligence of the party injured it is designated contributory negligence, and where that exists there can be no recovery. But although the subject of contributory negligence has become so important as to constitute a distinct head of the law, it is a phrase, however well established, not free from objection; Poll. Torts, Webb's ed. 569; and the penal theory on which it is sometimes considered as resting is discarded by the most authoritative writers; *id.*; Whart. Neg. § 300; Camp. Neg. 180. The view which is supported by reason and now likewise fully by authority is that the defence of contributory negligence of the plaintiff finds its true basis in the application above made of the doctrine of proximate cause, and that it is a conclusive answer to the action because it takes its place as the proximate, direct, immediate, or, to use the apt phrase of Pollock, the *decisive* cause of the injury (Torts 573, 575). In the leading English case it was left to the jury to say whether the negligence attributed to the plaintiff "directly contributed to the injury;" 2 C. B. N. s. 740; and on appeal the rule was laid down that negligence of the plaintiff would not prevent recovery, unless it were such that without it the injury *would* (not could) not have happened, or "if the defendant might, by the due exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff;" 5 C. B. N. s. 573. This general view was sustained in a subsequent case by the house of lords and great stress was laid on the evidence that the contributory negligence claimed was the *immediate* cause of the accident; 1 App. Cas. 754; the negligence set up as contributory must in order to constitute a defence *substantially* or *essentially* or *directly* tend to produce the injury, or be an *actual* and *efficient* cause of it; if it remotely contribute, it will not debar the plaintiff from a recovery; 86 Ala. 381; it

must have direct relation to the act or omission charged against the defendant; 64 Cal. 463. See NEGLIGENCE.

The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge but of fact for the jury to determine in view of the accompanying circumstances, all of which must be submitted to the jury, who must determine whether the original cause is by continuous operation linked to each successive fact; 90 Pa. 122; 94 U. S. 469; and a finding that the burning of the plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, is in effect a finding that there was no intervening and independent cause between the negligent conduct of defendant and injury to plaintiff; *id.* The doctrine under consideration finds its most frequent application in *fire and marine insurance*; 2 Am. Ins. § 234; 12 East 648; L. R. 4 Q. B. 414; L. R. 4 C. P. 206; L. R. 5 Ex. 204; 8 Cush. 377; 2 Duer 301; 11 N. Y. 9; 16 B. Monr. 427; 32 Pa. 351; 14 How. 351, and in cases of *tort founded on negligence*; 5 C. & P. 190; L. R. 4 C. P. 279; L. R. 8 Q. B. 274; 3 M. & R. 105; 35 N. J. L. 17; 70 Pa. 86; 109 Mass. 277; 1 Sm. L. Cas. 755. See, generally, 4 Am. L. Rev. 201; 4 So. L. Rev. 703; Webb's Poll. Torts 29, 566; Howe, Civ. L. 201.

CAUSA REI (Lat.). In Civil Law. Things accessory or appurtenant. All those things which a man would have had if the thing had not been withheld. Du Cange; 1 Mackeldey, Civ. Law 55.

CAUSA SCIENTIAE PATET (L. Lat.). The reason of the knowledge is evident.

CAUSARE (Lat. to cause). To be engaged in a suit; to litigate; to conduct a cause. Used in the old English and in the civil law.

CAUSATOR (Lat.). A litigant; one who takes the part of the plaintiff or defendant in a suit.

CAUSE (Lat. causa). In Civil Law. The consideration or motive for making a contract. Dig. 2. 14. 7; Toullier, liv. 3, tit. 3, c. 2, § 4; 1 Abb. 28. See EFFICIENT CAUSE. See ADEQUATE CAUSE; FOR GOOD CAUSE.

In Pleading. Reason; motive.

In a replication *de injuria*, for example, the plaintiff alleges that the defendant of his own wrong and without the cause by him, etc., where the word cause comprehends all the facts alleged as an excuse or reason for doing the act. 8 Co. 67; 11 East 451; 1 Chit. Pl. 565.

In Practice. A suit or action. Any question, civil or criminal, contested before a court of justice. Wood, Civ. Law 801. It was held to relate to civil actions only, and not to embrace *quo warranto*; 5 E. & B. 1. See 43 Mo. 254; 3 Q. B. 901.

CAUSE OF ACTION. In Practice. Matter for which an action may be brought. See ACCRUE.

A cause of action is said to accrue to any person when that person first comes to a right to bring an action. There is, however, an obvious distinction between a cause of action and a right, though a cause of action generally confers a right. Thus, statutes of limitation do not affect the cause of action, but take away the right. A cause of action implies that there is some person in existence who can bring suit and also a person who can lawfully be sued; 40 Ala. 148; 102 Ill. 272. See 28 Barb. 380; 4 Bingh. 704; 26 How. Pr. 601.

When a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, although the claimant may be ignorant of it; 3 B. & Ald. 288, 626; 5 B. & C. 259; 4 C. & P. 127. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action; 5 B. & C. 360; 8 D. & R. 346; 4 Bingh. 686.

CAUTIO, CAUTION. In Civil Law. Security given for the performance of any thing. A bond whereby the debtor acknowledges the receipt of money and promises to pay it at a future day.

In French Law. The person entering

into an obligation as a surety.

In Scotch Law. A pledge, bond, or other security for the performance of an obligation, or completion of the satisfaction to be obtained by a judicial process. Bell, Dict.

CAUTIO FIDEJUSSORIA. Security by means of bonds or pledges entered into by third parties. Du Cange.

CAUTIO PIGNORATITIA. A pledge by a deposit of goods.

CAUTIO PRO EXPENSIS. Security for costs or expenses.

This term is used among the civilians, Nov. 112, c. 2, and generally on the continent of Europe. In nearly all the countries of Europe, a foreign plaintiff, whether resident or not, is required to give caution *pro expensis*; that is, security for costs. In some states this requisition is modified, and when such plaintiff has real estate or a commercial or manufacturing establishment within the state, he is not required to give such caution. Foelix, *Droit Intern. Privé*, n. 106.

CAUTIO USUFRUCTUARIA. Security, which tenants for life give, to preserve the property rented free from waste and injury. Ersk. Inst. 2. 9. 59.

CAUTION JURATORY. Security given by oath. That which a suspender swears is the best he can afford in order to obtain a suspension. Ersk. Pr. 4. 3. 6; Paterson, Comp.

CAUTIONARY BOND. See BOND.

CAUTIONARY JUDGMENT. In an action of tort where it appears that the defendant is about to remove or fraudulently transfer his property, a cautionary judgment may be entered against him. 13 Pa. Co. Ct. 333.

A cautionary judgment was entered after suit brought on petition of plaintiff averring that defendant had mortgaged his real estate with the intent to defraud plaintiff by bringing about a sale of the real estate before plaintiff's suit could be finally disposed of. 17 Pa. Co. Ct. 38.

CAUTIONER. A surety; a bondsman. One who binds himself in a bond with the principal for greater security. He is still a cautioner whether the bond be to pay a debt or whether he undertake to produce the person of the party for whom he is bound. Bell, Dict.

CAVEAT (Lat. let him beware). In Practice. A notice not to do an act, given to some officer, ministerial or judicial, by a party having an interest in the matter.

It is a formal caution or warning not to do the act mentioned, and is addressed frequently to prevent the admission of wills to probate, the granting letters of administration, etc. See Williams, Ex. 551.

1 Burn, Eccl. Law 19, 263; Nelson, Abr.; Dane, Abr.; Ayliffe, *Parerg.*; 3 Bla. Com. 246; 2 Chit. Pr. 502, note b; 3 Redf. Wills 119; 4 Brew. Pr. 3974; Poph. 133; 1 Sid. 371; 3 Binn. 814; 3 Halst. 189.

In Patent Law. A legal notice to the patent office that the caveator claims as inventor, in order to prevent the issue of a patent on a particular device to any other person without notice to the caveator. It gives no advantage to the caveator over any rival claimant, but only secures to him an opportunity to establish his priority of invention.

It is filed in the patent office under statutory regulations; U. S. Rev. Stat. § 4902; and an alien resident for one year, having made oath of his intention to become a citizen, has the same privilege; *id.* The principal object of filing it is to obtain for an inventor time to perfect his invention without the risk of having a patent granted to another person for the same thing.

Upon the filing of such caveat and the payment of the proper fee, the law provides that if application be made within the year for a patent with which the caveat would in any manner interfere, the commissioner shall deposit the drawings, etc., of such application in the confidential archives of his office, and give notice thereof by mail to the person filing the caveat, who, if he would avail himself of his caveat, shall file his description, etc., within three months of

the mailing of the notice, with allowance for the usual time of transmission; U. S. Rev. Stat. § 4903.

As to the form of the caveat, it need contain nothing more than simply an intelligible description of any invention which the caveator claims to have made, giving its distinguishing characteristics, with sufficient precision to enable the office to determine whether there is a probable interference, when a subsequent application is filed. It amounts in effect to a notice to the office not to grant a patent for the same thing to another without giving the caveator an opportunity to show his better title to the same. A caveat cannot be withdrawn, but copies may be obtained and any correction or addition must be filed on a separate paper; Rob. Pat. § 445. It is evidence of the date of the invention described, and may be proof that the invention was prior to the time of filing; *id.* § 446; but it does not estop the caveator from the claim that his invention was perfect; *id.* § 446. It is not assignable, but the invention may be transferred and the caveat may be used to identify it; *id.* § 447. A caveator is not concluded by the description of his invention in the caveat; *id.* § 448. See PATENTS.

It is also used to prevent the issue of land patents; 9 Gratt. 508; 1 Wash. 50; 3 Md. 280; and where surveys are returned to the land office, and marked "in dispute," this entry has the effect of a caveat against their acceptance; 43 Pa. 197.

CAVEAT EMPTOR (Lat. let the purchaser take care). In every sale of real property, a purchaser's right to relief at law or in equity on account of defects or incumbrances in or upon the property sold depends solely upon the covenants for title which he has received; 2 Sugd. Vend. 425; Co. Litt. 384 a, Butl. note; Dougl. 665; 2 Freem. 1; 3 Swanst. 651; 1 Coke 1; 17 Pick. 475; 10 Ga. 311; 1 S. & R. 52; unless there be fraud on the part of the vendor; 3 B. & P. 162; 30 Me. 266; 2 Johns. Ch. 519; 5 id. 79; 9 N. Y. 36; 24 Pa. 142; 3 Md. Ch. Dec. 351; 1 Spenc. 353; 66 N. C. 233; 70 id. 718; 4 Ill. 334; 76 id. 71; 8 Leigh 658; 7 Gratt. 238; 15 B. Monr. 627; Freem. Ch. 134, 276; 3 Fred. Eq. 408; 3 Humphr. 347; 5 La. 293; 39 Tex. 177; and consult Rawle, Cov. for Title, 5th ed. § 319. This doctrine applies to a sale made under a decree foreclosing a mortgage, and the purchaser cannot rely upon statements made by the officer conducting the sales; 35 Neb. 466.

In sales of personal property substantially the same rule applies, and is thus stated in Story, Sales, 3d ed. § 848:—The purchaser buys at his own risk, unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in respect to a material inducement to the sale; Benj. Sales, § 611; 10 Wall. 838; 4 Johns. 421; 53 N. Y. 515; 82 Pa. 441; 11 Metc. 559; 38 Ia. 120; 43 Cal. 110; 51 Ala. 410; 75 N. C. 397; 36 Pac. Rep. (Cal.) 1033; Tiffany, Sales 163. It is the settled doctrine of English and American law that the purchaser is required to notice such qualities of the goods purchased as are reasonably supposed to be within the reach of his observation and judgment. Under the civil law there was on a sale for a fair price an implied warranty of title and that the goods sold were sound, but under the common law there is a clear distinction between the responsibility of the seller as to title and as to quality; the former he warranted, the latter, if the purchaser had opportunity to examine, he did not; 2 Kent 478; Pothier, *Cont. de Vente*, No. 184. See MISREPRESENTATION; CONCEALMENT.

This doctrine does not apply in an action for damages for inducing one by false representations to take an assignment of a lease executed by one who had no title to the land; 88 Ga. 629.

Consult Rawle, Covenants for Title; Benjamin, Sales; Story, Sales; 2 Kent 478; Leake, Cont. 198; 1 Story, Equity; Sugden, Vendors & P.

CAVEATOR. One who files a caveat.

CAYAGIUM. A toll or duty paid the king for landing goods at some quay or wharf. The barons of the Cinque Ports were free from this duty. Cowel.

CEAPGILD. Payment of an animal. An ancient species of forfeiture. Cowel; Spelman, Gloss.

CEDE. To assign; to transfer. Applied to the act by which one state or nation transfers territory to another.

CEDENT. An assignor. The assignor of a chose in action. Kames, Eq. 43.

CEDULA. In Spanish Law. A written obligation, under private signature, by which a party acknowledges himself indebted to another in a certain sum, which he promises to pay on demand or on some fixed day.

In order to obtain judgment on such an instrument, it is necessary that the party executing it should acknowledge it in open court, or that it be proved by two witnesses who saw its execution.

The citation affixed to the door of an absconding offender, requiring him to appear before the tribunal where the accusation is pending.

CELEBRATION OF MARRIAGE. The solemn act by which a man and woman take each other for husband and wife, conformably to the rules prescribed by law.

CELIBACY. The state or condition of life of a person not married.

CEMETERY. A place set apart for the burial of the dead. Cemeteries are regulated in England and many of the United States by statute. The fundamental English act is the cemeteries clauses act, 1847, 10 & 11 Vict. c. 65. See DEAD BODY.

CENEGILD. In Saxon Law. A pecuniary mulct or fine paid to the relations of a murdered person by the murderer or his relations. Spelman, Gloss.

CENNINGA. A notice given by a buyer to a seller that the things which had been sold were claimed by another, in order that he might appear and justify the sale. Blount; Whishaw.

The exact significance of this term is somewhat doubtful. It probably denoted notice, as defined above. The finder of stray cattle was not always entitled to it; for Spelman says, "As to strange (or stray) cattle, no one shall have them but with the consent of the hundred of tithingmen; unless he have one of these, we cannot allow him any *cenninga* (I think notice)." Spelman, Gloss.

CENS. In Canadian Law. An annual payment or due reserved to a seignor or lord, and imposed merely in recognition of his superiority. Guyot, Inst. c. 9.

The land or estate so held is called a *censive*; the tenant is a *censarius*. It was originally a tribute of considerable amount, but became reduced in time to a nominal sum. It is distinct from the *rentes*. The *cens* varies in amount and in mode of payment. Payment is usually in kind, but may be in silver; 2 Low. C. 40.

CENSARIA. A farm, or house and land, let at a standing rent. Cowel.

CENSO. In Spanish and Mexican Law. An annuity; a ground rent. The right which a person acquires to receive a certain annual pension, in consideration of the delivery to another of a determined sum of money or of an immovable thing. Civil Code Mex. art. 3206; Black, Dict.; 13 Tex. 653.

CENSO RESERVATIO. In Spanish and Mexican Law. The right to receive from another an annual pension by virtue of having transferred land to him by full and perfect title. 13 Tex. 653.

CENSURABLE. See CULPABLE.

CENSUS (Lat. *censere*, to reckon). An official reckoning or enumeration of the inhabitants and wealth of a country.

The census of the United States is taken every tenth year, in accordance with the provisions of the constitution; and many of the states have made provisions for a similar decennial reckoning at intervening periods.

The courts take judicial notice of the results of a census; 87 Ia. 588; 64 Cal. 87; 149 Pa. 210; 29 N. E. Rep. (Ind.) 157; 78 Pac. Rep. (Cal.) 270; 30 S. W. Rep. (Mo.) 103; 31 *id.* (Mo.) 23; *contra*, 31 N. E. Rep. (N. Y.) 921.

In Old European Law. A tax or tribute. Burrill.

CENSUS REGALIS. The royal property (or revenue).

CENT (Lat. *centum*, one hundred). A coin of the United States, weighing forty-eight grains, and composed of ninety-five per centum of copper and of tin and zinc in such proportions as shall be determined by the Director of the Mint. Act of Feb. 12, 1873, s. 13. See Rev. Stat. § 3515.

Previous to the act of congress just cited, the cent was composed wholly of copper. By the act of April 2, 1793, Stat. at Large, vol. 1, p. 248, the weight of the cent was fixed at eleven penny-weights, or 344 grains; the half cent in proportion. Afterwards, namely, on the 14th of January, 1798, it was reduced to 208 grains; the half-cent in proportion. 1 U. S. Stat. at Large, 299. In 1796 (Jan. 26), by the proclamation of President Washington, who was empowered by law to do so, act of March 3, 1795, sect. 3, 1 U. S. Stat. at Large, 440, the cent was reduced in weight to 108 grains; the half-cent in proportion. It remained at this weight until the passage of the act of Feb. 21, 1867, which provided for a weight of seventy-eight grains and an alloy of eighty-eight per centum of copper and twelve of nickel. The same act directs that the coinage of half-cent should cease. By the coinage act of Feb. 12, 1873, the weight and alloy were fixed as above stated. The first issue of cents from the national mint was in 1793, and has been continued every year since, except 1815. But in 1791 and 1792 some experimental pieces were struck, among which was the so-called Washington cent of those years.

CENTESIMA (Lat. *centum*). In Roman Law. The hundredth part.

Usuræ centesima. Twelve per cent. *per annum*; that is, a hundredth part of the principal was due each month,—the month being the unit of time from which the Romans reckoned interest. 2 Bla. Com. 462, n.

CENTRAL CRIMINAL COURT. In English Law. A court which has jurisdiction of all cases of treason, murder, felony, or misdemeanor committed within the city of London and county of Middlesex, and certain parts of the counties of Essex, Kent, and Surrey, and also of all serious offences within the former jurisdiction of the admiralty court.

This court was erected in 1834, and received the jurisdiction of the court of sessions, as far as concerned all the more serious offences, by virtue of the act 4 & 5 Wm. IV. c. 37, and by virtue of the same act, and the subsequent acts 7 Will. IV. and 19 & 20 Vict. c. 16, received the entire criminal jurisdiction of the court of admiralty.

The act provided that the court should consist of the lord mayor, the lord chancellor, the judges of the three superior courts at Westminster, the judges in bankruptcy, the judges of the admiralty, the dean of the arches, the aldermen, recorder, and common serjeant of London, the judges of the sheriff's court, persons who have been lord chancellor, or judge in one of the superior courts, and such others as may from time to time be appointed by the crown. Since the judicature acts all the judges of the High Court of Justice have been judges of the court. By act of 44 & 45 Vict. c. 63, the power of making rules and orders, originally given to eight or more of the judges of courts at Westminster, is vested in four or more of the judges of the High Court of Justice.

Twelve sessions at least are held every year, at the Sessions House in the Old Bailey. The important cases are heard in a session of the court presided over by two of the judges of the High Court of Justice. The less important cases are tried by either the recorder or common serjeant, or judge of the city of London court commissioned for that purpose,—on every occasion the lord mayor or some of the aldermen being also present on the bench. Two sessions of the court adjoin each other and sit simultaneously. See 2 Steph. com. 299; Whart. Lex.

CENTUMVIRI (Lat. one hundred men). The name of a body of Roman judges.

Their exact number was one hundred and five, there being selected three from each of the thirty-five tribes comprising all the citizens of Rome. They constituted, for ordinary purposes, four tribunals; but some cases (called *centumviraes causas*) required the judgment of all the judges. 3 Bla. Com. 515.

CENTURY. One hundred. One hundred years.

The Romans were divided into *centuries*, as the English were formerly divided into *hundreds*.

CEORL. A tenant at will of free condition, who held land of the thane on condition of paying rent or services.

A freeman of inferior rank occupied in husbandry. Spelman, Gloss.

Those who tilled the outlands paid rent; those who occupied or tilled the inlands, or demesne, rendered services. Under the Norman rule, this term, as did others which denoted workmen, especially those which applied to the conquered race, became a term of reproach, as is indicated by the popular signification of *churl*. Cowel; Spelman, Gloss. See 1 Poll. & Maitl. 8; 2 *id.* 458.

CEPI (Lat.). I have taken. It was of frequent use in the returns of sheriffs when they were made in Latin; as, for example, *cepi corpus* et B. B. (I have taken the body and discharged him on bail bond); *cepi corpus et est in custodia* (I have taken the body and it is in custody); *cepi corpus et est languidus* (I have taken the body and he is sick).

CEPI CORPUS (Lat. I have taken the body). The return of an officer who has arrested a person upon a *capias*. 3 Bouvier, Inst. n. 2804.

CEPIT (Lat. *capere*, to take; *cepit*, he took or has taken).

In Civil Practice. A form of replevin which is brought for carrying away goods merely. Wells, Repl. § 53; 3 Hill 282. *Non detinet* is not the proper answer to such a charge; 17 Ark. 85. And see 3 Wis. 399. Success upon a *non cepit* does not entitle the defendant to a return of the property; 5 Wis. 85. A plea of *non cepit* is not inconsistent with a plea showing property in a third person; 8 Gill 133.

In Criminal Practice. Took. A technical word necessary in an indictment for larceny. The charge must be that the defendant took the thing stolen with a felonious design. Bacon, Abr. *Indictment*, G., 1.

CEPIT ET ABDUXIT (Lat.). He took and led away. Applicable in a declaration in trespass or indictment for larceny where the defendant has taken away a living chattel.

CEPIT ET ASPORTAVIT (Lat.). He took and carried away. Applicable in a declaration in trespass or an indictment for larceny where the defendant has carried away goods without right. 4 Bla. Com. 231.

CEPIT IN ALIO LOCO (Lat. he took in another place). In Pleading. A plea in replevin, by which the defendant alleges that he took the thing replevied in another place than that mentioned in the declaration; 1 Chit. Pl. 490; 2 *id.* 558; Rast. Entr. 554, 555; Willes 475; Morris, Repl. 141; Wells, Repl. § 707. It is the usual plea where the defendant intends to avow or justify the taking to entitle himself to a return; 4 Bouvier, Inst. n. 3569.

CERT MONEY. The head-money given by the tenants of several manors yearly to the lords, for the purpose of keeping up certain inferior courts. Called in the ancient records *certum læte* (leet money). Cowel.

CERTAINTY. In Contracts. Distinctness and accuracy of statement.

A thing is certain when its essence, quality, and quantity are described, distinctly set forth, etc. Dig. 12. 1. 6. It is uncertain when the description is not that of an individual object, but designates only the kind. La. Civ. Code, art. 3632, no. 8; 5 Co. 121.

If a contract be so vague in its terms that its meaning cannot be certainly collected, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty, 5 B. & C. 583, or parol evidence cannot supply the defect,

then, neither at law nor in equity can effect be given to it; 1 R. & M. 116. If it is impossible to ascertain any definite meaning, such agreement is necessarily void; [1892] Q. B. 478. As to uncertainty of contract see 98 Mich. 491; 75 Md. 80; 70 Hun 575; 8 Wash. 438.

It is a maxim of law that is certain which may be made certain: *certum est quod certum reddi potest*; Co. Litt. 43. For example, when a man sells the oil he has in his store at so much a gallon, although there is uncertainty as to the quantity of oil, yet, inasmuch as it can be ascertained, the maxim applies, and the sale is good. See, generally, Story, Eq. § 240; Mitf. Eq. Pl., Jeremy ed. 41; Cooper, Eq. Pl. 5; Wigram, Disc. 77.

In Pleading. Such clearness and distinctness of statement of the facts which constitute the cause of action or ground of defence that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give the judgment. 13 East 107; 2 B. & P. 267; Co. Litt. 303; Comyns, Dig. Plead., c. 17. See 21 Or. 435.

Certainty to a common intent is attained by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one. See 2 H. Bla. 530; Andr. Steph. Pl. 384.

Certainty to a certain intent in general is attained when the meaning of the statute may be understood upon a fair and reasonable construction without recurrence to possible facts which do not appear; 1 Wms. Saund. 49; 9 Johns. 317; 5 Conn. 423.

Certainty to a certain intent in particular is attained by that technical accuracy of statement which precludes all argument, inference, and presumption against the party pleading. When this certainty is required, the party must not only state the facts of his case in the most precise way, but add to them such as show that they are not to be controverted, and, as it were, anticipate the case of his adversary; Lawes, Pl. 54.

The last description of certainty is required in estoppels; Co. Litt. 303; 2 H. Bla. 530; Dougl. 159; and in pleas which are not favored in law, as alien enemy; 8 Term 167; 6 Binn. 247. See 10 Johns. 70; 1 Rand. 270. With respect to an indictment, it is laid down that "an indictment ought to be certain to every intent, and without any intendment to the contrary;" Cro. Eliz. 490; and the charge contained in it must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include anything more than is expressed; 2 Burr. 1127; 92 U. S. 542; 96 id. 360; 40 Ia. 148; 81 Me. 401; 114 Mass. 283; 70 Mo. 460; 58 N. H. 348; 19 Tex. App. 383.

These definitions, which have been adopted from Lord Coke, have been subjected to severe criticism, but are of some utility in drawing attention to the different degrees of exactness and fulness of statement required in different instances. Less certainty is required where the law presumes that the knowledge of the facts is peculiarly in the opposite party; 8 East 85; 13 id. 112; 3 Maule & S. 14; 13 Johns. 437.

Less certainty than would otherwise be requisite is demanded in some cases, to avoid prolixity of statement. 2 Wms. Saund. 117, n. 1. See, generally, 1 Chit. Pl.

CERTIFICANDO DE RECOGNITIONE STAPULÆ. In English Law. A writ commanding the mayor of the staple to certify to the lord chancellor a statute staple taken before him where the party himself detains it, and refuses to bring in the same. There is a like writ to certify a statute merchant and in divers other cases. Reg. Orig. 148; Black, Dict.

CERTIFICATE. In Practice. A writing made in any court, and properly authenticated, to give notice to another court of anything done therein.

A writing by which testimony is given that a fact has or has not taken place.

Certificates are either required by law, as an insolvent's certificate of discharge, an alien's certificate of naturalization, which are evidence of the facts therein mentioned; or voluntary, which are given of the mere motion of the party giving them, and are in no case evidence. Com. Dig. Chancery (T, 5); 1 Greenl. Ev. § 498; 2 Willems 549.

There were anciently various modes of trial commenced by a certificate of various parties, which took the place of a writ in a common-law action. See Com. Dig. Certificate.

By statute, the certificates of various officers may be made evidence, in which case the effect cannot be extended by including facts other than those authorized; 1 Maule & S. 599; 3 Pet. 12, 29; 4 How. 522; 13 Pick. 172; 6 S. & R. 324; 3 Murph. 331; Rob. La. 307. An officer who has made a defective certificate of a married woman's acknowledgment cannot correct the defect after the expiration of his term; 91 Ala. 366; nor can he contradict his own certificate by testifying to fraud and coercion on the part of the husband toward the wife; 87 Va. 33. As to the power of an officer to amend his certificate, see 34 Cent. L. J. 26. A certificate of acknowledgment is a judicial act, and in the absence of fraud conclusive of material facts stated in it; 115 Pa. 338; 150 id. 514; but only of facts required by statute to be included in it, and therefore not that the wife of the grantor was of full age; 71 Pa. 476; 6 W. N. C. (Pa.) 428. See RETURN; NOTARY; ACKNOWLEDGMENT; STOCK. See LAND CERTIFICATE.

CERTIFICATE OF ASSIZE. In Practice. A writ granted for the re-examination or retrial of a matter passed by assize before justices. Fitzh. Nat. Brev. 181. It is now entirely obsolete. 3 Bla. Com. 389. Consult, also, Comyns, Dig. Assize (B, 27, 28).

CERTIFICATE OF COSTS. See JUDGE'S CERTIFICATE.

CERTIFICATE OF DEPOSIT. In Banking. A written statement from a bank that the party named therein has deposited the amount of money specified in the certificate, and that the same is held subject to his order in accordance with the terms thereof.

CERTIFICATE OF REGISTRY. A certificate that a ship has been registered as the law requires. 3 Kent 149. Under the United States statutes, "every alteration in the property of a ship must be indorsed on the certificate of registry, and must itself be registered." Unless this is done, the ship or vessel loses its national privileges as an American vessel; 1 Pars. Sh. & Adm. 50; Desty, Sh. & Adm. § 8. The English statutes make such a transfer void. Stat. 3 & 4 Will. IV. c. 54; Stat. 17 & 18 Vict. c. 104; Abb. Sh. 13th ed. 925.

The registry is not a document required by the law of nations as expressive of a ship's national character; 4 Taunt. 367; and is at most only *prima facie* evidence of ownership; 2 Hall, Adm. 1; 2 Wall. Jr. 264; Newb. Adm. 176, 312; 23 Pa. 76; 1 Cal. 481; 83 E. L. & Eq. 204; 14 East 226; 16 id. 169. The registry acts are to be considered as forms of local or municipal institution for purposes of public policy; 3 Kent 149.

CERTIFICATE OF STOCK.

"Certificates of stock" are mere evidences that the stockholders have invested in the enterprise, and cannot give the holders rights against creditors of the corporation 145 Ky. 634, 140 S. W. 1011. See Stock.

CERTIFICATES, GOLD. See GOLD CERTIFICATES.

CERTIFICATION. In Scotch Law. A notice to a party in a suit that, if he fail to do something, certain consequences will follow. Paterson, Comp.

See ACCEPTANCE, Negotiable Instruments.

CERTIFIED ACCOUNTANT. See CERTIFIED PUBLIC ACCOUNTANT.

CERTIFIED CHECK. A check which has been recognized by the proper officer as a valid appropriation of the amount of money therein specified to the person therein named, and which bears upon itself the evidence of such recognition.

The term as commonly understood implies that the check certified has passed from the custody of the bank and into the hands of some other persons; 155 U. S. 444.

Certification of a check is usually accomplished by writing the name of the officer authorized to bind the bank in that manner or the word "good," across the face of the check; but a parol acceptance of a check by an officer of the bank has been said to be sufficient to operate as a certification; 59 Barb. S. C. 226.

After certification the bank is bound as a direct and original promisor to the payee, and a new contract exists on which the latter has a right of action directly against the bank; Morse, Banks and Banking 414.

The maker of a check is discharged from all liability thereon, after it has been certified at the request of the holder; 52 N. Y. 350; 12 L. R. A. 493; 7 Biss. 193; 94 U. S. 343; 4 N. J. L. J. 34; 4 Barb. 401; 17 Ont. 943; but not if he procures the certification himself before the check is issued; 42 Ill. 238; 12 Colo. 480; 4 N. J. L. J. 34; 4 Ohio C. C. 135; 28 La. Ann. 933; 123 Ind. 78; 9 Heisk. 211; and there are *dicta* to the same effect; 52 N. Y. 350; 94 U. S. 343. But see an elaborate discussion of the subject questioning these decisions and maintaining that there is no difference between the case of certification at the request of the payee or of the drawer; 6 H. L. Rev. 138; and also Morse, Bks. & Bkg. § 415.

CERTIFIED PUBLIC ACCOUNTANT. One who has met the requirements for, and been licensed or certified as an expert public accountant, in accordance with the laws of the particular state in which he practices. Usually designated by the abbreviation C. P. A.

CERTIFIED QUESTION. A question certified must be one the answer to which is to aid the courts in determining a case before it. 200 U. S. 206.

CERTIORARI. In Practice. A writ issued by a superior to an inferior court of record, requiring the latter to send in to the former some proceeding therein pending, or the record and proceedings in some cause already terminated in cases where the procedure is not according to the course of the common law. See 112 Mass. 206.

The writ lies in most of the states of the United States to remove from the lower courts proceedings which are created and regulated by statute merely, for the purpose of revision; 13 Pick. 195; 8 Me. 293; 5 S. & R. 174; 2 Dutch. 49; 4 Hayw. 100; 2 Yerg. 173; 1 G. & J. 196; 8 Vt. 271; 1 Ohio 383; 2 Va. Cas. 270; 54 Barb. 589; 1 Ala. 95; 8 Cal. 58; 6 Mich. 137; 110 N. C. 417; 159 Pa. 559; 88 Ill. 27; and to complete the proceedings when the lower court refuses to do so, upon erroneous grounds; 1 Hayw. 302; 2 Ark. 73; and to correct errors in law; 75 Ala. 491; 99 Ill. 171; 49 Mich. 194; 65 Me. 160; 43 N. J. L. 112; 97 Pa. 260; 43 Wis. 407. In England, 13 E. L. & Eq. 129; 9 L. R. Q. B. 350; and in some states of the United States; 3 H. & M'H. 115; Cox 287; 2 South. 539; 7 Cow. 141; 2 Yerg. 173; 2 Whart. 117; 2 Va. Cas. 268; 2 Murph. 100; 1 Ala. 95; 5 R. L. 385; the writ may also be issued to remove criminal causes to a superior court. Har. Certiorari 8. But see 10 Ohio, 345. It also lies where a probate court proceeds without jurisdiction in admitting a claim against an estate; 30 Ill. App. 121; or where the court has jurisdiction but makes an order exceeding its power; 45 Mo. App. 387. It is also given by statute to review the acts and powers of official boards and officers; 62 Hun 619; 155 Mass. 467; 71 Wis. 502.

It is used also as an auxiliary process to obtain a full return to other process, as

when, for example, the record of an inferior court is brought before a superior court by appeal, writ of error, or other lawful mode, and there is a manifest defect or suggestion of diminution, to obtain a perfect transcript and all papers; 7 Cra. 288; 9 Wheat. 586; 2 Cow. 88; 2 South. 270, 651; 7 Halst. 85; 1 Blackf. 33; 3 Ind. 816; 1 Dev. & B. 882; 11 Mass. 414; 2 Munf. 229; 16 B. Monr. 472; 1 Ala. 499; 1 Col. T. 490. It does not issue as a matter of right on mere suggestion of defects in the record, but the application must be supported by evidence; 106 Mo. 111.

The office of the writs of certiorari and mandamus is often much the same. It is the practice of the United States supreme court, upon a suggestion of any defect in the transcript of the record sent up into that court upon a writ of error, to allow a special certiorari, requiring the court below to certify more fully; 3 Dall. 411; 7 Cra. 288; 3 How. 88; 9 Wall. 661. Relief may also be had in the U. S. Circuit Court of Appeals on allegation of diminution in the record sent up from the circuit court, as provided by rule 18; 49 Fed. Rep. 1; 1 C. C. A. 254. The same result might also be effected by a writ of mandamus. The two remedies are, when addressed to an inferior court of record, from a superior court, requiring the return of a record, much the same. But where diminution of the record is suggested in the inferior court, and the purpose is to obtain a more perfect record, and not merely a more perfect copy or transcript, it is believed that the writ of mandamus is the appropriate remedy.

In many of the states, the writ produces the same result in proceedings given by statute, such as the proceedings for obtaining damages under the mill acts, highway acts, pauper laws, etc., as the writ of error does when the proceedings are according to the course of the common law. Where the lower court is to be required to proceed in a cause, a writ of procedendo or mandamus is the proper remedy.

It does not lie to enable the superior court to revise a decision upon matters of fact; 69 N. Y. 408; 84 N. J. L. 343; 112 Mass. 206; 65 Me. 180; 18 Ill. 324; 5 Wis. 191; 46 Cal. 667; 88 Ga. 283; 55 N. J. L. 87; 6 Mackey 596; 41 La. Ann. 179. See 2 Ohio 27; 45 Mo. App. 387; nor matters resting in the discretion of the judge of the inferior court; 9 Metc. 423; 1 Dutch. 173; see 147 Pa. 342; unless by special statute; 6 Wend. 564; 10 Pick. 358; 4 Halst. 209; or where palpable injustice has been done; 1 Miss. 112; 1 Wend. 288; 2 Mass. 173, 489.

It does not lie where the errors are formal merely, and not substantial; 8 Ad. & E. 413; 4 Mass. 567; 6 Miss. 578; 56 Me. 184; 59 Ill. 225; nor where substantial justice has been done though the proceedings were informal; 24 Me. 9; 13 Tex. 18; 93 Wis. 467; 100 Mass. 270; 99 Ill. 171; 61 Wis. 494; nor where the proceedings are not void on their face and show no arbitrary action on the part of the trial judge; 45 La. Ann. 1295.

Certiorari will not lie as a substitute for an appeal from an interlocutory order of a superior court; 109 N. C. 310; nor to review an appealable order; 74 Cal. 217. The evidence cannot be reviewed upon certiorari; 146 Pa. 546; 151 id. 113; nor the rulings on the admission of evidence; 96 Mich. 415.

It is granted or refused in the discretion of the superior court; Har. Certiorari 49; 24 Me. 9; 17 Mass. 352; 2 N. H. 210; 26 Barb. 437; 34 N. J. L. 261; 4 T. B. Mon. 420; 1 Miss. 112; 28 Ark. 87; 16 Vt. 446; 24 Ga. 379; L. R. 5 Q. B. 466; 42 Ill. App. 650; 29 W. Va. 63; 111 U. S. 766; 109 Ill. 142; and the application must disclose a proper case upon its face; 8 Ad. & E. 45; 17 Mass. 351; 2 Hawks 102; 2 Harr. Del. 459; Wright, Ohio 180; 4 Jones, N. C. 309; 18 Ark. 449; 17 Ill. 31; 4 Tex. 1; 2 Swan 176.

The judgment is either that the proceedings below be quashed or that they be affirmed; Har. Certiorari 38, 49; 8 Yerg. 102, 218; 5 Mass. 423; 12 G. & J. 329; 6 Coldw. 382; see 35 N. H. 315; 75 Ala. 491; 113 Ill. 154; 20 Ga. 77; 53 Wis. 57; either wholly or in part; 5 Mass. 420; 4 Ohio 200; 13 Johns. 461. See, also, 1 Overt. 58; 2 Hayw. 38; 4 Ala. 357. The costs are discretionary with the court; 16 Vt. 426; 6 Ind. 367; but at common law neither party recovers costs; 8 Johns. 321; 11 Mass. 465; 3 N. H. 44; 4 Ohio 200; and the matter is regulated by statute in some states; 4 Watts 451; 1 Spenc. 271. See MANDAMUS; PROCEDENDO.

Consult 4 Bla. Com. 262, 265.

By the act of congress of March 3, 1801, establishing circuit courts of appeal, § 6, it is provided that in any case in which the decision of that court is final a certiorari may issue from the supreme court to bring up the record to that court for its review and determination. U. S. Rev. St. 1 Supp. 903. See UNITED STATES COURTS.

CERTIORARI FACIAS. Cause to be certified. The command of a writ of certiorari.

CERVISARI (*cervisiz*, ale). Among the Saxons, tenants who were bound to supply drink for their lord's table. Cowel; Domesday.

CERVISIA. Ale. *Cervisarius*. An alebrewer; an ale-house keeper. Cowel; Blount.

CESIONARIO. In Spanish Law. An assignee. White, New Recop. 304.

CESSAVIT PER BIENNIIUM (Lat. he has ceased for two years). In Practice. An obsolete writ, which could formerly have been sued out when the defendant had for two years ceased or neglected to perform such service or to pay such rent as he was bound to do by his tenure, and had not upon his lands sufficient goods or chattels to be distrained. Fitzh. Nat. Brev. 208. It also lay where a religious house held lands on condition of performing certain spiritual services which it failed to do. 3 Bla. Com. 232.

CESSAT EXECUTIO (Lat. let execution stay). In Practice. The formal order for a stay of execution, when proceedings in court were conducted in Latin. See EXECUTION.

CESSAT PROCESSUS (Lat. let process stay). In Practice. The formal order for a stay of process or proceedings, when the proceedings in court were conducted in Latin. See 2 Dougl. 627; 11 Mod. 231.

CESSIO BONORUM (Lat. a transfer of property). In Civil Law. An assignment of his property by a debtor for the benefit of his creditors.

Such an assignment discharged the debtor to the extent of the property ceded only, but exempted him from imprisonment. Dig. 2. 4. 25; 48. 19. 1; Nov. 4. 3. And see La. Civ. Code 2166; 2 Mart. La. n. s. 108; 5 id. 299; 4 Wheat. 122; 1 Kent 422.

CESSION (Lat. *cessio*, a yielding).

In Civil Law. An assignment. The act by which a party transfers property to another. See CESSIO BONORUM.

In Ecclesiastical Law. A surrender. When an ecclesiastic is created bishop, or when a parson takes another benefice, without dispensation, the first benefice becomes void by a legal cession or surrender. Cowel.

In Government Law. The transfer of land by one government to another.

France ceded Louisiana to the United States, by the treaty of Paris, of April 30, 1803; Spain made a cession of East and West Florida, by the treaty of Feb. 22, 1819. Cessions have been severally made to the general government of a part of their territory by New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia. See Gordon, Dig. art. 2236-2250.

It is the usage of civilized nations, when territory is ceded, to stipulate for the property rights of its inhabitants; 159 U. S. 452.

See TERRITORIAL PROPERTY.

CESSIONARY. In Scotch Law. An assignee. Bell, Dict.

CESSOR. One who ceased or neglected so long to perform a duty belonging to him, as to incur the danger of the law, and to become liable to have a writ of cessavit brought against him.

CESTUI QUE TRUST. He for whose benefit another person is seised of lands or tenements or is possessed of per-

sonal property.

He who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another. 2 Wash. R. P. *163.

He may be said to be the equitable owner; Will. R. P. 16th ed. 188; 1 Spence, Eq. Jur. 497; 1 Ed. Ch. 228; 2 Pick. 20; is entitled, therefore, to the rents and profits; may transfer his interest, subject to the provisions of the instrument creating the trust; 1 Spence, Eq. Jur. 507; 2 Washb. R. P. 196; and may ordinarily mortgage his interest; 49 N. J. Eq. 57; may defend his title in the name of his trustee; 1 Cruise, Dig. tit. 12, c. 4, § 4; but has no legal title to the estate, as he is merely a tenant at will if he occupies the estate; 2 Ves. Sen. Ch. 472; 16 C. B. 652; 1 Washb. R. P. 68; and may be removed from possession in an action of ejectment by his own trustee; Lew. Trust. 8th ed. *677; Hill, Trust. 274; 3 Dev. 425; 2 Pick. 508; he cannot sue for damages done to trust lands unless the trustee refuses to protect the rights of the beneficiary; 68 Hun 122. Where the trustee neglects to defend the legal title to trust property, the beneficiary may sue to remove a cloud on the title; 54 Fed. Rep. 55. See Trust.

He who is entitled in equity to take the rents and profits of lands whereof the legal estate is vested in some other person who is called the trustee; or, in other words, he who is the real, substantial and beneficial owner of lands which are held in trust, as distinguished from the trustee.

CESTUI QUE USE. He for whose benefit land is held by another person.

He who has a right to take the profits of lands of which another has the legal title and possession, together with the duty of defending the same and to direct the making estates thereof; Tudor, Lead. Cas. 252; 2 Bla. Com. 330. See 2 Washb. R. P. 95; Use.

CESTUI QUE VIE. He whose life is the measure of the duration of an estate. 1 Washb. R. P. 88.

CHACEA. A station for game, more extended than a park, less so than a forest; the liberty of hunting within such limits. Cowel.

The driving or hunting animals; the way along which animals are driven. Spelman, Gloss.

CHAFEWAX. An officer in chancery who fits the wax for sealing to the writs, commissions, and other instruments there made to be issued out. He is probably so called because he warms (*chauffe*) the wax.

CHAFFERS. Anciently signified wares and merchandise; hence the word *chaffering*, which is yet used for buying and selling, or beating down the price of an article. The word is used in stat. 3 Edw. III. c. 4.

CHALDRON. A measure of capacity, equal to fifty-eight and two-thirds cubic feet, nearly. Cowel.

CHALLENGE. In Criminal Law. A request by one person to another to fight a duel. No particular form of words is necessary to constitute a challenge, and it may be oral or written; 6 Blackf. 20; 12 Ala. 276; 2 Nott. & M. 181; 3 Dana (Ky.) 418. Sending a challenge is a high offence at common law, and indictable as tending to a breach of the peace; Hawk. Pl. Cr. b. 1, c. 3, § 3; 3 East 581; 1 Dana 524; 1 South. 40; 2 McCord 334; 1 Const. 107; 1 Hawks 487; 2 Ala. 506; 6 Blackf. 20; 9 Leigh 603; 3 Rog. 133; 3 Wheel. Cr. Cas. 245. He who carries a challenge is also punishable by indictment; Clark, Cr. L. 340; 3 Cra. 178. In most of the states, this barbarous practice is punishable by special laws. 2 Bish. Cr. Law, §§ 312-315. And in a large number of them by their constitutions the giving, accepting, or knowingly carrying a challenge, deprives the party of the right to hold any office of honor or profit in the commonwealth.

In most of the civilized nations, challenging another to fight is a crime, as calculated to destroy the public peace; and

those who partake in the offence are generally liable to punishment. In Spain, it is punished by loss of offices, rents, and honors received from the king, and the delinquent is incapable to hold them in future; Aso & M. Inst. b. 2, t. 19, c. 2, § 6. See, generally, Joy, Chall.; 1 Russ. Cr. 275; 2 Bish. Cr. Law, chap. xv.; 6 J. J. Marsh. 120; 1 Const. S. C. 107; 1 Munf. 468.

General Challenge. An objection to a juror such as disqualifies him from serving in any case at all, as opposed to a particular challenge (*q. v.*).

Particular Challenge. Such as holds that a juror is disqualified from serving simply in the particular action on trial; opposed to general challenge (*q. v.*). Anderson.

In Practice. An exception to the jurors who have been arrayed to pass upon a cause on its trial. See 2 Poll. & Maitl. 619, 646.

An exception to those who have been returned as jurors. Co. Litt. 155 b.

The most satisfactory derivation of the word is that adopted by Webster and Crabb, from *call*, challenge implying a calling off. The word is also used to denote exceptions taken to a judge's capacity on account of interest; 2 Binn. 454; 4 id. 549; and to the sheriff for favor as well as affinity; Co. Litt. 135 a; 10 S. & R. 336. The right is not allowed to enable the prisoner to select such jurors as he may wish, but to select just and impartial ones; 97 N. C. 469.

Challenges are of the following classes:—

To the array. Those which apply to all the jurors as arrayed or set in order by the officer upon the panel. Such a challenge is, in general, founded upon some error or manifest partiality committed in obtaining the panel, and which, from its nature, applies to all the jurors so obtained. These are not allowed in the United States generally; Colby, Pr. 235; 2 Blatchf. 435; 6 Miss. 20; the same end being attained by a motion addressed to the court, but are in some states; 41 Tex. 417; 24 Miss. 445; 1 Mann. Mich. 451; 20 Conn. 510; 1 Zab. 656; 1 Cowen 432; 2 Blackf. 332; 82 Pa. 306. The challenge must be based upon objection to all the jurors composing the panel; 84 Ill. App. 398. Mere irregularity in drawing a jury is not sufficient cause to sustain a challenge to the array; 89 Ill. App. 481; nor is the fact that a challenge to the array has been sustained for bias and prejudice of the officer summoning them and few of the same jurors are on the second venire; 95 Cal. 425; nor is the fact that one of the men named on the special venire is dead and another removed from the county; 118 N. C. 716; 52 N. J. Law 207. It was a good ground of challenge to the array that no persons of African descent were selected as jurors but all such were excluded because of their race and color, on affidavit of the prisoner to that effect, no evidence having been adduced *pro* or *con*; 103 U. S. 370.

For cause. Those for which some reason is assigned.

These may be of various kinds, unlimited in number, may be to the array or to the poll, and depend for their allowance upon the existence and character of the reason assigned.

To the favor. Those challenges to the poll for cause which are founded upon reasonable grounds to suspect that the juror will act under some undue influence or prejudice, though the cause be not so evident as to authorize a principal challenge; Co. Litt. 147 a, 157 a; Bacon, Abr. *Juries*, E, 5; 3 Wis. 823. Such challenges are at common law decided by triors, and not by the court. See *TRIOBS*; 16 N. Y. 501; 14 N. J. L. 195. But see 24 Ark. 346; 21 N. Y. 134; 6 Hun 140.

Peremptory. Those made without assigning any reason, and which the court must allow. The number of these in trials for felonies was, at common law, thirty-five; 4 Bla. Com. 354; but, by statute, has been reduced to twenty in most states, and is allowed in criminal cases only when the offence is capital; Thorn. *Juries* 119; 2 Blatchf. 470; 10 B. Monr. 125; 8 Ohio St. 98; 25 Mo. 187; see 5 Wis. 324; 1 Jones, N. C. 289; 19 Ohio 354; 85 Ala. 339. The prosecuting officer may exercise his right

of peremptory challenge of a juror at any time previous to the acceptance of the jury by the defendant; 36 S. C. 504; in civil cases the right is not allowed at all; 9 Exch. 472; 2 F. & F. 137; 2 Blatchf. 470; or, if allowed, only to a very limited extent; 5 Harr. Del. 245; 7 Ohio St. 155; 9 Barb. 161; 20 Conn. 510; 8 Blackf. 507; 3 Iowa 216. Unless given by statute no right exists; 86 Ala. 206. The rule that a juror shall be accepted or challenged and sworn as soon as his examination is completed is not objectionable as embarrassing the exercise of the right of peremptory challenge; 154 U. S. 134. In the United States courts in trials for treason or capital cases, the accused has twenty and the United States five peremptory challenges; U. S. Rev. Stat. § 819. The number of peremptory challenges allowed varies much in the different states. See 12 A. & E. Encyc. 346, 347, n. 3, for state statutes on the subject.

To the poll. Those made separately to each juror to whom they apply. Distinguished from those to the array.

Principal. Those made for a cause which when substantiated is of itself sufficient evidence of bias in favor of or against the party challenging. Co. Litt. 156 b. See 3 Bla. Com. 363; 4 id. 353. They may be either to the array or to the poll; Co. Litt. 156 a, b.

The importance of the distinction between principal challenges and those to the favor is found in the case of challenges to the array or of challenges to the poll for favor or partiality. All other challenges to the poll must, it seems, be principal. The distinctions between the various classes of challenges are of little value in modern practice, as the court generally determine the qualifications of a juror upon suggestion of the cause for challenge, and examination of the juror upon oath when necessary. See *TRIOBS*.

The causes for challenge are said to be either *propter honoris respectum* (from regard to rank), which do not exist in the United States; *propter defectum* (on account of some defect), from personal objections, as alienage, infancy, lack of statutory requirements; *propter affectum* (on account of partiality), from some bias or partiality either actually shown to exist or presumed from circumstances; *propter delictum* (on account of crime), including cases of legal incompetency on the ground of infamy; Co. Litt. 155 b *et seq.*

These causes include, amongst others, *alienage*; Wall. C. C. 147, but see 2 Cra. 8; *incapacity* resulting from age, lack of statutory qualifications; 10 Gratt. 767; see 43 La. Ann. 365; *partiality* arising from near relationship; 19 N. H. 379; 19 Pa. 95; 10 Gratt. 690; Busb. 330; 32 Me. 310; 20 Conn. 87; 2 Barb. Ch. 331; 3 Ind. 198; 65 Ga. 304; see 74 Mo. 270; 97 Pa. 548; an *interest* in the result of the trial; Thorn. *Juries* 90, 105; 11 Ind. 234; 8 Cush. 69; 21 N. H. 438; 1 Zab. 656; 11 Mo. 247; 69 Tex. 650; but it should be a direct pecuniary interest; 15 Neb. 637; 3 Ill. 661; 20 Fla. 980; 29 Ga. 105; *consciousness of scruples* as to finding a verdict of conviction in a capital case; 1 Baldw. 78; 16 Tex. 206, 445; 60 Ind. 441; 2 Cal. 257; 3 Ga. 453; 17 Miss. 115; 16 Ohio 364; 18 N. H. 536; 65 Cal. 148; 19 Tex. App. 618; see 13 Ark. 568; 14 Ill. 433; 5 Cush. 295; *membership* of societies, under some circumstances; 13 Q. B. 815; 5 Cal. 347; 4 Gray 18; *citizenship* in a municipality interested in the case; 42 Ia. 315; 51 N. Y. 506; 51 Ind. 119; 61 Mo. 479; 20 Kan. 156; 21 N. E. Rep. (Ind.) 977; but see 73 Ia. 241; acting as an employé of one of the parties; 64 Miss. 738; 18 S. C. 263; 63 Ga. 173; *bias* indicated by *declarations* of wishes or opinions as to the result of the trial; 1 Zab. 106; 19 Ohio 198; 1 Johns. 316; 60 Ill. 452, 465; 75 Pa. 424; 52 Ind. 68; see 96 U. S. 640; or *opinions* formed or expressed as to the guilt or innocence of one accused of crime; 19 Ark. 156; 80 Miss. 627; 2 Wall. Jr. 333; 10 Humphr. 456; 13 Ill. 685; 2 Greene 404; 19 Ohio 198; 5 Ga. 85; see 1 Dutch. 566; 15 Ga. 498; 18 id. 383; 7 Ind. 332; 2 Swan 581; 16 Ill. 364; 1 Cal. 379; 5 Cush. 295; 7 Gratt. 593; 12 Mo. 228; 18 Conn. 166; but if opinion is based on newspaper report or rumor, and the juror says he can give an impartial decision on the evidence, he is competent;

61 Cal. 548; 102 Ind. 502; 105 Ill. 547; 35 La. Ann. 327; 95 N. C. 611; 39 Mich. 245; 111 Pa. 251. A juror may be asked whether his "political affiliations or party predilections tend to bias his judgment either for or against the defendant;" 158 U. S. 408.

Who may challenge. Both parties, in civil as well as in criminal cases, may challenge, for cause; and equal privileges are generally allowed both parties in respect to peremptory challenges; but see 6 B. Monr. 15; 3 Wis. 823; 2 Park. Cr. Cas. N. Y. 586; and after a juror has been challenged by one party and found indifferent, he may yet be challenged by the other; 32 Miss. 389. A juror has no right to challenge himself, and though a good cause of challenge subsists, yet, if neither party will take advantage of it, the court cannot reject him; 1 N. J. L. 220; but see 43 Miss. 641.

The time to make a challenge is between the appearance and swearing of the jurors; 8 Gratt. 637; 3 Jones N. C. 443; 3 Ia. 216; 23 Pa. 12; 8 Gill 487; 8 Blackf. 194; 3 Ga. 453; 14 La. Ann. 461; 4 Nev. 265; 22 Mich. 76; 113 Mass. 297; but see 7 Ia. 189; 1 Curt. C. C. 23; 80 Ga. 544; 78 Mich. 124; the fact that a panel has been passed by a party as satisfactory will not prevent him from challenging one of the jurors so passed at any time before he is sworn; 78 Cal. 118; 83 Ala. 220. See 121 Ill. 442; 40 Mo. App. 234. It is a general rule at common law that no challenge can be made till the appearance of a full jury; 4 B. & Ald. 476; 45 Cal. 323; on which account a party who wishes to challenge the array may pray a *tales* to complete the number, and then make his objection. Challenges to the array, where allowed, must precede those to the poll; and the right to the former is waived by making the latter; Co. Litt. 158 a; Bacon, Abr. *Juries*, E, 11; 6 Cal. 214; 35 Neb. 139; but see 13 Wall. 434. In cases where peremptory challenges are allowed, a juror unsuccessfully challenged for cause may subsequently be challenged peremptorily; 4 Bla. Com. 356; 6 Term 531; 4 B. & Ald. 476. See 5 Cush. 295.

Manner of making. Challenges to the array must be made in writing; 1 Mann. Mich. 451; 1 Ia. 141; but challenges to the poll are made orally and generally by the attorney's or party's saying, "Challenge," or, "I challenge," or, "We challenge;" 1 Chit. Cr. Law 533-541; 4 Hargr. St. Tr. 740; Trials per Pais 172; Cro. Car. 105. See 43 Me. 11; 25 Penn. 134; 83 id. 306.

The guaranty in the constitution of a trial by jury does not prevent legislation as to the manner of selecting jurors or allowing peremptory challenges to the state; 61 Vt. 153.

CHAMBER. A room in a house. There may be an estate of freehold in a chamber as distinct and separate from the ownership of the rest of the house; 1 Term 701; Co. Litt. 48 b; 4 Mass. 576; 1 Metc. 533; 10 Conn. 318; and ejectment will lie for a deprivation of possession; 1 Term 701; 9 Pick. 293; though the owner thereof does not thereby acquire any interest in the land; 11 Metc. 448. See Brooke, Abr. *Demand* 20; 6 N. H. 555; 3 Watts 243; 3 Leon. 210. Consult Washburn; Preston, Real Property.

CHAMBER OF ACCOUNTS. In French Law. A sovereign court, of great antiquity, in France which took cognizance of and registered the accounts of the king's revenue; nearly the same as the English court of exchequer. Encyc. Brit.

CHAMBER OF COMMERCE. A society of the principal merchants and traders of a city, who meet to promote the general trade and commerce of the place. Some of these are incorporated, as in Philadelphia. Similar societies exist in all the large commercial cities, and are known by various names, as, Board of Trade, etc.

CHAMBERLAIN, LORD. See LORD CHAMBERLAIN OF THE HOUSEHOLD.

CHAMBERLAIN, LORD GREAT. See LORD GREAT CHAMBERLAIN.

CHAMBERS. In Practice. The private room of the judge. Any hearing before a judge which does not take place during a term of court or while the judge is sitting in court, or an order issued under such circumstances, is said to be *in chambers*. The act may be an official one, and the hearing may be in the court-room; but if the court is not in session, it is still said to be done *in chambers*.

CHAMPART. In French Law. The grant of a piece of land by the owner to another, on condition that the latter would deliver to him a portion of the crops. 18 Toullier, n. 182.

CHAMPERTOR. In Criminal Law. One who makes pleas or suits, or causes them to be moved, either directly or indirectly, and sues them at his proper costs, upon condition of having a part of the gain. Stat. 33 Edw. I. stat. 2.

One who is guilty of champerty.

CHAMPERTY (Lat. *campum partire*, to divide the land). A bargain with a plaintiff or defendant in a suit, for a portion of the land or other matter sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense. See 19 Alb. L. J. 468; 82 Va. 309; 7 Bing. 369.

Champerty differs from maintenance chiefly in this, that in champerty the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it; 4 Bla. Com., Chase's ed. 936, n. 5; 16 Ala. 488; 24 Ala. s. 472; 9 Metc. 489; 1 Jones, Eq. 100; 5 Johns Ch. 44; 4 Litt. 117; 37 Ga. 238; 10 Heisk. 390; 30 Ill. 133; while in simple maintenance the question of compensation does not enter into the account; 2 Bish. Cr. Law § 131; 53 Ind. 317.

The offence was indictable at common law; 4 Bla. Com. 135; 1 Pick. 415; 5 T. B. Monr. 413; 1 Swan 398; 8 M. & W. 691; see L. R. 8 Q. B. 112; 2 App. Cas. 186; 4 L. R. Ir. 43; 1 Ohio 132; 3 Greene 472; 18 Ill. 449; 28 Vt. 490; 6 Tex. 275; and in some of the states of the United States by statute; 37 Me. 196; 14 N. Y. 289; 18 Ill. 449; 73 Id. 11; 15 B. Monr. 64; 14 Conn. 12; 40 Id. 565; 38 Tex. 458; 2 Mo. App. 1. Champerty avoids contracts into which it enters; 8 R. I. 389. A common instance of champerty, as defined and understood at common law, is where an attorney agrees with a client to collect by suit at his own expense a particular claim or claims in general, receiving a certain proportion of the money collected; 9 Ala. n. s. 755; 17 Id. 305; 1 Ohio 132; 4 Dowl. 304; or a percentage thereon; 17 Ala. n. s. 206; 9 Metc. 489; 2 Bish. Cr. Law § 132; 86 Wis. 170; s. c. 56 N. W. Rep. 637; and see 3 Pick. 79; 4 Duer 275; 1 Pat. & H. 48; 18 Ill. 449; 15 B. Monr. 64; 20 Ala. n. s. 676; 6 Dana 479; 17 Ark. 608; 4 Mich. 535; 8 R. I. 389; 12 Id. 94; 53 Ill. 275; 7 Bush 355. The doctrine of champerty does not not apply to judicial sales; 10 Yerg. 460; 5 N. Y. 320; 17 S. W. Rep. (Ky.) 859. See 85 Me. 172; 148 Mass. 18.

The tendency of modern decisions is, while departing from the unnecessary severity of the old law, at the same time to preserve the principle which defeats the mischief to which the old law was directed. It has been the disposition of courts to look not so much to technical distinctions, and by treating statutes on the subject as declaratory of the common law, to deal with the subject with more flexibility, keeping in view the real object of the policy to restrain what was defined by Knight Bruce, L. J., to be "the traffic of merchandizing in quarrels, of huckstering in litigious discord;" 1 D. M. & G. 680, 686. In this spirit, the common-law rule relative to champerty and maintenance is no longer recognized in many states; 65 Hun 619; 82 Va. 309; 21 Or. 260; 55 Fed. Rep. 44; 83 Tex. 58; 45 Id. 106; but in New York by statute it is unlawful for an attorney to give or promise a consideration for placing in his hands a claim for injuries against a railroad company; Code C. P. 678; 61 Hun 613. Where an attorney agrees to prosecute an action for damages and advance all costs because of the poverty of the plaintiff, taking a contin-

gent fee of a portion of the amount recovered, it is not void for champerty; 37 Ill. App. 190; nor is a contract to pay for services of an attorney contingent entirely upon success; 36 W. Va. 1; 49 Ohio St. 475; 97 Pa. 455; 98 Id. 196; 127 Id. 474; 57 N. W. Rep. (Neb.) 767; 37 Ill. App. 180; 14 S. E. Rep. (W. Va.) 444; (and see 30 Ill. App. 62 and 28 N. E. Rep. 400;) 102 N. Y. 395; 71 La. 197; 138 Mass. 530; 119 Ill. 626; 40 Kan. 195. But the purchase by attorneys of rights of action, for the purpose of bringing suit thereon, is commonly prohibited in law, on grounds of public policy; Chase's Bla. Com. 905, n. 8; and an agreement that the client shall receive a certain amount out of the sum recovered and that all above that shall belong to the attorney, is champertous; 13 Or. 47; 35 Leg. Int. (Pa.) 152; but such an agreement for collection without suit is not champertous; 24 Atl. Rep. 955; s. c. 84 Me. 578.

In England, in New York, and probably most of the states, the purchase of land, pending a suit concerning it, is champerty; and if made with knowledge of the suit and not pursuant to a previous agreement, it is void; 4 Kent 449; 24 S. W. Rep. (Ky.) 4; 80 Id. 20; 70 Hun 428; this doctrine, established by the English statutes, Westm. 1, c. 25, Westm. 2, c. 49, and 28 Edw. I. c. 11, became part of the common law, and either as such or by statutory adoption became engrafted upon the law of almost all the states. The principle extends to the purchase of any cause of action, as a patent which has been infringed; 68 Fed. Rep. 627; unpaid promissory notes; 31 Atl. Rep. (Vt.) 315. In Pennsylvania a person may convey an interest in lands held adversely to him; 13 Pa. Co. Ct. 70.

The champerty of the plaintiff is no defence in the action concerning which the contract was made. A railroad company sued for an overcharge cannot defend by showing that the plaintiff made a champertous contract with his attorney to induce the company to accept the overcharge and then sue for the penalty; 60 Ark. 221; nor is such defence good in actions for personal injuries; 57 N. W. Rep. (Neb.) 767; nor can a purchaser of a disputed title defend against a prior unrecorded deed to plaintiff's attorney for one-half of the land, on the ground that the latter was given under a champertous contract; 42 Neb. 701; and generally the objection that a contract is champertous cannot be set up by a stranger to it or in defence of a suit brought under it; 14 So. Rep. (Ala.) 541; 29 N. E. Rep. (Ohio) 573; 11 So. Rep. (La.) 320; 16 S. W. Rep. (Mo.) 864.

An attorney suing as "administrator" to recover for a death by wrongful act may be guilty of a champertous agreement with the beneficiaries, which may be pleaded as a defence to the suit under a statute investing the code with equity powers for the purposing of discovering and preventing the offence; 55 Fed. Rep. 44. For an excellent analysis of the cases and the rules to be derived from them, see Wald's Poll. Cont. 293.

CHAMPION. He who fights for another, or who takes his place in a quarrel. One who fights his own battles. Bracton, l. 4, t. 2, c. 12.

CHANCE. See ACCIDENT.

CHANCE-MEDLEY. In Criminal Law. A sudden affray. This word is sometimes applied to any kind of homicide by misadventure, but in strictness it is applicable to such killing only as happens in defending one's self; 4 Bla. Com. 184.

CHANCELLOR. An officer appointed to preside over a court of chancery, invested with various powers in the several states.

There is a chancellor for the state in Delaware, and also, with vice-chancellors, in New Jersey, and in Alabama, Mississippi, and Tennessee there are district chancellors elected by the people. Under the federal system and in the other states the powers and jurisdiction of courts of equity are

exercised and administered by the same judges who hold the common-law courts.

The title is also used in some of the dioceses of the Protestant Episcopal Church in the United States to designate a member of the legal profession who gives advice and counsel to the bishop and other ecclesiastical authorities.

In Scotland, this title is given to the foreman of the jury. Bishp. Eq. 7.

An officer bearing this title is to be found in some countries of Europe, and is generally invested with extensive political authority. It was finally abolished in France in 1848. The title and office of chancellor came to us from England. See 1 Spence, Eq. Jur.; Encyc. Am.; 4 Viner, Abr. 374; Woodd. Lect. 95.

For the history of the office, see CANCELIARII.

In England the title is borne by several functionaries, thus:—

The Lord High Chancellor is prolocutor of the house of lords, formerly presided over the court of chancery, and is principal judge of the high court of justice under the judicature act, 1873. He is a privy councillor by virtue of his office, and visitor of all hospitals and colleges of the king's foundation for which no other visitor is appointed. To him belongs the appointment of justices of the peace throughout the kingdom. Cowel; 3 Bla. Com. 38, 47; 2 Steph. Com. 382; 3 Id. 320.

The Chancellor of the Duchy of Lancaster, who presides over the court of the duchy, to judge and determine controversies relating to lands holden of the king in right of the Duchy of Lancaster. This court has a concurrent jurisdiction with the court of chancery in matters relating to the duchy. Cowel; 3 Bla. Com. 78; 3 Steph. Com., 11th ed. 372, n.

The Chancellor of the Exchequer is an officer who formerly sat in the court of exchequer, and, with the rest of the court, ordered things for the king's benefit. Cowel. This part of his functions is now practically obsolete; and the chancellor of the exchequer is now known as the minister of state who has control over the national revenue and expenditure. 2 Steph. Com., 11th ed. 467.

The Chancellor of a Diocese is the officer appointed to assist a bishop in matters of law, and to hold his consistory courts for him. 1 Bla. Com. 382; 2 Steph. Com., 11th ed. 684.

The Chancellor of a University, who is the principal officer of the university. His office is for the most part honorary.

CHANCELLORS' COURTS IN THE TWO UNIVERSITIES. In English Law. Courts of local jurisdiction in and for the two universities of Oxford and Cambridge in England. 3 Bla. Com. 83. These are courts subsisting under ancient charters granted to these universities and confirmed by act of parliament, and they have an exclusive jurisdiction *inter alia*, in actions in which any member or servant of the university is a party—in any case at least where the cause of action arises within the liberties of the university, and the member, or servant, was resident in the university when it arose and when the action was brought; 4 Inst. 227; Rep. t. Hardw. 341; 2 Wils. 406; 12 East 12; 13 Id. 635; 15 Id. 634; 10 Q. B. 292; which privilege of exclusive jurisdiction was granted in order that the students might not be distracted from their studies and other scholastic duties by legal process from distant courts. The most ancient charter containing this grant to the University of Oxford was 28 Hen. III. A. D. 1244, and the privileges thereby granted were confirmed and enlarged by every succeeding prince down to Hen. VIII., in the 14th year of whose reign the largest and most extensive charter of all was granted, and this last-mentioned charter is the one now governing the privileges of that university. A charter somewhat similar to that of Oxford was granted to Cambridge in the third year of Queen Elizabeth. And subsequently was passed the statute of 13 Eliz.

c. 29, whereby the legislature recognized and confirmed all the charters of the two universities, and those of the 14 Henry VIII. and 3 Eliz. by name (13 Eliz. c. 29); 16 Q. B. D. 761 (Oxford), 12 East 12 (Cambridge), which act established the privileges of these universities without any doubt or opposition.

It is to be observed, however, that the privilege can be claimed only on behalf of members who are defendants, and when an action in the High Court is brought against such member the university enters a *claim of consuance*, that is, claims the cognizance of the matter, whereupon the action is withdrawn from the High Court and transferred to the University Court; 16 Q. B. D. 761. But as regards the University of Cambridge the jurisdiction appears to be no longer exclusive; 19 & 20 Vict. cxvii. § 18; and it attaches only when both parties are scholars or privileged persons and the cause of action arose in Cambridge or its suburbs.

Procedure in these courts was usually regulated according to the laws of the civilians, subject to specific rules made by the vice-chancellor, with the approval of three of her Majesty's judges. See (as to Oxford) 25 & 26 Vict. c. 26, § 12. Under the charter of Henry VIII. the chancellor and vice-chancellor and the deputy of such vice-chancellor are justices of the peace for the counties of Oxford and Berks, which jurisdiction has been recently confirmed in them by 49 & 50 Vict. c. 31; 3 Steph. Com. 325.

The courts of the Universities of Oxford and Cambridge have a criminal as well as a civil jurisdiction, and this of an extensive kind. The chancellor's court has authority to determine all offences which are misdemeanors only, when committed by a member of the university. And even treason, felony, and mayhem, if found to have been committed by any member thereof, may be tried in the court of the Lord High Steward of the University. A similar jurisdiction is enjoyed by the University of Cambridge. See Bac. Abr. tit. Universities.

The right was granted under Henry IV., confirmed by 13 Eliz. c. 29, which charter provides, that a scholar or other privileged person be tried before the high steward of the university or his deputy, who is to be nominated by the chancellor of the university for the time being, but such high steward must be approved by the Lord High Chancellor of England; and a special commission is given him under the great seal.

The judge of the chancellor's court at Oxford was a vice-chancellor, with a deputy or assessor. An appeal lay from his sentence to delegates appointed by the congregation, thence to delegates appointed by the house of convocation, and thence, in case of any disagreement only, to judges delegates appointed by the crown under the great seal in chancery; 3 Steph. Com., 11th ed. 325.

Proceedings in these courts are now governed by the common and statute law of the realm; Stat. 17 & 18 Vict. c. 81, § 45; 18 & 19 Vict. c. 36; 19 & 20 Vict. cc. 31, 95; 20 & 21 Vict. c. 25.

CHANCER. To adjust in an equitable manner. English.

CHANCERS. Formerly those who taxed costs. English.

CHANCERY. See COURT OF CHANCERY.

CHANCERY COURT OF THE COUNTY PALATINE OF DURHAM.

An English court of Chancery which still exists. The "Chancellor of the County Palatine of Durham and Sadberge," or Chancellor of Durham, is the judge. The court has jurisdiction within the area of the ancient county palatine, which includes the modern county. Its jurisdiction is concurrent with that of the High Court. Its procedure is now regulated by the Palatine Court of Durham Act, 1889, which gives a right of appeal to the Court of Appeal and thence to the House of Lords. Byrne. See COURTS OF ENGLAND.

CHANCERY COURT OF THE COUNTY PALATINE OF LANCASTER.

An English court having a local jurisdiction in equity. Its local jurisdiction is the same as that of the High Court. It consists of a vice-chancellor, with a registrar and other officers, forming a court of first instance, from which an appeal formerly lay to the "Court of Appeal in Chancery of the County Palatine of Lancaster," consisting of the Chancellor of the Duchy and the Lords Justices of the Court of Appeal in Chancery; but this appellate jurisdiction was transferred to the Court of Appeal of the Supreme Court by the Judicature Acts, 1873 and 1875, and there is also an appeal to the House of Lords. Byrne. See COURTS OF ENGLAND.

CHANGE OF ABODE. Where one changes his abode with no intention of returning to the former abode, the motive is immaterial so far as change creates a citizenship enabling the party to sue in the Federal courts. 232 U. S. 619.

CHANNEL. The bed in which the main stream of a river flows, and not the deep water of the stream, as followed in navigation. 55 La. 558. The main channel is that bed of the river over which the principal volume of water flows; 81 Fed. Rep. 757.

By act of congress of Sept. 19, 1890, U. S. Rev. Stat. 1 Supp. 800, any alteration or modification of the channel of any navigable water of the United States, by any construction, excavation, or filling, or in any other manner without the approval of the secretary of war, is prohibited. For the construction of this act, see 54 Fed. Rep. 351. See THALWEG.

CHANTRY. A church or chapel endowed with lands for the maintenance of priests to say mass daily for the souls of the donors. *Termes de la Ley*; Cowel.

CHAPELRY. The precinct of a chapel; the same thing for a chapel that a parish is for a church. *Termes de la Ley*; Cowel.

CHAPELS. Places of worship. They may be either *private* chapels, such as are built and maintained by a private person for his own use and at his own expense, or *free* chapels, so called from their freedom or exemption from all ordinary jurisdiction, or chapels of *ease*, which are built by the mother-church for the ease and convenience of its parishioners, and remain under its jurisdiction and control. See PUBLIC CHAPELS.

CHAPELS OF EASE. See PUBLIC CHAPELS.

CHAPTER. In Ecclesiastical Law. A congregation of clergymen.

Such an assembly is termed *capitulum*, which signifies a little head; it being a kind of head, not only to govern the diocese in the vacation of the bishopric, but also for other purposes. Coke, Litt. 103.

CHARACTER. The possession by a person of certain qualities of mind or morals, distinguishing him from others.

In Evidence. The opinion generally entertained of a person derived from the common report of the people who are acquainted with him; his reputation. 8 S. & R. 336; 3 Mass. 192; 3 Esp. 236; Tayl. Ev. 338, 329.

A clear distinction exists between the strict meaning of the words character and reputation. Character is defined to be the assemblage of qualities which distinguish one person from another, while reputation is the opinion of character generally entertained; Worcester, Dict. This distinction, however, is not regarded either in the statutes or in the decisions of the courts; thus, a libel is said to be an injury to character; the character of a witness for veracity is said to be impeached; evidence is offered of a prisoner's good character; Abbott, Law Dict. See 6 Cr. 218; 26 Vt. 278. The word character is therefore used in the law, rather to express what is properly signified by reputation.

The moral character and conduct of a person in society may be used in proof before a jury in three classes of cases; *first*, to afford a presumption that a particular person has not been guilty of a criminal act; *second*, to affect the damages in par-

ticular cases, where their amount depends on the reputation and conduct of any individual; and, *third*, to impeach or confirm the veracity of a witness.

Where the guilt of an accused person is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general reputation; since it is not probable that a person of known probity and humanity would commit a dishonest or outrageous act in the particular instance. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience—it is so manifest that the offence if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of reputation and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, evidence of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the prosecution to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character; Per Shaw, C. J., 5 Cush. 325. See 5 Esp. 13; 1 Campb. 460; 2 St. Tr. 1038; 1 Cox 424; 5 S. & R. 352; 2 Bibb 286; 5 Day 260; 7 Conn. 116; 14 Ala. 382; 6 Cowen 673; 3 Hawks 105; 30 Tex. App. 675; 17 R. I. 763; 36 Neb. 481.

On the trial of an indictment for homicide, evidence offered generally to prove that the deceased was well known, and understood to be a quarrelsome, riotous, and savage man, is inadmissible; 1 Whart. Cr. L. § 641; see 94 Ala. 25; 153 Pa. 451; but for the purpose of showing that the homicide was justifiable on the ground of self-defence, proof of the character of the deceased may be admitted, if it is also shown that the prisoner was influenced by his knowledge thereof in committing the deed; 26 Ohio 162; 28 Fla. 113. The general reputation of the deceased as a violent and dangerous person is presumptive proof of knowledge of decedent's character; 17 S. W. Rep. (Ky.) 186. Unless the character of the deceased is attacked, it is clearly not admissible for the prosecution to prove its peaceableness; 1 Whart. Cr. L. § 641; 114 Ill. 86. Good character will not avail one if the crime has been proven beyond a reasonable doubt; 133 N. Y. 609; 88 Ga. 91; 54 Ind. 400; 59 N. W. Rep. (Mich.) 230. In a criminal case the defendant has the right to prove his reputation for honesty and truth; 30 Tex. App. 614; though he be indicted for murder by poisoning, he can show his reputation for peace and quietude; 132 Ind. 317; 50 Kan. 525.

In some instances, evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad reputation for want of chastity, and even

of particular acts of adultery committed by her previous to her intercourse with the defendant; *Whart. Ev.* 51; *Bull. N. P.* 27, 296; 12 *Mod.* 232; 8 *Esp.* 286. See 5 *Munf.* 10. As to the statutory use of the word "character," see 8 *Barb.* 603; 5 *Park. Cr. C.* 254; 5 *la.* 389, 430; 49 *id.* 531.

In actions for slander or libel, the law is well settled that evidence of the previous general character of the plaintiff, before and at the time of the publication of the slander or libel, is admissible, under the general issue, in mitigation of damages. The ground of admitting such evidence is that a person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished. And the reasons which authorize the admission of this species of evidence under the general issue alike exist, and require its admission, where a justification has been pleaded but the defendant has failed in sustaining it; *Stone v. Varney*, 7 *Metc.* 86, where the decisions are collected and reviewed; 4 *Denio* 509; 20 *Vt.* 232; 6 *Pa.* 170; 2 *Nott & M.C.* 511; *Heard, Lib. & S.* § 299. See 1 *Johns.* 46; 11 *id.* 38; 93 *Mich.* 117. When evidence is admitted touching the general reputation of a person, it is manifest that it is to be confined to matters in reference to the nature of the charge against him; 2 *Wend.* 332. See 93 *Cal.* 596.

In an action for damages for assault and battery it is error to admit evidence of defendant's good character; 91 *Mich.* 399; 4 *Ind. App.* 232.

The party against whom a witness is called may disprove the facts stated by him, or may examine other witnesses as to his general character; but they will not be allowed to speak of particular facts or parts of his conduct; *Bull. N. P.* 296; 47 *Minn.* 47. For example, evidence of the general character of a prosecutrix for a rape may be given, as that she was a street-walker; but evidence of specific acts of criminality cannot be admitted; 3 *C. & P.* 589. And see 17 *Conn.* 467; 18 *Me.* 372; 14 *Mass.* 387; 5 *Cox, Cr. Cas.* 146. The regular mode is to inquire whether the witness under examination has the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath; 4 *St. Tr.* 693; 4 *Esp.* 102; 17 *Wall.* 586. In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge and the grounds of his opinion, or he may attack such witness's general character, and by fresh evidence support the character of his own; 2 *Stark.* 151, 241; *Stark. Ev. pt. 4*, 1753 to 1758; 1 *Phill. Ev.* 229. A party cannot give evidence to confirm the good character of a witness, unless his general character has been impugned by his antagonist; 9 *Watts* 124; 71 *Mo.* 436; 99 *Ind.* 28; 86 *Pa.* 74; 1 *Allen* 483. Consult *Wharton*; *Best*; *Greenleaf*; *Phillips*; *Powell*; *Rice*; *Starkie*; *Taylor*; *Evidence*; *Roscoe, Crim. Evidence*.

CHARGE. A duty or obligation imposed upon some person. A lien, incumbency, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies.

To impose such an obligation; to create such a claim.

To accuse.

The distinctive significance of the term rests in the idea of obligation directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed. Thus, charging an estate with the payment of a debt is appropriating a definite portion to the particular purpose; charging a person with the commission of a crime is pointing out the individual who is bound to answer for the wrong committed; charging a jury is stating the precise principles of law applicable to the case immediately in question. In this view, a charge will, in general terms, denote a responsibility peculiar to the person or thing affected and authoritatively imposed, or the act fixing such responsibility.

In Contracts. An obligation, binding upon him who enters into it, which may be removed or taken away by a discharge. *Termes de la Ley*.

An undertaking to keep the custody of another person's goods.

An obligation entered into by the owner

of an estate, which binds the estate for its performance. *Comyns, Dig. Rent, c. 6*; 2 *Ball & B.* 223.

In Devises. A duty imposed upon a devisee, either personally, or with respect to the estate devised. It may be the payment of a legacy or sum of money or an annuity, the care and maintenance of a relative or other person, the discharge of an existing lien upon land devised or the payment of debts, or, in short, the performance of any duty or obligation which may be lawfully imposed as a condition of the enjoyment of the bounty of a testator. A charge is not an interest in, but a lien upon, lands; 8 *Mass.* 768; 12 *Wheat.* 498; 4 *Metc.* 523; 184 *Mass.* 62; 95 *Pa.* 305; 1 *Ves. & B.* 260; and will not be divested by a sheriff's sale; 163 *Pa.* 346.

Where a charge is personal, and there are no words of limitation, the devisee will generally take the fee of the estate devised; 4 *Kent* 540; 2 *Bla. Com.* 108; 3 *Term* 356; 6 *Johns.* 185; 24 *Pick.* 139; but he will take only a life estate if it be upon the estate generally; 14 *Mees. & W.* 698; 3 *Mass.* 209; 10 *Wheat.* 231; 18 *Johns.* 35; 15 *Me.* 436; 8 *Harr. & J.* 208; 9 *Mass.* 161; 18 *Wend.* 200; unless the charge be greater than a life estate will satisfy; 6 *Co.* 16; 4 *Term* 93; 1 *Barb.* 102; 24 *Pick.* 138; 1 *Washb. R. P.* 59.

Consult *Washburn, Real Property*; *Kent*; *Preston, Estates*; *Roper, Legacies*; *Williams, Executors*; 9 *L. R. A.* 584, n.; 44 *Alb. J.* 186. See *LEGACY*.

In Equity Pleading. An allegation in the bill of matters which disprove or avoid a defence which it is alleged the defendant is supposed to pretend or intend to set up. *Story, Eq. Pl.* § 31.

It is frequently omitted, and this the more properly, as all matters material to the plaintiff's case should be fully stated in the stating part of the bill; *Cooper, Eq. Pl.* 11; 1 *Dan. Ch. Pr.* 372, 1833, n.; *Merwin, Eq.* § 915; 11 *Ves. Ch.* 574. See 2 *Hare, Ch.* 264.

In Practice. The instructions given by the court to the grand jury or inquest of the county, at the commencement of their session, in regard to their duty.

The exposition by the court to a petit jury of those principles of the law which the latter are to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the legal rights of the parties to the suit.

The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligations to obey; 10 *Metc.* 285-287; 13 *N. H.* 536; 21 *Barb.* 566; 2 *Blackf.* 169; 1 *Leigh* 588; 3 *id.* 751; 3 *J. Marsh.* 150; 21 *How. St. Tr.* 1039; 99 *Pa.* 322. See 5 *South. L. Rev.* 185; 1 *Cal.* 51; 3 *id.* 434. This is the rule in the federal courts; 156 *U. S.* 51, 715; *Alabama*, 12 *Ala.* 153; 70 *id.* 38; 73 *id.* 498; *Arkansas*, 13 *Ark.* 360; 35 *id.* 535; but see 13 *Ark.* 59; *California*, 44 *Cal.* 65; *Kentucky*, 1 *Metc. (Ky.)* 1; *Maine*, 53 *Me.* 336; *Massachusetts*, 10 *Metc. (Mass.)* 286; 5 *Gray* 182; *Michigan*, 48 *Mich.* 37; *Mississippi*, 61 *Miss.* 363; *Missouri*, 7 *Mo.* 607; *Nebraska*, 14 *Neb.* 60; *New Hampshire*, 13 *N. H.* 536; *New York*, 40 *N. Y.* 141; *North Carolina*, 1 *Jones (N. C. L.)* 251; *Ohio*, 29 *Ohio St.* 412; *Pennsylvania*, 145 *Pa.* 64; *Rhode Island*, 7 *Bost. L. Rep.* 947; *South Carolina*, 14 *Rich. (S. C. L.)* 37; *Texas*, 7 *Tex. App.* 472; and *Virginia*, 5 *Gratt.* 664. By statute, in some states, the jury are constituted judges of the law as well as of the facts in criminal cases,—an arrangement which assimilates the duties of a judge to those of the moderator of a town-meeting or of the preceptor of a class of law-students, besides subjecting successive criminals to a code of laws varying as widely as the impulses of successive juries can differ. It is so in *Georgia*; 48 *Ga.* 66; *Illinois*, 42 *Ill.* 321; *Indiana*, 104 *Ind.* 467; *Louisiana*, 37 *La. Ann.* 444; *Maryland*, 49 *Md.* 581; *Tennessee*, 2 *Swan* 237; and *Vermont*, 23 *Vt.* 14. Even in these states, however, the courts have tried to escape from this doctrine, and have of late years practically nullified it in many instances. See 56 *Ga.* 61; 75 *id.* 332; 57 *Md.* 108; 76 *Ill.* 211; 80 *Ind.* 221; 37 *La. Ann.* 449; 56 *Vt.* 233. The charge frequently made and usually includes a *summing up* of the evidence given to show the application of the principles involved; and in English practice the term *summing up* is used instead of charge. Though this is customary in many courts, the judge is not bound to sum up the facts; *Thompson, Ch. Juries* § 79; 3 *Hawks* 380. But if he do so up he must present all the material facts; 6 *W. & S.* 132; 1 *Ga.* 423. This is the practice in the courts of the U. S.; 8 *Wall.* 342.

It should be a clear and explicit statement of the law applicable to the condition of the facts; 4 *Hawks* 61; 1 *A. K. Marsh.*

76; 4 *Conn.* 356; 3 *Wend.* 75; 10 *Metc.* 14, 263; 1 *Mo.* 97; 24 *Me.* 289; 16 *Vt.* 679; 3 *Green* 32; 5 *Blackf.* 296; 23 *Pa.* 76; 1 *Gill* 127; 72 *Mich.* 10; adding such comments on the evidence as are necessary to explain its application; 8 *Me.* 42; 1 *Const. S. C.* 216; 1 *W. & S.* 68; 22 *Ga.* 385 (though in some states the court is prohibited by law from charging as to matters of fact, "but may state the testimony and the law," *e. g.*, *California*, *Tennessee*, *South Carolina*, *Georgia*, *Massachusetts*, etc.); and may include an opinion on the weight of evidence; 13 *How.* 115; 2 *M. & G.* 721; 84 *N. H.* 460; 8 *Conn.* 431; 81 *Pa.* 189; 5 *Cow.* 245; 28 *Vt.* 228; 5 *Jones*, *N. C.* 893; though the rule is otherwise in some states; 79 *Ill.* 441; 53 *Ga.* 162; 31 *Ark.* 307; 88 *Ala.* 40; 16 *Or.* 15; 75 *Mich.* 127; but should not undertake to decide the facts; 7 *J. J. Marsh.* 410; 3 *Dana* 66; 7 *Cow.* 29; 10 *Ala.* n. s. 599; 10 *Gill & J.* 346; 5 *R. I.* 295; unless in the entire absence of opposing proof; 5 *Gray* 440; 7 *Wend.* 160; 17 *Vt.* 176; 26 *Mo.* 523; 1 *Pa.* 68; 28 *Ala.* n. s. 775. And see 3 *Dana* 566. A United States court may express an opinion upon the facts; 128 *U. S.* 171; 36 *Fed. Rep.* 166. It is improper to instruct which of two conflicting theories of the evidence the jury shall accept; 94 *Ala.* 68. The presiding judge may express to the jury his opinion as to the weight of evidence. He is under no obligation to recapitulate all the items of the evidence, nor even all bearing on a single question; 155 *U. S.* 117.

Failure to give instructions not asked for is not error; 82 *Wis.* 571; 93 *Cal.* 518; 53 *N. J. Law* 601; 87 *Ga.* 681. A request to charge is properly refused though embodying correct principles, where there is no evidence to support it; 94 *Ala.* 45; 155 *Mass.* 298; 84 *Me.* 84; 3 *Wash. St.* 241; 109 *N. C.* 132; 88 *Ga.* 446; 66 *Tex.* 221; 150 *Pa.* 376; 130 *U. S.* 611; 126 *Ill.* 408; 25 *Tex. App.* 358. A request to charge may be disregarded when the court has already fully instructed the jury on the point. The court should refuse to charge upon a purely hypothetical statement of facts calculated to mislead the jury; 159 *U. S.* 3.

Erroneous instructions in matters of law which might have influenced the jury in forming a verdict are a cause for a new trial; 12 *Pick.* 177; 9 *Conn.* 107; 4 *Hawks* 64; even though on hypothetical questions; 11 *Wheat.* 59; 14 *Tex.* 483; 6 *Cal.* 214; on which no opinion can be required to be given; 5 *Ohio* 83; 11 *Gill & J.* 388; 3 *Ired.* 470; 5 *Jones N. C.* 388; 28 *Ala.* n. s. 100; 3 *Humphr.* 466; 6 *Mo.* 6; 20 *N. H.* 854; 16 *Me.* 171; 5 *Cal.* 478; 5 *Blackf.* 112; 16 *Miss.* 401; 16 *Tex.* 229; 8 *la.* 509; 18 *Ga.* 411; but the rule does not apply where the instructions could not prejudice the cause; 11 *Conn.* 342; 1 *McLean* 509; 2 *How.* 457. See 3 *Wyo.* 657. Any decision or declaration by the court upon the law of the case, made in the progress of the case, and by which the jury are influenced and the counsel controlled, is considered within the scope and meaning of the term "instructions;" *Hilliard, New Trials* 255.

Where on a trial for murder defendant's counsel asks the court to give its charge in writing, and after complying it gives orally other and additional charges, it is cause for new trial; 89 *Ga.* 188.

When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out specifically to the trial court the part to which he objects, in order to avail himself of the objection; 157 *U. S.* 73.

See *Thompson, Charging Juries*.

See *SPECIAL CHARGE*.

CHARGE, GENERAL. See *ERAL CHARGE*.

CHARGE DES AFFAIRES. *CHARGE D'AFFAIRES.* In International Law. The title of a diplomatic representative or minister of an inferior grade, to whose care are confided the affairs of his nation. The term is usually applied to a secretary of legation or other person in charge of an embassy or legation dur-

ing a vacancy in the office or temporary absence of the ambassador or minister.

He has not the title of minister, and is generally introduced and admitted through a verbal presentation of the minister at his departure, or through letters of credence addressed to the minister of state of the court to which he is sent. He has the essential rights of a minister; 1 Kent 39, n.; 4 Dall. 321.

CHARGE TO ENTER HEIR. In Scotch Law. A writ commanding a person to enter heir to his predecessor within forty days, otherwise an action to be raised against him as if he had entered.

The heir might appear and renounce the succession, whereupon a degree *cognitionis causa* passed, ascertaining the creditor's debt. If the heir did not appear, he then became personally liable to the creditor. A charge was either general, or special, or general-special. Charges are now abolished, by 10 & 11 Vict. c. 48, § 14, and a summons of constitution against the unentered heir substituted.

CHARGEABLE. This word in its ordinary acceptance, as applicable to the imposition of a duty or burden, signifies capable of being charged, subject, or liable to be charged, or proper to be charged, or legally liable to be charged. 46 Vt. 625.

Subject to charge; capable of being or of becoming charged. Anderson; 46 Vt. 625. For example, to be chargeable with a loss; a tax chargeable on land; a pauper chargeable upon a district. In its ordinary acceptance as applicable to the imposition of a duty or burden, signifies capable of being charged; subject, liable, proper to be charged. *Id.*

CHARGED WITH. "Charged with" means no more than "being prosecuted for." 4 Ky. L. R. 247.

CHARGES. The expenses which have been incurred in relation either to a transaction or to a suit. Thus, the charges incurred for his benefit must be paid by a hirer; the defendant must pay the charges of a suit. In relation to actions, the term includes something more than the costs, technically so called.

Against the Estate.

These affect the estate as a whole, and therefore do not include state inheritance and succession taxes on the shares of individual beneficiaries. 256 U. S. 350.

Criminal. Signify an accusation, made in a legal manner, of illegal conduct, either of omission or commission, by the person charged. 1 Bush (Ky.) 180.

See CRIMINAL CHARGES.

CHARGES DES AFFAIRES. See FOREIGN MINISTER.

CHARITABLE USES, CHARITIES. Gifts to general public uses, which may extend to the rich as well as the poor. Camden, Ld. Ch., in *Ambil.* 651; adopted by Kent, Ch., 7 Johns. Ch. 294; Lyndhurst, Ld. Ch., in 1 Ph. Ch. 191; and U. S. Supreme Court in 24 How. 506; Bisp. Eq. § 124; 2 Sneed 805.

Gifts to such purposes as are enumerated in the act 43 Eliz. c. 4, or which, by analogy, are deemed within its spirit or intent. Boyle, Char. 17.

Such a gift was defined by Mr. Binney to be "whatever is given for the love of God or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." 2 How. 128; approved by the Supreme Court of Pennsylvania in 28 Pa. 35, and the Supreme Court of the United States in 95 U. S. 311.

Lord MacNaghten said in [1891] A. C. 531—"Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads.

They had their origin under the Christian dispensation, and were regulated by the Justinian Code. Code Just. l. 3, *De Episc. et Cler.*; Domat, b. 2, t. 2, § 6, l. 1, b. 4, t. 2, § 6, 2; 1 Eq. Cas. Abr. 96; Mr. Rin-

ney's argument on the Girard will, p. 40; Chastell on the Charity of the Primitive Churches, b. 1, c. 2, b. 2, c. 10; *Codex donationum piarum, passim*. Under that system, donations for pious uses were liable to a regular and determined destination were liable to be adjudged invalid, until the edicts of Valentinian III. and Marcian declared that legacies in favor of the poor should be maintained even if legatees were not designated. Justinian completed the work by sweeping all such general gifts into the coffers of the church, to be administered by the bishops. The doctrine of pious uses seems to have passed directly from the civil law into the law of England; 3 Pet. 100, 139; How, Studies in the Civil Law 68. It would seem that, by the English rule before the statute, general and indefinite trusts for charity, especially if no trustees were provided, were invalid. If sustainable, it was under the king's prerogative, exercising in that respect a power analogous to that of the ordinary in the disposition of *bona vacantia* prior to the Statute of Distributions; F. Moore 832, 880; Duke, Ch. Uses 72, 362; 1 Vern. 224, note; 1 Eq. Cas. Abr. 96, pl. 8; 1 Ves. Sen. 220; Hob. 189; 1 Am. L. Reg. 545. The main purpose of the stat. 43 Eliz. c. 4 was to define the uses which were charitable, as contradistinguished from those which, after the Reformation in England, were deemed superstitious, and to secure their application; Shelf. Mortm. 99, 108. The objects enumerated in the statute were: Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repairs of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans, relief, stock or maintenance for houses of correction; marriage of poor maids; support, aid and relief of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

Subsequently it appears that this statute, as a mode of proceeding, fell into disuse, although under its influence and by its mere operation many charities were upheld which would otherwise have been void; Scaff. Mortm. 378, 379, and notes; 3 Leigh 470; Nelson, *Lex Test.* 137; Boyle, Char. 18 *et seq.*; 1 Burn, Eccl. Law, 317 *a*. Under this statute, courts of chancery are empowered to appoint commissioners to ascertain the application and enforcement of charities; and if, from any cause, the charity cannot be applied precisely as the testator has declared, such courts exercise the power in some cases of appropriating it, according to the principles indicated in the devise, as near as they can to the purpose expressed. And this is called an application *cy pres*; 3 Washb. R. P. 514. See *Cy Pres*.

There is no need of any particular persons or objects being specified; the generality and indefiniteness of the object constituting the charitable character of the donation; Boyle, Char. 23. A charitable use, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of man; Perry, Trusts § 687.

They embrace gifts to the poor of every class, including poor relations, where the intention is manifest; 33 Pa. 9; 2 Sneed 305; 4 Wheat. 518; 1 Sumn. 276; 35 N. H. 445; 7 Ch. D. 714; for the poor of a county, "who by timely assistance may be kept from being carried to the poor house;" 2 Del. Ch. 392; *id.* 421; for every description of college and school, and their instructors and pupils, where nothing contrary to the fundamental doctrine of Christianity is taught; to all institutions for the advancement of the Christian religion; 7 B. Monr. 351, 481; 4 Ired. Eq. 129; 30 Pa. 425; to all churches; 10 Cush. 129; 7 S. & R. 559; 4 Ia. 180; 63 Conn. 377; foreign missions; 86 Ky. 610; for the education of two young men for all coming time for the Christian ministry; 41 Fed. Rep. 871; the advancement of Christianity among the infidels; 1 Ves. Jr. 243; the benefit of ministers of the gospel; 28 N. J. Eq. 570; for distributing Bibles and religious tracts; 3 Cush. 358; 10 Pa. 23; chapels, hospitals, orphan asylums; 33 Pa. 9; 12 Ia. Ann. 301; 8 Rich. Eq. 190; 125 Mass. 821; even when discrimination is made in favor of members of one religious denomination; 90 Pa. 21; dispensaries; 27 Barb. 260; public libraries; 145 Ill. 625; and the like; 2 Sandf. Ch. 46; 14 Allen 539; 2 Sim. & S. 594; 7 H. L. Cas. 124; friendly societies; 32 Ch. D. 159; the Salvation Army; 34 Ch. D. 528; educational trusts; [1895] 1 Ch. 367; a volunteer corps; [1894] 3 Ch. 285; any religious society; [1893] 2 Ch. 41; (but not a Dominican convent, for the promotion of private prayer by its own members; *id.* 51); a society for the prevention of cruelty to animals (but not for the maintenance of animals); 41 Ch. D. 552; [1895] 2 Ch. 501; to repair a sea dyke; 88 Ch. D. 507; to provide a scholarship [1895] 1 Ch. 480; to repair a churchyard; 83 Ch.

D. 187; but not to repair a tomb; L. R. 4 Eq. 521. Sport is not a charity; [1895] 2 Ch. 649; to general public purposes; 80 Pa. 437; as supplying water or light to towns, building roads and bridges, keeping them in repair, etc.; 24 Conn. 850; and to the advancement of religion and other charitable purposes general in their character; 4 R. I. 414; 12 La. Ann. 301; 5 Ohio St. 237; 33 Pa. 415; 81 Eq. 445; 152 *id.* 477; 5 Ind. 465; L. R. 10 Eq. 246; L. R. 1 Eq. 585; L. R. 4 Ch. App. 309; L. R. 20 Eq. 438; 2 Pa. Dist. R. 435; 159 Mass. 226; 51 N. J. Eq. 154; [1893] 2 Ch. 41; 60 Fed. Rep. 365; Tudor, Char. Tr. or a devise may be made to a municipal corporation for charitable uses; 2 How. 128; 112 Mo. 561; 116 Ind. 139; and a city may refuse to accept such a bequest; 60 Conn. 314. A charitable devise may become void for uncertainty as to the beneficiary; 51 Minn. 277; 37 S. C. 457; 77 Md. 104; 92 Tenn. 559; 3 Misc. Rep. 388. The decision that the appropriation for the World's Columbian Exposition was a charitable use; 56 Fed. Rep. 630; was reversed by the Circuit Court of Appeals, which held that, being made for the benefit of a local corporation, it did not constitute a charitable trust, although aiding a great public enterprise; *id.* 654.

When the purposes of a charity may be best sustained by alienating the specific property bequeathed and investing the proceeds in a different manner, a court of equity has jurisdiction to direct such sale and investment, taking care that no deviation of the gift be permitted; 6 Wall. 169; 44 N. J. Eq. 179; 70 Md. 139.

Charities in England were formerly interpreted, sustained, controlled, and applied by the court of chancery, in virtue of its general jurisdiction in equity, aided by the stat. 43 Eliz. c. 4 and the prerogative of the crown; the latter being exercised by the lord chancellor, as the delegate of the sovereign acting as *parens patrie*; Spence, Eq. Jur. 439, 441; 12 Mass. 537. The subject has since been regulated by various statutes; the Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, amended by various subsequent acts down to 1894; Tud. Char. Tr. part iii.; 8d ed. By the Toleration Act, 1 Wm. & M. c. 13, charitable trusts for promoting the religious opinions of Protestant Dissenters have been held valid; 2 Ves. Sen. 278. Roman Catholics share in their benefits; 2 & 3 Will. IV. c. 115; and Jews, by 9 & 10 Vict. c. 59, § 2.

The weight of judicial authority in England was in favor of the doctrine which, as will be seen, prevails in this country, that equity exercised an inherent jurisdiction over charitable uses independently of the statute of Elizabeth;—that the statute did not create, but was in aid of, the jurisdiction. In support of this conclusion are found such judges as Ld. Ch. Northampton, in 1 Eden 10; Amb. 351; Sir Jos. Jekyll, in 2 P. Wms. 119; Ld. Ch. Redesdale, in 1 Bight 347; Ld. Ch. Hardwicke, in 2 Ves. Sr. 327; Ld. Keeper Finch, in 2 Lev. 167; Ld. Ch. Sugden, in 1 Dr. & W. 258; Ld. Ch. Somers, in 2 Vern. 342; Ld. Ch. Eldon, in 1 Bight 358, and 7 Ves. 36; Wilmot, C. J., in Wilmot's Notes 24; Ld. Ch. Lyndhurst, in Bight 335; and Sir John Leach, in 1 Myl. & K. 376.

The stat. 43 Eliz. c. 4 has not been reenacted or strictly followed in the United States. In some of them it has been adopted by usage; but, with several striking exceptions, the decisions of the English Chancery upon trusts for charity have furnished the rule of adjudication in our courts, without particular reference to the fact that the most remarkable of them were only sustainable under the peculiar construction given to certain phrases in the statute; Boyle, Char. 18 *et seq.* The opinion prevailed extensively in this country that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. In the case of the Baptist Association v. Hart's Ex'rs (4 Wheat. 1), the U. S. supreme court adopted that view and accepted the conclusion that there was

at common law no jurisdiction of charitable uses exercised in chancery, although in afterwards reviewing that decision an effort was made to distinguish the case by the two features that such cases are not recognized by the law of Virginia, where it arose, and that it was a donation to trustees incapable of taking, with beneficiaries uncertain and indefinite; 2 How. 128. These views were assailed in 1833 by Baldwin, J. (Bright, 346), in 1835, in 7 Vt. 241, and in 1844 by Mr. Binney in the Girard will case in 2 How. 128. In that case there was furnished a memorandum of fifty cases extracted from the then recently published chancery calendars, in which the jurisdiction had been exercised prior to the stat. of 43 Eliz. (2 How. 155, note); and although the accuracy of this list was challenged by Mr. Webster in argument; (*id.* 179 note), the court, per Story, J., accepted it to "establish, in the most satisfactory and conclusive manner," the conclusion stated. Baldwin, J., also enumerated forty-six cases of the enforcement of such trusts independently of the statute; Bright, 346. The doctrine was fully adopted by the U. S. supreme court in the Girard will case, and has been since adhered to; 95 U. S. 304. It is now conceded as settled that courts of equity have an inherent and original jurisdiction over charities, independent of the statute; Perry, Trusts § 694; 45 Me. 122; 23 Ala. 299; 29 Mo. 543; 25 Ind. 246; 27 Tex. 173; 2 Del. Ch. 392; *id.* 421, 463.

In Virginia and New York, that statute, with all its consequences, seems to have been repudiated; 3 Leigh 450; 22 N. Y. 70, & App.; 52 N. Y. 232; 112 *id.* 299. So in North Carolina, Connecticut, Maryland, and the District of Columbia; 1 Dev. Eq. 276; 1 Hawks 96; 4 Ired. Ch. 26; 6 Conn. 293; 22 *id.* 31; 5 Harr. & J. 392; 6 *id.* 1. 8 Md. 551; 75 *id.* 275; 7 Am. Dec. 339. 95 U. S. 304. In Georgia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Rhode Island, Vermont, and perhaps some other states, the English rule is acted on; 8 Blackf. 15; 18 B. Monr. 635; 4 Ga. 404; 4 Ia. 252; 16 Pick. 107; 4 R. I. 414; 12 La. Ann. 301; 7 Vt. 211, 241; 4 Wheat. 1; 2 How. 127; 17 *id.* 369; 24 *id.* 465; 145 Ill. 625. See 16 Ill. 225; 19 Ala. N. S. 814; 1 Swan 348. While not in force as a statute in Pennsylvania, it is embodied as its principles in the common law of that state; 120 Pa. 624; 38 Alb. L. J. 431.

It is said that charitable uses are favorites with courts of equity; the construction of all instruments, when they are concerned, is liberal in their behalf; 95 U. S. 313; and even the rule against perpetuities is relaxed for their benefit; *ibid.*; [1891] 3 Ch. 252; 2 Pa. Dist. R. 435; 63 Conn. 125; Bisph. Eq. § 133; 24 How. 495; 63 Pa. 99; 9 R. I. 177; *contra*, 34 N. Y. 554. See also Gray, Perp. §§ 689-692. But if a gift to charity is made to depend on a condition precedent, the event must occur within the rule against perpetuities; [1894] 3 Ch. 265; except where the event is the divesting of another charity; [1891] 3 Ch. 252. A gift may be made to a charity not *in esse* at the time; *ibid.*; Perry, Trusts § 736; 46 Wis. 70. See 126 N. Y. 215; 147 U. S. 557. And a gift for specific charitable purposes will not fail for want of trustees; 158 Mass. 400. See 140 N. Y. 30.

Generally, the rules against accumulations do not apply; Perry, Trusts § 738; 10 Allen 1; 45 Pa. 1. Where there is no trustee appointed or none capable of acting, the trust will be sustained, and a trustee appointed; 8 Hare 191; 3 Pet. 99. In New York a certain designated beneficiary is essential to the creation of a valid trust and the *cy-pres* doctrine is not accepted; see 79 N. Y. 602, said to reach the limit of uncertainty in that state, and 95 *id.* 418, and 108 *id.* 312, commenting on that case and reasserting the general rule in New York as stated; Tilden v. Green, 130 N. Y. 29; s. c. 14 L. R. A. 1; a bequest in which the beneficiary is not designated and the selection thereof is delegated to trustees with complete discretionary power is invalid, and the uncertainty as to beneficiaries cannot be cured by anything done by the trustees

to execute it; *id.*

A testamentary gift for a charity to an unincorporated association afterwards incorporated is sometimes sustained; as when the devise does not vest until after the incorporation; 57 Hun 161; but otherwise the incapacity to take cannot be cured by subsequent incorporation or amendment; 14 L. R. A. (N. Y.) 410 and note. A devise to a charity, however, is held valid where future incorporation is provided for or contemplated; *id.* Under the civil law, a similar rule seems to have prevailed, and gifts for pious uses might be made to a legal entity to be established by the state after the testator's death; Mackeldy, Civ. Law § 157; 3 Pet. 100; 17 La. 46; Howe, Studies in the Civil Law 68.

Legacies to pious or charitable uses are not, by the law of England, entitled to a preference in distribution; although such was the doctrine of the civil law. Nor are they in the United States, except by special statutes.

See, generally, 3 Washburn, Real Prop. 687, 690; Boyle, Char.; Duke, Char. Uses; 2 Kent 361; 4 *id.* 616; 2 Ves. Ch. 52, 272; 6 *id.* 404; 7 *id.* 86; Ambl. 715; 2 Atk. 88; 24 Pa. 84; 3 Rawle 170; 1 Pa. 49; 17 S. & R. 88; 2 Dana 170; 9 Cow. 437; 9 Wend. 394; 1 Sandf. Ch. 439; 9 Barb. 324; 17 *id.* 104; Brett, Lead. Cas. Mod. Eq.; 9 N. Y. 554; 9 Ohio 208; 5 Ohio St. 237; 24 Conn. 350; 6 Pet. 485; 9 *id.* 666; 9 Cra. 331; 2 How. 127; 20 Miss. 165; 10 Ill. 225; 2 Strobb. Eq. 379. Dwight's Charity Cases; a very full article in 1 Am. L. Reg. n. s. 129, 321, 385; 9 Am. Dec. 577. See 31 Am. L. Reg. 128, 235 and 5 Harvard L. Rev. 389 for discussion of the Tilden will case, cited *supra*, and also Potter will case, 1 Del. Ch. 421 (App.), in which the arguments are very fully reported and the authorities collected on both sides of the questions involved in this title.

CHARITY. See MASS; PUBLIC CHARITY.

See OFFICIAL TRUSTEES OF CHARITIES; PUBLIC CHARITY.

CHARTA. A charter or deed in writing. Any signal or token by which an estate was held.

CHARTA CHYROGRAPHATA. An indenture. The two parts were written on the same sheet, and the word chyrograph written between them in such a manner as to divide the word in the separation of the two parts of the indenture.

CHARTA COMMUNIS. An indenture.

CHARTA PARTITA. A charter-party.

CHARTA DE UNA PARTE. A deed poll. A deed of one part.

Formerly this phrase was used to distinguish a *deed poll*—which is an agreement made by one party only; that is, only one of the parties does any act which is binding upon him—from a deed *inter partes*. Co. Litt. 239. See DEED POLL.

CHARTA DE FORESTA (also written *Carta de Foresta*). A collection of the laws of the forest, made in the reign of Hen. III., and sometimes said to have been originally a part of Magna Charta.

The *charta de foresta* was called the Great Charter of the woodland population, nobles, barons, freemen, and slaves, loyally granted by Henry III. early in his reign (A. D. 1217). Inderwick, King's Peace 150; Stubbs's Charters 347. There is a difference of opinion as to the original charter of the forest similar to that which exists respecting the true and original Magna Charta (*q. v.*), and for the same reason, viz.:—that both required repeated confirmation by the kings, despite their supposed inviolability. This justifies the remark of recent historians as to the great charter that "this theoretical sanctity and this practical insecurity are shared with the Great Charter of Liberties" by the Charter of the Forest which was issued in 1217. 1 Poll. & Maitl. 158. It is asserted with great positiveness by Inderwick that no forest charter was ever granted by King John, but that Henry III. issued the charter of 1217 (which he puts in the third year of the reign, which, however, only commenced Oct. 28, 1216), in pursuance of the promises of his father; and Lord Coke, referring to it as a charter on which the lives and liberties of the woodland population depended, says that it was confirmed at least thirty times between the death of John and that of Henry V.; 4 Co. Inst. 308.

Webster, under the title Magna Charta, says that the name is applied to the charter granted in the 9th Hen. III. and confirmed by Edw. I. Prof. Mait-

land, in speaking of Magna Charta, refers to "the sister-charter which defined the forest law" as one of the four documents which, at the death of Henry III., comprised the written law of England. 1 Soc. England 410. Edward I. in 1297 confirmed "the charter made by the common consent of all the authorities in the time of Henry III. to be kept in every point without breach." Inderwick, King's Peace 150; Stubbs's Charters 436. The Century Dictionary refers to this latter charter of Edw. I. as the Charter of the Forest; but it was, as already shown, only a confirmation of it, and a comparison of the authorities leaves little if any doubt that the date was as above stated and the history as here given. Its provisions may be found in Stubbs's Charters and they are summarized by Inderwick, in his recent work above cited. See FOREST LAWS.

CHARTEL. A challenge to single combat. Used at the period when trial by single combat existed. Cowel.

CHARTER. A grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. 1 Story, Const. § 161; 1 Bla. Com. 108.

A charter differs from a constitution in this, that the former is granted by the sovereign, while the latter is established by the people themselves: both are the fundamental law of the land.

A deed. The written evidence of things done between man and man. Cowel. Any conveyance of lands. Any sealed instrument. Spelman. See Co. Litt. 6; 1 Co. 1; F. Moore 687.

An act of legislature creating a corporation. Dane, Abr. Charter.

The name is ordinarily applied to government grants of powers or privileges of a permanent or continuous nature, such as incorporation, territorial dominion or jurisdiction. Between private persons it is also loosely applied to deeds and instruments under seal for the conveyance of lands. Cent. Dict.

The charter of a corporation is to be strictly construed; 80 Me. 544; 130 U. S. 1; 69 Tex. 306. The reservation by the legislature of power to repeal a charter cannot give authority to take away or destroy property lawfully acquired or created under the charter; 111 N. Y. 1. A charter may be taken under the power of eminent domain; 102 Pa. 123. See CORPORATION.

BLANK CHARTER. A document given to the agents of the crown in the reign of Richard II., with power to fill up as they pleased.

CHARTER OF CONFIRMATION. In Scotch Law. A document which ratified and confirmed the purchaser's rights, and the sasine following upon it.

OPEN CHARTER. In Scotch Law. A charter from the crown or from the subject containing a precept of sasine which has not been executed.

ORIGINAL CHARTER. In Scotch Law. A charter by which the first grant of the subject is made to the vassal by the superior. Bell, Dict.

CHARTER OF PARDON. In English Law. An instrument under the great seal by which a pardon is granted to a man for felony or other offence. Black, L. Dict.

CHARTER-LAND. In English Law. Land formerly held by deed under certain rents and free services. It differed in nothing from free socage land; and it was also called bookland. 2 Bla. Com. 90.

CHARTER-PARTY. A contract of affranchisement, by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight.

The term is derived from the fact that the contract which bears this name was formerly written on a card (*charta-partita*), and afterwards the card was cut into two parts from top to bottom and one part was delivered to each of the parties, which was produced when required, and by this means counterfeits were prevented. Abb. Ship. 175; Pothier, *Traité de Chartre-partie*, gives this explanation taken from Boerius: "It was formerly usual in England and Aquitaine to reduce contracts into writing on a chart, divided afterwards into two parts from top to bottom, of which each of the contracting parties took one, which they placed together and compared when they had occasion to know the terms of their contract."

It is in writing not generally under seal in modern usage; 1 Pars. Adm. & Sh. 270; 2 Wash. 145; 4 Rand. 504; but may be by parol; Ben. Adm. 287; 16 Mass. 336; 9 Metc. 233; Ware, Dist. Ct. 263; 3 Sumn.

144. It should contain, *first*, the name and tonnage of the vessel; see 14 Wend. 195; 7 N. Y. 262; *second*, the name of the captain; 2 B. & Ald. 421; *third*, the names of the vessel-owner and the freighter; *fourth*, the place and time agreed upon for the loading and discharge; *fifth*, the price of the freight; 2 Gall. 61; *sixth*, the demurrage or indemnity in case of delay; 9 C. & P. 709; 10 M. & W. 498; 17 Barb. 184; Abb. Adm. 548; 4 Binn. 299; 9 Leigh 532; 5 Cush. 18; *seventh*, such other conditions as the parties may agree upon; 13 East 343; 20 Bost. L. Rep. 669; Bee 124. The owner who signs a charter-party impliedly warrants that the vessel is commanded by competent officers; 67 Hun 392. One of the conditions implied in a charter-party is that the vessel will commence the voyage with reasonable diligence; waiting four months violates the contract; 54 Fed. Rep. 530.

It may either provide that the charterer hires the whole capacity and burden of the vessel,—in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide,—or it may provide for an entire surrender of the vessel to the charterer, who then hires her as one hires a house, and takes possession in such a manner as to have the rights and incur the liabilities which grow out of possession. See 10 Bingh. 345; 8 Ad. & E. 835; 4 Wash. 110; 1 Cra. 214; 8 id. 39; 23 Me. 289; 4 Cow. 470; 1 Sumn. 551; 1 Paine 358. If the object sought can be conveniently accomplished without a transfer of the vessel, the courts will not be inclined to consider the contract as a demise of the vessel; 2 Sumn. 583; 3 Cliff. 339; 1 Cra. 214; 11 Wall. 591; 97 U. S. 379.

When a ship is chartered, this instrument serves to authenticate many of the facts on which the proof of her neutrality must rest, and should therefore be always found on board chartered ships; 1 Marsh. Ins. 407.

Unqualified charter-parties are to be construed liberally as mercantile contracts, and one who has thereby charged himself with an obligation must make it good unless prevented by the act of God, the law, or the other party; 50 Fed. Rep. 118, 124. A charter-party controls a bill of lading in case of conflict between them; 35 Fed. Rep. 620. In construing a charter-party, matter expunged from a printed form may be considered in determining the intentions of the parties; 53 Fed. Rep. 828. Quarantine regulations which interfere with the charter engagements of a vessel are fairly within the clause excepting liability for results caused by restraints of successor; 50 Fed. Rep. 835. See Maude & Pollock, Merchant Shipping; Abb. Shipping; Desty, Ship. & Adm.; Leggett, Chart. Part.

CHARTER ROLLS. Rolls preserved amongst the ancient English records, containing the royal charters from the year 1199 to 1516. They comprise grants of privileges to cities, towns, bodies corporate, and private trading companies; grants of markets, fairs, and free warrens, of creations of nobility, of privileges to religious houses, etc.

CHARTIS REDDENDIS (Lat. for returning charters). A writ which lay against one who had charters of feoffment intrusted to his keeping, which he refused to deliver. Reg. Orig. 159. It is now obsolete.

CHASE. The liberty or franchise of hunting, oneself, and keeping protected against all other persons, beasts of the chase within a specified district, without regard to the ownership of the land. 2 Bla. Com. 414-416.

The district within which such privilege is to be exercised.

A chase is a franchise granted to a subject, and hence is not subject to the forest laws; 2 Bla. Com. 38. It differs from a park, because it may be another's ground, and is not enclosed. It is said by some to be smaller than a forest and larger than a park. *Termes de la Ley*. But this seems to be a customary incident, and not an essential quality.

The act of acquiring possession of animals *feræ nature* by force, cunning, or address.

The hunter acquires a right to such animals by occupancy, and they become his

property; 4 Toulhier, n. 7. No man has a right to enter on the lands of another for the purpose of hunting, without his consent; 14 East 249; Fother, *Propriété*, pt. 1, c. 2, a. 2.

CHASTE. In the seduction statutes it means actual virtue in conduct and principle. One who falls from virtue and afterwards reforms is chaste within the meaning of the statutes; A. & E. Encyc. 48 Ga. 288; 5 La. 389; 8 Barb. 603; 55 N. Y. 644; 73 Ala. 527; 32 Mich. 112.

Chaste Character. Personal virtue; moral purity. Refers not to reputation but to moral qualities—to what a person really is. Anderson; 18 Iowa 375-76. Actual personal virtue—actually chaste and pure in conduct and principle. *Id.*; 8 Barb. (N. Y.) 608-9.

CHASTITY. That virtue which prevents the unlawful commerce of the sexes.

A woman may defend her chastity by killing her assailant. See SELF-DEFENCE.

Sending a letter to a married woman soliciting her to commit adultery is an indictable offence; 7 Conn. 266. See 14 Pa. 226. In England, and perhaps elsewhere, the mere solicitation of chastity is not indictable; 2 Chit. Pr. 478. Words charging a woman with a violation of chastity are actionable in themselves, because they charge her with a crime punishable by law, and of a character to degrade, disgrace, and exclude her from society; 2 Conn. 707; 5 Gray 2, 5; 2 N. H. 194; Heard, Lib. & Sl. § 36; 5 Johns. 190; 11 Metc. 552; 32 Pa. 275; but not so in the District of Columbia; 91 U. S. 225.

CHATTEL (Norm. Fr. *goods*, of any kind). Every species of property, movable or immovable, which is less than a freehold.

In the *Grand Coutumier* of Normandy it is described as a mere movable, but is set in opposition to a *feud* or *feud*; so that not only goods, but whatever was not a *feud* or *feud*, were accounted chattels; and it is in this latter sense that our law adopts it. 2 Bla. Com. 285.

Real chattels are interests which are annexed to or concern real estate: as, a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it and a reversion or remainder in some other person. A lease to continue until a certain sum of money can be raised out of the rents is of the same description; and so in fact will be found to be any other interest in real estate whose duration is limited to a time certain beyond which it cannot subsist, and which is, therefore, something less than a freehold. A lease giving the exclusive privilege for a term of years of boring and digging for oil and other minerals is also a chattel; 120 Pa. 590.

Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another; 2 Kent 340; Co. Litt. 48 a; 4 Co. 6; 5 Mass. 419; 1 N. H. 350.

Chattels; whether real or personal, are treated as personal property in every respect, and, in case of the death of the owner, usually belong to the executor or administrator, and not to the heir at law. There are some chattels, however, which, as Chancellor Kent observes, though they be movable, yet are necessarily attached to the freehold: contributing to its value and enjoyment, they go along with it in the same path of descent or alienation. This is the case with deeds, and other papers which constitute the muniments of title to the inheritance; the shelves and family pictures in a house; and the posts and rails of an enclosure. It is also understood that pigeons in a pigeon-house, deer in a park, and fish in an artificial pond go with the inheritance, as heirlooms to the heir at law. But fixtures, or such things of a personal nature as are attached to the realty, whether for a temporary purpose or otherwise, become chattels, or not, according to circumstances; Mitch. R. P. 21. See FIXTURES; 2

Kent 343; Co. Litt. 20 a, 118; 12 Price, p. 163; 11 Co. 50 b; 1 Chit. Pr. 90; 8 Viner, Abr. 296; 11 id. 166; 14 id. 109; Bacon, Abr. Baron, etc. C, 2; Dane, Abr. Index; Comyns, Dig. *Biens*, A.

CHATTEL INTEREST. An interest in corporeal hereditaments less than a freehold. 2 Kent 842.

There may be a chattel interest in real property, as in case of a lease; Stearns, Real Act. 115. A term for years, no matter of how long duration, is but a chattel interest, unless declared otherwise by statute. See the subject fully treated in 1 Washburn, R. P. 810 *et seq.*

CHATTEL MORTGAGE. A transfer of personal property as security for a debt or obligation in such form that upon failure of the mortgagor to comply with the terms of the contract, the title to the property will be in the mortgagee. Thomas, Mort. 427.

An absolute pledge, to become an absolute interest if not redeemed at a fixed time. 2 Caines, Cas. 200, per Kent, Ch.

Strictly speaking, a conditional sale of a chattel as security for the payment of a debt or the performance of some other obligation. Jones, Chat. Mort. § 1. The condition is that the sale shall be void upon the performance of the condition named. At law, if the condition be not performed, the chattel is irredeemable at law; but it may be otherwise in equity or by statute; *ibid.* The title is fully vested in the mortgagee and can be defeated only by the due performance of the condition; upon a breach, the mortgagee may take possession and treat the chattel as his own; *ibid.*; 34 N. Y. Sup. Ct. 398. See 52 Barb. 367; 12 Wis. 413.

At common law a chattel mortgage may be made without writing; it is valid as between the parties; 4 N. Y. 497; and even as against third parties if accompanied by possession in the mortgagee; 66 Barb. 433; but delivery is not essential in all cases to the validity of a chattel mortgage; 35 Ala. 131; but see 66 Barb. 433. It differs from a *pledge* in that in case of a mortgage the title is vested in the mortgagee, subject to defeasance upon the performance of the condition; while in the case of a *pledge*, the title remains in the pledgor, and the pledgee holds the possession for the purposes of the bailment; 24 Wend. 116; 28 Vt. 237; 48 Me. 363; 35 Cal. 404; 1 Pet. 449; 1 Pick. 339; 2 Ala. 555. By a mortgage the title is transferred; by a *pledge*, the possession; Jones, Mort. § 4.

Upon default, in cases of *pledge*, the pledgor may recover the chattel upon tendering the amount of the debt secured; but in case of a mortgage, upon default the chattel, at law, belongs to the mortgagee; 43 How. Pr. 445. In equity he may be held liable to an account; 88 id. 296. Apart from statutes, no special form is required for the creation of a chattel mortgage. A bill of sale absolute in form, with a separate agreement of defeasance, constitute together a mortgage, as between the parties; 97 Mass. 452, 459; 38 Ala. 185; 30 Cal. 685; 35 Tex. 182; 2 Mo. App. 102; or a note with an endorsement on the back that at any time the maker agreed to make a chattel mortgage; 46 Mo. App. 512. And in equity, the defeasance may be subsequently executed; 26 Ala. 312. A parol defeasance is not good in law; 10 Allen 332; 36 Me. 562; 10 Mo. 506; *contra*, 3 Mich. 211; but it is in equity; 72 N. Y. 133; 45 Md. 477; 43 Ga. 262; 33 Ill. 470; 6 Oreg. 321, 362; even as to third parties with notice; 6 N. W. Rep. 367. See 33 Neb. 454. The question whether a bill of sale was intended as a chattel mortgage is for the jury; 51 Mo. App. 534.

In a *conditional sale*, the purchaser has merely a right to purchase, and no debt or obligation exists on the part of the vendor; this distinguishes such a sale from a mortgage; 40 Miss. 463; 4 Daly 77.

Where there is an absolute sale and a simultaneous agreement of resale, the tendency is to consider the transaction a mortgage; 12 Sm. & M. 806; 11 Tex. 478; 15 Ark. 280; but not when the intention of

the parties is clearly otherwise; 6 Gratt. 197; 5 Humph. 675.

It is not necessary that a chattel mortgage should be under seal; 47 Me. 504; 98 Mass. 59; Ping. Chat. Mort. 45; 14 Wall. 244; 5 Mich. 107.

At common law a mortgage can be given only of chattels actually in existence, and belonging to the mortgagor actually or potentially; 33 N. H. 484; 2 Mo. App. 322; 6 Bradw. 162; 38 N. J. L. 255; 42 Wis. 588; 11 R. I. 476, 482; 6 Dak. 32; and even though the mortgagor may afterwards acquire title, the mortgage is bad against subsequent purchasers and creditors; but it is otherwise between the parties; 20 Hun 265; claims for money not yet earned may be the subject of a chattel mortgage; 14 L. R. A. (1a) 126, and an elaborate note thereto.

In equity the rule is different; the mortgage, though not good as a conveyance, is valid as an executory agreement; the mortgagor is considered as a trustee for the mortgagee; 11 R. I. 476; 10 H. L. Cas. 191; 2 Story 630; 94 U. S. 382; 3 Fed. Rep. 747; 1 Woods 214; 111 N. C. 197. See article in 15 Am. L. Rev. 121. But see 13 Metc. 17; 43 Wis. 583. Under this principle all sorts of future interests in chattels may be mortgaged; Jones, Chat. Mort. § 174.

Independently of statutes, a delivery is necessary to the validity of a chattel mortgage, as against creditors. See 42 Ill. App. 370; 97 Ala. 680. The registration statutes simply provide a substitute for change of possession. Between the parties, a change of possession is unnecessary; if there is a change of possession, registration is not required; 30 Wis. 81; 49 N. H. 340; 129 Ind. 7. At common law an unrecorded chattel mortgage is *prima facie* fraudulent and void as to creditors, where there is no change of possession, but such presumption may be rebutted; 51 Fed. Rep. 551; 51 Kan. 404. See 34 N. Y. 253; 20 Ohio St. 110. Statutes regulating chattel mortgages exist in all of the states except Louisiana. In Pennsylvania a statute provides for chattel mortgages on certain kinds of personal property.

No mortgage of a vessel is valid against third parties without notice, unless recorded in the office of the collector of customs of the port where the vessel is enrolled; Rev. Stat. § 4192, etc. As between parties and those who have notice, registration is not required; 100 U. S. 145; 61 N. Y. 71; 3 Wood 61; as to Extraterritoriality of Chattel Mortgages, see CONFLICT OF LAWS.

CHAUD-MEDLEY (Fr. *chaud*). The killing of a person in the heat of an affray.

It is distinguished by Blackstone from chance-medley, an accidental homicide. 4 Bla. Com. 184. The distinction is said to be, however, of no great importance. 1 Russ. Cr. 660. Chance-medley is said to be the killing in self-defence, such as happens on a sudden encounter, as distinguished from an accidental homicide. *Id.*

CHEAT. "Deceitful practices in defrauding or endeavoring to defraud another of his known right, by some wilful device, contrary to the plain rules of common honesty." Hawk. Pl. Cr. b. 2, c. 23, § 1.

The fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public.

In order to constitute a cheat or indictable fraud, there must be a prejudice received; and such injury must affect the public welfare, or have a tendency so to do; 2 East, Pl. Cr. 817; 1 Deacon, Cr. Law 225.

It seems to be a fair result of the cases, that a cheat, in order to be indictable at common law, must have been public in its nature, by being calculated to defraud numbers, or to deceive or injure the public in general, or by affecting the public trade or revenue, the public health, or being in fraud of public justice, etc. And the other cases to be found in the books, of cheats apparently private which have been yet held to be indictable at common law, will, upon examination, appear to involve considerations of a public nature also, or else to be founded in conspiracy or forgery. Thus, it is not indictable for a man to obtain goods by false verbal representations of his credit in society, and of his ability to pay

for them; 6 Mass. 72; or to violate his contract, however fraudulently it be broken, 1 Mass. 187; or fraudulently to deliver a less quantity of amber than was contracted for and represented; 2 Burr. 1125; 1 W. Bla. 278; or to receive good barley to grind, and to return instead a musty mixture of barley and oatmeal; 4 Maule & S. 214. See 2 East, Pl. Cr. 816; 7 Johns. 201; 2 Mass. 188; 1 Me. 387; 1 Yerg. 76; 1 Dall. 47; 1 B. & H. L. Cr. Cas. 1. Refusing to return a promissory note obtained for the purpose of examination is merely a private fraud; 14 Johns. 371.

To cheat a man of his money or goods, by using false weights or false measures, has been indictable at common law from time immemorial; 3 Greenl. Ev. § 86; 6 Mass. 72. See 1 Dall. 47. In addition to this, the statute 33 Hen. VIII. 1, which has been adopted and considered as a part of the common law in some of the United States, and the provisions of which have been either recognized as common law or expressly enacted in nearly all of them, was directed, as appears from its title and preamble, against such persons as received money or goods by means of counterfeit letters or privy tokens in other men's names; 6 Mass. 72; 12 Johns. 292; 3 Greenl. Ev. § 86; 2 Bish. Cr. L. 145. A "privy token," within the meaning of this statute, was held to denote some real visible mark or thing, as a key, a ring, etc., and not a mere affirmation or promise. And though writings, generally speaking, may be considered as tokens, yet to be within this statute they must be such as were made in the names of third persons, whereby some additional credit and confidence might be gained to the party using them; 2 East, Pl. Cr. 826, 827.

The word "cheat" is not actionable, unless spoken of the plaintiff in relation to his profession or business; Heard, Lib. & Sl. §§ 16, 28, 48; 6 Cush. 185; 2 Chit. Rep. 657; 2 Pa. 187; 20 Up. Can. Q. B. 382; 5 Wend. 263; 3 Hill 139; 2 Mass. 406; 35 La. 6. See FALSER PETENCES; TOKEN; ILLITERATE.

CHECK. Contracts. A written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or bearer, or to such person or order, a named sum of money. 2 Dan. Neg. Inst. 528; 28 Gratt. 170; 1 MacArth. 350; 2 Story 502; 23 Minn. 336. See 6 N. Y. 412.

The chief differences between checks and bills of exchange are: *First*, a check is not due until presented, and, consequently, it can be negotiated any time before presentment, and yet not subject the holder to any equities existing between the previous parties; 3 Johns. Cas. 5, 9; 9 B. & C. 388; Chit. Bills, 8th ed. 546. *Secondly*, the drawer of a check is not discharged for want of immediate presentment with due diligence; while the drawer of a bill of exchange is. The drawer of a check is only discharged by such neglect when he sustains actual damage by it, and then only *pro tanto*; 6 Cow. 494; 10 Wend. 306; 2 Hill 425. See 31 Pa. 100. *Thirdly*, the death of the drawer of a check rescinds the authority of the banker to pay it; while the death of the drawer of a bill of exchange does not alter the relations of the parties; 3 M. & G. 571-573. *Fourthly*, checks, unlike bills of exchange, are always payable without grace; 25 Wend. 372; 6 Hill 174. See a discussion of this subject, 4 Kent, Lacey's ed., note on p. 571 of the index, commenting upon opinion of Cowen, J., in 21 Wend. 372.

Checks are in use only between banks and bankers and their customers, and are designed to facilitate banking operations. It is of their very essence to be payable on demand, because the contract between the banker and customer is that the money is payable on demand; 21 Wend. 372; 2 Stor. 502, 512; 10 Wall. 647; 36 Neb. 744.

As between the holder of a check and the indorser it is required that due diligence be used in presenting them, and it should be protested in order to hold the drawer and indorsers; 3 Kent, Lacey's ed. 88; but it is not necessary to use diligence in presenting an ordinary check, in order to charge the drawer, unless he has received damage by the delay; 2 Pet. 586; 2 Hill 425; 1 Ga. 304; 2 M. & R. 401; 3 Scott, N. R. 555; 3 Kent, Lacey's ed. 88; 57 N. Y. 641; 22 Gratt. 743; 1 Vroom 284; Story, Pr. Notes § 493; 17 Ohio St. 82; 30 Mo. 188; 45 Wis. 192; 76 Ill. 303. And see on this point 13

L. R. A. 43; 154 Pa. 396; 44 Wis. 479.

In common with other kinds of negotiable paper, they must contain an order to pay money, and words of negotiability. This enables a *bona fide* holder for value to collect the money without regard to the previous history of the paper; 16 Pet. 1; 20 Johns. 637; 42 Ala. 108.

They must be properly signed by the person or firm keeping the account at the banker's, as it is part of the implied contract of the banker that only checks so signed shall be paid. The words "Agt. Glass Buildings" added to the signature of a check used for paying an individual debt of the agent, are enough to put the person receiving it on inquiry as to his authority to use the fund for such purpose; 14 L. R. A. 234, and note reviewing cases.

Post-dated checks are payable on the day of their date, although negotiated beforehand. See 1 Vroom 284; 10 Wend. 304; 2 Story 502. Where all the parties to a check reside in the same place, the holder has until the day following its date in which to present it; 29 Weekly Notes Cases, Pa. 32.

Checks, being payable on demand, are not to be accepted, but presented at once for payment. There is a practice, however, of marking checks "good," by the banker, which fixes his responsibility to pay that particular check when presented, and amounts, in fact, to an acceptance; 10 Wall. 648. Such a marking is called certifying; and checks so marked are called certified checks. See 25 N. Y. 143; 73 Pa. 483. The bank thereby becomes the principal debtor; 52 N. Y. 350; 10 Wall. 648; to the holder, not the drawer; 39 Pa. 92; and the statute of limitation does not run against the check; 39 Pa. 92; and the certifying after delivery at payee's instance takes the amount thereof out of the hands of the maker, and any loss by the insolvency of the bank falls on the payee; 37 Ill. App. 475; 156 Mass. 458; but where certified to at maker's request he is not discharged from liability; 156 Mass. 458; 160 Mass. 401. The bank cannot refuse to pay because notified not to pay by the drawer; 12 Hun 537; nor generally can it set up that the check was forged, or that the drawer has no funds; Tiedm. Comm. P. 437; 18 Wall. 621. In New York, it is held that certifying a check warrants only the signature, and not the terms of the check; 67 N. Y. 458. See 40 Ill. App. 640; *contra*, 28 La. Ann. 189. The certification is in effect merely an acceptance, and creates no trust in favor of the holder of the check, and gives no lien on any particular portion of the assets of the bank; 77 Hun 159. See CERTIFIED CHECK.

Giving a check is not payment unless the check is paid; 1 Hall 56, 78; L. R. 10 Ex. 153; 99 Mass. 277; 4 Hun 639; 66 Ill. 351; 7 S. & R. 116. But a tender was held good when made by a check contained in a letter, requesting a receipt in return, which the plaintiff sent back, demanding a larger sum, without objecting to the nature of the tender; and receiving a check marked "good" is payment; 2 Dan. Neg. Inst. 559.

A check cannot be the subject of a *donatio mortis causa*, unless it is presented and paid during the life of the donor; because his death revokes the banker's authority to pay; 4 Bro. Ch. 286; 27 La. Ann. 465. But in such a case a check has been considered as of a testamentary character; 3 Curt. Eocl. 650; and see 1 P. Wms. 441.

There is a practice of writing across checks "memorandum," or "mem." They are given thus, not as an ordinary check, but as a memorandum of indebtedness; and between the original parties this seems to be their only effect. In the hands of a third party, for value, they have, however, all the force of checks without such word of restriction; 16 Pick. 535; 11 Paige 612; Story, Pr. Notes § 499. See INDORSEMENT.

CHECK BOOK. A book containing blanks for checks.

These books are so arranged as to leave a margin,

called by merchants a *stump*, or *stubb*, when the check is filled out and torn off. Upon these stumps a memorandum is made of the date of the check, the payee, and the amount; and this memorandum, in connection with the evidence of the party under oath, is evidence of the facts there recorded.

CHECK ROOM. See WAREHOUSE-MAN.

CHEMICAL ANALYSIS. In an indictment for retailing intoxicating liquor without knowledge of its properties by retailer, court took notice of the fact that to make a chemical analysis of the beverage would require not only learning and skill in chemistry, but instruments and appliances not in common use. 141 N. C. 790.

CHEMIN (Fr.). The road wherein every man goes; the king's highway. Called in law *Latin via regia*. *Termes de la Ley*; Cowell; Spelman, Gloss.

CHEMIS. In Old Scotch Law. A mansion-house.

CHEROKEE NATION.

A tribe of Iroquoian Indians formerly occupying northern Georgia, but now dwelling in Oklahoma; the most enlightened of the Indian peoples of America. Stand. Dict. See INDIAN.

CHEVAGE. A sum of money paid by vassals to their lords in acknowledgment of their villenage.

It was paid to the lord in token of his being chief or head. It was exacted for permission to marry, and also permission to remain without the dominion of the lord. When paid to the king, it was called subjection. *Termes de la Ley*; Co. Litt. 140 a; Spelman, Gloss.

CHEVANTIA. A loan, or advance of money on credit.

CHEVISAANCE (Fr. agreement). A bargain or contract. An unlawful bargain or contract.

CHIEF. One who is put above the rest. Principal. The best of a number of things.

Declaration in chief is a declaration for the principal cause of action. 1 Tidd, Pr. 419.

Examination in chief is the first examination of a witness by the party who produces him. 1 Greenl. Ev. § 445.

Tenant in chief was one who held directly of the king. 1 Washb. R. P. *19.

CHIEF BARON. The title of the chief justice of the English court of exchequer. 3 Bla. Com. 44.

CHIEF CLERK IN THE DEPARTMENT OF STATE. An officer appointed by the secretary of state, whose duties are to attend to the business of the office under the superintendence of the secretary, and, when the secretary is removed from office by the president, or in any other case of vacancy, during such vacancy to take the charge and custody of all records, books, and papers appertaining to the department. The other executive departments have similar officers.

CHIEF JUDGE. See CHIEF JUSTICE.

CHIEF JUSTICE. The presiding or principal judge of a court.

CHIEF JUSTICE IN EYRE. In old English law, he who presided over the principal court of the forest, called the court of justice-seat, or of the chief justice in eyre (*q. g. v.*). He was also known as chief justice, or justice, of the forests, or justice in eyre of the forest. There were two of these justices of the forest, one for each side of the river Trent. Jacob. See FOREST COURTS; COURT OF ATTACHMENTS.

CHIEF JUSTICE OF THE FORESTS. See CHIEF JUSTICE IN EYRE.

CHIEF JUSTICIAR. Under the early Norman kings, the highest officer in the kingdom next to the king. He was guardian of the realm in the king's absence. His power was diminished under the reign of successive kings, and, finally, completely distributed amongst various courts in the reign of Edward I. 3 Bla. Com. 28. The same as *Capitalis Justiciarius*.

CHIEF LORD. The immediate lord

of the fee. Burton, R. P. 317.

CHIEF OFFICER OR AGENT OF CORPORATION. The "chief officer or agent of a corporation" which has any of the officers or agents herein mentioned is: first, its president; second, its vice-president; third, its secretary or librarian; fourth, its cashier or treasurer; fifth, its clerk; sixth, its managing agent. Section 732, subsection 33, Civil Code of Kentucky.

CHIEF PLEDGE. The borsholder, or chief of the borough. Spelman, Gloss.

CHILD. The son or daughter, in relation to the father or mother.

Illegitimate children are bastards. *Legitimate children* are those born in lawful wedlock. *Natural children* are illegitimate children. *Posthumous children* are those born after the death of the father.

Children born in lawful wedlock, or within a competent time afterwards, are presumed to be the issue of the father, and follow his condition; but this presumption may be repelled by the proof of such facts tending to establish non-intercourse as may satisfy a jury to the contrary; Field, Inf. 40; 3 C. & P. 215, 427; 13 Ves. Ch. 58; 3 Paige, Ch. 139; 6 Binn. 286; 3 Dev. 548. See 3 Wall. 175. Those born out of lawful wedlock follow the condition of the mother. The father is bound to maintain his children, and to educate them, and to protect them from injuries; Schoul. Dom. Rel. *315. The stat. 43 Eliz. c. 2, provided that the father and mother, grandfather and grandmother of a poor, impotent, etc. child should support it. The payment was assessed by the justices at the quarter sessions and was enforced by a levy on the goods of the offender, who in default was committed to prison. It is said that this act is in force in the U. S.; Schoul. Dom. Rel. *320. See 66 Pa. 19. But not after majority; 1 Ld. Raym. 699. Children are not liable at common law for the support of infirm and indigent parents; 16 Johns. 281; but generally they are bound by statutory provisions to maintain their parents who are in want, when they have sufficient ability to do so; 2 Kent 208; Pothier, *Du Mariage*, n. 354, 389; 2 Root 163; 5 Cow. 284; 88 Mich. 91. The child may justify an assault in defence of his parent; 3 Bla. Com. 3. The father, in general, is entitled to the custody of minor children; but, under certain circumstances, the mother will be entitled to them when the father and mother have separated; 5 Binn. 520; but see 93 Cal. 853. Where they are placed in the care of the husband, the court is not precluded from making an order giving the divorced wife access to them; [1891] Prob. 124. The courts of U. S. will, in their sound discretion, give the custody to the mother, or to a third party. Considerations as to the age and condition of the child weigh with the court. The well-being of the child, rather than the supposed right of either parent, controls the question of custody; 10 Cent. L. J. 389; s. c. 12 R. I. 462; 21 N. J. Eq. 384; 28 S. W. (Ky.) 664; Field, Inf. 60. The mother of an illegitimate child has a right to its custody; 10 Q. B. D. 454. See FATHER; MOTHER. Children are liable to the reasonable physical correction of their parents. See CORRECTION; AS SAULT; BATTERY.

Dependent Child. A girl sixteen, whose mother is dead, living with her aunt in a comfortable home and attending school, is not a "dependent child" under a Juvenile Court Act. 156 Ky. 57, 160 S. W. 733.

See COLORED CHILD; DEPENDENT CHILD; DELINQUENT CHILD; NEGLECTED CHILD.

The term children does not, ordinarily and properly speaking, comprehend grand children, or issue generally; yet sometimes, that meaning is affixed to it in cases of necessity; 6 Co. 16; 14 Ves. 576; 17 How. 417; 36 Ala. 694; 104 Mass. 193. And it has been held to signify the same as issue, in cases where the testator, by using the terms children and issue indiscriminately, showed his intention to use the former term in the sense of issue, so as to entitle grand-

children, etc., to take under it; 1 Ves. Sen. Ch. 186; 3 V. & B. 69; 7 Paige, Ch. 328; 1 Bail. Eq. 7; 4 Watts 82; 3 Greenl. Cruise, Dig. 213. See 25 Ga. 549; 88 Pa. 478. When legally construed, the term children is confined to legitimate children; 7 Ves. Ch. 458; see 23 Hun 260; 14 N. J. Eq. 159; and when the term is used in a will, there must be evidence to be collected from the will itself, or extrinsically, to show affirmatively that the testator intended that his illegitimate children should take, or they will not be included; 1 V. & B. 422; 4 Kent 346, 414, 419; 6 H. L. 265; 84 N. Y. 516. See BASTARD. The civil code of Louisiana, art. 2523, n. 14, enacts that "under the name of children are comprehended not only children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line."

Posthumous children inherit, in all cases, in like manner as if they had been born in the lifetime of the intestate and had survived him; 2 Greenl. Cruise, Dig. 185; 4 Kent 412. See 2 Washb. R. P. 412, 439, 699.

In Pennsylvania, and in some other states; act of 1836, p. 250; Rhode Island, Rev. Stat. tit. xxiv. c. 154, § 10; 3 Gray 867; the will of their fathers or mothers in which no provision is made for them is revoked, as far as regards them, by operation of law; 3 Binn. 498; 5 Wash. St. 390. If Iowa a will is revoked by the birth of a child after its execution; 50 Fed. Rep. 310. See, as to the law of Virginia on this subject, 3 Munf. 20. See AGE; IN VENTRE SA MERE. As to their competency as witnesses, see WITNESS.

CHILDREN. A general devise to the "children" of a testator includes a child *en ventre sa mere* at the time of the testator's death. 162 Ky. 320, 172 S. W. 693.

The words, bodily heirs, used in a will or deed are words of limitation, and ordinarily will be given their technical meaning; the word "children" is a word of purchase. 162 Ky. 199, 172 S. W. 521.

The law conclusively presumes that a woman is capable of bearing, and that a man is capable of begetting children until they die, regardless of their ages. 158 Ky. 281, 164 S. W. 939.

When the testator intended to create an estate entail, the word "children" being used in the sense of heirs of the body. 152 Ky., 731, 154 S. W. 11.

The word "children" must be read as equivalent to issue or descendants. 109 Ky. 752, 60 S. W. 915.

As used in a Statute of "Descent and Distribution," is not necessarily confined to children and issue born in lawful wedlock. 2 Bush (Ky.) 157; 85 Ky. 671, 4 S. W. 685.

The word "children" in a will does not include grandchildren unless it plainly appears from other provisions that such was the intention, or unless such a construction is necessary to give effect to the devise. 91 Ky. 601; 7 Bush (Ky.) 645; 88 Ky. 83; 11 S. W. 424.

The word "children" is ordinarily a word of purchase, but should not be so construed when such a construction is opposed to the intent of the grantor. 4 (Ky.) L. R. 256.

The language, "children of my two brothers" denotes a class. 1 Ky. L. R. 766.

In a devise to the testator's daughter and her children forever, the word "children" is used in the sense of heirs, and is a word of inheritance. 145 Ky. 544, 140 S. W. 559.

It being apparent that the word "children" in a deed is used in the sense of "heirs," the word children will be construed to mean "heirs" and to be a word of limitation. 146 Ky. 519, 142 S. W. 1057.

The word "children," as used in Stat., § 1393, is not confined to children born in lawful wedlock, but may include children by adoption. 150 Ky. 751, 150 S. W. 1008.

The word "children," as used in a will, was held to be equivalent to "heirs," and to be a word of inheritance and not of purchase. 151 Ky. 438, 152 S. W. 258.

Unless it is necessary to effectuate the manifest intention of the testator after a

survey of the whole will, the word heirs is a word of limitation, and the word "children" is a word of purchase. 78 S. W. 141.

Men and women are presumed capable of having children as long as they live. 161 Ky. 85, 170 S. W. 523.

The word "children" will not ordinarily include grandchildren and will never be construed to embrace them except in cases where it is necessary to give that construction to the word to effectuate the obvious intention of the testator. 7 Ky. Opin. 192.

While the word "children" as a rule is used in deeds and wills as a word of purchase, it is frequently used as synonymous for "heirs." 130 Ky. 663, 113 S. W. 851.

Under a will the word "children" construed to be words of inheritance and not of purchase, but equivalent to the word heirs. 65 S. W. 124.

The words "child" or "children" when used as describing those who are to take under a will, construed to embrace grandchildren. 90 Ky.; 4 Met. (Ky.) 341; 102 Ky. 443; 43 S. W. 416; 79 Ky. 227; 9 Dana (Ky.) 1. See also HEIRS and CHILDREN.

The words, "children surviving," as used in a will, mean the children surviving at the death of the testator. 10 Ky. Opin. 588.

"Kindes kinder" is a German idiom corresponding with our words "Children's children." 152 Ky. 731, 154 S. W. 11.

CHILDWIT (Sax.). A power to take a fine from a bondwoman gotten with child without the lord's consent.

By custom in Essex county, England, every reputed father of a bastard child was obliged to pay a small fine to the lord. This custom is known as childwit. Cowel.

CHILE. A republic of South America, formerly a Spanish dependency.

The executive is a president elected for five years and a council of 11 members. The senate of 33 members is elected by the provinces for six years, and the chamber of deputies of 94 members is elected by the departments for three years. There are courts of first instance in the departmental capitals, and courts of appeals and a high court in the capital. Chile became independent in 1810. The present constitution was adopted in 1833 and amended in 1874 and 1891.

CHILDREN HUNDREDS. A range of hills in England, formerly much infested by robbers.

To exterminate the robbers, a steward of the Children Hundreds was appointed. The office long since became a sinecure, and is now used to enable a member of parliament to resign, which he can do only by the acceptance of some office within the gift of the chancellor. 2 Steph. Com. 403; Whart. Dict.

CHIMIN. See CHEMIN.

CHIMINAGE. A toll for passing on a way through a forest; called in the civil law *pedagium*. Cowel. See Co. Litt. 56 a; Spelman, Gloss.; *Termes de la Ley*.

CHIMINUS. The way by which the king and all his subjects and all under his protection have a right to pass, though the property of the soil of each side where the way lieth may belong to a private man. Cowel.

CHIMNEY MONEY. See FUMAGE; HEARTH-MONEY.

CHINA. An empire. The most important division of the Chinese Empire.

The ruler has power to appoint his successor, who must be of the ruler's family, but of a younger generation. The civil laws are administered by a cabinet of four members, under which are "seven boards of government." This constitutes the central autocratic power, subject to the direction of which the viceroy of each province rules. There is also a board of fifty members, independent of the government, who can present petitions, etc., to the sovereign.

CHINESE. Stringent laws for the entire exclusion of Chinese from the United States have been passed in California,

Nevada, and Oregon; many of these have been decided to be unconstitutional. An ordinance providing that every male person imprisoned in the county jail should have his hair cut short is unconstitutional, as inflicting cruel and unusual punishment, and as contrary to the XIV. amendment of the U. S. constitution; 5 Sawy. 552. A statute forbidding the employment of Chinamen on public works, etc., is void, as contravening the Burlingame treaty and the XIV. amendment; 5 Sawy. 566; 1 Fed. Rep. 481. So is an act forbidding Chinamen to fish for the purpose of sale; 2 Fed. Rep. 743. But a state law forbidding the exhumation of dead bodies and their removal, without a permit, is not invalid when applied to the removal of bodies of Chinamen who have been buried in California; it is a merely sanitary regulation; 2 Fed. Rep. 624.

Under the XIV. amendment the laws excluding immigrants who are Chinese laborers are inapplicable to a person born in the United States, though his parents were not citizens and could not become such under the naturalization laws; 49 Fed. Rep. 146, 148.

The act of May 5, 1892, requiring the deportation of all Chinese laborers who fail to get a certificate of residence, is in no sense a sentence for crime or a banishment, and the provision of the constitution against cruel and unusual punishment has no application; 149 U. S. 698.

The failure of a Chinese laborer to register, as required by act of Congress, May 5, 1892, is held not to be excused by the fact that after the commencement of the time allowed for registration, but before its expiration, he was convicted and imprisoned for crime; 69 Fed. Rep. 972.

Under the act of May 5, 1892, Chinese persons were prohibited from coming to the United States except under certain conditions, for which see U. S. Rev. Stat. 2 Supp. 13, also full notes on pp. 14 to 19, which contain the various decisions of the federal courts in relation thereto. Act of Nov. 3, 1893 (exclusion act), applies to Chinese persons who, having left the country before its passage, afterwards sought to return; 66 Fed. Rep. 953; 14 C. C. A. 281. A Chinaman, who during half his time is engaged in cutting and sewing garments for sale by a firm of which he is a member, is not a merchant within the exclusion act; 66 Fed. Rep. 955.

CHINESE INTEREST. Interest for money charged in China. In a case where a note was given in China, payable eighteen months after date, without any stipulation respecting interest, the court allowed the Chinese interest of one per cent. per month from the expiration of the eighteen months. 2 W. & S. 227, 264.

CHIPPINGAVEL. A toll for buying and selling. A tax imposed on goods brought for sale. Whishaw; Blount. See BAGAVEL.

CHIRGEMOTE (spelled, also, *Chirch-gemote*, *Cirgemote*, *Kirkmote*; Sax. *circe-gemote*, from *circ*, *ciric*, or *cyric*, a church, and *gemot*, a meeting or assembly).

In Saxon Law. An ecclesiastical court or assembly (*forum ecclesiasticum*); a synod; a meeting in a church or vestry. Blount; Spelman, Gloss.; LL. Hen. I. cc. 4, 8; Co. 4th Inst. 821; Cunningham. Law Dict.

CHIROGRAPH (Lat. *chirographa*). In Conveyancing. A deed or public instrument in writing.

Chirographs were anciently attested by the subscription and crosses of witnesses. Afterwards, to prevent frauds and concealments, deeds of mutual covenant were made in a *script* and *rescript*, or in a part and counter-part; and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied, or cut asunder in an indented manner, the sheet or skin of parchment, one of which parts being delivered to each of the parties were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha* by the canonists, because that word, instead of the letters of the alphabet or the word *chirographum*, was used. 2 Bla. Com. 296. This method of preventing counterfeiting, or of detecting counterfeiters, is now used, by having some

ornament or some word engraved or printed at one end of certificates of stocks, checks, and a variety of other instruments, which are bound up in a book, and, after they are executed, are cut asunder through such ornament or word.

The last part of a fine of land.

It is called, more commonly, the foot of the fine. It is an instrument of writing, beginning with these words: "This is the final agreement," etc. It concludes the whole matter, reciting the parties, day, year, and place, and before whom the fine was acknowledged and levied. Cruise, Dig. t. 35, c. 2, s. 52.

In Civil and Canon Law. An instrument written out and subscribed by the hands of the king or prince. An instrument written out by the parties and signed by them.

The Normans, destroying these *chirographa*, called the instruments substituted in their place *charta* (charters), and declared that these charta should be verified by the seal of the signer with the attestation of three or four witnesses. Du Cange; Cowel.

In Scotch Law. A written voucher for a debt. Bell, Dict. The possession of this instrument by the debtor raises a presumption of payment by him. Bell, Dict.; Erskine, Inst. 1. 2, t. 4, § 5.

CHIVALRY, COURT OF. See COURT OF CHIVALRY.

CHIVALRY, TENURE BY. Tenure by knight-service. Co. Litt.

CHOCTAW NATION. By treaty with the United States, a portion of territory is set apart, over which the Choctaw Indians have exclusive jurisdiction.

CHOPS. The mouth of a harbor. Stats. of Mass. 1832, p. 1288.

CHOOSE. See APPOINT.

CHOSE (Fr. *thing*). Personal property. *Choses in possession.* Personal things of which one has possession.

Choses in action. Personal things of which the owner has not the possession, but merely a right of action for their possession. 2 Bla. Com. 339, 397; 1 Chit. Fr. 99.

CHOSE IN ACTION. A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action. Comyns, Dig. Bins.

It is one of the qualities of a chose in action that at common law it is not assignable; 10 Co. 47, 48; 2 Johns. 1; 20 id. 880; 12 Wend. 297; 1 Cra. 367. In Bracton's day it went to the heir, and he, not the executor, sued for the debts due to a dead man. This naturally led to difficulties, and the courts gradually yielded to the pressure of necessity and without a statute, so momentous a change was made as that early in the time of Edward I. the chancery had framed and the king's court had upheld writs of debt for and against executors; 2 Poll. & Maitl. 344. It was Coke's idea that the origin of the rule against assignment of choses in action was the "wisdom and policy of the founders of our law" in discouraging maintenance and litigation, but Pollock thinks that there is no doubt that it was the logical consequence of the primitive view of a contract as creating a strictly personal obligation between creditor and debtor. See Wald, Poll. Torts 207, and a long note G. in App. supporting this view. In equity, from an early period, the courts have viewed the assignment of a chose in action for a valuable consideration as a contract by the assignor to permit the assignee to use his name for the purpose of recovery, and, consequently, enforce its specific performance, unless contrary to public policy; 1 P. Wms. Ch. 381; 1 Ves. Sen. Ch. 412; 2 Stor. 660; 2 Ired. Eq. 54; 1 Wheat. 236; 15 Mo. 662. And now, at common law, the assignee is entitled to sue and recover in the name of the assignor, and the debtor will not be allowed, by way of defence to such suit, to avail himself of any payment to or release from the assignor, if made or obtained after notice of the assignment; 4 Term 340; 1 Hill 438; 4 Ala. N. S. 184; 14 Conn. 123; 29 Me. 9; 18 N. H.

230; 10 Cush. 93; 20 Vt. 25; 44 Ark. 564. If, after notice of the assignment, the debtor expressly promise the assignee to pay him the debt, the assignee will then, in the United States, be entitled to sue in his own name; 10 Mass. 316; 5 Pet. 597; 2 R. I. 146; 7 H. & J. 213; 2 Barb. 349, 420; 27 N. H. 260; but without such express promise the assignee, except under peculiar circumstances, must proceed, even in equity in the name of the assignor; 2 Barb. Ch. 596; 1 Johns. Ch. 463; 7 G. & J. 114; 2 Wheat. 373; or by agreement he can sue in his own name and pay over the proceeds of the sale to the assignor, in which he becomes a trustee; 44 Mo. App. 338. By statute in England, 36 & 37 Vict. c. 66, s. 25 (6), any absolute assignment by writing under the hand of the assignor of a chose in action, with written notice to the debtor, passes the legal right thereto and all remedies thereon. A partial assignment of choses in action is good in equity, although the legal title remains with the assignor; 69 Tex. 625.

But courts of equity will not, any more than courts of law, give effect to such assignments when they contravene any rule of law or of public policy. Thus, they will not give effect to the assignment of the half pay or full pay of an officer in the army; 2 Anstr. 533; 1 Ball & B. 389; or of a right of entry or action for land held adversely; 2 Ired. Eq. 54; or of a part of a right in controversy, in consideration of money or services to enforce it; 16 Ala. 488; 4 Dana 178; 2 Dev. & B. Eq. 24. Neither do the courts, either of law or of equity, give effect to the assignment of mere personal actions which die with the person; 4 S. & R. 19; 13 N. Y. 322; 6 Cal. 456; 47 Minn. 577; 4 Wash. St. 783; 58 Mass. 408. See 37 Ga. 386. A cause of action for deceit is assignable; 44 Mo. App. 338; but not for slander; 20 S. C. 123. But a claim of damages to property, though arising *ex delicto*, which on the death of the party would survive to his executors or administrators as assets, may be assigned; Bisp. Eq. 166; 3 E. D. Sm. 246; 12 N. Y. 622; 46 Wis. 113. The transfer of a bill of lading will pass the claim for the conversion of the goods represented by it; 44 Mo. App. 498; 81 Ga. 792; See 94 Mich. 381. The right of vendor to bring a second suit in trespass to try title is assignable and passes to the vendee; 1 Tex. Civ. App. 498.

The assignee of a chose in action, unless it be a negotiable promissory note or bill of exchange, without notice, in general takes it subject to all the equities which subsist against the assignor; 1 P. Wms. 496; 4 Price 161; 1 Johns. 522; 7 Pet. 608; 2 Stoekt. 146; 10 Conn. 444; 22 N. Y. 585; 68 N. C. 255; 29 Ia. 339; 103 Pa. 415; 63 Ill. 482. But it is not subject to the equities of third persons of which he had no notice; 44 Ill. App. 516. And a payment made by the debtor, even after the assignment of the debt, if before notice thereof, will be effectual; 8 Day 364; 10 Conn. 444; 3 Binn. 394; 4 Metc. 594.

In Pennsylvania by statute a bond is assignable and suit can be brought on it by the assignee if there are two witnesses to the assignment and in Delaware under a similar statute but one witness is now required.

To constitute an assignment, no writing or particular form of words is necessary, if the consideration be proved and the meaning of the parties apparent; 15 Mass. 485; 16 Johns. 51; 13 Sim. Ch. 489; 1 M. & C. 690; 56 Barb. 362; 1 Ves. 331; 37 N. J. Eq. 123; 49 Me. 167; 84 Pa. 299; and therefore the mere delivery of the written evidence of debt; 2 Jones, N. C. 224; 28 Mo. 56; 24 Miss. 260; 13 Mass. 304; 132 Pa. 277; 5 Me. 349; 17 Johns. 284; the delivery being essential to the assignment; 84 Va. 731; 37 N. J. Eq. 123; 33 Vt. 431; or the giving of a power of attorney to collect a debt, may operate as an equitable transfer thereof, if such be the intention of the parties; 7 Ves. Ch. 28; 1 Caines, Cas. 18; 19 Wend. 73. See ASSIGNMENT.

Bills of exchange and promissory notes, in exception to the general rule, are by the law merchant transferable, and the legal

as well as equitable right passes to the transferee. See BILL OF EXCHANGE. In some states, by statutory provisions, bonds, mortgages, and other documents may be assigned, and the assignee receives the whole title, both legal and equitable; 2 Bouvier, Inst. 192. In New York, the code enables an assignee to maintain an action in his own name in those cases in which the right was assignable in law or in equity before the code was adopted; 4 Duer 74.

Money is not properly a "chose in action," and it may be levied on to satisfy a judgment, if the officer can, without violence, get hold of it. 1 Dana (Ky.) 536.

CHOSE IN POSSESSION. A thing in possession, as distinguished from a thing in action. See CHOSE IN ACTION. Taxes and customs, if paid, are a chose in possession; if unpaid, a chose in action. 2 Bl. Com. 408.

CHRISTIAN. One who believes in or assents to the truth of the doctrines of Christianity, as taught by Jesus Christ in the New Testament. It does not include Mohammedans, Jews, Pagans, or infidels; 53 N. H. 9.

One who, being born of Christian parents or in a Christian country, does not profess any other religion, or does not belong to any one of the other religious divisions of man. Anderson; 53 N. H. 50.

CHRISTIAN SCIENCE. Christian Science is the law of God, the law of good, interpreting and demonstrating the principle and rule of universal harmony. 10 Va. L. R. 286; Eddy, Rudimental Divine Science 7.

The teachings of Jesus understood and followed.

The primarily distinguishing characteristic of the science is the theory that matter does not exist; that all is spirit; that disease is not a reality, but a mental delusion. These conclusions are deduced from the premise that God is all; that God is spirit or mind; therefore there is no matter; that God can not suffer disease, and that man, being a part of the *all*, of which God is the whole, partakes of His spiritual attributes, and is not material, and hence cannot suffer material sickness; that by a proper realization of these truths the patient finds that he is not in reality sick, but that his suffering is due to a condition of mind, and that a proper conception of the really existing conditions relieves the so-called disease. The word "mind" is used by Christian Scientists as synonymous with spirit or God, and not in its usual acceptation.

"The Christian Science Church has a recognized code and text-books of theology; these text-books are the Bible, Science and Health. Reverend Mary B. G. Eddy, of Boston, is the author of the book entitled "Science and Health."

To the Christian Scientist it is as much of a violation of the law of God to take drugs for the alleviation of suffering or the cure of disease, as for a Methodist clergyman to take the name of his God in vain to relieve his overwrought feelings.

"It is confidently believed that the exercise of the art of healing for compensation, whether exacted as a fee, or accepted as a gratuity, cannot be classed as an act of worship. Neither is it the performance of a religious duty." 40 Neb. 163.

Attitudes of Different States. The action of the legislatures of the different States in regard to the subject has been very diverse. We have seen something of the statute of Nebraska. New York and Massachusetts have refused to pass bills intended to include the Scientists in their medical statutes, when advocated by the medical profession, while North Carolina and Illinois have especially exempted the Christian Scientists from the operation of their statutes in regard to the practice of medicine. The wording of the exemption of the North Carolina statute is: "Provided, that this Act shall not apply to any person who ministers or cures the sick by prayer to Almighty God without the use of drugs or any material means."

Christian Science is not technically a practice of medicine within the usual statutes upon that subject; but we have also seen that it is a system of treatment of disease, and is accordingly subject to regulation by the State; therefore the conclusion follows that such statutes as that of Nebraska and of Virginia, putting Christian Scientists on the same or similar footing with other practitioners, are legitimate exercises of the legal power, as was held in the Nebraska case; and this notwithstanding their provisions regarding the scientists. *Id.*, 692.

Christian Science and the Law. Where religion manifests itself in overt acts, it is for the State to determine whether those acts are against good order. Since Christian Science does so manifest itself, the State may, therefore, rightfully inquire into the nature of its acts. . . . "Religious belief can not be accepted as a justification for committing an overt act made criminal by the law of the land." Jefferson. This principle would apply to the statutes imposing penalties for treating the sick without proper license. *Id.*

Practice of Medicine. The "practice of medicine" relates to the art of preventing, curing, or alleviating disease or pain; popularly it consists in the discovery of the cause and nature of disease and the administration of remedies, or prescribing treatment therefor. 20 R. I. 632.

More words of encouragement, prayer for divine assistance, or the teaching of "Christian Science" do not constitute the practice of medicine in either of its branches. *Id.*

The difference between Christian Scientists and other sects consists in the belief of the former regarding disease, which they believe can be reduced to a minimum through the power of prayer. *Id.*, 635.

Prayer for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and a fixed determination to look on the bright side of life, does not constitute the practice of medicine in the popular sense. *Id.*, 637.

CHRISTIANITY. The religion established by Jesus Christ.

Christianity has been judicially declared to be a part of the common law of Pennsylvania; 118 & R. 394; 5 Binn. 555; of New York, 8 Johns. 291; of Connecticut, 2 Swift, System 321; of Delaware, 2 Harr. Del. 553; of Massachusetts, 7 Dane, Abr. c. 219, a. 2, 19. See 20 Pick. 206. To write or speak contemptuously and maliciously against it is an indictable offence; Ogd. Lib. & Sl. 450; Cooper, Libel 59, 114. See 5 Jur. 529; 8 Johns. 290; 20 Pick. 206; 2 Lew. 237.

Archbishop Whately, in his preface to the Elements of Rhetoric, says, "It has been declared, by the highest legal authorities, that 'Christianity is part of the law of the land,' and, consequently, any one who impugns it is liable to prosecution. What is the precise meaning of the above legal maxim I do not profess to determine, having never met with any one who could explain it to me; but evidently the mere circumstance that we have religion by law established does not of itself imply the illegality of arguing against that religion." It seems difficult, says an accomplished writer (Townsend, St. Tr. vol. ii, p. 389), to render more intelligible a maxim which has perplexed so learned a critic. Christianity was pronounced to be part of the common law, in contradistinction to the ecclesiastical law, for the purpose of proving that the temporal courts, as well as the chief spiritual, had jurisdiction over offences against it. Blasphemies against God and religion are properly cognizable by the law of the land, as they disturb the foundations on which the peace and good order of society rest, root up the principle of positive laws and penal restraints, and remove the chief sanction for truth, without which no question of property could be decided and no criminal brought to justice. Christianity is part of the common law, as its root and branch, its majesty and pillar—as such a component part of that law as the government and maintenance of social order. The inference of the learned archbishop seems scarcely accurate, that all who impugn this part of the law must be prosecuted. It does not follow, because Christianity is part of the law of England, that every one who impugns it is liable to prosecution. The manner of and motives for the assault are the true tests and criteria. Scoffing, flippant, railing comments, not serious arguments, are considered offences at common law, and justly punished, because they shock the pious no less than deprave the ignorant and young. The meaning of Chief Justice Hale cannot be expressed more plainly than in his

is unknown in the classification of English courts, and conveys a different idea in the various states in which it is adopted as the designation of a court or class of courts, although the constitution of such courts, in many instances, is quite analogous to that of the English courts of assize and nisi prius.

Circuit Judge. Excepting criminal courts and judges thereof, the words "circuit court" embrace courts having similar jurisdiction, in whole or in part, to that of "circuit courts"; and the words "circuit judge" embrace judges of either of said courts. Section 732, subsection 14, Civil Code of Kentucky.

CIRCUIT COURT OF APPEALS. See COURTS OF THE UNITED STATES.

CIRCUICTY OF ACTION. Indirectly obtaining, by means of a subsequent action; a result which may be reached in an action already pending.

This is particularly obnoxious to the law, as tending to multiply suits; 4 Cow. 682.

CIRCULATION. See GENERAL CIRCULATION.

CIRCUMDUCTION. In Scotch Law. A closing of the period for lodging papers, or doing any other act required in a cause. Paterson, Comp.

CIRCUMSPECTE AGATIS. A royal writ issued by Edward I, which subsequently became a statute, and the object of which was to ascertain the boundaries in some particulars between ecclesiastical and temporal jurisdiction. The statute known as *articuli cleri* passed in the reign of Edward II dealt with the same subject. Burrill; Reeves, Hist. Eng. Law. See ARTICULI CLERI.

CIRCUMSTANCES. The particulars which accompany an act. The surroundings at the commission of an act.

The facts proved are either possible or impossible, ordinary or extraordinary and improbable, recent or ancient; they may have happened near us, or afar off; they are public or private, permanent or transitory, clear and simple or complicated; they are always accompanied by circumstances which more or less influence the mind in forming a judgment. And in some instances these circumstances assume the character of irresistible evidence: where, for example, a woman was found dead in a room, with every mark of having met with a violent death, the presence of another person at the scene of action was manifest by the bloody mark of a left hand visible on her left arm; 14 How. St. Tr. 1384; Greenl. Ev. 13 a. These points ought to be carefully examined, in order to form a correct opinion. The first question ought to be, is the fact possible? If so, are there any circumstances which render it impossible? If the facts are impossible, the witness ought not to be credited. If, for example, a man should swear that he saw the deceased shoot himself with his own pistol, and, upon an examination of the ball which killed him, it should be found too large to enter into the pistol, the witness ought not to be credited: 1 Stark. Ev. 536; or if one should swear that another had been guilty of an impossible crime.

CIRCUMSTANTIAL EVIDENCE.

In the absence of positive proof, but where there is circumstantial evidence of the *corpus delicti*, it is not error to submit to the jury the question of defendant's guilt with the instruction that the circumstantial evidence must be such as to satisfy the jury beyond a reasonable doubt that the *corpus delicti* has been established. 205 U. S. 36. See EVIDENCE. See REAL EVIDENCE.

CIRCUMSTANTIBUS. See TALES.

CIRCUMVENTION. In Scotch Law. Any act of fraud whereby a person is reduced to a deed by decret. Tech. Dict. It has the same sense in the civil law. Dig. 50. 17. 48. 155; id. 12. 6. 2; id. 41. 2. 34.

CITACION. In Spanish Law. The order of a legal tribunal directing an individual against whom a suit has been instituted to appear and defend it within a given time. It is synonymous with the term *emplazamiento* in the old Spanish law, and the *in jus vocatio* of the Roman law.

CITATIO AD REASSUMENDAM CAUSAM. In Civil Law. The name of a citation, which issued when a party died pending a suit, against the heir of the defendant, or, when the plaintiff died, for the heir of the plaintiff. Our bill of revivor is probably borrowed from this proceeding.

CITATION (Lat. *citare*, to call, to summon). In Practice. A writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not. Proctor, Pract.

The act by which a person is so summoned or cited.

In the ecclesiastical law, the citation is the beginning and foundation of the whole cause, and is said to have six requisites, namely: the insertion of the name of the judge, of the promover, of the impugnant, of the cause of suit, of the place, and of the time of appearance; to which may be added the affixing the seal of the court, and the name of the register or his deputy. 1 Brown, Civ. Law 468, 464; Ayliffe, Parerg. xliii. 175; Hall, Adm. Fr. 5; Merlin, Rép.

The process issued in courts of probate and admiralty courts. It is usually the original process in any proceeding where used, and is in that respect analogous to the writ of *capias* or *summons* at law, and the subpoena in chancery.

In Scotch Practice. The calling of a party to an action done by an officer of the court under a proper warrant.

The service of a writ or bill of summons. Paterson, Comp.

CITATION OF AUTHORITIES. The production of or reference to the text of acts of legislatures, treatises, or cases of similar nature decided by the courts, in order to support propositions advanced.

As the knowledge of the law is to a great degree a knowledge of precedents, it follows that there must be necessarily a frequent reference to these preceding decisions to obtain support for propositions advanced as being statements of what the law is. Constant reference to the law as it is enacted is, of course, necessary. References to the works of legal writers are also desirable for elucidation and explanation of doubtful points of law.

In the United States, the laws of the general government are generally cited by their date: as, Act of Sept. 24, 1789, § 35; or, Act of 1819, c. 170; or by reference to the statutes, as 24 Stat. L. 505; or by the section of the Revised Statutes of 1878, or its supplements. The same practice prevails in Pennsylvania, and in most of the other states, when the date of the statute is important. Otherwise, in most of the states, reference is made to the revised code of laws or the official publication of the laws: as, Va. Rev. Code, c. 26; N. Y. Rev. Stat. 8th ed. 400. Books of reports and text-books are generally cited by the number of the volume and page: as, 2 Washburn, R. F. 350; 4 Pa. 60. Sometimes, however, the paragraphs are numbered, and reference is made to the paragraphs: as, Story, Bailm. § 494; Gould, Pl. c. 5, § 30.

The civilians on the continent of Europe, in referring to the Institutes, Code, and Pandects or Digest, usually give the number, not of the book, but of the law, and the first word of the title to which it belongs; and, as there are more than a thousand of these, it is no easy task for one not thoroughly acquainted with those collections to find the place to which reference is made. The American writers generally follow the natural mode of reference, by putting down the name of the collection, and then the number of the book, title, law, and section. For example, Inst. 4. 15. 2. signifies Institutes, book 4, title 15, and section 2; Dig. 41. 9. 1. 3. means Digest, book 41, title 9, law 1, section 3; Dig. *pro dote*, or *ff pro dote*, signifies section 3, law 1 of the book and title of the Digest or Pandects entitled *pro dote*. It is proper to remark that Dig. and *ff* are equivalent: the former signifies Digest, and the latter—which is a careless mode of writing the Greek letter π , the first letter of the word *παιδευται*—signifies Pandects; and the Digest and Pandects are different names for one and the same thing. The Code is cited in the same way. The Novels are cited by their number, with that of the chapter and paragraph: for example, Nov. 185. 2. 4. for *Novella Justiniani* 185, *capite* 2, *paragrapho* 4. Novels are also quoted by the Collation, the title, chapter, and paragraph,

as follows: *Fr Authenticis, Collatione* 1, *titulo* 1, *cap.* 281. The Authentics are quoted by their first words, after which is set down the title of the Code under which they are placed: for example, *Authentica, cum testator. Codicis ad legem fascidium*. See Mackeldey, Civ. Law § 65; Domat, Civ. Law, Cush. ed. Index.

The system of citations in the present and the last editions of this work differs somewhat from that adopted in the earlier editions, in order that such citation might occupy as little space as possible. The briefest possible citation, that will avoid ambiguity, has been adopted in this work; the table of abbreviations (see ABBREVIATIONS) gives the full name of the book or volume of reports referred to.

Statutes of the various states will be cited by giving the number of the volume (where there are more volumes than one), the name of the state (using the common geographical abbreviation), the designation of the code, and the page where the statute or provision in consideration is found: thus, 1 N. Y. Rev. Stat. 4th ed. 63. To this it is desirable to add, when regard for space allows, the chapter and section of the statute referred to. In some cases the system of citing state statutes adopted in Stimson's Am. Stat. Law is resorted to, and the statutes of a state are referred to by the name of the state, the year, the page or chapter and section by number, omitting the letters c., p., and s. or §: thus, R. L. 1898, 65. 12., meaning Rhode Island Laws, 1898, chap. 65, § 12.

United States statutes, and statutes of the states not included in the codified collection of the state, are cited as statutes of the year in which they were enacted, or by the proper section of the Revised Statutes.

English statutes are referred to by indicating the year of the reign in which they were enacted, the chapter and section: thus, 17 & 18 Vict. c. 96, § 2.

Text-books are referred to by giving the number of the volume (where there are more volumes than one), and the name of the author, with an abbreviation of the title of the work sufficiently extended to distinguish it from other works by the same author, and to indicate the class of subjects of which it treats: thus, 2 Story, Const.

Where an edition is referred to which has been prepared by other persons than the authors, or where an edition subsequent to the first is referred to, this fact is sometimes indicated, and the page, section, or paragraph of the edition cited is given: thus, Angell & A. Corp. Lothrop ed. 96; Smith, Lead. Cas., 5th Hare & W. ed. 173. The various editions of Blackstone's Commentaries, however, have the editor's name preceding the title of the book: thus, Sharswood, Bla. Com.; Coleridge, Bla. C.; wherever the reference is to a note by the editor cited; otherwise the reference is merely to Blackstone.

Reports of the Federal courts of the United States, and of the English, Irish, and Scotch courts, are cited by the names of the reporters: thus, 3 Cra. 26; East 241; or, in later reports, the official method of citation is used. In a few instances, common usage has given a distinctive name to a series; and wherever this is the case such name has been adopted: as, Term; C. B.; Exch.

The reports of the state courts are cited by the name of the state, wherever a series of such reports has been recognized as existing: thus, 5 Ill. 63; 21 Pa. 96; and the same rule applies to citations of the reports of provincial courts: thus, 6 Low. C. 167. The later volumes of reports of the supreme court of the United States are cited by their serial number: thus, 161 U. S.

Otherwise, the reporter's name is used; thus, 5 Rawle 23, or an abbreviation of it; as 11 Pick. 23. This rule extends also to the provincial reports; and the principle is applied to the decisions of Scotch and Irish cases, except in later cases, when the official method is adopted.

Where the same reporter reports decisions in courts both of law and equity, an additional abbreviation, usually to equity reports and sometimes to law reports, indicates which series is meant: thus, 3 Ired. Eq. 87; 14 N. J. L. 42.

The list of abbreviations as used in this book, and as commonly used in legal books, see ABBREVIATIONS.

CITE. To summon; to command the presence of a person; to notify a person of legal proceedings against him and require his appearance thereto. Black, L. Dict.

To name or quote, for argument or exemplification, as to cite a case or authority. Stand. Dict.

CITIZEN. In English Law. An inhabitant of a city. 1 Rolle, Abr. 188. The representative of a city, in parliament. 1 Bla. Com. 174.

In American Law. One who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is qualified to fill offices in the gift of the people.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside; XIV. Amendment, U. S. Const.

One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. 19 How. 404.

A member of the civil state entitled to all its privileges. Cooley, Const. Lim. 77. See 92 U. S. 542; 21 Wall. 162; Web. Cit. 43.

Citizens are either native-born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office under the constitution of the United States, except the offices of president and vice-president.

Neither Chinese nor Japanese can become citizens; 5 Sawy. 155; 21 Fed. Rep. 905; 62 id. 126; 71 id. 274; U. S. Stat. L. 22; unless born within this country, of resident parents not engaged in the diplomatic service; 10 Sawy. 353. The constitution of the United States (art. 4, s. 2) provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." These are privileges which in their nature are *fundamental*; which belong of right to the citizens of all free states, and which have, at all times, been enjoyed by the citizens of the several states; 4 Wash. C. C. 380. The supreme court will not define these, but will decide each case as it arises; 12 Wall. 418; 94 U. S. 39; 18 How. 591; see 37 N. J. 106; 55 Ill. 185; 16 Wall. 36, 130; 8 id. 168; 18 id. 129; 92 U. S. 542. The term citizen in the constitution applies only to natural persons; 8 Wall. 168; 1 Wood 85; 49 Ill. 172; 13 Pet. 519.

Where a foreigner takes the oath declaring his intention of becoming a citizen of the United States, his minor sons thereby acquire an inchoate status as citizens, and if they attain majority before their father completes his naturalization, they are capable of becoming citizens by other means than the direct application provided for by the naturalization laws; 143 U. S. 135; but the illegitimate minor children of a naturalized citizen do not become citizens at the time he is naturalized; Lynch, Nat. and Cit. 16.

Free persons of color, born in the United States, were always entitled to be regarded as citizens; 1 Abb. U. S. 28; but see 19 How. 393. Negroes born within the United States are citizens; 2 Bond 389; Chase's Dec. 157 (but not before the 14th Amendment; 19 How. 393; 10 Bush 681); but the child of a member of one of the Indian tribes within the United States is not a citizen, though born in the United States; 2 Sawy. 118; 1 Dill. 444; and although the parents have given up their tribal relations they cannot become citizens until they are first naturalized; 112 U. S. 108. The fact that an unnaturalized person of foreign birth is enabled by a state statute to vote and hold office does not make him a citizen; 4 Dill. 425.

The age of the person does not affect his citizenship, though it may his political rights; 1 Abb. L. Dict. 224; nor the sex; *ibid.*; 21 Wall. 162; 92 U. S. 214; 1 McArthur 169; the right to vote and the right to hold office are not necessary constituents of citizenship; 21 Wall. 162; 43 Cal. 43.

All natives are not citizens of the United States: the descendants of the aborigines are not entitled to the rights of citizens; see *supra*; also 112 U. S. 103. Anterior to the adoption of the constitution of the United States, each state had the right to make citizens of such persons as it pleased.

A citizen of the United States residing in any of the states of the Union is a citizen of that state; 6 Pet. 761; Paine 594; 6 Rob. 33; 12 Blatch. 320; 1 Brock. 391; 1 Paige, Ch. 183.

The child of American parents born in a foreign country, on board an American ship of which his father was the captain, is a citizen of the United States; 5 Blatch. 18; and so is a child born abroad whose father was at the time a citizen of the United States residing abroad; 13 Op. Att.-Gen. 91; 45 Ia. 99. See 58 Me. 353; and so if both parents are citizens and reside abroad but have not renounced their citizenship; 50 Fed. Rep. 310.

A person may be a citizen for commercial purposes and not for political purposes; 7 Md. 209.

All persons who deserted the naval or

military service of the United States, and did not return there to within sixty days after the issuance of the proclamation of the president, dated March 11, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, and shall forever be incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizenship thereof; U. S. Rev. Stat. § 1996.

As to citizenship as acquired by naturalization, see ALLEGIANCE; NATURALIZATION; ALIEN.

Citizen and resident (*q. v.*) are not synonymous, and in some cases the distinction is important (cf. 248 U. S. 470). 252 U. S. 78.

Citizenship, not residence, confers the right to sue in the Federal courts; 63 Fed. Rep. 878. See Reno. Non-Residents, c. vii. Corporations are citizens of the state by which they are created, irrespective of the citizenship of their members; 8 Wall. 168; 106 U. S. 118. If two corporations created by different states, are consolidated each still retains its own citizenship for purposes of suit; 136 U. S. 356; 66 Fed. Rep. 655. See Reno. Non-Residents, § 104.

There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it. A railroad company organized under the laws of one state and authorized by its own state, may accept authority from another state to extend its railroad into such state and to control railroads therein. Such corporations may be treated by each of the states as domestic corporations. The presumption that a corporation is composed of citizens of the state which created it accompanies it when it does business in another state, and it may sue or be sued in the Federal courts in such other state as a citizen of the state of its original creation; 161 U. S. 545.

CITY. In England. An incorporated town or borough which is or has been the see of a bishop. Co. Litt. 108; 1 Bla. Com. 114; Cowel.

A large town incorporated with certain privileges. The inhabitants of a city. The citizens. Worcester, Dict.

Although the first definition here given is sanctioned by such high authority, it is questionable if it is essential to its character as a city, even in England, that it has been at any time a see; and it certainly retains its character of a city after it has lost its ecclesiastical character; 1 Steph. Com. 115; 1 Bla. Com. 114; and in the United States it is clearly unnecessary that it should ever have possessed this character. Originally, this word did not signify a town, but a portion of mankind who lived under the same government—what the Romans called *civitas*, and the Greeks *polis*; whence the word *politeia civitas seu republica status et administratio*. Toullier, *Rev. Civ. Fr. l. 1, t. 1, n. 202*; Henrion de Pansey, *Pouvoir Municipal*, pt. 36, 37.

—**CIVIL.** In contradistinction to *barbarous* or *savage*, indicates a state of society reduced to order and regular government; thus, we speak of civil life, civil society, civil government, and civil liberty. In contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, in contrast to those which are public and relate to the government; thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction.

It is also used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign*; thus, we speak of a civil station, as opposed to a military or an ecclesiastical station; a civil death, as opposed to a natural death; a civil war, as opposed to a foreign war; Story, Const. § 789; 1 Bla. Com. 6, 125, 251; Montesquieu, *Sp. of Laws*, b. 1, c. 3; Rutherford, *Inst. B. 2, c. 2*; *id.* c. 3; *id.* c. 8, p. 359; Heineccius, *Elem. Jurisp. Nat. b. 2, ch. 6*.

CIVIL ACTION. In Practice.

In THE CIVIL LAW.—A personal action which is instituted to compel payment, or the doing some other thing which is purely civil. Pothier, *Introd. Gen. aux Cont.* 110.

AT COMMON LAW.—An action which has for its object the recovery of private or

civil rights or compensation for their infringement. See ACTION.

CIVIL COMMOTION. An insurrection of the people for general purposes, though it may not amount to rebellion where there is an usurped power. 2 Marsh. 793.

In the printed proposals which are considered as making a part of the contract of insurance against fire, it is declared that the insurance company will not make good any loss happening by any civil commotion.

CIVIL CONTEMPT. "Civil contempt" is a failure of one to do something under order of court for the benefit of a party litigant. 141 Ky. 461, 133 S. W. 206.

"Civil contempts" are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceedings before the court, while "criminal contempts" are all those acts in disrespect of the court or of its process, or which obstruct the administration of justice or tend to bring the court into disrespect. 92 Ky. 449, 17 S. W. 435.

CIVIL DAMAGE ACTS. Acts passed in many of the United States which provide an action for damages against a vendor of intoxicating liquors, on behalf of the wife or family of a person who has sustained injuries by reason of his intoxication. Such an act, even if it allows an action against the owner on the property where the liquor was sold, without evidence that he authorized the sale, is constitutional; 74 N. Y. 509. See also 54 N. H. 117; 180 Mass. 158; 33 Wis. 570; 49 Vt. 628. Where the owner of a building had no knowledge as to how his premises were used, he is nevertheless liable where his agent rents it for the sale of intoxicating liquors; 131 N. Y. 536. See 72 Ill. 133. The act in New York creates a new right of action, viz., for injury to the "means of support;" it is not necessary that the injury should be one remediable at common law; 74 N. Y. 536. Injury to means of support is not necessarily deprivation of the bare necessities of life, but any substantial subtraction from the maintenance suitable to the man's business and condition in life; 48 Ill. App. 369. The Indiana act is constitutional, even though the liquor-seller was licensed; 57 Ind. 171. So in 41 Mich. 475. If the death of the husband can be traced to an intervening cause, the liquor-seller is not liable; 84 Ill. 195; s. c. 25 Am. Rep. 446; 54 Ind. 559. Damages for injuries resulting in death cannot be recovered; 35 Ohio St. 359; s. c. 35 Am. Rep. 598, 601; *contra*, 9 Neb. 304; 4 Hun 738; 87 N. Y. 493; 106 Ill. 263; 54 N. H. 117; 46 Ia. 195; but see 5 Hun 590; 8 id. 128; 146 Pa. 610. In some states exemplary damages can be recovered; 50 Ia. 34; 67 Me. 517; 33 Ohio St. 444; *contra*, 6 Neb. 304; 43 Ia. 558. The fact that the wife had bought liquor from the defendant under compulsion, or in order to keep her husband at home, does not defeat her right; *ibid.* See, generally, 20 Alb. L. J. 204; 48 Ill. App. 369.

CIVIL DEATH. That change of state of a person which is considered in the law as equivalent to death. See DEATH.

CIVIL INJURY. An infringement or privation of some civil right, and which is a subject for civil redress or compensation; as distinguished from a crime, which is a subject for punishment. See PRIVATE WRONGS.

CIVIL LAW. This term is generally used to designate the Roman jurisprudence, *jus civile Romanorum*.

In its most extensive sense, the term Roman Law comprises all those legal rules and principles which were in force among the Romans, without reference to the time when they were adopted. But in a more restricted sense we understand by it the law compiled under the auspices of the Emperor Justinian, and which are still in force in many of the states of modern Europe, and to which all refer as authority or written reason.

The ancient *leges curiatae* are said to have been collected in the time of Tarquin, the last of the kings, by a pontifex maximus of the name of Sextus or Publius Papirius. This collection is known under the title of *Jus Civile Papinianum*; its exist-

ing fragments are few, and those of an apocryphal character. Mackeldey § 81.

After a fierce and uninterrupted struggle between the patricians and plebeians, the latter extorted from the former the celebrated law of the *Twelve Tables*, in the year 300 of Rome. This law, framed by the decemvirs, and adopted in the *comitia centuriata*, acquired great authority, and constituted the foundation of all the public and private laws of the Romans, subsequently, until the time of Justinian. It is called *Lex Decemviralis*. It. From some period to the year 450 of Rome, this law consisted in the *leges*, the *plebiscita*, the *senatus consulta*, and the constitutions of the emperors, *constitutiones principum*; and the *jus non scriptum* was found partly in the *mores majorum*, the *consuetudo*, and the *res judicata*, or *authoritas rerum perpetua similiter judicatorum*. The edicts of the magistrates, or *jus honorarium*, also formed a part of the unwritten law; but by far the most prolific source of the *jus non scriptum* consisted in the opinions and writings of the lawyers—*responsa prudentium*.

The few fragments of the twelve tables that have come down to us, are stamped with the hall features of their aristocratic origin. But the *jus honorarium* established by the praetors and other magistrates, as well as that part of the customary law which was built up by the opinions and writings of the *prudentes*, are founded essentially on principles of natural justice.

Many collections of the imperial constitutions had been made before the advent of Justinian to the throne. He was the first after Theodosius who ordered a new compilation to be made. For this purpose he appointed a committee of ten lawyers, with very extensive powers; at their head was the *ex-questor sacri palatii*, Johannes, and among them the afterwards well-known Tribonian. His instructions were to select, in the most laconic form, all that was still of value in the existing collections, as well as the use of the *edicta*, to omit all that was obsolete matter; to introduce such alterations as were required by the times; and to divide the whole into appropriate titles. Within fourteen months the committee had finished their labors. Justinian confirmed this new code, which consisted of twelve books, by a special ordinance, and prohibited the use of the old constitutions, of *rescripts* and *edicts*. This code of Justinian, which is now called *Codez vetus*, has been entirely lost.

After the completion of this code, Justinian, in 529, ordered Tribonian, who was now invested with the dignity of *questor sacri palatii*, and sixteen other jurists, to select all the most valuable passages from the writings of the old jurists which were regarded as authoritative, and to arrange them, according to their subjects, under suitable heads. These commissioners also enjoyed very extensive powers; they had the privilege, at their discretion, to abbreviate, to add, and to make such other alterations as they might consider adapted to the times; and they were especially ordered to remove all the contradictions of the old jurists, to avoid all repetitions, and to omit all that had become entirely obsolete. The consequence of this was, that the extracts did not merely represent the originals, but were often interpolated and amended in conformity with the existing law. Alterations, modifications, and additions of this kind are now usually called *emblemata Triboniani*. This great work is called the *Pandects*, or *Digest*, and was completed by the commissioners in three years. Within that short space of time, they had extracted from the writings of no less than thirty-nine jurists all that they considered valuable for the purpose of this compilation. It was divided into fifty books, and was entitled, *Digesta sive Pandects juris enucleati ex omni veteri*. The *Pandects* were published on the 16th of December, 529, but they did not go into operation until the 30th of that month. In confirming the *Pandects*, Justinian prohibited further reference to the old jurists; and, in order to prevent any person becoming again so diffuse, indefinite, and uncertain as it had previously been, he forbade the writing of commentaries upon the new compilation, and permitted only the making of literal translations into Greek.

In preparing the *Pandects*, the compilers met with frequently great controversies in the writings of the jurists. Such questions to the number of thirty-four, had been already determined by Justinian before the commencement of the collection of the *Pandects*, and before its completion the decisions of this kind were increased to fifty, and were known as the fifty decisions of Justinian. These decisions were at first collected separately, and afterward embodied in the new code.

For the purpose of facilitating the study of the law, Justinian ordered Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law under the title of *Institutes*, which should contain the elements of legal science. This work was founded, and to a great extent copied, from the commentaries of Gaius, which, after having been lost for many centuries, were discovered by the great historian Niebuhr, in 1816, in a palimpsest, or re-written manuscript, of some of the homilies of St. Jerome, in the Chapter Library of Verona. When the *Institutes* were completed, the commentaries was omitted in the *Institutes*, and references were made to the new constitutions of Justinian so far as they had been issued at the time. Justinian published his *Institutes* on the 21st November, 529, and they obtained the force of law at the same time with the *Pandects*. On the 30th of December, 529, Theophilus, one of the editors, delivered lectures on the *Institutes* in the Greek language, and from these lectures originated the valuable commentaries known under the Latin title, *Theophilus Antecessoris Paraphrasis Graeca Institutionum Caesararum*. The *Institutes* consist of four books, each of which contains several titles.

After the publication of the *Pandects* and the *Institutes*, Justinian ordered a revision of the Code, which had been promulgated in the year 529. This became necessary on account of the great number of new constitutions which he had issued, and of the fifty decisions, and included in the *Codez vetus*, which the law had been altered, amended, or modified.

He therefore directed Tribonian, with the assistance of Dorotheus, Menna, Constantinus, and Johannes, to revise the Old Code and to incorporate the new constitutions into it. This revision was completed in the same year; and the new edition of the Code, *Codez repetita protractio*, was confirmed on the 16th November, 534, and the Old Code abolished. The Code contains twelve books subdivided into appropriate titles.

During the interval between the publication of the *Codez repetita protractio*, in 534, to the end of his reign, in 565, Justinian issued, at different times, a great number of new constitutions, by which the law on many subjects was entirely changed. The greater part of these constitutions were written in Greek, in obscure and pompous language, and published under the name of *Novella Constitutiones*, which are known to us as the *Novels* of Justinian. Soon after his death, a collection of one hundred and sixty-eight *Novels* was made, one hundred and fifty-four of which had been issued by Justinian, and the others by his successors.

Justinian's collections were, in ancient times, always copied separately, and afterwards they were printed in the same way. When taken together, they were indeed called, at an early period, the *Corpus Juris Civilis*; but this was not introduced as the regular title comprehending the whole body; each volume had its own title until Dionysius Gothofredus gave this general title in the second edition of his glosses *Corpus Juris Civilis*, in 1580. Since that time this title has been used in all the editions of Justinian's collections.

It is generally believed that the laws of Justinian were entirely lost and forgotten in the Western Empire from the middle of the eighth century until the alleged discovery of a copy of the *Pandects* at the storming and pillage of Amalfi, in 1135. This is one of those popular errors which had been handed down from generation to generation without question or inquiry, but which has now been completely exploded by the learned discussion, supported by conclusive evidence, of Savigny, in his *History of the Roman Law during the Middle Ages*. Indeed, several years before the sack of Amalfi the celebrated Imerius delivered lectures on the *Pandects* in the University of Bologna. The pretended discovery of a copy of the *Digest* at Amalfi, and its being given by Lotharius II. to his allies the Pisans as a reward for their services, is an absurd fable. No doubt, during the five or six centuries when the human intellect was in a complete state of torpor, the study of the Roman Law, like that of every other branch of knowledge, was neglected; but on the first dawn of the revival of learning the science of Roman jurisprudence was one of the first to attract the attention of mankind; and it was taught with such brilliant success as to immortalize the name of Imerius, its great professor.

Even at the present time the Roman Law, as a complete system, exercises dominion in the civil state in Europe except England. The countrymen of Lycurgus and Solon are governed by it, and in the vast empire of Russia it furnishes the rule of civil conduct. In America, it is the foundation of the law of Louisiana, Canada, Mexico, and all the republics of South America. Its influence in the formation of the common law of England cannot be denied by the impartial inquirer. The more thoroughly this subject is investigated, the larger is ascertained to be the indebtedness of the common law to the Roman system. It was publicly taught in England, by Roger Vacarius, as early as 1149; and all admit that the whole equity of jurisprudence prevailing in England and the United States is mainly based on the civil law. Consult *Poll. & Maitl.*; *Social General*; Address of Mr. Cranchborne, *Ann. Bar. Assn. Rept.* 1896; 1 Kent 518; *Paper of Mr. Cranchborne*, *Ann. Bar. Assn. Rept.* 1896. See *CODES*; *DIGESTS*; *INSTITUTES*; *NOVELLS*.

CIVIL LIBERTY. The liberty of a member of society, being a man's natural liberty, so far restrained by human laws (and no farther), as is necessary and expedient for the general advantage of the public. 1 Bl. Com. 125.

CIVIL LIST. An annual sum granted by the English parliament at the commencement of each reign, for the expenses of the royal household and establishment as distinguished from the general exigencies of the state. It is the provision for the crown made out of the taxes in lieu of its proper patrimony and in consideration of the assignment of that patrimony to the public use. Wharton, *Dict.*

CIVIL OBLIGATION. One which binds in law, and which may be enforced in a court of justice. Pothier, *Obl.* 173, 191.

CIVIL OFFICER. Any officer of the United States who holds his appointment under the national government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy. Rawle, *Const.* 213; 1 Story, *Const.* § 790.

The term occurs in the constitution of the United States, art. 2, sec. 4, which provides that the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. It has been decided that a senator of the United States is not a civil officer within the meaning of this clause of the constitution. *United States v. Johnson*, 10th January, 1799; 4 Tucker, *Bla. Com.* App. 57, 58; Rawle, *Const.* 213;

Sergeant, *Const. Law* 876; Story, *Const.* § 791.

CIVIL REMEDY. In Practice. The remedy which the party injured by the commission of a tortious act has by action against the party committing it, as distinguished from the proceeding by indictment, by which the wrong-doer is made to expiate the injury done to society.

In cases of treason, felony, and some other of the graver offences, this private remedy is suspended, on grounds of public policy, until after the prosecution of the wrong-doer for the public wrong; 4 Bla. Com. 363; 12 East 409; 35 Ala. 184; 1 N. H. 239. The law is otherwise in *Massachusetts*, except, perhaps, in case of felonies punishable with death; 15 Mass. 393; *North Carolina*, 1 Tayl. 58; *Ohio*, 4 Ohio 377; *South Carolina*, 3 Brev. 303; *Mississippi*, 30 Miss. 492; *Tennessee*, 6 Humph. 433; *Maine*, 23 Me. 381; and *Virginia*. At common law, in cases of homicide the civil remedy is merged in the public punishment; 1 Chit. Pr. 10. See *INJURIES*; *MERGER*; Bish. Cr. L. § 287.

CIVIL RIGHTS. A term applied to certain rights secured to citizens of the United States by the 13th and 14th Amendments to the constitution, and by various acts of congress made in pursuance thereof.

The act of April 9, 1866, provided that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are citizens of the United States; that such citizens of every race and color shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, etc., and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and be subject to like punishment, etc., and none other. This act is constitutional; 1 Abb. U. S. 28; 1 Am. L. T. 7; and must be liberally construed; 1 Abb. U. S. 28.

It is substantially replaced by the 14th Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

This provision applies to white as well as colored persons, and is intended to protect them against the action both of their own state and of other states in which they may happen to be. It renders void an act of a state legislature which gives to a few persons the sole right to carry on stockyards near New Orleans; 16 Wall. 36. A statute of West Virginia provided that juries should be composed of "white male citizens" etc. Held, that the object of this amendment was to prevent any discrimination between whites and blacks, and this statute was therefore invalid; 90 U. S. 303. But where a statute of Virginia did not in terms exclude negroes from juries, but entrusted the selection of jurymen to the county judge, who habitually excluded negroes in his selection, it was held that his conduct was a gross violation of the act of congress of March, 1875, which prohibits such discrimination, but that it was not such a denial of the rights of negroes as is contemplated by the statutes for the removal of such causes to the federal courts; a mixed jury in any particular case is not provided for in the act; but it is the right of every colored man that in the selection of jurymen to pass upon his life, etc., negroes shall not be, *by law*, excluded on account of their race; 100 U. S. 313; 17 Alb. L. J. 111. See 45 La. Ann. 903.

The provision of the act of March 1, 1875, that no person possessing all other qualifications required by law shall be disqualified from jury service in any state on account of race, color, or previous condition of servitude, and imposing a penalty upon any officer who shall not comply with its provisions, is constitutional; 100 U. S. 339.

Where equally good public schools are

provided for white and colored children, a provision that the two races shall attend different schools is not contrary to the 14th Amendment; 3 Woods 177; 70 Miss. 477; (but an act establishing a uniform system of common schools for colored children and excluding them from any share in the common school-fund was held to be a violation of the 14th Amendment of the constitution of the United States; 83 Ky. 49.) So of the separation of white and black persons in public conveyances, when appropriate, though distinct, quarters are provided for each; 9 Cent. L. J. 206; 114 Mo. 88; 45 La. Ann. 80; 109 U. S. 8; 62 Fed. Rep. 46; so with the rules of a theatre reserving certain sections for whites, while allowing black persons to occupy others; 111 Mo. 303; but to require colored persons to occupy particular seats in a theatre was held to be a violation of the Act, Ill. June 10, 1885, declaring the right of colored persons to "full and equal enjoyment of the accommodations" of theatres, etc.; 30 Ill. App.; aff. 128 Ill. 287. These amendments were designed to secure rights of a civil and political nature only, but not social or domestic rights; a state law forbidding marriages between whites and blacks does not contravene these provisions; 59 Ala. 57; 3 Woods 367; 3 Hughes 9; 30 Gratt. 608. A state law punishing more severely adultery between a white and a negro is valid; 58 Ala. 190; 106 U. S. 583. So is one declaring null and void marriages between whites and negroes; 1 Woods 537. A barber shop cannot discriminate against a colored person and deny him any rights therein to which a white person would be entitled if requiring the services of a barber; 25 Neb. 674.

A state is not prohibited by the 14th Amendment from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject matter, amount, or penalties of their respective judgments; 101 U. S. 22.

A law in Maine that no person shall recover damages from any municipality for injuries caused by a defective highway, if he is a resident of a place by the laws of which such actions will not lie, is invalid under the 14th Amendment; 69 Me. 278.

The right to sell liquor is not one of the rights of citizens protected by the 14th Amendment; 18 Wall. 129. The constitutionality of statutes prohibiting the transaction of business or engaging in the ordinary secular avocations on Sunday is unquestioned; 33 Barb. 548; 4 Ired. 400; 40 Ala. 725; 81 La. Ann. 663; 33 Ind. 201.

Negroes born within the United States are entitled to vote under the 14th Amendment, and are protected therein by the act of May 81, 1870; 2 Bond 389.

This amendment does not add to the privileges and immunities of citizens, but only protects those which they already have. It does not entitle women to vote in the various states; 21 Wall. 162; 1 McArth. 169; 11 Blatch. 200. It does not prohibit a state from passing laws to regulate the charges of warehousemen in their business; 94 U. S. 113; nor a state law forbidding the carrying of dangerous weapons; 153 U. S. 535.

See also 17 Wall. 446; U. S. Rev. Stat. §§ 1977, 1978, 1979, 1980; article in 1 So. L. Rev. 192.

CIVIL SERVICE. The executive branch of the public service as distinguished from the military, naval, legislative, and judicial. In England, it is applied generally to all duties paid for by the state other than those relating to military or naval matters. 6 A. & E. Ency. L. (2nd ed.) 88. See CIVIL SERVICE ACT.

CIVIL SERVICE ACT. The act of congress, passed in 1883, providing for the appointment of commissioners to constitute the United States Civil Service Commission, and regulating the duties of such commissioners. 6 A. & E. Ency. L. (2nd ed.) 89. See CIVIL SERVICE.

CIVIL WAR. War is either international or civil, foreign or domestic. In-

urrection, however violent or formidable, is not war. "Civil war" is preceded by insurrection, which becomes magnified and matured into war in the legitimate sense. And when so characterized, the parties are belligerents, and respectively entitled to belligerent rights. The American Revolution of '76 commenced in insurrection. But the insurgent colonies soon became belligerent states. By the Declaration of Independence civil war was inaugurated, as often and authoritatively recognized and adjudged. After that transforming event, the American resistance was rebellion no longer, but war. 1 Duvall (Ky.) 234.

CIVILIAN. One who follows civil pursuits as distinguished from military, naval or clerical. Stand. Dict. A doctor, professor, or student of the civil law.

Includes discharged soldiers, discharged military prisoners, and rejected applicants for enlistment; applicants for enlistment, provisionally accepted, but subject to final examination and not sworn in. 249 U. S. 358-360. See TROOPS OF THE UNITED STATES.

CIVILITER. Civilly: opposed to *criminaliter*, or criminally.

When a person does an unlawful act injurious to another, whether with or without an intention to commit a tort, he is responsible *civiliter*. In order to make him liable *criminaliter*, he must have intended to do the wrong; for it is a maxim, *actus non facit reum nisi mens sit rea*. 2 East 104.

CIVILITER MORTUUS. Civilly dead. In a state of civil death.

In New York one sentenced to life imprisonment in the state prison is *civiliter mortuus*; 4 Johns. Ch. 228; 6 id. 118.

CIVIS (Lat.). In the Roman Law. A citizen as distinguished from *incola*, an inhabitant; origin or birth constituting the former, domicile the latter. Burrill; Code, 10, 40, 7; Phill. Law of Dom., 25, 26. See INCOLA.

CIVITAS (Lat. from *civis*, a citizen). In the Roman Law. Any body of people living under the same laws; a state. Burrill. Citizenship; one of the three status, conditions or qualifications of persons. *Id.*; 1 Mackeld. Civ. Law, 129, § 119.

In Old Eng. Law. A city. By *civitas* is properly meant the inhabitants (*incolae*); *urbs* includes the buildings. But the one is commonly taken for the other. *Id.*; Co. Litt. 109 b.

A city (*civitas*) and a town (*urbs*) differ in this, that the inhabitants (*incolae*) are called the city, but town includes the buildings. R. & L. Dict.; Co. Litt. 409. See CIVIS.

CIVITATES FOEDERATAE. Towns in alliance with Rome, and considered to be free. Burrill; Butl. Hor. Jur. 29.

CLAIM. A challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant. Plowd. 359. See 1 Dall. 444; 12 S. & R. 179.

The owner of property proceeded against in admiralty by a suit *in rem* must present a *claim* to such property, verified by oath or affirmation, stating that the claimant by whom or on whose behalf the claim is made, and no other person, is the true and *bona fide* owner thereof, as a necessary preliminary to his making defence; 2 Conkl. Adm. 201-210.

A demand entered of record of a mechanic or material man for work done or material furnished in the erection of a building, in Pennsylvania and some other states.

The assertion of a liability to the party making it to do some service or pay a sum of money. See 16 Pet. 539.

The possession of a settler upon the wild lands of the government of the United States; the lands which such a settler holds possession of. The land must be so marked out as to distinguish it from adjacent lands; 10 Ill. 273. Such claims are considered as personalty in the administration of decedents' estates; 8 Ia. 463; are proper subjects of sale and transfer; 1 Morr. 70, 80, 312; 8 Ia. 463; 5 Ill. 531; the possessor being required to deduce a regular title from the first occupant to maintain ejectment; 5 Ill. 531; and a sale furnishing suffi-

cient consideration for a promissory note; 1 Morr. 90, 438; 1 Ia. 23. An express promise to pay for improvements made by "claimants" is good, and the proper amount to be paid may be determined by the jury; 2 Ill. 532. See PLACER CLAIM.

CLAIM BOND. See CLAIM PROPERTY BOND.

CLAIM OF CONUSANCE. In Practice. An intervention by a third person demanding jurisdiction of a cause which the plaintiff has commenced out of the claimant's court. Now obsolete. 2 Wils. 409; 3 Bla. Com. 298. See COGNIZANCE.

CLAIM PROPERTY BOND. A bond which may, in some states, be given by a defendant in replevin, which enables him to retain the property until the question of ownership and right of possession can be determined by the suit. Analogous to the forthcoming or delivery bond (*q. v.*) in attachment proceedings or in executions. Known also as "claim bond," "defendant's property bond." Shinn, Replevin, p. 375.

CLAIMANT. In Admiralty Practice. A person authorized and admitted to defend a libel brought *in rem* against property; thus, for example, Thirty heads of sugar. Bentzon, Claimant v. Boyle, 9 Cra. 191.

CLAIMS. See FRENCH SPOILIATION CLAIMS.

CLAMOR (Lat.). A suit or demand; a complaint. Du Cange; Spelman, Gloss.

In Civil Law. A claimant. A debt any thing claimed from another. A proclamation; an accusation. Du Cange.

CLARE CONSTAT (Lat. it is clearly evident).

In Scotch Law. A deed given by a mesne lord (subject-superior) for the purpose of completing the title of the vassal's heir to the lands held by the deceased vassal under the grantor. Bell, Dict.

CLAREMETHEN. In Old Scotch Law. The warranty of stolen cattle or goods; the law regulating such warranty. Skene; Black, L. Dict.

CLARENDON, ASSIZE OF. See ASSIZE OF CLARENDON.

CLARENDON, CONSTITUTIONS OF. The constitutions of Clarendon were certain statutes made in the reign of Henry II. of England, at a parliament held at Clarendon (A. D. 1164) by which the king checked the power of the pope and his clergy and greatly narrowed the exemption they claimed from secular jurisdiction.

Previous to this time, there had been an entire separation between the clergy and laity, as members of the same commonwealth. The clergy, having emancipated themselves from the laws as administered by the courts of law, had assumed powers and exemptions quite inconsistent with the good government of the country.

This state of things led to the enactment referred to. By this enactment all controversies arising out of ecclesiastical matters were required to be determined in the civil courts, and all appeals in spiritual causes were to be carried from the bishops to the prince, and from him to the king, but no further without the king's consent. The archbishops and bishops were to be regarded as barons of the realm, possessing the privileges and subject to the burdens belonging to that rank, and bound to attend the king in his councils. The revenues of vacant sees were to belong to the king, and goods forfeited to him by law were no longer to be protected in churches or church-yards. Nor were the clergy to pretend to the right of enforcing the payment of debts in cases where they had been accustomed to do so, but should leave all lawsuits to the determination of the civil courts. The rigid enforcement of these statutes by the king was unhappily stopped, for a season, by the fatal event of his disputes with Archbishop Becket. Fitz Stephen 27; 2 Lingard 59; 1 Hume 389; Wilkins 321; 4 Bla. Com. 422; 1 Poll. & M. 430-440, 461; 2 id. 196.

CLASS. A number of persons or things ranked together for some common purpose or as possessing some attribute in common.

The term is used of legatees; 3 McCord, Ch. 440; of obligees in a bond; 3 Dev. 284; and of other collections of persons; 17 Wend. 52; 16 Pick. 132; 77 Pa. 383; 1 Ld. Raym. 708.

CLASSES OF SAXONS. See HINDEN HOMINES.

CLASSIFICATION IN STATUTES.

Discrimination in law-making between persons and things of different classes, occupations, circumstances, etc. Consistent with the equality clause of the Fourteenth Amendment if based on reason and justice, and not merely arbitrary. Brannon, XIV Am. 323-325. See EQUAL PROTECTION OF THE LAWS; FOURTEENTH AMENDMENT.

CLAUSE. A part of a treaty; of a legislative act; of a deed; of a will, or other written instrument. A part of a sentence. See INTERPRETATION CLAUSE.

CLAUSULA DEROGATIVA. Derogatory clause (*q. v.*).

CLAUSUM. In Old English Law. Close. Closed.

A writ was either *clausum* (close) or *apertum* (open). Grants were said to be by *littera patentes* (open grant) or *littera clause* (close grant); 2 Bla. Com. 346.

A close. An enclosure.

Occurring in the phrase *quare clausum fregit* (4 Black. 181), it denotes in this sense only realty in which the plaintiff has some exclusive interest, whether for a limited or unlimited time or for special or for general purposes; 1 Chit. Pl. 174; 9 Cow. 89; 12 Mass. 127; 6 East 606.

CLAUSUM FREGIT. See QUARE CLAUSUM FREGIT; TRESPASS.

CLEAN HANDS. A phrase used in equity, the rule being that a plaintiff must come into court with "clean hands," or a clean record with respect to the transaction with the defendant though not necessarily with respect to a third person. 109 Ky. 595.

CLEAR. Free from indistinctness or uncertainty; easily understood; perspicuous, plain; free from impediment, embarrassment or accusation. Webster.

For a clear deed, see 8 W. & S. 563; clear title; 105 Mass. 409; clear of expense; 2 Ves. & B. 341; clear of assessments; 4 Yeates 386; clear days; 14 M. & W. 120; 3 B. & Ald. 581.

CLEARANCE. A certificate given by the collector of a port, in which it is stated that the master or commander (naming him) of a ship or vessel named and described, bound for a port named (and having on board goods described, in case the master requires the particulars of his cargo to be stated in such clearance), has entered and cleared his ship or vessel according to law.

This certificate, or clearance, evidences the right of the vessel to depart on her voyage; and clearance has therefore been properly defined as a *permission to sail*. The same term is also used to signify the act of clearing. Worcester, Dict.

The sixteenth section of the act of August 18, 1856 (R. S. § 4207), regulating the diplomatic and consular systems of the United States, makes it the duty of the collector of the customs whenever any clearance is granted to any ship or vessel of the United States, duly registered as such, and bound on any foreign voyage, to annex thereto, in every case, a copy of the rates or tariff of fees which shall be allowed in pursuance of the provisions of that act.

The act of congress of 2d March, 1799, section 93 (R. S. § 4197), directs that the master of any vessel bound to a foreign port or place shall deliver to the collector of the district from which such vessel shall be about to depart a manifest of all the cargo on board, and the value thereof, by him subscribed, and shall swear or affirm to the truth thereof; whereupon the collector shall grant a clearance for such vessel and her cargo, but without specifying the particulars thereof in such clearance, unless required by the master so to do. And if any vessel bound to any foreign place shall depart on her voyage to such foreign place without delivering such a manifest and obtaining a clearance, the master shall forfeit and pay the sum of five hundred dollars for every such offence; provided, that the collectors and other officers of the customs shall pay due regard to the inspection laws of the states in which they respectively act, in such manner that no vessel having on board goods liable to inspection shall be cleared out until the master or other person

shall have produced such certificate, that all such goods have been duly inspected, as the laws of the respective states do or may require to be produced to the collector or other officer of the customs; and provided, that receipts for the payment of all legal fees which shall have accrued on any vessel shall, before any clearance is granted, be produced to the collector or other officer aforesaid.

The 11th section of the act of February 10, 1820 (R. S. § 4200) provides that, before a clearance shall be granted for any vessel bound to a foreign place, the owners, shippers, or consignors of the cargo on board of such vessel shall deliver to the collector manifests of the cargo, or the parts thereof shipped by them respectively, and shall verify the same by oath or affirmation; and such manifests shall specify the kinds and quantities of the articles shipped by them respectively, and the value of the total quantity of each kind of articles; and such oath or affirmation shall state that such manifest contains a full, just, and true account of all articles laden on board of such vessel by the owners, shippers, or consignors respectively, and that the values of such articles are truly stated according to their actual cost or the values which they truly bear at the port and time of exportation. And, before a clearance shall be granted for any such vessel, the master of every such vessel, and the owners, shippers, and consignors of the cargo shall state, upon oath or affirmation, to the collector, the foreign place or country in which such cargo is truly intended to be landed; and the said oath or affirmation shall be taken and subscribed in writing.

According to Boulay-Paty, *Dr. Com. t. 2*. p. 19, the clearance is imperatively demanded for the safety of the vessel; for if a vessel should be found without it at sea it may be legally taken and brought into some court for adjudication on a charge of piracy. See SHIP'S PAPERS.

CLEARANCE CARD. A term used in railroad parlance to denote a letter, be it good, bad or indifferent, given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quitance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment. 174 Ill. 402.

CLEARING. In Mercantile Law. A method of making exchanges and settling balances, adopted among banks and bankers.

CLEARING-HOUSE. In Commercial Law. An office where bankers settle daily with each other the balance of their accounts.

The origin of the system is said to have been in Edinburgh; at least the bankers of that city so claim; but the earliest record of one (and that is not clear as to date) is that of London, founded in 1775, or possibly earlier. It was started in the ale-house of those times, the general resort of proprietors of new enterprises. The system, however, increased in usefulness so much as to require rooms, which were procured in Lombard Street, and a system was rapidly developed of exchanging checks and other securities to reduce the amount of actual money required for settlements. In this country such associations were established in New York in 1853, Boston in 1856, Philadelphia, Baltimore, and Cleveland in 1858, Worcester in 1861, Chicago in 1865, and since that date the number increased rapidly to thirty-one in 1884 (Boiles, *Proct. Bkg.*), and the system is now extended to most of the cities in which there are several banks. They also exist in Australia, France, Germany, Switzerland, Italy, and other continental countries of Europe. Most of these associations are unincorporated, but in Minnesota there is an act (Mar. 4, 1898) for their incorporation. The Clearing-house Association of New York consists of all the incorporated banks—private bankers not being admitted, as in Lon-

don. Two clerks from each bank attend at the clearing-house every morning, where one takes a position inside of a counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand parcels containing the checks on each of the other banks received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents—until, having walked around, they find themselves at their own desk again. At the end of this process the representative of each bank has handed to the representatives of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the clearing-house a balance in money. Balances are settled daily. In London the practice of presenting checks at the clearing-house has been held a good presentment to the banker at law. It is not usual to examine the checks until they are taken to the bank, and if any are then found not good they are returned to the bank which presented them, which settles such returned checks. In this country when a check is returned not good through the clearing-house, it is usually again presented at the bank.

To accomplish this purpose of settling daily balances was the original and still is the principal object of a clearing-house, whatever differences of method or detail may be found in different cities. The mode of proceeding in Philadelphia is described in 32 W. N. C. Pa. 358 and 63 Fed. Rep. 645; and that of London in 5 Mann. & G. 349; s. c. 6 Scott, N. R. 1; s. c. 12 L. J. C. P. 118.

The original purpose of a clearing-house—the exchange of paper payable by the several banks and the settlement of the daily balances between them—has undergone a gradual but very extensive expansion; and their operations have naturally given rise to much litigation, and many of the questions arising are not settled. In the larger cities they have become to some extent financial regulators and the medium through which in times of financial disturbance or stringency there is attained concerted action by the banks of a city. Such was the action of the New York and other clearing-houses in the period of financial distrust in 1893, in issuing to banks requiring them clearing-house certificates, representing the deposit of securities, and as available to the banks for settling clearing-house balances as currency or other money. The result was to make a practical increase in the circulation immediately available, flexible in its operations and readily withdrawn from circulation when no longer required.

Such certificates are held valid, and suit may be brought by the clearing-house committee upon notes included in the collateral deposited by a bank for the purpose of taking out certificates; 32 W. N. C. Pa. 183; 29 *id.* 139, 258. A clearing-house due bill is an ordinary due bill from a bank "to Banks," and usually stipulates that it is good when both signed and countersigned by duly authorized officers, and to be payable only through the clearing-house on the day after its issue. During the financial difficulties above referred to such due bills were used by the banks in payment of checks whenever practicable, being as available as cash for deposit in another bank of the same city. They are held not to be certificates of deposit but negotiable, and requiring indemnity to recover the amount due on them if lost or stolen; 16 Phila. 94.

A clearing-house association is properly sued in the names of the committee who have the entire control of its securities and business funds; 53 Fed. Rep. 746.

The tendency of the decisions upon the rights and liabilities of clearing-houses is to treat them with respect to the customs of the banks as merely instruments of making the exchanges, and not as liable to individual depositors or holders of paper for funds which have passed through the clearing-house in the process of exchange between banks. They are not responsible for anything except the proper distribution of money paid to settle balances, their purpose being to provide a convenient place where checks may be presented and balances adjusted; 118 Pa. 294. When a bank suspended after the morning exchanges but before the payment of the general balance due from it, which was made good by the other banks and applied by the clearing-house to the indebtedness of the suspended bank, it was held that the clearing-house was not liable to the holder of a draft on one of the other banks depos-

ited in the suspended bank, because the draft was never in the hands of the clearing-house for collection, nor did its manager hold the proceeds thereof with knowledge of the plaintiff's rights or of the existence of the draft until demand was made upon it; 32 W. N. C. Pa. 558.

The rules of a clearing-house have the binding effect of law as between the banks; 77 Hun 159; 118 Pa. 294; 81 N. J. L. 563; 35 La. Ann. 251; but do not affect the relations between the payee of a check presented through the clearing-house for payment, and the bank on which the check is drawn; 77 Hun 159.

The course of business of a clearing-house is based upon the idea that the members are principals (and trusted by each other as such), and not agents of parties not members, and this renders possible the volume of business transacted; 31 N. J. L. 563.

With respect to the effect of presentment at the clearing-house or failure to demand payment there, it has been held that presentation to the banker's clerk at the clearing-house was a presentation at the place of payment designated in a bill of exchange; 2 Campb. 596; that the failure to present a check at the clearing-house in violation of an imperative custom to do so does not discharge the drawer of the check as between the bankers and their customer; 1 Nev. & M. 541; and such failure to present is not material if presented in the ordinary way, even if the check was to have been paid if presented at the clearing-house, the latter being merely a substitute for ordinary presentation, authorized by custom but not required except as a substitute for the regular mode if that is omitted; 5 Mo. App. 444. Sending notes to a bank through the clearing-house is but leaving them there for payment during banking hours and not a demand at the bank for immediate payment; 139 Mass. 147.

The right of return of paper found not good secured by the rules of the clearing-house is a special provision in compensation for payment without inspection, with an opportunity for future inspection and recall of the payment. When the opportunity is had and not availed of, the general principles of law intervene to regulate the rights and liabilities of the paying bank; 106 Mass. 441; s. c. 8 Am. Rep. 849. The return of such paper after its receipt through the clearing-house is not prevented by its having been marked cancelled by mistake; 1 Campb. 426; 5 Mann. & G. 348; nor by putting it on a file and entering it in the journal; 118 Pa. 294; nor by failure to return by the time fixed by rule whether caused by mistake of fact; 129 Mass. 498; 101 *id.* 281; or not; *id.* 287; nor in such case if the bank had through mistake given credit to the depositor; 139 Mass. 513; but a rule of the Chicago clearing-house limiting the time of return was held to constitute a binding contract, and the right to recover back a payment made by mistake and discovered within fifteen minutes was denied and the Massachusetts rule criticised; 23 Fed. Rep. 179.

When there is no rule and no uniform custom, payment at the clearing-house is provisional, to become complete when payment is made in the ordinary course of business, and if not so made to be treated as payment under a mistake of fact, and with the same rights of reclamation as if made without a clearing-house; 132 Mass. 147. The rules may be waived; 7 Lans. 197.

A bank not a member, in sending checks through the clearing-house, is bound by its action under its rules in returning payment made by mistake; *id.*; but a bank not a member is not bound by the clearing-house rules as to the time of returning checks not good, in case of a check sent by it through a bank which was a member; such a case is governed by the ordinary principles applicable to it and not by the clearing-house rules; 31 N. J. L. 563.

When the drawee bank received a forged check through the clearing-house as genuine and failed to return it or to discover the forgery for several days, the bank which

took the check and sent it to the clearing-house could not be held liable for negligence in receiving it from a stranger and sending it through the clearing-house without notice; 30 Md. 11; s. c. 96 Am. Dec. 554.

In London there is also a railway clearing-house.

See Sewell; Boone; Paine; Gilbert, Banking; Byles, Bills; Pulling, Laws, etc., of London; Cleveland, Banking Laws of New York; Morse, Banks and Banking; 101 N. Y. 595; 25 L. R. A. 824, note.

CLEMENTINES. In Ecclesiastical Law. The collection of decretals or constitutions of Pope Clement V., which was published, by order of John XXII., his successor, in 1317.

The death of Clement V., which happened in 1314, prevented him from publishing this collection, which is properly a compilation as well of the epistles and constitutions of this pope as of the decrees of the council of Vienna, over which he presided. The Clementines are divided into five books, in which the matter is distributed nearly upon the same plan as the decretals of Gregory IX. See Dupin, *Bibliothèque*.

CLERGE. In Old Scotch Law. To clear or acquit of a criminal charge. Literally to cleanse or clean. Black, L. Dict.

CLERGY. The name applicable to ecclesiastical ministers as a class.

Clergymen were exempted by the emperor Constantine from all civil burdens. Baronius, *ad ann.* 319, § 80. Lord Coke says, 2 Inst. 3, ecclesiastical persons have more and greater liberties than other of the king's subjects, wherein to set down all would take up a whole volume of itself. In the United States the clergy is not established by law.

CLERGYABLE. In English Law. Allowing of, or entitled to, the benefit of clergy (*privilegium clericale*). Used of persons or crimes. 4 Bla. Com. 371. See BENEFIT OF CLERGY.

CLERICAL ERROR. An error made by a clerk in transcribing or otherwise. This is always readily corrected by the court.

An error, for example, in the teste of a *fi. fa.*; 4 Yeates 185, 205; or in the teste and return of a *vend. exp.*; or in a certificate of a notary; 13 So. Rep. (Ala.) 947; or where an action is begun by one plaintiff and is afterwards amended by adding additional parties, the entering of judgment in favor of "the plaintiff" instead of "the plaintiffs" is a clerical error and amendable on appeal; 49 Ill. App. 203; 1 Dall. 197; or in writing Dowell for McDowell; 1 S. & R. 120; 9 *id.* 284. See 8 Co. 162 a; 56 Fed. Rep. 570; 99 Cal. 621. An error is amendable where there is something to amend by, and this even in a criminal case; 2 Pick. 550; 1 Binn. 367; 12 Ad. & E. 217; for the party ought not to be harmed by the omission of the clerk; 3 Binn. 102; even of his signature, if he affixes the seal; 1 S. & R. 97.

CLERICUS (Lat.). In Civil Law. Any one who has taken orders in church, of whatever rank; monks. A general term including bishops, subdeacons, readers, and cantors. Du Cange. Used, also, of those who were given up to the pursuit of letters, and who were learned therein. Also of the amanuenses of the judges or courts of the king. Du Cange.

In English Law. A secular priest, in opposition to a regular one. Kennett, Paroch. Ant. 171. A clergyman or priest; one in orders. *Nullus clericus nisi causidicus* (no clerk but what is a pleader). 1 Bla. Com. 17. A freeman, generally. One who was charged with various duties in the king's household. Du Cange.

CLERICUS MERCATI HOSPITII REGIS. The clerk of the market at the king's gate. An honorable office pertinent to the ancient custom of holding markets in the suburbs of the king's court. In early times he witnessed the parties' verbal contracts. At a later date he adjudicated in its prices of commodities; he inquired as to all weights and measures; he measured land; and had the power to send bakers and others to the pillory. Inderwick, The King's Peace.

CLERICUS PACIS. See CLERK OF THE PEACE.

CLERK. In Commercial Law. A person in the employ of a merchant, who attends only to a part of his business, while the merchant himself superintends the whole. He differs from a factor in this, that the latter wholly supplies the place of his principal in respect to the property consigned to him. Pardessus, *Droit Comm.* n. 38; 1 Chit. Fr. 80.

In Ecclesiastical Law. Any individual who is attached to the ecclesiastical state and has submitted to the tonsure. One who has been ordained. 1 Bla. Com. 338. A clergyman. 4 Bla. Com. 367.

In Offices. A person employed in an office, public or private, for keeping records or accounts.

His business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs. Some clerks, however, have little or no writing to do in their offices: as the clerk of the market, whose duties are confined chiefly to superintending the markets. This is a common use of the word at the present day, and is also a very ancient signification, being derived, probably, from the office of the *clericus*, who attended, amongst other duties, to the provisioning the king's household. See Du Cange.

See COURT; EMPLOYEE.

CLERK OF ARRAIGNS. An assistant of the clerk of assize (*q. v.*). Byrne's L. Dict.

CLERK, ARTICLED. In England, a pupil to a solicitor under articles of agreement containing mutual covenants, binding the solicitor to teach and the articulated clerk to learn the business of a solicitor. R. & L. Dict.

CLERK OF ASSIZE. The principal officer attached to the assizes (*q. v.*), who takes charge of and reads the commission, and performs on the civil side duties analogous to those of a master (*q. v.*) of a court or an associate (*q. v.*), the corresponding duties on the Crown side being performed by the clerk of arraigns (*q. v.*). Byrne's L. Dict. See ASSIZES; COURTS OF ASSIZE AND NISI PRIUS.

CLERK OF THE COUNTY COUNCIL. See CLERK OF THE PEACE.

CLERK OF THE CROWN. In old English law, an officer in the Court of the King's Bench (*q. v.*), whose function was to frame, read and record all indictments against offenders there arraigned or indicted of any public crime. Jacob.

CLERK OF THE CROWN IN CHANCERY. The principal official of the Crown Office in Chancery (*q. v.*), that office now having been transferred to the High Court of Justice. He is an officer of Parliament, and of the Lord Chancellor in his non-judicial capacity, rather than an officer of the courts of law. His principal duties are to make out and issue writs of summons and election for both houses of Parliament, and to keep the custody of poll-books and ballot-papers. Nearly all patents passing the Great Seal, except those for inventions, are made out in his office, and he makes out the warrants for almost all letters-patent under the Great Seal. He also does the duties formerly performed by the Clerk of the Hanaper (*q. v.*), so far as such duties still exist, and is registrar of the Court of the Lord High Steward (*q. v.*). R. & L. Dict.

CLERK OF THE HANAPER, OR HAMPER. Formerly, an officer on the common law side of the Court of Chancery, who registered the fines that were paid on every writ, and saw that the writs were sealed up in bags, in order to be opened afterwards and issued, these writs and the returns to them having been originally kept in a hamper. The office was abolished in 1852, and the duties thereof transferred to the Clerk of the Crown in Chancery (*q. v.*). Byrne's L. Dict. See HANAPER.

CLERK OF THE PEACE, or **CLERICUS PACIS.** In old English law, a county officer appointed by the

Custos Rotulorum (*q. v.*), to keep the county records and to assist the justices of the peace (*q. v.*) in quarter sessions, not only in drawing indictments, entering judgments, issuing process, etc., but also in administrative business.

Now appointed and controlled by a joint committee of the county justices and the county council (*q. v.*), and known as clerk to the county council. He is chief officer of his council, is responsible for all the county records, and at quarter sessions discharges functions analogous to those performed by the clerk of assizes (*q. v.*) at assizes. *Byrne's L. Dict.*

CLERKSHIP. The period which must be spent by a law-student in the office of a practising attorney before admission to the bar. 1 *Tidd*, Pr. 61.

CLIENT. In Practice. One who employs and retains an attorney or counsellor to manage or defend a suit or action to which he is a party, or to advise him about some legal matters. See **ATTORNEY-AT-LAW**.

CLINK. See **PRIVILEGED PLACES**.

CLOSE. An interest in the soil. *Doctor & Stud.* 30; 6 *East* 154; 1 *Burr.* 133; or in trees or growing crops. 4 *Mass.* 266; 9 *Johns.* 113.

In every case where one man has a right to exclude another from his land, the law encircles it, if not already inclosed, with an imaginary fence, and entitles him to a compensation in damages for the injury he sustains by the act of another passing through his boundary—denominating the injurious act a breach of the inclosure; *Hamm. N. P.* 151; *Doctor & Stud. dial.* 1, c. 8, p. 30; 2 *Whart.* 430.

In considering the cases in which trespass might be supported for an injury to land, for breaking the close, it is laid down that the term *close*, being technical and signifying the *interest* in the soil, and not merely a close or inclosure in the common acceptance of that term. It lies however temporary the tenant's interest, and though it be merely in the profits of the soil as *vestura terre* or *herbagii pasture*; *Co. Litt.* 4 b; 5 *East* 480; 6 *id.* 606; 5 *T. R.* 535; *prima tonsura*; 7 *East* 200; chase for warren, etc.; 2 *Salk.* 687; if it be in exclusion of others; 2 *Bla. Rep.* 1150; 8 *M. & S.* 499. So it lies by one having a right to take off grass; 6 *East* 602; or after a tenancy expires to emblements; 9 *Johns.* 108; or one having the right to cut timber trees; 4 *Mass.* 266.

An ejection will not lie for a close; 11 *Co.* 55; *Cro. Eliz.* 235; *Ad. Ej.* 24. See **CLAUSUM**.

CLOSE COPIES. Copies which might be written with any number of words on a sheet. Office copies were to contain only a prescribed number of words on each sheet.

CLOSE HAULED. In Admiralty Law. This is a nautical term and means the arrangement of a vessel's sails when she endeavors to make progress in the nearest direction possible towards that point of the compass from which the wind blows. 6 *El. & Bl.* 771; *Black, L. Dict.*

CLOSE ROLLS. Rolls containing the record of the close writs (*littere clause*) and grants of the king, kept with the public records. 2 *Bla. Com.* 346.

CLOSE SEASONS. In England. The periods of the year during which it is forbidden to kill or take game, freshwater fish, sea fish, oysters, or as the case may be. The annual close season varies for different kinds of game, but the period March 1st to August 1st is included in the close seasons for all kinds of game, except hares. The period may vary according to the mode of capture adopted; thus, the time during which salmon are protected from capture by nets is always longer than the time during which it is forbidden to take them with rod and line. In addition to the annual close time,

there is also, in the case of salmon netting, a weekly close season, which is normally from noon on Saturday to 6 a. m. on Monday. Most kinds of game cannot be killed on Christmas Day or on Sunday, and the Wild Birds Protection Acts, 1880 to 1908, protect most species of birds between March 1st and August 1st; but these two periods of exemption are not technically close seasons. *Byrne*.

CLOSE THEREOF. Pertaining to Signing of Will. A subscription means a writing and a signature at its end. A statute requiring that the signature of the testator be placed at the end or "close thereof" is complied with although it precedes the date. 79 *Ky.* 607-614.

CLOSE WRITS. Writs directed to the sheriff instead of to the lord. 3 *Reeve, Hist. Eng. Law* 45. Writs containing grants from the crown to particular persons and for particular purposes, which, not being intended for public inspection, are closed up and sealed on the outside, instead of being open and having the seal appended by a strip of parchment. 2 *Bla. Com.* 346; *Sewall, Sher.* 372.

CLOSURE. See **CLOTURE**.

CLOTURE. The procedure in deliberative assemblies whereby debate is closed. Introduced in the English parliament in the session of 1832. *Wharton*. It is generally effected by moving the previous question. See *Roberts, Rules of Order* §§ 20, 58 a. This motion is not recognized in the senate of the United States.

CLOUD ON TITLE. See **BILL TO REMOVE CLOUD FROM TITLE**.

CLUB. A voluntary unincorporated association of persons for purposes of a social, literary, or political nature or the like. A club is not a partnership; 2 *M. & W.* 172; *Black, L. Dict.*

An organized association (*q. v.*) united for the promotion of some common purpose or object, either social, religious, benevolent, literary, scientific, or political. It may be either incorporated or unincorporated. 25 *A. & E. Ency.* 2nd ed., 1130.

The legal status of a voluntary unincorporated association depends mainly upon its objects and purposes. If it is organized for commercial purposes, and operated for pecuniary profit, it is no more than a mere partnership, and the rights and liabilities incident to that relation attach to its members. But societies and clubs, the objects of which are merely social, literary, scientific, or political are not partnerships. These organizations have no very definite legal status, and the courts have not attempted to formulate any general rules governing them. *Id.* pp. 1130, 1131.

CO-ADMINISTRATOR. One who is administrator with one or more others. See **ADMINISTRATOR**.

CO-ASSIGNEE. One who is assignee with one or more others. See **ASSIGNMENT**.

CO-EXECUTOR. One who is executor with one or more others. See **EXECUTOR**.

COADJUTOR. The assistant of a bishop. An assistant.

COADUNATIO. A conspiracy. 9 *Coke*, 58.

COAL. See **LUMP COAL**; **MINE RUN COAL**.

COAL NOTE. In English Law. A species of promissory note authorized by the stat. 3 *Geo. II. c.* 26, §§ 7, 8, which, having these words expressed therein, namely, "value received in coals," are to be protected and noted as inland bills of exchange.

COAST. The margin of a country bounded by the sea. This term includes the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified. Shoals perpetually covered with

water are not, however, comprehended under the name of coast. The small islands situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough to support the purposes of life, and are uninhabited, though resorted to for shooting birds, were held to form a part of the coast.

COCKET. A seal appertaining to the king's custom-house. *Reg. Orig.* 192. A scroll or parchment sealed and delivered by the officers of the custom-house to merchants as an evidence that their wares are customed. *Cowel*; *Spelman, Gloss.* See 7 *Low. C.* 116. The entry office in the custom-house itself. A kind of bread said by *Cowel* to be hard-baked; sea-biscuit; a measure.

CODE (*Lat. Codex*, the stock or stem of a tree—originally the board covered with wax, on which the ancients originally wrote). A body of law established by the legislative authority of the state, and designed to regulate completely, so far as a statute may, the subject to which it relates.

From the rude beginning, expressed in the derivation of the word, there developed the somewhat diversified signification which it has acquired in jurisprudence. It has been used to describe a collection of pre-existing laws arranged and classified into a logical system, or one intended to be such, without the interpolation of new matter, and also a declaration of the law composed partly of such materials as might be at hand from all sources,—statutes, adjudications, customs,—supplemented by such amendments, alterations, and additions as seemed to the lawgivers to be required to constitute a complete system and adapt it to the purpose of its adoption, or promulgation.

This mixed character, it may probably be asserted with confidence, is essential to the existence of a code as the term is now understood, and has entered more or less into the composition of every body of laws known as such in history.

The idea of a code involves that of the exercise of the legislative power in its promulgation; but the name has been loosely applied also to private compilations of statutes.

The subject of codes and the kindred topics of legal reform have received great attention from the jurists and statesmen of the present century. Probably no subject in the domain of law has been the occasion of more extended and earnest discussion than the relative merits of the Code system as it is understood by jurists, and that which is considered and treated on both sides of the controversy as its antithesis, a body of law partly written and partly unwritten, finding its beginnings in customs gradually ripening into customary law; seeking later expression in statutes and passing through a period of judicial interpretation and modification by being fitted, as it were, into successive cases, with sufficiently varying facts to produce that flexibility which is needed for final crystallization into a body of rules and principles sufficiently well settled as to have attained the dignity of a well ordered system. Of the one the Roman Law is the illustration unrivaled in history, as is the English Common Law of the other. While, however, these do represent two distinct and well defined systems of the development of law, the thoughtful and impartial reader of what is written by the ardent advocates of each, assuming as many of them do that the adoption of the one is the exclusion of the other, may find himself inclining to the conclusion that in dealing with this as with most juridical questions, an entirely one-sided view will leave much to be desired. It may be permissible to question whether these two systems are essentially distinct and antagonistic types, or different methods employed in and essential to the evolution of municipal law as a whole, and of the science of jurisprudence in its widest sense. It is true that there are recorded in history proposals to form a code of laws *de novo* having relation only to the future and disregarding the past, but this has been properly regarded as the visionary dream of the enthusiast rather than the matured conclusion of a judicious lawgiver. It is hardly to be questioned that no code has ever taken its place as an instrument of legal administration into which there did not enter as a substantial constituent a body of existing common law, and that every body of unwritten law on a given subject tending towards ultimately finding its expression in what is tantamount to a code, whether called by that name or not. Indeed, if dry technicalities of definition be avoided, it is hardly an exaggeration to say that there are single decisions of English or American judges, such, for example, as *Cogges v. Beauchamp*, which may not be inaptly termed a code or codification of the law on the subject to which they relate, and which come to be recognized as such with authority which could hardly be increased by legis-

lative affirmation. The difficulty of making a hard and fast line between the two systems is quite well shown by all the attempts to define precisely the word code. A very judicious writer, after a review of the historical codes, concludes that substantially they are of three kinds; and his classification is not only satisfactory in itself but admirably illustrative of that line.

"First.—The classification of statutes of force systematically arranged, according to subject-matter, without amendment, alteration, or interpolation of new law, the only change being in the correction of errors of expression, repetitions, superfluities, and contradictions, which are as small a space as possible, which, when done, will leave the laws in letter and in spirit just as they were.

"Second.—The same as the first in form, but going further and making such amendments as are deemed necessary to harmonize and perfect the existing system.

"Third.—To take a yet greater latitude, and, without changing the existing system of laws, to add new laws, and to repeal old laws, both in harmony with it, so that the code will meet present exigencies, and so far as possible provide for the future; and this is real codification." To these accurate statements the writer adds a fourth, "wholly impracticable and even visionary," which is "to disregard all existing laws, and make a system substantially new," such as the author deems best and wisest. (Paper of Judge Clark, Rep't Ga. St. Bar, 1890.)

There is unquestionably a strong tendency towards codification in a general sense, which manifests itself in the tendency to general revisions of federal and state statutes, the adoption of codes of procedure by name in several of them, and the thorough revision of the common law. The codes of India, and not the least in the growing interest in an active discussion of the subject. If this interest leads to action wisely tempered with a due regard for the proper functions of written and unwritten law, and freedom from extreme views and the effort to accomplish the impossible task of reducing all law to the unyielding forms of statutory enactment, it will undoubtedly be fruitful of good results.

When it is considered how rapidly statutes accumulate as time passes, the great convenience will be found in having the statute law in a systematic body, arranged according to subject-matter, instead of leaving it unorganized, scattered through the volumes in which it was from year to year promulgated. Revision to this extent is very frequent, and is what is usually accomplished in the Revised Statutes of many states which are inartificially termed codes. Of this general character were the Revised Statutes of the United States; *infra*. When the transposition of the statutes from a chronological to a scientific order is undertaken, the judicial character of common law is proposed themselves. These are of two classes: first, amendments for the purpose of harmonizing the inconsistencies which such an arrangement brings to notice, and supplying defects; second, the introduction into the system of all other laws which are recognized as unwritten or common law of the state. The object of the latter class of changes is to embody in one systematic enactment all that is thenceforth to be regarded as the law of the land. It is this attempt which is usually intended by the distinctive term codification.

The first two of the questions thus indicated may be deemed as settled, by general concurrence, in favor of the expediency of such changes; and the process of the collection of the statute law in one general code, or in a number of partial codes of systematic arrangement, is by the amendment of the statute, which such a revision invites, is a process which for some years has been renovating the laws of England and the United States. Although at the same time something has been done, especially in this country, towards embodying in these statutes principles which were before the common law, the common report law, yet the feasibility of doing this completely, or even to any great extent, must be deemed an open question. It has been discussed with great ability by Bentham, Savigny, Thibaut, and others. It is undeniable that, however successfully a code may be superadded to the common law, and declared law, so as to supersede previous sources, it cannot be expected to provide prospectively for all the innumerable cases which the diversity of affairs rapidly engenders, and there must soon come a time when it must be studied in the light of numerous explanatory decisions.

Real codification involves the most intimate and exhaustive knowledge not only of the statute law to be included, but also of the judicial interpretation and construction of it, and from the moment of the adoption of a code it begins to be the subject of a new series of decisions which are required to interpret, modify, and explain it and adapt it to modern conditions and the facts of cases of new impression, as is and always has been the case with respect to the adaptation of the ancient rules of the common law to modern conditions. In doing this the necessity for close opportunity of judicial legislation are infinite, and with the multiplicity of courts and jurisdictions the difficulties of preserving a system founded on reason are far greater than they were even a very few years ago. And this consideration is strongly urged in favor of the code system. On the other hand, the common law, and its servant, which was founded on such relations as the coachman and the blacksmith's striker, should have been applied with so little friction to the railroad and the factory, is hardly less wonderful than the development of the common carrier of the post road and van to the telephone company, and these rapid transformations may serve as the basis of an argument that no civil code can be framed with sufficient wisdom to provide for the constantly changing conditions of life and business.

In addition to the considerations herein mentioned as bearing upon the subject, the lord chief justice of England, in his address before the American Bar Association (Report 1896), in disapproving of the proposal to codify international law, mentions and illus-

trates a very fundamental objection to the codification of branches of the law not yet definitely reduced to fixed rules. His observations approach very nearly the suggestion of a striking and effective limitation of the extent to which codification should go beyond the scientific revision of statute law, and in the direction of including law settled by decision and not by statute. Some branches of the law are admirably adapted to complete codification, some others are not yet, and others again by their nature never can or will be.

The discussions on this subject have called attention to a subject formerly little considered, but which is of fundamental importance to the successful preparation of a code—the matter of statutory expression. There is no species of composition which demands more care and precision than that of drafting a statute. The writer needs not only to make his language intelligible, he must make it incapable of misconstruction. When it has passed to a law, it is no longer his intent that is to be considered, but the intent of the words which he has used; and that intent is to be ascertained under the strong pressure of an attempt of the advocate to win whatever possible construction may be most favorable to his cause. The true safeguard is found not in the old method of accumulating synonyms and by an enumeration of particulars, but rather—as is shown by those American codes of which the Revised Statutes of New York and the revision of Massachusetts are admirable specimens—by concise but complete statement of the full principle in the fewest possible words, and the elimination of description and paraphrase by the separate statement of necessary definitions. One of the rules to which the New York revisers generally adhered, and which they found of very great importance, was to confine each section to one proposition. In this way the intricacy and obscurity of the old statutes were largely avoided. The reader who wishes to pursue this interesting subject will find much that is admirable in Coode's treatise on Legislative Expression (London, 1840) (referred to in Bright's Fudon's Digest, Penna.). The larger work of Gael (Legal Composition, London, 1840) is more especially adapted to the wants of the English profession.

GREAT BRITAIN. There has not been in England any general codification in the modern sense.

There were some early English so-called codes which were of the former character. The first code in England appears to have been about the year 600 by Athelbert, king of the Kentings. His reign overlaps the reign of Justinian. His laws have come down to us only in a copy made after the Norman Conquest. They consist of ninety brief sentences. In the end of the 7th century the west Saxons had written laws,—the laws of Ine. The next legislator we come down to is Alfred the Great, about two centuries later. Later came the code of Canute. 1 Social England 165.

These are merely of historical interest. But in recent years there has been in England as elsewhere an interest in the subject of the arrangement, classification, and simplification of the law which found expression not only in words but in legislative action. The necessity for some reform, and the conditions which have forced the subject upon the attention of the English Bar and Parliament, are well expressed by Mr. Crackanthorpe in his recent address before the American Bar Association (Report, 1896):—

"We have in our libraries a number of monographs, dealing with the subjects Law in the most minute detail—books on Torts and Contracts, on Settlements and Wills, on Purchases and Sales, on Specific Performance, on Negotiable Instruments, and so forth. We have also many valuable compendia, or institutions, treatises, dealing with the Law as a whole. Each and all of these, however, bear witness to the disjointed character of our Jurisprudence. The numerous monographs overlap and jostle each other, like so many rudderless boats tossing at random on the surface of a wind-swept lake, while the bulky institutions, treated in their endeavor to be exhaustive, fail in point of logical arrangement, just as a vessel overlaid with a mixed cargo fails to get it properly stowed away in the hold. Some day, perhaps, we shall produce a Corpus Juris which will reduce our legal wilderness to order, and, by grubbing the decaying trees, enable us to discover the living forest. We have already digested with success portions of our civil law, notably that relating to bills of exchange and a part of that relating to partnership and trusts. These experiments are likely to be renewed from time to time, and I doubt not that ultimately we shall have a code as complete as that which has just been promulgated in Germany. At present we have not even a criminal code such as you have in the State of New York and as is to be found in most continental countries, all that has been done in that direction being to patch up our statutes dealing with larceny and a few other common offences."

In addition to those mentioned the partial codes thus far adopted in England include the Bills of Sale Act, the Employers' Liability Act, and others, and the India code is the result of a very successful effort to codify specific titles of the common law, and it is now constantly referred to in

common-law jurisdictions as the best considered expression of the rules of the common law on subjects covered by it at the time of its adoption. In addition to the partial or special English codes referred to, the course which the discussion upon codification has taken in that country has led to the systematic collection and revision of statutes upon particular subjects. Under the direction of Lord Cairns, the statutes of England from 1 Henry III. have been systematically revised by a committee, and published as the "Revised Statutes." Eighteen volumes have been published, bringing the work down to 1878.

In other British dependencies there have been movements in the direction of codification more pronounced in some instances than those in England. In Hong Kong and at the Straits Settlements codes of civil procedure were adopted on the lines of the New York code, which was also utilized in the Indian code.

The English Judicature Act of 1873 accomplished many of the reforms in the line of simplification which were aimed at in the New York code and those which followed it in the United States. Among other things, it provided for one civil action to take the place of the different actions of common law and the suits in equity; it provided for bringing actions in the name of the real party in interest and as many of them as had an interest, and against all against whom relief was claimed; for a decision according to the rules of the common law and equity, the latter to prevail when there was a conflict; it specified that the pleadings should be the statement of claim or complaint, the answer or defence, and the reply; that the trial should be by court, or jury, or referee.

This Judicature Act has been adopted by Victoria, Queensland, South Australia, Western Australia, Tasmania, New Zealand, Jamaica, St. Vincent, The Leeward Islands, British Honduras, Gambia, Grenada, Nova Scotia, Newfoundland, Ontario, and British Columbia. 35 Am. L. Reg. & Rev. n. s. 341.

UNITED STATES. In this country the subject has received no less attention and presented obstacles of less magnitude. Codes and revisions have been enacted as follows:

The Revision of Federal Statutes in 1873, which went into effect June 22, 1874, was by act of congress declared to constitute the law of the land; the pre-existing laws were thereby repealed, and ceased to be of effect. By subsequent acts of congress, certain errors in this revision were corrected. A new edition of the Revision of 1873 was authorized by acts of March 2, 1877, and March 9, 1878; this is not a new enactment, but merely a new publication; it contains a copy of the Revision of 1873, with certain specific alterations and amendments made by subsequent enactments of the 43d and 44th congresses, incorporated according to the judgment and discretion of the editor, under the authority of the acts providing for his appointment. These alterations, or amendments, were merely indicated by italics and brackets. The act of March 9, 1878, provides that the edition of 1878 shall be legal evidence of the laws therein contained in all the courts of the United States, and of the several states and territories, "but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by congress since the first day of December, 1878."

The supplement of 1881 is official to a limited extent. The provisions in regard to it are as follows: "The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States, and of the several states and territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by congress.—*Provided*, that nothing herein contained shall be construed to change or alter any existing law;" 21 Stat. L. 938. See *Wright v. U. S.*, 15 Ct. of Cl. 80, where the subject is explained by Richardson, J., one of the compilers. Volume I. Supplement to the Revised Statutes, contains all the permanent general laws enacted from the passage of the Revised Statutes in 1874, to and including the fifty-first congress, which expired in 1891, and supersedes Vol. I., prepared under resolution of June 7, 1880. The publication is *prima facie* evidence of the laws therein contained in all of the courts of the United States. Vol. II. of the Supplement contains the general laws of the fifty-second and subsequent

congresses.

COLONIAL CODES. Of these there were several adopted in the colonies prior to the Revolution.

In 1665 a code prepared by Lord Chancellor Clarendon, called the "Duke's Laws," was promulgated and went into operation at Long Island and West Chester, New York. Afterwards its provisions slowly made their way in New York and the other provinces.

It was an attempt to state the law relating to the rights of persons and property, and of procedure both civil and criminal.

The Massachusetts colony, in March, 1634, appointed a committee to revise the law. Other committees were appointed in 1635 and 1637. Maryland adopted a code in 1639. In Massachusetts in 1641, a code of laws was adopted which was called "The Liberties of the Massachusetts Colony in New England." Connecticut adopted a code in 1650, chiefly copied from the Massachusetts code. Virginia appears to have adopted a body of laws in 1611, and in 1656 their laws were reduced into one volume.

STATE CODES. New York is the pioneer in the work of codification. In that state the first act relating to procedure after the organization of state government was passed March 16, 1778. Various other acts were passed between 1801 and 1813. In 1813 there was a general revision of the law, and the subject of practice of the law. In 1828 the revisers collected into one act the various provisions relating to practice in all the courts which was made a part of the Revised Statutes. It is said that this part of the Revised Statutes constituted the first code of civil procedure in New York. It embraced nearly all the practice in all the courts and has been the basis of subsequent code revision. In 1848 the "Code of Procedure" was adopted. Mr. David Dudley Field, the eminent writer on this subject, had begun his work on law reform in 1839.

In Louisiana, the civil law prevails and there are complete codes framed thereunder. One feature of the Louisiana code should be carefully noted. It assumes that cases not anticipated may occur. Art. 21 declares that "in all civil matters where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent." This code was adopted in 1824 and took effect in 1825, the revision of 1870 being the same code, with the slavery provisions omitted, and with such amendments as had previously been made. It is said that the power above quoted has never been exercised except to furnish a remedy or mode of procedure.

FOREIGN COUNTRIES. On the continent of Europe the systems of law are generally founded upon the civil law, and each country has its own code, which is usually an adaptation in whole or in part of Roman Law. These codes are different in character, falling within sometimes one and sometimes another of the classes above enumerated, as they were intended to be scientific collections and classifications of existing law or to include new legislation.

The modern codes of Europe were preceded by periods of codification, such as that which Maine designates the "era of codes," in which, throughout the world, so far as the sphere of Roman and Hellenic influence extended, there appeared codes of the class of which The Twelve Tables is the conspicuous example; Maine, *Anc. L.* 2, 13; and the many codes of the Middle Ages based upon Roman law modified by local customs. There were also a great number of codes of maritime law, which in its nature was, and still is, well adapted to this exact form of expression, many of which are collected in the Black Book of the Admiralty (*q. v.*), which has been said to contain all maritime codes known at the time. Below are briefly referred to the best known historic codes, ancient and modern.

AUSTRIAN. The Civil Code was promulgated July 7, 1810, under Joseph II. (1786).

The first part of it was published and submitted to the Universities and the courts of justice, and some parts having been found wholly unsuited to the purpose, were by his successor abrogated. It is founded in a great degree upon the Prussian. The Penal Code (1852) is said to adopt to some extent the characteristics of the French Penal Code.

The civil code originated in an ordinance issued by Maria Theresa in 1753, the avowed objects being to provide for uniformity of the law in the provinces and digest the existing law. The result was unsatisfactory and another commission authorized Counsellor Harten to construct a code, of which the conditions prescribed are quite worthy of repetition. They were:—1. To abstain from doctrinal development. 2. To have in view contestations of the most frequent occurrence. 3. To be clear in expression. 4. To be governed by natural equity rather than the principles of the Roman Law. 5. To simplify the laws and to refrain from too much subtlety in details.

BURGUNDIAN. *Lex Romana*, otherwise known in modern times as the *Papinian Responsorum*. Promulgated A. D. 517.

It was founded on the Roman law; and its chief interest is the indication which, in common with the other Barbaric codes, it affords of the modifications of jurisprudence under the changes of society amidst which it arose.

CONSOLATO DEL MARE. A code of maritime law of high antiquity and great celebrity.

Its origin is not certainly known. It has been ascribed to the authority of the ancient kings of Arragon; but there is some reason for maintaining the theory that it was gradually collected and handed down as a digest of all the principal rules and usages established among the maritime nations of Europe from the twelfth to the fourteenth century. Since it was first promulgated at Barcelona in the fourteenth century it has been enlarged from time to time by the addition of various commercial regulations. Its doctrines are founded to a large extent on the Greek and Roman law. It seems to have been originally written in the dialect of Catalonia; but it has been translated into every language of Europe, except English. It has had great weight in determining the maritime law of Europe. It comprised the ancient ordinances of the Greek and Roman emperors and of the kings of France and Spain, and the laws of the Mediterranean islands and of Venice and Genoa. It is referred to at the present day as an authority in respect to the ownership of vessels, the rights and obligations thereto, to the rights and responsibilities of master and seamen, to the law of freight, of equipment and supply, of jettison and average, and of ransom, and of prize. The edition of Pardessus, in his *Collection de Lois Maritimes* (vol. 2), is deemed the best. There is also a French translation by Boucher, Paris, 1808. The original printed edition was published at Barcelona, in 1494. See also, Reddie, *Hist. of Mar. Com.* 171; Marvin's *Leg. Bibl.*; J. Duer, *Ins.*; 7 N. A. Rev. 330.

FRENCH CODES. The chief French codes of the present day are five in number, sometimes known as *Les Cinq Codes*. They were in great part the work of Napoleon, and the first in order bears his name. They are all frequently printed in one duodecimo volume. These codes do not embody the whole French law, but minor codes and a number of scattered statutes must also be resorted to upon special subjects.

Code Civil, or *Code Napoléon*, is composed of thirty-six laws, the first of which was passed in 1803 and the last in 1804, which united them all in one body, under the name of *Code Civil des Français*.

The first steps towards its preparation were taken in 1800, but it was not prepared till some years subsequently, and was finally thoroughly discussed in all its details by the Court of Cassation, of which Napoleon was president and in the discussions of which he took an active part throughout. In 1807 a new edition was promulgated, the title *Code Napoléon* being substituted. In the third edition (1816) the old title was restored; but in 1832 it was again displaced by that of *Napoléon*.

Under Napoleon's reign it became the law of Holland, of the Confederation of the Rhine, Westphalia, Bavaria, Italy, Naples, Spain, etc. It has undergone great amendment by laws enacted since it was established. It is divided into three books. Book 1. Of Persons and the enjoyment and privation of civil rights. Book 2. Property and its different modifications. Book 3. Different ways of acquiring property. Prefixed to it is a preliminary title, Of the Publication, Effects, and Application of Laws in General.

One of the most perspicuous and able commentators on this code is Toullier, frequently cited in this work.

Code de Procédure Civil. That part of the code which regulates civil proceedings.

It is divided into two parts. Part First consists of five books: the first of which treats of justices of the peace; the second, of inferior tribunals; the third, of royal (or appellate) courts; the fourth, of extraordinary means of proceeding; the fifth, of the execution of judgments. Part Second is di-

vided into three books, treating of various matters and proceedings special in their nature.

Code de Commerce. The code for the regulation of commerce.

This code was enacted in 1807. Book 1 is entitled, Of Commerce in General. Book 2, Maritime Commerce. The whole law of this subject is not embodied in this book. Book 3, Failures and Bankruptcy. This book was very largely amended by the law of 28th May, 1838. Book 4, Of Commercial Jurisdiction—the organization, jurisdiction, and proceedings of commercial tribunals. This code is, in one sense, a supplement to the *Code Napoléon*, applying the principle of the latter to the various subjects of commercial law. Sundry laws amending it have been enacted since 1807. Pardessus is one of the most able of its expositors. See Gouland, *Code de Commerce*.

Code d'Instruction Criminelle. The code regulating procedure in criminal cases, taking that phrase in a broad sense.

Book 1 treats of the police; Book 2, of the administration of criminal justice. It was enacted in 1808 to take effect with the Penal Code in 1811.

Code Penal. The penal or criminal code.

Enacted in 1810. Book 1 treats of penalties in criminal and correctional cases, and their effects; Book 2, of crimes and misdemeanors, and their punishment; Book 3, offenses against the police regulations, and their punishment. Important amendments of this code have been made by subsequent legislation.

There is also a *Code Forestier*; and the name code has been inaptly given to some private compilations on other subjects.

GENTOO CODE. A translation of the laws of the Hindus made during the administration of Warren Hastings as Governor-General of India, and prior to the translation of the Institutes of Menu.

The formulation of Hindu law in those institutes (*q. v. supra*) had the same effect in India as had always resulted from the written expression of the law. There was gradually formed a new body of law consisting of decisions and opinions of learned men upon the construction of written law closely resembling the body of law which was engrafted upon the Institutes of Justinian. The translation of those laws in the Gentoo code was followed by a further digest under the authority of the English government, so that a very complete body of Hindu law grew up, which discloses a system of procedure resembling in a marked degree that of the present day, comprising—a complaint, a summons or citation, an appearance, a hearing of both parties, the presence of attorneys, and law of evidence and method of examining witnesses.

There seems also to have been in India in very early times a system of natural arbitration by neighbors, probably the earliest effort at an administration of justice and resembling the ancient county court of the Saxons. See Menu, *infra*.

GERMAN CODE. In the current which swept over Europe during the sixteenth century, substituting, as Professor Sohm phrases it, "the revived spirit of antiquity for mediæval conceptions and ideas," Germany participated in the changes which took place in all departments of science. Then the Roman law was "received" in that country, and from that time it has been a controlling factor in the jurisprudence of the countries which form the German Empire. In certain territorial limits over which the Prussian Landrecht (see PRUSSIAN CODE) held sway "the formal validity of the *Corpus Juris Civilis* has been expressly set aside," but even there "the force of Roman principles of law has nevertheless remained substantially unimpaired within large departments of German jurisprudence." Particularly is the science of the Roman private law imbedded in the German jurisprudence, and indeed the existence of law as a science in Germany dates from the introduction of the Roman law. There were no preconceived ideas with which to conflict, and it was accepted by a national intellect unprejudiced by any preconceived ideas. See Prussian Code, *infra*.

The completion of twenty-five years of the life of the Empire has been made the occasion of the construction and promulgation of a new German code which has been in the course of preparation for several years. It is an example for the most part of antecedent laws, though of an arrangement novel in various respects. The civil code, having passed the Reichstag and received the approval of the emperor, was duly promulgated August 19, 1896, to go into effect January 1, 1900, at the same time with other special codes, including those of Civil Procedure, Insolvency, Assignments, Arbitrations, and the like.

GREGORIAN. An unofficial compilation of the rescripts of the Roman emperors. It was made in the fourth century, and is not now extant.

The Theodosian Code, which was promulgated nearly a century afterwards, was a continuation of this and of the collection of Hermogenes. The chief interest of all these collections is in their relation to their great successor the Justinian Code.

HANSE TOWNS, LAWS OF THE. A code of maritime law established by the Hanseatic towns.

It was first published in German, at Lubeck, in 1507. In an assembly of deputies from the several towns, held at Lubeck, May 23, 1614, it was revised and enlarged. The text, with a Latin translation, was published with a commentary by Kuricke; and a French translation has been given by Cleirac in *Us et Coutumes de la Mer*. It is not unfrequently referred to on subjects of maritime law.

HENRI (French). The best-known of several collections of ordinances made during the sixteenth, seventeenth, and eighteenth centuries, the number of which in part both formed the necessity and furnished the material for the *Code Napoléon*.

HENRI (Haytien). A very judicious adaptation from the *Code Napoléon* for the Haytiens. It was promulgated in 1812 by Christophe (Henri I.).

HERMOGENIAN. An unofficial compilation made in the fourth century, supplementary to the code of Gregorius. It is not now extant.

JUSTINIAN CODE. A collection of imperial ordinances compiled by order of the emperor Justinian.

All the judicial wisdom of the Roman civilization which is of importance to the American lawyer is embodied in the compilation to which Justinian gave his name, and from which that name has received its lustre. Of these, first in contemporary importance, if not first in magnitude and present interest, was the Code. In the first year of his reign he commanded Tribonian, a statesman of his court, to revise the imperial ordinances. The first result, now known as the *Code Vetus*, is not extant. It was superseded a few years after its promulgation by a new and more complete edition. Although it is this alone which is now known as the Code of Justinian, yet the Pandects and the Institutes which followed it are a part of the same system, declared by the Institutes, and the three together form one codification of the law of the Empire. The first of these works occupied Tribonian and nine associates fourteen months. It is comprised in twelve divisions or books, and embodies all that was deemed worthy of preservation of the imperial statutes from the time of Adrian down. The Institutes is an elementary treatise prepared by Tribonian and two associates upon the basis of a similar work by Gaius, a lawyer of the second century.

The Pandects, which were made public about a month after the Institutes, were an abridgment of the Institutes and the commentaries of the lawyers. They were presented in fifty books. Tribonian and the sixteen associates who aided him in this part of his labors accomplished this abridgment in three years. It has been thought to bear obvious marks of the haste with which it was compiled; but it is the chief embodiment of the Roman law, though not the most convenient resort for the modern student of that law.

Tribonian found the law, which for fourteen centuries had been accumulating, comprised in two thousand books, or, in other words, in three million sentences. It is probable that this matter, if printed in law volumes such as are now used, would fill from three to five hundred volumes. The comparison, to be more exact, should take into account treatises and digests, which would add the bulk of the collection more than to the substance of the material. The commissioners were instructed to extract a series of plain and concise laws, in which there should be no two laws contradictory or alike. In revising the imperial ordinances, they were empowered to amend the substance as well as in form. The codification being completed, the emperor decreed that no resort should be had to the earlier writings, nor any comparison be made with them. Commentators were forbidden to disfigure the new with explanations, and lawyers were forbidden to cite the old. The imperial laws which had sufficed to sink into oblivion nearly all the previously existing sources of law; but the new statutes which the emperor himself found it necessary to establish, in order to explain, complete, and amend the law, rapidly accumulated throughout his long reign. These are known as the "Novels." The Code, the Institutes, the Pandects, and the Novels, with some subsequent additions, constitute the *Corpus Juris Civilis*.

Among English translations of the Institutes are that by Cooper (Phila. 1812; N. Y. 1841)—which is regarded as a good one—and that by Sanders (Bond. 1833), which contains the original text also, and copious references to the Digests and Code. Among the modern French commentators are Ortolan and Pasquiere.

LIVINGSTON'S CODE. Edward Livingston, one of the commissioners who prepared the Louisiana Code, prepared and presented to congress a draft of a penal code for the United States; which, though it was never adopted, is not unfrequently referred to in

the books as stating principles of criminal law.

MARINE ORDINANCES OF LOUIS XIV. See *ORDONNANCE DE LA MARINE, infra*.

MENU, INSTITUTES OF. A code of Hindu law, of great antiquity, which still forms the basis of Hindu jurisprudence (Elphinstone's Hist. of India, p. 53), and is said also to be the basis of the laws of the Burmese and of the Laos. Buckle, Hist. of Civilization, vol. 1, p. 54, note 70. "It undoubtedly enshrines many genuine observances of the Hindu race, but the opinion of the best contemporary orientalists is that it does not, as a whole, represent a set of rules ever actually administered in Hindustan." Maine, Anc. Law 16.

This code contains simple rules for regulating the trial of ordinary actions; the number and competency of witnesses and sufficiency of evidence; methods of procedure in court and the judgment and its enforcement. There is no indication of such an office as the attorney, as the judge is required to examine witnesses and parties; there is also a summary of the customary law.

The Institutes of Menu are in, point of the relative progress of Hindu jurisprudence, a recent production. Maine, Anc. Law 17; though assigned to the ninth century B. C. A translation will be found in the third volume of Sir William Jones's Works. See, also, Gentoo Code, *supra*; HINDU LAW.

MOSAIC CODE. The code proclaimed by Moses for the government of the Jews, B. C. 1491.

One of the peculiar characteristics of this code is the fact that, whilst all that has ever been successfully attempted in other cases has been to change details without reversing or ignoring the general principles which form the basis of the previous law, that which was chiefly done in this case was the assertion of great and fundamental principles in part contrary and in part perhaps entirely new to the customs and usages of the people. These principles, thus divinely revealed and sanctioned, have given the Mosaic Code vast influence in the subsequent legislation of other nations than the Hebrews. The topics on which it is most frequently referred to as an authority in our law are those of marriage and divorce, and questions of affinity and of the punishment of murder and seduction. The commentaries of Michaelis and of Wines are valuable aids to its study.

ORDONNANCE DE LA MARINE. A code of maritime law enacted in the reign of Louis XIV.

It was promulgated in 1681, and with great completeness embodied all existing rules of maritime law, including insurance. Kent pronounces it a monument of the wisdom of the reign of Louis "far more durable and more glorious than all the military trophies won by the valor of his armies." Its compilers are unknown. An English translation is contained in the appendix to Peter's Admiralty Decisions, vol. 2. The ordinance has been at once illustrated and eclipsed by Valin's commentaries upon it.

OLERON, LAWS OF. A code of maritime law which takes its name from the island of Oleron.

Both the French and the English claim the honor of having originated this code,—the former attributing its compilation to the command of Queen Eleanor, Duchess of Guienne, near which province the island of Oleron lies; the latter ascribing its promulgation to her son, Richard I. A recent English writer considers that the greater part of it is probably of older date, and was merely confirmed by Richard; 1 Soc. Eng. 313. The latter monarch, without doubt, caused it to be improved, if he did not originate it, and he introduced it into England. He did at Chillon, in 1190, issue ordinances for the government of the navy which have been fairly described as the basis of our modern articles of war, and what they did for the navy, the code of Oleron, to which they were allied, did for the mercantile service. The provisions of both are extremely interesting, and some of the most curious of them may be found in 1 Social Eng. 312. Some additions were made to this Code by King John. It was promulgated anew in the reign of Henry III., and again confirmed in the reign of Edward I. It is most accessible to the American profession in the translation contained in the appendix to the first volume of Peter's Admiralty Decisions. The French version, with Cleirac's commentary, is contained in *Us et Coutumes de la Mer*. The subjects upon which it is now valuable are much the same as those of the *Consolato del Mare*.

OSTROGOTHIC. The code promulgated by Theodoric, king of the Ostrogoths, at Rome, A. D. 500. It was founded on the Roman law.

PRUSSIAN CODE. *Allgemeines Landrecht*. The former code of 1751 was not successful, and the Grand Chancellor de Cocceji was charged by Frederick II. with the duty of codifying the law of Prussia; he died in 1735, and afterwards the work was arrested by the seven years' war, but was resumed in 1780, under Frederick II., and a project was prepared by Dr. Carmer and Dr. Vol-

mar, which was submitted to the *savans* of Europe and to the royal courts. After long and thorough discussion, the present code was finally promulgated and put in force June 1, 1794, by Frederick William, and then for the first time all Europe was united under one system of law. It is known also as the Code Frederic. See German code, *supra*.

RHODIAN LAWS. A maritime code adopted by the people of Rhodes, and in force among the nations upon the Mediterranean nine or ten centuries before Christ. There is reason to suppose that the collection under this title in Vinnius is spurious, and, if so, the code is not extant. See Marsh. on Ins. b. 1, c. 4, p. 15.

THEODOSIAN. A code compiled by a commission of eight, under the direction of Theodosius the Younger.

It comprises the edicts and rescripts of sixteen emperors, embracing a period of one hundred and twenty-six years. It was promulgated in the Eastern Empire in 428, and quickly adopted, also, in the Western Empire. The great modern expounder of this code is Gothofredus (Godefroid). The results of modern researches regarding this code are well stated in the Foreign Quar. Rev. vol. 9, 374.

TWELVE TABLES. Laws of ancient Rome, compiled on the basis of those of Solon and other Greek legislators.

They first appeared in the year of Rome 238, inscribed on ten plates of brass. In the following year two more were added; and the entire code bore the name of the Laws of the Twelve Tables. The principles they contained were the germ of the body of the Roman law, and enter largely into the modern jurisprudence of Europe. See fragment of the law of the Twelve Tables in Cooper's Justinian 656; Gibbon's Rome c. 44; Maine, Anc. Law 2.

VISIGOTHIC. The *Lex Romani*; now known as *Breviarum Alaricianum*. Ordained by Alaric II. for his Roman subjects, A. D. 506.

WISBURY, LAWS OF. A concise but comprehensive code of maritime law, established by the "merchants and masters of the magnificent city of Wisbury."

The port of Wisbury, now in ruins, was situated on the northwestern coast of Gotland, in the Baltic sea. It was the capital of the island, and the seat of an extensive commerce, of which the chief relic and the most significant record is this code. It is a mooted point whether this code was derived from the Laws of Oleron, or that from this; but the similarity of the two leaves no doubt that one was the offspring of the other. It was of great authority in the northern parts of Europe. *Lex Rhodia novellus* says Gratian, *pro jure gentium in illo mare Mediterraneo vigeat; sicut apud Gallum leges Oleronis, et apud omnes transrhodanos, legis Wisbureses*. De Jure B. lib. 2, c. 3. It is still referred to on subjects of maritime law. An English translation will be found in the appendix to the first volume of Peter's Admiralty Decisions.

In a learned address before the American Bar Association (Annual Report, 1886), upon "Codification, the Natural Result of the Evolution of the Law," Mr. Semmes, one of the most earnest advocates of the merits of the civil law and the code system, sketches the history of the codes of Europe and the relation of the civil to the common law. From this paper many of the historical facts connected with the European codes are obtained, and to it are referred those who wish to pursue the study of the subject for an admirable guide to the learning of the civilians and a judicious argument in favor of the system. Mr. Semmes in his conclusion says:—

"The history of codification teaches that the task of preparing a code of laws is difficult, that its proper execution is a work of years, to be entrusted, not to a decisions committee of fugitive legislators, but to a permanent commission of the most enlightened and cultivated jurists, whose project, prior to adoption, should be subjected to rigid and universal criticism."

See as to codification, Mathews, Codification (pamphlet); 14 Am. L. Rev. 232; 5 id. 1; 1 So. L. Rev. 2, 192; 6 id. 1; Outlines of an International Code, by David Dudley Field; 27 Law Mag. (Engl.) 8d ser. 312; Law Mag. & Rev. (1872) 963; 2 id. (1873) 420; 3 id. (4th ser. 1877-8) 259; 5 id. 59; see 4 id. 31; Mr. James C. Carter's pamphlet (N. Y., 1884); Rept. Am. Bar Assn. 1889.

See NEW CODE; OLD CODE.

CODÆX (Lat.). A volume or roll. The code of Justinian.

CODÆX REPETITÆ PRAELECTIONIS. See NEW CODE.

CODÆX VITUS. See OLD CODE.

CODICIL. Some addition to, or quali-

tification of, a last will and testament.

This term is derived from the Latin *codicillus*, which is a diminutive of *codex*, and in strictness imports a little code or writing,—a little will. In the Roman Civil Law, codicil was defined as an act which contains dispositions of property in prospect of death, without the institution of an heir or executor. Domat, Civil Law, p. ii. b. iv. tit. i. s. 1; Just. De Codic. art. i. s. 2. So, also, the early English writers upon wills define a codicil in much the same way. "A codicil is a just sentence of our will touching that which any would have done after their death, without the appointing of an executor." Swinb. Wills, pt. i. s. 5, pl. 2. But the present definition of the term is that first given. 1 Wills, Extra. 8; Swinb. Wills, pt. i. s. v. pl. 5.

Under the Roman Civil Law, and also by the early English law, as well as the canon law, all of which very nearly coincided in regard to this subject, it was considered that no one could make a valid will or testament unless he did name an executor, as that was of the essence of the act. This was attended with great formality and solemnity, in the presence of seven Roman citizens as witnesses, on the *exceptione majores*. Hence a codicil is there termed an unofficious, or unsolemn, testament. Swinb. Wills, pt. i. s. v. pl. 4; Godolph. pt. i. c. i. s. 2; id. pt. i. c. 6, s. 2; Plowd. 185; where it is said by the judges, that "without an executor a will is null and void," which has not been regarded as law, in England, for the last two hundred years, probably.

The office of a codicil under the civil law seems to have been to enable the party to dispose of his property, in the near prospect of death, without the requisite formalities of executing a will (or testament, as it was then called). Codicils were strictly confined to the disposition of property; whereas a testament had reference to the institution of an heir or executor, and contained trusts and confidences to be carried into effect after the decease of the testator. Domat, b. iv. tit. i. l.

In the Roman Civil Law there were two kinds of codicils: the one, where no testament existed, and which was designed to supply its place as to the disposition of property, and which more nearly resembled our *donatio causa mortis* than anything else now in use; the other, where a testament did exist, had relation to the testament and formed a part of it and was to be construed in connection with it. Domat, p. ii. b. iv. tit. i. s. i. art. v. It is in this last sense that the term is now universally used in the English law, and in the American states where the common law prevails.

Codicils owe their origin to the following circumstance. Lucius Lentulus, dying in A.D. 10, left codicils, confirmed by anticipation in a will of former date, and in those codicils requested the Emperor Augustus, by way of *fidei commissum*, or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by the advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 2. 26; Bowy. Com. 135.

All codicils are part of the will, and are to be so construed; 4 Bro. Ch. 55; 17 Sim. 108; 16 Beav. 510; 2 Ves. Sen. Ch. 242; by Lord Hardwicke; 4 Y. & C. Ch. 160; 2 Russ. & M. 117; 3 Sandf. Ch. 11; 4 Kent 531. See 88 Ala. 427; 43 Barb. 424; and executed with the same formalities; Shoul. Wills 359; 4 Kent 531; 18 Gray 108.

A codicil properly executed to pass real and personal estate, and in conformity with the statute of frauds, and upon the same piece of paper with the will, operates as a republication of the will, so as to have it speak from that date; 4 Pa. 376; 4 Dane Abr. c. 127, a. 1, § 11, p. 550; 14 B. Monr. 333; 1 Cush. 118; 3 M. & C. 359. So also it has been held that it is not requisite that the codicil should be on the same piece of paper in order that it should operate as a republication of the will; 1 Hill 590; 7 id. 346; 3 Zab. 447; 1 Ves. Sen. 442; 14 Mo. 537; but where it is on the same piece of paper, not signed, only the will proper which was signed should be admitted to probate; 9 Pa. Co. Ct. R. 333; but see 5 Har. & J. 371.

A codicil duly executed, and attached or referring to a paper defectively executed as a will, has the effect to give operation to the whole, as one instrument; Shoul. Wills 448; 3 B. Monr. 390; 6 Johns. Ch. 374, 375; 14 Pick. 543; 16 Ves. Ch. 167; 7 id. 98; 1 Ad. & E. 423; 85 Hun 580. See numerous cases cited by Mr. Perkins, Pigott v. Walker, 7 Ves. Ch., Summer ed. 98; 1 Cr. & M. 42.

There may be numerous codicils to the same will. In such cases, the later ones operate to revive and republish the earlier ones; 3 Bingh. 614; 12 J. B. Moore 2. See 55 Md. 365.

But in order to set up an informally executed paper by means of one subsequently executed in due form, referring to such informal paper, the reference must be such

as clearly to identify the paper; 4 N. Y. 140.

A codicil which depends on the will for interpretation or execution fails, if the will be revoked; 1 Tucker 436; 5 Bush 337.

It is not competent to provide by will for the disposition of property to such persons as shall be named in a subsequent codicil, not executed according to the prescribed formalities in regard to wills; since all papers of that character, in whatever form, if intended to operate only in the disposition of one's property after death, are of a testamentary character, and must be so treated; 2 Ves. Ch. 304; 2 M. & K. 765; 1 V. & B. 422, 445.

So much of the will as is inconsistent with the codicil is revoked; 14 How. 390; 23 Vt. 374.

A codicil whose only provision is the appointment of an executor who died, cannot be admitted to probate apart from the will; 148 Pa. 5. A testator executed a codicil which was described as "a codicil to my will executed some years ago." After his death the will could not be found, but probate of the codicil was granted; [1892] Prob. 254. See WILLS.

COEMPTIO (Lat.). In Civil Law. The ceremony of celebrating marriage by solemnities.

The parties met and gave each other a small sum of money. They then questioned each other in turn. The man asked the woman if she wished to be his *mater-familias*. She replied that she so wished. The woman then asked the man if he wished to be her *mater-familias*. He replied that he so wished. They then joined hands; and these were called nuptials by *coemptio*. Boethius, *Coemptio*; Calvinus, Lex.; Taylor, Law Gloss.

COERCION. Constraint; compulsion; force.

Direct or positive coercion takes place when a man is by physical force compelled to do an act contrary to his will: for example, when a man falls into the hands of the enemies of his country, and they compel him, by a just fear of death, to fight against it. See 4 Ct. Cls. 1; id. 288, 317.

Implied coercion exists where a person is legally under subjection to another, and is induced, in consequence of such subjection, to do an act contrary to his will.

As will is necessary to the commission of a crime or the making of a contract, a person actually coerced into either has no will on the subject, and is not responsible; 1 East, Pl. Cr. 225; 5 Q. B. 279; 45 Mich. 2; 90 Pa. 161. The command of a superior to an inferior; 3 Wash. C. C. 209, 220; 12 Metc. 56; 1 Blatchf. 549; 18 How. 115; of a parent to a child; Broom, Max. 11; of a master to his servant, or a principal to his agent; 13 Mo. 246; 3 Cush. 279; 5 Miss. 304; 14 Ala. 365; 32 Vt. 32; 14 Johns. 119; do not amount to coercion.

As to persons acting under the constraint of superior power, and, therefore, not criminally amenable, the principal case is that of married women, with respect to whom the law recognizes certain presumptions. Thus, if a wife commits a felony, other than treason or homicide, or, perhaps, highway robbery, in company with her husband, the law presumes that she acted under his coercion, and, consequently, without any guilty intent, unless the fact of non-coercion is distinctly proved; Clarke, C. L. 77. See 2 C. & K. 887, 903; 103 Mass. 71; 65 N. C. 398. This presumption appears on some occasions to have been considered conclusive, and is still practically regarded in no very different light, especially when the crime is of a flagrant character; but the better opinion seems to be that in every case the presumption may now be rebutted by positive proof that the woman acted as a free agent; and in one case that was much discussed, the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them; Jebb 93; 1 Mood. 148. It seems that a married woman cannot be convicted under any circumstances as a receiver of stolen goods, when the property has been taken by her husband and given to her by him; 1 Dears. 184.

Husband and wife were jointly charged with felonious wounding with intent to disfigure and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not personally inflict any violence on the prosecutor. On this finding, the wife was held entitled to an acquittal; 1 Dears. & B. 553.

Whether the doctrine of coercion extends to any misdemeanor may admit of some doubt; but the better opinion seems to be that, provided the misdemeanor is of a serious nature, as, for instance, the uttering of base coin, the wife will be protected in like manner as in cases of felony; although it has been distinctly held that the protection does not extend to assaults and batteries or the offence of keeping a brothel; Russ. Cr. 38; 2 Lew. 229; 8 C. & P. 19, 541; 1 Metc. 151; 10 Mass. 152. Indeed, it is probable that in all inferior misdemeanors this presumption, if admitted at all, would be held liable to be defeated by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony; 8 C. & P. 541; 2 Mood. 53; 1 Tayl. Ev. 152. The law upon responsibility of married women for crime is fully stated in 1 B. & H. Lead. Cr. Cas. 76-87.

CO-EXECUTOR. One who is a joint executor with one or more others.

COFFIN. A chest or case for the reception of a corpse, commonly of wood, or metal, though among the ancients stone and pottery coffins occurred. "Coffin" generally designates the case immediately enclosing the body. 149 Ky. 502, 149 S. W. 871.

COFRADIA. The congregation or brotherhood entered into by several persons for the purpose of performing pious works. No society of this kind can be lawfully formed without license from the king and the bishop of the diocese.

COGNATES. In Civil and Scotch Law. Relations through females. 1 Mackeldey, Civ. Law 187; Bell, Dict.

COGNATI. In Civil Law. Collateral heirs through females. Relations in the line of the mother. 2 Bla. Com. 235.

The term is not used in the civil law as it now prevails in France. In the common law it has no technical sense; but as a word of discourse in English it signifies, generally, allied by blood, related in origin, of the same family.

Originally, the maternal relationship had no influence in the formation of the Roman family, nor in the right of inheritance. But the edict of the prætor established what was called the *Prætorian succession*, or the *bonorum possessio*, in favor of cognates in certain cases. Dig. 88. 8. See PATRIFAMILIAS; AGNATI.

COGNATION. In Civil Law. Signifies generally the kindred which exists between two persons who are united by ties of blood or family, or both.

Civil cognation is that which proceeds alone from the ties of families, as the kindred between the adopted father and the adopted child.

Mixed cognation is that which unites at the same time the ties of blood and family, as that which exists between brothers the issue of the same lawful marriage. Inst. 3. 6; Dig. 88. 10.

Natural cognation is that which is alone formed by ties of blood; such is the kindred of those who owe their origin to an illicit connection, either in relation to their ascendants or collaterals.

COGNISANCE. See COGNIZANCE.

COGNISEE. The party upon whom a fine is levied. 2 Bl. Com. 351.

COGNISOR. The party levying a fine. 2 Bl. Com. 350.

COGNITIO. See NOTIO.

COGNITIONIBUS ADMITTENDIS. A writ requiring a justice or other qualified person, who has taken a fine and neglects to certify it in the court of common pleas, to do so.

COGNIZANCE (Lat. *cognitio*, recognition, knowledge; spelled, also, *Conusance*

and *Cognisance*). Acknowledgment; recognition; jurisdiction; judicial power; hearing a matter judicially. See 12 Ad. & El. 259.

Of Pleas. Jurisdiction of causes. A privilege granted by the king to a city or town to hold pleas within the same. *Termes de la Ley*. It is in frequent use among the older writers on English law in this latter sense, but is seldom used, if at all, in America, except in its more general meaning. The universities of Cambridge and Oxford possess this franchise: 11 East, 543; 1 W Bla. 454; 10 Mod. 126; 3 Bla. Com. 298.

Claim of Cognisance (or of Conuſance). An intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of claimant's court. 2 Wils. 409; 2 Bla. Com. 350, n.

It is a question of jurisdiction between the two courts. Fortesc. 157; 5 Viner, Abr. 588, and not between the plaintiff and defendant, as in the case of plea to the jurisdiction, and must be demanded by the party entitled to conuſance, or his representative, and not by the defendant or his attorney. 1 Chit. Pl. 403.

There are three sorts of conuſance. *Tenere placita*, which does not oust another court of its jurisdiction, but only creates a concurrent one. *Cognitio placitorum*, when the plea is commenced in one court, of which conuſance belongs to another. A conuſance of exclusive jurisdiction: as, that no other court shall hold plea, etc. Hardr. 509; Bac. Abr. Courts, D.

In Pleading. The answer of the defendant in an action of replevin who is not entitled to the distress or goods which are the subject of the action—acknowledging the taking, and justifying it as having been done by the command of one who is so entitled. Lawes, Pl. 35, 38. An acknowledgment made by the deforciant, in levying a fine, that the lands in question are the right of the complainant. 2 Bla. Com. 350. See 21 Pick. 87; 5 Hill 194.

COGNOMEN (Lat.). A family name.

The *prænomen* among the Romans distinguished the person, the *nomen* the gens, or all the kindred descended from a remote common stock through males, while the *cognomen* denoted the particular family. The *agnomen* was added on account of some particular event, as a further distinction. Thus, in the designation Publius Cornelius Scipio Africanus, Publius is the *prænomen*, Cornelius is the *nomen*, Scipio the *cognomen*, and Africanus the *agnomen*. Vicat. These several terms occur frequently in the Roman laws. See Cas. temp. Hardw. 286; 6 Co. 95; 1 Tayl. 148.

COGNOVIT ACTIONEM (Lat.) he has confessed the action. *Cognovit* alone is in common use with the same significance).

In Pleading. A written confession of an action by a defendant, subscribed, but not sealed, and authorizing the plaintiff to sign judgment and issue execution, usually for a sum named.

It is given after the action is brought to save expense, and differs from a warrant of attorney, which is given before the commencement of any action and is under seal. 3 Bouvier, Inst. 8229.

COHABIT (Lat. con and habere). To live together in the same house, claiming to be married.

The word does not include in its signification, necessarily, the occupying the same bed; 1 Hagg. Cons. 144; 4 Paige, Ch. 425; though the word is popularly, and sometimes in statutes, used in this latter sense; 20 Mo. 210; Bish. Marr. & Div. § 506, n.; 116 Ind. 464; 82 Va. 115; 159 Mass. 61; 116 U. S. 55.

To live together in the same house.

Used without reference to the relation of the parties to each other as husband and wife, or otherwise. Used of sisters or other members of the same family, or of persons not members of the same family, occupying the same house; 2 Vern. 823; Bish. Marr. & Div. & Sep. 506, n. See 75 Pa. 207; 82 Ark. 187; 64 Me. 565.

COHABITATION. The act of living together in one house, boarding and tabling together. May be used with reference to married or unmarried persons, and persons of opposite sex; does not necessarily imply

sexual intercourse. 1 Nelson, Divorce and Separation, 95. See LASCIVIOUS COHABITATION.

COHAEREDES. See HAERES.

COIF. A head-dress.

In England there are certain sergeants at law who are called sergeants of the coif, from the lawn coif they wear on their heads under their thin caps when they are admitted to that order. It was anciently worn as a distinguishing badge. Speelman, Gloss.

COIN. A piece of metal stamped with certain marks and made current at a certain value. Strictly speaking, coin differs from money as the species differs from the genus. Money is any matter, whether metal, paper, beads, or shells, which has currency as a medium in commerce. Coin is a particular species, always made of metal, and struck according to a certain process called coining. Wharton. To fashion pieces of metal into a prescribed shape, weight, and fineness, and stamp them with prescribed devices, by authority of government, that they may circulate as money. 22 Ind. 306; 2 Duvall 29. Congress alone has the power to coin money; Const. U. S. Art. 1, § 7; but the states may pass laws to punish the circulation of false coin; 5 How. 410.

So long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value; 12 Fed. Rep. 840. See 160 U. S. 288. See COMMODITY.

COIN MONEY. "To coin money" clearly means to mould into form a metallic substance of intrinsic value, and stamp on it its legal value, so as to encourage and facilitate its free circulation and assure stability in the currency. 2 Duvall (Ky.) 29.

COINING. The process of moulding into form a metallic substance of intrinsic value, and stamping on it its legal value, so as to encourage and facilitate its free circulation and assure stability in the currency. 2 Duvall 29. The coining of money is in all states the act of the sovereign power. Wharton. In the United States this power is exclusive in Congress. Const. U. S. Art. 1, § 10.

COLIBERTUS. One who, holding in free socage, was obliged to do certain services for the lord. A middle class of tenants between servile and free, who held their freedom of tenure on condition of performing certain services. Said to be the same as the *conditionales*. Cowel.

COLLATERAL (Lat. con, with, latus, the side). That which is by the side, and not the direct line. That which is additional to or beyond a thing.

COLLATERAL ANCESTORS. Sometimes used to designate uncles and aunts and other collateral ancestors of the person spoken of, who are in fact not his ancestors. 8 Barb. Ch. 446.

COLLATERAL ASSURANCE. That which is made over and above the deed itself.

COLLATERAL CONSANGUINITY. That relationship which subsists between persons who have the same ancestors but not the same descendants,—who do not descend one from the other. 2 Bla. Com. 203.

The essential fact of consanguinity (common ancestral blood) is the same in lineal and collateral consanguinity; but the relationship is aside from the direct line. Thus, father, son, and grandson are lineally related; uncle and nephew, collaterally.

COLLATERAL ESTOPPEL. The collateral determination of a question by a court having general jurisdiction of the subject. See 26 Vt. 209.

COLLATERAL FACTS. Facts not directly connected with the issue or matter in dispute.

Such facts are inadmissible in evidence; but, as it is frequently difficult to ascertain *a priori* whether a particular fact offered in evidence will or will not

clearly appear to be material in the progress of the cause, in such cases it is usual in practice for the court to give credit to the assertion of the counsel who tenders such evidence, that the facts will turn out to be material. But this is always within the sound discretion of the court. It is the duty of the counsel, however, to offer evidence, if possible, in such order that each part of it will appear to be pertinent and proper at the time it is offered; and it is expedient to do so, as this method tends to the success of a good cause.

When a witness is cross-examined as to collateral facts, the party cross-examining will be contradicted by the answer; and he cannot, in general, confront him by another witness; Rose, Cr. Ev. 180.

COLLATERAL INHERITANCE TAX. A tax levied upon the collateral devolution of property by will or under the intestate law. See TAX.

COLLATERAL ISSUE. An issue taken upon some matter aside from the general issue in the case.

Thus, for example, a plea by the criminal that he is not the person attainted when an interval exists between attainder and execution, a plea in abatement, and other such pleas, each raises a collateral issue. 4 Bla. Com. 888, 896.

COLLATERAL KINSMEN. Those who descend from one and the same common ancestor, but not from one another.

Thus brothers and sisters are collateral to each other; the uncle and the nephew are collateral kinsmen, and cousins are the same. All kinsmen are either lineal or collateral.

COLLATERAL LIMITATION. A limitation in the conveyance of an estate, giving an interest for a specified period, but making the right of enjoyment depend upon some collateral event; as an estate to A till B shall go to Rome. Park, Dow. 163; 4 Kent 128; 1 Washh. R. P. 215.

COLLATERAL POWER. A "collateral power" is a bare power given to a mere stranger, who has no interest in the estate or property to which the power relates; e. g. a power of sale given to executors. 133 Ky. 344, 117 S. W. 943.

COLLATERAL PROCEEDING. A "collateral proceeding" is an action that has an independent purpose, and contemplates some relief or result other than the overturning of the judgment, although it may be necessary to its success that the judgment be overturned. 115 S. W. 217.

COLLATERAL SECURITY. A separate obligation attached to another contract to guaranty its performance. The transfer of property or of other contracts to insure the performance of a principal engagement. See 38 Ga. 292; 9 Ia. 831.

The property or securities thus conveyed are also called collateral securities; 1 Pow. Mortg. 393; 2 id. 666, n. 871; 3 id. 944, 1001; 10 Watts 270. See PLEDGE; CHATTEL MORTGAGE.

COLLATERAL UNDERTAKING. A contract based upon a pre-existing debt, or other liability, and including a promise to pay, made by a third person, having immediate respect to and founded upon such debt or liability, without any new consideration moving to him. 7 Har. & J. 391.

An agreement to do an act or pay money because of another existing contract, debt or liability. English.

COLLATERAL WARRANTY. Warranty as to an estate made by one who was ancestor to the heir thereof, either actually or by implication of law, in respect to other property, but who could not have been so in respect to the estate in question. Warranty made where the heir's title to the land neither was nor could have been derived from the warranting ancestor. *Termes de la Ley*.

Collateral warranty is spoken of as "a mode of common assurance." The statute of Gloucester being silent as to a collateral warranty, a warranty of a collateral ancestor whose heir the issue in tail might be descending upon the latter, would bind him without assets by force of the common law. Therefore, by getting a collateral relation, whose heir the issue in tail was to be, to concur in the alienation and bind himself and his heirs to warranty, the statute *De Donis* was successfully evaded.

Thus, if a tenant in tail should discontinue the tail, have issue and die, and the uncle of the issue should release to the discontinuee and die without issue, this is a collateral warranty to the issue in tail. Littleton § 799. The tenant in tail having

discontinued as to his issue before his birth, the heir in tail was driven to his action to regain possession upon the death of his ancestor tenant in tail; and in this action the collateral warranty came in as an estoppel. 2 Washb. R. F. 670.

The heir was barred from ever claiming the land, and, in case he had assets from the warranting ancestor, was obliged to give the warrantee other lands in case of an eviction. 4 Cruise, Dig. 436.

By the statute of Gloucester, 6 Edw. I. c. 3, tenant by the curtesy was restrained from making such warranty as should bind the heir. By a favorable construction of the statute *De Donis*, and by the statute 3 & 4 Will. IV. c. 74, tenants in tail were deprived of the power of making collateral warranty. By statute 11 Hen. VII. c. 20, warranty by a tenant in dower, with or without the assent of her subsequent husband, was prevented; and finally the statute 4 & 5 Anne, c. 16, declares all warranties by a tenant for life void against the heir, unless such ancestor has an estate of inheritance in possession. See Co. Litt. 873. Butler's note [328]; Stearns, R. Act. 135 372.

It is doubtful if the doctrine has ever prevailed to a great extent in the United States, and the statute of Anne has not been generally adopted in the American statute law, although re-enacted in New York; 4 Kent *469; and in New Jersey; 3 Halst. 106. It has been adopted and is in force in Rhode Island; 1 Sumn. 235; and in Delaware; 1 Harr. 50. In Kentucky and Virginia, it seems that collateral warranty binds the heir to the extent of assets descended; 1 Dana 59. In Pennsylvania, the statute of Gloucester is in force, but the statute of Anne is not, and a collateral warranty of the ancestor, with sufficient real assets descending to the heirs, bars them from recovering the lands warranted; 104 Pa. 575. See 2 Bla. Com. 301; 2 Washb. R. P. 668. If the learning of collateral warranty has been called difficult, it is simply because the law of warranty came to be turned from the purpose of its introduction,—that of protection and defence,—and fashioned into a remedy to meet an entirely different purpose. Later, collateral warranty ceased to be used for the purpose of barring estates tail, and its use could never have been universal. Rawle, Cov. for Title, secs. 8, 9. See Litt. § 709; 12 Mod. 513; Year Book 12; Edw. IV. 19; Tudor, Lead. Cas. R. P. 695; Pig. Recov. 9.

COLLATERALES ET SOCI. The former title of masters in chancery.

COLLATIO BONORUM. A collation of goods.

COLLATION. In Civil Law. The supposed or real return to the mass of the succession, which an heir makes of the property he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. See 9 La. Ann. 96; 4 Mart. U. S. 557.

As the object of collation is to equalize the heirs, it follows that those things are excluded from collation which the heir acquired by an onerous title from the ancestor; that is, where he gave a valuable consideration for them. And, upon the same principle, if a co-heir claims no share of the estate, he is not bound to collate. *Qui non vult hereditatem non cogitur ad collationem.* It corresponds to the common law hotchpot; 1 Sumn. 421; 2 Bla. Com. 517.

In Ecclesiastical Law. The act by which the bishop who has the bestowing of a benefice gives it to an incumbent.

Where the ordinary and patron were the same person, presentation and institution to a benefice became one and the same act; and this was called collation. Collation rendered the living full except as against the king; 1 Bla. Com. 391. An advowson under such circumstances is termed collative; 2 Bla. Com. 22.

In Practice. The comparison of a copy with its original, in order to ascertain its correctness and conformity. The report of the officer who made the comparison is also called a collation.

COLLECTIO DIONYSIANA. See DIONYSIUS.

COLLECTOR. One appointed to receive taxes or other impositions: as, collector of taxes, collector of militia fines, etc. A person appointed by a private person to collect the credits due him.

COLLECTOR OF THE CUSTOMS. An officer of the United States, appointed for the term of four years. Rev. Stat. U. S. § 2613. His general duties are defined in § 2621.

COLLEGA. In Civil Law. One invested with joint authority. A colleague; an associate. Black, L. Dict.

COLLEGE. An organized collection or assemblage of persons. A civil corporation, society, or company, having, in general, some literary object.

The assemblage of the cardinals at Rome is called a college. The body of presidential electors is called the electoral college, although the whole body never come together.

See MEDICAL COLLEGE.

COLLEGE FRATERNITIES. An intercollegiate Greek-letter fraternity has a dual, sometimes a triple organization. The first unit of association is the chapter. This is an organization composed of two classes of members, the undergraduate students (with sometimes a few resident graduates), and the alumni. The alumni are partially or wholly exempt from the payment of dues. In most fraternities a graduate of the chapter does not cease to be one of its members; he remains, legally as well as sentimentally, a member of the chapter organization.

The chapters in turn are associated in a general college fraternity, which in most cases is probably to be viewed not as an organization of chapters, but as an organization of their graduate and undergraduate members. Membership in the fraternity does not terminate if the chapter goes out of existence. The control of the affairs of the fraternity may be vested by its constitution in the undergraduates or the graduates, or the fraternity management may be placed under some system of joint control. The fraternity at its annual convention, attended by delegates chosen by graduates or undergraduates, or both, elects its general officers, who in most fraternities are now required to be graduates. The admission of new chapters is sometimes determined by vote of the undergraduate chapters; sometimes by vote of the annual convention; sometimes by officers or committees of the general fraternity; and in some instances by vote of the nearest geographical section or subdivision of the fraternity as a whole.

Both these organizations, the chapter and the fraternity, are ordinarily unincorporated. They are what are known as "voluntary associations." A voluntary association in most states is not a legal entity. It is not a person who can be sued in the courts. It is simply a collection of individuals. (71 Conn. 613 *et al.*) But several methods have been tried to obtain an organization that would own property and make contracts, such as the election of a board of trustees with such powers, or the incorporation of the undergraduate members, etc. The present tendency is to incorporate, not the chapter itself, but an alumni association. 42 Am. L. Rev. 168 *et seq.*

COLLEGIUM (Lat. *colligere*, to collect). In Civil Law. A society or assemblage of those of the same rank or honor. An army. A company, in popular phrase. The whole order of bishops. Du Cange.

Collegium illicitum. One which abused its right, or assembled for any other purpose than that expressed in its charter.

Collegium licitum. An assemblage or society of men united for some useful purpose or business, with power to act like a single individual.

All *collegia* were *illicita* which were not ordained by a decree of the senate or of the emperor; 2 Kent 269.

COLLIERY or COALERY. A coal mine, coal pit, or place where coals are dug, with the engines and machinery used in discharging the water and raising the

coal. Webster.

Colliery is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which the coal is mined; 58 Pa. 85.

COLLISION. In Maritime Law. The act of ships or vessels striking together, or of one vessel running against or foul of another.

It may happen *without fault*, no blame being imputable to those in charge of either vessel. In such case, in the English, American, and French courts, each party must bear his own loss; Pardessus, *Droit Comm.* p. 4, t. 2, c. 2, § 4; 14 How. 352; 1 Pars. Sh. & Adm. 525.

A collision by *inevitable accident* is when a collision is caused exclusively by natural causes, without any fault on the part of the owners or those in charge; 23 Wall. 169; 3 Cliff. 456; 13 Ct. Cl. 480. It must appear that neither vessel was in fault; 3 Cliff. 636. Where the captain and crew, except the second mate, were taken sick, and a collision occurred, through the absence of a lookout, it was held to be inevitable accident; 8 Reporter 389. See also 7 Biss. 249.

It may happen by *mutual fault*, that is, by the misconduct, fault, or negligence of those in charge of both vessels; 49 Fed. Rep. 475; 50 *id.* 581, 590; 53 *id.* 286; 9 C. C. A. 73. In such case, neither party has relief at common law; 3 Kent 231; 3 C. & P. 528; 21 Wend. 188, 615; 6 Hill 592; 12 Metc. 415; 26 Me. 39; (though now otherwise in England by the Judicature Act 1873); but the maritime courts aggregate the damages to both vessels and their cargoes, and then divide the same equally between the two vessels; 3 Kent 233; 1 Conkl. Adm. 374-376; 17 How. 170; 23 Wall. 84; 3 Ben. 371; 49 Fed. Rep. 765; 1 C. C. A. 234; 49 Fed. Rep. 169; 51 *id.* 766; 56 *id.* 271; 122 U. S. 97. See 1 Swab. 60-101. But where the collision is by intentional wrong of both parties, the libel will be dismissed; 4 Blatch. 124.

It may happen by *inscrutable fault*, that is, by the fault of those in charge of one or both vessels and yet under such circumstances that it is impossible to determine who is in fault. In such case the American courts of admiralty and the European maritime courts adopt the rule of an equal division of the aggregate damage; 1 Abb. N. S. 451; Daveis 365; Flanders, Mar. Law, 296. But the English courts have refused a remedy in admiralty; 2 Hagg. Adm. 145; 6 Thortn. 240; and see 2 Hugh. 128.

It may happen by *the fault* of those belonging to one of the colliding vessels, without any fault being imputable to the other vessel. In such case the owners of the vessel in fault must bear the damage which their own vessel has sustained, and are liable as well as their master to a claim for compensation from the owners of the other vessel for the damage done to her; 1 Swab. 23, 173, 200, 211; 3 W. Rob. 283; 1 Blatchf. 211; 2 Wall. Jr. 52; 1 How. 28; 13 *id.* 101. See 48 Fed. Rep. 334; although wilfully committed by the master; Crabbe 22; 1 Wash. C. C. 13; 3 *id.* 262. But see 1 W. Rob. 399; 2 *id.* 502; 1 Hill 343; 19 Wend. 343; 1 East 106; 6 Jur. 443.

Where one vessel, clearly shown to be guilty of a fault adequate in itself to have caused a collision, seeks to impugn the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault, and this principle is peculiarly applicable to a vessel at anchor, complying with regulations concerning lights and receiving injuries, through the fault of a steamer in motion; 158 U. S. 186. If a cargo be damaged by collision between two vessels, the owner may pursue both vessels or either, or the owners or both, or either; and in case he proceeds against one only, and both are held in fault, he may recover his entire damages of the one sued; 158 U. S. 803.

These four classes of cases are noted in 2 Dods. 85, by Lord Stowell.

Full compensation is, in general, to be made in such cases for the loss and damage

which the prosecuting party has sustained by the fault of the party proceeded against; 2 W. Rob. 279; including all damages which are fairly attributable exclusively to the act of the original wrong-doer, or which may be said to be the direct consequence of his wrongful act; 3 W. Rob. 7, 282; 11 M. & W. 228; 1 Swab. 200; 1 Blatchf. 211; 2 Wall. Jr. 52; 1 How. 28; 13 *id.* 113; 17 *id.* 170.

The personal liability of the owners is, however, limited in some cases to the value of the vessel and freight (but not by common law, or the earlier civil law, or the earlier general maritime law); *Code de Comm.* art. 216; Stat. 17 & 18 Vict. c. 104 (Merchants' Shipping Act), pt. 9, § 503; 9 U. S. Stat. L. 635; 10 *id.* 63, 72, 73; 3 W. Rob. 16, 41, 101; 1 E. L. & Eq. 637; 8 Hagg. Adm. 451; 15 M. & W. 301; 3 Stor. 465; Davis 172; 2 Am. L. Reg. 157; 13 Wall. 104. See 5 Mich. 368; 53 Fed. Rep. 952. The owner is not liable in respect of the insurance moneys; 8 Ben. 312; 9 Cent. L. J. 285; nor for loss of bounty the vessel might have earned; 3 C. C. A. 534. In maritime law the vessel itself is hypothecated as security for the injury done in such cases; 1 Swab. 1, 3; 23 E. L. & Eq. 62, 72; 14 How. 351; 16 *id.* 469. In England, the owner's liability is the value of the offending ship in her undamaged state; by the American and continental rule, it is the value of the ship immediately after the collision; 9 Cent. L. J. 285. When an owner has neglected to surrender any part of his vessel, he cannot avail himself of this limited liability; 24 Int. Rev. Rec. 198; nor can he where he has parted with his interest in, or title to, the ship before offering to surrender her; *id.* 123.

For the prevention of collisions, certain rules have been adopted (see NAVIGATION RULES) which are binding upon vessels approaching each other from the time the necessity for precaution begins, and continue to be applicable, as the vessels advance, so long as the means and opportunity to avoid the danger remain; 21 How. 372. But, whatever may be the rules of navigation in force at the place of collision, it is apparent that they must sometimes yield to extraordinary circumstances, and cannot be regarded as binding in all cases. Thus, if a vessel necessarily goes so near a rock, or the land, that by following the ordinary rules she would inevitably go upon the rock, or get on shore or aground, no rule should prevail over the preservation of property and life; 1 W. Rob. 478, 485; 4 J. B. Moore 314; 123 U. S. 349; 150 *id.* 674; but obedience to the rules is not a fault, even if a different course would have prevented a collision, and the necessity must be clear and the emergency sudden and alarming before an act of disobedience can be excused; 150 U. S. 674. No vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the rule of navigation; 1 W. Rob. 471, 478; 2 Wend. 452; and if it was clearly in the power of one of the vessels which came into collision to have avoided all danger by giving way, she will be held bound to do so, notwithstanding the rule of navigation; 6 Thornt. Adm. 600, 607; 3 Cliff. 117. But a vessel is not required to depart from the rule when she cannot do so without danger; 2 Curt. C. C. 363; 18 How. 581.

There must be a lookout properly *stationed and kept*; and under circumstances of special danger, two; 158 U. S. 186; and the absence of such a lookout is *prima facie* evidence of negligence; 10 How. 557; 23 *id.* 448; Davis 359; 1 C. C. A. 219; 50 Fed. Rep. 555. The rule requiring a lookout admits of no exception on account of size in favor of any craft capable of committing injury; 56 Fed. Rep. 271. The absence of a lookout is not material where the presence of one would not have availed to prevent a collision; 144 U. S. 371. A sailing vessel is entitled to assume that a steam vessel approaching her is being navigated with a proper lookout; 1 C. C. A. 219. By the International Code, rule 8, lights also must be kept; the rule was

formerly otherwise in regard to vessels on the high seas; 1 Pars. Sh. & Adm. 549; 2 W. Rob. 4; 2 Wall. Jr. 268. See NAVIGATION RULES; 12 How. 448; 23 *id.* 287; 1 Blatchf. 236, 370; Stu. Adm. Low. C. 222, 243; 21 Pick. 254; 6 Whart. 824; 1 Thornt. Adm. 592; 2 *id.* 101; 4 *id.* 97, 161; 6 *id.* 176; 7 *id.* 507; 2 W. Rob. 377; 3 *id.* 7, 49, 190; 1 Swab. 20, 233; 1 C. C. A. 519; 158 U. S. 186.

The injury to an insured vessel occasioned by a collision is a loss within the ordinary policy of insurance; 4 Ad. & E. 420; 6 N. & M. 718; 14 Pet. 99; 14 How. 352; 8 Cush. 477; but when the collision is occasioned by the fault of the insured vessel, or the fault of both vessels, the insurer is not ordinarily liable for the amount of the injury done to the other vessel which may be decreed against the vessel insured; 4 Ad. & E. 420; 7 E. & B. 172; 40 E. L. & Eq. 54; 11 N. Y. 9; 14 How. 352, and cases cited; but some policies now provide that the insurer shall be liable for such a loss; 40 E. L. & Eq. 54; 7 E. & B. 172.

When the collision was without fault on either side, and occurred in a foreign country, where, in accordance with the local law, the damages were equally divided between the colliding vessels, the amount of the decree against the insured vessel for its share of the damages suffered by the other vessel was held recoverable under the ordinary policy; 14 Pet. 99.

The fact that the libellants in a collision case had received satisfaction from the insurers for the vessel destroyed, furnishes no ground of defence for the respondent; 17 How. 152.

Improper speed on the part of a steamer in a dark night, during thick weather, or in the crowded thoroughfares of commerce, will render such vessel liable for the damages occasioned by a collision; and it is no excuse for such dangerous speed that the steamer carries the mail and is under contract to convey it at a greater average speed than that complained of; 3 Hagg. Adm. 414; 2 W. Rob. 2, 205; 18 How. 89, 223; 21 *id.* 1; 12 Ct. Cls. 480; 7 Biss. 35; 1 C. C. A. 78; 3 *id.* 534; 49 Fed. Rep. 169; 54 *id.* 542; 52 *id.* 400; 55 *id.* 117; 153 U. S. 130; 137 *id.* 330.

As between a steamer and a sailing vessel, the former must keep out of the way of the latter; 14 Blatch. 524; 91 U. S. 200; 144 *id.* 371; 137 *id.* 330; 54 Fed. Rep. 411; 59 *id.* 200; as between a vessel in motion and one at anchor, with proper lights, the former is ordinarily liable for a collision; 3 Cliff. 636; 2 Low. 220; 4 L. & Eq. Rep. 676; 2 Hugh. 17; 18 Alb. L. J. 151. Where a vessel is moored for the night according to custom along a well-known dock and not projecting beyond the wharf, if run into by a steamer in the fog, she is not at fault because she had no lights set and sounded no gongs; 48 Fed. Rep. 823.

A sailing vessel beating in the vicinity of a steam vessel is not obliged to run out her tack, provided her going about is not calculated to mislead or embarrass the steam vessel; 1 C. C. A. 219.

Instances of negligence are to be found in 95 U. S. 600; 98 *id.* 440; 3 Cliff. 456, 636; 14 Blatchf. 37, 254, 480, 524, 531, 545. An inexperienced carman is guilty of negligence in attempting to cross the path of a steamboat but a short distance in front of it; 153 Pa. 117.

When a collision is occasioned solely by the error or unskillfulness of a pilot in charge of a vessel under the provisions of a law compelling the master to take such pilot and commit to him the management of his vessel, the pilot is solely responsible for the damage, and neither the master, his vessel, nor her owner is responsible. But the burden of proof is on the vessel to show that the collision is wholly attributable to the fault of the pilot; L. R. 2 Ad. & Ecc. 3; [1892] Prob. 419. The rule in the United States is otherwise; 7 Wall. 53; but in this case the pilotage law was not absolutely compulsory. See PILOTAGE.

A cause of collision, or *collision and damage*, as it is technically called, is a suit *in rem* in the admiralty.

In the United States courts it is commenced by the filing of a libel and the arrest of the vessel to the mismanagement or fault of which the injury is imputed. In the English admiralty the suit is commenced by the arrest of the vessel and the filing of a petition. In England, the judge is usually assisted at the hearing of the cause by two of the Masters or Elder Brethren of Trinity House, or other experienced shipmasters, whose opinions upon all questions of professional skill involved in the issue are usually adopted by the court; 1 W. Rob. 471; 2 *id.* 226; 2 Chit. Genl. Pr. 514.

In the American courts of admiralty, the judge usually decides without the aid or advice of experienced shipmasters acting as assessors or advisers of the court; but the evidence of such shipmasters, as experts, is sometimes received in reference to questions of professional skill or nautical usage. Such evidence is not, however, admissible to establish a usage in direct violation of those general rules of navigation which have been sanctioned and established by repeated decisions; 3 Curt. C. C. 141, 383.

When a party sets up circumstances as the basis of exceptions to the general rules of navigation, he is held to strict proof; 1 W. Rob. 157, 182, 478; 6 Thornt. 607; 5 *id.* 170; 3 Hagg. Adm. 321; and courts of admiralty lean against such exceptions; 11 N. Y. Leg. Obs. 353, 355. The admissions of a master of one of the colliding vessels subsequently to the collision are admissible in evidence; 5 E. L. & Eq. 556; and the masters and crew are admissible as witnesses; 2 Dods. 83; 3 Hagg. Adm. 145; 3 *id.* 321, 325; 1 Conkl. 384.

As to the burden of proof in collision cases, see 9 Jur. 282, 670; 2 W. Rob. 90, 244, 504; 12 *id.* 131, 371; 3 Hagg. Adm. 356; 4 Thornt. Adm. 161, 356; 1 Conkl. 382; 1 How. 28; 18 *id.* 570; Olc. 132; 55 Fed. Rep. 338; [1892] Prob. 419.

The general rules in regard to costs in collision cases, in the admiralty courts, are that if only one party is to blame, he pays the costs of both; if neither is to blame, and the party prosecuting had apparent cause for proceeding, each party pays his own costs, but in the absence of apparent or probable cause the libel will be dismissed with costs; if both parties are to blame, the costs of both are equally divided, or, more generally, each party is left to pay his own costs. But costs in admiralty are always in the discretion of the court, and will be given or withheld in particular cases without regard to these general rules, if the equity of the case requires a departure from them; 2 W. Rob. 213, 244; 5 Jur. 1087; 2 Conkl. 438.

Consult 2 Pars. Mar. Law, 187; Conkl. Adm. 370-426; Fland. Mar. Law, c. 9; Abb. Shipp. Story & Perkins's notes; Marsden; Preble; Spence, Collisions. See LIEN; NAVIGATION RULES.

COLLISTRIGIUM. The pillory.

COLLOBIUM. A hood or covering for the shoulders, formerly worn by sergeants at law.

COLLOCATION. In French Law. The act by which the creditors of an estate are arranged in the order in which they are to be paid according to law.

The order in which the creditors are placed is also called collocation. 2 Low. C. 9, 139.

COLLOQUIUM. In Pleading. A general averment in an action for slander connecting the whole publication with the previous statement. 1 Stark. Sl. 431; Heard, Lib. & Sl. 228; or stating that the whole publication applies to the plaintiff, and to the extrinsic matters alleged in his declaration. 1 Greenl. Ev. § 417.

An averment that the words were spoken "of or concerning" the plaintiff, where the words are actionable in themselves. 6 Term 162; 16 Pick. 132; Cro. Jac. 674; Heard, Lib. & Sl. § 212; 1 Greenl. Ev. § 417; or where the injurious meaning which the plaintiff assigns to the words results from some extrinsic matter, or of and concerning, or with reference to, such matter. 2 Pick. 328; 16 *id.* 1; Heard, Lib. & Sl. §§ 212, 217; 11 M. & W. 287.

An averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory meaning assigned to them. Shaw, C. J., 16 Pick. 6.

Whenever words have "the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the *inducement*. There must then be a *colloquium* averring that the slanderous words were spoken of or concerning this fact. Then the word "meaning," or *innuendo*, is used to connect the matters thus introduced by averments and *colloquia* with the particular words laid, showing their identity and drawing what is then the legal inference from the whole declaration, that such was under the circumstances thus set out, the meaning of the words used. Per Shaw, C. J., 16 Pick. 6. By the Com. L. Proc. Act (1852) in England the colloquium has been rendered unnecessary. See *INNUEENDO*; Odger, Lib. & SL.

COLLUSION. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.

Collusion and fraud of every kind vitiate all acts which are infected with them, and render them void. See Shelf. Marr. & Div. 415, 450; 3 Hagg. Eccl. 130, 133; 67 Mich. 547; 87 id. 324; 2 Greenl. Ev. § 51; Bousquet, Dict. *Abordage*.

In Divorce Law. An agreement between a husband and wife that one of them will commit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury. 2 Wait, Act. & Def. 591; 2 Lev. & Tr. 302; L. R. 1 P. & M. 121. See 68 Mich. 600; 33 Ill. App. 105. Such an agreement is a fraud upon the court where the remedy is sought; 39 Wis. 167; and will bar a divorce; L. R. 1 P. & M. 121; 2 Bish. Mar. Div. & Sep. 251-266.

"Collusion is a conspiracy of the husband and wife to obtain a decree of divorce by false or manufactured testimony. Nelson, Law of Divorce, § 500. "Collusion may exist without connivance, but connivance is generally collusion for a particular purpose. Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury then is none where there is a common agreement between the parties to effect their object by fraud in a court of justice. See *CONNIVANCE*; *LEVITY*.

COLOMBIA. A republic of South America. It has a president elected for six years and a responsible ministry, a senate of 27 members representing the departments, and a house of representatives of 66 members elected by the people. There is a supreme court composed of seven magistrates appointed for life by the executive with the approval of the national council. The republic is divided into nine departments, each with its own judiciary. Colombia, which was formerly subject to Spain, became independent in 1819, and was divided in 1832 into the three republics of Ecuador, Granada, and Venezuela. In 1858 it became a confederation of eight states, which three years later were increased to nine. Subsequently, in 1883, a new constitution was formed and amended in 1886, when the nine states became mere departments, and their presidents were reduced to governors.

COLONIAL LAWS. The laws of a colony.

In the United States the term is used to designate the body of law in force in the colonies of America at the time of the commencement of our independence, which was, in general, the common law of England, with such modifications as the colonial experience had introduced. The colonial law is thus a transition state through which our present law is derived from the English common law.

In England the term colonial law is used with reference to the present colonies of that realm.

COLONUS (Lat.). In Civil Law. A freeman of inferior rank, corresponding with the Saxon *ceorl* and the German rural slaves.

It is thought by Spence not improbable that many of the *ceorls* were descended from the *coloni* brought over by the Romans. The names of the *coloni* and their families were all recorded in the archives of the colony or district. Hence they were called *adscriptitii*. 1 Spence, Eq. Jur. 51.

COLONY. A union of citizens or subjects who have left their country to people another, and remain subject to the mother-country. 3 Wash. C. C. 287.

The country occupied by the colonists.

A colony differs from a possession or a dependency. See *DEPENDENCY*.

COLOR. In Pleading. An apparent but legally insufficient ground of action admitted to subsist in the opposite party by the pleading of one of the parties to an action. 3 Bla. Com. 309; 4 B. & C. 547; 1 M. & P. 307. To give color is to give the plaintiff credit for having an apparent or *prima facie* right of action, independent of the matter introduced to destroy it, in order to introduce new matter in avoidance of the declaration. It was necessary that all pleadings in confession and avoidance should give color. See 3 Bla. Com. 309, n.; 1 Chit. Pl. 531.

Express color is a feigned matter pleaded by the defendant, from which the plaintiff seems to have a good cause, whereas he has in truth only an appearance or color of cause. Bacon, Abr. *Trespass*, I, 4; 1 Chit. Pl. 530. It was not allowed in the plaintiff to traverse the colorable right thus given; and it thus became necessary to answer the plea on which the defendant intended to rely.

Implied color is that which arises from the nature of the defence; as where the defence consists of matter of law, the facts being admitted but their legal sufficiency denied by matters alleged in the plea. 1 Chit. Pl. 528; Steph. Pl. 206.

By giving color the defendant could remove the decision of the case from before a jury and introduce matter in a special plea, which would otherwise oblige him to plead the general issue; 3 Bla. Com. 309.

The colorable right must be plausible or afford a supposititious right such as might induce an unlearned person to imagine it sufficient, and yet it must be in legal strictness inadequate to defeat the defendant's title as shown in the plea; Comyns, Dig. *Pleading*; Keilw. 1036; 1 Chit. Pl. 531; 4 Dane, Abr. 552; Archb. Pl. 211.

COLOR OF OFFICE. A pretence of official right to do an act made by one who has no such right. 9 East 364. Such person must be at least a *de facto* officer; 23 Wend. 406.

An act wrongfully done by an officer, under the pretended authority of his office, and grounded upon corruption, to which the office is a mere shadow of color. 41 N. Y. 464.

COLOR OF TITLE. In Ejectment. An apparent title founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like; 3 Wait, Act. & Def. 17; 35 Ill. 394; 94 Ala. 135. A tax deed, though void for failure to comply with the statutes, affords color of title; 37 Neb. 353; 143 Ill. 265; 3 C. C. A. 294. To give color, the conveyance, etc., must be good in form, and profess to convey the title and be duly executed; 3 Cow. 589; 4 Mart. (N. s.) 224; 47 Fed. Rep. 614; 132 Ind. 546; but a deed to a tenant in possession from one who has no title to the land is insufficient as a basis for adverse possession; 133 N. Y. 73. A conveyance void on its face is not sufficient; 11 How. 424; 21 Tex. 97. An entry is by color of title when it is made under a *bona fide* and not pretended claim of title existing in another; 3 Watts 72. A quit-claim deed is sufficient color of title to support a plea of title by limitation; 83 Tex. 428. The deed, or color of title, under which a person takes possession of land, serves to define specifically the boundaries of his claims; 10 Pet. 412. When a disseisor enters upon and cultivates part of a tract, he does not thereby hold possession of the whole tract constructively, unless this entry was by color of title by specific boundaries to the whole tract; color of title is valuable only so far as it indicates the extent of the disseisor's claim; 82 Pa. 99. See 108 Mo. 343; 139 Ill. 21. A person taking lands under a judicial sale, though void, has color of title; 134 Ind. 238; 37 W.

Va. 215.

COLORADO. One of the United States of America, being the twenty-fifth state admitted into the Union.

The territory of which it is composed was ceded by the treaties with France in 1803, and Mexico in 1848. The enabling act was approved March 8, 1876, and the state was finally admitted August 1, 1876. The Constitution was adopted in Convention March 14, 1876, and ratified July 1, 1876. See CALIFORNIA; LOUISIANA.

COLORE OFFICII. By color of office.

COLORED CHILD. A child having an appreciable mixture of negro blood is a "colored child." 142 Ky. 673, 134 S. W. 1151.

Under § 137 of the Constitution of Kentucky providing for the maintenance of separate schools for whites and colored children the words "colored children" include all children wholly or in part of negro blood, or having any appreciable mixture thereof. Children who are of negro blood to the extent of one-sixteenth are therefore colored children and not entitled to attend schools maintained for white children. 142 Ky. 673, 134 S. W. 1151.

COLORED MAN. This term generally refers to one of the negro race.

There is no legal technical significance to this phrase which the courts are bound judicially to know; 31 Tex. 74.

COLORED PEOPLE. Black people, Africans or their descendants, mixed or unmixed.

The term, "person of color," means of African descent. 37 Miss. 209. 6 A. & E. Ency. L. (2nd ed.) 213. See *COLORED MAN*.

COLT. An animal of the horse species, whether male or female, not more than four years old. Russ. & R. 416.

COMBAT. The form of a forcible encounter between two or more persons or bodies of men; an engagement or battle. A duel.

COMBINATION. A union of men for the purpose of violating the law.

This term has become prominent of late in reference to labor troubles. A strike is defined as "a combination among laborers (those employed by others), to compel an increase of wages, a change in the hours of labor, some change in the mode and manner of conducting the business of the principal, or to enforce some particular policy in the character or number of the men employed, or the like." 58 N. Y. 582. Such combinations are illegal at common law; 8 Mod. 10; 10 Cox, C. C. 593; 1 M. & Rob. 179; C. & M. 663; 12 Cox, C. C. 316; Bright. (Pa.) 36; but are not so in the United States, unless the objects of the combination are sought to be effected by unlawful means; 23 Fed. Rep. 554; 24 id. 217; 27 id. 443; 63 id. 803; 63 id. 310; 106 Mass. 1; 57 Vt. 273; 84 Va. 927. See *STRIKE*; *BOYCOTT*. A union of different elements. A patent may be taken out for a new combination of existing machines; 2 Mas. 112.

COMBINATION IN RAILWAYS. See *THROUGH ROUTE*.

COMBINATION RATE. See *THROUGH ROUTE*.

COMBUSTIO DOMORUM. Arson. 4 Bla. Com. 272.

COMBUSTIO PECUNIE. Burning of money; the ancient method of testing mixed and corrupt money paid into the exchequer, by melting it down. Black, L. Dict.

In the time of King Henry II. the bishop of Salisbury being treasurer, considered that though the money did answer in number and weight, (*numero et pondere*) it might be deficient in value, because mixed with copper or brass. Therefore, a consti-

tution was made, called the trial by combustion, the practice of which differed in little or nothing from the present method of assaying silver. *Id.*: Lowndes' Essay upon Coin, 5, c. in Cowell.

COMBUSTIONS. See SMOKE.

COMES. In Pleading. A word used in a plea or answer which indicates the presence in court of the defendant.

In a plea, the defendant says, "And the said C. D. by E. F. his attorney, comes, and defends," etc. The word comes, *venit*, expresses the appearance of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *verba* or pleading. It is, accordingly, not considered as, in strictness, constituting a part of the plea; 1 Chit. Pl. 411; Steph. Pl. 482.

COMES (Lat. *comes*, a companion). An earl. A companion, attendant, or follower.

By Spelman the word is said to have been first used to denote the companions or attendants of the Roman proconsuls when they went to their provinces. It came to have a very extended application, denoting a title of honor generally, always preserving this generic signification of companion of, or attendant on, one of superior rank.

Among the Germans the *comites* accompanied the kings on their journeys made for the purpose of hearing complaints and giving decisions. They acted in the character of assistant judges. *Tac. de Mor. Germ.* cap. 11, § 18; 1 Spence, Eq. Jur. 66; Spelman, Gloss. Among the Anglo-Saxons, the *comites* were the great vassals of the king, who attended, as well as those of inferior degree, at the great councils or courts of their kings. The term included also the vassals of those chiefs, 1 Spence, Eq. Jur. 43. *Comitatus*, county, is derived from *comes*, the earl or earldorman to whom the government of the district was intrusted. This authority he usually exercised through the *vice-comes*, or *shire reeve* (whence our sheriff). The *comites* of Chester, Durham, and Lancaster maintained an almost royal state and authority; and these counties have obtained the title of palatine; 1 Bla. Com. 116; COTTRELL PALATINE. The title of earl or comes has now become a mere shadow, as all the authority is exercised by the sheriff (*vice-comes*); 1 Bla. Com. 386.

COMITAS (Lat.). Courtesy; comity. An indulgence or favor granted another nation, as a mere matter of indulgence, without any claim of right made.

COMITATUS (Lat. from *comes*). A county. A shire. The portion of the country under the government of a *comes* or count. 1 Bla. Com. 116.

An earldom. Earls and counts were originally the same as the *comitates*. 1 Id. Raym. 13.

The county court, of great dignity among the Saxons. 1 Spence, Eq. Jur. 43, 66.

The retinue which accompanied a Roman proconsul to his province. Du Cange. A body of followers; a prince's retinue. Spelman, Gloss.

COMITES. Persons who are attached to a public minister. As to their privileges, see 1 Dall. 117; Baldw. 240; AMBASSADOR.

COMITIA (Lat.). The public assemblies of the Roman people at which all the most important business of the state was transacted, including in some cases even the trial of persons charged with the commission of crime. Anthon, Rom. Antiq. 51. The votes of all citizens were equal in the *comitia*. 1 Kent 518.

COMITIA CALATA. A session of the *comitia curiata* for the purpose of *adrogation*, the confirmation of wills, and the adoption by an heir of the sacred rites which followed the inheritance.

COMITIA CENTURIATA (called, also, *comitia majora*). An assemblage of the people voting by centuries. The people acting in this form elected their own officers, and exercised an extensive jurisdiction for the trial of crimes. Anthon, Rom. Antiq. 52.

COMITIA CURIATA. An assemblage of the *populus* (the original burgesses) by tribes. In these assemblies no one of the *plebs* could vote. They were held for the purpose of confirming matters acted on by the senate, for electing certain high officers, and for carrying out certain religious observances.

COMITIA TRIBUTA. Assemblies to create certain inferior magistrates, elect priests, make laws, and hold trials. Their power was increased very materially subsequently

to their first creation, and the range of subjects acted on became much more extensive than at first. Anthon, Rom. Antiq. 63; 1 Kent 518.

COMITY. Courtesy; a disposition to accommodate.

Courts of justice in one state will, out of comity, enforce the laws of another state, when by such enforcement they will not violate their own laws or inflict an injury on some one of their own citizens: as, for example, the discharge of a debtor under the insolvent laws of one state will be respected in another state, where there is a reciprocity in this respect.

A circuit court should follow the decisions of another circuit court, upholding a patent, except where new evidence of invalidity is introduced and then the investigation should be confined to that; 3 C. C. A. 672; but see 54 Fed. Rep. 169.

See INTERNATIONAL PRIVATE LAW.

COMITY OF NATIONS. The most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and it is inadmissible when it is contrary to its known policy, or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered, and ascertained in the same way and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided. Story, Conf. L. § 38.

COMMANDER-IN-CHIEF. The president is made commander-in-chief of the army and navy of the United States and of the militia when in actual service, by art. ii. § 2 of the constitution. The term implies supreme authority over the army and navy.

COMMANDITE. In French Law. A partnership in which some furnish money, and others furnish their skill and labor in place of capital. A special or limited partnership.

Those who embark capital in such a partnership are bound only to the extent of the capital so invested; Guyot, *Rép. Univ.*

The business being carried on in the name of some of the partners only, it is said to be just that those who are unknown should lose only the capital which they have invested, from which alone they can receive an advantage. Under the name of limited partnerships, such arrangements are now allowed by many of the states; although no such partnerships are recognized at common law. Troubat, *Lim. Partn.* cc. 3, 4.

The term includes a partnership containing dormant rather than special partners. Story, *Partn.* § 109.

COMMENCEMENT OF ACTION. The date of the subpoena in chancery, which is sued out and returned or placed in the hands of the officer is the "commencement of the suit." 7 B. Mon. (Ky.) 314.

The date of the issue of process is the "commencement of a suit." The service of a notice in ejectment is the "commencement of a suit." 7 B. Mon. (Ky.) 314.

COMMENCEMENT OF A DECLARATION. That part of the declaration which follows the venue and precedes the circumstantial statement of the cause of action. It formerly contained a statement of the names of the parties, and the character in which they sue or are sued, if any other than their natural capacity; of the mode in which the defendant had been brought into court, and a brief statement of the form of action. In modern practice, however, in most cases, little else than the names and character of the parties is contained in the commencement.

COMMENDA. In French Law.

The delivery of a benefice to one who cannot hold the legal title, to keep and manage it for a time limited and render an account of the proceeds. Guyot, *Rép. Univ.*

In Mercantile Law. An association in which the management of the property was intrusted to individuals. Troubat, *Lim. Partn.* c. 3, § 27.

COMMENDAM. In Ecclesiastical Law. The appointment of a suitable clerk to hold a void or vacant benefice or church living until a regular pastor be appointed. Hob. 144; Latch 236.

In Louisiana. A species of limited partnership.

It is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more. A similar partnership exists in France. *Code de Comm.* 36, 38; Sirey, 19, pt. 2, p. 25. He who makes this contract is called, in respect to those to whom he makes the advance of capital, a partner in *commendam*. La. Civ. Code, art. 2811.

COMMENDATORS. In Ecclesiastical Law. Secular persons upon whom ecclesiastical benefices are bestowed. So called because they are commended and intrusted to their oversight. They are merely trustees.

COMMENDATORY LETTERS. In Ecclesiastical Law. Such as are written by one bishop to another on behalf of any of the clergy or others of his diocese travelling thither, that they may be received among the faithful; or that the clerk may be promoted; or necessities administered to others. Wharton.

COMMENDATUS. In Feudal Law. One who by voluntary homage puts himself under the protection of a superior lord. Cowell; Spelman, Gloss.

COMMERCE. The various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit. Fardessus, *Dr. Com.* n. 1. Any reciprocal agreements between two persons, by which one delivers to the other a thing, which the latter accepts, and for which he pays a consideration: if the consideration be money, it is called a sale; if any other thing than money, it is called exchange or barter. Domat, *Dr. Pub.* liv. 1, tit. 7, s. 1, n. 2.

Congress has power by the constitution to regulate commerce with foreign nations and among the several states, and with the Indian tribes; 1 Kent 431; Story, *Const.* § 1053; and such power is not restricted by state authority; 125 U. S. 181; but a state statute, which conflicts with the actual exercise of the powers of congress, must give way to the supremacy of the national authority; 124 U. S. 465.

Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation of persons and property, as well as the purchase, sale, and exchange of commodities; the power conferred upon congress by the above clause is exclusive, so far as it relates to matters within its purview which are national in their character, and admit of a requisite uniformity of regulation affecting all the states. That clause was adopted in order to secure such uniformity against discriminating state legislation.

State legislation is not forbidden in matters either local in their operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys, and other improvements of harbors, bays, and rivers within a state, if their free navigation be not thereby impaired; congress by its inaction in such matters virtually declares that till it deems best to act they may be controlled by the states; 103 U. S. 691, per Field, J. See also 3 Cliff. 339, for a definition of commerce; Cooley, *Const.* L. 67.

The powers conferred upon congress to regulate commerce among the several states, are not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but keep pace with the progress of the country, and adapt themselves to new developments of time and circumstances so as to include, for example, telegraph lines; 96 U. S. 1. Congress may, in the exercise of its power, construct or authorize individuals or corporations to construct railroads across the states and territories of the United States; 127 U. S. 1.

The fact that congress has not legislated in regard to such commerce does not make it lawful for the states to do so. Such inaction shows only that no restrictions are to be put upon commerce in that direction. The right to legislate is exclusively vested in congress; 93 U. S. 259; 91 *id.* 275; 135 *id.* 100; 122 *id.* 326; 120 *id.* 489. But in another case it was held, that, while action by congress prescribing regulations is exclusive of state authority, yet, until action taken by congress, a state may legislate touching the rights, duties, and liabilities of citizens (if not directed against commerce or any of its regulations), notwithstanding such legislation may indirectly and remotely affect foreign or interstate commerce, for instance, to give a right of action against the owners of a vessel engaged in interstate traffic for the death of a passenger caused by the negligence of those in charge of the vessel; 93 U. S. 99; 121 *id.* 444.

"The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that, to whatever extent ground shall be covered by those directions, the exercise of state power is excluded. Congress may establish police regulations, as well as the states; confining their operations to the subjects over which it is given control by the constitution. But as the general police power can better be exercised under the supervision of the local authorities, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations which are made by congress do not often exclude the establishment of others by the state covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole country; while in some localities, state and local policy will demand peculiar regulations with reference to special and peculiar circumstances." Cooley Const. Lim. 731. See 120 U. S. 489; 122 *id.* 326.

The commercial clause of the constitution includes authority to regulate navigation in aid of commerce and to make improvements in navigable waters, such as building a lighthouse in the bed of a stream or requiring navigators of a stream to follow a prescribed course, or directing the water of a navigable stream from one channel to another; 93 U. S. 4. See also 1 Dill. 469. It renders invalid a state statute regulating the arrival of passengers from a foreign port with a view practically to exclude Chinese emigration to the United States; and not merely to exclude pauper or convict emigrants from the state; 92 U. S. 275. See also 3 Sawy. 144. But it does not where the detention is for the purpose of disinfection by order of a state Board of Health; 12 Wheat. 419; 57 Fed. Rep. 276. It invalidates a state statute which requires the payment of a license tax by commercial travellers selling goods manufactured in other states, but not by those selling goods manufactured in the state itself; 153 U. S. 289; 103 *id.* 344; 91 *id.* 275; 128 *id.* 129; 120 *id.* 489; 136 *id.* 104; 44 La. Ann. 356; 70 Miss. 558; 91 Tenn. 669, (but not

when the same tax is levied upon peddlers selling goods made in or out of the state; 100 U. S. 676; 156 *id.* 296; and see 102 *id.* 123). So of an act requiring importers of foreign goods to take out a license, in the exercise of a power of taxation; 12 Wheat. 419; 136 U. S. 114; and a state law which requires a party to take out a license for carrying on interstate commerce is unconstitutional and void; 141 U. S. 47. Also a city ordinance of Baltimore laying wharf fees upon vessels laden with the products of other states, which are not exacted from vessels laden with Maryland products; 100 U. S. 434. Also a state statute imposing a burdensome condition upon a shipmaster as a prerequisite for landing his passengers, with the alternative of the payment of a small sum for each of them; 92 U. S. 259. Also a state tonnage tax on foreign vessels, 20 Wall. 577, levied to defray quarantine expenses; 19 Wall. 581; but this does not extend to a tax for city purposes levied upon a vessel owned by a resident of the city, which is not imposed for the privilege of trading; 6 Biss. 505; 99 U. S. 273. It invalidates a state law granting a telegraph company exclusive right to maintain telegraph lines in such state, as contrary to the act of July 24, 1866, which practically forbids a state to exclude from its borders a telegraph company building its lines in pursuance of this act of congress; 96 U. S. 1; also an attempt to regulate transmission of telegraphic messages unto other states and their delivery; 122 U. S. 347; as telegraphic communications carried on between different states are interstate commerce; 127 U. S. 640; also one providing for inspection of sea-going vessels arriving at a port, and of damaged goods found thereon, by a state officer, with a view to furnishing official evidence to the parties immediately concerned, and when goods are damaged, to provide for their sale; 94 U. S. 246; also a state law which requires those engaged in the transportation of passengers among the states upon vessels within the state to give all persons traveling among the states equal rights and privileges in all parts of the vessels without distinction on account of race or color; 95 U. S. 485; (but not one which only applies to passengers carried within the state; 133 U. S. 587; also a state law laying a tax on foreign corporations engaged in carrying passengers or merchandise upon their gross receipts outside of the state; 15 Wall. 284; 7 Biss. 227; also a law of Missouri prohibiting the driving of cattle from Texas and other states into Missouri, during certain months; 95 U. S. 465.

A state law, requiring the master of every vessel in the foreign trade to pay a certain sum to a state officer for every passenger brought from a foreign country into the state, is void as infringing this provision of the constitution; 7 How. 283. No state can grant an exclusive monopoly for the navigation of any portion of the waters within its limits upon which commerce is carried on under coasting licenses granted under the authority of congress; Gibbons v. Ogden, 9 Wheat. 1; the rights here in controversy were the exclusive right to navigate the Hudson river with steam vessels. See also, on this point, 3 Wall. 713; 10 *id.* 637; 65 Pa. 399; 5 C. 3 Am. Rep. 696. But a state law granting to an individual an exclusive right to navigate the upper waters of a stream which is wholly within the limits of a state, separated from tide waters by falls impassable for purposes of navigation, and not forming a part of a continuous track of navigation between two or more states, or with a foreign country, is not invalid; 14 How. 568; and see 8 Bush 447. Interstate commerce by sea is of a national character and within the exclusive power of congress; 122 U. S. 326; and is commerce among the states even as to that part of the voyage within the state; 118 U. S. 557.

The state may authorize the building of bridges over navigable waters, notwithstanding the fact that they may, to some extent, interfere with the navigation of the stream. If the stream is one over which

the regulation of congress extends, the question arises whether the bridge will interfere with navigation or not; it is not necessarily unlawful if properly built, and if the general traffic of the country will be benefited rather than injured by its construction. There are many cases in which a bridge may be vastly more important than the navigation of the stream which it crosses. It may be said that a state may authorize such constructions, provided they do not constitute a material obstruction to navigation; and each case depends upon its own particular facts. The decision of the state legislature is not conclusive; the final decision rests with the federal courts, who may cause the structure to be abated if it be found to obstruct unnecessarily the traffic on the stream. Those who build the bridge must show the state authority that the construction of the bridge is proper, and that it benefits more than it impedes the general commerce; Cooley, Const. Lim. 738, 739, 740; the Wheeling Bridge Case, 13 How. 518; see also 6 McLean 72, 209, 237; 5 Ind. 13; 50 Fed. Rep. 16; 83 Me. 419; 153 U. S. 525; 154 *id.* 204. See BRIDGE.

The states may establish ferries; 1 Black 603; 41 Miss. 27; 11 Mich. 43; and dams; 2 Pet. 245; 42 Pa. 219; 28 Ind. 257; 1 Biss. 546; 108 Mo. 550.

The state has also the power to regulate the speed and general conduct of vessels navigating its waters, provided such regulations do not conflict with regulations prescribed by congress for foreign commerce, or commerce among the states; Cooley, Const. Lim. 740; 1 Hill 467, 470. It may also provide that a railroad is liable for damage from fire; 38 S. C. 103.

Thus the commercial power of congress is exclusive of state authority only where the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the states, and when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation until congress intervenes; 50 Fed. Rep. 16; 113 U. S. 205.

The constitutional provision does not apply to regulations as to life-preservers, boiler inspections, etc., on steamboats which confine their business to ports wholly within a state; 6 Ben. 43; nor to any commerce entirely within a state; 10 Wall. 557; 145 U. S. 192; 133 *id.* 587; nor to a condition in a railroad charter granted by a state that the company shall pay a part of its earnings to the state, from time to time, as a bonus; 21 Wall. 456; nor to a state law prescribing regulations for warehouses, carrying on business within the state exclusively, notwithstanding they are used as instruments of interstate traffic; 94 U. S. 113; nor to a law of Virginia by which only such persons as are not citizens of that state are prohibited from planting oysters in a soil covered by her tide-waters. Subject to the paramount right of navigation, each state owns the beds of all tide-waters within its jurisdiction, and may appropriate them to be used by its own citizens; 94 U. S. 231. It does not forbid a state from enacting, as a police regulation, a law prohibiting the manufacture and sale of intoxicating liquors; 97 U. S. 25; nor the sale of oleomargarine brought from another state; 148 Pa. 559; 156 *id.* 201; 156 Mass. 236; but the right of importation of intoxicating liquors from one state to another includes the right of sale in the original packages at the place where the importation terminates; 135 U. S. 100; 135 *id.* 161; nor a state act prescribing maximum rates of transportation within the state; 94 U. S. 155; and see *id.* 164; Cooley, Const. L. 75. Nor is a city ordinance, exacting a license fee, for the maintenance of its office in the city, from an express company doing business beyond the limits of a state, invalid; 16 Wall. 470; nor does it apply to a tax on telegraph poles erected with a city; 148 U. S. 92; 67 Hun 21; nor to a statute requiring locomotive engineers to be licensed after examination, it being a

valid exercise of the police power; 124 U. S. 465; see 128 *id.* 96.

Commerce is a term of the largest import. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the state may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. 91 U. S. 280.

See INTERSTATE COMMERCE; INTERSTATE COMMERCE COMMISSION; INTERSTATE COMMERCE ACT; CARRIER; DISCRIMINATION; FOREIGN COMMERCE.

COMMERCE OF U. S. See ATTEMPT TO INTRODUCE INTO COMMERCE OF U. S.

COMMERCE, REGULATION OF. See COMMERCE WITH FOREIGN NATIONS.

COMMERCE WITH FOREIGN NATIONS. In the clause in the U. S. Constitution giving Congress power to regulate commerce with foreign nations, such commerce means commerce between citizens of the United States and citizens or subjects of foreign governments. 3 Wall. (U. S.) 417. It means trade, and intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. 92 U. S. 270. The transportation of passengers from European ports to those of the United States has become a part of our commerce with foreign nations. *Id.* And a law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce. *Id.*

COMMERCIA BELLI. Compacts entered into by belligerent nations to secure a temporary and limited peace. 1 Kent 159.

Contracts made between citizens of hostile nations in time of war. 1 Kent 104.

COMMERCIAL AGENCY. A person, firm, or corporation engaged in the business of collecting information as to the financial standing, ability, and credit of persons engaged in business and reporting the same to subscribers or to customers applying and paying therefor. "They have become vast and extensive factors in modern commercial transactions for furnishing information to retail jobbers as well as to wholesale merchants. The courts are bound to know judicially that no vendor of goods at wholesale can be regarded as a prudent business man if he sells to a retail dealer, upon a credit, without first informing himself through these mediums of information of the financial standing of the customer, and the credit to which he is fairly entitled;" 1 Ind. App. 573; s. c. 28 N. E. Rep. 103. See also 83 N. Y. 31; 20 Mo. App. 661.

How far the agency may contract against its own negligence. An exception is made to some extent in favor of such agencies to the rule against stipulations by a person against liability for his own negligence. The agency usually contracts that their agents shall be considered as the agents of their patrons, and that they shall not be liable for the negligence of their agents. Where in an action upon such a contract the plaintiff contended that under it the agency was protected only against gross and not against ordinary negligence, the court thought otherwise, and on motion to take off a non-suit said:—

"By the contract the plaintiffs expressly agreed to take such loss upon themselves. The authorities to which we have been referred have, in our judgment, no application to the case. Common carriers,

innkeepers, and others, engaged in the exercise of a public calling, cannot thus protect themselves against the consequences of gross negligence in the agents whom they employ. This limitation of the right to contract, as parties may choose, is an exception from the general rule and confined to the class of cases named, when the public interests are supposed to demand its application. It has no place here. The contract which these parties entered into must be enforced as they made it. It may have been unwise, but with that we have nothing to do. One or the other must bear the risk involved in depending upon agents scattered over the country, of whom neither could know much. The plaintiffs agreed to bear it and they must take the consequences;" 7 W. N. C. Pa. 246.

Under a contract that the actual verity or correctness of the information was in no manner guaranteed, the agency was not liable for loss occasioned to a subscriber by the wilful and fraudulent act of a sub-agent in furnishing false information; 58 Fed. Rep. 174, reversing 51 *id.* 160. Where the inquiry was made concerning a grocer and the agency reported concerning the wrong person, who had the same name and was a grocer and saloon keeper, the plaintiff could not recover from the agency the value of goods sold on the strength of the report, the evidence being held to show that there was not such gross negligence as would render the agency liable; 70 Hun 334; but such a contract does not protect the agency from an error made in the publication of its books of reference giving the financial responsibility of merchants and others, and upon which a subscriber of the agency relied in selling goods and suffered a loss, and in such case it is unnecessary to thus establish the insolvency of the purchaser by suit before suing the agency; 134 Pa. 161.

When reports are privileged and when libellous. Such an agency is a lawful business and beneficial when lawfully conducted, but not exempt from liability for false and defamatory publications when other citizens would not be exempt. Its communications to a person interested in the information are privileged even if false, if made in good faith and without malice, but if communicated to its subscribers generally they are not privileged; 73 Tex. 15; 116 N. Y. 211; *id.* 217; 81 Mich. 280; 116 Mo. 226; 43 Wis. 348; 18 Fed. Rep. 214; 4 McCrary 160; 77 Ga. 172; 8 Phila. 617. See also 3 Montreal, Q. B. 55; 5 *id.* 42; 18 Can. S. C. 222. The contract of the agency to furnish information to all its subscribers, including those who have no special interest in it, is no defence to an action for libel; 49 N. Y. 417; nor was the fact that the information was given by printed signs of which each subscriber had the key; 46 N. Y. 188; the matter is privileged if communicated to the proper person by a clerk or agent as well as by the proprietor of the agency; 49 N. Y. 417; 12 Fed. Rep. 526; (but see 5 Blatchf. 497 and s. c. 10 Wall. 427, criticised in the two cases just cited;) or if specially reported upon proper occasion to subscribers having special interest in them, though not applied for by such subscribers; 22 Fed. Rep. 771; but if a subscriber apply for special information from the agency, a false denunciation of the person inquired about, coupled with the report, is actionable; 22 S. W. Rep. (Tex.) 868. So also are statements at first privileged but repeated and persisted in when known to be false, or, if otherwise privileged, made maliciously; 12 Fed. Rep. 526; or if made recklessly and without due care and caution in making inquiry; 22 Fed. Rep. 771; 73 Tex. 115; 40 Minn. 475.

The publication and circulation to subscribers in daily reports of the execution of a chattel mortgage was not libellous; 57 Md. 38; *contra*, 49 N. Y. 417; nor was the mere publication of a notice of foreclosure sale under a mortgage; 1 Mo. App. 4; nor of a copy of a judgment, with a note that the judgment was paid the same day; 3 Ir. Rep. 349; but in a similar case when the judgment was so paid, but it was not so stated, the publication was held libellous; 16 Ir. Rep. C. L. 298; and so also is a false publication of a trader that a judgment had been rendered; 23 Q. B. 184. And where the action was for publishing that a judgment had been rendered when only a verdict had been returned, it was held proper

to ask a witness to the effect of such statement, whether if he had known the actual fact his conduct would have been the same; 141 Pa. 501.

The burden of proof is upon the agency to show privilege *prima facie*, and after its character is established the burden is on the plaintiff to show malice; 12 Fed. Rep. 526; 37 N. Y. 477; and it is matter of law for the court to determine whether the matter published is libellous *per se*; 35 Hun 16.

Blacklisting. An action for libel may be brought by a person whose name is published in a book containing a list of delinquent debtors, printed and distributed to subscribers, manifestly for coercing the payment of claims, who is denied credit because of such publication, or by one to whom a letter is sent in an envelope on which is printed the name of an association and a statement that it is an organization for the purpose of collecting bad debts; 77 Wis. 236; but the publication and circulation by a corporation among its officers and employees, of a list of discharged employees, who are considered incompetent or untrustworthy, is not libellous, and a person whose name is on the list has no action unless he can show that the publication was malicious or known to be false; 73 Tex. 568.

Effect of fraudulent representations by vendee to agency upon vendor who relies upon them. An action for deceit will lie against persons or corporations making false representations of pecuniary responsibility to an agency in order to obtain credit and defraud those who may rely upon the reports; 50 Mo. App. 94; 83 N. Y. 31; 18 Hun 44; in such action the statements falsely made to the agency are admissible, if relied on by the vendee; 1 Ind. App. 573; or if approved by him after being written out by the agency, but not if not known to the vendor until after the sale; 81 Ala. 134; 75 Mich. 188. A contract for the sale of goods to the person making such representations, who proves to be insolvent at the time of making them and of the sale, may be rescinded and possession of the goods recovered; 53 Hun 610; 43 N. Y. 805; 31 Mo. App. 190; 85 Mich. 535; 61 Ia. 667; 77 Tex. 48; but where there were no representations other than those obtained by the agency from the seller, a fraudulent intent on the part of the vendee to use the agency as an instrument of fraud must be clearly shown; 33 Hun 549; 2 Cent. Rep. (Md.) 620; 99 N. Y. Rep. 9; s. c. 2 N. E. Rep. 19; 2 N. E. Rep. (N. Y.) 19. The vendor may show that he refused to make the sale until he received the report of the agency, and the agent may show his business methods; 85 Mich. 535. The right to rescind the sale is not affected by a refusal of the vendee to give further statements of his condition, as the original one is presumed to continue if not recalled by the agency; 36 N. Y. St. Rep. 728; but if the vendee has made subsequent reports showing an impaired responsibility, the vendor must take all the reports into consideration, and not only on the original one; but the vendee is not required to make subsequent reports unless he actually becomes insolvent or knows that he will soon be; 83 Mich. 419; 75 *id.* 188. Reports made six weeks before the sale may be relied on; 20 Mo. App. 173; but not those made from five to seven months before; 88 Mich. 418; 85 *id.* 535; 58 Hun 606; 99 N. Y. 353; 49 *id.* 417.

How affected by the statute of frauds. With respect to the liability of the agency for representations not made in writing when the liability was contested, on the ground that the contract was within the statute of frauds, there is not a satisfactory result to be found in decisions; but it has been held that the action was upon the original contract with the customer, which was by no statute required to be written; U. C. 39 Q. B. 551; (reversed on other points and doubted on this; 1 Ont. App. 153;) and also that the action was sustainable on the original contract to furnish accurate statements, in response to inquiry respecting any persons; 12 Phila. 310.

No remedy in equity against publication. An injunction will not be granted to restrain the agency from the publication of matter

injurious to the standing of the plaintiff, there being no jurisdiction in equity unless there is a breach of trust or contract involved; 143 Mass. 295; 9 N. Y. 544.

See MERCANTILE AGENCY.

COMMERCIAL COURT. An English court in which, since 1895, commercial causes have been heard. There is, however, no court known to the law by that name. The Commercial Court is merely the result of the action of the judges in applying the existing rules of court in such a way as to provide a very satisfactory machine for disposing of commercial causes. *Byrne*.

COMMERCIAL LAW. A phrase employed to denote those branches of the law which relate to the rights of property and relations of persons engaged in commerce.

This term denotes more than the phrase "maritime law," which is sometimes used as synonymous, but which more strictly relates to shipping and its incidents.

As the subjects with which commercial law, even as administered in any one country, has to deal are dispersed throughout the globe, it results that commercial law is less local and more cosmopolitan in its character than any other great branch of municipal law; and the peculiar genius of the common law, in adapting recognized principles of right to new and ever-varying combinations of facts, has here found a field where its excellence has been most clearly shown. The various systems of commercial law have been well contrasted by Leone Levi in his collection entitled "Commercial Law, its Principles and Administration, or the Mercantile Law of Great Britain compared with the Codes and Laws of Commerce of all the Important Mercantile Countries of the Modern World, and with the Institutes of Justinian;" London, 1850-52; a work of great interest both as a contribution to the project of a mercantile code and as a manual of present use.

As to the rule in the Federal Courts, see 16 Pet. 1; *id.* 511; 107 U. S. 83, where Bradley, J., says, "Where the law has not been settled, it is the right and duty of the Federal Courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law." See 12 Am. L. Reg. (N. S.) 473; UNITED STATES COURTS.

COMMERCIAL PAPER. Negotiable paper given in due course of business, whether the element of negotiability be given it by the law merchant or by statute. 5 Biss. 118.

Negotiable instruments for the payment of money, as promissory notes or bills of exchange, made by a banker, merchant, or trader in the due course of his business. 6 A. & E. Ency. L. 2nd ed., 221; 5 Biss (U. S.) 114; 60 Ark. 288. See PROMISSORY NOTE; BILL OF EXCHANGE.

COMMERCIAL PARTNERSHIP. See NON-TRADING PARTNERSHIP.

COMMERCIAL TRAVELLER. A travelling salesman who simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterwards to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchaser to the principal on such delivery. 34 Kans. 436; 93 N. C. 511. An order solicited by and given to such salesman does not constitute a sale, either absolute or conditional, of the goods ordered, but is a mere proposal, to be accepted or not, as the principal may see fit; 55 Wis. 515; 88 Ill. 298.

An agent who sells by sample and on credit, and is not intrusted with the possession of the goods to be sold, has no implied authority to receive payment, and payment to him will not discharge the purchaser; 63 Mo. 302; 32 N. J. Law 250; 30 Pa. 513; 24 Mich. 36. See 78 Me. 160; 119 Mass. 140.

Commercial travelers or drummers are agents who travel for wholesale merchants and supply the retail trade with goods, or rather take orders for goods to be shipped to the retail merchants. 6 Am. & Eng. Ency. 2nd ed., 223; 93 N. C. 511. The essential difference between drummers and peddlers seems to be that the latter deliver the goods at the time of the contract of sale, while the former merely solicit orders for

future delivery. *Id.*; 47 Fed. Rep. 539, *et al.* There is also a large number of traveling salesmen who are technically neither drummers nor peddlers, though often confounded with the former. They are such as have their principals' goods themselves in their possession, and make concurrent sale and delivery. *Id.*

The scope of a commercial traveler's authority is well defined, and, as a general rule, extends only to the soliciting of orders for goods. *Id.*; 58 Miss. 478. In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal. *Id.*, 227; 16 Kan. 571 *et al.*

COMMISSARIA LEX. A principle of the Roman law relative to the forfeiture of contracts. It is not unusual to restrict a sale upon credit, by a clause in the agreement that if the buyer should fail to make due payment the seller might rescind the sale. In the meantime, however, the property was the buyer's and at his risk. A debtor and his pledgee might also agree that if the debtor did not pay at the day fixed, the pledge should become the absolute property of the creditor. 2 Kent 583. This was abolished by a law of Constantine. Cod. 8. 35. 3.

COMMISSARY. An officer whose principal duties are to supply an army, or some portion thereof, with provisions.

The subsistence department of the army shall consist of one commissary-general of subsistence, with the rank of brigadier-general; two assistant commissaries-general of subsistence, with the rank of lieutenant-colonel of cavalry; eight commissaries of subsistence, with the rank of major of cavalry; and sixteen commissaries of subsistence, with the rank of captain of cavalry. U. S. Rev. Stat. § 1140. Their duties are defined in the following sections.

COMMISSARY COURT. In Scotch Law. A court of general ecclesiastical jurisdiction. It was held before four commissioners, appointed by the crown from among the faculty of advocates.

It had a double jurisdiction: *first*, that exercised within a certain district; *second*, another, universal, by which it reviewed the sentences of inferior commissioners, and confirmed the testaments of those dying abroad or dying in the country without having an established domicile. Bell, Dict.

It has been abrogated, its jurisdiction in matters of confirmation being given to the sheriff, and the jurisdiction as to marriage and divorce to the court of session. Paterson, Comp. See 4 Geo. IV. c. 47; 1 Will. IV. c. 69; 6 & 7 Will. IV. c. 41; 13 & 14 Vict. c. 36.

COMMISSION (Lat. *commissio*; from *committere*, to intrust to).

An undertaking without reward to do something for another, with respect to a thing bailed. Rutherford, Inst. 105.

A body of persons authorized to act in a certain matter. 5 B. & C. 850.

The act of perpetrating an offence.

An instrument issued by a court of justice, or other competent tribunal, to authorize a person to take depositions, or do any other act by authority of such court or tribunal, is called a commission.

Letters-patent granted by the government, under the public seal, to a person appointed to an office, giving him authority to perform the duties of his office. The commission is not the appointment, but only evidence of it, and, as soon as it is signed and sealed, vests the office in the appointee. 1 Cra. 137; 2 N. & McC. 357. See 1 Pet. C. C. 194; 2 Sumn. 299; 8 Conn. 109; 1 Pa. 297.

A broker is not entitled to commissions unless he actually completes the sale by finding a purchaser ready and willing to complete the purchase on the terms agreed on; his authority to sell on commission terminates on the death of his principal and is not a power coupled with an interest. 204 U. S. 228.

In Common Law. A sum allowed, usually a certain per cent. upon the value

of the property involved, as compensation to a servant or agent for services performed. See COMMISSIONS, SPECIAL COMMISSION.

COMMISSION OF ASSIZE. In English Practice. A commission which formerly issued from the king, appointing certain persons as commissioners or judges of assize to hold the assizes in association with discreet knights during those years in which the justices in eyre did not come.

Other commissions were added to this, which has finally fallen into complete disuse. See COURTS OF ASSIZE AND NISI PRIUS.

COMMISSION GOVERNMENT.

That form of city government in which the mayor is vested with legislative functions and the council is given other than legislative powers. 117 Minn. 458.

The provisions of the constitution dividing the powers of the government into three distinct departments, legislative, executive and judicial, and prohibiting any person of one department from exercising the powers belonging to the others, apply to the government of the state, and not to the government of local subdivisions such as municipal corporations; therefore, the Commission Plan of City Government which permits the exercise of all such powers by certain officers is not invalid as violating such constitutional provisions. 91 Neb. 32.

COMMISSION OF LUNACY. A writ issued out of chancery, or such court as may have jurisdiction of the case, directed to a proper officer, to inquire whether a person named therein is a lunatic or not. 1 Bouvier, Inst. n. 382.

COMMISSION MERCHANT. As this term is used, it is synonymous with the legal term "factor," and means one who receives goods, chattels, or merchandise, for sale, exchange, or other disposition, and who is to receive a compensation for his services, to be paid by the owner or derived from the sale of the goods. 50 Ala. 154. See AGENCY; FACTORS.

COMMISSIONED OFFICER. In the Army of the United States: All above and including second lieutenants. In the Navy of the United States: Of the line, comprising rear-admirals, commodores, captains, commanders, lieutenant-commanders, lieutenants, lieutenants (junior grade), and ensigns; and of the staff, comprising medical and pay officers, naval constructors, professors of mathematics, civil engineers, and chaplains. (Relative ranks in army.) Stand. Dict.

COMMISSION PLAN OF CITY GOVERNMENT. See COMMISSION GOVERNMENT.

COMMISSION OF REBELLION. In English Law. A writ formerly issued out of chancery to compel an attendance. It was abolished by the order of August 8, 1841.

COMMISSIONER. See FOREIGN MINISTER. PROHIBITION COMMISSIONER, etc.

COMMISSIONER OF ARRAY. See ARAYER.

COMMISSIONER OF PATENTS. The title given by law to the head of the patent office. Prior to 1836 the business of that office was under the immediate charge of a clerk in the state department, who was generally known as the superintendent of the patent office. He performed substantially the same duties which afterwards devolved upon the commissioner, except that he was not required to decide upon the patentability of any contrivance for which a patent was sought, inasmuch as the system of examinations had not then been introduced and the applicant was permitted to take out his patent at his own risk. See PATENTS; PATENT OFFICE, EXAMINERS IN.

COMMISSIONER OF WOODS AND FORESTS. An officer created by act of parliament of 1817, to whom was transferred the jurisdiction of the chief justices of the forest. Inderwick, *The King's Peace*.

The Commissioners of Woods, Forests and Land Revenues, and of Works and Public Buildings, are two boards appointed for the superintendence of the public property indicated by their titles. It includes the royal parks in and near London and the other royal demesnes given up by the crown on the settlement of the Civil List. Byrne.

COMMISSIONERS OF BAIL. Officers appointed by some courts to take recognizances of bail in civil cases.

COMMISSIONERS OF DEEDS. Officers appointed by the governors of many of the states, resident in another state or territory, empowered to take acknowledgments, administer oaths, etc., to be used in the state from which they derive their appointment. They have, for the most part, all the powers of a notary public, except that of protesting negotiable paper. Rap. & Lawr. Law Dict.

COMMISSIONERS OF HIGHWAYS. Officers having certain powers and duties concerning the highway, within the limits of their jurisdiction. They are usually three in number. In some of the states they are county officers, and their jurisdiction is coextensive with the county. In others, as in New York, Michigan, Illinois, and Wisconsin, they are town or township officers. They have power to establish, alter, and vacate highways; and it is their duty to cause them to be kept in repair.

COMMISSIONERS OF SEWERS. In English Law. A court of record of special jurisdiction in England.

It is a temporary tribunal, erected by virtue of a commission under the great seal, which formerly was granted *pro re nata* at the pleasure of the crown, but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute of sewers, 23 Hen. VIII. c. 5.

Its jurisdiction is to overlook the repairs of the banks and walls of the sea-coast and navigable rivers and the streams communicating therewith, and is confined to such county or particular district as the commission shall expressly name. The commissioners may take order for the removal of any annoyances or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh, or otherwise, at their own discretion. They are also to assess and collect taxes for such repairs and for the expenses of the commission. They may proceed with the aid of a jury or upon their own view; 3 Bla. Com. 73, 74; Crabb, Hist. Eng. Law 469.

In American Law. Commissioners have been appointed for the purpose of regulating the flow of water in streams. Their duties are discharged in the different states by county courts, county commissioners, etc.

Municipal officers in many cities having jurisdiction of the construction, maintenance, and regulation of sewers.

COMMISSIONERS, UNITED STATES. See UNITED STATES COMMISSIONERS.

COMMISSIONS. In Practice. Compensation allowed to agents, factors, executors, trustees, receivers, and other persons who manage the affairs of others, in recompense for their services.

The right to such allowance may either be the subject of a special contract, may rest upon an implied contract to pay *quantum meruit*, or may depend upon statutory provisions; 7 C. & P. 584; 9 id. 559.

The right does not generally accrue till the completion of the services; 4 C. &

P. 289; 7 Bingh. 99; and see 10 B. & C. 433; and does not then exist unless proper care, skill, and perfect fidelity have been employed; 3 Campb. 451; 9 Bingh. 287; 12 Pick. 328; 94 Mich. 173; 2 Tex. Civ. App. 267; and the services must not have been illegal nor against public policy; 4 Esp. 179; 3 B. & C. 639; 11 Wheat. 258. See 10 Lawy. Rep. Ann. 103.

A real estate broker solicited the privilege of offering an oil property for sale at a price which was fixed and afterwards reduced, upon express condition that the property if not sold on a given day should be taken off the market, which, as the broker failed to make the sale, was done. Eleven days afterward the owner sold the property to a person with whom the broker had opened negotiations, and it was held that time was of the essence of the contract and that the broker was not entitled to a commission; 173 Pa. 396.

The amount of such commissions is generally a percentage on the sums paid out or received. When there is a usage of trade at the particular place or in the particular business in which the agent is engaged, the amount of commissions allowed to auctioneers, brokers, and factors is regulated by such usage, in the absence of special agreement; 10 B. & C. 438; 1 Pars. Contr. 84, 85; Story, Ag. § 326; where there is no agreement and no custom, the jury may fix the commission as a *quantum meruit*; 9 C. & P. 620; 43 Miss. 288.

The amount which executors, etc., are to receive is frequently fixed by statute, subject to modification in special cases by the proper tribunal; 12 Barb. 671; Edw. Receiv. 176, 302, 643. In the absence of statutory provision, commissions cannot be allowed to executors for services in partitioning real estate, and allotting and transferring the same; 62 Hun 416. Where the executor has failed to keep accounts and to make investments according to the directions in the will, and by his negligence has involved the estate in litigation, he will not be allowed commissions; 48 N. J. Eq. 559. The entire commissions are not properly exigible before the administration is terminated; 40 La. Ann. 484; 44 id. 871. An executor is not entitled to commissions on his own indebtedness to the estate; 156 Pa. 473. In England, no commissions are allowed to executors or trustees; 1 Vern. Ch. 316; 4 Ves. Ch. 72, n.; 9 Cl. & F. 111; even where he carries on the testator's business by his direction; 6 Beav. 371. See the cases in all the states in 2 Perry, Trusts § 918, note.

In case the factor guaranties the payment of the debt, he is entitled to a larger compensation (called a *del credere* commission) than is ordinarily given for the transaction of similar business where no such guaranty is made; Paley, Ag. 88.

See AGENCY; AGENTS; EXECUTORS; ADMINISTRATION.

COMMITMENT. In Practice. The warrant or order by which a court or magistrate directs a ministerial officer to take a person to prison.

The act of sending a person to prison by means of such a warrant or order. 9 N. H. 204.

A commitment should be in writing under the hand and seal of the magistrate, and should show his authority and the time and place of making it; 2 R. I. 486; 3 Harr. & M'H. 113; T. U. P. Charit. 280; 8 Cra. 448. It must be made in the name of the United States or of the commonwealth or people, as required by the constitution of the United States or of the several states.

It should be directed to the keeper of the prison, and not generally to carry the party to prison; 2 Stra. 934; 1 Ld. Raym. 424. It should describe the prisoner by his name and surname, or the name he gives as his.

It ought to state that the party has been charged on oath; 14 Johns. 371; 3 Cra. 448; but see 2 Va. Cas. 504; 2 Bail. 290; and should mention with convenient certainty the particular crime charged against the prisoner; 3 Cra. 448; 11 St. Tr. 304, 318; Hawk. PL Cr. b. 2, c. 16, s. 16; 4 Md. 263; 1 Rob. 744; 5 Ark. 104; 26 Vt. 205.

See 17 Wend. 181; 23 id. 638; but a defect in describing the offence is immaterial if it is sufficiently described in the order endorsed on the deposition; 88 Cal. 316. It should point out the place of imprisonment, and not merely direct that the party be taken to prison; 3 Stra. 934; 1 Ld. Raym. 424.

It may be for further examination, or final. If final, the command to the keeper of the prison should be to keep the prisoner "until he shall be discharged by due course of law," when the offence is not bailable; see 3 Conn. 502; 29 E. L. & E. 134; when it is bailable, the gaoler should be directed to keep the prisoner in his "said custody for want of sureties, or until he shall be discharged by due course of law." When the commitment is not final, it is usual to commit the prisoner "for further hearing."

The word commit in a statute has a technical meaning, and a warrant which does not direct an officer to commit a party to prison but only to receive him into custody and safely keep him for further examination, is not a commitment; 23 Ct. Cls. 218.

See, generally, 4 Cra. 129; 2 Yerg. 53; 6 Humphr. 391; 9 N. H. 185; 5 Rich. So. C. 255; 85 Ga. 171.

COMMITTEE. In Legislation. One or more members of a legislative body, to whom is specially referred some matter before that body, in order that they may investigate and examine into it and report to those who delegated this authority to them.

The minority of a committee to which a corporate power has been delegated, cannot bind the majority, or do any valid act, in the absence of any special provision otherwise; 127 U. S. 579.

In Practice. A guardian appointed to take charge of the person or estate of one who has been found to be *non compos mentis*.

For committee of the person, the next of kin is usually selected; and, in case of the lunacy of a husband or wife, the one who is of sound mind is entitled, unless under very special circumstances, to be the committee of the other; Shelf. Lun. 137, 140. It is the duty of such a person to take care of the lunatic.

For committee of the estate, the heir at law is favored. Relations are preferred to strangers; but the latter may be appointed; Shelf. Lun. 144. It is the duty of such committee to administer the estate faithfully and to account for his administration. He cannot, in general, make contracts in relation to the estate of the lunatic, or bind it, without a special order of the court or authority that appointed him.

COMMITTEE OF SUPPLY. See PARLIAMENTARY COMMITTEES.

COMMITTEE OF WAYS AND MEANS. See PARLIAMENTARY COMMITTEES.

COMMITTITUR PIECE. In English Law. An instrument in writing, on paper or parchment, which charges a person already in prison, in execution at the suit of the person who arrested him.

COMMIXION. In Civil Law. A term used to signify the act by which goods are mixed together.

The matters which are mixed are dry or liquid. In the commixtion of the former, the matter retains its substance and individuality; in the latter, the substance no longer remains distinct. The commixtion of liquid is called *confusio* (q. v.), and that of solids a mixture. *Lec. Elem. du Dr. Rom.* § 570, 871; Story, Bailm. § 40; 1 Bouvier, Inst. n. 506.

COMMODOATE. In Scotch Law. A gratuitous loan for use. Erskine, Inst. b. 3, t. 1, § 20; 1 Bell, Com. 225. The implied contract of the borrower is to return the thing borrowed in the same condition as received.

Judge Story regrets that this term has not been adopted and naturalized, as mandate has been from *mandatum*. Story, Bailm. § 221. Ayilffe, in his *Pandects*, has gone further and terms the bailor the *commodatant*, and the bailee the *commodatary*, thus avoiding those circumlocutions which, in the common phraseology of our law, have become almost in-

dispensable. *Ayliffe, Pand. b. 4, t. 16, p. 517.* Brown, in his *Civil Law*, vol. 1, 882, calls the property loaned "commodated property."

COMMODATO. In Spanish Law. A contract by which one person lends gratuitously to another some object not consumable, to be restored to him in kind at a given period.

COMMODATUM. A contract by which one of the parties binds himself to return to the other certain personal chattels which the latter delivers to him to be used by him without reward; loan for use.

COMMODITIES CLAUSE. A provision contained in the Hepburn Act approved June 29, 1906, c. 3591, 34 Stat. 584. It has solely for its object to prevent carriers engaged in interstate commerce from being associated in interest at the time of transportation with the commodities transported. 213 U. S. 368.

Application to Railroads. It prohibits railroad companies engaged in interstate commerce from transporting in such commerce commodities only under the following circumstances and conditions: (1) When the commodity has been manufactured, mined or produced by a railway company or under its authority and at the time of transportation the railway company has not in good faith before the act of transportation parted with its interest in such commodity; (2) when the railway company owns the commodity to be transported in whole or in part; (3) when the railway company at the time of transportation has an interest direct or indirect in a legal sense in the commodity, which last prohibition does not apply to commodities manufactured, mined, produced, owned, etc., by a corporation because a railway company is a stockholder in such corporation. Such ownership of stock in a producing company by a railway company does not cause it as owner of the stock to have a legal interest in the commodity manufactured, etc., by the producing corporation. 213 U. S. 368. As thus construed the commodities clause is a regulation of commerce inherently within the power of Congress to enact. 200 U. S. 361.

COMMODITY. Convenience, privilege, profit, gain; popularly, goods, wares, merchandise. *Anderson.* Within the meaning of the constitution of Massachusetts "commodities" embraces everything which may be the subject of taxation,—including the privilege of using a particular branch of business or employment: as, the business of an auctioneer, of an attorney, of a tavern-keeper, of a retailer of liquors. *Id.*, 12 Mass. 256. "Commodity" is a general term, and includes the privilege and convenience of transacting a particular business. *Id.*, 123 Mass. 495.

Distinguished from Coin. The term "commodity" is opposed to coin, and that the two words mean the same thing which is now frequently expressed by the vulgar and popular language of money and property. The term commodity, is properly used to signify almost any description of article called moveable or personal estate. *Littell's Select Cases (Ky.)* 410.

COMMODORE. In the United States. A naval rank next below rear-admiral and next above captain, and corresponding to brigadier-general in the army titles: not used in the active list of the United States Navy since 1899, but retained as a retiring rank for captains with a civil war record. *Stand. Dict.*

In Great Britain. The commander of a squadron or division of a fleet, having often the temporary rank and pay of a rear-admiral. *Id.*

Also, a title given by courtesy or extension to (1) the senior captain of a naval squadron, (2) the senior captain of a fleet of merchantmen, (3) the presiding officer of a yacht-club, (4) the leading vessel in a fleet of merchantmen, and (5) sometimes a pilot captain. *Id.*

COMMON. An incorporeal hereditament, which consists in a profit which some

man has in connection with one or more others in the land of another. 12 S. & R. 32; 10 Wend. 647; 16 Johns. 14, 30; 10 Pick. 364; 3 Kent 408.

Common of digging, or common in the soil, is the right to take for one's own use part of the soil or minerals in another's lands; the most usual subjects of the right are sand, gravel, stones and clay. It is of a very similar nature to common of estovers and of turbary. *Elton, Com.* 109; *Black, L. Dict.*

Common of estovers is the liberty of taking necessary wood, for the use of furniture of a house or farm, from another man's estate. This right is inseparably attached to the house or farm, and is not apportionable. If, therefore, a farm entitled to estovers be divided by the act of the party among several tenants, neither of them can take estovers, and the right is extinguished; 2 Bla. Com. 34; *Plowd.* 381; 10 Wend. 639. It is to be distinguished from the right to estovers which a tenant for life has in the estate which he occupies. See *ESTOVERS.*

Common of pasture is the right of feeding one's beast on another's land. It is either appendant, appurtenant, because of vicinage, or in gross.

Common of piscary is the liberty of fishing in another man's water. 2 Bla. Com. 34. See *FISHERY.*

Common of shack. The right of persons occupying lands, lying together in the same common field, to turn out their cattle after harvest to feed promiscuously in that field. *Whart. Dict.*; *Steph. Com.*, 11th ed. 623; 1 B. & Ald. 710.

Common of turbary is the liberty of digging turf in another man's ground. Common of turbary can only be appendant or appurtenant to a house, not to lands, because turves are to be spent in the house; 4 Co. 37; 3 Atk. 189; *Noy.* 145; 7 East 127.

The taking seaweed from a beach is a commonable right in Rhode Island; 2 Curt. C. C. 571; 1 R. I. 106; 2 *id.* 218. In Virginia there are statutory provisions concerning the use of all unappropriated lands on the Chesapeake Bay, on the shore of the sea, or of any river or creek, and the bed of any river or creek in the eastern part of the commonwealth, ungranted and used as common; *Va. Code*, c. 62, § 1.

In most of the cities and towns in the United States, there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or by the early inhabitants.

Where land thus appropriated has been accepted by the public, or where individuals have purchased lots adjoining land so appropriated, under the expectation excited by its proprietors that it should so remain, the proprietors cannot resume their exclusive ownership; 3 Vt. 521; 10 Pick. 310; 4 Day 328; 1 *Ired.* 144; 7 *Watts* 894. And see 14 Mass. 440; 2 *id.* 475; 37 *Mich.* 291; 2 *Pick.* 475; 12 S. & R. 32; 6 Vt. 355.

COMMON APPENDANT. Common of pasture appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor. It can only be claimed by prescription: so that it cannot be pleaded by way of custom; 1 *Rolle, Abr.* 396; 6 *Coke* 59. It is regularly annexed to arable land only, and can only be claimed for such cattle as are necessary to tillage, as horses and oxen to plough the land, and cows and sheep to manure it; 2 *Greenl. Cruise*, Dig. 4, 5; 10 *Wend.* 647. Common appendant may by usage be limited to any certain number of cattle; but where there is no such usage, it is restrained to cattle *levant and couchant* upon the land to which it is appendant; *Digb. R. P.* 156; 8 *Term* 396; 2 *M. & R.* 205; 2 *Dane, Abr.* 611, § 12. It may be assigned; and by assigning the land to which it is appended, the right passes as a necessary incident to it. It may be apportioned by granting over a parcel of the land to another, either for the whole or a part of the owner's estate; *Willes* 227; 4 Co. 36; 8 *id.* 78. It may be extinguished by a release of it to the owner of the land,

by a severance of the right of common, by unity of possession of the land, or by the owner of the land, to which the right of common is annexed, becoming the owner of any part of the land subject to the right; 25 *Pa.* 161; 16 *Johns.* 14; *Cro. Eliz.* 592.

Common of estovers or of piscary, which may also be appendant, cannot be apportioned; 8 *Co.* 78. But see 2 *R. I.* 218.

COMMON APPURTENANT. Common appurtenant differs from common appendant in the following particulars, viz.: it may be claimed by grant or prescription, whereas common appendant can only arise from prescription; it does not arise from any connection of tenure, nor is it confined to arable land, but may be claimed as annexed to any kind of land; it may be not only for beasts usually commonable, such as horses, oxen, and sheep, but likewise for goats, swine, etc.; it may be severed from the land to which it is appurtenant, it may be commenced by grant; and an uninterrupted usage for twenty years is evidence of a grant. In most other respects commons appendant and appurtenant agree; 2 *Greenl. Cruise*, Dig. 5; 30 *E. L. & Eq.* 176; 15 *East* 108.

COMMON BECAUSE OF VICINAGE. The right which the inhabitants of two or more contiguous townships or villas have of inter-commoning with each other. It ought to be claimed by prescription, and can only be used by cattle *levant and couchant* upon the lands to which the right is annexed; and cannot exist except between adjoining townships, where there is no intermediate land; *Co. Litt.* 122 a; 4 *Co.* 38 a; 7 *id.* 5; 10 *Q. B.* 581, 589, 604; 19 *id.* 620; 18 *Barb.* 523.

COMMON IN GROSS. A right of common which must be claimed by deed or prescription. It has no relation to land, but is annexed to a man's person, and may be for a certain or indefinite number of cattle. It cannot be aliened so as to give the entire right to several persons to be enjoyed by each in severalty. And where it comes to several persons by operation of law, as by descent, it is incapable of division among them, and must be enjoyed jointly. Common appurtenant for a limited number of cattle may be granted over, and by such grant becomes common in gross; *Co. Litt.* 122 a, 164 a; 5 *Taunt.* 244; 16 *Johns.* 30; 2 *Bla. Com.* 34.

See, generally, *Viner, Abr. Common*; *Bacon, Abr. Common*; *Comyns, Dig. Common*; 2 *Bla. Com.* 34; 2 *Washb. R. P.*; *Williams, Rights of Common* (1880); 61 *Mo.* 210; 97 *Ill.* 498; 4 *How.* 421.

See *TENANCY IN COMMON.*

COMMON APPEARANCE. A general or common appearance is one which is unqualified or unrestricted, as compared with a special or conditional appearance, which is made for a specific purpose,—as, to make a motion, or is coupled with a condition. *Anderson.*

COMMON ASSURANCES. Deeds which make safe or assure to a man the title to his estate, whether they are deeds of conveyance or to charge or discharge.

COMMON BAIL. Fictitious sureties entered in the proper office of the court. See *BAIL*; *ARREST.*

COMMON BAR. In Pleading. A plea to compel the plaintiff to assign the particular place where the trespass has been committed. *Steph. Pl.*, And. ed. 351. It is sometimes called a blank bar.

COMMON BARRATRY. See *BARRATRY.*

COMMON BENCH. The ancient name for the court of common pleas. See *BENCH*; *BANCUS COMMUNIS.*

COMMON CARRIERS. A common carrier is one whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him. 1 *Pick.* 50; 2 *Kelly* 353; *Schouler, Bailm.*, 2d ed. § 345; *Edw. Bailm.* 495; 24 *Conn.* 479.

The definition includes carriers by land

and water. They are, on the one hand, stagecoach and omnibus proprietors, railroad and street railway companies; 36 Neb. 890; truckmen, wagons, and teamsters, carmen and porters; and express companies, whether such persons undertake to carry goods from one portion of the same town to another, or through the whole extent of the country, or even from one state or kingdom to another. And, on the other hand, this term includes the owners and masters of every kind of vessel or water-craft who set themselves before the public as the carriers of freight of any kind for all who choose to employ them, whether the extent of their navigation be from one continent to another or only in the coasting trade or in river or lake transportation, or whether employed in lading or unlading goods or in ferrying, with whatever mode of motive power they may adopt; Story, Bailm. §§ 494-496; 2 Kent 598, 599; Redf. Railw. § 124; 1 Salk. 249; 2 Ga. 348; 14 Ala. N. s. 261; 129 U. S. 397; 2 Dana 431; 12 Ga. 217; 26 Wend. 158. A pipe line company is a common carrier bound to receive and transport, for all persons alike, all oil intrusted to its care, and is not in any sense an agent for the person who employs it to transfer oil; 172 Pa. 580.

It has been doubted whether carmen; 8 C. & P. 207; and coasters; 6 Cow. 266; were common carriers; but these cases stand alone, and are contradicted by many authorities; 19 Barb. 577; 24 *id.* 533; 9 Rich. 193. Telegraph or telephone companies are not carriers; 60 Ill. 421; 41 N. Y. 544; 78 Pa. 238; 45 Barb. 274; 58 Ga. 433; 49 Conn. 352; but they are subject to the rules governing common carriers and others engaged in like public employment; 50 Fed. Rep. 677; 154 U. S. 1. See TELEGRAPH COMPANIES; TELEPHONE COMPANIES.

The liability of the owner of a tug-boat to his tow is not that of a common carrier; 77 Pa. 238; 18 Wend. 387; 24 La. Ann. 165; 1 Black 62; 6 Cal. 462.

And although the carrier receives the goods as a forwarder only, yet if his contract is to transport and to deliver them at a specified address, he is liable as a common carrier; 5 Am. Law Reg. N. s. 16; 48 N. H. 339.

Common carriers are responsible for all loss or damage during transportation, from whatever cause, except the act of God or the public enemy; Ang. Carr. 70, § 67; 1 Term 27; 2 Ld. Raym. 909, 918; 1 Salk. 18 and cases cited; 25 E. L. & Eq. 595; 2 Kent 597, 598; 7 Yerg. 340; 3 Munf. 239; 21 Wend. 190; 5 Strobb. 119; Rice 108; 4 Zab. 697; 12 Conn. 410; 4 N. H. 259; 11 Ill. 579; 129 U. S. 397; 15 Minn. 279; 66 Ala. 167; 55 Tex. 323. The act of God is held to extend only to such inevitable accidents as occur without the intervention of man's agency; Wood, Ry. L. 1877; 21 Wend. 192; 4 Dougl. 287; which could not be avoided by the exercise of due skill and care; 2 Watts 114; 10 Wall. 176; but where freight cars are stopped by a flood and the contents stolen, the loss is not due to inevitable accident, act of God, or insurrection; 154 Pa. 342. See ACT OF GOD.

The carrier is not responsible for losses occurring from natural causes, such as frost, fermentation, evaporation, or natural decay of perishable articles, or the natural and necessary wear in the course of transportation, or the shipper's carelessness, provided the carrier exercises all reasonable care to have the loss or deterioration as little as practicable; Bull. N. P. 69; 2 Kent 299, 300; Story, Bailm. § 492 *a*; 6 Watts 424; Redf. Railw. § 141; 86 Me. 225; 58 Fed. Rep. 936; 21 S. W. Rep. (Tex.) 623; 28 Pac. Rep. (Or.) 894. See 115 Ill. 407; 1 L. R. A. 702.

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy when she begins her voyage, and his undertaking is not discharged because the want of fitness is the result of latent defects; 157 U. S. 124.

Carriers, both by land and water, when they undertake the general business of carrying every kind of goods, are bound to

carry for all who offer; and if they refuse, without just excuse, they are liable to an action; 4 B. & Ald. 32; 8 M. & W. 372; 1 Pick. 50; 5 Mo. 36; 15 Conn. 539; 2 Sumn. 221; 6 Railw. Cas. 61; 6 Wend. 335; 19 *id.* 261; 2 Story 16; 12 Mod. 484; 4 C. B. 555; L. R. 1 C. P. 423; 19 S. C. 853; 6 How. 344; 30 L. J. Q. B. 273. But the business of a common carrier may be restricted within such limits as he may deem expedient, if an individual, or which may be prescribed in its grant of powers, if a corporation, and he is not bound to accept goods out of the line of his usual business. But should the carrier accept goods not within the line of his business, he assumes the liability of a common carrier as to the specific goods accepted; 23 Vt. 186; 14 Pa. 48; 10 N. H. 481; 30 Miss. 231; 4 Exch. 369; 17 Wall. 357; 6 Wend. 335; 26 Vt. 248; Schouler, Bailm., 2d ed. § 372; Redf. Railw. C. 116. The carrier may require freight to be paid in advance; but in an action for not carrying, it is only necessary to allege a readiness to pay freight; 8 M. & W. 372; 18 Ill. 488; 14 Ala. N. s. 249. It is not required to prove or allege a tender, if the carrier refuse to accept the goods for transportation. The carrier is entitled to a lien upon the goods for freight; 2 Ld. Raym. 752; and for advances made to other carriers; 6 Humpn. 70; 16 Ill. 403; 16 Johns. 356; 13 B. Monr. 243. The consignor is *prima facie* liable for freight; but the consignee may be liable when the consignor is his agent, or when the title is in him and he accepts the goods; 3 Bingh. 393; 4 Den. 110; 3 E. D. Sm. 187; Schouler, Bailm., 2d ed. § 335.

Common carriers may qualify their common-law responsibility by special contract; 4 Coke 83; Ang. Carr. § 220; 1 Ventr. 238; Story, Bailm. § 549, and note 5; 17 Wall. 357; 16 Wall. 318; 63 Pa. 14; 4 Ind. App. 326. A carrier cannot exact as a condition precedent that a shipper must sign a contract in writing limiting the common law liability; 45 Kan. 210; 29 S. W. Rep. (Tex.) 565. A contract to qualify the common-law liability may be shown by proving a notice, brought home to and assented to by the owner of the goods or his authorized agent, wherein the carrier stipulates for a qualified liability; 8 M. & W. 243; 6 How. 344; 3 Me. 228; 11 N. Y. 491; 9 Watts 87; 8 Pa. 479; 31 *id.* 209; 2 Rich. 286; 12 B. Monr. 63; 23 Vt. 186; 4 Har. & J. 317. Or it may be reduced to writing, in the form of a bill of lading. See BILL OF LADING. A contract by carrier limiting his liability for negligence is governed by the *lex loci contractus*; 149 Pa. 527.

But the carrier cannot contract against his own negligence or the negligence of his employees and agents; 15 Am. Law Reg. N. s. 140; 50 Pa. 313; 1 Fed. Rep. 382; 41 Conn. 333; 17 Wall. 357; 54 Pa. 53; 77 *id.* 516; 129 U. S. 128, 397; 133 *id.* 199; L. R. 2 App. Cas. 792; 93 U. S. 174; 95 *id.* 635; 17 Blatchf. 412; 56 Ala. 368; 86 Ill. 71; 6 Ind. 416; 47 *id.* 471; 97 Mass. 124; 115 *id.* 304; 42 Mo. 88.

Railroad companies, steamboats, and all other carriers who allow express companies to carry parcels and packages on their cars, or boats, or other vehicles, are liable as common carriers to the owners of goods for all loss or damage which occurs, without regard to the contract between them and such express carriers; 6 How. 344; 23 Vt. 186. See WHEELER, CARRIERS 89.

Railways, steamboats, packets, and other common carriers of passengers, although not liable for injuries to their passengers without their fault, are nevertheless responsible for the baggage of such passengers intrusted to their care as common carriers of goods; and such responsibility continues for a reasonable time after the goods have been placed in the warehouse or depot of the carrier, at the place of destination, for delivery to the passenger or his order; 1 C. B. 339; 2 B. & P. 416; 6 Hill 586; 26 Wend. 591; 10 N. H. 481; 7 Rich. 158. See 81 Tex. 479. Where one company checks baggage through a succession of lines owned by different companies, each company becomes responsible for the whole route; 8 N. Y. 37; 2 E. D. Sm. 184. The baggage-check given

at the time of receiving such baggage is regarded as *prima facie* evidence of the liability of the company. It stands in the place of a bill of lading; 7 Rich. 153; Redf. Railw. § 128. Baggage will not include merchandise; 9 Eng. L. & Eq. 477; 25 Wend. N. Y. 459; 6 Hill, N. Y. 586; 12 Ga. 217; 10 Cush. 506. Jewelry and a watch in a trunk, being female attire, are regarded as proper baggage; 4 Bingh. 218; 3 Pa. 451. See 131 U. S. 440; 148 U. S. 627. But money, except a reasonable amount for expenses, is not properly baggage; 9 Wend. 85; 5 Cush. 69; 9 Humpn. 621; 20 Mo. 513; 15 Ala. 242. See BAGGAGE.

The responsibility of common carriers begins upon the delivery of the goods for immediate transportation. A delivery at the usual place of receiving freight, or to the employees of the company in the usual course of business, is sufficient; 20 Conn. 534; 2 C. & K. 680; 2 M. & S. 172; 16 Barb. 383; Ang. Carr. §§ 129-147; 46 Mo. App. 574; 56 Ark. 279; 52 N. Y. 262; 38 Ill. 354; Edw. Bailm. 528; but where carriers have a warehouse at which they receive goods for transportation, and goods are delivered there not to be forwarded until some event occur, the carriers are, in the mean time, only responsible as depositaries; 24 N. H. 71; and where goods are received as wharfingers, or warehousemen, or forwarders, and not as carriers, liability will be incurred only for ordinary negligence; 7 Cow. 497. Where goods are injured because of insecure packing or boxing, the carrier is not liable; 23 Or. 14; but where it does not appear that they were received as in bad order, or that they were so in fact, the presumption is that they were in good order; 89 Ga. 815. Where there was less than a carload of goods, and there was no agreement on the part of the carrier to transport them in a ventilated car, although it was requested by the carrier that they should be so shipped, it was held that the carrier was not liable for the loss of perishable goods; 173 Pa. 398.

The responsibility of the carrier terminates after the arrival of the goods at their destination and a reasonable time has elapsed for the owner to receive them in business hours. After that, the carrier may put them in a warehouse, and is only responsible for ordinary care; Wood, Ry. L. 1906; 10 Metc. 472; 27 N. H. 86; 2 M. & S. 172; Story, Bailm. § 444. Where goods are delivered to the consignee in violation of instructions not to deliver without a bill of lading, the company is liable to the shipper for loss thereby sustained; 61 Hun 623. In carriage by water, the carrier is, as a general rule; bound to give notice to the consignee of the arrival of the goods; Redf. Railw. § 120; and the delivery of goods from a ship must be according to the custom and usages of the port, and such delivery will discharge the carrier of his responsibility; 154 U. S. 51.

Where goods are so marked as to pass over successive lines of railways, or other transportation having no partnership connection in the business of carrying, the successive carriers are only liable for damage or loss occurring during the time the goods are in their possession for transportation; 48 N. H. 339; 22 Wall. 129; 52 Vt. 335; 23 *id.* 136; 6 Hill 158; 22 Conn. 502; 1 Gray 502; 4 Am. Law Reg. 234; 36 S. C. 110; 1 Okla. 44. A carrier may stipulate that it shall be released from liability after goods have left its road; 78 Tex. 372; 84 Tex. 352; 41 Ill. App. 607; 5 Tex. Civ. App. 547. The English courts hold the first carrier, who accepts goods marked for a place beyond his route, responsible for the entire route, unless he stipulates expressly for the extent of his own route only; 8 M. & W. 421; 3 E. L. & Eq. 497; 18 *id.* 553, 557.

Where one of the carriers has contracted clearly and unequivocally to deliver goods at their destination, *i. e.*, to carry them over the whole route, his liability continues until final delivery; 33 Conn. 178; 66 Pa. 272; 3 Fed. Rep. 768; 51 N. H. 9; 48 *id.* 339; 96 U. S. 258; 84 Ill. 239. See 9 L. R. A. 833, note; 49 Vt. 255; 127 N. Y. 438; but the carrier upon whose line the damage or loss has occurred will also be liable; 1

Am. Law Reg. O. s. 119; 28 Wis. 209; 32 Vt. 665. Where the connecting carrier refuses or unreasonably delays to accept goods, the original carrier while so holding them is a carrier, and the liability as such continues until they are warehoused; 46 Mo. App. 656.

A contract to transport goods from or to points not on the carrying line, and without the state by which it is incorporated, is held to be good; 2 Am. Law Reg. n. s. 184; 47 Me. 578; 27 Vt. 110; 19 Wend. 534; Redf. Railw. Cases 110; 48 N. H. 339; *contra*, 24 Conn. 468.

The agents of corporations who are common carriers, such as railway and steamboat companies, will bind their principals to the full extent of the business entrusted to their control, whether they follow their instructions or not; 14 How. 468, 483. See 127 N. Y. 438. Nor will it excuse the company because the servant or agent acted wilfully in disregard of his instructions; 5 Duer, N. Y. 193; Redf. Railw. § 137, and cases cited in notes.

The contracts of common carriers, like all other contracts, are liable to be controlled and qualified by the known usages and customs and course of the business in which they are engaged; and all who do business with them are bound to take notice of such usages and customs as are uniform, of long standing, and generally known and understood by those familiar with such transactions; 25 Wend. 660; 6 Hill 157; 23 Vt. 136, 211, 212; 21 Ga. 526.

The liability of a common carrier may, at common law, be limited by the character of, or defects in, the subject-matter of the contract. The limitation was formerly applied to contracts for the carriage of slaves, and it was held in such cases that a carrier was not an insurer, and was only liable for the want of skill and care; 2 Pet. 150; 4 McCord 235; 4 Port. 234. The carrier of animals is not answerable for the damages caused by the conduct or propensities of the animals themselves; 9 Barb. 145; s. c. 13 Am. L. Reg. n. s. 145 (with note by Mr. Hunter). See 21 Mich. 165; 9 Bush 645; 111 Mass. 142; 8 Ill. App. 180; 75 Ala. 596; 44 Ia. 424; 27 S. W. Rep. (Tex.) 887; 29 id. (Tex.) 1110; but in other respects the liability for injury to live stock is as great as it would be under a contract for the carriage of inanimate objects; 4 Ohio St. 729; 9 Kan. 285; 26 Vt. 248; 52 N. H. 355; 5 Neb. 117; 72 Ill. 504; 4 M. & W. 749; 1 H. & H. 489.

In Michigan, Kentucky, and Tennessee, a railroad company is not at common law a carrier of live stock and may refuse to receive it for transportation; and only becomes liable as a common carrier by assuming to carry it as such; 21 Mich. 165; 25 id. 329; 10 Lea, Tenn. 304; 9 Bush, Ky. 645. Where a mandamus was asked to compel a common carrier to receive live stock for transportation under common-law liability, it was refused by the supreme court of New York; 16 Hun 813. If the carrier accept live stock for transportation, he is bound to exercise at least ordinary care; 38 Ia. 127; 70 Tex. 491; 29 S. W. Rep. (Tex.) 695; 57 Mo. App. 550; 22 S. E. Rep. (Va.) 490; 168 Pa. 209; 28 S. W. Rep. (Tex.) 925; 57 Mo. App. 135. The burden of proof is on carrier to show that loss or injury to live stock resulted from an excepted cause, when shipped under special contract, containing exemptions from liability; 69 Miss. 191.

There has been much legislation on the subject of special contracts for the transportation of live stock, and the courts have construed them with reference to their subject-matter and intrinsic qualities. In most of the states it seems to be settled that a carrier of live stock is liable for all accidents to them except those which arise from the act of God, the public enemy, or the inherent propensities of the animals themselves. See Wheel. Com. Car.

The carrier has an insurable interest in the goods, both in regard to fire and marine disasters, measured by the extent of his liability for loss or damage; 12 Barb. 595.

The carrier is not bound, unless he so stipulate, to deliver goods by a particular

time, or to do more than to deliver in a reasonable time under all the circumstances attending the transportation; Story, Bailm. § 545 a; 5 M. & G. 551; 6 McLean 296; 19 Barb. 36; 12 N. Y. 245. See 15 W. R. 792; L. R. 9 C. P. 325; 23 Wis. 138; 41 Ill. 73; 79 Mo. 296. What is a reasonable time is to be decided by the jury, from a consideration of all the circumstances; 7 Rich. 190, 409; 32 L. J. Q. B. 292; 4 B. & S. 66.

But if the carrier contract specially to deliver in a prescribed time, he must perform his contract, or suffer the damages sustained by his failure; 1 Duer, N. Y. 209; 12 N. Y. 99; 2 B. & P. 416; 21 L. J. Q. B. 178; 105 Mass. 437; 83 Mo. 574.

He is liable, upon general principles, where the goods are not delivered through his default, to the extent of their market value at the place of their destination; Ang. Carr. 488, 489; 4 Whart. 204; 11 La. Ann. 324; Sedg. Dam. 356; 2 B. & Ad. 932; 49 Vt. 255; 27 Ill. 148; 55 Mo. 167; 43 Mich. 209. See, also, 12 S. & R. 183; 1 Cal. 108.

If the goods are only damaged, or not delivered in time, the owner is bound to receive them. He will be entitled to damages, but cannot repudiate the goods and recover from the carrier as for a total loss; 5 Rich. 462; 12 N. Y. 509; 35 N. H. 390; 60 N. Y. Super. Ct. 132.

For the authorities in the civil law on the subject of common carriers, the reader is referred to Dig. 4. 9. 1 to 7; Pothier, Pand. lib. 4, t. 9; Donat, liv. 1, t. 16, ss. 1 and 2; Pardessus, art. 537 to 555; Code Civil, art. 1782, 1786, 1952; Moreau & Carlton, *Las Partidas*, c. 5, t. 8, l. 26; Erskine, Inst. b. 2, t. 1, § 28; 1 Bell, Com. 465; Abbott, Shipp. part 3, c. 3, § 3, note (1); 1 Voet, Ad Pand. lib. 4, t. 9; Merlin, Rép. *Voiture, Voiturier*; Goirand, Code of Commerce (1880) 163.

Consult Angell on Carriers; Chitty & Temple; Lawson; Ray; Thompson; Browne; Wheeler, Carriers; Story; Schouler, Bailments; Darlington; Parsons; Redfield; Wood, Railways; 13 Lawy. Rep. Ann. 33; COMMON CARRIERS OF PASSENGERS; BAGGAGE; BAILMENTS; LIEN; EXPRESS COMPANIES.

By Railroad. In the Employers' Liability Act, the words "common carrier by railroad" mean one who operates a railroad as a means of carrying for the public, i. e. a railroad company acting as a common carrier. 254 U. S. 187. Does not include an express company which neither owns nor operates a railroad, but uses and pays for railroad transportation. *Id.*

COMMON CARRIERS OF PASSENGERS. Common carriers of passengers are such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing. Thomps. Carriers of Passengers 26, n. § 1; 11 Allen 304; 19 Wend. 239; 10 N. H. 486; 15 Ill. 472; 2 Sumn. 221; 3 B. & B. 54; 9 Price 408.

A company owning parlor and sleeping cars, who enter into no contract of carriage with the passenger, but only give him superior accommodations during the journey, is not a common carrier; 73 Ill. 360; 62 Fed. Rep. 265. See PARLOR CARS; SLEEPING CARS. A street railway company is a common carrier of passengers and liable as such on common-law principles; 36 Neb. 890. See STREET RAILWAYS.

Common carriers may excuse themselves when there is an unexpected press of travel and all their means are exhausted. But see Redfield, Railw. 344, § 155, and notes, and cases cited; Story, Bailm. § 591; 10 N. H. 486; and they may for good cause exclude a passenger; thus, they are not required to carry drunken and disorderly people, or one affected with a contagious disease, or those who come on board to assault passengers, commit a crime, flee from justice, gamble, or interfere with the proper regulations of the carrier, and disturb the comfort of the passengers; Wood, Ry. L. 1200; 4 Dill. 321; 4 Wall. 605; 15 Gray 20; 11 Allen 304; 37 Ind. 576; 68 id. 316; 76 Pa. 510; 32 Ohio St. 345; or one whose pur-

pose is to injure the carrier's business; 2 Sumn. 221; 11 Blatchf. 233; but if a carrier receives a passenger, knowing that a good cause exists for his exclusion, he cannot afterwards eject him for such cause; 4 Wall. 605; 34 Cal. 616. Where one rightfully on a train as a passenger is put off, it is of itself a good cause of action against the company irrespective of any physical injury that may have resulted; 143 U. S. 60. It is not liable for injuries resulting from one trying to steal a ride on a freight train; 157 Mass. 377.

Passenger-carriers are not held responsible as insurers of the safety of their passengers, as common carriers of goods are. But they are bound to the very highest degree of care and watchfulness in regard to all their appliances for the conduct of their business; so that, as far as human foresight can secure the safety of passengers, there is an unquestionable right to demand it of all who enter upon the business of passenger-carriers; 2 Esp. 533; 17 Ill. 496; 36 Neb. 890; 1 Tex. Civ. App. 642; 145 Ill. 67; L. R. 9 Q. B. 122; 2 Q. B. D. 377; 136 Mass. 321; 102 U. S. 451; 94 Pa. 351.

The carrier is not excused because the passenger does not pay fare; 14 How. 483; or because he is an express messenger and is injured while engaged in his duties as such; 56 Ark. 594; 96 Pa. 256; common carriers must exercise the same degree of care in carrying passengers free, on pass or otherwise, as in carrying them for hire, and cannot in such case exempt themselves from liability for negligence; Ray, Neg. Imp. Dut. 5; 37 Mich. 111; 1 Cal. 348; 40 Barb. 546; 21 Ind. 48; 30 Allen 9; 30 Ill. 9; 24 N. Y. 196; 57 Pa. 335; 39 Ia. 246; 68 Mo. 340; 63 Md. 433; 71 Ind. 271; 22 L. R. A. 794. *Aliter* in England as to negligence; 13 Ir. L. T. 100; 9 Ir. L. T. 69; L. R. 10 Q. B. 437; 5 Wash. St. 46. When live stock is shipped upon a railroad it is customary to issue to the persons in charge "drover's" passes, which entitle the holder to accompany the stock and return. By the terms of such a pass the carrier may restrict his liability for injury done to the holder, but cannot, by any limitation therein contained, relieve himself from accountability for injury caused by his own or his servants' negligence; 17 Wall. 357; 19 Ohio 1, 221, 260; 51 Pa. 315; 47 Ind. 471; 41 Ala. 486; 39 Ia. 246; 20 Minn. 125; 93 U. S. 291; 26 Gratt. 328; 71 Ind. 271. But *contra* in case of negligence, in England; L. R. 8 Q. B. 57; 10 id. 212; and in New York; 24 N. Y. 181, 196; 25 id. 442; 32 id. 333; 49 id. 263; 61 Hun 623.

Where a train is signalled at a section house, which is not a regular stopping-place, and a person boards it without any one's knowledge, and in doing so is injured, the road is not liable; 68 Miss. 643. The passenger must be ready and willing to pay such fare as is required by the established regulations of the carriers in conformity with law. But an actual tender of fare or passage-money does not seem requisite in order to maintain an action for an absolute refusal to carry, and much less is it necessary in an action for any injury sustained; 6 C. B. 775; Story, Bailm. § 591; 1 East 203; 2 Kent 598, 599, and note. The rule of law is the same in regard to paying fare in advance that it is as to freight, except that, the usage in the former case being to take pay in advance, a passenger is expected to have procured his ticket before he had taken passage; and the law will presume payment according to such usages; 3 Pa. 451. One ceases to be a passenger of a street car the moment he leaves it; 156 Mass. 320.

Passenger-carriers are responsible as common carriers for the baggage or their passengers; 13 Wend. 626; but may limit their common-law liability by express contract, and by specific and reasonable regulations made known to the public, but they cannot relieve themselves from liability from loss occasioned by their own or their servants' negligence; 19 Wend. 234, 251; 2 Ohio 132; 8 Pa. 479; 47 Ind. 471; 41 Ala. 488. See L. R. 10 Q. B. 437. The term baggage includes such articles as the traveller's comfort, convenience, and amuse-

ment require. See BAGGAGE. The carrier may make such reasonable regulations as seem to him proper for the checking, custody, and carriage of baggage; 7 Allen 329. And is liable as a carrier until the passenger has had a reasonable time to remove it after its arrival at his destination; 69 Hun 479. But a steamship company is not responsible as a carrier for the baggage retained by a passenger; 2 N. Y. 355; 7 Cush. 155; 32 Wis. 85; 3 H. & C. 137; L. R. 6 C. P. 44; 83 Pa. 446.

Where the servants of common carriers of passengers—as the drivers of stage-coaches, etc., the captains of steamboats, and the conductors of railway trains—are allowed to carry parcels, the carriers are responsible for their safe delivery, although such servants are not required to account for what they receive by way of compensation; 6 Wend. 351; 23 Vt. 186, 208; 2 Story. 16; 2 Kent 609.

In regard to the particulars of the duty of carriers of passengers as to their entire equipment both of machinery and servants, the decisions are very numerous; but they all concur in the result that if there were anything more which could have been done by the carrier to insure the safety of his passengers, and injury occurs in consequence of the omission, he is liable. The consequence of such a rule naturally is, that, after any injury occurs, it is more commonly discovered that it was in some degree owing to some possible omission or neglect on the part of the carrier or his servants, and that he is, therefore, held responsible for the damage sustained; but where the defect was one which no degree of watchfulness in the carrier will enable him to discover, he is clearly not liable; Redf. Railw. § 149, notes; Ang. Carr. § 534; Story, Bailm. §§ 592-596; 2 B. & Ad. 169; 11 Gratt. 697; 1 McLean 540; 13 N. Y. 9; 16 How. 469; 97 Mass. 361; 71 Mo. 113; 103 Pa. 115; 105 id. 460; 11 C. B. N. s. 588. They must also furnish safe and convenient stations and approaches; 26 Ia. 124; 29 Ohio St. 374. And they must absolutely protect passengers against the misconduct of their own servants engaged in executing the contract; 121 U. S. 637; and if an employé is free from liability for injury done a passenger, the carrier is also; 142 U. S. 18. Where one enters a ticket-office to buy a ticket he is entitled to the protection of a passenger, although the agent refuse to sell him a ticket; 89 Va. 639.

The degree of speed allowable upon a railway depends upon the condition of the road; 5 Q. B. 747.

Passenger-carriers are not responsible where the injury resulted directly from the negligence of the passenger; Wood, Railw. L. 1273; 22 Vt. 213; 95 U. S. 439; 23 Pa. 147; Ang. Carr. 556; Redf. Railw. 330, § 150, and cases cited in notes; 3 B. & Ald. 804; 86 Pa. 308; 36 Wis. 92.

It is the duty of a street railway company to stop when a passenger is about to alight and not to start again until he has done so; 147 U. S. 571; but the act of alighting from a moving car is not negligence *per se*, regardless of attending circumstances; 48 Mo. App. 659; 49 id. 104; 93 Mich. 553; 44 La. Ann. 1059; 44 Ill. App. 56; but see 151 Pa. 562.

Where there is intentional wrong on the part of the defendant, the plaintiff may recover, notwithstanding negligence on his part; 5 Hill 282. So, also, where the plaintiff's negligence contributed but remotely to the injury, and the defendant's culpable want of care was its immediate cause, a recovery may still be had; 43 Mo. 480; 10 M. & W. 564; 5 C. & P. 190; 9 Ex. 91; 51 Ill. 338; 56 Cal. 513; 61 Md. 54. So, also, if the defendant is guilty of such a degree of negligence that the plaintiff could not have escaped its consequences, he may recover, notwithstanding there was want of prudence on his part; 3 M. & W. 244; 18 Ga. 679, 686; 1 Dutch. 556; Redf. Railw. § 150, and cases cited in notes. Passengers leaping from cars or other vehicles, either by land or water, from any just sense of peril, may still recover; 9 La. Ann. 441; 15 Ill. 468; 17 id. 406; 23 Pa. 147, 150; 13 Pet.

181; Redf. Railw. § 151.

Carriers of passengers are bound to carry for the whole route for which they stipulate, and according to their public advertisements and the general usage and custom of their business; Story, Bailm. § 600; 19 Wend. 534; 8 E. L. & Eq. 362. The carrier's liability extends over the entire route for which he has contracted to carry, though the destination is reached over connecting lines; 29 N. H. 49; 4 Cush. 400; 11 Minn. 277; 21 Wis. 582. But the carrier is also liable on whose line the loss or injury is suffered; 22 Conn. 502; 20 Vt. 421; 19 Barb. 222.

Where a passenger is carried some distance beyond his destination, and ejected against his protest, being compelled to walk back to the station, the company is liable for breach of contract; 6 Ind. App. 52. See TICKET.

Passenger-carriers are liable for reasonable damages for a failure to deliver passengers in reasonable time, according to their public announcements; 8 E. L. & Eq. 362; 34 id. 154; 1 Cal. 353; 18 N. Y. 534; 63 Barb. 260; 1 Hurl. & N. 408; L. R. 1 C. P. D. 286.

Passenger-carriers may establish reasonable regulations in regard to the conduct of passengers, and discriminate between those who conform to their rules in regard to obtaining tickets, and those who do not,—requiring more fare of the latter; 13 Ill. 460; 34 N. H. 230; 29 Vt. 160; 7 Metc. 596; 12 id. 482; 4 Zab. 435; 29 E. L. & Eq. 143; Redf. Railw. § 28, and notes; 24 Conn. 249; 4 Ind. App. 413; 134 Ind. 100; but a passenger is not bound to comply with the rules of a company unless they are reasonable; 90 Ga. 562. Passengers may be required to go through in the same train or forfeit the remainder of their tickets; Ray, Neg. Imp. Dut. 522; 11 Metc. 121; 1 Am. Railw. Cas. 601; 72 Pa. 231; 46 N. H. 213; 4 Zab. 438; 11 Ohio St. 462; 84 Tex. 678. The words "good this trip only" upon a ticket will not limit the undertaking of the company to any particular day or any specific train,—they relate to a journey and not to a time; and the ticket is good if used at any time within six years from its date; 24 Barb. 514; 51 Cal. 425. See article in 5 So. L. Rev. N. s. 765; 66 Cal. 191; 89 N. Y. 281; 85 Tex. 158; but a ticket "good for this day only," or for "only two days after date," is of no validity after that date though not used; 1 Allen 267; 7 Hun 670. Where a passenger buys a ticket which is silent as to stop-over privileges, he may rely on the statements of the ticket agent on that subject; 143 U. S. 60.

Railway passengers, when required by the regulations of the company to surrender their tickets in exchange for the conductor's checks, are liable to be expelled from the cars for a refusal to comply with such regulation, or to pay fare again; 22 Barb. 130; or for refusal to exhibit his ticket at the request of the conductor in compliance with the standing regulations of the company; 15 N. Y. 455. See TICKETS.

Railway companies may exclude merchandise from their passenger trains. The company is not bound to carry a passenger daily whose trunk or trunks contain merchandise, money, or other things known as "express matter"; 5 Am. Law Rep. 364. See, also, upon the subject of by-laws as to passengers on railways, Redf. Railw. § 28, and notes.

Where a stage-coach is overturned when laden with passengers, it is regarded as *prima facie* evidence of negligence in the proprietor or his servants; Ray, Neg. Imp. Dut. 25; 13 Pet. 181. Where the driver leaves his horses in the road unfastened, and a passenger is injured by their running away, he is entitled to recover; 66 Tex. 265. And where any injury occurs to a passenger upon a railway, it has been considered *prima facie* evidence of negligence on the part of the company; 5 Q. B. 747; 8 Pa. 433; 15 Ill. 471; 16 Barb. 113, 856; 20 id. 232.

The general rules above laid down, so far

as they are applicable, *mutatis mutandis*, control the rights and duties of passenger-carriers both by land and water. There are many special regulations, both in regard to the conduct of sailing and steam vessels, which it is the duty of masters to observe in order to secure the safety of passengers, and which it will be culpable negligence to disregard; but they are too minute to be here enumerated. See Ang. Carr. § 633. And a pilot being on board and having the entire control of the vessel will not exonerate the owner from responsibility any more than if the master had charge of the vessel,—the pilot being considered the agent of the owner; 8 Pick. 22; 5 B. & P. 182. But in 1 How. 28 it was considered that the owner is not responsible, while a pilot licensed under the acts of parliament is directing the movements of his ship in the harbor of Liverpool, for an injury to another ship by collision, such being the English law and the collision occurring in British waters; but it was held that the vessel was liable for the negligence of a pilot which it was obliged to take under a state law, or pay full pilotage; 7 Wall. 53. It is otherwise, if the employment of a pilot is compulsory under a law providing that neglect to do so shall be a misdemeanor; 63 Fed. Rep. 845.

COMMON COUNCIL. See COUNCIL.

COMMON COUNTS. Certain general counts, not founded on any special contract, which are introduced in a declaration, for the purpose of preventing defeat of a just right by an accidental variance in the evidence.

These are, in an action of assumpsit, counts founded on implied promises to pay money in consideration of a precedent debt, and have been variously classified. Those usually comprehended under the term are:—

1. *Indebitatus assumpsit*, which alleges a debt founded upon one of the several causes of action from which the law implies a promise to pay, and this is made the consideration for the promise to pay a sum of money equivalent to such indebtedness. This covers two distinct classes:—
a. Those termed money counts, because they related exclusively to money transactions as the basis of the debt alleged:

- (1) Money paid for defendant's use.
- (2) Money had and received by defendant for the plaintiff's use.
- (3) Money lent and advanced to defendant.
- (4) Interest.
- (5) Account stated.

b. Any of the usual states of fact upon which the debt may be founded, the most common being:

- (1) Use and occupation.
- (2) Board and lodging.
- (3) Goods sold and delivered.
- (4) Goods bargained and sold.
- (5) Work, labor, and services.
- (6) Work, labor, and materials.
2. *Quantum meruit*.
3. *Quantum valebat*.

See ASSUMPSIT.

COMMON FINE. A small sum of money paid to the lords by the residents in certain leets. *Fleta*; Wharton.

COMMON FISHERY. A fishery to which all persons have a right. A common fishery is different from a *common of fishery*, which is the right to fish in another's pond, pool, or river. See FISHERY.

COMMON FORM. See SOLEMN FORM.

COMMON GAMBLING HOUSE. A place where persons habitually assemble to bet or wager money or property on the prospective rise and fall in the prices of stocks, bonds, grain, etc., is, in law, a "common gambling house." 94 Ky. 359, 22 S. W. 446.

COMMON HIGHWAY. By this term is meant a road to be used by the community at large for any purpose of transit or traffic. Hammond, N. P. 239. See HIGHWAY.

COMMON INFORMER. One who, without being specially required by law or by virtue of his office, gives information of crimes, offences, or misdemeanors which have been committed, in order to prosecute the offender; a prosecutor.

COMMON INTENT. The natural sense given to words.

It is the rule that when words are used which will bear a natural sense and an artificial one, or one to be made out by argument and inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which have been omitted; 2 H. Blackst. 530. In pleading, certainty is required; but certainty to a common intent is sufficient—that is, what upon a reasonable construction may be called certain, without recurring to possible facts; Co. Litt. 203 a; Dougl. 163. See CERTAINTY.

COMMON LAW. That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or civil law.

The common law is reason dealing by the light of experience with human affairs. One of its merits is that it has the capacity to reach the ends of justice by the shortest paths. 100 U. S. 584. See COUTUME.

Those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. 1 Kent 492.

The body of rules and remedies administered by courts of law, technically so called, in contradistinction to those of equity and to the canon law.

The law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

The most prominent characteristic which marks this contrast, and perhaps the source of the distinction, lies in the fact that under the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the sudden change of a present arbitrary power, are added ascendancy, but, under the sanction of a constitutional government, each of these is set off against the other; so that the will of the people, as it is gathered both from long established custom and from the expression of the legislative power, gradually forms a system—just, because it is the deliberate will of a free people—stable, because it is the growth of centuries—progressive, because it is amenable to the constant revision of the people. A full idea of the genius of the common law cannot be gathered without a survey of the philosophy of English and American history. Some of the elements will, however, appear in considering the various narrower senses in which the phrase "common law" is used. Perhaps the most important of these narrower senses is that which it has when used in contradistinction to statute law, to designate unwritten as distinguished from written law. It is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law. When it is spoken of as the *lex non scripta*, it is meant that it is law not written by authority of law. The statutes are the expression of law in a written form, which form is essential to the statute. The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law; it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is nevertheless of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage; its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence it is said that the rules of the common law are flexible; 1 Gray 263; 5 Swan 42; 5 Cow. 557, 628, 632.

It naturally results from the flexible form of the statute or written law that it has no self-contained power of adaptation to cases not foreseen by legislators, that every statute of importance becomes, in course of time, supplemented, explained, enlarged, or limited by a series of adjudications upon it, so that at last it may appear to be merely the foundation of a larger superstructure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands, and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently interposes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the past, interlace and react upon each other. Historical evidence sup-

ports the view which these facts suggest, that many of the doctrines of the common law are but the common-law form of antique statutes, long since overgrown and imbedded in judicial decisions. While this process is doubtless continually going on in some degree, the contrary process is also continually going on; and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications of course, as the legislature will choose to make. This subject is more fully considered under the title Code, which see.

In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law technically so called in contradistinction to those of equity administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts.

In England the phrase is more commonly used at the present day in the second of the three senses above mentioned.

In this country the common law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana. Many of the most valued principles of the common law have been embodied in the constitution of the United States and the constitutions of the several states; and in many of the states the common law and the statutes of England in force in the colony at the time of our independence are by the state constitution declared to be the law of the state until repealed. There is an express constitutional adoption of it in Delaware, New York, Michigan, Wisconsin, and West Virginia, and an implied adoption of it in the constitutions of Kentucky and West Virginia. It has been adopted by statute in Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Washington and Wyoming. It was extended to Alabama by the ordinance of 1787 and the recognition of the latter in the state constitution; 3 How. 212; 28 Ala. 707. It is recognized by judicial decision without any statute in Iowa; 7 Ia. 352; Mississippi; 42 Miss. 1. See 1 Bish. Crim. Law § 15, note 4, § 45, where the rules adopted by the several states in this respect are stated. Hence, where a question in the courts of one state turns upon the laws of a sister state, if no proof of such laws is offered, it is, in general, presumed that the common law as it existed at the time of the separation of this country from England prevails in such state; 4 Denio 805; 20 Ind. 458; 11 Mich. 181; 47 Minn. 228; *contra*, in Pennsylvania, in cases where that state has changed from the common law; the presumption being that the law of the sister state has made the same change, if there is no proof to the contrary. The term common law as thus used may be deemed to include the doctrine of equity; 8 N. Y. 535; but the term is also used in the amendments to the constitution of the United States (art. 7) in contradistinction to equity, in the provision that "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state; 1 Gall. 20; 1 Baldw. 554, 558; 3 Wheat. 223; 3 Pet. 446. See 5 *id.* 241; 1 Mass. 61; 18 Wis. 147. The term is used in contradistinction to equity, admiralty, and maritime law; 3 Pet. 446; 1 Baldw. 554.

The common law of England is not in all respects to be taken as that of the United States or of the several states: its general principles are adopted only so far as they are applicable to our situation, and the principles upon which courts discriminate between what is to be taken and what is to be left have been much the same whether the common law was adopted by constitution, statute, or decision. While no hard and fast rule can be laid down which will at once differentiate every case, a very discriminating effort was made by Chancellor Bates, in *Clawson v. Primrose*, 4 Del. Ch. 643, to formulate the result of the decisions and ascertain the criterion which they had in most instances applied to the subject. In this discussion, which was character-

ized by Professor Washburn as the best he had ever read, the conclusion reached is thus stated:

"It cannot be overlooked that, notwithstanding the broad language of the constitution ('the common law of England as well as so much of the statute law as has been been adopted in practice, . . . such parts only excepted as are repugnant to the rights and privileges contained in the constitution and the declaration of rights') there were many parts of the common law of England, as it stood prior to 1776, which never have in fact been regarded by our courts as in force in this country; yet it is to be observed that the courts have not herein acted arbitrarily in adopting some parts of the common law and rejecting other parts, according to their views of the policy of particular rules or doctrine. On the contrary, those parts of the common law of England which have not been here practically administered by the courts will be found on examination to reduce themselves to two classes, resting upon grounds which render them proper to be treated as implied exceptions to the constitutional provision in addition to the expressed exception of such parts of the common law as were repugnant to the rights and privileges contained in the constitution. One of these classes of exceptions may be briefly disposed of. It embraces those parts of the rules and practice of the common law which had become superseded by long settled usages of trade, or business, or habits of dealing among our people, such as could not be unsettled or disturbed without serious inconvenience or injury. In such cases, upon the necessary maxim that *communis error facit jus*, the courts accepted these departures as practical modifications of the common law.

The other class of rules which, though parts of the common law of England, have never been administered by the courts under the constitution of 1776, embraces those parts of the common law which in the terms usually employed were, at the period of our independence, inapplicable to the existing circumstances and institutions of our people. There is less difficulty in applying the limitation practically than in attempting to define it. I understand it as excluding those parts of the common law of England which were applicable to subjects connected with political institutions and usages peculiar to the mother country, and having no existence in the colonies, such for example as offices, dignities, advowsons, tithes, etc.; also, as excluding some of the more artificial rules of the common law, springing out of the complicated system of police, revenue, and trade, among a great commercial people and not therefore applicable to the more simple transactions of the colonies or of the states in their early history. One of what may be understood as excluding or modifying many of what is known as the common law of practice, and possibly of evidence, which the greater simplicity in our system for the administration of justice, would render unnecessary or inconvenient.

But, on the other hand, our legislative and judicial history shows conclusively that what may be termed the common law of property was received as an entire system, subject to alterations by the legislature only. Rights of property and of person are fundamental rights necessary to be defined and protected in every civil society. The common law, as a system framed to this end, could not be deemed inapplicable in the colonies for want of a subject matter, or as being needless or superfluous, or unacceptable, which is the true sense of the limitation in question. Certain it is, as a matter of history, that our ancestors did not so treat it."

Among the other cases in which the subject is treated are 2 Pet. 144; 9 Cra. 333; 9 S. & R. 380; 5 Cow. 628; 5 Pet. 241; 8 *id.* 658; 7 Cra. 32; 1 Wheat. 415; 8 *id.* 223; 2 Dall. 297, 384; 1 Mass. 61; 9 Pick. 532; 8 Me. 162; 6 *id.* 55; 8 G. & J. 62; 1 Gall. 489; 3 Conn. 114; 34 *id.* 260; 28 Ind. 220; 5 W. Va. 1; 37 Barb. 16; 28 Ala. 704. See Sampson's Discourse before the N. Y. Hist. Soc.

The adoption of the common law has been held to include the construction of common-law terms; 4 How. Miss. 163; 5 Ark. 536; statutes; 2 Metc. 118; and constitutional provisions; 9 Humph. 43; curtesy; 3 Humph. 267; dower; 4 Ia. 381; husband and wife; 15 Cal. 308; champerty; 1 Ohio 182; real property, title, estates, and tenures; 43 Miss. 1; 26 Ala. 493; 24 Miss. 343; sureties; 2 How. 127; charitable uses; 7 Vt. 241; 8 N. Y. 541; 17 S. & R. 88; decedent's estates; 86 N. Y. 529; remedies and practice; T. U. P. Charit. 172; 1 Gall. 20; 42 Ala. 597; 1 Hemp. 105; 5 Pet. 253; 47 Ala. 424; 24 Ohio L. J. 435.

In actions in the federal courts in a territory, the common law is the rule of decision, in the absence of statutes or proof of laws or customs prevailing in the territory; 2 C. C. A. 367; 10 U. S. App. 200; 51 Fed. Rep. 551. The common-law rule of decision in a federal court is that of the state in which it is sitting; 2 McLean 568.

Illustrations of what it has been held not to include are the rule respecting conveyance by parol; 1 Ohio 245; but see 89 Ill. 370; shifting inheritances; 13 Ohio St. 21; 17 Ind. 367; 5 Wall. 710; mere possession of land as against miners; 5 Cal. 100; newspaper communications respecting a

judge considered as a contempt in England; 4 Ill. 404; cutting timber; 28 Ind. 220; easement by use in party-wall; 10 Ohio St. 523; estates in joint tenancy; 2 Ohio 305; rule as to partial reversal of a judgment against an infant and another; Kirby 117; *cy pres* doctrine; 35 Ind. 198; riparian rights to soil under water; 20 Nev. 269; overruling 7 *id.* 249; to running water; 2 Aik. Vt. 187; the definition of a navigable river; 123 Pa. 191; the law of waters as applied to large lakes, or to a river which is a national boundary; 19 Barb. 484.

In criminal law the common law is generally in force in the United States to some extent, and while it is in some states held that no crime is punishable unless made such by statute, there are in many states general statutes resorting to the common law for all crimes not otherwise enumerated, and for criminal matters generally. When there is no statutory definition of a crime named, the common-law definition is generally resorted to; 5 Cush. 295; as also are its rules of evidence in criminal cases, and of practice as well as principle in the absence of statutes to the contrary; 16 Tex. 445; and in Louisiana, although not recognized in civil matters, the common law in criminal cases is expressly adopted; 8 Rob. La. 545. It has been held to prevail in the District of Columbia as to theft; 33 Conn. 260; as to conspiracy in Maryland; 5 Harr. & J. 358; kidnapping in New Hampshire; 8 N. H. 550; homicide without intent to kill in Maine; 32 Me. 369; and in Tennessee; 3 Humph. 493; capacity to commit rape in New York; 2 Park. Cr. Rep. 174; but not in Ohio; 14 Ohio 222.

There is no common law of the United States, as a distinct sovereignty; 64 Fed. Rep. 59; 63 N. W. Rep. (la.) 589; 8 Pet. 658; 5 Cal. 374; 128 Pa. 217; and therefore there are no common-law offences against the United States; 7 Cra. 32; 52 Fed. Rep. 104; 86 *id.* 449; 108 U. S. 199; 144 *id.* 677. There is a rare and valuable pamphlet on this subject, by St. George Tucker Campbell, which contains a full discussion of this question. For earlier cases before the question was fully settled, see 2 Dall. 384; 1 Gall. 488; 1 Wheat. 415. But the common law is resorted to by federal courts for definition of common-law crimes not defined by statute; 2 Curt. C. C. 446; 4 Fed. Rep. 198. See **COMMERCIAL LAW**.

The admiralty law is distinct from the common-law and the line of demarcation is to be sought in the English decisions before the Revolution and those of the state courts prior to the constitution. See 5 Wheat. 391; Baldw. 558; 46 Me. 400. And as to the adoption of the English ecclesiastical law, see 35 Vt. 365; 88 N. C. 91; 2 Paige 501; 50 N. Y. 557.

In general, too, the statutes of England are not understood to be included, except so far as they have been recognized by colonial legislation, but the course pursued has been rather to re-enact such English statutes as were deemed applicable to our case. Those passed since the settlement of the particular colony are not in force, unless specially accepted by it, or expressly made to apply to it; if these were suitable to the condition of the colony they were usually accepted; Quincy 72; 5 Pet. 280; 2 Gratt. 579; 1 Dall. 64.

There cannot be said to be a settled rule as to what date is to be fixed as determining what British statutes were received as part of the common law. Many states fix July 4, 1776. This is provided by constitution in Florida, Maryland and Rhode Island, and by statute in Kentucky; in other states 4th Jac. I. is the period named after which English statutes are not included, as Arkansas, Colorado, Illinois, Indiana, Missouri, Virginia, Wyoming, (but the last four except stats. 43 Eliz. c. 6, § 2; 13 Eliz. c. 8 and 37 Hen. VIII. c. 9.) 1 Black 459; 28 Ind. 220; 7 Pet. 596; 78 Mo. 587; 11 Colo. 393. As to English statutes in force in Pennsylvania, see Report of the Judges in 3 Binn. 595; Roberts, Eng. Stat.; 1 Dall. 15; *id.* 19; *id.* 73; 3 Yeates 17; 4 *id.* 47; 2 Watts 294; 8 *id.* 398; 184 Pa. 315. Generally, it may be stated that the statutes adopted

prior to the Revolution, and held applicable under rules stated, are accepted as part of the common law; 1 Nev. 40; 8 Pick. 309; Mart. & Y. Tenn. 226; 18 Wis. 148. But see 31 Ala. 20; 4 Paige 178; 17 Ohio 452; 61 Mich. 105. Upon the subject of English statutes as part of the common law see an able note on the whole subject of this title in 22 L. R. A. 501. By reason of the modifications arising out of our different condition, and those established by American statutes and by the course of American adjudication, the common law of America differs widely in many details from the common law of England; but the fact that this difference has not been introduced by violent changes, but has grown up from the native vigor of the system, identifies the whole as one jurisprudence.

See works of Franklin, by Sparks, vol. 4, p. 271, as to the adoption of the common law in America; see also Cooley, Const. Lim., 2d ed. § 4, n. 35; 10 R. I. 227; 2 Wait, Actions and Defences 276.

COMMON LAW PROCEDURE ACTS. See **PROCEDURE ACTS**.

COMMON NUISANCE. One which affects the public in general, and not merely some particular person. 1 Hawkins, Pl. Cr. 197. See **NUISANCE**.

COMMON PLEAS. The name of a court having jurisdiction generally of civil actions.

Such pleas or actions are brought by private persons against private persons, or by the government, when the cause of action is of a civil nature. In England, whence we derived this phrase, common pleas are so called to distinguish them from *pleas of the crown*.

The Court of Common Pleas in England consisted of one chief and four puisné (associate) justices. It is thought by some to have been established by king John for the purpose of diminishing the power of the *aula regis*, but is referred by some writers to a much earlier period. 8 Coke 269; 1 Poll. & Maitl. 177; *Termes de la Ley*; 3 Blackstone, Comm. 89. It exercised an exclusive original jurisdiction in many classes of civil cases. See 3 Sharsw. Bla. Comm. 38, n. The right of practising in this court was for a long time confined to two classes of practitioners, limited in number, but is now thrown open to the bar generally. See 3 C. B. 537.

Courts of the same name exist in many states of the United States.

COMMON RECOVERY. A judgment recovered in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in the suit, which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoverer.

A common recovery is a kind of conveyance, and is resorted to when the object is to create an absolute bar of estates tail, and of the remainders and reversions expectant on the determination of such estates. 2 Bla. Com. 357. Though it has been used in some of the states, this form of conveyance is nearly obsolete, easier and less expensive modes of making conveyances, which have the same effect, having been substituted; 2 Bouvier, Inst. n. 202, 2096; 7 N. H. 8; 9 S. & R. 390; 2 Rawle 168; 1 Whart. 151; 6 Mass. 323.

COMMON SCHOOLS. Schools for general elementary instruction, free to all the public. 2 Kent 195-202.

COMMON SCOLD. One who, by the practice of frequent scolding, disturbs the neighborhood. Bish. Crim. Law § 147.

The offence of being a common scold is cognizable at common law. It is a particular form of nuisance, and was punishable by the ducking-stool at common law, in place of which punishment fine and imprisonment are substituted in the United States; Whart. Cr. L. 1442; 12 S. & R. 220; 3 Cra. 620. See 1 Term 743; 6 Mod. 11; 4 Rog. 90; 1 Russ. Cr. 302; Roscoe, Cr. Ev., 8th ed. 824; 53 N. J. L. 45.

COMMON SEAL. The seal of a corporation. See **SEAL**.

COMMON SERJEANT. A judicial officer of the city of London, who aids the recorder in disposing of the criminal business of the Old Bailey Sessions. Holthouse.

COMMON STOCK. See **STOCK**.

COMMON TRAVERSE. See **TRAVERSE**.

COMMON OF TURBARY. A license to dig turf upon the ground of another, or in the lord's waste. This common is appendant or appurtenant to a house, and not to lands for turfs are to be burnt in the house, and it may be in gross; but it does not give any right to the land, trees, or mines. It cannot exclude the owner of the soil. Tomlin; 1 Inst. 4. 122; 4 Rep. 37.

COMMON VOUCHER. In common recoveries, the person who is vouched to warranty. In this fictitious proceeding the officer of the court usually performs the office of a common voucher. 2 Bla. Com. 358.

COMMONALTY. The common people of England, as distinguished from the king and nobles.

The body of a society or corporation, as distinguished from the officers. 1 Perr. & D. 243. Charters of incorporation of the various tradesmen's societies, etc., in England are usually granted to the master, wardens, and commonalty of such corporation.

COMMONER. One possessing a right of common.

COMMONS. Those subjects of the English nation who are not noblemen. They are represented in parliament by the house of commons.

COMMONWEALTH. A word which properly signifies the common weal or public policy; sometimes it is used to designate a republican form of government.

The English nation during the time of Cromwell was called The Commonwealth. It is the legal title of the states of Kentucky, Massachusetts, Pennsylvania, and Virginia.

COMMORANT. One residing in a particular town, city, or district. Barnes 162.

COMMORIENTES. Those who perish at the same time in consequence of the same calamity. See **SURVIVOR**; **DEATH**.

COMMUNAL COURTS. One of the four main types of courts distinguishable in England by the end of Edward I.'s reign. (See **FEDERAL COURTS**.) This group of courts fell into two main divisions: (1) the Sheriff and his courts, and (2) the Coroner and his court. They were the courts of the Anglo-Saxon communities—the court of the shire and the hundred; but the officials who held these courts were royal officials. Thus, in respect to some parts of their jurisdiction they acted as the representatives of those old communities, and in respect of other parts they acted as direct agents of the king. The distinction drawn between the two capacities in which these courts acted is one of the roots of the technical division into courts of record and courts not of record. 1 Holdsw. Hist. E. L. 3rd ed., 64 *et seq.* See **FEDERAL COURTS**; **FRANCHISE COURTS**; **MANORIAL COURTS**.

COMMUNE CONCILIUM REGNI. The common council of the realm. One of the names formerly given to the English parliament. Burrill; 1 Bla. Com. 148.

COMMUNI DIVIDUNDO. In Civil Law. An action which lies for those who have property in common, to procure a division. It lies where parties hold land in common but not in partnership. Calvinus, Lex.

COMMUNINGS. In Scotch Law. The negotiations preliminary to a contract.

COMMUNIO BONORUM (Lat.). In Civil Law. A community of goods.

When a person has the management of common property, owned by himself and others, not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum*. Vicat; 1 Bouvier, Inst. n. 907, note.

COMMUNITY (Lat. *communis*, common).

In **Civil Law**. A corporation or body politic. Dig. 8. 4.

In **French Law**. A species of partnership which a man and woman contract when they are lawfully married to each other.

Conventional community is that which is formed by express agreement in the contract of marriage.

By this contract the legal community which would otherwise subsist may be modified as to the proportions which each shall take, and as to the things which shall compose it.

Legal community is that which takes place by virtue of the contract of marriage itself.

The French system of community property was known as the dotal system, *q. v.* The Spanish system was the Ganancial System, *q. v.* The conquest of Mexico by the Spaniards and their acquisition of the Florida territory resulted in the introduction on American soil of the Spanish system.

Louisiana, originally a French colony, was afterwards ceded to Spain when the Spanish law was introduced. It again reverted to the French and from them was acquired by the United States. The Louisiana Code has, with slight modifications, adopted the dotal system of the *Code Napoléon* as regards the separate rights of husband and wife, but as to their common property it retained the essential features of the Spanish ganancial system. Texas and California have adopted the community system of Spain and Mexico or modified it by their constitutions. New Mexico appears to have followed the Spanish law of property rights of married persons in its entirety. The community system as adopted in older community states has been adopted by Nevada, Washington, and Idaho, with certain modifications. Hence it may be said that the American community system prevails at this day in Louisiana, Texas, California, Nevada, Arizona, Washington, Idaho, Montana, and New Mexico, and is indebted to Spain for its origin. See Ballinger, *Community Property*, sec. 6; 1 New Mexico 147.

The community embraces the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; and of the estates which they may acquire during the marriage, either by donations made jointly to them, or through their outlay or industry as well as the fruits of the *bienes propios* which each one brought to the matrimony, and of all that which this acquisition produced by whatever title acquired; Ballinger, *Community Prop.* § 5, or by purchase, or in any other similar way, even although the purchase be made in the name of one of the two, and not of both; because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase; 10 La. 146, 179; 1 Mart. La. n. s. 325; 4 id. 212; 12 La. Ann. 598. The debts contracted during the marriage enter into the community, and must be acquitted out of the common fund; but not the debts contracted before the marriage.

The effects which compose the community of gains are divided into two equal portions between the heirs at the dissolution of the marriage; La. Civ. Code 2375. See Pothier, *Contr.*; Toullier. But the wife's interest in the community property is residuary and she is not the owner of any specific property before the debts are paid, whether to third persons or to the succession of her husband; 45 La. Ann. 389.

A chose in action to recover damages for personal injuries, if acquired during marriage, is considered community property; 24 Cal. 425.

COMMUNITY PROPERTY. In some of the States what is known as the "community system of matrimonial gains" prevails. The central idea of this system is that whatever is acquired by the efforts of either the husband or wife constitutes part of a common fund, or, as it is expressed, is community property. (Ballinger, *Commun. Prop.* §§ 6, 11.) This system belongs to the

civil law, and first found footing in this country during the Spanish dominion, but it has been developed on diverse lines by statutory provisions and judicial decisions in the different states, and in this development common-law influences have played some part. Tiffany, 1 Real Prop. (2nd ed.) 656, *et seq.* Either the husband or the wife, or both, may have "separate property" such as that belonging to either at the time of the marriage, or that acquired by either after the marriage through gift, devise, or descent or in exchange for separate property. All other property is community property, and therefore includes that gained by the exertions or labor of either husband or wife, and property acquired in exchange for such property. *Id.*; Ballinger, *Commun. Prop.* § 19. See CO-OWNERSHIP; JOINT OWNERSHIP; TENANCY IN COMMON; PARTNERSHIP PROPERTY; COPARCENARY.

COMMUTATION. The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the authority in which the pardoning power resides. See 1 Nev. 321; 31 Ohio 206; 22 Gratt. 789.

COMMUTATIVE CONTRACT. In Civil Law. One in which each of the contracting parties gives and receives an equivalent.

The contract of sale is of this kind. The seller gives the thing sold, and receives the price, which is the equivalent. The buyer gives the price, and receives the thing sold, which is the equivalent. Such contracts are usually distributed into four classes, namely: *Do ut des* (I give that you may give); *Facio ut facias* (I do that you may do); *Facio ut des* (I do that you may give); *Do ut facias* (I give that you may do). Pothier, *Obl.* n. 13. See La. Civ. Code, art. 1761.

COMPACT. An agreement. A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, *Const.* b. 3, c. 3; Ruth. *Inst.* b. 2, c. 6, § 1.

The parties may be nations, states, or individuals; but the constitution of the United States declares that "no state shall, without the consent of congress, enter into agreement or compact with another state, or with a foreign power." See 11 Pet. 1, 185; 8 Wheat. 1; *Baldw.* 60.

COMPANIONS. In French Law. A general term, comprehending all persons who compose the crew of a ship or vessel. Pothier, *Mar. Contr.* n. 163.

COMPANY. An association of a number of individuals for the purpose of carrying on some legitimate business.

This term is not synonymous with partnership, though every such unincorporated company is a partnership. Usage has reserved the term to associations whose members are in greater number, their capital more considerable, and their enterprises greater, either on account of their risk or importance.

When these companies are authorized by the government, they are known by the name of corporations.

The proper signification of the word "company" when applied to a person engaged in trade, denotes those united for the same purpose or in a joint concern. It is commonly used in this sense or as indicating a partnership. 33 Me. 52.

Sometimes the word is used to represent those members of a partnership whose names do not appear in the name of the firm. See 12 Toullier 97.

See HOLDING CORPORATION; AND, and Company.

COMPARATIVE NEGLIGENCE. That doctrine in the law of negligence by which the negligence of the parties is compared in the degree of "slight," "ordinary," and "gross" negligence, and a recovery permitted notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the

negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury; or when the negligence of the defendant is not gross, but only ordinary or slight when compared under the circumstances of the case with the contributory negligence of the plaintiff. A. & E. Encyc.; 103 Ill. 512; 115 id. 355; 82 id. 198; Whart. Neg. § 334. See NEGLIGENCE.

COMPARISON OF HANDWRITING. See HANDWRITING.

COMPATIBILITY. Such harmony between the duties of two offices that they may be discharged by one person.

COMPEARANCE. In Scotch Practice. Appearance; an appearance made for a defendant; an appearance by counsel. Bell; Black.

COMPENSACION. In Spanish Law. The extinction of a debt by another debt of equal dignity between persons who have mutual claims on each other.

COMPENSATIO CRIMINIS. The compensation or set-off of one crime against another: for example, in questions of divorce, where one party claims the divorce on the ground of adultery of his or her companion, the latter may show that the complainant has been guilty of the same offence, and, having himself violated the contract, cannot complain of its violation on the other side. This principle is incorporated in the codes of most civilized nations. See 1 Hagg. Cons. 144; 1 Hagg. Eccl. 714; 2 Paige, Ch. 108; 3 D. & B. 64; Bishop, *Marr. & D.* §§ 393, 394.

COMPENSATION (Lat. *compendere*, to balance). In Chancery Practice. Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence of the party so doing or paying.

When a simple mistake, not a fraud, effects a contract, but does not change its essence, a court of equity will enforce it, upon making compensation for the error. "The principle upon which courts of equity act," says Lord Chancellor Eldon, "is by all the authorities brought to the true standard, that though the party had not a title at law, because he had not strictly complied with the terms so as to entitle him to an action (as to time, for instance), yet if the time, though introduced (as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other), is not the essence of the contract, a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a court of equity will compel the execution of the contract upon this ground, that one party is ready to perform, and that the other may have a performance in substance if he will permit it;" 13 Ves. Ch. 237. See 10 id. 505; 13 id. 73, 81, 426; 6 id. 575; 1 Cox, Ch. 59.

In Civil Law. A reciprocal liberation between two persons who are both creditors and debtors of each other. *Est debiti et crediti inter se contributio*. Dig. 16. 2. 1.

It resembles in many respects the common-law set-off. The principal difference is that a set-off must be pleaded to be effectual; whereas compensation is effectual without any such plea. See 2 Bouvier, *Inst.* n. 1407.

It may be legal, by way of exception, or by reconvention; 8 La. 153; Dig. 16. 2; Code, 4. 31; Inst. 4. 6. 30; Burge, *Suret.* b. 2, c. 6, p. 181.

It takes place by mere operation of law, and extinguishes reciprocally the two debts as soon as they exist simultaneously, to the amount of their respective sums. It takes place only between two debts having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. It takes place whatever be the cause of the debts, except in case, first, of a demand of restitution of a thing of which the owner has been unjustly deprived; second, of a demand of restitution of a deposit and a

loan for use; *third*, of a debt which has for its cause ailments declared not liable to seizure. La. Civ. Code 2203-2208. See 11 La. Ann. 520; 16 *id.* 181.

As to taking property, see EMINENT DOMAIN.

In Criminal Law. Recrimination, which see.

See JUST COMPENSATION. INSURANCE.

COMPENSATORY DAMAGES. Doctrine of. A negligent defender is answerable only for the direct, proximate, and natural results of his act, and not for secondary, remote, and speculative damage to another party. For example, however severe the grief may be of the friends and relatives of the victim of a catastrophe, they can ordinarily maintain no common-law action for damages on that account. 74 N. H. 464-5.

Measure of. The proper measure of "compensatory damages" is the pecuniary loss suffered by the parties entitled to the sum to be recovered, without solatium for distress of mind. 100 Ky. 425, 38 S. W. 852. "Compensatory damages" are those allowed as a recompense for the injury actually received. 86 Ky. 393; 5 S. W. 875; 72 S. W. 312.

COMPERTORIUM. In the Civil Law. A judicial inquest by delegates or commissioners to find out and relate the truth of a cause. Wharton.

COMPERUIT AD DIEM (Lat. he appeared at the day).

In Pleading. A plea in bar to an action of debt on a bail bond. The usual replication of this plea is, *nul tiel record*: that there is not any such record of appearance of the said —. For forms of this plea, see 5 Wentworth 470; Lilly, Entr. 114; 2 Chit. Pl. 527.

When the issue is joined on this plea, the trial is by the record. See 1 Taunt. 23; Tidd, Pr. 259. And see, generally, Comyns, *Digg. Pleader* (2 W. 31); 7 B. & C. 478.

COMPETENCY. The legal fitness or ability of a witness to be heard on the trial of a cause. That quality of written or other evidence which renders it proper to be given on the trial of a cause.

There is a difference between competency and credibility. A witness may be competent, and, on examination, his story may be so contradictory and improbable that he may not be believed; on the contrary, he may be incompetent, and yet be perfectly credible if he were examined.

The court are the sole judges of the competency of a witness, and may, for the purpose of deciding whether the witness is or is not competent, ascertain all the facts necessary to form a judgment; 1 Greenl. Ev. § 426.

Prima facie every person offered is a competent witness, and must be received, unless his incompetency appears; 9 State Tr. 652.

In French Law. The right in a court to exercise jurisdiction in a particular case: as, where the law gives jurisdiction to the court when a thousand francs shall be in dispute, the court is competent if the sum demanded is a thousand francs or upwards, although the plaintiff may ultimately recover less.

COMPETENT. Able, fit, qualified; authorized or capable to act. Abb. L. Dict.; as *competent court*; 1 C. P. D. 176; *competent evidence*; 1 Lea 504; *competent persons*, 5 Ad. & El. 75; *competent clerk*, 27 Mis. 393.

COMPETENT EVIDENCE. That which the very nature of the thing to be proven requires, as the production of a writing where its contents are the subject of inquiry. 1 Lea 504; 1 Greenl. Ev. § 2. See EVIDENCE.

COMPETENT WITNESS. One who is legally qualified to be heard to testify in a cause. In Kentucky, Michigan, and Missouri, a will must be attested, for the purpose of passing lands, by competent witnesses; but, in Kentucky, if wholly written

by the testator, it need not be so attested. See WITNESS.

COMPETITION. The act or proceeding of striving for something that is sought by another at the same time; or contention of two or more for the same object or for superiority, rivalry, as between aspirants for honors or for advantage in business. Thornton, Sher. Anti-Tr. Act 333, quoting Stand. Dict. In trade, the act or proceeding of striving for trade that is sought by another at the same time. *Id.* Whatever restrains trade in a particular line, restrains competition in that line. *Id.*, citing 97 Mo. App. 64; 173 Mo. 356. See HOLDING CORPORATION.

COMPETITION, UNFAIR. Unfair competition consists essentially in the conduct of a trade or business in such a manner that there is an express or implied representation that the goods or business of one man are the goods or business of another. 28 A. & E. Ency. L. (2nd ed.), 345.

COMPETITION, UNFAIR METHODS OF. Words not defined by statute (*cf.* Sherman Act) and the exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. 257 U. S. 453, quoting 253 U. S. 427.

The question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. 243 U. S. 236.

COMPILATION. A literary production composed of the works of others and arranged in a methodical manner.

A compilation requiring, in its execution, taste, learning, discrimination, and intellectual labor, is an object of copyright (*q. v.*); as, for example, Bacon's Abridgment. Curtis, Copyr. 186. A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of an author; 4 McLean 314.

COMPLAINANT. One who makes a complaint. A plaintiff in a suit in chancery is so called.

COMPLAINT. In Criminal Law. The allegation made to a proper officer that some person, whether known or unknown, has been guilty of a designated offence, with an offer to prove the fact, and a request that the offender may be punished. It is a technical term, descriptive of proceedings before a magistrate. 11 Pick. 436. See 16 Me. 117.

To have a legal effect, the complaint must be supported by such evidence as shows that an offence has been committed and renders it certain or probable that it was committed by the person named or described in the complaint.

The fact that a complaint is drawn in flagrant disregard of the rules of pleading is not sufficient to support a demurrer thereto, if the allegations are susceptible of a construction that will support the action; 18 N. Y. S. 758.

In Practice. The name given in New York and other states to the statement of the plaintiff's case which takes the place of the declaration in common-law pleading.

COMPOS MENTIS. See NON COMPOS MENTIS.

COMPOSITION. An agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole. See COMPOUNDING A FELONY.

A composition deed executed by a debtor and his creditors in due form, operates as a settlement of the original claims of such creditors and supersedes the cause of action thereon, the rights and remedies of the parties being determined thereafter by the new agreement; 48 Minn. 317. An oral

agreement between several creditors and their debtor to compound and discharge their claims is valid; 78 Hun 56; 85 N. Y. 180. In an action upon a composition agreement, any creditor being a party thereto may bring a several action for damages for breach thereof; 56 N. W. Rep. (Minn.) 352.

COMPOSITION OF MATTER. A mixture or chemical combination of materials. The term is used in the act of congress, July 4, 1836, § 6, in describing the subjects of patents. It may include both the substance and the process, when the compound is new.

COMPOUND INTEREST. Interest upon interest; for example, when a sum of money due for interest is added to the principal, and then bears interest. This is not, in general, allowed. See INTEREST.

COMPOUNDER. In Louisiana. He who makes a composition.

An amicable compounder is one who has undertaken by the agreement of the parties to compound or settle differences between them. La. Code of Pract. art. 444.

COMPOUNDING A FELONY. The act of a party immediately aggrieved, who agrees with a thief or other felon that he will not prosecute him, on condition that he return to him the goods stolen, or who takes a reward not to prosecute. See 2 Harr. 532; 51 Ill. 284; 39 Ga. 85.

This is an offence punishable by fine and imprisonment, and at common law rendered the person committing it an accessory; Hawk. Pl. Cr. 125. And a conviction may be had though the person guilty of the original offence has not been tried; 97 Ala. 72. A failure to prosecute for an assault with an intent to kill is not compounding a felony; 29 Ala. N. S. 628. The accepting of a promissory note signed by a party guilty of larceny, as a consideration for not prosecuting, is sufficient to constitute the offence; 16 Mass. 91; and the offence is committed although the consideration is for another than the one making the agreement; 58 Ia. 121. The mere retaking by the owner of stolen goods is no offence, unless the offender is no offence, unless the offender is not prosecuted; Hale, Pl. Cr. 546; 1 Chit. Cr. Law 4; Clarke, Cr. L. 329; 16 Ill. 98; 51 *id.* 284.

The compounding of *misdemeanors*, as it is also a perversion or defeating of public justice, is in like manner an indictable offence at common law; 18 Pick. 440; 5 East 301; 111 Pa. 14; 47 Conn. 221. But the law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which the injured party might recover damages in an action. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it; 6 Q. B. 308; 9 *id.* 371; 2 Benn. & H. Lead. Cr. Cas. 258, 262; 6 Wis. 42; 27 Mich. 293; 42 Ia. 649; 30 Me. 105; 18 Pick. 440.

In the United States, compounding a felony is an indictable offence, and no action can be supported on any contract of which such offence is the consideration in whole or in part; 16 Mass. 91; 18 Pick. 440; 5 Vt. 43; 9 *id.* 28; 5 N. H. 553; 2 South. N. J. 578; 13 Wend. N. Y. 592; 6 Dana 338. A receipt in full of all demands given in consideration of stifling a criminal prosecution is void; 11 Vt. 252.

COMPRA Y VENTA (Span.). Buying and selling. The laws of contracts arising from purchase and sale are given very fully in *Las Partidas*, part 3, tit. xviii. ll. 55.

COMPRINT. The surreptitious printing of the copy of another to the intent to make a gain thereby. Strictly, it signifies to print together. There are several statutes in prevention of this act. Jacob; Cowel.

COMPRIVIGNI (Lat.). Step-brothers or step-sisters. Children who have one parent, and only one, in common. Cal-

vinus, Lex.

COMPROMIS (Fr.). Agreement of arbitration. 2 Am. J. Int. Law 898.

COMPROMISARIUS. In Civil Law. An arbitrator.

COMPROMISE. An agreement between two or more persons, who, for promoting or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which any one of them prefers to the hope of gaining balanced by the danger of losing. 105 U. S. 610, quoting the code of Louisiana, art. 3071. It has between the interested parties, a force equal to the authority of a thing adjudged. *Id.*, art. 3075.

Such settlements are sustained at law; Poll. Contr. 180; 2 Strobb. Eq. 258; 2 Mich. 145; 1 Watts 216; 2 Pa. 531; and are highly favored; 6 Munf. 406; 1 Bibb 168; 2 id. 418; 4 Hawks 178; 6 Watts 321; 14 Conn. 12; 4 Metc. Mass. 270; 62 Mich. 262. See, also, 21 E. L. & Eq. 199; 6 T. B. Monr. 91; 2 Rand. Va. 442; 5 Watts 259; 143 Pa. 374. The amount in question must, it seems, be uncertain; 2 B. & Ad. 889; 1 Ad. & E. 106. And see 5 Pet. 114; 21 Pa. 237; 20 Mo. 102; 13 Pick. 284; 6 Bingh. N. C. 62; 3 M. & W. 648; 1 Bouvier, Inst. 798. The compromise of a doubtful or disputed claim is a sufficient consideration to uphold an *assumpsit*; 18 N. Y. Supp. 858. See 49 Fed. Rep. 715.

Where a debtor tenders part of a disputed claim to the creditor in full satisfaction, if the latter accepts the tender, he is bound by the terms thereof; 46 Mo. App. 624. An offer of settlement by plaintiff, but not accepted by defendant, does not bind either party; 29 Fla. 288. There can be no compromise of a criminal charge; 1 Chit. Pr. 17.

An offer to pay money by way of compromise is not evidence of debt, since, as was said by Lord Mansfield, "it must be permitted to men 'to buy their peace' without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether anything, or what, is due."

If the terms "buy their peace" are attended to, they will resolve all doubts on this head of evidence; Bull. N. P. 7th ed. (1817) 286; and the author adds an example.—If A sue B for one hundred pounds, and B offer to pay him twenty pounds, it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying he would give twenty pounds to get rid of the action. But if an account consist of ten articles, and B offer to pay a particular one is due, it is good evidence for so much.

In one of the oldest cases on the subject, Lord Kenyon declared *ad nisi prius*:—"Evidence of concessions made for the purpose of settling matters in dispute I shall never admit;" 8 Esp. 113; but evidence was admitted that after the action was brought the defendant called upon the plaintiff and said he was sorry that the thing had happened, and offered two hundred pounds in settlement, which was not accepted; 8 Stark. N. P. 128; and in other cases evidence of offers of compromise made, but not expressed to be without prejudice, were held to be admissible; 1 M. & W. 440; *id.* 447, n.; apparently in opposition to the rule laid down by Lord Mansfield and Lord Kenyon above referred to.

It may, however, be considered settled that letters or admissions containing the expression in substance that they are to be without prejudice will not be admitted in evidence; 4 C. & P. 462; L. R. 6 Ch. 827; 3 Sc. N. 741.

In the last case the rule is put definitely on the ground of public policy by Tindal, C. J., who said:—"It is of great consequence that parties should be unfettered by consequence entered into upon the express understanding that it is to be without prejudice," and he also declared "that where used in the letter conceding the offer, the words 'without prejudice' must cover the whole correspondence," and this rule has been followed and it was held that not only the letter bearing the words "without prejudice," but also the answer thereto, which was not so guarded, was inadmissible in evidence; and to the same effect is L. R. 10 Ch. 264. It is the recognized rule in the United States that admissions made in treating for an adjustment cannot be given in evidence; 38 Mo. 323; 117 Mass. 55; 18 Ga. 406; 40 N. Y. Sup. Ct. 8; and in Canada; 8 Ont. 584; 11 id. 442.

Verbal offers of compromise of a claim made by a defendant's solicitor are also protected and cannot be given in evidence against his client; 2 C. & K. 24; 6 C. P. 437.

An account rendered by the defendant to the plaintiff showing a balance in the plaintiff's favor, accompanied by a letter proposing an arrangement and stating that the letter and account were without prejudice was held to be inadmissible as evidence; 6 C. P. 437. The principle of the exclusion of such admissions, whether verbal or documentary, therefore, seems to rest on the fact that there is some matter in controversy or some claim by one person against the other for the settlement or adjustment of which the communication is made, and that in furtherance of the maxim, "*Interest reipublice ut sit finis litium*," it is for the public good that communications having that end in view should not be allowed to prejudice either party in the event of their proving abortive. It is not necessary that such communications should be expressly guarded if they manifestly appear to have been made by way of compromise; 2 C. & K. 24; such admissions or negotiations are inadmissible whether made "without prejudice" or not; 15 Md. 510; 15 S. E. Rep. (S. C.) 381; 14 S. E. Rep. (Ga. 1856); s. c. 88 Ga. 321; 130 N. Y. 677; 2 Whart. Ev. § 1090; but see 10 So. Rep. (La.) 360; s. c. 43 La. Ann. 1062; 28 N. E. Rep. (Ind.) 1038; 51 Ill. App. 274. Where a letter opening negotiations for a compromise, but not stated to be without prejudice, was followed a day or two afterwards by another guarding against prejudice, it was held that the whole correspondence was thereby protected; 26 W. R. 109, and Gurney, B., refused to receive in evidence a letter written "without prejudice," even in favor of the party who had written it, saying, "If you write without prejudice so as not to bind yourself, you cannot use the letter against the other party;" 8 C. & P. 438.

And evidence of plaintiff that offers of compromise were made by him is inadmissible; 20 N. Y. Supp. 961; 66 Hun 316. And negotiations between parties for the purpose of clearing title to land and compromising differences will not prejudice the rights of either party; 21 S. W. Rep. (Tex.) 282.

Correspondence of this kind is not only inadmissible as evidence at the trial of the action, but it has also been held to be privileged from production for the purpose of discovery; 11 Beav. 111; 15 id. 321; *id.* 888.

Romilly, M. R., in the last of these cases, stated the rule very much in the same way as did Tindal, C. J., *supra*; he said: "Such communications made with a view of an amicable arrangement ought to be held very sacred, for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences."

When a correspondence for a settlement had commenced "without prejudice" but those words were afterwards dropped, it was immaterial; 6 Ont. 719.

The same principle is applied where the cause of action is other than a debt, as in a bastardy proceeding, where offers of compromise were held not admissible against the defendant as admissions of his guilt; 50 N. W. Rep. (Neb.) 155; 30 id. 639; 91 Ala. 615; 108 N. C. 267; nor does the payment of a certain sum on a claim for a much larger sum constitute a recognition of a legal liability to make further payments on such claim; 113 U. S. 648; but where offers of compromise are made to a third person, who has no authority to settle the claim, and there is no intimation that they were made "without prejudice" or in confidence, they are admissible in evidence; 20 S. W. Rep. (Mo.) 975; a statement made by one of several defendants to his co-defendants, advocating the settlement of plaintiff's claims is not within the rule excluding offers made for the purpose of compromise, but is competent as an admission of liability; 30 Pac. Rep. (Cal.) 529; and evidence of the admission of an independent fact, although made during a negotiation tending towards a compromise, is admissible; 32 N. Y. Supp. 156; 11 Miss. Rep. 423; 117 Mass. 55; 44 N. H. 22.

The extent of the protection which may be invoked by the use of the word "without prejudice" is limited to the purposes contemplated by the rule as stated and will not be extended to exclude evidence of communications which, though their character may prejudice the person to whom it is addressed if he should reject the offer; 62 L. J. Rep. Q. B. 511; nor a letter which is intended to be used by the party writing it; the words protect both parties from its use, but if the writer declare that he will use it, from that moment it loses its privileged character; 27 U. C. Q. 164. Such communications, when the negotiation is successful and a compromise is agreed to, are admissible both for the purpose of showing the terms of the compromise and enforcing it; 6 Ont. 719; and also in order to account for lapse of time; 15 Beav. 888, per Romilly, M. R.; L. R. 23 Q. B. 417, 38. But whether verbal or written, such communication cannot be regarded for the purpose of determining the question of costs; 58 L. J. Rep. Q. B. 501. In this well considered case, the English court of appeal established the rule contrary to what had been in some previous cases thought proper. See 2 Dr. & Sm. 29; 1 Jur. N. s. 599.

In Civil Law. An agreement between two or more persons, who, wishing to settle their disputes, refer the matter in controversy to arbitrators, who are so called because those who choose them give them full powers to arbitrate and decide what shall appear just and reasonable, to put an end to the differences of which they are made the judges. 1 Domat, *Lois, Civ. liv. 1, t. 14*.

COMPTE ARRETE. (Fr.). An account stated in writing and acknowledged to be correct on its face by the party against whom it is stated. 9 La. Ann. 485.

COMPTROLLER. An officer of a state, or of the United States, who has certain duties to perform in the regulation and management of the fiscal matters of the government under which he holds office.

In the treasury department of the United States there is an officer known as the comptroller of the treasury. The act of July 31, 1894, reorganizing the accounting offices of the government, abolished the offices of second comptroller of the treasury and the commissioner of customs, and provided that hereafter the first comptroller shall be known as the comptroller of the treasury. The Comptroller is charged with the duty of revising accounts, upon appeal from the settlements made by the auditors, such appeal to be taken within one year by either the claimant, the head of the department interested, or by the comptroller himself. Upon the request of a disbursing officer, or the head of a department, the comptroller is required to give his decision upon the validity of a payment to be made, which decision, when rendered, shall govern the auditors and the comptroller in the settlement of the account involving the payment; to approve, disapprove, or modify all decisions made by the auditors making an original construction, or modifying an existing construction of statutes, and to certify his action to the auditor. He shall transmit all decisions made by him forthwith to the auditor or auditors whose duties are affected thereby. By these regulations of the department the comptroller passes upon the sufficiency of authorities to indorse drafts and receive and receipt for money from the government, upon the evidence presented in applications for duplicates or lost or destroyed United States bonds, drafts, checks, etc. The forms of keeping and rendering all public accounts (except those relating to the postal service, the recovery of debts certified by the auditors to be due to the United States, and the preservation, with their vouchers and certificates, of accounts finally adjusted) are under the direction of the comptroller. Upon the request of the auditors, he decides the several auditors to the comptroller his decision upon such revision is final and conclusive upon the executive branch of the government.

COMPTROLLER OF THE CURRENCY.

In the Revised Statutes of the U. S. § 324, it provides there shall be in the Department of the Treasury a Bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by U. S. bonds; the chief officer of which Bureau shall be called the Comptroller of the currency, and shall perform his duties under the general direction of the Secretary of the Treasury.

The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, upon reasons to be communicated to him by the Senate; and he shall be entitled to a salary of five thousand dollars a year. *Id.*, § 325.

The Comptroller of the Treasury shall within fifteen days from the time of notice of his appointment, take and subscribe the oath of office; and he shall give to the U. S. a bond in the penalty of one hundred thousand dollars, with not less than two responsible securities, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office. *Id.*, § 326.

The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of national banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations. *Id.*, 332.

The Comptroller of the Currency shall make an annual report to Congress, (at the commencement of its session). *Id.*, 333. See **COMPTROLLER**.

COMPULSION. Forcible inducement to the commission of an act.

Acts done under compulsion are not, in general, binding upon a party; but when a man is compelled by lawful authority to do that which he ought to do, that compulsion does not affect the validity of the act; as, for example, when a court of competent jurisdiction compels a party to execute a deed, under the pain of attachment for contempt, the grantor cannot object to it on the ground of compulsion. But if the court compelled a party to do an act forbidden by law, or had not jurisdiction over the parties or the subject-matter, the act done by such compulsion would be void. See **COERCION**; **DURESS**; **CONSTRAINT**.

COMPULSORY INSURANCE. See **INSURANCE**.

COMPULSORY PILOTAGE. See **PILOTAGE**.

COMPULSORY SCHOOL ATTENDANCE ACTS. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods, during certain years of the life of such children.

The question which often arises in reference to such laws is whether such acts are unauthorized invasions of the natural rights of the parent. It has been said, the natural rights of the parent to the custody and control of his infant child are subordinate to the power of the State and may be restricted and regulated by municipal laws. One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth. If he neglects to perform it, or wilfully refuses to do so, he may be coerced by law to execute such civil obligation. 157 Ind. 329-330.

COMPULSORY SERVICE. See **INVOLUNTARY SERVITUDE**; **PEONAGE**.

COMPURGATOR. One of several neighbors of a person accused of a crime or charged as a defendant in a civil action, who appeared and swore that they believed him on his oath. 3 Bla. Com. 341.

Formerly, when a person was accused of a crime, or sued in some kind of civil actions, he might purge himself upon oath of the accusation made against him, whenever the proof was not the most clear and positive; and if upon his oath he declared himself innocent, he was absolved.

This usage, so eminently calculated to encourage perjury by iniquity, was soon found to be dangerous to the public safety. To remove this evil, the laws were changed, by requiring that the oath should be administered with the greatest solemnity; but the form was soon disregarded, for the mind became easily familiarized to those ceremonies which at first imposed on the imagination, and those who cared not to violate the truth did not hesitate to treat the form with contempt. In order to give a greater weight to the oath of the accused, the law was again altered so as to require that the accused should appear before the judge with a certain number of his neighbors, who were freeholders of the hundred, who should swear that they believed the accused had sworn truly. This new species of witnesses were called compurgators. If it was not his first offence or if his compurgators did not agree to make the oath, he was put to the ordeal (*q. v.*). The origin of the system lies back in the history of the Teutonic race. It is said still to survive in the practice of the criminal courts by which an accused person is allowed to call witnesses as to his character, as a defence, while the prosecution is not allowed to traverse their testimony. *Inderwick, The King's Peace*.

The number of compurgators varied according to the nature of the charge and other circumstances. See Du Cange, *Juramentum*; Spelman, *Gloss. Assarth*; *Termes de la Ley*; 3 Bla. Com. 341-348.

COMPUTATION. The account and construction of time by rule of law, as distinguished from any arbitrary construction of parties; as, of how many days a month shall consist; on what day a lease shall be said to commence and end; what days shall be included or not in the times of notices, rules of court, &c.

COMPUTATION OF TIME. The rule in regard to the "computation of time" is that when the computation is to be made from an act done, the day in which the act was done must be included; but when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded. 12 Bush (Ky.) 403.

COMPUTUS (Lat. *computare*, to account). A writ to compel a guardian, bailiff, receiver, or accountant, to yield up his accounts. It is founded on the stat. Westm. 2, cap. 12; Reg. Orig. 135.

CONCEAL. To withhold or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation. 57 Me. 839.

CONCEALED WEAPONS. As to validity of statutes against carrying concealed deadly weapons, see 8 Am. Rep. 22; 14 *id.* 380; *ARMS, WEAPON*.

CONCEALERS. Such as find out concealed lands: that is, lands privily kept from the king by common persons having nothing to show for them. They are called "a troublesome, disturbing sort of men; turbulent persons." Cowel.

CONCEALMENT. The improper suppression of any fact or circumstance by one of the parties to a contract from the other, which in justice ought to be known.

The omission by an applicant for insurance preliminarily to state facts known to him, or which he is bound to know, material to the risk proposed to be insured against, or omission to state truly the facts expressly inquired about by the underwriters to whom application for insurance is made, whether the same are or are not material to the risk.

Concealment, when fraudulent, avoids a contract, or renders the party using it liable for the damage arising in consequence thereof; 7 Metc. 252; 16 Me. 30; 2 Ill. 344; 3 B. & C. 605; 10 Cl. & F. 934; 12 Cush. 416. But it must have been of such facts as the party is bound to communicate; Webb, Poll. Torts 368; 3 E. L. & Eq. 17; 3 Conn. 413; 5 Ala. n. s. 596; 5 Pa. 467; 8 N. H. 463; 1 Dev. 351; 18 Johns. 403; 6 Humphr. 36. A concealment of extrinsic facts is not, in general, fraudulent, although peculiarly within the knowledge of the party possessing them; 2 Wheat. 195; 1 Baldw. 331; 14 Barb. 72; 2 Ala. n. s. 181. But see 1 Miss. 72; 1 Swan 54; 4 McCord 169. And the rule against the concealment of latent defects is stricter in the case of personal than of real property; 6 Woodb. & M. 358; 3 Campb. 505; 3 Term 759.

A failure to state facts known to an insurer, or his agent, or which he ought to know, since these he will be presumed to know, or which lessen the risk, for that only is material which tends to increase the risk, in the absence of express stipulation, and where no inquiry is made, is no concealment; May, Ins. § 207; 16 Ohio 334.

Where there is confidence reposed, concealment becomes more fraudulent; 9 B. & C. 577; 4 Metc. 881.

See, generally, 2 Kent 482; **DECEIT**; **MISREPRESENTATION**; **REPRESENTATION**.

CONCERT OF EUROPE. The term "Concert of Europe" has been commonly applied, since the Congress of Vienna (1814-1815) to the European powers consulting or acting together in questions of common interest. *Encyc. Brit.*

Tsar Alexander I and his fellow monarchs sought to achieve peace by means of the European agreements framed at the time of the downfall of Napoleon, in the early part of the 19th century. These agreements constituted a "Concert of Europe," which formally recognized that the various nations of Europe were united as one family by ties of religion, institutions, and culture, which solemnly pledged its members to the preser-

vation of "public peace, the tranquility of states, the inviolability of possessions, and the faith of treaties." The "Concert of Europe" in theory embraced all the Christian states of the entire Continent, but in practice it was dominated and directed by five Great Powers—Austria, Russia, Prussia, Great Britain, and France. It came to grief through its own inability to reconcile the principles of international peace and the sanctity of treaties with the maintenance of order and tranquility within the several sovereign states. Hayes. II. Pol. & Soc. Hist. of Mod. Eur. 679.

CONCESSI (Lat. *I have granted*). A term formerly used in deeds.

It is a word of general extent, and is said to amount to a grant, feoffment, lease, release, and the like; 2 Saund. 96; Co. Litt. 301, 302; Dane, Abr. Index; 5 Whart. 278.

It has been held in a feoffment or fine to imply no warranty; Co. Litt. 384; 4 Co. 80; Vaughan's Argument in Hayes v. Bickersteth, Vaughan 126; Butler's note, Co. Litt. 384. But see 1 Freem. 839, 414.

CONCESSIMUS (Lat. *we have granted*). A term used in conveyances. It created a joint covenant on the part of the grantors. 5 Co. 16; 3 Kebl. 617; Bacon, Abr. *Covenant*.

CONCESSION. A grant. The word is frequently used in this sense when applied to grants made by the French and Spanish governments in Louisiana.

CONCESSOR. A grantor.

CONCILIIUM. A council.

CONCILIIUM REGIS. A tribunal which existed in England during the times of Edward I. and Edward II., composed of the judges and sages of the law. To them were referred cases of great difficulty. Co. Litt. 304.

CONCLUSION (Lat. *con claudere*, to shut together). The close; the end.

In Pleading. **IN DECLARATIONS.** That part which follows the statement of the cause of action. In personal or mixed actions, where the object is to recover damages, the conclusion is, properly, *to the damage of the plaintiff, etc.* Comyns, Dig. *Pleader*, c. 84; 10 Co. 1156. And see 1 M. & S. 236; **DAMAGES**.

The form was anciently, in the King's Bench, "To the damage of the said A B, and thereupon he brings suit;" in the Exchequer, "To the damage," etc., "whereby he is the less able to satisfy our said lord the king the debts which he owes his said majesty at his exchequer, and therefore he brings his suit;" 1 Chit. Pl. 356-358. It is said to be mere matter of form, and not demurrable; 7 Ark. 282.

In Pleas. The conclusion is either *to the country*—which must be the case when an issue is tendered, that is, whenever the plaintiff's material statements are contradicted—or by verification, which must be the case when new matter is introduced. See **VERIFICATION**. Every plea in bar, it is said, must have its proper conclusion. All the formal parts of pleadings have been much modified by statute in the various states and in England.

In Practice. Making the last argument or address to the court or jury. The party on whom the *onus probandi* is cast, in general, has the conclusion.

In Remedies. An estoppel; a bar; the act of a man by which he has confessed a matter or thing which he can no longer deny.

For example, the sheriff is concluded by his return to a writ; and, therefore, if upon a capias he return *capit corpus*, he cannot afterwards show that he did not arrest the defendant, but is concluded by his return. See Plowd. 276 b; 3 Thomas, Co. Litt. 600.

CONCLUSION TO THE COUNTRY. **In Pleading.** The tender of an issue for trial by a jury.

When an issue is tendered by the defendant, it is as follows: "And of this the said C D puts himself upon the country." When tendered by the plaintiff, the formula is, "And this the said A B prays may be inquired of by the country." It is held, however, that there is no material difference between these two modes of expression, and that if the one be substituted for the other the mistake is unimportant; 10 Mod. 186.

When there is an affirmative on one side and a negative on the other, or *vice versa*, the conclusion should be to the country; 2 Saund. 189; 2 Burr. 1023; 16 Johns. 267. So it is though the affirmative and negative be not in express words, but only tantamount thereto; Co. Litt. 126 a; 1 Saund. 103; 1 Chit. Pl. 592; Com. Dig. Pleader, E, 32.

CONCLUSIVE. Shutting up a matter; shutting out all further evidence; not admitting of explanation or contradiction; putting an end to inquiry; final; decisive.

CONCLUSIVE EVIDENCE. That which cannot be controlled or contradicted by any other evidence.

Evidence which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue. 6 Lond. L. Mag. 373.

CONCLUSIVE PRESUMPTION. A rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise. 1 Greenl. Ev. § 15. Thus, for example, the possession of land under claim of title for a certain period of time raises a conclusive presumption of a grant. See **PRESUMPTION**.

In the civil law, such presumptions are said to be *juris et de jure*.

CONCORD. An agreement or supposed agreement between the parties in levying a fine of lands in which the deforciant (or he who keeps the other out of possession) acknowledges that the lands in question are the right of complainant; and from the acknowledgment or admission of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee. 2 Bla. Com. 350; Cruise, Dig. tit. 35, c. 2, § 83; Comyns, Dig. Fine (E, 9).

CONCORDAT. A convention; a pact; an agreement. The term is generally confined to the agreements made between independent governments, and most usually applied to those between the pope and some prince.

CONCUBARIA. A fold, pen or place where cattle lie. Cowel; Wharton.

CONCUBEANT. Lying together. Wharton.

CONCUBINAGE. A species of marriage which took place among the ancients, and which is yet in use in some countries. See **CONCUBINATUS**.

The act or practice of cohabiting, in sexual commerce, without the authority of law or a legal marriage. See 1 Brown, Civ. Law 80; Merlin, Rép.; Dig. 33. 49. 4; 7. 1. 1; Code, 5. 27. 12.

CONCUBINATUS. A natural marriage, as contradistinguished from the *justæ nuptiæ*, or *justum matrimonium*, the civil marriage.

The *concubinatus* was the only marriage which those who did not enjoy the *jus connubii* could contract. Although this natural marriage was authorized and regulated by law, yet it produced none of those important rights which flowed from the civil marriage—such as the paternal power, etc.; nor was the wife entitled to the honorable appellation of *mater-familias*, but was designated by the name of *concubina*. After the exclusive and aristocratic rules relative to the *connubium* had been relaxed, the *concubinatus* fell into disrepute; and the law permitting it was repealed by a constitution of the Emperor Leo the Philosopher, in the year 886 of the Christian era. See **PATER-FAMILIAS**.

CONCUBINE. A woman who cohabits with a man as his wife, without being married.

CONCUR. In Louisiana. To claim a part of the estate of an insolvent along with other claimants. 6 Mart. La. N. S. 460;

as, "the wife concurs with her husband's creditors, and claims a privilege over them."

CONCURRENCE. In French Law. The equality of rights or privileges which several persons have over the same thing; as, for example, the right which two judgment-creditors, whose judgments were rendered at the same time, have to be paid out of the proceeds of real estate bound by them. *Dict. de Jur.*

CONCURRENT. Running together; having the same authority; thus, we say, a concurrent consideration occurs in the case of mutual promises; such and such courts have concurrent jurisdiction,—that is, each has the same jurisdiction.

Concurrent writs. Duplicate originals, or several writs running at the same time for the same purpose, for service on or arrest of a person, when it is not known where he is to be found; or for service on several persons, as when there are several defendants to an action. Mozley & W. Dict.

Concurrent Power. In § 2 of the Eighteenth Amendment to the Constitution of the U. S.: Concurrent power between Congress and the States does not mean joint power, nor the approval by the States of congressional legislation, nor its dependency upon state action or inaction. 253 U. S. 387. The right of each (Congress and the States) to act with respect to a particular subject-matter separately and independently. *Id.* 396 n. *Contra* (to the definition of separate and independent action, and, in case of conflict, that that of Congress is supreme): Action in conjunction, contribution of effort, harmony of action, not antagonism. 253 U. S. 397, Justice Mc Kenna dissenting. A concurrent power excludes the idea of a dependent power. *Id.*, quoting Justice Mc Lean in 7 How. 283, 399. *et seq.*

CONCURRENT INSURANCE. To be "concurrent" the "insurance" must operate at the same time, upon the same property, and look to the indemnity of the insured in case of its loss or destruction from casualty insured against. It is not necessary for the two policies to have insured the property to the same extent and in the same way. 161 Ky. 725, 171 S. W. 407.

CONCURRENT PROMISES. Mutual promises are said to be "concurrent" where both promises are mutually dependent: Thus, where A. agrees to sell property to B., neither can sue the other without showing that he has performed or is ready to perform his part of the contract. R. & L. Dict.; Leake Cont. 344 *et seq.*

CONCURSO. In Civil Law. The litigation or opportunity of litigation between various creditors, each claiming, it may be, adversely to one another, to share in a fund or an estate; the object being to assemble in one accounting all the claimants on the fund. It is usual in cases of insolvency and injunction against a debtor's further transactions. 6 Am. & Eng. Ency. 2nd ed., 434. The suit in *concurso* is a remedy provided by state laws, to enable creditors to enforce their claims against a debtor. *Id.*; 2 La. 355.

CONCUSSION. In Civil Law. The unlawful forcing of another by threats of violence to give something of value. It differs from robbery in this, that in robbery the thing is taken by force, while in concussion it is obtained by threatened violence. Heineccius, Lec. El. § 1071.

CONDEBIT. In Ecclesiastical Law. The name of a plea entered by a party to a libel filed in the ecclesiastical court, in which it is pleaded that the deceased made the will which is the subject of the suit, and that he was of sound mind. 2 Ecci. 438; 6 id. 431.

CONDEMN. To sentence; to adjudge. 3 Bla. Com. 291.

To declare a vessel a prize. To declare a vessel unfit for service. 1 Kent 102; 5 Esp. 65.

CONDEMNATIO. See **FORMULÆ**.

CONDEMNATION. The sentence of a competent tribunal which declares a ship unfit for service. This sentence may be re-examined and litigated by the parties interested in disputing it; 5 Esp. 65; Abb. Sh. 15; 30 L. J. Ad. 145.

The judgment, sentence, or decree by which property seized and subject to forfeiture for an infraction of revenue, navigation, or other laws is condemned or forfeited to the government. See **CAPTOR**. The sentence or judgment of a court of competent jurisdiction that a ship or vessel taken as a prize on the high seas was liable to capture, and was properly and legally captured and held as prize.

Some of the grounds of capture and condemnation are: violation of neutrality in time of war; 2 Gall 261; carrying contraband goods; 5 Wall. 1, 28; 3 id. 514. breach of blockade; id. 28, 170; id. 608.

By the general practice of the law of nations, a sentence of condemnation is at present generally deemed necessary in order to divest the title of a vessel taken as a prize. Until this has been done, the original owner may regain his property, although the ship may have been in possession of the enemy twenty-four hours, or carried *infra præsidia*; Hall, Int. L. 417; 1 Rob. 189; 3 id. 97, n.; Carth. 423; 1 Kent 101-104; 10 Mod. 79; 4 Wheat. 298; Vattel, b. 3, ch. 14, § 216; 2 Dall. 1, 2, 4; 8 Cra. 226; Marsh. Ins. 402. A sentence of condemnation is generally binding everywhere; Marsh. Ins. 402; 3 Kent 103; 3 Wheat. 246; 4 Cra. 434. But see 1 Binn. 299, n.; 7 Bingham 495. Title vests completely in the captors, and relates back to the time of capture; 2 Russ. & M. 35; 15 Ves. 189.

Confiscation is the act of the sovereign against a rebellious subject; condemnation as prize is the act of a belligerent against another belligerent. The former may be effected by such means as the sovereign through legal channels may please to adopt; the latter can be made only in accordance with principles recognized in the common jurisprudence of the world. Both are *in rem*; but confiscation recognizes the title of the original owner, while in prize the tenure of the property is qualified, provisional and destitute of absolute ownership; 14 Ct. Cls. 14.

The condemnation of prize property while lying in a neutral port or the port of an ally is valid; 13 How. 498. *Contra*, in England; 5 Rob. 285.

See **BLOCKADE**.

The word is in general use in connection with the taking of land under the right of eminent domain, *q. v.* The condemnation of lands is but a purchase of them *in invitum*, and the title acquired is but a quit claim; 31 Cal. 215.

In Civil Law. A sentence or judgment which condemns some one to do, to give, or to pay something, or which declares that his claim or pretensions are unfounded.

The word is used in this sense by common-law lawyers also; though it is more usual to say conviction, both in civil and criminal cases; 3 Bla. Com. 291. It is a maxim that no man ought to be condemned unheard and without the opportunity of being heard.

CONDEMNATION PROCEEDINGS. A condemnation proceeding is a suit even though the condemning corporation may be free to decline to take the property after the valuation, it being charged with costs in case it elects not to take. 204 U. S. 570.

In condemnation proceedings the word plaintiff and defendant can only be used in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. *Id.*

It is said the proceedings only become a case, within the meaning of the Act of Congress, after the preliminary assessment and the appeal that then the landowner is in the position of one demanding pay for property which he has lost. *Id.*

CONDICTION. (Lat. from *condicere*).

In Civil Law. A summons.

A personal action. An action arising from an obligation to do or give some certain, precise, and defined thing. Inst. 3, 15, pr.

Condictio is a general name given to personal actions, or actions arising from obligations, and is distinguished from *vindicatio* (real action), an action to regain possession of a thing belonging to the actor, and from *actiones mixtæ* (mixed actions). *Condictio* is also distinguished from an action *ex stipulatu*, which is a personal action which lies where the thing to be done or given is uncertain in amount or identity. See Calvinus, Lex.; Hallfax, Anal. 117.

CONDICTION EX LEGE. An action arising where the law gave a remedy but provided no appropriate form of action. Calvinus, Lex.

CONDICTION INDEBITATI. An action which lies to recover that which the plaintiff has paid to the defendant, by mistake, and which he was not bound to pay, either in fact or in law.

This action does not lie if the money was due *ex equitate*, or by a natural obligation, or if he who made the payment knew that nothing was due; for *qui consulto dat quod non debet præsumitur donare*; Bell, Dict.; Calvinus, Lex.; 1 Kames, Eq. 307.

CONDICTION REI FURTIVÆ. An action against the thief or his heir to recover the thing stolen.

CONDICTION SINE CAUSA. An action by which anything which has been parted with without consideration may be recovered. It also lay in case of failure of consideration, under certain circumstances. Calvinus, Lex.

CONDITION. In Civil Law. The situation of every person in some one of the different orders of persons which compose the general order of society and allot to each person therein a distinct, separate rank. Domat, tom. ii. l. 1, tit. 9, sec. i. art. viii.

A paction or agreement which regulates that which the contractors have a mind should be done if a case which they foresee should come to pass. Domat, tom. i. l. 1, tit. 1, sec. 4.

Casual conditions are such as depend upon accident, and are in no wise in the power of the person in whose favor the obligation is entered into.

Mixed conditions are such as depend upon the joint wills of the person in whose favor the obligation is contracted and of a third person: as "If you marry my cousin, I will give," etc. Pothier.

Potestative conditions are those which are in the power of the person in whose favor the obligation was contracted: as, if I contract to give my neighbor a sum of money in case he cuts down a tree.

Resolutive conditions are those which are added not to suspend the obligation till their accomplishment, but to make it cease when they are accomplished.

Suspensive obligations are those which suspend the obligation until the performance of the condition. They are casual, mixed, or potestative.

Domat says conditions are of three sorts. The first tend to accomplish the covenants to which they are annexed. The second dissolve covenants. The third neither accomplish nor avoid, but create some change. When a condition of the first sort comes to pass, the covenant is thereby made effectual. In case of conditions of the second sort, all things remain in the condition they were in by the covenant, and the effect of the condition is in suspense until the condition comes to pass and the covenant is void. Domat, lib. i. tit. 1, § 4, art. 6. See Pothier, Obl. pt. i. c. 2, art. 1, § 1; pt. ii. c. 3, art. 2.

In Common Law. The status or relative situation of a person in the state arising from the regulations of society. Thus, a person under twenty-one is an infant, with certain privileges and disabilities. Every person is bound to know the condition of the person with whom he deals.

A qualification, restriction, or limitation

modifying or destroying the original act with which it is connected.

A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in a case of a will, to suspend, revoke, or modify the devise or bequest.

A modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event. Co. Litt. 201 a.

A qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated. Greenl. Cruise, Dig. tit. xiii. c. i. § 1.

A future uncertain event on the happening or the non-happening of which the accomplishment, modification, or rescission of a testamentary disposition is made to depend.

A condition annexed to a bond is usually termed a defeasance, which see. A condition defeating a conveyance of land in a certain event is generally a mortgage. See MORTGAGE. Conditions annexed to the reality are to be distinguished from limitations; a stranger may take advantage of a limitation, but only the grantor or his heirs of a condition; 2 Dutch. 1; 3 id. 376; 2 Paine 545; a limitation always determines an estate without entry or claim, and so doth not a condition; Sheppard, Touchst. 121; 2 Bla. Com. 155; 4 Kent 122, 123; 3 Gray 142; 19 N. Y. 100; from conditional limitations: in case of a condition, the entire interest in the estate does not pass from the grantor, but a possibility of reverter remains to him and to his heirs and devisees; in case of a conditional limitation, the possibility of reverter is given over to a third person; Chas. R. P. 286; 3 Gray 142; from remainders; a condition operates to defeat an estate before its natural termination, a remainder takes effect on the completion of a preceding estate; Co. Litt. Butler's note 94; from covenants; a covenant may be said to be a contract, a condition, something affixed *nomine pæne* for the non-fulfilment of a contract; the question often depends upon the apparent intention of the parties, rather than upon fixed rules of construction; if the clause in question goes to the whole of the consideration, it is rather to be held a condition; 2 Parsons Contr. 51; Flagg, Cov. 71; 10 East 285; see 2 Stockt. 498; 6 Barb. 386; 4 Harr. Del. 117; a covenant may be made by a grantee, a condition by the grantor only; 2 Co. 70; from charges; if a testator create a charge upon the devise personally in respect of the estate devised, the devise takes the estate on condition, but where a devise is made of an estate and also a bequest of so much to another person, payable "thereout" or "therefrom" or "from the estate," it is rather to be held a charge; 4 Kent 604; 12 Wheat. 498; 4 Metc. 538; 1 N. Y. 488; 14 M. & W. 698. Where a forfeiture is not distinctly expressed or implied, it is held a charge; 10 Gill & J. 7480; 10 Leigh 172. See, also, 38 Me. 18; 1 Pow. Dev. 664; CHARGE; LEGACY.

Affirmative conditions are positive conditions.

Affirmative conditions implying a negative are spoken of by the older writers; but no such class is now recognized. Shep. Touchst. 117.

Collateral conditions are those which require the doing of a collateral act. Shep. Touchst. 117.

Compulsory conditions are such as expressly require a thing to be done.

Consistent conditions are those which agree with the other parts of the transaction.

Copulative conditions are those which are composed of distinct parts or separate conditions, all of which must be performed. They are generally conditions precedent, but may be subsequent. Pow. Dev. c. 15.

Covert conditions are implied conditions. *Conditions in deed* are express conditions.

Disjunctive conditions are those which require the doing of one of several things. If a condition become impossible in the copulative, it may be taken in the disjunctive. Viner, Abr. Condition (S b) (Y b 2).

Express conditions are those which are created by express words. Co. Litt. 328.

Implied conditions are those which the law supposes the parties to have had in mind at the time the transaction was entered into, though no condition was expressed. Shep. Touchst. 117.

Impossible conditions are those which cannot be performed in the course of nature.

Inherent conditions are such as are annexed to the rent reserved out of the land whereof the estate is made. Shep. Touchst. 118.

In sensible conditions are repugnant conditions.

Conditions in law are implied conditions. The term is also used by the old writers without careful discrimination to denote limitations, and is little used by modern writers. Littleton § 380; 2 Bla. Com. 155.

Lawful conditions are those which the law allows to be made.

Positive conditions are those which require that the event contemplated should happen.

Possible conditions are those which may be performed.

Precedent conditions are those which are to be performed before the estate or the obligation commences, or the bequest takes effect. Powell, Dev. c. 15. A bond to convey land on the payment of the purchase-money furnishes a common example of a condition precedent. 9 Cush. 95. They are distinguished from conditions subsequent.

Repugnant conditions are those which are inconsistent with, and contrary to, the original act.

Restrictive conditions are such as contain a restraint; as, that a lessee shall not alien. Shep. Touchst. 118.

Single conditions are those which require the doing of a single thing only.

Subsequent conditions are those whose effect is not produced until after the vesting of the estate or bequest or the commencement of the obligation.

A mortgage with a condition defeating the conveyance in a certain event is a common example of a condition subsequent. All conditions must be either precedent or subsequent. The character of a condition in this respect does not depend upon the precise form of words used; 7 Gill & J. 527, 540; 2 Dall. 317; 30 Barb. 425; 6 Me. 106; 1 Va. Cas. 188; 4 Rand. 352; 6 J. J. Marsh. 161; 6 Litt. 151; 1 Spenc. 435; 1 La. Ann. 424; 1 Wis. 527; nor upon the position of the words in the instrument; 1 Term 645; Cas. temp. Talb. 166; the question is whether the conditional event is to happen before or after the principal; 4 Rand. 358. The word "if" implies a condition precedent, however, unless controlled by other words; Crabb, R. P. § 2152.

Unlawful conditions are those which are forbidden by law.

They are those which, first, require the performance of some act which is forbidden by law, or which is *malum in se*; or, second, require the omission of some act commanded by law; or, third, those which encourage such acts or omissions. 1 P. Wms. 189.

Void conditions are those which are of no validity or effect.

Creation of. Conditions must be made at the same time as the original conveyance or contract, but may be by a separate instrument, which is then considered as constituting one transaction with the original; 5 S. & R. 375; 7 W. & S. 335; 3 Hill 95; 8 Wend. 208; 10 Ohio 483; 10 N. H. 64; 2 Me. 132; 7 Pick. 157; 6 Blackf. 113. Conditions are sometimes annexed to and depending upon estates, and sometimes annexed to and depending upon recognizances, statutes, obligations, and other things, and are also sometimes contained in acts of parliament and records; Shep. Touchst. 117.

Unlawful conditions are void. Conditions in restraint of marriage generally are held void; Poll. Contr. 334; 13 Mo. 211; see 10 Pa. 350; 156 Mass. 265; 152 id. 523; 84 Me. 400; otherwise of conditions restraining from marriage to a particular person, or restraining a widow from a second marriage; 10 E. L. & Eq. 199; 2 Sim. 255; 6 Watts 213. A condition in general restraint of alienation is void; 1 Den. 449; 14 Miss. 780; 24 Ga. 203; 6 East 173; 141 U. S. 296; and see 21 Pick. 42; but a condition restraining alienation for a limited time may be good; Co. Litt. 228; 2 S. & R. 578. An unreasonable condition is also void; 63 Hun 612; as is a condition repugnant to the grant; 111 N. C. 519.

Where land is devised, there need be no limitation over to make the condition good; 1 Mod. 800; 1 Atk. 361. See 109 N. C. 461; but where the subject of the devise is personality without a limitation over, the condition, if subsequent, is held to be *in terrorem* merely, and void; 1 Jarm. Wills 887; 3 Whart. 575. See 62 Hun 612. But if there be a limitation over, a non-compliance

with the condition divests the bequest; 1 Eq. Cas. Abr. 112. A limitation over must be to persons who could not take advantage of a breach; 1 Wend. 388; 2 Conn. 196. A gift of personalty may not be on condition subsequent at common law, except as here stated; 1 Rolle, Abr. 412. See 21 Mo. 277.

Any words suitable to indicate the intention of the parties may be used in the creation of a condition; "On condition" is a common form of commencement.

Formerly, much importance was attached to the use of particular and formal words in the creation of a condition. Three phrases are given by the old writers by the use of which a condition was created without words giving a right of re-entry. These were *Sub conditione* (On condition), *Provisia ita quod* (Provided always), *Ita quod* (So that). Littleton 361; Shep. Touchst. 125.

Amongst the words used to create a condition where a clause of re-entry was added were, *Quod si contingat* (If it shall happen), *Pro* (For), *Si* (If), *Causa* (On account of); sometimes, and in case of the king's grants, but not of any other person, *ad faciendum* or *faciendo*, *ex intentione*, *ad effectum* or *ad propositum*. For avoiding a lease for years, such precise words of condition are not required; Co. Litt. 304 b. In a gift, it is said, may be present a modus, a condition and a consideration: the words of creation are *ut* for the modus, *si* for the condition, and *quid* for the consideration.

Technical words in a will will not create a condition where it is unreasonable to suppose that the testator intended to create a technical condition; 7 N. H. 142. The words of condition need be in no particular place in the instrument; 1 Term 645; 6 *id.* 868.

Construction of. Conditions which go to defeat an estate or destroy an act are strictly construed; while those which go to vest an estate are liberally construed; Crabb, R. P. § 2130; 17 N. Y. 34; 4 Gray 140; 35 N. H. 445; 18 Ill. 431; 15 How. 323. The condition of an obligation is said to be the language of the obligee, and for that reason to be construed liberally in favor of the obligor; Co. Litt. 43 a, 183 a; 2 Pars. Contr. 23; Shep. Touchst. 375; Dy. 14 b, 17 a; 1 Johns. 267. But wherever an obligation is imposed by a condition, the construction is to be favorable to the obligee; 2 Jarm. Wills 526; 1 Sumn. 440. Conditions subsequent are not favored in law but are always strictly construed because they tend to destroy estates; 73 Ia. 328; and where it is doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; 44 N. J. Eq. 849.

Performance should be complete and effectual; 1 Rolle, Abr. 425. An inconsiderable casual failure to perform is not non-performance; 6 Dana 44; 17 N. Y. 34. Any one who has an interest in the estate may perform the condition; but a stranger gets no benefit from performing it; 10 S. & R. 186. Conditions precedent, if annexed to land, are to be strictly performed, even when affecting marriage; 1 Mod. 300; 1 Atk. 361. Conditions precedent can generally be exactly performed; and, at any rate, equity will not generally interfere to avoid the consequences of non-performance; 3 Ves. Ch. 89; 1 Atk. 361; 3 *id.* 330; West 550; 2 Brown, Ch. 431. But in cases of conditions subsequent, equity will interfere where there was even a partial performance, or where there is only a delay of performance; Crabb, R. P. § 2160; 4 Ind. 625; 26 Me. 525. This is the ground of equitable jurisdiction over mortgages.

Generally, where there is a gift over in case of non-performance, the parties will be held more strictly to a performance than where the estate or gift is to revert to the grantor or his heirs.

Where conditions are liberally construed, a strict performance is also required; and it may be said, in the same way, that a non-exact performance is allowed where there is a strict construction of the condition.

Generally, where no time of performance is limited, he who has the benefit of the contract may perform the condition when he pleases, at any time during his life; Beach, Wills 412; Plowd. 16; Co. Litt. 203b; and need not do it when requested; Co. Litt. 209 a. A condition precedent must be performed within a reasonable time, when no time is fixed for the performance

thereof; 17 Nev. 409. But if a prompt performance be necessary to carry out the will of a testator, the beneficiary shall not have a lifetime in which to perform the condition; 5 S. & R. 384. In this case, no previous demand is necessary; 5 S. & R. 385; nor is it when the continuance of an estate depends upon an act to be done at a fixed time; 116 Ind. 424. But even then a reasonable time is allowed; 1 Rolle, Abr. 449.

If the place be agreed upon, neither party alone can change it, but either may with consent of the other; 1 Rolle 444; 11 Vt. 612; 8 Leon. 260. See CONTRACT; PERFORMANCE.

Non-performance of a condition which was possible at the time of its making, but which has since become impossible, is excused if the impossibility is caused by act of God; Poll. Contr. 387; 10 Pick. 507; or by act of law, if it was lawful at its creation; 16 Wall. 366; 1 Pa. 495; or by the act of the party; as, when the one imposing the obligation accepts another thing in satisfaction or renders the performance impossible by his own default; 21 Pick. 389; 1 Paine 652; 6 Pet. 745; 1 Cow. 339. If performance of one part becomes impossible by act of God, the whole will, in general, be excused; 1 B. & P. 242; Cro. Eliz. 280; 5 Co. 21; 1 Ld. Raym. 279.

The effect of conditions may be to suspend the obligation; as, if I bind myself to convey an estate to you on condition that you first pay one thousand dollars, in which case no obligation exists until the condition is performed: or may be to rescind the obligation; as, if you agree to buy my house on condition that it is standing unimpaired on the tenth of May, or I convey to you my farm on condition that the conveyance shall be void if I pay you one thousand dollars, in such cases the obligation is rescinded by the non-performance of the condition: or it may modify the previous obligation; as if I bind myself to convey my farm to you on the payment of four thousand dollars if you pay in bank stock, or of five thousand if you pay in money: or, in case of gift or bequest, may qualify the gift or bequest as to amount or persons.

The effect of a condition precedent is, when performed, to vest an estate, give rise to an obligation, or enlarge an estate already vested; 12 Barb. 440. Unless a condition precedent be performed, no estate will vest; and this even where the performance is prevented by the act of God or of the law; Co. Litt. 42; 2 Bla. Com. 157; 4 Kent 125; 4 Jones, N. C. 249; 109 N. C. 461. Not so if prevented by the party imposing it; 13 B. Monr. 163; 2 Vt. 469.

If a condition subsequent was void at its creation, or becomes impossible, unlawful, or in any way void, the estate or obligation remains intact and absolute; 2 Bla. Com. 157; 15 Ga. 103. Where the condition upon which an estate is to be divested and go to a third party is founded on a contingency that can never happen, the grantee will take a fee simple; 97 N. C. 206.

In case of a condition broken, if the grantor is in possession, the estate reverts at once; 5 Mass. 321; 5 S. & R. 375; 82 Me. 394; 63 Vt. 266; 129 Ind. 244; 1 Tex. Civ. App. 245. But see 2 N. H. 120. But if the grantor is out of possession, he must enter; 8 Blackf. 138; 12 Ired. 194; 18 Conn. 535; 8 N. H. 477; 34 Me. 322; 8 Exch. 67; and is then in, as of his previous estate; Co. Litt. Butler's note, 94. Only the grantor, his heirs or devisees, can take advantage of the failure to perform a condition subsequent, contained in a deed; 129 Ill. 466; 50 Ark. 141.

It is usually said in the older books that a condition is not assignable, and that no one but the grantor and his heirs can take advantage of a breach; Gilbert, Ten. 26. Statutory have equal rights in this respect with common-law heirs; 18 Conn. 635; 25 Me. 625; and in some of the United States the common-law rule has been broken in upon, and the devisee may enter; 16 Pa. 150; 5 Pick. 528; contra, 20 Barb. 455; while in others even an assignment of

the grantor's interest is held valid, if made after breach; 4 Harr. Del. 140; and of a particular estate; 19 N. Y. 100. In equity, a condition with a limitation over to a third person will be regarded as a trust, and, though the legal rights of the grantor and his heirs may not be destroyed, equity will follow him and compel a performance of the trust; Co. Litt. 236 a; 6 Pick. 306; 9 Watts 60; 2 Conn. 201.

Consult Blackstone; Kent, Commentaries; Crabb; Washburn; Real Prop.; Leake, Pollock, Contracts. As to effect of conditions in deeds, see 9 Lawy. Rep. Ann. 165.

Negative Condition. A condition which consists in not doing a thing; as, provided that the lessee shall not alien, etc.

CONDITION. See ILLEGAL CONDITION ON CONDITION.

CONDITIONAL ACCEPTANCE.

An acceptance is general when it imports an absolute acceptance, precisely in conformity to the tenor of the bill itself. It is "conditional" or qualified, when it contains any qualification, limitation or condition, different from what is expressed on the face of the bill, or from what the law implies, upon a general "acceptance." It is qualified when the drawee absolutely accepts the bill, but makes it payable at a different time or place, or for a different firm, or in a different mode from that which is the tenor of the bill. 3 Bush (Ky.) 628.

CONDITIONAL APPEARANCE.

See COMMON APPEARANCE.

CONDITIONAL CREDITOR. A creditor having a future right of action, or having a right of action in expectancy.

CONDITIONAL FEE. A fee which, at the common law, was restrained to some particular heirs, exclusive of others.

It was called a conditional fee by reason of the condition, expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end and the land return to its ancient proprietor.

Such a gift, then, was held to be a gift upon condition that it should revert to the donor if the donee had no heirs of his body, but, if he had, it should then remain to the donee. It was, therefore, called a fee simple, on condition that the donee had issue. As soon as the donee had issue born, his estate was supposed to become absolute, by the performance of the condition,—at least so far absolute as to enable him to charge or to alienate the land, or to forfeit it for treason. But on the passing of the statute of Westminster II., commonly called the statute *De Donis Conditionalibus*, the judges determined that the donee had no longer a conditional fee simple which became absolute at his own disposal as soon as any issue was born; but they divided the estate into two parts, leaving the donee a new kind of particular estate, which they denominated a *fee tail*; and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue, which expectant estate was called a reversion. And hence it is said that tenant in fee tail is by virtue of the statute *De Donis*. 2 Bla. Com. 112.

A conditional fee may be granted by will as well as by deed; 37 N. E. Rep. (Ind.) 322.

CONDITIONAL GUARANTY. A "guaranty" is "conditional" when there is some extraneous event beyond the mere default of the principal by which the guaranty becomes binding. Liability does not attach immediately upon nonpayment or non-performance by the principal. In general it is necessary to fix the liability of the guarantor that there should be notice of the guaranty and notice of the principal's default, and reasonable diligence in exhausting reasonable remedies against the principal. 112 Ky. 932, 66 S. W. 1027.

CONDITIONAL LIMITATION. A condition followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it.

A condition determines an estate after breach upon entry or claim by the proper person: a limitation marks the period which determines an estate without any act on the part of him who has the next expectant interest. A conditional limitation is, therefore, of a mixed nature, partaking of that of a condition and a limitation. 3 Gray 143. The

limitation over need not be to a stranger; 2 Eia. Com. 155; 11 Metc. 102; Watk. Conv. 204.

CONSULT CONDITION; LIMITATION; 1 Washburn, Real Prop. 459; 4 Kent 122, 127; 1 Preston, Est. §§ 40, 41, 98.

CONDITIONAL SALE. A sale in which the transfer of title is made to depend upon the performance of a condition. Black, L. Dict. See SALE; ROLLING STOCK.

CONDITIONAL STIPULATION. In Civil Law. A stipulation on condition. Inst. 3, 16, 4.

CONDITIONS OF SALE. The terms upon which the vendor of property by auction proposes to sell it.

The instrument containing these terms, when reduced to writing or printing.

It is always prudent and advisable that the conditions of sale should be printed and exposed in the auction-room: when so done, they are binding on both parties, and nothing that is said at the time of sale, to add to or vary such printed conditions, will be of any avail; 12 East 6; 6 Ves. Ch. 390; 15 id. 521; 2 Munf. 119; 1 Des. Ch. 573; 11 Johns. 555. See forms of conditions of sale in Babington Act. 233-243; Sugden, Vend. App. no. 4.

CONDONACION. In Spanish Law. The remission of a debt, either expressly or tacitly. 14 Am. L. Reg. 641.

CONDONATION. The conditional forgiveness or remission, by a husband or wife, of a matrimonial offence which the other has committed.

"A blotting out of an imputed offence against the marital relation so as to restore the offending party to the same position he or she occupied before the offence was committed." 1 Sw. & Tr. 334. See, as to this definition, 2 Bish. Mar. & Div. § 35; 36 Ga. 286.

While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned; Bish. Mar. & Div. § 354.

The doctrine of condonation is chiefly, though not exclusively, applicable to the offence of adultery. It may be either express, i. e. signified by words or writing, or implied from the conduct of the parties. The latter, however, is much the more common; and it is in regard to that that the chief legal difficulty has arisen. The only general rule is, that any cohabitation with the guilty party, after the commission of the offence, and with the knowledge or belief on the part of the injured party of its commission, will amount to conclusive evidence of condonation; but this presumption may be rebutted by evidence; 60 Law J. Prob. 73. See 33 Cent. L. J. 93. The construction, however, is more strict when the wife than when the husband is the delinquent party; Bish. Mar. & Div. § 355. But a mere promise to condone is not in itself a condonation; 1 Sw. & Tr. 193; 19 Ala. 363; but see, *contra*, 3 Blackf. 202, where there was only an unaccepted inducement held out to the wife to return. Knowledge of the offence is essential; 60 Ind. 259; 1 Bradw. 245; 23 Ark. 615. A divorce will not be granted for adultery where the parties continue to live together after it was known; 15 So. Rep. (La.) 657.

Every implied condonation is upon the implied condition that the party forgiven will abstain from the commission of the like offence thereafter; and also treat the forgiving party, in all respects, with conjugal kindness. Such, at least, is the better opinion; though the latter branch of the proposition has given rise to much discussion. It is not necessary, therefore, that the subsequent injury be of the same kind, or proved with the same clearness, or sufficient of itself, when proved, to warrant a divorce or separation. Accordingly, it seems that a course of unkind and cruel treatment will revive condoned adultery, though the latter be a ground of divorce *a vinculo matrimonii*, while the former will,

at most, only authorize a separation from bed and board; Geary, Mar. & F. R. 281; 1 Edw. Ch. 439; 4 Paige, Ch. 460; 14 Wend. 637; 31 N. J. Eq. 225; 6 Mo. App. 572; 8 Oreg. 224. Acts of cruelty against a wife revive acts of cruelty which have been condoned; 67 Hun 491; 4 Wash. St. 705.

Condonation is not so strict a bar against the wife as the husband; 3 Md. Ch. 21; 32 Miss. 279; 1 Bradw. 245; 1 Hag. Ec. 773.

The presumption of condonation from cohabitation in cases of cruelty is not so strong as in cases of adultery; 2 Bish. Mar. & Div. § 50 *et seq.* See 5 Am. L. Reg. N. S. 641. A divorce on the ground of cruelty will not be granted where the parties lived together a long time after the alleged cruelty and before the action was brought, as the offence will be presumed to have been condoned; 109 N. C. 139; 140 Ill. 326; 49 Ill. App. 573.

CONDUCT. See IMPROPER CONDUCT.

CONDUCT MONEY. Money paid to a witness for his travelling expenses. Wharton.

The tax that Charles I of England levied to pay the traveling expenses of the army. Stand. Dict.

CONDUCTIO (Lat.). A hiring; a bailment for hire.

It is the correlative of *locatio*, a letting for hire. *Conductio actio*, in the civil law, is an action which the hirer of a thing or his heir had against the latter or his heir to be allowed to use the thing hired. *Conducere*, to hire a thing. *Conductor*, a hirer, a carrier; one who undertakes to perform labor on another's property for a specified sum. *Conductus*, the thing hired. Calvinus, Lex.; Du Cange; 2 Kent 586.

CONDUCTOR. R. R. "Conductor" or "manager" are used interchangeably and mean a person who has charge of the train. 142 Ky. 590; 135 S. W. 266.

CONE AND KEY. A woman at fourteen or fifteen years of age may take charge of her house and receive *cone* and *key* (that is, keep the accounts and keys). Cowel. Said by Lord Coke to be *cover* and *keye*, meaning that at that age a woman knew what in her house should be kept under lock and key. Co. 2d Inst. 203.

CONFECTIO (Lat. from conficere). The making and completion of a written instrument. 5 Co. 1.

CONFEDERACY. In Criminal Law. An agreement between two or more persons to do an unlawful act or an act which, though not unlawful in itself, becomes so by the confederacy. The technical term usually employed to signify this offence is *conspiracy*. See 41 Wis. 284; 52 How. Pr. 353.

In Equity Pleading. An improper combination alleged to have been entered into between the defendants to a bill in equity.

A general charge of confederacy is made a part of a bill in chancery, and is the fourth part, in order, of the bill; but it has become merely formal, except in cases where the complainant intends to show that such a combination actually exists or existed, in which case a special charge of such confederacy must be made. Story, Eq. Pl. § 29; Mitf. Eq. Pl. 41; Cooper, Eq. Pl. 9.

In International Law. An agreement between two or more states or nations, by which they unite for their mutual protection and good. This term is applied to such an agreement made between two independent nations; but it is also used to signify the union of different states of the same nation: as, the confederacy of the states.

The original thirteen states, in 1781, adopted for their federal government the "Articles of confederation and perpetual union between the states." These were completed on the 15th of November, 1777, and, with the exception of Maryland, which afterwards also agreed to them, were adopted by the several states, which were thereby formed into a federal government, going into effect on the first day of March, 1781. 1 Story, Const. § 225, and so remained until the adoption of the present constitution, which acquired the force of the supreme law of the land on the first Wednesday of March, 1789. 5 Wheat. 420. See ARTICLES OF CONFEDERATION.

CONFEDERATE BONDS. As the bonds of the Confederate States have been declared illegal by the Fourteenth Amendment, a contract entered into since the war for the sale and delivery of such bonds is void, and no action will lie for a breach of the contract; 16 Fed. Rep. 53.

CONFEDERATE MONEY. Contracts made during the rebellion in Confederate money may be enforced in the United States courts, and parties compelled to pay in lawful money of the United States the actual value of the notes at the time and place of contract; 115 U. S. 556; and when payment was accepted and receipted for by the creditor, it was held to be a valid payment; 117 U. S. 327. These notes were currency imposed upon the community by irresistible force, and it must be considered in the courts of law the same as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States; 8 Wall. 1; and a contract payable in such notes was not invalid; 15 Wall. 448; 19 id. 556; 111 U. S. 50; 103 id. 792; 94 id. 434; 105 id. 132; but where a contract was entered into before the war, and the deferred payments came due and were discharged with depreciated currency, it was held, as against the non-ratification of the payment, to be void; 32 Fed. Rep. 511. *Contra*, 4 S. W. Rep. (Tex.) 309.

After one has accepted payment in Confederate money and acquiesces in the transaction for fifteen years, he is concluded by laches from disputing its validity; 145 U. S. 214. Where payment was made in 1864 in such money it was sufficient consideration though it afterwards became worthless; 1 Tex. Civ. App. 354. The act of a fiduciary in accepting Confederate money in payment of debts due the estate and investing the proceeds in bonds of the Confederate States issued for the avowed purpose of waging war against the United States is wholly illegal and void; 32 Fed. Rep. 511.

CONFEDERATE STATES. The Confederate States were a *de facto* government in the sense that its citizens were bound to render the government obedience in civil matters, and did not become responsible, as wrong-doers, for such acts of obedience; 8 Wall. 9; but it was not strictly a *de facto* government; *ibid.*; see 96 U. S. 176. During the war, the inhabitants of the Confederate States were treated as belligerents; 8 Wall. 10; 2 id. 404. Land sold to the Confederate government, and captured by the Federal government, became the property of the United States; 16 Wall. 414.

The Confederate States was an illegal organization, within the provision of the constitution of the United States prohibiting any treaty, alliance, or confederation of one state with another; whatever efficacy, therefore, its enactments possessed in any state entering into that organization, must be attributed to the sanction given to them by that state; 96 U. S. 176. The laws of the several states were valid except so far as they tended to impair the national authority or the rights of citizens under the constitution; *ibid.*

Unless suspended or superseded by the commanders of the United States forces which occupied the insurrectionary states, the laws of those states, so far as they affected the inhabitants, remained in force during the war, and over them their tribunals continued to exercise their ordinary jurisdiction; 97 U. S. 509. See articles in 2 So. J. Rev. 313; 3 id. 47.

CONFEDERATION. The name given to the form of government which the American colonies during the revolution devised for their mutual safety and government.

CONFERENCE. in French Law. A similarity between two laws or two systems of laws.

In International Law. Verbal explanations between the representatives of at least two nations, for the purpose of accelerating matters by avoiding the delays

CONFESSION

and difficulties of written communications.

A meeting of plenipotentiaries of different nations to adjust differences or formulate a plan of joint action; as, the conference at Berlin of representatives of the United States, Great Britain, and Germany respecting the affairs of Samoa, in 1889, and the monetary conference at Brussels of representatives of the United States and several European powers in 1894. See CONGRESS.

In Legislation. Mutual consultations by two committees appointed, one by each house of a legislature, in cases where the houses cannot agree in their action.

CONFESSION. In Criminal Law. The voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same.

An admission or acknowledgment by a prisoner, when arraigned for an offence, that he committed the crime with which he is charged.

Judicial confessions are those made before a magistrate or in court in the due course of legal proceedings.

Extra-judicial confessions are those made by the party elsewhere than before a magistrate or in open court.

Voluntary confessions are admissible in evidence; 20 Ga. 60; 12 La. Ann. 805; 3 Ind. 553; 30 Miss. 593; 30 Tex. App. 619; 94 Ala. 50; 3 Wash. St. 99; 92 Ky. 282; 93 Mich. 688; 76 Cal. 328; 25 Neb. 55; 41 La. Ann. 617; but a confession is not admissible in evidence where it is obtained by temporal inducement, by threats, promise or hope of favor held out to the party in respect of his escape from the charge against him, by a person in authority; 4 C. & P. 570; 4 Harr. Del. 503; 37 N. H. 175; 5 Fla. 285; 10 Ind. 106; 10 Gratt. 734; 40 Mich. 706; 88 Ala. 422; 55 Ga. 136; 63 id. 600; 50 Miss. 147; 1 Mont. 394; 2 Col. 186; 31 Tex. Cr. App. 489; 37 Vt. 191; 84 Pa. 200; 91 N. C. 581; see 18 N. Y. 9; 108 Mass. 285; 135 id. 269; 119 id. 305; 55 Vt. 510; 126 Mass. 464; 66 N. C. 639; 51 Ill. 236; 44 L. T. Rep. n. s. 687; 29 Pa. 429; 113 N. C. 688; or where there is reason to presume that such person appeared to the party to sanction such threat or inducement; 5 C. & P. 589; 2 Crawford & D. 347; 1 Dev. 259; but the inducement must be held out by a person in authority; 12 E. L. & Eq. 591; 10 Gray 178; 8 Heisk. 232; but see 4 C. & P. 570; otherwise the confession is admissible; 1 C. & P. 97, 129; Russ. & R. 153; 1 Leach 428; 14 Gratt. 652; 19 Vt. 116; 125 Mass. 210; 44 Miss. 332; 15 La. Ann. 145; 39 Mich. 245; but see 5 Jones, N. C. 432; 32 Miss. 382; 2 Ohio St. 588; or if the inducement be spiritual merely; 1 Mood. 197; Jebb, Ir. 15; 15 Mass. 161; 8 Ohio St. 98; or an appeal to the party to speak the truth; L. R. 1 C. C. C. 362; 44 Miss. 333; 125 Mass. 210; even if the appeal comes from an officer of the law; 15 Ir. L. R. n. s. 60; 54 Ind. 359; 44 La. 82; 2 Tex. App. 588; 94 Ala. 55; 160 Mass. 590; but see 2 Crawford & D. 152; Tayl. Ev. § 604. Mere advice to confess and tell the truth does not exclude; 75 N. C. 356; 54 Mo. 192; 55 Ga. 592; but see 36 S. C. 524; and the temporal inducement must have been held out by the person to whom the confession was made; Phill. Ev. 430; 4 C. & P. 223; Jebb 15; unless collusion be suspected; 4 C. & P. 550. The fact that defendant was intoxicated when he made his confession, though tending to affect its weight, is not ground for its exclusion; 32 Tex. Cr. App. 625.

A confession is admissible though elicited by questions put to a prisoner by a constable, magistrate, or other person; 5 C. & P. 312; 8 id. 179, 621; 14 Ark. 556; 119 Mass. 305; 63 N. Y. 590; 57 Mo. 102; 16 Kans. 14; 94 Ala. 50; 81 Tex. Crim. R. 276; 44 La. 82; even though the question assumes the prisoner's guilt or the confession is obtained by trick or artifice; 1 Mood. 28; Phill. Ev. 427; 83 Miss. 347; 85 Mo. 145; 14 Minn. 165; 80 N. Y. 484; 40 Ala. 314; see 8 C. & P. 622; 91 Ga. 377; and although it appears that the prisoner was not warned

that what he said would be used against him; 8 Mod. 89; 9 C. & P. 124. Statements made to a trial judge freely and voluntarily are admissible in evidence; 45 La. Ann. 36.

A statement not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath; 5 C. & P. 530; 7 Ired. 96; 5 Rich. 391; 122 Mass. 454; 71 N. Y. 602; 41 Tex. 39; 59 Ind. 105; 31 Tex. Cr. App. 485; *contra*, 39 Miss. 615; see 8 C. & P. 250; otherwise, if the answers are compulsory; 1 Den. Cr. Cas. 236; 6 C. & P. 161, 177; 15 N. Y. 384; 3 Wis. 823; 2 Park. Cr. Cas. 663; 2 Dill. 405; 49 Cal. 69. A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself; 5 C. & P. 332; 21 Pick. 515; 98 N. C. 595; 76 Ill. 217; 36 Ohio St. 628; 47 Ind. 251; 121 Mass. 69; see 26 Mich. 1; 32 Ala. n. s. 560; 126 Mass. 374; 63 N. Y. 522; 14 Tex. App. 474; unless such statement is made in the deposition of a witness or examination of another prisoner before a magistrate; 1 Mood. 347; 6 C. & P. 164.

Where a confession has been obtained, or an inducement held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence; unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled; 1 Greenl. Ev. 221; 4 C. & P. 225; 1 Wheel. Cr. Cas. 67; 5 Halst. 163; 3 Jones, N. C. 443; 5 Rich. 391; 24 Miss. 112; 33 Neb. 663; 113 N. C. 624; 10 N. J. L. 163; 87 Vt. 191; 2 Cra. C. C. 76; and the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will be rejected; 1 Dev. 259; 12 Miss. 31; 5 Cush. 605; 18 Conn. 166; 2 Leigh 701; 32 Ala. n. s. 560; 1 Sneed 75. And see 6 C. & P. 404; 5 Jones, N. C. 315; 12 La. Ann. 895.

Under such circumstances, contemporaneous declarations of the party are receivable in evidence, or not, according to the attending circumstances; but any act of the party, though done in consequence of such confession, is admissible if it appears from a fact thereby discovered that so much of the confession as immediately relates to it is true; 1 Leach 263, 386; Russ. & R. 151; 9 Pick. 496; 32 Miss. 382; 7 Rich. 327.

A confession made before a magistrate is admissible though made before the evidence of the witnesses against the party was concluded; 4 C. & P. 567. See 45 La. Ann. 36.

Parol evidence, precise and distinct, of a statement made by a prisoner before a magistrate during his examination, is admissible though such statement neither appears in the written examination nor is vouched for by the magistrate; 61 Me. 171; 2 Russ. Cr. 876; 7 C. & P. 188; but not if it is of a character which it was the duty of the magistrate to have noted; 1 Greenl. Ev. § 227, n. Parol evidence of a confession before a magistrate may be given where the written examination is inadmissible through informality; 1 Lew. 46; 4 C. & P. 550, n.; 1 M. & M. 408; Busb. 239.

The whole of what the prisoner said must be taken together; 1 Greenl. Ev. 218; 2 C. & K. 221; 9 Leigh 633; 2 Dall. 86; 5 Miss. 364. See 3 Park. Cr. Cas. 256; 26 Ala. n. s. 107; 11 Colo. 637; 61 Mo. 302; 24 Wis. 144; 39 Cal. 52; 11 Gray 328. Where a prisoner signs the confession which is written by another for him, he waives any objection to it as evidence; 157 Mass. 200.

All confessions are *prima facie* involuntary and therefore inadmissible, and they can be rendered admissible only by showing that they are voluntary and not constrained; 83 Ala. 1, 76; 84 id. 430; 50 Ark. 305; but a confession is not rendered inadmissible by the fact that the party is in custody, provided it is not extorted by inducements or threats; 160 U. S. 855.

The prisoner's confession, when the *corpus delicti* is not otherwise proved, is in-

sufficient to warrant his conviction; 1 Hayw. 455; 5 Halst. 163, 185; 18 Miss. 229; 17 Ill. 426; 2 Tex. 79. See, *contra*, Russ. & R. 481, 509; 1 Leach 311; 3 Park. Cr. Cas. 401; 11 Ga. 225. Consult Greenleaf; Phillips, Evidence; Wharton, Criminal Evidence; Roscoe, Crim. Ev.; Joy, Confessions; 1 Bennett & H. Lead. Cr. Cas. 112; ADMISSIONS.

CONFESSION AND AVOIDANCE. In Pleading. The admission in a pleading of the truth of the facts as stated in the pleading to which it is an answer, and the allegation of new and related matter of fact which destroys the legal effect of the facts so admitted. The plea and any of the subsequent pleadings may be by way of confession and avoidance, or, which is the same thing, in confession and avoidance. Pleadings in confession and avoidance must give color. See COLOR; 1 East 212. They must admit the material facts of the opponent's pleading, either expressly in terms; Dy. 171 b; or in effect. They must conclude with a verification; 1 Saund. 103, n. For the form of statement, see Steph. Pl. 72, 79.

Pleas in confession and avoidance are either in justification and excuse, which go to show that the plaintiff never had any right of action, as, for example, son assault demesne, or in discharge, which go to show that his right has been released by some matter subsequent.

See, generally, 1 Chit. Pl. 540; 2 id. 644; Co. Litt. 282 b; Archb. Civ. Pl. 215; Dane, Abr. Index.

CONFESSOR. A priest of some Christian sect, who receives an account of the sins of his people, and undertakes to give them absolution of their sins. The common law does not recognize any such relation, at least so as to exempt or prevent the confessor from disclosing such communications as are made to him in this capacity, when he is called upon as a witness. See CONFIDENTIAL COMMUNICATIONS.

CONFIDENCE. This word is considered peculiarly appropriate to create a trust. It is, when applied to the subject of a trust, as nearly a synonym as the English language is capable of. Trust is a confidence which one man reposes in another, and confidence is a trust. 2 Pa. 133.

CONFIDENTIAL COMMUNICATIONS. Those statements with regard to any transaction made by one person to another during the continuance of some relation between them which calls for or warrants such communications.

At law, certain classes of such communications are held not to be proper subjects of inquiry in courts of justice, and the persons receiving them are excluded from disclosing them when called upon as witnesses, upon grounds of public policy.

Secrets of state and communications between the government and its officers are usually privileged; 2 S. & R. 23; 6 Watts 164; 23 N. J. Eq. 111; 1 F. & F. 425; 5 H. & N. 588; 92 U. S. 107. So also the consultations of the judges, the testimony of arbitrators in certain cases, and the sources of information in criminal prosecutions. 1 Wharton, Ev. sec. 600; 11 Am. Rep. 349; 11 Barb. (N. Y.) 510; 10 Ohio 112; 23 Me. 85; 4 C. & P. 327; 78 Mo. 115; 14 Am. Dec. 214; 12 Am. Rep. 736; Steven's Dig. Ev. art. 113.

Of this character are all communications made between a husband and his lawful wife in all cases in which the interests of the other party are involved; Tayl. Ev. 781; 13 Pet. 223; 117 Mass. 90; 41 Ga. 613; 21 La. Ann. 843; 15 Me. 104; 2 Leigh 142; 6 Binn. 488; 6 H. & J. 153; 4 Term 678; 5 Esp. 107; 132 N. Y. 181; 85 Kan. 391; 22 Ill. 661; 101 Ind. 160. See 10 Metc. 287; 3 Day 37; 4 Vt. 116; 1 Doulgl. 48; 3 Harring. 88; 8 C. & P. 284. Nor does it make any difference which party is called upon as a witness; Ry. & M. 552; or when the relation commenced; 8 C. & P. 558; or whether it has terminated; 18 Pet. 209; 3 Dev. & B. 110; 1 Barb. 392; 6 East 192; 1 C. & P. 364; 98 Pa. 501; 45 Ind. 366; 102

id. 103; 81 Ill. 266; 29 Ga. 470; 31 Ark. 604. And see 13 Pick. 445; 7 Vt. 506; 5 Ala. n. s. 224; 1 B. Monr. 224. A third party who overheard such a conversation may testify as to it; 110 Mass. 181; 127 Ill. 518. The wife may be examined as to a conversation with her husband in the presence of a third party; 35 Vt. 379; 46 Barb. 158; 62 Hun 622; 154 Mass. 488; 131 *id.* 31; 61 Ind. 224; 25 Ohio St. 500; but not if the third person failed to hear or paid no attention to the conversation; 113 Mass. 160.

The confidential counsellor, solicitor, or attorney of any party cannot be compelled to disclose papers delivered or communications made to him, or letters or entries made by him, in that capacity; 4 B. & Ad. 876; 45 N. Y. 57; 80 *id.* 394; 38 Wis. 205; 12 Pick. 89; 23 Mo. 474; 11 Wheat. 295; 109 Mo. 1; 43 Ill. App. 370; 33 Ark. 771; 119 Ill. 543; 103 Mass. 523; 110 U. S. 311; 74 Me. 640; 9 Exch. 298; 7 Q. B. 767; nor will he be permitted to make such communications against the will of his client; 4 Term 756, 759; 12 J. B. Moo. 520; 3 Barb. Ch. 528; 8 Mass. 370; nor even if the communication is made in the presence of a third person; 155 Mass. 378. nor will the client be compelled to disclose such communications; 43 Ind. 112; 34 Ohio St. 91; 28 Vt. 701; not even when the client takes the witness stand in his own behalf; 43 Ind. 112; 38 Ia. 395; 34 Ohio St. 91; *contra*, 101 Mass. 193. The privilege extends to all matters made the subject of professional intercourse, without regard to the pendency of legal proceedings; 5 C. & P. 592; 6 Madd. 47; 22 Pa. 89; 12 Pick. 89; 38 Me. 581; 25 Vt. 47; 24 Miss. 134; 80 N. Y. 394; 65 Miss. 179; 65 Ga. 525; but see 28 Vt. 701, 750; and to matters discovered by the counsellor, etc., in consequence of this relation; 5 Esp. 52. See 1 M. & K. 102; 3 M. & C. 515; Story, Eq. Pl. § 601; 13 Ga. 260. See 29 Ala. n. s. 254; 21 Ga. 301.

Interpreters; 4 Term 756; 3 Wend. 337; 4 Munf. 273; 7 Ind. 209; 1 Pet. C. C. 356; and agents to collect evidence; 2 Beav. 173; 1 Phill. Ch. 471, 687; are considered as standing in the same relation as the attorney; so, also, is a barrister's clerk; 2 C. & P. 195; 1 *id.* 545; 5 *id.* 177; 5 M. & G. 271; 8 D. & R. 726; 12 Pick. 93; 3 Wend. 337; 16 N. Y. 180; 5 Cal. 450; but not a student at law in an attorney's office; 7 Cush. 576.

The cases in which communications to counsel have been held not to be privileged may be classed under the following heads: When the communication was made before the attorney was employed as such; 1 Vent. 197; see 33 Me. 581; 79 Cal. 636; 40 Hun 336; 34 Mo. 337; after the attorney's employment has ceased; 4 Term 431; 12 La. Ann. 91; 6 Hun 602; when the attorney was consulted because he was an attorney, yet was not acting as such; 4 Term 753; 4 Mich. 414; 14 Ill. 89; 7 Rich. 459; where his character of attorney was the cause of his being present at the taking place of a fact, but there was nothing in the circumstances to make it amount to a communication; 2 Ves. Ch. 189; 2 Curt. Eccl. 866; 29 N. H. 163; see 46 Ia. 88; when the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential communication; 7 East 357; 2 Brod. & B. 176; 3 Johns. Cas. 198; 2 Ind. App. 170; when it was intended that the communications should be imparted by him to others; 91 Cal. 63; when the things disclosed had no reference to professional employment, though disclosed while the relation of attorney and client subsisted; Peake 77; when the attorney made himself a subscribing witness; 10 Mod. 40; 2 Curt. Eccl. 866; 3 Burr. 1687; when he is a party to the transaction; 3 Wis. 274; Story, Eq. Pl. § 601; when he was directed to plead the facts to which he is called to testify; 7 Mart. La. n. s. 179; where an attorney is employed only to draw up a deed and bill of sale to be executed by another to such person, he may testify as to what passed between them and himself; 6 Dak. 107.

The attorney may be called upon to prove his client's handwriting; 120 Mass. 215; L. R. 8 Eq. 573; L. R. 5 Ch. Ap. 703; 47 Fed. Rep. 472; to identify his client; 2 D. & R. 347; 2 Cowp. 846; though not to disclose his client's address; L. R. 15 Eq. 257; unless the client be a ward of court; L. R. 8 Eq. 575; or a bankrupt; L. R. 5 Ch. 703. He may be required to testify as to whether he was retained by his client, and in what capacity; Whart. Ev. 589; 12 Pa. 304; but see 11 Wheat. 280.

After testator's death on the question whether an instrument present for probate was his will, the attorney may testify as to directions given him in its preparation by testator; 157 Mass. 90; see 111 N. Y. 239. He may testify as to what was said in their presence by a third person brought by his client; 106 Mo. 313.

The doctrine of privileged communications does not apply to testimony of a solicitor of patents, who is not an attorney-at-law; 49 Fed. Rep. 124.

Communications between a party or his legal adviser and witnesses are privileged; L. R. 8 Eq. 523; 16 *id.* 112; but see 63 Hun 632; so are communications between parties to a cause touching the preparation of evidence; Hare, Discov. 152; 43 L. J. C. P. 206; but see 6 B. & S. 888; 3 H. & N. 971. Communications between an attorney and client are not privileged where the latter disclaims the existence of such relations; 63 Hun 632.

The rule of privilege does not extend to confessions made to *clergymen*; 1 Greenl. Ev. 247; 4 Term 753; 2 Skimm. 404; 15 Mass. 161; 1 McNally 253; 4 Harr. 563; though judges have been unwilling to enforce a disclosure; 3 C. & P. 519; 6 Cox, C. C. 219; and see 92 U. S. 105; 63 Ill. 209; 21 Pick. 515; and the rule is otherwise by statute in some states; Iowa Code, 1851, art. 23, § 93; Michigan Rev. Stat. 1846, c. 102, § 85; Missouri Rev. Stat. 1845, c. 186, § 19; 2 New York Rev. Stat. 406, § 72; 13 Wend. 311; Wisconsin Rev. Stat. 1849, c. 98, § 75; nor to *physicians*; 11 Hargr. St. Tr. 243; 20 How. St. Tr. 643; 1 C. & P. 97; 3 *id.* 518; L. R. 6 C. P. 252; 39 Mich. 606; L. R. 9 Ex. 398; but in some states this has been changed by statute; Whart. Ev. § 606; 5 Hun 1; 61 *id.* 627; 77 Ind. 208; 112 U. S. 250; 26 Mo. App. 621; 40 Pac. Rep. (Kan.) 646; 100 Cal. 391; see 14 Wend. 637; but he may testify from knowledge and information acquired while not treating a patient professionally; 129 N. Y. 654; nor to *confidential friends*; 4 Term 758; 1 Caines 157; 3 Wis. 456; 14 Ill. 89; L. R. 18 Eq. 649; *clerks*; 3 Campb. 337; 1 C. & P. 337; *bankers*; 2 C. & P. 325; *sewards*; 2 Atk. 524; 11 Price 455; *nor servants*; 6 How. Miss. 35. Consult Wharton; Starkie; Greenleaf; Evidence; 17 Am. Jur. 304.

CONFINED. See CONTINUOUSLY CONFINED.

CONFINED TO BED. The term "confined to bed" as used in a disability policy requires that the insured shall be reasonably and continuously confined, or that his sickness is such as will substantially so confine him. 151 Ky. 149, 151 S. W. 361. See CONTINUOUSLY CONFINED.

CONFIRMATIO (Lat. *confirmare*). The conveyance of an estate, or the communication of a right that one hath in or unto lands or tenements, to another that hath the possession thereof, or some other estate therein, whereby a voidable estate is made sure and unvoidable, or whereby a particular estate is increased or enlarged. Shep. Touchst. 311; 2 Bla. Com. 325.

Confirmatio crescens tends and serves to increase or enlarge a rightful estate, and so to pass an interest.

Confirmatio diminuens tends or serves to diminish and abridge the services whereby the tenant holds.

Confirmatio perficiens tends and serves to confirm and make good a wrongful and defeasible estate, by adding the right to the possession or defeasible seisin, or to make a conditional estate absolute, by discharging the condition.

CONFIRMATIO CHARTARUM (Lat. confirmation of the charters). A statute passed in the 25 Edw. I., whereby the Great Charter is declared to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that, by word or deed or counsel, act contrary thereto or in any degree infringe it. 1 Bla. Com. 128.

CONFIRMATIO CRESCENS. See under CONFIRMATIO.

CONFIRMATIO DIMINUENS. See under CONFIRMATIO.

CONFIRMATIO PERFICIENS. A confirmation which makes valid a wrongful and defeasible title, or makes a conditional estate, absolute. Shep. Touchst. 311; Black.

CONFIRMATION. A contract by which that which was voidable is made firm and unavoidable.

A species of conveyance.

Where a party, acting for himself or by a previously authorized agent, has attempted to enter into a contract, but has done so in an informal or invalid manner, he confirms the act and thus renders it valid, in which case it will take effect as between the parties from the original making. See 2 Bouvier, Inst. nn. 2067-2069.

To make a valid confirmation, the party must be apprized of his rights; and where there has been a fraud in the transaction he must be aware of it and intend to confirm his contract. See 1 Ball & B. 353; 2 Sch. & L. 456; 12 Ves. Ch. 373; 1 *id.* 215; 1 Atk. 301; 8 Watts 280.

A confirmation does not strengthen a void estate. For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law; Co. Litt. 295. The canon law agrees with this rule; and hence the maxim, *qui confirmat nihil dat*. Toullier, Dr. Civ. Fr. l. 3, t. 3, c. 6, n. 476. See Viner, Abr.; Comyns, Dig.; Ayliffe, Pand. *386; 1 Chit. Pr. 315; 3 Gill & J. 290; 3 Yerg. 405; 1 Ill. 286; 9 Co. 142 a; RATIFICATION.

CONFIRMEE. He to whom a confirmation is made.

CONFIRMOR. He who makes a confirmation to another.

CONFISCARE. To confiscate.

CONFISCATE. To appropriate to the use of the state.

Especially used of the goods and property of alien enemies found in a state in time of war. 1 Kent 62 *et seq.* *Bona confiscata et forisfacta* are said to be the same (1 Bla. Com. 299), and the result to the individual is the same whether the property be forfeited or confiscated; but, as distinguished, an individual forfeits, a state confiscates, goods or other property. Used also as an adjective—*forfeited*. 1 Bla. Com. 299.

It is a general rule that the property of the subjects of an enemy found in the country may be appropriated by the government without notice, unless there be a treaty to the contrary; Hall, Int. L. 397; 1 Gall. 563; 3 Dall. 199. It has been frequently provided by treaty that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they conducted themselves innocently; and when there was no such treaty, such a liberal permission has been announced in the very declaration of war. Vattel, l. 3, c. 4, § 63. Sir Michael Foster (Discourses on High Treason, pp. 185-6) mentions several instances of such declarations by the king of Great Britain; and he says that alien enemies were thereby enabled to acquire personal chattels and to maintain actions for the recovery of their personal rights in as full a manner as alien friends; 1 Kent 57.

In the United States, the broad principle has been assumed "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy,

wherever found. The mitigations of this rigid rule which the policy of modern times has introduced into practice will more or less affect the exercise of this right, but cannot impair the right itself; "8 Cra. 122. Commercial nations have always considerable property in the possession of their neighbors; and when war breaks out, the question what shall be done with enemies' property found in the country is one rather of policy than of law, and is properly addressed to the consideration of the legislature, and not to courts of law. The strict right of confiscation exists in congress; and without a legislative act authorizing the confiscation of enemies' property, it cannot be condemned; 8 Cra. 128.

The right of confiscation exists as fully in case of a civil war as it does when the war is foreign, and rebels in arms against the lawful government, or persons inhabiting the territory exclusively within the control of the rebel belligerents, may be treated as public enemies. So may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory; 11 Wall. 269. Proceedings under the Confiscation Act of July 17, 1862, were justified as an exercise of belligerent rights against a public enemy, but were not, in their nature, a punishment for treason. Therefore, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights as against a purchaser in good faith and for value; 91 U. S. 21.

The claim of a right to confiscate debts contracted by individuals in time of peace, and which remain due to subjects of the enemy in time of war, rests very much upon the same principles as that concerning the enemy's tangible property found in the country at the commencement of the war. But it is the universal practice to forbear to seize and confiscate debts and credits; 1 Kent 64. See 4 Cra. 415; T. U. P. Charl. 140; 2 H. & J. 101, 112, 286, 471; 7 Conn. 428; 1 Day 4; Kirb. 228, 201; 2 Tayl. 115; Cam. & N. 77, 492; 2 Dill. 555; 15 Wall. 591; Chase, Dec. 259.

A suit in confiscation is an action of entirely different nature from a proceeding in prize. Confiscation is the act of the sovereign against a rebellious subject. Condemnation as prize is the act of a belligerent against another belligerent. Confiscation may be effected by such means, either summary or arbitrary, as the sovereign expressing its will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*, but confiscation recognizes the title of the original owner to the property which is to be forfeited, while in prize the tenure of the property seized is qualified, provisional and destitute of absolute ownership; Blatchf. Pr. Cas. 620. To confiscate property seized upon land, resort must be had to the common-law side of the court; 20 Wall. 110; prize proceedings are always in admiralty; 14 Ct. Cls. 48.

See, generally, Chitty, Law of Nations, c. 8; Marten, Law of Nat. lib. 8, c. 3, s. 9; Burlamaqui, Pol. Law, part 4, c. 7; Vattel, lib. 3, c. 4, § 63; Twiss, Law of Nations; Wheaton; Hall, International Law.

CONFITENS REUS. An accused person who admits his guilt. Wharton.

CONFLICT OF LAWS. A contrariety or opposition in the laws of states or countries in those cases where, from their relations to each other or to the subject-matter in dispute, the rights of the parties are liable to be affected by the laws of both jurisdictions.

As a term of art, it also includes the deciding which law is in such cases to have superiority. It also includes many cases where there is no opposition between two systems of law, but where the question is how much force may be allowed to a foreign law with reference to which an act has been done, either directly or by legal implication, in the absence of any domestic law exclusively applicable to the case.

An opposition or inconsistency of domestic laws upon the same subject.

Among the leading canons on the subject are these: the laws of every state affect and bind directly all property, real or personal, situated within its territory, all contracts made and acts done and all persons resident within its jurisdiction, and are supreme within its own limits by virtue of its sovereignty; 6 Binn. 361; 7 Wall. 151; 37 Mo. 354; Cowp. 208; 4 T. R. 192. Ambassadors and other public ministers while in the state to which they are sent, and members of an army marching through or stationed in a friendly state, are not subject to this rule; 4 Barb. 522; 4 Cra. 173.

Possessing exclusive authority, with the above qualification, a state may regulate the manner and circumstances under which property, whether real or personal, in possession or in action, within it, shall be held, transmitted, or transferred, by sale, barter, or bequest, or recovered or enforced; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done there; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases; Story, Conf. Laws § 18; Vattel, b. 2, c. 7, §§ 84, 85.

Whatever force and obligation the laws of one country have in another depends upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent; Huberus, lib. 1, t. 3, § 2. When a statute or the unwritten or common law of the country forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, which of the conflicting laws is to have effect.

Generally, force and effect will be given by any state to foreign laws in cases where from the transactions of the parties they are applicable, unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*.

The broad rule as to contracts is thus stated by Mr. Wharton (Conf. Laws § 401): "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above, supplies the applicatory law." This rule is quoted by Hunt, J., in 91 U. S. 411. In a later part of his opinion, in the same case, he says: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought. A careful consideration of the decisions of this country and of England will sustain these positions;" cited in 125 Mass. 374, which is in turn cited in 106 U. S. 124, where, in a suit on a bond executed in New York to indemnify the plaintiff's intestate as surety in an appeal bond in a suit in Louisiana, the court defined the "*seat of the obligation*" and held the law applicable to be the *lex loci solutionis* which was the law of Louisiana; the *lex loci contractus* was said to be a confusing phrase, because it is in reality the law not of the place of execution but of the seat of the obligation, and that might be either the place of execution or the place of performance.

Mr. Wharton has since expressed the rule in the following terms, in the second edition (1881) of his Conf. Laws § 401: "A contract, so far as concerns its formal making, is to be determined by the place where it is solemnized, unless the *lex situs* of property disposed of otherwise requires; so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place

in view; so far as concerns the remedy, by the law of the place of suit; and so far as concerns its performance, by the law of the place of performance." See 62 Ga. 241; 62 Ala. 518; 48 N. H. 176; 74 Ill. 197; 150 Pa. 466; 11 Cal. 118; as to *lex solutionis*; 22 Kan. 89; 4 McLean 440; 76 Ark. 356; 44 La. Ann. 511; 14 Johns. 338; 3 Mas. 91; as to *lex fori*; 80 N. C. 294; 26 Ark. 356; 11 La. 465; 1 Pet. 312; 4 McLean 540; 56 Ark. 187; 5 How. 83; as to *lex loci*; where a contract is a fraud on the laws of the *lex fori*, it will not be enforced; 47 Me. 120; See 49 Minn. 356; nor will it be enforced if contrary to public policy; Poll. Contr. 371; Whart. Conf. Laws § 480.

REAL ESTATE. In general, the mode of conveying, incumbering, transmitting, devising, and controlling real estate is governed by the law of the place of situation of the property; 44 Minn. 348; 126 Ind. 58; 7 Cr. 115; 11 How. 33; 3 La. Ann. 418; 14 Ves. 541; 4 T. R. 182. See *LEX RES SITÆ*.

Perhaps an exception may exist in the case of mortgages; 23 Miss. 175; 3 McLean 397. But the point cannot be considered as settled; 1 Washb. R. P. 524; Story, Conf. Laws § 363; Westl. Priv. Int. Law 75. It is said by Wharton (Conf. Laws § 368) that the law governing the mortgage, as such, is the law of *situs* of the land which the mortgage covers; but the *debt* is governed by the law of the domicile of the party to whom it is due, no matter where the property be situated; see 46 N. H. 300; 5 Sawy. 33; 41 N. Y. 313; 21 Wis. 340; 138 Ill. 559; 1 N. D. 216; and that when the money is invested on the land for which the mortgage is given, the *lex sitæ* prevails. For the purposes of taxation a *debt* has its *situs* at the domicile of the creditor; 100 U. S. 490.

PERSONAL PROPERTY. For the general rules as to the disposition of personal property, see *DOMICIL*. *Bills of exchange and promissory notes* are to be governed, as to validity and interpretation, by the law of the place of making, as are other contracts. The residence of the drawee of a bill of exchange, and the place of making a promissory note where no other place of payment is specified, is the *locus contractus*; 10 B. & C. 21; 1 Woodb. & M. 381; 4 C. & P. 35; 4 Mich. 450; 6 McLean 622; 35 N. J. L. 285; 9 Cush. 46; 26 Vt. 698; 11 Gratt. 477; 3 Gill 430; 18 Conn. 138; 6 Ind. 107; 65 N. H. 39; 89 Ky. 461; see 11 Tex. 54; 17 Miss. 220, where the place of address is said to be the place of making. As between the drawee and drawer and other parties (but not as between an indorser and indorsee, 19 N. Y. 436; but see 14 Vt. 33), each indorsement is considered a new contract; 14 B. Monr. 556; 5 Sandf. 330; 2 Ga. 158; 3 McLean 397. On a bill of exchange drawn in one state and payable in another, the time within which notice of protest must be mailed is determined by the law of a latter state; 125 Ind. 375. See *LEX LOCI*. A statute of limitations of a foreign state providing that an action on a note shall be brought within a certain time after the cause of action accrues bars the debt itself if not brought within the time limited, and may be pleaded in bar of an action brought on the note in another state; 6 Dak. 91. See 83 Me. 87.

The place of payment is, however, to be considered as the place of making; 30 Miss. 59; 7 Ohio St. 134; 4 Mich. 450; 5 McLean 448; 3 Gill 430; 8 B. Monr. 306; 14 Ark. 189; 17 Miss. 220; 13 Gray 597. But see 4 N. J. 319.

The better rule as to the rate of interest to be allowed on bills of exchange and promissory notes, where no place of payment is specified and no rate of interest mentioned seems to be the interest of the *lex loci*; 6 Johns. 183; 5 C. & F. 1, 12; 6 Cra. 221; 3 Wheat. 101; 1 Dall. 191; 12 La. Ann. 815; 58 Hun 606. And see 9 Gratt. 31; 24 Miss. 463; 2 Mo. 65; 1 Pars. Contr. 238; 53 Barb. 850; 33 N. J. L. 81; 3 Wheat. 101. The damages recoverable on a bill of exchange not paid are those of the place where the plaintiff is entitled to reimbursement. In the United States, these are generally fixed by statute; 4 Johns. 119; 6 Mass. 157; 2 Wash. C. C. 167; 3 Sumn.

523.

Where a place of payment is specified, the interest of that place must be allowed; 126 Mass. 360; 14 Vt. 33; 22 Barb. 118; 77 N. Y. 573. See 17 Johns. 511; except that when a contract is made in one state, to be performed in another, parties may contract for the legal rate of interest allowable in either state, provided such contract is entered into in good faith, and not merely to avoid the usury laws; 20 Mart. La. 1; 46 N. H. 300; 1 Wall. 310; 26 Barb. 213; 25 Ohio St. 413; 23 La. 194; 35 N. J. L. 285. See 91 Ga. 505; *contra*, Story, Conf. Laws § 298. A note made in one state and payable in another, is not subject to the usury laws of the latter state, if it is valid in that respect in the state where it was made; 47 Ark. 54; 2 Miles Pa. 185.

Chattel mortgages valid and duly registered under the laws of the state in which the property is situated at the time of the mortgage, will be held valid in another state to which the property is removed, although the regulations there are different; 13 Pet. 107; 62 Mo. 524; 25 Miss. 471; 53 N. H. 562; 7 Ohio St. 134; 12 Barb. 631; but see 48 Kan. 606; 40 Ill. App. 234; 7 Wall. 140; 35 N. Y. 657; and it will be enforced in the state to which the property has been removed, although it would have been invalid if made in that state; 30 Mo. 333; but it is said by Wharton (Conf. Laws § 317), that the law in regard to chattel mortgages is governed by the *lex rei sitæ*; that a lien is extinguished when goods are taken from the place where the lien was created to a place where such a lien is not recognized; Whart. Conf. Laws § 318; 9 Phila. 615 (where a chattel mortgage made in Maryland was held invalid in Pennsylvania as against a *bona fide* purchaser without notice); and a Louisiana court refused to enforce a chattel mortgage made in another state, such mortgages being unknown in Louisiana; 26 La. Ann. 185. See 37 Pa. 508, where it was held that a trust of personalty valid in the domicile would be protected if the parties removed to another state. See also 4 Dist. Rep. Pa. 270; 15 Pa. Co. Ct. 471.

The law of the *situs* governs a mortgage of chattels in one state, executed in another; Rorer, Int. St. L. 96; Jones, Chat. Mortg. § 305; 53 N. H. 88; 7 Wall. 139; 23 Kan. 89; 38 Ala. 67. See 76 Ind. 512; 21 Barb. 193; *contra*, 12 N. J. Eq. 86; 10 Ind. 28. The *lex fori* determines the remedies on the mortgage; 37 N. H. 86; *contra*, Story, Conf. Laws § 402; 50 Ill. 370 (where there appears to have been notice). See 38 N. Y. 153, where a mortgage on a ship, made and shown to be invalid in Pennsylvania, was held invalid in New York; 8 Humphr. 542.

The registration of chattel mortgages and transfer of government and local stocks are frequently made subjects of positive law, which then suspends the law of the domicile.

Where the mortgagor of chattels removes with them to another state, the mortgagee, to preserve his rights, need not again record the mortgage in such other state; 32 Minn. 377; 37 N. H. 87; 62 Mo. 524; 37 N. J. L. 201. But in Alabama it must be recorded to preserve its validity; 14 Ala. 55; 89 Ala. 588.

As to whether such mortgages will be respected in preference to claims of citizens of the state into which the property is removed, it is held that they will; 30 Vt. 42, overruling 23 Vt. 279; 7 Ohio St. 134; 12 Barb. 631; 8 Humphr. 542. A chattel mortgage valid in the state where executed without change of possession protects the property mortgaged against an attachment in Vermont, though in the possession of the mortgagor; 25 Vt. 581; 57 *id.* 360.

Questions of priority of liens and other claims are, in general, to be determined by the *lex rei sitæ* even in regard to personal property; 5 Cra. 259; 4 Binn. 553; 14 Mart. La. 93; 2 H. & J. 193, 224; 3 Pick. 128; 3 Rawle 312; 13 Pet. 312; 17 Ga. 491; 4 Rich. 561; 13 Ark. 543; 3 Barb. 89; see 33 Ala. 536. A chattel mortgage made in Canada, with possession delivered to the mortgagee, was held entitled to priority in

Michigan, whither the property was taken without consent of the mortgagee, over a prior chattel mortgage in Michigan executed before the property was taken to Canada and recorded after its return; Vining v. Millar, 32 L. R. A. (Mich.) 442.

The existence of the lien will generally depend on the *lex loci*; Story, Conf. Laws §§ 322 b, 402; 5 Cra. 259. See note on extra-territoriality of chattel mortgages, 17 L. R. A. 127.

Marriage comes under the general rule in regard to contracts, with some exceptions. See LEX LOCI. 25 Amer. Law Rev. 82.

The scope of a marriage settlement made abroad is to be determined by the *lex loci contractus*; 1 Bro. P. C. 129; 2 M. & K. 513; where not repugnant to the *lex rei sitæ*; 31 E. L. & Eq. 443; 4 Bosw. 266.

When the contract for marriage is to be executed elsewhere, the place of execution becomes the *locus contractus*; 23 E. L. & Eq. 288.

Torts. In an action brought in one state for injuries done in another, the statutes and decisions of the courts of the latter state must fix the liability; 47 Minn. 92; 48 Ohio St. 623; 88 Va. 971; 89 Tenn. 235. See 145 U. S. 193.

Movables in general. Personal property follows the owner; and hence its disposition and transfer must be determined by the law of his domicile; 2 Kent 428. See DOMICIL.

SPECIAL PERSONAL RELATIONS. **Executors and administrators**, in the absence of a specific statute authorizing it, have no power to sue or be sued by virtue of a foreign appointment as such; Westl. Priv. Int. Law 279; 2 Jones, Eq. 276; 10 Rich. 393; L. R. 5 Ch. App. 315; 1 Woolw. 383; 110 Mass. 369; 61 Pa. 478; 3 W. Va. 154; 55 Ga. 253; 54 Mo. 408; 38 Ala. 678; 54 Me. 453; 12 Wheat. 169; 3 Q. B. 498; 2 Ves. 35. It seems to be otherwise where a foreign executor has brought assets into the state; 18 B. Monr. 582; 1 Bradf. Surr. 241; and see 16 Ark. 283; 15 La. Ann. 243; and is otherwise by statute in Ohio; 5 McLean 4.

In the United States, however, payment to such executor will be a discharge, it seems; 7 Johns. Ch. 49; 18 How. 104; *contra*, 3 Sneed 55; otherwise in England; Dy. 305; 3 Kebl. 163; 1 M. & G. 159; 3 Q. B. 493. But see Westl. Priv. Int. Law 272.

And an executor who has so changed his situation towards the action as to render it his own may sue in a foreign court; Westl. Priv. Int. Law 286; 1 Hare 84; 4 Beav. 506.

Administration must be taken out in the *situs* (place of situation) of the property; 13 Wheat. 109; 20 Johns. 229; 1 Mas. 381; 1 Bradf. Surr. 69.

But, in general, administration is granted as of course to the executor or administrator entitled under the *lex domicilii* (but not, it seems, to a minor; 1 Sw. & T. 253; or a creditor; Ambl. 416). In such cases the probate granted in the place of domicile is the principal, that in the *situs* is ancillary; 3 Bradf. Surr. 233; L. R. 2 P. & M. 89; 1 Woolw. 383; 10 Gray 162; 10 H. L. Cas. 1; 3 Rawle 312; 61 Pa. 478; 21 Conn. 577. There is no legal privity between them; 35 N. H. 484.

All property of the decedent which is in the jurisdiction of the court granting principal or ancillary administration, or which comes into it if not already taken possession of under a grant of administration, comes under its operation; 3 Paige, Ch. 459.

Whether or not a legacy bears interest, depends on the laws of the state of the domicile; 152 Mass. 74.

Ships and cargoes and the proceeds thereof, on the death of the owner, complete their voyages and return to the home port to be administered; Story, Conf. Laws § 520; 45 Ill. 382; 1 Strobb. 25; 3 Paige, Ch. 459; 1 Strobb. L. 25.

The property in each jurisdiction is held liable for debts due in that jurisdiction, and the surplus is to be remitted to the principal administrator for distribution under the *lex domicilii*; 3 Cl. & F. 1; L. R. 4 Ch. App. 735; but whether the court of the ancillary jurisdiction will decree a distri-

bution or remit the property to the domiciliary jurisdiction, has been held to be a matter of judicial discretion; 53 N. Y. 192; 52 Ala. 124. See 57 Miss. 566; 24 Beav. 100; 3 Pick. 145; 3 Bradf. Surr. 233; 21 Conn. 577. See DOMICIL.

In case of insolvency, it is said the assets would be retained for an equitable distribution among the creditors of an amount proportioned to the whole amount of assets and claims; 3 Pick. 147; but this rule has been doubted; Whart. Conf. Laws § 623.

Each administrator must give priority to claims according to the law of his jurisdiction; Story, Conf. Laws § 524; 5 Pet. 518; 20 Johns. 265.

Guardians have no power over the property, whether real or personal, of their wards, by virtue of a foreign appointment; 4 Cow. 52; 1 Johns. Ch. 153; 4 Gill & J. 332; 4 T. R. 185; they must have the sanction of the appropriate local tribunal; Rorer, Int. St. L. 356; 6 Blatch. 537; 9 Wall. 394; 4 Allen 321; Whart. Conf. Laws § 260; L. R. 2 Eq. 74. As to the relations of foreign and domestic guardians, see 14 B. Monr. 544.

As to the power of a guardian over the domicile of his ward, see DOMICIL.

Receivers in equity have no extra-territorial powers by virtue of their appointment; 17 How. 322; 52 Mo. 17; 25 N. Y. 577; but see 3 Biss. 513. A receiver appointed for an insolvent corporation in one state has no title to its property in another state; 52 Tex. 396; 28 Conn. 274; 57 Fed. Rep. 534. See RECEIVERS.

Sureties come under the general rules, and their contracts are governed by the *lex loci*; but in the case of a bond with sureties, given to the government by a navy agent for the faithful performance of his duties, the liability of the sureties is governed by the common law, as the accountability of the principal was at Washington, the seat of government; 6 Pet. 172 (the case coming up from Louisiana). See 7 Pet. 435. See SURETSHIP.

JUDGMENTS AND DECREES OF FOREIGN COURTS relating to immovable property within their jurisdiction are held binding everywhere. And the rule is the same with regard to movables actually within their jurisdiction; Story, Conf. Laws § 592; 79 Pa. 354; 23 Wall. 458; 2 C. & P. 155. See 95 U. S. 714; L. R. 4 H. L. 414; 23 Pick. 270; 4 Cra. 434.

Thus *admiralty* proceedings *in rem* are held conclusive everywhere if the court had a rightful jurisdiction founded on actual possession of the subject-matter; 4 Cra. 241, 293, 433; 7 *id.* 423; 9 *id.* 126; 4 Johns. 34; 3 Sumn. 600; 1 Stor. 157; 1 H. & J. 142; 1 Binn. 299; 6 Mass. 277; L. R. 5 Q. B. 599; 1 Low. 253; 10 Nev. 47.

But such decree may be avoided for matter apparently erroneous on the face of the record; 7 Term 523; 1 Cai. Cas. 21; or if there be an ambiguity as to grounds of condemnation; 7 Bingh. 495; 1 Greenl. Ev. § 541, n.; 14 Cow. 520, n. 3; 2 Kent 120.

Proceedings under the garnishee process are held proceedings *in rem*; and a decree may be pleaded in bar of an action against the trustee or garnishee; 1 Greenl. Ev. § 542; 4 Cow. 520, n. But the court must have rightful jurisdiction over the *res* to make the judgment binding; and then it will be effectual only as to the *res*, unless the court had actual jurisdiction over the person also; 81 Me. 314; 7 B. Monr. 376; 9 Mass. 498; Story, Conf. Laws § 592; Greenl. Ev. § 542; 10 Nev. 47; 95 U. S. 714.

ASSIGNMENTS AND TRANSFERS. Voluntary assignments of personal property, valid where made, will transfer property everywhere; 15 N. Y. 320; 4 N. J. 163, 270; 17 Pa. 91; 58 Fed. Rep. 673; 43 *id.* 716; 1 La. Ann. 430; 2 *id.* 650; 52 Conn. 330; 137 Mass. 366; not as against citizens of the state of the *situs* attaching prior to the assignees' obtaining possession; 13 Mass. 146; 5 Harring. 81. Otherwise 12 Md. 54; 4 N. J. 162.

An involuntary assignment by operation of law as under bankrupt or insolvent laws will not avail as against attaching creditors

in the place of situation of the property; 5 N. Y. 320; 4 Zab. 162, 270; 6 Pick. 286, 302; 2 Hayw. 24; 4 M'Cord 519; 5 N. H. 313; 14 Mart. La. 93; 6 Binn. 353; 5 Cra. 289; 29 Me. 208; 1 Harr. & McH. 236; 19 N. Y. 207; 32 Miss. 246; 28 Conn. 274; 23 Ark. 526; 18 Pick. 247; 37 La. Ann. 522. See 61 Conn. 154; 49 N. J. Eq. 48.

It may be a question whether the same rule would hold if the assignees had obtained possession: Dougl. 161; 81 Wis. 291. An assignment by operation of law is good so as to vest property in the assignees by comity of nations; 6 M. & S. 126; 20 Johns. 262; 6 Binn. 363; 3 Mass. 517.

In England it is firmly settled that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England, and that an attachment of such property by an English creditor, after such bankruptcy, with or without notice to him, is invalid to overreach the assignment; but this rule does not prevail in the United States, either as regards a foreign assignee or an assignee under the laws of another state in the Union; Story, Conf. Laws § 409; 17 How. 322. See 25 Q. B. Div. 399.

The assignment by marriage is held valid; Story, Conf. Laws § 423. See DOMICIL.

Discharges by the *lex loci contractus* are valid everywhere; 4 Bosw. 459; 7 Cush. 15; 40 Me. 204; 26 Vt. 703; 13 Mass. 1; 12 Wheat. 370; 5 East 124. This rule is restricted in the United States by the clause in the constitution forbidding the passage of any law impairing the obligation of contracts. Under this provision, it is held that a state insolvent or bankrupt law may not have any extra-territorial effect to discharge the debtor; 5 How. 307; 7 N. Y. 500; Story, Const. § 1115. See LEX FORI. It may, however, take away the remedy for non-performance of the contract in the *locus contractus*, on contracts made subsequently.

As to FOREIGN JUDGMENTS and FOREIGN LAWS, see those titles.

See INTERNATIONAL PRIVATE LAW.

CONFRONTATION. In Practice. The act by which a witness is brought into the presence of the accused, so that the latter may object to him, if he can, and the former may know and identify the accused and maintain the truth in his presence. In criminal cases no man can be a witness unless confronted with the accused, except by consent.

CONFUSIO (Lat. *confundere*). A pouring together of liquids; a blending of an inseparable compound.

In *commixtio* a separation can be made; in *confusio* it cannot; 2 Bla. Com. 405.

The merger of the qualities of debtor and creditor in the same person. Sohm, 347.

CONFUSION OF DEBTS. The concurrence of two adverse rights to the same thing in one and the same person. 11 Humph. 198.

CONFUSION OF GOODS. Such a mixture of the goods of two or more persons that they cannot be distinguished.

When this takes place by the mutual consent of the owners, they have an interest in the mixture in proportion to their respective shares; 6 Hill 425, but see 112 N. C. 283. Where it is caused by the wilful act of one party without the other's consent, the one causing the mixture must separate them at his own peril; Bisp. Eq. § 86; 30 Me. 237, 295; 19 Ohio 337; 9 Barb. 630; 3 Kent 365; and must bear the whole loss; 2 Blackf. 377; 3 Ind. 306; 2 Johns. Ch. 62; 11 Metc. 493; 30 Me. 237; 11 Colo. 223; otherwise, it is said, if the confusion is the result of negligence merely, or accident; 20 Vt. 333. The rule extends no further than necessity requires; 2 Campb. 575; 1 Vt. 286; 24 Pa. 246; 97 N. C. 383; for if the goods can be distinguished, it will not justify one in taking another's goods upon the ground that they have been intermingled; 55 Fed. Rep. 576.

See 35 Cent. Law J. 405; 49 N. J. Eq. 573; 36 Neb. 607.

CONFUSION OF RIGHTS. A union of the qualities of debtor and creditor in the same person. The effect of such a union is, generally, to extinguish the debt; 1 Salk. 306; Cro. Car. 551; 1 Ld. Raym. 515. See 5 Term 381; Comyns, Dig. *Baron et Feme* (D).

CONGE. In French Law. A clearance. A species of passport or permission to navigate.

CONGE D'ACCORDER (Fr. leave to accord). A phrase used in the process of levying a fine. Upon the delivery of the original writ, one of the parties immediately asked for a *congé d'accorder*, or leave to agree with the plaintiff. *Termes de la Ley*; Cowel. See LICENTIA CONCORDANDI; 2 Bla. Com. 350.

CONGE D'EMPARTER (Fr. leave to imparl). The privilege of an imparlance (*licentia loquendi*). 3 Bla. Com. 299.

CONGE D'ELIRE (Fr.). The king's permission royal to a dean and chapter in time of vacation to choose a bishop, or to an abbey or priory of his own foundation to choose the abbot or prior.

Originally, the king had free appointment of all ecclesiastical dignities whosoever they chanced to be void. Afterwards he made the election over to others, under certain forms and conditions; as, that at every vacation they should ask of the king *congé d'elire*; Cowel; *Termes de la Ley*; 1 Bla. Com. 379, 382. The permission to elect is a mere form; the choice is practically made by the crown.

CONGEABLE (Fr. *congé*, permission, leave). Lawful, or lawfully done, or done with permission; as, enter congeable, and the like. Littleton § 279.

CONGO. A freestate in Africa. There is a Supreme Council of State under the nominal presidency of Leopold II., King of the Belgians, who has offered, after the lapse of ten years from 1890, to hand over the state to Belgium. It has a Civil Code compiled in 1890.

CONGREGATION. A society of a number of persons who compose an ecclesiastical body.

In the ecclesiastical law, this term is used to designate certain bureaux at Rome, where ecclesiastical matters are attended to.

In the United States, by congregation is meant the members of a particular church who meet in one place to worship. See 2 Russ. 120; 9 Barb. 64.

CONGRESS. An assembly of deputies convened from different governments to treat of peace or of other international affairs; as the Congress of Berlin to settle the terms of peace between Russia and Turkey in 1878, composed of representations of the great Powers of Europe.

In theory a congress may conclude a treaty, while a conference is for consultation, and its result, ordinarily a protocol, prepares the way for a treaty. See Cent. Dict.; Encyc. Dict. But this is not always true, as the Berlin conference of 1890 was composed of plenipotentiaries and its deliberations resulted in a treaty.

The legislative body of the United States, composed of the senate and house of representatives (*q. v.*). U. S. Const. art. 1, § 1.

Each house is the judge of the election and qualifications of its members. A majority of each house is a quorum; but a smaller number may adjourn from day to day, and compel the attendance of absent members. Each house may make rules, punish its members, and by a two-thirds vote expel a member. Each house must keep a journal and publish the same, excepting such parts as may, in their judgment, require secrecy, and record the yeas and nays at the desire of one-fifth of the members present. Art. 1, s. 5. A court is bound to assume that the journal speaks the truth and cannot receive oral testimony to impeach its correctness; 144 U. S. 1.

The members of both houses are in all cases, except treason, felony, and breach of the peace, privileged from arrest while attending to and returning from the session of their respective houses; and no member can be questioned in any other place for any speech or debate in either house. U. S. Const. art. 1, s. 6.

Each house of congress has claimed and exercised the power to punish contempts and breaches of its privileges, on the ground that all public functionaries are essentially invested with the powers of

self-preservation, and that whenever authorities are given, the means of carrying them into execution are given by necessary implication. Jefferson: Manual, § 3, art. *Privilege*; Duane's Case, Senate Proceedings, Gales and Seaton's Annals of Cong., 6th Congress, pp. 122-124, 184, and Index; Wolcott's Case, Journal Hou. Reps. 1st. Sess. 35th Congress, pp. 371-374, 386-389, 535-539; Irwin's Case, 3d Sess. 43d Congress, Index. In Kilbourn's Case, 103 U. S. 18, it was held that, although the house can punish its own members for disorderly conduct or for failure to attend its sessions, and can decide cases of contested elections and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, when the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness,—there is not found in the constitution any general power vested in either house to punish for contempt. The order of the house ordering the imprisonment of a witness for refusing to answer certain questions put to him by the house, concerning the business of a real estate partnership of which he was a member, and to produce certain books in relation thereto, was held void and no defence on the part of the sergeant-at-arms in an action by the witness for false imprisonment. The members of the committee, who took no actual part in the imprisonment, were held not liable to such action. The cases in which the power had been exercised are numerous. See Barclay, Dig. Rules of Hou. Reps. U. S. tit. *Privilege*. This power, however, extends no further than imprisonment; and that will continue no further than the duration of the power that imprisons. The imprisonment will therefore terminate with the adjournment or dissolution of congress.

The rules of proceeding in each house are substantially the same; the house of representatives chooses their own speaker; the vice-president of the United States is, *ex officio*, president of the senate. For rules of proceeding and forms observed in passing laws, see Barclay's Dig.

When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation; if he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on its journal and proceeds to reconsider it. If, after such reconsideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise considered, and, if approved by two-thirds of that house, it becomes a law. But in all such cases the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are to be entered on the journal of each house respectively.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return; in which case it shall not be a law. See Kent, Lect. XI.

The right of the president to sign a bill after an adjournment of congress although within ten days of its passage, has been inferentially approved by the supreme court on four different occasions, in connection with the captured and abandoned property act, which was signed by the president on March 12, 1833, and after the adjournment of congress; 2 Wall. 423; 2 id. 561; 9 id. 56; 13 id. 128. Upon this point the court of claims held, in a remarkably thorough and convincing opinion delivered by Mr. Justice North, that a bill signed by the president after the usual adjournment of congress for the winter holidays, but within ten days from the time when it was presented to him, was duly approved within the intent and meaning of the constitution, and must be recognized and administered as a law of the United States; 29 Ct. Cls. 623.

The house of representatives has the exclusive right of originating bills for raising revenue; and this is the only privilege that house enjoys in its legislative character which is not shared equally with the other; and hence bills are amendable by the senate in its discretion; Art. 1, § 7.

One of the houses cannot adjourn during the session of congress, for more than three days without the consent of the other; nor to any other place than that in which the two houses shall be sitting; Art. 1, s. 5.

All the legislative powers granted by the constitution of the United States or necessarily implied from those granted, are vested in the congress.

CONJECTIO CAUSÆ. In Civil Law. A statement of the case. A brief synopsis of the case given by the advocate to the judge in opening the trial. Calvinus, Lex.

CONJECTURE. A slight degree of credence, arising from evidence too weak or too remote to cause belief. 1 Mascardus, *De Prob. quæst.* 14, n. 14.

An idea or notion founded on a probability without any demonstration of its truth.

CONJOINTS. Persons married to each other. Story, Conf. Laws § 71; Wolfius, *Droit de la Nat.* § 858.

CONJUGAL RIGHTS. A class of personal rights arising from the relation of husband and wife.

In England, a writ lies for the restitution of conjugal rights in case of intentional desertion, including adultery, a refusal to consummate marriage, under some circumstances; but this remedy has

never been adopted in the United States; Bish. Mar. & Div. § 508 *et seq.*; 3 Bla. Com. 94; Geary, Mar. & Fam. R. 371 *et seq.*

CONJUNCTIVE. Connecting in a manner denoting union.

There are many cases in law where the conjunctive *and* is used for the disjunctive *or*, and vice versa.

An obligation is conjunctive when it contains several things united by a conjunction to indicate that they are all equally the object of the matter or contract.

CONJUNCTIVE OBLIGATION. One in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately. Civil Code, La. § 2063.

CONJURATION (Lat. a swearing together).

A plot, bargain, or compact, made by a number of persons under oath, to do some public harm.

Personal conference with the devil or some evil spirit, to know any secret or effect any purpose. The laws against conjuration and witchcraft were repealed in 1736, by stat. 9 Geo. II. c. 5; Mozley & W. Law Dict.

CONNECTICUT. The name of one of the original states of the United States of America.

It was not until the year 1663 that the whole territory now known as the state of Connecticut was under one colonial government. The charter was granted by Charles II. in April, 1662. Previous to that time there had been two colonies, with separate governments.

As this charter to the colony of Connecticut embraced the colony of New Haven, the latter resisted it until about January, 1665, when the two colonies, by mutual agreement, became indissolubly united. In 1037, Sir Edward Andros attempted to seize and take away the charter; but it was secreted and preserved in the famous Charter Oak at Hartford, and is now kept in the office of the secretary of state. 1 Hollister, Hist. Conn. 315. It remained in force, with a temporary suspension, as a fundamental law of the state, until the present constitution was adopted. Story, Const. 386; Comp. Stat. Conn. Rev. of 1875, §§ 217.

CONNECTING LINES. See COMMON CARRIERS.

CONNIVANCE. An agreement or consent, indirectly given, that something unlawful shall be done by another.

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offence has been committed; condonation is the result of a determination to forgive an injury which was not known until after it was inflicted. 3 Hagg. Eccl. 360.

Connivance differs, also, from collusion: the former is generally collusion for a particular purpose, while the latter may exist without connivance. 3 Hagg. Eccl. 180.

The connivance of the husband to his wife's prostitution deprives him of the right of obtaining a divorce, or of recovering damages from the seducer; Geary, Mar. & Fam. R. 268; 4 Term 657. The husband may actively connive at the adultery; 41 Barb. 114; 21 N. J. Eq. 61; or he may passively; 5 Eng. Eccl. 27; 3 Hagg. Eccl. 87. It may be satisfactorily proved by implication. See Shelf. Mar. & Div. 449; 2 Bish. Mar. & Div. § 6; 2 Hagg. Eccl. 278, 376; 3 id. 58, 82, 107, 119, 312; 3 Pick. 299; 2 Cal. 219; 15 N. H. 161; 31 Mich. 800; 109 Mass. 407; 35 Iowa 477.

See COLLUSION; LEVITY.

CONNOISSEMENT. In French Law. An instrument, signed by the master of a ship or his agent, containing a descrip-

tion of the goods loaded on a ship, the persons who have sent them, the persons to whom they were sent, and the undertaking to transport them. A bill of lading. Guyot, Répert. Univ.; Ord. de la Marine, l. 3, t. 3, art. 1.

CONNUBIUM (Lat.). A lawful marriage.

CONOCIMIENTO. In Spanish Law. A bill of lading. In the Mediterranean ports it is called *poliza de cargamento*. For the requisites of this instrument, see the Code of Commerce of Spain, arts. 799-811.

CONQUEST (Lat. *conquiro*, to seek for).

In Feudal Law. Purchase; any means of obtaining an estate out of the usual course of inheritance.

The estate itself so acquired.

According to Blackstone and Sir Henry Spelman, the word in its original meaning was entirely dissipated from any connection with the modern idea of military subjugation, but was used solely in the sense of purchase. It is difficult and quite profitless to attempt a decision of the question which has arisen, whether it was applied to William's acquisition of England in its original or its popular meaning. It must be allowed to offer every reasonable explanation of the derivation of the modern signification of the word, that it was still used at that time to denote a technical purchase—the prevalent method of purchase then, and for quite a long period subsequently, being by driving off the occupant by superior strength. The operation of making a conquest, as illustrated by William the Conqueror, was no doubt often afterwards repeated by his followers on a smaller scale; and thus the modern signification became established. On the other hand, it would be much more difficult to derive a general signification of purchase from the limited modern one of military subjugation. But the whole matter must remain mainly conjectural; and it is undoubtedly going too far to say, with Burrill, that the meaning assigned by Blackstone is "demonstrated, or, with Wharton, that the same meaning is a 'mere idle ingenuity.'" Fortunately, the question is not of the slightest importance in any respect.

In International Law. The acquisition of the sovereignty of a country by force of arms, exercised by an independent power which reduces the vanquished to the submission of its empire.

It is a general rule that, where conquered countries have laws of their own, those laws remain in force after the conquest until they are abrogated, unless contrary to religion or *mala in se*. In this case, the laws of the conqueror prevail; 1 Story, Const. § 150.

The conquest and occupation of a part of the territory of the United States by a public enemy renders such conquered territory during such occupation a foreign country with respect to the revenue laws of the United States; 4 Wheat. 246; 2 Gall. 486. The people of a conquered territory change their allegiance, but not their relations to each other; 7 Pet. 86. Conquest does not *per se* give the conqueror *plenum dominum et utile*, but a temporary right of possession and government; 2 Gall. 486; 3 Wash. C. C. 101; 8 Wheat. 591; 2 Bay 229; 2 Dall. 1; 12 Pet. 410.

The right which the English government claimed over the territory now composing the United States was not founded on conquest, but discovery. Story, Const. § 152.

In Scotch Law. Purchase. Bell, Dict.; 1 Kames 210.

See TERRITORIAL PROPERTY.

CONQUETS. In French Law. The name given to every acquisition which the husband and wife, jointly or severally, make during the conjugal community. Thus, whatever is acquired by the husband and wife, either by his or her industry or good fortune, enures to the extent of one

half for the benefit of the other. Merlin. Rép. *Conquêt*; Merlin, *Quest.*, *Conquêt*. In Louisiana, these gains are called *acquets*. La. Civ. Code, art. 2369. The *conquêts* by a former marriage may not be settled on a second wife to prejudice the heirs; 2 Low. C. 175.

CONSANGUINEOUS FRATER. A brother who has the same father. 2 Bla. Com. 231.

CONSANGUINITY (Lat. *consanguis*, blood together).

The relation subsisting among all the different persons descending from the same stock or common ancestor. See 1 Brad. Surr. R. 495.

Having the blood of some common ancestor. 9 Vt. 30.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common root or stock, but in different branches.

Lineal consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upward in a direct ascending line; and between the father and the son, or the grandson, and so downwards in a direct descending line.

In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree; and the rule is the same by the canon, civil, and common law.

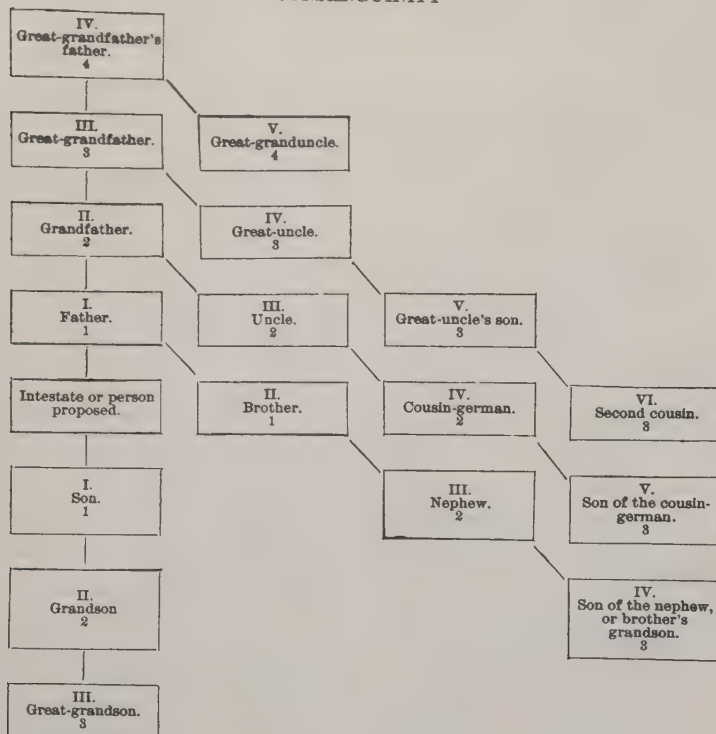
The mode of computing degrees of collateral consanguinity at the common and by the canon law is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor; and the rule of computation is extended to the remotest degrees of collateral relationship.

The method of computing by the civil law is to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person, calling it a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. Thus, from a nephew to his father is one degree; to the grandfather, two degrees; and then to the uncle three; which points out the relationship.

The following table, in which the Roman numeral letters express the degrees by the civil law, and those in Arabic figures those by the common law, will fully illustrate the subject.

The mode of the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the common law, different relations may stand in the same degree. The uncle and nephew stand related in the second degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth. The mode of computation, however, is immaterial; for both will establish the same person to be the heir; 2 Bla. Com. 202.

CONSANGUINITY



CONSCRIPTION. A compulsory enrolment of men for military service; draft. The body of conscripts. Stand. Dict.

CONSEIL DE FAMILLE. A family council, whose sanction for certain acts is required in French law. Anderson.

CONSEIL D'ETAT. One of the oldest institutions which France possesses. Its organization dates back as far as the time of Philippe to Bel. When Article 62 of the Ordinance of March 23, 1302, established a stationary parliament, and the place of holding parliament was fixed at Paris, this Monarch found the necessity of having near his person a private council for expediting business. He chose, therefore, from parliament and among his lords men specially charged with carrying out the business of the kingdom, and the *conseil d'état* was constituted under the name of the high council (*haut conseil*). But as a matter of fact long before the fourteenth century is to be found the origin of what is known as the *conseil d'état*.

Conseil d'état of today is a body of eminent Frenchmen selected for their skill, learning, and influence for the high responsibilities of state council, and these duties combine executive and consultative. Coxe, Manual of French Law.

CONSENSUAL CONTRACT. In Civil Law. A contract completed by the consent of the parties merely, without any further act.

The contract of sale, among the civilians, is an example of a consensual contract, because the moment there is an agreement between the seller and the buyer as to the thing and the price, the vendor and the purchaser have reciprocal actions. On the contrary, on a loan, there is no action by the lender or borrower, although there may have been consent, until the thing is delivered or the money counted; Pothier, Obl. pt. 4, c. 1, s. 1, art. 2; 1 Bell, Comm. 435.

CONSENT (Lat. *con*, with, together, *sentire*, to feel). A concurrence of wills.

Express consent is that directly given, either *viva voce* or in writing.

Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, which raises a presumption that the consent has been given.

Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Fonblanque, Eq. b. 1, c. 2, s. 1. Consent is implied in every agreement. See AGREEMENT; CONTRACT.

Where a power of sale requires that the sale should be with the consent of certain specified individuals, the fact of such consent having been given ought to be evinced in the manner pointed out by the creator of the power, or such power will not be considered as properly executed; 10 Ves. Ch. 308, 378. See further, as to the matter of consent in vesting or divesting legacies; 2 V. & B. 234; 3 Ves. Ch. 239; 12 *id.* 19; 3 Bro. Ch. 145; 1 Sim. & S. 172. As to implied consent arising from acts, see ESTOPPEL IN PAIS.

In Criminal Law. No act shall be deemed a crime if done with the consent of the party injured, unless it be committed in public, and is likely to provoke a breach of the peace, or tends to the injury of a third party; provided no consent can be given which will deprive the consent of any inalienable right; A. & E. Encyc. Desty, Cr. L. § 33. The one who gives consent must be capable of doing so; 1 Whar. Cr. L. § 146; 25 N. Y. 373. As to age of consent, see RAPE.

See ASSENT AND CONSENT.

CONSENT DECREE. See CONSENT JUDGMENT.

CONSENT JUDGMENT. A judgment that is based wholly upon an agreement of the parties with respect to the matter in controversy in an action and involves no judicial inquiry into, or preliminary adjudication of, the facts or the law applicable thereto. Freeman, 3 Law of Judgments, (5th ed.), 2773. Mere implication from silence is not sufficient; there should be express consent, or conduct which should equitably estop the opposite party from denying that he had

consented. 218 U. S. 258.

CONSENT RULE. An entry of record by the defendant, confessing the lease, entry, and ouster by the plaintiff, in an action of ejectment. This was, until recently, used in England, and still is in those of the United States in which the action of ejectment is still retained as a means of acquiring possession of land.

The consent rule contains the following particulars, viz.: *first*, the person appearing consents to be made defendant instead of the casual ejector; *second*, he agrees to appear at the suit of the plaintiff, and, if the proceedings are by bill, to file common bail; *third*, to receive a declaration in ejectment, and to plead not guilty; *fourth*, at the trial of the case, to confess lease, entry, and ouster, and to insist upon his title only; *fifth*, that if, at the trial, the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the cost of the *non pros.*, and suffer judgment to be entered against the casual ejector; *sixth*, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant; *seventh*, that, when the landlord appears alone, the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order; Ad. Eject. 233. See, also, 2 Cow. 442; 4 Johns. 311; 1 Cai. Cas. 102.

CONSENT TO. The words "approve of" and "consent to" do not, singly or combined, express the idea of wilful contribution to or procurement of a felonious act, which is necessary to constitute guilt. For a person may be present and heartily approve of an act after it is done without being at all willing to or capable of aiding, advising or procuring it done, especially if it be felonious; or he may consent in the sense of offering no resistance to commission of it, without the slightest contribution to it by his own will. 90 Ky. 654, 14 S. W. 685.

CONSEQUENTIAL DAMAGES. Those damages which arise not from the immediate act of the party, but as an incidental consequence of such act. See DAMAGES.

CONSEQUENTS. In Scotch Law. Implied powers or authorities. Things which follow, usually by implication of law. A commission being given to execute any work, every power necessary to carry it on is implied; 1 Kames, Eq. 241; Black, L. Dict.

CONSERVATOR (Lat. *conservare*, to preserve). A preserver; one whose business it is to attend to the enforcement of certain statutes.

A delegated umpire or standing arbitrator, chosen to compose and adjust difficulties arising between two parties. Cowel.

A guardian. So used in Connecticut. 3 Day 472; 5 Conn. 280; 12 *id.* 876.

CONSERVATOR OF THE PEACE. He who hath an especial charge, by virtue of his office, to see that the king's peace be kept.

Before the reign of Edward III., who created justices of the peace, there were sundry persons interested to keep the peace, of whom there were two classes: one of which had the power annexed to the office which they held; the other had it merely by itself, and were hence called wardens or conservators of the peace. Lambard, *Eirenarchia*, l. 1, c. 3. The latter sort are superseded by the modern justices of the peace; 1 Bla. Com. 349.

The king's majesty was the principal conservator of the peace within all his dominions. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, and the lord marshal and lord high constable of England, all the justices of the court of king's bench (by virtue of their offices), and the master of the rolls (by prescription) were general conservators of the peace throughout the whole kingdom, and might commit all breakers of it, or bind them in recognizances to keep it; the other judges were only so in their own courts. The coroner was also a conservator of the peace within his own county, as also the sheriff, and both of

them might take recognizances or security for the peace. Constables, tythingmen, and the like were also conservators of the peace within their own jurisdiction; and might apprehend all breakers of the peace, and commit them until they found sureties for their keeping it.

The judges and other similar officers of the various states, and also of the United States, are conservators of the public peace, being entitled "to hold to the security of the peace and during good behavior."

The Constitution of Delaware (1831) provides that:—

"The members of the senate and house of representatives, the chancellor, the judges, and the attorney-general shall, by virtue of their offices, be conservators of the peace throughout the state; and the treasurer, secretary, and prothonotaries, registers, recorders, sheriffs, and coroners, shall, by virtue of their offices, be conservators thereof within the counties respectively in which they reside."

CONSERVATOR TRUCIS (Lat.). An officer whose duty it was to inquire into all offences against the king's truces and safe conducts upon the main seas out of the liberties of the Cinque Ports.

Under stat. 2 Hen. V. stat. 1, c. 6, such offences are declared to be treason, and such officers are appointed in every port, to hear and determine such cases, "according to the ancient maritime law then practised in the admiral's court as may arise upon the high seas, and with two associates to determine those arising upon land." 4 Bla. Com. 69, 70.

CONSIDERABLE. Used in Criminal Law. The term "considerable" although generally used by textwriters in describing that condition which will reduce a homicide from murder to manslaughter, is at best inexact and indefinite, and unless explained by the court, is well calculated to confuse or mislead the jury; for what one jurymen, in the absence of instructions on the subject, might regard considerable, would, in the estimation of another, fall short of that degree or character of provocation that would meet the requirement of law. To make the best or worst of the word considerable, it certainly never was intended to mean more or less than legal provocation; and this court has expressly held that the trial court should not leave the jury to determine for themselves what would constitute legal provocation. 36 S. W. 14.

CONSIDERABLE PROVOCATION. The phrase "considerable provocation" means an assault or battery of some force, which, by reason of its violence or the circumstances attending it, is calculated to excite, and which does excite, the passions beyond control. 93 Ky. 242, 19 S. W. 665; 62 S. W. 877.

CONSIDERATIO. See **CONSIDERATION** EST PER CURIAM.

CONSIDERATION (L. Latin, *consideratio*). An act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other as an inducement to that other's act or promise. Poll. Contr. 91.

Blackstone defines it to be the reason which moves a contracting party to enter into a contract (2 Com. 443); but this definition is manifestly defective because it is within the distinction so well taken by Pateson, J., who says:—"It is not to be confounded with motive, which is not the same thing as consideration. The latter means something which is of value in the eye of the law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant;" Langd. Sel. Cas. Cont. 168; s. c. 2 Q. B. 851. In distinguishing between consideration and motive a helpful criterion is to be found in the expression "nothing is consideration that is not regarded as such by both parties;" 14 Wall. 570, 577; 110 Mass. 389; 79 Ind. 549, 551.

The price, motive, or matter of inducement to a contract,—whether it be the compensation which is paid, or the incon-

venience which is suffered by the party from whom it proceeds. A compensation or equivalent. A cause or occasion meritorious, requiring mutual recompense in deed or in law. Viner, Abr. *Consideration* (A).

It is also defined as "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if such act is performed or inconvenience suffered by the plaintiff by the consent, express or implied, of the defendant." Tindal, C. J., in 8 Scott 250. According to Kent it must be:—given in exchange, mutual, an inducement to the contract, lawful, and of sufficient value, with respect to the assumption. 2 Com. 464.

Concurrent considerations are those which arise at the same time or where the promises are simultaneous and reciprocal.

Continuing considerations are those which consist of acts which must necessarily continue over a considerable period of time.

Executed considerations are acts done or values given at the time of making the contract. Leake, Contr. 18, 612.

Executory considerations are promises to do or give something at a future day. *Ibid.*

Good considerations are those of blood, natural love or affection, and the like.

Motives of natural duty, generosity, and prudence come under this class; 2 Bla. Com. 297; 2 Johns. 52; 10 id. 298; 2 Ball. 588; 1 McCord 504; 2 Leigh 387; 30 Vt. 595; 1 C. & P. 401; 49 Ohio St. 562; 150 Pa. 98; 61 Conn. 60. The only purpose for which a good consideration may be effectual is to support a covenant to stand seized to uses; Shep. Touchet. 512. The term is sometimes used in the sense of a consideration valid in point of law; and it then includes a valuable as well as a meritorious consideration; 3 Cra. 140; 2 Ark. 601; 24 N. H. 302; 2 Madd. 420; 3 Co. 81; Amb. 698; 1 Ed. Ch. 167. Generally, however, *good* is used in antithesis to *valuable*.

Illegal considerations are acts, which if done or promises which if enforced, would be prejudicial to the public interest. Harriman, Cont. 101.

Impossible considerations are those which cannot be performed.

Moral considerations are such as are based upon a moral duty.

Past consideration is an act done before the contract is made, and is ordinarily by itself no consideration for a promise; Anson, Contr. 82. Pollock considers that whether a past benefit is, in any case, a good consideration is a question not free from uncertainty. On principle it should not be. Possible exceptions might be services rendered on request, without definite promise of reward (see Hob. 105) and voluntarily doing something which one was legally bound to do. Also a promise to pay a debt barred by the statute of limitations; but he considers that none of these exceptions are logical. See Poll. Cont. 170.

Valuable considerations are either some benefit conferred upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made. Chit. Contr. 7; Doct. & Stud. 179; 2 Pet. 152; 5 Cra. 142, 150; 1 Litt. 168; 3 Johns. 100; 8 N. Y. 207; 6 Mass. 58; 2 Bibb 80; 2 J. J. Marsh. 222; 2 N. H. 97; Wright, Ohio 660; 13 S. & R. 29; 12 Ga. 52; 24 Miss. 9; 4 Ill. 35; 5 Humphr. 19; 4 Blackf. 388; 3 C. B. 321; 4 East 155; 96 N. C. 67. The detriment to the promisee must be a detriment on entering into the contract and not from the breach of it; 2 Misc. Rep. 293.

"A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." L. R. 10 Ex. 162. See 5 Pick. 380.

A valuable consideration is usually in some way pecuniary, or convertible into money; and a very slight consideration, provided it be valuable and free from fraud, will support a contract; 3 How. 426; 12 Mass. 365; 12 Vt. 259; 29 Ala. N. S. 188; 30 Pa. 308; 22 N. H. 246; 11 Ad. & E. 988; 16 East 872; 9 Ves. Ch. 246; 2 Cr. & M. 628; 2 Sch. & L. 585, n. c.; 32 Mich. 82; 23 Ohio St. 292. Valuable considerations are divided by the civilians into four classes, which are given, with literal translations: *Do ut des* (I give that you may give), *Facio ut facias* (I do that you may do), *Facio ut des* (I do that you may give), *Do ut facias* (I give that you may do).

Consideration has been treated as the very life and essence of a contract; and a parol contract or promise for which there was no consideration could not be enforced at law; 7 W. & S. 817; Plowd. 308; Smith, Lead. Cas. 456; Doct. & Stud. 2, c. 24; 8 Call 439; 7 Conn. 67; 1 Stew. 51; 5 Mass. 401; 4 Johns. 285; 6 Yerg. 418; Cooke 467; 6 Halst. 174; 4 Munf. 95; 11 Md. 281; 25 Miss. 66; 80 Me. 412; 140 Ill. 269; 153 Pa. 281; 89 Ga. 117; 114 Mo. 208; Brooke, Abr. *Action sur le Case*, 40; such a promise was often termed a *nudum pactum* (*ex nudo pacto non oritur actio*), or *nude pact*.

This phrase was undoubtedly borrowed from the Roman law, but its use in English law had no relation whatever to its meaning in the Roman; nor is the word *pact* of the latter in any sense related to the common-law contract. The *nudum pactum*, as appears by the note cited *infra* from Pollock, had not anciently in England its modern signification of an agreement without consideration in the sense of the maxim quoted. In an elaborate note to Pollock on Contracts 873, Note F., the learned author calls attention to a difference between consideration in the English law and its nearest continental analogies, which difference, he says, has not always been realized. The actual history of the English doctrine is obscure. The most we can affirm is that the general idea was formed somewhere in the latter part of the fifteenth century. At the same time or a little later, *nudum pactum* lost its ancient meaning (*viz.*: an agreement not made by specialty so as to support an action of covenant or falling within one of certain classes so as to support an action of debt), and came to mean what it does now. The word consideration in the sense now before us came into use, at least as a settled term of art, still later. In the early writers, *consideration* always means the judgment of a court. . . .

The early cases of actions of assumpsit show by negative evidence which is almost conclusive that in the first half of the 15th century, the doctrine of consideration was quite unformed, though the phrase *quid pro quo* is earlier. But in 1459 there was a case which showed that an action of debt would then lie on any consideration executed. In the Doctor and Student (A. D. 1530) we find substantially the modern doctrine. So far as the writer of that work knows, he finds the first full discussion of consideration by that name in Plowden's report of *Sharington v. Stratton*; Plowd. 298.

The question of consideration was of importance in the learning of Uses before the statute, and the reflection is obvious that both the general conception and the name of Consideration have had their origin in the court of chancery in the law of uses and have been thence imported into the law of contracts rather than developed by the common-law courts. On this hypothesis, a connection with the Roman *causa* may be suggested with some plausibility.

The same writer proceeds to say that in the process thus sketched out some steps are conjectural, and considers that the materials are not ripe for a positive conclusion and will not be until the unpublished records of mediæval English law shall be competently edited. See Holmes, The Common Law 253, where a different theory of the origin of consideration is given as being a generalization from the technical requirements of the action of debt in its earlier form.

The theory on which the phrase *nudum pactum* was wrongly applied was that the maxim signified that a *gratuitous promise* to do or pay anything on the one side, without any compensation on the other, could only be enforced, in the Roman law, when made (or clothed) with proper words or formalities—*pactum verbis prescriptis vestitum*; Vinnius, *Com. de Inst. lib. 3, de verborum obligationibus*, tit. 16, p. 677; Cod. lib. 7, tit. 52. This solemnity it was argued had much the force of our seal, which imported consideration, as it was

said, meaning that the formality implied consideration in its ordinary sense *i.e.*, deliberation, caution, and fullness of assent; Hare, Contr. 146; 3 Bingh. 111; 3 Burr. 1639; 4 Md. Ch. Dec. 176; 35 Me. 260, 491; 25 Miss. 86; 53 Minn. 10; but see 2 Colo. App. 259. There was, however, the distinction often lost sight of but which ought to be made that even on the theory that the vitality of a seal was solely as a token of the existence of a consideration, under the common law it was not the fact that the instrument was under seal which gave it vitality, but the consideration whose existence is implied therefrom, while, under the civil law, the subject of consideration bore no such relation to the contract as it does under the English law even accepting the theory of Stephen and other writers stated under title CONTRACT, *q. v.*, that the consideration is not an essential element of a contract,—necessary to its existence. Under the civil law it was of the essence of certain contracts that they should be gratuitous, and those based upon a consideration constituted only a single division called commutative contracts, which again was subdivided into the four classes represented by the formula quoted, *supra*, *do ut des*, etc.

While, therefore, the Roman law doubtless exercised a large influence upon the English law of contracts, the subject of consideration particularly has been overlaid with erroneous theories, and the ascertainment of its true bearing long postponed, by the pursuit of false analogies, due probably to the early adoption of such phrases as the above and their incorporation into the common law, to express superficial impressions created by them rather than the meaning attributed to them by the Roman jurists.

These analogies have, however, been in recent years the subject of more careful investigation, and the study of the early English authorities and a greatly increased interest in, and knowledge of, the Roman law, have resulted in disturbing many of the theories of consideration in its true relation to the contract and the true meaning of the seal as making a contract actionable which would not be so if by parol.

The consideration is generally conclusively presumed from the nature of the contract, when sealed; 11 S. & R. 107; 66 Hun 635; but in some of the states by law, and in others by statute, the want or failure of a consideration may be a good defence against an action on a sealed instrument or contract; 1 Bay 275; 5 Binn. 232; 11 Wend. 106; 1 Blackf. 173; 3 J. J. Marsh. 473; 1 Bibb 500; 13 Ired. 235; 8 Rich. 437.

Negotiable instruments also, as bills of exchange and promissory notes, by statute 3 & 4 Anne (adopted as common law or by re-enactment in the United States), carry with them *prima facie* evidence of consideration; 4 Bla. Com. 445. See BILLS OF EXCHANGE, etc.

The consideration, if not expressed (when it is *prima facie* evidence of consideration), in all parol contracts (oral or written), must be proved; this may be done by evidence *aliunde*; 2 Ala. 51; 8 N. Y. 335; 7 Conn. 57, 291; 16 Me. 394, 458; 4 Munf. 95; 4 Pick. 71; 26 Me. 397; 1 La. Ann. 192; 21 Vt. 292; 4 Mo. 33.

A contract upon a good consideration is considered merely *voluntary*, but is good both in law and equity as against the grantor or himself when it has once been executed; Chit. Contr. 28; but void against creditors and subsequent *bona fide* purchasers for value; Stat. 27 Eliz. c. 4; Cowp. 705; 10 B. & C. 608; 69 La. 755.

Moral or equitable considerations are not sufficient to support an express or implied promise. They are only sufficient as between the parties in conveyances by deed, and in transfers, not by deed, accompanied by possession; 9 Yerg. 418; 3 B. & P. 249. See 11 A. & E. 438; 3 Pick. 207. These purely moral obligations are left by the law to the conscience and good faith of the individual. Mr. Baron Parke says, "A mere moral consideration is *nothing*;" 9 M. & W. 501; 8 Mo. 698. See 78 Hun 121. It was

at one time held in England that an express promise made in consequence of a previously existing moral obligation created a valid contract; per Mansfield, C. J., Cowp. 290; 5 Taunt. 36. This doctrine was at one time received in the United States, but appears now to be repudiated there; Poll. Contr. 168; except in Pennsylvania; 4 Pa. 364; 24 id. 370.

It is often said that a moral obligation is sufficient consideration; but it is a rule, that such moral obligation must be one which has once been valuable and enforceable at law, but has ceased to be so by the operation of the statute of limitations, or by the intervention of bankruptcy for instance. The obligation, in such case, remains equally strong on the conscience of the debtor. The rule amounts only to a permission to waive certain positive rules of law as to remedy; Poll. Contr. 623; 2 Bla. Com. 445; Cowp. 290; 3 B. & P. 249, n.; 2 East 506; 2 Ex. 90; 8 Q. B. 487; 6 Cush. 238; 20 Ohio 332; 24 Wend. 97; 24 Me. 561; 38 Pa. 306; 13 Johns. 259; 7 Conn. 57; 1 Vt. 420; 3 Pa. 173; 13 S. & R. 177; 17 id. 126; 14 Ark. 267; 1 Wis. 131; 21 N. H. 129; 4 Md. 476. See 51 Mo. App. 637; 78 Hun 121; 125 Pa. 394. But now, by statute, in England a promise to pay a debt barred by bankruptcy or one contracted during infancy is void; Leake, Contr. 318. If the moral duty were once a legal one which could have been made available in defence, it is equally within the rule; 5 Barb. 556; 2 Sandf. 311; 25 Wend. 389; 10 B. Monr. 382; 8 Tex. 397. See as to moral obligation as a consideration, 32 Cent. L. J. 53.

An express promise to perform a previous legal obligation, without any new consideration, does not create a new obligation; 7 Dowl. 781; 25 Ind. 328; 15 C. B. 295; 16 Q. B. 689; 91 N. Y. 401; 40 Ohio St. 400; 84 N. J. L. 54; 40 Vt. 28; 54 Ill. 303; 121 Mass. 106.

A valuable consideration alone is good as against subsequent purchasers and attaching creditors; and one which is rendered at the request, express or implied, of the promisor; Dy. 172, n.; 1 Rolle, Abr. 11, pl. 2, 8; 1 Ld. Raym. 312; 1 Wms. Saund. 264, n. (1); 3 Bingh. n. c. 710; 6 Ad. & E. 718; 3 C. & P. 36; 6 M. & W. 485; 2 Stark. 201; 2 Stra. 933; 3 Q. B. 234; Cro. Eliz. 442; F. Moore 643; 1 M'Cord 22.

Among valuable considerations may be mentioned these:—

In general, the waiver of any legal or equitable right at the request of another is sufficient consideration for a promise; 3 Pick. 452; 2 N. H. 97; Wright, Ohio 660; 20 Wend. 184; 4 Ired. Eq. 207; 4 Harr. 311; 4 B. & C. 8; 5 Pet. 114; 2 Nev. & P. 114; 4 Ad. & E. 108; 47 Minn. 320; 62 Mich. 570; 23 Mo. App. 427.

Forbearance for a certain or reasonable time to institute a suit upon a valid or doubtful claim, but not upon one utterly unfounded. This is a benefit to one party, the promisor, and an injury to the other, the promisee; 1 Rolle, Abr. 24, pl. 33; Com. Dig. Action on the Case upon Assumpsit (B, 1); L. R. 7 Ex. 285; L. R. 10 Q. B. 92; L. R. 2 C. P. 196; 8 Md. 55; 4 Me. 387; 4 Johns. 237; 1 Cush. 168; 9 Pa. 147; 13 Ill. 140; 5 Humphr. 19; 6 Leigh 85; 1 Dougl. 188; 20 Ala. n. s. 309; 6 Ind. 528; 4 Dev. & B. 209; 21 E. L. & Eq. 199; 6 T. B. Monr. 91; 3 Rand. 442; 15 Ga. 321; 5 Gray 553; 3 Md. 346; 25 Barb. 175; 9 Yerg. 436; 15 Me. 138; 6 Munf. 406; 11 Vt. 483; 4 Hawks 178; 6 Conn. 81; 1 Bulstr. 41; 2 Binn. 506; 4 Wash. C. C. 148; 5 Rawle 69; 23 Vt. 235; 44 Ill. App. 582; 18 C. B. 273; 27 Fed. Rep. 175; 36 Mich. 320; 77 Ind. 1; 84 N. J. L. 346; 183 Mass. 284; 105 Ill. 48; 57 Wis. 258. An agreement to forbear suit, though for an indefinite period, is sufficient consideration; 180 N. Y. 415; 34 Neb. 592; 42 Mo. App. 503.

An invalid or not enforceable agreement to forbear is not a good consideration; for suit may be brought immediately after the promise is made. The forbearance must be an enforceable agreement for a reasonable time; Hardr. 5; 4 East 455; 4 M. & W. 795; 4 Me. 387; 3 Pa. 282; 9 Vt. 233; L.

R. 8 Eq. 36; 43 Ia. 80; 25 Ala. 320; 45 N. H. 530; 74 Ill. 58; 78 Ky. 550. But if a meritorious claim is made in good faith, a forbearance to prosecute it may be a good consideration for a promise, although on the facts or on the law the suit would have failed of success; 11 Ill. 140; 60 Ill. 185; L. R. 5 Q. B. 449; 43 N. J. Eq. 377; 25 L. T. R. 504; 32 Ch. Div. 269; 63 Wis. 387; 5 Gray 45; 10 Harv. L. Rev. 113.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a compromise or mutual submission of demands to arbitration is a highly favored consideration at law; 1 Ch. Rep. 158; 4 Pick. 507; 2 Strobb. Eq. 238; 2 Mich. 145; 2 Pa. 531; 6 Munf. 406; 1 Bibb 168; 4 Hawks 178; 14 Conn. 12; 4 Metc. 270; 35 N. H. 556; 11 Vt. 483; 28 Miss. 56; 4 Jones, N. C. 359; 27 Me. 262; 21 Ala. n. s. 424; 14 Conn. 12; 2 M'Mull. 356; 4 Ill. 378; 5 Dana 45; 31 E. L. & Eq. 199; 2 Rand. 442; 5 B. & Ald. 117; 49 Fed. Rep. 715; 43 id. 364; 73 N. Y. 514; 66 Hun 170; 9 Colo. 385; 123 Ind. 211; 32 Ch. D. 266.

The giving up a suit instituted to try a question respecting which the law is doubtful, or is supposed by the parties to be doubtful, is a good consideration for a promise; Poll. Contr. 180; Leake, Contr. 626; L. R. 5 Q. B. 241; 82 Tex. 677; 2 Binn. 509; 2 C. B. 548; 4 East 455; 78 N. Y. 334; 102 Ill. 272; 5 Pet. 98; 112 Mass. 438; 49 N. J. Law 508; 78 N. Y. 334; 154 Mass. 453 and cases cited.

Incurring a legal liability to a third party is a valid consideration for a promise by the party at whose request the liability was incurred; L. R. 8 Eq. 134.

Refraining from the use of liquor and tobacco for a certain time at the request of another, is a sufficient consideration for a promise by the latter to pay a sum of money; 124 N. Y. 538.

The assignment of a debt or chose in action (unless void by reason of maintenance) with the consent of the debtor, is a good consideration for the debtor's promise to pay the assignee. It is merely a promise to pay a debt due, and the consideration is the discharge of the debtor's liability to the assignor; 4 B. & C. 525; 13 Q. B. 548; 23 Vt. 532; 7 Tex. 47; 22 N. H. 185; 10 J. B. Moo. 34; 2 Bingh. 437; 1 Cr. M. & R. 430; 22 Me. 484; 7 N. H. 549. See 63 Hun 572. Work and service are perhaps the most common considerations.

In the case of deposit or mandate it was once held that there was no consideration; Yelv. 4, 128; Cro. Eliz. 883; the reverse is now usually maintained; 10 J. B. Moo. 192; 2 M. & W. 143; M'Cle. & Y. 205; 13 Ired. 39; 24 Conn. 484; 1 Perr. & D. 3; 1 Sm. Lead. Cas. 96.

In these cases there does not appear to be any benefit arising from the bailment to the promisor. The definitions of mandate and deposit exclude this. Nor does any injury at the time accrue to the promisee; the bailment is for his benefit entirely.

Trust and confidence in another are said to be the considerations which support this contract. But we think parting with the possession of a thing may be considered an injury to the promisee, for which the prospect of return was the consideration held out by the promisor.

Mutual promises made at the same time are concurrent considerations, and will support each other if both be legal and binding; Cro. Eliz. 543; 6 B. & C. 255; 3 B. & Ad. 703; 3 E. L. & Eq. 420; 12 How. 126; 8 Miss. 508; 17 Me. 372; 4 Ind. 257; 4 Jones, N. C. 527; 7 Ohio St. 270; 3 Humphr. 19; 1 Caines 45; 1 Murph. 287; 13 Ill. 140; 8 Mo. 574; 83 Tex. 277; 157 Mass. 294; 75 Hun 140. Yet the promise of an infant is a consideration for the promise of an adult. The infant may avoid his contract, but the adult cannot; 9 Metc. 519; 7 Watts 412; 5 Cow. 475; 1 D. Chipm. 252; 1 A. K. Marsh. 76; 2 Bail. 497; 3 Maule & S. 203.

Marriage is now settled to be a *valuable* consideration, though it is not convertible into money or pecuniarily valuable; 3 Cow. 537; 11 Leigh 136; 7 Pet. 348; 6

Dana 89; 22 Me. 374; 2 D. F. & J. 566; 39 Ill. App. 145; 4 Wash. St. 199; 2 Yeates 109; 74 Ga. 669.

Subscriptions to take shares in a chartered company are said to rest upon sufficient consideration; for the company is obliged to give the subscriber his shares, and he must pay for them; Pars. Contr. 377; 16 Mass. 94; 8 id. 138; 21 N. H. 247; 34 Me. 360; 15 Barb. 249; 5 Ala. N. S. 787; 22 Me. 84; 9 Vt. 289.

On the subject of voluntary subscriptions for charitable purposes there is much confusion among the authorities; 6 Metc. 310. See SUBSCRIPTION.

Illegal considerations can be no foundation for a contract. Violations of morality, decency, and policy are in contravention of common law: as, contracts to commit, conceal, or compound a crime. So, a contract for future illicit intercourse, or in fraud of a third party, will not be enforced. *Ex turpi contractu non oritur actio*. But the act in question is not always a criterion; e. g. as to immoral considerations that which the law considers is whether the promise has a tendency to produce immoral results; hence while a promise of future illicit cohabitation is an illegal consideration; L. R. 16 Eq. 275; 64 Cal. 146; 11 Pa. 316; Harriman, Cont. 114; but a promise founded upon past illicit cohabitation is not illegal; 1 Johns. Ch. 329; but simply voluntary and governed by the same rules as other past executed considerations; Poll. Cont. 262. The illegality created by statute exists when the statute either expressly prohibits a particular thing, or affixes a penalty which implies prohibition, or implies such prohibition from its object and nature; 1 Ball & B. 360; 10 Ad. & E. 815; 2 E. L. & Eq. 113; 2 M. & G. 167; 6 Dana 91; 3 Bibb 500; 9 Vt. 23; 21 id. 184; 11 Wheat. 258; 22 Me. 488; 2 Miss. 18; 2 Ind. 392; 14 Mass. 322; 4 S. & R. 159; 15 Pa. 452; 4 Halst. 352; 2 Sandf. 186; 4 Humphr. 199; 3 McLean 214; 14 N. H. 294, 435; 5 Rich. 47; 3 Brev. 54; 145 U. S. 421. If any part of the consideration is void as against the law, it is void *in toto*; 11 Vt. 592; 64 Ga. 606; see 15 R. I. 261; 26 Vt. 184; 20 Ohio St. 431, but *contra*, if the promise be divisible and apportionable to any part of the consideration, the promise so far as not attributable to the illegal consideration might be valid; Leake, Contr. 631; 2 M. & G. 167.

A contract founded upon an impossible consideration is void. *Lex neminem cogit ad vana aut impossibilia*; 5 Viner, Abr. 110, 111, Condition (C) a, (D) a; 1 Rolle, Abr. 419; Co. Litt. 206 a; 2 B. & C. 474; Leake, Contr. 719. But this impossibility must be a natural or physical impossibility; 3 B. & P. 296, n.; 7 Ad. & E. 798; 1 Pet. C. C. 91, 221; 5 Taunt. 249; 2 Moore & S. 89; 9 Bingh. 68; but it may be otherwise when the consideration is valid at the time the contract was formed, but afterwards became impossible; Leake, Contr. 719.

An executory consideration which has totally failed will not support a contract when the performance of the consideration forms a condition precedent to the performance of the promise; Add. Contr. 126; 7 C. & P. 108; 2 C. B. 548; 3 Johns. 458; 7 N. Y. 389; 1 Vt. 166; 7 Mass. 14; 13 id. 216; 23 Ala. N. S. 320; 1 Const. S. C. 467; 2 Day 487; 2 Root 258; 4 Conn. 428; 1 N. & M'C. 210; 1 Ov. 438; 3 Call 373; 26 Me. 217; 5 Humphr. 337, 496; 3 Pick. 83; 6 Cra. 53; 4 Dev. & B. 212; 15 N. H. 114; 3 Ind. 289; Dudd. 161.

Sometimes when the consideration partially fails, the appropriate part of the agreement may be apportioned to what remains, if the contract is capable of being severed; 4 Ad. & E. 605; 1 M. & R. 218; 8 M. & W. 870; 2 Cro. & M. 48, 214; 14 Pick. 198; 28 N. H. 290; 2 W. & S. 235; L. R. 10 Q. B. 491; 1 Q. B. Div. 679; 26 Minn. 288; 26 Me. 217.

A past consideration will not generally be sufficient to support a contract. It is something done before the obligor makes his promise, and, therefore, cannot be a foundation for that promise, unless it has

been executed at the request (express or implied) of the promisor. Such a request plainly implies a promise of fair and reasonable compensation; 6 M. & G. 153; L. R. 8 Ch. 888; id. 5 C. P. 65; 2 Ill. 113; 14 Johns. 378; 22 Pick. 393; 9 N. H. 195; 7 Me. 76, 118; 27 id. 106; 7 Johns. 87; 2 Conn. 404; 1 Sm. Lead. Cas., note to Lampligh v. Braithwaite. But a pre-existing obligation will support a promise to perform that obligation which the law, in the case of a debt, will imply; Harriman, Contr. 83; 5 M. & W. 541; but a past consideration which did not raise an obligation at the time it was furnished, will support no promise whatever; 3 Q. B. 234; Harriman, Contr. 83; where there has been a request for services, a subsequent promise to pay a definite sum for them is evidence of the actual value of the services; id.

As to time, considerations may be of the past, present, or future. Those which are present or future will support a contract not void for other reasons; Story, Contr. 71. When the consideration is to do a thing hereafter, and the promise has been accepted, and a promise in return founded upon it, the latter promise rests upon sufficient foundation, and is obligatory; 3 Md. 67; 17 Me. 303; 24 Wend. 285; 17 Pick. 407; 1 Spear 363.

The adequacy of the consideration is generally immaterial; Add. Contr. 11; L. R. 5 Q. B. 87; s. c. 43 L. J. Q. B. 35; 8 A. & E. 745; 6 id. 488; 11 id. 983; L. R. 7 Ex. 235; 5 C. B. N. S. 265; 24 L. J. C. P. 271; 16 East 372; 5 W. & S. 476; 5 Rawle 69; excepting formerly in England before 31 & 32 Vict. c. 4, in the case of the sale of a reversionary interest or where the inadequacy of the consideration is so gross as of itself to prove fraud or imposition; 48 Ohio St. 562. There is no case where mere inadequacy of price, independent of other circumstances has been held sufficient to set aside a contract between parties standing on equal ground and dealing with each other without imposition or oppression; 2 Watts 104; 75 Mo. 681; 68 Ind. 405; 85 id. 294; 57 Vt. 227; 42 N. Y. 369. The adequacy of the consideration does not affect the contract; 2 How. 426; but the consideration must be real and not merely colorable; one cent has been held not to be a sufficient consideration for a promise to pay \$700; 17 Ind. 29; and \$1 has been held insufficient to support a promise to pay \$1000; 7 R. I. 470; a dollar would be a sufficient consideration for any promise except one to pay a larger sum of money absolutely; 2 How. 426.

See note to *Chesterfield v. Jannsen* in 1 W. & T. Lead. Cas.; CONTRACT.

See IMPLIED CONSIDERATION; MERITORIOUS CONSIDERATION.

CONSIDERATUM EST PER CURIAM (Lat. it is considered by the court). A formula used in giving judgments.

A judgment is the decision or sentence of the law, given by a court of justice, as the result of proceedings instituted therein for the redress of an injury. The language of the judgment is not, therefore, that "it is decreed," or "resolved," by the court, but that "it is considered by the court," *consideratum est per curiam*, that the plaintiff recover his debt, etc.

In the early writers, *considerare*, *consideratio* always means the judgment of a court. This usage was preserved down to our time in the judgment of the common-law courts in the form "It is considered," which, as Sir Frederick Pollock says, has been "wantonly" altered to "It is adjudged," under the Judicature Acts. Poll. Cont. 675, Note F.

CONSIDERED. The word "considered" is equivalent to "reasonably regarded." 154 Ky. 413, 157 S. W. 1133.

CONSIGN. To send goods to a factor or agent. See 4 Daly 320.

In Civil Law. To deposit in the custody of a third person a thing belonging to the debtor, for the benefit of the creditor, under the authority of a court of justice. Pothier, Obl. pt. 3, c. 1, art. 8.

The term to consign, or consignment, is derived from the Latin *consignare*, which signifies to seal; for it was formerly the practice to seal up the money thus received in a bag or box. Aso & M. Inst. 6, 2, t. 11, c. 1, § 5.

Generally, the consignment is made with a public officer: it is very similar to our practice of paying money into court. See Burge, Surety.

CONSIGNATIO. See CONSIGN.

CONSIGNATION. The payment of money into the hands of a third party when the creditor refuses to accept of it.

CONSIGNEE. One to whom a consignment is made.

When the goods consigned to him are his own, and they have been ordered to be sent, they are at his risk the moment the consignment is made according to his direction; and the persons employed in the transmission of the goods are his agents; 1 Liverm. Ag. 9. When the goods are not his own, if he accept the consignment, he is bound to pursue the instructions of the consignor: as, if the goods be consigned upon condition that the consignee will accept the consignor's bills, he is bound to accept them; id. 139; or if he is directed to insure, he must do so; id. 325.

It is usual in bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying freight: in such case the consignee or his assigns, by accepting the goods, by implication become bound to pay the freight; 29 N. Y. 436; 47 N. Y. 619; 3 Bingh. 383; 2 Pars. Contr. 640.

CONSIGNMENT. The goods or property sent by means of a common carrier by one or more persons, called the consignors, in one place, to one or more persons, called the consignees, who are in another. The goods sent by one person to another, to be sold or disposed of by the latter for and on account of the former. The transmission of the goods.

CONSIGNOR. One who makes a consignment.

CONSILIARIUS (Lat. *consiliare*, to advise). In Civil Law. A counsellor, as distinguished from a pleader or advocate. An assistant judge. One who participates in the decisions. Du Cange.

CONSILIUM (called, also, *Dies Consilii*). A day appointed to hear the counsel of both parties. A case set down for argument.

It is commonly used for the day appointed for the argument of a demurrer, or errors assigned; 1 Tidd, Pr. 438; 2 id. 684, 1122; 1 Sell. Pr. 336; 2 id. 385; 1 Archb. Pr. 191, 246.

CONSIMILI CASU (Lat. in like case). In Practice. A writ of entry, framed under the provisions of the statute Westminster 2d (13 Edw. I.), c. 24, which lay for the benefit of the reversioner, where a tenant by the curtesy aliened in fee or for life; 3 Bla. Com., 4th Dublin ed. 183 n.; Bac. Abr. Court of Chancery (A).

Many other new writs were framed under the provisions of this statute; but this particular writ was known emphatically by the title here defined. The writ is now practically obsolete. See 3 Bla. Com. 51; CASE; ASSUMPT.

CONSISTOR. A magistrate. Jacob; Blount.

CONSISTORY. In Ecclesiastical Law. An assembly of cardinals convoked by the pope.

The consistory is either public or secret. It is public when the pope receives princes or gives audience to ambassadors; *secret* when he fills vacant sees, proceeds to the canonization of saints, or judges and settles certain contestations submitted to him.

CONSISTORY COURT. In English Law. The courts of diocesan bishops held in their several cathedrals (before the bishop's chancellor, or commissary, who is the judge) for the trial of all ecclesiastical causes arising within their respective dioceses, and also for granting probates and administrations. From the sentence of these

courts an appeal lies to the archbishop of each province respectively. 2 Steph. Com. 230, 337; 3 *id.* 430, 431; 3 Bla. Com. 64; 1 Woodd. Lect. 145; Halifax, An. b. 8, c. 10, n. 12.

CONSOLATO DEL MARE. See CODE.

CONSOLIDATE. To unite into one, distinct things or parts of a thing. In a general sense, to unite into one mass or body, as to consolidate the forces of an army or various funds. In parliamentary usage, to consolidate two bills is to unite them into one. In law, to consolidate benefices, actions, or corporations is to combine them into one. See 45 Ia. 56.

CONSOLIDATED FUND. In England. (Usually abbreviated to *Consols.*) A fund for the payment of the public debt.

Formerly, when a loan was made, authorized by government, a particular part of the revenue was appropriated for the payment of the interest and of the principal. This was called the fund; and every loan had its fund. In this manner the Aggregate fund originated in 1715; the South-Sea fund in 1717; the General fund in 1717; and the Sinking fund, into which the surplus of these flowed, which, although intended for the diminution of the debt, was applied to the necessities of the government. These four funds were consolidated into one in the year 1787; and this fund is the Consolidated fund.

It is wholly appropriated to the payment of certain specific charges and the interest on the sums originally lent the government by individuals, which yield an annual interest of three per cent. to the holders. The principal of the debt is to be returned only at the option of the government.

CONSOLIDATION. In Civil Law. The union of the usufruct with the estate out of which it issues, in the same person; which happens when the usufructuary acquires the estate, or *vice versa*. In either case the usufruct is extinct. Lec. Elm. Dr. Rom. 424.

It may take place in two ways: first, by the usufructuary surrendering his right to the proprietor, which in the common law is called a surrender; secondly, by the release of the proprietor of his rights to the usufructuary, which in our law is called a release.

In Ecclesiastical Law. The union of two or more benefices in one. Cowel.

In Practice. The union of two or more actions in the same declaration.

CONSOLIDATION OF CORPORATIONS. See MERGER.

CONSOLIDATION OF RAILROADS. See MERGER; RAILROAD.

CONSOLIDATION RULE. In Practice. An order of the court requiring the plaintiff to join in one suit several causes of action against the same defendant which may be so joined consistently with the rules of pleading, but upon which he has brought distinct suits. 1 Dall. 147; 3 S. & R. 264; 2 Archb. Pr. 180. The matter is regulated by statute in many of the states.

An order of court, issued in some cases, restraining the plaintiff from proceeding to trial in more than one of several actions brought against different defendants but involving the same rights, and requiring the defendants also, in such actions, to abide the event of the suit which is tried. It is in reality in this latter case a mere stay of proceedings in all the cases but one.

It is often issued where separate suits are brought against several defendants founded upon a policy of insurance; 2 Marsh. Ins. 701; see 4 Cow. 78, 85; 1 Johns. 29; or against several obligors in a bond; 3 Chit. Pr. 645; 3 C. & P. 58. See 1 N. & M'C. 417, n.; 1 Ala. 77; 5 Yerg. 297; 7 Mo. 477; 2 Tayl. 200; 4 Halst. 335; 3 S. & R. 262; 19 Wend. 63.

Where two actions arose upon the same transaction, one for trespass against defendant's property, another against his person, and might have been joined, the court ordered them tried at the same time; 1 Dill. 351.

When two actions are consolidated, the original actions are discontinued and only the consolidated action remains; 30 Abb. N. C. 131; 3 Misc. Rep. 110.

The Federal courts are authorized to consolidate actions of a like nature, or relative

to the same question, as they may deem reasonable; Rev. Stat. § 921.

CONSORTIUM (Lat. a union of lots or chances). A lawful marriage. Union of parties in an action.

Company; companionship.

It occurs in this last sense in the phrase *per quod consortium amittit* (by which he has lost the companionship), used when the plaintiff declares for any bodily injury done to his wife by a third person. 3 Bla. Com. 140.

CONSPIRACY (Lat. *con*, together, *spiro*, to breathe). In Criminal Law. A combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. 4 Metc. 111; 4 Wend. 229; 15 N. H. 396; 5 H. & J. 317; 3 S. & R. 220; 12 Conn. 101; 11 Cl. & F. 155; 4 Mich. 414; 38 Ill. App. 168; 148 U. S. 197; Stimson, Lab. Law 195.

254 U. S. 465, citing 148 U. S. 203. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means. *Id.* 465, 466.

Lord Denman defined conspiracy as a combination for accomplishing an unlawful end, or a lawful end by unlawful means. 4 B. & Ad. 345.

The terms criminal or unlawful are used, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt that a combination by numbers to do them is an unlawful conspiracy and punishable by indictment; 12 Conn. 101; 15 N. H. 396; 1 Mich. 216; Dears. 337; 11 Q. B. 245; 9 Pa. 24; 8 Rich. 72; 1 Dev. 357.

Of this character was a conspiracy to cheat by false pretences without false tokens, when a cheat by false pretences only by a single person was not a punishable offence; 11 Q. B. 245. So a combination to destroy the reputation of an individual by verbal calumny of itself is not indictable; per Shaw, C. J., 4 Metc. 123. So a conspiracy to induce and persuade a young woman, by false representations, to leave the protection of her parent's house, with a view to facilitate her prostitution; 5 W. & S. 461; 2 Den. C. Cas. 79; and to procure an unmarried girl of seventeen to become a common prostitute; 4 F. & F. 160; to procure a woman to be married by a mock ceremony, whereby she was seduced; 48 Ia. 562. And see 5 Rand. 627; 6 Ala. n. s. 765. So a conspiracy, by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price; 1 Dears. 337. A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; 1 F. & F. 33.

The obtaining of goods on credit by an insolvent person without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods in and by means of the fair and ordinary course of his business, is not of itself such an unlawful act as may be the subject of an action for conspiracy; though it would be otherwise, it seems, in the case of a purchase made without any expectation of payment; 1 Cush. 189. But the obtaining possession of goods under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use in fraud of the seller, is such a fraud or cheat as may be the subject of a charge of conspiracy; 1 Cush. 189.

A combination to go to a theatre to hiss an actor; 2 Campb. 369; 6 Term 628; to indict for the purpose of extorting money; 4 B. & C. 329; to charge a person with being the father of a bastard child; 1 Salk. 174; to coerce journeymen to demand a higher rate of wages; 6 Term 619; 14 Wend. 9; to charge a person with poisoning another; F. Moore 816; to affect the price of public stocks by false rumors; 8 M. & S. 67; to prevent competition at an auction; 6 C. &

P. 239; to cheat by a fraudulent prospectus of a projected company and by false accounts; 11 Cox, Cr. Ca. 414; by false accounts between partners; L. R. 1 C. C. 274; by a mock auction; 11 Cox, Cr. Ca. 404; have each been held indictable.

Where the retail dealers of coal in a city form an association the main purpose of which is to fix prices below which it should not be retailed, whereby they prevent a dealer, not a member of the association, from obtaining coal from the wholesale dealers, they are guilty of conspiracy; 66 Hun 590; 139 N. Y. 251.

Strikes of laborers to raise wages or lock-outs by employers are lawful; 10 Cox, Cr. Ca. 592; if without intimidation; 11 Cox, Cr. Ca. 325. The system of sending a committee to the neighborhood of each factory where the strike is on, for the purpose of reporting the number of workmen engaged in such factories and their addresses, is not necessarily unlawful; 28 Wkly. Law Bul. Ohio 32; workmen may peaceably persuade their fellow-workmen to leave their employer's service in order to compel an advance in wages; 17 N. Y. Supp. 264; and where they enter into a lawful combination to control by artificial means the supply of labor preparatory to a demand for advance in wages, a combination of the employers to resist such is lawful; 159 Pa. 420. See Stimson, Lab. L.; Cogley, Strikes; Carson's Wright, Crim. Conspiracies. See also COMBINATION, LABOR UNIONS. This subject is mostly regulated by statute in England. An action will lie for damages for conspiracy where journeymen tailors by concerted action return all their garments unfinished to their employer; 9 Neb. 390; and for the fraudulent use of legal proceedings to injure another; 76 N. Y. 247. A combination by two or more persons to induce others not to deal with or enter into contracts with a particular individual, is actionable, if injury results and it is done for that purpose; [1893] 1 Q. B. 715; 52 N. J. L. 284. A combination to boycott is illegal and will be enjoined; 45 Fed. Rep. 135.

In order to render the offence complete, it is not necessary that any act should be done in pursuance of the unlawful agreement entered into between the parties, or that any one should have been defrauded or injured by it. The conspiracy is the gist of the crime; 9 Co. 55; 28 L. T. n. s. 75; 2 Mass. 337, 538; 3 S. & R. 220; 23 Pa. 355; 4 Wend. 259; 3 Zabr. 33; 3 Ala. 360; 5 Harr. & J. 317; 107 N. C. 822; 44 Fed. Rep. 896. But see 10 Vt. 353. Where persons enter on an unlawful purpose, with the intent to aid or encourage each other in carrying out their design, they are each criminally responsible for everything resulting from such purpose whether specifically contemplated or not; 97 Ala. 57; 142 U. S. 450.

By the laws of the United States (R. S. § 5364), a wilful and corrupt conspiracy to cast away, burn, or otherwise destroy any ship or vessel, with intent to injure any underwriter thereon, or the goods on board thereof, or any lender of money on such vessel on bottomry or respondentia, is made felony, and the offender punishable by fine not exceeding ten thousand dollars, and by imprisonment and confinement at hard labor not exceeding ten years.

Conspiracies to prevent witnesses from testifying, to impede the course of justice, to hinder citizens from voting, to prevent persons from holding office, to defraud the United States by obtaining approval of false claims, to levy war against the United States, to impede the enforcement of the laws, etc., are made punishable by act of congress; U. S. R. S. Index, *Conspiracy*.

In the absence of damage, the simple act of conspiracy does not furnish ground for a civil action; 76 Md. 118.

After a conspiracy has come to an end, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others; 150 U. S. 93; 144 *id.* 263.

In a prosecution under U. S. R. S. § 5480, as amended, for a conspiracy to defraud by means of the postoffice, three matters

of fact must be charged in the indictment and established by the evidence: 1. That the persons charged devised a scheme to defraud; 2. that they intended to effect this scheme by opening or intending to open correspondence with some other person through the postoffice establishment or by inciting such other person to open communication with them; 3. and that in carrying out such scheme such person must have either deposited a letter or packet in the postoffice, or taken or received one therefrom; 157 U. S. 187.

Where parties are on trial for conspiracy to stop the mails, contemporary telegrams from different parts of the country, announcing the stoppage of mail trains, are admissible in evidence against the defendants if brought home to them, and so, too, are acts and declarations of persons not parties to the record if it appears that they were made in carrying the conspiracy into effect; 159 U. S. 590.

A combination of persons not themselves employes, to procure the latter to strike to the injury of the employer's business, is held to be a criminal conspiracy giving also the right to an injunction and damages; 148 U. S. 197 (but see a criticism of this case, *Stimson*, *Lab. Law* 269); 106 Mass. 1; 107 *id.* 555; 147 *id.* 212; 62 Fed. Rep. 803; but the tendency in the American courts is not to treat such combinations as unlawful conspiracies; 63 Fed. Rep. 310; 38 Leg. Int. Pa. 412; 60 How. Pr. 168; but, where the evidence included facts showing intimidation, it is a criminal conspiracy; 84 Pitts. L. J. Pa. 313; and an injunction will be granted; 30 Atl. Rep. 261; s. c. 164 Pa. 449. In England the subject is regulated by statute providing that no agreement or combination of two or more to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employer and workmen shall be indictable as a conspiracy, if such act would not be criminal if committed by one; 88 & 39 Vict. c. 86. In the United States, the Maryland statute contains an exact copy of the English; in Montana, Minnesota and Oklahoma, the common law of conspiracy seems to be repealed, and in New York it is modified. For legislation on the subject and the course of decisions concerning it see *Stimson*, *Lab. Law* § 55.

Consult Russell, *Crimes*, Greaves ed.; Gabbett, *Crim. Law*; Bish. *Crim. Law*; Wright, *Crim. Consp.* See WRIT OF CONSPIRACY.

CONSPIRATORS. Persons guilty of a conspiracy.

CONSTABLE. An officer whose duty it is to keep the peace in the district which is assigned to him.

The most satisfactory derivation of the term and history of the origin of this office is that which deduces it from the French *comestabul* (Lat. *comes-stabuli*), who was an officer second only to the king. He might take charge of the army, wherever it was, if the king were not present, and had the general control of everything relating to military matters, as the marching troops, their encampment, provisioning, etc. Guyot, *Rép. Univ.*

The same extensive duties pertained to the constable of Scotland. Bell, *Dict.*

The duties of this officer in England seem to have been first fully defined by the stat. Westm. (13 Edw. I.); and question has been frequently made whether the office existed in England before that time. 1 Bla. Com. 356. It seems, however, to be pretty certain that the office in England is of Norman origin, being introduced by William, and that subsequently the duties of the Saxon tithing-men, borsholders, etc., were added to its other functions. See Cowel; Willc. *Const.*; 1 Bla. Com. 356; 1 Poll. & M. 642.

High constables were first ordained, according to Blackstone, by the statute of Westminster, though they were known as efficient public officers long before that time. 1 Sharsw. Bla. Com. 356. They are to be appointed for each franchise or hundred by the leet, or, in default of such appointment, by the justices at quarter-sessions. Their first duty is that of keeping the king's peace. In addition, they are to serve warrants, return lists of jurors, and perform various other services enumerated in Coke, 4th Inst. 267; 3 Steph. Com. 47; Jacob, *Law Dict.* In some cities and towns in the United States there are officers called

high constables, who are the principal police officers in their jurisdiction.

Petty constables are inferior officers in every town or parish, subordinate to the high constable. They perform the duties of headborough, tithing-man, or borsholder, and, in addition, their more modern duties appertaining to the keeping the peace within their town, village, or tithing.

In England, however, their duties have been much restricted by the act 5 & 6 Vict. c. 109, which deprives them of their power as conservators of the peace. 3 Steph. Com. 47.

In the United States, generally, petty constables only are retained, their duties being generally the same as those of constables in England prior to the 5 & 6 Vict. c. 109, including a limited judicial power as conservators of the peace, a ministerial power for the service of writs, etc., and some other duties not strictly referable to either of these heads. Their immunities and indemnities are proportioned to their powers, and are quite extensive. See 1 Sharsw. Bla. Com. 356, n. They are authorized to arrest without warrant on a reasonable suspicion of felony, for offences against the peace committed in their presence, and in various other cases: 1 Russ. Cr. 800; 1 Chit. Cr. Law 20; 4 Sharsw. Bla. Com. 292. See ARREST; CORONER.

CONSTABLE OF A CASTLE. The warden or keeper of a castle; the castellan. Stat. Westm. 1, c. 7 (3 Edw. I.); Spelman, *Gloss.*

The constable of Dover Castle was also warden of the Cinque Ports. There was besides a constable of the Tower, as well as other constables of castles of less note. Cowel; Lambard, *Const.*

CONSTABLE OF ENGLAND (called, also, *Marshal*). His office consisted in the care of the common peace of the realm in deeds of arms and matters of war. Lambard, *Const.* 4.

He was to regulate all matters of chivalry, tournaments and feats of arms which were performed on horseback. 3 Steph. Com. 47. He held the court of chivalry, besides sitting in the *aula regis*. 4 Bla. Com. 92.

The office is disused in England, except on coronation-days and other such occasions of state, and was last held by Stafford, Duke of Buckingham, under Henry VIII. His title is Lord High Constable of England. 3 Steph. Com. 47; 1 Bla. Com. 355.

CONSTABLE, LORD HIGH. See CONSTABLE OF ENGLAND; COURT OF CHIVALRY.

CONSTABLE OF SCOTLAND. An officer who was formerly entitled to command all the king's armies in the absence of the king, and to take cognizance of all crimes committed within four miles of the king's person or of parliament, the privy council, or any general convention of the estates of the kingdom. The office was hereditary in the family of Errol, and was abolished by the 20 Geo. III. c. 48. Bell, *Dict.*; Erskine, *Inst.* 1. 3. 37.

CONSTABLE OF THE EXCHEQUER. An officer spoken of in the 51 Hen. III. stat. 5, cited by Cowel.

CONSTABLEWICK. The territorial jurisdiction of a constable. 5 Nev. & M. 261.

CONSTABULARIUS (Lat.). An officer of horse; an officer having charge of foot or horse; a naval commander; an officer having charge of military affairs generally. Spelman, *Gloss.*

The titles were very numerous, all derived, however, from *comes-stabuli*, and the duties were quite similar in all the countries where the civil law prevailed. His powers were second only to those of the king in all matters relating to the armies of the kingdom.

In England his power was early diminished and restricted to those duties which related to the preservation of the king's peace. The office is now abolished in England, except as a matter of ceremony, and in France. Guyot, *Rép. Univ.*; Cowel.

CONSTAT (Lat. it appears). A certificate by an officer that certain matters therein stated appear of record. See 1 Hayw. 410.

An exemplification under the great seal of the enrolment of letters patent. Co. Litt. 225.

A certificate which the clerk of the pipe and auditors of the exchequer make at the request of any person who intends to plead or move in the court for the discharge of anything; and the effect of it is, the certifying what *constat* (appears) upon record touching the matter in question.

CONSTAT D'HUISSIER. In French Law. An affidavit made by a *huissier* setting forth the appearance, form, quality, color, etc., of any article upon which a suit depends. Arg. Fr. Merc. L. 554; Black, L. Dict.

CONSTATING INSTRUMENTS. The term is used to signify the documents or collection of documents which fix the constitution or charter of a corporation. Brice, *Ultra Vires* 84; 37 N. J. Eq. 363.

CONSTITUENT (Lat. *constituo*, to appoint). He who gives authority to another to act for him. The constituent is bound by the acts of his attorney, and the attorney is responsible to his constituent.

CONSTITUERE. In Old English Law. To establish; to appoint; to ordain.

Used in letters of attorney, and translated by constitute. Applied generally, also, to denote appointment. Reg. Orig. 172; Du Cange.

CONSTITUTED AUTHORITIES. The officers properly appointed under the constitution for the government of the people. Those powers which the constitution of each people has established to govern them, to cause their rights to be respected, and to maintain those of each of its members.

They are called *constituted*, to distinguish them from the *constituting* authority which has created or organized them, or has delegated to an authority, which it has itself created, the right of establishing or regulating their movements.

CONSTITUTIO. In Civil Law. An establishment or settlement. Used of controversies settled by the parties without a trial. Calvinus, *Lex*.

A sum paid according to agreement. Du Cange.

An ordinance or decree having its force from the will of the emperor. Dig. 1. 4. 1, Cooper's notes.

In Old English Law. An ordinance or statute. A provision of a statute.

CONSTITUTION. The fundamental law of a state, directing the principles upon which the government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise.

An established form of government; a system of laws and customs.

Constitution, in the former law of the European continent, signified as much as decree,—a decree of importance, especially ecclesiastical decrees. The decrees of the Roman emperors referring to the *ius circa sacra*, contained in the code of Justinian, have been repeatedly collected and called the Constitutions. The famous bull *Unigenitus* was usually called in France the Constitution. Comprehensive laws or decrees have been called constitutions; thus, the *Constitutio Criminalis Carolina*, which is the penal code decreed by Charles V. for Germany, the Constitutions of Clarendon (q. v.). In political law the word constitution came to be used more and more for the fundamentals of a government,—the laws and usages which give it its characteristic feature. We find, thus, former English writers speak of the constitution of the Turkish empire. These fundamental laws and customs appeared to our race especially important where they limited the power and action of the different branches of government; and it came thus to pass that by constitution was meant especially the fundamental law of a state in which the citizen enjoys a high degree of civil liberty; and, as it is equally necessary to guard against the power of the executive in monarchies, a period arrived—namely, the first half of the present century—when in Europe, and especially on the continent, the term constitutional government came to be used in contradistinction to absolutism.

We now mean by the term constitution, in common parlance, the fundamental law of a free country, which characterizes the organization of the country, secures the rights of the citizen and determines his main duties as a freeman. Sometimes, indeed, the word constitution has been used in recent times for what otherwise is generally called

an organic law. Napoleon I. styled himself emperor of the French by the Grace of God and the Constitutions of the Empire.

Constitutions were generally divided into written and non-written constitutions, analogous to *leges scriptæ* and *non scriptæ*. These terms do not indicate the distinguishing principle; Lieber, therefore, divides political constitutions into accumulated or cumulative constitutions and enacted constitutions. The constitution of ancient Rome and that of England belong to the first class. The latter consists of the customs, statutes, common laws, and decisions of fundamental importance. The Reform act is considered by the English a portion of the constitution as much as the trial by jury or the representative system, which have never been enacted, but correspond to what Cicero calls *leges natæ*. Our constitutions are enacted; that is to say, they were, on a certain day and by a certain authority, enacted as a fundamental law of the body politic. In many cases enacted constitutions cannot be dispensed with, and they have certain advantages which cumulative constitutions must forego; while the latter have some advantages which the former cannot obtain. It has been thought, in many periods, by modern nations, that enacted constitutions and statutory law alone are firm guarantees of rights and liberties. This error has been expounded in Lieber's Civil Liberty. Nor can enacted constitutions dispense with the "grown law" (*lex natæ*). For the meaning of much that an enacted constitution establishes can only be found by the grown law on which it is founded, just as the British Bill of Rights (an enacted portion of the English constitution) rests on the common law.

Enacted constitutions may be either *octroyed*, that is, granted by the presumed full authority of the grantor, the monarch; or they may be enacted by a sovereign people prescribing high rules of action and fundamental laws for its political society, such as ours is; or they may rest on contracts between contracting parties,—for instance, between the people and a dynasty, or between several states. We cannot enter here into the interesting inquiry concerning the points on which all modern constitutions agree, regarding which they differ—one of the most instructive inquiries for the publicist and jurist. See Hallam's Constitutional History of England; Hare; Miller; Rawle; Story on the Constitution; Sheppard's Constitutional Text-Book; Elliot's Debates on the Constitution, etc.; Lieber's article (Constitution), in the Encyclopedia Americana; Cooley, Const. Lim.; Bryce, Am. Com.; Von Holst, Hist. U. S.

For the constitutions of the several states, including those in force and the previous ones, see Charters and Constitutions, published under authority of Congress in 1878.

Constitution, Self-Executing Provisions. A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Cooley, Const. Lim. 99.

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature. . . . If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts." 48 Minn. 150.

"But it must remain entirely clear that where a state constitution declares in clear language that the members of corporations shall be individually liable for their debts to a defined extent, it cannot be held that supplementary legislation is required to execute this provision, and hence that the legislature may leave it forever dormant and inoperative merely because the framers of the constitution did not go on and prescribe the remedy which should be pursued for enforcing it." Thomp. Corp. § 3004.

See 3 Fed. Rep. 739; 80 Hun 14; 77 Wis. 104; 15 Pet. 449; 104 Pa. 150; 148 Id. 317.

But it has been held that a constitutional provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholder, and such other means as shall be provided by law," is not self-executing and is inoperative until supplemented by statute; 42 N. E. Rep. (N. Y.) 419.

CONSTITUTION OF THE UNITED STATES. We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity,

provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

[The Federal Convention which framed the Constitution met at Philadelphia on September 17th, and completed its work on September 17th. The number of delegates chosen to the convention was sixty-five; ten did not attend; sixteen declined signing the Constitution or left the convention before it was ready to be signed; thirty-nine signed. The states ratified the Constitution in the following order: Delaware, September 17, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, July 21, 1788; Virginia, June 25, 1788; New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 20, 1790. The first ten amendments were proposed in 1789, and declared adopted in 1791. The eleventh amendment was proposed in 1794, and declared adopted in 1798. The twelfth amendment was proposed in 1803, and declared adopted in 1804. The thirteenth amendment was proposed and adopted in 1865. The fourteenth amendment was proposed in 1866, and adopted in 1868. The fifteenth amendment was proposed in 1869 and adopted in 1870. The sixteenth amendment was adopted February 25, 1913. The seventeenth amendment was adopted July 31, 1913. The eighteenth amendment was submitted by Congress December 18, 1917, ratified by 36 states January 16, 1919, proclaimed January 20, 1919, and in effect January 16, 1920. The nineteenth amendment was submitted by Congress June 4, 1919, ratified by 36 states, August 18, 1920, proclaimed August 20, 1920, in effect on and after August 18, 1920. Ed.]

ARTICLE I

SECTION I.—All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II.—The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress under the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New York shall have one, and the States of Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III.—The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year, and the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President pro tempore in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV.—The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V.—Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may punish the members thereof for disorderly behavior, and with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI.—The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION VII.—All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names and the yeas and nays of the members of the house in which it shall have originated, and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.—The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States; To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coins, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriations of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive jurisdiction in all cases whatsoever over such district (not exceeding ten miles square) as may, by session of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the States in which they are situated, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX.—The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration heretofore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION X.—No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION I.—The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives; to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed.

The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; and list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, the House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President. [Note: This clause of the Constitution has been amended. See twelfth article of the amendments.]

The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which

he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

SECTION II.—The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III.—He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, on such day as he shall think proper, and he shall adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV.—The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION I.—The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II.—The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III.—No person shall be held to answer for a crime against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained.

ARTICLE IV

SECTION I.—Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II.—The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III.—New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

SECTION IV.—The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by convention in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

George Washington, President, and Deputy from VIRGINIA.

NEW HAMPSHIRE—John Langdon, Nicholas Gilman. MASSACHUSETTS—Nathaniel Gorham, Rufus King. CONNECTICUT—William Samuel Johnson, Roger Sherman.

NEW YORK—Alexander Hamilton. NEW JERSEY—William Livingston, David Brearley, William Patterson, Jonathan Dayton.

PENNSYLVANIA—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris.

DELAWARE—George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.

MARYLAND—James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll.

VIRGINIA—John Blair, James Madison, Jr.

NORTH CAROLINA—William Blount, Richard Dobbs Spaight, Hugh Williamson.

SOUTH CAROLINA—John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.

GEORGIA—William Few, Abraham Baldwin.

Attest: William Jackson, Secretary.

Amendments

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or things to be seized.

ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

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without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

ARTICLE XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII

The electors shall meet in their respective States and vote by ballot for President and Vice-President one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then the electors shall choose the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII

SECTION I.—Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SECTION II.—Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV

SECTION I.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION II.—Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and electors for the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION III.—No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military,

under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SECTION IV.—The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION V.—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV

SECTION I.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION II.—The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII

SECTION I.—The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

SECTION II.—When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies. Provided, That the Legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the Legislature may direct.

SECTION III.—This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII

LIQUOR PROHIBITION AMENDMENT

SECTION I.—After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited.

SECTION II.—The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION III.—This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution of the United States by the legislatures of the several States as provided by the constitution within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX

THE WOMAN SUFFRAGE AMENDMENT

SECTION I.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION II.—The Congress shall have power to enforce this article by appropriate legislation.

CONSTITUTIONAL. That which is consonant to, and agrees with, the constitution.

Laws made in violation of the constitution are null and void, and it is now well established that it is the function of the courts so to declare them in any case coming before the court, which involves the question of their constitutionality. The presumption is always in favor of the constitutionality of a law, and the party alleging the opposite must clearly establish it. A part of a law may be unconstitutional, while there is no such objection to the remaining parts, and in this case all of the law stands, except that part which is unconstitutional. This power of the courts to declare a law unconstitutional can only exist where there is a written constitution. No such power is possessed by the English courts, and an act of parliament is absolutely conclusive and binds everybody when once its meaning is ascertained. But, where a written constitution exists, it is the expression of the will of the sovereign power, and no body which owes its existence to that constitution (as does the legislature) can violate this fundamental expression of the will of the people. It was originally doubted whether the courts possessed this power, even where a written constitution exists, but it is now established beyond doubt. The question may arise with regard to both state and United

States laws considered with reference to the United States constitution, and with regard to state laws also as considered in reference to the state. No important question of law has ever been approached with more caution, examined and discussed with more deliberation and finally determined more conclusively, than that of the existence of this judicial power. It arose as early as 1793, on an act conferring powers upon the judges which were alleged to be not judicial, but a decision was avoided by repeal of the statute; see 2 Dall. 409; but the question arising in another case, the act was declared unconstitutional; see 13

How. 40, 52, n.; the question was again raised in 1798 and not decided: 8 Dall. 386; and later it was stated from the bench as the general sentiment of the bench and bar that the power existed; 4 Dall. 194. But in 1803 the question was directly raised in a famous case recently much discussed in legal periodical literature, and the power and duty of the court to declare an act unconstitutional were declared in an opinion by Marshall, C. J., in what Kent terms "an argument approaching to the precision and certainty of a mathematical demonstration;" 1 Kent 453; in that case the actual decision was against the jurisdiction, and therefore no law was declared unconstitutional, but the reasoning of the opinion is the basis of the rule afterwards applied and firmly settled; the question was next seriously raised and finally settled by the reasoning of Marshall, C. J., in 6 Wheat. 264; Marbury v. Madison, 1 Cra. 137; prior to this decision the question had been raised and decided in favor of the power of the courts in New Jersey, 4 Halst. 427, 440, 444; Virginia, 4 Call 1, 135; 2 Va. Cas. 20; Wythe 211; in South Carolina, 1 Bay 252; 1 Martin, N. C. 42; in Rhode Island, Pamph. J. B. Varnum, Providence, 1787; and it was raised in New York in a case argued by Hamilton; Hamilton's Works, vol. 5, 115; vol. 7, 197.

In 12 S. & R., Gibson, C. J., in a dissenting opinion, was of opinion that the right of the judiciary to declare a legislative act unconstitutional does not exist, unless expressly stated; but that it is expressly given by the clause in the federal constitution which provides that the constitution shall be the supreme law of the land, etc. The same judge in 2 Pa. 281 said to counsel that he had changed his opinion for two reasons:—the late convention of Pennsylvania by their silence sanctioned the pretensions of the court to deal freely with the acts of the legislature; and he was satisfied from experience of the necessity of the case.

The power has been exercised by the supreme court of the United States in the following cases:—2 Dall. 409; 13 How. 40, 52; 1 Cra. 137; 2 Wall. 561; 4 id. 335; 8 id. 603; 9 id. 41, 274; 11 id. 113; 13 id. 128; 17 id. 322; 22 U. S. 214; 95 id. 670; 100 id. 82; 103 id. 168; 106 id. 629; 109 id. 8; 116 id. 616; 27 id. 540; 158 id. 601, the last being the Income Tax cases in 1895. During the same period the power was exercised by that court with respect to state or territorial statutes in one hundred and eighty-two cases.

The discussion of the subject has been recently revived by an article on the Income Tax cases in the Am. L. Rev. for July—August, 1895, characterizing the exercise of the power in question as "without constitutional warrant" and "based only on the plausible sophistries of John Marshall, and another by the same writer on the case of Marbury v. Madison, characterizing the doctrine as an "unconstitutional usurpation of the lawmaking power by the federal courts;" 30 Am. L. Rev. 188. The first of these was followed by an article in the same periodical taking issue with it; id. 55; and one in 84 Am. L. Reg. & Rev. 796. In the last the subject is thoroughly reviewed from the earliest cases down to the Income Tax cases, and it contains much historical matter bearing upon the question not before collected. See also 7 How. L. Rev. 120; Am. L. Rev., March and April, 1885, 177; Coxe on Judicial Power and Unconstitutional Legislation.

In judging what a constitution means,

it must be interpreted in the light and by the assistance of the common law; 117 Ind. 477.

Certain fundamental principles govern the courts in passing upon the validity of legislative acts under the constitution; among them are the following:—

It is not usual as a *matter of practice* for courts to pass upon constitutional questions excepting before a full bench; 8 Pet. 118.

It has been said that inferior courts will not pass upon these questions; 4 Mich. 291; but see, *contra*, Cooley, Const. Lim. 198, n.; 1 Kan. 116. The contrary rule would seem now to be well settled.

Courts will not draw into consideration constitutional questions collaterally, or unless the consideration is necessary to the determination of the very point in controversy; 9 Ind. 287; 50 Ala. 377; 24 Barb. 446; 5 Tex. App. 579; 20 Mo. 393; 19 Ohio St. 373. If a statute is valid on its face, the court will not look into evidence *aliunde* to determine whether it violates the constitution; 92 Cal. 605; but where it is plainly invalid for other reasons, courts will not pass on its constitutionality; 8 Ohio Cir. Ct. R. 25; 50 Ala. 276; 30 Mich. 201; 4 Barb. 56.

To justify a court in declaring an act unconstitutional, the case must be so clear that no reasonable doubt can be said to exist; 41 Mo. 63; 17 Abb. Pr. 45; 33 Ark. 17; 16 Pick. 95; 57 N. Y. 473; 68 id. 381; 52 Pa. 477; 44 Ga. 76; 48 Mo. 468; see 130 U. S. 683; 39 N. H. 304; 62 Ill. 268; and every intendment will be made in favor of the constitutionality of the law; 5 Colo. 455.

The courts cannot pronounce void an act within the general scope of legislative powers, merely because contrary to natural justice; 2 Rawle 74; 73 Pa. 370; 4 Nev. 178; 60 Ill. 86; 94 U. S. 113; 52 Miss. 53; 119 Ind. 23; nor because it violates fundamental principles of republican government, unless these principles are protected by the constitution; 5 Wall. 469; 56 N. H. 514; nor because it is supposed to conflict with the *spirit* of the constitution; 24 Wend. 220; 21 Ohio St. 14; Cooley, Const. Lim., 6th ed. 204. Any legislative act which does not encroach upon the powers vested in the other departments of the government must be enforced by the courts; 62 Ill. 260; 5 W. Va. 22; 6 Cra. 128.

In the discussion of this subject expressions have been used from time to time by courts and legal authors which tend to leave in the mind of the reader an impression that legislative acts have been set aside upon some other or higher ground than that of unconstitutionality. These expressions will be found on examination either to consist of *dicta* not only entirely *obiter*, but usually not justified even as *dicta* by the facts of the cases in which they occur, or to be qualified by a context usually omitted in citing them. A few of them will suffice as examples. Judge Cooley, in the preface to the second edition of his very learned and valuable work on constitutional limitations, says: "There are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restraints which the people impose by their state constitutions." Again, in the work itself it is said that it is not necessary that the courts, before they can set aside a law as invalid must be able to find some *specific* inhibition which has been disregarded, or some *specific* command which has been disobeyed; Cooley, Const. Lim. 206. This language has been quoted and interpreted to sustain the idea sometimes hinted at rather than seriously and argumentatively advanced, that there is some vague sense of justice and right—some higher law, it might be termed—which may justify a court in holding that a legislative act is invalid, in the absence of an express or implied constitutional objection. And it has been considered that the same view is maintained by Judge Redfield in an article in 10 Am. L. Reg. n. s. 161. So in an early case it has been said that statutes against plain and obvious principles of common right and common reason are void; 1 Bay 98. So also Judge Story made some forcible

observations respecting "fundamental maxims of free government," to disregard which no power "lurked under any general grant of legislative authority," 2 Pet. 627, 657, which have been referred to as supporting the view under consideration. Of the like character were the assertions of Homer, C. J., that he could not agree "with those judges who assert the omnipotence of the legislature in all cases when the constitution has not interposed an explicit restraint;" 4 Conn. 209, 225; and the language of a New York court which declared that the vested rights of the inhabitants of the city of New York in certain public property rested "not merely upon the constitution, but upon the great principles of eternal justice which lie at the foundation of all free government;" 10 Barb. 223, 244. Commenting on these and similar statements, Mr. C. A. Kent, in an article in 11 Am. L. Reg. n. s. 734, says on this subject: "The judiciary of a state cannot declare a legislative act unconstitutional, unless it conflict, expressly or by implication, with some provision of the state or of the federal constitution." See 118 Ind. 426.

This is a concise and accurate statement of the law of the subject. A careful examination of these and other authorities relied upon for the purpose stated will make it apparent that there is no substantial basis for a doctrine which will permit a court to apply to a legislative act any test of validity other than that of its constitutionality. When there is doubt as to the construction of a law, courts may give to it one consonant with rather than opposed to principles of right and justice, and this was precisely the scope of the South Carolina case. In the New York case the great fundamental principles need not have been referred to by the court, for the reason that they were all protected by the constitution, and in the Connecticut case not only was no law held invalid, but the sole question decided was that an act declaring valid all marriages previously celebrated by a clergyman of any religious denomination according to its forms was constitutional. The note by Judge Redfield, referred to, is directed only to show that there are limitations to the legislative power, and that it does not embrace "judicial decrees or despotic orders or assessments such as a military conqueror might make," under the guise of taxation. But it will be found that the cases put by him, as well as those used by Judge Cooley, to illustrate the expression quoted from his work, and indeed all of those which have given rise to the theory under consideration, are provided for in the American constitutions either by express prohibitions and declarations of rights, or by the distribution of the powers of government and the right of the judicial branch to determine finally whether a given act is an exercise of legislative power. The whole subject is thoroughly discussed by Judge Cooley in his Constitutional Limitations, 6th ed., and upon full consideration of the authorities he concludes that a court cannot "declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution (p. 197); . . . that except when the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case" (p. 201), nor because of "apparent injustice or impolicy," or because "they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the constitution" (p. 202). See also Potter, Dwar. Stats. 62.

In the consideration of these questions, the distinction between the federal and state constitutions must be borne in mind: "Congress can pass no laws but such as the constitution authorizes expressly or by clear implication; while the state legisla-

ture has jurisdiction of all subjects on which its legislation is not prohibited." Cooley, Const. Lim. 210; see 24 N. Y. 427; 52 Pa. 477; 148 U. S. 657. But it has been held that the decision of congress that certain claims upon the public treasury are founded upon moral and honorable obligations and upon principles of right and justice, and that public money be appropriated in payment of such claims is constitutional, and can rarely, if ever, be the subject of review by the judicial branch of the government; 163 U. S. 427.

No one can attack as unconstitutional an independent provision of a law, who has no interest in and is not affected by such provision; 51 N. W. Rep. (S. D.) 1018; 35 N. E. Rep. (Ind.) 271; 86 Ky. 423; 48 Ala. 540; 51 Me. 449; 32 La. Ann. 726; 80 N. Y. 75.

The judiciary of the United States should not strike down a legislative enactment of a state, especially if it has direct connection with the social order, health and morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern; 155 U. S. 461.

An act may be declared partly valid and partly void as unconstitutional; 24 Pick. 361; 2 Pet. 526; 41 Md. 446; 92 Mich. 377; 45 Fed. Rep. 175; 143 U. S. 649; 95 id. 80; 103 id. 459; 116 id. 252; 129 N. Y. 643; 83 Pa. 273; 75 N. C. 509.

An act adjudged to be unconstitutional is as if it had never been enacted; 5 Ind. 343; 50 id. 341; 34 Mich. 170; 6 McLean 142; 54 N. Y. 528; 118 U. S. 425; 114 id. 270; though it was held in 56 Pa. 436, that an officer acting under an unconstitutional law was a *de facto* officer. An unconstitutional law must be deemed to have the force of law so far as to protect an officer acting under it, until it is declared void; 34 Tex. 335, but see 3 McLean 107; 114 U. S. 288.

If a decision adjudging a statute unconstitutional is afterwards overruled, the statute is considered to have been in force during the whole period since its enactment; 46 Ind. 86; but see 33 Pa. 495; 5 Phila. 180; 9 Am. L. Rev. 402. An unconstitutional act can under no circumstances be validated by the legislature; 30 S. C. 579.

See 11 Am. L. Reg. n. s. 730; 9 id. 585.

As to the constitutionality of various classes of statutes, see the several titles of constitutional law, including:—ARMS; BONDS; BRIDGES; CIVIL RIGHTS; COMMERCE; DUE PROCESS OF LAW; EMINENT DOMAIN; EX POST FACTO LAWS; EXECUTIVE POWER; EXTRADITION; FEDERAL QUESTION; FOREIGN JUDGMENTS; FULL FAITH AND CREDIT; HABEAS CORPUS; IMPAIRING OBLIGATION OF CONTRACTS; INTERSTATE COMMERCE; JUDICIAL POWER; JUDICIARY; LIQUOR LAWS; ORIGINAL PACKAGES; PERSONAL LIBERTY; POLICE POWER; PRIVILEGES AND IMMUNITIES; RETROACTIVE LAWS; SPECIAL LEGISLATION; STATUTES; TAXATION; TITLE; U. S. COURTS.

CONSTITUTIONAL CONVENTION. A convention summoned by the legislature to draw up a new, or amend an old constitution. It is ancillary and subservient to the fundamental law, not hostile and paramount thereto. Jameson, Const. Conv. § 11. It is bound by the act creating it; 75 Pa. 59. See Jameson, Const. Conv. §§ 376-418. The result of its labors, when adopted, must be submitted to a vote of the people, before it can become effective; Jameson, § 479 *et seq.* *Contra*, if the legislature does not so provide in the act calling the convention; 42 Mo. 119; 69 Miss. 898; in such case it need not be submitted to vote; 11 So. Rep. (Miss.) 472.

For a complete list of Constitutional conventions held in the United States, to 1876, see Jameson, Const. Conv. Appendix B, and see the work generally for a full discussion of the interesting questions which have arisen respecting the powers and duties of such bodies. See TATE.

CONSTITUTIONAL LAW. Fundamental Principles of. Some of the fundamental principles of constitutional law are as follows: (1) That the Government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; (2) that a power may be implied when necessary, to give effect to a power expressly granted; (3) that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the Supreme Law of the Land, a State of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; (4) that such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; (5) that among the powers of the State, not surrendered—which power therefore remains with the State—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; (6) and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own constitution or the Constitution of the United States. 219 U. S. 281, 282.

CONSTITUTIONS OF CLARENDON. See CLARENDON, CONSTITUTIONS OF.

CONSTITUTIONS OF THE FOREST. See FOREST LAWS; CHARTA DE FORESTA.

CONSTITUTOR. In Civil Law.

He who promised by a simple pact to pay the debt of another; and this is always a principal obligation. Inst. 4. §. 9.

CONSTITUTUM (Lat.). An agreement to pay a subsisting debt which exists without any stipulation, whether of the promisor or another party. It differs from a stipulation in that it must be for an existing debt. Du Cange.

A day appointed for any purpose. A form of appeal. Calvinus, Lex.

CONSTRAINT. The word constraint is equivalent to the word restraint. 2 Tenn. Ch. 493.

In Scotch Law. Duress.

It is a general rule, that when one is compelled into a contract there is no effectual consent, though, ostensibly, there is the form of it. In such case the contract will be declared void. The constraint requisite thus to annul a contract must be a *vis aut metus qui cadet in constantem virum* (such as would shake a man of firmness and resolution); Erskine, Inst. 3. 1. 16; 4. 1. 26; 1 Bell, Com. b. 3, pt. 1, c. 1, s. 1, art. 1, page 295.

Compulsion; restraint; abridgment of liberty or hindrance of the will. 7 Am. & Eng. Encyc. 2nd ed., 1. Constraint is synonymous with "compulsion" when used in reference to extrinsic force. The court said: "A voluntary act proceeds from one's own free will; done by choice or by one's own accord; unconstrained by external interference, force, or influence; not prompted or suggested by another. (Wor. Dict.; Imp. Dict.) 'Voluntarily' expresses by the use of one word all the force and meaning of the phrase, 'of her own free will and accord.' 'Compulsion' and 'constraint' are synonyms, when used in reference to extrinsic power, force, or influence as when exercised by one person on another." *Id.*; 81 Ala. 359.

CONSTRUCTION (Lat. *construere*, to

put together).

In Practice. Determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.

Drawing conclusions respecting subjects that lie beyond the direct expression of the term. Lieber, Leg. & Pol. Herm. 20.

Construction and interpretation are generally used by writers on legal subjects, and by the courts, as synonymous, sometimes one term being employed and sometimes the other. Lieber, in his Legal and Political Hermeneutics, distinguishes between the two, considering the province of interpretation as limited to the written text, while construction goes beyond, and includes cases where texts interpreted and to be construed are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for; C. 1, § 8; c. 8, § 3; c. 4 c. 5. This distinction needs no higher authority for its accuracy; but it is convenient to adopt the common usage, and consider some common rules and examples on these subjects, without attempting to distinguish exactly cases of construction from those of interpretation.

Legal rules of construction so called, suggest natural methods of finding and weighing evidence and ascertaining the fact of intention, but do not determine the weight which the evidence has in mind, and do not establish a conclusion at variance with that reached by a due consideration of all the competent proof; 58 N. H. 580, 592.

A *strict* construction is one which limits the application of the provisions of the instrument or agreement to cases clearly described by the words used. It is called, also, literal.

A *liberal* construction is one by which the letter is enlarged or restrained so as more effectually to accomplish the end in view. It is called, also, equitable.

The terms *strict* and *liberal* are applied mainly in the construction of statutes; and the question of strictness or liberality is considered always with reference to the statute itself, according to whether its application is confined to those cases clearly within the legitimate import of the words used, or is extended beyond though not in violation of (*ultra sed non contra*) the strict letter. In contracts, a strict construction as to one party would be liberal as to the other.

One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement, so far as it can be done without infringing upon any law of superior binding force.

In regard to cases where this intention is clearly expressed, there is little room for variety of construction; and it is mainly in cases where the intention is indistinctly disclosed, though fairly presumed to exist in the minds of the parties, that any liberty of construction exists.

Words, if of common use, are to be taken in their natural, plain, obvious, and ordinary significations; but if technical words are used, they are to be taken in a technical sense, unless a contrary intention clearly appear in either case, from the context; 9 Wheat. 188; 33 Miss. 678; 49 N. Y. 281; 54 Cal. 111.

All instruments and agreements are to be so construed as to give effect to the whole or as large a portion as possible of the instrument or agreement; and when a court of law is construing an instrument, whether a public law or a private contract, it is legitimate if two constructions are fairly possible to adopt that one which equity would favor; 160 U. S. 77.

Statutes, if penal, are to be strictly, and if remedial, liberally construed; Bish. Writ. L. 193; Dwarrris, Stat. 246; but the rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature; 6 Wall. 886. The apparent object of the legislature is to be sought for as disclosed by the act itself, the preamble in some cases, similar statutes relating to the same subject, the consideration of the mischiefs of the old law, and perhaps some other circumstances; Wilberforce, Stat. Law 99.

If the words of a constitutional provision convey a definite meaning which involves no absurdity and no contradiction of other parts of the instrument, then that meaning

apparent on the face of the instrument must be accepted; 130 U. S. 662.

All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly; 2 Black 858; 117 Ind. 477; 4 Mich. 823; 5 W. Va. 1.

In the construction of a statute a relative word or clause has reference to its first antecedent only, unless so to restrict its application will manifestly do violence to the plain intent of the language; 17 Co. Ct. Pa. 11.

In construing statutes of the various states or of foreign countries, the supreme court of the United States adopts the construction put upon them by the courts of the state or country by whose legislature the statute was enacted; 92 U. S. 289. See 151 U. S. 556; 98 *id.* 359; 24 Fed. Rep. 197; but this does not necessarily include subsequent variations of construction by such courts; 5 Pet. 280. If different interpretations are given in different states to a similar law, that law, in effect, becomes by the interpretations, so far as it is a rule for action by this court, a different law in one state from what it is in the other; 4 Wall. 196. So also in state courts the decisions of the tribunals of other states interpreting legislative enactments are considered as if incorporated therein; 44 N. Y. Sup. Ct. 260. See UNITED STATES COURTS.

In construing a statute, if it be of doubtful import, the courts will adopt a long continued construction put upon it by the executive officers charged with its execution; 12 Wheat. 206; 120 U. S. 169; 127 U. S. 607; 41 Ga. 157; 24 Ill. 27; 16 Ohio 599; 33 Wis. 663; 65 Wis. 341; but such construction in order to be binding on the courts must be long-continued and unbroken; 137 U. S. 562. So, the journals of the legislature may be referred to if the meaning of a statute is doubtful or badly expressed; 23 Wall. 307; 70 Ind. 331; but not the statements of individual members; 3 Q. B. D. 707; 2 H. & C. 521; 108 U. S. 243; 20 Cal. 387; 10 Minn. 107; 18 N. J. Eq. 13; 113 Pa. 52.

In construing a tariff act, when it is claimed that the commercial use of a word differs from its ordinary significance, in order that the former may prevail over the latter it must appear that the commercial designation is the result of established usage which was definite, uniform, and general at the time of the passage of the act; 159 U. S. 418.

In contracts, words may be understood in a technical or peculiar sense when such meaning has been stamped upon them by the usage of the trade or place in which the contract occurs. When words are manifestly inconsistent with the declared purpose and object of the contract, they may be rejected; 2 Atk. 32. When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context. When words admit of two senses, that which gives effect to the design of the parties is preferred to that which destroys it; Add. Contr. 45; Cowp. 714.

If a contract when made was valid by the laws of the state, as then expounded by all departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired (in the federal courts) by any subsequent act of the legislature of the state, or decision of its courts altering the construction of the law; 16 How. 432; 1 Wall. 175; 9 Am. L. Rev. 381.

Usages of the trade or place of making the contract are presumed to be incorporated, unless a contrary stipulation occurs. See LEX LOCI.

Numerous other rules for construction exist, for which reference may be had to the following authorities:—

As to the construction of statutes; 1 Kent 460; Bacon, Abr. Statutes, J; Dwarrris, Statutes; Sedgwick, Stat. and Const. Law; Sutherland, Statutory Construction; Endlich, Interpretation of Statutes; Lieber, Legal and Polit. Hermeneutics; Cooley, Const. Lim.; Wilberforce, Stat. Law.

Black, Interpretation of Laws; Bishop, Written Law; STATUTES.

As to the construction of contracts: Anson; Addison; Pollock; Leake; Hare; Comyns; Chitty; Parsons; Powell; Story; Harriman, Contracts; Keener, Quasi-contract; 2 Blackstone, Comm. 379; 1 Bell, Comm. 5th ed. 481; 4 Kent, Comm. 419; Vattel, b. 2, c. 17; Story, Const. §§ 598-599; Pothier, Obligations; Long, Story on Sales; CONTRACT. As to deeds, see that title.

As to the construction of wills; Jarman, Redfield, Schouler, Hawkins, Cassoday, Chaplin, Wigram, on Wills; 6 Cruise, Dig. 171; 2 Fonblanque, Eq. 809; Roper, Legacies; Washburn, Real Property; WILLS; DEVISE; LEGACY.

As to the construction of insurance policies, see Beach; Biddle; Bunyon; Cooke; May; Richards; Ostrander, Insurance; and title INSURANCE.

The Legislature is presumed to mean what it has plainly expressed, and when it has so expressed its meaning, construction is excluded. It is only when the meaning of the statute is obscure, or the words employed are of doubtful meaning, that, in order to give effect to the legislative intention, the duty of construction arises. In the construction of penal statutes, a well-established rule is that words and phrases must be taken in their ordinary acceptation and popular meaning, unless a contrary intent appears. While the words of such statutes are not to be restricted in meaning within the narrowest limits, neither are they to be extended beyond their common interpretation; and if there is a reasonable doubt as to whether the acts done are within the meaning of the statute, the party accused of its violation is entitled to the benefit of that doubt. Endlish on Int. of Statutes, § 329, 330; 20 R. I. 636. See ORIGINAL CONSTRUCTION.

While abstractly there may be a difference between "interpretation" and "construction," in common usage the words have the same significance; and "construction" as employed in the Act of March 2, 1907, c. 2564, 34 Stat. 1246, includes interpretation. 211 U. S. 370.

Even though a word may have a common-law significance which should control if the word stood alone, in the construction of a statute the word must be given the broader meaning resulting from the words with which it is accompanied. *Id.*

In construing written instruments the entire instrument will be considered and not single words or phrases, and the intent reached even if technical meanings be disregarded. *Id.*, 582. See CONTEMPORANEOUS

Of Statutes. Intent of the Legislature. In the "construction" of all acts the courts endeavor to arrive at the "intention of the Legislature," and, with a view of giving to the act the legislative intent, the same words and phrases are often given different meanings in different acts. 159 Ky. 88, 166 S. W. 808. See TITLE OF ACT, ETC.

CONSTRUCTION CONTRACT. See BUILDING CONTRACT.

CONSTRUCTION OF WORDS. See WORDS.

CONSTRUCTIVE. That which amounts in the view of the law to an act, although the act itself is not necessarily really performed. For words under this head, such as constructive fraud, etc., see the various titles FRAUD; NOTICE; TRUST; etc.

CONSTRUCTIVE CONTEMPT. A "constructive contempt" is one arising from matters not occurring in court, but which tend to degrade or make impotent the authority of the judge, or which tend to impede or embarrass the administration of justice. 160 Ky. 658, 170 S. W. 37.

CONSTRUCTIVE DELIVERY. Constructive delivery arises when, on account of circumstances or the nature of the property, manual delivery is impossible or useless, but from the circumstances there may be implied an intention of the person

in possession to act as bailee for another. So, where a vendor holds goods after a sale, he is by constructive delivery the bailee of such goods for the vendee (40 Ala. 372) or where after a contract of hiring is terminated the hirer retains the property for the benefit of the bailor, a new bailment is created without actual change of possession. [14 Pick. (Mass.) 497]. 4 Elliot, Contr. 242. Cf. ACTUAL DELIVERY; DELIVERY BY OPERATION OF LAW.

CONSTRUCTIVE POSSESSION. "Constructive possession" is that which exists in contemplation of law without actual personal occupation. 98 Ky. 342, 32 S. W. 947.

CONSTRUCTIVE PRESENCE. "Constructive presence" is such as would enable one to take part in aiding the escape of a perpetrator, or giving him information of approaching danger, if necessary. 5 Bush (Ky.) 703. See PRESENCE.

CONSTRUCTIVE TRUST. A "constructive trust" is one raised by equity in behalf of one who has been imposed upon by another. It is enforced to work out justice and in spite of the intention of one of the parties. Such a trust is also frequently called a resulting trust. 161 Ky. 114, 170 S. W. 537.

"Constructive trusts" include all those instances in which a trust is raised by doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such relation, and in most cases contrary to the intention of the one holding the legal title. 96 Ky. 346, 24 S. W. 431.

A "constructive trust" is an implied one raised in equity in behalf of one who has been imposed upon by another, in order to work out justice, and in spite of the intention of one of the parties. It involves some element of fraud, actual or constructive perpetrated by the party charged with the trust. 140 Ky. 287, 130 S. W. 1111.

A "constructive trust" is one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself. 19 S. W. 177.

A "constructive trust" arises when the legal title of property is obtained by a person in violation, express or implied, or some duty owed to the person who is equitably entitled, when the property thus obtained is held in hostility to his beneficial rights of ownership. And are raised by the doctrines of equity for the purpose of working out justice in the most efficient manner where there is no intention of the party to create such a relation and where there is no express or implied written or verbal declaration of trust. 102 Ky. 523, 44 S. W. 123.

CONSUETUDINARIUS (Lat.) In Old English Law. A ritual or book containing the rites and forms of divine offices or the customs of abbeys and monasteries.

A record of the *consuetudines* (customs). Blount; Whishaw.

CONSUETUDINARY LAW. Customary or traditional law.

CONSUETUDINES FEUDORUM (Lat. feudal customs). A compilation of the law of feuds or fiefs in Lombardy, made A.D. 1170.

It is called, also, the Book of Fiefs, and is of great and generally received authority. The compilation is said to have been ordered by Frederic Barbarossa, Erskine, Inst. 2. 3. 5, and to have been made by two Milanese lawyers, Spelman, Gloss., but this is uncertain. It is commonly annexed to the *Corpus Juris Civilis*, and is easily accessible. See 3 Kent, Comm., 10th ed. 665, n.; Spelman, Gloss.

CONSUETUDO (Lat.) A custom; an established usage or practice. Co. Litt. 58. Tolls; duties; taxes. Co. Litt. 58 b.

This use of *consuetudo* is not correct; *costuma* is the proper word to denote duties, etc. 1 Shars. Bla. Com. 313, n. An action formerly lay for the recovery of customs due, which was commenced by a writ de *consuetudinibus et servitiis* (of customs and services). This is said by Blount to be "a writ of right close which lies against the tenant that deforceth the lord of the rent and services due him." Blount; Old Nat. Brev. 77; Fitzh. Nat. Brev. 151.

There were various customs; as, *consuetudo Anglicana* (custom of England), *consuetudo curiae*

(practice of a court), *consuetudo mercatorum* (custom of merchants). See CUSTOM.

CONSUL. A commercial agent appointed by a government to reside in a seaport or other town of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him. The term includes consuls-general and vice-consuls. Rev. Stat. § 4130.

A *vice-consul* is one acting in the place of a consul.

Among the Romans, consuls were chief magistrates who were annually elected by the people, and were invested with powers and functions similar to those of kings. During the middle ages the term consul was sometimes applied to ordinary judges; and, in the Levant, maritime judges are yet called consuls. 1 Boulay Paty, Dr. Mar. tit. 3rd, a. 3. p. 57. Officers with powers and duties corresponding to those of modern consuls were employed by the ancient Athenians, who had them stationed in commercial ports with which they traded. 3 St. John, Mann, and Cus. of Anc. Greece 288. They were appointed about the middle of the twelfth century by the maritime states of the Mediterranean; and their numbers have increased greatly with the extension of modern commerce.

As a general rule, consuls represent the subjects or citizens of their own nation not otherwise represented; Bee 209; 1 Mas. 14; 3 Wheat. 435; 6 id. 152; 10 id. 66. Their duties and privileges are now generally limited, defined, and secured by commercial treaties, or by the laws of the countries they represent. They are not strictly judicial officers; 3 Taunt. 102; and have no judicial powers except those which may be conferred by treaty and statutes. See 10 Stat. L. 909; 11 id. 723; Ware 367; 91 U. S. 13.

American consuls are nominated by the president to the senate, and by the senate confirmed or rejected. U. S. Const. art. 2, sec. 2. Upon the exercise of this power of appointment by the president, congress can place no limitation; 23 Ct. Cls. 443.

They have the power and are required to perform many duties in relation to the commerce of the United States and towards masters of ships, mariners, and other citizens of the United States. Among these are the authority to receive protests or declarations which captains, masters, crews, passengers, merchants, and others make relating to American commerce; they are required to administer on the estates of American citizens dying within their consular jurisdiction and leaving no legal representatives, when the laws of the country permit it; see 2 Curt. Ecol. 241; to take charge of and secure the effects of stranded American vessels in the absence of the master, owner, or consignee; to settle disputes between masters of vessels and the mariners; to provide for destitute seamen within their consulate, and send them to the United States at the public expense. See Rev. Stat. § 1674 et seq. Also to hear complaints of ill-treatment of seamen; 55 Fed. Rep. 80. The consuls are also authorized to make certificates of certain facts in certain cases, which receive faith and credit in the courts of the United States; 3 Sumn. 27. But these consular certificates are not to be received in evidence, unless they are given in the performance of a consular function; 2 Cra. 187; Paine 594; 2 Wasm. C. C. 478; 1 Litt. 71; nor are they evidence, between persons not parties or privies to the transaction, of any fact, unless, either expressly or impliedly, made so by statute; 2 Sumn. 355; 1 Paine 594; 2 Crabbe 54.

Their rights are to be protected agreeably to the laws of nations, and of the treaties made between the United States and the nation to which they are sent. The act of 18th August, 1856, gives the president power to prescribe and alter from time to time their fees. But by acts passed at various times nearly all consuls now receive an annual salary, and only those not salaried are allowed to take fees for compensation; Rev. Stat. §§ 1690, 1790, 1745. The power to provide for compensation of diplomatic officers is vested in the legislative branch alone, and it may fix or limit the amount; 23 Ct. Cls. 59.

A consul is liable for negligence or omission to perform seasonably the duties imposed upon him, or for any malversation or

abuse of power, to any injured person, for all damages occasioned thereby; and for all malversation and corrupt conduct in office a consul is liable to indictment.

Of foreign consuls. Before a consul can perform any duties in the United States, he must be recognized by the president of the United States, and have received his *exequatur*.

A consul is clothed only with authority for commercial purposes; and he has a right to interpose claims for the restitution of property belonging to the citizens or subjects of the country he represents; 1 Curt. 87; 1 Mas. 14; Bee 209; 6 Wheat. 152; 10 *id.* 66; see 2 Wall. Jr. 59; but he is not to be considered as a minister or diplomatic agent, intrusted by virtue of his office to represent his sovereign in negotiations with foreign states; 3 Wheat. 435.

Consuls are generally invested with special privileges by local laws and usages, or by international compacts; but by the laws of nations they are not entitled to the peculiar immunities of ambassadors. In civil and criminal cases they are subject to the local laws; in the same manner with other foreign residents owing a temporary allegiance to the state; 1 Op. Atty. Gen. 45, 302; 5 S. & R. 546; 3 M. & S. 284; 2 Dall. 297; Hall, Int. L. 289; Wicquefort, *De l'Ambassadeur*, liv. 1, § 5; Bynkershoek, cap. 10; Marten, *Droit des Gens*, liv. 4, c. 3, § 148. See 24 Q. B. Div. 368. In the United States, the act of September 24, 1799, s. 13 (R. S. § 687), gives to the supreme court original but not exclusive jurisdiction of all suits in which a consul or vice-consul shall be a party. See 1 Binn. 143; 2 Dall. 299; 2 N. & McC. 217; 3 Pick. 80; 1 Green 107; 17 Johns. 10; 7 N. Y. 576.

His functions may be suspended at any time by the government to which he is sent, and his *exequatur* revoked. In general, a consul is not liable personally on a contract made in his official capacity on account of his government; 3 Dall. 384. A vice-consul of a foreign nation who possesses an unrevoked *exequatur* issued by the President of the United States, must still be recognized by the courts as the accredited representative of his country and entitled to all its privileges, although the government which sent him has been overthrown and a revolutionary government established in its place; 48 Fed. Rep. 94.

See, generally, Kent; Abb. Shipp.; Pars. Marit. Law; Marten, on Consuls; Worden, on Consuls; Tuson, on Consuls; Azuni, Mar. Law, pt. 1, c. 4, art. 8, § 7; Story, Const. § 1654; Sergeant, Const. Law 225; 7 Opinions of Atty. Gen.

CONSULAR COURTS. Courts held by the consuls of one country within the territory of another, under treaty authority, for the settlement of civil cases between citizens of the country which they represent. They sometimes have also a criminal jurisdiction, subject in the case of certain countries to review by the home courts; U. S. Rev. Stat. § 4095. See Piggott, *Extra-territoriality*. The United States has such courts in China, Japan, Siam, Madagascar, Persia, Tripoli, Tunis, Morocco, and Muscat; see U. S. Rev. Stat. §§ 4083, 4125, 4126, 4127; and similar jurisdiction is provided for by law in any country of like character with which treaty relations may thereafter be established; *id.* § 4129. Such courts did exist in Egypt and Turkey, but were suspended pursuant to act of March 23, 1874, U. S. Rev. Stat. 1 Supp. 6, by proclamation of the President, March 27, 1876, accepting the jurisdiction of the tribunals established by those countries; 19 Stat. L. 652. The jurisdiction of the home courts over offences on the high seas is not exclusive of the jurisdiction of the consular court, if the offender is not taken to the United States; *In re Ross*, 140 U. S. 453. When a treaty gives to the consular courts exclusive jurisdiction of suits against subjects of its own country, and to the territorial courts similar jurisdiction over its countrymen, the consular court cannot entertain a cross suit, or set-off, as against a subject of that country, in a suit properly brought against a citizen of

the nation which it represents; [1895] A. C. 646.

Courts under consular jurisdiction established by various states in any country not yet admitted to the family of nations, for the trial of cases to which citizens of the various states resident in the country are a party. Gradually abolished if the country is received into the family of nations. Maxey, Int. L. 242.

CONSULAR OFFICER. This term includes consuls-general, consuls, commercial agents, deputy-consuls, vice-consuls, vice-commercial agents, and consular agents. R. S. § 1874.

CONSULTATION. The name of a writ whereby a cause, being formerly removed by prohibition out of an inferior court into some of the king's courts in Westminster, is returned thither again; for, if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false or not proved, and that, therefore, the cause was wrongfully called from the inferior court, then, upon consultation and deliberation, they decree it to be returned, whereupon this writ issues. *Termes de la Ley*; 3 Bla. Com. 114.

In French Law. The opinion of counsel upon a point of law submitted to them.

CONSUMMATE. Complete; finished; entire.

A marriage is said to be consummate. A right of dower is *inchoate* when coverture and seisin concur, *consummate* upon the husband's death. 1 Washb. R. P. 250, 251. A tenancy by the curtesy is *initiate* upon the birth of issue, and *consummate* upon the death of the wife. 1 Washb. R. P. 140; 13 Conn. 68; 2 Me. 400; 2 Bla. Com. 128.

A contract is said to be consummated when everything to be done in relation to making it has been accomplished. It is frequently of great importance to know when a contract has been consummated, in order to ascertain the rights of the parties, particularly in the contract of sale. See *DELIVERY*, where the subject is more fully examined. It is also sometimes of consequence to ascertain where the consummation of the contract took place, in order to decide by what law it is to be governed. See *CONFLICT OF LAWS*; *CONTRACT*; *LEX LOCI*.

CONTAGIOUS DISORDERS. Diseases which are capable of being transmitted by mediate or immediate contact.

Persons sick of such disorders may remain in their own houses; 2 Barb. 104; but are indictable for exposing themselves in a public place endangering the public. See 4 M. & S. 73, 272. Nuisances which produce such diseases may be abated; 15 Wend. 397. See 4 McCord 472; 3 Hill, N. Y. 479; 25 Pa. 508; 48 Iowa 15; and a right of action may also be had for injury done to health; 26 Mo. App. 253; 108 Pa. 489. A system of quarantine laws established by a state is a rightful exercise of the police power for the protection of health, which is not forbidden by the constitution; 118 U. S. 455.

CONTANGO. In English Law. The commission received for carrying over or putting off the time of execution of a contract to deliver stocks or pay for them at a certain time. Wharton, Dict.; see Lewis, *Stock Exchange*.

CONTEK (L. Fr.). A contest, dispute, disturbance, opposition. Britt. c. 42.

CONTEMPLATION OF BANKRUPTCY. An intention or expectation of breaking up business or applying to be decreed a bankrupt. Crabbe 529; 5 B. & Ad. 289; 4 Bing. 20; 9 *id.* 349; 3 McLean 587.

Contemplation of a state of bankruptcy or a known insolvency and inability to carry on business, and a stoppage of business. Story, J., 5 Bost. L. Rep. 295, 299. See 3 Story 446.

Something more is meant by the phrase than the expectation of insolvency; it includes the making provision against the results of it; 18 How. 150; 8 Bosw. 194. See 1 Dill. 166; *id.* 203.

A conveyance or sale of property made in contemplation of bankruptcy is fraudulent and void; 2 Bla. Com. 285.

CONTEMPLATION OF INSOLVENCY. This term means something more than expectation of its occurrence;

it must include provision against its results so far as the transferee is concerned, and that can only be where he is already a creditor and the object is to take his debt out of the equal ratable distribution of the assets of the company when insolvent. 21 How. Pr. Rep. 409.

CONTEMPORANEOUS CONSTRUCTION, DOCTRINE OF. A rule of statute interpretation whereby the court shall look with disfavor upon a change whereby parties who have contracted with the government on the faith of a former construction might be injured; especially when it is attempted to make the change retroactive, and to require from a contractor a return of moneys paid to him under the former construction. 194 U. S. 99; 142 U. S. 621. But it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *Id.*; 110 U. S. 219; 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued, must yield to the positive language of the statute. *Id.*

CONTEMPT. A wilful disregard or disobedience of a public authority.

By the constitution of the United States, each house of congress may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. The same provision is substantially contained in the constitutions of the several states.

The power to make rules carries that of enforcing them, and to attach persons who violate them, and punish them for contempts; 1 Kent 236; 37 N. H. 450; 3 Wils. 183; 14 East 1. But see 4 Moore, P. C. 63; 11 *id.* 347. This power of punishing for contempts is confined to punishment during the session of the legislature, and cannot extend beyond it; 6 Wheat. 204, 230, 231; Rap. Contempt 2; and it seems this power cannot be exerted beyond imprisonment. And it is often regulated by statute; U. S. Rev. St. §§ 101-103. The arrest of the offending party is made by the sergeant-at-arms, acting by virtue of the speaker's warrant, both in England and the United States; 6 Wheat. 204; 10 Q. B. 359. The power of congress to punish for contempt must be found in some express grant in the constitution or be found necessary to carry into effect such powers as are there granted; 103 U. S. 169; 106 *id.* 220. See CONGRESS.

Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings; Bac. Abr. *Courts* (E); Rolle, Abr. 219; 8 Co. 38 b; 11 *id.* 43 b; 22 Me. 550; 21 *id.* 550; 5 Fred. 199; 37 N. H. 450; 16 Ark. 384; 25 Ala. N. S. 81; 25 Miss. 883; 1 Woodb. & M. 401; 12 Am. Dec. 178; 29 Ohio 330; 128 U. S. 289; 23 Neb. 848; 7 Cra. 32; 63 N. C. 397; 64 Ill. 195; 65 Ind. 508. See 131 U. S. 267. A court may commit for a period reaching beyond the term at which the contempt is committed; 13 Md. 642. The punishment should not be by piecemeal, but must be entire and final; 49 N. J. Eq. 577.

Contempts of court are of two kinds: such as are committed in the presence of the court, and which interrupt its proceedings, which may be summarily punished by order of the presiding judge; and constructive contempts, arising from a refusal to comply with an order of court; 49 Me. 392. In the court of chancery the failure or refusal to perform an order or decree is a contempt, and the enforcement of such orders and decrees is by attachment. For an exhaustive discussion of the practice in such cases, see note to *State v. Livingston*, 4 Del. Ch. 265.

A prosecution for contempt of court in order to compel obedience to an order made in a chancery proceeding is a civil action;

140 Ill. 552.

As to proceedings to compel payment of alimony, see note, 24 L. R. A. 433.

The punishment is summary and generally immediate in contempt committed *in facie curie*, and no process or evidence is necessary; 47 Kan. 771; 2 L. R. H. L. 361; 43 Conn. 257; and a party in contempt cannot be heard except to purge himself; 87 N. Y. 262.

In some states, as in Pennsylvania, the power to punish for contempt is restricted to offences committed by the officers of the court, or in its presence, or in disobedience of its mandates, orders, or rules; but no one is guilty of a contempt for any publication made or act done out of court which is not in violation of such lawful rules or orders or in disobedience of its process. Similar provisions, limiting the power of the courts of the United States to punish for contempt, are incorporated in the act of March 2, 1831; Rev. St. § 725; 4 Sharsw. Cont. of Stor. U. S. Laws 2256. See Oswald's Case, 4 Lloyd's Debates 141 *et seq.* If a newspaper article is *per se* libellous, making a direct charge against court or jury, or admitting of but one reasonable construction and requiring no inuendo to apply its meaning to the court, then the publisher cannot escape by denying under oath that he intended the plain meaning which the language used conveys; 131 Ind. 599. The question of contempt depends upon the act and not the intention of the party; 22 W. R. 398; Taney 362; 3 Burr. 1829; 3 C. B. 745. A publication in a newspaper, read by the jurors and attendants of the court, which has a tendency to interfere with the unbiased administration of the laws in pending cases, may be adjudged a contempt; 45 La. Ann. 1250.

The power of inferior courts to punish for contempt is usually restricted to contempts committed in the presence of the court; 3 Steph. Com. 342, n. 9; L. R. 8 Q. B. 134. A justice of the peace cannot punish contempts, even committed before him, by summary proceedings; 26 Pa. 99.

It is said that it belongs exclusively to the court offended to judge of contempts and what amounts to them; 37 N. H. 450; 8 Ore. 487; 26 Am. Rep. 752; 26 Pa. 9; 40 Ia. 207; and no other court or judge can or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction; 14 East 1; 2 Bay 182; 1 Ill. 266; 1 J. J. Marsh. 575; 1 Blackf. 166; T. U. P. Charlt. 136; 14 Ark. 538, 544; 1 Ind. 161; 6 Johns. 337; 6 Wheat. 204; 8 Utah 20; 98 Cal. 139. But it has been repeatedly held that a court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt; 1 Grant, Cas. 453; 7 Cal. 181; 13 Gratt. 40; 15 B. Mon. 607; though not on *habeas corpus*; 14 Tex. 436; see 53 Cal. 204; 51 Miss. 50; 24 Am. Rep. 624; see 114 Ill. 147. It should be by direct order of the court; 5 Wis. 227. A proceeding for contempt is regarded as a distinct and independent suit; 22 E. L. & Eq. 150; 25 Vt. 680; 21 Conn. 185. See, generally, 1 Abb. Adm. 508; 5 Duer 629; 1 Dutch. 209; 16 Ill. 534; 1 Ind. 96; 8 Blackf. 574; 3 Tex. 360; 1 Greene 394; 18 Miss. 103; and irregularities in the proceedings are immaterial where the result is a sufficient purging of the contempt and a consequent discharge of the rule; 88 Ga. 78.

Though the same act constitute both a contempt and a crime, the contempt may be tried and punished by the court; U. S. v. Debs, 64 Fed. Rep. 724; affirmed by the supreme court, which held that while it was competent for the executive branch of the government to remove forcibly obstructions to the passage of interstate commerce or the carrying of the mails, it is equally competent to invoke the jurisdiction of the courts to remove or restrain them. Such jurisdiction being recognized from ancient times and indubitable authority, is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law, or by the fact that the injunction may be enforced

by proceedings in contempt; as the penalty for violation of such an injunction is no substitute for criminal prosecution. The injunction having been served, the circuit court has authority to inquire whether its orders had been disobeyed, and finding that they had been, to enter the order of punishment, and its findings as to the act of disobedience are not open to review on *habeas corpus* in the supreme court or any other; 158 U. S. 564.

See 20 Am. Law Reg. N. S. 81 *et seq.*, where the whole subject is treated at great length. See Rapalje, Contempt; CONGRESS.

"Contempts" punishable are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create a universal disregard of their authority. 104 Ky. 155, 46 S. W. 515.

"Contempts" may arise by anything in short that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of their authority is entirely lost among the people. 160 Ky. 660, 170 S. W. 37.

One deceiving the court by falsely pretending to be sick is guilty of "contempt." 160 Ky. 664, 170 S. W. 37.

One filing a false answer is guilty of "contempt." 160 Ky. 664, 170 S. W. 37.

See CIVIL CONTEMPT; CONSTRUCTIVE CONTEMPT; ORDER PUNISHING FOR CONTEMPT; See DIRECT CONTEMPT.

CONTEMPTIBILITER (L. Lat. contemptuously; Lat. *contemptus*).

In Old English Law. Contempt, contempts. Fleta, lib. 2, c. 60, § 35.

CONTENTION. Does not necessarily imply blows. It may be evidenced by passionate words, looks and gestures. 34 Conn. 279.

CONTENTIOUS JURISDICTION. In Ecclesiastical Law. That which exists in cases where there is an action or judicial process and matter in dispute is to be heard and determined between party and party. It is to be distinguished from *voluntary jurisdiction*, which exists in cases of taking probate of wills, granting letters of administration, and the like. 3 Bla. Com. 66.

CONTENTMENT (or, more properly, *contentment*; L. Lat. *contentementum*). A man's countenance or credit, which he has together with, and by reason of, his freehold; or that which is necessary for the support and maintenance of men, agreeably to their several qualities or states of life. Whart. Lex.; Cowel; 4 Bla. Com. 379.

CONTENTS. The contents of a note are the sum it shows to be due; the same may be said of an account. The obligation or the promise contained in a contract is its contents. 105 U. S. 666.

CONTENTS UNKNOWN. A phrase contained in a bill of lading, denoting that the goods are shipped in apparently good condition. 12 How. 273.

CONTENTS AND NOT-CONTENTS. The "contents" are those who, in the house of lords, express assent to a bill; the "not" or "non-contents," dissent. May, P. L. c. 12, 357.

CONTEST. The word "contest," in constitutions and statutes, is a word of art. It has a distinct, defined meaning. It is a litigation. It implies a plaintiff and a defendant, and a thing in controversy. When it is decided, it is, or should be, decided upon evidence, and the decision is a judgment. Whatever the body may be called which decides an election contest,—whether board or tribunal,—it is, in all its elements, a court. 112 Ky. 1, 65 S. W. 142.

In Public Land Affairs.

A proceeding by an adverse or intending claimant conducted in his own interest

against the entry of another. 244 U. S. 178. Cf. PROTEST.

CONTESTATIO LITIS. In Civil Law. The statement and answer of the plaintiff and defendant, thus bringing the case before the judge, conducted usually in the presence of witnesses. Calvinus, Lex.

This sense is retained in the canon law. 1 Kaufm. Mackeldey, C. L. 206. A cause is said to be *contesta* when the judge begins to hear the cause after an account of the claims, given not through pleadings, but by statement of the plaintiff and answer of the defendant. Calvinus, Lex.

In Old English Law. Coming to an issue; the issue so produced. Steph. Pl. App. n. 39; Crabb, Hist. 216.

CONTESTED ELECTION. This phrase has no technical or legally defined meaning. An election may be said to be contested whenever an objection is formally urged against it, which, if found to be true in fact, would invalidate it. This must be true both as to objection founded upon some constitutional provision, as well as upon any mere statutory enactment; 109 Ind. 116.

In the United States, an election contested for illegality in a court or before a legislature. In England, an election where two or more are candidates for the same office. English.

CONTEXT (Lat. *contextum*,—con, with, *texere*, to weave,—that which is interwoven). Those parts of a writing which precede and follow a phrase or passage in question; the connection.

It is a general principle of legal interpretation that a passage or phrase is not to be understood absolutely as if it stood by itself, but is to be read in the light of the context, i. e. in its connection with the general composition of the instrument. The rule is frequently stated to be that where there is any obscurity in a passage the context is to be considered; but the true rule is much broader. It is always proper to look at the context in the application of the most ambiguous expression. Thus, if on a sale of goods the vendor should give a written receipt acknowledging payment of the price, and containing also, a promise not to deliver the goods, the word "not" would be rejected by the court, because it is repugnant to the context. It not unfrequently happens that two provisions of an instrument are conflicting: each is then the context of the other, and they are to be taken together and so understood as to harmonize with each other so far as may be, and to carry out the general intent of the instrument. In the context of a will, that which follows controls that which precedes; and the same rule has been asserted with reference to statutes. Consult, also, CONSTRUCTION; INTERPRETATION; STATUTES.

CONTIGUITY. See VICINITY.

CONTIGUOUS. In close proximity, in actual close contact. 69 N. Y. 191; as, contiguous proprietors are those whose lands actually touch. Vicinal are not necessarily contiguous proprietors; 32 La. Ann. 435.

In actual close contact; touching; near. A relative term; referring to a building, means in close proximity to the same. Anderson; 69 N. Y. 193. A building any particular number of feet, as twenty-five, from a detached dwelling, is not "contiguous" to it. *Id.*; 35 Minn. 433. No lot is contiguous to a river unless it fronts on the river or is separated only by a public highway, with no private owner intervening, or, possibly, on a block or square so situated. *Id.*; 32 Fed. Rep. 6. See ADJOINING.

CONTINGENCY. The quality of being contingent or casual; the possibility of coming to pass; an event which may occur. Webster.

It is a fortuitous event which comes without design, foresight, or expectation. 39 Barb. 272.

CONTINGENCY WITH DOUBLE ASPECT. If there are remainders so limited that the second is a substitute for the first in case it should fail, and not in derogation of it, the remainder is said to be in a contingency with double aspect. Fearn, Rem. 873; 1 Steph. Com. 328.

CONTINGENT. When applied to a use, remainder, devise, bequest, or other legal right or interest, it means that no present interest exists, and that whether

such interest or right ever will exist, depends upon a future uncertain event. The legal definition of the word concurs with its ordinary acceptance in showing that the term contingent implies a possibility; 5 Barb. 692.

CONTINGENT DAMAGES. Those given where the issues upon counts to which no demurrer has been filed are tried, before demurrer to one or more counts in the same declaration has been decided. 1 Stra. 431.

Inaccurately used to describe consequential damages, *q. v.*

CONTINGENT ESTATE. A contingent estate depends for its effect upon an event which may or may not happen: as, an estate limited to a person not *in esse*, or not yet born. Crabb, R. P. § 946.

CONTINGENT FEES. See CHAMPERTY.

CONTINGENT INTEREST IN PERSONAL PROPERTY. It may be defined as a future interest not transmissible to the representatives of the party entitled thereto, in case he dies before it vests in possession. Thus, if a testator leaves the income of a fund to his wife for life, and the capital of the fund to be distributed among such of his children as shall be living at her death, the interest of each child during the widow's lifetime is *contingent*, and in case of his death is not transmissible to his representatives. Moz. & W. Law Dict.

CONTINGENT LEGACY. A legacy made dependent upon some uncertain event. 1 Rep. Leg. 506. Beach, Wills 406. A legacy which has not vested. Wms. Ex. 1229.

CONTINGENT REMAINDER. An estate in remainder which is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, by which no present or particular interest passes to the remainderman, so that the particular estate may chance to be determined and the remainder never take effect. 2 Bla. Com. 169.

A remainder limited so as to depend upon an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. Fearn, Cont. Rem. 8; 2 Washb. R. P. 224. See 89 Mich. 428; 108 Mo. 267; 152 Pa. 18; [1892] 1 Q. B. 184; REMAINDER.

CONTINGENT USE. A use limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use.

Such a use as by possibility may happen in possession, reversion, or remainder. 1 Co. 121; Com. Dig. Uses (K, 6). A use limited to take effect upon the happening of some future contingent event; as, where lands are conveyed to the use of A and B after a marriage had between them. 2 Bla. Com. 334.

A contingent remainder limited by way of uses. Sugd. Uses 175. See, also, 4 Kent 237.

CONTINUAL CLAIM. A formal claim made once a year to lands or tenements of which we cannot, without danger, attempt to take possession. It had the same effect as a legal entry, and thus saved the right of entry to the heir. Cowel; 2 Bla. Com. 316; 3 id. 175. This effect of a continual claim is abolished by stat. 3 & 4 Will. IV. c. 27, § 11. 1 Steph. Com. 509.

CONTINUANCE (Lat. *continuare*, to continue).

In Practice. The adjournment of a cause from one day to another of the same or a subsequent term.

The postponement of the trial of a cause.

The action of a trial court on an application for continuance is purely a matter of discretion and will not be reviewed unless that discretion has been abused; 159

U. S. 487.

In the ancient practice, continuances were entered upon the record, and a variety of forms adapted to the different stages of the suit were in use. See 1 Chit. Pl. 435; 3 Bla. Com. 316. The object of the continuance was to secure the further attendance of the defendant, who having once attended could not be required to attend again, unless a day was fixed. The entry of continuance became at the time mere matter of form, and is now discontinued in England and most of the states of the United States.

Before the declaration, continuance is by *dies datus prece partium*; after the declaration, and before issue joined, by *impairance*; after issue joined, and before verdict, by *vice-comes non nisi brevis*; and after verdict or demurrer, by *curia advisari vult*. 1 Chit. Pl. 455, 749; Bac. Abr. Pleas (P), Trial (H); Com. Dig. Plead (V); Steph. Pl. 64. In its modern use the word has the second of the two meanings given above.

Among the causes for granting a continuance are *absence of a material witness*; 1 Dall. 270; 4 Munn. 547; 10 Leigh 687; 3 Harr. N. J. 495; 2 Wash. C. C. 159; 40 La. Ann. 745; 26 Tex. App. 69; 82 Va. 264; but he must have been subpoenaed; 1 Const. S. C. 198; 10 Tex. 116; 18 Ga. 383; see 2 Dall. 188; 3 Ill. 454; 158 Mass. 381; in many states the opposite party may oppose and prevent it by admitting that certain facts would be proved by such witness; Harp. Eq. 88; 7 Cow. 369; 5 Dana 298; 2 Ill. 399; 15 Miss. 475; 33 id. 47; 9 Ind. 563; 43 Ill. App. 161; 72 Mo. 518; 59 Cal. 345; and the party asking delay is usually required to make affidavit as to the facts on which he grounds his request; 10 Yerg. 258; 2 Ill. 307; 7 Ark. 256; 1 Cal. 403; 8 Rich. Eq. 295; 3 Day 280; 18 Ind. 303; and, in some states, as to what he expects to prove by the absent witness; 5 Gratt. 332; 13 Ill. 459; 10 Tex. 525; 4 McLean 588; 3 Tex. Civ. App. 367; in others, an examination is made by the court; 2 Leigh 584; 7 Cow. 386; 4 E. D. Sm. 68; and what diligence was used to procure his presence; 40 Ill. App. 82; 81 Miss. 490; 12 Gratt. 364; and it is error to grant a continuance on oral statement of counsel; 92 Cal. 431; the court is not bound to grant it where it is altogether conjectural whether the witnesses are alive, and if so where they reside or if their evidence can be procured; 50 Minn. 333; or to examine a witness not summoned; 158 Mass. 381; *inability to obtain the evidence of a witness out of the state in season for trial, in some cases*; 1 Wall. C. C. 5; 3 Wash. C. C. 8; 4 McLean 364; 3 Ill. 629; and see 2 Call 415; 2 Cai. 384; 23 Ga. 613; 68 id. 833; 12 La. Ann. 8; 1 Pet. C. C. 217; *filing amendments to the pleadings which introduce new matter of substance*; 1 Ill. 43; 4 Mass. 506; 4 Mo. 279; 4 Blackf. 387; 1 Hempst. 17; *filing a bill of discovery in chancery, in some cases*; 3 Har. & J. 452; 3 Dall. 512; see 8 Miss. 453; *detention of a party in the public service*; 2 Dall. 108; see 1 Wall. Jr. 189; *illness of counsel, sometimes*; 1 McLean 384; 11 Pet. 226; 5 Harring. 107; 4 Cal. 188; 41 id. 626; 4 Ia. 146; 19 Ga. 586; or *surprise from unexpected testimony*; 55 Ga. 21; 10 Tex. App. 183. But it is not sufficient where it is not shown that the client's case is prejudiced thereby; 4 Ind. App. 288.

The request must be made in due season; 4 Cra. 237; 5 Halst. 245; 2 Root 25, 45; 5 B. Monr. 314. It is addressed to the discretion of the court; 12 Gratt. 584; 3 Mo. 123; Harp. 85, 112; 2 Bailey 576; 1 Ill. 12; 145 U. S. 376; 94 Ala. 394; 93 id. 514; 96 Cal. 261; 37 Ga. 678; without appeal; 2 Ala. 320; 2 Miss. 100; 6 Ired. 98; 9 Ark. 103; 16 Pa. 412; 6 How. 1; and is not reviewable on error; 145 U. S. 376; 4 Cra. 237; 10 N. J. L. 235; but an improper and unjust abuse of such discretion may be remedied by superior courts, in various ways. See 1 Blackf. 50, 64; 4 Hen. & M. 157, 180; 4 Pick. 302; 1 Ga. 213; 16 Miss. 401; 9 Mo. 19; 3 Tex. 18; 18 Ill. 439; 7 Cow. 369; 84 Wis. 262. Reference must be made to the statutes and rules of the courts of the various states for special provisions.

CONTINUANDO (Lat. *continuare*, to continue, *continuando*, continuing).

In Pleading. An averment that a trespass has been continued during a number of days. 3 Bla. Com. 212. It was al-

lowed to prevent a multiplicity of actions; 2 Rolle, Abr. 545; only where the injury was such as could, from its nature, be continued; 1 Wms. Saund. 24, n. 1.

The form is now disused, and the same end secured by alleging divers trespasses to have been committed between certain days. 1 Saund. 24, n. 1. See, generally, Gould, Pl. c. 3, § 86; Hamm. N. P. 90, 91; Bac. Abr. Trespass, I, 2, n. 2.

CONTINUING CONSIDERATION. See CONSIDERATION.

CONTINUING CRIME. See CONTINUING OFFENSE.

CONTINUING DAMAGES. See MEASURE OF DAMAGES.

CONTINUING OFFENSE. A continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long it may occupy. 1 Words & Phrases (2nd series) 975.

CONTINUOUS EASEMENTS. Easements of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as a water-spout or a right of light or air. Washb. Easem. 21. See EASEMENTS.

The test of continuousness is that there is an alteration or arrangement of a tenement which makes one part of it dependent in some measure upon another part. This alteration or arrangement must be intended to be permanent in its nature. As applied to a water course it is not essential that the water should flow of itself continuously, but that the artificial arrangement by which the flow of water is produced should be of a permanent nature. 54 Ore. 147; *id.*, *et seq.*

See NON-APPARENT OR NON-CONTINUOUS EASEMENTS.

CONTINUOUSLY CONFINED. The term "continuously confined" in a sick benefit policy does not mean that the insured should be confined in bed, but it is sufficient that he is so confined to the house as to be totally unable to follow his vocation. 150 Ky. 135, 150 S. W. 11. See CONFINED TO BED.

CONTIONES. In Republican times at latest, general meetings of the people. These were frequently convoked by the magistrates for the purpose of making public announcements or eliciting the trend of public opinion. Apparently in furtherance of these objects, attendance at a *contio*, though not compulsory upon anyone, was on the other hand allowable even to non-citizens (being freemen) who had no place in the *comitia*. Launsbach, State and Family in Early Rome, 69.

CONTRA (Lat.). Over; against; opposite. *Per contra*. In opposition.

CONTRA BONOS MORES. Against sound morals.

Contracts which are incentive to crime, or of which the consideration is an obligation or engagement improperly prejudicial to the feelings of a third party, offensive to decency or morality, or which has a tendency to mischievous or pernicious consequences, are void, as being *contra bonos mores*; 2 Wils. 447; Cowp. 729; 4 Campb. 162; 1 B. & Ald. 683; 16 East 150.

CONTRA FORMAM FEOFFAMENTI (L. Lat.). (Contrary to the form of the feoffment.) A writ that formerly lay for a tenant, or his heir, enfeoffed of certain lands or tenements by charter of feoffment from a lord to do certain services, and especially suits to his court, who was afterwards distrained for more services than were mentioned in the charter.

CONTRA FORMAM STATUTI (against the form of the statute).

In Pleading. The formal manner of alleging that the offence described in an indictment is one forbidden by statute.

When one statute prohibits a thing and another gives the penalty, in an action for the penalty the declaration should con-

clude *contra formam statutorum*; Plowd. 206; 2 East 333; Esp. Pen. Act. 111; 1 Gal. 268. The same rule applies to informations and indictments; 2 Hale, Pl. Cr. 172: But where a statute refers to a former one, and adopts and continues the provisions of it, the declaration or indictment should conclude *contra formam statuti*; Hale, Pl. Cr. 172. Where a thing is prohibited by several statutes, if one only gives the action and the others are explanatory and restrictive, the conclusion should be *contra formam statuti*; And. 115; 2 Saund. 377.

When the act prohibited was not an offence or ground of action at common law, it is necessary both in criminal and civil cases to conclude against the form of the statute or statutes; 1 Saund. 135 c; 3 East 333; 1 Chit. Pl. 556; 11 Mass. 260; 1 Gall. 30.

But if the act prohibited by the statute is an offence or ground of action at common law, the indictment or action may be in the common-law form, and the statute need not be noticed even though it prescribe a form of prosecution or of action,—the statute remedy being merely cumulative; Co. 2d Inst. 200; 2 Burr. 503; 3 id. 1418; 4 id. 2351; 2 Wils. 146; 3 Mass. 515.

When a statute only inflicts a punishment on that which was an offence at common law, the punishment prescribed may be inflicted though the statute is not noticed in the indictment; 2 Binn. 332.

If an indictment for an offence at common law only conclude "against the form of the statute in such case made and provided;" or "the form of the statute" generally, the conclusion will be rejected as surplusage, and the indictment maintained as at common law; 1 Saund. 135 n. 3; 16 Mass. 385; 4 Cush. 143. But it will be otherwise if it conclude against the form of "the statute aforesaid," when a statute has been previously recited; 1 Chit. Cr. L. 289. See, further, Com. Dig. *Pleader* (C.) 76; 5 Viner, Abr. 552, 556; 1 Gall. 26, 257; 5 Pick. 128; 9 id. 1; 1 Hawks 192; 3 Conn. 1; 11 Mass. 290; 5 Me. 79.

CONTRA JUS COMMUNE (Lat.). Against common right or law; contrary to the rule of the common law.

CONTRA LEGEM (Lat.). Against the law. *Contra legem facti, qui id facit quod lex prohibet*, he acts against the law who does that which the law forbids.

CONTRA PACEM (Lat. against the peace).

In Pleading. An allegation in an action of trespass or ejectment that the actions therein complained of were against the peace of the king. Such an allegation was formerly necessary, but has become a mere matter of form and not traversable. See 4 Term 503; 1 Chit. Pl. 163, 402; Arch. Civ. Pl. 155; TRESPASS.

CONTRABAND. Goods exported from, or imported into a country against its laws.

CONTRABAND OF WAR. In International Law. Goods which neutrals may not carry in time of war to either of the belligerent nations without subjecting themselves to the loss of the goods, and formerly the owners, also, to the loss of the ship and other cargo, if intercepted. 1 Kent 138, 143. See 4 Heisk. 345.

Provisions may be contraband of war, and generally all articles calculated to be of direct use in aiding the belligerent powers to carry on the war; and if the use is doubtful, the mere fact of a hostile destination renders the goods contraband; 1 Kent 140; Hall, Int. L. 618.

The classification of goods best supported by authority, English and American, divides all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war; (2) articles which may be and are used for war or peace according to circumstances; (3) articles exclusively used for peaceful purposes. Articles of the first class destined to a belligerent country are always contraband; articles of the second class are so only when actually destined to

the military or naval use of the belligerent; articles of the third class are not contraband, though liable to seizure for violation of blockade or siege. Contraband articles contaminate non-contraband, if belonging to the same owner; in ordinary cases the conveyance of contraband articles attaches only to the freight; it does not subject the vessel to forfeiture; per Chase, C. J., in *The Peterhoff*, 5 Wall. 28.

The meaning of the term is generally defined by treaty provisions enumerating the things which shall be deemed contraband.

See 2 Wild. Int. L. 210 *et seq.*; Wheat. Int. L. 509; 6 Mass. 102; 2 Johns. Cas. 77, 120; 1 Wheat. 393; 8 Pet. 495; 93 U. S. 520; 1 Bond 446; and also the very important declaration respecting maritime law signed by the plenipotentiaries of Great Britain, France, Austria, Russia, Prussia, Sardinia, and Turkey, at Paris, April 16, 1856, Appendix to 3 Phill. Int. L. 359; also title Contraband and Free Ships in the index to same vol., and part 9, chap. 10, and part 11, chap. 1, of the same.

CONTRACAUSATOR. A criminal; one prosecuted for a crime. Wharton.

CONTRACT (Lat. *contractus*, from *con*, with, and *traho*, to draw. *Contractus ultro utroque obligatio est quam Græci συναλλαγήν vocant. Fr. contrat*).

An agreement between two or more parties to do or not to do a particular thing. Taney, C. J., 11 Pet. 420, 572. An agreement in which a party undertakes to do or not to do a particular thing. Marshall, C. J., 4 Wheat. 197. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Pars. Com. 5.

It has been also defined as follows: A compact between two or more parties. 6 Cra. 57, 136. An agreement or covenant between two or more persons in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. Encyc. Amer.; Webster. A contract or agreement is where a promise is made on one side and assented to on the other; or where two or more persons enter into an engagement with each other by a promise on either side. 2 Steph. Com. 108, 109.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Bla. Com. 446; 2 Kent 449.

A covenant or agreement between two parties with a lawful consideration or cause. West, Symbol. lib. 1, § 10; Cowel; Blount.

A deliberate engagement between competent parties upon a legal consideration to do or to abstain from doing some act. Story, Contr. § 1.

An agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing or to do or abstain from doing some particular act. Pothier, Contr. Pt. 1, c. 1, § 1; 36 Ch. D. 32.

A mutual promise upon lawful consideration or cause which binds the parties to a performance. The writing which contains the agreement of parties with the terms and conditions, and which serves as a proof of the obligation. The last is a direct signification. 2 Hill N. Y. 551.

A voluntary and lawful agreement by competent parties, for a good consideration, to do or not to do a specified thing. 9 Cal. 83.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other. Anson, Contr. 9.

A learned writer has said, in discussing the proper definition of contract, that "if we seek to build up a definition of the term 'contract' which shall include all things that have been called contracts and shall exclude all things that have been held not to be contracts, the task is evidently impossible. Any definition of contract therefore must be either arbitrary or inexact." Harriman, Contr. 4.

The consideration is not properly included in the definition of contract, because it does not seem to be essential to a contract, although it may be necessary to its enforcement. See CONSIDERATION. 1 Pars. Contr. 7.

Mr. Stephen, whose definition of contract is given above, thus criticizes the definition of Blackstone, which has been adopted by Chancellor Kent and other high authorities. First, that the word agreement itself requires definition as much as contract. Second, that the existence of a consideration, though essential to the validity of a parol contract, forms properly no part of the idea. Third, that the definition takes no sufficient notice of the mutuality which properly distinguishes a contract from a promise. 2 Steph. Com. 109.

The use of the word agreement (*aggregatio mentium*) seems to have the authority of the best writers in ancient and modern times (see above) as a part of the definition of contract. It is probably a translation of the civil-law *conventio* (*con* and *venio*), a coming together, to which (being derived from *ad* and *grez*) it seems nearly equivalent. We do not think the objection that it is a synonym nearly so a valid one. Some word of the kind is necessary as a basis of the definition. No two

synonyms convey precisely the same idea. "Most of them have minute distinctions," says Reid. If two are entirely equivalent, it will soon be determined by accident which shall remain in use and which become obsolete. To one who has no knowledge of a language it is impossible to define any abstract idea. But to one who understands a language, an abstraction is defined by a synonym properly qualified. By pointing out distinctions and the mutual relations between synonyms, the object of definition is answered. Hence we do not think Blackstone's definition open to the first objection.

As to the idea of consideration, Mr. Stephen seems correct and to have the authority of some of the first legal minds of modern times. Consideration, however, may be necessary to enforce a contract, though not essential to the idea. Even in that class of contracts (by specialty) in which no consideration is in fact required, one is said to be always presumed in law,—the form of the instrument being held to import a consideration. 2 Kent. 450, n. But see CONSIDERATION, where the subject is more fully treated. The third objection of Mr. Stephen to the definition of Blackstone does not seem one to which it is fairly open. There is an idea of mutuality in *con* and *traho*, to draw together, and it would seem that mutuality is implied in agreement as well. An *aggregatio mentium* seems impossible without mutuality. Blackstone's analysis appears to have regarded agreement as implying mutuality. For it defines it (2 Bla. Com. 442) "a mutual bargain or convention." In the above definition, however, all ambiguity is avoided by the use of the words "between two or more parties." Following agreement in its widest sense, it includes contracts, covenants and specialties (but see *infra*); but this usage is a general term for all sorts of obligations, though of too great authority to be now doubted, seems to be an undue extension of the proper meaning of the term, which is much more nearly equivalent to "agreement" which is never applied to specialties. Mutuality is of the very essence of both,—not only mutuality of assent, but of act. As expressed by Lord Coke, *Actus contra actum*; 2 Co. 15; 7 M. & G. 958, argument and note.

This is illustrated in contracts of sale, bailment, hire, as well as partnership and marriage, and in no other engagements but those with this kind of mutuality would seem properly to come under the head of contracts. In a bond there is none of this mutuality,—no act to be done by the obligee to make the instrument binding. In a judgment there is no mutuality either of act or of assent, it is *judicium redditum in invitum*. It may properly be denied to be a contract, though Blackstone insists that one is implied. Per Mansfield, 3 Burr. 1545; 1 Cow. 316; per Story, J., 1 Mas. 288. Chitty uses "obligation" as an alternative word of contract when speaking of bonds and judgments. Chit. Com. 2, 4. An act of legislature may be a contract; so may a legislative grant with exemption from taxes; 5 Ohio St. 861. So a charter is a contract between a state and an corporation within the meaning of the definition of the United States, art. 1, § 10, clause 1; 4 Wheat. 518.

At common law, contracts have been divided ordinarily into contracts of record, contracts by specialty, and simple or parol contracts. The latter may be either written (not sealed) or verbal; and they may also be express or implied. Implied contracts may be either implied in law or implied in fact. "The only difference between an express contract and one implied in fact is in the mode of substantiating it. An express agreement is proved by express words, written or spoken . . . ; an implied agreement is proved by circumstantial evidence showing that the parties intended to contract;" Leake, Contr. 11; 1 B. & Ad. 415; 1 Aust. Jur. 356, 377.

Accessory contracts are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledges. Louisiana Code, art. 1764; Poth. Obl. pt. 1, c. 1, s. 1, art. 2, n. 14.

Bilateral contracts are those in which a promise is given in consideration of a promise. Parsons, Contr. 464.

Contracts of beneficence are those by which only one of the contracting parties is benefited: as, loans, deposit, and mandate. Louisiana Code, art. 1767.

Certain contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated.

Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. Louisiana Code, art. 1761.

Consensual contracts were contracts of agency, partnership, sale, and hiring in the Roman law, in which a contract arose from the mere consensus of the parties without other formalities. Maine, Anc. Law 243.

Entire contracts are those the consideration of which is entire on both sides.

Executed contracts are those in which nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made: as, where an article is sold and delivered and payment therefor is made on the spot.

Executory contracts are those in which some act remains to be done: as, when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest payable at a future time. 6 Cra. 87, 136.

A contract executed (which differs in nothing from a grant) conveys a chose in possession; a contract executory conveys a chose in action. 2 Bla. Com. 448. As to the importance of grants considered as contracts, see *IMPAIRING THE OBLIGATION OF CONTRACTS*.

Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of making: as, to pay a stated price for certain specified goods; to deliver an ox, etc. 2 Bla. Com. 443.

Gratuitous contracts are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. Louisiana Code, art. 1766. Gratuitous promises are not binding at common law unless executed with certain formalities, viz., by execution under seal.

Illegal contracts are agreements to do acts prohibited by law, as to commit a crime; to injure another, as to publish a libel; H. & N. 73.

Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event. Louisiana Code, art. 1769.

Implied contracts may be either implied in law or in fact. A contract implied in law arises where some pecuniary inequality exists in one party relatively to the other which justice requires should be compensated, and upon which the law operates by creating a debt to the amount of the required compensation; Leake, Contr. 38. See 2 Burr. 1005; 11 L. J. C. P. 99; 8 C. B. 541. The case of the defendant obtaining the plaintiff's money or goods by fraud, or duress, shows an implied contract to pay the money or the value of the goods.

A contract implied in fact arises where there was not an express contract, but there is circumstantial evidence showing that the parties did intend to make a contract; for instance, if one orders goods of a tradesman or employs a man to work for him, without stipulating the price or wages, the law raises an implied contract (*in fact*) to pay the value of the goods or services. In the former class, the implied contract is a pure fiction, having no real existence; in the latter, it is inferred as an actual fact. See Leake, Contr. 12.

Independent contracts are those in which the mutual acts or promises have no relation to each other either as equivalents or as considerations. Louisiana Code, art. 1762.

Mixed contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

Contracts of mutual interest are such as are entered into for the reciprocal interest and utility of each of the parties: as sales, exchange, partnership, and the like.

Onerous contracts are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value.

Oral contracts are simple contracts.

Principal contracts are those entered into by both parties on their own accounts, or in the several qualities or characters they assume.

Real contracts are those in which it is necessary that there should be something

more than mere consent, such as a loan of money, deposit, or pledge, which, from their nature, require a delivery of the thing (*res*).

Reciprocal contracts are those by which the parties expressly enter into mutual engagements, such as sale, hire, and the like.

Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances, and statutes staple.

These have been said to be the highest class of contracts. Statutes, merchant and staple, and other securities of the like nature, are confined to England. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record; Poll. Contr. 141; 4 Bla. Com. 465.

Severable (or separable) contracts are those the considerations of which are by their terms susceptible of apportionment or division on either side, so as to correspond to the several parts or portions of the consideration on the other side.

A contract to pay a person the worth of his services as long as he will do certain work, or so much per week as long as he shall work, or to give a certain price per bushel for every bushel of so much corn as corresponds to a sample, would be a severable contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. So when the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact of sale by weight or measure—i. e. so much per pound or bushel—does not make a contract severable.

Simple contracts are those not of specialty or record.

They are the lowest class of express contracts, and answer most nearly to our general definition of contract.

To constitute a sufficient parol agreement to be binding in law, there must be that reciprocal and mutual assent which is necessary to all contracts. They are by parol (which includes both oral and written). The only distinction between oral and written contracts is in their mode of proof. And it is inaccurate to distinguish *verbal* from *written*; for contracts are equally *verbal* whether the words are written or spoken,—the meaning of verbal being—expressed in words. See 3 Burr. 1670; 7 Term 360, note; 11 Mass. 27, 30; 7 Conn. 87; 1 Calnes 386.

Specialties are those which are under seal; as, deeds and bonds.

Specialties are sometimes said to include also contracts of record; 1 Pars. Contr. 7; in which case there would be but two classes at common law, viz., specialties and simple contracts. The term *specialty* is always used substantively.

They are the second kind of express contracts under the ordinary common-law division. They are not merely written, but signed, sealed, and delivered by the party bound. The solemnities connected with these acts, and the formalities of witnessing, gave in early times an importance and character to this class of contracts which implied so much caution and deliberation (consideration) that it was unnecessary to prove the consideration even in a court of equity; Flowd. 305; 7 Term 477; 4 B. & Ad. 658; 8 Bingh. 111; 1 Fomb. Eq. 342, note. Though little of the real solemnity now remains, and a scroll is substituted in most of the states for the seal, the distinction with regard to specialties has still been preserved intact except when abolished by statute. In 18 Cal. 38, it is said that the distinction is now unmeaning and not sustained by reason. See *CONSIDERATION; SEAL*.

When a contract by specialty is changed by a parol agreement, the whole contract becomes parol; 2 Watts 451; 9 Pick. 298; 18 Wend. 71.

Unilateral contracts are those in which the party to whom the engagement is made makes no express agreement on his part.

They are so called even in cases where the law attaches certain obligations to his acceptance. Louisiana Code, art. 1768. A loan for use and a loan of money are of this kind. Poth. Obl. pt. 1, c. 1, s. 1, art. 2.

Verbal contracts are simple contracts. **Written contracts** are those evidenced by writing.

Pothier's treatise on Obligations, taken in connection with the Civil Code of Louisiana, gives an idea of the divisions of the civil law. Poth. Obl. pt. 1, c. 1, s. 1, art. 2, makes the five following classes: reciprocal and unilateral; consensual and real; those of mutual interest, of beneficence and mixed; principal and accessory; those which are subjected by the civil law to certain rules and forms, and those which are regulated by mere natural justice.

It is true that almost all the rights of personal property do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them: which is the method taken by the civil law; it has referred the greatest part of the duties and rights of which it treats to the head of obligations *ex contractu* or *quasi ex contractu*. Inst. 3. 14. 2; 2 Bla. Com. 443.

Quasi-contracts. The usual classification of contracts is objected to by Prof. Keener in his law of Quasi-Contracts. A true contract exists, he says, because the contracting party has *willed*, in circumstances to which the law attaches the sanction of an obligation, that he shall be bound. His contract may be implied in fact, or express. Which of the two it is, is purely a question of the kind of evidence used to establish the contract. In either case the source of the obligation is the intention of the party. "Contract implied in law" is, however, a term used to cover a class of obligations, where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and, in many cases, in spite of his actual dissent. Such contracts, according to the work cited, may be termed quasi-contracts, and are not true contracts. They are founded generally:—

1. Upon a record.
2. Upon statutory, official, or customary duties.

3. Upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another. The latter is the most important and most numerous class. See also Ans. Contr., 6th ed. 7; 2 Harv. L. Rev. 64; 109 U. S. 285.

A claim for half-pilotage fees under a statute allowing such fees, where a pilot's services are offered and declined, is an instance of a quasi-contract of the second class; 2 Wall. 450. See also 144 Mass. 64. Prof. Keener, in his work above cited, considers the duty of a carrier to receive and carry safely as being of a quasi-contractual nature. Among the third class are also cases of the liability of a husband to pay for necessities furnished to his wife; of a father for those furnished to his child. Also cases of actions to recover money paid under a mistake; actions in assumpsit against a tort-feasor, where the tort is waived; actions to recover compensation for benefits received under a contract which the plaintiff cannot enforce because he has failed to comply with the conditions thereof; actions for benefits conferred by the plaintiff under a contract which the defendant, by reason of the statute of frauds, illegality, impossibility, etc., is not bound to perform; actions for benefits conferred on the defendant at his request, but in the absence of a contract; actions for benefits intentionally conferred, but without the defendant's request; actions for money paid to the use of the defendant; and actions for money paid under compulsion of law and money paid to the defendant under duress, legal or equitable. These are the general classes given in Keener, Quasi-Contracts, to which reference is made, *passim*. The question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do. The action of *indebitatus assumpsit* was extended to most cases of quasi-contracts; Harriman, Contr. 24; 2 Harv. L. Rev. 63. The settled tendency of English and American law is toward a new classification of contracts and the treatment of implied contracts upon the lines here indicated. They are lines clearly defined in the Roman law as shown by Maine (Anc. Law, 8d. Am. ed. 332), who is extensively quoted by Keener. See *CONTRACTUAL OBLIGATION*.

Negotiations preceding a contract. Where there is an agreement between parties to enter into a contract in the future, and any essential part of the contract is left open, the agreement does not constitute a contract in itself; 156 Mass. 273. Such is the case also if the agreement itself shows that it was not intended to bind the parties, but that a formal contract was to be executed; 42 Mo. 118; 70 L. T. 781. But a mere reference to a contract to be drawn up in the future is not conclusive that the parties are not bound by their original agreement, though it tends to show that such is the case; 102 Mo. 309; L. R. 18 Eq. 180. The question is one of intention to be gathered from the original agreement, in view of

all the circumstances; 144 N. Y. 209; Harriman, Cont. 52.

Where negotiations are made "subject to the preparation and approval" or "completion of a formal contract," they do not constitute a binding contract, whether the condition is expressed in the offer; [1895] 2 Ch. 1844; or in the acceptance; 7 Ch. D. 29; but "the mere reference to a future contract is not enough to negative the existence of a present one;" 8 Ch. D. 70. Where a baker sold, and a company bought a shop, and the contract seemed complete in two letters, but afterward the company wrote a third letter introducing a new and vital term, viz., a restriction upon the baker's trading in the district, it was held that the three letters read together negated the idea that the two letters constituted the contract; 43 Ch. D. 116. Where the acceptance was "subject to the title being approved by our solicitor" it was held, that this meant no more than the liberty which every purchaser impliedly reserves to himself of breaking off the contract if the vendor breaks it, by not making a good title. The Court of Appeals construed these words as a condition, but Lord Cairns, L. C., pointed out that they would, if so construed, imply that the vendor was free, but the purchaser bound; 4 App. Cas. 311. In 3 App. Cases 1124, in the House of Lords, it was said, in holding that a correspondence between parties constituted a complete contract, "If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, 'We will have this agreement put in due form by a solicitor.'" In the same case Lord Blackburn said that there must be a complete agreement, "if not there is no contract so long as the parties are only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not."

Since the judicature acts in England, a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in precisely the same position as if the lease had been executed; 21 Ch. D. 9.

Qualities of contracts. Every agreement should be so complete as to give either party his action upon it; both parties must assent to all its terms; 3 Term 653; 1 B. & Ald. 681; 1 Pick. 278. To the rule that the contract must be obligatory on both parties there are some exceptions: as the case of an infant, who may sue, though he cannot be sued, on his contract; Add. Contr. 380; Stra. 937. See other instances, 6 East 307; 3 Taunt. 169; 5 id. 788; 3 B. & C. 232. There must be a good and valid consideration (*q. v.*), which must be proved though the contract be in writing; 7 Term 350, note (a); 2 Bla. Com. 444; Fonb. Eq. 335, n. (a). There is an exception to this rule in the case of bills and notes, which are of themselves *prima facie* evidence of consideration. And in other contracts (written), when consideration is acknowledged, it is *prima facie* evidence thereof, but open to contradiction by parol testimony. There must be a thing to be done which is not forbidden by law, or one to be admitted which is not enjoined by law. Fraudulent, immoral, or forbidden contracts are void.

A contract is also void if against public policy or the statutes, even though the statute be not prohibitory but merely affixes a penalty; Poll. Contr. 259 *et seq.*; Chitty, Com. L. 215, 217, 222, 223, 250; 1 Binn. 110, 118; 4 Dall. 269, 296; 4 Yeates 24, 84; 23 Ala. 514; 7 Ind. 132; 4 Minn. 278; 80 N. H. 540; 2 Sandf. 146. But see 5 Ala. 250. As to contracts which cannot be enforced from non-compliance with the statute of frauds, see FRAUDS, STATUTE OF.

It was for a long time not fully settled whether a contract between A and B that one of them should do something for the benefit of C did or did not give C a right of action on the contract. See 1 B. & P. 98; 3 id. 149; but it is now distinctly established in England that C cannot sue; 1 B. & S. 393; Poll. Contr. 200; in America the authorities are somewhat conflicting, and it is necessary to examine the authorities critically to deduce the rule governing particular cases.

On specialties most courts do not permit a suit in a third person's name, yet some do; Poll. Contr. 204, citing 3 Gray 484. In his instructive and valuable work on Contracts just published, Professor Harriman, after citing the authorities for the common-law rule that the one not a party to it can enforce a contract, enumerates and discusses the exceptions. The only exception recognized in Massachusetts (the right to recover money in the hands of the defendant which is of right the property of the plaintiff), is considered a real exception, as the liability is not contractual; the right of a son to sue on a promise made to a father is not now recognized in England or in Massachusetts as it formerly was, and it has no foundation in principle. The broad exception existing in most of the states permitting a person for whose benefit a promise is made to sue upon it, he considers not founded on any principle, but a clear case of judicial legislation which, like most arbitrary rules, has led to confusion. He reaches the conclusion that the right of a stranger to sue in certain cases is recognized in New York, Missouri, Indiana, Illinois, Nebraska, New Hampshire, Maine, and Rhode Island, and that in Massachusetts and Michigan, as in England, the common law prevails. In the federal courts he considers the rule not clearly settled, but that the general rules laid down by the supreme court coincide with the common-law rule; Harr. Cont. ch. vii. In 93 U. S. 143, the court (Davis, J.) said that "the right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country." In 98 U. S. 123, it was held that while the common-law rule is that a stranger cannot sue upon it, "there are confessedly many exceptions to it." In Pennsylvania the general rule is recognized; but it is held that where money or property is placed by one in the possession of another, to be paid or delivered to a third person, the latter has a right of action, being regarded as a party to the consideration on which the undertaking rests; 119 Pa. 76; so, also, 6 Watts 182. And a promise to one to pay a debt due by him to another is valid; 2 Watts 104. In some jurisdictions, even including courts adhering to the general common-law rule, a third person has a right to enforce a trust created for his benefit by another person; 95 U. S. 576; 16 Ill. 125; 113 id. 91; 130 Mass. 128; 91 Ind. 595. But see 154 Ill. 627, where it was held that when a contract of sale of land from A to B recited that part of the purchase money was "going to C," the latter could not sue B.

See for a general discussion of the subject, 29 Am. L. Reg. o. s. 596; 4 N. J. L. J. 197, 229; 8 Harv. L. Rev. 93; Harriman, Cont.

Construction and interpretation in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject-matter of the contract and

the situation of the parties are to be fully considered with regard to the sense in which language is used.

The legality of the contract is presumed and is favored by construction.

Words are to be taken, if possible, in their ordinary and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts.

The contract will be supported rather than defeated: *ut res magis valeat quam pereat*.

All parts will be construed, if possible, so as to have effect.

Construction is generally against the grantor—*contra proferentem*—except in the case of the sovereign. This rule of construction is not of great importance, except in the analogous case of penal statutes; for the law favors and supposes innocence.

Construction is against claims or contracts which are in themselves against common right or common law.

Neither bad English nor bad Latin invalidates a contract ("which perhaps a classical critic may think no unnecessary caution"); 2 Bla. Com. 379; 6 Co. 59. See CONSTRUCTION.

Parties. There is no contract unless the parties assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract. See PARTIES.

Remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of contracts. When the thing to be done is the payment of money, damages paid in money are entirely adequate. When, however, the contract is for anything else than the payment of money, the common law knows no other than a money remedy: it has no power to enforce a specific performance of the contract.

The injustice of measuring all rights and wrongs by a money standard, which as a remedy is often inadequate, led to the establishment of the equity power of decreeing specific performance when the remedy has failed at law. For example: contracts for the sale of real estate will be specifically enforced in equity; performance will be decreed, and conveyances compelled.

Where a contract is for the benefit of the contracting party, no action can be maintained by a third person who is a stranger to the contract and the consideration; 173 Pa. 274.

See, generally, as to contracts, Parsons; Chitty; Comyns; Leake; Anson; Story; Pollock, Contracts; Keener, Quasi-Contracts; Com. Dig.; Bac. Abr.; Vin. Abr.; Arch. Civ. Pl. 22; Poth. Obl.; Maine Anc. Law; Austin, Jurisp.; Sugd. Ven. & P.; Long, Sales (Rand. ed.) and Benj. Sales; Jones; Story; Edwards; and Lawson, on Bailment; Toull. Dr. Civ. rom. 6, 7; Hamm. Part. c. 1; Calv. Par.

For the several subjects embraced in the law of contracts, see the separate titles, also CONSIDERATION, SEE IMPOSSIBLE CONTRACT; IMPOSSIBILITY; LIBERTY OF CONTRACT; SEE ENTIRE AND SEVERAL CONTRACTS.

CONTRACT, BUILDING. See BUILDING CONTRACT.

CONTRACT OF SALE. A contract by which one of the contracting parties, called the seller, enters into an obligation to the other, to cause him to have freely by a title of proprietor, a thing, for the price of a certain sum of money, which the other contracting party, called the buyer, on his part obliges himself to pay.

The purpose of § 3 of the Clayton Act in forbidding contracts of sale, made upon the agreement or understanding that the purchaser shall not deal in goods of the seller's competitors, which "may substantially lessen competition or tend to create a monopoly," was not to prohibit the mere possibility of those consequences, but to prevent agreements which, in the circumstances, will probably lessen competition or create an actual tendency to monopoly. 258 U. S. 347.

CONTRACT PRICE. Mechanics' Liens. Under a statute the term "contract price" means not the abstract amount agreed to be paid, but the sum which the contractor was actually entitled to receive for the whole work done by him. 149 Ky. 350, 149 S. W. 854.

CONTRACT TO SATISFACTION. See SATISFACTION, CONTRACT TO.

CONTRACTION (Lat. *con*, together, *trahō*, to draw). A form of a word abbreviated by the omission of one or more letters. This was formerly much practised, but in modern times has fallen into general disuse. Much information in regard to the rules for contraction is to be found in the Instructor Clericalis.

CONTRACTOR. One who enters into a contract. Generally used of those who undertake to do public work or the work for a company or corporation on a large scale, or to furnish goods to another at a fixed or ascertained price. 2 Pard. n. 300. See 5 Whart. 366; 14 Ct. Cl. 59, 280, 289; 13 *id.* 136, 392. As to liability of a party for the negligence of a contractor employed by him, see INDEPENDENT CONTRACTOR.

CONTRACTUAL. Of the nature of or pertaining to a contract, as, contractual liability or contractual obligation, which see. A term used by writers on the Roman law to designate the class of obligations described in the classification of the civilians as *ex contractu*, and recently much used in English and American law in connection with the more modern method of classifying contracts referred to in connection with Quasi-Contract. See CONTRACT.

CONTRACTUAL OBLIGATION. The obligation which arises from a contract or agreement.

In the Roman law the expression was a familiar one, and, taking the result of the discussions of the subject by writers on the civil law, and keeping in view both the etymology and the use of the word obligation, we may define it, as there used, to be a tie binding one to the performance of a duty arising from the agreement of parties.

The term is resorted to as a relief from what he considers the misuse of the word contract and the difficulty of defining it, by Prof. E. A. Harriman, who uses it in this sense: "Nevertheless in the case of many 'contracts,' using the word in its broadest sense, we find existing an obligation with certain definite characteristics which can easily be recognized. This obligation we shall venture to call contractual." He divides "the endless variety of obligations which the courts enforce" into irrecusable and recusable obligations. The former are those which are imposed upon the person without his consent and without regard to any act of his own; the latter are the result of a voluntary act on the part of the person on whom they are imposed. These terms are adopted by him from an article by Professor John H. Wigmore in 8 Harv. L. Rev. 200, and he again divides recusable obligations into definite and indefinite, meaning thereby to express whether the extent of the undertaking is determined by the act of the party upon whom the obligation rests or not; and to differentiate still further the precise character of definite recusable obligations, which he terms contractual obligations, Professor Harriman originates the terms unifactoral and bifactoral, as the obligation is created by the act of the party bound, or requires two acts, one by the party bound and the other by the party to be benefited. The term contractual was of constant use by writers on the civil law, and Maine, in his Early Law and Custom, refers to the German Salic law as elaborately discussing contractual obligation. Professor Harriman's definition of this term is "that obligation which is imposed by the law in consequence of a voluntary act, and which is created by its act to its nature and extent by that act." Harr. Cont. 27. The idea of contractual obligation he thinks was unknown to our Anglo-Saxon ancestors; *id.* 15. It is

undoubtedly true, as Professor Harriman asserts, that the best considered theory of contract at the present time has been a slow and tedious development; but it is equally true that among the writers who have given most attention to the study of the historical development of the law there remain wide differences of opinion as to the time and manner of its development. It is likewise to be observed that the theories of Professor Harriman and those who have preceded him, in the views which he has so logically and comprehensively treated, do in fact include much that is familiar to the student of the Roman law, while there is exhibited a reluctance to give to that system due credit for the principles which were fully developed in it. In his preface the author here cited quotes with approval the remark of Sir Frederick Pollock, that English speaking lawyers "must seek a genuine philosophy of the common law, and not be put off with a surface dressing of Romanized generalities." It may be suggested that when, after centuries of an unscientific development of the English law of contract (due to causes which Professor Harriman well sketches in Part II. of his introduction), what seems to be not only a better, but the true theory has come to be recognized and developed; the coincidence of that theory with the root idea of the subject, as expressed in so scientific a system as the Roman law, should be acknowledged and utilized, rather than ignored, or characterized as "recasting English ideas and institutions in a Roman mould." It may be safely asserted that neither contract nor contractual obligation is an English idea or institution, but an idea of human civilization. Sir Henry Maine says we have no society disclosed to us destitute of the conception; Anc. Law 303. It is equally creditable to us to have discovered and developed the correct idea of it after it has been overlaid with the misconceptions of the common law, as to its true nature, as it was to the Civilians to have formulated it correctly as part of their scientifically constructed system. That a concurrence is reached by these distinct processes is strong confirmation of the accuracy of the result. The limits of this work forbid the elaboration of this subject to which it is entitled, and the reader is referred to Harriman, Contracts; Keener, Quasi-Contracts; Maine, Ancient Law, ch. ix.; Holmes, Common Law; Sanders, Inst. of Justinian; Howe, Studies in the Civil Law, which latter work contains an admirable statement of the subject of obligations in the Roman law.

CONTRADICTION. In Practice. To prove a fact contrary to what has been asserted by a witness.

A party cannot impeach the character of his witness, but may contradict him as to any particular fact; 1 Greenl. Ev. § 443; Buil. N. P. 297; 3 B. & C. 746; 4 *id.* 25; 5 Wend. 305; 12 *id.* 105; 21 *id.* 190; 7 Watts 39; 4 Pick. 179, 194; 17 Me. 19.

CONTRAESCRITURA. In Spanish Law. Counter-letter. An instrument, usually executed in secret, for the purpose of showing that an act of sale, or some other public instrument, has a different purpose from that imported on its face. Acts of this kind, though binding on the parties, have no effect as to third persons.

CONTRAFACIO (Lat.). Counterfeiting: as, *contrafactio sigilli regis* (counterfeiting the king's seal). Cowel; Reg. Orig. 42. See COUNTERFEIT.

CONTRAROTULATUR (Fr. *contre-rouleur*). A controller. One whose business it was to observe the money which the collectors had gathered for the use of the king or the people. Cowel.

CONTRAROTULATUR PIPE. An officer of the exchequer that writeth out summontwice every year to the sheriffs to levy the farms (rents) and debts of the pipe. Blount.

CONTRAVENTION. In French Law. An act which violates the law, a treaty, or an agreement which the party

has made. That infraction of the law punished by a fine which does not exceed fifteen francs and by an imprisonment not exceeding three days.

CONTRE-MAITRE. In French Law. The second officer in command of a ship. The officer next in command to the master and under him.

CONTRECTATIO. In Civil Law. The removal of a thing from its place amounting to a theft. The offence is purged by a restoration of the thing taken. Bowy. Com. 268.

CONTREFACON. In French Law. The offence of those who print or cause to be printed, without lawful authority, a book of which the author or his assigns have a copyright. Merlin, *Répert.*

CONTRIBUTION. Payment by one or more persons who are liable, in company with others, of a proportionate part of the whole liability or loss, to one or more of the parties so liable upon whom the whole loss has fallen or who has been compelled to discharge the whole liability. 1 Bibb 562; 4 Johns. Ch. 545; Pars. Part. 198.

"The principle is that parties having a common interest in a subject-matter shall bear equally any burden affecting it. *Qui sentit commodum sentire debet et onus*. Equality is equity. One shall not bear a common burden in ease of the rest. Hence, if, (as often may be done), a lien, charge, or burden of any kind, affecting several, is enforced at law against one only, he should receive from the rest what he has paid or discharged on their behalf. This is the doctrine of equitable contribution, resting on as simple a principle of natural justice as can be put." Per Bates, Ch., in 3 Del. Ch. 260. 8 Co. 11 b; 1 Cox. C. C. 318; 1 B. & P. 270; 4 Johns. Ch. 388; 1 Sto. Eq. 477; 1 Wh. & Tud. L. Cas. in Eq. 66. Though its most common application is to sureties and owners of several parcels of land subject to a lien, the application of the principal is said to be universal by Ld. Redesdale in 3 Bligh 59; and it applies equally to dower as to other incumbrances; 3 Del. Ch. 260; Wright, Ohio 285.

A right to contribution exists in the case of debtors who owe a debt jointly which has been collected from one of them; 4 Jones, N. C. 71; 4 Ga. 545; 19 Vt. 59; 3 Denio 130; 7 Humph. 385. See 1 Ohio St. 327. It also exists where land charged with a legacy, or the portion of a posthumous child, descends or is devised to several persons, when the share of each is held liable for a proportionate part; 3 Munf. 29; 1 Johns. Ch. 425; 1 Cush. 107; 8 B. Mour. 419. As to contribution under the maritime law, see GENERAL AVERAGE. See, generally, 4 Gray 75; 84 Me. 205; 11 Pa. 325; 8 B. Monr. 137; 51 Vt. 253; 77 N. Y. 280; 82 N. C. 334; 61 Ala. 440; 53 Cal. 686; 52 Iowa 597; 127 Mass. 396; 16 Blatchf. 122.

Originally this right was not enforced at law, but courts of common law in modern times have assumed a jurisdiction to compel contribution among sureties in the absence of any positive contract, on the ground of an implied assumpsit, and each of the sureties may be sued for his respective quota or proportion; Wh. & Tud. Lead. Cas. 66; 7 Gill 34, 85; 17 Mo. 150. The remedy in equity is, however, much more effective; 13 Ala. N. S. 225; 2 Rich. Eq. 15; Bisp. Eq. § 329. For example, a surety who pays an entire debt can, in equity, compel the solvent sureties to contribute towards the payment of the entire debt; 1 Ch. Cas. 346; Finch 15, 203; while at law he can recover no more than an aliquot part of the whole, regard being had to the number of co-sureties; 2 B. & P. 268; 6 B. & C. 697; 32 Me. 381. See SUBROGATION. See, generally, as to co-sureties, 1 Lead. Cas. Eq. 100; 13 Am. L. Reg. N. S. 529.

There is no contribution, as a general rule, between joint tort-feasors; 8 T. R. 166; 82 Ind. 488; 32 Md. 245; 8 Ohio 81; 11 Paige 18; 10 Cush. 287; 2 Ohio St. 203; 18 Ohio 1; but this rule does not apply when the person seeking redress did not

in fact know that the act was unlawful, and is not chargeable with knowledge of that fact; 4 Bing. 72; 26 Ala. 633; 28 Conn. 455; 92 N. C. 148; 66 Pa. 318. See 28 Alb. L. J. 148; 4 A. & E. Encyc. 12, 13.

The rule stated also fails when the injury grows out of a duty resting primarily upon one of the parties, and but for his negligence there would have been no cause of action against the other. A servant is consequently liable to his master for the damages recovered against the latter in consequence of the negligence of the servant; 2 Sm. Lead. Cas. 483. Where a recovery is had against a municipal corporation for an injury resulting from an obstruction to the highway, or other nuisance, occasioned by the act or default of its servant, or even of a citizen, the municipality has a right of action against the wrongdoer for indemnity; 2 Black 418.

In Civil Law. A partition by which the creditors of an insolvent debtor divide among themselves the proceeds of his property proportionally to the amount of their respective credits. *La Code*, art. 2522, n. 10. It is a division *pro rata*. Merlin, *Répert.*

CONTRIBUTORY. A person liable to contribute to the assets of a company which is being wound up, as being a member or (in some cases) a past-member thereof. 3 Steph. Com. 24; Moz. & W. Law Dict.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONTROLLER. A comptroller, which see.

CONTROVER. One who invents false news. Co. 2d Inst. 227.

CONTROVERSY. A dispute arising between two or more persons.

It differs from case, which includes all suits, criminal as well as civil; whereas controversy is a civil and not a criminal proceeding; 3 Dall. 419, 431, 432; 1 Tuck. Bla. Com. App. 430, 421.

By the constitution of the United States, the judicial power extends to controversies to which the United States shall be a party. Art. III. sec. 2. The meaning to be attached to the word controversy in the constitution is that above given.

An order of bankruptcy court disallowing a claim is a step in the proceeding, and not a controversy arising in the proceeding within the meaning of § 24a of the Bankruptcy Act. 222 U. S. 414.

See AMOUNT IN CONTROVERSY; CASE OR CONTROVERSY.

CONTRORSERY, SUBMISSION OF. See AGREED CASE.

CONTROVERT. To dispute; to deny; to oppose or contest; to take issue on.

CONTUBERNIUM. In Civil Law. A marriage between persons of whom one or both were slaves. Poth. *Contr. du Mar.* pt. 1, c. 2, § 4.

CONTUMACE CAPIENDO. See DE CONTUMACE CAPIENDO.

CONTUMACY (Lat. *contumacia*, disobedience). The refusal or neglect of a party accused to appear or answer to a charge preferred against him in a court of justice.

Actual contumacy is the refusal of a party actually before the court to obey some order of the court.

Presumed contumacy is the act of refusing or declining to appear upon being cited. 3 Curt. Ecc. i.

CONTUMAX. One accused of a crime who refuses to appear and answer to the charge. An outlaw.

CONTUSION. In Medical Jurisprudence. An injury or lesion, arising from the shock of a body with a large surface, which presents no loss of substance and no apparent wound. If the skin be divided, the injury takes the name of a contused wound. See 4 C. & P. 381, 558, 565; 6 *id.* 684; Thomas, *Med. Dict. sub v.*; 2 Beck, *Med. Jur.* 18, 23.

CONUSANCE, CLAIM OF. See COGNIZANCE.

CONUSANT. One who knows; as, if a party knowing of an agreement in which he has an interest makes no objection to it, he is said to be conusant. Co. Litt. 157.

CONUSOR. A cognizor.

CONVENE. In Civil Law. To bring an action.

CONVENTICLE. A private assembly of a few folks under pretence of exercise of religion. The name was first given to the meetings of Wickliffe, but afterwards applied to the meetings of the non-conformists. Cowel.

The meetings were made illegal by 16 Car. II. c. 4, and the term in its later signification came to denote an unlawful religious assembly.

CONVENTIO (Lat. a coming together). In Canon Law. The act of summoning or calling together the parties by summoning the defendant.

When the defendant was brought to answer, he was said to be convened,—which the canonists called *conventio*, because the plaintiff and defendant met to contest. Story, Eq. Pl. 402; 4 Bouv. Inst. no. 4121.

In Contracts. An agreement; a covenant. Cowel.

Often used in the maxim *conventio vincit legem* (the express agreement of the parties supercedes the law). Story, Ag. § 368. But this maxim does not apply, it is said, to prevent the application of the general rule of law. Broom, Max. 690. See MAXIMS.

CONVENTION. In Civil Law. A general term which comprehends all kinds of contracts, treaties, pacts, or agreements. The consent of two or more persons to form with each other an engagement, or to dissolve or change one which they had previously formed. Domat, l. 1, t. 1, s. 1; Dig. lib. 2, t. 14, l. 1; lib. 1, t. 1, l. 1, 4 and 5; 1 Bouvier, Inst. no. 100.

In Legislation. This term is applied to a meeting of the delegates elected by the people for other purposes than usual legislation. It is used to denote an assembly to make or amend the constitution of a state; also an assembly of the delegates of the people to nominate candidates to be supported at an election. As to the former use, see Jameson, *Constit. Conv.*; Cooley, *Const. Lim.*; CONSTITUTIONAL CONVENTION.

CONVENTION PARLIAMENT. An extraordinary assembly of the Houses of Lords and Commons, without the assent or summons of the sovereign. It can only be justified *ex necessitate rei*, as the parliament which restored Charles II. and that which disposed of the crown and kingdom to William and Mary. R. & L. Dict.

CONVENTIONAL. Arising from, and dependent upon, the act of the parties, as distinguished from *legal*, which is something arising from act of law. 2 Bla. Com. 120.

CONVENTAS (Lat. *convenire*). As assembly. *Conventus magnatum vel procerum.* An assemblage of the chief men or nobility; a name of the English parliament. 1 Bla. Com. 248.

In Civil Law. A contract made between two or more parties,

A multitude of men, of all classes, gathered together.

A standing in a place to attract a crowd. A collection of the people by the magistrate to give judgment. Calvinus, *Lex*.

CONVENTUS JURIDICUS. A Roman provincial court for the determination of civil causes.

CONVERSANT. One who is in the habit of being in a particular place is said to be conversant there. Barnes 162. Acquainted; familiar.

CONVERSION (Lat. *con*, with, together, *vertere*, to turn; *conversio*, a turning to, with, together).

In Equity. The exchange of property from real to personal or from personal to

real, which takes place under some circumstances in the consideration of the law, such as, to give effect to directions in a will or settlement, or to stipulations in a contract, although no such change has actually taken place. 1 Bro. C. C. 497; 1 Lead. Cas. Eq. 619; *id.* 872; 3 Redf. 235; 46 Wis. 70; 32 N. J. Eq. 181.

A *qualified conversion* is one directed for some particular purpose; 4 Del. Ch. 72. Where the purpose of conversion totally fails no conversion takes place, but the property remains in its original state, but where there is a partial failure of the purpose of conversion of land the surplus results to the heir; 1 Bro. C. C. 503; as money and not as land, and therefore if he be dead it will pass to his personal representatives even if the land were sold in his lifetime; 4 Madd. 492. The English authorities strongly favor the heir, and the authorities are collected by Bispham (Pr. of Eq. pt. ii. ch. v.) and by Bates, Ch. (4 Del. Ch. 72), who held that where there was a qualified conversion by will, if one of the legacies fail, whether it be void *ab origine* or lapse, that portion of the fund which fails of its object will result to the party who would have been entitled to the real estate unsold. Bispham considers the American authorities less favorable to the heir than the English, citing 3 Wheat. 563, where it was held that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold the character of personality, to all intents and purposes the claim of the heir is defeated and the estate is considered personal (see also 2 Rawle 185). But in the Delaware case cited it was considered that the English doctrine of qualified conversion was fully sustained by the American cases at large as collected in the American note to Ackroyd v. Smithson, 1 Wh. & Tud. L. Cas. in Eq. 590; and the case cited by Bispham from 4 Wheat., as appears from the foregoing statement of it, does not conflict with the English doctrine, as it is expressly limited to cases in which the intention is clear that the heir shall not take.

Land is held to be converted into money, in equity, when the owner has contracted to sell; and if he die before making a conveyance, his executors will be entitled to the money, and not his heirs; 1 W. Bla. 129; 62 Ala. 145.

When land is ordered by a will to be sold, it is regarded as converted into personality; 3 D. R. Pa. 187; but amere power of sale will not have that effect until it is exercised; 16 Pa. 65. Lands taken under the right of eminent domain are converted; 29 Atl. Rep. (N. J.) 592.

Money may be held to be converted into land under various circumstances: as where, for example, a man dies before a conveyance is made to him of land which he has bought. 1 P. Wms. 176; 10 Pet. 563; Bouvier, *Inst. Index*. See 53 How. Pr. 175; 49 Md. 72.

Courts of equity have power to order the conversion of property held in a trust from real estate into personal estate, or *vice versa*, when such conversion is not in conflict with the will of the testator, expressly or by implication, and is for the interest of the *cestui que trust*; 4 Del. Ch. 615; 1 Hill, S. C. 112. The English court of chancery largely exercised this jurisdiction; 2 Sto. Eq. Jur. § 1357; 6 Ves. Jr. 6; 6 Madd. 100.

At Law. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. 44 Me. 197; 36 N. H. 311; 45 Wis. 262.

A *constructive conversion* takes place when a person does such acts in reference to the goods or personal chattels of another as amount, in view of the law, to appropriation of the property to himself.

A *direct conversion* takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroys it, or alters its nature.

Every such unauthorized taking of personal property; Poll. Torts 435; 3 J. J. Mar. 84; 1 Bailey 546; 10 Johns. 172; 92 Ill. 218;

and all intermeddling with it beyond the extent of authority conferred, in case a limited authority over it has been given: 1 Metc. Mass. 555; 14 Vt. 387; 72 N. Y. 188; 46 Conn. 109; 75 N. Y. 547; 1 Ga. 381; with intent so to apply or dispose of it as to alter its condition or interfere with the owner's dominion; 18 Pick. 227; 8 M. & W. 540; constitutes a conversion, including a taking by those claiming without right to be assignees in bankruptcy; 3 Brod. & B. 2; using a thing without license of the owner; 8 Vt. 281; 6 Hill 425; 5 Ill. 495; 44 Me. 497; 11 Rich. Eq. 267; 5 Sneed 261; 24 Mo. 86; or in excess of the license; 16 Vt. 138; 5 Mass. 104; 4 E. D. Sm. 397; 5 Duer 40; 5 Jones, N. C. 122; misuse or detention by a finder or other bailee; 2 Pa. 416; 5 Mass. 104; 3 Pick. 492; 2 B. Monr. 339; 10 N. H. 199; 18 Me. 382; 8 Leigh 565; 3 Ark. 127; 1 Humph. 199; 4 E. D. Sm. 397; 31 Ala. n. s. 26; see 12 Gratt. 153; delivery by a bailee in violation of orders; 16 Ala. 466; non-delivery by a wharfinger, carrier, or other bailee; 4 Ala. 46; 2 Johns. Cas. 411; 1 Rice 204; 17 Pick. 1; see 28 Barb. N. Y. 515; a wrongful sale by a bailee, under some circumstances; 4 Taunt. 799; 8 id. 237; 10 M. & W. 576; 11 id. 363; 6 Wend. 603; 16 Johns. 74; 1 Dev. L. 306; 92 Ill. 218; 39 Mich. 413; a failure to sell when ordered; 1 Har. & J. 579; 13 Ala. n. s. 460; improper or informal seizure of goods by an officer; 2 Vt. 383; 18 id. 590; 5 Cow. 323; 3 Mo. 207; 5 Yerg. 313; 1 Ired. 453; 17 Conn. 154; 2 Blatchf. 552; 37 N. H. 86; informal sale by such officer; 2 Ala. 576; 14 Pick. 356; 3 B. Monr. 457; or appropriation to himself; 2 Pa. 416; 3 N. H. 144; as against such officer in the last three cases; the adulteration of liquors as to the whole quantity affected; 3 A. & E. 306; 8 Pick. 551; an excessive levy on a defendant's goods, followed by a sale; 6 Q. B. 381; but not including a mere trespass with no further intent; 8 M. & W. 540; 18 Pick. 227; nor an accidental loss by mere omission of a carrier; 2 Greenl. Ev. § 643; 5 Burr. 2825; 1 Pick. 50; 6 Hill 586; see 17 Pick. 1; nor mere non-feasance; 2 B. & P. 438; 12 Johns. 300; 19 Vt. 436. A manual taking is not necessary.

The intention required is simply an intent to use or dispose of the goods, and the knowledge or ignorance of the defendant as to their ownership has no influence in deciding the question of conversion; 3 Ired. 29; 4 Denio 180; 30 Vt. 307; 11 Cush. 11; 17 Ill. 413; 33 N. H. 151.

A license may be presumed where the taking was under a necessity, in some cases; 6 Esp. 81; or, it is said, to do a work of charity; 2 Greenl. Ev. § 643; or a kindness to the owner; 4 Esp. 195; 11 Mo. 219; 8 Metc. 578; without intent, in the last two cases, to injure or convert it; 8 Metc. 578. As to what constitutes a conversion as between joint owners, see 2 Dev. & B. Eq. 252; 1 Hayw. 255; 21 Wend. 72; 2 Murph. 65; 16 Vt. 382; 1 Dutch. 173; and as to a joint conversion by two or more, see 2 N. H. 546; 15 Conn. 384; 2 Rich. 507; 3 E. D. Sm. 555; 40 Me. 574. A tenant in common can maintain trover for the sale or attempted sale of the common chattel; 6 Cal. 559; 33 Ala. 559; 42 N. Y. 549; contra, 27 Vt. 93; 9 Ex. 145; some cases hold that nothing short of the destruction of the plaintiff's property is a conversion, because a sale passes only the vendor's title and the co-tenant continues a co-tenant with the purchaser; Big. Torts 204. It is held also that trover lies, between co-tenants, for a mere withholding of the chattel, or the misuse of it, or for a refusal to terminate the common interest; 17 Pa. 373; 12 Mich. 328.

An original unlawful taking is in general conclusive evidence of a conversion; 1 M'Cord 213; 15 Johns. 431; 13 N. H. 494; 17 Conn. 154; 29 Pa. 154; 126 Mass. 132; as is the existence of a state of things which constitutes an actual conversion; 6 Wend. 603; 7 Halst. 244; 1 Leigh 86; 12 Me. 243; 3 Mo. 382; 14 Vt. 367; without showing a demand and refusal; but where the original taking was lawful and the detention only is illegal, a demand and refusal to deliver must be shown; 47 Miss. 570; 5 B. & C.

140; 2 J. J. Marsh. 84; 16 Conn. 71; 19 Mo. 467; 2 Cal. 571; but this evidence is open to explanation and rebuttal; Cooley, Torts 532; 2 Wms. Saund. 47 e; 5 B. & Ald. 847; 16 Conn. 71; 6 S. & R. 300; 1 Cow. 322; 28 Barb. 75; 8 Md. 148; even though absolute; 2 C., M. & R. 495. Demands and unlawful refusal constitute a conversion; Big. Torts 200; mere refusal is only evidence of conversion; id. 202.

The refusal, to constitute such evidence, must be unconditional, and not a reasonable excuse; 7 C. & P. 285; 3 Ad. & E. 106; 5 N. H. 225; 8 Vt. 433; 9 Ala. 383; 16 Conn. 76; 1 Rich. 65; 24 Barb. 528; or accompanied by a condition which the party has no right to impose; 6 Q. B. 443; 2 Dev. L. 130; if made by an agent, it must be within the scope of his authority, to bind the principal; 6 Jur. 507; 5 Hill, N. Y. 455; 1 E. D. Sm. 532; but is not evidence of conversion where accompanied by a condition which the party has a right to impose; 6 Q. B. 443; 5 B. & Ald. 247; 7 Johns. 302; 2 Dev. L. 130; 2 Mas. 77. It may be made at any time prior to bringing suit; 2 Greenl. Ev. § 644; 11 M. & W. 366; 6 Johns. 44; if before he has parted with his possession; 11 Vt. 351. It may be inferred from non-compliance with a proper demand; 7 C. & P. 339; 2 Johns. Cas. 411. The demand must be a proper one; 2 N. H. 546; 1 Johns. Cas. 406; 2 Const. S. C. 239; 9 Ala. 744; made by the proper person; see 2 Brod. & B. 447; 2 Mas. 77; 12 Me. 328; and of the proper person or persons; 3 Q. B. 699; 2 N. H. 546; 1 E. D. Sm. 522. The plaintiff must have at least the right to immediate possession; 127 Mass. 64.

CONVERTIBLE STOCK. See STOCK.

CONVEY. To pass or transmit from one to another; to transfer property, or the title to property, by an instrument in writing. In a stricter sense, to transfer by deed or instrument under seal. See CONVEYANCE.

The word "take" may be regarded as an equivalent of "convey." 3 A. K. Mar. (Ky.) 509.

The term "convey," we conceive is in meaning and effect sufficient to answer the requisites of a grant at common law and under our statute concerning conveyances, and to carry with it the legal estate and vest it in the grantee. 3 A. K. Mar. (Ky.) 621.

The word "convey" used in an act, intended the passing of titles by conveyances, technically so-called, and not wills which are only *quasi* conveyances, and are not properly described by the term conveyance. 3 A. K. Mar. (Ky.) 509.

CONVEYANCE. The transfer of the title of land from one person or class of persons to another. 21 Barb. 551; 29 Conn. 356.

The instrument for effecting such transfer. It includes leases; 47 Cal. 242; and mortgages; 46 Cal. 603.

When there is no express agreement to the contrary, the expense of the conveyance falls upon the purchaser; 2 Ves. 155, note; who must prepare and tender the conveyance. But see, *contra*, 2 Rand. 20; Warvelle, Vend. 347. The expense of the execution of the conveyance is, on the contrary, usually borne by the vendor; Sugd. Vend. & P. 296; *contra*, 2 Rand. 20; 2 McLean 495. See 3 Mass. 487; 5 id. 472; Eunom. 2, § 12.

The forms of conveyance have varied widely from each other at different periods in the history of the law, and in the various states of the United States. The mode at present prevailing in this country is by bargain and sale. For a fuller account of this subject, see Sugden, Vendors; Geldart; Preston; Thorton. Conv.; Tiedeman; Washb. R. P.; Dembitz, Land Titles; Bouvier, Institutes, Index. See ASSIGNMENT; GENERAL ASSIGNMENT.

CONVEYANCE OF VESSELS.

The transfer of the title to vessels.

The act of congress approved the 29th July, 1850, Rev. Stat. § 4192, entitled An act to provide for recording the conveyances of vessels, and for other

purposes, enacts that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled. Provided, that the lien by bottomry on any vessel created, during her voyage, by a loan of money or materials necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of the act.

The second section enacts, that the collectors of the customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and also all certificates for discharging and cancelling any such conveyances, in a book or books to be kept for that purpose, in the order of their reception, noting in said book or books, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received; and shall certify on the bill of sale, mortgage, hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive, for so recording such instrument of conveyance or certificate of discharge, fifty cents.

The third section enacts that the collectors of the customs shall keep an index of such records, inserted alphabetically the names of the vendor or mortgagor, and of the vendee or mortgagee; and shall permit said index and books of records to be inspected during office-hours, under such reasonable regulations as they may establish; and shall, when required, furnish to any person a certificate setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, if inserted in the register or enrollment, and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel recorded since the issuing of the last register or enrollment,—viz., the date, amount of such incumbrance, from and to whom or in whose favor made. The collector shall receive for each such certificate one dollar.

The fourth section provides that the collectors of the customs shall furnish certified copies of such records, on the receipt of fifty cents for each bill of sale, mortgage, or other conveyance.

The fifth section provides that the owner or agent of the owner of any vessel of the United States, applying to a collector of the customs for a register or enrollment of a vessel, shall, in addition to the oath now prescribed by law, set forth, in the oath of ownership, the part or proportion of such vessel belonging to each owner, and the same shall be inserted in the register of enrollment; and that all bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing.

CONVEYANCEE. One who makes it his business to draw deeds of conveyance of lands for others and to investigate titles of real property. They frequently act as brokers for the sale of real estate and obtaining loans on mortgage, and transact a general real estate business.

CONVEYANCES BY RECORD. See RECORD, CONVEYANCES BY.

CONVEYANCING. A term including both the science and art of transferring titles to real estate from one man to another.

It includes the examination of the title of the alien and also the preparation of the instruments of transfer, as is, in England and Scotland, and, to a less extent, in the United States, a highly artificial system of law, with a distinct class of practitioners. A profound and elaborate treatise on the English law of conveyancing is Mr. Preston's Geldart and Thornton's works are also important; and an interesting and useful summary of the American law is given in Washburn on Real Property. See Clerke; Martindale; Morris; Yeakle, Conveyancing.

CONVEYANCING COUNSEL TO THE COURT OF CHANCERY. Certain counsel, not less than six in number, appointed by the Lord Chancellor, for the purpose of assisting the court of chancery, or any judge thereof, with their opinion in matters of title and conveyancing. Stat. 15 & 16 Vict. c. 80, ss. 40, 41; Moz. & W. Law Dict.

CONVICIUM. In Civil Law. The name of a species of slander or injury uttered in public, and which charged some one with some act *contra bonos mores*. Vicat; Bac. Abr. Slander, 29.

CONVICT. One who has been condemned by a competent court. One who has been convicted of a crime or misdemeanor.

To condemn. To find guilty of a crime or misdemeanor. 4 Bla. Com. 362.

CONVICTED. Found guilty of a crime whereof one stands indicted. A conviction may accrue in two ways, either by a confes-

sion and plea of guilt, or by the verdict of one's country. 4 Bla. Com. 362.

CONVICTION (Lat. *convictio*; from *con*, with, *vincere*, to bind). In Practice. That legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded. 48 Me. 123; 109 Mass. 323; 99 *id.* 420.

Finding a person guilty by verdict of a jury. 1 Bish. Cr. L. § 223; see 45 Alb. L. J. 1.

A record of the summary proceedings upon any penal statute before one or more justices of the peace or other persons duly authorized, in a case where the offender has been convicted and sentenced. Holt-house, Dict.

The first of the definitions here given undoubtedly represents the accurate meaning of the term, and includes an ascertainment of the guilt of the party by an authorized magistrate in a summary way, or by confession of the party himself, as well as by verdict of a jury. The word is also used in each of the other senses given. It is said to be sometimes used to denote final judgment. Dwar. 2d ed. 683.

Summary conviction is one which takes place before an authorized magistrate without the intervention of a jury.

Conviction must precede judgment or sentence; 1 Cal. 72; 34 Me. 534; see 51 Ill. 311; but it is not necessarily or always followed by it; 1 Den. C. C. 568; 14 Pick. 88; 8 Wend. 204; 3 Park. C. Cas. 567; 4 Ill. 76; 24 How. Pr. 38. Generally, when several are charged in the same indictment, a part may be convicted and the others acquitted; 2 Den. C. C. 86; 4 Hawks 356; 8 Blackf. 205; but not where a joint offence is charged; 14 Ohio 386; 6 Ired. 340. A person cannot be convicted of part of an offence charged in an indictment, except by statute; 7 Mass. 250; 7 Mo. 177; 1 Murph. 134; 13 Ark. 712. A conviction prevents a second prosecution for the same offence; Whart. Cr. Pl. § 456; 1 McLean 429; 7 Conn. 414; 14 Ohio 295; 2 Yerg. 24; 28 Pa. 13. But the recovery in a civil suit, of a fine, part of a penalty under a statute, does not prevent the prosecution of the defendant for the purpose of enforcing the full penalty by imprisonment; 16 Blackf. 9. And see 70 Me. 452; 8 Tex. App. 447; 66 Ind. 223. A conviction of a less offence may be had where the indictment charges a greater offence, which necessarily includes the less; 82 N. C. 621; 8 Tex. App. 71; 8 Baxt. 401; 23 Kan. 244; 52 Ia. 608. As to the rule where the indictment under which the conviction is procured is defective and liable to be set aside, see 1 Bish. Cr. L. §§ 663, 664; 4 Co. 44 a.

At common law conviction of certain crimes when accompanied by judgment disqualifies the person convicted as a witness; 18 Miss. 192. And see 11 Metc. 302. But where a statute making *defendants* witnesses is without exception, a conviction rendering such defendant infamous will not disqualify him; 5 Lans. 332; 63 Barb. 630. See 107 Mass. 403.

Summary convictions, being obtained by proceedings in derogation of the common law, must be obtained strictly in pursuance of the provisions of the statute; 1 Burr. 613; and the record must show fully that all proper steps have been taken; R. M. Charl. 235; 1 Cox 392; 2 Bay 105; 19 Johns. 39, 41; 14 Mass. 224; 3 Me. 51; 4 Zab. 142; and especially that the court had jurisdiction; 2 Tyler 167; 4 Johns. 292; 3 Yeates 475.

As to payment of costs upon conviction, see 1 Bish. Cr. Pr. § 1317, n.

Consult Arnold; Paley, Convictions; Russell; Bishop; Wharton; Clarke, Criminal Law; Greenleaf; Phillips, Evidence.

See SUMMARY CONVICTION.

Second. The "second" or any subsequent "conviction" for a violation of the act or any of its amendments, refers to a conviction for an offence committed after his conviction for a previous like offense. 116 Ky. 410, 76 S. W. 174.

CONVIVIVUM. A tenure by which a tenant was bound to provide meat and drink for his lord at least once in the year. Cowel.

CONVOCAION (Lat. *con*, together, *voco*, to call).

In Ecclesiastical Law. The general assembly of the clergy to consult upon ecclesiastical matters. See COURT OF CONVOCAION.

CONVOY. A naval force, under the command of an officer appointed by government, for the protection of merchant-ships and others, during the whole voyage, or such part of it as is known to require such protection. Marsh. Ins. b. 1, c. 9, s. 5; Park. Ins. 388.

Warranties are sometimes inserted in policies of insurance that the ship shall sail with convoy. To comply with this warranty, five things are essential: first, the ship must sail with the regular convoy appointed by the government; secondly, she must sail from the place of rendezvous appointed by the government; thirdly, the convoy must be for the voyage; fourthly, the ship insured must have sailing instructions; fifthly, she must depart and continue with the convoy till the end of the voyage, unless separated from it by necessity. Marsh. Ins. b. 1, c. 9, s. 5.

CO-OBLIGOR. Contracts. One who is bound together with one or more others to fulfil an obligation. As to suing co-obligors, see PARTIES; JOINDER.

COOL BLOOD. Tranquillity, or calmness. The condition of one who has the calm and undisturbed use of his reason. In cases of homicide, it frequently becomes necessary to ascertain whether the act of the person killing was done in cool blood or not, in order to ascertain the degree of his guilt. Bacon, Abr. *Murder* (B); Kel. 56; Sid. 177; Lev. 180.

COOLING-TIME. In Criminal Law. Time for passion to subside and reason to interpose. Cooling-time destroys the effect of provocation, leaving homicide murder the same as if no provocation had been given; 1 Russ. Cr. 667; Whart. Hom. 448; Kerr, Hom. 68; 3 Gratt. 594. See 29 Cent. L. J. 186; HOMICIDE.

CO-OWNERSHIP. While, as a general rule, lands or estates therein are held by one person in severalty, that is, in his own right only, without any other person being joined or connected with him in the ownership, this is not necessarily the case, and two or more persons may have undivided interests in the land; the common characteristic of all such interests being that the owners have no separate rights as regards any distinct portion of the land, but each is interested, according to the extent of his share, in every part of the whole land. (2 Bl. Com. 179). Such co-ownership bears different names, and presents different characteristics, according to the various methods and circumstances of its creation. For examples of co-ownership see the titles, JOINT TENANCY; TENANCY IN COMMON; COPARCENARY; TENANCY BY ENTIRETIES; COMMUNITY PROPERTY; PARTNERSHIP PROPERTY. 1 Tiffany, Real Prop. 2d ed., 625.

COP. See LAND COP.

COPARCENARY, ESTATES IN. Estates of which two or more persons form one heir. 1 Washb. R. P. 414.

The title to such an estate is always by descent. The shares of the tenants need not be equal. The estate is rare in America, but sometimes exists; 3 Ind. 360; 4 Gratt. 16; 17 Mo. 13; 3 Md. 190. See Watk. Conv. 145. CO-OWNERSHIP; JOINT OWNERSHIP; TENANCY IN COMMON; PARTNERSHIP PROPERTY; COMMUNITY PROPERTY.

COPARCENERS. Persons to whom an estate of inheritance descends jointly, and by whom it is held as an entire estate. 2 Bla. Com. 187.

In the old English and the American sense the term includes males as well as females, but in the modern English use is limited to females; 4 Kent 386. But the husband of a deceased coparcener, if entitled as tenant by the curtesy, holds as a coparcener with the surviving sisters of his wife, as does also the heir-at-law of his deceased wife upon his own death; Brown, Dict.

COPARTNER. One who is a partner with one or more other persons; a member of a partnership.

COPARTNERSHIP. A partnership.

COPARTNERY. In Scotch Law. The contract of copartnership. Bell, Dict.

COPE. A duty charged on lead from certain mines in England. Blount.

COPIA LIBELLI DELIBERANDA. A writ to enable a man accused to get a copy of the libel from the judge ecclesiastical. Cowel.

COPULATIVE TERM. One which is placed between two or more others to join them together.

COPY. A true transcript of an original writing.

Exemplifications are copies verified by the great seal or by the seal of a court. 1 Gilb. Ev. 19.

Examined copies are those which have been compared with the original or with an official record thereof.

Office copies are those made by officers intrusted with the originals and authorized for that purpose.

The papers need not be exchanged and read alternately; 2 Taunt. 470; 1 Stark. 183; 4 Campb. 372; 1 C. & P. 578. An examined copy of the books of an unincorporated bank is not evidence *per se*; 12 S. & R. 256; 2 N. & M'C. 299; 1 Greenl. Ev. § 508.

Copies cannot be given in evidence, unless proof is made that the originals from which they are taken are lost or in the power of the opposite party, and, in the latter case, that notice has been given him to produce the original; 1 Greenl. Ev. § 508; Tayl. Ev. 396.

A translation of a book is not a copy; 2 Wall. Jr. 547; 2 Am. L. Reg. 239; and a copy of a book means a transcript of the entire work; 12 Mo. Law Rep. n. s. 339.

COPYHOLD. A tenure by copy of court-roll. Any species of holding by particular custom of the manor. The estate so held.

A copyhold estate was originally an estate at the will of the lord, agreeably to certain customs evidenced by entries on the rolls of the courts baron. Co. Litt. 88 a; 2 Bla. Com. 35; 1 Poll. & M. 351, 357. It is a villenage tenure deprived of its servile incidents. The doctrine of copyhold is of no application in the United States. Wms. R. P. 257, 258, Rawle's note; 1 Washb. R. P. 26.

COPYHOLDER. A tenant by copyhold tenure (by copy of court-roll). 2 Bla. Com. 95.

COPYRIGHT. The exclusive privilege, secured according to certain legal forms, of printing, or otherwise multiplying, publishing, and vending copies of certain literary or artistic productions.

The intellectual productions to which the law extends protection are of three classes. *First*, writings or drawings capable of being multiplied by the arts of printing or engraving. *Second*, designs of form or configuration capable of being reproduced upon the surface or in the shape of bodies. *Third*, inventions in what are called the useful arts. To the first class belong books, maps, charts, music, prints, and engravings; to the second class belong statuary, bas-reliefs, designs for ornamenting any surface, and configurations of bodies; the third class comprehends machinery, tools, manufactures, compositions of matter, and processes or methods in the arts. According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing, which may be multiplied by the arts of printing in any of its branches. Property in the other classes of intellectual objects is usually secured by letters-patent, and the interest is called a *patent-right*. But the distinction is arbitrary and conventional.

The foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others. But, as it would be impracticable in civil society to prevent others from copying such characters or forms without the intervention of positive law, and as such intervention is highly expedient, because it tends to the increase of human culture, knowledge, and convenience, it has been the practice of civilized nations in modern times to secure and regulate the otherwise insecure and imperfect right which, according to the principles of natural justice, belongs to the author of new ideas.

This has been done by securing an exclusive right of multiplying copies for a limited period, as far as the municipal law of the particular country extends. But, inasmuch as the original right, founded in the principles of natural justice, is of an imperfect character, and requires, in order to be valuable, the intervention of municipal law, the law of nations has not taken notice of it as it has of some other rights of property; and therefore all copyright is the result of some municipal regulation, and exists only in the limits of the country by whose legislation

it is established. The international copyright which is established in consequence of a convention between any two countries is not an exception to this principle: because the municipal authority of each nation making such convention either speaks directly to its own subjects through the treaty itself, or is exerted in its own limits by some enactment made in pursuance of the international engagement.

It was formerly doubtful in England whether copyright, as applied to books, existed at common law, and whether the first statute (8 Anne, c. 19) which undertook to regulate this species of incorporeal property had taken away the unlimited duration which must exist at common law if that law recognized any right whatever.

The better opinion seems to be that the common law of England, before the statute of Anne, was supposed to admit the exclusive right of an author to multiply copies of his work by printing, and also his capacity to assign that right; for injunctions were granted in equity to protect it. See, on this subject, 4 Burr. 2308, 2408; 2 Bro. P. C. 145; 1 W. Bla. 301; 3 Swann. 673; 2 Ed. Ch. 327; 4 H. L. C. 815; 4 Exch. 145. But it has long been settled that, whatever the common-law right may have been before the statute, it was taken away by the statute, and that copyright exists only by force of some statutory provision; 8 Pet. 591; 17 How. 454; Drone, Copyr. 1; 128 U. S. 244.

In America, before the establishment of the constitution of the United States, it is doubtful whether there was any copyright at common law in any of the states; 8 Pet. 591. But some of the states had passed laws to secure the rights of authors, and the power to do so was one of their original branches of sovereignty, afterwards ceded to congress. By art. I, sect. 8, of the federal constitution, power was given to congress "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Under this authority, an act of May 31, 1790, secured a copyright in books, charts and books; and an act of April 23, 1802, gave a similar protection to engravings.

The persons entitled to secure a copyright, and what may be protected. The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person, may secure the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and authors or their assigns may reserve the exclusive right of dramatizing the same; and, in the case of a dramatic composition, of publicly performing or representing it, etc., or causing it to be performed or represented by others; R. S. § 4953, as amended March 3, 1891, 1 Supp. 951.

What may be copyrighted. Private letters may be copyrighted by their author; 2 Story 100; and so may abstracts of title; 3 Minn. 94.

The compilations of existing material selected from common sources arranged and combined in original and useful form are the subject of a copyright, whether it consists wholly of selected matter or partly of original composition; Drone, Copyr. 152; Thus: (*ibid.*) dictionaries; 2 Sim. & Stu. 1; gazetteers; 5 Beav. 6; road and guide books; 1 Drew. 353; directories; L. R. 1 Eq. 697; calendars; 12 Ves. 270; catalogues; L. R. 18 Eq. 444; mathematical tables; 1 Russ. & Myl. 73; a list of hounds; L. R. 9 Eq. 324; a collection of statistics; L. R. 3 Eq. 718.

An abridgment, one not a mere transcript of the part of an original, may be copyrighted; Drone, Copyr. 158; 1 Story 11; so may a digest; Drone, Copyr. 158. One who prepares reports of decided cases may obtain a valid copyright for the parts of which he is the author or compiler; 8 Pet. 591; 2 Blatchf. 165; 13 Wall. 608; but the reporter is not entitled to a copyright in the opinion of the court, even though he took it down from the lips of the judge, nor in the head notes when prepared by the judge; 6 U. S. Pat. Off. Gaz. 932.

The translation of a foreign work may be copyrighted, but this will not prevent the publishing of an independent translation of the same work; 6 Biss. 477.

The collection and arrangement of advertisements in a trade directory are the subject of copyright, though each single advertisement is not; [1893] 1 Ch. 218. A compilation made from voluminous public documents may be copyrighted; 32 Fed.

Rep. 202. A compilation of prices and quotations on the stock exchange, printed on sheets and issued daily as a newspaper; 73 Law J. 120.

A photographer, who makes no charge for photographing an actress in her public character, has the right to secure a copyright for his own exclusive benefit; 50 Fed. Rep. 324; and where he produces by an arrangement of lights and shadows, an original effect representing his conception of her in a certain character, he is entitled to the protection of the copyright laws; 57 Fed. Rep. 32. So of an artistic photograph of a woman and child; 111 U. S. 53; 48 Fed. Rep. 678;

A "book" may be printed on one sheet; 2 Paine 883; 1 Bond 640.

A diagram with directions for cutting ladies' garments printed on a single sheet of paper is a "book" within the copyright acts; 1 Bond 540; and so is a cut in an illustrated newspaper; 26 Fed. Rep. 519; information in a time-table may be copyrighted; 1 Eq. 697.

A scene in a play representing a series of dramatic incidents, but with very little dialogue, may be copyrighted; 56 Fed. Rep. 483; s. c. 4 C. C. A. 110; so of the introduction, chorus, and skeleton of a "topical song"; 60 Fed. Rep. 738. See 6 Blatchf. 256.

When a new edition differs substantially from the former one, a new copyright may be acquired, provided the alteration shall materially affect the work; 1 Story 11; 13 Blatchf. 163. New editions of a copyright work are protected by the original copyright, but not new matter; 4 Cliff. 1; 1 Flipp. 228.

What may not be copyrighted. No copyright can be obtained on racing tips published in a copyrighted newspaper; [1895] 2 Ch. 29; nor on a daily price current; 2 Paine 882; nor on a blank; 101 U. S. 99; nor cuts contained in a trade catalogue; 72 Fed. Rep. 168.

Where the judge of a supreme court of a state prepares the opinion or decision of the court, the statement of the case, and the syllabus, and the reporter of the court takes out a copyright in his own name for the state, the copyright is invalid; 128 U. S. 244. Where a reporter is employed on a condition that his reports shall belong to the state, he is not entitled to a copyright; 2 Blatchf. 165; 27 Fed. Rep. 50.

Publications of an improper kind will not be protected by the courts; 1 Deady 223.

An author cannot acquire any right to the protection of his literary products by using an assumed name or pseudonym. Without the protection of a copyright, his work is dedicated to a public when published; 14 Fed. Rep. 728. Where an advertisement solicitor entered into a contract to furnish 60,000 letters in possession of a company, which letters had been received in response to advertisements, it was held, in an action upon the contract for unpaid purchase money, that the writers of the letters retained such a proprietary interest in them that they could not be made the subject of sale without their consent, and the contract was therefore void; 32 Fed. Rep. 437.

The compilation of the statutes of a state may be so original as to entitle the author to a copyright, but he cannot obtain one for the laws alone, and the legislature of the state cannot confer any such exclusive privilege upon him; 27 Fed. Rep. 61. Such a compilation of statutes may be copyrighted as to the manner in which the work was done, but not as to the laws alone; *id.* A stage dance illustrating the poetry of motion of a series of graceful movements, etc., is not a dramatic composition within the act; 50 Fed. Rep. 926. The copyright of a book describing a new system of stenography does not protect the system apart from the language by which it is explained; 49 Fed. Rep. 15.

An opinion is not the subject-matter of copyright; nor is a printed expression of it, unless it amount to a literary composition; [1895] 2 Ch. 29; s. c. 12 Reports 381.

The term for which a copyright may be

obtained is the period of twenty-eight years from the time of recording the title; and at the expiration of that period the author, inventor, or designer, if living, or his widow and children, if he be dead, may re-enter for an additional or renewed term of fourteen years; upon recording title of the work, or description of the article so secured, a second time, and complying with all other regulations in regard to original copyrights within six months before the expiration of the first term, and, within two months from the date of said renewal, causing a copy of the record thereof to be published in one or more newspapers of the United States for two or more weeks; U. S. Rev. Stat. 1 Supp. 951.

The formalities requisite to the securing of the original term are: 1. The deposit on or before the day of publication in this or any foreign country, in the office of the librarian of congress or in the mail in the United States, addressed to the librarian of congress at Washington, of a printed copy of the title of the book, map, chart, etc., or a description of the painting, etc., and not later than the day of publication thereof, in this or any foreign country, delivering at the said office or so depositing in the mail, two copies of such book, etc., or in case of a painting, etc., a photograph of the same; and the proprietor of every such copyright book or other article must deliver at the said office or so deposit in the mail a copy of every subsequent edition wherein any substantial changes are made; which copies shall be printed from type set, or plate, negative, or drawing on stone, made in the United States, or from transfers made therefrom; U. S. Rev. Stat. § 4956, as amended by act of March 3, 1891, § 3. 2. The printing of a notice that a copyright has been secured on the title-page of every copy, or the page immediately following, if it be a book, or on the face, or front, if it be a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be completed as a work of the fine arts, or on the title or frontispiece, if it be a volume of maps, charts, music, or engravings, in the following words:—

"Entered according to Act of Congress, in the year _____, by A. B. in the office of the Librarian of Congress, at Washington," or at his option, the word "copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out; Thus:—"Copyright, 18—, by A. B."

In order to maintain an action for infringement on a copyright of a painting, a notice of copyright must have been inscribed on some visible portion thereof, when it was published; 72 Fed. Rep. 54. In the notice of copyright of a photograph the abbreviation "94," representing the year, is a substantial compliance with the act; 65 Fed. Rep. 94. The following notice on a map:—"Copyright entered according to Act of Congress, 1889, by T. C. Hefel, Civil Engineer," is sufficient, since it differs from the prescribed formula only by including words which are surplusage; 54 Fed. Rep. 179. The words "1889. Copyrighted by B. J. Falk, New York," are sufficient; 48 Fed. Rep. 222, 224. The words "Copyrighted 1891. All rights reserved," are not a sufficient notice of copyright; 69 Fed. Rep. 291.

It is sufficient, in the case of a separate article of an American author published in a foreign encyclopedia, to deposit the sheets or pages containing the article taken out of the bound volume; 56 Fed. Rep. 764.

Each volume of a book in two or more volumes, when such volumes are published separately, and each number of a periodical shall be considered as an independent publication; Act of March 3, 1891, sec. 11. The initial of the Christian name is sufficient if the full surname be given; 111 U. S. 53. Where the printed title was deposited by E. B. Meyers & Chandler and the printed notice of the entry of the copyright showed that the copyright was entered by E. B. Meyers alone, it was held immaterial; 128 U. S. 657.

A change of title and the filing of such

alteration, before the publication of a book and after the filing of the original title, will not affect the validity of the copyright; 56 Fed. Rep. 764.

A copyright may be taken in the name of a trustee for the benefit of some third party who is the author or proprietor; 82 Fed. Rep. 202; 42 *id.* 618; 56 *id.* 764.

One who does business under a fictitious partnership name may receive a copyright under that name; 49 Fed. Rep. 854. An author of an article intended for a foreign encyclopædia obtained a copyright therefor under an agreement with the publisher. It was held that the agreement was a license only to use the article, and that the copyright was properly in the author's name; 56 Fed. Rep. 764.

Prior to the act of congress "providing for keeping and distributing all public documents," approved February 6, 1859, the law provided that one copy of each book or other production should be sent to the librarian of the Smithsonian Institution, and one to the librarian of the Congressional Library. This provision is now repealed; and while in existence it was questionable whether a compliance with its conditions was essential to a valid copyright; 1 Blatchf. 618.

As to what will constitute a sufficient publication to deprive an author of his copyright: The public performance of a play is not such publication; 2 Biss. 34; 13 Blatchf. 47; the private circulation of even printed copies of a book is not; 5 McLean 33; 9 Am. L. Reg. 33; 1 Macn. & G. 25; the deposit of a chart with the secretary of the navy with an express agreement that it was not to be published, is not; 2 Paine 993; see, generally, 7 Am. Rep. 488. Publication of a manuscript constitutes a dedication to the public; 25 Fed. Rep. 183; 133 Mass. 33; the sale of a picture unconditionally carries with it the right of making copies of it and the publication thereof; 3 Cliff. 537. A picture which is publicly exhibited without having inscribed upon some visible portion of it, or upon the substance on which it was mounted, the notice required by the statute, is published; 72 Fed. Rep. 54. In this case the artist publicly exhibited his picture in Germany, without any notice of a reservation of his rights. A copyright subsequently taken out by his assignee was held invalid, as against one who made and sold photographs of it in the United States. See also 4 H. L. Cas. 815; 10 Ir. Ch. 121, 510; 8 Pet. 591; 9 Am. L. Reg. 33.

The remedy for an infringement of copyright is threefold. By an action of debt for certain penalties and forfeitures given by the statute. By an action on the case at common law for damages, founded on the legal right and the injury caused by the infringement. The action must be case, and not trespass; 2 Blatchf. 39. By a bill in equity for an injunction to restrain the further infringement, as an incident to which an account of the profits made by the infringer may be ordered by the court; 2 Morg. Lit. 706; 6 Ves. 705; 8 *id.* 323; 9 *id.* 841; 1 Russ. & M. 73, 159; 1 Y. & C. 197; 2 Hare 560; though it cannot embrace penalties; 2 Curt. C. C. 200; 2 Blatchf. 39.

The complainant in a bill in equity must make out a *prima facie* case of a valid copyright. It is sufficient if there be clear color of title founded on long possession; 6 Ves. 689; 8 *id.* 215; 17 *id.* 423; Jac. 314, 471; 2 Russ. 385; 2 Phil. 154. As to the objections that may be taken by general demurrer, see 2 Blatchf. 89. The injunction may go against an entire work or a part; 2 Russ. 393; 3 Stor. 768; 17 Ves. 423; 3 M. & C. 737; 11 Sim. 31; 2 Beav. 6; 2 Brown, Ch. 80; though the court will not interfere where the extracts are trifling; 2 Swanst. 428; 1 Russ. & M. 73; 2 *id.* 247.

An injunction to restrain the infringement of one directory by another will be limited to the extent to which the two books are identical; 80 Fed. Rep. 772.

Where the extracts of a copyrighted work are scattered through the defendant's book in such manner that the two cannot be distinguished and separated, the court may enjoin the defendant's book as a whole, but

if the matters can be separated the injunction should extend only to the copyrighted matter; 83 Fed. Rep. 494.

Where the author's pirated paragraphs of a digest can be separated from paragraphs not subject to criticism, the injunction should be restricted to the infringing paragraphs, even though it might consume a decade to examine the paragraphs of the digest and compare them. This will not relieve the complainant from the burden of proving his case; 64 Fed. Rep. 360.

Although the court is not convinced that a compilation which wrongfully appropriates extracts from the plaintiff's copyrighted work will injure its sale, yet an injunction in a proper case may be granted. Actual pecuniary damage is not the sole right to enjoin violation of copyright; 33 Fed. Rep. 494.

The practice of one newspaper copying literary matter from another is no defence to an action for the infringement of a copyright; [1892] 3 Ch. 489, where the cases are collected.

Original jurisdiction in respect to all these remedies is vested in circuit courts of the United States; Rev. Stat. § 629, cl. 9. Rev. Stat. § 4968 limits the action for the penalties and forfeitures to the period of two years after the cause of action arose. The remedy for an unauthorized printing or publishing of any manuscript is by a special action on the case, or by a bill in equity for an injunction. Original jurisdiction in these cases is likewise vested in the circuit courts.

Infringement. The statute provides that any person who shall print, publish, dramatize, translate or import, any copy of a book which is under the protection of a copyright, without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, or who shall, knowing the same to be so printed, sell, or expose to sale, any copy of such book, shall forfeit every copy of such book to the proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action brought by the proprietor, etc.; R. S. § 4964, as amended March 3, 1891.

Sec. 4965 provides that any person who, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving or photograph or chromo, etc., shall, without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, engrave, etc., either in whole or in part, or knowing the same to be so printed, etc., sell or expose to sale any copy of such map or other article, he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof either copied or printed, and shall further forfeit one dollar for each sheet of the same found in his possession, etc., and in case of a painting, statue or statutory, ten dollars for every copy of the same in his possession. Provided that in case of a photograph from any object in a work of fine arts, the sum to be recovered shall not be less than one hundred dollars or more than five thousand dollars, and that in case of such infringement of a copyright of a painting, etc., or model, or design of photograph or of a work of the fine arts, the recovery shall be not less than two hundred and fifty dollars and not more than ten thousand dollars. In each case half of the penalty to go to the proprietor of the copyright, and the other half to the use of the United States; § 4965, as amended March 3, 1891. The act is confined to the sheets in the possession of the party who prints or exposes them to sale; 7 How. 798. It has been held to be necessary to the recovery of these statutory penalties and forfeitures that the whole of the book should be reprinted; 23 Bost. Law Rep. 397.

But in order to sustain an action at common law for damages or a bill in equity for an infringement of copyright, an exact reprint is not necessary.

There may be a piracy. 1st. By reprinting the whole or part of a book *verbatim*. The mere quantity of matter taken from a

book is not of itself a test of piracy; 3 M. & C. 737; the court will look at the value or quality more than the quantity taken; 1 Story 11. Extracts and quotations fairly made, and not furnishing a substitute for the book itself, or operating to the injury of the author, are allowable; 17 Ves. 422; 17 Law Jour. 142; 1 Campb. 94; Ambl. 694; 2 Swanst. 428; 2 Stor. 100; 2 Russ. 383; 1 Am. Jur. 212; 2 Beav. 6; 11 Sim. 31. A "fair use" of a book, by way of quotation or otherwise, is allowable; 4 Cliff. 1; L. R. 8 Ex. 1; 31 L. T. N. s. 775; L. R. 18 Eq. 444; L. R. 5 Ch. 251; it may be for purposes of criticism, but so as not to supersede the work itself; 4 Cliff. 1; L. R. 8 Ex. 1; 26 Fed. Rep. 519; or in a later work to the extent of fair quotation; 11 Sim. 31; 31 L. T. N. s. 775; 2 Stor. 100; in compiling a directory, but not so as to save the compiler all independent labor; 30 Fed. Rep. 772; L. R. 1 Eq. 697; 7 *id.* 34; *id.* 5 Ch. 279; a descriptive catalogue of fruit, etc.; L. R. 18 Eq. 444; a book on ethnology; L. R. 5 Ch. 251; a dictionary, provided the new book may fairly be considered a new work; 31 L. T. R. 16. See 25 L. R. A. 441 for a full discussion; PIRACY.

2d. By *imitating* or copying, with colorable alterations and disguises, assuming the appearance of a new work. Where the resemblance does not amount to identity of parallel passages, the criterion is whether there is such similitude and conformity between the two books that the person who wrote the one must have used the other as a model, and must have copied or imitated it; see 5 Ves. 24; 8 *id.* 215; 12 *id.* 270; 16 *id.* 269, 422; 5 Swanst. 672; 2 Brown, Ch. 80; 2 Russ. 385; 2 S. & S. 6; 3 V. & B. 77; 1 Campb. 94; 1 East 361; 4 Esp. 169; 1 Stor. 11; 3 *id.* 768; 2 W. & M. 497; 2 Paine 393, which was the case of a chart. A fair and *bona fide* abridgment has in some cases been held to be no infringement of the copyright; 1 Morg. Lit. 319, 343; 2 Atk. 141; Amb. 403; Lofft 775; 1 Brown, Ch. 451; 5 Ves. 709; 2 Am. Jur. 491; 3 *id.* 215; 4 *id.* 456, 479; 4 Clifford 1; 1 Y. & C. 298; 4 McLean 306; 2 Stor. 105; 2 Kent 382; see 3 Am. L. Reg. 129. But Drone, Copyright 440, maintains the contrary doctrine.

A later writer on any science or art, such as physiognomy, though consulting and using the works of an earlier writer on the subject, will be held not to have pirated, but to have made a fair use of them, it not appearing that they have been drawn from to a substantial degree, notwithstanding there are some errors common to both, and that they have a similar division of systems as a basis, such division being only a somewhat altered form of a division in a work of a previous writer, from which they both had a right to draw material; 75 Fed. Rep. 6.

"The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether in substance it is reproduced; not whether the whole or whether a material part is taken. In this view of the subject it is no defence of piracy that the work entitled to protection has not been copied literally; that it has been translated into another language; that it has been dramatized; that the whole has not been taken; that it has been abridged; that it is reproduced in a new and more useful form. The controlling question always is whether the substance of the work is taken without authority;" Drone, Copyr. 385.

An author may resort with full liberty to the common sources of information and make use of the common materials open to all, but his work must be the result of his own independent labor; 75 Fed. Rep. 6.

A subsequent compiler of a directory is only required to do for himself that which the first compiler has done. He may not use a previous compilation to save himself trouble, though he do so but to a very limited extent, but he may use the former work to verify the spelling of names or the correctness of the addresses; 30 F. R. 772.

The compiler of a digest may compare notes, abstracts, and paragraphs from opinions of the courts and from syllabi prepared by the courts, and may digest such opinions

and syllabi from printed copies and published in a copyrighted system of rights, but he may not copy the original work of the reporter, or use his work in any way in order to lighten his labors, though he may use it to verify his own accuracy, to detect errors, etc.; 64 Fed. Rep. 360.

A translation has been held not to be a violation of the copyright of the original; 2 Wall. Jr. 547; s. c. 2 Am. L. Reg. 231. The correctness of this decision is questioned in *Drone*, Copyr. 455.

When the infringement of a copyright is established the question of intent is immaterial; 53 Fed. Rep. 499.

A copyrighted compilation, comprising lists of trotting and pacing horses with their speed, is infringed by one who uses the table to make up records of horses of 2.30 or better, notwithstanding the fact that the latter compilation might have been made by the defendant from other publications valuable to him; 70 Fed. Rep. 237.

Damages. Where the infringing material is so intermingled with the rest of the contents as to be almost incapable of separation, the infringer is liable for the entire profit realized from the book; 128 U. S. 617; 148 U. S. 488. Where the infringing publication uses only a part of the original matter and is issued in a cheaper form, the measure of damages is the profit realized by the infringer, and not what the copyright owner would have realized by a sale of an equal number of the original copyright work; 50 Fed. Rep. 473.

The title to a copyright is made assignable by that provision of the statute which authorizes it be taken out by the "legal assigns" of the author. An assignment may therefore be made before the entry for copyright; but, as the statute makes a written instrument, signed by the author, etc., and attested by two credible witnesses, necessary to a lawful authority in another to print, publish, and sell, a valid assignment or license, whether before or after the copyright is obtained by entry, must be so made. Whether a general assignment of the first term by the author will carry the interest in the additional or renewed term, see 2 Brown, Ch. 80; Jac. 315. Where A employed B to complete a school book for \$500, and took an assignment of the copyright, and A published the book calling B the author, it was held that only the original term of the copyright passed to A; 2 W. and M. 23.

The sole right of publicly performing or representing dramatic compositions, which have been entered for copyright under the act of 1881, by a supplemental act, passed March 3, 1891, is now added to the sole right of printing and publishing, and is vested in the author or proprietor, his heirs or assigns, during the whole period of the copyright; and authors may reserve the right to dramatize or translate their own works. These new rights, being made incident to the copyright, follow the latter whenever the formalities for obtaining it have been complied with. For an unlawful representation, the statute gives an action of damages, to be assessed at a sum not less than one hundred dollars for the first and at fifty dollars for every subsequent performance, as to the court shall seem just. The author's remedy in equity is also saved. The statute does not apply to cases where the right of representation has been acquired before the composition has been made the subject of copyright.

The provision of act of March 3, 1891, giving authors the exclusive rights to dramatize and translate their copyrighted works does not prevent the title of a copyrighted work ("Trilby") from being used in connection with a dramatic composition, under that name, which presents no scene, incident, or dialogue from that work; 67 Fed. Rep. 904.

For a discussion of these acts, and of the nature and incidents of dramatic literary property, see 9 Am. Law. Rep. 33, and 23 *Bost. Law Rep.* 397. See also 1 Am. L. Reg. 45; 2 *id.* 129; 14 *id.* 218; 2 *Biss.* 208.

The owner of a copyright who wishes to sell the published work directly and only to individual subscribers, through canvassers

employed by him, will be protected from interference by other dealers who have surreptitiously obtained copies without his consent and offered them for sale; 27 Fed. Rep. 914. But it has been held that the owner of a copyright transferring the title of copyrighted books under an agreement restricting their use, cannot, under the copyright statutes, restrain sales of books in violation of the agreement; 61 Fed. Rep. 689; the remedy is confined to the breach of the contract; *id.*

The words "Webster's Dictionary" are public property by reason of the expiration of the copyright in the dictionary; 47 Fed. Rep. 411.

One who buys copies of a publication which violates copyright and sells them again is liable for the profit on his sales; 24 Fed. Rep. 636.

International Copyright. Prior to the act of March 3, 1891, the benefits of the copyright law were confined to citizens of the United States, but that act provides for an international copyright which gives to a citizen or subject of a foreign state or nation the benefit of copyright on substantially the same basis as its own citizens, provided such foreign state or nation permits the same right to citizens of the United States, or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the president of the United States, by proclamation made from time to time as the purposes of this act may require. International copyright now extends to the citizens or subjects of Belgium, France, Great Britain, Switzerland, Germany, Italy, Denmark, Spain, Portugal, Mexico, and Chili.

The act of March 3, 1891, § 3, requiring that copies of a book or lithograph deposited with the Librarian of Congress shall be manufactured in this country, does not apply to mere musical compositions, though published in book form, or made by lithographic processes; 67 Fed. Rep. 905.

A copyright, or an undivided part thereof may be assigned to a non-resident foreigner; 56 Fed. Rep. 764; 42 *id.* 618.

CORAAGIUM or CORAAGE. Measures of corn. An unusual and extraordinary tribute, arising only on special occasions. They are thus distinguished from services. Mentioned in connection with *hidage* and *carrage*. Cowel.

CORAM (Lat.). Before; in presence of. Applied to persons only.

CORAM IPSO REGE (Lat.). Before the king himself. Proceedings in the court of king's bench are said to be *coram rege ipso*. 3 Bla. Com. 41.

CORAM NOBIS. A writ of error on a judgment in the king's bench is called a *coram nobis* (before us). 1 Archb. Pr. 234. See *CORAM VOBIS*.

CORAM NON JUDICE. Acts done by court which has no jurisdiction either over the person, the cause, or the process, are said to be *coram non judice*. 1 Conn. 40. Such acts have no validity. If an act is required to be done before a particular person, it would not be considered as done before him if he were asleep or *non compos mentis*; 5 H. & J. 42; 8 Cra. 9; Paine 55; 1 *Prest. Conv.* 266.

CORAM PARIBUS. In the presence of the peers or freeholders. 2 Bla. Com. 307.

CORAM VOBIS. A writ of error directed to the same court which tried the cause, to correct an error in fact. 3 Md. 325; 8 *Steph. Com.* 642.

If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court by writ of error *coram nobis* (before us), or *quæ coram nobis residant*; so called from its being founded on the record and process, which are stated in the writ to remain in the court of the king before the king himself. But if the error be in the judgment itself, and not

in the process, a writ of error does not lie in the same court upon such judgment. 1 Rolle, Abr. 746. In the Common Pleas, the record and proceedings being stated to remain before the king's justices, the writ is called a writ of error *coram vobis* (before you) or *quæ coram vobis residant*. 3 Chit. Bla. Com. 406, n.

CORD. A measure of wood, containing 128 cubic feet. See 67 Barb. 169.

CORDEL. A measure of land used in Mexican land grants. It equals 137.95 feet, or 50 varas (q. v.). 161 U. S. 219. See *SITTO*; *CABALLERIA*; *HECTARE*.

COREA. A nation of Asia. Its government is an absolute monarchy. The country was subject to the suzerainty of China, but by treaty concluded with Japan in 1895, the claims of China were renounced. The government is under the immediate control of the king, assisted by a cabinet of ministers.

CO-RESPONDENT. Any person called upon to answer a petition or other proceeding, but now chiefly applied to a person charged with adultery with the husband or wife, in a suit for divorce, and made jointly a respondent to the suit. See *DIVORCE*.

One of several defendants to a chancery or an admiralty cause. *Stand. Dict.*

CORN. In its most comprehensive sense, this term signifies every sort of grain, as well as peas and beans; this is its meaning in the memorandum usually contained in policies of insurance. But it does not include rice; Park, Ins. 112; 1 Marsh. Ins. 233, n.; Wesk. Ins. 145. See *Com. Dig. Biens* (G, 1). In the United States it usually means maize, or Indian corn; 53 Ala. 474.

CORN RENTS. Rents reserved in wheat or malt in certain college leases in England. Stat. 18 Eliz. c. 6; 2 Bla. Com. 322.

CORN-LAWS. Laws regulating the trade in bread-stuffs.

The object of corn laws is to secure a regular and steady supply of the great staples of food; and for this object the means adopted in different countries and at different times widely vary, sometimes involving restriction or prohibition upon the export, and sometimes, in order to stimulate production, offering a bounty upon the export. Of the former character was the famous system of corn laws of England, initiated in 1773 by Burke, and repealed in 1846 under Sir Robert Peel. See *Cobden's Life*.

CORNAGE. A species of tenure in England, by which the tenant was bound to blow a horn for the sake of alarming the country on the approach of an enemy. *Bac. Abr. Tenure* (N).

CORNELIAN LAW, THE. See *LEX CORNELIA*.

CORNET. A commissioned officer in a regiment of cavalry, abolished in England in 1871, and not existing in the United States army.

CORODY. An allowance of meat, drink, money, clothing, lodging, and such like necessities for sustenance. 1 Bla. Com. 288; 1 Chit. Pr. 225. An allowance from an abbey or house of religion, to one of the king's servants who dwells therein, of meat and other sustenance. *Fitzh. N. B.* 280.

An assize lay for a corody; Cowel. Corodies are now obsolete; Co. 2d Inst. 630; 2 Bla. Com. 40.

CORONATION. The ceremony of crowning a monarch. *English.*

CORONATION OATH. The oath administered to a sovereign in England before coronation. *Whart. Law Dic.*

CORONATOR (Lat.). A coroner. *Spel.*

CORONATORE EXONERANDO. A writ for the removal of a coroner, for a cause therein assigned.

CORONER. An officer whose principal duty it is to hold an inquisition, with the assistance of a jury, over the body of any person who may have come to a violent death, or who has died in prison.

It is his duty also, in case of the death of the sheriff or his incapacity, or when a vacancy occurs in that office, to serve all the writs and processes which the sheriff is usually bound to serve; 20 Ga. 386; 10 Humph. 346; 73 N. Y. 45; 1 Bla. Com. 849. See **SHERIFF**.

The chief justice of the King's Bench was the sovereign or chief coroner of all England; though it is not to be understood that he performed the active duties of that office in any one county; 4 Co. 57 b; Bac. Abr. **Coroner**; 8 Com. Dig. 243; 5 id. 212.

It was also the coroner's duty to inquire concerning shipwreck, and to find who had possession of the goods; concerning treasure-trove, who were the finders, and where the property was; 1 Bla. Com. 349.

The office has lost much of the honor which formerly appertained to it; but the duties are of great consequence to society, both for bringing murderers to punishment and protecting innocent persons from accusation. It may often happen that the imperfections of the early examination enable one who is undoubtedly a criminal to escape. It is proper in most cases of homicide to procure the examination to be made by a physician, and in many cases it is a coroner's duty so to do; 4 C. & P. 571. See 64 Ind. 524; 49 Ia. 148; 8 Oreg. 170.

Coroners were abolished in Massachusetts by act 1877, c. 200, and the governor given the power to appoint, in their place, medical examiners, "men learned in the science of medicine," whose duties were to make examinations of dead bodies, to hold autopsies upon the same, and in case of death from violence to notify the district attorney and a justice of the district of the fact.

See Lee, **Coroners**; Crock. Sher. & Cor.; 6 Am. L. Reg. 385.

The words "coroner," "justice," "jailer," "constable" mean officers of the county in which the action or proceeding referred to is pending, or may be brought, or to which the process referred to is directed. Section 732, subsection 16, Civil Code of Kentucky.

CORPORAL (Lat. *corpus*, body). Bodily; relating to the body: as, corporal punishment.

A non-commissioned officer of the lowest grade in an infantry, cavalry, or artillery company.

CORPORAL OATH. An oath which the party takes laying his hand on the gospels. Cowel. It is now held to mean solemn oath. 1 Ind. 184.

CORPORAL TOUCH. Actual, bodily contact with the hand.

It was once held that before a seller of personal property could be said to have stopped it *in transitu*, so as to regain the possession of it, it was necessary that it should come to his corporal touch; but the contrary is now settled. These words were used merely as a figurative expression. 8 Term 464; 5 East 184.

CORPORATION (Lat. *corpus*, a body). A body, consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members.

"An artificial being created by law and composed of individuals who subsist as a body politic under a special denomination with the capacity of perpetual succession and of acting within the scope of its charter as a natural person." 122 Ill. 293.

A corporation aggregate is a collection of individuals united in one body by such a grant of privileges as secures succession of members without changing the identity of the body and constitutes the members for the time being one artificial person or legal being capable of transacting the corporate business like a natural person. Bronson, J., 1 Hill, N. Y. 620.

It is this last characteristic of a corporation, sometimes called its immortality, prolonging its existence beyond the term of natural life, and thereby enabling a long-continued effort and concentration of means to the end which it was designed to answer, that constitutes its principal utility. A corporation is modelled upon a state or nation, and is to this day called a body *politic* as well as corporate,—thereby indicating its origin

and derivation. Its earliest form was, probably, the municipality or city, which necessity exacted for the control or local police of the marts and crowded places of the state or empire. The combination of the commonality in this form for local government became the earliest bulwark against despotic power: and a philosophical historian traces to the remains and remembrance of the Roman municipia the formation of those elective governments of towns and cities in modern Europe, which, after the fall of the Roman empire, contributed so largely to the preservation of order and to the protection of the rights of life and property as to become the foundation of modern liberty. McIntosh, Hist. of Eng. p. 31.

An *aggregate corporation*, at common law, is a collection of individuals, united into one collective body, under a special name, and possessing certain immunities, privileges and capacities, in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members, and may contract with them in the same manner, as with any strangers. 1 Bl. Com. 469, 475; 1 Kyd on Corp. 13, 69, 189; 1 Wooddes. 471, etc. A great variety of these corporations exist, in every country governed by the common law; in some of which, the corporate existence is perpetuated by new elections, made from time to time; and in others, by a continual accession of new members, without any corporate act. Some of these corporations are, from the particular purposes to which they are devoted, denominated *spiritual*, and some *lay*; and the latter are again divided into *civil* and *eleemosynary* corporations. It is unnecessary, in this place, to enter into any examination of civil corporations.

Civil corporations are those which are created to facilitate the transaction of business.

Ecclesiastical corporations are those which are created to secure the public worship of God.

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms and bounty of the founder, in such manner as he has directed; and in this class, are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits. 1 Bl. Com. 469, 470, 471, 482. 1 Kyd on Corp. 25; 1 Wooddes. 474; 1 Ves. 534; 1 W. Bl. 84; s. c. 1 Burr. 200; 1 Ld. Raym. 5; s. c. 2 T. R. 346; 1 Co. 22 b. 23.

Lay corporations are those which exist for secular purposes.

Municipal corporations are those created for the purpose of administering some portion of the government in a political subdivision of the state, as a city, county, etc.

Private corporations are those which are created wholly or in part, for purposes of private emolument. 4 Wheat. 668; 9 id. 907.

Public corporations are those which are exclusively instruments of the public interest.

Sole corporations are those which by law consist of but one member at any one time, as a bishop in England.

In the Dartmouth College Case, 4 Wheat. 668, Mr. Justice Story defined the various kinds of corporations as follows:—

"An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural persons composing it. . . . A great variety of these corporations exist in every country governed by the common law; . . . some of these corporations are, from the particular purposes to which they

are devoted, denominated *spiritual*, and some *lay*; and the latter are again divided into *civil* and *eleemosynary* corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder. . . . In this class are ranked hospitals, and colleges, etc. Another division of corporations is into *public* and *private*. Public corporations are generally esteemed such as exist for public and political purposes only, such as towns, cities, etc. Strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the Government, the corporation is private. . . . For instance, a bank created by the Government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation. . . . The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private. . . . This reasoning applies in its full force to eleemosynary corporations. . . . This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law."

Kent divides corporations into ecclesiastical and lay, and lay corporations into eleemosynary and civil; 2 Kent 274.

It has been held that a public corporation is one that cannot carry out the purposes of its organization without certain rights under its charter from the commonwealth, and that mere private corporations are those that need no franchise from the state to carry out such purposes; 123 Pa. 164. But Judge Thompson, in his learned work, doubts as to whether these divisions promote clear conceptions of the law; 1 Thomp. Corp. § 22; he considers that a more practical conception would divide them into three classes: public-municipal corporations, to promote the public interest; corporations technically private but of *quasi* public character, such as railroads etc.; and corporations strictly private; *id.* § 37.

The essence of a corporation consists "in a capacity (1) to have perpetual succession in a special and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an individual; (3) to receive and enjoy in common grants of privileges and annuities;" 22 Wend. 71.

By both the civil and the common law, the *sovereign* authority only can create a corporation,—a corporation by prescription, or so old that the license or charter which created it is lost, being presumed, from the long-continued exercise of corporate powers, to have been entitled to them by sovereign grant. In England, corporations are created by royal charter or parliamentary act; in the United States, by legislative act of any state, or of the congress of the United States,—congress having power to create a corporation, as, for instance, a national bank when such a body is an appropriate instrument for the exercise of its constitutional powers; 4 Wheat. 424. As to corporations created by congress see 21 Cent. L. J. 421. In many or most of the states general acts have been passed for the creation of certain classes of some corporations. And some state constitutions have taken from the legislature the power to create them by special act.

All corporations, of whatever kind, are moulded and controlled, both as to what they may do and the manner in which they may do it, by their charters or acts of incorporation, which to them are the laws of their being, which they can neither dispense with nor alter. Subject, however, to such limitations as these, or such as general statute or constitutional law, may impose,

every corporation aggregate has, by virtue of incorporation and as incidental thereto, *first*, the power of perpetual succession, including the admission, and, except in the case of mere stock corporations, the removal for cause, of members; *second*, the power to sue and be sued, to grant and to receive grants, and to do all acts which it may do at all, in its corporate name; *third*, to purchase, receive, and to hold lands and other property, and to transmit them in succession; *fourth*, to have a common seal, and to break, alter, and renew it at pleasure; and, *fifth*, to make by-laws for its government, so that they be consistent with its charter and with law. Indeed, at this day, it may be laid down as a general rule that a corporation may, within the limits of its charter or act of incorporation express or implied, lawfully do all acts and enter into all contracts that a natural person may do or enter into, so that the same be appropriate as means to the end for which the corporation was created.

A corporation may be dissolved, if of limited duration, by the expiration of the term of its existence, fixed by charter or general law; by the loss of all its members, or of an integral part of the corporation, by death or otherwise, if the charter or act of incorporation provide no mode by which such loss may be supplied; by the surrender of its corporate franchise to, and the acceptance of the surrender by, the sovereign authority; and, lastly, by the forfeiture of its charter by the neglect of the duties imposed or abuse of the privileges conferred by it; the forfeiture being enforced by proper legal process.

In England, a private as well as a public corporation may be dissolved by act of parliament; but in the United States, although the charter of a municipal corporation may be altered or repealed at pleasure, the charter of a *quasi* public or a private corporation, whether granted by the king of Great Britain previous to the revolution, or by the legislature of any of the states since, is, unless in the latter case express power be for that purpose reserved, within the protection of that clause of the constitution of the United States which, among other things, forbids a state from passing any "law impairing the obligation of contracts." Const. U. S. art. 1, sect. 10; 4 Wheat. 518. Under this clause of the constitution it has been settled that the charter of a *quasi* public or a private corporation, whether civil or eleemosynary, is an executed contract between the government and the corporation, and that the legislature cannot repeal, impair, or alter it against the consent or without the default of the corporation, judicially ascertained and declared; *id.* On the other hand, the doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchise, or privileges in which the government or the public has an interest. . . . Statutory grants of that character to be construed strictly in favor of the public, what is not unequivocally granted is withheld, nothing passes by mere implication.

A corporate franchise, however—as, to build and maintain a toll-bridge—may, by virtue of the power of eminent domain, be condemned by a state to public uses, upon just compensation, like any other private property; 6 How. 507.

For the history of corporations before 1800, see 2 Harv. L. Rev. 149. See FOREIGN CORPORATION; HOLDING CORPORATION; MUNICIPAL CORPORATION; PERPETUAL SUCCESSION; QUASI-PUBLIC CORPORATIONS.

As an Association. A corporation is but an association of individuals with a distinct name and legal entity, and in organizing itself as a collective body it waives no appropriate and constitutional immunities, and although it cannot refuse to produce its books and papers it is entitled to immunity under the Fourth Amendment against unreasonable searches and seizures, and where an examination of its books is not authorized by an act of Congress a *subpoena duces tecum* requiring the production of practically

all of its books and papers is as indefensible as a search warrant would be if couched in similar terms. 201 U. S. 43.

Counties. The counties of the State are political sub-divisions created for political purposes. Where they create debts by authority of law, they have been called "*quasi* corporations," but they in fact are not incorporated, and are not a corporation within the meaning of section 72, Civil Code, which refers to business corporations. 157 Ky. 54, 162 S. W. 561.

Not a Person. A corporation is not deemed a person within the clause of the Constitution of the United States protecting the privileges and immunities of citizens of the United States from being abridged or impaired by the law of a State, and the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is that of natural, not artificial, persons. 204 U. S. 359.

CORPORATION, PUBLIC SERVICE. See QUASI-PUBLIC CORPORATION.

CORPORATOR. A member of a corporation.

The corporators are not the corporation, for either may sue the other; 4 McLean 547; 19 Vt. 187; 3 Metc. Mass. 44; 97 U. S. 13.

CORPOREAL. That which can be touched and seen; material.

CORPOREAL HEREDITAMENTS. Substantial permanent objects which may be inherited. The term land will include all such. 2 Bla. Com. 17.

CORPOREAL PROPERTY. In Civil Law. That which consists of such subjects as are palpable.

In the common law, the term to signify the same thing is *property in possession*. It differs from *incorporeal property*, which consists of choses in action and easements, as a right of way, and the like.

CORPSE. The dead body of a human being. 1 Russ. & R. 366, n.; 2 Term 733; 1 Leach 497; 3 Pick. 370; Dig. 47. 12. 3. 7; 11. 7. 38; Code, 3. 44. 1. Stealing a corpse is an indictable offence, but not larceny at common law; Co. 3d. Inst. 203; 1 Russ. Cr. 629; 28 Alb L. J. 106. See DEAD BODY.

CORPUS (Lat.). A body. The substance. Used of a human body, a corporation, a collection of laws, etc. The capital of a fund or estate as distinguished from the income.

CORPUS AUTHENTICARUM. See LIBER AUTHENTICARUM.

CORPUS COMITATUS. The body of the county; the inhabitants or citizens of a whole county, as distinguished from a part of the county or a part of its citizens. 5 Mas. 290.

CORPUS CUM CAUSA. See HABEAS CORPUS CUM CAUSA.

CORPUS DELICTI. The body of the offence; the essence of the crime.

It is a general rule not to convict unless the *corpus delicti* can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Hence, on a charge of homicide, the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body; Best, Pres. § 201; 1 Stark. Ev. 575. See 6 C. & P. 176; 2 Hale, P. C. 290; Whart. Cr. Ev. § 324. Instances have occurred of a person being convicted of having killed another, who, after the supposed criminal has been put to death for the supposed offence, has made his appearance alive. The wisdom of the rule is apparent; but it has been questioned whether, in extreme cases, it may not be competent to prove the basis of the *corpus delicti* by presumptive evidence; 3 Benth. Jud. Ev. 284; Wills, Cir. Ev. 105; Best, Pres. § 204; 3 Greenl. Ev. 30. In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts: first, the death; and

secondly, the existence of criminal agency as its cause; 43 Miss. 472. A like analysis would apply in the case of any other crime. When the body of a murdered man was burned and mutilated beyond recognition, testimony that a piece of charred cloth found among the ashes with the deceased were like the trousers that the murdered man wore, and that a slate pencil found there was identical with one he carried about him, was competent evidence for the jury to establish the identity of the body; 25 S. E. Rep. (S. C.) 113.

The presumption arising from the possession of the fruits of crime recently after its commission, which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called the *corpus delicti*. Thus, to borrow an apt illustration from Mr. Justice Maule, if a man were to go into the London docks quite sober, and shortly afterwards were to be found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stowed, "I think," says the learned judge, "that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached and that any wine had actually been missed." Dears. 284; 1 Tayl. Ev. § 122. In this case it was proved that a prisoner indicted for larceny was seen coming out of the lower room of a warehouse in the London docks, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him from the bulky state of his pockets, and said, "I think there is something wrong about you;" upon which the prisoner said, "I hope you will not be hard upon me;" and then threw a quantity of pepper out of his pocket on the ground. The witness stated that he could not say whether any pepper had been stolen, nor that any pepper had been missed; but that which was found upon the prisoner was of like description with the pepper in the warehouse. It was held by all the judges that the prisoner, upon these facts, was properly convicted of larceny.

A confession alone ought not to be considered sufficient proof of the *corpus delicti*; 26 Miss. 157; 15 Wend. 147.

See CIRCUMSTANTIAL EVIDENCE.

CORPUS JURIS (L. Lat.). A body of law. A term introduced in the middle ages, to signify a book comprehending several collections of law. There are two principal collections to which that appellation is given; the *Corpus Juris Civilis*, and the *Corpus Juris Canonici*.

CORPUS JURIS CANONICI (Lat.) the body of the canon law). The name given to the collections of the decrees and canons of the Roman church. See CANON LAW.

CORPUS JURIS CIVILIS. The body of the civil law. The collection comprising the Institutes, the Pandects or Digest, the Code, and the Novels of Justinian. See those several titles, and also CIVIL LAW for fuller information. The name is said to have been first applied to this collection early in the seventeenth century.

CORPUS THEODOSIANUM. See LEX ROMANA VISIGOTHORUM.

CORRECTION. Chastisement, by one having authority, of a person who has committed some offence, for the purpose of bringing him into legal subjection.

It is chiefly exercised in a parental manner by parents, or those who are placed in *loco parentis*. A parent may therefore justify the correction of the child either corporally or by confinement; and a schoolmaster, under whose care and instruction a parent has placed his child, may equally justify similar correction; but the correction in both cases must be moderate and in a proper manner; Com. Dig. Pleader, (8 M.) 19; Hawk. c. 60, s. 23, c. 62, s. 2, c. 29, s. 5; 2 Humph. 288; 2 Dev. & B. L. 365. See

ASSAULT.

The master of an apprentice, for disobedience, may correct him moderately; 1 B. & C. 469; Cro. Car. 179; 2 Show. 289; 10 Mart. La. 88; but he cannot delegate the authority to another. A master has no right to correct his servants who are not apprentices; 10 Conn. 455; 2 Greenl. Ev. § 97; see ASSAULT for cases of undue correction.

Soldiers are liable to moderate correction from their superiors. For the sake of maintaining discipline in the navy, the captain of a vessel, belonging either to the United States or to private individuals, may inflict moderate correction on a sailor for disobedience or disorderly conduct; Ab. Sh. 160; 1 Ch. Pr. 73; 14 Johns. 119; 15 Mass. 365; 1 Bay 3; Bee 161; 1 Pet. Adm. 168; Moll. 209; 1 Ware 83. Such has been the general rule. But flogging and other degrading punishments are now forbidden in the army, navy, merchant service, and military prisons; R. S. §§ 1342, 1624, 4611, 1354.

The husband, by the old law, might give his wife moderate correction; 1 Hawk. P. C. 2. But in later times this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife; 1 Bla. Com. 444; Stra. 478, 875, 1207; 2 Lev. 128. See MARRIED WOMEN; HUSBAND.

Any excess of correction by the parent, master, officer, or captain, may render the party guilty of an assault and battery and liable to all its consequences; 4 Gray 36. See ASSAULT. In some prisons, the keepers have the right to correct the prisoners.

CORREGIDOR. In Spanish Law. A magistrate who took cognizance of various misdemeanors, and of civil matters. 2 White, New Rec. 53.

CORREI. In Civil Law. Two or more bound or secured by the same obligation.

Correi credendi. Creditors secured by the same obligation.

Correi debendi. Two or more persons bound as principal debtors to pay or perform. Ersk. Inst. 3. 3. 74; Calvinus, Lex.; Bell, Dict.

CORRESPONDENCE. The letters written by one person to another, and the answers thereto. See LETTER; COPYRIGHT.

CORROBORATING EVIDENCE. "Corroborating evidence" is evidence that tends to connect the accused with the particular crime under investigation, and it must have such relation to and be connected with this crime as to furnish some evidence, direct or circumstantial, of its commission. 164 Ky. 334, 175 S. W. 670.

CORRUPT PRACTICE. In English Law. (1) Treating, (2) undue influence, (3) personation or the procuring thereof, (4) bribery, or (5) making a false declaration as to election expenses in connection with a parliamentary election, or a municipal election, or a county council election, or a parish or district council election or other election under the Local Government Act, 1894. As regards parliamentary elections it also means the incurring of election expenses, without the authority in writing of an election agent, by any person; and where the offense is committed by any body of persons, then every director or officer thereof shall be deemed to have committed it unless he proves that it was committed without his knowledge or consent. Byrne. See ILLEGAL PRACTICES.

CORRUPTION. An act done with an intent to give some advantage inconsistent with official duty and the rights of others.

It includes bribery, but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another. Merlin, Rép.

Something against law: as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc.

CORRUPTION OF BLOOD. The

incapacity to inherit, or pass an inheritance, in consequence of an attainder to which the party has been subject. Abolished by stats. 3 & 4 Will. IV. c. 106, and 33 & 34 Vict. c. 23; 1 Steph. Com. 446.

When this consequence flows from an attainder, the party is stripped of all honors and dignities he possessed, and becomes ignoble.

The constitution of the United States, art. 3, s. 3, n. 2, declares that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained."

The act of July 17, 1862 (12 Stat. L. 589), for the seizure and condemnation of enemies' estates, with the resolution of the same date, does not conflict with this section, the forfeiture being only during the life of the offender; 9 Wall. 339; 11 id. 268; 18 id. 156, 163; 2 U. S. 202. See 4 Bla. Com. 388; 1 Cruise, Dig. 52; 3 id. 240, 378, 473; 1 Chit. Cr. L. 740.

CORSE-PRESENT. In Old English Law. A gift of the second best beast belonging to a man at his death taken along with the corpse and presented to the priest. Stat. 21 Hen. VIII. cap. 6; Cowel; 2 Bla. Com. 425.

CORSNED. In Old English Law. A piece of barley bread, which, after the pronouncement of certain imprecations, a person accused of crime was compelled to swallow.

A piece of cheese or bread of about an ounce weight was consecrated with an exorcism desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty, but might turn to health and nourishment if he was innocent. Spelman, Gloss. 439. It was then given to the suspected person, who at the same time received the sacrament. If he swallowed it easily, he was esteemed innocent; if it choked him, he was esteemed guilty. See 4 Bla. Com. 345.

CORTES. The name of the legislative assemblies of Spain and Portugal.

CORVEE. In French Law. Gratuitous labor exacted from the villages or communities, especially for repairing roads, constructing bridges, fortifications, etc.

Corvée seigneuriale are services due the lord of the manor. Guyot, Rép. Univ.; 3 Low. C. 1.

COSBERING. In Feudal Law. A prerogative or seigniorial right of a lord, as to lie and feast himself and his followers at his tenants' houses. Cowel.

COSENING. In Old English Law. An offence whereby anything is done deceitfully, whether in or out of contracts, which cannot be fitly termed by any special name. Called in the civil law *Stellionatus*. West, Symb. pt. 2, *Indictment*, § 68; Blount; 4 Bla. Com. 158.

COSINAGE (spelled, also, *Cousinage*, *Cosenage*). A writ to recover possession of an estate in lands when a stranger has entered and abated after the death of the grandfather's grandfather or of certain collateral relations. 3 Bla. Com. *186.

Relationship; affinity. Stat. 4 Hen. III. cap. 8; 3 Bla. Com. 186; Co. Litt. 160 a.

COST. The cost of an article purchased for exportation is the price paid, with all incidental charges paid at the place of exportation. 2 Wash. C. C. 493. Cost price is that actually paid for goods. 18 N. Y. 337. See ACTUAL COST.

COST-BOOK. In English Law. A book in which a number of adventurers who have obtained permission to work a lode and have agreed to share the enterprise in certain proportions, enter the agreement and from time to time the receipts and expenditures of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares. These associations are called "Cost-book mining companies," and are governed by the general law of partnership. Lindl. Partn. *147.

COSTA RICA. A republic of Central America. The president is elected for four

years. The single legislative chamber is elected for four years. The code of law is adopted from the Spanish code.

COSTS. In Practice. The expenses incurred by the parties in the prosecution or defence of a suit at law.

They are distinguished from fees in being an allowance to a party for expenses incurred in conducting his suit; whereas fees are a compensation to an officer for services rendered in the progress of the cause. 11 S. & R. 248.

No costs were recoverable by either plaintiff or defendant at common law. They were first given to plaintiff by the statute of Gloucester, 6 Edw. I. c. 1, which has been substantially adopted in all the United States.

A party can in no case recover costs from his adversary unless he can show some statute which gives him the right.

Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly; 2 Stra. 1006, 1069; 3 Burr. 1287; 4 S. & R. 129; 1 Rich. 4.

They do not extend to the government; and therefore when the United States, or one of the several states, is a party they neither pay nor receive costs, unless it be so expressly provided by statute; 1 S. & R. 505; 8 id. 151; 3 Cra. 73; 2 Wheat. 395; 12 id. 546; 5 How. 29; 23 Ala. 579; 41 N. H. 238; 2 Tyler 44; and in actions of a public nature, conducted solely for the public benefit, costs are rarely given against public officers; 94 Ill. 559; 41 Mich. 182; 19 Wend. 50. This exemption is founded on the sovereign character of the state, which is subject to no process; 3 Bla. Com. 400; Cowp. 366; 3 Pa. 153. The right of the state to costs on conviction in criminal cases is generally declared by statute.

In many cases, the right to recover costs is made to depend, by statute, upon the amount of the verdict or judgment. Where there is such a provision, and the verdict is for less than the amount required by statute to entitle the party to costs, the right to costs, in general, will depend upon the mode in which the verdict has been reduced below the sum specified in the act. In such cases, the general rule is that if the amount be reduced by evidence of direct payment, the party shall lose his costs; but if by set-off or other collateral defence he will be entitled to recover them; 2 Stra. 1911; 4 Dougl. 448; 9 Moore, P. C. 623; 8 East 28, 347; 2 Price 19; 1 Taunt. 60; 4 Bingh. 169; 1 Dall. 308, 457; 13 S. & R. 287; 16 id. 253; 4 Pa. 330.

When a case is dismissed for want of jurisdiction over the person, no costs are allowed to the defendant unless expressly given by statute. The difficulty in giving costs, in such case, is the want of power. If the case be not legally before the court, it has no more jurisdiction to award costs than it has to grant relief; 2 W. & M. 417; 1 Wall. Jr. 187; 9 id. 650; 3 Sumn. 473; 15 Mass. 221; 16 Pa. 200; 3 Litt. 332; 3 N. H. 180; Wright, Ohio 417.

In equity, the giving of costs is entirely discretionary, as well with respect to the period at which the court decides upon them as with respect to the parties to whom they are given.

In the exercise of their discretion, courts of equity are generally governed by certain fixed principles which they have adopted on the subject of costs. It was the rule of the civil law that *vicius victori in expensis condemnatus est*; and this is the general rule adopted in courts of equity as well as in courts of law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *prima facie* claim to costs given by success to the party who prevails; 3 Dan. Ch. Pr. 1515.

In patent cases in equity costs will not be allowed a plaintiff where some of the claims are withdrawn at the argument and some adjudged invalid, though others are sustained; 71 Fed. Rep. 886.

An executor or administrator suing at law or in equity in his representative capacity is not personally liable to the opposite party for costs in case he is unsuccessful, if the litigation were carried on in good faith for the benefit of the estate; 11 S. & R. 47; 15 id. 239; 23 Pa. 471. But the rule

is otherwise where vexatious litigation is caused by the executor or administrator, and where he has been guilty of fraud or misconduct in relation to the suit; 5 Binn. 188; 1 Wms. Exec. 451; 7 Pa. 136, 137.

See **DOUBLE COSTS**; **TREBLE COSTS**. Consult Brightly; Leake; Merrifield; Sayer; Tidd, Costs; and the books of practice adapted to the laws of each state.

See **LEGAL COSTS**.

COSTS OF THE DAY. Costs incurred in preparing for trial on a particular day. Ad. Eq. 343.

In English practice, costs are ordered to be paid by a plaintiff, who neglects to go to trial according to notice; Mozley & W. Law Dict.; Lush, Pr. 496.

COSTS DE INCREMENTO (increased costs, costs of increase). Costs adjudged by the court in addition to those assessed by the jury. 13 How. 372.

The cost of the suit, etc., recovered originally under the statute of Gloucester is said to be the origin of costs *de incremento*; Bull. N. P. 328 a. Where the statute requires costs to be doubled in case of an unsuccessful appeal, costs *de incremento* stand on the same footing as jury costs; 2 Stra. 1048; **TAXED COSTS**. Costs were enrolled in England in the time of Blackstone as *increase of damages*; 3 Bla. Com. 399.

COTERELLI. Anciently, a kind of peasantry who were outlaws. Robbers. Blount.

COTERELLUS. A cottager.

Coterellus was distinguished from *cotarius* in this, that the *cotarius* held by socage tenure, but the *coterellus* held in mere villenage, and his person, issue, and goods were held at the will of the lord. Cowel.

COTLAND. Land held by a cottager, whether in socage or villenage. Cowel; Blount.

COTSETUS. A cottager or cottageholder who held by servile tenure and was bound to do the work of the lord. Cowel.

COTTAGE, COTTAGIUM. In Old English Law. A small house without any land belonging to it, whereof mention is made in stat. 4 Edw. I.

But, by stat. 31 Eliz. cap. 7, no man may build such cottage for habitation unless he lay unto it four acres of freehold land, except in market-towns, cities, or within a mile of the sea, or for the habitation of laborers in mines, shepherds, foresters, sailors, etc. Twenty years' possession of cottage gives good title as against the lord; Bull. N. P. 108 a, 104. By a grant of a cottage the curtilage will pass; 4 Vin. Abr. 582.

COTTIER TENANCY. A species of tenancy in Ireland, constituted by an agreement in writing, and subject to the following terms: That the tenement consist of a dwelling-house with not more than half an acre of land; at a rental not exceeding 5*l.* a year; the tenancy to be for not more than a month at a time; the landlord to keep the house in good repair. Landlord and Tenant Act (Ireland), 23 & 24 Vict. c. 154, s. 81.

COUCHANT. Lying down. Animals are said to have been *levant* and *couchant* when they have been upon another person's land, damage feasant, one night at least. 3 Bla. Com. 9.

COULISSE. In Paris, the curb market. Stand. Dict.

COUNCIL (Lat. *concilium*, an assembly). The legislative body in the government of cities or boroughs. An advisory body selected to aid the executive. See 14 Mass. 470; 3 Pick. 517; 4 *id.* 25.

A governor's council is still retained in some of the states of the United States; 70 Me. 570. It is analogous in many respects to the privy council (*q. v.*), of the king of Great Britain and of the governors of the British colonies, though of a much more limited range of duties.

Common council is a term frequently applied to the more numerous branch of the legislative bodies in cities.

The British parliament is the common council of the whole realm.

COUNCIL OF LAW REPORTING. See **REPORTING, COUNCIL OF LAW**.

COUNSEL. The counsellors who are associated in the management of a particular cause, or who act as legal advisers in reference to any matter requiring legal knowledge and judgment.

The term is used both as a singular and plural noun, to denote one or more; though it is perhaps more common, when speaking of one of several counsellors concerned in the management of a case in court, to say that he is "of counsel."

Knowledge. A grand jury is sworn to keep secret "the commonwealth's counsel, their fellows', and their own."

See **ADVISE**; **COUNSEL, ADVISE, OR ASSIST.**

COUNSEL, ADVISE OR ASSIST. The words "counsel, advise or assist" were said to be words in appropriate use to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it done, and thereby becomes a principal or accessory. 95 Ky. 361, 25 S. W. 596.

COUNSELLOR AT LAW. An officer in the supreme court of the United States, and in some other courts, who is employed by a party in a cause to conduct the same on its trial on his behalf.

He differs from an attorney at law. In the supreme court of the United States, the two degrees of attorney and counsel were at first kept separate, and no person was permitted to practise in both capacities, but the present practice is otherwise; Weeks, Att. 54. It is the duty of the counsel to draft or review and correct the special pleadings, to manage the cause on trial, and, during the whole course of the suit, to apply established principles of law to the exigencies of the case; 1 Kent 307. In England the term "counsel" is applied to a barrister.

Generally, in the courts of the various states the same person performs the duties of counsellor and attorney at law.

In New York, the rules established by the court of appeals, in September, 1877, provided for an examination and admission as a counsellor after two years' practice as an attorney; Throop's Code § 56. The distinction is also preserved in New Jersey.

In giving their advice to their clients, counsel have duties to perform to their clients, to the public and to themselves. In such cases they have thrown upon them something which they owe to their administration of justice, as well as to the private interests of their employers. The interests propounded for them ought, in their own apprehension, to be just, or at least fairly disputable; and when such interests are propounded, they ought not to be pursued *per fas et nefas*; 1 Hagg. Adm. 222. An attorney and counsellor is not an officer of the United States, he is an officer of the court. His right to appear for suitors and to argue causes is not a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can be deprived only by the judgment of the court, for moral or professional delinquency; *Ex parte* Garland, 4 Wall. 383.

See **ATTORNEY AT LAW**; **PRIVILEGE**; **CONFIDENTIAL COMMUNICATIONS**; **DISBARMENT OF ATTORNEYS**.

COUNT (Fr. *comte*; from the Latin *comes*). An earl.

It gave way as a distinct title to the Saxon earl but was retained in countess, viscount, and as the basis of county. *Termes de la ley*; 1 Bla. Com. 398. See **COMES**.

In Pleading (Fr. *conte*, a narrative). The plaintiff's statement of his cause of action.

This word, derived from the French *conte*, a narrative, is in our old law-books used synonymously with declaration; but practice has introduced the following distinction. When the plaintiff's complaint embraces only a single cause of action, and he makes only one statement of it, that statement is called, indifferently, a declaration or count; though the former is the more usual term. But when the suit embraces two or more causes of action (each of which, of course, requires a different statement), or when the plaintiff makes two or more different statements of one and the same cause of action, each several statement is called a count, and all of them, collectively, constitute the declaration. In all cases, however, in which there are two or more counts, whether there is actually but one cause of action or several, each count purports, upon the face of it, to disclose a distinct right of action, unconnected with that stated in any of the other counts.

One object proposed in inserting two or more counts in one declaration when there is in fact but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two different modes of declaring; but the more usual end proposed in inserting more than one count in such case is to accommodate the statement to the cause, as far as may be, to the possible state of the proof to be exhibited on trial, or to guard, if possible, against the hazard of the proofs varying materially from the statement of the cause of action; so that, if one or more of several counts be not adapted to the evidence, some other of them may be so; Gould, Pl. c. 4, ss. 2, 3, 4; Steph. Pl. 266; *Doctrina Plac.* 178; 3 Com. Dig. 291; Dane, Abr. Index. In real actions, the declaration is usually called a count; Steph. Pl. 29. See **COMMON COUNTS**.

COUNT AND COUNT-OUT. These words refer to the count of the house of commons by the speaker. Forty members, including the speaker, are required to constitute a quorum. Each day after parliament is opened, the speaker counts the house. If forty members are not present he waits till four o'clock, and then counts the house again. If forty members are not then present, he at once adjourns it to the following meeting day. May, Parl. Prac. 219.

COUNT SUR CONSESSIT SOLVERE. A claim based upon a promise to pay. This is a count which was in use in the Mayor's Court, London, for centuries before the first Common Law Procedure Act. Under this count the plaintiff can sue for any liquidated demand, such as money received to the use of the plaintiff, or money due to him for work and labor done, goods sold, on an account stated, or under a bill of exchange, promissory note, etc.; but not for money due under a covenant. 2 Odgers, Common Law, 1037.

COUNTER (spelled, also, *Compter*). The name of two prisons formerly standing in London, but now demolished. They were the Poultry Counter and Wood Street Counter. Cowel; Whish. L. D.; Coke, 4th Inst. 248.

COUNTER AFFIDAVIT. An affidavit made in opposition to one already made. This is allowed in the preliminary examination of some cases.

COUNTER-BOND. A bond to indemnify. 2 Leon. 90.

COUNTER-CLAIM. A liberal practice introduced by the reformed codes of procedure in many of the United States, and comprehending **RECOURSEMENT** and **SET-OFF, q. v.**, though broader than either. The New York code thus defines it:

"The counter-claim must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action."

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract existing at the commencement of the action. N. Y. Code, 1889, § 501. See 21 N. Y. 191; 51 *id.* 327; 67 *id.* 48; 77 *id.* 282; 78 *id.* 325; 79 *id.* 575; 80 *id.* 560; 87 *id.* 550; 21 Hun 240; 8 How. Pr. 122, 335; 12 *id.* 310; 35 Wis. 618; 82 N. C. 356; 66 Ind. 498; 25 Minn. 210.

As Cross Action. A "counter-claim" is substantially a cross action by the defendant against the plaintiff growing out of or connected with the subject matter of the action. It is allowed in order that the whole controversy between the parties may be determined in one action, and it may be relied upon wherever an action could be brought by the defendant for the same cause. In an action for an assault and battery the defendant may be the party most aggrieved, and the one that is actually entitled to relief. If so, he could maintain an action against the plaintiff, and, having been sued by him, has

a right to seek redress against him by his cross action in the form of a counter-claim. 109 Ky. 645, 60 S. W. 497; 2 Met. (Ky.) 340.

COUNTER-LETTER. An agreement to recovery where property has been passed by absolute deed with the intention that it shall serve as security only. A defeasance by a separate instrument. 11 Pet. 351.

COUNTER-SECURITY. Security given to one who has become security for another, the condition of which is, that if the one who first became surety shall be damned, the one who gives the counter-security will indemnify him.

COUNTERFEIT. In Criminal Law. To make something false in the semblance of that which is true. It always implies a fraudulent intent. It refers usually to imitations of coin or paper money. See Vin. Abr. *Counterfeit*; R. M. Charl. 151; 1 Ohio 185; *FORGERY*.

COUNTERMAND. A change or recalling of orders previously given.

Express countermand takes place when contrary orders are given and a revocation of the prior orders is made.

Implied countermand takes place when a new order is given which is inconsistent with the former order.

When a command or order has been given, and property delivered, by which a right vests in a third person, the party giving the order cannot countermand it. For example, if a debtor should deliver to A a sum of money to be paid to B, his creditor, B has a vested right in the money, and, unless he abandon that right and refuse to take the money, the debtor cannot recover it from A. 1 Rolle, Abr. 32, pl. 13; Yelv. 164; Styles 296. See 3 Co. 26 b; 2 Vent. 298; 10 Mod. 432; Vin. Abr. *Countermand* (A, 1), *Bailment* (D); 9 East 49; Bac. Abr. *Bailment* (D); Com. Dig. *Attorney* (B, 9), (C, 8); Dane, Abr. *Countermand*.

COUNTERPART. Formerly, each party to an indenture executed a separate deed: that part which was executed by the grantor was called the original, and the rest the counterparts. It is now usual for all the parties to execute every part; and this makes them all originals. 2 Bla. Com. 296.

In granting lots subject to a ground-rent reserved to the grantor, both parties execute the deeds, of which there are two copies: although both are original, one of them is sometimes called the counterpart. See 12 Vin. Abr. 104; Dane, Abr. *Index*; 7 Com. Dig. 443; Merlin, *Rép. Double Ecrit*.

COUNTERPLEA. In Pleading. A plea to some matter incidental to the main object of the suit, and out of the direct line of pleadings. Steph. Pl., Andr. ed. 165; 2 Wms. Saund. 45 h. Thus, *counterplea of oyer* is the defendant's allegations why oyer of an instrument should not be granted. *Counterplea of aid prayer* is the defendant's allegation why the vouches of the tenant in a real action, or a stranger who asks to come in to defend his right, should not be admitted. *Counterplea of voucher* is the allegation of the vouches in avoidance of the warranty after admission to plead. Counterpleas are of rare occurrence. *Termes de la Ley*; *Doctrina Plac.* 300; Com. Dig. *Voucher* (B, 1, 2); Dane, Abr.

COUNTERSIGN. The word "countersign" means "to sign in addition to the signature of a principal or superior in order to attest the authenticity of a writing." 146 Ky. 181; 142 S. W. 225.

COUNTOR, COUNTER or COUNTOUR. In old English practice, an advocate or professional pleader, a term applied in old books to sergeants at law (*q. v.*), sometimes called serjeant counters. Synonymous with the old term narrator (*q. v.*) Barrill.

COUNTRY. A word often used in pleading and practice. Usually signifies a jury, or the inhabitants of a district from which a jury is to be summoned. 3 Bla. Com. 349; 4 *id.* 349; Steph. Pl. 73, 78, 290.

In the absence of some qualifying phrase

the word "country" in the revenue laws of the United States embraces all provinces of a state, no matter how widely separated. 221 U. S. 650.

In § 20 Immigration Act of 1917, the term "country" is used to designate, in general terms, the state which, at the time of deportation, includes the place from which the alien came. 264 U. S. 136.

COUNTY. One of the civil divisions of a country for judicial and political purposes. 1 Bla. Com. 113. Etymologically, it denotes that portion of the country under the immediate government of a count. 1 Bla. Com. 116.

The United States are generally divided into counties. Counties are, in many of the states, divided into townships or towns. In the New England States, however, towns are the basis of all civil divisions, and the counties are rather to be considered as aggregates of towns, so far as their origin is concerned. In Pennsylvania, the state was originally divided into three counties by William Penn. See Proud's Hist. Pa. 234; 2 *id.* 258.

In some states, a county is considered a corporation; 1 Ill. 115; in others, it is held a quasi corporation; 16 Mass. 87; 9 Me. 88; 8 Johns. 385; 3 Munf. 102. In regard to the division of counties, see 6 J. J. Marsh. 147; 4 Halst. 357; 9 Cow. 640; 89 Pa. 419; 8 Baxt. 74, 141; 100 U. S. 548; 33 Ark. 191, 497; 5 Heisk. 294. A county may be required by act of legislature to build a public work outside the county limits, where it is of special interest to the people of the county; 104 Mass. 236; 50 Md. 245. The terms "county" and "people of the county" are, or may be, used interchangeably; 58 Mo. 175.

In the English law, this word signifies the same as *shire*,—county being derived from the French, and *shire* from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided, for the better government thereof and the more easy administration of justice. There is no part of England that is not within some county; and the shire-reeve (*sheriff*) was the governor of the province, under the *comes*, earl, or count.

See CORPORATION, *Counties*.

COUNTY COMMISSIONERS. Certain officers generally intrusted with the superintendence of the collection of the county taxes and the disbursements made for the county. They are invested by the local laws with various powers. In some of the states they are called supervisors.

COUNTY CORPORATE. A city or town, with more or less territory annexed constituting a county by itself. 1 Bla. Com. 120. Something similar to this exists in this country in regard to Philadelphia, New York, and Boston. See 4 Mo. App. 347. They differ in no material points from other counties.

COUNTY COUNCIL. In England. An elective body created in 1888, by the Local Government Act, for each of the sixty-two administrative counties, to take over the administrative business which up to then had been transacted by the justices in quarter sessions. Byrne's L. Dict. See JUSTICE OF THE PEACE; CLERK OF THE PEACE; QUARTER SESSIONS; COURT OF THE GENERAL QUARTER SESSIONS OF THE PEACE.

COUNTY COURT. In English Law. Tribunals of limited jurisdiction, which as now existing were originally established under the stat. 9 & 10 Vict. c. 95.

They had at their institution jurisdiction of actions for the recovery of debts, damages, and demands, legacies, and balances of partnership accounts where the sum sued for did not exceed twenty pounds. It has since been much extended, especially in cases where the parties gave assent in writing. See 3 Bla. Com. 35. They are now regulated by stat. 51 & 52 Vict. (1889) c. 48.

Tribunals of limited jurisdiction in the county of Middlesex, established under the statute 22 Geo. II. c. 33.

County courts were held in England from the earliest times and were of great impor-

tance; Laws of Edward the Elder, A. D. 901-924. The origin of these courts, among the most ancient in England, is somewhat obscure, being ascribed by some writers to the reigning Edgar. This, however, being conjectural, serves to fix the earliest possible date. It is clear that William the Conqueror confirmed the ancient jurisdiction of these courts. They were held under the presidency of the sheriff once in every month. They had jurisdiction in civil, criminal, and ecclesiastical causes, the sheriff associating with himself a bishop or an archdeacon, if necessary, or other ecclesiastic or learned person to aid him. He also heard cases in the nature of appeals from the Hundred, Lathe, and Trithring courts. The judges were the freeholders of the county, summoned by the sheriff, and were called *señatores* or *suitors* of the court. They decided all cases of law and fact, the sheriff not being, for that purpose, a judge. Probably their judgment was not required to be unanimous. Inderwick, *The King's Peace*. "And so is the county court holden to this day." Coke, 4th Inst. 259. In some cases an appeal lay to the king. See, generally, 8 Steph. Com. 452; 3 Bla. Com. 83; 1 Poll. & Matl. 515, 521.

In American Law. Courts in many of the states of the United States and in Canada, of widely varying powers.

Court of County. The expressions "county court" and "court of county" are convertible terms, and are used as descriptive of the county court as distinguished from other courts. Sneed (Ky.) 183.

COUNTY AND HUNDRED COURTS. See COMMUNAL COURTS; HUNDRED COURT.

COUNTY JUDGE. The "county judge" is a constitutional officer. 138 Ky. 238, 127 S. W. 785.

COUNTY PALATINE. A county possessing certain peculiar privileges.

The owners of such counties have kingly powers within their jurisdictions, as the pardoning crimes, issuing writs, etc. These counties have either passed into the hands of the crown, or have lost their peculiar privileges to a great degree. 1 Bla. Com. 117; 4 *id.* 431. The name is derived from *palatium* (palace), and was applied because the earls anciently had palaces and maintained regal state. Cowel; Spel.; 1 Bla. Com. 117. See COURTS OF THE COUNTIES PALATINE.

COUNTY SEAT. The words "county seat" are used to designate the town in which the court-house is situated, because the comparison is to be made between the larger town and the smaller town at which the county buildings are located. 98 S. W. 298.

COUNTY SESSIONS. In England, the Court of General Quarter Sessions of the Peace held in every county once in every quarter of a year. Mozley & W. Law Dict.

COUPLED WITH AN INTEREST. The phrase "coupled with an interest," in connection with a power of attorney, does not mean an interest in the exercise of the power, but an interest in the property on which the power is to operate. 203 U. S. 120.

COUPONS. Those parts of a commercial instrument which are to be cut, and which are evidence of something connected with the contract mentioned in the instrument. They are generally attached to bonds or certificates of loan, where the interest is payable at particular periods, and, when the interest is paid, they are cut off and delivered to the payor. In England, they are known as *warrants* or *dividend warrants*, and the securities to which they belong, debentures. 13 C. B. 372. In the United States they have been decided to be negotiable instruments, if payable to bearer or order, upon which suit may be brought though detached from the bond; 53 Ind. 191; 44 Pa. 63; 21 How. 529; 109 Mass. 88; 22 Gratt. 833; 14 Wall. 282; 20 Wall. 558; 106 U. S. 559; Jones, R. R. Sec. § 320; 43 Me. 232; 22 Am. Rep. 315; 82 N. C. 382; 12 S. C. 200. Otherwise, in 1 Biss. 105, if the bond to which the coupons were at-

tached was not negotiable; see 43 Me. 232; and otherwise if not payable to bearer or order; 66 N. Y. 14; see 26 Conn. 121. In England the question has not been directly decided, but it has been held that they are not promissory notes, and therefore do not require a stamp; 13 C. B. 373. Dividend warrants of the Bank of England made payable to a particular person, but not containing words of transfer, were held not to be negotiable, notwithstanding they had been so by custom for sixty years; 9 Q. B. 396. A purchaser of overdue coupons takes only the title of his vendor; 18 Gratt. 750; 1 Hughes 410. Negotiable coupons are entitled to days of grace; 66 N. Y. 14; Jones, R. R. Sec. § 326; *contra*, 18 Gratt. 773; 2 Dan. Neg. Instr., 8d ed. § 1490 a.

Interest on coupons may be recovered in a suit on the coupons; 44 Fa. 75; 3 McLean 472; 92 U. S. 502; 96 id. 51; 57 N. H. 897; 65 N. C. 234; 41 Barb. 9; 4 A. & E. Encyc. of Law 439. The rate of interest provided for in the bond continues on the coupon till it is merged in judgment; 96 U. S. 51; 112 Mass. 53; 2 Nev. 199; 25 Ohio St. 621; *contra*, 22 How. 118; 82 Md. 501; 10 R. I. 223. See Jones, R. R. Sec. § 336. A suit on the coupon is not barred by the Statute of Limitations unless a suit on the bond would be barred; 14 Wall. 289; otherwise, when the coupons have passed into the hands of the party who does not hold the bonds; 20 Wall. 583. As to practice in actions on coupons, see 9 Wall. 477.

See Jones, Railroad Securities; Clemens, Corporate Securities; Cavanaugh, Money Securities; Daniel, Negotiable Instruments.

COUR DE CASSATION. In French Law. The supreme judicial tribunal and court of final resort, established 1790, under the title of *Tribunal de Cassation*; it received its present name 1802. It is composed of forty-nine counsellors and judges, including a first president and three presidents of chamber, an attorney-general and six advocates-general, one head registrar and four deputy registrars appointed by the head registrar, and a certain number of ushers. Jones, French Bar 23; Guyot, *Rep. Univ.*

The jurisdiction of the court is only on error shown in the proceedings of the lower courts in matters of law, taking the facts as found by the lower courts.

COURSE. The direction of a line with reference to a meridian.

Where there are no monuments, the land is usually described by courses and distances and those mentioned in the patent or deed will fix the boundaries. But when the lines are actually marked, they must be adhered to though they vary from the course mentioned in the deeds. See BOUNDARY.

COURSE OF EMPLOYMENT. The term "course of employment" is not susceptible of accurate definition, since what acts are within the scope of the servant's employment so as to render the master liable therefor must be gathered from the surrounding circumstances, the master's liability depending upon his consent, express or implied, to the servant's acts. 130 Ky. 380, 113 S. W. 429.

COURSE OF TRADE. What is usually done in the management of trade or business. A statute exempting from distress property deposited with a tavern-keeper "in the usual course of business," only includes property deposited by a guest for safekeeping; 5 Blackf. 489. Carriages used for carrying the band and performers of a circus in a street parade, are not carriages "used solely for the conveyance of any goods or burdens in the course of trade;" 1 L. R. 9 Exch. 25.

Men are presumed to act for their own interest, and to pursue the way usually adopted by men generally: hence it is presumed in law that men in their actions will pursue the usual course of trade.

COURSE OF THE VOYAGE. By this term is understood the regular and customary track, if such there be, which a ship

takes in going from one port to another, and the shortest way. Marsh. Ins. 185; Phill. Ins. 981.

COURT (Fr. *cour*, Dutch, *koert*, a yard). In Practice. A body in the government to which the public administration of justice is delegated.

The presence of a sufficient number of the members of such a body regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions. 20 Ala. 446; 20 Ark. 77.

The place where justice is judicially administered. Co. Litt. 58 a; 3 Bla. Com. 23, 25. See 45 La. 501.

The judge or judges themselves, when duly convened.

The term is used in all the above senses, though but infrequently in the third sense given. The application of the term—which originally denoted the place of assembling—to denote the assemblage, strikingly resembles the similar application of the Latin term *curia* (if, indeed, it be not a mere translation), and is readily explained by the fact that the earlier courts were merely assemblages, in the court-yard of the baron or of the king himself, of those who were qualified and whose duty it was so to appear at stated times or upon summons. Traces of this usage and constitution of courts still remain in the courts baron, the various courts for the trial of impeachments in England and the United States, and in the control exercised by the parliament of England and the legislatures of the various states of the United States over the organization of courts of justice, as constituted in modern times. Indeed, the English parliament is still the *High Court of Parliament*, and in Massachusetts the united legislative bodies are entitled, as they (and the body to which they succeeded) have been from time immemorial, the *General Court*.

In England, however, and in those states of the United States which existed as colonies prior to the revolution, most of these judicial functions were early transferred to bodies of a compacter organization, whose sole function was the public administration of justice. The power of impeachment of various high officers, however, is still retained by the legislative bodies both in England and the United States, and is, perhaps, the only judicial function which has ever been exercised by the legislative bodies in the newer states of the United States. These more compact bodies are the *courts*, as the term is used in its modern acceptance.

The one common and essential feature in all courts is a judge or judges—so essential, indeed, that they are even called the *court*, as distinguished from the accessory and subordinate officers; 3 Ind. 289; 53 Mo. 173; see 19 Vt. 473. Courts of record are also provided with a recording officer, variously known as clerk, prothonotary, register, etc.: while in all courts there are counsellors, attorneys, or similar officers recognized as peculiarly suitable persons to represent the parties actually concerned in the causes, who are considered as officers of the court and assistants of the judges, together with a variety of ministerial officers, such as sheriffs, constables, bailiffs, tipstaves, criers, etc. For a consideration of the functions of the various members of a court, see the various appropriate titles, as JURY, SHERIFF, etc.

The word "court" refers to the court in which an action or proceeding is pending, or may be brought; and the words "judge," "justice," "clerk," refer to officers of such court. Section 732, subsection 12, Civil Code of Kentucky.

Courts are said to belong to one or more of the following classes, according to the nature and extent of their jurisdiction, their forms of proceeding, or the principles upon which they administer justice, viz.:

Admiralty. See ADMIRALTY.

Appellate, which take cognizance of causes removed from another court by appeal or writ of error. See APPEAL; APPELLATE JURISDICTION; DIVISION OF OPINION.

Civil, which redress private wrongs. See JURISDICTION.

Criminal, which redress public wrongs, that is, crimes or misdemeanors.

Ecclesiastical. See ECCLESIASTICAL COURTS.

Of equity, which administer justice according to the principles of equity. See EQUITY; COURT OF EQUITY; COURT OF CHANCERY.

Of general jurisdiction, which have cognizance of and may determine causes various in their nature.

Inferior, which are subordinate to other courts. 18 Ala. 521; also, those of a very limited jurisdiction.

Of law, which administer justice according to the principles of the common law.

Of limited or special jurisdiction, which can take cognizance of a few specified

matters only.

Local, which have jurisdiction of causes occurring in certain places only, usually the limits of a town or borough, or, in England, of a barony.

Martial. See COURT-MARTIAL.

Not of record, those which are not courts of record.

Of original jurisdiction, which have jurisdiction of causes in the first instance. See JURISDICTION.

Of record. See COURT OF RECORD.

Superior, which are those of immediate jurisdiction between the inferior and supreme courts; also, those of controlling as distinguished from those of subordinate jurisdiction. 4 Bosw. 547. In Pennsylvania a court created in 1895, having jurisdiction of appeals from the lower courts in certain cases of lesser magnitude. In some states, as Delaware, the *nisi prius* court of first instance for civil cases in the county or other primary judicial district.

Supreme, which possess the highest and controlling jurisdiction; also, in some states, a court of higher jurisdiction than the superior courts, though not the court of final resort.

Within the United States. The words "every court within the United States" include the courts of the District of Columbia. 226 U. S. 551; § 905 Rev. Stat.

See COMMUNAL COURTS; FEUDAL COURTS; FRANCHISE COURTS; MANORIAL COURTS; EVERY COURT OF THE UNITED STATES, LAST RESORT; LEVY COURT; LOCAL COURT; MUNICIPAL COURT; SUPREME COURT OF THE UNITED STATES; LAST COURT; COURT OF RECORD; also various titles following.

COURT OF ADMIRALTY. See ADMIRALTY; UNITED STATES COURTS.

COURT OF ANCIENT DEMESNE. In English Law. A court of peculiar constitution, held by a bailiff appointed by the king, in which alone the tenants of the king's demesne could be impleaded. 3 Burr. 1046; 1 Spence, Eq. Jur. 100; 2 Bla. Com. 99; 1 Report Eng. Real Prop. Comm. 28, 29; 1 Steph. Com. 224; 1 Poll. & Maitl. 367; 3 & 4 Will. IV. c. 74, §§ 4, 5, 6.

COURT OF APPEAL. The full title of the Court of Appeal is His Majesty's Court of Appeal; but the customary title is recognized by the Interpretation Act, 1889, s. 12. The court consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, five ordinary judges entitled "Lords Justices of Appeal," the President of the Probate, Divorce and Admiralty Division, and every person who has held the office of Lord Chancellor. The Lord Chancellor is ex-officio the president of the court. Byrne. See COURTS OF ENGLAND.

COURT OF APPEAL, HER MAJESTY'S. In England, one of the two sections of the supreme court of judicature, established by the Judicature Acts of 1873 and 1875 (q. v.).

COURT OF APPEALS. In American Law. An appellate tribunal which, in Kentucky, Maryland, and New York, is the court of last resort. In Delaware and New Jersey, it is known as the court of errors and appeals; in Virginia and West Virginia, the supreme court of appeals; in Texas there is a court of civil appeals, and in Illinois, Indiana, Missouri, Pennsylvania, and the United States there are appellate courts sitting in judicial districts, all of which are inferior to the supreme court.

COURT OF APPRAISERS OF THE UNITED STATES. Nine general appraisers are appointed by the president of the United States with the advice and consent of the senate, who are employed at such ports as the secretary of the treasury shall from time to time direct, who supervise such appraisements and classification for duties as may be deemed needful to secure uniform appraisements at the several ports; U. S. Rev. Stat. 1 Supp.

§ 12. At ports where there is no appraiser, the dutiable value of imported merchandise is determined by the customs officer to whom is committed the estimation and collection of duties. A board of three general appraisers is stationed at New York, to the decision of which the collector or importer may appeal, if dissatisfied with the decision of the general appraiser, provided, that the owner, importer, consignee, or agent shall give notice to the collector in writing within two days after the decision of the general appraiser; § 12. A further right of appeal is granted from the decision of the collector as to the amount of duties to be collected upon imported merchandise, by giving notice to the collector in writing after payment of charges, setting forth distinctly and specifically the reasons for the objection thereto, which notice, payment, and invoice, and all papers and exhibits connected therewith, the collector transmits to the board of appraisers at New York or to a board of any three general appraisers who may be appointed by the secretary of the treasury. Should the owner, importer, consignee, or agent be dissatisfied with the decision of this board of appraisers, they may, within thirty days after such decision, apply to the circuit court of the United States, within the district in which the matter arises, for a review of the questions of law and of fact involved in the decision. And there is a further right of appeal to the supreme court of the United States whenever the attorney-general shall apply for it within thirty days. See Act June 10, 1890, U. S. Rev. Stat. 1 Supp. p. 744.

COURT OF ARBITRATION OF THE CHAMBER OF COMMERCE OF NEW YORK. Organized in 1874, for the settlement of controversies of a mercantile nature in the city of New York. Where all the parties are regular members of the chamber of commerce, either may summon the opposite party before this court. Other parties may voluntarily submit to its decision such questions arising in the port of New York. An official arbitrator presides, but others may be named by the parties to sit with him, and counsel may be employed. The decision of this court is final, and is in the form of an award by the arbitrator. N. Y. Laws, 1874, c. 278, and 1875, c. 495.

COURT OF ARCHDEACON. The most inferior of the English ecclesiastical courts, from which an appeal generally lies to that of the bishop. 3 Bla. Com. 64; 3 Steph. Com. 305.

COURT OF ARCHES (L. Lat. *curia de archibus*). In English Ecclesiastical Law. A court of appeal, and of original jurisdiction.

The most ancient consistory court belonging to the archbishop of Canterbury for the trial of spiritual causes, the judge of which is called the *dean of the arches*, because he anciently held his court in the church of St. Mary le Bow (*Sancta Maria de archibus*,—literally, "St. Mary of arches"), so named from the style of its steeple, which is raised upon pillars built *archwise*, like so many bent bows. *Termes de la Ley*. It is now held, as are also the other spiritual courts, in the hall belonging to the College of Civilians, commonly called Doctor's Commons.

Its proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but, the office of dean of the arches having been for a long time united with that of the archbishop's principal official, the judge of the arches, in right of such added office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. 3 Bla. Com. 64; 3 Steph. Com. 306; Whart. Law Dict. *Arches Court*. Many suits are also brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding known in the common law by the denomination of *letters of request*. 3 Steph. Com. 306; 2 Chitty, Gen. Pr. 496; 2 Add. Eccl. 406.

From the court of arches an appeal for-

merly lay to the pope, and afterwards, by statute 25 Hen. VIII. c. 19, to the king in chancery (that is, to a court of delegates appointed under the king's great seal), as supreme head of the English church, but now, by 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, to the judicial committee of the privy council; 3 Bla. Com. 65; 3 Steph. Com. 306.

A suit is commenced in the ecclesiastical court by citing the defendant to appear, and exhibiting a libel containing the complaint against him, to which he answers. Proofs are then adduced, and the judge pronounces a decree upon hearing the arguments of advocates, which is then carried into effect.

Consult Burn, Humphrey, Phill., Smith, Eccl. Law; Brett, Com. book xii.; Reeve, Eng. Law; 3 Bla. Com. 65; 3 Steph. Com. 306.

COURT OF ASSISTANTS. A New England colonial court of supreme jurisdiction. Stand. Dict.

COURTS OF ASSIZE AND NISI PRIUS. In English Law. Courts composed of two or more commissioners, called judges of assize (or of assize and *nisi prius*), who are twice in every year sent by the queen's special commission on *circuit* all round the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall; there being, however, as to London and Middlesex, this exception, that, instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, at what are called the London and Westminster sittings.

These judges of assize came into use in the room of the ancient justices in eyre (*justiciarii itinere*), who were regularly established, if not first appointed, by the Parliament of Northampton, A. D. 1176 (23 Hen. II.), (the first of these of whom we have any record, were appointed in 1170), with a delegated power from the king's great court or *curia regis*, being looked upon as members thereof; though the present justices of assize and *nisi prius* are more immediately derived from the stat. Westm. 2, 13 Edw. I. c. 30, and consist principally of the judges of the superior courts of common law, being assigned by that statute out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By stat. 27 Edw. I. c. 4 (explained by 12 Edw. II. c. 8), assizes and inquests are allowed to be taken before any one justice of the court in which the plea is brought, associating with him one knight or other approved man of the county; by stat. 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court), or before the chief baron of the exchequer, if he be a man of the law, or otherwise, before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's sworn justice; and, finally, by 2 & 3 Vict. c. 32, all justices of assize may, on their respective circuits, try causes pending in the court of exchequer, without issuing (as it had till then been considered necessary to do) a separate commission from the exchequer for that purpose. 3 Steph. Com. 322; 3 Bla. Com. 57, 58.

There are eight circuits (formerly seven), viz.: the Home, Midland, Norfolk, Oxford, Northern, Western, North Wales, and South Wales. A general commission was issued twice a year to the judges mentioned (of the superior courts of common law at Westminster), two of whom were assigned to every circuit. The judges had four several commissions, viz.: of the peace; of *oyer and terminer*; of *gaol delivery*; and of *nisi prius*. There were formerly five, including the commission of assize; but the abolition of assizes and other real actions has thrown that commission out of force. The commission of *nisi prius* was directed to the judges, the clerks of assize, and others; and by it civil causes in which issue had been joined in any one of the superior courts were tried in circuit by a jury of twelve men of the county in which the venire was laid, and on return of the verdict to the court above—usually on the first day of the term following—the court gave judgment on the fifth day after, allowing the four intermediate days to either party, if dissatisfied with the verdict, to move for a new trial. 3 Steph. Com. 514, 515; 3 Bla. Com. 58, 59. Where courts of this kind exist in the United States, they are instituted by statutory provision. 4 W. & S. 404. See *OYER AND TERMINER*;

GAOL DELIVERY; **COURTS OF OYER AND TERMINER** and **GENERAL GAOL DELIVERY**; **NISI PRIUS**; **COMMISSION OF THE PEACE**.

COURT OF ATTACHMENTS. The lowest of the three courts held in the forests. It has fallen into total disuse.

The highest court was called Justice in Eyre's Seat, or familiarly Justice Seat; the middle, the Swanmote; and the lowest, the Attachment. Wharton, Law Dict. *Attachment of the Forest*.

The Court of Attachments was to be held before the verderers of the forest once in every forty days, to inquire of all offenders against vert and venison, by receiving from the foresters or keepers their attachments or presentments *de viridi et venatione*, enrolling them, and certifying them under their seals to the court of justice-seat, or Swanmote; for this court could only inquire of offenders; it could not convict them; 3 Bla. Com. 171; **FOREST LAWS**.

COURT OF AUDIENCE. See **AUDIENCE COURT**.

COURT OF AUGMENTATION. A court established by 27 Hen. VIII. c. 27, for managing the revenues and possessions of all monasteries whose income was under two hundred pounds a year (which by an act of parliament of the same session had been given to the king), and for determining suits relating thereto.

It was called "The Court of the Augmentations of the Revenues of the King's Crown" (from the *augmentation* of the revenues of the crown derived from the suppression of the monasteries), and was a court of record, with one great seal and one privy seal,—the officers being a chancellor, who had the great seal, a treasurer, a king's attorney and solicitor, ten auditors, seventeen receivers, with clerk, usher, etc.

All dissolved monasteries under the above value, with some exceptions, were in survey of the court, the chancellor of which was directed to make a yearly report of their revenues to the king. The court was dissolved in the reign of queen Mary, but the Office of Augmentation remained long after; and the records of the court are now at the Public Record Office, in the keeping of the master of the rolls, stat. 1 & 2 Vict. c. 94, and may be searched on payment of a fee. Eng. Cyclopædia; Cowel.

COURT, BAIL. See **BAIL COURT**.

COURT OF BANKRUPTCY. A court of record, in England, with jurisdiction in bankruptcy, primary and appellate, and which is declared a court of law and equity for that purpose. The nature of its constitution may be learned from the early sections of the Bankrupt Law Consolidation Act, 1849. The judgments of this court may be examined, on appeal, by a vice-chancellor, and successively by the lord-chancellor and the house of lords, if he deem the question of sufficient difficulty or importance; 3 Bla. Com. 428. There is a court of bankruptcy in London, established by 1 & 2 Will. IV. c. 56, and 5 & 6 Will. IV. c. 29, s. 21; and courts of bankruptcy for different districts are established by 5 & 6 Vict. c. 123, which are branches of the London court. 2 Steph. Com. 199, 200; 3 *id.* 426. The Bankruptcy Act of 1869 constitutes two distinct jurisdictions: the London district, and the country district, comprising the rest of England. The former has all the powers of the superior courts of common law and equity, and the judge may reverse, vary, or affirm any order of a local bankruptcy court; Brown; Robson, Bkcy.

By the judicature acts, 1873 and 1875 (q. v.) the court of bankruptcy was consolidated into the supreme court of judicature. It has a court with officers and offices of its own.

COURT BARON. A domestic court, incident to every manor, to be held by the steward within the manor, for redressing misdemeanors and nuisances therein, and for settling disputes among the tenants relating to property. It is not a court of record. 1 Poll. & M. 580.

Customary court baron is one appertaining entirely to copyholders. See **CUSTOMARY COURT BARON**.

Freeholders' court baron is one held before the freeholders who owe suit and service to the manor. It is the court-baron proper.

These courts have now fallen into great disuse in England; and their jurisdiction is practically abolished by the County Courts Act, 39 and 41 Vict. c. 142, s. 28; 3 Steph. Com. 270-281. In the state of New York such courts were held while the state was a province. See charters in Bolton's Hist. of New Chester. The court has derived its name from the fact that it was the court of the baron or lord of the manor. 3 Bla. Com. 33, n.; see Fleta, lib. 2, c. 33; though it is explained by some as being the court of the freeholders, who were in some instances called barons. Co. Litt. 58 a.

COURT OF BROTHERHOOD AND GUESTLING. See **BROTHERHOOD AND GUESTLING, COURT OF**.

COURT OF CHANCERY, or CHANCERY. A court formerly existing in England and still existing in several of the United States, which possesses an extensive equity jurisdiction.

The name is said by some to be derived from that of the chief judge, who is called a chancellor; others derive both names directly from the cancelli (bars) which in this court anciently separated the press of people from the officers. See 3 Bla. Com. 40, n.; Story, Eq. Jur. 40; CANCELLARIUS.

In American Law. A court of general equity jurisdiction.

The terms equity and chancery, court of equity and court of chancery, are constantly used as synonymous in the United States. It is presumed that this custom arises from the circumstance that the equity jurisdiction which is exercised by the courts of the various states is assimilated to that possessed by the English courts of chancery. Indeed, in some of the states it is made identical therewith by statute, so far as conformable to our institutions.

Separate courts of chancery or equity exist in a few of the states; in others, the courts of law sit also as courts of equity; in others, equitable relief is administered under the forms of the common law; and in others, the distinction between law and equity has been formally abolished or never existed. The federal courts exercise an equity jurisdiction as understood in the English courts at the time of the revolution; Miller, Const. U. S. 318; independent of local state law; *id.*; 2 Sumn. 401; and the remedies are not according to state practice but as distinguished and defined in that country from which we derive our knowledge of those principles; 3 Wheat. 211. whether the state courts in the district are courts of equity or not; 2 McLean 568; 15 Pet. 9; 11 How. 669.

In English Law. Formerly the highest court of judicature next to parliament. Prior to the judicature acts it was the superior court of chancery, called distinctively "The High Court of Chancery," and consisted of six separate tribunals, viz.: the court of the lord high chancellor of Great Britain; the court of the master of the rolls, or keeper of the records in chancery; the court of appeal in chancery, the three separate courts of the vice-chancellors.

The jurisdiction of this court was fourfold.

The common-law or ordinary jurisdiction. By virtue of this the lord-chancellor was a privy councillor and prolocutor of the house of lords. The writs for a new parliament issued from this department. The Petty Bag Office was in this jurisdiction. It was a common-law court of record, in which pleas of *scire facias* to repeal letters-patent were exhibited, and many other matters were determined, and whence all original writs issued. See 11 & 12 Vict. c. 94; 12 & 13 Vict. c. 109.

The statutory jurisdiction included the power which the lord-chancellor exercised under the *habeas corpus* act, and by which he inquired into charitable uses, but did not include the equitable jurisdiction.

The specially delegated jurisdiction included the exclusive authority which the lord-chancellor and lords justices of appeal had over the persons and property of idiots and lunatics.

The equity or extraordinary jurisdiction was either assistant or auxiliary to the com-

mon law, including discovery for the promotion of substantial justice at the common law, preservation of testimony of persons not litigants relating to suits or questions at law, removal of improper impediments and prevention of unconscientious defences at common law, giving effect to and relieving from the consequences of common-law judgments; concurrent with the common law, including the remedial correction of fraud, the prevention of fraud by injunction, accident, mistake, account, dower, interpleader, the delivery up of documents and specific chattels, the specific performance of agreements; or exclusive, relating to trusts, infancy, the equitable rights of wives, legal and equitable mortgages, the assignment of choses in action, partition, the appointment of receivers, charities, or public trusts. Whart. Law Dict.

By the Judicature Acts (*q. v.*) this court was merged in the supreme court of judicature, and all its jurisdiction vested therein.

The inferior courts of chancery are the equity courts of the Palatine Counties, the courts of the Two Universities, the lord-mayor's courts in the city of London, and the court of chancery in the Isle of Man. See 18 & 19 Vict. c. 48, and the titles of these various courts. Consult Story, Eq. Jur.; Dan. Ch. Pr.; Spence, Eq. Jur.; COURTS OF EQUITY; EQUITY.

COURT OF THE CHIEF JUSTICE IN EYRE. The highest of the courts of the Forest, held every three years, by the chief justices, to inquire of purprestures or encroachments, assorts, or cultivation of forest land, claims to franchises, parks, warrens, and vineyards in the forest, as well as claims of the hundred, claims to the goods of felons found in the forest, and any other civil questions that might arise within the forest limits. But it had no criminal jurisdiction, except of offences against the forest laws. In the exercise of this, he passed sentences upon offenders convicted by the verderers in Swanimote (*q. v.*) and performed all the duties of a justice in eyre (*q. v.*). Forty days' notice was given of the holding of this court. It was called also the court of justice seat (*q. v.*). Inderwick, The King's Peace 152.

COURT OF CHIVALRY. In English Law. An ancient military court, possessing both civil and criminal jurisdiction touching matters of arms and deeds of war.

As a court of civil jurisdiction, it was held by the lord high constable of England while that office was filled, and the earl-marshal, jointly, and subsequently to the attainder of Stafford, duke of Buckingham, in the time of Henry VIII., by the earl-marshal alone. It had cognizance, by statute 13 Ric. II. c. 2, "of contracts and other matters touching deeds of arms and war, as well out of the realm as within it." This jurisdiction was of importance while the English kings held territories in France.

As a court of criminal jurisdiction, it could be held only by the lord high constable and earl-marshal jointly. It had jurisdiction over "pleas of life and member arising in matters of arms and deeds of war, as well out of the realm as within it."

It was not a court of record, could neither fine nor imprison, 7 Mod. 137, and has fallen entirely into disuse; 3 Bla. Com. 68; 4 *id.* 268.

COURTS CHRISTIAN. Ecclesiastical courts, which see.

COURTS OF THE CINQUE PORTS. In English Law. Courts of limited local jurisdiction, formerly held before the mayor and jurats (aldermen) of the Cinque Ports; from which a writ of error lay to the lord-warden in his court of Shepway, and from this court to the king's bench. By the 18 & 19 Vict. c. 48, and 20 & 21 Vict. c. 1, the jurisdiction and authority of the lord-warden of the Cinque Ports and constable of Dover Castle, in or in relation to the administration of justice

in actions, suits, or other civil proceedings, at law or in equity, are abolished; but a jurisdiction in cases of salvage is still retained; 57 and 58 Vict. c. 60; 2 Steph. Com. 499, n.; 3 Bla. Com. 79; 3 Steph. Com. 347, n.; and an appeal lies in admiralty causes from the county courts to the court of admiralty of the Cinque Ports, by 31 & 32 Vict. c. 71. See **CINQUE PORTS**.

COURT OF CLAIMS. See **UNITED STATES COURTS**.

COURT OF THE CLERK OF THE MARKET. In English Law. A tribunal incident to the market held in the suburbs of the king's court. The *clericus mercati hospitii regis* was the incumbent of an honorable office pertinent to the ancient custom of holding such markets. The clerk in early times witnessed verbal contracts; later he adjudicated on prices of corn, bread, and wine and other commodities as fixed by the justices of the peace; inquired as to the correctness of weights and measures in every city, town, or borough, subject to appeal to the lord high steward, who could fine him for extortion and send him to the tower for a third offence. The clerk also measured land in case of dispute, and he had power to send bakers, brewers, and others to the pillory for unlawful dealings. See Inderwick, The King's Peace 104.

The jurisdiction over weights and measures formerly exercised by the clerk of the market was taken from him by stat. 5 & 6 Will. IV. c. 68; 9 M. & W. 747; 4 Steph. Com. 323.

COURT OF COMMISSIONERS OF SEWERS. See **COMMISSIONERS OF SEWERS**.

COURT OF COMMON PLEAS. In American Law. A court of original and general jurisdiction for the trial of issues of fact and law according to the principles of the common law.

Courts of this name exist in some of the states of the United States, and frequently have a criminal as well as civil jurisdiction. They are, in general, courts of record, being expressly made so by statute in Pennsylvania, April 14, 1834, § 18. In Pennsylvania they exercise an equity jurisdiction also, as well as that at common law. Courts of substantially similar powers to those indicated in the definition exist in all the states, under various names.

In English Law. Formerly one of the three superior courts of common law at Westminster.

This court, which is sometimes called, also, Bancus Communis, Bancus, and Common Bench, was a branch of the *curia regis*, and was at its institution ambulatory, following the household of the king. In the eleventh clause of Magna Charta, it is provided that it shall be held at some fixed place, which is Westminster. The establishment of this court at Westminster, and the consequent construction of the *Inns of Court* and gathering together of the common-law lawyers, enabled the law itself to withstand the attacks of the canonists and civilians. It derived its name from the fact that the causes of common people were heard there. It had exclusive jurisdiction of real actions as long as those actions were in use, and had also an extensive and, for a long time, exclusive jurisdiction of all actions between subjects. This latter jurisdiction, however, was gradually encroached upon by the king's bench and exchequer, with which it afterwards had a concurrent jurisdiction in many matters. Formerly none but sergeants at law were admitted to practise before this court in *banc*; 6 Bingh. n. c. 235; but, by statutes 6 & 7 Vict. c. 18, § 61, 9 & 10 Vict. c. 54, all barristers at law have the right of "practice, pleading, and audience."

It consisted of one chief and four puisne or associate justices.

It had a civil, common-law jurisdiction, concurrent with the king's bench and exchequer, of personal actions and actions of ejectment, and a peculiar or exclusive jurisdiction of real actions, actions under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, the registration of judgments, annuities, etc., 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 Vict. c. 15; respecting fees for conveyances under 3 & 4 Will. IV. c. 74; the examination of married women concerning their conveyances, 11 & 12 Vict. c. 70; 17 & 18 Vict. c. 75; 19 & 20 Vict. c. 108, § 73; and of appeals from the revising barristers' court, 6 & 7 Vict. c. 18.

Whart. Law Dict.

Appeals formerly lay from this court to the king's bench; and by statutes 11 Geo. IV. and 1 Will. IV. c. 70, appeals for errors in law were afterwards taken to the judges of the king's bench and barons of exchequer in the exchequer chambers, from whose judgment an appeal lay only to the house of lords. 3 Bla. Com. 40.

The Judicature Act transferred the jurisdiction of this court to the Common Pleas division of the High Court of Justice; 3 Steph. Com. 353; and it was to be exercised by five of the judges of that division at least, whereof the Lord Chief Justice of England, or the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron of the Exchequer, should be one; *ibid.* But by order in council, made in 1880 under § 82 of that act, the Common Pleas division was merged in the Queen's Bench division. See JUDICATURE ACTS.

COURTS OF CONSCIENCE. See COURTS OF REQUESTS.

COURT FOR CONSIDERATION OF CROWN CASES RESERVED. A court established by stat. 11 & 12 Vict. c. 78, composed of such of the judges of the superior courts of Westminster as were able to attend, for the consideration of questions of law reserved by any judge in a court of oyer and terminer, gaol delivery, or quarter sessions, before which a prisoner had been found guilty by verdict; such question being stated in the form of a special case. Moz. & W. Dict.; 4 Steph. Com. 442.

COURT, CONSISTORY. See CON-SISTORY COURT.

COURT OF CONVOCATION. In English Ecclesiastical Law. A convocation or ecclesiastical synod, which is in the nature of an ecclesiastical parliament.

There is one for each province. They are composed respectively of the archbishop, all the bishops, deans, and archdeacons of their province, with one proctor, or representative, from each chapter, and, in the province of Canterbury, two proctors for the beneficed parochial clergy in each diocese, while in the province of York there are two proctors for each archdeaconry. In York the convocation consists of only one house; but in Canterbury there are two houses, of which the archbishop and bishops form the upper house, and the lower consists of the remaining members of the convocation. In this house a prolocutor, performing the duty of president, is elected. These assemblies meet at the time appointed in the queen's writ. The convocation has long been summoned *pro forma* only, but is still, in fact, summoned before the meeting of every new parliament, and adjourns immediately afterwards, without proceeding to the dispatch of any business.

The purposes of the convocation is stated to be the enactment of canon law, subject to the license and authority of the sovereign, and consulting on ecclesiastical matters.

In their judicial capacity, their jurisdiction extends to matters of heresy, schisms, and other mere spiritual or ecclesiastical causes,—an appeal lying from their judicial proceedings to the queen in council, by stat. 2 & 3 Will. IV. c. 92.

Cowel; Bac. Abr. Ecclesiastical Courts, A, 1; 1 Bla. Com. 279; 2 Steph. Com. 525, 668; 2 Burn. Eccl. Law, 18 *et seq.*; Encyc. Britt. *sub voc.*; Brett, Com. Book XII.

COURT OF THE CORONER. In English Law. A court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. 4 Steph. Com. 323; 4 Bla. Com. 274; now generally known as an inquest. In England, it is regulated by stat. 50 & 51 Vict. (1887) c. 71. See CORONER.

COURT FOR THE CORRECTION OF ERRORS. See SOUTH CAROLINA.

COURTS OF THE COUNTIES PALATINE. In English Law. A species of private court which appertains to the counties palatine of Lancaster and Durham.

They are local courts, which formerly had exclusive jurisdiction in law and equity of all cases arising within the limits of the respective counties. The judges who held these courts sat by special commission from the owners of the several franchises and under their seal, and all process was taken

in the name of the owner of the franchise, though subsequently to the 27 Hen. VIII. c. 24 it ran in the king's name. See COUNTY PALATINE.

The Judicature Act of 1873 transfers the jurisdiction of the court of common pleas of Lancaster and the court of pleas of Durham to the High Court of Justice. See JUDICATURE ACTS. But the chancery court at Lancaster is expressly retained by § 85 of the act. 1 Steph. Com. 133; 3 *id.* 634. The jurisdiction of the Durham chancery court is now regulated by stat. 52 & 53 Vict. (1889) c. 47; and that of the Lancaster chancery court by stat. 13 & 14 Vict. (1850) c. 43, 17 & 18 Vict. (1854) c. 82, and 52 & 53 Vict. (1890) c. 23.

COURT OF CRIMINAL APPEAL.

The Criminal Appeal Act, 1907, created the Court of Criminal Appeal. Under the Criminal Appeal (Amendment) Act, 1908, the court consists of the Lord Chief Justice and all the puisne judges of the King's Bench Division. Three, or any higher odd number, form a quorum. The Act of 1907 is the statute under which an appeal on the facts, as distinguished from the law and against the sentence, was for the first time given to a prisoner convicted on indictment. Any person so convicted may appeal (1) on any question of law; (2) with the leave of the Court of Criminal Appeal or of the judge who tried him, on any question either of facts or of mixed law and fact, or on any other reasonable ground; and (3) against the sentence. The court may increase as well as mitigate the sentence. The act and the Criminal Appeal Rules, 1908, made pursuant to s. 18 of the act, form a complete code. In a case involving any point of exceptional importance either the Director of Public Prosecutions or the prosecutor or the defendant may, if they can obtain the certificate of the Attorney-General, appeal to the House of Lords, but except in any such case the decision of the Court of Criminal Appeal is final. Byrne. See COURTS OF ENGLAND.

COURT OF DELEGATES. In

English Law. A court of appeal in ecclesiastical and admiralty suits, formerly the great court of appeal in ecclesiastical causes, now abolished by 2 & 3 Will. IV. c. 92, and its functions transferred to the Judicial Committee of the Privy Council. Cowel; 3 Bla. Com. 66, 67; 3 Steph. Com. 307, 308.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. In English

Law. A court which had the jurisdiction formerly exercised by the ecclesiastical courts in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and all suits, causes, and matters matrimonial.

It consisted of the lord chancellor and the justices of the queen's bench, the common pleas, the exchequer, and the judge of the court of probate, who was entitled judge ordinary.

The judge ordinary exercised all the powers of the court, except petitions for dissolving or annulling marriages and applications for new trials of matters of fact, bills of exception, special verdict and special cases, for hearing which excepted cases he must be joined by two of the other judges. Provision was made for his absence by authorizing the lord chancellor to appoint one of certain judicial persons to act in such absence. Juries were summoned to try matters of fact, and such trials were conducted in the same manner as jury trials at common law. See stat. 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; 23 & 24 Vict. c. 61. It is now merged in the High Court of Justice by the Judicature Act, *q. v.*

COURT OF THE DUCHY OF LANCASTER. In English Law. A court

of special jurisdiction, which has jurisdiction of all matters of equity relating to lands holden of the king in right of the duchy of Lancaster.

It is held by the chancellor or his deputy, is a court of equity jurisdiction and not of

record. It is to be distinguished from the court of the county palatine of Lancaster. 3 Bla. Com. 78. See COURTS OF THE COUNTIES PALATINE.

COURT OF THE EARL MARSHAL. See COURT OF CHIVALRY; EARL MARSHAL.

COURTS OF ENGLAND. Criminal Courts. The ordinary criminal courts in England now are: (1) Petty Sessions, (2) Quarter Sessions, (3) The Assizes, (4) The Central Criminal Court, (5) The King's Bench Division of the High Court of Justice, (6) The Court of Criminal Appeal. Peers who are charged with treason, felony, or misprison are tried either in (7) The House of Lords, or (8) The Court of the Lord High Steward. Appeals in criminal matters from the Channel Islands, the Isle of Man, the Empire of India, and the Colonies are heard by the Judicial Committee of the Privy Council, which advises the King thereon. 2 Odgers, Common Law 985.

Superior Civil Courts. The chief civil court of first instance is (1) The High Court of Justice. From this court appeal lies to (2) The Court of Appeal, and a further appeal to (3) The House of Lords. Appeals from the Channel Islands, the Isle of Man, India, and the Colonies lie to (4) The Judicial Committee of the Privy Council. (5) There are other courts vested with local or special jurisdiction which are yet superior courts, such as: (a) The Chancery Court of the County Palatine of Lancaster, (b) The Chancery Court of the County Palatine of Durham, (c) The Court of Railway and Canal Commission.

An immense quantity of minor civil business is transacted in the Borough Courts and the County Courts. These local courts are inferior courts of Record. *Id.*; 1000.

Inferior Civil Courts. Courts are divided into three classes: (a) Superior Courts of Record; (b) Inferior Courts of Record; (c) Inferior Courts not of Record. *Id.*; 1029. For detailed descriptions of the Courts here mentioned see SESSIONS OF THE PEACE (PETTY SESSIONS); COURT OF GENERAL QUARTER SESSIONS OF THE PEACE; ASSIZES; CENTRAL CRIMINAL COURT; COURT OF KING'S BENCH; COURT OF CRIMINAL APPEAL; HOUSE OF LORDS; COURT OF THE LORD HIGH STEWARD; JUDICIAL COMMITTEES OF THE PRIVY COUNCIL; JUDICATURE ACTS (HIGH COURT OF JUSTICE); COURT OF APPEAL; CHANCERY COURT OF THE COUNTY PALATINE OF LANCASTER; CHANCERY COURT OF THE COUNTY PALATINE OF DURHAM; COURT OF RAILWAY AND CANAL COMMISSIONS.

COURT OF EQUITY. A court which administers justice according to the principles of equity.

As to the constitution and jurisdiction of such courts, see COURT OF CHANCEERY.

Such courts are not, strictly speaking, courts of record except when made so by statute; Yelv. 226; 9 S. & R. 252. Their decrees touch the person only; 3 Cal. 36; but are conclusive between the parties; 8 Conn. 268; 1 Stock. 302; 6 Wheat. 109. See 2 Bibb 149. And as to the personality, their decrees are equal to a judgment; 2 Madd. 355; 2 Salk. 507; 1 Vern. 214; 3 Cal. 35; and have preference according to priority; 8 P. Wms. 401, n.; Cas. temp. Talb. 217; 4 Bro. P. C. 287; 4 Johns. Ch. 638. See Chase, Bla. Com. 843, n. 3. They are admissible in evidence between the parties; 2 Leigh 474; 13 Miss. 783; 1 Fla. 409; 10 Humphr. 610; and see 3 Litt. 249; 8 B. Monr. 438; 5 Ala. 254; 2 Gill 21; 12 Mo. 112; 2 Ohio 551; 9 Rich. 454; when properly authenticated; 2 A. K. Marsh. 290; and come within the provisions of the constitution for authentication of judicial records of the various states for use as evidence in other states; Pet. C. C. 352.

An action may be brought at law on a decree of a foreign court of chancery for an ascertained sum; 1 Campb. 253; Hempst. 197; but not for an unascertained sum; 3 Cal. 37, n.; but *nil debet* or *nul tiel record*

is not to be pleaded to such an action; 9 S. & R. 252. See *EQUITY*.

COURT OF ERROR. An expression applied especially to the court of exchequer chamber and the house of lords, as taking cognizance of error brought, Moz. & W. Dict. 3 Steph. Com. 333. It is applied in some of the United States to the court of last resort in the state.

COURT OF EXCHEQUER. In English Law, A superior court of record, administering justice in questions of law and revenue.

It was the lowest in rank of three superior common-law courts of record, and had jurisdiction originally only of cases of injury to the revenue by withholding, or non-payment. The privilege of suing and being sued in this court in personal actions was extended to the king's accountants, and then, by a fiction that the plaintiff was a debtor of the king, to all personal actions. It had formerly an equity jurisdiction and there was then an equity court; but, by statute 5 Vict. c. 6, this jurisdiction was transferred to the court of chancery.

It consisted of one chief and four puisne judges or barons.

As a court of revenue, its proceedings were regulated by 22 & 23 Vict. c. 1, § 9.

As a court of common law, it administered redress between subject and subject in all actions whatever, except real actions.

The appellate jurisdiction from this court was to the judge of the king's bench and common pleas sitting as the court of exchequer chamber, and from this latter court to the house of lords; 3 Steph. Com. 338-340; 3 Bla. Com. 44-46. The jurisdiction of this court is transferred by the Judicature Act of 1873 to the exchequer division of the high court of justice. See *JUDICATURE ACTS*.

In Scotch Law. A court which formerly had jurisdiction of matters of revenue, and a limited jurisdiction over cases between the crown and its vassals where no questions of title were involved.

This court was established by the statute 6 Anne, c. 26, and its processes resembled those in the English court of exchequer. It is now merged in the court of sessions; but the name is still applied to this branch of the latter court, which is held by two of the judges acting in rotation. Pat. Com. 1055, n. The proceedings are regulated by stat. 19 & 20 Vict. c. 56.

COURT OF EXCHEQUER CHAMBER. In English Law. A court for the correction and prevention of errors of law in the three superior common-law courts of the kingdom.

A court of exchequer chamber was first erected by statute 31 Edw. III. c. 12, to determine causes upon writs of error from the common-law side of the exchequer court. It consisted of the lord chancellor, lord treasurer, and the justices of the king's bench and common pleas. A second court of exchequer chamber was instituted by statute 27 Eliz. c. 8, consisting of the justices of the common pleas and the exchequer, which had jurisdiction in error of cases commenced in the king's bench. By statutes 11 Geo. IV. and 1 Will. IV. c. 70, these courts were abolished and the court of exchequer chamber substituted in their place. It is now merged in the Court of Appeals, under the Judicature Acts, *q. v.*

As a court of debate, it was composed of the judges of the three superior courts of law, to whom is sometimes added the lord chancellor. To this court questions of unusual difficulty or moment were referred before judgment from either of the three courts.

As a court of appeals, it consisted of the judges of two of the three superior courts of law (common bench, king's bench, and exchequer) sitting to decide writs of error from the other two courts. 3 Bla. Com. 56, 57; 3 Steph. Com. 333, 356.

From the decisions of this court a writ of error lay to the House of Lords; but no such appeal lies from the court of appeal under the new act.

COURT OF FACULTIES. In Ecclesiastical Law. A tribunal in England, belonging to the archbishop.

It does not hold pleas in any suits, but creates rights to pews, monuments, and other mortuary matters. It has also various other powers under 25 Hen. VIII. c. 21, in granting licenses, faculties, dispensations, etc., of different descriptions; as,

a license to marry, a faculty to erect an organ in a parish church, to level a churchyard, to remove bodies previously buried; and it may also grant dispensations to eat flesh on days prohibited, or to ordain a deacon under age, and the like. The archbishop's office in this tribunal is called *magister ad facultates*; Co. 4th Inst. 337; 2 Chit. Gen. Pr. 507.

COURTS OF THE FOREST. Courts held for the enforcement of the forest laws. The lowest of these was the Woodmote, or Court of Attachments (*q. v.*), held every forty days by the Verderers, to receive presentments and bind over the accused. The next was the Swanmote (*q. v.*), held thrice a year, to inquire of presentments and charges, and convict offenders, but without power to punish them. It was composed of the Verderers and presided over by the Steward of the Forest. The highest was the Court of the Chief Justice (*q. v.*), held once in three years, to decide all claims to franchises, etc., in the forest as well as of purprestures and the like, and to pass sentence on those convicted by the Verderers in Swanmote. There was also a Court of Survey of Dogs (*v. Court of Regard*), held by the Regarders of the Forest every three years for the lawing of dogs. Inderwick, The King's Peace, c. 4. See *FOREST LAWS*.

COURTS OF THE FRANCHISES. See *FRANCHISE COURTS*.

COURT OF GENERAL QUARTER SESSIONS OF THE PEACE. In American Law. A court of criminal jurisdiction, so-called in many states.

In English Law. A court of criminal jurisdiction, in England, held in each county once in every quarter of a year, but in the county of Middlesex twice a month. 4 Steph. Com. 317-320.

It is held before two or more justices of the peace, one of whom was a justice of the *quorum*.

The stated times of holding sessions are fixed by stat. 11 Geo. IV. and 1 Will. IV. c. 70, § 35. When held at other times than quarterly, the sessions are called "general sessions of the peace."

As to the jurisdiction of the various sessions, see 5 & 6 Vict. c. 33; 7 & 8 Vict. c. 71; 9 & 10 Vict. c. 25; 4 Bla. Com. 271.

COURT OF GREAT SESSIONS IN WALES. A court formerly held in Wales; abolished by 11 Geo. IV. and 1 Will. IV. c. 70, and the Welsh judicature incorporated with that of England. 3 Bla. Com. 77; 3 Steph. Com. 317, n.

COURT OF HIGH COMMISSION. See *HIGH COMMISSION COURT*.

COURT-HOUSE. The building occupied for the purposes of a court of record. The term may be used of a place temporarily occupied for the sessions of a court, though not the regular court-house; as, a church used when the court-house was occupied by troops; 55 Mo. 181; and see 59 Mo. 52; and where the court-house was burned down, sales required by law to be at its door must be held at the ruins of the door; 71 Ill. 350.

COURT, HUNDRED. See *HUNDRED COURT*.

COURT OF HUSTINGS. In English Law. The county court in the city of London.

It is held nominally before the lord mayor, recorder, and aldermen; but the recorder is practically the sole judge. It has an appellate jurisdiction of causes in the sheriff's court of London. A writ of error lies from the decisions of this court to certain commissioners (usually five of the judges of the superior courts of law), from whose judgment a writ of error lies to the house of lords. No merely personal actions can be brought in this court. See 3 Bla. Com. 80, n.; 3 Steph. Com. 293, n.; Madox, Hist. Exch. c. 20; Co. 2d Inst. 327; Calth. 131. Since the abolition of all real and mixed actions except ejectment, the jurisdiction of this court has fallen into

comparative desuetude. Pulling on Cust. Lond.; Moz. & W. Dict.

In American Law. A local court in some parts of the state of Virginia. 6 Gratt. 696.

COURT OF INQUIRY. In English Law. A court sometimes appointed by the crown to ascertain the propriety of resorting to ulterior proceedings against a party charged before a court-martial. See 2 Steph. Com. 590, note (2); 1 Coler. Bla. Com. 413, n.; 2 Brod. & B. 130. Also a court for hearing the complaints of private soldiers. Moz. & W. Dict.; Simmons, Cts. Mart. § 341.

In American Law. A court constituted by authority of the articles of war, invested with the power to examine into the nature of any transaction, accusation, or imputation against any officer or soldier. The said court shall consist of one or more officers, not exceeding three, and a judge-advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing; all of whom shall be sworn to the performance of their duty. It exists also in the navy; U. S. Rev. Stat. §§ 1342, 1624.

COURT OF JUSTICE SEAT. In English Law. The principal of the forest courts.

It was held before the chief justice in eyre, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, privileges, and all pleas and causes whatsoever, there arising. It might also try presentments in the inferior courts of the forests, and give judgment upon conviction of the Swanmote. After presentment made or indictment found, the chief justice might issue his warrant to the officers of the forest to apprehend the offenders. It might be held every third year; and forty days' notice was to be given of its sitting.

It was a court of record, and might fine and imprison for offences within the forest. A writ of error lay from it to the court of queen's bench to rectify and redress any maladministration of justice; or the chief justice in eyre might adjourn any matter of law into that court.

These justices in eyre were instituted by King Henry II., in 1184.

These courts were formerly very regularly held; but the last court of justice seat of any note was held in the reign of Charles I., before the earl of Holland. After the restoration another was held, *pro forma* only, before the earl of Oxford. But since the era of the revolution of 1688 the forest-laws have fallen into total disuse; 3 Steph. Com. 439-441; 3 Bla. Com. 71-73; Co. 4th Inst. 291. See *FOREST LAWS*.

COURT OF JUSTICIARY. In Scotch Law. A court of general criminal and limited civil jurisdiction.

It consists of the lord justice general, the lord justice clerk, and five other members of the court of sessions. The kingdom is divided into three circuits, in each of which two sessions, of not less than three days each, are to be held annually. A term may be held by any two of the justices, or by the lord justice general alone, or in Glasgow, by a simple justice; except in Edinburgh, where three justices constitute a *quorum*, and four generally sit in important cases.

Its criminal jurisdiction extends to all crimes committed in any part of the kingdom; and it has the power of reviewing the sentences of all inferior criminal courts, unless excluded by statute. Alison, Pr. 25.

Its civil jurisdiction on circuits is appellate and final in cases involving not more than twelve pounds sterling. See Paterson, Comp. § 940, n. *et seq.*; Bell, Dict.; Alison, Pr. 25; 20 Geo. II. c. 43; 23 Geo. III. c. 45; 30 Geo. III. c. 17; 1 Will. IV. c. 69, § 19; 11 & 12 Vict. c. 70, § 8. For amendments to the procedure of this court see 31 & 32 Vict. c. 95. See 35 Am. Law Reg. 619.

COURT OF KING'S BENCH. In English Law. The supreme court of common law in the kingdom, now merged in

the High Court of Justice under the Judicature Act of 1873, § 16. See JUDICATURE ACTS.

It was one of the successors of the *aula regis* and received its name, it is said, because the king formerly sat in it in person, the style of the court being *coram rege ipso* (before the king himself). During the reign of a queen it was called the Queen's Bench, and during Cromwell's protectorate it was called the Upper Bench. Its jurisdiction was originally confined to the correction of crimes and misdemeanors which amounted to a breach of the peace, including those trespasses which were committed with force (*vi et armis*), and in the commission of which there was, therefore, a breach of the peace. By aid of a fiction of the law, the number of actions which might be alleged to be so committed was gradually increased, until the jurisdiction extended to all actions of the case, of debt upon statutes or where fraud was alleged, and, finally, included all personal actions whatever, and the action of ejectment. See ASSUMPSIT; ARREST; ATTACHMENT. It was, from its constitution, ambulatory and liable to follow the king's person, all process in this court being returnable "*ubique fuerimus in Anglia*" (wherever in England we the sovereign may be), but has for some centuries been held at Westminster.

It consisted of a lord chief justice and four puisne or associate justices, who were, by virtue of their office, conservators of the peace and supreme coroners of the land.

The civil jurisdiction of the court was either *formal* or *plenary*, including personal actions and mixed action of ejectment; *summary*, applying to annuities and mortgages, 15 & 16 Vict. c. 55, 76, 219, 220, arbitrations and awards, cases under the Habeas Corpus Act, 31 Car. II. c. 2; 56 Geo. III. c. 100, cases under the Interpleader Act, 1 & 2 Will. IV. c. 58, officers of the court, warrants of attorney, cognovits, and judges' orders for judgment; *auxiliary*, including answering a special case, enforcing judgments of inferior courts of record, prerogative, mandamus to compel inferior courts or officers to act, 17 & 18 Vict. c. 125, §§ 75-77, prohibition, quo warranto, trying an issue in fact from a court of equity or a feigned issue; or *appellate*, including appeals from decisions of justices of the peace giving possession of deserted premises to landlords, 11 Geo. II. c. 19, §§ 16, 17, writs of false judgment from inferior courts not of record, but proceeding according to the course of the common law, appeals by way of a case from the summary jurisdiction of justices of the peace on questions of law, 20 & 21 Vict. c. 43; Order of Court of Nov. 25, 1857. See Whart. Law Dict.; Crabb, Hist.

Its criminal jurisdiction extended to all crimes and misdemeanors whatever of a public nature, it being considered the *custos morum* of the realm. Its jurisdiction was so universal that an act of parliament appointing that all crimes of a certain denomination should be tried before certain judges did not exclude the jurisdiction of this court, without negative words. It might also proceed on indictments removed into that court out of the inferior courts by certiorari.

COURT LANDS. See DEMESNE.

COURT LEET. In English Law. A court of record for a particular hundred, lordship, or manor, holden therein before the steward of the leet, for the punishment of petty offences and the preservation of the peace. Kitchin, Courts Leet.

These courts were established as substitutes for the sheriff's tourn in those districts which were not readily accessible to the sheriff on the tourn. The privilege of holding them was a franchise subsisting in the lord of the manor by prescription or charter, and might be lost by disuse. The court leet took cognizance of a wide variety of crimes, ranging from the very smallest misdemeanors to, but excluding, treason. For some of these offences of a lower order, punishment by fines, amercements, or other privies might be inflicted. For the higher crimes, they either found indictments which were to be tried by the higher courts, or made presentment of the case to such higher tribunals. They also took view of *frank-pledge*. Among other duties for the keeping of the peace, the court assisted in the election of, or, in some cases, elected certain municipal officers in the borough to which the leet was appended.

This court has fallen almost totally into disuse. Its duties were mainly, however, those of the trial of the smaller offences or misdemeanors, and presentment of the graver offences. These presentments might

be removed by certiorari to the king's bench and an issue there joined; 4 Bla. Com. 273; Greenw. County Courts 308 *et seq.*; Kitchin, Courts Leet; Powell, Courts Leet; 1 Reeve, Hist. Eng. Law 7. See Indorwick, The King's Peace 11; 1 Poll. & Matl. 568; 4 Steph. Com., 11th ed. 306.

COURT OF LIMITED POWERS. The fiscal court is a "court of limited jurisdiction or powers," and has no right or power to appropriate or extend county funds without statutory authority therefor. 152 Ky. 657, 153 S. W. 1005.

COURT OF THE LORD HIGH ADMIRAL. The High Court of Admiralty at one time held in England before the Lord High Admiral (*q. v.*), for the purpose of determining all causes belonging to the sea. See ADMIRALTY.

COURT OF THE LORD HIGH STEWARD. In English Law. A court instituted for the trial of peers or peeresses indicted for treason, felony, or misprision of either.

This court can be held only during a recess of parliament, since the trial of a peer for either of the above offences can take place, during a session of that body, only before the High Court of Parliament. It consists of a lord high steward (appointed in modern times *pro hac vice* merely) and as many of the temporal lords as may desire to take the proper oath and act. And all the peers qualified to sit and vote in parliament are to be summoned at least twenty days before the trial; Stat. 7 Will. III. c. 3.

The lord high steward, in this court, decides upon matters of law, and the lords triers decide upon the questions of fact.

The course of proceedings is to obtain jurisdiction of the cause by a writ of certiorari removing the indictment from the queen's bench or court of oyer and terminer where it was found, and then to go forward with the trial before the court composed as above stated. The guilt or innocence of the peer is determined by a vote of the court, and a majority suffices to convict; but the number voting for conviction must not be less than twelve. The manner of proceeding is much the same as in trials by jury; but no special verdict can be rendered.

A peer indicted for either of the above offences may plead a pardon in the queen's bench, but can make no other plea there. If indicted for any less offence, he must be tried by a jury before the ordinary courts of justice; 4 Bla. Com. 261-265. See HIGH COURT OF PARLIAMENT.

COURT OF THE LORD HIGH STEWARD OF THE UNIVERSITIES. In English Law. A court constituted for the trial of scholars or privileged persons connected with the university at Oxford or Cambridge who are indicted for treason, felony, or mayhem.

The court consists of the lord high steward, or his deputy nominated by the chancellor of the university and approved of by the lord high chancellor of England. The steward issues a precept to the sheriff, who returns a panel of eighteen freeholders, and another to the university bedels, who return a panel of eighteen matriculated laymen. From these panels a jury *de medietate* is selected, before whom the cause is tried. An indictment must first have been found by a grand jury, and cognizance claimed thereof at the first day. 3 Bla. Com. 83; 4 id. 277; 1 Steph. Com. 67; 3 id. 299; 4 id. 325. See CHANCELLORS' COURTS OF THE UNIVERSITIES.

COURT OF MAGISTRATES AND FREEHOLDERS. In American Law. The name of a court in South Carolina for the trial of slaves and free persons of color for criminal offences. Now abolished.

COURT OF THE MARSHALSEA. In English Law. A court which had jurisdiction of causes to which the domestic servants were parties.

It was held by the steward of the king's household, as judge, and the marshal was

the ministerial officer, and held pleas of trespasses committed within twelve miles of the sovereign's residence (called the verge of the court), where one of the parties was a servant of the king's household, and of all debts, contracts, and covenants, where both parties were servants as above. Where one of the parties only was of the king's household, a jury of the country was summoned; in the other case, the inquest was composed of men of the household only. This court was merged, in the time of Charles I., in the Palace Court, and abolished by 12 & 13 Vict. c. 101, § 13; 3 Steph. Com. 317, n. See PALACE COURT.

COURT-MARTIAL. A military or naval tribunal, which has jurisdiction of offences against the law of the service, military or naval, in which the offender is engaged.

The original tribunal, for which courts-martial are a partial substitute, was the Court of Chivalry, which title see. These courts exist, and have their jurisdiction by virtue of the military law, the court being constituted and empowered to act in each instance by authority from a commanding officer. The general principles applicable to courts-martial in the army and navy are essentially the same; and for consideration of the exact distinctions between them reference must be had to the works of writers upon these subjects. Courts-martial for the regulation of the militia are held in the various states under local statutes, which resemble in their main features those provided for in the army of the United States; and when in actual service the militia, like the regular troops, are subject to courts-martial, composed, however, of militia officers.

As to their constitution and jurisdiction, these courts may belong to one of the following classes:—

General, which have jurisdiction over every species of offence of which courts-martial have jurisdiction. They are to be composed in the United States of not less than five nor more than thirteen commissioned officers of suitable rank, according to the exigencies of the service (U. S. R. S. 237, art. 75), and in England of not less than thirteen commissioned officers, except in special cases, and usually do consist of more than that number.

Regimental, which have jurisdiction of offences not capital, occurring in a regiment or corps. They consist in the United States of three commissioned officers; and are appointed by the commanding officer. In England they consist of not less than three commissioned officers and may be summoned by any commanding officer, without regard to rank; Stat. 44 & 45 Vict. (1881) c. 58. The jurisdiction of this class of courts-martial extends only to offences less than capital committed by those below the rank of commissioned officers, and their decision is subject to revision by the commanding officer of the division, regiment, or detachment, by the officer who appointed them, or by certain superior officers.

Garrison, which have jurisdiction of some offences not capital, occurring in a garrison, fort, or barracks. They are of the same constitution as to number and qualifications of members as regimental courts-martial. Their limits of jurisdiction in degree are the same, and their decisions are in a similar manner subject to revision.

The U. S. Rev. Stat. § 1342, contain the rules and articles of war governing the army and, *inter alia*, provide:—

Art. 72. Any general officer, commanding an army, a territorial division, or a department, or colonel commanding a separate department, may appoint general courts-martial whenever necessary either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the president; and its proceedings and sentence shall be sent directly to the secretary of war, by whom they shall be laid before the president for his approval or orders in the case. (As amended by act of 1884, July 5; U. S. Rev. St. 1 Suppl. 463, c. 224.)

Art. 73. In time of war the commander of a division or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of

any person under his command, the court shall be appointed by the next higher commander.

Art. 74. Officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same.

U. S. Rev. Stat. § 1624 contains the articles governing the navy and, *inter alia*, it is provided:—

Art. 26. "Summary courts-martial may be ordered upon petty officers and persons of inferior ratings by the commander of any vessel, or by the commandant of any navy-yard, naval station, or marine barracks to which they belong, for the trial of offences which such officer may deem deserving of greater punishment than such commander or commandant is authorized to inflict, but not sufficient to require trial by a general court-martial." A paymaster's clerk in the navy, regularly appointed and assigned to duty on a receiving ship, is subject to trial and conviction, and sentence and imprisonment by general court-martial, for a violation of section 1624 of the Revised Statutes; 158 U. S. 109.

Art. 27. A summary court-martial shall consist of three officers not below the rank of ensign, as members, and of a recorder. The commander of a ship may order any officer under his command to act as such recorder.

Art. 38. General courts-martial may be convened by the president, the secretary of the navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the president.

Art. 39. A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside, and the others shall take place according to their rank.

The decision of the commanding officer as to the number that can be convened without injury to the service is conclusive; 12 Wheat. 19.

By act of 1890, October 1, U. S. Rev. St. 1 Supp. 878, c. 1259, any enlisted man guilty of an offence, cognizable by a garrison or regimental court-martial shall be brought within twenty-four hours before a summary court, composed of the line officers second in rank of the post or station or of the command of the alleged offender; but the offender may, if he chooses, object to a hearing by the summary court, and request a trial by court-martial. Where a person accused under article 43 of the articles for the government of the Navy (R. S. § 1624) is already in custody to await the result of a court of inquiry, the article is sufficiently complied with by delivering a copy of the charges against him immediately after the secretary of the Navy has informed him of that result and has ordered a court-martial to convene to try him; 158 U. S. 109.

The jurisdiction of such courts is limited to offences against the military law (which title see) committed by individuals in the service; 12 Johns. 257; see De Hart, Courts-Mart. 28; Ives, Mil. L. 37; 3 Wheat. 212; 3 Am. Jur. 281; which latter term includes sutlers, retainers to the camp, and persons serving with the army in the field; 60th Art. of War; De Hart, Courts-Mart. 24, 25. See V. Kennedy, Courts-Mart. 3. But while a district is under martial law, by proclamation of the executive, as for rebellion, they may take jurisdiction of offences which are cognizable by the civil courts only in time of peace; 11 Op. Att.-Gen. 137; V. Kennedy, Courts-Mart. 14. This rule is said by American writers to apply where the army passes into a district where there are no civil courts in existence; Benet, Mil. Law 15.

The act of March 3, 1863, did not make

the jurisdiction of military tribunals exclusive of that of the state courts in the *loyal* states; but otherwise in the rebellious states when in the military occupation of the United States; 97 U. S. 509.

Military commissions organized during the late war, in a state not invaded and not engaged in rebellion, in which the federal courts were open and not obstructed in the exercise of their judicial functions, had no jurisdiction to convict, for a criminal offence, a citizen, who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service; and congress could not invest them with any such power; *Ex parte Milligan*, 4 Wall. 2. Cases arising in the land and naval forces, or in the militia in time of war or public danger, are excepted from the right of trial by jury; *ibid*.

In regard to the jurisdiction of naval courts-martial over civil crimes committed at sea, see 1 Term 548; 3 Wheat. 212; 10 id. 159; 7 Hill 95; 1 Kent 841, n. Naval courts-martial in England are now governed by the Naval Discipline Act of 1866 (29 & 30 Vict. c. 109) and its amendments of 1884 (47 & 48 Vict. c. 39); 2 Steph. Com. 589-598.

The court must appear from its record to have acted within its jurisdiction; Ives, Mil. L. 35; 3 S. & R. 590; 1 Rawle 143; 11 Pick. 442; 19 Johns. 7; 25 Me. 188; 1 M'Mull. 69; 13 How. 134. A want of jurisdiction either of the person, 1 Brock. 324, or of the offence, will render the members of the court and officers executing its sentence trespassers; 3 Cra. 331. See MILITARY LAW; MARTIAL LAW. So, too, the members are liable to a civil action if they admit or reject evidence contrary to the rules of the common law; 2 Kent 10; V. Kennedy, Courts-Mart. 13; or award excessive or illegal punishment; V. Kennedy, Courts-Mart. 13.

The decisions of general courts-martial are subject to revision by the commanding officer, the officer ordering the court, or by the president or sovereign, as the case may be; 11 Johns. 150. No sentence extending to the loss of life or to the dismissal of a commissioned or warrant officer shall be carried into effect until confirmed by the president; U. S. R. S. § 1624, art. 53. The decision and sentence of a court martial, having jurisdiction of the person accused and of the offence charged, and acting within the scope of its lawful powers, cannot be reviewed or set aside by writ of *habeas corpus*; 158 U. S. 109. Consult Encyc. Brit. *sub voc.*; Benet; De Hart, and also Adye; Defalon; Hough; J. Kennedy; V. Kennedy; M'Arthur; Macnaghten; Maccomb; Simmons; Tytler, Courts-Martial; Brickhimer; Ives; Merrill; Winthrop, Mil. Law; Opinions Att.-Gen. *passim*.

COURT OF NISI PRIUS. In American Law. A court of original civil jurisdiction in the city and county of Philadelphia, held by one of the judges of the supreme court of the state. Abolished by the constitution of 1874; art. 5, § 1. See NISI PRIUS; COURTS OF ASSIZE AND NISI PRIUS.

COURT OF ORDINARY. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management of decedents' estates.

Such a court exists in Georgia (see Code Ga. 1882, §§ 318-340), and formerly existed in New Jersey, South Carolina, and Texas, but has been replaced by the court of probate or district court; *q. v.* See 2 Kent 409; ORDINARY.

COURT OF ORPHANS. In English Law. The court of the lord mayor and aldermen of London, which had the care of those orphans whose parents died in London and were free of the city.

By the custom of London this court was entitled to the possession of the person, lands, and chattels of every infant whose parent was free of the city at the time of his death and who died in the city. The executor or administrator of such deceased

parent was obliged to exhibit inventories of the estate of the deceased, and give security to the chamberlain for the orphan's part or share. It is now said to be fallen into disuse. 2 Steph. Com. 318; Pull. Cust. Lond. 198, *Orphans' Court*.

COURT OF OYER AND TERMINER. In American Law. The name of courts of criminal jurisdiction in several of the states of the American Union, as in Delaware and Pennsylvania.

They were abolished in New York Dec. 31, 1895, and in New Jersey by acts of March 14 and 23, 1895. In Pennsylvania they are held at the same time with the court of quarter sessions, as a general rule, and by the same judges. In Delaware they are specially called by a precept from the judges when there are capital felonies to be tried, and consist of the chief justice and three associate judges of the state.

COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY. In English Law. Tribunals for the examination and trial of criminals.

They are held before commissioners selected by the queen, among whom are usually two justices of the superior courts at Westminster, twice in every year in all the counties of England except the four northern, where they are held once only, and Middlesex and parts of other counties, over which the central criminal court has jurisdiction.

Under the commission of *oyer and terminer* the justices try indictments previously found at the same assizes for treason, felony, or misdemeanors. Under the commission of *general gaol delivery* they may try and deliver every prisoner who is in gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted or for whatsoever crime committed. These commissioners are joined with those of *assize* and *nisi prius* and the commission of the *peace*. 3 Steph. Com. 352. See COURTS OF ASSIZE AND NISI PRIUS.

In American Law. Courts of criminal jurisdiction in some states. See COURT OF OYER AND TERMINER.

COURT OF PALACE AT WESTMINSTER. This court had jurisdiction of personal actions arising within twelve miles of the palace at Whitehall. Abolished by 12 & 13 Vict. c. 101; 8 Steph. Com. 317, n.

COURT OF PASSAGE. An inferior court possessing a very ancient jurisdiction over causes of action arising within the borough of Liverpool. R. & L. See PASSAGE COURT.

COURT OF PECULIARS. In English Law. A branch of the court of arches, to which it is annexed.

It has jurisdiction of all ecclesiastical causes arising in the peculiars of Canterbury or other dioceses which are exempt from the ordinary's jurisdiction and subject to that of the metropolitan only. The court of arches has an appellate jurisdiction of causes tried in this court. 3 Bla. Com. 65; 3 Steph. Com. 306. See PECULIARS.

COURT OF PIE-POWDER, PY-POWDERS, or PIEPOUDRE (Fr. pied, foot, and poudre, dust, or poudreaux, old French pedler). In English Law. A court of special jurisdiction in every fair or market, said to have been so called because the several disputes which arose were adjudged with a dispatch that suited the convenience of transitory suitors,—the men with "dusty feet."

The word *piepoudre*, spelled also *piedpoudre* and *pypowder*, has been considered as signifying dusty feet, pointing to the general condition of the feet of the suitors therein; Cowel; Blount; or as indicating the rapidity with which justice is administered, as rapidly as dust can fall from the foot; Co. 4th Inst. 472; or pedler's feet, as being the court of such chapmen or petty traders as resorted to fairs. It was not confined to fairs or markets, but might exist, by custom, in cities, boroughs, or villis for the collection of debts and the like; Cro. Jac. 313; Cro. Car. 46; 2 Salk. 604. It was held before the steward of him who was entitled to the tolls from the market. It has fallen into disuse.

In an enumeration of common-law institutions which he claims were derived from the Roman law, Mr. Semmes claims that these courts owe both their origin and their name to the Roman law, "as will be seen by referring to the code l. 3. tit. 3. *De Pedaneis Judicibus*." Address, Am. Bar. Assn. Rep. 1886, p. 197.

The civil jurisdiction extended to all matters of contract arising within the precinct of the fair or market during the continuance of the particular fair or market at which the court was held, the plaintiff being obliged to make oath as to the time and place. The cases were mostly trade disputes, and accordingly the decisions were law made by merchants, and a good deal of interest attached to them as decisions by juries of experts; 1 Social England 464. Disputes only could be determined which arose in the fair and in fair time; Inderwick, King's Peace 105.

The criminal jurisdiction embraced all offences committed at the particular fair or market at which the court was held. An appeal lay to the courts at Westminster. See Barrington, Stat. 337; 3 Bla. Com. 32; 3 Steph. Com. 817, n.; Skene, *de verb. sig. Pede pulverosus*; Bracton 334.

COURT OF POLICIES OF INSURANCE. A court of special jurisdiction which took cognizance of cases involving claims made by those insured upon policies in the city of London.

It was organized by a commission issued yearly by the lord chancellor, by virtue of 43 Eliz. c. 12, and 13 & 14 Car. II. c. 23, to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common-law lawyers, and eight merchants, empowering any three of them (one being a civilian or barrister) to determine in a summary way all causes concerning policies in the city of London. The jurisdiction was confined to actions brought by assured persons upon policies of insurance on merchandise; and an appeal lay by way of a bill to the court of chancery. The court has been long disused, and was formally abolished by stat. 26 & 27 Vict. c. 125. 3 Bla. Com. 74; 3 Steph. Com. 317, n.; Crabb, Hist. Eng. Law 503.

COURT PREROGATIVE. See PREROGATIVE COURT.

COURT OF PROBATE. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law. In some states, this court has also a limited jurisdiction in civil and criminal actions. For the states in which such courts exist, and the limits of their jurisdiction, see the articles on the various states.

In English Law. A court in England, established under the Probate Act of 1857, having exclusive jurisdiction of testamentary causes or proceedings relating to the validity of wills and the succession to the property of persons deceased intestate. 2 Steph. Com. 192; 3 id. 346. See stat. 20 & 21 Vict. c. 77; 21 & 22 Vict. c. 95. This court is now merged in the High Court of Justice under the Judicature Act of 1873. See JUDICATURE ACTS.

COURT OF PYPOWDER. See COURT OF PIE-POWDER.

COURT OF QUARTER SESSIONS OF THE PEACE. In American Law. A court of criminal jurisdiction in the state of Pennsylvania.

There is one such court in each county of the state. Its sessions are, in general, held at the same time and by the same judges as the court of oyer and terminer and general gaol delivery.

COURT OF QUEEN'S BENCH. See COURT OF KING'S BENCH.

COURT OF RAILWAY AND CANAL COMMISSION. This is a court established by the English Railway and Canal Traffic Act, 1888. It consists of two non-judicial commissioners (one of them a person experienced in railway management) with salaries of £3,000 a year each, who are appointed on the recommendation of the President of the Board of Trade, and three ex-officio commissioners, consisting of an English judge nominated by the Lord Chancellor, a Scotch judge nominated by the Lord President of the Court of Session, and an Irish judge nominated formerly by the Lord Chancellor of Ireland, but now possibly by the Lord Chief Justice of Northern Ireland. The ex-officio commissioners hold office for five years; and they act respectively in England, Scotland and Northern Ireland. The commission deals with all such matters as were within the jurisdiction of the Railway Commission, except in so far as those matters have been transferred to the Railway Rates Tribunal; and it has jurisdiction not merely as regards matters directly relating to railways and canals but also as regards matters such as the construction of telegraphs and the water supply of the metropolis. Byrne. See COURTS OF ENGLAND.

COURT OF RECORD. A judicial organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. 8 Metc. 171, per Shaw, C. J.

A court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony. 3 Bla. Com. 24.

A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil causes above forty shillings, and proceeding according to the course of the common law. 37 Me. 29.

All courts are either of record or not of record. The possession of the right to fine and imprison for contempt was formerly considered as furnishing decisive evidence that a court was a court of record; Co. Litt. 117 b, 260 a; 1 Salk. 144; 12 Mod. 888; 2 Wms. Saund. 101 a; Viner, Abr. Courts; and it is said that the erection of a new tribunal with this power renders it by that very fact a court of record; 1 Salk. 200; 12 Mod. 888; 1 Woodd. Lect. 98; 3 Bla. Com. 24, 25; but every court of record does not possess this power; 1 Sid. 145; 8 Sharsw. Bla. Com. 25, n. The mere fact that a permanent record is kept does not, in modern law, stamp the character of the court; since many courts, as probate courts and others of limited or special jurisdiction, are obliged to keep records and yet are held to be courts not of record. See 11 Mass. 510; 22 Pick. 430; 1 Cow. 212; 3 Wend. 268; 10 Pa. 188; 5 Ohio 545; 7 Ala. 351; 25 id. 540. The definition first given above is taken from the opinion of Shaw, C. J., in 8 Metc. 171, with an additional element not required in that case for purposes of distinction, and is believed to contain all the distinctive qualities which can be said to belong to all courts technically of record at modern law.

Courts may be at the same time of record for some purposes and not of record for others; 23 Wend. 876; 6 Hill 590; 8 Metc. 188.

Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business; but such rules must not contravene the law of the land; 1 Pet. 604; 3 S. & R. 253; 8 id. 336; 2 Mo. 98. They can be deprived of their jurisdiction by express terms of denial only; 9 S. & R. 298; 2 Burr. 1042; 1 W. Bla. 285. Actions upon the judgments of such courts may, under the statutes of limitations of some of the states of the United States, be brought after the lapse of the period of limitation for actions on simple contracts; and this provision has given rise to several determinations of what are and what are not courts of record. See 22 Pick. 430; 6 Gray 515; 6 Hill 590; 1 Cow. 212; 25 Ala. n. s. 540; 37 Me. 29.

Under the naturalization act of the United States, "every court of record in a state having common-law jurisdiction and a seal and a clerk or prothonotary" has certain specified powers. As to what the requirements are to constitute a court of record under this act, see 8 Pick. 168; 23 Wend. 375.

A writ of error lies to correct erroneous proceedings in a court of record; 3 Bla. Com. 407; 18 Pick. 417; but will not lie unless

the court be one, technically, of record; 11 Mass. 510. See WRIT OF ERROR.

COURT OF REFEREES. See REFEREES, COURT OF.

COURT OF REGARD. In English Law. One of the forest courts, in England, held every third year, for the lawing or expeditation (*q. v.*) of dogs, to prevent them from running after deer. It is now obsolete. 3 Steph. Com. 440; 3 Bla. Com. 71, 72; Inderwick, King's Peace 151.

COURT FOR THE RELIEF OF INSOLVENT DEBTORS IN ENGLAND. In English Law. A local court which had its sittings in London only, which received the petitions of insolvent debtors and decided upon the question of granting a discharge.

It was held by the commissioners of bankruptcy; and its decisions, if in favor of a discharge, were not reversible by any other tribunal. See 3 Steph. Com. 426; 4 id. 287, 288.

This court was abolished by the Bankruptcy Act of 1861, which was repealed in 1869, and all the former powers of the court were vested in the court of bankruptcy in London, which was merged in the high court of justice by the Judicature Act of 1873, § 16. 3 Steph. Com. 346; 32 & 33 Vict. c. 83.

COURTS OF REQUESTS (called otherwise *courts of conscience*). In English Law. Courts of special jurisdiction, constituted by act of parliament in the city of London and other towns, for the recovery of small debts.

They were courts *not of record*, and proceeded in a summary way to examine upon oath the parties and other witnesses, without the aid of a jury, and made such order as is consonant to equity and good conscience.

They had jurisdiction of causes of debt generally to the amount of forty shillings, but in many instances to the amount of five pounds sterling.

The courts of requests in London consisted of two aldermen and four common councilmen, and was formerly a court of considerable importance, but was abolished, as well as all other courts of request, by the Small Debts Act, 9 & 10 Vict. c. 95, and the order in council of May 9, 1847, and their jurisdiction transferred to the county courts.

The court of requests before the king in person was virtually abolished by 16 Car. I. c. 10. See 3 Steph. Com. 449, and note (j); Bacon, Abr. Courts in London; COUNTY COURTS.

COURT ROLLS. The rolls of a manor, containing all acts relating thereto. While belonging to the lord of the manor, they are not in the nature of public books for the benefit of the tenant. Scriven on Copyholds. See COPYHOLD.

COURT, RULES OF. See RULE OF COURT; RULES OF PRACTICE; GENERAL ORDERS.

COURT OF SESSION. In Scotch Law. The supreme court of civil jurisdiction in Scotland.

The full title of the court is *council and session*. It was first established in 1425. In 1469 its jurisdiction was transferred to the king's council, which in 1503 was ordered to sit in Edinburgh. In 1582 the jurisdiction of both courts and the joint title were transferred to the present court. The regular number of judges was fifteen; but an additional number of justices might be appointed by the crown to an unlimited extent. This privilege was renounced by 10 Geo. I. c. 19.

It consists of thirteen judges, formerly of fifteen, and is divided into an inner and an outer house.

The inner house is composed of two branches or chambers, of co-ordinate jurisdiction, each consisting of four judges, and called respectively the first division and the second division. The first division is presided over by the lord president or lord justice general, the second by the lord justice clerk. The outer house is composed

of five separate courts, each presided over by a single judge, called a lord ordinary.

All causes commence before a lord ordinary, in general; and the party may select the one before whom he will bring his action, subject to a removal by the lord president in case of too great an accumulation before any one or more lords ordinary. See Bell, Dict.; Erskine, Prin. L. Scotl. (18th ed.); Paterson, Comp. § 1055, n. et seq.

COURT OF SESSIONS. In American Law. A court of criminal jurisdiction existing in some of the states of the United States.

COURT OF SHERIFF'S TOURN. See SHERIFF'S TOUR.

COURT OF STANNERIES. See STANNARY COURTS.

COURT OF STAR-CHAMBER. In English Law. A court which was formerly held by divers lords spiritual and temporal, who were members of the privy council, together with two judges of the courts of common law.

It was of very ancient origin, was new-modelled by the 3 Hen. VII. c. 1 and 21 Hen. VIII. c. 20, and was finally abolished, after having become very odious to the people, by the 16 Car. I. c. 10. The name *star-chamber* is of uncertain origin. It has been thought to be from the Saxon *stearan*, to govern, alluding to the jurisdiction of the court over the crime of coersage; and has been thought to have been given because the hall in which the court was held was full of windows, Lambard, Eiren. 148; or because the roof was originally studded with gilded stars, Coke, 4th Inst. 66; or, according to Blackstone, because the Jewish covenants (called stars or stars, and which, by a statute of Richard I., were to be enrolled in three places, one of which was near the exchequer) were originally kept there, 4 Bla. Com. 266, n. The derivation of Blackstone receives confirmation from the fact that this location (near the exchequer) is assigned to the *star-chamber* the first time it is mentioned. The word *star* acquired at some time the recognized signification of inventory or schedule. Stat. Acad. Cont. 33; 4 Sharsw. Bla. Com. 266, n.

The legal jurisdiction of this court extended originally to riots, perjuries, misbehavior of sheriffs, and other notorious misdemeanors. It acted without the assistance of a jury. See Hudson, *Court of Star Chamber* (printed at the beginning of the second volume of the *Collectanea Juridica*); 4 Bla. Com. 266, and notes; 4 Steph. Com. 308-310; 12 Amer. Law Rev. 21.

COURT OF THE STEWARD OF THE KING'S HOUSEHOLD. In English Law. A court which had jurisdiction of all cases of treason, misprision of treason, murder, manslaughter, bloodshed, and other malicious striking where by blood is shed, occurring in or within the limits of any of the palaces or houses of the king, or any other house where the royal person is abiding.

It was created by statute 33 Hen. VIII. c. 12, but long since fell into disuse. 4 Bla. Com. 276, 277, and notes.

COURT OF THE STEWARD AND MARSHAL. See COURT OF MARSHAL-SEA.

COURTS OF SURVEY. Courts for the hearing of appeals by owners or masters of ships, from orders for the detention of unsafe ships, made by the English board of trade, under the Merchant Shipping Act of 1876. R. & L.

COURT OF SWANMOTE or **SWAINMOTE** (spelled, also, *Swainmote*, *Swain-gemote*; Saxon, *swang*, an attendant, a freeholder, and *mote* or *gemote*, a meeting).

In English Law. One of the forest courts, now obsolete, held before the verderers, as judges, by the steward, thrice in every year,—the swains or freeholders within the forest composing the jury.

This court had jurisdiction to inquire into grievances and oppressions committed by the officers of the forest, and also to receive and try presentments certified from the court of attachments, certifying the cause, in turn, under the seals of the jury, in case of conviction, to the court of justice seat for the rendition of judgment. Cowel;

3 Bla. Com. 71, 72; 3 Steph. Com. 317, n. See Ind. King's Peace 150; FOREST LAWS.

COURT FOR THE TRIAL OF IMPEACHMENTS. A tribunal for determining the guilt or innocence of any person properly impeached. In England, the House of Lords, and in this country, generally, the more select branch of the legislative assembly, constitutes a court for the trial of impeachments. A peer could always be impeached for any crime, and although Blackstone lays it down that a commoner cannot be impeached for a capital offence, but only for a high misdemeanor, the opinion seems to have prevailed that he could be impeached for high treason; 4 Bla. Com. 260; 4 Steph. Com. 299; May, Parl. Prac. c. 23. See IMPEACHMENT.

COURTS OF THE TWO UNIVERSITIES. In English Law. See CHANCELLOR'S COURTS OF THE TWO UNIVERSITIES.

COURTS OF THE UNITED STATES. See UNITED STATES COURTS.

COURT OF WARDS AND LIVERIES. In English Law. A court of record in England, which had the supervision and regulation of inquiries concerning the profits which arose to the crown from the fruits of tenure, and to grant to heirs the delivery of their lands from the possession of their guardians.

The Court of the King's Wards was instituted by stat. 33 Hen. VIII. c. 46, to take the place of the ancient *inquisitio post mortem*, and the jurisdiction of the restoration of lands to heirs on their becoming of age (livery) was added by statute 33 Hen. VIII. c. 22, when it became the Court of Wards and Liveries. It was abolished by statute 12 Car. II. c. 24.

The jurisdiction extended to the superintendence of lunatics and idiots in the king's custody, granting licenses to the king's widows to marry, and imposing fines for marrying without license; 4 Reeve, Hist. Eng. Law 259; Crabb, Hist. Eng. Law 468; 1 Steph. Com. 183, 192; 4 id. 40; 2 Bla. Com. 68, 77; 3 id. 253.

COURTESY. See CURTESY.

COUSIN. The son or daughter of the brother or sister of one's father or mother. The issue, respectively, of two brothers or two sisters, or of a brother and a sister.

Those who descend from the brother or sister of the father of the person spoken of are called paternal cousins; maternal cousins are those who are descended from the brothers or sisters of the mother. See 2 Brown, Ch. 125; 1 Sim. & S. 301; 3 Russ. 140; 9 Sim. 386, 457. The word is still applied in Devonshire to a nephew. 1 Ves. Jr. 73.

COUSINAGE. See COSINAGE.

COUSTOM (Fr.). Custom; duty; toll. 1 Bla. Com. 314.

COUSTOMER (Fr.). A collection of customs and usages in the old Norman law. See GRAND COUTUMIER.

COUTHUTLAUGH. He that willingly receives an outlaw and cherishes or conceals him. In ancient times he was subject to the same punishment as the outlaw. Blount.

COUTUME. (Fr.). The nearest equivalent in French for the English "Common Law." 4 Pollock, 1st Book Jurispr. 254.

COVENABLE (L. Fr.). Convenient; suitable. Anciently written *covenable*.

COVENANT (Lat. *convenire*, to come together; *conventio*, a coming together. It is equivalent to the *factum conventum* of the civil law).

In Contracts. An agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not, exist.

A contract under seal; a deed.

Affirmative covenants are those in which the covenantor declares that something has been already done, or shall be done in the future.

Affirmative covenants do not operate to deprive covenantees of rights enjoyed independently of the covenants; Dyer 19 b; 1 Leon. 251.

Covenants against incumbrances. See COVENANT AGAINST INCUMBRANCES.

Alternative covenants are disjunctive covenants.

Auxiliary covenants are those which do not relate directly to the principal matter of contract between the parties, but to something connected with it. Those the scope of whose operations is in aid or support of the principal covenant. If the principal covenant is void, the auxiliary is discharged; Anstr. 256; Prec. Chanc. 475.

Collateral covenants are those which are entered into in connection with the grant of something, but which do not relate immediately to the thing granted; as, to pay a sum of money in gross, that the lessor shall distrain for rent on some other land than that which is demised, to build a house on the land of some third person, or the like. Platt, Cov. 69; Shepp. Touchst. 161; 4 Burr. 2439; 3 Term 393; 2 J. B. Moore 164; 5 B. & Ald. 7; 2 Wils. 27; 1 Ves. 56.

Concurrent covenants are those which are to be performed at the same time. When one party is ready and offers to perform his part, and the other refuses or neglects to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act; Platt, Cov. 71; 2 Selw. N. P. 443; Dougl. 698; 18 E. L. & Eq. 81; 4 Wash. C. C. 714; 16 Mo. 450.

Declaratory covenants are those which serve to limit or direct uses. 1 Sid. 27; 1 Hob. 224.

Dependent covenants are those in which the obligation to perform one is made to depend upon the performance of the other. Covenants may be so connected that the right to insist upon the performance of one of them depends upon a prior performance on the part of the party seeking enforcement. Platt, Cov. 71; 2 Selw. N. P. 443; Steph. N. P. 1071; 1 C. B. N. s. 646; 6 Cow. 296; 2 Johns. 209; 2 W. & S. 227; 8 S. & R. 268; 4 Conn. 3; 24 id. 624; 11 Vt. 549; 17 Me. 232; 3 Ark. 581; 1 Blackf. 175; 6 Ala. 60; 3 Ala. n. s. 330. To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded, rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangement of the covenant; 2 Pars. Contr. 645; 1 Wms. Saund. 320, n.; 7 Term 130; 5 B. & P. 223; 36 E. L. & Eq. 358; 4 Wash. C. C. 714; 4 Rawle 26; 2 W. & S. 227; 2 Johns. 145; 5 N. Y. 247; 1 Root 170; 4 Rand. 352. See note to Cutter v. Powell, Smith Lead. Cas.

Disjunctive covenants. Those which are for the performance of one or more of several things at the election of the covenantor or covenantee, as the case may be. Platt, Cov. 21; 1 Duer N. Y. 209.

Executory covenants are those whose performance is to be future. Shepp. Touchst. 161.

Express covenants are those which are created by the express words of the parties to the deed declaratory of their intention; Platt, Cov. 25. The formal word covenant is not indispensably requisite for the creation of an express covenant; 2 Mod. 268; 5 Q. B. 683; 8 J. B. Moore 546; 12 East 182, n.; 1 Bibb 879; 3 Johns. 44; 4 Conn. 508; 1 Harr. Del. 233. The words "I oblige," "agree," 1 Ves. 516; 2 Mod. 266, "I bind myself," Hardr. 178; 3 Leon. 119, have been held to be words of covenant, as are the words of a bond; 1 Ch. Cas. 194. Any words showing the intent of the parties to do or not to do a certain thing, raise an express covenant; 13 N. H. 513. But words importing merely an order or direction that other persons should pay a sum of money, are not a covenant; 6 J. B. Moore 202, n. (a).

Covenants for further assurance. See COVENANT FOR FURTHER ASSURANCE.

Covenants for quiet enjoyment. See COVENANT FOR QUIET ENJOYMENT.

Covenants for title are those covenants

in a deed conveying land which are inserted for the purpose of securing to the grantee and covenantee the benefit of the title which the grantor and covenantor professes to convey.

Those in common use in England are four in number—of right to convey, for quiet enjoyment, against incumbrances, and for further assurance—and are held to run with the land; the covenant for seisin has not been generally in use in modern conveyances in England; Rawle, Cov. § 24. In the United States there is, in addition, a covenant of warranty, which is more commonly used than any of the others. In the United States what are "often called 'full covenants' are the covenants for seisin, for right to convey, against incumbrances, for quiet enjoyment, sometimes for further assurance, and, almost always, of warranty—this last often taking the place of the covenant for quiet enjoyment;" Rawle, Cov. § 27. The covenants of seisin, for right to convey, and against incumbrances, are generally held to be *in presenti*; if broken at all, they are broken as soon as made; Rawle, Cov. 318; 4 Kent 471; 6 Cush. 128; 8 Washb. R. P. 478; see Mitch. R. P. 448; 36 Me. 170; and the various titles below for a fuller statement of the law relative to the different covenants for title.

Implied covenants or covenants in law are those which arise by intent and construction of law from the use of certain words having a known legal operation in the creation of an estate, so that after they have had their primary operation in the creation of the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created; 1 C. B. 429; Bacon, Abr. Covenant, B; Rawle, Cov. § 270, n. In Co. Litt. 139 b, it is said that "of covenants there be two kinds: a covenant personal and a covenant real; a covenant in deed and a covenant in law." In a conveyance of lands in fee, the words "grant, bargain, and sell," imply certain covenants; see 4 Kent 473; and the word "give" implies a covenant of warranty during the life of the feoffor; 10 Cush. 134; 2 Caines 193; 9 N. H. 222; 7 Ohio 394; (but this covenant and that implied from the word "grant" are abolished in England by 8 & 9 Vict. c. 106, § 14); and in a lease the use of the words "grant and demise;" Co. Litt. 384 4 Wend. 503; "grant;" Freeman. 367; Cro. Eliz. 214; 1 P. & D. 360; "demise;" 4 Co. 80; 10 Mod. 162; 9 N. H. 222; 15 N. Y. 327; "demise;" 1 Show. 79; 1 Salk. 137; raise an implied covenant on the part of the lessor, as do "yielding and paying;" 9 Vt. 151; on the part of the lessee. In regard to the covenants arising to each grantee by implication on sale of an estate with conditions, in parcels to several grantees, see 23 Barb. 153.

Covenants in deed. Express covenants.

Covenants in gross. Such as do not run with the land.

Covenants in law. Implied covenants.

Illegal covenants are those which are expressly or impliedly forbidden by law. Covenants are absolutely void when entered into in violation of the express provisions of statutes; 5 H. & J. 193; 5 N. H. 96; 4 S. & R. 159; 4 Halst. 252; or if they are of an immoral nature; 3 Burr. 1568; 1 B. & P. 340; 8 T. B. Monr. 35; against public policy; 4 Mass. 370; 7 Me. 113; 5 Halst. 87; 3 Day 145; 5 W. & S. 315; 6 Miss. 769; 2 McLean 464; 4 Wash. C. C. 297; 11 Wheat. 258; in general restraint of trade; 21 Wend. 166; 7 Cow. 307; 6 Pick. 206; or fraudulent as between the parties; 4 S. & R. 483; 5 Mass. 16; or as to third persons; 3 Day 450; 14 S. & R. 214; 3 Caines 213; 2 Johns. 286; 15 Pick. 49.

Independent covenants are those the necessity of whose performance is determined entirely by the requirements of the covenant itself, without regard to other covenants between the parties relative to the same subject-matter or transactions or series of transactions.

Covenants are generally construed to be independent; Platt, Cov. 71; 2 Johns. 145;

10 id. 204; 21 Pick. 438; 3 Bingh. N. S. 355; unless the undertaking on one side is in terms a condition to the stipulation of the other, and then only consistently with the intention of the parties; 3 Maule & S. 308; 10 East 295, 530; or unless dependency results from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance; Willes 496; or unless the non-performance on one side goes to the entire substance of the contract, and to the whole consideration; 1 Seld. 247. If once independent, they remain so; 19 Barb. 416.

Inherent covenants are those which relate directly to the land itself, or matter granted. Shepp. Touchst. 161. Distinguished from collateral covenants.

If real, they run with the land; Platt, Cov. 66.

Intransitive covenants are those the duty of performing which is limited to the covenantor himself, and does not pass over to his representative.

Joint covenants are those by which several parties agree to do or perform a thing together, or in which several persons have a joint interest as covenantees. 26 Barb. 63; 16 How. 580; 1 Gray 376; 10 B. Monr. 291. They may be in the negative; 35 Me. 260.

Negative covenants are those in which the party obliges himself not to do or perform some act. Courts are unwilling to construe a negative covenant a condition precedent, inasmuch as it cannot be said to be performed till a breach becomes impossible; 2 Wms. Saund. 156; 1 Mod. 64; 2 Kebl. 674.

Obligatory covenants are those which are binding on the party himself. 1 Sid. 27; 1 Kebl. 337. They are distinguished from declaratory covenants.

Personal Covenants. See PERSONAL COVENANT.

Principal covenants. Those which relate directly to the principal matter of the contract entered into between the parties. They are distinguished from auxiliary.

Real covenants. See REAL COVENANT.

Covenants of rights to convey. See COVENANT OF RIGHT TO CONVEY.

Covenants of seisin. See COVENANT OF SEISIN.

Covenants to stand seized, etc. See COVENANT TO STAND SEIZED TO USES.

Transitive covenants are those personal covenants the duty of performing which passes over to the representatives of the covenantor.

Covenants of warranty. See COVENANT OF WARRANTY.

Covenants are subject to the same rules as other contracts in regard to the qualifications of parties, the assent required, and the nature of the purpose for which the contract is entered into. See PARTIES; CONTRACTS.

No peculiar words are needed to raise an express covenant; 12 Ired. 145; 1 C. & M. 337; 5 Q. B. 683; 3 Ex. 287, per Parke, B.; and by statute in Alabama, Arkansas, Delaware, Illinois, Indiana, Mississippi, Missouri, Montana, Nevada, New Mexico, Pennsylvania, and Texas, the words *grant, bargain, and sell*, in conveyances in fee, unless specially restricted, amount to covenants that the grantor was seized in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment against his acts; 4 Kent 473; 2 Binn. 95; 23 Mo. 151, 174; 17 Ala. n. s. 198; 1 Sm. & M. 611; 19 Ill. 235; 15 Ark. 289; but do not imply any general warranty of title in Alabama, Arkansas, Pennsylvania, and North Carolina; 4 Kent 474; 22 Ark. 72; 1 Murph. 843; 2 Ala. n. s. 535. In Iowa, by the statute of 1843, the same rule was authorized, and upon this it was held that all covenants were express; 2 Green 525; but no such provisions are to be found in the revised code of 1884. In Ohio the statute of 1795 was almost exactly copied from the Pennsylvania statute, but was repealed in 1824 and reenacted in substance, and entirely repealed in 1831, and the latest Revised Statutes (1884), like those of Iowa, are silent on the subject. The Wisconsin statute, providing that no covenant shall be implied, makes an exception in the case of the short form of convey-

ance provided by statute, and declares that such a deed shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, etc.; Rev. Stat. 1878. In Tennessee there is no statutory provision as to implied covenants, but a statutory short form of conveyance was held to authorize the broadest construction of the granting words unless their effect was specially limited by the instrument itself; 5 Lea 100. In California and North and South Dakota the same rule substantially is prescribed by statute in the first-named state, the implied covenants do not run with the land; 37 Cal. 183. In Georgia a covenant of general warranty is held to include covenants of a right to convey, quiet enjoyment, and freedom from incumbrances; 64 Ga. 632. See generally on this subject, Rawle, Cov. § 286.

Describing lands in a deed as bounded on a street of a certain description raises a covenant that the street shall be of that description; 7 Gray 563; and that the purchaser shall have the use thereof; 5 Md. 314; 23 N. H. 261; which binds subsequent purchasers from the grantor; 7 Gray 83.

In New York it is provided by statute that no covenants can be implied in any conveyance of real estate; 4 Kent 469; but this provision does not extend to leases for years; 11 Paige 566; 42 N. Y. 174.

The New York statute has been enacted in Michigan, Minnesota, Oregon, Wisconsin, and Wyoming, and no covenants for title seem to be implied in states other than those above named. In some cases where the covenants relate to lands, the rights and liabilities of the covenantor, or covenantee, or both, pass to the assignee of the thing to which the covenant relates. In such cases the covenant is said to run with the land. If rights pass the benefit is said to run; if liabilities, the burden. Only real covenants run with the land, and these only when the covenant has entered into the consideration for which the land, or some interest therein to which the covenant is annexed, passed between the covenantor and the covenantee; 2 Sugd. Vend. 468, 484; 2 M. & K. 535; 19 Pick. 449, 464; 24 Barb. 366; 45 Me. 474; See 1 Washb. R. P. 526; and they die with the estate to which they are annexed; 8 Jones, N. C. 13; 13 Ired. 193; but an estoppel to deny passage of title is said to be sufficient; 3 Metc. Mass. 124; and the passage of mere possession, or defeasible estate without possession, enables the covenant to run; 23 Mo. 151, 174.

It is said by some authorities that the benefit of a covenant to do acts upon land of the covenantee, made with the 'covenantor and his assigns,' will run with the land though no estate passed between the covenantor and covenantee; Rawle, Cov. 335; Year B. 43 Edw. III. 13; 3 Den. 301; 8 Grant. 403; but the weight of authority is otherwise; 2 Sugd. Vend. 468; Platt, Cov. 461. Covenants concerning title generally run with the land; 3 N. J. 260; except those that are broken before the land passed; 4 Kent 473; 30 Vt. 602. See COVENANT OF SEISIN, etc. "Until breach, covenants for title, without distinction between them, run with the land to heirs and assigns. But while this is well settled, a strong current of American authority has set in favor of the position that the covenants for seisin, for right to convey, and, perhaps, against incumbrances, are what are called covenants *in presenti*,—if broken at all, their breach occurs at the moment of their creation. . . . These covenants, it is held, are then turned into a mere right of action, which is not assignable at law and can neither pass to an heir, a devisee, or a subsequent purchaser. A distinction is considered, by this class of cases, to exist, in this respect, between the covenants first named, and those for quiet enjoyment, of warranty, and for further assurance, which are held to be prospective in their character;" Rawle, Cov. §§ 204, 205. See also 2 Johns. 1.

Covenants in leases, by virtue of the statute 32 Hen. VIII. c. 34, which has been reenacted in most of the states, are assignable as respects assignees of the reversion and of the lease. The lessee continues liable on

express covenants after an assignment by him; but not on implied ones; 4 Term 98; but he is liable to the assignee of the lessor on implied covenants, at common law; Platt, Cov. 532; 2 Sugd. Vend. 466; Burton, R. P. § 855. See 1 Washb. R. P. 526.

In case of the assignment of lands in parcels, the assignees may recover *pro rata*, and the original covenantee may recover according to his share of the original estate remaining; 2 Sugd. Vend. 508; Rawle, Cov. § 215; 35 Me. 170; 27 Pa. 288; 3 Metc. Mass. 87; 8 Gratt. 407; 9 B. Monr. 58. But covenants are not, in general, apportionable; 27 Pa. 288.

See Spencer's case, 1 Sm. Lead. Cas. 206.

In Practice. A form of action which lies to recover damages for breach of a contract under seal. It is one of the *brevia formata* of the register, and is sometimes a concurrent remedy with *debt*, though never with *assumpsit*, and is the only proper remedy where the damages are unliquidated in nature and the contract is under seal; Fitzh. N. B. 340; Chit. Pl. 112, 113; 2 Steph. N. P. 1058.

The action lies, generally, where the covenantor does some act contrary to his agreement, or fails to do or perform that which he has undertaken; 4 Dane, Abr. 115; or does that which disables him from performance; Cro. Eliz. 449; 15 Q. B. 88; 23 Pick. 455.

To take advantage of an oral agreement modifying the original covenant in an essential point, the covenant must be abandoned and *assumpsit* brought; 27 Pa. 429; 24 Vt. 347.

The venue is local when the action is founded on privity of estate; 2 Steph. N. P. 1148; 1 Wms. Saund. 241 b, n.; and transitory when it is founded upon privity of contract. As between original parties to the covenant, the action is transitory; and, by the statute 32 Hen. VIII. c. 34, an action of covenant by an assignee of the reversion against a lessor, or by a lessee against the assignee of the reversion, is also transitory; 1 Chit. Pl. 274.

The declaration must, at common law, aver a contract under seal; 2 Ld. Raym. 1536; and either make proof thereof or excuse the omission; 3 Term 151; at least of such part as is broken; 4 Dall. 436; 4 Rich. 196; and a breach or breaches; 15 Ala. 201; 5 Ark. 263; 4 Dana 381; 6 Miss. 229; which may be by negating the words of the covenant in actions upon covenants of seisin and right to convey; Rawle, Cov. § 176; or according to the legal effect; but must set forth the incumbrance in case of a covenant against incumbrances; *id.* § 86; and must allege an eviction in case of warranty; *id.* § 155. The disturbance must be averred to have been under lawful title; *id.* No consideration need be averred or shown, as it is said to be implied from the seal; but performance of an act which constitutes a condition precedent to the defendant's covenant, if there be any such, must be averred; 1 Chit. Pl. 116; 2 Greenl. Ev. § 235; 26 Ala. n. s. 748. The damages laid must be large enough to cover the real amount sought to be recovered; 3 S. & R. 364, 567.

There is no plea of general issue in this action. Under *non est factum*, the defendant may show any facts contradicting the making of the deed; 1 Seld. 423; 1 Mich. 438; as, personal incapacity; 2 Campb. 272; that the deed was fraudulent; Loft 457; not delivered; 4 Esp. 255; or was not executed by all the parties; 6 Maule & S. 341.

Non infregit conventionem and *nul debet* have both been held insufficient; Com. Dig. Pleader, 2 V. 4. As to the effect of covenant performed, see COVENANTS PERFORMED. In respect to the damages to be recovered, see DAMAGES.

The judgment is that the plaintiff recover a named sum for the damages which he has sustained by reason of the breach or breaches of covenant, together with costs.

See INDEPENDENT COVENANT.

COVENANT TO CONVEY. A covenant by which the covenantor undertakes

to convey to the covenantee the estate described in the covenant, under certain circumstances.

This form of conditional alienation of lands is in frequent use in several of the United States; 14 Pa. 208; 19 Barb. 639; 4 Md. 498; 11 Ill. 194; 19 Ohio 347. Substantially the same effect is secured as by a conveyance and a mortgage back for the purchase-money, with this important difference, however, that the title of course remains in the covenantor until he actually executes the conveyance.

The remedy for breach may be by action on the covenant; 29 Pa. 204; but the better remedy is said to be in equity for specific performance; 1 Grant 230.

It is satisfied only by a perfect conveyance of the kind bargained for; 19 Barb. 639; otherwise where an imperfect conveyance has been accepted; 4 Md. 498.

COVENANT FOR FURTHER ASSURANCE. One by which the covenantor undertakes to do such reasonable acts in addition to those already performed as may be necessary for the completion of the transfer made, or intended to be made, at the requirement of the covenantee. It relates both to the title of the vendor and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter. Platt Cov. 841.

The covenant is of frequent occurrence in English conveyances; but its use in the United States seems to be limited to some of the middle states; 2 Washb. R. P. 648; 10 Me. 91; 4 Mass. 627; 10 Cush. 134. It is customary in railroad and other corporation mortgages.

The covenantor, in execution of his covenant, is not required to do unnecessary acts; Yelv. 44; 9 Price 43. He must in equity grant a subsequently acquired title; 2 Ch. Cas. 212; 1 Eq. Cas. Abr. 26; 2 P. Wms. 630; must levy a fine; 16 Ves. 366; 5 Taunt. 427; 4 Maule & S. 188; must remove a judgment or other incumbrance; 5 Taunt. 427; but a mortgagor with such covenant need not release his equity; 1 Ld. Raym. 36. It may be enforced by a bill in equity for specific performance, or an action at law to recover damages for the breach; 2 Co. 3 a; 6 Jenk. Cas. 24; Platt, Cov. 853; Rawle, Cov. § 362; 2 Washb. R. P. 666.

COVENANT AGAINST INCUMBRANCES. One which has for its object security against those rights to, or interests in, the land granted which may subsist in third persons to the diminution of the value of the estate, though consistently with the passing of the fee by the deed of conveyance. For what constitutes an incumbrance, see INCUMBRANCE.

The mere existence of an incumbrance constitutes a breach of this covenant; 2 Washb. R. P. 658; 20 Ala. 137; without regard to the knowledge of the grantee; 2 Greenl. Ev. § 242; 27 Vt. 739; 8 Ind. 171; 10 *id.* 424.

Such covenants, being in *presenti*, do not run with the land in Massachusetts and most of the other states; but the rule is otherwise, either by statute or decision in *Maine*, 1888, p. 697, tit. 9, § 18; 72 Me. 369; *Colorado*, R. S. 1883, 172; *Georgia*, Code 1882, 672; *New York*, 13 Johns. 105; 29 Barb. 339; *Ohio*, 10 Ohio 327; *Minnesota*, 25 Minn. 496; *Missouri*, 44 Mo. 512; 2 McCrary 856; *Indiana*, 5 Blackf. 232; *Wisconsin*, 22 Wis. 495 (reversing the rule adopted in 5 Wis. 17); *Iowa*, 36 Ia. 232; *South Carolina*, 1 N. & McC. 104; *Vermont*, 52 Vt. 639; and possibly in *Michigan*. See Rawle, Cov. § 212. If the covenant is so linked with another covenant as to have a prospective operation it runs with the land; *id.* This covenant is usually coupled with that of seisin in considering this question, but it was not treated as running with the land in this country so readily as the latter; Rawle, Cov. § 212.

Yet the incumbrance may be of such a character that its enforcement may constitute a breach of the covenant of warranty; as in case of a mortgage; 4 Mass. 349; 17 *id.* 596; 8 Pick. 547; 22 *id.* 494.

The measure of damages is the amount of

injury actually sustained; 7 Johns. 358; 5 Me. 94; 13 Mass. 304; 3 Cush. 201; 20 N. H. 369; 25 *id.* 229; Rawle, Cov. § 188.

The covenantee may extinguish the incumbrance and recover therefor, at his election, in the absence of agreement; 4 Ind. 588; 19 Mo. 490; 25 N. H. 239. See COVENANT; REAL COVENANT.

COVENANT OF NON-CLAIM. A covenant sometimes employed, particularly in the New England States, and in deeds of extinguishment of ground rents in Pennsylvania, that neither the vendor, nor his heirs, nor any other person, etc., shall claim any title in the premises conveyed. Rawle, Cov. § 22. It is substantially the same as the covenant of warranty, *q. v.*; *ibid.* § 231.

COVENANT NOT TO SUE. One entered into by a party who has a cause of action at the time of making it, by which he agrees not to sue the party liable to such action.

A *perpetual* covenant not to sue is one by which the covenantor agrees not to sue the covenantee at any time. Such a covenant operates as a release to the covenantee, and may be pleaded as such. Cro. Eliz. 623; 12 Mod. 415; 7 Mass. 153; 17 *id.* 623; 3 Ind. 473; 84 L. J. Q. B. 25. And see 11 S. & R. 149.

A covenant of this kind with one of several, jointly and severally bound, will not protect the others so bound; 12 Mod. 551; 6 Munf. 6; 1 Conn. 139; 4 Me. 421; 2 Dana 107; 17 Mass. 623. It is equivalent to a release with a reserve of remedies, and hence is properly used in composition deeds in preference to a release, which discharges all sureties and co-debtors; 3 B. & C. 361.

A covenant by one of several partners not to sue cannot be set up as a release in an action by all; 3 P. & D. 149.

A *limited* covenant not to sue, by which the covenantor agrees not to sue for a limited time, does not operate a release; and a breach must be taken advantage of by action; Carth. 63; 1 Show. 46; 2 Salk. 573; 11 Q. B. 552; 6 Wend. 471; 5 Cal. 501. See 29 Ala. n. s. 322, as to requisite consideration.

See Leake, Contr. 928.

COVENANT FOR QUIET ENJOYMENT. An assurance against the consequences of a defective title, and of any disturbances thereupon. Platt, Cov. 312; 11 East 641; Rawle, Cov. § 91. By it, when general in its terms, the covenantor stipulates at all events; 1 Mod. 101; to indemnify the covenantee against all acts committed by virtue of a paramount title; Platt, Cov. 313; 4 Co. 80 b; Cro. Car. 5; 3 Term 584; 6 *id.* 66; 3 Duer, N. Y. 464; 2 Jones, N. C. 203; Bush. 384; 3 N. J. 260; not including the acts of a mob; 19 Miss. 87; 2 Strobb. 366; nor a mere trespass by the lessor; 10 N. Y. 151.

But this rule may be varied by the terms of the covenant; as where it is against acts of a particular person; Cro. Eliz. 212; 5 Maule & S. 374; 1 B. & C. 29; or those "claiming or pretending to claim;" 10 Mod. 383; 1 Ventr. 175; or molestation by any person. See 21 Miss. 87.

It has practically superseded the ancient doctrine of warranty as a guaranty of title, in English conveyances; 2 Washb. R. P. 661; but the latter is more common in conveyances in America; Rawle, Cov. § 91.

It occurs most frequently in leases; 1 Washb. R. P. 325; Rawle, Cov. § 91; and is usually the only covenant used in such cases; it is there held to be raised by the words grant, demise, lease, yielding and paying, give, etc.; 1 P. & D. 360; 9 N. H. 223; 15 N. Y. 327; 6 Bingh. 656; 4 Kent 474, n.; and exists impliedly in a parol lease; 20 E. L. & Eq. 374; 3 N. J. 260; see 1 Duer, N. Y. 176. It is usual in ground-rent deeds in Pennsylvania; Rawle, Cov. § 91.

COVENANT OF RIGHT TO CONVEY. An assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey.

In modern English conveyancing, this covenant has taken the place of the covenant of seisin; 2 Washb. R. P. 648. It is

said to be the same as a covenant of seisin; 10 Me. 91; 4 Mass. 627; but is not necessarily so, as it includes the capacity of the grantor; T. Jones 195; 2 Bulstr. 12; Cro. Jac. 358.

The breach takes place on execution of the deed, if at all; Freem. 41; 5 Halst. 20; and the covenantor need not wait for a disturbance to bring suit; 5 Taunt. 426; but a second recovery of damages cannot be had for the same breach; Platt, Cov. 810; 1 Maule & S. 365; 4 id. 53.

COVENANT OF SEISIN. An assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey. Platt, Cov. 806. It has given place in English conveyancing to the covenant of right to convey, but is in use in several states of the United States. 2 Washb. R. P. 648.

In England; 1 Maule & S. 355; 4 id. 53; and in several states of the United States; e. g. Colorado, Georgia, New York, Ohio, Minnesota and other states (see Rawle, Cov. § 211); by decisions; 5 Blackf. 232; 17 Ohio 52; 22 Wis. 495; 32 Ia. 317; 40 Mo. 512; or by statute; 2 Washb. R. P. 650; this covenant runs with the land, and may be used on for breach by an assignee; in other states it is held that a mere covenant of *lawful seisin* does not run with the land, but is broken, if at all, at the moment of executing the deed; 4 Mass. 408, 439, 627; 10 Cush. 134; 2 Barb. 303; 2 Me. 269; 2 Dev. 80; 8 Gratt. 396; 5 Sneed 119; 7 Ind. 673; 27 Ill. 482; 37 Cal. 189; 23 Ark. 590. See discussion of this subject with authorities cited in COVENANT AGAINST INCUMBRANCES.

A covenant for *indefeasible seisin* is everywhere held to run with the land; 2 Vt. 328; 2 Dev. 80; 4 Dall. 439; 5 Sneed 123; 14 Johns. 248; 14 Pick. 128; 10 Mo. 467; and to apply to all titles adverse to the grantor's; 2 Washb. R. P. 656.

A covenant of *seisin* or *lawful seisin*, in England and most of the states, is satisfied only by an indefeasible seisin; Rawle, Cov. § 41; 7 C. B. 310; 22 Vt. 106; 15 N. H. 176; 6 Conn. 374; 23 id. 349; while in other states possession under a claim of right is sufficient; 3 Vt. 403; 10 Cush. 134; 4 Mass. 408; 2 id. 439; 51 Me. 567; 69 id. 510; 27 Ill. 229; 4 Neb. 133; 26 Mo. 92; 3 Ohio 211, 525.

A covenant of seisin, of whatever form, is broken at the time of the execution of the deed if the grantor has no possession either by himself or another; and no rights can pass to the assignee of the grantee; 2 Johns. 1; 2 Vt. 327; 5 Conn. 497; 14 Pick. 470; 17 Ohio 60; 8 Gratt. 397; 4 Cra. 430; 36 Me. 170; 24 Ala. n. s. 189; 4 Kent 471; 2 Washb. R. P. 656.

The existence of an outstanding life-estate; 22 Vt. 106; a material deficiency in the amount of land; 1 Bay 256; see 24 Miss. 597; non-existence of the land described; 16 Pick. 68; the existence of fences or other fixtures on the premises belonging to other persons, who have a right to remove them; 1 N. Y. 564; 7 Pa. 122; 30 Vt. 752; 19 Ia. 427; or of a paramount right in another to divert a natural spring; 38 Vt. 471; or to prevent the grantee from damming water to a certain height when that right is reserved to him by his deed; 20 Wis. 293; 29 Ind. 96; concurrent seisin of another as tenant in common; 12 Me. 389; 43 id. 567; adverse possession of a part by a stranger; 7 Johns. 376; a conveyance by one of two tenants in common of the entire estate (so far as his half is concerned) 38 Vt. 464; constitute a breach of this covenant. But the existence of such easements or incumbrances as do not affect the seisin of the purchaser does not constitute a breach of the covenant; Rawle, Cov. § 59. For instance, the existence of a highway over a part of the land; 15 Johns. 449; 1 Pa. 336; 1 Conn. 103; 16 Ind. 340; or of a judgment, mortgage, or right of dower; Rawle, Cov. § 59; 2 J. J. Marsh. 430; 10 Ohio 383; 7 Johns. 380; (otherwise if the mortgagee has entered; Rawle, Cov. § 59); the removal of fixtures; 45 N. Y. 792. But see 6 Cush. 124.

In the execution of a power, a covenant

that the power is subsisting and not revoked is substituted; Platt, Cov. 809.

COVENANT RUNNING WITH LAND. A covenant which goes with the land (conveyed by the deed in which it is expressed), as being annexed to the estate, and which cannot be separated from the land; and transferred without it. 4 Kent's Com. 472, note.

COVENANT TO STAND SEISED TO USES. A covenant by means of which under the statute of uses a conveyance of an estate may be effected. Burton, R. P. §§ 136, 145.

Such a covenant cannot furnish the ground for an action of covenant broken, and in this respect resembles the ancient real covenants.

The consideration for such a covenant must be relationship either by blood or marriage; 2 Washb. R. P. 129; Chal. R. P. 383. See 2 Seld. 342.

As a mode of conveyance it has fallen into disuse; though the doctrine is often resorted to by courts in order to give effect to the intention of the parties who have undertaken to convey lands by deeds which are insufficient for the purpose under the rules required in other forms of conveyance; 2 Washb. R. P. 155; 2 Sand. Uses 79, 83; 4 Mass. 136; 18 Pick. 397; 5 Me. 232; 11 Johns. 351; 5 Yerg. 249.

COVENANT OF WARRANTY. An assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title. 2 Jones, N. C. 203; 3 Duer, N. Y. 464; 58 Barb. 86; 3 Hill, S. C. 304.

It is not in use in English conveyances, but is in general use in the United States; 2 Washb. R. P. 659; and in several states is the *only* covenant in general use; Rawle, Cov. § 21; 4 Ga. 593; 8 Gratt. 353; 6 Ala. 60.

A special warranty is not a covenant against incumbrances; 83 Va. 157. See 4 Dall. 436.

The form in common use is as follows:—"And I the said [grantor], for myself, my heirs, executors, and administrators, do covenant with the said [grantee], his heirs and assigns, that I will, and my heirs, executors, and administrators shall, *warrant and defend* the same to the said [grantee], his heirs and assigns forever, against the lawful claims and demands of all persons [or, of all persons claiming by, through, or under me, but against none other]." [or other special covenant, as the case may be]. When *general*, it applies to lawful adverse claims of all persons whatever; when *special*, it applies only to certain persons or claims to which its operation is limited or restricted; 2 Washb. R. P. 665. See a form in Rawle, Cov. § 21, n.

This limitation may arise from the nature of the subject-matter of the grant; 8 Pick. 547; 19 id. 341; 5 Ohio 190; 9 Cow. 271.

Such covenants give the covenantor and grantee the benefit of subsequently acquired titles; 11 Johns. 91; 9 Cow. 271; 6 Watts 60; 9 Cra. 43; 13 N. H. 389; 1 Ohio 190; 3 Pick. 52; 24 id. 324; 3 Metc. 121; 18 Me. 281; 20 id. 260; to the extent of their terms; 12 Vt. 39; 3 Metc. 121; 9 Cow. 271; 34 Me. 488; but not if an interest actually passes at the time of making the conveyance upon which the covenant may operate; 3 McLean 56; 9 Cow. 271; 12 Pick. 47; 5 Gratt. 157; in case of terms for years, as well as conveyances of greater estates; Wms. R. P. 229; 2 Washb. R. P. 478; 4 Kent 261, n.; Cro. Car. 109; 4 Wend. 502; 1 Johns. Cas. 90; as against the grantor and those claiming under him; 2 Washb. R. P. 479; including purchasers for value; 14 Pick. 224; 5 N. H. 533; 5 Me. 231; 12 Johns. 201; 9 Cra. 53; but see 4 Wend. 619; 18 Ga. 192. And this principle does not operate to prevent the grantee's action for breach of the covenant, if evicted by such title; 1 Gray 195; 25 Vt. 635; 12 Me. 499. See 83 Me. 346. A deed of land is not void as between the parties because of a want of consideration, and such want is no answer to an action upon a breach of covenant of warranty; 154 Mass. 389.

In case of a *release* of right and title, covenants limited to those claiming under the grantor do not prevent the assertion by the grantor of a subsequently acquired title; 26 N. H. 401; 4 Wend. 800; 5 Gray 328; 11 Ohio 475; 14 Me. 351; 43 id. 432; 14 Cal. 472.

It is a real covenant, and runs with the estate in respect to which it is made, into the hands of whoever becomes the owner; 2 Washb. R. P. 659; Chal. R. P. 279; 4 Sneed 52; 82 Va. 703; 40 La. Ann. 827; against the covenantor and his personal representatives; 27 Pa. 288; 8 Zab. 260; see 142 N. Y. 78; to the extent of assets received, and cannot be severed therefrom; 13 Ired. 193.

The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the latter, while disturbance of possession is requisite to recover upon the former; 131 U. S. 75. Grantors having made an express contract of warranty, cannot set up knowledge of vice in their title, to exonerate themselves from the obligation of their contract; 138 U. S. 596.

The action for breach should be brought by the owner of the land and, as such, assignee of the covenant at the time it is broken; 4 Johns. 89; 19 Wend. 334; 2 Mass. 455; 7 id. 444; 3 Cush. 219; 10 Me. 81; 5 T. B. Monr. 357; 12 N. H. 413; but may be by the original covenantor, if he has satisfied the owner; 5 Cow. 137; 8 Cush. 222; 5 T. B. Monr. 357; 1 Conn. 244; 1 Dev. & B. 94; 10 Ga. 511; 26 Vt. 279.

To constitute a breach there must be an eviction by paramount title; Rawle, Cov. § 131; 6 Barb. 165; 5 Harr. Del. 162; 11 Rich. 80; 13 La. Ann. 390, 499; 5 Cal. 262; 4 Ind. 174; 6 Ohio St. 525; 26 Mo. 92; 17 Ill. 185; 36 Me. 455; 14 Ark. 309; 35 Neb. 521; 26 S. W. Rep. (Tex.) 443; 41 Vt. 296; which may be constructive; 12 Me. 499; 17 Ill. 185; 86 id. 69; and it is sufficient if the tenant yields to the true owner, or if, the premises being vacant, such owner takes possession; 5 Hill 599; 4 Mass. 349; 8 Ill. 162; 5 Ired. 393; 40 Minn. 94; 98 N. C. 239; 40 La. Ann. 827; 39 Cal. 360; 33 N. J. L. 328. See 4 Halst. 139. But in such case the grantee must prove the existence and assertion of such paramount, outstanding, hostile title; 16 Or. 339; 51 Ill. 377; 47 Ind. 256; 66 Me. 557; 108 Mass. 276; 40 Vt. 43; and assume the burden of proof with as much particularity as if suing in ejectment; Rawle, Cov. § 136; 32 Ia. 76; 51 Tex. 178; unless the adverse right has been established by a judgment or decree in a suit of which the covenantor had been properly notified; Rawle, Cov. § 136; in which case the judgment or decree will be conclusive evidence of the validity of the paramount title; *id.* See *id.* § 123 *et seq.*

Exercise of the right of eminent domain does not render the covenantor liable; 31 Pa. 37; 71 id. 83; 25 Cal. 452; 10 Cush. 134; 3 Wheat. 452.

When the covenantor is threatened with eviction, it is usual and proper for him to give notice to the covenantor to appear and defend the suit. If it appears on the record that the covenantor received the notice or if he defends the suit, recovery therein will be conclusive against him in an action by the covenantor; otherwise the question of notice will go to the jury on the facts. If no notice was given, the record of the adverse suit is not even *prima facie* evidence that the adverse title was paramount. Notice of the adverse suit is not indispensable to a recovery against the covenantor; Rawle, Cov. § 125.

As to the measure of damages for an eviction, see MEASURE OF DAMAGES.

COVENANTS PERFORMED. In Pleading. A plea to an action of covenant, in use in the state of Pennsylvania, whereby the defendant, upon proper notice to the plaintiff, may give anything in evidence which he might have pleaded. 4 Dall. 439; 2 Yeates 107; 15 S. & R. 105. And this evidence, it seems, may be given in the circuit court without notice, unless called for; 2 Wash. C. C. 456.

COVENANTEE. One in whose favor a covenant is made. Shepp. Touch. 150.

COVENANTOR. One who becomes bound to perform a covenant.

COVENTRY ACT. The common name for the statute 22 & 23 Car. II. c. 1,—it having been enacted in consequence of an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament.

By this statute it is enacted that if any person shall, of malice aforethought, and by lying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member, of any other person, with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. The act was repealed in England by the 9 Geo. IV. c. 31. The provision now in force on this subject is the 24 & 25 Vict. c. 100, § 18; 4 Steph. Com. 80, n.

COVERFEU. See *HORA AURORAE*.

COVERING DEED. See *DEBENTURE*; *DEBENTURE BOND*; *DEBENTURE STOCK*.

COVERT BARON. A wife. So called from being under the protection of her husband, baron, or lord. 1 Bla. Com. 442.

COVERTURE. The condition or state of a married woman.

During coverture the civil existence of the wife is, for many purposes, merged in that of her husband; 2 Steph. Com. 263-272. See *ABATEMENT*; *PARTIES*; *MARRIED WOMEN*.

COVIN. A secret contrivance between two or more persons to defraud and prejudice another in his rights. Co. Litt. 357b; Comyns, Dig. *Covin*, A: 1 Viner, Abr. 478; 28 Conn. 166. See *COLLUSION*; *DECEIT*; *FRAUD*.

COW. In a penal statute which mentions both cows and heifers, it was held that by the term cow must be understood one that had had a calf. 2 East, Pl. Cr. 616; 1 Leach 105. See 6 Humph. 285.

COWARDICE. Pusillanimity; fear; misbehavior through fear in relation to some duty to be performed before an enemy. O'Brien, Court M. 142.

By both the army and navy regulations of the United States this is an offence punishable in officers or privates with death, or such other punishment as may be inflicted by a court-martial; Rev. Stat. §§ 1342, 1634.

CRAFT. Art or skill; dexterity in particular manual employment, hence the occupation or employment itself; manual art; a trade. Webster.

This word is also now applied to all kinds of sailing vessels. 21 Gratt. 693. See 23 L. J. Rep. 156; 3 El. & Bl. 898.

CRANAGE. A toll paid for drawing merchandise out of vessels to the wharf: so called because the instrument used for the purpose is called a crane. 8 Co. 46.

CRANK. Some strange action; a caprice; a whim; a crotchet; a vagary.

Violent of temper; subject to sudden cranks. Carlyle. The word has no necessarily defamatory sense; 29 Fed. Rep. 827.

CRASTINUM, CRASTINO (Lat. tomorrow). On the day after. The return day of writs is made the second day of the term, the first day being some saint's day, which gives its name to the term. In the law Latin, *crastino* (the morning, the day after) would then denote the return day. 2 Reeve, Hist. Eng. Law 56. In the United States the return day is the first day of the term.

CRAVE. To ask; to demand. The word is frequently used in pleading: as, to craveoyer of a bond on which the suit is brought; and in the settlement of accounts the accountant-general craves a credit or an allowance. 1 Chit. Pr. 520. See *OYER*.

CRAVEN. A word denoting defeat,

and begging the mercy of the conqueror.

It was used (when used) by the vanquished party in trial by battle. Victory was obtained by the death of one of the combatants, or if either champion proved recreant,—that is, yielded, and pronounced the horrible word "craven." Such a person became infamous, and was thenceforth unfit to be believed on oath. 3 Bla. Com. 340. See *WAGER OF BATTLE*.

CREANCE. In French Law. A claim; a debt; also belief, credit, faith. 1 Bouvier, Inst. n. 1040.

CREANSOR. A creditor. Coel.

CREATE. To create a charter is to make an entirely new one, and differs from renewing, extending, or continuing an old one. 21 Pa. 188; 1 Gilm. 672; 16 Barb. 188. See 65 Me. 500; 45 Vt. 154.

CREDENTIALS. In International Law. The instruments which authorize and establish a public minister in his character with the state or prince to whom they are addressed. If the state or prince receive the minister, he can be received only in the quality attributed to him in his credentials. They are as it were his letter of attorney, his mandate patent, *mandatum manifestum*. Vattel, liv. 4, c. 6, § 76.

CREDIBILITY. Worthiness of belief. The credibility of witnesses is a question for the jury to determine, as their competency is for the court; Best, Ev. § 76; 1 Greenl. Ev. §§ 49, 425; Tayl. Ev. 1257.

CREDIBLE WITNESS. One who, being competent to give evidence, is worthy of belief. 5 Mass. 229; 17 Pick. 154; 2 Curt. Eccl. 336.

In deciding upon the credibility of a witness, it is always pertinent to consider whether he is capable of knowing the thing about which he testifies; whether he was actually present at the transaction; whether he paid sufficient attention to qualify himself to be a reporter of it; and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive, or to suppress or add to the truth.

In some of the states, witnesses must be attested by credible witnesses. In several of the states, credible witness is used, in certain connections, as synonymous with competent witness, and in Connecticut, in a statute providing for the certification of copies of records, it refers to a witness giving testimony under the sanction of the witness's oath; 26 Conn. 418; 18 Ga. 40; 2 Ball. 24; 9 Pick. 350; 12 Mass. 328; 58 Ky. 330; 66 N. H. 8; Jarm. Wills 124.

CREDIT. The ability to borrow, on the opinion conceived by the lender that he will be repaid.

A debt due in consequence of a contract of hire or borrowing of money.

The time allowed by the creditor for the payment of goods sold by him to the debtor. That which is due to a merchant, as distinguished from debit, that which is due by him.

That influence connected with certain social positions. 20 Toullier, n. 19.

In a statute making credits the subject of taxation, the term is held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services, due or to become due to the person liable to pay taxes thereon, when added together (estimating every such claim or demand at its true value in money) over and above the sum of all legal *bona fide* debts owing by such person; 87 Ohio St. 128.

See, generally, 5 Taunt. 338; 3 N. Y. 344; 24 id. 64, 71; 51 Cal. 243.

As to the "full faith and credit" to be given in one state to the records, etc., of another state, see *FOREIGN JUDGMENTS*; *CONFLICT OF LAWS*.

CREDIT, BILL OF. See *BILL OF CREDIT*.

CREDITABLE. The word "credible" in the statute, requiring a will to be attested by two credible witnesses, is used in the sense of "competent." 101 Ky. 64, 39 S. W. 520.

CREDITOR. He who has a right to require the fulfilment of an obligation or contract.

A person to whom any obligation is due. 37 N. J. L. 300. See 2 Root 261.

Preferred creditors are those who, in consequence of some provision of law, are en-

titled to some special privilege in the order in which their claims are to be paid.

See *FOREIGN CREDITOR*; *JOINT AND SEVERAL CREDITOR*.

CREDITOR, JUDGMENT. One who has obtained a judgment against his debtor, under which he can enforce execution.

CREDITORS' BILL. A bill in equity, filed by one or more creditors, for the purpose of collecting their debts out of assets, or under circumstances as to which an execution at law would not be available. They are usually filed by and on behalf of him or themselves and all other creditors who shall come in under the decree. They may be either against the debtor in his lifetime or for an account of the assets and a due settlement of the estate of a decedent.

They are divided by Bispham into two classes, numbered in the order here stated. In bills of what he terms the second class, or those which in effect seek for the administration of a decedent's estate, the usual decree against the executor or administrator is *quod computet*; that is to say, it directs the master to take the accounts between the deceased and all his creditors, and to cause the creditors, upon due public notice, to come before him to prove their debts at a certain place and within a limited time; and it also directs the master to take an account of all the personal estate of the deceased in the hands of the executor or administrator, and the same to be applied in payment of the debts and other charges in a due course of administration; 1 Story, Eq. Jur. 546-549.

Generally speaking, this jurisdiction has been transferred to probate courts in most of the states, but in some states the original jurisdiction of equity over the administration of estates remains unabridged by the statutes and concurrent with that of probate courts. These states are Alabama, Illinois, Iowa, Kentucky, Maryland, Mississippi, New Jersey, North Carolina, Rhode Island, Virginia, and the District of Columbia, and this rule also applies in the federal courts. In certain other states the jurisdiction of the probate courts is virtually exclusive. These states are Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, Oregon, and Pennsylvania. In some other states the equitable jurisdiction is ancillary and corrective. These states are Arkansas, California, Georgia, Kansas, Missouri, New York, Ohio, South Carolina, Tennessee, Texas, Vermont, and Wisconsin. This classification, which is given in 8 Pom. Eq. Jur. § 1154, is said to be a rough grouping with still considerable diversity among the individuals composing each class.

Creditors' suits of the other class are brought while the debtor is living and for the collection of a debt against him. This jurisdiction had its origin in the inadequacy of common-law remedies by writs of execution. These writs at common law often did not extend to estates and interests which were equitable in their nature, and creditors' suits were therefore permitted to be brought where the relief at common law by execution was ineffectual, as for the discovery of assets, to reach equitable and other interests not subject to levy and sale at law, and to set aside fraudulent conveyances.

Statutes in England and America have extended the common-law remedies and provided adequate legal relief in many cases where formerly a resort to equity was necessary; Pom. Eq. Jur. § 1415.

The jurisdiction of a court of chancery in suits brought by judgment creditors to enforce the collection of their judgments, after having exhausted their remedy at law, although it may have previously existed, is in some states expressly declared and particularly defined by statutes.

Before a creditor can resort to the equitable estate of his debtor, he must first obtain judgment and seek to collect the debt by execution; exhausting his remedy at law; 140 U. S. 106; 99 id. 398; 111 id. 110; 52 Ill. 98; 80 id. 79; 44 Ga. 466; and it must appear that a judgment has been re-

covered, execution issued thereon and returned "nulla bona," 117 Ill. 477; 111 U. S. 110; but this rule is said to be too general; 3 Pom. Eq. Jur. § 1415; it probably would not apply where the judgment was a lien; *id.*; 44 Miss. 79. A judgment cannot be questioned upon a creditor's bill brought to secure its payment; 8 Wall. 370.

Creditors cannot attack the interest of third parties, alleged to have been obtained by fraud, until they have gained a standing in court by legal proceedings; 62 Mich. 532; 75 Iowa 713; 78 Ga. 194; 86 Ky. 206.

Judgments of the federal court cannot be made the basis of a creditor's bill in a state court; 128 Ill. 804; *contra*, 42 Neb. 350; 39 Pac. Rep. (Kan.) 727. The plaintiff in a creditor's bill is not concluded by sworn answers of defendant; 40 Ill. App. 405.

A creditor's bill is not maintainable against a debtor and his fraudulent grantee, after the return of an execution satisfied; 80 Me. 461. A judgment creditor's bill may be framed for the double purpose of aiding an execution and to reach property not open to execution; 71 Mich. 431. Where other creditors are permitted to intervene on a creditor's bill, all are entitled to share *pro rata* in the fund available for payment of debts; 153 Pa. 189. See Puterbaugh, Pl. & Pr. A creditor's bill will lie against municipal corporation, though the same be not subject to garnishment. See 28 Chicago Leg. News 356.

State statutes authorizing suits in the nature of creditors' bills against corporations do not give the federal courts jurisdiction to entertain such suits when the creditor has not first exhausted his legal remedy, since the equity jurisdiction of those courts cannot be enlarged by a state statute; 60 Fed. Rep. 341; 8 C. C. A. 552; nor will such a bill lie to obtain the seizure of the property of an insolvent corporation which has failed to collect stock subscriptions and executed an illegal trust deed, as these facts do not change the rule of those courts that simple contract creditors cannot obtain the aid of equity to effect the seizure of the debtor's property and its application to their claims; 150 U. S. 371. But see 35 Cent. L. J. 207.

See Bishp. Eq. 525-528; 121 U. S. 44; 4 Harv. L. Rev. 99; 5 *id.* 101; Ad. Eq. 250.

CREEK. In Maritime Law. Such little inlets of the sea, whether within the precinct or extent of a port or without, as are narrow passages, and have shore on either side of them. Callis, Sew. 56; 5 Taunt. 705.

Such inlets that though possibly for their extent and situation they might be ports, yet they are either members of or dependent upon other ports.

In England the name arose thus. The king could not conveniently have a customer and comptroller in every port or haven. But such custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that port where these custom-officers were placed. 1 Chit. Com. Law, 736; Hale, de Portibus Maris, pt. 2, c. 1, vol. 1, p. 46; Comyns, Dig. Navigation (C); Callis, Sew. 34.

A small stream, less than a river. 12 Pick. 184; Cowp. 86; 88 N. Y. 103.

A creek passing through a deep level marsh and navigable by small craft, may, under legislative authority, be obstructed by a dam, or wholly filled up and converted into house-lots,—such obstructions not being in conflict with any act of congress regulating commerce; 2 Pet. 245; 1 Pick. 180; 21 *id.* 344; 3 Metc. Mass. 202; 2 Stockt. 211. See 4 B. & Ald. 589.

CREMATION. The act or practice of reducing a corpse to ashes by means of fire. Act Pa. 1891, June 8; P. L. 212.

To burn a dead body instead of burying it is not a misdemeanor unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body it is a misdemeanor so to dispose of the body as to prevent the coroner from holding an inquest; L. R. 12 Q. B. D. 247. In L. R. 20 Ch. D. 659, it was doubted as to whether it is lawful to burn a body, but the question was not decided. See 43 Alb. L. J. 140. See DEAD BODY.

CREMENTUM COMITATUS. The

increase of the county. The increase of the king's rents above the old vicontiel rents for which the sheriffs were to account. Wharton, Dict.

CREPUSCULUM. Daylight; twilight. The light which immediately precedes or follows the rising or setting of the sun. 4 Bla. Com. 224. Housebreaking during the period in which there is sunlight enough to discern a person's face (*crepusculum*) is not burglary; Co. 8d Inst. 63; 1 Russell, Cr. 830; 3 Greenl. Ev. § 75.

CRETIO. Time for deliberation allowed an heir (usually 100 days), to decide whether he would or would not take an inheritance. Calvinus, Lex.; Taylor, Gloss.

CREW. The word crew used in a statute in connection with *master*, includes officers as well as seamen. 3 Sumn. 209-212; 1 Law Rep. 63. Sometimes also the master is included; 6 Rob. (L.) 534; but a passenger would not be; 1 W. & M. 231. See SEAMAN.

CRIER (Norman, to proclaim). An officer whose duty it is to make the various proclamations in court, under the direction of the judges. The office of crier in chancery is now abolished, in England. Wharton.

CRIM. CON. An abbreviation for criminal conversation, of very frequent use, denoting adultery; unlawful sexual intercourse with a married woman. Bull. N. P. 27; Bacon, Abr. Marriage (E) 2; 4 Blackf. 157; 3 Bla. Com. 139.

The term is used to denote the act of adultery in a suit brought by the husband of the married woman with whom the act was committed, to recover damages of the adulterer. That the plaintiff connived at or assented to his wife's infidelity, or that he prostituted her for gain, is a complete answer to the action. But the fact that the wife's character for chastity was bad before the plaintiff married her, that he lived with her after he knew of the criminal intimacy with the defendant, that he had connived at her intimacy with other men, or that the plaintiff had been false to his wife, only go in mitigation of damages; 4 N. H. 501; 55 Pa. 77; as will the fact that the wife willingly consented or threw herself in the way of her paramour; 70 Ind. 520.

The wife cannot maintain an action for criminal conversation with her husband; and for this, among other reasons, because her husband, who is *particeps criminis*, must be joined with her as plaintiff. But the husband may maintain the action after a divorce granted; 2 Bish. Marr. Div. & Sep. § 727; 1 Hill, N. Y. 63. This action is rare in the United States, and has been abolished in England by the Divorce Act, 20 & 21 Vict. c. 85, s. 59. The husband may, however, in suing for a divorce, claim damages from the adulterer; 3 Steph. Com. 437. The right to an action for damages is not barred by the fact that the act was done by violence, and that a criminal action will lie; 44 Mich. 245. See article 15 Am. L. Reg. n. s. 451.

Where a wife sought a divorce and obtained a decree, for cruelty, the husband making no defense, but he subsequently sued another man for criminal conversation with her, alleging an act as known to him before the divorce suit, the court held that this would have been a perfect defense to the suit for divorce, and the decree therefor was conclusive against its existence and a complete bar to the civil action; 56 Mich. 291. See CASE.

CRIME. An act committed or omitted in violation of a public law forbidding or commanding it.

A wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name. 1 Bish. Cr. Law § 43. See 4 Denio 260; 6 Ark. 187, 461; Clark, Cr. Law 1.

The word crime generally denotes an offence of a deep and atrocious dye. When the act is of an inferior degree of guilt, it is called a misdemeanor; 4 Bla. Com. 4. Crime, however, is often used as comprehending misdemeanor and even as synonymous therewith, and also with offence; in short, as embracing

every indictable offence; T. U. P. Charit. 225; 60 Ill. 186; 31 Wis. 383; 9 Wend. 212; 24 How. 102; 32 N. J. L. 132, 144; 39 Hun 510; 102 N. Y. 583; but it is not synonymous with felony; 113 Pa. 379.

Crimes are defined and punished by statutes and by the common law. Most common-law offences are as well known and as precisely ascertained as those which are defined by statutes; yet, from the difficulty of exactly defining and describing every act which ought to be punished, the vital and preserving principle has been adopted that all immoral acts which tend to the prejudice of the community are punishable by courts of justice; 2 East 5, 31; 7 Conn. 386; 5 Cow. 286; 3 Pick. 32.

There are no common-law offences against the United States; 144 U. S. 677. See COMMON LAW.

There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute; 184 U. S. 624; 158 U. S. 282.

Deliberation and premeditation to commit crime need not exist in the criminal's mind for any fixed period before the commission of the act; 139 U. S. 510.

A crime *malum in se* is an act which shocks the moral sense of the community as being grossly immoral and injurious. With regard to some offences, such as murder, rape, arson, burglary, and larceny, there is but one sentiment in all civilized countries, which is that of unqualified condemnation. With regard to others, such as adultery, polygamy, and drunkenness, in some communities they are regarded as *mala in se*; while in others they are not even *mala prohibita*.

An offence is regarded as strictly a *malum prohibitum* only when, without the prohibition of a statute, the commission or omission of it would in a moral point of view be regarded as indifferent. The criminality of the act or omission consists not in the simple perpetration of the act, or the neglect to perform it, but in its being a violation of a positive law.

It is not only just, but it has been found necessary, to have the severity of punishment proportioned to the enormity of crimes. Different opinions are entertained as to what should be the highest in degree. In England, there are at present only two crimes for which the death penalty is enforced; namely, treason and murder. In Scotland, by act of 1887, 50 and 51 Vic. chap. 38, it is enacted that capital sentences shall be abolished, except on conviction of murder or offences against the act 10 Geo. IV. chap. 38, by which a variety of attempts to commit murder are considered capital. In the United States the death penalty is enforced by statutes of the different states as follows:—

In Alabama, Delaware, Georgia, Maryland, and West Virginia, for treason, murder, arson, and rape.

In Alaska, Arizona, Kansas, New Jersey, Mississippi, Montana, New York, North Dakota, Oregon, and South Dakota, for treason and murder.

In Colorado, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Nebraska, New Hampshire, New Mexico, Nevada, Ohio, Oklahoma, Pennsylvania, Utah, and Washington, for murder.

In Kentucky and Virginia, for murder, rape, and treason.

In Vermont, arson, treason, and murder. In Florida, Missouri, South Carolina, Texas, and Tennessee, for murder and rape.

In North Carolina, for arson, rape, burglary, and murder.

In Indiana, for treason, murder, and arson, if death result.

In California, treason, murder, and train-wrecking.

Capital punishment has been abolished in Maine, Rhode Island (except where a person shall commit murder while imprisoned for life, when he shall be hanged), Wisconsin, and except for treason in Michigan. R. I. Pub. Stat. (1882), 667; Wis. Act of 1853, n. 100; Mich. Rev. Stat. 1846; Maine Laws (1887), p. 104. In 1888, the legislature of New York substituted electricity as the means of executing criminals, instead of hanging, and a recent act has been passed in Ohio for the same purpose.

There are three degrees of murder according to the statute laws of Minnesota and Wisconsin, and two degrees in Alabama,

Arkansas, California, Connecticut, Delaware, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Virginia. In some of the other states murder remains as at common law, and in some it is somewhat modified by statute.

Crimes are sometimes classified according to the degree of punishment incurred by the commission of them.

They are more generally arranged according to the nature of the offence.

The following is, perhaps, as complete a classification as the subject admits:—

Offences against the sovereignty of the state. 1. Treason. 2. Misprision of treason.

Offences against the lives and persons of individuals. 1. Murder. 2. Manslaughter. 3. Attempts to murder or kill. 4. Mayhem. 5. Rape. 6. Robbery. 7. Kidnapping. 8. False imprisonment. 9. Abduction. 10. Assault and battery. 11. Abortion. 12. Cruelty to children.

Offences against public property. 1. Burning or destroying public property. 2. Injury to the same.

Offences against private property. 1. Arson. 2. Burglary. 3. Larceny. 4. Obtaining goods on false pretences. 5. Embezzlement. 6. Malicious mischief.

Offences against public justice. 1. Perjury. 2. Bribery. 3. Destroying public records. 4. Counterfeiting public seals. 5. Jail-breach. 6. Escape. 7. Resistance to officers. 8. Obstructing legal process. 9. Barratry. 10. Maintenance. 11. Champerty. 12. Contempt of court. 13. Oppression. 14. Extortion. 15. Suppression of evidence. 16. Compounding felony. 17. Misprision of felony.

Offences against the public peace. 1. Challenging or accepting a challenge to a duel. 2. Unlawful assembly. 3. Riot. 4. Riot. 5. Breach of the peace. 6. Libel.

Offences against chastity. 1. Sodomy. 2. Bestiality. 3. Adultery. 4. Incest. 5. Bigamy. 6. Seduction. 7. Fornication. 8. Lascivious carriage. 9. Keeping or frequenting house of ill-fame.

Offences against public policy. 1. False currency. 2. Lotteries. 3. Gambling. 4. Immoral shows. 5. Violations of the right of suffrage. 6. Destruction of game, fish, etc. 7. Nuisance.

Offences against the currency, and public and private securities. 1. Forgery. 2. Counterfeiting. 3. Passing counterfeit money.

Offences against religion, decency, and morality. 1. Blasphemy. 2. Profanity. 3. Sabbath-breaking. 4. Obscenity. 5. Cruelty to animals. 6. Drunkenness. 7. Promoting intemperance. See 2 Sharsw. Bla. Com. 42.

Offences against the public, individuals, or their property. 1. Conspiracy. See QUASI-CRIMES, INFAMOUS CRIME.

CRIME AGAINST NATURE. Sodomy or buggery. 10 Ind. 355.

CRIMEN (Lat.). A crime. See CRIME.

CRIMEN FALSI. In Civil Law. A fraudulent alteration, or forgery, to conceal or alter the truth, to the prejudice of another. This crime may be committed in three ways, namely: by forgery; by false declarations or false oath,—perjury; by acts, as by dealing with false weights and measures, by altering the current coin, by making false keys, and the like; see Dig. 48. 10. 22; 34. 8. 2: Code 9. 22; 2. 5. 9. 11. 16. 17. 23. 24; Merlin, *Répert.*; 1 Bro. Civ. Law 426; 1 Phill. Ev. 26; 2 Stark. Ev. 715.

At Common Law. Any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. 1 Greenl. Ev. § 373; 13 Ga. 97; 29 Ohio 351, 358; 55 Ala. 239; 4 Sawy. 211.

The meaning of this term at common law is not well defined. It has been held to include forgery; 5 Mod. 74; perjury, subornation of perjury; Co. Litt. 6 b; Comyns, Dig. *Testmoigne* (A 5); suppression of testimony by bribery or conspiracy to procure the absence of a witness; Ry. & M. 434; conspiracy to accuse of crime; 2 Hale, Pl. Cr. 277; 2 Leach 496; 3 Stark. 21; 2 Dods.

191; barratry; 2 Salk. 690. The effect of a conviction for a crime of this class is infamy, and incompetence to testify; 80 Va. 388. Statutes sometimes provide what shall be such crimes.

CRIMEN LAESÆ MAJESTATIS. See LAESÆ MAJESTAS.

CRIMINA EXTRAORDINARIA. Extraordinary Crimes. The list includes with marital relations of others or attempting the chastity of another's wife, besmearing another with mud or filth, polluting the pipes, tanks, or public streams to the public injury, cutting the latter off, seducing a girl after abducting her companion, accosting a woman or girl or doing anything immodest, procuring abortion, cornering the market, witchcraft, burglary, imposture, certain acts of snake charmers, breaking dykes, violating tombs, extortion including blackmail, stock theft, fraud, unlawful associations, *previ-catis*, receiving criminals, etc.

This list is not exhaustive, as has been decided by the old Cape Supreme Court in 6 S. C. 370. 28 So. Afr. L. J. 490.

CRIMINAL. Relating to crime; as criminal law, criminal evidence. Having the character of crime, as a criminal act. See CULPABLE.

CRIMINAL CASES. The term "criminal" when used in reference to judicial proceedings, is opposed to civil, and in its most comprehensive meaning, may be regarded as including all cases for the violation of the penal law. 7 B. Mon. (Ky.) 12.

The expression "criminal cases" usually means all such cases as are not civil. Hence, all prosecutions by indictment may be denominated criminal cases. 3 J. J. Mar. 142.

The most general classification of cases is into criminal and civil; and whatever case does not come within the one description, seems properly to belong to the other, unless indeed actions in the name of the informer upon penal statutes may be considered as an exception to this rule. It appears clear, therefore, that the expression "criminal cases" is used in contradistinction to civil cases. 2 Bibb (Ky.) 97.

CRIMINAL CHARGES. The words "criminal charges" signify an accusation, made in a legal manner, of illegal conduct, either of omission or commission by the person charged. 1 Bush (Ky.) 180.

CRIMINAL CONSPIRACY.

A "criminal conspiracy" is (1) a corrupt combination (2) of two or more persons, (3) by concerted action to commit (4) a criminal or an unlawful act, (a) or an act not in itself criminal or unlawful, by criminal or unlawful means; (b) or an act which would tend to prejudice the public in general, to subvert justice, disturb the peace, injure public trade, affect public health, or violate public policy; (5) or any act, however innocent, by means neither criminal nor unlawful, where the tendency of the object sought would be to wrongfully coerce or oppose either the public or an individual.

It is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end, that constitutes a criminal conspiracy. The unlawful thing must either be such as would be indictable if performed by one alone, or of a nature particularly adapted to injure the public or some individual by reason of the combination.

It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal; it is enough that they are wrongful, that is, amount to a civil wrong.

Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is an indictable offense, regardless of the means whereby it is to be accomplished. 106 Ky. 864, 51 S. W. 627. See CONSPIRACY.

CRIMINAL CONTEMPT. "Crimi-

nal contempt" consists of conduct on the part of one which amounts to an obstruction of justice and which tends to bring the court into disrepute. 141 Ky. 461, 133 S. W. 206. See CIVIL CONTEMPT.

CRIMINAL CONVERSATION. See CRIM. CON.

CRIMINAL COURTS OF ENGLAND. See COURTS OF ENGLAND.

CRIMINAL INFORMATION. A criminal suit brought, without interposition of a grand jury, by the proper officer of the king or state. Cole, Cr. Inf.; 4 Bla. Com. 398. See INFORMATION.

CRIMINAL INTENT. The intent to commit a crime; malice, as evidenced by a criminal act. Black, Dict.

The state of mind, which when accompanying a forbidden act, is frequently an element material to make the act a crime. This state of mind is often spoken of as malice. In no case, however, is it malice in the sense of mere hostile feeling or enmity. It is also to be distinguished from design or plan, which is a purpose or aim, considered with reference to its future fulfilment. In a broad sense, intent may also be that of ultimate purpose or object, but it is regarded simply as a state of mind co-existing with the act, and is of a conglomerate nature peculiar to itself. The idea of criminal intent usually partakes of deliberateness, knowledge, object, and the like; its absence is often indicated by ideas of mistake, good faith, reasonable belief, and the like. Wigd. Evi., 498. See also INTENTION.

CRIMINAL LAW. That branch of jurisprudence which treats of crimes and offences.

From the very nature of the social compact on which all municipal law is founded, and in consequence of which every man, when he enters into society, gives up part of his natural liberty, result those laws which, in certain cases, authorize the infliction of penalties, the privation of liberty, and even the destruction of life, with a view to the future prevention of crime and to insuring the safety and well-being of the public. *Salus populi suprema lex.*

The extreme importance of a knowledge of the criminal law is evident. For a mistake in point of law, which every person of discretion not only may know but is bound and presumed to know, is in criminal cases no defence. *Ignorantia eorum quæ quis scire tenetur non excusat.* This law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it; per Tindal, C. J., in 10 Cl. & F. 210. See 11 Blatchf. 200; 59 Ala. 57; 65 Me. 30; 39 N. J. L. 402. And this is true though the statute making an act illegal is of so recent promulgation as to make it impossible to know of its existence; 8 Ala. 119; 8 Ga. 880; 1 Gall. C. C. 62. This doctrine has been carried so far as to include the case of a foreigner charged with a crime which was no offence in his own country; 1 E. & B. 1; Dears. 51; 7 C. & P. 456; Russ. & R. 4. See 50 Ind. 341. And, further, the criminal law, whether common or statute, is imperative with reference to the conduct of individuals; so that, if a statute forbids or commands a thing to be done, all acts or omissions contrary to the prohibition or command of the statute are offences at common law, and ordinarily indictable as such; Hawk. Pl. Cr. bk. 2, c. 25, § 4; 8 Q. B. 883. See 15 M. & W. 404. An offence which may be the subject of criminal procedure is an act committed or omitted in violation of a public law either forbidding or commanding it; 144 U. S. 677.

In seeking for the sources of our law upon this subject, when a statute punishes a crime by its legal designation, without enumerating the acts which constitute it, then it is necessary to resort to the common law for a definition of the crime with its distinctions and qualifications. So if an act is made criminal, but no mode of prosecution is directed or no punishment provided, the common law furnishes its aid,

prescribing the mode of prosecution by indictment, and as a mode of punishment, fine, and imprisonment. This is generally designated the common law of England; but it might now be properly called the common law of this country. It was adopted by general consent when our ancestors first settled here. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law and have not been altered and modified by legislative enactments or judicial decisions, they have the same force and effect as laws formally enacted; 5 Cush. 303, 304; 4 Metc. Mass. 358; 13 *id.* 69, 70. "The common law of crimes," says an able writer, "is at present that *jus vagum et incognitum* against which jurists and vindicators of freedom have strenuously protested. It is to be observed that the definitions of crimes, the nature of punishments, and the forms of criminal procedure originated, for the most part, in the principles of the most ancient common law, but that most of the unwritten rules touching crimes have been modified by statutes which assume the common-law terms and definitions as if their import were familiar to the community. The common law of crimes has, partly from humane and partly from corrupt motives, been pre-eminently the sport of judicial constructions. In theory, indeed, it was made for the state of things that prevailed in this island and the kind of people that inhabited it in the reign of Richard I.; in reality, it is the patchwork of every judge in every reign, from Cœur de Lion to Victoria." Ruins of Time Exemplified in Hale's Pleas of the Crown, by Amos, Pref. x.

Some of the leading principles of the English and American system of criminal law are—*First*. Every man is presumed to be innocent until the contrary is shown; and if there is any reasonable doubt of his guilt, he is entitled to the benefit of the doubt. See 123 U. S. 623. *Second*. In general, no person can be brought to trial until a grand jury on examination of the charge has found reason to hold him for trial. 121 U. S. 1. *Third*. The prisoner is entitled to trial by a jury of his peers, who are chosen from the body of the people with a view to impartiality, and whose decision on questions of fact is final. *Fourth*. The question of his guilt is to be determined without reference to his general character. By the systems of continental Europe, on the contrary, the tribunal not only examines the evidence relating to the offence, but looks at the probabilities arising from the prisoner's previous history and habits of life. *Fifth*. The prisoner cannot be required to criminate himself. (The general rule, however, now seems to be in jurisdictions where there is no statutory prohibition, that an accused person testifying in his own behalf may be cross-examined like any other witness; 131 N. Y. 651; 50 *id.* 240; 73 Mich. 10; 105 Ind. 469; 122 *id.* 527; 36 Kan. 90; 11 Nev. 17; 105 Ill. 413. See for a full discussion of this question, Rice, Ev. § 223 and note; 142 U. S. 547.) *Sixth*. He cannot be twice put in jeopardy for the same offence. See 142 U. S. 148; 131 *id.* 176. *Seventh*. He cannot be punished for an act which was not an offence by the law existing at the time of its commission; nor can a severer punishment be inflicted than was declared by law at that time.

CRIMINAL LAW AMENDMENT ACT. This act was passed in 1871, 34 & 35 Vict. c. 32, to prevent and punish any violence, threats, or molestation, on the part either of master or workmen, in the various relations arising between them. 4 Steph. Com. 241.

CRIMINAL LAW CONSOLIDATION ACTS. The stats. 24 & 25 Vict. cc. 94-100, passed in 1861, for the consolidation of the criminal law of England and Ireland. 4 Steph. Com. 227. These important statutes amount to a codification of the modern criminal law of England. See Bruce's Archb. Pl. & Ev. in Cr. Ca. 1875.

CRIMINAL LETTERS. In Scotch Law. A summons issued by the lord ad-

vocate or his deputies as the means of commencing a criminal process. It differs from an indictment, and is like a criminal information at common law.

CRIMINAL LIBEL. A "criminal libel" is committed by any writing calculated to create disturbance of the peace, corrupt public morals, or lead to any act which, when done, is indictable. 115 Ky. 84, 72 S. W. 754.

CRIMINAL PROCEDURE. The method pointed out by law for the apprehension, trial, or prosecution, and fixing the punishment of those persons who have broken or violated, or are supposed to have broken or violated, the laws prescribed for the regulation of the conduct of the people of the community, and who have thereby laid themselves liable to fine or imprisonment, or both. A. & E. Encyc. Law. See PROCEDURE.

CRIMINAL PROCESS. Process which issues to compel a person to answer for a crime or misdemeanor. 1 Stew. 26.

CRIMINAL PROSECUTIONS. Any prosecution carried on in the name of the commonwealth, for any offense of crime against society. The word criminal is used as opposed to civil suits or actions. The one includes all suits of the government, the end and design of which is the punishment of the accused; the other embraces all actions for individual redress. 3 A. K. Marsh (Ky.) 74.

CRIMINALITER. Criminally; on criminal process.

CRIMINALITY. See EVIDENCE OF CRIMINALITY.

Evidence of. The Treaty of August 9, 1842, with Great Britain, providing that extradition shall only be had on such evidence of criminality as, according to the laws of the place where the person charged is found, would justify his arrest and commitment for trial if the offence had been committed there. The phrase "such evidence of criminality" as used in the treaty refers to the scope of the evidence or its sufficiency to block out those elements essential to a conviction. It does not refer to the character of specific instruments of evidence or to the rules governing admissibility. Thus, unsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination. 215 U. S. 398; 180 U. S. 371. And whether there is a variance between the evidence and the complaint is to be decided by the general law and not by that of the State.

CRIMINATE. To exhibit evidence of the commission of a criminal offence.

It is a rule that a witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge; 4 St. Tr. 6; 6 *id.* 649; 10 How. St. Tr. 1090; 1 Cra. 144; 2 Yerg. 110; 5 Day 260; 8 Wend. 598; 12 S. & R. 284; 18 Me. 272; 13 Ark. 307. Such a statement cannot be used to show guilt and a confession must be free and voluntary; 107 Mass. 180. If a defendant offers himself as a witness to disprove a criminal charge, he cannot excuse himself from answering on the ground that by so doing he may criminate himself; 122 Ill. 235. See CRIMINAL LAW.

An accomplice admitted to give evidence against his associates in guilt is bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution; 10 Pick. 477; 2 Stark. Ev. 12, note; but he is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; 9 Cow. 721, note (a); 2 C. & P. 411.

CRIMINOLOGY. The scientific study and doctrine of crime and criminals. Stand. Dict.

CRIMP. One who decoys and plunders sailors under cover of harboring them. Wharton.

CRITICISM. The art of judging skillfully of the merits or beauties, defects or faults, of a literary or scientific composition, or of a production of art. When the criticism is reduced to writing, the writing itself is called a criticism.

Liberty of criticism must be allowed, or there would be neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, is not a libel which has for its object not to injure the reputation of an individual, but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste for literature, or to censure that which is hostile to morality; 1 Campb. 351. As every man who publishes a book commits himself to the judgment of the public, any one may comment on his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. The critic does a good service to the public who writes down any such rapid or useless publication as should never have appeared; and, although the author may suffer a loss from it, the law does not consider such loss an injury; because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled; 1 Campb. 358, n. See 1 Esp. 28; Stark. Lib. and Sl. 228-234; 4 Bingham. n. s. 92; 8 Scott 340; 1 Mood. & M. 74, 187; Cooke, Def. 52; 20 Q. B. D. 275. See LIBEL; SLANDER.

CROFT. A little close adjoining a dwelling-house, and enclosed for pasture and tillage or any particular use. Jacob, Law Dict. A small place fenced off in which to keep farm-cattle. Spelman, Gloss. The word is now entirely obsolete.

CROP. See EMBLEMENTS; AWAY-GOING CROP.

CROPPER. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. 3 Rawle 12; 71 N. C. 7.

CROSS. A mark made by persons who are unable to write, instead of their names.

When properly attested, and proved to have been made by the party whose name is written with the mark, it is generally admitted as evidence of the person's signature.

The word intersect ordinarily means the same as to cross; literally to cut into or between. 45 Conn. 344.

CROSS-ACTION. An action by a defendant in an action, against the plaintiff in the same action, upon the same contract, or for the same tort. Thus, if Peter bring an action of trespass against Paul, and Paul bring another action of trespass against Peter, the subject of the dispute being an assault and battery, it is evident that Paul could not set off the assault committed upon him by Peter, in the action which Peter had brought against him; therefore a cross-action becomes necessary. 10 Ad. & E. 643.

CROSS-APPEAL. Where both parties to a judgment appeal therefrom, the appeal of each is called a cross-appeal as regards that of the other. 3 Steph. Com. 581.

CROSS-BILL. In Equity Practice. One which is brought by a defendant in a suit against a plaintiff in or against other defendants in the same suit, or against both, touching the matters in question in the original bill. Story, Eq. Pl. § 389; Mitf. Eq. Pl. 80. It is brought either to obtain a discovery of facts, in aid of the defence to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill; 17 How. 595.

It is considered as a defence to the original bill, and is treated as a dependency upon the original suit; 1 Eden, Inq. 190; 3 Atk. 312; 18 E. L. & Eq. 325; 14 Ark. 346; 14 Ga. 674; 14 Vt. 208; 15 Ala. 501; 35 N. H. 251. It is usually brought either to obtain a necessary discovery, as, for example, where the plaintiff's answer under oath is desired; 3 Swanst. 474; 3 Y. & C. 594; 2 Cox, Ch. 109;

or to obtain full relief for all parties, since the defendant in a bill could originally only pray for a dismissal from court, which would not prevent subsequent suits; 1 Ves. 284; 2 Sch. & L. 9, 11, n., 144, n. (z); 2 Stockt. 107; 14 Ill. 229; 20 Ga. 472; or where the defendants have conflicting interests; 9 Cow. 747; 1 Sandf. 108; 2 Wis. 299; but may not introduce new parties; 17 How. 130; unless affirmative relief is demanded and justice so requires; 37 W. Va. 376. It is also used for the same purpose as a plea *puis darrein continuance* at law; 2 Ball & B. 140; 2 Atk. 177, 553; 1 Stor. 218.

It should state the original bill, and the proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of a cross-litigation, on the grounds on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill; Mitf. Eq. Pl. 81; and it should not introduce new and distinct matters; 8 Cow. 361.

It should be brought before publication; 1 Johns. Ch. 62; 13 Ga. 478; and not after,—to avoid perjury; 7 Johns. Ch. 250; Nelson 103.

In England it need not be brought before the same court; Mitf. Eq. Pl. 81 *et seq.* For the rule in the United States, see 11 Wheat 446; Story, Eq. Pl. § 401; Dan. Ch. Pl. & Pr. 1549.

It is error to dismiss a cross-bill on demurrer in vacation without affording an opportunity to amend; 94 Ala. 236.

CROSS-COMPLAINT. This is allowed when a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action. The only real difference between a complaint and a cross-complaint, is, that the first is filed by the plaintiff and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. The difference between a counter-claim and a cross-complaint is that in the former the defendant's cause of action is against the plaintiff; and the latter, against a co-defendant, or one not a party to the action; 32 Ark. 290.

In California Practice. A complaint which a defendant is allowed to file with his answer if there be any relief he desires the court to afford him in and about the subject-matter of the plaintiff's suit. English.

CROSS-DEMAND. A demand is so called which is preferred by B, in opposition to one already preferred against him by A.

CROSS-ERRORS. Errors assigned by the respondent in a writ of error.

CROSS-EXAMINATION. In Practice. The examination of a witness by the party opposed to the party who called him, and who examined, or was entitled to examine, him in chief. See 4 Alb. L. J. 100.

In England and some of the states of the United States, when a competent witness is called and sworn, the other party is ordinarily entitled to cross-examine him as to matters not covered by the direct examination; 1 Esp. 357; 17 Pick. 490; 2 Wend. 166, 483; 23 Ga. 154; 32 Miss. 405; see 3 C. & P. 16; 2 M. & R. 273; 23 Ga. 154; but see 122 Mass. 578; but it is held in other states and in the federal courts that the cross-examination is confined to facts and circumstances connected with matters stated in the direct examination; 3 Wash. C. C. 580; 14 Pet. 448; 16 S. & R. 77; 6 W. & S. 75; 2 Dutch. 493; 5 Cal. 450; 4 Iowa 477; 4 Mich. 67; 95 id. 360; 145 Ill. 538; 127 id. 652; 96 Cal. 113; 23 Neb. 706; 92 Pa. 112; 96 id. 436. But see 12 La. Ann. 826; 2 Pat. & H. 616. In Pennsylvania, a party who is a witness on his own behalf may be fully cross-examined on any relevant matter.

Inquiry may be made in regard to collateral facts in the discretion of the judge; 7 C. & P. 880; 5 Wend. 805; 97 Ala. 681; but not merely for the purpose of contradicting the witness by other evidence; 1 Stark. Ev. 104; 7 East 108; 2 Lew. C. C. 154, 156; 7 C. & P. 789; 16 Pick. 157; 8 Me.

42; 2 Gall. 51. And see 1 Exch. 91; 7 Cl. & F. 122; 4 Denio 502; 2 Ired. 346; 14 Pet. 461; 67 Hun 648. Considerable latitude should be allowed in cross-examining witnesses as to value, in order that the ground of their opinion may appear; 143 Mass. 326.

As to whether a witness not cross-examined after the close of his examination in chief may be recalled and cross-examined see 1 Greenl. Ev. § 447; 1 Stark. Ev. 164; 16 S. & R. 77; 17 Pick. 498; 104 Pa. 117.

A written paper identified by the witness as having been written by him may be introduced in the course of a cross-examination as a part of the evidence of the party producing it, if necessary for the purposes of the cross-examination; 16 Jur. 103; 8 C. & P. 369; 2 Brod. & B. 289.

A cross-examination as to matters not otherwise admissible in evidence entitles the party producing the witness to re-examine him as to those matters; 3 Ad. & E. 554; 17 Tex. 417. If the defendant be permitted on cross-examination to lead out new matter, constituting his own case, which he had not opened to the jury, to the injury of the plaintiff, it is ground for reversal; 114 Pa. 35; 104 id. 207.

Leading questions may be put in cross-examination; 1 Stark. Ev. 96; 1 Phill. Ev. 210; Tayl. Ev. 1233; 6 W. & S. 75. For some suggestions as to the propriety of cross-examination in various cases and the most expedient manner of conducting it, see 2 Pothier, Obl. Evans ed. 293; 1 Stark. Ev. 160, 161; Archb. Cr. Pl. 111.

The trial court has not such a discretion with regard to the extent and scope of the cross-examination of the defendant in a criminal cause as it is permitted to exercise in the examination of other witnesses; 96 Cal. 171. See 40 La. Ann. 589.

CROSS-PETITION. A "cross-petition" is the commencement of an action by a defendant against a co-defendant, or a person who is not a party to the action, or against both; or by a plaintiff against a co-plaintiff, or a person who is not a party to the action, or against both, etc. So, a defendant may have a cross-action against a co-defendant alone, or a third person may be joined with the co-defendant, or against the third person alone, but he cannot have a cross-action against the plaintiff alone or jointly with a third person. 88 Ky. 22, 9 S. W. 840.

CROSS-REMAINDER. Where a particular estate is conveyed to several persons in common, or various parcels of the same land are conveyed to several persons in severalty, and upon the termination of the interest of either of them his share is to remain over to the rest, the remainders so limited over are said to be cross-remainders. In deeds, such remainders cannot arise without express limitation. In wills, they frequently arise by implication; 1 Prest. Est. 94; 2 Hilliard, R. P. 44; 4 Kent 201; Chal. R. P. 241.

CROSS-RULES. Rules entered where each of the opposite litigants obtained a rule *nisi*, as the plaintiff to increase the damages, and the defendant to enter a nonsuit. Wharton.

Under the former English practice, these were rules where each of the opposite litigants obtained a rule *nisi*, as the plaintiff to increase the damages, and the defendant to enter a nonsuit. R. & L. Dict.; Wharton.

CROSSED-CHECK. See CHECK.

CROSSING. The intersection at grade of a public highway by another or by a railroad, or of one railroad by another.

It is generally the duty of a railroad company to construct, maintain, and repair the crossing where it intersects a public highway at grade; 42 La. 234. It is bound to keep the approaches in a safe condition; 52 Mich. 108. And it must so construct, repair, and improve the crossing as to meet the increasing wants of the people; 133 Mass. 185; 32 Conn. 241. The obligation to maintain the crossing begins when the railroad is located over it; 101 Pa. 192; 60 Wis. 264; and it is a continuing duty; 56 Pa. 280; 75 Ill. 524; 51 Me. 313. Paving crossed a

highway the railroad company must restore it to such a condition that its usefulness will not be unnecessarily impaired; 89 N. Y. 266; and it is liable for a failure to construct and maintain suitable crossings at all points where it intersects a public highway at grade; 42 La. 234; A. & E. Encyo. See, generally, 14 R. I. 108; GRADE-CROSSINGS. See PUBLIC CROSSING.

CROWN. In England. A word often used for the sovereign.

CROWN CASES RESERVED. See COURT FOR CONSIDERATION OF CROWN CASES RESERVED.

CROWN DEBTS. Debts due to the crown, which are put, by various statutes, upon a different footing from those due to a subject.

CROWN LANDS. The demesne lands of the crown. See 29 & 30 Vict. c. 62; 2 Steph. Com. 534-536.

CROWN LAW. In England. Criminal law, the crown being the prosecutor.

CROWN OFFICE. The criminal side of the court of king's bench. The king's attorney in this court is called master of the crown office. 4 Bla. Com. 308.

CROWN OFFICE IN CHANCERY. One of the offices of the High Court of Chancery now transferred to the High Court of Justice, the principal official being the Clerk of the Crown in Chancery. Byrne's L. Dict. See JUDICATURE ACTS; COURT OF CHANCERY; CLERK OF THE CROWN IN CHANCERY.

CROWN SIDE. The criminal side of the court of king's bench. Distinguished from the pleas side, which transacts the civil business. 4 Bla. Com. 265; 4 Steph. Com. 308, 385.

CROWN SOLICITOR. In England. The solicitor to the treasury.

CRUDE. In its natural state; not cooked or prepared by fire or heat; undressed; not altered, refined or prepared for use by any artificial process; raw. 102 U. S. 198.

CRUEL AND UNUSUAL PUNISHMENT. See PUNISHMENT.

CRUELTY. As between husband and wife. Those acts which affect the life, the health, or even the comfort, of the party aggrieved, and give a reasonable apprehension of bodily hurt, are called cruelty. What merely wounds the feelings is seldom admitted to be cruelty, unless the act be accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional outbreaks of passion, will not amount to legal cruelty; 17 Conn. 189; *a fortiori*, the denial of such indulgences and particular accommodations, as are ordinarily considered necessities, is not cruelty. The negative descriptions of cruelty are perhaps best adapted, under the infinite variety of cases that may occur, to illustrate what is not cruelty; 1 Hagg. Cons. 35; 4 Ecol. 238, 311, 312; 1 Hagg. Ecol. 733, 768, n.; 1 Add. Ecol. 229; 11 Jur. 490; 1 Hagg. Cons. 37, 458; 2 id. 154; 1 Phill. Ecol. 111, 132; 1 M'Cord 205; 2 J. J. Marsh. 324; 8 N. H. 307; 3 Mass. 821; 97 id. 378; 104 id. 197; 36 Ga. 286; 4 Wis. 135; 4 La. Ann. 187; 14 Tex. 356; 24 N. J. Eq. 195; 3 Dana 28; 37 Pa. 225; 48 id. 238; 66 id. 498; 57 Ind. 568; 18 Kan. 871, 419; 73 N. Y. 369; 30 N. J. Eq. 119, 215; 10 Phila. 58; 30 Gratt. 307; 88 Ill. 248; 138 id. 436; 146 id. 328; 40 Mich. 493; 1 Colo. App. 281; 109 N. C. 139; 23 Or. 226.

As instances of physical cruelty may be noted: an attempt to kill; 14 Cal. 512; 32 La. Ann. 644; an attempt to poison; 34 Ark. 37; 76 Iowa 443; 66 Pa. 494; choking; 114 Ind. 538; 79 Mich. 124; 57 Miss. 330; kicking; 19 Ala. 307; 116 Ill. 509; 88 Iowa 210; 83 Va. 806; whipping; 31 Ga. 625; 65 Md. 104; spitting in the face; 1 N. J.

Eq. 474; Wright 557; communicating venereal disease; 94 Cal. 235; 16 R. I. 92; inexcusable neglect during sickness; 78 Iowa 691; 116 Ill. 509; 114 Ind. 558.

As instances of cruelty producing mental suffering; a false charge of adultery; 69 Ala. 84; 110 N. Y. 183; 180 Pa. 6; the commission of certain crimes, such as rape; 95 Cal. 430; keeping a mistress; [1891] Prob. 189; religious opinions, in certain cases; 74 Tex. 414; may be mentioned. See DIVORCE; LEGAL CRUELTY.

Cruelty towards weak and helpless persons takes place where a party bound to provide for and protect them either abuses them by whipping them unnecessarily, or by neglecting to provide for them those necessities which their helpless condition requires. Exposing a person of tender years, under one's care, to the inclemency of the weather; 2 Campb. 650; keeping such a child, unable to provide for himself, without adequate food; 1 Leach 187; Russ. & R. 20; or an overseer neglecting to provide food and medical care to a pauper having urgent and immediate occasion for them; Russ. & R. 46, 47, 48; are examples of this species of cruelty.

The improper treatment and employment of children has of late years attracted much attention, and in many of the principal cities, beginning with New York, in April, 1875, societies for the prevention of cruelty to children have been formed, authorized to prosecute persons who maltreat children, or force them to pursue improper and dangerous employments; N. Y. Act of April 21, 1875; Delafield on Children, 1876. Stat. 42 & 43 Vict. c. 34 regulates certain employments for children. By the act of Congress of February 13, 1885, the association for the prevention of cruelty to animals for the District of Columbia, was authorized to extend its operation, under the name of the Washington Humane Society, to the protection of children as well as animals from cruelty and abuse, and the agents of the society have power to prefer complaints for the violation of any law relating to or affecting the protection of children. They may also bring before the court any child who is subjected to cruel treatment, abuse or neglect, or any child under sixteen years of age found in a house of ill-fame, and the court may commit such child to an orphan asylum or other public charitable institution, and any person wilfully or cruelly maltreating, or wrongfully employing such child, is liable to punishment. 23 Stat. L. 302.

Cruelty to animals is an indictable offence. A defendant was convicted of a misdemeanor for tying the tongue of a calf so near the root as to prevent its sucking, in order to sell the cow at a greater price, by giving to her under the appearance of being full of milk while affording the calf all it needed; 6 Rog. Rec. N. Y. 62. A man may be indicted for cruelly beating his horse; 3 Rog. Rec. N. Y. 191; 4 Cra. 483; 3 Campb. 143; 9 L. T. R. n. s. 175; 7 Allen 579; 1 Aik. 226; 3 B. & S. 382; 44 N. H. 392; 4 Tex. App. 12, 284, 486; 4 Mo. App. 215; 52 id. 520; 85 Ill. 457; 150 Mass. 509. See 101 Mass. 34; 2 Curt. C. C. 194; 112 N. C. 887; 22 S. W. Rep. (Tex.) 39.

The treatment of animals has been the subject of much recent legislation, and, beginning with New York, societies have been organized in the United States and Europe for their protection, similar in their scope and power to those above referred to for children.

Under 12 and 13 Vict. c. 92, § 2, dishorning cattle is not an offence where the operation is skilfully performed; 16 Cox, Cr. Cas. 101. This practice is allowed in Pennsylvania; Act Pa. 1895, June 25, P. L. 286. In Massachusetts it was held that a fox is an animal in the sense of the statute, and a person letting loose a captive fox to be subjected to unnecessary suffering (for the purpose of being hunted by dogs) was liable to punishment; 145 Mass. 296. A common carrier by land or water from one state to another is liable to punishment for confining cattle, sheep, swine or other animals for a longer period than twenty-eight

hours, without unloading them for rest, water and feeding, for at least five consecutive hours; U. S. Rev. Stat. §§ 4386-89.

See LEGAL CRUELTY.

CRUISE. A voyage or expedition in quest of vessels or fleets of the enemy which may be expected to sail in any particular track at a certain season of the year. The region in which these cruises are performed is usually termed the rendezvous, or cruising-latitude.

When the ships employed for this purpose, which are accordingly called *cruisers*, have arrived at the destined station, they traverse the sea backwards and forwards, under an easy sail, and within a limited space, conjectured to be in the track of their expected adversaries. Wesk. Ins.; Lex Merc. Red. 271, 284; Dougl. 509; Marsh. Ins. 190, 199, 530; 2 Gall. 268, 526.

CRY DE PAYS, CRY DE PAIS. A hue and cry raised by the country. This was allowable in the absence of the constable when a felony had been committed.

CRYER. See CRIER.

CUCKING-STOOL. An engine or machine for the punishment of scolds and unquiet women.

Called also a trebuchet, turnmill, and castigatory. Bakers and brewers were formerly also liable to the same punishment. Being fastened in the machine, they were immersed over head and ears in some pool; Blount; Co. 3d Inst. 219; 4 Bla. Com. 168.

CUCKOLD. A "cuckold" is a man whose wife is unfaithful. The word alludes to the habit of a female cuckold which lays her eggs in the nests of other birds to be hatched by them. To say that one is a "cuckold" is slanderous *per se*. 159 Ky. 73, 166 S. W. 770.

CUI ANTE DIVORTIUM (L. Lat. The full phrase was, *Cui ipsa ante divortium contradicere non potuit*, whom she before the divorce could not gainsay). In Practice. A writ which anciently lay in favor of a woman who had been divorced from her husband, to recover lands and tenements which she had in fee-simple, fee-tail, or for life, from him to whom her husband had aliened them during marriage, when she could not gainsay it; Fitzh. N. B. 240; 3 Bla. Com. 188, n.; Stearns, Real Act. 143; Booth, Real Act. 188. Abolished in 1833 by stat. 3 & 4 Will. IV. c. 27.

CUI IN VITA (L. Lat. The full phrase was, *Cui in vita sua, ipsa contradicere non potuit*, whom in his lifetime she could not gainsay). In Practice. A writ of entry which lay for a widow against a person to whom her husband had in his lifetime aliened her lands. Fitzh. N. B. 193. The object of the writ was to avoid a judgment obtained against the husband by confession or default. It is now of no use in England by force of the provisions of the statute 32 Hen. VIII. c. 28, § 6. See 6 Co. 8, 9; Booth, Real Act. 186. As to its use in Pennsylvania, see 3 Binn. Appx.; Rep. Comm. on Penn. Civ. Code, 1835, 90, 91. Abolished in England by 3 & 4 Will. IV. c. 27.

CUL DE SAC (Fr. bottom of a bag). A street which is open at one end only.

It seems not to be settled whether a *cul de sac* is to be considered a highway; but the authorities are generally to the contrary. See 11 East 376, note; 5 Taunt. 137; 5 B. & Ald. 456; Hawk. Pl. Cr. b. 1, c. 76, s. 1; Dig. 50. 16. 43; 43. 12. 1. § 13; 47. 10. 15. § 7.

In order to become a public highway by dedication, a way must be a thoroughfare, which a *cul de sac* could not be; Washb. Easements 182, 213.

CULPA. A fault; negligence. Jones, Bailm. 8.

Culpa is to be distinguished from *dolus*, the latter being a trick for the purpose of deception, the former merely a negligence. There are three degrees of *culpa*: *lata culpa*, gross fault or neglect; *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect; and the definitions of these degrees are precisely the same as those in our law. Story, Bailm. § 18; 8 Allen 121; 49 N. H. 387. See NEGLIGENCE.

CULPABLE. This means not only criminal but censurable; and when the term is applied to the omission by a person to preserve the means of enforcing his own rights, censurable is more nearly equivalent. As he has merely lost a right of action which he might voluntarily relinquish, and has wronged nobody but himself, culpable neglect would seem to convey the idea of neglect for which he was to blame and is ascribed to his own carelessness, improvidence or folly. 8 Allen, 122.

CULPRIT. A person who is guilty, or supposed to be guilty, of a crime.

When a prisoner is arraigned, and he pleads not guilty, in English practice, the clerk, who arraigns him on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove the accusation. This is done by writing two monosyllabic abbreviations, *cul. prit.* 4 Bla. Com. 389; 1 Chit. Cr. Law 416. See Christian's note to Bla. Com. cited; 3 Sharw. Bla. Com. 340, n. 9. The technical meaning has disappeared, and the compound is used in the popular sense as above given.

CULTIVATED. A field may be cultivated ground, though lying fallow. 13 Ired. L. 36. See 4 Cow. 190.

CULVERTAGE. A base kind of slavery. The confiscation or forfeiture which takes place when a lord seizes his tenant's estate. Blount; Du Cange.

CUM ONERE (Lat.). With the burden; subject to the incumbrance; subject to the charge. A purchaser with knowledge of an incumbrance takes the property *cum onere*. Co. Litt. 231 a; 7 East 164; Paley, Ag. 175.

CUM TESTAMENTO ANNE XO (Lat.). With the will annexed. The term is applied to administration when there is no executor named in a will, or if he is named is incapable of acting, or where the executor named refuses to act.

CUMULATIVE EVIDENCE. That which goes to prove what has already been established by other evidence. 20 Conn. 305; 28 Me. 379; 24 Pick. 246; 43 Barb. 203; 43 Iowa 175.

Newly discovered evidence, if cumulative merely, is not sufficient ground for a new trial; 33 Neb. 731; 87 Ga. 244; 85 W. Va. 418; 3 Wyo. 680; 69 Miss. 152; 43 Ill. App. 301.

CUMULATIVE LEGACY. See LEGACY.

CUMULATIVE SENTENCES.

Sentences separately imposed to be discharged one after the other. English. Where, upon the trial of an indictment containing several counts charging distinct misdemeanors, identical in character, a general verdict of guilty is rendered, or a verdict of guilty upon two or more specified counts, the court has no power to impose a sentence or cumulative sentences exceeding in the aggregate what is prescribed as the maximum punishment for an offense of the character charged. Anderson; 60 N. Y. 560.

See ACCUMULATIVE SENTENCES.

CUMULATIVE REMEDY. A remedy created by statute in addition to one which still remains in force.

CUMULATIVE VOTING. The cumulative system of voting is that by which, when two or more persons are to be elected to the same office, a voter is allowed one vote for each vacancy to be filled, and is permitted to distribute such votes as he pleases among the candidates, or to cast them all for one candidate. 8 A. & E. Ency. 2nd ed. 494.

CUNEATOR. A coiner. Du Cange. *Cuneare*, to coin. *Cuneus*, the die with which to coin. *Cuneata*, coined. Du Cange; Spelman, Gloss.

CURATE. One who represents the incumbent of a church, parson or vicar, and takes care of the church and performs divine services in his stead. An officiating temporary minister in the English church who represents the proper incumbent. Burn, Ecol. Law; 1 Bla. Com. 393. See CURE OF SOULS.

CURATIO (Lat.). In Civil Law. The power or duty of managing the property of him who, either on account of infancy or some defect of mind or body, cannot manage his own affairs. The duty of a curator or guardian. Calvinus, Lex.

CURATOR. In Civil Law. One legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other cause, is unable to attend to them himself; a guardian.

There are curators *ad bona* (of property), who administer the estate of a minor, take care of his person, and intervene in all of his contracts; curators *ad litem* (of suits), who assist the minor in courts of justice, and act as curators *ad bona* in cases where the interests of the curator are opposed to the interests of the minor. There are also curators of insane persons, and of vacant successions and absent heirs.

In Missouri the term has been adopted from the civil law and it is applied to the guardian of the ward's estate, as distinct from the guardian of his person; 49 Mo. 117.

Under the Roman law, the guardian of a minor, both as to person or property was called a tutor (*q. v.*); and if, after being of an age to exercise his rights, he needed a person to look after his rights, such person was called a curator. Sandars, Inst. Just. Introd. xi. A person who had attained the age of puberty was not required to have a curator, but if he had married, the property was almost certain to have one, as it was part of his tutor's duty to urge him to do so; *id.* 74; Dig. xxi. 7. 5. 5.

Interim Curator. In England. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the crown of an administrator for the same purpose; Stat. 83 & 84 Vict. c. 23; 4 Steph. Com. 462; Mozl. & W. Dict. See *INTERIM CURATOR*.

CURATOR BONIS (Lat.). In Civil Law. A guardian to take care of the property. Calvinus, Lex.

In Scotch Law. A guardian for minors, lunatics, etc. Halkers, Tech. Terms; Bell, Dict.

CURATOR AD HOC. A guardian for this special purpose.

A *curator ad hoc* can be appointed to proceed against the tutor for an accounting or his removal only when there is no under-tutor; 45 La. Ann. 1062.

CURATOR AD LITEM (Lat.). Guardian for the suit. In English law, the corresponding phrase is guardian *ad litem*.

CURATORSHIP. The office of a curator.

Curatorship differs from tutorship (*q. v.*) in this, that the latter is instituted for the protection of property in the first place, and secondly, of the person; while the former is intended to protect, first, the person, and secondly, the property. 1 *Leçons Élém. du Droit Civ. Rom.* 241.

CURATRIX. A woman who has been appointed to the office of a curator.

CURE BY VERDICT. See *AIDER BY VERDICT*.

CURE OF SOULS. The ordinary duties of an officiating clergyman.

Curate more properly denotes the incumbent in general who hath the *cure of souls*; but more frequently it is understood to signify a clerk not instituted to the *cure of souls*, but exercising the spiritual office in a parish under the rector or vicar. 2 Burn, Eccl. Law 64; 1 H. Bl. 424.

CURFEW (French, *couvre*, to cover, and *feu*, fire). This is generally supposed to be an institution of William the Conqueror, who required, by ringing of the bell at eight o'clock in the evening, that all lights and fires in dwellings should then be extinguished. But the custom is evidently older than the Norman; for we find an order of King Alfred that the inhabitants of Oxford should at the ringing of that bell cover up their fires and go to bed. And there is evidence that the same practice prevailed at this period in France, Normandy, Spain, and probably in most of the other countries of Europe. Henry, Hist. of Britain, vol. 3, 567. It was doubtless intended as a precaution against fires, which were very frequent and destructive when most houses were built of wood.

That it was not intended as a badge of infamy is evident from the fact that the law was of equal obligation upon the nobles of court and upon the native-born serfs. And yet we find the name of *curfew law* employed as a by-word denoting the most odi-

ous tyranny.

The curfew is spoken of by a recent writer in 1 Social England 373, as having been ordained by William I. in order to prevent nightly gatherings of the people of England.

It appears to have met with so much opposition that in 1103 we find Henry I. repealing the enactment of his father on the subject; and Blackstone says that, though it is mentioned a century afterwards, it is rather spoken of as a time of night than as a still subsisting custom. Shakespeare frequently refers to it in the same sense. This practice is still pursued, in many parts of England and of this country, as a very convenient mode of apprising people of the time of night.

CURIA. In Roman Law. One of the divisions of the Roman people. The Roman people were divided by Romulus into three tribes and thirty *curia*: the members of each *curia* were united by the tie of common religious rites, and also by certain common political and civil powers. Dion. Hal. l. 2, p. 32; Liv. l. 1, cap. 13; Plut. in *Romulo*, p. 30; Festus Brison, in *verb.*

In later times the word signified the senate or aristocratic body of the provincial cities of the empire. Brissot, in *verb.*; Ortolan, *Histoire*, no. 25, 408; Ort. Inst. no. 125.

The senate-house at Rome; the senate-house of a provincial city. Cod. 10. 81. 2; Spelman, Gloss.

In English Law. The king's court; the palace; the royal household. The residence of a noble; a manor or chief manse; the hall of a manor. Spelman, Gloss.

A court of justice, whether of general or special jurisdiction. Fleta, lib. 2, l. 72, § 1; Feud. lib. 1, 2, 22; Spelman; Cowel; 3 Bla. Com. c. iv. See *COURT*.

A court-yard or enclosed piece of ground; a close. Stat. Edw. Conf. l. 6; Bracton, 70, 222 b, 335 b, 356 b, 358; Spelman, Gloss. See *CURIA CLAUDENDA*.

The civil or secular power, as distinguished from the church. Spelman, Gloss.

CURIA ADVISARE VULT (Lat.). The court wishes to consider the matter.

In Practice. The entry formerly made upon the record to indicate the continuance of a cause until a final judgment should be rendered.

It is commonly abbreviated thus: *cur. adv. vult*, or *c. a. v.* Thus, from amongst many examples, in *Clement v. Chivis*, 2 B. & C. 172, after the report of the argument we find "*cur. adv. vult*," then, "on a subsequent day judgment was delivered," etc.

CURIA CLAUDENDA (Lat.). In Practice. A writ which anciently lay to compel a party to enclose his land. Fitzh. N. B. 297.

CURIA REGIS (Lat.). The king's court. See *AULA REGIA*.

CURIALITY. In Scotch Law. Curtesy.

CURRENCY. This term is commonly used for whatever passes among the people for money, whether gold or silver coin or bank notes. 22 Ill. 74; 9 Mo. 697; 1 Ohio 115, 119; 1 Hask. 385; 16 La. 323; 47 Wis. 560. See 9 Cent. L. J. 488. See *NATIONAL CURRENCY*.

CURRENT FISCAL YEAR. Refers to fiscal year of the city, beginning January 1st and ending December 31st. 109 Ky. 203, 58 S. W. 700.

CURRENT MONEY. That which is in general use as a medium of exchange.

It means the same thing as currency of the country. 5 Lea 96.

The adjective "current," when qualifying money, is not the synonym of "convertible." It is employed to describe money which passes from hand to hand, from person to person, and circulates through the community and is generally received. Money is current which is received in the common business transactions, and is the common medium in barter and trade; 41 Ala. 321.

Current money means that money which is commonly used and recognized as such; current bank notes, such as are convertible into specie at the counter where they were issued. 1 Dall. 124; 7 Ark. 283; see 20 La. Ann. 368; 14 Mich. 501; 1 Yeates 849; 23 Ill. 632, 888; 32 *id.* 75; 9 Ind. 185; 3 T. B. Monr. 166; 21 La. Ann. 624; 64 N. C. 861; 41 Ala. 321. Money received as such in common business transactions; the common medium in barter and exchange. Anderson; 41 Ala. 321. Where a bond was conditioned for the payment in 1782 of a certain sum "in lawful current money of Pennsylvania," it was ruled, that these words must be taken to mean the paper money emitted under the authority of Congress. 1 Dallas (U. S.) 125.

CURSITOR. A junior clerk in the court of chancery, whose business it formerly was to write out from the register those forms of writs which issued of course. 1 Poll. & M. Hist. Engl. Law 174.

Such writs were called *writs de cursu* (of course), whence the name, which had been acquired as early as the reign of Edward III. The body of cursitors constituted a corporation, each clerk having a certain number of counties assigned to him. Coke, 2d Inst. 670; 1 Spence, Eq. Jur. 288. The office was abolished by 5 & 6 Will. IV. c. 82.

CURSITOR BARON. An officer of the court of exchequer, who is appointed by patent under the great seal to be one of the barons of the exchequer. The office was abolished by stat. 19 & 20 Vict. c. 86. Wharton, Dict., 3d Lond. ed.

CURTESY. The estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate. Chal. R. P. 814.

An estate for life which a husband takes at the death of his wife, having had issue by her born alive during coverture, in all lands of which she was seised in fact of an inheritable estate during coverture.

The right of the husband to enjoy during his life land of which his wife is at any time during coverture seised in fee simple (absolute or defeasible) or in fee tail, provided there was issue born alive to the marriage. Demb. Land Tit. § 109.

It is a freehold estate for the term of his natural life. 1 Washb. R. P. 127. In the common law the word is used in the phrases *tenant by curtesy*, or *estate by curtesy*, but seldom alone; while in Scotland of itself it denotes the estate. The phrase "tenant by the law of England" was also used, and is said to have been of earlier origin; 2 Poll. & M. Hist. of Engl. Law 412.

Some question has been made as to the derivation both of the custom and its name. It is said that the term is derived from *curtis*, a court, and that the custom, in England at least, is of English origin, though a similar custom existed in Normandy, and still exists in Scotland. 1 Washb. R. P. 128, n.; Wright, Ten. 192; Co. Litt. 80 a; 2 Bla. Com. 126; Ersk. Inst. 880; Grand Cout. de Normandie, c. 119. But a recent work considers this derivation "more ingenious than satisfactory," and suggests that it is possible to explain the phrase by "some royal concession," as "being reasonable enough." 2 Poll. & M. Hist. Engl. Law 412.

In Pennsylvania, by act of April 8, 1833, issue of the marriage is no longer necessary, so that the husband gains a freehold by the marriage itself; 10 Pa. 399; but the law applies only when the estate is devisable, not to an estate tail or defeasible fee; 152 Pa. 303. Ohio, Illinois, Kentucky, and Maine reduce the husband's life estate to one-third, calling it "dower," and dispense with birth of issue alive, while dower remains unchanged. In South Carolina and Georgia, curtesy has gone out of use, the husband having under the law greater benefits. Demb. Land Tit. § 109. Louisiana, Texas, California, Nevada, Washington, and Idaho, and Arizona and New Mexico have the "community" system and

there is no curtesy; *id.* § 111. And in Indiana, Iowa, Minnesota, the Dakotas, Kansas, Colorado, Wyoming, and Mississippi, dower is applied by a forced lien of the widow and there is no curtesy; *id.* § 108. See DESCENT AND DISTRIBUTION. See DOWER-CURTESY.

CURTILAGE. The enclosed space immediately surrounding a dwelling-house, contained within the same enclosure.

It is defined by Blount as a yard, backside, or piece of ground near a dwelling-house, in which they sow beans, etc., yet distinct from the garden. Blount; Spelman. By others it is said to be a waste piece of ground so situated. Cowel. It has also been defined as "a fence or enclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the dwelling-house, the enclosure consisting either of a separate fence or partly of a fence and partly of the exterior of buildings so within this enclosure." 10 Cush. 480.

It usually includes the yard, garden, or field which is near to and used in connection with the dwelling. 83 Ala. 62. See 61 Ala. 58.

The term is used in determining whether the offence of breaking into a barn or warehouse is burglary. See 4 Bla. Com. 234; 1 Hale, Pl. Cr. 538; 2 Russell, Cr. 18; Russ. & R. 289; 1 C. & K. 84.

In Michigan the meaning of curtilage has been extended to include more than an enclosure near the house. 2 Mich. 250. See 81 N. J. L. 485; 17 N. Y. Sup. Ct. 151; 31 Me. 522; 140 Mass. 289.

CURTILLUM. The area or space within the enclosure of a dwelling-house. Spelman, Gloss.

CURTIS. The area about a building; a garden; a hut or farmer's house; a farmer's house with the land enrolled with it.

A village or a walled town containing a small number of houses.

The residence of a nobleman; a hall or palace.

A court; a tribunal of justice. 1 Washb. R. P. 120; Spelman, Gloss.; 3 Bla. Com. 320.

CUSTODES. Keepers; guardians; conservators.

Custodes pacis (guardians of the peace). 1 Bla. Com. 349.

Custodes libertatis Angliæ auctoritate parliamenti (guardians of the liberty of England by authority of parliament). The style in which writs and all judicial process ran during the grand rebellion, from the death of Charles I. till Cromwell was declared Protector. Jacob, Law Dict.

CUSTODIA LEGIS. In the custody of the law.

When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise; 7 Wis. 334.

Where a sheriff has taken under attachment more than enough property to satisfy it, the property is not in *custodia legis* in a sense that will prevent a levy by a U. S. marshal in a suit in the federal court, so as to give the latter creditor a lien on the excess after satisfying the first attachment; 57 Ark. 450. Nor are executions issued on void judgments and their returns admissible against subsequent attaching creditors, to show that the goods were in *custodia legis*; 51 Mo. App. 470.

For a collection of cases on property and funds in the custody of the courts not subject to attachment or garnishment, see 10 Lawy. Rep. Ann. 529, note. See CUSTODY.

CUSTODY. The detainer of a person by virtue of a lawful authority. 3 Chit. Fr. 355.

The care and possession of a thing. Custody has been held to mean nothing less than actual imprisonment; 59 Pa. 320; 82 *id.* 306. See CUSTODIA LEGIS, POSSESSION.

CUSTOM. Such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter, to which it relates.

Custom is a law established by long usage. 9 Wend. 349.

It differs from prescription, which is personal and is annexed to the person of the owner of a particular estate; while the other is local, and relates to a particular district. An instance of the latter occurs where the question is upon the manner of conducting a particular branch of trade at a certain place; of the former, where a certain person and his ancestors, or those whose estates he has, have been entitled to a certain advantage or privilege, as to have common of pasture in a certain close, or the like.

2 Bla. Com. 263. The distinction has been thus expressed: "While prescription is the making of a right, custom is the making of a law;" Laws. Us. & Cust. 16, n. 2.

General customs are such as constitute a part of the common law of the country and extend to the whole country.

Particular customs are those which are confined to a particular district; or to the members of a particular class; the existence of the former are to be determined by the court, of the latter, by the jury. Laws. Us. & Cust. 15, n. 3; see 23 Me. 90.

In general, when a contract is made in relation to matter about which there is an established custom, such custom is to be understood as forming part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract; 2 Pars. Contr. 652, 683; 1 Hall 602; 2 Pet. 138; 5 Binn. 285; 19 Wend. 389; 1 M. & W. 476; L. R. 17 Eq. 358; 25 Me. 401; 7 D. C. 105.

Evidence of a usage is admissible to explain technical or ambiguous terms; 3 B. & Ad. 728; 3 Ind. App. 299; 156 Mass. 381. But evidence of a usage contradicting the terms of a contract is inadmissible; 2 Cr. & J. 244; 113 Mass. 136; 74 N. Y. 586; 1 W. Va. 69; 114 Ill. 28; 1 Misc. Rep. 399; 44 Minn. 153. Nor can a local usage affect the meaning of the terms of a contract unless it is known to both contracting parties; 144 U. S. 476; nor can it affect a contract made elsewhere; 140 U. S. 565.

"Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract, without altering its effect more or less. To fall within the exception of repugnancy the incident must be such as, if expressed in the written contract, would make it inensible or inconsistent;" *Per cur.* in 3 E. & B. 715. See Leake, Contr. 197; 7 E. & B. 274.

In order to establish a custom, it will be necessary to show its existence for so long a time that "the memory of man runneth not to the contrary" and that the usage has continued without any interruption of the right; for, if it has ceased for a time for such a cause, the revival gives it a new beginning, which will be what the law calls within memory. It will be no objection, however, that the exercise of the right has been merely suspended; 1 Bla. Com. 76; 2 *id.* 31; 14 Mass. 488; 3 Q. B. 581; 6 *id.* 393; L. R. 7 Q. B. 214; 80 Me. 500. See 32 Mo. App. 298.

It must also have been peaceably acquiesced in and not subject to dispute; for, as customs owe their origin to common consent, their being disputed, either at law or otherwise, shows that such consent was wanting; 2 Wend. 501; 3 Watts 178. In addition to this, customs must be reasonable and certain. A custom, for instance, that land shall descend to the most worthy of the owner's blood is void; for how shall this be determined? But a custom that it shall descend to the next male of the blood, exclusive of females, is certain, and therefore good; 2 Bla. Com. 78; Browne, Us. & Cust. 21. See 43 Fed. Rep. 777.

Evidence of usage is never admissible to oppose or alter a general principle or rule of law so as, upon a given state of facts, to make the legal right and liabilities of the parties other than they are by law; Browne, Us. & Cust. 135, n; 2 Term 327; 19 Wend. 252; 6 Binn. 416; 16 C. B. n. 646; 10 Wall. 383; 104 Mass. 518; 85 Ala. 565; 112 N. Y. 530; but the rule is said by Mr. Lawson to extend no further than to usages which "conflict with an established rule of public policy, which it is not to the general interest to disturb." Laws. Us. & Cust. 486. With respect to a usage of trade, however, it is sufficient if it appears to be known, certain, uniform, reasonable, and not contrary to law; 3 Wash. C. C. 150; 7 Pet. 1; 5 Binn. 287; 8 Pick. 360; 4 B. & Ald. 210; 1 C. & P. 59; 87 Tenn. 350. See 159 Mass. 522. But if not directly known to the parties to the transaction, it will still be binding upon them if it appear to be so general and well established that knowledge of it may be presumed; 1 Cai. 43; 4 Stark. 452; 1 Dougl.

510. A usage of trade is sufficiently long continued if it has existed so long as to show that the parties to a contract meant to employ the expression in the sense defined by it; 52 Mo. App. 298. And one who seeks to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it; 139 N. Y. 416. A local custom cannot supersede or modify a statute; 109 N. C. 539; 76 Hun 181.

See 26 L. J. Ex. 219; 9 Pick. 196; 2 Caines 219; 2 F. & F. 131; 14 Gray 210; 9 Wheat. 583; 8 S. & R. 533; s. c. 11 Am. Dec. 632; Dougl. 201; 4 Taunt. 843; 49 Ala. 405; 7 Mass. 30; L. R. 2 Ex. 101; 19 Wend. 386; 41 Md. 153; s. c. 20 Am. Rep. 90. See Lawson; Browne; Us. & Cust.; note to Wigglesworth v. Dallison, 8m. Lead. Cas.; [1892] Prob. 411; 91 Ga. 466. See USAGE.

CUSTOM-HOUSE. A place appointed by law, in ports of entry, where importers of goods, wares, and merchandise are bound to enter the same, in order to pay or secure the duties or customs due to the government.

CUSTOM-HOUSE BROKER. A person authorized to act for parties, at their option, in the entry or clearance of ships and the transaction of general business. Wharton. See act of July 13, 1866, § 8, 14 U. S. Stat. L. 117.

CUSTOM OF MERCHANTS. A system of customs acknowledged and taken notice of by all nations, and which are, therefore, a part of the general law of the land. See LAW MERCHANT; 1 Chit. Bla. Com. 76, n. 9.

CUSTOM OF THE REALM. The Common Law. This phrase was used in early English times to denote what later developed into the Common Law. From early times, the king's judges undertook to know better than the men of any particular city or county what "the custom of the realm" was. Thus developed under the hands of trained professional judges and advocates, the custom of the realm, or Common Law which rapidly became a specialized branch of learning worked out by rule. 4 Pollock, 1st Book Jurispr. 255-57.

CUSTOM OF TRADE. See USAGE OF TRADE.

CUSTOMARY COURT BARON. A court baron at which copyholders might transfer their estates, and where other matters relating to their tenures were transacted. 3 Bla. Com. 83.

This court was held on the manor, the lord or his steward sitting as judge. 1 Crabb, R. P. § 633. It might be held anywhere in the manor, at the pleasure of the judge, unless there was a custom to the contrary. It might exist at the same time with a court baron proper, or even where there were no freeholders in the manor.

A recent work doubts if there was a court for free men and a separate court for unfree men, though in Coke's day it was said that the lord of a manor had "a court baron" for free men and "a customary court" for his copyholders. The court rolls and manuals for stewards of the 13th and 14th centuries do not appear to show two courts; 1 Poll. & M. Hist. Engl. Law 580.

CUSTOMARY ESTATES. Estates which owe their origin and existence to the custom of the manor in which they are held. 2 Bla. Com. 149.

CUSTOMARY FREEHOLD. A class of freeholds held according to the custom of the manor, derived from the ancient tenure in villen socage. Holders of such an estate have a freehold interest, though it is not held by a freehold tenure. 2 Bla. Com. 149. In reference to customary freehold, outside the ancient demesne all the tenures of the non-freeholding peasantry are in law one tenure, tenure in villeinage; 1 Poll. & M. Hist. Engl. Law 384.

CUSTOMARY SERVICE. A service due by ancient custom or prescription only. Such is, for example, the service of doing suit at another's mill, where the persons res-

ident in a particular place, by usage, time out of mind have been accustomed to grind corn at a particular mill. 3 Bla. Com. 234.

CUSTOMARY TENANTS. Tenants who hold by the custom of the manor. 2 Bla. Com. 149.

CUSTOMS. Taxes levied upon goods and merchandise imported or exported. Story, Const. § 949; Bacon, Abr. *Smuggling*.

The duties, toll, tribute, or tariff payable upon merchandise exported or imported. These are called customs from having been paid from time immemorial. Expressed in law Latin by *custuma*, as distinguished by *consuetudines*, which are usages merely. 1 Bla. Com. 814.

CUSTOMS OF LONDON. Particular regulations in force within the city of London, in regard to trade, apprentices, widows and orphans, etc., which are recognized as forming part of the English common law. 1 Bla. Com. 75; 3 Steph. Com. 586, and note. See DEAD MAN'S PART. The custom of London, as regards intestate succession, was abolished by 19 & 20 Vict. c. 94; as regards foreign attachment, it was extended to all England and Wales by the Common Law Procedure Act of 1854, ss. 60-67; and is the basis of the law on that subject in this country. See ATTACHMENT.

CUSTOM OF YORK. A custom of intestacy in the Province of York similar to that of London. Abolished by 19 & 20 Vict. c. 94.

CUSTOS BREVIUM (Lat.). Keeper of writs. An officer of the court of common pleas whose duty it is to receive and keep all the writs returnable to that court and put them upon file, and also to receive of the prothonotaries all records of *nisi prius*, called *postates*. Blount. An officer in the king's bench having similar duties. Cowel; *Termes de la Ley*. The office is now abolished.

CUSTOS MARIS (Lat.). Warden or guardian of the seas. Among the Saxons, an admiral. Spelman, Gloss. *Admiratus*.

CUSTOS MOREUM. Applied to the court of queen's bench, as "the guardian of the morals" of the nation. 4 Steph. Com. 377.

CUSTOS PLACITORUM CORONÆ (Lat.). Keeper of the Pleas of the Crown (the criminal records). Said by Blount and Cowel to be the same as the *Custos Rotulorum*.

CUSTOS ROTULORUM (Lat.). Keeper of the rolls. The principal justice of the peace of a county, who is the keeper of the records of the county. 1 Bla. Com. 849. He is always a justice of the peace and *quorum*, is the chief civil officer of the

king in the county, and is nominated under the king's sign-manual. He is rather to be considered a minister or officer than a judge. Blount; Cowel; Lambard, *Eiren. lib.* 4, cap. 3, p. 373; 4 Bla. Com. 272; 3 Steph. Com. 87.

CUSTUMA ANTIQUA SIVE MAGNA (Lat. ancient or great duties). The duties on wool, sheepskin or wool-peits and leather exported were so called, and were payable by every merchant, stranger as well as native, with the exception that merchant strangers paid one-half as much again as natives. 1 Bla. Com. 314.

CUSTUMA PARVA ET NOVA (Lat.). An impost of threepence in the pound sterling on all commodities exported or imported by merchant strangers. Called at first the alien's duty, and first granted by stat. 31 Edw. I. Maddox, *Hist. Exch.* 526, 532; 1 Bla. Com. 314.

CUT. A wound made with a sharp instrument. 3 La. Ann. 512; 1 Russ. & R. 104. See 12 How. 9, 20.

CWT. "Cwt." designates not the twentieth of a ton, but one hundred and twelve pounds. 11 B. Mon. (Ky.) 65.

CYNEBOTE. A mulct anciently paid, by one who killed another, to the kindred of the deceased. Spelman; Gloss.

CY PRES (L. Fr. as near as). The rule of construction applied to a will (but not to a deed) by which, where the testator evinces a general intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. 3 Hare 12; 2 Term 254; 2 Bligh 49; Sugd. Pow. 60; 1 Spence, Eq. Jur. 532; Bisph. Eq. § 126; McGrath, *Cy Pres*.

The principle is applied to sustain wills in which perpetuities are attempted to be created, so that, if it can possibly be done, the devise is not regarded as utterly void, but is expounded in such a manner as to carry the testator's intention into effect as far as the law respecting perpetuities will allow. This is called a construction *cy pres*. Its rules are vague, and depend chiefly upon judicial discretion applied to the particular case. Sedgwick, *Stat. Law* 265; Story, Eq. Jur. §§ 1187 *et seq.* A limitation void because it offends the doctrine of perpetuity will be void altogether, and cannot be held under the *cy pres* rule of construction to be good as to that part which keeps within the period of perpetuity, and void only as to the excess; 142 Ill. 606.

See Tiedman, *Real Property*. It is also applied to sustain devises and bequests for charities (*q. v.*). In its origin the doctrine was applied, in the exercise of

the royal prerogative, delegated to the Lord Chancellor under the sign manual of the crown. Where there was a definite charitable purpose which was illegal and could not take place, the chancellor would substitute another. The judicial doctrine under this name is that if charity be the general substantial intention, though the mode provided for its execution fails, the English chancery will find some means of effectuating it, even by applying the fund to a different purpose from that contemplated by the testator, but as near to it as possible, provided only it be charitable; Bisph. Eq. § 129; Boyle, *Char.* 147, 155; Shelf. Mortm. 601; Beach, *Wills* 250; 3 Bro. Ch. 379; 4 Ves. 14; 7 *id.* 69, 82. Where a legacy is given to a charitable institution which exists at the testator's death, but ceases to exist before the legacy is paid over, it becomes the property of the charity on the death of the testator, and upon the charity ceasing to exist it is applicable to charitable purposes according to the doctrine of *cy pres*; [1891] 2 Ch. 236. Most of the cases carry the doctrine beyond what is allowed where private interests are concerned, and have in no inconsiderable degree to draw for their support on the prerogative of the crown and the statute of charitable uses; 43 Eliz. c. 4. This doctrine does not universally obtain in this country to the disinheritance of heirs and next of kin. See CHARITABLE USES; 14 Allen 580; 1 Am. Law Reg. 538; 2 How. 127; 17 *id.* 860; 24 *id.* 465; 6 Wall. 837; 4 Wheat. 1; 8 N. Y. 548; 14 *id.* 380; 22 *id.* 70.

Where the perpetuity is attempted to be created by deed, all the limitations based upon it are void; Cruise, *Dig. t. 38. c. 9. § 34*. See, generally, 1 Vern. 250; 2 Ves. 336, 337, 364, 380; 3 *id.* 141, 220; 4 *id.* 18; Comyns, *Dig. Condition* (L. 1); 1 Roper, *Leg.* 514; Swinb. *Wills* pl. 4. § 7, a. 4, ed. 1590, p. 31; Dane, *Abr. Index*; Toulhier, *Dr. Civ. Fr. liv. 3, t. 3, n. 586, 595, 611*; Domat, *Lois Civ. liv. 6, t. 2, § 1*; Shelf. Mortm.; Highmore, Mortm.

The *cy pres* doctrine has been repudiated by the states of North Carolina, Connecticut, Indiana, Iowa, Alabama, Maryland, Virginia, New York, South Carolina, and Pennsylvania, though in the last state it has been partially introduced by statute. But the doctrine has been approved in all the New England states except Connecticut; in Mississippi and Illinois, and in some states the question has not been decided; Bisph. Eq. § 130; 1 Dev. 276; 22 Conn. 81; 35 Ind. 198; 17 S. & R. 38; 33 Pa. 465; 30 *id.* 165; 34 N. Y. 584; 33 N. H. 296; 49 Me. 303; 50 Mo. 165; 5 C. E. Green 522; [1898] 2 Ch. 41; 36 Ala. 305; 150 Mass. 377; 147 *id.* 343; Tied. R. P.; 1 Spence, Eq. Jur. 532; 3 Hare 12.

CYROGRAPHARIUS. In Old English Law. A cyrographer. An officer of the common pleas court.

CYROGRAPHUM. A chirograph, which see.

D. S. B. See DEBITUM SINE BREVI.

DABIS? DABO (Lat.). (Will you give? I will give.) In the Roman Law. One of the forms of making a verbal stipulation.

DACION. In Spanish Law. The real and effective delivery of an object in the execution of a contract.

DAILY. Every day; day by day. Web. Where a statute requires an advertisement to be published in a daily newspaper it is such if it uses the term "daily newspaper" in contradistinction to the term "weekly," "semi-weekly," or "tri-weekly" newspaper. The term was used and is to be understood in its popular sense, and in this sense it is clear that a paper which, according to its usual custom, is published every day of the week except one, is a daily newspaper; otherwise a paper which is published every day except Sunday would not be a daily newspaper. 45 Cal. 80.

A "daily newspaper" may mean one that is issued every day of the week but one. Anderson; 45 Cal. 30, 33.

DAILY NEWSPAPER. See DAILY.

DAKIR. See LAST.

DAM. A construction of wood, stone, or other materials, made across a stream of water for the purpose of confining it; a mole. See 28 Mich. 98; 19 N. J. Eq. 245.

It is an instrument for turning the water of a stream to the use of a mill, but it may not in fact have been used for that purpose at all, or if at all, in such a way as to affect the original rights of riparian owners on either hand. 44 N. H. 78.

The owner of a stream not navigable may erect a dam across it, provided he do not thereby materially impair the rights of the proprietors above or below to the use of the water in its accustomed flow; Gould, Waters 110, n.; 4 Mas. 401; 13 Johns. 212; 20 id. 90; 9 Pick. 528; 15 Conn. 366; 6 Pa. 32; 14 S. & R. 71; 8 N. H. 321; 127 Mass. 534; 69 Me. 19; 81 Gratt. 96; 49 Ia. 490; 28 Am. L. Reg. 147, n. He may even detain the water for the purposes of a mill, for a reasonable time, to the injury of an older mill,—the reasonableness of the detention in each particular case being a question for the jury; 12 Pa. 243; 17 Barb. 654; 28 Vt. 459; 25 Conn. 321; 2 Gray 394; 38 Me. 243; 64 id. 171; 99 Mass. 474; 38 Mich. 77; 58 N. H. 553. But he must not unreasonably detain the water; 6 Ind. 324; and the jury may find the constant use of the water by night and a detention of it by day to be an unreasonable use, though there be no design to injure others; 10 Cush. 397; see 77 N. Y. 526. Nor has such owner the right to raise his dam so high as to cause the stream to flow back upon the land of supra-riparian proprietors; 1 B. & Ald. 258; 1 S. & S. 203; 13 Ill. 201; 24 N. H. 364; 8 Cush. 595; 19 Pa. 134; 25 id. 519; 38 Me. 237; 59 Ga. 286; 124 Mass. 461. And see BACK-WATER. These rights may, of course, be modified by contract or prescription. See WATERCOURSE. If there be no license or act from which a license will necessarily follow, a person erecting a dam so as to flood the land of another, is a trespasser and acts at his peril; 77 Ga. 809.

When one side of the stream is owned by one person and the other by another, neither, without the consent of the other, can build a dam which extends beyond the *flum aquae*, thread of the river, without committing a trespass; Cro. Eliz. 269; Holt 499; 12 Mass. 211; 4 Mas. 397; Angell, Waterc. 14, 104, 141; 69 Pa. 98. See *Lois*

des Bât. p. 1, c. 3, s. 1, a. 3; Pothier, *Traité du Contrat de Société*, second app. 256; Hillier, Abr. Index; 7 Cow. 266; 2 Watts 327; 8 Rawle 90; 5 Pick. 175; 4 Mass. 401; 17 id. 289; 70 Me. 248.

On the ground of public policy many of the states have enacted statutes enabling persons to build dams on their own land, although in so doing the land of a higher riparian owner may be overflowed; and in some cases this permission is given although the party may own the land on one side only. In all these instances, however, a remedy is provided for assessing the damages resulting from such dam. See Angell, Waterc. §§ 482, 484.

The degree of care which a party who constructs a dam across a stream is bound to use, is in proportion to the extent of injury which will be likely to result to third persons provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets, these must likewise be guarded against; and the measure of care required in such cases is that which a discreet person would use if the whole risk were his own; 5 Vt. 371; 3 Hill 531; 8 Denio 433; Ang. Waterc. 336; 107 Mass. 493; Washb. Easem. *288, *289; 67 Ind. 236; 51 Conn. 137.

If a mill-dam be so built that it causes a watercourse to overflow the surrounding country, where it becomes stagnant and unwholesome, so that the health of the neighborhood is sensibly impaired, such dam is a public nuisance, for which its owner is liable to indictment; 4 Wis. 387. So it is an indictable nuisance to erect a dam so as to overflow a highway; 4 Ind. 515; 6 Metc. 433; see 12 R. I. 27; or so as to obstruct the navigation of a public river; 1 Stockt. 754; 3 Blackf. 136; 2 Ind. 591; 18 Barb. 277; 4 Watts 437; 38 Mich. 77; 57 Miss. 227; 32 Gratt. 684. See IRRIGATION.

DAMAGE. The loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident.

He who has caused the damage is bound to repair it; and if he has done it maliciously he may be compelled to pay beyond the actual loss. When damage occurs by accident without blame to any one, the loss is borne by the owner of the thing injured; as, if a horse run away with his rider, without any fault of the latter, and injure the property of another person, the injury is the loss of the owner of the thing. When the damage happens by the act of God, or inevitable accident, as by tempest, earthquake, or other natural cause, the loss must be borne by the owner. See COMYNS. Dig.; Sedgwick; Mayne; Field, Damages; 1 Rutherf. Inst. 399; see COMPENSATION; DAMAGES; MEASURE OF DAMAGES.

DAMAGE CLEER. The tenth part in the common pleas, and the twentieth part in the king's bench and exchequer courts, of all damages beyond a certain sum, which was to be paid the prothonotary or chief officer of the court in which they were recovered before execution could be taken out. At first it was a gratuity, and of uncertain proportions. Abolished by stat. 17. Car. II. c. 6. Cowel; *Termes de la Ley*.

DAMAGE FEASANT (French, *faisant dommage*, doing damage). A term usually applied to the injury which animals belonging to one person do upon the land of another, by feeding there, treading down his grass, corn, or other production of the earth. 3 Bla. Com. 6; Co. Litt. 142, 161; Com. Dig.

Pleader (3 M. 26). By the common law, a distress of animals or things damage feasant is allowed. Gilb. Distr. 21; Poll. Torts 473, 478. It was also allowed by the ancient customs of France. 11 Toullier 403; Merlin, *Répert. Fourrière*; 1 Fournel, *Abandon*.

DAMAGED GOODS. Goods subject to duties, which have received some injury either in the voyage home, or while bonded in warehouse.

DAMAGES. The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another.

The sum claimed as such indemnity by a plaintiff in his declaration.

The injury or loss for which compensation is sought.

Compensatory damages. Those allowed as a recompense for the injury actually received.

Consequential damages. Those which, though directly, are not immediately, consequential upon the act or default complained of.

Double or treble damages. See MEASURE OF DAMAGES.

Exemplary damages. Those allowed for torts committed with fraud, actual malice, or deliberate violence or oppression, as a punishment to the defendant, and as a warning to other wrong doers. 23 S. E. Rep. (W. Va.) 58; Hale, Dam. 200; MEASURE OF DAMAGES.

General damages. Those which necessarily and by implication of law result from the act or default complained of.

Liquidated damages. See MEASURE OF DAMAGES.

Nominal damages. See MEASURE OF DAMAGES.

Punitive damages. See MEASURE OF DAMAGES.

Special damages. Such as arise directly, but not necessarily or by implication of law, from the act or default complained of.

These are either superadded to general damages, arising from an act injurious in itself, as when some particular loss arises from the uttering of slanderous words, actionable in themselves, or as such arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as when the words become actionable only by reason of special damage ensuing.

Unliquidated damages. See MEASURE OF DAMAGES.

Vindictive damages. See MEASURE OF DAMAGES.

In modern law, the term damages is not used in a legal sense to include the costs of the suit; though it was formerly so used. Co. Litt. 387 a; Dougl. 751.

The various classes of damages here given are those commonly found in the text-books and in the decisions of courts of common law. Other terms are of occasional use (as *resulting*, to denote consequential damages), but are easily recognizable as belonging to some one of the above divisions. The question whether damages are to be limited to an allowance compensatory merely in its nature and extent, or whether they may be assessed as a punishment upon a wrong-doer in certain cases for the injury inflicted by him upon the plaintiff, received much attention from the courts and was very fully and vigorously discussed by Greenleaf and Sedgwick, the latter of whom, though supporting the doctrine admitted that it was exceptional and anomalous and could not be logically supported; Sedgwick, Dam. § 253. He attributes the origin of the principle to the rule making juries the judges of the damages; id. § 354. In cases of aggravated wrong there were large verdicts and the courts were powerless, although the early cases consisted mainly of setting them aside. Originating in the unrestrained expressions of judges in justifying verdicts, there grew up this doctrine of exemplary damages characterized as "a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine." The current of authorities set strongly (in numbers, at least) in favor of allowing punitive damages; 13 How. 363, and that rule of decision has prevailed in most of the states, though in some it is repudiated; 38 Mich. 290; 114 Mass. 518; 11 Colo. 345; 11 Nev. 261; 66 N. H. 456; and in others the doctrine is

also denied but exemplary damages were permitted on the ground that they were compensatory merely for mental suffering; 11 Nev. 350; 1 Wyo. 27. This rule prevailed in West Virginia; 31 W. Va. 220, 459; but was recently over-ruled; 23 S. E. Rep. (W. Va.) 55. The argument against such damages was based on the objection that it admits of the infliction of pecuniary punishment to an almost unlimited extent by an irresponsible jury, a view which is theoretically more obnoxious (supposing that there is no practical difference) than that which considers damages merely as a compensation, of the just amount of which the jury may well be held to be proper judges. It also seemed to favor somewhat of judicial legislation in a criminal department to extend such damages beyond those cases where an injury is committed to the feelings of an innocent plaintiff. See 2 Greenl. Ev. § 238; 2 Sedgw. Dam. 323; 1 Kent 630; 91 U. S. 455; Hale, Dam. 200; MEASURE OF DAMAGES.

It is, perhaps, hardly necessary to add that direct is here used in opposition to remote, and immediate to consequential. See INTERVENING DAMAGES.

In Pleading. In personal and mixed actions (but not in penal actions, for obvious reasons), the declaration must allege, in conclusion, that the injury is to the damage of the plaintiff, and must specify the amount of damages; Com. Dig. Pleader (C, 84); 10 Co. 116 b.

In personal actions there is a distinction between actions that sound in damages and those that do not; but in either of these cases it is equally the practice to lay damages. There is, however, this difference: that, in the former case, damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter, the liquidated debt, or the chattel demanded, being the main object, damages are claimed in respect of the detention only of such debt or chattel, and are, therefore, usually laid at a small sum. The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration; Com. Dig. Pleader (C, 84); 10 Co. 117 a, b; Viner, Abr. Damages (R.); 1 Bulstr. 49; 2 W. Bla. 1300; 17 Johns. 111; 4 Denio 31; 8 Humphr. 530; 1 Ia. 336; 2 Dutch. 60. Where the jury returns a verdict for larger damages than are alleged or proved, it should be set aside; 66 Tex. 133.

In real actions no damages are to be laid, because in these the demand is especially for the land withheld, and damages are in no degree the object of the suit; Steph. Pl. 426; 1 Chit. Pl. 397-400.

General damages need not be averred in the declaration; nor need any specific proof of damages be given to enable the plaintiff to recover. The legal presumption of injury in cases where it arises is sufficient to maintain the action. Whether special damage be the gist of the action, or only collateral thereto, it must be particularly stated in the declaration, as the plaintiff will not otherwise be permitted to go into evidence of it at the trial, because the defendant cannot also be prepared to answer it. See 2 Sedgw. Dam. 606; 4 Q. B. 493; 11 Price 19; 7 C. & P. 804; 22 Pa. 471; 32 Me. 379; 23 N. H. 93; 21 Wend. 144; 4 Cush. 104, 408; 121 Mass. 393; 38 Cal. 689; 43 Conn. 562; 64 Vt. 442; 92 Mich. 304; 6 Wall. 578; 42 Ala. 176.

In Practice. To constitute a right to recover damages, the party claiming damages must have sustained a loss; the party against whom they are claimed must be chargeable with a wrong; the loss must be the natural and proximate consequence of the wrong.

There is no right to damages, properly so called, where there is no loss. A sum in which a wrong-doer is mulcted simply as punishment for his wrong, and irrespective of any loss caused thereby, is a "fine," or a "penalty," rather than damages. Damages are based on the idea of a loss to be compensated, a damage to be made good; 11 Johns. 136; 2 Tex. 460; 11 Pick. 527; 15 Ohio 726; 3 Sumn. 192; 4 Mass. 115; 91 Pa. 302; 104 Mass. 353; 16 Q. B. D. 613. See 142 N. Y. 391; Hale, Dam. 3. This loss, however, need not always be distinct and definite, capable of exact description or of measurement in dollars and cents. A sufficient loss to sustain an action may appear from the mere nature of the case itself. The law in many cases presumes a loss where a wilful wrong is proved; and thus also damages are awarded for injured feelings,

bodily pain, grief of mind, injury to reputation, and for other sufferings which it would be impossible to make subjects of exact proof and computation in respect to the amount of the loss sustained; 2 Day 259; 8 H. & M.H. 510; 5 Fred. 545; 3 Humphr. 140; 15 Conn. 267; 8 B. Monr. 433; 94 Mich. 119; 112 N. C. 333; 39 Ill. App. 495; 82 Tex. 33. The rule is not that a loss must be proved by evidence, but that one must appear, either by evidence or by presumption, founded on the nature of the case.

There is no right to damages where there is no wrong. It is not necessary that there should be a tort, strictly so called,—a wilful wrong, an act involving moral guilt. The wrong may be either a wilful, malicious injury, as in the case of assault and battery, libel, and the like, or one committed through mere motives of interest, as in many cases of conversion of goods, trespasses on land, etc.; or it may consist in a mere neglect to discharge a duty with suitable skill or fidelity, as where a surgeon is held liable for malpractice, a sheriff for the escape of his prisoner, or a carrier for the neglect to deliver goods; or a simple breach of contract, as in case of refusal to deliver goods sold, or to perform services under an agreement; or it may be a wrong of another person for whose act or default a legal liability exists, as where a master is held liable for an injury done by his servant or apprentice, or a railroad company for an accident resulting from the negligence of its engineer. But there must be something which the law recognizes as a wrong, some breach of a legal duty, some violation of a legal right, some default or neglect, some failure in responsibility, sustained by the party claiming damages. For the sufferer by accident or by the innocent or rightful acts of another cannot claim indemnity for his misfortune. It is called *damnum absque injuria*,—a loss without a wrong, for which the law gives no remedy; Poll. Torts 22, 175; 15 Ohio 659; 11 Pick. 527; 11 M. & W. 755; 10 Metc. 371; 51 N. Y. 476; 38 N. J. L. 339; 53 N. H. 442; 60 Me. 175; 50 Barb. 316; 42 Md. 119. See 106 Mass. 194; L. R. 3 H. L. 330; 45 La. Ann. 1358; 140 N. Y. 267.

The obligation violated must also be one owed to the plaintiff. The neglect of a duty which the plaintiff had no legal right to enforce gives no claim to damages. Thus, where the postmaster of Rochester, New York, was required by law to publish lists of letters uncalled for in the newspaper having the largest circulation, and the proprietors of the "Rochester Daily Democrat" claimed to have the largest circulation and to be entitled to the advertising, but the postmaster refused to give it to them, it was held that no action would be against him for loss of the profits of the advertising. The duty to publish in the paper having the largest circulation was not a duty owed to the publisher of that paper. It was imposed upon the postmaster not for the benefit of publishers of newspapers, but for the advantage of persons to whom letters were addressed; and they alone had a legal interest to enforce it; 11 Barb. 135. See also, 17 Wend. 534; 11 Pick. 526.

Whether when the law gives judgment on a contract to pay money—e. g. on a promissory note—this is to be regarded as enforcing performance of the promise, or as awarding damages for the breach of it, is a question on which juriconsults have differed. Regarded in the latter point of view, the default of payment is the wrong on which the award of damages is predicated.

The loss must be the natural and proximate consequence of the wrong; 2 Greenl. Ev. § 256; 2 Sedgw. Dam. 362; Field, Dam. 43; Hale, Dam. 4. Or, as others have expressed the idea, it must be the "direct and necessary," or "legal and natural," consequence. It must not be "remote" or "consequential." The loss must be the natural consequence. Every man is expected—and may justly be—to foresee the usual and natural consequences of his acts, and for these he may justly be held accountable; but not for consequences that could not have been

foreseen; 17 Pick. 73; 3 Tex. 324; 13 Ala. N. s. 490; 28 Me. 361; 2 Wis. 427; 1 Sneed 515; 4 Blackf. 277; 6 Q. B. 928; 63 Hun 624; 62 Conn. 503; 134 N. Y. 471. See 152 Pa. 390, 394; 39 Fed. Rep. 440. It must also be the proximate consequence. Vague and indefinite results, remote and consequential, and thus uncertain, are not embraced in the compensation given by damages. It cannot be certainly known that they are attributable to the wrong, or whether they are not rather connected with other causes; 4 Jones, N. C. 163; 1 Sm. L. Cas. 302. See 64 Hun 209; 69 id. 202; 98 Cal. 45; 9 C. C. App. 134.

In cases of tort the rule has been thus stated: "The question is not what cause was nearest in time or place to the catastrophe. This is not the meaning of the maxim *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes, and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster;" 95 U. S. 117. See CAUSA PROXIMA NON REMOTA SPECTATUR.

"The true inquiry is, whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated;" 118 Mass. 131. See L. R. 10 Q. B. 111; 4 Col. 344; 3 C. 34 Am. Rep. 89, and note; 5 Ind. App. 444.

The foregoing are the general principles on which the right to recover damages is based. Many qualifying rules have been established, of which the following are among the more important instances. In an action for damages for an injury caused by negligence, the plaintiff must himself appear to have been free from fault; for if his own negligence in any degree contributed directly to produce the injury, he can recover nothing. The law will not attempt to apportion the loss according to the different degrees of negligence of the two parties; 1 C. & P. 181; 11 East 60; 7 Me. 51; 1 Ia. 407; 17 Pick. 284; 3 Barb. 49; 14 Ohio 364; 3 La. Ann. 441; 60 Mich. 403; though this rule has in some cases been relaxed in favor of the plaintiff; L. R. 1 Ap. Ca. 754; e. g., if the injury would have occurred although the plaintiff had been free from negligence; 5 C. B. N. s. 585; 35 Ind. 463; 53 Mo. 434; 45 Vt. 72; or if the injury is wilful; 67 Ala. 539; 95 Ind. 263; 139 Ill. 596. See NEGLIGENCE. There is no right of action by an individual for damages sustained from a public nuisance, so far as he only shares the common injury inflicted on the community; 5 Co. 72. For any special loss occurred by himself alone, he may recover; 4 Maule & S. 101; 2 Bingh. 263; 1 Bingh. n. c. 222; 2 id. 281; 3 Hill, N. Y. 612; 22 Vt. 114; 7 Metc. 276; 1 Pa. 309; 17 Conn. 372; but in so far as the whole neighborhood suffer together, resort must be had to the public remedy; 7 Q. B. 339; 7 Metc. 276; 1 Bibb 293. Judicial officers are not liable in damages for erroneous decisions.

Where the wrong committed by the defendant amounted to a felony, the English rule was that the private remedy by action was stayed till conviction for the felony was had. This was in order to stimulate the exertions of private persons injured by the commission of crimes to bring offenders to justice. This rule has, however, been changed in some of the United States. Thus, in New York it is enacted that when the violation of a right admits of both a civil and criminal remedy, one is not merged in the other. And see 15 Mass. 336; 2 Stor. 59; Ware 78. A criminal prosecution and conviction for an assault and battery is not a bar to the recovery of punitive damages in a civil action for the same offence; but it may be shown in mitigation of damages; 151 Pa. 634; but see 64 Vt. 593. When a servant is injured through the negligence of a fellow-servant employed in the same enterprise or avocation, the

common employer is not liable for damages. The servant, in engaging, takes the risk of injury from the negligence of his fellow-servants; *McKinn. Fellow-Serv.* 18; 4 *Metc. Mass.* 49; 6 *La. Ann.* 495; 23 *Pa.* 384; 5 *N. Y.* 493; 15 *Ga.* 349; 15 *Ill.* 550; 3 *Ohio St.* 201; 5 *Exch.* 343. But this rule does not exonerate the master from liability for negligence of a servant in a different employment. See *MASTER AND SERVANT*. By the common law, no action was maintainable to recover damages for the death of a human being; 1 *Campb.* 498; 1 *Cush.* 475; 69 *Tex.* 192. But in England, by the 9 & 10 *Vict. c.* 93, known as Lord Campbell's Act, it has been provided that whenever the death of a person shall be caused by a wrongful act which would, if death had not ensued, have entitled the party injured to maintain an action, the party offending shall be liable notwithstanding the death. Similar statutes have been passed in several of the United States. See 15 *N. Y.* 433; 18 *Mo.* 162; 97 *id.* 253; 18 *Q. B.* 93; 77 *Ga.* 393; 39 *Fed. Rep.* 18.

Excessive or inadequate damages. Even in that large class of cases in which there is no fixed measure of damages, but they are left to the discretion of the jury, the court has a certain power to review the verdict, and to set it aside if the damages awarded are grossly excessive or unreasonably inadequate. The rule is, however, that a verdict will not be set aside for excessive damages unless the amount is so large as to satisfy the court that the jury have been misled by passion, prejudice, ignorance, or partiality; *Field, Dam.* 683; 19 *Barb.* 461; 9 *Cush.* 228; 16 *B. Monr.* 577; 22 *Conn.* 74; 27 *Miss.* 68; 10 *Ga.* 37; 6 *Rich.* 419; 1 *Cal.* 33, 363; 11 *Gratt.* 697; 2 *Misc. Rep.* 303; 69 *Hun* 346; 52 *Fed. Rep.* 87; 74 *Ind.* 520; 8 *id.* 165; 76 *N. Y.* 594; 85 *Tenn.* 400. But this power is very sparingly used; and cases are numerous in which the courts have expressed themselves dissatisfied with the verdict, but have refused to interfere, on the ground that the case did not come within this rule. See 3 *Abb. Pr.* 104; 23 *Barb.* 87; 20 *Mo.* 272; 15 *Ark.* 345; 6 *Tex.* 352; 16 *Ill.* 405; 2 *Stor.* 661; 1 *Zabr.* 183; 5 *Mas.* 197; 85 *Wis.* 102; 53 *Minn.* 341.

As a general rule, in actions of tort the court will not grant a new trial on the ground of the smallness of damages; 12 *Mod.* 150; 2 *Stra.* 940; 24 *E. L. & Eq.* 406; 23 *Conn.* 74. But they have the power to do so in a proper case; and in a few instances in which the jury have given no redress at all, when some was clearly due, the verdict has been set aside; 1 *Cal.* 450; 2 *E. D. Sm.* 349; 4 *Q. B.* 917.

An important case sustaining this view is reported in 5 *Q. B. D.* 78; *s. c.* 21 *Alb. L. J.* 62; there two verdicts of £7,000 and £16,000, respectively, were successively set aside as inadequate.

In the cases in which there is a fixed legal rule regulating the measure of damages, it must be stated to the jury by the presiding judge upon the trial. His failure to state it correctly is ground of exception; and if the jury disregard the instructions of the court on the subject, their verdict may be set aside. In so far, however, as the verdict is an honest determination of questions of fact properly within their province, it will not, in general, be disturbed. *Sedgw. Dam.* 604. See *CONSEQUENTIAL DAMAGES*; *MEASURE OF DAMAGES*. Consult *Greenl. Ev.*; *Wood's Mayne*; *Field*; *Harris*; *Smith*; *Sutherland*; *T. Sedgwick* and *D. H. Sedgwick*, *Damages*.

DAMAGES BY ELEMENTS. See *ELEMENTS*.

DAME. The legal title of the wife or widow of a knight or baronet. *R. & L. Dict.*

DAMNA (Lat. *damnum*). Damages, both inclusive and exclusive of costs.

DAMNATUS. In Old English Law. Condemned; prohibited by law; unlawful. *Damnatus coitus*, an unlawful connection. *Black, L. Dict.*

DAMNATUS COITUS. See *DAMNATUS*.

DAMNI INJURIE ACTIO (Lat.). In Civil Law. An action for the damage done by one who intentionally injured the beast of another. *Calvinus, Lex.*

DAMNOSA HEREDITAS. A name given by Lord Kenyon to that species of property of a bankrupt which, so far from being valuable, would be a charge to the creditors: for example, a term of years where the rent would exceed the revenue.

The assignees are not bound to take such property; but they must make their election, and having once entered into possession they cannot afterwards abandon the property; 7 *East* 842; 8 *Campb.* 340.

See *HEREDITAS DAMNOSA*.

DAMNUM (Lat.). That which is taken away; loss; damage; legal hurt or harm. *Anderson, L. Dict.*

DAMNUM ABSQUE INJURIA (Lat. injury without wrong). A wrong done to a man for which the law provides no remedy. *Broom, Max. 1.*

Injuria is here to be taken in the sense of legal injury; and where no malice exists, there are many cases of wrong or suffering inflicted upon a man for which the law gives no remedy; 2 *Ld. Raym.* 595; 11 *M. & W.* 735; 11 *Pick.* 627. Thus, if the owner of property, in the prudent exercise of his own right of dominion, does acts which cause loss to another, it is *damnum absque injuria*; 2 *Barb.* 168; 10 *Metc.* 371; 83 *Pa.* 144; see 113 *id.* 128; 10 *M. & W.* 100. A railroad company which exercises due care in blasting on its own land, in order to lay its tracks, is not liable for injury to adjoining property arising merely from the incidental jarring; 140 *N. Y.* 267.

So, too, acts of public agents within the scope of their authority, if they cause damage, cause simply *damnum absque injuria*; *Sedgw. Dam.* 29, 111; 8 *W. & S.* 35; 1 *Pick.* 415; 23 *id.* 590; 2 *B. & Ald.* 646; 1 *Gale & D.* 539; 4 *Ravie* 9; 2 *Hill N. Y.* 466; 14 *Pa.* 214; 9 *Conn.* 438; 4 *N. Y.* 135; 25 *Vt.* 49; 109 *U. S.* 385; 119 *id.* 284; 183 *Mas.* 480; 71 *Me.* 171. See 2 *Zabr.* 243; 1 *Smith, Lead. Cas.* 244; and *Weeks* on *Doc. of Dam. Abs. Inj.*

The state, in localizing its public levees, acts in the exercise of its police powers, and private injury resulting therefrom is *damnum absque injuria*; 45 *La. Ann.* 1353.

DAMNUM FATALE. In Civil Law. Damages caused by a fortuitous event or inevitable accident; damages arising from the act of God.

Among these were included losses by shipwreck, lightning, or other casualty; also losses by pirates, or by *vis major*, by fire, robbery, and burglary; but theft was not numbered among these casualties. In general, bailees are not liable for such damages; *Story, Bailm.* 471.

DAMNUM INFECTUM (Lat.). Damage not yet done; apprehended damage.

DAMP. See *BLACK DAMP*.

DANEGETT. A tax or tribute imposed upon the English when the Danes got a footing in their island.

DANELAGE. The laws of the Danes which obtained in the eastern counties and part of the midland counties of England in the eleventh century. 1 *Bl. Com.* 65.

DANGER. See *IMMEDIATE, Danger*.

DANGEROUS. See *PALPABLY DANGEROUS*.

DANGEROUS DRUGS ACT. See *OPIMUM*.

DANGEROUS INSTRUMENTALITY. The rule of "dangerous instrumentality" requires the master to exercise a proper degree of care to guard, control, and protect dangerous instrumentalities owned or operated by him, and to respond in damages for an injury incurred by the improper use of such an instrumentality by a servant, though not then engaged in the performance of his duties. 163 *Ky.* 770, 174 *S. W.* 791.

DANGEROUS WEAPON. One dangerous to life. This must often depend upon the manner of using it, and the question should go to the jury. A distinction is made between a dangerous and a deadly weapon; 2 *Curt.* 241. A jackknife may be a dangerous weapon in fact, but whether it was such as matter of law was not decided; 119 *Mass.* 342. A heavy oak stick, three feet long and an inch thick, is a dangerous

weapon but not a "deadly" weapon in the sense that from the use of it alone an attack would be as matter of law an aggravated assault under a Texas statute; 23 *Tex.* 679. See *ARMS*; *CONCEALED WEAPONS*. See *WEAPON*.

DANGERS OF THE RIVER. In a bill of lading this term means only the natural accidents incident to river navigation, and does not embrace such as may be avoided by the exercise of that skill, judgment, and foresight which are demanded from persons in a particular occupation. 35 *Mo.* 213. See 17 *Fed. Rep.* 478.

DANGERS OF THE SEA. See *PERILS OF THE SEA*.

DAPIFER. In old European law, a steward, either of a King or lord; a seneschal. Originally, a domestic who waited on the table. *Burrill*; *Spelman*.

DARREIN (Fr. *dernier*). Last. *Darrein continuance*, last continuance. See *PUIS DARREIN CONTINUANCE*; *CONTINUANCE*.

DARREIN PRESENTMENT. See *ASSIZE OF DARREIN PRESENTMENT*.

DARREIN SEISIN (L. Fr. last seisin). A plea which lay in some cases for the tenant in a writ of right. 3 *Metc. Mass.* 184; *Jackson, Real Act.* 285. See 1 *Roscoe, Real Act.* 206; 2 *Prest. Abstr.* 345.

DATE. The designation or indication in an instrument of writing of the time and place when and where it was made.

The word "date" is used frequently to designate the actual time when an event takes place, but, as applied to written instruments, its primary signification is the time specified therein. Indeed this is the meaning which its derivation (*datus*—given) most naturally suggests. 263 *U. S.* 174.

"The primary signification of the word *date*, is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item, or of a charge in a book account, is not necessarily the time when the article charged was, in fact, furnished, but simply the time given or set down in the account, in connection with such charge." *Id.*, 32 *N. J.* 515-516.

When the place is mentioned in the date of a deed, the law intends, unless the contrary appear, that it was executed at the place of the date; *Plowd. 7 b.* The word is derived from the Latin *datum* (given); when the instruments were in Latin the form ran *datum*, etc. (given the — day of, etc.).

A date is necessary to the validity of policies of insurance; but where there are separate underwriters, each sets down the date of his own signing, as this constitutes a separate contract; *Marsh. Ins.* 336; 2 *Pars. Marit. Law* 27. Written instruments generally take effect from the day of their date, but the actual date of execution may be shown, though different from that which the instrument bears; and it is said that the date is not of the essence of a contract, but is essential to the identity of the writing by which it is to be proved; 2 *Greenl. Ev.* §§ 12, 489, *n.*; *Tayl. Ev.* 186; 4 *Cush.* 403; 3 *Wend.* 233; 31 *Me.* 243; 32 *N. J. L.* 513; 70 *Pa.* 387; 91 *id.* 17; 17 *E. L. & Eq.* 548; 2 *Greenl. Cruise, Dig.* 618, *n.* See 100 *Ill.* 573; 19 *L. J. Q. B.* 435. And if the written date is an impossible one, the time of delivery must be shown; *Shepp. Touchst.* 72; *Cruise, Dig. c.* 2, § 61.

A date in a note or bill is required only for the purpose of fixing the time of payment. If the time of payment is otherwise indicated, no date is necessary; 1 *Ames, Bills and Notes* 145, citing 8 *Wend.* 478; 4 *Whart.* 252. When a note payable at a fixed period after date has no date, a holder may fill the date with the day of issue; *ibid.* It is usually presumed that a deed was de-

livered on the day of its date; but proof of the date of delivery must be given if the circumstances were such that collusion might be practised; Steph. Dig. Ev. 138: 77 Va. 92; 83 Gratt. 497; 119 Mo. 1. See 6 Bing. 296; 34 N. J. L. 93; 18 Me. 190. But this presumption does not hold in respect to deeds in fee, unattested and unacknowledged; 31 Barb. 155. Parol evidence is admissible to show that the date stated in the *in testimonium* clause of a mortgage deed of personal property is not its true date; 130 Mass. 355; 134 id. 52. There is a presumption as to a note that it was delivered on the day of its date; 107 Mass. 439.

In general, it is sufficient to insert the day, month, and year; but in recording deeds, and other recordable instruments, in Pennsylvania, in noting the receipt of a *fi. fa.*, or other writ of execution, the hour of reception must be given; 44 Pa. 438.

Where a date is given, both as a day of the week and a day of the month, and the two are inconsistent, the day of the month governs. Walk. 27.

In public documents, it is usual to give not only the day, the month, and the year of our Lord, but also the year of the United States, when issued by authority of the general government, or of the commonwealth, when issued under its authority.

See, generally, Bacon, Abr. *Obligations*; Com. Dig. *Fait* (B. 3); Cruise, Dig. tit. 32, c. 21, § 1; 1 Burr. 60; Dane, Abr. Index.

DATION. In Civil Law. The act of giving something. It differs from donation, which is a gift; dation, on the contrary, is giving something without any liberality; as, the giving of an office.

DATION EN PAIEMENT. In Civil Law. A giving by the debtor and receipt by the creditor of something in payment of a debt instead of a sum of money.

It is somewhat like the accord and satisfaction of the common law. 16 Foulrier, n. 45; Foulrier, *Vente*, n. 601. *Dation en paiement* resembles in some respects the contract of sale; *dare in solutum est quasi vendere*. There is, however, a very marked difference between a sale and a *dation en paiement*. First, The contract of sale is complete by the mere agreement of the parties; the *dation en paiement* requires a delivery of the thing given. Second, When the debtor pays a certain sum which he supposed he was owing, and he discovers he did not owe so much, he may recover back the excess; not so when property other than money has been given in payment. Third, He who has in good faith sold a thing of which he believed himself to be the owner, is not precisely required to transfer the property of it to the buyer; and while he is not troubled in the possession of the thing, he cannot pretend that the seller has not fulfilled his obligations. On the contrary, the *dation en paiement* is good only when the debtor transfers to the creditor the property in the thing which he has agreed to take in payment; and if the thing thus delivered be the property of another, it will not operate as a payment. Pothier, *Vente*, nn. 602, 603, 604. See 1 Low. C. 53; 43 La. Ann. 332.

DATIVE. A word derived from the Roman law, signifying "appointed by public authority." Thus, in Scotland, an executor-dative is an executor appointed by a court of justice, corresponding to an English administrator. Mozley & W. Dict.

DATUM (L. Lat.). In old conveyancing. Given; dated.

DAUGHTER. A female child; an immediate female descendant.

DAUGHTER-IN-LAW. The wife of one's son.

DAY. The space of time which elapses while the earth makes a complete revolution on its axis.

A portion of such space of time which, by usage or law, has come to be considered as the whole for some particular purpose.

The space of time which elapses between two successive midnights. 2 Bla. Com. 141.

That portion of such space of time during which the sun is shining.

Generally, in legal signification, the term included the time elapsing from one midnight to the succeeding one; 2 Bla. Com. 141; 89 Pa. 522; see 65 Ind. 569; but it is also used to denote those hours during which business is ordinarily transacted (frequently called a *business day*); 5 Hill 437; as well as that portion of time during which the sun is above the horizon (called, sometimes, a *solar day*), and, in addition, that part of the morning or evening during which sufficient of its light is above for the features of a man to be reasonably discerned; Co. 8d Inst. 63; 9 Mass. 154. Where a party is required to take

action within a given number of days in order to secure or assert a right, the day is to consist of twenty-four hours, that is the popular and legal sense of the term; 107 Ill. 631.

By custom, the word *day* may be understood to include working-days only; 3 Esp. 121; 2 C. C. App. 630. In a similar manner only, a certain number of hours less than the number during which the work actually continued each day. 5 Hill 437.

Sundays and other public holidays falling within the number of days specified by a statute for the performance of an act, are often omitted from the computation, as not being judicial days; 1 Rob. (Va.) 676; 17 Gratt. 109; 12 Ga. 93; 46 Mo. 17; 92 Mich. 693; 145 Ill. 614; 55 Fed. Rep. 49; 2 C. C. App. 630. But see 31 Cal. 371. Where the last day of the six months within which an appeal or writ of error may be taken to review in the Circuit Court of Appeals, the judgment or decree of a lower court, falls on Sunday, the appeal cannot be taken or the writ sued out on any subsequent day; 4 C. C. App. 393. When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, or other public holiday, it is not counted, and the contract may be performed on Monday; 20 Wend. 205; 27 N. J. L. 68; 50 Minn. 303. See 1 Sandf. 664.

The time for completing commercial contracts is not limited to banking hours; 5 La. Ann. 514.

A day is generally, but not always, regarded in law as a point of time; and fractions will not be recognized; 2 B. & Ald. 586; 20 Vt. 653; 11 Mass. 204; 150 id. 153; 13 Colo. 285; 25 Fla. 371. And see 11 Conn. 17; 3 Op. Att. Gen. 82; 11 How. Pr. 193; 64 Pa. 240. See FRACTION OF A DAY.

It is said that there is no general rule in regard to including or excluding days in the computation of time from the day of a fact or act done, but that it depends upon the reason of the thing and the circumstances of the case; 9 Q. B. 141; 6 M. & W. 55; 15 Mass. 193; 19 Conn. 376; 5 Dak. 335; 12 Colo. 285. And see, also, 5 Co. 1 a; Dougl. 463; 4 Nev. & M. 378; 5 Metc. 439; 9 Wend. 346; 9 N. H. 304; 5 Ill. 420; 24 Pa. 272; 28 Atl. Rep. (N. J.) 578. Perhaps the most general rule is to exclude the first day and include the last; 153 Pa. 465; 54 Mo. App. 627; 150 Mass. 159; 12 A. & E. 635; 43 Conn. 56; 23 Mich. 1; 3 Den. 12. Such is the rule as to negotiable paper; 1 Dan. Neg. Instr. 496; 1 Pars. Bills & N. 385; 4 Am. L. Reg. N. s. 224 and note; 40 Pa. 372. See, generally, 2 Sharsw. Bla. Com. 141, n.

The rule now generally followed seems to be that not only in mercantile contracts, but also in wills and other instruments, and in the construction of statutes, the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded; 19 Conn. 376; 23 Barb. 234; 37 Mo. 574; 23 Ind. 48.

A statutory rule for computing time does not apply to ascertain the day, or the last day, on which a thing may be done, where such day is expressed by its date; 53 Minn. 269. See ELECTION DAY.

DAY BOOK. In Mercantile Law. An account-book in which merchants and others make entries of their daily transactions. This is generally a book of original entries, and, as such, may be given in evidence to prove the sale and delivery of merchandise or of work done.

DAY RULE. In English Practice. A rule or order of the court by which a prisoner on civil process, and not committed, is enabled, in term-time, to go out of the prison and its rule or bounds. Tidd. Pr. 961. Abolished by 5 & 6 Vict. c. 22.

DAYLIGHT. That portion of time before sunrise, and after sunset, which is accounted part of the day (as distinguished from night), in defining the offense of burglary. 4 Bl. Com. 224.

DAYS IN BANK. In English Practice. Days of appearance in the court of common pleas, usually called *bancum*. They are at the distance of about a week from each other, and are regulated by some festival of the church.

By the common law, the defendant is allowed three full days in which to make his appearance in court, exclusive of the day of appearance or return-day named in the writ; 3 Bla. Com. 378. Upon his appearance, time is usually granted him for pleading; and this is called giving him day, or, as it is more familiarly expressed, a continuance. 3 Bla. Com. 316. When the suit is ended by discontinuance or by judgment for the defendant, he is discharged from further attendance, and is said to go thereof *sine die*, without day. See CONTINUANCE.

DAYS OF GRACE. Certain days allowed to the acceptor of a bill or the maker of a note in which to make payment, in addition to the time contracted for by the bill or note itself.

They are so called because formerly they were allowed as a matter of favor; but, the custom of merchants to allow such days of grace having grown into law, and been sanctioned by the courts, all bills of exchange are by the law merchant entitled to days of grace as of right. The statute of Anne making promissory notes negotiable confers the same right on those instruments. This act has been generally adopted throughout the United States; and the days of grace allowed are three; 6 W. & S. 179; Chitty, Bills; Byles, Bills. Bank checks are due on presentation and are not entitled to days of grace; 36 Neb. 744. In Arkansas a bill payable at sight is entitled to grace; 53 Ark. 512; and on "demand" drafts in Arizona, Mississippi, Nebraska, Nevada, New Mexico, and South Dakota, grace is allowed.

The principle deducible from all the authorities is, that, as to every bill not payable on demand, the day on which payment is to be made to prevent dishonor is to be determined by adding three days of grace, where the bill itself does not otherwise provide, to the time of payment as fixed by the bill. This principle is formulated into a statutory provision in England in the bills of exchange act, 1882, 45 & 46 Vict. c. 61, § 14; 115 U. S. 333; 1 Pet. 31.

Where there is an established usage of the place where the bill is payable to demand payment on the fourth or other day instead of the third, the parties to it will be bound by such usage; 5 How. 317; 9 Wheat. 582; 1 Smith, Lead. Cas. 417. When the last day of grace happens on Sunday or a general holiday, as the Fourth of July, Christmas day, etc., the bill is due on the day previous, and must be presented on that day in order to hold the drawer and indorsers; Big. Bills & N. 90; 7 Wend. 460; 4 Dall. 127; 5 Binn. 541; 4 Yerg. 210; 10 Ohio 507; 1 Ala. 295; 3 N. H. 14; *contra*, 33 Neb. 646; unless changed by statute as in some states. Days of grace are, for all practical purposes, a part of the time the bill has to run, and interest is charged on them; 2 Cow. 712; 14 La. Ann. 265; 1 Dan. Neg. Instr. 489. According to the usage and custom of merchants to fix the liability of the indorser of negotiable paper, it should be protested on the last day of grace; 86 Tex. 299.

In computing the days of grace allowed in a bond for the payment of interest, the day when the interest became payable will not be counted; 49 N. J. Eq. 385. A bill payable in thirty days having been drawn and accepted on February 11th, of a leap year, the last day of grace falls on March 15th, the 29th of February being counted as a distinct day; 65 Ind. 582.

Our courts always assume that the same number of days are allowed in other countries; and a person claiming the benefit of a foreign law or usage must prove it; 13 N. Y. 290; 2 Vt. 129; 7 Gill & J. 78; 9 Pet. 83; 4 Metc. Mass. 203. When properly proved, the law of the place where the bill or note is payable prescribes the number of days of grace and the manner of calculating them; 1 Denio 367; Story, Pr. Notes §§ 216, 247. The tendency to adopt as laws local usages or customs has been materially checked; 8 N. Y. 190. By tacit consent, the banks in New York city have not claimed days of grace on bills drawn on them; but the courts refused to sanction the custom as law or usage; 25 Wend. 673.

According to law and usage, days of grace are allowed on bills payable at the places and in the countries following:—

United States of America, three days, except California, Connecticut, Idaho, Illinois, Maine, Maryland, Massachusetts, Montana, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Vermont, Wisconsin, and the District of Columbia, where no grace is allowed on time paper although in some of them three days are given on sight drafts.

Great Britain and Ireland, and Australia, three days.

France, none, protest one day after due date (*Bordeaux*, formerly ten days).

Germany, none, protest within two working days after due date (in *Berlin*, *Altona*, *Bremen*, *Frankfort*, and *Hamburg*, a different usage formerly prevailed, but not as to the last, within recent years).

Spain, none, protest within one day (in *Cadiz* it was formerly different).

Russia, ten days (but banks do not usually avail themselves of it); protest last day of grace.

Austria, *Belgium*, *Denmark*, *Italy*, *Sweden*, *Switzerland*, none, protest up to second day after due date.

Holland, *Portugal*, *Turkey*, *Poland*, *India*, *Japan*, *Argentina*, *Mexico*, none, protest one day after due date.

Brazil, none, protest on due date.

China, under consular jurisdiction.

The information as to foreign countries has been compiled for this work by the secretary of the London Institute of Bankers. As to the cities named, special inquiry is advised, when necessary.

Bankers' checks and demand notes or bills are payable on demand without grace. See 12 Am. L. Reg. n. s. 8; 86 Neb. 744.

DAYS OF THE WEEK. The courts will always take judicial notice of the days of the week; for example, when a writ of inquiry was stated in the pleadings to have been executed on the fifteenth of June, and upon an examination it was found to be Sunday, the proceeding was held to be defective; *Forbes*, 379; *Stra.* 887.

DAYSMAN. An arbitrator, umpire, or elected judge. *Cowel*.

DAYWRE. As much arable land as could be ploughed in one day's work. *Cowel*.

DE (Lat.) and (L. Lat.). Of; about, concerning, respecting.

DE ADMEASURETIONE. Of admeasurement.

Used of the writ of admeasurement of dower, which lies where the widow has had more dower assigned to her than she is entitled to. It is said by some to lie where either an infant heir or his guardian made such assignment at suit of the infant heir whose rights are thus prejudiced. 2 Bla. Com. 189; *Fitzh.* N. B. 346. It seems, however, that an assignment by a guardian binds the infant heir, and that after such assignment the heir cannot have his writ of admeasurement. 2 Ind. 888; 1 Pick. 814; 37 Me. 509; 1 Washb. R. P. 226.

Used also of the writ of admeasurement of pasture, which lies where the quantity of common due each one of several having rights thereto, has not been ascertained; 3 Bla. Com. 88. See ADMEASUREMENT OF DOWER.

DE ETATE PROBANDA (Lat. for proving age). A writ which lay to summon a jury for the purpose of determining the age of the heir of a tenant *in capite* who claimed his estate as being of full age. *Fitzh.* N. B. 257.

DE ALLOCACIONE FACIENDA (Lat. for making allowance). A writ to allow the collectors of customs, and other such officers having charge of the king's money, for sums disbursed by them.

It was directed to the treasurer and barons of the exchequer.

DE ALTO ET BASSO. Of high and low. A phrase anciently used to denote the absolute submission of all differences to arbitration. *Cowel*.

DE ANNUA PENSIONE (Lat. of annual pension). A writ by which the king, having due unto him an annual pension from any abbot or prior for any of his chaplains which he will name who is not provided with a competent living, demands it of the said abbot or prior for the one that is named in the writ. *Fitzh.* N. B. 231; *Termes de la Ley*, *Annua Pensione*.

DE ANNUO REDITU (Lat. for a yearly rent). A writ to recover an annuity, no matter how payable. 2 Reeve, *Hist. Eng. Law* 258.

DE APOSTATA CAPIENDO (Lat. for taking an apostate). A writ directed to the sheriff for the taking the body of one who, having entered into and professed

some order of religion, leaves his order and departs from his house and wanders in the country. *Fitzh.* N. B. 283; *Termes de la Ley*, *Apostata Capiendo*.

DE ARBITRATIONE FACTA (Lat. of arbitration had). A writ formerly used when an action was brought for a cause which had been settled by arbitration. *Watson*, *Arb.* 256.

DE ASSISA PROROGANDA (Lat. for proroguing assize). A writ to put off an assize issuing to the justices where one of the parties is engaged in the service of the king.

DE ATTORNATO RECIPIENDO (Lat. for receiving an attorney). A writ to compel the judges to receive an attorney and admit him for the party. *Fitzh.* N. B. 156 b.

DE AVERIIS CAPTIS IN WITHERNAM (Lat. for cattle taken in withernam). A writ which lies to take other cattle of the defendant where he has taken and carried away cattle of the plaintiff out of the country, so that they cannot be reached by replevin. *Termes de la Ley*; 3 Bla. Com. 149.

DE AVERIIS REPLEGIANDIS (Lat.). A writ to replevy beasts. 3 Bla. Com. 149.

DE AVERIIS RETORNANDIS (Lat. for returning cattle). Used of the pledges in the old action of replevin. 2 Reeve, *Hist. Eng. Law* 177.

DE BANCO (L. Lat.). Of the Bench. A term formerly applied in England to the justices of the Court of Common Pleas, or Bench, as it was originally styled.

DE BENE ESSE (Lat. formally; conditionally; provisionally). A technical phrase applied to certain acts deemed for the time to be well done, or until an exception to other avoidance. It is equivalent to provisionally, with which meaning the phrase is commonly employed. For example, a declaration is filed or delivered, special bail is put in, a witness is examined, etc., *de bene esse*, or provisionally; 3 Bla. Com. 383.

The examination of a witness *de bene esse* takes place where there is danger of losing the testimony of an important witness from death by reason of age or dangerous illness, or where he is the only witness to an important fact; 1 Bland, Ch. 288; 3 Bibb 204; 16 Wend. 601; 13 Ves. 261; 28 Ala. 141. In such case, if the witness be alive at the time of trial, his examination is not to be used; 2 Dan. Ch. Pr. 111. See *Haynes*, Eq. 183; *Mitf. Eq. Pl.* 62, 149.

To declare *de bene esse* is to declare in a bailable action subject to the contingency of bail being put in; and in such case the declaration does not become absolute till this is done; *Grah.* Fr. 191.

When a judge has a doubt as to the propriety of finding a verdict, he may direct the jury to find one *de bene esse*; which verdict, if the court shall afterwards be of opinion that it ought to have been found, shall stand. *Bac. Abr. Verdict* (A). See, also, 11 S. & R. 84.

DE BIEN ET DE MAL. See *DE BONO ET MALO*.

DE BIENS LE MORT (Fr. of the goods of the deceased). *Dyer* 82.

DE BONIS ASPORTATIS (Lat. for goods carried away). The name of the action for trespass to personal property is trespass *de bonis asportatis*. *Bull.* N. P. 886; 1 Tidd, Fr. 5.

DE BONIS NON. See *ADMINISTRATION*.

DE BONIS PROPRIIS (Lat. of his own goods). A judgment against an executor or administrator which is to be satisfied from his own property.

When an executor or administrator has been guilty of a *devastavit*, he is responsible for the loss which the estate has sustained

de bonis propriis. He may also subject himself to the payment of a debt of the deceased *de bonis propriis* by his false plea when sued in a representative capacity; as, if he plead *plene administravit* and it be found against him, or a release to himself when false. In this latter case the judgment is *de bonis testatoris si, et si non, de bonis propriis*. 1 Wms. Saund. 836 b, n. 10; *Bacon*, *Abr. Executor* (B, 3).

DE BONIS TESTATORIS (Lat. of the goods of the testator). A judgment rendered against an executor which is to be satisfied out of the goods or property of the testator; distinguished from a judgment *de bonis propriis*.

DE BONIS TESTATORIS AC SI (Lat. from the goods of the testator, if he has any, and, if not, from those of the executor). A judgment rendered where an executor falsely pleads any matter as a release, or, generally, in any case where he is to be charged in case his testator's estate is insufficient. 1 Wms. Saund. 836 b; *Bacon*, *Abr. Executor* (B, 3); 2 Archb. Pr. 148.

DE BONO ET MALO (Lat. for good or ill). A person accused of crime was said to put himself upon his country *de bono et malo*. The French phrase *de bien et de mal* has the same meaning.

A special writ of gaol delivery, one being issued for each prisoner; now superseded by the general commission of gaol delivery. 4 Bla. Com. 270.

DE CALCETO REPARENDO (Lat.). A writ for repairing a highway, directed to the sheriff, commanding him to restrain the inhabitants of a place to repair the highway. *Reg. Orig.* 154; *Blount*.

DE CAPITIS MINUTIS (Lat.). Of those who have lost their status, or civil condition.

DE CARTIS REDDENDIS (Lat. for restoring charters). A writ to secure the delivery of charters; a writ of detainue. *Reg. Orig.* 159 b.

DE CATALIS REDDENDIS (Lat. for restoring chattels). A writ to secure the return specifically of chattels detained from the owner. *Cowel*.

DE CAUTIONE ADMITTENDA (Lat. for admitting bail). A writ directed to a bishop who refused to allow a prisoner to go at large on giving sufficient bail, requiring him to admit him to bail. *Fitzh.* N. B. 63 c.

DECERTIFICANDO. A writ requiring a thing to be certified. A kind of certiorari. *Reg. Orig.* 152. See *WRIT DE CERTIFICANDO*.

DE COMMUNI DIVIDENDO. In Civil Law. A writ of partition of common property. See *COMMUNI DIVIDENDO*.

DE COMPUTO. Writ of account. A writ commanding a defendant to render a reasonable account to the plaintiff, or show cause to the contrary. The foundation of the modern action of account. *Black, L. Dict.* See *COMPUTUS*.

DE CONTUMACE CAPIENDO. A writ issuing from the English court of chancery for the arrest of a defendant who is in contempt of the ecclesiastical court. 1 N. & P. 685; 5 Dowl. 213, 646; 5 Q. B. 335.

This writ was issued in lieu of excommunication in all cases of contempt in the spiritual courts, the latter being discontinued by 53 Geo. III., c. 127, § 2. The writ has the same force and effect as formerly belonged, in case of contempt, to a writ *de excommunicato capiendo*. (q. v.) *Wharton*; 2 and 3 Wm. IV., c. 93; 3 and 4 Vict., c. 93. See *EXCOMMUNICATION*.

DE CORPORE DELICTI (L. Lat.). As to the *corpus delicti*, or substantial fact of a crime having been committed. It ought not to be clear as to the *corpus delicti*; i. e. not only that one was found dead in that neighborhood, but that he was wounded

and slain. For a man may die suddenly from another cause.

DE CURIA CLAUDENDA (Lat. of enclosing a court). An obsolete writ, to require a defendant to fence in his court or land about his house, where it was left open to the injury of his neighbor's freehold. 1 Crabb, R. P. 314; 6 Mass. 90.

DE DECEPTIONE. Writ of deceit, or disceit. A writ which properly lay where one did anything in the name of another, by which the other was damaged and deceived. Burrill; Reg. Orig. 112.

DE DIE IN DIEM (L. Lat.). From day to day.

DE DOMO REPARANDA (Lat.). The name of an ancient common-law writ, by which one tenant in common might compel his co-tenant to concur in the expense of repairing the property held in common. 8 B. & C. 269; 1 Thomas, Co. Litt. 216, note 17, and p. 787.

DE DONIS, THE STATUTE (more fully, *De Donis Conditionalibus*; concerning conditional gifts). The statute of Westminster the Second. 13 Edw. I. c. 1.

The object of the statute was to prevent the alienation of estates by those who held only a partial interest in the estate in such a manner as to defeat the estate of those who were to take subsequently. This was effected by providing that, in grants to a man and the heirs of his body or the heirs male of his body, the will of the donor should be observed according to the form expressed in the deed of gift (*per formam doni*); that the tenements so given should go, after the grantee's death, to his issue (or issue male), if there were any, and if none, should revert to the donor. This statute was the origin of the estate in fee tail, or estate tail, and by introducing perpetuities, it built up great estates and strengthened the power of the barons. See Bac. Abr. *Estates Tail*; 1 Cruise, Dig. 70; 1 Washb. R. P. 271. See **CONDITIONAL FEE TAIL**.

DE DOTE ASSIGNANDA (Lat. for assigning dower). A writ commanding the king's escheator to assign dower to the widow of a tenant *in capite*. Fitzh. N. B. 263, c.

DE DOTE UNDE NIHIL HABET (Lat. of dower in that whereof she has none). A writ of dower which lay for a widow where no part of her dower had been assigned to a widow. It is now much disused; but a form closely resembling it is still much used in the United States. 4 Kent 63; Stearns, Real Act. 303; 1 Washb. R. P. 230.

DE EJECTIONE CUSTODIE. A writ which lay for a guardian who had been forcibly ejected from his wardship. Reg. Orig. 163; Black, L. Dict. See **EJECTIONE CUSTODIAE**.

DE EJECTIONE FIRMÆ. A writ which lay at the suit of the tenant for years against the lessor, reversioner, remainderman, or stranger who had himself deprived the tenant of the occupation of the land during his term. 3 Bla. Com. 199. Originally lying to recover damages only, it came to be used to recover the rest of the term, and then generally the possession of lands. Involving, in the question of who should have possession, the further question of who had the title, it gave rise to the modern action of ejectment. Brooke, Abr.; Adams, Ejectm.; 3 Bla. Com. 199 *et seq.*

DE ESTOVERIIS HABENDIS (Lat. to obtain estovers). A writ which lay for a woman divorced *a mensa et thoro* to recover her alimony or estovers. 1 Bla. Com. 441.

DE EXCOMMUNICATO CAPIENDO (Lat. for taking one who is excommunicated). A writ commanding the sheriff to arrest one who was excommunicated, and imprison him till he should become reconciled to the church. 3 Bla. Com. 102.

DE EXCOMMUNICATO DELIBERANDO (Lat. for freeing one excommunicated). A writ to deliver an excommunicated person, who has made satisfaction to the church, from prison. 3 Bla. Com. 102.

DE EXONERATIONE SECTÆ. A writ to free the king's ward from suit in any court lower than the court of common pleas during the time of such wardship.

DE FACTO. Actually; in fact; in deed. A term used to denote a thing actually done.

An officer *de facto* is one who performs the duties of an office with apparent right, and under claim and color of an appointment, but without being actually qualified in law so to act. 87 Me. 423.

Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto*, and are binding on the public; 159 U. S. 596.

An officer in the actual exercise of executive power would be an officer *de facto*, and as such distinguished from one who, being legally entitled to such power, is deprived of it,—such a one being an officer *de jure* only. An officer holding without strict legal authority; 2 Kent 395. An officer *de facto* is frequently considered an officer *de jure*, and legal validity allowed his official acts; 10 S. & R. 250; 1 Cox 318; 10 Mass. 290; 25 Conn. 278; 28 Wis. 364; 24 Barb. 537; 85 Me. 301; 19 N. H. 115; 2 Jones, N. C. 124; 55 Pa. 468; 45 Miss. 151; 8 How Pr. 933; 99 U. S. 20; 86 Ill. 233; 88 Conn. 449 (a very fully considered case); S. C. 9 Am. Rep. 409; 73 N. C. 546; 111 Id. 729; 85 S. C. 192; 68 Mich. 273; 7 L. R. H. L. 894. But this is so only so far as the rights of the public and third persons are concerned. In order to sue or defend in his own right as a public officer, he must be *de jure*; 89 Ill. 347. An officer *de facto* incurs no liability by his mere omission to act; 77 N. Y. 878; 59 How. Pr. 404; but see 108 Mass. 528; 101 U. S. 192.

An officer acting under an unconstitutional law, acts by color of title, and is an officer *de facto*; 56 Pa. 436. When a special judge is duly elected, qualifies, and takes possession of the office according to law, he becomes judge *de facto*, though his official oath is not filed as required by law; and the proceedings of the court, if unchallenged during his incumbency, cannot afterwards be questioned collaterally; 111 Mo. 542. See 65 Vt. 399; 49 Ark. 459; 90 Pa. 344; 86 Ill. 238.

Contracts and other acts of *de facto* directors of corporations are valid; Green's Brice, *Ultra Vires*, 322, n. c.; 70 N. C. 348; 85 Mo. 18; 21 Pa. 131.

An officer *de facto* is *prima facie* one *de jure*; 21 Ga. 217.

When the inspectors of an election fail to issue a certificate of election, one who has received the highest number of legal votes cast, and holding over as the present incumbent, has sufficient apparent authority or color of title to be considered an officer *de facto*; 67 Hun 169.

A government *de facto* signifies one completely, though only temporarily, established in the place of the lawful government; 42 Miss. 651, 703; 43 Ala. 204. See **DE JURE**; Austin, Jur. Lect. vi. p. 236.

A wife *de facto* only is one whose marriage is voidable by decree; 4 Kent 86.

Blockade *de facto* is one actually maintained; 1 Kent 44.

For a consideration of the validity of the acts of officers *de facto* see 34 Cent. Law J. 212. See **SOVEREIGN DE JURE OR DE FACTO**.

DE FAIRE ECHELLE. In French Law. A clause commonly contained in the French policies of insurance, which is equivalent to a license for a vessel to touch and trade at intermediate ports. 14 Wend. 491.

DE HERETICO COMBURENDO (Lat. for burning a heretic). A writ which lay where a heretic had been convicted of heresy, had abjured, and had relapsed into heresy. It is said to be very ancient. 4 Bla. Com. 46.

DE HOMINE CAPTO IN WITHERNAM (Lat. for taking a man in withernam). A writ to take a man who had carried away a bondman or bondwoman into another country beyond the reach of a writ of replevin. 3 Bla. Com. 129.

DE HOMINE REPLEGIANDO (Lat. for replevying a man). A writ which lies to replevy a man out of prison, or out of the custody of a private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. Fitzh. N. B. 66; 3 Bla. Com. 129. The statute—which had gone nearly out of use, having been superseded by the writ of *habeas corpus*—has been revived within a few years in some of the United States in an amended and more effectual form. It can be used only for the benefit of the person imprisoned. 1 Kent 404, n.; 34 Me. 136.

DE IDIOTA INQUIRENDO. An old common-law writ, long obsolete, to inquire whether a man be an idiot or not. 2 Steph. Com. 509.

DE INCREMENTO (Lat. of increase). Costs *de incremento*, costs of increase—that is, which the court assesses in addition to the damages established by the jury. See **COSTS DE INCREMENTO**.

DE INJURIA (Lat. The full term is, *de injuria sua propria absque tali causa*, of his own wrong without such cause; or, where part of the plea is admitted, *absque residuo causæ*, without the rest of the cause).

In Pleading. The replication by which in an action of tort the plaintiff denies the effect of excuse or justification offered by the defendant.

It can only be used where the defendant pleads matter merely in excuse and not in justification of his act. It is confined to those instances in which the plea neither denies the original existence of the right which the defendant is charged with having violated, nor alleges that it has been released or extinguished, but sets up some new matter as a sufficient excuse or cause for that which would otherwise and in its own nature be wrongful. It cannot, therefore, be properly used when the defendant's plea alleges any matter in the nature of title, interest, authority, or matter of record; 8 Co. 66; 1 B. & P. 76; 4 Johns. 159, note; 1 Wend. 126; 25 Vt. 328; 13 Mass. 500; 38 N. J. L. 98; Steph. Pl. 276; Pep. Pl. 35.

The English and American cases are at variance as to what constitutes such legal authority as cannot be replied to by *de injuria*. Most of the American cases hold that this replication is bad whenever the defendant insists upon a right, no matter from what source it may be derived; and this seems to be the more consistent doctrine.

If the plea in any sense justifies the act, instead of merely excusing it, *de injuria* cannot be used; 4 Wend. 577; 1 Hill, N. Y. 78; 13 Ill. 80. The English cases, on the other hand, hold that an authority derived from a court *not of record* may be traversed by the replication *de injuria*; 3 B. & Ad. 2.

The plaintiff may confess that portion of a plea which alleges an authority in law or an interest, title, or matter of record, and aver that the defendant did the act in question *de injuria sua propria absque residuo causæ*, of his own wrong without the residue of the cause alleged; 1 Hill, N. Y. 78; 2 Am. Law Reg. 246; Steph. Pl. 276.

The replication *de injuria* puts in issue the whole of the defence contained in the plea; and evidence is, therefore, admissible to disprove any material averment in the whole plea; McKelv. Pl. 50; 8 Co. 66; 11 East 451; 10 Bingham. 157; 8 Wend. 129; 14 Wall. 613. See 2 Cr. M. & R. 338. In England, however, by a uniform course of decisions in their courts, evidence is not admissible under the replication *de injuria* to a plea, for instance, of *moderate castigavit* or *moliter manus imposuit*, to prove that an excess of force was used by the defendant; but it is necessary that such excess should be specially pleaded. There must be a new assignment; 2 Cr. M. & R. 338; 1 Bingham. 317; 1 Bingham. N. C. 380; 8 M. & W. 150.

In this country, on the other hand, though some of the earlier cases followed the English doctrine, later cases decide that the plaintiff need not plead specially in such a case. It is held that there is no new cause to assign when the act complained of is the same that is attempted to be justified by plea. Therefore the fact of the act being moderate is a part of the plea, and is one of the points brought in issue by *de injuria*; and evidence is admissible to prove an excess; 15 Mass. 351; 25 Wend. 871; 2 Vt. 474; 24 id. 218; 1 Zab. 183.

Though a direct traverse of several points going to make up a single defence in a plea will be bad for duplicity, yet the general replication of *de injuria* cannot be objected to on this ground, although putting the same number of points in issue; 3 B. & Ad. 1; 25 Vt. 330; 2 Bingham. N. C. 579; 3 Tyrwh. 491. Hence this mode of replying has a great advantage when a special plea has been resorted to, since it enables the plaintiff to traverse all the facts contained in any single point, instead of being obliged to rest his cause on an issue joined on one fact alone.

In England it is held that *de injuria* may be replied in assumpsit; 2 Bingham. N. C. 579.

In this country it has been held that the use of *de injuria* is limited to actions of tort; 2 Pick. 357. But in New Jersey it may be used in actions *ex contractu* wherever a special plea in excuse of the alleged breach of contract can be pleaded, as a general traverse to put in issue every material allegation in the plea; 38 N. J. L. 98. Whether *de injuria* can be used in actions of replevin seems, even in England, to be a disputed question. The following cases decide that it may be so used; 9 Bingham. 756; 3 B. & Ad. 2; *contra*, 1 Chit. Pl. 622.

The improper use of *de injuria* is held to be only a ground of general demurrer; 6 Dowl. 502; but see 3 M. & W. 230; 2 Pick. 357. Where it is improperly employed, the defect will be cured by a verdict; 5 Johns. 112; Hob. 76; 1 T. Raym. 50. See, generally, 11 Am. L. Reg. 577; Crogate's Case, 1 Sm. Lead. Cas. 247.

DE JUDAISMO, STATUTUM. The name of a statute passed in the reign of Edward I., which enacted severe penalties against the Jews. Barringt. Stat. 197.

DE JURE. Rightfully; of right; lawfully; by legal title. Contrasted with *de facto* (which see). 4 Bla. Com. 77.

Of right; distinguished from *de gratia* (by favor). By law; distinguished from *de equitate* (by equity).

The term is variously applied; as, a king or officer of *jure*, or a wife of *jure*.

A government of *jure*, but not of *facto*, is one deemed lawful, which has been supplanted; a government of *jure* and also of *facto* is one deemed lawful, which is present or established; a government of *facto* is one deemed unlawful, but which is present or established. Any established government, be it deemed lawful or not, is a government of *facto*. Austin, Jur. sec. vi. 336. See **DE FACTO. SOVEREIGN DE JURE.**

DE LA PLUS BELLE (Fr. of the fairest). A kind of dower; so called because assigned from the best part of the husband's estate. It was connected with the military tenures, and was abolished, with them, by stat. 12 Car. II. cap. 24. Littleton § 48; 2 Bla. Com. 132, 135; Scrib. Dower 18; 1 Washb. R. P. 149, n.

DE LIBERTATIBUS ALLOCANDIS (Lat. for allowing liberties). A writ, of various forms, to enable a citizen to recover the liberties to which he was entitled. Fitzh. N. B. 229; Reg. Orig. 262.

DE LUNATICO INQUIRENDUM (Lat.). The name of a writ directed to the sheriff, directing him to inquire by good and lawful men whether one therein named is a lunatic or not. See 4 Rawle 234; 5 Halst. 217; 6 Wend. 497; 19 Hun 292; 7 Abb. N. Cas. 425; 31 N. J. Eq. 203.

An inquisition in lunacy proceedings must show that the imbecility of the mind is such as to render the imbecile unfit for the

government of himself and his property; 44 N. J. Eq. 564.

The English practice is now regulated by the Lunacy Acts (16 & 17 Vict. c. 70, and 25 & 26 Vict. c. 86), under which the lord chancellor, upon petition or information, grants a commission in the nature of this writ; 2 Steph. Com. 511. In the United States the practice is similar, and a commission of lunacy is appointed. In New York there is a state commissioner of lunacy. See Ray's Med. Jur. Ins.; Ordron. Jud. Asp. Ins. 225; 3 Abb. N. C. 187.

DE MANUCAPTIARE (Lat. of main-prize). A writ, now obsolete, directed to the sheriff, commanding him to take sureties for the prisoner's appearance,—usually called mainpennors—and to set him at large. Fitzh. N. B. 250; 1 Hale, Pl. Cr. 141; Coke, *Bail & Mainp.* c. 10; Reg. Orig. 268 b.

DE MEDIATE LINGUÆ. See **MEDIATE LINGUÆ.**

DE MEDIO (Lat. of the *mesme*). A writ in the nature of a writ of right, which lies where upon a subinfeudation the *mesme* (or middle) lord suffers his under-tenant or tenant *paravail* to be distrained upon by the lord paramount for the rent due him from the *mesme* lord. Booth, Real Act. 136; Fitzh. N. B. 135; 3 Bla. Com. 234; Co. Litt. 100 a.

DE MELIORIBUS DAMNIS (Lat.). Of the better damages. When a plaintiff has sued several defendants, and the damages have been assessed severally against each, he has the choice of selecting the best, as he cannot recover the whole. This is done by making an election of *melioribus damnis*.

DE MERCATORIBUS, THE STATUTE. The statute of Acton Burnell. See **ACTON BURNELL.**

DE MINIMIS NON CURAT LEX. The law does not notice (or care for) trifling matters. 74 S. W. 233.

DE MINIS. Writ of threats. A writ which lay where a person was threatened with personal violence, or the destruction of his property, to compel the offender to keep the peace. Reg. Orig. 88 b. 89; Fitzh. Nat. Brev. 79. G. 80; Black, L. Dict. See **WRIT DE MINIS.**

DE MODO DECIMANDI (Lat. of a manner of taking tithes).

A prescriptive manner of taking tithes, different from the general law of taking tithes in kind. It is usually by a compensation either in work or labor, and is generally called a *modus*; Cro. Eliz. 446; 2 P. Wms. 463; 2 Russ. & M. 102; 4 Y. & C. 269, 283; 2 Bla. Com. 29; 3 Steph. Com. 180.

DE NATURA BREVIUM. See **NATURA BREVIUM.**

DE NON DECIMANDO (Lat. of not taking tithes). An exemption by custom from paying tithes is said to be a prescription of *non decimando*. A claim to be entirely discharged of the payment of tithes, and to pay no compensation in lieu of them. Cro. Eliz. 511; 3 Bla. Com. 81.

DE NON SANE MEMORIE (L. Fr.). Of unsound memory or mind; a phrase synonymous with *non compos mentis*.

DE NOVI OPERIS NUNCIATIONE (Lat.). In Civil Law. A form of injunction or interdict which lies in some cases for the party aggrieved, where a thing is intended to be done against his right. Thus, where one buildeth a house contrary to the usual and received form of building, to the injury of his neighbor, there lieth such an injunction, which being served, the offender is either to desist from his work or to put in sureties that he shall pull it down if he do not in a short time avow, *i. e.* show, the lawfulness thereof. Ridley, Civ. & Eccl. Law, pt. 1, c. 1, 8.

DE NOVO (Lat.). Anew; afresh. When a judgment upon an issue in part is reversed on error for some mistake made by the court in the course of the trial, a *venire de novo* is awarded, in order that the case may again be submitted to a jury.

DE ODIS ET ATIA (Lat. of hatred and

ill will). A writ directed to the sheriff, commanding him to inquire whether a person charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam* (through hatred and ill will); and if upon the inquiry due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. 3 Bla. Com. 128. This was one of the many safeguards by which the English law early endeavored to protect the innocent against the oppression of the powerful through a misuse of its forms. The writ was to issue of course to any one, without denial, and *gratis*. Bracton, l. 3, tr. 2, ch. 8; Magna Charta, c. 26; Stat. Westm. 2 (13 Edw. I.), c. 29. It was restrained by stat. Gloucester (6 Edw. I.), c. 9, and abolished by 28 Edw. III. c. 9, but revived, however, on the repeal of this statute, by the 42 Edw. III. c. 1; Co. 2d Inst. 43, 55, 315. It has now passed out of use. 3 Bla. Com. 129. See **ASSIZE**.

DE OFFICE (L. Fr.). Of office; in virtue of office; officially; in the discharge of ordinary duty. The court is bound in virtue of its office. This phrase corresponds with Latin *ex officio*, or, more nearly with *virtute officii*.

DE PACE ET LEGALITATE TUENDA (L. Lat.). For keeping the peace, and for good behavior.

DE PARCO FRACITO (Lat. of pound-breach). A writ which lay where cattle taken in distress were rescued by their owner after being actually impounded. Fitzh. N. B. 100; 3 Bla. Com. 146; Reg. Orig. 116 b; Co. Litt. 47 b.

DE PARTITIONE FACIENDA (Lat. for making partition). The ancient writ for the partition of lands held by tenants in common.

DE PERAMBULATONE FACIENDA (Lat. for making a perambulation). A writ which lay where there was a dispute as to the boundaries of two adjacent lordships or towns, directed to the sheriff, commanding him to take with him twelve discreet and lawful knights of his county and make the perambulation and set the bounds and limits in certainty. Fitzh. N. B. 309. D. A similar provision exists in regard to town-lines in Connecticut, Maine, Massachusetts, and New Hampshire, by statute.

DE PLACITO (L. Lat.). Of a plea; of, or in an action. Formal words used in declarations and other proceedings, as descriptive of the particular action brought.

DE PLANO (Lat. and L. Lat.). Without form; in a summary manner.

DE PLEGIIS ACQUIETANDIS (Lat. for clearing pledges). A writ which lay where one had become surety for another to pay a sum of money at a specified day, and the principal failed to pay it. If the surety was obliged to pay, he was entitled to this writ against his principal. Fitzh. N. B. 37 C; 3 Reeve, Hist. Eng. Law 65.

DE PRÆROGATIVA REGIS (Lat. of the king's prerogative). The statute 17 Edw. I. st. 1, c. 9, defining the prerogatives of the crown on certain subjects, but especially directing that the king shall have ward of the lands of idiots, taking the profits without waste and finding them necessities. 2 Steph. Com. 509.

DE PROCEDENDO AD JUDICIUM. See **PROCEDENDO.**

DE PROPRIETATE PROBANDA (Lat. for proving property). A writ which issues in a case of replevin, when the defendant claims property in the chattels replevied and the sheriff makes a return accordingly. The writ directs the sheriff to summon an inquest to determine on the validity of the claim; and, if they find for the defendant, the sheriff merely returns their finding. The plaintiff is not concluded by such finding; he may come into the court and traverse it. Hamm. N. P. 456.

This writ has been superseded in England

by the "summons to interplead;" in Pennsylvania and Delaware the "claim property bond" is a convenient substitute for the old practice, and similar to this is the practice under the New York Code. *Morr. Repl.* 304.

DE QUOTA LITIS (Lat.). In Civil Law. A contract by which one who has a claim difficult to recover agrees with another to give a part, for the purpose of obtaining his services to recover the rest. 1 Duval, n. 201. See *CHAMPERTY*.

DE RATIONABILIS PARTE BONORUM (Lat. of a reasonable part of the goods). A writ, long since obsolete, to enable the widow and children of a decedent to recover their proper shares of his personal estate. 2 Bla. Com. 492. The writ is said to be founded on the customs of the counties, and not on the common-law allowance. *Fitzh. N. B. 123, L.* See *CUSTOM OF LONDON*.

DE RATIONABILIBUS DIVISIS (Lat. for reasonable boundaries). A writ which lies to determine the boundaries between the lands of two proprietors which lie in different towns. The writ is to be brought by one against the other. *Fitzh. N. B. 128, M.; 3 Reeve, Hist. Eng. Law 48.*

DE RECTO DE ADVOCATIONE (Lat. of right of advowson; called, also, *le droit de advocation*). A writ which lay to restore the right of presentation to a benefice, for him who had an advowson, to himself and heirs in fee simple, if he was disturbed in the presentation. Year B. 39 Hen. VI. 20 a; *Fitzh. N. B. 30, B.*

DE RECTO DEFICERE (L. Lat.). To fail of right; to fail in doing justice.

DE REPARATIONE FACIENDA (Lat.). The name of a writ which lies by one tenant in common against the other, to cause him to aid in repairing the common property. 8 B. & C. 269.

DE RESTITUTIONE EXTRACTI AB ECCLESIA. See *RESTITUTIONE* *ETC.*

DE RETORNO HABENDO (Lat.). The name of a writ issued after a judgment has been given in replevin that the defendant should have a return of the goods replevied.

The judgment for defendant at common law is *pro retorno habendo*. Plaintiff's pledges are also so called. See *Morr. Repl.; REPLEVIN*.

DE SALVA GUARDIA (Lat. of safe-guard). A writ to protect the persons of strangers seeking their rights in English courts. *Reg. Orig.* 26.

DE SCUTAGIO HABENDO (Lat. of having scutage). A writ which lay in case a man held lands of the king by knight's service, to which homage, fealty, and escuage were appendant, to recover the services or fee due in case the knight failed to accompany the king to the war. It lay also for the tenant *in capite*, who had paid his fee, against his tenants. *Fitzh. N. B. 83, C.*

DE SECTA AD MOLENDINUM (Lat. of suit to a mill). A writ which lieth to compel one to continue his custom (of grinding) at a mill. 3 Bla. Com. 235; *Fitzh. N. B. 122, M.; 2 Reeve, Hist. Eng. Law 55.*

DE SON TORT (Fr.). Of his own wrong. This term is usually applied to a person who, having no right to meddle with the affairs or estate of a deceased person, yet undertakes to do so, by acting as executor of the deceased. See *EXECUTOR*.

DE SON TORT DEMESNE (Fr.). Of his own wrong. See *DE INJURIA*.

DE SUPERONERATIONE PASTURE (Lat. of surcharge of pasture). A writ lying where one who had been previously impleaded in the county court was again impleaded in the same court for surcharging common of pasture, and the cause was removed to Westminster Hall. *Reg. Jur.* 36 b.

DETALLAGIO NON CONCEDENDO (Lat. of not allowing tallage). The name given to the statutes 25 and 34 Edw. I., restricting the power of the king to grant tallage. Co. 2d Inst. 532; 2 Reeve, *Hist. Eng. Law* 104. See *TALLIAGE*.

DE UNA PARTE (Lat.). A deed *de una parte* is one where only one party grants, gives, or binds himself to do a thing to another. It differs from a deed *inter partes* (q. v.). See *DEED POLL*.

DE UXORE RAPTA ET ABDUCTA (Lat. of a wife ravished and carried away). A kind of writ of trespass. *Fitzh. N. B. 89, O; 3 Bla. Com. 139.*

DE VENTRE INSPICIENDO (Lat. of inspecting the belly). A writ to inspect the body where a woman feigns to be pregnant, to see whether she is with child. It lies for the heir presumptive to examine a widow suspected to be feigning pregnancy in order to enable a supposititious heir to obtain the estate. 1 Bla. Com. 456; 2 Steph. Com. 287; Cro. Eliz. 556; Cro. Jac. 635; 2 P. Wms. 693; 21 Vin. Abr. 547.

It lay also where a woman sentenced to death pleaded pregnancy; 4 Bla. Com. 495. This writ has been recognized in America; 2 Chandel. Am. Cr. Tr. 381.

DE VICINETO (Lat. from the neighborhood). The sheriff was anciently directed in some cases to summon a jury *de vicineto*; 3 Bla. Com. 360.

DE WARRANTIA CHARTÆ (Lat. of warranty of charter). This writ lieth properly where a man doth enfeof another by deed and bindeth himself and heirs to warranty. Now, if the defendant be impleaded in an assize, or in a writ of entry in the nature of an assize, in which actions he cannot vouch, then he shall have the writ against the feoffor or his heirs who made such warranty; *Fitzh. N. B. 184, D; Cowel; Termes de la Ley*; Blount; 3 Reeve, *Hist. Eng. Law* 55. Abolished by 3 & 4 Will. IV. c. 27.

DE WARRANTIA DIEI. A writ which lay for a party in the service of the king who was required to appear in person on a certain day, commanding the justices not to record his default, the king certifying to the fact of such service. *Fitzh. N. B. 36.*

DEACON. In Ecclesiastical Law. The lowest degree of holy orders in the Church of England. 2 Steph. Com. 660; *Mozley & W.*

DEAD BODY. A corpse.

There is no right of property, in the ordinary sense of the word, in a dead human body; Co. Inst. 202; 4 Bla. Com. 235; 99 Mass. 281; 10 R. I. 227; 31 Leg. Int. 268; 3 Edw. Ch. 155; 10 Cent. L. J. 303; 5 W. R. 313; 2 Wms. on Ex., 7th Am. ed. 165 n.; but there are rights attached to it which the law will protect; 10 Cent. L. J. 304; and for the health and protection of society, it is a rule of the common law, and this has been confirmed by statutes in civilized states and countries, that public duties are imposed upon public officers, and private duties upon the husband or wife and the next of kin of the deceased, to protect the body from violation and see that it is properly interred, and to protect it after it is interred; 1 Witthaus & Becker's Med. Jur. 297. The executors have a right to possession of it and it is their duty to bury it. 2 Wms. on Ex., 7th Am. ed. 165 n.; 10 Pick. 154; 42 Pa. 293. It was held in an English case that a direction by will as to the disposition of the testator's body cannot be enforced. In this case it was doubted as to whether it is lawful to burn a body, but the point was not decided; 20 L. R. Ch. D. 659; s. c. 21 Am. L. Reg. N. s. 508; but subsequently it was held that it was no misdemeanor to burn a body unless it was done in such a manner as to amount to a nuisance; 12 Q. B. D. 247.

The right to make testamentary direction concerning the disposal of the body has been conferred by statute in several states; e. g. New York, Maine, Oklahoma, and Minnesota. The question of the right of dis-

posal of the body is ably discussed by Mr. R. S. Guernsey in 10 Cent. L. J. 303, 325, and he concludes upon the authorities that in the absence of testamentary disposition the right and duty of burial devolves upon relatives "as follows: 1. Husband or wife. 2. Children. 3. If none—(1) Father. (2) Mother. 4. Brothers and sisters. 5. Next of kin according to the course of the common law, according to the law of descent of personal property;" *id.* 327. Probably the rule may be fairly stated that there be no husband or wife of the deceased, the nearest of kin in order of right to administration is charged with the duty of burial.

Where a widow ordered a funeral of her husband, it was held, that she was liable for the expense, although she was an infant at the time, the court holding that the expenses fell under the head of necessities, for which infants' estates are liable; 13 M. & W. 252.

The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial; 2 Den. 325. And every householder in whose house a dead body lies is bound by the common law, if he has the means to do so, to inter the body decently; and this principle applies where a person dies in the house of a parish or a union; 12 A. & E. 773. The expense for such burial may be paid out of the effects of deceased; 3 Camp. 298.

To disinter a dead body without lawful authority, even for the purpose of dissection, is a misdemeanor, for which the offender may be indicted at common law; 1 Russ. Cr. 414; 1 D. & R. 13; R. & R. 366, n. b; 4 Blackf. 328; 19 Pick. 304; 1 Greenl. 226. This offence is punished by statute in New Hampshire, in Vermont, in Massachusetts, in Wisconsin, in New York. See 1 Russ. 414, n. A. There can be no larceny of a dead body; 2 East, Pl. Cr. 652; 12 Co. 106; but may be of the clothes or shroud upon it; 13 Pick. 402; 12 Co. 113; Co. 3d Inst. 110; 1 Greenl. 226; 69 Mo. 208.

After the right of burial has once been exercised by the person charged with the duty of burial, or where such person has consented to the burial by another person, no right to the corpse remains except to protect it from unlawful interference; 43 N. J. Eq. 140; 11 Phila. 303; 10 B. & S. 298. But see 130 Mass. 422. An autopsy may be made by a physician at the tomb of the deceased, under legal direction and at the request of the relatives, for the purpose of ascertaining whether a crime has been committed in producing death, and he does not render himself liable by removing and keeping in his possession a portion of the skull of the deceased at the direction of the coroner; 78 Wis. 483. It is the duty of the coroner after death by violence to cause an autopsy to be made; the surgeon who makes it can recover from the county for his labor; 34 Pa. 301; 86 Ind. 154; 35 N. Y. 964. The matter of ordering autopsies and dissections of dead bodies, or exhuming them for that purpose, has been regulated by statutes in nearly all the states of the United States. See for collection of statutes relative to this entire subject, 1 Witthaus & Becker, Med. Jur. 304.

In England, where a son had removed, without leave, the body of his mother from the burial-ground of a congregation of Protestant dissenters, to bury it in church ground, it was held that he was guilty of a misdemeanor at common law, and that it was no defence to such a charge that his motives were pious and laudable; 1 Dears. & B. 160; s. c. 7 Cox, C. C. 214. But where the master of a workhouse, having as such the lawful possession of the bodies of paupers who died therein, and who therefore was authorized under the statute to permit the bodies of such paupers to undergo anatomical examination, unless to his knowledge the deceased person had expressed in his lifetime, in the manner therein mentioned, his desire to the contrary, "or unless the surviving husband or wife, or any known relative, of the deceased person, should re-

quire the body to be interred without such examination," in order to prevent the relatives of the deceased paupers from making this requirement, and to lead them to believe that the bodies were buried without dissection, showed the bodies to the relatives in coffins, and caused the appearance of a funeral to be gone through, and, having by this fraud prevented the relatives from making the requirement, then sold the bodies for dissection, he was held not to be indictable at common law; 1 Dears. & B. 590. When a *post mortem* examination is required by law, neither the coroner, nor the physician who performs it, nor the person in whose room it is held, will be liable to the relations of the deceased for injury to their feelings caused by the mutilations of the body; 32 Atl. Rep. (Md.) 177.

The preventing a dead body from being buried is also an indictable offence; 2 Term 734; 4 East 460; 1 Russ. Cr. 415, 416, note A. To inter a dead body found in a river, it seems, would render the offender liable to an indictment for a misdemeanor, unless he first sent for the coroner; 1 Ky. 250; or to cast it into a river without the rites of sepulchre; 1 Me. 226.

The purchaser of land upon which is located a burial ground may be enjoined from removing bodies therefrom, if he attempts to do so against the wishes of the relatives or next of kin of the deceased. Every interment is a concession of the privilege which cannot afterward be repudiated, and the purchaser's title to the ground is fettered with the right of burial; 2 Brewster (Pa.) 373. But the right of the municipal or state authorities, with the consent of the owner of the burial lot or in the execution of eminent domain, to remove dead bodies from cemeteries is well settled; 88 Pa. 42; 30 Ind. 483; 63 N. H. 17. To seize a dead body on pretence of arresting for debt is *contra bonos mores* and an extortion on the relatives; 4 East 460. And in some states there are statutes declaring it to be a misdemeanor to attach or seize under execution a dead body; Cal. Pen. Code § 295; Me. Rev. St. ch. 124, § 26; Mass. Pub. St. ch. 207, § 46; R. I. Pub. St. § 3222.

The law of Indiana (2 R. S. c. 473) prohibits the removal of a dead body without the consent of a near relative or of the deceased in his lifetime. The laws of Louisiana, California, Connecticut, Vermont, and Ohio, recognize the interest of the relatives of a deceased person in his body.

In 4 Bradf. Sur. 502, a learned report by S. B. Ruggles lays down these conclusions, substantially:—

1. Neither a corpse nor its burial is subject to ecclesiastical cognizance.
2. The right to bury a corpse and preserve it is a legal right.
3. Such right, in the absence of testamentary disposition, is in the next of kin (so in 13 Ind. 138).
4. The right to protect the corpse includes the right to preserve it by burial, to select the place of sepulture, and to change it at pleasure.
5. If the burial-place be taken for public use, the next of kin must be indemnified for removal and reinterment, etc. Approved by the Sup. Ct. N. Y. (1856).

A widow who allows her husband to be buried in a certain place may not disturb his remains; her right to the body of her deceased husband being terminated by the burial, and any further disposition of such body belonging thereafter exclusively to his next of kin; 42 Pa. 203. When one in accordance with his own wishes was buried in his own lot by his widow, and she removed his remains, she was ordered, in equity, to restore them; 10 R. I. 227; S. C. 14 Am. Rep. 672, and note. A son is not allowed to remove his father's remains against his mother's wishes; 18 Abb. N. C. 78; see 10 Alb. L. J. 70, with note. After interment, the control over a dead body is in the next of kin living. But if they differ about its disposal, equity will not help its removal. Where a corpse has been properly buried, it is doubtful if even the next of kin can remove it; 16 Am. L. Reg. 135, and note. Where a wife al-

lowed her husband's remains to be placed temporarily in a vault in New York, and his father removed them to his own vault, *Held*, that, in the absence of a request by the deceased husband in his lifetime, the widow might control the place of burial, but that she could not, under the circumstances, disturb their repose and take them to Kentucky; *Southworth v. Southworth*, in the New York Superior Court, 1881, reported in an article on this subject in 17 Can. L. J. 184. The husband having in a time of great distress of mind after his wife's death consented to her burial in a lot of the husbands of two of her sisters, and sought to remove her body to the lot owned by himself and his co-heirs, the defendants, being the lot owners, refused permission, and on application for injunction to restrain their interference, it was held that he had never consented to her burial in the lot as a final resting place, and that the defendants might be required by a court of chancery to permit the removal. Chief Justice Gray said: Neither the husband nor the next of kin, have, strictly speaking, any right of property in a dead body; but controversies between them as to the place of its burial are, in this country where there are no ecclesiastical courts, within the jurisdiction of a court of equity; 130 Mass. 423; 99 id. 281; 2 Bla. Com. 429; 60 How. Pr. 368.

See Bingham, *Christ. Antiq.*; Tyler, *Am. Eccl. Law*; Burton, *The Burial Question*; Cooley, *Torts* 280; *The Law of Burials*, Anon.; 1 Witthaus & Becker, *Med. Jur.* 297; note in 18 Abb. N. C. 75, containing a list of law literature on this and kindred topics; notes to *Moak's Eng. Rep.* 656; *BURIAL; CEMETERY; CORPSE*.

Disposition of. In the absence of a statute or testamentary disposition, the burial of the dead devolves upon the father or next of kin, who must shroud the corpse to avoid exposure, enclose it in a case and deposit it in a tomb, in respect to all which his choice is subject to no regulation, save that he shall refrain from all acts or omissions as would amount to a nuisance. 149 Ky. 498, 149 S. W. 871.

DEAD-BORN. A dead-born child is to be considered as if it had never been conceived or born; in other words, it is presumed it never had life, it being a maxim of the common law that *mortuus exiit non est exiit* (a dead birth is no birth). Co. Litt. 29 b. See 2 Paige, Ch. 35; 4 Ves. 334.

This is also the doctrine of the civil law. Dig. 50. 16. 129. *Non nasci, et natum mori, pari sunt* (not to be born, and to be born dead, are equivalent). La. Civ. Code, art. 28; Domat, liv. préf. t. 2, s. 1, nn. 4, 6.

DEAD FREIGHT. The amount paid by a charterer for that part of the vessel's capacity which he does not occupy although he has contracted for it.

When the charterer of a vessel has shipped part of the goods on board, and is not ready to ship the remainder, the master, unless restrained by his special contract, may take other goods on board, and the amount which is not supplied, required to complete the cargo, is considered *dead freight*. The dead freight is to be calculated according to the actual capacity of the vessel. 3 Chit. Com. Law 399; 2 Stark. 450; McCull. Com. Dic. See L. R. 6 Q. B. 528.

DEAD LETTER ACT. See OB-SOLETE.

DEAD LETTERS. Letters transmitted through the mails according to direction, and remaining for a specified time uncalled for by the persons addressed, are called dead letters.

By the act to amend the laws relating to the post-office department, June 8, 1872, the postmaster-general is authorized to regulate the times at which undelivered letters shall be sent to the dead-letter office, and for their return to the writers; and to have published a list of undelivered letters—by writing, posting, or advertising—in his discretion. If advertised, it must be in the newspaper of largest circulation regularly published within the delivery, and in case of dispute as to the calculation of com-

puting newspapers, the postmaster may receive evidence and decide upon the fact. If no daily paper is published within the delivery, then the list may be advertised in the daily paper of adjoining delivery. One cent to be paid the publisher for each letter advertised. Letters addressed in a foreign language may be advertised in the journal of that language most used. Such journal must be in the same or adjoining district.

Dead letters containing valuables shall be registered in the department; and if they cannot be delivered to the person addressed, or to the writer, the contents, so far as available, shall be included in receipts of department, subject to reclamation within four years; and such letters, containing valuables not available, shall be disposed of as the postmaster-general shall direct; the proceeds therefrom to be turned into the Treasury as a part of the postal revenues. U. S. Rev. Stat. sec. 398.

Foreign dead letters remain subject to treaty stipulations.

The postage on a return dead letter is two cents, the single rate, unless it is registered as valuable, when double rates are charged.

By the act of July 1, 1864, c. 197, sect. 18, the contents of dead letters which have been registered in the department, so far as available, shall be used to promote the efficiency of the dead-letter office.

Dead matter is thus classified by the post-office department: uncalled or refused by the party addressed; that which, from its nature, as obscene or relating to lottery, cannot be delivered; fictitious or indefinite address; fraudulent. See POSTAGE.

DEADLY WEAPON. See DANGEROUS WEAPON; ARMS. SEE WEAPON.

DEAD MAN'S PART. That portion of the personal estate of a person deceased which by the custom of London became the administrator's.

If the decedent left wife and children, this was one-third of the residue after deducting the widow's chamber; if only a widow, or only children, it was one-half; 1 P. Wms. 341; Salk. 246; if neither widow nor children, it was the whole; 2 Show. 175. This provision was repealed by the statute 1 Jac. II. c. 17, and the same made subject to the statute of distributions. 2 Bla. Com. 518. See CUSTOM OF LONDON.

DEADMAN'S PLACE. See PRIVILEGED PLACES.

DEAD'S PART. In Scotch Law. The part remaining over beyond the shares secured to the widow and children by law. Of this the testator had the unqualified disposal. Stair, Inst. lib. iii. tit. 4, § 24; Bell, Dict.; Paterson, Comp. §§ 674, 848, 902. See LEGITIM.

DEAD-PLEDGE. A mortgage; *mortuum vadium*.

DEAF AND DUMB. A person deaf and dumb is *doli capax*; but with such persons who have not been educated, and who cannot communicate their ideas in writing, a difficulty sometimes arises on the trial.

A case occurred of a woman deaf and dumb who was charged with a crime. She was brought to the bar, and the indictment was then read to her; and the question, in the usual form, was put, Guilty or not guilty? The counsel for the prisoner then rose, and stated that he could not allow his client to plead to the indictment until it was explained to her that she was at liberty to plead guilty or not guilty. This was attempted to be done, but was found impossible, and she was discharged from the bar *simpliciter*. Case of Jean Campbell, 1 Wh. & St. Med. Jur. § 468. When the party indicted is deaf and dumb, he may, if he understands the use of signs, be arraigned, and the meaning of the clerk who addresses him conveyed to him by signs, and his signs in reply explained to the court, so as to justify his trial and the infliction of punishment; 14 Mass. 207; 1 Leach 102; 1 Chit. Cr. L. 417. See 8 Jones, N. C. 136. It was formerly said that persons deaf and dumb were presumably idiots; 1 Hale, P. C. 34; but that doctrine was formulated at a period when the subject of the education of such unfortunate persons had received little or no attention. Such, baldly stated, is unquestionably not the rule of law. One deaf and dumb is not *consequently* insane, and his capacity appearing, he may be tried; 1 Bish. Cr. L. § 395; the ordinary presumption of sound mind and criminal responsibility, as was said by Gilpin, C. J., in a case of homicide by a person so afflicted, "does not apply to a deaf and dumb person when charged

with the commission of a crime. On the contrary, the legal presumption is then directly reversed; for in such case it is incumbent upon the prosecution to prove to the satisfaction of the jury that the accused had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act at the time when it was committed by him, and had a knowledge and consciousness that the act he was doing was wrong and criminal and would subject him to punishment; 1 Houst. Cr. Rep. 391. In that case the prisoner was acquitted "under circumstances wherein plainly they would not have done it if he had been endowed with hearing and speech;" 1 Bish. Cr. L. § 395.

A person deaf and dumb may be examined as a witness, provided he can be sworn; that is, if he is capable of understanding the terms of the oath, and assents to it, and if, after he is sworn, he can convey his ideas, with or without an interpreter, to the court and jury; Phill. Ev. 14. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that as the more satisfactory method; but, if his knowledge of that method is imperfect, he will be permitted to testify by means of signs; 1 Greenl. Ev. § 366; Tayl. Ev. 1170.

DEAF, DUMB, AND BLIND. A man born deaf, dumb, and blind was formerly considered an idiot (*q. v.*). Fitch, N. B. 233; 1 Bla. Com. 304. But this is only a legal presumption and is open to be rebutted by evidence of capacity; *id.*, Sherwood's note 23; 1 Chit. Med. Jur. 301, 345; 4 Johns. Ch. 44; 3 Ired. 538.

DEAFFOREST. In Old English Law. To discharge from being forest. To free from forest laws.

DEAL. To deal is to traffic, to transact business, to trade. 8 A. & E. Ency. L. 2nd ed., 346. See DEALER.

DEALER. A dealer in the popular, and therefore in the statutory sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. 27 Pa. 494; 33 *id.* 385.

He stands intermediately between the producer and the consumer, and depends for his profit, not upon the labor he bestows upon his commodities, but upon the skill and foresight with which he watches the markets. 8 A. & E. Ency. L. 2nd ed. 346.

DEAN. In Ecclesiastical Law. An ecclesiastical officer, who derives his name from the fact that he presides over ten canons, or prebendaries, at least.

There are several kinds of deans, namely: deans of chapters; deans of peculiars; rural deans; deans in the colleges; honorary deans; deans of provinces.

See RURAL DEAN.

DEAN AND CHAPTER. In Ecclesiastical Law. The council of a bishop, to assist him with their advice in the religious and also in the temporal affairs of the see. 3 Co. 75; 1 Bla. Com. 382; Co. Litt. 103, 300; *Termes de la Ley*; 2 Burn, Eccl. Law 120.

DEAN OF THE ARCHES. The presiding judge of the court of arches. He was also an assistant judge in the court of admiralty. 1 Kent 371; 3 Steph. Com. 727.

DEATH. The cessation of life. The ceasing to exist.

Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them, is considered as dead.

A person convicted and attainted of felony and sentenced to the state prison for life, in the state of New York, in consequence of the act of 29th of March, 1790, and by virtue of the conviction and sentence of imprisonment for life, to be considered as civilly dead; 6 Johns. 118; 4 *id.* 228, 260. And a similar doctrine anciently prevailed in other cases at common law in England. See Co. Litt. 133; 1 Sharw. Bla. Com. 132, n.

Natural death is the cessation of life.

It is also used to denote a death which occurs by the unassisted operation of natural causes, as distinguished from a violent death, or one caused or accelerated by the interference of human agency.

In Medical Jurisprudence. The cause, phenomena, and evidence of violent death are of importance.

An ingenious theory as to the cause of death has been brought forward by Philip, in his work on Sleep and Death, in which he claims that to the highest form of life three orders of functions are necessary, viz.: the muscular, nervous, and sensorial; that of these the two former are independent of the latter, and continue in action for a while after its cessation; that they might thus continue always, but for the fact that they are dependent on the process of respiration; that this process is a voluntary act, depending upon the will, and that this latter is embraced in the sensorial function. In this view, death is the suspension or removal of the sensorial function, and that leads to the suspension of the others through the cessation of respiration. Philip, Sleep & D.; Dean, Med. Jur. 413 *et seq.*

Its phenomena, or signs and indications.

Real is distinguishable from apparent death by the absence of the heart-beats and respiration. These conditions are, however, not always easy to determine positively when the following tests may be applied:—1. Temperature of body the same as the surrounding air. 2. Intermittent shocks of electricity at different tensions give no indications of muscular irritability. 3. Movements of the joints of the extremities and of the jaw showing more or less *rigor-mortis*. 4. A bright needle plunged into the biceps muscle and left there showing no signs of oxidation on withdrawal (Cloquet's test). 5. The opening of a vein showing that the blood has coagulated. 6. The subcutaneous injection of ammonia causing a dirty brown stain (Monte Verde's test). 7. A fillet applied to the arm causing no filling of the veins on the distal side of the fillet (Richardson's test). 8. "Diaphanous test"; after death there is an absence of the translucence seen in the living when the hand is held before a strong light with the fingers extended and in contact. 9. "Eye test": after death there is loss of pupillary reaction to light and to anhydriatics, and there is also loss of corneal transparency; H. P. Loomis in Witthaus & Becker, Med. Jur.

Its evidence when produced by violence. This involves the inquiry as to the cause of death in all cases of the finding of bodies divested of life through unknown agencies. It seeks to gather all the evidence that can be furnished by the body and surrounding circumstances bearing upon this difficult and at best doubtful subject. It more immediately concerns the duties of the coroner, but is liable to come up subsequently for a more thorough and searching investigation. As this is a subject of great, general, and growing interest, no apology is deemed necessary for presenting briefly some of the points to which inquiry should be directed, together with a reference to authorities where the doctrines are more thoroughly discussed.

The first point for determination is, whether the death was the act of God or the result of violence. Sudden death is generally produced by a powerful invasion of the living forces that develop themselves in the heart, brain, or lungs—the first being called *syncope*, the second *apoplexy*, and the third *asphyxia*. Dean, Med. Jur. 426.

The last two are the most important to be understood in connection with the subject of persons found dead.

In death from *apoplexy*, the sudden invasion of the brain destroys innervation, by which the circulation is arrested, each side of the heart containing its due proportion of blood, and the cavities are all distended from loss of power in the heart to propel its contents. Death from *apoplexy* is disclosed by the appearances revealed by dissection, particularly in the brain.

Death by *asphyxia* is still more important to be understood. It is limited to cases where the heart's action is made to cease through the interruption of the respiration. It is accomplished by all the possible modes of excluding atmospheric air from the lungs. The appearances in the body indicating death from *asphyxia* are, violet discolorations, eyes prominent, firm, and brilliant, cadaveric rigidity early and well marked, venous system of the brain full of blood, lungs distended with thick dark-colored blood, liver, spleen, and kidneys gorged, right cavities of the heart distended, left

almost empty.

Many indications as to whether the death is the act of God or the result of violence may be gathered from the position and circumstances in which the body is found. As thorough an examination as possible should be first made of the body before changing its position or that of any of the limbs, or varying in any respect its relations with surrounding bodies. This is more necessary if the death has been apparently caused by wounds. Then the wounds require a special examination before any change is made in position, in order from their nature, character, form, and appearance to determine the instrument by which they were inflicted, and also their agency in causing the death. Their relations with external objects may indicate the direction from which they were dealt, and, if incised, their extent, depth, vessels severed, and hemorrhage produced may be conclusive as to the cause of death.

A thorough examination should be made of the clothes worn by the deceased, and any parts torn or presenting any unusual appearance should be carefully noted. A list should be made of all articles found on the body, and of their state and condition. The body itself should undergo a very careful examination. This should have reference to the color of the skin, the temperature of the body, the existence and extent of the cadaveric rigidity of the muscular system, the state of the eyes and of the sphincter muscles, noting at the same time whatever swellings, ecchymoses, or livid, black, or yellow spots, wounds, ulcers, contusions, fractures, or luxations, may be present. The fluids that have exuded from the nose, mouth, ears, sexual organs, etc., should be carefully examined: and when the deceased is a female, it will be proper to examine the sexual organs with care, with a view of ascertaining whether before death the crime of rape had or had not been committed.

Another point to which the attention should be directed is, the state of the body in reference to the extent and amount of decomposition that may have taken place in it, with the view of determining when the death took place. This is sometimes important to identify the murderer. The period after death at which putrefaction supervenes became a subject of judicial examination in Desha's case, reported in Dean, Med. Jur. 423 *et seq.*, and more fully in 2 Beck, Med. Jur. 44 *et seq.* Another interesting inquiry, where persons are found drowned, is presented in the inquiry as to the existence of *adipocere*, a compound of a yellowish-white color, consisting of calcareous or ammoniacal soap, which is formed in bodies immersed in water in from eight weeks to three years from the cessation of life. Tayl. Med. Jur., Hartsh. ed. 542; 1 Ham. Leg. Med. 104.

Another point towards which it is proper to direct examination regards the situation and condition of the place where the body is found, with the view of determining two facts:—*first*, whether it be a case of homicide, suicide, or visitation of God; and, *second*, whether, if one of homicide, the murder occurred there or at some other place, the body having been brought there and left. The points to be noted here are whether the ground appears to have been disturbed from its natural condition; whether there are any, and what, indications of a struggle; whether there are any marks of footsteps, and, if any, their size, number, the direction to which they lead, and whence they came; whether any traces of blood or hair can be found; and whether any, or what, instruments or weapons, which could have caused death, are found in the vicinity; and all such instruments should be carefully preserved, so that they may be identified. Dean, Med. Jur. 257; 2 Beck, Med. Jur. 107, nn. 136, 250.

As the decision of the question relating to the cause of death is often important and difficult to determine, it may be proper to notice some of its signs and indications in a few of the most prominent cases where it is induced by violence.

Death by drowning is caused by asphyxia

from suffocation, by nervous or syncopal asphyxia, or by asphyxia from cerebral congestion.

In the first, besides other indications of asphyxia, the face is pale or violet, a frothy foam at the mouth, froth in the larynx, trachea, and bronchia, water in the trachea and, sometimes, in the ramifications of the bronchia, and also in the stomach. In the second, the face and skin are pale, the trachea empty, lungs and brain natural, no water in the stomach. In the third, the usual indications of death by apoplexy are found on examination of the brain. See 1 *Hann. Leg. Med.* 120.

Death by hanging is produced by asphyxia suspending respiration by compressing the larynx, by apoplexy pressing upon the veins and preventing the return of blood from the head, by fracture of the cervical vertebrae, laceration of trachea or larynx, or rupture of the ligaments of the neck, or by compressing the nerves of the neck. The signs and indications depend upon the cause of death. Among these are, face livid and swollen, lips distorted, eyelids swollen, eyes red and projecting, tongue enlarged, livid, compressed, froth about the lips and nostrils, a deep ecchymosed mark of the cord about the neck, sometimes ecchymosed patches on different parts of the body, fingers contracted or clenched, and the body retaining its animal heat longer than in other modes of death.

Death by strangulation presents much the same appearances, the mark of the cord being lower down on the neck, more horizontal, and plainer and more distinctly ecchymosed.

Death by cold leaves few traces in the system. Pale surface, general congestion of internal organs, sometimes effused serum in the ventricles of the brain.

Death by burning presents a narrow white line surrounding the burnt spot; external to that, one of a deep-red tint, running by degrees into a diffused redness. This is succeeded in a few minutes by blisters filled with serum.

Death by lightning usually exhibits a contuse or lacerated wound where the electric fluid entered and passed out. Sometimes an extensive ecchymosis appears,—more commonly on the back, along the course of the spinal marrow.

Death by starvation produces general emaciation; eyes and cheeks sunken; bones projecting; face pale and ghastly; eyes red and open; skin, mouth, and fauces dry; stomach and intestines empty; gall-bladder large and distended; body exhaling a fetid odor; heart, lungs, and large vessels collapsed; early commencement of the putrefactive process.

These and all other questions relating to persons found dead will be found fully discussed in works on medical jurisprudence.

By Opium. "Death by opium" means not the accidental or involuntary, but the rational and voluntary use of opium. 6 *Bush (Kv.)* 271.

The Legal Consequences. Persons who have been once shown to have been in life are always presumed thus to continue until the contrary is shown; so that the burden is on the party asserting the death to make proof of it; 2 *East* 312; 2 *Rolle* 461. But proof of a long continued absence unheard from and unexplained will lay a foundation for presumption of death; 155 *Mass.* 461; 83 *Me.* 289; 83 *Ky.* 219; but where an heir at law and devisee marries in the state and afterwards removes with their children to the west, and nothing is heard of him or them for forty-five or fifty years by any of their relations living in the state, the court will not instruct the jury to presume that they were all dead without issue; 6 *Houst.* 447. Various periods of time are found in the adjudged cases to warrant such presumption. It was held to arise after twenty-seven years; 3 *Bro. C. C.* 510; twenty years, sixteen years; 5 *Ves.* 458; 155 *Mass.* 359; fourteen years; 3 *S. & R.* 390; twelve years; 18 *Johns.* 141; eleven years; 7 *Mackey* 268. The general rule, as now understood, is that the presumption of the duration of life ceases at the expiration of seven

years from the time when the person was last known to be living; 1 *Phil. Ev.*, 4th *Am. ed.* 640; 1 *Greenl. Ev.* § 41; *Tayl. Ev.* 216; 5 *Johns.* 263; 5 *B. & Ad.* 86; 11 *Ky. L. Rep.* 219; 126 *Pa.* 297; 69 *Tex.* 19. There are cases, however, where a presumption of death may be raised from even a shorter absence; 45 *Minn.* 159; 125 *N. Y.* 610; and while seven years is the period in which the presumption of continued life ceases, yet this period may be shortened by proof of such facts and circumstances as, submitted to the test of experience, would force a conviction of death within a shorter period; 71 *Fed. Rep.* 258; 97 *U. S.* 628; 180 *Mass.* 505; 18 *Neb.* 664; but the law raises no presumption as to the exact time of death; 97 *U. S.* 628; 73 *Wis.* 170. See article in 2 *Harv. L. Rev.*; 84 *Sol. Journ.* 247. It seems that such continued absence for seven years from the particular state of his residence, without showing an absence from the United States, is sufficient; 10 *Pick.* 515; 1 *Rawle* 373; 1 *A. K. Marsh.* 278; 1 *Penning.* 167; 2 *Bay* 476; but the statutory presumption of the death of a person will not be received until all reasonable doubt of his death, at a given time, is removed; 49 *N. J. Eq.* 420. There are cases, however, in which an absence of seven years will not raise a presumption of death without issue, as where it is probable that the failure to communicate with friends is intentional; 66 *Hun* 266. See *ESCHÉAT*.

The record of the probate of a will is not competent evidence of death; 60 *N. Y.* 121; *S. C.* 19 *Am. Rep.* 144, and note. But it is held that where a foreign court of competent jurisdiction has made a grant of administration on the presumption of death, such grant may be accepted by the court of probate as sufficient proof of the death; [1892] *Prob.* 255. A letter contained in an envelope requesting a return to the writer, if not called for, and showing the post office stamp that it had been returned to the writer, is admissible as affording ground for an inference, more or less strong, of the death of the addressee; 63 *Vt.* 667.

Questions of great doubt and difficulty have arisen where several persons, respectively entitled to inherit from one another, happen to perish all together by the same event, such as a shipwreck, a battle, or a conflagration, without any possibility of ascertaining who died first. In such cases the French civil code and the civil code of Louisiana lay down rules (the latter copying from the former) which are deduced from the probabilities resulting from the strength, age, and difference of sex of the parties.

If those thus perishing together were under fifteen, the eldest shall be presumed the survivor. If they were all above sixty, the youngest shall be presumed the survivor. If some were under fifteen and others above sixty, the former shall be presumed the survivors. If those who have perished together had completed the age of fifteen and were under sixty, the male shall be presumed the survivor where the ages are equal or the difference does not exceed one year. If they were of the same sex, that presumption shall be admitted which opens the succession in the order of nature; and thus the younger must be presumed to have survived the elder. *French Civ. Code*, art. 720-722; *La. Civ. Code*, art. 930-933; 76 *Cal.* 649.

The English common law has never adopted these provisions, or gone into the refinement of reasoning upon which they are based. It requires the survivorship of two or more to be proved by facts, and not by any settled legal rule or prescribed presumption. In some of the cases that have arisen involving this bare question of survivorship, the court have advised a compromise, denying that there was any legal principle upon which it could be decided. In others, the decision has been that they all died together, and that none could transmit rights to others; 1 *W. Bla.* 640; *Fearne, Posth. Works* 33, 39; 2 *Phill.* 261; *Cro. Eliz.* 503; 1 *Metc. Mass.* 308; 3 *Hagg. Ecc.* 748; 5 *B. & Ad.* 91; 1 *Y. & C. Ch.* 121; 1 *Curt.* 405, 429; 23 *Kan.* 276; 3 *Redf.* 87; [1892] *Prob.* 143; 73 *Me.* 403; that is, the one who bears the burden of proof of survivorship fails in

his case; 75 *N. Y.* 78. Where a mother and daughter die in the same year, but there is no evidence of the precise date of the death of the mother, an assumption that she died before the daughter is not warranted; 81 *Tex.* 678.

Where the death of two or more persons result from a common disaster, the case must be determined upon its own peculiar facts and circumstances, whenever the evidence is sufficient to support a finding as to survivorship; 73 *Wis.* 445.

Where land has been sold on administration proceedings under a petition alleging the decease of a person because of his disappearance from home and failure to hear from him for a period of seven years, he cannot on his return recover it in ejectment against innocent purchasers who have taken possession and made valuable improvements; 5 *Wash. St.* 309.

As to contracts. These are, in general, not affected by the death of either party. The executors or administrators of the decedent are required to fulfill all his engagements, and may enforce all those in his favor. But to this rule there are the following exceptions, in which the contracts are terminated by the death of one of the parties:—

The contract of marriage. See *MARRIAGE*. The contract of partnership. See *PARTNERSHIP*.

Those contracts which are altogether personal: as, where the deceased has agreed to accompany the other party to the contract on a journey, or to serve another; *Pothier, Obl. c. 7, art. 3, §§ 2, 3*; 24 *Fed. Rep.* 588; or to instruct an apprentice; *Bacon, Abr. Executor, P*; 1 *Burn, Eccl. Law* 82; *Hamm. Partn.* 157; *Ans. Contr.* 325; 1 *Rawle* 61; also an instance of this species of contract in 2 *B. & Ad.* 303. In all those cases where one is acting for another and by his authority, such as agencies and powers of attorney, where the agency or power is not coupled with an interest, the death of the party ordinarily works a revocation; 8 *Wheat.* 174; 83 *Pa.* 228. Where the power is to transfer stock, signed by the seller of the stock, it is not revoked by his death; 31 *W. N. Cas. Pa.* 502. See *AGENCY*.

As to torts. In general, when the tortfeasor or the party injured dies, the cause of action dies with him; but when the deceased might have waived the tort and maintained assumpsit against the defendant, his personal representative may do the same thing. See *ACTIO PERSONALIS MORITUR CUM PERSONA*, where this subject is more fully examined.

As to crimes. When a person accused of crime dies before trial, no proceedings can be had against his representatives or his estate.

As to inheritance. By the death of a person seized of real estate or possessed of personal property, his property real and personal, after satisfying his debts, vests, when he has made a will, as he has directed by that instrument; but if he dies intestate, his real estate goes to his heirs at law under the statute of descents, and his personal to his administrators, to be distributed to the next of kin, under the statute of distributions.

In suits. At common law an original suit abated by reason of the death of the plaintiff; 6 *Wait, Act. & Def.* 400; 24 *Miss.* 192; but in most of the states and England it is otherwise, and the personal representatives may become parties and prosecute the suit; *Wms. Ex.*, 7th *Am. ed.* pt. ii. §. iii. ch. 4, and American note thereto, pp. 91, 99. In one state, Delaware, there is a constitutional provision that no action shall abate by the death of a party; *Del. Const.* art. 6, § 18. The English practice and rules under the procedure acts will be found in the chapter of *Williams on Executors* above cited and a reference to the American statutes in the note thereto. In case of the death of a plaintiff the usual practice is to make a suggestion of it to the court which is entered of record; and in case of the death of a defendant his executor or administrator may be made a party, either by *scire facias*, or motion for an order of revivor, or other proceeding for giving due notice to the representative, according to

the varying practice of the several states. See *ABATEMENT*.

The death of a defendant will discharge the special bail; Tidd, R. 243; but when he dies after the return of the *ca. sa.* and before it is filed, the bail are fixed; 6 Term 284; 5 Binn. 333, 338; 2 Mass. 485; 12 Wheat. 604; 4 Johns. 407; 4 N. H. 29; 45 Ala. 53; 67 How. Fr. 178.

DEATH-BED DEED. A deed made by one who was at the time sick of a disease from which he afterwards died. Bell, Dict.

DEATH DUTIES. Death duties were established by the Roman and ancient law, and by the modern laws of France, Germany and other continental countries, England and her colonies, and an examination of all shows that tax laws of this nature rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit or the transmission from the dead to the living on which such taxes are more immediately vested. 178 U. S. 42.

A tax of this kind has been defined as "an exaction made by the State in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate." 76 Conn. 241; 153 N. Y. 1, 4.

Soon after the organization of the Federal government Congress imposed death duties, and has used this mode of taxation at intervals until the present time. The same mode of taxation has been practiced by many of the State legislatures.

Constitutionality of. The constitutions of many of the States contain, in some form, the maxim "taxation should be equal and uniform." This maxim . . . caused a difficulty which was most keenly felt when courts were called upon to reconcile the unquestioned power of taxation, through the imposition of death duties, with the constitutional provision requiring uniformity and equality in taxation. Such legislation generally involved, and in some instances to a marked degree, the violation of the rule of uniformity in rate and of equality in operation. The difficulty was overcome partly through an application of the theory, found useful in other tax troubles, that the rule of equality did not apply to the people as a whole, or to property in general, but only to persons and property after they had been classified for purposes of taxation.

More reliance, however, was placed upon the theory that imposition of death duties is not taxation within the meaning of the troublesome maxim; that inasmuch as the process by which the State assumes the care of property upon the death of its owner and secures its distribution to the objects designated by him in his will, or to the persons designated by the law of intestacy, is the creature of statute, which the State may alter or abrogate at pleasure, therefore the power of its owner to so transfer property, through his death, and of his legatee or the distributee of his estate to so receive the property, is a privilege granted by the State, which may properly dictate the terms on which the privilege may be enjoyed. Upon this theory, laws for collecting taxes by way of death duties, which disregard uniformity in rate and involve gross inequality in operation, have been held valid by courts of last resort in States whose constitutions require uniformity and equality in taxation. 76 Conn. 242, 243.

DEATH DUTIES. In England, duties payable on the devolution of property at death. Those now commonly payable are Estate Duty, Succession Duty, and Legacy Duty. Another death duty payable from 1894 to 1914 was Settlement Estate Duty. Three other death duties are Temporary Estate Duty, now wholly abolished, Probate Duty which is still payable but only to a small extent, and Account Duty which would appear to be still payable in some cases. Byrne.

DEATH'S PART. See *DEAD'S PART* *DEAD MAN'S PART*.

DEBAUCH. To corrupt one's manners, to make lewd, to mar or spoil; to seduce and vitiate a woman. 2 Hilt. 329.

In an action for damages for crim. con., the allegation being that defendant seduced and debauched the plaintiff's wife, *whereby* her affections were alienated, etc., if the charge of adultery be not proved, the word *debauch* in the petition will not support a verdict for damages for alienation of affection; 47 Iowa 409.

It is a word of French origin which has come into use in our language in the sense of enticing and corrupting.

From the French word *debauche* (meaning, literally, from the shop). Original English signification was, to entice or draw one away from his work, employment, or duty; later acquired the additional meaning, to "seduce" a woman, which was extended to include "seduce and violate" a woman, the sense in which it is most generally used at present. 8 A. & E. Ency. L. 2nd ed., 958. See *DEBAUCHERY*.

DEBAUCHERY. The term *debauchery* is not a legal or technical term. To *debauch* is to corrupt in morals or principles; to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to *debauch*. *Debauchery* then, is an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence, taking up of vicious habits. 227 U. S. 331.

DEBENTURE (from *debentur mihi*, Lat., with which various old forms of acknowledgments of debt commenced). A certificate given in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer for drawback of duties on merchandise imported and exported by him, provided the duties on the said merchandise shall have been discharged prior to the time aforesaid. U. S. Rev. Stat. §§ 3037-40.

In some government departments a term used to denote a bond or bill by which the government is charged to pay a creditor or his assigns the money due on auditing his account.

An instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property, payable to a given person, etc., and usually constituting one of a series of similar instruments. Cavanagh, Mon. Sec. 267. See 56 L. J. R. Ch. D. 815; Brice, *Ultra Vires*, 2d ed. 279.

A charge in writing of certain property, with the repayment at a time fixed of money lent by a person therein named at a given interest. It is frequently resorted to by public companies to raise money for the prosecution of their undertakings. The period is usually three, five, or seven years, and the amounts £50, £100, or £500, or some amounts divisible by ten. Wharton.

It is difficult to find in the books any statement approaching a definition of this class of securities. As a rule, both text writers and courts content themselves with a statement of inability to define them. A late English writer says:—"No one seems to know exactly what a debenture means." Buckley, Companies Act 169; and Chitty, J., said in one case that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture." 37 Ch. D. 230, 234; but in the same case North, J., would not go so far. In another case the same judge (Chitty) said: "The term itself imports a debt and acknowledgment of a debt, and generally if not always imports an obligation to pay." 30 Ch. D. 215; and again in another case he thus expresses the doubt existing as to the exact legal idea involved in the expression: "So far as I am aware, the term debenture has never received any precise legal definition. It is, comparatively speaking, a new term. I do not mean a new term in the English language, because there is a passage in Swift (quoted in Latham's Dict.) where the term debenture is used." The lines referred to are:

"You modern wits, should each man bring his claim,
Have desperate debentures on your fame;
And little would be left you, I'm afraid,
If all your debts to Greece and Rome were paid."

And the judge continued: "But although it is not a term with any legal definition, it is a term which has been used by lawyers frequently with reference to instruments under acts of parliament, which, when you turn to the acts themselves, are not so described;" 56 L. J. Ch. 817.

An American authority on corporate securities says:—"Debentures, which are the commonest

form of security issued by English corporations, are defined to be instruments under seal creating a charge according to their wording upon the property of the corporation, and to that extent conferring a priority over subsequent creditors and over existing creditors not possessed of such charge. This is the true and proper use of the term; although it is frequently applied on the one hand to instruments which do not confer a charge and which are nothing more than ordinary unsecured bonds, and on the other to instruments which are more than a mere charge, being in effect mortgages, and are properly termed mortgage debentures;" Jones, Corp. B. & M. § 82.

In the case of an instrument engaging for the payment of "the amount of this debenture," with coupons for interest payable half-yearly, Grove, J., said: "In the several dictionaries which we are in the habit of consulting, no satisfactory definition can be found, and neither of the learned counsel has been able to afford us any. I do not remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body deriving power by act of parliament or otherwise to increase its capital by borrowing money." It was something different from a promissory note, having a different stamp duty, different form, and a special mode of paying interest. The paper was held a debenture and subject to a higher stamp duty than a promissory note. In the same case Lindley, J., said that what were known as debentures were of various kinds:—mortgage debentures which were charges on some kinds of property, debenture bonds which were not, debentures which were nothing more than an acknowledgment of indebtedness and "a thing like this which is something more;" 7 Q. B. D. 165.

Debentures may be issued by a single person, a firm, or corporation, and it is an attribute implied in the definition of debenture that the holders are entitled without priority among themselves. They are, it is said, usually made a primary charge on the corporate property or undertaking, and as such will have priority over judgments obtained by general creditors and over the claims of shareholders; Cav. Mon. Sec. 358. "Such debentures are in effect statutory mortgages. . . . In England each creditor is secured by a separate mortgage, while in America one secures all; and by statute in England, holders of mortgage debentures have no priority *inter se*." Jones, Corp. B. & M. Sec. 32.

Sometimes the nature of a debenture holder's charge is that of a floating mortgage or security attaching only to the subjects which are for the time being the property of the company, and not preventing the latter from disposing of the subject charged free from incumbrance; *id.*; L. R. 15 Ch. D. 485; 10 *id.* 530.

A debenture is distinguished (1) from a mortgage which is an actual transfer of property, (2) from a bond which does not directly affect property, and (3) from a mere charge on property which is individualized and does not form part of a series of similar charges; Cav. Mon. Sec. 267, citing L. R. 10 Ch. D. 530, 681; 15 *id.* 485; 21 *id.* 762; L. R. 7 App. Cas. 673. Debentures strictly so called differ from mortgages in not conferring on the grantee the legal title or any of the ordinary rights of ownership of the property upon which the charge is created. A leading American writer says of this class of securities as understood in England that the charge created by them confers only equitable rights either as against other creditors or as against the corporation creating them. It is a test whether an instrument is a debenture or mortgage to ascertain whether the holder has any legal right to interfere with the company's use or control of the property in whatever way it pleases. If the instrument confers a charge, which can be protected and enforced only in equity it is strictly a debenture; Jones, Corp. B. & M. § 82. See 10 H. L. C. 191. Of course, the effect and extent of the charge depend entirely upon the language used; L. R. 2 Ch. D. 337.

A debenture holder in England differs from a mortgagee in that the latter has a lien upon tolls and traffic receipts and may have a receiver appointed while the former has not; Jones, Corp. B. & M. § 232; 2 Ir. Eq. 524; L. R. 7 Ch. 655.

Debentures issued by an English company owning land in Italy and binding their "assets, property, and effects" were held to create no mortgage or lien; 26 W. R. 123; and debenture bonds, principal and interest payable to bearer, secured by mortgage of the company to certain persons as trustees for the holders, which was void for non-recording, were held to create no charge; 19 Q. B. D. 568.

Where a company had power "to issue bonds, debentures, or mortgage debentures," which would entitle holders to be paid *pari passu* out of the company's property, evidences of debt expressed as "obligations" by which the company bound "themselves and their successors and all their estate property, etc.," were held to be debentures and to create a charge; 10 Ch. Div. 530.

Where a number of debentures are sealed one after another in numerical order they *prima facie* rank in priority accordingly, but if it is so provided, they rank *pari passu*; 21 Ch. D. 782; 38 *id.* 156, 171; Buckley, Companies Acts 172.

Debentures are not issued until they are delivered; *id.*; 34 Ch. D. 58.

The exact nature of debentures has been much discussed in England as arising in cases where the question was whether a paper required registration under the Bills of Sales Act which excepted from its provisions "debentures" issued by any mortgage, loan, or other incorporated company and secured upon the capital stock or goods, chattels, and effects of such company.

A memorandum of agreement which contained a covenant by a company to pay to each of nine persons, who were mentioned in it as lenders, the sum set opposite their names *pari passu*, and charged all the property of the company, was a debenture; per Chitty, J., 36 Ch. D. 215; and the covering deed which usually accompanies debentures as a security for the payment of the debentures when due is not a debenture; 34 Ch. D. 43.

A mere memorandum in writing by a coal and fireclay working and brick-making company, of a deposit with bankers of title deeds, as a security for balances due or to become due, but which did not admit any specific debt, or contain an agreement to pay otherwise than by an agreement to execute a legal mortgage, was not a debenture; 37 Ch. D. 281.

The act referred to speaks of "debentures issued . . . and secured upon," and an English writer of authority considers that this means a borrowing money for the benefit of several lenders; Buckley, Companies Acts 170; but it has been held that the statutory term debenture applied when there were several lenders but only one security given for the benefit of all; 36 Ch. D. 215; it may consist of one document, not necessarily of a series of documents; *id.*; and a single security to a single lender, not purporting in terms to be a debenture, was one in law; 37 Ch. D. 260. A security to a lender on some part of a company's property is not one, while an issue secured upon its entire stock in trade and undertaking is, and between these two is to be sought the line of demarcation; Buckley, Companies Acts 172.

See 7 Ry. & Corp. L. J. 518.

DEBENTURE BOND. An obligation on the part of a corporation to pay principal and interest at a fixed time. 4 Elliott, Contracts § 3584. See **DEBENTURE**; **DEBENTURE STOCK**.

DEBENTURE STOCK. An issue of stock usually irredeemable and transferable in any amount, not including a fraction of a pound.

The terminability and fixity in amount of debentures being inconvenient to lenders has led to their being in many cases superseded by debenture stock. Whart. Lex.

The issue of debenture stock is not borrowing at all; it is the sale, in consideration of a sum of money, of the right to receive a perpetual annuity; 9 Ch. D. 337; Buckley, Companies Acts 172; and none the less so if redeemable at the option of the company; *id.*

In England. A stock or fund representing money borrowed by a company or public body, and charged on the whole or part of its property. Defined by Lord Lindley as "borrowed capital consolidated into one mass for the sake of convenience." Differs from debentures chiefly in these respects, that the title of each original holder appears in a register, instead of being represented by an instrument complete in itself, and that

the stock is capable of being transferred in any amounts, unless there are qualifying regulations of the company. Byrne. See **DEBENTURE**; **DEBENTURE BOND**.

DEBET ESSE FINIS LITII. There ought to be an end of suits; there should be some period put to litigation.

DEBIT ET DETINET (Lat. he owes and withholds). In Pleading. An action of debt is said to be in the *debit et detinet* when it is alleged that the defendant owes and unjustly withholds or detains the debt or thing in question.

The action is so brought between the contracting parties. See **DETINET**.

DEBET ET SOLET (Lat. he owes and is used to). Where a man sues in a writ of right or to recover any right of which he is for the first time disseised, as of a suit at a mill or in case of a writ of *quod permittat*, he brings his writ in the *debit et solet*. Reg. Orig. 144 a; Fitzh. N. B. 132, M.

DEBIT. A term used in book-keeping, to express the left hand page of the ledger, or of an account to which are carried all the articles supplied or amounts paid on the subject of an account, or that are charged to that account.

The balance of an account where it shows that something remains due to the party keeping the account.

An amount which is set down as a debt or owing.

DEBIT SANS BREVE. See **DEBITUM SINE BREVI**.

DEBITA FUNDI (Lat.). In Scotch Law. Debts secured on land. Bell, Dict.

DEBITA LAICORUM (Lat.). Debts of the laity. Those which may be recovered in civil courts.

DEBITUM. A thing due or owing; an obligation; a debt (*q. v.*). Anderson.

DEBITUM FUNDI. (Lat.). A debt of the ground; a debt which is a charge upon real estate.

DEBITUM IN PRÆSENTI SOLVENDUM IN FUTURO (Lat.). An obligation of which the binding force is complete and perfect, but of which the performance cannot be required till some future period.

DEBITUM SANS BREVE. See **DEBITUM SINE BREVI**.

DEBITUM SINE BREVI. Debt without a writ or declaration. Written also *debitum*, or *debit*, *sans breve*; abbreviated d. s. b. Anderson.

DEBT (Lat. *debere*, to owe; *debitum*, something owed). In Contracts. A sum of money due by certain and express agreement. 3 Bla. Com. 154. See 2 Wash. C. C. 336.

All that is due a man under any form of obligation or promise. 3 Metc. Mass. 522. See 91 Pa. 402.

Any claim for money. Penn. Stat. March 21, 1806, § 5.

Active debt. One due to a person. Used in the civil law.

Ancestral debt. One of an ancestor which the law compels the heir to pay. 16 Pet. 23; A. & E. Encyc.

Doubtful debt. One of which the payment is uncertain. *Clef des Lois Romaines*.

Fraudulent debt. A debt created by fraud implies confidence and deception. It implies that it arose out of a contract, express or implied, and that fraudulent practices were employed by the debtor, by which the creditor was defrauded. 23 Ohio St. 638.

Hypothecary debt. One which is a lien upon an estate.

Judgment debt. One which is evidenced by matter of record.

Liquid debt. One which is immediately and unconditionally due.

Passive debt. One which a person owes.

Privileged debt. One which is to be paid before others in case a debtor is insolvent.

The privilege may result from the character of the creditor; as where a debt is due to the United States; or the nature of the debt, as funeral expenses, etc. See **PREFERENCE**; **PRIVILEGE**; **LIEN**; **PRIORITY**; **DISTRIBUTION**.

Specialty. A debt by specialty or special contract is one whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal; 2 Bla. Com. 465; 51 Vt. 86.

A debt may be evidenced by matter of record, by a contract under seal, or by a simple contract. The distinguishing and necessary feature is that a fixed and specific amount is owing and no future valuation is required to settle it; 3 Bla. Com. 154; 2 Hill 220.

See **ACCORD AND SATISFACTION**; **BANKRUPTCY**; **COMPENSATION**; **CONFESSION**; **DEFEASANCE**; **DELEGATION**; **DISCHARGE OF A CONTRACT**; **EXTINGUISHMENT**; **FORMER RECOVERY**; **LAPSE OF TIME**; **NOVATION**; **PAYMENT**; **RELEASE**; **RESCISSION**; **SET-OFF**.

In Practice. A form of action which lies to recover a sum certain. 2 Greenl. Ev. 279; Andr. Steph. Pl. 77, n.

It lies wherever the sum due is certain or ascertained in such a manner as to be readily reduced to a certainty, without regard to the manner in which the obligation was incurred or evidenced; 3 Speed 145; 1 Dutch. 506; 26 Missa. 621; 3 McLean 150; 2 A. C. Marsh. 264; 1 Mas. 248; 18 Wall. 631; 97 U. S. 546; 110 Pa. 509.

It is thus distinguished from *assumpsit*, which lies as well where the sum due is uncertain as where it is certain, and from *covenant*, which lies only upon contracts evidenced in a certain manner.

It is said to lie in the *debit et detinet* (when it is stated that the defendant owes and detains) or in the *detinet* (when it is stated merely that he detains). Debt in the *detinet* for goods differs from *detinue*, because it is not essential in this action, as in *detinue*, that the specific property in the goods should have been vested in the plaintiff at the time the action is brought. Dy. 24 b.

It is used for the recovery of a debt *eo nomine* and in *numero*; though damages, which are in most instances merely nominal, are usually awarded for the detention; 1 H. Bla. 550; Cowp. 588.

The action lies in the *debit et detinet* to recover money due, on a record or a judgment of a court of record; Salk. 109; 17 S. & R. 1; 27 Vt. 20; 10 Tex. 24; 21 Vt. 569; 1 Dev. 378; 1 Conn. 403; although a foreign court; 18 Ohio 430; 3 Brev. 395; 15 Me. 167; 2 Ala. 85; 1 Blackf. 16; 3 J. J. Mar. 600; 12 Me. 94; see 6 How. 44; on statutes at the suit of the party aggrieved; 15 Ill. 39; 32 N. H. 234; 11 Ala. n. s. 346; 11 Ohio 180; 10 Watts 382; 1 Scamm. 290; 2 McLean 195; 8 Pick. 514; 18 Wall. 516; or a common informer; 2 Cal. 243; 16 Ala. n. s. 214; 8 Leigh 479; including awards by a statutory commission; 11 Cush. 429; on specialties; 1 Term 40; 9 Mo. 218; 7 Ala. 772; 3 Ill. 14; 3 T. B. Monr. 204; 5 Gill 103; 3 Gratt. 350; 32 N. H. 446; 16 Ill. 79; 10 Humphr. 367; including a recognizance; 1 Hempst. 290; 21 Conn. 81; 8 Blackf. 527; 26 Me. 209; see 15 Ill. 221; 6 Cush. 138; 30 Ala. n. s. 68; 15 Ohio 65; on a promissory note; 1 Ark. 165; 36 Pa. 638; on a bill of exchange; 8 Leigh 50; on simple contracts, whether express; 26 Miss. 521; 17 Ala. n. s. 684; 1 Humphr. 480; although the contract might have been discharged (a) or before the day of payment in articles of merchandise; 4 Yerg. 171; or implied; Bull. N. P. 167; 18 Pick. 229; 10 Yerg. 452; 28 Me. 215; 1 Hempst. 181; 14 N. H. 414; to recover a specific reward offered; 1 N. J. 310. An action of debt is the proper remedy of a landlord against his tenant in possession to recover a statutory penalty for wilfully cutting trees without the owner's consent; 11 So. Rep. (Ala.) 743; and also in favor of the beneficiaries in a certificate of membership in a mutual benefit association; 23 Ill. App. 341; but it does not lie on a decree of foreclosure, which orders the money secured by the mortgage to be paid, or in default thereof the mortgaged premises to be sold and the proceeds paid into court; 15 R. I. 202.

It lies in the *detinet* for goods; Dy. 24 b; 1 Hempst. 290; 3 Mo. 21; Hard. 508; and by an executor for money due the testator; 1 Wms. Saund. 1; 4 Maule & S. 120; see 10 B. Monr. 247; 7 Leigh 604; or against him on the testator's contracts; 8 Wheat. 642.

The *declaration*, when the action is founded on a *record*, need not aver consideration. When it is founded on a *specialty*, it must contain the specialty; 11 S. & R. 238; but need not aver consideration; 16 Ill. 79; 65 Vt. 431; but when the action is for rent, the deed need not be declared on; 14 N. H. 414. When it is founded on a simple contract, the consideration must be averred; and a liability or agreement, though not necessarily an express promise to pay, must be stated; 2 Term 28, 80.

The *plea of nil debet* is the general issue when the action is on a simple contract, on statutes, or where a specialty is matter of inducement merely; 2 Mass. 521; 11 Johns. 474; 13 Ill. 619; 6 Ark. 250; 18 Vt. 241; 3 McLean 163; 15 Ohio 373; 8 N. H. 23; 83 Me. 268; 1 Ind. 146; 23 Miss. 238. *Non est factum* is the common plea when on specialty, denying the execution of the instrument; 3 Ld. Raym. 1500; 2 Ia. 320; 4 Strobb. 38; 5 Barb. 449; 8 Pa. 487; 7 Blackf. 514; 3 Mo. 79; and *nul tiel record* when on a record, denying the existence of the record; 16 Johns. 55; 23 Wend. 298; 6 Pick. 232. As to the rule when the judgment is one of another state, see 33 Me. 268; 3 J. J. Marsh. 600; 7 Cra. 481; 4 Vt. 58; 2 South. 778; 2 Ill. 2; 2 Leigh 172; as well as the titles FOREIGN JUDGEMENT, CONFLICT OF LAWS. Other matters must, in general, be pleaded specially; 1 Ind. 174.

The *judgment* is, generally, that the plaintiff receive his debt and costs when for the plaintiff, and that the defendant receive his costs when for the defendant; 20 Ill. 120; 1 Ia. 99; 4 How. Miss. 40. See 8 S. & R. 263. It is reversible error to render judgment not only for the debt sued on, but for damages, as in assumpsit and for interest on the judgment; 3 Utah 451. See JUDGMENT.

In Relation to Negotiable Instruments. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it. 250 U. S. 381, citing 177 Mass. 337. See FLOATING DEBT; LIQUIDATED DEBT.

DEBT OF RECORD. A debt which appears to be due by the evidence of a court of records, as by a judgment or recognizance. 2 Bl. Com. 465.

DEBTEE. One to whom a debt is due; a creditor; as, debtee executor. 3 Bla. Com. 18.

DEBTOR. One who owes a debt; he who may be constrained to pay what he owes. See JOINT DEBTORS; STAY LAWS.

The word "debtor" in its broad sense implies liability. 91 Ky. 183, 15 S. W. 179.

DEBTOR'S ACT, 1869. The statute 32 & 33 Vict. c. 62, abolishing imprisonment for debt in England, and for the punishment of fraudulent debtors. 2 Steph. Com. 159-164. (Not to be confounded with the Bankruptcy Act of 1869.) Mozl. & W. Dict.

DEBTOR'S SUMMONS. In English Law. A summons issuing from a court having jurisdiction in bankruptcy, upon the creditor proving a liquidated debt of not less than 50l., which he has failed to collect after reasonable effort, stating that if the debtor fail, within one week if a trader, and within three weeks if a non-trader, to pay or compound for the sum specified, a petition may be presented against him, praying that he may be adjudged a bankrupt. Bkcy. Act, 1869, s. 7; Robson, Bkcy.; Mozl. & W. Dict.

DECALOGUE. The ten commandments.

DECANATUS, DECANIA, DECANIA (Lat.). A town or tithing, consisting originally of ten families of freeholders. Ten tithings compose a hundred. 1 Bla. Com. 114.

Decanatus, a deanery, a company of ten. Spelman, Gloss.; Calvinus, Lex.

Decania, Decana, the territory under the charge of a dean.

DECANUS (Lat.). A dean; an officer having charge of ten persons. In Constantinople, an officer who has charge of the

burial of the dead. Nov. Jus. 43, 59; Du Cange. The term is of extensive use, being found with closely related meanings in the old Roman, the civil, ecclesiastical, and old European law. It is used of civil and ecclesiastical as well as military affairs. There were a variety of *decani*.

Decanus monasticus, the dean of a monastery.

Decanus in majori ecclesia, dean of a cathedral church.

Decanus militaris, a military captain of ten soldiers.

Decanus episcopi, a dean presiding over ten parishes.

Decanus frieborgi, dean of a friebourg, tithing, or association of ten inhabitants. A Saxon officer, whose duties were those of an inferior judicial officer. Du Cange; Spelman, Gloss.; Calvinus, Lex.

DECAPITATION (Lat. de, from, caput, a head). The act of beheading. In some countries a method of capital punishment.

DECEDENT. A deceased person.

The signification of the word has become more extended than its strict etymological meaning. Strictly taken, it denotes a dying person, but is always used in the more extended sense given, denoting any deceased person, testate or intestate.

DECEIT. A fraudulent misrepresentation or contrivance, by which one man deceives another, who has no means of detecting the fraud, to the injury and damage of the latter. It need not be made in words, if the impression be made on the mind of the other party, upon which he acts, without the exact expression in words of the understanding sought to be created; 17 C. B. N. S. 482; 29 Mich. 229.

Fraud, or the intention to deceive, is the very essence of this injury; for if the party misrepresenting was himself mistaken, no blame can attach to him; Poll. Torts 353; 61 Ill. 373; 86 Pac. Rep. (Kan.) 978; 45 Ill. App. 244. The representation must be made *malò animo*; but whether or not the party is himself to gain by it is wholly immaterial.

It may be by the deliberate assertion of a falsehood to the injury of another, by failure to disclose a latent defect, or by concealing an apparent defect; but, as a rule, mere silence on the part of one party to a transaction as to facts which are important to the other is not deceit, if he is under no obligation to disclose them; Big. Torts 12; L. R. 6 H. L. 377; 93 U. S. 631. See CAVEAT EMPTOR.

The party deceived must have been in a situation such as to have no means of detecting the deceit. But see 52 Kan. 221.

A person cannot sustain an action for deceit where no harm comes to him; 47 Minn. 225; 2 Misc. Rep. 257; nor can he where he does not rely on the misrepresentations; 86 Wis. 427.

To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions, in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it; that the misrepresentations related to alleged facts or to the condition of things as then existent. It is not every representation relating to the subject-matter of the contract which will render it void or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation; 18 Pick. 95.

In order to constitute deceit it is necessary either that the false representations should be known by the person making them to be untrue, or that he should have no reason to believe them true. Mere ignorance of their falsity is no excuse; 42 Ga. 88; see 78 Ill. 65; 59 Ind. 379; 106 Mass. 77; 28 Mich. 53; 45 N. H. 422; 68 N. Y. 426. Deceit may be committed not only with the careful intention of one who knows what he asserts to be true or false, but also with the reckless intention of one who does not know what he represents to be true or false, but who, for one reason or another, is willing that his reckless representations

should be believed; 9 Colo. 33; 53 N. J. Law 77; 13 Pet. 26; 31 N. W. Rep. (Minn.) 360, and cases cited.

The mere expression of opinion is not deceit, though untrue and made in most positive language; 3 T. R. 51; 2 East 92; 63 N. C. 304; but the expression of opinion as knowledge may render one liable for fraud; 42 Vt. 121. Thus a cattle-dealer who expresses an apparent opinion as to the weight of cattle he desires to sell, knowing it to be untrue, is guilty of deceit; 84 Wis. 62.

Though false representations as to the value of land are not alone sufficient to sustain an action for damages, yet if in connection with others as to the net revenues derived, they are sufficient to support such an action; 66 Hun 633; 54 Fed. Rep. 320; and an action for false representation as to title, in a sale of lands, may be maintained though the deed contains no covenants; 54 Fed. Rep. 87.

An action for deceit can only be based upon the misrepresentation of matters of fact, not of matters of law; unless the party who made the misrepresentation did it with knowledge both of the law and of the other's ignorance of it; 31 Ala. 434; 33 Ill. 238; 119 *id.* 567; 69 Ind. 1; L. R. 4 Ch. D. 702; 19 Tex. 303; 91 U. S. 45.

If the party complaining of misrepresentations had the same sources of information as the one who made them, he must avail himself of his means of knowledge, or he cannot recover; 13 Wall. 379; 107 Mass. 364. But a contracting party may rely upon express statements of fact, the truth of which is known or presumed to have been known to the other party, even where the means of information are open to him; Big. Torts 26; especially when the representation has a natural tendency to prevent investigation or is made the basis of the contract; *id.*; where one contracting party has a mental or physical infirmity, or where the parties do not stand upon an equal footing, the duty of investigating the truth of statements may be less; *id.* 28.

The plaintiff must also have acted upon the representation, and sustained injury by so doing; 4 H. & N. 225; 22 Me. 131; 84 Miss. 432; 80 Pa. 401; 63 N. H. 218; and they must have been made to him; 17 How. 183; 34 Miss. 432; 154 Mass. 286. One who purchases stock in the market, upon the faith of a prospectus received from persons not connected with the corporation, cannot enforce a liability against the directors for false representations therein; L. R. 6 H. L. 377; but where a prospectus is put out by a company to sell its stock, any one of the public may act on it; Big. Torts 33.

The false representations upon which deceit is predicated must also, in order to support the action, be material and relevant, and be the determining factor of the transactions; L. R. 2 Ch. 611; 5 De G., M. & G. 126; 36 Ark. 362; 89 Ill. 29; 50 Ia. 687; 127 Mass. 217; 66 N. Y. 558.

Where the effect of the misrepresentations was to bring the parties into relations with each other, express evidence of an intent to defraud is unnecessary; but where by false representations one suffers damage in a transaction with a third person, there must be express evidence that the party making the representation intended it to be acted on, or that the plaintiff was justified in assuming that he so intended; 3 Term 51; Big. Torts 31.

An honest belief in a misrepresentation which the maker does not know to be false, and which it is not shown that he should know to be false by using proper care to ascertain its truth, is a complete defence, L. R. 14 App. Cas. 337, reversing 37 Ch. D. 541; but one who makes a representation positively, without knowing whether it is false or true, is liable for deceit; L. R. 7 H. L. 102; 29 Mich. 359.

To tell half the truth and to conceal the other half, amounts to a false statement, and differs in no respect from the case of false representations; 62 Ill. 501; 128 U. S. 338; 388; 24 Mich. 335; L. R. 6 H. L. 403; 35 Vt. 156.

An action of tort for deceit in the sale of property does not lie for false and fraudu-

lent representations concerning profits that may be made from it in the future; 5 Allen 824. While an honest belief in the truth of representations is a defence to an action for deceit at common law, it is no defence to a bill in equity to set aside the transaction; 7 Beav. 149; 25 Fed. Rep. 361; 86 Ill. 142; 108 Mass. 356; 44 Miss. 477. It is also a ground for objecting to the enforcement of the contract, and even for a rescission of the contract upon the ground of mistake; Big. Torts 28.

Private corporations are held liable for the wrongful acts and neglect of their agents or servants, done in the course of their employment; 49 Md. 241. In England the rule is that if the person has been induced to purchase shares of a corporation by misrepresentations of its directors and suffers damage thereby, he must bring an action of deceit against such directors individually; while in the United States it seems to be the rule that a corporation may be sued in such cases; 2 Allen 1; 77 N. C. 288; 23 How. 381; 78 Ga. 596; 2 Black 722; 48 N. J. L. 288. "If the director of a company puts shares forth into the world, and deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares in consequence of the falsehood," the action for deceit lies; Pollock, C. B., in 4 H. & N. 538; 2 Q. B. D. 48. See also 2 M. & W. 519; 3 B. & Ad. 114.

The general principles upon which the right of action for deceit is based are those stated in Webb's Poll. Torts 355:—

"To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur:

"It is untrue in fact.

"The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not.

"It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.

"The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage.

"There is no cause of action without both fraud and actual damage, or the damage is the gist of the action.

"And according to the general principles of civil liability, the damage must be the natural and probable consequence of the plaintiff's action on the faith of the defendant's statement.

"The statement must be in writing and signed in one class of cases, namely, where it amounts to a guaranty; but this requirement is statutory, and as it did not apply to the court of chancery, does not seem to apply to the high court of justice in its equitable jurisdiction."

The remedy for a deceit, unless the right of action has been suspended or discharged, is by an action of trespass on the case. The old writ of deceit was brought for acknowledging a fine, or the like, in another name, and this being a perversion of law to an evil purpose and a high contempt, the act was laid *contra pacem*, and a fine imposed upon the offender. See Brooke, Abr. *Disceit*; Viner, Abr. *Disceit*.

When two or more persons unite in a deceit upon another, they may be indicted for a conspiracy. See, generally, 1 Rolle, Abr. 106; Com. Dig.; 1 Viner, Abr. 560; 8 id. 490; Bigelow, Torts 9; Cooley, Torts 554.

It has been held that an action will not lie for fraudulent misrepresentations of a vendor of real estate as to the price he paid therefor; 11 Am. Rep. 218; s. c. 60 Me. 578; 102 Mass. 217; 133 N. Y. 590; 29 Minn. 91; 80 Ind. 472; nor ordinarily for false statements as to value of stock; 11 Am. Rep. 379; s. c. 56 N. Y. 83; nor for a false certificate of classification of a sailing yacht; 60 Law J. Q. B. 526; nor a representation that a stallion would not produce sorrel colts; 54 N. W. Rep. (Ia.) 437.

False representations concerning the fi-

nancial responsibility of another, made for the purpose of procuring him credit, negligently and carelessly, without investigation, when investigation would disclose their falsity, imply a fraudulent intent and are actionable; 59 Fed. Rep. 388. See COMMERCIAL AGENCY.

In an action of deceit in inducing plaintiff by false representations to take an assignment of a lease executed by one who has no title to the land, no offer of restitution need be made; 88 Ga. 629. But one who seeks to rescind a contract of sale because of fraud, but retains the property so sold, cannot maintain an action for deceit; 2 Misc. Rep. 257.

DECEM TALES (Lat. ten such). In Practice. A writ requiring the sheriff to appoint ten like men (*apponere decem tales*), to make up a full jury when a sufficient number do not appear. See TALES DE CIRCUMSTANTIBUS.

DECEMVIRI LITIBUS JUDICANDIS. Ten judges (five being senators and five knights), appointed by Augustus to act as judges in certain cases. Calvinus, Lex.; Anthon, Rom. Ant.

DECENNARIUS (Lat.). One who held one-half a virgate of land. Du Cange, One of the ten freeholders in a *decennary*. Du Cange; Calvinus, Lex.

Decennier. One of the *decennarii*, or ten freeholders making up a tithing. Spelman, Gloss.; Du Cange, *Decenna*; 1 Bla. Com. 114. See DECANUS.

DECENNARY (Lat. *decem*, ten). A district originally containing ten men with their families.

King Alfred, for the better preservation of the peace, divided England into counties, the counties into hundreds, and the hundreds into tithings or decennaries: the inhabitants whereof, living together, were sureties or pledges for each other's good behavior. One of the principal men of the latter number presided over the rest, and was called the chief pledge, borsholder, borrow's elder, or tithing-man.

DECENNIER. See DECENNARIUS; DECANUS.

DECEPTIONE. See DE DECEPTIONE.

DECIES TANTUM (Lat.). An obsolete writ, which formerly lay against a juror who had taken money for giving his verdict. Called so, because it was sued out to recover from him ten times as much as he took.

DECIME (Lat.). The tenth part of the annual profit of each living, payable formerly to the pope. There were several valuations made of these livings at different times. The *decime* (tenths) were appropriated to the crown, and a new valuation established, by 26 Hen. VIII. c. 3; 1 Bla. Com. 284.

DECIMATION. The punishment of every tenth soldier by lot.

DECINER. Same as DECANUS and DECENNIER (q. v.). Jacob.

DECISION. In Practice. A judgment given by a competent tribunal. The French lawyers call the opinions which they give on questions propounded to them, decisions. See Inst. 1. 2. 8; Dig. 1. 2. 2; 29 Ind. 170; 36 Wis. 434; also JUDGMENT.

The terms "opinions" and "decisions" are often confounded, yet there is a wide difference between them. A decision of a court is its judgment; the opinion is the reason given for that judgment. 13 Cal. 27.

The finding of the court as distinguished from "verdict" the finding of the jury. 134 Ind. 573. See JUDGMENT, FINAL DECISION.

DECLARANT. One who makes a declaration.

DECLARATION. In Pleading. A specification, in a methodical and logical form, of the circumstances which constitute the plaintiff's cause of action. 1 Chit. Pl. 248; Co. Litt. 17 a, 303 a; Bacon, Abr. *Pleas* (B); Comyns, Dig. *Pleader*, C, 7; Lawes, Pl. 35; Steph. Pl. 36; 6 S. & R. 28.

In real actions, it is most properly called the *count*; in a personal one, the *declaration*; Steph.

Pl. 36; Doctr. Plac. 83; Lawes, Pl. 38. See Fitzh. N. B. 16 a, 60 d. The latter, however, is now the general term,—being that commonly used when referring to real and personal actions without distinction; 3 Bouvier, Inst. n. 861.

In an action at law, the declaration answers to the bill in chancery, the libel (*narratio*) of the civilians, and the allegations of the ecclesiastical courts.

It may be *general* or *special*: for example, in debt on a bond, a declaration counting on the penal part only is *general*; one which sets out both the bond and the condition and assigns the breach is *special*; Gould, Pl. c. 4, § 50.

The parts of a declaration are the *title* of the court and term; the *venue*, see VENUE; the *commencement*, which contains a statement of the names of the parties and the character in which they appear, whether in their own right, the right of another, in a political capacity, etc., the mode in which the defendant has been brought into court, and a brief recital of the form of action to be proceeded in; 1 Saund. 318, n. 3, 111; 6 Term 130; if a person is doing business under a firm name, he properly sues on an account growing out of such business in his individual name; 83 Mich. 226; 93 Ala. 92; the *statement* of the cause of action, which varies with the facts of the case and the nature of the action to be brought, and which may be made by means of one or of several counts; 3 Wils. 185; 2 Bay 206; one count may incorporate by reference, certain general averments which are in a previous count in the same pleading; 94 Cal. 49; see COUNT; the *conclusion*, which in personal and mixed actions should be to the damage (*ad damnum*, which title see) of the plaintiff; Comyns, Dig. *Pleader* (C, 84); 10 Co. 116 b, 117 a; 1 M. & S. 236; unless in *scire facias* and in penal actions at the suit of a common informer, but which need not repeat the capacity of the plaintiff; 5 Binn. 16, 21; the *profert* of letters testamentary in case of a suit by an executor or administrator; Bacon, Abr. *Executor* (C); Dougl. 5, n.; 1 Day 805; and the *pledges of prosecution*, which are generally disused, and, when found, are only the fictitious persons, John Doe and Richard Roe.

The *requisites* or *qualities* of a declaration are that it must correspond with the process; and a variance in this respect was formerly the subject of a plea in abatement, see ABATEMENT; it must contain a statement of all the facts necessary in point of law to sustain the action, and no more; Co. Litt. 303 a; Plowd. 84, 122; Pep. Pl. 8. See 2 Mass. 363; Cowp. 682; 6 East 422; Viner, Abr. *Declaration*; 45 La. Ann. 935. The omission of a complaint to allege a material fact is cured where such fact is shown by the answer; 33 Ill. App. 91.

The circumstances must be stated with certainty and truth as to *parties*; 3 Cai. 170; 1 M. & S. 804; 8 B. & P. 559; 6 Rich. 390; 8 Tex. 109; 4 Munf. 430; 1 Campb. 195; *time* of occurrence, and in personal actions it must, in general, state a time when every material or traversable fact happened; 36 N. H. 252; 3 Ind. 484; 3 Zab. 309; 3 McLean 96; see 15 Barb. 550; and when a venue is necessary, time must also be mentioned; 5 Term 620; Com. Dig. *Pleader* (C, 19); 5 Barb. 375; 4 Den. 80; though the precise time is not material; 2 Dall. 346; 3 Johns. 43; 25 Ala. n. S. 469; unless it constitute a material part of the contract declared upon, or where the date, etc., of a written contract is averred; 4 Term 590; 2 Campb. 307, 308, n.; 36 N. H. 252; 3 Zab. 309; or in ejectment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff and his right of entry accrued; 2 East 257; 1 Johns. Cas. 283; the place, see VENUE; and, generally, as to particulars of the demand, sufficient to enable the defendant to ascertain precisely the plaintiff's claim; 2 B. & P. 265; 2 Saund. 74 b; 12 Ala. n. S. 567; 2 Barb. 643; 35 N. H. 530; 33 Miss. 17; 1 Rich. 498.

In Evidence. A statement made by a party to a transaction, or by one having an interest in the existence of some fact in relation to the same.

Such declarations are regarded as original evidence and admissible as such—*first*, when

DECLARATION

the fact that the declaration was made is the point in question; 4 Mass. 703; 11 Wend. 110; 1 Conn. 387; 2 B. & Ad. 845; 1 Mood. & R. 2, 8; 9 Bingh. 359; 4 Bingh. N. C. 489; 1 Br. & B. 269; *second*, including expressions of bodily feeling, where the existence or nature of such feelings is the object of inquiry, as expressions of affection in actions for crim. con.; 1 B. & Ald. 90; 8 Watts 355; see 4 Esp. 39; 2 C. & P. 23; 7 id. 193; 133 Mass. 459; representations by a sick person of the nature, symptoms, and effects of the malady under which he is laboring; 6 East 188; 4 M'Cord 88; 8 Watts 355; see 9 C. & P. 275; 7 Cush. 581; 30 Ala. N. S. 562; 23 Ga. 17; 27 Mo. 279; 80 Vt. 377; 54 Ill. 485; in prosecution for rape, the declarations of the woman forced; 1 Russ. Cr. 585; Tayl. Ev. 507. 517; 3 Stark. 241; 18 Ohio 99; *third*, in cases of pedigree, including the declarations of deceased persons nearly related to the parties in question; 3 Russ. & M. 147; 2 C. & K. 701; 1 Cr. M. & R. 919; 1 De G. & S. 40; 1 How. 231; 4 Rand. 607; 8 Dev. & B. 81; 18 Johns. 37; 2 Conn. 347; 4 N. H. 871; 84 Ky. 409; 113 Mass. 267; family records; 8 B. & C. 813; 5 Cl. & F. 24; 7 Scott, N. E. 141; 2 Dall. 116; 1 Pa. 381; 8 Johns. 128; and see 13 Ves. 514; 1 Pet. 328; 5 S. & R. 251; 4 Mas. 268; *fourth*, cases where the declaration may be considered as a part of the *res geste*; Steph. Dig. Ev. art. 27; 36 N. H. 167, 353; 16 Tex. 74; 6 Fla. 18; 41 Me. 149, 432; 14 Cox. Cr. Cas. 341; s. c. 28 Engl. Rep. 587 and note; 20 Ga. 432; 157 Mass. 9; 95 Ala. 598; 63 Hun 634; 149 Pa. 566; 49 Ohio St. 25; 80 Wis. 590; 95 Mich. 412; 147 U. S. 150; 132 Ind. 387; including those made by persons in the possession of land; 5 B. & Ad. 233; 9 Bingh. 41; 1 Bingh. N. C. 430; 8 Q. B. 243; 16 M. & W. 497; 2 Pick. 536; 17 Conn. 539; 4 S. & R. 174; 2 M'Cord 241; 16 Me. 27; 2 N. H. 287; 15 id. 546; 1 Ired. 432; 10 Ala. N. S. 355; 6 Hill. 405; 80 Vt. 29; 19 Ill. 31; 30 Miss. 589; 35 Neb. 58; see 33 Pa. 411; 27 Mo. 220; 23 Ala. N. S. 236; 9 Ind. 323; and entries made by those whose duty it was to make such entries. See 1 Greenl. Ev. §§ 115-123; 1 Smith, Lead. Cas. 142; 100 Pa. 159.

Declarations regarded as secondary evidence or hearsay are yet admitted in some cases: *first*, in matters of general and public interest, common reputation being admissible as to matters of public interest; 14 East 329, n.; 1 M. & S. 686; 6 M. & W. 234; 19 Conn. 250; but reputation amongst those only connected with the place or business in question, in regard to matters of general interest merely; 1 Cr. M. & R. 929; 2 B. & Ad. 245; and the matter must be of a *quasi* public nature; 1 East 357; 14 id. 329, n.; 10 B. & C. 657; 1 M. & S. 77; 1 Mood. & M. 416; 10 Pet. 412; 16 La. 296; see REPUTATION; *second*, in cases of ancient possession where ancient documents are admitted, if found in a place in which and under the care of persons with whom such papers might reasonably be expected to be found; 17 Wend. 371; 74 Me. 56; 117 U. S. 255; 108 Ill. 243; if they purport to be a part of the transaction to which they relate; 1 Greenl. Ev. § 144; ANCIENT WRITINGS; *third*, in case of declarations and entries made against the interest of the party making them, whether made concurrently with the act or subsequently; 1 Taunt. 141; 3 Brod. & B. 132; 3 B. & Ad. 893; 40 Ill. App. 442; 49 Minn. 255; 82 Tex. 22; 186 N. Y. 384; 72 Mich. 630; and see 1 Phill. Ev. 293; Grell. Eq. Ev. 221; but such declarations and entries, to be so admitted, must appear or be shown to be against the pecuniary interest of the party making them; 1 C. & P. 276; 11 Cl. & F. 85; 2 Jac. & W. 789; 3 Bingh. N. C. 308, 320; but letters written and signed by deceased, or a memorandum made by him, are not admissible by a party claiming under him if not shown to have been communicated to the party claiming adversely; 66 Hun 28; *fourth*, dying declarations.

Dying declarations, made in cases of homicide where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations, are admissible; Steph. Dig.

Ev. § 26; 2 B. & C. 605; 1 Leach 267, 378; 2 Mood. & R. 53; 2 Johns. 31; 15 id. 286; 1 Meigs 265; 4 Miss. 655; see 4 C. & P. 233; 91 Ga. 729; if made under a sense of impending death; 2 Leach 563; 6 C. & P. 380, 381; 5 Cox, Cr. Cas. 318; 11 Ohio 424; 2 Ark. 229; 3 Cush. 181; 9 Humphr. 9, 24; 115 Mo. 452; 50 Kan. 666; 90 Ga. 117; 64 Conn. 298. And see 2 C. & P. 269; 6 id. 386; 9 Va. 78, 111; 3 Leigh 786; 1 Hawks 443; 28 Eng. Rep. 587; 14 Am. L. Rev. 317; 111 N. C. 695; 91 Tenn. 617. It is not necessary that the declarant state that he is expecting immediate death; it is enough if, from all the circumstances, it satisfactorily appears that such was the condition of his mind at the time of the declarations; 24 Kan. 189; and the question of whether made under a sense of impending death, is a question exclusively for the court; 81 Fla. 514. The declaration may have been made by signs; 1 Greenl. Ev. § 161 b; and in answer to questions; 7 C. & P. 233; 2 Leach 563; 3 Leigh 758. The substance only need be given by the witness; 11 Ohio 424; 8 Blackf. 101; but the declaration must have been complete; 3 Leigh 786; 146 U. S. 140; and the circumstances under which it was made must be shown to the court; 1 Stark. 521; 3 C. & P. 629; 7 id. 187; 1 Hawks 444; 2 Gratt. 594; 16 Miss. 401; 2 Hill 619. Such declarations are inadmissible when the witness does not pretend to give either the words or substance of what the deceased said, or all that he said; 118 Mo. 491. The admissibility of the declaration is not affected by the fact that subsequently to their being made and before death the declarant entertained a belief in recovery; 14 Cox, Cr. Cas. 365; s. c. 28 Engl. Rep. 587, and note; 23 Or. 555.

Declarations, to be admissible as original evidence, must have been made at the time of doing the act to which they relate; 3 Conn. 250; 16 Miss. 722; 9 Paige 611; 23 Ga. 193; 8 Metc. 436; 6 Me. 266; 36 N. H. 353; 14 S. & R. 275; 1 B. & Ad. 135. And see 3 Metc. Mass. 199; 4 Fla. 104; 3 Humphr. 315; 24 Vt. 363; 21 Conn. 101; 133 Ind. 243. For cases of entries in books, see 1 Binn. 284; 9 S. & R. 285; 13 Mass. 427; 10 Am. Rep. 22; s. c. 36 Ind. 280.

To authorize their admission as secondary evidence, the declarant must be dead; 11 Price 162; 1 C. & K. 53; 12 Vt. 178; and the declaration must have been made before any controversy arose; 13 Ves. Ch. 514; 3 Campb. 444; 10 B. & C. 657; 4 M. & S. 486; 1 Pet. 328. It must also appear that the declarant was in a condition or situation to know the facts, or that it was his duty to know them; 2 J. & W. 464; 9 B. & C. 935; 4 Q. B. 137; 2 Sm. Lead. Cas. 193, n. The test to be applied to dying declarations to determine their admissibility is whether a living witness would have been permitted to testify to the matters contained in the declaration; 24 Or. 61.

The declarations of an agent respecting a subject-matter, with regard to which he represents the principal, bind the principal; Story, Ag. §§ 134-137; 1 Phill. Ev. 831; Mech. Ag. 714; 2 Q. B. 212; 3 Harring. 299; 20 N. H. 165; 31 Ala. N. S. 33; 6 Gray 450; 133 N. Y. 298; 158 Mass. 185; 39 Ill. App. 423; if made in the line of his duty and within the scope of his authority; 156 Mass. 289; 92 Mich. 252; 48 Minn. 305; if made during the continuance of the agency with regard to a transaction then pending; 8 Bingh. 451; 5 Wheat. 336; 8 Watts 487; 14 N. H. 101; 30 Vt. 29; 11 Rich. 367; 24 Ga. 211; 31 Ala. N. S. 33; 7 Gray 92, 345; 4 E. D. Smith 165; 3 Utah 41; see 3 Rob. L. 201; 8 Metc. 44; 19 Ill. 456; and similar rules extend to partners' declarations; 1 Greenl. Ev. § 112; 31 Ala. N. S. 26; 36 N. H. 167; 52 N. W. Rep. (Minn.) 386. See PARTNER.

Where several defendants are all interested in the relief prayed against them, admissions of one of them, made against his own interest, are admissible in evidence to affect him, although they would not be evidence to affect his co-defendants; 88 Ga. 541. See 109 Mo. 9; 49 Minn. 322; 3 Ind. App. 339.

Declarations made over a telephone are admissible, if the witness testifies that he recognized the declarant's voice; 31 Tex.

Cr. Rep. 349. See 97 Mo. 473; TELEPHONE.

When more than one person is concerned in the commission of a crime, as in cases of riots, conspiracies, and the like, the declarations of either of the parties, made while acting in the common design, are evidence against the whole; 3 B. & Ald. 566; 1 Stark. 81; 2 Pet. 358; 10 Pick. 497; 80 Vt. 100; 32 Miss. 405; 9 Cal. 593; 32 Tex. Cr. Rep. 568; 64 Cal. 293; but the declarations of one of the rioters or conspirators made after the accomplishment of their object and when they no longer acted together, are evidence only against the party making them; 2 Russ. Cr. 572; Rosc. Cr. Ev. 324; Whart. Ev. 1205; 1 Ill. 269; 1 Mood. & M. 501; 150 U. S. 93; 144 id. 309. And see 2 C. & P. 232; 7 Gray 1, 46. If one of two persons accused of having together committed a crime of murder makes a voluntary confession in the presence of the other, under such circumstances that he would naturally have contradicted it if he did not assent, the confession is admissible in evidence against both; 156 U. S. 51.

See HEARSAY EVIDENCE; BOUNDARY; REPUTATION; PEDIGREE; CONFESSION.

In Scotch Law. The prisoner's statement before a magistrate.

When used on trial, it must be proved that the prisoner was in his senses at the time of making it, and made it of his own free will; 2 Hume 328; Alison, Pr. 557. It must be signed by the witnesses present when it was made; Alison, Pr. 557, and by the prisoner himself; Arkl. Just. 70. See Paterson, Comp. §§ 952, 970.

Declaration by debtor of inability to pay his debts. In England a formal declaration of this character is an act of bankruptcy, under sec. 6 of the Bankruptcy Act of 1869; Robson, Bkcy.

DECLARATION OF INDEPENDENCE. A public act by which, through the Continental Congress, the thirteen British colonies in America declared their independence, in the name and by the authority of the people, on the fourth day of July, 1776, wherein are set forth:—

Certain natural and inalienable rights of man; the uses and purposes of governments; the right of the people to institute or to abolish them; the sufferings of the colonies, and their right to withdraw from the tyranny of the king of Great Britain;

The various acts of tyranny of the British king;

The petitions for redress of those injuries, and the refusal to redress them; the recital of an appeal to the people of Great Britain, and of their being deaf to the voice of justice and consanguinity;

An appeal to the Supreme Judge of the world for the rectitude of the intentions of the representatives;

A declaration that the United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is and ought to be dissolved;

A pledge by the representatives to each other of their lives, their fortunes, and their sacred honor.

The effect of this declaration was the establishment of the government of the United States as free and independent.

DECLARATION OF INTENTION. The act of an alien who goes before a court of record and in a formal manner declares that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof at the time he may be a citizen or subject. See Rev. Stat. §§ 2165, 2174.

This declaration must, in ordinary cases, be made at least two years before his admission. *Id.* But there are exceptions to this rule. See NATURALIZATION.

DECLARATION OF LONDON. An international agreement of 71 articles between the great powers regulating blockades in time of war, contraband of war,

neutrals, resistance to search, and compensation, signed at London in 1909, but rejected by the House of Lords in 1911. *Stand. Dict.*

DECLARATION OF PARIS. A declaration respecting international maritime law set forth by the leading powers of Europe at the Congress of Paris in April, 1856. The several articles are:—

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, except contraband of war.
3. Neutral goods, except contraband of war, are not liable to confiscation under a hostile flag.
4. Blockades, to be binding, must be effective. *Twiss, Law of Nations*, part ii. s. 86.

DECLARATION OF ST. PETERSBURG. The declaration drawn up by the International Military Commission (q. v.) at St. Petersburg, in 1868, prohibiting the use in war of explosive or inflammable bullets. *Bordwell, Law of War*, pp. 87, 88.

DECLARATION OF TRUST. The act by which an individual acknowledges that a property, the title of which he holds, does in fact belong to another, for whose use he holds the same.

The instrument in which such an acknowledgment is made.

Such a declaration is not always in writing; though it is highly proper it should be so: *Hill, Trusts*, 49, note y; *Sugden, Pow.* 200; 1 *Washb. R. P.* See *Tiedm. Eq. Jur.* 296; *FRAUDS, STATUTE OF; TRUST.*

DECLARATION OF WAR. The public proclamation of the government of a state, by which it declares itself to be at war with a foreign power which is named, and which forbids all and every one to aid or assist the common enemy.

The power of declaring war is vested in congress by the constitution, art. 1, s. 8, § 12. There is no form or ceremony necessary except the passage of the act. A manifesto stating the causes of the war is usually published; but war exists as soon as the act takes effect. It was formerly usual to precede hostilities by a public declaration communicated to the enemy, and to send a herald to demand satisfaction. *Potter, Grec Ant.* b. 3, c. 7; *Dig.* 49. 15. 24. But that is not the practice of modern times.

In some countries, as England, the power of declaring war is vested in the king; but he has no power to raise men or money to carry it on,—which renders the right almost nugatory.

Civil wars are never declared; *Boyd's Wheat. Int. Law* 355. See 2 *Black* 669. Many recent wars have been begun without this formality. A war *de facto* can exist without it; *L. R.* 4 P. C. 179.

DECLARATORY. Something which explains or ascertains what before was uncertain or doubtful; as, a declaratory statute, which simply declares or explains the law or the right, as it stood previous to the statute; *Sedgw. Stat. & Const. L.* 28; they are usually passed to put an end to a doubt as to what the law is, and declare what it is and what it has been. 1 *Bla. Com.* 86. Very many of the state statutes in this country are declaratory of the common law, and were not passed to quiet a doubt but to incorporate into the law of the state well-settled common-law principles. See *STATUTES*.

DECLARE. Often used of making a positive statement, as "declare and affirm." 17 *N. J. L.* 432. To assert; to publish; to utter; to announce clearly some opinion or resolution. 90 *Pa.* 121. For its use in pleading, see *DECLARATION*.

DECLINATION. In Scotch Law. A preliminary plea objecting to the jurisdiction on the ground that the judge is interested in the suit.

DECLINATORY PLEA. A plea of sanctuary or of benefit of clergy. 4 *Bla. Com.* 333. Abolished, 6 & 7 *Geo. IV.* c. 28, s. 6; *Mozl. & W. Dict.* See *BENEFIT OF CLERGY*.

DECOCTION. The operation of boil-

ing certain ingredients in a fluid for the purpose of extracting the parts soluble at that temperature; the product of this operation.

In a case in which the indictment charged the prisoner with having administered to a woman a decoction of a certain shrub called *savin*, it appeared that the prisoner had administered an *infusion*, and not a decoction. The prisoner's counsel insisted that he was entitled to an acquittal on the ground that the medicine was misdescribed; but it was held that infusion and decoction are *ejusdem generis*, and that the variance was immaterial. 8 *Camp.* 74, 75.

DECOCTOR. In Roman Law. A bankrupt; a person who squandered the money of the state. *Calvinus, Lex;* *Du Cange*.

DECOLLATIO. Decollation; beheading.

DECONFES. In French Law. A name formerly given to those persons who died without confession, whether they refused to confess or whether they were criminals to whom the sacrament was refused. *Droit de Canon*, par M. l'Abbé André; *Du pin, Gloss.* to *Loisel's Institutes*.

DECOY. A pond used for the breeding and maintenance of water-fowl. 11 *Mod.* 74, 180; 3 *Salk.* 9; *Holt* 14; 11 *East* 571.

DECOY LETTER. A letter prepared and mailed on purpose to detect offenders against the postal and revenue laws. 5 *Dill.* 39.

The use of decoy letters by inspectors of mails for the purpose of ascertaining the depredations upon the mails is proper and justifiable as a means to that end; 40 *Fed. Rep.* 752.

A postal employé who takes from the mail under his charge a package containing things of value, though placed in the mail as a decoy and addressed to a person having no existence, is punishable, under R. S. secs. 3891, 5467, for taking a letter or package entrusted to him; 48 *Fed. Rep.* 803; 38 *id.* 106; 40 *id.* 752; *contra*, 35 *id.* 407, 890. The fact that they were decoy letters is immaterial on a prosecution for embezzlement; 42 *Fed. Rep.* 891.

The offence of sending letters by mail giving information where obscene pictures can be obtained does not lose its criminal character, though the letters were sent in response to a decoy letter, since it does not appear that the accused was solicited to use the mails and thus to commit an offence; 50 *Fed. Rep.* 528.

A decoy letter placed in a sealed envelope and addressed to a fictitious person in a place where there was no post-office was wrapped up in a newspaper, enclosed in an ordinary paper wrapper, sealed and properly stamped and directed as the envelope inside the packet, and in this condition was handed by a post-office inspector and placed by him as a decoy in a basket kept for improperly illegibly addressed mail matter. It was held that this was not a mailing of the packet, and that it did not become mail matter; 30 *Fed. Rep.* 818. A letter with a fictitious address which cannot be delivered is "not intended to be conveyed by mail" within the meaning of R. S. sec. 3891, providing a penalty for embezzling; 35 *id.* 407.

DECREE. In Practice. The judicial decision of a litigated cause by a court of equity. It is also applied to the determination of a cause in courts of admiralty and probate. It is accurate to use the word judgment as applied to courts of law and decree to courts of equity, although the former term is now used in a larger sense to include both. There is, however, a distinction between the two which is well understood, and may wisely be preserved as tending to keep before the mind the distinction between the two jurisdictions—quite as fundamental with respect to the final determination of a cause as to the forms of procedure and the principles of jurisprudence applied by the two tribunals. Even the modern tendency of courts of law to avail themselves of equitable forms of procedure and principles of decision has left undisturbed the well-defined line of demarcation between the judgment at law and the decree in equity. It is well stated by an

able writer, thus:—"A judgment at law was either simply for the plaintiff or for the defendant. There could be no qualifications or modifications of the judgment. But such a judgment does not always touch the true justice of the cause or put the parties in the position they ought to occupy. While the plaintiff may be entitled, in a given case, to general relief, there may become a duty connected with the subject of litigation which he owes to the defendant, the performance of which, equally with the fulfilment of his duty by the defendant, ought, in a perfect system of remedial law, to be exacted. This result was attained by the decree of a court of equity which could be so moulded, or the execution of which could be so controlled and suspended, that the relative duties and rights of the parties could be secured and enforced;" *Bisph. Eq.* § 7.

It necessarily springs from the nature of the chancery jurisdiction that its determinations should be cast in a mould differing, *toto celo*, from a judgment at law, and it would hardly be an exaggeration to say that the essential character of the decree, as described by the author quoted, is to be found in the literal application of the fundamental maxim, "He who seeks equity must do equity." Accordingly, it is said that a court of equity will always reach, by a direct decree, what would otherwise be accomplished by a circuitry of proceedings; 4 *Del. Ch.* 410. And even when a complainant is entitled to relief which it is inequitable to grant except upon a condition to be performed by him springing from an obligation of equity and good conscience, though not from legal right, a chancellor may make a decree only upon such condition; 8 *Wall.* 557; *Bisph. Eq.* § 43. In such case, when something remains to be done by the party in order to entitle him to relief, while no present decree can be made, as the decree must be absolute and final and not contingent, the court will enter an interlocutory decree and suspend the entry of a final decree until the performance of such condition; 3 *Del. Ch.* 124; and in default thereof in a reasonable time dismiss the bill; 4 *id.* 43. The doctrine of the wife's equity is a familiar instance of this principle.

Decrees are either interlocutory or final. In the strictest sense all decrees are interlocutory until signed and enrolled; 2 *Dan. Ch. Pr.*, 6th Am. ed. 987, n. 1; but it is not in this sense that the terms are in practice used. But while there is a distinction well understood it is not always easy of exact definition. The existence of the two classes is, however, necessary in American chancery courts, as the right of appeal is frequently confined to final decrees, as in the federal courts. The former is entered on some plea or issue arising in the cause which does not decide the main question; the latter settles the matter in dispute; and a final decree has the same effect as a judgment at law; 2 *Madd.* 462; 1 *Ch. Ca.* 27; 2 *Vern.* 89; 4 *Brown, P. C.* 287. See 7 *Viner, Abr.* 394; 7 *Comyns, Dig.* 445; 1 *Belt, Suppl. Ves.* 223; 28 *Cal.* 75, 85. For forms of decrees, see *Seton, Decrees*; 2 *Dan. Ch. Pr.* 986.

Final Decree. One which finally disposes of a cause, so that nothing further is left for the court to adjudicate. See 2 *Dan. Ch. Pr.* 904, n.

A decree which determines the particular cause. It is not confined to those which terminate all litigation on the same right; 1 *Kent* 316.

A decree which disposes ultimately of the suit. *Ad. Eq.* 375. After such decree has been pronounced, the cause is at an end, and no further hearing can be had; *id.* 388; *Beach, Mod. Eq. Pr.* 789.

Prior to the establishment of the circuit courts of appeals there was an appeal to the United States supreme court only from final decrees of the circuit courts; *U. S. Rev. Stat.* § 692; and the same is still true of appeals from those courts; *U. S. Rev. Stat.* 1 *Supp.* 908; except that special provision is made for an appeal within a limited time from an order granting or refusing an injunction; *id.* 904. Accordingly, the ques-

tion what is a final decree is one of constant occurrence and importance as determining the jurisdiction of the appellate courts. The same question arises under the constitutional and statutory regulations of appeals in many of the states, although in some of them the right of appeal is not limited to final decrees; e. g. Delaware, where it is extended to interlocutory decrees or orders, if prayed before the first day of the following term, while it may be taken from a final decree within two years after it is signed.

Another reason why the distinction is important is that a final decree, entered of record and not directed to be without prejudice, is a bar to another bill filed between the same parties for the same subject-matter; 2 Del. Ch. 37.

Where the whole law of a case is settled by a decree, and nothing remains to be done, unless a new application be made at the foot of the decree, the decree is a final one so far as respects a right of appeal; 12 Wall. 86; and so is a decree dismissing a bill with costs, although they be afterwards taxed and decree entered for them; 139 U. S. 549; but a decree of foreclosure and sale is not final in the sense which allows an appeal from it so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined; 23 Wall. 405; see 45 N. J. Eq. 77; but a decree for foreclosure and sale of mortgaged premises is final and may be appealed from without waiting for the return and confirmation of the sale by a decretal order; 4 How. 503.

A decree fixing the priority of claims against an insolvent corporation, and directing the sale of its property for their payment, is a final decree within equity rule 88, relating to rehearings; 1 C. C. App. 535. A decree is final which disposes of every matter of contention between the parties, except as to one severable item, not relating to appellants, and refers the case to a master to ascertain that; 140 U. S. 52.

If the decree decides the rights to property and orders it to be delivered up or sold, or adjudges a sum of money to be paid, and the party is entitled to have such decree carried into immediate execution, it is a final decree; 6 How. 208. In such cases it is held that the decree is final upon the merits, and the ulterior proceedings, as in the foreclosure case, constitute but a mode of executing the original decree; 4 id. 503.

The multiplicity of cases on this subject is too great for citation here, but the principle applied is illustrated by those cited, and as to a particular case the course of decisions must be critically examined. Cases will be found collected in notes to U. S. Rev. Stat. § 692 and to 2 Dan. Ch. Pr., 6th Am. ed. ch. XXVI. sec. 1. See Foster, Federal Practice; Field, Federal Courts; FINAL DECREE; JUDGMENT.

Interlocutory Decree. An adjudication or order made upon some point arising during the progress of a cause which does not determine finally the merits of the question or questions involved. Neither the courts nor the text-writers have satisfactorily defined this term. As was well said by Baldwin, J., "The difficulty is in the subject itself; for, by various gradations, the interlocutory decree may be made to approach the final decree, until the line of discrimination becomes too faint to be readily perceived." 1 Rob. Va. 27. The real matter of importance is to define what is a final decree, and that being done, it may be generally stated that every other order or decree made during the progress of a cause in chancery is interlocutory. The test which is to be derived from the cases can hardly be better stated than in a late case, thus:

Where something more than the ministerial execution of the decree as rendered is left to be done, the decree is interlocutory, and not final, even though it settles the equities of the bill; 135 U. S. 232.

As every decree *inter partes* is either final or interlocutory, all that has been said upon the former head, with the citations, must also be read in connection with this.

Decree Pro Confesso. An order or

decree of a court of chancery that the allegations of the bill be taken as confessed, as against a defendant in default, and permitting the plaintiff to go on to a hearing *ex parte*.

"A decree *pro confesso* is one entered when the defendant has made default by not appearing in the time prescribed by the rules of court. A decree *nisi* is drawn by the plaintiff's counsel, and is entered by the court as it is drawn. A decree, when the bill is taken *pro confesso*, is pronounced by the court after hearing the pleadings and considering the plaintiff's equity;" Freem. Judg. § 11.

Such a decree is also entered when the defendant, having appeared, has not answered. The effect of such a decree is that the facts set forth in the bill are taken as true, and a decree made thereon according to the equity of the case. It was formerly the practice to put the plaintiff to his proof of the substance of the bill; 4 Johns. Ch. 547; 1 Dan. Ch. Pr., 5th Am. ed. 517, n.; but the practice of taking the bill *pro confesso* is now generally established; *id.* 518; and the subject is, in most courts of chancery, provided for, and the practice thereon regulated by rule of court.

The usual modern practice is substantially that provided for by Equity Rule 19 of the United States courts. Upon motion, it appearing from the record that the facts warrant it, an order is entered that the bill be taken *pro confesso*, and the cause proceeds *ex parte*, and the court may proceed to a decree after thirty days from the entry of the order; 1 Dan. Ch. Pr. 525, note.

Such a decree cannot be entered when the bill contains a great lack of precision; 2 J. J. Marsh. 155; but only when the allegations of the bill are specific, and the defendant has been properly served; 30 Ill. 25; 47 id. 353; 3 Ind. 316; 122 Mass. 302.

When only one defendant answers, but he disproves the whole case made by the bill, a decree *pro confesso* cannot be entered against those who fail to answer; 27 Va. 433.

A decree *pro confesso* cannot be safely entered against an infant; 30 Beav. 148; 8 Pet. 128; 56 Ala. 612; 74 Ala. 415; 43 Ill. 239; 44 id. 503; 65 Me. 352; 44 Miss. 296; 21 N. H. 470; 3 Johns. Ch. 367; 8 N. Y. 9; 8 Ohio 373; though this is sometimes done, on consent of his solicitor; 116 Mass. 377.

In Legislation. In some countries, as in France, some acts of the legislature or of the sovereign, which have the force of law are called *decrees*; as, the Berlin and Milan decrees.

In Scotch Law. A final judgment or sentence of court by which the question at issue between the parties is decided.

DECREE IN ABSENCE. In Scotch Law. Judgment by default or *pro confesso*.

DECREE OF CONSTITUTION. In Scotch Law. Any decree by which the extent of a debt or obligation is ascertained.

The term is, however, usually applied especially to those decrees which are required to found a title in the person of the creditor in the event of the death of either the debtor or the original creditor. Bell, Dict.

DECREE DATIVE. In Scotch Law. The order of a court of probate appointing an administrator.

DECREE OF FORTHCOMING. In Scotch Law. The decree made after an arrestment ordering the debt to be paid or the effects to be delivered up to the arresting creditor. Bell, Dict.

DECREE OF LOCALITY. In Scotch Law. The decree of a teind court allocating stipend upon different heritors. It is equivalent to the apportionment of a tithe rent-charge.

DECREE OF MODIFICATION. In Scotch Law. A decree of the teind court modifying or fixing a stipend.

DECREE NISI. In English Law. A decree for a divorce, not to take effect till after such time, not less than six months from the pronouncing thereof, as the court shall from time to time direct. During this

period any person may show cause why the decree should not be made absolute; 29 Vict. c. 33, s. 3; 23 & 24 Vict. c. 144, s. 7; 2 Steph. Com. 281; Mozl. & W. Dict.

The term is also sometimes applied to a decree entered provisionally to become final at a time therein named, unless cause is shown to the contrary.

DECREE OF REGISTRATION. In Scotch Law. A proceeding by which the creditor has immediate execution. It is somewhat like a warrant of attorney to confess judgment. 1 Bell, Com. 1. 1. 4.

DECREET. In Scotch Law. The final judgment or sentence of court by which the question at issue between the parties is decided.

Decreet absolutor. One where the decision is in favor of the defendant.

Decreet condemnator. One where the decision is in favor of the plaintiff. Erskine, Inst. 4. 3. 5.

DECREET ARBITRAL. In Scotch Law. The award of an arbitration. The form of promulgating such award. Bell, Dict. Arbitration; 2 Bell, Hou. L. 49.

DECREPT (Fr. *décérépt*; Lat. *decrepitus*). Infirm; disabled, incapable, or incompetent, from either physical or mental weakness or defects, whether produced by age or other cause, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. 16 Tex. App. 11.

DECRETALES BONIFACII OCTAVI. A supplemental collection of the canon law, published by Boniface VIII. in 1298, called, also, *Liber Sextus Decretalium* (Sixth Book of the Decretals). 1 Kaufm. Mackeldey, Civ. Law 82, n. See DECRETALES.

DECRETALES GREGORII NONI. The decretals of Gregory the Ninth. A collection of the laws of the church, published by order of Gregory IX. in 1227. It is composed of five books, subdivided into titles, and each title is divided into chapters. They are cited by using an X (or extra); thus, *Cap. & X de Regulis Juris*, etc. 1 Kaufm. Mackeldey, Civ. Law 83, n.; Butler, Hor. Jur. 115.

DECRETAL ORDER. In Chancery Practice. An order made by the court of chancery, upon a motion or petition, in the nature of a decree. 2 Dan. Ch. Pr. 638.

DECRETALS. In Ecclesiastical Law. Canonical epistles, written by the pope alone, or by the pope and cardinals, at the instance or suit of one or more persons, for the ordering and determining some matter in controversy, and which have the authority of a law in themselves.

The decretals were published in three volumes. The first volume was collected by Raymondus Barcinus, chaplain to Gregory IX., about the year 1227, and published by him to be read in schools and used in the ecclesiastical courts. The second volume is the work of Boniface VIII., compiled about the year 1298, with additions to and alterations of the ordinances of his predecessors. The third volume is called the Clementines, because made by Clement V., and was published by him in the council of Vienne, about the year 1308. To these may be added the Extravagantes of John XXII. and other bishops of Rome, which, relatively to the others, are called *Novellæ Constitutiones*. Ridley's View, etc. 99, 100; 1 Fournel, Hist. des Avocats 194, 195.

The false decretals were forged in the names of the early bishops of Rome, and first appeared about A. D. 845-850. The author of them is not known. They are mentioned in a letter written in the name of the council of Quierzy, by Charles the Bald, to the bishops and lords of France. See Van Espen Fleury, *Droit de Canon*, by André.

The decretals constitute the second division of the *Corpus Juris Canonici*.

DECRETUM GRATIANI. A collection of ecclesiastical law made by Gratian, a Bolognese monk, in the year 1151. It is the oldest of the collections constituting the *Corpus Juris Canonici*. 1 Kaufm. Mackeldey, Civ. Law 81; 1 Bla. Com. 83; Butler, Hor. Jur. 113.

DECRY. To cry down; to destroy the credit of. It is said that the king may at any time decry the coin of the realm. 1 Bla. Com. 278.

DECURIO. In Roman Law. One of the chief men or senators in the provincial towns. The *decuriones*, taken together, had the entire management of the internal affairs of their towns or cities, with powers resembling in some degree those of our modern city councils. 1 Spence, Eq. Jur. 54; Calvinus, Lex.

DEDBANA. An actual homicide or manslaughter. Toml.

DEDI (Lat. I have given). A word used in deeds and other instruments of conveyance when such instruments were made in Latin.

The use of this word formerly carried with it a warranty in law, when in a deed; for example, if in a deed it was said, "*dedi* (I have given), etc., to A. B.," there was a warranty to him and his heirs. But this is no longer so. 8 & 9 Vict. c. 106, s. 4. Brooke, Abr. *Guaranty*, pl. 85. The warranty thus wrought was a special warranty, extending to the heirs of the feeoffee during the life of the donor only. Co. Litt. 884 b; 4 Co. 81; 5 id. 17; 3 Washb. R. P. 671. *Dedi* is said to be the aptest word to denote a feoffment; 3 Bla. Com. 310. The future, *dabo*, is found in some of the Saxon grants. 1 Spence, Eq. Jur. 44. See GRANT.

DEDI ET CONCESSI (Lat. I have given and granted). The aptest words to work a feoffment. They are the words ordinarily used, when instruments of conveyance were in Latin, in charters of feoffment, gift, or grant. These words were held the aptest; though others would answer; Co. Litt. 884 b; 1 Steph. Com. 114; 2 Bla. Com. 53, 316. See COVENANT.

DEDICATION. An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. 28 Wis. 416; 33 N. J. L. 18; 95 Cal. 463.

Express dedication is that made by deed, vote, or declaration.

Implied dedication is that presumed from an acquiescence in the public use.

To be valid it must be made by the owner of the fee; 5 B. & Ald. 454; 3 Sandf. 502; 4 Campb. 16; 84 Ala. 215; or, if the fee be subject to a naked trust, by the equitable owner; 6 Pet. 431; 1 Ohio St. 478; and to the public at large; 22 Wend. 425; 2 Vt. 480; 10 Pet. 662; 11 Ala. n. s. 63. In making the appropriation, no particular formality is required, but any act or declaration, whether written or oral, which clearly expresses an intent to dedicate, will amount to a dedication, if accepted by the public, and will conclude the donor from ever after asserting any right incompatible with the public use; Washb. Easem. 133; 11 M. & W. 827; 5 C. & P. 460; 6 Pet. 431; 22 Wend. 450; 25 Conn. 235; 19 Pick. 405; 2 Vt. 480; 9 B. Monr. 201; 12 Ga. 239; 27 Mo. 211; 22 Tex. 94; 95 Cal. 463; 148 Pa. 367; 35 W. Va. 554; 44 La. Ann. 931; 96 Ala. 272; 135 Ind. 331; the vital principle of the dedication being the intention, which must be unequivocally manifested, and clearly and satisfactorily appear; 40 Minn. 284; 84 Ala. 215; 78 Cal. 9; 42 Kan. 203. A mere acquiescence by the owner of land in its occasional and varying use for travel by the public is insufficient to establish a dedication thereof, as a street by adverse user; 135 Pa. 256; 152 id. 368. And, without any express appropriation by the owner, a dedication may be presumed from twenty years' use of his land by the public, with his knowledge; 22 Ala. n. s. 190; 19 Conn. 250; 11 Metc. 421; 3 Zab. 150; 4 Ind. 518; 17 Ill. 249; 26 Pa. 187; or from any shorter period, if the use be accompanied by circumstances which favor the presumption, the fact of dedication being a conclusion to be drawn, in each particular case, by the jury, who as against the owner have simply to determine whether by permitting the public use he has intended a dedication; 5 Taunt. 125; 6 Wend. 651; 9 How. 10; 10 Ind. 219; 4 Cal. 114; 17 Ill. 416; 30 E. L. & Eq. 207. See 51 Minn. 381. But this presumption, being merely an inference from the public use, coupled with circumstances indicative of the owner's intent to dedicate, is open to

rebuttal by the proof of circumstances indicative of the absence of such an intent; 4 Cush. 332; 25 Me. 297; 9 How. 10; 4 B. & Ad. 447; 7 C. & P. 578; 8 Ad. & E. 99; 110 Mo. 260; 63 Hun 628; 134 U. S. 84.

The death of the owner is a revocation of a proffered dedication of streets, and an acceptance thereafter by the village gives it no right in the streets; 67 Hun 546. Where one who has offered to dedicate land for a public street, conveys such land before his offer is accepted, the conveyance operates as a revocation of the offer; 141 Ill. 89; 100 Cal. 302.

Without acceptance, a dedication is incomplete. In the case of a highway, the question has been raised whether the public itself, or the body charged with the repair, is the proper party to make the acceptance. In England, it has been decided that an acceptance by the public, evidenced by mere use, is sufficient to bind the parish to repair, without any adoption on its part; 5 B. & Ad. 469; 2 N. & M. 583. See 8 Steph. Com. 130. In this country there are cases in which the English rule seems to be recognized; 1 R. I. 98; 23 Wend. 103; though the weight of decision is to the effect that the towns are not liable, either for repair or for injuries occasioned by the want of repair, until they have themselves adopted the way thus created, either by a formal acceptance or by indirectly recognizing it, as by repairing it or setting up guide-posts therein; Thomp. Highw. 52; 13 Vt. 424; 6 N. Y. 257; 8 Gratt. 632; 2 Ind. 147; 3 Cush. 290; 35 W. Va. 554; 89 Va. 401; 69 Hun 86; 152 Pa. 494; 84 Ala. 224; 69 Tex. 449; Ang. Highw. 111. It has been held that the acceptance, improvement, and user by a city of a street or a portion of a street as platted is equivalent to an acceptance of the whole tract platted; 110 Mo. 618.

In order that a plat showing lots, blocks, and streets may operate as a common-law dedication of an easement in the streets to the public, there must be an acceptance by the public in a reasonable time; 86 Mich. 567. See STREET; BRIDGE; HIGHWAY.

The authorities above cited relate chiefly to the dedication of land for a highway. But a dedication may be made equally well to any other purpose which is for the benefit of the public at large, as for a square, a common, a landing, a cemetery, a school, or a monument; and the principles which govern in all these cases are the same, though they may be somewhat diversified in the application, according as they are invoked for the support of one or another of these objects; 6 Hill 407; 11 Pa. 444; 18 Ohio 18; 2 Ohio St. 107; 12 Ga. 239; 4 N. H. 537; 1 Wheat. 469; 2 Watts 23; 1 Spenc. 86; 8 B. Monr. 234; 3 Sandf. 503; 7 Ind. 641; 2 Wis. 153; 93 Cal. 43; 154 Mass. 323.

DEDIMUS ET CONCESSIMUS (Lat. we have given and granted). Words used by the king, or where there were more grantors than one, instead of *dedi et concessi*.

DEDIMUS POTESTATEM (Lat. we have given power). The name of a writ to commission private persons to do some act in the place of a judge; as, to administer an oath of office to a justice of the peace, to examine witnesses, and the like. Cowel; Com. Dig. *Chancery* (K, 3), (P, 2), *Fine* (E, 7); Dane, Abr. Index; 2 Bla. Com. 351.

DEDIMUS POTESTATEM DE AT-TORNO FACIENDO (Lat.). The name of a writ which was formerly issued by authority of the crown in England to authorize an attorney to appear for a defendant, and without which a party could not, until the statute of Westminster 2 (*infra*), appear in court by attorney.

By statute of Westminster 2, 13 Edw. I. c. 10, all persons impleaded may make an attorney to sue for them, in all pleas moved by or against them, in the superior courts there enumerated. 3 M. & G. 184, n.

DEDITITI (Lat.). In Roman Law. Criminals who had been marked in the face or on the body with fire or an iron so that the mark could not be erased, and were subsequently manumitted. Calvinus, Lex.

DEDUCTION FOR NEW. In Maritime Law. The allowance (usually one-third) on the cost of repairing a damage to the ship by the extraordinary operation of the perils of navigation, the renovated part being presumed to be better than before the damage. In some parts, by custom or by express provision in the policy, the allowance is not made on a new vessel during the first year, or on a new sheathing, or on an anchor or chain-cables; 1 Phill. Ins. § 50; 2 id. §§ 1369, 1431, 1433; Benecke & S. Av. 167, n. 238; 2 S. & R. 229; 1 Cai. 573; 18 La. 77; 2 Cra. 218; 21 Pick. 456; 5 Cow. 63.

DEED. A written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound and accepted by the obligee or covenantor. Co. Litt. 171; 3 Bla. Com. 295; Shepp. Touchst. 50.

A writing containing a contract sealed and delivered to the party thereto. 3 Washb. R. P. 239.

A writing under seal by which lands, tenements, or hereditaments are conveyed for an estate not less than a freehold. 2 Bla. Com. 294.

A writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. 35 W. Va. 647. See 73 Tex. 129.

Any instrument in writing under seal, whether it relates to the conveyance of real estate or to any other matter—as, for instance, a bond, single bill, agreement, or contract of any kind,—is as much a deed as is a conveyance of real estate, and, after delivery and acceptance, is obligatory; 2 S. & R. 504; 5 Dana 305; 2 Miss. 164. The term is, however, often used in the latter sense above given, and perhaps oftener than in its more general signification.

Deeds of feoffment. See FEOFFMENT.

Deeds of grant. See GRANT.

Deeds indented are those to which there are two or more parties who enter into reciprocal and corresponding obligations to each other. See INDENTURE.

Deeds of release. See RELEASE; QUIT-CLAIM.

Deeds poll are those which are the act of a single party and which do not require a counterpart. See DEED POLL.

Deeds under the statute of uses. See BARGAIN AND SALE; COVENANT TO STAND SEISED; LEASE AND RELEASE.

According to Blackstone, 2 Com. 313, deeds may be considered as conveyances at common law, of which the original are feoffment; gift; grant; lease; exchange; partition; the derivative are release; confirmation; surrender; assignment; defeasance,—or conveyances which derive their force by virtue of the statute of uses; namely, covenant to stand seized to uses; bargain and sale of lands; lease and release; deed to lead and declare uses; deed of revocation of uses.

For a description of the various forms in use in United States, see 2 Washb. R. P. 607.

Requisites of. Deeds must be upon paper or parchment; 5 Johns. 248; must be completely written before delivery; 1 Hill, S. C. 267; 6 M. & W. 216, Am. ed. note; 3 Washb. R. P. 239; but see 21 Or. 211; BLANK; must be between competent parties, see PARTIES; and certain classes are excluded from holding lands, and, consequently, from being grantees in a deed; see 1 Washb. R. P. 73; 2 id. 564; must have been made without restraint; 13 Mass. 371; 2 Bla. Com. 291; must contain the names of the grantor and grantee; 2 Brock. 156; 19 Vt. 613; 12 Mass. 447; 14 Mo. 420; 13 Ohio 120; 14 Pet. 322; 1 McLean 321; 2 N. H. 525; but a variance in the names set forth in the deed will not invalidate it; 148 Pa. 216; must relate to suitable property; Browne, Stat. Frauds § 6; 3 Washb. R. P. 331; must contain the requisite parts, see *infra*; must be sealed; 6 Pet. 124; Thornt. Conv. 205; see 12 Cal. 166; 98 N. C. 558; (i. e. in order to constitute it a deed, though an unsealed instrument may operate as a conveyance of land; Mitchell, R. P. 453; and should, for safety, be signed, even where statutes do not require it; 3 Washb. R. P. 239; but see 66 Tex. 142. Previous to the Statute of Frauds, signing was not essential to a deed, provided it was sealed. The statute makes it so; 2 Bla. Com. 306; *contra*, Shepp. Touch. n. (24), Preston's ed., which latter is of opinion that the statute was intended to

DEED OF ARRANGEMENT

affect-parol contracts only, and not deeds. See Wms. R. P. 153; 2 Q. B. 580.

They must be delivered (see DELIVERY) and accepted; 8 Ill. 177; 1 N. H. 353; 5 *id.* 71; 20 Johns. 187; 13 Cent. L. J. 222; 85 Ia. 149; 88 Minn. 395. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both; 16 Or. 437. But if the deed is delivered without the consent of the grantor it is of no effect; 145 U. S. 817. Deeds conveying real estate must in most states of the United States be acknowledged and recorded. See ACKNOWLEDGMENT; RECORD. In Pennsylvania this is unnecessary to its validity as between the parties; 146 Pa. 451.

The requisite number of witnesses is also prescribed by statute in most of the states. See ATTESTATION.

Formal parts. The premises embrace the statement of the parties, the consideration, recitals inserted for explanation, description of the property granted, with the intended exceptions. The *habendum* begins at the words "to have and to hold," and limits and defines the estate which the grantee is to have. The *reddendum*, which is used to reserve something to the grantor, see EXCEPTION; the conditions, see CONDITION; the covenants, see COVENANT; WARRANTY; and the conclusion, which mentions the execution, date, etc., properly follow in the order observed here; 5 Washb. R. P. 365.

The construction of deeds is favorable to their validity; the principal includes the incident; punctuation is not regarded; a false description does not harm; the construction is least favorable to the party making the conveyance or reservation; the *habendum* is rejected if repugnant to the rest of the deed. Shepp. Touchst. 89; 3 Kent 422.

All the terms of a deed should be construed together; 98 N. C. 299; 82 Va. 685; 138 U. S. 226; and the words therein should be taken most strongly against the party using them; 131 U. S. 75; 84 Ala. 313; where two clauses in a deed are repugnant, the first prevails; 83 Va. 288; and if possible a deed should be so construed as to give it effect; 69 Tex. 153.

The *lex rei sitae* governs in the conveyance of lands, both as to the requisites and forms of conveyance. See LEX REI SITAE.

Recitals in deeds of payment of the considerations expressed therein are not proof of such payments as against persons not parties thereto; 142 U. S. 417; nor is a consideration always necessary to the validity of a deed of land; 73 Tex. 129. An alteration in the description of property in a deed cannot be made without re-execution, reacknowledgment, and redelivery, after the deed has been delivered and recorded; 148 U. S. 21.

Much of the English law in reference to the possession and discovery of title-deeds has been rendered useless in the United States by the system of registration, which prevails so universally.

Consult Preston; Wood; Thornton, Conveyancing; Greenleaf's Cruise, Dig.; Washburn; Hilliard; Williams; Tiedeman, Real Property; Barton, Deeds; Leake, Land Laws; Dembitz, Land Titles.

In Real Estate Law. In its broadest meaning includes all varieties of sealed instruments; in its secondary and more common meaning it signifies a writing under seal conveying real estate. 61 Fla. 310, cited by 2 Elliot, Contr. 1169. See EXECUTED DEED; GOOD AND SUFFICIENT DEED.

DEED OF ARRANGEMENT. In English law, an assignment for the benefit of creditors. Stand. Dict.

DEED TO DECLARE USES. A deed made after a fine or common recovery, to show the object thereof.

DEED, DISENTAILING. See DIS-ENTAILING DEED.

DEED TO LEAD USES. A deed made before a fine or common recovery, to show the object thereof.

DEED POLL. A deed which is made by one party only.

A deed in which only the party making it

executes it or binds himself by it as a deed. 3 Washb. R. P. 311.

The term is now applied in practice mainly to deeds by sheriffs, executors, administrators, trustees, and the like.

The distinction between deed poll and indenture has come to be of but little importance. The ordinary purpose of a deed poll is merely to transfer the rights of the grantor to the grantee. It was formerly called *charta de una parte*, and usually began with these words: "*Sciatis presentes et futuri quod ego, A, etc.*" and now begins, "Know all men by these presents that I, A, B, have given, granted, and enfeoffed, and by these presents do give, grant, and enfeoff," etc. Cruise, Dig. tit. 32, c. 1, s. 23. See INDENTURE.

DEED OF SETTLEMENT. See SETTLEMENT, DEED OF.

DEED OF TRUST. Of two kinds, an absolute deed of trust, and one in the nature of a mortgage.

A deed of trust in the nature of a mortgage is one conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor.

An absolute deed of trust is one by which the grantor parts absolutely with the title, which rests in the grantee unconditionally for the purpose of the trust.

The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to conditions of defeasance. 5 Elliott, Contracts 4605; 5 Ohio St. 124. See MORTGAGE; GENERAL ASSIGNMENT.

DEED IN WRITING. A "deed in writing" is but a common mode of expressing, fully and explicitly, to the popular understanding, the technical idea legally implied by the single word deed; that is, a writing sealed, which the common mind might not understand as being intended or signified by deed, without explanation or circumlocution. 5 Dana (Ky.) 368.

DEEM. To decide; to judge; to sentence. When by statute certain acts are deemed to be crimes of a particular nature, they are such crimes, and not a semblance of it, nor a mere fanciful approximation to or designation of the offence. 132 Mass. 247.

To determine upon consideration; to think, suppose, hold an opinion. 9 A. & E. Ency. L. 2nd ed., 165.

DEEMSTERS. Judges in the Isle of Man, who decide all controversies without process, writings, or any charges. These judges were chosen by the people, and are said by Spelman to be two in number. Spelman, Gloss.; Camden, Brit.; Cowel; Blount.

DEFACE. To mar or disfigure the face or external surface of; to obliterate or efface in whole or in part. Stand. Dict.

DEFALCATION. The act of a defaulter.

The reduction of the claim of one of the contracting parties against the other, by deducting from it a smaller claim due from the former to the latter.

The law operates this reduction in certain cases; for, if the parties die or are insolvent, the balance between them is the only claim; but if they are solvent and alive, the defendant may or may not defalcate at his choice. See SET-OFF. For the etymology of this word, see Brackenridge, Law Misc. 186. Defalcation was unknown at common law; 1 Rawle 291.

DEFAMATION. The speaking or writing words of a person so as to hurt his good fame, *de bona fama aliquid detrahere*. Written defamation is termed libel, and oral defamation slander.

The provisions of the law in respect to defamation, written or oral, are those of a civil nature, which give a remedy in damages to an injured individual, or of a criminal nature, which are devised for the security of the public. Heard, Lib. & Sl. § 1.

In England, besides the remedy by action, proceedings might formerly be instituted in the ecclesiastical court for redress of the injury. The punishment for defamation,

in this court, was payment of costs and penance enjoined at the discretion of the judge. When the slander had been privately uttered, the penance might be ordered to be performed in a private place; when publicly uttered, the sentence was to be in public, as in the church of the parish of the defamed party, in time of divine service; and the defamer was required publicly to pronounce that by such words—naming them—as set forth in the sentence he had defamed the plaintiff, and, therefore, that he did beg pardon, first of God, and then of the party defamed, for uttering such words. Clerk's Assist. 225; 3 Burn. Eccl. Law, Defamation, pl. 14; 2 Chit. Pr. 471; Cooke, Def. This jurisdiction was taken away in England by 18 & 19 Vict. c. 41, and in Ireland by 23 & 24 Vict. c. 32.

If words are false, injurious, and uttered *mallo animo*, they are actionable; 40 La. Ann. 423; words that, according to their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, are actionable, whether written or spoken; 84 Va. 664; 74 Ia. 563; 70 Md. 328; 17 Wis. 427; 98 N. C. 131; 147 Mass. 438; 152 Pa. 187; 51 Fed. Rep. 424; as is the publication of anything which tends to hold a person up to contempt and ridicule; 76 Ga. 280; but under the common law there was no redress for defamatory words unless they imputed a crime, or related to a man's profession or trade; 17 Or. 259.

If a publication does not contain a libellous charge, no action will lie therefor, no matter what its author intended; 119 Ind. 244; and where the language is so vague and uncertain, that it could not have been intended to be used in reference to any particular person or persons, it is not actionable; 40 Minn. 291. In publishing a libel a man is presumed to intend the natural consequences of his act; 57 Conn. 73. A false publication that a business firm is insolvent is libellous *per se*; 116 Mo. 226.

When the truth is relied upon in justification of a libel, to constitute a complete defence, it must be as broad as the defamatory accusation; 37 Minn. 285. One may show in mitigation of a libel that the violent conduct and language of the other provoked him to the use of the words charged; 75 Mich. 402. See LIBEL; SLANDER.

DEFAULT. The non-performance of a duty, whether arising under a contract or otherwise.

By the fourth section of the English statute of frauds, 29 Car. II. c. 3, it is enacted that "no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement," etc., "shall be in writing," etc.

In Practice. The non-appearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defence.

When the plaintiff makes default, he may be nonsuited; and when the defendant makes default, judgment by default is rendered against him. Comyns, Dig. Pleading, E. 42, B. 11. See article JUDGMENT BY DEFAULT; 7 Viner, Abr. 429; Doctr. Plac. 208; Grah. Pr. 681. See as to what will excuse or save a default, Co. Litt. 259 b; 20 Iowa 245.

DEFEASANCE. An instrument which defeats the force or operation of some other deed or of an estate. That which is in the same deed is called a condition; and that which is in another deed is a defeasance. Comyns, Dig. Defeasance.

The defeasance may be subsequent to the deed in case of things executory; Co. Litt. 237 a; 2 Saund. 43; but must be a part of the same transaction in case of an executed contract; Co. Litt. 236 b; 1 N. H. 89; 3 Mich. 482; 7 Watts 401; 21 Ala. N. 8; 9. Yet, where an instrument of defeasance is executed subsequently in pursuance of an agreement made at the time of making the original deed, it is sufficient; 2 Washb. R. P. 489; as well as where a deed and the defeasance bear different dates but are delivered at the same time; Devl. Deeds 1102; 13 Pick. 411; 31 Pa. 131; 7 Me. 485; 13 Ala. 246. The instrument of defeasance must at law be of as high a nature as the principal deed; 23 Pick. 526; 7 Watts 261,

401; 43 Me. 206. It must recite the deed it relates to, or at least the most material part thereof; and it is to be made between the same persons that were parties to the first deed; 43 Me. 371. Defeasances of deeds conveying real estate are generally subject to the same rules as deeds, as to record and notice to purchasers; 8 Wend. 208; 14 id. 68; 17 S. & R. 70; 12 Mass. 456; 38 Me. 447; 40 id. 891; but in some states actual notice is not sufficient without recording; Mich. Rev. Stat. 261; Minn. Stat. at Large, 1873, § 23.

In equity, a defeasance could be proved by parol and a deed, absolute on its face, shown to be in legal effect a mortgage; 3 W. & S. 338; 115 Pa. 254; but such evidence must be clear, explicit, and unequivocal, and the parol defeasance must be shown to have been contemporaneous with the deed; id. In Pennsylvania, all defeasances are now required to be in writing, executed as deeds and recorded within sixty days after the deed. Act of June 8, 1881.

DEFEASIBLE FEE. A "defeasible fee" is where the devise becomes invested with the fee-simple title, subject to be divested upon the happening of some contingency provided by the will, as where an estate is devised to A, and if A should die without children then to B; in such a case the devise overtakes effect in the event A dies without children and B becomes the owner in fee of the estate. 85 Ky. 492, 3 S. W. 902.

A "defeasible fee" is a vested remainder, which might be defeated by their death without children before the time fixed in the will when the devise should take effect. 109 Ky. 520, 59 S. W. 855.

DEFEAT OR OBSTRUCT. The words "defeat or obstruct" signify the performance of some act on the part of the sureties, which will amount to a prevention or hindrance of a suit in opposition to the will and rights of the creditor, such as he cannot with reasonable diligence overcome. The terms import resistance and obstruction to his rights, and unless the acts complained of are, in point of fact, such as would hinder and prevent him from bringing suit, notwithstanding his desire to do so, they cannot properly be said to defeat or obstruct such suit. 3 Met. (Ky.) 68.

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DEFECT. The want of something required by law.

In pleading, matter sufficient in law must be deduced and expressed according to the forms of law. Defects in matters of substance cannot be cured, because it does not appear that the plaintiff is entitled to recover; but when the defects are in matter of form, they are cured by a verdict in favor of the party who committed them; 2 Wash. C. C. 1; 1 Hen. & M. 153; 16 Pick. 128, 541; 12 Conn. 455; 1 Pet. 76; 2 Green, N. J. 133; 4 Blackf. 107; 2 McL. 35; Bacon, Abr. *Verdict*, X. See 31 Ohio St. 15; 50 Barb. 55; 40 Wis. 373.

DEFECTUM CHALLENGE PROPRIETATIS. See CHALLENGE.

DEFECTUM SANGUINIS. See ESCHEAT.

DEFENCE. Torts. A forcible resistance of an attack by force.

A man is justified in defending his person, that of his wife, children, and servants, and for this purpose he may use as much force as may be necessary, even to killing the assailant, remembering that the means used must always be proportioned to the occasion, and that an excess becomes itself an injury; 3 M. & W. 150; 69 Miss. 478; 93 Cal. 476; 30 Fla. 142; 27 Tex. App. 562; 49 Ark. 543; 96 Ky. 39; but it must be in defence, and not in revenge; 1 C. & M. 214; 11 Mod. 48; Poll. Torts 255; 35 S. C. 283;

for one is not justified in shooting another, if such other party is retreating or has thrown away his weapon; 129 Ind. 587; nor is a mere threat to take one's life, with nothing more, a sufficient defence or excuse for committing homicide; 35 S. C. 197.

A man may also repel force by force in defence of his personal property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, as robbery, by any force short of taking the aggressor's life; 1 Bish. New Cr. L. § 875; or short of wounding or the employment of a dangerous weapon; 148 Mass. 529. In the latter case, Holmes, J., said:—"We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which can hardly stand on the right of self-defence, but involve other considerations of policy." See 42 Ill. App. 427.

With respect to the defence or protection of the possession of real property, although it is justifiable even to kill a person in the act of attempting to commit a forcible felony, as burglary or arson, yet this justification can only take place when the party in possession is wholly without fault; 1 Hale, Pl. Cr. 440, 444; 1 East, Pl. Cr. 259, 277. And where an illegal forcible attack is made upon a dwelling-house with the intention merely of committing a trespass, and not with any felonious intent, it is generally lawful for the rightful occupant to oppose it by force; 7 Bing. 305; 20 Eng. C. L. 139. See, generally, 1 Chit. Pr. 589; Grotius, lib. 2, c. 1; Rutherford, Inst. b. 1, c. 16; 2 Whart. Cr. L. § 1019; Bishop; Clark; Wharton, Criminal Law; Thompson, Cases of Self-Defence; ASSAULT; SELF-DEFENCE.

In Pleading and Practice. The denial of the truth or validity of the complaint. A general assertion that the plaintiff has no ground of action, which is afterwards extended and maintained in the plea. 3 Bla. Com. 296; Co. Litt. 127; 35 Ind. 448.

In this sense it is similar to the *contestatio litis* of the civilians, and does not include justification. In a more general sense it denotes the means by which the defendant prevents the success of the plaintiff's action; or, in criminal practice, the indictment. The word is commonly used in this sense in modern practice.

Half defence was that which was made by the form "defends the force and injury, and says" (*defendit vim et injuriam, et dicit*).

Full defence was that which was made by the form "defends the force and injury when and where it shall behoove him, and the damages, and whatever else he ought to defend" (*defendit vim et injuriam quando et ubi curia consideravit, et damna et quicquid quod ipse defendere debet, et dicit*), commonly shortened into "defends the force and injury when," etc. 8 Term 632; 3 B. & P. 9, n.; Co. Litt. 127 b; Willes 41. It follows immediately upon the statement of appearance, "comes" (*venit*), thus: "comes and defends." By a general defence the propriety of the writ, the competency of the plaintiff, and the jurisdiction of the court were allowed; by defending the force and injury, misnomer was waived; by defending the damages, all exceptions to the person of the plaintiff; and by defending either when, etc., the jurisdiction of the court was admitted. 3 Bla. Com. 298.

The distinction between the forms of half and full defence was first lost sight of; 8 Term 633; Willes 41; 3 B. & P. 9; 2 Saund. 209 c; and no necessity for a technical defence exists, under the modern forms of practice.

Formerly, in criminal trials for capital crimes the prisoner was not allowed counsel to assist in his defence; 1 Ry. & M. 166; 3 Campb. 4; 8 Sharw. Bla. Com. 356, n. This privilege was finally extended to all persons accused of felonies in England, by 8 & 7 Will. IV. c. 114; and in the United States by statute or universal practice; 3 Whart. Cr. L. § 3004.

DEFENDANT. A party sued in a personal action. The term does not in strict-

ness apply to the person opposing or denying the allegations of the demandant in a real action, who is properly called the tenant. The distinction, however, is very commonly disregarded; and the term is further frequently applied to denote the person called upon to answer, either at law or in equity, and as well in criminal as civil suits.

See 8 Dana 41; 11 Ohio 374; 9 Ill. 20; 10 Paige 290; 16 Wis. 169; 118 Mass. 470; 122 id. 8; 56 L. J. R. Ch. D. 400; 54 Ala. 440.

See CONDEMNATION PROCEEDINGS; PLAIN-TIFF.

DEFENDANT IN ERROR. The distinctive term appropriate to the party against whom a writ of error is sued out.

DEFENDANT'S PROPERTY BOND. See CLAIM PROPERTY BOND.

DEFENDEMUS (Lat. we will defend).

A word anciently used in feoffments or gifts, whereby the donor and his heirs were bound to defend the donee against any servitude or incumbrance on the thing granted, other than contained in the donation. Cowel.

DEFENDER. In Scotch and Canon Law. A defendant.

DEFENDER (Fr.). To deny; to defend; to conduct a suit for a defendant; to forbid; to prevent; to protect.

DEFENDER OF THE FAITH.

A peculiar title belonging to the King of England, as "Catholic" to the King of Spain, and "Most Christian" to the King of France, first conferred by Pope Leo X on Henry VIII for writing against Martin Luther, later taken from him by the same pope for suppressing the houses of religion at the time of the reformation, but re-conferred on him by parliament in opposition to the pope, and used thereafter by all succeeding kings. Jacob.

DEFENDERE. In old pleading, to defend or deny.

To defend, in the modern sense.

In old English statutes, to prohibit or forbid; to prohibit from use; to appropriate to one's exclusive use; to fence in or enclose; to fence out or exclude others. Burrill. See DEFENSUM; DEFENSE; IN DEFENSIO.

DEFENERATION. The act of lending money on usury. Wharton.

DEFENSA. A park or place fenced in for deer, and defended as a property and peculiar for that use and service. Cowel.

DEFENSE AU FOND EN DROIT (called, also, *défense en droit*). A demurrer. 2 Low. C. 278. See, also, 1 Low. C. 216.

DEFENSE AU FOND EN FAIT. The general issue. 3 Low. C. 421.

DEFENSIVE ALLEGATION. In Ecclesiastical Practice. The answer of the party defending to the allegations of the party moving the cause. 3 Bla. Com. 100.

DEFENSIVE WAR. A war in defence of national right,—not necessarily defensive in its operations. 1 Kent 50.

DEFENSOR. In Civil Law. A defender; one who takes upon himself the defence of another's cause, assuming his liabilities.

An advocate in court. In this sense the word is very general in its signification, including *advocatus*, *patronus*, *procurator*, etc. A tutor or guardian. Calvinus, Lex.

In Old English Law. A guardian or protector. Spelman, Gloss. The defendant; a warrantor. Bracton.

In Canon Law. The advocate of a church. The patron. See ADVOCATUS. An officer having charge of the temporal affairs of the church. Spelman, Gloss.

DEFENSOR CIVITATUS (Lat. defender of the state).

In Roman Law. An officer whose business it was to transact certain business of the state.

Those officers were so called who, like the tribunes of the people at first, were chosen by the people in the large cities and towns, and whose duty it was to

watch over the order of the city, protect the people and the *decuriones* from all harm, protect sailors and naval people, attend to the complaints of those who had suffered injuries, and discharge various other duties. As will be seen, they had considerable judicial power. Du Cange; Schmidt, *Civ. Law*, introd. 16.

DEFENSOR FIDEI. Defender of the faith (*q. v.*). Jacob.

DEFENSUM. In old English law, an enclosure, or any fenced ground.

A part of an open field, appropriated to a particular use, as for hay, which was hence said to be in *defenso* (*q. v.*).

A state of several occupancy or appropriation.

Defence, in the old sense of prohibition; a state of prohibition, or in which the use of a thing is prohibited by law. Burrill. See IN DEFENSO; DEFENSE, DEFENDERE.

DEFERRED STOCK. See STOCK.

DEFICIENCY. That which is lacking or wanting. Stand. Dict.

That part of a debt, which a mortgage was made to secure, not realized from the subject mortgaged. Anderson; 35 Barb. (N. Y.) 492.

DEFICIT (Lat. is wanting). The deficiency which is discovered in the accounts of an accountant, or in the money which he has received.

DEFINE. To set bounds to, mark the limits of.

To make clear the design or scope of a thing; to remove doubt or uncertainty as to the meaning or application of; to determine authoritatively, settle officially, decide judicially. Anderson.

To define piracies is to enumerate the crimes which shall constitute piracy. 5 Wheat. (U. S.) 160.

DEFINITE. Bounded, limited, defined; determinate, precise, fixed, certain. Opposed to indefinite. Anderson. See FAILURE OF ISSUE.

DEFINITION (Lat. *de*, and *finis*, a boundary; a limit). An enumeration of the principal ideas of which a compound idea is formed, to ascertain and explain its nature; that which denotes and points out the substance of a thing. Ayliffe, Pand. 59.

Definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so: *omnis definitio in jure civili periculosa est, parum est enim ut non subverti possit*.

All ideas are not susceptible of definition, and many legal terms cannot be defined. This inability is frequently supplied, in a considerable degree, by descriptions.

The meaning of ordinary words, when used in acts of parliament, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained; L. R. 1 Ex. D. 143; for words used with reference to one set of circumstances may convey an intention quite different from what the self same set of words used in reference to another set of circumstances would or might have produced; L. R. 3 App. Cas. 68.

For a list of definitions of various words and phrases, as found in the reports, etc., which are not the subject of separate titles, see WORDS; MAXIMS.

DEFINITIVE. That which terminates a suit; final. A definitive sentence or judgment is put in opposition to an interlocutory judgment.

A distinction has been drawn in the United States supreme court between a final and a definitive judgment in regard to the condemnation of a prize in a court of admiralty; 1 Cra. 103; but for all practical purposes a definitive judgment or decree is final; 84 Pa. 238; 96 *id.* 420. See DECREE; JUDGMENT.

DEFLOURATION. The act by which a woman is deprived of her virginity.

When this is done unlawfully and against her will, it bears the name of rape (which

see); when she consents, it is fornication (which see); or if the man be married it is adultery on his part; 2 Greenl. Ev. § 48; 21 Pick. 509; 36 Me. 261; 11 Ga. 53; 2 Dall. 104.

DEFORCE. To withhold wrongfully the possession of lands; to keep another wrongfully out of possession of a freehold. 3 Bl. Com. 172.

DEFORCEMENT. The holding any lands or tenements to which another has a right.

In its most extensive sense the term includes any withholding of any lands or tenements to which another person has a right; Co. Litt. 277; 17 Conn. 212; so that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, by which the owner of the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him who has the right of property as falls within none of the injuries above mentioned; 8 Bla. Com. 173; Archb. Civ. Pl. 18; Dane, Abr. Index.

In Scotch Law. The opposition given, or resistance made, to messengers or other officers while they are employed in executing the law.

This crime is punished by confiscation of movables, the one half to the king and the other to the creditor at whose suit the diligence is used; Erskine, Pr. 4. 4. 32.

DEFORCIANT. One who wrongfully keeps the owner of lands and tenements out of the possession of them. 2 Bla. Com. 850.

DEFORCIARE. To withhold lands or tenements from the rightful owner. This is a word of art which cannot be supplied by any other word. Co. Litt. 331 b; 3 Thomas, Co. Litt. 3; Bract. lib. 4, 238; Fleta, lib. 5, c. 11.

DEFOSSION. The punishment of being buried alive. Black, L. Dict.

DEFRAUD. To defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice. 12 Barb. 186.

To cheat; to wrong another by fraud (*q. v.*). R. & L. Dict. See "DEFRAUD" THE UNITED STATES.

"DEFRAUD" THE UNITED STATES. To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicanery, or overreaching of those charged with carrying out the governmental intention. It is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicanery or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds. 265 U. S. 188.

DEFRAUDACION. In Spanish Law. The crime committed by a person who fraudulently avoids the payment of some public tax.

DEFUNCT. Dead; a deceased person.

DEGRADATION. In Ecclesiastical Law. The act of depriving a priest of his orders or benefices or of both, either by word of mouth or by public reproach, and a solemn ceremony of stripping from the offender the vestments of his office.

The mode of proceeding in the trial of clergymen is determined by canons in the various dioceses.

The same term is applied to the loss, by a peer, of his rank as such, as when he is deprived thereof by act of parliament. 2 Steph. Com. 608. Degradation must be distinguished from disqualification for bankruptcy, under stat. 34 & 35 Vict. c. 50.

DEGRADING. Sinking or lowering a person in the estimation of the public.

As to compelling a witness to answer questions tending to degrade him, see WITNESS; 18 Howell, St. Tr. 17, 334; 16 *id.* 161; 1 Phill. Ev. 289. To write or print of a man what will degrade him in society is a libel; 1 Dowl. 674; 2 M. & R. 77.

DEGREE (Fr. *degré*, from Lat. *gradus*, a step in a stairway; a round of a ladder).

A remove or step in the line of descent or consanguinity.

As used in law, it designates the distance between those who are allied by blood: it means the relations descending from a common ancestor, from generation to generation, as by so many steps. Hence, according to some lexicographers, we obtain the word pedigree (*q. v.*) *par degré* (by degrees), the descent being reckoned *par degré*. Minshew. Each generation lengthens the line of descent one degree; for the degrees are only the generations marked in a line by small circles or squares, in which the names of the persons forming it are written. See CONSANGUINITY; LINE; Ayliffe, Farerg. 209; Toullet, *Droit. Civ. Franc.* liv. 3, t. 1, c. 8, n. 158; Asso & M. Inst. b. 2, t. 4, c. 8, § 1.

In criminal law, the word is used to distinguish different grades of guilt and punishment attached to the same act, committed under different circumstances, as murder in the first and second degrees.

The state or civil condition of a person. 15 Me. 122.

The ancient English statute of additions, for example, requires that in process, for the better description of a defendant, his *state, degree, or mystery* shall be mentioned.

An honorable state or condition to which a student is advanced in testimony of proficiency in arts and sciences.

They are of pontifical origin. See 1 Schmidt, *Thesaurus*, 144; Vicat, *Doctores*; Minshew, *Dict. Bachelier*; Merlin, *Répertoire Univ.*; Van Espen, pt. 1, tit. 10; Giannone, *Istoria di Napoli*, lib. xi. c. 2, for a full account of this matter.

For the degrees of negligence, see NEGLIGENCE; BAILEE; BAILMENT.

DEGREE OF CARE. A child is only required to exercise such "degree of care" as children of the same age ordinarily exercise under similar circumstances. 150 Ky. 831, 151 S. W. 14.

DEHORS (Fr. out of; without). Something out of the record, agreement, will, or other thing spoken of; something foreign to the matter in question. See ALIENDE.

DEI GRATIA. By the grace of God. An expression used in the titles of sovereigns, and considered as one of the prerogatives of royalty, although anciently a part of the titles of inferior officers and magistrates, ecclesiastical and civil. Burrill; Spelman.

DEI JUDICUM (Lat. the judgment of God). A name given to the trial by ordeal.

DEJACION. In Spanish Law. A general term applicable to the surrender of his property to his creditors by an insolvent. The renunciation of an inheritance. The release of a mortgage upon payment, and the abandonment of the property insured to the insurer.

DEJERATION (Lat.). A taking of a solemn oath. Wharton.

DEL CREDERE COMMISSION. One under which the agent, in consideration of an additional payment, engages to insure to his principal not only the solvency of the debtor, but the punctual discharge of the debt. 21 W. R. 465; L. R. 6 Ch. App. 397; and he is liable, in the first instance, without any demand from the debtor. But the principal cannot sue the *del credere* factor until the debtor has refused or neglected to pay; 1 Term 112; Paley, Ag. 39. See PARS. Contr.; STORY; Wharton; Mechem, Agency.

He is virtually a surety; 8 Ex. 40; and the purchaser is the primary debtor; 7 Misc. Rep. 582. He is distinguished from other agents by the fact that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; L. R. 6 Ch. 403.

DEULATE. In Scotch Law. To accuse. Bell, Dict.

DELATIO. In Civil Law. An accusation or information. Du Cange; Calvinus, Lex.

DELATOR. An accuser or informer. Du Cange.

DELATURA. In Old English Law. Thewarward of an informer. Whishaw.

DELAWARE. The name of one of the original states of the United States of America, being the first to adopt the constitution.

In 1623, Cornelius May, with some Dutch emigrants, established a trading-house, but the settlers soon removed to North river. Ten years afterwards De Vries arrived at Cape Henlopen, but the natives shortly destroyed the settlement. In the spring of 1638 the Swedes under Minuit established a settlement at the mouth of the Minquas river, which was called by them the Christiana, in honor of their queen. They purchased all the lands from Cape Henlopen to the falls near Trenton, and named the country New Sweden. Stuyvesant, the Dutch governor of New York, ended the Swedish authority in 1654. The Dutch held the country until 1664, when it fell into the hands of the English, and was granted by Charles II. to his brother James, Duke of York. In 1682 William Penn obtained a patent from the Duke of York, releasing all his title claimed through his patent from the crown to a portion of the territory. By this grant Penn became possessed of New Castle and the land lying within a circle of twelve miles around it, and subsequently of a tract of land beginning twelve miles south of New Castle and extending to Cape Henlopen. In consequence of a dispute between Penn and Lord Baltimore, the south and west lines, dividing his possessions from Maryland, were traced in 1761, under a decree of Lord-Chancellor Hardwicke, by the surveyors Mason and Dixon; and this line, extending westward between Maryland and Pennsylvania, has become historical as *Mason and Dixon's line* (q. v.).

Delaware was divided into three counties, called New Castle, Kent, and Sussex; and by enactment of Penn was annexed to Pennsylvania under the name of the Three Lower Counties upon Delaware. These counties remained for twenty years a part of Pennsylvania, each county sending six delegates to the general assembly. They separated in 1783, with the consent of the proprietary, and were governed by a separate legislature of their own, pursuant to the liberty reserved to them by a clause of their original charter. Delaware was the first state to ratify the federal constitution, on December 7, 1787.

In 1776 a state constitution was framed, a second in 1792, and a third in 1831, which remained in force until 1897. The agitation for constitutional changes was begun before 1880, and in 1883 a convention was held and a constitution adopted which was, on submission to a popular vote, defeated. After the civil war the efforts to obtain a convention were resumed, but were unsuccessful until 1896.

DELAY. To procrastinate; detain, or stop; to prolong.

To hinder, keep back, or retard, as to hinder or delay creditors. 9 A. & E. Ency. L. 2nd ed. 188. See HINDER and DELAY.

A carrier who receives live-stock for shipment cannot escape liability for injuries by delay in their transportation, on the ground that there was an unusual rush of business on its road; 3 Tex. Civ. App. 8; see 49 Ill. App. 448; but it is liable for an unreasonable delay; 53 Mo. App. 473; 50 Fed. Rep. 567. In an action for damages for delay in transporting cattle, the difference in the market value of the cattle at the place of destination, at the time they should have arrived, and the time they did arrive, is the measure of damages; 83 Tex. 608.

When a telegraph company receives a message to transmit at a time when it cannot be sent because of a storm and broken wires, and does not inform the sender of such inability, it will not be relieved from liability for special damages for failure to transmit it within a reasonable time because of such storm; 8 Ind. App. 246; 55 Fed. Rep. 738. See TELEGRAPH. UNAVOIDABLE

DELECTUS PERSONÆ (Lat. the choice of the person). The right of a partner to decide what new partners, if any, shall be admitted to the firm. Story, Partn. §§ 5, 195.

This doctrine excludes even executors and representatives of partners from succeeding to the state and condition of partners; 7 Pick. 237; 3 Kent 55; Colly. Partn. §§ 8, 113, n.; Lind. Partn. 590.

In Scotch Law. The personal preference which is supposed to have been exercised by a landlord in selecting his tenant, by the members of a firm in making choice of partners, in the appointment of persons to office, and other cases. Nearly equivalent

to personal trust, as a doctrine in law. Bell, Dict.

DELEGATE (Lat. *delegare*, to choose from). One authorized by another to act in his name; an attorney.

A person elected, by the people of an organized territory of the United States, to congress, who has a seat in congress and a right of debating, but not of voting. Ord. July 13, 1787; 2 Story, U. S. Laws 2076.

A person elected to any deliberative assembly. It is, however, in this sense generally limited to occasional assemblies, such as conventions and the like, and does not usually apply to permanent bodies, as houses of assembly, etc. In Maryland the most numerous branch of the Legislature is called the House of Delegates.

DELEGATION. In Civil Law. A kind of novation by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor or to the person appointed by him. See NOVATION.

Perfect delegation exists when the debtor who makes the obligation is discharged by the creditor.

Imperfect delegation exists when the creditor retains his rights against the original debtor. 2 Duvergny, n. 169.

It results from the definition that a delegation is made by the concurrence of at least three parties, viz.: the party delegating—that is, the ancient debtor who procures another debtor in his stead; the party delegated, who enters into the obligation in the place of the ancient debtor, either to the creditor or to some other person appointed by him; and the creditor, who, in consequence of the obligation contracted by the party delegated, discharges the party delegating. Sometimes there intervenes a fourth party; namely, the person indicated by the creditor in whose favor the person delegated becomes obliged, upon the indication of the creditor and by the order of the person delegating. Pothier, Obl. pt. 3, c. 2, art. 6; 45 Miss. 454. See La. Civ. Code 2183, 2189; 14 Wend. 116; 20 Johns. 76; 5 N. H. 410; 11 S. & R. 179.

The party delegated is commonly a debtor of the person delegating, and, in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated, by the new obligation which he contracts. Pothier, Obl. pt. 3, c. 2, art. 6, § 2.

In general, where the person delegated contracts a valid obligation to the creditor, the delegant is entirely liberated, and the creditor has no recourse against him in case of the substitute's insolvency. There is an exception to this rule when it is agreed that the debtor shall at his own risk delegate another person; but even in that case the creditor must not have omitted using proper diligence to obtain payment whilst the substitute continued solvent. Pothier, Obl. pt. 3, c. 2.

Delegation differs from transfer and simple indication. The transfer which a creditor makes of his debt does not include any novation. It is the original debt which passes from one of the parties, who makes the transfer, to the other, who receives it, and only takes place between these two persons, without the consent of the debtor necessarily intervening. Again, when the debtor indicates to the creditor a person from whom he may receive payment of the debt, and to whom the debtor gives the creditor an order for the purpose, it is merely a mandate, and neither a transfer nor a novation. So, where the creditor indicates a person to whom his debtor may pay the money, the debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication. Pothier, Obl. pt. 3, c. 2. See NOVATION.

At Common Law. The transfer of authority from one or more persons to one or more others.

Any person, *sui juris*, may delegate to another in authority to act for him in a matter which is lawful and otherwise capable of being delegated; Comyns, Dig. Attorney, c. 1; 9 Co. 75 b; Story, Ag. § 6.

When a bare power or authority has been given to another, the latter cannot, in general, delegate that authority, or any part of it, to a third person, for the obvious reason that the principal has relied upon the intelligence, skill, and ability of his agent, and cannot have the same confidence in a stranger; Story, Ag. § 13; 2 Kent 633; Broom, Leg. Max. 839; 5 Pet. 390; 3 Stor. 411, 425; 1 McMull. 453; 15 Pick. 303, 307; 26 Wend. 485; 11 G. & J. 58; 5 Ill. 127, 133; 35 W. Va. 300; 62 Hun 369; 2 Misc. Rep. 397. A power to delegate his authority may, however, be given to the agent by express terms of substitution; 1 Hill 505. And sometimes such power is implied, as in the following cases: *First*, when, by the law, such power is indispensable in order to accomplish the end proposed; as, for example, when goods are directed to be sold at auction, and the law forbids such sales except by licensed auctioneers; 6 S. & R. 336. *Second*, when the employment of such substitute is in the ordinary course of trade; as, where it is the custom of trade to employ a shipbroker or other agent for the purpose of procuring freight and the like; 2 M. & S. 301; 2 B. & P. 433; 3 Johns. Ch. 167, 178; 6 S. & R. 336. *Third*, when it is understood by the parties to be the mode in which the particular thing would or might be done; 3 Chit. C. L. 206; 9 Ves. 234, 251, 252; 1 M. & S. 484; 2 id. 301, 303, note. See 53 Fed. Rep. 936. *Fourth*, when the powers thus delegated are merely mechanical in their nature; 1 Hill 501; Sugd. Pow. 176.

As to the form of the delegation, for most purposes it may be either in writing, not under seal, or verbally without writing; or the authority may be implied. When, however, the act is required to be done under seal, the delegation must also be under seal unless the principal is present and verbally or impliedly authorizes the act; Story, Ag. § 51; Mech. Ag. 81; 5 Cush. 483.

Judicial power cannot be delegated; 3 Brev. 500; 112 N. C. 141; a statute authorizing an attorney to sit in the place of a judge who was disqualified, by reason of prejudice or interest, is void; 39 Wis. 390; S. C. 20 Am. Rep. 50. See 3 Dutch. 622; Cooley, Const. Lim. 117.

Legislative power cannot be delegated by the legislature to any other body or authority; 62 Me. 62, 451; 43 Tex. 41; 72 Pa. 491; 45 Mo. 453; 26 Vt. 362; 4 Harring. 479; 8 N. Y. 483; Cooley, Const. Lim. 141; 43 Fed. Rep. 178; 50 id. 406; 47 Mo. App. 125; see 145 U. S. 649; but the taking effect of a statute may be made to depend upon some subsequent event; 7 Cra. 332; 60 Me. 356; 23 Md. 449; 42 Conn. 533; 43 Iowa 252. The grant by congress to the secretary of war prescribing rules for the use of canals owned or operated by the government is not a delegation of legislative power, and the rules prescribed by him have the force of law and persons violating the same are subject to criminal punishment therefor; 74 Fed. Rep. 207. The question of the adoption or rejection of a general law cannot be referred to the vote of the people. It is usual, however, to confer certain legislative functions upon municipal corporations, and this practice has been constantly upheld.

The state government may delegate to a municipal corporation part of its own powers, but these powers cannot be delegated by the corporation, unless the authority to delegate is specially granted by the legislature, nor can the corporation divest itself of the discretion vested by the statute; 44 La. 809.

Acts (commonly called local-option laws) permitting the people of a locality to accept or reject for themselves particular police regulations, have been upheld as constitutional; 72 Pa. 491; s. c. 13 Am. Rep. 716; 119 Mass. 199; 42 Ind. 547; *contra*, 6 Pa. 507; 4 Harring. 479; 33 Ia. 134; s. c. 11 Am. Rep. 115; 63 Mo. 168. See Cooley, Const. Lim. 150; 60 Conn. 97.

DELESTAGE. In French Marine Law. A discharging of ballast from a vessel. Black, L. Dict.

DELIBERATE. To examine, to consult, in order to form an opinion. Thus, a jury deliberate as to their verdict.

DELIBERATION. The act of the understanding by which a party examines whether a thing proposed ought to be done or not to be done, or whether it ought to be done in one manner or another.

The deliberation relates to the end proposed, to the means of accomplishing that end, or to both. It is a presumption of law that all acts committed are done with due deliberation,—that the party intended to do what he has done. But he may show the contrary. In contracts, for example, he may show that he has been taken by surprise (q. v.); and when a criminal act is charged, he may prove that it was an accident, and not with deliberation,—that, in fact, there was no intention or will. See 18 Am. Dec. 778, n.

By the use of this word in describing the crime of murder in the first degree, the idea is conveyed that the perpetrator weighs the motives for the act, and its consequences, the nature of the crime, or other things connected with his intentions, with a view to a decision thereon, that he carefully considers all these, and the act is not suddenly committed; 28 Ia. 524. See 66 Mo. 13; 91 id. 502; 85 Mich. 16. See INTENTION; WILL.

In Legislation. Council or consultation touching some business in an assembly having the power to act in relation to it.

DELICT. In Civil Law. The act by which one person, by fraud or malignity, causes some damage or tort to some other.

In its most enlarged sense, this term includes all kinds of crimes and misdemeanors, and even the injury which has been caused by another, either voluntarily or accidentally, without evil intention. But more commonly by delicts are understood those small offences which are punished by a small fine or a short imprisonment.

Private delicts are those which are directly injurious to a private individual.

Public delicts are those which affect the whole community in their hurtful consequences.

Quasi delicts are the acts of a person, who, without malignity, but by an inexcusable imprudence, causes an injury to another. Pothier, Obl. n. 116; Erskine, Pr. 4. 4. 1.

DELICTUM (Lat.). A crime or offence; a tort or wrong, as in actions *ex delicto*. 1 Chit. Pl. A challenge of a *jur propter delictum* is for some crime or misdemeanor that affects his credit and renders him infamous. 3 Bla. Com. 363; 2 Kent 241. Some offence committed or wrong done. 1 Kent 552; Cowp. 199, 200. A state of culpability. Occurring often, in the phrase "*in pari delicto melior est conditio defendentis*." So, where both parties to a broken contract have been guilty of unlawful acts, the law will not interfere, but will leave them *in pari delicto*. 3 Greenl. Ev. § 111.

DELIMIT. To mark or lay out the limits or boundary line of a territory or country.

DELINQUENT. In Civil Law. He who has been guilty of some crime, offence, or failure of duty.

DELINQUENT CHILD. A "delinquent child" is one who, because of some act of commission or omission on its part, becomes unmanageable or ungovernable, or is found to be leading an immoral or vicious life, so as to require, for its good and possible reformation, that it be taken into custody and surrounded by proper moral training and influences, to make of it, if possible, a good and respectable citizen. 142 Ky. 106, 133 S. W. 1137.

Within an Oklahoma act to regulate them by juvenile courts: Any child under the age of sixteen years who violates any law of the United States, or of the state, or any city or village ordinance; or who is incorrigible, either at home or in school, or who knowingly associates with thieves, vicious or immoral persons, or who, without just cause and

without the consent of its parents, or custodian, absents itself from home or its place of abode, or who is growing up in idleness or crime; or who knowingly frequents a house of ill repute; or who knowingly frequents any policy shop, or place where any gaming device is operated; or who patronizes or visits any public pool rooms or bucket shop; or who wanders about the street in the night time without being on any lawful business or occupation, or who habitually wanders about any railroad yards or tracks or who habitually uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct in any public place or about any schoolhouse; or who is addicted to the use of intoxicating liquor or any injurious drugs, or who is the user of cigarettes. 60 Okl. Cr. Rep. 499. See DEPENDENT CHILD.

DELIRIUM FEBRILE. In Medical Jurisprudence. A form of mental aberration incident to febrile disease, and sometimes to the last stages of chronic diseases.

The aberration is mostly of a subjective character, maintained by the inward activity of the mind rather than by outward impressions. "Regardless of persons or things around him, and scarcely capable of recognizing them when aroused by his attendants, the patient retires within himself, to dwell upon the scenes and events of the past, which pass before him in wild and disorderly array, while the tongue feebly records the varying impressions, in the form of disjointed, incoherent discourse, or of senseless rhapsody." Ray, Med. Jur. 346. It comes on gradually, being first manifested by talking while asleep, and by a momentary confusion of persons and things on waking. Fully aroused, however, the mind becomes clear and tranquil, and so continues until the return of sleep, when the same incidents recur. Gradually the mental disorder becomes more intense, and the intervals between its returns of shorter duration, until they disappear altogether. Occasionally the past is revived with wonderful vividness, and acquirements are displayed which the patient, before his illness, had entirely forgotten. Instances are related of persons speaking in a language which, though acquired in youth, had long since passed from their memory. See the definition of delirium by Bland, Ch., in *Owings's case*, 1 Bland, Ch. 388.

The only acts which are liable to be affected by delirium are wills, which are often made in the last illness during the periods when the mind is apparently clear. Under such circumstances it may be questioned whether the apparent clearness was or was not real; and it is a question not always easily answered. In the early stages of delirium the mind may be quite clear, no doubt, in the intervals, while it is no less certain that there comes a period at last when no really lucid interval occurs and the mind is reliable at no time. The person may be quiet, and even answer questions with some degree of pertinence, while a close examination would show the mind to be in a dreamy condition and unable to appreciate any nice relations. In all these cases the question to be asked is, whether the delirium which confessedly existed before the act left upon the mind no trace of its influence; whether the testator, calm, quiet, clear, and coherent as he seemed, was not quite unconscious of the nature of the act he was performing. The state of things implied in these questions is not fanciful. In every case it may possibly exist, and the question must be met.

After obtaining all the light which can be thrown on the mental condition of the testator by nurses, servants, and physicians, then the character of the act itself and the circumstances which accompany it require a careful investigation. If it should appear that the mind was apparently clear, and that the act was a rational act rationally done, consistent one part with another, and in accordance with wishes or instructions previously expressed, and without any appearance of foreign influence, then it would be established. A different state of things would to that extent raise suspicion and throw discredit on the act. Yet at the very best it will occasionally happen, so dubious sometimes are the indications, that the decision will be largely conjectural. 1 Hagg. Eccl. 146, 256, 502, 577; 2 id. 142; 3 id. 700; 1 Lee, Eccl. 130; 2 id. 229. See INMADITY.

DELIRIUM TREMENS (called, also, *mania-a-potu*). In Medical Jurisprudence. A form of mental disorder, usually accompanied by tremor, incident to habits of intemperate drinking, which generally appears as a sequel to a period of unusual excess or after a few days' abstinence from stimulating drink. It may also be caused by an accident, fright, or acute inflammatory disease, such as pneumonia.

The nature of the connection between this disease and abstinence is not yet clearly understood. Where the former succeeds a broken limb, or any other severe accident that confines the patient to his bed and obliges him to abstain, it would seem as if its development were favored by the constitutional disturbance then existing. In other cases, where the abstinence is apparently voluntary, there is some reason to suppose that it is really the incubation of the disease, and not its cause.

Its approach is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient

knows not how to describe or account for, disturbed sleep, and impaired appetite. These symptoms having continued two or three days, at the end of which time they have usually increased in severity, the patient ceases to sleep altogether, and soon becomes delirious at intervals. After a while the delirium becomes constant, as well as the utter absence of sleep. There is usually an elevation of temperature of two or three degrees. This state of watchfulness and delirium continues three or four days, when, if the patient recovers, it is succeeded by sleep, which at first appears in uncasy and irregular naps, and lastly in long, sound, and refreshing slumbers. When sleep does not supervene about this time, the disease proves fatal.

The mental aberration of delirium tremens is marked by some peculiar characters. Almost invariably the patient manifests feelings of fear and suspicion, and labors under continual apprehensions of being made the victim of sinister designs and practices. He imagines that people have conspired to rob and murder him, and insists that he can hear them in an adjoining room arranging their plans and preparing to rush upon him, or that he is forcibly detained and prevented from going to his own home. One of the most common hallucinations in this disease is that of constantly seeing devils, snakes, or vermin around him and on him. Under the influence of the terrors inspired by these notions, the wretched patient often endeavors to cut his throat, or jump out of the window, or murder his wife, or some one else whom his disordered imagination identifies with his enemies.

Delirium tremens must not be confounded with other forms of mental derangement which occur in connection with intemperate habits. Hard drinking may produce a paroxysm of maniacal excitement, or a host of hallucinations and delusions, which disappear after a few days' abstinence from drink and are succeeded by the ordinary mental condition. In *U. S. v. McGuire*, 1 Curt. 1, for instance, the prisoner was defended on the plea that the homicide for which he was indicted was committed in a fit of delirium tremens. There was no doubt that he was laboring under some form of insanity; but the fact, as he succeeded by the ordinary mental condition, before the recurrence of sound sleep, renders it very doubtful whether the trouble was delirium tremens, although in every other respect it looked like that disease.

By repeated decisions the law has been settled in this country that delirium tremens annuls responsibility for any act that may be committed under its influence; provided, of course, that the mental condition can stand the tests applied in other forms of insanity. The law does not look to the remote causes of the mental affection; and the rule on this point is that if the act is not committed under the immediate influence of intoxicating drinks, the plea of insanity is not invalidated by the fact that it is the result of drinking at some previous time. Such drinking may be morally wrong; but the same may be said of other vicious indulgences which give rise to the state of the insanity which exists in the case; Whart. Cr. L. § 43; 37 Tenn. 478; 30 Ala. 149, 40 id. 283; 2 Cra. 158; 19 Mich. 401; 12 Tex. 500; 64 Ind. 432; 1 Curt. 1; 5 Mas. 28; State v. Wilson, Ray, Med. Jur. 520; 9 Houst. 369; 105 Cal. 486; 26 S. W. Rep. (Tex.) 896. In England, the existence of delirium tremens has been admitted as an excuse for crime for the same reasons; *Rex v. Watson and Reg. v. Simpson*, 2 Tayl. Med. Jur. 590; 14 Cox. Cr. Cas. 569. In the case of *Birdsall*, 1 Beck, Med. Jur. 808, it was held that delirium tremens was not a valid defence, because the prisoner knew, by repeated experience, that indulgence in drinking would probably bring on an attack of the disease; see also in 19 Mich. 401.

DELIVER. A warehouse would not "deliver" liquors, in the sense of § 3 of the National Prohibition Act, if it permitted their owner to have access to them to take them to his dwelling for lawful use. 254 U. S. 93.

DELIVERING CARRIER. The term "delivering carrier" applies to all carriers who actually deliver goods at their destination. 127 Ky. 304, 105 S. W. 443.

DELIVERY. In Conveyancing. The transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such a manner as to deprive the grantor of his right to recall it at his option.

An *absolute* delivery is one which is complete upon the actual transfer of the instrument from the possession of the grantor.

A *conditional* delivery is one which passes the deed from the possession of the grantor, but is not to be completed by possession in the grantee, or a third person as his agent, until the happening of a specified event. A delivery in this manner is an *escrow* (q. v.).

No particular form is required to effect a delivery. It may be by acts merely, by words merely, or by both combined; but in all cases an intention that it shall be a delivery must exist; *Comyns, Dig. Faint* (A); 1 Wood. Conv. 193; 6 Sim. 31; 11 Vt. 621; 18 Me. 391; 2 Pa. 191; 12 Johns. 536; 20 Pick. 28; 4 J. J. Marsh. 572; 141 Ill. 400; 38 Minn. 443; 69 Tex. 513; 16 Or. 437.

"Although a delivery is essential to the transfer of title under a deed, no formality, either of words or action, is necessary to constitute it. Anything which signifies the intention of the grantor to part with

his control or dominion over the paper, so that it may become a muniment of title in the grantee, operates as a legal delivery. The question of delivery is purely one of intention. With respect to the measure of proof required, a difference is recognized in the cases depending upon the character of the deed, whether it be voluntary or made to give effect to a sale. In the former case the intention to part with the control of the deed is not presumed and a delivery must be proved strictly. . . . But if the conveyance be for a valuable consideration and absolute on its face, the intention to consummate the conveyance by the delivery of the deed as a muniment of title is inferred from the grantor's parting with the possession of it, whether it be to the grantee directly or to some third person—if he part with it without any condition or reservation." *Bates, Ch., in 4 Del. Ch. 326.* In the absence of direct evidence, the delivery of a deed will be presumed from the concurrent acts of the parties recognizing a transfer of title; 94 U. S. 405; 160 Pa. 336; 148 Ill. 426. So long as a deed is within the control and subject to the dominion and authority of the grantor, there is no delivery, without which there can be no deed; 37 W. Va. 725. The possession of a deed by the grantee therein, is *prima facie* evidence of its delivery; 32 Fla. 264; 70 Hun 600; 98 Ala. 470. The deed of a corporation was said to be delivered by affixing the corporate seal; *Co. Litt. 22, n.; 36, n.; Cro. Eliz. 167; 2 Rolle, Abr. Fuit (1).*

It may be made by an agent as well as by the grantor himself; 9 Mass. 307; 4 Day 68; 5 B. & C. 871; 2 Washb. R. P. 579; or to an agent previously appointed; 6 Metc. 356; or subsequently recognized; 22 Me. 121; 14 Ohio 307; but a subsequent assent on the part of the grantee will not be presumed; 9 Ill. 177; 1 N. H. 353; 15 Wend. 656. See, also, 9 Mass. 307; 4 Day 66; 2 Ired. Eq. 557. Where a father in purchasing land has the deed executed in the name of his minor son, the delivery of the deed to the father is sufficient delivery to the son; 107 Mo. 101.

The delivery of a deed to a third person for the grantee's benefit, followed by an assertion of title by the grantee, is a good delivery; 146 Ill. 262; as is also such a delivery where the third person is to be custodian, but where the deed is not to go into force until after the grantor's death; 68 Hun 490.

To complete a delivery, acceptance must take place, which may be presumed from the grantee's possession; 1 Har. & J. 319; 4 Pick. 518; 2 Ala. 136; 1 N. H. 353; 4 Fla. 359; 108 Mo. 110; 1 Zab. 879; from the relationship of a person holding the deed to the grantee; 7 Ill. 557; 1 Johns. Ch. 240, 456; and from other circumstances; 18 Conn. 257; 5 Watts 243. The execution and registration of a deed, and delivery of it to the register for that purpose, do not vest the title in the grantee; he must first ratify these acts; 3 Wall. 636; 10 Mass. 456; 3 Metc. 281; 55 N. W. Rep. (Ia.) 326; but see 87 Mich. 349; but they are *prima facie* evidence of delivery; 79 Pa. 15; 91 Tenn. 147; 94 Mich. 204.

There can ordinarily be but one valid delivery; 12 Johns. 536; 20 Pick. 28; which can take place only after complete execution; 2 Dev. 379; 148 U. S. 21. But there must be one; 2 Harring. 197; 16 Vt. 563; 2 Washb. R. P. 581; Mitch. R. P. 464; and from that one the deed takes effect; 12 Mass. 455; 4 Yeates 278; 18 Me. 190. See 1 Denio 323.

The delivery of a deed in escrow contrary to the condition is voidable; 2 W. N. C. Pa. 504; but it cannot be avoided, as against a *bona fide* purchaser, without proof by the most unexceptionable testimony, of facts which avoid the title; and the *onus* of showing such facts is on the grantor; 10 Pa. 285.

In Contracts. The transfer of the possession of a thing from one person to another.

Originally, delivery was a clear and unequivocal act of giving possession, accom-

plished by placing the subject to be transferred in the hands of the transferee or his avowed agent, or in their respective warehouses, vessels, carts, and the like; but in modern times it is frequently symbolical, as by delivery of the key to a room containing goods; 5 Johns. 385; 1 Yeates 529; 2 Ves. Sen. 445; 1 East 192; see, also, 7 East 558; 8 B. & P. 238; 158 Mass. 592; by marking timber on a wharf, or goods in a warehouse, or by separating and weighing or measuring them; 3 Vt. 374; 40 N. J. L. 581; 69 Md. 587; or otherwise constructive, as by the delivery of a part for the whole; 23 Vt. 265; 9 Barb. 416; 11 Cush. 282; 39 Me. 496; 8 B. & P. 69. And see, as to what constitutes a delivery, 4 Mass. 661; 71 N. Y. 291; 59 Ill. 218; 89 Va. 1; 90 Tenn. 306; 74 Ia. 506; [1892] 1 Q. B. 582.

Where goods are ordered by a foreign merchant, the title passes, on a delivery to a carrier for shipment, subject only to the right of stoppage *in transitu*; 88 Pa. 264; 153 Mass. 221; 87 Fed. Rep. 268; 117 Ind. 132; 7 Mont. 150; 50 Mo. App. 18; 98 Ala. 176; but such is not a delivery to the vendee where he dies before they reach their destination; 62 Mich. 349. Where the vendor takes the bill of lading deliverable to the order of himself, or of his agent, it prevents the property from passing to the intended vendee until delivery; 50 Ark. 20; Blackb. Sales 130.

Delivery is not necessary at common law to complete a sale of personal property as between the vendor and vendee; Benj. Sales § 315; as a sale passes title as soon as the bargain is struck without any delivery or payment; 143 U. S. 346; but as against third parties possession retained by the vendor raises a presumption of fraud conclusive according to some authorities; 1 Cra. 309; 2 Munf. 341; 4 M'Cord 294; 1 O. v. 91; 14 B. Monr. 533; 18 Pa. 113; 4 Harr. 458; 2 Ill. 296; 1 Halst. 155; 5 Conn. 196; 12 Vt. 653; 4 Fla. 219; 9 Johns. 337; 1 Campb. 332; 48 Pa. 413; 73 Cal. 399; 122 Pa. 25; others holding it merely strong evidence of fraud to be left to the jury; 3 B. & C. 368; 5 Rand. 211; 1 Bail. 568; 3 Yerg. 475; 3 J. J. Marsh. 643; 4 N. Y. 308, 580; 2 Metc. 99; 18 Me. 127; 5 La. Ann. 1; 1 Tex. 415; but delivery is necessary, in general, where the property in goods is to be transferred in pursuance of a previous contract; 1 Taunt. 318; 16 Me. 49; 1 Pars. Contr. 235; and also in case of a *donatio causa mortis*; 3 Binn. 370; 2 Ves. Ch. 120; 9 id. 1; 64 Cal. 346; 158 Mass. 592; 3 Misc. Rep. 277. To give validity to a gift, there must be such a delivery of the subject thereof as works an immediate change in the dominion of the property; 45 Mo. App. 180. The rules requiring actual full delivery are subject to modification in the case of bulky articles; 5 S. & R. 19; 12 Mass. 400; 16 Me. 49. See, also, 3 Johns. 390; 13 id. 294; 1 Dall. 171; 2 N. H. 75; 7 Ore. 49; 59 Pa. 464; 2 Kent 508.

The word delivery is used in different senses, which should be borne in mind in considering the cases. Sometimes it denotes transfer of the property in the chattel and sometimes transfer of the possession of the chattel. When used in the latter sense it may refer either to the formation of the contract, or to the performance of it. When it refers to the delivery of possession in the performance of the contract, the buyer is sometimes spoken of as being in possession although he has only the right of possession, while the actual custody remains with the vendor.

A condition requiring delivery may be annexed as a part of any contract of transfer; 19 Me. 147.

In the absence of contract, the amount of transportation to be performed by the seller to constitute delivery is determined by general usage.

See Browne, Stat. of Frauds; Story; Benjamin, Sales; Parsons, Contr.

Of Deed. "Delivery" is the transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such a manner as to deprive the grantor of the right to recall it at his option. No particular form of delivery is required. A deed may

be manually given by the grantor to the grantee, yet this is not necessary. The real test of delivery is, did the grantor, by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered. And it is now well settled that a deed may be delivered to a third person for the grantee, and if subsequently assented to by the grantee it will be as good a delivery as if handed to him in person; and any words or acts which show an intention to receive the title will be sufficient to prove the acceptance. 50 S. W. 39.

Of Goods. Delivery of goods by a consignor to a common carrier for account of a consignee amounts to a delivery and where a purchaser directs delivery of the goods for his account to a designated carrier the latter becomes his agent. Delivery by the consignor, and acceptance by the consignee or his agent, of bills of lading issued by a common carrier for goods, constitute a delivery. 207 U. S. 229.

In Medical Jurisprudence. The act of a woman giving birth to her offspring.

Pretended delivery may present itself in three points of view. *First*, when the female who feigns has never been pregnant. When thoroughly investigated, this may always be detected. There are signs which must be observed, and the attention of an enlargement of the orifice of the uterus, and a tumefaction of the organs of generation, should always be present, and if absent are conclusive against the fact. 2 *Annales d'Hygiène*, 227. *Second*, when the pretended pregnancy and delivery have been preceded by one or more abortions. In this case attention should be given to the following circumstances: the mystery, if any, which has been affected with regard to the situation of the female; her age; that of her husband; and, particularly, whether aged or decrepit. In the former case, if a man has been actually delivered, and substitutes a living for a dead child. But little evidence can be obtained on this subject from a physical examination.

Concealed delivery generally takes place when the woman either has destroyed her offspring or it was born dead. In suspected cases the following circumstances should be attended to: *First*, the proofs of pregnancy which arise in consequence of the examination of the mother. When she has been pregnant, and has been delivered, the usual signs of delivery mentioned below, will be present. A careful investigation of the woman's appearance before and since the delivery will have some weight; though such evidence is not always to be relied upon, as such appearances are not unfrequently deceptive. *Second*, the proofs of recent delivery. *Third*, the connection between the supposed state of parturition and the state of the child that is found; for if the age of the child do not correspond to that time, it will be a strong circumstance in favor of the mother's innocence. A redness of the skin and an attachment of the umbilical cord to the navel indicate a recent birth. Whether the child was living at its birth, belongs to the subject of infanticide.

The usual signs of delivery are very well collected in Beck's excellent treatise on Medical Jurisprudence, and are here presented:—

If the female be examined within three or four days after the occurrence of delivery, the following circumstances will generally be observed: greater or less weakness, a slight paleness of the face, the eyes a little sunken and surrounded by a purplish or brown colored ring, and a looseness of the skin like that of a person convalescing from disease. The belly is soft, the skin of the abdomen is lax, lies in folds, and is traversed in various directions by shining reddish and whitish lines, which especially extend from the groin and pubes to the navel. These lines have sometimes been termed *lineæ albae, canes*, and are particularly observed near the umbilical region, where the abdomen has experienced the greatest distension. The breasts become tumid and hard, and, on pressure, emit a fluid which at first is serous and afterwards gradually becomes white. The areolae round the nipples are dark colored. The external genital organs and vagina are dilated and tumefied throughout the whole of their extent, from the pressure of the foetus. The uterus may be felt through the abdominal parietes, voluminous, firm, and globular, rising nearly as high as the umbilicus. Its orifice is soft and tumid, and dilated so as to admit two or more fingers. The fourchette, or anterior margin of the perineum, is sometimes torn, or it is lax, and appears to have suffered considerable distension. A discharge (termed the lochia) commences from the uterus, which is distinguished from the menses by its pale color, its peculiar and well-known smell, and its duration. The lochia are at first of a red color, and gradually become lighter until they cease.

These signs may generally be relied upon as indicating recent delivery; yet it requires much experience in order not to be deceived by appearances. The lochia discharge might be mistaken for menstruation, or leucorrhœa, were it not for its peculiar smell; though this is not absolutely characteristic. Relaxation of the soft parts arises as frequently from menstruation as from delivery; but in these cases the os uteri and vagina are not so much tumefied, nor is there that tenderness and swelling. The parts are found pale and flabby when all signs of contusion disappear after delivery, and this circumstance does not follow menstruation.

The presence of milk, though a usual sign of delivery, is not always to be relied upon; for this secretion may take place independent of pregnancy. The wrinkles and relaxations of the abdomen which follow delivery may be the consequence of

dropsy, or of lankness following great obesity. This state of the parts is also seldom striking after the birth of the first child, as they shortly resume their natural state. Positive proof of the occurrence of birth is furnished only by the discovery of parts of the ovum. In most cases the demonstration by the microscope of shreds of the decidua with large, nucleated and fatty cells is of itself a sure proof; Winckle, quoted by Witthaus & Becker.

See, generally, 1 Beck. Med. Jur. c. 7, p. 206; 1 Chit. Med. Jur. 411; Ryan, Med. Jur. c. 10, p. 133; 1 Briand, Méd. Lég. lière partie, c. 5; Whart. & S.; Witthaus & Becker, Med. Jur.

Of Warehouse Receipts. The "delivery of warehouse receipts" is a symbolic delivery of the property itself; it has the same effect as the delivery of the property, and a transfer of the warehouse receipts by the person in possession has the same effect and force as a transfer of property by the same person. 10 Bush (Ky.) 469. See **ACTUAL DELIVERY**; **CONSTRUCTIVE DELIVERY**; **DELIVERY BY OPERATION OF LAW**.

DELIVERY BOND. See **FORTHCOMING BOND**; **CLAIM PROPERTY BOND**.

DELIVERY BY OPERATION OF LAW. This takes place when lost goods are found, or goods seized under legal process, the finder or the officer being a bailee by operation of the law, and not because the owner has consented to their delivery to him. (Goddard Bailments, § 4). A delivery may be made to the servant or agent of the bailee. (67 Maine 587). 4 Elliot, Contr. 242. Cf. **ACTUAL DELIVERY**; **CONSTRUCTIVE DELIVERY**.

DELIVERY ORDER. An order addressed by the owner of goods to a person holding them on his behalf, requesting him to deliver them to a person named in the order; not a document of title. Byrne.

According, however, to the English Factors' Act and the American Sales Act, a delivery order is a form of document of title (*q. v.*). See 2 Williston, Sales, 2nd ed., § 405.

DELUSION. In Medical Jurisprudence. A symptom of mental disease, in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary. A faulty belief concerning a subject capable of physical demonstration, out of which the person cannot be reasoned by adequate means for the time being. 1 Wood, American Text Book of Med. See **HALLUCINATION**.

The individual is, of course, insane. For example, should a parent unjustly persist, without the least ground, in attributing to his daughter a coarse vice, and use her with uniform unkindness, there not being the slightest pretence or color of reason for the supposition, a just inference of insanity or delusion would arise in the minds of a jury; because a supposition long entertained and persisted in, after argument to the contrary, and against the natural affections of a parent, suggest that he must labor under some morbid mental delusion; Whart. Cr. L. § 37; Whart. & S. Med. Jur.; 1 Redf. Wills; Ray, Med. Jur. § 20; Shelf. Lun. 296; 3 Add. Eccl. 70, 90, 180; 1 Hagg. Eccl. 27. See 10 Fed. Rep. 170; Mann, Med. Jur. of Insan. 58.

Where one "labors under a partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment." This is the rule as stated by the English judges, cited in 1 Whart. Cr. L. § 37. Shaw, C. J., in 7 Metc. 500, says: "Monomania may operate as an excuse for a criminal act" when "the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that

belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

Where a testator was laboring under a delusion that his brother was exercising his muscle preparatory to killing him, that of itself would not justify a rejection of his will on the ground of unsound mind; 64 Hun 639. A person persistently believing supposed facts which have no real existence, against all evidence and probability, and conducting himself on the assumption of their existence, is, so far as such facts are concerned, under an insane delusion; 95 Mich. 332. See **SYSTEMATIZED DELUSION**.

DEMAIN. See **DEMESNE**.

DEMAND. A claim; a legal obligation. Demand is a term of art of an extent greater in its signification than any other word except claim. Co. Litt. 291; 2 Hill 220; 9 S. & R. 124; 6 W. & S. 226.

A release of all demands is, in general, a release of all covenants, real or personal, conditions, whether broken or not, annuities, recognizances, obligations, contracts, and the like; 3 Pa. 130; 2 Hill 228; but does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent was not only not due, but the consideration—the future enjoyment of the lands—for which the rent was to be given was not executed; 1 Lev. 99; Bac. Abr. Release, I. See 10 Co. 128; 23 Pick. 295; 7 Md. 375; 79 Ga. 555.

In Practice. A requisition or request to do a particular thing specified under a claim of right on the part of the person requesting.

In cases of action arising ex contractu it is frequently necessary, to secure to the party all his rights and to enable him to bring an action, that he should make a demand upon the party bound to perform the contract or discharge the obligation. Thus, where property is sold to be paid for on delivery, a demand must be made before bringing an action for non-delivery, and proceed on trial; 5 Term 409; 3 M. & W. 254, 39 Ill. App. 158; 67 Hun 505; but not if the seller has incapacitated himself from delivering them; 5 B. & Ald. 712; 2 Bibb 280; 1 Vt. 25; 4 Mass. 474; 3 Wend. 556; 2 Me. 308; 5 Munf. 1; and this rule and exception apply to contracts for marriage; 2 Dowl. & R. 55; 1 Chit. Pr. 57, note (n), 438, note (e). Nor is a demand necessary where it is to be presumed that it would have been unavailing, 38 Minn. 545; 39 Kan. 31. Where a selling price has been agreed on, the bringing of a suit therefor is a sufficient demand for the money claimed; 1 Misc. Rep. 509. A demand of rent is necessary before re-entry for non-payment; 92 Tenn. 161. But where rent is payable on the first day of the month, no demand of the rent on the day it falls due is necessary to entitle the landlord to maintain an action therefor; 128 Mass. 483; 99 id. 888. See **RE-ENTRY**. No demand is in general necessary on a promissory note before bringing an action; but after a tender demand must be made of the sum tendered; 1 Campb. 181, 474; 1 Stark. 323. A note payable "on call" may be sued on without demand; 83 Ala. 595; but a demand and notice of non-payment are essential to fix the liability of endorsers unless waived; 1 App. D. C. 171. Where a mortgagor has resolved to default on an interest coupon and provides no funds to pay it, the holder is not required to present it for payment before bringing suit; 161 Pa. 391.

In cases arising ex delicto, a demand is frequently necessary. Thus, when the wife, apprentice, or servant of one person has been harbored by another, the proper course is to make a demand of restoration before an action brought, in order to constitute the party a wilful wrong-doer unless the plaintiff can prove an original illegal enticing away; 2 Lev. 63; 5 East 39; 4 J. B. Moo. 12.

So, too, in cases where the taking of goods is lawful but their subsequent detention be-

comes illegal, it is absolutely necessary, in order to secure sufficient evidence of a conversion on the trial, to give a formal notice of the owner's right to the property and possession, and to make a formal demand in writing of the delivery of such possession to the owner. See **TROVER**; **CONVERSION**. And when a nuisance has been erected or continued by a man on his own land, it is advisable, particularly in the case of a private nuisance, to give the party notice, and request him to remove it, either before an entry is made for the purpose of abating it or an action is commenced against the wrong-doer; and a demand is always indispensable in cases of a continuance of a nuisance originally created by another person; 2 B. & C. 302; Cro. Jac. 555; Poll. Torts 314; 5 Co. 100; 5 Viner, Abr. 506; 1 Ayliffe, Pand. 497; Bac. Abr. Rent, I.

In cases of contempt, as where an order to pay money or to do any other thing, has been made a rule of court, a demand for the payment of the money or performance of the thing must be made before an attachment will be issued for a contempt; 1 Cr. M. & R. 88, 459; 4 Tyrwh. 369; 2 Scott 193; 1 H. & W. 216.

Demand should be made by the party having the right, or his authorized agent; 2 B. & P. 464 a; 1 Bail. 193; 2 Mas. 77; 18 N. H. 75; 55 Ind. 122; of the person in default, in cases of torts; 8 B. & C. 528; 7 Johns. 302; 30 Conn. 237; 46 Barb. 183; in case of rent; 2 Washb. R. P. 321, 322; and at a proper time and place in case of rents; Wood, Landl. & Ten. 1034; 3 Wend. 230; 17 Johns. 66; 4 N. H. 251; 15 id. 68; 4 Harr. & M'H. 135; 21 Pick. 389; 56 Ind. 554; in cases of notes and bills of exchange; Pars. Notes & B.

As to the allegation of a demand in a declaration, see 1 Chit. Pl. 322; 2 id. 84; 1 Wms. Saund. 33, note 2; 65 Hun 43; Com. Dig. **Pleader**. See **LIQUIDATED DEMAND**; **MONEY DEMAND**; **ON DEMAND**.

DEMAND IN RECONVENTION. A demand which the defendant institutes in consequence of that which the plaintiff has brought against him. Used in Louisiana. La. Pr. Code, art. 374.

DEMANDANT. The plaintiff or party who brings a real action. Co. Litt. 127 Com. Dig. See **REAL ACTION**.

DEMEMBRATION. In Scotch Law Maliciously cutting off or otherwise separating one limb from another. 1 Hume 323; Bell, Dict.

DEMENS (Lat.). One who has lost his mind through illness or some other cause. One whose faculties are enfeebled. Dean, Med. Jur. 481. See **DEMENTIA**.

DEMENTIA. In Medical Jurisprudence. That form of insanity which is characterized by mental weakness and decrepitude, and by total inability to reason correctly or incorrectly.

The mind dwells only in the past, and the thoughts succeed one another without any obvious bond of association. Delusions, if they exist, are transitory, and leave no permanent impression; and for everything recent the memory is exceedingly weak. In mania, the action of the mind is marked by force, hurry, and intensity; in dementia, by slowness and weakness. It is the natural termination of many forms of insanity. Occasionally it occurs in an acute form in young subjects; and here only it is curable. In old men, in whom it often occurs, it is called senile dementia, and it indicates the breaking down of the mental powers in advance of the bodily decay. It is this form of dementia only which gives rise to litigation; for in the others the incompetency is too patent to admit of question. It cannot be described by any positive characters, because it differs in the different stages of its progress, varying from simple lapse of memory to complete inability to recognize persons or things. And it must be borne in mind that often the mental infirmity is not so serious as might be supposed at first sight. Many an old man who seems to be scarcely conscious of what is passing around him, and is guilty of frequent breaches of decorum, needs only to have his attention aroused to a matter in which he is deeply interested, to show no lack of vigor or acuteness. In other words, the mind may be damaged superficially (to use a figure), while it may be sound at the core. And therefore it is that one may be quite oblivious of names and dates, while comprehending perfectly well his relations to others and the interests in which he was concerned. It follows that the impressions made upon casual or ignorant observers in regard to the mental condition are of far less value than those made upon persons who have been well acquainted with his habits and have had occa-

sion to test the vigor of his faculties.

Senile dementia or the imbecility caused by the decay of old age is often the ground on which the wills of old men are contested, and the conflicting testimony of observers, the proofs of foreign influence, and the indications of mental capacity all combine to render it no easy task to arrive at a satisfactory conclusion. The only general rule of much practical value is that competency must be always measured, not by any fancied standard of intellect, but solely by the requirements of the act in question. A small and familiar matter would require less mental power than one complicated in its details and somewhat new to the testator's experience. Less capacity would be necessary to distribute an estate between a wife and child than between a multitude of relatives with unequal claims upon his bounty. Such is the principle; and the ends of justice cannot be better served than by its correct and faithful application. Of course, there will always be more or less difficulty; but generally by discarding all legal and metaphysical subtleties and following the leading of common sense, it will be satisfactorily surmounted.

The legal principles by which the courts are governed are not essentially different whether the mental incapacity proceed from dementia or mania. If the will coincides with the previously expressed wishes of the testator, if it recognizes the claims of those who stood in near relation to him, if it shows no indication of undue influence,—if, in short, it is a rational act rationally done,—it will be established though there may have been considerable impairment of mind. 2 Phill. Eccl. 449; 3 Wash. C. C. 580; 4 id. 262; 44 N. H. 531; 151 Ill. 106; 40 N. E. Rep. (Ind.) 70; 51 N. J. Eq. 233; 5 Misc. Rep. 199; 83 Hun 327; 84 id. 1591; 165 Pa. 586; 166 id. 630.

This species of *dementia* is also frequently alleged and proved as a ground of impeaching deeds. This particular form of mental disease may result either in total incompetency, such as is produced by any form of insanity, or a greatly defective capacity, though short of total insanity, in which the court scrutinizes the act, and sustains it only when there is found to have been capacity sufficient for the act in question and entire freedom of will. Consequently such cases usually include the two elements of mental incompetency of some degree and undue influence; and probably a majority of the cases in which the aid of equity is sought to set aside deeds on the ground of undue influence involve also the question of the existence of *senile dementia* to a greater or less extent. The principle upon which courts of equity deal with this class of persons is neither as a matter of course to affirm or avoid their acts, but to protect them in the exercise of such capacity as they have. It will scrutinize their transactions; considering the nature of the act done, the inducements leading to it, and the attending circumstances and influences. If the conscience of the court is satisfied that such a grantor comprehended the nature and consequences of the transaction, and exercised a deliberate and free judgment, it will be sustained; but if the nature of the act or the attending circumstances justify the conclusion that the grantor's weakness has been taken advantage of, the deed will be set aside in equity however valid it might be at law; 1 Bro. Ch. 560; 1 Knapp 73; 5 Dana 181; 12 B. Monr. 55; 2 Dev. & B. Eq. 241; 1 Ohio St. 54; 4 Sneed 497. The United States Supreme Court says:—"It may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of law, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate—a court of equity will . . . interfere and set the conveyance aside;" 94 U. S. 511; 1 Sto. Eq. Jur. § 238; Bishp. Eq. 288. For a thorough examination and discussion of the subject in a case of *senile dementia* in which a deed was set aside, see 5 Del. Ch. 374. In that case Saulsbury, Ch., thus stated the principle

upon which courts of equity deal with such cases: "In cases of alleged mental incapacity, the test is whether the party had the ability to comprehend in a reasonable manner the nature of the affair in which he participated. This is the rule in the absence of fraud. . . . This ability so to comprehend necessarily implies the power to understand the character, legal conditions, and effect of the act performed. . . . The cause of mental weakness is immaterial. It may arise from injury to the mind, temporary illness, or excessive old age. In such cases any unfairness will be promptly redressed." In a very similar case a deed was set aside on the ground of mental incapacity of the grantor by reason of senile dementia or dotage, by Bland, Ch., whose opinion contains an elaborate discussion of the different species of dementia, which he classifies as, Idiocy, Delirium, Lunacy, and Dotage, under which latter term he describes senile dementia; 1 Bland, Ch. 370. See 1 Redf. Wills; 3 Am. L. Reg. N. S. 449, article by Judge Redfield; 2 Ham. Leg. Med. 116; INSANITY.

DEMENTIA, SENILE. See **DEMENTIA**; **DOTAGE**.

DEMESNE (Lat. *dominium*). Lands of which the lord had the absolute property or ownership; as distinguished from feudal lands, which he held of a superior. 2 Bla. Com. 104; Cowel. Lands which the lord retained under his immediate control, for the purpose of supplying his table and the immediate needs of his household; distinguished from that farmed out to tenants, called among the Saxons *bordlands*. Blount; Co. Litt. 17 a.

Own; **original**. *Son assault demesne*, his (the plaintiff's) original assault, or assault in the first place. 2 Greenl. Ev. § 638; 3 Bla. Com. 120, 306.

DEMESNE AS OF FEE. A man is said to be seised in his *demesne as of fee* of a corporeal inheritance, because he has a property *dominium* or *demesne* in the thing itself. 2 Bla. Com. 106. But when he has no dominion in the thing itself, as in the case of an incorporeal hereditament, he is said to be *seised as of fee*, and not in his *demesne as of fee*; Littleton § 10; 17 S. & R. 196; Jones, Land Tit. 166.

Formerly it was the practice in an action on the case—e. g. for a nuisance to real estate—to aver in the declaration the seisin of the plaintiff in *demesne as of fee*; and this is still necessary, in order to estop the record with the land, so that it may run with or attend the title; Archb. Civ. Pl. 104; Co. Entr. 9, pl. 8; 1 Saund. 346. But such an action may be maintained on the possession as well as on the seisin; although the effect of the record in this case upon the title would not be the same; Steph. Pl. 322; 4 Term 718; 2 Wms. Saund. 113 b; Cro. Car. 500, 575.

DEMESNE LANDS. A phrase meaning the same as *demesne*.

DEMESNE LANDS OF THE CROWN. That share of lands reserved to the crown at the original distribution of landed property, or which came to it afterwards by forfeiture or otherwise. 1 Bla. Com. 286; 2 Steph. Com. 550.

DEMI-MARK. A sum of money (6s. 8d., 3 Bla. Com. App. v.) tendered and paid into court in certain cases in the trial of a writ of right by the grand assize. Co. Litt. 294 b; Booth, Real Act. 98.

It was paid by the tenant to obtain an inquiry by the grand assize into the time of the demandant's seisin; 1 Reeve, n. s. t. Eng. Law 429; Stearns, Real Act. 378. It compelled the demandant to begin; 3 Chit. Pl. 1373. It is unknown in American practice; 13 Wend. 546.

DEMI-VILL. Half a tithing.

DEMIETAS. A word used in ancient records for a moiety, or one-half.

DEMISE. A conveyance, either in fee, for life, or for years.

A lease or a conveyance for a term of

years. According to Chief Justice Gibson, the English word *demise*, though improperly used as a synonyme for *concessio* or *demisio*, strictly denotes a posthumous grant, and no more. 5 Whart. 278. See 4 Bingh. N. C. 678; 5 How. Pr. 71.

In a conveyance, the word "*demise*" imports in law a covenant for quiet enjoyment; 9 N. H. 219; 1 M. G. & S. 429; it implies a power to lease; 8 Cow. 36. See 109 Mass. 235; COVENANT.

A term nearly synonymous with death, appropriated in England especially to denote the decease of the king or queen.

DEMISE OF THE CROWN. The natural dissolution of the king.

The term is said to denote in law merely a transfer of the property of the crown. 1 Bla. Com. 249. By *demise* of the crown we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. Plowd. 117, 234.

A similar result, viz.: the perpetual and continuous existence of the office of president of the United States, has been secured by the constitution and subsequent statutes. 1 Sharsw. Bla. Com. 249.

DEMISE AND RE-DEMISE. An old form of conveyance by mutual leases made from one to another on each side of the same land, or of something issuing from it. A lease for a given sum—usually a mere nominal amount—and a release for a larger rent. Toullier; Whishaw; Jacob.

DEMOCRACY. That form of government in which the people rule.

But the multitude cannot actually rule: an unorganic democracy, therefore, one that is not founded upon a number of institutions each endowed with a degree of self-government, naturally becomes a one-man government. The basis of the democracy is equality, as that of the aristocracy is privilege; but equality of itself is no guarantee for liberty, nor does equality constitute liberty. Absolute democracies existed in antiquity and the middle ages; they have never endured for any length of time. On their character, Aristotle's *Politics* may be read to the greatest advantage. Lieber, in his *Civil Liberty*, dwells at length on the fact that mere equality, without institutions of various kinds, is adverse to self-government; and history shows that absolute democracy is anything rather than a convertible term for liberty. See **ABSOLUTISM**; **GOVERNMENT**.

DEMOLISH. To pull or throw down; utterly to destroy; to reduce to naught. 9 A. & E. Ency. L., 2nd ed., 218.

DEMONETIZE. To divest of the character of standard money; to withdraw from use as currency. Stand. Dict.

DEMONSTRATIO (Lat.). Description; addition; denomination. Occurring often in the phrase *falsa demonstratio non nocet* (a false description does not harm). 2 Bla. Com. 382, n.; 3 P. Wms. 140; 1 Greenl. Ev. § 291; Wigr. Wills 208, 233. See **FORMULAE**.

DEMONSTRATION (Lat. *demonstrare*, to point out). Whatever is said or written to designate a thing or person.

Several descriptions may be employed to denote the same person or object; and the rule of law in such cases is that if one of the descriptions be erroneous it may be rejected, if, after it is expunged, enough will remain to identify the person or thing intended. For *falsa demonstratio non nocet*. The meaning of this rule is, that if there be an adequate description with convenient certainty of what was contemplated, a subsequent erroneous addition will not vitiate it.

The complement of this maxim is, *non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*; which means that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some object wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to ascertain that person or thing wherein all the circumstances are true; 4 Exch. 601; 8

Bingh. 244; Broom, Leg. Max. 490; 7 Cush. 460.

The rule that *falsa demonstratio* does not vitiate an otherwise good description applies to every kind of statement of fact. Some of the particulars of an avowment in a declaration may be rejected if the declaration is sensible without them and by their presence is made insensible or defective; Yelv. 182.

In Evidence. That proof which excludes all possibility of error.

DEMONSTRATIVE LEGACY. A pecuniary legacy coupled with a direction that it be paid out of a specific fund.

A bequest of a sum of money payable out of a particular fund or thing. A pecuniary legacy given generally, but with a demonstration of a particular fund as the source of its payment. 118 Ind. 147; 17 Ohio St. 413. See 47 Ala. 547; 56 Md. 120.

Such a bequest differs from a specific legacy in this, that if the fund out of which it is payable fails for any cause, it is nevertheless entitled "to come on the estate as a general legacy; and it differs from a general legacy in this, that it does not abate in that class, but in the class of specific legacies." 63 Pa. 312, per Sharswood, J. A bequest of "\$2,000 of the South Ward Loan of Chester," where the testator owned \$10,000 of the loan, was held demonstrative; 58 Fed. Rep. 718. So, also, "25 shares of capital stock of the State Bank," etc., the testator owning 25 shares; 1 Ired. Eq. 309; had the testator said "my" 25 shares, it would have been a specific legacy; *id.* So of a gift of 23½ canal shares of which the testator owned 15½, all of which he sold before his death; 2 Beav. 515. The criterion in all the cases is whether it was the testator's intention to give the specific security then owned by him, or, on the other hand, to give nothing distinctly severed from his estate, but rather such a sum as would suffice to buy the securities named; *id.* See 2 White & T. Lead. Cas. 646; 3 Am. Dec. 667; 2 Y. & C. 90; 28 N. Y. 61; 49 Md. 356.

DEMPSTER. In Scotch Law. A doomsman. One who pronounced the sentence of court. 1 Howell, St. Tr. 937.

DEMUR. To raise an objection in point of law, and rest or pause upon it, referring its decision to the court; to object to the pleading of the opposite party as insufficient to sustain his action or defense, and refer it to the judgment of the court whether it ought to be answered.

DEMURRAGE. The delay of a vessel by the freighter beyond the time allowed for loading, unloading, or sailing. Payment for such delay.

The amount due by the freighter or charterer to the owner of the vessel for such delay. 5 E. & B. 755; Abb. Adm. Dec. 548; 19 Fed. Rep. 144.

Demurrage may become due either by the ship's detention for the purpose of loading or unloading the cargo, either before or during or after the voyage, or in waiting for convoy; 8 Kent 159; Abbott, Shipp. 192; Pars. Mar. Law; 26 N. Y. 85; 134 *id.* 143; 1 Holmes 290; 49 Fed. Rep. 107; 65 Hun 625; 1 C. C. A. 85; Porter, Bills of L. 356.

Where neither the charter nor the bill of lading contained any provisions as to demurrage, and the master made no formal protest against the delay, but signed the bill of lading without objection and did not bring suit until long after, demurrage could not be recovered; 1 C. C. A. 237.

Under the terms of a charter where demurrage was to be paid for each working day beyond the days allowed for loading, the time lost by reason of storms before the beginning of the lay days, or after their expiration, could not be deducted in computing the demurrage; 2 C. C. A. 656.

The term "working days" in maritime affairs means calendar days, on which the law permits work to be done, and excludes Sundays and legal holidays, but not stormy days; 2 C. C. A. 650. But see 143 N. Y. 279, where it was held that Sundays are properly included in computing demurrage, when demurrage has begun to run. Where

there are no agreed demurrage days for loading the case is one of implied contract to load with reasonable diligence; 74 Fed. Rep. 247. See LAY DAYS.

DEMURRER (Lat. *demorari*, Old Fr. *demorror*, to stay; to abide). **In Pleading.** An allegation, that, admitting the facts of the preceding pleading to be true, as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. A declaration that the party demurring will go no further, because the other has shown nothing against him; 5 Mod. 232; Co. Litt. 71 b. It imports that the objecting party will not proceed, but will wait the judgment of the court whether he is bound so to do; Co. Litt. 71 b; Steph. Pl. 61; Pep. Pl. 11.

In Equity. An allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that, for some reason apparent on the face of the bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer to the whole bill, or to some certain part thereof. Mitf. Eq. Pl. 107.

On demurrer a bill must be taken as true, and matter in avoidance is not available; 57 Fed. Rep. 433.

A demurrer may be either to the relief asked by the bill, or to both the relief and the discovery; 5 Johns. Ch. 184; 10 Paige, Ch. 210; but not to the discovery alone where it is merely incidental to the relief; 2 Bro. Ch. 123; 1 Y. & C. 197; 1 S. & S. 83. It is said by Langdell (Eq. Pl. 60) that every proper demurrer is to relief alone; and that while it always, if well taken, protects the defendant from giving any discovery, that is a legal consequence merely. As to exceptions to avoid self-implication, see 3 Johns. Ch. 407; 1 Hayw. 167; 2 H. & G. 382; 6 Day 361. If it goes to the whole of the relief, it generally defeats the discovery if successful; 2 Bro. Ch. 319; 3 Edw. Ch. 117; Saxt. 358; Walk. Ch. 35; 5 Metc. 525; otherwise, if to part only; Ad. Eq. 334; Story, Eq. Pl. § 545; 10 Paige, Ch. 210.

It may be brought either to original or supplemental bills; and there are peculiar causes of demurrer in the different classes of supplemental bills; 2 Madd. 387; 4 Sim. 76; 3 Hare 476; 3 P. Wms. 284; 4 Paige, Ch. 259; 7 Johns. Ch. 250; 13 Pet. 6, 14; Story, Eq. Pl. § 611.

Demurrers are *general*, where no particular cause is assigned except the usual formulary that there is no equity in the bill, or *special*, where the particular defects are pointed out; Story, Eq. Pl. § 455; Dan. Ch. Pr. 586. General demurrers are used to point out defects of substance; special, to point out defects in form. "The terms have a different meaning [in equity] from what they have at common law;" Langd. Eq. Pl. 58.

The defendant may demur to part of the bill; 2 Barb. Ch. 106; and plead or answer to the residue, or both plead and answer to separate parts thereof; 3 P. Wms. 80; 6 Johns. Ch. 214; 4 Wis. 54; taking care so to apply them to different and distinct parts of the bill that each may be consistent with the others; 3 M. & C. 653; 1 Keen 359; 23 Miss. 304; Story, Eq. Pl. § 442; but if it be to the whole bill, and a part be good, the demurrer must be overruled; 27 Miss. 419; 5 Ired. Eq. 86; 29 Me. 273; 12 Metc. 323; 36 W. Va. 592. If it is to the whole bill it cannot be sustained if, for any equity apparent in the bill, complainants are entitled to relief; 101 Ala. 607, 752; 43 Fed. Rep. 450. A general demurrer to a bill must be overruled unless it appears that on no possible state of the evidence could a decree be made; 55 Fed. Rep. 892; 62 Mich. 480.

Demurrers lie only for matter apparent on the face of the bill, and not upon any new matter alleged by the defendant; Beames,

Ord. in Ch. 26; 6 Sim. 51; 2 Sch. & L. 637; 5 Fla. 110; 3 Halst. Ch. 440; 54 Fed. Rep. 63. Demurrers are not applicable to pleas or answers. If a plea or answer is bad in substance, it may be shown on hearing; and if the answer is insufficient in form, exceptions should be filed; Story, Eq. Pl. §§ 456, 864; Langd. Eq. Pl. 58; 54 Miss. 341; 14 N. J. Eq. 254.

Demurrers to relief are usually brought for causes relating to the *jurisdiction*, as that the *subject* is not cognizable by any court, as in some cases under political treaties; 1 Ves. 371; 2 Pet. 253; but see 5 Pet. 1; 8 *id.* 436; 1 Wheat. 304; 2 *id.* 259; 10 *id.* 181; 1 Wash. C. C. 322; certain cases of confiscation; 8 Ves. 424; 10 *id.* 354; see 3 Dall. 199; and questions of boundaries; Story, Eq. Pl. 347; 1 Ves. 446; as to law in the United States, see 6 Cra. 158; 4 Dall. 3; 5 Pet. 284; 14 *id.* 210; or that it is not cognizable by a court of equity; 1 S. & S. 227; 6 Beav. 165; 30 N. H. 446; 18 Me. 124; 7 Cra. 68; 16 Ga. 541; 16 Mo. 543; 3 Ired. Eq. 123; 21 Miss. 93; L. R. 8 Ch. App. 369; or that some other court of equity has jurisdiction properly; 4 Wheat. 1; 6 Cra. 158; 7 Ga. 248; 2 Paige, Ch. 402; 1 Ves. 203; or that some other court has jurisdiction properly; 3 Dall. 382; 8 Pet. 148; 30 N. H. 444; 2 How. 497; to the person, as that the plaintiff is not entitled to sue, by reason of personal disability, as infancy, idiocy, etc.; Jac. 377; bankruptcy and assignment; 8 Sim. 28, 76; 1 Y. & C. 172; or has no title to sue in the character in which he sues; 2 P. Wms. 369; 4 Johns. Ch. 575; to the substance of the bill, as that the matter is too trivial; 4 Johns. Ch. 183; 3 Ohio St. 457; 1 Vern. 359; that the plaintiff has no interest in the matter; Mitf. Eq. Pl. 154; 2 Bro. Ch. 322; 2 S. & S. 592; 4 Russ. 225, 244; 1 Johns. Ch. 305; 30 Me. 419; 29 W. Va. 256; 87 Va. 249; or that the defendant has no such interest; Story, Eq. Pl. § 519; 2 Bro. Ch. 332; 5 Madd. 19; 3 Barb. 435; 10 Wheat. 384; or that the bill is to enforce a penalty; 1 Young 308; 4 Bro. Ch. 434; to the frame and form of the bill, as that there is a defect or want of form; Mitf. Eq. Pl. 206; 5 Russ. 42; 11 Mo. 42; or that the bill is multifarious; Story, Eq. Pl. § 580, n.; 2 S. & S. 79; 4 Harring. 9; 2 Gray 471; 8 How. 412; 4 Edw. 592; that there is a want or misjoinder of plaintiffs; 1 P. Wms. 428; 4 Russ. 272; 2 Paige, Ch. 281; 4 *id.* 510; 3 Cra. 220; 8 Wheat. 451; 5 Fla. 110; 5 Duer 168; 2 Gray 467; 1 Jones, N. C. 40; 4 Fla. 11; for a misjoinder of parties defendant where those only can demur who are improperly joined; 98 Mich. 657; or where laches affirmatively appear on the face of a bill; 54 Fed. Rep. 63; but laches as an equitable defence cannot be raised on demurrer; 65 Vt. 611.

Demurrers to discovery may be brought for most of the above causes; 9 Sim. 180; 12 Beav. 428; 2 Stor. 59; 1 Johns. Ch. 547; and, generally, that the plaintiff has no right to demand the discovery asked for, either in whole or in part; 8 Ves. 398; 2 Russ. 564; or to ask it of the defendant; Story, Eq. Pl. § 570. "A demurrer to discovery is not, in its nature, a pleading at all, but a mere statement in writing that the defendant refuses to answer certain allegations or charges in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out." Langd. Eq. Pl. 61. See Beach, Mod. Eq. Pr. 239; DISCOVERY.

The effect of a demurrer when allowed is to put an end to the suit, unless it is confined to a part of the bill or the court gives the plaintiff leave to amend; 13 Ill. 81; it is within the discretion of the court whether the defendant will be ruled to answer after overruling a demurrer; and it may enter a decree against him at once, or hear evidence, or refer to a master to take evidence before entering a decree; 41 Ill. App. 439; 145 Ill. 433. If overruled, the defendant must make a fresh defence by answer; 12 Mo. 132; unless he obtain permission to put in a plea; Ad. Eq. 336. It admits the facts which are well pleaded; 20 How. 108; and the jurisdiction; 28 Vt. 470; 4 R.

I. 285; 1 Stockt. 434; 4 Md. 72. But the demurrer admits the facts in the bill only for the purpose of argument on the demurrer; if the demurrer is overruled the plaintiff must proceed to prove his bill; Langd. Eq. Pl. 60. The court will sometimes disallow the demurrer without deciding that the bill is good, reserving that question till the hearing; *ibid.*

Under rule 31 of the Rules of Practice for courts of equity of the United States as laid down by the supreme court, no demurrer shall be allowed to be filed unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay. The supreme court has held that a demurrer lacking these is fatally defective and a decree *pro confesso* may be entered unless something takes place between the filing of the demurrer and the decree, to take away the right; 149 U. S. 574.

At Law. A general demurrer is one which excepts to the sufficiency of a previous pleading in general terms, without showing specifically the nature of the objection; and such demurrer is sufficient when the objection is on matter of substance; Steph. Pl. 159; Co. Litt. 72 a; 1 Dutch. 506; 11 Ark. 12; 2 Ia. 532; 2 Barb. 160; 82 Tex. 146. A court, after overruling a general demurrer to a complaint on the ground that it does not state a cause of action, may in its discretion enter final judgment on the demurrer; and this judgment will be a bar to any other suit for the same cause of action; 111 U. S. 472.

A special demurrer is one which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection and the particular ground of exception; Co. Litt. 72 a. An objection to a complaint, on the ground of ambiguity or uncertainty, can be taken only by special demurrer; 96 Cal. 602; as must be a demurrer to a plea on the ground of duplicity; 64 Vt. 212; but see 99 Ala. 541.

It is necessary where the objection is to the form, by the statutes 27 Eliz. c. 5 and 4 Anne, c. 16; 18 Ark. 347; 6 Md. 210; 20 Ohio 100. Under a special demurrer the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all objections in substance.

It is not enough that a special demurrer object in general terms, that the pleading is "uncertain, defective, and informal," or the like, but it is necessary to show in what respect it is uncertain, defective, and informal; 1 Wms. Saund. 161, n. 1, 337 b, n. 3; Steph. Pl. 159, 161; 1 Chit. Pl. 642.

A demurrer may be for insufficiency either in substance or in form; that is, it may be either on the ground that the case shown by the opposite party is essentially insufficient, or on the ground that it is stated in an infartificial manner; Hob. 164; 48 Fed. Rep. 241. But such a demurrer does not raise the question of the jurisdiction of the court; 48 Ohio St. 554. It lies to any of the pleadings, except that there may not be a demurrer to a demurrer; Salk. 219; Bacon, Abr. Pleas (N 2). But it will not lie to a supplemental complaint; 131 Ind. 373; while it will to a supplemental answer; 134 Ind. 614. Demurrer may be to the whole or a part of the pleading; but if to the whole, and a part be good, the demurrer will be overruled; 13 East 76; 3 Caines 89, 265; 5 Johns. 476; 13 id. 264, 402; 11 Cush. 348; 23 Miss. 548; 2 Curt. C. C. 97; 2 Paine 545; 14 Ill. 77; 2 Md. 284; 81 Wis. 301; 94 Ala. 226. But see 6 Fla. 262; 4 Cal. 327; 9 Ind. 241; 6 Gratt. 130; 3 B. Monr. 400. The objection must appear on the face of the pleadings; 2 Saund. 364; 29 Vt. 354; or upon over of some instrument defectively set forth therein; 2 Saund. 60, n.; 1 Misc. Rep. 364. A joint demurrer by two defendants to a declaration for want of a cause of action should be overruled if the declaration sets forth a cause of action as to either of them; 88 Ga. 308; 144 Ill. 213.

A demurrer does not reach vagueness and uncertainty in a complaint, but they must be remedied by a motion to make more

specific and certain; 130 Ind. 131; 3 Ind. App. 312; 92 Ky. 72; 51 Fed. Rep. 669.

Where the want of jurisdiction in a federal court is apparent on the face of the petition, it may be taken advantage of by demurrer; 146 U. S. 202.

For the various and numerous causes of demurrer, reference must be had to the law of each state.

As to the effect of a demurrer. It admits all such matters of fact as are sufficiently pleaded; Com. Dig. Pleader (A 5); 4 Ia. 63; 14 Ga. 8; 9 Barb. 297; 7 Ark. 282; 6 Wash. 315; 7 Misc. Rep. 1. Its office was to test the sufficiency of the preceding pleading both as to form and substance, and it was resorted to by either party who believed that the pleading of the other party was insufficient either because the declaration did not show a good cause of action or the plea did not set up a legal defence; but it does not admit mere epithets charging fraud and allegations of legal conclusions; 144 U. S. 73; nor an erroneous averment of law; 97 Ala. 491. On demurrer the court consider the whole record, and give judgment according to the legal right for the party who on the whole seems the best entitled to it; 4 East 502; 8 Ark. 224; 2 Mich. 276; 7 How. 708; 28 Ala. N. S. 637; 31 N. H. 22; 39 Me. 426; 16 Ill. 269. For example, on a demurrer to the replication, if the court think the replication bad, but perceive substantial fault in the plea, they will give judgment, not for the defendant, but for the plaintiff; 2 Wils. 150; 7 How. 706; provided the declaration be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant; 5 Co. 29 a. The court will not look back into the record to adjudge in favor of an apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground; 5 B. & Ald. 507. If, however, the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondent ouster, without regard to any defect in the declaration; Carth. 172; 4 R. I. 110; 13 Ark. 335; 14 Ill. 49. A party waives his demurrer by not calling for action thereon; 83 Tex. 97.

In Practice. Demurrer to evidence is a declaration that the party making it, generally the plaintiff, will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue; 28 Ala. N. S. 637. Upon joinder by the opposite party, the jury is generally discharged from giving any verdict; 1 Archb. Pr. 186; and the demurrer being entered on record is afterwards argued and decided by the court in banc; and the judgment there given upon it may ultimately be brought before a court of error; Andr. Steph. Pl. 180. See 2 H. Bla. 187; Gould, Pl. c. 9, part 2, § 47. It admits the truth of the evidence given and the legal deductions therefrom; 14 Pa. 275; 111 N. C. 175. As to the right so to demur, and the practice, see 4 Ia. 63. All facts proved and legitimate inferences therefrom must be admitted; 35 S. W. Rep. (Tenn.) 560; and if the evidence is *prima facie* insufficient the demurrer is sustained; 33 S. W. Rep. (Mo.) 161; otherwise if there is some evidence on each material point; 2 Kan. App. 711; 45 Pac. Rep. (Kan.) 100. In criminal trials it is entirely discretionary with the court whether it will entertain a demurrer to the evidence, even though counsel for the prisoner and state should both consent to it; 29 Fla. 439.

A demurrer to the evidence in an equity case has the same effect as in a law case, and concedes every fact which such evidence tends to prove, and every inference fairly deducible from the facts proved; 113 Mo. 340. There is an increasing tendency towards the adoption of the demurrer to evidence in practice and in many states it takes the place of a motion for a non-suit. For a full discussion of the subject see 32 L. R. A. 354, where the authorities are collected.

Demurrer to interrogatories is the reason which a witness tenders for not answering a particular question in interrogatories; 2 Swanst. 194. It is not, strictly speaking, a

demurrer, except in the popular sense of the word; Greal. Eq. Ev. 61. The court are judicially to determine its validity. The witness must state his objection very carefully; for these demurrers are held to strict rules, and are readily overruled if they cover too much; 2 Atk. 524; 1 Y. & J. 132.

DEMURRER BOOK. In English Practice. A transcript of all the pleadings that have been filed or delivered between the parties made upon the formation of an issue at law. 3 Steph. Com. 511; Lush, Pr. 787.

DEMURRER TO EVIDENCE. See DEMURRER.

DEMY SANKE, DEMY SANGUE. Half-blood. A corruption of *demi-sang*.

DEN AND STROND. Liberty for ships and vessels to run aground or come ashore (strand themselves). Cowel.

DENARII. An ancient general term for any sort of *pecunia numerata*, or ready money. The French use the word *denier* in the same sense; *payer de ses propres deniers*.

DENARIUS DEI. God's penny; earnest money. A certain sum of money which is given by one of the contracting parties to the other as a sign of the completion of the contract. See EARNEST.

It differs from *arrhes* in this, that the latter is a part of the consideration, while the *denarius Dei* is no part of it. 1 Duvergny, n. 132; 3 id. n. 49; *Répert. de Jur., Denier à Dieu*.

DENIAL. In Pleading. A traverse of the statement of the opposite party; a defence.

DENIER A DIEU. In French Law. A sum of money which the hirer of a thing gives to the other party as evidence, or for the consideration of the contract, which either party may annul within twenty-four hours, the one who gave the *denier à Dieu* by demanding, and the other by returning it. See DENARIUS DEI.

DENIZATION. The act by which a foreigner becomes a subject of a country, but without the rights either of a natural-born subject or of one who has become naturalized. It has existed from an early period, and is effected only by letters patent from the sovereign. Denization has no retrospective operation; a denizen is in an intermediate position between an alien and a natural-born subject, and partakes of both these characters. He may ordinarily take lands by purchase, but not by inheritance; and his issue born before denization cannot inherit from him, but his issue born after it may; Cockburn, Nationality 27; Morse, Citizenship 106. See 20 Wend. 852.

DENIZEN. In English Law. An alien born who has obtained, *ex donatione legis*, letters patent to make him an English subject.

He is intermediate between a natural-born subject and an alien. He may take lands by purchase or devise,—which an alien cannot; but he is incapable of taking by inheritance. 1 Bla. Com. 374.

But now in England, by the Naturalization Act of 1870, an alien can take, hold, and dispose of every description of property, in all respects as a natural-born subject.

In South Carolina, and perhaps in other states, this civil condition is well known to the law, having been created by statute.

The right of making denizens is not exclusively vested in the king, for it is possessed by parliament, but is scarcely ever exercised but by royal power. It may be effected by conquest; 7 Co. 6 a; 2 Ventr. 6; Com. Dig. *Alien* (D 1); Chitty. Com. Law 120. See DENIZATION.

In the common law, the word denizen is sometimes applied to a natural-born subject. Co. Litt. 129 a; 6 Pet. 101, 116.

DENMARK. A kingdom of Europe. It is a hereditary monarchy, and has a responsible ministry. The legislature, in conjunction with the sovereign, is called the Rigsdag or Diet, and it consists of the Lands-thing or upper house and the Folkething. The Landsting consists of 66 members, part life nominees of the crown and part elected for eight years. The Folkething consists

of 103 members elected for three years. The Rigsdag must meet annually for two months. For the administration of justice the high courts are the supreme tribunals of the kingdom with a president and 12 ordinary and 7 extraordinary members. There is a superior tribunal for the isles and Copenhagen consisting of a president and 16 members, and a tribunal for Jutland at Viborg consisting of a president and 8 members, and a tribunal of commerce and navigation consisting of a president and 35 members.

DENOUNCEMENT. In Mexican Law. A judicial proceeding for the forfeiture of land held by an alien.

Though real property might be acquired by an alien in fraud of the law, that is without observing its requirements, he nevertheless retained his right and title to it, liable to be deprived of it by the proper proceedings of denouncement, which in its substantive characteristics was equivalent to the inquest of office found, at common law. 28 Cal. 477; 1 *id.* 63; 3 Wheat. 563.

DENUNCIATION. In Civil Law. The act by which an individual informs a public officer, whose duty it is to prosecute offenders, that a crime has been committed. See 1 Bro. Civ. Law 447; Ayliffe, Parerg. 210; Pothier, Proc. Cr. sect. 2, § 2.

DENUNTIATIO. In Old English Law. A public notice or summons. Bracton 202 b.

DEODAND. Any personal chattel whatever, animate or inanimate, which is the immediate cause of the death of a human creature. It was forfeited to the king to be distributed in alms by his high almoner "for the appeasing," says Coke, "of God's wrath." The word comes from *Deo dandum*, a thing that must be offered to God.

A Latin phrase which is attributed to Bracton has, by mistranslation, given rise to some erroneous statements in some of the authors as to what are deodands. *Omnia que ad mortem movent*, although it evidently means all things which tend to produce death, has been rendered *more to death*,—thus giving rise to the theory that things in motion only are to be forfeited. A difference, however, according to Blackstone, existed as to how much was to be sacrificed. Thus, if a man should fall from a cartwheel, the cart being stationary, and be killed, the wheel only would be deodand; while, if he was run over by the same wheel in motion, not only the wheel but this cart and the load became deodand. And this, even though it belonged to the dead man. Horses, oxen, carts, boats, mill-wheels, and cauldrons were the commonest deodands. The common name for it was the "banna," the slayer. In the thirteenth century the common practice was that the thing itself was delivered to the men of the township where the death occurred, and they had to account to the king's officers. In very early records the justices in eyre named the charitable purpose, to which the money was to be applied; 2 Pol. & Bailt. 471. In 1840, a railway company in England was amerced £2,000, as a deodand. Deodands were not abolished till 1846; Statute 9 & 10 Vict. c. 62. See 1 Bla. Com. 301; 2 Steph. Com. 551. Originally deodands went to the Crown, to be applied to charitable uses; they were often granted to lords of manors. The value was fixed, generally very low, by the coroner's jury. The Law's Lumber Room 60.

No deodand accrues in the case of a felonious killing; 1 Q. B. 818; 1 G. & D. 211, 481; 9 Dow. 1048.

DEPART. In Pleading. To forsake or abandon the ground assumed in a former pleading, and assume a new one. Burrill.

In Old Eng. Law. To divide or separate; to part. *Id.*; Cowell.

In Maritime Law. To leave a port; to be out of a port. To depart imports more than to sail, or set sail. A warranty in a policy, that a vessel shall depart on or before a particular day, is a warranty not only that she shall sail, but that she shall be out of the port on or before that day. *Id.*; 3 M. & S. 461; 3 Kent's Com. 307, note. To depart does not mean merely to break ground, but fairly to set forward upon the voyage. *Id.*; 6 Taunt. 241.

DEPARTMENT. A portion of a country.

In France, the country is divided into departments, which are somewhat similar to the counties in this country. The United States have been divided into military departments, including certain portions of the country. 1 Pet. 293.

A portion of the agents employed by the executive branch of the United States government, to whom a specified class of duties is assigned. *e.g.*, department of state department of the treasury, department of war, department of justice, post office department.

DEPARTURE. In Maritime Law. A deviation from the course prescribed in the policy of insurance. It may be justifiable; 7 Cra. 100; 1 Paine 247. See 51 Pa. 143; DEVIATION.

In Pleading. The statement of matter in a replication, rejoinder, or subsequent pleading, as a cause of action or defence, which is not pursuant to the previous pleading of the same party, and which does not support and fortify it; 2 Wms. Saund. 84 a. n. 1; 2 Wils. 98; Co. Litt. 304 a. It is not allowable, as it prevents reaching an issue; 49 Ind. 111; 13 N. Y. 83, 89; 2 Wms. Saund. a. n. 1; Steph. Pl. 410; 1 M. & S. 395. It is to be taken advantage of by demurrer, general; 5 D. & R. 295; 14 Johns. 132; McKel. Pl. 57; 2 Caines 320; 16 Mass. 1; or special; 2 Saund. 84; Com. Dig. Pleader (F 10); 77 Md. 64.

A departure is cured by a verdict in favor of him who makes it, if the matter pleaded by way of departure is a sufficient answer in substance to what has been before pleaded by the opposite party; that is, if it would have been sufficient if pleaded in the first instance; 2 Saund. 84; 1 Lilly, Abr. 444.

DEPARTURE IN DESPITE OF COURT. This took place where the tenant, having once made his appearance in court upon demand, failed to reappear when demanded; Co. Litt. 139 a. As the whole term is, in contemplation of law, but a single day, an appearance on any day, and a subsequent failure to reappear at any subsequent part of the term, is such a departure; 8 Co. 62 a; 1 Rolle, Abr. 588; Metc. Yelv. 211.

DEPENDENCY. A territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe.

It differs from a colony, because it is not settled by the citizens of the sovereign or mother state; and from possession, because it is held by other title than that of mere conquest. For example, Malta was considered a dependency of Great Britain in the year 1818. 3 Wash. C. C. 286. See Act of Cong. Mch. 1, 1809, commonly called the non-importation law.

DEPENDENT (adj.). Not to be performed until a connected thing is done by another. Opposed, independent, completely obligatory within itself; as, a dependent, or an independent, contract or covenant.

(n.) A person who is dependent for support upon another. Anderson; 50 Wis. 619.

DEPENDENT OR NEGLECTED CHILD. A "dependent or neglected child" is one whose condition, due to some act of commission or omission on the part of its parents or those whose duty it is to exercise control over it, is such as make it necessary, for the benefit of the child and the good of society, to remove it from its surroundings. 142 Ky. 160, 133 S. W. 1137.

In an act to regulate them by juvenile courts means: Any child under the age of sixteen years who for any reason is destitute, homeless or abandoned; or dependent upon the public for support; or has not the proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame, or within a vicious or disreputable place; or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardians or any other persons in whose care it may be, is an unfit place for such a child; and any child under eight years who is found begging, singing, or playing any musical instrument upon the street, or giving any public entertainment, or who accompanies or is used in aid of any person so doing. 60 Okl. Cr. Rep. 498. See DELINQUENT CHILD.

DEPENDENT PROMISE. One which it is not the duty of the promisor to

perform until some obligation contained in the same agreement has been performed by the other party. Hamm. Partn. 17, 29, 80, 109; Harr. Cont. 152. See CONTRACT; COVENANT; INDEPENDENT PROMISE.

DEPENDENT PROMISES. Mutual promises are said to be "dependent," when the performance of one promise depends on the performance of the other, and, therefore, until the prior condition is performed, the other party is not liable on his promise; as where A. promised B. to keep some buildings in repair on condition of their being first put into repair by B. R. & L. Dict.; Leake Cont. 344 *et seq.* See INDEPENDENT PROMISES; CONCURRENT PROMISES.

DEPONENT. One who gives information, on oath or affirmation, respecting some facts known to him, before a magistrate; he who makes a deposition. 47 Me. 248.

DEPORTATION. In Roman Law. A perpetual banishment, depriving the banished of his rights as a citizen; it differed from relegation (*q. v.*) and exile (*q. v.*). 1 Bro. Civ. Law 125, n.; Inst. 1. 12. 1; Dig. 48. 22. 14. 1.

In Modern Law. "The removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken." 149 U. S. 709. It differs from transportation (*q. v.*), which is by way of punishment of one convicted of an offence against the laws of the country; and from extradition (*q. v.*), which is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished; *id.*

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country; 149 U. S. 698; in the same opinion the supreme court says, by a divided court, that this right exists even though such persons be subjects of a friendly power and have acquired a domicile in this country. This case follows Vattel, Law of Nations § 230; Ortolan, *Dipl. de la Mer* 297; 1 Phill. Int. L. § 220; Bar. Int. Law (Gillespie's ed.) 708. In England, the only question has been whether the power of deportation could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament. See 2 Inst. 57; 1 Bla. Com. 260; 6 Law Quart. Rev. 27. A British colonial governor has exercised it; 1 Moore, P. C. 460. See App. Cas. (1891) 272.

Congress may exercise the power through the executive, or may call in the judiciary to ascertain contested facts; 149 U. S. 698.

DEPOSE. To deprive an individual of a public employment or office against his will. Wolfius, Inst. § 1063. The term is usually applied to the deprivation of all authority of a sovereign.

To give testimony under oath. See DEPOSITION.

DEPOSIT. A naked bailment of goods to be kept for the depositor without reward, and to be returned when he shall require it. Jones, Bailm. 36, 117; 9 Mass. 470; 40 Vt. 380.

A bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust. Story, Bailm. § 41; 42 Miss. 544.

A contract by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously and obliges himself to return it when he shall be requested. See 3 L. R. P. C. C. 101.

An *irregular deposit* arises where one deposits money with another for safekeeping, in cases where the latter is to return, not the specific money deposited, but an equal sum.

A *quasi deposit* arises where one comes lawfully into possession of the goods of another by finding.

A depositary is bound to take only ordinary care of the deposit, which will of course vary with the character of the goods to be kept, and other circumstances; *Edw. Bailm.* 43. See 14 S. & R. 375; 17 Mass. 479; 3 Mas. 132; 2 Ad. & E. 526; 1 B. & Ald. 59. While gross negligence on the part of a gratuitous bailee is not fraud, it is in effect the same thing; 100 U. S. 699. He has, in general, no right to use the thing deposited; *Bac. Abr. Bailment, D*; unless in cases where permission has been given or may from the nature of the case be implied; *Story, Bailm.* § 90; *Jones, Bailm.* 80, 81. He is bound to return the deposit in *indiviso*, and in the same state in which he received it: if it is lost, or injured, or spoiled, by his fraud or gross negligence, he is responsible to the extent of the loss or injury; *Jones, Bailm.* 36, 46, 120; 17 Mass. 479; 2 Hawks 145; 1 Dane, Abr. c. 17, art. 1 and 2; 87 Mich. 209. He is also bound to restore, not only the thing deposited, but any increase or profits which may have accrued from it; if an animal deposited bear young, the latter are to be delivered to the owner; *Story, Bailm.* § 99.

In the case of irregular deposits, as those with a banker, the relation of the banker to his customer is that of debtor and creditor, and does not partake at all of a fiduciary character. It ceases altogether to be the money of the depositor, and becomes the money of the banker. It is his to do what he pleases with it, and there is no trust created; *Edw. Bailm.* 41, 45; 17 Wend. 94; 1 Mer. 568; 33 N. E. Rep. (Ohio) 1054; 138 Ill. 596; 33 Fla. 429; 104 U. S. 64. See 37 N. J. E. 18. The legal remedy is a suit at law for debt: the balance cannot be reached by a bill in equity; 2 H. L. Cas. 39; except in some cases of insolvency, when a fund can be followed; 11 Phila. 511. See 1 C. C. App. 598. The banker is not liable for interest unless expressly contracted for; and the deposit is subject to the statute of limitations; 2 H. L. Cas. 39; 139 N. Y. 514.

Deposits in the civil law are divisible into two kinds—necessary and voluntary. A necessary deposit is such as arises from pressing necessity; as, for instance, in case of a fire, a shipwreck, or other overwhelming calamity; and thence it is called *misericordiae depositum*. *La. Civ. Code* 2385. A voluntary deposit is such as arises without any such calamity, from the mere consent or agreement of the parties. *Dig.* 16, 3, 2.

This distinction was material in the civil law in respect to the remedy, for in voluntary deposits the action was only in *simpliciter*, in the other in *duplum*, or twofold, whenever the depositary was guilty of any default. The common law has made no such distinction. *Jones, Bailm.* 43.

Deposits are again divided by the civil law into simple deposits and sequestrations: the former is when there is but one party depositor (of whatever number composed), having a common interest; the latter is where there are two or more depositors, having each a different and adverse interest. These distinctions do not seem to have become incorporated into the common law. See *Story, Bailm.* § 41. See *BAILMENT*.

Where goods, for the recovery of which an action has been brought, are converted into money, which is, by consent of all parties, placed in the hands of an officer of the court, it is at the risk of one party as much as the other; 6 Wash. 603.

Deposit is sometimes used as equivalent to or in the sense of earnest (*q. v.*), when made by way of a forfeiture to bind a bargain. In such case it is forfeited on a breach "even if as a deposit and in part payment of the purchase money," and it cannot be recovered back unless circumstances make it inequitable to retain it; 53 L. J. Ch. 1061; 27 Ch. D. 89. See *BAILMENT*.

General Deposit. Same as *irregular deposit* (*q. v.*).

Special Deposit. A deposit to be returned in the identical thing. See *IRREGULAR DEPOSIT*; *QUASI DEPOSIT*; *SPECIAL DEPOSIT*; *GENERAL DEPOSIT*.

DEPOSITARY. A person entrusted with anything by another for safekeeping; a trustee; fiduciary; one to whom goods are bailed to be held without recompense. *Stand. Dict.*

In the law of bailment, the person with whom a thing is deposited by another, to be kept for the depositor or bailor, and returned upon demand, without a recompense. *Burrill.* See *BAILLEE*; *DEPOSIT*;

DEPOSITORY.

DEPOSITION. The testimony of a witness reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial of some question of fact in a court of justice. 3 Blatchf. 456; 23 N. J. L. 49.

Depositions were not formerly admitted in common-law courts, and were afterwards admitted from necessity, where the oral testimony of a witness could not be obtained. But in courts of chancery this is generally the only testimony which is taken; *Ad. Eq.* 383. In some of the United States, however, both oral testimony and depositions are used, the same as in courts of common law.

In criminal cases, in the United States, depositions cannot be used without the consent of the defendant; 3 Greenl. Ev. § 11; 15 Miss. 475; 4 Ga. 335.

The constitution of the United States provides that in all criminal prosecutions "the accused shall enjoy the right to be confronted with the witnesses against him." Amend. art. 6. This principle is recognized in the constitutions or statutes of most of the states of the Union. 3 Greenl. Ev. § 11; *Cooley, Const. Lim.* 387.

In some of the states, provision is made for the taking of depositions by the accused. *Conn. Comp. Stat. art. 6, § 162*; 3 Greenl. Ev. § 11.

Provision has been made for taking depositions to be used in civil cases, by an act of congress and by statute in most of the states.

The Rev. Stat. §§ 863-876, directs that when, in any civil cause depending in any district in any court of the United States, the testimony of any person shall be necessary who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided that a notification in writing from the party or his attorney, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest. And in all cases *in rem*, the person having the agency or possession of the property at the time of the seizure shall be deemed the adverse party until a claim shall have been put in; and when the deposition of the witness is taken from the district, and want of an attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice, as any judge authorized to hold circuit courts, or any clerk of such court, shall think reasonable and direct. Any person may be compelled to appear and depose, as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify to the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the deposition so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given, to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. Provided that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice,—which power they shall severally possess; nor to extend to depositions taken *in perpetuum rei memoriam*, which, if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application therefor, made as a court of equity, may, according to the usages in chancery, direct to be taken.

In any cause before a court of the United States, it shall be lawful for such court, in its discretion to admit in evidence any deposition taken *in perpetuum rei memoriam*, which would be so admissible in a

court of the state wherein such cause is pending, according to the laws thereof.

The act of January 24, 1827, authorizes the clerk of any court of the United States within which a witness resides, or where he is found, to issue a subpoena to compel the attendance of such witness; and a neglect of the witness to attend may be punished by the court whose clerk has issued the subpoena, as for contempt. And when papers are wanted by the parties litigant, the judge of the court within which they are may issue a subpoena *duces tecum*, and enforce obedience by punishment as for a contempt. *Rev. Stat.* §§ 863-876; see 92 U. S. 1; *Desty, Fed. Proc.*

No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition, nor shall any witness be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpoena. See *Rev. Stat.* § 870, etc.

Section 863 Rev. Stat. above quoted, relating to depositions *de bene esse*, applies to equity as well as to common-law causes; 36 Fed. Rep. 188. When a party is represented by counsel at the taking of a deposition and takes part in the examination, that must be regarded as a waiver of irregularities in taking it; 168 U. S. 271.

A clerical mistake in making out a commission which in no way misled the opposite party or affected his rights, is no valid ground for the suppression of the deposition; 149 U. S. 981.

The statutes of some states provide that courts may issue commissions to take depositions; others, that the parties may take them by giving notice of the time and place of taking the deposition to the opposite party. The privilege of taking them is generally limited to cases where the witness lives out of the state or at a distance from the court, or where he is sick, aged, about to leave the state, or where, from some other cause, it would be impossible or very inconvenient for him to attend in person. If the deposition is not taken according to the requirements of the statute authorizing it, it will, on objection being made by the opposite party, be rejected. See, generally, *Weeks, Depositions*.

In Ecclesiastical Law. The act of depriving a clergyman, by a competent tribunal, of his clerical orders, to punish him for some offence and to prevent his acting in future in his clerical character. *Ayliffe, Parerg.* 206.

DEPOSITO. In Spanish Law. A real contract by which one person confides to the custody of another an object on the condition that it shall be returned to him whenever he shall require it.

DEPOSITOR. He who makes a deposit.

DEPOSITORS' GUARANTY FUND. See *GUARANTY FUND*.

DEPOSITORY. The place where a deposit (*q. v.*) is placed and kept. *Burrill.* See *DEPOSITORY*.

DEPOSITUM. A species of bailment. See *DEPOSIT*.

DEPOT. A warehouse for the storage, transfer, and sometimes for the sale of goods. *Stand. Dict.*

A building which is used for the accommodation and protection of railway passengers or freight. 103 Ky. 134. Frequently used synonymously with railway station. 33 S. W. 939. May include surrounding ground. *Anderson*; 21 Wis. 79.

The terms "depot" and "railway station" are frequently used synonymously. 33 S. W. 939.

A place where military stores or supplies are kept. 19 Wall. 264. A recruiting station, barracks. A place out of reach of fire where troops are gathered for an attack on the enemy's outworks. *Stand. Dict.*

In England, that part of a battalion which remains at headquarters while the rest are on foreign service, more commonly called the home battalion.

In Japan, a department for instruction and training of reserves. *Stand. Dict.*

DEPOT. In French law, the depositum (*q. v.*) of the Roman and the deposit of the English law. It is of two

kinds, either the *depot*, simply so called, which may be either voluntary or necessary, or the *séquestre* (q. v.), which is a deposit made pending litigation regarding it, made either under an agreement of the parties, or by direction of the court or judge. R. & L. Dict.; Brown. See SEQUESTRATION; SEQUESTATOR; SEQUESTER; SEQUESTRE; SEQUESTRATIO; DEPOSIT.

DEPREDAATION. In French Law. The pillage which is made of the goods of a decedent.

DEPRIVATION. In Ecclesiastical Law. A censure by which a clergyman is deprived of his parsonage, vicarage, or other ecclesiastical promotion or dignity. See Ayliffe, Parerg. 206. 1 Bla. Com. 393. See DEGRADATION.

DEPRIVE. Referring to property taken under the power of eminent domain, it means the same as "take." 21 Pa. 167.

The constitution contains no definition of this word "deprive" as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection; 94 U. S. 123. See DUE PROCESS OF LAW; EMINENT DOMAIN; PRIVILEGES AND IMMUNITIES.

DEPUTY. One authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter.

In general, ministerial officers can appoint deputies, Comyns, Dig. Officer (D 1), unless the office is to be exercised by the ministerial officer in person; and when the office partakes of a judicial and ministerial character, although a deputy may be made for the performance of ministerial acts, one cannot be made for the performance of a judicial act; a sheriff cannot, therefore, make a deputy to hold an inquisition, under a writ of inquiry, though he may appoint a deputy to serve a writ. Sometimes, however, a general deputy or under-sheriff is appointed, who possesses, by virtue of his appointment, authority to execute all the ordinary duties of sheriff, and may even appoint, in the name of the sheriff, a special deputy; 12 N. J. L. 159; 2 Johns. 63.

In general, a deputy has power to do every act which his principal might do; but a deputy cannot make a deputy. See 9 Ia. 87; 9 Mo. 183; 20 Wall. 111.

A deputy should always act in the name of his principal. The principal is liable for the deputy's acts performed by him as such, and for the neglect of the deputy; 3 Dane, Abr. c. 76, a. 2; and the deputy is liable himself to the person injured for his own tortious acts; Dane, Abr. Index; Com. Dig. Officer (D), Viscount (B). See 7 Viner, Abr. 556; L. R. 3 Q. B. Div. 741; 8 Jones, L. 62.

See FOREIGN MINISTER.

DEPUTY KEEPER OF THE RECORDS. See RECORD OFFICE.

DERAIGN. The literal meaning of the word seems to be, to disorder or displace, as deraignment out of religion; stat. 31, Hen. VIII. c. 6. But it is generally used in the common law for to prove, as, to deraign the warranty; Glanv., lib. 2, c. 6.

DERELICT. Abandoned; deserted; cast away.

Land left uncovered by the receding of water from its former bed. 2 Rolle, Abr. 170; 2 Bla. Com. 262; 1 Crabb, R. P. 109.

When so left by degrees, the derelict land belongs to the owner of the soil adjoining; but when the sea retires suddenly, it belongs to the government; 2 Bla. Com. 262; 1 Bro. Civ. Law 239; 1 Sumn. 328, 490; 1 Gall. 133; Bee 62, 178, 260; Ware 332.

Personal property abandoned or thrown away by the owner in such manner as to indicate that he intends to make no further claim thereto. 2 Bla. Com. 9; 2 Reeve, Hist. Eng. Law 9; 1 C. B. 112; Broom, Max. 261; 1 Ohio 81; 2 Schoul. Per. Prop. 8; 12 Ga. 473. Dereliction or renunciation properly requires both the intention to abandon and external action. Thus the casting overboard of articles in a tempest to lighten the

ship is not dereliction, as there is no intention of abandoning the property in the case of salvage. Nor does the mere intention of abandonment constitute dereliction of property without a throwing away or removal, or some other external acts; 74 Me. 455.

It applies as well to property abandoned at sea as on land; 1 Mas. 373; 1 Sumn. 207, 336; 2 Kent 357. A vessel which is abandoned and deserted by her crew without any purpose on their part of returning to the ship, or any hope of saving or recovering it by their own exertions, is derelict; 2 Pars. Mar. Law 615; 20 E. L. & Eq. 607; 2 Cra. 240; Olc. 77; Newson, Salvage; 1 Newb. 329, 421; 3 Ware 65; 14 Wall. 396; Bee 260.

The title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there; 38 Fed. Rep. 503; "because as goods lying at the bottom, they always await their owner;" *id.*; after another has taken them, the owner must follow them within a year and a day; *id.*; 5 Co. 105; 1 B. & Ad. 141, where the law is fully discussed; 3 Black Book, Adm. 439.

A vessel at least six miles from shore submerged from midship to bow, her running rigging overboard and snarled fast, her boat gone, her cabin, etc., full of water, a distress flag set, and deserted by her crew, who had left no sign of an intention to return and were not visible, is *prima facie* derelict, though she was anchored and her master was intending to return to save her and had telegraphed for a wrecking vessel; 87 Fed. Rep. 233.

However long goods thrown overboard may have been on the ocean, they do not become derelict by time, but will be restored on the payment of salvage, unless there was a voluntary intention to abandon them; Bee 82. See SALVAGE; QUASI-DERE LICT.

DERELICTION. The gaining of land from the water, in consequence of the sea shrinking back below the usual water mark; the opposite of alluvion.

DERIVATIVE. Coming from another; taken from something preceding; secondary; as, derivative title, which is that acquired from another person.

There is considerable difference between an original and a derivative title. When the acquisition is original, the right thus acquired to the thing becomes property, which must be unqualified and unlimited, and since no one but the occupant has any right to the thing, he must have the whole right of disposing of it. But with regard to derivative acquisition it may be otherwise; for the person from whom the thing is acquired may not have an unlimited right to it, or he may convey or transfer it with certain reservation of right. Derivative title must always be by contract.

Derivative conveyances are those which presuppose some precedent conveyance, and serve only to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 3 Bla. Com. 324.

DEROGATION. The partial abrogation of a law. To derogate from a law is to enact something which impairs its utility and force; to abrogate a law is to abolish it entirely.

DEROGATORY CLAUSE. A sentence or secret character inserted by the testator of a will, of which he reserves the knowledge to himself, with a condition that no will he may make thereafter should be valid, unless this clause be inserted word for word. This is done as a precaution to guard against later wills being extorted by violence, or otherwise improperly obtained. Wharton.

DESAFUERO. In Spanish Law. An irregular action committed with violence against law, custom, or reason.

DESCEND. To pass by succession; as when the estate vests by operation of law in the heirs immediately upon the death of the ancestor. 128 Mass. 40. See DESCENT AND DISTRIBUTION; DESCENT OF DIGNITIES; DESCENT OF CROWN LANDS; DEVOLVE; DEVOLUTION.

DESCENDANTS. Those who have is-

sued from an individual, including his children, grandchildren, and their children to the remotest degree. Ambl. 327; 3 Bro. Ch. 30, 230; 1 Roper, Leg. 115.

The descendants from what is called the direct descending line. The term is opposed to that of ascendants.

There is a difference between the number of ascendants and descendants which a man may have; every one has the same order of ascendants, though they may not be exactly alike as to numbers, because some may be descended from a common ancestor. In the line of descendants they fork differently according to the number of children, and continue longer or shorter as generations continue or cease to exist. Many families become extinct, while others continue; the line of descendants is, therefore, diversified in each family.

DESCENT CAST. The same as what the older writers called a "descent which tolls entry." Where a person who had acquired land by disclaim, abatement or intrusion, died seized of the land, the descent of it to his heir took away or "toll" the real owner's right of entry, so that he could only recover the land by an action. R. & L. Dict., quoting Litt. § 385 *et seq.* and Co. Litt. 237b. The doctrine of descent cast was abolished in the reign of William IV. R. & L. Dict.

Originally meant merely "the happening of any descent," because the law casts the land upon the heir. *Id.*, quoting Litt. § 385, and Watk. Desc. 33.

DESCENT OF CROWN LANDS. In English law, the hereditary succession of the demesne lands of the crown. "All the lands whereof the King is seized in *jure coronae*, shall, *secundum jus coronae*, attend upon and follow the Crown; so that to whomsoever the Crown descends, those lands and possessions descend also." Cunningham. See DEMESNE; DEMESNE LANDS OF THE CROWN.

DESCENT OF DIGNITIES. In English law, the hereditary succession of titles. "A dignity differs from common inheritances, and goes not according to the rules of the common law"; for it may descend "to the half blood, and there is no copartnership in it, but the eldest takes the whole." Cunningham, quoting Co. Litt. 27." The dignity of peerage is personal, annexed to the blood, and so inseparable that it cannot be transferred to any person, or surrendered even to the Crown; it can move neither forward nor backward, but only downward to posterity; and nothing but corruption of blood, as if the ancestor be attainted of treason or felony, can hinder the descent to the right heir." Cunningham, quoting Lex Constitutionis, 85.

DESCENT AND DISTRIBUTION. The division among those legally entitled thereto of the real and personal property of intestates, the term *descent* being applied to the former and *distribution* to the latter. *Descent* is the devolution of real property to the heir or heirs of one who dies intestate; the transmission by succession or inheritance.

Title by descent is the title by which one person, upon the death of another, acquires the real estate of the latter as his heir at law. 2 Bla. Com. 201; Com. Dig. *Descent*.

It was one of the principles of the feudal system that on the death of the tenant in fee the land should *descend*, and not *ascend*. Hence the title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend.

The English doctrine of primogeniture, by which by the common law the eldest son and his issue take the whole real estate, has been universally abolished in this country. So, with few exceptions, has been the distinction between male and female heirs.

The rules of descent are applicable only to real estates of inheritance. Estates for the life of the deceased, of course, terminate on his death; estates for the life of another are governed by peculiar rules.

Distribution is the division by order of the court or legal representative having authority, among those entitled thereto, of the residue of the personal estate of an intestate, after payment of the debts and charges.

The term is sometimes used to denote the division of a residue of both real and personal estate, and also the division of an estate according to the terms of a will, but neither use is accurate, the term being technically applied only to personal estate.

The title to real estate vests in the heirs by the death of the owner; the legal title to personal estate, by such death, vests in the executor or administrator, and is transferred to the persons beneficially interested, by the distribution; 4 Conn. 347.

Terms of years, and other estates less than freehold, are regarded as personal estate, and, on the death of the owner, vest in his executor or administrator.

The rules of descent and distribution are prescribed by the statute laws of the several states; and, although they correspond in some respects, it is doubtful whether in any two they are precisely alike.

Property in real estate and its transmission by descent as by alienation or devise is governed by the *lex rei sitae* (q. v.), but the law of the domicile of the decedent governs in the distribution of his personal estate, unless otherwise provided by statute. See DOMICIL; CONFLICT OF LAWS.

DESCRIPTIO PERSONÆ. Description of the person. In wills, it frequently happens that the word heir is used as a *descriptio personæ*: it is then a sufficient designation of the person. In criminal cases, a mere *descriptio personæ* or addition, if false, can be taken advantage of only by plea in abatement; 1 Metc. 151. A legacy "to the eldest son" of A would be a designation of the person. See 1 Roper, Leg. c. 2.

The description contained in a contract of the persons who are parties thereto.

In all contracts under seal there must be some *designatio personæ*. In general, the names of the parties appear in the body of the deed, "between A B, of, etc., of the one part, and C D, of, etc., of the other part," being the common formula. But there is a sufficient designation and description of the party to be charged if his name is written at the foot of the instrument; 1 Ld. Raym. 2; 1 Salk. 214; 2 B. & P. 339.

When a person is described in the body of the instrument by the name of James, and he signs the name of John, on being sued by the latter name he cannot deny it; 3 Taunt. 505; Cro. Eliz. 897, n. (a). See 11 Ad. & E. 594; 8 P. & D. 271.

DESCRIPTION. An account of the accidents and qualities of a thing. Ayliffe, Pand. 60.

A written account of the state and condition of personal property, titles, papers, and the like. It is a kind of inventory, but is more particular in ascertaining the exact condition of the property, and is without any pleading of it.

In Pleading. One of the rules which regulate the law of variance is that allegations of matter of *essential description* should be proved as laid. It is impossible to explain with precision the meaning of these words; and the only practical mode of understanding the extent of the rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases. With respect to criminal law, it is clearly established that the name or nature of the property stolen or damaged is matter of *essential description*. Thus, for example, if the charge is one of firing a stack of hay, and it turns out to have been a stack of wheat, or if a man is accused of stealing a drake, and it is proved to have been a goose, or even a duck, the variance is fatal. 1 Tayl. Ev. §233; Steph. Cr. Proc. 177.

The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered, has, in modern practice, been relaxed, and a general description of the property held to be good. The provisions of state statutes as to the description of the premises by metes and bounds, have been held to be only directory, and a description by name where the property is well known is often sufficient; 127 U. S. 490.

DESERTER. See FOREIGN TROOPS.

DESERTION. In Criminal Law. An offence which consists in the abandonment of the public service, in the army or navy, without leave.

An absence without leave, with the intention of returning, will not amount to desertion; 115 Mass. 336; 2 Sumn. 373; 3 Story 108.

The articles of war, U. S. Rev. Stat. § 1842, provide as follows:

Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to such punishment, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried. Art. 48.

By the articles of war it is enacted that any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall in time of war suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct. Art. 20.

By the articles for the government of the navy, art. 4, it is enacted that the punishment of death, or such punishment as a court-martial may adjudge, may be inflicted on any person in the naval service who in time of war deserts or entices others to desert; and by art. 8, such punishment as a court-martial may adjudge, may be inflicted on any person in the navy, who in time of peace deserts or entices others to desert.

The act by which a man abandons his wife and children, or either of them.

Wilful desertion, as the term is applied in actions for divorce, is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. 17 Or. 542.

On proof of desertion, the courts possess the power under statute, in many states, to compel support of the wife. And a continued desertion by either husband or wife, after a certain lapse of time, entitles the party deserted to a divorce, in most states.

There must, however, be an actual and intentional withdrawal from matrimonial cohabitation for a statutory period, against the consent of the abandoned party and without justification; Tiffany, Dom. Rel. 181; and an intention to desert in the mind of the offender; 43 Conn. 313; 30 Gratt. 807; 89 Pa. 173; Bish. Mar. Div. & Sep. 1687-1734; 5 Q. B. D. 81; 69 Law T. 617; 160 Mass. 258; where parties continue to live together as husband and wife and other marital duties are observed, a refusal to occupy the same bed does not by itself constitute desertion; 39 Minn. 258.

Desertion is established by proof of a refusal to commence cohabitation; 57 Ia. 370; Wright 223; a refusal to renew cohabitation, on request of the other party; 29 Ala. 719; 31 Me. 342; 45 N. J. Eq. 498; 180 N. Y. 192; 89 Pa. 173; causing a separation, by driving the other away, or by cruel conduct which has that effect; 14 Ct. of Sess. Cas. (4th series) 443; 87 Ala. 393; 125 Ill. 510; 4 Bush 682; 33 Md. 328; 99 Mass. 498; 54 Mich. 492; 41 N. J. Eq. 202; 46 N. J. Eq. 490; a refusal by the wife to follow the husband when he changes his residence; 14 Cal. 654; 87 Ill. 250; 29 N. J. Eq. 96; 163 Pa. 649. But a separation by mutual consent is not desertion; 3 L. R. P. & D. 129; 7 Prob. Div. 17; 50 Mich. 49; 48 N. J. Eq. 549; Wright 284; 49 Pa. 249; 96 Va. 768; 53 Wis. 153; neither is non-cohabitation; 13 Ala. 145; 44 Mass. 257; Wright 469; 21 W. Va. 445; nor a refusal by the husband to follow the wife to a new residence; for it is her duty to follow him; 17 N. H. 251. See DOMICIL.

Mere non-support is not always desertion; 83 N. J. Eq. 7; 1 Hun 444; but if the husband have the means to support his wife, and does not do so, this is a wilful desertion; 58 N. H. 266; but see 135 Pa. 459.

It is not yet settled whether the refusal of sexual intercourse is desertion. The true rule seems to be that it is, in the absence of specific statutory provisions qualifying the meaning of the term; 87 Ga. 471; 17 Oreg. 543; 1 Bish. Mar. & Div. § 1670; contra, 28 Atl. Rep. (N. J.) 467. See 188 Ill. 436; 97 Mass. 327; 112 Mass. 298; 89 Minn. 258; 83 Wis. 553.

Involuntary absence, on account of sickness or business, if not prolonged beyond such a time as is reasonable or necessary, will not constitute desertion; 1 P. & M. 641; 1 Swab. & T. 88; 3 id. 547; 42 Ill. App. 504; 131 Pa. 552. See 9 L. R. A. 696, n.; Tiffany; Schouler, Dom. Rel.; DIVORCE.

DESERTION OF A SEAMAN. The abandonment, by a sailor, of a ship or vessel, in which he had engaged to perform a voyage, before the expiration of his time, and without leave.

Where a seaman signs articles for a voyage, agreeing to go to the port where the vessel is lying to join her, and fails to do so, he is a deserter; 53 Fed. Rep. 551.

Desertion without just cause renders the sailor liable on his shipping articles for damages, and, will, besides, work a forfeiture of his wages previously earned; 3 Kent 155. It has been decided in England that leaving the ship before the completion of the voyage is not desertion, in case—first, of the seaman's entering the public service, either voluntarily or by impressment; and, second, when he is compelled to leave it by the inhuman treatment of the captain; 2 Esp. 269; 1 Bell, Com. 514; 2 C. Rob. 232. And see 1 Sumn. 373; 2 Pet. Adm. 393; 3 Story 109.

To justify the forfeiture of a seaman's wages for absence for more than forty-eight hours, under the provisions of the act of congress of July 20, 1790, an entry in the log-book of the fact of his absence, made by the officer in charge of it on the day on which he absented himself, and giving the name of the absent seaman as absent without permission, is indispensable; 3 Pars. Sh. & Adm. 101; 1 Wash. C. C. 48; Gilp. 212, 296.

Receiving a marine again on board, and his return to duty with the assent of the master, is a waiver of the forfeiture of wages previously incurred; 1 Pet. Adm. 160.

DESERVING. Worthy or meritorious, without regard to condition or circumstances. In no sense of the word is it limited to persons in need of assistance, or objects which come within the class of charitable uses. 130 Mass. 211.

DESIGN. As a term of art, "the giving of a visible form to the conceptions of the mind, or in other words to the invention." 4 Wash. C. C. 48. See COPYRIGHT; PATENTS. Plan, scheme, or intention carried into effect. 1 Sumn. 434. A project, an idea. 3 H. & N. 301.

As used in an indictment, see 2 Mass. 128.

DESIGNATE.

The word "designate" used in a statute, regulating primary elections, and providing that no petitioner shall be counted unless his residence and post office address be "designated," means, to mark out and make known; to point out; to name; to show. 138 Ky. 267, 127 S. W. 991. See APPOINT.

DESIGNATIO PERSONÆ. See DESCRIPTIO PERSONÆ.

DESIGNATION. The expression used by a testator to denote a person or thing, instead of the name itself.

A bequest of the farm which the testator bought of a person named, or of a picture which he owns, painted by a certain artist, would be a designation of the thing.

DESIRE. The word desire, in a will, raises a trust, where the objects of that desire are specified; 1 Cal. 84. See WANT.

DESLINDE. In Spanish Law. The act of determining and indicating the boundaries of an estate, county, or province.

DESMEMORIADOS. In Spanish Law. Persons without memory. White, New Recop. lib. 1, tit. 2, c. 1, § 4.

DESPACHEURS. The name given, in some countries, to persons appointed to settle cases of average. Ord. Hamb. t. 21, art. 10.

DESPATCHES. Official communications of official persons on the affairs of government.

In general, the bearer of despatches is entitled to all the facilities that can be given him, in his own country, or in a neutral state; but a neutral cannot, in general, be the bearer of despatches of one of the belligerent parties; 6 C. Rob. 465. See 2 Dods. 54; 1 Edw. 274.

DESPERATE. Of which there is no hope.

This term is used frequently in making an inventory of a decedent's effects, when a debt is considered so bad that there is no hope of recovering it. It is then called a desperate debt, and, if it be so returned, it will be *prima facie* considered as desperate. See Toll. Ex. 248; 2 Wms. Ex. 644; 1 Chitt. Pr. 580; 11 Wend. 365.

DESPITUS. A contemptible person. Fleta, l. 4, c. 5, § 4.

DESPOIL. This word involves in its signification, violence or clandestine means, by which one is deprived of that which he possesses. 1 Cal. 268.

DESPOT. This word, in its original and most simple acceptation, signifies *master and supreme lord*; it is synonymous with monarch; but taken in bad part, as it is usually employed, it signifies a tyrant.

DESPOTISM. That abuse of government where the sovereign power is not divided, but united in the hands of a single man, whatever may be his official title. It is not, properly, a form of government. Toullier, Dr. Civ. Fr. tit. pré. n. 32; Ruth. erf. Inst. b. 1, c. 20, § 1.

DESRENABLE. Unreasonable. Britton, c. 121.

DESTINATION. The intended application of a thing.

For example, when a testator gives to a hospital a sum of money to be applied in erecting buildings, he is said to give a destination to the legacy. Mill-stones taken out of a mill to be picked, and to be returned, have a destination, and are considered real estate, although detached from the freehold. Heirlooms, although personal chattels, are, by their destination, considered real estate; and money agreed or directed to be laid out in land is treated as real property; 3 Wheat. 577; 2 Bell, Com. 2; Erskine, Inst. 2, 14; Fonbl. Eq. b. 1, c. 6, § 9. See EASEMENT; FIXTURES.

In Common Law. The port at which a ship is to end her voyage is called her port of destination. Pardessus, n. 600.

The phrases "port of destination" and "port of discharge" are not equivalent; 5 Mass. 404. See 66 Me. 65.

DESTROY. In the act of congress punishing with death any one destroying vessels, it means to unfit the vessel for service, beyond the hopes of recovery, by ordinary means. 1 Wash. C. C. 363; 4 Dall. 412.

A will burned, cancelled, or torn, *animo revocandi* is destroyed; 2 Nott & McC. 272. The scratching out of the signature with a knife, in England, has been held to be tearing or otherwise destroying a will in the sense of the statute; 56 L. J. R. Pr. & D. 96.

DESUETUDE. Disuse.

DETACHIARE. To seize or take into custody another's goods or person. Burrill. See ATTACHARE.

DETAIL. In Military Law. One who belongs to the army, but is only detached, or set apart, for the time to some particular duty or service, and who is liable at any time, to be recalled to his place in the ranks. 39 Ala. 379.

DETAIN. "Detain" means to stop; to delay; to restrain from proceeding. 55 S. W. 687.

DETAINER. Detention. The act of keeping a person against his will, or of

withholding the possession of goods or other personal or real property from the owner.

Detainer and detention are very nearly synonymous. If there be any distinction, it is perhaps that detention applies rather to the act considered as a fact, detainer to the act considered as something done by some person. Detainer is more frequently used with reference to real estate than in application to personal property.

All illegal detainers of the person amount to false imprisonment, and may be remedied by *habeas corpus*. Hurd, Hab. Corp. 309.

A detainer or detention of goods is either lawful or unlawful; when lawful, the party having possession of them cannot be deprived of it. It is legal when the party has a right to the property, and has come lawfully into possession. It is illegal when the taking was unlawful, as in the case of forcible entry and detainer, although the party may have a right of possession; but in some cases the detention may be lawful, although the taking may have been unlawful; 3 Pa. 20. So also the detention may be unlawful although the original taking was lawful; as when goods were distrained for rent, and the rent was afterwards paid; or when they were pledged, and the money borrowed and interest was afterwards paid; or, as in another case, if one borrow a horse, to ride from A to B, and afterwards detain him from the owner, after demand, such detention is unlawful, and the owner may either retake his property, or have an action of replevin or detinue; 1 Chitt. Pr. 135. In these and many other like cases the owner should make a demand, and, if the possessor refuses to restore them, trover, detinue, or replevin will lie, at the option of the plaintiff. In some cases the detention becomes criminal although the taking was lawful, as in embezzlement.

There may also be a detainer of land; and this is either lawful and peaceable, or unlawful and forcible. The detainer is lawful where the entry has been lawful and the estate is held by virtue of some right. It is unlawful and forcible where the entry has been unlawful and with force, and it is retained by force against right; or even where the entry has been peaceable and lawful, if the detainer be by force and against right; as, if a tenant at will should detain with force after the will has determined, he will be guilty of a forcible detainer; 2 Chitt. Pr. 235; Com. Dig. Detainer, B 2; 8 Cow. 216; 1 Hall 240; 4 Johns. 198; 4 Bibb 501. See 45 Ala. 421; 54 Mo. 437; 83 Ill. 473. A forcible detainer is a distinct offence from a forcible entry; 8 Cow. 216. See FORCIBLE ENTRY AND DETAINER.

In Practice. A writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. A detainer may be lodged against one within the walls of a prison, on what account soever he is there; Com. Dig. Process, E (3 B). This writ was superseded by 1 & 2 Vict. c. 110, §§ 1, 2.

DETAINING. See UNLAWFULLY DETAINING.

DETECTIVE. One whose business it is to watch, and furnish information concerning, alleged wrongdoers by adroitly investigating their haunts and habits. In England they are usually police officers in plain clothes, and are the successors of the Bow Street runners. In this country there are usually detectives in the police department of the large cities, but the term is applied more particularly to the persons engaged in the detection of crime and the prosecution of such investigations as in England are made through the private inquiry offices. The latter correspond to the private detective agencies in the United States.

One who joins a conspiracy for the purpose of robbery, in order to expose it, and honestly carries out the plan, is not an accessory before the fact, though he encourages the others to the commission of the crime, with the intent that they shall be punished; 157 Pa. 13. See 84 Pa. 187; Tayl. Ev. § 971; Whart. Cr. Ev. § 440.

May belong to a private agency, or to the police department. Private detectives are required in some states to be licensed. 9 A. & E. Ency. L., 2nd ed., 410. See SHADOW.

DETENTION. The act of retaining and preventing the removal of a person or property.

The detention may be occasioned by accidents, as the detention of a ship by calms, or by ice; or it may be hostile, as the detention of persons or ships in a foreign country by order of the government. In general, the detention of a ship does not change the nature of the contract; and therefore sailors will be entitled to their wages during the time of the detention; 1 Bell, Com. 5th ed. 517; Mackelday, Civ. Law § 210; 2 Pars. Sh. & Adm. 63. See DETAINER.

DETERMINABLE. Liable to come to an end by the happening of a contingency; as, a determinable fee.

DETERMINABLE FEE (also called a *qualified or base fee*). One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and his heirs on the part of his father affords an example of this species of estate; Littleton § 254; Co. Litt. 27 a, 220; 1 Prest. Est. 449; 2 Bla. Com. 109; Cruise, Dig. tit. 1, § 82. See 1 Washb. R. P. 62; 35 Wis. 86.

DETERMINATE. That which is ascertained; what is particularly designated; as, if I sell you my horse Napoleon, the article sold is here determined. This is very different from a contract by which I sell you a horse, without a particular designation of any horse.

DETERMINATION. The decision of a court of justice. See DECREE; JUDGMENT.

The end, the conclusion, of a right or authority; as, the determination of a lease, Com. Dig. Estates by Grant (G 10, 11, 12). The phrase "determination of will" is used of the putting an end to an estate at will. 2 Bla. Com. 146.

The determination of an authority is the end of the authority given; the end of the return-day of a writ determines the authority of the sheriff; the death of the principal determines the authority of a mere attorney. See FINAL DISPOSITION.

DETERMINE. To come to an end. To bring to an end. 2 Bla. Com. 121; 1 Washb. R. P. 380.

See BECOME VOID.

DETERMINED AND BECOME VOID. Distinguished. The latter differs from the former only as a species differs from its genus, and must therefore be included in it: for to say that a thing "has become void," necessarily implies that it has in effect been terminated or brought to an end; but the expression applies only to its end or termination in one specific mode: whereas to say that a thing "has been determined," though it clearly imports simply that the thing has been terminated or brought to an end, yet the expression is generic in its nature, and comprehends every mode of terminating or bringing a thing to an end. 4 Bibb (Ky.) 548.

DETINET (Lat. *detinere*, to detain; *detinet*, he detains). In Pleading. An action of debt is said to be in the *detinet* when it is alleged merely that the defendant withholds or unjustly detains from the plaintiff the thing or amount demanded.

The action is so brought by an executor, 1 Wms. Saund. 1; and so between the contracting parties when for the recovery of such things as a ship, horse, etc.; 3 Bla. Com. 156.

An action of *replevin* is said to be in the *detinet* when the defendant retains possession of the property until after judgment in the action; Bull. N. P. 52; Chitt. Pl. 145.

It is said that anciently there was a form of writ adapted to bringing the action in this form; but it is not to be found in any of the books; 1 Chitt. Pl. 145.

In some of the states of the United States,

however, the defendant is allowed to retain possession upon giving a bond similar to that required of the plaintiff in the common-law form; the action is then in the detinet; 3 Sharsw. Bla. Com. 146, n.; 5 W. & S. 556; 8 Ark. 510; 3 Sandf. 63; 13 Ill. 315; 1 Dutch. 890. The jury are to find the value of the chattels in such case, as well as the damage sustained. See *DEBIT ET DETINET*; *DETINUIT*.

DETINUE (Lat. *detinere*,—*de*, and *tenere*,—to hold from; to withhold).

In Practice. A form of action which lies for the recovery, in specie, of personal chattels from one who acquired possession of them lawfully but retains it without right, together with damages for the detention. 3 Bla. Com. 151.

It is generally laid down as necessary to the maintenance of this action that the original taking should have been lawful, thus distinguishing it from replevin, which lies in case the original taking is unlawful. Brooke, Abr. *Detinue*, 21, 96, 68. It is said, however, by Chitty, that it lies in cases of tortious taking, except as a distress, and that it is thus distinguished from replevin, which lay originally only where a distress was made, as was claimed, wrongfully; 1 Chit. Pl. 113. See 3 Sharsw. Bla. Com. 155. In England this action has yielded to the more practical and less technical action *trover*, but was formerly much used in the slaveholding states of the United States for the recovery of slaves; 4 Munf. 72; 4 Ala. 221; 3 Bibb 510; 1 Ov. 187; 10 Ired. 124.

The action lies only to recover such goods as are capable of being identified and distinguished from all others; Andr. Steph. Pl. 79, n.; Com. Dig. *Detinue*, B, C; Co. Litt. 286 b; 1 J. J. Marsh. 500; 15 B. Monr. 479; 2 Greene 266; 5 Sneed 562; in cases where the defendant had originally lawful possession, which he retains without right; 12 Ala. 279; 2 Mo. 45; 4 B. Monr. 365; 11 Ala. N. s. 322; as where goods were delivered for application to a specific purpose; 4 B. & P. 140; but a tort in taking may be waived, it is said, and *detinue* brought; 2 A. K. Marsh. 268; 14 Mo. 491; 15 Ark. 285. That it lies whether the taking was tortious or not, see 18 Ala. 151; 9 Ala. N. s. 780; 1 Mo. 749. It may be maintained for the recovery of a policy of insurance where it has been paid for, but is withheld by the agent who wrote it; 40 Ill. App. 132. The property must be in existence at the time; 2 Dana 332; 1 Ala. N. s. 203; 1 Ired. 523; see 13 Mo. 612; 12 Ark. 368; but need not be in the possession of the defendant; 1 Dana 110; 5 Yerg. 301; 13 B. Monr. 304; 19 Ala. N. s. 491; 23 Mo. 389; 18 B. Monr. 86. See 4 Dev. & B. 458; 10 Ired. 124.

The plaintiff must have had actual possession, or a right to immediate possession; 2 Mo. 45; 1 Wash. Va. 308; 4 Bibb 518; 7 Ala. N. s. 189; 6 Ired. 88; 2 Jones, N. C. 168; 2 Md. Ch. Dec. 178; 34 Neb. 93; but a special property, as that of a bailee, with actual possession at the time of delivery to the defendant, is sufficient; 2 Wms. Saund. 47 b; 9 Leigh 158; Cam. & N. 416; 1 Miss. 315; 4 B. Monr. 365; 2 Mo. 45; 22 Ala. 534. A mere equitable claim reserved by a vendor on the sale of personal property for the unpaid purchase money, is not sufficient title to authorize a recovery in *detinue*; 94 Ala. 616. Either want of title in the plaintiff or the absence of actual possession in defendant, when the action was brought, will prevent plaintiff's recovery, as constructive possession in defendant from the fact that he had the title is not sufficient; 36 W. Va. 423. A demand is not requisite except to entitle the plaintiff to damages for detention between the time of the demand and that of the commencement of the action; 4 Bibb 340; 14 Mo. 491; 3 Litt. 46; 3 Munf. 123; 12 Ala. N. s. 135; 19 S. E. Rep. (N. C.) 599. See 90 Ala. 253.

The declaration may state a bailment or trover; though a simple allegation that the goods came to the defendant's hands is sufficient; Brooke, Abr. *Detinue*, 10. The bailment or trover alleged is not traversable; Brooke, Abr. *Detinue*, 1, 2, 60. It must describe the property with accuracy; 2 Ill. 206; 13 Ired. 172; 2 Greene, Ia. 266.

The plea of *non detinet* is the general issue, and special matter may be given in evidence under it; Co. Litt. 283; 16 E. L. & Eq. 514; 2 Munf. 329; 6 Humphr. 108;

94 Ala. 616; including title in a third person; 3 Dana 422; 12 Ala. N. s. 823; eviction, or accidental loss by a bailee; 3 Dana 36. The plea of not guilty is not appropriate; 40 Ill. App. 132.

The defendant in this action frequently prayed garnishment of a third person, who he alleged owned or had an interest in the thing demanded; but this he could not do without confessing the possession of the thing demanded, and making privy of bailment; Brooke, Abr. *Garnishment*, 1, *Interpleader*, 8. If the prayer of garnishment was allowed, a *sci. fa.* issued against the person named as garnishee. If he made default, the plaintiff recovered against the defendant the chattel demanded, but no damages. If the garnishee appeared, and the plaintiff made default, the garnishee recovered. If both appeared, and the plaintiff recovered, he had judgment against the defendant for the chattel demanded, and a *distringas* in execution; and against the garnishee a judgment for damages, and a *fi. fa.* in execution.

The judgment is in the alternative that the plaintiff recover the goods, or the value thereof if he cannot have the property itself; 7 Ala. N. s. 189; 5 Munf. 166; 1 Bibb 484; 7 B. Monr. 421; 8 Humphr. 406; 5 Mo. 489; 4 Ired. Eq. 118; 7 Gratt. 343; 4 Tex. 184; 34 W. Va. 639; with damages for the detention; 1 Ired. 523; 13 Mo. 612; 8 Gratt. 578; 16 Ala. N. s. 271; and full costs. One cannot recover as damages both rent or hire and the ordinary wear and tear of the property sued for, as rent and hire include ordinary wear and tear; 90 Ala. 253.

The verdict and judgment must be such that a special remedy may be had for a recovery of the goods detained, or a satisfaction in value for each parcel in case they or either of them cannot be returned; 7 Ala. N. s. 189, 807; 2 Humphr. 59; 5 Miss. 489; 4 Dana 53; 3 B. Monr. 813.

DETINUE OF CHARTERS. In old English law, a writ for the recovery of wrongfully detained charters or deeds pertaining to the title of lands. Jacob. See *DETINUE*; *WRIT OF DETINUE*.

DETINUE OF GOODS IN FRANK MARRIAGE. A writ formerly available to a wife after a divorce, for the recovery of the goods given with her in marriage. Moz. & W. Dict.

DETINUIT (Lat. *he detained*).

In Pleading. An action of replevin is said to be in the *detinuit* when the plaintiff acquires possession of the property claimed by means of the writ. The right to retain is, of course, subject in such case to the judgment of the court upon his title to the property claimed; Bull. N. P. 521.

The declaration in such case need not state the value of the goods; 6 Blackf. 469; 7 Ala. N. s. 189.

The judgment in such case is for the damage sustained by the unjust taking or detention, or both, if both were illegal, and for costs; 4 Bouvier, Inst. n. 3562.

DEUTEROGAMY. A second marriage after the death of a former husband or wife.

DEVASTATION. Wasteful use of the property of a deceased person: as, for extravagant funeral or other unnecessary expenses. 2 Bla. Com. 508.

DEVASTAVIT. The mismanagement and waste by an executor, administrator, or other trustee, of the estate and effects trusted to him as such, by which a loss occurs.

Devastavit by direct abuse takes place when the executor, administrator, or trustee sells, embezzles, or converts to his own use goods intrusted to him; Com. Dig. *Administration* (11); 101 U. S. 327; releases a claim due to the estate; 3 Bacon, Abr. 700; Cro. Eliz. 43; 7 Johns. 404; 9 Mass. 352; or surrenders a lease; 2 Johns. Cas. 376; 3 P. Wms. 380; 68 N. C. 537; below its value. These instances sufficiently show that any wilful waste of the property will be considered a direct *devastavit*. See

64 Cal. 35.

Devastavit by mal-administration most frequently occurs by the payment of claims which were not due nor owing, or by paying others out of the order in which they ought to be paid, or by the payment of legacies before all the debts are satisfied; 4 S. & R. 394; 5 Rawle 266; 110 Mass. 195; 84 Va. 731.

Devastavit by neglect. Negligence on the part of an executor, administrator, or trustee may equally tend to the waste of the estate as the direct destruction or mal-administration of the assets, and render him guilty of a *devastavit*. The neglect to sell the goods at a fair price, within a reasonable time, or, if they are perishable goods, before they are wasted, will be a *devastavit*; and a neglect to collect a doubtful debt which by proper exertion might have been collected will be so considered. Bacon, Abr. *Executors*, L. See 5 Misc. Rep. 560; 127 Pa. 360; 83 Va. 361, 791; 79 Ga. 260.

The law requires from trustees good faith and due diligence, the want of which is punished by making them responsible for the losses which may be sustained by the property intrusted to them; when, therefore, a party has been guilty of a *devastavit*, he is required to make up the loss out of his own estate. See Com. Dig. *Administration*, I; Belt, Suppl. to Ves. 209; 39 Pa. 218; 160 Ill. 13; 1 Johns. 396; 1 Cai. Cas. 96; Bacon, Abr. *Executors*, L; 11 Toullier 58. The return of *nulla bona testatoris nec propria* and a *devastavit* to the writ of execution *de bonis testatoris*, in an action against an executor or administrator, is called a *devastavit*. Upon this return the plaintiff may forthwith sue out an execution against the person or property of the executor or administrator in as full a manner as in an action against him sued in his own right. This is not, however, a common use of the word; Brown, Dict.

DEVENERUNT (Lat. *devenire*, to come to). A writ, now obsolete, directed to the king's escheators when any one of the king's tenants *in capite* dies, and when his son and heir dies within age and in the king's custody, commanding the escheator, or that by the oaths of twelve good and lawful men they shall inquire what lands or tenements by the death of the tenant have come to the king. Dy. 360; Keilw. 199 a; Blount; Cowel.

DEVEST OR DIVEST. To deprive, to take away; opposite to *invest*, which is to deliver possession of anything to another. Wharton.

DEVIATION. In Insurance. Varying from the risks insured against, as described in the policy, without necessity or just cause, after the risk has begun. 1 Phill. Ins. § 977; 1 Arn. Ins. 415.

Any unnecessary or unexcused departure from the usual or general mode of carrying on the voyage insured. 15 Am. L. Rev. 106. See also 9 Mass. 436.

The mere intention to deviate is not a deviation, and if not carried into effect will not vitiate a policy or exempt insurers from a loss happening before the vessel arrives at the dividing port; 3 Cra. 357; 6 id. 29. Usage, in like cases, has a great weight in determining the manner in which the risk is to be run,—the contract being understood to have implied reference thereto in the absence of specific stipulations to the contrary; 2 Pars. Ins. 6; 38 Me. 414; 30 Pa. 334; 18 Mo. 193; 19 N. Y. 372; 11 Fed. Rep. 181. A variation from risks described in the policy from a necessity which is not inexcusably incurred does not forfeit the insurance; 1 Phill. Ins. § 1018; as to seek an intermediate port for repairs necessary for the prosecution of the voyage; 1 Phill. Ins. § 1019; changing the course to avoid disaster; 1 Phill. Ins. § 1023; 2 Mas. 234; delay in order to succor the distressed at sea; 6 East 54; 2 Cra. 240, 258; if the object is to save life, otherwise, to save property merely; 1 Spru. 141; 2 Wash. C. C. 80; 1 Sumn. 328; damage merely in defence against hostile attacks; 1 Phill. Ins. § 1080; or in taking measures to repel such attacks;

2 Mas. 230. "Liberty to touch" at a particular port, reserved in the policy, does not imply liberty to remain for trading, which, if it involves delay, may amount to deviation; 7 *id.* 26; nor to touch and stay at a port out of the course when within the usage of the trade; 2 *Pai.* 83; *Wall. C. Ct.* 58.

Necessity alone will sanction a deviation, and the latter must be strictly commensurate with the power compelling; 7 *Cra.* 26; the smallest deviation without necessity discharges the underwriters, though the loss be not the immediate consequence of the deviation; 2 *Wash.* 254.

This subject is fully treated in 15 *Am. L. Rev.* 108.

Change of risk in insurance against fire, so as to render the insured subject, or its surroundings, or the use made of it, different from those specified in the application, will discharge the underwriters; *Biddle, Ins.* 710; 2 *N. Y.* 210; 7 *Cush.* 175; 19 *Pa.* 45; 13 *B. Monr.* 282; 23 *Mo.* 453; 4 *Zabr.* 447; 1 *Dutch.* 54; 4 *Wis.* 20.

Change of risk under a life-policy in contravention of its express provisions will defeat it, in like manner; 1 *Phill. Ins.* §1039; though such a policy does not appear to have any implied conditions other than those relative to fraud common to all contracts.

The effect of a deviation in all kinds of insurance is to discharge the underwriters, whether the risk is thereby enhanced or not; and the doctrine applies to lake and river navigation as well as that of the ocean; 1 *Phill. Ins.* § 987; 2 *Pars. Ins.* 5. See *INSURANCE*.

In Contracts. A change made in the progress of a work from the original plan agreed upon.

When the contract is to build a house according to the original plan, and a deviation takes place, the contract must be traced as far as possible, and the additions, if any have been made, must be paid for according to the usual rate of charging; 3 *B. & Ald.* 47. And see 14 *Ves.* 413; 6 *Johns. Ch.* 38; 3 *Cra.* 270; 9 *Pick.* 298; *Chit. Contr.* 168.

The Civil Code of Louisiana, provides that when an architect or other workman has undertaken the building of a house by the job, according to a plot agreed on between him and the owner of the ground, he cannot claim an increase of the price agreed on, on the plea of the original plot having been changed and extended, unless he can prove that such changes have been made in compliance with the wishes of the proprietor.

DEVICE. That which is devised or formed by design, a contrivance, an invention. 59 *Ala.* 91. See *PATENT*.

In the Elkins Act of 1903. Any plan or contrivance whereby merchandise is transported for less than the published rate, or any other advantage is given to, or discrimination practiced in favor of, the shipper. A device need not necessarily be fraudulent. 209 *U. S.* 71.

DEVILING. Doing the duties of an office devil; hack-work of a semi-literary or legal nature. *Stand. Dict.*

DEVISAVIT VEL NON. In Practice. The name of an issue sent out of a court of chancery, or one which exercises chancery or probate jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will; 7 *Bro. P. C.* 437; 2 *Atk.* 424; 5 *Pa.* 21.

An application for an issue *devisavit vel non* is properly denied where the decided weight of evidence is in favor of the testamentary capacity of testatrix, and it appears that the two sons in whose favor the will was made cared for their mother and her estate, while the two who had been disinherited, attempted to have her declared insane; 157 *Pa.* 465.

DEVISE. A gift of real property by a

last will and testament.

The term devise, properly and technically, applies only to real estate; the object of the devise must, therefore, be that kind of property; 1 *Hill, Abr. c.* 38, 62; 21 *Barb.* 561. But it is also sometimes improperly applied to a bequest or legacy. See 4 *Kent* 289; 8 *Viner, Abr.* 41; *Com. Dig. Estates by Devise*. Although the word "devise" is more specially appropriate to a gift of lands, yet the terms "bequest" and "devise" are used indifferently, and legatees may take under a devise of lands, if the context of the will shows that such was the testator's intention; 21 *N. H.* 515; 53 *Pa.* 427.

A general devise of lands will pass a reversion in fee, even though the testator has other lands which will satisfy the words of the devise, and although it be highly improbable that he had in mind such reversion; 3 *P. Wms.* 56; 8 *Bro. P. C.* 408; 4 *Bro. Ch.* 338; 1 *Metc. Mass.* 281; 8 *Ves.* 256.

A general devise will pass leases for years, if the testator have no other real estate upon which the will may operate; but if he have both lands in fee and lands for years, a devise of all his lands and tenements will commonly pass only the lands in fee-simple; *Cro. Car.* 298; 1 *Ed. Ch.* 151; 6 *Sim.* 99. But if a contrary intention appear from the will, it will prevail; 5 *Ves.* 540; 9 *East* 448.

Testator "gave, devised and bequeathed all his furniture, goods, chattels and effects, whatsoever the same may be and wheresoever situate." It was held that giving expression to the word "devise," in connection with the other terms of the will, that the gift passed all the property of the testator, whether real or personal; [1891] 3 *Ch.* 389.

A devise in a will can never be regarded as the execution of a power, unless that intention is manifest; as, where the will would otherwise have nothing upon which it could operate. But the devise to have that operation need not necessarily refer to the power in express terms. But where there is an *interest* upon which it can operate, it shall be referred to that, unless some other intention is obvious; 6 *Co.* 176; 6 *Madd.* 190; 4 *Kent* 334; 1 *Jarm.* Wills 628.

The devise of all one's lands will not generally carry the interest of a mortgagee, in premises, unless that intent is apparent; 2 *Vern.* 621; 3 *P. Wms.* 61; 1 *Jarm. Wills.* 633. The fact that the mortgagee is in possession is sometimes of importance in determining the purpose of the devise. But many cases hold that the interest of a mortgagee or trustee will pass by a general devise of all one's land, unless a contrary intent be shown; 13 *Johns.* 537; 8 *Ves.* 407; 1 *J. & W.* 494. But see 9 *B. & C.* 267. This is indeed the result of the modern decisions, 4 *Kent* 539; 1 *Jarm. Wills* 638. It seems clear that a devise of one's mortgages will pass the beneficial title of the mortgagee; 4 *Kent* 539.

Devises may be contingent or vested, after the death of the testator. They are contingent when the vesting of any estate in the devisee is made to depend upon some future event, in which case, if the event never occur, or until it does occur, no estate vests under the devise. But when the future event is referred to merely to determine the time at which the devisee shall come into the use of the estate, this does not hinder the vesting of the estate at the death of the testator; 1 *Jarm. Wills, c. xxvii.*, and numerous cases cited. The law favors that construction of the will which will vest the estate; 21 *Pick.* 311; 1 *W. & S.* 205. But this construction must not be carried to such an extent as to defeat the manifest intent of the testator; 21 *Pick.* 311; 7 *Metc.* 171. Where the estate is given absolutely, but only the time of possession is deferred, the devisee or legatee acquires a transmissible interest although he never arrive at the age to take possession; 1 *Ves.* Sen. 44, 59, 118; 4 *Pick.* 198; 7 *Metc.* 173. See *LAPSED DEVISE*; *WILL*; *LEGACY*; *CHARGE*.

DEVISEE. A person to whom a devise has been made.

All persons who are *in rerum natura*, and even embryos, may be devisees, unless excepted by some positive law. But the devisee must be in existence, except in case of devises to charitable uses; *Story, Eq. Jur.* §§ 1146, 1180; 2 *Washb. R. P.* 688; 2

How. 127; 4 *Wheat.* 33, 49. See *CHARITABLE USES*. In general, he who can acquire property by his labor and industry may receive a devise; *Cam. & N.* 853. *Femes covert*, infants, aliens, and persons of non-sane memory may be devisees; 4 *Kent* 506; 2 *Wms. Ex.* 289, n.; 1 *Harr. Del.* 524. Corporations in England and in some of the United States can be devisees only to a limited extent; 2 *Washb. R. P.* 687.

DEVISOR. A testator. One who devises real estate.

Any person who can sell an estate may, in general, devise it; and there are some disabilities to a sale which are not such to a devise.

DEVOIR. Duty. It is used in the statute of 2 *Ric. II. c. 3*, in the sense of duties or customs.

DEVOLUTION. In Ecclesiastical Law. The transfer, by forfeiture, of a right and power which a person has to another, on account of some act or negligence of the person who is vested with such right or power; for example, when a person has the right of presentation and he does not present within the time prescribed, the right devolves on his next immediate superior. *Ayliffe, Parerg.* 331. See 3 *App. Cas.* 520.

The automatic passing of anything from one person to another. Transfer to a successor in office; a passing of a thing from a person dying to a person living, as the devolution of a title. *Anderson*; 7 *Eng. Ch.* 648. See *DESCENT*; *DESCENT OF DIGNITIES*; *DESCENT OF CROWN LANDS*.

DEVOLVE. To pass from a person dying to a person living. 1 *Mylne & K.* 648.

Automatically to pass from one person to another. To descend, in hereditary succession. See *DEVOLUTION*; *DESCENT*.

DIAMOND. A "diamond" is a mineral. 141 *Ky.* 97, 132 *S. W.* 397.

DI COLONA. In Maritime Law. The contract which takes place between the owner of a ship, the captain, and the mariners, who agree that the voyage shall be for the benefit of all. The term is used in the Italian law. *Targa, c.* 86, 87; *Emerigon, Mar. Loans.* s. 5.

The New England whalers are owned and navigated in this manner and under this species of contract. The captain and his mariners are all interested in the profits of the voyage in certain proportion, in the same manner as the captain and crew of a privateer, according to the agreement between them. Such agreements were very common in former times, all the mariners and the masters being interested in the voyage. It is necessary to know this in order to understand many of the provisions of the laws of Oleron, Wisbuy, the Consolato del Mare, and other ancient codes of maritime and commercial law. *Hall, Mar. Loans* 42.

DICTATE. To pronounce, word by word, what is meant to be written by another. It is thus defined in the Louisiana code, which provides that the testator may dictate his will; 6 *Mart. N. s.* 143. The presentation, by testator, of an instrument which he has caused to be written, declaring it to be his will, may sometimes supply the want of dictation; 16 *La. Ann.* 219.

DICTATOR. In Roman Law. A magistrate at Rome invested with absolute power. His authority over the lives and fortunes of the citizens was without bounds. His office continued but for six months. *Hist. de la Jur. Dig.* 1. 2. 18, 1. 1. 1.

DICTORES. Arbitrators.

DICTUM (also, *Obiter Dictum*). An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication.

It frequently happens that, in assigning its opinion upon a question before it, the court discusses collateral questions and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection or without previous

argument at the bar; and as, moreover, they do not enter into the adjudication of the point at issue they have only that authority which may be accorded to the opinion, more or less deliberate, of the individual judge who announces it. Chase, *Bla. Com.* 26, n. It may be observed that in recent times, particularly in those jurisdictions where appeals are largely favored, the ancient practice of courts in this respect is much modified. Formerly, judges aimed to confine their opinion to the precise point involved, and were glad to make that point as narrow as it might justly be. Where appeals are frequent, however, a strong tendency may be seen to fortify the judgment given with every principle that can be invoked in its behalf—those that are merely collateral, as well as those that are necessarily involved. In some courts of last resort, also, when there are many judges, it is not unfrequently the case that, while the court come to one and the same conclusion, the different judges may be led to that conclusion by different views of the law, so that it becomes difficult to determine what is to be regarded as the principle upon which the case was decided and what shall be deemed mere dicta.

It is not easy to define the term with such precision as to afford an exact criterion by which to decide when the language of a court or judge is entitled to be considered as a precedent and followed as an authority. Judicial references to the subject indicate that expressions which would be included under the term *dicta* are nevertheless afterwards treated by other courts with respect if not with the binding force of adjudicated cases. Possibly no better definition can be found than that of Folger, J., in 62 N. Y. 68: "*Dicta* are the opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are not the professed, deliberate determinations of the judge himself; *obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects."

The general rule, broadly stated by the United States supreme court, is that to make an opinion a decision "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, . . . and, therefore, this court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties." Per Curtis, J., in 16 How. 287. And in *Cohen v. Virginia*, when the case of *Marbury v. Madison* was very earnestly pressed upon the attention of the court, Marshall, C. J., said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent case when the very point is presented;" 6 Wheat. 899. In 3 How. 292, Catron, J., dissenting, strongly criticised the majority of the court for a long discussion of the power of a court as to which they decided that they had no authority to review its decisions. In a later case the same court said, in reference to an allusion to the opinion in a case previously decided, "This was the only question before the court and the decision is authority only to the extent of the case before it; . . . if more was intended by the judge who delivered the opinion it was purely *obiter*;" 96 U. S. 211. The great powers and peculiar functions included in the constitutional powers of that court, as well as the conclusiveness of its judgments as declarations of constitutional construction, make it not only proper but essential that its decisions should be confined to the points necessarily involved in the case and embraced in the argument. And the same reasons not only warrant but require a rigid exclusion of mere *dicta* from the category of authorities. The reason for the enforcement of the rule, as against expressions of opinion upon points not fairly raised by the case, is very well stated by the supreme court of Pennsylvania: "What I have said or written outside of the case trying, or shall say or write in such circumstances, may be taken as my opinion at the time, without argument or full consideration; but I will not consider myself bound by it when the point is fairly trying and fully

argued and considered." Per Huston, J., 17 S. & R. 287.

According to the more rigid rule, any expression of opinion however deliberate upon a question however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum*; but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not so persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point; 1 Abbott, N. Y. Dig. pref. iv. And a judicious text writer has said that "the line must not be too sharply drawn;" Wells, Res. Adj. & Sta. Dec. § 581. The fact that a decision might have been rested upon a different ground, and even a more satisfactory one, does not place the actual decision, on a ground arising in the category of a *dictum*; 4 Heisk. 419.

But even when the point ruled was not directly and necessarily in issue, there are distinctions drawn as to the relative authority of judicial expressions of opinion comprehended under the general term *dicta*, as used in its broadest sense. An expression of opinion upon a point involved in a case, argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the case, if a *dictum*, should be considered as a judicial *dictum* as distinguished from a mere *obiter dictum*, i. e. an expression originating alone with the judge writing the opinion, as an argument or illustration; 60 Wis. 284. What was, in strictness, a *dictum* of Mr. Justice McLean has been extensively commented on, treated, and in several cases followed, as an authority. The suit was on a bond of a U. S. officer, and the question was when a resignation took effect, it being claimed that for default after resignation the surety was not liable. The court held the resignation to be a conditional one, and went on to discuss the right of resignation and the necessity of acceptance or power of rejection, reaching the conclusion that an unqualified resignation required no acceptance and would have discharged the surety; 1 McLean 509. This case having been cited to that point it was contended that it was a mere *dictum*. After defining *dictum* the supreme court of Nevada held "that while technically such, it was not liable to the objections usually urged,—it was the expression of opinion on a point argued, and entitled to far more weight than an ordinary *dictum* on a point not discussed and remotely connected with the case." 3 Neb. 566. The same case was followed in 6 Cal. 28; 49 Ala. 402; and is commented on and treated as an authority without being characterized as a *dictum* in 103 U. S. 471 and 31 N. J. L. 107.

So also it has been held, with respect to a court of last resort, that all that is needed to render its decision authoritative is that there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in its fullest extent; 5 Md. 488; and that when a question of general interest is involved, and is fully discussed and submitted by counsel, and the court decides the question with a view to settle the law, the decision cannot be considered a *dictum*; *id.*

When a question is involved in the case, though not in the particular phase of it, at the time before the court, the language of the court is not a mere *dictum*. When a will was offered for probate the question of its validity, so far as regarded charitable uses, was involved, and what was said as to that was not *obiter*; 107 U. S. 174; although a point may not have been exhaustively argued a decision upon it cannot be said to be *obiter dictum* when it was upon a question raised by a demurrer upon which the court distinctly expressed an opinion; 26 Md. 488.

The expressions of courts and judges which fall within the general designation of *dicta* are accorded more or less weight as they agree with, or run counter to, the cur-

rent of authority, and, like the adjudications of courts in other jurisdictions, not direct authorities, they are always considered with reference to the judicial reputation and experience of their authors. Referring to a case cited in a *dictum* Lord Mansfield said, "This *dictum* of Lord C. J. Holt's is no formed decisive resolution; no adjudication; no professed or deliberate determination . . ."; then after citing cases *contra* he continued, "therefore this mere *obiter dictum* ought not to weigh against the settled direct authority of the cases which have been deliberately and upon argument determined the other way." 2 Burr. 2064. "*Dicta* of judges upon matters not argued or directly before them, have had more importance attached to them than, in my opinion, they ought to have had; but such expressions, falling from such a man as Lord Hardwicke, may be safely relied upon to show that, at that time, the idea of a larger legacy being adeemed by a smaller portion was not familiar to his mind. It is the more important to keep this *dictum* of Lord Hardwicke in mind because another *dictum* of that very eminent judge . . . is relied upon in support of the supposed rule." Ld. Ch. Cottenham, in 1 Russ. 27. Consult 1 Phill. Eccl. 406; 1 Eng. Eccl. 129; Ram, Judgm. 36; Willes 686; 1 H. Bla. 53; 2 B. & P. 375; 7 Pa. 287; 3 B. & Ald. 341; 8 Bingham. 90. The doctrine of the courts of France on this subject is stated in 11 Toullier 177, n. 183.

In French Law. The report of a judgment made by one of the judges who has given it. Pothier, Proc. Civ. pl. 1, c. 5, art. 2.

DIE BY HIS OWN HAND. "Die by his own hand" means voluntary self-destruction by the free will of a sane man; and said self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used for the purpose. Self-slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law. 6 Bush (Ky.) 273. See **SUICIDE**.

DIE LEAVING NO LAWFUL ISSUES SURVIVING THEM. The words "die leaving no lawful issue surviving them" did not purport an indefinite failure of issue, but referred to the child's or children's death before the termination of the life estate. 131 Ky. 609, 115 S. W. 739.

DIE WITHOUT CHILDREN. The phrase "die without children" used in a devise, was held to refer to death of either son at any time before or after testator's death, and each son took a defeasible fee, which would be defeated by the death of the devisee at any time without issue then living. 133 Ky. 406, 118 S. W. 270.

Where a will gives testatrix's property to her husband for life, and upon his death to her daughters, and provides that if any of them should die without children their parts should be divided equally among the remaining children, the phrase "die without children" refers to death before the death of the life tenant. 121 S. W. 997.

DIEM CLAUSIT EXTREMUM (Lat. he has closed his last day,—died). A writ which formerly lay on the death of a tenant *in capite*, to ascertain the lands of which he died seised, and reclaim them into the king's hands. It was directed to the king's escheators. Fitzh. N. B. 251, K; 2 Reeve, Hist. Eng. Law 327.

A writ of the same name, issuing out of the exchequer after the death of a debtor of the king, to levy the debt of the lands or goods of the heir, executor, or administrator. *Termes de la Ley*. This writ is still in force in England. 3 Steph. Com. 667.

DIES (Lat.). A day; days. Days for appearance in court. Provisions or maintenance for a day. The king's rents were anciently reserved by so many days' provisions. Speelman, Gloss.; Cowel; Blount.

DIES AMORIS (Lat.). A day of favor. It obtained after a default by the defendant,

it amounted to a waiver of the default. Co. Litt. 185 a; 2 Reeve, Hist. Eng. Law 60. The appearance day of the term, or *quarto die post*, was also so called.

DIES COMMUNES IN BANCO (Lat.). Regular days for appearance in court; called, also, common return-days. 2 Reeve, Hist. Eng. Law 57.

DIES DATUS (Lat. a day given). A day or time given to a defendant in a suit, which is in fact a continuance of the cause. It is so called when given before a declaration. When it is allowed afterwards, it assumes the name of *imparance*, which see.

Dies datus in banco, a day in bank. Co. Litt. 185. *Dies datus partibus*, a continuance; *dies datus prece partium*, a day given on prayer of the parties.

DIES DOMINICUS. The Lord's day; Sunday.

DIES FASTI (Lat.). In Roman Law. Days on which courts might be held and judicial and other business legally transacted. Calvinus, Lex.; Anthon, Rom. Ant. 3 Bla. Com. 275, 424.

DIES GRATIE (Lat.). In Old English Law. Days of grace. Co. Litt. 184 b.

DIES NEFASTI (Lat.). In Roman Law. Days on which it was unlawful to transact judicial affairs, and on which the courts were closed. Anthon, Rom. Ant.; Calvinus, Lex.; 1 Kaufmann, Mackeld. 24; 3 Bla. Com. 275.

DIES NON (Lat.). An abbreviation of the phrase *dies non juridicus*, universally used to denote nonjudicial days. Days during which courts do not transact any business; as, Sunday, or the legal holidays. 3 Chitty, Gen. Pr. 104; W. Jones 156. Sunday was the original *dies non*, but in many states days declared by statute to be legal holidays are also such, but the decisions on this subject depend largely upon the terms and scope of the statutes, many of which apply solely to the presentment and payment of commercial paper, and others include a prohibition of judicial business and provide for the closing of public offices.

A distinction was made in 9 Co. 66 between judicial and ministerial acts performed on a *dies non*; this was overruled in 1 Stra. 387; but the distinction now obtains; 5 Cent. L. J. 26. And under a statute forbidding the transaction of any judicial business on Sunday or a legal holiday, the issuing on such a day of an attachment by a county judge for a claim not due was held to be "judicial" business and void; 54 N. W. Rep. (Neb.) 258; but an attachment for a claim past due was held to be valid, as a ministerial, and not a judicial act; 55 N. W. Rep. (Neb.) 327.

It has usually been held that a verdict may be received on a *dies non*; 3 Watts 58; 14 Ind. 39; 23 Tex. App. 43; 32 Tex. Cr. R. 119; but a judgment entered on such verdict on the same day is void; 3 Ill. 368; 15 Johns. 118. See 36 Ind. 466; 34 N. H. 202; 17 Pick. 106; 74 N. C. 187; 93 Tenn. 476; 36 Neb. 218. A judgment by confession entered upon December 25, a legal holiday, is not void; 45 Ill. App. 326. In Kentucky although Thanksgiving day is a legal holiday, it is not treated as the Christian Sabbath, except as to commercial paper, and where money becomes due on such a day, the debtor is in default if he fails to pay on that day; 85 Ky. 88. A bill of exceptions signed on Sunday is void; 187 Ind. 697. Warrants for treason, felony, and breach of the peace may be executed on Sunday; 74 N. C. 187. Where public policy or the prevention of irreparable wrong requires it, the courts may sit on Sunday and issue process; 13 Am. L. Reg. n. s. 747; s. c. 64 Ill. 243.* See a full article on this title in 7 So. L. Rev. n. s. 697. See SUNDAY; HOLIDAYS.

DIES NON JURIDICUS (Lat.). Non-judicial days. See DIES NON.

DIES PACIS (Lat. day of peace). The year was formerly divided into the days of the peace of the church and the days of

the peace of the king,—including in the two divisions all the days of the year. Crabb, Hist. Eng. Law 35.

DIES A QUO (Lat.). In Civil Law. The day from which a transaction begins. Calvinus, Lex.; 1 Kaufm. Mackeld. Civ. Law 168.

DIES UTILES (Lat.). Useful or available days. Days in which an heir might apply to the judge for an inheritance. Cooper, Inst.; Calvinus, Lex.; Du Cange.

DIETA (Lat.). A day's journey; a day's work; a day's expenses. A reasonable day's journey is said to be twenty miles, by an old computation. Cowel; Spelman, Gloss.; Bracton 285 b; 3 Bla. Com. 218.

DIET. A general assembly is sometimes so called on the continent of Europe. 1 Bla. Com. 147.

DIETS OF COMPEARANCE. In Scotland. The days within which parties in civil and criminal prosecutions are cited to appear. Bell.

DIGEST. A compilation arranged in an orderly manner.

The name is given to a great variety of topical compilations, abridgments, and analytical indices of reports, statutes, etc. When reference is made to the *Digest*, the Pandects of Justinian are intended, they being the authoritative compilation of the civil law. As to this Digest and the mode of citing it, see PANDECTS. Other digests are referred to by their distinctive names. For some account of digests of the civil and canon law, and those of Indian law, see CIVIL LAW, CODE, and CANON LAW.

The digests of English and American law are for the most part deemed not authorities, but simply manuals of reference, by which the reader may find his way to the original cases which are authorities. 1 Burr. 364; 2 Wils. 1, 2. Some of them, however, which have been the careful work of scholarly lawyers, possess an independent value as original repositories of the law. Bacon's Abridgment, which has long been deservedly popular in this country, and Comyn's Digest, also often cited, are examples of these. The earlier English digests are those of Statham (Hen. VI.), Fitzherbert, 1566, Brooke, 1573, Rolle, Danvers, Nelson, Viner, and Petersdorf. Of these Rolle and Viner are still not unfrequently cited, and some others rarely. The several digests by Coventry & Hughes, Harrison, Fisher, Jacobs, and Chitty, together with the subsequent annual digests of Emden and of Mews, afford a convenient index for the American reader to the English reports. In most of the United States one or more digests of the state reports have been published, and in some of them digests or topical arrangements of the statutes. There are also digests of the federal reports, the federal statutes, and one known as the United States Digest, with the annual volumes from 1873 to 1889 and the American Digest and the General Digest subsequent to that date, which cover the reports of the federal and state courts together. Dane's Abridgment of American Law has been commended by high authority (Cory's article in N. Am. Rev. July, 1883), but it has not maintained a position as a work of general use. There are also numerous digests of cases on particular titles of the law.

DIGEST, THE. See FIFTY DECISIONS, THE.

DIGGING. Has been held as synonymous with excavating, and not confined to the removal of earth. 1 N. Y. 316.

DIGNITARY. In Ecclesiastical Law. An ecclesiastic who holds a dignity or benefice which gives him some pre-eminence over mere priests and canons, such as a bishop, archbishop, prebendary, etc. Swift; Burn, Law Dict.

DIGNITIES. In English Law. Titles of honor.

They are considered as incorporeal hereditaments. The character of our government forbids their admission into the republic.

DILACION. In Spanish Law. The time granted by law or by the judge to parties litigant for the purpose of answering a demand or proving some disputed fact.

DILAPIDATION. A species of ecclesiastical waste which occurs whenever the incumbent suffers any edifices of his ecclesiastical living to go to ruin or decay. It is either voluntary, by pulling down, or permissive, by suffering the church, parsonage-houses, and other buildings thereunto belonging, to decay. And the remedy for either lies either in the spiritual court, where the canon law prevails, or in the courts of common law. It is also held to be good cause of deprivation if the bishop,

parson, or other ecclesiastical person dilapidates buildings or cuts down timber growing on the patrimony of the church, unless for necessary repairs; and that a writ of prohibition will also lie against him in the common-law courts. 3 Bla. Com. 91.

DILATORY DEFENCE. In Chancery Practice. One the object of which is to dismiss, suspend, or obstruct the suit, without touching the merits, until the impediment or obstacle insisted on shall be removed.

DILATORY PLEA. One which goes to defeat the particular action brought, merely, and which does not answer as to the general right of the plaintiff. See FLEA.

DILIGENCE. The degree of care and attention which the law exacts from a person in a particular situation or a given relation to another person. The word finds its most frequent application in the law of Bailments and of Negligence. Indeed it may be termed the correlative of negligence.

In the law of bailment, three degrees of diligence have been recognized, viz.: slight, ordinary, and great.

In order to avoid liability for negligence either in contract or tort it is said to be a "general rule that every one is bound to exercise due care towards his neighbors in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be a proved consequence of the default;" Poll. Torts 538. What constitutes "due diligence" depends very much upon the facts of each particular case. It will depend upon the relation of the parties and the obligations which the law implies from it, the risk or danger, either apparent or which may be apprehended by the exercise of his faculties by a man of ordinary prudence.

The failure or omission to exercise due diligence is sometimes a ground of liability both in contract and tort, as when there is a misfeasance in the execution of a contract from which there results a common-law liability. 1 Chit. Pl. 135. See NEGLIGENCE; BAILEE.

In Scotch Law. Process. Execution.

Diligence against the heritage. A writ of execution by which the creditor proceeds against the real estate of the debtor.

Diligence incident. A writ or process for citing witnesses and examining havers. It is equivalent to the English subpoena for witnesses and rule or order for examination of parties and for interrogatories.

Diligence to examine havers. A process to obtain testimony: equivalent to a bill of discovery in chancery, or a rule to compel oral examination and a *subpoena duces tecum* at common law.

Diligence against the person. A writ of execution by which the creditor proceeds against the person of the debtor: equivalent to the English *ca. sa*.

Second diligence. Second letters issued where the first have been disregarded. A similar result is produced in English practice by the attachment for contempt.

Summary diligence. Diligence issued in a summary manner, like an execution of a warrant of attorney, *cognovit actionem*, and the like, in English practice.

Diligence against witnesses. Process to compel the attendance of witnesses: equivalent to the English subpoena. See PATERSON, Comp.; Bell. See DUE DILIGENCE AND FORESIGHT.

DIME (Lat. *decem*, ten). A silver coin of the United States, of the value of ten cents, or one-tenth of the dollar.

DIMINUTION OF THE RECORD. In Practice. Incompleteness of the record of a case sent up from an inferior to a superior court.

When this exists, the parties may suggest a diminution of the record, and pray a writ of *certiorari* to the justices of the court below to certify the whole record; Tidd, Pr. 1109; 1 S. & R. 472; Co. Entr. 232; 8 Viner, Abr. 552; Cro. Jac. 597; Cro. Car. 91; 1

Ala. 20; 4 Dev. 575; 1 D. & B. 382; 1 Munf. 119. See CERTIORARI.

DIOCESE. The territorial extent of a bishop's jurisdiction. The circuit of every bishop's jurisdiction. Co. Litt. 94; 1 Bla. Com. 111; 2 Burn, Eccl. Law 158.

DIOCESAN COURTS. See CONSISTORY COURTS.

DIONYSIUS. About the year 500 there was in Rome a monk of Scythian birth who was labouring upon the foundations of the *Corpus Juris Canonici*. He called himself Dionysius Exiguus. He was an expert chronologist and constructed the Dionysian cycle. He was collecting some of the letters (decretal letters they will be called) that had been issued by the popes from Siricus onwards (384-498); he was also collecting and translating the canons of eastern councils. This *Collectio Dionysiana* made its way in the West. Some version of it may have been the book of canons which the Archbishop Theodore produced at the council of Hertford in 673. A version of it (*Dionysio-Hadriana*) was sent by Pope Hadrian to Charles the Great in 774. It helped to spread abroad the notion that the popes can declare, even if they can not make, law for the universal church, and thus contract the sphere of secular jurisprudence. 14 L. Q. R. 20.

DIPLEGIA. See PARALYSIS.

DIPLOMA. An instrument of writing, executed by a corporation or society, certifying that a certain person therein named is entitled to a certain distinction therein mentioned.

It is usually granted by learned institutions to their members or to persons who have studied in them.

Proof of the seal of a medical institution and of the signatures of its officers thereto affixed, by comparison with the seal and signatures attached to a diploma received by the witness from the same institution, has been held to be competent evidence of the genuineness of the instrument, although the witness never saw the officers write their names; 25 Wend. 469.

This word, which is also written *dupluma*, in the civil law signifies letters issued by a prince. They are so called it is supposed, a *duplicitas tabellae*, to which Ovid is thought to allude, 1 *Amor.* 12, 2, 27, when he says, *Tunc ego vos duplices rebus pro nomine aere*. Sueton. in Augustum, c. 26. Seals also were called *Diplomata*. *Vocat. Diploma*.

DIPLOMACY. The science which treats of the relations and interests of nations with nations.

DIPLOMATIC AGENTS. Public officers who have been commissioned according to law to superintend and transact the affairs of the government which has employed them, in a foreign country. Vattel, liv. 4, c. 5.

The agents were formerly of divers orders and known by different denominations. Those of the first order were almost the perfect representatives of the government by which they were commissioned: such were legates, nuncios, internuncios, ambassadors, ministers, plenipotentiaries. Those of the second order did not so fully represent their government: they were envoys, residents, ministers, *chargés d'affaires*, and consuls. The classification of these agents, now so far sanctioned as to be considered a rule of international law, was agreed upon at the Congress of Vienna in 1815 and modified by that of Aix-la-Chapelle in 1818. There are (1) ambassadors, ordinary and extraordinary, legates, and nuncios; (2) envoys, ministers, or others accredited to sovereigns; (3) ministers resident, accredited to sovereigns; (4) *chargés d'affaires*, and other diplomatic agents accredited to ministers of foreign affairs (whether bearing the title of minister or not), and consuls charged with diplomatic duties. See the several titles and Davis, Int. Law ch. vii.

DIPLOMATICS. The art of judging of ancient charters, public documents, or diplomas, and discriminating the true from

the false. Encyc. Lond.

DIPSOMANIA. In Medical Jurisprudence. A mental disease characterized by an uncontrollable desire for intoxicating drinks. An irresistible impulse to indulge in intoxication, either by alcohol or other drugs. 19 Neb. 614. How far the law will hold a party responsible for acts committed while the mind is overwhelmed by the effects of liquor so taken is an open question. See DRUNKENNESS.

DIRATIONARE. In old English law, to derain; to prove.

And, according to Spelman, to disprove; to prove the contrary, or refute an adversary's allegation.

To make good a defence; to clear or acquit one's self. Burrill. See DISRATIONARE; DERAIGN.

DIRECT. Straightforward; not collateral. 6 Blatchf. 535. The direct line of descent is formed by a series of relationships between persons who descend successively one from the other.

Evidence is termed *direct* which applies immediately to the fact to be proved, without any intervening process as distinguished from *circumstantial*, which applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy.

The examination in chief of a witness is called the direct examination.

DIRECT CONTEMPT. A "direct contempt" is an act by any person done in the presence of the presiding judge which shows disrespect for his person or authority while acting in his official capacity. 160 Ky 658, 170 S. W. 37.

DIRECT SETTLEMENT. The direct method of settlement, where there is no physical handing over of commodities in buying and selling transactions, e. g. in the grain pit, consists in setting off contracts to buy wheat of a certain amount at a certain time, against contracts to sell a like amount at the same time, and paying the difference of price in cash, at the end of the business day. 198 U. S. 247. Cf. RING SETTLEMENT.

DIRECTING THE VERDICT. See VERDICT; JURY.

DIRECTION. The order and government of an institution; the persons who compose the board of directors are jointly called the direction.

Direction, in another sense, is nearly synonymous with instruction (q. v.).

In Practice. The instruction of a jury by a judge on a point of law, so that they may apply it to the facts before them. See CHARGE.

That part of a bill in chancery which contains the address of the bill to the court: this must, of course, contain the appropriate and technical description of the court. See BILL.

DIRECTOR OF THE MINT. An officer appointed by the president of the United States, by and with the advice and consent of the senate. He is the chief officer of the bureau of the mint and is under the general direction of the secretary of the treasury. He has the control and management of the mint, the superintendence of the officers and persons employed therein, and the general regulation and superintendence of the business of the several branch mints and of the assay offices. Act of Congress, Feb. 12, 1873, U. S. Rev. Stat. § 343.

DIRECTORY STATUTE. See STATUTE.

DIRECTORS. Persons appointed or elected according to law, authorized to manage and direct the affairs of a corporation or company. The directors collectively form the board of directors.

They are generally invested with certain powers by the charter of the corporation, and it is believed that there is no instance of

a corporation created by statute without provision for such a board of control, whether under the name of directors, or, as they are sometimes termed, managers or trustees, — the latter designation being more frequent in religious or charitable corporations. A recent comprehensive work on corporations states that the author has likewise found no instance in which these officers were wanting; 3 *Thomp. Corp.* § 8850. But the power to elect directors has been held to be inherent and not dependent upon statute; 62 Wis. 590.

As to the nature of the office and its powers very different views have been held, and each is sustained by high authority. They have been held to be the corporation itself "to all purposes of dealing with others" and not to "exercise a delegated authority in the sense which applies to agents or attorneys;" Shaw, C. J., in 2 Metc. 163. Another view, and probably the one which is the best settled conclusion of judicial opinion in this country, is that they are general agents; 61 Pa. 203; 48 Vt. 266; 86 Ill. 220; 13 N. Y. 599; 24 Conn. 591; 3 *Thomp. Corp.* § 3968. The question is of importance with respect to the power of directors to act outside of the home state of the corporation, in order to do which, they must act as agents; 13 Pet. 519; 11 Ind. 398; 6 Conn. 428. They are undoubtedly, in a certain sense, agents, but they are agents of the corporation, not of the stockholders; they derive their powers from the charter. They alone have the management of the affairs of the corporation, free from direct interference on the part of the stockholders; 5 W. & S. 248; 12 Wheat. 113; 1 Disn. 84. The stockholders cannot perform any acts connected with the ordinary affairs of the corporation; 12 Barb. 27, 63; the delegation of powers to the directors excludes control by the stockholders; 2 Col. 565. See 8 Wheat. 357; 2 Cai. 381; 33 Cal. 11.

It has been said that directors are special agents of the corporation, and not general agents; 52 Barb. 339; and this is the view which it is said that in England "the ingenuity of the bench has been taxed to demonstrate;" 3 *Thomp. Corp.* § 3969; Lindl. Partn., 4th ed. 249. Among the cases relied on as supporting this view are, 6 Exch. 796; 8 C. B. 849; 6 H. L. Cas. 401; L. R. 5 Eq. 316; but the distinction has been said not to be very satisfactory; per Comstock, J., in 13 N. Y. 599. See Green's Brice, *Ultra Vires* 470, n. Although the weight of authority is as stated, it is nevertheless important to keep in view the different theories held, in order to weigh accurately the authorities upon the powers of directors, and to distinguish between them when they are to be applied to a particular case. Directors have no common-law powers; 3 *Thomp. Corp.* § 3978; but only granted ones, although in dealing with corporations courts sometimes ascribe to the directors certain powers, termed implied powers, which, however, in fact amount to no more than a recognition by the courts of the usages of business and acts done in the course of business; *id.* But they have no power to make changes in the fundamental law of the corporation, their relation to it being analogous to that of a legislature to the constitution of the state; *id.* § 3979. Accordingly, their power to make such changes must be derived from the charter. They may not change the membership or capital of the corporation by increasing either; 18 Wall. 233; 3 Whart. 228; 72 Mo. 424; or reducing the capital; 3 La. 568; R. M. T. Charl. 260; nor make by-laws unless specially authorized; 56 Mo. App. 145; nor request or accept amendments to the charter; 9 La. Ann. 341; 44 Mo. 570; 18 N. J. Eq. 178; 2 Conn. 579; (but see *contra*, 1 Disney, Ohio 84, which is doubted, 3 *Thomp. Corp.* § 3980, n. 7). They may alien property in the course of business; 3 *Thomp. Corp.* § 3984 (and see note on this subject 59 Am. Rep. 468); or mortgage corporate property; 13 Metc. 437; 30 Vt. 452; 35 Me. 491; 14 Allen 381; 19 N. Y. 207; or make an assignment for the benefit of creditors; 8 Gill 59; and see *Thomp. Corp.* chs. 145 and 146, which discusses this subject and the validity of

preferential assignments by directors in favor of others and of themselves. They cannot give away corporate property; 48 Pa. 29; 24 Me. 490; nor sell the stock at less than par; 1 Biss. 240; in money or money's worth; 7 Mo. App. 210 (but see 139 U. S. 417; 2 Thomp. Corp. § 1665; STOCK); nor, as a general rule, become surety, accommodation indorser, or guarantor; 3 Thomp. Corp. § 3990; but under urgent necessity their assumption of a debt of another to secure from the common creditors an extension for themselves has been held justified; 84 Vt. 134. See 23 How. 381. In the usual course of business they have a general power to borrow money; 8 Wheat. 398; 12 S. & R. 256; and secure it by assigning securities owned by the corporation; 79 Wis. 81; and one so dealing with them is not affected with knowledge of a breach of trust by them; 87 Fed. Rep. 394. They may make, accept, or indorse negotiable paper; 18 Pick. 291; 21 id. 270; 20 Me. 138; but a single director is not authorized to make corporate notes; 41 Barb. 575. They may determine the salaries of officers of the corporation; 87 Vt. 608. Under the English decisions the powers of corporations with respect to borrowing money, and making notes are now restricted; 3 Thomp. Corp. § 3989, n. 3.

As to the effect of *ultra vires* acts of directors, the general principles that they do not bind the corporation or the stockholders unless ratified or unless circumstances of equitable estoppel exist; 3 Thomp. Corp. § 3999; which see for a discussion of this subject and also, *id.* § 5987, and *ULTRA VIRES*. Their acts are not voidable for mere errors of judgment; 43 Fed. Rep. 483; 13 Colo. 534; even though absurd, if honest; 71 Pa. 11; 86 Ky. 380.

While directors are not strictly trustees, yet they occupy a fiduciary position; 21 Wall. 616; 59 Me. 277; 48 Cal. 398; 54 N. Y. 314; 2 Black 715; 71 Pa. 11; 5 Sawy. 408; 8 Bart. 108; 1 Edw. Ch. 518; 9 Bush 468; s. c. Zinn, Cas. on Trusts 466, and 4 Am. Corp. Cas. 404; 14 Mich. 477; 8 Kan. 466; 24 N. J. Eq. 463; 80 W. Va. 443; Moraw. Priv. Corp. 516; and by some very leading authorities they are termed trustees; Walworth, Ch., in 3 Paige 223; Hardwicke, Ld. Ch., in 2 Atk. 400. The director of a corporation cannot buy the corporate property at a judicial sale; 2 Pa. Dist. R. 629. Directors also occupy a fiduciary relation to creditors, for whom they have been said to be *quasi* trustees, and when the corporation becomes insolvent, they become trustees for the creditors and stockholders; 1 Holmes 433; 53 Cal. 306; 37 Tex. 660. When directors of an insolvent corporation confessed a judgment against it in favor of one of themselves to give him an advantage by priority of lien over another creditor, about to obtain judgment, the preference was not permitted and the two judgments were placed upon the same footing; 9 Fed. Rep. 532. See Thomp. Liab. of Dir. 397; 18 Ohio St. 169. Directors are held personally responsible for acts of misfeasance or gross negligence, or for fraud and breach of trust; L. R. 5 H. L. 480; 50 Vt. 477; 71 Pa. 11; 68 Law T. 380; 3 Fed. Rep. 817; 17 Cent. L. (N. J. Ch.) 433. An action to enforce this responsibility must be brought on behalf of all the stockholders, and not by a single one; 83 Pa. 19; and cannot be brought by a creditor; 8 W. Va. 530. Directors are not liable for the fraud of agents employed by them; 26 W. R. 147; Thomp. Liab. of Dir. 355.

It is their duty to use their best efforts to promote the interests of the stockholders, and they cannot acquire any adverse interests; 4 Dill. 330; 53 Cal. 466; s. c. 81 Am. Rep. 62; 59 Me. 277; 21 Kan. 365. A director may become a creditor of a corporation, where his action is not tainted with fraud or other improper act; 37 Fed. Rep. 394. It is said to be the rule that contracts made by a director with his company are voidable; L. R. 6 H. L. 189; 4 Dill. 330; 79 Pa. 168; 36 Mich. 268; 91 U. S. 587; 44 Cal. 106. In many instances the courts have held them absolutely void. In a leading English case in the house of lords the view

was taken that the directors were agents of the corporation and could not be permitted to enter into engagements or have any personal interest which might possibly conflict with the interests of the corporation, and that no question could be raised as to the fairness or unfairness of such a contract; 1 McQ. H. L. (Sc.) 461; and in several American cases taking this view it is considered that directors were subject to the rule applying to all persons standing in relations of trust and involving duties inconsistent with their dealing with the trust property as their own; 22 N. Y. 327; 36 Ind. 60; 64 Wis. 639. A recent high authority says, "there is no sound principle of law or equity which prohibits" such contracts, if entered into in good faith, and where there is a quorum of directors on the other side of the contract present, so that the adoption of the measure does not depend on the vote of the interested director, and even in the latter case the contract is good at law. Because, however, he is on both sides of it equity will closely scrutinize it and set it aside if it violates the good faith which the circumstances require; 3 Thomp. Corp. § 4059; but in many cases contracts of a corporation with directors, fairly made, have been upheld; 43 Fed. Rep. 493; 51 id. 83; 113 U. S. 322; 134 id. 688; 80 N. Y. 527; 48 Mich. 106; 47 Conn. 47. The true rule to be ascertained from the cases is probably, that as to such contract there is a presumption of invalidity which casts upon the party claiming under such contracts the burden of showing that no undue advantage was taken or resulted from the relation, and the evidence must clearly show such fairness and good faith; 184 N. Y. 240; 132 id. 177; 125 id. 263; 108 U. S. 651; 146 id. 536; 80 N. J. Eq. 702. Accordingly, the more reasonable view is that first stated, and it is supported by the weight of American authority; 3 Thomp. Corp. § 4061; but courts holding the extreme view that such contracts are void will not enforce the fairest contract if the corporation exercises the option to set it aside; *id.*

Some courts take the view that in all cases of such contracts their nature and terms and the circumstances under which they were made must be taken into consideration, and that after having been subjected to careful scrutiny they will be enforced if for the benefit of the corporation; 56 Ia. 178; 41 Fed. Rep. 736; 123 Pa. 508; 19 Vt. 187. A corporation acting in good faith and with the sole object of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that credit, and to obtain renewals of maturing paper at a time when it is in fact a going business and expects to continue in business, although its assets may not in fact equal its indebtedness; 157 U. S. 312. See, generally, on the subject of contracts between the directors and the corporation, 3 Thomp. Corp. §§ 4059 to 4075. Note by J. C. Harper, 20 Fed. Rep. 175, and one by Francis Wharton, 17 id. 53. This rule extends even to cases where a majority of directors in one corporation contract with another corporation in which they are directors; Green's Brice, *Ultra Vires* 479, n.; 93 Mo. 485. In a leading case on this subject a railroad company desired to purchase the property of a canal company, both companies having the same president, who by a purchase of a majority of the stock of the canal company at nominal rates obtained the election of directors favorable to the railroad company. Through legal proceedings, which were in fact collusive, the railroad company purchased the canal property at a price which was alleged by stockholder and creditor to be grossly inadequate. On bill filed to set aside the sale the court said:

"Without attempting to decide as to the power of directors, in the absence of authority given by the stockholders, to fix a price or compensation for the property so sought to be appropriated, it is enough to say that this is not such an agreement as equity will sustain. There was not only such a gross inadequacy of price as to shock the moral sense, but there was, in effect, a sale by a

trustee to himself, or to his own use and benefit. This equity will never permit, not even where there is good faith and an adequate consideration. Here there was neither. The vendor and purchaser were in the same interest. As directors of the canal company it was the duty of the president and his associates to obtain the highest price for the property; while as stockholders of the railroad company it was their interest to get it as low as possible. It was in effect, a sale by the railroad company to itself;" 18 Ohio St. 169. The same principles are supported by many authorities; 2 Black 715; 43 Wis. 433; 88 N. J. L. 505; 79 Pa. 168; 47 Ia. 641.

In some cases the question has arisen as to the effect of a minority only of the directors being interested in both companies. A contract made between two corporations through their respective boards of directors is not voidable at the discretion of one of the parties thereto from the mere circumstance that a minority of its board of directors are also directors of the other company; 84 Ohio St. 450. In that case the court said that upon the most diligent research it had been unable to find a case holding such a contract invalid or voidable from the mere circumstance that a minority of the directors of one company are also directors of the other company, and, "in our judgment, where a majority of the board are not adversely interested and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness;" *id.*; 10 Fed. Rep. 418, 433; 77 Ill. 236. With respect to the rule just stated, however, Mr. J. C. Harper, in a note on this general subject, says:—

"It may be questioned, from the authorities heretofore referred to, and the general tendency of decisions upon the relations of directors and other officers to the stockholders and creditors, whether the foregoing will be accepted as the correct view of the effect of the presence of an adversely interested minority. It is respectfully suggested that the stockholders and creditors contracted for a full board of impartial disinterested directors;" 20 Fed. Rep. 180. This view is sustained by many courts; in another case it was said: "A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests in conflict with those of the company he ought to resign;" 18 Ohio St. 183. In considering the same subject McCrary, J., said:—"Besides, where shall we draw the line? If the presence of two interested directors in the board at the time of the ratification does not vitiate the act, would the presence of a larger number of such directors have that effect, and, if so, what number?" 2 Fed. Rep. 879; and on appeal his decision as to the voidability of the contract was affirmed and the supreme court per Miller, J., said, "We concur with the circuit judge that no such contract as this can be enforced in a court of equity where it is resisted and its immorality is brought to light. . . . Such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity;" 109 U. S. 524.

Arrangements made by directors of a railroad company to secure from it unusual advantages through the medium of a new company in which they are to be stockholders, and which is to receive valuable contracts from the railroad company in the profits of which they would share, are not to be enforced by the courts; 103 U. S. 651, affirming 4 Dill. 330; such contracts cannot be made or ratified by a board of directors

including members of the construction company and are void; 109 U. S. 522; but a recovery may be had on such a contract for work actually benefitting the railroad company, on *quantum meruit*; *id.*

In dealing with third parties, directors have all the powers conferred upon them by the charter. Third parties, without notice, are not bound to know of limitations placed upon directors by by-laws or otherwise; *Brice, Ultra Vires* 474; L. R. 5 Ch. 288; 13 Cush. 1; 1 Woolw. 40; but see 62 N. Y. 240; 17 Mass. 1. They cannot delegate matters in which they are bound to use their discretion; *Green's Brice, Ultra Vires* 490; *Moraw, Priv. Corp.* 536; 21 N. H. 149. See 96 U. S. 341; 2 Metc. 163; 19 N. Y. 207. The powers of directors of eleemosynary corporations are much greater than those of moneyed corporations; 41 Mo. 578. As to the power of directors to transfer all the corporate property for the purpose of winding up the company, see 5 W. & S. 249.

Unless the charter provides otherwise, directors need not be chosen from among the stockholders; L. R. 5 Ch. Div. 306; 22 Ohio St. 354. Directors *de facto* are, presumably, directors *de jure*, and their contracts bind the company; L. R. 7 Ch. 587. A director who is permitted to act as such after he has sold all his stock, is a director *de facto*, and the proceedings of the board in which he takes part are valid as to third persons; 4 Misc. Rep. 570.

In the absence of a provision of the charter or of a special contract, a director is not entitled to compensation; 39 N. Y. 202; 71 Ill. 200; 55 Ia. 104; 39 Am. Rep. 167; and he cannot recover therefor even where a resolution to compensate him has been passed after the services were rendered; 29 Pa. 534; 49 Ind. 118; 40 Ind. 361; 27 Conn. 170. But it is otherwise, when the services were outside of the line of his duty as an officer, under the charter and by-laws; as obtaining a right of way, soliciting subscriptions, etc.; 87 Ill. 447; 49 Mo. 389; 3 Misc. Rep. 325; 74 Mich. 226. The supreme court of Pennsylvania, in a suit by a director elected to serve without compensation, to recover a sum allowed to him by resolution after the services were rendered said: "We regard it as contrary to all sound policy to allow the director of a corporation elected to serve without compensation, to recover payment for services performed by him in that capacity, or as incidental to his office. It would be a sad spectacle to see the managers of any corporation, ecclesiastical or lay, civil or eleemosynary, assembling together and parcelling out among themselves the obligations or other property of the corporation in payment for their past services;" 29 Pa. 536. This doctrine has, however, been disapproved by the supreme court of Kansas, which said: "We think the rule is, in the absence of positive restrictions, that, when no salary is prescribed, one appointed to an executive office, like that of cashier, is entitled to reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this, though such appointee is also a director, and continues to be such while holding the independent office;" 20 Fed. Rep. 183, note. There is undoubtedly no implied promise to pay such an officer either for regular or extra services, and the underlying principle has been stated by the supreme court of Massachusetts in terms quoted with approval by the supreme court of the United States: "Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man, in the same situation with the

person who receives and is benefitted by them, would and ought to understand that compensation was to be paid for them;" 130 Mass. 391; 137 U. S. 96. See *Pierce*, R. R. 31 and notes, where the cases on this point are collected.

Where five members constituted a board of directors of which three were a quorum, action taken by three directors present at a meeting, upon a majority vote, was held to be valid; 19 N. J. Eq. 402; s. c. 3 Am. Corp. Cas. 592. See *QUORUM*.

To make a legal board of directors, they must meet at a time when and a place where every other director has the opportunity of attending to consult and be consulted with; and there must be a sufficient number present to constitute a quorum; 3 La. 574; 13 Id. 527. See 11 Mass. 288; 5 Litt. 45; 12 S. & R. 256; 1 Pet. 46. The fact that notice of a special meeting of the board was not given as provided by the by-laws of a corporation is immaterial, if all the members of the board were in fact present and participated in the proceedings; 53 Minn. 381. See 35 Fed. Rep. 161.

The fact that a stockholder contemplates, if elected a director, to vote for an arrangement by which another corporation will control the company, cannot, though such an arrangement be illegal, affect the validity of his election; 49 Ohio St. 668.

Provision is usually made, in the act under which a company is incorporated, for the election of directors. Such election usually takes place once a year, and is generally by a vote of the stockholders.

See *PROHIBITION COMMISSIONER*, etc.

DIRECTORY. A provision in a statute, rule of procedure, or the like, is said to be directory when it is to be considered as a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative (*q. v.*) or mandatory provision, which must be followed. The general rule is, that the prescriptions of a statute relating to the performance of a public duty are so far directory, that though neglect of them may be punishable, yet it does not affect the validity of the acts done under them, as in the case of a statute requiring an officer to prepare and deliver a document to another officer on or before a certain day. R. & L. Dict.; Maxw. Stat. 330 *et seq.*

DIRIMANT IMPEDIMENTS. Those bars which annul a consummated marriage.

DISABILITY. The want of legal capacity. See *ABATEMENT*; *DEVISE*; *DEED*; *INFANCY*; *INSANITY*; *LIMITATION*; *MARRIAGE*; *PARTIES*. See *NON-ABILITY*.

DISABLING STATUTES (also called the *Restraining Statutes*). The acts of 1 Eliz. c. 19, 13 Eliz. c. 10, 14 Eliz. cc. 11, 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, by which the power of ecclesiastical or eleemosynary corporations to lease their lands was restricted. 2 Bla. Com. 319, 321; Co. Litt. 44 a; 2 Steph. Com. 735.

DISAFFIRMANCE. The act by which a person who has entered into a voidable contract, as, for example, an infant, disavows to such contract and declares he will not abide by it.

Disaffirmance is expressed or implied:—the former, when the declaration that the party will not abide by the contract is made in terms; the latter, when he does an act which plainly manifests his determination not to abide by it: as, where an infant made a deed for his land, and on coming of age he made a deed for the same land to another; 2 D. & B. 320; 10 Pet. 58; 18 Mass. 371, 375.

DISAFFOREST. To restore to their former condition lands which have been turned into forests. To remove from the operation of the forest laws. 2 Bla. Com. 416. See *AFFOREST*.

DISAVOW. To deny the authority by

which an agent pretends to have acted, as when he has exceeded the bounds of his authority.

It is the duty of the principal to fulfil the contracts which have been entered into by his authorized agent; and when an agent has exceeded his authority he ought promptly to disavow such act, so that the other party may have his remedy against the agent. See *AGENT*; *PRINCIPAL*.

DISBAR. In England, to expel a barrister from the bar. Wharton.

In the United States, to deprive a person of the right to practise as an attorney at law.

An attorney in England is said to be stricken from the rolls. As disbarment is a very extreme penalty, suspension is more frequent. See *ATTORNEY*. A lawyer can be disbarred only for misconduct in his professional capacity or respecting his professional character. He cannot be disbarred for theft, perjury, and the like offences, without a formal indictment, trial, and conviction. The office of an attorney is his property and he cannot be deprived of it unless by judgment of his peers and the law of the land; 95 Pa. 220.

Courts have jurisdiction and power upon their own motion without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll, provided he has had reasonable notice and an opportunity to be heard. 95 Pa. 220; 54 Wis. 379; 107 U. S. 265.

The complaint must affect the official character of the attorney; 63 Ill. 157; 40 Am. Rep. 637. The offence need not be an indictable one; but its character must be such as to show the attorney unfit to be trusted with the powers of the profession; 30 L. J. (Q. B.) 32; 10 Bush. Ky. 592; 2 Cra. C. C. 60; 5 Rawle 191. But ignorance of the law is not a cause for disbarment; 24 N. H. 149. Disrespect to the court may be a cause if it is very gross; 24 Fed. Rep. 726; and any breach of fidelity to the court is good ground; 82 N. Y. 161; 71 Me. 288. So also bringing a divorce suit without authority and acting in fraudulent collusion with the husband to procure the divorce without consent or knowledge of the wife; 6 Tex. 55; perjury or subornation of perjury; 10 M. & W. 28; or violation of confidence of client; 71 Me. 288. On being convicted of felony an attorney loses his right to practise in court without an order removing him; 5 Daly, N. Y. 465. Neither pardon for felony nor a satisfactory settlement with the injured party affects the court's power to disbar; 64 Me. 140; 93 Pa. 116; Weeks, Attys. § 83.

An unsigned advertisement that divorces could be procured for reasons unknown to the law, and without reference to the residences of the parties, is cause for disbarment; 79 Ill. 148.

See, generally, *Archbold, Practice*, Chitt'y's ed. 148; 1 Tidd, Pr., 9th ed. 89; 6 East 126; L. R. 3 Q. B. 543; 5 B. & Ald. 1088.

DISBURSEMENT. Money paid out by an executor, guardian, or trustee, on account of the fund in his hands. The necessary expenditures incurred in an action, and which, under the codes of procedure of some of the states, are included in the costs, are also so called. But see 41 Ala. 267; 9 Abb. Pr. o. s. 111.

DISCEPTIO CAUSÆ (Lat.). In Roman Law. The argument of a cause by the counsel on both sides. Calvinus, Lex.

DISCHARGE. In Practice. The act by which a person in confinement under some legal process, or held on an accusation of some crime or misdemeanor, is set at liberty; the writing containing the order for his being so set at liberty is also called a discharge.

The discharge of a defendant, in prison under a *ca. sa.*, when made by the plaintiff, has the operation of satisfying the debt, the plaintiff having no other remedy; 4 Term 526.

But when the discharge is in consequence of the insolvent laws, or the defendant dies in prison, the debt is not satisfied. In the

first case the plaintiff has a remedy against the property of the defendant acquired after his discharge, and in the last case against the executors or administrators of the debtor. Bacon, *Abr. Execution*, D; Bingham, *Execution* 266.

The word has still other uses. Thus, we speak of the discharge of a surety, whereby he is released from his liability; of a debt; of a contract; of lands, or money in the funds, from an incumbrance; of an order of a court of justice, when such order is vacated; 2 Steph. Com. 107, 161. We also speak of a discharge in bankruptcy; 121 U. S. 457; 142 *id.* 381; 48 Fed. Rep. 789.

See **RULE DISCHARGED.**

DISCHARGE OF CONTRACT.

Termination of a contractual obligation. Accomplished in a number of ways: (1) By agreement; (2) by performance; (3) by impossibility of performance; (4) by operation of rules of law upon certain sets of circumstances; (5) by breach. 3 Elliott, *Contracts*, § 1855, 1856.

DISCHARGE OF A JURY. See JURY.

DISCLAIMER. A disavowal; a renunciation; as, for example, the act by which a patentee renounces part of his title of invention.

Of Estates. The act by which a party refuses to accept an estate which has been conveyed to him. Thus, a trustee is said to disclaim who releases to his fellow-trustees his estate, and relieves himself of the trust; 1 Hill, R. P. 354; 13 Conn. 83; 6 Cow. 616.

Of Tenancy. The act of a person in possession, who denies holding the estate of the person who claims to be the owner. 2 Nev. & M. 672. An affirmation, by pleading or otherwise, in a court of record, that the reversion is in a stranger. It works a forfeiture of the lease at common law; Co. Litt. 251; 1 Cruise, Dig. 109; Woodf. Landl. & T. 360; but not, it is said, in the United States; 1 Washb. R. P. 93. Equity will not aid a tenant in denying his landlord's title; 1 Pet. 486.

In Patent Law. A declaration in writing, filed under the patent laws, by an inventor whose claim as filed covers more than that of which he was the original inventor, renouncing such parts as he does not claim to hold. See **PATENT.**

In Pleading. A renunciation by the defendant of all claim to the subject of the demand made by the plaintiff.

In Equity. It must, in general, be accompanied by an answer; 10 Paige, Ch. 105; 2 Russ. 458; 2 Y. & C. 546; 9 Sim. 102; 2 Bland, Ch. 678; and always when the defendant has so connected himself with the matter that justice cannot be done otherwise; 9 Sim. 102. It must renounce all claim in any capacity and to any extent; 6 G. & J. 153. It may be to part of a bill only, but it must be clearly a separate and distinct part of the bill; Story, Eq. Pl. § 839; Beach, Mod. Eq. Pr. 282. A disclaimer may, in general, be abandoned, and a claim put in upon subsequent discovery of a right; Cooper, Eq. Pl. 310.

At Law. In *real actions*, a disclaimer of tenancy or estate is frequently added to the plea of non-tenure; Littleton § 391; 10 Mass. 64. The plea may be either in abatement or in bar; 13 Mass. 439; 7 Pick. 81; as to the whole or any part of the demanded premises; Stearns, *Real Act.* 193.

At common law it is not pleaded as a bar to the action, nor is it strictly a plea in abatement, as it does not give the plaintiff a better writ. It contains no prayer for judgment, and is not concluded with a verification. It is in effect an offer by the plaintiff to yield to the claim of the defendant and admit his title to the land; Stearns, *Real Act.* 193. It cannot, in general, be made by a person incapable of conveying the land. It is equivalent to a judgment in favor of the defendant, except when costs are demanded; 13 Mass. 439; in which case there must be a replication by the defendant; 6 Pick. 5; but no formal replication is

requisite in Pennsylvania; 5 Watts 70; 3 Pa. 367. And see 1 Washb. R. P. 93.

DISCONTINUANCE. In Pleading. The chasm or interruption which occurs when no answer is given to some material matter in the preceding pleading, and the opposite party neglects to take advantage of such omission. See Com. Dig. *Pleader*, W.; Bac. *Abr. Pleas*, P. It is distinguished from insufficient pleading by the fact that the pleading does not profess to answer all the preceding pleading in a case of discontinuance; 1 Wms. Saund. 28, n. It constitutes error, but may be cured after verdict, by 32 Hen. VIII. c. 80, and after judgment by *nil dicit*, confession, or *non sum informatus* under 4 Anne, c. 16. See, generally, 1 Saund. 28; 4 Rep. 62 a; 56 N. H. 414.

In Practice. The chasm or interruption in proceedings occasioned by the failure of the plaintiff to continue the suit regularly from time to time, as he ought; 8 Bla. Com. 296; 52 Miss. 467; 56 N. H. 416; 71 Ala. 215. The entry upon record of a discontinuance has the same effect. The plaintiff cannot discontinue after demurrer joined and entered, or after verdict or writ of inquiry, without leave of court; Cro. Jac. 35; 1 Lilly, *Abr.* 473; 8 C. C. App. 437; but see 7 Wash. 407; although he can notwithstanding the interposition of a counterclaim; 17 N. Y. Sup. 844; and is generally liable for costs when he discontinues, though not in all cases. See 1 Johns. 143; 18 *id.* 252; 1 Cai. 116; 48 Mo. 235; 12 Wend. 402; Com. Dig. *Pleader* (W 5); Bac. *Abr. Plea* (5 P) See **DISCONTINUANCE OF ESTATES.**

DISCONTINUANCE OF ESTATES. An alienation made or suffered by the tenant in tail, or other tenant seised in *autre droit*, by which the issue in tail, or heir, or successor, or those in reversion or remainder, are driven to their action, and cannot enter.

The term discontinuance is used to distinguish those cases where the party whose freehold is ousted can restore it only by action, from those in which he may restore it by entry; Co. Litt. 325 a; 3 Bla. Com. 171; Ad. Ej. 85; Bac. *Abr.*; Viner, *Abr.*

Discontinuances of estates, prior to their express abolition, had long become obsolete, and they are now abolished by 3 & 4 Will. IV. c. 27, and 8 & 9 Vict. c. 106; Moz. & W. Dic.; 1 Steph. Com. 510, n.

DISCONTINUED. "Discontinued" with reference to an action, is synonymous with "stricken from the docket;" "filed away." 164 Ky. 426, 175 S. W. 662.

DISCONTINUOUS SERVITUDE. An easement made up of repeated acts instead of one continuous act, such as right of way, drawing water, etc. See **EASEMENT.**

DISCOUNT. In Contracts. Interest reserved from the amount loaned at the time of making a loan. An allowance sometimes made for prompt payment. As a verb, it is used to denote the act of giving money for a bill of exchange or promissory note, deducting the interest; 6 Ohio St. 527; 15 *id.* 87; 13 Conn. 248; 48 Mo. 189; 8 Wheat. 338; 14 Ala. 677; 42 Md. 592.

In an ordinary commercial document, discount means rebate of interest and not "true" or mathematical discount; [1896] 2 Ch. 320.

A discount by a bank means *ex vi termini* a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. It is the difference between the price and the amount of the debt, the evidence of which is transferred; 104 U. S. 276; 8 Wheat. 350.

The taking of legal interest in advance is not usurious; but it is only allowed for the benefit of trade and where the bill or note discounted is meant for circulation and is for a short term; 2 Cow. 678, 712; 3 Wend. 408.

There is a difference between *buying* a bill and *discounting* it. The former word is used when the seller does not indorse the bill and is not accountable for its payment. See Pothier, *De l'Usure*, n. 128; 3 Pet. 40; Blydenburgh, *Usury*; Sewell, *Banking*; 14 Ala. 668; 7 How. Pr. 144. The true discount for a given sum, for a given time, is such a sum as will in that time amount to the interest of the sum to be discounted. Wharton.

In Practice. A set-off or defalcation in an action. Viner, *Abr. Discount*. But see 1 Metc. Ky. 597.

To discount, *ex vi termini*, implies reservation of interest in advance. 251 U. S. 114. See **SET-OFF.**

DISCOUNTING. See **BUYING A NOTE.**

DISCOVERT. Not covert; unmarried. The term is applied to a woman unmarried, or widow,—one not within the bonds of matrimony.

DISCOVERY. (Fr. *découvrir*, to uncover, to discover). The act of finding an unknown country.

The nations of Europe adopted the principle that the discovery of any part of America gave title to the government by whose subjects or by whose authority it was made, as against all European governments. This title was to be consumed by possession; 8 Wheat. 543; 16 Pet. 367; 2 Washb. R. P. 518.

By the law of nations, dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest; 187 U. S. 202.

An invention or improvement. See **PATENT.** Also used of the disclosure by a bankrupt of his property for the benefit of creditors.

In Practice. The disclosure of facts resting in the knowledge of the defendant, or the production of deeds, writings, or things in his possession or power, in order to maintain the right or title of the party asking it, in some other suit or proceeding.

It was originally an equitable form of procedure, and a bill of discovery, strictly so called, was brought to assist parties to suits in other courts. Every bill in equity is in some sense a bill of discovery, since it seeks a disclosure from the defendant, on his oath of the truth of the circumstances constituting the plaintiff's case as propounded in his bill; Story, Eq. Jur. § 1488; but the term is technically applied as defined above. See 4 R. I. 450; 2 Stockt. Ch. 273. Many important questions have arisen out of the exercise of this power by equity; but these are of comparatively little practical importance in England and many of the states of the United States, where parties may be made witnesses and compelled to produce books and papers in courts of law; 8 Steph. Com. 598; 17 & 18 Vict. c. 125.

Such bills are greatly favored in equity, and are sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction; Story, Eq. Jur. § 1483; 8 Conn. 528; 2 H. & G. 332. See 17 Mass. 117; 22 Me. 207; 4 Hen. & M. 478; 3 Md. Ch. Dec. 418; 40 Ill. App. 616. Some of the more important of the objections are,—*first*, that the subject is not cognizable in any municipal court of justice; Story, Eq. Jur. § 1489; *second*, that the court will not lend its aid to obtain a discovery for the particular court for which it is wanted, as where the court can itself compel a discovery; 2 Ves. 451; 2 Edw. Ch. 605; 37 N. H. 55; *third*, that the plaintiff is not entitled by reason of personal disability; *fourth*, that the plaintiff has no title to the character in which he sues; 4 Paige, Ch. 639; *fifth*, that the value of the suit is beneath the dignity of the court; *sixth*, that the plaintiff has no interest in the subject-matter or title to the discovery required; 2 Bro. Ch. 321; 4 Madd. 193; Cooper, Eq. Pl. c. 1, § 4; 2 Metc. Mass. 127; 17 Me. 404; 10 Ky. L. Rep. 980; or that an action for which it is wanted will not lie; 3 Bro. Ch. 155; 1 Bligh, n. s. 120; 3 Y. & C. 255; see 1 Phill. Ch. 209; *seventh*, that the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery; *eighth*, that the policy of the law exempts the defendant from the discovery, as on account of the peculiar relations of the parties; 2 Y. & C. 107; 8 E. L. & Eq. 89; 35 *id.* 283; 3 Paige, Ch. 36; in case of arbitrators; 2 Vern. 380; 3 Atk. 529; *ninth*, that the defendant is not bound to discover

his own title; Bisph. Eq. 561; 1 Vern. 105; 6 Whart. 141; see 61 Conn. 593; or that he is a *bona fide* purchaser without notice of the plaintiff's claim; 2 Edw. Ch. 81; 8 M. & K. 581; 8 Sim. 153; 5 Mas. 269; 1 Sumn. 506; 7 Pet. 252; 7 Cra. 2; 6 Paige, Ch. 323; and see 33 Vt. 252; 1 Stockt. 82; *tenth*, that the discovery is not material in the suit; 2 Ves. 491; 1 Johns. Ch. 548; *eleventh*, that the defendant is a mere witness; 2 Bro. Ch. 332; 3 Edw. Ch. 129; but see 2 Ves. 451; 1 Sch. & L. 227; 11 Sim. 805; 1 Paige, Ch. 37; *twelfth*, that the discovery called for would criminate the defendant.

The suit must be of a purely civil nature, and may not be a criminal prosecution; Lofft 1; 19 How. St. Tr. 1154; 7 Md. 416; a penal action; 1 Keen 329; 2 Blatchf. 39; a suit partaking of this character; 1 Pet. 100; 6 Conn. 36; 14 Ga. 255; or a case involving moral turpitude. See 1 Bligh, n.s. 96; 2 E. L. & Eq. 117; 5 Madd. 229; 11 Beav. 380; 1 Sim. 404; 24 Miss. 17.

Workmen pledged to secrecy and employed in a factory in which the business is conducted in private, to secure secrecy as to the method of manufacture, will not be compelled, in a suit against their employer, to disclose such secrets; 49 Fed. Rep. 17.

A corporation not a party to a suit will not be compelled to open its records which it is claimed will disclose something of importance to the litigation; 35 Fed. Rep. 15; nor is an adverse examination of a defendant before trial allowable for the purpose of discovering a cause of action; 3 Misc. Rep. 514; 67 Hun 398.

An infant party to an action cannot be compelled to make discovery of documents; [1893] 2 Q. B. 178.

The court has power to allow a party to an action to take photographs of documents in the possession of the other party; [1893] 2 Q. B. 191.

It seems to be settled that a bill will lie against a corporation and its officers to compel a discovery from the officers, to aid a plaintiff or a defendant in maintaining or defending a suit brought against or by the corporation alone; 19 Blatchf. 69; 1 Ch. D. 71; 144 Mass. 347.

In the sense in which the word is used with respect to equity suits generally, there was, until a comparatively recent period, a failure to recognize the distinction between the two functions of an answer in chancery, viz.: discovery and defence. These two were in the civil law entirely separated, while in chancery they were indiscriminately commingled. The distinction is very clearly put in Langdell's Equity Pleadings, 2d ed. § 68, where the author attributes to Wigram (Disc., 2d ed. § 17) and Hare (Disc. 223) the simultaneous notice of what he terms "the unnatural union." The distinction is important because, when it is borne in mind, the "rule for determining what discovery the defendant must give in his answer becomes simple and uniform. He must answer categorically every material allegation and charge in the bill, unless he has some objection which would be good in the mouth of a witness." In a note to his second edition, Professor Langdell characterizes this rule as too narrow, and sets forth cases in which a defendant may object to answer as to matters which as a witness he could not. Among these are the cases of a defendant against whom no case is made and no relief prayed; one joined because he has a conflicting claim against another defendant, which must be set up by cross-bill; or where a defendant may refuse to answer parts of the bill relating wholly to other defendants. With respect to particular cases the rule must be deduced from the decisions most nearly applicable, and the cases will be found to be collected and examined with discrimination in the work cited. See also Ad. Eq. b. 1, ch. 1.

Courts of equity which have once obtained jurisdiction for purposes of discovery will dispose of a cause finally, if proper for the consideration of equity, though the remedy at law is fully adequate; 1 Story, Eq. Jur. § 64 k; 1 Munf. 98; 1 A. K. Marsh. 463, 468; 15 Me. 82; 2 Johns. Ch. 424; 1 Dessaus. 208; 2 Ov. 71; 96 Ala. 469. Con-

sult Adams; Story; Bispham; Pomeroy; Beach, Eq. Jur.; Greenleaf; Phillips, Evidence; Wigram; Hare, Discovery; Joy, Confessions; Langdell, Equity Pleading.

DISCREDIT. To deprive one of credit or confidence.

In general, a party may discredit a witness called by the opposite party, who testifies against him, by proving that his character is such as not to entitle him to credit or confidence, or any other fact which shows he is not entitled to belief. It is clearly settled, also, that the party voluntarily calling a witness cannot afterwards impeach his character for truth and veracity; 1 Mood. & R. 414; 3 B. & C. 746; 70 Miss. 742; 32 Tex. Cr. R. 519. See 5 Ind. App. 243; 42 Ill. App. 178; 52 Kan. 531. If a party call a witness who turns out unfavorable, he may call another to prove the same point; Tayl. Ev. 1247; 2 Campb. 556; 2 Stark. 384; 1 Nev. & M. 84; 4 B. & A. 193; 50 Mo. App. 18; 1 Phill. Ev. 229. The rule that a party cannot discredit his own witness is not violated by proving facts contrary to the testimony of such witness; 111 N. C. 314.

Where the evidence of a witness is a surprise to the party calling him, the trial judge, in the exercise of discretion, may permit him to be cross-examined by such party to show that his previous statements and conduct were at variance with his testimony; 150 Pa. 611; 54 Minn. 434. Proof of contradictory statements by one's own witness, voluntarily called and not a party, is in general not admissible, although the party calling him may have been surprised by them; but he may show that the facts were not as stated, although these may tend incidentally to discredit the witness; 151 U. S. 303.

DISCREPANCY. A difference between one thing and another, between one writing and another; a variance.

A *material discrepancy* exists when there is such a difference between a thing alleged and a thing offered in evidence as to show they are not substantially the same; as, when the plaintiff in his declaration for a malicious arrest averred that "the plaintiff, in that action, did not prosecute his said suit, but therein made default," and the record was that he obtained a rule to discontinue.

An *immaterial discrepancy* is one which does not materially affect the cause; as, where a declaration stated that a deed bore date in a certain year of our Lord, and the deed was simply dated "March 30, 1701." 2 Salk. 658; 19 Johns. 49; 5 Taunt. 707; 2 B. & Ald. 801; 8 Miss. 428; 2 McLean 69; 21 Pick. 486.

DISCRETION. That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.

The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

Whether or not a particular question is one of discretion is in almost every case a matter of settled law, and the individual court or judge has no power to place it within or without that category. It is only when a question arises which, according to precedent, is treated as such that the judicial discretion is invoked and its exercise cannot be reviewed.

The discretion of a judge is said by Lord Camden to be the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable. *Optima lex quae minimum relinquit arbitrio iudicis: optimus iudex qui minimum sibi.* Bacon, Aph. 1 Pow. Mortg. 247 a; 2 Bell, Suppl. to Ves. 891; Toullier, liv. 3, n. 33; 1 Lilly, Abr. 447. But the prevailing opinion is that discretion must not be arbitrary, fanciful, and capricious; it must be legal and regular, governed by rule, not by humor; 4 Burr. 25; 18 Wend. 99.

There is a species of discretion which is authorized by express law and without which justice cannot be

administered; for example, if an old offender, a man of much intelligence and cunning, whose talents render him dangerous to the community, induces a young man of weak intellect to commit a larceny in company with himself, they are both liable to be punished for the offence. The law foreseeing such a case, has provided that the punishment should be proportioned so as to do justice, and it has left such apportionment to the discretion of the judge. It is evident that without such discretion justice could not be administered; for one of these parties assuredly deserves a much more severe punishment than the other.

And many matters relating to the trial such as the order of giving evidence, granting of new trials, etc., are properly left mainly or entirely to the discretion of the judge; 18 Wend. 79, 96; 34 Barb. 291; 38 S. C. 269; 32 Mich. 321; 136 N. Y. 555; 2 C. C. App. 389; 111 N. C. 145.

Decisions upon matters within the absolute discretion of a court are not reviewable in courts of appeal; 157 Mass. 579; 159 id. 900; 111 N. C. 509; 108 U. S. 120; 4 C. C. App. 663; but the discretion in granting or refusing a writ of mandamus must be exercised under legal rules, and is reviewable in an appellate court; 78 N. Y. 56. Such a writ will not be granted to regulate the exercise of a discretion on the part of an official; 15 Fla. 317; 52 Ala. 87.

A testator may leave it to his executor to construe the provisions of his will, and to decide doubtful questions concerning his intentions; 15 Fed. Rep. 696; and the donor of a power may leave its execution to the discretion of the donee; 4 D. J. & S. 614.

In Criminal Law. The ability to know and distinguish between good and evil,—between what is lawful and what is unlawful.

The age at which children are said to have discretion is not very accurately ascertained. Under seven years, it seems that no circumstances of mischievous discretion can be admitted to overthrow the strong presumption of innocence which is raised by an age so tender; 1 Hale, Pl. Cr. 27, 28; 4 Bla. Com. 23. Between the ages of seven and fourteen the infant is, *prima facie*, destitute of criminal design; but this presumption diminishes as the age increases, and even during this interval of youth may be repelled by positive evidence of vicious intention; for tenderness of years will not excuse a maturity in crime, the maxim in these cases being *malitia supplet aetatem*. At fourteen, children are said to have acquired legal discretion; 1 Hale, Pl. Cr. 25. See 88 Pa. 35; DOLI CAPAX; AGE.

DISCRETIONARY. See MINISTERIAL DUTY.

DISCRETIONARY TRUSTS. Those which cannot be duly administered without the application of a certain degree of prudence and judgment; as, when a fund is given to trustees to be distributed in certain charities to be selected by the trustees.

DISCRIMINATION. This word is now generally applied in law to a breach of the statutory or common-law duty of a carrier to treat all customers alike. It is applied to inequality in both rates of fare and rates of freight, and may also be practised by inequality in the facilities afforded to different consignors. In regard to freight rates, discrimination means the charging shippers unequal sums for carrying the same quantity of goods equal distances; 95 N. C. 434. The fact that the higher charge is not unreasonable will not affect the case; 31 Fed. Rep. 57. The mere allowance of a rebate will not prove discrimination; for others may obtain the same advantage; but to contract to deny others the benefit of a rebate is discrimination; 22 Mo. App. 224; 38 N. J. L. 505; 32 A. & E. R. R. Cas. 413; 56 Ill. 513; 118 Ill. 250.

Mere inequality in charges is not discrimination; it is such only when the shippers stand on the same footing in all respects. The reasonableness of unequal rates may be proved by the difference in the character of the goods, or the part of the line over which they are shipped, having due regard to the expense of carriage; 67 Ill. 11; 12 Gray 395; 74 Pa. 181; 9 Lea 684; 53 Tex. 98.

It is held in England that it is not an unlawful discrimination for a carrier to convey a large quantity of merchandise at a less rate than that charged for smaller quantities; for transportation in large and small quantities does not involve the same

amount of trouble and expense; 4 Nev. & M. 7; 4 C. B. N. s. 366; but a contrary view prevails in the United States; 12 Fed. Rep. 309; 31 Fed. Rep. 652; 43 Ohio St. 379; 1 Interst. Com. Rep. 107; and in any case it is not lawful to charge a less rate to all the inhabitants of one town, irrespective of their individual shipments, than to those of another, though the aggregate of freight shipped by the former is greater than that shipped by the latter; 4 Eng. R. R. & Canal Traffic Cases 291.

The rule requiring equal charges for equal distances does not require that the rates for a specified distance should be increased for every greater distance by the corresponding multiple of the specified distance; 111 E. C. L. 248; 1 Interst. Com. Rep. 480; 74 Pa. 190.

Under the Interstate Commerce Act.—This question of discrimination arises in the United States most frequently under the provisions of the Interstate Commerce Act of 1887, Feb. 24; U. S. Rev. Stat. 1 Supp. 529, which provides: (§ 2) That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination; (§ 3) That it shall be unlawful for any such common carrier to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or description of traffic, or subject such to any undue or unreasonable prejudice or disadvantage; and (§ 4) That it shall be unlawful for any such common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance, within the same line in the same direction, the shorter being included in the longer distance.

The fact that one railroad is long and circuitous, and therefore obliged to charge a less rate per mile to a competitive point than its shorter rivals, will not establish dissimilar conditions, nor does the fact that there is possible water competition; 1 Interst. Com. Rep. 160; but differences in grade compelling the use of shorter trains, is to be considered in deciding the question of discriminations; 4 Nev. & M. 192. So, it would seem that an increase in the speed of trains will justify an increase in the rate of freight charged; 4 Eng. R. R. & Canal Traffic Cases 291; as may the fact that cars are of a peculiar construction, and only fit for hauling a certain class of freight, so that they must be returned empty; but not the fact that cars are of an improved construction, so that more valuable freight is transported in them; 1 Interst. Com. Rep. 182. On the other hand, it is not discrimination for a carrier to refuse to transport cattle in cars of a special construction furnished by the shipper, when it supplies cars for the same purpose, which it can use more conveniently and profitably by reason of their being likewise so adapted for other freight when not used for carrying cattle; 6 Ry. & Corp. L. J. 364.

The doing for or allowing to one party or place what is denied to another. 17 A. & E. Ency. 2nd ed., 143.

In interstate commerce, unjust discriminations by carriers between persons, corporations, or localities, either in rates or facilities, in the rendition of like services under similar conditions and circumstances, is deemed unlawful by the Interstate Commerce Act. (*q. v.*) 3 Moore, Carriers 2nd ed. 1759, 1784, 1785.

For discrimination in legislation, see

CLASSIFICATION IN STATUTES; EQUAL PROTECTION OF THE LAWS; FOURTEENTH AMENDMENT.

DISCUSSION. In Civil Law. A proceeding on the part of a surety by which the property of the principal debtor is made liable before resort can be had to the sureties; this is called the *benefit of discussion*. This is the law in Louisiana. See Domat, 3, 4, 1-4; Burge, Suretyship 329, 343, 348; 5 Toullier 544; 7 id. 93.

In Scotch Law. The ranking of the proper order in which heirs are liable to satisfy the debts of the deceased. Bell.

DISEASE. A disease of an organ is an affection of that organ of a character so well defined and marked as to materially disturb or derange for a time its vital functions. 112 U. S. 258.

Disease implies a substantial attack of illness, or a malady, which has some bearing on the general health of a person, not a slight illness, or temporary derangement of the functions of some organ. *Id.* quoting the Circuit Court for the Southern District of New York. See ILLNESS; AFFECTION.

See CHRISTIAN SCIENCE. See SERIOUS.

DISENTAILING ASSURANCE. A deed executed under stat. 8 & 4 Will. 4, c. 74, whereby the tenant in tail is enabled to alienate the land for an estate in fee-simple or any less estate, and thus destroy the entail. The deed must be duly enrolled in the court of chancery within six months of its execution; 1 Steph. Com. 250, 575.

See DISENTAILING DEED.

DISENTAILING DEED. In England, an assurance by which a tenant in tail (*q. v.*) bars his estate tail so as to convert it into an estate in fee, either absolute or base; introduced by the Fines and Recoveries Act in 1833. Byrne. See ASSURANCE; ESTATE IN TAIL; ESTATE IN FEE SIMPLE.

DISFRANCHISEMENT. The act of depriving a member of a corporation of his right as such, by expulsion.

It differs from amotion (*q. v.*), which is applicable to the removal of an officer from office, leaving him his rights as a member; Willc. Corp. n. 708; Ang. & A. Corp. 287; 10 H. L. Cas. 404; 44 Mo. 570; 2 Daly 389. The power of disfranchisement extends only to societies not owning property or organized for gain; unless the power be given by the charter; 60 Pa. 107; Green's Brice, *Ultra Vires* 45; 41 L. T. s. s. 490; 80 Ill. 184; 5 Ill. 216; Ang. & A. Corp. § 410. It extends to the expulsion of members who have proved guilty of the more heinous crimes, as to which there must first be a conviction by a jury; 2 Binn. 448; 52 Pa. 135. It is said that the power exists where members do not observe certain duties to the corporation, especially where the breach tends directly or indirectly to the forfeiture of the corporate rights, and franchises, and the destruction of the corporation; Green's Brice, *Ultra Vires* 45; 45 Ill. 112; 61 Ga. 86; 62 Ia. 36. A member is entitled to notice of the charges against him, and to an opportunity to be heard; 30 Pa. 485; 50 id. 107; 54 Barb. 538; 40 N. J. L. 295; 44 How. Fr. 216; 44 Mo. 570; 111 Mass. 185. See EXPULSION.

Except in cases authorized by constitutional provisions, a citizen entitled to vote cannot be disfranchised, or deprived of his right by any action of the public authorities, and a law having such effect is void; Cooley, Const. Lim. 776; as an act creating a new county and leaving part of its territory unorganized so that the voters of that portion could not participate in the election; 15 Mich. 471; 30 N. Y. 47.

The present use of the word in England is the depriving an individual of his right of voting, or a constituency of their right of returning a member to parliament; May's Parl. Fr.

DISGRACE. Ignominy; shame; dishonor. No witness is required to disgrace himself. 13 How. St. Tr. 17, 384; 16 id. 161. See CRIMINATE.

DISGUISE.

A person lying in ambush is not in disguise within the meaning of a statute declaring a county liable in damages to the next of kin of any one murdered by persons in disguise; 46 Ala. 118, 142.

DISHERISON. Disinheritance; depriving one of an inheritance. Obsolete. See DISINHERISON.

DISHERITOR. One who disinherits, or puts another out of his freehold. Obsolete.

DISHONOR. A term applied to the non-fulfilment of commercial engagements.

To dishonor a bill of exchange, or a promissory note, is to refuse or neglect to pay it at maturity.

The holder is bound to give notice to the parties to such instruments of its dishonor; and his laches will discharge the indorsers. See NOTICE OF DISHONOR.

DISINHERISON. In Civil Law. The act of depriving a forced heir of the inheritance which the law gives him.

In Louisiana, forced heirs may be deprived of their legitime, or legal portion, and of the seisin granted them by law, for just cause. The disinherison must be made in proper form, by name and expressly, and for a just cause; otherwise it is null. See FORCED HEIRS; LEGITIME.

DISINHERITANCE. The act by which a person deprives his heir of an inheritance, who, without such act, would inherit.

By the common law, any one may give his estate to a stranger, and thereby disinherit his heir apparent. Cooper, Justin. 495; 7 East 106.

An heir cannot be disinherited by mere words of exclusion, but the entire property of the testator must be given to some one else by express words or by necessary implication; 93 Ky. 498; 105 N. Y. 185; s. c. 5 Am. Prob. Rep. 510; 132 N. Y. 398; 112 Pa. 532; and where a will provides that a gift therein is to be the entire share of an heir, he is not excluded from a share of property not disposed of by the will; 84 Va. 880; even though the will shows that the testator believed he was disposing of all his property; *id.* A testamentary writing which revokes all other wills, and excludes a son from any share of the estate, for reasons given, but does not dispose of the property, does not affect the rights of such son; 85 Va. 459.

In a case of doubt the law leans to a distribution as nearly conforming to the rules of inheritance as possible.

DISINTERESTED WITNESS. One who has no interest in the cause or matter in issue, and who is lawfully competent to testify.

In North Carolina and Tennessee, wills to pass lands must be attested by disinterested witnesses. The word "disinterested" is also applied to arbitrators and magistrates; 48 Ill. 31; 50 Me. 384. See INTEREST.

DISJUNCTIVE ALLEGATIONS. In Pleading. Allegations which charge a party disjunctively, so as to leave it uncertain what is relied on as the accusation against him.

An indictment, information, or complaint which charges the defendant with one or other of two offences, in the disjunctive, as that he murdered or caused to be murdered, forged or caused to be forged, wrote and published or caused to be written and published, is bad for uncertainty; 1 Salk. 342, 371; 2 Stra. 900; 5 B. & C. 251; 1 C. & R. 248; 1 Y. & J. 22. An indictment which averred that S. made a forcible entry into two closes of meadow or pasture was held to be bad; 2 Rolle, Abr. 81. A complaint which alleges an unlawful sale of "spirituous or intoxicating liquor" is bad for uncertainty; 2 Gray 501. So is an information which alleges that N. sold beer or ale without an excise license; 6 Dowl. & R. 143. And the same rule applies if the defendant is charged in two different characters in the disjunctive: as, *quod A existens servus sive deputatus*, took, etc.; 2 Rolle, Abr. 263.

DISJUNCTIVE COVENANTS. See COVENANT.

DISJUNCTIVE TERM. One which is placed between two contraries, by the affirming of one of which the other is taken away: it is usually expressed by the word *or*. See 3 Ves. 450; 1 P. Wms. 433; 2 Cox, Ch. 213; 2 Atk. 643; 3 Ves. Sen. 67; Cro. Eliz. 525; 1 Bingh. 500; Ayliffe, Pand. 56.

In the civil law, when a legacy is given to Caius or Titius, the word *or* is considered

and, and both Cains and Titius are entitled to the legacy in equal parts. 6 Toullier, n. 704. See **COPULATIVE TERM**; **CONSTRUCTION**.

DISME. Dime, which see.

DISMISS. To remove. To send out of court. Formerly used in chancery of the removal of a cause out of court without any further hearing. The term is now used in courts of law also.

It signifies a final ending of a suit, not a final judgment on the controversy, but an end of that proceeding; 56 N. H. 417; 24 Ga. 33; 1 Ohio St. 170. It is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiff's right of action; 109 U. S. 429.

After a decree, whether final or interlocutory, has been made by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant; 109 U. S. 718.

The effect of dismissals under the codes of some of the United States, has been much discussed. Thus in New York, "a final judgment dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced," does not prevent a new action for the same cause of action, unless it expressly declares that it is rendered upon the merits.

DISMISSED. See **DISMISS**.

DISOBEDIENCE. Continued "disobedience" on the part of a pupil in school constitutes insubordination. 129 Ky. 35, 110 S. W. 346.

DISORDERLY CONDUCT. One who commits a breach of the peace, riot, rout or affray is necessarily guilty of "disorderly conduct." Conduct may be disorderly, and not be a breach of the peace. 108 Ky. 624, 57 S. W. 491.

DISORDERLY HOUSE. In Criminal Law. A house the inmates of which behave so badly as to become a nuisance to the neighborhood. It has a wide meaning, and includes bawdy houses, common gaming houses, and places of a like character; 1 Bish. Cr. L. § 1108; 2 Cra. 875; 120 Mass. 356. In order to constitute it such it is not necessary that there be acts violative of the peace of the neighborhood, or boisterous disturbance and open acts of lewdness; 71 Md. 275; 96 Ala. 1; but a single act of lewdness of a man and woman in a house, does not constitute the offence of keeping a house of prostitution; 75 Mich. 127.

The keeper of such house may be indicted for keeping a public nuisance; Hardr. 344; 1 Wheel. Cr. Cas. 290; 1 S. & R. 342; Bacon, Abr. Nuisances, A.; 4 Sharsw. Bla. Com. 167, 168, note; 83 N. Y. 587; 52 Ala. 377. The husband must be joined with the wife in an indictment to suppress a disorderly house; 1 Show. 146.

DISORDERLY PERSONS. A class of offenders described in the statutes which punish them. See 4 Bla. Com. 169.

DISPARAGEMENT. In Old English Law. An injury by union or comparison with some person or thing of inferior rank or excellence.

Marriage without *disparagement* was marriage to one of suitable rank and character. 2 Bla. Com. 70; Co. Litt. 82 b. The guardian in chivalry had the right of disposing of his infant ward in matrimony; and provided he tendered a marriage without *disparagement* or inequality, if the infant refused, he was obliged to pay a *valor maritagii* to the guardian.

Disparagare, to connect in an unequal marriage. Spelman, Gloss. *Disparagatio*, disparagement. Used in Magna Charta (9 Hen. III.), c. 6. *Disparagatio*, disparagement. Kelham. *Disparage*, to marry unequally. Used of a marriage proposed by a guardian between those of unequal rank and injurious to the ward.

DISPAUPER. In English Law. To deprive a person of the privilege of suing

in forma pauperis.

When a person has been admitted to sue *in forma pauperis*, and before the suit is ended it appears that the party has become the owner of a sufficient estate real, or personal, or has been guilty of some wrong, he may be *dispaupered*.

DISPENSATION. A relaxation of law for the benefit or advantage of an individual. In the United States, no power exists, except in the legislature, to dispense with law; and then it is not so much a dispensation as a change of the law.

DISPLACE. Used in shipping articles, and, when applied to an officer, meaning properly to disrate, not to discharge. 103 Mass. 68.

DISPONE. In Scotch Law. A technical word essential to the conveyance of heritable property, and for which no equivalent is accepted however clear may be the meaning of the party. Paterson, Comp.

DISPOSE. To alienate or direct the ownership of property, as, disposition by will. 42 N. Y. 79; see 40 N. H. 219; 101 U. S. 380. Used also of the determination of suits; 13 Wall. 664. Called a word of large extent; Freem. 177.

DISPOSITION. See **FINAL DISPOSITION**.

DISPOSSESSION. Ouster; a wrong that carries with it the amotion of possession. An act whereby the wrong-doer gets the actual occupation of the land or hereditament. It includes abatement, intrusion, disseisin, discontinuance, deforcement. 3 Bla. Com. 167.

DISPUTATIO FORI (Lat.). Argument in court. Du Cange.

DISPUTE. A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. 19 Pa. 494.

DISQUALIFY. To incapacitate, to disable, to divest or deprive of qualifications. 57 Cal. 606.

To disqualify means to deprive of the qualities or properties necessary for any purpose; to render unfit; to deprive of legal capacity, power, or right; as, a conviction of perjury "disqualifies" a man to be a witness. 9 A. & E. Ency. 542; 57 Cal. 604.

DIRATIONARE. In old English law, to prove; to deraign; to establish or make good a claim, charge or accusation. Also, according to Spelman, to disprove or refute. Burrill. See **DIRATIONARE**; **DERAIGN**.

DISSASINA. In old Scotch law, disseisin, dispossession. Burrill; Skene.

DISSECTION. The act of cutting into pieces an animal or vegetable for the purpose of ascertaining the structure and uses of its parts; anatomy; the act of separating into constituent parts for the purpose of critical examination. Webster.

DISSEISE. To deprive of seisin (*q. v.*); to turn or put out of possession wrongfully; to oust or dispossess of a freehold. Burrill. See **DISSEISIN**; **DISSEISEE**.

DISSEISEE. One who is wrongfully put out of possession of his lands; one who is disseised.

DISSEISIN. A privation of seisin. A usurpation of the right of seisin and possession, and an exercise of such powers and privileges of ownership as to keep out or displace him to whom these rightfully belong. 2 Washb. E. P. 288; Mitch. R. P. 259.

It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner from the seisin or estate in the land, and the commencement of a new estate in the wrong-doer. It may be by abatement, intrusion, discontinuance, or deforcement, as well as by disseisin properly so called. Every dispossession is not a disseisin. A disseisin, properly so called,

requires an ouster of the freehold. A disseisin at election is not a disseisin in fact; 2 Pres. Abstr. T. 379; but by admission only of the injured party, for the purpose of trying his right in a real action; Co. Litt. 277; 2 Me. 242; 4 N. H. 371; 5 Cow. 871; 5 Pet. 402; 6 Pick. 172.

Disseisin may be effected either in corporeal inheritances, or incorporeal. Disseisin of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold: as if a man enters, by force or fraud, into the house of another, and turns, or, at least, keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession or dispossession; 3 Bla. Com. 169, 170. See 6 Pick. 172; 6 Johns. 197; 2 Watts 23; 1 Vt. 155; 10 Pet. 414; 1 Dana 279; 11 Me. 408.

In the early law every disseisin was a breach of the peace; if perpetrated with violence it was a serious breach. The disseisor was amerced never less than the amount of the damage; if it were by force of arms he was sent to prison and fined. Besides he gave the sheriff an ox,—"the disseisin ox,"—or five shillings. If he disseised one who has already recovered possession from him by the assize, this was a still graver offence, for which he was imprisoned by a statute. The offender was a redisseisor; 2 Poll. & Maitl. Hist. of Eng. Law 45.

DISSEISITUS. A disseisee, or the party who is disseised, or put out of possession or seisin of the freehold. Burrill; Litt. 472.

DISSEISOR. One who puts another out of the possession of his lands wrongfully.

DISSENT. A disagreement to something which has been done. It is express or implied.

The law presumes that every person to whom a conveyance has been made has given his assent to it, because it is supposed to be for his benefit. To rebut the presumption, his dissent must be expressed. See 4 Mas. 206; 11 Wheat. 78; 1 Binn. 503; 12 Mass. 456; 3 Johns. Ch. 261; 35 Neb. 361; 91 Tenn. 147; 114 N. Y. 307; **ASSENT**.

In Ecclesiastical Law. A refusal to conform to the rites and ceremonies of the established church. 2 Burn, Eccl. Law 165, 220.

DISSETER. One who refuses to conform to the rites and ceremonies of the established churches; a non-conformist (*q. v.*). 2 Burn, Eccl. Law 165-220.

In English history, a separatist from the Church of England and the service and worship thereof. Protestant dissenter, one belonging to a Protestant sect, as distinguished from a papist, or from such as deny the Trinity. Jacob. See **NON-CONFORMIST**; **RECUSSANT**.

DISSENTIENTE. See **NEMINE DISSENTIENTE**; **NEMINE CONTRADICENTE**.

DISSOLUTION. In Contracts. The dissolution of a contract is the annulling its effects between the contracting parties.

The dissolution of a partnership is the putting an end to the partnership. Its dissolution does not affect contracts made between the partners and others; so that they are entitled to all their rights, and are liable on their obligations, as if the partnership had not been dissolved. See **PARTNERSHIP**.

Of Corporations. Dissolution of corporations takes place by act of legislature (but in America only by consent of the corporation, or where the power to dissolve has been reserved by the legislature); by the loss of all the members, or an integral part of them; by a surrender of the charter; by the expiration of the period for which it was chartered; by proceedings for the winding up of the company under the law; or by a forfeiture of the franchises, for abuse of its powers. The loss of members will not work a dissolution, so long as enough members remain to fill vacancies; 5 Ind. 77; 155 Mass. 183; nor does a failure to elect officers; 13

Pa. 183; 20 Conn. 447; 19 D. C. 575; 3 Watts 46. So of an eleemosynary corporation; 14 How. 268; nor does the resignation of all the officers of a corporation work a dissolution; 18 Ia. 469; but it is said that a municipal or charitable corporation may be dissolved by the loss of all of its members, although this mode of dissolution cannot take place in the case of business corporations which have a transferable joint stock, because the corporate shares, being personal property, must always belong to some person, and such person must of necessity be a member of the corporation; 5 Thomp. Corp. § 6652; 24 Pick. 29. And even where all the shares of stock pass into the hands of less than the prescribed number of stockholders, there is no dissolution, even though they may have passed into the hands of two members; 14 Pick. 63; or of a single person; 42 Ga. 148; and such person could carry on the corporate business; *id.*

Ordinarily, a corporation may by a majority vote surrender its franchises; 44 Pa. 435; 7 C. E. Green 404; 7 Gray 398; but such a surrender must be accepted by the state; 9 R. I. 590; excepting where the stockholders are liable for the debts; 7 Cold. 420. A corporation is not dissolved or its franchises forfeited by its insolvency and assignment of its assets for the benefit of its creditors, where the state brings no proceedings to have the charter forfeited, and there is no surrender thereof by act of the shareholders; 86 Tenn. 614; 11 Colo. 97; 35 Fed. Rep. 433.

A non-user of corporate powers does not of itself work a dissolution, even though it be for twenty years; 21 N. J. Eq. 463; but see 37 Vt. 324, where there had been no corporate acts performed for 23 years and it was held there was a dissolution. The question is one of fact and intent; 5 Thomp. Corp. § 6659. The fact that a corporation has ceased to do business and has made an assignment of all its property for the payment of its debts and for several years held no annual meetings or elected directors, does not work a dissolution to the extent of preventing its maintaining an action for a debt due it; *id.* § 6660. The sale of the property and franchises of a corporation in foreclosure proceedings does not, *ipso facto*, work a dissolution. It will pass the franchise of the company to operate or enjoy the particular property foreclosed, but not its primary franchise to be a corporation; 5 Thomp. Corp. § 6662. (But that the corporation is extinguished by such a sale, see 37 Mo. 131.) The insolvency of a corporation or the appointment of a receiver therefore does not work a dissolution; 24 Pick. 49.

By the statutory consolidation of two corporations, it would seem that both are dissolved, strictly speaking, unless the statute provides for the consolidation of one of the companies into the other. Provision is always made by such statutes that the indebtedness of either of the companies shall become the indebtedness of the consolidated company. See 5 Thomp. Corp. § 6671.

The forfeiture of a charter by misuser or nonuser is complete only upon a final adjudication thereof in a competent court, upon proper proceedings at the suit of the government which created the corporation, and in the courts of such government; Moraw. Priv. Corp. 959, 1015; the existence of the charter cannot be attacked collaterally, or by an individual; 7 Pick. 344; 4 G. & J. 1. But when the legislature has reserved the right to revoke a charter for abuse of its privileges or failure to perform a condition, it may enact the repeal at the proper time; 23 Pick. 334; 26 Pa. 287; and such repealing act will be held constitutional unless the company can show by plain and satisfactory evidence that the privileges granted under the charter were not misused or abused; *id.* The courts will not presume that the power of repeal has been improperly exercised; 5 Thomp. Corp. § 6579. Where the legislature reserves the unqualified right of repeal upon the happening of a certain condition, it is exclusively within its power to determine whether the condi-

tion has happened, and a previous judicial determination of that fact is not necessary; *id.*; 26 Pa. 287; 23 Pick. 334; 33 Minn. 377. And so where there is a right of repeal in the legislature in case the corporation misuses its franchises; 26 Pa. 287. Such misuse or abuse of corporate privileges consists in any positive act in violation of the charter and in derogation of public right wilfully done or caused to be done by those appointed to manage the general concerns of the corporation; *id.* Where a franchise is granted with a provision that if not exercised in a specified time it shall be void, upon the expiration of the time without the performance of the condition, the charter falls without any action on the part of the state to declare its forfeiture; 110 Pa. 391; 46 N. J. Eq. 118; 81 N. Y. 69. But other cases hold that the charter is not forfeited until action by the state either legislative or judicial; 79 Mo. 632; 16 Wall. 203; 73 Ill. 541. The former view is strongly maintained by Judge Thompson; see 5 Thomp. Corp. § 6586. If the charter or the statute under which it is granted names a definite period for the life of the corporation, the corporation is dissolved, *ipso facto*, upon the expiration of that period without any action either on the part of the state or of the members of the corporation; 76 Cal. 190; 5 Mo. App. 337. "The incapacity to revive or resuscitate the powers of a corporation may arise from three causes: 1. The absence of the necessary officers who are required to be present when the deficiency is supplied, or their incapacity or neglect to do some act which is requisite to the validity of the appointment; 2. The want of the necessary corporations who are required to unite in the appointment; 3. The want of the proper persons from whom the appointment is to be made." 5 Thomp. Corp. § 6658.

Upon a dissolution, the assets of all kinds are a trust fund for the payment of debts, and afterwards for distribution among the stockholders; 2 Kent 307; 13 Blatch. 134; 39 N. H. 435. The title of the land of an eleemosynary corporation reverts on its dissolution, to the original owner without any act on his part; 129 Ill. 403. Actions at law against a private corporation abate upon its dissolution; 71 Tex. 90; *contra*, 30 W. Va. 43; 11 Colo. 97. Dissolution puts an end to all existing contracts. It works a breach of the contract; Green's Brice, *Ultra Vires* 803. See 12 Am. Dec. 239; 44 La. Ann. 463; Boone, Corporations § 197; 9 Lawy. Rep. Ann. 33, note; *id.* 273.

Since the dissolution of a corporation, either by its own limitation or by the decree of a court of competent jurisdiction, puts an end to its legal existence, it can thereafter neither prosecute nor defend an action. Accordingly, in the absence of statutory reservations (which, however, generally exist), upon the dissolution of a corporation all actions pending against it abate; 8 Pet. 251; 21 Wall. 609; 68 Ill. 348; 31 Me. 57; 123 Mass. 32; 58 N. Y. 562; 71 Tex. 90; and if the suit has been commenced by attachment, the dissolution will destroy the attachment lien; 56 Conn. 468; 8 W. & S. 207; unless ripened into a judgment at the time of the dissolution, and this, whether the attachment is original or is sued out in aid of a pending action; 5 Thomp. Corp. § 6724.

Under the statutes providing for the keeping alive of actions which would otherwise abate on the dissolution of a corporation, it is not quite settled whether the same principles apply as those which apply to the survival of actions on the death of a natural person; but the weight of authority is in favor of the affirmative; 16 N. Y. Supp. 692; 81 Wis. 207.

In Practice. The act of rendering a legal proceeding null, or changing its character; as where an attachment is dissolved so far as it is a lien on property by entering bail or security to the action; or as injunctions are dissolved by the court.

DISSUADE. In Criminal Law. To turn from any action by advice or solicitation. Worc. Dict.

To dissuade a witness from giving evidence against a person indicted is an indictable offence at common law; Hawk. Pl. Cr. b. 1, c. 21, s. 15. The mere attempt to stir evidence is also criminal although the persuasion should not succeed, on the general principle that an incitement to commit a crime is in itself criminal; 1 Russ. Cr. 44; 2 East 5, 21; 6 *id.* 454; 2 Stra. 904; 2 Leach 925.

DISTANCE. The rule is that the distance between given points should be measured in a straight line; 5 E. & B. 92; 6 *id.* 350; 8 L. R. Exch. 32. But in a rule of court as to service the distance has been taken by the usual road; 7 Cow. 419.

DISTILLERY. A place or building where alcoholic liquors are distilled or manufactured. See Pet. C. C. 180; Act July 13, 1866, 14 Stat. L. 117; 45 N. Y. 499; 54 *id.* 85.

DISTRACTED PERSON. A term used in the statutes of Illinois, Rev. Laws, 1833, p. 332, and New Hampshire, Dig. Laws, 1830, p. 339, to express a state of insanity.

DISTRACTIO. In Civil Law. The sale of a pledge by a debtor. The appropriation of the property of a ward by a guardian. Calvinus, Lex.

DISTRAHERE. To withdraw; to sell. *Distrare controversias*, to diminish and settle quarrels; *distrare matrimonium*, to dissolve marriage; to divorce. Calvinus, Lex.

DISTRRAIN. To take as a pledge property of another, and keep the same until he performs his obligation or until the property is relieved by the sheriff. It was used to secure an appearance in court, payment of rent, performance of services, etc. 3 Bla. Com. 231; Fitzh. N. B. 32 (B) (C), 223; 3 Daly 455. See DISTRESS.

DISTRESS (Fr. *distraindre*, to draw away from; Lat. *districtio*). The taking of a personal chattel out of the possession of a wrong-doer into the custody of the party injured, to procure satisfaction for the wrong done. 8 Bla. Com. 6; 44 Barb. 488. It is generally resorted to for the purpose of enforcing the payment of rent, taxes, or other duties, as well as to exact compensation for such damages as result from the trespasses of cattle.

This remedy is of great antiquity, and is said by Spelman to have prevailed among the Gothic nations of Europe from the breaking up of the Roman Empire. But in a recent work the opinion is expressed that distress before judicial proceedings has been taken is not very old. 1 Pol. & Mail. Hist. Engl. Law 384. Distress was not a means whereby the distrainer could satisfy the debt due him; *ibid.* After distress the lord might not sell the goods; they were not in his possession, but were in *custodia legis*, and he must be ready to give them up if the tenant tendered arrears or offered pague and pledge that he would contest the claim in a court of law. The lord could not take what he liked best among the chattels that he found; 2 *id.* 574. The English statutes since the days of Magna Charta have, from time to time, extended and modified its features to meet the exigencies of the times. Our state legislatures have generally, and with some alterations, adopted the English provisions, recognizing the old remedy as a salutary and necessary one, equally conducive to the security of the landlord and to the welfare of society. As a means of collecting rent, however, it is becoming unpopular in the United States, as giving an undue advantage to landlords over other creditors in the collection of debts. See 2 Dall. 68; 2 Halst. 29; 1 Harr. & J. 8; 1 McCord 299; 1 Blackf. 469; 1 Bibb 607; 2 Leigh 370; 3 Dana 209.

In the New England states the law of attachment upon *mere process* has superseded the law of distress; 3 Pick. 105, 360; 4 Dane. Abt. 126. The state of New York has expressly abolished it by statute. The courts of North Carolina hold it to be inconsistent with the spirit of her laws and government, and declare that the common process of distress does not exist in that state; 2 McCord 89; Cam. & N. 22; to the same effect are the laws of Missouri, 3 Mo. 472. In Ohio, Tennessee, and Alabama there are no statutory provisions on the subject, except in the former state to secure to the landlord a share of the crops in preference to an execution creditor, and exist in the latter, confining the remedy to the city of Mobile; 6 Ala. 229. Mississippi has abolished it by statute; but property cannot be taken in execution on the premises unless a year's rent, if it be due, is first tendered to the landlord, who has also a lien on the growing crop; 50 Miss. 556; to the same effect are the statutes of Wisconsin; Wis. Laws, 1826, p. 77. In Colorado a landlord cannot distrain unless in pursuance of an express agreement; 11 Colo. 393.

To authorize a distress there must be a

fixed rent in money, produce or services; it may be by parol and if not certain it must be capable of being reduced to a certainty; Co. Litt. 96 a; 9 Wend. 323; 3 Pa. 31; 1 Bay 315; and hence it will not lie on an agreement to pay no rent, but make repairs of uncertain value; Add. Pa. 347; a distress for a rent of a certain quantity of grain, may name the value in case of tender of arrears or sale of the property; 13 S. & R. 52. See 3 W. & S. 531.

A distress can only be taken for rent in arrear, and not, therefore, until the day after it is due; unless by the terms of the lease it is made payable in advance; 4 Cow. 516; 3 Munf. 277; 183 Ill. 488. But no previous demand is necessary, except where the conditions of the lease require it; 83 Ga. 402. Nor will the right be extinguished either by an unsatisfied judgment for the rent or by taking a promissory note therefor, unless such note has been accepted in absolute payment of the rent; 5 Hill 651; 3 Pa. 490.

It may be taken for any kind of rent, the detention of which beyond the day of payment is injurious to him who is entitled to receive it.

At common law, the distrainer must have possessed a reversionary interest in the premises out of which the distress issued, unless he had expressly reserved a power to distrain when he parted with the reversion; 3 Cow. 633; 1 Term. 44; Co. Litt. 143 b. But the English statute of 4 Geo. II. c. 38, substantially abolished all distinctions between rents, and gave the remedy in all cases where rent is reserved upon a lease. The effect of the statute was to separate the right of distress from the reversion to which it had before been incident, and to place every species of rent upon the same footing as if the power of distress had been expressly reserved in each case.

A distress may be made by each one of several joint tenants for the whole rent or they may all join together; 4 Bingh. 562; 2 Bail & B. 465; by tenants in common, each for his separate share; 1 McCl. & Y. 107; Cro. Jac. 611; unless the rent be entire, as of a house, in which case they must all join; Co. Litt. 197 a; 5 Term 246; a husband as tenant by the curtesy for rent due to his wife, although due to her as executrix or administratrix; 2 Saund. 195; 1 Ld. Raym. 369; a widow after dower has been admeasured for her third of the rent; Co. Litt. 32 a; an heir at law, or devisee, for that which becomes due to them respectively, after the death of the ancestor, in respect to their reversionary estate; 5 Cow. 501; 1 Saund. 287; see 34 Ill. App. 373; and guardians, trustees, or agents who make leases in their own names, as well as the assignee of the reversion which is subject to a lease; 2 Hill 475; 5 C. & P. 379. Payment of rent is sufficient attornment to enable the party to whom the payment is made to make a distress; 28 Ill. App. 643.

Generally all goods found upon the premises, whether of tenant, under-tenant, or stranger, may be distrained for rent in arrear; Woodf. Landl. & T. 435; 13 Wend. 256; 1 Rawle 435; 7 H. & J. 129; 4 Rand. 334; 1 Bail. 497; 91 Pa. 349; Com. Dig. *Distress* (B 1). Thus, a gentleman's chariot in a coach-house of a livery-stable keeper was distrainable by the landlord of the livery-stable keeper; 3 Burr. 1498; cattle put on the tenant's land by consent of the owners of the beasts, are distrainable by the landlord immediately after for rent in arrear; 3 Bla. Com. 8; and furniture leased to a tenant, and used by him on the demised premises, is subject to the landlord's right of distress for rent; 134 Pa. 177. And the necessity of this rule is justified by the consideration that the rights of the landlord would be liable to be defeated by a great variety of frauds and collusions, if his remedy should be restricted to such goods only as he could prove to be the property of the tenant.

Goods of a person who has some interest in the land jointly with the distrainer, as those of a joint tenant, although found upon the land, cannot be distrained; nor goods of executors and administrators, or of the assignee of an insolvent regularly discharged according to law, in Pennsylvania, for more than one year's rent. Nor can the goods of a former tenant, rightfully on the

land, be distrained for another's rent, as emblements, or growing crops of a tenant at will quitting on notice, even after they are reaped, if they remain on the land for the purpose of husbandry; Willes 131; or in the hands of a vendee they cannot be distrained although the purchaser allow them to remain uncut after they have come to maturity; 2 Ball & B. 362; 5 J. B. Moo. 97. If a tenant seek to remove from the premises any portion of the crops before the rent is due, he is subject to distraint immediately; 84 Ga. 479.

As a distress is only of the property of the tenant, things wherein he can have no absolute property, as cats, dogs, rabbits, and animals *feræ nature*, cannot be distrained; yet deer, which are of a wild nature, kept in a private enclosure for sale or profit, may be distrained for rent; 3 Bla. Com. 7. There can be no distress of such things as cannot be restored to the owner in the same plight as when taken, as milk, fruit, and the like; 3 Bla. Com. 9; or things affixed or annexed to the freehold, as furnaces, windows, doors, and the like; Co. Litt. 47 b; or essentially part of the freehold although for a time removed therefrom, as a millstone removed to be picked; or an anvil fixed in a smith's shop; 6 Price 3; 1 Q. B. 895; 3 id. 961.

Goods are also privileged in cases where the proprietor is either compelled from necessity to place his goods upon the land, or where he does so for commercial purposes; 17 S. & R. 139; 4 Halst. 110; 1 Bay 102, 170; 2 McCord 39; 3 Ball & B. 75; 6 J. B. Moo. 243; 2 C. & P. 353. In the first case, the goods are exempt because the owner has no option: as goods of a traveller in an inn; 7 Hen. VII. M. 1, p. 1; 2 Keny. 439; Barnes 472; 1 W. Bla. 483; 8 Burr. 1408. In the other, the interests of the community require that commerce should be encouraged; and adventurers will not engage in speculations if the property embarked is to be made liable for the payment of debts they never contracted. Hence goods landed at a wharf, or deposited in a warehouse on storage; 17 S. & R. 138; 21 Me. 47; 23 Wend. 462; goods of a third person consigned to an agent to be sold on commission (and if the landlord knows that the goods are so owned and has them sold under distress, he is liable to the owner in trespass; 155 Pa. 582); a horse standing in a smith's shop to be shod, or in a common inn, or cloth at a tailor's house to be made into a coat, or corn sent to a mill to be ground; 3 Bla. Com. 8; Woodf. Landl. & T. 440; cannot be distrained; neither can goods of a boarder, for rent due by the keeper of a boarding-house; 5 Whart. 9; unless used by the tenant with the boarder's consent and without that of the landlord; 1 Hill, N. Y. 565.

At common law, goods delivered to a common carrier, or other person, to be conveyed for hire, or goods on the premises of an auctioneer, for the purpose of sale are privileged; 1 Cr. & M. 380.

Goods taken in execution cannot be distrained. The law in some states gives the landlord the right to claim payment out of the proceeds of an execution for rent not exceeding one year, and he is entitled to payment up to the day of seizure, though it be in the middle of a quarter; 5 Binn. 505; but he is not entitled to the day of sale; 5 Binn. 505. See 13 Johns. 1. The usual practice is to give notice to the sheriff that there is a certain sum due to the landlord as arrears of rent,—which notice ought to be given to the sheriff, or person who takes the goods in execution upon the premises; for the sheriff is not bound to find out whether rent is due, nor is he liable to an action unless there has been a demand of rent before the removal; Com. Dig. *Rent* (D 8); 11 Johns. 185. This notice can be given by the immediate landlord only. A ground-landlord is not entitled to his rent out of the goods of the under-tenant taken in execution; 2 Stra. 787. And where there are two executions, the landlord is not entitled to a year's rent on each. See 2 Stra. 1024. Goods distrained and replevied may be distrained by another landlord for subsequent rent; 2 Dall. 68. Where a tenant

makes an assignment in the usual form, for the benefit of creditors, the assigned property is no longer his in his own right, and it cannot be seized under a distress warrant for rent; 26 S. C. 383; 36 id. 75.

By statute in some states tools of a man's trade, some designated household furniture, school-books, and the like, are exempted from distress, execution, or sale. In Pennsylvania, property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school-books in use in the family, are exempted from distress for rent. Also sewing-machines in private families.

There are also goods conditionally privileged, as beasts of the plough, which are exempt if there be a sufficient distress besides on the land whence the rent issues; Co. Litt. 47 a; implements of trade, as a loom in actual use, where there is a sufficient distress besides; 4 Term 565; other things in actual use, as a horse whereon a person is riding, an axe in the hands of a person cutting wood, and the like; Co. Litt. 47 a.

At common law a distress could not be made after the expiration of the lease. This evil was corrected by statute in Pennsylvania in 1772. Similar legislative enactments exist in most of the other states. In Philadelphia, the landlord may, under certain circumstances, apportion his rent, and distrain before it becomes due.

A distress may be made either upon or off the land. It generally follows the rent, and is, consequently, confined to the land out of which it issues; Woodf. Landl. & T. 456. If two pieces of land, therefore, are let by two separate demises, although both be contained in one lease, a joint distress cannot be made for them; for this would be to make the rent of one issue out of the other; Rep. t. Hardw. 245; 2 Stra. 1040. But where lands lying in different counties are let together by one demise at one entire rent, and it does not appear that the lands are separate from each other, one distress may be made for the whole rent; 1 Ld. Raym. 55; 12 Mod. 76. And where rent is charged upon land which is afterwards held by several tenants, the grantee or landlord may distrain for the whole upon the land of any of them; because the whole rent is deemed to issue out of every part of the land; Rolle, Abr. 671. If there be a house on the land, the distress may be made in the house; if the outer door or window be open, a distress may be taken out of it; Rolle, Abr. 671. If an outer door be open, an inner door may be broken for the purpose of taking a distress, but not otherwise; Cas. t. Hard. 188. In levying a distress for rent entrance was obtained into the courtyard through a gate, and being there, the bailiff broke open the main door of the warehouse and distrained therein; the court held the distress illegal, for the reason that the door that was broken was the outer door; 68 Law T. 742. A distress was held lawful where a party climbed over the wall surrounding the yard of a house and entered the house by an open window; [1894] 1 Q. B. 119. Barges on a river, attached to the leased premises (a wharf) by ropes, cannot be distrained; 6 Bingh. 150.

By an act of 1772 in Pennsylvania copied from the act of 11 Geo. II. c. 19, where a tenant fraudulently removes his goods from the premises to prevent a distress, the landlord may distrain on them within 30 days after removal, but not on goods previously sold *bona fide* and for a valuable consideration to one not privy to the fraud. To bring a case within the act, the removal must take place after the rent becomes due, and must be secret, not made in open day; for such removal cannot be said to be clandestine within the meaning of the act; 12 S. & R. 217; 7 Bingh. 423; 1 Mood. & M. 535. This English statute has been re-enacted in many of the states, but the period during which the goods may be followed varies in different states. In Louisiana the landlord may follow goods removed from his premises for fifteen days after removal, provided they continue to be the property of the tenant; La. Civ. Code 2675;

Tayl. Landl. & T. § 598. It has been made a question whether goods are protected that were fraudulently removed on the night before the rent had become due; 4 Campb. 135. The goods of a stranger cannot be pursued; they can be distrained only while they are on the premises; 1 Dall. 440.

A distress for rent may be made either by the person to whom it is due, or, which is the preferable mode, by a constable or bailiff, or other officer properly authorized by him. If made by a constable or bailiff, he must be properly authorized to make it; for which purpose the landlord should give him a written authority, usually called a warrant of distress; but a subsequent assent and recognition given by the party for whose use the distress has been made is sufficient; Hamm. N. P. 382.

Being thus provided with the requisite authority to make a distress, he seizes the tenant's goods, or some of them in the name of the whole, and declares that he takes them as a distress for the sum expressed in the warrant to be due by the tenant to the landlord, and that he takes them by virtue of the said warrant; which warrant he ought, if required, to show; 1 Leon. 50. When making the distress, it ought to be made for the whole rent; but if goods cannot be found at the time sufficient to satisfy the whole, or the party mistake the value of the thing distrained, he may make a second distress; Bradb. Distr. 129, 130. It must be taken in the daytime after sunrise and before sunset; except for damage feasant, which may be in the night; Co. Litt. 142 a.

As soon as a distress is made an inventory of the goods should be made, and a copy of it delivered to the tenant, together with a notice of taking such distress, with the cause of taking it, and an opportunity thus afforded the owner to replevy or redeem the goods. This notice of taking a distress is not required by the statute to be in writing; and, therefore, parol or verbal notice may be given either to the tenant on the premises, or to the owner of the goods distrained; 12 Mod. 76. And although notice is directed by the act to specify the cause of taking, it is not material whether it accurately state the period of the rent's becoming due; Dougl. 279; or even whether the true cause of taking the goods be expressed therein; 7 Term 654. If the notice be not personally given, it should be left in writing at the tenant's house, or, according to the directions of the act, at the mansion-house, or other most notorious place on the premises charged with the rent distrained for.

The distrainer may leave or impound the distress on the premises for the five days mentioned in the act, but becomes a trespasser after that time; 2 Dall. 69. As in many cases it is desirable, for the sake of the tenant, that the goods should not be sold as soon as the law permits, it is usual for him to sign an agreement or consent to their remaining on the premises for a longer time, in the custody of the distrainer, or of a person by him appointed for that purpose. While in his possession, the distrainer cannot use or work cattle distrained, unless it be for the owner's benefit, as to milk a cow, or the like; 5 Dane, Abr. 34. Goods distrained for rent may be replevied by a claimant thereof before sale; 33 W. N. C. (Pa.) 62.

Before the goods are sold, they must be appraised by two reputable freeholders, who shall take an oath or affirmation, to be administered by the sheriff, undersheriff, or coroner, in the words mentioned in the act. The next requisite is to give six days' public notice of the time and place of sale of the things distrained; see 153 Pa. 376; after which, if they have not been replevied, they may be sold by the proper officer, who may apply the proceeds to the payment and satisfaction of the rent, and the expenses of the distress, appraisal, and sale; Woodf. Landl. & T. 1322. The overplus, if any, is to be paid to the tenant. A distrainer has always been held strictly accountable for any irregularity he might commit, although accidental,

as well as for the taking of anything more than was reasonably required to satisfy the demand; Bradb. Dist.; Gilbert, Rent.

See Law of Distress for Rent by R. T. Hunter, London.

DISTRESS INFINITE. In English Practice. A process commanding the sheriff to distrain a person from time to time, and continually afterwards, by taking his goods by way of pledge to enforce the performance of something due from the party distrained upon. In this case no distress can be immoderate, because, whatever its value may be, it cannot be sold, but is to be immediately restored on satisfaction being made; 3 Bla. Com. 251. It was the means anciently resorted to by a creditor to compel an appearance. See ATTACHMENT; ARREST.

DISTRIBUTEES. The persons who are entitled under the statute of distribution to the personal estate of one who has died intestate. 9 Ired. 279.

DISTRIBUTION. See DESCENT AND DISTRIBUTION.

DISTRICT. A certain portion of the country, separated from the rest for some special purpose.

The United States are divided into judicial districts, in each of which is established a district court; they are also divided into election districts, collection districts, etc.

It may be construed to mean territory; 97 Pa. 305; and in the revenue laws the words "district" and "port" are often used in the same sense; 3 Mas. 155.

DISTRICT ATTORNEYS OF THE UNITED STATES. Officers appointed in each judicial district, whose duty it is to prosecute, in such district, all delinquents, for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except in the supreme court, in the district in which the court shall be holden. Rev. Stat. § 767.

The district attorney must appear upon the record for the United States as plaintiffs, in order that the United States should be recognized as such on the record; 7 Blatch. 424; 3 Ben. 132; 4 Blatch. 418.

The officer who represents the state in criminal proceedings within a particular county is also, in some of the states, called district attorney.

As a prosecuting attorney he is a quasi judicial officer and stands indifferent between the accused and any private interest; 51 Mich. 422.

DISTRICT COURTS. See UNITED STATES COURTS and the articles on the various states.

DISTRICT OF COLUMBIA. A portion of the country, originally ten miles square, which was ceded to the United States by the states of Virginia and Maryland, over which the national government has exclusive jurisdiction.

Under the constitution, congress is authorized to "exercise exclusive jurisdiction in all cases whatsoever, over such district, not exceeding ten miles square, as may, by cession of particular states and the acceptance of congress, become the seat of government of the United States." In pursuance of this authority, the states of Maryland and Virginia ceded to the United States a small territory on the banks of the Potomac, and congress, by the act of July 16, 1790, accepted the same, for the permanent seat of the government of the United States.

By the act of July 11, 1846, congress retroceded the county of Alexandria, part of the District of Columbia, to the state of Virginia.

The seat of government was removed from Philadelphia to the district in December, 1800. As it exists at present, it constitutes but one county, called the county of Washington.

By act of Congress of Feb. 21, 1871, a territorial government was created for the district; 16 Stat. L. 419; which was not a mere municipality in its restricted sense, but was held to be placed upon the same footing with that of the states or territories within the limits of the act; 7 D. C. 166. This government was, however, abolished by act of June 20, 1874, U. S. Rev. Stat. § 1 Supp. 22; and a temporary government by commissioners was thereby created, which existed until by act of June 11, 1878, id. 173, provision was made for the continuance of the District "as a municipal corporation" and its control by the federal government through these commissioners, two of whom are appointed by the President and confirmed by the Senate, and the other is an engineer officer of the army to be detailed

for that service by the President. It is a municipal corporation having a right to sue and be sued, and is subject to the ordinary rules that govern the law of procedure between private persons. The sovereign power is lodged in the government of the United States, and not in the corporation of the District; 132 U. S. 1. Congress is its local legislature; 116 id. 404; and exercises over it full and entire jurisdiction both of a political and municipal nature; 147 id. 282, 300; and it may legislate with respect to people and property therein as may the legislature of a state over any of its subordinate municipalities; 97 id. 687, 680.

The District of Columbia and the territorial districts of the United States are not states within the meaning of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts; 3 Cra. 445; 1 Wheat. 91; R. M. T. Charit. 374. Kent says: "However extraordinary it might seem to be, that the courts of the United States, which were open to aliens, and to the citizens of every state, should be closed upon the inhabitants of those districts (territories and the District of Columbia), on the construction that they were not citizens of a state, yet as the court observed, this was a subject for legislative, and not for judicial consideration." 1 Com. 949. It might be suggested as a consideration not here adverted to, that the theory on which this right of suing in federal courts is based is possible prejudice to the rights of a citizen of another state or an alien in the state court. In the District of Columbia and territories this would not apply, as their courts are created by the federal government.

For the judiciary of the district, see UNITED STATES COURTS.

Relation to the United States. (1) The District of Columbia is not a State, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States; (2) It is not a State, within the meaning of Revised Statutes, sec. 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question; (3) It is a State, as that word is used in treaties with foreign powers, with respect to the ownership, disposition and inheritance of property. 182 U. S. 270. The same applies to territories (q. v.).

DISTRICT MESSENGER SERVICE. See DISTRICT TELEGRAPH COMPANIES.

DISTRICT TELEGRAPH COMPANIES. Companies that exist in most, if not all, of the large cities, whose business is principally, if not exclusively, to furnish messenger boys for the purpose of carrying parcels, messages, and doing other errands, when called upon at district stations of the company in the city; subject to the same duties and liabilities as ordinary telegraph companies, except in so far as both may be affected by the difference of the nature of their respective businesses in particular cases. Jones, Tel. & Tel. Cos. 2nd ed., 955. See TELEGRAPH.

DISTRICTIO. A distraint, or distress (q. v.). Cowel.

DISTRINGAS. A writ directed to the sheriff, commanding him to distrain a person of his goods and chattels to enforce a compliance with what is required of him.

It is used to compel an appearance where the party cannot be found, and a writ may be availed of to compel the appearance of a corporation aggregate. 4 Bouvier, Inst. n. 4191; Comyns, Dig. Process (D 7); Chitty, Pr.; Sellon, Pr.

A form of execution in the actions of detinue and assize of nuisance. Brooke, Abr. pl. 26; 1 Rawle 44.

DISTRINGAS JURATORES (Lat. that you distrain jurors). A writ commanding the sheriff to have the bodies of the jurors, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. 3 Bla. Com. 354. It issues at the same time with the *venire*, though in theory afterwards, founded on the supposed neglect of the juror to attend. 3 Steph. Com. 590.

DISTRINGAS NUPER VICE COMITEM (Lat. that you distrain the late sheriff). A writ to distrain the goods of a sheriff who is out of office, to compel him to bring in the body of a defendant, or to sell goods attached under a *fi. fa.*, which he ought to have done while in office, but has failed to do. 1 Tidd, Pr. 313.

DISTURBANCE. A wrong done to an incorporeal hereditament by hindering or disquieting the owner in the enjoyment

of it. 3 Bla. Com. 235; 1 S. & R. 296; 41 Me. 104. The remedy for a disturbance is an action on the case, or, in some instances in equity, by an injunction.

DISTURBANCE OF COMMON. Any act done by which the right of another to his common is incommenced or hindered. The remedy is by distress (where beasts are put on his common) or by an action on the case, provided the damages are large enough to admit of his laying an action with a *per quod*. Cro. Jac. 195; Co. Litt. 122; 3 Bla. Com. 237; 1 Saund. 546; 4 Term 71.

DISTURBANCE OF FRANCHISE. Any acts done whereby the owner of a franchise has his property damaged or the profits arising thereby diminished. The remedy for such disturbance is a special action on the case; Cro. Eliz. 558; 2 Saund. 113 b; 3 Sharsw. Bla. Com. 236; 28 N. H. 498.

Equity will grant an injunction against disturbance of a franchise in certain cases; 6 Paige 554; 12 Pet. 91; 8 G. & J. 479.

DISTURBANCE OF PATRONAGE. The hindrance or obstruction of the patron to present his clerk to a benefice. 3 Bla. Com. 242. The principal remedy was a writ of right of advowson; and there were also writs of *darrein presentment* and of *quare impedit*. Co. 2d Inst. 355; Fitzh. N. B. 81.

DISTURBANCE OF PUBLIC WORSHIP. The interference with the good order of religious assemblies has been described as disturbance, and in some of the United States, statutes have been passed to meet the offence; 1 Bish. Crim. L. 542; 28 Ind. 364; 34 N. Y. 141; 1 Ala. Sel. Cas. 61; 7 Humph. 11; 1 W. & S. 548; 90 Ga. 459; 51 Mo. App. 293; 83 Ala. 68; 67 Miss. 358.

It is not necessary to constitute the offence that the congregation shall be actually engaged in acts of religious worship at the time of the disturbance, but it is sufficient if they are assembled for the purpose of worship; 78 N. C. 443; 68 Ind. 264.

To support a conviction for disturbing a congregation assembled for public worship, the evidence must show a wilful disturbance; 19 S. W. Rep. (Tex.) 605; 1 Gra. 476; 5 Tex. App. 470; 53 Ala. 898; 68 Ind. 264; 82 N. C. 576.

A Christmas festival is not a religious assembly; 4 Lea 199; nor is a church business meeting; 11 Tex. App. 318. A Sunday school is not divine service; 73 Pa. 39.

DISTURBANCE OF TENURE. Breaking the connection which subsists between lord and tenant. 3 Bla. Com. 242; 2 Steph. Com. 518.

DISTURBANCE OF WAYS. This happens where a person who hath a right of way over another's ground by grant or prescription is obstructed by enclosures or other obstacles, or by ploughing across it, by which means he cannot enjoy his right of way, or at least in so commodious a manner as he might have done; 3 Bla. Com. 242; 5 Gray 409; 7 Md. 352; 23 Pa. 348; 29 *id.* 22.

DISTURBING. See ALARMING.

DITCH. The words "ditch" and "drain" have no technical or exact meaning. They both may mean a hollow place in the ground, natural or artificial, where water is collected or passes off. 5 Gray 64.

DITTAY. In Scotch Law. A technical term in civil law, signifying the matter of charge or ground of indictment against a person accused of crime. *Taking up dittay* is obtaining informations and presentments of crime in order to trial. Skene, *de verb. sign.*, Bell, Dict.

DIVERSION. A turning aside or altering the natural course of a thing. The term is chiefly applied to the unauthorized changing the course of a water-course to the prejudice of a lower proprietor. Rap. & Lawr. L. Dict. See 17 Conn. 299; 6 Price 1.

One who has a natural gas well on his place may explode nitroglycerine therein for the purpose of increasing the flow, though it has the effect of drawing the gas from the land of another; 131 Ind. 599.

The owner of land through which flows a stream of water, may recover damages from one who diverts the water, for any actual injury suffered therefrom in the enjoyment of his land; 145 Pa. 488; 84 Wis. 438; 66 Hun 632. The fact that one diverts water maliciously is of no importance in determining whether a legal right of plaintiff has been violated; 134 N. Y. 885. See WATER-COURSE; GAS; OIL.

DIVERSITY OF PERSON. The plea of a prisoner in bar of execution that he is not the person convicted. 4 Steph. Com. 368; Moz. & W. Law Dict.

DIVERSO INTUITU. In a different view or point of view; with a different view, design, or purpose; by a different course or process. 1 W. Bla. 89; 9 East 311; 1 Pet. 500; Gall. 318; 4 Kent, Com. 211 (b).

DIVEST. See DEVEST.

DIVIDE. In Real Estate Law. When used by two contracting parties who agreed to "divide" the commissions, divide means severance or partition into equal parts. 43 Colo. 131, cited by Walker, Real Est. Agen., 889.

In a Will. The words "to divide" have been construed to be effective words to give an immediate interest in the estate. 110 Ky. 890, 62 S. W. 1033.

DIVIDED. See EQUALLY DIVIDED.

DIVIDEND. A portion of the principal or profits divided among several owners of a thing. 13 Allen 400; 12 N. Y. 325; 8 R. I. 310; 1 Dev. & B. Eq. 545; 23 Wall. 38.

The term is usually applied to the division of the profits arising out of the business of a corporation or to the division among the creditors of the effects of an insolvent estate.

As confined to corporations it is "that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively." 2 Thomp. Corp. § 2126.

In the commonest use of the term dividends are a sum which a corporation sets apart from its profits to be divided among its members. 31 Mich. 76; which, for the purpose of declaring a dividend, consist of the excess of its cash and other property on hand over its liabilities; 79 Ia. 678.

Dividends cannot usually be paid out of the capital but only from the profits. The former is a trust fund for the stockholders; 2 Thomp. Corp. § 2152; which each of them is entitled to have preserved intact; 25 Mo. App. 439; but this principle does not apply when the capital from its nature is liable to waste and depreciation, as in case of companies to work a mine or a patent; 41 Ch. Div. 1.

Where dividends are required to be declared out of profits merely of a railroad company, the rule for ascertaining what the profits are is to exclude from consideration all debts other than what are commonly understood by the term funded debts, but to treat as deductions debts incurred and due for engines, rails, and the like, which should and would have been paid at the time if the funds had been in hand and are necessary deductions from the property; 29 Beav. 272; and as to what are net earnings in the sense of surplus profits and therefore susceptible of definition, see 99 U. S. 420; 99 Am. Dec. 762, note; 90 Cal. 181.

In England it was held that dividends must be payable in money; L. R. 14 Eq. 517; and it has been said there that the whole of the profits of a corporation must be divided periodically; per Giffard, L. J., in L. R. 4 Ch. 494; but this is perhaps too broadly stated; Green's Brice, *Ultra Vires* 201. Neither of the above rules obtains in America: here stock and scrip dividends are very common; 102 Mass. 542; 115 *id.*

461; 52 N. H. 72; 51 Barb. 378; 8 R. I. 427; 6 Gill 363; Green's Brice, *Ultra Vires* 200; Moraw. Priv. Corp. 448; and in the absence of statutory restriction are lawful; 98 N. Y. 162; 115 Mass. 471; 5 Fed. Rep. 737; 74 Pa. 83; and bonds may be issued to the stockholders of a railroad corporation in place of cash as the dividends representing earnings appropriated to the construction account, and these dividends having been duly earned may be declared for four years at once instead of each year; 47 Hun 550.

The declaration of dividends is within the implied scope of the authority of the directors, and unless controlled by the action of the corporation itself they have authority, at their sole discretion, to declare dividends and to fix the time and place of payment within the limits of reason and good faith with the stockholders; 45 Barb. 510; 6 La. Ann. 745; 99 U. S. 420; 99 Mass. 101; 40 N. J. Eq. 114; 90 Cal. 131; 98 N. Y. 162; and as to time and place; 29 N. J. L. 32. See 77 Me. 445; 119 U. S. 296. And generally courts will not interfere in behalf of a common stockholder to compel the declaration of a dividend except in case of fraud or abuse of discretion; 51 Barb. 378; 33 Conn. 446; 29 Ala. 503; 4 Abb. Pr. 107; 33 Mich. 63; 81 A. & E. Corp. Cas. 349; nor will equity restrain the declaration of a dividend where the propriety of declaring one is fairly within the discretion of the directors; 41 Ch. Div. 1. Dividends may be applied by the corporation to debts due by the stockholder where the right of set-off would exist with respect to other creditors; 3 Sto. 411; but this right exists only where the dividend has been declared and therefore a stockholder cannot refuse to pay interest due to the corporation in anticipation that a dividend will be declared; 1 Clarke, Ch. 351. It has been held that unpaid dividends are assets of the corporation available for creditors in case of its insolvency; 44 Ala. 305; but this view is disapproved and declared unsound upon good reasons; 2 Thomp. Corp. § 2134. Dividends improperly declared may be recalled; *id.* § 2135; and even if paid, it has been held that they may be reclaimed; 17 B. Mon. 412; but this decision is doubted; 2 Thomp. Corp. § 2135; although approved in a case which did not require the court to go so far but only to hold that the dividend, not having been paid, was not collectible; 25 Mo. App. 439. There can be no discrimination among stockholders of the same class in respect to dividends, but if one stockholder is discriminated against he cannot recover his share ratably from the others, until at least he has established his right as a creditor of the company and pursued his remedy against it; 88 N. Y. 40.

A stockholder cannot recover the profits made by a corporation until a dividend has been declared; 99 Mass. 101; 57 N. Y. 196; 31 Mich. 78; 83 Pa. 269; 57 Me. 143; 112 N. Y. 1; but after a dividend has been declared, and a demand made therefor by a stockholder, he may sue in assumpsit for the amount due him; Chase, Dec. 167; 57 N. Y. 196; 49 Pa. 270; and a stockholder has been allowed to follow the amount of his dividend into the hands of the receiver of the company; 14 Hun 8; 42 Conn. 17; and the resolution declaring the dividend is an admission of indebtedness in legal money; 24 N. Y. 548; and it is no defence to show that the earnings were received in other property; *id.* Mandamus will not lie to compel the payment of dividends declared by a private corporation; 41 Mich. 166.

Dividends must be so declared as to give each stockholder his proportional share of profits; 45 Barb. 510; 57 N. Y. 196; 13 Ill. 516; L. R. 3 Ch. 263; 3 Brewst. 366; and if one person is excepted, he may sue for his dividends, for the reason that such exception is void; 21 S. W. Rep. (Mo.) 508. They can properly be declared only out of profits actually earned; and when improperly declared and paid, they may be recovered back; 71 N. Y. 9; 15 How. 304.

When the fact that a dividend has been voted by the directors is not made public or communicated to the stockholders, and no

fund is set apart for payment, the vote may be rescinded; 158 Mass. 84.

It has been said that cash dividends are to be regarded as income, and stock dividends as capital; 115 Mass. 461; 102 id. 542; L. R. 5 Eq. 238; 1 McCl. 527; other cases hold that all dividends from earnings or profits are income and go to the life tenant; 18 Barb. 646; 30 id. 638; 4 C. E. Green 117. See 52 N. H. 72; also 24 Am. Rep. 169, n.; same note in substance in 18 Alb. L. J. 264. It is now uniformly held that cash dividends, extra dividends, or bonuses declared from earnings of a corporation are income; A. & E. Encyc.; 15 Sim. 473; [1887] L. R. 12 App. Cas. 385; 10 Lea 595; 88 Pa. 264; 99 Mass. 101; 104 N. Y. 618.

Dividends on the stock of a corporation whose only property consists of land, which dividends are paid from the proceeds of sales of the land, or from interest on the deferred payments on sales, are all income; 78 Hun 121. As between a life tenant and remainderman, a dividend representing profits is to be considered as income, though permanent improvements to an equal amount had previously been made and it is just sufficient to pay for a voted increase in the capital stock, which the stockholders might subscribe to; 152 Mass. 58. See 1 McLean 527.

In 28 Pa. 368, where accumulated profits were divided among the stockholders proportionally, in the form of full paid stock, the stock was considered to be income; in 83 Pa. 264 (s. c. 24 Am. Rep. 164), the capital stock was increased and the option to subscribe at par given to the stockholders; the original stock immediately fell in value by about the market value of the option; a trustee of shares sold his option on a part of his shares, and used the proceeds to subscribe for other shares; these latter were considered to be capital. The court based its estimate on the market value of the stock at the time of the transaction. In 64 Pa. 256, under peculiar circumstances the proceeds of the sale of a right to subscribe for additional stock were considered income. Extra dividends and bonuses declared from earnings are considered income; 15 Sim. 473; 31 Beav. 280; 2 Edw. Ch. 231; 6 Allen 174. And this is the case though the profits were earned before the purchase of the stock; 31 Beav. 280. The enhanced price for which stocks sell by reason of profits earned but not divided belongs to the corpus of the estate; 32 L. J. Ch. 627. See 36 Cent. Law J. 452; Thompson, Corporations, tit. Dividend; Stock.

In another sense, according to some old authorities, dividend signifies one part of an indenture. See CASH DIVIDEND.

Tontine Dividend. See INSURANCE.

DIVIDEND ADDITIONS. "Dividend additions" means paid up insurance to the original policy, and originating in the practice of issuing and appending to the original policy, a policy payable at death for such an amount as the unused part of the dividend apportioned to the original policy would purchase, at a single premium. 151 Ky. 609, 152, S. W. 780.

DIVIDEND STOCK. See STOCK.

DIVINE RIGHT OF KINGS. The theory of the Divine Right of Kings in its completest form involves the following propositions:

1. *Monarchy is a divinely ordained institution.*
2. *Hereditary right is indefeasible.* The succession to monarchy is regulated by the law of primogeniture. The right acquired by birth cannot be forfeited through any acts of usurpation, of however long continuance, by any incapacity in the heir, or by any act of deposition. So long as the heir lives, he is king by hereditary right, even though the usurping dynasty has reigned for a thousand years.

3. *Kings are accountable to God alone.* Monarchy is pure, the sovereignty being entirely vested in the king, whose power is incapable of legal limitation. All law is a mere accession to his will, and all constitu-

tional forms and assemblies exist entirely at his pleasure. He cannot limit or divide or alienate the sovereignty, so as in any way to prejudice the right of his successor to its complete exercise.

4. *Non-resistance and passive obedience are enjoined by God.* Under any circumstances resistance to a king is a sin, and insures damnation. Whenever the king issues a command directly contrary to God's law, God is to be obeyed rather than the man, but the example of the primitive Christians is to be followed and all penalties attached to the breach of the law are to be patiently endured. Figgis, Divine Right of Kings, p. 5 et seq.

DIVINE SERVICE. The name of a feudal tenure, by which the tenants were obliged to do some special divine services in certain, as to sing so many masses, etc. 2 Bla. Com. 102; Mozl. & W. Dict.

In its modern use the term does not include Sunday schools; 73 Pa. 89.

DIVISA. In Old English. A device, award, or decree; also a devise; bounds or limits of division of a parish or farm. Also a court held on the boundary, in order to settle disputes of the tenants. Wharton.

DIVISIBLE. That which is susceptible of being divided.

A contract cannot, in general, be divided in such a manner that an action may be brought, or a right accrue, on a part of it; 2 Pa. 454. But some contracts are susceptible of division: as, when a reversioner sells a part of the reversion to one man and a part to another, each shall have an action for his share of the rent which may accrue on a contract to pay a particular rent to the reversioner; 3 Whart. 404. See APPORTIONMENT. But when it is to do several things at several times, an action will lie upon every default; 15 Pick. 409. See 1 Me. 316; 6 Mass. 344.

DIVISION. In English Law. A particular and ascertained part of a county. In Lincolnshire division means what riding does in Yorkshire. See SCHISM.

DIVISION OF JOINT RATE. See THROUGH ROUTE.

DIVISION OF OPINION. Disagreement among those called upon to decide a matter.

When, in a company or society, the parties having a right to vote are so divided that there is not a plurality of the whole in favor of any particular proposition, or when the voters are equally divided, it is said there is division of opinion. The term is especially applied to a disagreement among the judges of a court such that no decision can be rendered upon the matter referred to them.

When the judges of a court are divided into three classes, each holding a different opinion, that class which has the greatest number shall give the judgment: for example, on a *habeas corpus*, when a court is composed of four judges, and one is for remanding the prisoner, another is for discharging him on his own recognizance, and the two others are for discharging him absolutely, the judgment will be that he be discharged; *Rudyard's Case*; Bacon, Abr. *Habeas Corpus* (B 10), *Court*, 5. See UNITED STATES COURTS. On the trial of an action at law, when the judges of the circuit court of the United States are opposed in opinion on a material question of law, the opinion of the presiding judge prevails; U. S. Rev. Stat. § 650; but in any such case the judgment rendered conformably thereto might, without regard to its amount, be reviewed on a writ of error, upon a certificate stating such question; 100 U. S. 153. The power of the supreme court to review a case on a division of opinion in a circuit court, under U. S. Rev. Stat. §§ 651 and 697, is taken away by the act of March 3, 1891, creating the circuit courts of appeals, which impliedly repeals said sections; 163 U. S. 132; U. S. v. Hewecker, Oct. 28, 1896. See 151 U. S. 577.

DIVISUM IMPERIUM. A divided jurisdiction. Applied *e. g.* to the jurisdic-

tion of courts of common law and equity over the same subject. 1 Kent 386; 4 Steph. Com. 9.

DIVORCE. The dissolution or partial suspension, by law, of the marriage relation.

The dissolution is termed divorce from the bond of matrimony, or, in the Latin form of the expression, a *vinculo matrimonii*; the suspension, divorce from bed and board, a *mensa et thoro*. The former divorce puts an end to the marriage; the latter leaves it in full force. The term divorce is sometimes also applied to a sentence of nullity, which establishes that a supposed or pretended marriage either never existed at all, or at least was voidable at the election of one or both of the parties.

The more correct modern usage, however, confines the signification of divorce to the dissolution of a *valid* marriage. What has been known as a divorce *a mensa et thoro* may more properly be termed a legal separation. So also a sentence or decree which renders a marriage void *ab initio*, and bastardizes the issue, should be distinguished from one which is entirely prospective in its operation; and for that purpose the former may be termed a sentence of nullity. The present article will accordingly be confined to divorce in the strict acceptance of the term. For the other branches of the subject, see SEPARATION A MENSA ET THORO; NULLITY OF MARRIAGE.

Marriage, being a legal relation, and not (as sometimes supposed) a mere contract, can only be dissolved by legal authority.

The relation originates in the consent of the parties, but, once entered into, it must continue until the death of either husband or wife, unless sooner put an end to by the sovereign power. The Supreme Court of the United States, in 125 U. S. 210, say that whilst marriage is often termed by text writers and in decisions of courts a civil contract, it is something more. When the contract to marry is executed by the marriage, a relation between the parties is created which cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties, but not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. The supreme court then approves the views laid down in 51 Me. 483, where it is said that when the contracting parties have entered into the marriage state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common; they are of law, not of contract. It was of contract that the relation should be established, but being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign as evidenced by the law. They can neither be modified nor changed by any agreement of the parties. It is a relation for life and the parties cannot terminate it at any shorter period by virtue of any contract they may make. "Marriage has been said to be something more than a mere contract, religious or civil; to be an institution"; L. R. 1 P. & D. 130. In England, until late years, no authority existed in any of the judicial courts to grant a divorce in the strict sense of the term. The subject of marriage and divorce generally belonged exclusively to the various ecclesiastical courts; and they were in the constant habit of granting what were termed divorces *a mensa et thoro*, for various causes, and of pronouncing sentences of nullity; but they had no power to dissolve a marriage, valid and binding in its origin, for causes arising subsequent to its solemnization. For that purpose recourse must be had to parliament; 2 Burn, Eccl. Law 202; Macq. Parl. Pr. 470. But by the statute of 20 & 21 Vict. (1857) c. 85, entitled "An act to amend the law relating to divorce and matrimonial causes in England," a new court was created, to be called "The Court for Divorce and Matrimonial Causes," upon which was conferred exclusively all jurisdiction over matrimonial matters then vested in the various ecclesiastical courts, and also the jurisdiction theretofore exercised by parliament in granting divorces. At present divorce causes are heard, in the first instance, in the "Probate and Divorce Division of the High Court of Justice," whence

an appeal lies to the "Court of Appeal."

In this country the usage has been various. Formerly it was common for the various state legislatures, like the English parliament, to grant divorces by special act. Latterly, however, this practice is now much less common. In many states, also, it has been expressly prohibited by recent state constitutions; 1 Bish. Mar. & D. § 1471; Lloyd, Div. 12, 13. Such a statute is constitutional and it does not offend against the constitutional provision which forbids laws impairing the obligation of contracts, even though there was no valid ground for divorce and the wife was not notified; 125 U. S. 190, where the husband was a resident of the territory. See also 90 Wis. 272. Generally, at the present time, the jurisdiction to grant divorces is conferred by statute upon courts of equity, or courts possessing equity powers, to be exercised in accordance with the general principles of equity practice, subject to such modifications as the statute may direct. The practice of the English ecclesiastical courts, which is also the foundation of the practice of the new court for divorce and matrimonial causes in England, has never been adopted to any considerable extent in this country; but it is said that in some jurisdictions the principles and practice of the ecclesiastical courts are followed so far as they are applicable to our altered conditions and in accord with the spirit of our laws: 2 Bish. Mar. & Div. 460. See 35 Vt. 365; 33 Md. 401.

Numerous and difficult questions are constantly arising in regard to the validity in one state of divorces granted by the courts or legislature of another state. The subject is fully and ably treated in 2 Bish. Mar. Div. and Sep. § 128. The learned author there states the following propositions, which he elaborates with great care:—*first*, the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual *bona fide* domicile within its territory; *secondly*, to entitle the court to take jurisdiction, it is sufficient for one of the parties to be domiciled in the country; both need not be, neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such personal service cannot be made, but there should be reasonable constructive notice, at least; *thirdly*, the place where the offence was committed, whether in the country in which the suit is brought or a foreign country, is immaterial; *fourthly*, the domicile of the parties at the time of the offence committed is of no consequence, the jurisdiction depending on their domicile when the proceeding is instituted and the judgment is rendered; *fifthly*, it is immaterial to this question of jurisdiction in what country or under what system of divorce laws the marriage was celebrated; *sixthly*, without a citation within the reach of process, or an appearance, the jurisdiction extends only to the status and what depends directly thereon, and not to collateral rights.

It should be observed, however, that the fourth proposition is not sustained by authority in Pennsylvania and New Hampshire, it being held in those states that the tribunal of the country alone where the parties were domiciled when the *delictum* occurred have jurisdiction to grant a divorce; 7 Watts 849; 8 W. & S. 251; 6 Pa. 449; 34 N. H. 518, and cases there cited; 35 N. H. 474; 64 N. H. 523. And for the law of Louisiana, see 9 La. Ann. 317. In Pennsylvania, the rule has been changed by statute of 26th April, 1850, § 6. See 30 Pa. 412.

The doctrine of the first proposition is said not to have been thoroughly established in England; 2 Bish. Mar. D. & Sep. § 43; but it is fully established in America; 13 Bush 318; 56 Ind. 263; 25 Minn. 29; 13 Hun 414; 1 Utah 112; 45 La. Ann. 1140; 1 Tex. Civ. App. 315; 120 N. Y. 485; 135 Mass. 83; 102 N. C. 491; 80 Pa. 501. But see *contra*, 30 Pa. 412; 135 *id.* 522. Mr. Bishop maintains the second proposition as fully supported on principle and authority; see especially 4 R. I. 87; 57 Miss. 200; 28 Ala. 12; 35 La. 238; 9 Wall. 108; 95 U. S. 714; 19 D. C. 431; but see 76 N. Y. 78; Story, Confli.

Laws, Redf. ed.; 3 Am. L. Reg. N. S. 193. As to the third proposition, which is said by the same author to be universal, see 29 Ala. 719; 8 N. H. 21; 57 Barb. 305; 18 Johns. 192. The fifth proposition is universally recognized; see 7 Watts 849; 14 Pick. 181; 28 Ala. 12; 31 Ga. 223. See, however, 2 Cl. & F. 568.

When both husband and wife are domiciled in the state where the divorce is granted, the decree of divorce is without doubt valid everywhere; 89 N. H. 88; 9 Me. 140; 14 Mass. 227; 56 Md. 128; 72 N. Y. 237; 8 Wis. 664; 110 U. S. 701; 111 *id.* 524; 104 Ill. 35. See L. R. 6 P. D. 85.

It is contended by an able writer that, by force of the constitution, whenever a state court has jurisdiction over a cause in divorce, its sentence has the same effect in every other state which it has there; 2 Bish. Mar. Div. & Sep. §§ 153-158, 185. See Whart. Confli. of L. § 237.

If the court making the decree had jurisdiction, it will be held conclusive in other states; 99 Cal. 374; 40 Hun 611; 80 Ky. 353; 98 Mass. 158; and jurisdiction will be presumed; 155 Ill. 158; unless want of it appears upon the record; 30 Ill. App. 159; 80 N. Y. 1; 27 Minn. 263; or it may be shown as against the record; 52 Mich. 117; 154 Mass. 290. One party must be domiciled in the state; 125 Ind. 163; 78 Me. 187; 95 Minn. 29; 25 Mich. 247; 37 Ohio St. 317. See 3 Hagg. Eccl. 639.

There is much difference of opinion as to the extra-territorial effect of constructive service by publication as between states. If both parties are domiciled within the state the decree is of force in other states; 11 Allen 196; 115 Mass. 438; 72 N. Y. 217; but if only one, the decree determines his or her status; 95 U. S. 714, 734; 24 Wis. 372; 154 Mass. 290.

The view cited from Bishop concerning the extra-territorial operation of the decree under the constitution is held in 9 Me. 140; 110 Mo. 233; 29 Pac. Rep. (Kan.) 1071; 91 Ala. 591; the contrary view is taken in 86 Mich. 333; 56 Wis. 195; 42 N. J. Eq. 152; 50 Ohio St. 726; 12 Pa. Co. Ct. 334; [1893] Prob. 89. In New York it was held in an action for divorce by the wife, where the husband removed to Minnesota and there secured a divorce, the summons and complaint therein having been personally delivered to the plaintiff, but she not appearing at the trial, that the decree of the Minnesota court did not affect the status of the plaintiff in the state of New York; 130 N. Y. 193; and to the same effect are 101 *id.* 23; 76 *id.* 78. Referring to this line of decisions, Pryor, J., said: "To this conclusion I am compelled; but I am not forbidden to say that my reason revolts against it." 2 Misc. 549; and the New York court of appeals held, that after a defendant had gone into another state and filed an answer, he was bound by the effect given to it by the statutes of that state; 103 N. Y. 415.

In England the courts have jurisdiction in case the parties are domiciled there at the commencement of the proceedings, and this is not affected by the residence of the parties, their allegiance, their domicile at the time of the marriage, the place of the marriage, or the place of the offence; Dicey, Confli. Laws 269; and where the respondent has submitted to the jurisdiction of the court; *id.* 276. See DOMICIL.

In several states divorces are by statute inoperative when a person goes out of the state and obtains elsewhere a divorce for a cause not valid in the state from which he goes. And in Massachusetts the courts have held invalid decrees, for causes not cognizable in that state, granted in another state, for a divorce when the party went there to procure it; 122 Mass. 156; or to annul a marriage; 157 *id.* 42; but where it was not shown that the party went to the other state for that purpose and the wife had executed a release to the husband, she was not permitted to impeach the decree; 129 Mass. 1; and so where an appearance was entered in the other state; 55 Cal. 384; or where there has been obtained a *bona fide* domicile elsewhere; 76 Me. 535.

The supreme court of the United States

has no jurisdiction to re-examine the judgment of a state court, recognizing as valid the decree of a foreign court annulling a marriage; 107 U. S. 819. See 16 Am. L. Reg. 65, 193; also Whart. Confli. Laws.

It was never the practice of the English parliament to grant a divorce for any other cause than adultery; and it was the general rule to grant it for simple adultery only when committed by the wife, and upon the application of the husband. To entitle the wife, other circumstances must ordinarily concur, simple adultery committed by the husband not being sufficient; Macq. Parl. Pr. 473. The English statute of 20 & 21 Vict. c. 85, before referred to, prescribes substantially the same rule,—it being provided, § 27, that the husband may apply to have his marriage dissolved "on the ground that his wife has, since the celebration thereof, been guilty of adultery," and the wife, "on the ground that, since the celebration thereof, her husband has been guilty of incestuous bigamy, or of bigamy with adultery, or of rape, or of sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

In this country the question depends upon the statutes of the several states, the provisions of which are far from uniform. In some of the states, also, the matter is left wholly or in part to the discretion of the court. See Bish. Mar. D. & Sep. 16 Or. 163. For more specific information, recourse must be had to the statutes of the several states.

Some of the more important grounds for divorce are: *desertion*; for a statutory period; 89 Ga. 471; 44 Ill. App. 357; 65 Vt. 623; (see DESERTION); *abandonment*; 45 La. Ann. 664; *adultery*; 37 Ill. App. 219; 48 N. J. Eq. 532; *cruelty*; 91 Mich. 279; 84 Ia. 221; 81 Conn. 233; 69 Law T. 152; 76 Ga. 319; 83 Va. 806; *habitual drunkenness*; 22 Or. 329; 45 La. Ann. 1864; *conviction of crime*, in most states; *incurable insanity*, in some states; *failure to support*; and *impotence, relationship, incapacity* to enter into the contract, *fraud, duress*, etc.

Cruelty usually means the infliction, or threatened infliction, of bodily harm, by personal violence, actual or threatened, or by words or conduct causing mental suffering, and thereby injuring, or tending to injure, the health. In some states falsely charging the wife with adultery is sufficient. In a few states bodily injury is not necessary; Tiffany, Dom. Rel. 174. Charges by a husband of beating and bruising by his wife, with expressions of a wish that he were dead and suggestions of poisoning him, are "such inhuman treatment as to endanger life;" 10 Ia. 133. So any course of conduct which would have the effect of impairing health would be legal cruelty; 53 Ia. 511; 84 Ia. 221. See CUELTY.

Where the wife resides in the same house, but wilfully occupies separate apartments from the husband and refuses to recognize him or to eat or sleep with him for a long period, she was held to have deserted her husband; 89 Ga. 471; but a mere refusal to have sexual intercourse with the husband is not desertion; 138 Ill. 436; 39 Minn. 248. The confinement of the wife in the lunatic asylum is not an abandonment of the husband; 23 S. W. Rep. (Ky.) 215. When a wife is deserted she need not hunt for her husband or go to the place whither he has fled; 44 Ill. App. 357. Where by statute both parties have to be residents of the state, it means an actual and not a theoretical residence, and the rule that the domicile of the wife follows that of the husband does not apply; 61 Hun 635.

Some of the principal defenses in suits for divorce are: *Connivance*, or the corrupt consent of a party to the conduct of the other party, whereof he afterwards complains. This bars the right of divorce, because no injury was received; for what a man has consented to he cannot say was an injury; 2 Bish. Mar. & D. § 204. See 116

Ind. 84; 77 Hun 595. And this may be passive as well as active; 3 Hagg. Eccl. 87. See 186 Mass. 310. *Collusion*, which is an agreement between husband and wife for one of them to commit, or appear to commit, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce, as for a real injury. Where the act has not been done, collusion is a real or attempted fraud upon the court; where it has, it is also a species of connivance; in either case it is a bar to any claim for divorce; 2 Bish. Mar. & D. § 251. See 86 Mich. 600. *Condonation*, or the conditional forgiveness or remission by the husband or wife of a matrimonial offence which the other has committed. While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned; 2 Bish. Mar. & D. § 263; 86 Ala. 322; 60 Law J. Prob. 73; 109 N. C. 139; 49 Ill. App. 573. For the nature of the condition, and other matters, see *CONDONATION*. *Recrimination*, which is a defence arising from the complainant's being in like guilt with the one of whom he complains. It is incompetent for one of the parties to a marriage to come into court and complain of the other's violation of matrimonial duties, if the party complaining is guilty likewise; 2 Colo. App. 8. When the defendant sets up such violation in answer to the plaintiff's suit, this is called, in the matrimonial law, *recrimination*; 2 Bish. Mar. & D. § 340.

The foregoing defences, though available in all divorce causes, are more frequently applicable where a divorce is sought on the ground of adultery.

The consequences of divorce are such as flow from the sentence by operation of law, or flow from either the sentence or the proceeding by reason of their being directly ordered by the court and set down of record. In regard to the former, they are chiefly such as result immediately and necessarily from the definition and nature of a divorce. Being a dissolution of the marriage relation, the parties have no longer any of the rights, nor are subject to any of the duties, pertaining to that relation. They are henceforth single persons to all intents and purposes. It is true that the statutes of some of the states contain provisions disabling the guilty party from marrying again; but these are in the nature of penal regulations, collateral to the divorce, and which leave the latter in full force.

In regard to rights of property as between husband and wife, a sentence of divorce leaves them as it finds them. Consequently, all transfers of property which were actually executed, either in law or fact, continue undisturbed; for example, the personal estate of the wife, reduced to possession by the husband, remains his after the divorce the same as before. On the termination of a tenancy by the entirety, created by a conveyance to husband and wife, by an absolute divorce, they afterward hold the land as tenants in common without survivorship; 128 N. Y. 268. See 92 Tenn. 697. But it puts an end to all rights depending upon the marriage and not actually vested; as, dower in a wife, all rights of the husband in the real estate of the wife, and his right to reduce to possession her choses in action; 27 Miss. 630; 57 Mo. 200; 6 Ind. 229; 6 W. & S. 85, 86; 4 Harr. Del. 440; 8 Conn. 541; 2 Md. 423; 8 Mass. 99; 10 Paige, Ch. 420, 424; 5 Blackf. 309; 5 Dana 254; 102 N. C. 491; 45 N. J. Eq. 466; 125 U. S. 216; 111 id. 525; 20 Ohio St. 454. In respect to dower, however, it should be observed that a contrary doctrine has been settled in New York, it being there held that immediately upon the marriage being solemnized the wife's right to dower becomes perfect, provided only she survives her husband; 4 N. Y. 95; 6 Duer, N. Y. 102, 152. See 55 Pa. 375; 63 id. 306; 39 Cal. 157; 46 Tex. 269; *DOWER*.

Of these consequences which result from the direction or order of the court, the most important are: *Alimony*, or the allowance which a husband, by order of court, pays to his wife, living separate from him, for her maintenance. The allowance may be for

her use either during the pendency of a suit,—in which case it is called *alimony pendente lite*,—or after its termination, called *permanent alimony*. As will be seen from the foregoing definition, *alimony*, especially *permanent alimony*, pertains rather to a separation from bed and board than to a divorce from the bond of matrimony. Indeed, it is generally allowed in the latter case only in pursuance of statutory provisions. See *ALIMONY*. It is provided by statute in several of our states that, in case of divorce, the court may order the husband to restore to the wife, when she is the innocent party, and sometimes even when she is not, a part or the whole of the property which he received by the marriage. In some cases, also, the court is authorized to divide the property between the parties, this being a substitute for the allowance of *alimony*. For further particulars, *recourse must be had to the statutes in question*.

The custody of children. In this country, the tribunal hearing a divorce cause is generally authorized by statute to direct, during its pendency and afterwards, with which of the parties, or with what other person, the children shall remain, and to make provision out of the husband's estate for their maintenance. There are few positive rules upon the subject, the matter being left to the discretion of the court, to be exercised according to the circumstances of each case. The general principle is to consult the welfare of the child, rather than any supposed rights of the parents, and as between the parents to prefer the innocent to the guilty. In the absence of a controlling necessity or very strong propriety, arising from the circumstances of the case, the father's claim is to be preferred; see Reeve, Dom. Rel. 453; Lloyd, Div. 241; 40 N. H. 272; 16 Pick. 203; 24 Barb. 521; 27 id. 9; 2 Q. B. D. 75; 2 U. C. Q. B. 370; 55 Ala. 428; 56 Miss. 418; 12 R. I. 462; [1891] Prob. 124; and 2 Bish. Mar. & Div. § 1185, where the subject is fully treated; the general rule, however, being that the welfare of the child will be consulted rather than the rights of either parent; 12 R. I. 462; 68 Ill. 17; 32 N. J. Eq. 738; 44 Ala. 670. If the child is of an age to require especially a mother's care, her right of custody is preferred; *id.*; 55 id. 428; 14 Cal. 512; but it is for the trial court to say upon all the evidence whether she is more worthy of their custody than the father; 92 Cal. 653. In some cases a child will be placed in the custody of a third person; 47 How. Pr. 172; 2 Russ. 1; 21 Tex. 67; 80 Ind. 547; 39 Wis. 167. See *CUSTODY*.

A bigamous marriage being void *ab initio*, the second wife cannot maintain an action for judicial separation; 5 Misc. Rep. 193.

By the civil law, the child of parents divorced is to be brought up by the innocent party at the expense of the guilty party. Ridley's View, pt. 1, c. 3, § 9, citing 8th Collation. See *FOREIGN DIVORCE*.

DIVORCE A MENSA ET THORO.

A divorce from table and bed, or from bed and board. A partial or qualified divorce, by which the parties are separated and forbidden to live or cohabit together, without affecting the marriage itself. 1 Bl. Com. 440. See *DIVORCE*.

DIVORCE A VINCOLO MATRIMONII.

A divorce from the bond of marriage. A total divorce of husband and wife, dissolving the marriage tie, and releasing the parties wholly from their matrimonial obligations. 1 Bl. Com. 440.

DO UT DES. I give that you may give. See *CONSIDERATION*.

DO UT FACIAS. I give that you may do. See *CONSIDERATION*.

DOCK. The enclosed space occupied by prisoners in a criminal court.

The space between two wharves. See 17 How. 434. The owner of a dock is liable to a person who, by his invitation, and in the exercise of due care, places a vessel in the dock, for injury to the vessel caused by a defect thereon which the owner negli-

gently allows to exist; 127 Mass. 236.

DOCKAGE. The sum charged for the use of a dock. In the case of a dry dock, it has been held in the nature of rent. 1 Newb. 69. See *WHARFAGE*.

DOCKMASTERS. Officers appointed to direct the mooring of ships, so as to prevent the obstruction of dock entrances.

DOCK WARRANT. A negotiable instrument, in use in England, given by the dock owners to the owner of goods imported and warehoused in the docks, as a recognition of his title to the goods, upon the production of the bills of lading, etc. Pulling on the Customs of London.

DOCKET. A formal record of judicial proceedings; a brief writing. A small piece of paper or parchment having the effect of a larger. Blount. An abstract. Cowel.

To docket is said to be by Blackstone to abstract and enter into a book; 3 Bla. Com. 397. The essential idea of a modern docket, then, is an entry in brief in a proper book of all the important acts done in court in the conduct of each case from its commencement to its conclusion. See Colby, Fr. 154.

In common use, it is the name given to the book containing these abstracts. The name of trial-docket is given to the book containing the cases which are liable to be tried at a specified term of court. The docket should contain the names of the parties and a minute of every proceeding in the case. It is kept by the clerk or prothonotary of the court. The docket entries form the record until the technical record is made up in proper form; 88 Conn. 449; 2 Allen 433; 49 Me. 337; 106 Mass. 90; and this is true of the entries in the docket of a justice of the peace; 18 Pick. 424; 23 Vt. 159. A sheriff's docket is not a record; 9 S. & R. 91; 1 Bradf. 343.

DOCKET BOOK. See *RECORD BOOKS*.

DOCTOR. Means commonly a practitioner of medicine, of whatever system or school. 4 E. D. Smith 1.

DOCTORS COMMONS. An institution near St. Paul's Cathedral in London, where the ecclesiastical and admiralty courts were held until the year 1857. 3 Steph. Com. 306, n.

In 1768 a royal charter was obtained by virtue of which the members of the society and their successors were incorporated under the name and title of "The College of Doctors of Laws exercent in the Ecclesiastical and Admiralty Courts." The college consists of a president (the dean of the arches for the time-being) and of those doctors of laws who, having regularly taken that degree in either of the universities of Oxford and Cambridge, and having been admitted advocates in pursuance of the rescript of the archbishop of Canterbury, shall have been elected fellows of the college in the manner prescribed by the charter.

DOCTRINE OF COMPENSATORY DAMAGES. See *COMPENSATORY DAMAGES*, *DOCTRINE OF*.

DOCTRINE OF RELATION. The doctrine of relation is that principle by which an act done at one time is considered to have been done at some antecedent time. It is a doctrine of frequent application, designed to promote justice. 200 U. S. 334.

DOCUMENT. See *JUDICIAL DOCUMENT*; *PUBLIC DOCUMENT*.

DOCUMENT OF TITLE. By the Factors' Act 56, Vict. c. 39, § 4, it is stated to mean any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate warrant, or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented. Benj. Sales 788.

DOCUMENTS. The deeds, agreements, title-papers, letters, receipts, and other written instruments used to prove a fact. See 12 R. I. 99.

If a document is lost, secondary evidence of its contents may be given, after laying a proper foundation therefor, by proving its former existence, and its due execution, and satisfactorily accounting for the failure to produce it. The burden of proving all these facts rests on the party who seeks to introduce secondary evidence of the document claimed to have been lost; 101 N. Y. 427; 102 Pa. 333; 74 Me. 127; 66 Tex. 13; 20 Vt. 455. See 77 Pa. 507.

In Civil Law. Evidence delivered in the forms established by law, of whatever nature such evidence may be. The term is, however, applied principally to the testimony of witnesses. Savigny, Dr. Rom. § 165. See EVIDENCE.

DOCUMENTARY EVIDENCE. See TESTIMONY.

DOE, JOHN. The name of the fictitious plaintiff in the action of ejectment. 3 Steph. Com. 618.

DOG. A domestic animal.

In almost all languages this word is used as a term or name of contempt or reproach. See 3 Bulstr. 236; 2 Mod. 260; 1 Leon. 143; and the title *Action on the Case for Defamation* in the Digests.

A dog is said at common law to have no intrinsic value, and he cannot, therefore, be the subject of larceny; 4 Bla. Com. 236; 3 S. & R. 571; 81 N. C. 527; Bell, Cr. Cas. 36. (But it is otherwise in England, by statute, and in Pennsylvania, by a statute passed in 1878, dogs are made personal property, subject to larceny, upon being duly registered. In Texas they may become the subject of theft; 30 Tex. App. 333; while they are held to be property within the meaning of Amend. V. of the Constitution; 8 Utah 245.) But the owner has such property in him that he may maintain trespass for an injury to his dog, or trover for a conversion; 1 Metc. Mass. 555; 10 Ired. 259; "for a man may have property in some things which are of so base nature that no felony can be committed of them: as, of a bloodhound or mastiff;" 13 Hen. VIII. 3; 18 id. 2; 7 Co. 18 a; 2 Bla. Com. 397; Fitzh. N. B. 86; Brooke, Abr. *Trespas*, pl. 407; Hob. 283; Cro. Eliz. 125; Cro. Jac. 463; 2 W. Bla. 1117.

Dogs, if dangerous animals, may lawfully be killed when their ferocity is known to their owner, or in self-defence; 10 Johns. 365; 13 id. 312; 35 Neb. 638; and when bitten by a rabid animal a dog may be lawfully killed by any one; 13 Johns. 312; 60 Ill. 211; but one is not justified in killing a dog without notice to the owner, merely because it barks around his house at night; 98 Mich. 420.

When a dog, in consequence of its vicious habits, becomes a common nuisance, the owner may be indicted. And when he commits an injury, if the owner had a knowledge of his mischievous propensity he is liable to an action on the case; Bull. N. P. 77; 1 B. & Ald. 620; 4 Campb. 198; 4 Cow. 351; 6 S. & R. 36; 1 Ill. 492; 17 Wend. 496; 23 id. 354; 4 Dev. & B. 146; 10 Cush. 509; 64 N. H. 686; 161 Pa. 98; 41 La. Ann. 1029; 49 Hun. L. 163; 27 Ill. App. 531. See 1 Ky. L. Rep. 90; 159 Mass. 497; ANIMAL.

A man has a right to keep a dog to guard his premises, but not to put him at the entrance of his house; because a person coming there on lawful business may be injured by him; and this, though there may be another entrance to the house; 4 C. & P. 297; 6 id. 1. See also 155 Pa. 225. But if a dog is chained, and a visitor so incautiously go near him that he is bitten, he has no right of action against the owner; 3 Bla. Com. 154.

A tax on dogs is constitutional, and so is a provision that in case of refusal to pay the tax, the dog may be killed; 100 Mass. 136; 82 N. C. 175; *contra*, 8 Ohio Cir. Ct. R. 12; 8 Utah 245. A proceeding of the most stringent character for the destruction of dogs kept contrary to municipal regulations is constitutional; 69 Miss. 34. See EXPEDITION.

DOGMA. In Civil Law The word is used in the first chapter, first section, of the second Novel, and signifies an ordinance of the senate. See, also, Dig. 27. l. 6.

DOLE. A part or portion. *Dole-meadow*, that which is shared by several. Spelman, Gloss.: Cowel.

DOLEANCE. A personal charge against a judicial officer,—a personal charge either of misconduct or of negligence. L. R. 6 P. C. 155.

DOLI CAPAX. Capable of mischief; having knowledge of right and wrong. 4 Bla. Com. 22, 23; 1 Hale, Pl. Cr. 26, 27.

DOLI INCAPAX (Lat.). Incapable of distinguishing good from evil. A child under seven is absolutely presumed to be *doli incapax*; between seven and fourteen is, *prima facie*, *incapax doli*, but may be shown to be *capax doli*. 4 Bla. Com. 23; Broom, Max. 310; 2 Pick. 280; 14 Ohio 222; 2 Park. Cr. R. 174. See DISCRETION; AGE.

DOLLAR (Germ. Thaler). The money unit of the United States.

It was established under the confederation by resolution of congress, July 6, 1783. This was originally represented by a silver piece only; the coinage of which was authorized by the act of congress of Aug. 8, 1786. The same act also established a decimal system of coinage and accounts. But the coinage was not effected until after the passage of the act of April 3, 1792, establishing a mint. 1 U. S. Stat. L. 246; and the first coinage of dollars commenced in 1794. The law last cited provided for the coinage of "dollars or units, each to be of the value of a Spanish milled dollar, as the same was then current, and to contain three hundred and seventy-one grains and four-sixteenths parts of a grain of pure silver, or four hundred and sixteen grains of standard silver."

The Spanish dollar known to our legislation was the dollar coined in Spanish America, North and South, which was abundant in our currency, in contradistinction to the dollar coined in Spain, which was rarely seen in the United States. The intrinsic value of the two coins was the same; but, as a general (not invariable) distinction the American coinage bore pillars, and the Spanish an escutcheon or shield: all kinds bore the royal effigy.

The milled dollar, so called, is in contradistinction to the irregular, misshapen coinage nicknamed *cob*, which a century ago was executed in the Spanish-American provinces,—chiefly Mexican. By the use of a milling machine the pieces were figured on the edge, and assumed a true circular form. The pillar dollar and the milled dollar, in effect the same in value, and, in general terms, the same coin; though there are pillar dollars ("cobs") which are not milled, and there are milled dollars (of Spain proper) which have no pillars.

The weight and fineness of the Spanish milled and pillar dollars is eight and one-half ounces to a Castilian mark or four hundred and seventeen and fifteen-sevenths grains Troy. The limitation of four hundred and fifteen grains in our law of 1806. April 10, 2 U. S. Stat. L. 374, was to meet the loss by wear. The legal fineness of these dollars was ten deniers, twenty grains, equal to nine hundred and two and seven-ninths thousandths; the actual fineness was somewhat variable, and always below. The Spanish dollar and all other foreign coins are ruled out by the act of congress of Feb. 21, 1837, 13 U. S. Stat. L. 267-7, 168, they being no longer a legal tender. But the statements herein given are useful for the sake of comparison; moreover, many contracts still in existence provide for payment of ground-rents, for example) in Spanish milled or pillar dollars. The following terms, or their equivalents, are frequently used in contracts made about the close of the last and the beginning of the present century:

"silver milled dollars, each dollar weighing seven pennyweights, and six grains at least." This was equal to four hundred and fourteen grains. The standard fineness of United States silver coin from 1792 to 1836 was four hundred and eighty-five parts fine silver in sixteen hundred and sixty-four. Consequently, a piece of coin of four hundred and fourteen grains should contain three hundred and sixty-nine and forty-six hundredths grains pure silver.

By the act of Jan. 18, 1837, § 5, U. S. Stat. L. 137, the standard weight and fineness of the dollar of the United States was fixed as follows: "of one thousand parts by weight, nine hundred shall be of pure metal, and one hundred of alloy," the alloy to consist of copper; and it was provided that the weight of the silver dollar should be four hundred and twelve and one-half grains (412-1/2).

The weight of the silver dollar has not been changed by subsequent legislation; but the proportionate weight of the lower denomination of silver coins has been diminished by the act of Feb. 21, 1863, 11 U. S. Stat. L. 160. By this act the half-dollar (and the lower coins in proportion) is reduced in weight fourteen and one-quarter grains below the previous coinage: so that the silver dollar which was embraced in this act weighs twenty-eight and one-half grains more than two half-dollars. The silver dollar then, consequently, ceased to be current in the United States; but it continued to be coined to supply the demands of the West India trade and a local demand for cabinets, etc.

But the act of Feb. 28, 1875, 20 U. S. Stat. L. c. 20, restored the standard silver dollar of the act of Jan. 18, 1837, as a legal tender for all debts except where otherwise stipulated in the contract, and required the monthly purchase of not less than two million and not more than four million dollars worth of silver bullion and the coinage of the same into standard silver dollars, but this latter clause was repealed by act of July 14, 1880. The act of Feb. 12, 1873, introduced the *trade-dollar*, of the weight of four hundred and twenty grains Troy, intended chiefly, if not wholly, for the Mexican market. The *trade-dollar* was first coined in the East. It has found its way, however, all over the United States, and, as it has been declared by a joint resolution of congress of July 22, 1876, 19 Stat. L. p. 215, not to be a legal tender, has led to great inconvenience. See 10 Am. L. Reg. n. s. 37; 7 W. N. C. Pa. 223. The coinage of the *trade-dollar* was terminated and its redemption and recoinage in standard dollars was directed by the act of March 8, 1877, 24 Stat. L. 643. See also U. S. R. S. 1 Supp. 503, 774.

By the act of November 16, 1898, it is declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be

secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. It is further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetalism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts.

By the act of March 3, 1849, a gold dollar was authorized to be coined at the mint of the United States and the several branches thereof, conformably in all respects to the standard of gold coins now established by law, except that on the reverse of the piece the figure of the eagle shall be omitted. It is of the weight of 25.8 grains, and of the fineness of nine hundred thousandths. This dollar was made the unit of value by act of congress Feb. 12, 1873, and it was further provided that such dollar, when worn by natural abrasion, or so reduced in weight after twenty years of circulation (as evidenced by date on the face of such coin), will be redeemed by the United States Treasury or its offices, subject to such regulations as the Secretary of the Treasury may prescribe for the protection of the Government against fraudulent abrasions and other practices; U. S. Rev. Stat. §§ 3505, 3511.

A charge of one-fifth per centum was formerly made for converting gold bullion into coin, but by act of Jan. 14, 1875, this law was repealed. The gold dollar and the silver dollar and gold pieces are no longer coined. See 26 Stat. L. 485.

When the word *dollars* is used in a bequest or in any instrument for the payment of money, the amount is payable in whatever the United States declares to be legal tender, whether coin or paper money; but not in real or personal property in which money has been invested. 18 N. J. Eq. 136; 32 id. 306; 27 Ind. 436; 38 Texas 351; 8 Dana 190; 1 W. N. C. Pa. 223; 24 Ark. 100.

DOLO. The Spanish form of *dolus*.

DOLUS (Lat.). In Civil Law. A fraudulent address or trick used to deceive some one; a fraud. Dig. 4. 3. 1. Any subtle contrivance by words or acts with a design to circumvent. 2 Kent 560; Code 2. 21.

Dolus differs from *culpa* in this, that the latter proceeds from an error of the understanding, while to constitute the former there must be a will or intention to do wrong. Wolfenb. § 17. See MALUS.

It seems doubtful, however, whether the general use of the word *dolus* in the civil law is not rather that of very great negligence, than of fraud, as used in the common law. A distinction was also made between *dolus* and *culpa*, the essence of the former being the intention to deceive, while that of the latter was actual damage resulting from the deceit.

Such acts or omissions as operate as a deception upon the other party, or violate the just confidence reposed by him, whether there be a deceitful intent (*malus animus*) or not. Pothier, *Traité de Dépôt*, nn. 23, 27; Story, Bailm. § 20 a; Webb's Poll. Torts 18; 2 Kent 506, n.

DOLUS MALUS (Lat.). Fraud. Deceit with an evil intention. Distinguished from *dolus bonus*, justifiable or allowable deceit. Calvinus, Lex.; Broom, Max. 849; 1 Kaufmann, Mackeld. Civ. Law 165. Misconduct. *Magna negligentia culpa est, magna culpa dolus est* (great negligence is a fault, a great fault is fraud). 2 Kent 560, n.

DOM PROC. (Domus Procerum.) The house of lords. Wharton, Lex.

DOMAIN. Dominion; territory governed. Possession; estate. Land about the mansion-house of a lord. The right to dispose at our pleasure of what belongs to us.

A distinction has been made between property and domain. The former is said to be that quality which is conceived to be in the thing itself, considered as belonging to such or such a person, exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing. Hence domain and property are said to be correlative terms; the one is the active right to dispose of, the other a passive quality which follows the thing and places it at the disposition of the owner. 3 Toullier, n. 83. But this distinction is too subtle for practical use. Puffendorf, *Droit de la Nat.* l. 4. c. 4, 106 § 2. See 1 Bla. Com. 105; *Clef des Lois Rom.*; Domat; 1 Hill, Abr. 24, 2; 2 id. 237; EMINENT DOMAIN.

DOMBOC (spelled, also, often, *dombe*, Sax.). The name of codes of laws among the Saxons. Of these King Alfred's was the most famous. 1 Bla. Com. 46; 4 id. 411. The *dombo* of king Alfred is not to be confounded with the *domesday-book* of William the Conqueror.

DOME (Sax.). Doom; sentence; judgment. An oath. The homager's oath in the black book of Hereford. Blount.

DOMESDAY, DOMESDAY-BOOK (Sax.). An ancient record made in the time of William the Conqueror, and now remaining in the English exchequer, consisting of

two volumes of unequal size, containing minute and accurate surveys of the lands in England. It was printed by the English Government, in 1788. 2 Bla. Com. 49, 50. The work was begun by five justices in each county in 1081 and finished in 1086.

The great inquest survey, or "Description of all England," which we call Domesday Book, is one of the most precious documents that any nation possesses. For variety of information, for excellence of plan, for the breadth of land, and for the space it covers it is probably unrivalled. It is at once a terrier, a rent roll, an assessment register, as well as a book of settlements and a legal record. 1 Social England 286.

A variety of ingenious accounts are given of the origin of this term by the old writers. The common opinion seems to be that it was so called from the fulness and completeness of the survey making it a day of judgment for the value, extent, and qualities of every piece of land. See Spelman, Gloss.; Blount; *Termes de la Ley*. It was practically a careful census taken and recorded in the exchequer of the kingdom of England.

DOMESDAY OF IPSWICH. See IPSWICH; DOMESDAY OF.

DOMESMEN (Sax.). An inferior kind of judges. Men appointed to doom (judge) in matters in controversy. Cowel. Suitors in a court of a manor in ancient times, who are judges there. Blount; Whishaw; *Termes de la Ley*. See JURY.

DOMESTICS. Those who reside in the same house with the master they serve. The term does not extend to workmen or laborers employed out-of-doors. 5 Binn. 167; 6 La. Ann. 276; 43 Tex. 456; Merlin, *Répert.* The act of congress of April 30, 1790, s. 25, used the word domestic in this sense. This term does not extend to a servant whose employment is out of doors and not in the house; 41 Tex. 556.

Formerly this word was used to designate those who resided in the house of another, however exalted their station, who performed services for him. Voltaire, in writing to the French queen, in 1748, says, "Deign to consider, madam, that I am one of the domestics of the king, and consequently yours, my companions, the gentlemen of the king," etc.; but librarians, secretaries, and persons in such honorable employments would not probably be considered domestics, although they might reside in the houses of their respective employers.

Fothier, to point out the distinction between a domestic and a servant, gives the following example:—A literary man who lives and lodges with you, solely to be your companion, that you may profit by his conversation and learning, is your domestic; for all who live in the same house and eat at the same table with the owner of the house are his domestics; but they are not servants. On the contrary, your valet-de-chambre, to whom you pay wages, and who sleeps out of your house, is not, properly speaking, your domestic, but your servant. Pothier, *Proc. Sect. 2*, art. 5, § 5; Pothier, *Obl.* 710, 828; 9 Toullier, s. 814; H. de Fansy, *Des Justices de Paix*, c. 30, n. 1.

DOMESTIC ATTACHMENT. See ATTACHMENT.

DOMESTIC MANUFACTURES. This term in a state statute is used, generally, of manufactures within its jurisdiction. 64 Pa. 100.

DOMICIL. That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. 10 Mass. 188; 11 La. 175; 5 Metc. 187; 4 Barb. 505; Wall. Jr. 217; 9 Ired. 99; 1 Tex. 673; 13 Me. 255; 27 Miss. 704; 1 Bosw. 673; 74 Ill. 312.

The domicile of a person is that place or country in which his habitation is fixed, without any present intention of removing therefrom; [1892] 3 Ch. 180.

Dacey defines domicile as, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law; Dacey, *Dom.* 42; and again as "that place or country either (1) in which he in fact resides with the intention of residence (*animus manendi*); or (2) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*); or (3) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he, in fact, no longer resides there;" *id.* 44. The same

definition substantially is given in Dacey, *Conf. Laws* (Moore's ed.) 727. It is there said not to include cases of domicile created by operation of law.

Other definitions are quoted in the same works with modification:

Domicil is "a habitation fixed in some place with the intention of remaining there always." Vattel, *Droit des Gens*, liv. i, c. xix, s. 218, *Du Domicile*.

"The place where a person has established the principal seat of his residence and of his business." Pothier, *Intro. Gen. Cout. d'Orleans*, ch. 1, s. 1, art. 8.

"That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode [and thus for the centre at once of his legal relations and his business]." Savigny, s. 853.

"That place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom." Story, *Conf. Laws* § 48.

"A residence at a particular place, accompanied with [positive or presumptive proof of] an intention to remain there for an unlimited time." Phillimore, *Int. Law* 49.

"That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." 28 L. J. Ch. 361, 366, per Kindersley, V. C.

One's domicile is the technically preeminent headquarters that every person is compelled to have in order that his rights and duties that have attached to it by the law may be determined. 232 U. S. 619.

If the intention of permanently residing in a place exists, a residence in pursuance of that intention however short, will establish a domicile. L. R. 1 Sc. App. 307, 319, cited by Taylor, *Int. Pub. Law* 249.

It has been said that there is no precise definition of the word; 25 L. J. Ch. 730; but Dacey (Domicil, App. and in his *Conf. Laws* 731) dissents from this statement. In the latter work the learned writer says that "the attempts which have been made to define domicile, and of the criticisms upon such attempts, lead to results which may be summed up as follows:—

"First. Domicil, being a complex term, must, from the nature of things, be capable of definition. In other words, it is a term which has a meaning, and that meaning can be explained by analyzing it into its elements.

"Secondly. All the best definitions agree in making the elements of domicile 'residence' and '*animus manendi*.'

"Thirdly. Several of these definitions—such, for example, as Story's, Phillimore's, or Vice-Chancellor Kindersley's—have succeeded in giving an explanation of the meaning of domicile, which, even if not expressed in the most precise language, is substantially accurate.

"Fourthly. The reason why English courts have been inclined to hold that no definition of domicile is satisfactory is, that they have found it impossible to reconcile any definition with three sets of judicial decisions or dicta (an officer in the service of the East India Company; an Englishman acquiring a domicile in another country; and a person residing in another country for his health). When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicile now admitted to be erroneous, whilst the third set can be reconciled with all the best definitions of domicile." Dacey, *Conf. Laws* 735.

A person must have a domicile for purposes of taxation; 1 Metc. 242; 132 Mass. 89; 42 Wis. 476; 49 Me. 367; for jurisdiction; 65 N. H. 248; for succession; 52 Me. 165; 76 Ala. 433; 53 N. Y. 556; for administration; 85 Pa. 466; for pauper settlement; 23 Pick. 177; for loyal character; 93 U. S. 605; for homestead exemption; 20 Tex. 24; for attachment; 54 Miss. 308; 72 N. C. 1. A person can, however, have but one domicile at a time; 93

U. S. 605; 98 Mass. 158; 80 La. Ann. 502; 23 Pick. 170; but Cockburn (Nationality) says that it is quite possible for a person to have two domicils. See Morse, *Citizenship* 100. And a person may have both a civil and a commercial domicile; Dacey, *Conf. Laws* 740.

Domicil may be either national or domestic. In deciding the question of national domicile, the point to be determined will be in which of two or more distinct nationalities a man has his domicile. In deciding the matter of domestic domicile, the question is in which subdivision of the nation does the person have his domicile. Thus, whether a person is domiciled in England or France would be a question of national domicile, whether in Norfolk or Suffolk county, a question of domestic domicile. The distinction is to be kept in mind, since the rules for determining the two domicils, though frequently, are not necessarily, the same; see 2 Kent 449; Story, *Conf. Laws* § 39; Westl. *Priv. Int. Law* 15; Wheat. *Int. Law* 123; Jac. *Dom.* 77.

The Romanists and civilians seem to attach about equal importance to the place of business and of residence as fixing the place of domicile; Pothier, *Intro. Gen. Cout. d'Orleans*, c. 1, art. 1, § 8; Denizart; Story, *Conf. Laws* § 42. This may go far towards reconciling the discrepancies of the common law and civil law as to what law is to govern in regard to contracts. But at common law the main question in deciding where a person has a domicile is to decide where he has his home and where he exercises his political rights.

Legal residence, inhabitancy, and domicile are generally used as synonymous; 1 Bradf. *Surr.* 70; 1 Harr. Del. 388; 1 Spenc. 328; 2 Rich. 489; 10 N. H. 452; 3 Wash. C. C. 555; 15 M. & W. 438; 4 Barb. 505; 7 Gray 299; 49 Ia. 447; but much depends on the connection and purpose; 1 Wend. 43; 5 Pick. 231; 17 id. 281; 15 Me. 58; as "residence" has a more restricted meaning than "domicil," 59 Mo. 238; 4 Humph. 346; 132 Mass. 89. So also in insolvency statutes; 130 Mass. 281, those relating to administration and distribution; 81 West Va. 790; testamentary matters; 20 N. Y. Sup. 417; eligibility for public office; 3 N. Y. Sup. 367; attachment statutes; 12 C. R. Pa. 255; and matters of jurisdiction; 120 N. Y. 485; 54 Ia. 289; 29 Fed. Rep. 494. The term citizenship ordinarily conveys a distinct idea from that of domicile; 45 Ia. 99; but it is often construed in the sense of domicile; 129 U. S. 115; 56 Fed. Rep. 556.

Two things must concur to establish domicile,—the fact of residence and the intention of remaining. These two must exist or must have existed in combination; 8 Ala. n. s. 159; 4 Barb. 504; 6 How. 163; Story, *Conf. Laws* § 44; 17 Pick. 231; 27 Miss. 704; 15 N. H. 137; 58 Conn. 268. There must have been an actual residence; 11 La. 175; 5 Metc. Mass. 587; 20 Johns. 208; 12 La. 190; 1 Binn. 849. The character of the residence is of no importance; 8 Me. 203; 1 Spears, Eq. 3; 5 E. L. & Eq. 52; 38 La. Ann. 1304; and if it has once existed, mere temporary absence will not destroy it, however long continued; 7 Cl. & F. 842; 43 Me. 426; 3 Bradf. *Surr.* 267; 29 Ala. n. s. 703; 4 Tex. 187; 3 Me. 455; 10 Pick. 79; 3 N. H. 123; 3 Wash. C. C. 555; 91 Ga. 80; 59 Mo. 238; 32 La. Ann. 506; 103 Mass. 576; as in the case of a soldier in the army; 36 Me. 428; 4 Barb. 522. And the law favors the presumption of a continuance of domicile; 5 Ves. 750; 5 Pick. 370; 1 Wall. Jr. 217; 1 Bosw. 678; 21 Pa. 106; 113 N. C. 537. The original domicile continues till it is fairly changed for another; 5 Madd. 232, 370; 10 Pick. 77; 8 Ala. n. s. 169; 2 Swan 232; 1 Tex. 673; 1 Woodb. & M. 8; 15 Me. 58; 3 Wall. Jr. 11; 10 N. H. 156; and reverts on an intention to return; 1 Curt. Eccl. 856; 19 Wend. 11; 8 Cra. 278; 3 C. Rob. 12; 8 Wheat. 14; 8 Ala. n. s. 159; 3 Rawle 312; 1 Gall. 275; 4 Mas. 308; 8 Wend. 134. This principle of revival, however, is said not to apply where both domicils are domestic; 5 Madd. 379; Am. Lead. Cas. 714.

Mere taking up residence is not sufficient, unless there be an intention to abandon

don a former domicile; 7 Jac. Dom. 125; 1 Spear 1; 6 M. & W. 511; 21 Me. 857; 10 Mass. 488; 1 Curt. Eccl. 856; 4 Cal. 175; 2 Ohio 232; 5 Sandf. 44; 156 Pa. 617; 77 Mo. 678; nor is it even *prima facie* evidence of domicile when the nature of the residence either is inconsistent with, or rebuts the presumption of the existence of an *animus manendi*; Dicey, Dom. Rule 19; 84 L. J. Ch. 212. Nor is intention of constituting domicile alone, unless accompanied by some acts in furtherance of such intention; 5 Pick. 370; 1 Bosw. 673; 5 Md. 186; 126 Mass. 161; 75 Pa. 201; 129 U. S. 328. A subsequent intent may be grafted on a temporary residence; 2 C. Rob. 322. Removal to a place with an intention of remaining there for an indefinite period and as a place of fixed present domicile, constitutes domicile, though there be a floating intention to return; 2 B. & P. 228; 3 Hagg. Eccl. 374. Both inhabitancy and intention are to a great extent matters of fact, and may be gathered from slight indications; 1 Sneed 63; 30 Pac. Rep. (N. M.) 936; 126 Mass. 219. A statute as to acquiring a residence will be strictly construed, and where a person spends part of his time in one state and the other part at his home in another, and where he has no business in the former but appears to be gaining a residence for the purpose of divorce only, he is not a *bona fide* resident; 43 Ill. App. 370. The place where a person lives is presumed to be the place of domicile until facts establish the contrary; 2 B. & P. 228, n.; 2 Kent 532; 113 N. Y. 532. A decedent is presumed to have been domiciled at the place where he died; 27 Ct. Cls. 529. See 5 Ves. Jr. 750; but where he was a non-resident of the state for many years and until within two months prior to his death, the presumption is that he was a non-resident at the time of his death; 156 Pa. 617.

Proof of domicile does not depend upon any particular fact but upon whether all the facts and circumstances taken together tend to establish the fact; 23 Pick. 170; 85 Pa. 466. Engaging in business and voting in a particular place are evidence of domicile there; Myr. Prob. Cal. 237; voting in a place is evidence, though not conclusive; 74 Ill. 312; 74 Me. 154; also payment of taxes; 25 Atl. Rep. (N. H.) 553; 61 Mich. 575; the execution of one's will in accordance with the laws of a particular place; 53 N. Y. 556; attending a particular church; 62 Vt. 386. But the ownership of real estate in a place not coupled with residence therein is of no value; 156 Pa. 617; 1 Tex. 673. Declaring an intent to become a citizen is not sufficient to prove an intention to adopt a domicile in the place where the declaration is made; 13 C. C. R. Pa. 177. Declarations made at the time of change of residence are evidence of a permanent change of domicile, but a person cannot, by his own declarations, make out a case for himself; 1 Flipp. 536; 157 Mass. 542; 65 N. H. 248; but see as to the latter, L. R. 2 P. & M. 435. Declarations of the party are admissible to prove domicile; 6 Misc. Rep. 620; 10 Biss. 128; but acts are said to be more important than words; 50 N. J. Eq. 137.

Domicile is said to be of three kinds,—domicil of origin, or by birth, domicile by choice, and domicile by operation of law. The place of birth is the domicile by birth if at that time it is the domicile of the parents; 2 Hagg. Eccl. 405; 5 Tex. 211. See 10 Rich. 38. If the parents are on a journey, the actual domicile of the parents will generally be the place of domicile; 5 Ves. 750; Westl. Priv. Int. Law 17. Children of ambassadors; 14 Beav. 441; 81 L. J. 24, 391; and consuls; L. R. 1 Sc. App. 441; 4 P. D. 1; and children born on seas, take the domicile of their parents; Story, Conf. Laws § 48.

The domicile of an illegitimate child is that of the mother; 23 L. J. Ch. 724; 35 Me. 411; 8 Cush. 75; but it has been thought better to "regard the father who acknowledges his illegitimate children, or who is adjudged to be such by the law, as imparting his domicile to such children;" Whart. Conf. L. 37; L. R. 1 Sc. App. 441; see Westl. Priv. Int. Law 272; where it is said that the place of birth of a child whose parents

are unknown, is its domicile; if that is unknown, the place where it is found. The domicile of a legitimate child is that of its father; L. R. 1 P. & D. 611; 2 Hagg. Eccl. 405; 81 N. J. Eq. 194; 1 Binn. 349; 5 Ves. 786; see 45 Mo. App. 415. Westlake (Int. Law) maintains that a posthumous child takes its mother's domicile; but see Whart. Conf. Laws § 35. The domicile by birth of a minor continues to be his domicile till changed; 1 Binn. 349; 3 Zab. 394; 8 Blackf. 84. See 49 Fed. Rep. 257; It changes with that of the father; 92 Ala. 551; 112 U. S. 452; 67 N. Y. 367.

A student does not change his domicile by residence at college; 7 Mass. 1; 5 Metc. Mass. 587; 71 Pa. 302; 85 Ia. 246; 76 Me. 158; 17 N. H. 235; and a prisoner removed from his domicile for temporary imprisonment does not acquire a new domicile; 74 Ga. 761; 85 Ala. 439; 74 Me. 237; or a convict for a long term; 74 Me. 237; or a fugitive from justice though intending never to return; 180 Mass. 231; but see 85 Ala. 439. A change of residence for purposes of health does not generally establish a new domicile; 27 Tex. 734; 38 Miss. 646. Absence in the service of the government does not necessarily affect the domicile; 89 N. C. 115; 17 Fla. 399; 23 N. Y. Supp. 137; depending, of course, on the intention of the party; 3 Ore. 229, 568; 128 Mass. 219. A diplomatic representative residing abroad does not change his domicile; 12 Pa. 365; or a consul; 4 How. Miss. 360; or one in the military or naval service; 36 Me. 428; 128 Mass. 219; nor a sailor absent on duty; 100 Mass. 167.

The domicile of origin always remains in abeyance, as it were, to be resorted to the moment the domicile of choice is given up. If one leaves a domicile of choice, with the intention of acquiring a new one, his domicile of origin attaches the moment he leaves the former, and persists until he acquires the latter; L. R. 1 Sc. App. 441; 75 Fed. Rep. 321; Dicey, Dom. 92. This, however, can only be true of national, as distinguished from local domicile; when a local domicile of choice is acquired, it certainly persists until a new one is adopted.

Domicil by choice is that domicile which a person of capacity of his free will selects to be such. Residence by constraint, which is involuntary, by banishment, arrest, or imprisonment, will not work a change of domicile; Story, Conf. Laws § 47; 3 Ves. 198, 202; 11 Conn. 234; 5 Tex. 211; 1 Milw. 191; 1 Curt. Eccl. 856; 1 Sw. & Tr. 253; 41 Ill. 495; 74 Me. 236.

Domicil is conferred in many cases by operation of law, either expressly or consequentially.

The domicile of the husband is that of the wife; 29 Ala. n. s. 719; 7 Bush 135; 26 Tex. 665; 77 Ga. 84; 69 Ill. 277; 105 Mass. 116; 45 N. J. L. 495; 7 H. L. C. 390; L. R. 4 P. D. 1; 138 U. S. 694. A woman on marriage takes the domicile of her husband, and a husband, if entitled to a divorce, may obtain it though the wife be actually resident in a foreign state; 2 Cl. & F. 488; 1 Dow. 117; 2 Curt. Eccl. 351; 35 N. E. Rep. (Ind.) 718; 45 La. Ann. 457; 44 Ala. 437; 122 Mass. 162; 56 Wis. 195. See, also, 15 Johns. 121; 1 Dev. & B. Eq. 588; 2 Strobb. Eq. 174. But, where it is necessary for her to do so, the wife may acquire a separate domicile, which may be in the same jurisdiction; 9 Wall. 108; 39 Wisc. 659; 57 Mo. 204; 129 Ill. 386; 21 How. 582; *contra*, 2 Cl. & F. 488; Dicey, Dom. 104. She may rest on her husband's domicile for the purpose of obtaining a divorce; 15 N. H. 159; 1 Johns. Ch. 389; 5 Yerg. 203; 6 Humphr. 148; 8 W. & S. 251. See 54 Ark. 172; 80 Am. L. Rev. 604, 612; DIVORCE.

A wife divorced *a mensa et thoro* may acquire a separate domicile so as to sue her husband in the United States courts; 21 How. 582; so where the wife is deserted; 5 Cal. 230; 2 E. L. & Eq. 52; 2 Kent 573.

The domicile of a widow remains that of her deceased husband until she makes a change; Story, Conf. Laws § 46; 18 Pa. 17.

Prisoners, exiles, and refugees do not thereby change their domicile; see L. R. 1 Sc. App. 148; 11 Conn. 234; 21 Vt. 563; 85

Ala. 439. It may be otherwise in case of a life sentence; Whart. Conf. Law § 54.

Commercial domicile. There may be a commercial domicile acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments; 1 Kent 82; 144 U. S. 47; 52 Fed. Rep. 203. See Dicey, Dom. 841; 2 Wheat. 76.

This is such a residence in a country for purposes of trade as makes a person's trade or business contribute to or form part of the resources of such country. The question is whether he is or is not residing in such country with the purpose of continuing to trade there; Dicey, Conf. Laws 737. The intention of remaining in the commercial domicile is the intention to continue to trade and trade there for the present; *id.* 738. Commercial domicile is not forfeited by temporary absence at the domicile of origin; 144 U. S. 63; but if a person go into a foreign country and engage in trade there, he is, by the law of nations, to be considered a merchant of that country, and subject for all civil purposes, whether that country be hostile or neutral; 3 B. & P. 113; 3 C. Rob. 12; 1 Hagg. 103, 104; 1 Pet. C. C. 159; 2 Cra. 64; and this whether the effect be to render him hostile or neutral in respect to his *bona fide* trade; 1 Kent 75; 3 B. & P. 113; 1 C. Rob. 249.

Corporations. If the term domicile can apply to corporations, they have their domicile wherever they are created; L. R. 1 Ex. 428; 5 H. L. 416; 40 Mo. 580. See 147 Ill. 234; but a permanent foreign agency of an insurance company may create an independent domicile in the place of the agency, for the purpose of enforcing legal obligation; 53 N. Y. 339. See 1 Black 256. If a railroad performs its functions within a state under a charter granted by the legislature, the fact that earlier charters were granted in other states does not render the corporation any the less a resident of the state granting the latest charter; 91 Tenn. 395; an insurance company organized under the laws of one state, but which appoints an agent in another state on whom service of process can be made, does not change the domicile of the corporation; 138 N. Y. 209. See also 107 U. S. 581; 138 N. Y. 209; 158 Mass. 461.

Change of domicile. Any person, *sui juris*, may make any *bona fide* change of domicile at any time; 5 Madd. 379; 5 Pick. 370; 35 E. L. & Eq. 532. And the object of the change does not affect the right, if it be a genuine change with real intention of permanent residence; 3 Wash. C. C. 546; 5 Mas. 70; 1 Paine 594; 3 Sumn. 251; 85 Ala. 439. Domicil is not lost by going to another state to seek a home, but continues until the home is obtained; 12 Pa. Co. Ct. R. 255. Legitimate children follow the domicile of the father, if the change be made *bona fide*; 2 Salk. 528; 2 Bro. Ch. 500; 16 Mass. 52; Ware 464; 27 Mo. 280; L. R. 1 P. & D. 611; 67 N. Y. 379; 45 Ia. 49; 49 Fed. Rep. 257; 23 L. J. Ch. 724; 67 Ala. 304; 28 Ind. 43; illegitimate children, that of the mother; 37 L. J. Ch. 724; Dicey, Dom. 97; 35 Me. 411; 8 Cush. 75; but there are limitations to the power to change a minor child's domicile in the case of alien parents; 10 Ves. 52; 5 East 221; 8 Paige, Ch. 47; 2 Kent 226; and of the mother, if a widow; Burge 38; 30 Ala. n. s. 613; see 2 Bradf. Surr. 214; 45 Mo. App. 415; however, if she acquires a new domicile by remarriage, the child's domicile does not change; 40 N. Y. Sup. Ct. 347; 2 Bradf. Surr. 414; 8 Cush. 528; 11 Humphr. 536. See [1893] 3 Ch. 490; 112 U. S. 452; 35 Ala. 521. If a father abandons his children, who are cared for and live with their grandmother for several years, and he subsequently removes them against her will, the residence of the children is not changed; 92 Cal. 195; 49 Fed. Rep. 257.

The guardian is said to have the same power over his ward that a parent has over his child; 5 Pick. 20; 33 Tex. 512; 8 Ohio 227; 1 Binn. 349, n.; 2 Kent 237. But see *contra*, 3 Blackf. 345. The point is not settled in England; Dicey, Dom. 133. See 3 Mer. 67; 9 W. N. C. Pa. 564. "It has been

generally held that a guardian can change the ward's domicile from one county to another in the same state; 42 Vt. 350; L. R. 5 Q. B. 325. It is doubtful, to say the least, whether the guardian can remove the ward's domicile out of the state in which he was appointed; L. R. 13 Eq. 617; 52 Ala. 430. A guardian appointed in a state where the ward is temporarily residing cannot change the ward's domicile from one state to another; 113 U. S. 452. But see 87 Tenn. 644. The mere appointment of a guardian will not prevent the ward from changing his domicile where he has sufficient mental capacity to do so; 17 R. I. 480; 149 Mass. 57. It may be considered questionable whether the guardian can change the national domicile of his ward; 2 Kent 226; Story, Conf. Laws § 506.

The domicile of a lunatic may be changed by the direction or with the assent of his guardian; 5 Pick. 20; 42 Vt. 350; *contra*, 53 Me. 442. See L. R. 1 P. & M. 611; 3 Ves. Jr. 193; 9 W. R. 764.

The husband may not change his domicile after committing an offence which entitles the wife to a divorce, so as to deprive her of her remedy; 14 Pick. 181; 2 Tex. 261. And it is said the wife may not in the like case acquire a new domicile; 10 N. H. 61; 9 Me. 140; 17 Conn. 284; 5 Yerg. 203; 2 Mass. 153; 2 Litt. 337; 2 Blackf. 407. Until a new domicile is gained, the old one remains; 93 U. S. 605; 55 Me. 117. See DIVORCE.

The law of the place of domicile governs as to all acts of the parties, when not controlled by the *lex loci contractus* or *lex rei sitæ*. Personal property of the woman follows the law of the domicile upon marriage. It passes to the husband, if at all, in such cases as a legal assignment by operation of the law of domicile, but one which is recognized extra-territorially; 2 Rose 97; 20 Johns. 267; Story, Conf. Laws § 423.

The state and condition of the person according to the law of his domicile will generally, though not universally, be regarded in other countries as to acts done, rights acquired, or contracts made in the place of his native domicile; but as to acts, rights, and contracts done, acquired, or made out of his native domicile, the *lex loci* will generally govern in respect to his capacity and condition; 2 Kent 234. See LEX LOCI.

The disposition of, succession to, or distribution of the personal property of a decedent, wherever situated, is to be made in accordance with the law of his actual domicile at the time of his death; 8 Sim. 310; 3 Stor. 755; 11 Miss. 617; 1 Spear, Eq. 3; 4 Bradf. Surr. 127; 15 N. H. 137. See 143 Ill. 25.

The principle applies equally to cases of voluntary transfer, of intestacy, and of testaments; 5 B. & C. 451; 3 Stor. 755; 3 Hagg. 273; 3 Curt. Eccl. 468; 9 Pet. 503; 2 Harr. & J. 191; 6 Pick. 286; 9 N. H. 137; 8 Paige, Ch. 519; 1 Mas. 381; 6 T. B. Monr. 52; 29 Ala. n. s. 72; 6 Vt. 374. Stocks are considered as personal property in this respect; 1 Cr. & J. 151; Bligh, n. s. 15; 1 Jarm. Wills 3.

Movable articles are generally taxable at the place where they are actually situated, 141 U. S. 18, and domicile is the test of liability to personal taxes; 80 Ia. 470; 158 Mass. 461.

Wills are to be governed by the law of the domicile as to the capacity of parties; 1 Jarm. Wills 3; and as to their validity and effect in relation to the transfer of personal property; 4 Blackf. 53; 2 Ill. 375; 2 Bail. 436; 5 Pet. 519; 2 B. Monr. 582; 3 Curt. Eccl. 468; 11 N. H. 88; 1 M'CORD 354; 5 Gill & J. 488; 53 N. Y. 556; 35 Ala. 521; 52 Me. 165; 75 Pa. 201; but by the *lex rei sitæ* as to the transfer of real property; 1 Blackf. 372; 6 T. B. Monr. 527; 22 Me. 303; 8 Ohio 239; 7 Cra. 115; 31 Mo. 166; 27 Tex. 38; 14 Ves. 541; 75 Pa. 201. See LEX REI SITÆ.

The forms and solemnities of the place of domicile must be observed; 8 Sim. 279; 4 M. & C. 76; 2 H. & J. 191; 1 Binn 336; 4 Johns. Ch. 460; 1 Mas. 381; 12 Wheat. 169; 9 Pet. 483; 52 Me. 165; 35 Ala. 521; 15 La. Ann. 137, 154.

The local law is to determine the character of property; 6 Paige, Ch. 630; Story, Conf. Laws § 447; Erskine, Inst. b. 3, tit.

9, § 4. And it is held that a state may regulate the succession to personal as well as real property within its limits, without regard to the *lex domicilii*; 6 Humphr. 116.

The interpretation of a will of movables is to be according to the law of the place of the last domicile of the testator; 3 Cl. & F. 544, 570; L. R. 3 H. L. 55; 68 Pa. 151; 4 Bligh 502; 3 Sim. 298; 2 Bro. Ch. 38; 9 Pet. 483. But so far as its validity is concerned, it does not matter that after the will was made in one domicile the testator went to another, where he died; Whart. Conf. Laws § 592; Beach, Wills 158; 10 Mo. 543; Story, Conf. Laws § 479 g. See 53 N. Y. 556. In England, by statute, a will does not become invalid nor is its construction altered by reason of the testator's change of domicile after making it; Dicey, Dom. 308. It has been said that the rules as to construction of wills apply whether they be of real or personal property, unless in case of real property it may be clearly gathered from the terms of the will that the testator had in view the *lex rei sitæ*; Story, Conf. Laws § 479 h; 2 Bligh 60; 4 M. & C. 76. But see, *contra*, Whart. Conf. Laws § 597. See CONFLICT OF LAWS; LEX REI SITÆ; WILL.

Distribution of the personal property of an intestate is governed exclusively by the law of his actual domicile at the time of his death; 5 B. & C. 458; 4 Bush 51; 14 How. 400; 14 Mart. La. 99; 2 H. & J. 193; 4 Johns. Ch. 460; 1 Mas. 418; 15 N. H. 137; 35 La. Ann. 19. This includes the ascertainment of the person who is to take; Story, Conf. Laws § 481; 2 Ves. 35; 2 Hagg. 455; 2 Keen 293. The descent of real estate depends upon the law of the place of the real estate; 7 Cra. 115; 52 Ala. 85; 8 L. R. Ch. 542; 32 Ind. 99; 111 N. Y. 624; 9 Wheat. 565; 14 Ves. 541; 70 Ala. 626; 38 N. J. Eq. 516; 101 Ill. 26. The question whether debts are to be paid by the administrator from the personalty or realty is to be decided by the law of his domicile; Story, Conf. Laws § 528; 9 Mod. 66; 2 Keen 293.

Insolvents and bankrupts. An assignment of property for the benefit of creditors, valid by the law of the domicile is generally recognized as valid everywhere; Bish. Insolv. Debt. 385; 4 Johns. Ch. 471; 2 Rose 97; 1 Cr. M. & R. 296; 53 Conn. 330; 187 Mass. 366; 143 Id. 53; 40 Barb. 465; 104 Pa. 381; 41 N. J. Eq. 402; in the absence of positive statute to the contrary; 6 Pick. 286; 14 Mart. La. 93, 100; 6 Binn. 353; but not to the injury of citizens of the foreign state in which property is situated; 5 East 131; 17 Mart. La. 596; 6 Binn. 360; 5 Cra. 289; 12 Wheat. 213; 4 Bush 149; 49 N. H. 125; 1 H. & M'H. 236; 35 Barb. 663. But a compulsory assignment by force of statute is not of extra-territorial operation; 20 Johns. 239; 6 Binn. 353; 6 Pick. 286; 27 Mich. 153. Distribution of the effects of insolvent or bankrupt debtors is to be made according to the law of the domicile, subject to the same qualifications; Story, Conf. Laws § 323, 423 a. See, generally, 13 Am. L. Rev. 261; 7 Wash. L. Rep. 487; 11 Cent. L. J. 421; 23 Alb. L. J. 86; Whart. Conf. Laws; Morse, Citizenship; Tiffany; Schouler, Domestic Relations; CONFLICT OF LAWS; BANKRUPT; INSOLVENCY.

In International Law. Two kinds of domicile: (1) Domicil of origin; (2) domicil of choice. (*q. v.*) *Id.*

One's domicile is the technically preeminent headquarters that every person is compelled to have in order that his rights and duties that have attached to it by the law may be determined. 232 U. S. 619.

DOMICIL OF ORIGIN. The home of the parents. That which arises from a man's birth and connections. The domicil of the parents at the time of birth, or what is termed the domicil of origin, constitutes the domicil of an infant, and continues until abandoned, or until the acquisition of a new domicil in a different place.

That domicil such as children, legitimate or illegitimate, acquired by an absolute rule or fiction of law at the time of birth by reason of the domicil at that time of the person upon whom they are dependent,

usually the father or mother. Taylor, Int. Pub. Law 250.

DOMINANT. That to which a servitude or easement is due, or for the benefit of which it exists. Distinguished from *servient*, that from which it is due.

DOMINANT TENEMENT. See TENEMENTS. See DOMINANT AND SERVIENT.

DOMINICUM (Lat. domain; domain; demesne). A lordship. That of which one has the lordship or ownership. That which remains under the lord's immediate charge and control.

In this sense it is equivalent to the Saxon *bord-lands*, Speiman, Gloss.; Blount. In regard to lands for which the lord received services and homage merely, the *dominium* was in the tenant.

Property; domain; anything pertaining to a lord. Cowel.

In Ecclesiastical Law. A church, or any other building consecrated to God. Du Cange.

DOMINION. Ownership or right to property. 2 Bla. Com. 1. "The holder has dominion of the bill." 8 East 579.

Sovereignty or lordship, as the dominion of the seas. Black, L. Dict. See DOMINIUM.

DOMINIUM (Lat.). Perfect and complete property or ownership in a thing.

Plenum in re dominium,—*plena in re potestas*. This right is composed of three principal elements, viz.: the right to use, the right to enjoy, and the right to dispose of the thing, to the exclusion of every other person. To use a thing, *jus utendi tantum*, consists in employing it for the purposes for which it is fit, without destroying it, and which employment can therefore be repeated; to enjoy a thing, *jus fruendi tantum*, consists in receiving the fruits which it yields, whether natural or civil, *quidquid ex re nascitur*; to dispose of a thing, *jus abutendi*, is to destroy it, or to transfer it to another. Thus, he who has the use of a horse may ride him, or put him in the plow to cultivate his own soil; but he has no right to hire the horse to another and receive the civil fruits which he may produce in that way.

On the other hand, he who has the enjoyment of a thing is entitled to receive all the profits or revenues which may be derived from it, either from natural or civil fruits.

And, lastly, he who has the right of disposing of a thing, *jus abutendi*, may sell it, or give it away, etc., subject, however, to the rights of the usuary or usufructuary, as the case may be.

These three elements, *usus*, *fructus*, *abusus*, when united in the same person, constitute the *dominium*; but they may be, and frequently are, separated: so that the right of disposing of a thing may belong to *Primus*, and the rights of using and enjoying to *Secundus*, or the right of enjoying alone may belong to *Secundus*, and the right of using to *Tertius*. In that case, *Primus* is always the owner of the thing, but he is the naked owner, inasmuch as for a certain time he is actually deprived of all the principal advantages that can be derived from it. *Secundus*, if he has the use and enjoyment, *jus utendi et fruendi simul*, is called the usufructuary, *usufructuarius*; if he has the enjoyment only, *jus fruendi tantum*, he is the *fructuarius*; and *Tertius*, who has the right of use, *jus utendi tantum*, is called the usuary, *-usuarium*. But this dismemberment of the elements of the *dominium* is essentially temporary; if no shorter period has been fixed for its duration, it terminates with the life of the usuary, fructuary, or usufructuary; for which reason the rights of use and usufruct are called personal servitudes. Besides the separation of the elements of the *dominium* among different persons, there may also be a *jus in re*, or dismemberment, so far as real estates are concerned, in favor of other estates. Thus, a right of way over my land may exist in favor of your house; this right is so completely attached to the house that it can never be separated from it, except by its entire extinction. This class of *jura in re* is called predial servitudes. To constitute this servitude, there must be two estates belonging to different owners; these estates are viewed in some measure as juridical persons, capable of acquiring rights and incurring obligations. The estate in favor of which the servitude exists is the creditor-estate; and the estate by which the servitude is due, the debtor-estate. 2 Mariadé. See EMINENT DOMAIN.

DOMINIUM BONITARIUM. See BONITARIAN OWNERSHIP.

DOMINIUM DIRECTUM (Lat.). Legal ownership. Ownership as distinguished from enjoyment.

DOMINIUM • DIRECTUM ET UTILE (Lat.). Full ownership and possession united in one person.

DOMINIUM EX JURE QUIRITUM See QUIRITARIAN OWNERSHIP.

DOMINIUM UTILE (Lat.). The beneficial ownership. The use of the property.

DOMINUS (Lat.). The lord or master; the owner. Ainsworth, Lat. Lex. The owner or proprietor of a thing, as distinguished from him who uses it merely. Calvinus, Lex. A master or principal, as distinguished from an agent or attorney. Story, Ag. § 8; Ferriere, Dict.

In Civil Law. A husband. A family. Vicat, Voc. Jur.

DOMINUS LITIS (Lat.). The master of suit. The client, as distinguished from an attorney.

And yet it is said, although he who has appointed an attorney is properly called *dominus litis*, the attorney himself, when the cause has been tried, becomes the *dominus litis*. Vicat.

DOMINUS NAVIS. In Civil Law. The absolute owner of a ship. Wharton.

DOMITÆ (Lat.). Tame; subdued; not wild.

Applied to domestic animals, in which a man may have an absolute property. 2 Bla. Com. 391.

DONATARIUS (L. Lat.). One to whom something is given. A donee.

DONATIO (Lat.). A gift. A transfer of the title to property to one who receives it without paying for it. Vicat. The act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, without any consideration. See 56 Ind. 476; 65 Ga. 499.

A donation is never perfected until it has been accepted; for an acceptance is requisite to make the donation complete. See *ASSENT*; Ayl. Pand. tit. 9; *Clef des Lois Rom.*; 2 Kent 438; 2 E. D. Sm. 305; 28 Ala. N. s. 641. In old English law and in the modern law, in several phrases, the word retains the extended sense it has in the civil law.

Its literal translation, gift, has acquired in real property law a more limited meaning, being applied to the conveyance of estates tail. 2 Bla. Com. 316; Littleton § 59; West, Symb. § 254; 4 Cruise, Dig. 51. There are several kinds of *donatio*: as, *donatio simplex et pura* (simple and pure gift without compulsion or consideration); *donatio absoluta et larga* (an absolute gift); *donatio conditionalis* (a conditional gift); *donatio stricta et coarctura* (a restricted gift; as an estate tail).

DONATIO INTER VIVOS (Lat. a gift between living persons). A contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee, gratuitously, and the donee who accepts and acquires the legal title to it. It operates, if at all, in the donor's lifetime, immediately and irrevocably; it is a gift executed; no further act of parties, no contingency of death or otherwise, is needed to give it effect; 3 Del. Ch. 62. "Gifts *inter vivos* have no reference to the future and go into immediate and absolute effect"; 2 Kent, Com. Lacy's ed. 439. Such a gift takes place when the giver is not in any immediate apprehension of death, which distinguishes it from a *donatio mortis causa* (q. v.).

This division of gifts is taken from the Roman law as are also the rules by which they are governed; 2 Kent, Com. 439. A *donatio inter vivos*, as distinguished from a *donatio mortis causa*, does not require actual delivery, and it is sufficient, to complete such a gift, that the conduct of the parties should show that the ownership of the chattel has been changed; 79 Ga. 119. It is true, however, that under such a gift a person "may take a benefit to accrue at a future day—it may be at the donor's death; but this can be only through the instrumentality of a trust created either in a third person or in the donor. The effect is to divest at once the former property of the donor in the thing so given. Such a gift is no less immediate than in the ordinary case;" 3 Del. Ch. 62. See *GIFT*.

DONATIO MORTIS CAUSA (Lat. a gift in prospect of death). A gift made

by a person in sickness, or other immediate peril, who, apprehending his dissolution near, delivers, or causes to be delivered, to another, the possession of any personal goods, to keep as his own in case of donor's decease. 2 Bla. Com. 514; 51 Pa. 345.

The civil law defines it to be a gift under apprehension of death: as, when anything is given upon condition that if the donor die the donee shall possess it absolutely, or return it if the donor should survive, or should repent of having made the gift, or if the donee should die before the donor. 1 Miles 109.

It differs from a legacy, inasmuch as it does not require proof in the court of probate; 2 Stra. 777; see 1 Bligh, N. s. 531; and no assent is required from the executor to perfect the donee's title; 3 Ves. 190; 18 & 3. 245. It differs from a gift *inter vivos* because it is ambulatory and revocable during the donor's life, because it may be made to the wife of the donor, and because it is liable for his debts, and it requires actual delivery; 79 Ga. 11. See also as to these distinctions Brett, L. Cas. Mod. Eq. 38.

To constitute a good *donatio mortis causa*: first, the thing given must be personal property; 3 Binn. 370; a bond; 3 Binn. 370; 2 Ves. Sen. 431; 3 Madd. 184; bank notes; 23 Pa. 59; 2 Bro. Ch. 612; 33 Barb. 250; 3 P. Wms. 356; certificates of stock; 55 Barb. 251; a policy of life insurance; 1 B. & S. 109; 51 Pa. 345; and a check offered for payment during the life of the donor; 4 Bro. Ch. 286; will be so considered; but a check not so presented, which had not passed into the hands of a *bona fide* holder, is revoked by the death of the decedent; L. R. 6 Eq. 198; 27 La. Ann. 465; s.c. 21 Am. Rep. 567; 13 L. R. Eq. 489; 31 Ohio St. 457; 30 Hun 632; 59 Cal. 665; *aliter*, as to a check given abroad; L. R. 5 Ch. Div. 780. See 154 Pa. 183. A check to a wife expressing that it was to enable her to buy mourning, was held under peculiar circumstances a valid *donatio mortis causa*; 1 P. Wms. 441. A note not negotiable, or if negotiable, not indorsed, but delivered, passes by such a donation; 1 Dan. Neg. Inst. § 24; Tiedm. Com. Pap. 252; 13 Gray 418; but in 5 Gill & J. 54, this is limited to bank notes and notes payable to bearer. A certificate of deposit which is delivered to a person for the use of a third party, though not indorsed, is a valid gift; 11 Colo. 183; 36 Ill. App. 525; *contra*, 109 Mo. 90; see 64 Cal. 246. The delivery of a savings-bank pass passes the money in bank; 63 Me. 364; 124 Mass. 472; 129 id. 425; 36 Conn. 187; 8 R. I. 636; *contra*, 3 Ir. Eq. 668; 121 Pa. 177; see 59 Va. 1. A banker's deposit note is a good subject of gift; 44 Ch. Div. 76; but where the bank book is already in the hands of the donee, a statement by the donor that his wife may have it is not sufficient; 81 Me. 281. See 36 Cent. Law J. 354; 31 Am. Law Reg. 681; 34 id. 85, for discussions and annotations on this subject. A mortgage is a good gift; Barn. Ch. Cas. 90; 5 Madd. 351; 1 Bligh, N. s. 497; a policy of insurance; 1 Best & Sm. 109; 33 Beav. 619; a receipt for money; 4 De G. & Sm. 517; bonds; 3 Atk. 214; 1 Bligh, N. s. 497; bank notes; 2 Eden 125; Sel. Ch. Cas. 14; 3 P. Wms. 356; 2 Bro. C. C. 612.

A promissory note of the sick man made in his last illness is not a valid donation; 5 B. & C. 501; 14 Pick. 204; 3 Barb. Ch. 76; 21 Vt. 288; 77 Pa. 338. See 33 N. H. 520; 18 Conn. 410; 11 Md. 424; 4 Cush. 87; 41 Ill. App. 659. See 6 Harv. L. Rev. 86. In England, bills delivered on a deathbed but without consideration, are valid donations; 27 Beav. 303; but a gift of the donor's own cheque, if not payable until after his death, is not valid; 15 Ch. D. 651; 27 Ch. D. 631. See also 5 Ch. D. 730; 4 D. M. & G. 249. As to a gift of money, see 50 N. J. Eq. 637.

Second, the gift must be made by the donor in peril of death, and to take effect only in case the giver dies; Bisph. Eq. 70; 3 Binn. 370; 1 Bligh, N. s. 530; 48 Vt. 513; 49 N. Y. 17; 3 Misc. Rep. 277; a gift made in apprehension of death from a surgical operation is valid; 125 N. Y. 572. There is quite a conflict of authority as to whether a gift by a soldier about to join the army is a valid *donatio causa mortis*, with the weight of authority against sustaining them. They have been upheld, it may possibly be considered, in 42 Ill. 39; but this case is explained in Travis on Sales as a gift *inter vivos* on condition; a case cited as upholding them, 34 Ind. 547, is overruled if it does so

hold; 38 id. 451, which holds them invalid, as do also 51 Pa. 345; 23 W. Va. 415; 47 Barb. 370; 5 Rob. N. Y. 216 (Barbour, J., dissenting). See 4 Cold. 288.

Such a gift is only good when made in relation to the death of the person by illness affecting him at the time; 2 Ves. Jr. 121; but if it appear that the donation was made when the donor was ill and only a few days or weeks before his death, it will be presumed that it was made in the last illness and in contemplation of death; 1 Wms. Ex. 845; 3 Story 755; 31 Me. 422.

When a gift was made in contemplation of death, but the donor so far recovered as to be able to attend to his business, and then died of the same disease, *held* not a good *donatio*; 17 Me. 287. That the donor lived fourteen days; 2 Whart. 17; three days; 3 Binn. 366; 85 Me. 227; six hours; 23 Pa. 63; after making the gift, does not invalidate it. There seems to be no rule limiting the time within which the gift must be made before death; 49 N. Y. 17.

Third, there must be an actual delivery of the subject to or for the donee, in cases where such delivery can be made; 2 Ves. 120; 2 Gill & J. 268; 4 Gratt. 472; 31 Me. 422; 14 Barb. 243; 7 E. L. & Eq. 134; 75 Pa. 115, 147; 49 N. Y. 17; 41 N. H. 147; 75 Cal. 548; 149 Mass. 12; L. R. 6 Eq. 474; 63 N. H. 552; 77 Mo. 166; 94 N. C. 274. The delivery must be as complete as the nature of the property will admit of; 56 Me. 324; 114 Mass. 80. In this last case taking the key of a trunk, putting goods into the trunk and returning the key to its place at the request of the owner, who expressed a desire, in his last illness, to make the trunk and its contents a *donatio mortis causa*, was held not to be a sufficient delivery. The gift of the keys of a box deposited in a vault of a bank containing bonds, etc., is a sufficient constructive delivery of the contents of the box; 89 Va. 1; 2 Ves. Sen. 431; Prec. Ch. 300; [1891] W. N. 201; where donor delivered the keys of a trunk to donee, and said the trunk and its contents were donee's, it was valid; 158 Mass. 592; but see 85 Me. 227. An intention to give is sufficiently manifested from the fact that a person in *extremis* hands a package of bonds to another saying, "These bonds are for you;" 73 Cal. 61. Delivery can be made to a third person for the use of a donee; 3 Binn. 370; 2 Bradf. Surr. 340; 5 Bush 591; but not if the third party is the agent of the giver; 2 Coll. 356. The acceptance is presumed, unless the contrary appear; 94 Mich. 11.

To make such a gift valid there must be a renunciation by the donor and an acquisition by the donee, of all interest and title to the property intended to be given; 18 N. Y. Sup. 852.

To constitute such a gift, the subject of the gift must be delivered either to the donee or to some person for his use and benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time to revoke the gift; 75 Cal. 548.

It is an unsettled question whether such kind of gift appearing in writing, without delivery of the subject, can be supported; 2 Ves. 120; 3 Ired. Ch. 263; but Lord Hardwicke expressed the opinion that it could be; 2 Ves. Sen. 440; 1 id. 314; *contra*, 1 Wms. Ex. 855. And see 12 Tex. 327. By the Roman and civil law, a gift *mortis causa* might be made in writing; Dig. lib. 39, t. 6, l. 28; 2 Ves. Sen. 440; 1 id. 314.

Upon the recovery of the donor and his consequent ability to comply with the statute, the dispensation from its requirements ceases and the gift *causa mortis*, though valid when made, becomes of no further force. No expression to this effect is necessary; 3 Del. Ch. 63; 89 Va. 1.

The essentials are also thus stated: 1. It must be in view of donor's death. 2. With express or implied intention that it shall only take effect by reason of existing disorder. 3. Delivery by the donor to the donee or some one on his behalf; Brett, L. Cas. Mod. Eq. 33; but this is not so satisfactory as the well-settled enumeration above given.

A *donatio mortis causa* does not require the executor's assent; 2 Ves. Jr. 120; is revocable by the donor during his life; 2 Bradf. Surv. 839; 27 Me. 196; 3 Woodb. & M. 519; 34 N. H. 439; 99 Cal. 311; by recovery; 3 Macn. & G. 664; Wms. Ex. 651; or resumption of possession; 7 Taunt. 233; 2 Ves. Sen. 433; but not by a subsequent will; Prec. Chanc. 300; *contra*, 81 Ill. App. 28; but may be satisfied by a subsequent legacy; 1 Ves. Sen. 314. And see 1 Ired. Ch. 130. It may be of any amount of property; 24 Vt. 591. It is liable for the testator's debts; 1 Phill. Ch. 406; 109 Mo. 90; 68 N. H. 552; 107 U. S. 602; a gift providing for the payment of certain bills and a division of the remaining property is valid; 70 Hun 565.

A gift *causa mortis* is none the less valid because it embraces the entire personal estate of the donor, and the testimony of one credible witness is sufficient to establish such a gift; 89 Va. 1; 24 Vt. 591; but see 18 Pa. 326; 13 Allen 43; and a gift accompanied by the condition that part thereof is to be applied to the payment of the donor's debts is good; 18 N. Y. Sup. 852.

For a thorough discussion of this subject and examination of authorities, see 3 Del. Ch. 51. See also 1 Am. L. Reg. 1; note to Ward v. Turner, Wh. & T. L. C. Eq.; 86 Cent. Law J. 354; 32 id. 27.

DONATIO PROPTER NUPTIAS (Lat. gift on account of marriage). In Roman Law. A gift made by the husband as a security for the marriage portion. The effect of the act of making such a gift was different according to the relation of the parties at the time. Vicat, Voc. Jur. Called, also, a mutual gift.

The name was originally applied to a gift made before marriage, and was then called a *donatio ante nuptias*; but in process of time it was allowed to be made after marriage as well, and was then called a *donatio propter nuptias*.

DONATION. See DONATIO.

DONATIVE. See ADVOWSON.

DONEE. He to whom a gift is made or a bequest given; one who is invested with a power of appointment; he is sometimes called an appointee. 4 Kent 316; 4 Cruise, Dig. 51.

DONIS, STATUTE DE. See DE DONIS, THE STATUTE

DONOR. He who makes a gift. One who gives lands in tail. *Termes de la Ley*.

DONUM (Lat.). A gift.

The difference between *donum* and *munus* is said to be that *donum* is more general, while *munus* is specific. *Munus* is said to mean *donum* with a cause for the giving (though not a legal consideration), as on account of marriage, etc. *Donum* is said to be that which is given from no necessity of law or duty, but from free will, "from the absence of which, if they are not given, no blame arises; but if they are given, praise is due." Vicat, Voc. Jur.; Calvinus, Lex.

DOOM. Judgment.

DOOR. The place of usual entrance into a house, or into a room in the house.

To authorize the breach of an outer door in order to serve process, the process must be of a criminal nature; and even then a demand of admittance must first have been refused; 5 Co. 94; 1 N. H. 346; 10 Johns. 263; 1 Root, 83, 184; 21 Pick. 156; 120 Mass. 190; 106 Ill. 621; 14 B. Monr. 395. The outer door may also be broken open for the purpose of executing a writ of *habere facias*; 5 Co. 93; Bac. Abr. Sheriff (N 3).

An outer door cannot, in general, be broken for the purpose of serving civil process; 13 Mass. 320; 51 Ill. 357; 19 Vt. 151; 1 M. & W. 336; 4 Hill 437; but after the defendant has been arrested, and he takes refuge in his own house, the officer may justify breaking an outer door to take him; Fost. 320; 1 Rolle 188; Cro. Jac. 555; 10 Wend. 300. When once an officer is in the house, he may break open an inner door to make an arrest; Kirb. 386; 17 Johns. 137; 13 M. & W. 53; 2 Harr. 494. See 1 Toulrier, n. 214, p. 88; L. R. 2 Q. B. 593; or break the outer door to get out; 7 A. & E. 826.

DORMANT. Sleeping; silent; not known; not acting. He whose name and transactions as a partner are professedly concealed from the world; 2 H. & G. 159; 5 Cow. 584; 4 Mass. 424; 47 N. Y. 15; Coll. Partn. § 4. The term is applied, also, to titles, rights, judgments, and executions. As to the latter, see 11 Johns. 110; 2 Hill 364.

DOS (Lat.). In Roman Law. That which is received by or promised to the husband from the wife, or any one else by her influence, for sustaining the burdens of matrimony. There are three classes of *dos*. *Dos profectitia* is that which is given by the father or any male relative from his property or by his act; *dos adventitia* is that which is given by any other person or from the property of the wife herself; *dos receptitia* is where there is a stipulation connected with the gift relating to the death of the wife. Vicat; Calvinus, Lex.; Du Cange; 1 Washb. R. P. 147.

In English Law. The portion bestowed upon a wife at her marriage by her husband. 1 Reeve, Hist. Eng. Law 100; 1 Washb. R. P. 147; 1 Cruise, Dig. 153.

Dower generally. The portion which a widow has in the estate of her husband after his death. Park, Dower.

This use of the word in the English law, though, as Spelman shows, not strictly correct, has still the authority of Tacitus (*de Mor. Germ.* 18) for its use. And if the general meaning of marriage portion is given to it, it is strictly applicable to a gift from the husband to the wife as to one from the wife to the husband. It occurs often, in the phrase *dos de dote peti non debet* (dower should not be sought of dower). 1 Washb. R. P. 309.

DOS RATIONABILIS (Lat.). A reasonable marriage portion. A reasonable part of her husband's estate, to which every widow is entitled, of lands of which her husband may have endowed her on the day of marriage. Co. Litt. 386. Dower, at common law. 2 Bla. Com. 134.

DOSSIER (Fr.) A brief; a collection of memoranda and documents relating to some matter, as a lawyer's dossier of a case in court. Stand. Dict.

DOT (a French word adopted in Louisiana). The fortune, portion, or dowry which a woman brings to her husband by the marriage. 6 Mart. La. N. s. 460.

DOTAGE. That feebleness of the mental faculties which proceeds from old age. A diminution or decay of that intellectual power which was once possessed. 1 Bland, Ch. 389. See DEMENTIA.

The slow approach of death, of that irrevocable cessation, without hurt or disease, of all the functions which once belonged to the living animal. 10 A. & E. Ency. 2nd ed., 120; 1 Bland (Md.) 389. See DEMENTIA, SENILE.

DOTAL PROPERTY. By the civil law in Louisiana, by this term is understood that property which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry. La. Civ. Code, art. 2335. The effect of marriage under the civil law as found in the digest was that the wife brought her *dos* and the husband his *antidos* into the marriage. In all other property belonging to them they each retained the rights of owners in their separate capacities uncontrolled by their relation of husband and wife; Ballinger, Community Property § 2. See COMMUNITY.

DOTATION. In French Law. The act by which the founder of a hospital, or other charity, endows it with property to fulfil its destination.

NOTE. In Spanish Law. The property and effects which a woman brings to her husband for the purpose of aiding him with the rents and revenues thereof to support the expenses of the marriage. Las Partidas, 4. 11. 1. "Dos," says Cujas, "*est pecunia marito, nuptiarum causa, data vel promissa*." The dower of the wife is inalienable, except in certain specified cases,

for which see Escriche, Dic. Raz. Dote.

As an English verb it has been found to be delirious, silly or insane. 7 Ind. 441. See BESOR.

NOTE ASSIGNANDA. In English Law. A writ which lay in favor of a widow, when it was found by office that the king's tenant was seized of tenements in fee or fee-tail at the time of his death, and that he held of the king in chief. Such widows were called king's widows.

NOTE UNDE NIHIL HABET. A writ which lies for a widow to whom no dower has been assigned. 3 Bla. Com. 182. By 23 and 24 Vict. c. 126, an ordinary action commenced by writ of summons has taken its place; but it remains in force in the United States, and under the designation of dower *unde nihil habet*, is the form in common use for the recovery of dower at law; 1 Washb. R. P. 290; 4 Kent 63; Stearns, Real Act. 302.

DOUBLE AVAIL OF MARRIAGE. See DUPLEX VALOR MARITAGII.

DOUBLE COMPLAINT. See DUPLEX QUERELA.

DOUBLE COSTS. See COSTS.

DOUBLE OR TREBLE DAMAGES. See MEASURE OF DAMAGES.

DOUBLE EAGLE. A gold coin of the United States, of the value of twenty dollars or units.

It is so called because it is twice the value of the eagle, and, consequently, weighs five hundred and sixteen grains of standard fineness, namely, nine hundred thousandths fine. It is a legal tender for twenty dollars to any amount. Act of March 3, 1849, 6 Stat. L. 397. U. S. Rev. Stat. §§ 3511, 3514. The double eagle is in value the largest coin issued in the United States. The first issue was made in 1849. See act of Feb. 12, 1873, 17 Stat. L. p. 426; EAGLE.

DOUBLE INSURANCE. Where divers insurances are made upon the same interest in the same subject against the same risks in favor of the same assured, in proportions exceeding the value. 1 Phill. Ins. §§ 859, 866.

A like excess in one policy is over-insurance. If the valuation of the whole interest in one policy is double that in another, and half of the value is insured in each policy according to the valuation in that policy, it is not a double insurance; its being so or not depends on the aggregate of the proportions, one-quarter, one-half, etc., insured by each policy, not upon the aggregate of the amounts.

Where the insurance is on the interests of different persons, though on the same goods, it is not double insurance; 9 S. & R. 107; nor is it where carrier and shipper each insure; 26 Fed. Rep. 492.

In England, each underwriter is liable for the whole amount insured by him until the assured is fully indemnified, and either on paying over his proportion *pro rata* is entitled to contribution from the other; but no one can be liable over the rate at which the subject is rated in his policy.

In the United States, the policies generally provide that the prior underwriters shall be liable until the assured is fully indemnified, and underwriters for the excess are exonerated; but the excess is to be ascertained by the aggregate of the proportions, as a quarter, half, etc., to make up the integer; 1 Phill. Ins. § 861; 1 W. Bla. 416; 1 Burr. 459; 15 B. Monr. 433, 452; 18 Ill. 553. This clause does not apply to double insurance by simultaneous policies; 1 Phill. Ins. § 862; 5 S. & R. 475.

In case of double insurance, the assured may sue upon all the policies and is entitled to judgment upon all, but he is entitled to but one satisfaction; therefore, if during the pendency of suits on several policies concerning the same risk and interest, the loss is paid in full by one company, the actions against the others must fail, and the insurer paying the loss has a remedy against the other insurers for a proportionate share of the loss. If there be any doubt as to whether the policies cover the same property or interest, evidence is admissible to show the fact; 20 Barb. 302; 45 Ill. 85; 18 id. 553; 49 Pa. 14; 54 id. 277; May, Ins. § 13.

The question of double insurance does not generally arise in life insurance, as there is no fixed value to the life, and the person in each case is to pay a fixed sum without regard to other insurance. But where the insurable interest has an ascertainable value

the question may arise, as where two policies are taken out in different offices, by a creditor, on the life of a debtor, and for the same debt. Then only the value of the interest can be recovered and the amount recovered on the first policy is to be deducted from the amount payable on the second; May, Ins. § 440. See INSURANCE.

DOUBLE PLEA. The alleging, for one single purpose, two or more distinct grounds of defence, when one of them would be as effectual in law as both or all. See DUPLICITY.

By the statute 4 Anne, c. 16, in England, and by similar statutes in most if not all of the states of the United States, any defendant in any action or suit, and any plaintiff in replevin in any court of record, may plead as many several matters as may be necessary for a defence with leave of court. This statute allows double pleading; but each plea must be single, as at common law; Lawes, Pl. 131; 1 Chit. Pl. 512; Andr. Steph. Pl. 320; and the statute does not extend to the subsequent pleadings; Com. Dig. *Pleader* (E 2); Story, Pl. § 72; Gould, Pl. c. 8; *Dootrina Plac.* 222. And in criminal cases a defendant cannot plead a special plea in addition to the general issue; 7 Cox, Cr. Cas. 85.

DOUBLE POSSIBILITY. A possibility upon a possibility. 2 Bla. Com. 170. See CONTINGENT REMAINDER.

DOUBLE RENT. In English Law. Rent payable by a tenant who continues in possession after the time for which he has given notice to quit, until the time of his quitting possession. Stat. 11 Geo. II. c. 19; Fawcett, L. & T. 304; Moz. & W. Dict. The provisions of these statutes have been re-enacted in New York, and some other states, though they are not generally adopted in this country.

DOUBLE USE. A term used in patent law to indicate that a later device is merely a new application of an older device, not involving the exercise of the inventive faculty.

In construing letters patent for new applications of old devices, if the new use be so nearly analogous to the former one that it would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them are remote, and especially if the use of the old device produce a new result, it may involve an exercise of the inventive faculty—much depending upon the nature of the changes required to adapt the device to its new use; 155 U. S. 597. See PATENT.

DOUBLE VOUCHER. A voucher which occurs when the person first vouched to warranty comes in and vouches over a third person. See a precedent, 2 Bla. Com. App. V. p. xvii.; VOUCHER.

The necessity for double voucher arises when the tenant in tail is not the tenant in the writ, but is tenant by warranty; that is, where he is vouched, and comes in and confesses the warranty. Generally speaking, to accomplish this result a previous conveyance is necessary, by the tenant in tail, to a third person, in order to make such third person tenant to a writ of entry. Pres. Conv. 125, 126.

DOUBLE WASTE. When a tenant bound to repair suffers a house to be wasted, and then unlawfully fells timber to repair it, he is said to commit double waste. Co. Litt. 53. See WASTE.

DOUBT. The uncertainty which exists in relation to a fact, a proposition, or other thing; an equipoise of the mind arising from an equality of contrary reasons. Ayliffe, Pand. 121.

The most embarrassing position of a judge is that of being in doubt; and it is frequently the lot of the wisest and most enlightened to be in this condition: those who have little or no experience usually find no difficulty in deciding the most problematical questions.

Some rules, not always infallible, have been adopted in doubtful cases, in order to arrive at the truth. 1. In civil cases, the doubt ought to operate against him who, having it in his power to prove facts to remove the doubt, has neglected to do so. In cases of fraud, when there is a doubt, the presumption of innocence ought usually to remove it. 2. In criminal cases, whenever a reasonable doubt

exists as to the guilt of the accused, that doubt ought to operate in his favor. In such cases, particularly when the liberty, honor, or life of an individual is at stake, the evidence to convict ought to be clear and devoid of all reasonable doubt.

The term reasonable doubt is often used, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond reasonable doubt; because if the law, which mostly depends upon the existence of a moral nature, should go further than this and require an absolute certainty, it would exclude circumstantial evidence altogether." Per Shaw, C. J., in 5 Cush. 320; 1 Gray 534; 2 Dev. & B. L. 311; 1 Houst. Cr. Rep. 316. In approving the opinion of Shaw, C. J., the court, in 10 Cal. 395, said: "The moral certainty is the 'abiding doubt' of a fact after it has been clearly established by satisfactory proof." No man should be deprived of life under the form of law unless the jury can say upon their conscience that the evidence is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged; 160 U. S. 469. It must be an actual, substantial doubt, arising from the evidence or want of evidence in the case; 32 Neb. 782.

If the evidence produced in a criminal action be of such a convincing character that the jurors would unhesitatingly be governed by it as to the weighty and important matters of life, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. Therefore, a charge to the jury that if, after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous; 180 U. S. 431.

Proof 'beyond a reasonable doubt' is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof 'to a moral certainty,' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; and each signifies such proof as satisfies the judgment and consciences of the jury, of reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible; 118 Mass. 24.

See Best, Pres. § 195; Will. Cr. Ev. 825; 33 How. St. Tr. 506; Burn. Cr. Law of Scotl. 522; 1 Greenl. Ev. § 1; D'Aguesseau, *Œuvres*, xiii. 243; 108 U. S. 312; 181 U. S. 1; J. L. 615; 75 Me. 326; 100 N. Y. 510; 124 Ill. 321; 2 Green. Cr. Cas. 434; 10 Am. L. Rev. 542; 14 Cent. L. J. 440; 47 Ala. 78; PRESUMPTION OF INNOCENCE. See REASONABLE DOUBT RATIONAL DOUBT.

DOUBTFUL TITLE. See TITLE.

DOVE. A bird; a species of pigeon. Doves are considered as *feræ naturæ*, and not the subject of larceny unless they are in the owner's custody; as, for example, in a dove-house, or when in the nest before they can fly; 9 Pick. 15.

It has been held that larceny may be committed of pigeons which, though they have access to the open air, are tame and unreclaimed and return to their house or box; 2 Den. Cr. Cas. 361. See 2 id. 362, note; 4 C. & P. 131.

DOWAGER. A widow endowed; one who has a jointure.

In England, this is a title or addition given to the widow of a prince, duke, earl, or other nobleman, to distinguish her from the wife of the heir, who has the right to bear the title; 1 Bla. Com. 224.

DOWER (from Fr. *douer*, to endow). The provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. Co. Litt. 30 a; 2 Bla. Com. 130; 4 Kent 35; Washb. R. P. 146.

Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of § 2 of Article IV of the Constitution or the Fourteenth Amendment. At most it is a right which, while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each State as respects

property within its limits. 258 U. S. 318; 18 How. (U. S.) 591. See AS DOWER.

There were five species of dower in England:—

Dower by custom, where a widow became entitled to a specified portion of her husband's lands in consequence of some local or particular custom.

Dower ad ostium ecclesie, where a man of full age, on coming to the church-door to be married, endowed his wife of a certain portion of his lands.

Dower ex assensu patris, which differed from dower ad ostium ecclesie only in being made out of the lands of the husband's father and with his consent.

Dower de la plus belle, where the widow, on suing the guardian in chivalry for dower, was required by him to endow herself of the fairest portion of any lands she might hold as guardian in socage, and thus release from dower the lands of her husband held in chivalry. This was abolished along with the military tenures, of which it was a consequence; 2 Bla. Com. 132, n.

Dower by common law, where the widow was entitled during her life to a third part of all the lands and tenements of which her husband was seised in law or in fact of an inheritable estate, at any time during the coverture, and which any issue she might have had might by possibility have inherited.

Since the passage of the Dower Act in England, 3 & 4 Will. IV. c. 105, all these species of dower, except that by custom and by the common law, have ceased to exist; 2 Sharw. Bla. Com. 135, n. Dower in the United States, although regulated by statutes differing from each other in many respects, conforms substantially to that at the common law; 1 Washb. R. P. 149; see Schoul. Hus. & W. 453.

Where a statute provided that no estate in dower be allotted to the wife on the death of her husband, it took away a wife's inchoate right of dower in lands previously alienated by her husband without joining her in the deed; 47 Fed. Rep. 854; the inchoate right of the wife is not such a vested right or interest as cannot be taken away by legislative action; 4 C. C. A. 200.

Of what estates the wife is dowerable. Her right to dower is always determined by the laws of the place where the property is situate; 1 Miss. 281; 4 La. 381; 3 Strobb. 562.

She is entitled to one-third of all lands, tenements, or hereditaments, corporeal and incorporeal, of which her husband may have been seized during the coverture, in fee or in tail; 2 Bla. Com. 131; 23 Vt. 611.

She was not dowerable of a term for years, however long; Park, Dow. 47; 1 Md. Ch. Dec. 36.

The inheritance must be an entire one, and one of which the husband may have corporeal seisin or the right of immediate corporeal seisin; Plowd. 506; 1 Sm. & M. 107.

Dower does not attach in an estate held in joint tenancy; but the widow of the survivor has dower; Co. Litt. § 45; 15 Pet. 21. But where the principle of survivorship is abolished, this disability does not exist; 9 Dana 185; 2 Strobb. 67.

An estate in common is subject to dower; 3 Paige, Ch. 653; 3 Edw. Ch. 500; 6 Gray 314; 87 Tenn. 17; 88 Va. 529; 1 Md. 172. But the dower in land owned by the husband in common with others is divested by partition thereof in a suit to which the husband is a party, though the wife is not joined; 36 S. C. 404. See 2 Can. L. T. 15.

In the case of an exchange of lands, the widow may claim dower in either, but not in both; Co. Litt. 31 b; if the interests are unequal, then in both; 7 Barb. 633; 32 Me. 412; 1 N. H. 65.

She is entitled to dower in mines belonging to her husband, if opened by him in his lifetime on his own or another's land; 1 Taunt. 402; 1 Cow. 460; 73 Ill. 405; 45 Me. 493. See 92 Mich. 186, where she was held to be entitled whether the mines were opened before or after her husband's death; 49 Fed. Rep. 549; 3 C. C. A. 312. See also 16 L. R. A. 247.

She had right of dower in various species of incorporeal hereditaments: as, rights of

fishing, and rents; Co. Litt. 32 a; 2 Bla. Com. 182; 1 Bland, Ch. 227; but the rents should be estates of inheritance; 2 Cruise, Dig. 291.

In most of the states she is dowable of wild lands; 2 Doug. Mich. 141; 10 Ga. 321; 2 Rob. Va. 507; 8 Dana 121; 8 Ohio 418; 24 Ark. 124; 17 N. J. Eq. 32; 68 N. C. 236; *contra*, 15 Mass. 157; 14 Me. 409; 2 N. H. 56.

She has no right of dower in a pre-emption claim; 16 Mo. 478; 2 Ill. 314.

At law there was nothing to prevent her from having dower in lands which her husband held as trustee. But, as she would take it subject to the trust, courts of equity were in the habit of restraining her from claiming her dower in lands which she would be compelled to hold entirely to another's use, till it was finally established, and it remains the same both in England and the United States, that she is not entitled to dower in anything her husband may hold as a mere trustee; 2 Ohio St. 415; 5 B. Monr. 152; Park, Dow. 105.

At common law she was not dowable of the estate of a *cestui que trust*; 2 Sch. & L. 887; 4 Kent 43; Hempst. 251. See 139 Pa. 461. But by the Dower Act this restriction was removed in England; 3 & 4 Will. IV. c. 105; 1 Spence, Eq. Jur. 501. The common-law rule that a widow could only have dower in the legal estates of the husband has been either expressly or impliedly changed by statute in the majority of states, and she now has a right of dower in his equitable estates as well, but only in those of which he died seised; 17 Fed. Rep. 333; 78 Ill. 604; and if the husband has aliened an equitable estate, although his wife may not have consented, the dower is defeated; 68 Ill. 341; 3 Gill 304. In Delaware a widow is not dowable out of an equitable estate of her deceased husband, except in intestate lands; 3 Del. Ch. 407, but in the United States the law upon this subject is not uniform; 12 Pet. 201; 19 Me. 141; 2 S. & R. 554; 7 Ala. 447; 1 Hen. & M. 92. In some, dower in equitable estates is given by statutes; while in others the severe common-law rule has not been strictly followed by the courts; 1 Md. Ch. Dec. 452; 5 Paige, Ch. 318; 6 Dana 471; 8 Humphr. 537; 1 Jones, N. C. 430; 3 Gill 304.

A mortgagee's wife, although her husband has the technical seisin, had no dowable interest till the estate becomes irredeemable; 4 Dane, Abr. 671; 13 Ark. 44; 4 Kent 42; 49 Me. 58; 2 Ves. Jr. 631; 33 Gratt. 83.

A widow was not dowable of an equity of redemption under the common law; 17 Fed. Rep. 331; L. R. 6 Ch. D. 218; 105 Ill. 342; 53 Md. 607; 45 Miss. 243; 49 N. H. 296; 13 R. I. 105; 6 Mack. 536; nor did the English courts admit the doctrine until the statute of 1833; Ld. Ch. Redesdale in 2 S. & L. 388; but, as was said by Chancellor Bates in 3 Del. Ch. 407, the American courts, being free to carry the equitable view of mortgaged estates to its logical results, have uniformly allowed dower in an equity of redemption; Jones, Mort. 606; 15 Pet. 38; 84 Me. 50; 4 Gray 46; 5 Johns. Ch. 452; 2 Blackf. 262; 1 Rand. 844; 1 Conn. 559; 29 N. H. 564; 1 Stockt. Ch. 361; but after the surplus proceeds of sale have been applied by the sheriff to a judgment against the husband, it is too late to assert the widow's claim to equitable dower; 4 Del. Ch. 599. See on this subject 11 Can. L. T. 281.

In reference to her husband's contracts for the purchase of lands, the rule seems to be, in those states where dower is allowed in equitable estates, that her right attaches to her husband's interest in the contract, if at his death he was in a condition to enforce specific performance; 5 Paige, Ch. 318; 5 Blackf. 406; 1 Hen. & M. 92; 1 B. Monr. 93; 2 Ill. 314; 2 Ohio St. 512; 7 Gray 533; 19 Ill. 545; 1 Jones, N. C. 430. If his interest has been assigned before his death, or forfeited, or taken on execution, her dower-right is defeated; 29 Pa. 71; 6 Rich. Eq. 72; 4 J. J. Marsh. 451; 16 Ala. 522; 16 B. Monr. 114; 1 Hen. & M. 91.

She is entitled to dower in lands actually purchased by her husband and upon which the vendor retains a lien for the unpaid purchase-money, subject to that lien; 12

B. Monr. 261; 8 Blackf. 120; 2 Bland, Ch. 242; 1 Humphr. 408; see 51 Ill. 302; 40 Ala. 538; 44 Ga. 319; 119 Mass. 519; 53 Me. 138; or upon which her husband has given a mortgage to secure the purchase-money, subject to that mortgage; 10 Rich. Eq. 285. See 4 L. R. A. 606.

She is not entitled to dower in partnership lands purchased by partnership funds and for partnership purposes, until the partnership debts have been paid; 4 Metc. 537; 4 Miss. 372; 10 Leigh 406; 5 Fla. 350; 20 Mo. 174; 88 Va. 529; 28 Ark. 259; 65 Mo. 148; 30 N. J. Eq. 417. See 92 Ky. 190; 95 Mich. 426. She has been denied dower in land purchased by several for the purposes of sale and speculation; 3 Edw. Ch. 423; it has been treated as personality so far as was necessary to settle the partnership affairs, the right of dower being subject to the debts of the firm; 115 Mo. 222; 71 Ia. 63; 12 Leigh 405.

Sometimes she is allowed dower out of money, the proceeds of real estate sold by order of court, or by the wrongful act of an agent or trustee; 14 Pick. 345; 11 Ala. N. S. 33; 3 Sandf. Ch. 434; 12 B. Monr. 172; 7 Humphr. 72.

Her claim for dower has been held not subject to mechanics' liens; 7 Metc. 157; 8 Ill. 511; 8 Blackf. 252; 1 B. Monr. 257.

The principle of equitable contribution applies equally to dower, as to other incumbrances; 3 Del. Ch. 260.

She is not entitled to dower in an estate *pur autre vie*; 5 Cow. 388; or in a vested remainder; 5 N. H. 240, 469; 2 Leigh 29; 5 Paige, Ch. 161; or in reversion of the husband, where he dies before the termination of the life estate; 139 Ill. 433.

In some states she has dower only in what the husband died seised of; 6 McLean 442; 1 Root 53; 2 N. C. 253; 4 Kent 41.

The wife's dower will be protected against the voluntary conveyance of the husband made pending a marriage engagement, under the same circumstances in which the husband is relieved against an antenuptial settlement by the wife; 3 Del. Ch. 99; s. c. 17 Am. Law Rep. N. S. 319. This case is considered by Washburn and Bishop as the leading case and approved by each of them; 3 Washb. R. P. 359; 2 Bish. M. W. § 343, note 2, quoting the greater portion of the opinion of Bates, Ch.

Requisites of. Three things are usually said to be requisite to the consummation of a title to dower, viz.: marriage, seisin of the husband, and his death; 4 Kent 36; 1 Washb. R. P. 169; 61 Ala. 481; 4 N. Y. 99.

The marriage must be a legal one; though, if voidable and not void, she will have her dower unless it is dissolved in his lifetime; 14 Miss. 308; Co. Litt. 33 a; 1 Cruise, Dig. 164; 9 Mo. 501; 23 Ark. 21.

The husband must have been seised in the premises of an estate of inheritance at some time during the coverture. It may not be an actual seisin: a seisin in law with the right of immediate corporeal seisin is sufficient; 7 Mass. 253; 39 Me. 25; 1 Paige, Ch. 635; 2 S. & R. 554; 1 Cruise, Dig. 166; 45 N. J. Eq. 27; 88 N. C. 312; 9 Ohio St. 371. Possession by a widow of the mansion house of her husband, and her unassigned right of dower, do not prevent the heir from being seised thereof so that his widow may acquire dower therein; 111 Mo. 273. It is not necessary that the seisin of the husband should be a rightful one. The widow of a disseisor may have dower against all who have not the rightful seisin; Park, Dow. 37; Scribn. Dow. 702; 4 Dane, Abr. 668. See 125 Mass. 122.

So, although the estate is a defeasible one, provided it is one of inheritance, she may claim her dower until it is defeated; Co. Litt. 241; 3 Halst. 241; 10 Co. 95.

The seisin is not required to remain in the husband any particular length of time. It is sufficient if he is seised but an instant to his own benefit and use; 11 Rich. Eq. 417; 37 Me. 508; 2 Bla. Com. 132; 43 How. Pr. 382; but a mere instantaneous seisin for some other purpose than proprietorship will not give the wife dower; 14 Me. 390; 4 Miss. 369; 1 Johns. Cas. 95; 27 Ala. N. S. 578; 15 Vt. 39; 2 G. & J. 318; 6 Metc. 475.

Where he purchases land and gives a mortgage at the same time to secure the purchase-money, such incumbrance takes precedence of his wife's dower; 15 Johns. 458; 12 S. & R. 18; 4 Mass. 566; 5 N. H. 479; 7 Halst. 52; 1 Bay 312; 37 Me. 11.

The death of the husband. 1 Cruise, Dig. 168. What was known as civil death in England did not give the wife right of dower; 2 Crabb, R. P. 130; 7 B. Monr. 51; 6 Johns. Ch. 129. Imprisonment for life is declared civil death in some of the states.

How dower may be prevented or defeated. At common law, *alienage* on the part of the husband or wife prevented dower from attaching; 2 Bla. Com. 131; 16 Wend. 617; 2 Mo. 32. This disability is partially done away with in England, 7 & 8 Vict. c. 66, and is almost wholly abolished in the United States. See ALIEN.

It is well established that the wife's dower is defeated whenever the seisin of her husband is defeated by a paramount title; Co. Litt. 240 b; 4 Kent 48.

The foreclosure of a mortgage given by the husband before marriage, or by the wife and husband after marriage, will defeat her right of dower; 15 Johns. 458; 12 S. & R. 18; 1 Ind. 527; 19 Miss. 164; 2 Rob. Va. 384; 8 Blackf. 174; 4 Harr. Del. 111; 140 Ill. 470; 51 N. J. Eq. 135. And in Pennsylvania, whether the wife joined or not. Like force would be given to a vendor's lien or mortgage for the purchase-money, or to a judgment lien outstanding at the time of marriage.

Her right to dower in the estate which she has joined with her husband in mortgaging is good against every one but the mortgagee; 3 Miss. 692; 18 Ohio St. 567; 14 Pick. 98; 29 N. H. 564; 37 Me. 509. The same is true in regard to an estate mortgaged by her husband before coverture; 14 Pick. 98. In neither case would the husband have the right to cut off her claim for dower by a release to the mortgagee, or an assignment of his equity of redemption; 5 Johns. Ch. 452, 482; 14 Pick. 98; 8 Humphr. 713; 1 Rand. 344; 34 Me. 50; 2 Halst. 392. As to a purchase and mortgage for the purchase-money before marriage, in which the husband releases the equity of redemption after marriage, see 6 Cow. 316.

An agreement on the part of the husband to convey before dower attaches, if enforced, will extinguish her claim; 2 Ind. 197; 3 Md. Ch. 359.

Dower will not be defeated by the determination of the estate by natural limitation; as, if the tenant in fee die without heirs, or the tenant in tail; 8 Co. 34; 4 Kent 49; 12 B. Monr. 73. Whether it will be defeated by a conditional limitation by way of executory devise or shifting use, is not yet fully settled; Co. Litt. 241 a, Butler's note 170; Sugd. Pow. 333; 3 B. & P. 652; 2 Atk. 47; 1 Leon. 167. But it seems that the weight of American authority is in favor of sustaining dower out of such estates; 9 Pa. 190; 4 Desaus. 617. See 1 Washb. R. P. 216.

Dower will be defeated by operation of a collateral limitation: as, in the case of an estate to a man and his heirs so long as a tree shall stand, and the tree dies; 3 Prest. Abstr. 373; 4 Kent 49.

In some states it will be defeated by a sale on execution for the debts of the husband; 5 Gill 94; 8 Pa. 120; 1 Humphr. 1; 11 Mo. 204; 3 Dev. 8; but see 73 Ia. 657. In Missouri it is defeated by a sale in partition; 22 Mo. 202. See 22 Wend. 498; 2 Edw. Ch. 577. See 25 Alb. L. J. 887.

It is defeated by a sale for the payment of taxes; 8 Ohio St. 430.

It is also defeated by exercise of the right of eminent domain during the life of the husband. Nor has the widow the right of compensation for such taking. The same is true of land dedicated by her husband to public use; 3 Ohio St. 24; 9 N. Y. 110.

How dower may be barred. A divorce from the bonds of matrimony was at common law a bar to dower; 2 Bla. Com. 130; 4 Barb. 192; 84 Ala. 368; 28 Atl. Rep. (N. J.) 719; but the woman's right to dower, or something equivalent to it, is reserved by statutes in most of the states, if she be the

innocent party; 6 Duer, N. Y. 102. A judgment of divorce in another state, for cause other than adultery, which has the effect to deprive the wife of dower in the state where rendered, will not have such effect in New York; the United States constitution makes a judgment in another state conclusive as to the fact of divorce, but gives no extra-territorial effect on land of the husband; 133 N. Y. 540. See 15 L. R. A. 542.

By the common law neither adultery alone nor with elopement was a bar to dower; 2 Scrib. Dow. 531; but by the statute of Westminster 2d, a wife who eloped and lived in adultery forfeited her dower-right. This provision has been re-enacted in several of the states and recognized as common law in others; 9 Mo. 555; 2 Brock. 256; 3 N. H. 41; 13 Ired. 361; 4 Dane. Abr. 676; 1 Bailey 312; *contra*, 24 Wend. 193; 64 N. Y. 47; 2 Allen 45; 69 Me. 527; 6 R. I. 543. Dower is not barred even if the wife commit adultery, if she be abandoned by her husband and he be profligate and intemperate and an adulterer; 1 Houst. Del. 224; nor if she be deserted by her husband will her subsequent seduction and adultery operate as a bar; 62 Pa. 308; 126 *id.* 341; 6 U. C. C. P. 310; 27 Ind. 132. For the analysis of decisions and reference to state statutes on this subject, see 2 Scrib. Dow. 531.

In North Carolina, a widow who had been convicted as accessory before the fact to her husband's murder, and was imprisoned under sentence therefor, was held entitled to dower in his lands; 100 N. C. 240.

The widow of a convicted traitor could not recover dower; 2 Bla. Com. 130; but this principle is not recognized in this country; Wms. R. P. 103, n.

Nor does she in this country, as at common law, forfeit her dower by conveying in fee the estate assigned to her; 4 Kent 82; Wms. R. P. 121, 125, n.; 1 B. Monr. 88.

The most common mode formerly of barring dower was by jointure; Scrib. Dow. 389; 14 Gratt. 518; 8 Mo. 22; 14 Ohio St. 610; 77 Wis. 557. Marriage is a sufficient consideration to support an ante-nuptial contract for release of dower; 121 Pa. 302; 141 Ill. 22. Now it is usually done by joining with her husband in conveying the estate. Formerly this was done by levying a fine, or suffering a recovery; 4 Kent 51; 2 Bla. Com. 137; now it is by deed executed in concurrence with her husband and acknowledged in the form required by statute; Wms. R. P. 189; 114 Ill. 104; Mitch. R. P. 156; which is the mode prevailing in the United States. The husband must usually join in the act; 5 B. Monr. 352; 19 Pa. 361; 6 Cush. 196; 14 Me. 432.

Words of grant will be sufficient although no reference is made in the deed to dower *eo nomine*; 12 How. 256; 16 Ohio 236.

In most of the states her deed must be acknowledged, and that, too, in the form pointed out by statute; 6 Ohio St. 510; 2 Binn. 341; 1 Bail. 421; 1 Blackf. 379; which must appear in the certificate; 13 Barb. 50.

She should be of age at the time; 2 J. J. Marsh. 359; 6 Leigh 9; 1 Barb. 399; 8 Miss. 437; 10 Ohio St. 127.

She cannot release her dower by parol; see 5 T. B. Monr. 57; 3 Zab. 62. A parol sale of lands in which the husband delivers possession does not exclude dower; 3 Sneed 316. But it has been held that she may bar her claim for dower by her own acts operating by way of estoppel; 1 Rand. 844; 2 Ohio St. 511; 4 Paige, Ch. 94; 12 S. & R. 18; 1 Ind. 354; 5 Gill 94. See 22 Ala. n. s. 104; 1 Rich. Eq. 222; 112 Mo. 1.

A release of dower by a wife direct to her husband will not enable him by his sole deed to convey the land free of dower right, for, if the release is at all effectual, the husband becomes vested with a fee simple and the dower-right immediately reattaches by operation of law; 63 Hun 633; 22 Or. 303; but where the wife has power to release her dower by an attorney in fact, she may constitute her husband attorney for the purpose; 133 N. Y. 505.

A release of dower has been presumed after a long lapse of time; 4 N. H. 321; 3 Yeates 507.

At common law there was no limitation to the claim for dower; 4 Kent 70. As to the statutes in the different states, see *id.* note; 1 Washb. R. P. 217. Adverse possession for seven years with claim and color of title and payment of taxes will bar a claim of dower; 125 Ill. 647; 111 Mo. 275; but see 83 Ia. 481.

The right to dower does not depend on the existence of the family relation at the death of the husband and is not barred by desertion; 126 Pa. 341.

Upon the doctrine of *dos de dote*, see 1 Washb. R. P. 209.

In some states the wife may elect to take half of the husband's estate in lieu of dower under certain contingencies; 28 Mo. 203; or she may accept a devise in lieu of dower; 66 Hun 311; 146 Ill. 312; 37 S. C. 529; 56 Ark. 532.

It seems that a contract to marry on condition that the wife should receive no portion of the husband's lands may be valid; 9 Rich. Eq. 434.

As to how dower may be barred, see 32 Cent. Law J. 166.

How and by whom dower may be assigned. Her right to have dower set out to her accrues immediately upon the death of her husband; but until it is assigned she has no right to any specific part of the estate; 2 Bla. Com. 139. She was allowed by Magna Charta to occupy the principal mansion of her husband for forty days after his death, if it were on dowerable lands. This right is variously recognized in the states; 2 Mo. 163; 16 Ala. n. s. 148; 7 T. B. Monr. 337; 5 Conn. 462. In Missouri and several other states, she may remain in possession of and enjoy the principal mansion-house and mesuages thereto belonging until dower has been assigned; 5 T. B. Monr. 561; 4 Blackf. 331. This makes her tenant in common with the heir to the extent of her right of dower; and an assignment only works a severance of the tenancy; 4 Kent 62; 2 Mo. 163.

There were two modes of assigning dower; one by "common right," where the assignment was by legal process, the other "against common right," which rested upon the widow's assent and agreement.

Dower of "common right" must be assigned by metes and bounds, where this is possible, unless the parties agree to a different form; 2 Penning. 521; 1 Rolle, Abr. 683; Style 276; Perkins 407.

If assigned "against common right," it must be by indenture to which she is a party; Co. Litt. 34 b; 1 Pick. 189, 314.

Where assigned of common right, it must be unconditional and absolute; Co. Litt. 84 b, n. 217; 1 Rolle, Abr. 682; and for her life; 1 Bright, Husb. & W. 379.

Where it is assigned not by legal process, it must be by the tenant of the freehold; Co. Litt. 35 a. It may be done by an infant; 2 Bla. Com. 136; 1 Pick. 314; 2 Ind. 336; or by the guardian of the heir; 2 Bla. Com. 136; 37 Me. 509. Dower may be assigned in partition; 73 Ia. 657.

As between the widow and heir, she takes her dower according to the value of the property at the time of the assignment; 5 S. & R. 290; 4 Miss. 360; 15 Me. 371; 2 Harr. Del. 336; 13 Ill. 483; 9 Mo. 237.

As between the widow and the husband's alienee, she takes her dower according to the value at the time of the alienation; 6 Johns. Ch. 253; 4 Leigh 498. This was the ancient and well-established rule; 2 Johns. 484; 9 Mass. 218; 3 Mas. 347. But in this country the rule in respect to the alienee seems now to be that if the land had been enhanced in value by his labor and improvements, the widow shall not share in these; Scrib. Dow. 612; 5 S. & R. 289; 9 Mass. 218; 3 Mas. 347; 4 Leigh 498; 2 Blackf. 223; 10 Ohio St. 498; 9 Ala. n. s. 901; 10 Md. 746; 13 Ill. 483; 69 *id.* 40; 85 Ky. 539; 96 Mo. 226; 7 Mackey 268; 52 Ia. 563; 69 Me. 200; 42 Miss. 747; if it has been enhanced by extraneous circumstances, such as the rise and improvement of property in the neighborhood, she is to have the full benefit of this; 5 Blackf. 406; 3 Mas. 375; 6 McLean 422; 5 Call 433; 1 Md. Ch. Dec. 452; Wms. R. P. 191, n.

There seems to be no remedy for her now in either country where the land has deteriorated in value by the waste and mismanagement of the alienee or by extraneous circumstances; 10 Mo. 746; 5 S. & R. 290; 3 Mas. 368; 5 Blackf. 406; 1 Md. Ch. Dec. 452; see 11 R. I. 878; but she must be content to take her dower in the property as it was at the time of her husband's death, when her right first became consummate; 1 Washb. R. P. 239. See 18 L. R. A. 425. Where the widow dies without asserting her claim, neither her personal representatives, nor those of her assignee of such dower right, can maintain an action to have dower admeasured or for a gross sum in lieu thereof; 59 Hun 538; 49 N. J. Eq. 66.

Dower may also be recovered in equity, the jurisdiction of which, as Chancellor Kent says, "has been thoroughly examined, clearly asserted, and definitively established;" 4 Kent 71; and nearly half a century later this language is repeated as correctly expressing the result of the authorities; Bisph. Eq. § 495. The jurisdiction was asserted in the United States at an early period; 1 Leigh 449; 5 Monr. 264; 4 J. J. Marsh. 64; 5 Johns. Ch. 482; 4 Paige 98; and although in New Jersey in the time of Kent the equitable jurisdiction was denied; 4 Kent 72; 2 Halst. 392; it was afterwards asserted and sustained; 1 Gr. Ch. 349. The jurisdiction is concurrent with that of courts of law, which must settle the legal title when that is in controversy, "but if that be admitted or settled, full and effectual relief can be granted to the widow in equity both as to the assignment of dower and the damages;" 4 Kent 71; and in many respects the remedy in equity possesses great advantages over that at law; Bisph. Eq. § 496. As to the remedies afforded both by law and equity for the enforcement of dower, see 1 Washb. R. P. 226; 4 W. R. 459.

Nature of the estate in dower. Until the death of her husband, the wife's right of dower is not an interest in real estate of which value can be predicated; 9 N. Y. 110. And although on the death of her husband this right becomes consummate, it remains a chose in action until assignment; 4 Kent 61; 1 Barb. 500; 32 Me. 424; 5 J. J. Marsh. 12; 10 Mo. 746; 26 Md. 289; 13 R. I. 357.

During coverture a wife has such an interest in her husband's lands which have been conveyed by him without her joining in the deed, as will make a release by her a valuable consideration; 4 Ind. App. 28. See 37 S. C. 285.

Until assignment, she has no estate which she can convey or which can be taken on execution for her debts; 2 Keen 527; 4 Paige, Ch. 448; 9 Miss. 489; 1 Dev. & B. 437; 14 Mass. 378; 13 Ill. 433; 48 Ia. 611; 63 N. C. 271; *contra*, 10 Ala. n. s. 900.

But where she does sell or assign this right of action, equity will protect the rights of the assignee and sustain an action in the widow's name for his benefit; 4 Rich. 516; 10 Ala. n. s. 900; 7 Ired. Eq. 152; 109 N. C. 674. She may mortgage her undivided dower interest, which is valid in equity; 68 N. W. Rep. (Ia.) 897.

She can release her claim to one who is in possession of the lands, or to whom she stands in privity of estate; 11 Ill. 384; 17 Johns. 167; 32 Me. 424; 33 Ala. n. s. 404; 112 Mo. 1; 8 L. R. Q. B. D. 81; 12 R. I. 637.

But as soon as the premises have been set out and assigned to her, and she has entered upon them, the freehold vests in her by virtue of her husband's seisin; Co. Litt. 239 a; 4 Mass. 384; 6 N. Y. 394; 4 Dev. & B. 442. Her estate is a continuation of her husband's by appointment of the law; 1 Pick. 189; 4 Me. 67; 99 N. C. 290. As to the nature of the estate, see 6 Cent. L. J. 63, 143, 163. As to dower generally, see Scribner, Dower; Dembitz, Land Titles; Tudor; Washburn; Cruise; Tiedman, Real Property; DIVORCE; ELECTION OF RIGHTS.

DOWER - CURTESY. Distinguished. There is a radical difference between a right of dower and an estate by the curtesy. The latter takes effect as a freehold estate immediately on the death of the wife;

on the other hand, dower is not in any sense an estate until assigned. 95 Ky. 93, 23 S. W. 677.

DOWRESS. A woman entitled to dower. See **DOWER**.

DOWRY. Formerly applied to mean that which a woman brings to her husband in marriage: this is now called a portion. This word is sometimes confounded with dower. See Co. Litt. 31; La. Civ. Code; Dig. 23. 3. 76; Code 5. 12. 20; 6 Rob. (La.) 111; 10 id. 74; 6 La. Ann. 786; 22 Mo. 254.

DOZE. While the dictionaries define a "doze" as a slumber or light sleep, nothing is truer than the fact that the man possessed cannot tell the difference, and what he tells is unreliable. He is unconscious, and, therefore, not in possession of his faculties either of hearing or seeing. 163 Ky. 151, 173 S. W. 373.

DOZINER. Same as **DECANUS** and **DECENNIE** and **DECINER** (q. v.). Jacob.

DRAFT. An order for the payment of money, drawn by one person on another. 1 Story 30. It is said to be a *nomen generalissimum*, and to include all such orders; *ibid.*, per Story, J. It is frequently used in corporations where one agent draws on another; in such case it may be treated either as an accepted bill or a promissory note; 1 Dan. Neg. Inst. 350; Tiedman, Com. Pap. § 128. Drafts come within a statutory provision respecting "bills and notes for the direct payment of money;" 50 Mo. 491. They are frequently given for mere convenience in keeping accounts, and providing concurrent vouchers, and it is not necessary to present such a draft to the drawee or to give notice of non-payment before suing the corporation; 1 Dan. Neg. Inst. 350; 10 Cal. 369; 40 Ind. 361; 28 Barb. 391; 1 Cush. 256. A draft by directors of an assurance company on its cashier was said to contain all that is essential to constitute a promissory note; 9 C. B. 574. Drafts are frequently used between municipal officers, and are not usually negotiable instruments; 1 Dan. Neg. Inst. 352. But it has been held that municipal warrants or orders for the payment of debts, if authorized and drawn in negotiable language, may be sued on by the transferee; *id.* 353; 4 Hill, N. Y. 265. They must be presented for payment before suit; 26 Vt. 846; 19 Me. 193; *contra*, 2 Greene (La.) 469.

Draft, in a commercial sense, is an allowance to the merchant where the duty is ascertained by weight, to insure good weight to him; it is a small allowance in weighable goods, made by the king to the importer; it is to compensate for any loss that may occur from the handling of the scales, in the weighing, so that, when weighed the second time, the article will hold out good weight. 5 Blatchf. 192.

Also the rough copy of a legal document before engrossing.

DRAGOMAN. An interpreter employed in the east, and particularly at the Turkish court.

DRAIN. To conduct water from one place to another, for the purpose of drying the former.

The right of draining water through another man's land. This is an easement or servitude acquired by grant or prescription. See 3 Kent 436; 7 M. & G. 354.

In 5 Gray 63, it was said that the word drain has no technical or exact meaning, and in 58 Cal. 699, Myrick, J., quotes definitions from Webster's Dictionary thus: "1. To draw off by degrees; to cause to flow gradually out or off; hence, to cause the exhaustion of. 2. To exhaust off liquid contents by draining them off; to make gradually dry or empty, to deprive of moisture; hence, to exhaust. 3. To cause to pass through some porous mass or substance for the purpose of clarifying; to filter. And Drainage (Engin.), the system of drains and their operation, by which water is removed from towns, railway beds, and other works." Then he adds: "The definition of the word 'drain' given in Worcester's

Dictionary is somewhat different from Webster's, in that the idea expressed in the third definition as above is entirely omitted; thus showing that lexicographers differ." In the same case, McKee, J., said: "The storage of debris and the promotion of the drainage of a district of country are things essentially different. The one has no necessary connection with the other. To drain land is to rid it of its superfluous moisture. This is generally done by deepening, straightening, or embanking the natural water-courses which run through it, and by supplementing them when necessary by artificial ditches and canals; but it is not within the art of the drainer to promote drainage by building reservoirs for the storage of debris from 'mining and other operations,' unless the word is to be wrenched from its geological or ordinary signification and meaning, and changed so as to mean water, at any mining or other locality where water may have accumulated." See **WATER-COURSE**. See **DITCH**.

DRAINAGE DISTRICT. In swampy, marshy country, a district established by the government of a state, county, city or town for the purpose of systematic drainage, sometimes at the expense of the government, sometimes at that of the landowners. The laws relative to such drainage vary in different states, and even within the same state. Tiedeman, 2 State and Federal Control of Persons and Property, 767-771.

DRAM. A liquid containing alcohol; something that can intoxicate. 32 Tex. 228. See 101 Ill. 134.

DRAMSHOP. A place where spirituous, or vinous, or malt liquors are retailed by less quantity than one gallon; commonly called a saloon, but not of as broad a meaning as saloon (q. v.). Joyce, Intoxicating Liquors, § 15, 169. See **DRAMSHOP KEEPER**; **DRAM**.

DRAMSHOP KEEPER. A person permitted and licensed by law to sell intoxicating liquors in any quantity less than a quart. Joyce, Intoxicating Liquors, § 15. See **DRAMSHOP**; **DRAM**.

DRAW. To drag (on a hurdle) to the place of execution. Anciently no hurdle was allowed, but the criminal was actually dragged along the road to the place of execution. A part of the ancient punishment of traitors was the being thus drawn. 4 Bla. Com. 92, 377.

DRAWBACK. An allowance made by the government to merchants on the re-exportation of certain imported goods liable to duties, which in some cases consists of the whole, in others of a part, of the duties which had been paid upon the importation. Goods can thus be sold in a foreign market at their natural cost in the home market. For the various acts of congress which regulate drawbacks, see U. S. Rev. Stat. tit. 34, c. 9.

A device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all. 169 U. S. 23. See **BONIFICATION OF TAX**.

DRAWEE. A person to whom a bill of exchange is addressed, and who is requested to pay the amount of money therein mentioned. See **BILL OF EXCHANGE**.

DRAWER. The party who makes a bill of exchange.

DRAWING. Every person who applies for a patent for an invention is required to furnish a drawing or drawings illustrative of that invention: provided from the nature of the case the invention can be so illustrated. Drawings are also required on application for a patent for a design. See **PATENT**.

DRAWING THE STUMPS. When the coal in any division or section of the mine has been exhausted, all the miners are with-

drawn from that particular place, and the stumps or pillars are taken out, for the coal they contain. In removing them, props of timber are used to support the roof. The removing of these pillars or stumps is called "drawing the stumps." 79 S. W. 292.

DRAWLATCHES. Thieves; robbers. Cowel.

DRAYAGE. In a case arising under a statute providing that certain tolls should be charged on coal landed on wharves and thence shipped or "warehoused without drayage," it appeared that the coal, after being taken out of the vessel and put on the wharf, was taken away on tram-cars, of which the railway was supported by pillars resting on the wharf, and by this process was put in the warehouse without any actual hauling on drays. The court held that this amounted to drayage and said: "The difference between the two rates was evidently intended to cover the wear and tear of wharves by the passing of loaded means of conveyance. It makes no difference, as far as the question before us is concerned, whether the conveyance was by wagons, drays, or cars; or whether on a tramway resting on pillars ten feet high, on timbers six inches above the wharf, or on rails resting immediately on the wharf;" 54 Cal. 241.

DREDGE. Formerly applied to a net or drag for taking oysters; now a machine for cleansing canals and rivers. To dredge is to gather or take with a dredge, to remove sand, mud, and filth from the beds of rivers, harbors, and canals, with a dredging machine. 15 Can. L. T. 268.

DREDGER. See **DREDGE**.

DREDGING-MACHINE. See **DREDGE**.

DREIT DREIT. Droit droit. Double right. A union of the right of possession and the right of property. 2 Bla. Com. 199.

DRENCHES, or DRENGES. Tenants *in capite* (q. v.). Such as, having been put out of their estates at the coming of the Conqueror, were afterwards restored to them, on showing that they had been owners thereof, and that they were neither *in auxilio* or *in consilio* against him. Cunningham.

DRENGAGE. The tenure by which the drenches, or drenges (q. v.) held their lands. Cunningham.

DRIFTWAY. A road or way over which cattle are driven. 1 Taunt. 279; Selw. N. P. 1037; Woolr. Ways 1. The term is in use in Rhode Island. 2 Hilliard, Abr. Prop. 33.

DRINK. In the case of spirits a "drink" was held to be not more than a quart. 67 Ill. 482.

DRIP. The right of drip is an easement by which the water which falls on one house is allowed to fall upon the land of another.

Unless the owner has acquired the right by grant or prescription, he has no right so to construct his house as to let the water drip over his neighbor's land; 1 Rolle, Abr. 107. See 3 Kent 436; Dig. 43, 23. 4. 6; 11 Ad. & E. 40.

DRIVER. One employed in conducting a coach, carriage, wagon, or other vehicle with horses, mules, or other animals.

Frequent accidents occur in consequence of the neglect or want of skill of drivers of public stage coaches, for which the employers are responsible.

The law requires that a driver should possess reasonable skill and be of good habits for the journey; if, therefore, he is not acquainted with the road he undertakes to drive; 3 Bing. 314, 321; drives with reins so loose that he cannot govern his horse; 2 Esp. 593; does not give notice of any serious danger on the road; 1 Campb. 67; takes the wrong side of the road; 4 Esp. 273; incautiously comes in collision with another carriage; 1 Stark. 423; 1 Campb. 167; or

does not exercise a sound and reasonable discretion in travelling on the road to avoid dangers and difficulties, and any accident happens by which any passenger is injured, both the driver and his employers will be responsible; 11 Mass. 57; 6 Term 659; 1 East 106; 4 B. & Ald. 590; 3 McLean 157.

It has been held that the conductor of a street railway is not a driver; 47 N. Y. 124; and one who drove a wagon loaded with calves and drawn by horses was held not to be "driving or conducting" cattle; L. R. 1 Q. B. 259. The New York Court of Appeals refuses to say "whether one who drives a horse to harness comes under this statute, which does not name a driver but does name a rider." See COMMON CARRIERS OF PASSENGERS.

DROF-LAND (Drift-land). A yearly payment made by some to their landlords for driving their cattle through the manor to fairs and markets. Cowel.

DROIT (Fr.). In French Law. Law. The whole body of law, written and unwritten.

A right. No law exists without a duty. Toullier, n. 96; Pothier, *Droit*.

In English Law. Right. Co. Litt. 158. A person was said to have *droit droit*, *plurimum juris*, and *plurimum possessionis*, when he had the freehold, the fee, and the property in him. Crabb, Hist. Eng. Law 406.

DROIT D'ACCESSION. In French Law. That property which is acquired by making a new species out of the material of another. *Modus acquirandi quo quis ex aliena materia suo nomine novam speciem faciens bona fide ejus speciei dominum consequitur.* It is a rule of the civil law that if the thing can be reduced to the former matter it belongs to the owner of the matter, e. g. a statue made of gold; but if it cannot so be reduced it belongs to the person who made it, e. g. a statue made of marble. This subject is treated in the *Code Civil de Napoléon*, art. 565, 577; Merlin, *Répert. Accession*; Malleville's Discussion, art. 565. See ACCESSION.

DROIT, AUTER or AUTRE. See AUTER DROIT.

DROITS OF ADMIRALTY. Rights claimed by the government over the property of an enemy. In England, it has been usual in maritime wars for the government to seize and condemn, as droits of admiralty, the property of an enemy found in her ports at the breaking out of hostilities. 1 C. Rob. 196; 13 Ves. 71; 1 Edw. 60; 3 Bos. & P. 191. The power to exercise such a right has not been delegated to, nor has it ever been claimed by, the United States government; Benedict, Adm.; § 83; 6 Wheat. 264; 8 Cra. 110.

DROIT D'AUBAINE. A rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased. Finally abolished in 1819. Boyd's Wheat. Int. Laws § 82.

The word *aubaine* signifies *hospes loci*, *peregrinus advena*, a stranger. It is derived, according to some, from *alibi*, elsewhere, *natus*, born, from which the word *albinus* is said to be formed. Others, as Cujas, derive the word directly from *advena*, by which word *aubains* or strangers are designated in the capitularies of Charlemagne. See Du Cange; Trévoux, Dict.

DROITS CIVILS. In French Law.

Private rights, the exercise of which is independent of the status (*qualité*) of citizen. Foreigners enjoy them, and the extent of that enjoyment is determined by the principle of reciprocity. Conversely, foreigners, although not resident in France, may be sued on contracts made by them in France, and (unless possessed of sufficient real property in France) are obliged to give security; 1 B. C. B. 501; Brown, Law Dict.

DROIT-CLOSE. The name of an ancient writ directed to the lord of ancient demesne, and which lies for those tenants in ancient demesne who hold their lands and tenements by charter in fee-simple, in fee-tail, for life, or in dower. Fitzh. N. B. 28.

DROITURAL. What belongs of right; relating to right; as, real actions are either *droitural* or *possessory*,—*droitural* when the plaintiff seeks to recover the property. Finch, Law 257. See WRIT OF RIGHT.

DROP LETTER. A letter addressed for delivery and mailed in the same district in which it is posted.

DROVE-ROAD. A road for driving cattle. A right of way for carriages does not involve necessarily a right to drive cattle, or an easement of drove-road.

DRUGGIST. One who deals in medicinal substances, vegetable, animal, or mineral, uncombined. 28 La. Ann. 785. In a Kentucky case on an indictment for selling liquor without license, the defendant sold dry goods on one side of his shop and drugs on the other. As a merchant he needed a license, but as a druggist he could sell in any quantity less than a quart without. The charge of the court was that if he was an unlicensed merchant and sold less than a quart he was guilty, unless he was "a druggist in good faith, and his business was compounding and selling drugs." This was reversed for error as confining the business of a retail druggist or apothecary to one who actually compounds his medicines. For the definition of apothecary under United States statutes, see APOTHECARY.

In America the term druggist is used synonymously with apothecary, although, strictly speaking, a druggist is one who deals in medicinal substances, vegetable, animal, or mineral, before being compounded, while composition and combination are really the business of the apothecary. The term is here used in its double sense, and throughout this article is to be read as if druggist or apothecary. In England an apothecary is a sub-physician, or privileged practitioner. He is the ordinary medical man, or family medical attendant, in that country. Under the revised Pharmacy Acts of 38 and 39 Vict. c. 117, any one selling or compounding poisons, or unlawfully using the name of chemist or druggist, or compounding medicines otherwise than according to the formulae of the British Pharmacopoeia, is liable to a penalty of £5; Oke's Mag. Syn. 584.

Druggists are subject to the general rule of law that persons who hold themselves out to the world as possessing skill and qualification for a particular trade or profession are bound to reasonable skill and diligence in the performance of their duties. Accordingly the law implies an undertaking on the part of apothecaries and surgeons that they shall use a reasonable degree of care and skill in the treatment of their patients; Chit. Contr. 553; 66 La. 708; 34 La. Ann. 913; 43 Hun 265. This rule is probably more strict in the United States than in England; Webb's Poll. Torts 26, note. One who practises as a druggist, whether under a license or not, holds himself out as competent to do this, but not to prescribe as a physician; and for any lack of capacity or for negligence, he is answerable in damages to the person injured, the same principles of law applying to him as to a medical practitioner; Bish. Non-Contr. L. § 716.

The utmost care is required of those who prepare medicines or sell drugs, as the least carelessness may prove injurious to health or fatal in its results. Hence druggists are held responsible for injuries resulting from a want of usual care and skill. The highest degree of skill is not to be expected nor can it reasonably be required of all; 39 Me. 156. Perhaps a higher degree of skill than is the usual rule was required in 13 B. Monr. 219; in that case it was held that any mistake made by the druggist, if the result of ignorance or carelessness, renders him liable to the injured party; 7 N. Y. 397. Where one, whether an apothecary or not, negligently gave a customer poison and the customer swallowed it and was injured, he who negligently gave the poison was guilty of a tort, and liable for the injury to the customer unless the latter was also guilty of negligence which contributed to the injury; 61 La. 64. If a druggist negligently sells a deadly poison as a harmless medicine to A, who administers it to B and B takes it as a medicine and dies in a few hours by reason thereof, a right of action against the druggist survives to B's administrator; 106 Mass. 143. The sale of an article in itself

harmless, which becomes dangerous only by being used in combination with some other article, without any knowledge on the part of the vendor that it was to be used in such combination, does not render him liable to an action by one who purchased the article from the original vendee and is injured while using it in a dangerous combination, although by mistake the article sold was different from that which was intended to be sold; 11 Allen 514.

A druggist who sells to one person for the use of another a hair wash made by himself and represented not to be injurious, is liable to the person for whom it was purchased when used as directed, for injuries arising from such use, the intended use by the third person being known to the vendor; L. R. 5 Ex. 1. The maker of a proprietary medicine recommended for the cure of a certain disease, the bottle having on it directions for use, who sells the medicine, so put up, to a druggist, is liable to one who buys it from the druggist and is injured by its use according to the directions on the bottle; 83 Ga. 457.

Where a druggist selling a poisonous medicine, fully and clearly warned the person of its nature and gave him accurate directions as to the quantity which he could safely take, and the person was injured or killed by taking an overdose in disregard of the directions, the druggist is not liable for negligence simply because he failed to put a label marked "Poison" on the package as directed by statute. The customer disregarding the warning and direction of the vendor was guilty of negligence; 92 N. Y. 490.

A druggist who delivers one medicine when another is asked for is responsible for the consequences, on the ground of negligence only. If the error occurred without fault on the part of himself or his servant, the case is like one of inscrutable accident, and the druggist is not liable though injurious consequences follow.

An unlicensed druggist who conducts a drug store cannot escape the penalty of the law for the unlawful sale of intoxicating liquors by showing that the sales were made for medicinal purposes by his clerk, who was a licensed pharmacist; 67 Ia. 641. A druggist is not liable if he compounds carefully another's prescription; 61 Ga. 505. But if he sell one medicine for another and an injury result therefrom, it is no defence for him to show that the case was negligently treated; 47 Mich. 576. An apothecary, if guilty of criminal negligence, and fatal results follow, may be convicted of manslaughter; 1 Lew. Cr. Cas. 169. See APOTHECARY.

DRUGS. Substances used in the composition of medicines or in dyeing and in chemical operations. Webst. Dict.

"Drugs and Medicines," when used in insurance policies, include saltpetre; 79 N. C. 279; s. c. 28 Am. Rep. 322. It is a question of fact whether benzine is a drug; 53 Vet. 418; s. c. 33 Am. Rep. 687.

Where a druggist was charged with selling peppermint lozenges on Sunday, it appeared that the statute permitted the selling of "drugs and medicines" on that day. They were held *prima facie* within the statute; 33 U. C. Q. B. 543. So a mixture of rosewater and prussic acid to be used as a lotion is within the same terms; L. R. 4 Q. B. 296.

DRUGS, DANGEROUS. See OPIUM.

DRUMMER. A travelling salesman. One who solicits custom; 34 Ark. 553; s. c. 36 Am. Rep. 34. "Commercial agents who are travelling for wholesale merchants and supplying the retail trade with goods, or rather, taking orders for goods to be shipped to the retail merchant;" 4 Lea 93. See COMMERCIAL TRAVELER.

DRUNKENNESS. In Medical Jurisprudence. The condition of a man whose mind is affected by the immediate use of intoxicating drinks.

This condition presents various degrees of intensity, ranging from a simple exhilaration to a

state of utter unconsciousness and insensibility. In the popular phrase, the term drunkenness is applied only to those degrees of it in which the mind is manifestly disturbed in its operations. In earlier stages it frequently happens that the mind is not only not disturbed, but acts with extraordinary clearness, promptitude, and vigor. In the latter the thoughts obviously succeed one another without much relevance or coherence, the perceptive faculties are active, but the impressions are misperceived, as if they passed through a distorting medium, and the reflective powers cease to act with any degree of efficiency. Some of the intermediate stages may be easily recognized; but it is not always possible to fix upon the exact moment when they succeed one another. In some persons peculiarly constituted, a fit of intoxication presents few if any of these successive stages, and the mind rapidly loses its self-control, and for the time is actually frenzied, as if in a maniacal paroxysm, though the amount of the drink may be comparatively small. The same phenomenon is observed sometimes in persons who have had some injury of the head, who are deprived of their reason by the slightest indulgence.

The habitual abuse of intoxicating drinks is usually followed by a pathological condition of the brain, which is manifested by a degree of intellectual obtuseness, and some insensibility to moral distinctions once readily discerned. The mind is more exposed to the force of foreign influences, and more readily induced to regard things in the light to which others are directed. In some cases it produces a permanent mental derangement, which, if the person continues to indulge, is easily mistaken by common observers for the immediate effects of hard drinking. These two results—the mediate and the immediate effects of drinking may coexist; but it is no less necessary to distinguish them from each other, because their legal consequences may be very different. Moved by the latter, a person goes into the street and abuses or assaults his neighbors; moved by the former, the same person makes his wit, and cuts off with a shilling those who have the strongest claims upon his bounty. In a judicial investigation, one class of witnesses will attribute all his extravagances to drink, while another will see nothing in them but the effect of insanity. The medical jurist should not be misled by either party, but be able to refer each particular act to its proper source.

Drunkenness may be the result of dipsomania. Rather suddenly, and perhaps without much preliminary indulgence, a person manifests an insatiable thirst for strong drink, which no considerations of propriety or prudence can induce him to control. He generally retires to some secluded place, and there, during a period of a few days or weeks, he swallows enormous quantities of liquor, until his stomach refuses to bear any more. Vomiting succeeds, followed by sickness, depression, and disgust for all intoxicating drinks. This affection is often periodical, the paroxysms recurring at intervals varying from three months to several years. Sometimes the indulgence is more continuous and limited, sufficient, however, to derange the mind, without producing sickness, and equally beyond control. Dipsomania may arise from moral causes, such as anxiety, disappointment, grief, sense of responsibility, or physical, consisting chiefly of some anomalous condition of the stomach. Esquirol, *Mal. Men.* ii. 73; Marc, *de la Folie*, ii. 606; Ray, *Med. Jur.* 497; Macnish, *Anatomy of Drunkenness*, chap. 14.

The common law shows but little disposition to afford relief, either in civil or criminal cases, from the immediate effects of drunkenness. It has never considered mere drunkenness alone as a sufficient reason for invalidating any act; thus it has been held that drunkenness in the maker of a negotiable note is no defence against an innocent holder; 91 Pa. 17; the contract of a drunken man being not void but voidable only; 8 Am. Rep. 246, n. See also 1 Ames, *Cas.* on Bills and Notes 558; 61 Mich. 384; see 15 Johns. 503; 42 Ind. 565; 72 Ill. 108. If a person when sober agree to sign a contract, he cannot avail himself of intoxication at the time of signature as a defence; 63 Hun 629. When carried so far as to deprive the party of all consciousness, a strong presumption of fraud is raised; and on that ground courts may interfere; 1 Ves. 19; 18 id. 12. Drunkenness in such a degree as to render the testator unconscious of what he is about, or less capable of resisting the influence of others, avoids a will; Shelf. Lun. 274, 304; 3 D. R. Pa. 554. In actions for torts, drunkenness is not regarded as a reason for mitigating damages; Co. Litt. 247a; Webb, *Poll. Torts* 59, n. See 68 Ga. 612. Courts of equity, too, have declined to interfere in favor of parties pleading intoxication in the performance of some civil act; but they have not gone the length of enforcing agreements against such parties; 1 Story, *Eq.* § 232; 57 N. W. Rep. (Minn.) 478; 18 Ves. Jr. 12; 1 Ves. 19.

In England drunkenness has never been admitted in extenuation for any offences committed under its immediate influence; 3 With. & Beck. *Med. Jur.* 508. "A drunkard who is *voluntarius demon*," says Coke, "hath no privilege thereby: whatever ill or hurt he doth, his drunkenness

doth aggravate it." Lawyers have occasionally shown a disposition to distinguish between the guilt of one who commits an offence unconsciously, though in consequence of vicious indulgence, and that of another who is actuated by malice aforethought and acts deliberately and coolly. In Pennsylvania, as early as 1794, it was remarked by the courts on one occasion that, as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design; Add. Pa. 257. See 88 Pa. 144. In 1819, Justice Holroyd decided that the fact of drunkenness might be taken into consideration in determining the question whether the act was premeditated or done only with sudden heat and impulse; Rex v. Grundley, 1 Russ. Cr. 8. This particular decision, however, was, a few years afterwards, pronounced to be not correct law; 7 C. & P. 145. Again, it was held that drunkenness, by rendering the party more excitable under provocation, might be taken into consideration in determining the sufficiency of the provocation; 7 C. & P. 817. More recently (1849), in Rex v. Monkhouse, 4 Cox, Cr. Cas. 55, it was declared that there might exist a state of drunkenness which takes away the power of forming any specific intention. See, also, 16 Jur. 750.

In this country, courts have gone still further in regarding drunkenness as incompatible with some of the elements of crime. It has been held, where murder was defined to be wilful, deliberate, malicious, and premeditated killing, that the existence of these attributes is not compatible with drunkenness; 13 Ala. N. S. 413; 4 Humphr. 136; 11 id. 154; 1 Spear 384; Tayl. *Med. Jur.* 739; and when a man's intoxication is so great as to render him unable to form a wilful, deliberate, and premeditated design to kill, or of judging of his acts and their legitimate consequences, then it reduces what would otherwise be murder in the first degree to murder in the second degree; Wright, Ohio 45; 29 Cal. 678; 1 Leigh 612; 2 Park. C. R. 233; 21 Miss. 446; 40 Conn. 136; 24 Am. L. Rep. 507; 28 S. W. Rep. (Tex.) 396; 33 Ala. 419; 41 Conn. 584; 66 Ill. 118; 75 Pa. 403. See 82 Wis. 23; 22 Or. 591; 95 Cal. 425. But where one who intends to kill another becomes voluntarily intoxicated for the purpose of carrying out the intention, the intoxication will have no effect upon the act; 28 Fla. 113; 96 Ala. 81. See 36 Pac. Rep. (Cal.) 770; 118 Mo. 7; and if one person gets another drunk and persuades him to commit a crime, he is legally responsible; 91 Ga. 740.

Intoxication does not excuse crime, but may show an absence of malice; 10 Ky. L. Rep. 656; 88 Ala. 100; and the burden of proof is on the defendant to show intoxication to such an extent as to render him incapable of malice; 46 La. Ann. 27.

If one commits robbery while so drunk as not to know what he was doing, he will not be deemed to have taken the property with a felonious intent; 92 Ky. 522.

It has been already stated that strong drink sometimes, in consequence of injury to the head, or some peculiar constitutional susceptibility, produces a paroxysm of frenzy immediately, under the influence of which the person commits a criminal act. Cases of this kind have been too seldom tried to make it quite certain how they would be regarded in law. It is probable, however, that the plea of insanity would be deprived of its validity by the fact that, sane or insane, the party was confessedly drunk. In a case where injury of the head had been followed by occasional paroxysms of insanity, in one of which the prisoner killed his wife, it appeared that he had just been drinking, and that intoxication had sometimes brought on the paroxysms, though they were not always preceded by drinking. The court ruled that if the mental disturbance were produced by intoxication it was not a valid defence; and accordingly the prisoner was convicted and executed. Trial of McDonough, Ray, *Med. Jur.* 514. The principle is that if a person voluntarily deprives himself of reason, he

can claim no exemption from the ordinary consequences of crime; 3 Par. & Fonbl. *Med. J.* 39; and the courts hold that voluntary intoxication is no justification or excuse for crime; 51 Kan. 651; 49 Cal. 485; 18 Ala. 413; 55 Ga. 31; 68 id. 612; 50 Vt. 488; 4 Tex. App. 76. Milder views have been advocated by writers of note, and have appeared in judicial decisions. Mr. Alison, referring to the class of cases just mentioned, calls it inhuman to visit them with the extreme punishment otherwise suitable. Prin. of Crim. Law of Scotland 654. See, also, 23 Am. Jur. 290. When a defendant sets up the defence of *delirium tremens*, and there is evidence to support the plea, the court in charging the jury is bound to set forth the law applicable to such a defence; 12 Rep. 701. This disease is a species of insanity, and one who labors under it is not responsible for his acts; 1 Wh. & Stillé, *Med. Jur.* § 202. While drunkenness is no excuse for crime, *mania a potu* is; 100 N. C. 487. See 43 Cal. 344; 64 Ind. 435; 50 Barb. 266. Where dipsomania affects the intellect and not merely the will it may be a defence; 3 With. & Beck. *Med. Jur.* 506. See 86 N. Y. 559; 105 Cal. 486. Where a person, in regard to a particular act, though knowing right from wrong, has lost his power to discriminate, in consequence of mental disease, he will be exempt from crime; 3 With. & Beck. 507. See 115 N. C. 807. Dipsomania would hardly be considered, in the present state of judicial opinion, a valid defence in a capital case, though there have been decisions which have allowed it, holding the question whether there is such a disease, and whether the act was committed under its influence, to be questions of fact for the jury; 49 N. H. 399; 40 Conn. 136; 1 Bish. Cr. Law § 409.

The law does recognize two kinds of inculpable drunkenness, viz.: that which is produced by the "unskillfulness of the physician," and that which is produced by the "contrivance of enemies." Russ. Cr. 8. To these there may perhaps also be added that above described, where the party drinks no more liquor than he has habitually used without being intoxicated, but which exerts an unusually potent effect on the brain, in consequence of certain pathological conditions. See 5 Gray 86; 11 Cush. 479; 1 Benn. & H. Lead. Cr. Cas. 113. See *INTEMPERATE*.

DRY EXCHANGE. A term invented for disguising and covering usury,—in which something was pretended to pass on both sides, when in truth nothing passed on one side; whence it was called *dry*. Stat. 3 Hen. VII. c. 5; Wolfius, *Ins.* Nat. § 657.

DRY RENT. Rent-seck; a rent reserved without a clause of distress.

DRY TRUST. A passive trust; one which requires no action on the part of the trustee beyond turning over the money or property to the *cestui que trust*. Black, L. Dict. See *TRUST*. See *NAKED TRUST*.

DUBITANTE. Doubting. Affixed in law reports to a judge's name, to signify that he doubts the correctness of a decision.

DUCAT. The name of a foreign coin.

The ducat, or sequin, was originally a gold coin of the middle ages, apparently a descendant from the bezant of the Greek-Roman Empire. For many centuries it constituted the principal international currency, being intended, or supposed, to be made of pure gold, though subsequently settled at a basis a little below. It is now nearly obsolete in every part of the world. Its average value is about \$2.26 of our money. It is said they appeared earliest in Venice, and that they bore the following motto: *Sit tibi, Christe, datus, quem tu regis, iste Ducatus*,—whence the name ducat.

The silver ducat was formerly a coin of Naples, weighing three hundred and forty-eight grains, eight hundred and forty-two thousandths fine; consequent value, in our money, about eighty-nine cents; but it now exists only as a money of account.

DUCES TECUM (L. Lat.). (You bring with you.) A term applied to certain writs, where a party summoned to appear in court is required to bring with him some piece of evidence, or other thing that the court would view.

DUCES TECUM LICET LANGUIDUS. A writ directing the sheriff to bring a person whom he returned as so sick that

he could not be brought without endangering his life. *Blount v. Cowel*. The writ is now obsolete. See *SUBPOENA DUCES TECUM*.

DUCKING-STOOL. A stool or chair in which common scolds were formerly tied and plunged into water. The ducking-stool is mentioned in the *Domesday Book*; it was extensively in use throughout Great Britain from the fifteenth till the beginning of the eighteenth century. *Cent. Dict.* See *CASTIGATORY*.

DUE. Just and proper, as due care, due rights. 8 N. J. Eq. 701; 10 Allen 18, 532. A due presentment and demand of payment must be made. See 4 Rawle 307; 3 Leigh 389; 3 Cra. 300.

What ought to be paid; what may be demanded.

It differs from *owing* in this, that sometimes what is owing is not due: a note payable thirty days after date is owing immediately after it is delivered to the payee, but it is not due until the thirty days have elapsed. But see 7 N. Y. 470; 10 N. J. L. 340; 5 Pet. 96.

The word "due," unlike "arrears," has more than one signification, and expresses two distinct ideas. At times it signifies a simple indebtedness without reference to the time of payment; at others it shows that the day of payment has passed; 31 Fed. Rep. 125; 5 N. J. L. 345.

Bills of exchange and promissory notes are not due until the end of the three days of grace, unless the last of these days happen to fall on a Sunday or other holiday, when it becomes due on the Saturday or day before, and not on the Monday or day following. *Story, P. Notes*, § 440; 14 Me. 264; 25 Barb. 326; 24 N. Y. 283; 17 Wis. 181; 19 Pick. 381; 31 Mich. 215; unless changed by statute.

DUE-BILL. An acknowledgment of a debt in writing is so called. This instrument differs from a promissory note in many particulars: it is not payable to order, nor is it assignable by mere indorsement. *Byles, Bills* *11, n. (t.). See I. O. U.; *PROMISSORY NOTES*.

Where the terms of a due-bill are unambiguous, an erroneous interpretation thereof by the maker is no defence to an action on such due-bill; 33 Ill. App. 58. In an action on a due-bill, the defendant can show, under a plea of want of consideration, that the indebtedness for which it had been given had been paid before the bill was made; 34 Ill. App. 571. The maker of a written acknowledgment of a sum due is not estopped by it as to any one who may purchase the supposed debt; 42 Minn. 498.

DUE CARE. Reasonable care adapted to the circumstances of the case. 10 Allen 332; 54 Md. 656.

That which is proper and legal under the circumstances. English. In cases where the gist of the action is negligence, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject-matter or transaction which constitutes the cause of action. *Anderson*; 10 Allen 20.

DUE COURSE OF LAW. This phrase is synonymous with "due process of law," or "the law of the land," and means law in its regular course of administration through courts of justice. 19 Kan. 542.

DUE DILIGENCE AND FORESIGHT. The measure of due diligence and foresight is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. 194 Fed. 344. See *UNAVOIDABLE CAUSE*.

DUE PROCESS OF LAW. Law in its regular course of administration through courts of justice. 3 *Story, Const.* 264, 661; *Miller, Const.* 664; 18 How. 273; 13 N. Y. 378.

Any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice. 110 U. S. 516.

Due process of law has never been pre-

cisely defined; while its fundamental requirement is opportunity for hearing and defense, the procedure may be adapted to the case, and proceedings in court are not always essential. 204 U. S. 241.

While the exact definition of the term "due process of law" may be uncertain, it is certain that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity to be heard. 230 U. S. 140.

While the words "due process of law," as used in the Fourteenth Amendment, protect fundamental rights, the Amendment was not intended to interfere with the power of the State to protect the lives, liberty and prosperity of its citizens, nor with the power of adjudication of its courts in administering the process provided by the law of the State. 200 U. S. 164.

This term is considered by Coke as equivalent to the phrase "law of the land" (used in *Magna Charta*, c. 29), and is said by him to denote "indictment or presentment of good and lawful men." *Co. 2d Inst.* 50. Amendment V. of the constitution of the United States provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." Amendment XV. prohibits a state from depriving a person of life, liberty, or property, without due process of law. A similar provision exists in all the state constitutions; the phrases "due course of law" and "the law of the land" are sometimes used; but all three of these phrases have the same meaning; 96 U. S. 97; *Cooley, Const. Lim.* 437, where the provisions in the various state constitutions are set forth. *Miller, J.*, says, in *Davidson v. New Orleans*, 96 U. S. 103, that a general definition of the phrases which would cover every case would be most desirable, but that, apart from the risk of failure to make the definition perspicuous and comprehensive, there is a wisdom in ascertaining the extent and application of the phrase by the judicial process of exclusion and inclusion as the cases arise. If that case, however, he says also, that it must be confessed that the constitutional meaning or value of the phrase remains without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States. As contributory to the discussion, he proceeds, for the court, to lay down the following proposition: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." In the case just cited it is remarked that during nearly a century while this provision was in the constitution of the United States, as a restraint upon the authority of the federal government, and during that time the powers of that government were watched with jealousy, this special limitation on its powers was seldom invoked; but after it became, as part of the Fourteenth Amendment, a limitation upon the powers of the states, in a very few years, the docket of the supreme court was crowded with cases in which it was invoked. See 140 U. S. 316; 133 *id.* 660; 154 *id.* 421. The full significance of the clause "law of the land" is said by *Ruffin, C. J.*, to be that statutes which would deprive a citizen of the rights of person or property without a regular trial according to the course and usage of the common law would not be the law of the land; 4 Dev. 15. *Mr. Webster's* explanation of the meaning of these phrases in the *Dartmouth College Case* (4 Wheat.

518) is: "By the law of the land is more clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

The privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; 152 U. S. 382; 148 *id.* 662; 110 *id.* 535.

In 4 Wheat. 285, *Johnson, J.*, says: "As to the words from *Magna Charta* incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this,—that they were intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice."

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights;" 12 N. Y. 209. Law in its regular course of administration through courts of justice is due process; and when secured by the law of the state, the constitutional requirement is satisfied; 189 U. S. 462. The phrase as used in the constitution does not "mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it;' per *Bronson, J.*, in 4 Hill, N. Y. 140. "The meaning of these words is that no man shall be deprived of his property without being heard in his own defence;" *Tucker, J.*, in 1 Hen. & M. 531. See, also, 6 W. & S. 171.

Judge Cooley (Const. Lim. 441) says: "Due process of law in each particular case means, such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Taking property under the taxing power is taking it by due process of law; 23 Cal. 363; 103 U. S. 586. In this connection, it is said in 2 McCord 56: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, . . . is embraced in the alternative 'law of the land.'" In 50 Miss. 479, it is said that these constitutional provisions do not mean the general body of the law as it was at the time the constitution took effect; but they refer to certain fundamental rights which that system of jurisprudence of which ours is derivative has always recognized; if any of these are disregarded in the proceedings by which a person is condemned to the loss of property, etc., then the deprivation has not been by due process of law. And it has been held that the state cannot deprive a person of his property without due process of law through the medium of a constitutional convention any more than it can through an act of the legislature; 69 Mo. 637. Exaction of tolls under a state statute for the use of an improved waterway, is not a de-

privation of property within the federal constitution; 123 U. S. 288.

The subject was exhaustively considered in *Murray's Lessees v. Hoboken, etc., Co.*, 18 How. 272, where it was held that a collector of customs, from whom a balance of accounts has been found to be due by accounting officers of the treasury of the United States, designated for that purpose by law, could be deprived of his liberty or property, in order to enforce the payment of that balance, without the exercise of the judicial power of the United States. The proceedings in that case were by way of a distress-warrant issued by the solicitor of the treasury to the marshal of the district, under which the marshal was authorized to collect the amount due by a sale of the collector's personal property. The court considered that the power exercised was executive, and not judicial; and that the writ and proceedings under it were due process of law within the meaning of that phrase as derived from our ancestors and found in the constitution.

In 95 U. S. 37, it was held that the phrase due process of law does not necessarily mean judicial proceedings, and that summary proceedings for the collection of taxes, which were not arbitrary or unequal, were not within the prohibition of this provision. So, also, in 5 Nev. 281. This provision does not imply that all trials in state courts affecting the property of persons must be by jury; it is enough if they were had according to the settled course of judicial proceedings; 92 U. S. 90; 5 Nev. 281; 2 Tex. 250. The question is independent of the question whether the proceeding was by motion or action if it be sanctioned by state law and affords an opportunity to be heard; 160 U. S. 389; and it does not imply a hearing according to established practice in the courts, but by appropriate judicial proceedings; 66 N. W. Rep. (Neb.) 624. As to the right of foreigners to enter our country, the decisions of executive or administrative officers acting within powers expressly conferred by congress are due process of law; 142 U. S. 651.

A statute which provides that real-estate owners shall be liable for damages arising out of the illegal use of their property by a tenant is valid; 18 Am. Law Reg. N. S. 124. A commitment for contempt of court is not obnoxious to this constitutional provision; 23 Minn. 411; 134 U. S. 31; nor is a commitment for failure to pay a tax, not resorted to until other means of collection have failed, and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses; 13 U. S. 660. A statute providing for assessment on property owners, for street improvements, is not invalid as taking property without due process of law; 4 N. Y. 419; 128 U. S. 578. A provision in the constitution and laws of Missouri by which a litigant, in certain courts of St. Louis, has a right of appeal to the St. Louis court of appeals, but not to the supreme court of the state, is not repugnant to the XIV. amendment. A state may establish one system of law in one portion of its territory and another in another, provided it does not deprive any person of his rights without due process of law; 101 U. S. 22. A review by an appellate court of the final judgment in a criminal case is not a necessary element of due process of law; 153 U. S. 684. A provision in a Wisconsin statute giving jurisdiction to courts to try prosecutions upon informations for all crimes is not repugnant to that amendment; such trial is by due process of law; 30 Wis. 129. The entry of judgment on a bond when the bond is forfeited is not obnoxious to this constitutional provision; 2 Tex. 250. The mere entry of a judgment for money, which is void for want of proper service, does not deprive the defendant of liberty or property; 137 U. S. 15. A law which provides that in case of refusal to pay certain taxes, the treasurer shall levy the same by distress and sale of the goods of the person refusing or of any goods in his possession, and that no claim of property by any other person shall prevent a sale, but giving the

owner of the goods a remedy against the person taxed, is constitutional; 5 Mich. 251, where the subject is fully treated. It has been held in California (49 Cal. 402), that a statute which directs the commissioner of immigration to visit vessels arriving from a foreign state, and to ascertain whether there are any lewd women on board, and if such be found, to prevent them from landing unless bonds be given to the state, is not repugnant to the XIV. amendment. An act to allow animals running at large to be taken by any person and publicly sold by a public officer, is constitutional; 39 Mich. 41. An act which makes a garnishee liable to pay a judgment against the defendant, in case the garnishee neglects to render a sworn account, does not deprive him of his property without due process of law; 12 R. I. 127. Taxation authorized for the purposes of meeting railroad aid bonds is not in violation of the constitutional provision against depriving a person of his property without due process of law. This clause has reference not to the object and purposes of a statute, but to the modes in which rights are ascertained; per Emmons, J., in 1 Flipp. 120. Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subject to which it relates and is enforceable by usual methods adapted to the nature of the case; 129 U. S. 114.

Whenever a tax or other burden is imposed upon property for public use, whether for the whole state or a limited part thereof, and the law provides a mode for confirming or contesting the charge, with such notice and proceedings as are appropriate, the judgment rendered in such proceedings cannot be said to deprive the owner of his property without due process of law; 4 Fed. Rep. 366. The tax here was for the reclamation of swamp lands. See 140 U. S. 316; 128 id. 573; 154 id. 421.

A person imprisoned under a valid law, although there was error in the proceeding resulting in the commitment, is not imprisoned without due process of law; 5 Fed. Rep. 899, per Deady, J. An error in a charge to a jury in a criminal case is not a denial of due process of law; 139 U. S. 651. To compel an attorney to render services gratuitously to defend a person accused of crime, is not the taking of his time and labor, which is his property, without compensation and without process of law; 5 Wash. St. 329.

A statute which authorized the president of the police commissioners of St. Louis, upon satisfactory information that there are any prohibited gaming tables in that city, to issue his warrant for their seizure and to destroy the same publicly, is void; 10 Cent. L. J. 29. The sale of land to satisfy void street assessments which the legislature has unconstitutionally attempted to validate, would be taking property without due process of law; 53 Cal. 44. The commitment to the workhouse of an alleged pauper, upon an *ex parte* hearing, by two overseers, without opportunity to the pauper to be heard, is repugnant to the XIV. amendment, and void; 65 Me. 120, reversing earlier cases in Maine decided before that amendment was passed. A judgment upon a suit *in personam* in Oregon, where there was no service of notice upon the defendant within the jurisdiction, and no appearance on his part, is void, and a sale of defendant's land thereunder passes no title; 95 U. S. 714. See 137 id. 15. No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party; 154 U. S. 34; but when parties have been regularly heard in the course of judicial proceedings, an erroneous decision does not deprive the unsuccessful party of his property without due process of law; 159 id. 103.

A statute providing that the use of an easement shall not be evidence of a right thereto, is unconstitutional so far as it applies to rights acquired by user or prescription prior to the enactment; 12 R. I. 522. The legislature may make a tax deed *prima facie* evidence of title in the purchas-

er, but cannot make it conclusive evidence of his title to the land; 148 U. S. 172. An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without fault on its part, when under the general law, no one else is liable under such circumstances, is void. A person has the right to be present before the tribunal which passes judgment upon the question of life; etc., to be heard by testimony, and to controvert every material fact which bears upon the question involved; if any question of fact or liability be conclusively presumed against him, this is not due process of law; 58 Ala. 594. An affirmation by an appellate court of a judgment of death for murder, although in the absence of the accused and his counsel and without notice to either, does not deprive the defendant of his right to life without due process of law; 143 U. S. 442, 452.

The punishment of death by electricity does not deprive a criminal of due process of law; 142 U. S. 155.

Persons invested with the elective franchise can be deprived of it only by due process of law; 6 Coldw. 233.

An act authorizing monument-makers to place a lien on a tombstone and sell it for non-payment, without providing for any tribunal to adjust the rights of parties, is unconstitutional, and a sale under it is without due process of law; 4 N. Y. Sup. 445.

The provisions of a bill which dispense with personal service in proceedings when it is practicable and has been usual under the general law, the defendants being residents of the county and state, and amenable to process, are void; 50 Miss. 468. A law imposing an assessment for a local improvement without notice to, and a hearing or an opportunity to be heard on the part of, the owner of property assessed, is unconstitutional. It is not enough that he may have notice and a hearing; the law must require notice and give a right to a hearing; 74 N. Y. 133; 96 Ga. 680; 41 N. E. Rep. (Ind.) 326; 23 S. E. Rep. (Va.) 909. A statute providing for the taking of private property for a railroad and for the assessment of damages by commissioners, need not, under the Delaware constitution, provide for notice to the owner of the time and place of meeting of the commissioners, nor need it secure to the owner a hearing; the United States Constitution and amendments impose no restraint upon the states in the exercise of the right of eminent domain, and the words, "due course of law," in the state constitution do not apply thereto; 5 Del. Ch. 524; in which case the authorities are collected and the construction of these words exhaustively considered by Saulsbury, Ch.

See works on constitutional law; 27 Am. Law Reg. 611, 700; 23 id. 129; 5 Am. R. & Corp. Rep. 575; 31 Am. St. Rep. 104; 7 Cent. L. J. 255; 8 id. 398; 18 id. 302; 10 id. 470; 28 id. 266; 48 Am. Dec. 269; 12 Fed. Rep. 583; 13 id. 783; 3 L. R. A. 194; 4 id. 724; 21 id. 789.

A process which accords with those immutable principles of justice which inhere in the very idea of free government. 220 U. S. 117 citing 169 U. S. 366; 139 U. S. 462; 4 Wheat. 235, 244; 211 U. S. 78, 101. Process due according to the law of the land. This process in the States is regulated by the law of the State. 169 U. S. 384, citing 92 U. S. 90.

In Taxation. Due process of law requires that opportunity to be heard as to the validity of the tax and the amount of assessment be given to a taxpayer, who, without fraudulent intent and in the honest belief that it is not taxable, withholds property from tax returns; and this requirement is not satisfied where the taxpayer is allowed to attack the assessment only for fraud and corruption. 207 U. S. 127.

DUEL. A "duel" is a combat with a deadly weapon fought under prescribed rules according to a precedent formal agreement without sudden heat or passion. 132 Ky. 636, 116 S. W. 786.

DUELLING. The fighting of two persons, one against the other, at an appointed time and place, upon a precedent quarrel. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.

When one of the parties is killed, the survivor is guilty of murder; 1 Russ. Cr. 448; 1 Yerg. 228. Fighting a duel, even where there is no fatal result, is of itself a misdemeanor. See 2 Com. Dig. 252; Clark, Cr. L. 340; Co. 3d Inst. 157; Const. 167; 2 Ala. 506; 20 Johns. 457; 1 McMull. 126. For cases of mutual combat upon a sudden quarrel, see 1 Russ. Cr. 495; 2 Bish. Cr. Law § 311. Under the constitutions of some of the states, as Alabama, California, Kentucky, Pennsylvania, Virginia, and Wisconsin, any one being directly or indirectly engaged in a duel is forever disqualified from holding public office. See 10 Bush 725; 20 Johns. 457; 4 Metc. (Ky.) 1; 2 McCord 334; 28 Gratt. 180; CHALLENGE.

DUELLUM. Trial by battle. Judicial combat. Spelman, Gloss. See WAGER OF BATTLE.

DUES. "The word dues is one of general significance, and includes all contractual obligations." 176 U. S. 562. Held "equivalent to debts or that which is owing." 186 U. S. 150. Said to be broader in meaning than the word debts; may signify "what ought to be paid, what may be demanded"; may include damages for personal injuries. In statutes providing that "dues from corporations" shall be secured by individual liability of stockholders, does not include obligations which a corporation had no right to incur. 4 Thompson, Corporations, 2nd ed., §§ 4847, 4848. See PUBLIC DUES.

DUKE. The title given to those who are in the highest rank of nobility in England.

DUKE'S LAWS. Laws of the New York colony passed during the governorship of Nicholls, who was appointed by the Duke of York. Stand. Dict.

DULY PROSECUTE. The covenant of a replevin bond to "duly prosecute" is satisfied by prompt trial of the action in the circuit court and in the court of appeals. 128 Ky. 506, 108 S. W. 896.

DUM BENE SE GESSERIT (Lat. while he shall conduct himself well). These words signify that a judge or other officer shall hold his office during good behavior, and not at the pleasure of the crown nor for a certain limited time.

DUM FERRET OPUS (Lat.). While the work glows; in the heat of action. 1 Kent's Com. 120.

DUM FUIT IN PRISONA (L. Lat.). In English Law. A writ which lay for a man who had aliened lands under duress by imprisonment, to restore to him his proper estates. Co. 2d Inst. 482. Abolished by stat. 3 & 4 Will. IV. c. 27.

DUM FUIT INFRA ETATEM (Lat.). The name of a writ which lay when an infant had made a feoffment in fee of his lands or for life, or a gift in tail. Abolished by stat. 3 & 4 Will. IV. c. 27.

It could be sued out by him after he came of full age, and not before; but in the meantime he could enter, and his entry remitted him to his ancestor's rights; Fitzh. N. B. 192; Co. Litt. 247, 337.

DUM NON FUIT COMPOS MENTIS (Lat.). The name of a writ which the heirs of a person who was *non compos mentis*, and who aliened his lands, might have sued out to restore him to his rights. Abolished by 3 & 4 Will. IV. c. 27.

DUM SOLA (Lat. while single or unmarried). A phrase to denote that something has been done, or may be done, while a woman is or was unmarried. Thus, when a judgment is rendered against a woman *dum sola*, and afterward she marries, the *scire facias* to revive the judgment must be against both husband and wife.

DUM SOLA ET COSTA. While single and chaste. Burrill.

DUMB. Unable to speak; mute. See DEAF AND DUMB.

A dog is a dumb animal; 5 Tex. App. 475.

DUMB-BIDDING. In sales at auction, when the amount which the owner of the thing sold is willing to take for the article is written, and placed by the owner under a candlestick, or other thing, and it is agreed that no bidding shall avail unless equal to that, this is called dumb-bidding. Babington, Auct. 44.

DUN. One who duns or urges for payment; a troublesome creditor. A demand, for payment, whether oral or written. Stand. Dict.

DUNGEON. A cell under ground; a place in a prison built under ground, dark, or but indifferently lighted. In the prisons of the United States there are few or no dungeons.

DUNNAGE. Pieces of wood placed against the sides and bottom of the hold of a vessel, to preserve the cargo from the effect of leakage, according to its nature and quality. Abbott, Shipp. 227.

Material placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other. 13 Wallace (U. S.) 674. See BALLAST.

There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other; 13 Wall. 674.

DUODECIMA MANUS (Lat.). Twelve hands. The oaths of twelve men, including himself, by whom the defendant was allowed to make his law. 3 Bla. Com. 343.

DUPLEX QUERELA (Lat.). In Ecclesiastical Law. A complaint in the nature of an appeal from the ordinary to his next immediate superior for delaying or refusing to do justice in some ecclesiastical cause. 3 Bla. Com. 247; Cowel; Jacobs.

DUPLEX VALOR MARITAGII (Lat. double the value of a marriage). Guardians in chivalry had the privilege of proposing a marriage for their infant wards, provided it were done without disparagement, and if the wards married without the guardian's consent they were liable to forfeit double the value of marriage. Co. Litt. 82 b; 2 Sharsw. Bla. Com. 70.

DUPLICATE (Lat. *duplex*, double). The double of anything. A document which is essentially the same as some other instrument. 7 Mann. & G. 98; 40 N. Y. 345.

A duplicate writing has but one effect. Each duplicate is complete evidence of the intention of the parties. When a duplicate is destroyed, for example, in the case of a will, it is presumed both are intended to be destroyed; but this presumption possesses greater or less force, owing to circumstances. When only one of the duplicates is in the possession of the testator, the destruction of that is a strong presumption of any intent to revoke both; but if he possessed both, and destroys but one, it is weaker; when he alters one, and afterwards destroys it, retaining the other entire, it has been held that the intention was to revoke both; 1 P. Wms. 346; 13 Ves. 310. But that seems to be doubted; 3 Harg. Eccl. 548. See 81 Pa. 389; 49 E. C. L. 94; 103 id. 29; 54 Ind. 29.

In English Law. The certificate of discharge given to an insolvent debtor who takes the benefit of the act for the relief of insolvent debtors.

DUPPLICATIO (Lat. a doubling). The defendant's second answer; that is, the answer to the plaintiff's replication.

DUPPLICATUM JUS (Lat. a twofold or double right). Words which signify the same as *dreil dreit*, or *droit droit*, and which are applied to a writ of right, patent, and such other writs of right as are of the same nature, and do as it were flow from it as the writ of right. Booth, Real Act. 87.

DUPPLICITY. In Pleading. (Lat. *duplex*, twofold; double.) The union of more than one cause of action in one count in a writ, or more than one defence in one plea, or more than a single breach in a replication. 1 W. & M. 381.

The union of several facts constituting together but one cause of action, or one defence, or one breach, does not constitute duplicity; 1 W. & M. 381; 10 Vt. 353; 3 H. & M.H. 455; 2 Blackf. 85; 4 Zabr. 333; 16 Ill. 133; 1 Dev. 397; 1 McCord 464; 10 Me. 83; 14 Pick. 156; 53 Miss. 474; 4 Ind. 109; 2 Tex. Civ. App. 115; 101 N. C. 749; 86 Wis. 142; 77 Md. 121; 87 Ky. 578. Though the joinder of two or more distinct offences in one count of an indictment is faulty, yet where the acts imputed are component parts of the same offence the pleading is not objectionable for duplicity; 54 N. J. L. 416; nor is it where one of the two offences charged is insufficiently set out; 39 Minn. 476. It must be of causes on which the party relies, and not merely matter introduced in explanation; 28 Conn. 184; 14 Mass. 157. In trespass it is not duplicity to plead to part and justify or confess as to the residue; 17 Pick. 236. If only one defence be valid, the objection of duplicity is not sustained; 2 Blackf. 385; 14 Pick. 158.

It may exist in any part of the pleadings; the declaration; 23 N. H. 415; 2 Harring. Del. 162; pleas; 4 McLean 267; 2 Miss. 160; replication; 5 Blackf. 451; 4 Ill. 74; 6 Mo. 460; or subsequent pleadings; 24 N. H. 120; 4 McLean 388; 1 Wash. C. C. 446; 8 Pick. 73; and was at common law a fatal defect; 20 Mo. 229; 23 N. H. 415; to be reached on demurrer only; 18 Vt. 383; 10 Gratt. 255; 13 Ark. 721; 1 Cush. 137; 5 Gill 94; 5 Blackf. 451; 97 Ala. 270; 35 Pac. Rep. (Cal.) 1022. The rules against duplicity did not extend to dilatory pleas so as to prevent the use of the various classes in their proper order; Co. Litt. 304 a; Steph. Pl. App. n. 56.

Owing to the statutory changes in the forms of pleading, duplicity seems to be no longer a defect in many of the states of the United States, either in declarations; 8 Ark. 378; pleas; 1 Cush. 137; 7 J. J. Marsh. 335; or replications; 8 Ind. 96; though in some cases it is allowed only in the discretion of the court, for the furtherance of justice; 32 Mo. 185.

It is too late after verdict to object to duplicity in an information for a misdemeanor; 106 Mo. 395.

DUPLY. In Scotch Law. The defendant's answer to the plaintiff's replication. The same as *dupplicatio*. MacLaurin, Forms of Pr. 127.

DURANTE ABSENTIA. See ADMINISTRATION.

DURANTE BENE PLACITO (Lat.). During good pleasure. The ancient tenure of English judges was *durante bene placito*. 1 Bla. Com. 267, 342.

DURANTE MINORE ETATE (Lat.). During the minority. An infant can enter into no contracts during his minority, except those for his benefit. If he should be appointed an executor, administration of the estate will be granted, *durante minore etate*, to another person. 2 Bouvier, Inst. n. 1555.

DURANTE VIDUITATE (Lat.). During widowhood.

DURATION. Extent, limit or time. 7 Cal. 102.

The power of enduring, continuance in time; the portion of time during which anything exists. 10 A. & E. Ency. 2nd ed., 319. Duration signifies extent, limit, or time. *Id.*, 7 Cal. 102.

DURBAR. In India, a court, audience, or levee. *Wilson's Gloss. Ind.*; *Moz. & W. Dict.*

DURESS. Personal restraint, or fear of personal injury or imprisonment. 2 *Metc. Ky.* 445.

Duress of imprisonment exists where a man actually loses his liberty. If a man be illegally deprived of his liberty until he sign and seal a bond, or the like, he may allege this duress and avoid the bond; 2 *Bay* 211; 9 *Johns.* 201; 10 *Pet.* 137; 45 *Mich.* 569; 95 *Ill.* 588; 41 *N. H.* 414; 74 *Me.* 218; 94 *N. Y.* 268. But if a man be legally imprisoned, and, either to procure his discharge, or on any other fair account, seal a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it; *Co.* 2d *Inst.* 482; 3 *Cai.* 168; 6 *Mass.* 511; 1 *H. & M.* 350; 17 *Me.* 338; 18 *How.* 307; 2 *Wash. C. C.* 180; 61 *Conn.* 50. Where the proceedings at law are a mere pretext, the instrument may be avoided; *Aleyn* 92; 1 *Bla. Com.* 136.

Duress per minas, which is either for fear of loss of life, or else for fear of mayhem or loss of limb, must be upon a sufficient reason; 1 *Bla. Com.* 131. In this case, a man may avoid his own act. *Lord Coke* enumerates four instances in which a man may avoid his own act by reason of menaces:—for fear of loss of life; of member; of mayhem; of imprisonment; *Co.* 2d *Inst.* 489; 2 *Rolle, Abr.* 124; *Bac. Abr. Duress, Murder, A.*; 2 *Ld. Raym.* 1578; *Savigny, Dr. Rom.* § 114; 91 *Pa.* 114.

Where plaintiff executes a note in consideration that defendant will not prosecute his son for perjury and under a threat that otherwise the son will be prosecuted, the threats constitute duress; 154 *Mass.* 460.

It has been held that restraint of goods under circumstances of hardship will avoid a contract; 2 *Bay* 211; 9 *Johns.* 201; 10 *Pet.* 137; 57 *Ill.* 289; 114 *Mass.* 364; 63 *Pa.* 49; 68 *N. C.* 134; 95 *U. S.* 210; 11 *Exch.* 878. But see 2 *Metc. (Ky.)* 445; 3 *Gall.* 337; 8 *Ct. Cl.* 461; 50 *Ala.* 437.

The duress to avoid a deed is that which compels the grantor to do what he would not do voluntarily; 80 *Me.* 472; 45 *Mich.* 569; 90 *Pa.* 161. If a contract is made under duress and subsequently ratified, it becomes valid; 24 *Fla.* 390.

The violence or threats must be such as are calculated to operate on a person of ordinary firmness and inspire a just fear of great injury to person, reputation, or fortune. See 4 *Wash. C. C.* 402; 39 *Me.* 559; 169 *id.* 376; 18 *Colo.* 82; 26 *Ark.* 280; 36 *La. Ann.* 471. The age, sex, state of health, temper, and disposition of the party, and other circumstances calculated to give greater or less effect to the violence of threats, must be taken into consideration; 32 *Am. Rep.* 180, n.; 1 *Ky. Law Rep.* 137; 16 *Wall.* 432; 28 *Am. L. Reg. o. s.* 206.

Violence or threats will amount to duress not only where they are exercised on the contracting party, but when the wife, the husband, or children of the party are the object of them; 26 *N. Y.* 12; 131 *Mass.* 51; 3 *Washb. R. P.* 276.

If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of any measure authorized by law and the circumstances of the case, are of this description. See *Norris, Peake's Ev.* 440, and the cases cited; also, 6 *Mass.* 506, for the general rule at common law; 84 *Me.* 108; *contra*, 106 *Mass.* 291; 155 *id.* 233; 36 *N. Y.* 365; 47 *N. J. L.* 265; 79 *N. C.* 608; 50 *Conn.*

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But the mere forms of law to cover coercive proceedings for an unjust and illegal cause, if used or threatened in order to procure the assent to a contract, will invalidate it; and arrest without cause of action, or a demand of bail in an unreasonable sum, or threat of such proceeding, by this rule invalidates a contract made under their pressure.

Where a person has been refused payment of the balance due after completing his contract, unless he repair, labor free, certain damages done to the work by a stranger, he cannot recover the cost of such extra labor as he was not under duress; 133 *N. Y.* 372.

All the above cases relate to cases where there may be some other motive besides the violence or threats for making the contract. When, however, there is no other cause for making the contract, any threats, even of slight injury, will invalidate it.

Excessive charges paid to railroad companies refusing to carry or deliver goods, unless these payments were made voluntarily, have been recovered on the ground of duress; 27 *L. J. Ch.* 137; 32 *id.* 225; 30 *L. J. Exch.* 361; 28 *id.* 169. Where the carrier refuses to transport stock until a special contract is signed limiting its liability, it does not bind the shipper; 48 *Kan.* 210.

The burden of proving duress is on the party alleging it; 37 *Neb.* 666.

See, generally, 2 *Watts* 167; 1 *Bail.* 84; 6 *Mass.* 511; 6 *N. H.* 508; 3 *Gall.* 337; 148 *U. S.* 541.

DURHAM. See COUNTY PALATINE.

DURSLEY. In Old English Law. Blows without wounding or bloodshed; dry blows. *Blount.*

DUTIES. In its most enlarged sense, this word is nearly equivalent to taxes embracing all impositions or charges levied on persons or things; in its more restrained sense, it is often used as equivalent to *customs, or imposts.* *Story, Const.* § 949.

DUTY. A human action which is exactly conformable to the laws which require us to obey them.

That which is right or due from one to another. A moral obligation or responsibility.

It differs from a legal obligation, because a duty cannot always be enforced by the law: it is our duty, for example, to be temperate in eating, but we are under no legal obligation to be so; we ought to love our neighbors, but no law obliges us to love them.

See ACCOUNT DUTY; ESTATE DUTY; LEGACY DUTY; PROBATE DUTY; HEAD MONEY; See GERMAN DUTY ON DUTY.

DWELLING-HOUSE. A building inhabited by man. A house usually occupied by the person there residing, and his family. The apartment, building, or cluster of buildings in which a man with his family resides. 2 *Bish. Cr. Law* § 104.

The importance of an exact signification for this word is often felt in criminal cases; and yet it is very difficult to frame an exact definition which will apply to all cases. It is said to be equivalent to mansion-house; 3 *S. & R.* 199; 4 *Strobh.* 372; 7 *Mann. & G.* 122. See 14 *M. & W.* 181; 4 *C. B.* 106; 4 *Call* 109.

Judge Cooley, in 50 *Mich.* 219, says that in the law of burglary the dwelling-house is deemed to include whatever is within the curtilage, even though not inclosed with the dwelling, if used with it for domestic purposes; 2 *Mich.* 250; 16 *id.* 142.

It must be a permanent structure; 1 *Hale, Pl. Cr.* 557; 1 *Russ. Cr.* 798; must be inhabited at the time; 2 *Leach* 1018, n.; 33 *Me.* 30; 26 *Ala. n. s.* 145; 10 *Cush.* 479; 18 *Johns.* 115; 4 *Call* 109; 62 *Miss.* 782. It is

sufficient if a part of the structure only be used for an abode; *Russ. & R.* 185; 11 *Metc.* 295; 9 *Tex.* 42; 2 *B. & P.* 508; 27 *Ala. n. s.* 31; 68 *N. C.* 207. How far a building may be separate is a difficult question. See *Russ. & R.* 495; 10 *Pick.* 293; 4 *C. B.* 106; 1 *Dev.* 253; 3 *Humphr.* 879; 1 *N. & McC.* 583; 5 *Leigh* 751; 6 *Mich.* 142; 24 *N. J. L.* 377; 33 *How. Fr.* 378; 98 *Mich.* 26; 45 *N. H.* 37; 20 *N. Y.* 52; 18 *Q. B.* 783; 23 *Ir. L. T. Rep.* 30; 89 *Mo.* 430; 38 *Ohio St.* 506; 68 *N. C.* 207.

A suite of rooms in a college of the University of Cambridge is a dwelling-house; *L. R.* 4 *C. P.* 539. In a rather curious case the question what is a dwelling-house divided the court. Six separate tenants occupied a house of ten rooms, each having exclusive possession of his part of the premises and the owner did not reside there. The outer and street door had no lock or bolt and was always kept open. The entry, stairway, and an ashpit and other conveniences were used in common. Two of the judges held that each of the six tenants occupied a "dwelling-house," and two held otherwise; *L. R.* 6 *C. P.* 327.

DWELLING-PLACE. See RESIDENCE; DOMICIL.

DYING DECLARATIONS. See DECLARATIONS.

DYING BY HIS OWN HAND. See SELF-DESTRUCTION.

DYING WITHOUT ISSUE. Not having issue living at the death of the decedent. 5 *Paige, Ch.* 514; 34 *Me.* 176; 13 *N. J. Eq.* 105. In England this is the signification, by statutes 7 *Will. IV.*; 1 *Vict. c.* 26, § 29. But the old English rule, that the words, when applied to real estate, import an indefinite failure of issue, has been generally adhered to in this country; 20 *N. J. L.* 6; 33 *Barb.* 328; 32 *Md.* 101. See 2 *Washb. R. P.* 362; 4 *Kent* 273.

The words "dying without children or issue" are restricted or limited to the death of the remainderman before the termination of the particular estate. 137 *Ky.* 637, 126 *S. W.* 151; 150 *Ky.* 488, 150 *S. W.* 648.

DYNASTY. A succession of kings in the same line or family.

DYSNOMY. Bad legislation; the enactment of bad laws.

DYSPEPSIA. The group of symptoms resulting from alterations in the process of digestion due either to functional or organic diseases of the stomach.

Dyspepsia is not, in general, considered as a disease which tends to shorten life, so as to make a life uninsurable, unless the complaint has become organic dyspepsia, or was of such a degree at the time of the insurance as by its excess to tend to shorten life; 4 *Taunt.* 768.

DYVOUR. In Scotch Law. A bankrupt.

DYVOUR'S HABIT. In Scotch Law. A habit which debtors who are set free on a *cessio bonorum* are obliged to wear, unless in the summons and process of *cessio* it be libelled, sustained, and proved that the bankruptcy proceeded from misfortune. And bankrupts are condemned to submit to the habit, even where no suspicion of fraud lies against them, if they have been dealers in an illicit trade. *Erskine, Pract. Scot.* 4, 3, 13.

E CONVERSO (Lat.). On the other hand; on the contrary. Equivalent to *e contra*.

EAGLE. A gold coin of the United States of the value of ten dollars.

It weighs two hundred and fifty-eight grains of standard fineness; that is to say, of one thousand parts by weight, nine hundred shall be of pure metal and one hundred of alloy, the alloy consisting of silver and copper. As the proportion of silver and copper in the gold coins of the United States is not fixed by law further than to prescribe that the silver therein shall not exceed fifty in every thousand parts, the proportion was made the subject of a special instruction by Mr. Snowden, former director of the mint, as follows:—

"As it is highly important to secure uniformity in our gold coinage, all deposits of native gold, or gold not previously refined, should be assayed for silver, without exception, and refined to from nine hundred and ninety to nine hundred and ninety-three, say averaging nine hundred and ninety-one as near as may be. When any of the deposits prove to be nine hundred and ninety, or finer, they should be reserved to be mixed with the refined gold. The gold coin of the mint and its branches will then be nearly true: gold, nine hundred; silver, eight; copper, ninety-two; and thus a greater uniformity of color will be attained than was heretofore accomplished."

The instructions on this point were prescribed by the director in September, 1883. Mint Pamphlet, "Instructions relative to the Business of the Mint," 14. The act of February 12, 1873, Rev. Stat. § 3514, fixes the proportion of silver at in no case more than one-fourth of the whole alloy. For all sums whatever the eagle is a legal tender for ten dollars. U. S. Rev. Stat. § 8085.

EALDERMAN (Sax.). A Saxon title of honor. It was a mark of honor very widely applicable, the ealdermen being of various ranks. It is the same as alderman, which see.

EALDORMAN. Literally, an elder. The title was applied in Anglo-Saxon times to an official who, along with the sheriff and the bishop, was one of the three chief officers of each county. He represented the king. The area of an ealdorman's jurisdiction was sometimes larger than a county, and his position was sometimes that of a viceroy. The office was not continued after the Conquest, but the name of the office was borrowed by the mediæval alderman and is still used. Byrne's L. Dict.

EAR-MARK. A mark put upon a thing for the purpose of distinction. Money in a bag tied and labelled is said to have an ear-mark. 3 Maule & S. 575.

Also used in equity in respect of property or a fund in the hands of a third party, which is capable of identification as belonging to the claimant out of possession.

The doctrine that money has no ear-mark is no longer law. Property entrusted to a person in a fiduciary capacity may be followed as long as it may be traced, and where a person holding money as trustee or in a fiduciary character mixed it with his own and draws out of the mixed fund for his own purposes, the court presumes that his own drawings are to come out of his own money; 13 Ch. D. 696. And see note to this case citing leading English cases in Brett's Leading Cases in Modern Equity 179; Trusts.

EAR-WITNESS. One who attests to things he has heard himself.

EARL. In English Law. A title of nobility next below a marquis and above a viscount.

Earls were anciently called *comites*, because they were wont *comitari regem*, to wait upon the king for counsel and advice. They were also called *shiremen*, because each earl had the civil government of a shire. After the Norman conquest they were called *counts*, whence the shires obtained the names of counties. They have now nothing to do with the government of counties, their duties having devolved on the sheriff, the earl's deputy, or *vicecomes*. 1 Bla. Com. 296.

EARL MARSHAL. An officer who formerly was of great repute in England. He held the court of chivalry alone as a court of honor, and in connection with the lord high constable as a court having criminal jurisdiction. 3 Bla. Com. 68; 4 *id.* 268. The duties of the office now are restricted to the settlement of matters of form merely. It would appear, from similarity of duties and from the derivation of the title, to be a relic of the ancient office of alderman of all England. See ALDERMAN.

EARL'S PENNY. A corruption for Arles penny. See ARLES; EARNEST.

EARL'S THIRD PENNY. In the sheriff's court, the Crown was entitled to two-thirds of the fees issuing out of all pleas of the shire, the other third (third penny) going to the Earl. This was known as the "Earl's Third Penny," and was for the support of the Earl's state. It originated with the creation of Earls Under William the Conqueror. Wharton.

EARLDOM. The dignity or jurisdiction of an earl. The dignity only remains now, as the jurisdiction has been given over to the sheriff; 1 Bla. Com. 339.

EARNEST. The payment of a sum of money or delivery of a thing or token, upon the making of a contract for the sale of goods, to bind the bargain, the delivery and acceptance of which marks the final and conclusive assent of both parties to the contract.

It has been defined to be the payment of a part of the price of goods sold, or the delivery of part of such goods, for the purpose of binding the contract. 106 Mass. 54.

It has been stated in a general way that the effect of earnest is to bind the goods sold; and, upon their being paid for without default, the buyer is entitled to them; but, notwithstanding the earnest, the money must be paid upon taking away the goods, because no other time for payment is appointed; earnest only binds the bargain, and gives the buyer a right to demand, but a demand without payment of the money is void; after earnest given, the vendor cannot sell the goods to another without a default in the vendee, and therefore if the latter does not come and pay, and take the goods, the vendor ought to go and request him, and then, if he does not come, pay for the goods, and take them away in convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person; 2 Bla. Com. 447; 2 Kent, Com. 495; 2 H. Bla. 516; Ayl. Pan. 450; 3 Campb. 496; 1 Bailey 537.

There is great difference of opinion as to the exact definition of this word. It had a significance at common law sufficiently well understood to warrant its use in the statute of frauds of 29 Car. II. § xvii. which makes parol sales of goods, etc., void unless there is a delivery, or the buyer "give something in earnest to bind the bargain, or in part payment."

The Roman law included two kinds of earnest, one being a contract prior to that of sale and independent of it, which was practically the payment of a sum of money for what we should now call an option to purchase, to be forfeited by the purchaser if he did not buy, while, if the other party was unwilling to sell, he must return the earnest and pay an equal amount as a forfeit. The other kind of earnest was that afterwards found in the common law and might be a thing, usually a ring, which either party, generally the buyer, gave to the other as a token. It is important in reading the civil law on this topic to bear in mind these two classes. Benj. Sales § 195. Justinian changed the law on this subject by providing that either party might rescind the sale by forfeiting the amount of the earnest money; Inst. l. 3. § 1. At least the text appears to be susceptible of no other meaning, but Pothier maintains that, after earnest, neither party

could avoid the obligation; in this he is not followed by the later civilians. The same controversy has arisen upon a similar provision of the French code. The conclusion above stated is that of Benjamin, who cites the authorities; Sales § 189-200.

In Scotland the word arles is used for earnest, and is usually applied to a small sum given to a servant on hiring, as earnest that the wage will be paid.

The word earnest "has been supposed to flow from a Phœnician source, through the *ἀρραβών* of the Greeks, the *arra* or *arrha* of the Latin, and the *arrhes* of the French.

... The general rule appears to have been that expressed in the Institutes III. 23: '*Is qui recusat adimplere contractum, sequidem est emptor, perdit quod dedit: si vero venditor, duplum restituere compellitur, licet super arris nihil expressum est.*' Furthermore, the earnest did not lose that character, because the same thing might also avail as part payment: '*Datur autem arrha vel simpliciter* (says Vinnius, on Inst. III. 24) *ut sit argumentum duntaxat et probatio emptiois contractæ: veluti si annulus datur; vel ut simul postea cedat in partum pretii, data certa pecunia.*' From the Roman law the principles relating to the earnest appear to have passed to the earlier jurisprudence of England: '*Item cum arrarum nomine* (says Bracton ii. 27) *aliquid datum fuerit ante traditionem, si emptorem emptiois penituerit, et a contractu rescire voluerit, perdat quod dedit: si autem venditorem, quod arrarum nomine receperit, emptori restituat, duplicatum.*' Though the liability of the vendor to return to the purchaser twice the amount of the deposit has long since departed from our law, the passage in question seems an authority for the proposition that the earnest is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things is apparent from the 17th section of the statute of frauds, where they are treated as separate acts, each of which is sufficient to give validity to a parol contract." Fry, L. J., in 53 L. J. Ch. 1055, 1061.

Kent says it is *only one mode* of binding the bargain, and giving the buyer a right to the goods on payment; 2 Com. 495; it is a token or pledge passing between the parties by way of evidence or ratification of the sale. . . . It is mentioned in the statute of frauds, and in the French code, as an efficient act; but it has fallen into very general disuse in modern times, and seems rather to be suited to the manners of simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present day. It has been omitted in the New York Revised Statutes; *id.* (14th ed.) 495, n. (b). That it has fallen into disuse is true both as to the giving of earnest in its ancient, strict, and technical sense, and to its having fallen into disuse has been attributed the tendency to treat earnest and part payment as meaning the same thing, though the language of the statute of frauds implies that the former is something to bind the bargain while no part payment can be made until the contract has been closed; Benj. Sales § 189.

One very recent definition is: "Specifically, in law, a part of the price of goods or service bargained for, which is paid at the time of the bargain to evidence the fact that the negotiation has ended in an actual contract. Hence it is said to bind the bargain." Cent Dict. And another is: "Something given by a buyer to a seller by way of token or pledge to bind the bargain; a

part or portion of goods delivered into the possession of the buyer at the time of the sale as a pledge or security for the complete fulfillment of the contract; a handsel." Encyc. Dict. And the latter authority illustrates the function of earnest as evidence of the conclusion of the contract by the Scotch law which holds a party who resiles, to fulfil the contract as well as to forfeit the earnest paid.

It is sometimes said that the question whether the earnest shall count as part of the price or wage depends on the intention of the parties, which, in the absence of direct evidence, will be inferred from the proportion which it bears to the whole sum. Int. Cyc. "If a shilling be given in the purchase of a ship or of a box of diamonds, it is presumed to be given merely in evidence of the bargain, or, in the common way of speaking, is dead earnest; but if the sum be more considerable it is reckoned up in the price." Ersk. Inst. b. iii. tit. iii. § 5.

Another writer considers "that the original view of earnest in England was, that it was a payment of a small portion of the price or wage, in token of the conclusion of the contract; and as this view seems to have been adhered to, the sum, however small, would probably then be counted as a part payment." Sto. Sales 216.

It has been a mooted question whether at common law either earnest or delivery was necessary to perfect a sale of chattels; in a case where it was objected that because there was neither, there could not be a recovery for the breach of a parol contract of sale, it was said: Earnest paid is not necessary to complete a parol contract of sale; when made, it only prevents the vendor, under any circumstances, from rescinding the contract without the assent of the vendee; and this by common law, and not by any statute; 3 Red. 236.

It has been much discussed whether the giving of earnest has any effect to pass the title to the property sold; and in earlier cases of the sale of specific chattels it was so held; Shep. Touchst. 224; Buller, J., in 5 Term 409; 7 East 558; Noy, Max. 87-9; 2 Bla. Com. 447-9; but see the analysis of these authorities; Benj. Sales §§ 355-6. It is said by this learned writer on the subject, that there is no case in which this has been held when a completed bargain, if in writing, would not have altered the property; *id.* § 357; and it is concluded that the true legal effect of earnest is simply to afford conclusive evidence of a bargain actually completed with the mutual intention that it should be binding on both; and whether the property has passed in such cases is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of earnest; *id.* Hence with respect to the remedy of the seller, if the buyer refuse to take the property sold, the law of earnest, properly speaking, is not concerned; but it is to be treated as in the case of contracts otherwise legally evidenced. See 2 Kent, Com. Lacey's ed. 496, note 51; SALES.

To constitute earnest to bind the bargain something must be paid or given. An instance is reported where, the buyer having drawn a shilling across the palm of the seller and returned it to his own pocket, according to a custom alleged to exist in the north of England, it was held that the statute was not satisfied; 7 Taunt. 597. This has been said to be the only reported case; Benj. Sales § 191; but it has been held in the United States that money left in the hands of a third person as a forfeiture is not sufficient; 108 Mass. 54; much less a deposit of a check; 60 Mo. App. 635; 30 Ind. 103. The three cases last cited are usually referred to in connection with the subject of earnest. In the Massachusetts case, the question was as to the recovery of money deposited as a forfeiture, which it was argued was earnest to bind the bargain in case of a refusal to take the goods, and the court said that earnest, as used in the statute of frauds, was part payment. On the strength of this case a text-writer on the law of that state adopts the statement as a definition of earnest; Usher, Sales Per. Prop. §

118. So an authoritative writer on the statute of frauds uses the terms, earnest and part payment, as interchangeable, and discusses the question of when earnest must be paid mainly upon New York cases, although in that state the exception is confined to part payment, the "giving something in earnest" being omitted; Reed, Stat. Fr. § 226. While, therefore, the clear and philosophical definitions of the nature and effect of earnest cited from Benjamin on Sales unquestionably commend themselves as better satisfying the apparent purpose of the statute to designate two distinct acts, it must be admitted that they are constantly referred to by American courts and writers as alternative expressions of the same thing. Consequently the cases cited in text-books as laying down rules as to earnest are usually found, on examination, to be in fact cases of part payment, and they must be so read. This use of the words, interchangeably, makes unavoidable a reference to the cases just referred to, especially since the word earnest, in addition to what has been indicated as its real significance, has, in this country, certainly, an acquired meaning too general to be disregarded.

In part payment something having value must pass from the buyer to the seller; 16 M. & W. 302; 12 Barb. 570; 30 *id.* 265; 49 *id.* 348; an unaccepted tender to the vendor on a call for part payment by him will not suffice to bind him, as when a remittance by mail of a check was returned to the sender; 41 Vt. 676; nor the promissory note of the buyer; 10 Barb. 573; 26 Wis. 511; 68 Ind. 278; even if there were an express agreement that the note should be received as part payment, which in this instance there was not; *id.*; in this case it was held that the note was not only ineffectual as part payment, but that it could not be regarded as earnest, sufficient to bind the bargain. After referring to the Massachusetts decision, *supra*, that, as used in the statute of frauds, earnest was regarded as part payment of the price, the court said: "But, conceding that it may be something distinct from payment, it is quite clear that it must have some value. The note has no value whatever, because it had no consideration to support it, and its payment could not, therefore, have been enforced. To say that such a note has value, is but grasping at a shadow, and losing sight of the substance. The contract for the sale of the hogs not being valid, the note given in consideration of the agreement therefor was based upon no valid consideration;" *id.*; 32 N. Y. 519; 12 Barb. 570. But see 13 M. & W. 58; Byles, Bills *386; Chitty, Cont. 11th. Am. ed. 665. But when the contract was partly performed by compliance with a condition, and a note was tendered for the price, it was considered that the statute was satisfied; 16 Barb. 277. A note of a third person accepted as payment is sufficient; 10 Barb. 573; or a check if paid is a payment relating back to the time when given; 17 Hun 135; a stipulation that borrowed money owing from the seller to the buyer shall be treated as part payment will avail; 33 Barb. 543; but not an agreement to credit an account due from the seller and send goods for the balance; 43 N. E. Rep. (Ind.) 575; or a promise to pay a part of the purchase money to a creditor of the vendor or credit it in the account against him; 5 Hill 204; but if such debt be actually paid it is good; 21 U. C. Q. B. 340; or if accepting the promise the creditor discharge the vendor; 10 Wis. 425; but the payment must be made at the time of the agreement; 34 *id.* 83; and if there was no entry in the account stating that the credit was given on account of the transactions in suit it was insufficient; 44 Barb. 96. A mere agreement that the price shall go in settlement of an existing account is not sufficient without more; 30 Barb. 265; 16 M. & W. 302; 36 Ala. 675; 16 L. J. Ex. 120; nor is an agreement to sell one article and take another in part payment; 1 Hilt. 366. Part payment may be by the actual delivery of anything of value, as a chattel; 37 Vt. 103; but a delivery of goods must be sufficient within the statute

of frauds if they were in litigation; 64 Barb. 275.

With respect to the time at which part payment must be made, it is in some states required to be at the time of making the contract; 63 N. W. Rep. (Wis.) 1057. It was so held in New York; 20 Wend. 63; though in a later case the question was raised and not determined; 53 N. Y. 119; the same day is sufficient; 30 Barb. 265; and so was a payment asked and received on the following day, the contract being held to be then made for the first time; 39 N. Y. 261. See 57 *id.* 375. And when a check is given and paid upon presentation it is a payment at the time; 84 N. Y. 549; so also a check upon a deposit in bank; 70 Fed. Rep. 190. In some cases it has been held that payment is not so restricted; 7 U. C. C. P. 133; 12 Metc. 435; 13 Me. 424; 48 N. H. 189. It is to be observed that this question of time arises with more frequency under the New York statute which does not provide for earnest *eo nomine*, but only for part payment "at the time," as does also the Wisconsin statute.

See Benjamin; Blackburn; Story, Sales; Browne; Reed, Statute of Frauds; FRAUDS, STATUTE OF; PAYMENT; SALES.

EARNING POWER. See IMPAIRMENT, *Earning Power*.

EARNINGS. The word has been used to denote a larger class of credits than would be included in the term wages. 103 Mass. 235; 115 *id.* 165. See 131 *id.* 534. It also means the gains of the debtor derived from his services or labor without the aid of capital; 20 Wis. 330.

Surplus earnings, is an amount owned by a company, over and above the capital and actual liabilities. 76 N. Y. 74.

Net earnings, generally speaking, are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. 99 U. S. 420. See DIVIDENDS.

EARTH. Clay, gravel, loam and the like, in distinction from the firm rock. The term also includes hard-pan, which is a hard stratum of earth. 75 N. Y. 76.

EASEMENT. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. 2 Washb. R. P. 25; 60 Vt. 702.

A privilege which the owner of one adjacent tenement hath of another, existing in respect of their several tenements, by which that owner against whose tenement the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists. *Termes de la Ley, Easements*; Bell, Dict., *Easements; Servitude*; 1 S. & R. 298; 8 B. & C. 389; 2 M'Cord 451; 8 Pick. 406; 74 Ill. 183; 47 Md. 301; 50 Vt. 361; 71 Tex. 690; 73 Wis. 178.

Although the terms are sometimes used as if convertible, properly speaking *easement* refers to the right enjoyed by one and *servitude* the burden imposed upon the other.

An interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use of or over the estate of another. 113 N. Y. 81.

In the civil law, the land against which the privilege exists is called the *servient tenement*; its proprietor, the *servient owner*; he in whose favor it exists, the *dominant owner*; his land, the *dominant tenement*. And, as these rights are not personal and do not change with the persons who may own the respective estates, it is very common to personify the estates as themselves owning or enjoying these easements; 4 Sandf. Ch. 72; 3 Paige, Ch. 254; 16 Pick. 522.

Easements are of two kinds—appurtenant, or appendant, and in gross. The former run with the land, and pass by a deed of conveyance; but the latter are personal, are not assignable, and will not pass by a deed of conveyance; Washb. Easem. 12; 61 Pa. 38; Ld. Raym. 407; 110 Ill. 268. See 14

L. R. A. 333, n., as to the right to assign or transmit easements in gross. A way is never presumed to be in gross when it can be construed to be appurtenant to the land; 82 Va. 462.

Easements are also classified as continuous and discontinuous, the precise distinction between them being thus stated: "Continuous are those of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man. Discontinuous are those, the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water." 21 N. Y. 505. Of the former the right to light and air would be an example, of the latter, the right to use a pump; Chase's Bla. Com. 282, note, which see as to Easements generally.

Easements have these essential qualities. There must be two tenements owned by distinct proprietors: the dominant, to which the privilege is attached; the servient, upon which it is imposed. Tudor, Lead. Cas. 108; 17 Mass. 443; 29 Ohio St. 642.

Easements, strictly considered, exist only in favor of, and are imposed only on, corporeal property; 2 Washb. R. P. 35. They confer no right to any profits arising from the servient tenement; 4 Pick. 145; 30 E. L. & Eq. 189; 70 N. Y. 419. They are incorporeal. Like other incorporeal hereditaments they have been held not to pass without a grant; 3 Kent, Com. 434; 2 Mart. 214. By the common law, they may be temporary; by the civil law, the cause must be perpetual. They impose no duty on the servient owner, except not to change his tenement to the prejudice or destruction of the privilege; Gale, Easem. 3d ed. 1; Washb. Easem. 5.

Easements are as various as the exigencies of domestic convenience or the purposes to which buildings and lands may be applied.

The following attach to land as incidents or appurtenances, viz.: the right—

Of pasture on other land; of fishing in other waters; of taking game on other land; of way over other land; of taking wood, minerals, or other produce of the soil from other land; of receiving air, light, or heat from or over other land; of receiving or discharging water over, or having support to buildings from, other land; 3 E. B. & E. 655; of a right to take ice on a pond; 93 Mich. 450; of going on other land to clear a mill-stream, or repair its banks, or draw water from a spring there, or to do some other act not involving ownership; of carrying on an offensive trade; 2 Bingham. c. 184; 5 Metc. 8; of burying in a church, or a particular vault; 8 Hou. L. Cas. 362; 11 Q. B. 666; 29 Grant. 347; 123 Mass. 155, 562; 71 N. Y. 194; 134 *id.* 435. Projection of a cornice on a house over an adjoining lot, apparent and continuous for over 20 years, raises a conclusive presumption of right to maintain it; 153 Pa. 291.

The right to maintain a building or other permanent structure upon the land of another cannot be acquired by custom; 148 Mass. 309.

Where the owner of a tract of land fronting upon a public highway sells a portion thereof which is entirely surrounded by the land of the grantor and of strangers with no outlet, except over the lands of the grantor, the grantee is entitled to a right of way over the grantor's land, unless the situation of the land or the object for which it is used and conveyed shows that no grant of such right was intended; 40 Kan. 208. See 65 Vt. 333.

Some of these are affirmative or positive, —i.e., authorizing the commission of acts on the lands of another actually injurious to it; as, a right of way,—or negative, being only consequentially injurious; as, forbidding the owner from building to the obstruction of light to the dominant tenement. Tudor, Lead. Cas. 107; 2 Washb. R. P. 26.

All easements must originate in a grant or agreement, express or implied, of the owner of the servient tenement; 113 N. Y. 61. The evidence of their existence, by the common law, may be by proof of the agreement itself, or by prescription, requir-

ing an uninterrupted enjoyment immemorially, or for upwards of twenty years, to the extent of the easement claimed, from which a grant is implied. A negative easement does not admit of possession; and, by the civil law, it cannot be acquired by prescription, and can only be proved by grant. Use, therefore, is not essential to its existence; Gale, Easem. 28, 81, 123; 2 Bla. Com. 263; Bell, Law Dict. *Servitudes*. An easement can only be created by a conveyance under seal or by long user, from which such conveyance is presumed; 97 N. C. 271; see 100 N. C. 161; or by necessity; 46 N. Y. 879; 117 Ill. 643; and the burden is on one claiming that it was by virtue of a license, to prove that fact; 68 Hun 269. As to the creation of easements by deed, see 8 L. R. A. 617, n.; and by implication; 13 *id.* 126.

In case of a division of an estate consisting of two or more heritages, the question whether an easement or convenience, which may have been used in favor of one in or over the other by the common owner of both, shall become attached to the one or charged upon the other in the hands of separate owners, by a grant of one or both of those parts, or upon a partition thereof, must depend, where there are no words limiting or defining what is intended to be embraced in the deed or partition, upon whether the easement is necessary for the reasonable enjoyment of the part of the heritage claimed as an appurtenance.

Where it is not necessary, it requires descriptive words of grant or reservation in the deed to create it; Washb. Easem. 95; 36 Am. Rep. 415. The common-law rule requiring the word "heirs" in the creation of an estate of inheritance by deed is inapplicable in creating a permanent easement; 82 Conn. 195; 93 Mich. 599. See 157 Mass. 489. The use of the word appurtenances is not sufficient to create an easement where none existed before; 66 Miss. 136.

An easement in land held in common cannot be acquired by one of the tenants in common in favor of land held by him in severalty, as a right of flowage over common property by a tenant owning a dam; 15 N. H. 413; or a right of way over the common land by the tenant to a lot in the rear owned by him; 65 Ga. 468.

Easements are extinguished: by release; by merger, when the two tenements in respect of which they exist are united under the same title and to the same person; 68 N. Y. 62; by necessity, or abandonment, as by a license to the servient owner to do some act inconsistent with its existence; 53 N. Y. 622; by cessation of enjoyment, when acquired by prescription,—the non-user being evidence of a release where the abandonment has continued at least as long as the user from which the right arose. In some cases a shorter time will suffice; 2 Washb. R. P. 56, 82, 453. See 3 Kent 550; Cruise, Dig. tit. 31. c. 1. § 17; Gale, Easem.; 68 Me. 334; 26 Pa. 438; 73 *id.* 179; 69 Tex. 449; 120 Ill. 200. An easement acquired by grant cannot be lost by mere non-user, though it may be by non-user coupled with an intention of abandonment; 110 N. Y. 595; 134 *id.* 450.

Prescription does not run against the exercise of a servitude in favor of one who resisted and prevented its exercise; 40 La. Ann. 425. Mere non-user must be accompanied by adverse use of the servient estate; 18 L. R. A. 535, with note on the effect of non-user generally. One cannot acquire a prescriptive right over his own lands or the lands of another which he occupies as tenant; 116 Mo. 379.

An easement in favor of land held in common will be extinguished by a partition, if nothing is said about it; 1 Barb. 592. As to the loss or extinguishment of easements, see 1 L. R. A. 214, n.

The remedy at common law for interference with a right of easement is an action of trespass, or where it is for consequential damages and for an act not done on plaintiff's own land, of case; 8 Blackf. 317; 14 Allen 40. Where the act complained of is done in one county, but the injurious consequences thereof are felt in

another, the action may be brought in the latter; 9 Pick. 59; 5 Post. 525. Redress may also, as a general proposition, be obtained through a court of equity, for the infringement of an easement and an injunction will be granted to prevent the same; Washb. Easem. 747.

See Washburn, Easements; BACKWATER; AIR; ANCIENT LIGHTS; COMMON; DAM; HIGHWAY; PARTY-WALL; PROFIT A PRENDRE; SERVITUDE; STREET; SUPPORT; WAY.

EASTERLY. When this word is used alone it will be construed to mean due east; but this is a rule of necessity, growing out of the indefiniteness of the term and has no application where other words are used for the purpose of qualifying its meaning. Where such is the case it means precisely what the qualifying word makes it mean; 32 Cal. 257.

EASTER TERM. In English Law. Formerly one of the four movable terms of the courts, but afterwards a fixed term, beginning on the 15th of April and ending on the 8th of May in every year, though sometimes prolonged so late as the 13th of May, under stat. 11 Geo. IV. and 1 Will. IV. c. 70. See TERM.

EASTWARDLY. "Eastwardly," as used in a deed, is an indefinite expression, and means nothing more, necessarily, than that the land shall lie on the eastern, and not upon the western side of the given line. 2 Bibb (Ky.) 120.

EAT INDE SINE DIE. Words used on an acquittal, or when a prisoner is to be discharged, *that he may go without day*; that is that he be dismissed. Dane, Abr. Index.

EAVES-DROPPERS. In Criminal Law. Such persons as wait under walls or windows or the eaves of a house, to listen to discourses and thereupon to frame mischievous tales.

The common-law punishment for this offence is fine and finding sureties for good behavior; 4 Bla. Com. 167; 1 Rus. Cr. 302; 2 Ov. Tenn. 108. See 4 Clark Pa. 5; 1 Bish. Cr. L. § 112; 3 Head 299; 8 Haz. Pa. Reg. 305.

EBB AND FLOW. An expression used formerly in this country to denote the limits of admiralty jurisdiction. This jurisdiction is discussed in 3 Mas. 127; 2 Story 176; 2 Gall. 398; 4 Wall. 562; 8 *id.* 15. In the last case, the jurisdiction was extended not merely to the high seas and the ebb and flow of the tide, but to all the navigable waters of the United States, including the great lakes and rivers. See Curt. Jurisd. of Courts of U. S.

EBEREMURDER. See ABEREMURDER.

ECCHYMOSIS. In Medical Jurisprudence. Blackness. An extravasation of blood by rupture of capillary vessels, and hence it follows contusion; but it may exist, as in cases of scurvy and other morbid conditions, without the latter. Ryan Med. Jur. 172. Ecchymoses produced by blows upon a body but a few hours dead cannot be distinguished from those produced during life. 1 With. & Beck. Med. Jur. 485; 2 Beck. Med. Jur. 22.

ECCLESIA (Lat.). An assembly. A Christian assembly; a church. A place of religious worship. Spelman, Gloss.

In the civil law this word retains its classical meaning of an assembly of whatever character. Du Cange; Calvinus, Lex.; Vicat. Voc. Jur.; Acts xix. 39. Ordinarily in the New Testament the word denotes a Christian assembly, and is rendered into English by the word *church*. It occurs twice in the gospels, Matt. xvi. 18, xviii. 17, but frequently in the other parts of the New Testament, beginning with Acts ii. 47. *Ecclesia* there never denotes the building, however, as its English equivalent *church* does. In the law, generally, the word is used to denote a place of religious worship, and sometimes a parsonage. Spelman, Gloss. See CHURCH.

ECCLESIASTIC. A clergyman; one destined to the divine ministry; as, a bishop, a priest, a deacon.

ECCLESIASTICAL COMMISSIONERS. In English Law. A body ap-

pointed to consider the state of the revenues, and the more equal distribution of episcopal duties, in the several dioceses. They were first appointed as royal commissioners in 1835; were incorporated in 1836, and now comprise the bishops and chief justices, and other persons of distinction. 2 Steph. Com. 748.

ECCELESIASTICAL CORPORATIONS. Such corporations as are composed of persons who take a lively interest in the advancement of religion, and who are associated and incorporated for that purpose. Ang. & A. Corp. § 36.

Corporations whose members are spiritual persons are distinguished from *lay* corporations; 1 Bla. Com. 470.

They are generally called *religious corporations* in the United States. 2 Kent 274; Ang. & A. Corp. § 37.

ECCELESIASTICAL COURTS (called, also, *Courts Christian*). In English Ecclesiastical Law. The generic name for certain courts in England having cognizance mainly of spiritual matters.

The jurisdiction which they formerly exercised in testamentary and matrimonial causes has been taken away. Stat. 20 & 21 Vict. c. 77, § 3, c. 85, § 2; 21 & 22 Vict. c. 95. See 3 Bla. Com. 67.

They consist of the archdeacon's court, the consistory courts, the court of arches, the court of peculiars, the prerogative courts of the two archbishops, the faculty court, and, on appeal, the privy council.

ECCELESIASTICAL LAW. The law of the church.

The existence in England of a separate order of ecclesiastical courts, and a separate system of law by them administered, may be traced back to the time of William the Conqueror, who separated the civil and the ecclesiastical jurisdictions, and forbade tribunals of either class from assuming cognizance of cases pertaining to the other. The elements of the English ecclesiastical law are the canon law, the civil law, the common law of England, and the statutes of the realm. The jurisdiction of the ecclesiastical tribunals extended to matters concerning the order of clergy and their discipline, and also to such affairs of the laity as "concern the health of the soul;" and under this latter theory it grasped also cases of marriage and divorce, and testamentary causes. But in more recent times, 1880-1888, these latter subjects have been taken from these courts, and they are now substantially confined to administering the judicial authority and discipline incident to a national ecclesiastical establishment. See, also, CANON LAW.

ECHOUEMENT. In French Marine Law. Stranding. Black. L. Dict.

The striking or running aground on a bank by a vessel. English.

ECLAMPSIA PARTURIENTUM. In Medical Jurisprudence. Puerperal convulsions. Convulsive movements, loss of consciousness, and coma occurring during pregnancy, parturition or the puerperium. The attack closely resembles the convulsions of epilepsy. The disease is often fatal, causing the death of the patient in about one-fourth of all the cases, and fetal death in about one-half. Mental defects may result from eclampsia, and are occasionally permanent. American Text-book of Obstetrics.

The word eclampsia is of Greek origin *Significat splendorem, fulgorem, effulgentiam, et emicationem quales ex oculis aliquando prodeunt. Metaphorice amittit de emicatione flammæ vitalis in puerberie et ætatis vigore.* Castelli, Lex. Medic.

An ordinary person, it is said, would scarcely observe it, and it requires the practised and skilled eye of a physician to discover that the patient is acting in total unconsciousness of the nature and effect of her acts. There can be but little doubt that many of the tragical cases of infanticide proceed from this cause. The criminal judge and lawyer cannot inquire with too much care into the symptoms of this disease, in order to discover the guilt of the mother, where it exists, and to ascertain her innocence, where it does not. See two well-reported cases of this kind in the Boston Medical Journal, vol. 27, no. 10, p. 161.

ECCLECTIC PRACTICE. See MEDICINE.

ECUMENIC or ECUMENICAL. General, universal. Worcester. See ECUMENICAL COUNCIL.

ECUMENICAL. See ECUMENIC.

ECUMENICAL COUNCIL. An as-

sembly of prelates or divines from the whole body of a church to regulate matters of doctrine or discipline. Webster. See GENERAL COUNCIL; ECUMENICAL.

EDICT (Lat. edictum). A law ordained by the sovereign, by which he forbids or commands something: it extends either to the whole country or only to some particular provinces.

Edicts are somewhat similar to public proclamations. Their difference consists in this,—that the former have authority and form of law in themselves, whereas the latter are, at most, declarations of a law before enacted.

Among the Romans this word sometimes signified a citation to appear before a judge. The edicts of the emperors, also called *constitutiones principum*, were new laws which they made of their own motion, or either to decide cases which they had foreseen, or to abolish or change some ancient laws. They were different from rescripts or decrees, which were answers given in deciding questions brought before them. These edicts contributed to the formation of the Georgian, Armenian, Theodosian, and Justinian codes. See Dig. l. 4. l. 1; Inst. l. 2. 7; Code l. 1; Nov. 189.

EDICTAL CITATION. In Scotch Law. A citation against a "foreigner" who is not in Scotland, but who has a landed estate there, or against a native of Scotland who is not in Scotland.

EDICTS OF JUSTINIAN. Thirteen constitutions or laws of this prince, found in most editions of the *Corpus Juris Civilis* after the Novels. Being confined to matters of police in the provinces of the empire, they are of little use.

EDICTUM (Lat.). An edict; a mandate or ordinance.

EDICTUM PERPETUUM (Lat.). The title of a compilation of all the edicts. The collection is in fifty books, and was made by Salvius Julianus, a jurist acting by command of the emperor Adrian. Parts of this collection are cited in the Digest.

EDITION. A published form of a literary work. Stand. Dict. Also, a republication, sometimes with revision and correction. 10 A. & E. Ency. 2nd ed., 411; 2 Fed. Cas. No. 961.

EDITOR. One who superintends the selection, preparation, or arrangement of articles for publication. One who publishes a magazine or newspaper. English.

Of a Newspaper. Formerly, included not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation. U. S. 721. Later, the business of an editor separated from that of a publisher and printer, and has become an independent profession. *Id.*

EDITUS. In old English Law. Put forth or promulgated when speaking of the passage of a statute; and brought forth or born, when speaking of the birth of a child. Black. L. Dict.

EDUCATE. Includes proper moral, as well as intellectual and physical instruction. 6 Heisk. 395. See 39 Cal. 80; 10 Pick. 507; 105 Mass. 420; 29 N. J. Eq. 36.

EDUCATION. The result of educating in knowledge, skill, or discipline of character, acquired; also the act or process of training by a prescribed or customary course of study or discipline. Webster. See 7 H. L. Cas. 713.

It may be directed particularly to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it refers to them all; 145 Mass. 146.

Legal Education. This subject has been for several years receiving earnest and extended attention in England and the United States. It has been elaborately treated at various times by committees of the American Bar Association, in which a report was made in 1879 by Carleton Hunt, chairman, and subsequent reports in 1881, 1890, 1891, and 1892. See the annual reports of those years. In 1893 the association formed a section of legal education, which has held yearly conferences for the reading of papers and discussion on the sub-

ject, which has been ably and elaborately treated. See the annual reports from 1893 to 1896. Its work in 1894 was published by the United States in the reports of the Commissioner of Education.

The subject has also been much discussed by various State Bar Associations, as will appear by reference to their published reports. See Pennsylvania State Bar Association, 1895 and 1896; Georgia, 1894, 1895; Virginia, 1895.

An interesting address by Lord Russell of Killowen, Lord Chief Justice of England, was delivered before the Benchers of Lincoln's Inn, October, 1895. See also a paper by Austen G. Fox on the work of the New York State Board of Examiners; Am. Bar Assn. Report, 1896, and 10 Harv. L. Rev. 199. The following is a partial list of books and papers on the subject:

Legal Education, by Gerald B. Finch, London, 1885; 1 Jurid. Soc. Papers 335; Hoffman's Course of Legal Studies; Warren's Introd. to Law Studies; Jones, Legal Educ. in France; Parliamentary Reports on Inns of Court, 1855, and on Legal Educ., 1846; Sir R. Palmer's Address before the Legal Educ. Association, 1871; Reports of Incorporated Law Society, 1893, 1894, 1895, 1896; Bar Examinations in Canada, 18 Legal News (Can.) 275; 3 Amer. Lawy. 55, 288, 288; 33 Am. Law Reg. 689; N. Y. State Bar Association Report, 1894; 7 Harv. Law Rev. 203; Sir F. Pollock's Advice to Students, 95 Law Times 553; Existing Questions, by Austin Abbott, 26 Chi. Leg. News 72; Methods of Study, by J. N. Field, 48 Alb. L. J. 264; 34 id. 84; 24 Am. L. Rev. 211, 1087; Address by Lawrence Maxwell, Jr., 30 Weekly L. Bull. 41; 48 Alb. L. J. 81-88; 47 id. 496; 28 Can. L. J. 605; 9 Scot. L. Rev. 123; 9 Harv. L. Rev. 169; Case System, 27 Am. L. Reg. 416; 28 Am. L. Rev. 1; 25 id. 234; 22 id. 756; In Germany, 8 Am. L. Rec. 200; In Japan, 5 G. B. 17, 18; Inns of Court, 1 id. 68. See numerous other references in Jones's Index of Legal Periodicals.

EDWARD THE CONFESSOR, LAWS OF. See LEGES EDWARDI CONFESSORIS.

EFFECT. The operation of a law, of an agreement, or an act, is called its effect. 4 Ind. 342.

By the laws of the United States, a patent cannot be granted for an effect only, but it may be for a new mode or application of machinery to produce effects; 1 Gall. 478. See 4 Mas. 1; 1 Pet. C. C. 394; 1 Robinson, Pat. §§ 147, 148.

EFFECT OF WORDS IN WILLS. While the predominant idea of the testator's mind when discovered is to be heeded as against all doubtful and conflicting provisions which might defeat it, effect must be given to all the words of a will if by the rules of law it can be done. 205 U. S. 423.

EFFECTS. Property, or worldly substance. As thus used, it denotes property in a more extensive sense than goods. 2 Bla. Com. 284. See 7 Fed. Rep. 361. Indeed the word may be used to embrace every kind of property, real and personal, including things in action; as, a ship at sea; 1 Hill, S. C. 155; a bond; 3 Minn. 389; 16 East 222.

In a will, "effects" may carry the whole personal estate; 5 Madd. 72; 15 Ves. 507; but not real estate; unless the word "real" be added; 2 Pow. Dev. 167; 15 M. & W. 450; 3 Cranch 206; Schouler, Wills § 509. When preceded or followed in a will by words of narrower import, if the bequest is not residuary, it will be confined to species of property of the same kind (*ejusdem generis*) with those previously described; 13 Ves. 39; Rop. Leg. 210. See 2 Sharsw. Bla. Com. 884, n. Generally speaking the word "effects" in a will, is equivalent to "property" or "worldly substance"; but the interpretation may be restricted to articles *ejusdem generis* with those previously enumerated or specified; 1 Ves. Jr. 143; 15 Ves. 500.

When "the effects" passes realty, and when personality, in a will, see 1 Jarm.

Wills 585, 590; Beach, Wills 457, 470; 14 How. 400, 420; 1 Cowp. 307; L. R. 8 Ch. Div. 561; WILL.

EFFICIENT CAUSE. It is only when something occurs, subsequent to the defendant's acts, which makes it result in what would not otherwise have happened, that the latter or intervening "cause" is said to be the "efficient" one, and for the result of which the original actor is not responsible in law. 80 S. W. 449.

EFFIGY. The figure or representation of a person.

To make the effigy of a person with an intent to make him the object of ridicule, is libel (q. v.). Hawk. Pl. Cr. b. 1. c. 73, s. 2; 14 East 227; 2 Chitty, Cr. Law 866.

In France an execution by effigy or in effigy is adopted in the case of a criminal who has fled from justice. By the public exposure or exhibition of a picture or representation of him on a scaffold, on which his name and the decree condemning him are written, he is deemed to undergo the punishment to which he has been sentenced. Since the adoption of the Code Civil, the practice has been to affix the names, qualities, or addition, and the residence, of the condemned person, together with an extract from the sentence of condemnation, to a post set upright in the ground, instead of exhibiting a portrait of him on the scaffold. Répét. de Villargues; Biret, Vocab.

EFFRACTION. A breach made by the use of force.

EFFRACTOR. One who breaks through; one who commits a burglary.

EGO. I, myself. This term is used in forming genealogical tables, to represent the person who is the object of inquiry.

EIGHT HOUR LAWS. Statutes making eight hours a day's labor for workmen, laborers, and mechanics.

Laws limiting the hours of toil of employees, (such as laborers, workmen, mechanics, etc.), to eight hours in any one calendar day, without reduction of compensation for the day's services. 60 Kan. 106.

Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the United States. R. S. § 3738. This act is not a contract between the government and its laborers that eight hours shall constitute a day's work. It neither prevents the government from making agreements with them, by which their labor may be more or less than eight hours a day, nor does it prescribe the amount of compensation for that or any other number of hours' labor; 94 U. S. 400.

On May 24, 1888, a law was passed directing that eight hours should constitute a day's work for letter-carriers in the United States, and for time worked in excess of that number of hours they should be paid extra (25 Stat. L. 157). Under this statute the supreme court held that a letter-carrier was entitled to eight hours' work each day, and that over time on one day could not be set off against a deficiency on another; 148 U. S. 134. See FACTORY ACT.

In United States Statute. The Act of August 1, 1892, c. 352, 27 Stat. 340 limits the service and employment of all laborers and mechanics employed by the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or the District, to eight hours in any one calendar day, and makes it unlawful "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency," and imposes penalties for the violation thereof. 206 U. S. 254, 255. The provisions of this act were held constitutional and within the powers of Congress. In this respect Congress has the same power as a State has over the construction of its public works. *Id.*, citing 191 U. S. 207.

EIGHTEENTH AMENDMENT. See CONSTITUTION OF THE UNITED STATES; NATIONAL PROHIBITION ACT.

EIGNE. A corruption of the French word *ainé*. Eldest or first-born. It is frequently used in our old law-books;

bastard eigne signifies an elder bastard when spoken of two children, one of whom was born before the marriage of his parents and the other after: the latter is called *mulier puisne*. Littleton, sect. 399.

EIK. In Scotch Law. An addition; as *etk* to a reversion, *etk* to a confirmation. Bell, Dict.

EINETIUS. In English Law. The oldest; the first-born. Spelman, Gloss.

EIRE, or EYRE. In English Law. A journey. See EYRE.

EISNE. The senior; the oldest son. Spelled, also, *eigne*, *einsne*, *atsne*, *eign*. *Termes de la Ley*; 1 Kelham.

EISNETIA, EINETIA (Lat.). The share of the oldest son. The portion acquired by primogeniture. *Termes de la Ley*; Co. Litt. 166 b; Cowel.

EITHER. May be used in the sense of each. 59 Ill. 87.

EJECTION. Turning out of possession. 3 Bla. Com. 199.

The term is in general use with reference to the removal of an obnoxious person from the conveyance of a common carrier.

It must be conceded that the carrier, as an incident to its public employment, not only has the power, but is bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of its passengers, and it follows that it has the right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in its vehicles, and to expel or exclude therefrom any person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency, or disturbance either inevitable or reasonably probable; Ray, Pas. Carriers 165.

A person who steps upon a car after he has once been put off is a trespasser, regardless of his right to be on the car in the first instance; 40 Ill. App. 421. In ejecting a passenger from a car no more force than is necessary should be used; 53 Neb. 74.

An action on the case in tort is proper against a carrier for wrongfully ejecting from its train a passenger who has paid his fare, though no force is used; 86 W. Va. 318.

As to ejection of passengers for refusal to pay fare, see 12 Lawy. Rep. Ann. 823; PASSENGERS; COMMON CARRIERS OF PASSENGERS; TICKET.

EJECTIONE CUSTODIÆ (Lat.). A writ of which lay for a guardian to recover the land or person of his ward, or both, where he had been deprived of the possession of them. Fitzh. N. B. 139, L.; Co. Litt. 199.

EJECTIONE FIRMÆ (Lat.) Ejection from a farm. This writ lay where lands or tenements were let for a term of years, and afterwards the lessor, reversioner, remainderman, or a stranger ejected or ousted the lessee of his term. The plaintiff, if he prevailed, recovered the term with damages. Hence Blackstone calls this a *mixed* action, somewhat between real and personal; for therein are two things recovered, as well restitution of the "term of years," as damages for the ouster or wrong. This writ is the original foundation of the action of ejectment. 3 Sharw. Bla. Com. 199; Fitzh. N. B. 220, F. G.; Gibson, Eject. 3; Stearn, Real Act. 53, 400.

EJECTMENT (Lat. e, out of, jacere, to throw, cast; ejicere, to cast out, to eject).

In Practice. A form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained.

A form of action which lies to regain the possession of real property, with damages for the unlawful detention.

In its origin, during the reign of Edw. III., this action was an action of trespass which lay for a tenant for years, to recover damages against a person who had ousted him of his possession without right. To the judgment for damages the courts soon added a judgment for possession, upon which the plaintiff became entitled to a writ of possession. The action of *ejectione firmæ* (q. v.), was framed to meet the case of the termor, and just at the close of the middle ages it was held that under it he could recover his term. As to its history see 2 Poll. & Matl.

105. As the disadvantages of real actions as a means of recovering land for the benefit of the real owner from the possession of one who held them without title became a serious obstacle to their use, this form of action was taken advantage of by Ch. J. Rolle to accomplish the same result.

In the original action, the plaintiff had been obliged to prove a lease from the person shown to have title, an entry under the lease, and an ouster by some third person. The modified action as sanctioned by Rolle was brought by a fictitious person, as lessee against another fictitious person (the casual ejector) alleged to have committed the ouster. Service was made upon the tenant in possession, with a notice annexed from the casual ejector to appear and defend. If the tenant failed to do this, judgment was given by default and the claimant put in possession. If he did appear, he was allowed to defend only by entering into the *consent rule*, by which he confessed the fictitious lease, entry, and ouster to have been made, leaving only the title in question. The tenant by a subsequent statute was obliged, under heavy penalties, to give notice to his lessor of the pendency of the action.

The action has been superseded in England under the Common Law Procedure Act (1852, §§ 170-220) by a writ, in a prescribed form, addressed, on the claimant's part, to the person or persons in possession, by name, and generally "to all persons entitled to defend the possession" of the premises therein described; commanding such of them as deny the claimant's title to appear in court and defend the possession of the property. Not only the person to whom the writ is directed, but also the claimant, on filing an affidavit that he or his tenant is in possession, and obtaining the leave of the court or a judge, is allowed to appear and defend.

Ejectment has been materially modified in many of the states of the United States, though still retaining the name; but is retained in its original form in others, and in the United States courts for those states in which it existed when the circuit courts were organized. In some of the United States it has never been in use. See 8 Bla. Com. 198.

The action lies for the recovery of corporeal hereditaments only; 7 Watts 318; 5 Denio 389; including a room in a house; 1 Harris. N. J. 203; upon which there may have been an entry and of which the sheriff can deliver possession to the plaintiff; 9 Johns. 298; 15 Conn. 137; and not for incorporeal hereditaments; 2 Yeates 331; 3 Green, N. J. 191; 17 Or. 510; or, rights of dower; 17 Johns. 167; 10 S. & R. 326; or a right of way; 1 N. Chippm. 204; 40 Mich. 232; or a rent reserved; 5 Denio 477. See 20 Miss. 373. One is liable in ejectment for the projection of his roof over another's land; 60 Vt. 728.

The recording of a tax-deed of wild and unoccupied lands is such an assertion of title by the grantee as to authorize ejectment by the original owner; 80 Wis. 387.

It may be brought upon a right to an estate in fee-simple, fee-tail, for life, or for years, if only there be a right of entry and possession in the plaintiff; 5 Ohio 28; 10 Mo. 229; 10 Gill & J. 443; 1 Wash. C. C. 207; 1 Blackf. 133; 1 D. & B. 586; 8 Dana 289; 3 Ga. 105; 4 Gratt. 129; 15 Ala. 412; 17 Ill. 288; 2 Dutch. 376; 4 Cal. 278; 32 Pa. 876; 4 Col. 88; 112 N. Y. 364; but the title must be a legal one; 2 Wash. C. C. 33; 3 Barb. 554; 3 H. & J. 155; 4 Vt. 105; 4 Conn. 95; 3 Litt. 32; 13 Miss. 499; 4 Gratt. 129; 98 U. S. 425; 56 Ala. 414; 98 id. 543; 72 Tex. 330; 73 Cal. 415; 101 N. C. 550; 128 U. S. 374 (but in Pennsylvania a valid equitable title will sustain ejectment, on the ground, as has been said, that there is no court of chancery in that state; 8 S. & E. 484; 87 Pa. 286); which existed at the commencement of the suit; 5 H. & J. 155; 4 Vt. 105; 5 W. & S. 427; 23 Miss. 100; 13 Ill. 251; 25 Miss. 177; 20 Barb. 559; 72 Tex. 330; 83 Ala. 220; 11 Mo. 481; (but he cannot recover if the title is terminated pending the action; 86 Ala. 318); at the date of the demise; 3 A. K. Marsh. 131; 2 D. & B. 97; 3 McLean 302; 11 Ill. 547; 12 Ga. 166; 21 How. 481; and at the time of trial; 12 B. Monr. 32; 20 Vt. 83; 9 Gill 269; 24 Fla. 378; and it must be against the person having actual possession; 1 D. & B. 5; 3 Hawks 479; 4 Dana 67; 17 Vt. 674; 9 Humphr. 137; 4 McLean 255; 8 Barb. 244; 86 Pa. 33. A railroad company which has condemned lands for railroad purposes has a sufficient title to sustain an action; 152 Pa. 498.

Plaintiff in ejectment may recover as against a mere trespasser, on proof of his former possession only, without regard to his title; 83 Ala. 220; 38 Fed. Rep. 789; 77 Ga. 262; 87 Ky. 559; 71 Tex. 132.

The real plaintiff must recover on the strength of his own title, and cannot rely on the weakness of the defendant's; 1 East 246; 2 S. & R. 65; 6 Vt. 631; 4 Halst. 149;

2 Ov. 185; 3 Humphr. 614; 2 H. & J. 112; 1 Blackf. 341; 19 Miss. 249; 6 Ired. 159; 1 Cal. 295; 27 Ala. N. S. 586; 16 Fla. 189; 36 W. Va. 489; 110 N. Y. 380; 24 Neb. 559; 115 Mo. 638; and must show an injury which amounts in law to an ouster or dispossession; 1 Vt. 244; 5 Munf. 346; 4 N. Y. 61; 15 Pa. 483; an entry under a contract which the defendant has not fulfilled being equivalent; 5 Wend. 24; 7 S. & R. 297; 7 J. J. Marsh. 318; 3 B. Monr. 173; 3 Green, N. J. 371; 16 Ohio 485; 14 Ill. 91; 79 Cal. 55.

It may be maintained by one joint tenant or tenants in common against another who has dispossessed him; 2 Ohio 110; 7 Cra. 456; 3 Conn. 191; 17 Miss. 111; Spenc. 394; 4 N. Y. 61; 24 Mo. 541; 50 Vt. 11; 70 Tex. 139; 122 Pa. 613. Co-tenants need not join as against a mere disseisor; 5 Day 207; 3 Blackf. 82; 6 B. Monr. 457; 10 Ired. 146; but mere tenants in common may; 4 Cra. 165; 4 Bibb 241; 11 Ired. 211; not in Missouri. In Indiana it may be maintained by the wife against the husband to recover her separate real estate; 118 Ind. 521.

A court of law will not uphold or enforce an equitable title to land as a defence to an action of ejectment; 128 U. S. 374; 97 Mo. 268; 31 Fed. Rep. 393; *contra*, 61 Pa. 186; but see 111 N. C. 542; 90 Ga. 210; 74 Cal. 154. Where a defendant has entered a disclaimer of title and possession, he cannot defend his possession as agent of his wife without first showing a title in her; 121 Pa. 520.

Where a defendant in ejectment repudiates a tenancy and claims a title in fee, he dispenses with the necessity of notice to quit; 126 Ill. 228; 75 Cal. 342.

Plaintiff in ejectment in proving title need not go further back than the common source of title, where the defendant claims under the same person; 29 S. C. 372; 85 Ky. 503; 30 W. Va. 505; 37 Md. 180; 78 Ga. 245; 17 Wash. L. Rep. 873; 92 Mich. 580.

The plea of not guilty raises the general issue; 3 Pa. 365; 29 Ala. N. S. 542.

The judgment is that the plaintiff recover his term and damages; Pet. C. C. 452; 18 Vt. 600; 12 Barb. 481; 16 How. 275; or damages merely where the term expires during suit; 18 Johns. 295.

Where the fictitious form is abolished, however, the possession of the land generally is recovered, and the recovery may be of part of what the demandant claims; 1 N. Chipm. 41; 6 Ohio 891; 1 H. & M.H. 158; 2 Barb. 330; 1 Ind. 242; 10 Ired. 237; 9 B. Monr. 240; 26 Mo. 591; 4 Sneed 586; 84 Va. 891.

The damages are, regularly, nominal merely; and in such case an action of trespass for mesne profits lies to recover the actual damages; 3 Johns. 481; 3 H. & J. 84; 13 Ired. 439; 25 Miss. 445; 101 N. C. 8; 110 Mo. 419; 65 Vt. 485. See TRESPASS FOR MESNE PROFITS.

In some states, however, full damages may be assessed by the jury in the original action; 18 Vt. 600; 12 Barb. 481; 59 Ga. 55; 55 Miss. 390; 78 N. C. 361; and the verdict is conclusive as to the damages; 100 Cal. 142.

Consult Adams; Archbold; Cole; Gilbert; Remington; Newell; Tyler, Ejectment; LIMITATIONS.

EJECTUM. That which is thrown up by the sea. 1 Pet. Adm. App. 43. See JETSAM.

EJERCITORIA. In Spanish Law. The action which lies against the owner of a vessel for debts contracted by the master, or contracts entered into by him, for the purpose of repairing, rigging, and victualing the same.

EJIDOS. In Spanish Law. Lands used in common by the inhabitants of the place for a pasture, wood, threshing-ground, etc. 15 Cal. 554.

EJUSDEM GENERIS (Lat.). Of the same kind.

In the construction of laws, wills, and other instruments, when certain things are enumerated, and then a phrase is used which might be construed to include other things, it is generally confined to things *ejusdem generis*; as, where an act (9 Anne, c. 20) provided that a writ of *quo warranto* might issue against persons who should usurp "the offices of mayors, bailiffs, port-reeves, and other offices, within the cities, towns, corporate boroughs, and

places, within Great Britain," etc., it was held that "other offices" meant offices *ejusdem generis*, and that the word "places" signified places of the same kind; that is, that the offices must be corporate offices, and the places must be corporate places. 5 Term 375; Bac. Abr. Information (D); 8 Dowl. & R. 303. So, in the construction of wills, when certain articles are enumerated, the term *goods* is to be restricted to those *ejusdem generis*. Bacon, Abr. Legacies, B; 3 Rand. 191; 2 Atk. 113; 3 id. 61.

ELDER BRETHREN. A distinguished body of men, elected as masters of Trinity House, an institution incorporated in the reign of Henry VIII., charged with numerous important duties relating to the marine, such as the superintendence of lighthouses. Mozl. & W. Dict.; 2 Steph. Com. 502. The full title of the corporation is Elder Brethren of the Holy and Undivided Trinity. It consists of a master, deputy master, a certain number of acting elder brethren, and of honorary elder brethren, with an unlimited number of younger brethren, the master and honorary elder brethren being chosen on account of eminent social position, and are elected by the court of elder brethren. The deputy master and elder brethren are chosen from such of the younger brethren as have been commanders in the navy four years previously, or have served as master in the merchant service on foreign voyages for at least four years. The younger brethren are chosen from officers of the navy or the merchant shipping service who possess certain qualifications. Their action is subject to an appeal to the Board of Trade. Two of the elder brethren assist the court of admiralty at the hearing of every suit for collision, and occasionally in suits for salvage. Their duty is to guide the court by advice only; though influential, their opinion is not legally binding on the judges.

ELDEST. He or she who has the greatest age.

The eldest son of a man is his first-born, the *primo-genitus*; L. R. 2 App. Cas. 698; L. R. 12 Ch. Div. 171.

The laws of primogeniture are not in force in the United States; the eldest child of a family cannot, therefore, claim any right in consequence of being the eldest.

ELECTED. In its ordinary signification this word carries with it the idea of a vote, generally popular, sometimes more restricted, and cannot be held the synonym of any other mode of filling a position. 5 Nev. 121; 25 Md. 214.

ELECTED UNDER THE CONSTITUTION. See UNDER.

ELECTION. Choice; selection. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society.

The word, in its ordinary signification, carries the idea of a vote, and cannot be held the synonym of any other mode of filling a position; 5 Nev. 121. See 28 Mich. 341; APPOINTMENT. Election has often been construed to mean the act of casting and receiving the ballots,—the actual time of voting, not the date of the certificate of election; 54 Ala. 205.

Both houses of congress, and parliamentary bodies in general, claim to be the sole judges of the election of their own members. This right seems to be derived from the declaration of rights, delivered by the commons to the king in 1604. Brown, Law Dict.

In the United States this power is vested in congress and the state legislatures by the federal and state constitutions, and chancellor Kent considers that "there is no other body known to the constitution to which such power might safely be trusted. It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and as each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to for the sake of uniformity and certainty." 1 Com. 238. On the other hand, experience of the temptation to defeated members, which makes contests, in reliance (unfortunately too often well-founded) upon the irresponsibility of party majorities, leads Mr. Justice Miller to remark that "this provision . . . seems, from the experience of the past, to have been one of those principles adopted from the English house of commons which has not worked well with our institutions, and which the house of commons itself has been obliged to abandon. Contested elections are now, by the law of England, tried before the judiciary, and the judgment of the court is conclusive upon the subject. It is conceded on all hands that justice is in this way more nearly administered with accuracy than it was under the former system. Both in that country and in this, under the former method, the result of a contested election has been very generally

forecast by a knowledge of the relations of the parties contesting to the political majority or minority of the house in which the contest is carried on. As this is a constitutional provision, however, there exists no power in the legislature, without an amendment of that instrument, to refer these contested cases to the judiciary. The increasing number of contested election cases arising out of frauds supposed to be perpetrated at the elections themselves, the investigation of which is always difficult, and the uncertainty of a fair and impartial decision . . . render it doubtful whether the entire provision on this subject is of any value." Miller, Const. 193.

Much may be said in support of the views of each of these learned commentators, and there is a possible middle ground practicable under existing constitutional conditions, which might be suggested. That would be to provide for a judicial determination of the contest in the first instance, reserving to the legislative body the final decision only on exception or appeal under such limitations as would preserve and emphasize the judicial character of the proceeding. This would, on the one hand, preserve the absolute independence of the legislature as one of three co-ordinate branches of the government,—a basic principle, it may be remarked, of American and not of English governmental policy,—and at the same time aid to the difficulty and probably lessen the frequency of partisan decisions, contrived in the comparative secrecy of committee rooms and consummated by the mere brute force of a majority.

Distinguished from Transfer. Election is simply what its name imports; a choice shown by an overt act between two inconsistent rights either of which may be asserted at the will of the chooser alone. *Transfer* is different from election and requires acts of a different sort on the part of the owner and corresponding acts on the part of the transferee. 205 U. S. 340.

Election of Public Officers. The right to vote is not a natural one but is derived from constitutions and statutes. Each state determines for itself the qualifications of its voters, and the United States adopts the state law upon the subject as the rule in federal elections in accordance with Section 2, Article 1 of the Constitution of the United States, which provides that "the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications required for electors of the most numerous branch of the state legislature."

The power of the state governments, however, to prescribe the qualifications of electors is limited by the Fifteenth Amendment of the Constitution which provides "that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude." This provision renders void all provisions of a state constitution or a state law which come in conflict with it or with any act of congress passed to enforce it; McCrary, Elections 2; 110 U. S. 663. In the territories the right to vote is regulated by congress.

The right to vote, if once given by a state constitution, cannot be impaired or taken away by legislation. But the legislature can regulate the right to vote in a reasonable way by prescribing questions to be propounded to voters to test their qualifications; 9 Wis. 279; or by requiring them to swear to support the Constitution of the United States, or by requiring registration. But regulations must not in any way impair the right to vote, and hence it has been held that an act prohibiting from voting those who, having been drafted into the military service and duly notified, had failed to report for duty, was void; 59 Pa. 109. An act requiring the voter to declare under oath that he is not guilty of any crime and has not voluntarily borne arms against the United States has also been held void; 24 Ark. 161. But see 3 W. Va. 551. The right to vote can, however, be limited to male citizens or extended to females, but only upon the same terms and conditions as are applied to males; 11 Blatch. 200; 53 Mo. 58; 15 Kan. 26; 2 Utah 186.

The qualifications of voters in the different states are usually citizenship, residence for a given period, age (21 years), sometimes payment of taxes, ownership of land, and education, and mental capacity. See CITIZEN; RESIDENCE; NATURALIZATION; DOMICIL.

The disqualification of voters is imposed

as a punishment for crime, usually an infamous one.

Elections must be held at the time and place required by law. Legislative or constitutional provisions on this question are mandatory; 41 Pa. 403; 30 Conn. 591; 44 N. H. 643; see 110 N. C. 232; and votes cast by soldiers in the field, outside of the state, under a statute permitting it, are not valid, when the constitution requires a citizen to vote at his place of residence. In the absence of any constitutional provision a statute providing that soldiers in service may vote is valid; 15 Iowa 304.

If polls are moved to a place not authorized, the election becomes void; 68 Pa. 333; if the polls are not kept open as required by law, the election will be set aside, if enough votes were thereby excluded to change or render doubtful the result; 31 Cal. 82; 68 Pa. 333; but see 4 Wash. St. 661; but it is doubtful whether a few minutes' delay in opening the polls will avoid an election; McCrary, *Elect.* 85; 5 Eng. El. Cas. 387; 4 *id.* 378. Closing polls too soon; 74 Ill. 76; or during the dinner hour will not vitiate the election; 19 Ohio St. 25. But the casting of enough votes after the proper hour for closing to change the result will; 4 Pa. L. J. 341. See 3 Cong. El. Cas. 564.

Generally speaking, notice is essential to the validity of an election; McCrary, *Elect.* 87; and all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, even though only a minority of those entitled to vote really do vote; 68 Md. 146; but formalities or even the absence of notice may be dispensed with, where there has been an actual election by the people; 10 La. 212. See 6 Wash. 427; 99 Cal. 554; but it would seem that, if by a default of notice, enough voters were deprived of a chance to vote, to change the result, the election would be void; McCrary, *Elect.* 88. The fact that an order providing for an election of the board of education was passed by less than a quorum of the board, does not affect the validity of the election, where it is held at the time provided by statute and there is no statute provision requiring the order to be made; 147 Ill. 514. In California, in a much considered case, it was held that voters must take notice of general elections prescribed by law, and in such cases provisions of the laws as to notice are merely directory, but that in elections to fill vacancies, the requirements as to notice must be fully complied with; 11 Cal. 49. In this case it was further held that, without statutory regulations, no election can be held. See also 12 Cal. 409; 132 Mass. 289; 69 Ind. 218; 20 Kan. 584; 41 N. J. L. 296; 91 N. Y. 616. An election to fill a vacancy cannot be held where such vacancy did not occur long enough before the election to enable due notice to be given; 17 Ind. 554; 12 Cal. 409. A failure to give more than three days' notice may not be fatal to the election, if there was full knowledge thereof and a full vote; 17 R. I. 591.

Slight irregularities in the manner of conducting elections, if not fraudulent, will not avoid an election; Paine, *Elect.* 502. For instance, the presence of one of the candidates in the room where the election was held, and the fact that he intermeddled with the ballots, was held not to vitiate the poll, there not appearing to have been any actual fraud; Bright, *Elect.* Cas. 268. Irregularities which do not tend to affect results, will not defeat the will of the majority; 20 Pa. 498. Where a special election was not called by legal authority, the fact that the people voted for the several candidates, will not render the election valid; 91 Mich. 283.

A majority of voters is necessary to pass a constitutional amendment, by a popular vote, but it will be presumed that the number of those who voted is the number of the qualified voters; 22 Alb. L. J. 147; see as to the latter point, 48 Ill. 263; 16 Wall. 644; 68 Md. 146. But there may be a constitutional or statutory method prescribed for ascertaining a majority, in

which case the presumption stated does not apply. Thus, in Delaware, a majority to determine whether a constitutional convention shall be called is to be ascertained by the highest vote cast at any one of the last three preceding elections; Const. 1831.

As to whether, when the person receiving the highest number of votes is ineligible, the person receiving the next highest number of votes is thereby elected: In England it is held that the second highest is elected only when it is affirmatively shown that the voters for the candidate highest in votes had such actual knowledge of his ineligibility that they must be taken to have thrown away their votes wilfully; L. R. 3 Q. B. 629; so in 50 N. Y. 451. But in other cases this distinction has not been regarded, and it has been held that the election is void; 13 Cal. 145; 66 Pa. 270; 47 Miss. 266; 38 Me. 597; 53 Mo. 97; 23 Mich. 341. The better opinion is stated by Cooley (Const. Lim.) and Dillon (Mun. Corp.) to be in accordance with this view. This rule was followed in Rhode Island in the presidential election of 1876; 16 Am. L. Reg. 15, with a note by Judge Mitchell. It was therein also held that the ineligibility at the time of election cannot be removed by a subsequent resignation of the office which constituted the ineligibility.

The legislative precedents as to the effect of ineligibility are not uniform. See 56 Pa. 270; 47 Miss. 266; 50 N. Y. 451.

An act providing for the registration of voters, either local or general in its operation, is within the legislative power and constitutional; 93 Ky. 156.

The election laws of the United States of 1870 and 1871, for supervising the election of representatives, now repealed, were constitutional; 100 U. S. 371.

A wager upon the result of an election, being contrary to public policy, is void; 4 Johns. 426; 37 Cal. 670; 4 Kan. 94. All contracts tending to corrupt elections are also void; 13 Am. L. Reg. n. s. 607; 22 Vt. 546. In Pennsylvania and other states one betting on the result of an election is disfranchised as a voter thereat.

Election Officers. Canvassing officers and return judges are ministerial officers only; they exercise no judicial or discretionary function; Cooley, Const. Lim. 788; 44 Mo. 223; 22 Barb. 72; 126 Mass. 282. It is said they may judge whether the returns are in due form; 25 Ill. 328. The acts of such officer, within the scope of his authority, are presumed to be correct; 1 Bartl. 138. In some states, canvassing officers have the power to revise the returns, hear testimony, and reject illegal votes; it is so in Texas, Alabama, Louisiana, and Florida; McCrary, *Elect.* 67. Where election officers have adopted and enforced an erroneous view as to the qualifications of voters, whereby legal voters are not permitted to vote, an election may be set aside, especially if it appear that such voters would have changed or rendered doubtful the result of the election; Bright, *Elect.* Cas. 455; McCrary, *Elect.* 68. A canvassing board which has counted a vote and declared the result, is *functus officio*. It cannot make a recount; 45 Mo. 350; 33 N. Y. 603; 21 Ohio St. 216.

It is a general rule that the errors of a returning officer shall not prejudice the rights of innocent voters; Cl. & H. 329; (see 135 Ill. 591; 147 *id.* 514); as where it was the duty of the officer to return the votes sealed and he returned them unsealed, it was held that in the absence of any suspicion of fraud the return was good. Also where a state prescribed a certain form of certificate to be executed by the election officer, it is sufficient if the certificate is substantially in that form, and if an election officer insert by accident the wrong name in his return of the persons voted for, the mistake may be corrected; Cl. & H. *Elect.* Cas. 229, 369.

But it has also been held that where a statute requires the election officer to place on each ballot the number corresponding with the number of the voter, the failure so to number will deprive the voter of his rights; 62 Mo. 422; 53 Mo. 350. All regu-

lations intended to secure the purity of elections are of vital importance and must be enforced to the letter; 1 Kan. 273, 279; 9 Kan. 569. Regulations which affect the time and place of the election and the legal qualifications of the voters are usually matters of substance, while those relating to the recording and return of the votes received and the mode and manner of conducting the details of the election are directory.

A statute requiring an official act, for public purposes, to be done by a given day, is directory only; 6 Wend. 496. A representative in the legislature cannot be deprived of his seat by the failure of mere election officers to make the return required by law to the secretary of state; see opinion of the judges in Maine; Me. Laws, 1890, p. 225, where many election questions are considered fully. Mere irregularity on the part of election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll; 85 Ky. 597; nor is an election invalid because the election officers *de facto* were disqualified; 37 Minn. 439; 69 Tex. 55; so also irregularities which do not tend to affect results are not allowed to defeat the will of the majority, which must be respected, even when irregularly expressed; 19 Barb. 540; 20 Pa. 493; 11 Kan. 289; 29 Ill. 454; 20 Mo. 107; 11 Mich. 362; 26 Tex. 5; 81 Cal. 173; 34 Cal. 635; Bright, *Elect.* Cas. 448, 449, 450.

By the laws of some states separate boxes are kept at the voting polls for the reception of ballots for different officers, and the question has arisen whether a ballot dropped into the wrong box can be counted. There is some conflict of authority on this point, but it has been held by the supreme court of Michigan that a voter cannot be deprived of his vote by the mistake or fraud of an officer in depositing it in the wrong box, if the intention of a voter can be ascertained with reasonable certainty; and for the same reason a ballot should not be rejected because put in the wrong box by the honest mistake of the voter himself; 11 Mich. 362; Cl. & H. *Elect.* Cas. 679; 1 Bart. 5; McCrary on Elections, sec. 195.

An election officer who wilfully and corruptly refuses to any qualified citizen the right to vote or to register is liable in damages to the person injured; Ashby v. White, Sm. L. Cas.; 2 Ld. Raym. 958; 98 Ill. 60. In England and in most of the American states proof of a malicious or a corrupt purpose on the part of the officer is necessary; 11 S. & R. 35; 44 N. H. 383; 5 Blackf. 138; 1 Bush 135; but in Massachusetts it is not necessary to show malice, and this rule has been followed in Ohio and Wisconsin. But even in Massachusetts the officer is not liable if he acted under a mistake into which he was led by the conduct of the plaintiff; 5 Metc. 162; 2 Mass. 236; 11 Mass. 350; 11 Ohio 372; 20 Wis. 544. See 11 Johns. 114; 18 N. H. 91; 17 Ind. 536.

Exemplary damages may be recovered if the refusal was wilful, corrupt, and fraudulent; 33 Md. 135.

The jurisdiction to hear and determine election cases, though by common law in courts having ordinary common-law jurisdiction, is generally regulated by special statutes in most of the states.

Where a court can reach a conclusion as to the actual legal vote cast at a precinct, on a contest of an election, it can give effect to it notwithstanding the election officers may have been guilty of misconduct; 15 So. Rep. (La.) 89.

Ballots. Voting by ballots is by a ticket or ball and secrecy is an essential part of this manner of voting; 9 S. C. 94; 27 N. Y. 45; 4 Vt. 535; 26 Minn. 107; L. R. 10 C. P. 753; therefore a statute which provides for numbering ballots is repugnant to a constitutional provision that elections shall be by ballot; 33 Ind. 89; *contra*, 68 Tex. 133; 69 Hun 596. Ballots are frequently deposited which do not clearly indicate the voter's intention; for instance, by misspelling the name of a candidate, etc. The rule in such cases is thus stated in Cooley, Const. Lim. 611:—"We think evidence of such facts as may be called the circumstances surrounding the election,—such as, who were the

candidates brought forward by the nominating conventions; whether other persons of the same name resided in the district from which the officer was to be chosen; and if so, whether they were eligible or had been named for the office; if the ballot was printed imperfectly, how it came to be so printed, and the like,—is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective that it fails to show any intention whatever, in which case it is inadmissible." See on this point, 4 Wis. 430; 8 Cow. 102; 27 N. Y. 64. The case in 1 Dougl. Mich. 65, which is *contra*, was overruled in 16 Mich. 283, and the rule above laid down by Judge Cooley approved and followed. Thus votes for "E. M. Braxton," "Elliot Braxton," and "Braxton" have been counted for Elliot M. Braxton in the 42d Congress. See McCrary, *Elect.* 296. Ballots cast for "D. M. Carpenter," "M. D. Carpenter," "M. I. Carpenter," and "Carpenter" were counted for Mathew H. Carpenter; 4 Wis. 430. Ballots for "Judge Ferguson" were counted for Fenner Ferguson; 1 Bartl. 267. Ballots cast for "E. Clark" and "Clark" were counted for E. E. Clark; those cast for "W. E. Robso," "Robertson," "Robers," and "Robin—" were counted for W. E. Robinson. Where the only candidates for an office were Caleb Gumm and Joel D. Hubbard, votes for "J. D. Huba," "J. D. Hubba," "J. D. Hub," and also one for "Huber," and one for "D. Huber," are properly counted for Hubbard; 97 Mo. 311. See opinion of judges of supreme court of Maine, printed in Maine Laws, 1880, App. p. 225.

A ballot containing the names of two candidates for the same office is bad as to both, but is not thereby vitiated as to other names of candidates on the same ballot; 4 Wis. 420; S. C. Bright, *Elect. Cas.* 258; 29 Neb. 341; where a ballot contains the names of three persons for the same office, and there is only one vacancy to be filled, it should be rejected; 67 Hun 169.

Where there are statutory provisions as to the marking of ballots, the paper on which they are printed, etc., a ballot not complying with the law should not be received; the direction is mandatory; 3 S. & R. 29; 130 Ind. 561; but see 15 Ill. 492, where the law required white paper without any marks, and blue-tinted paper, ruled, was used, and the ballot declared legal; and where the law required the marking of the ballots with ink, if otherwise regular and marked with a pencil, they were counted; 34 Neb. 116. In 46 Cal. 398, the court held, in this connection, that as to those things over which the voter has control, provisions as to the appearance of ballots are mandatory; and as to those things that are not under his control, such provisions are directory. Ballots on which a printed name is erased and another name written in its place are valid; 22 N. Y. 309; 17 Oreg. 189; but see 44 La. Ann. 796.

Where a law provides that the voter may insert in the blank space provided therefor any name not already on the ballot, it was held that such insertion might be made by the use of a "sticker" as well as by writing the name of the candidate; 146 Pa. 529.

The fact that some of the ballots cast at an election were marked, and thereby rendered void by the election law, does not invalidate the ballots that were regular; 69 Hun 596.

Australian Ballot. This system, the leading features of which have now been adopted in many of the states, is the first important gift to civilization from the continent of Australasia. It originated in South Australia soon after the beginning of the present century as the result of the efforts of Mr. Francis S. Dutton, and thence passed from state to state in Australasia, then to the mother country in Europe, afterward to Canada, and eastward to continental countries, and finally westward again to the United States within the last few years. It has been said that a somewhat similar system had been in vogue in

England in Maryport for many years before the modern system was introduced in Australasia. But the Australasian system seems to have been purely indigenous, and was developed without any copying or even knowledge of the system at Maryport.

The cardinal features of the system, as everywhere adopted, are an arrangement for polling by which compulsory secrecy of voting is secured and an official ballot printed and distributed by government authority containing the names of all candidates. The details of the system include methods by which candidates may be nominated, prescribing the number of persons necessary to nominate a candidate, forms in which the various party nominations and information for the voters shall be printed on the ballots, arrangements for small closets or rooms into which the voter can retire and mark his ballot in secret, regulations for allowing him to take into the closet with him when he so desires a person to assist him in marking his ballot, and regulations for the numbering and counting of the ballots. See Wigmore, *Australian Ballot System*.

The system now generally in vogue in the United States is in most cases not the Australian ballot pure and simple. One feature of that system is the enumeration of candidates for a particular office alphabetically and without designation of party name or emblem. This was adopted in Massachusetts. But in most states the plan, better adapted for the American states, is to use an official ballot, but, when many officers are voted for on a single ballot, to have the column of each party indicated by name or sign or both, and permit the voter to vote a "straight" ticket by a single mark for all officers voted for. This, in various forms, may be termed the American modification of the Australian ballot.

The novel features of this system of voting have given rise to much litigation, and a considerable body of law has already accumulated, which involves not so much new principles as the application of old ones to new conditions. It is, nevertheless, desirable to consider these decisions separately from those under the old system, as thereby a clearer impression is received, both of the system and the method of its enforcement, which is necessarily committed very largely to the courts, and, like cases of railroad receiverships, devolves upon the courts the exercise of functions often to some extent administrative as well as judicial.

It may be said without reserve that the courts have, as a rule, been true to the fundamental doctrines of the law of elections: to give effect to the intention of the voter, where it can be done without defeating the purpose of the legislation,—to enforce party rules with respect to nominations and test the integrity and fairness of those made by petition,—to disregard mere technical irregularities and hold valid elections carried on in good faith rather than to permit them to be defeated by the carelessness, ignorance, or fraud of officials,—to enforce rigidly the safeguards against bribery and intimidation, and the provisions to secure the secrecy of the ballot which lie at the foundation of the system.

For an extended discussion of the Australian ballot laws of England and some of the American states, see *Bowers v. Smith*, 111 Mo. 45, in which it is held that the system should be construed in subordination to the constitution and laws of the state wherein it is adopted.

Such laws have been held constitutional; *id.*, 146 Pa. 529; 99 Mich. 538; 54 N. J. L. 446; 108 Mo. 153; 159 Mass. 487; 164 *id.* 486; 41 N. E. Rep. (Mass.) 681; 42 Pac. Rep. (Wyo.) 1049; 21 S. E. Rep. (Va.) 483. The objections taken will be found to include general ones and also features of particular statutes. The statute forbidding the counting of a ballot not officially stamped and marked with the initials of a judge of election is in conflict with the constitutional provision that all persons duly qualified are entitled to vote and that all elections shall be by ballot; 12 Wash. St. 377. In Illinois

the new ballot law is held to have repealed all other laws respecting voting on municipal affairs and ballots; 147 Ill. 204; but it is held to apply only to the election of officers and not to special elections to determine other matters, in Wisconsin; 63 N. W. Rep. (Wis.) 933; and Pennsylvania; 3 Pa. Dist. Rep. 395.

Questions as to the regularity of nomination papers under the Australian ballot system are usually settled by the courts either under express statutory provisions or under their general jurisdiction when applicable. A number of such questions decided in reference to the then pending election are reported in 5 Dist. Rep. Pa. 660-665, 677-681.

Where conflicting nominations have each certain claims to superiority, if technical rules only are applied, the court will give weight to the fact that one candidate carried the district by a decisive majority. The desire of the court in such cases is to reach what is substantial; *id.* 660. If, under the rules of the party, the county committee has power to fill vacancies and did not act, but only certain members of it residing within the representative district, such action is a clear violation of the party rules and the nomination by such irregular body is void; *id.* 660. Where congressional conferees from one county of a congressional district were appointed in violation of the party rules, the conference in which they took part was not a regular body, and the nomination made by it was void; *id.* 661. Nominations attended by fraud and the exercise of arbitrary power will not be upheld by the courts. A minority of delegates cannot nominate, and a faction may not arbitrarily select their meeting-place in defiance of a clear majority of the Ward Executive Committee; *id.* 661. Where persons who are not delegates are permitted upon the floor of a convention and the evidence justifies the conclusion that their presence was not harmless, the nomination is invalid; *id.* 662. A nomination paper which attempts to name presidential electors, representatives at large in congress, and other state officers, as well as candidates for separate congressional, senatorial, and representative districts, by a single paper is bad; *id.* 665. A court will not, however, in the exercise of its equitable powers, enjoin the printing of a certain column on the official ballot on a mere allegation that the nomination papers are defective, false, and fraudulent. Proof of such allegation must be made before the court will find it so as a fact; *id.* 667. Where an adequate remedy exists and a sufficient opportunity has been given to present to the court objections to a nomination paper, the court will not intervene by injunction in relief of a complainant who has failed to avail himself of such a remedy; *id.* 681.

Whenever an official ballot is provided for by statute the secretary of state will not decide which of two rival conventions of the same organization is the regular one, but all such nominations should be certified and left to the voters for their decision; 43 Neb. 651; 18 Colo. 26; 88 Mich. 164. See also 39 N. Y. Supp. 119; 5 Misc. Rep. 369; 6 *id.* 245; nominations by a bolting convention are invalid; 5 Pa. Dist. Rep. 194; in case of a tie vote in a nominating convention neither the candidates nor the election officers can determine the result by lot; 61 N. W. Rep. (Mich.) 346.

The offence of falsely making or signing a nomination certificate must be charged in the words of the statute, being unknown at common law, and the want of criminal intent is no defence, and the voter must sign in person, or be present, and request it to be done; 40 N. E. Rep. (Mass.) 862.

As to defects in statement of names of candidates in nomination papers, see L. R. 1 C. P. Div. 596; L. R. 15 Q. B. Div. 273; 12 *id.* 237; they are not invalidated by ordinary abbreviations of names; 10 N. S. Wales L. R. 59.

Provisions as to filling vacancies are not always mandatory, and after a fair election, an irregularity will not be permitted to invalidate it; 40 Pac. Rep. (Mont.) 80.

For the form of ballots prescribed in a number of states, see 10 Lavy. Rep. Ann.

150. For inserting names under the Australian ballot law in the official ballot, not legally entitled to insertion, see 35 Cent. Law J. 805.

Courts will not interfere with the discretion of the officer charged with the preparation of the official ballot, as to details; 63 N. W. Rep. (Neb.) 23.

Prohibiting the printing of the name of a candidate in more than one column is constitutional; 64 N. W. Rep. (Mich.) 496; 62 *id.* 564; but where the act provides that names shall be grouped by parties, a candidate named by more than one party is entitled to have his name appear in the column of each; 33 S. W. Rep. (Mo.) 447; *contra*, 42 Pac. Rep. (Wyo.) 750.

A construction which makes the error of a single official disfranchise large bodies of voters must be avoided if the language is susceptible of any other; 111 Mo. 45; and where, by the negligence of the officer, the name of a candidate and of the office is omitted from the ballot, the voter may write them, and his vote will be valid; 39 N. E. Rep. (N. Y.) 641.

The provision requiring the voter to make a cross with a stamp opposite each name voted for is mandatory; 38 Pac. Rep. (Cal.) 447; 36 N. E. Rep. (Ind.) 204; 29 Atl. Rep. (Me.) 930; 130 Ind. 561; but in other states the courts are disposed to be more liberal and permit marking outside of the square if to the right of the name; 17 R. I. 812; 13 Pa. Co. Ct. 41; *id.* 205; 41 Pac. Rep. (Cal.) 454; *id.* (Nev.) 762; 64 N. W. Rep. (S. D.) 180, 186; 41 N. E. Rep. (Ill.) 1003; 34 S. W. Rep. (Ky.) 6 (in which cases the subject of marks is fully considered). A provision for marking with ink is directory only, and pencil will answer; 34 Neb. 116; a blanket pasted is not legal in Pennsylvania, but a single sticker may be used; 30 Atl. Rep. 955. As to what distinguishing marks on ballots will vitiate them see 41 N. E. Rep. (Ill.) 1002; *id.* (Ind.) 796; 91 Cal. 526; 129 N. Y. 395; 31 S. W. Rep. (Tex.) 547; and where by mistake "spoiled ballots" were counted the result was not thereby ascertained and the returns of the county clerk were *prima facie* evidence which should be considered by the court; 60 N. W. Rep. (Neb.) 1034; voters are not confined to the names on the official ballot but may write other names thereon; 40 N. E. Rep. (Ill.) 290; signing a ballot invalidates it; 41 N. E. Rep. (Ill.) 1002. The failure of a voter to retire to the booth to mark the ballot does not make the marking illegal if not wilful; 31 S. W. Rep. (Mo.) 97. In Michigan the supreme court have with much detail considered this subject and enumerate seven methods of marking which are defective by reason of their being in effect distinguishing marks; 61 N. W. Rep. (Mich.) 643.

The provision that an officer or person designated by law may assist a voter physically or educationally unable to vote should be liberally construed; 21 S. E. Rep. (W. Va.) 483; the voter is the sole judge of his disability; 12 Pa. Co. Ct. 227; *contra*, under the same statute, 2 Pa. Dist. Rep. 1; the disability must be one contemplated by the statute and not drunkenness or ignorance; *id.*; nor that he left his glasses at home; 60 N. W. Rep. (Minn.) 676; a ballot is good if the voter asks assistance though he can read; 43 N. E. Rep. (Ind.) 474; where the voter is required to make oath, this is mandatory, and failure to take it invalidates the vote; 99 Mich. 538; but if no form of oath is prescribed any sufficient form of words will suffice; 60 N. W. Rep. (Minn.) 676; if the statute does not restrict the voter's choice of an assistant the election officers cannot do so; 12 Pa. Co. Ct. 227; but when the statute designates a particular officer, it is mandatory; 21 S. E. Rep. (W. Va.) 483; and irregularities in the services of the voter's assistant, as having one where two were required, or if the assistant had received money from a candidate, will not invalidate the vote; 31 S. W. Rep. (Tex.) 547; if the assistant prepares a ballot contrary to the direction of the voter, if fraudulently done, it will avoid the vote, but if it does not appear whether it was fraud of the assistant or mistake of the

voter it will not be rejected; *id.*

When an interpreter was permitted by law but not asked for, the presence of one inside the railing, conversing with voters, was held to vitiate the election; 66 N. W. Rep. (Mich.) 388.

Irregularities in taking the ballot must be gross to defeat the election; L. R. 10 C. P. 751; L. R. 16 Q. B. Div. 789; 7 Can. S. C. 247. When the statute declares a certain irregularity fatal courts will give effect to it, otherwise they will ignore such innocent irregularities as are free from fraud and have not interfered with a fair expression of the voter's will; 111 Mo. 45.

Irregularities which have been held harmless, are where two voting places in a precinct by law entitled to one; 17 Kan. 347; 111 Mo. 45; where ballots were received by officers near a house appointed whose owner refused to permit its use; 53 Cal. 198; errors or irregularities in printing; 17 Colo. 338; 31 Pac. Rep. (Or.) 830; ballots improperly prepared by the officers are not marked "ballots" and may be counted; 43 N. E. Rep. (N. Y.) 536.

When candidates and voters have participated in an election and acquiesced in the result failure to give notice may be disregarded; 84 Mich. 420; and other irregularities may be so far acquiesced in by the defeated candidate that he will be disqualified to complain; L. R. 1 Q. B. 433; 17 Colo. 338.

Contested Elections. At common law the right to an office was tried by a writ of *quo warranto*; in modern practice, an information in the nature of *quo warranto* is usual, in the absence of a statute; McCrary, Elect. 196. See 3 Bla. Com. 263; 2 Jurist N. S. 114. An act for trying contested elections without a jury is not unconstitutional; 43 Pa. 389. As to whether the declarations not under oath of illegal voters is evidence as to the votes cast by them, is doubtful, see 23 Wis. 319; 1 Bartl. 19, 230; 9 Kan. 569; 27 N. Y. 45. The ordinary rules of evidence apply to election cases; McCrary, Elect. 231; Paine, Elect. 324. A legal voter may refuse to testify for whom he voted, but he may waive this privilege; 2 Pars. 580. It is competent for witnesses to testify that they were under age at the time of voting, and that their votes were cast for the candidate receiving the largest number; 133 Ind. 11.

In all contested elections, the tribunal will look beyond the certificate of the returning board; 20 Wend. 12. See 56 Mo. 107.

In purging the poll of illegal votes, unless it be shown for whom the illegal votes were cast, they will be deducted from the total vote; 2 Brewst. 128.

Where the laws have been entirely disregarded by the election officers and the returns are utterly unworthy of credit, the entire poll will be thrown out, but legal votes, having been properly proved, may be counted; Bright, Elect. Cas. 493. "Nothing short of the impossibility of determining for whom the majority of votes were given ought to vacate an election;" Cl. & H. 504.

Where another than the person returned as elected is found to have received the highest number of legal votes given, he is entitled to the office; 86 Ky. 596.

See BALLOT; ELECTORAL COMMISSION; ELIGIBILITY; MAJORITY; VOTER.

Senators and Representatives. Final choice of an officer by the duly qualified electors. Primaries are in no sense elections for office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. Congress may at any time by law make or alter regulations as to the times, places, and manner of holding elections as prescribed in each State by the Legislature thereof. 256 U. S. 232, 233. See GENERAL ELECTION; SPECIAL ELECTION; PRIMARY ELECTION.

ELECTIONS IN CORPORATIONS. —The power of election by corporations may apply either to corporate officers generally, or to the selection of new members to fill vacancies in those corporations, whose na-

ture and composition require them to consist of members and not of holders of capital stock, as eleemosynary corporations. The election of members of a corporation of the former class is, in general, regulated by the charter, or other constituent law of the corporation, or by its by-laws, and their provisions must be strictly followed. In the absence of express regulations it is a general principle that the power of election of new members, or when the number is limited, of supplying vacancies, is an inherent power necessarily implied in every corporation aggregate. It is said to result from the principle of self-preservation; 2 Kent 293; 1 Rolle, Abr. 513; 8 East 272.

If the right and power of election is not adequately prescribed by the charter, a corporation has power to make by-laws consistent with the charter, and not contrary to law, regulating the time and manner of elections and the qualifications of electors, and manner of proving the same; 3 Term 189; 3 S. & R. 29; 131 Pa. 614; and if there be no by-law, established usage will be resorted to; 20 Pa. 454. In many states there are general statutes on this subject, and in such case they must be strictly followed; 1 Thomp. Corp. § 745.

Unless under express provision as to special meetings, or filling vacancies, elections of officers are held at regular meetings of the corporation. The time is nearly, if not always, regulated by statute, charter, or by-laws, and such cases as are found on the subject are not as to any general principle; 1 Thomp. Corp. § 701; the date cannot be changed by directors so as, by postponement of an annual election, to lengthen their terms; 23 Md. 432; a business meeting of a benevolent corporation may be held on Sunday; 65 Barb. 357; and a charter provision requiring the choice of directors at an annual meeting was held to be directory and not exclusive; 20 N. H. 53.

The place of meeting for elections is also usually regulated by the law of the corporation itself, and if there be none, it should unquestionably be done at its usual and principal place of business, or where it exercises its corporate functions. This is for corporate purposes its domicile, (*q. v.*) and the term residence is also applied to corporations, as the place where its business is done; 15 Ill. 436; 32 *id.* 493; while it is a citizen only of the state by which it was created; *id.* In the latter state only may constituent acts be done; 13 Pet. 519, 588; 11 Wall. 459, 476; 14 N. J. Eq. 380. See also 36 Vt. 750; 35 Mo. 13. Accordingly it has been held that votes and similar acts outside of the state creating it are void; 27 Me. 509; even under a provision authorizing the calling of a first meeting at such a time or place as they think proper; *id.*; but the appointment in one state of a secretary, by the directors of a manufacturing corporation of another state, has been held valid; 6 Conn. 428; and a corporation created by a concurrent legislation of two states may hold meetings for elections in either; 31 Ohio St. 317. In some states, as Minnesota, the Dakotas, and Colorado, the holding of such meetings is permitted outside of the state; and in the latter state it is held that the fact that the annual meeting was held outside of the state cannot be raised in a collateral proceeding; 5 Colo. 282. Under an authority to call special meetings on notice of time and place, they may be called by the president at a place other than the regular place of business; 5 Sawy. 403; and at such a meeting an election may be held if otherwise legal. Where no place is named in the charter, the directors may designate it, and officers elected at such meeting will be such *de facto*; 45 Pa. 59.

Meetings for the election of officers following the law of the corporation must be called by the person or persons designated for that purpose; 10 Conn. 200; 25 W. Va. 36; though it has been held that it need not always be by formal action or with strictness of procedure if it is done by their direction; 3 N. J. Eq. 68; 8 Allen 217; *contra*; 25 W. Va. 36; 84 N. H. 148; 12 Metc. 105; they must be duly assembled; 14 La. Ann. 799; whether of stockholders; 9 La.

397; or directors; 12 N. H. 205, 549; 47 Ia. 11; upon due notice; 5 Burr. 2681; in accordance with charter or by-laws; 13 Allen 90; 7 Conn. 214; 14 Vt. 800; 12 Bush 62; and when there is no provision as to method, personal notice is proper; 7 Conn. 214; or according to general statute law, if there be such; 19 Wend. 87; but, though it is safer and better practice to give notice, in case of stated meetings for regular elections, notice is not required, but the members are charged with notice of them; 36 Me. 78; 4 B. & C. 441; 36 N. H. 252; 11 Wend. 604; while of special meetings there must always be notice; 2 H. L. Cas. 789; 23 N. Y. 128; 6 S. & R. 469; and the failure to notify a single member will avoid the proceedings, 5 Burr. 2681; 4 B. & C. 441; 4 A. & E. 538; 22 N. Y. 128; 1 Thomp. Corp. § 708; unless notice is waived by attendance, as, if all are present, each of them waives the want or irregularity of notice; 7 Ind. 547; 11 Wend. 604. Such waiver will not operate as against a positive direction of the charter; 1 Dill. Mun. Corp. § 264; and when there is no provision as to notice it must be personal; 8 Conn. 191; 8 Metc. 301; 40 Cal. 77; 31 N. J. L. 107.

As to what constitutes a *quorum* at elections, see MEETINGS; QUORUM.

As to all the details of the conduct of elections, the provisions of state statutes, charters, or by-laws, must be strictly pursued and will generally be found to cover the subject. Where a statute provided for three inspectors, it was held that two could act; 16 Abb. Pr. n. s. 8. The method of appointment prescribed must be strictly followed; 11 Wend. 604; though in certain emergencies the corporators may appoint; 2 Abb. Pr. n. s. 361; and a candidate has been held not disqualified; 7 Cow. 402; but this is so contrary to well settled and judicious legal principles that it cannot be considered desirable. An election otherwise valid will not be avoided because inspectors were not sworn; 19 Wend. 635; or the oath taken not subscribed by them; 2 Abb. Pr. n. s. 361. In the absence of a statute to the contrary, their duties are ministerial, and they cannot act upon the challenge of a vote except to follow the transfer books; 19 Wend. 37; 4 Cow. 382; or put the challenged party on oath; *id.* note; or pass judicially upon proxies regular on their face; 44 N. J. L. 529; because not acknowledged or witnessed; 36 How. Pr. 477; but this would be otherwise if, as is often the case, the charter requires witnesses. They may not reject votes once received; 10 Abb. Pr. n. s. 361; nor go beyond the ballot to ascertain the intention of the voter; 15 *id.* 14. Ballots in which only the initials of a candidate were inserted have been held sufficient when it was determined by a verdict who was intended thereby; 5 Denio 409. If the statutes provide that only a certain number are to be chosen, ballots containing more names will not be counted; 37 Mo. 365; 38 N. Y. St. 217; 8 Wend. 396; 2 Burr. 1020; votes for ineligible candidates were formerly held to be "thrown away;" 2 Burr. 1021 note; but it has been held in a later case that such votes will not give the election to a minority candidate unless the voters knew of the ineligibility; 44 N. J. L. 529.

There is no common-law right to vote by proxy, except in England in case of peers; 1 Bla. Com. 168; 131 Pa. 625; and in public or municipal corporations, voting can only be done in person; 2 Kent 294; in private corporations, the right of voting by proxy is usually conferred by charter and the weight of authority is that, if not so conferred, it may be done by by-law; *id.* 295; 5 Day 329; 181 Pa. 614; 69 Ill. 195; Moraw. Corp. § 436; Cook, Stockh. § 610; *contra*; 18 Hun 427; 14 N. J. L. 222. See 3 Grant, Pa. 209; 103 Pa. 134; 1 Paige 598; 2 Pa. Co. Ct. 280; 1 Thomp. Corp. § 737; 4 L. R. A. 421; 3 Dersaus. 557. A proxy may be revoked, even if given for a valuable consideration, if about to be used fraudulently; 6 Paige 337; and voting by proxy in fraud or violation of the charter may be restrained by injunction; 6 Gill & J. 94. A certificate of election is not essential; 11 Wend. 604;

but it is, when valid on its face, *prima facie* evidence of election; 10 Abb. Pr. 821; but a court on *quo warranto*, may go behind it; 20 Wend. 12.

It is probable that at common law each stockholder is entitled to but one vote without respect to the number of shares held. In public and municipal corporations undoubtedly each member has but one vote, and it is said in connection with the statement of this principle: "This rule has been applied to stockholders in a private corporation, and it has been held that such a shareholder has but one vote, although he be the owner of many shares of the capital stock;" Cook, Stock & Stockholders § 608. But this writer, after adverting to the almost universal practice of providing by constitution, statute, or charter for a vote to each share of stock, adds, "at the present day it is probable that no court, even in the absence of such provision, would uphold a rule which disregards, in the matter of voting, the number of shares which the shareholder holds in the corporation;" *id.* And after a reference to the same common-law rule it is said: "But there are good reasons for holding that this rule has no application to ordinary joint stock business corporations of the present day;" Moraw. Corp. § 476. Where the charter did not regulate the voting, but declared that the by-laws may make provision for the conduct of elections, it was held that a corporation might enact a by-law giving to stockholders a vote for each share of stock, and that one providing that they should have one vote for each share up to ten and fixing the proportion which the shares should bear to the votes above that number, "is a reasonable regulation; it is uniform in its operation; it conflicts with no law, and it is binding on all the shareholders;" 131 Pa. 614.

In some states cumulative voting is authorized by statutory or constitutional provision; and such provision in a state constitution is self-executing; 104 Pa. 150. See, generally, works on corporations; Thompson, Corporations, Ch. XV.; 18 L. R. A. 582; MEETINGS; PROXY; QUORUM.

ELECTION DAY. An "election day" or the day of any general or primary election, would, in legal contemplation, mean twenty-four hours, including the period during which the election is actually held. 95 Ky. 38, 23 S. W. 655.

ELECTION PETITIONS. In England. Petitions for inquiry into the validity of elections of members of Parliament, when it is alleged that the return of a member is invalid for bribery or any other reason; heard by two judges of the King's Bench Division. Byrne.

ELECTION OF RIGHTS OR REMEDIES.—The obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. 2 Sto. Eq. Jur. § 1075.

Etymologically, election denotes choice, selection out of the number of those choosing. Thus, the election of a governor would be the choice of some individual from the body of the electors to perform the duties of governor. In common use, however, it has come to denote such a selection made by a distinctly defined body—as a board of aldermen, a corporation, or state—conducted in such a manner that each individual of the body choosing shall have an equal voice in the choice, but without regard to the question whether the person to be chosen is a member of the body or not. The word occurs in law frequently in such a sense, especially in governmental law and the law of corporations. But the term has also acquired a more technical signification, in which it is often used as a legal term, which is substantially the choice of one of two rights or things, to each one of which the party choosing has equal right, but both of which he cannot have. This option occurs in fewer instances at law than in equity, and is in the former branch, in general, a question of practice.

At Law. In contracts, when a debtor is obliged in an alternative obligation to do one of two things, as to pay one hundred dollars or deliver one hundred bushels of wheat, he has the choice to do one or the other until the time of payment; he has not the choice, however, to pay a part in each. Pothier, Obl. part 2, c. 3, art. 6, no.

247; 11 Johns. 59. Or, if a man sell or agree to deliver one of two articles, as a horse or an ox, he has the election till the time of delivery,—it being a rule that, "in case an election be given of two several things, always he which is the first agent, and which ought to do the first act, shall have the election;" Co. Litt. 145 a; 7 Johns. 465; 3 Bibb 171. On the failure of the person who has the right to make his election in proper time, the right passes to the opposite party; Co. Litt. 145 a; Pothier, Obl. no. 247; 1 Des. Ch. 460; Hopk. Ch. 337; 40 Ohio St. 559; 56 Vt. 538; 66 How. Fr. 306; 21 Fed. Rep. 898.

When one party renounces a contract the other party may elect to rescind at once, except so far as to sue upon it and recover for the breach, and he may immediately bring an action, without waiting for the time of performance to arrive or elapse; (in such case he cannot treat the contract as subsisting for any other purpose); 2 E. & B. 678; L. E. 7 Exch. 114; L. R. 16 Q. B. 460; 155 Pa. 107; 111 U. S. 264; 11 Fed. Rep. 372; *contra*, as to a contract for the sale of land, 114 Mass. 580. See the cases collected, Ans. Cont. (8th ed., 355) n. 1. It is a maxim of law that, an election once made and pleaded, the election is concluded: *electio semel facta et placitum testatum non patitur regressum*; Co. Litt. 146; 11 Johns. 241.

In many cases of voidable contracts there is a right of election to affirm or disavow them, after the termination of the disability, the existence of which makes this contract voidable. So all contracts of an infant, except for necessities, may be avoided by him within a reasonable time after he comes of age, but they are voidable only, and he must elect not to be bound by them; 48 N. H. 251; 18 Neb. 54. See 102 U. S. 300. And bringing suit is an election to rescind; 50 N. H. 385; 13 Daly, N. Y. 227. See INFANT.

Whenever, by law or contract, a party has laid before him a variety of steps, the taking of one of which excludes another, or the rest, he must choose between them. After his choice is made, and by words or acts expressed in a manner suited to the particular case, he cannot reverse it; he is said to have elected the one step, and waived the other; Bish. Cont. § 808.

Other cases in law arise: as in case of a person holding land by two inconsistent titles; 1 Jenk. Cent. Cas. 27; dower in a piece of land and that piece for which it was exchanged; 8 Leon 271. See Sugd. Pow. 498.

In Equity. A choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property already his own, which is attempted to be disposed of, in favor of a third party, by virtue of the same paper. The doctrine of election presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other; 1 Swanst. 394, note (b); 3 Woodd. Lect. 491; 2 Rop. Leg. 480; Snell, Pr. Eq. 287.

The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it; 133 U. S. 695.

Where an express and positive election is required, there is no claim, either at law or in equity, to but one of the objects between which election is to be made; but in many cases there is apparent, from the whole of an instrument, the intention that the party to be benefited shall be benefited on certain conditions. In such cases, equity will require the party to elect; Bishp. Eq. sec. 295.

The question whether an election is required occurs most frequently in case of devises; "because deeds being generally mat-

ters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires;" L. R. 8 Ch. 578; but it extends to deeds; 1 Swanst. 400; 2 Story, Eq. Jur. § 1075, n.; and it has been held to apply to "voluntary deeds, to cases of contracts for valuable consideration resting in articles, to contracts for value completely executed by conveyance and assignments;" per Selborne, Ld. Ch., L. R. 8 Ch. 578, where the authorities are collected. The doctrine also applies to powers of appointment; 2 Ves. Jr. 367; L. R. 9 Eq. 519; 22 Ch. D. 555; 27 *id.* 696; 34 *id.* 160.

In the case, not strictly of election, but often so treated, of two distinct gifts of a testator's own property, one onerous and the other not, it is the general rule that the donee may take one and reject the other, unless it appear that it was the testator's intention that the option should not exist; 22 Ch. D. 573, 577; and where a gift is made by a deed of which the consideration is partly invalid by reason of the disability of the parties, the parts of the deed are read together and the burden is treated as the consideration for the benefit; Brett, L. Cas. Mod. Eq. 263. When a married woman made a valid appointment by will to her husband under a power, and also bequeathed personal property (not her separate estate) to another person to which the power did not extend, the husband was not put to his election, but took both under the power and *jure mariti*, as to the property ineffectually bequeathed; 9 Ves. 369.

There must be a clear intention by the testator to give that which is not his property; 1 Sim. 105; 18 Ves. 41; 1 Ed. Ch. 532; L. R. 7 Eq. 291. And if the testator has some interest in the thing disposed, the presumption that he intended to dispose only of his interest must be overruled in order to make a case of election; 6 Dow. 149, 179; 1 Ves. 515.

The intention of the testator to put the devisee to his election must appear from the will itself; but surrounding circumstances may be shown by parol; 41 Ark. 64; 30 Beav. 14. The time in which election may be exercised must be reasonable; 30 Beav. 235; 77 Va. 136; 19 Ves. 663; 34 Ala. 558; 30 Ia. 465; 4 McLean 99.

The doctrine applies to every species of property or interest, whether the donor does or does not know of his right to dispose of it; Wats. Comp. Eq. (2d. ed.) 177; cases of transactions involving property of the wife; 23 Beav. 457; 30 Gratt. 83; satisfaction of dower; Amb. 466, 682; 8 Paige, Ch. 325; 2 Sch. & L. 452; 14 Sim. 258; 1 Drur. & W. 107. The doctrine does not apply to creditors; 12 Ves. 354; 1 Pow. Dev. 437.

As to the right or duty of election by persons under disability, there is much apparent confusion in the cases both as to theory and practice. Story states the rule generally that married women, infants, and lunatics are not bound by election; 2 Eq. Jur. § 1097. The statement would seem too broad even before the great changes made in all matters affecting the property rights and powers of married women by the trend of recent legislation, and before the changes characterized by a careful commentator as a "brand new invention of equity not fifty years old, and made exclusively for the benefit of married women under the old law—a breed which is rapidly becoming extinct;" Brett, L. Cas. Mod. Eq. 257. This writer considers the old and true doctrine of election to apply only to the acceptance of gifts under an instrument made by another, while the new doctrine involves the confirmation or repudiation of voidable instruments made by the person electing, who, in the cases referred to, is always a married woman. The rule, so far as there is one, has been stated thus:—Parties competent to make an election must usually be *sui juris*, but election may sometimes be made by a court of equity on behalf of infants and married women; Bisph. Eq. § 304; but this is really no rule and probably none can be exactly defined; the cases must be resorted to, and a large measure of judicial discretion has been exercised in dealing with them as they arose. In some it is held that a mar-

ried woman may be permitted to elect; 4 Kay & J. 409; 59 Wis. 483; 65 Pa. 451; in others that she cannot; 3 Myl. & Cr. 171; Lord Cairns in L. R. 7 H. L. 67; 9 Ch. D. 363; but it may be referred to a master to inquire what is best for her; 2 Ves. 60; L. R. 7 H. L. 67 (but in this case there were also infants). It was held that she must elect by Lord Hatherly in 3 J. & H. 344 (which Brett says "led to the new departure"); followed by Kay, L. J., in 28 Ch. D. 124; *contra*; by Sir George Jessel in 18 Ch. D. 531; followed by Chitty, L. J., in 37 Ch. D. 606. The decisions of Lord Hatherly and Sir George Jessel were referred to without disapproval by Lord Selborne, one in L. R. 8 Ch. 578, and the other in 8 App. Cas. 420. Finally in 31 Ch. D. 275, (reversing 28 Ch. Div. 124), it was held that the wife would not be compelled to elect, but was entitled to retain both funds, on the ground that the settled fund had a restraint on anticipation. This case reviews the conflicting decisions and considers that they leave the question to be determined on principle. It is treated as deciding that but for the fact on which the case was put it was one for election; Snell, Pr. Eq. 247; and it assumed without discussion that election applied to married women, and thereby as Brett considers "sealed the triumph of the new election"; Lead. Cas. Mod. Eq. 257.

With regard to infants, the practice has varied very much, and the cases are collected in 1 Swanst. 413, note (c). The infant has been permitted to elect after coming of age in some cases; cas. t. Talbot 176; *id.* 190; 2 Ves. Jr. 12; 3 Bro. P. C. 173; in others an inquiry has been directed; 2 Sch. & Lef. 266; and this may be considered the usual practice; 1 Bro. P. C. 300; 2 Eq. 481; though the court has elected for them without reference; 26 L. J. N. S. Ch. 148; 2 Bland, Ch. 606; and the same practice is adopted when the persons to elect are unborn; Brett, L. Cas. Mod. Eq. 260. See, generally, on this subject, Serrell, Equit. Doct. Elect. 164.

Persons not under disabilities are bound to elect; 79 N. Y. 478. Positive acts of acceptance or renunciation are not indispensable, but the question is to be determined from the circumstances of each case as it arises; 21 Beav. 447; 13 Price 782; 1 M'Cl. 541; 15 Pa. 430. And the election need not be made till all the circumstances are known; 1 Bro. Ch. 186, 445; 2 V. & B. 222; 1 M'Cl. & Y. 569. See, generally, 2 Story, Eq. Jur. § 1075; 1 Swanst. 402, note; 2 Kop. Leg. 480-578; Bisph. Eq. 295.

A widow has a right, regulated by statute in the several states, to declare her election between the provisions in her favor under the will of her husband and her right of dower. When bound to elect she is entitled to full information and ascertainment of the values of the two interests, and she may file a bill in equity to obtain them; 2 Scribn. Dow. 497, and cases cited at large in note 1. The right must be exercised by the widow herself, being purely personal; 6 Gray 307; 6 Ired. L. 274; and the rule is not subject to exception even if she is insane; 7 Ired. L. 73; 5 Md. 508. After the widow's death within forty days without election, her representatives could not make a renunciation of the will; 3 Har. & McH. 95; 37 Ohio St. 460; 71 Ind. 455; 90 Pa. 384. For the statutory provisions on the subject see 2 Scribn. Dow. 505, notes.

There must be an intention to elect and knowledge of her rights so as to constitute a deliberate choice; 43 Pa. 474; 2 Gr. Ch. 504; and an election made under a mistake does not conclude her; 1 Bro. C. C. 445; 12 Ves. Jr. 136; 4 Dessaus. 274; but if she is acquainted with the material facts the election will bind her even though she do not understand her legal rights; 21 Pa. 407. But see 6 Humph. 320; 11 Ohio St. 386. Nor is she concluded by an election procured by fraud; 10 Yerg. 94; 2 Dana 13. In some cases an election is implied, but so much difficulty is found to exist with respect to what constitutes an implied election that it will generally remain to be determined by the circumstances of each case. See 1 Lead. Cas. in Eq. 537, 570, and cases cited;

5 Call 481; 2 Hen. & Mun. 381; 12 Pick. 146; 43 Pa. 474; 6 Ohio St. 480; 14 Gratt. 518. In many states, if deprived of the provision given in lieu of dower, the widow is entitled to demand her dower; 2 Scribn. Dow. 525; 2 Harris, N. J. 459; if the deprivation be substantial though not total; 32 Me. 132; or if a previous application for dower has been refused; 1 Metc. 66; or the statutory period for demand has passed before she was advised of the failure of her provision; 32 Me. 133; or she had previously elected to take under the will; 20 Wend. 564, affg. 7 Paige 221. In taking a testamentary provision in lieu of dower the widow becomes a purchaser for a valuable consideration; 1 Lead. Cas. in Eq. 511, 570; 2 Scribn. Dow. 527, and cases cited in note; 4 Del. Ch. 289.

In cases not covered by statute a widow may be required to elect upon general equitable principles. In the case last cited, she being also a legatee of one-third of the estate "according to law," was held to be put to her election, not under the statute but under the general doctrine of equity which is thus stated by Bates, Ch.: This doctrine precludes a party taking a benefit by deed or will from asserting any title or claim clearly inconsistent with the provisions of the instrument under which he takes—putting him to his election between the two. In its application to dower it is nowhere better stated than by our court of appeals in 3 Harring. 474. "In regard to dower it seems from all the cases to be an established rule that a court of equity will not compel the widow to make her election, unless it be shown by the express words of the testator, that the devise or bequest was given in lieu of satisfaction of dower; or unless it appears that such was the testator's intention, by clear and manifest implication arising from the fact that the dower is plainly inconsistent with the devise or bequest, and so repugnant to the will as to defeat its provisions. If both claims can stand consistently together, the widow is entitled to both, although the claim under the will may be much greater in value than her dower." 2 S. & L. 352; 3 Ves. Jr. 249; 1 Drew. 411 (17 E. L. & Eq. 483); Dru. & War. 107; 3 Kay & J. 257; 2 John. Ch. 451.

Of Remedies. A choice between two or more means of redress for an injury or the punishment of a crime allowed by law.

The selection of one of several forms of action allowed by law.

The choice of remedies is a matter demanding practical judgment of what will, upon the whole, best secure the end to be attained. Thus, a remedy may be furnished by law or equity, and at law, in a variety of actions resembling each other in some particulars. Actually, however, the choice is greatly narrowed by statutory regulations in modern law, in most cases. See 1 Chit. Pl. 297-314.

A person may often choose whether he will sue in tort or contract. If his goods are taken from him by fraud he may sue for the price in assumpsit, or bring an action of replevin or trover; 1 Paige, N. Y. 192; 99 Mass. 255; 7 Blackf. (Ind.) 501; 29 Ala. 332; 25 Mich. 386; 25 Ark. 100; 43 Cal. 380; 30 Vt. 277; 57 Me. 441. And when two actions are pending at law or in equity between the same persons and for the same subject-matter, the plaintiff is usually compelled to elect which one he will maintain; 32 N. J. Eq. 67; 29 Minn. 252; 35 Ala. 297. But an election is not usually compelled between domestic and foreign suits; 7 Blatchf. (C. C.) 159; 18 Wis. 94; and a foreclosure of a mortgage and a suit on the bond as well as actions to enforce admiralty liens and at the same time recover on the debt are also exceptions; 53 Ill. 171; 6 Cal. 48; 10 Wall. 204.

It may be laid down as a general rule that when a statute prescribes a new remedy the plaintiff has his election either to adopt such remedy or proceed at common law. Such statutory remedy is cumulative, unless the statute expressly or by necessary implication takes away the common-law remedy; 1 S. & R. 32; 5 Johns. 175; 16 *id.* 220; 1 Call 243; 2 Me. 404; 6 H. & J. 833; 4 Halst. 384; 3 Chit. Pr. 130; 15 Hun 556; 74 N. Y. 437; 61 Ind. 290; 47 Ia. 602.

The commencement and trial of an action on a contract is not such an election of remedies as would estop plaintiff from suing on the notes; 39 Mich. 267; 90 *id.* 476.

Where a plaintiff has separate and concurrent remedies against a number of parties, he loses no rights by suing some and afterwards discontinuing his action; 82 Wis. 120. See 141 N. Y. 437. An unsatisfied judgment on a note will not bar an action on notes taken as collateral security; 59 Fed. Rep. 917.

By joining his wife in a suit for her legacy, a husband exercises his election to treat it

as joint property; 4 Del. Ch. 117.

After a suit in replevin has been discontinued before judgment without obtaining any benefit, because plaintiff has paid the value of the goods to satisfy his replevin bond, this suit does not constitute such an election of remedy as to stop him from claiming payment of the purchase price out of the assets of the purchaser's estate; 82 Md. 50.

In Criminal Law. The choice or determination by a prosecuting officer, upon which of several charges, or counts, in an indictment he will proceed to trial.

No objection can be raised, either on demurrer or on arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind. Indeed, on the face of the record, every count purports to be for a separate offence, and in misdemeanors it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment. In cases of felony, the courts, in the exercise of a sound discretion, are accustomed to quash indictments containing several distinct charges, when it appears, before the defendant has pleaded and the jury are charged, that the inquiry is to include several crimes. When this circumstance is discovered during the progress of the trial, the prosecutor is usually called upon to select one felony, and to confine himself to that, unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction. Thus, if a prisoner is charged with receiving several articles, knowing them to have been stolen, and it is proved that they were received at separate times, the prosecutor may be put to his election; but if it is possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of his accusation; 1 Mood. 146; 2 Mood. & R. 524. In another case, the defendant was charged in a single count with uttering twenty-two forged receipts, which were severally set out and purported to be signed by different persons, with intent to defraud the king. His counsel contended that the prosecutor ought to elect upon which of these receipts he would proceed, as amidst such a variety it would be almost impossible for the prisoner to conduct his defence. As, however, the indictment alleged that they were all uttered at one and the same time, and the proof corresponded with this allegation, the court refused to interfere; and all the judges subsequently held that a proper discretion had been exercised: 2 Leach 877; 2 East, Pl. Cr. 934. See 11 Cl. & F. 155; Deards. J. 427; 12 Cush. 612; 12 S. & R. 69; 2 H. & J. 426; 12 Wend. 426; 118 Mass. 448; 29 Mich. 61; 75 Mo. 355.

The state need not elect on which count of an indictment it will proceed to trial, where the several counts relate to the same transaction; 109 Mo. 654.

The artificial distinction between felonies and misdemeanors is, in most jurisdictions, obsolete, and in most states several distinct offences to which a similar punishment is attached may be joined. It usually rests with the court whether it will compel a prosecuting officer to elect which count to proceed on; 51 Me. 363; 104 Mass. 532; 39 Ill. 571; 66 Mo. 632; Whart. Crim. Pl. & Pr. § 393. The election should be made before opening the case of the defence; Blash. Cr. Proc. § 462; 65 Ga. 449; 107 Mass. 219.

ELECTION DISTRICT. A subdivision of territory, whether of state, county, or city, the boundaries of which are fixed by law, for convenience in local or general elections. 41 Pa. 408; 2 Pa. L. J. R. 82.

ELECTOR. One who has the right to make choice of public officers; one who has a right to vote. See 10 Minn. 107. See **PRESIDENTIAL ELECTORS.**

One who exercises the right of election in equity. The term is sometimes used in this sense. Brett, L. Cas. Mod. Eq. 257.

In the German Empire the name was given to those great princes who had the right to elect the emperor or king. The office of elector in some instances became hereditary and was connected with territorial possessions as, elector of Saxony.

ELECTORAL COLLEGE. A name given to the presidential electors, when met to vote for president and vice-president of the United States, by analogy to the college of cardinals, which elects the pope, or the body which formerly selected the German emperor. It is, according to the more general usage, applied to the electors chosen by a single state, but is also used to designate those chosen throughout the United States.

This term has no strict legal or technical meaning, and being unknown to the constitution and laws of the United States, its use is purely colloquial. Accordingly the term is not clearly defined, and it is employed by approved writers in both the senses stated, though more frequently when reference is made to the entire body of electors the plural is employed, as, "the expectations of the public . . . (have) been so completely frustrated as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges;" 2 St. Const. § 1463; " . . . would be chosen as electors, and would, after mature deliberation in their respective colleges," etc.; 1 Hare, Am. Const. L. 219; "the electoral colleges have sunk so low"; id. 221. So in speaking of the electors the phrase "state colleges" is used by Stevens; Sources of the Constitution of the U. S. 153, note. Following this view is a very recent definition:—"A name informally given to the electors of a single state when met to vote for president and vice-president of the United States, and sometimes to the whole body of electors. Cent. Dict.

On the other hand, the other use is well sustained by authority, and we find this equally recent definition: "The body of electors chosen by the people of the United States to elect their president." Encyc. Dict. This is supported by Webster and Worcester as well as some authorities on constitutional law. "The presidential electors chosen as therein directed, constitute what is commonly called the 'electoral college'"; Black, Const. L. 86; and again, "by an electoral college appointed or elected in the several states"; id. "In case the electoral college fails to choose a vice-president, the power devolves on the senate to make the selection from the two candidates having the highest number of votes." 1 Calhoun's, Works 175. See **PRESIDENTIAL ELECTORS.**

The Presidential electors from each state shall be appointed in such manner as the legislature thereof may direct, (Const. U. S., art. 2, § 1) reserving to Congress the power of determining the time of choosing the electors. (Rev. Stat. U. S., tit. 3, c. 1.) No senator or representative or person holding an office of trust or profit under the United States shall be appointed an elector. (Const. U. S., art. 2, § 1.) This includes a person holding an office by appointment of the President made pursuant to an act of Congress, and on whom is imposed the duty of assisting in managing and directing an exposition held under the auspices of the federal government. 22 A. & E. Ency. 2nd ed., 1230; 11 R. I. 638.

ELECTORAL COMMISSION. A commission created by an act of congress of January 29, 1877, to decide certain questions arising out of the presidential election of November, 1876, in which Hayes and Wheeler had been candidates of the republican party and Tilden and Hendricks of the democratic party. The election was very close, and depended on the electoral votes of South Carolina, Florida, and Louisiana. It was feared that there would be much trouble at the final counting of the votes by the president of the senate according to the plan laid down in the Constitution. The republicans had a majority in the senate and the democrats had a majority in the house of representatives. A resolution was adopted by congress for the appointment of a committee of seven members by the speaker to act in conjunction with a similar committee that might be appointed by the senate to prepare a report and plan for the creation of a tribunal to count the electoral votes whose authority no one could question and whose decision all could accept as final. The joint committee thus appointed reported a bill providing for a commission of fifteen members, to be composed of five members from each house appointed *viva voce*, with four associate justices of the supreme court, which latter would select another of the justices of the supreme court, the entire commission to be presided over by the associate justice longest in commission. This body has since been known as the Electoral Commission.

Justices Clifford, Miller, Field, and Strong were named in the act as members, and they chose as the fifth justice Justice Brad-

ley. The other members were Senators Bayard, Edmunds, Frelinghuysen, Morton, and Thurman, and Representatives Abbott, Garfield, Hoar, Hunton, and Payne.

The commission began its sessions February 1, and completed its work March 2, 1877. Various questions came before it in regard to the electoral vote of South Carolina, Florida, and Louisiana, as to which of two state returns was valid, and as to the eligibility of certain of the presidential electors. The most important decision of the commission and the one which has caused most comment and criticism was to the effect that the regular returns from a state must be accepted, and that the commission had no power to go behind these returns; or, as the commission itself expressed it, "that it is not competent under the Constitution and the law as it existed at the date of the passage of said act, to go into evidence *alimunde* the papers opened by the president of the senate in the presence of the two houses, to prove that other persons than those regularly certified to by the governor of the state of Florida in and according to the determination and declaration of their appointment by the Board of State Canvassers of said state prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not, and that all proceedings of the courts or acts of the legislature or of the executive of Florida subsequent to the casting of the votes of the electors on the prescribed day are inadmissible for any such purpose." Curtis, Constitutional History of the United States, vol. 2, 419.

The result of the controversy over the election of 1876 was the passage, after long and earnest consideration, of the Act of Congress of Feb. 3, 1887, to regulate the counting of the electoral votes for president and vice-president. U. S. Rev. St. 1 Supp. 525. See **PRESIDENTIAL ELECTORS**; **PRESIDENT OF THE UNITED STATES.**

ELECTRIC CORPORATION. A company formed under general or special laws, with the right, expressly or by necessary implication, to generate, produce, develop, supply or use electricity for effectuating the purposes for which its charter powers are conferred. To this end the courts have looked with favor upon a construction of charters of such corporations whereby the scope of their provisions has been held to include, by implication, the use of electricity when such right is not conferred in express terms. 1 Joyce, Elec. Law, 2nd ed. 1.

ELECTRIC LIGHT. Light produced by electricity. It is furnished either by municipalities or by corporations formed for the purpose of manufacturing it for hire.

The Nature of Electric Light Companies. Such companies, although not public corporations in the sense that the term is applied to municipal corporations; Croswell Elec. § 20; and being unable without statutory authority to claim an exemption of property from the ordinary mechanic's lien; 43 Kan. 182; (see **FIXTURES**), are held to exercise a public use and are of a public character similar to telegraph and telephone companies; 150 Mass. 592; 153 id. 129; 160 Pa. 511; 42 Fed. Rep. 723; 130 Ind. 149; but when poles are set for this purpose by a company for furnishing light commercially as well as for lighting streets, the abutting owner of land on a street used by such companies may demand compensation for such use, as it is held to create an additional servitude; 13 Pa. Co. Ct. Rep. 369; 51 N. Y. Sup. Ct. 280; 32 Hun 96; *contra*; when controlled by the municipality; 65 How. Pr. 407. But this subject can scarcely be considered as finally and definitely settled on principle; see Crosw. Elec. § 126. In New York they are held to be manufacturing companies with reference to taxation; 129 N. Y. 543 (reversing 15 N. Y. 718); *contra*; 145 Pa. 105, 181; but by paying a state tax they are exempt from local taxation; 8 Pa. Co. Ct. Rep. 626.

Implied Powers of the Municipality. The right of a municipality to light the streets

is generally conceded as a part of the police power and while usually enumerated in the charters, its omission would not deprive the city of such right, whether by electricity or other means; 130 Ind. 149; 83 S. C. 1; 53 Kan. 477; 37 Fed. Rep. 882; 146 U. S. 258; and the right of the municipality, not only to own, operate, and control an electric light plant, but to raise money for such purpose by taxation has been upheld by the courts; 130 Ind. 149; 83 S. C. 1; 53 Kan. 477; 29 Am. & Eng. Corp. Cas. 243; and to issue bonds for that purpose; 121 Ind. 312; 49 Hun 550; but the town must follow strictly the provisions of the statute authorizing such issue, and keep within the limits of such statute or the issue is void; 111 Mo. 365. The contrary view of such implied powers was taken in 153 Mass. 129, where the court decided that the existing statute giving towns the right to maintain street lamps and to raise money by taxation for such purpose did not carry with it the right to maintain the more costly electric light plant, and that to authorize such a purchase an express statute must be passed, thus settling a question raised but not decided in 150 Mass. 592. An act was accordingly passed in that state granting this power to the municipality and limiting and defining the conditions under which it should be exercised; act 1891, c. 370; 1893, c. 454; 1892, c. 259. The states of Connecticut, Iowa, Michigan, Mississippi, Nebraska, Ohio, and Pennsylvania have also conferred this right by statute.

Commercial Lighting by the Municipality. Where the right of maintaining an electric light plant has been conferred upon towns by statute, it has been usually held to apply as well to private property as to public streets, lanes, highways, etc.; 42 Fed. Rep. 723; 130 Ind. 149; but where public lighting by electricity has been only implied from existing statutes the implication will not extend to a commercial use by the municipality; 83 S. C. 1; 121 Ind. 212. This right has been created by statute in Massachusetts, Michigan, Nebraska, New York, Pennsylvania, and Tennessee, and the courts have declared the constitutionality of these acts; 150 Mass. 592; 160 Pa. 511.

As to Rights and Privileges. A municipality may grant a franchise to an electric light company to use its streets without making such right an exclusive one; 28 N. E. Rep. (Ind.) 94; 48 N. W. Rep. (Ia.) 1005; but it must have legislative authority to grant such franchise; 5 Ohio Cir. Ct. Rep. 340; 33 Fed. Rep. 659; and in Iowa it must be submitted to a vote of qualified electors; 48 N. W. Rep. (Ia.) 1005; 57 *id.* 689. It may confer the right on one company to use poles erected by another company; 95 Mich. 551; and may fix the compensation to the latter for their use; 10 Ohio Cir. Ct. Rep. 531; but unless the limit of such use is fixed and the manner of stringing the wires prescribed such a permission is unreasonable and void; 53 N. W. Rep. (Mich.) 452; and a company will be enjoined from use of another's poles without permission from the city, the court, or the other company; 23 Wkly. Law. Bul. 137. In Louisiana a grant to an electric light company included the right to remove poles erected under a preceding contract with a gas company; 40 La. Ann. 474. A contract with a gas company to light the streets with gas was held not to deprive the city of the power to contract with another company to furnish electric lights for the same purpose; 80 W. Va. 435; 23 Fed. Rep. 529. The right of the city to grant franchises for electric lighting carries with it the right to purchase or operate a plant even if there be an existing organized corporation and the city violates no contract by so doing; 42 Fed. Rep. 723. As a rule, however, the statutes provide for the purchase of an existing plant by the municipality and for arbitration in case of disagreement as to the price. In Massachusetts an existing company is not compelled to sell its property to the town; 161 Mass. 432.

Conflicting Electrical Companies. Where

a telegraph and an electric light company had each obtained a franchise for the use of the same street, it was held that the company which first obtained the franchise was entitled to priority, and the other company must so adjust its wires as to prevent danger from juxtaposition or interference with the business of the first company; 46 Mo. App. 120; and that where the street was already occupied by the telegraph company the electric light company would be enjoined from placing its wires so near as to interfere with the transmission of messages; *id.* The distance at which a wire will affect the wires of the telegraph company need not be stated in the bill; 76 Fed. Rep. 178; but where the electric light company had already strung its wires the telegraph company could not compel their removal; 46 Mo. App. 120. In the case of a telephone and an electric light company, both having valid franchises, the telephone company was refused an injunction against the latter company on the ground that they had first occupied the streets, but on streets not occupied by either company, the electric light company was enjoined from using the same side of the street for lights and from stringing wires within such a distance as to injure the service of the telephone company; 27 Neb. 284; 12 Ont. 571; 27 S. W. Rep. (Tex.) 902. If two electric light companies have the use of the same street, the first to occupy them has the prior right, and the second company will be restrained from stringing its wires so near as to interfere with the business of the first company or cause danger to the public; 65 Vt. 387; 94 Ala. 372. In the latter case the decision was based rather on the ground that such juxtaposition of the wires was dangerous to public safety, than on any business consideration.

As to the liability for negligence as applied to electrical companies regarding both the employes of such companies and the general public, see **POLES; WIRES.**

See generally **EMINENT DOMAIN; HIGHWAYS; IMPAIRING OBLIGATION OF CONTRACTS; INTERSTATE COMMERCE; MASTER & SERVANT; MEASURE OF DAMAGES; NEGLIGENCE; PARALLEL LINES; RAILWAYS; RATES; STREETS; TELEGRAPH; TELEPHONE.**

ELECTRICITY. A natural force utilized mainly for the production of heat, light, and power.

A powerful physical agent which makes its existence manifest by attractions and repulsions, by producing light and heat, commotions, and chemical decompositions, and other phenomena. Encyc. Dict.

The great increase in the use of this force and its application to the purposes of everyday life not only for power to be used for transportation and manufacturing, but also for lighting and heating, have naturally brought it constantly before the courts. As a result there is a large and constantly increasing body of law on the subject which will be found under the several titles which deal directly with electrical appliances. As to trolleys see **RAILROAD**; and with respect to telegraph, telephone, electric light, poles, and wires, see those titles.

ELECTROCUTION. A method of punishment of death inflicted by causing to pass through the body of the convicted person a current of electricity of sufficient force and continuance to cause death. See 1 With. & Beck. Med. Jur. 663.

It is in use in New York under the act of 1893, and in Ohio was adopted by Act of April 9, 1896, to go into effect on July 1 of that year.

Punishment by death is not cruel within the meaning of the Constitution of the United States, which prohibits the infliction of unusual and cruel punishments; and while the infliction of the death penalty by a new agency is unusual, the adoption of such an agency which is not a certainly prolonged or extreme procedure is not violative of this constitutional provision; 119 N. Y. 569.

This act of New York is not repugnant to the Constitution of the United States when

applied to a convict who committed the crime for which he was convicted after the act took effect, 136 U. S. 436. See 119 *id.* 584; **CRIMES.**

ELEEMOSYNARIUS (Lat.). An almoner. There was formerly a lord almoner to the kings of England, whose duties are described in *Fieta*, lib. 2, cap. 23. A chief officer who received the eleemosynary rents and gifts, and in due method distributed them to pious and charitable uses. Cowel.

ELEEMOSYNARY. Relating to the distribution of alms, bounty or charity; charitable. See **CORPORATIONS.**

ELEEMOSYNARY CORPORATIONS. Such private corporations as are instituted for purposes of charity, their object being the distribution of the bounty of the founder of them to such persons as he directed. Of this kind are hospitals for the relief of the impotent, indigent, sick, and deaf or dumb; Ang. & A. Corp. § 39; 1 Kyd, Corp. 26; 4 Conn. 272; 3 Bland 407; 1 *Id.* Raym. 5; 2 Term 346. The nature of eleemosynary corporations is discussed in the Dartmouth College case. They are in no sense ecclesiastical corporations as understood in the classification of Blackstone; as Marshall, C. J., said that if the act created a civil institution to be employed in the administration of the government, it would be a public corporation, but it was in fact a private eleemosynary institution created for purposes unconnected with government, —and none the less so because for public education; 4 Wheat. 681. See, also, 3 *id.* 464; 1 Bla. Com. 471.

A recent writer says: "In the English law corporations are divided into *ecclesiastical* and *lay*; and lay corporations are again divided into *eleemosynary* and *civil*. It is doubtful how far clear conceptions of the law are promoted by keeping in mind these divisions. They seem, for us at least, to have an historical, rather than a practical, value. In a country where the church is totally disassociated from the state, there is little room for a division of corporations into *ecclesiastical* and *lay*; and while charitable corporations have many features which distinguish them from other private corporations, as will hereafter appear, it is very seldom that the word '*civil*' is used in our American books of reports in order to distinguish corporations other than charitable."

ELEGIT (Lat. *eligere*, to choose). A writ of execution directed to the sheriff, commanding him to make delivery of a moiety of the party's land and all his goods, beasts of the plough only excepted.

The sheriff, on the receipt of the writ, holds an inquest to ascertain the value of the lands and goods he has seized, and then they are delivered to the plaintiff, who retains them until the whole debt and damages have been paid and satisfied. During that term he is called tenant by *elegit*; Co. Litt. 289. See *Pow. Mort.*; *Wats. Sheriff* 206; 1 C. B. n. s. 568.

The name was given because the plaintiff has his choice to accept either this writ or a *fi. fa.*

By statute, in England, the sheriff is now to deliver the whole estate instead of the half. See 3 Bla. Com. 418, n. The writ is still in use in the United States, to some extent, and with somewhat different modifications in the various states adopting it; 4 Kent 431, 436; 10 Gratt. 580; 1 Hill, Abr. 555; 3 Ala. 560.

ELEMENTS. A term popularly applied to fire, air, earth and water, anciently supposed to be the four simple bodies of which the world was composed. Encyc. Dict. Often applied in a particular sense to wind and water, as "the fury of the elements." Cent. Dict. It has been said that "damages by the elements," and "damages by the act of God," are convertible expressions; 35 Cal. 416.

ELEMENTS, DAMAGES BY. Usually means damages by air, fire and water. These are ordinarily excepted from a lessee's covenant to keep in repair, and refers to damages by these occurring without fault or negligence in the lessee. Has been held to refer only to some sudden, unusual or unexpected action of the elements, as floods, tornadoes, and the like. 10 A. & E. Ency.

2nd ed. 895; 40 Minn. 106. "Damages by the elements," and "damages by the acts of God" have been held to be convertible expressions in the law of leases. *Id.*; 35 Cal. 416.

ELEVATED RAILWAYS. See RAILWAYS.

ELEVATOR. A building containing one or more mechanical elevators, especially a warehouse for the storage of grain; a hoisting apparatus; a lift; a car or cage for lifting and lowering passengers or freight in a hoistway. Cent. Dict.

An elevator is a platform, car, cab, or cage, propelled vertically in a hoistway, hatchway, or shaft, by cables, moved generally by either hydraulic pressure, electricity, steam, or compressed air. In its upward and downward course it is usually conducted by a motorman on board, who stops and starts it at will. In comparatively recent years the elevator has come into general use in the factory, mill, warehouse, mercantile and office building, and apartment house. It may be constructed and used for the carriage of passengers, or freight, or both. 10 A. & E. Ency. 2nd ed., 945.

A passenger elevator is not a device dangerous, to life, *per se*; 90 Wis. 497.

A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier; 41 Minn. 207; and is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants; 54 Fed. Rep. 637; 80 Cal. 595. A carrier of passengers by elevator is not an insurer, but is required to exercise the highest degree of care; 62 Fed. Rep. 139; 114 N. Y. 812; 159 Mass. 26. In constructing an elevator the utmost care must be exercised; 41 Minn. 209; competent workmen must be employed and suitable material used; 20 Col. 292. In case of a casualty, it is not enough to show that the elevator is one of a kind in ordinary use; 50 Mo. 390; 138 Ill. 170. But the absence of safety appliances is said not to be conclusive evidence of negligence; 142 Mass. 83. An elevator is not supposed to be a place of danger, to be approached with great caution; but when the door is opened a passenger may enter it without stopping to make a special examination; 114 N. Y. 318. One who habitually rides on a freight elevator, in contravention of a posted notice, does so at his own risk; 156 Mass. 511. See as to injury to passengers, 25 L. R. A. 33, as to freight *id.* 34.

The business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of a common carrier, and may be controlled by public legislation for the common good; Munn. v. Illinois, 94 U. S. 113; 143 U. S. 517.

For liability of owners of buildings for accidents at elevator shafts, see 9 Lawy. Rep. Ann. 640, n. See, generally, Webb, Elevators; L. R. 12 Q. B. Div. 30.

Operators of Elevators. The proprietor or operator of an elevator is a carrier. *Id.*; 62 Fed. Rep. 139, *et al.* A carrier by elevator of passengers, is not an insurer, but is required to exercise the highest degree of care in everything calculated to insure the safety of his passengers. There is no distinction in law between the duties and liabilities of a carrier by elevator and one by railroad. *Id.*

ELIGIBILITY. The constitution of the United States provides that no person holding any office under the United States shall be a member of either house. The acceptance by a member of congress of a commission as a volunteer in the army vacates his seat; Cl. & H. 122, 395, 637. But by a decision of the second comptroller of the treasury, of Feb. 24, 1894, it was held that there was no incompatibility of office between that of a member of the house of representatives and the military office held by an officer of the United States army on the retired list, and that he was entitled to pay for both offices. A centennial commissioner holds an office of trust or profit un-

der the United States, and is thereby ineligible as a presidential elector; 16 Am. L. Reg. n. s. 15; s. c. 11 R. I. 638. A state cannot by statute provide that certain state officers are ineligible to a federal office; 1 Bartl. 167, 619.

Duelling has been made in some states a disqualification for office; see **DUELLING**. In Kentucky, it was held that the doing of any of the prohibited acts was a disqualification for office without a previous conviction; 14 Am. L. Reg. n. s. 22; but this opinion has been questioned in a note to that case. See McCrary, Elect. 189.

An alien cannot, even in the absence of any provision forbidding it, hold an office; 14 Wis. 497; 54 N. W. Rep. (Ia.) 525. See Cooley, Const. Lim. 748, n.; but he may be elected to an office; 28 Wis. 96; 50 *id.* 103. And members elect of congress, who were ineligible on account of participation in the rebellion, have been admitted to a seat, their disqualification having been subsequently removed; McCrary, Elect. 193.

As to the effect of the ineligibility of the candidate having the highest number of votes, see **ELECTION**.

ELIGIBLE. This term relates to the capacity of holding as well as that of being elected to, an office; 15 Ind. 327. See 15 Cal. 117; 3 Nev. 566; 14 Wis. 497.

ELIGIBLE TO THE OFFICE. The words "eligible to office" relate to the time the candidate is about to assume office, and not to the time of his election. They mean "qualified for the office." 97 Ky. 558, 31 S. W. 137.

ELISORS. In Practice. Two persons appointed by the court to return a jury, when the sheriff and the coroner have been challenged as incompetent; in this case the elisors return the writ of venire directed to them, with a panel of the jurors' names, and their return is final, no challenge being allowed to their array. 3 Bla. Com. 355; 1 Cow. 32; 3 *id.* 296. See **CHALLENGE**.

ELL. A measure of length.

In old English the word signifies *arm*, which sense it still retains in the word *elbow*. Nature has no standard of measure. The cubit, the ell, the span, palm, hand, finger (being taken from the individual who uses them), are variable measures. So of the foot, pace, mile, or *mile passuum*. See Report on Weights and Measures, by the secretary of state of the United States, Feb. 22, 1821.

ELOGIUM (Lat.). In Civil Law. A will or testament.

ELOIGNE. In Practice. (Fr. *éloigner*, to remove to a distance; to remove afar off.) A return to a writ of replevin, when the chattels have been removed out of the way of the sheriff.

ELONGATA. In Practice. The return made by the sheriff to a writ of replevin, when the goods have been removed to places unknown to him. See, for the form of this return, Wats. Sheriff, Appx. c. 18, s. 3, p. 454; 3 Bla. Com. 148.

On this return the plaintiff is entitled to a capias in withernam. See **WITHERNAM**; Wats. Sheriff 300, 301. The word *éloigné* is sometimes used as synonymous with *elongata*.

ELONGATUS. The sheriff's return to a writ *de homine replegiando*, q. v.

ELOPEMENT. The departure of a married woman from her husband and dwelling with an adulterer. Cowel; Blount; Tomlin.

To constitute elopement the wife must not only leave the husband, but go beyond his actual control. For if she abandon the husband, and go and live in adultery in a house belonging to him, it is said not to be an elopement; 3 N. H. 42; 1 Rolle, Abr. 680.

While the wife resides with her husband and cohabits with him, however exceptionable her conduct may be, yet he is bound to provide her with necessities and to pay for them; but when she elopes, the husband is no longer liable for her support, and is not bound to pay debts of her contracting.

when the separation is notorious; and whoever gives her credit does so, under these circumstances, at his peril; 3 Pick. 289; 6 Term 603; 11 Johns. 281; Bull. N. P. 135. It has been said that the word has no legal sense; 2 W. Bla. 1080; but it is frequently used, as is here shown, with a precisely defined meaning. An action may be maintained by the husband, against a third person, for enticing away his wife, where nothing in the nature of criminal conversation is alleged. See Schoul. Hus. & W. 64; ENTICE.

ELSEWHERE. In another place.

Where one devises all his lands in A, B, and C, three distinct towns, and *elsewhere*, and had lands of much greater value than those in A, B, and C, in another county, the lands in the other county were decreed to pass by the word "elsewhere"; and by Lord Chancellor King, assisted by Raymond, C. J., and other judges, the word "elsewhere" was adjudged to be the same as if the testator had said he devised all his lands in the three towns particularly mentioned, or in any other place whatever. 3 P. Wms. 56. See, also, Chan. Proc. 302; 1 Vern. 4, n.; Cowp. 360, 308; 5 Bro. P. C. 496; 1 East 456. As to the effect of the word "elsewhere" in the case of lands not purchased at the time of making the will, see 3 Atk. 254; 2 Ventr. 351. As to the construction of the words "or elsewhere" in shipping articles, see 2 Gall. 477.

ELUVIONES. Spring-tides.

EMANCIPATION. An act by which a person who was once in the power or under the control of another is rendered free.

This is of importance mainly in relation to the emancipation of minors from the parental control. See 3 Term 355; 8 *id.* 479; 11 Vt. 253, 477; 2 Ind. App. 264; 37 W. Va. 242. See Cooper, Justin. 441, 480; 2 Dall. 57, 58; Ferrière, *Dict. de Jurisp. Emancipation*; MANUMISSION.

An infant husband is entitled to his own wages, so far as necessary for the support of himself and family, even though he married without his father's consent; 157 Mass. 73. Where children contract for, collect, and use their own earnings, emancipation is to be inferred; 29 Wkly. Law Bul. 389; and so when they become of age, no other facts being shown; 28 Atl. Rep. (Vt.) 633.

EMANCIPATION PROCLAMATION. See BONDAGE.

EMBARGO. A proclamation or order of state, usually issued in time of war or threatened hostilities, prohibiting the departure of ships or goods from some or all the ports of such state, until further order. 2 Wheat. 148.

A civil embargo is the act of a state detaining the ships of its own citizens in port, which amounts to an interdiction of commerce, accompanied, as it usually is, by a closing of its ports to foreign vessels. Such an embargo is enumerated under the head of reprisals. A hostile embargo is a seizure, as before mentioned, of foreign vessels and property which may be in the ports of the wronged state. This may also be a prelude to war. Snow, Int. Law 78.

The detention of ships by an embargo is such an injury to the owner as to entitle him to recover on a policy of insurance against "arrests or detentions." And whether the embargo be legally or illegally laid, the injury to the owner is the same, and the insurer is equally liable for the loss occasioned by it. Marsh. Ins. b. 1, c. 12, s. 5; 1 Kent 60; 1 Bell, Dict. 517.

An embargo detaining a vessel at the port of departure, or in the course of the voyage, does not of itself work a dissolution of a charter-party, or of the contract with the seamen. It is only a temporary restraint imposed by authority for legitimate political purposes, which suspends for a time the performance of such contracts, and leaves the rights of parties untouched; 1 Bell, Dict. 517; 8 Term 259; 5 Johns. 308; 7 Mass. 325; 5 B. & P. 405; 4 East 546; Twiss' Law of Nations, part ii. s. 12.

EMBARGO, HOSTILE. See **HOSTILE EMBARGO**; **EMBARGO**.

EMBASSAGE or EMBASSY. The message or commission given by a sovereign or state to a minister called an "ambas-

sador," empowered to treat or communicate with another sovereign or state; also the establishment of an ambassador. Black, L. Dict.

EMBEZZLEMENT. In Criminal Law. The fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another. 40 N. Y. Super. Ct. 41.

The fraudulent appropriation of property by a person to whom it has been intrusted or to whose hands it has lawfully come; it is distinguished from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious attempt must have existed at the time of the taking. 160 U. S. 268.

The principles of the common law not being found adequate to protect general owners against the fraudulent conversion of property by persons standing in certain fiduciary relations to those who were the subject of their peculations, certain statutes have been enacted, as well in England as in this country, creating new criminal offences and annexing to them their proper punishments. The general object of these statutes doubtless was to define and embrace, as criminal offences punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection arising from the fact of a possession lawfully acquired by the party screened him from punishment. 2 Metc. Mass. 345; 9 id. 142. See 34 La. Ann. 1153.

In order to constitute embezzlement, it must distinctly appear that the party acted with felonious intent, and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner. A mere failure to pay over money intrusted to such party as agent for investment is not sufficient, if this intent is not plainly apparent; 63 Mich. 276. The money appropriated need not have been intrusted to the accused by the owner; it is sufficient if it were intrusted to the employer of the accused and appropriated by the latter; 27 S. W. Rep. (Ky.) 811; and that the money was taken without any attempt at concealment is no defence to the charge of embezzlement; 83 Pac. Rep. (Cal.) 42.

Embezzlement being a statutory offence, reference must be had to the statutes of the jurisdiction for the classes of persons and property affected by them. It has been held that there may be embezzlement of bank bills; 63 Mass. 284; municipal or city bonds; 91 N. Y. 5; 66 Wis. 343; grain; 83 Ia. 321; an animal; 72 Ala. 273; commercial securities; 24 Ia. 102; [1891] 1 Q. B. 112; and of a mortgage; 5 Allen 502; and by public officers placed in a fiduciary relation as such; 10 Gray 173; 10 Mich. 54. See 11 Allen 439; 31 Cal. 103; 15 Wend. 581; 86 Pa. 416; 23 Minn. 67; 6 How. Pr. 59; 81 Ia. 587; 111 Mo. 413. Where one withdraws from the money drawer of a cash register money that he had deposited a moment before without registering the sale of the article for which it had been received, he is guilty of embezzlement; 155 Mass. 523. Where an attorney collects money for his client, he acts as agent and attorney, and in either case, if he appropriate the money collected to his own use with the intention of depriving the owner of the same, he is guilty of embezzlement; 74 Mich. 478. In a prosecution for the embezzlement of money held by defendant as bailee, it is immaterial that it was deposited in a bank for a time, so that the money actually converted was not the identical bills delivered to the bailee; 160 Mass. 319.

A taking is requisite to constitute a larceny, and embezzlement is in substance and essentially a larceny, aggravated rather than palliated by the violation of a trust or contract, instead of being, like larceny, a trespass. The administration of the common law has been not a little embarrassed in discriminating between the two offences. But they are so far distinct in their character that, under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and in

cases of embezzlement the proper mode is to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. And it is often no less difficult to distinguish this crime from a mere breach of trust. Although the statutes declare that a party shall be deemed to have committed the crime of simple larceny, yet it is a larceny of a peculiar character, and must be set forth in its distinctive character; 8 Metc. 247; 9 id. 138; 9 Cush. 284; 83 Ill. 425; 26 Ohio St. 265. See 81 Ill. 599; 13 Ark. 168; Bish. Cr. L. § 338.

When money is embezzled, the owner has a right to settle as for an implied contract, and such settlement is no bar to a criminal prosecution; 66 N. Y. 526; 111 Mo. 473.

A partner is not guilty of embezzlement in appropriating the funds of the firm to his own use; 53 N. W. Rep. (Ia.) 1066. See 3 Tex. App. 523; 13 Cox, C. C. 96.

When an embezzlement of a part of the cargo takes place on board of a ship, either from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to the reparation of the loss, in proportion to their wages. So too the embezzlement of property saved is a bar to salvage. When the embezzlement is fixed on any individual, he is solely responsible; when it is made by the crew, or some of the crew, but the particular offender is unknown, and, from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. The presumption of innocence is always in favor of the crew; and the guilt of the parties must be established beyond all reasonable doubt before they can be required to contribute; 1 Mas. 104; 4 B. & P. 347; 3 Johns. 17; Dane, Abr. Index; Wesk. Ins. 194; 3 Kent 151; See Pars. Sh. & Adm.

Stringent provisions are made by several acts of congress against the embezzlement of arms, munitions, and habiliments of war, property stored in public storehouses, letters, precious metals, and coins from the mint.

Embezzling Money. One who embezzles money from an estate forfeits his right to commissions, irrespective of whether he is or is not convicted of any crime in respect thereto, and his conviction does not involve the pecuniary amount of the commissions which he forfeits by reason of the embezzlement. 205 U. S. 292. See LARCENY AND EMBEZZLEMENT.

EMBLEMENTS (Fr. *emblem*, or *emblem*, to sow with corn. The profits of the land sown). The right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves. Co. Litt. 55 b; 4 H. & J. 189; 8 B. & Ald. 118; 64 Pa. 134.

It is a privilege allowed to tenants for life, at will, or from year to year, because of the uncertainty of their estates and to encourage husbandry. If, however, the tenancy is for years, and its duration depends upon no contingency, a tenant when he sows a crop must know whether his term will continue long enough for him to reap it, and is not permitted to re-enter and out it after his term has ended; 4 Bingh. 224; 10 Johns. 361; 5 Hail. 128; 48 Mo. App. 430. Whenever a tenancy, other than at sufferance, is from the first of uncertain duration and is unexpectedly terminated without fault of the tenant, he is entitled to emblements; 88 Ala. 508.

This privilege extends to cases where a lease has been unexpectedly terminated by the act of God or the law; that is, by some unforeseen event which happens without the tenant's agency; as, if a lease is made to husband and wife so long as they continue in that relation, and they are afterwards divorced by a legal sentence, the husband will be entitled to emblements; Oland's case, 5 Co. 116 b; or where the lessee of a tenant for life has growing crops unharvested at the time of the latter's death, he is entitled to them; 56 Conn. 374. A similar result will follow if the landlord, having the power, terminates the tenancy by notice to quit; Cro. Eliz. 460; but not where, under the terms of the lease, the landlord re-enters, and takes possession be-

cause the tenant fails to pay rent; 69 Hun 588. See other cases of uncertain duration, 9 Johns. 112; 8 Viner, Abr. 364; 3 Pa. 496. But it is otherwise if the tenancy is determined by an act of the tenant which works a forfeiture; as if, being a woman, she has a lease for a term of years provided she remains so long single, and she terminates it by marrying; for this is her own act; 2 B. & Ald. 470; 1 Price 53; 8 Wend. 584. A landlord who re-enters for a forfeiture takes the emblements; 7 Bingh. 154. Where a tenant wrongfully retains possession of land after his term has expired, crops planted by him so long as they remain unsevered, belong to the landlord; 45 Mo. App. 505. See LANDLORD AND TENANT.

All such crops as in the ordinary course of things return the labor and expense bestowed upon them within the current year become the subject of emblements,—consisting of grain, peas, beans, hemp, flax, and annual roots, such as parsnips, carrots, turnips, and potatoes, as well as the artificial grasses, which are usually renewed like other crops. But such things as are of spontaneous growth, as roots and trees not annual, and the fruit on such trees, although ripe, and grass growing, even if ready to cut, or a second crop of clover, although the first crop taken before the end of the term did not repay the expense of cultivation, do not fall within the description of emblements; Cro. Car. 515; Cro. Eliz. 463; 10 Johns. 361; Co. Litt. 55 b; Tayl. Landl. & T. § 534; Woodf. Landl. & T. 750.

But although a tenant for years may not be entitled to emblements as such, yet by the custom of the country, in particular districts, he may be allowed to enter and reap a crop which he has sown, after his lease has expired; Dougl. 201; 16 East 71; 7 Bingh. 465. The parties to a lease may, of course, regulate all such matters by an express stipulation; but in the absence of such stipulation it is to be understood that every demise is open to explanation by the general usage of the country where the land lies, in respect to all matters about which the lease is silent; and every person is supposed to be cognizant of this custom and to contract in reference to it; 2 Pet. 138; 5 Binn. 285. The rights of tenants, therefore, with regard to the *away-going crop*, will differ in different sections of the country; thus, in Pennsylvania and New Jersey a tenant is held to be entitled to the grain sown in the autumn before the expiration of his lease, and coming to maturity in the following summer; Mitch. R. P. 24; 54 Pa. 142; 2 South. 460; 13 Conn. 59; 24 N. J. L. 89; while in Delaware the same custom is said to prevail with respect to wheat, but not as to oats; 1 Harr. Del. 522; and trespass will lie against one who interferes with the land to the injury of the outgoing tenant; 6 Houst. 584.

Of a similar nature would be the tenant's right to remove the manure made upon the farm during the last year of the tenancy. Good husbandry requires that it should either be used by the tenant on the farm, or left by him for the use of his successor; and such is the general rule on the subject in England as well as in this country; 15 Wend. 169; 2 Hill, N. Y. 143; 2 N. Chipm. 115; 1 Pick. 371. A different rule has been laid down in North Carolina; 2 Ired. 326; but it is clearly at variance with the whole current of American authorities upon this point. See MANURE. Straw, however, is incidental to the crop to which it belongs, and may be removed in all cases where the crop may be; 22 Barb. 568; 1 W. & S. 509.

There are sometimes, also, mutual privileges, in the nature of emblements, which are founded on the common usage of the neighborhood where there is no express agreement to the contrary, applicable to both outgoing and incoming tenants. Thus, the outgoing tenant may by custom be entitled to the privilege of retaining possession of the land on which his away-going crops are sown, with the use of the barns and stables for housing and carrying them away; while the incoming tenant has the privilege of entering during the continuance of the old tenancy for the purposes of

ploughing and manuring the land. But, independently of any custom, every tenant who is entitled to emblements has a right of ingress, egress, and regress to cut and carry them away, and the same privilege will belong to his vendee,—neither of them, however, having any exclusive right of possession. See 46 Barb. 278; Tayl. Landl. & T. § 543; Woodf. Landl. & T. 754. LANDLORD AND TENANT; WAY-GOING CROP.

EMBRACEOR. In Criminal Law. He who, when a matter is on trial between party and party, comes to the bar with one of the parties, and, having received some reward so to do, speaks in the case or privily labors the jury, or stands there to survey or overlook them, thereby to put them in fear and doubt of the matter. But persons learned in the law may speak in a cause for their clients. Co. Litt. 369; *Termes de la Ley*.

EMBRACERY. In Criminal Law. An attempt to corrupt or influence a jury, or any way incline them to be more favorable to one side than to the other, by money, promises, threats, or persuasions, whether the juror on whom such attempt is made give any verdict or not, or whether the verdict be true or false. Hawk. Pl. Cr. 250; Bacon, Abr. *Juries*, M 3; Co. Litt. 157 b, 369 a; Noy 102; 11 Mod. 111, 118; 5 Cow. 503; 2 Bish. Cr. L. § 389; 2 Nev. 288; 5 Day 260. 8 Vt. 47; 20 Vid. 9.

Such an attempt is a misdemeanor at common law; Cl. Cr. L. 326.

EMENDA (Lat.) Amends. That which is given in reparation or satisfaction for a trespass committed; or, among the Saxons, a compensation for a crime. Spelman, Gloss.

EMENDALS. In English Law. This ancient word is said to be used in the accounts of the inner temple, where so much in emendals at the foot of an account signifies so much in bank, in stock, for the supply of emergencies. Cunningham, Law Dict. But Spelman says it is what is contributed for the reparation of losses. Cowel.

EMENDATIO PANIS ET CEREBIS. The power of supervising and correcting the weights and measures of bread and ale. Cowel.

EMERGENCY. An unexpected condition demanding immediate action. English.

EMIGRANT. One who quits his country for any lawful reason, with a design to settle elsewhere, and who takes his family and property, if he has any, with him. Vattel, b. 1, c. 19, § 224. See 2 Cra. 302.

EMIGRANT AGENT. A person engaged in hiring laborers to be employed beyond the limits of the State (as used in a revenue act of the State of Georgia). 179 U. S. 270.

EMIGRATION. The act of removing from one place to another.

It is sometimes used in the same sense as expatriation; but there is some difference in the signification. Expatriation is the act of abandoning one's country; while emigration is, perhaps not strictly, applied to the act of removing from one part of the country to another. See 2 Kent 34, 44; EXPATRIATION. See IMMIGRATION.

EMINENCE. A title of honor given to cardinals.

EMINENT DOMAIN. The superior right of property subsisting in a sovereignty, by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner.

The power to take private property for public use. 6 How. 536.

The right of every government to appropriate otherwise than by taxation and its police authority (which are distinct powers), private property for public use. Dill. Mun. Corp. § 584.

Different theories are advanced as to the precise

nature of the power, and it has been defined to be the right retained by the people or government over the estate of individuals, to reclaim the same for public use,—a kind of reserved right or estate remaining in the sovereign as paramount to the individual title. This conception of the right was at one time very generally accepted. The result of this view is to consider the right, theoretically, at least, as so much of the original proprietorship retained by the sovereign power in granting lands or franchises to individuals or corporations, wherever the common-law theory of original proprietorship prevails. An argument by analogy in support of this view is derived from the able examination and explanation of the origin of the *ius publicum* in 7 Cush. 90. See, also, remarks of Daniel, J.; 6 How. 533. Perhaps no better statement of this doctrine is to be found than this: "The highest and most exact idea of property remaining in the government, or in the aggregate body of the people in their sovereign capacity, giving a right to resume the possession of the property in the manner directed by the constitution and the laws of the state whenever the public good requires it." 3 Paige, Ch. 73; or, "The true theory and principle of the matter is, that the legislature resume dominion over the property, and having resumed it, instead of using it by their agents, to effect the intended public good, and to avoid entanglement in the common business of life, they revert it in other individuals or corporations to be used by them in such manner as to effect, directly or indirectly, or incidentally, as the case may be, the public good intended." 34 Conn. 78; see also 3 Yerg. 41; 8 Barb. 499; 113 N. Y. 275; 23 Mo. 597.

But this theory of resumption of original proprietorship is disapproved by the most authoritative writers, and with reason; the weight of authority and of argument are both against it. In this country the right is exercised by two governments, each sovereign, operating on the same property; the federal power can, upon no hypothesis, be based upon original grant in the older states, nor perhaps the state power, in the new states; a new sovereignty by acquiring territorial rights succeeds to this right over property of which the original grant was from the prior one; property may be appropriated a second time after the power has been already exercised and, upon the theory under consideration, necessarily exhausted; personal property is subject to the right, although the doctrine of reserved right cannot apply to it, while the reservation of the state will supply no argument, as it applies equally to personal property in which the state never had any title; and any paramount or reserved right could be granted, but this right never can; 113 Ill. 427; 38 Conn. 196. All these considerations are inconsistent with the theory suggested and seem to leave no alternative but to recognize the right as an attribute of sovereignty and in no sense an interest or estate. See Lewis, Em. Dom. § 3; Rand. Em. Dom. § 3; 32 Ia. 66; 3 Dev. & B. L. 451; 18 Wend. 9, 57; 2 Redf. Law. 229.

This right is distinguished from public domain, which is property owned absolutely by the state in the same manner as an individual holds his property; 37 Am. Jur. 121; 2 Kent, Com. 339; 3 Yerg. 389; 6 How. 540; termed by Cooley "the ordinary domain of the state"; Const. Lim. 642.

The right of eminent domain is not to be confounded with cases in which there exists a sovereign right to take or destroy private property without making compensation. The familiar case of taxation is readily distinguished. An owner is not entitled to compensation for damage or loss to property taken or destroyed during war. As to the distinction between the war power and eminent domain see 13 Am. L. Reg. 265, 337, 401; Mills, Em. Dom. § 3. So property may be taken under a controlling necessity, or to prevent the spread of a fire; 13 Co. 63; 28 N. J. L. 605; 50 Tex. 614; 7 Metc. 462; 13 Minn. 38; 18 Wend. 126; or, under the police power, to abate a nuisance (*q. v.*); 7 Cush. 53 (in which Shaw, C. J., draws the distinction between the police power and eminent domain); 126 Mass. 438; or by restraining the owner of land from making a noxious use of it; 105 Ill. 388; or by removing sand, etc., from beaches; 11 Metc. 55; compelling railroads to erect cattle guards; 27 Vt. 140; or holding them responsible for damages by fire (*q. v.*) from locomotives; 41 Ia. 297; compelling riparian owners to keep up a levee; 2 Mart. La. N. S. 455; or changing the course of a river; 47 Cal. 536; or as a forfeiture for violation of law; 3 R. I. 64; 8 Mich. 330; 26 Pa. 287; 12 La. Ann. 432.

History and nature of the power. The phrase "eminent domain" appears to have originated with Grotius, who carefully describes its nature; Lewis, Em. Dom. § 3, n.; Mills, Em. Dom. § 5; 1 Thayer, Cas. Const. L. 945. The power is a universal one and as old as political society, and the American constitutions do not change its scope or nature but simply embody it, as described by Grotius, in positive, fundamental law.

The language of Grotius is: "We have elsewhere said, that the property of subjects is under the

eminent domain of the state; so that the state, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added, that when this is done, the state is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss, if need be, contribute." Grotius, *Bel. et Pac. lib. iii. c. 20*. In the last clause quoted there seems to be an expression thus early of the doctrine which commonly forms a part of later legislation in the exercise of the right of eminent domain of the assessment of benefits on the person whose property is taken.

The term used by Grotius has been objected to by other writers, as, for example, Bynkershoek, who prefers the terms *imperium eminentia* rather than *dominium eminentia*, considering the former as more accurately expressing the idea of supreme power. At the same time that he advocates the use of a terminology to give more emphatic expression to the sovereign nature and character of the power, this writer discusses the question whether it may be exercised only for necessity as he conceives Puffendorf to urge, or also on the ground of convenience, or, to use the exact phrase of Grotius, utility. Bynkershoek considers either ground sufficient, but he also lays down the principle of requiring compensation not merely for a taking, but for "every loss which private persons bear for the common necessity or utility," thus anticipating the doctrine not recognized by writers of his time, but accepted by modern constitution makers, under the name of consequential damages, as well as compensation for loss occasioned by the taking private property. *Quest. Jur. Pub. lib. ii. c. 15*. Puffendorf also criticizes the term employed by Grotius. He divides the term control (*potestas*) into *dominium* as used in respect to what is one's own, and *imperium*, with respect to what belongs to others. According to him he would consider that *imperium eminentia* is more accurate than *dominium eminentia*; *De Jure Naturæ et Gentium, lib. i. c. 1. s. 19*. So Heineccius says: "We confess that this use of the word is not quite apt, for the conception of *dominium* and that of *imperium* are different; it is the latter that is not the former which belongs to rulers," but he adds, that as there is no doubt about the absolute right, it is useless to condemn the word when once it has been accepted; *Elem. Jur. Nat. et Gent. lib. ii. c. 2. § 128*.

All these writers agree that the power is exercised as an attribute of sovereignty, and in this conclusion there is a general concurrence. Vattel says: "In political society everything must give way to the common good; and if even the person of the citizen is subject to this rule, their property cannot be excepted. The sovereign or constituted administrator public affairs in the most advantageous manner, if it have not the power, on occasion, to dispose of every kind of property under its control. It should be presumed that when the nation takes possession of a country, property in specific things is subject to it, and upon this reservation." So it was said by the U. S. Supreme Court: "The power to take private property for public use, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in *Boom Co. v. Patterson*, 98 U. S. 418, a constitutional recognition;" *Field, J.*, 109 U. S. 513, 518.

Blackstone rests the doctrine upon necessity, and considers the recognized right to compensation as evidence of the great regard of the law for private property; while the good of the individual must give way to that of the community. The state may interpose to compel the individual to acquiesce, but such interposition is not arbitrary but only upon full indemnification and equivalent for the injury thereby sustained. The nature of the transaction he states thus: "All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this restriction of power which the legislature indulges with caution, and which nothing but the legislature can perform." 1 Sharsw. Illa. Com. 139, n. 19.

This statement by Blackstone of English law is to be borne in mind hereafter in considering the nature and origin of the right to compensation. Here we have the right defined with the same limitation which, as will be seen, is sometimes claimed to rest solely on express provisions of written constitutions. And the force of this statement is strengthened, by the observation of Fuller, J., that there were many cases in which an injury is suffered by individuals for which there is no right of action, as in a case of the destruction of private property in time of war for the public defence; *id.*; 4 Term 794; 3 Wils. 461; 6 Taunt. 29.

Notwithstanding this recognition of the nature of the power the subject of eminent domain as understood in the United States is practically eliminated from English law and the title itself is usually not to be found in digests or text books of that country. "That there is no eminent domain in English jurisprudence," says a recent writer on the subject, "is because the power is included, and the obligation to compensate lost, in the absolutism of parliament." "The only technical term approximating to eminent domain is compulsory power, as used by the enabling municipal and other corporations to take property for their use. The multiplication of such acts led to the enactment of several general laws, notably the Lands Clauses Consolidation Act (*q. v.*), which is a complete code. This act or one of the others of a similar class, or the Railway Clauses Consolidation Act, is incorporated by reference in the various special acts;" *Rand. Em. Dom. § 7*.

It follows of necessity that English decisions do not apply to the vast number of constitutional questions constantly arising in this country, though the adherence of English legislation to the same great principle of compensation necessarily results. In producing a body of law in England covering most of the questions which are adjudicated in our own

country respecting the construction and application of statutes under which the power is exercised.

The right of compensation. Though not included in the definitions of the power as usually given, the necessity for compensation is recognized by the most authoritative writers as an incident to the right, an original element of its existence, and not a superimposed limitation.

Accordingly eminent domain is said with more precision to be the right of the nation, or the state, or of those to whom the power has been lawfully delegated, to condemn private property to public use, and to appropriate the ownership and possession of such property for such use, upon paying to the owner a due compensation, to be ascertained according to law; Black, Const. L. 350.

Nearly if not all of the American constitutions provide for compensation. Professor Thayer states that "now (1895) only three constitutions, New Hampshire, North Carolina, and Virginia are without a clause expressly requiring compensation." The provisions of the several constitutions are given in Randolph, Em. Dom. 401 to 416, and Lewis, Em. Dom. §§ 14 to 53 (the latter including the prior as well as the last state constitutions). With respect to compensation, Kent says: "This principle, in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law;" 2 Com. 339.

It would seem to be the most satisfactory conclusion both upon reason and authority that neither the right of the state to take nor the right of the individual to compensation required a constitutional assertion. The right to take private property for public use does not depend on constitutional provisions, but is an attribute of sovereignty; 2 Harr. N. J. 129; 2 Dev. & Bat. 451; it (the right) exists, and the only limitation upon its exercise is that imposed by the state or federal constitution; 5 Del. Ch. 524.

So also the *right to compensation* is an incident to the exercise of the power, inseparably connected with it; 17 N. J. L. 129; "this is an affirmation of a great doctrine established by the common law for the protection of private property;" 2 Story, Const. § 1790; "the obligation attaches to the exercise of the power, though it is not provided for by the state constitution, or that of the United States had not enjoined it;" Bald. C. C. 220. "If by the assertion that this right existed at common law independent of the declaration of rights, is meant that compensation in such case is required by a plain dictate of natural justice, it must be conceded. The bill of rights declares a great principle; the particular law prescribes a practical rule by which the remedy for the violation of right is to be sought and afforded;" Shaw, C. J., in 12 Cush. 475. In New Hampshire, although the constitution did not contain an express provision requiring compensation, "yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the state, that the legislature cannot constitutionally authorize such taking without compensation;" 51 N. H. 504. It is a condition precedent to its exercise under a statute that it make reasonable provision for compensation to the owner of the property taken; 159 U. S. 380; 2 Johns. Ch. 162.

There are *dicta* which countenance the opinion that compensation is not of the essence of eminent domain, that the usual constitutional clause is restrictive, not declaratory, so that, were it omitted, the state could properly take property without paying for it; Rand. Em. Dom. § 226, citing 98 U. S. 403; 100 *id.* 513; 21 Conn. 313; 5 Del. Ch. 524; 17 Wend. 649; 54 N. H. 590, 647. In one of these cases the language used is "the provision found in the federal and state constitutions for just compensation for property taken is no part of the power itself, but merely a limitation upon the use of it, a condition upon which it may be exercised;" 100 U. S. 513.

One of the leading text writers on the subject takes this view; Lewis, Em. Dom. § 10; and argues

it with great earnestness, treating it as the same question discussed by Sedgwick and Cooley and referred to supra under the title Constitutional "q. v.", whether there are limitations of legislative power other than those contained in the constitutions, federal and state. The real question involved in the relation of compensation to eminent domain is a different one. It is not whether the sovereign powers of government exercised by American state legislatures are subject to undefined limitations not embodied in the written constitution, but what is the sovereign power which we term eminent domain, as recognized and exercised by governments long before written constitutions were known. It is true that some courts in discussing this subject have fallen into the same confusion of ideas, but the distinction none the less exists and should be borne in mind. Is it the right to take private property arbitrarily, or only to take it on making compensation? Lewis thinks "the question has lost most of its practical interest from the fact that all states except one (North Carolina), now have an express limitation in their organic law touching the exercise of this power." It is submitted, however, that the precise definition and true limitation of so automatic a governmental power can never become a matter of indifference. So long as one state constitution is silent on the subject of compensation it remains a practical question in American constitutional law and the existence of a reserved power to amend or abolish any existing constitution, coupled with the prevalent tendency to attack and impair the right to private property, must necessarily lead to it, independently of the theoretical interest in maintaining correct definitions of the inherent rights of sovereignty.

Suggestions in the line of the cases cited by Randolph and the views expressed by Lewis, led to practical results in a few cases. In South Carolina land was taken for roads without compensation; 2 Bay 38; 3 Hill 100; but in New York, taking wild land without compensation was held unconstitutional; 19 Barb. 118. In New Jersey and Pennsylvania, the subject rested on a statutory rather than a constitutional basis. In Louisiana land on the proprietors included an extra allowance for roads; 42 N. J. L. 619; 30 Pa. 302; and this was held compensation; 100 Pa. 302. See 132 *id.* 636. Under the New Jersey constitution, land might be taken for highways without compensation until otherwise directed by the legislature. In Louisiana land on the Mississippi River can be taken without compensation for the construction of a public levee under the old French law, and this applies to the land of a citizen of another state, provided he receive the same measure of right as citizens of Louisiana in regard to their property similarly situated; 150 U. S. 452.

In Thayer's Cases on Constitutional Law the editor discusses this subject in a very interesting note and reaches the somewhat metaphysical conclusion that the right to compensation is a component part of the right to take, though it arises at the same time and the latter cannot exist without it, the two being compared to shadow and substance.

He argues that the right of the state springs from the necessity of government, while the obligation to reimburse state property is a right of the individual. These two, therefore, have not the same origin; they do not come, for instance, from any implied contract between the state and the individual, that the former shall have the property, if it will make compensation. The right is not a mere right of pre-emption, and it has no condition of compensation annexed to it, either precedent or subsequent. But there is a right to take, and attached to it, as an incident, an obligation to make compensation; this latter, morally speaking, follows the other, indeed, but it is not a right, it is a duty, and it flows from another source. From this he argues that for the taking the citizen cannot complain; if recompense is not made, the duty of the sovereign is violated and the individual "has an eternal claim against the state, which can never be blotted out except only by satisfaction, but this claim is for compensation, and not for his former property," and, "in the absence of constitutional provisions," the loss "must be regarded as *damnum absque injuria*." 1 Cas. Const. L. 953, note.

The distinction between this theory and the doctrine that the right to compensation is an inherent attribute rather than a subsequent limitation of the original right would seem to be rather ingenious than practical. The citations in the same note from the civilians show clearly that, in their view, compensation was essential, and even in the states whose organic law was, at the time of the decision, either silent or contained merely a general declaration as to private rights the necessity of compensation has been recognized; Rand. Em. Dom. § 227, citing 3 N. H. 534; 35 *id.* 134; 3 Md. Ch. 248; Baker, C. C. 208; 17 N. J. L. 129; 70 N. C. 550; 111 *id.* 278; 13 Ark. 198; see also *Monongahela Navigation Case*, 148 U. S. 312; 13 Cush. 475. The mistaken idea that the fifth amendment of the constitution of the United States, applied to the states, seems to have contributed to this opinion in some cases; 2 Johns. Ch. 162; 1 N. J. Eq. 694. "The true doctrine is, in the writer's opinion," says the author last cited, "that which requires the payment of compensation whether it be expressly enjoined or not. The modern concept of a constitutional state as restricted in the United States to the right of eminent domain for spoliation of the individual." The same view is supported by Mills, Em. Dom. § 1.

Whatever view may be taken of the general doctrine of the law on this subject the necessity of compensation is firmly imbedded in American constitutional law.

It may be considered settled that the exercise of the right is not justifiable, where the statute fails to provide compensation; and the courts will, in general, substantially declare such an act unconstitutional; 2 Kent 339, n.; *dicta* in 4 Term 794; 1 Rice 883;

3 Leigh 337; 44 N. H. 143; 47 Me. 345; 18 Tex. 585; 21 Ohio St. 607; 26 Ill. 436; 89 Ga. 205; 44 La. Ann. 173; 116 Mo. 114; 143 U. S. 812; 183 *id.* 558. See *contra*, 3 Hill, S. C. 100; 54 Fed. Rep. 559. This compensation must be in money; 2 Mass. 125; 3 Dall. 304; 44 Cal. 51; 66 Ill. 329; 89 N. J. L. 665.

In constitutional construction the words "just," "ample," "full," "adequate," "due," etc., prefixed to the word "compensation," has been said to lend no appreciable additional weight; Rand. Em. Dom. § 223; but much stress has often been put upon it by courts. The word "just" in the fifth amendment excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner; 148 U. S. 326. The word "just" is not used as an antithesis of unjust, but "evidently to intensify the meaning of the word compensation;" 8 Nev. 165; it means recompense "all circumstances considered;" 5 Blackf. 384, "to save the owner from suffering in his property or estate . . . as far as compensation in money can go;" 60 Me. 290; "making the owner good by an equivalent in money;" 27 Wis. 478.

The federal power. All lands held by private owners everywhere within the geographical limits of the United States are subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; 135 U. S. 641.

The right of eminent domain is one of the powers of the federal government essential to its independent existence and perpetuity. Among the purposes for which it is exercised are the acquisition of lands for forts, armories, arsenals, navy yards, light-houses, custom-houses, post-offices, court-houses, and other public uses. The right may be exercised within the states without application to them for permission to exercise it; 91 U. S. 367; the fact that the power has not been exercised adversely does not disprove its existence, nor does the fact that in some instances the states have condemned lands for the use of the general government; *id.* It is a right belonging to a sovereignty to take private property for its own public uses but not for those of another; hence the power of the United States must be complete in itself, it can neither be enlarged nor diminished, nor can the manner of its exercise be regulated by the state whose consent is not a condition precedent to its enjoyment; *id.*

This right exists in the District of Columbia, the territories, and lands within the United States acquired through cession; 4 Cra. C. C. 75; 147 U. S. 232.

The power of eminent domain in the general government as exercised for local purposes in the District of Columbia is the same as that exercised by a state within its own territory; 147 U. S. 282; there and in the territories it exists in all cases in which a similar power could be exercised by the states; 101 U. S. 129. It is among the powers derived by the territorial governments immediately from the United States; 2 Mich. 427; 26 Pac. Rep. (Ariz.) 376; 1 Chand. Wis. 71.

Within the states the United States has the right of eminent domain for federal purposes; 91 U. S. 367; 135 *id.* 641. This power has been exercised to condemn land for military posts; 7 How. 185; fortification; 18 Cal. 229; navigation work; 59 Fed. Rep. 9; light-house and coast survey purposes; 10 Cal. 229; 54 N. H. 590; 160 U. S. 499; the construction of interstate railroads; 127 U. S. 1; water supply; 14 Md. 444; post-office; 91 U. S. 367; 106 Mass. 356; a national cemetery at Gettysburg; 160 U. S. 668. The weight of authority is in favor of the exercise of the right by the United States directly when property is required for federal purposes and not through the right of eminent domain of the state; 14

Md. 444; 96 N. Y. 327; though the latter method is upheld in some cases; 1 Barb. 24; 103 Mass. 356; 54 N. H. 590; but it is held that the United States may delegate to a tribunal created under the laws of the state the power to fix and determine the amount of compensation to be paid by the federal government for private property taken by it in the exercise of the right of eminent domain; 109 U. S. 513. The United States circuit court has jurisdiction to entertain proceedings instituted by the United States to appropriate land for a postoffice; 91 U. S. 387. In this case there was no act of congress relating to the subject except the appropriation of money, and a direction to the secretary of the treasury to purchase a site, and the jurisdiction was objected to. The supreme court held that the proceedings were a suit at law and cognizable under the general provisions of the judiciary act. As to the federal right, see 14 Am. & Eng. R. Cas. 30; 15 Am. L. Reg. 193; 91 U. S. 367. The state cannot condemn for the United States and bind the latter as to compensation; 23 Mich. 471, in which the whole subject of the exercise of this right by state and federal governments was considered by Cooley, J. Proceedings may be in the United States courts, or in state courts, in the name of the United States, and state practice should be followed; 96 N. Y. 227; 49 Wis. 395; 109 U. S. 513; or may by act of congress be made to follow some state statute; 82 Pa. 383.

Public uses of the federal government have been held to be public uses of the state; 14 Md. 444.

Proceedings under state laws for condemnation of lands, involving the ascertainment by judicial proceedings of the value of property to be paid as compensation, may be removed to the United States court; 124 U. S. 197; 75 Fed. Rep. 84; if they take the form of a proceeding before the courts; 98 U. S. 403; the preliminary proceedings are in the nature of an inquest and not a "suit," but when transferred into the state court by appeal it becomes one; *id.*; 115 *id.* 1, 18. As to removal of such proceedings, see 25 Am. L. Reg. 183.

An interesting question referred to but not decided by the supreme court is whether a state can exercise this right as to lands of the United States not held for actual public uses, without the consent of congress or of an officer having power of disposal of public lands. It has been decided in the affirmative; 6 Porter, Ala. 472; and it was also held that an abandoned military reservation is part of the public lands and that the state may use them to construct public roads or bridges, by the right of eminent domain; 6 McLean 517; but a municipal corporation has no right to open streets through property of the United States, adjacent to the city, although the ground had been laid out in lots and streets by the government; 7 How. 185. In the latter case it was said that such power would exist as to land "purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose;" but in a later case this and other like expressions were characterized as *dicta*, and it was said that the view could hardly be reconciled with special railroad and general legislation of congress, and that "when that question shall be brought into judgment here, it will require and receive the careful consideration of the court;" 117 U. S. 161.

Exercise of the power through agents. The right of eminent domain is also an attribute or part of the sovereignty of the states, and is by them exercised for a great and constantly increasing variety of purposes, some of which are for governmental uses either of the state at large or of local municipal bodies, or by private persons or corporations authorized to exercise some function of such public character, technically known as a public use. When this is conferred upon private persons or corporations the right is termed by some writers the delegated power of eminent domain; 4 Thomp. Corp. ch. cxxii.; and such person or corporation is the agent of the state for its exercise. Strictly speaking it is not accu-

rate to say that the state delegates a right of sovereignty, of which it cannot divest itself, hence it is more exact to speak of it as exercising the power through an agent. While corporations are usually selected for such agency, it may be and sometimes is conferred upon individuals; 5 Ohio 485; 50 N. H. 591; 4 Wend. 667; 70 Cal. 159; and where incorporation and a franchise were granted to an individual "and associates" it was held that he need not associate any one with him; 8 Me. 365. It has also been held that an individual as purchaser of a railroad and franchises at the foreclosure sale acquired the right to condemn lands; 93 U. S. 217; 39 La. Ann. 417. In one case it is said that a statute neither did nor could confer this right "upon private persons, but only corporations organized for public purposes can be clothed with such privileges;" 80 Pa. 59; but this expression, so far as it concerns the power of the legislature, was *obiter*; and a case often cited with this only decides that under a general act, then under construction, the power could not be exercised by individuals, because there was no provision of law for its exercise by individuals; 10 Ohio St. 372.

The exercise of the power by such agencies is governed in the main by the same principles and limitations as when it is directly exerted by the federal or state government, and the exceptions to this rule readily disclose themselves in the consideration of the natural divisions of the subject. When its exercise by a private corporation is authorized it has been termed not a franchise but a means to the enjoyment of corporate franchises; 10 Ohio St. 373; but the contrary view was expressed by Bradley, J., in 127 U. S. 1, and it is remarked by a recent writer that "a power conferred upon certain corporations, which is not possessed by the citizens generally, and which is in derogation of their rights, so nearly resembles a franchise as to justify its treatment" under that title; 4 Thomp. Corp. § 5587. The use of the term franchise is not defined, by those who most use it, with sufficient precision to be conclusive against either view. It is as much a franchise, if one at all, if exercised by an individual as a corporation, though the writer quoted seems to overlook the possibility of this. It is, however, a grant of power or privilege from the sovereign to the citizen or subject, to do what would but for the grant be unlawful, and it undoubtedly does come within the usually accepted definition of the word franchise (*q. v.*). As is true with respect to franchises generally, the grant of the power is never presumed unless the intent to part with it is clearly expressed; *id.* § 5598; Lewis, Em. Dom. § 240; 93 Pa. 150; 74 Ga. 570; 42 Mo. 235; 41 N. J. Eq. 43; and its exercise by the state may determine a preceding contract made by the state without impairing the obligation of such contract, the right itself being always reserved by implication, if not expressly; 84 Va. 271.

It is no objection to a grant of the power to a corporation that the latter is seeking to effect its own private gain; 4 Thomp. Corp. § 5589; for that is said to be merely compensation for the risk assumed for the benefit of the public; 17 N. H. 47. When unrestrained by constitutional provision, the discretion of the legislature in selecting agents through whom the power is to be exercised is absolute. In a state whose constitution prohibits its exercise by foreign corporations they cannot or course act unless domesticated in the state; 52 Fed. Rep. 627; but otherwise they may do so; 39 N. Y. 171; 143 N. Y. 411; 33 Pa. 175; 145 Mass. 450; 57 Ia. 560; 81 Mo. 126; 69 Hun 615; but a constitutional incapacity cannot be avoided by acting through a domestic corporation; 27 Neb. 699 (see 22 Neb. 628; 69 Ia. 563); though by consolidating with a domestic corporation it may exercise the power; 47 Mich. 456; 36 Minn. 85; as thereby the consolidated company becomes a corporation of the state; 33 Neb. 171.

How the question of public use is determined. It is well settled that the power exists only in cases where the public exigency de-

mands its exercise. See remarks of Woodbury, J., and cases cited by him in 6 How. 545. But the practice of all the states and of the federal government, since this decision, in condemning land for purposes of public convenience but not necessity, has been so frequent that the legislative control over the necessity and the particular location is almost universally conceded. Mills, Em. Dom. § 11. In a proceeding to condemn land, the term "necessary" does not mean that it is indispensable or imperative, but only that it is convenient and useful; and if an improvement is useful, and a convenience and benefit to the public sufficient to warrant the expense in making it, then it is necessary; 91 Mich. 149; but it is no ground for a right to take land that its resources could be utilized at a much less expense than the land already owned; 64 Cal. 123. In 4 Thomp. Corp. § 5593, in concluding a discussion of the various theories as to what uses are public uses, the author says: "But it is a sound conclusion that the use must be a public use in the sense that it is open to such members of the public as may choose to use it upon the performance of reasonable or proper conditions; or in the sense of satisfying a great public want or exigency. On the other hand, where the public use is not compulsory, but is optional with the private corporation seeking the condemnation, it is not a public use." In U. S. v. Gettysburg Electric Railway Co., 160 U. S. 668, it was said: "The constitution provides that private property shall not be taken for public uses without just compensation. These words are a limitation, the same in effect as 'You shall not exercise this power except for public use.'"

The legislature cannot so determine that the use is public as to make its determination conclusive on the courts, and the existence of a public use in any class of cases is a question for the courts; Mills, Em. Dom. § 10; 44 Vt. 648; 59 Wis. 984; 21 W. Va. 534; 42 Ohio St. 202; 37 Md. 537; 51 Cal. 269; 34 Ia. 311.

The Missouri constitution provides, as do those of Colorado, Mississippi, and Washington, that it shall be a judicial question whether the use contemplated is public, and that question will be determined without the aid of a jury; 91 Mo. 54.

The presumption is in favor of the public character of a use declared so by the legislature; 79 Pa. 257; 21 W. Va. 534; and unless it is clear that it is not possible for the use to be public, the courts cannot interfere; Mills, Em. Dom. § 10.

In an early case it was said that in general the question whether a particular structure, as a bridge, or a lock, canal, or road, is for the public use, is a question for the legislature, and it may be presumed to have been decided by them; 12 Cal. 475; citing 4 Fick. 439; but in a later case when this position was broadly urged, it was held to be obviously untenable, and that, where the power was exercised, it necessarily involved an inquiry into the rightful authority of the legislature under the organic law, and that the legislature had no power to determine finally upon the extent of its authority over private rights; 16 Gray 417. In this case what is probably the true doctrine was stated, that it is the duty of the courts to make all reasonable presumptions in favor of the validity of the legislative act. But this is simply the application to this particular subject of the general presumption of the constitutionality of legislative acts.

This right of the courts to determine the question of public use was maintained in 103 N. Y. 375; but if the court determine the matter in question to be a public use, their power is exhausted and the extent to which property shall be taken for it is wholly in the legislative discretion; 147 U. S. 233. Whether the necessity exists for taking the property is a legislative question; 37 N. E. Rep. (Mass.) 437.

The grant of the right is a determination on the part of the legislature that the object is necessary; 31 N. J. Eq. 475; and of this it is the judge; 80 Ky. 259; 98 N. Y. 109; 25 Mo. 540; and parties cannot be heard on the question of necessity; 127 Mass. 408. If it is a public use there is no restraint on legislative discretion and the judicial function is gone; Mills, Em. Dom. § 11. If the use is certainly public courts will not interfere; only when there is an attempt to evade the law and procure condemnation

for private uses will courts declare it void; *Mills, Em. Dom.* § 11; 17 W. Va. 812. The fact that a railroad has located its line across certain land, is *prima facie* proof that it is necessary for it to take that land for the use of its road; 139 Ill. 151. Whether the land is reasonably required is a question of fact to be determined by the court or jury, and the burden of proof is on the plaintiff; 93 Cal. 528.

It has been held that when under the constitution a federal question arises, the supreme court will determine the law without reference to state decisions; 16 How. 432. See 16 Wall. 678; 53 N. Y. 128. But in determining what is a taking of property, the federal courts will accept the definition of the word property by the state court, where it is clearly settled; 18 Wall. 163; 147 U. S. 248; 94 id. 324; 10 Wall. 497; even following reversals by the latter; 2 Black 599; 6 Pet. 291; 16 Wall. 678.

What is a public use. Property taken for public use need not be taken by the public as a body into its direct possession, but for public usefulness, utility, or advantage, or purposes productive of general benefit or great advantage to the community; 33 Conn. 532. It is not necessary that the entire community, or any considerable portion of it, should participate in an improvement to constitute a public use; 16 Gray 417; 58 Mo. 175; it may be limited to the inhabitants of a small locality; but the benefit must be in common, not to particular persons or estates; 18 Cal. 229. See *Mills, Em. Dom.* § 12. If a considerable number will be benefited the use is public; 75 Me. 91; 97 Ind. 79; as a school available for use by a portion of the community taxed to pay for the property taken; 83 Vt. 271.

The legislature determines the number of people to be benefited to make the use public; 2 Stew. & P. 199; but the incidental benefit of additional facilities for business, etc., will not make use public; 97 N. Y. 42.

It has been judicially decided that the following are public uses:—an almshouse; 7 N. Y. 314; a public bath; 101 N. Y. 132; a schoolhouse; 117 Mass. 384; 33 Vt. 271; 7 R. I. 545; 48 Mo. 243; 68 Pa. 170; a market; 28 Hun 515; 49 Mich. 249; telegraph and telephone lines; 103 Ill. 401; 53 N. J. L. 341; 43 id. 381; 136 Mass. 75; 53 Ala. 211; 92 Cal. 528; water-works for a town; 4 Gray 500; 126 Mass. 416; 67 Col. 659; water supply for a town; 27 Ala. 104; 129 Mass. 138; 55 N. J. L. 235; the improvement of the navigation of a river; 12 Cush. 475; and the creation of a wholly artificial system of navigation by canals; *id.*; 3 Cra. C. C. 599; 20 Johns. 733; 41 Ind. 364; 39 N. Y. 171; the drainage of marshes; 2 Pet. 245; 119 Mass. 583; 98 Ind. 587; sewers; 11 Gray 345; wharves; 83 Ky. 628; 110 N. Y. 569; 135 id. 253; ferries; 8 Me. 365; 1 N. & McC. 387; irrigation; 22 Ore. 389; 69 Cal. 255; 164 U. S. 112, 160; turnpikes; 35 N. H. 184; 27 Conn. 641; bridges; 5 Ohio 485; 91 Pa. 216; 3 Ga. 31; 36 N. H. 404; Wright, Ohio 364; the criterion being, whether the public may use by right, or only by permission, and not to whom the tolls are paid; 1 Duv. Ky. 372; cemeteries; 46 Vt. 218; 103 Mass. 106; 20 Conn. 466; even if the price of the lots therein differ; 53 id. 551; but not if used exclusively for members of a private corporation; 66 N. Y. 569; a restaurant at a summer resort; 91 N. Y. 552; parks; 127 Mass. 408; 45 N. Y. 234; 99 id. 569; 75 Me. 91; 55 Wis. 328; 61 Ill. 115; 117 U. S. 379; 147 id. 282; even if paid for by a county, though beneficial only or mainly to a neighboring city; 58 Mo. 175; the erection of a memorial hall or monumental statues, arches, and the like, the publication of town histories, decorations on public buildings, parks designed to provide for fresh air or recreation, educate the public taste, or inspire patriotism; 153 Mass. 255. A highway is a public use; 11 Ind. 420; 103 Mass. 120; but it must connect with another highway; 108 N. Y. 375; 64 Wis. 588; 84 Pa. 90; though at one end only; 56 Wis. 429; 39 Conn. 231; 24 N. Y. 559. It may, however, terminate on private property; 39 N. J. L. 226; 87 Ill. 189; 43 Conn. 437; or at a river; 63 N. H. 530; 125 Ind. 562; or at a church;

63 Pa. 471. So the improvement of a harbor is a public use, (but not the extension of harbor lines to prevent the placing of buildings on either side of a bridge); 60 Conn. 278; and the reclamation of flat land; 1 Thayer, Cas. Const. L. 1025, n. citing cases. Gas works; 63 Barb. 437; 123 Pa. 374; 2 R. I. 15; a state military encampment; 54 N. J. L. 268; a public urinal; 130 Mass. 170, are public uses.

Other instrumentalities of commerce held to be public uses are, pipe lines for the transportation of oil or natural gas; 5 W. Va. 332; dams for booms used in logging; 3 Dill. 465; 56 Me. 443; 57 N. H. 110; see also 98 U. S. 403; 28 Minn. 534; 65 Pa. 242; a flume for the transportation of lumber; 16 Ore. 87. As to the condemnation of land to facilitate mining operations there is a conflict of decisions. In some of the states the courts have refused to permit it; 51 Cal. 269; 73 id. 432; 84 Pa. 90; 18 Fed. Rep. 753; while in others they have considered it justifiable on the ground of public utility; 59 Ga. 419; 15 Nev. 147; and the owner of a mine may have land condemned for a railroad for the transportation of the products of his mine to the nearest thoroughfare by rail or water, provided such a railway shall be free to all who wish to use it; 32 Pa. 169; 47 N. J. L. 518; 37 Md. 537; 41 Fed. Rep. 294; and this latter provision will be implied from the statute authorizing the condemnation; 63 Ia. 25; but it has been held that a mine-owner cannot condemn land solely for the transportation of his own products; 56 Pa. 413; 70 id. 210; 118 Ill. 427; 40 Ohio St. 504; or to take water to the mines; 63 Cal. 73.

The right to condemn land for mill sites has been frequently granted; 8 Blackf. 266; 3 Yerg. 41; 12 Pick. 467; 12 Cush. 475; 12 Metc. 132; 44 Vt. 648; 1 N. J. Eq. 694; 33 Conn. 532. In the last case it was urged that it was against public policy to allow such great agencies as streams capable of propelling machinery to go to waste, and that to utilize such power, even for the erection of private mills, promotes the wealth of the state and is of incidental benefit to the people. But although courts have recognized this right to a certain extent, 15 Wall. 500, it has been with reluctance and it will not now probably be sustained; *Mills, Em. Dom.* § 15; it has been doubted; 12 Wis. 213; and by some denied; 40 Me. 317; 3 Barb. 42; 34 Ala. 311; 35 Mich. 333, in which, after reviewing the authorities, Judge Cooley holds the question not one of necessity but of comparative cost. A general statute, delegating to individuals the power to condemn land and locate mills, was held unconstitutional; 42 Ga. 500.

A railroad is a public use; 135 U. S. 641; 20 Fla. 579; 9 N. Y. 588; 2 Harring. 514; 3 Paige 45; 2 Mich. 427; 43 N. Y. 137; 143 id. 67; even where used for freight only; 47 N. J. L. 43; so also are all appurtenances essential to the reasonable, convenient, and proper construction, maintenance, and operation of the road, such as yard-room; 46 N. Y. 137; 34 Vt. 484; and terminals; 66 Me. 26; turnouts, engine-houses, depots, shops, turntables; 17 Ill. 123; 4 Ohio St. 308; and repair shops, stock-yards; 139 U. S. 128; 49 Mo. 165; paint-shop, lumber, and timber sheds; 18 Ill. 324; wharves; 77 N. Y. 248; a place of deposit for waste earth; 8 Phila. 145; but not shops for manufacturing new rolling stock; 46 N. Y. 546; 6 How. 507; 34 Vt. 484; or tenement houses for employees; *id.*; 43 N. Y. 137; 23 N. J. L. 510; as to an ordinary warehouse, it was doubted; 4 Coldw. 419; 59 Pa. 23; but a building for handling freight was not a mere warehouse; 77 N. Y. 248; so land for a track to an elevator could be taken; 47 N. Y. 150; but not for a railroad constructed solely to convey passengers to see the Niagara River and whirlpool for revenue to a private person; 108 N. Y. 375. See *Lewis, Em. Dom.* § 170; *Rand. Em. Dom.* § 45.

It is not a public use to provide for fencing a large tract of land subject to floods which carried off the fences; 12 Bush 312; or to acquire swamp land and build docks, warehouses, factories, etc.; 96 N. Y. 42; or to settle private controversies concerning title by transferring the land of one to

another; 2 Dall. 304; 1 S. & R. 54. The latter cases arose under legislation to settle titles and adjust controversies in Pennsylvania under the Connecticut grant.

It is settled that the legislature cannot authorize the taking of property for a private use, but the decisions conflict as to the case of private ways, or roads laid out under statutes existing in many states. By many courts they are held unconstitutional as being a private use; 4 Hill 140; 25 Ia. 540; 82 id. 358; 43 Ind. 455; 27 Mo. 373; 40 Ill. 175; but in others such roads are held to be a public use, and the word private is construed as a word of classification and not technical or describing the use; 32 Cal. 241; 83 id. 507; 4 Harring. 580; 11 Vt. 600; 34 Ala. 311; 4 Ohio St. 494; 103 Mass. 202; 84 Pa. 90; 77 id. 39; 22 N. J. L. 356.

The latest case in the United States Supreme Court thus expresses the general principle:—"The taking by a state of the private property of one person without the owner's consent for the private use of another is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." An act authorizing a board of transportation to require a railroad corporation to grant to private persons a location on the right of way of a railroad for the purpose of erecting a third elevator is invalid; 164 U. S. 403. The prohibition is against taking without due process of law. So at the same term the court say:—"There is no specific prohibition of the Federal Constitution which acts upon the states with regard to their taking private property for any but a public use;" 164 U. S. 112.

What is a public use, for which private property may be taken by due process of law, depends upon the particular facts and circumstances connected with the particular subject-matter; *id.* 112. See notes on this subject in which the cases are collected: 91 Am. Dec. 585; 3 Am. St. Rep. 503.

What may be taken. Every kind of property may be taken under this power. It "is attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public uses when necessity demands it." *Lewis, Em. Dom.* § 262; 87 Ill. 374; 324; 39 Ala. 307; 36 Conn. 196; 41 Ind. 334; 111 Mass. 125. The general rule to be gathered from all the authorities, considered together, is, that a legislative grant of power to condemn property, expressed in general terms, confers on the grantee power to take all kinds of property except property already devoted to public use and necessary for the exercise of such use; 27 Cent. L. J. 207; it makes no difference whether corporeal property, as land, or incorporeal, as a franchise, is to be affected; 14 Wend. 51; 1 Baldwin, C. C. 205; 160 U. S. 163; see 1 Rice 383; 11 N. H. 19; 17 Conn. 454; 11 Pet. 420; 8 N. H. 393; 3 Hill, S. C. 109; 8 Dana 289; 5 W. & S. 171; 2 Miss. 21; 130 N. Y. 249; 154 Mass. 579; 68 Miss. 805; 92 Cal. 528. The power has been held to exist, to build a railroad over basins maintained by a water power company for public purposes, and its franchise is not thereby destroyed; 23 Pick. 360; to take for a public road the property, easement, and franchise of a bridge company; 6 How. 507; to build a railroad over the land of a gas company not then in use but likely to become necessary; 63 N. Y. 326; over the lands and right of way of a canal company; 11 Leigh 42; 14 Ill. 314; over lands of a state asylum for deaf and dumb; 3 Ind. 421; over a turnpike which would not be materially injured; 21 Vt. 290; but not over lands, not necessary for the railway, owned and used by the state for an institution for the blind; 43 Ill. 303. In a proceeding by a railroad company to condemn for terminal warehouses the land of a steamboat company, the test whether the defendant held its land for such use as to exempt it from condemnation was said to be not what the defendant "does or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it. It does not so hold its

property impressed with a trust for the public use unless its charter puts that character upon it and so that it cannot be shaken off; 99 N. Y. 12. Any property belonging to a railway not in actual use or necessary to the proper exercise of the franchise thereof may be taken for the purpose of another railroad under a general power; 17 W. Va. 812; 112 Ill. 599; 63 Barb. 151; 133 Mass. 277; 146 Pa. 297; but not where the loss of the property to be taken is necessary to the exercise of the franchise of its owner; 81 Ill. 523; 3 Ore. 164. The same general principles are applied to cases where a municipal corporation attempts to condemn railroad property; if the property is not necessary to the new use and the latter is destructive of the old one it is not permitted to be taken; 23 A. & E. R. R. Cas. 36; s. c. 103 Ind. 486; 56 N. W. Rep. (S. D.) 1077; otherwise, if it will leave the franchise unimpaired; 39 N. J. L. 28. A market house has been condemned for a railway terminal station, reached by an elevated railroad, and its approaches; 143 Pa. 580; but one corporation cannot take the franchise of another which is in use unless expressly authorized by the legislature, and then only by regular condemnation, and cannot take it at all, if this will materially affect its use; 53 Fed. Rep. 687. So a street may be taken; 2 L. R. A. 59; 12 N. J. L. 133; a bridge; 39 Am. & Eng. Corp. Cas. 36; or land in custody of the law; 14 Am. L. Rev. 131.

Where the power in a charter to condemn lands is limited so as to exclude land or property of any other corporation existing under the law of the state, this restriction was not confined to lands of corporations existing at the passage of the act, but applies to those thereafter incorporated; and another corporation which acquired lands after the first corporation had filed a survey thereof according to the requirements of the laws, but before any petition for the appointment of commissioners had been presented, could claim exemption from condemnation under the limitations; 32 Atl. Rep. (N. J.) 74.

See review of cases on this general subject, of the taking of a franchise; 27 Cent. L. J. 207, 231; and as to corporate property; 14 Am. & Eng. R. R. Cas. 41.

Claims of citizens against a foreign power may be taken by the national government for the purpose of adjusting its relations with such power; 2 Ct. of Cl. 224; and a claim for damages to land by reason of an unlawful entry may be taken and adjusted in a proceeding to take the land itself; 24 Barb. 658.

It has been held that money cannot be taken; Field, J., 12 Cal. 76; *contra*, 151 Mass. 364; only as to money taken by the state in time of war; 4 Const. 419; 13 How. 115; 44 Mo. 484; and without any such limitation; Sharswood, J., in 65 Pa. 152, who says that "the public necessity which gives rise to it prevents its being restrained by any limitations as to either subject or occasion." "Such," the opinion continues, "would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great public calamity, as famine or pestilence, contribution could be levied on banks, corporations, or individuals."

Buildings on land condemned are parts of the realty and pass with the land, and the owner must be paid for them in full, and being so paid cannot recover from the company damages for the removal of them; 23 Neb. 465; 23 Kan. 816; nor can the owner remove them; 99 Pa. 640. See, generally, as to structures, 3 Am. R. R. & Corp. Cas. 181.

An act for the extinguishment of irredeemable ground rents was held not to be an exercise of the right of eminent domain and therefore unconstitutional; 67 Pa. 479. Generally a city may not condemn property beyond its territorial limits; 13 Peters 519; 36 N. H. 404; or a corporation in a different state from that of its incorporation; 58 Fed. Rep. 133; but there are exceptions to the rule as in case of a city which may condemn property beyond its borders where

the necessity exists, as for a park; 44 Mich. 602; 53 Mo. 175; a sewer; 38 Mich. 474; 140 Ill. 216; or waterworks; 81 Pac. Rep. (Col.) 238; 54 N. J. L. 62; but in such case the property must be sufficiently near to the municipality to be serviceable for the purpose for which it is condemned; 99 N. Y. 569.

Indirect or consequential damages. The principle that a right of compensation exists wherever private property is taken for public use does not extend to the case of one whose property is indirectly damaged by the lawful use of property already belonging to the public. For example, it was held that an adjoining or abutting owner was not entitled to compensation for damages resulting from the change of a grade of a street; 4 Term 794; 153 Mass. 564; 82 Me. 1; 136 N. Y. 533. Callender v. Marsh, 1 Pick. 418, was the leading American case, and gave rise to a statute to remedy the wrong suggested by it. In Pennsylvania the doctrine of these cases was followed in a case in which Gibson, C. J., expressed regret that such injustice was remediless; 18 Pa. 187 (a case referred to by the same court as of a class intended to be remedied by the constitution of 1874; 150 Pa. 589). These and the other authorities were reviewed by the United States Supreme Court, and the same conclusion reached as being "well settled both in England and in this country;" 20 How. 135. Of the law at this period, it was said that the limitation of the term "taking" to an actual physical appropriation or divesting of title was "far too narrow to answer the purpose of justice;" Sedg. Const. L. (2d ed.) 456. See 1 Thayer, Cas. Const. L. 1053, 1055; 2 Am. R. & Corp. Cas. 435. The law on this specific subject of change of grades became firmly settled, except as changed by constitutional or statutory enactments, but on the general subject of what constitutes a "taking" of property, it has since undergone very great changes, and the narrow rule of physical appropriation has ceased to afford a criterion of decision. An illustration of the tendency to treat this question liberally, rather than technically, is a decision that it is a "taking" of property to prohibit an owner of land on a boulevard from building, beyond a certain limit, on the front part of the lot; 22 S. W. Rep. (Mo.) 861; 97 Pa. 242; 118 *id.* 593. See also 73 Mich. 523; 18 L. R. A. 166. The older cases rested upon a narrow, the later ones upon a liberal, meaning of the word "property" in the constitutions. Of the latter, *Eaton v. Boston*, etc., Railroad, 51 N. H. 504, is the leading case on the subject of the right to compensation where property is injured and not physically taken. Plaintiff's land was overflowed during a freshet as the result of the construction of the defendant's railroad. Damages for the land actually taken for the railroad had been paid as the result of condemnation proceedings. It was held that the right to use the land undisturbed really constituted the property in it, rather than the physical possession of the land itself, and that even if the land itself were the "property," a physical interference with it which abridged the right to use it was in fact a taking of the owner's property to that extent. The opinion of Smith, J., in this case is said to have contributed more than any other towards the change in the law extending the effect of the word *taking*; Lewis, Em. Dom. § 58. See also 54 N. H. 545; 77 Wis. 288; 28 Minn. 534; 14 Ch. Div. 58; 99 U. S. 635; Earl, J., dissenting in 90 N. Y. 122. It is now quite settled that the flowing of lands, against the owner's consent and without compensation, is a taking; 51 N. H. 504; 30 Mich. 321. See also 41 Ill. 502; 25 Wis. 223; 18 Wall. 166. In the latter case, Miller, J., after referring to the decisions that there is no remedy for a consequential injury from the improvements of roads, streets, rivers, etc., said: "But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water,

earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further." This was afterwards said by the court to be a case of "physical invasion of the real estate of the private owner, a practical ouster of his possession"; 98 U. S. 408.

The interference with the rights of abutting owners by building an elevated railroad on a street was held a taking of private property for public use without compensation, to restrain which the plaintiff was entitled to an injunction; 90 N. Y. 122. This case was decided by four judges against three dissenting, whose views were expressed by Earl, J., in an opinion much referred to, contending that it was a use of the street properly incident to its purpose as a public highway. An effort to secure a re-examination of the doctrine of this case resulted in its affirmance; 104 N. Y. 268. In a subsequent case the New York court of appeals stated the law of that state to be that, although the abutting owner might have an injunction, and in the same proceeding recover full compensation for the permanent injury, he could not, in an action at law, recover permanent damages measured by the diminution in value of the property, but only such temporary damages as he had sustained at the time of commencing the action; 135 N. Y. 432; 112 *id.* 190. See also 118 *id.* 618; 187 *id.* 802.

In a leading case the construction of an ordinary commercial railroad along a street in front of a lot without impairing ingress and egress, but resulting in the usual injuries to the lot from steam, smoke, dust, smells, interference with light and air, jarring the ground, etc., was held to be an appropriation of the street for what was not a proper street use, for which damages were recoverable, but limited to the injury resulting from the operation of the road in front of the lot, and not including any accruing from operating it on other parts of the street; 39 Minn. 286.

The Maryland court of appeals, in reviewing the decisions on the subject, and particularly the New York cases, mentions as the only other cases holding that opinion, 7 Ohio St. 460; 39 Minn. 286; 66 Miss. 279, and considers that its own decision in 50 Md. 148 and 74 *id.* 363 should be adhered to as being in accord with the decided weight of judicial opinion. The conclusion is thus stated: "The New York doctrine involves this inextricable dilemma, viz., if the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken in the constitutional sense; but if a railroad company in lawfully constructing its road does precisely the same thing that the city did in grading a street, then the abutter's property is taken, though not physically entered upon at all. The structure is therefore a lawful one. But it does not destroy the street as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and other injuries complained of are purely incidental and consequential, though the appellant, under the statutes of Maryland, is not without a remedy therefor; 79 Md. 277; s. c. 29 Atl. Rep. 830.

The question what constitutes a taking, under the older constitutional provisions, was much considered with respect to the use of streets and highways by many other modern appliances, such as gas and water pipes, steam and electric railroads, and poles for telegraph, telephone, and electric light wires. In this class of cases, of which the elevated railroad cases have been used as an illustration, the question has turned on the consideration whether the proposed use was a legitimate incidental use of the street as such, and the tendency of the cases is in favor of a very liberal construction of the

rights of the public, at least in streets of cities. In some states a distinction is made between city streets and country roads, and the public easement in the latter is much more restricted, and the rights of abutting owners to damages consequently more extended; 63 N. Y. 886; 111 Pa. 35; 167 *id.* 62; 124 Ind. 577.

In a general view of the subject nothing more is practicable than a mere indication or illustration of the tendency of the decisions which must be resorted to and examined for application to a special case. City streets are legitimately used, from necessity, for sewers and drains; 28 Conn. 393; 103 Ind. 872; 29 N. J. Eq. 206; 27 Miss. 337; water pipes; 29 Hun 245; gas pipes, as a practical necessity in cities, are not questioned but indirectly sanctioned; 90 N. Y. 161; 32 Vt. 371; 2 Hun 146. See 13 Allen 146, 160. As to steam railroads, from a great conflict of decisions (difficult if not impossible to reconcile), it would seem to be the best opinion that it is not a legitimate use of the street; see *Rand. Em. Dom.* § 405; *Lewis, Em. Dom.* § 111, with notes citing the cases at large; a horse railway is almost universally held to be a proper use of streets; *Rand. Em. Dom.* § 403; *Lewis, Em. Dom.* § 124; the only substantial dissent being in New York; 39 N. Y. 404; unless the fee is in the public; 50 *id.* 206. See 14 Ohio St. 523; 27 Wis. 194. With respect to electric railways in cities, now a current subject of litigation, the doctrine of "the right of the public to use the streets by means of street cars," was said to be "now so thoroughly settled as to be no longer open to debate," and it was extended to the poles and wires of the new system; 47 N. J. Eq. 380; and see 85 Mich. 634; 75 Md. 222; 61 Conn. 127; 147 Pa. 579; but not along a country road; 167 *id.* 62. See *Rand. Em. Dom.* § 403. Electric light poles are usually treated as proper, on the same basis as the older lamp posts; 54 Hun 469; but not telegraph and telephone poles, according to the weight of authority; 49 Fed. Rep. 113; 86 Va. 696; 16 R. I. 668; 148 U. S. 92; though in some cases it is held otherwise, and of these the leading case considered the subject within the principle of *Callender v. Marsh*; the opinion of the court and the dissenting one of two judges present the two views of the question very fully; 136 Mass. 75. See also 88 Mo. 258.

In the cases relating to the use of streets and highways a great diversity of decision is occasioned by the distinctions drawn between the rights of an abutting owner who has the fee and one owning merely an easement of access over a street of which the soil belongs to the public. The question is further complicated by the varied application of the doctrine that an owner whose land was taken for a street or highway is presumed to anticipate the future uses to which it may be put both over and under the surface. The confusion of the decisions is well stated by a writer on the subject: "Laying aside constitutional and statutory declarations of liability for consequential injuries we find the following anticipations imputed to one whose land is affected by a street easement. In every state except Ohio he anticipates that he may be obliged to enter his house by a second-story window when the grade is raised, or by a ladder when the grade is lowered. In New York he does not foresee any improved method of transportation from the horse-car to the electric motor; but in Pennsylvania he anticipates all methods. The Massachusetts man seems to be the only one who has clearly anticipated the telegraph and telephone. Judged by results there is no working rule of general application deducible from a presumed anticipation of future use." *Rand. Em. Dom.* § 414.

In some states there are constitutional provisions covering this subject, sixteen of them requiring compensation when property is damaged by such proceedings generally, and three others when the delegated power of eminent domain is exercised by corporations. Under these provisions compensation is required for property "damaged" as well as "taken," and the former word is held to include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property; 25 Neb. 489; 66 Cal. 492; 67 Ga. 386; 106 Ill. 511; 45 Ark. 429; s. c. 136 U. S. 121.

The treatment by the courts of the subject of consequential damages is illustrated by the course of decisions under two constitutions of Illinois, by the supreme court of that state, which is very elaborately re-

viewed in a judgment of the supreme court of the United States. The constitution of 1848 prohibited the taking or application to public use of property without just compensation; and the rule adopted by the courts was that any physical injury to private property, by the erection, etc., of a public improvement, in or along a public highway, whereby its use was materially interrupted, was to be regarded as a taking, within the meaning of the constitution. The constitution of 1870 provided that private property should not be taken or damaged without just compensation, and upon this it was held that the property owner was protected against any substantial damage, though consequential, and that it did not require a trespass or actual physical invasion; 103 Ill. 64, 379; 125 U. S. 161. In the judgment last cited Harlan, J., said: "We concur in that construction" and "we regard that case (103 Ill. 64) as conclusive of this question." This constitution of Illinois was the first in which the word "damaged" was inserted, but in 1894 the supreme court of Colorado enumerated fourteen other states which had then adopted the word; 36 Pac. Rep. (Colo.) 789.

See, generally, as to land injured; 2 Am. R. & C. Cas. 94; 5 *id.* 201; property damaged; 25 Am. L. Rev. 924; taken or damaged; 27 Am. L. Reg. 391; 21 Cent. L. J. 130.

What estate is acquired. Where the constitution contains no restriction, a fee or any less estate may be taken, in the discretion of the legislature; 100 Mass. 544; 89 Ind. 501; 34 Ohio St. 541; 3 Dill. 465; 79 N. Y. 293; 80 Va. 616; *Lewis, Em. Dom.* § 277; *Rand. Em. Dom.* § 205; Cooley, Const. Lim. 688; and if a fee is taken under the statute, the land may afterwards be devoted to other uses; *id.*; *Rand. Em. Dom.* § 209. If the state condemn, a fee is presumed; 50 Pa. 425; 53 *id.* 477; but when a private corporation does so, never; *Rand. Em. Dom.* § 206; when the act authorized a railroad company to take the fee for a right of way it was a qualified estate which would revert; 50 Mo. 496; s. c. 62 *id.* 429; but a railroad may be authorized to take a fee; 2 Dev. & B. 451. The purpose is sometimes said to indicate the estate taken; 127 Mass. 408; 45 N. Y. 234; but this is an unsafe criterion of the interest, and the better opinion is that it merely defines the use. See 31 La. Ann. 430; 32 *id.* 471; 90 Mich. 385; 53 N. J. L. 1. Under a provision that the title should vest, a city took a fee for sewers; 144 Mass. 303; but a turnpike company only an easement; 36 Barb. 186. An absolute power of alienation, the ear-mark of untrammelled and unconditional ownership, has been supported in land held by a municipal corporation for a park; 45 N. Y. 234; 137 *id.* 241; or an almshouse; 7 N. Y. 314; 2 Blatchf. 95; when a street which had been taken for a canal was abandoned, the right of the public and the abutters revived in the street; 88 Ind. 563; and land taken for a canal was afterwards used for a street; 42 Hun 202; 84 Ohio St. 541. It is said that a municipal corporation can condemn the fee-simple title of land for streets, but only so as to acquire the absolute control for that purpose and not a proprietary right to sell or devote it to a private use; 46 Minn. 540. When the fee is taken and the use ceases, the state may authorize a sale for other uses, but when only an easement, the land reverts; *Lewis, Em. Dom.* 596, citing cases; and so if there is an abandonment; *id.* 597.

See, generally, 3 Am. R. & Corp. Cas. 368; 32 Am. L. Reg. 563; 10 Am. & Eng. R. R. Cas. 11; 32 Cent. L. J. 80.

The time when payment must be made varies according to the exact terms of the constitutional provision under which proceedings are taken. In the majority of states where there is no express provision it is held that compensation need not be concurrent in time with the taking, it is sufficient if an adequate and certain remedy is provided by which the owner may compel payment of damages; 18 Wend. 9; 26 *id.* 585; 6 Hill 359; 11 N. Y. 308; 96 *id.* 227;

and this means reasonable legal certainty; *id.*; 54 N. Y. 132, 146; 89 *id.* 189; or if there is a definite provision or security for the payment of the compensation; 34 Ala. 461; 31 Ark. 494; 20 Fla. 597; 187 Mass. 71; 54 N. H. 590 (but 50 *id.* 591 seems *contra*); 19 Conn. 142; 5 Ohio St. 109; 17 Pa. 524 (*contra*, as to private roads; 31 *id.* 12); 11 Leigh 42; 57 Vt. 128; 88 N. C. 686; 57 Wis. 364; 25 Fed. Rep. 521. The same rule was formerly followed, in some states in which later constitutions provided for prior payment, or required compensation where none was provided for before, as Maryland; 3 Bland, Ch. 386; 19 Ga. 427; 3 Mich. 496; 52 Ind. 16; and other states require that the owner shall receive compensation before entry; 45 Cal. 640 (see 31 *id.* 538, which reviewed the cases, established a different rule, and was overruled); 53 *id.* 208; 37 Tex. 447; 1 Md. Ch. 248; 57 Ill. 307; 120 *id.* 86; but in Maine, while title does not pass, possession may be taken before payment, and a reasonable time—three years being so held—allowed therefor; 34 Me. 247; 75 *id.* 91.

It has been held that the state when acting directly may provide that title shall pass when the amount is ascertained, it being presumed that payment will be made by the state; 78 N. Y. 325; but any such declaration in a statute is controlled by the constitution, and it was held in a New York case that payment must be prior to or concurrent with the taking; 21 Wall. 196. In many state constitutions there is a distinction between the direct exercise of the power by the government and the delegated power conferred on private corporations. Under such a provision it was said that in both cases the sovereign power is coupled with the correlative duty; 52 N. J. L. 132; but municipal corporations must settle first when exercising delegated power; *id.*; 38 *id.* 151; 39 *id.* 291. And it is said by a writer of authority, "the almost invariable, and certainly the just, course being to require payment to precede or accompany the act of appropriation;" 2 Dill. Mun. Corp. 615. Generally, however, when the compensation is to be paid by the state or is a charge upon the funds of a municipality that is held sufficient; 103 Mass. 120; 88 N. C. 686; 1 Pa. 309; 99 N. Y. 569; 40 Ind. 33; 40 Wis. 674; 68 Pa. 168, 170; 2 Am. Ry. & Corp. Cas. (Wis.) 424; but if the available resources are shown to be insufficient an entry may be enjoined; 26 *id.* 46.

The fact that there is a limitation of the amount to be expended does not invalidate the law for taking property; 91 U. S. 367; 160 *id.* 668.

When the title passes. It naturally follows that no title can be acquired under the proceedings until the compensation is paid or so secured as to be treated in law as the equivalent of payment. Accordingly when the title is permitted to vest before payment, it is said to be subject to a claim for compensation in the nature of a vendor's lien enforceable in equity; *Lewis, Em. Dom.* § 620, and note citing cases. And a sale or mortgage of the property could only be made subject to such prior right of the landowner, which is maintained by some courts on the theory of a lien, and by others on that of title remaining in the owner; *id.* § 621. In Pennsylvania, however, an extreme doctrine prevails; the appropriation is valid and effectual where compensation is paid or secured; 8 W. & C. 459; 66 Pa. 404; 75 *id.* 464; and title passes when the bond is approved by the court under the statute; 85 *id.* 73; and remains vested even if the bond is found to be valueless; 138 *id.* 168; and there is no lien for compensation; 118 *id.* 512. By the act of location the corporation acquires a conditional title as against the land-owner, which becomes absolute upon making or securing compensation; 141 *id.* 407; as against third parties there is a valid location after entry made, lines run, map prepared, and a report made to the directors and adopted by them; 159 *id.* 331; but running a line, making a map, and a report to the directors, not acted on, did not confer title to the location to justify an injunction to restrain another company from taking the land for a railway, though

the land was owned by the plaintiff company; 141 *id.* 407.

If a land-owner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he cannot maintain either trespass or ejectment, and will be restricted to a suit for damages; 158 U. S. 1.

The actual cash market value, at the time, of property actually taken must be allowed; 117 Mass. 302; 68 Mo. 491; 51 Kan. 408; 110 Ill. 414; 98 U. S. 408. It has been said that the true criterion of market value is the sum which the property would bring if sold at auction, conducted in the fairest possible way; 63 N. H. 557; but this is not the result of the best considered cases. "Market value means the fair value of the property as between one who wants to purchase and one who wants to sell an article; not what could be obtained for it under peculiar circumstances; not its speculative value; not a value obtained from the necessity of another. Nor is it to be limited to that price which the property would bring when forced off at auction under the hammer;" 119 Mass. 126; it is measured by the difference between what it would have sold for before the injury, and what it would have sold for as affected by it; 7 S. & R. 441; 112 Pa. 56; what would be accepted by one desiring but not obliged to sell and paid by one under no necessity of buying; 115 *id.* 325; 49 Ark. 381; it is not to be measured by the interest or necessity of the particular owner; 95 Pa. 426; nor, on the other hand, by those of the appropriator; 110 Pa. 54; 88 Cal. 50; 22 N. J. L. 195; 53 Ga. 178; 59 Ia. 243; when these principles are fairly applied due consideration may be given to auction value; 115 Pa. 325; but its availability for other special purposes to which it is particularly adapted by reason of "its natural advantages, or its artificial improvements, or its intrinsic character," may be considered as an element of value; Lewis, *Em. Dom.* § 479, and cases cited; as, for railroad approaches to a large city; 116 Me. 114; 58 *id.* 491; or for a bridge site; 17 Ga. 30; 49 Ark. 381; or a mill site; 64 Miss. 404; so also its situation and surroundings for railroad purposes; 52 N. J. L. 391; 34 Kan. 158; 111 Ill. 413; or market-gardening; 110 Ill. 414; or subdivision into village lots; 57 Wis. 332; 91 Ill. 49; 39 Ohio St. 108; 30 Minn. 227; or in case of a pond, for ice or milling, there being no other one near; 5 N. Y. Sup. Ct. 217; or for warehouse purposes; 33 Minn. 210. When the water of a stream running through a farm was taken by a village for its waterworks, the owner was entitled to damages, not only for being deprived of the water for farm purposes, but also for being deprived of the opportunity to sell water rights to prospective purchasers of village lots plotted out for sale in a part of the farm; 67 Vt. 658. So its adaptability for the particular purpose for which the condemnation is bought may be shown, as islands well situated for boom purposes; 98 U. S. 403; or the bed of an old canal desired for a railroad; 27 Hun 116. But mere speculative opinions and considerations will be excluded from consideration; 127 Mass. 358; 9 G. & J. 479; 116 Ill. 163; 107 Pa. 461; 57 Wis. 332; 17 N. J. L. 25; 18 Mo. App. 632.

See, generally, 21 L. R. A. 373; 57 Am. & Eng. R. R. Cas. 508; 2 Am. R. R. & Corp. Cas. 744.

Assessment of benefits on the remainder of a tract of which part is taken is prohibited by the constitution in some states, either generally, as in Iowa and Ohio, in favor of any corporation, as in Arkansas, Kansas, and South Carolina, or any other than municipal, as in California, North Dakota, and Washington. In the other states there is a diversity of decisions which have been thus classified, as: 1. Not considered. 2. Special benefit is set off against damages to the remainder but not against the value

of the part taken. 3. General or special, as in the last class. 4. Special, against both damages to remainder and value of part taken. 5. General and special, as in the last class. Lewis, *Em. Dom.* § 465.

In the first class the benefit is excluded because compensation is held to be money, and this view appears to be confined to one state; 34 Miss. 237, 241; 63 *id.* 807.

The second rule which obtains has been justly criticised as illogical; Lewis, *Em. Dom.* § 467; but it rests upon the theory that for the part taken compensation in money is required, while for incidental damage the legislature may prescribe the rule of compensation. This was the doctrine laid down in Tennessee which, with several other states, adheres to it; 2 Swan, Tenn. 422; 6 Wis. 636; 59 *id.* 364; 34 Md. 336; 9 Leigh 313; 21 Gratt. 164; 24 W. Va. 682; 11 Neb. 585; 25 *id.* 542.

The third class rests upon the same idea of requiring compensation in money for the part taken, but treating the claim for damage to the remainder as consequential and properly subject to the set-off of all advantages; and in Kentucky, from which comes the leading case, a judgment was reversed for an instruction excluding general benefits; 17 B. Monr. 173; 5 Dana 28; 50 Ga. 612 (but see 17 Ga. 30, in which a different doctrine was applied, which was passed without mention in 30 *id.* 43, which laid down the rule afterwards adhered to); 26 Tex. 588; 33 *id.* 112; 37 *id.* 447; 60 Tex. 215; but see 60 *id.* 76; 31 La. Ann. 430; 36 *id.* 344.

The fourth rule allows special benefits against both the value of the part taken and damage to the remainder, because just compensation is construed to mean recompense for the net resulting injury, and excludes a share of the general advantage, because to allow it would be to distribute it unequally, charging those whose land is taken for that which the rest of the community enjoy without cost; 60 Maine 290; 55 N. H. 413; 4 Cush. 291; 125 Mass. 226, 557; 57 Vt. 240; 32 Conn. 452; 55 N. J. L. 88; 95 Pa. 426; 112 *id.* 56 (which lays down the rule with great clearness not only on this point but in confining the consideration of inconvenience and advantage to the effect of both upon the market value); 4 Jones, N. C. 89; 74 N. C. 220; 70 Mo. 629; 91 *id.* 26; 11 Minn. 515; 23 *id.* 61, 503; 59 Wis. 374; 18 Ore. 283 (but see 6 *id.* 328). See L. R. 2 C. P. 638.

The last class permits all benefits to be set off against all damages of either kind, placing the rule on natural equity, and in a leading case (17 Ga. 30, afterwards apparently overruled as stated *supra*), it is argued that the term compensation comes from the civil law which so construes it. This rule is accepted by many courts which, among other reasons, hold that compensation does not mean money but includes any means of recompense; 46 Cal. 85; 2 Harring. 514; 5 Ohio St. 140; 43 *id.* 228 (before the constitution of 1851); 97 Ind. 79; 130 *id.* 219; 5 Rich. 428; 6 Rich. 47. See 60 Tex. 76. In New York this rule applies to cases where land is taken by the state and municipal corporations; 99 N. Y. 296; 120 *id.* 309; but in the case of private corporations the third rule seems to apply; 68 *id.* 591; 118 *id.* 618; 129 *id.* 576. See 50 *id.* 302. In Illinois the cases prior to 1870 were under the fifth rule; 14 Ill. 190; and since the constitution of that year and a subsequent statute it has been held that benefits were prohibited as against the value of land taken; 77 Ill. 250; that general benefits cannot be set off against either value or damage; 79 *id.* 290; and that special damage may be charged against the damage to the residue; Lewis, *Em. Dom.* § 470, where the cases are collected and analyzed.

The last rule enumerated seems to be approved by the federal courts; 3 Cra. C. C. 599; 103 U. S. 599; and upon candid consideration it must be admitted that if benefits are to be allowed at all it is the only logical doctrine. This seems also to be the conclusion of the writer whose classification of the decisions is here given, and to whose discussion of the whole subject

reference may profitably be made; Lewis, *Em. Dom.* § 471.

Damage to property injured but not physically taken. A question of great importance which yet remains to be settled arises either under the later constitutional provisions for compensation for injury as well as actual taking, or under the extension of the meaning of the word taking to include consequential damages so called, when the injury to property is so great and permanent as practically to deprive the owner of all use and enjoyment of it.

In such cases the only remedy of the property owner, in the absence of legislation, is a common-law action, and for permanent or continuing injury trespass is totally inadequate, as is evidenced by the fact that to restrain it when continuous is a recognized ground of equitable interference. In many cases it is held that prospective damages cannot be recovered, and the property owner is thus put to the necessity of resorting to repeated actions, but when the trespass is the result of the exercise of a public use authorized by statute this remedy is not only unsatisfactory but illogical. Accordingly it is held in many cases that such damage being of a permanent nature there should be but one recovery for all damages past, present, and future; and it has been held that they may be allowed. An action on the case is the proper remedy in such cases, but the measure of damages applied is not uniform, though when the liberal rule referred to is adopted the payment vests in the defendant a right to maintain its works and operates as a bar to further suits. In some cases such an action has also been held to have the effect of statutory proceedings for the assessment of compensation; 118 Ill. 203; 141 *id.* 35. This subject is, however, involved in great confusion, which should undoubtedly be removed by legislative enactments providing for the acquisition of the right to cause, and the assessment of compensation for, permanent injury to property whenever consequential damages are provided for by constitution or statute, or recognized by the courts. As to this subject, see discussions with copious citations of cases in Lewis, *Em. Dom.* §§ 624, 625; Rand. *Em. Dom.* §§ 308-311; 26 Am. L. Reg. 281, 345.

Who are proper and necessary parties. The compensation must be paid to the true owner as on that the title depends; 82 N. Y. 436; 112 Ill. 379; 133 U. S. 553; and if paid to the wrong person, it may be recovered from him by one having an interest; 92 N. Y. 262; 109 Ind. 411; but if title is doubtful, it may be paid into court; 41 Fed. Rep. 70; 73 N. Y. 560; and if afterwards paid out wrongly the person who paid it in is not liable; 146 U. S. 338.

The general principle is that the necessary parties to a proceeding, independent of statutory requirements, are all persons having an interest in the property taken, as proprietors, or such as is recognized by the law of the state as property; Lewis, *Em. Dom.* § 317. When the ownership is divided, each is entitled to his share, as life-tenant and remainderman; 112 N. C. 759; 86 Mo. 478; dower after admeasurement; 117 Pa. 174; but not before the dower is assigned; 43 Ill. 401; and only as against the award when it is inchoate; 27 N. J. Eq. 534. The interest of a tenant must be compensated; 4 Whart. 86; if the lease has actual value to him; 144 Ill. 537; sometimes separately; 127 Ill. 144; and sometimes by apportionment of the entire amount; 108 Mass. 535.

When part of land under lease is taken, the lease is not terminated or the tenant discharged; 134 Ill. 37; but both he and the lessor are entitled to compensation for their respective losses; 20 Pick. 159; 11 Ohio 408; 30 Pa. 362; 1 Thayer, *Cas. Const.* L. 968. See Rand. *Em. Dom.* § 304; 21 L. R. A. 212, with note on rights of tenants, reversioners, life-tenants, remaindermen, etc., in such cases; 5 Am. R. R. & Corp. Cas. 208, as to grantor and grantee, and 29 Am. St. Rep. 304, as to leased premises. See also 29 Am. L. Rev. 351, as to the abatement of rent when leased premises are

appropriated.

As to mortgagees the decisions lack both uniformity and consistency, and this result is largely due to the differing views taken of the position of a mortgagee before the law. As between the parties to the mortgage the award takes the place of the land and the lien attaches to it; 2 Paige 68; 59 Ind. 453; 102 Mo. 560; 123 Ill. 95; as to all rights and interests; 112 N. Y. 610. The damages should be apportioned by the jury between owner, lessee, mortgagee, etc.; 48 Mich. 547. In some cases the remainder of the land must be exhausted before the mortgagee can resort to the fund; 44 N. Y. 192; or to the condemned land; 20 Neb. 281; and the mortgagee, if not a party to the proceedings, may appropriate the fund; 56 Ia. 422; 32 N. J. Eq. 370; but when the land has been sold and bought in by the mortgagee he loses all claim to the fund and new proceedings must be taken to condemn his interest; 35 N. J. Eq. 379. As affecting the title of the appropriator who has been said to take no better title than an innocent purchaser for value; 38 Ia. 463; and must protect himself against the claim of the mortgagee; 57 Wis. 311; the more reasonable opinion would seem to be that the mortgagee is a necessary party; if in possession he certainly is; 36 N. H. 84; 5 Gray 468; or after condition broken; 57 Vt. 248; in other cases to be bound he must have notice; 24 Minn. 25; 29 N. J. Eq. 128; 12 R. L. 144; 55 Vt. 207; 57 Wis. 311; 109 Ind. 441; 40 Mich. 383; 67 Me. 358; L. R. 1. Eq. 145; *contra*; 11 N. H. 293; 13 W. Va. 476; 45 Conn. 303; 126 Mass. 1, 427; 56 Cal. 508; 44 N. Y. 192. See Lewis, Em. Dom. § 324; 18 L. R. A. 113. It was held that the appropriator must see to the discharge of the mortgage and may pay it off or keep the money until it is due; 19 Wend. 659; and he may require or provide for its satisfaction; 131 N. Y. 127. It has even been held that a mortgagee cannot move for consequential damages to mortgaged property when the mortgagor has without fraud settled with the company; 121 Pa. 467.

Judgment liens may be divested by the proceedings, and the creditor need not be made a party; 47 N. Y. 157, 162. This is the leading case and well states the reasons on which this settled principle is based. See also 59 Ind. 446; 7 Phila. 650; Lewis, Em. Dom. § 325; Rand. Em. Dom. §§ 302, 340.

Notice and procedure. It is a general rule that notice of proceedings must be given to the owner of property to be taken; Lewis, Em. Dom. § 363; Rand. Em. Dom. § 333; though a few cases hold contrary to the otherwise uniform course of decisions; 5 Del. Ch. 524; 40 Md. 425, 437; 25 Miss. 479; 25 *id.* 17; 23 Ill. 202. In the Delaware case there was actual notice, though it was held that the act need not require it; in the Mississippi cases the proceeding is considered as *in rem*, which is treated as actual notice, and the Illinois case is in effect though not expressly overruled in 59 *id.* 276 and 78 *id.* 96. These cases have been termed "sporadic decisions," by which the current of authority is not disturbed; Rand. Em. Dom. § 333. See also Lewis, Em. Dom. § 364; where the cases are cited, and, for other cases cited in support of the view that notice need not be required in the act; 21 N. Y. 595; 2 Dana 227; 2 Mich. 441; 5 Ohio St. 140; 3 Page 75. The questions whether the property shall be taken and what compensation shall be paid need not be tried by a jury; 2 Dev. & Bat. 451; 2 Harring. 514; the constitution does not describe the mode or means by which compensation shall be ascertained; these therefore can only be prescribed by the legislature; 5 Del. Ch. 524; under the constitution of the United States, a jury is not necessary; 46 Fed. Rep. 176; and it cannot be demanded as a matter of right; 100 N. C. 497; 11 N. H. 19; 54 N. J. L. 268.

It was recently held that due process of law is furnished and equal protection of the law given in such proceedings when the course pursued for the assessment and collection of taxes is that customarily provided in the state, for then the party charged has an opportunity to be heard; 164 U. S.

112; and where by state law a burden is imposed upon property for the public use, "whether it be for the whole state or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections;" *id.*

As to procedure generally, see Rand. Em. Dom. ch. xi.; Lewis, Em. Dom. ch. xvii.-xix.; Mills, Em. Dom. ch. xi.; 3 L. R. A. 83; 14 A. & E. R. Cas. 378, 384, 392; and for some cases as to the necessity of notice and a hearing, to constitute due process of law, see 2 L. R. A. (Ind.) 653, note; 3 *id.* (Mont.) 194, note; 11 *id.* 224.

The power need not be exhausted in the first instance; 36 Conn. 196; 87 Ala. 50; and a railroad may subsequently take land for laying additional tracks when necessary; 57 Ark. 359; 4 Montg. Co. Rep. Pa. 102; or a canal company for a new supply of water; 23 Pick. 36; or a company may take more than at present required, having view to future and other needs, and use of part is not an abandonment; 153 Pa. 488.

See, generally, Mills; Lewis; Randolph, Eminent Domain; Cooley, Const. Lim. ch. xv.; Gould, Waters, ch. viii.; Redfield, Railways, Part 3; Wood, Railways, ch. xiv.; Harris, Damages; Thompson, Highways; POLICE POWER; TAXATION; RAILROAD; DUE PROCESS OF LAW.

EMISSION. In Medical Jurisprudence. The act by which any matter whatever is thrown from the body: thus, it is usual to say, emission of urine, emission of semen, etc.

Emission is not necessary in the commission of a rape to complete the offence; 1 Hale, P. C. 628; 4 C. & P. 249; 5 *id.* 297; 6 *id.* 251; 9 *id.* 31; 1 Const. 354; 30 Tex. App. 510; 30 Pac. Rep. (N. M.) 851; 106 Mo. 463; [1891] 2 Q. B. 149. It is, however, essential in sodomy; 12 Co. 36; 94 Mich. 27. But see 1 Va. Cas. 307.

EMIT. To put out; to send forth.

The tenth section of the first article of the constitution contains various prohibitions, among which is the following: "No state shall emit bills of credit." To emit bills of credit is to issue paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. 4 Pet. 410, 432; 11 *id.* 257; 28 Ark. 369; 1 Scam. 87; Story, Const. § 1358. See **BILLS OF CREDIT**.

EMMENAGOGUES. In Medical Jurisprudence. The name of a class of medicines which are believed to have the power of favoring the discharge of the menses. These are "*savine* (see *Juniperus Sabina*), black hellebore, aloes, gamboge, rue, madder, stinking goosefoot (*chenopodium olidum*), gin, parsley (and its active principle, *apiol*), permanganate of potassium, cantharides, and borax, and for the most part substances which, in large doses, act as drastic purgatives or stimulating diuretics." They are sometimes used for the criminal purpose of producing abortion (*q. v.*). They always endanger the life of the woman. 1 Beck, Med. Jur. 316; Dunglison, Med. Dict.; Parr, Med. Dict.; 3 Par. & F. Med. Jur. 88; Taylor's Med. Jur. 184.

EMOLUMENT. The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private. Webster. It imports any perquisite, advantage, profit or gain arising from the possession of an office. 105 Pa. 303. See 113 *id.* 108. See **ALL BACK PAY AND EMOLUMENTS**.

EMPEROR. This word is synonymous with the Latin *imperator*: they are both derived from the verb *imperare*. Literally, it signifies *he who commands*.

EMPHYTEUSIS. In Civil Law. The name of a contract, in the nature of a perpetual lease, by which the owner of an

uncultivated piece of land granted it to another, either in perpetuity or for a long time, on condition that he should improve it, by building on, planting, or cultivating it, and should pay for it an annual rent, with a right to the grantee to alienate it, or transmit it by descent to his heirs, and under a condition that the grantor should never re-enter as long as the rent should be paid to him by the grantee or his assigns. Inst. 3, 25, 3; 18 Toullier, n. 144.

EMPHYTEUTA. The grantee under a contract of *emphyteusis* or *emphyteosis*. Vicat, Voc. Jur.; Calvinus, Lex.; 1 Hallam, c. ii. p. 1.

EMPIRE. The territory or jurisdiction of an Emperor. A nation composed of what was previously several separate countries but which have been brought by conquest, compact, or colonization under one government at the head at which is an Emperor. Extensive dominion or influence. English.

American Empire. A term used by Chief Justice Marshall to mean the United States, inclusive of its states, territories, District of Columbia, etc. 182 U. S. 261.

EMPIRICISM. In Medicine. A practice of medicine founded on mere experience without the aid of science or the knowledge of principles. 108 Ky. 769.

EMPLAZAMIENTO. In Spanish Law. The citation given to a person by order of the judge, and ordering him to appear before his tribunal on a given day and hour.

EMPLOY. In 169, Rev. Stats., used as the equivalent of appoint. 252 U. S. 515, quoting 21 Ops. Atty. Gen. 356.

EMPLOYEE or EMPLOYEE. From the French. A term of rather broad signification for one who is employed, whether his duties are within or without the walls of the building in which the chief officer usually transacts his business. 3 Ct. Cl. 257, 260. It is not usually applied to higher officers of corporations or to domestic servants, but to clerks, workmen, and laborers, collectively.

Strictly and etymologically, it means "a person employed," but in practice, in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though perhaps not confined to any official employment, it is understood to mean some permanent employment or position. It may be any one who renders service to another; 30 N. J. Eq. 588; and has been extended so far as to embrace attorney and counsel; 58 N. Y. 338. The servant of a contractor for carrying mail is an employee of the department of the post-office; Brook. 280; also one who received five per cent. of the cost for superintending the erection of a warehouse was held an employee; 14 Md. 558. See **MASTER AND SERVANT**.

Usually embraces a laborer, servant, or other person occupied in an inferior position. Anderson; 75 N. Y. 41. Not restricted, however, to any particular employment or service. One engaged or used as an agent or substitute by another in transacting business, or the performance of some service. It may be skilled labor or the service of the scientist or professional man as well as servile or unskilled manual labor. *Id.*; 58 N. Y. 371.

Clerk. In 169, Rev. Stats., the term clerks and employees sufficiently broad to include persons filling positions which require technical skill, learning and professional training. 252 U. S. 515, quoting 29 Ops. Atty. Gen. 123.

Officer. The distinction between officer and employee in 169, Rev. Stats., does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. 252 U. S. 516, quoting 15 Ops. Atty. Gen. 3 et al.

In the Employers' Liability Act the words "employee" and "employed" were used in their natural sense, and were intended to describe the conventional relation of employer and employee. 252 U. S. 479, quoting 237 U. S. 94.

EMPLOYED. The act of doing a thing, and the being under contract or orders to do it. 14 Pet. 464, 476; 2 Paine 731, 745.

Where persons were employed "in and about the works," it was held that although their work as miners was at the bottom of a mine, the term covered them as employees until they arrived safely at the top, even although they discharged themselves; 2 C. P. Div. 397.

EMPLOYERS' LIABILITY ACT. The English statute of 43 and 44 Vict. c. 42, regulating the liability of employers in actions for negligence by their workmen and greatly limiting and modifying the common-law doctrine of common employment. The act is said to be "on the face of it an experimental and empirical compromise between conflicting interests." Poll. Torts 127. It was enacted for a limited time only, and has been since renewed from time to time. The effect is to put a "workman," "as against his employer, in approximately the same position as an outsider, as regards the safe and fit condition of the material instruments, fixed or movable, of the master's business," and to hold the latter responsible for the conduct of those in delegated authority under him; *id.*

Similar statutes have been enacted in many of the states. See Reno, Emp. Liab. Acts; MASTER AND SERVANT; FACTORY ACT.

EMPLOYERS' LIABILITY INSURANCE. A recent and important extension of the insurance principle, for protection against the legal liability which one assumes in becoming the employer of others; not a mere contract of indemnity against damages, but a contract to discharge liability for damage. 11 A. & E. Ency. L. 2nd ed. 9. See MASTERS' LIABILITY; INSURANCE.

EMPLOYERS AND WORKMEN ACT. The English statute of 38 and 39 Vict. c. 90, regulating the jurisdiction of certain courts over disputes between masters and employees. See MASTER AND SERVANT. Under this act of 1875 (38 and 39 Vict. c. 90), justices of the peace have jurisdiction in many cases where questions arise as to the rights or liabilities of either party to a contract of service, and County Courts also have jurisdiction in some of those matters. But this act does not apply to domestic or menial servants. Byrne.

EMPLOYMENT. "Employment" does not always begin or end with the actual work of the day in which the employee is engaged, but may begin when the employee enters the premises of his employer for the purpose of going to his work and may continue while he is going from his work at the end of the day on the premises of the employer. 162 Ky. 215, 172 S. W. 517.

Profession or Trade. The words "employment, profession or trade" means some business, employment, profession or trade in which one is engaged. The position of a juror is not an office or employment within the meaning of the words. 163 Ky. 144, 173 S. W. 330. See COURSE OF EMPLOYMENT.

EMPRESTITO. In Spanish Law. A loan. Something lent to the borrower at his request. *Las Partidas*, pt. 3, tit. 18, l. 70.

EMPTIO, EMPTOR (Lat. *emere*, to buy). *Emptio*, a buying. *Emptor*, a buyer. *Emptio et venditio*, buying and selling.

In Roman Law. The name of a contract of sale. Du Cange; Vicat, Voc. Jur.

EN AUTRE DROIT (Fr.). In the right of another.

EN DECLARATION DE SIMULATION. A form of action used in Louisiana. It is one of revindication (*q. v.*), and has

for its object to have the contract declared judicially a simulation and a nullity; 5 La. Ann. 1; 20 *id.* 169.

EN DEMEURE (Fr.). In default. Used in Louisiana. 3 Mart. La. N. s. 574.

EN OWEL MAIN (L. Fr.). In equal hand. The word *owel* occurs also in the phrase *owelty of partition*. See 1 Washb. R. P. 427.

EN TESMOIGNANCE (L. Fr.) (Lat. in testimonium). In testimony or witness. *En tesmoignances des queux choses nous avons fait faire cestes nous lettres overts*; in testimony whereof we have caused these our letters to be made patent (open).

EN VENTRE SA MERE (Fr.). In its mother's womb. For certain purposes, indeed for all beneficial purposes, a child *en ventre sa mere* is to be considered as born; 5 T. R. 49; 1 P. Wms. 329. Its civil rights are equally respected at every period of gestation; it is capable of taking under a will, by descent, or under a marriage settlement, may be appointed executor, may have a guardian assigned to it, may obtain an injunction to stay waste; 3 Johns. Cas. 18; 5 S. & R. 38; Bing. Inf. ch. vii; 1 Ves. 81; 2 Atk. 117; Bacon, Abr. *Infancy* (H); 2 H. Bla. 399; 2 Vern. 710; 4 Ves. Jr. 227. In a recent English case it was held that such a child is to be considered as living so as to vest in the parent on the death of the life tenant a devise made by a testator to A for life, and on her death to the parent of the child, "for her absolute use and benefit in case she has issue living at the death" of A, "but in case she has no issue then living," then over, when the parent was *en ventre* at the time of A's death; [1895] 2 Ch. 497. The right of an unborn infant to take property by descent or otherwise has been said by a learned commentator to be an inchoate right, which will not be completed by a premature birth; 1 Sharsw. Bla. Com. 120, n.; but as the word *premature* is used in the authorities, the rule accurately stated is that it must be born alive or after such period of foetal existence that it might reasonably be expected to survive; 4 Sm. & M. 99; 5 S. & R. 38; 4 Kent 248; 2 Paige 85. See Tyler, Inf. & Cov. ch. xiv., POSTHUMOUS CHILD; FETUS; NEGLIGENCE.

ENABLE. To supply with adequate power or means; give authority; power. Stand. Dict. In itself it has the primary meaning, in the case of a person under any disability as to dealing with another, of removing that disability, not of conferring compulsory power as against that other. 66 L. J. ch. 208.

ENABLING POWERS. A term used in equity. When the donor of a power, who is the owner of the estate, confers upon persons not seised of the fee the right of creating interests to take effect out of it, which could not be done by the donee of the power unless by such authority, this is called an *enabling power*.

ENABLING STATUTE. The act of 32 Henry VIII. c. 28, by which tenants in tail, husbands seised in right of their wives, and others, were empowered to make leases for their lives or for twenty-one years, which they could not do before. 2 Bla. Com. 319; Co. Litt. 44 a. The phrase is also applied to any statute enabling persons or corporations to do what before they could not.

ENACT. To establish by law; to perform or effect; to decree. The usual formula in making laws is, *Be it enacted*.

ENAJENACION. In Spanish Law. The act by which one person transfers to another a property, either gratuitously, as in the case of a donation, or by an owner's title, as in the case of a sale or an exchange.

In Mexican Law. This word is used in conveying to convey the fee, and not a mere servitude upon the land. 26 Cal. 88.

ENCEINTE (Fr.). Pregnant. See PREGNANCY.

ENCLOSURE. An artificial fence around one estate. 39 Vt. 34, 326; 36 Wis. 42. See CLOSE.

ENCOMIENDA. A charge or mandate conferring certain important privileges on the four military orders of Spain, to wit, those of Santiago, Calatrava, Alcantara, and Montesa. In the legislation of the Indies, it signified the concession of a certain number of Indians for the purpose of instructing them in the Christian religion and defending their persons and property.

ENCOURAGE. To intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident. 7 Q. B. Div. 258.

Encourage, Aid or Abet. "Encourage, aid or abet" were said to be words in appropriate use to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it done, and thereby becomes a principal or accessory. 95 Ky. 361, 25 S. W. 596. See ADVISE.

ENCROACH. To gain unlawfully upon the lands, property, or authority of another: as if one man presseth upon the grounds of another too far, or if a tenant owe two shillings rent-service and the lord exact three. So, too, the Spencers were said to encroach the king's authority. Blount; Plowd. 94 a. Quite a memorable instance of punishment for encroaching (acchoaching) royal power took place in 21 Edw. III. 1 Hale, Pl. Cr. 80. Taking fees by clerks of the courts has been held encroaching; 1 Leon. 5.

ENCUMBRANCE. See INCUMBRANCE.

END. See AT THE END.

END LINE. Within the intent of the mining law, Rev. Stats., § 2322, with respect to the right to pursue a vein extralaterally on its dip, the "end lines" of a lode location are those that cut across the strike of the vein, if it crosses the location. 256 U. S. 25.

ENDEAVOR. In Crim. Code, § 135, the term embraces any effort or essay to accomplish the evil purpose that the section was enacted to prevent, namely, corruption of a juror. The term is not subject to the technical limitations of "attempt." An experimental approach through a third person to the corruption of a juror is enough to constitute an "endeavor." 255 U. S. 143.

ENDOWED SCHOOLS ACTS. In English Law. Beginning with the stat. 3 & 4 Vict. c. 77, parliament has passed a series of acts for improving the condition of, and extending the system of education in, the endowed schools. Moz. & W.

ENDOWMENT. Now generally used of a permanent provision for any public object, as a school or hospital, but more technically, of the assigning dower to a woman, or the severing of a sufficient portion for a vicar towards his perpetual maintenance. 1 Bla. Com. 387; 2 *id.* 135; 3 Steph. Com. 99; 27 Me. 381; 32 N. J. L. 360; 4 Har. & M. 429.

ENDOWMENT INSURANCE. See INSURANCE.

ENDORSE. See INDORSE.

ENEMY. A nation which is at war with another. A citizen or a subject of such a nation. Any of the subjects or citizens of a state in amity with another state who have commenced or have made preparations for commencing hostilities against the latter state, and also the citizens or subjects of a state in amity with another state who are in the service of a state at war with it. See Salk. 635; Bacon, Abr. *Treason*, G; 43 Pa. 491.

By the term enemy is also understood a person who is desirous of doing injury to another. The Latins had two terms to signify these two classes of persons: the first, or the public enemy, they called *hostis*, and the latter, or the private enemy, *inimicus*.

An enemy cannot, as a general rule, en-

ter into any contract which can be enforced in the courts of law; but the rule is not without exceptions: as, for example, when a state permits expressly its own citizens to trade with the enemy; and perhaps a contract for necessities, or for money to enable the individual to get home, might be enforced; 7 Pet. 586. See also 4 Op. Atty. Gen. 81; 4 Sawy. 457; 24 Ark. 337; 4 Dall. 87.

ENFEOFF. To make a gift of any corporeal hereditaments to another. See **FEOFFMENT**.

ENFRANCHISE. To make free; to incorporate a man in a society or body politic. Cum. Dict.

ENFRANCHISEMENT. Giving freedom to a person. Admitting a person to the freedom of a city. A denizen of England, or a citizen of London, is said to be enfranchised. So, too, a villein is enfranchised when he obtains his freedom from his lord. *Termes de la Ley*; 11 Co. 91; Jacob, Law Dict.

The word is now used principally either of the manumission of slaves (*q. v.*), of giving to a borough or other constituency a right to return a member or members to parliament, or of the conversion of copyhold into freehold. Moz. & W. L. Dict.

ENFRANCHISEMENT OF COPYHOLD. The change of the tenure by which lands are held from copyhold to freehold, as by a conveyance to the copyholder or by a release of the seigniorial rights. 1 Watk. Comp. 362; 1 Steph. Com. 632; 2 id. 51.

ENGAGE. To embark; to take a part to devote attention and effort. 11 A. & E. Ency. 2nd ed., 33.

In a by-law prohibiting a member of a life insurance association from engaging in certain occupations, "to engage" held to be equivalent to "carry on," and applies to one who is a partner in a business, although he takes no active part in it. 199 N. Y. 401.

ENGAGEMENT. In French Law. A contract. The obligations arising from a *quasi contract*.

The terms *obligation and engagement* are said to be synonymous; 17 Toullier, n. 1; but the Code seems specially to apply the term *engagement* to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee; art. 1370. An engagement to do or omit to do something amounts to a promise; 21 N. J. L. 360.

Promises or debts of a married woman, not expressly charged on her separate estate, are termed her *general engagements*, not binding it unless made with reference to and upon the credit of it. L. R. 4 C. P. 593; L. R. 2 Eq. 182; 3 DeG. F. & J. 513.

ENGLESHIRE. A law was made by Canute, for the preservation of his Danes, that, when a man was killed, the hundred or town should be liable to be amerced, unless it could be proved that the person killed was an Englishman. This proof was called *Engleshire*. It consisted, generally, of the testimony of two males on the part of the father of him who had been killed and two females on the part of his mother. 1 Hale, Pl. Cr. 447; 4 Bla. Com. 195; Spelman, Gloss.

ENGLISH MARRIAGE. This phrase may refer to the place where the marriage was solemnized, or it may refer to the nationality and domicile of the parties between whom it was solemnized, the place where the union so created was to have been enjoyed. 6 Prob. Div. 51.

ENGROSS (Fr. gros). To copy the rude draught of an instrument in a fair, large hand. To write out, in a large, fair hand, on parchment. The term is applied to statutes, which, after being read and acted on a sufficient number of times, are ordered to be engrossed. Anciently, also, used of the process of making the indenture of a fine. 5 Co. 39 b.

In Criminal Law. To buy up such large quantities of an article as to obtain a monopoly of it for the purpose of selling at

an unreasonable price. The tendency of modern law is very decidedly to restrict the application of the law against engrossing; and is very doubtful if it applies at all except to obtaining a monopoly of provisions; 1 East 143. And now the common-law offence of the total engrossing of any commodity is abolished by stat. 7 & 8 Vict. c. 24. Merely buying for the purpose of selling again is not necessarily engrossing. 14 East 406; 15 id. 511. See **TRUSTS**; **COMBINATIONS**.

ENGROSSER. One who engrosses or writes on parchment in a large, fair hand.

One who purchases large quantities of any commodity in order to have the command of the market and to sell them again at high prices.

ENGROSSING. The offence committed by an engrosser.

ENHANCED. Taken in an unqualified sense, it is equivalent to "increased," and comprehends any increase in value however caused or arising. 32 Fed. Rep. 812.

But, it has been held to include only the value caused by improvements made upon land, and not that which arises fortuitously, or from what may be called natural causes. *Id.* See **FORSTALLING THE MARKET**.

ENTIA PARS (L. Lat.). The part of the eldest. Co. Litt. 166; Bacon, Abr. *Coparceners* (C).

When partition is voluntarily made among coparceners in England, the eldest has the first choice, or *primer election* (*q. v.*); and the part which she takes is called *entia pars*. This right is purely personal, and descends: it is also said that even her assignee shall enjoy it; but this has been doubted. The word *entia* is said to be derived from the old French *eisme*, the eldest; Bac. Abr. *Coparceners* (C); Keilw. 1 a, 49 a; Cro. Eliz. 18.

ENJOIN. To command; to require: as, private individuals are not only permitted, but enjoined, by law, to arrest an offender when present at the time a felony is committed or a dangerous wound given, on pain of fine and imprisonment if the wrong-doer escape through their negligence. 1 Hale, Pl. Cr. 587; 1 East, Pl. Cr. 298; Ry. & M. 93.

To command or order a defendant in equity to do or not to do a particular thing by writ of injunction. See 55 Ch. Div. 418; **INJUNCTION**.

ENLARGE. To extend: as, to enlarge a rule to plead is to extend the time during which a defendant may plead. To enlarge means, also, to set at liberty: as, the prisoner was enlarged on giving bail.

ENLARGING. Extending, or making more comprehensive: as, an enlarging statute, which is one extending the common law. Enlarging an estate is the increasing an estate in land, as where A. has an estate for life with remainder to B. and his heirs, and B. releases his estate to A. 2 Bla. Com. 324. See **RELEASE**.

ENLISTMENT. The act of making a contract to serve the government in a subordinate capacity, either in the army or navy. The contract so made is also called an enlistment. See, as to the power of infants to enlist, 4 Bing. 437; 5 id. 423; 6 id. 255; 1 S. & R. 87; 11 id. 93. A drafted man is said to be "enlisted" as well as a volunteer, but the term does not apply to one entering the army under a commission; 107 Mass. 282; 48 N. H. 280. See 8 Allen 480; 2 Sprague 103; 40 Conn. 286. The contract of enlistment involves a change in the status of the recruit, which he cannot throw off at will, though he may violate his contract; 137 U. S. 147. See **MILITIA**; **MILITARY LAW**.

ENORMIA (Lat.). Wrongs. It occurs in the old Latin forms of pleading, where, after a specific allegation of the wrongs done by the defendant, the plaintiff alleges generally that the defendant did *alia enormia* (other wrongs), to the dam-

age, etc. 2 Greenl. Ev. § 278; 1 Chit. Pl. 379. See **ALIA ENORMIA**.

ENQUETE or ENQUEST. In Canon Law. An examination of witnesses in the presence of a judge authorized to sit for this purpose, taken in writing, to be used as evidence in the trial of a cause. The day of hearing must be specified in a notice to the opposite party; 9 Low. C. 392. It may be opened, in some cases, before the trial; 10 Low. C. 19.

ENROLL. To register; to enter on the rolls of chancery, or other courts; to make a record.

ENROLMENT. In English Law. The registering or entering on the rolls of chancery, king's bench, common pleas, or exchequer, or by the clerk of the peace in the records of the quarter sessions, of any lawful act: as, a recognizance, a deed of bargain and sale, and the like. Jacob, Law Dict. For the terms "enrolment" and "registration" as used in the United States merchant shipping laws, see R. S. tit. 50; 21 Stat. L. 271; 18 id. 30; 3 Wall. 566; **VESSEL**. See **REGISTER OF SHIPS**.

ENS LEGIS. A being of the law. Used of corporations.

ENTAIL. A fee abridged or limited to the issue, or certain classes of issue, instead of descending to all the heirs. 1 Washb. R. P. 66; Cowel; 2 Bla. Com. 112, n.; Wms. R. P. 61.

To restrict the inheritance of lands to a particular class of issue. 1 Washb. R. P. 66; 2 Bla. Com. 113. See **FE-TAIL**. See **QUASI-ENTAIL**.

ENTENCION. In Old English Law. The plaintiff's declaration.

ENTER. To go upon lands for the purpose of taking possession; to take possession. In a strict use of terms, entry and taking possession would seem to be distinct parts of the same act; but, practically, entry is now merged in taking possession. 1 Washb. R. P. 10, 32; Stearn, Real Act. 2.

To cause to be put down upon the record. An attorney is said to enter his appearance, or the party himself may enter an appearance. See **ENTRY**.

A provision in a post-office appropriation act referring to the entering of mail matter refers to second class mail as that is the only class to which the word "enter" can apply. 229 U. S. 288; § 2 Post Office Appropriation Act of 1912.

ENTERTAINMENT. Something connected with the enjoyment of refreshment rooms, tables, and the like. It is something beyond refreshments; it is the accommodation provided whether that includes musical or other amusements or not. L. R. 10 Q. B. 595. It is synonymous with board; 2 Miles 323; but it may include refreshment, without seating accommodation; 1 Ex. Div. 385.

ENTICE. To solicit, persuade, or procure. 12 Abb. Pr. U. S. 187. The enticing desertions from the army or navy or arsenals of the United States is punishable with fine and imprisonment. R. S. §§ 1553, 1668, 5455, 5525.

A husband may recover compensation for enticing his wife away: 36 Pac. Rep. (Colo.) 609; 153 Mass. 143; 26 Vt. 273. It is no defence to show that they had not lived happily together, though it may go in mitigation of damages; 121 Mass. 236; 63 N. W. Rep. (Ia.) 341. Stronger evidence is required where a parent harbors his daughter; it ought to appear that there were improper motives; 5 Johns. 196; Schoul. Husband & Wife § 64; 89 Tenn. 478; 47 Mich. 172. So of a wife's action against her husband's parents for enticing him away from her; 6 Ind. App. 317; and probably of a brother's harboring his sister; 89 Tenn. 479. It has been held that neither at common law nor under statutes giving a wife the right to sue has she a right of action for enticing away her husband; 76 Wis. 374; 82 Me. 503; 88 Tenn. 270; but the weight of authority is that the

action will lie at common law; 133 Ind. 386; 45 Fed. Rep. 315; 43 Neb. 269; 116 N. Y. 584; 9 H. L. Cas. 577. See 89 Mich. 128, with citations.

A parent has a right of action against one who improperly entices his minor child away from him; 71 Ind. 451; 50 Barb. 351; L. R. 2 C. P. 615; in tort or assumption; Tiffany, Pers. & Dom. Rel. 284. The action is on the theory of loss of services, and the relation of master and servant, either actual or constructive, must be proven; *id.*; 27 N. J. L. 86.

A master has a right of action for knowingly enticing his servant; 2 El. & Bl. 216; 56 N. H. 456; s. c. 22 Am. Rep. 475 and note; 43 Ga. 331; 33 S. C. 238; even though the contract of employment was one which the servant could terminate at will; 70 N. C. 60; L. R. 2 C. P. 615; but not where it had expired by its own limitations; 4 Pick. 425. The doctrine extends to all kinds of employees; 107 Mass. 555; though it has been held to apply, at common law, only to domestic servants and apprentices; 15 S. C. 82.

Where one after notice continues to employ another's servant the latter has a right of action, though at the time he hired him the second master did not know that he was hiring another man's servant; Schoul. Dom. Rel. § 487; but in *Lumley v. Gye*, 2 El. & Bl. 216, which was an action for damages caused by the enticement of Wagner, a celebrated singer, from one theatre to another, the majority of the court thought the action would lie.

Enticement in some states renders one liable to criminal prosecution; 44 Ga. 328; 50 Ala. 160; 89 N. C. 553. See, generally, 26 Fla. 206 and cases cited.

ENTIRE. That which is not divided; that which is whole.

When a contract is entire, it must, in general, be fully performed before the party can claim the compensation which was to have been paid to him: for example, when a man hires to serve another for one year, he will not be entitled to leave him at any time before the end of the year, and claim compensation for the time unless it be done by the consent or default of the party hiring; 6 Vt. 35; 2 Pick. 267; 4 McCord 26, 246; 4 Me. 454; 2 Pa. 454; 15 Johns. 224; 6 H. & J. 38. See 27 Atl. Rep. (Md.) 501. A contract is entire if the consideration be single and entire, notwithstanding the subject of the contract consist of several distinct items; 2 Pars. Cont. 517. See **DIVISIBLE**.

An *entire day* is an undivided day, from midnight to midnight; 43 Ala. 325; 7 Tex. App. 30, 192. The words "entire use, benefit," etc., in a trust deed for the benefit of a married woman, have been construed as equivalent to "sole and separate use;" 3 Ired. Eq. 414. *Entire tenancy* "is contrary to several tenancy, signifying a sole possession in one man, whereas the other signifies joint or common in more." Cowel.

Entire and Absolute Property. "Entire and absolute property" signifies undivided, unmingled, complete in all its parts; free and not controlled by others. 7 T. B. Mon. (Ky.) 393.

Property. See "Entire and absolute property," *Supra*.

ENTIRE AND SEVERAL CONTRACTS. If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. . . . But if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items. 115 U. S. 196; 2 Parsons on Contracts, 29-31. See **CONTRACT**; **SEVERAL**.

ENTIRETY. This word denotes the whole, in contradistinction to moiety, which denotes the half part. A husband and wife, when jointly seized of land, are seized by entireties *per tout* and not *per my et per tout*, as joint tenants are. Jacob, Law

Dict.; 2 Kent 132. See 156 Pa. 628; *PER TOUT ET NON PER MY*.

The same words of conveyance that would make two other persons joint tenants will make the husband and wife tenants of the entirety; 38 S. C. 34; 69 Miss. 795; 23 Or. 4; 92 Tenn. 707. Where a wife pays for land and consents that the title may be taken in the name of herself and husband, they hold as tenants in entirety, and a conveyance by the husband passes the rights to the possession of the land during their joint lives, and to the fee in case the husband survive; 67 Hun 229; 159 Mass. 415. See **TENANCY BY ENTIRETIES**.

ENTITLE. In its usual sense, to entitle is to give a right; therefore a person is said to be entitled to property when he has a right to it. R. & L. Dict.; L. R. 20 Eq. 534. Also, to bestow a name upon. English.

ENTREGA. In Spanish Law. Delivery.

ENTREPOT. A warehouse. A magazine where goods are deposited which are to be again removed.

ENTRY. In Common Law. The act of setting down the particulars of a sale, or other transaction, in a merchant's or tradesman's account-books: such entries are, in general, *prima facie* evidence of the sale and delivery, and of work done; but unless the entry be the original one, it is not evidence. See **SHORT ENTRY**; **SINGLE ENTRY**.

In Revenue Law. The submitting to the inspection of officers appointed by law, to collect customs, goods imported into the United States, together with a statement or description of such goods, and the original invoices of the same, for the purpose of estimating the duties to be paid thereon.

The act of March 2, 1799, s. 36, 1 Story, U. S. Laws 606, and the act of March 1, 1823, 3 Story, U. S. Laws 1881, and of March 3, 1863, regulate the manner of making entries of goods. Under the last mentioned act, goods entered by means of any false paper, etc., or their value, shall be forfeited, and the word "entry" in that act means the entire transaction by which the goods become a part of the merchandise of the country; 5 Ben. 25.

The term "entry" in the acts of congress is used in two senses. In many of the acts it refers to the bill of entry,—the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction; a series of acts which are necessary to the end to be accomplished, viz. the entering of the goods; 3 Sawy. 46.

In Criminal Law. The act of entering a dwelling-house, or other building, in order to commit a crime.

In cases of burglary, the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offence; Co. 3d Inst. 64.

It is an entry if a person descend a chimney but is arrested before he can get low enough to enter any room; it is an entry to open a window entirely, but not to push it up or down when partly opened; putting a finger or a pistol over a threshold is an entry, but not a centre-bit or crowbar, these instruments being intended for breaking, and not for committing a felony. Sir M. Hale suggests a "quere," however, with a "seeming" to the contrary, as to an entry by a bullet fired into a house; 1 Hale, Pl. Cr. 555. It is submitted, says Wilmot (Dig. Law of Burglary 58), that the only possible way in which the discharging a loaded gun or pistol into a dwelling-house from the outside could be held burglary would be by laying the intent to commit felony by killing or wounding, or generally to commit felony; and *quere*, whether the breaking and entry requisite to complete the burglary would be satisfied by such discharge? It is not necessary in all cases to show an actual entry by all the prisoners; there may be a constructive entry as well as a

constructive breaking. A, B, and C come in the night by consent to break and enter the house of D to commit a felony. A only actually breaks and enters the house; B stands near the door, but does not actually enter; C stands at the lane's end, or orchard-gate, or field-gate, or the like, to watch that no help come to aid the owner, or to give notice to the others if help comes; this is burglary in all, and all are principals; 1 Hale, Pl. Cr. 555. See **BURGLARY**.

Upon Real Estate. The act of going upon the lands of another, or lands claimed as one's own, with intent to take possession. See 8 Humph. 306.

In general, any person who has a right of possession may assert it by a peaceable entry, without the formality of a legal action, and, being so in possession, may retain it, and plead that it is his soil and freehold; 8 Term 295. A notorious act of ownership of this kind was always equivalent to a feudal investiture by the lord, and is now allowed in all cases where the original entry of a wrong-doer was unlawful. But, in all cases where the first entry was lawful and an apparent right of possession was thereby gained, the owner of the estate cannot thus enter, but is driven to his action at law; 3 Bla. Com. 175. See **RE-ENTRY**; **FORCEFUL ENTRY**.

At common law, no person could make a valid sale of land unless he had lawfully entered, and could make livery of seisin,—that is, could make an actual delivery of possession to the purchaser. This provision was early incorporated into the English statutes, to guard against the many evils produced by selling pretended titles to land. A pretended title within the purview of the law is where one person claims land of which another is in possession holding adversely to the claim; 1 Plowd. 88 a; Littleton § 347; 9 Wend. 511. And now in most of the states, every grant of land, except as a release, is void as an act of maintenance, if, at the time it is made, the lands are in the actual possession of another person claiming under a title adverse to that of the grantor; 4 Kent 446; 5 Johns. 489; 6 Mass. 418; 87 Hun 50; 30 S. W. Rep. (Ky.) 20; *contra*, 5 N. H. 181; 6 Binn. 420; 2 App. Cas. D. C. 349. See **CHAMPERTY**.

In a more limited sense, an entry signifies the simply going upon another person's premises for some particular purpose. The right to land is exclusive, and every unwarranted entry thereon without the owner's leave, whether it be enclosed or not, or unless the person entering have an authority given him by law, is a trespass; 12 Johns. 408; 19 *id.* 385; 2 Mass. 127. But the owner's license will sometimes be presumed, and then will continue in force until it is actually revoked by the owner; 10 Johns. 246; Willes 195; Tayl. L. & T. 766.

Authority to enter upon lands is given by law in many cases. See **ARREST**.

The proprietor of chattels may under some circumstances enter the land of another upon which they are placed, and remove them, provided they are there without his default: as, where his tree has blown down into the adjoining close by the wind, or his fruit has fallen from a branch which overhung it; 20 Vin. Abr. 418; 2 Greenl. Ev. § 627.

A landlord also may enter, to distrain or to demand rent, to see whether waste has been committed, or repairs made, and may go into the house for either purpose, provided the outer door be open; Cro. Eliz. 876; 2 Greenl. Ev. § 627. So, if he is bound to repair, he has a right of entry given him by law for that purpose; Moore 889. Or if trees are excepted out of a demise, the lessee has a right of entering to prune or fell them; 11 Co. 53; Tayl. L. & T. § 767. A tenant becomes a trespasser after the expiration of his term, though his holding is in good faith under color of a reasonable claim of right; and the landlord may forcibly enter thereon and eject him without legal process; 16 R. I. 524; 17 *id.* 731.

Every traveller also has, by law, the privilege of entering a common inn, at all seasonable times, provided the host has sufficient accommodation, which, if he has not,

it is for him to declare. *Wand. Inns 46.*

So any man may throw down a public nuisance; and a private one may be thrown down by the party grieved, and this before any prejudice happens, but only from the probability that it may happen; *Webb, Poll. Torts 518; 5 Co. 102.* And see 1 *Brownl. 212; 12 Mod. 510; W. Jones 221; 1 Stra. 688; 58 Wis. 404.* To this end, the abator has authority to enter the close in which it stands. See *NUISANCE*.

In Practice. The placing on record the various proceedings in an action, in technical language and order. The extreme strictness of the old practice is somewhat relaxed, but the term entry is still used in this connection. "Books of Entries" were formerly much relied on, containing forms or precedents of the proceedings in various actions as they appear on record.

In the law books the words entry and entered are frequently used as synonymous with recorded; 190 N. Y. 504. See 100 Ill. 484; 54 Cal. 519; 74 Ind. 59.

For entry of public lands, see *PRE-EMPTION RIGHT*. For the terms entry of judgment, entry of appearance, entry for copyright, see *JUDGMENT; APPEARANCE; COPYRIGHT*.

ENTRY AD COMMUNEM LEGEM. In English Law. A writ which lay in favor of the reversioner, when the tenant for term of life, tenant for term of another's life, tenant by the curtesy, or tenant in dower had aliened and died. *Tomlin, Law Dict.* Long obsolete, and abolished in 1838.

ENTRY, WRIT OF. In Old Practice. A real action brought to recover the possession of lands from one who wrongfully withholds possession thereof.

Such writs were said to be in the *Quibus*, where the suit was brought against the party who committed the wrong; in the *Per*, where the tenant against whom the action was brought was either heir or grantee of the original wrong-doer; in the *Per and Cui*, where there had been two descents, two alienations, or descent and an alienation; in the *Post*, where the wrong was removed beyond the degrees mentioned.

The above designations are derived from significant Latin words in the respective forms adapted to the cases given. A descent or alienation on the part of the disseisor constituted a degree (see *Co. Litt. 289 a*); and at common law the writ could be brought only within the degrees (two), the demandant after that being driven to his writ of right. By the statute of Marlbridge (q. v.), 2 Hen. III. c. 1 (A. 1197), however, a writ of entry after (post) the degrees had been passed in the alienation of the estate, was allowed. Where there had been no descent and the demandant himself had been disseised, the writ ran, *Præcipe A quod reddat B sex acras terre, etc. de quibus idem A. etc.* (command A to restore to B six acres of land, etc. of which the said A. etc.); if there had been a descent after the description came, the clause, *in quod idem A non habet ingressum nisi per C qui illud ei demisit* (into which the said A. the tenant, has no entry but through C, who demised it to him); where there were two descents, *nisi per D cui C illud demisit* (but by D, to whom C demised it); where it was beyond the degrees, *nisi post disseisinam quam C* (but after the disseisin which C, the original disseisor, did, etc.).

The writ was of many varieties, also, according to the character of the title of the claimant and the circumstances of the deprivation of possession. Both enumerates and discusses twelve of these, of which some are *sur disseisin, sur intrusion, ad communem legem, ad terminum qui preterit, cui in vita, cui ante divorcium*, etc. Either of these might, of course, be brought in any of the four degrees, as the circumstances of the case required. The use of writs of entry has been long since abolished in England; but they are still in use in a modified form in some of the United States, as the common means of recovering possession of realty against a wrongful occupant; 2 *Pick. 473; 10 id. 859; 5 N. H. 450; 88 Me. 21, 71; 85 id. 90; 124 Mass. 307, 498; 139 id. 244; 157 id. 24.* See *Stearn, Real Act.; Booth, R. A.; Co. Litt. 238 b*.

To maintain a writ of entry, the demandant who declares on his own seisin, and alleges a disseisin, is required to prove only that he has a right of entry and need not prove an actual wrongful dispossession or an adverse possession by the tenants; 161 *Mass. 91*.

ENTRYMAN. See *ASSIGN*.

ENURE. To take or have effect. To serve to the use, benefit, or advantage of a person. The word is often written *inure*.

A release to the tenant for life enures to him in reversion; that is, it has the same effect for him as for the tenant for life. A discharge of the principal enures to the benefit of the surety.

ENVOY. In International Law. A diplomatic agent sent by one state to another. *Wharton*.

A minister of the second rank, on whom his sovereign or government has conferred a degree of dignity and respectability which, without being on a level with an ambassador, immediately follows, and, among ministers, yields the pre-eminence to him alone.

Envoys are either ordinary or extraordinary; by custom the latter is held in greater consideration. *Vatt. liv. 4, c. 6, § 72.* See *FOREIGN MINISTER*.

EO INSTANTI. At that instant; at the very or same instant; immediately. 1 *Bl. Com. 196, 249; 1 Co. 188; Black, L. Dict.*

EORLE (Sax.). An earl. *Blount; 1 Bl. Com. 398.*

EPILEPSY. In Medical Jurisprudence. A disease of the brain, which occurs in paroxysms with uncertain intervals between them.

These paroxysms are characterized by the loss of sensation, and convulsive motions of the muscles. When long continued and violent, this disease is very apt to end in dementia. It gradually destroys the memory and impairs the intellect, and is one of the causes of an unsound mind.

EPIQUEYA. In Spanish Law. The benignant and prudent interpretation of the law according to the circumstances of the time, place, and person. This word is derived from the Greek, and is synonymous with the word equity. See *Murillo, nn. 67, 68.*

EPISCOPACY. In Ecclesiastical Law. A form of government by diocesan bishops; the office or condition of a bishop.

EPISCOPALIA (L. Lat.). In Ecclesiastical Law. Synodals, or payments due the bishop.

EPISCOPUS (L. Lat.). In Civil Law. A superintendent; an inspector. Those in each municipality who had the charge and oversight of the bread and other provisions which served the citizens for their daily food were so called. *Vicat; Du Cange.*

A bishop. These bishops, or *episcopi*, were held to be the successors of the apostles, and have various titles at different times in history and according to their different duties. It was applied generally to those who had authority or were of peculiar sanctity. After the fall of the Roman empire they came to have very considerable judicial powers. *Du Cange; Vicat; Calvinus, Lex.*

EPISTOLÆ (Lat.). In Civil Law. Rescripts; opinions given by the emperors in cases submitted to them for decision.

Answers of the emperors to petitions. The answers of counsellors (*juris-consulta*), as Ulpian and others, to questions of law proposed to them, were also called *epistolæ*.

Opinions written out. The term originally signified the same as *litteræ*. *Vicat.*

EQUAL PROTECTION OF THE LAWS. The equality clause of the Fourteenth amendment (q. v.) which states that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which, according to 169 U. S. 466 protects not only natural persons, but also those artificial persons called corporations. The exact interpretation and application of the clause depends of necessity on the circumstances of each individual case, but in general is taken to mean that "the law shall operate equally and uniformly," not on "persons merely as such, but on persons according to their relations," that is, "upon all persons in similar circumstances." *Bramon, XIV Am. 315, 319, 323, 324.* See *CLASSIFICATION IN STATUTES*.

EQUALITY. Likeness in possessing the same rights and being liable to the same

duties. See 1 *Toullier, nn. 170, 198.*

Persons are all equal before the law, whatever adventitious advantages some may possess over others. All persons are protected by the law, and obedience to it is required from all.

Judges in court, while exercising their functions, are all upon an equality, it being a rule that *inter pares non est potestas*: a judge cannot, therefore, punish another judge of the same court for using any expression in court, although the words used might have been a contempt in any other person. *Bacon, Abr., Of the Court of Sessions, Of Justices of the Peace.*

In contracts, the law presumes that the parties act upon a perfect equality: when, therefore, one party uses any fraud or deceit to destroy this equality, the party grieved may avoid the contract. In case of a grant to two or more persons jointly, without designating what each takes, they are presumed to take in equal proportions; 4 *Day 395; 6 Ired. Eq. 437; 83 Pa. 59.*

It is a maxim that when the equity of the parties is equal, the law must prevail; 3 *Call 259*; and that as between different creditors, equality is equity; 2 *Bouvier, Inst., 2d ed. n. 3729; 1 Paige, Ch. 181.* See *Kames, Eq. 75.*

EQUALLY DIVIDED. Under a bequest of property to be "equally divided" between the children of B and J, brothers of testators, the nieces and nephews take *per capita* and not *per stirpes*. 118 *Ky. 751, 82 S. W. 408.*

Where the words "equally divided" are used in a will they generally mean *a per capita* and not *a per stirpes* division. 12 *Bush (Ky.) 369; 150 Ky. 641; 150 S. W. 835.*

EQUINOX. The name given to two periods of the year when the days and nights are equal; that is, when the space of time between the rising and setting of the sun is one-half of a natural day. The vernal equinox occurs about March 21, the autumnal about September 23.

EQUIPMENT. The act of equipping or being equipped, as for a voyage or expedition. 11 *A. & E. Ency. 2nd ed., 54; 85 Cal. 329.* The visible, tangible furniture, fixtures, and apparatus on premises, which are usual and necessary for the operations there conducted. *Id.; 50 Md. 346.*

Of a railroad, the necessary adjuncts such as cars, locomotives, etc. *Id.; 45 N. E. Rep. 826.*

EQUITABLE. By operation of equity; cognizable in equity.

EQUITABLE ASSETS. Such assets as are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets.

Those portions of the property which by the ordinary rules of law are exempt from debts, but which the testator has voluntarily charged as assets, or which, being non-existent at law, have been created in equity. *Ad. Eq. 254.*

They are so called because they can be reached only by the aid and instrumentality of a court of equity, and because their distribution is governed by a different rule from that which governs the distribution of legal assets. 2 *Fonb. Eq. b. 4, pt. 2, c. 2, § 1*, and notes; 2 *Vern. 763; Willes 528; 8 Woodd. Lect. 466; Story, Eq. Jur. § 552.*

The doctrine of equitable assets has been much restricted in the United States generally, and has lost its importance in England since the act of 1870, providing that simple contract and specialty creditors are, in future, payable *pari passu* out of both legal and equitable assets; *Bisph. Eq. § 581; 4 Johns. Ch. 651; 5 Pet. 160; 2 Brock. 325; 3 Dana 18; 9 B. Monr. 499; 3 Ired. Eq. 259.*

EQUITABLE ASSIGNMENT. An assignment of a chose in action, a thing not in esse, as a mortgage of personal property to be acquired in the future, and a mere contingency which, though not good at law, equity will recognize. *Bisph. Eq. § 164; 10 H. L. Cas. 209; 19 Wall. 544; 88 Ill. App.*

66; 33 N. J. Eq. 614; 91 Pa. 96. In making such an assignment, no particular form of words is necessary; 85 Me. 41; 56 Barb. 362; 33 Vt. 431; 59 N. H. 838; 30 N. J. Eq. 171; but the property must be specifically pointed out; 56 Me. 465; Benj. Sales 62; and there must be an appropriation or separation, and the mere intent to appropriate is not sufficient; 54 Fed. Rep. 577; 87 N. J. Eq. 128. See 14 Wall. 69. A valid assignment may be made of a portion of the contract price of a building contracted to be erected by the assignor, but not yet erected, and such assignment need not be written nor accompanied by any transfer of the contract itself; 50 N. J. Eq. 201. The assignee of a chose in action takes it subject to existing equities in favor of third persons, as well as to those between the original parties; 50 N. Y. 67; 3 Lead. Cas. Eq. 372, n.; Beach, Eq. Jur. 342. Equity will not recognize the assignment of certain kinds of property as against the policy of the law, such as, mere litigious rights, pensions, salaries of judges, commissions of officers in the army or navy, claims against the United States, and the like; 1 E. L. & Eq. 153; 67 Pa. 369; L. R. 7 Ch. 109; 8 id. 76; 6 Ct. Cl. 123; 4 id. 569; 112 U. S. 733. The assignment of secured notes carries with it an equitable assignment of the security; 43 Ill. App. 516. See ASSIGNMENT; EXPECTANCY.

EQUITABLE CONVERSION. See CONVERSION.

EQUITABLE DEFENCE. A defence to an action on grounds which, prior to the passing of the Common Law Procedure Act (17 and 18 Vict. c. 125), would have been cognizable only in a court of equity. Moz. & W. The codes of procedure and the practice in some of the states likewise permit both a legal and equitable defence to the same action.

EQUITABLE ESTATE. A right or interest in land, which, not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available.

These estates consist of uses, trusts, and powers. They possess in some respects the qualities of legal estates in modern law; 1 Pet. 508; 13 Pick. 154; 5 Watts 118; 82 Pa. 86; 1 Johns. Ch. N. Y. 508; 2 Vern. 536; 1 Bro. Ch. Cas. 499; Wms. R. P. 134-136; 1 Spence, Eq. Jur. 601; 1 Washb. R. P. 130, 161.

EQUITABLE ESTOPPEL. Estoppel in pais (q. v.). 10 Otto 580.

In order to constitute an "equitable estoppel" there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon to his prejudice. 157 Ky. 33, 163 S. W. 504. See ESTOPPEL.

EQUITABLE MORTGAGE. A lien upon real estate of such a character that it is recognized in equity as a security for the payment of money and is treated as a mortgage. A mortgage of a merely equitable estate or interest is also so called.

Such a mortgage may exist by a deposit with the lender of money of the title-deeds to an estate; Story, Eq. Jur. § 1020; Bishp. Eq. 161; 1 Bro. Ch. C. 269, note; 17 Ves. 230; 2 Myl. & K. 417; 5 Wheat. 277; 2 Dick. 759; 2 Drew 41; 20 Beav. 607. They must have been deposited as a present, *bona fide* security; 1 Washb. R. P. 503; and the mortgagee must show notice to affect a subsequent mortgagee of record; 24 Me. 311; 3 Hare 416; Story, Eq. Jur. § 1020. Such mortgages are recognized in some states; 24 Me. 311; 18 Miss. 418; 16 Ga. 460; 2 Hill, S. C. 166; 2 Sandf. 9; 4 R. I. 512; but under the usual system of the registration of deeds are of infrequent occurrence.

Such a mortgage has been said to exist in

favor of the vendor of real estate as security for purchase-money due from the purchaser; in which case a lien is recognized in some jurisdictions; 15 Ves. 339; 1 Bro. Ch. C. 420, 424, n. It is occasionally spoken of as an equitable mortgage; 1 Bland 491; 2 Rob. Va. 447, though it is doubtful if it is to be so considered. It is properly termed vendor's lien, which see. See also LIEN.

EQUITABLE WASTE. See WASTE.

EQUITATURA. In Old English Law. Needful equipments for riding or travelling.

EQUITY. A branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

In the broad sense in which this term is sometimes used, it signifies natural justice.

In a more limited application, it denotes equal justice between contending parties. This is its moral signification, in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction and proceedings, it has a more restrained and limited signification.

One division of courts is into courts of law and courts of equity, and equity, in this relation and application, is a branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

The difference between the remedial justice of the courts of common law and that of the courts of equity is marked and material. That administered by the courts of law is limited by the principles of the common law (which are to a great extent positive and inflexible), and especially by the nature and character of the process and pleadings, and of the judgments which those courts can render; because the pleadings cannot fully present all the matters in controversy, nor can the judgments be adapted to the special exigencies which may exist in particular cases. It is not uncommon, also, for cases to fall in those courts, from the fact that too few or too many persons have been joined as parties, or because the pleadings have not been framed with sufficient technical precision.

The remedial process of the courts of equity, on the other hand, admits, and generally requires, that all persons having an interest shall be made parties, and makes a large allowance for amendments by summing up and discharging parties after the commencement of the suit. The pleadings are usually framed so as to present to the consideration of the court the whole case, with its possible legal rights, and all its equities,—that is, all the grounds upon which the suitor is or is not entitled to relief upon the principle of equity. And its final remedial process may be so varied as to meet the requirements of these equities, in cases where the jurisdiction of the courts of equity exists, by "commanding what is right, and prohibiting what is wrong." In other words, its final process is varied so as to enable the courts to do that equitable justice between the parties which the case demands, either by commanding what is to be done, or prohibiting what is threatened to be done.

The principles upon which, and the modes and forms by and through which, justice is administered in the United States, are derived to a great extent from those which were in existence in England at the time of the settlement of this country; and it is therefore important to a correct understanding of the nature and character of our own jurisprudence, not only to trace it back to its introduction here on the early settlement of the colonies, but also to trace the English jurisprudence from its earliest inception as the administration of law, founded on principles, down to that period. It is in this way that we are enabled to explain many things in our own practice which would otherwise be entirely obscure. This is particularly true of the principles which regulate the jurisdiction and practice of the courts of equity, and of the principles of equity as they are now applied and administered in the courts of law which at the present day have equitable jurisdiction conferred upon them by statutes passed for that purpose. And for the purpose of a competent understanding of the course of decisions in the courts of equity in England, it is necessary to refer to the origin of the equitable jurisdiction there, and to trace its history, inquiring upon what principles it was originally founded, and how it has been enlarged and sustained.

The study of equity jurisprudence, therefore, comprises an inquiry into the origin and history of the courts of equity; the distinctive principles upon which jurisdiction in equity is founded; the nature, character, and extent of the jurisdiction itself; its peculiar remedies; the rules and maxims which regulate its administration; its remedial process and proceedings and modes of defence; and its rules of evidence and practice.

"The meaning of the word 'equity,' as used in its technical sense in English jurisprudence, comes back to this: that it is simply a term descriptive of a certain field of jurisdiction exercised in the English system, by certain courts, which, though its extent and boundaries are not marked by lines founded upon principle so much as by the features of the original constitution of the English scheme of remedial law, and the accidents of its development." Bishp. Eq. § 11.

ORIGIN AND HISTORY. The courts of equity may be said to have their origin as far back as the Aula or Curia Regis, the great court in which the king administered justice in person, assisted by his counselors. Of the officers of this court, the chancellor was one of great trust and con-

fidence, next to the king himself; but his duties do not distinctly appear at the present day. On the dissolution of that court, he exercised separate duties.

On the introduction of seals, he had the keeping of the king's seal, which he affixed to charters and deeds; and he had some authority in relation to the king's grants,—perhaps annulling those which were alleged to have been procured by misrepresentation or to have been issued unadvisedly.

As writs came into use, it was made his duty to frame and issue them from his court, which, as early as the reign of Henry II., was known as the chancery. And it is said that he exercised at this period a sort of equitable jurisdiction by which he mitigated the rigor of the common law,—to what extent it is impossible to determine. He is spoken of as one who "annuls unjust laws, and executes the rightful commands of the pious prince, and puts an end to what is injurious to the people or to morals,"—which would form a very ample jurisdiction; but it seems probable that this was according to the authority or direction of the king, given from time to time in relation to particular cases. He was a principal member of the king's council, after the conquest, in which, among other things, all applications for the special exercise of the prerogative in regard to matters of judicial cognizance were discussed and decided upon. In connection with the council, he exercised a separate authority in cases in which the council directed the suitors to proceed in chancery. The court of chancery is said to have sprung from this council. But it may be said that it had its origin in the prerogative of the king, by which he undertook to administer justice, on petitions to himself, without regard to the jurisdiction of the ordinary courts, which he did through orders to his chancellor. The great council, or parliament, also sent matters relating to the king's grants, etc., to the chancery; and it seems that the chancellor, although an ecclesiastic, was the principal actor as regards the judicial business which the select or king's council, as well as the great council, had to advise upon or transact. In the reign of Edward I. the power and authority of the chancellor were extended by the statute of Westminster 2d.

In the time of Edward III. proceedings in chancery were commenced by petition or bill, the adverse party was summoned, the parties were examined, and chancery appears as a distinct court for giving relief in cases which required extraordinary remedies, the king having, "by a writ, referred all such matters as were of *grace* to be dispatched by the chancellor or by the keeper of the privy seal."

It may be considered to have been fully established as a separate and permanent jurisdiction, from the 17th of Richard II.

In the time of Edward IV. the chancery had come to be regarded as one of the four principal courts of the kingdom. From this time its jurisdiction and the progress of its jurisdiction become of more importance to us.

It is the tendency of any system of legal principles, when reduced to a practical application, to fail of effecting such justice between party and party as the special circumstances of a case may require, by reason of the minuteness and inflexibility of its rules and the inability of the judges to adapt its remedies to the necessities of the controversy under consideration. This was the case with the Roman law; and, to remedy this, edicts were issued from time to time, which enabled the consuls and prætors to correct "the scrupulosity and mischievous subtlety of the law;" and from these edicts a code of equitable jurisprudence was compiled.

So the principles and rules of the common law, as they were reduced to practice, became in their application the means of injustice in cases where special equitable circumstances existed, of which the judge could not take cognizance because of the precise nature of its titles and rights, the

inflexible character of its principles; and the technicality of its pleadings and practice. And in a manner somewhat analogous to the Roman mode of modification, in order to remedy such hardships, the prerogative of the king or the authority of the great council was exercised in ancient times to procure a more equitable measure of justice in the particular case, which was accomplished through the court of chancery.

This was followed by the "invention" of the writ of subpoena by means of which the chancery assumed, upon a complaint made directly to that court, to require the attendance of the adverse party, to answer to such matters as should be objected against him. Notwithstanding the complaints of the commons, from time to time, that the course of proceeding in chancery "was not according to the course of the common law, but the practice of the holy church," the king sustained the authority of the chancellor, the right to issue the writ was recognized and regulated by statute, and other statutes were passed conferring jurisdiction where it had not been taken before. In this way, without any compilation of a code, a system of equitable jurisprudence was established in the court of chancery, enlarging from time to time; the decisions of the court furnishing an exposition of its principles and of their application. It is said that the jurisdiction was greatly enlarged under the administration of Cardinal Wolsey, in the time of Henry VIII. The courts of equity also began to act *in personam* and to enjoin plaintiffs in common-law courts from prosecuting inequitable suits. A controversy took place between Lord Chancellor Ellesmere and Lord Coke, Chief Justice of the King's Bench, in the time of James I., respecting the right of the chancellor to interfere with any of the proceedings and judgments of the courts of law. The king sustained the chancellor; and from that time the jurisdiction then claimed has been maintained. See 1 Ch. Rep. 1; 2 Lead. Cas. Eq. 504; Bishp. Eq. § 407; 1 Poll. & Matl. 172; CANCELLARIUS.

It is from the study of these decisions and the commentaries upon them that we are enabled to determine, with a greater or less degree of certainty, the time when and the grounds upon which jurisdiction was granted or was taken in particular classes of cases, and the principles upon which it was administered. And it is occasionally of importance to attend to this; because we shall see that, chancery having once obtained jurisdiction, that jurisdiction continues until expressly taken away, notwithstanding the intervention of such changes in common-law practice and rules as, if they had been made earlier, would have rendered the exercise of jurisdiction in equity incompatible with the principles upon which it is founded.

A brief sketch of some of the principal points in the origin and history of the court of chancery may serve to show that much of its jurisdiction exists independently of any statute, and is founded upon an assumption of a power to do equity, having its first inception in the prerogative of the king, and his commands to do justice in individual cases, extending itself through the action of the chancellor, to the issue of a writ of summons to appear in his court without any special authority for that purpose, and, upon the return of the subpoena, to the reception of a complaint, to a requirement upon the party summoned to make answer to that complaint, and then to a hearing and decree, or judgment, upon the merits of the matters in controversy, according to the rules of equity and good conscience.

It appears as a noticeable fact that the jurisdiction of the chancery proceeded originally from and was sustained by successive kings of England against the repeated remonstrances of the commons, who were for adhering to the common law; though not, perhaps, approving of all its rigors, as equity had been to some extent acknowledged as a rule of decision in the common-law courts.

This opposition of the commons may

have been owing in part to the fact that the chancellor was in those days usually an ecclesiastic, and to the existing antipathy among the masses of the people to almost everything Roman.

The master of the rolls, who for a long period was a judicial officer of the court of chancery, second only to the chancellor, was originally a clerk or keeper of the rolls or records, but seems to have acquired his judicial authority from being at times directed by the king to take cognizance of and determine matters submitted to him.

DISTINCTIVE PRINCIPLES. It is quite apparent that some principles other than those of the common law must regulate the exercise of such a jurisdiction. That law could not mitigate its rigor upon its own principles. And as, down to the time of Edward III., and, with few exceptions, to the 21st of Henry VIII., the chancellors were ecclesiastics, much more familiar with the principles of the Roman law than with those of the common law, it was but a matter of course that there should be a larger adoption of the principles of that law; and the study of it is of some importance in this connection. Still, that law cannot be said to be of authority even in equity proceedings. The commons were jealous of its introduction. "In the reign of Richard II. the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common-law tribunals."

This opposition of the barons and of the common-law judges furnished very sufficient reasons why the chancellors should not profess to adopt that law as the rule of decision. In addition to this, it was not fitted, in many respects, to the state of things existing in England; and so the chancellors were of necessity compelled to act upon equitable principles as expounded by themselves. In later times the common-law judges in that country have resorted to the Roman law for principles of decision to a much greater extent than they have given credit to it.

Since the time of Henry VIII. the chancery bench has been occupied by some of the ablest lawyers which England has produced, and they have given to the proceedings and practice in equity definite rules and forms, which leave little to the personal discretion of the chancellor in determining what equity and good conscience require. The discretion of the chancellor is a judicial discretion, to be exercised according to the principles and practice of the court. See DISCRETION.

The avowed principle upon which the jurisdiction was at first exercised was the administration of justice according to honesty, equity, and conscience,—which last, it is said, was unknown to the common law as a principle of decision.

In the 15th of Richard II. two petitions, addressed to the king and the lords of parliament, were sent to the chancery to be heard, with the direction, "Let there be done, by the authority of parliament, that which right and reason and good faith and good conscience demand in the case."

These may be said to be the general principles upon which equity is administered at the present day.

The distinctive principles of the courts of equity are shown, also, by the classes of cases in which they exercise jurisdiction and give relief,—allowing it to be sought and administered through process and proceedings of less formality and technicality than are required in proceedings at law. This, however, has its limitations, some of its rules of pleading in defence being quite technical. And it is another peculiar feature that the relief is administered by a decree or process adapted to the exigencies of the particular case.

JURISDICTION. It is difficult to reduce a jurisdiction so extensive and of such diverse component parts to a rigid and precise classification. But an approach to it may be made. The general nature of the jurisdiction has already been indicated. It exists—

First, for the purpose of compelling a

discovery from the defendant, respecting the truth of the matters alleged against him, by an appeal to his conscience to speak the truth. The discovery is enforced by requiring an answer to the allegations in the plaintiff's complaint, in order that the plaintiff may use the matters disclosed in the answer, as admissions of the defendant, and, thus, evidence is secured for the plaintiff, either in connection with and in aid of other evidence offered by the plaintiff, or to supply the want of other evidence on his part; or it may be to avoid the expense to which the plaintiff must be put in procuring other evidence to sustain his case.

When the plaintiff's complaint, otherwise called a bill, prays for relief in the same suit, the statements of the defendant in his answer are considered by the court in forming a judgment upon the whole case.

To a certain extent, the statements of the defendant in answer to the bill are evidence for himself also.

The discovery which may be required is not only of facts within the knowledge of the defendant, but may, also, be of deeds and other writings in his possession.

The right to discovery is not, however, an unlimited one: as, for instance, the defendant is not bound to make a discovery which would subject him to punishment, nor, ordinarily, to discover the title upon which he relies in his defence; nor is the plaintiff entitled to require the production of all papers which he may desire to look into. The limits of the right deserve careful consideration. The discovery, when had, may be the foundation of equitable relief in the same suit, in which case it may be connected with all the classes of cases in which relief is sought; or it may be for the purpose of being used in some other court, in which case the jurisdiction is designated as an assistant jurisdiction. Since the new statutes on the admission of evidence of parties, bills of discovery have practically fallen into disuse. See DISCOVERY.

Second, where the courts of law do not, or did not, recognize any right, and therefore could give no remedy, but where the courts of equity recognize equitable rights and, of course, give equitable relief. This has been denominated the exclusive jurisdiction. In this class are *trusts, charities, forfeited and imperfect mortgages, penalties and forfeitures, imperfect consideration*.

Uses and trusts have been supposed to have had their origin in the restrictions laid by parliament upon conveyances *in mortmain*,—that is, to the church for charitable, or rather for ecclesiastical, purposes.

It may well be that the doctrine of equitable titles and estates, unknown to the common law but which could be enforced in chancery, had its origin in conveyances to individuals for the use of the church in order to avoid the operation of these restrictions,—the conscience of the feoffee being bound to permit the church to have the use according to the design and intent of the feoffment.

But conveyances in trust for the use of the church were not by any means the only cases in which it was desirable to convey the legal title to one for the use of another. In many instances, such a conveyance offered a convenient mode of making provision for those who, from any circumstances, were unable to manage property advantageously for themselves, or to whom it was not desirable to give the control of it; and the propriety in all such cases of some protection to the beneficiary is quite apparent. The court of chancery, by recognizing that he had an interest of an equitable character which could be protected and enforced against the holder of the legal title, exercised a jurisdiction to give relief in cases which the courts of common law could not reach, consistently with their principles and modes of procedure.

Mortgages, which were originally estates conveyed upon condition, redeemable if the condition were performed at the day, but absolute on non-performance, the right to redeem being thereby forfeited, owe their origin, in the modern conception of

the term, to the court of chancery; which, acting at first, perhaps, in some cases where the non-performance was by mistake or accident, soon recognized an equitable right of redemption after the day, as a general rule, in order to relieve against the forfeiture. This became known as an equity of redemption,—a designation, in use at the present day, although there has long been a legal right of redemption in such cases.

Relief against penalties and forfeitures also was formerly obtained only through the aid of the court of chancery.

In most of the cases which fall under this head, courts of law now exercise a concurrent jurisdiction.

Third, where the courts of equity administer equitable relief for the infraction of legal rights, in cases in which the courts of law, recognizing the right, give a remedy according to their principles, modes, and forms, but the remedy is deemed by equity inadequate to the requirements of the case. This is sometimes called the concurrent jurisdiction. This class embraces *fraud, mistake, accident, administration, legacies, contribution*, and cases where justice and conscience require the *cancellation, or reformation of instruments, or the rescission, or the specific performance of contracts*.

The courts of law relieve against fraud, mistake, and accident where a remedy can be had according to their modes and forms; but there are many cases in which the legal remedy is inadequate for the purposes of justice.

The modes of investigation and the peculiar remedies of the courts of equity are often of the greatest importance in this class of cases.

Transfers to defeat or delay creditors, and purchases with notice of an outstanding title, come under the head of fraud.

It has been said that there is a less amount of evidence required to prove fraud, in equity, than there is at law; but the soundness of that position may well be doubted.

The court does not relieve in all cases of accident and mistake.

In many cases the circumstances are such as to require the cancellation or reformation of written instruments or the specific performance of contracts, instead of damages for the breach of them.

Fourth, where the court of equity administers a remedy because the relations of the parties are such that there are impediments to a legal remedy. *Partnership* furnishes a marked instance. *Joint-tenancy and marshalling of assets* may be included.

From the nature of a partnership, there are impediments to suits at law between the several partners and the partnership in relation to matters involved in the partnership; and impediments of a somewhat similar character exist in other cases.

Fifth, where the forms of proceeding in the courts of law are not deemed adequate to the due investigation of the particulars and details of the case. This class includes *account, partition, dower, ascertainment of boundaries*.

Sixth, where, from a relation of trust and confidence, or from consanguinity, the parties do not stand on equal ground in their dealings with each other: as, the relations of *parent and child, guardian and ward, attorney and client, principal and agent, executor or administrator and legatees or distributees, trustee and cestui que trust*, etc.

Seventh, where the court grant relief from considerations of public policy, because of the mischief which would result if the court did not interfere. *Marriage-brokerage agreements, contracts in restraint of trade, buying and selling public offices, agreements founded on corrupt considerations, usury, gaming, and contracts with expectant heirs*, are of this class.

Many cases of this and the preceding class are sometimes considered under the head of *constructive fraud*.

Eighth, where a party from incapacity to take care of his rights is under the special

care of the court of equity, as *infants, idiots, and lunatics*.

This is a branch of jurisdiction of very ancient date, and of a special character, said to be founded in the prerogative of the king.

In this country the court does not, in general, assume the guardianship, but exercises an extensive jurisdiction over guardians, and may hold a stranger interfering with the property of an infant accountable as if he were guardian.

Ninth, where the court recognizes an obligation on the part of a husband to make provision for the support of his wife, or to make a settlement upon her, out of the property which comes to her by inheritance or otherwise.

This jurisdiction is not founded upon either trust or fraud, but is derived originally from the maxim that he who asks equity should do equity.

Tenth, where the equitable relief appropriate to the case consists in restraining the commission or continuance of some act of the defendant, administered by means of a writ of *injunction*.

Eleventh, the court aids in the procuration or preservation of evidence of the rights of a party, to be used, if necessary, in some subsequent proceeding, the court administering no final relief.

See a full note as to equity jurisdiction in 19 Am. L. Reg. N. S. 563.

PECULIAR REMEDIES, AND THE MANNER OF ADMINISTERING THEM. Under this head are—*specific performance of contracts; re-execution, reformation, rescission, and cancellation of contracts or instruments; restraint by injunction; bills quia timet; bills of peace; protection of a party liable at law, but who has no interest, by bill of interpleader; election between two inconsistent legal rights; conversion; priorities; tacking; marshalling of securities; application of purchase-money.*

In recent periods, the principles of the court of chancery have in many instances been acted on and recognized by the courts of law (as, for instance, in relation to mortgages, contribution, etc.) so far as the rules of the courts of law admitted of their introduction.

In some states the entire jurisdiction has, by statute, been conferred upon the courts of law, who exercise it as a separate and distinct branch of their authority, upon the principles and according to the modes and forms previously adopted in chancery.

In a few, the jurisdictions of the courts of law and of equity have been amalgamated, and an entire system has been substituted, administered more according to the principles and modes and forms of equity than the principles and forms of the common law.

RULES AND MAXIMS. In the administration of the jurisdiction, there are certain rules and maxims which are of special significance.

First, Equity having once had jurisdiction of a subject-matter because there is no remedy at law, or because the remedy is inadequate, does not lose the jurisdiction merely because the courts of law afterwards give the same or a similar relief.

Second, Equity follows the law. This is true as a general maxim. Equity follows the law, except in relation to those matters which give a title to equitable relief because the rules of law would operate to sanction fraud or injustice in the particular case.

Third, Between equal equities, the law must prevail. The ground upon which the suitor comes into the court of equity is that he is entitled to relief there. But if his adversary has an equally equitable case, the complainant has no title to relief.

Fourth, Equality is equity: applied to cases of contribution, apportionment of moneys due among those liable or benefited by the payment, abatement of claims on account of deficiency of the means of payment, etc.

Fifth, He who seeks equity must do equity. A party cannot claim the interposition of the court for relief unless he will do what

it is equitable should be done by him as a condition precedent to that relief.

Sixth, Equity considers that as done which ought to have been done. A maxim of much more limited application than might at first be supposed from the broad terms in which it is expressed. In favor of parties who would have had a benefit from something contracted to be done, and who have an equitable right to have the case considered as if it had been done, equity applies this maxim. Illustration: when there is an agreement for a sale of land, and the vendor dies, the land may be treated as money, and the proceeds of the sale, when completed, go to the distributees of personal estate, instead of to the heir. If the vendee die before the completion of the purchase, the purchase-money may be treated as land for the benefit of the heir.

REMEDIAL PROCESS, AND DEFENCE. A suit in equity is ordinarily instituted by a complaint, or petition, called a bill; and the defendant is served with a writ of summons, requiring him to appear and answer, called a subpoena.

In Pennsylvania the suit is begun by filing and serving a copy of the bill, the subpoena having been dispensed with by a rule of court.

The forms of proceedings in equity are such as to bring the rights of all persons interested before the court; and, as a general rule, all persons interested should be made parties to the bill, either as plaintiffs or defendants.

There may be amendments of the bill; or a supplemental bill,—which is sometimes necessary when the case is beyond the stage for amendment.

In case the suit fails by the death of the party, there is a bill of revivor, and after the cause is disposed of there may be a bill of review.

The defence is made by demurrer, plea, or answer. If the defendant has no interest, he may disclaim. Discovery may be obtained from the plaintiff, and further matter may be introduced, by means of a cross-bill, brought by the defendant against the plaintiff, in order that it may be considered at the same time. Issue is joined by the plaintiff's filing a replication to the defendant's answer; Sto. Eq. Pl. § 878 n. The U. S. Equity rule 66 requires a replication to be filed on or before the next rule day; failing which the bill may be dismissed. In some states, as Delaware, the replication is entered as of course without filing; and special replications are now as a rule not used.

The final process is directed by the decree, which being a special judgment can provide relief according to the nature of the case. This is sometimes by a perpetual injunction.

There may be a bill to execute, or to impeach, a decree.

EVIDENCE AND PRACTICE. The rules of evidence, except as to the effect of the answer and the taking of the testimony, are, in general, similar to the rules of evidence in cases at law. But to this there are exceptions.

The answer, if made on oath, is evidence for the defendant, so far as it is responsive to the calls of the bill for discovery, and as such it prevails, unless it is overcome by something more than what is equivalent to the testimony of one witness. If without oath, it is a mere pleading, and the allegations stand over for proof.

If the answer is incomplete or improper, the plaintiff may except to it, and it must, if the exceptions are sustained, be so amended as to be made sufficient and proper.

The case may be heard on the bill and answer, if the plaintiff so elects, and sets the case down for a hearing thereon.

If the plaintiff desires to controvert any of the statements in the answer, he files a replication by which he denies the truth of the allegations in the answer, and testimony is taken.

The testimony, according to the former practice in chancery, is taken upon interrogatories filed in the clerk's office, and

propounded by the examiner, without the presence of the parties. But this practice has been very extensively modified.

If any of the testimony is improper, there is a motion to suppress it.

The case may be referred to a master to state the accounts between the parties, or to make such other report as the case may require; and there may be an examination of the parties in the master's office. Exceptions may be taken to his report.

The hearing of the case is before the equity judge, who may make interlocutory orders or decrees, and who pronounces the final decree or judgment. There may be a rehearing, if sufficient cause is shown.

At the present day, wherever equity forms are used, the proceedings have become very much simplified.

The system of two distinct sets of tribunals administering different rules for the adjudication of causes has now been changed in England. By the Judicature Acts of 1873 and 1876, the courts of law and equity were consolidated into one Supreme Court of Judicature, in which equitable claims and defences are recognized in all proceedings to the same effect as a court of chancery would have recognized them before the passing of the act. Equitable remedies are substantially applied.

In America, the federal courts have equity powers under the constitution, where an adequate remedy at law does not exist; *R. S. § 723*; 140 U. S. 105; 141 *id.* 656; 138 *id.* 146. The adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by congress; 121 U. S. 201. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union; 150 U. S. 202; 120 *id.* 130; 2 *Sumn.* 612.

Courts of chancery were constituted in some of the states after 1776: and in Pennsylvania, for a short time, as early as 1723, a court of chancery existed; see Rawle, *Eq.* in Penna.; and in most of the colonies before the revolution; see *Bisph. Eq.* § 14, n.

At the present time, distinct courts of chancery exist in very few of the states. In the greater number chancery powers are exercised by judges of common-law courts according to the ordinary practice in chancery. In the remaining states, the distinctions between actions at law and suits in equity have been abolished, but certain equitable remedies are still administered under the statutory form of the civil action. See *Bisph. Eq.* § 15. It has been claimed that Pennsylvania was the first state to administer equity through common-law forms; but in a recent report to the Texas State Bar Association it is said: "Of one fact there can be no doubt, viz., Texas was the first state in the Union, which was dominated by common-law people and lawyers, to reject the common-law form of pleading and practice when the issue was raised between that system and the civil-law system; and Texas was unquestionably the first state in the American Union to abolish the distinction between law and equity in the enforcement of private rights and redress of private wrongs." *Ann. Rep.* 1896.

For a very comprehensive reference list of text-books and periodical literature on Equity Jurisprudence, Pleading, and Practice, see the admirable catalogue of the St. Louis Law Library.

That system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction. In its technical and scientific legal sense means neither natural justice nor even all that portion of natural justice which is susceptible of being judicially enforced. It has a precise, definite and limited significance, and is used to denote a system of justice which was administered in a particular

court—the nature and extent of which system cannot be defined in a single sentence. *Bispham, Prin. of Eq.* 10th ed., p. 1.

The term "equity," as descriptive of an important body of English law, has an essentially technical signification, and its precise and definite meaning when so used is clearly distinguishable from that which it bears in its ordinary acceptance. Thus, "equity" may be in one sense synonymous with natural right and justice; but neither Courts of Chancery nor courts of law profess to afford relief in all cases in which redress would be prescribed by rules of charity, generosity or benevolence, or by the dictates of a nice sense of honor, and yet the rules of benevolence and the principles of honor are included within the scope of the terms "right" and "justice," and may therefore fall within one meaning of the term "equity." On the other hand, courts of common law recognize "equity" in a certain sense. Thus, when the "equity" of a statute is spoken of, or a certain case is said to be within that "equity," or the like, the meaning intended to be conveyed is simply that a sound and fair interpretation of the law must be given—an interpretation based not upon its letter alone, but upon its spirit and true sense. The meaning of the word "equity" then, as used in its technical sense in English jurisprudence, is simply a term descriptive of a certain field of jurisdiction exercised, in the English system, by certain courts, and of which the extent and boundaries are not marked by lines founded upon principle so much as by the features of the original constitution of the English scheme of remedial law and the accidents of its development. *Id.*, p. 22, 23.

EQUITY EVIDENCE. See **EQUITY**; **EVIDENCE**.

EQUITY JURISPRUDENCE. That system of jurisprudence which comprehends every matter of law for which common law provides no, or inadequate remedy. *Stand Dict.*

EQUITY PLEADING. See **EQUITY**; **PLEA**.

EQUITY OF REDEMPTION. A right which the mortgagor of an estate has of redeeming it, after it has been forfeited at law by the non-payment at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest, and costs.

The phrase of equity of redemption is indiscriminately, though often incorrectly, applied to the right of the mortgagor to regain his estate, both before and after breach of condition. In North Carolina, by statute, the former is called a *legal right of redemption*, and the latter the *equity of redemption*, thereby keeping a just distinction between these estates; 1 N. C. Rev. Stat. 266; 4 M'Cord 340. The interest is recognized at law for many purposes: as a subsisting estate, although the mortgagor in order to enforce his right is obliged to resort to an equitable proceeding, administered generally in courts of equity, but in some states by courts of law; 11 S. & R. 223; or in some states may pay the debt and have an action at law; 18 Johns. 7, 110; 1 Halst. 466; 2 H. & M.H. 9.

This estate in the mortgagor is one which he may devise or grant; 2 Washb. R. P. 40; and which is governed by the same rules of devolution or descent as any other estate in lands; 10 Conn. 243; 2 S. & S. 323; 2 Hare 35. He may mortgage it; 1 Pick. 485; and it is liable for his debts; 3 Metc. 81; 21 Me. 104; 7 Watts 475; 15 Ohio 467; 1 Cai. Cas. 47; 4 B. Monr. 429; 31 Miss. 253; 20 Ill. 53; 7 Ark. 269; 1 Day 93; 4 M'Cord 336; but see 7 Paige, Ch. 437; 7 Dana 67; 14 Ala. N. S. 476; 23 Miss. 206; 2 Dougl. Mich. 176; 24 Mo. 249; 13 Pet. 294; and in many other cases, if the mortgagor still retains possession, he is held to be the owner; 5 Gray 470, note; 11 N. H. 298; 22 Conn. 587; 13 Ill. 469; 34 Me. 89; 23 Barb. 490.

Any person who is interested in the mortgaged estate, or any part of it, having a legal estate therein, or a legal or equitable lien thereon, provided he comes in as privy in estate with the mortgagor, may exercise the right; including heirs, devisees, executors, administrators, and assignees of the mortgagor; 2 Root 509; 2 Hayw. 22; 14 Vt. 501; 10 Paige, Ch. 49; 9 Mass. 422; 48 Minn.

223; subsequent incumbrancers; 5 Johns. Ch. 35; 1 Dana 23; 8 Cush. 46; 47 Minn. 434; 63 Hun 635; judgment creditors; 2 Litt. 393; 4 Hen. & M. 101; 4 Yerg. 10; 2 Cal. 595; 2 D. & B. Eq. 285; 133 Ind. 670; 45 Ill. 62; 140 Id. 135; tenants for years; 8 Metc. 517; 7 N. Y. 44; a jointress; 1 Vern. 190; 2 Wh. & T. Lead. Cas. 752; dowerless tenant by curtesy; 14 Pick. 98; 84 Wis. 240; 64 Vt. 616; one having an easement; 23 Pick. 401; one having an interest as a partner; 159 Mass. 356.

A mortgagee for adequate value and in good faith may acquire the equity of redemption; 112 Mo. 315; and a second mortgagee who purchases such equity is entitled to any payments that may have been made on the first mortgage, but which were not credited thereon; 26 Atl. Rep. (N. J.) 889.

Where the necessary amount has been tendered within the statutory period for redemption, it can be followed up by suit to redeem at any time before the right to bring suit is barred; 57 Ark. 108. A court of equity has the discretion governed by the equities of each case, to name terms on which it will let in a party to redeem; 112 Mo. 599.

Where a bill to redeem is filed before the debt is due, it must be dismissed, although the hearing is not had until after the debt is due; 160 Mass. 102. See **MORTGAGE**.

EQUIVALENT. Of the same value. Sometimes a condition must be bilaterally accomplished in *forma specifica*; but some may be fulfilled by an equivalent, *per equi-polens*, when such appears to be the intention of the parties: as, if I promise to pay you one hundred dollars, and then die, my executor may fulfil my engagement; for it is equivalent to you whether the money be paid to you by me or by him. *Rolle, Abr.* 451. For its meaning in patent law, see 7 Wall. 327; **PATENT**.

EQUIVOCAL. Having a double sense. In the construction of contracts, it is a general rule that when an expression may be taken in two senses, that shall be preferred which gives it effect. See **CONSTRUCTION**; **INTERPRETATION**.

EUQULEUS (Lat.). A kind of rack for extorting confessions. *Encyc. Lond.*

ERASURE. The obliteration of a writing. The effect of an erasure is not *per se* to destroy the writing in which it occurs, but is a question for the jury, and will render the writing void or not, under the same circumstances as an interlineation. See 5 Pet. 560; 11 Co. 83; 5 Bingh. 183; 11 Conn. 531; 3 La. 56; 57 Ala. 173; 63 Ind. 401; 39 Mo. 34; 44 N. H. 237; 43 Wis. 231; 69 Me. 429; 119 Mass. 269. See **ALTERATION**; **INTERLINEATION**.

ERISCUNDUS (Lat. *eriscere*). For dividing. *Familie eriscunde actio*. An action for dividing a way, goods, or any matter of inheritance. *Vicat, Voc. Jur.*; *Calvinus, Lex*.

ERECTION. This term is generally used of a completed building. 45 N. Y. 153; 119 Mass. 254. The repairing, alteration, and enlarging, or the removal from one spot to another, of a building, is not erection within the meaning of a statute forbidding the erection of wooden buildings; 27 Conn. 332; 2 Rawle 262; 51 Ill. 422. The moving of a building is not an erection of a building; 121 Mass. 229; but the painting of a house has been held to be part of the erection; 51 Ill. 422. See **LIEN**.

EREGIMUS (Lat. *we have erected*). A word proper to be used in the creation of a new office by the sovereign. *Bac. Abr. Offices, E*.

EROSION. This consists of the gradual eating away of the soil by the operation of currents or tides. 100 N. Y. 433.

The proprietorship of lands may be lost by erosion and regained by accretion. 11 A. & E. Ency. 2nd ed., 255; 100 N. Y. 433.

As distinguished from submergence. The one consists of a gradual eating away of the soil by the operation of currents or tides,

and the other of its disappearance under the water and the formation of a navigable body over it. *Id.* Loss of title to land by erosion occurs only when the erosion is accompanied by a transportation of the land beyond the owner's boundary. *Id.* See RIPARIAN PROPRIETORS; ACCRETION.

EROTIC MANIA. In Medical Jurisprudence. A name given to a morbid activity of the sexual propensity. It is a disease or morbid affection of the mind, which fills it with a crowd of voluptuous images, and hurries its victim to acts of the grossest licentiousness, in the absence of any lesion of the intellectual powers. See Krafft-Ebing, *Psychopathia Sexualis*, Chaddock's ed.; MANIA.

ERRANT (Lat. *errare*, to wander). Wandering. Justices in eyre were formerly said to be *errant* (itinerant.) Cowel.

ERRONEOUS. Deviating from the law. 72 Ind. 338.

The word never designates a corrupt or evil act. It is to be distinguished from "illegal" which means that which lacks authority of or support from law. Anderson; 72 Ind. 338. An erroneous judgment is rendered according to the course and practice of the courts, but contrary to law. An irregular judgment is contrary to the course and practice of the courts. *Id.*; 74 N. C. 599.

ERROR. A mistake in judgment or deviation from the truth in matters of fact, and from the law in matters of judgment.

Error of fact will excuse the party acting illegally but honestly, in many cases, will avoid a contract in some instances, and when mutual will furnish equity with a ground for interference; 15 Me. 45; 20 Wend. 174; 5 Conn. 71; 12 Mass. 36. See MISTAKE.

Error in law will not, in general, excuse a man for its violation. A contract made under an error in law is, in general, binding; for, were it not so, error would be urged in almost every case; Bisph. Eq. 187. 2 East 469. See 6 Johns. Ch. 166; 8 Cow. 195; 2 J. W. 249; 1 Y. & C. 232; 6 B. & C. 671. But a foreign law will for this purpose be considered as a fact; 15 Me. 45; 9 Pick. 112; 2 Pothier, Obl. 369, etc.

ERROR, WRIT OF. See WRIT OF ERROR.

ESCAMBIO. In Old English Law. A writ granting power to an English merchant to draw a bill of exchange on another who is in a foreign country. Reg. Orig. 194. Abolished by Stats. 59 Geo. III. c. 49, and 26 & 27 Vict. c. 125.

ESCAMBIUM. Exchange, which see.

ESCAPE. The deliverance of a person who is lawfully imprisoned, out of prison, before such a person is entitled to such deliverance by law. 5 Mass. 310.

The voluntarily or negligently allowing any person lawfully in confinement to leave the place. 2 Bish. Cr. L. § 917.

Departure of a prisoner from custody before he is discharged by due process of law.

Escape takes place without force; prison-break, with violence; rescue, through the intervention of third parties.

Actual escapes are those which take place when the prisoner in fact gets out of prison and unlawfully regains his liberty.

Constructive escapes take place when the prisoner obtains more liberty than the law allows, although he still remains in confinement. Bac. Abr. *Escape* (B); Plowd. 17; 5 Mass. 310; 2 Mas. 436.

Negligent escape takes place when the prisoner goes at large, unlawfully, either because the building or prison in which he is confined is too weak to hold him, or because the keeper by carelessness lets him go out of prison.

Voluntary escape takes place when the prisoner has given to him voluntarily any liberty not authorized by law. 5 Mass. 320; 2 D. Chip. 11.

When a man is imprisoned in a proper place under the process of a court having jurisdiction in the case, he is lawfully imprisoned, notwithstanding the proceedings

may be irregular; 1 Cr. & D. 203; see 133 Mass. 899; but if the court has not jurisdiction the imprisonment is unlawful, whether the process be regular or otherwise. Bacon, Abr. *Escape in Civil Cases* (A 1); 13 Johns. 378; 8 Cow. 192; 1 Root 233. See 7 Conn. 452.

Letting a prisoner, confined under final process, out of prison for any, even the shortest time, is an escape, although he afterwards return; 2 W. Bla. 1048; 40 N. J. L. 230; 57 How. Pr. 109; 38 Fed. Rep. 794; 11 Mass. 180; 40 N. J. L. 417; 85 N. Y. 445; and this may be (as in the case of imprisonment under a *ca. sa.*) although an officer may accompany him; 3 Co. 44 a; Plowd. 37; Hob. 202; 1 B. & P. 24. Where an insolvent debtor whose discharge has been refused by the court, surrenders himself to the keeper of a prison, who will not receive him because he has no writ or record showing that he is an insolvent debtor and is not in charge of an officer, the surrender is not sufficient to make the keeper liable for the debt in case of the debtor's escape; 140 Pa. 102.

In criminal cases, the prisoner is indictable for a misdemeanor, whether the escape be negligent or voluntary; 2 Hawk. Pl. C. 189; Cro. Car. 209; 7 Conn. 834; 82 N. C. 585; and the officer is also indictable; 32 Ark. 124; 80 N. C. 390; 107 *id.* 857. If the offence of the prisoner was a felony, a voluntary escape is a felony on the part of the officer; 2 Hawk. Pl. C. c. 19, § 25; if negligent, it is a misdemeanor only in any case; 2 Bish. Cr. L. § 925; Cl. Cr. L. 327. See 78 Ind. 166. It is the duty of the officer to rearrest after an escape; 6 Hill 344; 111 Ill. 90; 1 Russ. Cr. 572.

In civil cases, a prisoner may be arrested who escapes from custody on mesne process, and the officer will not be liable if he rearrest him; Cro. Jac. 419; but if the escape be voluntary from imprisonment on mesne process, and in any case if the escape be from final process, the officer is liable in damages to the plaintiff, and is not excused by retaking the prisoner; 2 B. & A. 56; 88 Mass. 260. Nothing but an act of God or the enemies of the country will excuse an escape; 24 Wend. 331; 2 Murph. 886; 1 Brev. 146; 51 Miss. 575. See 5 Ired. 702; 5 W. & S. 455.

Attempts to escape by one accused of crime are presumptive of guilt, and the conduct of a defendant in arrest, either before or after being accused of the crime, may be competent evidence against him, as indicating a guilty mind; 30 La. Ann. Part II. 1266; 58 Ala. 335; 6 Tex. App. 207, 347; 14 Bush 340; 47 Cal. 113; 33 N. H. 216. Where a prisoner being in the corridor of a jail unlocks a door between the corridor and a cell, and thence escapes, he commits prison breach; 53 N. J. L. 488. An unsuccessful attempt at prison breach is indictable; 12 Johns. 339. See Whart. Cr. L. § 1667; 26 Am. L. Reg. 345; FLIGHT. See AVERT.

ESCAPE WARRANT. A warrant addressed to all sheriffs throughout England, to retake an escaped prisoner for debt, and commit him to gaol till the debt is satisfied.

ESCHEAT (Fr. *escheoir*, to happen). An accidental reverting of lands to the original lord.

An obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee; 2 Bla. Com. 244.

The estate itself which so reverted was called an *escheat*. Spelman. The term included also other property which fell to the lord; as, trees which fell down, etc. Cowel.

All *escheats* under the English laws are declared to be strictly feudal and to import the extinction of tenure. Wr. Ten. 115; 1 W. Bla. 123.

That if the ownership of a property become vacant, the right must necessarily subside into the whole community in which when society first assumed the elements of order and subordination it was originally vested, is a principle which lies at the foundation of property; 4 Kent 425; and this seems to be the universal rule of civilized society. Domat, *Précis* Pub. lib. 1, t. 6, s. n. 1. See 10 Viner, Abr. 139; 1 Bro. Civ. Law 260; 5 Binn. 375; 27 Barb. 376; 5 Cal.

373; 47 Md. 103; 86 Pa. 284; Mitch. R. P. 813. It was recognized by Justinian, and by the civil law an officer was appointed, called the *escheator*, whose duty it was to assert the right of the emperor to the *hereditas jacens* or *caduca* when the owner left no heirs or legates to take it. Code 10, 10, 1. By the earlier English usages the estate of the vassal *escheated* to his lord when there were no representatives in the seventh degree, and this custom was later extended to include male descendants *ad infinitum*; Lib. Feud. I. 1, s. 4.

In case of *escheat* by failure of heirs, by corruption of blood, or by conviction of certain crimes, the feud fell back into the lord's hands by a termination of the tenure. 1 Washb. R. P. 24. At the present day, in England, *escheat* can only arise from the failure of heirs. By the Felony Act, 53 and 34 Vict. c. 23, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any forfeiture or *escheat*; 3 Steph. Com. 690; Moz. & W.; Brown. An action of *ejectment*, commenced by writ of summons, has taken the place of an ancient writ of *escheat*, against the person in possession on the death of the tenant without heirs.

The early English law is thus well stated: "By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by *escheat* to the king as the sovereign lord; but the king's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees; 8 App. Cas. 777, 778; 2 Bla. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the court of chancery, but was really a proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse in the nature of a plea or defense to the king's claim, and not in the nature of an original suit; Lord Somers in 14 How. St. Tr. 1, 83; 6 Ves. 609; 4 Madd. 281; L. R. 2 Eq. 95; 3 Johns. 1; 11 Allen 157, 172. The inquest of office was a proceeding in which, when there was proper office found for the king, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the king's favor; Bayley, J., in 12 East 96, 103; 16 Vin. Abr. 83, pl. 1; Hamilton v. Brown, 161 U. S. 256.

In this country, however, the state steps in, in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction; 4 Kent 424. See 10 Gill & J. 450; 3 Dane, Abr. 140. And it *escheats* to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office according to the law of the particular state; 161 U. S. 256; 3 Washb. R. P., 4th ed. 47, 48. It is, perhaps, questionable how far this incident exists at common law in the United States generally. In Maryland the lord proprietor was originally the owner of the land, as the crown was in England. In most of the states the right to an *escheat* is secured by statute; 4 Kent 424; 1 Washb. R. P. 24, 27; 2 *id.* 443. See DESCENT AND DISTRIBUTION.

In Indiana and Missouri it was held that at common law, if a bastard died intestate, his property *escheated*; 6 Blackf. 533; 30 Mo. 268; but this is now otherwise by statute in those states and in most of the others. See BASTARD. So at common law there was an *escheat* if the purchaser or heirs of the decedent were aliens; 7 N. H. 475; Co. Litt. 2 b; but it is usually otherwise by the statutes of the several states. See ALIEN.

In Massachusetts unclaimed moneys or dividends of any insolvent bank or insurance company, after 10 years' custody by the clerk of court, are turned over to the state treasurer, and if not claimed within two years thereafter, *escheat* to the state; acts of Mass. p. 210; and such a provision is constitutional; 1 Cald. 202.

Hereditaments which, although they may be held in fee-simple, are not strictly subjects of tenure, such as fairs, markets, commons in gross, rents charge, rents seck, and the like, do not *escheat*, but become extinct upon a failure of heirs of the tenant; Challis, R. P. 30.

The method of proceeding, and subject-matter. To determine the question of *escheat* a proceeding must be brought in the nature of an inquest of office or office found; 7 Wend. 367; 5 Cal. 373; 28 Ga. 227; 14 Ia. 474; and to give the inquisition the effect of a lien the same must be filed, as the record of it is the only competent evidence by which title by *escheat* can be established; 21 Mich. 24; 3 Johns. 1; and such action must also be taken to recover *escheated* lands held in adverse possession; after which an entry must be made to give the state a right of possession; 7 Wend. 367; 6 Leigh 588; 74 Ind. 252; and the facts

which support the escheat must be stated; 2 Head 553; 2 Watts 228; a bill of information must be filed and a *scire facias* issued against all alleged to have, hold, claim, or possess such estate; 117 Ill. 123; and the names of all persons in possession of the premises, and all who were known to claim an interest therein, must be set forth and the *scire facias* served on them personally; to all other persons constructive notice is sufficient; *id.* In Texas, no proceedings can be had, except under and according to an act of the legislature; 64 Tex. 133; 161 U. S. 256.

In many of the states, however, the doctrine in force is, that land cannot remain without an owner; it must vest somewhere, and on the death of an intestate without heirs it becomes *eo instanti* the property of the estate; 6 Johns. Ch. 360; 2 Har. & J. 112; 5 Neb. 203; 7 N. H. 475; 7 Watts 455; 9 R. L. 26; 24 N. J. L. 566. In the case of *Wah-lahan v. Ingersoll*, 117 Ill. 123, it was held that on the death of an intestate without heirs, the title to his estate devolves immediately upon the state, but, in order to make that title available, it must be established in the manner prescribed by law by proceedings in the proper court, in the name of the people for the purpose of proving and establishing by judicial determination the title of the state. After a long lapse of time an inquest will be presumed; 27 Va. 291; 26 Ga. 582. A right of action for the recovery of lands is vested in the state at the death of the owner whose property escheats; 107 N. Y. 185. Persons claiming as heirs may come in under the statute and obtain an order for leave to make up an issue at law to have their rights determined; 13 Rich. L. 77. The legislature is under no constitutional obligation to leave the title to such property in abeyance, and a judicial proceeding for ascertaining an escheat on due notice, actual to known and constructive to all possible unknown claimants, is due process of law; and a statute, providing for such proceeding does not impair the obligation of any contract, contained in the grant under which the former owner held whether from the state or a private person; 161 U. S. 256, 275.

Not only do estates in possession escheat, but also those in remainder, if vested; 2 Hill 67; and equitable as well as legal estates; 1 Wall. 5; 5 Ired. Eq. 207; 3 Washb. R. P. 446; 10 Gill & J. 443; 4 Kent 424; (in many states this provision is statutory, but the rule in England is contrary; 1 Eden 177); also those held in trust, when the trust expires; 88 Pa. 429.

Proceedings to traverse an inquest. An inquisition is traversable, the traverser being considered as a defendant, and being only required to show failure of title in the state and bare possession in himself; 2 Johns. 1; *contra*, in Pennsylvania, where such traverser is in the position of plaintiff in ejectment and must show a title superior to the commonwealth; proceedings may be brought by any one claiming an interest and including an administratrix in possession; 137 Pa. 133; it is a proceeding at law and not in equity; 19 Ore. 504; and the court of common pleas has jurisdiction over it; 137 Pa. 133; the traverser being allowed to begin and conclude the suit to the jury; 2 Ashm. 163. And if only one of those notified appear, he is entitled to a separate trial of his traverse; 21 S. C. 435; but such traverser has no precedence over others on the dockets of cases; *Riley*, S. C. 301.

When all the members of a partnership have died intestate and without heirs, the property escheats to the state, but the heirs or kindred of any one of the partners may traverse the inquisition; 67 Pa. 102.

The law favors the presumption of the existence of heirs, and there must be something shown by those claiming by virtue of escheat to rebut that presumption; 2 Watts 223; 41 Tex. 249; but see *contra*, 36 Tex. 283; 4 Md. 133; 90 N. C. 385, overruling as to this point, 1 Hayw. 373. Proceedings for an escheat for want of heirs or devisees, like ordinary provisions for the administration of his estate, presuppose that he is dead; if he is still alive, the court is

without jurisdiction and its proceedings are null and void, even in a collateral proceeding; 161 U. S. 256, 267; citing 8 Cr. 9, 23; 154 U. S. 34; 27 Tex. 217; *id.* 491, 497; 67 *id.*

Equity cannot enjoin proceedings to have an escheat declared, where every question presented could be decided on a traverse should such escheat be found; 88 Pa. 284; and an *amicus curiæ* cannot move to quash an inquisition, unless he has an interest himself or represents some one who has; 2 Cal. 284.

Disposition of escheated lands by the state. Where the state takes the title of escheated land, it is entitled to the rights of the last owner; therefore, such lands cannot be taken up by location as vacant land; 11 Tex. 10; or be regarded as ungranted land; but it must be sold pursuant to the statute; 2 Brev. 321; 27 Pa. 36; and a grant of such lands by the state before office found is valid; 7 Watts 456; 24 N. J. L. 566; 27 Barb. 376; as is also a grant of land to escheat *in futuro*; 9 Rich. Eq. 440; but no authority is vested in officers of the land office to issue warrants for the taking up of escheated lands. After seven years from the inquisition they shall be sold at auction; 27 Pa. 33; and the power to order the sale of the property is vested in the district court; 41 Tex. 10. The disposition of funds secured by the sale of such property must be strictly in conformity with the state statute; and the legislature of a state can pass no act diverting the funds to another purpose; 5 Neb. 203; but where the constitution gives to the legislature the power to provide methods to enforce the forfeiture, there can be no proceedings until the legislature acts; 64 Tex. 133.

In selling escheated lands the grantee named in the statute must be a party to the proceedings, or the sale will be void; 2 Swan 46; 1 Cald. 381.

When land is held by a foreign corporation and a statute has been passed declaring that the land shall be held "indefeasibly as to any right of escheat" in the commonwealth, the penalty of escheat is removed, although the act imposing such penalty is not repealed in terms; 133 Pa. 591; 7 L. R. A. 634.

As to statutory disposition of escheated lands, see the statutes of the several states; DESCENT AND DISTRIBUTION.

See, generally, 12 L. R. A. 529; ALIEN; BASTARD; DISSOLUTION; FOREIGN CORPORATION.

ESCHEATOR. The name of an officer whose duties are generally to ascertain what escheats have taken place, and to prosecute the claim of the sovereign for the purpose of recovering the escheated property. 10 Vin. Abr. 158; Co. Litt. 13 b; Toml. L. D. His office was to be retained but one year; and no one person could hold the office more than once in three years.

This office has fallen into desuetude. There was formerly an escheator-general in Pennsylvania, but his duties have been transferred to the auditor-general, and in most of the states the duties of this office devolve upon the attorney-general.

ESCRIBANO. In Spanish Law. The public officer who is lawfully authorized to reduce to writing and verify by his signature all judicial acts and proceedings as well as all acts and contracts entered into between private individuals.

ESCRIPT. Writing; a writing; a written instrument.

ESCROW. A deed delivered to a stranger, to be by him delivered to the grantee upon the happening of certain conditions, upon which last delivery the transmission of title is complete.

The delivery must be to a stranger; 8 Mass. 230. See 9 Co. 137 b; T. Moore 642; 5 Blackf. 13; 23 Wend. 43; 2 Dev. & B. L. 530; 4 Watts 180; 22 Me. 569; for when delivered directly to the grantee it cannot be treated as an escrow; 52 Ark. 493; 114 Ill. 19; 1 Tex. Civ. App. 238; 84 Me. 340; nor to the agent or attorney of the grantee; 85 Me. 242; but see 1 S. D. 497; 84 Ala. 327. The second delivery must be conditioned, and not merely postponed; 8 Metc. 486; 2

B. & C. 83; Shepp. Touch. 58. Care should be taken to express the intent of the first delivery clearly; 10 Wend. 310; 8 Mass. 230; 22 Me. 569; 14 Conn. 271; 3 Green, Ch. 155. An escrow has no effect as a deed till the performance of the condition; 21 Wend. 267; 16 Or. 255; 56 Miss. 338; 10 Neb. 1; and takes effect from the second delivery; 1 Barb. 500. See 3 Metc. 412; 6 Wend. 666; 16 Vt. 533; 30 Me. 110; 10 Pa. 285; 91 Ala. 610. But where the parties announce their intention that the escrow shall, after the performance of the condition, take effect from the date of the deed, such intention will control; Devl. Deeds 329; 34 Ill. 13.

A deed delivered in escrow cannot be revoked; 77 Cal. 279.

See, generally, 14 Ohio St. 309; 13 Johns. 285; 5 Mas. 60; 6 Humph. 405; 3 Metc. 412; 3 Ill. App. 30, 498; 57 Ala. 459; 90 *id.* 294; 33 Ohio St. 203; 26 N. Y. 465; 28 Am. L. Reg. 697, n.; 91 Cal. 282; 47 Fed. Rep. 276; 10 Lawy. Rep. Ann. 469, n.

ESCUAGE. In Old English Law. Service of the shield. Tenants who hold their land by escuage hold by knight's service. 1 Thomas, Co. Litt. 273; Littleton § 95, 86 b. Abolished by Stat. 13 Car. II. c. 24. SCUTAGE.

ESKETORES. Robbers or destroyers of other men's lands and fortunes. Cowel.

ESKIPMENTUM. Tackle or furniture; outfit. Certain towns in England were bound to furnish certain ships at their own expense and with double *skippage* or tackle. The modern word outfit would seem to render the passage quite as satisfactorily; though the conjecture of Cowel has the advantage of antiquity.

ESKIPPER, ESKIPPARE. To ship. Kelh. Norm. L. D.; Rast. 409.

ESKIPPESON. Shippage, or passage by sea. Spelled, also, *skippeson*. Cowel.

ESNECY. Eldership. In the English law, this word signifies the right which the eldest coparcener of lands has to choose first one of the parts of the estate after it has been divided.

ESPERA. The period fixed by a competent judge within which a party is to do certain acts, as, *e. g.*, to effect certain payments, present documents, etc.; and more especially the privilege granted by law to debtors, allowing them certain time for the payment of their indebtedness.

ESPLEES. The products which the land or ground yields; as, the hay of the meadows, the herbage of the pasture, corn or other produce of the arable, rents, and services. See 11 S. & R. 275; Dane, Abr. Index; 9 Barb. 293.

ESPOUSALS. A mutual promise between a man and a woman to marry each other at some other time: it differs from a marriage, because then the contract is completed. Wood, Inst. 57. See BETROTHMENT.

ESQUIRE (Lat. *Armiger*; Fr. *Escuyer*). A title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law; and therefore it confers no distinction in law.

In England, it is a title next above that of a gentleman and below that of a knight. Camden reckons up four kinds of esquires particularly regarded by the heralds: the eldest sons of knights, and their eldest sons in perpetual succession; the eldest sons of the younger sons of peers, and their eldest sons in like perpetual succession; esquires created by the king's letters patent, or other investiture, and their eldest sons; esquires by virtue of their office, as justices of the peace, and others who bear any office of trust under the crown. 2 Steph. Com. 615. A miller or a farmer may be an esquire; 1 R. 2. Eq. 235.

ESSART. See ASSART.

ESSE. See IN ESSE.

ESSENDI QUIETAM DE THEOLONIA (Lat. of being quit of toll). A writ which lay anciently for the citizens or burgesses of a town which was entitled to exemption from toll, in case toll was de-

conveys his estate to a third person. He can only convey what he has, and his grantee takes an estate during the life of the grantor. If the tenant died during the life of the grantor (who was called the *cestui que vie*), at common law the balance of the estate went to the first person who took it, termed a general occupant. If the original gift was to the tenant and his heirs, the heir took it as special occupant. By statute in England, if there is no special occupant, the estate goes to the executors as personalty, if not disposed of by will. This rule has been adopted in most of the United States, except a few, where it still descends as personalty; 1 Washb. R. P. 88; 2 Bla. Com. 120.

ESTATE IN REMAINDER. See REMAINDER.

ESTATE IN REVERSION. See REVERSION.

ESTATE IN SEVERALTY. See SEVERALTY, ESTATE IN.

ESTATE BY STATUTE MERCHANT. See STATUTE MERCHANT.

ESTATE AT SUFFERANCE. The interest of a tenant who has come rightfully into possession of lands by permission of the owner and continues to occupy the same after the period for which he is entitled to hold by such permission. 1 Washb. R. P. 303; 2 Bla. Com. 150; Co. Litt. 57 b; Sm. L. & T. 217; 25 Cal. 31; 86 Ind. 108; 39 Mo. 177; Mitch. R. P. 174. This estate is of infrequent occurrence, but is recognized as so far an estate that the landlord must enter before he can bring ejectment against the tenant; 3 Term 292; 1 M. & G. 644. If the tenant has personally left the house, the landlord may break in the doors; 1 Bingh. 58; 17 Pick. 263; and the modern rule seems to be that the landlord may use force to regain possession, subject only to indictment if any injury is committed against the public peace; 7 Term 431; 14 M. & W. 437; 1 W. & S. 90; 7 M. & G. 316; 13 Johns. 235; 121 Mass. 309; 59 Me. 508. See 32 Vt. 82; 26 Mo. 116; 68 Ill. 53; L. R. 17 Ch. Div. 174.

ESTATE TAIL. See FEE-TAIL.

ESTATE IN VADIO. Pledge. See MORTGAGE.

ESTATE AT WILL. An estate in lands which the tenant has, by entry made thereon under a demise, to hold during the joint wills of the parties to the same. Co. Litt. 55 a; Tud. L. Cas. R. P. 10; 2 Bla. Com. 145; 4 Kent 110. Estates properly at will are of very infrequent occurrence, being generally turned into estates for years or from year to year by decisions of the courts or by statute; 4 Kent 115; Tud. L. Cas. R. P. 14; 4 Rawle 123; 1 Term 159.

ESTATE FROM YEAR TO YEAR. A lease for a year which unless terminated arises new by implication for another year. English.

ESTATE FOR YEARS. An interest in lands by virtue of a contract for the possession of them for a definite and limited period of time. 2 Bla. Com. 140; 2 Crabb, R. P. §1367; Bac. Abr. Leases; Wms. R. P. 195. Such estates are frequently called terms. See TERM. The length of time for which the estate is to endure is of no importance in ascertaining its character, unless otherwise declared by statute; 15 Mass. 439; 1 N. H. 350; 13 S. & R. 60; 22 Ind. 122; 4 Kent 93.

ESTATES. Estates may mean as well the interests in the lands, as the lands themselves.

ESTATES OF THE REALM. The lords spiritual, the lords temporal, and the commons of Great Britain. 1 Bla. Com. 153; 3 Hallam, ch. 6, pl. 3. Sometimes called the three estates.

ESTER IN JUDGMENT. To appear before a tribunal either as plaintiff or defendant. Kelh. Norm. L. D.

ESTIMATE. A word used to express

the mind or judgment of the speaker or writer on the particular subject under consideration. It implies a computation or calculation. 37 Hun 203.

A rough valuation; an appraisement. English. Equivalent to "asses." Both mean "to fix" the amount of the damages or the value of the thing to be ascertained. 11 A. & E. Ency. 2nd ed., 383; 49 Ala. 162.

Estimated cost of a building held to mean the reasonable cost of a building erected in accordance with the plans and specifications referred to, and not necessarily the amount of some actual estimate made by a builder, nor an estimate agreed upon by the parties, nor yet an estimate or bid accepted by the defendant. *Id.*; 55 Conn. 437.

Estimated Capacity. The ordinary meaning of estimate is to calculate roughly, or to form an opinion as to amount from imperfect data. In this sense the expression "estimated capacity" meant substantially the supposed or probable capacity of the car. 72 S. W. 805.

ESTOPPEL. The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.

A preclusion, in law, which prevents a man from alleging or denying a fact, in consequence of his own previous act, allegation, or denial of a contrary tenor. Steph. Pl. 239.

A plea which neither admits nor denies the facts alleged by the plaintiff, but denies his right to allege them. Gould, Pl. c. 2, § 39.

A special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring anything to the contrary. 3 Bla. Com. 308.

Where a fact has been admitted or asserted for the purpose of influencing the conduct or deriving a benefit from another so that it cannot be denied without a breach of good faith, the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations or denying the truth of his admissions; 5 Ohio 199; Rawle, Cov. 407.

This doctrine of law gives rise to a kind of pleading that is neither by way of traverse, nor confession and avoidance, viz.: a pleading that, waiving any question of fact, relies merely on the estoppel, and, after stating the previous act, allegation, or denial of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before did or said. This pleading is called a pleading by way of estoppel. Steph. Pl. 240; 126 Mass. 21; 18 Hun 103; 57 Miss. 634; 31 La. Ann. 61, 106; 8 Baxt. 289; 90 Ill. 604; 6 Wash. 244. See 93 Cal. 541.

Formerly the questions of regarding estoppel arose almost entirely in relation to transfers of real property, and the rules in regard to one kind of estoppel were quite fully elaborated. In more modern times the principle has come to be applied to all cases where one by words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position; 2 Exch. 653; 1 Zab. 403; 28 Me. 525; 0 N. Y. 121; 40 Me. 348. See, as to the reason and propriety of the doctrine, Co. Litt. 332 a; 11 Wend. 117; 1 Dev. & B. L. 464; 12 Vt. 44.

"The correct view of estoppel is that taken in a recent work (Bigelow, Est.). 'Certain admissions,' it is there said, 'are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded.' In other words, when an act is done, or a statement made by a party the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel will be given to what would otherwise be a mere matter of evidence. The law of estoppel, therefore, is a branch of the law of evidence, it has become a part of the jurisdiction of chancery, simply because in equity alone, or rather by equitable construction alone, has that full effect been given to this species of evidence which is necessary to the due administration of justice." Bisph. Eq. § 280. See Tiedm. Eq. Jur. 106.

Where there is an attempt to apply the doctrine of estoppel, one essential in such a case is that the party in whose favor it is invoked must himself act in good faith; 50 Kan. 773.

By DEED. Such as arises from the provisions of a deed. It is a general rule that a party to a deed is estopped to deny any thing stated therein which has operated upon the other party: as, the inducement to accept and act under such deed; 7 Conn. 214; 13 Vt. 158; 3 Mo. 373; 5 Ohio 199; 10 Cush. 163; 107 Mo. 616; and see 135 N. Y. 326; 52 Minn. 67; 36 S. C. 468; 98 N. C. 203; 3 M'Cord 411; 6 Ohio 366; including a

deed made with covenant of warranty, which estops even as to a subsequently acquired title; 11 Johns. 91; 24 Pick. 324; 20 Me. 200; 3 Ohio 107; 12 Vt. 39; 145 U. S. 546; 130 id. 122; 157 Mass. 57; 89 Tenn. 411. But see 13 Pick. 116; 5 Gray 328; 4 Wend. 300; 11 Ohio 475; 14 Me. 351; 43 id. 432; 29 Fla. 228. See 101 U. S. 240; 21 Hun 145; 45 N. Y. Sup. Ct. 528; 61 Ga. 322; 94 Ill. 191; 83 Ia. 565; 94 Ala. 508; 83 Va. 817; 64 N. H. 500.

A corporation accepting conveyance of a water works plant by deed describing certain mortgages thereon, and expressly declaring that the conveyance was made subject thereto, is thereby estopped from questioning the validity of the mortgages; 73 Fed. Rep. 956.

To create an estoppel, the deed must be good and valid in its form and execution; 2 Washb. R. P. 41; 39 Minn. 511; and must convey no title upon which the warranty can operate in case of a covenant; 3 McLean 56; 9 Cow. 271; 2 Pres. Abs. 216.

Estoppels affect only parties and privies in blood, law, or estate; 6 Bing. n. c. 79; 3 Johns. Ch. 103; 24 Pick. 324; 35 N. H. 90; 5 Ohio 190; 2 Dev. 177; 13 N. H. 389; 44 La. Ann. 584; 32 Fla. 264. See 125 Mass. 25; 47 Fed. Rep. 231. Estoppels, it is said, must be reciprocal; Co. Litt. 352 a; 17 Or. 204. But see 4 Litt. 272; 15 Mass. 499; 11 Ark. 82; 2 Sm. L. C. 664. And see 2 Washb. R. P. 453.

A grantor is not estopped by recitals in his deed of payment of consideration, from suing for the unpaid purchase money; 110 N. C. 400. A grantee cannot enter and hold under a deed and at the same time repudiate the title thereby conveyed; 75 Md. 376. See 156 Mass. 181; 145 Pa. 628; 112 N. C. 688; 94 Mich. 429; 46 Ill. App. 119; 79 Cal. 23.

By MATTER OF RECORD. Such as arises from the adjudication of a competent court. Judgments of courts of record, and decrees and other final determinations of ecclesiastical, maritime, and military courts, work estoppels; 1 Munf. 466; 2 B. & Ald. 362; 16 Blatch. 324; 69 Me. 445; 75 N. Y. 417; 25 Minn. 72; 101 U. S. 570; 124 Mass. 109, 347; 87 Ill. 367; 139 id. 274; 98 U. S. 433; 109 N. C. 406; 12 Colo. 434. See 44 La. Ann. 548; 112 N. C. 759. Admissions in pleadings, either express or implied, cannot afterwards be controverted in a suit between the same parties; Com. Dig. Estoppel A 1. It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment; 158 U. S. 216. Estoppels by deed and by record are common-law doctrines.

By MATTER IN PAIS. Such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself; 17 Conn. 345, 355; 5 Denio 154; 46 Ohio St. 255; 39 Minn. 419. See 97 N. C. 303; 43 Ill. App. 157; 116 Mo. 333; 3 Tex. Civ. App. 406; 66 Hun 628. Equitable estoppel, or estoppel by conduct, is said to have its foundation in fraud, considered in its most general sense; Bisph. Eq. § 282. It is said (Bigelow, Estop. 437) that the following elements must be present in order to constitute an estoppel by conduct: 1. There must have been a representation or concealment of material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party would act upon it. 5. The other party must have been induced to act upon it. See 69 Tex. 287; Tiedm. Eq. Jur. 107. The rule of equitable estoppel is, that where one by his acts, declarations, or silence, where it is his duty to speak, has induced another person, in reliance on such acts or declarations, to enter into a transaction, he shall not, to the prejudice of the person so misled, impeach the transaction; per Bates, Ch., in 3 Del. Ch. 9.

In the leading case on this subject (Pickard v. Sears, 6 A. & E. 469) a mortgagee of personally was held to be estopped from asserting his title under the mortgage because he had passively acquiesced in a purchase of

the same by the defendant under an execution against the mortgagor. Cases of estoppel by silence are numerous; 10 Wall. 289; 31 Pa. 334; 12 Gray 73, 265; 4 Wall. 573; 158 Mass. 97; but silence does not always amount to fraud; 65 Pa. 241; and there is no estoppel by silence where a party has had no opportunity to speak; 63 Pa. 417. See 94 Mich. 34; 2 Misc. Rep. 397.

The estoppel will be limited to the acts which were based upon the representations out of which the estoppel arose; thus, where a sheriff had a writ against A, but took B into custody, upon B's representations that she was A, but detained her after he was informed that she was not A, B was estopped to recover damages for the false arrest but not for the subsequent detention; 2 C. B. N. S. 495. See 50 Ga. 90; 27 Barb. 595; Bisph. Eq. § 292. The acts alleged as an estoppel must be executed and not merely executory; 83 Va. 397; as when a statement is not accepted and acted upon, it does not constitute an estoppel; 73 Ia. 263; 60 Vt. 261. Where an indorser gave notes in compromise of the claims of the indorsee, the acceptance of partial payments by the latter did not estop him from suing on the original notes upon which, under the agreement, the indorser was to be released from liability upon payment of the compromise notes at maturity; 75 Fed. Rep. 832.

It is said that the contract of a person under disability cannot be made good by estoppel; Bisph. Eq. § 293. See 2 Gray 161; 117 Mass. 241; 52 Pa. 400. It makes no difference that the person, if a married woman, falsely represented herself to be *sole*; 9 Ex. 422; 97 N. C. 106. But estoppel may operate to prevent such a person from enforcing a right. For instance, if a married woman were to induce A to buy property from B, knowing that the title was not in B, but in herself, she would be estopped from asserting her title against A; 3 Bush 702; 8 C. E. Green 477; 30 Ala. 332. The same principle would extend to similar acts on the part of an infant; 3 Hare 503; 9 Ga. 23; but not unless the conduct was intentional and fraudulent; 38 Fed. Rep. 482. An unexecuted contract void as against public policy cannot be validated by invoking the doctrine of estoppel; 71 Mich. 141.

The doctrine that estoppels bind not only parties, but privies of blood, law, and estate, is said to apply equally to this class of estoppels; Bigelow, Estop. 74, 449; but a ward cannot be estopped by an act of his guardian which the other party to the agreement knew to be unauthorized; 145 Ill. 658.

The maxim *vigilantibus non dormientibus leges adjuvant* specially applies to a claim of equitable estoppel, since in such cases the interposition of equity is extraordinary and restrictive of what but for the estoppel would be a clear legal right; 3 Del. Ch. 9.

The doctrine of estoppel is said to be the basis of another equitable doctrine, that of election; Bisph. Eq. § 294. See ELECTION.

This principle has been applied to cases of dedication of land to the public use; 6 Pet. 438; 19 Pick. 405; of the owner's standing by and seeing land improved upon; 50 N. Y. 222; 63 Pa. 164; 24 Mich. 134; 24 Neb. 702; 64 Ala. 570; 85 Tenn. 171; 30 W. Va. 687; 31 S. C. 153; or sold; 7 Watts 166; 11 N. H. 201; 2 Dana 13; 13 Cal. 359; 1 Woodb. & M. 213; 40 Me. 348; 115 Mo. 613; without making claim; 44 La. Ann. 917; 115 Mo. 613; 37 Fed. Rep. 508; 76 Cal. 260; 69 Tex. 38, 287; 41 Minn. 198; 85 Ky. 260. See EQUITABLE ESTOPPEL.

In Equity. Where an act is done or a statement made by a party, under such circumstances that to impair its efficacy or controvert its truth, would be contrary to justice and good faith, the result is that the party is debarred from asserting any right or title in opposition to any right which has been acquired in reliance upon such act or statement; this result is called an estoppel. Bispham, Prin. of Eq. 10th ed., p. 478.

ESTOPPEL IN PAIS. An equitable estoppel. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done,

shall not subject such person to loss or injury by disappointing the expectations upon which he acted. 10 Otto (U. S.) 580.

ESTOVERS (*estouvers*, necessities; from *estoffer*, to furnish). The right or privilege which a tenant has to furnish himself with so much wood from the demised premises as may be sufficient or necessary for his fuel, fences, and other agricultural operations. 2 Bla. Com. 35; Woodf. L. & T. 232; 10 Wend. 639.

Any tenant may claim this right, whether he be a tenant for life, for years, or at will; and that without waiting for any special leave or assignment of the lessor, unless he is restrained by some provision contained in his lease; Shepp. Touchst. 3, n. 1; Chal. R. P. 311. Nor does it appear to be necessary that the wood should all be consumed upon the premises, provided it is taken in good faith for the use of the tenant and his servants, and in reasonable quantities, with the further qualification, also, that no substantial injury be done to the inheritance; 1 Paige, Ch. 573.

Where several tenants are granted the right of estovers from the same estate, it becomes a *common of estovers*; but no one of such tenants can, by underletting his land to two or more persons, apportion this right among them; for in this way he might surcharge the land, and the rights of his cotenants, as well as those of the landlord, would be thereby invaded. In case, therefore, of the division of a farm among several tenants, neither of the under-tenants can have estovers, and the right, consequently, becomes extinguished; 10 Wend. 650; 4 Co. 36; 8 id. 78. There is much learning in the old books relative to the creation, apportionment, suspension, and extinguishment of these rights, very little of which, however, is applicable to the condition of things in this country, except perhaps in the state of New York, where the entanglements produced by grants of the manor-lands have led to some litigation on the subject. Tayl. Landl. & T. § 220. See 4 Washb. R. P. 99; 7 Bing. 640; 7 Pick. 152; 17 id. 248; 14 Me. 221; 2 N. H. 130; 7 id. 341; 7 Ired. Eq. 197; 6 Yerg. 334; 5 Mas. 13.

The alimony allowed to a wife was called at common law, *estovers*. See *DE ESTOVERIS HABENDIS*.

ESTRAY. Cattle whose owner is unknown. Spelman, Gloss.; 29 Ia. 437; 27 Wis. 422; 4 Oreg. 206; 18 Pick. 426; but see 69 Mo. 205; 14 Tex. 431. Any beast, not wild, found within any lordship, and not owned by any man. Cowel; 1 Bla. Com. 297; 2 id. 14. These belonged to the lord of the soil. Britt. c. 17.

Statutes directing unlicensed dogs at large to be killed and animals running at large to be seized and upon notice by a justice, etc., sold at auction, are not unconstitutional; 39 Mich. 451; 32 N. C. 175; 69 Mo. 205; 16 Or. 62.

An animal turned on a range by its owner is not an estray, although its immediate whereabouts is unknown to the owner, unless it wanders from the range and becomes lost; 16 Or. 62.

ESTREAT. A true copy or note of some original writing or record, and especially of fines and amercements imposed by a court, extracted from the record, and certified to a proper officer or officers authorized and required to collect them. Fitzh. N. B. 57, 76. A forfeited recognizance taken out from among the other records for the purpose of being sent up to the exchequer, that the parties might be sued thereon, was said to be estreated. 4 Bla. Com. 253.

ESTREPEMENT. A common-law writ for the prevention of waste.

The same object being attainable by a motion for an injunction in chancery, the writ became obsolete in England, and was explicitly abolished by 3 & 4 Will. IV. c. 27.

The writ lay at common law to prevent a party in possession from committing waste on an estate the title to which was disputed, after judgment obtained in any real action and before possession was delivered by the sheriff.

But, as waste might be committed in some cases pending the suit, the statute of Gloucester gave

another writ of *estrepement pendente placito*, commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel strepementum pendente placito dicto indiscusso*." By virtue of either of these writs, the sheriff may resist those who commit waste or offer to do so; and he might use sufficient force for the purpose; 3 Bla. Com. 226, 228.

The writ is sometimes directed to the sheriff and the party in possession of the lands, in order to make him amenable to the court as for a contempt in case of his disobedience to the injunction of the writ. At common law the process proper to bring the tenant into court is a *venire facias*, and thereon an attachment. Upon the defendant's coming in, the plaintiff declares against him. The defendant usually pleads "that he has done no waste contrary to the prohibition of the writ." The issue on this plea is tried by a jury, and in case they find against the defendant they assess damages which the plaintiff recovers. But, as this verdict convicts the defendant of a contempt, the court proceed against him for that cause as in other cases; Co. 2d Inst. 329; Rast. 317; 1 B. & P. 121; 2 Lilly, Reg. Estrepement; 5 Co. 119; Reg. Brev. 76.

In Pennsylvania, by legislative enactment, the remedy by *estrepement* is extended for the benefit of any owner of lands leased for years or at will, at any time during the continuance or after the expiration of such demise, and due notice given to the tenant to leave the same, agreeably to law; or for any purchaser at sheriff or coroner's sale of lands, etc., after he has been declared the highest bidder by the sheriff or coroner; or for any mortgagee or judgment-creditor, after the lands bound by such judgment or mortgage shall have been condemned by inquisition, or which may be subject to be sold by a writ of *venditioni exponas* or *levari facias*. See 10 Viner, Abr. 497; Woodf. Landl. & T. 447; Arch. Civ. Pl. 17; 7 Com. Dig. 659; 24 Pa. 162; 37 id. 260.

ESTREYTE. See *LARGE*.

ET ADJOURNATUR. And it is adjourned. A phrase used in the old reports, where the argument of a cause was adjourned to another day, or where a second argument was had. 1 Keb. 692, 754; Black, L. Dict.

ET ALIUS (Lat.). And another. The abbreviation *et al.*, sometimes in the plural written *et als.*, is affixed to the name of the first plaintiff or defendant, in entitling a cause, where there are several joined as plaintiffs or defendants.

On an appeal from a judgment in favor of two or more parties, a bond payable to one of the appellees *et al.* will be good; 3 La. Ann. 313; 19 id. 232. But where a summons should state the parties to the action, the name of one followed by the words *et al.* is not sufficient; 44 Cal. 630.

ET CÆTERA (Lat.). And others; and other things. See 39 Hun 576; 4 Daly 62.

The addition of the abbreviation *et c.* to some minor provisions of an agreement for a lease does not introduce such uncertainty as to prevent a decree for specific performance where the material points are clear; Chelmsford, Ld. Ch., in 2 De G. & J. 559; but such an agreement "for letting and taking coals, etc.," was too indefinite a statement of the *subject-matter* of the agreement to admit of such a decree; 1 De G. M. & G. 80; but an agreement "to do all the painting, papering, repairing, decorating, etc., during the term of the lease" was not so uncertain as to prevent a specific performance; 21 L. J. Rep. 185.

Under a bequest of "all her household furniture and effects, plate, linen, china, glass, books, wearing apparel, etc.," it was claimed that the testatrix had disposed of the general residue of her estate, but she was held by Romilly, M. R., to be intestate "except as to the articles specified in the will and those which are *eiusdem generis*;" 26 Beav. 220; and the same judge held the words *good-will*, etc., in a contract, to include "such other things as are necessarily connected with and belong to the good-will, . . . for instance, the use of trade-marks," and a covenant not to engage in similar business in Great Britain for a reasonable time to be limited in the conveyance having

regard to the nature of such undertakings. "All these things would be included in the words *et cetera*," 23 L. J. Ch. 212; "all my furniture, etc.," passed only property *eiusdem generis* and not shares of a water-works company; L. R. 11 Eq. 363; "all my money, cattle, farming implements, etc.," the paying" certain sums named to testator's two brothers, was, upon looking at the whole will, sufficient to make the widow universal residuary legatee of real and personal estate, the latter being insufficient to pay debts; Jessel, M. R., L. R. 4 Ch. Div. 800.

The abbreviation etc. was formerly much used in pleading to avoid the inconveniences attendant upon making full and half defence. See DEFENCE. It is not generally to be used in solemn instruments; see 6 S. & R. 427; when used in pleadings to avoid repetition, it usually refers to things unnecessary to be stated; 27 Ark. 564.

Where the sense of the abbreviation may be gathered from the preceding words there is sufficient certainty; but where the abbreviation cannot be understood and affects a vital part of the contract or instrument the uncertainty will be fatal.

See 105 Mass. 21; 11 Hun 70; L. R. 11 Eq. 362.

ET DE HOC PONIT SE SUPER PATRIAM (Lat.). And of this he puts himself upon the country. The Latin form of concluding a traverse. See 3 Bla. Com. 313.

ET HOC PARATUS EST VERIFICARE (Lat.). And this he is prepared to verify. The Latin form of concluding a plea in confession and avoidance; that is, where the defendant has confessed all that the plaintiff has set forth, and has pleaded new matter in avoidance. 1 Salk. 2.

ET HOC PETIT QUOD INQUIRATUR PER PATRIAM (Lat.). And this he prays may be inquired of by the country. The conclusion of a plea tendering an issue to the country. 1 Salk. 3.

ET INDE PRODUCIT SECTAM (Lat.). And thereupon he brings suit. The Latin conclusion of a declaration, except against attorneys and other officers of the court. 3 Bla. Com. 295.

ET MODO AD HUNC DIEM (Lat.). And now at this day. The Latin form of the commencement of the record on appearance of the parties.

ET NON (Lat.). And not. These words are sometimes employed in pleading to convey a pointed denial. They have the same effect as "without this," *absque hoc*. 2 Bouvier, Inst., 2d ed. n. 2985, note.

ET SIC AD PATRIAM (Lat.). And so to the country. A phrase used in the year books, to record an issue to the country.

ET UXOR (Lat. and wife). Used to show that the wife of the grantor is a party to the deed. The abbreviation is *et ux*.

ETHICS, LEGAL. The principles of morally right and wrong conduct and character as expounded by the legal profession.

Following are the **Canons of Professional Ethics** and the **Canons of Judicial Ethics** as adopted by the American Bar Association.

Canons of Professional Ethics: (Adopted by the American Bar Association at its thirty-first annual meeting at Seattle, Washington, on August 27, 1908.)

[The committee of the American Bar Association which prepared the Canons was composed of the following: Henry St. George Tucker, Virginia, Chairman; Lucien Hugh Alexander, Pennsylvania, Secretary; David J. Brewer, District of Columbia; Frederick V. Brown, Minnesota; J. M. Dickinson, Illinois; Franklin Ferriss, Missouri; William Wirt Howe, Louisiana; Thomas H. Hubbard, New York; James G. Jenkins, Wisconsin; Thomas Goode Jones, Alabama; Alton B. Parker, New York; George R. Peck, Illinois; Francis Lynde Stetson, New York; Ezra R. Thayer, Massachusetts.]

Preamble.

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system

for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic to a great extent, depends upon our maintenance of Justice pure and unswayed. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. The Duty of the Lawyer to the Courts.

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, nor for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. The Selection of Judges.

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to do honor to the office and not by a desire for the distinction the position may bring to themselves.

3. Attempts to Exert Personal Influence on the Court.

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstruction of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

4. When Counsel for an Indigent Prisoner.

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial cause and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of Crime.

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be deprived of the protection of the law. Undertaken in defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to accept his second or confidential agency also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion.

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence in the lawyer, but as a request for the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is

his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising Upon the Merits of a Client's Cause.

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations With Opposite Party.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel, much less should the client be allowed to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Acquiring Interest in Litigation.

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

11. Dealing With Trust Property.

Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except in the client's knowledge and consent should not be commingled with his private property or be used by him.

12. Fixing the Amount of the Fee.

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in the client's knowledge and service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fees.

Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.

14. Suing a Client for a Fee.

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. How Far a Lawyer May Go in Supporting a Client's Cause.

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law, and the lawyer is bound to his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or

chicanery. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improperities.

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

17. Ill Feeling and Personalities Between Advocates.

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants.

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of Lawyer as Witness for His Client.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

20. Newspaper Discussion of Pending Litigation.

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. Punctuality and Expedition.

It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness.

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in the jurisdiction where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude Toward Jury.

All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument by him. A lawyer made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. Right of Lawyer to Control the Incidents of the Trial.

As to incidental matters pending the trial, not affecting the merits of the case, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be

allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. Selecting Technical Advantage of Opposite Counsel; Agreements With Him.

A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. Professional Advocacy Other Than Before Courts.

A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

27. Advertising, Direct or Indirect.

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touts of any kind, whether allied real estate firms or trust companies, advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

28. Stirring Up Litigation, Directly or Through Agents.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other ground of action in order to secure for them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attendants or others who may succeed, under the guise of giving disinterested, friendly aid in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

29. Upholding the Honor of the Profession.

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. A lawyer should not consent to the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. Justifiable and Unjustifiable Litigations.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in the trial of his client's case is one proper for judicial determination.

31. Responsibility for Litigation.

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what cases he will bring into Court for plaintiff, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. The Lawyer's Duty in Its Last Analysis.

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

Oath of Admission.

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other States of the Union*—duties which they are sworn on admission to obey and for the willful violation of which disbarment is provided:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of

I will maintain the respect due to Courts of Justice and judicial officers.

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the cause confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

We commend this form of oath for adoption by the proper authorities in all the States and Territories.

*Alabama, California, Georgia, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wisconsin. The oaths administered on admission to the Bar in all the other States require the observance of the highest moral principle in the practice of the profession, but the duties of the lawyer are not as specifically defined by law in the States named.

[The foregoing foot-note was appended to the above form of Oath as published at the time of the adoption of the Canons of Professional Ethics in 1908. It does not indicate any subsequent changes of form or requirement of Oath by later State legislation.]

Canons of Judicial Ethics: (Adopted by the American Bar Association at its Forty-Seventh Annual Meeting at Philadelphia, Pennsylvania, on July 9, 1924.)

[The committee of the American Bar Association, which prepared the Canons, was appointed in 1922, and composed of the following: William H. Taft, District of Columbia, Chairman; Leslie C. Cornish, Maine; Robert W. Mowbray, Pennsylvania; Charles A. Boston, New York, and Garret W. McEnerney, California. George Sutherland, of Utah, originally a member of the Committee, retired and was succeeded by Mr. McEnerney. In 1923, Frank M. Angellotti, of California, took the place of Mr. McEnerney.]

Ancient Precedents.

"And I charged your Judges at that time, saying: Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

"I shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the presence of God shall be with you, and the cause that is too hard for you, bring it unto me, and I will hear it."—Deuteronomy, I, 16-17.

"Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous."—Deuteronomy, XVI, 19.

"We will not make any justices, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it."—Magna Charta, XLV.

"Judges ought to remember that their office is *ius dicere, jus dare*; to interpret law, and not to make law, or give law."

"Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue."

"Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-timed cymbal. It is the grace to a judge first, to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions though pertinent."

"The place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purprie thereof ought to be preserved without scandal and corruption." . . . —Bacon's Essay "of Judicature."

Preamble.

In addition to the Canons for Professional Conduct of Lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

1. Relations of the Judiciary.

The assumption of the office of judge casts upon the incumbent duties of the Bench, and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

2. The Public Interest.

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously forming in his attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

3. Constitutional Obligations.

It is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees.

4. Avoidance of Impropriety.

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

5. Essential Conduct.

He should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

6. Industry.

He should exhibit an industry and application commensurate with the duties imposed upon him.

7. Promptness.

He should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part, justifies dissatisfaction with the administration of the business of the court.

8. Court Organization.

He should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.

9. Consideration for Jurors and Others.

He should be considerate of jurors, witnesses and others in attendance upon the court.

10. Courtesy and Civility.

He should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

He should also require, and, so far as his power extends, enforce on the part of the clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

11. Unprofessional Conduct of Attorneys and Counsel.

He should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counselors, brought to his attention, and if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.

12. Appointees of the Judiciary and Their Compensation.

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest

probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most scrupulous in granting or approving honoraria for the services or charges of such appointees to avoid excessive allowances, whether or not expected to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

13. Kinship or Influence.

He should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

14. Independence.

He should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

15. Interference in Conduct of Trial.

He may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interferences, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the case, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to his unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

16. Ex parte Applications.

He should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

17. Ex parte Communications.

He should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs of argument are to be received are largely a matter of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

18. Continuances.

Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper appreciation of their duties to the public interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the court.

19. Judicial Opinions.

In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing arguments of counsel, and overruled or overruled portions of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that Courts of Appeal in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which

he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

20. Influence of Decisions Upon the Development of the Law.

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law.

21. Idiosyncrasies and Inconsistencies.

Justice should not be moulded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

22. Review.

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

23. Legislation.

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects in procedure, of the result of his observation and experience.

24. Inconsistent Obligations.

He should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

25. Business Promotions and Solicitations for Charity.

He should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the support of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

26. Personal Investments and Relations.

He should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information coming to him in a judicial capacity for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

27. Executorships and Trusteeships.

While a judge is not disqualified from holding executorships or trusteeships, he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him.

28. Partisan Politics.

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

29. Self-Interest.

He should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

30. Candidacy for Office.

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding judicial office he should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.

If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

31. Private Law Practice.

In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should not practise in the court in which he is a judge, even when provided over by another judge, or appear therein for himself in any controversy.

If forbidden to practise law, he should refrain from accepting any professional employment while in office.

He may properly act as arbitrator or lecture upon or instruct in law or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

32. Gifts and Favors.

He should not accept any presents or favors from litigants, or from lawyers practising before him or from others whose interests are likely to be submitted to him for judgment.

33. Social Relations.

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business associations or friendships, constitute an element in influencing his judicial conduct.

34. A Summary of Judicial Obligation.

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

EUGENICS. The science and art of improving the human race by applying the ascertained laws of inheritance of characteristics to the selection of marriage mates, with the aim of securing to the offspring a desirable combination of traits, including resistance to untoward conditions; term first used by Sir Francis Galton in 1883. *Stand. Dict.* Negative eugenics is the science and art of preventing the procreation of weak and defective persons. *Id.*

EUGENICS LAWS. Laws, the purpose of which is to restrict marriage only to those physically and morally fit to enter into the relation and beget offspring free from physical and moral taint. Keezer, *Mar. & Div.* 2nd ed., p. 99. An example of a eugenic law is that of Wisconsin which requires all male applicants for marriage licenses to submit to a medical examination to determine whether such persons are free from acquired venereal diseases and making it a condition to the issuance of a license that the applicant present to the licensing officer a certificate showing such freedom from such venereal disease. The law was upheld as within the police power of the

state and as not infringing any constitutional right of persons desiring to enter into the matrimonial relation. *Id.*; 157 Wis. 641.

EUNDO MORANDO ET RED-EUNDO (Lat.). This Latin phrase signifies going, remaining, and returning. It is employed in cases where a person is privileged from arrest, in order to give him the freedom necessary to the performance of his respective obligations, to signify that he is protected from arrest *eundo, morando et redeundo*.

EUNOMY. Equal laws and a well-adjusted constitution of government.

EUNUCH (Lat. *eumuchus* from the Gr. *ευνυχος*, one who had charge of the sleeping apartments). A man whose organs of generation have been so far removed or disorganized that he is rendered incapable of reproducing his species. Domat, *liv. prél. tit. 2, s. 1, n. 10*.

EVASION (Lat. *evadere*, to avoid). A subtle device to set aside the truth or escape the punishment of the law: as, if a man should tempt another to strike him first, in order that he might have an opportunity of returning the blow with impunity. He is, nevertheless, punishable, because he becomes himself the aggressor in such a case. Hawk. Pl. Cr. c. 31, §§ 24, 25; Bac. Abr. *Fraud*, A.

EVENT. The consequences of anything, the issue, conclusion, end; that in which an action, operation, or series of operations, terminates. 11 Barb. 473.

EVERY. Originally, "everich"—ever each; each one of all. Anderson.

Includes all the separate individuals which constitute the whole, regarded one by one; as, in the expression, "every person not having a license shall be liable to a fine." *Id.*; 19 S. C. 221.

In a statute "every railroad" may mean all railroads. *Id.*; 81 Va. 367. See ALL.

EVICTIION. Deprivation of the possession of lands or tenements.

Originally and technically, the dispossession must be by judgment of law; if otherwise, it was an *ouster*; 2 Wend. 563, note; 7 *id.* 285; but the necessity of legal process was long ago abandoned in England; 4 Term 617; and in this country also it is settled that there need not be legal process; 4 Hill 645; 8 Dev. 200; 54 Miss. 450. The word is difficult to define with technical accuracy; 17 C. B. 30; but it may be fairly stated that any actual entry and dispossession, adversely and lawfully made under paramount title, will be an eviction; Rawle, *Cov.* § 133.

Total eviction takes place when the possessor is wholly deprived of his rights in the premises. Partial eviction takes place when the possessor is deprived of only a portion of them; as, if a third person comes in and ejects him from the possession of half his land, or establishes a right to some easement over it, by a title which is prior to that under which he holds.

With respect to the demised premises, an eviction consists in taking from a tenant, some part of the premises of which he was in possession, not in refusing to put him in possession of something which by the agreement with his landlord he should have enjoyed; 12 Wend. 529. And in order to effect a suspension of rent there must be something equivalent to an expulsion from the premises, and not a mere trespass, or disturbance in the enjoyment of them; 4 Wend. 505; 5 Sandf. 542; T. Jones 148; 1 Verg. 379; 120 Mass. 284. The entry of a landlord upon demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent and not to his entire seclusion; 151 Pa. 101.

It is not necessary, however, in order to produce the eviction of a tenant, that there should be an actual physical expulsion; for a landlord may do many acts tending to diminish the enjoyment of the premises, short of an expulsion, which will amount to an eviction in law; as, if he erect a nuisance so near the demised premises as to

deprive the tenant of the use of them, or if he otherwise intentionally disturb the tenant's enjoyment to such an extent as to injure his business or destroy the comfort of himself and family, it will amount to an eviction; 8 Cow. 737; 2 Ired. 350; Woodf. Landl. & T. 1096; 52 N. W. Rep. (S. Dak.) 583; 16 N. Y. Sup. 163; 44 Mo. App. 279; 91 Pa. 323; 106 Mass. 201; 49 Vt. 109.

In New York it is said that eviction from the whole premises leased relieves the tenant from the payment of rent; but when the eviction is from a part only, the rent will be apportioned; 46 N. Y. 870. When the landlord's wrongful act interferes more or less with the beneficial enjoyment of the premises, but leaves them intact, the act is merely a trespass, though the tenant suffer injury by it; *ibid.*

Where the landlord, instead of resorting to the means provided by law, takes upon himself without authority to remove the property of his tenant and turn him out, he will be liable in damages, though it were effected without personal violence in the tenant's absence; 44 La. Ann. 514.

Constructive eviction may arise from any wrongful act of the lessor which deprives the tenant of the full enjoyment of the leased premises: as, by forbidding an under-tenant to pay rent to the tenant; 25 Ill. 587; building a fence in front of the premises to cut off the tenant's access thereto; 9 Allen 421; erecting a permanent structure which renders unfit for use two rooms; 106 Mass. 201; refusal to do an act indispensably necessary to enable the tenant to carry on the business for which the premises were leased: as, when premises were let for a grog-shop, the landlord refused to sign the necessary documents required by statute to enable the tenant to obtain a license; 42 Md. 236; also where lessor tears down an adjoining building, making it evident that lessee's building would fall; 142 N. Y. 263. And when a landlord, who owned another building adjoining that occupied by a tenant, the two being constructed together, tore the former down, rendering the latter unsafe for occupancy, and then procured its condemnation and destruction by the city authorities, these acts constituted an eviction, for which the tenant might recover damages; and the landlord could not avail himself of the action of the city authorities as a defence; 68 N. W. Rep. (Wis.) 406.

But a mere failure of the landlord to make repairs, although such may cause the place to be untenable, will not amount to an eviction; 23 La. Ann. 59; 35 N. Y. Super. Ct. 412; 73 Pa. 285. See 49 Vt. 109. But the doctrine of constructive eviction amounts only to a right to abandon the premises; it is not a defence against an action for rent when the tenant waives the eviction and remains in possession; 20 N. Y. 251.

The remedy for an eviction depends chiefly upon the covenants in the deed under which the party held. When the grantee suffers a total eviction, if he has a covenant of seisin or for quiet enjoyment, he recovers from the grantor the consideration-money which he paid for the land, with interest, and not the enhanced value of the premises, whether such value has been created by the expenditure of money in improvements thereon, or by any other more general cause; 14 Wend. 38; 2 Mass. 432. And this seems to be the general rule in the United States; 13 Johns. 50; 4 Dall. 441; Cooke 447; 1 Hen. & M. 202; 4 Halst. 139; 2 Bibb 272.

With respect to a lessee, however, who pays no purchase-money, the rule of damages upon an eviction is different; for he recovers nothing, except such expenses as he has been put to in defending his possession; and as to any improvements he may have made upon the premises, he stands upon the same general footing with a purchaser. The rents reserved in a lease, where no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. Upon an eviction the rent ceases, and the lessee is thereby relieved from a burden which must be deemed

equal to the benefit he would have derived from the continued enjoyment of the property; 2 Hill 105; 1 App. D. C. 447; 44 Mo. 164; 49 Vt. 109; 59 Pa. 420; 25 Ill. 587. And see 1 Duer, N. Y. 343; Tayl. Landl. & T. § 817; 147 Ill. 634; 3 Ind. App. 54. It is no defence, however, to an action for rent which was due at the time of the eviction; 8 Misc. Rep. 307.

When the eviction is only *partial*, the damages to be recovered under the covenant of seisin are a ratable part of the original price, and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract. The contract is not rescinded, so as to entitle the vendee to the whole consideration-money, but only to the amount of the relative value of the part lost; 5 Johns. 19; 12 id. 126; 4 Kent 462. See 6 Bac. Abr. 44; 1 Saund. 204, 322 a; 117 Mass. 282; 23 Gratt. 109; 43 N. J. L. 480. 71 Fed. Rep. 226. See MEASURE OF DAMAGES.

Eviction by Paramount Title. "Eviction by paramount title" is not constituted by the entry of one claiming under a title which is conceived by the vendee to be paramount. 163 Ky. 618, 174 S. W. 505.

EVIDENCE. That which tends to prove or disprove any matter in question, or to influence the belief respecting it. Belief is produced by the consideration of something presented to the mind. The matter thus presented, in whatever shape it may come, and through whatever material organ it is derived, is evidence. Prof. Parker, Lectures on Medical Jurisprudence, in Dartmouth College.

The word evidence, in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 1 Greenl. Ev. c. I. § 1; Will, Cir. Ev. 1. Testimony is not synonymous with evidence; 17 Ind. 272; the latter is the more comprehensive term; Whart. Cr. L. § 738; and includes all that may be submitted to the jury whether it be the statement of witnesses, or the contents of papers, documents, or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial; Will, Cir. Ev. 2; 48 Ill. App. 230.

The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact. Cal. Code Civ. Proc. § 1823. And the law of evidence is declared to be a collection of general rules established by law:

1. For declaring what is to be taken as true without proof.
2. For declaring the presumptions of law, both disputable and conclusive.
3. For the production of legal evidence.
4. For the exclusion of what is not legal.
5. For determining in certain cases the value and effect of evidence. *Id.* § 1825.

"The rules of evidence," says a late discriminating writer, "are the maxims which the sagacity and experience of ages have established, as the best means of discriminating truth from error, and of contracting as far as possible the dangerous power of judicial discretion." Will, Cir. Ev. 2.

That which is legally submitted to a jury, to enable them to decide upon the questions in dispute, or issue, as pointed out by the pleadings, and distinguished from all comment and argument, is termed evidence. 1 Stark. Ev. pt. 1, § 3.

Evidence may be considered with reference to its *instruments*, its *nature*, its *legal character*, its *effect*, its *object*, and the *modes of its introduction*.

The *instruments of evidence*, in the legal acceptance of the term, are:—

1. *Judicial notice or recognition.* There are divers things of which courts take judicial notice, without the introduction of proof by the parties: such as the territorial extent of their jurisdiction, local divisions of their own countries, seats of courts, all public matters directly concerning the general government, the ordinary course of nature, divisions of time, the meanings of words, and, generally, of whatever ought

to be generally known in the jurisdiction. If the judge needs information on subjects, he will seek it from such sources as he deems authentic. See 1 Greenl. Ev. c. 2; Steph. Ev. art. 58; Tayl. Ev. 3; JUDICIAL NOTICE.

2. *Public records*; the registers of official transactions made by officers appointed for the purpose; as, the public statutes, the judgments and proceedings of courts, etc.

3. *Judicial writings*: such as inquisitions, depositions, etc.

4. *Public documents* having a semi-official character: as, the statute-books published under the authority of the government, documents printed by the authority of congress, etc.

5. *Private writings*: as, deeds, contracts, wills.

6. *Testimony of witnesses.*

7. *Personal inspection*, by the jury or tribunal whose duty it is to determine the matter in controversy: as, a view of the locality by the jury, to enable them to determine the disputed fact, or the better to understand the testimony, or inspection of any machine or weapon which is produced in the cause.

Real evidence is evidence of the thing or object which is produced in court. When, for instance, the condition or appearance of any thing or object is material to the issue, and the thing or object itself is produced in court for the inspection of the tribunal, with proper testimony as to its identity, and, if necessary, to show that it has existed since the time at which the issue in question arose, this object or thing becomes itself "real evidence" of its condition or appearance at the time in question. 1 Greenl. Ev. § 13 a, note. For a full discussion of this species of evidence, see 50 N. J. L. 491.

There are rules prescribing the limits and regulating the use of these different instruments of evidence, appropriate to each class.

In its nature, evidence is *direct*, or *presumptive*, or *circumstantial*.

Direct evidence is that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact.

It is that evidence which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are sworn to by those who have the actual knowledge of them by means of their senses. 1 Phill. Ev. 116; 1 Stark. Ev. 19; Tayl. Ev. 84. In one sense, there is but little direct or positive proof, or such proof as is acquired by means of one's own sense; all other evidence is presumptive; but, in common acceptance, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.

Presumptive evidence is that which shows the existence of one fact, by proof of the existence of another or others, from which the first may be inferred; because the fact or facts shown have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be proved.

Presumptive evidence has been divided into presumptions of law and presumptions of fact.

Presumptions of law, adopted from motives of public policy, are those which arise in certain cases by force of the rules of law, directing an inference to be drawn from proof of the existence of a particular fact or facts. They may be conclusive or inconclusive.

Conclusive presumptions are those which admit of no averment or proof to the contrary. Thus, the records of a court, except in some proceeding to amend them, are conclusive evidence of the matter there recorded, being presumed to be rightly made up.

Inconclusive or disputable presumptions of law are those where a fact is presumed to exist, either from the general experience of mankind, or from policy, or from proof of the existence of certain other facts, until something is offered to show the contrary. Thus, the law presumes a man to be sane until the contrary appears, and to be inno-

cent of the commission of a crime until he is proved to be guilty. So, the existence of a person, or of a particular state of things, being shown, the law presumes the person or state of things to continue until something is offered to conflict with the presumption. See Best, Presumption, ch. ii.

But the presumption of life may be rebutted by another presumption. Where a party has been absent from his place of residence for the term of seven years, without having been heard of, this raises a presumption of his death, until it is encountered by some evidence showing that he is actually alive, or was so within that period.

Presumptions of fact are not the subject of fixed rules, but are merely natural presumptions, such as appear, from common experience, to arise from the particular circumstances of any case. Some of these are "founded upon a knowledge of the human character, and of the motives, passions, and feelings by which the mind is usually influenced." 1 Stark. Ev. 27.

They may be said to be the conclusions drawn by the mind from the natural connection of the circumstances disclosed in each case, or, in other words, from circumstantial evidence.

Circumstantial evidence is sometimes used as synonymous with presumptive evidence, but not with strict accuracy; for presumptive evidence is not necessarily and in all cases what is usually understood by circumstantial evidence. The latter is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things, and the ordinary transactions of business, etc., to lead the mind to a conclusion that the fact exists which is sought to be established. See 1 Stark. Ev. 478; Whart. Ev. 1, 2, 15.

The latest writer on this subject thus states the distinction: the word presumption, *ex vi termini*, imports an inference from facts known, based upon previous experience of the ordinary connection between the two, and, the word itself implies a certain relation between fact and inference. Circumstances, however, generally but not necessarily lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, not real; and even where the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ therefore as genus and species. Will, Cir. Ev. 17.

Presumptive evidence may sometimes be the result, to some extent, of any arbitrary rule—as in the case of the presumption of death after an absence of seven years without being heard of—derived by analogy from certain statutes.

The judge and the jury draw conclusions from circumstantial evidence, and find one fact from the existence of other facts shown to them,—some of the presumptions being so clear and certain that they have become fixed as rules of law, and others having greater or less weight according to the circumstances of the case, leaving the matter of fact inquired about in doubt until the proper tribunal to determine the question draws the conclusion.

In its legal character, evidence is *primary* or *secondary*, and *prima facie* or *conclusive*.

Primary evidence is the best evidence, or that proof which most certainly exhibits the true state of facts to which it relates. The law requires this, and rejects secondary or inferior evidence when it is attempted to be substituted for evidence of a higher or superior nature. For example, when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing, if it is to be attained; and in that case no copy or other inferior evidence will be received.

This is a rule of policy, grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from sinister motives, and an apprehension that the best evidence, if produced would alter the case to the prejudice of the party. This

rule, relates not to the measure and quantity of evidence, but to its quality when compared with some other evidence of superior degree.

To this general rule there are several exceptions. 1. As it refers to the *quality* rather than to the *quantity* of evidence, it is evident that the fullest proof that every case admits of is not requisite: if, therefore, there are several eye-witnesses to a fact, it may be sufficiently proved by one only. 2. It is not always requisite, when the matter to be proved has been reduced to writing, that the writing should be produced: as, if the narrative of a fact to be proved has been committed to writing, it may yet be proved by parol evidence. A receipt for the payment of money, for example, will not exclude parol evidence of payment; 4 Esp. 213. And see 3 B. & Ald. 566; 3 Cra. 51; 1 Dak. 372; 78 N. Y. 82; 41 Minn. 169. The evidence of a father and mother, cognizant of their child's birth, is primary evidence of its date or the age of the child, although there is a written record thereof in the family Bible; 49 Kan. 237; 34 S. C. 118. 1 McCord 164; 73 Wis. 248. A stenographer's notes of the testimony of a witness are not the best evidence of such testimony, so as to prevent any other person who was present from testifying in relation thereto; 35 S. C. 537; 17 Misc. Rep. 157. Documentary evidence is not the best evidence of marriage; 72 Mich. 184. Oral admissions of a party against himself as to the contents of a writing are primary evidence; 62 Conn. 542.

Secondary evidence is that species of proof which is admissible when the primary evidence cannot be produced, and which becomes by that event the best evidence that can be adduced. 3 Yeates 530.

But before such evidence can be allowed it must be clearly made to appear that the superior evidence is not to be had; 87 Ga. 727; 91 Mich. 229. The person who possesses it must be applied to, whether he be a stranger or the opposite party: in the case of a stranger, a subpoena and attachment, when proper, must be taken out and served; and in the case of a party, notice to produce such primary evidence must be proved before the secondary evidence will be admitted; 7 S. & R. 116; 3 B. & Ald. 296; 61 Pa. 328; 149 *id.* 25; 72 Mich. 599; 7 Exch. 639; 94 Ala. 602. See 45 Mo. App. 497; 83 Ala. 401; 25 Neb. 57. Secondary evidence of the contents of a written contract is inadmissible in the absence of proper diligence to secure the original; 70 Tex. 745; 84 Ala. 592. After proof of the due execution of the original, the contents should be proved by a counterpart, if there be one, for this is the next best evidence; and it seems that no evidence of a copy is admissible until proof has been given that the counterpart cannot be produced; 6 Term 296. If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original; Bull. N. P. 254; 6 Binn. 284; 8 Mass. 273. If regularly recorded, an office copy may be given in evidence. If there be no copy, the party may produce an abstract, or even give parol evidence of the contents of a deed; 10 Mod. 8; 6 Term 556. A transcribed telegraphic message which is actually delivered is primary evidence, and if lost or destroyed its contents may be proved by parol; 50 Minn. 424. See 118 Ind. 98; 127 Ill. 652. Letter-press copies of writings are secondary evidence; 30 S. W. Rep. (Tex.) 454.

If books or papers necessary as evidence in the courts of one state be in the possession of a person living in another state, secondary evidence without further showing may be given to prove the contents of such papers, and notice to produce them is unnecessary; 20 Wall. 125. See 52 Minn. 174. Where the attesting witness to a deed lives out of the state, secondary evidence of its execution is admissible; 157 Mass. 272.

It has been decided in England that there are no degrees in secondary evidence; and when a party has laid the foundation for such evidence, he may prove the contents of a deed by parol, although it appear that

an attested copy is in existence; 6 C. & P. 208; 8 *id.* 389; 7 M. & W. 102. It is urged on the one hand that the rule requiring the best evidence has reference to its nature, not to its strength, and the argument *ab inconvenienti* is invoked against the extension of the rule recognizing degrees. On the other hand it is contended that such an extension is an equitable one and rests on the same principle which forbids the introduction of any secondary evidence while the primary is available. English cases cited in favor of the recognition of degrees are said to be not so much decisions of the point as *dicta*, as they refer to it as a rule existing but not involved in the case; 10 Mod. 8; 2 Atk. 71; 1 Nev. & Per. 8. But in the latter case the rule is doubted, and in 6 C. & P. 359 impliedly denied by Patteson, J., as it is also by Parke, J.; 6 C. & P. 81; *id.* 206. See 8 Dowl. 389; 3 Scott, N. R. 577. The question is not settled in the United States; Greenl. Ev. § 84, note; and the United States Supreme Court, after saying they do not adopt the English rule, observe that the rule of exclusion or admission must be so applied as to promote the ends of justice, and guard against fraud, surprise, and imposition; 20 Wall. 226. See 3 Wash. St. 166; 68 Fed. Rep. 804. The American doctrine seems to be "that if from the nature of the case itself it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that when the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove that it was known to the other party in time to have been produced at the trial;" 1 Gr. Ev. § 84, note; 7 Tex. 315; 2 Cold. 321; 28 Ala. 250; 56 Ga. 258; 75 Ill. 315; 62 Me. 480; 20 Wall. 226; 9 Pet. 663. In an action against a stockholder for an assessment, without deciding whether the law recognizes degrees of secondary evidence, oral testimony of the contents of the notice of the call was admitted, when the existence of a copy did not appear; 53 Minn. 381. In an action for work and labor where the time-book had been burned but there was proof that plaintiff had made a copy of the entries against the defendant, the copy was held best evidence and parol proof was excluded in the absence of proof of the loss of the copy; 98 Mich. 168.

Prima facie evidence is that which appears to be sufficient proof respecting the matter in question, until something appears to controvert it, but which may be contradicted or controlled.

Conclusive evidence is that which establishes the fact: as in the instance of conclusive presumptions.

Evidence may be conclusive for some purposes but not for others.

Admissibility of evidence. In considering the legal character of evidence, we are naturally led to the rules which regulate its competency and admissibility, although it is not precisely accurate to say that evidence is in its legal character competent or incompetent; because what is incompetent for the consideration of the tribunal which is to pronounce the decision is not, strictly speaking, evidence.

But the terms incompetent evidence and inadmissible evidence are often used to designate what is not to be heard as evidence; as, witnesses are spoken of as competent or incompetent.

As the common law excludes certain classes of persons from giving testimony in particular cases, because it deems their exclusion conducive, in general, to the discovery of the truth, so it excludes certain materials and statements from being introduced as testimony in a cause, for a similar reason. Thus, as a general rule, it requires witnesses to speak to facts within their own knowledge, and excludes hearsay evidence.

Hearsay is the evidence, not of what the witness knows himself, but of what he has heard from others.

Such mere recitals or assertions cannot be received in evidence for many reasons, but principally for the following:—first,

that the party making such declarations is not on oath; and, secondly, because the party against whom it operates has no opportunity of cross-examination; 1 Phil. Ev. 185. See, for other reasons, 1 Stark. Ev. pt. 1, p. 44; Tayl. Ev. 508. The general rule excluding hearsay evidence does not apply to those declarations to which the party is privy, or to admissions which he himself has made.

Many facts, from their very nature, either absolutely or usually exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof. These are questions of pedigree or relationship, character, prescription, custom, boundary, and the like; as also questions which depend upon the exercise of particular skill and judgment. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and, consequently, resort must be had to the best means of proof which the nature of the case affords. The rule permitting a resort to hearsay evidence, however, in cases of pedigree extends only to the admission of declarations by deceased persons who were related by blood or marriage to the person in question, and not to declarations by servants, friends, or neighbors; 75 Fed. Rep. 217. And "general reputation in the family," which is admissible in matters of pedigree, or to establish the facts of birth, marriage, or death, is confined to declarations of deceased members of the family, and family history and traditions handed down by declarations of deceased members, in either case made *ante litem motam*, and originating with persons presumed to have competent knowledge of the facts stated; and evidence of the opinion or belief of living members of a family as to the death of another member, or of general reputation among a person's living friends and acquaintances as to his death, is not within the rule, and is inadmissible; 35 Atl. Rep. (Vt.) 77. See BOUNDARY; CUSTOM; PEDIGREE; PRESCRIPTION.

Admissions are the declarations which a party by himself, or those who act under his authority, make of the existence of certain facts. But where an admission is made the foundation of a claim, the whole statement must be taken together; 82 Va. 59. See 62 Conn. 542; 85 Ala. 569; ADMISSIONS.

A statement of all the distinctions between what is to be regarded as hearsay and what is to be deemed original evidence would extend this article too far. The general principle is that the mere declaration, oral or written, of a third person, as to a fact, standing alone, is inadmissible.

Res gestæ. But where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as part of the *res gestæ*; 9 N. H. 271; 93 U. S. 465; 116 Ind. 278; 79 Ga. 631; 112 Mo. 374; 128 Ill. 545; 95 Mich. 412; 82 Tex. 516; 18 Fed. Rep. 156; 148 Pa. 566; 21 How. St. Tr. 514; Steph. Dig. Ev. §§ 2, 7.

So, declarations of third persons, in the presence and hearing of a person, which tend to affect his interest, may be shown in order to introduce his answer or to show an admission by his silence, but this species of evidence must be received with great caution; 1 Greenl. Ev. 236.

Confessions of guilt in criminal cases come within the class of admissions, provided they have been voluntarily made and have not been obtained by the hope of favor or by the fear of punishment. And if made under such inducements as to exclude them, a subsequent declaration to the same effect, made after the inducement has ceased to operate, and having no connection with the hopes or fears which have existed, is admissible as evidence; 17 N. H. 171. Actions as well as verbal declarations may constitute a confession, and the

same rule as to admissibility applies to both; 98 N. C. 595. There is, however, a growing unwillingness to rest convictions on confessions unless supported by corroborating circumstances, and in all cases there must be at least proof of the *corpus delicti*, independently of the confession; 1 Whart. Cr. Law, § 683; Cooley, Const. Lim. 385; Tayl. Ev. 744. See ADMISSIONS; CONFESSION; RES GESTE.

Dying declarations are an exception to the rule excluding hearsay evidence, and are admitted, under certain limitations in cases of homicide, so far as the circumstances attending the death and its cause are the subject of them. See DECLARATION; DYING DECLARATIONS.

Opinions of persons of skill and experience, called experts, are also admissible in certain cases, when, in order to the better understanding of the evidence or to the solution of the question, a certain skill and experience are required which are not ordinarily possessed by jurors. See EXPERT; OPINION.

In several instances proof of facts is excluded from public policy; as professional communications between lawyer and client, and physician and patient; secrets of state, proceedings of grand juror, and communications between husband and wife. See CONFIDENTIAL COMMUNICATIONS; PRIVILEGED COMMUNICATIONS.

The effect of evidence. As a general rule, a judgment rendered by a court of competent jurisdiction directly upon a point in issue is a bar between the same parties; 1 Phill. Ev. 242; and privies in blood, as an heir; 3 Mod. 141; or privies in estate; 1 Ld. Raym. 730; Bull. N. P. 232, stand in the same situation as those they represent: the verdict and judgment may be used for or against them, and is conclusive. See RES JUDICATA; JUDGMENT.

The constitution of the United States, art. 4, s. 1, declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." See 3 Wheat. 234; 17 Mass. 546; 3 Bibb 369; 2 Marsh. 293; 5 Day 563; 159 U. S. 113, 235; 2 Black, Judg. § 857; FOREIGN JUDGMENT.

Foreign laws must be proved as facts in the courts of this country, and mere citations to English statutes and authorities cannot be accepted as showing the English law; 50 Fed. Rep. 73. See FOREIGN LAW. For the force and effect of foreign judgments, see FOREIGN JUDGMENT.

The object of evidence is next to be considered. It is to ascertain the truth between the parties. It has been discovered by experience that this is done most certainly by the adoption of the following rules, which are now binding as law:—1. The evidence must be confined to the point in issue. 2. The substance of the issue must be proved; but only the substance is required to be proved. 3. The affirmative of the issue must be proved.

It is a general rule, both in civil and criminal cases, that the evidence shall be confined to the point in issue. Justice and convenience require the observance of this rule, particularly in criminal cases; for when a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and which alone he has come prepared to answer; 2 Russ. Cr. 694; 1 Phill. Ev. 166.

To this general rule there are several exceptions, and a variety of cases which do not fall within the rule. In general, evidence of collateral facts is not admissible; but when such a fact is material to the issue joined between the parties, it may be given in evidence: as, for example, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had general authority from him to fill up bills with the name of a fictitious payee, evidence may be given to show that

he had accepted similar bills before they could, from their date, have arrived from the place of date; 2 H. Bla. 288.

When special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and, therefore, evidence of it cannot be received; yet a damage which is a necessary result of the defendant's breach of contract may be proved notwithstanding it is not in the declaration; 11 Price 19.

In general, evidence of the character of either party to a suit is inadmissible; yet in some cases such evidence may be given. See CHARACTER.

When evidence incidentally applies to another person or thing not included in the transaction in question, and with regard to whom or to which it is inadmissible, yet if it bear upon the point in issue it will be received; 8 Bing. 376. And see 4 B. & P. 93; 9 Conn. 47; 1 Whart. Cr. Law § 649.

The acts of others, as in the case of conspirators, may be given in evidence against the prisoner, when referable to the issue; but confessions made by one of several conspirators after the offence has been completed, and when the conspirators no longer act in concert, cannot be received. See 3 Pick. 33; 2 Pet. 364; 2 Va. Cas. 269; 1 Rawle 362, 458; 2 Leigh 745; 2 Day 205; 2 B. & Ald. 573, 574; 25 Tex. App. 533; CONFESSION.

In criminal cases, when the offence is a cumulative one, consisting itself in the commission of a number of acts, evidence of those acts is not only admissible, but essential to support the charge. On an indictment against a defendant for a conspiracy to cause himself to be believed a man of large property, for the purpose of defrauding tradesmen after proof of a representation to one tradesman, evidence may thereupon be given of a representation to another tradesman at a different time; 1 Campb. 399; 2 Day 205; 1 Johns. 99.

To prove the guilty knowledge of a prisoner with regard to the transaction in question, evidence of other offences of the same kind committed by the prisoner, though not charged in the indictment, is admissible against him; as, in the case where a prisoner had passed a counterfeit dollar, evidence that he had other counterfeit dollars in his possession is evidence to prove the guilty knowledge; 2 Const. 758, 776; 1 Bail. 300; 2 Leigh 745; 1 Wheel. Cr. Cas. 415; Russ. & R. 132; 5 Rand. 701.

The substance of the issue joined between the parties must be proved; 1 Phill. Ev. 190; Tayl. Ev. 233. Under this rule will be considered the quantity of evidence required to support particular averments in the declaration or indictment.

And, first, of civil cases. 1. It is a fatal variance in a contract if it appear that a party who ought to have been joined as plaintiff has been omitted; 1 Saund. 291 *h*, n.; 2 Term 283; and so where a bill for specific performance alleges the execution of a contract in a certain year, and the proof shows that it was made in another; 85 Ala. 286. But it is no variance to omit a person who might have been joined as defendant; because the non-joinder ought to have been pleaded in abatement; 1 Saund. 291 *d*, n. 2. The consideration of the contract must be proved; but it is not necessary for the plaintiff to set out in his declaration, or prove on the trial, the several parts of a contract consisting of distinct and collateral provisions: it is sufficient to state so much of the contract as contains the entire consideration of the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance; 6 East 568; 4 B. & Ald. 387.

Second. In criminal cases, it may be laid down that it is, in general, sufficient to prove what constitutes the offence. 1. It is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified; 2 Campb. 585; 1 H. & J. 427. See 78 Ga. 98; 63 Mich. 297. If a man be indicted for robbery, he may be found guilty of larceny and not guilty of the robbery; 2 Hale. Pl.

Cr. 803. The offence of which the party is convicted must, however, be of the same class with that of which he is charged; 1 Leach 14; 2 Stra. 1183.

2. When the intent of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only; 3 Stark. 85.

3. When a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved; 3 Rog. 77; 3 Day 283; 26 Tex. App. 486. For example, if a party be charged with stealing a black horse, the evidence must correspond with the averment, although it was unnecessary to make it; Rosc. Cr. Ev. 77; 4 Ohio 350; 83 Ga. 881; but see 73 Cal. 7, where an indictment charging a murder with a "bludgeon" is supported by proof that death was produced by a blow with a bolt or club; 23 Neb. 33. See 103 N. C. 364; 26 Tex. App. 109.

4. The name of the prosecutor or party injured must be proved as laid; and the rule is the same with reference to the name of a third person introduced into the indictment, as descriptive of some person or thing. See 35 Fed. Rep. 407; 10 Ky. L. Rep. 972; 40 Minn. 55.

The affirmative of the issue must be proved. The general rule with regard to the burden of proving the issue requires that the party who asserts the affirmative should prove it. But this rule ceases to operate the moment the presumption of law is thrown into the other scale. When the issue is on the legitimacy of a child, therefore, it is incumbent on the party asserting the illegitimacy to prove it; 2 Selw. N. P. 709. Or where an answer admits all the averments of the complaint, and sets up a counter-claim as a defence, the affirmative of all the issues raised by the pleadings is on the defendant; 61 Hun 624. See ONUS PROBANDI; PRESUMPTION; 2 Gall. 485; 1 McCord 573; 2 So. L. Rev. (N. S.) 126; 44 La. Ann. 1043.

Modes of proof. Records are to be proved by an exemplification, duly authenticated according to law, in all cases where the issue is *nul tiel record*. In other cases, an examined copy, duly proved, will, in general, be evidence; 2 Woods 680. Foreign laws are proved in the mode pointed out under the article FOREIGN LAW. See *supra*.

Private writings are proved by producing the attesting witness; or in case of his death, absence, or other legal inability to testify, as if after attesting the paper he becomes infamous, his handwriting may be proved. When there is no witness to the instrument, it may be proved by the evidence of the handwriting of the party, by a person who has seen him write, or who in a course of correspondence or business relations has become acquainted with his hand. See 3 Wash. C. C. 31; 1 Rawle 233; 4 Am. L. Rev. 625; 49 Minn. 420. As to the question whether the genuineness of a signature may be proved or disproved by comparison, or the signature to documents not a part of the case be proven for the purpose of using them as standards of comparison with the signature to the instrument sued on, see HANDWRITING.

Books of original entry, when duly proved, are *prima facie* evidence of goods sold and delivered, and of work and labor done. See ORIGINAL ENTRY.

A recent decision laid down some general rules in relation to the use of the ballots as evidence in an election contest, which present the law in that regard in a very terse and lucid form. It holds (1) that one who has received a certificate of election to office is not estopped in case of contest from going behind the returns from ballot boxes which were counted without objection by either party, and which formed the basis of the certificate; (2) that in an election contest, the ballots of a certain box, which had been opened before a legislative committee after the election, are admissible when it appears that the opportunity for

the ballots to have been tampered with was a mere possibility; and (3) that the fact that a discrepancy exists between the returns of the votes counted from that ballot box and a recount made by the court in an election contest does not indicate that there was any alteration in the ballots after being voted, nor tend to cast suspicion thereon, when the evidence shows that, when the count was concluded by the election officers, there were discrepancies between the tally sheets of the different clerks of the election, which it was attempted to reconcile by guessing at the result, and making changes accordingly; 84 S. W. Rep. (Tex.) 992. See ELECTION.

Proof by witnesses. The testimony of witnesses is called oral evidence, or that which is given *viva voce*, as contradistinguished from that which is written or documentary. It is a general rule that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law; or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter, or vary a written instrument, either appointed by law, or by the contract of the parties, to be the appropriate and authentic memorial of the particular facts it recites; for by doing so, oral testimony would be admitted to usurp the place of evidence decidedly superior in degree; 1 S. & R. 27, 464; 8 Marsh. 393; 1 Bibb 271; 11 Mas. 30; 3 Conn. 9; 12 Johns. 77; 1 Maule & S. 21; 45 La. Ann. 580; 67 Hun 815; 142 N. Y. 207; 150 Mass. 496; but this rule does not apply in suits between persons not parties to the writing; 8 Misc. Rep. 314; 50 Ohio St. 528; 77 N. Y. 613; 142 Mass. 76; 60 Me. 465; 1 Gr. Ev. § 279.

But parol evidence is admissible to defeat a written instrument, on the ground of fraud, mistake, etc., or to apply it to its proper subject-matter, or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. In these cases, the parol evidence does not usurp the place, or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate at all, or is essential in order to give to the instrument its legal effect; 1 Murph. 423; 1 Des. 465; 1 Bay 247; 1 Bibb 271; 11 Mass. 30. See 1 Pct. C. C. 85; 3 S. & R. 340; Pothier, Obl. pl. 4, c. 2; 15 R. I. 41; 1 Okl. 232; 65 Vt. 281; 62 Conn. 459; 6 Harv. L. Rev. 325, 417; 2 Misc. Rep. 219; 148 U. S. 581; 154 Pa. 149. Where the facts do not appear on the face of the judgment, oral evidence is admissible to show how credits thereon come to be allowed, and what they were allowed for; 75 Fed. Rep. 852. And parol evidence has been admitted to establish a contemporaneous oral agreement which induced the execution of the written contract though the effect be to alter or reform the latter; 114 Pa. 170; 116 id. 270; so when the contract was a letter "confirming our verbal contract," proof of the latter was permitted although inconsistent with the letter; 120 id. 429.

See, generally, the treatises on Evidence, of Gilbert, Phillips, Starkie, Roscoe, Swift, Bentham, Macnally, Peake, Greenleaf, Wharton, Stephen, Rice; Best on Presumption; Browne, Parol Ev.; Will, Circ. Ev. See ADMINICL; CIRCUMSTANTIAL EVIDENCE, CORROBORATING EVIDENCE; FAILURE OF FORMER TRIAL; INDICATIVE EVIDENCE; IRRELEVANT EVIDENCE; PRIMA FACIE EVIDENCE.

EVIDENCE, CIRCUMSTANTIAL. The proof of facts which usually attend other facts sought to be proved; that which is not direct evidence. For example, when a witness testifies that a man was stabbed with a knife, and that a piece of the blade was found in the wound, and it is found to fit exactly with another part of the blade found in the possession of the prisoner, the facts are directly attested, but they only prove circumstances; and hence this is called circumstantial evidence.

Circumstantial evidence is of two kinds, namely, certain and uncertain. It is cer-

tain when the conclusion in question necessarily follows: as, where a man had received a mortal wound, and it was found that the impression of a bloody left hand had been made on the left arm of the deceased, it was certain some other person than the deceased must have made such mark; 14 How. St. Tr. 1334. But it is *uncertain* whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was made by the assassin, or by a friendly hand that came too late to the relief of the deceased. It has been contended that, in order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused; Wills, Cir. Ev. 300; Stark. Ev. 100; 1 Crim. L. Mag. 284; 9 Houst. 564; 85 Pa. 127; 19 Ia. 230; 58 Ind. 530; but other writers have held that the distinction between this species of evidence and that which is direct is merely one of logic, and of no practical significance; that all evidence is more or less circumstantial; all statements of witnesses, all conclusions of juries, are the results of inference; or as it was expressed by Gibson, C. J., "the difference being only in degree;" 4 Pa. 269. See 2 Sumn. 27; 4 Pa. 269; Whart. Cr. Ev. § 10; Tayl. Ev. 86. Even in its strictest sense, circumstantial evidence is legal evidence, and when it is satisfactory beyond reasonable doubt, a jury is bound to act upon it as if it were the most direct; 1 Cent. L. J. 219; 1 Greenl. Ev. § 13; 3 Rice, Ev. 544. See CIRCUMSTANCES; EVIDENCE.

EVIDENCE, CONCLUSIVE. That which, while uncontradicted, satisfies the judge and jury; it is also that which cannot be contradicted.

The record of a court of common-law jurisdiction is conclusive as to the facts therein stated; 2 Wash. Va. 64; 2 Hen. & M. 55; 6 Conn. 508. But the judgment and record of a prize-court is not conclusive evidence in the state courts, unless it had jurisdiction of the subject-matter; and whether it had or not, the state courts may decide; 1 Conn. 429. See, as to the conclusiveness of the judgments of foreign courts of admiralty, 3 Cra. 459; 4 id. 421, 434; Gilm. 16; 1 Const. 381; 1 Nott & M'C. 537. See EVIDENCE.

EVIDENCE, DIRECT. That which applies immediately to the *factum probandum*, without any intervening process: as, if A testifies he saw B inflict a mortal wound on C, of which he instantly died. 1 Greenl. Ev. § 13. See EVIDENCE.

EVIDENCE, EXTRINSIC. External evidence, or that which is not contained in the body of an agreement, contract, and the like.

It is a general rule that extrinsic evidence cannot be admitted to contradict, explain, vary, or change the terms of a contract or of a will, except in a latent ambiguity, or to rebut a resulting trust; 14 Johns. 1; 1 Day 8. Excepting where evidence is admissible to vary a written contract on the ground that it does not represent the actual contract between the parties. See Wigram, Extrinsic Evidence; 14 L. R. A. 450; EVIDENCE.

EVIDENTIARY. Having the quality of evidence; constituting evidence; evidencing.

EVOCATION. In French Law. The act by which a judge is deprived of the cognizance of a suit over which he had jurisdiction, for the purpose of conferring on other judges the power of deciding it. It is like the process by writ of *certiorari*.

EWAGE. A toll paid for water-passage. Cowel. The same as *aquagum*.

EWBRICE. Adultery; spouse-breach; marriage-breach. Cowel; Tomlin, Law Dict.

EX AEQUO ET BONO (Lat.). In justice and good dealing. 1 Story, Eq. Jur. § 965.

EX CONTRACTU (Lat.). From con-

tract. A division of actions is made in the common and civil law into those arising *ex contractu* (from contract) and *ex delicto* (from wrong or tort). 3 Bla. Com. 117; 1 Chit. Pl. 2; 1 Mackelvey, Civ. Law § 195.

EX DEBITO JUSTITIÆ (Lat.). As a debt of justice. As a matter of legal right. 3 Bla. Com. 48.

EX DELICTO (Lat.). Actions which arise in consequence of a crime, misdemeanor, or tort are said to arise *ex delicto*: such are actions of case, replevin, trespass, trover. 1 Chit. Pl. 2; See EX CONTRACTU; ACTIONS.

EX DOLO MALO (Lat.). Out of fraud or deceit. When a cause of action arises from fraud or deceit, it cannot be supported; *ex dolo malo non oritur actio*. See MAXIMS.

EX EMPTO. Out of purchase; founded on purchase. A term of the civil law, adopted by Bracton. Inst. 4, 6, 28; Bract. fol. 102; Black, L. Dict.

EX FACTO (Lat.). From, by or in consequence of an act, or thing done. Applied generally to an act done in violation of law or right. A title is said to originate *ex facto*, when it commences in an unlawful act.

EX GRATIA (Lat.). Of favor. Of grace. Words used formerly at the beginning of royal grants, to indicate that they were not made in consequence of any claim of legal right.

EX INDUSTRIA (Lat.). Intentionally. From fixed purpose.

EX MALEFICIO (Lat.). On account of misconduct. By virtue of or out of an illegal act. Used in the civil law generally, and sometimes in the common law. Browne, Stat. Frauds 110, n.; Broom, Leg. Max. 351.

EX MERO MOTU (Lat.). Of mere motion. The term is derived from the king's letters patent and charters, where it signifies that he grants them of his own mere motion, without petition. To prevent injustice, the courts will, *ex mero motu*, make rules and orders which the parties would not strictly be entitled to ask for. See EX GRATIA; EX PROPRIO MOTU.

EX MORA (Lat.). From the delay; from the default. All persons are bound to make demands for damages which arise from their own default.

EX MORE (Lat.). According to custom.

EX NECESSITATE LEGIS (Lat.). From the necessity of law.

EX NECESSITATE REI (Lat.). From the necessity of the thing. Many acts may be done *ex necessitate rei* which would not be justifiable without it; and sometimes property is protected *ex necessitate rei* which under other circumstances would not be so, or a way of necessity will be allowed; 126 Mass. 445. Property put upon the land of another from necessity cannot be distrained for rent. See DISTRESS.

EX OFFICIO (Lat.). By virtue of his office.

Many powers are granted and exercised by public officers which are not expressly delegated. A judge, for example, may be *ex officio* a conservator of the peace and a justice of the peace. See OFFICIO, EX, OATH OF.

EX OFFICIO OATH. See OATH, EX OFFICIO.

EX OFFICIO INFORMATION. In English Law. A criminal information filed by the attorney-general *ex officio* on behalf of the crown, in the court of queen's bench, for offences more immediately affecting the government, and to be distinguished from informations in which the crown is the nominal prosecutor. Moz. & W. L. Dict.; 4 Steph. Com. 372.

EX PARTE (Lat.). Of the one part. Many things may be done *ex parte*, when the opposite party has had notice. An affidavit or deposition is said to be taken *ex*

parte when only one of the parties attends to taking the same. An injunction is granted *ex parte* when but one side has had a hearing. "*Ex parte*," in the heading of a reported case, signifies that the name following is that of the party upon whose application the case is heard. The term *ex parte* implies an examination in the presence of one of the parties and the absence of the other. 2 Scam. 62.

EX PARTE MATERNA (Lat.). On the mother's side. The words *ex parte materna* and *ex parte paterna* have a well-known signification in the law. They are found constantly used in the books to denote the line, or blood of the mother or father, and have no such restricted or limited sense, as from the mother or father, exclusively; 24 N. J. L. 433; 2 Bla. Com. 224, and notes.

EX PARTE PATERNA (Lat.). On the father's side. See **EX PARTE MATERNA**; DESCENT AND DISTRIBUTION.

EX POST FACTO (Lat.). From or by an after act; by subsequent matter. The correlative term is *ab initio*. An estate granted may be made good or avoided by matter *ex post facto*, when an election is given to the party to accept or not to accept; 1 Coke 146. A remainderman or reversioner may confirm *ex post facto* a lease granted by a life-tenant to last beyond his own life.

Within the meaning of the Constitution, any law is *ex post facto* which is enacted after the offence was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage. 107 U. S. 221. See IMPOSSIBILITY.

EX POST FACTO LAW. A statute which would render an act punishable in a manner in which it was not punishable when it was committed. 6 Cra. 138; 1 Kent 408.

A law made to punish acts committed before the existence of such law, which had not been declared crimes by preceding laws. Mass. Declar. of Rights, pt. 1, s. 24; Md. Decl. of Rights, art. 15.

A law passed after the commission of the offence charged, which inflicts a greater punishment than was annexed to the crime at the time of commission, or which alters the situation of the accused to his disadvantage. 8 Wyo. 478.

A law which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage. 2 Wash. 366; 107 U. S. 228; see 65 Miss. 542; 6 Cra. 87; 43 N. J. L. 203; 29 N. Y. 124; 4 Wall. 325.

Parliament, in virtue of its supreme power, may pass such laws, being sustained by discretion alone; 1 Bla. Com. 46, 160.

By the constitution of the United States, congress is forbidden to pass *ex post facto* laws. U. S. Const. art. 1, § 9. And by § 10 of the same instrument, as well as by the constitutions of most, if not all, of the states, a similar restriction is imposed upon the state legislatures. Such an act is void as to those cases in which, if given effect, it would be *ex post facto*; but so far only. In cases arising after it, it may have effect; for as a rule for the future, it is not *ex post facto*.

There is a distinction between *ex post facto* laws and *retrospective* or *retroactive* laws; every *ex post facto* law must necessarily be retrospective, but not every retrospective law is an *ex post facto* law; in general, *ex post facto* laws only are prohibited. Retrospective laws are prohibited by the constitutions of the states of New Hampshire and Ohio. See 15 Ohio 207; 27 id. 22; 50 id. 428; 107 U. S. 221; T. U. P. Charl. 94.

It is fully settled that the term *ex post facto*, as used in the constitution, is to be taken in a limited sense as referring to criminal or penal statutes alone, and that the policy, the reason, and the humanity of the prohibition against passing *ex post facto* laws do not extend to civil cases, to cases that merely affect the private property of citizens. But the prohibition cannot be evaded by giving a civil form to what is, in

substance, criminal; 4 Wall. 277; id. 333; 97 U. S. 385; 39 N. Y. 418; 43 Ga. 490; Hare, Am. Const. L. 547. Divorce not being a punishment may be authorized for causes happening previous to the passage of the divorce act; 40 Miss. 340.

The constitution does not prohibit the states from passing retrospective laws generally. Some of the most necessary acts of legislation are, on the contrary, founded upon the principles that private rights must yield to public exigencies; 8 Wheat. 89; 17 How. 403; 8 Pet. 88; 11 id. 421; 9 Cra. 374; 1 Gall. 105; 2 Pet. 380, 523, 627; 7 Johns. 488; 6 Binn. 271; 63 Mo. 343; 50 How. Fr. 21; 93 Ill. 483; Cooley, Const. Lim. 285; 36 S. C. 454. See 73 Ia. 707; 74 id. 708.

Test oaths of past loyalty to the government have been held void as *ex post facto*; 4 Wall. 333; except as pre-requisites to the exercise of the elective franchise; 47 Mo. 119; 39 N. Y. 418. A law prohibiting the sale of intoxicating liquors is not *ex post facto*, 5 R. I. 185; or a law imposing a retrospective tax; 31 N. J. L. 133; 20 Wall. 323; see 16 Pa. 63; s. c. 17 How. 856; 66 N. C. 361; or a law authorizing a divorce for past offences; 40 Miss. 349; 10 N. H. 380; compare 3 Murph. (N. C.) 327; or a law providing that the punishment of future crimes shall be increased by reason of past offences; 63 Me. 409. Corporations cannot pass *ex post facto* by-laws; 31 Mich. 458.

Laws under the following circumstances are to be considered *ex post facto* laws within the words and intent of the prohibition: 1. Every law that makes an act done before the passing of the law, which was innocent when done, criminal and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; though it would be otherwise of a law mitigating the punishment; 3 Story, Const. 212. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender; 3 Dall. 390. This construction, it is said, "has been accepted and followed as correct by the courts ever since;" Cooley, Const. Lim. 325. See 93 Cal. 427; 155 Mass. 163.

This classification has been generally adopted as accurate and complete, but is not entirely so. Thus a law has been decided to be *ex post facto* which was intended to punish a criminal act, prosecution as to which was already barred by a statute of limitations; Moore v. State of N. J., 43 N. J. L. 203; s. c. 24 Alb. L. J. 308; but an act which reduces a punishment is not *ex post facto* as to crimes committed prior to its enactment; 140 N. Y. 484; 65 N. C. 311; 12 Allen 421; 20 Tex. App. 335. The statement under the fourth head also requires modification. Convictions under changes in the rules of evidence have been held not unconstitutional; 53 N. Y. 164; 9 Cush. 279; 14 Rich. L. 281; 81 Tex. Cr. R. 597; 84 Ky. 1; 84 Ind. 452; though it seems to be settled that a law requiring a less degree of evidence cannot be applied to a previous offence. But changes in the forms, in the manner of passing sentence, or the qualifications of jurors, do not fall within the prohibition; 11 Pick. 28; 2 Wash. St. 552; 3 Wyo. 478; 29 S. C. 355; nor will a provision reducing the number of peremptory challenges on a prosecution for a capital offence, though applied to cases where the offence was committed before the change was made; 81 Fla. 291; 86 Ala. 617; nor an amendment which confers jurisdiction in a criminal cause upon a division of the supreme court less in numbers and different in personnel from the court as organized when the crime was committed; 152 U. S. 377. A change of criminal procedure applied to the trial of crimes committed before it took effect is not *ex post facto*, unless it affects some substantial right to which the accused was entitled when the alleged offence was committed; 33 La. Ann. 1214; 107 U. S. 221. The supreme court of the United States has recently decided that

a constitutional provision, requiring all grand and petit jurors to be qualified electors, able to read and write, and enjoining on the legislature to provide by law for listing and drawing persons so qualified, but declaring that, until otherwise provided by law, all crimes should be tried as though no change had been made (Const. Miss. 1890, §§ 264, 288), went into effect immediately on its adoption, so far as the qualifications of jurors were concerned; that one who committed a crime after the adoption of the constitution, but before the legislature passed a new jury law, could be tried, after the passage of such a law, by a jury selected under its provisions; and that, as the new law did not aggravate the crime previously committed, or inflict a greater punishment, or alter the rules of evidence, its application to the trial of the accused did not make it an *ex post facto* law; 162 U. S. 565.

For a review of the history of the *ex post facto* clause of the constitution in connection with its adoption, and with its subsequent construction by the federal and state courts, see 107 U. S. 221.

See also 134 id. 160; Cooley, Const. Lim. ch. ix.; Sto. Const. §§ 1345, 1373; Wade, Retro. L.; Pat. Fed. Restr. ch. vi.; Johnson, Ex Post Facto Laws; Black, Const. Prohibitions; Pomeroy, Const. Law; 6 Myer, Fed. Dec. 258; 25 Am. L. Reg. 681; 4 L. Mag. & Rev. 4th 59; Savigny, Conf. Laws; 22 Am. L. Rev. 523; Myer, Vested Rights; 3 L. R. A. 181; 1 id. 632; Fisher, Evolution of Const.; IMPAIRING THE OBLIGATION OF CONTRACTS; RETROSPECTIVE.

EX PROPRIO MOTU (Lat.). Of his own accord.

EX PROPRIO VIGORE (Lat.). By its own force. 2 Kent 457.

EX REL. See **EX RELATIONE**.

EX RELATIONE (Lat.). At the information of; by the relation. A bill in equity, for example, may in many cases be brought for an injunction to restrain a public nuisance *ex relatione* (by information of) the parties immediately interested in or affected by the nuisance; 18 Ves. 217; 2 Johns. Ch. 382; 6 id. 439; 13 How. 518; 12 Pet. 91.

It is frequently abbreviated *ex rel.* See **RELATOR**.

EX TEMPORE (Lat.). From the time; without premeditation.

EX VI TERMINI (Lat.). By force of the term.

EX VISCERIBUS (Lat. from the bowels). From the vital part, the very essence of the thing. 10 Co. 24 b; 2 Metc. Mass. 213. *Ex visceribus verborum* (from the mere words and nothing else); 10 Johns. 494; 1 Story, Eq. § 980.

EX VISITATIONE DEI (Lat.). By or from the visitation of God. In the ancient law, upon a prisoner arraigned for treason or felony standing mute, a jury was impelled to inquire whether he stood obstinately mute, or was dumb *ex visitatione Dei*; 4 Steph. Com. 391. This phrase is frequently employed in inquisitions by the coroner, where it signifies that the death of the deceased is a natural one.

EXACTION. A wilful wrong done by an officer, or by one who, under color of his office, takes more fee or pay for his services than the law allows.

Between extortion and exaction there is this difference: that in the former case the officer extorts more than his due, when something is due to him; in the latter, he exacts what is his due, when there is nothing due to him. Co. Litt. 388.

EXACTOR. In Old English and Civil Law. A collector. *Exactor regis* (collector for the king). A collector of taxes or revenue. Vicat, Voc. Jur.; Spelman, Gloss. The term exaction early came to mean the wrong done by an officer, or one pretending to have authority, in demanding or taking any reward or fee for that matter, cause, or thing which the law allows not. *Termes de la Ley*.

EXAMINATION. In Criminal Law. The investigation by an authorized magistrate of the circumstances which constitute the grounds for an accusation against a person arrested on a criminal charge, with a view to discharging the person so arrested, or to securing his appearance for trial by the proper court, and to preserving the evidence relating to the matter.

Practically, it is accomplished by bringing the person accused, together with witnesses, before a magistrate (generally a justice of the peace), who thereupon takes down in writing the evidence of the witnesses, and any statements which the prisoner may see fit to make. If no cause for detention appears, the party is discharged from arrest. If sufficient cause of suspicion appears to warrant putting him on trial, he is committed, or required to give bail or enter into a recognizance to appear at the proper time for trial. The witnesses are also frequently required to recognize for their appearance; though in ordinary cases only their own recognizance is required. The magistrate signs or certifies the minutes of the evidence which he has taken, and it is delivered to the court before whom the trial is to be had. The object of an examination is to enable the judge and jury to see whether the witnesses are consistent, and to ascertain whether the offence is bailable. 2 Leach 562. And see 4 Sharsw. Bla. Com. 296.

At common law, the prisoner could not be interrogated by the magistrate; but under the statutes 1 & 2 Phil. & M. c. 13, 2 & 3 Phil. & M. c. 10, the provisions of which have been substantially adopted in most of the United States, the magistrate is to examine the prisoner as well as the witnesses. 1 Greenl. Ev. § 224; 4 Bla. Com. 296; Rosc. Cr. Ev. 44; Ry. & M. 432.

The examination should be taken and completed as soon as the nature of the case will admit; Cro. Eliz. 829; 1 Hale, Pl. Cr. 585; 2 id. 120. The prisoner must not be put upon oath, but the witnesses must; 1 Phil. Ev. 106; Archb. Cr. Pr. & Pl. 386. The prisoner formerly had no right to the assistance of an attorney; but the privilege was granted at the discretion of the magistrate; 2 Dowl. & R. 86; 1 B. & C. 37. Now, however, a prisoner is permitted to have counsel as a matter of course. The magistrate's return and certificate are conclusive evidence, and exclude parol evidence, of what the prisoner said on that occasion with reference to the charge; 2 C. & K. 223; 5 C. & P. 162; 1 Mood. & M. 403. See CONFESSION; RECOGNIZANCE.

In Practice. The interrogation of a witness, in order to ascertain his knowledge as to the facts in dispute between parties.

The examination in chief is that made by the party calling the witness; the cross-examination is that made by the other party. In the examination in chief the counsel cannot ask leading questions, except in particular cases. See CROSS-EXAMINATION; LEADING QUESTIONS.

The examination is to be made in open court, when practicable; but when, on account of age, sickness, absence from the jurisdiction, or other cause, the witness cannot be so examined, then in civil causes it may be made before authorized commissioners.

The interrogation of a person who is desirous of performing some act, or availing himself of some privilege of the law, in order to ascertain if all the requirements of the law have been complied with, conducted by and before an officer having authority for the purpose.

There are many acts which can be of validity and binding force only upon an examination. Thus, in many states, a married woman must be privately examined as to whether she has given her consent freely and without restraint to a deed which she appears to have executed; see *ACQUITTANCE*; an insolvent who wishes to take the benefit of the insolvent laws, one who is about to become bound for another in legal proceedings, a bankrupt, etc., must submit to an examination.

EXAMINATION DE BENE ESSE. A conditional examination. The examination of a witness out of court before a trial, with the view of using his deposition in case his personal attendance cannot be procured at the trial.

EXAMINED COPY. A phrase applied to designate a paper which is a copy of a record, public book, or register, and which has been compared with the original. 1 Campb. 469.

Such examined copy is admitted in evidence, because of the public inconvenience

which would arise if such record, public book, or register were removed from place to place, and because any fraud or mistake made in the examined copy would be so easily detected; 1 Greenl. Ev. § 91; 1 Stark. Ev. 189. But in an answer in chancery on which the defendant was indicted for perjury, or where the original must be produced in order to identify the party by proof of handwriting, an examined copy would not be evidence; 1 Mood. & R. 189. See COPY.

EXAMINERS. Persons appointed to question students of law in order to ascertain their qualifications before they are admitted to practice.

The word "examiner" embraces any person authorized to take a deposition. Section 732, subsection 38, Civil Code of Kentucky.

Persons employed by the government of the United States in the Patent Office for the purpose of passing upon applications for letters patent. See SPECIAL EXAMINER. MEDICAL EXAMINER.

EXAMINERS IN CHANCERY. Officers who examine, upon oath, witnesses produced on either side upon such interrogatories as the parties to any suit exhibit for that purpose. Cowel.

The examiner is to administer an oath to the party, and then repeat the interrogatories one at a time, writing down the answer himself; 2 Dan. Ch. Pr. 1062. Anciently, the examiner was one of the judges of the court; hence an examination before the examiner is said to be an examination in court; 1 Dan. Ch. Pr. 1053.

EXANNUAL ROLL. A roll containing the illeivable fines and desperate debts, which was read yearly to the sheriff (in the ancient way of delivering the sheriff's accounts), to see what might be gotten. Hale, Sheriffs 67; Cowel.

EXCAMB. In Scotch Law. To exchange. *Excambion*, exchange. The words are evidently derived from the Latin *excambium*. Bell, Dict. See EXCHANGE.

EXCAMBIATOR. An exchanger of lands; a broker. Obsolete.

EXCAMBIUM (Lat.). In English Law. Exchange; a recompense. 1 Reeve, Hist. Eng. Law 442.

EXCELLENCY, HIS. A title given by the constitution of Massachusetts to the governor of that State; also, by custom, to the governors of the other States, and to the President of the United States. Anderson. The title of a viceroy, governor, ambassador or commander-in-chief. R. & L. Dict.

EXCEPTING. The words "excepting" and "reserving," although strictly distinguishable, are often used interchangeably or indiscriminately, and the use of either term is not conclusive as to the nature of the provision. 146 Ky. 307, 142 S. W. 394.

EXCEPTIO REI JUDICATAE. A defence in the Scotch law that the matter has been adjudged in another court or country, and the judgment carried into effect. Wharton. A term constantly used in modern law, to denote a defence founded upon a previous adjudication of the same matter. Burrill; Fract. fol. 100 b, 177. See RES JUDICATA.

EXCEPTION (Lat. *excipere*: ex, out of, capere, to take).

In Contracts. A clause in a deed by which the lessor excepts something out of that which he before granted by the deed. The exclusion of something from the effect or operation of the deed or contract which would otherwise be included.

An exception differs from a reservation (*q. v.*),—the former being always of part of the thing granted, the latter of a thing not in esse, but newly created or reserved; the exception is of the whole of the part excepted; the reservation may be of a right or interest in the particular part affected by the reservation. See 5 R. I. 410; 41 Me. 177; 42 id. 9; 51 id. 493; 19 Barb. 102; 2 B. & C. 197. The two words, however, are often used indiscriminately; 189 Mass. 237; 28 Conn. 541. An exception differs, also, from an explanation, which, by the use of a *videlicet*, *provisio*, etc., is allowed only to explain doubtful clauses precedent, or to separate and distribute

generals into particulars; 3 Pick. 272.

To make a valid exception, these things must concur: *first*, the exception must be by apt words, as, "saving and excepting," etc.; see 30 Vt. 242; 5 R. I. 419; 41 Me. 177; 102 N. C. 14; *second*, it must be of part of the thing previously described, and not of some other thing; *third*, it must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted; 11 Md. 339; 23 Vt. 395; 10 Mo. 426; see 146 Pa. 451; an exception, therefore, in a lease which extends to the whole thing demised is void; *fourth*, it must be of such thing as is severable from the demised premises, and not of an inseparable incident; 33 Pa. 251; 37 N. H. 167; *fifth*, it must be of such a thing as he that excepts may have, and which properly belongs to him; *sixth*, it must be of a particular thing out of a general, and not of a particular thing out of a particular thing; *seventh*, it must be particularly described and set forth; a lease of a tract of land except one acre would be void, because that acre was not particularly described; Co. Litt. 47 a; 12 Me. 237; Wright, Ohio 711; 3 Johns. 375; 8 Conn. 369; 6 Pick. 499; 6 N. H. 421; 4 Strobb. 208; 2 Tayl. 173; see 91 Cal. 74; 112 N. C. 58. Exceptions against common right and general rules are construed as strictly as possible; 1 Bart. Conv. 68; 5 Jones, N. C. 63. When a grantor makes a valid exception, the thing excepted remains the property of himself or his heirs; but if he has no valid title to it, neither he nor his heirs can recover; 97 N. C. 95.

In Equity Practice. The allegation of a party, in writing, that some pleading or proceeding in a cause is insufficient.

In Civil Law. A plea. Merlin, *Répert. Declinatory exceptions* are such dilatory exceptions as merely decline the jurisdiction of the judge before whom the action is brought. La. Code Proc.

Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress.

Declinatory exceptions have this effect, as well as the exception of discussion offered by a third possessor or by a surety in an hypothecary action, or the exception taken in order to call in the warrantor. 7 Mart. La. n. s. 232; 1 La. 38, 420.

Peremptory exceptions are those which tend to the dismissal of the action.

Some relate to forms, others arise from the law. Those which relate to forms tend to have the cause dismissed, owing to some nullities in the proceedings. These must be pleaded in *limine litis*. Peremptory exceptions founded on law are those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished. These may be pleaded at any time previous to definitive judgment; Pothier, Proc. Civ. pt. 1, c. 2, ss. 1, 2, 3. These, in the French law, are called *Fins de non recevoir*.

In Practice. Objections made to the decisions of the court in the course of a trial. See BILL OF EXCEPTION.

EXCEPTION TO BAIL. An objection to the special bail put in by the defendant to an action at law made by the plaintiff on grounds of the insufficiency of the bail. 1 Tidd, Fr. 255.

EXCEPTION ON TRIAL. An exception taken by the counsel of a party, on the trial of a cause, to a decision made by the judge in the course of the trial, or to an opinion expressed or direction given in his charge to the jury; and usually for the purpose either of moving for a new trial, or of bringing a writ of error.

EXCESS. When a defendant pleaded to an action of assault that the plaintiff trespassed on his land, and he would not depart when ordered, whereupon he *molliiter manus imposuit*, gently laid hands on him, the replication of excess was to the effect that the defendant used more force than necessary. Wharton.

EXCESSIVE BAIL. Bail which is *per se* unreasonably great and clearly disproportionate to the offence involved, or which under the peculiar circumstances appearing is shown to be so in the particular case. 44 Cal. 558; 53 id. 410.

EXCESSIVE DAMAGES. Damages, given by the verdict of a jury, which are unreasonably great in amount, and not warranted by law; outrageous damages. One of the grounds for granting new trials.

EXCHANGE. In Commercial Law. A negotiation by which one person transfers to another funds which he has in a certain place, either at a price agreed upon or which is fixed by commercial usage.

This transfer is made by means of an instrument which represents such funds and is well known by the name of a bill of exchange. The price above the par value of the funds so transferred is called the *premium* of exchange, and if under that value the difference is called the *discount*,—either being called the *rate* of exchange.

The par of exchange is the value of the money of one country in that of another, and is either real or nominal. The nominal par is that which has been fixed by law or usage, and, for the sake of uniformity, is not altered, the rate of exchange alone fluctuating. The real par is that based on the weight and fineness of the coins of the two countries, and fluctuates with changes in the coinage. The nominal par of exchange in this country on England, settled in 1799 by act of congress, was four dollars and forty-four cents for the pound sterling; but by successive changes in the coinage this value has been increased, the real mint par at present being a little over four dollars and eighty-seven cents. The *course* of exchange means the quotations for any given time.

The transfer of goods and chattels for other goods and chattels of equal value. This is more commonly called *barter*. Where a party deposits wheat with a mill company, expecting to receive a proportionate amount of flour, it constitutes an exchange and not a sale; 49 Mo. App. 23. One cannot, as having been defrauded thereby, rescind an exchange of property, without tendering a return of his property to the other, unless it is absolutely worthless; 97 Mich. 581.

The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property; 14 Gray 872.

The profit which arises from a maritime loan, when such profit is a percentage on the money lent, considering it in the light of money lent in one place to be returned in another, with a difference in amount in the sum borrowed and that paid, arising from the difference of time and place. The term is commonly used in this sense by French writers. Hall, Mar. Loans 50, n.

The place where merchants, captains of vessels, exchange-agents, and brokers assemble to transact their business. *Code de Comm.* art. 71.

In Conveyancing. A mutual grant of equal interests in land, the one in consideration of the other. 2 Bla. Com. 323; Littleton 62; Shep. Touchst. 289; Watk. Conv; Digby, R. P. 368. It is said that exchange in the United States does not differ from bargain and sale. 1 Bouvier, Inst. n. 2059.

There are five circumstances necessary to an exchange. That the estates given be equal. That the word *excambium*, or exchange, be used,—which cannot be supplied by any other word, or described by circumlocution. That there be an execution by entry or claim in the life of the parties. That if it be of things which lie in grant, it be by deed. That if the lands lie in several counties, or if the thing lie in grant, though they be in one county, it be by deed indented. In practice this mode of conveyancing is nearly obsolete.

See Cruise, Dig. tit. 32; Com. Dig.; Co. Litt. 51; 1 Washb. R. P. 159; 1 N. H. 65; 3 Harr. & J. 861; 3 Wood, Conv. 243; 79 Ia.

185; 47 Minn. 500; 133 Ind. 202; 30 Ala. 591.

Of Services. Barter. Carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. 248 U. S. 474. See FOREIGN EXCHANGE. QUOTATIONS OF PRICES ON AN EXCHANGE.

EXCHEQUER (L. Lat. *scaccarium*, Nor. Fr. *eschequier*). In English Law. A department of the government which has the management of the collection of the king's revenue.

The name is said to be derived from the chequered cloth which covered the table on which some of the king's accounts were made up and the amounts indicated by counters.

It consisted of two divisions, one for the receipt of revenue, the other for administering justice. Co. 4th Inst. 103; 3 Bla. Com. 44, 45. See COURT OF EXCHEQUER; COURT OF EXCHEQUER CHAMBER.

EXCHEQUER BILLS Bills of credit issued by authority of parliament.

They constitute the medium of transaction of business between the bank of England and the government. The exchequer bills contain a guarantee from government which secures the holders against loss by fluctuation. Wharton; McCulloch, Comm. Dict.

EXCISE. An inland imposition, paid sometimes upon the consumption of the commodity, and frequently upon the retail sale. 1 Bla. Com. 318; Story, Const. § 950; Cooley, Tax. 4. See 11 Allen 208; INTERNAL REVENUE.

A tax laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges. 220 U. S. 151 quoting Cooley, Const. Lim., 7th ed., 680.

EXCLUSIVE (Lat. *ex*, out, *claudere*, to shut). Not including; debarring from participation. Shut out; not included.

An exclusive right or privilege, as a copyright or patent, is one which may be exercised and enjoyed only by the person authorized, while all others are forbidden to interfere.

Exclusive Jurisdiction. The words "exclusive jurisdiction" mean not only exclusive, but full and final jurisdiction, and that no appeal lies from the judgment of the county court, although it may have imposed a fine and imprisonment. 159 Ky. 87, 166 S. W. 808.

Exclusive of Interest and Cost. The term "exclusive of interest and cost" as used in the statute, means the cost incurred in the suit and embraced in the judgment from which the appeal is taken. 101 Ky. 219, S. W. 673.

EXCOMMUNICATION. In Ecclesiastical Law. An ecclesiastical sentence pronounced by a spiritual judge against a Christian man, by which he is excluded from the body of the church, and disabled to bring any action or sue any person in the common-law courts. Bac. Abr.; Co. Litt. 133, 184; 91 Tenn. 303.

In early times it was the most frequent and the most severe method of executing ecclesiastical censure, although proper to be used, said Justinian (Nov. 123), only upon grave occasions. The effect of it was to remove the excommunicated person not only from the sacred rites, but from the society of men. In a certain sense it interdicted the use of fire and water, like the punishment spoken of by Cesar (lib. 6 de Bell. Civil.) as inflicted by the Druids. Innocent IV. called it the nerve of ecclesiastical discipline. On repentance, the excommunicated person was absolved and received again to communion. These are said to be the powers of binding and loosing,—the keys of the kingdom of heaven. This kind of punishment seems to have been adopted from the Roman usage of interdicting the use of fire and water. Fr. Duaren. De Sacris Eccles. Ministeriis, lib. 1, cap. 8. See Ridley, View of the Civil and Ecclesiastical Law 245.

EXCOMMUNICATO CAPIENDO (Lat. for taking an excommunicated person).

In Ecclesiastical Law. A writ issuing

out of chancery, founded on a bishop's certificate that the defendant had been excommunicated, returnable to the king's bench. 4 Bla. Com. 415; Bac. Abr. *Excommunication*, E. See Cro. Eliz. 224, 680; Cro. Car. 421; Cro. Jac. 567; 1 Salk. 293.

EXCUSABLE HOMICIDE. In Criminal Law. The killing of a human being, when the party killing is not altogether free from blame, but the necessity which renders it excusable may be said to have been partly induced by his own act. 1 East, Pl. Cr. 220. See HOMICIDE.

EXCUSATIO (Lat.). In Civil Law. Excuse. A cause from exemption from a duty, such as absence, insufficient age, etc. Vicat, Voc. *Jur.*, and reference there given.

EXCUSATOR (Lat.). In English Law. An excuser.

In Old German Law. A defendant; he who utterly denies the plaintiff's claim. Du Cange.

EXCUSE. A reason alleged for the doing or not doing a thing.

This word presents two ideas, differing essentially from each other. In one case an excuse may be made in order to show that the party accused is not guilty; in another, by showing that though guilty he is less so than he appears to be. Take, for example, the case of a sheriff who has an execution against an individual, and who, in performance of his duty, arrests him; in an action by the defendant against the sheriff, the latter may prove the facts, and this shall be a sufficient excuse for him; this is an excuse of the first kind, or a complete justification; the sheriff was guilty of no offence. But suppose, secondly, that the sheriff has an execution against Paul, and by mistake, and without any malicious design, he arrests Peter instead of Paul; the fact of his having the execution against Paul and the mistake being made will not justify the sheriff, but it will extenuate and excuse his conduct, and this will be an excuse of the second kind.

Persons are sometimes excused for the commission of acts which ordinarily are crimes, either because they had no intention of doing wrong, or because they had no power of judging, and therefore had no criminal will, or, having power of judging, they had no choice, and were compelled by necessity. Among the first class may be placed sailors under the age of discretion, lunatics, and married women committing certain offences in the presence of their husbands. Among acts of the second kind may be classed the beating or killing another in self-defence, the destruction of property in order to prevent a more serious calamity, as the tearing down of a house on fire to prevent its spreading to the neighboring property, and the like. See Daloz, Dict.

EXCUSSIO (Lat.). In Civil Law. Exhausting the principal debtor before proceeding against the surety. Discussion is used in the same sense in Scotch law. Vicat, *Excussio* Beneficium.

EXECUTE. To complete; to make; to perform; to do; to follow out.

The term is frequently used in law; as, to execute a deed, which means to make a deed, including especially signing, sealing, and delivery. To execute a contract is to perform the contract. To execute a use is to merge or unite the equitable estate of the cestui que use in the legal estate, under the statute of uses. To execute a writ is to do the act commanded in the writ. To execute a criminal is to put him to death according to law, in pursuance of his sentence. See EXECUTED DEED.

EXECUTED. Done; completed; effectuated; performed; fully disclosed; vested; giving present right of employment. The term is used of a variety of subjects.

EXECUTED CONSIDERATION. See CONSIDERATION.

EXECUTED CONTRACT. One which has been fully performed. The statute of frauds does not apply to such contracts; 130 Ind. 108; 48 Kan. 418; 9 U. S. App. 537; 159 Pa. 121; 100 Ala. 430; 18 Colo. 456; 88 Tex. 158. See CONTRACTS.

EXECUTED DEED. In Real Estate Law. A deed signed, sealed if necessary, acknowledged if necessary, and delivered. 214 Mo. 473, cited by 2 Elliot, Contr. 1169. The word "to execute" as applied to deeds, notes or written contracts, includes, signing and delivery, but in popular speech it is often used to express merely the act of signing the instrument. *Id.*; 122 S. W. 377. See EXECUTE.

EXECUTED ESTATE. An estate whereby a present interest passes to and resides in the tenant, not dependent upon any subsequent circumstance or contingency. They are more commonly called estates in possession. 2 Bla. Com. 162.

An estate where there is vested in the grantee a present and immediate right of present or future enjoyment. An estate which confers a present right of present enjoyment.

When the right of enjoyment in possession is to arise at a future period, only the estate is executed; that is, it is merely vested in point of interest; where the right of immediate enjoyment is annexed to the estate, then only is the estate vested in possession. 1 Prest. Est. 82; Fearn, Cont. Rem. 352.

Executed is synonymous with vested. 1 Washb. R. P. 11.

EXECUTED REMAINDER. One giving a present interest, though the enjoyment may be future. Fearn, Cont. Rem. 81; 2 Bla. Com. 168. See REMAINDER.

EXECUTED TRUST. A trust of which the scheme has in the outset been completely declared. Ad. Eq. 151. One in which the devise or trust is directly and wholly declared by the testator or settlor, so as to attach on the lands immediately under the deed or will itself. 1 Greenl. Cruise, Dig. 335; 1 Jac. & W. 570. "A trust in which the estates and interest in the subject-matter of the trust are completely limited and defined by the instrument creating the trust, and require no further instruments to complete them." Bisph. Eq. 31. The instrument creating such a trust must be construed according to the rules of law, although the intention may be defeated; *id.* 86. See 1 Hayes, Conv. 85; TRUST; EXECUTORY TRUST.

EXECUTED USE. A use with which the possession and legal title have been united by statute. 1 Steph. Com. 339; 2 Sharsw. Bla. Com. 335, note; 7 Term 342; 12 Ves. Ch. 89; 4 Mod. 380; Comb. 312.

EXECUTED WRIT. A writ the command in which has been obeyed by the person to whom it was directed.

EXECUTION. The accomplishment of a thing; the completion of an act or instrument; the fulfilment of an undertaking. Thus, a contract is executed when the act to be done is performed; a deed is executed when it is signed, sealed, and delivered. See 12 Fred. 221. Where the party is present and directs another to sign for him, no written authority is necessary; 30 N. J. Eq. 193; 6 Neb. 368; 23 Cal. 563; 175 Pa. 393; Reed, St. of Fr. § 1063.

In Criminal Law. Putting a convict to death, agreeably to law, in pursuance of his sentence. This is to be performed by the sheriff or his deputy; (see 4 Bla. Com. 403); or under the laws of the United States, by the marshal. See CRIMES; ELECTROCUTION; GARROTE; GUILLOTINE; HANGING.

In Practice. Putting the sentence of the law in force. 3 Bla. Com. 412. The act of carrying into effect the final judgment or decree of a court.

The writ which directs and authorizes the officer to carry into effect such judgment.

Final execution is one which authorizes the money due on a judgment to be made out of the property of the defendant.

Execution *quousque* is such as tends to an end, but is not absolutely final; as, for example, a *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken, to the intent that the plaintiff shall be satisfied of his debt, etc., the imprisonment not being absolute, but until he shall satisfy the same. 6 Co. 87.

Execution, in civil actions, is the mode of obtaining the debt or damages or other thing recovered by the judgment; and it is either for the plaintiff or defendant. For the plaintiff upon a judgment in debt, the execution is for the debt and damages; or in *assumpsit*, *covenant*, *case*, *replevin*, or *trespas*, for the damages and costs; or in *detinue*, for the goods, or their value, with damages and costs. For the defendant upon a judgment in *replevin*, the execution

at common law is for a return of the goods, to which damages are superadded by the statutes 7 Hen. VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3; and in other actions upon a judgment of *non pros.*, *non suit*, or verdict, the execution is for the costs only; Tidd, Pr. 993.

After final judgment signed, and even before it is entered of record, the plaintiff may, in general, at any time within a year and a day, and whilst the parties to the judgment continue the same, take out execution; provided there be no writ of error depending or agreement to the contrary, or, where this is allowed, security entered for stay of execution. But after a year and a day from the time of signing judgment the plaintiff cannot regularly take out execution without reviving the judgment by *scire facias*, unless a *feri facias*, or *capias ad satisfaciendum*, etc., was previously sued out, returned, and filed, or he was hindered from suing it out by a writ of error; and if a writ of error be brought, it is, generally speaking, a *supersedeas* of execution from the time of its allowance; provided bail, when necessary, be put in and perfected, in due time. See Tidd, Pr. 994; 3 Ala. 223.

Writs of execution are judicial writs issuing out of the court where the record is upon which they are grounded. Hence, when the record has been removed to a higher court by writ of error or *certiorari*, or on appeal, either the execution must issue out of that court, or else the record must be returned to the inferior court by a *remittitur* (*q. v.*) for the purpose of taking out execution in the court below. The former is the practice in England; the latter, in some of the United States.

The object of execution in personal actions is effected in one or more of the three following ways. 1. By the seizure and sale of personal property of the defendant. 2. By the seizure of his real property, and either selling it or detaining it until the issues and profits are sufficient to satisfy the judgment. 3. By seizing his person and holding him in custody until he pays the judgment or is judicially declared insolvent.

These proceedings, though taken at the instance and under the direction of the party for whom judgment is given, are considered the act of the law itself, and are in all cases performed by the authorized minister of the law. The party or his attorney obtains, from the office of the court where the record is, a writ, based upon and reciting the judgment, and directed to the sheriff (or, where he is interested or otherwise disqualified, to the coroner) of the county, commanding him, in the name of the sovereign or of the state, that of the goods and chattels or of the lands and tenements of the defendant in his bailiwick he cause to be made or levied the sum recovered, or that he seize the person of the defendant, as the case may be, and have the same before the court at the return day of the writ. This writ is delivered by the party to the officer to whom it is directed, who thenceforth becomes responsible for his performance of its mandate, and in case of omission, mistake, or misconduct is liable in damages to the person injured, whether he be the plaintiff, the defendant, or a stranger to the writ.

When property is sold under execution, the proceeds are applied to the satisfaction of the judgment and the costs and charges of the proceedings; and the surplus, if there be any, is paid to the defendant in execution.

Execution against personal property. When the property consists of goods and chattels, in which are included terms for years, the writ used is the *feri facias* (*q. v.*). If, after levying on the goods, etc., under a *feri facias*, they remain unsold for want of buyers, etc., a supplemental writ may issue, which is called the *venditioni exponas*. At common law, goods and chattels might also be taken in execution under a *levari facias*; though now perhaps the most frequent use of this writ is in executions against real property.

Where it is sought to reach an equitable interest a bill in equity is sometimes filed

in aid of an execution; 73 Fed. Rep. 627.

When the property consisted of *choses in action*, whether debts due the defendant or any other sort of credit or interest belonging to him, it could not be taken in execution at common law; but now, under statutory provisions in many of the states, such property may be reached by a process in the nature of an attachment, called an *attachment execution* or *execution attachment*. See ATTACHMENT; CREDITORS' BILL.

Execution against real estate. Where lands are absolutely liable for the payment of debts, and can be sold in execution, the process is by *feri facias* and *venditioni exponas*. In Pennsylvania the land cannot be sold in execution unless the sheriff's jury, under the *feri facias*, find that the profits will not pay the debt in seven years. But, practically, lands are almost never extended. And, in general, under common-law practice, lands are not subject to sale under execution, until after a levy has been made under the *feri facias*, and they are appraised under an inquisition. They are then liable to be sold under a *venditioni exponas*.

There are in England writs of execution against land which are not in general use here. The extent (*q. v.*), or *extendi facias*, is the usual process for the king's debt. The *levari facias* (*q. v.*) is also used for the king's debt, and for the subject on a *recognizance* or *statute staple* or *merchant* (*q. v.*), and on a judgment in *scire facias*, in which latter case it is also generally employed in this country.

Execution against the person. This is effected by the writ of *capias ad satisfaciendum*, under which the sheriff arrests the defendant and imprisons him till he satisfies the judgment or is discharged by process of law; Freeman, Ex. 451. See INSOLVENCY. This execution is not final, the imprisonment not being absolute; whence it has been called an execution *quousque*; 6 Co. 87.

Besides the ordinary judgment for the payment of a sum certain, there are specific judgments, to do some particular thing. To this the execution must correspond: on a judgment for plaintiff in a real action, the writ is a *habere facias seisinam*; in ejectment it is a *habere facias possessionem*; for the defendant in replevin, as has already been mentioned, the writ is *de retorno habendo*.

Still another sort of judgment is that *in rem*, confined to a particular thing; such are judgments upon mechanics' liens and municipal claims, and, in the peculiar practice of Pennsylvania, on *scire facias* upon a mortgage. In such cases the execution is a writ of *levari facias*. A confession of judgment upon warrant of attorney, with a restriction of the lien to a particular tract, is an analogous instance; but in such case there is no peculiar form of execution; though if the plaintiff should, in violation of his agreement, attempt to levy on other land than that to which his judgment is confined, the court on motion would set aside the execution.

An execution issued in direct violation of an express agreement not to do so, except in a certain contingency which has not happened, will be set aside; 127 Pa. 238.

The lien of an execution from the judgment or decree of a court of record relates to its teste, and attaches to all personality owned by the debtor between the teste and the levy so as to defeat the title of all intermediate purchasers; 85 Tenn. 720; not only in the county in which judgment was rendered, but everywhere in the state; 86 Tenn. 139. A sale under execution transmits only the debtor's estate, in the same plight and subject to all the equities under which he held it; 97 N. C. 241.

In Connecticut, Massachusetts, and Maine by common law and immemorial usage, under a judgment against a town, the property of any inhabitant may be taken in execution; 121 U. S. 121.

See, generally, Bingham; Freeman; Herman, and a long list of leading cases and annotations on special branches of the title in St. Louis Law Library catalogue, tit. Executions; EXEMPTION; FIERI FACIAS; HOMESTEAD. See SPECIAL EXECUTION.

EXECUTION PAREE. In French Law. A right founded on an act passed before a notary, by which the creditor may immediately, without citation or summons, seize and cause to be sold the property of his debtor, out of the proceeds of which to receive his payment. It imports a confession of judgment, and is not unlike a warrant of attorney. La. Code of Proc. art. 732; 6 Toullier, n. 208; 7 id. 99.

EXECUTIONER. The name given to him who puts criminals to death, according to their sentence; a hangman.

In the United States there are no executioners by profession. It is the duty of the sheriff or marshal to perform this office, or to procure a deputy to do it for him.

EXECUTIVE. That power in the government which causes the laws to be executed and obeyed.

It is usually confided to the hands of the chief magistrate; the president of the United States is invested with this authority under the national government; and the governor of each state has the executive power of the state in his hands.

The officer in whom the executive power is vested.

The constitution of the United States directs that "the executive power shall be vested in a president of the United States of America." Art. 2, s. 1. See Story, Const. b. 3, c. 36.

EXECUTIVE DUTY. See MINISTERIAL DUTY.

EXECUTIVE POWER. Authority exercised by that department of government which is charged with the administration or execution of the laws as distinguished from the legislative and judicial functions.

'Executive power,' which the constitution declares shall be 'vested' in the president, includes power to carry into execution the national laws—and including such other powers, not legislative or judicial in their nature, as might from time to time be delegated to the president by congress—as the prosecution of war when declared—and to take care that the law be faithfully executed." 1 Curtis, Const. Hist. 578.

The separation of the three primary governmental powers as found in the constitution of the United States and of the separate states is the culmination of a revolution which had long been in progress in Europe. As is pointed out by a recent writer all governmental power was formerly united in the monarch of the middle ages. As the result of experience there was a separation of the state from the government, the former being termed the constitution-making power and the latter the instrumentalities by which administration was to be carried on. Further advances in experience indicated the necessity of the distribution of powers by which there should be a deliberative body for the formulation of the rules and regulations under which the state should exist and its affairs be administered; another which should be the medium by which these rules and regulations forming the body of municipal law should be carried into effect; and a third to which should be committed the functions known in the science of government as judicial. The latter, under the government of the United States, has attained its highest development and exercises authority in some instances over the other two departments of the government elsewhere unknown, even going so far as to define the limits of their authority and to declare void legislative acts. See CONSTITUTIONAL. This theory of the distribution of powers of government among three distinct authorities, independent of each other, was first formulated by Montesquieu, *Esprit des Loix*, b. xi. c. vi. The absolute independence of the three branches of government which was advocated by Montesquieu has not been found entirely practicable in practice, and, although the threefold division of powers is the basis of the American constitution, there are many cases in which the duties of one department are to a certain extent devolved upon and shared by another. This is illustrated in the United States and in many of the states by the veto power which vests in the executive a part of the legislative authority, and on the other hand by the requirement of the confirmation by one branch of the legislature of executive appointments. The practical difficulty in the way of an exact division of powers is thus well expressed: "Although the executive, legislative and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parties constitute one brotherhood whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of vicinage' bordering on the domains of each." 70 N. C. 93, 102. In England, there is in parliament a practical union of all the governmental powers, that body having absolute power of selecting the agents through whom, in

fact, is exercised the executive power theoretically vested in the crown, and the final judicial authority on appeal remaining in the House of Lords. There is, notwithstanding, a complete recognition of the threefold nature of governmental power which is not lost nor destroyed by the unity of the final depository of it all.

While the science of government in modern times may be said to accept the general theory of the separation of powers, subject to limitations and exceptions suggested, the application of the theory has not been uniform. Great difficulty has been found in practice in determining the depository of executive power and whether it should be vested in one man or a board of control, the latter being supposed to insure deliberation and possibly to prevent tyranny, and the other being more conducive to efficient administration. See 8 Co. Const. 33 1419-23; Montesquieu, *Espr. de L.* b. xi. c. vi.; De Lolme, Const. Eng. b. 2, ch. 2; Federalist No. 70; 1 Kent 271. The necessity for the latter has led to the almost universal adoption of the plan of having a single executive head, and the principal remaining difficulty has been the selection of a chief officer of the government to be entrusted to it. This is in part the result of the effort to apply too rigidly the theory of the absolute separation of powers already shown to be impracticable. Another difficulty has been said to arise from the failure to recognize that executive power really comprises two functions, the political or governmental and the administrative. The former concerns the relations of the chief executive authority with the great powers of government, the latter relates to the practical management of the public service. It has been said that the executive authority, as understood in the American states, is mainly a political chief, that in France and to a less extent in England its position as an administrator is more important, while in the federal government in this country it is both, as it is also in Germany; 1 Goodnow, Comp. Adm. L. 61.

The proper treatment of this subject involves the consideration of the systems of executive administration developed in the principal countries of the world which have adopted the principle of the distribution of powers. Only the briefest summary, however, is here practicable.

The general theory of the distribution of powers in Great Britain is very much like that in the purely governed states. The residuary powers of governmental powers is in the crown, and the crown may exercise all authority not expressly otherwise delegated, but it rests with parliament to decide ultimately what powers shall be exercised by the crown and how it shall exercise them; herein it differs from the German system. From the comprehensive Norman idea of royalty which combined all the sovereign powers of the Saxon and Dane with those of the feudal theory of monarchy exemplified at the time in France, there developed at first hereditary and despotic power which was gradually limited by the action of the commons, the representatives of parliament for the imposition of taxes and the enactment of laws affecting the ordinary relations of individuals. Later it was considered that a law once enacted could not be changed without the consent of parliament, and finally the latter body assumed the right to initiate and repeal laws, and the crown lost its original power of veto which has certainly become obsolete, though it has been said to be merely dormant and susceptible of being revived; 2 Todd, Parl. Govt. in Eng. 390. See 1 Stubbs, Const. Hist. of Eng. 688. The result of this development is that parliament has assumed most of the legislative power, though many matters not regulated by it are controlled by the crown which exercises a large ordinance power both independent and supplementary. The crown has lost both the taxing power and the power of pardon, and its original and its old executive powers, and its action is controlled very largely by a body whose power has gradually developed, viz., the privy council. The crown may do anything which it is not forbidden to do and possesses the administrative as well as the political power, makes treaties, as well as declares them, and both remove and direct the incumbents. The crown is, therefore, the chief both of the administrative and political departments of the executive power, its position being modified by the principle that its advisers, without whom it cannot act, must possess a majority of the commons in the house of commons. The principle of parliamentary responsibility puts the crown in the position of reigning but not governing; but so long as it possesses the confidence of the house of commons it has very extensive executive powers, and in council may declare war, make treaties, which in other countries can be done only with the consent of the legislature. The crown is in theory irresponsible, but when its ministers are in a minority in the house of commons it chooses new ministers who will have the confidence of parliament, or dissolves parliament in the hope that the new body will have confidence in the existing ministers, but the theory is that in all cases the crown and not parliament administers. See Pom. Const. Law § 176; 1 Goodnow, Comp. Adm. L. ch. vi.

In France the executive power is vested in a president elected by the legislature. His position is said by a recent writer, probably on account of the monarchical traditions in France, to be more important from the administrative point of view and less from a political point of view than that of the President of the United States, he having no veto power. He has quite as extensive power of appointment and a very extensive power of removal, not only of officers appointed by himself, but of local administrative officers; as mayors of communes; Law, Apr. 5, 1884; and he may dissolve local and municipal legislative bodies in the departments and communes; Law, Aug. 10, 1871, and Apr. 5, 1884. In addition to his power of executing laws, he has in many cases authority to supplement the law without any delegation of legislative power by what are known as decrees. This supplemental power is accorded to him under a constitutional provision that he shall execute and see to the execution of the laws, and the difference between the interpretation put upon this and the similar pro-

vision in the United States constitution is accorded to the monarchical traditions of the country, and the resulting idea that the residuary governmental power is vested in the executive and not, as in this country, in congress. The president is also held to a greater responsibility for his action than in the American system. 1 Goodnow, Comp. Adm. L. ch. iv.

In Germany the conception of executive power is much broader than in the United States, and it is more important from the administrative point of view. There are important constitutional limitations on the action of the Prince, or executive head of the subdivisions of the empire, but in the absence of such limitations he is recognized as having the governmental power, being as in France the possessor of the residuum of the governmental power. The limitations upon his action by the constitution are found in the requirement of legislative consent for the validity of legislative acts affecting freedom of person and property and the financial affairs of the government, judicial power administered by courts independent of the control of the executive, and the necessity that each of his official acts must be countersigned by a minister who is responsible for it either to the legislature or to the criminal courts. The administrative powers are very extensive, including that of appointment and removal, and a very wide power of direction, together with the authority to make decrees or ordinances as to all matters not regulated in detail by legislation.

In the imperial government, the Emperor occupies, from the administrative point of view, about the same position as the President of the United States. He has a general power of appointment and of administrative direction, which latter is, however, exercised under the responsibility of the chancellor, who must countersign all acts by which it is exercised; but just what the responsibility of the latter officer seems to be undefined other than that he may be called upon to defend his policy before the federal council. The Emperor does not have any ordinary administrative powers expressly mentioned in the constitution or delegated by the legislature, and in the exercise of it he often requires the consent of the federal council. He is entirely irresponsible. *id.* ch. v. A leading German commentator regards the governmental form of the empire as a republic; 2 Zorn, *Das Reichsstaatsrecht*, 102.

In the United States, the federal executive power is vested in the president. In all the states the chief executive is the governor. With respect to the power of the latter the differences in the state constitutions make it necessary, for brief statements of the executive officers and their duties, to refer to the titles under the names of the several states, and for more detailed information to the constitutions of the states, while comparative views of the provisions on particular points may be found in Stimson, Am. Stat. Law. Many features are common to most of the states and, making due allowance for differences of detail, the character of the officer is substantially the same. In general, it may be noted that he is commander of the state militia, subject to the paramount federal constitutional control when it is in the actual service of the United States: he has in most cases a pardoning power (except in some states for treason), as to which, however, there is a growing tendency to limit it by requiring the recommendation of a board of pardons, either such in name or effect, usually composed of several executive officers, *virtute officii*; he has usually a veto power which compels the reconsideration of legislation by a two-thirds vote in most cases, but in some, three-fifths, and in others a mere majority; in most of the states he has power to summon the legislature in extra session, and to adjourn its sessions when the two houses disagree as to the time. As a rule, the governor's power of appointment is confined to minor state officials, and he has no power of removal except for cause and after a hearing. He is usually charged with the duty of sending messages to the legislature containing his views and recommendations upon public questions. The constitutional powers vested in the governor alone are addressed to and regulated by his own uncontrolled discretion; for example, where an officer assuming to act as governor, in his absence, had issued a proclamation convening the legislature in extraordinary session, the governor having returned previous to the time named for the meeting, and issued a second proclamation, revoking the first, it was held that, the power of convening the legislature being discretionary, the call might be recalled before the meeting took place; 3 Neb. 409; s. c. 19 Am. Rep. 634.

Under the United States constitution the governor of a state may call upon the president, when necessary, for aid in the enforcement of the laws.

His limited power of removal makes his power of direction and administration very slight. He is in effect a political rather than an administrative officer, his powers of the former class having increased while those of the latter class have been gradually curtailed. In this respect his relative position is quite the reverse of that of the president. For a discriminating review of this subject, see 1 Goodnow, *Comp. Adm. L.* ch. iii.; and see titles on the several states.

The executive power possessed by the president must be considered historically in order to reach an adequate view, both of its present scope and limitations and its growth since the adoption of the constitution. It is to be observed primarily that in the United States there is the fundamental condition that the executive power, whether of president or governor, is expressly granted, and the residuum of sovereignty is in the legislature, either federal or state as the case may be, and not, as in France and Germany, actually so, or, as in England, theoretically so. This remark is equally true as to its general results, notwithstanding decisions, that the express grant of executive power carries with it certain implied powers. These were still powers of executing the laws, and not, as in the countries named, of supplementing or adding to them.

Though it is often said that the framers of the United States constitution, in creating the office of president, had in view, as a model, the English king; *Pom. Const. Law* § 176, a more recent and probably correct view is that the office was rather modelled upon the colonial governor; 1 Goodnow, *Comp. Adm. L.* § 2, and 1 Bryce, *Am. Com.* 86. An examination of the powers of the executive in each of the three colonies of New York, Massachusetts, and Virginia leads Professor Goodnow to the conclusion that the American constitutional executive power was that which has been called the political or governmental power, and which had usually been exercised by the colonial governor, to which was added the carrying on of foreign relations, which, in the colonial period, were under the control of the mother country, and afterwards of the continental congress. The fact that the constitution, in vesting in the president the executive power, used the term as one whose meaning would be readily understood, undoubtedly leads to the conclusion that the general powers so characterized were such as people of the states were accustomed to have exercised by the governors, first of the colonies and then of the states. But see Stevens, *Sources Const. U. S.* ch. vi.

The specific powers conferred by the constitution in addition to the general provision vesting the executive power in him, are that he shall be commander-in-chief of the army and navy and the militia of the states when in service; that he may require the opinions of the officers of the executive departments; grant reprieves and pardons, except in cases of impeachment; make treaties with the advice and consent of the senate, two-thirds thereof concurring, and, the senate consenting, appoint ambassadors, judges, and other officers whose appointment is not otherwise provided for by law; give information to congress; convene both houses, or either, and adjourn them, when they disagree with respect to the time of adjournment, to such time as he shall think proper; receive ambassadors and other public ministers; take care that the laws be faithfully executed; and commission all officers; *Const. art. ii*, §§ 1, 2, 3.

This grant is said to have conferred upon the president the political power of an executive and one administrative power, viz., the power of appointment, beyond which he had no control over the administration; 1 Goodnow, *Comp. Adm. L.* § 63; *Pom. Const. L.* § 633.

These original powers of the president have been increased by acts of congress conferring specific powers upon him and by decisions that his power is not limited by the express terms of legislative acts but includes certain "rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution;" 135 U. S. 1, 64. Under this implied power it was held that the president could take measures to protect a United States judge or a mail-carrier in the discharge of his duty without an act of congress authorizing him to do so; *id.* 67; or, in the same manner, to place guards upon the public lands to pro-

tect the property of the government. As an illustration of the exercise of this power the supreme court cites the executive action which resulted in the release of Koszta from a foreign prison where he was confined in derogation of his rights as a person who had declared his intention to become an American citizen; *id.* 64. He may remove obstructions to interstate commerce and the transportation of the mails; and enforce the full and free exercise of all national powers and the security of all rights under the constitution; *in re Debs*, 158 U. S. 568.

Another increase of the administrative power of the president was due to his power of removal, which was not expressed in the constitution, but it was held by a majority vote in the first congress to be a part of the executive power; 1 Lloyd's Debates 351, 366, 450, 480-600; 2 *id.* 1-12; 5 Marsh. Life of Washington, ch. 3, 106; and this construction of the constitution was judicially approved; *Deady* 204; and was undoubtedly the recognized practice of the government until the passage of the Tenure of Office Acts of 1867-9; U. S. Rev. Stat. §§ 1767 to 1769; which were repealed in 1887. See 2 Sto. Const. §§ 1537-43; Paper of W. A. Dunning on the Impeachment and Trial of President Johnson; 4 Papers Am. Hist. Assoc. 491; 1 Kent 310; *Pom. Const. L.* §§ 647-657. To the power of removal thus recognized has been attributed the evolution of "the president's power of direction and supervision over the entire national administration" and "the recognition of the possession by the president of the administrative power;" 1 Goodnow, *Comp. Adm. L.* 66. Whatever theories may be formed of the conception of the office in the minds of the framers of the constitution, and however the result may have been brought about, it cannot be doubted that the executive head of the federal government is now in fact the depositary of the complete executive power, as it is understood to comprehend both political and administrative power. He is authorized to appoint certain officers in the executive departments, the discharge of whose duties is under his direction; 1 Cra. 165; 12 Pet. 524; 5 Cra. C. C. 163. This is considered by the writer last cited to be a great enlargement of the American conception; and this view seems to be well supported by the considerations already suggested. It is true that at the time of the adoption of the constitution the powers conferred upon the president were considered by many to be so great as to endanger the stability of the Union, and it is considered by one of the ablest authorities on constitutional law that no one of the three great departments "has been more shorn of its just powers, or crippled in the exercise of them, than the presidency;" Miller, *Const. U. S.* 20, 95. But the context shows that this has reference solely to the encroachments on the appointing power by the extra-legal participation of members of congress therein—an evil much mitigated by the extension of the civil service system to the greater number of offices which were formerly not subject to its operation.

The administrative power of the president includes not only the control of the personnel of the public service but also the vast number of powers brought into action in the course of the administration of the government growing out of powers vested in the president by his duty under the constitution to see that the laws are faithfully executed. These duties, aside from this specific enumeration in the constitution as already stated, are those imposed upon the president by act of congress, and may be either of a special or general character, as the promulgation of regulations for the control of particular branches of the public service, such as consular regulations and the civil service rules; but in most cases such executive regulations proceed from the heads of departments and not from the president directly, although they are in law presumed to proceed from him; 13 Peters 498, 518; 10 *id.* 291; 20 Wall. 92, 109; 99 U. S. 10, 19; 101 *id.* 755. Executive acts, as to the manner of doing which there is

no provision of law, may be done through the head of the proper department whose acts are the acts of the president in contemplation of law; 187 U. S. 202, 217. The president may act in special cases by directions to his subordinate officers, either directly or through the head of a department, or by his decision on appeal from either of them, though, as a rule, he is not considered to be authorized to entertain such appeals except as to the jurisdiction of the officer appealed from; 15 Op. Atty. Gen. 94, 100, reviewing opinions on this question. In other cases the appeal does not go beyond the head of the department; 4 *id.* 515; 9 *id.* 462; 10 *id.* 526.

Congress may impose on any executive officer any duty which is not repugnant to any right which is secured and protected by the constitution; 1 Cra. 137; 12 Pet. 524. With respect to certain executive functions which spring from the legislation of congress, after the occasion is created by the passage of a law, the authority of the legislature is ended, and the uncontrolled discretion of the executive attaches and is exercised independently of the other departments of the government. In the exercise of such powers the discretion of the subordinate officer, within his sphere, is the discretion of the president. Of this character are the control of the military resources of the government; the pardoning power and the power of appointment, all of which are dormant until legislation has been enacted for creating an army and navy, or defining crimes and punishments and the creation of offices. As to another class of executive powers which depend entirely upon the legislation of congress both for their existence and their scope, the president merely executes the law. Within this class necessarily fall the greater number of executive functions, and they differ from the other classes in that, with respect to them, the president may be deprived of all discretion.

The executive powers which are derived directly from the constitution would still remain if all the legislative acts of congress were repealed. As to these the president is clothed with unrestrained discretion, and his acts in pursuance of them are purely political. He cannot be controlled nor can his powers be enlarged or diminished by legislation, though through the medium of proper laws he may be aided in the performance of the duties thus imposed upon him. For example, an attempt to limit the pardoning power or control its effect has been held unconstitutional, where the supreme court having declared that the power of the president dispensed with the necessity of proof of loyalty in cases authorizing claims for the value of property seized as captured or abandoned during the war; congress subsequently enacted that such proof should be required irrespective of any executive pardon or amnesty. This the court held unconstitutional, saying:—"Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end." 13 Wall. 128, 148. But when a claim was made against the government for payment for supplies furnished before the war, it was held that the prohibitory legislation of congress prevented a recovery, because the disability of the claimant to receive a debt from the United States did not arise as a consequence of any offence but out of a state of war, and ended with the close of the war, and not by reason of the pardon, which operated only to relieve him from punishment for his acts and gave him no new rights; 118 U. S. 62.

As to his express powers the president is equally independent of the courts and can be held for maladministration of them only by impeachment; 1 Cra. 165; 12 Pet. 524;

5 Cra. C. C. 163; Hempst. 306.

The command of the army and navy is essentially an executive power; 2 Sto. Const. § 1491; 2 Kent 282; though it did not pass without criticism; 2 Elliot, Deb. 365; 3 *id.* 103, 108; the power to call out the militia is discretionary and his judgment of the necessity is final; 12 Wheat. 29; and he may delegate the command of it; Rawle, Const. 193; 2 Sto. Const., 5th ed. § 1492, n. 2. See 5 Mass. 548.

The power to require opinions from the heads of departments has been termed a mere redundancy; Federalist, No. 74; but it is said to be not without its use and frequently acted upon; 2 Sto. Const. § 1493; especially in two notable instances, by President Washington, 1793, relative to the condition of affairs between France and Great Britain, and by President Grant in 1873 in reference to the subject of expatriation; Miller, Const. U. S. 185.

The pardoning power of the president extends to any case in which it might have been exercised under the English law; 7 Pet. 150; 18 How. 307; and includes the power to grant a conditional pardon; *id.*; 4 Wall. 333; to relieve against forfeiture of property under a confiscation act; 6 Wall. 766; or release from fines, penalties, and forfeiture which accrue from the offence; 91 U. S. 474; or contempt of court; 24 La. Ann. 119; s. c. 13 Am. Rep. 115; it includes amnesty; 13 Wall. 128; and a general amnesty proclamation includes domiciled aliens; 16 Wall. 14, 148. The power of the president to issue a proclamation of general amnesty has been much drawn into question, and it was denied in a report of the Judiciary Committee of the Senate made Feb. 17, 1869, that he could do it without the authority or assent of congress. It was the subject of legislation, an express power being granted to the president by sec. 13 of the act of June 17, 1862, which was repealed by act of Jan. 19, 1867. It was, however, generally considered that the subject was within the power of the executive, and it was exercised by Presidents Washington, Adams, Madison, Lincoln, and Johnson, and independently of congressional action. See an extended discussion of the subject in 8 Am. Law Reg. n. s. 513, 577. The president may act on pardons immediately, or first refer them to the executive departments; 14 Op. Att. Gen. 20.

The power to make treaties "embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors; for indemnity for injuries or payment of debt; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other." 2 Sto. Const. sec. 1508. This power is plenary; 14 Pet. 540; 93 U. S. 188; it includes removing the disabilities of aliens to inherit; 5 Cal. 381; or enabling them to purchase and hold lands in the United States; 2 Wheat. 259.

An important question has frequently arisen as to the effect of this power where legislation was required to give effect to a treaty. "In regard to this, any serious difficulty has been averted by the wisdom and forbearance of the house of representatives;" Miller, Const. U. S. 168. See also *id.* 181, and authorities cited; Pom. Const. L. §§ 676-681; 1 Kent 286; TREATIES.

The power of appointment includes nomination and appointment, and the power to commission is distinct, but when the commission is signed and sealed, the legal right of the officer is vested and delivery of the commission is not essential; 1 Cra. 137; 19 How. 74. The nomination is a recommendation in writing; 1 Cra. 137; 7 Op. Att. Gen. 186; and the senate can only affirm or reject; 3 Op. Att. Gen. 188; congress cannot by law designate the person to fill an office; 13 How. 40. The president cannot make a temporary appointment in a recess, if the senate was in session when or since the vacancy occurred; 16 Am. L. Reg. 786.

Whether a newly created office, not before filled, is a *vacancy*, within the constitutional power of the president to make temporary

appointments, is a question upon which courts and attorneys-general have differed. The most reasonable conclusion and that best supported by authority seems to be that it is not; Cooley, Const. Law 104, n. 5; Ordonaux, Const. Leg. 107; and it is said that if the senate is in session when offices are created by law and no appointment is made, no vacancy exists in such sense that the president can appoint during the recess; *id.*; 2 Sto. Const. § 1559; 7 Am. L. Reg. n. s. 786; 3 Fed. Rep. 112.

Strictly speaking, an appointment to office is an executive act; 3 J. J. Marsh. 404; 2 Goodn. Comp. Adm. L. 22; but in many cases it has been held that it may be exercised by the legislative power, and this in the absence of negative constitutional limitation is held valid; *id.*; Cooley, Const. Lim. 115, n.; 15 Md. 376; 13 Mich. 481; 24 *id.* 44; 6 W. Va. 562; *contra*, 118 Ind. 449; *id.* 426; 7 Ohio St. 546; 29 *id.* 102.

See, generally, as to the president's power of appointment and removal, 2 Sto. Const. §§ 1545-1553; Rawle, Const. 166; Sergeant, Const. ch. 29; Miller, Const. U. S. 156; Pom. Const. L. §§ 642-651.

Among the executive powers of first importance vested in the president is the management of foreign affairs, including the treaty power, to be exercised with the consent of the senate, and the power to appoint and receive foreign ministers, both of which are expressed in the constitution.

A question recently much discussed, is whether the recognition of a foreign revolutionary government is a matter entrusted, under the constitution, to the discretion of the president acting alone, or whether it is vested in congress, or requires the joint action of both of the political departments of the government. It has been contended on the one hand that this power

"rests exclusively with the executive," and that, "a resolution on the subject by the senate or by the house, by both bodies or by one, whether concurrent or joint, is inoperative as legislation, and is important only as advice of great weight voluntarily tendered to the executive regarding the manner in which he shall exercise his constitutional functions."

Such is the view said to have been expressed by Secretary Olney in a public statement, which, although not an official document, was generally accepted as a fit expression of the opinion of those who take the extreme view of the prerogative of the executive on this subject. The occasion of this utterance was a unanimous report of the Committee on Foreign Affairs of the Senate, recommending the passage of a joint resolution, "That the independence of the Republic of Cuba be, and the same is, hereby acknowledged by the United States of America."

The opposite opinion is based upon the idea that, because the constitution vests in congress the power to declare war (which is liable to be a consequence of the recognition of a new government) not only is the action of that body necessary, but it is the proper department of the government to act in such case. At least it is contended that congress has the power to act even if its power is not exclusive.

The argument in favor of the absolute and exclusive control of the subject by congress is substantially this:—The recognition of the independence of a people is from its very nature the creation of obligations arising from international law, and therefore must belong to the law-making power; it is also a supreme act of sovereignty and must be done by that department of the government in which the national sovereignty resides. Under the constitution, congress is invested with almost all the prerogatives of sovereignty, the only one granted to the president being the pardoning power, and even that is denied in cases of impeachment. The power in question is not directly granted to the president; therefore, is not one of his functions unless necessary to the full and proper exercise of some power directly granted to him or inherent in the office. His general inherent function is to *execute the laws*, to which this power of recognition has no relation, unless it be exercised in pursuance of law.

The only expressed power from which it is sought to imply this far-reaching authority is that of receiving ambassadors and ministers, and that, it is urged, is simply a ceremonial duty, imposed upon him as the medium through which the government communicates with foreign governments. As the power of receiving ambassadors and ministers can be exercised pursuant to the direction of congress in doubtful cases, the power to determine the existence or independence of a nation is not necessarily involved in the constitutional grant of power to receive ambassadors, etc. If this power is vested in the executive, it is unlimited and involves the authority, so far as this government is concerned, to alter the map of the world, change the relation of this government to other governments, and involve the country in war. That such uncontrolled executive power over foreign relations was intended, cannot be reconciled with the fact that the president cannot declare war, or make a treaty, or appoint an ambassador or consul without the consent of the senate.

The argument from this point of view is very forcibly stated in a speech by Senator Bacon, Jan. 18, 1897, in the United States senate, made expressly to take issue with the position taken by Secretary Olney, *supra*.

A third view is that, under the constitution and according to precedent,

"the recognition of the independence of a new foreign power is an act of the executive (president alone, or president and senate), and not of the legislative branch of the government, although the executive branch may properly first consult the legislative. While the legislative branch of the government cannot directly exercise the power of recognizing a foreign government, because that is a power executive or judicial in nature, and one which the judiciary, by refusing independently to examine the question, cast entirely upon the executive), nevertheless, if a recognition of such independence is liable to become a *casus belli* with some other foreign power, it is most advisable as well as proper for the executive first to consult the legislative branch as to its wishes and postpone its own action if not assured of legislative approval."

The basis of the argument in favor of legislative participation in such action is mainly the power to declare war and, as particularly urged by Mr. Clay, the power to regulate commerce. The argument in favor of exclusive executive power is found in the general control of foreign relations, as to which the only expressed powers are to "make treaties" and to "receive ambassadors and other ministers." The argument of greater force in favor of executive control is, however, not that the power in question is included in the specific powers named but that it is a part of the general grant of executive power; that all duties in connection with foreign relations, not otherwise specified, are placed upon the executive, and that the two powers enumerated are merely illustrative and not exclusive. This third view is thus stated in a memorandum submitted to the United States senate by Senator Hale in connection with resolutions pending for the recognition of Cuba, and printed as Ex. Doc. No. 56, 2d Sess. 54th Cong.

"It is in the light of this conception of the executive character of foreign negotiations and acts concerning foreign relations that our constitution gave the president power to send and receive ministers and agents to or from any country he sees fit, and when he sees fit, and not to send or receive any, as he may think best. Also, the power to make treaties; that is, to negotiate with or without agents, as he may prefer, when he may prefer, or not at all, if he prefer; to draw up such articles as may suit him; and to ratify the acts of his plenipotentiaries, instructed by him, the only qualification of his power being the advice and consent of the states in the senate to the treaty he makes. These grants confirm the executive character of the proceedings, and indicate an intent to give all the power to the president, which the federal government itself was to possess—the general control of foreign relations."

The extent of executive control of foreign relations was the subject of an extended debate in congress in 1796, upon a resolution calling upon the president for details of the negotiations leading up to the Jay treaty with England, the exact question, however, being the effect of a treaty when negotiated. See TREATY.

With respect to the express power of the executive to make treaties, that is

shared with the senate and there is no precedent for the primary act of recognition of a new foreign state, by the joint action of president and senate under the treaty-making power. As to the power to "receive ambassadors and other ministers," though it was much debated as giving the president too much power, the only comments on it in the *Federalist* are the following:

"This, though it has been a rich theme of declamation; is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the Government; and it was far more convenient that it should be arranged in this manner, than that there should be necessity for convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor." *Federalist*, No. 69, p. 336.

"Except some cavils about the power of . . . receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any. . . . As to the reception of ambassadors, what I have said in a former paper will furnish a sufficient answer." *Id.* No. 77, p. 332.

The executive can alone appoint a diplomatic representative to a new government, but to do this there is required congressional action to provide for the payment of his salary, and it might be an inference from the practice of the government that the creation of an office, either directly or by provision for compensation to its incumbent, is a prerequisite to the appointment of a person to exercise any public functions. It has been argued, on the other hand, that such an officer, appointed by the president and senate, and his position as an officer having been established, might serve gratuitously or be paid out of the contingent fund. It would seem, however, that it might be urged with more force that merely from an appointment authorized by the constitution, there would arise an obligation to provide compensation, of the same character as those created in many cases without the direct action of congress, notably under the power to make a treaty (*q. v.*).

In 1798 a discussion arose as to this power, in which was considered the possible clashing between the appointing power of the president and the appropriating financial power of congress. In the course of debate Mr. Otis made the following remarks with some observations not less pertinent to the present question than to that to which they were addressed: "It was owing to the apparent contradictions arising from a theoretical view of constitutions like ours that they were pronounced to be impracticable by some of the best writers of antiquity. And these abstract questions and extreme cases were not calculated to reconcile the minds of our citizens to our excellent form of government. It is a plain and conclusively reply, by which all such objections are obviated, that the constitution is not predicated upon a presumed abuse of power by any department, but on the more reasonable confidence that each will perform its duty within its own sphere with sincerity, that division of sentiment will yield to reason and explanation, and that extreme cases are not likely to happen."

And Attorney-General Cushing objected to an act in which it was provided that the president "shall" appoint a consul at Port au Prince, that it involved the diplomatic recognition of the Haytian empire, which rested entirely within the discretion of the president. 7 Op. Attys. Gen. 243.

Turning to the precedents, the right to recognize a foreign power was discussed in 1817 with reference to the South American republics. The matter first came up on an appropriation to pay a minister, which was defeated, after a debate, in which Mr. Clay maintained that recognition might be either by the president in receiving or sending a minister, or by congress under the commerce clause; and the relation of the two powers of government to the subject was much considered; Ann. of Cong. (1818), pp. 1498-1608-1655. The subject was at this time much discussed both in congress and between the president and individual members, so much so that Mr. Adams, the secretary of state, in his memoirs, mentions jocular remarks made in the cabinet in that connection about the power of impeachment; 4 Memoirs, J. Q. Adams 204-206. Subsequently the subject was revived in the house and various resolutions were considered, with the result of a request for information from the president, which was responded to by the message of March 8, 1822, in which he said it was his duty to invite the attention of congress to a very important subject, and to communicate the sentiments of the executive on it; that should congress entertain other sentiments, then there might be such co-operation between the two departments of the government as their respective rights and duties might require. And after stating that in his judgment the time had come to recognize the republics, he said: "Should congress concur in the view herein presented, they will doubtless see the propriety of making the necessary appropriations for carrying it into effect." The house then resolved that it "concur in the opinion expressed by the president in his message of the 8th of March, 1822, that the late American provinces of Spain which have declared their independence and are in the enjoyment of it, ought to be recognized by the United States as independent

nations," and directed an appropriation "to enable the President of the United States to give due effect to such recognition." The Hale memorandum concludes a review of this matter with a protest against the conclusion which has been drawn that President Monroe, after all the discussion, had admitted the power of recognition in congress, but concedes that he did acknowledge "the importance of consulting the legislative branch when a step was about to be taken whose expediency might be doubted, and which would necessarily result in a request for appropriations."

In June, 1838, in reporting a resolution declaring that the independence of Texas ought to be recognized, the committee on foreign affairs of the senate made a report in which it was said: "The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; or, lastly, by the executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the executive is concerned, to make it."

The President of the United States, by the constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgment of the independence of any new power, but in this case he has not yet done it, for reasons which he is not necessary to doubt, seems sufficient. If in any instance the president should be tardy, he may be quickened in the exercise of his power by the expression of the opinion, or by other acts, of one or both branches of congress, as was done in relation to the republics formed out of Spanish America." Quoted in Senate Report, No. 1160, 54th Cong. 2d Sess.

President Jackson, in his message of Dec. 21, 1836 after referring to the resolution, said that there had never been any deliberate inquiry as to where belonged the power of recognizing a new state,—a power in some cases only necessary in a declaration of war, and nowhere expressly given, but only as it is implied from some of the great powers given to congress or in that given to the president to make treaties and receive and appoint ministers. Then he continues: "In the preamble to the resolution of the house of representatives it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of congress. In this view, on the ground of expediency, I am disposed to concur, and do not, therefore, feel it necessary to express any opinion as to the strict constitutional right of the executive, either apart from or in conjunction with the senate, over the subject. It is to be presumed that on no future occasion will a dispute arise, as none has heretofore occurred, between the executive and the legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the constitution and most safe that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions of a declaration of war must be furnished. Its submission to congress, which represents in one of its branches the states of this Union, and in the other the people of the United States, where there may be reasonable ground to apprehend so grave a consequence, would certainly afford the fullest satisfaction to every citizen and a perfect guaranty to all other nations of the justice and prudence of the measures which might be adopted."

As to this message the Hale memorandum, which, it is to be remembered, is an argument for the absolute and unquestioned power of the executive (but modified only by what might be termed a *paraduty* to consult congress in extreme cases) remarks: "President Jackson plainly was of the opinion that, in a doubtful case, when international complications might be involved, the president should not recognize a new government without the assent of congress. His language is so carefully guarded that no inference can be made with entire confidence as to the proper course if the executive were strongly of the opinion that facts justifying the recognition of independence did not exist."

With respect to other expressions on this subject from the executive department of the government, Secretary Seward wrote to Minister Dayton, April 7, 1844: "The question of recognition of foreign revolutionary or reactionary governments is one exclusively for the executive, and cannot be determined by any act of congress or of the senate. This had reference to the action of the house of representatives, which had unanimously adopted a resolution protesting against the establishment of an empire in Mexico under Maximilian. The senate did not act on it. The French government asked an explanation, and the secretary of state, using the expression quoted, said that the vote of the house or the senate could neither coerce the executive to modify its policy nor deprive it of its freedom of action. In Dec., 1834, the house by a large majority affirmed their right to advise on questions of foreign policy; but as remarked by an intelligent foreign writer, this declaration does not detract from the influence on the course of the administration. Chamberlain. Exec. Pow. in the U. S. 101.

On the other hand, Secretary Clayton, writing to Mr. Mann, a special agent to investigate the Hungarian insurrection, says: "Should the new government prove to be, in your opinion, firm and stable, the president's secretary recommends that congress, at the next session, the recognition of Hungary; and you might intimate, if you should see fit, that the president would in that event be gratified to receive a diplomatic agent from Hungary in the United States by or before the next meeting of congress, and that he entertains no doubt whatever that in case her new government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body." In his Digest of International Law, from which the foregoing is quoted, Dr. Wharton concludes his statement of precedents on

this subject as follows: "As to this it is to be remarked that while Mr. Webster, who shortly afterwards, on the death of President Taylor, became secretary of state, sustained the sending of Mr. Mann as an agent of inquiry, he was silent as to this paragraph, and suggests, at the utmost, only a probable congressional recognition in case the new government should prove to be firm and stable. In making congress the arbiter, President Taylor followed the precedent of President Jackson, who, on March 8, 1837, signed a resolution of congress for the recognition of the independence of Texas. The recognition, however, by the United States, of the independence of Belgium, of the powers who threw off Napoleon's yoke, and of the South American states who have from time to time declared themselves independent of prior governments, has been primarily by the executive, and such also has been the case in respect to the recognition of the successive revolutionary governments of France."

The courts have frequently had occasion to determine whether the independence of a foreign country should be recognized as existing for the purpose of the pending case, but not to pass upon the question of power as between the executive and legislative departments. In an early case Marshall, C. J., said that before a nation

"could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations. That as our executive had never recognized the independence of Buenos Ayres, it was competent for the court to pronounce its independence." 2 Wh. Cr. Cas. 543.

A little later, on certificate of division, the supreme court had before it the direct question of the rights of a revolting colony, or portion of a nation which has declared its independence. The case was the trial for piracy of one of the revolutionary subjects.

Marshall, C. J., speaking for the court, said:

"Those questions which respect the rights of a part of a foreign empire, which asserts and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. Such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be who can place the nation in such a position with respect to foreign powers, that their own judgment shall appear wise, to whom are entrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. The certificate of opinion was . . . The court further of opinion that when a civil war rages in a foreign nation, a part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." 3 Wheat. 610.

In a case involving the question of the right of citizens of the United States to the use of the seal fisheries at the Falkland Islands belonging to Buenos Ayres, 3 Sumn. 270, 273, Mr. Justice Story said:

"It is very clear that it belongs exclusively to the executive department of our government to recognize from time to time any new governments which may arise in the political revolutions of the world; and until such new governments are so recognized they cannot be admitted by our courts of justice to have or to exercise the common rights and prerogatives of sovereignty."

He adds that "this doctrine was fully recognized by the supreme court" in *Gelston v. Hoyt*; which was one of those cases cited *infra* in which the court had referred to the recognition of independence, by the "government." On appeal from Judge Story's decision the supreme court held that the action, of the executive department of the government, on the question to whom the sovereignty of the islands belonged was binding and conclusive on the courts, and it was enough that in the exercise of his constitutional functions the president had decided that question; 13 Pet. 417, 420. In several cases the court has said that the question of the recognition of belligerency or independence is one for the government of the United States; 4 Wheat. 52; 5 id. 338; 6 id. 193; 8 id. 324; 4 Cra. 241, 272; and again congress and the president are referred to as "those departments" having the control of such matters; 11 Wall. 632, 638. On a bill to enforce an agreement the validity of which turned on the question whether at its date Texas was, or was not, independent, Taney, C. J., said that "was a question for that part of our government which is charged with our foreign

relations," and it was held that the court could not inquire whether it had not in fact become an independent sovereign state before its recognition as such by the treaty-making power; 14 How. 38, 51.

In the Prize Cases, much later than any of those above cited (relating not to foreign but to domestic relations, and therefore not strictly applicable), this language is used:

"As in the case of an insurrection, the President must, in the absence of congressional action, determine what degree of force the crisis demands, and as in political matters the courts must be governed by the decisions and acts of the political department to which this power is entrusted, the proclamation of blockade by the president is of itself conclusive evidence that a state of war existed which demanded and authorized recourse to such a measure." 2 Black 635.

In this case, the court terms the executive the political department of the government, and in a later case it so designates congress; 1 Wall. 412. More recently in a case in which the president was authorized, by act of congress, to declare that a guano island belonged to the United States, the court said:

"Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the political as well as all other officers, citizens, and subjects of that government;" 137 U. S. 302.

With reference to the status of the revolutionary party of Chile, the circuit court of appeals said that it was to be regarded by the courts as determined by the executive department of the United States; 56 Fed. Rep. 505; aff'd 84 id. 99.

The earliest reference to this subject by a text-writer is by Rawle, who says:

"The power of receiving foreign ambassadors carries with it, among other things, the right of judging in the case of an insurrection in a foreign country, whether the new ruler ought to be recognized. The legislature, indeed, possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until their sense is declared, the act of the executive is binding. The judicial power can take no notice of any government until one or the other of those two departments has acted on it. Circumstances may render the decision of great importance to the interests and peace of the country. A precipitate acknowledgment of the independence of part of a foreign nation, separating itself from its former head, may produce the resentment of the latter, a refusal to do so may disgust the former, and prevent the attainment of amity and commerce with them if they succeed. The principle on which the separation takes place must also be taken into consideration, and if they are conformable to those which led to our own independence, and appear likely to be preserved, a strong impulse will arise in favor of recognition. . . . The power of congress on this subject cannot be controlled; they may, if they think proper, acknowledge a small and helpless community, though with a certainty of drawing war upon our country; but greater circumspection is required from the president, who, not having the constitutional power to declare war, ought ever to abstain from a measure likely to produce it." Rawle, Const. 195.

A little later Story wrote:

"The exercise of this prerogative of acknowledging new nations is, therefore, under such circumstances, an executive function of great delicacy, which requires the utmost caution and deliberation. . . . If such recognition is made, it is conclusive upon the nation, unless indeed, it can be reversed by an act of congress repudiating it. If, on the other hand, such recognition has been refused by the executive, it is said that congress may, notwithstanding, solemnly acknowledge the sovereignty of the nation or party (citing Rawle). These, however, are propositions which have hitherto remained as abstract statements under the constitution, and therefore can be pronounced, not as absolutely true, but as still open to discussion if they should ever arise in the course of our foreign diplomacy. The constitution has expressly invested the executive with power to receive ambassadors and other ministers. It has not expressly invested congress with the power either to repudiate or acknowledge them." 2 Sto. Const. § 1568.

In connection with this treatment of the subject is to be considered the judicial utterance of Judge Story, before cited from 3 Sumn. 270. Pomeroy is also cited in Senator Hale's memorandum as an authority in favor of the exclusive executive control, which he does assert strongly with reference to foreign relations, and the treaty-making power in general, but he does not discuss the particular question under consideration; while he enforces with great earnestness the necessity of harmonious action of congress and the executive, and of their co-operation in giving due effect to the powers confided to each; Pom. Const. Law § 675.

Dr. Wharton, in his Digest of Interna-

tional Law, in discussing the subject of the recognition of various revolutionary governments, entitles section vii. of chap. iii., vol. 1, thus: "Such recognition determinable by executive," thus implying the opinion that the right rests with the executive alone. The author states the proposition embodied in his caption more fully thus:

"In political matters the courts follow the department of the government to which those matters may be committed, and will not recognize the existence of a new government until it has been recognized by the executive." Most of the cases, however, which are cited by him under this caption are among the authorities upon the proposition already noted, that it is not a matter for the judicial department of the government, but that the courts will not take cognizance of the existence of a new government until it has been recognized by the political department of the government, without discriminating between the executive and legislative branches of the government.

From an examination of all the decisions touching this question by the judicial department, no precise principle can be deduced unless it be that the references to it rest upon an assumption of entire harmony of action between the executive and legislative departments. And the fact that the direct issue arising from the claim of exclusive control by one of those two departments has not heretofore been made, will readily account for the absence of direct judicial authority or authoritative expression of opinion by text-writers. The duties and powers of what the supreme court frequently terms the political departments are so closely interwoven that it is unlikely that such an issue will be sharply drawn. Every approach to it hitherto has resulted, after discussion, in the recognition by congress of the right of the executive to full control of foreign relations and to the initiative in the practical recognition of a new foreign power, and, on the other hand, by a prudent disposition on the part of the executive not to act in a doubtful case or one likely to create a *casus belli* without ascertaining the disposition of congress. This has been simply the application to this particular subject of the principle of mutual recognition of the distribution of powers and interdependence of the executive and congress which, with the prudent reserve of the judiciary in keeping closely within the limits of its own sphere, has enabled the government to avoid the dangers of mere theoretical construction alluded to by Mr. Otis in the quotation made from his remarks upon the subject. The undoubted constitutional powers of both departments bearing upon the question make harmony of action as necessary in dealing with this subject as with most, if not all, of the ordinary details of the government. While the president may undoubtedly recognize a foreign government, as has frequently been done, such action, if it involved war, would still require the action of congress to make it effective, and doubtless the precedents established by Presidents Jackson and Monroe, neither of whom was indifferent to the respect due to his office, will always have very great, if not controlling, weight. Again, the question recently raised of the right of congress by independent action and against the views of this president, to recognize the independence of a new nation, is more likely to be met hereafter, as heretofore, in the spirit of co-operation and full recognition of the executive control of foreign relations than to be asserted, to the extent of making a direct issue, as it would need to be by a majority of two-thirds of each house.

Executive officers, including the president, are required to execute the laws as enacted by the legislature or congress, and can in no case nullify them by refusing to execute them so long as their unconstitutionality or invalidity has not been judicially established, for, until this is done, the constitutionality is presumed, and in the judicial power alone resides the power to decide as to the validity of a statute; Pom. Const. L. secs. 148, 662-668; 2 Dall. 304; 1 Wheat. 304; 6 id. 264; 21 How. 506.

The question whether an executive officer has, under any circumstances, the right to question the constitutionality of an act of congress, and to make this decision the

basis of acting upon claims to be passed upon by him, was the subject of consideration and extended discussion in the sugar bounty case lately pending before the comptroller of the treasury. It was contended on the one hand that every law must be considered valid until declared otherwise by the supreme court, and that although the comptroller is an independent officer, and not a mere subordinate of the secretary of the treasury or the president, such an exercise of jurisdiction would be a dangerous usurpation by an executive officer of judicial authority, which is confided by the constitution exclusively to the courts. On the other hand, it was urged that the constitution is the supreme law, and that an executive officer is responsible for a wrongful act under an unconstitutional statute. It was replied that his responsibility is political. The claim was disallowed by the comptroller upon the ground that the act was unconstitutional and the case sent to the court of claims under the authority of U. S. Rev. Stat. § 1085. The act in question had been held unconstitutional, but not by the court of last resort; 23 Wash. Law Rep. 33. Subsequently the act was held to be constitutional by the supreme court, but the question of the power of the comptroller was not determined; 163 U. S. 427. This decision of the comptroller and the questions involved have been elaborately discussed by Mr. Black, the writer on constitutional law, who, after an examination of the authorities, reaches the conclusion that the power of an executive officer to judge of the constitutionality of a statute (in advance of a determination by the courts) is confined to cases in which it is necessary for the regulation of his own conduct, and that where the rights of others are involved he must enforce the law; 29 Am. L. Rev. 801. See also 11 Op. Atty. Gen. 214; 114 U. S. 270; 96 id. 567; 104 id. 728; 135 id. 100; 120 id. 102.

The same principle is applied in the state governments. In a recent case in Louisiana it was held that the executive officers of the state government have no authority to decline the performance of purely ministerial duties imposed upon them by a statute, on the ground that it is unconstitutional. An executive officer cannot nullify a law by neglecting or refusing to act under it; 18 So. Rep. (La.) 746.

The so-called war powers of the executive, so much discussed during the late war, do not now present a practical subject for discussion, and may be passed, with this quotation from a judicious writer on the subject:

"During our Civil War, many powers were claimed and exercised by the president under a stringency of circumstances for which no provision had been made in the constitution. Secession being the outgrowth of the doctrine of states governed by compact and not by law, it became necessary, in the complication growing out of the war, whether in the form of military occupancy and blockade, legislative reconstruction, or judicial protection of persons and property in the seceded states, to find by implication, in the executive department, certain war powers not hitherto contemplated and never before invoked. While the general results of their exercise doubtless contributed to the restoration of the Union, and the re-establishment of the government of the United States over all its territory, these powers were so far anomalous in their assumption as to afford no justifiable precedents for the government of the executive, in the ordinary circumstances of our federal administration. A formal discussion of their scope and application has accordingly been omitted, because they present exceptions to the body of our constitutional legislation that are never again likely to be repeated." Ordronaux, Const. Leg. 109. See Whiting, War Powers under the Constitution; Campbell, Collection of Pamphlets on *Habeas Corpus*, Martial Law, etc.

The president is not responsible to the courts, civil or criminal; 4 Blatchf. 451; nor are his acts reviewable by them to the extent of bringing them into conflict with him; 4 Wall. 475; except that they may declare void an order or regulation in excess of his powers; 1 Gall. 137; 9 Am. Law Reg. 524; but with respect to all of his political functions growing out of the foreign relations, the control of military officers, and his relations with congress, it is settled that the courts have no control whatever; 5 Peters 1, 20; 7 How. 1; 4 Wall. 475; 1 Goodn. Comp. Adm. L. 34, 73; Pom. Const. L. § 633. See also 1 Ves. 467;

1 Ves. Jr. 875; 2 *id.* 58.

All the acts of the president by which his political powers are exercised are considered equally political, and are only brought within the scope of judicial examination where the act of some inferior ministerial officer, who is the direct instrument for exercising the executive function, is submitted to the scrutiny of the courts. This usually occurs where the constitutionality of a law is questioned by the judicial examination of the act of some officer who has attempted to carry the law into execution. In such a case there is not a direct judicial examination of the president's acts, or those of his subordinates, but merely the determination of the question whether there is a valid law; *id.* 419; 1 Cranch 137; 4 Wall. 475; Pom. Const. Law § 633.

So, as a necessary incident of the power to perform his executive duties, must be included freedom from any obstruction or impediments; accordingly, the president cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability; 2 Sto. Const. § 1569.

Whether in any case a court may issue a mandamus to the governor of a state is a question on which the decisions are not uniform. In some states it is held that, although conceding the independence of the executive from the control of the judiciary with respect to political duties and powers, as to ministerial duties imposed upon the executive, which might have been committed to another officer, the writ may be resorted to; 7 Jones, L. 545; 5 Ohio St. 528; 89 Cal. 189; 25 Md. 173; 42 *id.* 572; 17 Colo. 156; 36 Ala. 371; 31 Neb. 82; 2 Mont. 242; 33 Kan. 641. But the weight of authority would seem to be in favor of the contrary opinion; 32 Me. 508; 3 R. I. 192; 19 Ill. 229; 100 *id.* 472; 120 Mo. 428; 127 Ind. 588; 25 N. J. L. 331; 8 Ga. 360; 39 Mo. 388; 120 *id.* 428; 1 Ark. 571; 29 Mich. 320; 17 Fla. 67; 23 La. Ann. 1; 19 Minn. 103; 61 Miss. 102.

As to other executive officers, such as secretary of state, treasurer, auditor, and the like, though some conflict exists, the better-considered doctrine, and that supported by the great weight of authority, is properly said to be that courts will apply the general principle of law and issue the writ in the case of purely ministerial acts; High, Ext. Leg. Rem. § 124a-126, where the cases are collected.

The same principle is applied to determine how far the courts will interfere in like manner with the heads of executive departments, or bureaus thereof, of the federal government. If the act is purely ministerial the writ will issue; 12 Pet. 524; 16 D. C. 428; but it must be an act not growing out of the inherent powers of the officer; 6 How. 92; 17 *id.* 284; and in no case where the act involves the exercise of discretion will the court interfere; 4 Wall. 522; 9 *id.* 298; 116 U. S. 423; 128 *id.* 40; 137 *id.* 637; 139 *id.* 306; 155 *id.* 803.

See, generally, Desty; Rawle; Story; Miller; Black, Constitution; Sergeant; Sedgwick, Const. Law; Thayer, Cas. Const. L.; Cooley, Const. Lim.; Elliot's Debates; Elmes, Executive Departments; Kent, Com. Lect. xiii.; 4 West. Law Monthly 505; Stubbs, Const. Hist. Eng.; Todd, Parl. Gov. in Eng.; Dunning, The Constitution in Civil War, 3 Pol. Sci. Quar. 454; Von Holst, Hist. U. S.; Whiting, War Powers; Ordronaux, Const. Leg. 99-110; Goodnow, Comp. Adm. Law; Bryce, Am. Com.; Chamberlain, Executive Power in the U. S.; Fisher, Evolution of the Const.; Stevens, Sources Const. U. S.; Wilson, Legislative Government; Government; Judicial Power; LEGISLATIVE POWER; OFFICER; PRESIDENT OF THE UNITED STATES.

EXECUTOR. One to whom another man commits by his last will the execution of that will and testament. 2 Bla. Com. 503.

A person to whom a testator by his will commits the execution, or putting in force, of that instrument and its codicils. Fonbl.

Rights and Wrongs 307. See LETTERS TESTAMENTARY; HERES.

Lord Hardwicke, in 3 Atk. 801, says, "The proper term in the civil law, as to goods, is *heres testamentarius*; and executor is a barbarous term, unknown to that law." And again, "What we call executor and residuary legatee is, in the civil law, universal heir." *Id.* 800.

The word executor, taken in its broadest sense, has three acceptations. 1. *Executor a lege constitutus*. He is the ordinary of the diocese. 2. *Executor ab episcopo constitutus* or *executor dativus*; and that is he who is called an administrator to an intestate. 3. *Executor a testator constitutus*, or *executor testamentarius*; and that is he who is usually meant when the term executor is used. 1 Wms. Ex. 185.

A general executor is one who is appointed to administer the whole estate, without any limit of time or place, or of the subject-matter.

A *rightful executor* is one lawfully appointed by the testator, by his will. Deriving his authority from the will, he may do most acts before he obtains letters testamentary; but he must be possessed of them before he can declare in an action brought by him as such; 1 P. Wms. 763; Wms. Ex. 173.

An *instituted executor* is one who is appointed by the testator without any condition, and who has the first right of acting when there are substituted executors.

A *substituted executor* is a person appointed executor if another person who has been appointed refuses to act.

An example will show the difference between an instituted and a substituted executor. Suppose a man makes his son his executor, but if he will not act he appoints his brother, and if neither will act, his cousin: here the son is the instituted executor in the first degree, the brother is said to be substituted in the second degree, the cousin in the third degree, and so on. See Swinb. Wills, pt. 4, s. 19, pl. 1.

An *executor de son tort* is one who, without lawful authority, undertakes to act as executor of a person deceased. See EXECUTOR DE SON TORT.

A *special executor* is one who is appointed or constituted to administer either a part of the estate, or the whole for a limited time, or only in a particular place.

An *executor to the tenor* is a person who is not directly appointed by the will an executor, but who is charged with the duties which appertain to one; as, "I appoint A B to discharge all lawful demands against my will," 3 Phill. Eccl. 116; 1 Eccl. 374; Swinb. Wills 247; Wentw. Ex. pt. 4, s. 4, p. 230; [1892] Prob. 227, 280; 60 Law T. N. s. 332.

Qualification. Generally speaking, all persons who are capable of making wills, and many others besides, may be executors; 2 Bla. Com. 503. The king may be an executor. So may a corporation sole. So may a corporation aggregate; Toller, Exec. 30; Schoul. Ex. & Ad. 32. So may an alien, if he be not an alien enemy residing abroad or unlawfully continuing in the country. See 3 Abb. App. Dec. 86. So may married women and infants; and even infants unborn, or *en ventre sa mère*, may be executors; 1 Dane, Abr. c. 29 a 2, § 8; 5 S. & R. 40. But in England an infant cannot act solely as executor until his full age of twenty-one years. Meanwhile, his guardian or some other person acts for him as administrator *cum test. ann.* See 25 Miss. 162; Schoul. Dom. Rel. § 416; ADMINISTRATION. A married woman cannot be executrix without her husband's consent; 56 Me. 300; 84 Ala. 40; 2 Ark. 212. But a man by marrying an executrix becomes executor in her right, and is liable to account as such; 2 Atk. 212; 1 Des. 150.

Persons attainted, outlaws, insolvents, and persons of bad moral character may be qualified as executors, because they act *en autre droit* and it was the choice of the testator to appoint them; 6 Q. B. 57; 12 B. Monr. 191; 7 W. & S. 244; 3 Salk. 162. It is the duty of the court, when a will has been proven, to grant letters testamentary to the person named in it upon application, if he is not disqualified by statute; 16 Or. 147. Poverty or insolvency is no ground for refusing to qualify an executor; but an insolvent executor may be compelled to give security; 2 Halst. Ch. 9; 2 Barb. Ch. 351; 148 Pa. 564. In some states a bond is required from executors, similar to or iden-

tical with that required from administrators. The testator may, by express direction, exempt from the obligation of giving a bond with sureties any trustees whom he appoints or directs to be appointed, but not his executor, unless permitted to do so by state statute; because the creditors of the estate must look to the funds in the executor's hands.

Idiot and lunatics cannot be executors; and an executor who becomes *non compos* may be removed; 1 Salk. 36; 2 Robertson 128. In Massachusetts, when any executor shall become insane, or otherwise incapable of discharging his trust, or *evidently unsuitable therefor*, the judge of probate may remove him; 11 Metc. 104. A drunkard may perform the office of executor; 12 B. Monr. 191; 7 W. & S. 244; but in some states, as Massachusetts and Pennsylvania, there are statutes providing for his removal. A court will not reject an executor on the ground that he is lacking in honesty, integrity, and business experience; 61 Conn. 420. As to who may be, see 30 Cent. L. J. 222.

Appointment. Executors can be appointed only by will or codicil; but the word "executor" need not be used. He may be appointed and designated, by committing to his charge those duties which it is the province of an executor to perform; 3 Phill. Eccl. 118; 10 B. Monr. 394; 2 Bradf. Surr. 32; 2 Spears 97; 7 Watts 51; Schoul. Ex. & Ad. 36. Even a direction to keep accounts will, in the absence of any thing to the contrary, constitute the person addressed an executor. A testator may project his power of appointment into the future and exercise it after death through an agent pointed out by name or by his office; 56 Conn. 268.

The appointment of an executor may be absolute, qualified, or conditional. It is *absolute* when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time; Toller, Ex. 36. It may be *qualified* as to the time or place wherein, or the subject-matters whereon, the office is to be exercised; 1 Will. Ex. 204. Thus, a man may be appointed executor, and his term made to begin or end with the marriage of testator's daughter; or his authority may be limited to the state; or to one class of property, as if A be made executor of goods and chattels in possession, and B of *choses* in action; Swinb. Wills, pt. 4, s. 17, pl. 4; Off. Exco. 29; 8 Phill. Eccl. 424. Still, as to creditors, three limited executors all act as one executor, and may be sued as one; Cro. Car. 293. Finally, an executor may be appointed *conditionally*, and the condition may be precedent or subsequent. Such is the case when A is appointed in case B shall resign. Godolphin, Orph. Leg. pt. 2, c. 2, § 1. As to appointment, see 24 L. R. A. 634; 39 Sol. J. 228, 244.

Removal. An executor who fails to keep proper accounts or to render any account for a long period, who retains the trust funds mixed with his own and who makes improper investments, should be dismissed; 155 Pa. 215; but the mere delay of an executor to convert real estate into personalty when the same has increased in value, is not such misconduct as to warrant his removal; 65 Hun 621. He may be removed, however, where he has any conflicting personal interest; 148 Mass. 247.

Assignment. An executor cannot assign his office. In England, if he dies having proved the will, his own executor becomes also the original testator's executor. But if he dies intestate, an administrator *de bonis non* of the first testator succeeds to the executorship. And an administrator *de bonis non* succeeds to the executorship in both these events, in the United States generally, wherever a trust is annexed to the office of executor; 4 Munf. 231; 7 Gill 81; 8 Ired. Eq. 52; 17 Me. 204; 1 Barb. Ch. 565; 4 Fla. 144.

Acceptance. The appointee may accept or refuse the office of executor; 3 Phill. Eccl. 577; 4 Pick. 33; 34 Me. 37; 65 N. H. 102. But his acceptance may be implied by acts of authority over the property which evince a purpose of accepting, and by any

acts which would make him an executor *de son tort*, which see. So his refusal may be inferred from his keeping aloof from all management of the estate; 5 Johns. Ch. 388; 16 Conn. 291; 2 Murph. Eq. 85; 9 Ala. 181; 62 Pa. 166; 158 *id.* 645. But he cannot be compelled to accept and qualify or renounce in some formal manner; 76 Ia. 163. See Wms. Exrs. 274. If one of two or more appointees accepts, and the other declines or dies, or becomes insane, he becomes sole executor; 6 Watts 373. An administrator *de bonis non* cannot be joined with an executor.

Acts before probate. The will itself is the sole source of an executor's title. Probate is the evidence of that title. See 97 Ala. 375; 10 Pick. 463; 34 N. H. 407. Before probate, an executor may do nearly all the acts which he can do after. He can receive payments, discharge debts, collect and recover assets, sell bank-stock, give or receive notice of dishonor, initiate or maintain proceedings in bankruptcy, sell or give away goods and chattels, and pay legacies. And when he has acted before probate he may be sued before probate; 6 Term 295; 4 Metc. 421. He may commence, but he cannot maintain, suits before probate, except such suits as are founded on his actual possession; 3 C. & P. 123; 7 Ark. 404; 9 Me. 174; 3 N. H. 517; 2 Atk. 285; 5 Exch. Cas. 14. So in some states he cannot sell land without letters testamentary; 7 Cra. 115; 9 Wheat. 565; or transfer a mortgage; 1 Pick. 81; or remain in his own state and sue by attorney elsewhere; 12 Metc. 423; or indorse a note so as to be sued, in some states; 5 Me. 261; 2 N. H. 291. And see 2 Pet. 239; 7 Johns. 45; Byles, Bills 40; Story, Pr. Notes 304; Story, Bills 250; 87 Ga. 448.

Powers of executors. An executor may do, in general, whatever an administrator can. See ADMINISTRATOR. His authority dates from the moment of his testator's death; Com. Dig. Administration (B 10); 5 B. & Ald. 745; 2 W. Bla. 692; 10 Ad. & El. 212. When once probate is granted, his acts are good until formally reversed by the court; 3 Term 125; 15 S. & R. 39. In some states he has power over both real and personal estate; 3 Mass. 514; 1 Pick. 157. In the majority, he has power over the real estate only when expressly empowered by the will, or when the personal estate is insufficient; 9 S. & R. 431; 2 Root 438; 25 Wend. 424; 3 M'Cord 371; 9 Ga. 55; 27 N. J. Eq. 445; 57 Ind. 82. The will may direct him to sell lands to pay debts, but the money resulting is usually held to be equitable assets only; 9 B. & C. 459; 3 Brev. 242; 8 B. Monr. 499; 82 Ill. 892; 50 N. J. L. 636; but the title and right of possession to the land remain in the heirs until the sale, and they are the proper parties to maintain ejectment; 68 Miss. 510; but see 112 N. C. 791; and to collect the rents; 168 Pa. 431. In equity, the testator's intention will be regarded as to whether the surplus fund, after a sale of the real estate and payment of debts, shall go to the heir; 1 Wms. Ex. 555, Am. note. An executor's power is that of a mere trustee, who must apply the goods for such purposes as are sanctioned by law; 4 Term 645; 9 Co. 88; Co. 2d Inst. 236; 13 Bush 77; 16 N. Y. Sup. Ct. 12. The personal representative has the legal title to the *choses* in action of the deceased, and may transfer, discharge, or compound them as if he were the absolute owner; 83 Ala. 225; 85 N. J. Eq. 461.

Chattels real go to the executor; but he has no interest in freehold terms or leases, unless by local statute, as in South Carolina. But the wife's chattels real, unless taken into possession by her husband during his lifetime, do not pass to his executors; 1 Wms. Ex. 579, n; 5 Whart. 138; 4 Ala. N. S. 350; 7 How. Miss. 425. The husband's act of possession must effect a complete alteration in the nature of the joint interest of husband and wife in her chattels real, or they will survive to her.

Chattels personal go to the executor; 3 Redf. 450; 35 N. J. Eq. 461; 67 Ind. 596; 18 Conn. 610. Such are emblements; Brooke, Abr. Emblements; 4 H. & J. 139; 98 N. C. 333; but see 96 Ala. 536. Heirlooms and

fixtures go to the heir; and as to what are fixtures, see FIXTURES, and 1 Wms. Ex. 615; 2 Sm. L. Cas. 9th Am. ed. 1450; Crosw. Ex. & Ad. 352. The widow's separate property and paraphernalia go to her. For elaborate collections of cases on the effect of nuptial contracts about property upon the executor's right, see 1 Wms. Ex. *660, Am. note 2; 2 *id.* 636, note 1; 1 Sm. Lead. Cas. 65. Donations *mortis causa* go to the donee at once, and not to the executor; 1 Nott & M'C. 237; 23 Pa. 59; 16 Gray 403; 56 Me. 327.

Suits. 1. *By.* In general, a right of action founded on a tort or malfeasance dies with the person. But personal actions founded upon any obligation, contract, debt, covenant, or other duty to be performed, survive, and the executor may maintain them; Cowp. 375; 1 Wms. Saund. 216, n. See 76 Ind. 573; 5 B. & Ad. 78. By statutes in England and the United States this common-law right is much extended. An executor may now have trespass, trover, etc., for injuries done to the intestate during his lifetime. Except for slander, for libels, and for injuries inflicted on the person, executors may bring personal actions, and are liable in the same manner as the deceased would have been; 2 Brod. & B. 102; 2 Johns. Cas. 17; 1 Md. 102; 15 Ala. N. S. 253; 5 Blackf. 232; 6 T. B. Monr. 40; 3 Ohio 211; 2 W. N. C. Pa. 154. See 28 Cal. 507; 17 Vt. 176; 98 Mass. 85. Should his death have been caused by the negligence of any one, they may bring an action for the benefit of the family. Executors may also sue for stocks and annuities, as being personal property. A right of action for the breach of a parol contract for the sale of land survives to the executors; 6 S. & R. 208. So they may sue for an insurance policy. And for all these purposes they may take legal proceedings by action, suit, or summons.

The supreme court of New Jersey has lately held that the courts of New Jersey will enforce the Pennsylvania statute giving a right of action to the widow of one who dies of injuries inflicted by the wrongful act of another, that statute not being repugnant to the policy of the former state; but such an action cannot be brought in New Jersey by the personal representative of the deceased, as required by the laws of that state in similar cases; 84 Atl. Rep. (N. J.) 945.

2. *Against.* An action of trespass *quare clausum fregit* survives against the executor; 9 Phila. 240. So also in causes of action wholly occurring after the testator's death, the executor is liable individually; 80 N. C. 219. The actions of trespass and trover do not survive against the executors of deceased defendants. But the action of replevin does. The general rule is that causes of action *ex contractu* survive, while those *ex delicto* do not. "Executors and administrators are the representatives of the personal property of the deceased and not of his wrongs except so far as the tortious act complained of was beneficial to his estate;" 2 Kent 410.

Wife's choses. In general, *choses* in action given to the wife either before or after marriage survive to her, provided her husband have not reduced them to possession before his death. A promissory note given to the wife during coverture comes under this rule in England; 12 M. & W. 855; 7 Q. B. 864; but not so in this country generally; 4 Dana 333; 15 Conn. 587; 17 Me. 301; 17 Pick. 391. Mere intention to reduce *choses* into possession is not a reduction, nor is a mere appropriation of the fund; 5 Ves. 515; 11 S. & R. 377; 5 Whart. 138; 2 Hill, Ch. 644; 4 Ala. N. S. 350; 14 Ohio 100.

Other suits. For actions accruing after the testator's death, the executor may sue either in his own name or as executor. This is true of actions for tort, as trespass or trover, actions on contract and on negotiable paper; 3 Nev. & M. 391; 4 Hill 57; 19 Pick. 432; 4 Jones, N. C. 159. So he may bring replevin in his own name; 6 Fla. 314; and so, in short, wherever the money, when recovered, will be assets, the executor may sue as executor; 20 Wend. 668;

6 Blackf. 120; 1 Pet. 686. See 22 Ark. 535; 56 Pa. 166. An executor cannot recover in ejectment without producing the will; 56 Ga. 527; 87 *id.* 448.

As to federal jurisdiction over the administration of estates, it is held that by virtue of their chancery powers these courts have jurisdiction over such cases when the requisite citizenship and other conditions exist. The jurisdiction does not extend to the appointment of administrators, confirmation of executors, or the probate of wills; nor will it be exercised when the state courts of concurrent jurisdiction have taken possession of the subject-matter of the controversy. The possession of the state court which will exclude the exercise of power by the federal court, and *vice versa*, must be the possession of some thing, corporeal or incorporeal, which has been taken under the dominion of the court. A controversy or inquiry is not such a thing, and the pendency of a suit or proceeding in one court, involving a question, controversy, or inquiry, is no bar to the exercise of jurisdiction in the determination of the same question, etc., in the other; 41 Fed. Rep. 486.

Other powers. An executor may sell terms for years, and may even make a good title against a specific legatee, unless the sale be fraudulent. So he may underlet a term. He may indorse a promissory note or a bill payable to the testator or his order; 10 Miss. 687. The rule that executors have no power to confess judgment is not applicable to offers of judgments to firm creditors, by a firm composed of a surviving member and the executor of a deceased member, conducting the interests of the deceased therein; 61 Hun 557; but they may compromise claims; 15 Pick. 79; 26 Me. 531; 50 Tenn. 311; or submit matters in dispute to arbitration; 70 Vt. 340; 41 Ala. 138; 74 N. Y. 38. Without the sanction of the probate court, he has no power to bind the estate by contract, even for the necessities of infant devisees; 91 Mich. 270.

Co-executors. Co-executors are regarded in law as one individual; and hence, in general, the acts of one are the acts of all; Com. Dig. Administration (B 12); 9 Cow. 34; 8 S. C. 244; 83 Tex. 635; 129 N. Y. 190. Hence the assent of one executor to a legacy is sufficient, and the sale or gift of one is the sale or gift of all. So a payment by or to one is a payment by or to all; 8 Blackf. 170; 10 Ired. 263; 74 N. Y. 539; a release by one binds all; 26 Pa. 502. But each is liable only for the assets which have come into his own hands; 11 Johns. 21. So he alone who is guilty of tort or negligence is answerable for it, unless his co-executor has connived at the act or helped him commit it; 74 Cal. 199. An executor is not liable for a *devastavit* of his co-executor; 9 S. C. 460; 74 N. Y. 539. A power to sell land, conferred by will upon several executors, must be executed by all who proved the will; 2 Dev. & B. 262. But if only one executor consents to act, his sale under a power in the will would be good, and such refusal of the others may be *in pais*; Cro. Eliz. 80; 3 Dana 195; 92 Mich. 440. If the will gives no direction to the executors to sell, but leaves the sale to the discretion of the executors, all must join. But see less strict rules in 8 Pa. 417; 2 Sandf. 512; 1 N. Y. 341. Where all the executors must unite to make a valid conveyance, no valid contract to convey can be made by a part of them; 72 Wis. 539. One executor cannot bind his co-executors by a confession of judgment without their consent; 2 Pittsb. Pa. 54. On the death of one or more of several joint executors, their rights and powers survive to the survivor; Bac. Abr. Executor (D); Shepp. Touchst. 484. As to acts of co-executor, see 8 Cent. L. J. 63, 82; and as to liability of joint-executors, see 24 *id.* 147.

Duties. The following is a brief summary of an executor's duties:—

First. He must bury the deceased in a manner suitable to the estate; 2 Bla. Com. 503. But no unreasonable expenses will be allowed, nor any unnecessary expenses if there is any danger of the estate proving

insolvent; 2 C. & P. 207; 2 W. N. C. Pa. 447; 24 N. Y. Sup. Ct. 296; 28 La. Ann. 149; 59 N. Y. 582.

Second. Within a convenient time after the testator's death, he should collect the goods of the deceased, if he can do so, peaceably; if resisted, he must apply to the law for redress.

Third. He must prove the will, and take out administration. In England, there are two ways of proving a will,—in *common form*, and in *form of law*, or solemn form. In the former, the executor *propounds* the will,—i. e. presents it to the registrar, in the absence of all other interested parties. In the latter, all parties interested are summoned to show cause why probate should not be granted.

Fourth. Ordinarily, he must make an inventory of personal property at least, and, in some states, of real estate also; 5 N. H. 492; 11 Mass. 190; 58 Me. 499; 14 N. J. Eq. 514; 71 Pa. 75. This duty rests on the executor and not on the adult legatees; 65 Hun 619.

Fifth. He must next collect the goods and chattels, and the claims inventoried, with reasonable diligence. And he is liable for a loss by the insolvency of a debtor, if it results from his gross delay; 6 Watts 46; 15 Ala. N. S. 328.

Sixth. He must give notice of his appointment in the statute form, and should advertise for debts and credits; 2 Ohio St. 156; but the giving or not giving it does not affect the statute of limitations, nor does the failure to publish, affect a creditor who did not present his claim; 94 Cal. 357.

Seventh. The personal effects he must deal with as the will directs, and the surplus must be turned into money and divided as if there were no will. The safest method of sale is a public auction.

Eighth. He must keep the money of the estate safely, but not mixed with his own, or he may be charged interest on it. He is also charged when he has misemployed funds or let them lie idle, provided a want of ordinary prudence is proved against him; 4 Mass. 205; 2 Bland, Ch. 306; 1 Sumn. 14; 2 Rand. 409; 4 Harr. N. J. 109; 3 Des. 241; 33 Pa. 258; 131 N. Y. 409. When a debtor is appointed executor of the creditor's will, equity will presume that the debt has been paid, and will treat it as an asset in the executor's hands; 90 Mich. 247. And generally, interest is to be charged on all money received by an executor and not applied to the use of the estate; 1 Bailey, Eq. 98; 1 Dev. Eq. 369; 6 J. J. Marsh. 94; 82 Pa. 143. See 150 id. 801. But an executor cannot be charged with interest on money allowed him for commission; 10 Pa. 408; 2 Jones, N. C. 347; he is not chargeable with compound interest; 24 Pa. 180. Where investments have been made contrary to the requirements of the will, on personal security, they are at the executor's risk, and he must answer personally for any loss; 48 N. J. Eq. 559. See INTEREST; INVESTMENTS.

Ninth. He must be at all times ready to account to the proper authorities, and must actually file an account at the end of the year generally prescribed by statute. The burden of proving items of a discharge in an accounting is upon the accountant; 48 N. J. Eq. 559.

Tenth. He must pay the debts and legacies in the order required by law. Funeral expenses are preferred debts, and so are debts to the United States, under certain limitations respecting insolvency, by act of congress; 2 Kent 418. Otherwise there is no order of payment universal in the United States. A valid claim against an estate cannot be defeated on the ground that the estate had been settled before the claim was filed; 85 Ia. 698. See ADMINISTRATION.

Compensation. Commissions are not allowed on a legacy given in trust to an executor; 1 Bradf. Surr. 198, 321. Reasonable expenses are always allowed an executor; 5 Gray 26; 28 Vt. 765; 3 Cal. 287; 4 Abb. N. Cas. 317; 29 Miss. 72. When one of two co-executors has done nothing, he should get no commission; 20 Barb. 91. In

England, executors cannot charge for personal trouble or loss of time, and can only be paid for reasonable expenses. An executor cannot pay himself. His compensation must be ordered by the court; 58 Ind. 374. Faithful service by an executor is a condition to the right of commissions. Misappropriation of funds may forfeit the right; 84 Pa. 51.

In England the jurisdiction of probate formerly belonged to the ecclesiastical courts. It was then exercised in the Court of Probate, which held its sittings in Westminster Hall. There was a principal registry of wills, situated in Doctors Commons, and forty *district* registries, scattered throughout England and Wales, each presided over by a district registrar, by whom probate was granted where the application was unopposed. This Court of Probate is now consolidated into the Supreme Court of Judicature, and its jurisdiction is exercised by the Probate, Divorce, and Admiralty Division of that court. Mozl. & W. Dict. In the United States the jurisdiction is vested in surrogates, judges of probate, registers of wills, county courts, etc.

See Schouler; Williams; Crosswell, Exrs. and Adms.; Woerner, Law of Adm.; 3 Field, Lawy. Br. 387-416; 9 Harv. L. Rev. 42; 2 Lawson, Rights & Rem. 889-1008; ADMINISTRATION; ADMINISTRATOR.

EXECUTOR DE SON TORT. One who attempts to act as executor without lawful authority.

If a stranger takes upon him to act as executor without any just authority (as, by intermeddling with the goods of the deceased, and many other transactions), he is called in law an executor of his own wrong, *de son tort*; 2 Bla. Com. 507; 4 M'Cord 238; 12 Conn. 213; 48 Miss. 88; 14 E. L. & Eq. 510; 3 Litt. 163; 3 Pa. 129; 58 Ala. 310; 33 Ga. 264. If a man kill the cattle of the testator, or take his goods to satisfy a debt, or collect money due him, or pay out such money, or carry on his business, or take possession of his house, etc., he becomes an executor *de son tort*. Where a person with whom a will had been left filed it, but took out no letters with the will annexed, or any other legal authority to administer on the estate, he became an executor *de son tort*; 77 Ga. 114.

But a stranger may perform many acts in relation to a testator's estate without becoming liable as executor *de son tort*. Such are locking up his goods for preservation, burying the deceased in a manner suitable to his fortune, paying for the funeral expenses and those of the last sickness, making an inventory of his property to prevent loss or fraud solely, feeding his cattle, milking his cows, repairing his houses, etc. Such acts are held to be offices of kindness and charity; 19 Mo. 196; 28 N. H. 473. Nor does paying the debts of the deceased with one's own money make one an executor *de son tort*; 8 Rich. 29; 59 Conn. 247. Nor does one become executor *de son tort* by obtaining payment of a debt from an executor *de son tort*; 65 L. T. N. S. 709. The fact that a widow has taken possession of community property is not sufficient to authorize suit against her on a note of her deceased husband; 75 Tex. 595. As to what acts will render a person so liable, see Godolphin, Orph. Leg. 91; 1 Wms. Exec. 299; 1 Dane, Abr. 561; Bull. N. P. 48; Com. Dig. Administration (C) 3; 9 Johns. 426; 15 S. & R. 39; 26 Me. 361; 6 Blackf. 367.

An executor *de son tort* is liable only for such assets as come into his hands, and is not liable for not reducing assets to possession; 2 Rich. Eq. 247; 82 Pa. 193. And it has been held that he is only liable to the rightful administrator; 3 Barb. Ch. 477; 53 Ala. 319. But see 9 Leigh 79; 2 M'Cord 423; 19 Mo. App. 488; which imply that he is also liable to the heir at law. He cannot be sued except for fraud, and he must be sued as executor; 1 Brayt. 116; 11 Ired. 215; 10 S. & R. 144; 5 J. J. Marsh. 170. But in general he is liable to all the trouble of an executorship, with none of its profits. And the law on this head seems to have been borrowed from the civil-law doctrine of *pro hærede gestio*. See Heineccius,

Antiq. Syntagma, lib. 2, tit. 17, § 16, p. 468.

An executor *de son tort* is an executor only for the purpose of being sued, and not for the purpose of suing; 11 Ired. 215. He is sued as if rightful executor. But if he defends as such he becomes thereby also an executor *de son tort*; Lawes, Pl. 190, note; 4 B. Monr. 136; 1 M'Cord, Ch. 318; 21 Miss. 688; 2 H. & J. 435. When an executor *de son tort* takes out letters of administration, his acts are legalized, and are to be viewed in the same light as if he had been rightful administrator when the goods came into his hands; 19 Mo. 196; 15 Mass. 325; 4 Harr. Del. 108; 8 Johns. 126. But see, *contra*, 2 N. H. 475. A voluntary sale by an executor *de son tort* confers only the same title on the purchaser that he himself had; 6 Exch. 164; 20 E. L. & Eq. 145; 20 Ala. N. S. 587; 10 Watts 287.

It is held that in regard to land no man can be an executor *de son tort*; 1 Root 183; 7 S. & R. 192; 10 id. 144. In Arkansas it is said that there is no such thing as a technical executor *de son tort*; 17 Ark. 129, 129; and so in Missouri; 103 Mo. 339. See, on this subject, 35 Me. 287; 15 N. H. 137; 17 Mo. 91; 23 Miss. 544; 13 Ga. 478; 23 Ala. N. S. 548; 25 id. 353; Busb. 399; 12 La. Ann. 254, 344; 1 Rawle 149; Schoul. Exrs. & Adms. § 184.

EXECUTORY. Performing official duties; contingent; also, personal estate of a deceased; whatever may be executed,—as, an executory sentence or judgment.

EXECUTORY CONSIDERATION. Something which is to be done after the promise is made, for which it is the legal equivalent. See CONSIDERATION.

EXECUTORY CONTRACT. One in which some future act is to be done; as, where an agreement is made to build a house in six months, or to do any act at a future day. See CONTRACT.

An agreement to sell and convey land, which is not a conveyance, operating as a present transfer of legal estate and seisin, is wholly executory, though it contains the words "grant, bargain and sell;" and produces no effect upon the estates and titles of the parties; and creates no lien or charge on the land itself; 33 Pa. 287; 37 id. 201; 35 W. Va. 463.

EXECUTORY DEVISE. Such a limitation of a future estate in lands or chattels as the law admits in case of a will, though contrary to the rules of limitation in conveyances at common law.

It is a limitation by will of a future estate or interest in lands or chattels. 38 Pa. 294.

By the executory devise no estate vests at the death of the testator, but only on the future contingency. It is only an indulgence to the last will and testament which is supposed to be made by one *inops consilii*. When the limitation by devise is such that the future interest falls within the rules of contingent remainders, it is a contingent remainder, and not an executory devise. 4 Kent 257; 3 Term 733.

If a particular estate of freehold be first devised, capable in its own nature of supporting a remainder, followed by a limitation which is not immediately connected with, or does not immediately commence from, the expiration of the particular estate of freehold, the latter limitation cannot take effect as a remainder, but may operate as an executory devise; e. g., if land be devised to A for life, and after his decease to B in fee, B takes a (vested) remainder, because his estate is immediately connected with, and commences on, the limitation of A's estate. If land be limited to A for life, and one year after his decease to B in fee, the limitation to B is not such a one as will be a remainder, but may operate as an executory devise. Fearn, Cont. Rem. 399. If land be limited to A for life, and after his decease to B and his heirs, with a proviso that if B survive A and die, without issue of his body living at his decease, then to C and his heirs, the limitation to B, etc., prevents an immediate connection of the estate limited to C with the life estate of A, and prevents its commencement on the death of A. It must operate, if at all, as an executory devise; Butler's note (c) to Fearn, Cont. Rem. 397. If a chattel interest be bequeathed for life, with a remainder over, this latter disposition cannot take effect as a remainder, but may as an executory devise, or more properly bequest; id. 407.

An executory devise differs from a remainder in three very material respects:—

First. It needs no particular estate to support it. *Second.* By it a fee-simple or other less estate may be limited on a fee-simple. *Third.* By it a remainder may be limited of a chattel interest after a particular estate for life created in the same.

The first is a case of freehold commencing in *future*. A makes a devise of a future estate on a cer-

tain contingency, and till the contingency happens does not dispose of the fee-simple, but leaves it to descend to his heirs at law. 1 T. Raym. 82; 1 Salk. 228; 1 Lutw. 726.

The second case is a fee upon a fee. A devise to A and his heirs forever, which is a fee-simple, and then, in case A dies, before he is twenty-one years of age, to B and his heirs. Cro. Jac. 590; 10 Mod. 420.

The third case is a limitation in a term of years after a life estate. A grants a term of one thousand years to B for life, remainder to C. The common law regards the term for years as swallowed up in the grant for life, which, being a freehold, is a greater estate, and the grantee of such a term for life could alien the whole. A similar limitation in a will may take effect, however, as an executory bequest; 2 S. & R. 59; 1 Desaus. 271; 4 id. 380.

It is not a mere possibility, but a substantial interest, and in respect to its transmissibility stands on the same footing with a contingent remainder; 81 Va. 268.

In order to prevent perpetuities, the rule has been adopted that executory interests must be so limited that from the time of their limitation they will necessarily vest in right (not necessarily in possession) at a period not exceeding that occupied by the life or lives of a person or persons then living, or *in ventre matris*, and the minority of any person or persons born or *in ventre matris* prior to the decease of such first named person or persons, or at a period not exceeding that occupied by the life or lives of such first named person or persons, and an absolute term of twenty-one years afterwards, or within, or at the expiration of an absolute term of twenty-one years without reference to any life. For example, lands are devised to such unborn son of a *feme covert* as shall first reach the age of twenty-one years. The utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son. Such an executory devise is therefore good. If, however, such limitation had been to the first unborn son who shall attain the age of twenty-five years, the rule against perpetuities would be infringed and the limitations bad; Smith, Ex. Int. 391; 2 Bla. Com. 174.

An executory devise limited after an indefinite failure of issue is bad as leading to a perpetuity; 4 Kent 275; and so of an executory bequest, but the courts are in the latter case much less apt to construe limitations as contemplating a definite failure of issue; 4 Kent 281; 1 P. Wms. 663; Gray, Perpet. 212.

An executory devise is generally indestructible by any alteration in the estate out of or after which it is limited. But if it is limited on an estate tail the tenant in tail can bar it, as well as the entail, by common recovery or by deed enrolled, etc., where such deed is by statute given the force and effect of a common recovery; Butler's note to Fearn, Cont. Rem. 562; Wms. R. P. 319.

EXECUTORY ESTATES. Interests which depend for their enjoyment upon some subsequent event or contingency. Such estate may be an *executory devise*, or an *executory remainder*, which is the same as a contingent remainder, because no present interest passes.

EXECUTORY PROCESS (*Via Executoria*). In Louisiana. A process which can be resorted to in two cases, namely: 1. When the right of the creditor arises from an act importing confession of judgment, and which contains a privilege or mortgage in his favor. 2. When the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought. Code of Practice, art. 732.

EXECUTORY REMAINDER. The same as a contingent remainder. See CONTINGENT REMAINDER.

EXECUTORY TRUSTS. A trust is called *executory* when some further act is requisite to be done by the author of the trust to give it its full effect. See Bisph. Eq. 81; Lewin, Tr. 144.

The distinction between executed and executory trusts is well settled; 7 Pa. 177; 1 Desaus. 444; though once doubted in England; 1 Ves. 142; but see 2 Ves. 823. The

test is said to be: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is? or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates? per Lord St. Leonards, Ld. Ch., in 4 H. L. Cas. 210; see 7 R. I. 383; Bisph. Eq. 86.

In the case of articles made in contemplation of marriage, and which are, therefore, preparatory to a settlement, so in the case of a will directory of a future conveyance to be made or executed by the trustees named therein, it is evident that something remains to be done. The trusts are said to be executory, because they require an ulterior act to raise and perfect them: *i. e.* the actual settlement is to be made or the conveyance to be executed. They are instructions, rather than complete instruments, in themselves.

The court of chancery will, in promotion of the supposed views of the parties or the testator and to support their manifest intention, give to the words a more enlarged and liberal construction than in the case of legal limitations or trusts executed; 1 Fonbl. Eq. b. 1; 1 Sanders, Uses and T. 237; White, Lead. Cas. 18. Where a voluntary trust is executory and not executed, if it could not be enforced at law because it is a defective conveyance, it is not helped in favor of a volunteer in a court of equity; 4 Johns. Ch. 498, 500; 4 Paige, Ch. 305; 1 Dev. Eq. 93. But where the trust, though voluntary, has been executed in part, it will be sustained or enforced in equity; 1 Johns. Ch. 329; 7 Pa. 175, 178; White, Lead. Cas. 176; 6 Ves. 656; 13 id. 140; 1 Keen 551; 3 Beav. 258.

EXECUTORY USES. Springing uses which confer a legal title corresponding to an executory devise.

Thus, when a limitation to the use of A in fee is defeasible by a limitation to the use of B to arise at a future period, contingency, or event, these contingent or springing uses differ herein from an executory devise: there must be a person seized to such uses at the time the contingency happens, else they can never be executed by the statute. Therefore, if the estate of the feeoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever; 1 Co. 134, 138; Cro. Eliz. 439; whereas by an executory devise the freehold itself is transferred to the future devisee. In both cases, a fee may be limited after a fee; 10 Mod. 423.

EXECUTRIX. A woman who has been appointed by will to execute such will or testament. See EXECUTOR.

EXECUTRY. In Scotch Law. The movable estate of a person dying, which goes to his nearest of kin. So called as falling under the distribution of an executor. Bell, Dict.

EXEMPLARY. See PUNITIVE.

EXEMPLARY DAMAGES. See MEASURE OF DAMAGES.

EXEMPLIFICATION. A perfect copy of a record or office-book lawfully kept, so far as relates to the matter in question. See, generally, 1 Stark. Ev. 151; 1 Phill. Ev. 307; 7 Cra. 481; 9 id. 122; 3 Wheat. 284; 10 id. 469; 2 Yeates 632; 1 Hayw. 359; 1 Johns. Cas. 208; 6 Ct. Cls. 230; 92 Ind. 246; 56 Me. 107; 52 Ga. 438. As to the mode of authenticating records of other states, see FOREIGN JUDGMENTS.

EXEMPLUM (Lat.). In Civil Law. A copy. A written authorized copy. Used also in the modern sense of example; *ad exemplum constituti singulares non trahi* (exceptional things must not be taken for examples). Calv. Lex. *Exempli gratia*, for the sake of example. Abb. e. g.

EXEMPTION. The right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or to a distress for rent.

In general, the sheriff may seize and sell all the property of a defendant which he can find, except such as is exempted by the common law or by statute. The common law was very niggardly of these exceptions:

it allowed only the necessary wearing apparel; and it was once held that if a defendant had two gowns the sheriff might sell one of them; Comb. 356. But in modern times, with perhaps a prodigal liberality, a considerable amount of property, both real and personal, is exempted from execution by the statutes of the several states; 19 Am. L. Reg. 1; 4 So. L. Rev. N. S. 1; 3 Hughes 600; 82 N. C. 212, 241; 63 Ga. 593; 31 La. Ann. 374; 8 Bax. 38; 69 Mo. 41; 38 Mich. 669; 77 Cal. 194; 99 id. 202; 6 Wash. 327; 54 Minn. 366; 137 Pa. 133; and there is now hardly a state or nation which has not by statute made certain exemptions designed as a protection for the family; 18 John. 403; and such statutes are to be liberally construed; 104 Ind. 259; 33 Wis. 510; 61 Ill. 449; 46 Vt. 546; 33 Tex. 199; 40 Conn. 106. Some of the exemptions are the following: household furniture; 33 N. H. 345; 18 Wis. 103; 30 Vt. 224; 15 Cal. 266; 56 Tex. 308; tools of trade; 19 Conn. 513; 44 id. 93; 28 La. Ann. 695; 52 Wis. 315; the interest of a legatee in lands, until the court has held it to be a charge on such, although the legacy is given with a view that it shall be such a charge; 63 Hun 674; curtesy initiate; 109 N. C. 202; property held in trust; 33 Neb. 770; the bridge of a public corporation; 33 Neb. 857; blackberries while growing; 49 Minn. 412; trademark, apart from the articles it has served to identify; 20 N. Y. S. 462; a vendor's lien reserved for the purchase price of lands conveyed; 3 Tex. Civ. App. 509; the interest of a *cestui que trust* under a trust for maintenance and support; 8 C. C. App. 370; the interest of the grantor in property transferred in fraud of creditors; 141 N. Y. 1. State exemption laws are inapplicable to debts due from a citizen to the United States; 9 Fed. Rep. 674. See 106 U. S. 280. See, generally, DISTRESS; EXECUTION; HOMESTEAD; FAMILY; TOOLS.

From Taxation. "Exemption from taxation" means free from liability, from duty, from service. It is a grace, a favor, an immunity; taken out from under the general rule, not to be like others who are not exempt; to receive and not to make a return. 149 Ky. 183, 148 S. W. 1.

EXEMPTS. Persons who are not bound by law, but excused from the performance of duties imposed upon others.

By act of congress Feb. 24, 1864, it was enacted that such persons as were rejected as physically or mentally unfit for the service, all persons actually in the military or naval service of the United States at the time of the draft, and all persons who had served in the military or naval service two years during the then war and been honorably discharged therefrom, and no others, were exempt from enrolment and draft under said act, and act of congress, March 3, 1863.

EXEQUATUR (Lat.). In French Law. A Latin word which was, in the ancient practice, placed at the bottom of a judgment emanating from another tribunal, and was a permission and authority to the officer to execute it within the jurisdiction of the judge who put it below the judgment.

We have something of the same kind in our practice. When a warrant for the arrest of a criminal is issued by a justice of the peace of one county, and he flies into another, a justice of the latter county may indorse the warrant, and then the ministerial officer may execute it in such county. This is called *backing a warrant*.

In International Law. An official recognition of a consul or commercial agent, made by the foreign department of the state to which he is accredited, authorizing him to exercise his power. He cannot act without it, and it may be refused or revoked at the pleasure of the same government. 3 Chit. Com. Law 56; 3 M. & S. 290; 5 Pardessus, n. 1445; Twiss, Law of Nations; 1 Halleck, Int. Law 351.

EXERCITOR MARIS (Lat.). In Civil Law. One who fits out and equips a vessel, whether he be the absolute or qualified owner, or even a mere agent. Emerigon, Mar. Loans, c. 1, s. 1. We call him *exercitor* to whom all the returns come. Dig. 1. 1. 15; 14. 1. 7; 3 Kent 161; Molloy, de Jur. Mar. 243.

The managing owner, or ship's husband.

These are the terms in use in English and American laws, to denote the same as *exercitor maris*. See *SHIP'S HUSBAND*.

EXERCITORIA ACTIO (Lat.). In Civil Law. An action against a managing owner (*exercitor maris*), founded on acts of the master. 3 Kent 161; Vicat, Voc. Jur.

EXFESTUCARE (Lat.). To abdicate; to resign by passing over a staff. Du Cange. To deprive one's self of the possession of lands, honors, or dignities, which was formerly accomplished by the delivery of a staff or rod. Said to be the origin of the custom of *surrender* as practised in England formerly in courts baron. Spelman, Gloss. See also, Vicat, Voc. Jur.; Calvinus, Lex.

EXHEREDATIO (Lat.). In Civil Law. A disinheriting. The act by which a forced heir is deprived of his legitimate or legal portion. In common law, a disinheritance. Occurring in the phrase, in Latin pleadings, *ad exheredationem* (to the disinheritance), in case of abatement.

EXHERES (Lat.). In Civil Law. One disinherited. Vicat, Voc. Jur.; Du Cange.

EXHIBERE (Lat.). To present a thing corporeally, so that it may be handled. Vicat, Voc. Jur. To appear personally to conduct the defence of an action at law.

EXHIBIT. To produce a thing publicly, so that it may be taken possession of and seized. Dig. 10. 4. 2.

To file of record. Thus, it is the practice in England in personal actions, when an officer or prisoner of the king's bench is defendant, to proceed against such defendant in the court in which he is an officer, by *exhibiting*, that is, *filing*, a bill against him. Steph. Pl. 52, n. (b); 2 Sellon, Fr. 74; 2 Conn. 38.

A paper or writing proved on motion or other occasion.

A supplemental paper referred to in the principal instrument, identified in some particular manner, as by capital letter, and generally attached to the principal instrument. 1 Stra. 674; 2 P. Wms. 410; Gresl. Eq. Ev. 98.

A paper referred to in, and filed with the bill, answer, or petition in a suit in equity, or with a deposition. 16 Ga. 68.

In the absence of a positive statutory provision, exhibits properly identified need not be attached to the deposition in connection with which they are offered in evidence; 98 Cal. 490. It has been held that the exhibits filed with a petition form no part thereof, and cannot be considered in determining its sufficiency on demurrer; 113 Mo. 440; and if the exhibit is not the foundation for the cause of action or of the defence, it will not be considered; 129 Ind. 568.

EXHIBITANT. A complainant in articles of the peace. 12 Ad. & E. 599.

EXHIBITION. In Scotch Law. An action for compelling the production of writings. See *DISCOVERY*.

EXHUMATION. The taking or digging up of that which has been buried; disinterring; especially, the disinterring of a human body. Stand. Dict.

EXIGENDARY. In English Law. An officer who makes out exigents.

EXIGENT, EXIGI FACIAS. In Practice. A writ issued in the course of proceedings to outlawry, deriving its name and application from the mandatory words found therein, signifying, "that you cause to be exacted or required;" and it is that proceeding in an outlawry which, with the writ of proclamation, issued at the same time, immediately precedes the writ of *capias ulagatum*. 2 Va. Cas. 244.

EXIGENT LIST. A phrase used to indicate a list of cases set down for hearing upon various incidental and ancillary motions and rules.

EXIGENTER. An officer who made out exigents and proclamations. Cowel. The office is now abolished. Holthouse.

EXIGIBLE. Demandable; that which may be exacted.

EXILE. Banishment. A person banished.

EXILIUM (Lat.). In Old English Law. Exile. Setting free or wrongly ejecting bond-tenants. *Waste* is called *exilium* when bondmen (*servi*) are set free or driven wrongfully from their tenements. Co. Litt. 536. Destruction; waste. Du Cange. Any species of waste which drove away the inhabitants, into exile, or had a tendency to do so. Bac. Abr. *Waste* (a); 1 Reeve, Hist. Eng. Law 386.

EXISTIMATIO (Lat.). The reputation of a Roman citizen. The decision of arbiters. Vicat, Voc. Jur.; 1 Mackeldey, Civ. Law § 123.

EXISTING. The force of this word is not necessarily confined to the present. Thus a law for regulating "all existing railroad corporations" extends to such as are incorporated after as well as before its passage, unless exception is provided in their charters; 63 Ill. 117; 5 Ind. 525; 38 Ia. 215.

EXIT WOUND. The wound made in coming out by a weapon which has passed through the body or any part of it. 2 Beck. Med. Jur. 119.

EXITUS (Lat.). An export duty. Issue, child, or offspring. Rent or profits of land.

In Pleading. The issue or the end, termination or conclusion, of the pleadings; so called because an issue brings the pleadings to a close. 3 Bla. Com. 314.

EXLEX (Lat.). An outlaw. Spelman, Gloss.

EXOINE. In French Law. An act or instrument in writing which contains the reasons why a party in a civil suit, or a person accused, who has been summoned, agreeably to the requisitions of a decree, does not appear. Pothier, *Procéd. Crim.*, s. 3, art. 3. See *ESSOIGN*.

EXONERATION. The taking off a burden or duty. The main use of the word is in the rule in the distribution of an intestate's estate that the debts which he himself contracted and for which he mortgaged his land as security, shall be paid out of the personal estate in exoneration of the real.

But when the real estate is charged with the payment of a mortgage at the time the intestate buys it, and the purchase is made subject to it, the personal is not in that case to be applied in exoneration of the real estate; 2 Pow. Mortg. 780; 5 Hayw. 57; 3 Johns. Ch. 229; 1 Lead. Cas. in Eq. n. *646; 92 Pa. 491.

But the rule for exonerating the real estate out of the personal does not apply against specific or pecuniary legatees, nor the widow's right to paraphernalia, and, with reason, not against the interest of creditors; 2 Ves. 64; 1 P. Wms. 693; 3 *id.* 367. See 26 Beav. 522; 35 Pa. 54; 21 Conn. 550.

Like the right of contribution between those equally liable for the same debt, the right of exoneration exists between debtors successively liable. A surety who discharges an obligation is entitled to look to the principal for reimbursement, and to invoke the aid of a court of equity for this purpose, and a subsequent surety, who, by the terms of the contract, is responsible only in the case of the default of the principal and a prior surety, may claim exoneration at the hands of either; Bisph. Eq. § 331; 3 Pom. Eq. Jur. § 1416.

As to exoneration of simple contract debts, see 1 Sm. L. Cas., 9th Am. ed. 614.

EXONERETUR (Lat.). In Practice. A short note entered on a bail-piece, that the bail is exonerated or discharged in consequence of having fulfilled the condition of his obligation, made by order of the court or of a judge upon a proper cause being shown. See *RECOGNIZANCE*.

EXPATRIATION. The voluntary act of abandoning one's country and becoming the citizen or subject of another.

The right of a citizen to do this has been much discussed. The question has been settled in the United States by the act of July 27, 1868, which declares the right of expatriation to be the inherent right of all people, disavows the claim made by foreign states that naturalized American citizens are still the subjects of such states, and extends to such naturalized citizens, while in foreign countries, the same protection accorded to native-born citizens. Rev. Stat. §§ 1999, 2000. This declaration comprehends our own citizens as well as those of other countries; 14 Op. Atty. Gen. 295. Since the passage of this act, the United States has entered into treaties with nearly all the nations of Europe by which the contracting powers mutually concede to subjects and citizens the right of expatriation on conditions and under qualification. And in case of conflict between the above act of congress and any treaty, it would seem the treaty must be held paramount; Morse, Citizenship § 179. To be legal, the expatriation must be for a purpose which is not unlawful nor in fraud of the duties of the emigrant at home. But a woman who is a citizen of the United States does not expatriate herself merely by marriage with an alien, and in any event actual removal from the country and the acquisition of a domicile elsewhere are conditions precedent to such expatriation; 56 Fed. Rep. 556. There is no implied expatriation, and it will not occur unless in some manner assented to by congress, and the purpose to effect it must be manifested by some unequivocal act on the part of the citizen as to whom the question is raised; *id.*

A citizen may acquire in a foreign country commercial privileges attached to his domicile, and be exempted from the operation of commercial acts embracing only persons resident in the United States or under its protection. See *DOMICIL; NATURALIZATION*. See also Miller, Const. U. S. 285, 297; 2 Cra. 120; 2 Kent 36; Grotius, b. 2, c. 5, s. 24; Puffendorf, b. 8, c. 11, ss. 2, 3; Vattel, b. 1, c. 19, ss. 218, 223, 224, 225; Wyckford, tom. i. 117, 119; 3 Dall. 133; 7 Wheat. 342; 1 Pet. C. C. 161; 4 Hall, L. T. 461; Bracken, Law Misc. 409; 9 Mass. 461; 21 Am. L. Reg. 77; 11 *id.* 447; 3 Can. L. T. 463, 511; 22 Law Rep. 641; 25 Law Mag. & Rev. 124; Lawrence's Wheat. Int. L. 891. For the doctrine of the English courts on this subject, see 1 Barton, Conv. 31, note; Vaugh. 227, 281; 7 Co. 16; Dy. 2, 224, 298 b, 300 b; 2 P. Wms. 124; 1 Hale, Pl. Cr. 68; 1 Wood, Conv. 382; Westl. Priv. Int. Law; Story, Conf. Laws; Cockburn, Nationality.

EXPECTANCY. Contingency as to possession. That which is expected or hoped for. Frequently used to imply an estate in expectancy.

Estates are said to be *in possession* when the person having the estate is in actual enjoyment of that in which his estate subsists, or *in expectancy*, when the enjoyment is postponed, although the estate or interest has a present legal existence.

A bargain in relation to an expectancy is, in general, considered invalid, unless the proof of good faith is strong; 2 Ves. 157; 1 Bro. Ch. 10; Jeremy, Eq. Jur. 397; 32 S. W. Rep. (Ky.) 406.

But it is well settled in equity that a deed which purports to convey property, which is in expectancy or to be subsequently acquired, or which is not the subject of grant at law, though inoperative as a grant or conveyance, will be upheld as an executory agreement, and enforced according to its intent, if supported by a valid consideration, whenever the grantor is in a condition to give it effect; per Strong, J., in 40 Pa. 37, 43; 11 Paige 290; 2 S. & R. 507; 12 R. L. 560, 568; 10 H. L. Cas. 189, 211; 91 Pa. 96; *id.* 296. So it is said that an estate in expectancy, though contingent, is a fair subject of contract, and an agreement by an expectant heir in respect thereto, fairly made upon valuable considerations, will be enforced in equity; 45 Ill. 232; 1 Hoffm. Ch. 382; 5 Jones, Eq. 211; so also the interest which a person may take under the will of another living person; 2 Pa. 325; 9 Beav. 252; but a mere agreement to appropriate the money when received from a legacy

will not operate as an assignment of it; 92 Pa. 196. An executory agreement between the husbands of two expectant legatees to divide equally what should be left to either of them has been enforced; 2 P. Wms. 182; 2 Sim. 183. In a few instances the contrary is held; 7 Ohio St. 432; 125 Ind. 139; Cal. Civ. Code 700, 1045; and a conveyance to a wife upon consideration only of natural love and affection was held invalid, in equity, as against creditors at the time of the deed or the death of the ancestor; 87 Tenn. 759; so an agreement by a wife, as a collateral security for an old debt of the husband, will not be enforced; 40 Pa. 37.

The general doctrine is undoubtedly to treat such an assignment as a contract enforceable in equity, but Pomeroy considers it inadequate; 3 Pom. Eq. Jur. § 1287, n. 2; and prefers the theory that it is an actual transfer of the ownership of an equitable property right which ripens into an absolute title; *id.* § 1271.

Such an agreement or assignment will be enforced against creditors of the grantor and attaches to the estate, in equity, at the death of the ancestor; 46 Barb. 84.

Equity will, in general, relieve a party from unequal contracts for the sale or pledge of expectancies, as they are in fraud of the ancestor. See 2 P. Wms. 182; 2 Sim. 183, 192; 5 *id.* 524; 1 Sto. Eq. Jur. § 342. But relief will be granted only on equitable terms; for he who seeks equity must do equity; *id.*; 1 Fonbl. Eq. b. 1, c. 2, § 13, note p.

In dealing with such cases, the rule applied by courts of equity is, as laid down in *Chesterfield v. Janssen*, to scrutinize them carefully according to the circumstances of each; 2 Ves. Sr. 125; and, if upon inadequate consideration, or otherwise fraudulent, they will be relieved against and wholly or partially set aside; *id.*; 1 L. Cas. in Eq. 773; 2 Pom. Eq. Jur. § 953, and note, where the cases are collected.

In a leading modern English case the principle is thus stated: "The court will relieve 'expectant heirs' against bargains relating to their reversionary or expectant interest in cases of undervalue, of weakness due to age or poverty, and of the absence of independent advice. But all these circumstances must co-exist in order to entitle them to relief." L. R. 8 Ch. 484. In that case it was held that the repeal of the usury laws in England has not altered the doctrine by which the court of chancery affords relief against improvident and extravagant bargains. In the opinion Lord Selborne directed attention to the fact that concealment was usually a feature of these cases, but agreed with Lord St. Leonards that it was not an indispensable condition of equitable relief; Sugd. Vend. & Pur., 11th ed. 316; differing, as to this point, with Lord Brougham; 2 Myl. & K. 456. The independent advice of a father seems to rebut the presumption of fraud; 2 App. Cas. 814; but old age or youth increases it; 2 Giff. 157; 4 D. J. & S. 388; or poverty and ignorance; L. R. 10 Ch. 389; 40 Ch. D. 312. In the first of these two cases, Jessel, M. R., thus defined the term "expectant heir": "The phrase is used not in its literal meaning, but as including every one who has either a vested remainder, or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir-apparent or presumptive, or by reason, merely, of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relation. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen. So that the doctrine not only included the class mentioned, who in some popular sense might be called 'expectant heirs,' but also all remaindermen and reversioners."

The principle has been held to include younger sons of peers; 15 Ch. D. 679. As to what is a reversionary interest for this purpose, see 11 Eq. 265, 276; L. R. 2 Ch. 542; and as to what is independent advice, see 10 Eq. 641, in which the borrower, though

accompanied by a friend who was a solicitor but did not act as such, or know the terms of the contract, was held not to have independent advice.

Undervaluation is not alone a sufficient ground for setting aside a contract, conveyance, or mortgage of a reversion, otherwise fair; stat. 31 Vict. c. 4; 2 Ch. Cas. 136; 35 Beav. 570; 32 L. J. Ch. 201.

By the civil law, such contracts are held *contra bonos mores*, and they are forbidden in general terms; Code 2, 3, *de pactis* 30; and in the French code it is forbidden to sell the succession of a living person, even with his consent; art. 1600; the same is the rule of the Italian code; art. 1460; and of that of Austria; § 879.

See, generally, 2 Lead. Cas. in Eq., 4th Am. ed. 1530, 1559, 1605; 3 Pom. Eq. Jur. ch. 8, sec. 3; Brett, L. Cas. Mod. Eq., 3d ed. 69, n.; 9 Harv. L. Rev. 476; CATCHING BARGAIN; POST OBIT.

EXPECTANT. Contingent as to enjoyment.

EXPEDIENTE. A complete statement of every step taken in the proceedings of a Mexican land grant, and a *testimonio* is the first copy of the *expediente*. A grant of final title papers is attached to the *testimonio* and delivered to the grantee as evidence of title, and entry is made at the time in a book called the *TOMA DE RAZON* (memorandum book), which identifies the grantee, date of the grant and property granted. 161 U. S. 219. See *TOMAR RAZON*.

EXPEDITATION. A cutting off the claws or ball of the fore-feet of mastiffs, to prevent their running after deer; a practice for the preservation of the royal forests. Cart. de For. c. 17; Spelman, Gloss.; Cowell. See COURT OF REGARD.

EXPEND. The word "expend" means, to dispose of. 92 Ky. 16, 17 S. W. 150.

EXPENDITORS. Paymasters. Those who expend or disburse certain taxes. Especially the sworn officer who supervised the repairs of the banks of the canals in Romney Marsh. Cowell.

EXPENSÆ LITIS (Lat.). Expenses of the suit; the costs, which are generally allowed to the successful party.

EXPENSE OF LITIGATION. The words "expense of litigation" used in an indemnity policy providing that the insurer will pay the "expense of litigation," in addition to a fixed amount, include the costs of the suit incurred by the assured, the damages awarded the claimant on an appeal by the assured, and the interest that accrued on the judgment against the assured. 150 Ky. 732, 150 S. W. 994.

EXPENSES. See FAMILY EXPENSES. NECESSARY EXPENSE.

EXPENSIVE. In its popular sense, that which would involve or require expense. 31 Conn. 499.

EXPERIENCE. The term "experience" used in a credit insurance policy, meant a business transaction which was closed. 133 Ky. 745, 118 S. W. 1004.

The execution of a note in payment for goods sold on credit did not, until payment of the note close the transaction, so as to render it an "experience" which would justify the creditor in again extending credit to an old customer. 133 Ky. 745, 118 S. W. 1004.

EXPERIENCED MULE. A mule that has been working in a mine nine or ten years, and is pretty well up to all the tricks, knowing enough to see that a collision is inevitable, and jumping out of the way to avoid it, is an "experienced mule." 156 Ky. 715, 161 S. W. 1112.

EXPERTS (Lat. *experti*, instructed, proved by experience). Persons selected by the court or parties in a cause, on account of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinions. Merlin, *Repert.* Witnesses who are admitted to testify from a peculiar knowledge of some art or science,

a knowledge of which is requisite or of value in settling the point at issue.

Persons professionally acquainted with the science or practice in question. Strickl. Ev. 408. Persons conversant with the subject-matter on questions of science, skill, trade, and others of like kind. Best, Ev. § 346. The qualification of a witness as an expert is largely within the discretion of the trial judge; 61 Fed. Rep. 752; 132 Mass. 218; 63 Pa. 156; 126 Ind. 141; 108 N. Y. 61; 107 Ind. 84. Such a witness may be asked whether the examination made by him was superficial or otherwise; 158 U. S. 271; he need not be engaged in his profession, it is sufficient that he has studied it; 12 Ala. N. S. 648. Experts alone can give an opinion based on facts shown by others, assuming them to be true; 100 N. C. 457.

"It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better understand and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study and experience may be supposed to have more skill and knowledge than jurors of average intelligence may generally be presumed to have." 97 N. Y. 511; and not only may they testify to facts but they may give their opinions on them as experts; 118 N. Y. 429. The practical result of the rule admitting such testimony is far from satisfactory; its principal defect being that such witnesses are usually called because their known theories are understood to support the fact which the party calling them wishes to prove; 40 Cal. 405. "They come," says Lord Campbell, speaking of scientific witnesses, "with a bias on their minds to support the cause in which they are embarked, and hardly any weight should be given to their evidence;" 10 Cl. & F. 154. In another case it was said that it was generally safer to take the judgments of unskilled jurors than the hired and biased opinions of experts; 97 N. Y. 511; and such testimony is frequently characterized by the courts as of little value; 4 Dill. 488; 3 Bann. & A. 43; 6 Fish. 336; L. R. 6 Ch. Div. 415, n. See 32 Am. L. Reg. 529.

On the other hand, the necessity of such testimony in certain classes of cases, particularly those involving patent law, is thus set forth in 3 Rob. Pat. § 1012:—
"Notwithstanding the strictures passed upon expert testimony by many jurists on each side of the Atlantic, and the truth of the assertions by which these censures have been justified, it is still certain that in most patent cases expert evidence is, and must always be, indispensable. That the expert is consulted before he is summoned as a witness; that when his opinion is unfavorable to the party who consults him he is not produced in court, at least on that side of the case; that when called as a witness his testimony is expected to support, and generally does support, the claims of the litigant on whose behalf he is presented,—are no doubt true; but this is only what occurs in every other trial, where counsel have properly prepared their case. The error lies with those who ascribe judicial functions to the patent expert, and demand of him such freedom from partisanship as the exercise of judicial powers requires. That there are experts in other departments of affairs upon whose opinion the court is forced to rely as the foundation of its own judgments, because incapable of forming an opinion for itself, and that such experts consequently fill the places of judges and should be beyond the influence and control of parties, must be conceded. But such is not the case with patent experts, whose opinion is received in evidence only in connection with the reasons on which it is based, and is to be accepted or rejected by the jury according to their own view of its fallacy or truth. The patent expert, considered in his real character, is an explorer, gifted with unusual powers of discernment and apprehension; a chronicler, trained to preserve the recollection of the essential attributes of things; an expositor, fitted to embody those essential attributes in accurate and intelligible language; a monitor, able to suggest the conclusions which follow from the premises he has described. His relation to the jury is not unlike that which counsel sustain to the court, as guides to a correct decision of the issues severally confided to their judgments,—the one pointing out facts and applying them in support of the claims advanced by his employer, as the other produces his authorities and applies them to the maintenance of his claims of law."

Such assistance, it is properly suggested, it would not be wise in any tribunal to undervalue or reject; 3 Rob. Pat. § 1012.

The fact that the opinions of experts in patent cases are often diametrically oppo-

site does not necessarily discredit their testimony but merely emphasizes the fact that their opinions are to be regarded as *opinions*, merely, and a decision rendered between them; Hall, J., in 4 Fish. 13. A patent expert is in effect an "auxiliary counsel" who argues upon the law and the facts; 28 Fed. Rep. 618. While expert evidence is not conclusive on the jury; 1 Fish. 17; and is to be judged by the same standards as ordinary evidence; 27 Fed. Rep. 691; 4 Fish. 404; 1 Sawyer 512; 1 Fish. 298; and to be accorded by the jury such weight as they see fit; 1 Fish. 351; 6 McLean 308; 3 *id.* 492; it is nevertheless of great value in patent cases, 2 Fish. 465; 1 *id.* 133, 198, 461; 1 Bond 254; 5 McLean 44; 3 Story 742; 2 Robb 288; 3 McLean 432.

The value of such testimony depends on the skill, not the number; 4 McLean 70; and is to be measured by their reasons; 3 Blatchf. 184; 4 Fish. 20, 232, 468.

There are two classes of patent experts, as is clearly shown by an able writer, scientific and mechanical, each having a distinct sphere. The scientific expert is one familiarized by his studies and experiments with the principles of a science and qualified to understand, distinguish, and explain the subject-matter and application thereto of such science. His services are invoked to determine the character and scope of an invention with reference to the condition of the art at the date of its production. His testimony is directed to the question whether the alleged invention is the result of an inventive act; whether it embraces or excludes a different invention or is substantially the same in principle, function, or effect with any other. The mechanical expert represents the skilled workman in his art, who by practical training in it could comprehend and apply to it various instruments and methods. His evidence will bear upon the defence of want of novelty, prior patent, inutility of the invention, or ambiguity of the description in the specification of the patent. One person may appear in both capacities. 3 Rob. Pat. § 1013. See Curt. Pat. § 479.

Expert testimony is admissible upon questions for the court as well as upon those for the jury, where it can be properly applied to the subject-matter of the question as the construction of the patent and whether a prior patent covers the same invention; 3 Rob. Pat. § 1014. In dealing with such questions the court is at liberty to admit expert evidence, but cannot be compelled to do so, and it is not error to refuse it; *id.*; 1 Fish. 487; 21 How. 88.

It has been a matter of grave discussion whether an expert is bound to testify on matters of *opinion* without extra compensation, the weight of decisions being that he is not bound to do so; 1 C. & K. 25; Sprague 276; 5 So. L. Rev. 793; 59 Ind. 15; 60 Ark. 508; *contra*, 6 Cent. L. J. 11; 21 D. C. 491; 59 Ind. 1, 15; 6 So. Law Rev. 706. It was recently held that, in the absence of statutory authority, one who testifies for the state in a criminal case as an expert cannot demand extra compensation as such, at least when not compelled to make any preliminary examination or preparation, or to attend and listen to the testimony; 60 Ark. 204. When no demand is made in advance for special compensation, an expert witness can recover only the statutory witness fees; 3 Colo. App. 177.

See, generally, as to who are experts, and the admissibility of their evidence, 1 Greenl. Ev. 440; Tayl. Ev. 1209; 8 Dougl. 157; 2 Mood. & M. 75; 9 Conn. 55; 17 Pick. 497; 12 La. Ann. 183; 28 Am. L. Reg. 529, 593; 1 Am. L. Rev. 45; 5 *id.* 227, 428; 22 Alb. L. J. 365; 77 Cal. 579; 98 Mich. 511; 1 Misc. Rep. 354; 98 Ala. 285; 143 Ill. 571; 160 Mass. 181; Hershell, How to Use Experts; Etting, Exp. Ev. See also OPINION; PATENT; HYPOTHETICAL QUESTION.

EXPIATION. In Civil Law. The crime of abstracting the goods of a successor.

This is said not to be a theft, because the property no longer belongs to the deceased, nor to the heir before he has taken possession. In the common law, the grant of letters testamentary, or letters of

administration, relates back to the time of the death of the testator or intestate: so that the property of the estate is vested in the executor or administrator from that period.

EXPIRATION. Cessation; end: as, the expiration of a lease, of a contract or statute.

In general, the expiration of a contract puts an end to all the engagements of the parties, except to those which arise from the non-fulfilment of obligations created during its existence. See PARTNERSHIP; CONTRACT.

The term is specially used to denote the day upon which the risk of an insurance policy terminates. When before the expiration of policies the companies agreed to "hold" the policies for renewal, and after the expiration the agent of the insured told them to continue to hold them until the form could be arranged, the policies were held to be in force; 162 Mass. 358. Temporary insurance from one day "until" a certain other date, includes all of the day of expiration; 4 Dist. Rep. Pa. 382. See INSURANCE.

When a statute is limited as to time, it expires by mere lapse of time, and then it has no force whatever; and, if such a statute repealed or supplied a former statute, the first statute is, *ipso facto*, revived by the expiration of the repealing statute; 6 Whart. 294; 1 Bland, Ch. 664; unless it appear that such was not the intention of the legislature; 8 East 212; Bacon, Abr. Statute (D).

EXPIRY OF THE LEGAL. In Scotch Law. The expiration of the term within which the subject of an adjudication may be redeemed on payment of the debt adjudged for. Bell, Dict.; 3 Jurid. Styles, 3d ed. 1107.

EXPLICATIO (Lat.). In Civil Law. The fourth pleading: equivalent to the surjoinder of the common law. Calvinus, Lex.

EXPLOSION. A sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. 22 Ohio St. 348.

There is no difference in ordinary use between "explode" and "burst." The ordinary idea is that the explosion is the cause, while the rupture is the effect; 44 N. Y. 151. See SMOKE.

EXPLOSIVES. A fire insurance company includes the following as explosives: benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, naphtha, nitro-glycerine. Blasting powder included in the phrase, "other explosives." 216 U. S. 315.

Powder is an explosive, dangerous to handle, the degree of danger corresponding to its quantity. 222 U. S. 424.

EXPORT (v.). Technically includes the sending of merchandise from one country to a foreign country, and its landing in such a country. It is often used, however, to mean only the shipment from a country. 228 U. S. 530. The word "export" will be given the latter meaning when used in a statute the manifest purpose of which would be defeated by limiting the word to its strict technical meaning. *Id.*

While the word export technically includes the landing in, as well as the shipment to a foreign country, it is often used as meaning only the shipment from this country and it will be so construed when used in a statute the manifest purpose of which would be defeated by limiting the word to its strict technical meaning. 228 U. S. 525.

EXPORTS. Merchandise sent from one country to another. Anderson; As used in the Consti., Art. 1, does not include articles transported from one State into another. *Id.*; 7 Nev. 142. Cf. IMPORTS.

EXPORTATION. In Common Law. The act of sending goods and merchandise from one country to another. 2 M. & G. 155; 3 *id.* 959.

In order to preserve equality among the states in their commercial relations, the constitution provides that "no tax or duty shall be laid on articles ex-

ported from any state." Art. 1, s. 9. And, to prevent a pernicious interference with the commerce of the nation, the tenth section of the first article of the constitution contains the following prohibition: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." See 12 Wheat. 419; IMPORTATION.

EXPOSE. A French word, sometimes applied to a written document containing the reasons or motives for doing a thing. The word occurs in diplomacy.

To cast out to chance, to place abroad, or in a situation unprotected; 5 Mich. 90.

To set out, bring into view; display, exhibit; show: as, to expose property to sale (75 Pa. 256), to expose the person (2 Bishop, Cr. L. § 318). Anderson. See INDECENCY.

EXPOSITION DE PART. In French Law. The abandonment of a child, unable to take care of itself, either in a public or private place.

If the child thus exposed should be killed in consequence of such exposure, as, if it should be devoured by animals, the person so exposing it would be guilty of murder. Rosc. Cr. Ev. 591.

EXPOSITORY STATUTES. See STATUTE.

EXPOSURE. See INDECENT EXPOSURE.

EXPOSURE OF PERSON. In Criminal Law. Such an intentional exposure, in a public place, of the naked body, as is calculated to shock the feelings of chastity or to corrupt the morals.

This offence is indictable on the ground that every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law. 1 Bish. Cr. Law § 123; 32 Mo. 560. An indecent exposure, though in a place of public resort, if visible by only one person, is not indictable. An omnibus is a *public place*; 2 Cox, Cr. Cas. 378; 3 *id.* 183; Dears. 207. But see 1 Dev. & B. 208; 68 N. C. 259. An ordinance making it an offence to expose the person indecently without reference to the intent which accompanies the act, is a valid exercise of police power; 93 Mich. 135.

See, generally, 1 Benn. & H. Lead. Cr. Cas. 443; 3 Day 103; 5 *id.* 81; 18 Vt. 574; 1 Mass. 8; 2 S. & R. 91; 5 Barb. 208.

EXPRESS. Stated or declared, as opposed to implied. That which is made known and not left to implication. It is a rule that when a matter or thing is expressed it ceases to be implied by law; *expressum facit cessare tacitum*. Co. Litt. 183.

EXPRESS ABROGATION. A direct repeal in terms by a subsequent law referring to that which is abrogated.

EXPRESS ASSUMPSIT. A direct undertaking. See ASSUMPSIT; ACTION.

EXPRESS COMPANIES. Companies organized to carry small and valuable packages expeditiously in such manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce. 10 Fed. Rep. 218.

An express company may be defined to be a common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages, which cannot be conveniently or safely carried as common freight; and also other articles and packages of any description which the shipper desires or the nature of the article requires should have safe and rapid transit and quick delivery, transporting the same in the immediate charge of its own messenger on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights; and within cities and towns or other defined limits, it collects from the consignors and

delivers to the consignees at other places of business the goods which it carries. 44 Fed. Rep. 310. Their right to use the facilities afforded by a railroad depends entirely on contract; 117 U. S. 3.

They are common carriers; 44 Ala. 468; 28 Ohio St. 144; 36 Ga. 669; notwithstanding a declaration in their bill of lading that they are not to be so considered; 98 U. S. 174; 15 Minn. 270. See COMMON CARRIERS.

Like all other common carriers they must receive all goods offered for transportation, on being paid or tendered the proper charge; 6 Hun 844; 5 Cush. 69; and if they cannot transport them within a reasonable time, must refuse them or be responsible for loss caused by the delay; 54 N. Y. 500; 76 id. 805; 64 Ill. 128. They may also refuse to receive dangerous articles for transportation; 15 Wall. 524; 107 Mass. 568.

An express company insures the safe delivery of the goods received at the destination if on its own route; if not, safe delivery at the end of its own route to the next carrier; and will be relieved only by the act of God or of the public enemy; 33 N. J. L. 543; 58 Ill. 44; 49 Miss. 480; 49 N. Y. 491; 69 Pa. 394; 101 Mass. 420; 52 Vt. 335.

An express company may by special contract limit its liability for the value of goods lost; 69 Ill. 62; 62 N. Y. 35; 74 id. 125; 28 Ohio St. 144; 89 Ind. 475; except for losses due to its own negligence or misconduct; 93 U. S. 174; 93 Ill. 523; 74 Mo. 538; 87 N. Y. 413. A contract between an express company and its messenger exempting it from liability for injury to him by the negligence of the carrier, is valid and may extend so far as to authorize the express company to contract with the carrier against liability to the messenger; but such contract will not enure to the benefit of the carrier having no knowledge of it or not having availed itself of it by contracting with the express company; 44 N. E. Rep. (Ind.) 796.

The express business is an "industrial pursuit" within the meaning of U. S. Rev. Stat. § 1889, and may therefore be carried on in Washington territory by a corporation formed there under a general law, or by a corporation otherwise duly formed or incorporated elsewhere; id.; 10 Sawy. 441; 43 Fed. Rep. 467.

By various statutes of New York, an express company organized as a joint-stock company has all the powers of a corporation, except that it has no right to adopt and use a common seal; 3 Abb. N. S. 163.

A statement filed by an express company showing that the business was managed, and its property and effects owned, by five trustees, the names of four of whom, and their respective places of residence, were given; that there was one vacancy, and that "the persons interested as *cestui que trust* are the stockholders of said company, who change from day to day, and of whom it is impossible to make an accurate statement, owing to the frequency of such changes," was a substantial compliance with the requirement of an act requiring that the statement so filed shall show the full name of every member of such company and his proper place of residence; 32 Ind. 19.

See an epitome of the law on this subject at that date by Judge Redfield in 5 Am. Law Reg. N. S. 1; and three articles on express companies as common carriers; id. 449, 513, 648. See also as to limiting liability, 27 id. 570; discrimination; 1 Am. & Eng. Corp. Cas. 390; and as to carriers by express generally; 20 Am. L. Reg. 602; 5 Myers, Fed. Dec. 647; 3 Am. & Eng. R. R. Cas. 601; 13 id. 425; 16 id. 93; 23 id. 572.

EXPRESS CONSIDERATION. A consideration expressed or stated by the terms of the contract.

EXPRESS CONTRACT. One in which the terms are openly uttered and avowed at the time of making. 2 Bla. Com. 443; 1 Pars. Contr. 4. One made in express words. 2 Kent 450. See CONTRACTS.

EXPRESS COVENANTS. Those

stated in words more or less distinctly expressing the intent to covenant; 88 Ga. 675. See COVENANT.

EXPRESS TRUST. One declared in express terms. See TRUSTS.

EXPRESS WARRANTY. One expressed by particular words. 2 Bla. Com. 300. The statements in an application for insurance are usually construed to constitute an express warranty. 1 Phil. Ins. 346. See WARRANTY.

EXPROMISSIO (Lat.). In Civil Law. The species of novation by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. See NOVATION.

EXPROMISSOR. In Civil Law. The person who alone becomes bound for the debt of another, whether the latter were obligated or not. He differs from a surety, who is bound together with his principal. Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64. 4; 38. 1. 37. 8.

EXPROPRIATION. The surrender of a claim to exclusive property. Wharton.

Compulsorily depriving a person of a right of property belonging to him in return for a compensation. R. & L. Dict.; St. Bonnet; Holtz. Encyc. The term has been introduced from its use in foreign countries to denote a compulsory purchase of land, etc., for the purpose of a railway, canal, or the like. ("*expropriation pour cause d'utilité publique.*") Id.; 1 App. Cas. 384. See EMINENT DOMAIN.

The exclusion of the small owner or wage earner from the ownership of land and other property through their centralization in the hands of monopolists. English.

EXPULSION (Lat. expellere, to drive out). The act of depriving a member of a body politic or corporate, or of a society, of his right of membership therein, by the vote of such body or society, for some violation of his duties as such, or for some offence which renders him unworthy of longer remaining a member of the same.

By the constitution of the United States, art. 1, s. 5, § 5, each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. In the case of John Smith, a senator from Ohio, who was expelled from the senate in 1867, the committee made a report which embraces the following points:

First. That the senate may expel a member for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

Second. That a previous conviction is not requisite in order to authorize the senate to expel a member from their body for a high offence against the United States.

Third. That although a bill of indictment against a party for treason and misdemeanor has been abandoned because a previous indictment against the principal party had terminated in an acquittal, owing to the inadmissibility of the evidence upon that indictment, yet the senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds that the party is guilty of a high misdemeanor it is sufficient ground of expulsion.

Fourth. That the fifth and sixth articles of the amendments of the constitution of the United States, containing the general rights and privileges of the citizens as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the senate as to expulsion.

Fifth. That before a committee of the senate, appointed to report an opinion relative to the honor and privileges of the senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, or to be confronted with his accusers. It is before the senate that the member charged is entitled to be heard.

Sixth. In determining on expulsion, the senate is not bound by the forms of judicial procedure, or the rules of judicial evidence; nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must, in its nature, be discretionary, and its exercise of a more summary character. 1 Hall, Law Journ. 469, 466; 6 Wheat. 204; Cooley, Const. Lim. 162.

Corporations have the right of expulsion in certain cases, as such power is necessary to the good order and government of corporate bodies; and the cases in which the inherent power may be exercised are classified by Lord Mansfield as follows: 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men; such as the offences of perjury, forgery, and the like. But before an expulsion is made for a cause of this kind it is

necessary that there should be a previous conviction by a jury according to the law of the land. 2. When the offence is against his duty as a corporator, in which case he may be expelled on trial and conviction before the corporation. 3. The third is of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land; 1 Burr. 517; 75 Pa. 291; 50 id. 107; 15 Am. Rep. 27; Field, Corp. 78; 47 Wis. 670; 1 Spelling, Priv. Corp. § 523. See 1 Thomp. Corp. 806-930, where the subject is fully treated; AMOTION; DISFRANCHISEMENT.

Distinguished from Banishment, Extradition. Expulsion constitutes neither banishment nor extradition. Those who have been banished are, like those who are expelled, forced to leave the country; but whereas those who are subjected to banishment are compelled to depart only when lawfully convicted of a crime which entails banishment as its penalty, those who are expelled are subject to deportation on being served with an official order to that effect. . . . The Government, on the one hand, issues the order of expulsion (deportation) in due course and at its discretion without any preliminary understanding with the state of which the party expelled is a national; and on the other hand, the grounds of expulsion need not be set out in the order, for, on principle, the Government is the sole judge as to the necessity to deport. This absence of prior *entente* with the state to which the deportee belongs results in expulsion being a unilateral act, differing essentially thereby from extradition, with which expulsion is at times confused. Extradition presupposes a prior understanding between states as a matter of course: it constitutes a bilateral act in the form of a convention agreed upon between two states. When a state extradites a person, or in other words delivers up an individual accused of crime, or who has actually been found guilty of an offense committed outside of its jurisdiction and against the laws of the state which is seeking to have him extradited and which has the right to determine and to punish his guilt, this is done by force of prior treaties or by virtue of a special agreement between states. When, on the other hand, a state expels, . . . it is not because it is under any obligation to do so based on a contract with another state. (Alexis Martiné, l'Expulsion des Étrangers, pp. 5, 6.) Bouvé, Exclusion and Expulsion of Aliens in the United States, p. 6. See DEPORTATION; EXTRADITION; RENVOI.

EXTENSION. In Common Law. This term is applied among merchants to signify an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agree to wait for a definite length of time after their several claims become due and payable, before they will demand payment. It is often done by the issue of notes of various maturities.

Among the French, a similar agreement is known by the name of *attermoiement*. Merlin, *Répert. mot Attermoiement*.

EXTENSION OF PATENT (sometimes termed *Renewal of Patent*). In Patent Law. An ordinary patent was formerly granted for the term of fourteen years. But the law made provision that when any patentee, without neglect or fault on his part, had failed to obtain a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, he might obtain an extension of such patent for the term of seven years longer. A fee of forty dollars was required from the applicant, and a public notice of sixty days was to be given of the application. No extension could be granted after the patent had once expired.

The extension of a patent was intended for the sole benefit of the inventor; and where it was made to appear that he would receive no benefit therefrom, it would not be granted. The assignee, grantee, or licensee of an interest in the original patent retained no

right in the extension, unless by reason of some stipulation to that effect. But where any person had a right to use a specific machine under the original patent he still retained that right after the extension. See act of 1833, § 18, and act of 1848, § 1; PATENTS. By act of congress of March 2, 1861, c. 88, § 16, 12 Stat. L. 249, it was provided that patents should be granted for the term of seventeen years, and further extension was forbidden. U. S. Rev. Stat. § 4924, provided for the granting of extensions only on patents issued prior to March 2, 1861.

EXTENT. A writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment.

It is so called because the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to the plaintiff. Fitzh. N. B. 131. The writ originally lay to enforce judgments in case of recognizances or debts acknowledged on statutes merchant or staple; see stat. 13 Edw. I. *de Mercatoribus*; 37 Edw. III. c. 9; and by 33 Hen. VIII. c. 89, was extended to debts due the crown. The term is sometimes used in the various states of the United States to denote writs which give the creditor possession of the debtor's lands for a limited time till the debt be paid. 16 Mass. 180.

Extent in aid is an extent issued at the suit or instance of a crown-debtor against a person indebted to himself. This writ was much abused, owing to some peculiar privileges possessed by crown-debtors, and its use was regulated by stat. 57 Geo. III. c. 117. See 3 Bla. Com. 419.

Extent in chief is an extent issued to take a debtor's lands into the possession of the crown. See 2 & 3 Vict. c. 11; 5 & 6 Vict. c. 86, § 8.

Manorial extent. A survey of a manor made by a jury of tenants, often of unfree men sworn to sit for the particulars of each tenancy, and containing the smallest details as to the nature of the service due.

These manorial extents "were made in the interest of the lords, who were anxious that all due services should be done; but they imply that other and greater services are not due, that the customary tenants, even though they be unfree men, owe these services for their tenements, no less and no more. Statements that the tenants are not bound to do services of a particular kind are not very uncommon." 1 Pol. & Maitl. 343. "Many admissions against their own (the lords) interests the extent of their manors may contain; they suffer it to be recorded that a 'day's work' ends at noon, that in return for some works they must provide food, even that the work is not worth the food that has to be provided; but they do not admit that for certain causes, and for certain causes only, may they take their tenements into their own hands. As a matter of fact it is seldom of an actual ejectment that the peasant has to complain;" *id.* 353. Many examples of the manorial extents have been preserved in the monastic cartularies and elsewhere. "Among the most accessible are the Golden Book (printed at the end of the Domesday); the Black Book of Peterborough; the Domesday of St. Paul's, the Worcester Register, the Battle Cartulary, all published by the Camden Society; the Kanesey, Gloucester, and Malmsbury Cartularies or registers published in the Rolls series; the Burton Cartulary of the Salt Shore and the Yorkshire Inquisitions of the Yorkshire Record Society;" *id.* 189.

EXTENUATION. That which renders a crime or tort less heinous than it would be without it. It is opposed to aggravation.

In general, extenuating circumstances go in mitigation of punishment in criminal cases, or of damages in those of a civil nature.

EXTRATERRITORIALITY (Fr.). This term (*extraterritorialité*) is used by French jurists to signify the immunity of certain persons, who, although in the state, are not amenable to its laws: foreign sovereigns, ambassadors, ministers plenipotentiary, and ministers from a foreign power, are of this class. Felix, *Droit Intern. Privé*, liv. 2, tit. 2, c. 2, s. 4; Westl. Priv. Int. L. 211. See Davis, Int. L. 59, 150; AMBASSADOR; CONFLICT OF LAWS; PRIVILEGE FROM ARREST.

EXTINGUISHMENT. The destruction of a right or contract. The act by which a contract is made void. The annihilation of a collateral thing or subject in the subject itself out of which it is derived. Prest. Merg. 9. For the distinction between an extinguishment and passing a right, see 2 Sharsw. Bla. Com. 325.

An extinguishment may be by matter of fact and by matter of law. It is by matter of fact either express, as when one receives

satisfaction and full payment of a debt and the creditor releases the debtor; 11 Johns. 513; or implied, as when a person hath a yearly rent out of lands and becomes owner, either by descent or purchase, of the estate subject to the payment of the rent, and the latter is extinguished; 3 Stew. 60; but the person must have as high an estate in the land as in the rent, or the rent will not be extinct; Co. Litt. 147 b.

There are numerous cases where the claim is extinguished by operation of law; for example where two persons are jointly but not severally liable for a simple contract-debt, a judgment obtained against one is at common law an extinguishment of the claim on the other debtor; 1 Pet. C. C. 301; 2 Johns. 213.

A conveyance of mortgaged land by the mortgagor to the mortgagee extinguishes the mortgage; 114 Ill. 388. Taking a note for the amount due does not deprive a claimant of his right to a lien, but merely suspends its enforcement until the note is payable; 7 Misc. Rep. 79.

See, generally, Co. Litt. 147 b; 5 Whart. 541; 3 Conn. 62; 1 Ohio 187; 11 Johns. 513; 1 Halst. 190; 4 N. H. 251; 31 Pa. 475; 154 Mass. 314; 84 Me. 33; 54 Fed. Rep. 568; 37 Neb. 677; 2 Crabb, R. P. § 1487.

EXTINGUISHMENT OF COMMON. Loss of the right to have common. This may happen from various causes; by the owner of the common right becoming owner of the fee; by severance from the land; by release; by approvement; 2 Hill, R. P. 75; 2 Steph. Com. 41; 1 Crabb, R. P. § 341; Co. Litt. 280; 1 Bacon, Abr. 628; Cro. Eliz. 594.

EXTINGUISHMENT OF COPYHOLD. This takes place by a union of the copyhold and freehold estates in the same person; also by an act of the tenant showing an intention not to hold any longer of his lord; Hutt. 81; Cro. Eliz. 21; Wms. R. P. 287; Watk. Copyh.

EXTINGUISHMENT OF A DEBT. Destruction of a debt. This may be by the creditor's accepting a higher security; 1 Salk. 304; 1 Md. 492; 24 Ala. n. s. 439. A judgment recovered extinguishes the original debt; 1 Pick. 118; Hill & D. 392. A trust deed given to secure the payment of a bond is not affected by the rendition of a judgment on the bond, since the original debt is not thereby merged, but only the form of the evidence of the debt charged; 89 Va. 524. A debt evidenced by a note may be extinguished by a surrender of the note; 10 Cush. 169; 29 Pa. 50; 3 Ind. 337. As to the effect of payment in extinguishing a debt, see PAYMENT.

EXTINGUISHMENT OF RENT. A destruction of the rent by a union of the title to the lands and the rent in the same person. *Ternes de la Ley*; Cowel; 3 Sharsw. Bla. Com. 325, note.

EXTINGUISHMENT OF WAYS. Destruction of a right of way, effected usually by a purchase of the close over which it lies by the owner of the right of way. 2 Washb. R. P.

EXTORSIVELY. A technical word used in indictments for extortion.

When a person is charged with extorsively taking, the very import of the word shows that he is not acquiring possession of his own; 4 Cox, Cr. Cas. 387. In North Carolina the crime may be charged without using this word; 1 Hayw. 406.

EXTORTION. The unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. 4 Bla. Com. 141; 152 Pa. 554; 1 Hawk. Pl. Cr. c. 68, s. 1; 1 Russ. Cr. *144; 2 Bish. Cr. L. 390; 14 Fed. Rep. 595.

At common law, any oppression by color of right; but technically the taking of money by an officer, by reason of his office, where none at all was due, or when it was not yet due. The obtaining of money by force or fear is not extortion; 61 Hun 571; Whart. Cr. L. 833.

In a large sense the term includes any oppression under color of right; but it is generally and constantly used in the more limited technical sense above given.

The incumbent of an office, which it was attempted to create by an unconstitutional statute, cannot be guilty of extortion, as he is neither a *de jure* nor a *de facto* officer; 31 Atl. Rep. (N. J.) 213.

To constitute extortion, there must be the receipt of money or something of value; the taking a promissory note which is void is not sufficient to make an extortion; 2 Mass. 523; 16 *id.* 93. See Bacon, Abr.; Co. Litt. 168. It is extortion and oppression for an officer to take money for the performance of his duty, even though it be in the exercise of a discretionary power; 2 Burr. 927. See 6 Cow. 661; 1 Cai. 180; 3 Pa. 183; 152 *id.* 554; 1 South. 324; 7 Pick. 279; 4 Cox, Cr. Cas. 387. See 27 Tex. App. 513; 133 N. Y. 649.

EXTRA BRAKEMAN. "Extra brakeman" is described to mean one who has no regular employment, but takes the place of a regular employee when off duty. 80 S. W. 499.

EXTRA-DOTAL PROPERTY. In Louisiana this term is used to designate that property which forms no part of the dowry of a woman, and which is also called paraphernal property. La. Civ. Code, art. 2315.

EXTRA-JUDICIAL. That which does not belong to the judge or his jurisdiction, notwithstanding which he takes cognizance of it. Extra-judicial judgments and acts are absolutely void. See *CORAM NON JUDICE*; Merlin, *Répert. Excess de Pouvoir*.

EXTRA-JUDICIUM. Extra-judicial; out of the proper cause. Judgments rendered or acts done by a court which has no jurisdiction of the subject, or where it has no jurisdiction, are said to be *extra-judicial*.

EXTRA QUATUOR MARIA (Lat. beyond four seas). Out of the realm. 1 Bla. Com. 157. See *BEYOND SEA*.

EXTRA SERVICES. When used with reference to officers it should be construed to embrace all services rendered by such for which no compensation is given by law. 21 Ind. 32.

Also, extraordinary services; beyond what is common, additional to what is due or expected. Anderson.

EXTRA-TERRITORIALITY. That quality of laws which makes them operate beyond the territory of the power enacting them, upon certain persons or certain rights. See Wheat. Int. Law 121; 19 Law M. & R., 4th series 147.

A fiction by which a public minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign.

EXTRA-TERRITORIUM. Beyond or outside of the territorial limits of a state. 6 Binn. 353.

EXTRA VIAM. Out of the way. When, in an action of trespass, the defendant pleads a right of way, the defendant may reply *extra viam*, that the trespass was committed beyond the way, or make a new assignment. 16 East 343, 349.

EXTRACT. A part of a writing. In general, an extract is not evidence, because the whole of the writing may explain the part extracted, so as to give it a different sense; but sometimes extracts from public books are evidence, as extracts from the registers of births, marriages, and burials, kept according to law, when the whole of the matter has been extracted which relates to the cause or matter in issue.

EXTRACTOR OF THE COURT OF SESSION. In Scotland. A salaried officer of the High Court of Justice.

EXTRADITION (Lat. *ex*, from, *traditio*, handing over). The surrender by one sovereign state to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may

be dealt with according to its laws.

The surrender of persons by one sovereign state or political community to another, on its demand, pursuant to treaty stipulations between them.

The surrender of persons by one federal state to another, on its demand, pursuant to their federal constitution and laws.

Without treaty stipulations. Public jurists are not agreed as to whether extradition, independent of treaty stipulations, is a matter of imperative duty or of discretion merely. Some have maintained the doctrine that the obligation to surrender fugitive criminals was perfect, and the duty of fulfilling it, therefore, imperative, especially where the crimes of which they were accused affected the peace and safety of the state; but others regard the obligation as imperfect in its nature, and a refusal to surrender such fugitives as affording no ground of offence. Of the former opinion are Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent; the latter is maintained by Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, Heffter, and Wheaton.

Except under the provisions of treaties, the delivery by one country to another of fugitives from justice is a matter of comity, not of obligation; 119 U. S. 407.

Foreign extradition belongs solely to the national government; 14 How. 103; 10 S. & R. 125; 119 U. S. 407. A state cannot regulate the surrender of fugitives from justice to foreign countries; 50 N. Y. 321.

Many nations have practised extradition without treaty engagements to that effect, as the result of mutual comity and convenience; others have refused. The United States has always declined to surrender criminals unless bound by treaty to do so; 1 Kent 39, n.; 1 Opin. Attys. Gen. 511; 6 id. 85, 431; 50 N. Y. 321; 14 Pet. 540; 12 Vt. 631; 1 Dall. 120. The existence of an extradition treaty does not prohibit the surrender by either country of a person charged with a crime not enumerated in the treaty; 36 Pac. Rep. (Cal.) 669. No state has an absolute right to demand of another the delivery of a fugitive criminal, though it has what is called an *imperfect* right, but a refusal to deliver the criminal is not just cause of war. Per Tilghman, C. J., in 10 S. & R. 125.

Under treaty stipulations. The sovereignty of the United States, as it respects foreign states, being vested by the constitution in the federal government, it appertains to it exclusively to perform the duties of extradition which, by treaties, it may assume; 14 Pet. 540; 119 U. S. 407; and, to enable the executive to discharge such duties, congress passed the act of Aug. 12, 1848, 11 Stat. L. 302. The general government alone has the power to enact laws for the extradition of foreign criminals. It possesses that power under the treaty power in the constitution; 14 Pet. 540; 50 N. Y. 321; 12 Blatch. 391. See 14 How. 103.

Treaties have been made between the United States and many foreign powers for the mutual surrender of persons charged with certain crimes. These treaties may be found in full in the United States Statutes at Large, in 2 Moore on Extradition 1072; Haswell, Treaties & Conventions, U. S. See also 17 Am. L. J. 44.

Austria-Hungary. Murder, assault with intent to commit murder, piracy, arson, robbery, forgery, counterfeiting, and embezzlement of public moneys.

Baden. Same as Austria-Hungary.

Bavaria. Same as Austria-Hungary.

Belgium. Murder, attempt to commit murder, rape, abortion, arson, bigamy, piracy, mutiny, burglary, forgery, counterfeiting, embezzlement of public moneys and also of private moneys, wilful destruction or obstruction of railroads which endangers human life, reception of articles obtained by means of any one of the above crimes.

Bremen. Same as Prussia. See *post*.

Dominican Republic. Murder, attempt to commit murder, rape, forgery, counter-

feiting, arson, robbery, intimidation, forcible entry of an inhabited house, piracy, embezzlement by public officers or by private persons.

Ecuador. Murder, arson, rape, piracy, mutiny, burglary, forgery, counterfeiting, embezzlement of public property.

France. Murder, rape, forgery, arson, embezzlement by public officers or private persons and counterfeiting.

Great Britain. Murder, manslaughter, assault with intent to commit murder, piracy, arson, robbery, forgery, counterfeiting, embezzlement, larceny, receiving money or valuables known to have been embezzled stolen, or fraudulently obtained, fraud by a bailee, banker, agent, factor, trustee, or director of board of officers of any company made criminal by the laws of both countries, perjury, rape, abduction, child-stealing, kidnapping, house-breaking, shop-breaking, piracy, mutiny, crimes against the laws of both countries for the suppression of slavery, and slave-trading. See 14 Am. L. J. 85; 15 id. 224.

Hanover. Murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or utterance of forged papers, counterfeiting and embezzling of public moneys.

Hawaiian Islands. Murder, piracy, arson, robbery, forgery or the utterance of forged papers.

Haiti. Murder, attempt to commit murder, piracy, rape, forgery, counterfeiting, utterance of forged papers, arson, robbery, and embezzlement by public officers or private persons.

Italy. Murder, attempt to commit murder, rape, arson, piracy, mutiny, burglary, the utterance of forged papers and counterfeiting of public, sovereign, or government acts, counterfeiting, embezzlement of public moneys, and embezzlement by private persons. See 11 Law Mag. & Rev., 4th ed. 62.

Japan. Murder, assault with intent to commit murder, counterfeiting, forgery, embezzlement of public funds, robbery, burglary, entering or breaking into offices of government or of banks, trust companies, insurance, or other companies with the intent to commit a felony, perjury, rape, arson, piracy, assault with intent to kill, and manslaughter on the high seas on board a ship bearing the flag of the demanding country, malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings when the act endangers human life.

Lucemburg. Murder, attempt to commit murder, rape, attempt to commit rape, abortion, bigamy, arson, piracy, mutiny, burglary, forgery, counterfeiting, embezzling of public moneys, embezzling by private persons, wilful obstruction, or destruction of railroads which endangers human life, reception of articles obtained by means of any of the above crimes. An attempt against the life of the head of a foreign government or against that of any member of his family when such an attempt comprises the act either of murder, assassination, or poisoning shall not be considered a political offence or an act connected with such an offence.

Mecklenberg-Schwerin. Same as Prussia. See *post*.

Mecklenberg-Strelitz. Same as Prussia. See *post*.

Mexico. Murder, assault with intent to commit murder, mutilation, piracy, arson, rape, kidnapping, forgery, counterfeiting, embezzling of public moneys, robbery, burglary, larceny of goods of the value of \$25, or more when the same is committed within the frontier states or territories of the contracting parties.

Netherlands. Murder, manslaughter, attempt to commit murder, rape, bigamy, abortion, arson, burglary, mutiny, breaking and entering public offices or the offices of banks, trust companies, insurance companies, and attempt to commit theft therein, robbery, forgery, counterfeiting, embezzling by public officers, embezzling by private persons, intentional destruction of a vessel on the high seas, kidnapping of minors, obtaining money or valuables by

false devices, larceny, wilful destruction or obstruction of railroads which endangers human life.

Nicaragua. Murder, piracy, arson, rape, mutiny, burglary, robbery, forgery, counterfeiting, embezzling of public money, embezzling by private persons.

North German Confederation. Same as Prussia. See *post*.

Oldenberg. Same as Prussia. See *post*.

Orange Free State. Murder, attempt to commit murder, rape, forgery, arson, robbery, forcible entry of an inhabited house, piracy, embezzling by public officers, or by private persons.

Ottoman Porte. Murder, attempt to commit murder, rape, arson, piracy, mutiny, burglary, forgery, counterfeiting, embezzling of public moneys by private persons.

Peru. Murder, abduction, rape, bigamy, arson, kidnapping, robbery, larceny, burglary, counterfeiting, embezzling of public moneys, or by private persons, fraud, bankruptcy, fraudulent barratry, mutiny, severe injuries intentionally inflicted on railroads, or to telegraph lines, or to persons by means of explosions of mines or steam boilers, piracy.

Prussia. Murder, assault with intent to commit murder, piracy, arson, robbery, forgery, utterance of forged papers, counterfeiting, embezzling of public moneys.

Salvador. Murder, attempt to commit murder, rape, arson, piracy, mutiny, burglary, robbery, forgery, counterfeiting, embezzling of public moneys and by private persons.

Schaumburg-Lippe. Same as Prussia. See *ante*.

Spain. Murder, attempt to commit murder, rape, arson, piracy, mutiny, burglary, breaking and entering offices of government or banks, trust companies or insurance companies with intent to commit felony therein, robbery, forgery or the utterance of forged papers, counterfeiting, embezzling of public funds and by private persons, kidnapping, destruction or loss to a vessel caused intentionally on the high seas by persons on board the said vessel, obtaining by threats or false devices money or valuables, larceny, slave-trading. See 16 Am. L. J. 444.

Sweden and Norway. Murder, attempt to commit murder, rape, piracy, mutiny, arson, robbery, burglary, forgery, counterfeiting, embezzling by public officers.

Switzerland. Murder, attempt to commit murder, rape, forgery, or the emission of forged papers, arson, robbery, piracy, embezzling by public officers or by private persons.

Two Sicilies. Same as Italy. See *ante*.

Venezuela. Murder, attempt to commit murder, rape, forgery, counterfeiting, arson, robbery, intimidation, forcible entry of an inhabited house, piracy, embezzling by public officers or by private persons.

Wurtemberg. Same as Prussia. See *ante*.

Most of the foregoing treaties contain provisions relating to the evidence required to authorize an order of extradition; but as to this, see FUGITIVE FROM JUSTICE.

The United States has made treaties for the mutual surrender of *deserting seamen* with the following foreign states: Austria-Hungary, Belgium, Bolivia, Colombia, Denmark, Dominican Republic, Ecuador, France, German Empire, Greece, Hawaiian Islands, Hayti, Italy, Madagascar, Netherlands, Peru, Portugal, Roumania, Russia, Salvador, Spain, Sweden and Norway, Tonga.

It has also made treaties with numerous Indian tribes as nations or distinct political communities, in many of which the Indians have stipulated to surrender to the federal authorities persons accused of crime against the laws of the United States; and in some tripartite treaties they have stipulated for mutual extradition of criminals to one another. 11 Stat. L. 612, 703.

Between the several states, by art. iv. sec. ii. of the constitution of the United States, it is provided that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the exec-

utive authority of the state from which he fled, be delivered up to be removed to the state having the jurisdiction of the crime."

The act of congress of Feb. 12, 1793, U. S. Rev. Stat. §§ 5378-9 prescribed the mode of procedure in such cases, and imposed a like duty upon the territories northwest or south of the river Ohio. See FUGITIVE FROM JUSTICE.

As to trial for a different offence. If surrendered by a foreign government, an extradited criminal can be tried only for the offence for which he was extradited; 14 Fed. Rep. 130; 26 *id.* 421; 32 *id.* 911; 13 Bush 697; 39 Ohio St. 273; 10 Tex. App. 627; 119 U. S. 407; *contra*, 8 Blatchf. 131; 13 *id.* 295; 6 Crim. L. Mag. 511; 9 Misc. Rep. 600; 81 Hun 336. See 89 Fed. Rep. 204; 28 Am. L. Rev. 568; 32 Am. L. Reg. N. S. 557; Spear, *Extrad.* 150; 14 Alb. L. J. 91; 23 Cent. L. J. 241; 25 *id.* 267; 19 *id.* 22; 19 L. R. A. 206.

Extradition treaties of the United States do not guarantee a fugitive an asylum in any foreign country. So far as they regulate the right of asylum at all, they limit it; 119 U. S. 436; and the laws of the United States do not recognize any right of asylum, on the part of a fugitive from justice, in any state to which he has fled; 137 U. S. 900.

Under the extradition treaty with England and Rev. Stat. §§ 5272, 5275, a person brought to this country by extradition proceedings can only be tried for the offence with which he is charged in such proceedings; if not tried, or if acquitted after trial, he shall have reasonable time to leave the country before he is arrested for any other crime previously committed; 119 U. S. 407.

As between the states of the Union, fugitives from justice have no right of asylum, in the international sense; and a fugitive who has been returned by interstate rendition may be tried for other offences than that for which his return was demanded, without violating any rights secured by the constitution or laws of the United States; 127 U. S. 700; 148 *id.* 537, *aff.* 90 Ga. 347; 112 N. C. 896; 135 N. Y. 536; 158 Mass. 149; 116 Mo. 505; 119 *id.* 467; 116 Ind. 61; 89 Ia. 94; 158 Mass. 149; 104 Ala. 4; 60 Wis. 587; 4 Tex. App. 645; 12 Pa. Co. Ct. R. 263; 1 Colo. App. 191; 2 Ohio N. P. 230; 3 Wash. Ty. 131; *contra*, 41 Fed. Rep. 472; 45 *id.* 471; 40 Kan. 338; 56 *id.* 690; 47 Mich. 481. In some states the courts have overruled former decisions, bringing themselves in accord with the United States supreme court; 66 N. W. Rep. (Neb.) 808, *rev.* 29 Neb. 135; 2 Ohio N. P. 230, *rev.* 48 Ohio St. 588.

As to trial for other offences. See 19 Cent. L. J. 22; 25 *id.* 267; 28 *id.* 241; 28 Am. L. Rev. 568; 26 Am. L. Reg. 241; 32 *id.* 568; 19 L. R. A. 206.

A prisoner, regularly committed for trial on criminal process of the state which is in itself regular and valid, cannot be discharged because he was brought back from another state on extradition warrants procured by false affidavits; and on that ground alone the federal courts will not release him.

on *habeas corpus*; 75 Fed. Rep. 821; nor is a fugitive, who has been kidnapped and brought back into the state where his offence was committed, entitled to release on *habeas corpus*; 9 B. & C. 446; 119 U. S. 436; 18 Fed. Rep. 167, *aff.* 110 Ill. 627; 127 U. S. 700, *aff.* 84 Fed. Rep. 525; 21 Iowa 467; 18 Pa. 37; 1 Bailey 288; 7 Vt. 118; *contra*, State v. Simmons, 39 Kan. 262. A prisoner cannot set up as a ground for discharge that he has been enticed into the state by fraudulent representations; 4 N. Y. Crim. Rep. 576; nor that the extradition proceedings in the other state were irregular; 45 Fed. Rep. 352; 52 Vt. 609.

The constitutional provision for interstate rendition warrants a surrender after conviction; 7 N. Y. Crim. Rep. 406; but after serving his sentence the convict cannot be surrendered under a requisition from another state until he has had reasonable time to return to the state from which he was extradited; *id.*

Extradition proceedings may be made the basis of a suit for malicious prosecution; 16 Fed. Rep. 93.

As to questions of practice relating to this subject, see FUGITIVE FROM JUSTICE; also, Hurd, *Hab. Corp.* 592.

See Spear; Moore, *Extrad.*; Rorer, *Inter-State Law*; 18 Alb. L. J. 146; 10 Am. L. Rev. 617; 28 *id.* 568; 35 Cent. Law J. 301; paper by H. D. Hyde, *Report Am. Bar Assn.* for 1880; Hawley, *Interst. Extrad.*; Hawley, *Internat. Extrad.*; 35 Am. L. Reg. N. S. 749; St. Louis Law Library catalogue, list of authorities *h. t.*

The word "person" etymologically considered includes citizens as well as those who are not; and while it is the practice of a preponderant number of nations to refuse to deliver its own citizens under a treaty of extradition silent on the point specifically, *held*, in view of the diplomatic history of the United States, there is no principle of international law by which citizens are excepted from the operation of a treaty to surrender persons where no such exception is made in the treaty itself. The United States has always so construed its treaties. 229 U. S. 448.

A person extradited under the treaty of 1899 with Great Britain cannot be punished for an offense other than that for which his extradition has been demanded even though prior to his extradition he had been convicted and sentenced therefor.

While the escape of criminals is to be deprecated, treaties of extradition should be construed in accordance with the highest good faith, and a treaty should not be so construed as to obtain the extradition of a person for one offense and punish him for another, especially when the latter offense is one for which the surrendering government has refused to surrender him on the ground that it was not covered by the treaty. 205 U. S. 310. See EXPULSION.

EXTRANEUS. In Old English Law. One foreign born; a foreigner. 7

Rep. 16.

In Roman Law. An heir not born in the family of the testator. Those of a foreign state. The same as *alienus*. Vicat, *Voc. Jur.*; Du Cange.

EXTRAORDINARY. Beyond or out of the common order or rule; not usual, regular, or of a customary kind; not ordinary; remarkable; uncommon; rare. 29 Abb. N. C. 154. 19 Fed. Rep. 103.

Extraordinary Care. Synonymous with greatest care, utmost care, highest degree of care. Abbott; 54 Ill. 19.

Extraordinary Peril. What is beyond the ordinary, usual, or common, not what has never been previously heard of, or is within former experience. Anderson; 1 Duer, 170.

EXTRAVAGANTES. In Canon Law. The name given to the constitutions of the popes posterior to the Clementines.

They are thus called, *quasi vagantes extra corpus juris*, to express that they were out of the canonical law, which at first contained only the decrees of Gratian; afterwards the Decretals of Gregory IX., the Sexte of Boniface VIII., the Clementines, and at last the Extravagantes, were added to it. There are the Extravagantes of John XXII., and the common Extravagantes. The first contain twenty epistles, decretals, or constitutions of that pope, divided under fifteen titles, without any subdivision into books. The others are epistles, decretals, or constitutions of the popes who occupied the holy see either before or after John XXII. They are divided into books, like the decretals.

EXTREMIS (Lat.). When a person is sick beyond the hope of recovery, and near death, he is said to be *in extremis*.

A will made in this condition, if made without undue influence, by a person of sound mind, is valid. As to the effect of declarations of persons *in extremis*, see DYING DECLARATIONS; DECLARATIONS.

EXTUNC (Lat.). From then; from that time; from thence; thereafter.

EY. A watery place; water. Co. Litt. 6.

EYE-WITNESS. One who saw the act or fact to which he testifies. When an eye-witness testifies, and is a man of intelligence and integrity, much reliance must be placed on his testimony; for he has the means of making known the truth.

EYOTT. A small island arising in a river. Fleta, l. 3, c. 2, s. b; Bracton, l. 2, c. 2. See ISLAND.

EYRE. A journey; a court of itinerant justices. In old English law applied to the judges who travelled in circuit to hold courts in the different counties. See JUSTICES IN EYRE.

EYRE, CHIEF JUSTICE IN. See CHIEF JUSTICE IN EYRE.

EYRER. To go about. See EYRE.

F.

F. The sixth letter of the alphabet. A fighter or maker of frays, if he had no ears, and a felon on being admitted to clergy, was to be branded in the cheek with this letter. Cowel; Jacob. Those who had been guilty of falsity were to be so marked. 2 Reeve, Hist. Eng. L. 392.

F. O. B. Free on board. A term frequently inserted, in England, in contracts for the sale of goods to be conveyed by ship, signifying that the buyer will be responsible for the cost of shipment. In London, when goods are so sold, the buyer is considered as the shipper and the goods are shipped at his risk; 5 Moo. P. C. 165; 3 Hurlst. & N. 484; 4 *id.* 822; 29 L. J. C. P. 218; 42 N. E. Rep. (Ill.) 147.

FABRIC LANDS. In English Law. Lands given for the repair, rebuilding, or maintenance of cathedrals or other churches.

It was the custom, says Cowel, for almost every one to give by will more or less to the fabric of the cathedral or parish church where he lived. These lands so given were called fabric lands, because given *ad fabricam ecclesie reparandam* (for repairing the fabric of the church). Called by the Saxons *timber-lands*. Cowel; Spelman, Gloss.

FABRICARE (Lat.). To make. Used of an unlawful making, as counterfeiting coin; 1 Salk. 342, and also lawful coining.

FABRICATE. To invent; to devise falsely. Invent is sometimes used in a bad sense, but fabricate never in any other. To fabricate a story implies that it is so contrary to probability as to require the skill of a workman to induce belief in it. Crabbe, Syn.

The word implies fraud or falsehood; a false or fraudulent concoction, knowing it to be wrong. L. R. 10 Q. B. 162.

In the Law of Evidence. To forge; to create by artifice, with a view to deceive; as to fabricate evidence, or facts, the materials of evidence. To produce or exhibit false and deceptive appearances, in order to have them observed and testified to, as genuine facts. To present false statements of transactions or occurrences, through the medium of evidence. Burrill.

FABRICATED FACT. In the law of evidence. A fact existing only in statement, without any foundation in truth.

FABULA. In old European law, a contract or covenant. Also in the laws of the Lombards and Visigoths, a nuptial contract; a will. Burrill.

FACE. The outward appearance or aspect of a thing.

The words of a written paper in their apparent or obvious meaning, as, the face of a note, bill, bond, check, draft, judgment, record, or contract, which titles see. The face of a judgment is the sum for which it was rendered, exclusive of interest. 32 Ia. 265.

FACIAS (Lat. *facere*, to make, to do). That you cause. Occurring in the phrases *scire facias* (that you cause to know), *fiat facias* (that you cause to be made), etc. Used also in the phrases *Do ut facias* (I give that you may do), *Facio ut facias* (I do that you may do), two of the four divisions of considerations made by Blackstone, 2 Com. 444.

FACIES? FACIAM (Lat.). Will you do? I will do.

FACILITIES. A name formerly given to certain notes of some of the banks in the state of Connecticut, which were made payable in two years after the close of the war of 1812. 14 Mass. 322.

This word has been the subject of much discussion in connection with the English Traffic Act and the act of congress creating the interstate commerce commission. It has been held to include all works necessary for the accommodation of traffic and safety of passengers; 3 Nev. & Mac. 48; designation of the hour and speed of connecting trains; 2 El. & Bl. 530; accommodation for receiving and delivering freight where there was no station before, if within the power of the company, and if demanded by the public convenience; *id.* 306; or even to provide a new station; *id.* 331.

The statutory obligation to afford due and reasonable facilities is not limited by the convenience of the company; 3 Nev. & Mac. 37; or the question of remuneration to the company; 7 *id.* 72, 83; nor is it to be interfered with by disputes between different companies; 3 *id.* 540. It cannot be avoided because the company, by its own act, has rendered the performance of such obligation more difficult; [1891] 1 Q. B. 440. Facilities must be of a more or less public character, and not designed to remedy a mere private grievance; 1 Nev. & Mac. 38, 56, 58, 61.

In a very leading case the word was held to include structural alterations; per Lord Selborne, L. C. (with whom concurred Coleridge, C. J., Brett, L. J., dissenting) in 6 Q. B. D. 506 (reversing 5 Q. B. D. 220, in which the decision was by Cockburn, C. J., and Manisty, L. J., dissenting).

Land owned by a railroad company may be rented for storage of coal without liability for undue preference, storage not being included in the facilities required by the English act; L. R. 5 C. P. 622; s. c. 1 Nev. & Mac. 166.

By the second clause of the third section of the act of congress creating the Interstate Commerce Commission all railroad companies are required "to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines.—This (it was held by the Circuit Court for Kentucky, per Mr. Justice Jackson) leaves the carriers where it finds them and imposes no duty upon the railroad companies, either to the public or to other lines, to make new stations, yards or depots, even though such would be convenient for the public or other carriers; 37 Fed. Rep. 567; and when a new railroad makes a physical connection with an old one, at a point other than the regular yard or depot, the old company is not compelled to provide the same or equal facilities at the point of contact which it had originally provided at its regular yards and depots; *id.*; the provision was not enacted for the benefit of carriers but of the commerce transported; *id.* In this case the Inter-State Commerce Commission made an order requiring the connection; 2 Int. Com. Rep.—; but on application to the circuit court to enforce the order the court considered it was not warranted by the act and refused to enforce it.

Under this clause, railroad companies are not required to furnish competing connecting carriers with equal facilities, for the interchange of traffic, when this involves the use of its tracks by such carriers; it may permit such use by one carrier to the exclusion of others; 59 Fed. Rep. 400; nor is the clause violated by receiving and forwarding without prepayment of freight or car mile-

age, cars of other companies, containing goods coming from one locality and under like circumstances, refusing goods from a different locality; 61 Fed. Rep. 158, affg. 51 *id.* 465.

A state constitution prohibiting discrimination in charges and facilities does not require a company to make provision for joint business with a new line crossing it, similar to those already made with a rival line at another near point; 110 U. S. 667; but railroad companies may be required to furnish facilities at, and prevented from abandoning stations already established; 37 Conn. 153; 42 *id.* 56; 104 U. S. 1; 63 Me. 269; 103 Mass. 254; 19 Neb. 476. The mere failure of a common carrier to provide facilities for the shipment of freight does not constitute a legal ground for the recovery of damages; 61 Ark. 560; 35 S. W. Rep. (Ky.) 626; 2 Mo. App. Rep. 941. See COMMON CARRIER.

The power of the commission to regulate the accessory facilities is held by the circuit court of appeals to be confined to mere regulation, and cannot be used to invade rights of property by entering the domain of deprivation, construction, and reconstruction of properties to carry out the proposed regulation; 74 Fed. Rep. 803.

See, generally, as to the construction of the word in the English Traffic Act, Darling-ton, Ry. Rates, Ch. III. See INTERSTATE COMMERCE; RATES. A term applied to certain notes made payable two years after the war of 1812, which were issued by some of the Connecticut banks. Applied to railroads, means everything necessary for the convenience of passengers and the safety and prompt transportation of freight. English.

FACILITY. In Scotch Law. A degree of mental weakness short of idiocy but justifying legal intervention.

In order to support the reduction of the deed of a facile person, there must be evidence of circumvention and of imposition in the transaction, as well as facility in the party and lesion. But where lesion in the deed and facility in the grantor concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside; Bell, Dict.

FACIO UT DES (Lat. I do that you may give). An expression applied in the civil law to the consideration of that species of contract by which a person agrees to perform anything for a price either specifically mentioned or left to the determination of the law to set a value on it; as, when a servant hires himself to his master for certain wages or an agreed sum of money; 2 Bla. Com. 445. See CONSIDERATION.

FACIO UT FACIAS (Lat. I do that you may do). An expression used in the civil law to denote the consideration of that species of contract by which I agree with a man to do his work for him if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides; or it may be to forbear on one side in consideration of something done on the other. 2 Bla. Com. 444. See CONSIDERATION.

FACSIMILE. An exact copy or accurate imitation of an original instrument.

In England, where the construction of a will may be affected by the appearance of the original paper, the court will order the probate to pass in *facsimile* as it may possibly help to show the meaning of the tes-

tator; 1 Wms. Ex., 7th ed. 331, 386, 566, See PROBATE.

Made like in appearance. Said of counterfeits, designs, signatures, trade-marks, etc. Anderson.

FACT (Lat. *factum*). An action; a thing done. A circumstance.

Fact is much used in modern times in distinction from law. Thus, in every case to be tried there are facts to be shown to exist to which the law is to be applied. If law is, as it is said to be, a rule of action, the fact is the action shown to have been done, and which should have been done in accordance with the rule. Fact, in this sense, means a thing done or existing. It has been a frequent subject of debate whether certain words and phrases imply questions of fact, or of law, or both, or are conclusions of law. A useful collection of decisions will be found in *Ram on Facts*, 3d Am. ed. 21.

Material facts are those which are essential to the right of action or defence. See 30 Mo. 63; 40 N. H. 338.

Immaterial facts are those which are not essential to the right of action or defence. Material facts must be shown to exist; immaterial facts need not. As to what are questions of law for the court and of fact for the jury, see **QUESTIONS OF LAW AND FACT**; **IGNORANCE**; **Wells, Law and Fact**. As to pleading material facts, see Gould, Pl. c. 3, § 28.

Facts constituting a cause of action are those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of such facts. 1 Dak. 403 See **INVESTIGATIVE FACT**

FACTA ARMORUM. Feats of arms; jousts; tournaments, etc. Cowel.

FACTIO TESTAMENTI (Lat.). In Civil Law. The power of making a will, including right and capacity. Also, the power of receiving under a will. Vicat, Voc. Jur.

FACTOR. An agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission. Pal. Ag. 13; Sto. Ag. § 33; Com. Dig. *Merchant*, B; Malynes, *Lex Merc.* 81; Beawes, *Lex Merc.* 44; 3 Chit. Com. L. 193; 2 Kent 622; 1 Bell, *Comm.* 385, § 408; 2 B. & Ald. 142.

An agent for the sale of goods in his possession or consigned to him. Lawson, R. & Rem. § 227.

When the agent accompanies the ship, taking a cargo aboard, and it is consigned to him for sale, and he is to purchase a return cargo out of the proceeds, such agent is properly called a factor; he is, however, usually known by the name of a super-cargo (q. v.). Beawes, *Lex Merc.* 44; Livermore, Ag. 99; 1 Domat, b. 1, t. 16, § 3, art. 2.

A factor differs from a broker in some important particulars: namely, he may buy and sell for his principal in his own name, as well as in the name of his principal; on the contrary, a broker acting as such should buy and sell in the name of his principal; 3 Chitty, *Com. Law* 193, 210, 541; 2 B. & Ald. 143; 3 Kent 622; 23 Wall. 321; 11 Mart. La. 381. Again, a factor is intrusted with possession, management, disposal, and control of the goods to be bought and sold, and has a special property and a lien on them; the broker, on the contrary, has usually no such possession, management, control, or disposal of the goods, nor any such special property or lien; Paley, Ag. 13; 1 Bell, *Com.* 385. The business of factors in the United States is usually done by commission merchants, who are known by that name, and the term factor is but little used; 1 Pars. *Contr.* 78. The term factor, however, is largely used in the Southern States in the cotton business, and in a different sense from commission merchant; 16 Fed. Rep. 516. He not only sells cotton, but makes advances to the merchant or planter, in cash or goods, to be repaid when the crop comes in. He thus has a lien upon the crop before it is shipped to him. In Alabama the term "commission merchant" as used in the revenue laws is synonymous with "factor"; 50 Ala. 154.

A domestic factor is one who resides in the same country with his principal.

By the usages of trade, or intention of law, when domestic factors are employed in the ordinary business of buying and selling goods, it is presumed that a reciprocal credit among the principal and the agent and third persons has been given. When a purchase has been made by such a factor, he, as well as his principal, is deemed liable for the debt; and in case of a sale the buyer is responsible both to the factor and principal, and the purchase-money; but this presumption may be rebutted by proof of exclusive credit; Story, Ag. § 267, 291, 293; Paley, Ag. 243, 271; 9 B. & C. 78; 15 East 62.

A foreign factor is one who resides in a different country from his principal. 1

Term 112; 4 Maule & S. 576.

Foreign factors are held personally liable upon all contracts made by them for their employers, whether they describe themselves in the contract as agents or not. In such cases the presumption is that the credit is given exclusively to the factor. But this presumption may be rebutted by proof of a contrary agreement; Story, Ag. § 268; Mech. Ag. 1031; Bull. N. F. 130; 1 D. & P. 398; 9 B. & C. 78.

His duties. He is required to use reasonable skill and ordinary diligence in his vocation; 1 Ventr. 121; 66 Hun 633; 104 Ala. 662. If for any reason not tortious, he delays selling the goods consigned to him, he is not liable for a subsequent loss occurring through an act of God; 44 Ill. App. 527. He is bound to obey his instructions; 8 N. Y. 62; 77 Ga. 64; 5 C. B. 895; but when he has none he may and ought to act according to the general usages of trade; 14 Pet. 479; 7 Taunt. 164; 5 Day 536; 3 Caines 226; 1 Story. 43; to sell for cash when that is usual, or to give credit on sales when that is customary; 51 N. H. 56. He is bound to render a just account to his principal, and to pay him the moneys he may receive for him. The mere fact that one sells products as a factor, does not impose upon him the burden of proving due diligence in the sale; 111 N. C. 438.

His rights. He has the right to sell the goods in his own name; and, when untrammelled by instructions, he may sell them at such times and for such prices as, in the exercise of a just discretion, he may think best for his employer; 3 C. B. 380; 63 N. C. 542; but he must obey instructions if given; 5 Dill. 438; 81 N. Y. 676; but when the instructions are to wait until a certain law has produced its effect on the market, a certain discretion as to time may be exercised; 21 id. 386. He may sell on credit when such is the usage of the market; 1 Sto. 43; but if he sell on change he is held to a high degree of diligence to ascertain the solvency of the purchaser; 75 Ill. 464. In the absence of instructions he may give a warranty; 1 Wall. 359; and he may insure the goods of the principal in his own name; 120 Mass. 449. He is, for many purposes, between himself and third persons, to be considered as the owner of the goods. He may, therefore, recover the price of goods sold by him in his own name, and, consequently, he may receive payment and give receipts, and discharge the debtor, unless, indeed, notice has been given by the principal to the debtor not to pay. But the title to goods consigned to a factor to be sold remains in the principal until sold, and may not be sold on execution to pay debts of the factor; 38 W. Va. 158. He has a lien on the goods for advances made by him, and for his commissions; but he is not to be considered as the owner, beyond the extent of his lien; id.; 63 N. W. Rep. (Minn.) 720; 23 Wall. 35. He has no right to barter the goods of his principal; 65 Mo. 89; 44 Wis. 265; nor to pledge them for the purpose of raising money for himself, nor to secure a debt he may owe; 13 Mass. 173; 59 Ill. App. 149; 1 McCord 1; 1 Mas. 440; 5 Johns. Ch. 429; 73 Pa. 25; L. R. 10 C. P. 354. See 3 Den. 473; 13 E. L. & Eq. 261: **FACTOR'S ACTS**. But he may pledge them for advances made to his principal, or for the purpose of raising money for him, or in order to reimburse himself to the amount of his own lien; 2 Kent 623; 4 Johns. 103; 7 East 5; Story, *Bailm.* § 325; Edw. *Bailm.* 104; 10 Wall. 141. Another exception to the general rule that a factor cannot pledge the goods of his principal is, that he may raise money by pledging the goods for the payment of duties or any other charge or purpose allowed or justified by the usages of the trade; 2 Gall. 13; 6 S. & R. 386; 3 Esp. 182. He has a lien upon the goods of his principal in his possession, to protect himself against unpaid drafts drawn and accepted in the course of the agency; 25 S. W. Rep. (Mo.) 846; and such lien is personal to the factor; 38 W. Va. 158. Where a factor disobeys instructions in selling grain which he has bought for his principal, he thereby loses his lien on money deposited with him as security; 40 Ill. 313; 114 id. 96.

It may be laid down as a general rule

that when the property remitted by the principal, or acquired for him by his order, is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor who has become bankrupt have no right to the specific property; 2 Stra. 1182; 3 Maule & S. 562; even where it is money in the factor's hands; 2 Burr. 1369; 14 N. H. 38; 2 Dall. 60; 2 Pick. 86; 5 id. 7; 63 Conn. 198. He may sell them to reimburse advances; 14 Pet. 479; unless restrained by an agreement with his principal, but if he has agreed to hold them for a given time he is bound to do so; 16 Fed. Rep. 516. And where the factor dies insolvent, before remitting to the shipper, the latter is entitled to satisfaction out of the proceeds of the sale or deposit in bank, as against the claim of the bank on an un-matured note; 70 Hun 90. And see 1 B. & P. 539, 648, for the rule as to promissory notes. Stock ordered of a broker on margin contracts belongs not to the broker, but to the customers, and may be redeemed by them from an assignee of the broker for benefit of creditors; 63 Conn. 198.

But the rights of third persons dealing *bona fide* with the factor as a principal, where the name of the principal is sunk entirely, are to be protected; 7 Term 360; 3 Bingham 139; 6 Maule & S. 14.

See, generally, 53 Am. Dec. 156, note; Lawson, *Rights & Rem.* § 227-230; 3 Wait, Act. & Def. 289; 2 Sm. L. Cas. 118; 1 Am. L. Cas. 788; 16 Fed. Rep. 516, note; LIEN; AGENT; BROKER; DEL CREDERE COMMISSION. See **FOREIGN FACTOR**.

FACTOR'S ACTS. A name given to legislative enactments in England and the United States designed to mitigate the hardships of the common-law rule governing dealings with factors, and especially with respect to pledges made by them of the goods of the principal. The object of the English legislation known under this general designation is the protection of persons dealing with those having possession of goods or documents representing the title thereto. The first acts were 4 Geo. IV. c. 84 and 6 Geo. IV. c. 94, and these were confined to persons entrusted with documents of title, not with the goods themselves. This defect was remedied by 5 & 6 Vict. c. 39, of which the Ontario act is merely a copy; R. S. Ont. c. 121. The subject was again dealt with in 40 & 41 Vict. c. 39, under which many of the decisions under the former acts were practically set aside. As to the provisions of the English acts and decisions thereunder, see 5 Can. L. T. 145.

In the United States the rule of the common law that a factor cannot pledge the property of his principal has been largely altered by statute in many of the states. Founded generally it is said upon the statutes of 6 Geo. IV. c. 94; 3 Wait, Act. & Def. 300. It is necessary to have reference to the legislation or absence of it in any particular state, to ascertain the law applicable to a particular case and to compare it with the English acts in order to determine the applicability of English decisions. See, as to legislation in this country, 58 Am. Dec. 165, note. See also **FACTOR**.

In England. (1839). Enable a person in the possession of goods, or documents of title to goods, to validly sell or pledge the same, notwithstanding they may have been entrusted to him for a different purpose, or may have been already sold by him to someone else, or may be subject to a lien in favor of the person from whom he has bought them, or that his agency may have been revoked. Byrne. This act repeals former similar acts and consolidates their provisions. Similar statutes are to be found in the States and in Canada.

FACTORAGE. The wages or allowances paid to a factor for his services; it is more usual to call this commissions.

FACTORIZING PROCESS. A process for attaching effects of the debtor in

the hands of a third party. It is substantially the same process known as the *garishnee process*, *trustee process*, process by *foreign attachment*; Drake, *Attach.* § 451.

FACTORY. A building or group of buildings appropriated to the manufacture of goods, including the machinery necessary to produce the goods, and the engine or other power by which the machinery is propelled; the place where workers are employed in fabricating goods, wares, or utensils. Cent. Dict.

All buildings and premises wherein or within the close or curtilage of which steam, water, or any mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing cotton, etc. 7 Vict. c. 15, sect. 73. By subsequent acts, this definition has been extended to various other manufacturing places; Moz. & W. L. Dict. The term includes the fixed machinery when used in a policy of insurance; 8 Ind. 479.

In Scotch Law.—A contract which partakes of a mandate and *locatio ad operandum*, and which is in the English and American law books discussed under the title of Principal and Agent. Bell, *Comm.* 259.

FACTORY ACTS. Laws enacted for the purpose of regulating the hours of work, and the sanitary condition, and preserving the health and morals, of the employes, and promoting the education of young persons employed at such labor.

The statute of 1802 (42 Geo. III. c. 73) was the first to be passed, and was followed by those of 1833, and others following at brief intervals up to 1883. For a detailed account of the English acts, see *International Cyclopaedia*, *h. t.*

In this country statutes have been passed from time to time in most if not all the states, having in view the same reformatory purpose or kindred ones, as the English Factory Act of 1833 and the others of like character which followed it. The right of the states to pass such acts is sustained under the police power and the principles by which the validity of any such legislation is to be tested is thus stated by the most recent writer on the subject of labor law: "Such statutes are doubtless constitutional in any case where the reason of the regulation is based upon consideration of the public health, safety, and comfort, or the health and morals of the operatives, and is apparent on the face of the statute, but it will not do, under the guise of police regulation, to pass statutes of which the real purpose is different, even though they be in the interest of any particular trade, or otherwise desirable. Such regulations or reformations can only be attained by combination among the workmen themselves to see that they are complied with." Stimson, *Lab. L.* of U. S. § 45.

The most important subjects covered by this legislation are summarized by the same author: "The preservation of the health of employes in factories by the removal of excessive dust, or for securing pure air, or requiring fans or other special devices to remove noxious dust or vapors peculiar to the trade; statutes requiring guards to be placed about dangerous machinery, belting, elevators, wells, shafts, etc.; statutes providing for fire-escapes, adequate stairways, etc. A rooming by bells, tubes, etc., doors opening outwardly, etc.; statutes providing against injury to the operatives by the machinery used, such as laws prohibiting the machinery to be cleaned while in motion, or from being cleaned by any woman or minor; laws requiring mechanical self-shutters, etc., or connection by bells, tubes, etc., between any room where machinery is used and the engine-room; laws aimed at overcrowding in factories, and at the general comfort of the operatives; and many special laws in railways, mines, and other special occupations, such as the laws requiring warning guards to be placed before bridges upon railroads, requiring the frogs and switches or other appliances of the track to be in good condition and properly protected by timber or otherwise, providing automatic couplings to both freight and passenger trains, and, in building trades, providing for railings upon scaffolds and for suitable scaffolds generally." *Id.*

There are in many of the states restrictions upon the employment of women and children by limiting the number of hours of labor permitted and providing for oversight of their treatment. For details of such legislation in various states, see *id.* § 13. It is held constitutional as to minors without doubt, resting on the theory that the state is *parens patrie*, and as such entitled to the control of those who are unable to contract for themselves. The effort is made to rest it on the same ground as to women; 120 Mass. 383 (in which state there is an unusual and extensive constitutional power of legislation "for the good and welfare" of the people); but elsewhere the constitutionality of such acts has been lately denied on the ground that it was class legislation; 155 Ill. 98. It is now earnestly contended that under the modern

view of women under the law, as equally capable with men of contracting, and often of voting and holding office, any effort to restrict the freedom of women to contract cannot be sustained; Stimson, *Lab. L.* § 13. But while we may admit the full force of the argument against this class of legislation based upon the changed legal relations of women, it may nevertheless be doubted whether it does not to some extent, at least, miss the real underlying principle of such legislation. It is intended for the protection of women and the amelioration of their condition, and is more or less a recognition of the different physical constitution of woman and her peculiar and important relation to the community. Such considerations rest upon conditions which are not changed by any increase of her property rights or political privileges, and, so far as they may have been the basis of these restrictive regulations, they exist and operate with undiminished force. They are apparently overlooked by courts and text writers, including the author quoted, but must undoubtedly be reckoned with in any attempt to deal properly either with the validity or the policy of the acts in question. It is at least fairly to be considered whether they are not quite sufficient to bring the subject of the protection, not the restriction, of women fairly within the scope of the police power as determined by the criterion above quoted, viz.: considerations of public health, safety, and comfort, or the health and morals of the operatives. Every one of these things would remain to be affected by regulations for promoting the welfare of women, even if they were absolutely unshackled by the law as to other classes of rights. The underlying principle or motif of such legislation is restraint of the employer rather than of the employé.

FACTORY PRICES. The prices at which goods may be bought at factories, as distinguished from the prices of those bought in the market, after they have passed into the hands of third parties or shopkeepers. 2 Mas. 90.

FACTUM. A deed; a man's own act and deed. A culpable or criminal act; an act not founded in law. A deed; a written instrument under seal: called, also, *charta*. Spelman, *Gloss.*; 2 Bla. Com. 295.

The difference between *factum* and *charta* originally would seem to have been that *factum* denoted the thing done, and *charta* the evidence thereof; Co. Litt. 9b. When a man denies by his plea that he made a deed on which he is sued, he pleads *non est factum* (it is not his deed).

In wills, *factum* seems to retain an active signification and to denote a making. See 11 How. 358.

A fact. *Factum probandum* (the fact to be proved). 1 Greenl. Ev. § 13.

A portion of land granted to a farmer; otherwise called a hide, *bovata*, etc. Spelm.

In French Law. A memoir which contains concisely set down the fact on which a contest has happened, the means on which a party founds his pretensions, with the refutation of the means of the adverse party. See *Vicat*, *Voc. Jur.*

FACULTY. In Canon Law. A license; an authority. For example, the ordinary, having the disposal of all seats in the nave of a church, may grant this power, which when it is delegated is called a faculty, to another.

Faculties are of two kinds; first, when the grant is to a man and his heirs in gross; second, when it is to a person and his heirs as appurtenant to a house which he holds in the parish; 1 Term 429, 432; 12 Co. 106.

In Scotch Law. Ability or power. The term faculty is more properly applied to a power founded on the consent of the party from whom it springs, and not founded on property; Kames, *Eq.* 504.

FACULTY OF ADVOCATES. See *ADVOCATES*.

FACULTY OF A COLLEGE. The body of instructors or professors whose duties are to attend to the educational business, course of studies, and discipline of the college, as distinguished from the

trustees in whom are vested the title to the property and management of the financial concerns of the institution.

FACULTIES, MASTER OF THE. The Archbishop of Canterbury has an officer called the Master of the Faculties, who deals with applications for the admission and removal of notaries public. The judge of the Provincial Courts of Canterbury and York is now *ex officio* Master of the Faculties. Byrne; Pub. Wor. Reg. Act, 1874, s. 7. See *COURT OF FACULTIES*.

FADERFIUM (Sax. from *foeder*, father, and *feh*, a gift). A gift or portion which a woman's father or brother gave her on her marriage. Burrill; Spelman.

FAEDERFEOH. The portion brought by a wife to her husband, and which reverted to a widow, in case the heir of her deceased husband refused his consent to her second marriage; *i. e.* it reverted to her family in case she returned to them. R. & L. Dict.; Anc. Inst. Engl.

FAESTING-MEN. Approved men who were strong-armed. Subsequently the word seems to have been used in the sense of *rich*, and hence it probably passed into its later and common meaning of pledges or bondsmen, which, by Saxon custom, were bound to answer for each other's good behavior. Cowel; Du Cange.

FAGGOT. A badge, worn in medieval times by persons who had recanted their heretical opinions, designed to show what they considered they had merited but had escaped. Cowel.

These persons were condemned not only to the penance of carrying a faggot, but for a more durable mark of infamy, they were to have the sign of a faggot embroidered on the sleeve of their upper garment. If this badge or faggot was at any time left off, it was often alleged as the sign of apostasy. Jacob.

FAGGOT VOTE. A term applied to votes manufactured by nominally transferring land to persons otherwise disqualified from voting for members of parliament.

FAIDA. In Saxon Law. Great and open hostility which arose on account of some murder committed. The term was applied only to that deadly enmity in deference to which, among the Germans and other northern nations, if murder was committed, punishment might be demanded from any one of kin to the murderer by any one of the kin of the murdered man. Du Cange; Spelman, *Gloss.*

FAIL. To leave unperformed; to omit; to neglect, as distinguished from *refuse*, which latter involves an act of the will, while the former may be an act of inevitable necessity; 9 Wheat. 344.

Refuse. "Fail" may be equivalent to "refuse" where the condition to be performed depends on the will of a person. But where the condition does not depend on his will, but on the will of those over whom he can have no control, there is a manifest distinction between "refuse" and "fail" to comply with it. The first is an act of the will, the second may be an act of inevitable necessity. 9 Wheat. U. S. 344.

FAILLITE (Fr.). In French Law. Bankruptcy; failure. The condition of a merchant who ceases to pay his debts. 3 Masse, *Droit Comm.* 171; Guyot, *Répert.*

FAILURE. In legal parlance, the neglect of any duty may be a failure, and the commission of any fault a delinquency. When applied to a mercantile concern, it means an inability to meet its debts from insolvency. It is synonymous with insolvency. 1 Rice 126.

The state or condition of being wanting; a failing short; deficiency or lack; defect, want, absence; default; defeat. Also, default; omission; neglect; non-performance; as, failure to perform a contract. Also suspension of payment: as, failure in business, a failing debtor. Anderson.

FAILURE OF CONSIDERATION. See CONSIDERATION.

FAILURE OF EVIDENCE. A failure to offer proof, either positive or inferential, to establish one or more of the many facts, the establishment of all of which is indispensable to the finding of the issue for the plaintiff. 7 Gill. & J. 28.

FAILURE OF ISSUE. A want of issue to take an estate limited over by an executory devise.

Failure of issue is definite or indefinite. When the precise time for the failure of issue is fixed by the will, as in the case of a devise to Peter, but, if he dies without issue living at the time of his death, then to another, this is a failure of issue definite. An indefinite failure of issue is a general failure whenever it may happen, without fixing any time, or a certain and definite period, within which it must happen. 4 Kent 275. An executory devise in fee, with remainder over, to take effect on an indefinite failure of issue is void for remoteness, and hence courts are astute to devise some construction which shall restrain the failure of issue to the term of limitation allowed; *id.* 276, n. See 40 Pa. 18; 2 Redf. Wills 276, n.; Beach, Wills 374; DYING WITHOUT ISSUE; EN VENTRE SA MERE; SHELLEY'S CASE, RULE IN.

FAILURE OF JUSTICE. An expression used to denote the deprivation of a right or the loss of reparation for an injury as the result of the lack or inadequacy of a legal remedy. It is also colloquially applied to the miscarriage of justice which occurs when the result of a trial is so palpably wrong as to shock the moral sense of the community.

FAILURE OF RECORD. The neglect to produce the record after having pleaded it. When a defendant pleads a matter and offers to prove it by the record, and the plaintiff pleads *nulli record*, a day is given to the defendant to bring in the record; if he fails to do so, he is said to fail of his record, and, there being a failure of record the plaintiff is entitled to judgment. *Termes de la Ley*. See the form of entering it; 1 Wms. Saund. 92, n. 3.

FAILURE OF TITLE. The entire or partial loss of title suffered by a grantee or one who has contracted to purchase property, resulting from failure or inability of the grantor or vendor to pass a satisfactory title.

Defect or want of title. When discovered before the money has been paid, the purchaser may deduct an amount equal to the value of the land of which he is deprived. Anderson.

FAILURE OF TRUST. The lapse or inability to execute a trust, whether from the legal insufficiency or defective execution of the instrument creating it, the uncertainty of the object, or the lack of a person to take as *cestui que trust*. It is a doctrine of equity that a trust shall not fail for want of a trustee. See TRUST.

Defeat of a proposed trust from want of constituting facts or elements or of law to effectuate the object. Anderson.

FAINT PLEADER. A false, fraudulent, or collusive manner of pleading, to the deception of a third person.

FAIR. A public mart or place of buying or selling. 1 Bla. Com. 274. A greater species of market, recurring at more distant intervals.

Though etymologically signifying a market for buying and selling exhibited articles, it includes a place for the exhibition of agricultural and mechanical products. 48 Ohio St. 509.

A fair is usually attended by a greater concourse of people than a market, for the amusement of whom various exhibitions are gotten up. McCulloch, Comm. Dict.; Wharton, Dict.

A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious provision of

such things as the subject needeth, or the utterance of such things as we abound in above our own uses and occasions. Cowel; Cunningham, Law Dict. A privileged market.

A fair is a franchise which is obtained by a grant from the crown. 2d Inst. 220; 3 Mod. 123; 1 Ld. Raym. 341; 2 Saund. 172; 1 Rolle, Abr. 106; Tomlin; Cunningham, Law Dict.

In some of the United States fairs are recognized and regulated by statute.

FAIR ABRIDGMENT. See COPY-RIGHT.

FAIR CRITICISM. See CRITICISM.

FAIR KNOWLEDGE OR SKILL. A reasonable degree of knowledge or measure of skill. 95 Ind. 382.

FAIR-PLAY MEN. A local irregular tribunal which at one time existed in Pennsylvania.

About the year 1769 there was a tract of country in Pennsylvania, situate between Locoming creek and Pine creek, in which the Proprietaries prohibited the making of surveys, as it was doubtful whether it had or had not been ceded by the Indians. Although settlements were forbidden, yet adventurers settled themselves there. Being without the pale of ordinary authorities, the inhabitants annually elected a tribunal, in rotation, of three of their number, whom they denominated *fair-play men*, who had authority to decide all disputes as to boundaries. Their decisions were final, and enforced by the whole community *en masse*. Their decisions are said to have been just and equitable. 2 Smith, Pa. Laws 195; Sergeant, Land Laws 77.

FAIR PLEADER. The name of a writ given by the statute of Marlebridge, 52 Hen. III. c. 11. See BEAU PLEADER.

FAIR PREPONDERANCE. Of evidence, a preponderance which is apparent upon fair consideration. 29 Minn. 225; 63 Ia. 466; 54 Conn. 274; 86 Pa. 286.

FAIR SALE. A sale conducted with fairness as respects the rights of all parties affected. 24 Minn. 419. A sale at a price sufficient to warrant confirmation or approval when it is required. See SALE.

FAIR VALUE. In a contract by a city to purchase a waterworks plant at "fair and equitable value, the amount is to be determined not by capitalization of the earnings nor limited to the cost of reproducing the plant, but allowance should be made for the additional value created by connection with and supply of buildings, although the company did not own the connections. 10 C. C. A. 653; s. c. 62 Fed. Rep. 863.

A reasonable equivalent. That which a thing is reasonably worth. English.

FAIRLY. Reasonably; justly; equitably. It is not synonymous with "truly," and the latter should not be substituted for it in a commissioner's oath to take testimony fairly. Language may be "truly" yet unfairly reported, and it may be fairly reported, yet not in accordance with strict truth; 17 N. J. Eq. 284; but it may be deemed synonymous with "equitably"; 41 Ala. 40. "Fairly merchantable" conveys the idea of mediocrity in quality, or something just above it; 74 Me. 479.

FAIRWAY. The middle or deepest or most navigable channel. 202 U. S. 49. See THALWEG.

FAIT. Anything done. A deed lawfully executed. Comyns, Dig. Fait.

Femme de fait. A wife *de facto*.

FAIT ENROLLE. A deed enrolled, as a bargain and sale of freeholds. R. & L. Dict.; 1 Keb. 568.

FAIT JURIDIQUE. In French Law. A judicial fact. One of the factors or elements constitutive of an obligation.

FAITH. A term used in the law only in connection with the adjectives good and bad, as expressing the belief, intent, or purpose with which a transaction has been entered into or completed. See GOOD FAITH.

Credit; confidence; trust. Belief. Intent. In Scotch Law. An oath; a pledge. English.

FAITH AND CREDIT. See FOREIGN JUDGMENTS.

FAITHFUL. As respects temporal affairs, diligently, and without unnecessary delay; but it does not include the idea of impartiality. 16 N. J. L. 72.

FAITOURS. Idle persons; idle livers; vagabonds. *Termes de la Ley*; Cowel; Blount; Cunningham, Law Dict.

FAKIR. A term applied among the Mohammedans to a kind of religious ascetic or beggar, whose claim is that he "is in need of mercy, and poor in the sight of God, rather than in need of worldly assistance." Hughes, Dict. of Islam. Sometimes spelled *Faqeer* or *Fakeer*.

Faker or Fakir. One who represents the spurious as genuine. A street vendor. A Mohammedan ascetic, religious mendicant, or mendicant priest. Stand. Dict.

FALCARE (Lat.). To cut or mow down. *Falcare prata*, to cut or mow down grass in meadows *hayed* (laid in for hay), was a customary service for the lord by his inferior tenants. Kennett, Gloss.

Falcator. The tenant performing the service.

Falcatura. A day's mowing. *Falcatura una.* Once mowing the grass.

Falcatio. A mowing.

Falcata. That which was mowed. Kennett, Gloss.; Cowel; Jacobs.

FALCIDIA. In Spanish Law. The fourth portion of an inheritance, which legally belongs to the heir, and for the protection of which he has the right to reduce the legacies to three-fourth parts of the succession, in order to protect his interest.

FALCIDIAN LAW. In Roman Law. A statute or law restricting the right of disposing of property by will, enacted by the people during the reign of Augustus, on the proposition of Falcius, who was a tribune, in the year of Rome 714.

Its principal provision gave power to fathers of families to bequeath three-fourths of their property, but deprived them of the power to give away the other fourth, which was to descend to the heir. Inst. 2. 22. This fourth was termed the *Falcidian portion*.

A similar principle exists in Louisiana, and formerly prevailed in England. See LEGITIME.

As to the early history of testamentary law, see Maine, Ancient Law.

In some of the states the statutes authorizing bequests and devises to charitable corporations limit the amount which a testator may give, to a certain fraction of his estate.

FALDA. In Spanish Law. The slope or skirts of a hill. 2 Wall. 673.

FALDÆ CURSUS. In Old English Law. A fold-course or sheep-walk. Spel.; 2 Vent. 130.

FALDAGE. The privilege which anciently several lords reserved to themselves of setting up folds for sheep in any fields within their manors, the better to manure them, and this not only with their own but their tenants' sheep. Called, variously, *secta faldare*, *fold-course*, *free-fold*, *faldagii*. Cunningham, Law Dict.; Cowel; Spelman, Gloss.

FALDATA. In Old English Law. A flock or fold of sheep. Cowel.

FALDFEY. A compensation paid by some customary tenants that they might have liberty to fold their own sheep on their own land. Cunningham, Law Dict.; Cowel.

FALDISDORY. In Ecclesiastical Law. The bishop's seat or throne within the chancel.

FALDSOCA. Liberty or privilege of foldage. See FALDAGE.

FALDSTOOL. A folding seat similar to a camp stool, made either of wood or metal, sometimes covered with silk or other material. It was used by a bishop when

officiating in other than his own cathedral church. Encyc. Dic.

Or Foldstool. A place at the south side of the altar, at which the sovereign kneels at his coronation. R. & L. Dict. A folding stool. English.

FALD WORTH. A person reckoned old enough to become a member of the decennary, and so subject to the law of frank-pledge. Spel.

FALERÆ. In Old English Law. The tackle and furniture of a cart or wain. Blount.

FALESIA. In Old English Law. A hill or down by the sea-side. Co. Litt. 5 b; Domesday.

FALK-LAND. See FOLC-LAND.

FALL. In Scotch Law. To loose. To fall from a right is to loose or forfeit it. 1 Kames, Eq. 228.

FALL OF LAND. In English Law. A quantity of land six ells square.

FALLO. In Spanish Law. The final decree or judgment given in a lawsuit.

FALLOW LAND. Land ploughed, but not sown, and left uncultivated for a time, after successive crops; land left untilled for a year or more.

FALLUM. In Old English Law. An unexplained term for some particular kind of land.

FALSA DEMONSTRATIO. In Civil Law. False designation; erroneous description of a person or a thing in a written instrument. Inst 2, 20, 30.

FALSA DEMONSTRATIO NON NOCET. See MAXIMS; DEMONSTRATIO.

FALSA MONITA. In the Civil Law. Counterfeit money. Cod. 9, 24.

FALSARE. In Old English Law. To counterfeit. Bract. fol. 276 b. *Falcarious*, a counterfeiter.

FALSE. Applied to the intentional act of a responsible being, it implies a purpose to deceive. 63 Vt. 201; 18 U. C. C. P. 19. Somewhat more than erroneous, untrue, or illegal; distinctively characterizes a wrongful act known to involve an error or an untruth. Anderson; 13 Wend. 320-321.

FALSE ACTION. See FEIGNED ACTION.

FALSE CHARACTER. To personate the master or mistress of a servant or his or her representative and give a false character to the servant, is an offence punishable by fine, by 32 Geo. III. c. 56. See PERSONATE.

FALSE CLAIM. A claim made by a man for more than his due. An instance is given where the prior of Lancaster claimed a tenth part of the venison in *corio* as well as *in carne*, where he was entitled to that *in carne* only. Manw. For. Laws, cap. 35, num. 3.

FALSE DECRETALS. A collection of decretal letters and conciliar degrees (9th century), received as authoritative for more than 500 years, but since proved to be spurious or forged; the Pseudo-Isidorian Decretals. Stand. Dict.

FALSE FACT. The appearance or semblance of a fact; a fact existing only in statement, without any foundation in truth.

FALSE AND FRAUDULENT. In accepted legal meaning, the phrase stands for actual intent to deceive. 239 U. S. 317.

FALSE IMPRISONMENT. Any unlawful restraint of a man's liberty, whether in a place made use of for imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever. 1 Bish. Cr. Law § 553; Webb's Poll. Torts 259; 8 N. H. 550; 7 Humph. 43; 12 Ark. 43; 7 Q. B. 742; 5 Vt. 588; 3 Blackf. 46; 9 Johns. 117; 1 A. K.

Marsh 345; 86 Fed. Rep. 252; 92 Mich. 498; 78 Hun. 238. See 35 W. Va. 588.

The total, or substantially total, restraint of a man's freedom of locomotion, without authority of law, and against his will. Big. Torts 113. Any general restraint is sufficient; there need not be actual contact of the person. Any demonstration of physical violence, which apparently can be avoided only by submission, constitutes imprisonment. Submission, in such case, is not consent; *id.* 114; but the detention must be such as to cause escape in any direction to amount to a breach of the restraint.

Arresting the wrong person under a warrant constitutes false imprisonment; F. Moo. 457; so if there is a misnomer in the warrant, even though the person actually intended was arrested; 4 Wend. 455; and if the officer makes the arrest out of his bailiwick, or detains the person unduly; 4 B. & C. 596; an arrest under a void writ constitutes a false imprisonment; 5 Hill 242. A writ may be void because defective in language, because the court had no jurisdiction of the proceedings, or because the court had no jurisdiction to issue the writ; Big. Torts 122; 84 A. & E. Corp. Cas. 431; 67 N. W. Rep. (Minn.) 989. The clerk of the court who issues a defective writ, or one not authorized by the court, is liable; and so is a judge who orders a writ which he had no right to issue, or where he had no jurisdiction. Both the attorney and his client may be liable if the former ordered the arrest, and even when the arrest has been ordered by a judge, *i. e.* in a case where they participate in making the arrest; Big. Torts 128; or where the writ was issued by the misconduct of the attorney; *id.* 129. If the writ be voidable it must be set aside before an action for false imprisonment will lie, but otherwise if it be void; *id.* 131.

Malice is not an element of false imprisonment; 66 Hun 230; 35 W. Va. 588; except so far as it affects the measure of damages; 35 Neb. 898.

In order to be restored to liberty, the remedy is, by writ of *habeas corpus*. An action of trespass *vi et armis* lies. To punish the wrong done to the public by the false imprisonment of an individual, the offender may be indicted; 4 Bla. Com. 218; 2 Burr. 993. See Bacon, Abr. *Trespass* (D. 3); 9 N. H. 491; 6 Ala. n. s. 778; 2 Harr. Del. 538; 3 Tex. 282; 10 Cush. 375.

One cannot maintain an action for false imprisonment where he is arrested by a proper officer, under a warrant lawful on its face, and issued by proper authority; 97 Ala. 626; 94 Mich. 1. Justification is not available as a defence unless pleaded; 2 Misc. Rep. 127.

FALSE JUDGMENT. The name of a writ which lies when a false judgment has been given in the county court, court baron, or other courts not of record. Fitzh. N. B. 17, 18.

FALSE LATIN. When legal proceedings were conducted in Latin, if a word were significant though not good Latin, yet an indictment, declaration, or fine should not be made void by it; but if the word were not Latin, nor allowed by the law, and it were in a material point, it made the whole vicious. 5 Coke 121; 2 Nels. 830. Wharton.

FALSE LIGHTS AND SIGNALS. Lights and signals falsely and maliciously displayed for the purpose of bringing a vessel into danger. Exhibiting false lights or signals, with intent to bring any ship into danger, is felony, punishable, in England, with penal servitude for life; stat. 24 & 25 Vict. c. 97, § 47; and in the United States by imprisonment. U. S. Rev. Stat. § 5358. See COLLISION.

FALSE NEWS. Spreading false news, whereby discord may grow between the queen of England and her people, or the great men of the realm, or which may produce other mischiefs, still seems to be a misdemeanor under Stat. 3 Edw. I. c. 34; Steph. Cr. Dig. § 95.

FALSE OATH. See PERJURY.

FALSE PERSONATION. See PERSONATION.

FALSE PLEA. See SHAM PLEA.

FALSE PRETENCES. In Criminal Law. False representations and statements, made with a fraudulent design to obtain "money, goods, wares, and merchandise," with intent to cheat. 2 Bouvier, Inst. n. 2908.

A representation of some fact or circumstance calculated to mislead, which is not true. 19 Pick. 184.

Such a fraudulent representation of fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value. It may relate to quality, quantity, the nature or other incident of the article offered for sale, whereby the purchaser buying it, is defrauded; 126 Ill. 139.

The pretence must relate to past events. Any representation or assurance in relation to a future transaction may be a promise, or covenant, or warranty, but cannot amount to a statutory false pretence; 19 Pick. 185; 3 Term 93; but one will be guilty if there are false representations of a past or existing fact, although a promise be also a part of the inducement to the person defrauded to part with his property; 90 Ga. 437. It must be such as to impose upon a person of ordinary strength of mind; 3 Hawks 620; 4 Pick. 178; and this will doubtless be sufficient; 11 Wend. 557; Clark, Cr. L. 278. But, although it may be difficult to restrain false pretences to such as an ordinarily prudent man may avoid, yet it is not every absurd or irrational pretence which will be sufficient. See 14 Ill. 348; 17 Me. 211; 1 Den. Cr. Cas. 592; Russ. & R. 127. It is not necessary that all the pretences should be false, if one of them, *per se*, is sufficient to constitute the offence; 14 Wend. 547. And although other circumstances may have induced the credit, or the delivery of the property, yet it will be sufficient if the false pretences had such an influence that without them the credit would not have been given or the property delivered; 11 Wend. 557; 14 *id.* 547. The false pretences must have been used before the contract was completed; 13 Wend. 311. Extra-judicial admissions and statements of the defendant alone as to the falsity of the statement are not sufficient to warrant a conviction, as the falsity is in the nature of a *corpus delicti* which requires other proof; 40 Pac. Rep. (Cal.) 440.

The question is modified in the different states by the wording of the statutes, which vary from each other somewhat. It may be laid down as the general rule of the interpretation of the words "by any false pretence," which are in the statutes, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offence within the acts. See 1 Den. Cr. Cas. 559; 8 C. & K. 98; 22 Pa. 253; 100 Cal. 352.

There must be an intent to cheat or defraud some person; Russ. & R. 317; 98 N. C. 733; 112 Mo. 585. This may be inferred from a false representation; 13 Wend. 87. The intent is all that is requisite: it is not necessary that the party defrauded should sustain any loss; 11 Wend. 181; 1 C. & M. 516, 537; 4 Pick. 177. The offence is not proven where the representations were not relied on; 98 Cal. 661. See, generally, 2 Bish. Cr. Law § 409; 19 Pick. 179; 24 Me. 77; 7 Cox, Cr. Cas. 131; 16 Am. Law Reg. n. s. 321; 126 Ill. 139; 183 Ind. 297; 137 N. Y. 530; DECET; FRAUD.

FALSE AND PRETENDED PROPECIES. When made with intent to disturb the public peace they are punishable under 33 Hen. VIII. c. 14, 3 & 4 Edw. VI. c. 15, and 5 Eliz. c. 15. These statutes, although unrepealed, are not likely to be enforced.

FALSE REPRESENTATION. A representation which is untrue, wilfully

made to deceive another to his injury. See DECEIT; MISREPRESENTATION; FRAUD. See FALSE PRETENCES.

FALSE RETURN. A return made by the sheriff, or other ministerial officer, to a writ, in which is stated a fact contrary to the truth, and injurious to one of the parties or some one having an interest in it.

In this case the officer is liable for damages to the party injured; 2 Esp. 475. When the sheriff has levied on property sufficient to satisfy an execution, and yet return it unsatisfied, he is *prima facie* liable to the plaintiff for the full amount of the judgment, and he must show such facts as will exonerate or excuse him; 74 N. Y. 895. In some states, every return of process, untrue in fact, is held to expose the sheriff to all the penalties of a false return; 74 N. C. 479; 81 id. 568. But when the actual damage is the result of the negligence of the party complaining, the sheriff will only be liable for nominal damages; 93 Mass. 211; 103 id. 507; 6 Nev. 88; 10 Hun 531. See RETURN OF WRITS.

FALSE SWEARING. In English Law. The misdemeanor committed by a person who swears falsely before any person authorized to administer an oath upon a matter of public concern, under such circumstances that the false swearing would have amounted to perjury if committed in a judicial proceeding; as where a person makes a false affidavit under the Bills of Sale Acts. Steph. Cr. Dig. 84.

Swearing to a statement with knowledge of its falsity, as, by an assured. Anderson; 6 Ind. 139.

A verified false assertion which deceives, or is fitted and likely to deceive, the one to whom it is made. *Id.*; 67 N. Y. 292.

Also, to use such profane language as the law forbids. Profane swearing is generally punished by statutes. *Id.*

FALSE TOKEN. A false document or sign of the existence of a fact,—in general used for the purpose of fraud. See 3 Term 98; 2 Starkie, Ev. 563; 1 Bish. Cr. L. 585; 13 Wend. 811; 14 id. 570; 9 id. 182.

FALSE VERDICT. One obviously opposed to the principles of right and justice.

The false verdict of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and, therefore, exemplarily punished by attain, but by 6 Geo. IV. c. 50 the writ of attain was wholly abolished and superseded by the practice of setting aside the first verdict and granting new trials; 3 Bla. Com. 402.

FALSE WEIGHTS AND MEASURES. Weights and measures which do not conform to those established by law.

In the laws of King Edgar, nearly a century before the Conquest, we find an injunction that one measure kept at Winchester should be observed throughout the realm. In England the prerogative of fixing the standard anciently vested in the crown; in Normandy in the duke. "The regulation of weights and measures cannot, however, with propriety be referred to the king's prerogative; for from Magna Charta to the present time there are about twenty acts of parliament to fix and establish the standard and uniformity of weights and measures." 1 Bla. Com. 274, n. In a case before the Court of King's Bench it was held that although it was the custom of the town to sell eighteen ounces in a pound of butter, yet the jury of the court-leet were not justified in seizing the butter of a person who sold pounds less than that, but more than sixteen ounces each, the statutory weight; 3 T. R. 271; and it has been determined that no practice or usage could contravene the statutes 22 Car. II. c. 8 and 22 & 23 Car. II. c. 12, which enact that if any person shall either buy or sell salt or grain by any other measure than the Winchester bushel, he shall forfeit forty shillings and also the value of the grain or salt so sold or bought; one-half to the poor, the other to the informer. 4 T. R. 759; 5 id. 353. In this country the power to fix the standard of weights and measures is in congress; Const. U. S. art. I, s. 8. See WEIGHTS; MEASURES.

FALSEDAD. In Spanish Law. Falseness; deviation from the truth. *Las Partidas*, pt. 3, tit. 26, l. 1.

FALSEHOOD. Any untrue assertion or proposition. A wilful act or declaration contrary to the truth. See 51 N. H. 207.

It has been said that the use of the term falsehood does not always and necessarily imply a lie or

wilful untruth, but is generally used in the second sense here given. It is committed either by the wilful act of the party, or by dissimulation, or by words. It is wilful, for example, when the owner of a thing sells it twice, by different contracts, to different individuals, unknown to them; for in this the seller must wilfully declare the thing is his own when he knows that it is not so. It is committed by dissimulation when a creditor, having an understanding with his former debtor, sells the land of the latter, although he has been paid the debt which was due to him. Falsehood by word is committed when a witness swears to what he knows not to be true.

Crabbe thus distinguishes between falsehood and untruth: "The latter is an untruth saying, and may be unintentional, in which case it reflects no disgrace on the agent. A falsehood and a lie are intentional false sayings, differing only in degree of the guilt of the offender; falsehood being not always for the express purpose of deceiving, but a lie always for the worst of purposes." See ROSE, Cr. Ev. 382; DECEIT; FRAUD; MISREPRESENTATION.

FALSELY. Under a statute making it a misdemeanor "wilfully to make a false answer," an indictment charging that one "falsely and fraudulently answered," is bad for omitting "wilfully"; 1 Den. C. C. 157.

In an indictment for forgery the averment that defendant swore falsely was held insufficient, without the additional words "corruptly and wilfully"; Cro. Eliz. 201; and "falsely and corruptly" were held insufficient without "wilfully"; id. 143; and falsely and maliciously were held insufficient without "wilfully and corruptly," with a *quere* whether one of the last two words would suffice without the other; 7 D. & R. 665; but in Cox's case, Leach 69, it was held that wilfully was not required at common law but was necessary under stat. 5 Eliz. c. 9. An indictment for perjury was held good without the averment that the defendant did falsely, corruptly, and wilfully swear, etc., and the court said: "The words falsely, corruptly, and wilfully . . . are mere expletives to swell the sentence, in the language of Lord Hardwicke, 1 Atk. 50; "3 Yeates 407, 413. In obtaining money under false pretences it is not enough to charge that the defendant falsely pretended by certain pretences set forth, without specially averring the falsity of the pretences; 2 M. & S. 379.

The use of the word falsely in a statute (against counterfeiting) implies that there must be a fraudulent or criminal intent in the act; 5 McLean 208, 211. See also 4 B. & C. 329; 6 Com. Dig. 58; Stark. Cr. Pl. 86.

In an action for libel, "wrongfully and falsely published" will, it seems, amount to maliciously published, but it is better to add falsely and maliciously; 1 Chit. Pl. 491 and note (x); the word falsely must have great stress laid on it in an action for slander; 2 Wils. 300, 301. Case will lie for falsely and maliciously suing out a commission in bankruptcy; 2 Wils. 145; or for falsely, maliciously, and without probable cause procuring a search warrant; 1 D. & R. 97. In an action on the case for conspiracy or for malicious prosecution the allegation that the prosecution was false and malicious is not sufficient without adding probable cause; 2 Munf. 10; *contra* as to conspiracy; 1 Binn. 172. See FALSE SWEARING.

FALSI CRIMEN. A fraudulent subornation or concealment of truth.

FALSIFICATION. In Equity Practice. The showing an item in the debit of an account to be either wholly false or in part erroneous. 1 Sto. Eq. Jur. § 525.

FALSIFY. In Chancery Practice. To prove that an item in an account before the court as complete, which is inserted to the debit of the person falsifying, should have been omitted.

When a bill to open an account has been filed, the plaintiff is sometimes allowed to surcharge and falsify such account; and if anything has been inserted that is a wrong charge, he is at liberty to show it; and that is a falsification. 2 Ves. 565; 11 Wheat. 237. See SURCHARGE.

In Criminal Law. To alter or make false.

The alteration or making false of a record is punishable at common law or by statute in the states, and, if of records of the United States courts, by act of congress of

April 30, 1790; U. S. Rev. Stat. § 5394.

In Practice. To prove a thing to be false. Co. Litt. 104 b.

FALSIFYING JUDGMENTS. A term sometimes used for reversing judgments. See 4 Steph. Com. 553.

FALSIFYING A RECORD. A crime against public justice punishable in England by 24 & 25 Vict. c. 98, and by statute in the several states and District of Columbia.

Changing a record by alterations, erasures, interlineations or otherwise. See ALTERATION.

FALSING. In Scotch Law. Making or proving false. Bell, Dict.

FALSING OF DOOMS. In Scotch Law. Protesting against a sentence and taking an appeal to a higher tribunal. Bell, Dict.

An action to set aside a decree. Skene.

FALSO RETORNO BREVIIUM (L. Lat.). In Old English Law. The name of a writ which might have been sued out against a sheriff for falsely returning writs. Cunningham, Law Dict.

FALSONARIUS. A person guilty of forgery; a counterfeiter.

FALSUS. Deceiving; fraudulent; erroneous. In the first two senses it is applied to persons in respect to their acts and conduct, as well as to things; and in the third sense it is applied to persons on the question of personal identity.

FAMA. Rumor; report; fame.

FAMACIDE. A killer of reputation; a slanderer. Black, L. Dict.

FAMILIA (Lat.). In Roman Law. A family.

This word had four different acceptations in the Roman law. In the first and most restricted sense it designated the *pater-familias*,—his wife, his children, and other descendants subject to his paternal power. In the second and more enlarged sense it comprehended all the *agnates*,—that is to say, all the different families who would all be subject to the paternal authority of a common chief if he were still living. Here it has the same meaning as *agnatio*. In a third acceptation it comprises the slaves and those who are in *manipio* of the chief,—although considered only as things, and without any tie of relationship. And, lastly, it signifies the whole fortune or patrimony of the chief. See PATER-FAMILIAS; 1 Ortolan 28.

In Old English Law. A household. All the servants belonging to one master. Du Cange; Cowel. A sufficient quantity of land to maintain one family. The same quantity of land is called sometimes *mansa* (a manse), *familia*, *carucata*. Du Cange; Cunningham, Law Dict.; Cowel; Creasy, Church Hist. See MANCIO.

FAMILIÆ EMPTOR. In the Roman Law. An intermediate person who purchased the aggregate inheritance when sold *per aes et libram*, in the progress of making a will under the twelve tables. The purchaser was merely a man of straw, transmitting the inheritance to the *hæres* proper. Brown.

FAMILIÆ ERCISCUNDÆ (Lat.). In Civil Law. An action which lay for any of the co-heirs for the division of what fell to them by inheritance. Stair, Inst. l. 1, tit. 7, § 15.

FAMILIARES REGIS. Persons of the king's household. The ancient titles of the six clerks of chancery in England. 2 Reeve, Hist. Eng. Law 249, 251.

FAMILY. Father, mother, and children. All the individuals who live under the authority of another, including the servants of the family. 2 Fed. Rep. 432. All the relations who descend from a common ancestor or who spring from a common root. La. Code, art. 3522, no. 16; 9 Ves. 323. The primary meaning of a testator's "family" in a will is children; 3 Ch. Div. 672.

In common parlance it consists of those who live under the same roof with the *pater familias*; those who form his fire-

side. But when they branch out and become the heads of new establishments, they cease to be part of the father's family; 4 Term 797; 154 Mass. 299.

While usually importing a household, including parents, children, and servants, it is not necessary, to sustain the family relation between parents and children, that they should reside together; 21 Or. 230.

The term as used in connection with homestead and exemption laws is important. See a full discussion of the cases in *Thomps. Homest. & Ex.* It is said to mean, in the Texas constitution, "every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object—the promotion of their mutual interests and social happiness." 31 Tex. 680. "A family is the collective body of persons who live in one house, under one head or manager." 52 Ia. 431; 53 *id.* 706; s. c. 36 Am. Rep. 248 (and note).

The meaning of the term is usually a matter of statutory or constitutional interpretation. A widower with whom lived his son and son's wife and a household servant is the head of a family; 52 Ia. 431; but a widower keeping house with a female relative whom he is not bound to support has no family; 48 Tex. 517. An unmarried woman keeping house and taking care of two children of a deceased sister is the head of a family; 53 Ia. 706. A widower without children, who takes his mother to live with him, is the head of a family; 11 Ia. 104. A widower and grown-up daughter constitute a family; 14 How. Pr. 521; or merely a widower; 95 Cal. 397. An unmarried man who succeeds his father in taking care of his minor sisters may be deemed the head of a family; 27 Ark. 658. So of an unmarried man supporting his widowed sister and her small children; 20 Mo. 75; and of an unmarried man whose widowed sister lived with him and kept his house; per Dillon, J.; 16 N. B. R. 382; s. c. Fed. Cas. No. 733. So of an unmarried woman with her illegitimate child; 47 Cal. 73. But not of a man who has no family; 9 Ala. 981; 10 Allen 425. A single person in the actual occupancy of a homestead, although not the head of a family, is entitled to a homestead exemption as a family; 60 N. W. Rep. (S. D.) 159. A husband and wife are a family, as to exempt property; 14 How. Pr. 519; so as to homestead; 21 Ill. 45. But having a wife and keeping house is not marrying and having a family; 11 Pa. 159. See *Thomp. Homest. & Ex.* §§ 44-63.

In the construction of wills, the word family, when applied to personal property, is synonymous with *kindred or relations*. It may, nevertheless, be confined to particular relations by the context of the will, or may be enlarged by it, so that the expression may in some cases mean children, or next of kin, and in others may even include relations by marriage; *Schoul. Wills* 537. The primary meaning of the word family is children, and it must be so construed in all cases unless the context shows that it was used in a different sense; 85 Va. 509. It has been more commonly held that parents are not included in the term; 8 Ves. 604; 2 Redf. Wills 73; 1 *Rop. Leg.* 115; 2 Ves. 110; 5 *Moule & S.* 126; 11 *Paige* 169; it may include a wife as well as children; 8 Allen 339. A statute providing that real estate shall not go "out of the family" restricts the descent to the issue of the ancestor; 3 N. J. L. 481. See *HEAN OF A FAMILY*.

FAMILY ARRANGEMENT. An agreement made between a father and his son, or children, or between brothers, to dispose of property in a different manner to that which would otherwise take place.

In these cases, frequently, the mere relation of the parties will give effect to bargains otherwise without adequate consideration. 1 *Chitty, Pr.* 67; 1 *Turn. & R.* 13; 23 S. W. Rep. (Tenn.) 72; 50 Mo. App. 1.

Such an arrangement may be upheld, although there were no rights in dispute at the time of making it, and the court

will not be disposed to scan with much nicety the quantum of the consideration; L. R. 2 Ch. 294. A family arrangement is not by itself a valuable consideration; Brett, L. C. in *Mod. Eq.* 294. Wherever doubts and disputes have arisen with regard to the rights of different members of a family (especially when relating to legitimacy) and fair compromises have been entered into to preserve harmony, those arrangements have been sustained, albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers; Sugden, L. C., in 2 Dr. & War. 503. The impossibility of estimating money considerations in family arrangements has led to their exemption from the rules which affect other arrangements; 7 Cl. & F. 280.

In ordinary cases a father's dealings with his child who has just come of age are open to suspicion, and so are dealings with a reversioner, but if these are in the nature of a family arrangement, the court will regard them, not with suspicion, but with favor; 2 *Giff.* 232. It is not essential that the son should have independent advice, nor will inquiry be made as to how far the father's influence was exerted. At the same time any unusual benefit secured to the father will be scrutinized and perhaps expunged; 41 Ch. D. 200; and only the usual provisions should be inserted. It seems that resettlements under a family arrangement will justify the execution of a power under which the donee retains some benefit, which would otherwise be a fraud on the power. See 1 *Swans.* 129. An agreement between the children of a testator that the shares of the children shall be considered as vesting at the death of the testator divested of the survivorship clause contained in the will, will be upheld in equity; 172 Pa. 104.

Evidence of circumstances to show a family arrangement at the execution of deeds is admissible, and a deed otherwise invalid would be good evidence if it formed a component part of such arrangement; 9 S. & R. 268. See **FAMILY MEETING**.

FAMILY BIBLE. A Bible containing a record of the births, marriages, and deaths of the members of a family.

An entry by a father, made in a Bible, stating that Peter, his eldest son, was born in lawful wedlock, of Maria, his wife, at a time specified, is evidence to prove the legitimacy of Peter; 4 *Campb.* 401. But the entry in order to be evidence must be an original entry; and, when it is not so, the loss of the original must be proved before the copy can be received; 6 S. & R. 135. See 10 *Watts* 82.

A family Bible, containing entries of family incidents, where the parties who made the entries are dead, will be received in evidence; *Whart. Ev.* § 219; *Tayl. Ev.* 572; 1 *Greenl. Ev.* § 104; L. R. 1 Ex. 255; 80 Ia. 301; 53 Ga. 535. See 11 Cl. & F. 85; 89 Conn. 503. In order to make an entry evidence as to the birth or death of a child, it must be shown that the entry is in the handwriting of a parent; 30 Ia. 301. Entries in a family Bible or Testament are admissible in evidence even without proof that they have been made by a parent or relative; 52 Md. 709.

FAMILY EXPENSES. It has been held that the words "expenses of the family" mean such expenses as were incurred on account of and to be used in the family, and that what is included in the term must be determined by the circumstances of each case. 12 A. & E. Ency. 2nd ed., 878; 11 Ill. App. 627. Several of the United States statutes make the wife's separate property liable for debts incurred for the expenses of the family. She has been held personally liable. *Id.*; 11 *Oregon* 72. A diamond shirt stud procured for personal use and actually used and worn by a husband was held to be a family expense. *Id.*; 103 Iowa 695. Provisions, clothing, etc., included in family expenses. *Id.*; 18 Iowa 83. Rent of a house, sewing machine, etc. are family expenses. But a reaping machine was held not a family

expense. The court said: "The expenses of a family are something quite different from whatever may contribute, either remotely or directly, to the support of the family. The merchant purchases goods on credit, and by selling them at a profit supports his family; or a farmer purchases cattle on credit, and by selling them at a profit contributes materially to the comfort and support of his family. But the indebtedness so contracted does not, we think, become a family expense." *Id.*; 49 Iowa 536.

FAMILY MEETING (called, also, *family council*).

In Louisiana. Meetings of at least five relations of minors or other persons on whose interest they are called upon to deliberate, or, in default of relations, then of the friends of such minors or other persons. See 45 La. Ann. 857.

The appointment of the members of the family meeting is made by the judge. The relations or friends must be selected from among those domiciliated in the parish in which the meeting is held: the relations are selected according to their proximity, beginning with the nearest. The relation is preferred to the connection in the same degree; and among relations of the same degree the eldest is preferred. The undertutor must also be present. 6 Mart. La. N. S. 455.

The family meeting is held before a justice of the peace, or notary public, appointed by the judge for the purpose. It is called for a fixed day and hour, by citations delivered at least three days before the day appointed for that purpose.

The members of the family meeting, before commencing their deliberations, take an oath before the officer before whom the meeting is held, to give their advice according to the best of their knowledge touching the interests of the person respecting whom they are called upon to deliberate. The officer before whom the family meeting is held must make a particular procès-verbal of the deliberations, cause the members of the family meeting to sign it, if they know how to sign, and must sign it himself, and deliver a copy to the parties that they may have it homologated.

The sale of minor's property without the advice of a family meeting is null and void as against the purchaser; 45 La. Ann. 857.

FAMILY PHYSICIAN. A physician who regularly attends and is consulted by the members of the family as their medical adviser; but he need not attend in all cases or be consulted by all the members of the family. 17 Minn. 519; 58 Mo. 424.

FAMILY USE. That use ordinarily made by and suitable for the members of a household whether as individuals or collectively. 52 Cal. 120. The supply of water in a municipal corporation for family use includes the supply of gaols, hospitals, almshouses, schools, and other municipal institutions; *id.* See **FAMILY**; **GROCERIES**.

FAMOSUS (Lat.). Defamatory; slanderous; scandalous. Used in civil and old English law to express that which affected injuriously the character or reputation.

FAMOSUS LIBELLUS (Lat.). Among the civilians these words signified that species of *injuria* which corresponds nearly to libel or slander.

FAN. See **FORCING FAN**.

FANAL. In French Law. A small lighthouse. A lamp or apparatus in such lighthouse. A lantern placed high up on the stern of a vessel.

FANATIC. A religious enthusiast; a bigot; a person entertaining wild and extravagant notions, or affected by zeal or enthusiasm, especially upon religious subjects.

The word was formerly defined in English law as a person pretending to be inspired, and was to be a term applied to "Quakers, Anabaptists, and all other sectaries, and factious dissenters from the Church of England." *Jac. L. Dict.* See *Stat.* 13 Car. II. c. 6.

FANECA. In Spanish Law. A measure of land, which is not the same in every province. *Diccionario de la Acad.*; 2 White, Recop. 49. In Spanish America, the fanega consisted of six thousand four hundred square varas, or yards. 2 White, Recop. 138.

FARANDMAN. In Scotch Law. A traveller; a merchant-stranger. Skene.

FARDEL. The fourth part of a yard land. Spelman, Gloss. According to others the eighth part. Noy, Complete Lawye: 57; Cowel. See Cunningham, Law Dict.

FARDELLA. In Old English Law. A bundle; a pack; a fardel. Rieta, lib. 1, c. 22, § 10.

FARDING-DEAL. The fourth part of an acre of land. Spelm. Gloss.

FARE. A voyage or passage. The money paid for a voyage or passage. The latter is the modern signification. See 26 N. Y. 536; TICKET.

In case of a water company it means the tax or compensation which the company may charge for furnishing a supply of water. 111 N. C. 615. See RATES.

FARINAGIUM. A mill. Spelm. A toll of the grist of meal or flour. Jac. L. Dict.

FARLEY or FARLEU. Money paid in lieu of a heriot (*q. v.*). Applied also to the best chattel as distinguished from heriot, — the best beast. Cowel.

FARLINGARII. Whoremongers; adulterers.

FARM. A certain amount of provision reserved as the rent of a messuage. Spelman, Gloss.

Rent generally which is reserved on a lease; when it was to be paid in money, it was called *blanche firme*. Spelman, Gloss.; 2 Bla. Com. 42.

A term. A lease of lands; a leasehold interest. 2 Sharsw. Bla. Com. 17; 1 Reeve Hist. Eng. Law 301, n.; 2 Chit. Pl. 879, n. e. The land itself, let to farm or rent. 2 Bla. Com. 388.

A portion of land used for agricultural purposes, either wholly or in part. 18 Pick. 553; 2 Binn. 238.

A body of land, usually under one ownership, devoted to agriculture; either to the raising of crops, or pasturage, or both. It is not understood to have any necessary relation to, or to be circumscribed by, political subdivisions. A farm may consist of any number of acres, of one quarter section or less, or many quarter sections; of one field, or many fields; may lie in one township and county, or in more than one; 32 N. E. Rep. (Ill.) 693. See 47 How. Pr. 446.

It is usually the chief message in a village or town whereto belongs a great demesne of all sorts. Cowel; Cunningham, Law Dict.; *Termes de la Ley*. A large tract or portion of land taken by a lease under a yearly rent payable by the tenant. Tomlin. Law Dict.

From this latter sense is derived its common modern signification of a large tract used for cultivation or other purposes, as raising stock, whether hired or owned by the occupant, including a messuage with out-buildings, gardens, orchard, yard, etc. Plowd. 186; Touchst. 18.

In American law, the word has almost exclusively this latter meaning of a portion of land used for agricultural purposes, either wholly or in part. 3 Binn. 238; 18 Pick. 553; 6 Metc. 529; 2 Hill R. P. 338.

By the conveyance of a farm will pass a messuage, arable land, meadow, pasture, wood, etc., belonging to or used with it. Co. Litt. 5 a; Shepp. Touchst. 93; 4 Cruise, Dig. 321; Plowd. 167.

In a will, the word farm may pass a freehold, if it appear that such was the intention of the testator; 6 Term 345; 9 East 443. See 6 East 604, n.; 8 id. 339.

FARM LET. Technical words in a lease creating a term for years. Co. Litt. 45 b; 2 Mod. 250; 1 Washb. R. Pr. Index, *Lease*.

FARM OUT. To rent for a certain term. The collection of the revenue among the Romans was farmed out to persons called *publicani*. The same system existed

in France before the revolution of 1789; and in England the excise taxes were farmed out, and thereby their evils were greatly aggravated. The farming of the excise was abolished in Scotland by the union, having been before that time abandoned in England. In all these cases the custom gave rise to great abuse and oppression of the people, and in France most of the farmers-general, as they were called, perished on the scaffold. See Int. Cyc. titles Farmers-general, Excise, *Publicani*.

FARMER. The lessee of a farm. It is said that every lessee for life or years, although it be but of a small house and land, is called *farmer*. This word implies no mystery, except it be that of husbandman. Cunn. Law Dict; Cowel; 3 Sharsw. Bla. Com. 318.

In common parlance, and as a term of description in a deed, farmer means one who cultivates a farm, whether he owns it or not. There may also be a farmer of the revenue or of other personal property as well as lands. Plowd. 195; Cunn. Law Dict.

FARMER GENERAL. See FARM OUT.

FARMERS' ALLIANCE. A co-operative association of agriculturists formed for the purchase of supplies and sale of farm products without the intervention of traders, aiming in some cases also at social and educational elevation, and favoring political schemes conceived in the interest of the farmer. Stand. Dict. See GRANGE.

FARO. A gambling game of cards in which checks, commonly known as "chips," are used to represent money, which is staked upon the order in which the cards turn up as dealt. The players all play against the dealer, who is termed the banker. See GAMING. See KENO or FARO BANK.

FARRAGO LIBELLI (Lat.). An ill-composed book containing a collection of miscellaneous subjects not properly associated or scientifically arranged. Whart.

FARRIER. One who takes upon himself the public employment of shoeing horses.

Like an innkeeper, a common carrier, and other persons who assume a *public* employment, a farrier is bound to serve the public as far as his employment goes, and an action lies against him for refusing, when a horse is brought to him at a reasonable time for such purpose, if he refuses; Oliph. Horses 131; and he is liable for the unskilfulness of himself or servant in performing such work; 1 Bla. Com. 431; but not for the malicious act of the servant in purposely driving a nail into the foot of the horse with the intention of laming him; 2 Salk. 440; Hanover, Horses 215.

FARTHING. In English Law. The one-fourth part of a penny (*q. v.*).

FARTHING OF GOLD. A quarter-noble, (a noble being worth six shillings and eightpence). Byrne. 9 Hen V. c. 7.

FARTHING OF LAND. Sometimes written *farundel* or *farthingdell*. See FARDING-DEAL.

FARVAND. Standing by itself, this word signifies "passage by sea or water." In charter-parties, it means voyage or passage by water. 18 C. B. 880.

FARYNDON INN. The ancient designation of Serjeants' Inn, Chancery Lane, London. See INNS OF COURT.

FAS (Lat.). Right; justice. Calvinus, Lex.; 3 Bla. Com. 2. See PER FAS ET NEFAS.

FASHIONS. See PERISHABLE GOODS.

FASIUS. A faggot of wood.

FAST. "Fast" is defined as moving rapidly; quick in motion; rapid; swift. 50 S. W. 239.

FAST BILL OF EXCEPTIONS. One which may be taken in Georgia in injunction cases and the like, in time and manner to secure speedy hearing. It is certified within twenty days after the decision. 66 Ga. 353.

FAST-DAY. A day of penitential observance and religious abstinence. As to counting it in legal proceedings, see 1 Chit. Archb. Pr., 12th ed. 160; HOLIDAY.

Days of fasting and humiliation, appointed to be kept by public authority. There are fixed days of fasting enjoined by the English church, at certain times in the year, mentioned in ancient statutes, particularly the 2nd and 3rd ed., 6, c. 19. Other days of fasting, which are not fixed, are occasionally appointed by the king's proclamation. Tomlin.

FAST ESTATE. Real property. A term sometimes used in wills. 6 Johns. 185; 9 N. Y. 502.

FASTERMANNES. Securities. Bondsmen. Spelman, Gloss. Men *fast* bound as sureties of the peace for each other under the Saxon law. Encyc. Lond.

FASTI. See DIES FASTI.

FAT CATTLE. See PERISHABLE GOODS; PROVISIONS.

FATHER. He by whom a child is begotten.

In England, by 43 Eliz. c. 2, the father and mother, grandfather and grandmother of poor, old, blind, and impotent persons are obliged to furnish them with necessaries, if of sufficient ability. Statutes of the same tenor have been enacted in some states. The English statute may be considered as a part of the common law of the United States. In some states the failure to support, or the abandonment of, a minor child is a penal offence. Except under this statute, there appears to be no civil obligation on a parent to support his minor child; 11 C. B. 452; L. R. 3 Q. B. 559; or to pay his debts; 6 M. & W. 482. To the same effect in the United States; 110 Ind. 74; 88 N. J. L. 383; 13 Barb. 502; but the contrary view is held in many cases; 79 Ia. 151; Tiffany, Pers. & Dom. Rel. 233, and cases cited; see 2 Kent 190. Where a parent, though able, neglects to provide the necessities of life and necessary medical attendance for a minor child, and thereby causes its death, he is guilty of manslaughter, and, if wilfully done, of murder; Tiff. Pers. & Dom. Rel. 232; Clark, Cr. L. 177. A widow is likewise bound to maintain her minor children; 56 N. Y. 435; 10 Ia. App. 344; *contra*, 76 Ala. 534; 64 Ill. 383. A child is not bound at common law to maintain his parents; 70 Ind. 239; 45 N. H. 358; 32 Conn. 142; but in many states a liability to support indigent parents is imposed by statute, and in such case a third person may recover from the child for necessities furnished to such parent; 88 Mich. 91; 64 N. W. Rep. (S. D.) 1123. A parent is not liable for his child's torts, unless committed by the child as his agent; 63 Ill. 312; 45 Kan. 423; 3 Fed. Rep. 862; nor is he criminally liable for his child's acts; Tiffany, Pers. & Dom. Rel. 241. See also 66 Cal. 368; 60 Wis. 511.

If the father be without means to maintain and educate his children according to their future expectations in life, courts of equity will make an allowance for these purposes out of the income of their estates, and, in an urgent case, will even break into the principal; 19 Ala. N. S. 650; 1 P. Wms. 498; 4 Johns. Ch. 100; 2 Ired. 354; 2 Ashm. 332; 5 R. I. 269; 1 Coop. Eq. 52. The father is not bound, without some agreement, to pay another for maintaining his children; 9 C. & P. 497; nor is he bound by their contracts, even for necessities, unless an actual authority be proved, or a clear omission of his duty to furnish such necessities; 20 Eng. L. & Eq. 281; 10 Barb. 483; 15 Ark. 137; 9 N. H. 270; 2 Bradf. Surr. 287; 18 Ga. 457; Ewell, Lead. Cas. 61, n.; 45 Ill. App. 447; 8 Misc. Rep. 640; or unless he suffers them to remain away with their

mother, or forces them from home by hard usage; 3 Day 37; but, especially in America, very slight evidence may sometimes warrant the confidence that a contract for the infant's necessities is sanctioned by the father; Tiffany, Per. & Dom. Rel. 233; thus he is held bound where he knows the circumstances and does not object; 26 Vt. 9; 12 Met. 343; 29 Tex. 135. See PARENT; MOTHER. Where the court takes away from the father the care and custody of the children, chancery directs maintenance out of their own fortunes, whatever may be their father's circumstances; 2 Russ. 1; Macphers. Inf. 224. And if their custody be given to the mother by a decree of divorce it has been held that the duty of supporting them devolves on her; 136 Mass. 187; 26 Barb. 184; but the father still remains liable; 45 Ohio St. 452. The obligation of the father to maintain the child extends only to providing necessary support, and ceases as soon as the child is able to provide for itself, or it becomes of age, however wealthy the father may be; 2 Kent 190; unless the child becomes chargeable to the public as a pauper; 1 Ld. Raym. 699; or be physically or mentally incapable of self-support; 12 Pa. C. R. 447. The obligation also ceases during the minority of the child, if the child voluntarily abandons the home of his father, either for the purpose of seeking his fortune in the world or to avoid parental discipline and restraint; 16 Mass. 28; 4 Ill. 179; 14 Ala. 435. There is no legal obligation to educate the child, although some *dicta* and statements by text-writers are to the contrary; 1 Bla. Com. 150; 2 Kent 189; but the duty is said by a recent writer to be only a moral one, and he adds that there is no case which enforces such an obligation; Tiff. Dom. Rel. 238; 44 Mo. App. 308. Where the child's fortune warrants a greater expenditure than the father's means will permit, or where the father is unable to support the child, an allowance to the father may be made by a court of equity out of the child's property for his maintenance and education; Coop. t. Eld. 52; 4 Sandf. Ch. 617; 63 N. H. 14; 2 Kent, Com. 191; Tiff. Pers. & Dom. Rel. 236.

During the lifetime of the father, he is guardian by nature or nurture of his children. As such, however, he has charge only of the person of the ward, and no right to the control or possession either of his real or personal estate; 7 Johns. Ch. 3; 8 Pick. 218; 14 Ala. 388; 29 W. Va. 251. As to the father's right to the custody of his children, see 4 Ad. & E. 624; 2 Cox, C. C. 242; [1892] App. Cases 425; 25 Kan. 308; 26 id. 650; Reed, J., in Col. App. 325; 141 Mass. 203; CUSTODY. The rights of the father, while his children remain in his custody, are to have authority over them, to enforce all his lawful commands, and to correct them with moderation for disobedience; 2 Humphr. 283; and these rights, the better to accomplish the purposes of their education, he may delegate to a tutor or instructor; 2 Kent 205. See ASSAULT; CORRECTION. As to criminal liability of the father, see 95 N. C. 588. He may maintain an action for the seduction of his daughter, or for any injury to the person of his child, so long as he has a right to its services; 2 M. & W. 539; 13 Gratt. 726; 6 Ind. 262; 24 Wend. 429; 7 Watts 62; 43 Ill. App. 371; and may even be justified in committing a homicide in protecting his child; 1 Bla. Com. 450; and the fact that a child by her father as next friend has recovered damages for a personal injury does not bar a subsequent action by him for loss of service occasioned by the same injury; 125 Mass. 180; 60 Tex. 225. The authorities are not uniform as to whether the right of the father to recover for a tort committed against the child is to be limited to the theory of loss of service, and therefore based entirely upon the doctrine of an implied relation of master and servant. Such would seem to be the English rule, which gives no remedy, even for expenses, when the child is of such tender age as to be incapable of service; 8 Scott N. R. 741; 7 D. & R. 133. Some American cases follow the same principle; 26 Mo.

App. 75; 60 N. H. 20; but the trend of the authorities is otherwise, and as was said by the Circuit Court of Appeals, in a case of injury to a child of five years of age, "they approve a more reasonable doctrine, and, basing the right of action on the parental relation instead of that of master and servant, allow the father to recover his consequential loss, irrespective of the age of the minor;" 8 C. C. A. 169; s. c. 59 Fed. Rep. 417; 2 Cush. 347; 100 N. Y. 95; 49 Cal. 236; 32 Ohio St. 800; 7 Ala. 169; 50 Ark. 477; Tiff. Pers. & Dom. Rel. 274; and see SEDUCTION; ENTICE. Generally, the father is entitled to the services or earnings of his children during their minority, so long as they remain members of his family; 4 Mas. 380; 2 Gray 257; 17 Ala. n. s. 14; 1 Bla. Com. 453; 60 Mich. 635; but he may relinquish this right in favor of his children; Field, Inf. 63; 2 Metc. Mass. 39; 7 Cow. 92; 14 Ala. n. s. 753; 11 Humphr. 104; 29 Vt. 514; 21 Pa. 232; 2 Ind. App. 264; and he will be presumed to have thus relinquished this right if he abandoned or neglects to support and educate his children; Ware 462; 3 Barb. 115; 6 Ala. n. s. 501; 15 Mass. 273; 65 N. H. 644; 92 Cal. 195; but where a father verbally agrees that his daughter shall reside in a stranger's house as a servant, he does not thereby surrender his parental control, so as to bar his right to recover for her seduction; 86 Pa. 358. An infant husband is entitled to his own wages, so far as necessary for the support of himself and family, although he married without his father's consent; 157 Mass. 78.

The emancipation of a minor may be proved by the act of the father in allowing him to draw his own wages, as well as by other acts, and no proof of a formal contract is necessary; 2 Ind. App. 264.

As to his right to earnings and emancipation, see also 3 Mass. 113; 50 N. H. 501; 1 Ware, 1st ed. 462; 39 Conn. 270; s. c. 2 Am. L. Reg. n. s. 715, with note by Redfield; 24 Me. 631; 63 N. H. 415. The father, as such, has no claim to any property acquired by the child other than earnings; 14 Allen 497.

An agreement of the father, by which his minor child is put out to service, ceases to be binding upon the child after the father's death, unless made by indentures of apprenticeship; 34 N. H. 49; 45 Mo. App. 415; 29 W. Va. 751. The power of the father ceases on the arrival of his children at the age of twenty-one; though if after that age they continue to live in the father's family, they will not be allowed to recover for their services to him upon an implied promise of payment; 3 Pa. 478; 83 N. H. 581; 22 Mo. 439; 6 Ind. 60; 10 Ill. 296; the presumption being that such services are gratuitous, but this may be rebutted; 109 N. C. 710; but see 50 Fed. Rep. 881; 145 Pa. 582. See also 34 Vt. 429; 44 N. H. 293.

A stepfather is not bound to support and educate his stepchildren; 32 Minn. 385; 113 Ill. 61; nor is he entitled to their custody, labor, or earnings, unless he assumes the relation of parent; 11 Barb. 224; 19 Pa. 360; 18 Ill. 46; 1 Busb. 110; 3 N. Y. 312; Schouler, Dom. Rel. 321; 100 N. C. 46; 17 Or. 115; but see 63 N. H. 14.

See also Schouler; Tiffany; Reeve, Dom. Rel.; KIDNAPPING; CHILD; INFANT.

FATHER-IN-LAW. The father of one's spouse.

FATHOM. A measure of length, equal to six feet. Used as a nautical measure.

The word is probably derived from the Teutonic word *fad*, which signifies the thread or yarn drawn out in spinning to the length of the arm, before it is run upon the spindle. Webster; Minshew.

FATUA MULIER. A whore. Du Fresno.

FATUM. In Civil Law. Fate. An overruling power. An event which can neither be anticipated nor prevented. See DAMNUM FATALE.

FATUOUS PERSON. In Scotch Law. One entirely destitute of reason; *is qui omnino desipit*. Erskine, Inst. b. 1, tit. 7, s. 48. An idiot. Jacob. One who is incapable of managing his affairs, by reason

of a total defect of reason. He is described as having uniform stupidity and inattention of manner and childishness of speech. Bell's Law. Dict.

FATUUS. An idiot or fool. Bract. f. 420 b. Silly; ill-considered; foolish; indiscreet.

FATUUM JUDICIUM. A foolish judgment or verdict. As applied to the latter it is one rather false by reason of folly than criminally so as amounting to perjury. Bract. f. 289.

FAUBOURG. A district or part of a town adjoining the principal city; as a faubourg of New Orleans. 18 La. 286.

FAUCES TERRÆ (Lat. jaws of the land). Projecting headlands or promontories, including arms of the sea. Such arms of the sea are said to be inclosed within the *fauces terræ*, in contradistinction to the open sea; 1 Kent 367. See ARM OF THE SEA.

FAULT. An improper act or omission, which arises from ignorance, carelessness, or negligence. The act or omission must not have been meditated, and must have caused some injury to another. *Leg. Elem.* § 783.

In legal literature it is the equivalent of "negligence." An error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any shortcoming or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act; 2 Ind. App. 427.

Gross fault or neglect consists in not observing that care towards others which a man the least attentive usually takes of his own affairs. Such fault may, in some cases, afford a presumption of fraud, and in very gross cases it approaches so near as to be almost undistinguishable from it, especially when the facts seem hardly consistent with an honest intention. But there may be a gross fault without fraud; 2 Stra. 1099; Story, Bailm. § 18; Toullier, l. 3, t. 3, § 251.

Ordinary fault consists in the omission of that care which mankind generally pay to their own concerns; that is, the want of ordinary diligence.

A slight fault consists in the want of that care which very attentive persons take of their own affairs. This fault assimilates itself to, and in some cases is scarcely distinguishable from, mere accident or want of foresight.

This division has been adopted by common lawyers from the civil law. Although the civilians generally agree in this division, yet they are not without a difference of opinion. See Pothier, *Observation générale sur le précédent Traité et sur les suivants*, printed at the end of his *Traité des Obligations*, where he cites Accussus, Alciat, Cujas, Duren, D'avezan, Vinnius, and Heineccius, in support of this division. On the other side the reader is referred to Thomasius, tom. 2, *Dissertationem*, page 1006; Le Brun, cited by Jones, Bailm. 27; and Toullier, *Droit Civil Français*, liv. 3, tit. 5, § 281.

These principles established, different rules have been made as to the responsibilities of parties for their faults in relation to their contracts. They have been reduced to three. See BAILMENT; DOLUS; NEGLIGENCE. See ALL FAULTS.

FAUTOR. In Spanish Law. Accomplice; the person who aids or assists another in the commission of a crime.

FAUX. In French Law. A falsification or fraudulent alteration or suppression of a thing by words, by writings, or by acts without either. Biret, *Vocabulaire des Six Codes*.

Toullier says (tom. 9, n. 188), "*Faux* may be understood in three ways: in its most extended sense, it is the alteration of truth, with or without intention; it is nearly synonymous with lying; in a less extended sense, it is the alteration of truth, accompanied with fraud, *mutatio veritatis cum dolo facta*; and lastly, in a narrow, or rather the legal, sense of the word, when it is a question to know if the *faux* be a crime, it is the fraudulent alteration of the truth in those cases ascertained and punished by the law." See CRIMEN FALSI.

FAVOR. Bias; partiality; lenity; prejudice.

The grand jury are sworn to inquire into all offences which have been committed

and into all violations of law, without fear, favor, or affection. See **GRAND JURY**. When a juror is influenced by bias or prejudice, so that there is not sufficient ground for a principal challenge, he may nevertheless be challenged for favor. See **CHALLENGE**; *Bac. Abr. Juries*, E; 7 Pet. 160.

FAVORED NATION TREATMENT. See **MOST FAVORED NATION TREATMENT**.

FEAL. Truthful; true. The tenants by knight's service used to swear to their lords to be feal and leal. *Feal homager*, faithful subject.

FEAL AND DIVOT. A right in Scotland, similar to the right of turbary in England for fuel, etc. Wharton.

It is a predial servitude peculiar to the law of Scotland, in virtue of which the proprietor of the dominant tenement possesses the right of turning up and carrying off turf from the servient tenement for the purpose of building fences, roofing houses, and the like. This, as well as the servitude of fuel, implies the right of using the nearest ground of the servient tenement on which to lay and dry the turf peats or fuel. These servitudes do not extend beyond the ordinary uses of the actual occupants of the dominant tenements, and cannot be taken advantage of for such a purpose as to burn limestone for sale. They are not included in the servitude of pasturage, but must be constituted either by express grant, or by possession following on the usual clause of parts and pertinents; *Ersk. II. tit. ix. s. 17*. The etymology of these words has been much disputed. *Feal* or *fail* is said to come from the Sui-Gothic *wail*, any grassy part of the surface of the ground; and *Jamieson* derives *divot* from *delve* (Sax. *delfan* or *deltan*), or, as another alternative, says that it may have been formed by the monkish writers of the charters, from *defodere*, to dig the earth. The former is the more probable conjecture. *Int. Cyc.*

FEALTY. That fidelity which every man who holds lands of another owes to him of whom he holds.

Under the feudal system, every owner of lands held them of some superior lord, from whom or from whose ancestors the tenant had received them. By this connection the lord became bound to protect the tenant in the enjoyment of the land granted to him; and, on the other hand, the tenant was bound to be faithful to his lord and to defend him against all his enemies. This obligation was called *fidelitas* or fealty; 1 Bla. Com. 233; 2 id. 86; Co. Litt. 67 b.

This fealty was of two sorts: that which is general, and is due from every subject to his prince; the other special, and required of such only as in respect of their fee are to this oath to their landlords; 1 Bla. Com. 357; Cowel.

The oath or obligation of fealty was one of the essential requisites of the feudal relation; 2 Sharsw. Bla. Com. 45, 86; Littleton §§ 117, 131; Wright, Ten. 35; *Termes de la Ley*; 1 Washb. R. P. 19; see 1 Poll. & Maitl. 27-28, and see as follows: "Hear this ye good people that I (such as one by name) faith will bear to our lord King Edward from this day forward of life and limb, of body and chattels and earthly honor, and the services which belong to him for the fees and tenements which I hold of him, will lawfully perform to him which they become due to the best of my power, and help, and aid, and the saints." Stubbs, *Const. Hist.* § 462 n. Fealty was due alike from freeholders and tenants for years as an incident to their estates to be paid to the reversioner; Co. Litt. 67 b. Chal. R. P. 13. Tenants at will did not have fealty; 2 Burton, R. P. 335, n. 1 Washb. R. P. 371. It has now fallen into disuse, and is no longer exacted; 8 Kent 510; Wright, Ten. 35, 55; Cowel.

FEAR. In Criminal Law. Dread; consciousness of approaching danger.

Fear in the person robbed is one of the ingredients required to constitute a robbery from the person; and without this the felonious taking of the property is a larceny. It is not necessary that the owner of the property should be in fear of his own person; but fear of violence to the person of his child; 2 East, Pl. Cr. 718; or to his property; id. 731; 2 Russ. Cr. 73; is sufficient; 2 Russ. Cr. 71. See 35 Ind. 400; 58 Mo. 581; **PUTTING IN FEAR**.

FEASANCE. A doing; a performing or performance. *Feasant*, doing or making, —as *damage feasant* (q. v.). *Feasor*, doer, maker, —as *feasors del estatute*, makers of the statute; Dyer 3 b.

FEASTS. Certain established periods in the Christian church. Formerly the days of the feasts of saints were used to indicate the dates of instruments and memorable events, 8 Toulhier, n. 81. The feasts of the English church were formerly used to divide the terms of the legal year, but this division was abolished by the judicature act. See **TERM**.

FEACIAL LAW. A branch of Roman

jurisprudence concerned with embassies, declarations of war, and treaties of peace: so called from *feciales* (q. v.), who were charged with its administration. It more nearly resembles the international law of modern times than any other department of the Roman law.

FEACIAL LAW, or FETIAL LAW
See **JUS FECIALE**.

FEACIALES. Amongst the ancient Romans, that order of priests who discharged the duties of ambassadors. Subsequently their duties appear to have related more particularly to the declaring war and peace. Calvinus, *Lex*.

FEDERAL. A term commonly used to express a league or compact between two or more states.

In the United States the central government of the Union is federal. The constitution was adopted "to form a more perfect union" among the states, for the purpose of self-protection and for the promotion of their mutual happiness. Freeman's *Hist. Fed. Govt.*; Austin, *Jurispr.* Lect. 6; see 92 U. S. 542.

FEDERAL COURTS. See **UNITED STATES COURTS**.

FEDERAL GOVERNMENT. A union or confederation of sovereign states, created either by treaty, or by the mutual adoption of a federal constitution, for the purpose of presenting to the world the appearance of a single state, while retaining the rights and power of internal regulation and administration, or at least of local self-government.

The more extended the renunciation of individual sovereignty, the more powerful does the new government become and the more nearly does it approach to a substantial union. No real diminution of sovereignty is necessarily involved except the relinquishment of the power of conducting independent relations with foreign powers.

"There are two different modes of organizing a federal union. The federal authorities may represent the governments solely, and their acts may be obligatory only on the governments as such, or they may have the power of enacting laws and issuing orders which are binding directly on individual citizens. The former is the plan of the (old) German so-called confederation, and of the Swiss constitution previous to 1848. It was tried in America for a few years immediately following the war of independence. The other principle is that of the existing constitution of the United States, and has been adopted within the last dozen years by the Swiss confederacy. The federal congress of the American union is a substantive part of the government of every individual state. Within the limits of its attributions, it makes laws which are obeyed by every citizen individually, executes them through its own officers, and enforces them by its own tribunals. This is the only principle which has been found, or which is even likely to produce an effective federal government. A union between the governments only is a mere alliance, and subject to all contingencies which render alliances precarious." Mills, *Representative Government* 301.

A primary difficulty, it has been said, in framing a federal government, and a source of danger to its permanence, is liability to disagreement between the constituent governments or between one or more of the local governments and the federal government as to the limits of their respective powers. The scheme adopted in the American system as a provision for such cases has been thus described: "Under the more perfect mode of federation, where every citizen of each particular state owes obedience to two governments—that of his own state, and that of the federation—it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in either of the governments, or in any functionary subject to it, but in any umpire independent of both. There must be a supreme court of justice, and a system of subordinate courts in every state of the union, before whom such questions shall be carried, and whose judgment on them, in the last stage of appeal, shall be final. Every state of the union, and the federal government itself, as well as every functionary of each, must be liable to be sued in those courts for exceeding their powers, or for non-performance of their federal duties, and must in general be obliged to employ the courts as the instruments for enforcing their federal rights. This involves the remarkable consequence, actually realized in the United States, that a court of justice, the highest federal tribunal, is supreme over the various governments, both state and federal, having the right to declare that any new law made, or act done by them, exceeds the powers assigned to them by the federal constitution, and in consequence has no legal validity." "The tribunals which act as umpires between the federal and state governments naturally also decide all disputes between two states, or between a citizen of one state and the government of another. The usual remedies between nations, war and diplomacy, being excluded by the federal union, it is necessary that a judicial remedy

should supply the place. The supreme court of the federation dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real international tribunal." *Id.* 305. See Freeman, *Fed. Govt.* The American union is the most striking illustration of federal government in existence, and its permanent character was settled by the civil war which finally determined its indestructibility by action of individual states. In Europe, the empire of Germany and the republic of Switzerland are instances of the operation of successful federal governments, as are most of the South American States; while in the British Empire the Dominion of Canada and the pending Australian federation now nearly completed, as also the Greater Republic of Central America, are indications of a tendency in that direction which existing conditions are likely to increase very rapidly. See these several titles, and also **UNITED STATES OF AMERICA**; **GOVERNMENT**. See **FEDERAL**.

FEDERAL QUESTION. See **UNITED STATES COURTS**.

FEE. A reward or wages given to one for the execution of his office, or for professional services, as those of a counsellor or physician. Cowel.

Fees differ from costs in this, that the former are, as above mentioned, a recompense to the officer for his services; and the latter, an indemnification for the party for money laid out and expended in his suit; 11 S. & R. 248; 9 Wheat. 262. See 4 Binn. 267. Fees are synonymous with charges; 60 Me. 124. See **CHAMPERTY**; **ETHICS**; **LEGAL**.

That which is held of some superior on condition of rendering him services.

A fee is defined by Spelman (Feuds, c. 1) as the right which the tenant or vassal has to the use of lands while the absolute property remains in a superior. But this is a very strict meaning of the word, speedily passed into its modern signification of an estate of inheritance; 2 Bla. Com. 106; Cowel; *Termes de la Ley*; 1 Washb. R. P. 51; Co. Litt. 1 b; 1 Prest. Est. 420; 3 Kent 514. The term may be used of other property as well as lands; *Old Nat. Brev.* 41. The term is generally used to denote as well the land itself so held, as the estate in the land, which seems to be its stricter meaning. Wright, Ten. 19, 49; Cowel. The word fee is explained to signify that the land or other subject of property belongs to its owner, and is transmissible, in the case of an individual, to those whom the law appoints to succeed him, under the appellation of heirs; and, in the case of corporate bodies, to those who are to take on themselves the corporate function, and, from the manner in which the body is to be continued, are denominated successors; 1 Co. Litt. 271 b; Wright, Ten. 147, 150; 2 Bla. Com. 104, 106.

The compass or circuit of a manor or lordship. Cowel.

A *fee-simple* is an estate limited to a man and his heirs absolutely. See **FEE-SIMPLE**.

A *fee-tail* is one limited to particular classes of heirs. See **FEE-TAIL**.

A *determinable fee* is one which is liable to be determined, but which may continue forever. See **DETERMINABLE FEE**.

A *qualified fee* is an interest given to a man and certain of his heirs at the time of its limitation. See **QUALIFIED FEE**; 75 Md. 397.

A *conditional fee* includes one that is either to commence or determine on some condition; 10 Co. 95 b; Prest. Est. 476; Fearn, *Cont. Rem.* 9. See **CONDITIONS**; **SHELLEY'S CASE**, **RULE IN**. See **QUASI-FEE**. See **DEFEASIBLE FEE** See **REASONABLE FEE**.

FEE-BILL. A schedule of the fees to be charged by clerks of courts, sheriffs, or other officers, for each particular service in the line of their duties.

FEE EXPECTANT. A name sometimes applied to an estate created where lands are given to a man and his wife in frank marriage (q. v.), to have and to hold to them and their heirs. In this case they have fee simple; but if they are given to them and their heirs, they have tail and fee-expectant. Tomlin; Kitch. 153.

FEE-FARM. Land held of another in fee,—that is, in perpetuity by the tenant and his heirs at a yearly rent, without fealty, homage, or other services than such as are specially comprised in the feoffment. Cowel. Fealty, however, was incident to a holding in fee-farm, according to some authors. Spelman, Gloss.; *Termes de la Ley*. Land held at a perpetual rent. 2 Bla. Com. 43.

FEE-FARM RENT. The rent reserved on granting a fee-farm. It might be one-fourth the value of the land, according to Cowel, one-third, according to other authors. Spelman, Gloss.; *Termes de la Ley*.

FEE AND LIFE-RENT. In Scotch Law. Two estates in land—the first of which is the full right of proprietorship, the second the limited right of usufruct during life—may be held together, or may co-exist in different persons at the same time. The settling of the limits of the rights which in the latter case they respectively confer is of very great practical importance, and, from the loose way in which both expressions have been used by conveyancers, by no means free from difficulty. “In common language, they are quite distinct; life-rent importing a life-interest merely,—fee a full right of property in reversion after a life-rent. But the proper meaning of the word life-rent has sometimes been confounded by a combination with the word fee, so as in some degree to lose its appropriate sense, and occasionally to import a fee. This seems to have begun chiefly in destinations ‘to husband and wife, in conjunct fee and life-rent and children in fee,’ where the true meaning is, that each spouse has a joint life-rent while both live, but each has a possible fee, as it is uncertain which is to survive. The same confusion of terms came to be extended to the case of a destination to parent and child—‘to A. B. in life-rent, and the heirs of the marriage in fee’—where the word life-rent was held to confer a fee on the parent. It came gradually to be held as the technical meaning of the word life-rent to a parent, with fee to his children *nascituri*, that the word life-rent meant a fee in the father. Finally the expression came to be held as strictly limited in its proper meaning by the accompanying word *allenerly*, or some similar expression of restriction; or where the fee was given to children *nati* and *nomi-natim*, there being in that case no necessity to divert the word life-rent from its proper meaning, or, on a similar principle, where the settlement was by means of a trust created to make up the fee.” Bell, *Prin. s. 1712*. See also *Ersk. Prin. 420*; *FIAE*.

In Scotch Law. A term used in grants or conveyances to two persons where it was intended that one should have a life estate and the survivor should have the fee; or, life estate to the parent and fee to the heir. English.

FEE-SIMPLE. An estate of inheritance. *Co. Litt. 1 b*; *2 Bla. Com. 106*. The word simple adds no meaning to the word fee standing by itself. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, thus distinguishing it from a fee-tail, as well as from an estate which, though inheritable, is subject to conditions or collateral determination. *1 Washb. R. P. 51*; *Wright, Ten. 146*; *1-Prest. Est. 420*; *Littleton § 1*.

It is the largest possible estate which a man can have, being an absolute estate. It is where lands are given to a man and to his heirs absolutely, without any end or limitation put to the estate. *Plowd. 557*; *2 Bla. Com. 106*; *Chal. R. P. 191*. See *54 Me. 426*; *42 Vt. 686*.

Where the granting clause of a deed conveys an estate in fee-simple, a subsequent proviso that the grantee shall not convey without the consent of the grantor is void as a restriction or alienation, general as to time and person, and therefore repugnant to the estate created; *64 Cal. 863*.

In modern estates the terms fee, fee-simple, and fee-simple absolute are substantially synonymous; *45 Mo. 170*.

The word “heirs” is necessary, in a conveyance, to the creation of a fee-simple, and no expression of intention, in substituted terms, will have an equivalent effect; *36 N. J. L. 434*; *92 Ill. 877*; *48 Md. 344*; but see *54 N. H. 290*; *2 Head 889*; but it is otherwise in a will; *74 Pa. 173*; *7 R. I. 188*.

In the absence of statute, a conveyance of property to a trustee, with power to sell and convey the fee, vests in such trustee an estate in fee-simple, without the use of the word “heirs”; *113 Mo. 188*. The common-law rule that a fee-simple cannot be conveyed without the word “heirs” does not

apply to an exception, or an easement appurtenant to other land of the grantor or of the right to take profit in the soil; *85 Me. 448*.

FEE-TAIL. (*Fr. tailleur, to dock, to shorten*). An inheritable estate which can descend to certain classes of heirs only. It is necessary that they should be heirs “of the body” of the ancestor, and these are proper words of limitation. It corresponds with the *feudum talliatum* of the feudal law. The estate itself is said to have been derived from the Roman system of restricting estates. *1 Spence, Eq. Jur. 21*; *1 Washb. R. P. 66*; *2 Bla. Com. 112, n.* See, also, *Co. 2d Inst. 338*; *Tudor, Lead. Cas. 607*; *4 Kent 14*; *Chal. R. P. 259*; and it is said to exist by virtue of the statute *de donis*; *Crabb, R. P. § 971*. See, generally, *1 Gray 286*; *35 N. H. 176*; *113 Mo. 175*; *88 Ga. 251*; *155 Mass. 323*; *146 Pa. 242*.

An estate-tail may be general, *i. e.* limited to the heirs of the body merely; or special, *i. e.* limited to a special class of such heirs, *e. g.* heirs male or heirs female, or those begotten of a certain wife named; *1 H. & J. (Md.) 111*. In the last case specified, if the wife died without issue, the husband was called tenant in tail after possibility of issue extinct.

The restrictions against alienation could be evaded at common law by levying a fine, suffering a recovery. In this country, an entail can generally be barred by deed.

FEED. This word is used in its ordinary sense with reference to cattle and hogs which are said to be made marketable by feeding. *66 Ill. 102*.

It is also used in the sense of lending additional strength or subsequent support, as “the estate which becomes vested feeds the estoppel”; *5 Man. & Ry. 202, 207*; so a subsequent title acquired by the mortgagor is said “to feed the mortgage.” See *GRAFT*.

It is also used in the phrase *feeding of a cow by and on the land* to signify from the land while there is food on it, and with hay by the owner of the land while at other times; *2 Q. B. Div. 49*.

A certain amount of food or provender given to horses, cattle, etc., at a time. *12 A. & E. Ency. 2nd ed., 891*. For a stable to be a “feed stable” it is immaterial that food be kept at the stable, or that it be furnished unless ordered by the owner of the stock. It is sufficient that food is supplied for all who apply. *Id.*; *64 Miss. 511*.

FEGANGI. An escaping thief caught with stolen goods in his possession. *Spel. Glos.*

FEHMGERICHTE. An irregular tribunal which existed and flourished in Westphalia during the thirteenth and fourteenth centuries.

From the close of the fourteenth century its importance rapidly diminished; and it was finally suppressed by Jerome Bonaparte in 1811. See *Bork, Geschichte der Westphälischen Vehmgerichte*; *Paul Wigand, Das Fehmgericht Westphaleus*.

FEIGNED ACTION. In Practice. An action brought on a pretended right, when the plaintiff has no true cause of action, for some illegal purpose. In a feigned action the words of the writ are true; it differs from *false action*, in which case the words of the writ are false. *-Co. Litt. 361, § 689*.

FEIGNED DISEASES. Simulated maladies. Diseases are generally feigned from one of three causes—fear, shame, or the hope of gain. Thus a man engaged in the military or naval service may pretend to be afflicted with various maladies, in order to escape the performance of military duty; the mendicant, to avoid labor and to impose on public or private beneficence; the criminal, to prevent the infliction of punishment. The spirit of revenge, and the hope of receiving exorbitant damages, have also induced some to magnify slight ailments into alarming illness. On this subject, *Fodere* (vol. ii. 452) observes, at the time when the conscription was in full

force in France, “that it is at present brought to such perfection as to render it as difficult to detect a feigned disease as to cure a real one.” *Zaccarias* has given five rules for detecting feigned diseases. (1) Inquiry should be made of the relatives and friends of the suspected individual as to his physical and moral habits, and as to the state of his affairs and what may possibly be the motive for feigning disease, particularly whether he is not in immediate danger of some punishment, from which this sickness may excuse him. (2) Compare the disease under examination with the causes capable of producing it; such as the age, temperament, and mode of life of the patient. (3) The aversion of persons feigning disease to take proper remedies. This indeed will occur in real sickness; but it rarely happens when severe pain is present. (4) Particular attention should be paid to the symptoms present, and whether they necessarily belong to the disease. (5) Follow the course of the complaint, and attend to the circumstances which successively occur. *Wharton*.

FEIGNED ISSUE. In Practice. An issue brought by consent of the parties, or by the direction of a court of equity, or of such courts as possess equitable powers, to determine before a jury some disputed matter of fact which the court has not the power or is unwilling to decide. A series of pleadings was arranged between the parties, as if an action had been commenced at common law upon a *bet* involving the fact in dispute. *3 Bla. Com. 452*. This is still the practice in most of the states retaining the distinction between the procedure in law and in equity. Under the reformed codes of some states issues may be framed in certain exceptional cases. In England, the practice has been disused since the passing of the stat. 8 and 9 Vict. c. 109, s. 19, permitting any court to refer any question of fact to a jury in a direct form. The act 21 and 22 Vict. c. 27, provided for trial by jury in the court of chancery.

FELAGUS (Lat.). One bound for another by oath; a sworn brother. *Du Cange*. A friend bound in the decennary for the good behavior of another. One who took the place of the deceased. Thus, if a person was murdered, the recompense due from the murderer went to the father or mother of the deceased; if he had none, to the lord; if he had none, to his *felagus*, or sworn brother. *Cunningham, Law Dict.*; *Cowel*; *Du Cange*.

FELD (obs. for field). As used in compound words it is said to signify wild. *Blount*.

FELE. See *FEAL*.

FELLOW. A co-worker. A partaker or sharer of. A companion; associate; comrade. One united in a legal relation. An incorporated member of a college or collegiate foundation (whether in a university or otherwise).

FELLOW-HEIR. A co-heir.

FELLOW-SERVANTS. Those engaged in the same common pursuit, under the same general control. *Cooley, Torts 541*.

All who serve the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who take the risk of each other's negligence. *Thomp. Negl. 1026*. As to the rights and liabilities growing out of this relation, see *MASTER AND SERVANT*.

Servants are fellow servants (1) when they have a common master; (2) and are engaged in a common employment; (3) and acting within the scope of their employment; (4) but not when one is engaged in performance of duty owed by master to his servants; (5) or represents his master in a position of superior authority. *2 Thomas, Negl. 2nd ed., 1602*. See *MASTER AND SERVANT*.

FELO DE SE (Lat.). In Criminal Law. A felon of himself; a self-murderer. See SUICIDE.

FELON. One convicted and sentenced for a felony.

A felon is infamous, and cannot fill any office or become a witness in any case unless pardoned, except in cases of absolute necessity for his own preservation and defence: as, for example, an affidavit in relation to the irregularity of a judgment in a cause in which he is a party; 2 Stra. 1148; 1 Mart. La. 25; Stark. Ev. pt. 2, tit. *Infamy*. A conviction in one state where the witness is offered in another does not affect his competency; see 17 Mass. 515; 2 H. & M.H. 120, 378; 1 Harr. & J. 572.

A person who has committed a felony, been convicted, served his sentence, and been discharged, has been held to be no longer a felon; 3 Exch. Div. 352; where it was held that such person can recover against one who has called him a felon.

FELONIA (Lat.). Felony. The act or offence by which a vassal forfeited his fee. Spelman, Gloss.; Calvinus, Lex. *Per feloniam*, with a criminal intention. Co. Litt. 391.

Felonice was formerly used also in the sense of feloniously. Cunningham, Law Dict. See next title.

FELONICE. Feloniously. Cun. Dict. Anciently it was said that this word must be used in all indictments for felony; 4 Bla. Com. 407; and Lord Coke includes it among the *voces artis*,—words of art, which cannot be dispensed with by any periphrasis or circumlocution. 4 Coke 39; Co. Litt. 391 a. See FELONIOUSLY.

FELONIOUS. Having the quality of a felony; malignant; malicious; villainous; perfidious. In a legal sense, done with intent to commit a crime, of the nature of a felony; done with deliberate purpose to commit a crime; in a felonious manner, with deliberate intention to commit a crime; 47 Kan. 201.

FELONIOUS HOMICIDE. The killing of a human creature, of any age or sex, without justification or excuse. It may include killing oneself as well as any other person; 4 Bla. Com. 188. The mere intention to commit homicide was anciently held to be equally guilty with the commission of the act; Foster, Cr. L. 193; 1 Russ. Cr. 46, note; but a recent work states that in ancient law the mere attempt to commit a crime was not punishable; 2 Poll. & Maitl. 507: See HOMICIDE; ATTEMPT.

FELONIOUSLY. In Pleading. This is a technical word which at common law was essential to every indictment for a felony, charging the offence to have been committed feloniously: no other word nor any circumlocution could supply its place; Com. Dig. *Indictment* (G 6); Bac. Abr. *Indictment* (G 1); 2 Hale, Pl. Cr. 173, 184; 1 Ben. & H. Lead. Cr. Cas. 154. It is still necessary in describing a common-law felony, or where its use is prescribed by statute; Whart. Cr. Pl. § 260; 41 Miss. 570; 18 Tex. 387; 25 Mo. 324; 68 N. C. 211; 17 Ind. 307; 34 N. H. 510.

In an indictment it is equivalent to purposely or unlawfully; 47 Kan. 201.

An indictment for burglary which does not allege that the breaking and entering was "feloniously and burglariously" done is bad, and the defect is not cured by verdict; 35 W. Va. 280.

FELONY. An offence which occasions a total forfeiture of either lands or goods, or both, at common law, to which capital or other punishment may be superadded, according to the degree of guilt. 4 Bla. Com. 94; 1 Russ. Cr. 78; Co. Litt. 391; 1 Hawk. Pl. Cr. c. 87; 5 Wheat. 163. The essential distinction between felony and misdemeanor (*q. v.*) is lost in England since the Felony Act of 1870, though such other differences as existed before that act still exist. Moz. & W. Law Dict. At the present day in this country it simply denotes the degree or class of crime committed; 1 Bish.

New Cr. L. § 616.

Blackstone derives it from the Saxon *peo* or *peof*, fee or feud, and the German *lof*, price, as being a crime punishable with the loss of the feud or benefice. 4 Com. 95. But it is observed that this Saxon word originally signified money or goods, and only in a translated sense feud or inheritance; Lye, Sax. Dict.; and another commentator remarks, "as in petit larceny the lands are not liable to escheat, and petit larceny has always been ranked among felonies, a later writer seems inclined to derive it from *pōlen* in the sense of offending, 2 Wooddes, 510." Bac. Abr. *Felony*. Pothier defines felony as an atrocious wrong committed by a vassal towards his lord, by which the former forfeited his fief to the latter.

In American law the word has no clearly defined meaning at common law, but includes offences of a considerable gravity; 1 Park. Cr. Rep. 39; 4 Ohio St. 542. In general, what is felony under the English common law is such under ours; 1 Bish. Cr. L. § 617; Clark, Cr. L. 83. A crime is not a felony unless so declared by statute, or it was such at the common law; 17 R. I. 698. If a statute creates a non-capital offence, not declaring it to be felony, the law will give it the lower grade of misdemeanor; 91 N. C. 561.

The United States Revised Statutes contain no definition of the word, and the meaning of § 4090, referring to "offences against the public peace amounting to felony under the laws of the United States," is not altogether clear. It is defined, however, by statute clearly and fully in many of the states, usually in effect, that all offences punishable either by death or imprisonment in the state prison shall be felonies. 137 N. Y. 29; 98 Mo. 668; 6 Dak. 46; 2 Flap. 551. Express words or necessary implication are required and doubtful words will not suffice; 1 Bish. New Cr. L. § 622. "When an act of congress makes punishable a crime which under the common law is felony, *a fortiori* when directly or by necessary implication, it declares a thing to be felony, it is felony; but where a national statute creates a non-capital offence, and is silent as to its grade, it is misdemeanor." 1 Bish. New Cr. L. § 671. See 9 Fed. Rep. 886, which holds that common-law felonies are not within the purview of the constitution unless congress so enacts.

Where a statute permits a milder punishment than imprisonment or death, this discretion does not prevent the offence being felony; 48 Me. 218; 20 Cal. 117; 117 Mo. 618. See 89 Va. 570; 38 W. Va. 58; 98 Mo. 668; *contra* in Illinois; 94 Ill. 501. It has also been held that common-law felonies, punishable less severely than the statutory standard; do not, therefore, cease to be felonies; 10 Mich. 169; 3 Hill, N. Y. 395; but see 5 id. 260; 1 Bish. Cr. L. § 620.

Receiving stolen goods was a felony so as to justify arrest without a warrant; 5 Cush. 281; 6 Binn. 816; 2 Term 77; and held the following were not: adultery; 2 Bail. 149; 5 Rand. 627; 16 Vt. 551; assault with intent to murder; 13 Ired. 505; impeding an officer in the discharge of his duty; 25 Vt. 415; involuntary manslaughter by negligence; 15 Ga. 349; 7 S. & R. 423; mayhem; 5 Ga. 404; 7 Mass. 245; perjury; 1 R. M. Charlt. 228; 5 Exch. 378; piracy; 1 Salk. 85; 10 Wheat. 495. In England none of the maritime crimes were felony; Story, Const. § 1162.

One may be guilty of misprision of felony, but not of a misdemeanor. In misdemeanor or treason one may commit the crime of a principal by procuring another to do the action in his absence; but in felony such person is only an accessory before the fact. A person against whose property a misdemeanor has been committed may sue the offender at once, but in case of felony he must by the better opinion first begin prosecution; 1 Bish. New Cr. L. § 609. Felonies cannot be prosecuted by information; 9 Fed. Rep. 893. See **FOUNDING-A FELONY**.

FELONY ACT. The stat. 83 & 34 Vict. c. 23, abolishing forfeitures for felony, and sanctioning the appointment of *interim curators* and *administrators* of the property of felons. Moz. & W.; 4 Steph. Com. 10, 459.

FEMALE. The sex which bears the young.

It is a general rule that the young of female animals which belong to us are ours; *nam fetus ventrem sequitur*. Inst. 2. 1. 19; Dig. 6. 1. 5. 2. The rule was, in general, the same with regard to slaves; but when a female slave came into a free state, even without the consent of her master, and was there delivered of a child, the latter was free.

FEME, FEMME. A woman.

FEME COVERT. A married woman. See **MARRIED WOMAN**; **COVERTURE**.

FEME SOLE. A single woman, including those who have been married, but whose marriage has been dissolved by death or divorce, and, for most purposes, those women who are judicially separated from their husbands. Moz. & W. Dict.; 2 Steph. Com. 250.

FEME SOLE TRADER. A married woman, who, by the custom of London, trades on her own account, independently of her husband; so called, because, with respect to her trading, she is the same as a *feme sole*. Jacob, Dict.; 1 Cro. 63; 3 Keb. 902; 2 Bish. M. W. § 528. The custom was recognized as common law in South Carolina, but did not extend beyond trading in merchandise; 1 Hill, S. C. 429; 2 Bay 164; under it a woman could not be a *feme sole* carrier; 1 McMullan 50. By statute in several states a similar custom is recognized; thus in Pennsylvania, by act of Feb. 22, 1718, the wives of mariners who had gone to sea were recognized as *feme sole* traders when engaged in any work for their livelihood, and by act of May 4, 1855, the benefits of this act are extended to all those wives whose husbands, from drunkenness, profligacy, or other cause, neglect or refuse to provide for them, or desert them; 2 P. & L. Dig. 2895. By the latter act she may make application to the court of common pleas and obtain a decree and certificate that she is authorized to do business under said act; *id.* It is not necessary that there should be a decree in order that a wife may have the benefit of the act; it is remedial, and to be construed benignly; 59 Pa. 13; 131 id. 241; mere non-support does not entitle her to the privileges of the act; there must be profligacy, drunkenness, or wilful absence or neglect; 110 Pa. 486; but if, deserted by her husband, she engages in business, she cannot be held liable as a *feme sole* trader unless she has been decreed such; 34 Leg. Int. 5. She may convey her real estate by deed in which her husband does not join; 95 Pa. 472; and the title passes free from any claim of the husband as tenant by the curtesy; 104 Pa. 298; in which the act was declared constitutional. The husband is liable for necessities, notwithstanding the wife has been declared a *feme sole* trader; 9 Phila. 236; and actual residence with her husband does not take away her privileges under the act; 101 Pa. 371; and so in South Carolina; 2 Bay 163; 2 Bish. M. W. § 528. As her powers are in some respects greater than those of a married woman under the act of June 8, 1893, there is no reason for regarding the early Pennsylvania acts as superseded by the later act; 2 P. & L. Dig. 2895, note.

In North Carolina the doctrine that a *feme covert* may be a sole trader was considered with deliberation, and it was held that it did not obtain in that state; 1 Jones, Eq. 1. In an appeal from the District of Columbia it was said by the supreme court that "the law seems to be settled that when a wife is left by her husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts," whether the husband was banished for crime or abandoned her; but by Maryland law a deed of real estate acquired by her while a *feme sole* trader, abandoned by her husband, was held void; 1 Pet. 105. In California under a sole trader act, excluding from the benefits of the act a married woman carrying on business in her

own name, but managed by her husband, it was held that she could not escape liability as sole trader on the ground that she permitted such management; 43 Cal. 105. See 24 Miss. 416.

A married woman by statute authorized to carry on trade and perform labor or services on her sole and separate account, is personally liable on a note given for property purchased for business purposes; in such a case the court said: "The power of a married woman to make contracts relating to her separate business is incident to the power to conduct it. . . . The power to engage in business would be a barren and useless one disconnected with the right to conduct it in the way and by the means usually employed." 53 N. Y. 422; *id.* 93; 106 *id.* 74.

See, generally, Husb. Married Women, c. xi.; 2 Bish. M. W. c. xlii.

FEMICIDE. The killing of a woman. One who kills a woman. See **HOMICIDE**.

FEMININE. Of or belonging to females.

When the feminine is used, it is generally confined to females; as, if a man bequeathed all his mares to his son, his horses would not pass. See 3 Brev. 9.

FENATIO, or FEONATIC. In Forest Law. The fawning of deer; the fawning season. Spel. Gloss.

FENCE. A building or erection between two contiguous estates, so as to divide them, or on the same estate, so as to divide one part from another. It may be of any material presenting a sufficient obstruction; 77 Ill. 169; and has been held to include a gate; 63 Me. 303. See 19 Can. L. J. 204.

Fences are regulated by local laws. In general fences on boundaries are to be built on the line, and the cost, when made no more expensively than is required by law, is borne equally between the parties; 2 Miles 337, 395; 2 Me. 72; 11 Mass. 294; 3 Wend. 142; 15 Conn. 526; 50 Iowa 237. For modifications of the rule, see 32 Pa. 65; 28 Mo. 556. One adjoining land-owner can compel another to contribute to the expense of maintaining a partition fence only when the fence completes an inclosure which contains no other lands than those of the latter; 50 Ohio St. 722. A partition fence is presumed to be the common property of both owners of the land; 8 B. & C. 257, 259, note a; 20 Ill. 834; 24 Minn. 307. When built upon the land of one of them it is his; but if it were built equally upon the land of both, at their joint expense, each would be the owner in severalty of the part standing on his own land; 5 Taunt. 20; 2 Greenl. Ev. § 617. See 2 Washb. R. P. 79.

A class of cases has arisen, in this country, regarding the responsibility of steam railway companies for protecting their tracks by fences. In some cases they are required by statute to do so, but unless so required they are not under any obligation to do so, having no other duty than other land-owners; 3 Wood, R. R. 1843; 78 Fed. Rep. 94. A railroad company, when not required by law to fence its tracks, in doing so only exercises extraordinary diligence to prevent danger to cattle, and is not liable if it fails to maintain such fence; 35 S. W. Rep. (Ind. Ter.) 238. When the company is required by statute to fence its track, a failure to do so renders it liable to an employee for an injury caused thereby; 60 Fed. Rep. 370; and see 25 L. R. A. 820, note.

But in a very recent case (78 Fed. Rep. 94) the circuit court of appeals held that the Virginia fence act imposed a duty only to the owners of stock and not to the railroad's employees; and that the violation of the act is no ground of recovery for the death of an employee, killed by the derailling of his train by cattle which came upon the track at a place where the right of way was not fenced. The court distinguished the cases in 111 Mo. 178; 124 *id.* 140; 119 N. Y. 468, as arising under a special statute.

Mandamus is the proper remedy to compel the performance of the statutory duty;

12 L. R. A. 180, note.

The power of the states to require such fencing by statute is fully sustained; 70 Tex. 298; s. c. 35 Am. & Eng. R. R. Cas. 286; and the extent and manner of it are within the legislative discretion; 19 *id.* 545; s. c. 109 Ill. 402; and such statutes are valid under the police power; *id.* 402, 537; 140 *id.* 309; 35 Minn. 503; 16 Kan. 573; 66 Pa. 164; 26 Mo. 441; (a leading case collecting authorities and approving; 27 Vt. 141;) and are not unconstitutional as imposing expense on one for the sole benefit of another; 63 Mo. 56.

As a means of compelling railroads to fence their tracks statutes have been enacted in many states making them absolutely liable in damages for killing stock, by analogy to the similar statutes respecting damage by fires from locomotives (*q. v.*); but such statutes have generally been held unconstitutional where the question has been raised; 58 Ala. 594; 62 *id.* 71; 6 Utah 253; 8 Mont. 271, 279; 98 N. C. 778; 18 Colo. 600; 16 Kan. 573; 1 Wash. 206; 25 L. R. A. 320, note.

In some states the common law requiring the owner of cattle to keep them within a sufficient enclosure is held not to be in force, and in such a case a railroad company, while not required to fence, and fully authorized to transact its lawful business on its track, must exercise reasonable care to avoid injuring cattle which have wandered on their premises, and it is liable for accidents which by ordinary care could have been prevented; 46 Miss. 573; 71 Ala. 545; 27 Conn. 393; 31 Fla. 669; 59 Md. 806; 24 Vt. 487; 89 Mo. 147; 3 Wood, R. R. 1846. Where it is the duty of the company, arising out of the contract, to fence its track, a failure to comply with the terms of such contract renders the company liable for all injuries to animals consequent thereon.

See, generally, as to fencing railroads; 3 Wood, R. R. §§ 417 and 421, where these cases are collected; 5 L. R. A. 737, note, and 8 *id.* 135, both citing statutes and decisions; 11 *id.* 427 (Missouri statutes and decisions); Whart. Negl. 892; 93 Mich. 607; 65 Hun 622; 42 Ill. App. 90; 119 N. Y. 468; 124 Mo. 140; 111 *id.* 173.

Barbed wire fences have given rise to much litigation in this country. It is held that one is not necessarily negligent in using a barbed wire fence, but it should be so used and cared for as not to endanger persons and property, and the use of such fences imposes upon those who use them care reasonably proportionate to their danger; 112 Ind. 504; and a railroad company using barbed fences must use due diligence in running its trains, not only to avoid killing stock, but to avoid precipitating them by fright against the fence to be mangled or bruised; 63 Ga. 680. On his own land one may maintain such a fence, and it is not illegal; 82 Tex. 26, affirming 70 *id.* 123; and expressly disapproving 2 Tex. Unrep. Cas. 254; s. c. 2 Tex. L. Rev. 338 (commented on, 29 Alb. L. J. 23); in which it was held that "such fences are dangerous unless constructed with planks in connection with the wire." But this case was also reviewed with all analogous cases in 8 Ont. H. B. Div. 538; where it was held that it was not negligence *per se* to maintain such fences and they were not a nuisance. The owner is bound to keep the wires properly stretched and not hanging loose; 79 Cal. 317; 112 Ind. 504. See 10 N. J. L. 43. One who has allowed the use of his land by the public before stretching a barbed wire fence across the way is bound to give notice, in order to escape liability for injury resulting from ignorance of the obstruction; 81 N. E. Rep. (Ind.) 559. If it was negligence to maintain such a fence near a private road, it would be negligence in a person riding a horse difficult to control, to approach it; 82 Tex. 26. See, generally, 16 N. J. L. 105.

In Scotch Law. To hedge in or protect by certain forms. *To fence a court*, to open in due form. Pitcairn, Cr. Law, pt. 1, p. 75; See **GOOD AND LAWFUL FENCE**.

FENCE-MONTH. A month in which it is forbidden to hunt in the forest. It begins fifteen days before midsummer and ends fifteen days after. Manw. For. Laws, c. 23. There were also fence-months for fish. Called, also, *defence-month*, because the deer are then defended from "scare or harm." Cowel; Spelman, Gloss.; Cunningham, Law Dict.

FENDER. A guard and protection against danger. 59 N. J. L. 403.

FENERATION. The action or practice of lending on interest; usury. In some modern dictionaries, applied to interest on money lent. Feneration at the rate of an eightieth part by the month; Colebrook, Dig. Hindu Law, I. 7.

FENGELD (Sax.). A tribute exacted for repelling enemies. Spelman, Gloss.

FENIAN. A member of a secret political association of Irish or Irish-Americans founded in New York about 1857, and having for its object to secure the independence of Ireland. As to its organization and its operation, see Enc. tit. Fenian Society.

According to some authorities this word is also defined a champion, hero, giant; or in the plural, invaders or foreign spoilers.

A very late authority designates the word as "one of the names of the ancient population of Ireland confused in modern times with *fann*, the name of a body of warriors who are said to have been the defenders of Ireland in the time of Finn and other legendary Irish kings." Murray, New Eng. Dict. This is in allusion to the popular tradition attributing the name to a race of heroes in Irish legendary history. See Cent. Dict.; Enc. Dict.; Enc. Brit. ix. 75.

FEOD. Said to be compounded of the two Saxon words *feoh* (stipend) and *odh* (property); by others, to be composed of *feoh* (stipend) and *hod* (condition). 2 Bla. Com. 45; Spelman, Gloss. See **FEE**; **FEUD**.

FEODAL. Belonging to a fee or feud; feudal. More commonly used by the old writers than *feudal*.

FEODAL ACTIONS. Real actions. 3 Bla. Com. 117.

FEODAL LAW. Feodal system. See **FEUDAL LAW**.

FEODALITY. Fidelity or fealty. Cowell. See **FEALTY**.

FEODARUM, or FEUDARAM CONSUETUDINES. See **FEUDAL LAWS**.

FEODARY. An officer in the court of wards, appointed by the master of that court, by virtue of the statute 32 Hen. VIII. c. 46, to be present with the escheator at the finding offices and to give in evidence for the king as to value and tenure. He was also to survey and receive rents of the ward-lands and assign dower to the king's widows. The office was abolished by stat. 12 Car. II. c. 24; Kennett, Gloss.; Cowel.

FEODATORY, or FEUDATORY. The grantee of a feud or fee. The tenant or vassal who held an estate by feudal service. *Termes de la Ley*; 2 Bla. 46.

Also grantees, to whom lands in feud or fee were granted by a superior lord, were sometimes called homagers, and in some writings are termed vassals, feuds, and feudatories. Tomlin.

FEODI FIRMA (L. Lat.). Fee-farm, which see.

FEODUM. The form in use by the old English law-writers instead of *feudum*, and having the same meaning. *Feudum* is used generally by the more modern writers and by the feudal law-writers. Littleton § 1; Spelman, Gloss. There were various classes of *feoda*. See **FEUDUM**.

FEOFFAMENTUM. A feoffment. 2 Bla. Com. 810.

FEOFFARE. To bestow a fee. 1 Reeve, Hist. Eng. Law 91.

FEOFFATOR. A feoffor; he who gives or grants a fee, or who makes a feoffment. Bract. fols. 12 b, 81.

FEOFFATUS. A feoffee; one to whom a fee is given or a feoffment made. Bract. fols. 17 b, 44 b.

FEOFFEE. He to whom a fee is conveyed. Littleton § 1; 2 Bla. Com. 20.

FEOFFEE TO USES. A person to whom land was conveyed for the use of a third party. One holding the same position with reference to a use that a trustee does to a trust. 1 Greenl. Cruise, Dig. 833. He answers to the *haeres fiduciarius* of the Roman law.

FEOFFMENT. A gift of any corporeal hereditaments to another. It operates by transmutation of possession; and it is essential to its completion that the seisin be passed. Watk. Conv. 183.

The conveyance of a corporeal hereditament either by investiture or by livery of seisin. 1 Sullivan, Lect. 143; 1 Washb. R. P. 83; Chal. R. P. 363.

The instrument or deed by which such hereditament is conveyed.

This was one of the earliest modes of conveyance used in the common law. It signified originally the grant of a fee or feud; but it came in time to signify the grant of a free inheritance in fee, respect being had rather to the perpetuity of the estate granted, than to the feudal tenure; 1 Reeve, Hist. Eng. Law 90. The feoffment was likewise accompanied by livery of seisin; 1 Washb. R. P. 83. The conveyance by feoffment with livery of seisin has become infrequent, if not obsolete, in England, and in this country has not been used in practice; Cruise, Dig. tit. 32, c. 4, § 3; Shepp. Touchst. c. 9; 2 Bla. Com. 20; Co. Litt. 9; 4 Kent 467; Perkins, c. 3; Com. Dig.; 12 Viner, Abr. 167; Bacon, Abr.; Dane, Abr. c. 104; 1 Sullivan, Lect. 143; Stearns, Real Act. 2; 8 Cra. 229.

FEOFFMENT TO USE. A feoffment of lands made to one person for the benefit or to the use of another. In such case the feoffee was bound in conscience to hold the lands according to the use, and could himself derive no benefit. Sometimes such feoffments were made to the use of the feoffor. The effect of such conveyance was entirely changed by the statute of uses. See Wms. R. P. 6th ed. 155; USE. Since the statute a feoffment directed to operate to the use of any other person than the feoffee, though it be a common-law conveyance, so far as it conveys the land to the feoffee, derives its effect from the statute of uses, so far as the use is limited by it to the person or persons in whose favor it is declared. Thus, if A be desirous to convey to B in fee, he may do so by enfeoffing a third person, C, to hold to him and his heirs to the use of B and his heirs, the effect of which will be to convey the legal estate in fee-simple to B. For since the statute of uses, the legal estate passes to the feoffee by means of the livery as it would have done before; but no sooner has this taken place than the limitation to uses begins to operate, and C thereby becomes seised to the use defined or limited, the consequence of which is that by force of the legislative enactment the legal estate is *eo instanti* taken out of him, and vests in B, for the like interest as was limited in the use, *i. e.* in fee-simple. B thus becomes the legal tenant as effectually as if the feoffment had been made to himself, and without the intervention of a trustee. This method is not much practised in consequence of the livery of seisin, which has become obsolete. See 2 Sand. Us. 13; Watk. Conv. 288; FEOFFMENT.

FEOFFOR. He who makes a feoffment. 2 Bla. Com. 20; Litt. § 1.

FEOR (Sax.). A reward; wages; a fee. The word was in common use in these senses. Spelman, Feuds.

FEORME. A certain portion of the produce of the land due by the grantee to the lord according to the terms of the charter. Spel. Feuds c. 7.

FERÆ BESTIÆ. Wild beasts.

FERÆ NATURÆ (Lat. of a wild nature; untamed). A term used to designate animals not usually tamed, or not regarded as reclaimed so as to become the subject of property.

Such animals belong to the person who has captured them only while they are in his power; for if they regain their liberty his property in them instantly ceases, unless they have *animus revertendi*, which is to be known only by their habit of returning; 2 Bla. Com. 386; 3 Binn. 546; Brooke, Abr. *Proprietie* 87; Com. Dig. *Biens*, F; 7 Co. 17 b; Inst. 2. 1. 15; [1896] 1 Q. B. 106.

Property in animals *feræ naturæ* is not acquired by hunting them and pursuing them; if, therefore, another person kills such animal in the sight of the pursuer, he has a right to appropriate it to his own use; 3 Cal. 175. But if the pursuer brings the animal within his own control, as by entrapping it or wounding it mortally, so as to render escape impossible, it then belongs to him; *id.*; though if he abandons it another person may afterwards acquire property in the animal; 20 Johns. 75. The owner of land has a qualified property in animals *feræ naturæ* when, in consequence of their inability and youth, they cannot go away. See Year B. 12 Hen. VIII. (9 B. 10 A); 2 Bla. Com. 394; Bacon, Abr. *Game*.

The supreme court of the United States recently held a Louisiana statute constitutional which prescribed that dogs are only to be regarded as personal property when recorded on assessment rolls. The court said: "The very fact that they are without protection of the criminal laws shows that property in dogs is an imperfect or qualified nature, and that they stand, as it were, between animals *feræ naturæ*, in which until subdued there is no property, and domestic animals, in which the right of property is complete." *Sentell v. N. O. & C. R. R. Co.*, April 26, 1897. See DOGS; GAME; ANIMALS.

FERECOSTA (Ital.). In Scotch Law. A kind of small vessel or boat. Skene.

FERDELLA TERRE. A fardel land; ten acres; or perhaps a yard-land. Cowel.

FERDFARE (Sax.). A summons to serve in the army. An acquittance from going into the army. Fleta, lib. 1, c. 47, 23.

FERDINGUS. Apparently a freeman of the lowest class, being named after the *cotseti*. Anc. Inst. Eng.

FERDWITE. An acquittance of manslaughter committed in the army; also a fine imposed on persons for not going forth on a military expedition. Cowel.

FERIA (Lat.). In Old English Law. A week-day; a holiday; a day on which process may not be served; a fair; a ferry. Du Cange; Spelman, Gloss.; Cowel; 4 Reeve, Hist. Eng. Law 17.

FERIÆ (Lat.). In Civil Law. Holidays. Numerous festivals were called by this name in the early Roman empire. In the later Roman empire the single days occurring at intervals of a week apart, commencing with the seventh day of the ecclesiastical year, were so called. Du Cange. All *feriæ* were *dies nefasti*. All *feriæ* were divided into two classes,—"*feriæ publicæ*" and "*feriæ privatz*." The latter were only observed by single families or individuals in commemoration of some particular event which had been of importance to them or their ancestors. Smith, Dict. Antiq.

FERIAL DAYS. Originally and properly, days free from labor and pleading. In statute 27 Hen. VI. c. 5, working-days. Cowel.

FERITA. In European Law. A wound; stroke. Spel. Gloss.

FERLING. In English Law. The fourth part of a penny; also, the quarter of a ward in a borough.

FERLINGATA. A fourth part of a

yard-land.

FERLINGUS, or FERLINGUM. A furlong (q. v.). Co. Litt. 5 b.

FERM, or FEARM. A house or land, or both, let by lease. Cowel.

FERME (Sax.). A farm; a rent; a lease; a house or land, or both, taken by indenture or lease. Plowd. 195; Vicat, Voc. Jur.; Cowel. See FARM.

FERMER, FERMOR. A lessee; a farmer. One who holds a term, whether of lands or an incorporeal right, such as customs or revenue.

FERMIER. In French Law. One who farms any public revenue.

FERMISONA. The winter season for killing deer, as *tempus pinguedinis* is the summer season. Tomlin.

FERMORY. In Old Records. A place in monasteries, where they received the poor (*hospicio excipiebant*), and gave them provisions (*ferm, firma*). Spel. Gloss.

FERNIGO. In English Law. A waste ground or place where ferns grow. Cowel.

FERRATOR. A farrier (q. v.).

FERRI. In Civil Law. To be borne, *i. e.* on or about the person, in contradistinction from *portari*, to be carried on an animal.

FERRIAGE. The toll or price paid for the transportation of persons and property across a ferry. 35 Cal. 606.

FERRIFODINA. In Old English Law. An iron mine. Townsh. Pl. 273.

FERRUM (Lat. iron). In Old English Law. A horse-shoe.

FERRUERE. The shoeing of horses. Kelham.

FERRY. A liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. 42 Me. 9; 3 Zab. 206; Woolr. Ways 217. The term is also used to designate the place where such liberty is exercised; 4 Mart. La. N. s. 426. Ferry properly means a place of transit across a river or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another. It is not a servitude or easement. It is wholly unconnected with the ownership or occupation of land, so much so that the owner of the ferry need not have any property in the soil adjacent on either side. 12 C. B. N. s. 82.

An exclusive right of ferry exists where one acquires the sole and exclusive privilege of taking tolls for such service. The element of receiving payment is essential, as one may lawfully transport his own goods in a boat, where an exclusive right of ferry is held by another; 73 Mo. 655.

In England, ferries are established by royal grant or by prescription, which is an implied grant; in the United States, by legislative authority, exercised either directly or by a delegation of powers to courts, commissioners, or municipalities; 7 Pick. 344; 11 Pet. 420; 20 Conn. 218; 8 Me. 365; 18 Ark. 19. Without such authority no one, though he may be the owner of both banks of the river, has the right to keep a public ferry; 3 Mo. 470; 13 Ill. 27; 6 Ga. 130; 11 Pet. 420; Willes 508; though after twenty years' uninterrupted use such authority will be presumed to have been granted; 2 Dev. 403; 1 N. & M'C. 389; 4 Ill. 53; 7 Ga. 348; but see 10 Ky. L. Rep. 940. The franchise of a ferry will, in preference, be granted to the owner of the soil, but may be granted to another; and by virtue of the right of eminent domain the soil of another may be condemned to the use of the ferry, upon making just compensation; 6 B. & C. 703; 5 Yerg. 189; 7 Humph. 86; 2 Dev. 403; 9 Ga. 339; 6 Dana 242; 8 Me. 365; 2 Cal. 262. If the *termini*

of the ferry be a highway, the owner of the fee will not be entitled to compensation; 3 Kent 421; 4 Zabr. 718; 7 Gratt. 205; 1 T. B. Monr. 843; though in Pennsylvania and other states a different doctrine prevails; 9 S. & R. 81; 8 Watts 219; 20 Wend. 111; 4 Am. L. Reg. N. S. 520; 3 Yerg. 387. See **EMINENT DOMAIN**.

One state has the right to establish ferries over a navigable river separating it from another state or from a foreign territory, though its jurisdiction may extend only to the middle of such river; and the exercise of this right does not conflict with the provision in the constitution of the United States conferring upon congress the power "to regulate commerce with foreign nations and among the several states," nor with any law of congress upon that subject; 11 Wend. 586; 3 Yerg. 387; 3 Zabr. 206; 2 Gilm. 197; 88 N. Y. 39; 74 Tex. 480. The granting of a temporary license to operate a ferry within the city limits, is valid; 103 Mo. 550. A state may at its pleasure erect a new ferry so near an older ferry as to impair or destroy the value of the latter by drawing away its custom, unless the older franchise be protected by the terms of its grant; 15 Pick. 243; 6 Dana 43; 9 Ga. 517; 6 How. 507; 16 id. 524; 7 Ill. 197; 1 La. Ann. 289; 10 Ala. N. S. 37; 25 Wend. 638. See 145 Pa. 404; 138 U. S. 287. But if an individual, without authority from the state, erect a new ferry near an older ferry, lawfully established, as to draw away the custom of the latter, such individual will be liable to an action on the case for damages, or to a suit in equity for an injunction in favor of the owner of the latter; 6 M. & W. 234; 67 N. W. Rep. (S. D.) 57; 3 Wend. 618; 17 Ala. N. S. 584; 16 B. Monr. 699; 4 Jones 277; 3 Murph. 57; but he may transport his own goods in his own boats where another has an exclusive right of ferry; 73 Mo. 635; 51 Mo. App. 228; 74 Tex. 480. The grant to a city by the legislature of the right of licensing ferries, does not empower the city to grant exclusive ferry privileges; 108 Mo. 550.

The franchise of a ferry is an incorporeal hereditament, and as such it descends to heirs, is subject to dower, may be leased, sold, and assigned; 5 Com. Dig. 291; 12 East 334; 2 McLean 376; 8 Mo. 470; 7 Ala. N. S. 55; 9 id. 529; 51 Mo. App. 228; 65 Miss. 351; and when created by act of the legislature can be conveyed only by deed; 138 Ill. 518; but, nevertheless, being a franchise in which the public have rights and interests, it is subject to legislative regulation for the enforcement and protection of such rights and interests; Cooley, Const. Lim. 732; 10 Barb. 223; 4 Zabr. 718; 11 B. Monr. 361; 9 Mo. 580.

The owners of ferries are common carriers, and liable as such for the carriage of the goods and persons which they receive upon their boats. They are bound to have their ferries furnished with suitable boats, and to be in readiness at all proper times to transport all who apply for a passage; Ang. High. 437; 3 Humphr. 245; 3 Pa. 342; 5 Mo. 36; 12 Ill. 344; 5 Cal. 360; 10 M. & W. 161; 34 Ark. 385; 100 Ala. 323. They must have their flats so made and secured with railings that all drivers with horses and carriages may safely enter thereon; and as soon as the carriage and horses are fairly on the drops or slips of the flat, and during their transportation, although driven by the owner or his servant, they are in the possession of the ferryman, and the owners of the ferry are answerable for the loss or injury of the same unless occasioned by the fault of the driver; 1 McCord 439; 16 E. L. & Eq. 437; 14 Tex. 260; 28 Miss. 792; 4 Ohio St. 722; 7 Cush. 154; they are not required to have railings at the end of their boats when not in actual use, so as to prevent runaway teams from entering and passing over the same to the river; 46 Minn. 388; see **NEGLIGENCE**; but it is also well settled that if the owner retains control of the property himself and does not surrender the charge to the ferryman, such strict liability does not attach, and he is only responsible for actual negligence; 26 Ark. 3; s. c. 7 Am. Rep. 595; 52 N. Y. 32; 10 M. &

W. 546; 36 Am. Rep. 504, n. See 91 Ga. 422. If the ferry be rented, the tenant and not the owner is subject to these liabilities, because such tenant is *pro hac vice* the owner; 1 Ala. 866; 12 Ired. 1; 26 Barb. 618; 22 Vt. 170. See article in 4 Am. L. Reg. N. S. 517; 19 id. 148; Washb. Easements; Ang. Pat. Fed. Restr. s. t. Act. Water Courses.

See **COMMERCE**; **TAXATION**; **RATES**.

FERRYMAN. One employed in taking persons across a river or other stream, in boats or other contrivances, at a ferry. 3 Ala. 160; 8 Dana 158.

FERTILIZERS. A statute whose controlling purpose is to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers, by fixing on sellers a statutory guaranty that fertilizers sold by them contain the chemical ingredients and in the proportions represented, and furnishing to buyers cheap and reliable means of proving deception and fraud, should any be attempted, is within the pale of legitimate police regulation, as the accomplishment of these objects will greatly promote the prosperity and success of agricultural industry. 22 A. & E. Ency. 2nd ed., 935; 84 Ala. 93, 5 Am. St. Rep. 332.

The manufacture of fertilizers is exempt from taxation. This does not extend to a mill which produces cottonseed meal, which, though it can be used as a fertilizer is not produced primarily for that purpose and is used quite as freely for food. *Id.*, vol. 12, p. 351; 49 La. Ann. 750.

FESTAS IN CAPPIS. In Old English Law. Grand holidays, on which choirs were accustomed to wear caps. Jac. L. Dict.

FETIAL LAW. See **JUS FETIALE**.

FESTING-MAN. A bondsman; a surety; a pledge; a frank-pledge. It was one privilege of monasteries that they should be free from *festing-men*, which Cowel explains to mean not to be bound for any man's forthcoming who should transgress the law. Cowel.

FESTING-PENNY. Earnest (*q. v.*) given to servants when hired or retained. The same as *arles-penny*. Cowel.

FESTINUM REMEDIUM (Lat. a speedy remedy). A term applied to those cases where the remedy for the redress of an injury is given without any unnecessary delay. Bacon, Abr. *Assise*, A. The action of dower is *festinum remedium*, and so is that of assise.

FESTUCA. In Frankish Law. A rod or staff or (as described by other writers) a stick, on which imprecatory runs were cut, which was used as a gage or pledge of good faith by a party to a contract, or for symbolic delivery in the conveyance or quit-claim of land, before a court of law, anterior to the introduction of written documents by the Romans. 2 Poll. & Maitl. 86, 184, 190; Maitl. Domesday Book and Beyond 323.

FESTUM (Lat.). A feast, a holiday, a festival.

FETTERS. A sort of iron put on the limbs of a malefactor or a person accused of crime.

When a prisoner is brought into court to plead, he shall not be put in fetters; Co. 2d Inst. 315; Co. 3d Inst. 34; 2 Hale, Pl. Cr. 119; Kel. 10; 1 Chitty, Cr. Law 417; 4 Bla. Com. 322.

In the first case in this country in which the old common-law doctrine was considered and enforced, the court held that to try a prisoner in shackles was to deprive him of his rights, and that a conviction, under such circumstances, would be reversed; 42 Cal. 165, followed in 64 Mo. 61 (affg. 1 Mo. App. 438). A single expression on this subject seems to be opposed to these cases. An English writer, commenting on the action of a barrister who withdrew and refused to proceed with a case because the

judge ordered his client fettered during the trial, considers the removal of fetters to be a mere matter of courtesy, being designed to relieve the prisoner, so far as is practicable, from all that might enlist prejudice against him or disturb his self-possession, and that such removal cannot be considered a matter of right; 43 L. T. 390.

An officer having arrested a defendant on a civil suit, or a person accused of a crime, has no right to handcuff him unless it is necessary or he has attempted to make his escape; 4 B. & C. 596. It is not conclusive on a question of escape that the arresting officer did not handcuff the prisoner; 94 N. C. 829.

FEU. In Scotch Law. A holding or tenure where the vassal in place of military service makes his return in grain or money. Distinguished from wardholding, which is the military tenure of the country. Bell, Dict.; Erskine, Inst. lib. ii. tit. 3, § 7.

FEU ANNUALS. In Scotch Law. The *reddendo*, or annual return from the vassal to a superior in a feu holding. Wharton, Dict., 2d Lond. ed.

FEU ET LIEU (Fr.). In Old French Canadian Law. Hearth and home, meaning actual settlement by a tenant on the land.

FEU HOLDING. A holding by tenure of rendering grain or money in place of military service. Bell, Dict.

FEUAR. In Scotch Law. The tenant or vassal of a feu. Bell, Dict.

FEUD. Land held of a superior on condition of rendering him services. 2 Bla. Com. 106.

A hereditary right to use lands, rendering services therefor to the lord, while the property in the land itself remains in the lord. Spelman, Feuds c. 1.

The same as *feod*, *fief*, and *fee*. 1 Sullivan, Lect. 128; 1 Spence, Eq. Jur. 34; Dalrymple, Feud. Pr. 99; 1 Washb. R. P. 18; Mitch. R. P. 80.

In Scotland and the North of England, a combination of all the kin to revenge the death of any of the blood upon the slayer and all his race. *Termes de la Ley*; Whishaw. See **FEUDISM** See **HONORARY FEUD** **IMPROPER FEUDS**; **MILITARY FEUDS**.

FEUDA. Fees.

FEUDAL ACTIONS. See **FEODAL ACTIONS**.

FEUDAL COURTS. During the 13th century in England the central courts were beginning to analyze and distinguish the different principles upon which the local courts exercised their jurisdiction. By the end of Edward I's reign they were sufficiently clearly drawn to enable one to distinguish four main groups of local courts: the communal, the franchise, the manorial, and the feudal courts.

The latter depend upon the principle that the lord of tenants can hold a court for his tenants merely because they are his tenants. A lord of tenants will also often have a franchise or franchises by virtue of which he exercises a wider jurisdiction; but because his purely feudal jurisdiction does not depend upon a special grant from the crown it is in theory at any rate, clearly distinguishable from the jurisdiction which he exercises as lord of a franchise.

Such courts became, in the course of the 13th century gradually of less importance. This was due chiefly to three causes: Firstly, the feudal principle would have led to a series of courts one above the other; and the higher courts would have been the courts of provinces. Secondly, such courts were not in fact needed because of the growth of the jurisdiction of the king's court. Thirdly, feudalism has its two sides—its property side and its jurisdictional side. Under the circumstances of the time, the jurisdiction involved in feudalism gradually declined, and it became merely appendant to land owning. This development gave rise to the manorial jurisdiction of later law.

1 Holdsw. Hist. E. L. 3rd ed., 64-5, 177-9. See COMMUNAL COURTS; FRANCHISE COURTS; MANORIAL COURTS.

FEUDAL LAW, FEODAL LAW. A system of tenures of real property which prevailed in the countries of western Europe during the middle ages, arising from the peculiar political condition of those countries, and radically affecting the law of personal rights and of movable property.

Although the feudal system has never obtained in this country, and is long since extinct throughout the greater part of Europe, some understanding of the theory of the system is essential to an accurate knowledge of the English constitution, and of the doctrines of the common law in respect to real property. The feudal tenure was a right to lands on the condition of performing services and rendering allegiance to a superior lord. It had its origin in the military immigrations of the Northmen, who overran the falling Roman empire. Many writers have sought to trace the beginning of the system in earlier periods, and resemblances more or less distinct have been found in the tenures prevailing in the Roman republic and empire, in Turkey, in Hindustan, in ancient Tuscany, as well as in the system of Celtic clanship. Hallam, Mid. Ag. vol. 1; Stuart, Soc. in Europe; Robertson, Hist. of Charles V.; Pinkerton, Diss. on the Goths; Montesquieu, *Ess. des Loix*, 2d ed., 2d pt., c. 10, § 1; *Origine et Progrès des Inst. judiciaires*, tom. 1, p. 4.

But the origin of the feudal system is so obvious in the circumstances under which it arose, that perhaps there is no other connection between it and these earlier systems than that all are the outgrowth of political conditions somewhat similar. It has been said that the system is nothing more than the natural fruit of conquest; but the fact that the conquest was by immigrants, and that the conquerors made the acquired country their permanent abode, is an important element in the case, and in so far as other conquests have fallen short of this, the military tenures resulting have fallen short of the feudal system. The military chieftains of the northern nations allotted the lands of the countries they occupied among themselves and their followers, with a view at once to strengthen their own power and ascendancy and to provide for their followers.

Some lands were allotted to individuals as their own proper estates, and these were termed *allodial*; but, for the most part, those lands which were not retained by the chieftain he assigned to his *comites*, or knights, to be held by his permission, in return for which they assured him of their allegiance and undertook for him military service.

It resulted that there was a general dismemberment of the political power into many petty nations and petty sovereignties. This violence and disorders the times rendered it necessary both for the strong to seek followers and for the weak to seek a protecting allegiance; and this operated on the one hand to lead the vassals to divide again among their immediate retainers the lands which they had received from the paramount lord, upon similar terms, and by this subinfeudation the number of fiefs was largely increased, and the same circumstances operated on the other hand to abrogate the *allodial* estates by inducing *allodial* proprietors to surrender their lands to some neighboring chieftain and receive them again from him under feudal tenure. Every one who held lands upon a feudal tenure was bound to defend him, and such factor or immediate lord, in turn, subordinate to his superior, and bound to defend him, and so on upwards to the paramount lord or king, who in theory of the law was the ultimate owner of all the lands of the realm. The services which the vassals were bound to render to their lords were chiefly military; but many other benefits were required, such as the power of the lord or the good will of the tenant would sanction.

This system came to its height upon the continent in the empire of Charlemagne and his successors. It was completely established in England in the time of William the Norman and William Rufus, his son; and the system thus established may be said to be the foundation of the English law of real property and the position of the landed aristocracy, and of the civil constitution of the realm. And when we reflect that in the middle ages real property had a relative importance far beyond that of movable property, it is not surprising that the system should have left its traces for a long time upon the law of personal relations and personal property. The feudal tenures were originally temporary, at the will of the lord, or from year to year; afterwards they came more commonly to be held for the life of the vassal; and gradually they acquired an inheritable quality, the lord recognizing the heir of the vassal as the vassal's successor in his service.

The chief incidents of the tenure by military service were—*Aids*, a pecuniary tribute required by the lord in an emergency, e. g. a ransom for his person if taken prisoner, or money to make his son a knight or to marry his daughter. *Relief*,—the consideration which the lord demanded upon the death of a vassal for giving the vassal's heir to succeed to the possession; and connected with this may be mentioned *primer seisin*, which was the compensation that the lord demanded for having entered upon the land and protected the possession until the heir appeared to claim it. *Fines upon alienation*,—a consideration exacted by the lord for giving his consent that the vassal should transfer his estate to another, who should stand in his place in respect to the services owed. *Escheat*,—Where on the death of the vassal there was no heir, the land reverted to the lord; also, where the vassal was guilty of treason, for the guilt of the vassal was deemed to taint the blood, and the lord would no longer recognize him or his heirs. *Wardship and Marriage*,—Where the heir was a minor, the

lord, as a condition of permitting the estate to descend to one who could not render military service, assumed the guardianship of the heir, and, as such, exercised custody both of his person and of the property, without accounting for the profits, until the heir, if a male, was twenty-one and could undertake the military services, or, if a female, until she was of a marriageable age, when on her marriage her husband might render the services. The lord claimed, in virtue of his guardianship, to make a suitable match for his ward, and if wards refused to comply they were mulcted in damages. Feudal tenures were established in England by the statute 12 Car. II. c. 24; but the principles of the system still remain at the foundation of the English and American law of real property. Although in many of the states of the United States all lands are held to be *allodial*, it is the theory of the law that the ultimate right of property is in the state; and in most of the states *escheat* is regulated by statute. "The principles of the feudal system are so interwoven with every part of our jurisprudence," says Ch. J. Tilghman, "that to attempt to eradicate them would be to destroy the whole." 3 S. & R. 447; 9 id. 338. "Though our property is *allodial*," says Ch. J. Gibson, "yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee." 3 Watts 71; 1 Whart. 337; 7 S. & R. 188; 13 Pa. 33.

Many of these incidents are rapidly disappearing, however, by legislative changes of the law. The principles of the feudal law will be found in Littleton's Ten.; Wright's Tenures; 2 Bla. Com. c. 5; Dalrymple's Hist. of Feudal Property; Sullivan's Lectures; Book of Fiefs; Spelman's Treatise of Feuds and Tenures; Cruise's Digest; *Le Grand Coutumier*; the *Salic Laws*; the *Capitularies*; *Les Etablissements de St. Louis*; *Assise de Jerusalem*; Pothier, *des Fiefs*; Merlin, *Rép. Feodalité*; Dalloz, Dict. *Feodalité*; Guizot, *Essai sur l'Histoire de France*, Essai 5ème; Introduction to Robertson's Charles V.; Poll & Maitl. Hist. Eng. Law; Stubbs, Const. Hist.

The principal original collection of the feudal law of continental Europe is a digest compiled at Milan in the twelfth century, *Feudorum Consuetudines*, which is the foundation of many of the subsequent compilations. The American student will perhaps find no more convenient source of information than Blackstone's Commentaries, Sharswood's ed., vol. 2, 43, and Greenleaf's Cruise, Dig. Intro.

FEUDARY. A tenant who holds by feudal tenure. Held by feudal service. Relating to feuds or feudal tenures. See FEODARY.

FEUDATARY. See FEODATARY.

FEUDOTE. A recompense for engaging in a feud, and the damages consequent, it having been the custom in ancient times for all the kindred to engage in their kinsman's quarrel. Jac. L. Dict.

FEUDE, or DEADLY FEUD. A German word, signifying implacable hatred, not to be satisfied but with the death of the enemy. Such was that among the people in Scotland and in the northern part of England, which was a combination of all the kindred to revenge the death of any of the blood upon the slayer and all his race. *Termes de la Ley*.

FEUDIST. A writer on feuds, as Cujacius. Spel. Gloss.

FEUDORUM LIBRI. The Books of Feuds published during the reign of Henry III., about the year 1153. The particular customs of Lombardy as to feuds began about that time to be the standard of authority to other nations, by reason of the greater refinement with which that branch of learning had been there cultivated. This compilation was probably known in England, but does not appear to have had any other effect than to influence English lawyers to the more critical study of their own tenures, and to induce them to extend the learning of real property so as to embrace more curious matter of similar kind. "Thus, tenures in England continued a peculiar species of feuds, partaking of certain qualities in common with others; but when once established here, growing up with a strength and figure entirely their own. While most of the nations of Europe referred to the Books of Feuds as the grand code of law by which to correct and amend the imperfections in their own tenures, there is not in English law books any allusion that intimates the existence of such a body of constitutions." 2 Reeves, Hist. Eng. Law 55.

FEUDO. In Spanish Law. Feud or fee. White, New Recop. b. 2, tit. 2, c. 2.

FEUDUM. A feud, fief, or fee. A right of using and enjoying forever the lands of

another, which the lord grants on condition that the tenant shall render fealty, military duty, and other services. Spelman, Gloss. It is not properly the land, but a right in the land. This form of the word is used by the feudal writers. The earlier English writers generally prefer the form *feodum*; but the meaning is the same.

Feudum antiquum. A fee descended from the tenant's ancestors. 2 Bla. Com. 212. One which has been possessed by the relations of the tenant for four generations. Spelman, Gloss.

Feudum apertum. A fee which the lord might enter upon and resume either through failure of issue of the tenant or any crime or legal cause on his part. Spelman, Gloss. 2 Bla. Com. 245.

Feudum francum. A free feud. One which was noble and free from tallage and other subsidies to which the *plebeia feuda* (vulgar feuds) were subject. Spelman, Gloss.

Feudum haberticum. A fee held on the military service of appearing fully armed at the *ban* and *arriere ban*. Spelman, Gloss.

Feudum improprium. A derivative fee. **Feudum individuum.** A fee which could descend to the eldest son alone. 2 Bla. Com. 215.

Feudum laicum. A lay fee.

Feudum ligium. A liege fee. One where the tenant owed fealty to his lord against all other persons. Spelman, Gloss.; 1 Bla. Com. 367.

Feudum maternum. A fee descending from the mother's side. 2 Bla. Com. 212.

Feudum militare. A knight's fee, held by knight service and esteemed the most honorable species of tenure. 2 Bla. Com. 62.

Feudum nobile. A fee for which the tenant did guard and owed fealty and homage. Spelman, Gloss.

Feudum novum. One which began with the person of the feudatory, and did not come to him by descent.

Feudum novum ut antiquum. A new fee held with the qualities and incidents of an ancient one. 2 Bla. Com. 212; Wms. R. P. 126.

Feudum paternum. A fee which the paternal ancestors had held for four generations. Calvinus, Lex.; Spelman, Gloss. One descendible to heirs on the paternal side only. 2 Bla. Com. 223. One which might be held by males only. Du Cange.

Feudum proprium. A genuine original feud or fee, of a military nature, in the hands of a military person. 2 Sharsw. Bla. Com. 57.

Feudum talliatum. A restricted fee. One limited to descend to certain classes of heirs. 2 Bla. Com. 112, n.; 1 Washb. R. P. 66; Spelman, Gloss.

The distinction between *feudum antiquum* and *feudum novum* has had an important bearing upon the law of descent with respect to the admission of collateral and the exclusion of ascendants. The theory of Blackstone, which is characterized by both Christian and Pollock & Maitland as "ingenious," will be found fully stated in 2 Com. 211, while for the latest criticism of it and other theories on the subject, see 2 Poll & Maitl. 285.

An old Norman term used to denote a stretch of land, and rarely a tenure or mass of rights. Maitl. Domes. Bk. & Beyond, 152. See FEUM.

FEUM. An older form of *feudum* (q. v.). Maitl. Domesday Book and Beyond 152.

FEW. An indefinite expression for a small or limited number. In cases where exact description is required, the use of the word will not answer; 53 Vt. 60; 2 Car. & P. 300; Black, L. Dict.

FIANCER. To pledge one's faith; Kelham.

FIANZA (Span.). Surety. The contract by which one person engages to pay the debt or fulfil the obligations of another if the latter should fail to do so.

FIAR. In Scotch Law. One whose property is charged with a life-rent. Where a right is taken to a husband and wife in conjunct fee and life-rent, the husband, as the *persona dignior*, is the only *fiar*. Ersk.

Prin. 421.

FIARS PRICES. The value of grain in the different counties of Scotland, fixed yearly by the respective sheriffs, in the month of February, with the assistance of juries. These regulate the prices of grain stipulated to be sold at the fiar's prices, or when no price has been stipulated. Ersk. 1, 4, 6.

FIAT. An order of a judge or of an officer whose authority, to be signified by his signature, is necessary to authenticate the particular acts. A short order or warrant of the judge, commanding that something shall be done. See 1 Tidd, Pr. 100, 108. See **JOINT FIAT**.

FIAT IN BANKRUPTCY. An order of the lord chancellor that a commission of bankruptcy shall issue. 1 Deac. Bank. 106. Fiats are abolished by 12 & 18 Vict. c. 116.

FIAUT. An order; command. See **FIAT**.

FICTION. The legal assumption that something which is or may be false is true.

The expedient of fictions is sometimes resorted to in law for the furtherance of justice. The law-making power has no need to resort to fictions: it may establish its rules with simple reference to the truth; but the courts, which are confined to the administration of existing rules, and which lack the power to change those rules, even in hard cases, have frequently avoided the injustice that their application to the actual facts might cause, by assuming, in behalf of justice, that the actual facts are different from what they really are. Thus, in English law, where the administration of criminal justice is by prosecution at suit of the crown, the courts, rather than disregard the rules under which all other parties stand in respect to their neglect to appear and prosecute their suits, adopt the fiction that the king is legally ubiquitous and always in court, so that he can never be non-suited. The employment of fictions is a singular illustration of the justice of the common law, which did not hesitate to conceal or affect to conceal the fact, that a rule of law has undergone alteration, its letter remaining unchanged.

Fictio in the old Roman law was properly a term of pleading and signified a false averment on the part of the plaintiff, which the defendant was not allowed to traverse; as that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of the fiction was to give the court jurisdiction; Maine, *Anc. Law* 25.

Fictions are to be distinguished on the one hand from presumptions of law, and on the other hand from estoppels. A presumption is a rule of law prescribed for the purpose of getting at a certain conclusion, though arbitrary, where the subject is intrinsically liable to doubt from the remoteness, discrepancy, or actual defect of proofs.

Thus, an infant under the age of seven years is conclusively presumed to be without discretion. Proof that he has discretion the court will not listen to. In the nature of the subject, there must be a limit, which it is better should be a general though arbitrary one than be fluctuating and uncertain in each case. An estoppel, on the other hand, is the rule by which a person is precluded from asserting a fact by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to question.

This distinction is thus expressed by a Scotch writer—"A *fictio juris* differs from a presumption. Writers are presumed which are likely to be true; but a fiction of law assumes for truth what is either false, or at least is as probably false as true. Thus, an heir is feigned or considered in law as the same person with his ancestor; thus, also, writings against which certification is obtained in a reduction-improvement are judged to be false, *fictio juris*, though the most convincing proof shall be brought that they once existed and were genuine. Fictions of law must in all their effects be always limited to the special purpose of equity for which they were introduced. Ersk. Prin. 431.

The familiar fictions of the civil law and of the earlier common law were very numerous; but the more useful of them have either been superseded by authorized changes in the law or have gradually grown as it were into distinct principles, forming exceptions or modifications of those principles to evade which they were at first contrived. As there is no just reason for resorting to indirection to that which might be done directly, fictions are rapidly disappearing before the increasing homogeneity of our jurisprudence. See 4 Benth. Ev. 300; 2 Pothier, *Obl. Evans* ed. 43. But they have doubtless been of great utility in conducting to the gradual amelioration of the law; and, in this view, fiction, equity, and legislation have been named together as the three instrumentalities in the improvement of the law. They have been employed historically in the order here given. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or the other of them. But there is no instance in which the order of their appearance has been changed or inverted. Maine, *Anc. Law* 24.

Theoretical writers have classified fictions as of five sorts: *abeyance*, when the fee of land is supposed to exist for a time

without any particular owner during an outstanding freehold estate; 2 Bla. Com. 107; 1 Cruise, Dig. 67; 1 Com. Dig. 175; 1 Viner, Abr. 104; the doctrine of *remitter*, by which a party who has been disseised of his freehold, and afterwards acquires a defective title, is remitted to his former good title; that one thing done to-day is considered as done at a preceding time by the doctrine of *relation*; that, because one thing is proved, another shall be presumed to be true, which is the case in all *presumptions*; that the heir, executor, or administrator stand by *representation* in place of the deceased. Again, they have been classified as of three kinds: positive, when a fact which does not exist is assumed; negative, when a fact which does exist is ignored; and fictions by relation, when the act of one person is taken as if it were the act of a different person,—e. g., that of a servant as the act of his master; when an act at one time or place is treated as if performed at a different time or place; and when an act in relation to a certain thing is treated as if it were done in relation to another thing which the former represents,—e. g., where delivery of a portion of goods sold is treated as giving possession of the whole; Best, Pres. 27.

Fictions being resorted to simply for the furtherance of justice; Co. Litt. 150; 10 Co. 42; 1 Cowp. 177; several maxims are fundamental to them. First, that that which is impossible shall not be feigned; D'Aguesseau, *Œuvres*, tome iv. pp. 427, 447 c. *Plaidoyer*; 2 Rolle 502. Second, that no fiction shall be allowed to work an injury; 3 Bla. Com. 43; 17 Johns. 348. Third, a fiction is not to be carried further than the reasons which introduced it necessarily require; 1 Lilly, Abr. 610; 2 Hawk. Pl. Cr. 320; Best, Pres. 30.

Consult Dalloz, Dict.; Burg. Ins. 139; Ferguson, *Moral Phil.* pt. 5, c. 10, § 3; 1 Toullier 171, n. 203; 2 id. 217, n. 203; 11 id. 10, n. 2; Maine, *Anc. Law*; Benth. Jud. Ev.; 1 Poll. & Maitl. 469.

FICTION OF LAW. A legal assumption that a thing is true, which is either not true, or which is as probably false as true.

FICTITIOUS ACTION. A suit brought on pretence of a controversy when no such controversy in truth exists. Such actions have usually been brought on a pretended wager, for the purpose of obtaining the opinion of the court on a point of law. Courts of justice were constituted for the purpose of deciding really existing questions of right between parties; and they are not bound to answer impertinent questions which persons think proper to ask them in the form of an action on a wager; 12 East 248. Such an attempt has been held to be a contempt of court; and Lord Hardwicke in such a case committed the parties and their attorneys; Rep. t. Hardw. 237. See, also, Comb. 425; 1 Co. 88; 6 Cra. 147; *FEIGNED ACTIONS*.

FICTITIOUS PARTY. Where a suit is brought in the name of one who is not in being, or of one who is ignorant of the suit and has not authorized it, it is said to be brought in the name of a fictitious plaintiff. To bring such a suit is deemed a contempt of court; 4 Bla. Com. 133.

FICTITIOUS PAYEE. When a contract, such as negotiable paper, is drawn in favor of a fictitious person, and has been indorsed in such name, it is deemed payable to bearer as against all parties who are privy to the transaction; and a holder in good faith may recover on it against them; Pars. Bills & N. 691, n.; 2 H. Bla. 178, 288; 19 Ves. 311; 30 Miss. 123; 54 Ill. 239; 11 Barb. 248; 2 Yeates 480. And see 10 B. & C. 468; 2 Sandf. 83; 2 Duer 121; 104 Mass. 336; 2 Neb. 29.

The maker of such a note, by negotiating it, transfers title to it without indorsement, and it is presumed that the note came into the possession of the holders with the names of all the indorsers on it, and *prima facie* he is created as a holder for value; 5 N. Y. Supp. 753; 6 Bosw. 202; 3 Hill 112; pro-

vided that the acceptor or indorser be ignorant of the fact that the payee is fictitious; 21 Ohio St. 433; 1 Camp. 130; and to entitle the holder of such a note to a recovery it must appear affirmatively that he was ignorant of the fact that the payee was a fictitious person; 4 E. D. Sm. 88. It was said by Lord Ellenborough that as between the original parties who put it into circulation with a knowledge of the fiction, it might be held void as an inoperative instrument, but if money from the holder actually gets into the hands of the acceptor it may be recovered back as money had and received; 1 Camp. 130; *id.* addenda, 180 b, 9. See also Peak. Add. Cas. 146; Sto. Prom. Notes 39. In the hands of a *bona fide* holder the note or bill is good against the maker; 79 N. Y. 536; 22 Ia. 404; 11 Ind. 103; 40 N. H. 21.

A *bona fide* holder for a valuable consideration of a bill drawn payable to a fictitious person and indorsed in that name by the drawer may recover the amount of it in an action against the acceptor for money paid or money had and received upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill; 3 Term 174; and the mere fact of the acceptance of such a bill is evidence that the value has been received for it; *id.* 182; in this case three judges thought that the bill was to be considered as payable to bearer, and in the leading case of *Minet v. Gibson* that view was taken and it was held that a recovery from the acceptor may be had upon a count upon a bill payable to bearer, where such acceptor is aware that the payee is a fictitious person; 3 Term 481. This judgment was affirmed by the House of Lords, though with a dissent by Eyre, C. B., and Heath, J., judges, with whom Lord Thurlow coincided; 1 H. Bla. 569; s. c. 6 Bro. P. C. 235. The case has been termed "anomalous" by a text writer who quotes the dissenting opinion of Eyre, C. B., as one "whose reasoning, it is conceived, has never been refuted;" 2 Ames, Bills & Notes 864. But the same writer admits that "the doctrine of the case has been generally adopted;" *id.* In an action on such a bill, to show that the acceptor is aware that the payee is a fictitious person, evidence is admissible to show the circumstances under which he had received other bills payable to fictitious persons; 2 H. Bla. 187, 288. See also 18 C. B. n. s. 694; L. R. 1 C. P. 463.

When a note is made payable to the name of some person not having any interest, and not intended to become a party to the transaction, whether a person of such a name is or is not known to exist, the payee may be deemed fictitious; 2 N. H. 446.

A note payable to a company or firm having no existence legal or *de facto*, has been held to be such a note; 11 Ind. 101; 40 N. H. 21; 4 E. D. Smith 83. See 6 Wend. 627; Byles, Bills, Wood's ed. 888.

FICTITIOUS PERSON. A person having no real existence. A patent to a fictitious person is in legal effect no more than a declaration that the Government thereby conveys the property to no one, and in such a case the doctrine that a subsequent *bona fide* purchaser is protected does not apply. 199 U. S. 63.

FICTITIOUS STOCK. See **STOCK**.

FIDE-JUBERE. In Civil Law. To become *fide-jussor*; to pledge one's self; to act as surety for another. Among the words designated as words of obligation or forms of stipulation. *Fide-jubes*? do you make yourself *fide-jussor*? *Fide-jubeo*, I do make myself *fide-jussor*. Inst. 8. 15. 1.

FIDE-JUSSIO. An act by which any one binds himself as an additional security for another. This giving security does not destroy the liability of the principal, but adds to the security of the surety. Vicat, *Voc. Jur.*; Hallifax, *Annals*, b. 2, c. 16, n. 10.

FIDE-JUSSOR. In Civil Law. One who becomes security for the debt of an-

other, promising to pay it in case the principal does not do so. 3 Bla. Com. 108, 291.

He differs from a co-obligor in this, that the latter is equally bound to a debtor with his principal, while the former is not liable till the principal has failed to fulfil his engagement. Dig. 12, 4, 4; 16, 1, 13; 84, 8, 64; 88, 1, 87; 50, 17, 110; 6, 14, 20; Hall, 33; Dunl. Adm. Pr. 800; Clerke, Prax. tit. 63.

The obligation of the fide-jussor was an accessory contract; for, if the principal obligation was not previously contracted, his engagement then took the name of mandate. *Lec. Elém.* § 872; *Code Nap.* 2012.

FIDE-PROMISSOR. See FIDE-JUSSOR.

FIDEI-COMMISSARIUS (L. Lat.). In Civil Law. One who has a beneficial interest in an estate which, for a time, is committed to the faith or trust of another. This term has nearly the same meaning as *cestui que trust* has in the common law. 1 Greenl. Cruise, Dig. 295; Story, Eq. Jur. § 966.

Fidei-commissary and *fide-commissary*, anglicized forms of this term, have been proposed to take place of the phrase *cestui que trust*, but do not seem to have met with any favor.

According to Du Cange, the term was sometimes used to denote the executor of a will.

FIDEI-COMMISSUM (L. Lat.). In Civil Law. A trust. A devise was made to some person (*heres fiduciarius*), and a request annexed that he should give the property to some one who was incapable of taking directly under the will. Inst. 2, 23, 1; 1 Greenl. Cruise, Dig. 295; 15 How. 367, 407, 409. A gift which a man makes to another through the agency of a third person, who is requested to perform the will of the giver. The Louisiana civil code prohibits *fidei-commissa*; 3 La. Ann. 432; thus abolishing express trusts, but not affecting implied trusts; 2 How. 619.

The rights of the beneficiary were merely rights in courtesy, to be obtained by entreaty or request. Under Augustus, however, a system was commenced, which was completed by Justinian, for enforcing such trusts. The trustee or executor was called *heres fiduciarius*, and sometimes *fide-jussor*. The beneficial heir was called *heres fidei-commissarius*.

The uses of the common law are said to have been borrowed from the Roman *fidei-commissa*; 1 Greenl. Cruise 295; Bacon, Read. 19; see Bisph. Eq. 50; 1 Madd. 446; Story, Eq. Jur. § 966. The *fidei-commissa* are supposed to have been the origin of the common-law system of entails; 1 Spence, Eq. Jur. 21; 1 Washb. R. P. 60. This has been doubted by others. See SUBSTITUTION.

FIDELIS. Faithful; trustworthy.

FIDELITAS. Fealty; fidelity.

FIDEM MENTIRI. When a tenant does not keep that fealty which he has sworn to the lord. Leg. Hen. I. c. 53.

FIDES. Faith; honesty; confidence. See GOOD FAITH.

FIDUCIA (Lat.). In Civil Law. A contract by which we sell a thing to some one—that is, transmit to him the property of the thing, with the solemn forms of emancipation—on condition that he will sell it back to us. This species of contract took place in the emancipation of children, in testaments, and in pledges. Pothier, Pand.

FIDUCIARIUS TUTOR. See PUPIL; TUTOR.

FIDUCIARY. This term is borrowed from the civil law. The Roman laws called a fiduciary heir the person who was instituted heir, and who was charged to deliver the succession to a person designated by the testament. Merlin, *Répert.* But Pothier, Pand. vol. 22, says that *fiduciarius heres* properly signifies the person to whom a testator has sold his inheritance under the condition that he should sell it to another. Fiduciary may be defined in trust, in confidence.

The law forbids one standing in such a position making any profit at the expense of the party whose interests he is bound to protect, without full disclosure; Bisph. Eq. § 238; 10 H. L. Cas. 26, 31, 45. What constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society; 52 Barb. 581; 78 Pa. 392; agent; 1 Johns. Ch. 550; medical or religious adviser; 24 Pa. 232; article in 10 Jur. N. S. 91; husband and wife; 86 Pa. 512; or a son; 13 Ch. Div. 338. See L. R. 3 Eq. 461; Hill, Trustees 547. Many cases have arisen in New York under the laws allowing arrest for debts incurred in a fiduciary capacity. The term seems to refer rather to the good faith than the ability of the party; 8 How. Pr. 208. See 4 Sandf. 707; 6 How. Pr. 86; 2 Abb. Pr. 444; 24 How. Pr. 274; 5 Rob. (N. Y.) 502. Under the bankrupt laws of 1841, and March 2, 1867, § 33, providing that debts contracted in a fiduciary capacity should not be barred by a discharge, the following cases fall within the act; an agent who appropriates money put into his hands for a specific purpose of investment; 1 Edm. 206; collector of city taxes who retains money officially collected; 7 Metc. 152; one who receives a note or other security for collection; 5 Denio 269; commission merchant; 54 Ga. 125; and it does not alter the rule that the debt has been reduced to judgment before the discharge; 52 Iowa 158. This exception from the operation of a discharge in bankruptcy relates to technical trusts, not merely such as the law implies from the contract, but those actually and expressly constituted; 87 N. Y. 307; 129 *id.* 23. In the following cases the debt has been held not a fiduciary one; a factor who retains the money of his principal; 2 How. 202, 203; 2 La. Ann. 1023; 104 Mass. 245; an agent under an agreement to account and pay over monthly; 5 Biss. 324; one with whom a general deposit of money is made; 72 N. C. 463; a debt created by a person acting as an attorney in fact; 127 Mass. 41. See, also, 82 N. C. 395; 57 Miss. 598; 90 Ill. 371; 31 La. An. 809; 46 Cal. 547.

FIDUCIARY CONTRACT. An agreement by which a person delivers a thing to another on the condition that he will restore it to him. The following formula was employed: *Ut inter bonos agere oportet, ne propter te fidemque tuam fraudas.* Cicero, *de Offic.* lib. 3, cap. 13; *Lec. du Dr. Civ. Rom.* § 237. See 2 How. 202; 6 W. & S. 18; 7 Watts 415.

FIEF. A fee, feod, or feud.

FIEF D'HAUBERK. A fee held on the military tenure of appearing fully armed on the *ban* and *arrière-ban*. *Feudum hauberticum.* Spelman, Gloss.; Calvinus, Lex.; Du Cange. A knight's fee. 2 Bla. Com. 62.

FIEF TENANT. The holder of a fief or fee.

FIEL. In Spanish Law. An officer who keeps possession of a thing deposited under authority of law. *Las Partidas*, pt. 3, tit. 9, l. 1.

FIELD. A cultivated tract of land. 81 N. C. 585; 97 Mass. 412; but not a one-acre lot used for cultivating vegetables; 7 Heisk. 510.

FIELDAD. In Spanish Law. Sequestration. This is allowed in six cases by the Spanish law where the title to property is in dispute. *Las Partidas*, pt. 3, tit. 3, l. 1.

FIELD-ALE, or FILKDALE. The drinking of ale by bailiffs and other officers in the field, at the expense of the hundred; an old English custom long since prohibited. Toml.

FIERDING COURTS. Ancient Gothic courts "in the lowest instance;" so called because four were instituted within every superior district or hundred. Their jurisdiction

was limited within forty shillings, or three marks; 3 Steph. Com. 393; 3 Bla. Com. 34; Stiernhook, *De Jure Goth.* i. 1, c. 2.

FIERI FACIAS (Lat. that you cause to be made). In Practice. A writ directing the sheriff to cause to be made of the goods and chattels of the judgment-debtor the sum or debt recovered.

It receives its name from the Latin words in the writ, used when legal proceedings were conducted in Latin (*quod fieri facias de bonis et catallis, id quod causam te facias de bonis et catallis*). It is the form of execution in common use where the judgment-debtor has personal property.

The foundation of this writ is a judgment for debt or damages; and the party who has recovered such a judgment is generally entitled to it, unless he is delayed by the stay of execution which the law allows in certain cases after the rendition of the judgment, or by proceedings in error.

The execution, being founded on the judgment, must, of course, follow and be warranted by it; 2 Saund. 72 *h, k*; Bingham, Judg. 183; 2 Cow. 454. Hence, where there is more than one plaintiff or defendant, it must be in the name of all the plaintiffs against all the defendants; 6 Term 525. It is either for the plaintiff or the defendant. When it is against an executor or administrator for a liability of the testator or intestate, it is conformable to the judgment, and must be only against the goods of the deceased, unless the defendant has made himself personally liable by his false pleading, in which case the judgment is *de bonis testatoris si, et si non, de bonis propriis*; 1 S. & R. 453; 4 *id.* 394; 18 Johns. 502; 1 Hayw. 598; 2 *id.* 112.

At common law, the writ bound the goods of the defendant or party against whom it was issued, from the teste day; by which it is to be understood that the writ bound the property against the party himself, and all claiming by assignment from or by representation under him; 4 East 538; so that a sale by the defendant of his goods to a *bona fide* purchaser did not protect them from a *feri facias* tested before, although not issued or delivered to the sheriff till after the sale; Cro. Eliz. 174; Cro. Jac. 451; 1 Sid. 371; but by the statute of frauds, 29 Car. II. c. 3, § 10, it was enacted "that no writ of *feri facias*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution issued forth, but from the time that such writ shall be delivered to the sheriff," etc., who must "indorse upon the back thereof the day of the month and year whereon he or they received the same;" and the same or similar provisions have been enacted in most of the states; 2 S. & R. 157; 1 Whart. 377; 8 Johns. 446; 3 Harr. Del. 512; 32 Mo. 387; 14 Wis. 202. The property in the goods is not altered, but remains in the defendant until the actual execution of the writ; Wats. Sher. 176.

The execution of the writ is made by levying upon the goods and chattels of the defendant or party against whom it is issued; and, in general, seizing a part of the goods in the name of the whole on the premises is a good seizure of the whole; 1 Ld. Raym. 725; 4 Wash. C. C. 29; 1 Munf. 269; 2 Hill, N. Y. 666; 5 Ired. 192; 7 Ala. N. S. 619. But see 1 Whart. 377; 6 Halst. 218. It may be executed at any time before and on the return-day; 13 Tex. 507; but not on Sunday, where it is forbidden by statute (29 Car. II. c. 7, which has been substantially followed in the United States); Watson, Sher. 173; 5 Co. 92; Comyns, Dig. Execution, C 5. After the death of the plaintiff, the sheriff may execute a *fi. fa.* tested in his lifetime, and under it seize his goods in the hands of his executor or administrator; Wats. Sher. 173.

The sheriff cannot break the outer door of a house for the purpose of executing a *feri facias*; 5 Co. 92; nor unlatch an outer door; 4 Hill, N. Y. 437; nor can a window be broken for this purpose; W. Jones 429. He may, however, enter the house, if it be open, and, being once lawfully entered, he may break open an inner door or chest to seize the goods of the defendant, even without any request to open them; 4 Taunt.

619; 3 B. & P. 223; Cowp. 1; Troub. & H. Pr. 1116. Although the sheriff is authorized to enter the house of the party to search for goods, he cannot enter that of a stranger for that purpose, without being guilty of a trespass, unless the defendant's goods are actually in the house; Comyns, Dig. Execution (C 5). The sheriff may break the outer door of a barn; 1 Sid. 186; 1 Kebl. 639; or of a store disconnected with the dwelling-house and forming no part of the curtilage; 16 Johns. 287. See 1 Sm. L. Cas., 9th Am. ed. 228, with note on the subject; BREAKING.

At common law a *fi. fa.* did not authorize a sheriff to seize bank-bills, checks, or promissory notes; but it is otherwise now, by stat. 1 & 2 Vict. c. 110, § 12, and 3 & 4 Vict. c. 82; and this is now the law of many of the United States; 2 Va. Cas. 246; 1 Bail. 39; Hempst. 91; 4 N. H. 198; 29 Pa. 240. So money may be taken; 1 Bail. 39; 1 Cra. 117; 12 Johns. 220. The writ applies generally to goods and chattels, but the common-law rules as to what may be taken are very much extended; see as to the different species of property in England; Watson, Sheriff ch. x. sec. ii., and as to what interest may be taken; *id.* sec. iii.; and as to railway property; 24 Am. & Eng. R. R. Cas. 5; copyright and patent; 40 Am. Rep. 123; growing crops; 31 Am. L. Reg. 602; seat in the stockexchange; 28 Cent. L. J. 444; board of trade shares; 22 Am. L. Reg. 438; 3 Am. & Eng. Corp. Cas. 171; 4 *id.* 65; property in *custodia legis*; 28 Am. Rep. 35; interest of heirs; 44 Am. Dec. 338; trust funds; 7 Cent. L. J. 433; equitable interest; 9 Can. L. T. 125, 145; 17 Can. L. J. 54; pension money; 21 Ir. L. T. 47. For the form of the writ, see 3 Sharsw. Bla. Com. App. xxvii.; as to proceeding in equity in aid of executions at law, see CREDITORS' BILL. See, generally, Murfree, Freeman, Executions ch. X; Watson, Sheriff; EXECUTION; LEVY; SHERIFF.

FIERI FECI (L. Lat.). In Practice. The return which the sheriff or other proper officer makes to certain writs, signifying, "I have caused to be made."

When the officer has made this return, a rule may be obtained upon him after the return-day, to pay the money into court, and, if he withholds payment, an action of debt may be had on the return, or assumpsit for money had and received may be sustained against him; 3 Johns. 183.

FIFTEENTHS. An aid; aid granted from time to time to the crown by parliament, consisting of a fifteenth part of the personal property in every township, borough, and city in the kingdom. In the eighth year of Edward III. the valuation of the kingdom was fixed and a record made in the exchequer of the amount (twenty-nine thousand pounds). This valuation was not increased as the property in the kingdom increased in value; whence the name came in time to be a great misnomer. Co. 2d Inst. 77; 1 Poll. & Maitl. 604; 2 Bla. Com. 309; Cowel.

FIFTY DECISIONS, THE. In the process of the making of the Digest or Pandects under the authority of Justinian, all moot points in the law which could be satisfactorily settled only by imperial authority were determined as the work progressed by a series of imperial ordinances of Justinian known as the "Fifty Decisions" (529-532). Taylor, Jurispr., 144.

FIGHT. Does not necessarily imply that both parties should give and take blows. It is sufficient that they voluntarily put their bodies in position with that intent. 73 N. C. 155; 46 Ga. 148. See PRIZE-FIGHT.

FIGHTWITE (Sax.). A mulct or fine for making a quarrel to the disturbance of the peace. Called also by Cowel *forisfactura pugnæ*. The amount was one hundred and twenty shillings. Cowel.

FIGURES. Numerals. They are either Roman, made with letters of the alphabet; for example, MDCLXXVI; or they are Arabic, as follows: 1776.

Roman figures may be used in contracts

and law proceedings, and they will be held valid; but Arabic figures, probably owing to the ease with which they may be counterfeited or altered, have been holden not to be sufficient to express the sum due on a contract; but it seems that if the amount payable and due on a promissory note be expressed in figures or ciphers, it will be valid. Story, Bills § 42, note; Story, Pr. Notes § 21.

Figures to express numbers are not allowable in indictments; but all numbers must be expressed in words at length, except in setting forth a copy of a written instrument. And complaints are governed by the same rule in cases over which magistrates have final jurisdiction. But the decisions on this point are not uniform. And in most of them the proper distinction between the use of figures in the caption and in the body of an indictment has not been observed. In America, perhaps the weight of authority is contrary to the law as above stated. But, at all events, a contrary practice is unclerical, uncertain, and liable to alteration; and the courts which have sustained such practice have uniformly cautioned against it. See 13 Viner, Abr. 210; 1 Chitty 319; 34 Conn. 280; 35 Me. 489.

Bills of exchange, promissory notes, checks, and agreements of every description are usually dated with Arabic figures; it is, however, better to date deeds and other formal instruments by writing the words at length. See 5 Toullier, n. 336; 4 Yeates 278; 2 Johns. 233; 2 Miss. 256; 6 Blackf. 533; 1 Vt. 336.

FILACER. An officer of the common pleas, king's bench, and exchequer, whose duty it was to file the writs on which he made process. There were fourteen of them; and it was their duty to make out all original process. Cowel; Blount. The office was abolished in 1837.

FILARE. In Old English Practice. To file. Townsh. Pl. 67.

FILE (Lat. *Filum*). A thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the more safe-keeping and ready turning to the same. Spelman, Gloss.; Cowel; Tomlin, Law Dict. Papers put together and tied in bundles. A paper is said also to be filed when it is delivered to the proper officer, and by him received to be kept on file, 13 Viner, Abr. 211; 1 Littleton 113; 1 Hawk. Pl. Cr. 7, 207. Where filed by a wife as agent; 120 Mass. 130.

The origin of the term indicates very clearly that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the string or wire; 38 Ala. 248.

Filing a paper, in modern usage, consists in placing it in the custody of the proper official by the party charged with the duty, and the making of the proper indorsement by the officer. 2 S. Dak. 525. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record. It is not synonymous with deposited; 67 Hun 560.

The word "file" is derived from the Latin word *filum*, and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. "Filing" is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. 241 U. S. 76.

FILED AWAY. A recital in a divorce decree, that a part of the judgment for alimony was paid by defendant, and that the case was "filed away" was in effect, keeping control of the case to be redocketed upon notice. 135 Ky. 198, 122 S. W. 120.

FILENJAID (Brit.). A name given to villeins in the laws of Hoel Dda. Barring. Obs. St. 302.

FILIATE. To declare whose child a bastard is. 2 W. Bla. 1017.

FILIATION. In Civil Law. The descent of son or daughter, with regard to his or her father, mother, and their ancestors.

Nature always points out the mother by evident signs, and, whether married or not, she is always certain; *mater semper certa est, etiam si quo conciperit*. There is not the same certainty with regard to the father, and the relation may not know or may feign ignorance as to the paternity; the law has therefore established a legal presumption to serve as a foundation for paternity and filiation.

When the mother is or has been married, her husband is presumed to be the father of the children born during the coverture, or within a competent time afterwards, whether they were conceived during the coverture or not: *pater est quem nuptiæ demonstrant*.

This rule is founded on two presumptions: one on the cohabitation before the birth of the child; and the other that the mother has faithfully observed the vow she made to her husband.

This presumption may, however, be rebutted by showing either that there has been no cohabitation, or some physical or other impossibility that the husband could be the father. See ACCESS; BASTARD; GESTATION; NATURAL CHILDREN; PATERNITY; PUTATIVE FATHER.

FILICETUM. In English Law. A ferny or brackly ground; a place where fern grows. Co. Litt. 4 b; Shep. Touch. 95.

FILIOLUS. Properly a little son; a god-son. Tonlin; Dugd. Warwicksh. 697. See also FILIUS.

FILIUS (Lat.). A son. A child.

As distinguished from heir, *filius* is a term of nature, *heres* a term of law. 1 Powell, Dev. 311. In the civil law the term was used to denote a child generally. Calvinus, Lex.; Vicat. Voc. Jur. Its use in the phrase *nullius filius* would seem to indicate a use in the sense of legitimate son, a bastard being the legitimate son of nobody; though the word is usually rendered a son, whether legitimate or illegitimate. Vicat, Voc. Jur.

FILIUS FAMILIAS (Lat.). A son who is under the control and power of his father. Story, Confli. Laws § 61; Vicat, Voc. Jur.

FILIUS MULIERATUS (Lat.). The first legitimate son born to a woman who has had a bastard son by her husband before her marriage. Called, also, *mulier, mulier puitsé*. 2 Bla. Com. 248.

FILIUS NULLIUS (Lat. son of nobody). A bastard. Called, also, *filius populi* (son of the people). 1 Bla. Com. 459; 6 Co. 65 a.

FILIUS POPULI. A son of the people; a natural child.

FILL. To occupy the whole capacity or extent of, so as to leave no space vacant.

To possess and discharge the duties of an office. The election of a person to an office constitutes the essence of his appointment, but the office cannot be considered as actually filled until his acceptance, either expressed or implied; 2 N. H. 202.

In a subscription for shares in a corporation the word "fill" amounts to a promise to pay assessments; 10 Me. 478. As to the use of the word in connection with a doctor's prescription, see 61 Ga. 505; DRUGGIST.

FILLY. A young mare; a female colt. An indictment charging the theft of a "filly" is not sustained by proof of the larceny of a "mare;" 1 Tex. App. 448.

FILUM AQUÆ (Lat. a thread of water). This may mean either the middle line or the outer line. *Altum filum* denotes high-water mark. Blount. *Filum* is, however, used almost universally in connection with *aquæ* to denote the middle line of a stream. *Medium filum* is sometimes used with no additional meaning. The common-law rule was that conveyances of land bounded on streams, above tide water, extend *usque ad filum aquæ*. See RIVER; WATER-COURSE.

FILUM FORESTÆ (Lat.). The bor-

der of the forest. 2 Bla. Com. 419; 4 Inst. 303; Manw. Puritie.

FILUM VIÆ (Lat.). The middle line of a road; a term used to indicate the middle line or thread of a street or road. 2 Sm. L. Cas. 98. See 121 Mass. 18; 119 *id.* 281; 88 Pa. 453; 57 Mo. 582; 87 Ill. 348. Where a description of land gives a street or road as a boundary, it is presumed that the title passes *ad medium filum viæ*; 33 Pa. 124. See **BOUNDARY**; **HIGHWAY**; **STREET**.

FIN. End, limit, period of limitation. (Fr.) End; extremity; termination; expiration. Also, end in the sense of aim, design, etc. Also, chief point, essential part. Wesely Fr. Dict.

FIN DE NON RECEVOIR. In French Law. An exception or plea founded on law, which without entering into the merits of the action shows that the plaintiff has no right to bring it, either because the time during which it ought to have been brought has elapsed, which is called *prescription*, or that there has been a compromise, accord, and satisfaction, or any other cause which has destroyed the right of action which once subsisted. Pothier, *Proc. Civ.* pt. 1, c. 2, s. 2, art. 2; Story, *Conf. Laws* § 580.

FINAL. Last; conclusive; pertaining to the end. In law it is usually employed in contrast with interlocutory (*q. v.*) with respect to pendency of suits.

FINAL IN THE ACTION. The language "the decision of the motion shall be final in the action" means final in the sense of ending the matter instead of final in the sense of being an appealable order." 143 Ky. 139, 136 S. W. 130.

FINAL ADJOURNMENT. See **RISE**.

FINAL COSTS. Such costs as are to be paid at the end of the suit; costs, the liability for which depends upon the final result of the litigation.

FINAL DECISION. One from which no appeal or writ of error can be taken. 47 Ill. 167; 6 El. & Bl. 408.

A decision from which there is no appeal. English.

The words in the Judicial Code, § 218, "final decisions in the district courts" mean the same thing as "final judgments and decrees" as used in former acts regulating appellate jurisdiction. 252 U. S. 36.

FINAL DECREE.

Whether a decree is final or interlocutory depends upon its essential purport and effect and not upon its characterization in pleadings. 238 U. S. 82. See **DECREE**.

FINAL DETERMINATION. See **FINAL DISPOSITION**.

FINAL DISPOSITION. Such a conclusive determination of the subject-matter embraced in a submission to arbitrators, that after the award is made nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.

Such an award that the party against whom it is given may perform it without any further ascertainment of rights or obligation. See 50 Me. 401.

A disposition which leaves nothing further to be done. In an award a disposition that leaves no matter undetermined. English.

The "final disposition" of a suit means the final determination of the suit. In an act allowing the Court of Claims "at any time while any suit or claim is pending before or an appeal from the said court, or within two years next after the final disposition of any such suit or claim, on motion on behalf of the United States, to grant a new trial in any such suit or claim," "final disposition" means the final determination of the suit on appeal (if an appeal is taken), or if none is taken, then its final determination in the

Court of Claims. The final determination of a suit is the end of litigation therein. 13 Wall. (U. S.) 669.

FINAL HEARING. The trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, which are termed interlocutory. 24 Wis. 171.

FINAL JUDGMENT. See **JUDGMENT**.

FINAL ORDER. A "final order" either determines the action itself, decides some matter litigated by parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original position. 18 B. Mon. (Ky.) 826; 141 Ky. 404, 132 S. W. 1024.

A "final order" is one that disposes of the merits of the cause; that settles the rights of the parties under the issues made by the pleadings. 115 Ky. 783, 74 S. W. 1091.

FINAL ORDER OR JUDGMENT. A "final order or judgment" either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original position. 7 Bush (Ky.) 623.

A "final judgment or order" is such an order as at once puts an end to the action; it must not merely decide that one of the parties is entitled to relief of a final character, but it must give that relief by its own force, or be enforceable for that purpose, either without further action by the court, or by process of contempt. 145 Ky. 315, 140 S. W. 533.

FINAL PASSAGE. In Parliamentary Law. The vote on a passage of a bill or resolution in either house of the legislature after it has received the prescribed number of readings and has been subjected to such action as is required by the fundamental law governing the body or its own rule. See 54 Ala. 616.

The passage of a bill before a legislative body after all the preliminaries have been carried out. English.

The constitution of Alabama provided that no bill could become a law unless on its final passage it be read at length and the vote taken by yeas and nays. It was held that the final passage of a bill within this section was a vote on its passage in either house of the General Assembly after it had received three readings on three different days in that house. 13 A. & E. Ency. 2nd ed., 20; 54 Ala. 605.

FINAL PROCESS. Writs of execution. So called to distinguish them from *mesne process*, which includes all process issuing before judgment rendered. 3 Steph. Com. 489. See **ORIGINAL PROCESS**; **MESNE PROCESS**.

FINAL RECOVERY. The ultimate judgment of a court. 100 Mass. 91. It has also been construed as referring to the verdict, as distinguished from the judgment. 6 Allen 243.

FINAL SENTENCE. One which puts an end to a case. Distinguished from interlocutory. See **SENTENCE**.

FINAL SETTLEMENT. In Probate and Administration. The final account of an executor or administrator closing the business of the estate, with the order of the court thereon approving it and discharging the accountant. 13 N. E. Rep. () 181; 4 Wash. 682; 87 Ind. 114; 65 Ala. 442.

FINALIS CONCORDIA (Lat.). A decisive agreement. A fine. A final agreement.

A final agreement entered by the parties by permission of court in a suit actually brought for lands. Subsequently the bring-

ing suit, entry of agreement, etc., became merely formal, but its entry upon record gave a firm title to the plaintiff; 1 Washb. R. P. 70; 1 Spence, Eq. Jur. 143; Tudor, *Lead. Cas.* 689.

Finis est amicitabilis compositio et finalis concordia ex consensu et concordia domini regis vel iudicatarum (a fine is an amicable settlement and decisive agreement by consent and agreement of our lord the king or his justices). Glanville, lib. 8, c. 1.

Talis concordia finalis dicitur eo quod finem imposuit negotio, adeo ut neutra pars litigantium ab eo de cetero poterit recidere (such concord is called final because it puts an end to the business, so that neither of the litigants can afterwards recede from it). Glanville, lib. 9, c. 3; Cunningham, *Law Dict.*

FINANCES. The public revenue or resources of a government or state. The income or means of an individual or corporation. It is somewhat like the *fiscus* of the Romans. The word is generally used in the plural.

Money resources generally. The state of the finances of an individual or corporation, being his condition in a monetary point of view. The cash he has on hand, and that which he expects to receive, as compared with the engagements he has made to pay.

FINANCIER. One who manages the finances or public revenue. Persons skilled in matters appertaining to the judicious management of money affairs.

FIND. The word find or finding does not always imply the same thing in legal proceedings. Where a cause is tried by the court, the finding means the fact which the court considers the evidence establishes, but find, as used in a statute in respect to the truth of a complaint for the revocation of a license, implies that the board is satisfied from the evidence, and the conclusion may be informally expressed. 74 Wis. 267.

FINDER. One who lawfully comes to the possession of another's personal property, which was then lost.

The finder of lost property at common law had a valid claim to the same against all the world except the true owner; 1 Stra. 504; 62 Me. 275; 1 E. D. Sm. 393; 11 R. I. 588; 28 Gratt. 601; 16 Ore. 269; and money or property found on the premises of another has been held, in the case of a servant in a hotel, as against the proprietor, to belong to the finder; 90 Pa. 377; so a stranger who finds money in a shop may retain it as against the shop-owner; 21 L. J. Q. B. 75; unless it has been simply laid aside and left by mistake; 10 Allen (Mass.) 648; 1 Misc. Rep. (N. Y.) 22; or a conductor who finds money on the cars may retain it as against the company; 56 N. Y. 175; or an employee in a mill, who finds bank-notes among old papers bought to be manufactured over; 62 Ind. 281. Drift-logs found on the banks of a river may be rightfully retained by the finder as against the riparian owner; 86 Tenn. 14; but an aerolite which buries itself in the ground belongs rather to the owner of the soil on which it falls than to one who observes it and digs it out; 86 Ia. 71. In a very recent English case, where a workman employed by a corporation to clear out a pool on its land found two rings in the mud at the bottom of the pool, the corporation was held entitled to recover the rings in an action of detinue; [1896] 2 Q. B. 44. In that case Lord Russell of Killowen, C. J., put the decision on the ground that the possession of land carried with it everything attached to it, or under it, and he expressly distinguished the last English case above cited, which, he said, stood by itself on the special ground that the notes being dropped in the public part of the shop were never in the custody of the shopkeeper; accordingly he says: "It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in*

quo."

A commentator upon these cases says: "This language applies to land with respect to which the public has no easement, which differentiates the case from findings in shops and other public places. The real distinction, however, is this, that those things belong to the owner of the premises in which they are found, which, either from their nature, or from the circumstances attending the loss, become practically part and parcel of the freehold, such as the rings, covered by the water and mud, which undoubtedly belonged to the owner of the land, and the aerolite which buried itself in the ground to the depth of three feet; or, to use the language of some of the cases, those things belong to the owner which may be regarded as *accretions* to his land, such as the aerolite, the rings, or drift-logs; though the latter may be pursued and taken by a former finder, from whom they have escaped." 36 Am. L. Reg. n. s. 588.

Where a man buys a chattel which unknown to himself and the vendor contains valuable property, he will, as to that, be considered merely as a finder. When a person purchased at a public auction a bureau, and appropriated to his own use a purse containing money, found in a secret drawer, the existence of which at the time of the sale was not known to any one, it was held that there was a delivery of the bureau but not of the purse and money, and it was a simple case of finding and subject to the law in such cases; 7 M. & W. 623. See Br. Leg. Max., 8th Am. ed. 807.

The finder is entitled to certain rights, and liable to duties which he is obliged to perform. This is a species of deposit, which, as it does not arise *ex contractu*, may be called a *quasi deposit*; and it is governed by the same general rules as common deposits. The finder is required to take the same reasonable care of the property found as any voluntary depositary *ex contractu*; Doctor & Stud. Dial. 2, c. 38; 2 Bulstr. 306, 312; 1 Rolle 125; 50 Vt. 688; 107 Mass. 251.

The finder is not bound to take the goods he finds; yet, when he does undertake the custody, he is required to exercise reasonable diligence in preserving the property; and he will be responsible for gross negligence. Some of the old authorities laid down that "if a man find butter, and by his negligent keeping it putrefy, or if a man find garments, and by his negligent keeping they be moth-eaten, no action lies." So it is if a man find goods and then lose them again. Bacon, Abr. *Bailment*, D; and in support of this position, Leon. 123, 223; Ow. 141; 2 Bulstr. 21, are cited. But these cases, if carefully examined, will not, perhaps, be found to decide the point as broadly as it is stated in Bacon. A finder would be held responsible for gross negligence, or fraud; Story, *Bailm.* § 85.

On the other hand, the finder of an article is entitled to recover all expenses which have necessarily occurred in preserving the thing found; Domat, l. 2, t. 9, s. 2, n. 2. But unlike salvors by water, he can claim nothing beyond this; 2 H. Bla. 254; 37 Conn. 96; 27 Ohio 435; Shoul. *Bailm.* 28.

And when the owner does not reclaim the goods lost, they belong to the finder; 1 Bla. Com. 296; 2 id. 9; 2 Kent 290; and should there be several finders, they share in common; 33 Atl. Rep. (N. J.) 1055. The acquisition of treasure by the finder is evidently founded on the rule that what belongs to none naturally becomes the property of the first occupant: *res nullius naturaliter fit primi occupantis*. Mohey or goods that are lost are the only kind that can be said to be found. It is property that the owner has involuntarily parted with, and not property that he has intentionally concealed in the earth for safekeeping; 16 Ore. 269. Money left on a desk in a bank, provided for the use of the depositors, is not lost so as to entitle the finder to the same, as against the bank; 1 Misc. Rep. 22. It seems that the title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there, and no other person can acquire such title except by condemnation and sale in admiralty; 38 Fed.

Rep. 508. One who finds property at sea is only a salvor. When a ship was almost becalmed in high seas a floating chest was found and with but little trouble taken on board. It contained 70 doubloons. It was held that the finders were not entitled to the whole property, though no claims or marks of ownership, but should be compensated by a moiety as for salvage services. The other moiety was directed to be paid into court; Fed. Cas. No. 6620.

As to the criminal responsibility of the finder, the result of the authorities is that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny; 1 Den. Cr. Cas. 335, 387; 2 id. 8; Clark, Cr. L. 255; 29 Ohio St. 184; s. c. 23 Am. Rep. 731; 11 Cox, C. C. 103, 227, 353; 2 C. & K. 841; 53 Ind. 343. If a finder attempts to retain lost property as against the owner, or converts it to his own use, when he knows the owner, he will be guilty of larceny; 1 Humph. 228; 2 Sneed 285. See as to this rule and its qualification Broom, Com., 4th ed. 955; Mart. & Yerg. 226. There must be a felonious intent; 116 Mass. 42; s. c. 17 Am. Rep. 133 and note. Though it is the duty of the finder to seek out the owner and restore the property with due diligence, yet the want of promptness on the part of the finder does not prove felonious intent in keeping the property; 22 Ill. App. 177. The question is, whether the finder, when he came into possession, believed the owner could be found; 2 Green, Cr. L. Rep. 35. In *Regina v. Thurborn, Parke, B.*, observes that it cannot be doubted that if, at this day, the punishment of death was assigned to theft and usually carried into effect, the misappropriation of lost goods would never be held to constitute that offence. Whart. Cr. L. § 901. See TAKING.

See as to title by accession, accretion, and by finding, 35 Cent. Law J. 368.

FINDING. The result of the deliberations of a jury or a court. 1 Day 238; 2 id. 12; 16 Blatchf. 65.

If the court below neglect or refuse to make a finding one way or the other as to the existence of a material fact which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. Both of these are questions of law and proper subjects for review in an appellate court; 147 U. S. 73.

Where a case is tried by a court without a jury, its findings upon questions of fact are conclusive, in the United States supreme court; 121 U. S. 535; 120 id. 20. Error in the findings of fact by the court are not subject to revision if there is any evidence upon which such findings could be made; 184 U. S. 494.

FINE. In Conveyancing. An amicable composition or agreement of a suit, either actual or fictitious, by leave of the court, by which the lands in question become, or are acknowledged to be, the right of one of the parties. Co. Litt. 120; 2 Bla. Com. 349; Bacon, Abr. *Fines and Recoveries*. Fines were abolished in England by stat. 3 & 4 Wm. IV. c. 74. Their use was not unknown in the United States, but has been either expressly abolished or become obsolete. See 1 Steph. Com. 514.

A fine is so called because it puts an end not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Such concords, says Doddridge (Eng. Lawyer 84), have been in use in the civil law, and are called transactions, whereof they say thus: *Transactioes sunt de eis que in controversia sunt, a lite futura aut pendente ad certam compositionem reducuntur, dando aliquid vel accipiendo*. Or shorter, thus: *Transactio est de re dubia et lite ancipite ne dum ad finem ducent, non gratuita pectio*. It is commonly defined an assurance by matter of record, and is founded upon a supposed previously existing

right, and upon a writ requiring the party to perform his covenant; although a fine may be levied upon any writ by which lands may be demanded, charged, or bound. It has also been defined an acknowledgment on record of a previous gift or feoffment, and *prima facie* carries a fee, although it may be limited to an estate for life or in fee-tail. Prest. Conv. 200, 202, 208, 209; 2 Bla. Com. 348.

The stat. 18 Edw. I., called *modus levandi fines*, declares and regulates the manner in which they should be levied and carried on; and that is as follows: The party to whom the land is conveyed or assured commences an action at law against the other, generally an action of covenant, by suing out a writ of *precipe*, called a writ of covenant, that the one shall convey the land to the other, on the breach of which agreement the action is brought. The suit being thus commenced, then follows the *licentia concordandi*, or leave to compromise the suit. The concord, or agreement itself, after leave obtained by the court; this is usually an acknowledgment from the deforciant that the lands in question are the lands of the complainants. The note of the fine, which is only an abstract of the writ of covenant and the concord; naming the parties, the parcels of land, and the agreement. The foot of the fine, or the conclusion of it, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. See Cruise, *Fines*; Bacon, Abr. *Fines and Recoveries*; Comyns, Dig. *Fine*.

In Incorporation Law. A term applied to the charge made against a member of a building and loan association who fails to make his monthly payment when due. It has been lately held, that such fines are not by way of penalty, but are rather to be considered as liquidated damages, fixed by consent of the parties, for the loss sustained by the association by reason of the failure of the defaulting member to make prompt payment, and since such payments are essential to the success of the plan of the association, and for the interest of its members as a whole, the fines will be enforced, independently of statutory provisions, if reasonable in amount and equitable in their application; 36 S. W. Rep. (Ark.) 1085. This case also holds that a fine of "ten cents per share, to be imposed for each and every month that payment is not made," is reasonable. It has also been held that where the by-law provides for a fine of twenty cents per month on each one hundred dollars borrowed, the fine for one month is not repeated and added to that of each succeeding month, but only twenty cents on each one hundred dollars can be imposed in any one month; and when the constitution of a building association prescribes the fines to be imposed on delinquent members, it thereby fixes the limit beyond which the association cannot go; but it may by by-law waive some part of the fines so authorized, and impose smaller ones, and in that case the by-law will govern; 25 S. E. Rep. (W. Va.) 537.

In Criminal Law. Pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. See Shepp. Touchst. 2; Bacon, Abr. *Fines and Amercements*; 1 Bish. Cr. L. § 940. It may include a forfeiture or penalty recoverable in a civil action; 11 Gray 373; 6 Neb. 37.

The amount of the fine is frequently left to the discretion of the court, who ought to proportion the fine to the offence. To prevent the abuse of excessive fines, the constitution of the United States directs that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendm. to the Constitution, art. 8; Cooley, Const. Lim. 377.

This applies to national and not to state legislation; 5 Wall. 480; 7 Pet. 243. The supreme court cannot, on *habeas corpus*, revise the sentence of an inferior court on the ground that the fine was excessive; 7 Pet. 568. See INDENTURE OF A FINE; COGNISOR; COGNISEE; JOINT FINE.

FINE FOR ALIENATION. A sum of money which a tenant by knight's service, or a tenant *in capite* by socage tenure, paid to his lord for permission to alienate his right in the estate he held to another, and by that means to substitute a new tenant for himself. 2 Bla. Com. 71, 89; 6 N. Y. 487, 495. These fines are now abolished. In France, a similar demand from the tenant, made by the lord when the former alienated his estate, was called *lods et vente*. This imposition was abolished, with nearly

every other feudal right, by the French revolution.

FINE CAPIENDO PRO TERRIS.

An obsolete writ which lay for a person who, upon conviction by jury, had his lands and goods taken, and his body imprisoned, to be remitted his imprisonment, and have his lands and goods redelivered to him, on obtaining favor of a sum of money, etc. Reg. Orig. 142.

FINE SUR COGNIZANCE DE DROIT COME CEO QUE IL AD DE SON DONE. A fine upon acknowledgment of the right of the cognizee as that which he hath of the gift of the cognizor. By this the deforciant acknowledges in court a former feoffment or gift in possession to have been made by him to the plaintiff. 2 Bla. Com. 352; Cunningham, Law Dict.; Shepp. Touchst. c. 2; Comyns, Dig. Fine.

FINE SUR COGNIZANCE DE DROIT TANTUM. A fine upon acknowledgment of the right merely. Generally used to pass a reversionary interest which is in the cognizor. 2 Bla. Com. 351; Jacob, Law Dict.; Comyns, Dig.

FINE SUR CONCESSIT. A fine granted where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the consignee an estate *de novo*, usually for life or years, by way of a supposed composition. 2 Bla. Com. 353; Shepp. Touchst. c. 2.

FINE SUR DONE, GRANT ET RENDER. A double fine, comprehending the fine *sur cognizance de droit come ceo* and the fine *sur concessit*. It may be used to convey particular limitations of estates and to persons who are strangers or not named in the writ of covenant; whereas the fine *sur cognizance de droit come ceo*, etc., conveys nothing but an absolute estate, either of inheritance, or at least freehold. Salk. 340. In this last species of fines the cognizee, after the right is acknowledged to be in him, grants back again or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. 2 Bla. Com. 353; Viner, Abr. Fine; Comyns, Dig. Fine; 1 Washb. R. P. 33.

FINE FOR ENDOWMENT. A fine anciently payable to the lord by the widow of a tenant without which she could not be endowed of her husband's lands. Abolished under Henry I., and by Magna Charta. Moz. & W.

FINE-FORCE. An absolute necessity or inevitable constraint. Old N. B. 78; Plowd. 94; 6 Co. 11; Cowel.

FINE NON CAPIENDO PRO ULICHRE PLACITANDO. An obsolete writ to prohibit officers of court from taking fines for fair pleading.

FINE AND RECOVERY ACT. The statute 3 & 4 Will. IV. c. 74. This act abolished fines and recoveries. 2 Sharsv. Bla. Com. 364, n.; 1 Steph. Com. 514. See FINE.

FINE PRO REDISSEISINA CAPIENDO. An old writ which lay for the release of one imprisoned for a disseisin, on payment of a reasonable fine. Reg. Orig. 222.

FINEM FACERE (Lat.). To make or pay a fine. Bracton 106; Skene.

FINES LE ROY. In Old English Law. A sum of money which any one is to pay the king for any contempt or offence; which fine any one that commits any trespass, or is convict that he falsely denies his own deed, or did anything in contempt of the law, shall pay to the king. *Termes de la Ley*; Cunningham, Law Dict.

FINIRE. In English Law. To fine, or pay a fine. Cowel. To end or finish a matter.

FINIS. End; conclusion; limit.

FINISHED.

The question whether a house has been "finished" is one of fact; and the owner's moving into it is not conclusive proof of the fact, where the owner accepted an order to be paid when the house is finished; 121 Mass. 584.

FINITIO. An ending; death as the end of life. Blount; Cowel.

FINIUM REGUNDORUM ACTIO. In Civil Law. An action for regulating boundaries. 1 Mackeldey, Civ. Law § 271.

FINORS. Those that purify gold and silver, and part them by fire and water from coarser metals; and therefore in the statute of Hen. VII. c. 2, they are also called "parters." *Termes de la Ley*.

FIRDFARE. In English Law. A summoning forth to a military expedition (*indictio ad protectionem militarem*). Spel. Glos.

FIRDIRINGA (Sax.). A preparation to go into the army. Leg. Hen. I.

FIRDSOCNE (Sax.). Exemption from military service. Spelman, Gloss.

FIRDWITE (Sax.). A mulct or penalty imposed on military tenants for their default in not appearing in arms or coming to an expedition. Cowel. A penalty imposed for murder committed in the army. Cowel.

FIRE. The effect of combustion. Webster, Dict.

The legal sense of the word is the same as the popular. 1 Pars. Marit. Law 231.

Fire is not a peril of the sea. In Scotch law, however, fire is an inevitable accident. Bell, Dict.

Whether a fire arises purely by accident, or from any other cause, when it becomes uncontrollable and dangerous to the public, a man may, in general, justify the destruction of a house on fire for the protection of the neighborhood; for the maxim *salus populi est suprema lex* applies in such case; 11 Co. 13. See ACCIDENT; ACT OF GOD; EMINENT DOMAIN; 3 Wms. Saund. 422 a, note 2; 3 Co. Litt. 57 a, n. 1; 1 Cruise, Dig. 151, 152; 1 Rolle, Abr. 1; Bacon, Abr. Action on the Case, F; 2 Lois des Batim. 124; 1 Term 310; 6 id. 489; Amb. 619.

When real estate is let, and the tenant covenants to pay the rent during the term, unless there are proper exceptions to such covenants, and the premises are afterwards destroyed by fire during the term, the rent must be paid although there be no enjoyment; for the common rule prevails, *res perit domino*. The tenant, by the accident, loses his term; the landlord, the residence; Story, Eq. Jur. § 102; Woodf. L. & T. 408.

The owner of property may kindle and have a fire on his own premises for any lawful purpose, such as burning waste in husbandry, without liability for injury to the property of another, if it is done with due care as to time, manner, and circumstances, and with respect to casual fires, also having due regard to the conditions of weather, wind, and proximity of inflammable material; Thomas, Negl. 640; Webb, Poll. Torts 616, and note. Even in the extreme case of one who had been warned of the danger that his haystack would take fire and endanger others, the contention that the question should have been put to the jury whether he had acted *bona fide*, to the best of his judgment, and that the standard of ordinary prudence was too uncertain as a criterion, was unsuccessfully pressed, and the care of a prudent man was held to be the proper measure of duty; 3 Bing. N. C. 468.

Very early in England, the duty of every man to safely keep his own fire was a stringent "custom of the realm," i. e. at common law; Y. B. 2 Hen. IV. 13, pl. 5; and this, it is said, may be founded on ancient German custom, when a man carries fire more than nine feet from his hearth, only at his peril; Li. Langob. cc. 347, 348 (A. D. 643), Poll. Torts 616. The rule applied as well to out-door fires, and in a case grounded upon the common custom of the realm for negligently keeping his fire; 1 Ld. Raym. 264; s. c. 1 Salk. 13. Liability for domestic fires began accidentally and without accident is removed in England by stats. of Anne and Geo. III., 11 Q. B. 347. The rule of modern times is without

doubt affected by the great increase of business uses to which fire is applied, such as for mills, railroads, and the like, and in England the leading case of *Rylands v. Fletcher* (which itself concerned a reservoir, but the application of which has passed far beyond the class of facts on which it was determined), laid down the rule "that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This principle was expressly applied to railroads; L. R. 3 Q. B. 783; and to an engine brought on a highway; 5 Q. B. Div. 507. The case of *Rylands v. Fletcher* is itself one of those landmarks of judicial decision, the results and extent of which are difficult to estimate, and it is not easy to conceive of a subject-matter to which it can apply with greater force than to fire.

In the United States, as to *Rylands v. Fletcher*, judicial opinion is not uniform; it has been approved; 106 Mass. 194; 125 id. 232; 185 id. 508; and distinctly disapproved; 51 N. Y. 476. See Big. L. Cas. 497. But it may be safely asserted as a rule that "a man who negligently sets fire on his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated;" 107 Mass. 494; 70 N. Y. 112; 28 Minn. 139; 46 id. 147; 95 Mich. 303; 43 Cal. 437. One accidentally but not negligently firing his house is not liable for the spread of the fire by wind; 99 Ind. 16. The spreading of a fire does not raise a presumption of negligence; 81 Mo. 80; if there was none in starting it; 64 Miss. 661; 44 N. J. L. 280. As to setting fire and restraining it, the rule is that ordinary prudence, honest motives, in the one, and due diligence as to the other, exempt one from liability; 3 Ia. 80; and the burden of proof is on the plaintiff; 18 Me. 32. The same principles as a rule apply to fires generally as to those caused by locomotives when there is statutory authority for doing so.

Although it is well settled, both in this country and in England, that the right to operate a railroad includes the use of fire in locomotives; 93 Pa. 341; 140 N. Y. 308; and, if every reasonable precaution has been observed to prevent injury, the railroad company will not be liable; 114 N. Y. 11; 4 Md. 242; yet it must show the absence of negligence on its part, at least so far as concerns safety of construction and care in the operation of its locomotives, and the freedom of the track from combustibles (see *infra*); Webb Poll. Torts 561, n.; 49 Fed. Rep. 807; 3 E. just. 447; 41 La. Ann. 96; 86 Mich. 615. In some states this burden is put upon the company by statute; 39 Md. 115; 60 Ia. 338; 63 Ill. 95; and in others by decisions adopting the rule; 53 Mo. 498; 44 N. J. L. 247; 90 N. C. 374; 4 Neb. 268; 14 Cal. 387; in other states the plaintiff must fix upon defendant both the origin of the fire, and negligence in one of the points referred to; 36 Ia. 121; 31 Ind. 143; 142 N. Y. 11; 91 U. S. 454. But the owner is, in the absence of statute, held to the duty of ordinary care, and his negligence will defeat recovery; 44 Mich. 169; 90 Ill. 586; or if the spreading of the fire was due to the negligence of the servants of the owner there is no liability; 69 Miss. 139. It has been held that the fact that fire has been communicated by a passing locomotive is *prima facie* evidence of negligence; 4 U. S. App. 427; 85 Mo. 178; 36 Neb. 189; 60 Hun 632; 63 Miss. 388; 42 Ill. App. 527; 23 Fed. Rep. 811. See 11 L. R. A. 506, note. The company must exercise as great a degree of care to protect the public from injury by fire as is required in favor of its patrons; 67 Hun 469; and the failure to provide the best appliances to prevent injury to property by fire is want of ordinary care; 44 Fac. Rep. (Nev.) 423; *contra*, 33 S. W. Rep. (Tex.) 280; but the rule is that the company is only bound to exercise due care with respect to providing the best appliances; 32 S. W. Rep. (Tex.) 846; 140 N. Y. 308; 142 id. 11; and compliance with a statute requiring a guard

against the emission of sparks, except during certain months, does not exempt the company from the exercise of that care to which they are bound in law, to avoid injuring the property of their neighbor; 11 Ohio Cir. Ct. Rep. 378.

A question, the settlement of which has caused much litigation, was whether a railroad company was liable for damage to property *not adjoining* the track, nor set on fire *directly* from the locomotive, but by the spreading of the fire from the property first ignited. The rule now firmly established is that the company is liable for such injury naturally and by the ordinary course of events resulting from the fire started by the locomotive; 98 N. H. 242; 63 Conn. 391; 42 Me. 579; 96 Mass. 414; 107 *id.* 494; even where the property was at a considerable distance from the track; C. P. 98; s. c. 6 *id.* 14; 30 Mich. 181; or if several owners intervene; 13 Metc. 99.

The stubborn resistance to the establishment of this rule and its extended discussion by the courts of so many jurisdictions would be surprising but that it is readily accounted for by the fact that early decisions in New York and Pennsylvania were made on the basis of strong contention against it in every state when the question first arose. Ryan v. N. Y. C. R. Co., 35 N. Y. 210, and Pa. v. R. Co., 62 Pa. 353, where the cases relied upon to sustain the position that where the fire communicated from the sparks to a house near the track, and thence extended to another at a distance, the company was not liable for the loss of the latter, notwithstanding its negligence in allowing the sparks to escape. In the New York case it was determined that the negligence was too remote, and the injury not the natural and probable result; but later in the same court, in an action against a railroad company for fire, resulting from the ignition of a tie by coal from a locomotive, an effort was made to distinguish the case, and it was held that the question of proximate cause was properly left to the jury; 49 N. Y. 420. It was further shaken (usually upon the idea of distinguishing it), in 56 *id.* 300; 90 *id.* 158; and its weight as authority practically ended by 115 *id.* 879; and 118 N. Y. 224.

The Pennsylvania case was also "distinguished" in a case in which the same court held that where sparks from an engine fired a railroad tie and it resulted in burning two fields and fences, the proximity of the cause is a question for the jury, who must determine the facts constituted a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of the defendants, and that it might have been foreseen under the circumstances; 80 Pa. 373; but Pa. R. Co. v. Kerr was expressly approved and followed in a later case in which damage by a fire, spread by burning oil carried by a running stream, was held too remote, and the stream was considered to be an intervening agency; in this case the court said that the facts were ascertained and there was nothing to put to the jury, and on this theory it was distinguished from the case in 80 Pa. This case had what the chancellor of New Jersey termed substantially its counterpart in that state, in a case of damages caused by sparks from a steam locomotive, and strong disapproval of the Pennsylvania case and the earlier case in New York was expressed. The stream was considered similar to other material forces, and a natural link in the chain of causation, and the receiver was held liable, the rule as applied being thus stated: "Where a fire originates in the negligence of a defendant, and is carried by a material force, whether it be the wind, the law of gravitation, combustible matter existing in a state of nature, or other means, to the plaintiff's property and destroys it, and it appears that no object intervened between the point where the fire started and the injury, which would have prevented the injury, if due care had been taken, the defendant is legally answerable for the loss." 32 N. J. Eq. 647. The only point which suggested difficulty in applying to this class of cases the general doctrine of liability for the result of negligence is brought out with distinctness in the different views taken by the Pennsylvania and New Jersey courts of cases precisely similar as to the facts, and that difference may be considered, as concerning rather the doctrine of proximate cause than as having special relation to fires from locomotives. The cases in 35 N. Y. 210 and 62 Pa. 353 are said to "stand alone" and to be "in conflict with every English or American case as yet reported"; 59 Ill. 249; "much shaken" and "each qualified and explained in its own jurisdiction, by later decisions so as to take from its weight"; 62 Conn. 391; and finally the United States supreme court, speaking through a Pennsylvania justice says of the two cases: "Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such doctrine, even in the states where the decisions were made." Strong, J., in 94 U. S. 469, 474, citing 40 N. Y. 420 and 80 Pa. 373; and cases *contra* of other states.

The result is to settle the rule as stated that, whether the fire is traceable to its neg-

ligence directly or indirectly, the company is liable when the fire started by its locomotive was the proximate cause of the injury complained of, and this applies as well to the class of cases hereafter noted in this title. The application of the doctrine is illustrated by a very recent case which held that when the fire negligently set was carried by moderately high wind, though not unusual, the wind was not the proximate cause, and the company was liable; 2 Kan. App. 319. When the fire is communicated indirectly, the question as to what is the proximate cause of the injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances; 94 U. S. 469; 69 Ill. 349; 71 *id.* 572; 39 Md. 115; 40 N. J. L. 299; 60 Cal. 578; 53 Mo. 366; 16 Kan. 263; and, notwithstanding the earlier cases discussed *supra*; 143 N. Y. 182; and 90 Pa. 123.

A railroad company has the right to keep its right of way free from combustibles by burning off grass, etc., but in such case it is bound at its peril to keep such fire within bounds; 110 Ind. 538. See 11 L. R. A. 506, note. Indeed, though not an insurer, the railroad company must keep its track reasonably clear of such danger; 62 N. W. Rep. (Mich.) 365; 23 S. W. Rep. (Tex.) 421; 33 Fla. 406; 105 Mass. 199; 39 N. J. L. 209 (but see 34 Pac. Rep. (Wyo.) 953); and is liable for damages from fire, caused by its negligence with respect to a fire which spreads from the track; 115 N. C. 667; and the care exercised in constructing and operating the engine is no defence; 57 Ill. App. 69; 54 N. W. Rep. (Wis.) 779; 24 S. E. Rep. (Va.) 264; nor is the diligence of the company in attempting to quench the fire; 67 N. W. Rep. (Wis.) 1129; it is for the jury to determine the question of negligence or care with respect to allowing weeds to grow on the right of way; 75 Va. 499; 58 Wis. 335; or the time and manner of setting and guarding the fire; 63 N. W. Rep. (Mich.) 647; the company must exercise ordinary care which is proportioned to, and measured by, the amount of danger, and is liable for the want of it; 26 S. W. Rep. (Tex.) 1052; such fire if started for a lawful purpose is itself no evidence of negligence, which must be proved by the person complaining; 60 N. W. Rep. (S. D.) 69; nor is unlawful speed of a train unless the fire would not otherwise have occurred; 32 S. W. Rep. (Tex.) 884.

It has been held that when a fire is caused by the sparks of a locomotive, communicating with dried grass which a railroad company has permitted to accumulate in the line of its track, and thence spreading to the property of an adjacent land-owner, it is a question for a jury whether the company was guilty of negligence, irrespective of any question as to negligence or omission of duty on the part of the land-owner; 26 Wisc. 223; s. c. 7 Am. Rep. 69; 40 Cal. 14; s. c. 6 Am. Rep. 595; *contra*, 54 Ill. 504; s. c. 5 Am. Rep. 155; 11 W. Va. 14; 12 So. Rep. (Miss.) 156. Direct evidence of the accumulation of such inflammable material was held sufficient evidence of defendant's liability; 20 Minn. 58; 74 N. C. 377; 92 Ill. 437; but allowing such accumulation is not negligence *per se*, unless such as a prudent man having regard to the same hazard would not permit; 80 La. 78; 87 Ind. 193; and there must be a connection between the negligence and the injury and no intervening cause (such as in this case a high wind carrying a burning brand over a ridge to a marsh adjoining plaintiff's); 79 Wis. 140.

Generally the accumulation of inflammable material near the track is contributory negligence; 42 Neb. 105; 63 Tex. 57; but it is not so to permit the natural growth of stubble and grass to remain; 87 Mo. 117; nor to deposit wood near the track under a contract with the company; 57 Ind. 150; erecting a wooden building near a railroad track is not negligence *per se*; 94 Ky. 71; but the owner assumes the risks incident thereto, and cannot recover if it is burned without fault on the part of the company; 62 N. W. Rep. (Mich.) 365. In Indiana a plaintiff must not only aver

freedom from fault but absence on his part of contributory negligence; 96 Ind. 40, 62. And what is termed the Illinois negligence rule is: where fire is ignited on the right of way of a railroad, by reason of an accumulation of grass left there, and communicated to the adjoining field by the negligence of the owner in not keeping it free from combustible materials, the owner cannot recover for the injury thereby occasioned, unless the negligence of the company is greater than his own; 54 Ill. 504.

In many states statutes have been passed making railroad companies absolutely liable for damage caused by fires from locomotives, and such statutes have been almost uniformly held to be constitutional; 105 Mass. 199; 145 *id.* 129; 37 Me. 92; 85 *id.* 502; 54 Conn. 447. In two very recent cases the United States supreme court held that such a statute does not violate the constitution of the United States, as depriving the company of property without due process of law, or as denying it the equal protection of the laws, or as impairing the obligation of the contract made between the state and the company by its incorporation under general laws imposing no such liability; 165 U. S. 1; *id.* 27. Such statutes apply to property not adjoining the right of way, if set on fire by intervening property ignited by the locomotive; 62 *id.* 840; 41 S. C. 86; 2 Colo. App. 159; and are not void as interfering with the federal jurisdiction over interstate commerce; 63 N. H. 25; 16 S. E. Rep. (S. C.) 429. In Iowa it was held that the company was *prima facie* liable; 50 Ia. 340. Under such a statute imposing absolute liability contributory negligence is not a defence; 25 L. R. A. (Mo.) 161; and the company is liable for the spreading of the fire even when the person whose property was first set on fire requested the railroad men to let it burn, as he wished to burn up the bogs; 52 Conn. 264. See 25 L. R. A. 161.

As to liability for damages from fires by reason of the failure to furnish water to extinguish them, see WATER.

See, generally, Thomas, Negl. 646; 1 L. R. A. 625, note; 21 *id.* 255; 22 Abb. N. C. 377; NEGLIGENCE; RAILROAD.

FIRE-ARM. An instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploded within it.

In 1637 a royal charter was granted to the gun-makers of London empowering them to search for, prove, and mark hand guns, pistols, etc., and by the statutes of 1818 and 1853 the proving of all fire-arms was made compulsory. These statutes have been superseded by the gun-barrel proof act 31 and 32 Vict., which regulates the duties and powers of the London and Birmingham proof-houses, and which makes the forging or counterfeiting of proof-marks or stamps, and the selling, or having in possession for the purpose of sale, of fire-arms bearing such forged or counterfeited mark or stamp, a misdemeanor.

As to what constitutes a fire-arm, the decisions have been somewhat conflicting. A pistol so dilapidated that it could not be discharged by the trigger has been held to be a fire-arm and a deadly weapon; 53 Ala. 508; so where the mainspring was so disabled as not to allow it to be discharged in the regular way; 61 Ga. 417; but not so where the weapon could not be discharged by a cap on the tube; 46 Ala. 88. The separate parts of a pistol found on the offender's person was held a fire-arm; 63 *id.* 3. See ARMS; WEAPON.

All sorts of guns, fowling-pieces, blunderbusses, pistols, etc. R. & L. Dict. A weapon acting by the force of gun-powder. Anderson; 53 Ala. 509. A contrivance which can be carried on the person from which a deadly missile is thrown by some explosive. English. See ARMS.

FIRE DEPARTMENT. A department of the government of a city, town, or village charged with the prevention or extinction of fires. 13 A. & E. Ency. 2nd ed., 73; Cent. Dict. A city is not liable to the owner of property injured by fire in consequence of its neglect to provide and keep in repair suitable fire apparatus, or to provide and keep in repair the public wells, cisterns or waterworks. *Id.*, 79; 67 Fed. Rep. 349.

As Public Property. The firemen of a municipality are paid out of taxes levied for that purpose, and they are maintained to protect the lives and property of citizens of the Commonwealth. The firemen of a city are just as essential to its safety and proper government as is its police force. The fire department can only be effective by having engines, engine houses, and appliances which are usual in meeting the demands on the department. The property of a city used in connection with its "fire department" is, in our opinion, "public property," used for public purposes and is necessary to its government. 105 Ky. 344; 49 S. W. 320.

FIRE-ESCAPE. An apparatus constructed to afford a safe and convenient method of escape from a burning building.

Regulations have been enacted in most of the states, often by municipal ordinances, providing that all factories, hotels, schools, buildings, theatres, hospitals, public buildings, and flat or tenement houses shall be equipped with safe and suitable means of escape in case of fire. Such regulations are of a highly penal character, and are to be strictly construed; 105 Pa. 222; 106 *id.* 321; 15 R. I. 112. They are not of such a character as to interfere with the use and enjoyment of private property; 10 Daly 377.

The original duty to provide fire-escapes rests with the owner or proprietor; 78 N. Y. 810; 58 Hun 376; and the fact that he has erected them in compliance with the statute will not exempt him from providing additional ones when ordered so to do; 10 Daly 377; but in some states it has been held that when the real owner has leased his premises the tenant in actual occupancy and possession, who places his operatives in a position of danger and enjoys the benefit of their services, becomes responsible under the law; 105 Pa. 222; 106 *id.* 321; 42 Ohio St. 458; (*contra*, 16 N. Y. Sup. Ct. Rep. 750.) But these cases seem to place the question of liability more on the ground of the relation of master and servant, it being held that as an absolute duty is laid upon the owner by statute, a servant sustaining an injury by breach of such duty may maintain an action on the case for such injury; 70 N. Y. 126; 11 R. I. 451. A building becomes a public nuisance if not supplied with such appliances as required by statute; 16 Abb. 195. And the mere relation of landlord and tenant will not bar the action; 78 N. Y. 810. It is not the duty of the tenant to search for defects and report them to the owner; *id.*; nor will the owner be permitted to wait until he is officially directed to provide fire-escapes; *id.*; 58 Hun 376; although no such obligation existed at common law; 30 S. W. Rep. (Tenn.) 393; 131 N. Y. 90; 126 Mass. 84; 80 Am. Rep. 661.

They must be reasonably secure, although they need not be the best that can be devised; 131 N. Y. 90; and the number required depends on the size of the building, the number of employees, and the inflammable character of the materials there used; 61 Hun 254; having erected a reasonably safe fire-escape, the owner is not responsible if a fire cuts off access to it; 106 Pa. 321. See Thomas, Negl. 772; Ray, Neg. Imp. Dut. 660; NEGLIGENCE.

FIRE INSURANCE. A contract to indemnify the insured for loss or damage, occasioned by fire, during a specified period. Flanders, Fire Ins. 17. See INSURANCE.

FIRE ORDEAL. See ORDEAL.

FIRE POLICY. See INSURANCE; POLICY.

FIRE-PROOF. Incombustible; not in danger from the action of fire.

A statement that a building is fire-proof necessarily excludes the idea that it is of wood, and necessarily implies that it is constructed of some substance fitted for the erection of fire-proof buildings. The characterization of one portion of a building as fire-proof suggests a comparison with other

portions of the same building, and warrants the conclusion that the specified portion is different from the remainder; 102 N. Y. 459; 7 N. E. Rep. 321. In an insurance policy, a condition that books be kept in a fire-proof safe is complied with if the safe be of the kind commonly regarded as fire-proof; 4 Tex. Civ. App. 82. The insured does not by this clause warrant his safe to preserve the books; *id.* Such a clause, commonly called the iron-safe clause, is a warranty the breach of which avoids the policy; 29 S. W. Rep. (Tex.) 218; 81 *id.* 321; but not when the stipulation was inserted by fraud without knowledge of the insured; 84 Ga. 759. See INSURANCE.

To say of any article that it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible.

FIRE RAISING. In Scotch Law. The wilfully setting on fire buildings, growing or stored cereals, growing wood, or coalheughs. Ersk. Pr. 577. See ARSON.

FIRE AND SWORD. Letters of fire and sword were the ancient means for dispossessing a tenant who retained possession contrary to the order of the judge and diligence of the law. They were directed to the sheriff, and ordered him to call the assistance of the county to dispossess the tenant. Bell, Dict.; Erskine, Inst. lib. iv. tit. 3, § 17.

FIRE AND WATER. See INTERDICTION OF FIRE AND WATER.

FIRE-WORKS. A contrivance of inflammable and explosive materials combined of various proportions for the purpose of producing in combustion beautiful or amusing scenic effects, or to be used as a night signal on land or sea, or for various purposes in war. Cent. Dict.

Percussion caps for signalling railway trains are held to be explosive preparations, although the court considered they were not "fireworks" as the latter term is known to commerce; 3 B. & S. 128. Under a clause in an insurance policy forbidding the keeping of gunpowder, fireworks are not prohibited; 66 Cal. 178. See INSURANCE; RISKS AND PERILS; CAUSA PROXIMA NON REMOTA SPECTATUR.

Any device of paper or pasteboard containing explosives which make a noise or produce colored lights. English.

FIREBALE. A beacon or high tower by the seaside, wherein are continual lights, either to direct sailors in the night, or to give warning of the approach of an enemy. Cowell.

FIREBOTE. An allowance of wood or estovers to maintain competent firing for the tenant. A sufficient allowance of wood to burn in a house. 1 Washb. R. P. 99. Tenant for life or years is entitled to it; 2 Bla. Com. 35. Cutting more than is needed for present use is waste; 3 Dane, Abr. 288; 8 Pick. 312; Cro. Eliz. 598; 7 Bingh. 640. The rules in England and in this country are different in relation to the kind of trees which the tenant may cut; 7 Pick. 132; 7 Johns. 227; 6 Barb. 9; 2 Zab. 521; 2 Ohio St. 180; 13 Pa. 438; 3 Leon. 16.

FIREMAN A PUBLIC OFFICER. A fireman is a public officer within the meaning of the term in its broadest sense. 145 Ky. 240, 140 S. W. 197.

FIRKIN. A measure of capacity, equal to nine gallons. The word firkin is also used to designate a weight, used for butter and cheese, of fifty-six pounds avoirdupois.

FIRLOT. A Scotch measure of capacity containing two gallons and a pint. Spelman.

FIRM. The persons composing a partnership, taken collectively.

The name or title under which the members of a partnership transact business.

The word is used as synonymous with partnership. The words "house," "concern," and "company" are also used in the same sense. This name is in point of law conventional, and applicable only to the persons who, on each particular occasion

when the name is used, are members of the firm. A firm is usually described, in legal proceedings, as certain persons trading or carrying on business under and using the name, style, and firm of, etc. See 9 Q. B. 361; 9 M. & W. 347; 1 Chitty, Balim. 40.

The firm name is part of the good will of a partnership, and where, on a dissolution, one of the partners transfers to the others all his interest in the firm business and assets, with the understanding that they are to succeed to the business, the retiring partner cannot use the firm name in a business of like kind carried on in the vicinity; 33 N. E. Rep. (Ohio) 88.

It may be that the names of all the members of the partnership appear in the name or style of the firm, or that the names of only a part appear, with the addition of "and company," or other words indicating a participation of others, as partners, in the business; 16 Pick. 428; or that the name of only one of the partners, without such addition, is the name of the firm. It sometimes happens that the name of neither of the partners appears in the style of the firm; 9 M. & W. 284. In New York, Georgia, and Louisiana, no partner is permitted to transact business in the name of a person not interested in the firm. A. & E. Encycy.

The proper style of the firm is frequently agreed upon in the partnership articles; and where this is the case, it becomes the duty of every partner, in signing papers for the firm, to employ the exact name agreed upon; Colly. Partn. § 215; Story, Partn. § 202. This may be necessary, not only to bind the firm itself; Story, Partn. § 102; but also to prevent the partner signing from incurring a personal liability both to third persons and to his copartners; Story, Partn. §§ 102, 202; 2 Jac. & W. 268; 11 Ad. & E. 839; Pothier, Partn. nn. 100, 101. Where persons associate themselves together and carry on business under a common name, and the association is not a corporation, they may be regarded as partners, whatever name they may have adopted; 4 Ind. App. 20.

So, the name which a partnership assumes, recognize, and publicly use becomes the legitimate name and style of the firm, not less so than if it had been adopted by the articles of copartnership; 2 Pet. 186, 198; 21 Md. 538; and a partner has no implied authority to bind the firm by any other than the firm name thus acquired; 9 M. & W. 284; 35 S. C. 572; 48 Ga. 570; 51 Wis. 170. Wherefore, where a firm consisted of J B & C H, the partnership name being J B only, and C H accepted a bill in the name of "J B & Co.," it was held that J B was not bound thereby; 9 M. & W. 284. See Davis 325.

If the firm have no fixed name, a signing by one, in the name of himself and company, will bind the partnership; 2 Ohio 61; 57 Ga. 36; and a note in the name of one, and signed by him "For the firm, etc.," will bind the company; 5 Blackf. 90. Where the business of a firm is to be carried on in the name of B & D, a signature of a note by the names and surnames of the respective parties is a sufficient signature to charge the partnership; 3 C. B. 792. Where a written contract is made in the name of one, and another is a secret partner with him, both may be sued upon it; 2 Ala. 134; 5 Watts 454.

Where partners agree that their business shall be conducted in the name of one person, whether himself interested in the partnership business or not; that is the partnership name, and the partners are bound by it; 6 Hill 322; 1 Denio 405, 471, 481; 50 Ark. 62. By agreement among themselves, the individual names of partners, or of any one of them, may be used to bind the firm and create obligations good against the partnership; 73 Wis. 70. Where the name used is the name of one of the partners, and he does business also on his own private account, a contract signed by that name will not bind the firm, unless it appears to have been entered into for the firm; but, if there be no proof that the contract was made for the firm, the presumption will be that it was made by the partner on his own

separate account, and the firm will not be responsible; Story, Partn. § 189; Pars. (Jas.) Partn. 76; 5 Pick. 11; 1 Du. N. Y. 405; 17 S. & R. 165; 5 Mass. 176; 5 Pet. 529. See PARTNERS; PARTNERSHIP.

The name of the firm should be distinct from the names of all other firms. When there is confusion in this respect, the partners composing one firm may, in some cases, be made responsible for the debts of another. See Peake, Cas. 80; 7 East 210; 2 Bell, Comm. 670; 8 Mart. La. n. s. 89; Pars. Partn. 120. As to the right of a surviving partner to carry on the business in the name of the firm, see 7 Sim. 127; Story, Partn. § 100, n.; Colly. Partn. § 163, n.

Merchants and lawyers have different notions respecting the nature of a firm. Merchants are in the habit of looking upon a firm as a body distinct from the members composing it; Lindl. Partn. 218; 39 La. Ann. 862; 14 Fed. Rep. 615. See 64 Ga. 248; 77 Ind. 361; 64 Ia. 261. The law looks to the partners themselves; any change among them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or creditor of his copartners; but he cannot be either debtor or creditor of the firm of which he is himself a member; 4 Mylne & C. 171.

A firm can neither sue nor be sued, otherwise than in the name of the partners composing it; Pars. (Jas.) Partn. 76. Consequently, no action can be brought by the firm against one of its partners, nor by one of its partners against it; for in any such action one person at least would appear both as plaintiff and defendant, and it is considered absurd for any person to sue himself, even in form; 1 B. & Ald. 694; 4 Mylne & C. 171; 6 Taunt. 596; 6 Pick. 320; 5 Gill & J. 487. For the same reason, one firm cannot bring an action against another. If there be one or more persons partners in both firms; 6 Taunt. 597; 2 B. & P. 120; unless by statute; as in Pennsylvania, by the act of April 14, 1888.

An appeal or writ of error taken in the name of a firm and not giving the names of the individuals comprising it will be dismissed, and the defect cannot be amended; 11 Wall. 66; 21 How. 393; 22 Id. 87.

Whenever a firm is spoken of by its name or style, the courts admit evidence to show what persons did in fact constitute the firm at the time in question; 6 Taunt. 15; 4 Maule & S. 13; 2 Keen 255. If persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is binding as much as if real names had been used; 1 Chitty, Bailm. 707; 2 C. & P. 296; 2 Campb. 548.

Any change in the persons composing a firm is productive of a new signification of the name. If, therefore, a legacy is left to a firm, it is a legacy to those who compose it at the time the legacy vests; see 2 Keen 255; 3 Mylne & C. 507; 7 De G. M. & G. 679; and if a legacy is left to the representatives of an old firm, it will be payable to the executors of the survivors of the partners constituting the firm alluded to, and not to its successors in business; 11 Ir. Eq. 451; 1 Lindl. Partn. 216. Where a creditor takes a note made by one partner in the firm name after its dissolution, whereby the time of payment of a firm debt is extended, the other partner is discharged from liability; 17 S. E. Rep. (Ga.) 290. Again, an authority given to a firm of two partners cannot, it would seem, be exercised by them and a third person afterwards taken into partnership with them; 6 Bing. n. c. 201. See 4 Ad. & E. 832; 16 Sim. 121; 7 Hare 351; 4 Ves. 649.

A name may be a trade-mark; and, if it is, the use of it by others will be illegal, if they pass off themselves or their own goods for the firm or the goods of the firm whose name is made use of; 2 Keen 213; 4 K. & J. 747. Moreover, if this is done intentionally, the illegality will not be affected by the circumstance that the imitators of the trade-mark are themselves of the same name as

those whose mark they imitate; 13 Beav. 209; 3 De G. M. & G. 896.

Where one partner acts for the firm in demanding illegal charges and detains goods until they are paid, every member of the firm is liable for damages; 130 N. Y. 340.

An action by a firm may be defeated by a defence founded on the conduct of one of the partners. If one member of a firm is guilty of a fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defence to an action on the contract brought by him and his copartners; for their innocence does not purge his guilt. See Ry. & M. 178; 2 Beav. 128; 10 Id. 523; 3 Drew. 3; 9 B. & C. 241. The above rule seems not to rest upon the ground that the act of the one partner is imputable to the firm; Pars. (Jas.) Partn. 139; it governs when the circumstances are such as to exclude the doctrine of agency. Thus, if a partner pledges partnership property, and in so doing clearly acts beyond the limits of his authority, still, as he cannot dispute the validity of his own act, he and his copartners cannot recover the property so pledged by an action at law; 5 Exch. 499. So, although a partner has no right to pay his own separate debt by setting off against it a debt due from his creditor to the firm, yet if he actually agrees that such set-off shall be made, and it is made accordingly, he and his copartners cannot afterwards in an action recover the debt due to the firm; 7 M. & W. 204; 9 B. & C. 532; 1 Lindl. Partn. 169, 170; 1 Maule & S. 751. When a partner executing a firm note waives exemptions, and signs the firm name, the waiver is confined to the partner signing; 94 Ala. 626. An individual note given by a partner, and indorsed by him in the firm name without authority, in satisfaction of a debt which the creditor knows to be that of the individual, is not enforceable by the latter against the firm; 18 N. Y. Sup. 867.

If a person becomes surety to a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctuating body, or not. If he did, his liability is not discharged by any change among the members constituting the partnership at the time he became surety; 10 B. & C. 122; 5 B. & Ald. 261; but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged, and consequently any change in it, whether by the death or the retirement of a partner; 7 Hare 50; 3 Q. B. 703; 10 Ad. & E. 30; or by the introduction of a new partner; 2 W. Bla. 934; immediately puts an end to the surety's liability so far as subsequent events are concerned. In all such cases the surety's position and risk are altered, and whether he has in fact been damaged by the change or not, he has a right to say, *non in hæc fœdera veni*. Similar doctrines apply to cases where a person becomes surety for the conduct of a firm; 5 M. & W. 580. See 6 Q. B. 514; 4 B. & P. 34; 8 Cl. & F. 214; 1 Lindl. Partn. 172-174; De G. 300; 2 Rose 239, 228; 4 Dow. & C. 426.

Consult, Parsons (J.), Principles Partn.; Pars. (Jas.) Partn.; Bates, Lim. Part.

FIRM NAME. The name or title of a firm in business. See FIRM.

FIRMA (L. Lat.). A farm or rent reserved on letting lands, anciently frequently reserved in provisions. Spelman, Gloss.; Cunningham, Law Dict.

A banquet; supper; provisions for the table. Du Cange.

A tribute or custom paid towards entertaining the king for one night. Domesday; Cowel.

A rent reserved to be paid in money, called then *alba firma* (white rents, money rents). Spelman, Gloss.

A lease. A letting. *Ad firmam tradidi* (I have farm let). Spelman, Gloss.

A message with the house, garden, or lands, etc., connected therewith. Co. Litt. 5 a; Shepp. Touchst. 93. See FARM.

FIRMA BURGI. The right to receive the tolls, rents, or other profits of a burgh or borough; it was granted to the local authority by the king or other lord of the borough upon payment of a fixed sum. Byrne.

FIRMA FEODI (L. Lat.). Fee-farm. See FEODI-FIRMA.

FIRMAN. A passport granted by the Great Mogul to captains of foreign vessels to trade within the territories over which he has jurisdiction; a permit.

FIRMARATIO. The right of a tenant to his lands and tenements. Cowel.

FIRMARIUM. A place in monasteries and elsewhere where the poor were received and supplied with food. Spelman.

FIRMARIUS (L. Lat.). A fermor. A lessee of a term. *Firmarii* comprehend all such as hold by lease for life or lives or for year, by deed or without deed. Co. 2d Inst. 144, 145; 1 Washb. R. P. 107; 8 Pick. 312; 7 Ad. & E. 637.

FIRMITAS. In English Law. An assurance of some privilege, by deed or charter.

FIRMLY. Where a statute requires an affidavit that an appellant from an award of a board of arbitrators "firmly believes injustice has been done," it is not sufficient to express belief, omitting the word firmly. The word is a strong expression intended to put the affiant on his guard. It cannot be dispensed with without substituting something equal to it in substance; as to what shall be so considered, there may be liberal construction. Verily is as strong a word as firmly, and is sufficient; 4 S. & R. 134.

FIRMURA. Liberty to scour and repair a mill-dam, and carry away the soil, etc. Blount.

FIRST. In a will the word "first" may not import precedence of one bequest over another. 59 Me. 330; 57 Id. 523.

FIRST BILL. The term "first bill" used in credit insurance policy, means the particular articles contracted for at one time. 133 Ky. 746, 118 S. W. 1004.

FIRST-CLASS. Occupying the highest standing in a particular classification. In a contract for "first-class" work, it is for the jury to decide as to whether the terms were substantially complied with; 67 Hun 652.

Funeral. Term "first-class funeral" when applied to a particular individual, generally has reference to the previous social status and pecuniary condition of the person to be interred; for what might be considered extravagant in one case would be seemingly moderate in another. 13 A. & E. Ency. 2d ed., 552; 11 N. Y. St. Rep. 649.

Securities. First-class interest-paying securities does not include stocks or second mortgages. *Id.*; 35 N. J. Eq. 470.

Station. A first-class station of a railway is a station at which all trains, other than mail, express, and special, are advertised to stop and take up and set down passengers. *Id.*; L. R. 8 Eq. 671.

Title. The stipulation by a vendee of real estate that the title should be "first-class" could mean nothing more than that it should be marketable. *Id.*; 120 N. Y. 253.

FIRST-CLASS MATTER. Matter received at the United States post-offices, in writing or sealed against inspection.

Includes written matter, namely: Letters, postal cards, post cards (private mailing cards), and all matter wholly or partly in writing, whether sealed or unsealed, except manuscript copy accompanying proof sheets or corrected proof sheets of the same and the writing authorized by law to be placed upon matter of other classes. (Sec. 426, 441, and 447, Postal Laws and Regulations.) Matter sealed or otherwise closed against inspection is also of the first class. (Secs. 380 and 453,

Id.) Note: Typewriting and carbon and letterpress copies thereof are the equivalent of handwriting and are classed as such in all cases. U. S. Off. Postal Guide, 1924, 8.

FIRST-CLASS MISDEMEANANT. Under the Prisons Act (28 & 29 Vict. c. 128, s. 67) prisoners in the county, city, and borough prisons convicted of misdemeanor and not sentenced to hard labor, are divided into two classes, one of which is called the first division; and it is in the discretion of the court to order that such a prisoner be treated as a *misdemeanant of the first division*, usually called "first-class misdemeanant," and as such not to be deemed a criminal prisoner, *i. e.* a prisoner convicted of a crime.

FIRST DEGREE. The words "in the first degree" should be taken in their ordinary acceptance, and not in the legal sense which they may bear in other states under peculiar statutes. They naturally mean simply that the defendant was guilty of the first or highest degree of murder. 70 S. W. 292.

FIRST FRUITS. The first year's whole profits of the spiritual preferments. There were three valuations (*valor beneficium*) at different times, according to which these first fruits were estimated, made in 1253, 1288, and 1318. A final valuation was made by the 26 Hen. VIII. c. 3.

They now form a perpetual fund, called Queen Anne's bounty, the income of which is used for the augmentation of poor livings. 1 Sharsw. Bla. Com. 284, and notes; 2 Burn, Eccl. Law 260.

FIRST IMPRESSION (Lat. *primæ impressionis*). First examination. First presentation to a court for examination or decision. A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is said to be a case of the first impression. Austin, Jur. sect. xxv. *ad fin.* See IMPRESSION; PRIMÆ IMPRESSIONIS.

FIRST PURCHASER. In the English law of descent, the first purchaser was he who first acquired an estate in a family which still owns it. A purchase of this kind signifies any mode of acquiring an estate, except by descent. 2 Bla. Com. 220.

FISC. In Civil Law. The treasury of a prince; the public treasury. 1 Low. C. 361.

Hence, to *confiscate* a thing is to appropriate it to the *fisc*. Paillet, *Droit Public*, 21, n., says that *fiscus*, in the Roman law, signified the treasure of the prince, and *aerarium* the treasure of the state. But this distinction was not observed in France. See Law 10, ff. *De jure Fisci*.

FISCAL. Belonging to the *fisc*, or public treasury. A fiscal agent does not necessarily imply a depositary of the public funds, so as, by the simple use of it in a statute without any directions in this respect to make it the duty of the state treasurer to deposit with him any moneys in the treasury; 27 La. Ann. 29.

FISCAL COURT. See COURT OF LIMITED POWERS.

FISCUS. A great basket. The word signified a wicker-basket or pannier in which the Romans were accustomed to keep and carry about large sums of money (Cic. 1, Verr. c. 8; Phaedr. Fab. ii, 7), and hence *fiscus* came to signify any person's treasure or money chest.

The importance of the imperial *fiscus* soon led to the practice of appropriating the name to that property, which the Cæsar claimed as Cæsar, and the word *fiscus*, without any adjunct, was used in this sense. (Juv. Sat. iv. 54.) Ultimately the word came to signify, generally, the property of the state, the Cæsar having concentrated in himself all the sovereign power, and thus the word *fiscus* finally had the same signification as *aerarium*, in the republican period. In the later periods, the words were used indiscriminately, but only in the sense of the imperial chest, for there was then no other public chest. Wharton; Smith's Dict. Antiq.

FISH. An animal which inhabits the water, breathes by means of gills, swims by the aid of fins, and is oviparous.

Fishes in rivers and in the sea are considered as animals *feræ nature*; consequently, no one has any property in them until they have been captured; and, like other wild animals, if, having been taken, they escape and regain their liberty, the captor loses his property in them.

FISH ROYAL. A whale, porpoise, or sturgeon thrown ashore on the coast of England belonged to the king as a branch of his prerogative. Hence these fish are termed royal fish. Hale, *De Jure Mar.* pt. 1, c. 7; 1 Sharsw. Bla. Com. 290; Plowd. 305; Bracton, l. 3, c. 3.

FISHERY. A place prepared for catching fish with nets or hooks. This is commonly applied to the place of drawing a seine or net. 1 Whart. 131.

A *common of fishery* is not an exclusive right, but one enjoyed in common with certain other persons. 3 Kent 329.

A *free fishery* is said to be a franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil. 3 Kent 329.

A *several fishery* is one by which the party claiming it has the right of fishing, independently of all other, so that no person can have a coextensive right with him in the object claimed; but a partial and independent right in another, or a limited liberty, does not derogate from the right of the owner. 5 Burr. 2814.

A distinction has been made between a *common fishery* (*commune piscarium*), which may mean for all mankind, as in the sea, and a *common of fishery* (*communium piscarie*), which is a right, in common with certain other persons, in a particular stream. 8 Taunt. 133. Angell seems to think that *common of fishery* and *free fishery* are convertible terms. Law of Watercourses, c. 6, ss. 3, 4.

Woolrych says that sometimes a *free fishery* is confounded with a *several*, sometimes it is said to be synonymous with *common*, and again it is treated as distinct from either. Law of Waters, etc., 97. A *several fishery* as its name imports, is an exclusive property; this, however, is not to be understood as depriving the territorial owner of his right to a *several fishery* when he grants to another person permission to fish; for he would continue to be the *several proprietor*, although he should suffer a stranger to hold a coextensive right with himself. Woolf, Wat. 95.

These distinctions in relation to *several*, *free*, and *common of fishery* are not strongly marked, and the lines are sometimes scarcely perceptible. "Instead of going into the black-letter books to learn what was a *fishery*, and a *free fishery*, and a *several fishery*," says Huston, J., "I am disposed to regard our own acts, even though differing from old feudal law." 1 Whart. 133.

The right of fishery is to be considered with reference to navigable waters and to waters not navigable; meaning, by the former, those in which the tide ebbs and flows; by the latter, those in which it does not. By the common law of England the fisheries in all the navigable waters of the realm belong to the crown by prerogative, in such way, nevertheless, as to be common to all the subjects: so that an individual claiming an exclusive fishery in such waters must show it strictly by grant or prescription. In that country navigable waters meant tide waters, but different conditions have resulted in the application of the rule *cessat ratio cessat lex*, and while the same principle is recognized that navigable waters belong to the state and non-navigable ones to the riparian proprietor, the recognition of tide-water as the test of navigability is abandoned. See NAVIGABLE WATERS.

In rivers not navigable the fisheries belong to the owners of the soil or to the riparian proprietors; 2 Bla. Com. 39; Gould, Wat. 42, 48; Hale, *De Jure Mar.* c. 4; 1 Mod. 105; 4 Burr. 2162; Dav. 155; 7 Co. 16 a; Plowd. 154 a. In such rivers the owner of the adjoining soil has an exclusive right of fishery in front of his land to the thread of the river, except so far as this right has been qualified by legislative regulation; but this right is limited to the taking of fish, and does not carry with it the right to prevent the passage of fish to lakes and ponds for breeding purpose; 5 Pick. 99.

The common-law doctrine accepting the tide-water test of navigability has been declared to be the law in several of the United States; 17 Johns. 195; 20 id. 90; 3 N. H. 331; 1 Pick. 180; 5 id. 199; 5 Day 72; 1 Baldw. 60; 5 Mas. 181; 5 Harr. & J. 193; 2 Conn. 481; 103 Mass. 446, 447; 37 Me. 472. But in some states, as Pennsylvania, North Carolina, and South Carolina, the right of fishery in the great rivers of those states, though not tide-waters, is held to be vested in the state and open to all the world; 2 Binn. 475; 14 S. & R. 71; 1 M'Cord 580; 8 Ired. 277; 34 Ohio 492. See 89 Pa. 346; 75 Hun 472. This modification of the common-law doctrine has been applied not to the abandonment of the distinction between the public and private rights of fisheries as affected by navigability, but to the establishment of a different test of navigability, made necessary by the difference of physical conditions in the two countries already alluded to. So in the leading Pennsylvania case the point of the decision was that neither the quality of fresh or salt water, nor the flux or reflux of the tide, would determine whether a river should be considered navigable or not; 2 Binn. 475. After changing the test of navigability, these cases applied the rule of the public character of streams actually navigable which had been in England determined by the mere test of tide water. See 7 Pet. 320; 60 Pa. 339.

In this country each state has the exclusive control of fisheries in the tide waters and beds of tide waters within its jurisdiction, subject to the paramount right of navigation; 139 U. S. 240; 94 id. 391. This right is said by Cooley to be "considered as pertaining to the state by virtue of an authority existing in every sovereign, and which is called the eminent domain. Some of these rights are complete without any action on the part of the state, as is the case with . . . the rights of fishery in public waters." Cooley, Const. Lim. 651, 524. The jurisdiction of a state is coextensive with its territory, coextensive with its legislative powers, and within what are generally recognized as the territorial limits of a state, by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties; 3 Wheat. 386; within its limits a state has authority to regulate the time and manner of the taking of fish by the public in the waters therein; 1 Metc. 95; 20 Pick. 186; 24 Me. 482; 75 id. 597; and so far as public and common rights are concerned, the state has control over fisheries; 35 Me. 118.

The control of fisheries to the extent of at least a marine league from the shore belongs to the nation on whose coast the fisheries are prosecuted. Bays wholly within the territory of a nation, not exceeding two marine leagues in width at the mouth, are within its territorial jurisdiction; 139 U. S. 240.

The fact that congress has never assumed control over fisheries is persuasive evidence that the right to control them remains in the state; 139 U. S. 240. In England it was held that the ownership of the crown in the bed of navigable waters is for the benefit of the subject, and cannot be used in any such manner to derogate from or interfere with the right of navigation, which belongs by law to all subjects of the realm; and that consequently the grantees of a particular portion, who occupied it for a fishery, could not be lawfully authorized to charge and collect anchorage dues from vessels anchoring therein; 20 C. B. N. S. 1.

By the award of the arbitrators under the treaty with Great Britain (27 Stat. L. 948), it was settled that the United States had no exclusive jurisdiction in Behring Sea outside the ordinary three-mile limit, and no right of property in, or protection over, the fur seals frequenting the islands of the United States when found outside of such three-mile limit. Therefore the act of March 2, 1889, declaring that Rev. St. sec. 1956, which forbids the killing of fur-bearing animals in Alaska and the waters thereof, shall apply to "all the dominion of the United States in the waters

of Behring Sea," must be construed to mean the waters within three miles of the shores of Alaska; 75 Fed. Rep. 513.

Private or several fisheries in navigable waters may be established by the legislatures, or may, perhaps, be acquired by prescription clearly proved; 16 Pet. 369; 6 Cow. 369; 5 Ired. 118; 4 Md. 262; 10 Cush. 369; 39 Mich. 626; and in some of the United States there are such private fisheries, established during the colonial period, which are still held and enjoyed as such; as, in the Delaware; 1 Whart. 145; 1 Baldw. 76. The right of private fishery may exist not only in the riparian proprietor, but also in another who has acquired it by grant or otherwise; Co. Litt. 123 a, n. 7; Schultes, Aq. Rights 40; Ang. Waterc. 184; Gould, Wat. 183; 33 N. J. L. 223. But see 2 Salk. 637. Such a right is held subject to the use of the waters as a highway; Ang. Tide-Wat. 80; 1 South. 61; 1 Jones, N. C. 299; 1 Campb. 516; 1 Whart. 136; and to the free passage of the fish; 7 East 195; 1 Rice 447; 5 Pick. 199; 10 Johns. 236; 2 Cush. 251; 15 Me. 303. See as to right of fishery; 9 L. R. A. 236, 807; as to prescription to such rights; 14 id. 386; on land of another; 13 Am. St. Rep. 416.

The free right of fishery in navigable waters extends to the taking of shell-fish between high and low water-mark; 2 B. & P. 473; 5 Day 22; 37 Me. 472; 15 How. 132; 103 Mass. 217.

Oysters which have been taken, and have thus become private property, may be planted in a new place flowed by tide-water, and where there are none naturally, and yet remain the private property of the person planting them; 14 Wend. 43; 34 Barb. 592; 2 R. I. 434; 47 Hun 366. A state may pass laws prohibiting the citizens of other states from taking oysters within its territorial limits; 4 Wash. C. C. 371; 12 R. I. 385; 94 U. S. 391; Angell, Tide-Wat. 156. See 40 Fed. Rep. 625. The exclusive right to take oysters in a navigable bay cannot be acquired by prescription; 25 S. W. Rep. (Tex.) 650.

The preservation of game and fish is within the proper domain of the police power of a state; 152 U. S. 133. See as to river and lake fisheries, 14 Law Mag. & Rev. 4th 220; France and Canada; 15 id. 301; United States and Canada; 13 id. 282; 21 Am. L. Rev. 369, 431; 1 Rev. Crit. 38.

See, generally, 2 Bla. Com. 39; 3 Kent 409; Bacon, Abr. Prerogative; Schultes, Aq. Rights; Ang. Waterc. §§ 61-89; Washburn, Easements; Woolrych, Waters; Ang. Tidew. ch. 7; 23 Am. St. Rep. 837; 13 Myer, Fed. Dec. 208; 3 Wait, Act. & Def. 355.

FISH COMMISSIONER.

The Act of February 9, 1871, provides for the appointment of a commissioner of fish and fisheries, with all necessary powers looking to the preservation and increase of food fishes throughout the country. U. S. Rev. Stat. § 4805.

FISHGARTH. A dam or weir in a river for taking fish, especially in the rivers of Ouse and Humbef. Tomlin.

FISHERIES ARBITRATION. The right to fishing on the high seas, without the territorial limits of any state (a marine league, or three geographical miles from the shore) is a right common to all mankind, and cannot be granted or restricted by any particular nation. 13 A. & E. Ency. 2nd ed., 560; 5 Ired. L. 118, 42 Am. Dec. 155. By the award of arbitrators under the treaty of arbitration between the United States and Great Britain it was decided "that the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Behring sea when such seals are found outside the ordinary three-mile limit." *Id.*; 27 Am. L. Rev. 703.

FISHERIES COMMISSION.

The relation of the United States with the British provinces on the Atlantic has been the subject of important negotiations. By the treaty of 1818, the United States have the right to fish on certain specified coasts of British America without reference to the distance from shore, while as to all other

coasts they are excluded from fishing within three marine miles of the shore. The treaty of Washington of 1871 removes the three-mile restriction. Art. XIX. yields a corresponding right to all British subjects as to the Atlantic coasts of the United States north of the 39th parallel, and concedes to each nation the right to import, free of duty, fish and fish oils into the ports of the other. The treaty was to continue in operation for ten years, and further until two years' notice from either party. In Art. XXII. it is stated that the British government asserts that these provisions of the treaty would work greatly to her disadvantage. Provision was accordingly made, by the same article, for the appointment of a commission, which is known as the Fisheries Commission, to determine the amount of compensation to be paid by the United States. The tribunal, consisting of three members, met at Halifax, N. S., June 15, 1877, and the business sessions lasted from July 23 to November 23, 1877. The award was five and one-half million dollars in gold to Great Britain. The United States commissioner did not sign the award, stating that, "in his opinion the advantages accruing to Great Britain under the treaty of Washington are greater than those conferred on the United States. . . . He deemed it his duty to state further, that it is questionable whether it is competent for the board to make an award under the treaty, except with the unanimous consent of its members." See U. S. Rev. Stat. §§ 2505, 2506; 12 Am. Law Rev. 380.

FISHING BANKS. A fishing ground of comparative shoal water in the sea. 21 Ore. 523.

FISHING-BILL. A term used in equity for a bill that seeks a discovery upon general, loose, and vague allegations. Story, Eq. Pl. § 325; on that ground alone, such a bill will be at once dismissed; 32 Fed. Rep. 263.

Referring to a bill in equity or to interrogatories, "fishing" imports seeking to pry into the title or individual affairs of an adverse party.

A "fishing bill" is a bill in which the plaintiff shows no cause of action, and endeavors to compel the defendant to disclose a cause in the plaintiff's favor. Anderson; 11 Barb. 298. A bill in equity that seeks a discovery upon general, loose, and vague allegations. *Id.* 32 F. R. 263.

FISK. In Scotch Law. The revenue of the crown. Generally used of the personal estate of a rebel which has been forfeited to the crown. Bell, Dict.

FISTUCA (Lat.; spelled, also, *festuca*; called, otherwise, *baculum*, *virga*, *fustus*). The rod which was transferred, in one of the ancient methods of feoffment, to denote a transfer of the property in land. Spelman, Gloss. See **FESTUCA**.

FIT. Suitable; appropriate; conformable to a duty. Fit for cultivation refers to that condition of soil which will enable a farmer with a reasonable amount of skill to raise regularly and annually, by tillage, grain or other staple crops; 34 Cal. 581; 13 Ired. L. 37; 29 Kan. 596.

FIVE CIVILIZED NATIONS. Several of the more powerful Indian tribes occupying the Indian Territory, known as the "five civilized nations," namely the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles, and the tribes incorporated into these nations, have adopted to a great extent the habits of civilized life, and have established a well-organized constitutional government secured to them by treaties and Acts of Congress. Each nation has its elective executive head, a dual legislative and a judiciary system, with superior and inferior courts. They may enact laws for the regulation of their internal affairs provided such laws are not in conflict with the constitution and laws of the United States, and the proceedings and judgments of their courts in cases within their jurisdiction stand on the same footing and are entitled to the same faith and credit as those of the territories of the Union. (4 Okla. 5.) 16 A. & E. Ency. 2nd ed., 214. See **INDIAN TERRITORY**.

FIVE MILE ACT. An act of parliament passed in 1665, 17 Chas. II. c. 2, forbidding nonconformists who refused to take the oath of non-resistance to come within five miles of any corporation in which they had preached since the passing of the act of oblivion in 1660. This act was nullified by the toleration act of 1689.

This was the popular title both of the statute 35 Eliz. c. 2, and of the statute 17 Car. 2. c. 2. The Act of Elizabeth forbade "popish recusants" who had been convicted of failing to attend the services of the Established Church to move more than five miles from their usual places of abode; and the statute of Charles, amongst other things, prohibited persons preaching in non-conformist places of worship, from being, except when on a journey, within five miles of any city, incorporated town or borough sending burgesses to Parliament. Byrnes.

FIX. To determine; to settle; 52 N. W. Rep. (S. D.) 673. A constitutional provision to the effect that the general assembly shall fix the compensation of officers, means that it shall prescribe or "fix" the rule by which such compensation is to be determined. 18 Ohio 9.

FIX COMPENSATION. "Fix" declares stability and confirmation. The opposite of change. In the phrase "increase and fix the compensation" it is the natural complement of the power to increase,—establishes the increase. 248 U. S. 408.

FIXING BAIL. In Practice. Rendering absolute the liability of special bail.

The bail are fixed upon the issue of a *ca. sa. (capias ad satisfaciendum)* against the defendant; 2 N. & M'C. 159; 16 Johns. 117; 3 Harr. N. J. 9; 11 Tex. 56; and a return of *non est* thereto by the sheriff; 4 Day 1; 2 Bail. 492; 3 Rich. S. C. 145; 1 Vt. 276; 7 Leigh 371; made on the return-day; 2 Metc. Mass. 590; 1 Rich. S. C. 421; unless the defendant be surrendered within the time allowed *ex gratia* by the practice of the court; 3 Conn. 316; 9 S. & R. 24; 2 Johns. 101; 1 Dev. N. C. 91; 11 Gill & J. 92; 8 Cal. 552; 17 Ga. 88.

In New Hampshire, 1 N. H. 472; Massachusetts, 2 Mass. 485; Missouri, 69 Mo. 359; Tennessee, 5 Yerg. 183; and Texas, 7 Tex. App. 279; bail are not fixed till judgment on a *sci. fa.* is obtained against them, except the death of the defendant after a return of *non est* to an execution against him.

The death of the defendant after a return of *non est* by the sheriff prevents a surrender, and fixes the bail inevitably; 5 Binn. 332; 4 Johns. 407; 3 M'Cord 49; 4 Pick. 120; 4 N. H. 29; 12 Wheat. 604. See 1 Ov. 224; 1 Ohio 35; 2 Ga. 331.

In Georgia and North Carolina, bail are not fixed till judgment is obtained against them; 3 Dev. 155; 61 Ga. 197, 492. See **BAIL**.

FIXTURES. Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold. There is much dispute among the authorities as to what is a proper definition. Bro. Fixt. 1; Tyler's Fixt. 35; 6 Am. L. Rev. 412, where various definitions are reviewed.

Anything fixed or attached to a building, and used in connection with it, movable or immovable. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture and does not pass with a conveyance of the freehold. If, however, it be so connected with the building, that it cannot be severed from it without injury to the building, then it is part of the realty and passes with the conveyance of the soil; 95 Ala. 77.

Questions frequently arise as to whether given appendages to a house or land are to be considered part of the real estate, or whether they are to be treated as personal property: the latter are movable, the former not.

The annexation may be actual or constructive. 1st, By actual annexation is understood every mode by which a chattel can be joined or united to the freehold. The article must not be merely laid upon the ground; it must be fastened, fixed, or set into the land, or into some such erection as is unquestionably a part of the realty; otherwise it is in no sense a fixture; Bull. N. P.

34; 8 East 88; 9 *id.* 215; Pothier, *Traité des Choses* §1; 20 Wend. 636; 3 Blackf. 111. Looks, iron stoves set in brickwork, posts, window-blinds, and a mirror firmly attached to the chimney breast by molding, afford examples of actual annexation; see 5 Hayw. 109; 20 Johns. 29; 1 Harr. & J. 289; 3 M'Cord 553; 9 Conn. 63; 1 Miss. 508, 620; 7 Mass. 432; 15 *id.* 159; 4 Ala. 314; 36 W. Va. 671; 43 Ill. App. 585; 2d, by constructive annexation. Some things have been held to be parcel of the realty, which are not annexed or fastened to it; for example, deeds or chattels which relate to the title of the inheritance and go to the heir; Shep. Touch. 469; 31 Barb. 632; 41 N. H. 503. Cars used in connection with a drier in a brickyard, and which are indispensable to the use of the drier, are part of the realty, and a mechanic's lien will attach thereto; 37 Ill. App. 69. So wires and insulators used in forming and completing the connection between an electric light and power plant and the places supplied with light and heat by such plant; 32 Atl. Rep. (N. J.) 69; 48 Kans. 182; gas burners, chandeliers, and the like; 31 N. J. L. 181; 4 Metc. Ky. 357; 18 L. T. N. S. 900. Tubs, vats, and casks placed in a brewery with a design of permanent use therein and which are too large to pass out of any existing opening are part of the realty; 47 Fed. Rep. 756. So deer in a park, fish in a pond, and doves in a dove-house, go to the heir, and not to the executor, being, like keys and heirlooms, constructively annexed to the inheritance; Shep. Touch. 90; Pothier, *Traité des Choses* §1. But loose, movable machinery used in prosecuting any business to which the freehold is adapted, cannot be considered part of the real estate nor in any way appurtenant to it; 12 N. H. 305; 6 Exch. 295; 14 Allen 130; 55 Fed. Rep. 229. See, however, 2 W. & S. 116, 890.

The criterion of an irremovable fixture is the united application of three requisites: (1) real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold; 117 Ind. 176; 42 Kan. 213.

The general rule is, that fixtures once annexed to the freehold become part of the realty. But to this rule there are exceptions: as, first, where there is a manifest intention to use the fixture in some employment distinct from that of the occupant of the real estate; second, where it has been annexed merely for the purpose of carrying on a trade; 3 East 88; 4 Watts 390; for the fact that it was put up for such a purpose indicates an intention that the thing should not become part of the freehold. See 1 H. Bla. 260. Buildings may, by agreement of parties, be erected upon land without becoming affixed thereto; 150 U. S. 483. But if there is a clear intention that the thing should be permanently annexed to the realty, its being used for purposes of trade would not, perhaps, bring the case within one of the exceptions; 1 H. Bla. 260. The tendency of modern authorities is to make the intention of the parties the general rule for deciding whether an article is realty or personalty; L. R. 7 C. P. 328; 12 N. Y. 170; 17 Am. Dec. 690; 96 Ala. 44. But the intention must be definitely expressed by words or acts; mere unexpressed mental intention is of no avail; 16 Ill. 480; 43 N. H. 390; 43 P. 308. See 43 Mich. 389, and note. This intention will prevail except as against innocent purchasers; 117 Ind. 176.

With respect to the different classes of persons who claim the right to remove a fixture, it has been held that where the question arises between an executor and the heir at law the rule is strict that whatever belongs to the estate to which the fixture appertains will go to the heir; but if the ancestor manifested an intention (which it is said may be inferred from circumstances) that the things affixed should be considered personalty, they will be so treated, and will go to the executor. See Bac. Abr. *Executor, Administrator*; 28 Stra. 1141; 1 P. Wms. 94; Bull. N. P. 34; 13 Cl. & F. 312; 36 Am.

Rep. 446. As between a vendor and a vendee the same strictness applies as between an executor and an heir at law; for all fixtures which belong to the premises at the time of the sale, or which have been erected by the vendor, whether for purposes of trade or manufacture or not, as potash-kettles for manufacturing ashes, and the like, chandeliers and gas-brackets, pass to the vendee of the land, unless they have been expressly reserved by the terms of the contract; 6 Cow. 663; 20 Johns. 29; Ewell, *Fixt.* 271; Tyler, *Fixt.* 519; 26 Weekly Law Bul. 149; (see also 1 Daly, N. Y. 487; 10 Rich. L. 135;) a faucet attached to a hot-water boiler and a rosebush in the yard pass by deed of the realty; 19 N. Y. Sup. 881; but a filter capable of delivering 105 gallons of water per minute, resting loosely on a factory floor, is a fixture; 62 Hun 618. The same rule applies as between mortgagor and mortgagee; 15 Mass. 159; 147 *id.* 500; 1 Atk. 477; 16 Vt. 124; 12 N. H. 205; Ewell, *Fixt.* 271. Wires for conducting an electrical current to lamps pass as fixtures under a mortgage of the electric light plant; 12 Pac. Rep. (Ariz.) 694; and the annunciator and all the wires of an electric-bell system are part of the realty of a hotel and pass as fixtures under a mortgage; 63 N. W. Rep. (Minn.) 257; in which case steam radiators and an office-desk attached to the building were held to be fixtures, while gas-burners and chandeliers were held not to pass as such to the mortgagee; *contra*, as to the last point; 24 N. Y. Supp. 70; and in 28 Atl. Rep. (Pa.) 694, it was held that steam radiators and valves were not annexed to the realty, but being exactly analogous to gas fixtures were severable from the realty. The question whether ranges, hot-water boilers, sinks, and wash-tubs are fixtures under a mortgage depends on when and how they are attached to the house; 24 N. Y. Supp. 70; and as between a devisee and the executor, things permanently annexed to the realty at the time of the testator's death pass to the devisee,—his right to fixtures being similar to that of a vendee; 2 B. & C. 80; Ferard, *Fixt.* 246. Tapestry which has been cut and pieced so as to cover the walls of a room and the space left by the doors and mantelpiece, and was hung by being nailed to wooden buttons let into the plaster and nailed to the brick work, passed as a fixture under the devise of the mansion-house; [1896] 2 Ch. 497; see also 3 L. R. Eq. 382, where, under the provisions of a will, tapestry, pictures, and frames filled with satin and attached to the walls, and also statues, figures, vases, and stone garden seats purchased and set in place by the testator who was tenant for life, which were essentially part of the house or the architectural designs of the building or grounds, however fastened, were fixtures, and could not be removed, but glasses and pictures not in panels, not being part of the building, were not fixtures.

Where a husband, managing his wife's property as her agent, voluntarily, at his own expense, places thereon a boiler, engine, and connections for furnishing power, and subsequently joins his wife in executing a mortgage on the land, the boiler and engine are not trade fixtures, and the husband, as against the purchasers at sheriff's sale on proceeding, under the mortgage, has no right to remove them; 180 Pa. 283.

But as between a landlord and his tenant the strictness of the ancient rule has been much relaxed. The rule here is understood to be that a tenant, whether for life, for years, or at will, may sever at any time before the expiration of his tenancy, and carry away all such fixtures of a chattel nature as he has himself erected upon the demised premises for the purposes of ornament, domestic convenience, or to carry on trade; provided, always, that the removal can be effected without material injury to the freehold; 16 Day 322; 16 Mass. 449; 2 Dev. 376; 1 Bail. 541; 19 N. Y. 234; Ewell, *Fixt.* 76; 69 Tex. 146; 42 Kan. 23; 47 Ill. App. 33; and this is so whether it be made of wood or brick; 142 U. S. 396. There have been adjudications to this ef-

fect with respect to bakers' ovens; salt-pans; carding-machines; cider mills and furnaces; steam-engines; soap-boilers' vats and copper stills; mill-stones; Dutch barns standing on a foundation of brick-work set into the ground; a varnish-house built upon a similar foundation, with a chimney; and to a ball-room, erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil; and also in regard to things ornamental or for domestic convenience: as, furnaces; stoves; cupboards and shelves; bells and bell-pulls; gas-fixtures; portable hot-air furnace; 4 Gray 256; 127 Mass. 123, and note; 34 Am. Rep. 358; 29 Pa. 506; 92 Mich. 552; 55 Fed. Rep. 289; pier and chimney-glasses, although attached to the wall with screws; marble chimney-pieces; grates; window-blinds and curtains. The decisions, however, are adverse to the removal of hearth-stones, doors, windows, locks and keys; because such things are peculiarly adapted to the house in which they are affixed; also, to all such substantial additions to the premises as conservatories, greenhouses (except those of a professional gardener), stable, pig-styes and other out-houses, shrubbery and flowers planted in a garden. Nor has the privilege been extended to erections for agricultural purposes; though it is difficult to perceive why such fixtures should stand upon a less favored basis than trade fixtures, when the relative importance of the two arts is considered; Tayl. Landl. & Ten. § 544; 3 East 88; 13 Pa. 433. But some American authorities question the correctness of the doctrine in its application to the United States; 2 Pet. 137; 20 Johns. 29; Ferard, *Fixt.* 60. A railroad company, occupying land under an agreement, on the termination of such, may remove the rails which have been laid; 142 U. S. 396.

The time for exercising the right of removal is a matter of some importance. A tenant for years may remove them at any time during his term and afterwards, if he is in possession and holding over rightfully; 7 M. & W. 14; 14 Cal. 59; 40 Ind. 145; 55 Fed. Rep. 239. But tenants for life or at will, having uncertain interests in the land, have, after the determination of their estates not occasioned by their own fault, a reasonable time within which to remove their fixtures; 3 Atk. 13; 19 N. J. 238; 102 Mass. 193; but a tenant at will whose tenancy can only be terminated after reasonable notice, has not this privilege; 87 Minn. 459.

If a tenant quits possession of the land without removing such fixtures as he is entitled to, the property in them immediately vests in the landlord, and though they are subsequently severed, the tenant's right to them does not revive. If, therefore, a tenant desires to have any such things upon the premises at the expiration of his term, for the purpose of valuing them to an incoming tenant, or the like, he should take care to get the landlord's consent; otherwise he will lose his property in them entirely; 1 B. & Ad. 394; 2 M. & W. 450; Tyl. *Fixt.* 73; 32 W. Va. 66. The rights of parties with respect to particular articles are sometimes regulated by local customs, especially as between outgoing and incoming tenants; and in cases of this kind it becomes a proper criterion by which to determine the character of the article, and whether it is a fixture or not.

See, generally, on this subject, Vin. Abr. *Landl. and Tenant* (A); Bac. Abr. *Executors*, etc. (H 8); Comyns, Dig. *Biens* (B, C); 2 Sharsw. Bla. Com. 281, n. 23; Pothier, *Traité des Choses*; 4 Co. 63, 64; Co. Litt. 53 a, and note 5, by Hargrave; F. Moore 177; 3 Washb. R. P.; Brown; Amos & Ferard; Tyler; Ewell, *Fixtures*; 6 Am. L. Rev. 412; 17 Am. Dec. 686; 24 Alb. Law J. 314; 10 L. R. A. 723, note.

FLACO. A place covered with standing water.

FLAG. A symbol of nationality carried by soldiers, ships, etc., and used in many places where such a symbol is necessary or proper.

Nationality is determined by the flag when all other requisites are complied

with; 5 East 398; 3 B. & P. 201; 1 C. Rob. Adm. 1; 1 Dods. Adm. 81, 131; 9 Cra. 388; 2 Pars. Marit. Law 114, 118, n. 129.

A ship navigating under the flag, and pass of a foreign country is to be considered as bearing the national character of the country under whose flag she sails; Wheat. Int. L. 3d Eng. ed. § 340. In an unusual case, during the French and German war a vessel really of Swiss (neutral) ownership bore the German flag because Swiss subjects were not permitted to fly the Swiss federal flag and France had refused to recognize any Swiss maritime flag. The French Conseil des Prises held, reversing the decision below, that she was not a German vessel and restored her to her owners; Dalloz, *Jur. Gén.* pt. iii. p. 94 (14 espèces).

A cargo documented as foreign property in the same manner as the ship by which it is carried, and covered by a foreign flag, is not, under the English rule, the subject of capture; 5 Rob. Rep. 2; *id.* 5, note. In that country, although the ship is held to be bound by the character imposed upon it by the authority of the government from which all the documents issue, yet goods which have no dependence upon the authority of the state may be differently considered; and if the goods be laden in time of peace, though sailing under a foreign flag, they are not subjects of capture; *id.*; but these licenses are construed with great liberality in the British courts of admiralty; Stew. Vice Adm. 360.

The doctrine of the courts in this country has been very strict as to this point, and it has been frequently decided that sailing under the license and passport of protection of the enemy in furtherance of his views and interests was, without regard to the object of the voyage or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war; 8 Cra. 181; *id.* 203; *id.* 444; 2 Wheat. 143; 4 *id.* 100. These decisions placed the objection to such licenses on the ground of pacific dealing with an enemy and as amounting to a contract that the party to whom the license is given should, for that voyage, withdraw himself from the war and enjoy the repose and blessings of peace. The illegality of such intercourse was strongly condemned; and it was held that, the moment a vessel sailed on a voyage with an enemy's license on board, the offence was irrevocably committed and consummated, and that the *delictum* was not done away even by the termination of the voyage, but the vessel and cargo might be seized after arrival in a port of the United States and condemned as lawful prize. See 1 Kent 85, 164; Wheat. Int. L. (3d Eng. ed.) 340.

By the rules of the United States Navy the use of a foreign flag to deceive an enemy is permissible, but it must be hauled down before a shot is fired, and under no circumstances will it be allowable to commence an action or to fight a battle without the display of the national flag; Snow, Int. L. 96.

Law of the Flag. An expression applied to the municipal law of the country to which a ship belongs of which the flag is the symbol, when that law is resorted to in preference to the *lex loci contractus* for the construction and effect of a contract or the determination of a liability affecting the ship or her cargo.

The law of the flag is "to regulate the liabilities and regulations which arise among the parties to the agreement, be it of affreightment or by hypothecation, upon this principle, that the ship-owner who sends his vessel into a foreign port gives a notice by his flag to all who enter into contracts with the shipmaster, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all;" Foote, *Priv. Int. L.* 408; and in England this rule is usually followed, the tendency being that, in the absence of indication of the intention of the parties the presumption is in favor of the law of the ship's flag; Scrutton, *Chart. Part. 11*; *contra*, 3 Moo. P. C. N. s. 273;

129 U. S. 397; 12 Q. B. D. 589; 10 *id.* 540; in which cases it was held that the *lex loci contractus* must prevail. In his treatise on merchant shipping (3d ed. 170) MacLachlin thus states the rule as to the effect of the law of the flag on the authority of the master. "The agency of the master is devolved upon him by the law of the flag. The same law that confers his authority, ascertains its limits, and the flag at the mast-head is notice to all the world of the extent of such power to bind the owners or freighters by his act. The foreigner who deals with this agent has notice of that law, and, if he be bound by it, there is no injustice. His notice is the national flag which is hoisted on every sea and under which the master sails into every port, and every circumstance that connects him with the vessel isolates that vessel in the eyes of the world, and demonstrates his relation to the owners and freighters as their agent for a specific purpose and with power well defined under the national maritime law; *id.*; this was suggested by the author quoted as a possible explanation of the apparently anomalous exception of bottomry bonds from the general rule that the *lex loci contractus* prevails.

This precise rule was followed in the leading English case of *Lloyd v. Guibert*, where the question was as to the master's authority to bind the ship-owner; L. R. 1 Q. B. 115; s. c. 6 B. & S. 100, and 33 L. J. Q. B. 245; s. c. on appeal 35 *id.* 74; 6 B. & S. 120.

In this case, in the Queen's Bench, Blackburn, J., in language almost exactly following that above quoted, applied the law of the flag (French), which did not recognize a personal liability of the owner in a bottomry bond, as against the *lex loci contractus* (Danish), or the laws of the place of performance (English), or that of the place when the cargo was loaded (Haytien). The court after noting the "singular absence of authority" said that two American cases had been cited; 1 La. 528 and 3 Sto. 465, adding that "neither of these decisions is binding on us, but we have derived very great assistance from them." As to the last of these cases there follows this comment: "The very learned judgment of Mr. Justice Story just referred to affords a complete answer to a plausible argument in which was suggested that the general maritime law clothed the master with power to bind his owners absolutely, and that the municipal law of the owner's country was analogous to secret restrictions in the ostensible authority of a partner or other agent clothed with general power." In the Exchequer Chamber, where the judgment was affirmed, Willes, J., said: "The general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce." The same doctrine was applied by the English Court of Appeal to the master's control over the cargo as well as the ship, by Brett, L. J., in L. R. 7 P. D. 137; by Dr. Lushington in Br. & L. 38, and in a later case by Sir J. Hannen, who sustained a sale of part of a damaged cargo, where it was shown by the result to have been unnecessary, such sale being authorized by the law of the flag; [1891] Prob. 328. But see 1 L. 249; *id.* 528, where the *lex loci contractus* was held to prevail.

In 3 Sto. 465, although the law of the flag was, in fact, enforced, the decision cannot be said to have followed the rule laid down by MacLachlin, as in that case the particular point decided was as to liability of the owner to the freighter, when the former was a citizen of a state the laws of which did not recognize such liabilities, while by the law of the state in which the freighter resided and also of the foreign port where the cargo was shipped, such a liability existed, and the *lex domicilii* of the ship-owners was held to govern the contract. See

also 8 Pet. 538; BOTTOMRY.

As to the effect of the law of the flag upon the construction of a contract of affreightment, the decisions in this country as a rule are usually governed by the *lex loci contractus*. In the case of *The Brantford City*, Judge Brown thus stated this rule: "The 'law of the flag' . . . does not embody any rule of legal construction. Literally, it is but a concise phrase to express a simple fact, namely, the law of the country to which the ship belongs, and whose flag she bears, whether it accords with the general maritime law or not. In so far, however, as the law of the flag does not represent the general maritime law, it is but the municipal law of the ship's home. It has, therefore, no force abroad, except by comity. But foreign law is not adopted by comity, unless some good reason appear in the particular case why it should be preferred to the law of the former. The most frequent and controlling reasons are the actual or presumed intent of the parties or the evident justice of the case arising from its special circumstances.

On this ground, the law of the ship's home is applied by comity, to regulate the mutual relations of the ship, her owner, master, and crew, as among themselves; their liens for wages, and modes of discipline; 1 W. Rob. 35; 1 Low. 453; 3 Fed. Rep. 577; 29 *id.* 127. For the same reason it is also applied, by comity, to torts on the high seas, as between vessels of the same nation, or vessels of different nations subject to similar laws, though not if they are subject to different laws; 105 U. S. 24. Independently of the intent of the parties, the law of the flag has no application to cases of tort, as between ships or persons of different nationalities and conflicting laws; and Federal law, by which stipulations of a common carrier exempting him from the consequence of his own negligence are held to be against public policy and void, is controlling in suits brought here upon shipments made here on board foreign ships under bills of lading signed by foreign masters, though such stipulations be valid by the law of the ship's flag." 29 Fed. Rep. 373.

This case is expressly approved by the supreme court in a case upon the same point, which is the leading American case upon this branch of the subject; 129 U. S. 397, 461. See comments on this case by the circuit court of appeals; 67 Fed. Rep. 493. Precisely the contrary view, under almost identical circumstances, was held in the case of *The Missouri* and the doctrine of *Lloyd v. Guibert* was held to extend to this particular point; 41 Ch. Div. 321. Where both the law of the flag and the *lex loci contractus* were British, the law of England was held to govern the contract; 63 Fed. Rep. 268; 60 *id.* 227; affg. 56 *id.* 247. In a shipment of goods in England, in an English vessel, on an ordinary bill of lading, the liability of the vessel is to be determined according to the law of the place of shipment, as the law of the flag; 19 Fed. Rep. 101. So also where the bill of lading was made expressly subject to "a live stock contract," and there was an express provision in that contract that all questions relating to the bill of lading should be determined by British law; 24 Fed. Rep. 922. But the circuit court of appeals, in a similar case, where the bill of lading contained the "so-called flag clause" (that liability should be determined by the law of England, but there was no reference to this in the charter, made in this country), held it no evidence to modify the later and that it was ineffective to substitute the law of the flag for the *lex loci contractus* with respect to the stipulation for exemption from liability for negligence; 66 Fed. Rep. 607; affg. 56 *id.* 123.

Generally it may be said that the doctrine of the *Missouri* is in conflict with the current of authority in England, it being usually held in that country that as to such stipulations in the bill of lading the *lex loci contractus* prevails; 9 Q. B. D. 118; 10 *id.* 521, 540; 12 *id.* 596; 3 Moo. P. C. N. s. 272; and to the same effect and under precisely similar circumstances is a judgment of the court of cassation in France, imperfectly

stated in a note to the case last cited and fully reported in 75 *Journal du Palais* (1864) 225, and see 1 Dalloz 449. This question, it may be remarked, is as yet scarcely to be considered as settled by any hard-and-fast rule of law, and the only certain guide, says Bowen, L. J., "is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself with a view to discovering from it the true intention of the parties."

Flag of Truce. A white flag displayed by one of two belligerent parties to notify the other party that communication and a cessation of hostilities are desired.

Although each party has the right to send such a flag, there is no obligation on the commander of the enemy's forces to receive it; Snow, Int. L. 96; although it is usual to do so except in very exceptional cases; Davis, Int. L. 238; but if he receive the flag he may take all reasonable precautions to protect himself from any injury that may result from the presence of an enemy within his lines; he may detain the messenger at the outposts or may cause him to be blindfolded, but such messenger is entitled, if the bearer of a *bona fide* message, to complete inviolability of person; but during an engagement, firing is not necessarily to cease on the appearance of a flag of truce, unless it be made clear that it is exhibited as a token of submission; Snow, Int. L. 97. The rules of war justly forbid the sending of flags of truce for the purpose of obtaining information either directly or indirectly, and a messenger forfeits his inviolability of person and may be detained and subjected to punishment as a spy if he take advantage of his mission to abet an act of treachery. See Davis; Snow, Int. L.; and also article 45 of the Project of an International Declaration concerning the laws and customs of war proposed in the Brussels conference of 1874. This proposal, though not formally adopted because of a failure of unanimous assent, is of great value as a compact statement of the generally accepted views at that time of the great powers of Europe on the subjects covered by it. It may be found in Wheat. Int. L., 3d Eng. ed. § 411 l.

In naval operations the senior officer alone is authorized to dispatch or admit flags of truce. The firing of a gun from the senior officer's vessel is generally understood as a warning to approach no nearer. The flag of truce should be met at a suitable distance by a boat or vessel in charge of a commissioned officer having a white flag plainly displayed from the time of leaving until her return, and the same precautions must be observed in dispatching such a flag; Snow, Int. L. 97. See *BANNER*.

FLAG OF TRUCE. A white flag, which, when displayed by a belligerent, denotes a desire to enter into negotiations with the enemy. The bearer of such a flag cannot insist upon being admitted, and if he offers himself during the progress of an engagement, the enemy is not obliged to cease firing, and is not responsible if the bearer of the flag is accidentally killed or injured. Though the bearer is not expected to refrain from making observations or from reporting what he may learn without effort on his part, he is punishable as a spy if he abuses the flag by surreptitiously obtaining military knowledge thereunder. 16 A. & E. Ency. 2nd ed., 1159.

FLAG OF THE UNITED STATES. By the act entitled "An act to establish the flag of the United States," passed April 4, 1818, 3 Story, U. S. Laws 1667, it is enacted—

§ 1. That from and after the fourth day of July next, the flag of the United States be thirteen horizontal stripes, alternate red and white; that the union be twenty stars, white in a blue field.

§ 2. That, on the admission of every new state into the Union, one star be added to the union of the flag; and that such addition shall take effect on the fourth day of July then next succeeding such

admission. See Preble, Hist. of Amer. Flag.

It has been held in an unreported case in Illinois that a statute requiring the national flag to be floated over every school-house during school hours is unconstitutional, on the ground that, it transcended the police power of the state, Wright, J., contending that the legislature could not enact a statute with penal sanctions unless it had for its object "the maintenance of the police authority of the state, the morals of the state, or the health of the state. The question that arose in this case was whether, in a group of college buildings, each building was compelled to display a separate flag, and the decision that one flag floated from a flagstaff for the group of buildings, was not a compliance with the law is severely criticised in 30 Am. L. Rev. 746.

FLAGELLAT. Whipped; scourged. An entry on old Scotch records. 1 Pitt. Crim. Tr. pt. 1, p. 7.

FLAGRANS (Lat.). Burning; raging; in actual perpetration. *Flagrante bello*, while war is actually in progress. *Flagrant necessity*, an urgent and immediate peril or emergency which will excuse an act under other circumstances unlawful.

FLAGRANS CRIMEN. In Roman Law. A term denoting that a crime is being or has just been committed; for example, when a crime has just been committed and the *corpus delictum* is publicly exposed, or if a mob take place, or if a house be feloniously burned, these are severally *flagrans crimen*.

The term used in France is *flagrant delit*. The Code of Criminal Instruction gives the following concise definition of it, art. 41; "Le délit qui se commet actuellement ou qui vient de se commettre, est un flagrant délit."

FLAGRANTE DELICTO (Lat.). In the very act of committing the crime. 4 Bla. Com. 307.

FLAGRANTLY. "Flagrantly against the evidence" means that it is palpably against the evidence. 160 Ky. 45, 169 S. W. 546.

FLANGE WHEEL. A wheel contrived for an omnibus, with a disc capable of being lowered against the wheel into a groove in the rail of the tramway and drawn up when running on the pavement, has been held a flange wheel. 6 C. P. D. 70.

FLAT. When used as a description of anything respecting an arm of the sea means a level place over which the water stands or flows. 34 Conn. 424.

A floor or separate division of a floor, fitted for housekeeping and designed to be occupied by a single family. Cent. Dict.

A building, the various floors of which are fitted up as flats, either residential or business.

A flat is in law a house, though in fact only a part of one in the ordinary sense; L. R. 8 Q. B. D. 423; and the contract between the owner and the occupier is classed among "contracts for permissive use." Holland, Jur. 254.

The owner of a building who rents flats therein retains control of all portions not actually demised to tenants; [1893] Q. B. 177; 9 Allen 17; he is bound to keep such portions in a reasonable state of repair, and a failure so to do renders him liable in damages; 101 Mass. 251; 106 id. 94; 129 id. 33; 151 id. 162; 81 Me. 318; 67 id. 545; 31 Hun 30; 93 N. Y. 7; 98 id. 635; 127 id. 381; 130 id. 269; 4 C. B. n. s. 556; 8 C. P. 326; but the owner is not an insurer, and when he has constructed his roofs, pipes, or drains with the reasonable foresight commonly exercised by prudent men, he will not be responsible for a latent defect or an unusual stress of circumstances; 27 N. B. 499; L. R. 6 Ex. 217; 39 N. Y. Sup. Ct. Rep. 246; 5 Q. B. D. 602. Where the upper rooms only are leased, a covenant is implied on the part of the lessor to give such rooms the necessary support; 26 N. Y. 498; 28 Mo. App. 116; and he is under a negative

duty to do nothing to lessen or decrease such support, or to render it insecure; 50 Hun 181; 46 id. 521.

It is the duty of the owner to keep the elevators in a reasonable state of repair, employ competent persons to work them, exercise due regard to the safety of the persons using them, keep the approaches to them properly lighted, and keep the entrance to them on each floor closed when the cage is not at that floor; 3 T. L. R. 500. See *ELEVATOR*.

As regards the furnishing of artificial light in halls and passage-ways, it has been held that in the absence of contractual obligation there is no legal duty on the part of the owner to furnish such light; 26 N. Y. Supp. 801; 131 N. Y. 674; *contra*, 154 Mass. 235.

The janitor, being appointed and removable by the owner, is, when engaged in the discharge of his general duties, the landlord's servant. Any particular tenant may sue the owner for damages, if the general services so contracted for are not rendered, but when a janitor is engaged by a tenant on some special service, such tenant becomes *dominus pro tempore*, and as such he incurs a liability similar to the landlord's; so when he attempts to interfere with or assume the direction of the janitor when the latter is discharging any general duty. See [1893] 1 Ch. 1. In either case his duties and liabilities are regulated by the general principles of the law of Master and Servant (*q. v.*).

The distinction between the tenants of flats and lodgers and guests at a hotel is, that while the latter may have the exclusive enjoyment of their lodgings or rooms, they have not, as have the tenants of flats, the exclusive possession; 30 L. J. M. C. 74. See, generally, *APARTMENT; LEASE; LANDLORD AND TENANT*.

A place within a river, cove, creek, or harbor, more or less under water; "a shallow or 'shoal water.'" Anderson; 34 Conn. 376. A flat place on a mountain top.

FLAVIANUM JUS (Lat.). A treatise on civil law, which takes its name from its author, Cneius Flavius. It contains forms of actions. Vicat, Voc. Jur.

FLECTA. A feathered or fleet arrow. Cowell.

FLEDUTE. A discharge or freedom from amercements where one having been an outlawed fugitive cometh to the place of our lord of his own accord. *Termes de la Ley*.

The liberty to hold court and take up the amercements for beating and striking. Cowell.

The fine set on a fugitive as the price of obtaining the king's freedom. Spelman, Gloss.

FLEDWITE. FLIGHWITE (Sax. flyth, flight, and wite, punishment.) A discharge from amercements, where a person having been a fugitive came to the peace of our King, of his own accord, or with license. *Termes de la Ley*; Cun. L. Dict. But some authorities add to this definition a *quere* whether it is not rather a fine set upon a fugitive to be allowed to return to the king's place. Cowell; Holt-house.

FLEE FROM JUSTICE. To leave one's home, residence, or known place of abode, or to conceal one's self therein, with intent in either case to avoid detection or punishment for some public offence. 48 Mo. 240; 3 Dill. 381.

FLEET. A place of running water where the tide or float comes up.

A famous prison in London, so called from a river or ditch which was formerly there, on the side of which it stood. It was used especially for debtors and bankrupts, and persons charged with contempt of the courts of chancery, exchequer, and common pleas. Abolished in 1842 and pulled down in 1845. Such persons as had been sent there were thereafter sent to the Marshalsea. Moz. & W.; Hayden's

Dict. Dates.

FLEET BOOKS. The original records of the marriages celebrate in the Fleet Prison between 1686 and 1754. These books are not, it is said, admissible in evidence to prove a marriage, as they were not made under public authority, but on a question of pedigree they might, perhaps, be admitted to show the name under which a woman passed at the time of her marriage there. Tayl. Ev. § 1430. These books are now deposited in the office of the registrar-general.

Consist of about three hundred large books, or registers, and about a thousand "pocket books" containing entries of marriages and baptisms celebrated in or about the Fleet Prison between 1674 and 1754. Up to 1821, when they were purchased by the Government, they were in private hands. After 1821 they were in the Registry of the Consistory Court of London, from which they passed to the Registrar-General under the Non-Parochial Registers Act, 1840, s. 6. Byrne.

FLEET MARRIAGES. Under the common law, neither banns, license, nor clergymen were absolutely necessary for the validity of a marriage. One of the means by which persons might validly be married was mere consent of the parties in the presence of witnesses. Another valid means was a clandestine marriage by a person in priest's orders. The Fleet marriages were clandestinely performed, in defiance of ecclesiastical authority, by persons who were, or pretended to be, in priest's orders; and they were therefore valid either *qua* clandestine marriages celebrated by a priest, or *qua* matrimonial contracts in the presence of witnesses. They were celebrated by a class of disreputable persons living in or about the Fleet Prison, who cared nothing for ecclesiastical censures, in any room—frequently a tap-room—which they saw fit to use. The first on record took place in 1613. From 1674 to 1754 many thousands of these marriages took place. In 1753 the statute 26 Geo. 2, c. 33 was passed and made any such marriage impossible as from 25th March, 1754. Byrne; Burn, 2nd ed. Hist. Fleet Mar.

FLEM. A fugitive bondman or villein. Spelman. The possession of the goods of such fugitives was called *flemeswite*. Fleta, lib. 1, c. 147.

(From Sax. *flean*, to kill or slay.) An outlaw. Tomlin.

FLESH. Includes live flesh and dead flesh. 2 Pa. Dist. Rep. 437.

FLET. A house or home. Cowell.

FLETA. The title of an ancient law-book, supposed to have been written by a judge while confined in the Fleet Prison; written about 1290.

It is written in Latin, and is divided into six books. The author lived in the reigns of Edward II. and Edward III. See lib. 2, cap. 66, § *Item quod nullus*; lib. 1, cap. 20, § *que cooperunt*; 10 Coke, pref. Edward II. was crowned A. D. 1306. Edward III. was crowned 1326, and reigned till A. D. 1377. During this period the English law was greatly improved, and the lawyers and judges were very learned. Hale, Hist. Comm. Law 162; 4 Bla. Com. 427, says of this work "that it was for the most part law until the alteration of tenures took place." The same remark he applies to Britton and Hengham.

But a late work speaks of it as "little better than an ill-arranged epitome." 1 Poll. & M. Hist. Engl. Law 188.

FLICHTWITE. A fine on account of brawls or quarrels. Spel. Gloss.

FLIGHT. In Criminal Law. The evading the course of justice by a man's voluntarily withdrawing himself. Formerly, if the jury found that the party fled for it, whether he were found guilty or not of the principal charge, he forfeited his goods and chattels. 4 Bla. Com. 387. Evidence of the flight of an accused person has a tendency to establish guilt; 164 U. S. 492. See FUGITIVE FROM JUSTICE; EXTRADITION.

FLIGHTWITE. The same as FLEDWITE (*q. v.*).

FLOAT. A certificate authorizing the party possessing it to enter a certain amount of land. 20 How. 504. See 7 C. C. A. 293.

A Mexican grant of quantity, as of a certain number of leagues of land lying within a larger tract, whose boundaries are given, is a float, subject to location within the tract by the government before it can attach to any specific lands; 149 U. S. 652; 127 *id.* 428.

FLOATABLE. A stream capable of floating logs, etc., is said to be floatable. 2 Mich. 519.

FLOATING CAPITAL. Capital retained for the purpose of meeting current expenditure.

It includes raw materials destined for fabrication, such as wool and flax products in the warehouses of merchants or manufacturers; such as cloth or linen and money for wages and stores. De Laveleye, Pol. Ec.

FLOATING DEBT. That mass of lawful and valid claims against a corporation, for the payment of which there is no money in the corporate treasury specifically designed, nor any system of taxation or other means of providing money to pay, particularly provided. 71 N. Y. 374.

FLODEMARK. High-tide mark. Blount. The mark which the sea at flowing water and highest tides makes upon the shore. And. 189; Cunningham, Law Dict.

FLOGGING. Thrashing or beating with a whip or lash. This system of punishment was abolished in the army by act of Aug. 5, 1861; U. S. Rev. Stat. § 1342; in the navy June 6, 1872; *id.* § 1642. See WHIPPING.

FLOOD. An inundation of water over land not usually covered by it. Such an accident is an Act of God. 4 Harr. Del. 449. See ACT OF GOD.

FLOODING LAND. See EMINENT DOMAIN; WATER; WATERCOURSE.

FLOOR. The section of a building between horizontal planes. 145 Mass. 8. "Floor cloth canvas" has been held to be synonymous with "oil cloth foundations"; 1 Otto 362. In a lease the words "first floor" are equivalent to the "first story" of a building and include the walls unless other words control the meaning; 145 Mass. 8.

The horizontal part of the interior of a building upon which persons walk. English.

The floor of a court, in England, is that part between the judge's bench and the front row of counsel. Litigants appearing in person, in the High Court or Court of Appeal, are supposed to address the court from the floor. R. & L. Dict.

In Parliamentary Practice. That member of a public body in session whose right it is to speak, i. e. who has been recognized by the chairman, or other person presiding at the time, is said to "have the floor"; in other words, to be entitled to address the meeting in preference to any other member. *Id.*

FLORENTINE PANDECTS. A copy of the Pandects, discovered accidentally at Amalphi, Italy, about 1187, and afterwards removed to Florence. Butl. Hor. Jur. 90.

FLORIDA. The name of one of the states of the United States of America, being the fourteenth admitted to the Union. It was discovered by Ponce de Leon in 1513; settled by Huguenots in 1562, and permanently settled by Spaniards at St. Augustine in 1565; and ceded to Great Britain in 1763, to Spain in 1763, and to United States in 1819. The Americans took possession in 1821.

It was admitted into the Union in 1845 by virtue of the act of congress entitled: "An act for the admission of the states of Iowa and Florida into the Union," approved March 3, 1845, and the present constitution was adopted Feb. 25, 1868.

The declaration of rights, in addition to the usual guarantees, provides as follows: That the paramount allegiance of every citizen is due to the federal government, and that no power exists with the people of the state to dissolve its connection

therewith; and that the state shall ever remain a member of the American Union, and any attempt to dissolve said union shall be resisted with the whole power of the state.

FLORIN (called also *Guilder*). A coin, originally made at Florence.

The name formerly applied to coins, both of gold and silver, of different values in different countries. In many parts of Germany, the florin, which is still the integer or money-unit in those countries, was formerly a gold piece, value about two dollars and forty-two cents. It afterwards became a silver coin, variously rated at from forty to fifty-six cents, according to locality; but by the German conventions of 1837 and 1888 the rate of nine-tenths fine and one hundred and sixty-three and seven-tenths grains troy per piece was adopted, making the value forty-one cents. This standard is the only one now used in Germany; and the florin or guilder of the Netherlands is, also, coined at nearly the same standard (weight, one hundred and sixty-six grains; fineness, eight hundred and ninety-six thousandths), the value being the same. The florin of Tuscany is only twenty-seven cents in value.

FLOTAGES. Things which float by accident on the sea or great rivers. Blount.

The commissions of water-bailiffs. Cunningham, Law Dict.

FLOTSAM, FLOTSAN. A name for the goods which float upon the sea when cast overboard for the safety of the ship, or when a ship is sunk. Distinguished from *jetsam* and *ligan*. Bracton, lib. 2, c. 5; 5 Co. 106; Comyns, Dig. *Wreck*, A; Bacon, Abr. *Court of Admiralty*, B; 1 Bla. Com. 292. See JETTISON; LIGAN.

FLOU-MARKE. Flode-mark, which see.

FLOWAGE. The overflowing with water, the water which thus overflows. Webster.

The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural watercourse with well defined banks; 95 Mich. 586; 46 Cal. 346; 98 *id.* 157. Where one drains water from his land into the highway, causing another's crops to be damaged by flowage through a drain connected with the highway, he is liable; 44 Ill. App. 649. See EMINENT DOMAIN; WATER; WATERCOURSE.

FLOWING LANDS. Raising and settling back water on another's land by a dam placed across a stream or watercourse which is the natural drain and outlet for the surplus water on such land, 2 Gray 235. See EMINENT DOMAIN; WATER; WATERCOURSE.

FLUCTUS. Flood; flood tide. Bracton fol. 255.

FLUMEN (L. Lat.). In Civil Law. The name of a servitude which consists in the right of turning the rain-water, gathered in a spout, on another's land. Erskine, Inst. b. 2, t. 9, n. 9; Vicat, Voc. Jur. See STILLICIDIUM.

FLUMINE VOLUCRES. Wild fowl; water fowl. 11 East 571.

FLUVIOUS. A public river; flood tide.

FLY FOR IT. Anciently, it was the custom in a criminal trial, to inquire after a verdict of not guilty, "Did he fly for it?" Abolished by 7 & 8 Geo. IV. c. 28. Wharton.

The question "Did he fly for it?" was anciently put to a jury in order to enable them to find whether one charged with treason or felony had fled in order to avoid justice. Byrne.

FLYING SWITCH. This is made by uncoupling the cars from the locomotive while in motion, and throwing the cars on to the side track, by turning the switch, after the engine has passed it, upon the main track. 29 Iowa 39. See RAILROAD.

FLYMA. One escaped from justice; a fugitive. Anc. Inst. *Flyman Frymth*, was the offence of harboring a fugitive; *id.*

FOCAGE. Housebote; firebote. Cowel.

FOCALE (L. Lat.). In Old English Law. Firewood. The right of taking

wood for the fire. *Fire-bote*. Cunningham, Law Dict.

FODERUM (L. Lat.). Food for horses or other cattle. Cowel.

In feudal law, fodder and supplies provided as a part of the king's prerogative for use in his wars or other expeditions. Cowel.

FODERTORIUM. Provisions to be paid by custom to the royal purveyors. Cowel.

FEDUS (Lat.). A league; a compact.

FEMINA VERO CO-OPERTA. A feme covert.

FENERATION. See FENERATION.

FENUS NAUTICUM (Lat.). The name given to marine interest.

The amount of such interest is not limited by law, because the lender runs so great a risk of losing his principal. Erskine, Inst. b. 4, t. 4, n. 76. See MARINE INTEREST.

FESCA. Herbage; grass. Cowel.

FETICIDE. In Medical Jurisprudence. Of late years this term has been applied to designate the act by which criminal abortion is produced. 1 Beck, Med. Jur. 288; Guy, Med. Jur. 133. See INFANTICIDE.

FETURA (L. Lat.). In Civil Law. The produce of animals, and the fruit of other property, which are acquired to the owner of such animals and property by virtue of his right. Bowyer, Mod. C. L. c. 14, p. 81.

FETUS (Lat.). In Medical Jurisprudence. An unborn child. An infant *in ventre sa mère*.

An arbitrary distinction is made by some writers between *fetus* and *embryo*, the latter term being used for the product of conception up to the fourth month of gestation and the former term after the fourth month.

Although it is often important to know the age of the fetus, there is great difficulty in ascertaining the fact with the precision required in courts of law.

The great difference between children at birth, as regards their weight and size, is an indication of their condition while with in the womb, and is a sufficient evidence of the difficulty as to the age of the fetus by its weight and size at different periods of its existence.

Thousands of healthy infants have been weighed immediately after birth, and the extremes have been found to be two and eighteen pounds. It is very rare indeed to find any weighing as little as two pounds, but by no means uncommon to find them weighing four pounds. So it is with the length, which varies as much as that of the adult does from the average height of the race.

Neither can anything positive be learned from the progress of development; for although the condition of the bones, cartilages, and other parts will generally mark with tolerable accuracy the age of a healthy fetus, yet an uncertainty will arise when it is found to be unhealthy. It has been clearly proved, by numerous dissections of new-born children, that the fetus is subject to diseases which interfere with the proper formation of parts, exhibiting traces of previous departure from health, which had interfered with the proper formation of parts and arrested the process of development.

Interesting as the different periods of development may be to the philosophical observer, they cannot be of much value in legal inquiries from their extreme uncertainty in denoting precisely the age of the fetus by unerring conditions.

See Amer. Text Book Obstetrics; 1 Beck, Med. Jur. 290; Billard on Infants, Stewart trans. 36, 37, and 39; Ryan, Med. Jur. 137; 1 Chitty, Med. Jur. 493; Dean, Med. Jur.; 2 Witth & Beck, Med. Jur. 201. And see the articles BIRTH, DEAD-BORN; EN VENTRE SA MERE; FETICIDE; INFANTICIDE; LIFE; PREGNANCY; QUICKENING.

FOG. Watery vapor precipitated in the lower part of the atmosphere, and disturbing its transparency. It differs from cloud only in being near the ground. Webster.

It has been held that fog is a generic term, descriptive of all conditions of the atmosphere increasing the perils of navigation, and that its meaning should not be limited to the strictly technical definition of the word, excluding mist or falling snow. 13 A. & E. Ency. 2nd ed., 727; 71 Fed. Rep. 215.

Every vessel must, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions; 137 U. S. 390. A speed of six miles per hour is excessive for a steamer in a dense fog, where she is emerging from New York harbor and is likely to meet vessels from many points of the compass; 153 U. S. 64.

The owner of a sailing vessel cannot sub-

stitute for the fog-horn which she is required by the sailing regulations to carry, an instrument blown by steam, and in their opinion more efficient than the fog-horn; 5 U. S. App. 314. See 153 U. S. 94. A vessel is not properly equipped at sea which has no spare mechanical fog-horn; 55 Fed. Rep. 117.

A steamer failing to slack its speed in a fog is at fault in case of collision; 5 U. S. App. 314; 1 id. 614; 54 Fed. Rep. 542; 52 id. 400; [1892] Prob. 105. See COLLISION.

FOGAGIUM (L. Lat.). Coarse, rank grass which has not been eaten off in the summer. Cowel.

FOI. In French Feudal Law. Faith; fealty. Guyot, Inst. Feod. c. 2.

FOINISUM. The fawning of deer. Spel. Gloss.

FOITERERS. Vagabonds, Blount.

FOLC-GEMOTE (spelled, also, *folkmote*, *folemote*, *folkgemote*; from *folc*, people, and *gemote*, an assembly).

A general assembly of the people in a town, burgh, or shire.

During the time at which the separate tribal nations of Britain were under the control or supremacy of the kingdoms of Northumbria, York, and West Saxony successively, the term was applied to the *concilium* or the freeholders of each village. Tacitus calls it the nation assembled in arms. Their meetings were held each fortnight, and the members bound themselves reciprocally to the peaceable behavior of themselves, their families, and their dependents; 2 Burke, Abr. Eng. Hist. ch. 7. They chose their rulers, the *folc kings*, at this tribal moot, settled matters of unjust trading, the common tillage and pasturage, and all things that concerned the common household; 1 Soc. Eng. 125, 136. The conqueror so far as possible endeavored to preserve the customs of the people, but with the growth of the royal power the most important questions were referred to the councillors of the king, comprising the bishops, abbots, and eorlmen who succeeded the *folc kings* in the *folks* or *shires* and designated the *witenagemote* or council of the wise men; this in turn dissolved into the *curia regis*; Inderwick, King's Peace. About this period the spelling of the word changes from *folc*-moot to *folk*-moot. The meeting of the *folk*-moot was then transferred to London, and was held thrice a year, and the principal duties that devolved upon it were to hear royal proclamations and statutes, to choose mayors and burgesses, and to pronounce upon offenders the sentence of outlawry; 1 Poll. and Maitl. 543. The *folk*-moot and the *witenagemote* are said to have been the foundation of the English Parliament. See Stubbs, Sel. Chars. 10-13; Inderwick, King's Peace; Bagehot, Physics and Politics; Manwood, For. Laws; Spelman, Gloss.; De Brady, Gloss.; Cunningham, Law Dict.; PARLIAMENT; WITTENAGEMOTE.

FOLCLAND (Sax.). Land of the people. Spelman, Gloss. Said by Blackstone to be land held by no assurance in writing, but to have been distributed amongst the common people at the pleasure of the lord, and resumable at his discretion. 2 Bla. Com. 90; Cowel.

It was, however, probably, land which belonged to the community, and which, being parcelled out for a term to people of all conditions, reverted again to the commons at the expiration of the term. 1 Spence, Eng. Jur. 8; Whart. Law Dict., 2d Lond. ed.

The subject of land-tenure among the Anglo-Saxons is very obscure. Doubtless all land was originally held in common by the tribe or kingdom, and out of this after a time portions of it were disposed of to individuals. Individual ownership was generally designated by the term *allod*, which comprised original allotments which had the name *ethel*, and those which were carved out of the common lands by grant or charter. The tenure of the latter was designated by the term *boctland*, which is described as "land which is held under a book, under a privilege, modelled on Roman precedents, expressed in Latin words, armed with ecclesiastical sanctions, and marking for alienation and individualism." 8 Eng. Hist. Rev. 1-17. The folcland which was not granted as *boctland* could be let out for temporary occupation as *laenland*. A late theory maintained, in the review quoted by Dr. Vinogradoff is that folcland indicated an estate, not belonging to the folk, but held by folk-right or customary law, and not subject to disposition of the holder. *id.*; Medley, Eng. Const. Hist. 1-17. The folcland which the modern copy-holders are termed the historical successors of the owners of folcland; *id.* 38; Pollock, Land Laws 48. Nothing is certain except that the terms referred to were used, but their precise scope is the merest speculation, and successive writers invest it with the freedom which is invited by the lack of definite historical or documentary information. The subject affords ample scope for theorising, as most of what is written upon the subject is of this character, and it is said that the word folcland is only found technically used three times in Anglo-Saxon documents. The theory of Vinogradoff above stated is earn-

estly supported by Professor Maitland, in his Domesday Book and Beyond (which appears while this article is still in press). He says, referring to the author cited: "His argument has convinced us; but as it is still new we will take leave to repeat it with some few additions of our own." The subject of book-land and folk-land is elaborately discussed, and the three documents in which the latter word occurs, as above stated, are fully described. The conclusion is thus stated: "Land, it would seem, is either book-land or folk-land. Book-land, is land held by book, by a royal and ecclesiastical privilege. Folk-land is land held without book, by unwritten title, by the folk-law. 'Folk-land' is the term which modern historians have rejected in favour of the outlandish *allod*. The holder of folk-land is a free land owner, though at an early date the king discovers that over him and his land there exists an alienable superiority. Partly by alienations of this superiority, partly perhaps by gifts of land of which the king is himself the owner, book-land is created. Edward's law speaks as though it were dealing with two different kinds of land. But really it is dealing with two different kinds of title... the same land might be both book-land and folk-land, the book-land of the minister, the folk-land of the free men who were holding, not indeed for, but still 'under' the minister. They or their ancestors had held under the king, but the king had booked their land (which also in a certain sense was his land) to a church. 'Bookland' is a briefer term than 'land held by book-right'; 'folk-land' is a briefer term than 'land held by folk-right.' The same piece of land may be held by book-right and by folk-right; it may be book-land and folk-land too."

See Medley, Eng. Const. Hist. 16; Stubbs, Const. Hist. 36; 1 Poll. and Maitl. 88; Kemble, Sax. in Eng. 506; Lodge, Essays in Anglo-Saxon Law 68; Maitland, Domesday Book 226, 235.

FOLC-RIGHT. The common right of all the people. A law common to all the realm, mentioned by King Edward the elder. It is doubtless in the same sense that the phrase common law originated. 1 Bla. Com. 65, 67.

FOLD-COURSE. In English Law. Land used as a sheep-walk.

Land to which the sole right of folding the cattle of others is appurtenant; sometimes it means merely such right of folding. The right of folding on another's land, which is called common foldage. Co. Litt. 6 a, note 1; W. Jones 375; Cro. Car. 432; 2 Vent. 139.

FOLD-SOKE. A feudal service which consisted in the obligation of the tenant not to have a fold of his own but to have his sheep lie in the lord's fold. He was said to be *consuetus ad foldam*, tied to his lord's fold. The basis of this service is thus expressed by a recent writer: "It is manure that the lord wants; the demand for manure has played a large part in the history of the human race." Maitland, Domesday Book 76. In East Anglia the peasants had sheep enough to make this an important social institution; *id.* 442.

FOLDAGE. A privilege possessed in some places by the lord of a manor, which consists in the right of having his tenants' sheep to feed on his fields, so as to manure the land. The name of foldage is also given in parts of Norfolk to the customary fee paid to the lord for exemption at certain times from this duty. Elton, Com. 45, 46. See FOLD-SOKE.

FOLGARI. Menial servants; followers. Bract.

FOLGERAS. See HEORDFESTE.

FOLGERE. In Old English Law. A freeman who has no house or dwelling of his own, but is the follower or retainer of another (heorhfaest), for whom he performs certain predial services. Anc. Inst. Eng.

FOLGERS. Menial servants or followers. Cowel.

FOLGOTH. Official dignity.

FOLIO. A leaf. The references to the writings of the older law-authors are usually made by citing the folio, as it was the ancient custom to number the folio instead of the page, as is done in modern books.

A certain number of words specified by statute as a *folio*. Wharton. Originating, undoubtedly, in some estimate of the number of words which a *folio* ought to contain.

In Michigan it has been held that a legal *folio* is one hundred words; 38 Mich. 639; and that number is generally made a *folio* by statute; R. S. U. S. § 828.

FOLK-LAND. See **FOLC-LAND**.

FOLK-MOOT. See **FOLC-GEOTE**; **WITENA-GEOTE**.

FOLLOWING BASIS. An agreement that an adjustment in general average shall be made on the "following basis," followed by a statement of the amount to be contributed for the valuation of the ship after collision, and the valuation of the freight and the cargo, does not mean that the freight shall be assessed on its gross valuation, but merely that the valuation shall be taken as the foundation upon which the adjustment shall be made according to law; and if the law applicable prescribes that the freight shall be assessed at one half its gross value, as in California, this will prevail. 58 Fed. Rep. 801.

FONDS PERDUS. In French Law. Capital is said to be invested a *fonds perdu* when it is stipulated that in consideration of the payment of an amount as interest, higher than the normal rate, the lender shall be repaid his capital in this manner. The borrower, after having paid the interest during the period determined, is free as regards the capital itself. Arg. Fr. Merc. Law 560.

The repayment of a sum by paying an instalment of it with the interest. English.

FONSADERA. In Spanish Law. Any tribute or loan granted to the king for the purpose of enabling him to defray the expenses of a war.

FONTANA. A fountain of water. Bract. fol. 238.

FOOD. What is fed upon to support life by being received within and assimilated by the organism of an animal or plant; nutriment; aliment; provisions; victuals. Webster.

The exposure of unwholesome provisions for sale as food is not criminal, unless the person guilty thereof knew of their unwholesome character; 44 Mo. App. 429. Although a statute suppressing the manufacture of oleomargarine may be unnecessarily oppressive, redress can only be had through the legislature; 127 U. S. 678. See **OLEOMARGARINE**.

A dealer who sells food sealed in a can to a buyer who knows that the seller has not prepared nor inspected it, and is ignorant of its contents, except so far as results from the fact that he has purchased it from others, gives no implied warranty that it is wholesome and fit for use; 88 N. Y. Supp. 1062. See **ADULTERATION**; **HEALTH**.

FOOD AND DRUG ACTS. Acts intended to serve one or both of two purposes: To preserve the public health, and to prevent deception. The title of the federal law, the so-called Food and Drugs Act, June 30, 1906 which is typical, is "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." West. P. F. & D. L. 1.

FOOT. A measure of length, containing one-third of a yard, or twelve inches. See **ELL**. Figuratively it signifies the conclusion, the end; as, the foot of the fine, the foot of the account. See 10 Metc. 26; 5 McLean 306.

FOOT OF THE FINE. The fifth part or the conclusion of a fine. It includes the whole matter, reciting the names of the parties, day, year, and place, and before whom it was acknowledged or levied. 3 Bla. Com. 351.

FOOT FRONT. See **FRONT FOOT**.

FOOTGELD. An amercement for not cutting out the ball or cutting off the claws

of a dog's feet (expediating him). To be quit of *footgeld* is to have the privilege of keeping dogs in the forest *unlawed* without punishment or control. Manw. For. Laws, pt. 1, p. 86; Crompton, Jur. 197; *Termes de la Ley*; Cunningham, Law Dict.; **EXPEDIATING**.

FOOTPRINTS. Impressions made by the feet of persons, or their shoes, boots, or other covering for the feet, on the ground, snow, or other surface. In the same category are also impressions of shoe-nails, patches, abrasions, or other peculiarities therein. When found at or near the scene of a crime they often lead to the identification of guilty parties.

"The presumption founded on these circumstances has been appealed to by mankind in all ages, and in inquiries of every kind, and it is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance." Will, Circ. Ev. 194. It is said that evidence of footprints and their correspondence with defendant's feet may be proved even when his agency is disputed, not as alone convincing, or indeed, available, but as tending to establish a case; Whart. Cr. Ev. § 795; even where the defendant's proof tended to establish an *alibi*; 25 S. W. Rep. (Tex.) 629. Evidence of footprints alone has been held insufficient to convict; 1 F. & F. 354; 19 Ia. 230; 17 Fla. 669; and unless the measurement is careful and accurate, or there is some peculiarity shown, the probative force is slight; 31 Fla. 240; 3 N. Y. Crim. Rep. 406; 57 Ga. 482; 89 Mo. 166; but in many cases such peculiarities have been shown and evidence of the footprints admitted; 8 Tex. Cr. App. 30; 117 Ill. 271; 59 Ga. 738; 17 Kan. 458; 10 Crim. L. Mag. 890; but a conviction on such evidence will be reversed for refusal to admit proof for the defendant that he has never worn a shoe which would make such a print; 12 Tex. Crim. App. 219; the discovery and comparison should be prompt with relation to the crime; 53 Ga. 253; and the measurement should be accurate; 12 Tex. Crim. App. 219; 8 id. 332; though it need not be immediate, the question of time going to the weight of the evidence, not to its competency; 68 Cal. 576.

The identification of such tracks is a matter of common observation, which does not require expert testimony; 63 N. Y. 590; 68 Ala. 569; 84 N. C. 756; and only the peculiarity of the tracks and the facts of identification may be proved, but not the opinion of the witness whether they were made by the defendant; 7 Neb. 320; 88 Ala. 193; 98 id. 10; but a witness has been permitted to prove the measurement of the tracks and their exact correspondence with the shoe of the defendant; 30 Tex. App. 482; the examination and the comparison need not be made in the presence of the defendant; 84 N. C. 756; nor can he be compelled to put his foot in the track to make evidence against himself; 63 Ga. 667; but where he was compelled to do so the evidence was admitted; 74 N. C. 646; and tracks have been voluntarily made by the accused before the jury for comparison with those proved; 80 Ga. 269. Comparison of the shoes with the footmarks should be made before the former are put in the marks; 1 Lew. C. C. 116; and where this was not done the evidence on the subject was rejected; *id.*

Such evidence, even if established beyond doubt, is liable, as in all cases of circumstantial evidence, to be the subject of fabrication, or erroneous inference; see the case of Mayenc, Gabriel 403, where the shoes of another person were put on by one committing a crime; and the celebrated case of Thornton, fully reported in Will, Circ. Ev. 288, where an *alibi* was successfully proved after apparently conclusive circumstantial evidence, including footprints.

Proof may be made by horse-tracks corresponding with those made by a horse of defendant; 32 Tex. Crim. App. 112; or that shoes taken from such horse fitted the tracks; 23 Ala. 44; and when the prisoner

had reversed the shoes of his horse after reaching the house, to give the impression that two persons had been there, the artifice led to his detection by the discovery of recent nail-marks in the horse's hoof; Spooner's Case, 2 Chand. Am. Crim. Tr.; but horse-tracks alone are not sufficient to convict; 65 Ia. 614; and see 8 Tex. Cr. App. 332.

For a full discussion of the subject, see Will, Circ. Ev. 194-204, in which will be found most of the cases here cited and many others.

The mark of a foot; footprint; a trace; a footmark. Worcester Dict.

In Criminal Law. On a question of identity, footprints are admissible as evidence if they correspond to those which would be made by the boots probably worn, (63 N. Y. 590), or the horse probably ridden, (23 Ala. 44), yet alone are inadequate to justify a conviction. (1 Post. & F. 354.) 2 Bishop, New Crim. Pro. 2nd ed., 943.

FOR. In place of or in front of. 37 Wis. 265. Because or on account of; by reason of; as agent for; in behalf of. 31 N. Y. 103; **AGENT**. Used in connection with a period it means "during," where publication is required for at least thirty days, one publication thirty days before the sale would not be a compliance. 18 Neb. 139. And see 16 Ohio 563; 12 Kan. 493. It may, if necessary, be inserted in a statute by judicial construction; 25 Minn. 522.

In a contract it implies a condition precedent; Hob. 41; 5 M. & S. 187. See also 12 Mod. 455.

In French Law. A tribunal. *Le for interieure*, the interior forum; the tribunal of conscience. Poth. Obl. pt. 1, c. 11, art. 3.

FOR ACCOUNT OF. A phrase used in an order, draft, or memorandum to designate the person against whom, or account against which, the thing or sum is to be charged.

FOR THE ACCOUNT, SELLING. A method of selling stock by stock brokers. The broker may, in executing the order of a client, enter into a contract for the specific amount of stock ordered to be bought or sold, or may include such order with others he may have received in a contract for the entire quantity, or in quantities at his convenience.

Neither in stock exchange contracts is there any real appropriation to any particular client of any particular stock in any transaction entered into with the jobber. Each transaction only forms an item in an account with that jobber, or, more correctly, with the house generally—that is to say, specific delivery or acceptance of that amount of stock is not necessarily made; but the transaction is liable to be balanced at any time during that account by a counter transaction by the same broker on behalf of the same or any client, or even on his own behalf, so that the balance only of all purchases and sales of that particular stock made by the broker in the house generally is to be finally accepted or delivered by him, and this through the instrumentality of the clearing house and the system of tickets. 182 U. S. 487, quoting Dos Passos on Stock Brokers and Stock Exchanges, 276.

FOR COLLECTION. See **INDORSEMENT**.

FOR DEPOSIT TO THE CREDIT OF. See **INDORSEMENT**.

FOR GOOD CAUSE. A statute authorizing a continuance "for good cause" in the absence of a party is satisfied by proof of the illness of plaintiff in another state, and the ignorance of his attorney of the names of the witnesses and the details of the case. 35 Cal. 636.

Has no certain meaning in a stipulation for canceling a contract. 14 A. & E. Ency. 2nd ed., 1074; 40 Mich. 324. In a statute for the removal of a public officer for good cause, the cause must be one which touches the qualifications of the officer for the office,

and shows that he is not a fit or proper person to perform the duties thereof. *Id.*; 45 Neb. 321.

Where the charter of a railroad provided that the report of the commissioners appointed to appraise compensation for land might be set aside for good cause shown, it was held that nothing was good cause for setting aside the report but such matters as led to a reasonable apprehension that an injustice had been done in settling the amount of damages, or some improper conduct on the part of the commissioners, the company, or their agents in regard to the assessments. *Id.*; 14 N. J. L. 162.

FOR AT LEAST. As applied to a number of days required for notice this phrase includes either the first or last day, but not both. 28 Atl. Rep. (N. J.) 578. See **TIME**. See **AT LEAST**.

FOR THAT. In Pleading. Words used to introduced the allegations of a declaration. "For that" is a positive allegation; "For that whereas" is a recital. Hamm. N. P. 9.

FOR THAT WHEREAS. Introductory words in pleading. See Hamm. N. P. 9. These words are used in the introduction of the statement of the plaintiff's case as a recital in the declaration in all actions except trespass, in which there being no recital the expression was "For that." 1 Burr. Inst. Cler. 170.

FOR USE. Words used to describe a suit, judgment, or decree in which the nominal plaintiff sues for the benefit or advantage of another. This is necessary in some cases where an assignee is obliged to sue in the name of the assignor. The style of the suit is "for use, etc., vs. B."

Loans for use are distinguished from loans for consumption; the former being those in which the article bailed is to be used and returned and the latter those in which it may be consumed and returned in kind.

FOR VALUE AND WITHOUT NOTICE. See **PURCHASER FOR VALUE AND WITHOUT NOTICE**.

FOR WHOM IT MAY CONCERN. A general clause in a policy of insurance, intended to apply to all persons who have any insurable interest. 1 Phill. Ins. 152. This phrase, or some similar one, must be inserted, to give any one but the party named as the insured rights under the policy. See 1 Term 313, 464; 1 B. & P. 316, 345; 2 Maule & S. 485; 12 Mass. 80; 13 id. 589; 6 Pick. 198; 2 Pars. Marit. Law 29, 477; 13 East 274.

FORAGE. Hay and straw for horses, particularly in the army. Jac.

FORAGIUM. Straw when the corn is threshed out. Cowel.

FORAKER ACT. The act which temporarily provided a civil government and revenues for the Island of Porto Rico. 182 U. S. 247. (Approved April 12, 1900, 31 Stat. 77, c. 191.)

FORANEUS. One from without; a foreigner; a stranger. Calv. Lex.

FORATHE. One who can take oath for another who is accused of one of the lesser crimes. Manw. For. Laws 3; Cowel.

FORBALCA. In Old Records. A forebalk; a balk (that is, an unplowed piece of ground) lying forward or next the highway. Cowel.

FORBANER. To deprive forever. To shut out. 9 Ric. II. cap. 2; 6 Hen. VI. cap. 4; Cowel.

FORBANNITUS. A pirate; an outlaw. law.

FORBARRE. To deprive one of a thing forever. Cowel.

FORBATUDUS. The aggressor slain in combat. Jac.

FORBEARANCE. A delay in enforcing rights. The act by which a creditor waits for the payment of a debt due him by the debtor after it has become due. It is sufficient consideration to support assumpsit.

An agreement to forbear bringing a suit for a debt due, although for an indefinite time, and even although it cannot be construed to be an agreement for a perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise; 183 Mass. 287; 123 id. 297; 110 id. 389.

See **ASSUMPSIT**; **CONSIDERATION**.

FORCE. Restraining power; validity; binding effect.

A law may be said to be in force when it is not repealed, or more loosely, when it can be carried into practical effect. An agreement is in force when the parties to it may be compelled to act, or are acting, under its terms and stipulations.

Strength applied. Active power. Power put in motion.

Actual force is where strength is actually applied or the means of applying it are at hand. Thus, if one break open a gate by violence, it is lawful to oppose force to force. See 2 Salk. 641; 8 Term 78, 357. See **BATTERY**.

Implied force is that which is implied by law from the commission of an unlawful act. Every trespass *quare clausum fregit* is committed with implied force. Co. Litt. 57 b, 161 b, 162 a; 1 Saund. 81, 140, n. 4; 5 Term 361; 8 id. 78, 358; Bao. Abr. Trespass; 3 Wils. 13; Fitzh. N. B. 890; 5 B. & P. 365, 454.

Mere nonfeasance cannot be considered as force, generally; 2 Saund. 47; Co. Litt. 161.

If a person with force break a door or gate for an illegal purpose, it is lawful to oppose force to force; and if one enter the close of another *vi et armis*, he may be expelled immediately, without a previous request; for there is no time to make a request; 2 Salk. 641; 8 Term 78, 357. When it is necessary to rely upon actual force in pleading, as in the case of a forcible entry, the words "*manu forti*," or "with a strong hand," should be adopted; 8 Term 357; 4 Cush. 441. But in other cases the words "*vi et armis*," or "with force and arms," are sufficient.

Municipal officers seizing private property under an order condemning it for a street, are not guilty of forcible trespass if they use no more force than necessary, even though the owner be present forbidding them; 100 N. C. 497. See **FULL FORCE**.

FORCE AND ARMS. A phrase used in declarations of trespass and in indictments, but now unnecessary in declarations, to denote that the act complained of was done with violence. 2 Chitty, Pl. 846, 850; 2 Steph. Com. 364. See **FORCE**.

FORCE AND FEAR, called also "*vi metusque*," means that any contract or act extorted under the pressure of force (*vis*) or under the influence of fear (*metus*) is voidable on that ground, provided, of course, that the force or the fear was such as influenced the party. Brown.

FORCE MAJEURE (Fr.). Superior or irresistible force. Emerig. Tr. des Ass. c. 12. See **VIS MAJOR**.

FORCED HEIRS. In Louisiana. Those persons whom the testator or donor cannot deprive of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them. La. Civ. Code, art. 1482. As to the portion of the estate they are entitled to, see **LEGITIME**. The causes for which forced heirs may be deprived of this right must be stated in the testament and also established by proof by the other heirs; *id.* Art. 1492.

FORCED OUT. Where a license to a corporation was to cease if the licensor was "forced out of the company," and one who had acquired all the stock, except that

held by the licensor, procured from the company an assignment of all its property, and induced it to cease doing business, it was held that the licensor was "forced out of the company." 148 Ill. 115.

The phrase "forced out of the company" held to mean exclusion from the active and responsible management of the business of the corporation, and from the beneficial enjoyment of the anticipated profits of the enterprise. 13 A. & E. Ency. 2nd ed., 741; 148 Ill. 115.

FORCED SALE. In Practice. A sale made at the time and in the manner prescribed by law, in virtue of execution issued on a judgment already rendered by a court of competent jurisdiction; a sale made under the process of the court, and in the mode prescribed by law. 6 Tex. 110.

A forced sale is a sale against the consent of the owner. The term should not be deemed to embrace a sale under power in a mortgage. 15 Fla. 336.

When the owner of a homestead estate consents to a sale under an execution or other legal process, the sale is not forced, but is as voluntary as when he directly effects the sale and executes the conveyance. Anderson; 33 Cal. 276. A sale under a power in a mortgage is a voluntary, not a forced sale. *Id.*; 15 Fla. 340.

FORCES. The military and naval resources of a country.

Regular Forces. While a declaration of war in the usual form calls upon all citizens to proceed to hostilities against the enemy, in practice this duty is limited to those persons who are impressed with military character by the national authority, to such, in short, as constitute the regular army and navy, (now include the aviation forces).

Irregular Forces. The employment of savages, etc., by civilized states as allies or subordinates in wars with other savages. Except as against their kind, the employment of savages is now condemned. The employment of guerrillas, banditti, etc., come under this head.

Navy Forces. In the United States the following are recognized as armed forces of the state at sea: (1) The officers and men of the navy, naval reserve, naval militia, and their auxiliaries; (2) the officers and men of all other armed vessels cruising under lawful authority. (Am. Naval Code. art. 9) Taylor, Int. Pub. Law. See **MILITARY FORCES**.

FORCHEAPUM. Pre-emption. Blount.

FORCIBLE ENTRY OR DETAINER. A forcible entry or detainer consists in violently taking or keeping possession of lands or tenements, by means of threats, force, or arms, and without authority of law. Comyns, Dig.; Woodf. Landl. & Ten. 973; 2 Bish. Cr. L. 489.

Such an entry as is made with strong hand, with unusual weapons, and unusual number of servants or attendants, or with menace of life or limb; an entry which only amounts in law to a trespass is not within statutes relating thereto. 21 Or. 541.

To make an entry forcible, there must be such acts of violence, or such threats, menaces, or gestures, as may give reason to apprehend personal injury or danger in standing in defence of the possession. But the force made use of must be more than is implied in any mere trespass; 8 Term 357; 10 Mass. 409; 1 Add. Pa. 14; Tayl. Landl. & Ten. § 786.

Driving the tenant from the premises by deadly weapons and an array of numbers is a forcible entry; 100 N. C. 466. It is sufficient to support an action of forcible entry that it was made against the will of the individual when in peaceable possession, and there need have been no actual force; 46 Mo. App. 11; 48 id. 148; 52 id. 226.

Proceedings in case of a forcible entry or detainer are regulated by the statutes of the several states, and relate to a restitution

of the property, if the individual who complains has been dispossessed, as well as to the punishment of the offender for a breach of the public peace. And the plea of ownership is no justification for the party complained of; for no man may enter even upon his own lands in any other than a peaceable manner. Nor will he be excused if he entered to make a distress or to enforce a lawful claim, nor if possession was ultimately obtained by entreaty; Woodf. L. & T. 741, n.; 8 Mass. 215; 1 Dev. & B. 324; 8 Litt. 184; 8 Term 361; but, *contra*, it has been held, that an intruder in quiet possession of land may be forcibly expelled by the owner; 21 Or. 541; 64 Cal. 5. If the owner is guilty of a breach and trespass on the person of the intruder in taking possession of his land, he is liable for that, but his possession is lawful, and an action of trespass *quare clausum* is not maintainable against him; 9 Allen 530; 1 W. & S. 90; 54 Pa. 86. This follows the English doctrine as expressed by Parke, B., that, where a breach of the peace has been committed by a freeholder who, in order to get possession of his land, assaults a person wrongfully holding possession of it, although the freeholder may be responsible to the public for a forcible entry, he is not liable to the other party; and in an action brought against him, it is a sufficient justification that the tenant was in possession against the will of the owner; 14 M. & W. 437. See article in 4 Am. Law Rev. 429. A lessee never in possession cannot maintain unlawful detainer against the lessor, either at common law or statute; 48 Mo. App. 19. A change of possession pending a suit for forcible entry and detainer does not affect the right of recovery; 141 Ill. 395.

Upon an indictment for this offence at common law, the entry must appear to have been accompanied by a public breach of the peace; and, upon a conviction for either a forcible entry or detainer, the court will award restitution of the premises in the same manner as a judge in a civil court, under a statutory proceeding, is authorized to do upon a verdict rendered before him; 1 Ld. Raym. 512; 8 Term 360; Cro. Jac. 151; Al. 50; Tayl. Landl. & Ten. § 794.

Neither title nor right of possession is at issue, or can be made at issue, in an action of forcible entry and detainer; 8 Mont. 365.

FORCING FAN. A "forcing fan" is a mechanical contrivance used in a coal mine for supplying pure or fresh air, which, by a process of suction, withdraws the impure air from the air courses in the mine and causes the vacuum thus created to immediately fill by the pure air entering the mine at the main entry, from which it goes into the various entries, brattices or trap doors and curtains being maintained at certain openings to prevent the escape of the fresh air from the passage through which it is conveyed to the places of work. 160 Ky. 731, 170 S. W. 19.

FORDA. In Old Records. A ford or shallow, made by damming or penning up the water. Cowel.

FORDAL (Sax.). A butt or headband. A piece.

FORDANNO. A first assailant. Spel. Glos.

FORDIKA. In Old Records. Grass or herbage growing on the edge or bank of dykes or ditches. Cowel.

FORE (Sax.). Before. (Fr.) Out. Kelham.

FORECLOSE. To shut out; to bar. Used of the process of destroying an equity of redemption. 1 Wash. R. P. 589; Dan. Ch. Pr. 1204; Coote, Mortg. 511; 9 Cow. 382.

FORECLOSURE. In Practice. A proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred or closed forever.

The modern significance of the term, as applied to mortgages, is that of a sale under a judgment of foreclosure, and not the judgment itself; 93 Cal. 600.

This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case, the mortgagee may file a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or, in default thereof, to be forever closed or barred from any right of redemption.

In some cases, however, the mortgagee obtains a decree for a sale of the land under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances, according to their priority. See 2 Johns. Ch. 100; 9 Cow. 346; 1 Sumn. 401; 7 Conn. 152; 5 N. H. 30; 1 Hayw. 482; 5 Ohio 554; 5 Yerg. 240; 2 Pick. 540; 2 Gall. 154; 4 Me. 495; 1 Wash. R. P. 589; Dan. Ch. Pr. 1204; Beach, Mod. Eq. Pr. 735.

In an action to foreclose a mortgage, there is no occasion for an entry for breach of condition; 60 Com. 24. Where, before beginning suit to foreclose for default in paying interest, the defaulted interest was paid and accepted, such acceptance is a waiver of any claim of forfeiture on account of the default; 85 Iowa 612.

As to the subject generally, and also as to Railway Foreclosure, see MORTGAGE.

FOREFAULT. In Scotch Law. To forfeit; to lose.

FOREGIFT. A premium paid by a lessee for his lease, separate and distinguished from the rent. A payment in advance.

FOREGOERS. Royal purveyors. 26 Edw. III. c. 5.

FOREHAND RENT. In English Law. A species of rent which is a premium given by the tenant at the time of taking the lease, as on the renewal of leases by ecclesiastical corporations, which is considered in the nature of an improved rent. 1 Term 486; 3 Atk. Ch. 473; Crabb, R. P. § 155.

FOREIGN. That which belongs to another country; that which is strange. 1 Pet. 343.

Every nation is foreign to all the rest; and the several states of the American Union are foreign to each other with respect to their municipal laws; 2 Wash. C. C. 282; 4 Conn. 517; 2 Wend. 411; 12 S. & R. 203; 2 Hill, S. C. 319; 7 T. B. Monr. 585; 5 Leigh 471; 3 Pick. 293; 10 Wall. 192; 99 Mass. 388.

But the reciprocal relations between the national government and the several states composing the United States are not considered as foreign, but domestic; 5 Pet. 398; 6 *id.* 317; 9 *id.* 607; 4 Cra. 384; 4 Gill & J. 1, 63.

FOREIGN ANSWER. An answer not triable in the county where it is made. Stat. 15 Hen. VI. c. 5; Blount.

FOREIGN OPPOSER. An officer in the exchequer who examines the sheriff's *estreats*, comparing them with the records, and apposeth (interrogates) the sheriff what he says to each particular sum therein. Coke, 4th Inst. 107; Blount; Cowel, *Foreigne*. The word is written *opposer*, *oposeth*, by Lord Coke; and this signification corresponds very well to the meaning given by Blount, of examiner (interrogator) of the sheriff's accounts.

FOREIGN ASSIGNMENT. An assignment made in a foreign country or in another state. 2 Kent 405. See ASSIGNMENT.

FOREIGN ATTACHMENT. A process by virtue of which the property of an absent and non-resident debtor is seized for the purpose of compelling an appearance, and, in default of that, to pay the claim of the plaintiff. See ATTACHMENT.

FOREIGN BILL OF EXCHANGE. A bill that is drawn in one country and made payable in another; and so if the parties to it reside in the same state, but

the bill is drawn in one state and made payable in another state. Tiedeman, Com. Rep. § 3. See BILL OF EXCHANGE.

FOREIGN BOUGHT AND SOLD. A custom in London, which, being found prejudicial to sellers of cattle in Smithfield, was abolished. Wharton.

FOREIGN CHARITY. One created or endowed to be administered in a state or country foreign to that of the domicile of the benefactor. A bequest by a testator whose will is probated in one state establishing a charitable use to be administered by a corporation to be created by and in another state; all the trustees (thirteen in number) except two being non-residents of the state of domicile of the testator, is a foreign charity. The court of chancery of New Jersey will not administer such a charity, but when it is valid by the law of that state and of the state where it is to be executed, and the trustees have the legal capacity to receive the fund and carry out the charity, the court will order its payment to them, leaving it to the courts of the other state to see to its due administration. 84 N. J. Eq. 101. Such is the general rule; Boyle on Char. 134; Perry, Tr. § 741; Tudor, Char. Tr. 259; Hill, Trust. 468; Sto. Eq. Jur. § 1184; 19 Beav. 597. See also 2 Swanst. *181; Amb. 236; 1 Russ. 112; 1 Phil. 185; 18 Beav. 552; Tam. 79. CHARITABLE USE.

FOREIGN COINS. Coins issued by the authority of a foreign government.

There were formerly several acts of Congress passed which rendered certain foreign gold and silver coins a legal tender in payment of debts upon certain prescribed conditions as to the fineness and weight, but by the third section of the act of Feb. 21, 1837, 11 Stat. L. 163, it was provided:—"That all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts, are repealed; but it shall be the duty of the director of the mint to cause assays to be made from time to time of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and to embrace in his annual report a statement of the results thereof."

The value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed by the secretary of the treasury; R. S. § 354; 23 Wall. 246.

The value of foreign coins as ascertained by the estimate of the director of the mint and proclaimed by the secretary of the treasury is conclusive upon custom-house officers and importers; 115 U. S. 25.

FOREIGN COMMERCE. "Commerce which in some sense is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial. The phrase can never be applied to transactions wholly internal." . . . "Nor . . . because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce." 14 How. 568, 573.

Relating to the United States. Every species of commercial intercourse between the United States and foreign nations. 9 Wheat. (U. S.) 192. Foreign commerce is under the regulation of Congress, by Constitutional provision. 3 Moore, Carriers 2nd ed., 1758. See COMMERCE; CARRIER; INTERSTATE COMMERCE; FOREIGN TRADE.

FOREIGN CORPORATION. One created by or under the laws of any other state or government.

A corporation is a person in most senses and for most purposes of legal administration, and for the purposes of determining the jurisdiction of the federal courts it is a citizen, but it is not such in the sense that a natural person is one, and hence for most purposes corporations are "foreign" as between the states. It is settled that it is not a citizen within the meaning of the constitutional guarantees entitling "the citizens of each state to all privileges and immunities of citizens in the several states;" 13 Pet.

519; 10 Wall. 566; 125 U. S. 181; 136 *id.* 114; 48 Ill. 173; 47 Ind. 236; 23 N. J. L. 429. It is said that corporations are persons within the meaning of the clauses of the fourteenth amendment to the constitution concerning the deprivation of property, and concerning the equal protection of the laws; Miller, Const. U. S. 668; but another recent writer considers it "past all doubt that the framers of this provision had no idea in their minds that it would be turned into a means of protecting foreign corporations and guaranteeing to them the same privileges which are enjoyed by domestic corporations. Such a doctrine would sweep away all the previous constitutional doctrine on the question of the status of foreign corporations," giving them the privileges and immunities which they have been held not to possess, and practically preventing their taxation and regulation, or any discrimination in the privileges or terms of business accorded to them and to domestic corporations. "Down to the present time, such construction has not been arrived at, although, such is the steady tendency of the federal judiciary to enlarge the rights of corporations, that it cannot be predicted whether it will not be reached in the near future;" 6 Thomp. Corp. § 7877. The status of foreign corporations is settled by decisions of the United States Supreme Court from which certain general principles are readily deducible, and are very well stated in 6 Thompson, Corp. §§ 7875 and 7781. "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty;" Taney, C. J., in Bank of Augusta v. Earle, 13 Pet. 519; 1 Black 286; 32 W. Va. 164. It may contract in other states within the scope of its own powers and subject to the laws of the *lex loci contractus* or the *lex loci solutionis*, as the case may be, as it was aptly said, natural persons may contract where they do not reside. "And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permissible by the law of the place?" 1 Pars. Sel. Cas. (Pa.) 180, 225. See 13 Pet. 388; 12 N. Y. 495; 18 Wis. 109; 10 Mo. 1059; 11 Paige 685. In the absence of proof, the validity of such contracts is presumed; 90 Ala. 207; 45 Ga. 34; 3 Duer 648.

In a very recent case it was said that a corporation organized under the laws of one state, which carries on its business in another state, carries with it into the latter state its corporate powers unless prohibited from exercising any of them by the laws or public policy of the state in which it so carries on business; 73 Fed. Rep. 956.

"Every power, however, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied;" Taney, C. J., in 13 Pet. 519, 588; any other exercise of power by it rests absolutely upon the doctrine of comity; *id.*; and is subject to the laws and regulations, process and remedial jurisdiction of the state of business or temporary domicile; 81 Me. 477; 2 Maine 501; 25 N. J. L. 381; 39 Fed. Rep. 290; 99 Mass. 143; 49 Barb. 478; and this comity stops short of permission to exercise any powers in excess either of the powers of domestic corporations of the same class; 88 Barb. 574; 128 N. Y. 205; 50 Fed. Rep. 338; 33 Am. & Eng. Corp. Cas. 15, 16; or of the powers authorized by its own charter; 8 Head 337; 51 Mich. 145; 4 Johns. Ch. 370. So a telegraph company incorporated in Maryland, whose operations were by its charter limited to that state was refused, by the Delaware courts, a mandamus to compel a telephone com-

pany to furnish to it a telephone in aid of its business in Delaware; 31 Atl. Rep. (Del.) 714.

Foreign corporations are sometimes by the legislation of a state made domestic corporations for certain purposes, as for jurisdiction; 12 Wall. 65; 46 Fed. Rep. 47; 107 U. S. 581; 118 *id.* 161; and to determine when this is so is sometimes a matter of great difficulty; 6 Thomp. Corp. § 7891; but where, by the concurrent action of two states, a railroad company is chartered or consolidated for police and jurisdictional purposes, it is as a whole treated as a domestic corporation of each state; *id.*; and cases cited in notes 2 and 3; 1 Black 286; 22 Fed. Rep. 561, 568; 12 Gratt. 655; 41 *id.* 551; 18 Md. 193; 5 R. L. 233; 12 Wall. 65; 25 Neb. 156, 164. See also as to the status of such corporations; 5 Railw. & Corp. L. J. 515.

The right of federal control of interstate commerce results in certain restraints upon the power of the states to regulate and tax foreign corporations so far as their business is held to be foreign or interstate commerce within the meaning of the federal constitution. The only limitation, however, on the powers of a state to exclude or exact conditions from a foreign corporation arises when the corporation is in the employ of the federal government or its business is strictly commerce, interstate or foreign; 125 U. S. 181; 119 *id.* 110. Such commerce receives the same protection when carried on by corporations or by individuals; 114 U. S. 196; and includes transportation; 15 Wall. 232; 125 U. S. 465; 135 *id.* 161; telegraph lines; 127 *id.* 640; which are also subject to federal regulation under acts of congress authorizing their location under certain conditions, on post roads; U. S. Rev. Stat. § 1977; 96 U. S. 11; 105 *id.* 460; the sale of merchandise by a corporation of one state whether made without the state or by commercial travellers, to a resident of another; 92 Ala. 145; 57 Ark. 24; the sale of patented or copyrighted articles or books; 2 Biss. 309; 53 Ind. 454, the right to vend them anywhere within the United States being secured by the constitution and patent and copyright laws; Const. U. S. art. 1, § 8; U. S. Rev. Stat. § 4884; but insurance is not commerce, and hence corporations engaged in that business may be regulated; 8 Wall. 168; 10 *id.* 566; 118 Pa. 322; 83 Wis. 667; 62 Ga. 379.

Subject to these constitutional limitations, the states may in their discretion, impose conditions upon foreign corporations, as essential to enable them to do business; 125 U. S. 181; 136 *id.* 114; 119 *id.* 110; they may discriminate between them and domestic corporations by a tax upon the privilege of doing business in the state, and, if it be considered good policy, make that discrimination so burdensome as to amount to exclusion; 48 Ill. 173; and the federal constitution does not secure to them against inequality of taxation either as to system or rates as compared with domestic corporations; 129 Pa. 463; 33 Fed. Rep. 121; but such tax was held contrary to the state constitution; 74 Cal. 113; though "it is clear that it violates no principle of the federal constitution as the supreme court of California seem to suppose;" 6 Thomp. Corp. § 7877, n. 3; and another state court has said that the state cannot impose upon foreign and domestic corporations taxes differing in principle; per Beasley, C. J., 31 N. J. L. 531; but this reasoning has been characterized as a *dictum*; 6 Thomp. Corp. § 8090; as the corporation in question being engaged in interstate commerce was exempt from discrimination on that ground; And see 42 La. Ann. 428. In the United States circuit court in California it was held by Field and Sawyer, JJ., that the principle of taxation prescribed by the state constitution was in violation of the protection secured by the fourteenth amendment against unequal taxation; 13 Fed. Rep. 722; 18 *id.* 385. These decisions, though appealed from, are said not to have been determined by the supreme court; 33 *id.* 121; where it was held that a tax upon some special business carried on by individuals or corporations is not prohibited.

And the supreme court, before any of these cases, had held that the provision of the Illinois constitution, requiring taxation to be uniform and equal, means by general law, uniform as to the class upon which it operates; 92 U. S. 575; in which the syllabus, thus stating the decision, is said to be evidently drawn by the justice writing the opinion (Miller, J.); 6 Thomp. Corp. § 8038. Again it was held that the amendment "does not prevent the classification of property for taxation"; 115 U. S. 321; nor "prohibit special legislation," as to lay a tax on the franchise or business of a corporation measured by its dividends; 134 *id.* 594; or gross receipts; 142 *id.* 339, aff. 44 Fed. Rep. 310. See also 134 U. S. 282. The provisions of state constitutions securing uniformity and equality of taxation have been held not violated by a specific tax upon a particular business; 60 Ga. 597; 33 Fed. Rep. 121; or on gross receipts of a foreign corporation on business within the state; 142 U. S. 339; or upon such corporations as a class; 85 Pa. 513, cited with approval in the last case.

The state power of taxation of such corporations is subject to certain restrictions in addition to those already stated, but as a general rule the property of the corporation owned or used within the state is alone the proper subject of taxation. The difficulty is to determine from the cases what this is. The power has been sustained as to franchises; 6 Wall. 594, 611; even of an interstate corporation acting under U. S. R. S. § 5263; 125 U. S. 590; 141 *id.* 40; as to tangible property within the state even if employed in interstate commerce; 18 Wall. 5, 203; 105 U. S. 460; 125 *id.* 590; 127 *id.* 117, 640; and with respect to the *situs* for this purpose, personal property may be separated from its owner; 141 *id.* 18, in which the principle was applied to rolling-stock (q. v.), of which as a general rule the *situs* is the domicile of the corporation; 50 Md. 417; 53 Mo. 18; but subject to exceptions growing out of its character and use; 39 La. 56; 63 Ill. 395. See 6 Thomp. Corp. § 8097, and note 8.

This power does not reach the capital of a company domiciled without the state, though a tax on a proportion of it has been sustained as a license; 47 Ind. 511; and so has a tax called an excise, on capital of a corporation having its domicile within and its business without the state; 99 Mass. 148; or a franchise tax assessed according to legislative discretion; 97 N. Y. 136; measured by the capital found to be employed within the state; 91 N. Y. 574; 104 *id.* 240; which is justified on the theory that part of the capital is employed within the state; 129 N. Y. 558. See TAXATION. Independently of the power of taxation foreign corporations may be excluded from doing business in other states or, if permitted to do it, are subject to such terms and conditions as the legislature may see fit to impose; 99 Mass. 148; 26 Ohio St. 521; 47 Ind. 326; 29 Mich. 236; 18 How. 404; 5 Sawy. 88; 8 Wall. 168; 10 *id.* 410. Such conditions may include: restrictions upon the right of eminent domain (q. v.); payment of license fees; 125 U. S. 181; provisions that any restriction imposed by the home state of the foreign corporation shall also be imposed upon corporations of that state in the domestic state; 92 N. Y. 311; 104 Ill. 653; such provisions when, as is usual, they are in the form of a license or tax are not objectionable on the ground of inequality; 115 Ind. 257, 596; 29 Kan. 672. So statutes are upheld requiring such corporations to file their charter, etc.; 130 U. S. 301; or their agents to file evidence of their authority; 101 Ind. 413; or to keep a known place of business, and a resident agent; or to appoint an attorney for service of process in suits against the company; 4 Colo. 369; in default of which contracts are voidable; 5 Sawy. 88; 6 Ore. 431; 91 Ala. 287; and all such statutes are self-enforcing; 91 *id.* 337.

When by constitution or statute such corporations are restricted from doing business within the state, in default of compliance with the provisions thereof, the decisions are not uniform as to what amounts to a

violation of the prohibition. Such a statute does not prevent a foreign trust company, which has not complied therewith, from purchasing securities of a railroad company in the state, and taking a mortgage upon its property to secure them, since such isolated act is not doing business in the state; 47 Fed. Rep. 593; writing a policy of insurance by a foreign insurance company upon property situated in Wisconsin involves the doing of business in Wisconsin, although the contract was in point of fact executed in another state; 76 Wis. 285. A foreign insurance company is not considered as doing business in Pennsylvania where no person in the state is authorized to accept application for insurance, receive or collect money thereon, or on any other account for the company, but all applications are sent direct to the foreign office; 172 Pa. 117. The same question arises when corporations "doing business" within a state are taxed, and these words are held to mean the transaction of a substantial part, not the whole, of its business; 105 N. Y. 76; the maintenance of a sales agency; 44 Fed. Rep. 324; or having part of its railroad in another state than that of its incorporation; 21 Wall. 492, affg. 66 Pa. 24; but not a mere license; 117 N. Y. 84; nor having an office in the state of its creation when its manufacturing business is carried on in another state; 46 N. J. Eq. 270.

The conclusion from an examination of the authorities is stated to be, that isolated transactions do not amount to such doing business as is prohibited, therefore the ordinary operations of commerce are not restricted nor the right to make contracts, which is secured by the construction of the commercial clause of the federal constitution, as already stated; 6 Thomp. Corp. § 7936. In the work already cited are collected a great number of acts held valid in states where statutes of the class referred to are in operation. A familiar case is that of a policy of insurance written on property in a state whose laws have not been complied with by the company; a distinction has been taken between one procured by the company or a broker for it, and those solicited by citizens of the state and written in isolated instances, the *situs* of the contract in the latter case being the state of the insurance company; 31 Mich. 346; 37 N. J. L. 33. But this distinction is criticised and said not to be sound; 4 Thomp. Corp. § 7937, n. 2; and the weight of authority is said to be that where the foreign insurance company has an agency in another state, and has not complied with its restrictive statutes, a policy written out and returned from the home office, upon an application received and transmitted by the agent, is valid, although the agent has not complied with the statutes of the foreign state; 7 Biss. 315, 372.

Most of the statutes of this class prescribe penalties, either by *qui tam* action or indictment, upon agents for violations of them, and it is held that such a state statute making it a misdemeanor for a person in the state to procure insurance for a resident there from an insurance company not incorporated under its laws, and which had not filed the bond required by the laws of the state relative to insurance, is not a regulation of commerce, and does not conflict with the constitution of the United States; 155 U. S. 648. Such an act in Pennsylvania was held not to apply to the owner of property who merely obtained insurance on his own property; 139 Pa. 605.

A foreign corporation which has not complied with a statute requiring all foreign corporations to file a statement in the office of the secretary of state showing the location of its agent, the names of its officers, etc., as a condition precedent to doing business in the state, cannot recover upon a bond conditioned for the faithful discharge of the duty of an agent appointed to conduct business in the state; 74 Fed. Rep. 597; 92 Pa. 352; 7 Biss. 30; *contra*, 21 N. Y. Supp. 876; 33 Ohio St. 386. The agent of a foreign corporation which has not filed its statement under this act, is presumed to know of its incapacity and becomes personally liable

to one with whom he dealt on account of such corporation, and this responsibility is in addition to the statutory penalty for acting as the agent of a foreign corporation without complying with the provisions of the act; 145 Pa. 30.

When such restrictive statutes exist, contracts made in violation of them are treated in some states as voidable at the election of the other party; 3 N. Y. 286; 37 N. J. L. 33; 6 Gray 376; 42 N. H. 547; 45 Mich. 103; except as against a *bona fide* holder of negotiable paper for value and without notice; 8 Gray 206; or it is held that the remedy is suspended until the statute is complied with; 64 Ind. 1, 548; or that they are only void when the statute expressly so provides, as held in an able and learned opinion by Bartholomew, J., in 3 N. Dak. 188; s. c. 54 N. W. Rep. 544; 62 N. H. 622; 5 Biss. 381; 37 Fed. Rep. 242; 155 Mass. 259; or not void when the statute provides a penalty; 132 U. S. 282; 36 Ala. 546; 33 W. Va. 566; 83 Ala. 115 (but see 83 *id.* 275, 280, and 89 *id.* 198). In other states it is held that the contract cannot be enforced; 80 Pa. 15; 11 Wis. 394; 55 Ill. 65; 55 Vt. 526; but the corporation cannot set up its own non-compliance with a statute to avoid its own contract; 145 Pa. 30; 102 Mass. 221; 141 Ill. 85; 68 Ind. 347; 80 Ia. 56; 102 U. S. 415. Such contracts may be validated by the legislature, by subsequent act; 93 Ill. 483. The rule avoiding them as against public policy is not to be extended; L. R. 19 Eq. 465. Whether compliance with such statutes is presumed or must be averred and proved is a point on which the decisions differ; it is held that there is such presumption in 55 Ark. 163, 625; 36 Mich. 261; 73 Mo. 368; 106 Ind. 242; and an analogous case is 28 N. Y. 324. On the other hand, it has been frequently held that compliance must be averred and proved; 89 Ala. 198; 88 *id.* 275, 280; 55 Vt. 526; but this view is considered illogical and unsound by a recent writer; 31 Am. L. Rev. 19; and also by a leading authority who considers the best opinion to be that compliance need not be averred; 6 Thomp. Corp. § 7965; citing as conclusive the analogous case in which failure of a liquor dealer to have a license is held to be a good defence to an action for liquor sold; 145 U. S. 421; although no one would think of averring and proving his license. With much reason, therefore, it is held that such averment is not necessary, and nothing short of a distinct averment of non-compliance will make proof to the contrary necessary; 55 Ark. 625.

The question of the power of a foreign corporation to take hold and transmit title to land is one of public policy, and no general rule can be formulated from the decisions and statutes which must (as in most matters affecting land titles) be referred to with reference to a particular state. Enabling statutes will be found in many states, either general, or where such legislation is permissible, for special cases. It can at least be suggested that in the absence of any such legislation, or of express decisions, serious doubt will arise as to the power. The conclusion is reached by Judge Thompson that in the absence of prohibitory local law, there is much authority that, if authorized to do so in the state of their creation, corporations may hold land in other states; 117 Ill. 287; 19 Fed. Rep. 78; 25 Vt. 433; 5 McLean 111; 25 Mich. 214; unless forbidden to do so either by the public policy of the state; 8 Biss. 284; 73 Ill. 142; or its statute law; 132 Pa. 591, where the subject is considered at length by Paxson, J., with respect to general enabling laws and proceedings by the state in such cases; 14 Pet. 123; 32 Fed. Rep. 22. See 6 Thomp. Corp. § 7914.

It is sometimes held that the power exists for business purposes, as an office; 13 Pa. 13; 67 Ill. 568; 117 *id.* 237; and it has been held that a Connecticut company having no business there could operate as a land company in New Hampshire; 19 Fed. Rep. 78; *contra*, 67 Ill. 567; but the tendency of American legislation is to permit the holding of land by foreign corporations, for business but not for speculation; 6 Thomp.

Corp. § 7917. The right of such corporation to take and hold title to real estate cannot be questioned in ejectment by it against a former managing director; 153 U. S. 523. See ALIEN.

The power of acquiring land has been held to exist until forbidden; 101 U. S. 332; and as against every one except the state, proceeding for a forfeiture; 14 Pet. 123; 73 Ind. 68; 110 Ill. 65; 117 *id.* 237; 98 U. S. 621. Of such proceedings it is said that the only one in this country is that in Pennsylvania cited *infra*; 6 Thomp. Corp. § 7918, n. 3.

Land may generally be taken by devise; 24 Pa. 474; 31 W. Va. 621; but only by corporations having charter power so to take; 29 Barb. 650; 72 Ill. 50; see 15 Ohio St. 537; 38 Conn. 342; and upon the question of devise generally, see 9 Cow. 437. Foreign corporations have usually the power to acquire land by foreclosure of mortgages; 30 N. J. Eq. 408; 6 McLean 1; 15 Gray 491; and in such cases the state only and not the mortgagor can set up a want of power; 28 Nob. 672; 79 Ind. 172.

In all cases involving the right of foreign corporations to hold lands the *lex rei sitae* governs; Sto. Conf. L. § 428; 4 Sandf. 252; 29 Barb. 650. See ESCHATEL.

Whenever a foreign corporation has the power to contract in a state or country it may enforce it or recover damages for a breach in like manner as other persons may do in like case; 2 Stra. 807; 2 Ld. Raym. 1535, note; 5 Cra. 61; 13 Pet. 519; 6 Cow. 46; 4 Johns. Ch. 370; 18 Wis. 109; 6 Metc. 391; 5 McLean 111; 13 Vt. 97; 17 Me. 34; 1 Hill, S. C. 44. From these and many other cases it is clearly a principle long and well settled that, unless prohibited by local statutory law, a corporation of one state may sue in another by its corporate title. Such prohibitory legislation exists in many states as already sufficiently shown; *supra*. When it does not exist this right of action extends to all cases and causes of action as to which a remedy exists in favor of other persons or domestic corporations; 6 Thomp. Corp. § 7978; and see *id.* §§ 7880-8. An action by such corporation for libel has been sustained; 35 Ill. App. 627.

In such actions when, as in most jurisdictions, it is unnecessary to aver or prove the corporate existence in suits by or against corporations (see 6 Thomp. Corp. § 7658), or at least only to make very formal allegation of it (*id.* § 7661), the same rule applies to foreign corporations; *id.* § 7984; 31 Ind. 283; 26 Ohio St. 562; nor, as has been held, in the absence of a statute either expressly or by authoritative construction requiring it, need there be an averment of compliance with statutory pre-requisites for doing business; 2 Dak. 280; 40 N. Y. Supp. 860; 25 S. E. Rep. (Va.) 8; the ground of dispensing with the averment of compliance with such statutes is the presumption of legality and compliance with local law, discussed, *supra*.

Apart from this question, which only affects the right of action upon contracts made within the state, the foreign corporation has, as to all other matters, the same rights and remedies as other non-residents; 4 Colo. 369; 67 Ind. 546; 8 N. M. 237. See 73 Cal. 590. It may foreclose a mortgage even when by statute disqualified from acquiring real estate; 91 Pa. 491; 36 Minn. 103; *contra*, 89 Ala. 196; and purchase at the execution sale; 94 Ind. 14; or maintain an action on an insurance policy; 11 Colo. 419; or for a tax wrongfully paid; 9 Mont. 145. Where a foreign corporation, by the law of its domicile, continues to exist after the expiration of its charter for the purpose of suing on debts accrued before such expiration, it may also sue in such case in New York; 40 N. Y. Supp. 360.

In suits against foreign corporations the question of jurisdiction is of first importance, and it is the general rule that a corporation, like a natural person, cannot be sued in *personam* in a state within whose limits it has never been found; 6 Thomp. Corp. § 7988. This conclusion springs naturally from the principle that a "corpora-

tion being the creation of local law, can have no legal existence beyond the limits of the sovereignty where created;" 8 Wall. 181; but this rule is subject to exceptions growing out of the theory that, under certain circumstances, such corporations will be held in law to have acquired a domicile within a state, at least so far as to subject them to suit.

In England in spite of *dicta* to the contrary; L. R. 7 Q. B. 293; 1 Ex. Div. 287; there was said by the Lord Chief Justice to be no case prior to 1885 holding foreign corporations suable in that country; 54 L. J. Q. B. Div. 527. The necessities of the case resulted in a rule authorized by statute providing for acquiring jurisdiction over a foreign corporation carrying on business in England by service on a "head officer" in charge of its business there; and the court of appeal sustained the jurisdiction so acquired; 58 L. J. Q. B. Div. 508; 33 Ch. Div. 446. See 5 H. L. Cas. 416.

In the United States the exceptions to the general rule first stated are thus classified by Thompson: (1) Where a corporation had established a permanent agency in the state or country; (2) when it is agreed with the state that process may be served in it; (3) when it is agreed with the opposite party that an action may be brought against it to enforce a contract against it in a state or country other than its domicile; 6 Thomp. Corp. § 7988. These exceptions were rendered necessary to meet the case of corporations in recent years doing business so extensively outside of the domicile of their creation, and particularly of what are known as "tramp corporations," purposely organized in another state to do business in their own and evade its laws; besides, trading corporations being equally migratory with individuals, the reason originally assigned for want of jurisdiction had ceased to exist; *id.* § 7989. Accordingly it may be considered that corporations may acquire business domiciles in other states and countries, and, wherever they do so, they may be sued without the aid of local statute law; *id.* In most, if not all of the states, however, statutes exist requiring foreign corporations to appoint an agent for process as a condition of doing business in the state, and so, also, by local statutes, jurisdiction is affirmatively assumed. See 129 Mass. 444; 4 Mo. App. 595; 74 Mo. 457; 3 Hun 171; 40 N. H. 548; 41 Ga. 660; 46 Ala. 641; 83 *id.* 498; 32 N. J. L. 15; 24 *id.* 222; 29 Fed. Rep. 17; 44 *id.* 31; 115 N. Y. 457. Delaware Constitution, 1897, Art. ix. § 5. The principles upon which the jurisdiction rests are that it must appear in the record that the corporation was engaged in business in the state, and that the person upon whom service was made represented the company *there* in the business; and while the certificate of service is *prima facie* evidence of the latter fact, it is open to contradiction when the record is offered in evidence in another state; Field, J., in 106 U. S. 350.

A corporation may subject itself to the jurisdiction of a foreign state by contract with a private person; 60 L. T. N. S. 924; or with the state; 91 Ala. 337. See 6 Thomp. Corp. § 7992.

Foreign corporations are sometimes held not liable to suit, except *ex contractu*, upon domestic contracts; 55 Ga. 194; or for torts committed within the state; 112 N. Y. 315; 76 Ala. 888; 16 Fed. Rep. 436; 25 N. J. L. 381; unless the statutory jurisdiction extends to any cause of action; 84 N. Y. 63; 40 Md. 595; 21 Wis. 506; nor are they liable to suits by non-residents on foreign contracts; 46 Vt. 697; *contra*, 132 Mass. 432.

The United States circuit court has no inherent power, as a court of equity, at the suit of domestic shareholders, to dissolve an English mining company, owning and operating a mine in the United States, and to wind up its business operations; nor has it any such power under the act of parliament known as the "Companies Act, 1862;" 58 Fed. Rep. 644; s. c. 7 C. C. A. 412.

With respect to what constitutes a valid service on a foreign corporation, the sub-

ject is generally regulated by statutes which must be consulted with reference to any given case, and reference may be made to 6 Thomp. Corp. Ch. 198, where the decisions are collected as to service on different classes of officers and agents. The decisions of the United States Supreme Court establish the rule that jurisdiction cannot be acquired by service upon an officer casually within the state for purposes not connected with the business of the corporation; 18 How. 404; 106 U. S. 350; 137 *id.* 98; 149 *id.* 94; 150 *id.* 653; 156 *id.* 518. The same view is supported by the weight of authority in the state courts; 141 Pa. 462; 71 Ga. 246; 26 Minn. 233; 91 Ill. 170; 32 N. J. L. 15; 2 McArthur 146; 40 Ill. App. 547; Alderson, Jud. Writes and Proc. 219; Murfree, For. Corp. 210; *contra*, 87 N. Y. 137; 61 Mich. 226; 47 La. Ann. 389; but in two of these states the federal courts have refused to follow the ruling of the state court; 22 Fed. Rep. 635; 44 *id.* 31; 68 *id.* 442.

So an insurance company having an isolated transaction in a state through a broker who deals with the company through another broker is not "doing business" or "found" in the state so as to be liable to substituted service or to service on the brokers; 55 Fed. Rep. 751.

Foreign corporations, it is said, cannot be logically dealt with as non-residents within the meaning of attachment laws, where they have become domesticated so far as to be liable to actions *in personam*; 6 Thomp. Corp. § 8060; 29 Mo. 75; 7 Bush 116. See 27 N. J. L. 206; 64 Ga. 18. Formerly a foreign attachment could not be issued in courts of the United States; 4 Cra. 421; 3 Dill. 474; 103 U. S. 794; but in 1872 the federal, circuit, and district courts were authorized to adopt the state laws in force relative to attachments; U. S. Rev. Stat. § 915; and the federal courts now apply state statutes relating to attachments to foreign corporations; 51 Fed. Rep. 580. Such corporations may also be summoned as garnishees whenever they would be liable for the debt attached, or by residence or agency are amenable to process; 9 N. H. 394; 31 Pa. 114; 102 Ill. 249; 9 Conn. 430; or when they do business in the state and have a managing agent there; 61 Fed. Rep. 580.

It has been held that the dissolution of a corporation dissolves a foreign attachment against it, on the ground that to compel an appearance was the primary object of the process; 8 W. & S. 207; but the soundness of this case has been doubted on the ground that jurisdiction having attached to the *res* continues for the real object of the suit,—satisfaction of the demand; 6 Thomp. Corp. § 8062; and this view is supported by another case which holds that comity does not interfere with it; 63 Ill. 348. But in a very recent case it was held that a state statute providing that corporations shall continue to exist for a certain period after the time fixed for dissolution, for the purpose of prosecuting and defending suits, and that no body of persons acting as a corporation shall set up want of legal organization as a defence to a suit against them as a corporation, does not control or affect foreign corporations merely doing business in the state; and a suit against such a corporation abates upon its dissolution, so that, if a judgment be thereafter entered against it, the same is void; 74 Fed. Rep. 425. See DISSOLUTION OF CORPORATIONS.

A corporation, by doing business in another state and becoming liable to suit there, both in state and federal courts, does not lose its right to claim, for the purposes of federal jurisdiction, a citizenship in the state by which it was created; Murfr. For. Corp. 236. When sued in a foreign state it may remove the cause to a federal court; *id.*; 104 U. S. 5; 22 Fed. Rep. 353. But it is otherwise if the effect of the legislation under which it enters the foreign state be to confer corporate privileges upon it in that state. In such case the company is a citizen of both states; 22 Fed. Rep. 563; 104 U. S. 5.

See, generally, Murfree: Reno. For. Corp.;

Patterson, Fed. Restraint St. Action § 118; Beach, Insurance Ch. 2; Thompson, Corp. tit. xix.; INTERSTATE COMMERCE; POLICE POWER; TAXATION; UNITED STATES COURTS; MERGER.

It is not a "citizen," within the meaning of the Constitution, and cannot maintain a suit in a Federal court against a citizen of a different State from that by which it was created, unless the persons who compose the corporate body are all citizens of that State. The legal presumption is that its members are citizens of the State in which alone the body has a legal existence. Anderson; 1 Black, 295-96; 94 U. S. 535 *et al.*

By comity, if not forbidden by its charter, nor by the laws of that State, a corporation may exercise its powers in another State. *Id.*; 101 U. S. 352.

FOREIGN COUNTY. Another country. It may be in the same kingdom, it will still be foreign. See Blount, *Foreign*.

FOREIGN COURT. The circuit court of the United States is not a foreign court relatively to the court of chancery of New Jersey; 19 Am. L. Reg. N. S. 426.

FOREIGN CREDITOR. One who is resident in a state or country foreign to that of the domicile of the debtor or the *situs* of his property.

FOREIGN DECREE. See FOREIGN JUDGMENT.

FOREIGN DIVORCE. One obtained in a state or country other than that in which the marriage was solemnized and the parties, or at least the one against whom the proceeding is taken, are domiciled. See DIVORCE.

FOREIGN DOMICIL. See DOMICIL.

FOREIGN DOMINION. In English Law. A country, at one time subject to a foreign prince; which, by conquest or cession, has become a part of the dominion of the British Crown. 5 B. & S. 290.

FOREIGN ENLISTMENT ACT. The statute 59 Geo. III. c. 69, for preventing British citizens from enlisting as sailors or soldiers in the service of a foreign power. Wharton, Lex.; 4 Steph. Com. 226. See NEUTRALITY.

FOREIGN EXCHANGE. Drafts drawn on a foreign state or country. See BILL OF EXCHANGE.

FOREIGN FACTOR. One who resides in a country foreign to that of his principal. See FACTOR.

FOREIGN FISHING. Oil, manufactured from whales caught by the crew of an American vessel, is not the product of foreign fishing within the purview of the revenue laws of the United States, though it has since been owned and brought into port by persons in the foreign service. 2 Sumn. 336.

FOREIGN-GOING SHIP. In the English Merchant Shipping Act, any ship employed in trading between some place or places in the United Kingdom, and other places specified in said act outside the limits of the kingdom.

FOREIGN JUDGMENT. A judgment of a foreign tribunal.

It is a general rule that foreign judgments are admitted as conclusive evidence of all matters directly involved in the case decided, where the same question is brought up incidentally. 1 Greenl. Ev. 547, and note; 12 Pick. 572; 7 Bost. L. Rep. 461. Such judgments and decrees *in rem*, whether relating to immovable property or movables within the jurisdiction of the foreign court, are binding everywhere; L. R. 4 H. L. 414; [1897] 1 Q. B. 55; [1896] 2 Q. B. 455. This rule applies to admiralty proceedings *in rem* founded on actual possession of the subject-matter, and garnishment proceeding in a like case.

It seems to be the better opinion that judgments *in personam* regular on their face, which are sought to be enforced in

another country, are conclusive evidence, subject to a re-examination, in the courts where the new action is brought, only for irregularity, fraud, or lack of jurisdiction as to the cause or parties; 1 Greenl. Ev. § 546; Westl. Priv. Int. Law 373; Story, Confli. Laws § 607; 2 Swanst. 325; Dougl. 6, n.; 3 Sim. 453; 6 Q. B. 288; 4 Munt. 241; 15 N. H. 227; 13 Gray 501; 99 Mass. 273; 20 Conn. 544; 21 Iowa 58; but see 28 Conn. 28; 8 Paige, Ch. 44; 5 Wall. 290. It was formerly held that they were *prima facie* evidence merely. See 2 H. Bla. 410; Dougl. 1, 6; 3 Maule & S. 20; 9 Mass. 462; 84 N. J. Eq. 130; 13 Gray 591; 21 Ia. 370; 13 John. 192; 88 Me. 406. But this theory has been entirely overthrown, the doctrine of their conclusive character having been settled in England by the case of *Bank of Australia v. Nias*, L. R. 6 Q. B. 179. It is also fully recognized in this country; 26 N. Y. 148; 49 *id.* 571; 5 Hamm. 545; 54 Me. 28; 55 *id.* 389; and see the case of *Hilton v. Guyot*, *infra*.

The subject of the conclusiveness of foreign judgments has been treated with much diversity of opinion in the English courts. That they are *prima facie* evidence to sustain an action is clear according to all the authorities, but whether conclusive, and if not so in all cases, what defences may be admitted, was for a long time not definitely settled by the English courts. The cases were very fully reviewed by Judge Redfield with this result.

"So that now it may be regarded as fully established in England, that the contract resulting from a foreign judgment is equally conclusive, in its force and operation, with that implied by any domestic judgment. But there is still a very essential and important distinction between the two. Domestic judgments rest upon the conclusive force of the record, which is absolutely unimpeachable. Foreign judgments are mere matters *en pais*, to be proved the same as an arbitration and award, or an account stated; to be established, as matter of fact before the jury; and by consequence subject to any contradiction or impeachment which might be urged against any other matter resting upon oral proof. Hence any fraud which entered into the concoction of the judgment itself is proper to be adduced, as an answer to the same; but no fraud which occurred and was known to the opposite party, before the rendition of such foreign judgment, and which might, therefore, have been brought to the notice of the foreign court, can be urged in defence of it. It is proper to add, that while the English courts thus recognize the general force and validity of foreign judgments, it has been done under such limitations and qualifications that great latitude still remains for breaking the force of, and virtually disregarding such foreign judgments as proceed upon an obvious misapprehension of the principles governing the case; or where they are produced by partiality or favoritism, or corruption, or where upon their face they appear to be at variance with the instinctive principles of universal justice. But these are rare exceptions." Sto. Confli. Laws, Redfield's ed. § 618 a-618 k. And a very recent commentator states precisely the same conclusion from the English cases; 35 Am. L. Reg. N. s. 277.

An English writer on the subject attributes the vacillation of the courts of that country to the fact that two doctrines have been discussed as the basis of the conclusive effect given to a foreign judgment. The earlier theory was that of comity, which, as defined by Blackburn, J., in opposing the doctrine, is that "it is an admitted principle of the law of nations, that a state is bound to enforce within its territories the judgment of a foreign tribunal." L. R. 6 Q. B. 139. This doctrine was supported by Lords Nottingham, Ellenborough, Kenyon, Cockburn, and Brougham, and Chief Baron Pigot, Sir G. Jessel, and Sir R. Phillimore; 2 Swanst. 326, n.; 4 Campb. 28; 4 M. & S. 141; 7 Term 681; 30 L. J. C. P. 177; 2 Cl. & F. 470; Ir. Rep. 1 C. L. 471; 50 L. J. P. 30; L. R. 4 P. C. 144. Of the objections raised the most important was said to be

uncertainty; Piggott, For. Judg. 6. See Sto. Confli. Laws § 598. The other theory, termed that of obligation, is that when a competent court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action of debt to enforce the judgment may be sustained. This was first enunciated by Parke, Baron, in 1845; 9 M. & W. 810; 14 L. J. Ex. 145; it was approved in 1870 by Blackburn and Mellor, JJ.; L. R. 6 Q. B. 139; and by the same judges and Lush and Hannen, JJ., *id.* 155.

Both ideas are involved in what the English writer last cited terms the theory of obligation and comity, which is in substance this: A legal obligation arises in the state where the judgment was rendered, accompanied by a correlative sanction under which the obligation may be made effective so long as the defendant is within the jurisdiction of the foreign court; but when, by his absence from that jurisdiction, the remedy is no longer available, the obligation will, in another state or country, be clothed by comity with an auxiliary sanction to replace the correlative sanction which it has lost; Piggott, For. Judg. 18.

The foreign court must have had jurisdiction, and when the defendant was not a subject of or resident in the country in which the judgment was obtained, so that there existed nothing imposing on him any duty to obey it, the judgment cannot be enforced in an English court; L. R. 6 Q. B. 155; 67 L. T. 767. But the conclusiveness of a judgment when there was jurisdiction is illustrated by a decision that a mistake of English law as to an English contract, apparent on the face of the proceedings, was not ground of defence to a foreign judgment; L. R. 6 Q. B. 139.

In this country the subject has recently been elaborately discussed by the United States Supreme Court in the case of *Hilton v. Guyot*, in the argument and opinions of which are collected all the authorities. In that case it was held that "when an action is brought in a court of this country, by a citizen of a foreign country, against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect;" 159 U. S. 113.

In the opinion of the majority of the court, Mr. Justice Gray reviews all the leading American and English cases, and examines in detail existing laws and usages of civilized nations, and reaches the conclusion that "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact."

But the court go further and rest the decision upon the principle of reciprocity,

adopting and applying the rule that "judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim."

Accordingly, it was held that, such being the practice of the French courts, with regard to American judgments, the judgment recovered in France, which was the cause of action, was not conclusive, but subject to review upon its merits.

Chief Justice Fuller delivered a dissenting opinion in which concurred Harlan, Brewer, and Jackson, JJ., taking the ground that the question was not one of comity, but to be determined upon the broad principle of public policy that there should be an end of litigation, and that this applied equally to foreign and domestic judgments.

The principles of this decision were at the same time applied to a Canadian judgment which was held conclusive inasmuch as the pleadings showed a submission to the jurisdiction of a competent court. Mere averments that the judgment was "irregular and void," and that there was "no jurisdiction or authority on the part of the court to enter such a judgment upon the facts and the pleadings" are but averments of legal conclusions and so insufficient to impeach the judgment; and it was held that, in answer to an action upon a foreign judgment the specific facts must be given upon which it is supposed to be irregular and void or based upon fraud. If rendered upon regular proceedings and due notice or appearance, and not procured by fraud, in a foreign country, by whose laws a judgment of one of our own courts, under like circumstances, is held conclusive of the merits, it is conclusive between the parties in an action brought upon it in this country, as to all matters pleaded and which might have been tried; 159 U. S. 235.

Foreign adjudications as respects torts are not binding; Whart. Confli. L. § 793, 827; and a judgment in Germany for infringement of trade-mark cannot be set up in the United States; 50 Fed. Rep. 369. See TRADE-MARK.

The various states of the United States are considered as foreign to each other, with respect to this subject; 137 U. S. 287. In Louisiana it has been decided that a judgment rendered by a Spanish tribunal under the former government of that state is not a foreign judgment; 4 Mart. La. 301, 310.

Foreign judgments may be evidenced by *exemplifications* certified under the great seal of the state or country where the judgment is recorded, or under the seal of the court where the judgment remains; 1 Greenl. Ev. § 501; by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated; 2 Cra. 238; 5 *id.* 335; 2 Cai. 155; 7 Johns. 514; 8 Mass. 273; 60 Ill. App. 309. The acts of foreign tribunals which are recognized by the law of nations, such as courts of admiralty and the like, are sufficiently authenticated by copies under seal of the tribunal; 5 Cra. 335; 3 Conn. 171. The record of a judgment of a foreign court, not of record and of inferior territorial jurisdiction, is not admissible in evidence, in the absence of proof of facts showing that the court had jurisdiction; 37 Ill. App. 23. See 113 N. C. 453.

The constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; Const. Art. IV. § 1. It is enacted by the act of May 26, 1790, that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said

attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken; and by the act of March 27, 1804, that from and after the passage of this act all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the presiding justice is duly commissioned and qualified; or, if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken; and the provisions of both acts shall extend to the records, etc., of the territories; U. S. Rev. Stat. § 906.

The object of this clause was to prevent judgments from being disregarded in other states; 25 Mich. 247; it relates only to the validity and force of judgments rendered in one state where proved in another; 12 Fed. Rep. 375. It does not change the nature of a judgment; 13 Pet. 312; but places judgments rendered in another state on a different footing from what are known at common law as foreign judgments; 9 Wheat. 1; 3 N. J. L. 466; 6 *id.* 236. The clause makes the record evidence but does not affect the jurisdiction either of the court in which the judgment is rendered or of that in which it is offered in evidence. The judgment of a foreign state differs only from a foreign judgment in not being re-examinable for fraud in obtaining them, if the court had jurisdiction; 127 U. S. 265, 292. A judgment rendered in another state is to be regarded as a domestic judgment; 27 Pa. 247; 53 Vt. 177; but it is not on the footing of a domestic judgment so far as to be enforced by execution, but the manner of their enforcement is left to the state in which they are sued on, pleaded, or offered in evidence. When pleaded and proved they are conclusive, and if their enforcement is denied it amounts to the denial of a right secured by the constitution of the United States; 146 U. S. 657. The constitution and the rule of comity include only judgments in civil actions, not in criminal prosecutions; 17 Mass. 514. A judgment for a penalty cannot be enforced in another state, but whether a law is penal is to be determined by the courts called upon to enforce it; and if the court of another state declines to give it full faith and credit because, in its opinion, it is for a penalty, it denies the constitutional right; 146 U. S. 657. As to the effect of a decree of divorce in another state, see *DIVORCE*. The judgment of a state court has the same validity and effect in any other state as it has in the state where it was rendered; 6 Wheat. 129; 9 How. 520; 50 Mo. App. 873; 141 U. S. 87; 43 Fed. Rep. 510. The judicial proceedings within the act are only such as have been rendered by a competent court, with full jurisdiction; 9 Mass. 462; 45 Ill. App. 633; 50 N. J. L. 636; 17 Wend. 521; 11 How. 165; it may be a superior

court of record or an inferior tribunal; 80 N. H. 78; 13 Ohio 209; including a judgment of the justice of the peace; 94 Tenn. 721. A judgment may be attacked on the ground of a want of jurisdiction; Mill. Const. U. S. 632; 18 Wall. 457; 1 Tex. Civ. App. 315; 27 Ohio St. 600; 23 S. E. Rep. (S. C.) 178; 99 Cal. 374; 138 U. S. 439; 133 *id.* 107; thus a judgment against a defendant who was not served with proper process, and who did not appear, would be entitled to no credit in another state; 11 How. 165; 137 U. S. 287; 2 Misc. Rep. 570; but facts establishing the want of jurisdiction must be shown; 74 Fed. Rep. 51. A judgment of a foreign state, against several defendants jointly, in an action in which one of them was not served with process, cannot, in Rhode Island, be enforced against one of such defendants who in the foreign action was served with process; 33 Atl. Rep. (R. I.) 4. See 4 Harring. 281; 3 *id.* 241, 517. In cases where the court had jurisdiction of the parties and of the subject-matter, fraud in obtaining the judgment may be set up as a defence; 159 Ill. 311; 70 Hun 197; or if it will constitute a ground of collateral attack; *id.*; 148 Ill. 536; but see 5 Wall. 290; but fraud cannot be pleaded as a ground of attack, in one Federal court, upon a judgment obtained in another; 138 U. S. 439. The constitution does not give to a judgment all the attributes to which it was entitled in the state where it was rendered; 7 Gill & J. 434; but if duly certified, it is admissible in evidence in any state; 7 Cal. 54, 247; a state may give a judgment rendered in another state any effect it may think proper, always provided it does not derogate from the legal effect conferred upon it by the constitution and the laws of congress in this behalf; 9 Mass. 462. In case, however, full faith and credit is not given to the judgment of another state, any judgment thereon will be erroneous; 7 Wall. 139. When the court rendering the judgment has jurisdiction, its judgment is final as to the merits; 5 Wall. 302; 14 Tex. 352; 9 Mass. 462; 7 Gill. 430; 67 Fed. Rep. 459; 62 N. W. Rep. (Neb.) 306; but no greater effect can be given to a judgment than it had in the state where it was rendered; 17 Wall. 529; 18 N. Y. 468. If a judgment or decree is enforceable in the state where it is rendered, it is enforceable in any other state; 9 Pet. 86; but the constitutional provision does not give validity to a void judgment or decree; 12 Wheat. 213; 4 N. J. L. 192; 14 Pet. 49; 148 N. Y. 34. It does not impose on any state the duty of following the decision of another state as to the construction of the statutes of the latter; 3 McCrary 609; 18 Hun 507; nor enforcing within its territory the law of another state. A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force when sued on in another state as a judgment in an adversary proceeding; an action thereon can only be defeated by want of jurisdiction by fraud in procuring the judgment, or defences based on matter arising after the judgment was rendered; any defence to the original cause of action is conclusively negatived by the judgment; but the sufficiency of the warrant may be inquired into and is to be determined from the evidence of the law of the state of its entry; 62 N. W. Rep. (Neb.) 306. Where a judgment is revived by *scire facias*, without service on or appearance by the defendant, the plaintiff cannot recover thereon in another state where the defendant resides, after the statute of limitations has run against the original judgment; such revival is either a new proceeding substituted for an action of debt, and hence invalid without service, or a continuation of the original action, and therefore barred; 161 U. S. 642; 35 Atl. Rep. (Vt.) 489. And in an action on such judgment the statute of the former governs and not that of the place where the judgment was rendered; 65 Hun 17.

A judgment *in personam* against a corporation, obtained in a federal court of a sister state, is conclusive on the merits of

the case in the courts of every other state when made the basis of an action; and the directors and managers of the corporation are as conclusively bound by the judgment as the corporation itself; 46 Fed. Rep. 584.

Judgments of the Indian courts in the Indian Territory stand on the same footing with those of the Federal territorial courts, and are entitled to the same faith and credit; 59 Fed. Rep. 836.

The provisions of the act of Congress relating to the authentication of records and judicial proceedings must be complied with in order to secure the admission of the exemplification as evidence in a suit upon the judgment in another state; it is not necessary that such exemplification should be used in pleading or in a statement of claim or affidavit of defence; 124 Pa. 280. As to pleading, see 27 Cent. L. J. 400; 26 Abb. N. C. 315.

As to the effect to be given to foreign judgments, see *Story, Conf. Laws*; *Freem. Judgt.* 593; *Dalloz, Étranger*; *Piggott, Foreign Judgments*; 20 Myers, *Federal Decisions* 638; 4 *Law Magazine & Rev.*, 4th ed. 417; *CONFLICT OF LAWS; JUDGMENT; FOREIGN CORPORATION*.

FOREIGN JURISDICTION. The exercise by one government, within the territory of another, of powers acquired by it in any manner whatsoever, whether by treaty, grant, usage, sufferance, or otherwise.

A jurisdiction other than that of the former.

FOREIGN JURISDICTION ACT. In English Law. The stat. 6 & 7 Vict. c. 94, by which it was provided that the crown may exercise any power or jurisdiction it may have in any foreign place or country in the same manner as if obtained by cession or conquest; and that any act done in pursuance of such power or jurisdiction shall be as valid as if done according to the local law then in force in such place. 1 Steph. Com. 103.

FOREIGN JURY. One drawn from a county other than that in which issue is joined. See *JURY*.

FOREIGN KINGDOM. One under the dominion of a foreign prince. 19 Johns. 375.

FOREIGN LANGUAGE. When in an action of slander the words complained of were spoken in German a declaration setting forth the words in English is not sufficient; the words must be stated in the foreign language as spoken, with an avowment of the signification in English, and that they were understood by those who heard them; 8 Wend. 394. See also *Cro. Eliz.* 496, 865; *SLANDER*.

When a will was made and proved in French and in the probate it was translated into English, but as it appeared, falsely, the translation was not conclusive, but the English court of chancery held that it might determine according to what the translation ought to be; 1 P. Wms. 520.

FOREIGN LAW. The laws of a foreign country.

The courts do not take judicial notice of foreign laws; and they must, therefore, be proved as matters of fact; 4 Mood. Parl. Cas. 21; 3 Esp. 163; 1 D. & L. 614; 40 Tex. 291; 9 Humphr. 546; 2 Barb. Ch. 582; 19 Vt. 182; 9 Mo. 8; 60 Ind. 128; 64 Ga. 184; 8 Mass. 99; 2 Dow. & C. 171; 4 Conn. 517; 1 Paige 220; 10 Watts 158; 9 Gill 1; *written laws*, by the text, or a collection printed by authority, or a copy certified by a proper officer, or in their absence, perhaps, by the opinion of experts as secondary evidence; *Story, Conf. Laws* § 641; 1 Greenl. Ev. § 496; 14 How. 426; 2 Cra. 287; 8 Ad. & E. 208; 6 Wend. 475; 10 Ala. n. s. 885; 1 Tex. 98; 10 Ark. 516; they may be construed with the aid of text-books as well as of experts; 2 Low. 142; where experts are called, the sanction of an oath is said to be required; 4 Conn. 517; 12 *id.* 384. See 12 Vt. 396; *Story, Conf. Laws* § 641; 1 Greenl. Ev. § 488, note. As to the manner of proving un-

written laws of foreign countries, the decisions show a divergence of opinion; the rule, as laid down by Lowell, J., in the case of *The Pashawick*, 2 Low. 142, where the reasoning of Lord Stowell, in *Dalrymple v. Dalrymple*, 3 Hagg. Const. 64, is cited with approval, is, that the unwritten law of England may be proved in the United States courts not by experts only, but also by text-writers of authority, and by the printed reports of adjudged cases; Whart. Ev. § 800. But mere citations of English statutes and authorities cannot be accepted as proving English laws; 50 Fed. Rep. 78. But in respect to the laws of other foreign countries, where a system obtains wholly different from our own, the rigid proof by the testimony of experts alone should be insisted on. See 11 Cl. & F. 85; 14 E. L. & Eq. 249; 4 Cow. 508, n.; 1 Wall. Jr. C. C. 47; 4 Johns. Ch. 507; as to who can prove such laws; 43 N. H. 176; 1 Johns. 395; 2 La. Ann. 891. It need not be a lawyer; 74 Ill. 197; 26 N. H. 152; 8 C. B. 812; 37 Neb. 614; 129 U. S. 897. The United States courts take judicial notice of the laws of every state and territory in the United States; 35 Fed. Rep. 642; but the decisions of the various state courts are not harmonious on this point as far as regards the laws of each other. In Tennessee; 9 Heisk. 873; and Rhode Island; 11 R. I. 411; the courts will take judicial notice of the laws of sister states; in Illinois, of the jurisdiction of courts in other states; 17 Ill. 577; and the supreme court has decided that where a state recognizes acts done in pursuance of the laws of another state, the courts of the first state should take judicial cognizance of such laws so far as may be necessary to judge of the acts alleged to be done under them; 8 Wall. 518. In Louisiana, where a statute of another state has been properly brought to the notice of the court, it will in all future cases take notice of that statute and presume the law of the foreign state to be the same until some change is shown; 21 La. Ann. 594; 5 Ind. App. 89. In Pennsylvania it has been held that the courts should take notice of the local laws of a sister state in the same manner as the supreme court of the United States would do on a writ of error to a judgment; 27 Pa. 479; but see, *contra*, 9 Wis. 328; 20 Am. L. Reg. n. s. 385. See 81 Fla. 10. A copy of the authorized statute-book is recognized as proof of a foreign law in Pennsylvania; 2 Pa. 35; and the construction of those statutes may be proved either by the reports of cases, or by one familiar therewith; 163 Pa. 245; 170 Pa. 84.

Foreign unwritten laws, customs, and usages may be proved, and are ordinarily proved, by parol evidence; and when such evidence is objected to on the ground that the law in question is a written law, the party objecting must show that fact; 15 S. & R. 87; 2 La. 154.

The manner of proof varies according to circumstances. As a general rule, the best testimony or proof is required; for no proof will be received which presupposes better testimony attainable by the party who offers it. When the best testimony cannot be obtained, secondary evidence will be received; 2 Cra. 287. See 14 Cent. L. J. 125, where there is a general article on this title. A foreign law must be proved like any other fact, and in the absence of such proof it will be presumed that the common law prevails, in the foreign jurisdiction; 53 Mo. App. 60.

Exemplified or sworn copies of written laws and other public documents must, as a general thing, be produced when they can be procured; but should they be refused by the competent authorities, then inferior proof may be admitted; *id.*

When our own government has promulgated a foreign law or ordinance of a public nature as authentic, that is held sufficient evidence of its existence; 1 Cra. 38; 1 Dall. 463; 12 S. & R. 203.

When foreign laws cannot be proved by some mode which the law respects as being of equal authority to an oath, they must be verified by the sanction of an oath.

The usual modes of authenticating them are by an exemplification under the great

seal of a state, or by a copy proved by oath to be a true copy, or by a certificate of an officer authorized by law, which must itself be duly authenticated; 2 Cra. 288; 2 Wend. 411; 6 *id.* 475; 5 S. & R. 538; 15 *id.* 84; 2 Wash. C. C. 175; 82 Md. 274; 38 Ark. 645; 67 Ill. 645.

Witnesses in Cuba examined under a commission touching the execution of a will testified, in general terms, that it was executed according to the law of that country; and, it not appearing from the testimony that there was any written law upon the subject, the proof was held sufficient; 8 Paige, Ch. 446.

A defendant pleaded infancy in an action upon a contract governed by the law of Jamaica: held that the law was to be proven as a matter of fact, and that the burden lay upon him to show it; 8 Johns. 190.

Proof of such unwritten law is usually made by the testimony of witnesses learned in the law and competent to state it correctly under oath; 2 Cra. 287; 1 Pet. C. C. 225; 2 Wash. C. C. 175; 15 S. & R. 84; 4 Johns. Ch. 520; Cowp. 174; 2 Hagg. Adm. App. 15-144; 100 Mass. 79; 14 How. 400.

In England, certificates of persons in high authority have been allowed as evidence in such cases; 8 Hagg. Eccl. 767, 769.

The public seal of a foreign sovereign or state affixed to a writing purporting to be a written edict, or law, or judgment, is of itself the highest evidence, and no further proof is required of such public seal; 2 Cra. 238; 2 Conn. 85; 1 Wash. C. C. 363; 4 Dall. 413, 416; 6 Wend. 475; 9 Mod. 66; 35 Fed. Rep. 134.

But the seal of a foreign court is not, in general, evidence without further proof, and must, therefore, be established by competent testimony; 3 Johns. 810; 2 H. & J. 193; 4 Cow. 526, n.; 3 East 221.

By the act of May 26, 1790, it is provided "that the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto;" R. S. § 905. See RECORD. It may here be observed that the rules prescribed by acts of congress do not exclude every other mode of authentication, and that the courts may admit proof of the acts of the legislatures of the several states, although not authenticated under the acts of congress. Accordingly, a printed volume, purporting on its face to contain the laws of a sister state, is admissible as *prima facie* evidence to prove the statute law of that state; 4 Cra. 384; 12 S. & R. 208; 6 Binn. 321; 5 Leigh 571; 5 Ind. App. 89; 97 Ala. 417; 70 Hun 145; 63 Mo. App. 617; *contra*, 2 Hawks 441; 2 Haring. 84; 2 Wend. 411; 2 La. Ann. 654; 9 Wis. 328. By act of Aug. 8, 1846, a standard copy of the laws and treaties of the United States is fixed, and made competent evidence in all courts without further proof or authentication. R. S. § 906.

Foreign laws have, as such, no extra-territorial force, but have an effect by comity; Sto. Const. § 1305. In the absence of pleading and proof to the contrary, the laws of another state are presumed to be like those of the state in which the action is brought; 35 Neb. 375; 87 *id.* 644; 93 Cal. 172; 144 Pa. 205; 76 Hun 200. See 142 U. S. 101; 40 La. Ann. 769; 85 Tenn. 616. While a state court is bound to take judicial cognizance of the principles of common law as it prevails in other states, this is not true of the statutes of such states; 40 La. Ann. 766; 50 Ark. 237; 73 Wis. 332; 86 Tenn. 50; 88 Minn. 421. But see 156 Mass. 65. Until the fact is shown, they will be assumed to be the same as those of the *forum*; 1 Harr. & J. 637. See 5 Cl. & F. 14; 8 H. L. C. 19; LEX FORI.

A person claiming title under a foreign corporation is chargeable with knowledge of its chartered powers and restrictions; 19 N. Y. 207.

The effect of foreign laws when proved is properly referable to the court; the object of the proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result from foreign laws to be applied to the matters in controversy before them. The court are, therefore, to

decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of their applicability to the matter in issue; Story, Conf. Laws § 638; Greenl. Ev. 486; 2 H. & J. 193; 8 *id.* 234, 242; 4 Conn. 517; Cowp. 174; 20 A. L. Reg. n. s. 379. As to proof of foreign laws generally, see 14 Cent. L. J. 125; 19 *id.* 236, 243; 17 Myers, Fed. Dec. 458; 7 Law Mag. & Rev., 4th 269; 5 Am. L. Reg. 321; 8 So. L. Rev. 150; 18 Alb. L. J. 183; by experts, 18 *id.* 17; by oral proof, 25 L. R. A. 449.

As to criminal cases, see 11 Crim. L. Mag. 776; penal actions, 3 L. R. A. 779; presumptions, 24 Alb. L. J. 204; Lawson, Pres. Ev. 358-80. See CONFLICT OF LAWS; LEX LOCI CONTRACTUS.

FOREIGN MATTER. Matter which must be tried in another county. Blount. Matter done or to be tried in another county. Cowel.

FOREIGN MINISTER. An ambassador or envoy from a foreign country. See AMBASSADOR.

In the diplomatic sense, a minister who comes from another jurisdiction or government. Anderson; 5 Pet. * 56.

The modern law of nations recognizes a class of public officers, who, while bearing various designations, chiefly significant in the relation of rank, precedence, or dignity, possess in substance the same functions, rights, and privileges,—being agents of their respective governments for the transaction of diplomatic business abroad, possessing also such powers as their respective governments may please to confer, and enjoying, as a class, established legal rights and immunities of person and property in the governments to which they are accredited as the representatives of sovereign powers.

Disregarding questions of dignity, these diplomatic agents might all be denominated ambassadors, because they are immediate officers of the sovereign; or envoys, because they are persons sent; or ministers, because engaged in public service or duty; or procurators, because they are the protectors of their respective governments; or legates, because officially employed as the substitute of the superior; or nuncios, or internuncios, because they are messengers to or between governments; or deputies, because they are deputed; or commissioners, because they hold and discharge commissions; or *chargés d'affaires*, because they are charged with business; or agents, because they act for their governments. All these and other designations of public ministers, are found in the history of modern negotiations, the name having no fixed relation to the functions or powers, or true nature of the office. *Id.* See AMBASSADOR; ENVOY; CHARGÉS DES AFFAIRES; etc.

FOREIGN MONEY. Mercantile paper may be given for the payment of a certain sum in denominations of foreign money. A. & E. Ency. 2nd Ed. 105; Chitty on Bills, 123 *et al.* But whether an instrument payable generally in money or currency of a foreign state is negotiable, is not settled. *Id.* In 27 Mich. 191 it was held that a note payable in "Canada currency" is negotiable, whereas in 23 Wend. (N. Y.) 71 it was held that a note payable in "Canada money" is not negotiable. The court declared that "Canada money" was but a commodity, not legal tender for debts, nor money within the meaning of the rule as to negotiable instruments. *Id.*

FOREIGN OFFICE. The department of state through which the British sovereign communicates with foreign powers.

FOREIGN PLEA. See PLEA.

FOREIGN PORT. A port or place which is wholly without the United States. 19 Johns. 375; 2 Gall. 4, 7; 1 Brook. 285. A port without the jurisdiction of the court; 1 Dods. 201; 4 C. Rob. 1; 1 W. Rob. 29; 6 Exch. 886; 1 Bl. & H. 68, 71. The ports of the several states of the United States are foreign to each other so far as regards the authority of masters to pledge the credit

of their vessels for supplies; 10 Wall. 199; 99 Mass. 888. Practically, the definition has become, for most purposes of maritime law, a port at such distance as to make communication with the owners of the ship very inconvenient or almost impossible. See 1 Pars. Mar. Law 142, n.; FORT.

FOREIGN PROCESS ACTS. English statutes providing for the service of process of certain courts in places beyond their territorial jurisdiction.

FOREIGN RELATIONS. See UNITED STATES.

FOREIGN SERVICE. *Servitium forinsecum.* See FORINSECUS.

FOREIGN STATE. A foreign nation or country. In the United States the states are considered as foreign to each other with respect to those subjects which are controlled by their municipal law. See FOREIGN JUDGMENT; EXTRADITION; FUGITIVE FROM JUSTICE.

FOREIGN TRADE. The exportation and importation of commodities to or from foreign countries, as distinguished in the United States from interstate or coastwise trade. See 1 Holmes 421; FOREIGN COMMERCE.

Held to include trade between the Atlantic and Pacific ports of the United States, within a revenue statute specifically providing that it should be included. 13 A. & E. Ency. 2nd ed., 835; 1 Holmes (U. S.) 421. Under an act exempting from duty lumber to be used in the construction and equipment of "vessels built in the United States for the purpose of being employed in the foreign trade," the term "the foreign trade" limits the application of the act to vessels owned by Americans. It does not apply to those built for foreigners. *Id.*; 15 Blatchf. (U. S.) 26. See FOREIGN COMMERCE.

FOREIGN TROOPS. While foreign troops entering or passing through our territory with the permission of the Executive are exempt from territorial jurisdiction, it is doubtful whether in the absence of a treaty or positive legislation to that effect there is any power to apprehend or return deserters. 183 U. S. 424.

FOREIGN VESSEL. A vessel owned by residents in or sailing under the flag of a foreign nation. This term does not mean a vessel in which foreigners domiciled in the United States have an interest; 1 Gal. 58.

An omission in the registry and enrolment of an American vessel does not make her foreign, but, at best, only deprives her of her American privileges. Crabbe 271. See FLAG. The patent laws were not intended to apply to and govern a vessel of a foreign, friendly nation; 19 How. 183. See PATENT.

FOREIGN VOYAGE. A voyage whose termination is within a foreign country. 3 Kent 177, n. The length of the voyage has no effect in determining its character, but only the place of destination; 1 Stor. 1; 3 Sumn. 342; 2 Bost. L. Rep. 146; 2 Wall. C. C. 264; 1 Pars. Mar. Law 81.

FOREIGN WATERS. By U. S. Rev. St. § 4370 tugboats towing in whole or in part in foreign waters are exempt from a penalty therein imposed on foreign tugboats for towing vessels of the United States.

Where the treaty between the United States and Great Britain of June 15, 1846, fixed the boundary between the two countries in the strait of San Juan de Fuca by a line following the middle of the strait, but also secured to each nation a right of free navigation over all the waters of the strait, all the waters north of the boundary line were held to be "foreign waters," within the meaning of said section; 7 U. S. App. 188; s. c. 50 Fed. Rep. 437; reversing 48 *id.* 319.

FOREIGNER. One who is not a citi-

zen. Cowel.

In the *Old English Law*, it seems to have been used of every one not an inhabitant of a city, at least with reference to that city; 1 H. Bla. 218. See, also, Cowel, *Foreigne*.

In the *United States*, any one who was born in some other country than the United States, and who owes allegiance to some foreign state or country. 1 Pet. 343, 349. An alien. See ALIEN; CITIZEN.

FOREJUDGE. To deprive a man of the thing in question by sentence of court.

Among foreign writers, says Blount, forejudge is to banish, to expel. In this latter sense the word is also used in English law of an attorney who has been expelled from court for misconduct. Cowel; Cunningham, Law Dict.

FOREMAN. The presiding member of a grand or petit jury. See GRAND JURY; JURY.

FORENSIC. See FORENSIS.

FORENSIC MEDICINE. See MEDICAL JURISPRUDENCE.

FORENSIS. Forensic. Belonging to court. *Forensis homo*, a man engaged in causes. A pleader; an advocate. Vicat, Voc. Jur.; Calvinus, Lex.

FORESAID. In Scotch Law. Aforesaid. Sometimes *foresaids*, in the plural; 2 How. St. Tr. 715; and also in the form *foresaids*; 1 Pitt. Cr. Tr. pt. 1, 107.

FORESHOKE (Lat. Derelictum). Forsaken; especially with reference to lands abandoned by the tenant. *Termes de la Ley*; Cowel; Moz. & W.

FORESHORE. That part of the land immediately in front of the shore; the part of it which is between high and low water marks, and alternately covered with water and left dry by the flux and reflux of the tides. It is indicated by the middle line between the highest and lowest tides (spring and neap).

This is popularly described as the land between high and low water marks. It is to be found in arms of the sea. It forms part of the adjoining county, the justices of which have cognizances of offences committed there, whether it is or is not at the time covered with water. It also forms part of the adjoining parish. Byrne.

The property in the foreshore is *prima facie* vested in the Crown, but a part of it may belong to a subject by an ancient grant from the Crown, or by prescription. This ownership of the Crown is for the benefit of the community, and cannot be used in any way so as to derogate from or interfere with the public rights of navigation and fishery. *Id.* See ALLUVION; DERELICT.

FORESIGHT. See DUE DILIGENCE AND FORESIGHT.

FOREST. A certain territory of wooded ground and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide in the safe protection of the prince for his princely delight and pleasure, having a peculiar court and officers. Man. For. Laws, cap. 1, num. 1; *Termes de la Ley*; 1 Bla. Com. 239.

A royal hunting-ground which lost its peculiar character with the extinction of its courts or when the franchise passed into the hands of a subject, Spelman, Gloss.; Cowel; Man. For. Laws, cap. 1; 2 Bla. Com. 83; 1 Steph. Com. 665 See NEW FOREST.

FOREST COURTS. In English Law. Courts instituted for the government of the king's forest in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or venison, to the vert or greensward, and to the covert in which the deer were lodged. They comprised the courts of attachments or woodmote, of regard, or swanimote, and of justice-seat (which several titles see); but since the revolution of 1688 these courts, it is said, have gone into absolute desuetude. 3 Steph. Com. 499; 2 Bla. Com. 71.

But see 8 Q. B. 981, where a mandamus to the verderers of a royal forest was refused, on the ground that the court of the Chief Justice in Eyre had power to compel the verderers to permit the exercise of the rights sought to be enforced.

FOREST LAW. The old law relating to the forest, under which the most horrid tyrannies were exercised, in the confiscation of lands for the royal forests. Hallam's Const. Hist. ch. 8.

The privilege of reserving the forest for the use of the sovereign alone was instituted by the Saxon kings, who, however, occasionally conferred it upon a subject by special license; and a charter of the forest is said to have been issued by Canute at Winchester in the year 1016, but the authenticity of this document is doubted by Lord Coke; Inst. iv. 320. There is, however, no doubt that this monarch issued the *Constitutiones de Foresta*, by which document he appointed four chiefs of the forest (*primarii*) who administered justice; under these were four *mediocres* who undertook the care of the venison and vert; and who in turn superintended two *tithing-men* whose duties were to care for the vert and venison by night and who, if slaves, became free on being appointed to this office. Complaints against the *mediocres* and the *tithing-men* were heard by the *primarii* and by them disposed of, and complaints against the *primarii* were dealt with by the king himself; Hallam, Anc. Laws and Inst. sec. 10. If a freeman used violence towards a *primarius* of the forest, he lost his freedom and his goods; if a villein, he lost his right hand; and for a repetition of the offence by either, he forfeited his life. Offences against the vert were dealt with leniently as compared with those against the venison, and there was also a difference in the penalties imposed for killing a royal beast and a beast of the forest; thus for killing the latter, a freeman was fined, while for the former he lost his liberty. A difference was also recognized according to the rank of the offender, as if a bishop, abbot, or baron killed a royal beast he was subject to the penalty of the pleasure of the king, while for the same offence a slave lost his life. Certain animals are enumerated in this document for the killing of which no penalty was attached, and the wild boar is especially mentioned as never having been held to be an animal of venison; *id.* sec. 27.

Under the Concessors these laws were not enforced with the rigidity of Canute, the penalties for trespass were moderate, and the administration of the forest law did not seem to be a subject of complaint from any class of people, but William the Conqueror soon altered the conditions of the law. The hunting of wild beasts of the forest being his chief pastime he immediately claimed absolute and exclusive right to all forests then existing, and allowed no one to enter without his license; he extended those already existing by laying waste whole towns and villages; and he devastated vast tracts in Hampshire and Yorkshire to form the new forest, including the land of both God and man to make of it a home for wild beasts." Lappenburg, England, under the Anglo-Norman Kings 214. The Conqueror appointed new judges of the forests to supersede the former judges and keepers; he created the office of chief justice of the forest and the foresters subordinate to the chief justice, who could convict offenders and send them before the chief justice, but who had no power to punish such offenders. The verderers sat at Swanmote and all within the limits of the forest were bound to attend this court thrice a year, and to serve as inquests and juries when required. The *agistors*, the *foresteri*, and the *regarders* were also appointed by the Normans as officers of the forest, but without judicial powers. The highest penalty enforced for offences in the forest during the reign of William I. seems to have been the loss of a limb or the eyes of the offender, and this was enforced and fines were imposed for the most trivial offences; Sax. Chronicles; Comp. fol. 194.

These abuses were continued until about the year 1215, the most extensive afforestations having been under Richard I. and John. In the 47th and 48th clauses of the great charter certain provisions are found relating to the forest, but although the belief that John issued a charter distinct from these clauses is very ancient, it is erroneous; the document given in Matthew Paris under the name, being the forest charter of Henry III. with an altered salutation. Stubbs' Chart. 88. In the great charter the heavy burden of attending the forest courts is remitted and this provision was conferred in the *charta de foresta*, and thus the exact analogy established by Henry II. between the courts of the shire and those of the forest was abolished. The *charta de foresta* disafforested the lands appropriated by Richard and John, and all those seized by Henry II. which had operated to the injury of the land-owners and outside of the royal demesne; it greatly mitigated the punishment for destroying game, and provided that for that offence no man should lose life or limb, and that his punishment should be limited to a fine or imprisonment for a year and a day; the following curious provision occurs in cap. ii.: "Whatsoever archbishop, bishop, earl, or baron coming to us at our commandment, passing by our forest, it shall be lawful for him to take and kill one or two of our deer by view of our forester, if he be present; or if he shall cause him and to blow a horn for him, that he seem not to steal our deer; and likewise they shall do returning from us," and this clause is still unrepealed. By reason of "the cruel and insupportable hardships which those forest laws created for the subject," says Blackstone, "we find the immunities of *charta de foresta* as warmly contended for as the rights of the king with as much difficulty, as those of Magna Charta itself"; 2 Com. 416.

After this charter was issued, the forest laws not being enforced fell gradually into desuetude, until

Charles I. attempted to revive, them in order to replenish his exchequer, and the forest court of justice sat fined certain persons heavily for alleged encroachments on the ancient boundaries of the forest, although the right to such land was fortified by several centuries of possession. This was one of the first grievances on which the long parliament acted, and since the passing of the act "certainty of forests"; 16 Car. I. c. 16, whereby it was declared that all land should be held disforested where no justice seat, assize, or court of attachment had been held for sixty years next before the first year of the reign of Charles I., the laws of the forest have practically ceased, and by acts 14 and 15 Vict. c. 43, 16 and 17 Vict. c. 42, and 19 and 20 Vict. c. 32, many of the royal forests have been disforested on the plea of public necessity. See Hallam, Hist. Eng. Const.; Stubbs' Charters; Inderwick, King's Peas; CHARTA DE FORESTA.

FORESTAGIUM. A tribute payable to the king's foresters. Cowel.

FORESTALL. To intercept or obstruct a passenger on the king's highway. Cowel; Blount. To beset the way of a tenant so as to prevent his coming on the premises. 3 Bla. Com. 170. To intercept a deer on his way to the forest before he can regain it. Cowel. See FORESTALLING THE MARKET.

FORESTALLER. One who commits the offence of forestalling. Used, also, to denote the crime itself; namely, the obstruction of the highway, or hindering a tenant from coming to his land. 3 Bla. Com. 170. Stopping a deer before he regains the forest. Cowel.

FORESTALLING THE MARKET. Buying victuals on their way to the market before they reach it, with the intent to sell again at a higher price. Cowel; Blount; 4 Bla. Com. 158. Every device or practice, by act, conspiracy, words, or news, to enhance the price of victuals or other provisions; Co. 3d Inst. 196; 1 Russ. Cri. 169; 4 Bla. Com. 158. See 13 Vin. Abr. 430; 1 East 132; 3 M. & S. 67. At common law, as well as by stat. 5 & 6 Edw. VI. c. 14, this was an indictable offence against public trade, but since the stat. 7 & 8 Vict. c. 24, the practice of forestalling is no longer illegal. See ENGROSS.

In the United States forestalling the market takes the form of "corners" or of "trusts," which are attempts by one person or a conspiracy or combination of persons to monopolize an article of trade or commerce, or to control or regulate, or to restrict its manufacture or production in such a manner as to enhance the price; 78 Ind. 487; 68 N. Y. 538; A. & E. Encyc. See TRUST.

FORESTARIUS. A forester. An officer who takes care of the woods and forests. *De forestario apponendo*, a writ which lay to appoint a forester to prevent further commission of waste when a tenant in dower had committed waste. Bracton 816; Du Cange.

FORESTER. A sworn officer of the forest, appointed by the king's letters patent to walk the forest, watching both the vert and the venison, attaching and presenting all trespassers against them within their own bailiwick or walk. These letters patent were generally granted during good behavior; but sometimes they held the office in fee. Blount; Cowel.

FORETHOUGHT FELONY. In Scotch Law. Murder committed in consequence of a previous design. Erskine, b. iv. tit. 4, c. 50; Bell, Dict.

FORFANG. A taking beforehand. A taking provisions from any one in fairs or markets before the king's purveyors are served with necessities for his majesty. Blount; Cowel.

FORFEIT. To lose as the penalty of some misdeed or negligence. The word includes not merely the idea of losing, but also of having the property transferred to another without the consent of the owner and wrongdoer.

Lost by omission or negligence or misconduct. 48 Minn. 13.

This is the essential meaning of the word, whether it be that an offender is to forfeit a sum of money, or an estate is to be forfeited to a former owner for a breach of condition, or to the king for some crime. Cowel says that *forfeiture* is general and *confiscation* a particular forfeiture to the king's exchequer. The modern distinction, however, seems to refer

rather to a difference between forfeiture as relating to acts of the owner and confiscation as relating to acts of the government; 1 Stor. 184; 13 Pet. 187; 11 Johns. 293. Confiscation is more generally used of an appropriation of an enemy's property; forfeiture, or the taking possession of property to which the owner, who may be a citizen, has lost title through violation of laws. See 1 Kent 67; 1 Stor. 134. A provision in an agreement, that for its breach the party shall "forfeit" a fixed sum, implies a penalty, not liquidated damages; 15 Abb. Pr. 273; 17 Barb. 220.

FORFEIT AND PAY. An agreement in a contract to forfeit and pay a specified sum in default of performance, is an agreement for liquidated damages; 57 Ark. 168; even where under the contract a bond is given as an earnest of good faith; *id.*

FORFEITABLE. Subject to forfeiture; as a franchise for misuser or non-user, or lands or property for crime.

Subject to the loss of property, right, or office, as a punishment for some illegal act or negligence. Worcester Dict.

FORFEITURE. A punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured as a recompense for the wrong which he alone, or the public together with himself, hath sustained. 2 Bla. Com. 367. A sum of money to be paid by way of penalty for a crime. 21 Ala. N. s. 673; 10 Gratt. 700.

Forfeiture by alienation. By the English law, estates less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate; as if a tenant for his own life aliens by feoffments or fine for the life of another, or in tail, or in fee, or by recovery; there being estates, which either must or may last longer than his own, the creating them is not only beyond his power, but is a forfeiture of his own particular estate; 2 Bla. Com. 274; 1 Co. 14 b.

In this country such forfeitures are almost unknown, and the more just principle prevails that the conveyance by the tenant operates only on the interest which he possessed, and does not affect the remainderman or reversioner; 4 Kent 81, 424; 5 Ohio 30; 1 Pick. 318; 1 Rice 459; 2 Rawle 168; 1 Wash. Va. 381; 11 Conn. 553; 23 N. H. 500; 21 Me. 372. See, also, Stearn, Real Act. 11; 2 Sharps. Bla. Com. 121, n.; Wms. R. P. 25; 5 Dane, Abr. 6; 1 Washb. R. P. 92, 197.

Forfeiture for crimes. Under the constitution and laws of the United States, Const. art. 3, § 3; Act of April 30, 1790, § 24, forfeiture for crimes is nearly abolished. And when it occurs the state recovers only the title which the owner had; 4 Mass. 174. See, also, Dalr. Feuds, p. 145; Post. Cr. Law 95; 1 Washb. R. P. 92; Story, Const. 1296; 100 N. C. 240.

Forfeiture for treason. The constitution of the United States, art. 3, § 2, provides that no attainer of treason shall work forfeiture except during the life of the person attainted. The Confiscation Act provided that only the life estate of the convicted person can be condemned and sold; 9 Wall. 350; 18 id. 156. It was merely an exercise of the war power; 11 Wall. 804; and did not apply to the confiscation of enemies' property; 1 Woods 221.

Forfeiture by non-performance of conditions. An estate may be forfeited by a breach or non-performance of a condition annexed to the estate, either expressed in the deed at its original creation, or implied by law, from a principle of natural reason; 2 Bla. Com. 281; Littleton § 361; 1 Prest. Est. 478; Tud. Lead. Cas. 794; 5 Pick. 528; 2 N. H. 120; 5 S. & R. 375; 32 Me. 394; 18 Conn. 535; 12 S. & R. 190; 3 Wash. St. 424; 1 Tex. Civ. App. 245. Such forfeiture may be waived by acts of the person entitled to take advantage of the breach; 1 Conn. 79; 1 Johns. Cas. 126; 1 Washb. R. P. 454; 36 W. Va. 639. In order to authorize a claim to forfeiture of valuable property on account of violation of a condition, proceedings to enforce must be had at once; 17 Or. 140.

Equity will not lend its aid to enforce a

forfeiture because of a breach of condition subsequent in a deed, although the aid is sought upon the special ground of removing a cloud on the title; 127 Ill. 101; nor will it concern itself to make up the loss of interest to one who refused the principal in the hope that he could enforce, upon purely technical grounds, a forfeiture of lands sold and all payments made thereon, under the terms of a harsh and unconscionable contract; 74 Fed. Rep. 52.

Forfeiture by waste. Waste is a cause of forfeiture. 2 Bla. Com. 288; Co. 2d Inst. 299; 1 Washb. R. P. 118.

Forfeiture of property and rights cannot be adjudged by legislative acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law. Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form; Cooley, Const. Law 450; 38 Miss. 434; 24 Ark. 161; 27 id. 26. Where no express power of removal is conferred upon the executive, he cannot declare an office forfeited for misbehavior; the forfeit must be declared by judicial proceedings; 8 B. Monr. 648; 36 N. J. L. 101.

Forfeiture of wages. A provision in a contract for service to the effect that the wages of an employee shall be forfeited for neglect or misconduct which brings damage to the company, should be strictly construed as against the company; 85 Ill. App. 481. Where, after being discharged, a railroad employee sues for wages, claiming to have been hired by the month, and this being admitted by the company, which sets up the defence that he was dismissed for cause, it is error to instruct the jury that they may find for the plaintiff if they believe from the evidence that he was hired by the month; 16 Mo. App. 522, reconciled in 20 Mo. App. 554. See WAGES; MASTER AND SERVANT.

Forfeiture of vessel. Rev. Stat. U. S. § 5283, provides for the forfeiture of every vessel which, within the limits of the United States, is fitted out and armed, or attempted to be so, to be employed in the service of any foreign prince, state, or people, to commit hostilities against the subjects, citizens, or property of a prince, state, or people with which the United States are at peace. *Held*, that under this section no forfeiture can be claimed of a vessel which is only employed to transport arms and munitions of war to a vessel fitting out to pursue the forbidden warlike enterprises; 47 Fed. Rep. 84; 48 id. 99; 49 id. 646.

Forfeiture of charter. A private corporation may be dissolved by a forfeiture of its charter for the non-user or misuser of its franchises; 9 Cra. 43; 24 Pick. 52; 137 N. Y. 606. Accidental negligence or abuse of power will not warrant a forfeiture; there must be some plain abuse of its powers or neglect to exercise its franchises, and the acts of misuse or non-use must be wilful and repeated; 51 Miss. 603; 14 Am. L. Reg. 577; 17 S. W. Rep. (Tenn.) 128. Thus long-continued neglect on the part of a turnpike company to repair its road is cause of forfeiture; 8 R. I. 182, 521. So a bridge company is subject to forfeiture of its charter if it neglect for a long time to rebuild a bridge which has been carried away by a flood; 23 Wend. 254. Where a franchise has been granted by the legislature to construct a street railway within a certain time, with a condition that it will be forfeited if the provisions of the act are not complied with, a failure to lay the track within the time limited works a forfeiture of the right, without a suit by the state, and the franchise may be conferred upon any other person or persons; 45 Cal. 385. Where the legislature forbids the owning of lands by a corporation the state may, on a violation of the prohibition, declare a forfeiture of the franchise; 123 Pa. 561. A forfeiture must be judicially declared; 7 Cold. 420; 49 How. Pr. 20; 72 N. Y. 245; 180 id. 232. A forfeiture can be enforced by *scire facias* or a *quo warranto* only at the suit of the government, which cre-

ated the corporation; 46 Md. 1; 26 Pa. 31; 46 N. J. Eq. 118. (As to the distinction between these proceedings, see 3 Term 199.) But not at the suit of an individual; 7 Pick. 344; 24 How. 378. The state may waive a cause of forfeiture; 9 Wend. 351; 73 Tex. 435. Equity has no jurisdiction in the matter; Moraw. Priv. Corp. 10, 40; 1 N. J. Eq. 369; 8 Humph. 253.

FORFEITURE OF A BOND. A failure to perform the condition on which the obligee was to be excused from the penalty in the bond. Courts of equity and of law in modern practice will relieve from the forfeiture of a bond; and, upon proper cause shown, criminal courts will, in general, relieve from the forfeiture of a recognizance to appear. See 3 Yeates 93; 2 Wash. C. C. 442; 2 Blackf. 104, 200; 1 Ill. 257.

FORFEITURE OF MARRIAGE.

A penalty incurred by a ward in chivalry when he or she married contrary to the wishes of his or her guardian in chivalry.

The latter, who was the ward's lord, had an interest in controlling the marriage of his female wards, and he could exact a price for his consent; and at length it became customary to sell the marriage of wards of both sexes; 2 Bla. Com. 70.

When a male ward refused an equal match provided by his guardian, he was obliged, on coming of age, to pay him the value of the marriage,—that is, as much as he had been *bona fide* offered for it, or, if the guardian chose, as much as a jury would assess, taking into consideration all the real and personal property of the ward; and the guardian could claim this value although he might have made no tender of the marriage; Co. Litt. 82 a; Co. 2d Inst. 92; 5 Co. 126 b; 6 id. 70 b.

When a male ward between the age of fourteen and twenty-one refused to accept an offer of an equal match (one without disparagement), and during that period formed an alliance elsewhere without his guardian's permission, he incurred forfeiture of marriage,—that is, he became liable to pay double the value of the marriage. Co. Litt. 78 b, 82 b.

FORFEITURE OF SILK. In English law. When the importation of silk was prohibited it was customary at each term of the Exchequer to proclaim a forfeiture of such as was suffered to lie in the docks.

FORFEITURES ABOLITION ACT. The same as the Felony Act of 1870, abolishing forfeitures for felony in England.

FORGAVEL. A small rent reserved in money; a quit-rent. Sometimes written *forgabulum*.

FORGE. To fabricate by false imitation; especially, in law, to make a false instrument in similitude of an instrument by which one person could be obligated to another for the purpose of fraud and deceit. 92 Cal. 563. See 43 Me. 392.

To forge is to do one of the following things with intent to defraud, namely, (1) to make a document purporting to be what it is not, or (2) to alter a document without authority, in such a manner that if the alteration had been authorized it would have altered the effect of the document, or (3) to sign a document: (a) in the name of a person without his authority, whether such name is or is not the same as that of the person signing; (b) in the name of any fictitious person alleged to exist; (c) in a name represented as being the name of a different person from that of the person signing it, and intended to be mistaken for the name of the former; or (d) in the name of a person personated by the person signing the document, if the effect of the document depends upon the identity between the person signing the document and the person whom he professes to be. R. & L. Dict.; Steph. Cr. Dig. 267-*et seq.*; 2 Russ. Cr. 618.

FORGERY. The falsely making or materially altering, with intent to defraud, any writing which, if genuine, might apparent-

ly be of legal efficacy or the foundation of a legal liability. 2 Bish. Cr. Law § 523; 29 Fla. 408.

The fraudulent making and alteration of a writing to the prejudice of another man's right. 4 Bla. Com. 247. The essence of forgery consists in making an instrument appear to be that which it is not; L. R. 1 C. C. R. 200.

Bishop, 2 Cr. Law § 523, n., has collected nine definitions of forgery, and justly remarks that the books abound in definitions. Coke says the term is "taken metaphorically from the smith, who beateth upon his anvil and forgoeth what fashion and shape he will." Co. 3d Inst. 109.

A person may commit forgery by fraudulently making, over his own signature, a paper writing which, if genuine, would possess legal efficacy, and might operate to the prejudice of another's rights; 85 Tenn. 232. One may have authority to sign the name of another to an instrument for the payment of money in a stated amount, or for a legal purpose, and yet commit a forgery by signing for a larger amount, or for an illegal purpose with intent to defraud; 51 Ark. 88.

A clerk in the telegraph office who sent to a bookmaker a telegram offering to bet on a certain horse, which purported to be sent before the race, and to be signed by a person who had authorized him to telegraph bets in his name, but which was in fact sent after the clerk knew that the horse had won the race, was held guilty of forgery under a statute against procuring money by virtue of any forged or altered instrument. Lord Russell of Killowen, C. J., and Vaughan Williams, J., doubted as to the statute, but not that it was forgery at common law; [1896] 1 Q. B. 309.

The making of a whole written instrument in the name of another with a fraudulent intent is undoubtedly a sufficient making; although otherwise where one executes a promissory note as agent for a principal from whom he has no authority; 15 Hun 155; but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of the instrument, whereby a new operation is given to it, will amount to a forgery; 1 Stra. 18; 5 Strobb. 581; L. R. 1 C. C. R. 200; and this, although it be afterwards executed by a person ignorant of the deceit; 2 East, Pl. Cr. 855.

The fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versa*, will also be a forgery; 11 Gratt. 322; 1 Add. 44. For example, it is forgery in an individual who is requested to draw a will for a sick person in a particular way, instead of doing so, to insert legacies of his own head, and then procure the signature of such sick person to be affixed to the paper without revealing to him the legacies thus fraudulently inserted; Noy 101; F. Moore 759, 760; Co. 3d Inst. 170; 1 Hawk. Pl. Cr. c. 70, s. 2; 2 Russ. Cr. 318; Bacon, Abr. *Forgery* (A); but one was not held to be guilty of forgery, who in writing a promissory note for an illiterate person to execute, inserts therein an amount larger than directed; 89 Ga. 783.

It has even been intimated by Lord Ellenborough that a party who makes a copy of a receipt and adds to such copy material words not in the original, and then offers it in evidence on the ground that the original has been lost, may be prosecuted for forgery; 5 Esp. 100.

It is a sufficient making where, in the writing, the party assumes the name and character of a person in existence; 2 Russ. Cr. 337. But the adoption of a false description and addition where a false name is not assumed and there is no person answering the description, is not a forgery; 1 Russ. & R. 405.

Making an instrument in a fictitious name, or the name of a non-existing person, is as much a forgery as making it in the name of an existing person; 2 Russ. Cr. 328; 82 Tex. Cr. R. 74; 90 Ga. 347; and although a man may make the instrument in his own name, if he represent it as the instrument of another of the same name, when in fact there is no such person, it will be a forgery in the name of a non-existing person; 2 Leach 775; 2 East, Pl.

Cr. 963; 7 Pet. 132; 5 City H. Rec. 87. See 53 Iowa 68. But the correctness of this decision has been doubted; Rosc. Cr. Ev. 884. One who, with intent to forge the check of "R. & M.," signs the name "A. E. R. & Co.," thereto, believing it to be the true name of the firm, is not guilty of forgery; 90 Cal. 586.

Though, in general, a party cannot be guilty of forgery by a mere *non-feasance*, yet if in drawing a will he should fraudulently omit a legacy which he had been directed to insert, and by the omission of such bequest it would cause a material alteration in the limitation of a bequest to another, as, where the omission of a devise of an estate for life to one causes a devise of the same lands to another to pass a present estate which would otherwise have passed a remainder only, it would be a forgery; 1 Hawk. Pl. Cr. c. 70, s. 6; 2 East, Pl. Cr. 856; 2 Russ. Cr. 320.

It may be observed that the offence of forgery may be complete without a publication of the forged instrument; 2 East, Pl. Cr. 855; 3 Chitty, Cr. Law 1038.

With regard to the thing forged, it may be observed that it has been held to be forgery at common law fraudulently to falsify or falsely make records and other matters of a public nature; 1 Rolle, Abr. 65, 68; a parish register; 1 Hawk. Pl. Cr. c. 70; a letter in the name of a magistrate, or of the governor of a gaol directing the discharge of a prisoner; 6 C. & P. 129; Mood. 379; the making a false municipal certificate with intent to defraud is forgery, notwithstanding the city has not power to issue such certificates; 68 Mo. 150; the alteration of a document to prevent the discovery of an embezzlement; 11 Crim. L. Mag. 47.

With regard to private writings, forgery may be committed of any writing which, if genuine, would operate as the foundation of another man's liability or the evidence of his right; 3 Greenl. Ev. § 103; 2 Mass. 397; 12 S. & R. 237; 8 Yerg. 150; as, a check; 5 Leigh 707; an assignment of a legal claim; an indorsement of a promissory note; 11 Gratt. 322; 3 Ohio 229; writing the name of the payee falsely and fraudulently on the back of a treasury warrant payable to order; 37 Fed. Rep. 108; a receipt or acquittance; 15 Mass. 526; an acceptance of a bill of exchange, or an order for the delivery of goods; 8 C. & P. 629; 3 Cush. 150; 26 Tex. App. 176; 11 Crim. L. Mag. 245; 81 Tex. Cr. R. 587; or an order for money; 79 Ga. 344; a deposition to be used in court; 50 Me. 409; a private act of parliament; 4 How. St. Tr. 951; a copy of any instrument to be used in evidence in the place of a real or supposed original; 8 Yerg. 150; false entries in the books of a mercantile house, but not necessarily so in every case; 32 Penn. 529; 46 N. H. 266; a letter of recommendation of a person as a man of property and pecuniary responsibility; 2 Greenl. Ev. § 365; a false testimonial to character; Templ. & M. 207; 1 Den. Cr. Cas. 492; Dears. 285; a railway pass; 2 C. & K. 604; a railroad-ticket; 3 Gray 441; or fraudulently to testify or falsely to make a deed or will; 1 Hawk. Pl. Cr. b. 1; c. 70, § 10; a certified bill of costs; 85 Tenn. 232; or of a contract which, if genuine, would be void as against public policy; 100 Cal. 664. Forgery may be of a printed or engraved as well as of a written instrument; 3 Gray 441; 9 Pick. 312; 127 U. S. 457; but falsely to subscribe a person's name to a recommendation of a medicine is not forgery; 2 Pear. 351; nor to alter a lease by interlineations in order to conform it to the purpose of parties; 89 Pa. 432; nor is the private memorandum-book of a public officer, not required to be kept by law, the subject of forgery; 3 Col. 571; nor is the forging of his docket entries by a justice of the peace indictable, under a statute making forging of the record of a court of record an indictable offence; 1 Houst. Cr. Cas. 110; nor the changing the date of tax receipts which still show on their face that they were given for the taxes of the year previous; 66 Miss. 14; a forgery must be of some document or

writing; therefore, the printing an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery; 1 Dears. & B. 460; Clark, Cr. L. 295.

The intent must be to defraud another; 83 Ia. 128; 83 Ala. 46; but it is not requisite that any one should have been injured; it is sufficient that the instrument forged might have proved prejudicial; 3 Gill & J. 220; 4 Wash. C. C. 726; 81 Tex. Cr. R. 51; it has been held that the jury ought to infer an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from the person's ordinary caution, it would not be likely to impose upon him; and although the object was general to defraud whoever might take the instrument, and the intention of the defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the contemplation of the prisoner; Russ. & R. 291; 101 N. C. 770; 11 Crim. L. Mag. 281; 44 La. Ann. 962. See Russ. Cr. b. 4, c. 32, s. 3; 2 East, Pl. Cr. 853; 1 Leach 367; Rosc. Cr. Ev. 400; Clark, Cr. L. 800.

Most, and perhaps all, of the states in the Union have passed laws making certain acts to be forgery with the result, upon the whole, of enlarging the meaning of the word, and the national legislature has also enacted several on this subject, which are here referred to; but these statutes do not take away the character of the offence as a misdemeanor at common law, but only provide additional punishment in the cases particularly enumerated in the statutes; 3 Cush. 150; 3 Gray 441. It has been held that the crime of uttering forged commercial paper is included in the common-law definition of the word "forgery" as used in a treaty, and that a prisoner charged with it should be surrendered, although under the law of the other treaty power that crime is known as "fraud" by means of forgery, and "forgery" is only falsification of public documents; 55 Fed. Rep. 376.

The act of offering for sale and selling a forged instrument is a sufficient representation as to its genuineness; 73 Ia. 128.

See, generally, Hawk. Pl. Cr. b. 1, c. 51, 70; 3 Chitty, Cr. Law 1022; 2 Russ. Cr. b. 4, c. 32; 2 Bish. Cr. Law c. 22; 2 Bish. Cr. Proc. § 398; Rosc. Cr. Ev.; Starkie, Ev.; 1 Whart. Cr. L. c. 9; COUNTERFEIT.

FORGERY ACT, 1870. The stat. 33 & 34 Vict. c. 58, was passed for the punishment of forgers of stock certificates, and for extending to Scotland certain provisions of the Forgery Act of 1861; Moz. & W.

FORHERDA. In Old English Law. A headland, or foreland. Cowel.

FORI DISPUTATIONES. In Civil Law. Arguments in court. Disputations or arguments before a court. Eminent citizens and statesmen often debated in the forum, and their answers to questions put were gradually adopted by the courts and incorporated into the body of the Roman law under this name. 1 Kent 590; Vicat, Voc. Jur. verb. *Disputatio*.

FORINSECUM SERVITIUM. See INTRINSECUM SERVITIUM.

FORINSECUS (Lat.), FORINSIC. Outward; on the outside; without; foreign; belonging to another manor. *Silio forinsecus*, the outward ridge or furrow. *Servitium forinsecum*, the payment of aid, scutage, and other extraordinary military services. *Forinsecum manerium*, the manor, or that part of it which lies outside the bars or town and is not included within the liberties of it. Cowel; Blount; Cunningham, Law Dict.; Jacob, *Foreign Service*; 1 Reeve, Hist. Eng. Law 278.

FORIS (Lat.). Out at the doors, out of door; abroad; without. Harp. Lat. Dict.

FORISBANTUS. Banished. Mat. Par. 1245.

FORISFACERE (Lat.). To forfeit. To lose on account of crime. It may be applied not only to estates, but to a variety of

other things, in precisely the popular sense of the word forfeit. Spelman, Gloss.; Du Cange.

To confiscate. Du Cange; Spelman, Gloss. To commit an offence; to do a wrong. To do something beyond or outside of (*foris*) what is right (*extra rationem*). Du Cange. To do a thing against or without law. Co. Litt. 59 a.

To disclaim. Du Cange.

FORISFACTUM (Lat.). Forfeited. *Bona forisfacta*, forfeited goods; 1 Bla. Com. 299; A crime. Du Cange; Spelman, Gloss.

FORISFACTURA (Lat.). A crime or offence through which property is forfeited. Leg. Edw. Conf. c. 32.

A fine or punishment in money.

Forfeiture. The loss of property or life in consequence of crime. Spelman, Gloss.

Forisfactura plena. A forfeiture of all a man's property. Things which were forfeited. Du Cange; Spelman, Gloss.

FORISFACTUS (Lat.). A criminal. One who has forfeited his life by commission of a capital offence. Spelman, Gloss; Leg. Rep. c. 77; Du Cange. *Si quispiam forisfactus poposcerit regis misericordiam*, etc. (if any criminal shall have asked pardon of the king, etc.). Leg. Edw. Conf. c. 18.

Forisfactus servus. A slave who has been a free man but has forfeited his freedom by crime. Leg. Athelstan, c. 3; Du Cange.

FORISFAMILIATED, FORISFAMILIATUS. In Old English Law. Portion off. A son was *forisfamiliar* when he had a portion of his father's estate assigned to him during his father's life, in lieu of his share of the inheritance, when it was done at his request and he assented to the assignment. The word etymologically denotes *put out of the family* (*foris familiam ponere*, from which is *forisfamiliar*; Glanv. l. 7, c. 3) mancipiated. 1 Reeve, Hist. Eng. L. 110; Bract, fol. 64.

FORIS FAMILIATION. The separation of a child from the father's family. Bell; Toml.

One who is no longer an heir of the parent was termed *forisfamiliar*. Du Cange; Spelman, Gloss; Cowel. Similar in some degree to the modern practice of advancement.

FORISJUDICATIO (Lat.). In Old English Law. Forejudger. A forejudgment. A judgment of court whereby a man is put out of possession of a thing. Co. Litt. 100 b; Cunningham, Law Dict.

FORISJUDICATUS (Lat.). Forejudged; sent from court; banished. Deprived of a thing by judgment of court. Bracton, 250 b; Co. Litt. 100 b; Du Cange.

FORISJURARE (Lat.). To forswear; to abjure; to abandon. *Forisjurare parentum*. To remove oneself from parental authority. The person who did this lost his rights as heir. Du Cange; Leg. Hen. I. c. 88.

Provinciam forisjurare. To forswear the country. Spelman, Gloss.; Leg. Edw. Conf. c. 6.

FORJUDGE. See FOREJUDGE.

FORJURER (L. Fr.). In Old English Law. To abjure; to forswear. *Forjurur royale*, to abjure the realm. Britt. cc. 1, 16.

FORLER-LAND. Land in the diocese of Hereford, which had a peculiar custom attached to it, but which has been long since disused, although the name is retained. Butl. Surv. 56.

"Some of the peculiar customs of Hereford are recently published, as that the reeve of the borough may have been directly accountable to the king," while "in most cases the king's farmer was the sheriff of the shire." Matl. Domesd. 209. So also, "at Hereford the reeve's consent was necessary when a burgage was to be sold, and he took a third of the price. When a burgess died the king got his horse and arms (these Hereford burgesses were fighting men); if he had no horse, then ten shillings" or his land with the houses." Any one who was too poor to do his service might abandon his tenement to the reeve without having to pay for it. Such an entry as this seems to tell us that the services were no trivial re-

turn for the tenements;" *id.* 199.

FORM. In Practice. The model of an instrument or legal proceeding, containing the substance and the principal terms, to be used in accordance with the laws.

The legal order or method of legal proceedings or construction of legal instruments.

Form is usually put in contradistinction to substance. For example, by the operation of the statute of 27 Eliz. c. 5, s. 1, all merely formal defects in pleading, except in dilatory pleas, are aided on general demurrer. The difference between matter of form and matter of substance, in general, under this statute, as laid down by Lord Hobart, C. J., is that "that without which the right doth sufficiently appear to the court is form;" but that any defect "by reason whereof the right appears not" is a defect in substance; Hob. 238. A distinction somewhat more definite is that if the matter pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but that if the fault is in the manner of alleging it, the defect is formal; Dougl. 683.

For example, the omission of a consideration in a declaration in assumpsit, or of the performance of a condition precedent, when such condition exists, of a conversion of property of the plaintiff in trover, of knowledge in the defendant, in an action for mischief done by his dog, of malice, in an action for malicious prosecution, and the like, are all defects in substance. On the other hand, duplicity, a negative pregnant, argumentative pleading, a special plea amounting to the general issue, omission of a day, when time is immaterial, of a place, in transitory actions, and the like, are only faults in form; Bacon, Abr. Pleas, etc. (N 5, 6); Comyns, Dig. Pleading (Q 7); 10 Co. 95 a; 2 Stra. 694; Gould, Pl. c. 9, § 17, 18; 1 Bla. Com. 142. The fact that at some time that fastidious objections against trifling errors of form, arising from mere clerical mistakes, are not encouraged or sanctioned by the courts, it has been justly observed that "infinite mischief has been produced by the facility of the courts in overlooking matters of form: it encourages carelessness, and places importance too much upon a footing with knowledge amongst those who practise the drawing of pleadings;" 1 B. & P. 50; 2 Binn. 434. See MATTER OF FORM.

FORMA. Form; the prescribed or established form or method of legal proceedings; applied to obsolete actions "which are frequently mere establishments, *Forma et figura judicii*," the form and shape of judicial action. 3 Bla. Com. 271.

A form prescribed by statute. According to Lord Coke, there are two manner of forms, verbal form; and legal form. The former stands upon the letters and syllables of the act; the latter stands upon the substance of the thing to be done, and upon the sense of the statute. Burrill; 10 Co. 100 a.

FORMA PAUPERIS. See IN FORMA PAUPERIS.

FORMALITIES. Customary behavior, dress, or ceremony; ceremonial. Cent. Dict. In England. Robes worn by the magistrates of a city or corporation, etc., on solemn occasions. Encyc. Lond.

Established orders or methods, rules of proceeding or expression. Opposed, to informalities. Anderson; 16 S. & R. *118.

FORMALITY. The conditions which must be observed in making contracts, and the words which the law gives to be used in order to render them valid; it also signifies the conditions which the law requires to make regular proceedings.

FORMATA. Canonical letters. Spelman.

FORMATA BREVIA. See BREVIA FORMATA.

FORMED ACTION. An action for which a form of words is provided which must be exactly followed. 10 Mod. 140.

FORMEDON. An ancient writ provided by stat. Westm. 2 (18 Edw. I.) c. 1, for him who hath right to lands or tenements by virtue of a gift in tail. Stearn, Real Act. 322; Andr. Steph. Pl. 66.

It is a writ in the nature of a writ of right, and is the highest remedy which a tenant in tail can have. Co. Litt. 316.

This writ lay for those interested in an estate-tail who were liable to be defeated of their right by a discontinuance of the estate-tail, who were not entitled to a writ of right absolute, since none but those who claimed in fee-simple were entitled to this; Fitzh. N. B. 255. It is called *formedon* because the plaintiff in it claimed *per formam doni*. It is of three sorts: 1. in the remainder; in

the reverter; in the descender; 2 Prest. Abstr. 343.

The writ was abolished in England by stat. 3 & 4 Will. IV. c. 27.

FORMEDON IN THE DESCENDER. A writ of formedon which lies where a gift is made in tail and the tenant in tail alienates the lands or is disseised of them and dies, for the heir in tail to recover them, against the actual tenant of the freehold; Fitzh. N. B. 211; Littleton § 595.

If the demandant claims the inheritance as an estate-tail which ought to come to him by descent, from some ancestor to whom it was first given, his remedy is by a writ of *formedon in the descender*; Stearn, Real Act. 322.

It must have been brought within twenty years from the death of the ancestor who was disseised; 21 Jac. I. c. 16; 3 Brod. & B. 217; 6 East 83; 4 Term 300; 2 Sharsw. Bla. Com. 193, n.

FORMEDON IN THE REMAINDER. A writ of formedon which lies where lands are given to one for life or in tail with remainder to another in fee or in tail, and he who had the particular estate dies without issue, and a stranger intrudes upon him in remainder and keeps him out of possession. Fitzh. N. B. 211; Stearn, Real Act. 323; Littleton § 597; 3 Bla. Com. 293.

FORMEDON IN THE REVERTER. A writ of formedon which lies where there is a gift in tail, and afterwards, by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns.

In this case the demandant must suggest the gift, his own right as derived from the donor, and the failure of heirs of the donee; 3 Bla. Com. 293; Stearn, Real Act. 323; Fitzh. N. B. 212; Littleton § 597.

FORMELLA. A certain weight of more than seventy pounds, mentioned in stat. 51 Hen. III. Cowel.

FORMER JEOPARDY. For a plea of "former jeopardy" to avail, it must appear that in each prosecution, the accused, the sovereignty whose laws have been violated, and the offenses not only as to the act but also as to the crime, are identical. 154 Ky. 150, 156 S. W. 1058.

The statute giving an appeal to the Commonwealth in penal actions and indictments for misdemeanors which subject the defendant to a fine only, and authorizing a new trial after the reversal of an acquittal in the trial court, is not in conflict with the constitutional provision that no person shall, for the same offense, be twice put in jeopardy for his life or limb. 146 Ky. 109, 142 S. W. 202.

FORMER RECOVERY. A recovery in a former action. The term former adjudication is sometimes, though infrequently, used.

It is a general rule that in a real or personal action a judgment unreversed, whether it be by confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or a like nature, for the same cause; Bacon, Abr. *Pleas* (1 12, n. 2); 6 Co. 7; Hob. 4, 5; Ventr. 70.

There are two exceptions to this general rule. First, in the case of mutual dealings between the parties, when the defendant omits to set off his counter-demand, he may recover in a cross action. Second, when the defendant in ejectment neglects to bring forward his title, he may avail himself of a new suit; 1 Johns. Cas. 492, 502, 510. It is evident that in these cases the cause of the second action is not the same as that of the first, and, therefore, a former recovery cannot be pleaded. In real actions, one is not a bar to an action of a higher nature; 6 Co. 7. See 12 Mass. 337; RES JUDICATA.

FORMER TRIAL. (Self-Incrimination.) Incriminating statements made by the defendant at former trials of the same criminal cause of action may be deemed voluntary and, if so, are competent. 2

Cham., Mod. L. Evid., 1995; 122 Mass. 455. The same rule obtains when the earlier case was a civil action and the later criminal. *Id.*; 33 Tex. Cr. 163. Speaking of the admissibility of former confessions made in the course of court proceedings the supreme judicial court of Massachusetts says, "It is immaterial when or where they were made." *Id.*; 122 Mass. 455. Should it happen that the original statement was clearly volunteered on a former trial by the present defendant, it is unquestionably competent against him on a subsequent trial. *Id.*; 35 So. 302.

FORMIDO PERICULI (Lat.). Fear of danger. 1 Kent, Com. 23.

FORMS OF ACTION. This term comprehends the various classes of personal action at common law, viz.: trespass, case, trover, detinue, replevin, covenant, debt, assumpsit, *scire facias*, and revivor, as well as the nearly obsolete actions of account and annuity, and the modern action of mandamus. They are now abolished in England by the Judicature Acts of 1873 and 1875, and in many of the states of the United States, where a uniform course of proceeding under codes of procedure has taken their place. But the principles regulating the distinctions between the common-law actions are still found applicable even where the technical forms are abolished.

FORMULA. In common-law practice, a set form of words used in judicial proceedings. In the civil law, an action. Calvin; Black.

These words are generally written, always consisting of the same parts, and expressed in precisely the same language, except where variation is necessary to accommodate it to a particular case. The writs, pleadings and records of the common law system of practice furnish the best examples of written formulae. Burrill.

In Civil Law. An action. *Id.*; Calv. Lex. See FORMULAE.

[FORMULAE]

In Roman Law. When the *legis actiones* were proved to be inconvenient, a mode of procedure called *per formulas* (i. e. by means of formulae) was gradually introduced, and eventually the *legis actiones* were abolished by the *Lex Aebutia*, B. C. 164, excepting in a very few exceptional matters. R. & L. Diet.

FORMULAE. In Roman Law. Directions sent by the magistrate to the judge for the dispositions of cases, with respect to which the *legis actiones* (established actions, or more accurately according to English legal idiom, forms of action) were inadequate. Sand. Just. Introd. lxviii.

The introduction of the *formulae* marked a distinct change in the Roman system of civil process, and they were in turn succeeded by an equally radical change. These periods have been designated as three great epochs. First, was the system of the *legis actiones*, defined as "certain hard, sharply defined forms which a rude civilization prescribed for all proceedings." These, as civilization advanced, were necessarily replaced by more convenient forms of action, and were finally practically suppressed. The new system of *formulae* was a very flexible form of organizing the proceedings adopted by the praetors, by which they were "enabled to give a means enforcing every right which the more enlarged views of an advancing civilization pronounced to be founded on equity." The praetors (in the provinces, praefects) sat as magistrates. From them the directions were sent to the judge in formal shape for each case; and the different forms in which these directions were given were expressed by the *formulae*. They were binding on the judge, but no form was binding on the magistrate, who could avail himself "of any equitable doctrine, which a more refined jurisprudence or his own sense of what was right suggested to him," and so "vary the *formula*, so as to

render substantial justice." "These *formulae* (which were preserved and collected), so flexible in their general character, yet couched in terms always precise and simple, furnish one of many admirable instances of the power of the Romans to express correctly the subtlest legal ideas; and it was by this machinery that the praetors principally introduced their great legal changes."

The *formula* ordinarily consisted of these three parts:

The *demonstratio* or statement of the fact or facts which the plaintiff alleges as the ground of his case.

The *intentio*, the really important part of the *formula*, a precise statement of the demand which the plaintiff made against (*tendebat in*) his adversary. It was necessary that it should exactly meet the law which would govern the facts alleged by the plaintiff if true.

The *condemnatio*, the direction to condemn or absolve according to the true circumstances of the case. In three actions, —to divide a family inheritance, or property held in common, or settle boundaries, the judge was required to adjudicate. This was termed the *adjudicatio*. In these actions, therefore, the parts of the *formula* would be four—*demonstratio*, *intentio*, *adjudicatio*, and *condemnatio*, in case, as might happen, the judge should order a payment in money by some of the parties to equalize the division; the *condemnatio*, under this system, being always pecuniary.

This system finally gave place to that which prevailed in the third period of the Roman system, "that of the *extraordinaria judicia*, by which, under the later emperors, the supreme authority took the whole conduct of the proceeding into its own hands, and arrived at what seemed to it to be just, in as direct and speedy a manner as it found possible. See a clear and satisfactory statement of the Roman system of civil process during these three periods; Sand. Just. Introd. lxi. See also Mackeld. Rom. Law § 204.

FORMULARIES. A collection of the forms of proceedings among the Franks and other early European nations. Co. Litt. Butler's note, 77.

FORNAGIUM. The fee taken by a lord of his tenants, bound to bake in his common oven, for liberty to use their own. Cowel; Moz. & W.

FORNICATION. In Criminal Law. Unlawful carnal knowledge by an unmarried person of another, whether the latter be married or unmarried.

Fornication is distinguished from adultery by the fact that the guilty person is not married. Four cases of unlawful intercourse may arise: where both parties are married; where the man only is married; where the woman only is married; where neither is married. In the first case such intercourse must be adultery; in the second case the crime is fornication only on the part of the woman, but adultery on the part of the man; in the third case it is adultery in the woman, and fornication (by statute in some states, adultery) in the man; in the last case it is fornication only in both parties.

In some states it is indictable by statute; 6 Vt. 311; 2 Tayl. C. 165; 2 Gratt. 555; and where it is there may be a conviction for this offence on an indictment for adultery; 2 Dall. 124; 4 Ired. 231; 1 Bish. Crim. L. 795. In Pennsylvania it is a misdemeanor for which an indictment lies, and is also a constituent of incest, adultery, seduction under promise of marriage, and rape; 149 Pa. 35.

FORNIX (Lat. a vault or arch). A brothel,—so-called because formerly situated in underground vaults. Fornication. *Fornix et cætera.* Fornication and the rest; fornication and bastardy (*qq. v.*).

FORNO. In Spanish Law. An oven. Las Partidas, pt. 3, t. 32. l. 18.

FORO. In Spanish Law. The place where tribunals hear and determine causes,—*eaecendendum litium locus*. This word, according to Varo, is derived from *ferendo*, and is so called because all lawsuits have reference to things that are vendible, which presupposes the administration of justice to take place in the markets.

FOROS. In Spanish Law. Emphyteutic rents. Schm. C. L. 309.

FORPRISE. An exception; reservation; excepted; reserved. Anciently, a term of frequent use in leases and conveyances. Cowel; Blount.

In another sense, the word is taken for any exaction. Cunningham, Law Dict.

FORSCHEL, or FORSCHET. A strip of land lying next to the highway. Cowel.

FORSES. Waterfalls. Cam. Brit.

FORSPEAKER. An attorney or advocate. One who speaks for another. Blount.

FORSPECA, FORSPEECA. Prolocutor; paranymphus. Anc. Inst. Eng.

FORSTAL. An intercepting or stopping in the highway. See **FORESTALL**.

Forstaller, forstall, forstallare, forstallment, forstaller, may all be found under **FORESTALL**, etc.

FORSWEAR. In Criminal Law. To swear to a falsehood.

This word has not the same meaning as perjury. It does not, *ex vi termini*, signify a false swearing before an officer or court having authority to administer an oath, on an issue. A man may be sworn by making a false oath before an incompetent tribunal, as well as before a lawful court. Hence, to say that a man is sworn will or will not be slander, as the circumstances show that the oath was or was not taken before a lawful authority; Heard, Lib. & S. §§ 16, 34; Cro. Car. 378; Bacon, Abr. Slander (B 3); Cro. Eliz. 609; 1 Johns. 505; 13 id. 48, 80; 12 Mass. 496; 1 Hayw. 116.

FORT. Something more than a mere military camp, post, or station; it implies a fortification or a place protected from attack by some such means as a moat, wall, or parapet. 12 Fed. Rep. 424.

FORTALICE, or FORTELACE. A fortress or place of strength which anciently did not pass without a special grant. 11 Hen. VII. c. 18. They were originally built for the defence of the country, either against foreign invasions, or civil commotions; and were anciently held to be *inter regalia*, corresponding with the Roman *res publicae*, such as navigable rivers, ports, ferries, and the like, but they now pass with the lands in every charter; Ersk. Pr. 165.

FORTALITUM. A fortalice (*q. v.*). Strictly, in old Scotch law, a fortified house or town, or one having a moat around it.

FORTAXED. Wrongly or extortionately taxed.

FORTHCOMING. In Scotch Law. The action by which an arrestment (attachment) of goods is made available to the creditor or holder.

The arrestee and common debtor are called up before the judge, to hear sentence given ordering the debt to be paid or the arrested goods to be given up to the creditor arresting. Bell, Dict.

FORTHCOMING BOND. A bond given for the security of the sheriff, conditioned to produce the property levied on when required. 2 Wash. Va. 189; 11 Gratt. 532; 61 Ga. 520; 87 id. 566.

The measure of damages for breach of a forthcoming bond would be the value of the property at the time the bond was given, provided that value did not exceed the amount of the execution, debt, interest, and costs; 91 Ga. 132. See **BOND**.

In attachment proceedings or in executions, a bond whereby the defendant may secure to himself possession of the property in question, pending the outcome of the litigation. It is conditioned for the delivery of the property in response to the judgment that may be obtained, or for the payment of the penalty of the bond. Known also as a delivery bond. 4 Elliott, Contracts, §§ 3528, 3529. Known as a claim property bond (*q. v.*) in replevin proceedings. Shinn, Replevin, § 419.1.

FORTHWITH. As soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term; it varies, of course, with every particular case; 4 Tyrwh. 337; Styles, Reg. 452; 75 Pa. 378. See 101 Ill. 621; 11 H. L. Cas. 337; 67 N. Y. 274; 58 Md. 261; 7 Ch. Div. 288; 9 Q. B. 684; 44 Ohio St. 437. When a defendant is ordered to plead forthwith, he must plead within twenty-four hours; Wharton. In other matters of practice, the word has come to have the same meaning; 3 Edw. 328. A demand for an account forthwith is not the same in substance and effect as a demand for an account within 15 days; 64 Vt. 300. Where a verdict was returned between noon and one P.M. on Saturday, while the justice was hearing other cases, an entry of judgment on the verdict on Monday was sufficient under a statute requiring it to be rendered "forthwith"; 56 Minn. 350. Where a chattel mortgage must "be forthwith deposited" to affect subsequent *bona fide* purchasers, the filing more than three months after execution was notice to purchasers who took title after the filing; 23 Tex. 338. A statute providing that an order to revive an action may be made forthwith, means at the first term after plaintiff's death; 22 S. W. Rep. (Ky.) 434. When an insurance policy required notice of loss to be given forthwith, it was sufficient twelve days after the fire when no harm was caused by delay; 50 Kan. 453.

FORTIA (Lat.). A word of art, signifying the furnishing a weapon of force to do the fact, and by force whereof the fact was committed, and he that furnished it was not present when the act was done. Co. 2d Inst. 182.

The general meaning of the word is an unlawful force. Spelman, Gloss.; Du Cange. *Fortia frisca*. Fresh force (*q. v.*).

FORTILITY. In Old English Law. A fortified place; a castle; a bulwark. Cowel; 11 Hen. VII. c. 18.

FORTIN. A little fort; a field fort. Enc. Dict.

FORTIOR (Lat.). Stronger. A term applied in the law of evidence to that species of presumption, arising from facts shown in evidence, which is strong enough to shift the burden of proof to the opposite party. Burr. Circ. Ev. 64.

FORTIORI. See **A FORTIORI**.

FORTIS (Lat.). Strong. *Fortis et sana*, strong and sound; staunch and strong; as a vessel. Townsh. Pl. 227.

FORTLETT. A place or port of some strength; a little fort. Old. Nat. Brev. 45.

FORTRET. A little fort; a fort.

FORTUIT (Fr.). Accidental; casual; fortuitous. *Cas fortuit*, a fortuitous event. *Fortuitum*, accidentally; by chance.

FORTUITOUS. Depending on or happening by chance; casual; not designed; adventitious. In Civil Law. Resulting from unavoidable causes.

FORTUITOUS COLLISION. An accidental collision.

FORTUITOUS EVENT. In Civil Law. That which happens by a cause which cannot be resisted.

That which neither of the parties has occasioned or could prevent. *Lois des Bât.* pt. 2, c. 2. An unforeseen event which cannot be prevented. Dict. de Jurisp. *Cas fortuit*.

There is a difference between a fortuitous event, or inevitable accident, and irresistible force. By the former, commonly called the act of God, is meant any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness. By the latter is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile army, or by public enemies. Story, Bailm. § 23; *Lois des Bât.* pt. 2, c. 2, § 1.

Fortuitous events are fortunate or unfortunate. The accident of finding a treasure is a fortuitous event of the first class. *Lois des Bât.* pt. 2, c. 2, § 2.

Involuntary obligations may arise in consequence of fortuitous events. For example, when to save a vessel from shipwreck, it is necessary to throw goods overboard, the loss must be borne in common; there arises, in this case, between the owners of the vessel and of the goods remaining on board, an obligation to bear proportionately the loss which has been sustained. *Lois des Bât.* pt. 2, c. 2, § 2. See **ACT OF GOD**.

FORTUNA (Lat.). Fortune; also treasure-trove. Jac.; Moz. & W.

FORTUNE-TELLER. One who pretends to be able to reveal future events; one who pretends to the knowledge of futurity.

It was a practice during the Middle Ages, and is still far from dying out, though laws for its suppression have been passed, and many fortune-tellers have been convicted and punished. Encyc. Dict.

An English statute provided that every person pretending or professing to tell fortunes should be deemed a rogue and a vagabond. It was held that no distinction could be drawn between professing to possess a power and pretending to exercise that power. 13 A. & E. Ency. 2nd ed., 1163; 16 Cox C. C. 173, 18 Q. B. Div. 478. It was held that one who professed to possess a power to foretell future events and who offered his services to the public in that capacity by advertising in the newspapers was subject to prosecution as a disorderly person for pretending to tell fortunes. *Id.*; 109 Mich. 493.

FORTUNUM. In Old English Law. A tournament or fighting with spears, and an appeal to fortune therein.

FORTY-DAYS-COURT. The court of attachments (*q. v.*) in the forests.

FORUM. At Common Law. A place. A place of jurisdiction. The place where a remedy is sought. Jurisdiction. A court of justice.

Forum actus. The forum of the place where an act was done.

Forum conscientie. The conscience.

Forum contentiosum. A court. 3 Bla. Com. 211.

Forum contractus. Place of making a contract. 2 Kent 463.

Forum domesticum. A domestic court. 1 W. Blackst. 82.

Forum domicilii. Place of domicil. 2 Kent 463.

Forum ecclesiasticum. An ecclesiastical court.

Forum ligeantie rei. The forum of the allegiance of the defendant.

Forum originis. The forum of birth.

Forum regium. The court of the king. Stat. Westm. 2, c. 43.

Forum rei. This expression is used alternatively for the forum of the defendant's domicil, in which case it is the genitive of *reus*, or the forum of the thing in controversy, when it is the genitive of *res*.

Forum rei gestæ. Place of transaction. 2 Kent 463.

Forum rei sitæ. The place where the thing is situated.

The tribunal which has authority to decide respecting something in dispute, located within its jurisdiction: therefore, if the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all matters of right and title on which it professes to decide, in relation to such property. And the same principle applies to all other cases of proceedings *in rem*, where the subject is movable property, within the jurisdiction of the court pronouncing judgment. Story, Conf. Laws § 532, 545, 551, 561, 562; Kalmes, Eq. b. 3, c. 8, § 4; 1 Greenl. Ev. § 541.

Forum seculare. A secular court.

In Roman Law. The paved open space in cities, particularly in Rome, where were held the solemn business assemblies of the people, the markets, the exchange (whence *cedere foro*, to retire from 'change, equivalent to "to become bankrupt"), and where the magistrates sat to transact the business of their office. It corresponded to the *ágora* of the Greeks. Dion. Hal. l. 3, p. 200. It came afterwards to mean any place where causes were tried, *locus exercenda-*

rum litium. Isidor. l. 18, Orig. A court of justice.

The obligation and the right of a person to have his case decided by a particular court.

It is often synonymous with that signification of *judicium* which corresponds to our word court (which see), in the sense of jurisdiction. *in foro interdicere*, l. 1, § 13, D. 1, 32; C. 8, § 4, D. 48, 19; *fori præscriptio*, l. 7, pr. D. 2, 8; l. 1, C. 3, 24; *forum rei accusator sequitur*, l. 5, pr. C. 3, 13. In this sense the *forum* of a person means both the obligation and the right of that person to have his case decided by a particular court. 6 Glük, Pand. § 237. What court should have cognizance of the cause depends, in general, upon the person of the defendant, or upon the person of some one connected with the defendant.

Jurisdictiones depending upon the person of the defendant. By modern writers upon the Roman law, this sort of jurisdiction is distinguished as that of common right, *forum commune*, and that of special privilege, *forum privilegiatum*.

(A.) *Forum commune*. The jurisdiction of common right was either general, *forum generale*, or special, *forum speciale*.

(a.) *Forum generale*. General jurisdiction was of two kinds, the *forum originis*, which was that of the birthplace of the party, and the *forum domicilii*, that of his domicile. The *forum originis* was either *commune* or *privilegium*. The former was that legal status which, as freeborn subjects of the empire, wherever residing, had at Rome when they were found there and had not the *jus recuandandi domum* (i. e., the right of one absent from his domicile of transferring to the *forum domicilii* temporary sojourns, l. 3, § 4, D. 5, 1, 1, 23, § 4, D. 4, 6; 3 Glük, Pand. 188. After the fall of the Roman citizenship was conferred by Caracalla upon all free-born subjects of the empire, the city of Rome was considered the common home of all, *omnium patria*, and every citizen, no matter where he resided, unless protected by special privilege, be sued at Rome without there present. Noodt, Com. ad Dig. 5, 1, p. 183; Hofacker, Pr. Jur. Civ. § 421. The *forum originis privum*, or *forum originis speciale*, was the court of that father was a citizen, though that might possibly be neither his own birthplace nor the actual domicile of his father. Except in particular places, as Delphi and Pontus, where the nativity of the mother conferred the privilege of citizenship upon her son, the birthplace of the father only was regarded. L. 1, § 1, D. 50, 1. The case of the *nullius filius* was also an exception. Such a person having no known father derived his *forum originis* from the birthplace of his mother. L. 9, D. 50, 1.

Adoption might confer a twofold citizenship, that of the natural and that of the adoptive father; l. 7, C. 8, 48; but the latter was lost by emancipation; l. 15, D. 50, 1. In general, the birthplace of the father alone fixed the *forum originis* of the son. Amaya, Com. ad Tit. Cod. de incolis, p. 21, sq. 99. The *forum originis* was unchangeable, and continued although the party had established his domicile in another place; consequently, he could always be sued in the court of that jurisdiction whenever he was there present; 6 Glük, Pand. p. 260.

Forum domicilii. The place of the domicile exercised the greatest influence over the rights of the party. (As to what constitutes domicile, see DOWELL.) In general, one was subject to the laws and courts of his domicile, unless specially privileged. L. 29, D. 50, 1. This privilege, *privilegium domicilii*, was *universale*, in the sense that all suits of whatever nature, real or personal, petitory or possessory, might be instituted in the courts of the defendant's domicile even when the thing in dispute was not situated within the jurisdiction of such court, and the defendant was not present at such place at the commencement of the suit; 6 Glük, Pand. 237 et seq. It seems, however, that as regarded real actions the *forum domicilii* was concurrent with the *forum rei sitæ*, id. 230, and, in general, was concurrent with special jurisdictions of all kinds; but in some exceptional cases the law conferred exclusive cognizance upon the special jurisdiction, *forum speciale*. In cases of concurrence the plaintiff had his election of the jurisdiction.

In another sense the *forum domicilii* was personal, as it did not necessarily descend to the heir of the defendant. See *Jurisdiction ex persona alterius*, at the end of this article.

Forum speciale, particular jurisdiction. These were very numerous. The more important are: (1.) *Forum continentis causarum*. Sometimes two or more actions or disputed questions are so connected that they cannot advantageously be tried separately, although in strictness they belong to different jurisdictions. In such cases the modern civil law permits them to be determined in a single court, although such court would be incompetent in regard to a portion of them taken singly. This beneficial rule was in the Roman law, though formerly supposed to be derived thence. See 11 Glük, Pand. § 760, and cases there cited.

(2.) *Forum contractus*, the court having cognizance of the action on a contract. If the place of performance was ascertained by the contract, the court of that place had exclusive jurisdiction of actions founded thereon; 6 Glük, Pand. 296. If the place of performance was uncertain, the court of the place where the contract was made might have jurisdiction, provided the defendant at the time of the institution of the suit was either present at that place or had attachable property there. Id. 298.

(3.) *Forum delicti, forum deprehensionis*, is the jurisdiction of the person of the defendant, and of the court of the place where the offence was committed, or that of the place where the criminal was arrested. The latter jurisdiction, *forum deprehensionis*, extended at most only to the preliminary examination of the person arrested; and even this was abolished by Justinian, Nov. lxxix. c. 1, xxxvii.

c. 5, on the ground that the examination as well as the punishment should take place on the spot where the crime was committed; 6 Glük, Pand. § 517.

(4.) *Forum rei sitæ* is the jurisdiction of the court of that place where is situated the thing which is the object of the action. Such court had jurisdiction over all actions affecting the possession of the thing, and over all real actions, as well as against the possessor in that character, and all such actions *in personam* so far as they were brought for the recovery of the thing itself. But such court had no jurisdiction of purely personal actions. Id. § 518.

Forum arresti is a jurisdiction unknown to the Roman law, but of frequent occurrence in the modern civil law. It is that over persons or things detained by a judicial order, and corresponds in some degree to the attachment of our practice. Id. § 519. *Gestæ administrationis*, the jurisdiction over the accounts and administration of guardians, agents, and all persons appointed to manage the affairs of third parties. The court which appointed such administrator, or wherein the cause was pending in which such appointment was made, or within whose territorial limits the business of the administration was transacted, had exclusive jurisdiction over all suits arising out of his acts or brought for the purpose of compelling him to account, or brought by him to recover compensation for his outlays; L. 1, C. 3, 21; 6 Glük, Pand. § 521.

Privileged jurisdictions, *forum privilegiatum*. In general, the privileged jurisdiction of a person held the same rank as the *forum domicilii*, and, like that, did not supplant the particular jurisdictions above named save in certain exceptional cases. The privilege was general in its nature, and applied to all cases not specially excepted, but it only arose when the person possessing it was sued by another; for he could not assert it in his own behalf, the plaintiff, the rule being, *actor sequitur forum rei*, the plaintiff must resort to the jurisdiction of the defendant. It was in general limited to personal actions; all real actions brought against the defendant in the character of possessor or the thing in dispute followed the *forum rei sitæ*. The privilege embraced the wife of the privileged person, his children, and the wife of the privileged person, and his children, as long as they were under his *potestas*. And lastly, when a *forum privilegiatum* purely personal conflicted with the *forum speciale*, the former must yield; 6 Glük, Pand. 339-341. To these rules some exceptions occur, which will be mentioned below.

Privileged persons were: 1. *Personæ miserabiles*, who were persons under the special protection of the law on account of some infirmity of age, sex, mind, or condition. These were entitled, whether as plaintiffs or defendants, to carry their causes directly before the emperor, and, passing over his interior courts, to demand a hearing before his supreme tribunal, whenever they had valid grounds for doubting the impartiality, or for alleging the crassification of the inferior courts, or for alleging the influence of a powerful adversary; 6 Glük, Pand. § 522. On the other hand, if their adversary, on any pretext whatever, had himself passed by the inferior courts, they were not bound to submit to this would be disadvantageous to them, but in order to avoid the increase of costs and other inconveniences, might decline answering except before their *forum domicilii*. The *personæ miserabiles* thus privileged were minor orphans, widows, whether rich or poor, persons afflicted by chronic disease or other forms of illness (*disturbatio morbo fatigati debiles*), which included paralytics, epileptics, the deaf, the dumb, and the blind, etc., persons impoverished by calamity or otherwise distressed, and the poor when their adversary was rich and powerful, *pauperes in causa potentium perhorrescent*. This privilege was, however, not available, when both parties were *personæ miserabiles*; when it had been waived either expressly or tacitly; when the party had become *persona miserabilis* since the institution of the action, except always the case of reasonable suspicion in regard to the impartiality of the judge; when the party had become *persona miserabilis* through his own crime or fault; when the cause was trivial, or belonged to the class of unconditionally privileged cases having an exclusive *forum*; and when the cause of action was a right acquired from a *persona non miserabilis*. 6 Glük, Pand. § 522.

Clerici, the clergy. The privilege of clerical persons to be impleaded only in the episcopal courts commenced under the Christian emperors. Justinian enlarged the jurisdiction of these courts, not only by giving them exclusive cognizance of affairs and offences purely ecclesiastical, but also by constituting them the ordinary courts for the trial of suits brought against the clergy even for temporal causes of action. Nov. 83, Nov. 123, cap. 8, 21, 22, 23. The causes of action cognizable in the *forum ecclesiasticum* were—1. *causæ ecclesiasticæ* *mere tales*, purely ecclesiastical, i. e., those pertaining to doctrine, church service, and ceremonies, and right to membership; those relating to the synodal assemblies and church discipline; those relating to offices and dignities and to the election, ordination, translation, and deposition of pastors and other officers of the church, and especially those relating to the consecration of marriages and to divorce; or, 2. *causæ ecclesiasticæ* *mixtæ*, mixed causes, i. e., disputes in regard to church lands, tithes, and other revenues, their management and disbursement, and legacies to pious uses, in regard to the boundaries of ecclesiastical jurisdictions, in regard to patronage and advowsons, in regard to burials and to consecrated places, as graveyards, convents, etc., and, lastly, in regard to offences against the canons of the church, as simony, etc. But the privilege here treated of was the *personal* privilege of the clergy when defendant in a suit to which the plaintiff, the *actor*, *sequitur forum rei* prevailed. All persons employed in the church service in an official capacity, even though not in holy orders, were thus privileged. But the privilege did not embrace real actions, nor personal actions brought to recover the possession of a thing: these must be instituted in the *forum rei sitæ*. The ju-

risdiction extended to all personal actions, criminal as well as civil; although in criminal actions the ecclesiastical courts had no authority to inflict corporal or capital punishment, being restricted to the canonical judgments of deprivation, degradation, excommunication, etc. 6 Glük, Pand. § 523. *Academici*. In the modern civil law the officers and students of the universities are privileged to be sued before the university courts. This species of privilege was unknown to the Roman law. See 6 Glük, Pand. § 524.

Militæ. Soldiers had special military courts as well as civil as criminal cases. In civil matters, however, the *forum militare* had preference only over the courts of the place where the soldier defendant was stationed; as he did not forfeit his domicile by absence on military duty, he might always be sued for debt in the ordinary *forum domicilii*, provided he had left there a procurator to transact his business for him, or had property there which might be proceeded against. L. 3, C. 2, 51; l. 6, *eadem*; l. 4, C. 7, 53. Besides this, the privilege of the *forum militare* did not extend to such soldiers as carried on a trade or profession in addition to their military service and, in a case growing out of such trade, although in other respects they were subject to the military tribunal. L. 7, C. 8, 13. If after an action had been commenced the defendant became a soldier, the privilege did not attach; but the suit must be concluded before the court which had acquired jurisdiction of it. The *forum militare* had cognizance of personal actions only. Actions arising out of real rights could be instituted only in the *forum rei sitæ*. In the Roman law, ordinary crimes of soldiers were cognizable in the *forum delicti*. The modern civil law is otherwise. 6 Glük, Pand. 418, 421.

There are many classes of persons who are privileged in respect to jurisdiction under the modern civil law who were not so privileged by the Roman law. Such are officers of the court of the sovereign, ministers of state and councillors, ambassadors, noblemen, etc. These do not require extended notice.

Jurisdiction ex persona alterius. A person might be entitled to be sued in a particular court on grounds depending upon the person of another. Such was—1. *The Wife*, who, if the marriage had been legally contracted, acquired the *forum* of her husband; l. 65, D. 5, 1; l. ult. D. 50, 1, 1, 19, D. 2, 1; and retained it until her second marriage; l. 2, § 1, D. 50, 1; or change of domicile; § 93, Voet. Com. ad D. 5, 1. 2. *Servants*, who possessed the jurisdiction of their master as regarded the *forum domicilii*, and also the *forum privilegiatum*, so far at least as the privilege was that of the master, in which such master belonged and was not purely personal. 6 Glük, Pand. § 510 b. 3. *The heres*, who in many cases retained the jurisdiction of his testator. A suit sued in the character of heir in respect to causes of action which suit had been commenced before the testator's death, the heir must submit to the *forum* which had acquired cognizance of the suit; l. 1, § 30, D. 5, 1. When the cause of action accrued, but the action was not commenced, in the lifetime of the testator, the heir must submit to general jurisdiction, *forum originis*, or the privileged jurisdiction, *forum privilegiatum*, of his testator; though the weight of the authorities is on the side of the negative; Glük, Pand. § 550 b. If the cause of action arose after the death of the testator, as in the case of the *querela inofficiosa*, of partition, of suits to recover a legacy or to enforce a testamentary trust, the heir must be pursued in his own jurisdiction, i. e., the *forum domicilii* or *forum rei sitæ*; 6 Glük, Pand. § 550 a. Authorities there cited. And, a fortiori, if the action against the heir was not in that character, but merely in the capacity of possessor of the thing in dispute, the suit must be brought before the *forum* to which he was himself subject; id. p. 251.

FORUTH. A long slip of ground. Cowell.

FORWARDING MERCHANT. A person who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight.

Such a one is not deemed a common carrier, but a mere warehouseman or agent; 12 Johns. 232; 7 Cow. 497; see 15 Minn. 270; 2 Wheel. Abr. 142; nor is he an insurer; 27 Cal. 11. He is required to use only ordinary diligence in sending the property by responsible persons; 2 Cow. 593; 6 Allen 254; 64 N. Y. 800. See Story, Bailm. § 502; Ang. Car. § 75; 2 Wend. 594; COMMON CARRIERS.

FOSSA (Lat.). In English Law. A ditch full of water, where formerly women who had committed a felony were drowned; the grave. Cowell. See FURCA.

FOSSAGE, FOSSAGIUM. In Old English Law. A composition paid in lieu of the duty of cleaning out and repairing the moat surrounding a fortified town. A duty or tax paid for that work.

FOSSATORIUM OPERATIO (Lat.). The service of laboring done by the inhabitants and adjoining tenants, for repair and maintenance of the ditches round a city or town. A contribution in lieu of such work, called *fossagium*, was sometimes paid. Kennett; Cowel.

FOSSATUM. A canal; a moat; a place inclosed by a ditch; a trench.

Also it is taken for the obligations of citizens to repair the city ditches. The work or services done by tenants, etc. for repairing and maintenance of ditches is called *fossatorium operatio*; and the contribution for it *fossagium* (q. v.). Jacob; Kennet's Gloss.

FOSELUM. A small ditch. Cowel.

FOSSWAY, or FOSSE. One of the four great roads of England built by the Romans; so called from the ditch on each side.

Trevisa describes it thus: "The first and greatest of the four weyes is called *fosse*, and stretches out of the south into the north, and begynneth from the corner of Cornewalle, and passeth forth by Devenshyre by Somersete, and forth besides Tetbury, upon Cotteswold, besides Coventre, unto Leyster; and so forth, by wyldes playnes towards Newerke, and endeth at Lincoln" (Polychron. l. 1, c. xiv.). Wharton.

FOSTER-LAND. Land given for finding food for any person, as for monks in a monastery. Cowel.

FOSTER-LOAN (Sax.). A nuptial gift; the jointure for the maintenance of a wife. Toml.

FOSTER-SHIP. Forester-ship.

FOSTERING. An ancient custom in Ireland, in which persons put away their children to fosterers. Fostering was held to be a stronger alliance than blood, and the foster children participated in the fortunes of their foster fathers. Hallam's Const. Hist. ch. 18; Moz. & W.

FOSTERLEAN. The remuneration paid for the rearing or fostering of a child. The jointure of a wife. Jacob; Encyc. Dict.

FOUND. A person is said to be found within a state when actually present therein, but as applied to a corporation it is necessary that it is doing business in such state through an officer or agent or by statutory authority in such manner as to render it liable then to suit and to constructive or substituted service of process. See 55 Fed. Rep. 751; FOREIGN CORPORATION; SERVICE; NON EST INVENTUS.

If the legislature of a state requires a foreign corporation to consent to be "found" within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the state, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent. 96 U. S. 377. For the purpose of securing business a corporation may consent to be "found" away from home, for the purposes of suit as to matters growing out of its transactions. *Id.*

"Find" and "found" said of a defendant as to whom a summons or other process has been issued, have a technical meaning, the equivalent of the Latin *inventus*, come upon, met. Anderson; 42 N. Y. Supr. Ct. 172.

Opposed, "not found"; *non est inventus*, he has not been found; abbreviated *n. e. i.* "Not found" is an abridged form of return which usage sanctions. It imports that the defendant was not found within the meaning of the precept, that is, after proper effort to find him in the due execution of the precept. *Id.*; 10 Bened. 95. See RESIDES or IS FOUND.

FOUND WITHIN THE DISTRICT. In Jud. Code, § 50: Words confined to cases in which the action is brought in the district of the plaintiff's residence. 250 U. S. 313.

FOUNDATION. The establishment of

a charity. That upon which a charity is founded and by which it is supported.

This word, in the English law, is taken in two senses, *fundatio incipientis*, and *fundatio perficiens*. As to its political capacity, an act of incorporation is metaphorically called its foundation; but as to its dotation, the first gift of revenues is called the foundation. 10 Co. 23 a.

FOUNDER. One who endows an institution. One who makes a gift of revenues to a corporation. 10 Co. 83; 1 Bla. Com. 481.

In England, the king is said to be the founder of all civil corporations; and where there is an act of incorporation, he is called the general founder, and he who endows is called the perficient founder. 1 Bla. Com. 481.

FOUNDERS' SHARES. In English Company Law. Shares issued to the founders of (or vendors to) a public company as a part of the consideration for the business, or concession, etc., taken over, and not forming a part of the ordinary capital. As a rule, such shares only participate in profits after the payment of a fixed minimum dividend on paid-up capital. Encyc. Dict.

FOUNDERS' STOCK. See STOCK.

FOUNDEROSUS. Out of repair. Cro. Car. 366.

FOUNDLING. A new-born child abandoned by its parents, who are unknown. The settlement of such a child is in the place where found. *Foundling hospitals* are charitable institutions which exist in many countries for the care of such children. In England they are regulated by stat. 13 Geo. II. c. 29. See Int. Cyc. h. t.

FOUNDRY. Works for the casting of metals, without regard to whether they are cast for agricultural and mechanical, or other purposes. 44 La. Ann. 793.

FOUE (Fr.). An oven; kiln; bake-house. *Four banal* (banal of a manner; common), an oven owned by the proprietor of the estate, to which the tenants were obliged to bring their bread for baking. Also the proprietary right to maintain such an oven.

FOUR CORNERS. The four corners of an instrument means that which is contained on the face of it (without any aid from the knowledge of the circumstances under which it was made). This is said to be within its four corners, because every deed is still supposed to be written on one entire skin, and so to have but four corners. Wharton.

To look at the four corners of an instrument is to examine the whole of it, so as to construe it as a whole, without reference to any one part more than another. Burrill; 2 Smith's Lead. Cas. 295.

FOUR SEAS. The seas surrounding England. These were divided into the Western, including the Scotch and Irish; The Northern, or North Sea; The Eastern, being the German Ocean; The Southern, being the British Channel. Selden, Mare Clausum, lib. 2, c. 1.

Within the four seas means within the jurisdiction of England; 4 Co. 125; Co. 2d Inst. 252. See LIMITATION.

FOURCHER (Fr. to fork), or **FOURCH**. In English Law. A method of delaying an action formerly practised by defendants.

When an action was brought against two, who, being jointly concerned, were not bound to answer till both appeared, and they agreed not to appear both in one day, and the appearance of one excused the other's default, who had a day given him to appear with the other: the defaulter, on the day appointed, appeared; but the first then made default: in this manner they forked each other, and practised this for delay. See Co. 2d Inst. 250; Booth, Real Act. 16.

FOURIERISM. A social system invented by Charles Fourier, characterized by Mill as "the most skilfully combined and with the greatest foresight of objections, of all forms of socialism." Pol. Econ. II. 14, which see and also Int. Cyc. for fuller accounts of the system, and Cent. Dict. and Encyc. Dict. for briefer ones.

FOURTEENTH AMENDMENT.

That amendment to the United States Constitution which provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Brannon, XIV Am. 7. See EQUAL PROTECTION OF THE LAWS; CLASSIFICATION IN STATUTES.

FOURTH-CLASS MATTER. See MATTER.

FOUTGELD. See FOOTGELD.

FOWLS OF WARREN. Such fowls as are preserved under the game-laws in warrens. According to Manwood, these are partridges and pheasants. According to Coke, they are either *campestris*, as partridges, rails, and quails, *sylvestres*, as woodcocks and pheasants, or *aquaticæ*, as mallards and herons. Co. Litt. 233.

FOX'S LIBEL ACT. An act passed in England in 1792, which provided that in prosecutions for libel, the jury might give a general verdict of guilty or not guilty upon the whole matter put at issue upon the indictment, and should not be required by the court to find the defendant guilty merely upon proof of the publication of the alleged libel, in the sense ascribed to it in the indictment.

FOY (L. Fr.). Faith; allegiance; fidelity.

FRACTION, FRACTIO. The act of breaking, or the state of being broken, especially by violence; a breaking or fracture. A fragment; a separated portion; a disconnected part. Cent. Dict.

FRACTION OF A DAY. A portion of a day. The dividing a day. Generally, the law does not allow the fraction of a day, and the day on which an act is done must therefore be either entirely included or excluded; 2 Bla. Com. 141; 25 Fla. 371; 11 Mass. 204; 44 Pa. 240; 20 Vt. 653; and, therefore, judgments entered on the same day are regarded as entered at the same time, and create liens equal in point of priority; 4 McLean 555; 8 W. & S. 304; but this is merely a legal fiction, which does not apply where it is necessary to distinguish between the two parts of a day; 3 Burr. 1844; 11 H. L. Cas. 411; and, therefore, it has been said that there is no such general rule of law; but that common sense and common justice sustain the propriety of considering fractions of a day whenever it will promote the purposes of substantial justice; 2 Stor. 571; 100 U. S. 689; 104 *id.* 474; 37 Ill. 239; 3 La. Ann. 430; 60 Me. 58; 16 Ohio 111; thus, the bankrupt act of 1841 was repealed by the act of March 3, 1843, which was not signed by the president till the evening of that day; proceedings in bankruptcy begun on the morning of that day were held to have been begun before the passage of the act; *id.*; tobacco stamped, sold, and removed in the morning of March 3, 1875, was not considered subject to an increased tax-rate imposed by the act of that date, which was not signed by the president until a later hour of that day; 97 U. S. 381; where a township voted aid bonds on the morning of an election day in Illinois, at which a constitutional provision was adopted forbidding the issuing of such bonds, the court found as a fact that the township vote was had before the adoption

of the constitution, and, therefore, sustained the validity of the bonds; 104 U. S. 469. Although the law does not generally consider fractions of a day, yet when substantial justice requires it, courts may ascertain the precise time when a statute is approved or an act done; 147 U. S. 640. In 97 U. S. 170, the court held that the president's proclamation of June 13, 1865, removing restrictions upon trade, etc., took effect as of the beginning of that day and refused to consider the fraction of a day. In computing the time for the performance of official duties, each fraction of a day is to be considered as a full day; 12 Colo. 285. See *FORM*; *FULL AGE*; *TIME*; *DAY*.

FRACTITUM. Arable land. *Toml.*; *Moz.* & *W.*

FRACTURA NAVIUM. Breaking up of ships or wreck of shipping at sea. Very like *naufraque* (q. v.).

FRAIS (Fr.). Costs; charges; expenses.

FRAIS DE JUSTICE. Costs incurred incidentally to the action. See 1 *Tropolong*, 135, n. 122; 4 *Low. C.* 77. *Frais d'un procès.* Costs of a suit.

FRAIS JUSQU'A BORD (Fr.). In *French Commercial Law.* Expenses up to the time that goods are actually shipped on board of a vessel, including such items as packing, portage, or cartage, commissions, etc. 16 *Fed. Rep.* 386. A shipment on which the seller pays the *frais jusqu'a bord*, would correspond to a sale of the goods "free on board" (q. v.).

Expenses to the board (vessel); free on board. See *F. O. B.*

FRANC. A French coin, of the value of about twenty cents.

FRANC ALEU. In *French Law.* An absolutely free inheritance. Allodial lands. Generally, however, the word denotes an inheritance free from seigniorial rights, though held subject to the sovereign. *Dumoulin, Cout. de Par.* §1; *Guyot, Rép. Univ.*; 8 *Kent* 498, n.; 8 *Low. C.* 95.

FRANC TENANCIER. In *French Law.* A freeholder.

FRANCHILANUS. A freeman. *Chart. Hen. IV.* A free tenant. *Spel. Glos.*

FRANCHISE. A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right. *Ang. & A. Corp.* §4; 4 *Neb.* 416, 420.

A certain privilege conferred by grant from government and vested in individuals. 3 *Kent* 458.

A royal privilege or branch of the king's prerogative subsisting in the hands of a subject. *Finch i.* 164; 2 *Bla. Com.* 37; 8 *Cruise, Dig.* 278; 13 *Pet.* 595; 36 *W. Va.* 802.

A very recent writer, who finds in the history of early English tenures a universality of oppressive services which literally made life a burden to the average land-holder, considers the first use of the terms "liberty" and "franchise" to be an expression of the relief of the possessor from some part of this burden. He says: "Lastly in our thirteenth century we learn that privileges and exceptional immunities are 'liberties' and 'franchises.' What is our definition of a liberty, a franchise? A portion of royal power in the hands of a subject. In Henry III.'s day we do not say that the Earl of Chester is a free man, more of a *liber homo*, than is the Earl of Gloucester, but we do say that he has more, greater, higher liberties." *Maitl. Domest.* 43.

The right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter. 122 *Ill.* 293.

"The word franchise is generally used to designate a right or privilege conferred by law. What is called 'the franchise of forming a corporation,' is really but an exemption from the general rule of the common law prohibiting the formation of corporations. All persons in this state have now the right of forming corporate associations upon complying with the simple formalities prescribed by the statute. The right of forming a corporation, and of acting in a corporate capacity under the general incorporation laws, can be called a

franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed is a franchise. *Horton, C. J.*, in 40 *Kan.* 96.

It is a privilege emanating from the sovereign power of the state, owing its existence to a grant or, as at common law, to prescription, which presupposes a grant, and vested in individuals or a body politic something not belonging to the citizen of common right. 142 *Ill.* 494.

Commenting on Blackstone's definition, Thompson says: "It has been well observed that, under our American systems of government and laws, this definition is not strictly correct; since our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit as well as of individual advantage." 4 *Thomp. Corp.* § 5335.

In a popular sense, the word seems to be synonymous with right or privilege: as, the elective franchise.

There are two franchises, distinct in their nature, and yet governed by substantially the same rules as to grant and exercise, which may be enjoyed by a corporation. One is the franchise of being or existing as a corporation, that is, possessing a unity and perpetuity of existence, though composed of an aggregate of changing members; the other is the exercise of rights, like the right of eminent domain or the partial appropriation of public property by exclusive use, as in ferries. Either of these franchises is a branch of sovereignty. 1 *Bouv. Inst.* 1690.

A franchise to be a corporation, however, is distinct from a franchise as a corporation to maintain and operate a railway; the latter may be mortgaged, without the former, and pass to a purchaser at a foreclosure sale; 112 *U. S.* 609.

The grant of letters patent for an invention is a franchise; (1891) 2 *Q. B.* 235; and so is a charter of incorporation from the state; 36 *W. Va.* 802.

To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant; 40 *Minn.* 213; 38 *id.* 366.

In a case already cited it is said that a franchise, or the right to be and act as an artificial body, is vested in the individuals who compose the corporation, and not in the corporation itself; 122 *Ill.* 293. "But this," it is said, "is an imperfect statement of the true conclusion,—which is, that a primary franchise, that is to say, the franchise of being a corporation, vests in the individuals who compose the corporation; while those secondary franchises which are vendible by the corporation, necessarily, and for that reason alone, must be deemed to vest in the corporation. However, judicial theory is so confused on the subject, that proceedings by information in the nature of a *quo warranto*, to vacate the franchises of corporations, are sometimes brought against the individuals who compose the corporation, and sometimes against the corporation itself." 4 *Thomp. Corp.* § 5337.

Franchises are only grantable by the sovereign power, and in the United States they are usually held by the corporations created for the purpose, and can be held only under legislative grant; 15 *Pick.* 243; 73 *Ill.* 541; 13 *Pet.* 519; 15 *Johns.* 353; and may be incorporated with such conditions as its legislature may judge most befitting to its interest and policy; 134 *U. S.* 594; 143 *id.* 805.

The state is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchise, is contrary to a sound

public policy; 71 *Fed. Rep.* 787.

The grant of a franchise by the legislature is a contract and cannot be resumed by the state or its benefits impaired or diminished without the consent of the parties; 4 *Wheat.* 519; 8 *Wall.* 51; 8 *Kent Com.* 458; it is within the protection of that clause of the constitution of the United States which forbids the states from impairing the obligation of contracts; 10 *Wall.* 511; 9 *Yerg.* 490; 30 *Ark.* 123, 693; 97 *U. S.* 454; but this does not apply to mere personal privileges to members of a corporation, such as the exemption of a servant of such body from militia duty, or serving on juries, etc.; 4 *Lea* 316; such an exemption was held in this case unconstitutional; *contra*, 88 *Ala.* 176, where such an exemption was held part of the franchise granted to the corporation; and it may become a vested right which cannot be taken away by subsequent legislation; 67 *Mo.* 637 (overruling 5 *Mo. App.* 220). See *IMPAIRING THE OBLIGATION OF CONTRACTS*.

By the constitution or laws of many of the states, charters can only be granted subject to amendment or repeal. As to the power of the legislature in such cases, see 109 *Mass.* 103; 63 *Me.* 269; 41 *Iowa* 297; *Beach, Pub. Corp.* 63; 146 *U. S.* 253; but municipal franchises are entirely under the control of the legislature; *Cooley, Const. Lim.* 336; 10 *How.* 402; 94 *U. S.* 113; 128 *id.* 174.

The grant of a franchise is construed strictly and in case of doubt most favorably to the public; 130 *U. S.* 1; 11 *Conn.* 185; 80 *Me.* 544; 25 *Cal.* 283; 69 *Tex.* 306; 9 *Ga.* 475; 127 *Ind.* 369; and in the absence of doubt the obvious meaning of the words is to be followed; 34 *Fed. Rep.* 579; 79 *Ala.* 465; such a grant is not held to be exclusive unless from its nature a presumption arises that it was intended; 11 *Pet.* 420; 2 *Port.* 296; 21 *Vt.* 590; 127 *Ind.* 369; 17 *Conn.* 40, 454; 6 *Paige* 554; nor is a proviso to be so interpreted as to defeat the grant; 87 *Pa.* 34; 27 *id.* 803; 46 *id.* 112.

Franchises are held subject to the exercise of the right of eminent domain, which see for a discussion of this branch of the subject. See also 2 *Gray* 1, 35; 4 *id.* 474; 23 *Pick.* 360; 66 *Pa.* 41; 5 *Johns.* Ch. 101; 13 *How.* 71; 105 *U. S.* 13; 148 *id.* 312.

They are also said to be liable for the debts of the owner; 2 *Washb. R. P.* 24; but it is the general rule that they cannot be levied upon and sold under execution without authority or statute; 34 *La. Ann.* 1235; 40 *Mo.* 140; 9 *Sm. & M.* 394; 10 *Lea* 488; though it may be otherwise provided by statute; 70 *Pa.* 355. See 111 *N. C.* 615; 98 *Cal.* 311. See also to levy on franchises, 4 *Am. & Eng. Corp. Cas.* 138; 15 *Am. Dec.* 595.

As a general rule franchises cannot be sold or assigned without the consent of the legislature; *Moraw. Priv. Corp.* 390; 65 *Pa.* 278; 40 *Me.* 140; 27 *N. J. Eq.* 557. The primary franchise to be a corporation, and such others as involve the performance of public duties are inalienable; 10 *Allen* 448, 459; 11 *id.* 65; 32 *N. H.* 484; 56 *Pa.* 413; 46 *Md.* 1; 21 *How.* 441; 4 *Biss.* 35; 71 *Tex.* 274; 11 *C. B.* 775; 17 *How.* 30; 83 *Va.* 707; 84 *id.* 648; 101 *U. S.* 71.

The secondary franchises of a quasi-public corporation cannot be aliened without legislative authority; *id.* 130 *id.* 1; 139 *id.* 24; 6 *H. L. Cas.* 113; 1 *McCrary* 541; 3 *Fed. Rep.* 417, 423, 430. The same principles apply to a mortgage or lease of a franchise, see cases cited, and also, 24 *N. J. Eq.* 455; 115 *Mass.* 347; 101 *U. S.* 71; 8 *Phila.* 94. The power to sell includes the power to mortgage; 119 *U. S.* 191.

The franchises which pass by a judicial sale of a railroad and franchises are those which are essential to the operation of the corporation but do not include such special privileges as an exemption from taxation; 93 *U. S.* 217. A corporation having public duties cannot transfer a portion of them; 50 *Ind.* 85; but the attempt to divide the franchise only concerns the public and cannot be objected to by a rival company; 45 *Cal.* 365.

An irrigation company may make a valid conveyance of all its property and right of

way; 40 Kan. 96; 38 Cal. 300. See, generally, as to the sale of franchises, 4 Thomp. Corp. ch. cxvi.; as to their constitutional protection see the **IMPAIRING OF OBLIGATION OF CONTRACTS**; as to their control and regulation by the state, see **POLICE POWER**; and 12 Cent. L. J. 194; as to the regulation of tolls and charges, see **RATES**; and as to their taxation, see that title, and 17 L. R. A. 92; as to conflicting franchises, see 4 Am. L. Mag. 71.

The remedy for a non-user or misuser of a franchise by a corporation duly created and organized is by *quo warranto* or *scire facias*, which titles see. A court of equity will not in such case interfere or declare the franchise to be forfeited; 1 N. J. Eq. 369; 2 Johns. Ch. 371; but see 4 Thomp. Corp. § 4588. Where a franchise is asserted in a proceeding to claim a right under it, its existence may be denied by way of defence; 47 Ohio St. 1. But a franchise set up by a corporation in defence if it is in *de facto* possession of it cannot be disputed except by a person or corporation, who in the proceeding claims a better title; 64 Cal. 69. See also as to *quo warranto* for misuser, 30 Am. Dec. 48; and as to compulsory exercise of franchises, 15 L. R. A. 321.

See, generally, Thompson, Corporations, title 19; 18 Myer, Fed. Dec. 866; Foote & Everett, Incorporated Companies Operating under Municipal Franchises; **FORFEITURE**; **DISSOLUTION**.

Corporate. The right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. A right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. 134 U. S. 599. See **FRANCHISE**.

Elective. The right or privilege of voting for public officers in an election; by the right of suffrage. **Stand. Dict.**

Of a Railroad Corporation. Rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, etc. They are positive rights and privileges, and may be conveyed to a purchaser of the road as part of the property of the company. Immunity from taxation is not one of them, and is personal, and incapable of transfer without express statutory direction. 93 U. S. 223.

FRANCHISE COURTS. One of the four main types of local courts distinguishable in England by the end of Edward I.'s reign. (See **FUDAL COURTS**.) They were courts held by private persons by virtue of some franchise granted by the crown. The *quo warranto* enquiries of Edward I.'s reign resulted in laying down the principle that these franchises can exist only by virtue of royal grant or by prescription. 1 Holdsw. Hist. E. L. 3rd ed., 64, 87 *et seq.* See **FUDAL COURTS**; **COMMUNAL COURTS**; **MANORIAL COURTS**.

FRANCHISE TAX. A "franchise tax" is a property tax on tangible property and is not a privilege tax. 135 Ky. 324, 122 S. W. 164.

FRANCIA. France. **Bract.** fol. 427 q.

FRANCIGENA. A designation formerly given to aliens in England.

FRANCUS. Free; a freeman; a Frank. **Spel. Glos.**

Francus bancus. Free bench (q. v.).

Francus homo. A freeman.

Francus plegius. Frank pledge (q. v.)

Francus tenens. A freeholder. See **ESTATE OF FREEHOLD**.

FRANK. In Old English Law. Free. Usually employed in compounds, as *frank-bank*, free bench (q. v.).

To send letters and other mail matter free of postage. See **FRANKING PRIVILEGE**.

Members of Parliament, peers, etc., had the privilege of franking their letters, which has been abolished since the introduction of the penny postage. Wharton; 3 & 4 Vict., c. 96.

Also a French gold coin, worth twenty sols, which is a livre, about 10½ d. English money. **Tomlin.**

FRANKALMOIGNE. A species of ancient tenure, still extant in England, whereby a religious corporation, aggregate or sole, holds its lands of the donor, in consideration of the religious services it performs.

The services rendered being divine, the tenants are not bound to take an oath of fealty to a superior lord. A tenant in frankalmoigne is not only exempt from all temporal service, but the lord of whom he holds is also bound to acquit him of every service and fruit of tenure which the lord paramount may demand of the land held by this tenure. The services to be performed are either spiritual, as prayers to God, or temporal, as the distribution of alms to the poor. Of this latter class is the office of the queen's almoner, which is usually bestowed upon the Archbishop of York, with the title of Lord High Almoner. The spiritual services which were due before the Reformation are described by Littleton § 135; since that time they have been regulated by the liturgy or Book of Common Prayer of the Church of England; Co. 2d Inst. 502; Co. Litt. 93, 494 a. **Hargr. ed.** note (b); 2 Bla. Com. 101.

In the United States, religious corporations hold land by the same tenure with which all other corporations and individuals hold. Our religious corporations are generally restricted to the holding of whatever quantity of land is required for the immediate purposes of their incorporation; sometimes, as in Pennsylvania, the maximum value of the lands is fixed by statute. Subject to this restriction, they have a fee-simple estate in their lands for the purpose of alienation, but only a determinable fee for the purpose of enjoyment. On a dissolution of the corporation, the fee will revert to the original grantor and his heirs; but such grantor will be forever excluded by an alienation in fee; and in that way the corporation may defeat the possibility of a reverter; 2 Kent 281; 2 Prest. Est. 50. And see 3 Binn. 626; 1 Watts 218; 3 Pick. 232; 12 Mass. 587; 8 Dana 114.

FRANK-CHASE. A liberty or right of free chase. **Cowel.**

FRANK-FEE. Lands not held in ancient demesne. Called "lands pleable at common law." **Reg. Orig.** 12, 14; **Fitzh. N. B.** 161; **Termes de la Ley.**

That which a man holds to himself and his heirs and not by such service as is required in ancient demesne, according to the custom of the manor. The opposite of copyhold. **Cowel.** A fine had in the king's court might convert demesne-lands into frank-fee; 2 Bla. Com. 368.

FRANK-FERME. Lands or tenements where the nature of the fee is changed by *feoffment* from knight's service to yearly service and whence no homage but such as is contained in the feoffment may be demanded. **Britton**, c. 66, n. 3; **Cowel**; 2 Bla. Com. 80.

FRANK-FOLD. The right of the lord to fold his tenant's sheep for manuring the land. **Termes de la Ley**; **Cowel**; **Keilw.** 198. See **FOLDAGE**.

FRANK-LAW. An obsolete expression signifying the rights and privileges of a citizen, and seeming to correspond to our term "civil rights."

FRANK-MARRIAGE. A species of

estate-tail where the donee had married one of kin (as daughter or cousin) to the donor and held the estate subject to the implied condition that the estate was to descend to the issue of such marriage. On birth of issue, as in other cases of estate-tail before the statute *De donis*, the birth of issue was regarded as a condition performed, and the estate thereupon became alienable by the donee; 1 Cruise, Dig. 71; 1 Washb. R. P. 67.

The estate is said to be in frank-marriage because given in consideration of marriage and free from services for three generations of descendants; **Blount**; **Cowel**. See, also, 2 Bla. Com. 115; 1 Steph. Com. 232.

FRANK-PLEDGE. A pledge or surety for freemen. **Termes de la Ley.**

The bond or pledge which the inhabitants of a tithing entered into for each one of their number that he should be forthcoming to answer every violation of law. Each boy, on reaching the age of fourteen, was obliged to find some such pledge, or be committed to prison; **Blount**; **Cowel**; 1 Bla. Com. 114.

FRANK-TENEMENT. A freehold. See **LIBERUM TENEMENTUM**.

FRANKING PRIVILEGE. The privilege of sending certain matter through the public mails without payment therefor.

It was first claimed by the house of commons in 1600, and was confirmed by statute in 1764. The establishment of the penny postage in 1840 caused the abolition of the custom in England. See 1 Bla. Com. 323; 2 Steph. Com. 570, n.

It was formerly enjoyed by various officers of the federal government, including members of both houses of congress, theoretically for the public good.

By the act of January 31, 1873, the franking privilege was abolished from and after July 1, 1873, and the act of March 3, 1873, repealed all laws permitting the transmission by mail of any free matter whatever. The act of March 3, 1875, s. 5, permits members of congress to send free public documents and acts; a qualified exercise of the privilege has been extended to certain officials, where public convenience seemed to require it. By the act of March 3, 1877 (19 Stat. L. 326), it is made lawful to transmit through the mail free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States, provided that every such letter or package bears over the words "Official Business," an endorsement showing the name of the department or bureau from whence transmitted. This provision was extended by the act of March 3, 1879 (20 Stat. L. 302), to all officers of the government and made applicable to all official mail matter. By the act of January 12, 1905 (38 Stat. L. 622), members of congress are entitled to send through the mails free, under their frank, any mail matter to any government official or to any person, correspondence not exceeding one ounce in weight, upon official or departmental business. They may also frank the congressional record or any part thereof. U. S. Rev. Stat. 1 Supp. 70.

FRANKLEYN (spelled, also, *Frankling* and *Franklin*). A freeman; a freeholder; a gentleman. **Blount**; **Cowel**.

FRASSETUM. A wood or wood ground where ash trees grow. **Co. Litt.** 4 b.

FRATER (Lat.). Brother.

Frater consanguineus. A brother born from the same father, though the mother may be different.

Frater nutricius. A bastard brother.

Frater uterinus. A brother who has the same mother but not the same father.

Blount; **Vicat**, **Voc. Jur.**; 2 Bla. Com. 232.

Fratres conjurati. Sworn brothers or companions for the defence of their sovereign or for other purposes. **Hoved.** 445.

Fratres poes. Certain friars who were accustomed to wear white and black garments. **Walsingham** 124. See **BROTHER**.

FRATERIA. A fraternity, brotherhood, or society of religious persons, who were mutually bound to pray for the good health and life, etc., of their living brethren, and the souls of those that were dead. **Cowel**.

FRATERNIA. A fraternity or brotherhood.

FRATERNITY. A body of men associated for business, pleasure, or social intercourse, by some common tie, either natural, as of the like business, interest or character,

or formal, as for religious or social purposes. "Some people of a place united together, in respect of a mystery and business, into a company." 1 Salk. 193. See COLLEGE FRATERNITIES. See LITERARY OR SCIENTIFIC INSTITUTION.

FRATRIAGE. A younger brother's inheritance.

FRATRICIDE. One who has killed a brother or sister; also the killing of a brother or sister. Black, L. Dict.

FRAUD. An endeavor to alter rights, by deception touching motives, or by circumvention not touching motives. Bigelow, Fraud 5.

Fraud is sometimes used as a term synonymous with *convin*, *collusion*, and *deceit*, but improperly so. *Convin* is a secret contrivance between two or more persons to defraud and prejudice another of his rights. *Collusion* is an agreement between two or more persons to defraud another under the forms of law, or to accomplish an illegal purpose. *Deceit* is a fraudulent contrivance by words or acts to deceive a third person, who, relying thereupon, without carelessness or neglect of his own, sustains damages thereby. Co. Litt. 357 b; Bacon, Abr. Fraud.

Actual or positive fraud includes cases of the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. 1 Story, Eq. Jur. § 186.

For instance, the misrepresentation by word or deed of material facts, by which one exercising reasonable discretion and confidence is misled to his injury, whether the misrepresentation was known to be false, or only not known to be true, or even if made altogether innocently; the suppression of material facts which one party is legally or equitably bound to disclose to another; all cases of unconscientious advantage in bargains obtained by imposition, circumvention, surprise, and undue influence over persons in general, and especially over those who are, by reason of age, infirmity, idiocy, lunacy, drunkenness, coverture, or other incapacity, unable to take due care of and protect their own rights and interests; bargains of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition, or undue influence, when the decree of the court can place the parties in *statu quo*; cases of surprise and sudden action, without due deliberation, of which one party takes advantage; cases of the fraudulent suppression or destruction of deeds and other instruments, in violation of, or injury to, the rights of others; fraudulent awards with intent to do injustice; fraudulent and illusory appointments and revocations under powers; fraudulent prevention of acts to be done for the benefit of others under false statements or false promises; frauds in relation to trusts of a secret or special nature; frauds in verdicts, judgments, decrees, and other judicial proceedings; frauds in the confusion of boundaries of estates and matters of partition and dower; frauds in the administration of charities; and frauds upon creditors and other persons standing upon a like equity, are cases of actual fraud. 1 Story, Eq. Jur. c. 8.

Legal or constructive fraud includes such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law.

Thus, for instance, contracts against some general public policy or fixed artificial policy of the law; cases arising from some peculiar confidential or fiduciary relation between the parties, where advantage is taken of that relation by the person in whom the trust or confidence is reposed, or by third persons; agreements and other acts of parties which operate virtually to delay, defraud, and deceive creditors; purchases of property, with full notice of the legal or equitable title of other persons to

the same property (the purchaser becoming, by construction, *particeps criminis* with the fraudulent grantor); and voluntary conveyances of real estate, as affecting the title of subsequent purchasers; 1 Story, Eq. Jur. c. 7. See Bisph. Eq. 205.

According to the civilians, *positive fraud* consists in doing one's self, or causing another to do, such things as induce the opposite party into error, or retain him there. The intention to deceive, which is the characteristic of fraud, is here present. Fraud is also divided into that which has induced the contract, *dolus dans causam contractui*, and incidental or accidental fraud. The former is that which has been the cause or determining motive of the contract, that without which the party defrauded would not have contracted, when the artifices practised by one of the parties have been such that it is evident that without them the other would not have contracted. *Incidental or accidental fraud* is that by which a person, otherwise determined to contract, is deceived on some accessories or incidents of the contract,—for example, as to the quality of the object of the contract, or its price,—so that he has made a bad bargain. Accidental fraud does not, according to the civilians, avoid the contract, but simply subjects the party to damages. It is otherwise where the fraud has been the determining cause of the contract, *qui causam dedit contractui*: in that case the contract is void. Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 2, n. § 5, n. 86, et seq. See, also, 1 Malleville, *Analyse de la Discussion du Code Civil*, pp. 15; 16.

What constitutes fraud. 1. It must be such an appropriation as is not permitted by law. 2. It must be with knowledge that the property is another's, and with design to deprive him of it. 3. It is not in itself a crime, for want of a criminal intent; though it may become such in cases provided by law. Livermore, Penal Law 739; See Poll. Contr. (6th ed.) 534, et seq.

Fraud, in its ordinary application to cases of contracts, includes any trick or artifice employed by one person to induce another to fall into or to detain him in an error, so that he may make an agreement contrary to his interest; and it may consist in misrepresenting or concealing material facts, and may be effected by words or by actions. See 143 U. S. 79.

Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another, or to obtain an undue advantage of him, there is a positive fraud in the fullest sense of the term; 85 Tenn. 139. It must relate to facts then existing or which had previously existed; 11 Colo. 15; 127 Ill. 187. If a person take upon himself to state as true that of which he is wholly ignorant, he will, if it be false, incur the same legal responsibility as if he had made the statements with knowledge of its falsity; 125 Pa. 52; 147 Mass. 403; 71 Wis. 196; 73 id. 39; 75 Mich. 199; 78 Iowa 749.

While, on the one hand, the courts have aimed to repress the practice of fraud, on the other, they have required that before relieving a party from a contract on the ground of fraud, it should be made to appear that on entering into such contract he exercised a due degree of caution. *Vigilantibus, non dormientibus, subveniunt leges*. A misrepresentation as to a fact the truth or falsehood of which the other party has an opportunity of ascertaining, or the concealment of a matter which a person of ordinary sense, vigilance, or skill might discover, does not in law constitute fraud. See 130 U. S. 648. Misrepresentation as to the legal effect of an agreement does not avoid it as against a party whom such misrepresentation has induced to enter into it,—every man being presumed to know the legal effect of an instrument which he signs or of an act which he performs. Ans. Contr. 151. But see 69 Tex. 508.

An intention to violate entertained at the time of entering into a contract, but not afterward carried into effect, does not vitiate the contract; per Tindal, C. J., 2

Scott 588; 4 B. & C. 506; per Parke, B., 4 M. & W. 115, 122; but making a promise as an inducement to a contract, with no intention of performing it, constitutes a fraud for which the contract may be rescinded; 78 Cal. 126; 40 Minn. 476; but see 42 Ill. App. 543. When one person misrepresents or conceals a material fact which is peculiarly within his own knowledge, or, if it is also within the reach of the other party, is a device to induce him to refrain from inquiry, and it is shown that the concealment or other deception was practised with respect to the particular transaction, such transaction will be void on the ground of fraud; 6 Cl. & F. 232; Comyn, Contr. 38; per Tindal, C. J., 3 M. & G. 446, 450. See 85 Ill. 804; 32 N. J. Eq. 373; 12 Ves. 78. And even the concealment of a matter which may disable a party from performing the contract is a fraud; 9 B. & C. 387; per Little-dale, J.

Equity doctrine of fraud. It is sometimes inaccurately said that such and such transactions amount to fraud in equity, though not in law; according to the popular notion that the law allows or overlooks certain kinds of fraud which the more conscientious rules of equity condemn and punish. But, properly speaking, fraud in all its shapes is as odious in law as in equity. The difference is that, as the law courts are constituted, and as it has been found in centuries of experience that it is convenient they should be constituted, they cannot deal with fraud otherwise than to punish it by the infliction of damages. All those manifold varieties of fraud against which specific relief, of a preventive or remedial sort, is required for the purposes of substantial justice, are the subjects of equity and not of law jurisdiction.

What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out." Per Hardwicke, C., in 3 Atk. 378. It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. "It may be stated as a general rule that fraud consists in anything which is calculated to deceive, whether it be a single act or combination of circumstances, whether it be by suppression of the truth or suggestion of what is false; whether it be by direct falsehood, or by *innuendo*, by speech or by silence, by word of mouth or by a look or a gesture. Fraud of this kind may be defined to be any artifice by which a person is deceived to his disadvantage." Bisph. Eq. § 206.

It is said by Lord Hardwicke, 2 Ves. Ch. 153, that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this: that courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial proof, if of sufficient force. Circumstances of mere suspicion, leading to no certain results, will not, in either, be held sufficient to establish fraud.

The equity doctrine of fraud extends, for certain purposes, to the violation of that class of so-called imperfect obligations which are binding on conscience, but which human laws do not and cannot ordinarily undertake to enforce: as in a large variety of cases of contracts which courts of equity do not set aside, but at the same time refuse to lend their aid to enforce: 2 Kent 39; 1

Johns. Ch. 630; 1 Ball & B. 250. The proposition that "fraud must be proved and not assumed," is to be understood as affirming that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence, either positive or circumstantial. Fraud may be inferred from facts calculated to establish it. Per Black, C. J., in 22 Pa. 179; 148 id. 234; 59 Fed. Rep. 70.

The following classification of frauds as a head of equity jurisdiction is given by Lord Hardwicke, J., in *Chesterfield v. Janssen*, 2 Ves. Ch. 126; 1 Atk. 301; 1 Lead. Cas. Eq. 428.

1. Fraud, or *dolus malus*, may be actual, arising from facts and circumstances of imposition. 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and no honest or fair man would accept, on the other. 3. It may be inferred from the circumstances and condition of the parties: for it is as much against conscience to take advantage of a man's weakness or necessity as of his ignorance. 4. It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons.

Effect of. Fraud, both at law and in equity, when sufficiently proved and ascertained, avoids a contract *ab initio*, whether the fraud be intended to operate against one of the contracting parties, or against third parties, or against the public; Ans. Contr. 162; 1 W. Blackst. 465; Dougl. 450; 3 Burr. 1909; 3 V. & B. 42; 1 Sch. & L. 209; Domat, Lois Civ. p. 1, l. 4, t. 6, s. 3, n. 2; see 49 Conn. 98; but the injured party may elect to allow the transaction to stand; L. R. 2 H. L. 246; 49 N. Y. 626; 7 Bush 63.

The fraud of an agent by a misrepresentation which is embodied in the contract to which his agency relates, avoids the contract. But the party committing the fraud cannot in any case himself avoid the contract on the ground of the fraud; Chitty, Contr. 590, and cases cited. The party injured may lose the right to avoid the contract by *laches*; 47 N. H. 208; 21 Wis. 68; Bishp. Eq. § 202; 130 Mass. 50; 55 N. H. 608; 78 N. Y. 159; 67 Ill. 450. But no delay will constitute *laches* except that occurring after the discovery of the fraud; 11 Cl. & F. 714; 4 How. 561; 23 Iowa 467; 43 id. 556; 35 Ala. 560; 30 Minn. 64. The injured party must repudiate the transaction *in toto*, if at all; he may not adopt it in part and repudiate it in part; 13 How. 51; 25 Beav. 594. See 2 Phil. 425.

As to frauds in contracts and dealings, the common law subjects the wrong-doer, in several instances, to an action on the case, such as actions for fraud and deceit in contracts on an express or implied warranty of title or soundness, etc. But fraud gives no action in any case without damage; 8 Term 56; and in matters of contract it is merely a defence; it cannot in any case constitute a new contract; 7 Ves. 211; 2 Miles 229. It is essentially *ad hominem*; 4 Term 397.

A person cannot recover for fraudulent representations where he did not rely upon them, but relied upon information from other sources and upon his own judgment; 118 Ind. 565; 39 Kan. 752; 76 Iowa 507; 84 Ala. 95; 23 Neb. 817; 135 U. S. 609. Fraud must be clearly proved and it is proper so to instruct the jury; 143 Pa. 234. There is no error in charging that fraud is never presumed, and must be shown by satisfactory proof; 59 Fed. Rep. 70.

In Criminal Law. Without the express provision of any statute, all deceitful practices in defrauding or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence; Co. Litt. 3 b; Dy. 295; Hawk. Pl. Cr. c. 71.

In considering fraud in its criminal aspect, it is often difficult to determine whether facts in evidence constitute a

fraud, or amount to a felony. It seems now to be agreed that if the property obtained, whether by means of a false token or a false pretence, be parted with absolutely by the owner, it is a fraud; but if the possession only be parted with, and that possession be obtained by fraud, it will be felony; Bacon, Abr. *Fraud*; 2 Leach 1066; 2 East, Pl. Cr. c. 673.

Of those gross frauds or cheats which, as being "levelled against the public justice of the kingdom," are punishable by indictment or information at the common law; 2 East, Pl. Cr. c. 18, § 4, p. 821; the following are examples:—uttering a fictitious bank bill; 2 Mass. 77; selling unwholesome provisions; 4 Bla. Com. 162; *mala praxis* of a physician; 1 Ld. Raym. 213; rendering false accounts, and other frauds, by persons in official situations; Rex v. Bembridge, cited 2 East 136; 5 Mod. 179; 2 Campb. 269; 3 Chitty, Cr. Law 666; fabrication of news tending to the public injury; Stark. Lib. 546; Hale, Summ. 132; and per Scroggs, C. J., Rex v. Harris, Guildhall, 1680; cheats by means of false weights and measures; 2 East, Pl. Cr. c. 18, § 3, p. 820; and generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public; 2 East, Pl. Cr. c. 18, § 2, p. 818; as with the common cases of obtaining property by false pretences. See DECEIT; MISREPRESENTATION. See "DE FRAUD" THE UNITED STATES. See INFLUENCE.

FRAUD ORDER (Postal Service).

An order from the central authority to a local official, prohibiting the delivery of letters to a firm or individual suspected of making an illegal use of the mails. Stand. Dict.

FRAUDARE. In Civil Law. To cheat; defraud; deceive.

FRAUDS, STATUTE OF. The name commonly given to the statute 29 Car. II. c. 3, entitled "An Act for the Prevention of Frauds and Perjuries."

The multifarious provisions of this celebrated statute appear to be distributed under the following heads. 1. The creation and transfer of estates in land, both legal and equitable, such as at common law could be effected by parol, *i. e.* without deed. 2. Certain cases of contracts which at common law could be validly made by oral agreement. 3. Additional solemnities in cases of wills. 4. New liabilities imposed in respect of real estate held in trust. 5. The disposition of estates *pur autre vie*. 6. The entry and effect of judgments and executions. The first and second heads, however, comprise all that in the common professional use of the term is meant by the Statute of Frauds.

And they present this important feature, characterizing and distinguishing all the minor provisions which they both contain, *i. e.* that whereas prior to their enactment the law recognized only two great classes of contracts, conveyances, etc.—those which were by deed and those which were by parol, including under the latter term alike what was written and what was oral,—these provisions introduced into the law a distinction between *written parol* and *oral parol* transactions, and rendered a writing necessary for the valid performance of the matters to which they relate. Those matters are the following:—conveyances, leases, and surrenders of interests in lands; declarations of trusts of interest in lands; special promises by executors or administrators to answer damages out of their own estate; special promises to answer for the debt, default, or miscarriage of another; agreements made upon consideration of marriage; contracts for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; agreements not to be performed within the space of one year from the making thereof; contracts for the sale of goods, wares, and merchandise for the price of ten pounds sterling or upwards. All these matters

must be, by the statute, put in writing, signed by the party to be charged, or his attorney. It has been a question whether a promise to accept a bill of exchange is within the statute, and in some jurisdictions it is required by statute to be in writing. See ACCEPTANCE. It has been recently held in England that, apart from the special statute, it need not be in writing and is not within the statute of frauds; [1894] 2 Q. B. 685; 91 U. S. 406; 142 id. 116; 34 Fed. Rep. 866; 9 Wash. 659.

As to contracts of indemnity to a third person see INDEMNITY; 42 Am. St. Rep. 186-94; as to contracts to be performed within a year see 164 U. S. 418.

In regard to contracts for the sale of goods, wares, and merchandise, the payment of earnest-money, or the acceptance and receipt of part of the goods, etc., dispenses with the written memorandum. See EARNEST; SALE.

The substance of the statute, as regards the provisions above referred to, has been re-enacted in almost all the states of the Union; and in many of them, other points coming within the same general policy, but not embodied in the original English statute, have been made the subject of more recent enactments: as, for instance, the requirement of writing to hold a party upon a representation as to the character, credit, etc., of a third person, which was provided in England by 9 Geo. IV. cap. 14, § 6, commonly called Lord Tenterden's Act. The legislation of the different states on these matters will be found collected in the Appendix to Browne on the Statute of Frauds.

See Throop, Val. of Verb. Agr.; Reed; Wood, Stat. Frauds. For sufficiency of memorandum required by the statute, see 34 Cent. L. J. 6. As to the various subjects affected by the statute of frauds see the several titles, and for reference to authorities on the different branches of the subject, see the classified list in the St. Louis Law Library Catalogue.

FRAUDULENT CONVEYANCE.

A conveyance, the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent on the party making it. 2 Kent 440; 4 id. 462; and if fraudulent as to any provision therein, is void *in toto* as against creditors; 29 W. Va. 203.

Fraudulent conveyances received early attention; and the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, made perpetual by 29 Eliz. c. 18, declared all conveyances made with intent to defraud creditors, etc., to be void. By a liberal construction, it has become the settled English law that a voluntary conveyance shall be deemed fraudulent against a subsequent purchaser even with notice; 9 East 69; 2 Bla. Com. 296; Roberts, Fraud. Conv. 2, 3.

Voluntary conveyances are not so construed in the United States, however, where the subsequent purchaser has notice, especially if there be a good consideration; Wait, Fraud. Convey. 97; 2 Gray 447.

These statutes have been generally adopted in the United States as the foundation of all the state statutes upon this subject; 1 Story, Eq. Jur. 353; 4 Kent 462.

The mere fact of indebtedness alone will not render a voluntary conveyance void, if the grantor has property amply sufficient remaining to pay his creditor; 71 Tex. 592; 22 Neb. 172.

A voluntary gift for charitable purposes is not to be treated as "covinous," within the meaning of 27 Eliz. c. 4, and is not avoided by a subsequent conveyance for value; [1892] App. Cas. 412.

When a mortgage is given to one person for the purpose of securing debts due to himself and others, with intent on the part of the mortgagor to defraud other creditors, it is valid as to an innocent beneficiary whose debt is an honest one, although the mortgagee himself is a party to the fraud; 6 U. S. App. 510.

Voluntary conveyances by a debtor who is financially embarrassed are *prima facie* fraudulent as to existing creditors, and

where a conveyance is made *mala fide*, and the fraud is participated in by both parties thereto, it cannot be upheld in derogation of the claims of creditors; existing or subsequent; 39 Minn. 527; 50 Ark. 42; 36 Fed. Rep. 29.

But although such conveyance is void as regards purchasers and creditors, it is valid as between the parties; 5 Binn. 109; 3 W. & S. 255; 4 Ired. 102; 20 Pick. 247, 354; 1 Ohio 469; 2 South. 738; 2 Hill, S. C. 488; 7 Johns. 161; 1 W. Bla. 262; 77 Iowa 203. An offence within the 13 Eliz. c. 5, § 3, is also indictable; 6 Cox, Cr. Cas. 31.

This subject is fully treated in a note to *Twyne's case*, 1 Sm. Lead. Cas. (continued in 18 Am. L. Reg. N. S. 187), and in *Bump; May; Fraud. Conv.* See BADGES OF FRAUD.

FRAUS (Lat.). Fraud. The term of the civil law was, however, *dolus* (q. v.). It has been said that *fraus* was distinguished from *dolus* and had a more extended meaning. Calv. Lex.

Calvin derives *fraus* from *ferre*, to bear, to bear away or take away, its object usually being to take away another's right of property. Burrill; Calv. Lex. See *PIA FRAUS*.

FRAUS DANS LOCUM CONTRACTUI. A misrepresentation or concealment of some fact that is material to the contract, and had the truth regarding which been known the contract would not have been made as made, is called a "*fraud dans locum contractui*," i. e. a fraud occasioning the contract, or giving place or occasion for the contract.

FRAUS LEGIS (Lat.). Fraud of law. In Civil Law. The institution of legal proceedings for a fraudulent purpose. See IN FRAUDUM LEGIS.

FRAXINETUM. In Old English Law. A wood of ashes; a place where ashes grow. Co. Litt. 4b; Shep. Touchst. 95.

FRAY. See AFFRAY.

FRECTUM. Freight. *Quoad frectum navium suarum*, as to the freight of his vessels. Blount.

FREESTOLE. Freedstole. The seat of peace, a name given to a seat or chair near the altar, to which all fled whoso sought to obtain the privilege of sanctuary. Encyc. Dict. A sanctuary. Gib. Cod.

FREDUM. A fine paid for obtaining pardon when the peace had been broken. Spelman, Gloss.; Blount. A sum paid the magistrate for protection against the right of revenge. 1 Robertson, Charles V., App. note xxiii.

Freda was a Frankish term answering to the Saxon "wites." Maitl. Domesd. 278.

FREDWIT, or FREDWITE. A liberty to hold courts and take up the fines for beating and wounding. Cowel; Cunningham, Law Dict.

To be free from fines.

FREE. Not bound to servitude. At liberty to act as one pleases. This word is put in opposition to slave. U. S. Const. art. 1, § 2. Used in distinction from being bound as an apprentice.

The Declaration of Independence asserts that all men are born free; and in this sense the term is usually supposed to mean all mankind; though this seems to be doubted in 19 How. 393.

Certain: as, *free services*. These were also more honorable.

Confined to the person possessing, instead of being held in common: as, *free fishery*.

FREE ALMS. See FRANK-ALMOIGNE.

FREE BENCH. Copyhold lands which the wife has for dower after the decease of her husband. Kitch. 102; Bracton, lib. 4, tr. 6, cap. 13, num. 2; Fitzh. N. B. 150; Plowd. 411.

Dower in copyhold lands. 2 Bla. Com. 129. The quantity varies in different sections of England; Co. Litt. 110b; L. R. 16 Eq. 592; incontinency was a cause of forfeiture, except on the performance of a

ridiculous ceremony; Cowel; Blount.

FREE BORD. An allowance of land outside the fence which may be claimed by the owner. An allowance, in some places, two and a half feet wide outside the boundary or enclosure. Blount; Cowel.

FREE BOROUGH MEN. Such great men as did not engage like the frank-pledge men for their *centenier*. Jac. L. Dict.

FREE CHAPEL. A chapel founded by the king and exempted from the jurisdiction of the ordinary. It may be one founded or endowed by a private person under a grant from the king; Cowel *Termes de la Ley*.

FREE COURSE. Having the wind from a favorable quarter. To prevent collision of vessels, it is the duty of the vessel having the wind free to give way to a vessel beating up to windward and tacking; 3 Hagg. Adm. 215. At sea, such vessel meeting another close-hauled must give way, if necessary to prevent the danger of collision; 3 C. & P. 528. See 3 W. Rob. 225; 2 Dods. 87; MARITIME LAW.

FREE ENTRY, INGRESS AND EGRESS. The right to go upon land from time to time as required to assert any right, as to take emblements.

FREE FISHERY. See FISHERY.

FREE FOLD. See FOLDAGE; FRANK-FOLD.

FREE ON BOARD. A phrase applied to the sale of goods which denotes that the seller has contracted for their delivery on the vessel, cars, etc., without cost to the buyer for packing, portage, cartage, and the like. See *FRAIS JUSQU'A BORD*; F. O. B.

In such a contract the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made 117 Pa. 508; Abb. f. o. b.

FREE MINER. In the district of Hundred of St. Briavels, in England, any male person born and abiding in the district, of the age of twenty-one, who has worked a year and a day in a coal or iron mine, or in a stone quarry within the hundred. See GALE; GAVELLER.

FREE PLEDGE. See FRANKPLEDGE.

FREE SERVICES. Such as it was not unbecoming the character of a soldier or freeman to perform: as, to serve under his lord in the wars, to pay a sum of money, and the like. 2 Bla. Com. 62; 1 Washb. R. P. 25.

FREE SHIPS. Neutral ships. "*Free ships make free goods*" is a phrase often used in treaties to denote that the goods on board neutral ships shall be free from confiscation even though belonging to an enemy; Wheat. Int. L. 507; 1 Kent 126. The doctrine is recognized, except as to goods contraband of war, in the Declaration of Paris (1856), q. v., and the controversy over it has been brought to a close as regards all maritime nations but the United States. This declaration, while a great step in favor of neutrals, does not free neutral commerce from the belligerent right of search for the purpose of ascertaining the true character of a ship sailing under a neutral flag, and for contraband goods. Pomeroy, Int. L. 220. While the United States are not a party to the declaration of Paris; yet, during the civil war, its second and third articles, relating to this subject, were adhered to by both parties; Wheat. Int. L. 475 a. See 3 Phill. Int. L. 3d ed. 238; Up-ton, Mar. Warfare 186; Wheat. Int. L. 581; FLAG, for a full discussion; NEUTRALITY; DECLARATION OF PARIS.

FREE SOCAGE. Tenure in free socage is a tenure by certain and honorable services which yet are not military. 1 Spence, Eq. Jur. 52; Dalrymple, Feuds, c. 2, § 1; 1 Washb. R. P. 25; called, also, free and common socage. See SOCAGE.

FREE SOCMEN. Tenants in free socage. 2 Bla. Com. 79.

FREE TENURE. Freehold tenure.

Freehold; the opposite of the ancient villeinage, and modern copyhold. Burrill; 2 Bl. Com. 89, 90.

FREE WARREN. A franchise for the preserving and custody of beasts and fowls of warren. 2 Bla. Com. 89, 417; Co. Litt. 253. This franchise gave the grantee sole right of killing, so far as his warren extended, on condition of excluding other persons. 2 Bla. Com. 39.

FREEDMAN. In Roman Law. A person who had been released from a state of servitude. See LIBERTINE.

The term is frequently applied to the emancipated slaves in the southern states. By the fourteenth amendment of the constitution, citizenship was conferred upon them; Cooley, Const. Lim. 361. See 16 Wall. 36; 93 U. S. 542. The fifteenth amendment protects the elective franchise of freedmen and others of African descent; and this was the object of its adoption; Cooley, Const. Lim. 752.

FREEDOM. The condition of one to whom the law attributes the single individual right of personal liberty, limited only, in the domestic relations, by powers of control which are associated with duties of protection. See MARRIED WOMEN; PARENT AND CHILD; GUARDIAN AND WARD; MASTER AND APPRENTICE.

This right becomes subject to judicial determination when the law requires the public custody of the person as the means of vindicating the rights of others. The security of the liberty of the individual and of the rights of others is graduated by the intrinsic equity of the law, in purpose and application. The means of protecting this liberty of the individual without hazarding the freedom of others must be sought in the provisions of the remedial and penal law.

Independently of forfeiture of personal liberty under such laws and of its limitations in the domestic relations, freedom, in this sense, is a *status* which is invariable under all legal systems. It is the subject of judicial determination when a condition incompatible with the possession of personal liberty is alleged against one who claims freedom as his *status*. A community wherein law should be recognized, and wherein nevertheless this status should not be enjoyed by any private person, is inconceivable; and, wherever its possession is thus controverted, the judicial question arises of the personal extent of the law which attributes liberty to free persons. The law may attribute it to every natural person, and thereby preclude the recognition of any condition inconsistent with its possession. This universal extent of the law of free condition will operate in the international as well as in the internal private law of the state. In most European countries the right of one, under the law of a foreign country, to control the person of another who by such law had been his slave or bondman is not recognized under that international rule for the allowance of the effect of a foreign law which is called *comity*, because the law of those countries attributes personal liberty as a right to every natural person. 1 Hurd, Law of Freedom §§ 116, 300.

In other countries the power of the master under a foreign law is recognized in specified cases by a statute or treaty, while an otherwise universal attribution of personal liberty precludes every other recognition of a condition of bondage. On this principle, in some of the United States, an obligation to render personal service or labor, and the corresponding right of the person to whom it is due, existing under the law of other states, were not enforced except in cases of claim within art. 4, sec. 2, ¶ 3 of the constitution of the United States; 18 Pick. 193; 20 N. Y. 562.

Legal rights are the effects of civil society. No legal condition is the reservation of a state of nature anterior to civil society. Freedom, as here understood, is the effect of law, not a pre-existing natural

element. It is, therefore, not necessarily attributed to all persons within any one jurisdiction. But personal liberty, even though not attributed universally, may be juridically regarded as a right accordant with the nature of man in society; and the effect of this doctrine will appear in a legal presumption in favor of free condition, which will throw the burden of proof always on him who denies it. This presumption obtained in the law of Rome (XII Tab. T. vi. 5; Dig. lib. 40 tit. 5, l. 53; lib. 43, tit. 29, s. 3, l. 9; lib. 50, tit. 17, l. 20, 23) even when slavery was derived from the *jus gentium*, or that law which was found to be received by the general reason of mankind; 1 Hurd, Law of Freedom § 157.

In English law, this presumption in favor of liberty has always been recognized, not only in the penal and remedial law, but in applying the law of condition, at a time when involuntary servitude was lawful; Fortesque, cc. 42, 47; Co. Litt. fol. 124 b; Wood, Inst. c. 1, § 5. In the slave-holding states of the Union, a presumption against the freedom of persons of negro descent arose or was declared by statute; Cooper, Justin. 485; 1 Dev. 336; 8 Ga. 157; 5 Halst. N. J. 275. In interpreting manumission clauses in wills, the rule differed in the states according to their prevailing policy; Cobb, Slav. 298.

The condition of a private person who is legally secured in the enjoyment of those rights of action, in social relations, which might be equally enjoyed by all private persons.

The condition of one who may exercise his natural powers as he wills is not known in jurisprudence, except as the characteristic of those who hold the supreme power of the state. The freedom which one may have by his individual strength resembles this power in kind, and is no part of legal freedom. The legal right of one person involves correlative obligations on others. All persons must be restricted by those obligations which are essential to the freedom of others; 2 Harr. Cond. La. 208; but these are not inconsistent with the possession of rights which may be enjoyed equally by all. Such obligations constitute a condition opposed to freedom only as things which mutually suppose and require each other. Where the law imposes obligations incompatible with the possession of such rights as might be equally enjoyed by all, a condition arises which is contrary to freedom, see BONDAGE, and the condition of those who hold the rights correlative to such obligations becomes superior to freedom, as above defined, or is merged in the superiority of a class or caste. The rights and obligations of all cannot be alike; men must stand towards each other in unlike relations, since the actions of all cannot be the same. In the possession of relative rights they must be unequal. But individual (absolute) rights, which exist in relations towards the community in general, and capacity for relative rights in domestic relations, may be attributed to all in the same circumstances of natural condition. It is in the possession of these rights and this capacity that this freedom exists. As thus defined, it comprehends freedom in the narrower sense, as the greater includes the less; and when attributed to all who enjoy freedom in the narrower sense, as at the present day in the greater part of Europe and formerly in the free states of the Union, the latter is not distinguished as a distinct condition. But some who enjoy personal liberty might yet be so restricted in the acquisition and use of property, so unprotected in person and limited in the exercise of relative rights, that their condition would be freedom in the narrower sense only. During the middle ages, in Europe, it was possible to discriminate the existing free conditions as thus different; and the restrictions formerly imposed on free colored persons in the slaveholding states of the Union created a similar distinction between their freedom and that which, in all the states, was attributed to all persons of white race.

Freedom, in either sense, is a condition which may exist anywhere, under the civil power; but its permanency will depend on the guarantees by which it is defended. These are of infinite variety. In connection with a high degree of guarantee against irresponsible sovereign power, freedom, in the larger sense above described, may be called *civil freedom*, from the fact that such guarantee becomes the public law of the state. Such freedom acquires specific character from the particular law of some one country, and becomes the topic of legal science in the juridical application of the guarantees by which the several rights incident to it are maintained. This constitutes a large portion of the jurisprudence of modern states, and embraces, particularly in England and America, the public or constitutional law. The bills of rights in American constitutions, with their great original, Magna Charta, are the written evidences of the most fundamental of these guarantees. The provisions of the constitution of the United States which have this character operate against powers held by the national government, but not against those reserved to the states; 7 Pet. 243; Sedgw. Const. 597. It has been judicially declared that a person "held to service or labor in one state under the laws thereof escaping into another" is not protected by any of these provisions, but may be delivered up, by national authority, to a claimant, for removal from the state in which he is found, in any method congress may direct, and that any one claimed as such fugitive may be seized and removed from such state by private claimant, without regard either to the laws of such state or the acts of congress; 13 Pet. 597.

The other guarantees of freedom in either sense are considered under the titles EVIDENCE; ARREST; BAIL; TRIAL; HABEAS CORPUS; HOMINE; REPLEGIANDO.

Irresponsible superiority, whether of one or of many, is necessarily antagonistic to freedom in others. Yet freedom rests on law, and law on the supreme power of some state. The possession of this power involves a liberty of action; but its possession by a body of persons, each one of whom must submit to the will of the majority, is not in itself a guarantee of the freedom of any one individual among them. Still, the more equally this power is distributed among those who are thus individually subject, the more their individual liberty of action in the exercise of this power approximates to a legal right,—though one beyond any incident to civil freedom as above defined,—and its possession may be said to constitute political freedom, so far as that may be ascribed to private persons which is more properly ascribed to communities. In proportion as this right is extended to the individual members of a community, it becomes a guarantee of civil freedom, by making a delegation of the power of the whole body to a representative government possible and even necessary, which government may be limited in its action by customary or written law. Thus, the political liberties of private persons and their civil freedom become intimately connected; though political and civil freedom are not necessarily coexistent. 1 Sharsw. Bla. Com. 6, n. 127, n.

Political freedom is to be studied in the public law of constitutional states, and in England and America, particularly in those provisions in the bills of rights which affect the subject more in his relations towards the government than in his relations towards other private persons. See LIBERTY. The terms freedom and liberty are words differing in origin (German and Latin); but they are, in use, too nearly synonymous to be distinguished in legal definition. See LIBERTY; Lieber, Civ. Lib. etc. 37, n.

FREEDOM OF THE CITY. In English Law. Immunity from county jurisdiction, and the privilege of corporate taxation and self-government held under a charter from the crown. This freedom is enjoyed of right, subject to the provision of the charter, and is often conferred as an

honor on princes and other distinguished individuals. The freedom of a city carries the parliamentary franchise. Encyclo. Dict. The rights and privileges possessed by the burgesses or freemen of a municipal corporation under the old English law; now of little importance, and conferred chiefly as a mark of honor. See 11 Chic. L. J. (U. S.) 357.

The phrase has no place in American law, and as frequently used in addresses of welcome made to organizations visiting an American city, particularly by mayors, has no meaning whatever except as an expression of good will.

FREEDOM OF CONTRACT. See LIBERTY OF CONTRACT.

FREEDOM OF THE PRESS. See LIBERTY OF THE PRESS.

FREEDOM OF SPEECH. See LIBERTY OF SPEECH.

FREEHOLD. See ESTATE OF FREEHOLD.

FREEHOLD ESTATE. One who is merely holding as agent has no "freehold estate" within a statute which provides that land shall be assessed against the owner of the first freehold estate. 151 Ky. 488, 152 S. W. 571.

FREEHOLD LAND SOCIETIES. Societies in England designed for the purpose of enabling mechanics, artisans, and other working-men to purchase at the least possible price a piece of freehold land of a sufficient yearly value to entitle the owner to the elective franchise for the county in which the land is situated. Wharton.

Only in form within the scope of the Building Societies Acts. In a society of this kind "subscriptions are received from the members in the way generally adopted by building societies, and, with the funds thus acquired, an estate is purchased in some eligible situation. The property is then laid out in lots of a size suited to the wants of the members; roads are made, and other improvements effected, the cost of which, and of the conveyance to the society, is added to the amount of the purchase-money. The total sum thus expended upon the whole estate is then equitably apportioned amongst the several lots, and determines their price. The members are thus enabled to obtain a small quantity of land at wholesale price." (Dav. B. Soc. 63.) As a building society formed under the Building Societies Acts cannot legally hold land, except as security for advances such an arrangement as the one above described is in reality *ultra vires*, and has to be effected through the medium of trustees, on whose honor the members must rely. This kind of society was invented principally to give the working classes votes in the days when the franchise was higher than it is now. R. & L. Dict.; Second Rep. of Com. 16.

FREEHOLD IN LAW. A freehold which has descended to a man, upon which he may enter at pleasure, but which he has not entered on. *Termes de la Ley*.

FREEHOLDER. The owner of a freehold estate. Such a man must have been anciently a freeman; and the gift to any man by his lord of an estate to him and his heirs made the tenant a freeman, if he had not been so before. See 1 Washb. R. P. 29, 45. One who owns land in fee, or for life, or for some indeterminate period. The estate may be equitable or legal. 75 N. C. 13.

FREEMAN. One who is not a slave. One born free or made so.

In Old English Law. A freeholder, as distinguished from a villein.

An inhabitant of a city. Stat. 1 Hen. VI. c. 11, § 3 Steph. Com. 196; Cunningham, Law Dict.

(*Liber homo*, q. v.) In the distinction of a freeman from a vassal under the feudal policy, *liber homo* was commonly opposed to *vassus* or *vassallus*; the former denoted an allodial proprietor, the latter, one who

held of a superior. Tomlin.

The title of a freeman is also given to any one admitted to the freedom of a corporate town, or of any other corporate body, consisting, among other members, of those called freemen. *Id.*

FREEMAN'S ROLL. A list of persons admitted as burgesses or freemen for the purposes of the rights reserved by the Municipal Corporation Act, 5 & 6 Will. IV. c. 76. Distinguished from the Burgess Roll; 3 Steph. Com. 197. The term was used, in early colonial history, of some of the American colonies.

FREIGHT. In Maritime Law. The sum agreed on for the hire of a ship, entirely or in part, for the carriage of goods from one port to another. 13 East 300. All rewards or compensation paid for the use of ships. 1 Pet. Adm. 206; 2 Boulay-Paty, t. 8, s. 1; 2 B. & P. 321; 4 Dall. 459; 2 Johns. 346; 3 Pardessus, n. 705; Chitty, Com. L. 407. The price to be paid for the actual transportation of goods by sea from one place to another. 154 Pa. 242.

The amount of freight is usually fixed by the agreement of the parties; and if there is no agreement, the amount is to be ascertained by the usage of the trade and the circumstances and reason of the case; 3 Kent 173. Pothier is of opinion that when the parties agree as to the conveyance of the goods, without fixing a price, the master is entitled to freight at the price usually paid for merchandise of a like quality at the time and place of shipment, and if the prices vary he is to pay the mean price; Pothier, Charte-Part. n. 8. But there is a case which authorizes the master to require the highest price: namely, when goods are put on board without his knowledge; *id.* n. 9. When the merchant hires the whole ship for the entire voyage, he must pay the freight though he does not fully lade the ship; Chitty, Com. L. 407; 24 Wend. 304; he is, of course, only bound to pay in proportion to the goods he puts on board, when he does not agree to provide a full cargo. If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the agreed freight; Roccus, notes 72-75; 1 Pet. Adm. 207; 10 East 530; 2 Vern. 210. See L. R. 6 Q. B. 528; 15 East 264; DEAD FREIGHT.

The general rule is that the delivery of the goods at the place of destination, in fulfillment of the agreement of the charter-party or bill of lading, is required, to entitle the master or owner of the vessel to freight; 2 Johns. 327; 3 *id.* 321; 142 N. Y. 90; 5 Harring. 293; 21 How. 527. But to this rule there are several exceptions.

When a cargo consists of live stock, and some of the animals die in the course of the voyage, without any fault or negligence of the master or crew, and there is no express agreement respecting the payment of freight, it is, in general, to be paid for all that were put on board; but when the contract is to pay for the transportation of them, then no freight is due for those which die on the voyage; Molloy, b. 2, c. 4, s. 8; Dig. 14, 2, 10; Abbott, Shipp., 15th ed. 534. See 87 Fed. Rep. 268.

An interruption of the regular course of the voyage, happening without the fault of the owner, does not deprive him of his freight if the ship afterwards proceeds with the cargo to the place of destination, as in the case of capture and recapture; 3 C. Rob. 101; 3 Kent 228; but where a voyage is broken up by reason of the inexcusable delay of the ship, resulting in damage to the shippers, he need not pay the freight; 39 Fed. Rep. 44. In case of the blockade of, or the interdiction of, commerce with the port to which the cargo is destined, and the return of the goods to the owner, no freight will be due; 2 Johns. 336; 10 East 526; but see 4 Dall. 455.

A shipowner who is prevented from performing the voyage by a wrongful act of the charterer is *prima facie* entitled to the freight that he would have earned, less

what it would have cost him to earn it; 128 U. S. 474.

When the ship is forced into a port short of her destination, and cannot finish the voyage, if the owner of the goods will not allow the master a reasonable time to repair, or to proceed in another ship, the master will be entitled to the whole freight; and if, after giving his consent, the master refuses to go on, he is not entitled to freight. See DEVIATION.

When the merchant accepts of the goods at an intermediate port, it is the general rule of marine law that freight is to be paid according to the proportion of the voyage performed; and the law will imply such contract; 2 McLean 423; 2 Johns. 323. The acceptance must be voluntary, and not one forced upon the owner by any illegal or violent proceedings, as from it the law implies a contract that freight *pro rata parte itineris* shall be accepted and paid; 2 Burr. 883; 7 Term 381; 2 S. & R. 229; 7 Cra. 353; 6 Cow. 504; 3 Kent 182; Com. Dig. Merchant (E3), note, pl. 43, and the cases there cited. See 61 Fed. Rep. 390.

But if the master refuse to repair his vessel and send on the goods, or to procure other vessels for that purpose and the owner of the goods then receives them, such an acceptance will not be such a voluntary one as to make him liable for freight *pro rata*; 5 Cow. 504; 16 Am. Dec. 443; 2 Bosw. 195; and where the port designated in the charter-party was unsafe, the master was held justified in discharging part of his cargo at another port in order to be able to proceed with the rest to the point designated; [1896] 1 Q. B. 586; L. R. 6 P. D. 68.

When the ship has performed the whole voyage, and has brought only a part of her cargo to the place of destination, there is a difference between a general ship and a ship chartered for a specific sum for the whole voyage. In the former case, the freight is to be paid for the goods which may be delivered at their place of destination; in the latter, it has been questioned whether the freight could be apportioned; and it seems that in such a case a partial performance is not sufficient, and that a special payment cannot be claimed except in special cases; 1 Johns. 24; 1 Bulstr. 167; 7 Term 381; 2 Campb. 466. These are some of the exceptions to the general rule called for by principles of equity, that a partial performance is not sufficient, and that a partial payment or ratable freight cannot be claimed.

If goods are laden on board, the shipper is not entitled to their return and to have them reloaded without paying the expenses of unloading and the whole freight and surrendering the bill of lading or indemnifying the master against any loss or damage he may sustain by reason of the non-delivery of the bill; 6 Duer, N. Y. 194; 8 N. Y. 529. In general, the master has a lien on the goods, and need not part with them until the freight is paid; 21 How. 527; and when the regulations of the revenue require them to be landed in a public warehouse, the master may enter them in his own name and preserve the lien; Abb. Shipp. pt. 8, ch. 3, § 11. His right to retain the goods may, however, be waived either by an express agreement at the time of making the original contract, or by his subsequent agreement or consent. The refusal of a master to deliver a cargo until security is furnished for the freight gives no right of action to the charterer, as the cargo is subject to a lien for freight; 48 Fed. Rep. 591. See LIEN; MARITIME LIEN; AVERAGE.

If freight be paid in advance and the goods are not conveyed and delivered according to the contract, it can, in all cases, in the absence of an agreement to the contrary, be recovered back by the shipper; 1 Sandf. 578.

The captor of an enemy's vessel is entitled to freight from the owner of the goods if he perform the voyage and carries the goods to the port of original destination; 1 Kent 181; but in such cases the doctrine of freight *pro rata* is entirely rejected; 4 Rob. Rep. 278; 5 *id.* 67; 6 *id.* 269.

See, generally, 3 Kent 178; Abbott, Shipping; Parsons, Marit. Law; Marshall, Ins.;

Comyns, Dig. Merchant (E 3 a); Boulay-Paty; Pothier, Charte-Part.

Other common carriers and railroads. In this connection the term is sometimes used as synonymous with merchandise.

As to the regulation of rates for carrying freight by statute, see IMPAIRING THE OBLIGATION OF CONTRACTS; RATES; INTER-STATE COMMERCE. As to discrimination in the charges, see DISCRIMINATION.

FREIGHTER. He to whom a ship or vessel has been hired, and who loads her under his contract. He who loads a general ship. 3 Kent 173; 3 Pardessus, n. 704.

The freighter is entitled to the enjoyment of the vessel according to contract, and the vessel hired is the only one that he is bound to take; there can, therefore, be no substitution without his consent. When the vessel has been chartered only in part, the freighter is only entitled to the space he has contracted for; and in case of his occupying more room or putting on board a greater weight, he must pay freight on the principles mentioned under the article of FREIGHT.

The freighter hiring a vessel is required to use the vessel agreeably to the provisions of the charter-party, or, in the absence of any such provisions, according to the usages of trade; he cannot load the vessel with merchandise which would render it liable to condemnation for violating the laws of a foreign state; 3 Johns. 105. He is also required to return the vessel as soon as the time for which he chartered her has expired, and to pay the freight.

FRENCH POOL. "French pool," also called "Paris Mutual," is described to be a small machine, containing the name of each horse to be run in a particular race written or printed on the side, and printed numbers placed on the inside of the machine, which could be seen through holes in it. It is used by the owner or person operating it, and by those engaged in betting on horse racing in this way. The owner or operator sells the tickets for five dollars each; they bear numbers corresponding with the number given the horse on the machines, and by turning a crank or screw attached to the machine the betters are shown at once the number of tickets sold on each horse as each of said tickets is sold, so as to enable him to bet more intelligently and safely, and lessen the chances of disaster to himself. After the race is over, the machine is examined to see how many tickets have been sold, and those persons holding tickets on the winning horse get the amount of all the money received by the operator for all the tickets sold by him on all the horses that have run in the particular race, less five per cent commission on the pool, which the operator of the machine retains for his services. 79 Ky. 619; 92 Ky. 573, 18 S. W. 454.

FRENCH SPOILIATION CLAIMS. On January 20, 1835 (23 Stat. L. 283), the congress of the United States, authorized all citizens of the United States or their legal representatives, to present to the court of claims valid claims which they had against France for spoiliations of property on the high seas prior to 1801. These spoiliations were committed by French war vessels and privateers in pursuance of governmental orders, inspired by alleged violations of the treaty of 1778 by the United States, and extended from about 1796 to 1801. The United States authorized retaliatory measures in 1798, and according to their supreme court, war existed between the two countries. Napoleon having succeeded to the Directory, made a treaty with the United States by which the respective pretensions of the two nations were abandoned. The claimants insisted that this proceeding was a trading off of their claims against France for a national consideration, and that their own government became liable therefor, and the court of claims has so advised congress. See NEXT OF KIN.

Claims for indemnity upon the French Government, for losses of citizens of the United States or their legal representatives,

arising from illegal captures, seizures, etc., of vessels or cargoes prior to the treaty of 1800 between France and the United States. Jurisdiction was given, by an act of 1885, to the Court of Claims to inquire into the matter of each claim which might be presented to it and to report to Congress its opinion of the validity and the amount of the claim with a statement as to its ownership. After the court had reported a French Spoliation case it remained with Congress to determine, first, the measure of the indemnity which the United States should give; and, second, the persons who were equitably entitled to participate therein. 190 U. S. 361, 362.

FRIENDLESMAN (Sax.). An outlaw. So called because of his outlawry he was denied all help of friends after certain days. Cowel; Blount.

FRIENDWITE. A fine exacted from him who harbored an outlawed friend. Cowel; Cunningham. A quitance for *for-fang* (exemption from the penalty of taking provisions before the king's purveyors had taken enough for the king's necessities). Cowel.

FREBORGH. A free-surety or free-pledge. Spelman, Gloss. See **FRANK-PLEDGE**.

FREOLING. See **FRILING**.

FREQUENT. To visit often; to resort to often or habitually. 109 Ind. 175.

A single visit to a place, or once passing through a street, cannot be said to be a "frequenting" that place or street. Anderson. May be used in contradistinction to "found," which applies to the case of a person apprehended in a building or inclosed ground, where the necessary inference would be that the purpose was unlawful, in which case it would be enough to show that the party was in the place only once. *Id.*; 14 Q. B. D. 98. What amounts to frequenting a street must depend upon circumstances. *Id.*; 101-2.

FRERE. A brother. Britt. c. 75.

FRESH DISSEISIN. Such disseisin as a man may seek to defeat of himself, and by his own power, without the help of the king or judges. There was no limit set to the time within which this might be done. It is set in one case as a disseisin committed within fifteen days. Bracton, lib. 4, cap. 5. In another case it was held a fresh disseisin when committed within a year. Britton, cap. 82, 48, 65; Cowel.

FRESH FINE. A fine levied within a year. Stat. Westm. 2 (13 Edw. I.), cap. 45; Cowel.

FRESH FORCE. Force done within forty days. Fitzh. N. B. 7; Old N. B. 4. The heir or reversioner in a case of disseisin by *fresh force* was allowed a remedy in chancery by bill before the mayor. Cowel.

FRESH SUIT. Where a man robbed follows the robber with all diligence, apprehends and convicts him of felony by verdict, even if it requires a year, it is called *fresh suit*, and the party shall have his goods again. The same term was applied to other cases; Cowel; 1 Bla. Com. 297.

FRESHET. A flood or overflowing of a river by means of rains or melted snow; an inundation. 3 Phila. 42.

FRETTUM. Freight. Mqz. & W.

FRETUM. A strait. *Fretum Brittanicum*, the strait between Dover and Calais.

FRIAR. A member of an order of religious persons, of whom there were four principal branches: 1. Minors. Gray Friars, or Franciscans. 2. Augustines. 3. Dominicans, or Black Friars. 4. White Friars, or Carmelites. Cowel; Whart.; Moz. & W.

FRIBUSCULUM. In Civil Law. A slight dissension between husband and

wife, which produced a momentary separation, without any intention to dissolve the marriage,—in which it differed from a divorce. Pothier, Pand. lib. 50, s. 106; Vicat, Voc. Jur. This amounted to a separation in our law. See **SEPARATION**.

FRIDBORG, FRITHBORG. Frank-pledge. Cowel. Security for the peace. Spelman, Gloss.

FRIDBURGUS (Sax.). A kind of frank-pledge whereby the principal men were bound for themselves and servants. Fleta, lib. 1, cap. 47. Cowel says it is the same with frank-pledge.

FRIDSTOL. See **FREDSTOLE**.

FRIEND OF THE COURT. See **AMICUS CURIAE**.

FRIENDLESS MAN. An outlaw. Cowel.

FRIENDLY SOCIETIES. Associations for the purpose of affording relief to the members and their families in case of sickness or death. They are governed by numerous acts of parliament, and were first authorized in 1793.

FRIENDLY SUIT. A suit brought by a creditor in chancery against an executor or administrator, being really a suit by the executor or administrator, in the name of a creditor against himself, in order to compel the creditors to take an equal distribution of the assets. 2 Wms. Ex. 1915. See **AMICABLE ACTION**; **CASE STATED**.

A suit brought between parties by mutual arrangement in order to obtain a decision upon some point in which both are interested. Byrne.

Also, any suit instituted by agreement between the parties to obtain the opinion of the court upon some doubtful question in which they are interested, such as actions for construction of wills, partition suits, etc. R. & L. Dict.

FRIGHT. An ordinary witness not an expert may testify that a horse appeared to be frightened; 117 Mass. 122. Although this was a *dictum*, it was followed in the court of another state which held that such witness might testify that horses were frightened by water being thrown upon them; 60 Ia. 429.

FRIGIDITY. Impotence.

FRILING, or FREOLING. A free-man born. Jac. L. Dict.; Spel. Gloss.

(Anglo-Sax. *fre*, free, and *ling*, offspring.) Persons of free descent; the middle class of persons among the Saxons. Burrill; Spelman.

FRIPPER, FRIPPERER. One who scours and dresses up old clothes to sell again. Moz. & W.

FRISCUS. Fresh uncultivated ground. Mon. Angl. tit. 2, p. 56. Fresh, not salt. Reg. Orig. 97. Recent or new.

FRITH. See **FRYTH**.

FRITHBOTE. A satisfaction or fine for a breach of the peace. See **FREDUM**.

FRITHBREACH. The breaking of the peace. Cowel.

FRITHGAR. The year of jubilee or of meeting for peace and friendship. Jac. L. Dict.

FRITHGILDA. A guild hall. A company or fraternity for the maintenance of peace and security; a fine for breach of the peace. Jac. L. Dict.

FRITHMAN. A member of a company or fraternity. Blount.

FRITHSOCNE. Surety of defence. Jurisdiction of the peace. The franchise of preserving the peace. Cowel; Spelman, Gloss.

FRITHSOEN, or FRITHSTOL. Asylum; sanctuary. See **FREDSTOLE**.

FRITHSOKE, or FRITHSOKEN. The right of liberty of having a view; frank-pledge. Fleta. See **FRITHSOCNE**, which seems to be interchangeable. Cowel; Cun. L. Dict.

FRITHSPLOT, or FRITHGEARD. A spot or plot of land, encircling some stone, tree, or well, considered sacred, and, therefore, affording sanctuary to criminals. Whart.

FRIVOLOUS. An answer or plea is frivolous which controverts no material allegation in the complaint, and which is manifestly insufficient. Under the English common-law amendment act, and by the codes of some of the states, the court is authorized to strike out such a plea, so that the plaintiff can obtain judgment without awaiting the regular call of the cause; 1 Abb. Pr. 41; 8 *id.* 149; 3 Sandf. 732. See 1 Misc. Rep. 483; 74 Hun 639; 53 Minn. 98; 51 Wis. 430.

An answer cannot be stricken out on the ground that it is frivolous, where an extended argument or illustration is required to demonstrate its frailty: 67 Hun 648; 74 *id.* 527. A pleading interposed for delay is frivolous, but a pleading is not frivolous because vague; 7 Wis. 383; 16 How. Pr. 135; 2 N. Dak. 72.

Frivolous is not synonymous with irrelevant; 5 Abb. Pr. N. S. 338, 343; 53 Barb. 650.

FRODMORTEL, or FREOMORTEL. An immunity for committing manslaughter. Mon. Angl. t. 1, 173.

FROM. The legal effect of this word has been a fruitful subject of judicial discussion resulting in a great diversity of construction of the word as used with respect to both time and place. Many attempts have been made to lay down a general rule to determine whether it was to be treated as inclusive or exclusive of a *terminus a quo*, whether of time or place. Very long ago a critical writer, after reviewing the cases up to that date, undertook to formulate such a rule thus: From, as well in strict grammatical sense, as in the ordinary import thereof, when referring to a certain point as a *terminus a quo*, always excludes that point; though in vulgar acceptance it were capable of being taken indifferently, either inclusively or exclusively, yet in law it has obtained a certain fixed import and is always taken as exclusive of the *terminus a quo*. Powell, Powers 449. This conclusion states a rule applied in the majority of cases, and it was said that the prepositions "from," "until," "between," generally exclude the day to which they relate, but the general rule will yield to the intent of parties; 120 Mass. 94. But the rule has not been unvarying, and many courts have not hesitated to follow the views of Lord Mansfield, in Cowp. 714 (overruling his own decision of three years before, *id.* 189), that it is either exclusive or inclusive according to context and subject-matter, and the court will construe it to effectuate the intent of parties and not to destroy it.

As to time, after an examination of authorities, Washington, J., laid down what he considered the settled principles to be deduced from them: (1) When time is computed from an act done, the day of its performance is included; (2) when the words are from the date, if a present interest is to commence, the day is included, if it is a *terminus* from which to impute time the day is excluded; 4 Wash. C. C. 240; in which the latter principle was applied to a lease, as it was also in Lord Raym. 84; and to a bond; 15 S. & R. 135; and the first proposition has been laid down with reference to the words "from and after the passage of this act;" 9 Cra. 104; 1 Paine 261; 1 Gall. 348; *contra*, 1 Nott. & McC. 505. See 3 Cra. 399. From is generally held a word of exclusion; 9 Wend. 845; Anth. 243; 33 Me. 67; 18 *id.* 106; 12 R. I. 819; 1 Pick. 485; 7 Allen 487. But a promise made November 1st, 1811, and sued November 1st, 1817, was held barred by statute of limitation; 15 Mass. 193; Hobart 139. In many cases it is held to be either exclusive

or inclusive according to the intention of the parties; 24 Barb. 9; 1 Hayw. N. C. 114; 2 Pars. Cont. 175. Where an act was to be done in a given number of days from the time of the contract, the day on which the contract was made was included; 21 Ind. 194; but if the contract merely says in so many days it means so many days from the day of date, and that is excluded; 9 N. H. 304. A fire policy from one given date to another includes the last day, whether the first is included was not decided; L. R. 5 Exch. 296. In most cases when something is required to be done in a given time from the day on which an event has happened, that day is excluded, as in case of proving claims against the estate of a decedent or insolvent; 19 Conn. 376; enrolling deeds, after execution; 5 Tenn. 283; appeal from arbitrators, afterward; 3 S. & R. 496; 1 id. 411; issuing a *seire facias* to revive a judgment, after entry; 6 W. & S. 327; the time an execution runs, after its date; 6 Cow. 639; redemption from execution sale; id. 518; allowing appeal from a justice; 2 Cow. 603. The principle is thus well expressed. When time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, that day is excluded and the last day included; 2 Wall. 177; 3 Denio 16. But it was held that in considering the question of barring a writ of error, the day of the decree is included; 13 B. Mon. 460.

From the expiration of a policy means from the expiration of the time from which the policy was effected and not the time at which the risk is terminated by alienation; 2 Mass. 318. Six months from testator's death allowed a legatee to give security not to marry, are exclusive of that day; 15 Ves. 248. Where an annuity is given, and from and after the payment thereof and subject thereto, the principal over, the gift over is subject to make up deficiency of income; *aliter* if the gift over were from and after the annuitant's death, merely; L. R. 2 Ch. App. 644, reversing L. R. 4 Eq. 58. From time to time, as applied to the payment of expenses or damages caused by building a railroad; L. R. 5 Ex. 6; or the appointment, by a married woman, of rents and profits; 1 Ves. Jr. 189 and note; 3 Bro. C. C. 340; 12 Ves. 501, do not require periodical payments or appointments, nor restrain the party from a sweeping discharge or disposition of the whole subject-matter at once. From time to time is not sufficient in a bail bond which under the statute should stipulate for appearance from term to term; 25 S. W. Rep. (Tex.) 1072. From day to day, in reference to adjournments, usually means to the next day but, under a statute authorizing the adjournment of a sale from day to day, a sale is good if made by adjournment to a day, certain, which did not immediately succeed the first; 4 Watts. 363. From henceforth in a lease means from the delivery; 5 Co. 1; so also does one from March 25th last past (the execution being March 25th); 4 B. & C. 272; or one from an impossible date (as February 30th), or no date, but if it has a sensible date, the word date in other parts of it means date, not delivery; 4 B. & C. 908. Where authority is given to commissioners to build a bridge and then and from thenceforth, the county to be liable, means only after the bridge is built; 16 East 305.

Whenever they are used with respect to places it is said that "from," "to," and "at" are taken inclusively according to the subject-matter; 91 U. S. 343 (fixing the terminus of a railroad in an act of congress). From an object to an object in a deed excludes the terminus referred to; 52 Me. 252; 84 id. 459. From place to place means from one place in a town to another in the same town; 7 Mass. 158; 11 Gray 81. From a street means from any part of it according to circumstances; 74 Pa. 259. From a town is not always and indeed is seldom exclusive of the place named; it generally means from some indefinite place within that town; 3 Cra. C. C. 599, 606. Authority in a railroad charter to construct a railroad from a city to another point gives power to construct

the road from any point within the city; 52 Ga. 244; 99 Pa. 155; 3 Head 596; *contra* 8 Rich. L. 177. And see 10 Johns 393, where in a similar case "to" was construed "into;" and 6 Paige 554 where, "at or near" was held equivalent to "within." But from a town to another in an indictment for transportation of liquor does not charge it as done within the town; 84 Me. 459. To construe reasonably the expression a road from a village to a creek within the same village, in a statute, requires that it be taken inclusively; 7 Barb. 416. Sailing from a port means out of it; 2 Mass. 129. Descent from a parent cannot be construed to mean through a parent, it must be immediate, from the person designated; 2 Pet. 58, 86; 4 Ind. 51; but the words from the part of the father include a descent, either immediately from the father or from any person in the line of the father; 1 S. & R. 222.

The words to be paid for in from six to eight weeks have no definite meaning and it was properly left to the jury to say if the suit was brought prematurely; L. R. 9 C. P. 20. From the loading in a marine policy ordinarily means that the risk is covered after the goods are on board, but this meaning may be qualified by any words in the policy indicating a different intention; 16 East 240; L. R. 7 Q. B. 589, 702. A contract to deliver from one to three thousand bushels gives the seller an option to deliver any quantity he chooses within the limits named; 4 Me. 497. Appraisers living from one to one and a half miles away, in a fairly well settled community, are *prima facie* from the neighborhood; 23 S. W. Rep. (Mo.) 688.

From and After. An act authorizing contracts for the payment of interest at 10 per centum provided: "This Act shall take effect and be in force from and after the first day of September, 1871." The words "from" and "after" are used in direct connection, and they fix the day named as a positive period of time after which the rule of action prescribed by the Act is to prevail. 12 Bush (Ky.) 403.

From His Appointment. The words "from his appointment" merely designate the beginning of the term of the first incumbent, and where an incumbent was re-appointed from term to term, the time being permitted to lap over the expiration of the term, each re-appointment was for the unexpired term, and where a four-year term ended in January and an appointment was made in December of the previous year the appointee was entitled to hold only until such later date. 138 Ky. 314, 127 S. W. 1010.

FRONT. Ordinarily, as applied to a lot or tract of land, that part of it which abuts on, or gives access from, it to a highway whether natural or artificial. But sometimes as in a covenant to keep up sidewalks, the front of a corner lot may mean the side; 31 Ia. 89.

When the contract of sale calls for a store fifty-six feet front and rear and the deed describes the lot as nineteen feet wide, there being visible monuments, —side walls,—the later control and front and rear will be taken as the depth of the lot, though the natural meaning would be the width; 10 Paige 386.

A covenant not to open or put out a door to the front of the street means a door giving access to the street and not close upon it, and the covenant is broken if the door be eight feet back of the actual front; Dowl. & Ry. 556, 563.

The words from to the river (in French and Spanish deeds, *face au fleuve*, or *frente al rio*), used in describing part of a plantation, *prima facie* designate a riparian estate, unless, taken in such sense, they have an incongruous or absurd result; 6 Mart. La. 19, 224, in which the meaning of this expression was learnedly and elaborately defined. It is otherwise as to a sale of part of a tract when at the time of sale the vendor owned another part between that sold and the river; in the last case the words are descriptive of the situation of the property; 8 Mart. La. 572.

And the words front of the levee (*frente a la levee*) when there was land outside of the levee susceptible of ownership does not signify a boundary on the river; 9 Mart. La. 656, 719.

It was held that land which had a five foot strip between it and the street was not liable for street improvements under a charter providing that land taxable for street improvements must front on the street. 14 A. & E. Ency. 2nd ed., 558; 50 Mo. App. 367.

A corner lot has two fronts, at an angle with each other. A covenant, in a lease of a lot upon the corner of two streets, to "keep up the sidewalks in front of the same" is not confined to the main front, but includes the sidewalk on the side street. Id.; 31 Iowa 89. But it has been held that the real front of a corner lot is determined by the architectural construction of the main buildings, their use and occupancy, and not by the entrance into subordinate or out-buildings. Id.; 3 Ohio Dec. 667. Front to the river is a phrase which makes the river a boundary. Id.; 6 Mart. (La.) 224.

FRONT OF AN ACRE. An expression which "has no proper application to a line, and has not a natural or generally acknowledged and received sense. It is too vague to determine the length of the front line of a lot as a basis for a decree for specific performance;" 3 Del. Ch. 466.

FRONT FOOT. As used in an act providing that property shall be assessed in proportion to the "front foot" has been held synonymous with "abutting foot." 181 Mo. 19.

A foot on the highway, street, or water front. When applied to lots means a foot front and the entire depth of that foot as distinguished from square foot. English.

FRONTAGE, FRONTAGER. In English Law. A frontager is a person owning or occupying land which abuts on a highway, river, sea-shore, or the like. The term is generally used with reference to the liability of frontagers on streets to contribute towards the expense of paving, draining, or other works on the highway carried out by a local authority, in proportion to the frontage of their respective tenements. Public Health Act, 11 & 12 Vict. c. 63. There is no liability at common law binding a frontager on the sea to maintain a sea-wall on his land; 1 Q. B. D. 225. Such an owner has an easement of access, as it is called, to a highway or water on which his land fronts or abuts, which is a right distinct from the right of the public to pass over or navigate upon it; but it does not warrant an action by the frontager for obstruction to navigation without proof of special damage; L. R. 5 App. Cas. 84. The corresponding American term is abutter (q. v.)

FROST-THING, THE. See GULA-THING, THE.

FROZEN SNAKE. A term used to impute ingratitude and held libellous, the court taking judicial notice of its meaning without an innuendo. 12 Ad. & El. 624.

FRUCTUARIUS (Lat.). One entitled to the use of profits, fruits, and yearly increase of a thing. A lessee; a fermor. Bracton, 241; Vicat, Voc. Jur.

Sometimes, as applied to a slave, he of whom any one has the usufruct. Vicat, Voc. Jur.

FRUCTUS (Lat.). The right of using the increase of fruits: equivalent to usufruct.

That which results or springs from a thing: as, rents, interest, freight from a ship, etc.

All the natural return, increase, or addition which is added by nature or by the skill of man, including all the organic products of things. Vicat, Voc. Jur.; 1 Mac-kelvey, Civil Law § 154.

FRUCTUS CIVILES (Lat. civil fruits). All revenues and recompenses which, though not *fruits* properly speaking, are recognized as such by the law. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex.; Vicat, Voc. Jur.

FRUCTUS INDUSTRIALES (Lat.). Those products which are obtained by the labor and cultivation of the occupant: as, corn or peaches; 1 Kauffmann, Mackeld. § 154, n.; 40 Md. 212; 118 Mass. 325. Emblements are such in the common law; 2 Steph. Com. 258; Vicat, Voc. Jur.

Fruits and vegetables produced by cultivation, as distinguished from the products of perennials; such as trees, bushes, etc., which are *fructus naturales*. 49 Minn. 412.

FRUCTUS LEGIS. The fruit of the law *i. e.* execution.

FRUCTUS NATURALES (Lat.). Those products which are produced by the powers of nature alone: as wool, metals, milk, the young of animals, and the fruit of trees and other perennial plants. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex. See **FRUCTUS INDUSTRIALES**.

FRUCTUS PENDENTES (Lat.). The fruits united with the thing which produces them. These form a part of the principal thing; 1 Kauffmann, Mackeld. § 154. Sometimes called *fructus stantes*, standing fruits.

FRUCTUS REI ALIENAE. Fruits taken from another's estate; the fruits of another's property.

FRUCTUS SEPARATI. In Civil Law. Separate fruits, the fruits of a thing when they are separated from it. Dig. 7, 4, 13.

FRUGES (Lat.). Anything produced from vines, underwood, chalk-pits, stone-quarries. Dig. 50, 16, 77.

Grains and leguminous vegetables. In a more restricted sense, an esculent growing in pods. Vicat, Voc. Jur.; Calvinus, Lex.

FRUIT. The produce of a tree or plant which contains the seed or is used for food. This term, in legal acceptance, is not confined to the produce of those trees which, in popular language, are called fruit trees, but applies also to the produce of oak, elm, and walnut trees. It denotes the produce not only of orchard, but of timber trees. 5 B. & C. 847.

FRUITS OF CRIME. In the Law of Evidence. Material objects acquired by means and in consequence of the commission of crime, and sometimes the subject-matter of the crime. Burr. Circ. Ev. 445; Benth. Jud. Ev. 31.

FRUIT FALLEN. The produce of any possession detached therefrom, and capable of being enjoyed by itself. Thus a next presentation, when a vacancy has occurred, is a fruit fallen from the advowson. Whart.

FRUMENTUM. In Civil Law. Grain. That which grows in an ear. Dig. 50.

FRUMGYLD. The first payment made to the kindred of a slain person in recompense for his murder. Blount; *Termes de la Ley*; Leg. Edmundi, cap. ult.

FRUMSTOLL (Sax.). A chief seat or mansion-house. Cowel. An original or paternal dwelling. Anct. Inst. Eng.

FRUSCA TERRA. In Old Records. Uncultivated and desert ground. 2 Mon. Angl. 327; Cowel.

FRUSSURA. Plowing; a breaking. Cowel.

FRUSTRUM TERRE. A piece or parcel of land lying by itself. Co. Litt. 5 b.

FRUTECTUM, FRUTETUM, or FRUTICETUM. A place where shrubs or herbs grow. Jac.; Blount; Spel. Glos.

FRUTOS. In Spanish Law. Fruits; products; profits; grains. White, New Recop. b. 1, tit. 7, c. 5, § 2.

FRYMITH, FYNMITH. In English Law. The affording harbor and entertainment to any one. Anct. Inst. Eng.

FRYTHER (Sax.). In Old English Law. A plain between woods. Co. Litt. 5 b. An arm of the sea, or a strait between two lands. Cowel.

A wood, from *frid*, pax; for the English Saxons held woods to be sacred, and therefore made them sanctuaries. Tomlin. Also, a plain between woods, or a lawn. *Id.*; Co. Litt. 5. Camden in his Britannia used it for an arm of the sea, or a strait, between two lands, from the word *frctum*, *Id.*

FUAGE, FOCAGE. Hearth-money. A tax laid upon each fireplace or hearth. 1 Bla. Com. 324; Spelman, Gloss. An imposition of a shilling for every hearth, levied by Edward III. in the dukedom of Aquitaine.

FUDGE. When a libellous statement was copied from a prior publication and published with the word fudge prefixed thereto, it was left to the jury to say whether the word was added to vindicate the character of the plaintiff, or merely to create an argument in favor of the publisher in case of an action; 6 C. & P. 245.

FUEL. See SMOKE.

FUEL & GAS. See GAS.

FUER. To fly; which may be by bodily flight, or by non-appearance when summoned to appear in a court of justice, which is flight in the interpretation of the law. Cowel; Toml.; Whart.

The flight is of two kinds: (1) *fuere in fait*, or *in facto*, where a person does apparently and corporally flee; (2) *fuere in ley*, or *in lege*, when, being called to court, one does not appear, according to legal interpretation he flees. Wharton.

FUEBO. In Spanish Law. Compilations or general codes of law.

The usages and customs which, in the course of time, had acquired the force of unwritten law.

Letters of privilege and exemption from payment of certain taxes, etc.

Charters granted to cities or towns on condition of their paying certain dues to the owner of the land of which they had enjoyment.

Acts of donation granted by some lord or proprietor in favor of individuals, churches, or monasteries.

Ordinances passed by magistrates in relation to the dues, fines, etc., payable by the members of a community.

Letters emanating from the king or some superior lord, containing the ordinances and laws for the government of cities and towns, etc.

This term has many and very various meanings, as is shown above, and is sometimes used in other significations beside those here given. See, also, Schmidt, Span. Law 64; Escriche, Dict. Razz. *Feuro*.

Fuero Viejo. A compilation of Spanish law, published about A. D. 992. R. & L. Dict.

FUERO DE CASTILLA. In Spanish Law. The body of laws and customs which formerly governed the Castilians.

FUERO DE CORREOS Y CAMINOS. In Spanish Law. A special tribunal taking cognizance of all matters relating to the post-office and roads.

FUERO DE GUERRA. In Spanish Law. A special tribunal taking cognizance of all matters in relation to persons serving in the army.

FUERO JUZGO. In Spanish Law. The code of laws established by the Visigoths for the government of Spain, many of whose provisions are still in force. See

the analysis of this work in Schmidt's Span. Law 30.

FUERO DE MARINA (called, also, *Jurisdiccion de Marina*). In Spanish Law. A special tribunal taking cognizance of all matters relating to the navy and to the persons employed therein.

FUERO MUNICIPAL. In Spanish Law. The body of laws granted to a city or town for its government and the administration of justice.

FUERO REAL. In Spanish Law. A code of laws promulgated by Alonzo el Sabio in 1255, and intended as an introduction to the larger and more comprehensive code called *Las Siete Partidas*, published eight years afterwards. For an analysis of this code, see Schmidt, Span. Law 67.

FUERO VIEJO. The title of a compilation of Spanish Law, published about A. D. 992. Schm. Civil Law, introd. 65.

FUGA CATALORUM. In Old English Law. A drove of cattle. Fleta; Blount.

FUGACIA. A chase. Cowel; Blount.

FUGAM FECIT (Lat. he fled). In Old English Law. A phrase in an inquisition, signifying that a person fled for treason or felony. The effect of this is to make the party forfeit his goods absolutely, and the profits of his lands until he has been pardoned or acquitted.

FUGATIO. A privilege. to hunt. Wharton; Blount.

FUGATOR. In English Law. A privilege to hunt. Blount.

A driver. *Fugatores carrucarum*, drivers of wagons. Fleta, lib. 2, c. 78.

FUGATOES CARRUCARUM. Wagoners, who drive oxen without beating or goading. Wharton; Fleta, 1. 2, c. 78.

FUGITATE. In Scotch Practice. To outlaw by the sentence of a court; to outlaw for non-appearance in a criminal case. 2 Allison Prac. 350. See next title.

FUGITATION. In Scotch Law. A declaration that a criminal who does not appear on the day to which he is cited is a fugitive, in consequence of which he is subject to single escheat: Ersk. Prin. 591 (*i. e.* forfeiture all moveables to the crown; *id.* 155); and he may also be denounced a rebel; *id.*

FUGITIVE FROM JUSTICE. One who, having committed a crime, flees from the jurisdiction within which it was committed, to escape punishment.

As one state cannot pursue those who violate its laws into the territories of another, and as it concerns all that those guilty of the more atrocious crimes should not go unpunished, the practice prevails among the more enlightened nations of mutually surrendering such fugitives to the justice of the injured state. This practice is founded on national comity and convenience, or on express compact. The United States recognize the obligation only when it is created by express agreement. They have contracted the obligation with many foreign states by treaty, and with one another by their federal constitution and laws. See EXTRADITION.

Surrender under Treaties. The treaties enumerate the crimes for which persons may be surrendered, and in some other particulars limit their own application. They also contain some provisions relating to the mode of procedure; but, as it was doubted whether such stipulations had the force of law; Park. Cr. Cas. 108; congress passed the act of August 12, 1848, entitled "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders." 9 Stat. L. 302. This has since been amended; and the statutes on the subject are found in U. S. Rev. Stat. §§ 5270-5280.

These acts embody those provisions contained in the treaties relating to the procedure, and contain others designed to facilitate the execution of the duty assumed by treaty.

The following are the leading provisions of the law relating to the practice: 1. A complaint made under oath or affirmation charging the person to be arrested with the commission of one of the enumerated crimes. 2. A warrant for the apprehension of the person charged may be issued by any of the justices of the supreme court or judges of the several circuit or district courts of the United States, or the judge of a court of record of general jurisdiction of any state, or the commissioners authorized so to do by any of the courts of the United States. 3. The person arrested is to be brought before the officer issuing the warrant, to the end that the evidence of criminality may be considered. 4. Copies of the depositions upon which an original warrant in the country demanding the fugitive may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. 5. The degree of evidence must be such as, according to the laws of the place where the person arrested shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed. 6. If the evidence is deemed sufficient, the officer hearing it must certify the same, together with a copy of all the testimony taken before him, to the secretary of state, and commit the prisoner to the proper goal until the surrender be made, which must be within two calendar months. 7. The secretary of state, on the proper demand being made by the foreign government, orders, under his hand and seal of office, in the name and by authority of the president, the person so committed to be delivered to such person as may be authorized, in the name and on behalf of such foreign government, to receive him. 8. The demand must be made by and upon those officers who represent the sovereign power of their states. 7 Op. Attys. Gen. 6; 8 *id.* 521. By act of Aug. 3, 1882, it is directed that all extradition cases under treaties shall be heard publicly; U. S. Rev. Stat. 1 Supp. 371.

The convenient and usual method of action is for some police officer or other special agent, after obtaining the proper papers in his own country, to repair to the foreign country, carry the case through with the aid of his minister, receive the fugitive, and conduct him back to the country having jurisdiction of the crime; 8 Op. Attys. Gen. 521.

In all the treaties the parties stipulate upon mutual requisitions, etc., to deliver up to justice all persons who, being charged with crime, "shall seek an asylum or shall be found in the territories of the other." The terms of this stipulation embrace cases of absence without flight, as well as those of actual flight; 8 Op. Attys. Gen. 306. The treaties of the United States do not guarantee a fugitive an asylum in any foreign country. So far as they regulate the right of asylum at all, they limit it; 119 U. S. 700. See as to the right of asylum, 6 Law Mag. & Rev. 4th, 262. After the arrest, and until the surrender, it is the duty of the United States to provide a suitable place of confinement and safely keep the prisoner; 8 Op. Attys. Gen. 396. If, however, the prisoner escapes, he may be retaken in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape may be retaken on an escape; U. S. Rev. Stat. § 5272.

It is provided in all the treaties that the expense of the apprehension and delivery shall be borne and defrayed by the party making the requisition. The substance of the various treaties is set forth under EXTRADITION.

Inter-State Rendition. In art. iv, sec. 2, of the constitution, it is provided that

"A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The act of congress of February 12, 1793, 1 Stat. L. 303, prescribes the mode of procedure, and requires, on demand of the executive authority of a state and production of a copy of an indictment found or an affidavit made before a magistrate charging the person demanded with treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person so charged fled, that the executive authority of the state or territory to which such person shall have fled shall cause the person charged to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and cause the fugitive to be delivered to such agent when he shall appear; but if such agent do not appear within six months, the prisoner shall be discharged. It further provides that if any person shall by force set at liberty or rescue the fugitive from such agent while transporting the fugitive to the state or territory from which he fled, the person so offending shall, on conviction, be fined not exceeding five hundred dollars and be imprisoned not exceeding one year, and that all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive shall be paid by the state or territory making the demand. U. S. Rev. Stat. § 5278-9.

In the execution of the obligation imposed by the constitution, the following points deserve attention:—

The crime, other than treason or felony, for which a person may be surrendered. Some difference of opinion has prevailed on this subject, owing to some diversity of the criminal laws of the several states; but the better opinion appears to be that the terms of the constitution extend to all acts which by the laws of the state where committed are made criminal; 6 Pa. L. J. 412; 1 Kent 42, n.; 9 Wend. 212; 13 Ga. 97; 3 Zab. 311; 24 How. 107; 56 N. Y. 187. The word "crime" embraces every species of indictable offence; 24 How. 99; including an act not criminal at the time the constitution was adopted but made so afterwards; 37 N. J. 147; 56 N. Y. 182; and an act which is criminal under the law of the state from which the accused has fled, but is not so under the law of the state into which he has fled; 24 How. 103. It has been held that the offence must be a crime; a prosecution under bastardy proceedings will not support an application for extradition; 25 Alb. L. J. 108 (Michigan).

The accusation must be in the form of an affidavit or indictment found and duly authenticated. If by affidavit, it should be sufficiently full, and explicit to justify arrest and commitment for hearing; 6 Pa. L. J. 412; 3 McLean 121; 1 Sandf. 701; 3 Zab. 311; 116 Mo. 505; 52 Wis. 699. The demand must be made by the governor of the state; 9 Gray 262.

The accused must have fled from the state in which the crime was committed; and of this the executive authority of the state upon which the demand is made should be reasonably satisfied. This is sometimes done by affidavit. The governor upon whom the demand is made acts judicially, so far as to see whether the case is a proper one; 31 Vt. 279; but he cannot look behind the indictment in which the crime is charged; 32 N. J. 145; 16 Wall. 366. The duty to surrender the fugitive is obligatory; 24 How. 103; 16 Wall. 370; 32 N. J. 145. But in the case of a conflict of jurisdiction between the two states the surrender may be postponed; 16 Wall. 366; 51 How. Pr. 422. As to executive discretion, see 18 Am. L. Rev. 181.

In the absence of direct evidence on the question of flight, if it appear from the indictment or affidavit produced that the crime charged is atrocious in its nature,

was recently committed, and the prosecution promptly instituted, the unexplained presence of the accused in another state immediately after the commission of the crime ought perhaps to be regarded as *prima facie* evidence of flight, sufficient, at least, to warrant an order of arrest. The order of surrender is not required, by the act of congress, to be made at the same time with the order of arrest, and time, therefore, can be taken, in doubtful cases, after the accused is arrested and secured, to hear proofs to establish or rebut such *prima facie* evidence; 6 Am. Jur. 226; 7 Bost. Law Rep. 386. Where an officer of a bank, the business of which is under his control, goes to another state and allows the bank, while to his knowledge in an insolvent condition, to receive a deposit, in violation of the state law, he is guilty of the offence, though not in the state at the time of the deposit or afterwards, and is a fugitive from the justice of that state; 49 Fed. Rep. 833.

Under a statute providing interstate extradition, a person is a fugitive from justice when he has committed a crime within a state, and withdrawn from the jurisdiction of its courts without waiting to abide the consequences, and it matters not that some other cause than a desire to flee induced such withdrawal; 14 U. S. App. 87.

One who sets in motion the agencies for the commission of a crime, but departs from the state before the offence is consummated, is a fugitive from justice within the meaning of the statute relating to extradition; 49 Fed. Rep. 833.

In order to constitute "fleeing from justice," under R. S. sec. 1045, it is not necessary that there should be an intent to avoid the justice of the United States. It is sufficient that there is an intent to avoid the justice of the state having jurisdiction over the same territory and the same act. It is sufficient that there is a flight with the intention to avoid prosecution whether one has been begun or not; 160 U. S. 128.

The accused person may be arrested to await a demand; 49 Cal. 436; but he cannot be surrendered before a formal demand is made; 17 B. Monr. 677. But if he be so surrendered and returned to the state from which the requisition came, this is not a ground of discharge then; 18 Pa. 39.

The surrender of the accused must be made to an agent of the executive authority of the demanding state, duly appointed to receive the fugitive.

The proceedings of the executive authorities are subject to be reviewed on *habeas corpus* by the judicial power, and if found void the prisoner may be discharged; 3 McLean 121; 3 Zab. 311; 9 Tex. 635; 49 Cal. 434; 106 Mass. 223; 56 N. Y. 182; 49 Fed. Rep. 833. But the courts have no jurisdiction to compel the executive to comply with a requisition; 24 How. 66; 5 Cal. 287. Nor have the federal courts such jurisdiction; 24 How. 66. Nor will the court on *habeas corpus* try the validity of the indictment under which he is charged; 32 Tex. Cr. R. 301.

As to the trial of an offender for a different offence than that for which he was surrendered, or when his surrender was improperly obtained, see EXTRADITION. See JUSTICE, FLEEING FROM.

FUGITIVE'S GOODS. Under the old English Law, where a man fled for felony, and escaped, his own goods were not forfeited as *bona fugitivorum* until it was found by proceedings of record (e. g. before the coroner in the case of death) that he fled for the felony. Foxley's Case, 5 Co. 109 a. See FUGAM ECIT; WAIFS.

FUGITIVE SLAVE. One who, held in bondage, flees from his master's power.

Prior to the adoption of the constitution of the United States, the duty of surrendering slaves fleeing beyond the jurisdiction of the state or colony where they were held to service was not regarded as a perfect obligation, though, on the ground of inter-state comity, they were frequently surrendered to the master. Instances of such surrender or permission to reclaim occur in the history of the colonies as early as 1685; Henr. & Hab. Corp. 562. As slavery disappeared in some states, the difficulty of

recovering in them slaves fleeing from those where it remained was greatly increased, and on some occasions reclamations became quite impracticable. The subject engaged the attention of the convention of 1787; and, at the instance of members from slaveholding states, a provision was inserted in the constitution for the surrender of such persons escaping from the state where they owed service, into another, which provision was considered a valuable accession to the security of that species of property; 4 Elliott, Debates 487, 492; 5 id. 176, 286.

This provision is contained in art. iv. sec. 2 of the constitution, and is as follows:

"No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Congress, conceiving it to be the duty of the federal government to provide by law, with adequate sanctions, for the execution of the duty thus enjoined by the constitution, by the act of February 12, 1793, and again by the amendatory and supplementary act of September 18, 1850, regulated the mode of arrest, trial, and surrender of such fugitives. Some of the states have, also, at times passed acts relating to the subject; but it has been decided by the supreme court of the United States that the power of legislation in the matter was vested exclusively in congress, and that all state legislation inconsistent with the laws of congress was unconstitutional and void; 16 Pet. 608; 11 Ill. 382.

These acts of congress were held to be constitutional and valid in all their provisions; 16 Pet. 608; 5 S. R. 62; 9 Johns. 67; 2 Paine 348; 7 Cush. 285; 6 McLean 355; 21 How. 506.

The 3d and 4th sections of act of 1793, 1 Stat. L. 302, authorized the arrest of a slave by the owner, his agent or attorney, and on proof before a United States judge or a magistrate, a certificate of ownership should be given and would be a warrant for removal. Under the act of 1850, 9 Stat. L. 462, the manuals of the United States were required to arrest such slaves.

The act of 1850, and the 3d and 4th sections of the act of 1793 were repealed by the act of June 25, 1864, 13 Stat. at L. 200. For some decisions as to the question of the interference between the acts of 1793 and 1850, see 5 McLean 469; 13 How. 423.

In the practical application of the provisions of the acts of 1793 and 1850 for the reclamation of fugitive slaves, it was held that the owner was clothed with authority in every state of the Union to seize and recapture his slave wherever he could do it without any breach of the peace or illegal violence; 10 Pet. 608; that he might arrest him on Sunday, in the night-time, or in the house of another if no breach of the peace was committed; Baldw. 577; that if the arrest was by agent of the owner, he must be authorized by written power of attorney executed and authenticated as required by the act; 6 McLean 224; and if his arrest was demanded it should be shown; 3 McLean 631; but he was not required to exhibit it to every one who might mingle in the crowd which obstructed him; 4 McLean 402; that, if resisted by force in making the arrest, the owner might use sufficient force to overcome the unlawful resistance offered without being guilty of the offence of riot; 3 Am. L. J. 258; 7 T. L. J. 115; Baldw. 577; that whilst the examination was pending before the magistrate who had jurisdiction of the case, the person arrested was in custody of the law, and might be imprisoned for safekeeping; 2 Paine 348; 4 Wash. C. C. 461; 6 McLean 355; that the act of Sept. 18, 1850, did not operate as a suspension of the writ of *habeas corpus*; 5 Op. Atty. Gen. 254; but that that writ could not be used by state officers to defeat the jurisdiction acquired by the federal authorities in such cases; 7 Cush. 285; 5 McLean 92; 1 Blatchf. 635; 21 How. 506.

The provisions of the constitution and laws above cited are held to extend only to cases where persons held to service or labor in one state or territory by the laws thereof escaped into another. Hence, if the owner voluntarily took his slave into such other state or territory, and the slave left him there or refused to return, he could not institute proceedings under those laws for his recovery; 4 Wash. C. C. 396; 10 Pa. 817; 10 How. 82. And children, born in a state where slavery prevailed, of a negro woman who was a fugitive slave, were not fugitive slaves or slaves who had escaped from service in another state, within the meaning of the constitution and acts of congress; 29 Ala. x. s. 155.

Since the adoption of the thirteenth amendment of the U. S. constitution, the above is entirely obsolete and possesses no more than an historical interest.

FULL. Complete; entire; detailed.

FULL AGE. The age of twenty-one, by common law, of both males and females, and of twenty-five by the civil law. Litt. § 259; 1 Bla. Com. 463; Vicat, Voo. Jur. Full age is completed on the day preceding the anniversary of birth; Salk. 44, 625; 2 Ld. Raym. 1096; 2 Kent 263; 3 Harr. Del. 537; 4 Dana 597. See FRACTION OF A DAY.

This period is arbitrary, and is fixed by statute. In the United States the common-law period has been generally adopted. In Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Ohio, South Dakota, Vermont, and Washington, however, a woman is of full age at eighteen. 2 Kent 233. In Louisiana and Texas, the common-law rule, and not that of the civil law, prevails; 7 Tex. 502. See AGE.

FULL ANSWER. One which meets all the legal requirements.

One which is ample and sufficient. As extensive a term as though "complete" had been super-added. Burrill; Ligon, J. 22 Ala. R. 817.

FULL BLOOD. Whole blood; generally used to denote brothers and sisters who descend from the same father and mother.

FULL CONFIDENCE. Under a bequest to the wife of testator "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," the words full confidence do not constitute a trust, but are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation; 8 Ch. D. 540.

FULL COURT. A court in banc with all the judges on the bench who are qualified to sit. It is not unusual for counsel in a case of great public importance, in the absence of one or more of the judges, to ask for a postponement of a trial or argument in order that the cause may be heard and determined by a full court and not by a mere quorum. The granting of such an application is not a matter of right, but, in a case which appears to the court to justify it, the course proposed will generally be taken. Such applications are not unusual in the United States Supreme Court, in cases involving grave constitutional questions, and in the state courts in cases involving the life of a party or some grave public question. Sometimes where a case has been decided by a majority of a quorum, but a minority of the whole number of judges, a motion for a rehearing by the full court is allowed.

Formerly in England the expression was used when other judges sat with the judge who regularly held the court. Thus the Full Court of Appeal in Chancery consisted of the Lord Chancellor and Lords Justices sitting together. The Full Court in Divorce and Matrimonial Causes consisted of the Judge Ordinary and at least two other members of the court. These arrangements are, nominally at least, superseded under the Judicature Acts.

FULL DEFENCE. See DEFENCE.

FULL FAITH AND CREDIT. A phrase used in the constitution of the United States, which provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. See FOREIGN JUDGMENTS.

Acceptance as Legal English. Also, the records and judicial proceedings of the courts of any State shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from which they are taken. Anderson; Act 26 May, 1790, c. 11.

FULL FORCE. An averment in a plea, that it continued in "full force," imports only, that it had not been reversed. 5 J. J. Mar. (Ky.) 38.

FULL LIFE. Life in fact and in law.

FULL-PAID STOCK. See STOCK.

FULL POWERS. The full powers in all matters of equity which are secured to it by the provision for its establishment were intended to embrace such subjects of jurisdiction as the chancery court has possessed by immemorial usage or particular legislative enactments. 14 A. & E. Ency. 2nd ed. 562; 4 How. (Miss.) 175.

All matters requiring legislation are necessarily embraced by the expression 'full legislative powers.' Full legislative powers mean ample, complete, perfect powers, not wanting in any essential quality; otherwise they would be limited, and not full powers. Id.; 44 Ala. 537.

FULL PROOF. In Civil Law. Proof

of two witnesses, or a public instrument. Halifax, Civil Law b. 3, c. 9, nn. 25, 30; 3 Bla. Com. 370.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt. 38 N. J. L. 450. See PLENA PROBATIO.

FULL RIGHT. The union of a good title with actual possession.

FULL SUPPLY. In a contract to furnish ice, and, in case of inability "to lay up a full supply," to be bound only to deliver such proportion "as the quantity of ice laid up to be the full supply," the words full supply had reference to the capacity of the ice-houses, and the contracting party was only bound to use reasonable and practicable means according to the usage of trade. 69 N. Y. 45, 52.

FULL WAGES. The seventh article of the Laws of Oleron provides: That if a mariner be taken sick on the voyage, he ought to be put on shore, and care should be taken of him at the expense of the ship; when the vessel is ready to sail, she is not to wait for him; but, still he is to be entitled to his full wages if he recover; and if he does not, his wife, or next of kin, is to have them; deducting only such charges as the master has been at for him. The phrase full wages means the same wages which he would have been entitled to had he lived and served out the whole voyage of the vessel. 1 Wash. C. C. 414; 2 H. Bla. 606, note.

Wages up to the end of a period of contract. Wages for a full day, week or month, or period engaged for, as the case may be. The full amount usually paid for the particular work done, as distinguished from reduced wages. English.

FULLER'S RENTS. See PRIVILEGED PLACES.

FULLUM AQUÆ. A stream, or stream of water. Blount.

FUMAGE, FUAGE, or FOUAGE. (vulgarly called smoke-far-things.) A tax paid to the sovereign for every house that had a chimney. It is probable that the hearth money, imposed by 13 & 14 Car. II., c. 10, originated thus. This hearth-money (q. v.) was declared a great oppression, and abolished by 1 W. & M., st. 1, c. 10; but a tax was afterwards laid upon all houses, except cottages, and upon all windows by 7 Wm. III., c. 18. Wharton. Also, dung for soil, or manuring of land with dung. Jacobs. See WINDOW TAX; INHABITED HOUSE DUTY.

FUNCTION. The occupation of an office: by the performance of its duties, the officer is said to fill his function. Dig. 32. 65. 1.

FUNCTIONARY. One who is in office or in some public employment.

FUNCTUS OFFICIO (Lat.). A term applied to something which once has had life and power, but which has become of no virtue whatsoever.

For example, a warrant of attorney on which a judgment has been entered is *functus officio*, and a second judgment cannot be entered by virtue of its authority. When arbitrators cannot agree and choose an umpire, they are said to be *functi officio*. Wats. Arb. 94. If a bill of exchange be sent to the drawee, and he passes it to the credit of the holder, it is *functus officio*, and cannot be further negotiated; 5 Pick. 85. When an agent has completed the business with which he was intrusted, his agency is *functus officio*.

FUND. "Merely a name for a collectio. or an appropriation of money. It may be nothing but a designation of one branch of the accounts of the state; or of a certain amount of money, when collected to be applied to a particular purpose. It may have no property and represent no investments; and what are called its revenues may include all the moneys appropriated or

directed to be paid to it, or for its benefit, or that of the objects it represents." 34 Barb. 135. See 24 N. J. Eq. 358; 7 H. L. Cas. 273; 69 Ia. 278.

A deposit of resources; stock or capital; money invested for a specific object; revenue: as, the fund of a bank, or of a trust. Anderson. While the restricted meaning of "funds" is cash on hand, the broader meaning includes property of every kind, when such property is specially contemplated as something to be used or applied in the payment of debts. Thus, for example, as employed in a statute, may comprehend all the resources of a corporation. Anderson; 69 Iowa, 280.

FUNDAMENTAL. This word is applied to those laws which are the foundation of society. Those laws by which the exercise of power is restrained and regulated are fundamental. The constitution of the United States is the fundamental law of the land. See Wolffius, Inst. Nat. § 984.

FUNDAMUS. We found. One of the words by which a corporation may be created in England. 1 Bl. Comm. 473; 3 Steph. Comm. 173.

(Lat. from *fundo*, to found or establish.) We establish. One of the words used by the King of England by which he performed the creation of a corporation, in those times when his consent was necessary to the establishment of a corporation. 1 Bl. Com. 473. Other such words were *creamus*, *erigimus*, *incorporamus*. Id.

FUNDATIO (Lat.). A founding.

FUNDATOR. A founder (q. v.)

Founder incipiens: The incipient founder of a corporation; the king or state by whom it is incorporated.

Founder perficiens: The perficient founder, the donor or endower of the institution with funds. Burrill; 2 Kent's Com. 303.

In Old English Law. A founder; a caster or melter of metals. Id.; Fleta, lib 1, c. 20, § 132.

FUNDIPATRIMONIALES. Lands of inheritance.

FUNDI PUBLICI. Public lands.

FUNDING SYSTEM. The practice of borrowing money to defray the expenses of government.

In the early history of the system it was usual to set apart the revenue from some particular tax as a *fund* to the principal and interest of the loan. The earliest record of the funding system is found in the history of Venice. In the year 1171, during a war between the republic and the Byzantine emperor Manuel Comnenas, a Venetian fleet ravaged the eastern coasts, but, being detained by negotiations at Chios, suffered severely from the plague. The remnant of the expedition, returning, took with it the frightful pestilence, which ravaged Venice and produced a popular commotion in which the doge was killed. To carry on the war, the new doge, Sebastian Giani, ordered a forced loan. Every citizen was obliged to contribute one-hundredth of his property, and he was to be paid by the state five per cent. interest, the revenues being mortgaged to secure the faithful performance of the contract. To manage the business, commissioners were appointed, called the Chamber of Loans, which after the lapse of centuries grew into the Bank of Venice. Florence and other Italian republics practised the system; and it afterwards became general in Europe. Its object is to provide large sums of money for the immediate exigencies of the state, which it would be impossible to raise by direct taxation.

In England the funding system was inaugurated in the reign of William III. The Bank of England, like the Bank of Venice and the Bank of St. George at Genoa, grew out of it. In order to make it easy to procure money to carry on the war with

France, the government proposed to raise a loan, for which, as usual, certain revenues were to be set aside, and the subscribers were to be made a corporation, with exclusive banking privileges. The loan was rapidly subscribed for, and the Bank of England was the corporation which it brought into existence. It was formerly the practice in England to borrow money for fixed periods; and these loans were called terminable annuities. Of late years, however, the practice is different,—loans being payable only at the option of the government; these are termed interminable annuities. The rate of interest on the earlier loans was generally fixed at three and a half per cent. and sold at such a rate below par as to conform to the state of the money-market. It is estimated that two-fifths of the entire debt of England consists of this excess over the amount of money actually received for it. The object of such a plan was to promote speculation and attract capitalists; and it is still pursued in France.

Afterwards, however, the government receded from this policy, and, by borrowing at high rates, were enabled, when the rate of interest declined, by offering to pay off the loan, to reduce the interest materially. The national debt of England consists of many different loans, all of which are included in the term *funds*. Of these, the largest in amount and importance are the "three per cent. consolidated annuities," or consols, as they are commonly called. They originated in 1751, when an act was passed consolidating several separate three per cent. loans into one general stock, the dividends of which are payable on the 5th of January and 5th of July at the Bank of England. The bank being the fiscal agent of the government, pays the interest on most of the funds, and also keeps the transfer-books. When stock is sold, it is transferred on the books at the bank to the new purchaser, and the interest is paid to those parties in whose names the stock is registered, at the closing of the books a short time previous to the dividend-day. Stock is bought and sold at the stock exchange generally through brokers. Time sales, when the seller is not the actual possessor of the stock, are illegal, but common. They are usually made deliverable on certain fixed days, called accounting-days; and such transactions are called "for account," to distinguish them from the ordinary sales and purchases for cash. Stock-jobbers are persons who act as middlemen between sellers and purchasers. They usually fix a price at which they will sell and buy, so that sellers and purchasers can always find a market for stock, or can purchase it in such quantities as they may desire, without delay or inconvenience.

In America the funding system has been fully developed. The general government, as well as those of all the states, have found it necessary to anticipate their revenue for the promotion of public works and other purposes. The many magnificent works of internal improvement which have added so much to the wealth of the country were mainly constructed with money borrowed by the states. The canals of New York, and many railroads in the western states, owe their existence to the system.

The funding system enables the government to raise money in exigencies, and to spread over many years the taxation which would press too severely on one. It affords a ready method of investing money on good security, and it tends to identify the interest of the state and the people. But it is open to many objections,—the principal of which is that it induces statesmen to countenance expensive and oftentimes questionable projects who would not dare to carry out their plans were they forced to provide the means from direct taxation. McCulloch, Dict. of Comm.; Sewell, Banking.

FUNDITORES. Pioneers. Jac. L. Dict.

FUNDS. Cash on hand: as, A B is in funds to pay my bill on him. Stocks: as, A B has one thousand dollars in the funds.

By public funds is understood the taxes, customs, etc., appropriated by the government for the discharge of its obligations.

In England "The Funds" are synonymous with "Government Funds," or "Public Funds;" 7 H. L. C. 280; and generally mean funded securities guaranteed by the English government; 27 L. J. Ch. 448; but do not include foreign bonds guaranteed by England; 2 Coll. 324; nor bank stock; 7 H. L. C. 273. See IN CURRENT FUNDS. See GENERAL FUND. See RESERVED FUNDS.

FUNDUS (Lat.). Land. A portion of territory belonging to a person. A farm. Lands, including houses; 4 Co. 87; Co. Litt. 5 a; 3 Bla. Com. 209.

FUNERAL. The word "funeral" means "obsequies," a rite or ceremony pertaining to a burial. 43 S. W. 469.

A "funeral" is a disposition of the deceased when the obsequies are attended by his family or friends or acquaintances, and by the conditions usually incident to a burial of the dead. 154 Ky. 461, 157 S. W. 922.

In some localities "funerals" are not infrequently attended by invitation. Some are strictly private; while others are open to the public. These are matters which address themselves to the discretion and will of those in interest—the relatives and friends of the deceased. It is usual in this and other civilized communities to have the interment accompanied with some character of religious ceremony; but, there is no law imposing upon those having in charge the burial of the dead, such duty. The customs of the country vary so much on the question of ceremonies used in the interment of the dead that if it were not violative of that provision of the Constitution guaranteeing to every man the right to worship God according to the dictates of his own conscience, it would be utterly impracticable to prescribe a form that would be acceptable to the people generally. 149 Ky. 503, 149 S. W. 871. See FIRST-CLASS.

FUNERAL EXPENSES. Money expended in procuring the interment of a corpse.

The person who orders the funeral is responsible personally for the expenses, and if the estate of the deceased should be insolvent, he must lose the amount. But if there are assets sufficient to pay these expenses, the executor or administrator is bound, upon an implied assumption, to pay them; 1 Campb. 298; Holt 809; 1 Hawks 394; 13 Viner, Abr. 563. See 7 Misc. Rep. 237.

Frequent questions arise as to the amount which is to be allowed to the executor or administrator for such expenses. It is exceedingly difficult to gather any certain rule from the numerous cases which have been decided upon this subject. Courts have taken into consideration the circumstances of each case, the rank in life of the decedent, whether his estate was insolvent or not, and when the executors have acted with common prudence or in obedience to the will, their expenses have been allowed. In a case where the testator directed that his remains should be buried at a church thirty miles distant from the place of his death, the sum of sixty pounds sterling was allowed; 3 Atk. 119. In another case, under peculiar circumstances, six hundred pounds were allowed; Chanc. Prec. 29. In a case in Pennsylvania, where the intestate left a considerable estate, and no children, \$258.75 was allowed, the greater part of which had been expended in erecting a tombstone over a vault in which the body was interred; 14 S. & R. 64; a sum of \$127 for burial expenses is not unreasonable where deceased left an estate worth \$800; 67 Hun 617. The expense of raising a monument comes under the head of funeral expenses; 76 Cal. 589; 14 Hun 296; 3 Misc. Rep. 170.

Funeral expenses usually have priority in the order of payment of debts.

A husband is liable for the funeral expenses of his wife; 1 H. Bla. 90; 12 C. B. N. S. 344; 98 Mass. 539; and the liability is imposed by law *quasi ex contractu*; Tiff.

Pers. & Dom. Rel. 128. In some cases it is held that when he has paid them the husband is not entitled to reimbursement out of the wife's separate estate; 59 Ala. 89; 52 Conn. 425; 100 Cal. 345; *contra*, 33 Ch. Div. 575; 6 Madd. 90; 14 Hun 563; 44 Ohio 84. 184. where the wife's executor paid them. The rule is not affected by the fact that the wife was separated by her fault from the husband; 43 Ill. App. 89; or that she bequeathed money to another person who assisted in managing the funeral; 41 Mich. 590. See 2 Wms. Exer. 166, n.; 3 id. 275, n.; 2 Bla. Com. 508; Godolph. p. 3; 3 Atk. 249; Bacon, Abr. *Executors*, etc. (L 4); Viner, Abr. *Funeral Expenses*.

See, generally, 27 Am. St. Rep. 732; 33 N. J. Eq. 524-9; DEAD BODY.

FUNGIBLE. A term applicable to things that are consumed by the use, as wine, oil, etc., the loan of which is subject to certain rules, and governed by the contract called *mutuum*. See Schmidt, Civ. Law of Spain and Mexico 145; Story, Bailm.

FUNGIBLES RES. Fungible things. A term applied in the civil law to things of such a nature as that they could be replaced by equal quantities and qualities, because *mutua vice funguntur*, they replace and represent each other; thus, a bushel of wheat. A particular horse would not be fungibles res. R. & L. Dict.; Sand. Just. (5th ed.) 322. Things of a kind, as distinguished from specific things. English.

FUR (Lat.). A thief. One who stole without using force, as distinguished from a robber. See FURTUM.

FUR. Skins valuable chiefly on account of the fur. Skins is a term appropriated to those valuable chiefly for the skin. The word hides is inapplicable to fur skins. 7 Cow. 202, 214.

Where a policy was on a cargo of fur, evidence was received to show that among dealers in such articles the word fur included bearskins, deerskins, etc., and that they were not included in the terms "skins" and "hides." 14 A. & E. Ency. 2nd ed., 566; 7 Cow. (N. Y.) 202. Evidence was admitted in 7 Cowen, 202, showing that, by the usage of the trade, skins valuable chiefly on account of the fur were called fur, while skins was a term appropriated to those which were valuable chiefly for the skin, by which was understood the skin with the hair removed. 152 U. S. 585.

FUR MANIFESTUS (Lat.). In the Civil Law. A manifest thief. A thief who is taken in the very act of stealing.

FURANDI ANIMUS. An intention of stealing.

FURCA. A fork. A gallows or gibbet. Bract. fol. 56.

FURCA ET FLAGELLUM (Lat.) gallows and whip). The meanest of servile tenures, where the bondman was at the disposal of the lord for life and limb. Cowel.

FURCA ET FOSSA (Lat.) gallows and pit). A jurisdiction of punishing felons,—the men by hanging, the women by drowning. Skene; Spelman, Gloss.; Cowel.

FURIAN LAW, THE. See LEX FURIA.

FURIGELDUM. A mulct paid for theft. Jac. L. Dict.

FURIOSITY. Madness by which the judgment is prevented from being applied to the ordinary purposes of life. Bell. It is distinguished from fatuity or idiotcy. Toml.

FURIOSUS (Lat.). An insane man; a madman; a lunatic.

In general, such a man can make no contract, because he has no capacity or will; *Furiosus nullum negotium genere potest, quia non intelligit quod agit*. Inst. §. 20, 8. Indeed, he is considered so incapable of exercising a will, that the law treats him as if

he were absent; *Furiosi nulla voluntas est. Furiosus absentis loco est*. Dig. 1, ult. 40, 124, 1. See INSANE; NON COMPOS MENTIS.

FURLINGUS (Lat.). A furlong, or a furrow one-eighth part of a mile long. Co. Litt. 5 b.

FURLONG. A measure of length, being forty poles, or one-eighth of a mile.

FURLOUGH. A permission given in the army and navy to an officer or private to absent himself for a limited time.

FURNAGE (from furnus, an oven). A sum of money paid to the lord by the tenants, who were bound by their tenure to bake at the lord's oven, for the privilege of baking elsewhere. The word is also used to signify the gain or profit taken and received for baking.

FURNISH. To supply. 248 U. S. 45. Distinguished from "invent" which means to create. Id.

FURNITURE. Personal chattels in the use of a family.

"The word relates, ordinarily, to movable personal chattels. It is very general, both in meaning and application; and its meaning changes, so as to take the color of, or be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlor, of a bed-chamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation, etc. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kind according to the purpose which they are intended to subserve; yet being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some one of those purposes, they pertain to such places respectively, and collectively constitute the furniture thereof; 63 Ala. 410.

"The expression household furniture must be understood to mean those vessels, utensils, or goods, which, not becoming fixtures, are designed in the manufacture originally and chiefly for use in the family, as instruments of the household and for conducting and managing household affairs. Neither of these articles would seem to hold such a place in the domestic economy. The trunk, though perhaps often made to some extent to take the place of the chest of drawers, the bureau or the wardrobe, is nevertheless in its construction designed for and adapted to the use of the traveller as such, rather than the householder. By the cabinet box we understand an article designed, in material and workmanship, rather for ornament than use, intended for keeping jewelry and other small articles of value; thus ministering to the taste of the owner rather than the necessities or convenience of the household; 33 N. H. 345. Accordingly a trunk and cabinet box were held not to be furniture."

It is held that by the term household furniture in a will, all personal chattels will pass which may contribute to the use or convenience of the householder or the ornament of the house: as, plate, linen, china (both useful and ornamental), and pictures; 1 Johns. Ch. 329, 388; 1 S. & S. 189; 2 Will. Ex. 752; Jarm. Wills 712, n.; 3 Ves. 312; 24 Or. 2; 3 Ves. 311; 41 N. J. Eq. 93; bronzes, statuary, and pictures; 124 Mass. 221; 41 N. J. Eq. 93; but a watch will not; 33 Me. 535; nor will books; 3 Ves. 311; or furniture of a school-room in a boarding school kept by a teacher; 60 Pa. 220; or silver plate used in a hotel; 1 Rob. 21. A sewing machine and piano were held exempt from attachment as "household furniture"; 13 R. I. 20; but a doubt was expressed as to the piano, and as to that it was held *contra* in 30 Vt. 224; 18 Wis. 163.

FURNITURE OF A SHIP. This term includes everything with which a ship requires to be furnished or equipped to make

her seaworthy; it comprehends all articles furnished by ship-chandlers, which are almost innumerable. 1 Wall. Jr. 369.

FURNIVAL'S INN. A place in Holborn which was formerly an Inn of Chancery. 1 Steph. Com. 19, n. See INNS OF COURT.

FURST AND FONDUNG. Time to advise or take counsel. Jac. L. Dict.

FURTA. A right or privilege derived from the king as supreme lord of a state to try, condemn, and execute thieves and felons within certain bounds or districts of an honour, manor, etc. Cowell seems to be doubtful whether this word should not read *furca*, which means directly a gallows. Cowel; Holthouse, L. Dict.

FURTHER ADVANCE. A second or subsequent loan of money to a mortgagor by a mortgagee, either upon the same security as the original loan was advanced upon, or an additional security. Equity considers the arrears of interest on mortgage security converted into principal, by agreement between the parties, as a further advance. Whart.

FURTHER ASSURANCE. See COVENANT FOR FURTHER ASSURANCE.

FURTHER CONSIDERATION. It frequently happens that a decree in Chancery directs accounts and inquiries to be taken before the chief clerk. The hearing of any question arising out of such inquiries is called a hearing on further consideration. Hunt. Eq. Rules Sup. Ct. xl. 10.

FURTHER DIRECTIONS. When accounts in Chancery were taken before Masters, a hearing after a master had made his report in pursuance of the directions of the decree was called a hearing on further directions. This stage of suit is now called a hearing on further consideration. Hunt. Eq. See 2 Dan. Ch. Pr., 5th ed. 1233, n.

FURTHER HEARING. In Practice. Hearing at another time.

Prisoners are frequently committed for further hearing, either when there is not sufficient evidence for a final commitment, or because the magistrate has not time, at the moment, to hear the whole of the evidence. The magistrate is required by law, and by every principle of humanity, to hear the prisoner as soon as possible after a commitment for further hearing; and if he neglects to do so within a reasonable time, he becomes a trespasser; 10 B. & C. 28; 5 M. & R. 53. Fifteen days was held an unreasonable time, unless under special circumstances; 4 C. & P. 134; 6 S. & R. 427.

In Massachusetts, magistrates may, by statute, adjourn the case for ten days; Gen. Stat. c. 170, § 17. It is the practice in England to commit for three days, and then from three days to three days; 1 Chitty, Cr. Law 74.

FURTHER MAINTENANCE OF ACTION, PLEA TO. A plea grounded upon some fact or facts which have arisen since the commencement of the suit, and which the defendant puts forward for the purpose of showing that the plaintiff should not further maintain his action. Brown.

FURTI, ACTIO. See RES ADIRATAE.

FURTIVE. In Old English Law. Stealthily; by stealth. Fleta, lib. 1, c. 38, 3.

FURTUM (Lat.). Theft. The fraudulent appropriation to one's self of the property of another, with an intention to commit theft, without the consent of the owner. Fleta, l. 1, c. 36; Bract. 150; Co. 8d Inst. 107.

The thing which has been stolen. Bract. 151.

FURTUM CONCEPTUM (Lat.). The theft which was disclosed when, upon searching any one in the presence of witnesses in due form, the thing stolen is found. Detected theft is, perhaps, the nearest concise translation of the phrase, though not quite exact. Vicat, Voc. Jur.

FURTUM GRAVE (Lat.). Aggravated theft. Formerly, there were three classes of this theft: *first*, by landed men; *second*, by a trustee or one holding property under a trust; *third*, theft of the *majora animalia* (larger animals), including children. Bell, Dict.

FURTUM MANIFESTUM (Lat.). Open theft. Theft where a thief is caught with the property in his possession. Bract. 150 b.

FURTUM OBLATUM (Lat.). The theft committed when stolen property is offered any one and found upon him. The crime of receiving stolen property. Calvinus, Lex.; Vicat, Voc. Jur.

FUSTIGATIO. In English Law. A beating with sticks or club; one of the ancient kinds of punishment of malefactors. Bract. fol. 104 b, lib. 3, tr. 1, c. 6.

FUSTIS. In Old English Law. A staff used in making livery of seisin. Bract. fol. 40.

FUTHWITE, or FITHWITE. A fine for fighting or breaking the peace. Cowel; Cun. L. Dict.

FUTURE ACQUIRED PROPERTY. Mortgages, especially of railroad companies, are frequently made in terms to cover after acquired property; such as rolling stock, etc. Such mortgages are valid; 64 Pa. 366; 32 N. H. 484; 95 U. S. 10; L. R. 16 Eq. 383. This may include future net earnings; 15 Ia. 284; the proceeds to be received from the sale of surplus lands; L. R. 2 Ch. 201; a ditch or flume in process of construction, which was held to cover all improvements and fixtures thereafter to be put on the line thereof; 26 Cal. 620; rolling stock, etc.; 64 Pa. 366; 49 Barb. 441. Future calls of assessments on stock cannot be mortgaged; L. R. 10 Eq. 681; but it has been held that calls already made could be; *id*.

By statutes in most of the states a will speaks as of the death of the testator and ordinarily passes property acquired after its date. See EXPECTANCY; MORTGAGE.

FUTURE ADVANCES. See MORTGAGE.

FUTURE DEBT. In Scotch Law. A debt which is created, but which will not become due till a future day. 1 Bell, Com. 315.

FUTURE ESTATE. An estate which is to commence in possession in the future

(*in futuro*). It includes remainders, reversions, and estates limited to commence *in futuro* without a particular estate to support them, which last are not good at common law except in the case of terms for years. See 2 Bla. Com. 165. In New York law it has been defined "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate created at the same time," thus excluding reversions, which cannot be said to be created at the same time, because they are a remnant of the original estate remaining in the grantor; 11 N. Y. Rev. Stat. 3d ed. 9, § 10. See, also, How. St. Mich. § 5526; Gen. St. Minn. 1878, c. 45, § 10; 89 Mich. 428; 52 N. W. Rep. (Minn.) 920.

FUTURE INCREASE. The devise of a slave and her "future increase" cannot of itself, embrace increase which has accrued prior to the date of the will. 7 J. M. Mar. (Ky.) 412.

FUTURE SUFFERING. "Future suffering" and permanent impairment of earning power are not synonymous terms. The plaintiff at the date of the trial may be in such condition that future suffering is reasonably to be expected, although his injuries may not be such as to permanently impair his power to earn money. 163 Ky. 167, 173 S. W. 757.

FUTURE USES. See CONTINGENT USES.

FUTURES. This term has grown out of those purely speculative transactions, in which there is a nominal contract of sale for future delivery, but where in fact none is ever intended or executed. The nominal seller does not have or expect to have the stock or merchandise he purports to sell, nor does the nominal buyer expect to receive it or pay the price. Instead of that, a percentage or "margin" is paid, which is increased or diminished as the market rates go up or down and accounted for to the buyer. This is simple speculation and gambling; mere wagering on prices within a given time. 14 R. I. 138.

Anything bought or sold upon a contract of future delivery. English. The expression "dealing in futures" has grown out of those purely speculative transactions in which there is a nominal contract of sale for future delivery, but where in fact none is ever intended or executed.

The nominal seller does not have or expect to have the stock or merchandise he purports to sell, nor does the nominal buyer expect to receive it or to pay the price. Instead, a percentage or "margin" is paid, which is increased or diminished as the market rates go up or down, and accounted for to the buyer. This is simply speculation and gambling; mere wagering on prices within a given time. Anderson; 14 R. I. 138. See SPECULATION; WAGER.

FUTURI (Lat.). Those who are to be. Part of the commencement of old deeds. "*Sciant presentes et futuri, quod ego, talis, dedi et concessi*," etc. (Let all men now living and to come know that I, A B, have, etc.). Bract. 34 b.

FUZ, or FUST. A Celtic word, meaning a wood or forest.

FYGTWITE. One of the fines incurred for homicide. See FIGHTWITE.

FYKE. A bow-net for catching fish. Pub. St. Mass. 1892, p. 129.

FYLE. In Scotch Law. To defile; to declare foul or defiled. Hence to find a prisoner guilty.

FYLIT. In Scotch Practice. Fyled; found guilty. See FYLE.

FYNDRINGA (Sax.). An offence or trespass for which the fine or compensation was reserved to the king's pleasure. Leges Hen. I. c. 10. Its nature is not known. Spelman reads *fynderinga*, and interprets it *treasure trove*; but Cowel reads *fyrtleringa*, and interprets it a joining of the king's *fird* or host, a neglect to do which was punished by a fine called *firdnite*. See Cowel; Spelman, Gloss. Du Cange agrees with Cowel.

FYRD, or FYRDUNG. The military array or land force of the whole country. Contribution to the fyrd was one of the imposts forming the *trinoda necessitas*. Whart.

FYRDWITE. A fine for neglect of military duty. If the lord did not respond to the king's call for the quota of *milites* which he was required to send, he must pay the fine for each man short. The man was bound to the lord, not to the king. Maitl. Domesd. 159, 161. See FYRTHWITE.

FYRTHWITE, or FRIDWITE. A mulct paid by one who deserted the army. Cowel; Cun. L. Dict. Doubtless these words and Fyrdwite (*q. v.*) were different forms of the same thing.

G.

G The seventh letter of the alphabet. In Law French it is often used at the beginning of words for the English W, as in *gage* for *wage*, *garranty* for *warranty*, *gast* for *waste*.

GABEL (Lat. *vectigal*). A tax, imposition, or duty. This word is said to have the same signification that *gabelle* formerly had in France. Cunningham, Dict. But this seems to be an error; for *gabelle* signified in that country, previous to its revolution, a duty upon salt. Merlin, Rép. Coke says that *gabel* or *gavel*, *gabulum*, *gabellum*, *gabellatum*, *gabellatum*, and *gavilletum*, signify a rent, duty, or service yielded or done to the king or any other lord. Co. Litt. 143 a. See **GAVEL**.

GABELLA. A tax or duty on personality. Cowel; Spel. Gloss. See **GABEL**.

GABLATOIRES. Those who paid *gabel* (q. v.). Cowel.

GABULUM (spelled, also, *gabulum gabula*). The gable-end of a building. Kennett, Paroch. Antiq. p. 201; Cowel. A tax. Du Cange.

GABULUS DENARIORUM. Money rent. Seld. Tit. 321.

GADSDEN PURCHASE. A purchase of land from Mexico for ten million dollars, made by the United States through the Gadsden Treaty, 1853-54. Acquired its name from the man who effected the treaty, James Gadsden, who was at that time ambassador to Mexico. 5 You Holst, Const. Hist. U. S. p.p. 6-9.

The land purchased lies mainly within what is now Arizona and New Mexico Stand. Dict.

GADSDEN TREATY. See **GADSDEN PURCHASE**.

GAFOL (spelled, also, *gabella*, *gavel*), Rent; tax; interest of money. *Gafol gild*. Payment of such rent, etc. *Gafol land* was land liable to tribute or tax; Cowel; or land rented; Saxon Dict. See Taylor, Hist. of Gavelkind pp. 26, 1021; Anc. Laws & Inst. of Eng. Gloss.; Maitl. Domesd. 44.

GAGE, GAGER (Law Lat. *vadium*). Personal property placed by a debtor in possession of his creditor as a security for the payment of his debt; a pawn or pledge (q. v.). Granv. lib. 10, c. 6; Britton c. 27. To pledge; to wage. Webster, Dict. *Gager* is used both as noun and verb: e. g. *gager del ley*, *wager of law*; Jacobs; *gager ley*, to wage law; Britton c. 27; *gager deliverance*, to put in sureties to deliver cattle distrained; *Termes de la Ley*; Kitchen fol. 145; Fitzh. N. B. fol. 67, 74.

Estates in *gage* are those held in *radio* or pledge; *vivum vadium* is a *vifgage* or living pledge; a mortgage is *mortuum vadium*, a *dead-gage* or pledge; for, whatsoever profit it yields, it redeems not itself, unless the whole amount secured is paid at the appointed time. Cowel.

GAGER DE DELIVERANCE. One who had distrained and was sued, but had delivered the cattle distrained, was obliged not only to avow the distress but also to furnish pledge or surety to deliver them, or, as it was called, *gager deliverance*, literally, to deposit or undertake for the discharge. See Fitz. N. B. 67; Kelham, Dict.

GAGER DEL LEY. *Wager of law* (q. v.).

GAGGING ACTS. See **SIX ACTS**, THE.

GAINAGE. *Wainage*, or the draught-oxen, horses, wain, plough, and furniture for carrying on the work of tillage. Also, the land tilled itself, or the profit arising from it. Old. N. B. fol. 117.

GAINER. To obtain by husbandry. *Gainure*. Tillage. *Gainery*. Tillage or the profit therefrom or from the beasts used in it. *Gainé*, *gaignent* (que), who plough or till. Kelham; Stat. Westm. 1. cc. 16, 17.

GAINERY. Tillage, or the profit arising from it, or the beasts employed therein. Jacob. See **GAINAGE**; **GAINER**.

GAINOR. One who occupies or cultivates arable land; a sokeman (q. v.). Old. N. B. 12.

GAJUM. A thick wood. Spell. Gloss.

GALE. The payment of a rent or annuity. **GABEL**.

A contraction of *gavel* (q. v.). The right to open and work a mine within the Hundred of St. Briavel's, or a stone quarry within the open lands of the Forest of Dean, a right granted only to the free miners (q. v.) of the district who in turn may sell, devise or dispose of this right to any persons whomsoever. The right is a license or interest in the nature of real estate, conditional on the due payment of rent and observance of the obligations imposed on the galee. The galee pays the Crown a rent known as a galeage rent, royalty or some similar name, proportionate to the quantity of minerals got from the mine or quarry. Byrne. See **GAVELLER**.

GALEA, GALEE, GALOIE, or GALEIS. A galley, galleys. Spel. Gloss.; Kelham.

GALEAGE RENT. See **GALE**; **GAVELLER**.

GALEE. A person holding a gale. Byrne. See **GALE**; **GAVELLER**.

GALENES. In Old Scotch Law. A kind of compensation for slaughter. Bell, Dict.

GALLON. A liquid measure, containing two hundred and thirty-one cubic inches, or four quarts. The imperial gallon contains about 277 and the ale gallon 282 cubic inches.

GALLOWES. An erection on which to hang criminals condemned to death. In the thirteenth century there was in certain cases power given to him who caught a thief with stolen goods upon him, to hang him, and it is said that "the manorial gallows was a common object of the country." 1 Poll. & Maitl. 564. See **INFANGENETHF**; **UTFANGENETHF**.

GAMACTA. A stroke or blow. Spel. Gloss.

GAMALIS. A child born in lawful wedlock; also one born to betrothed but unmarried parents. Spel. Gloss.

GAMBLE. To engage in unlawful play. To play games for stakes or bet in them. It is the most apt word in the language to express these ideas; 2 Yerg. 472; a *gambler* is one who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property. Per Ames, J., 118 Mass. 193. A common *gambler* is one who furnishes facilities for gambling, or keeps or exhibits a gambling table, establishment, device, or apparatus. 1 Dak. 291, citing cases. A *gambling police* is a life-insurance policy taken out by one who has no insurable interest in the life of the assured. See IN-

SURABLE INTEREST. A *gambling device* is any contrivance or apparatus by which it is determined who is the winner or loser in a chance or contest on which money or value is staked or risked. See 2 Whart. Cr. L. § 1465; 27 Ark. 362; 49 Minn. 443; 1 Kan. 474; 46 Mo. 375; 1 Cra. C. C. 535; 17 Tex. 191; **GAMING**; **WAGER**.

GAMBLING. Synonymous, in a criminal sense, with *gaming* (q. v.). 14 A. & E. Ency. 2nd ed. 666.

GAMBLING CONTRACTS. See **WAGER**.

GAMBLING DEVICE. An invention or contrivance to determine the question as to who wins or who loses his money on a contest of chance. 53 N. W. Rep. (Minn.) 42.

GAMBLING HOUSE. See **COMMON GAMBLING HOUSE**.

GAME. Birds and beasts of a wild nature, obtained by fowling and hunting. Bacon, Abr. See 11 Metc. 79.

As applied to animals it is to be understood in its ordinary sense, in the absence of statutory definition; 15 S. E. Rep. (Ga.) 453.

GAME LAWS. Laws regulating the killing or taking of birds, and beasts, as game. The English game laws are founded on the idea of restricting the right of taking game to certain privileged classes, generally landholders, and are said to be directly descended from the old forest laws. The doctrine as laid down by Blackstone that the sole right of hunting and killing game was at common law vested in the crown has been controverted by Prof. Christian who clearly demonstrated that the owner of the soil, or the lessee or occupier, if no reservation was made in the lease, possessed the exclusive right to such game restriction. In 1831 the English law was so modified as to enable any one to obtain a certificate or license to kill game, on payment of a fee. An account of present game laws of England will be found in Appleton's New Am. Cyc. vol. viii.; Eng. Cyc., Arts. & Sc. Div. and Int. Cyc. h. t.

The laws relating to game in the United States are generally, if not universally, framed with reference to protecting the animals from indiscriminate and unreasonable havoc, leaving all persons free to take game under certain restrictions as to the season of the year and the means of capture. The details of these regulations must be sought in the statutes of the several states.

As the most effective means of enforcing such statutes, most of them prohibit all persons, including licensed dealers, under penalty, from buying or selling or even having in possession or control any game purchased within a certain period after the commencement of the close season. The enforcement of these penalties has been fruitful of much litigation.

A statute forbidding any one to kill, sell, or have in possession woodcock, etc., between specified days has been held not to apply to such lawfully taken in another state; 128 Mass. 410; 51 Ohio St. 209 (followed in 59 N. W. Rep. (Minn.) 1099); 139 Pa. 298; *contra* as to game unlawfully taken in another state; 35 Am. Rep. 390, note; 19 Kan. 127; L. R. 2 C. P. Div. 553; 71 Mich. 325; it has been held not to be an offence to expose live birds for sale under a statute prohibiting the killing or having possession of certain birds after the same are killed; 134 N. Y. 393, reversing 13 N. Y. St. 24; and the mere possession of game

during the closed season does not constitute an offence if it were killed during the open season; 88 Me. 385; but a statute which forbids the sale or having in possession for the purpose of sale, of such game during the close season, is constitutional and a valid exercise of the police power, even if it were killed out of the state; 68 N. W. Rep. (Mich.) 227; 103 Cal. 476; 58 Minn. 393; 51 N. Y. Sup. Ct. 306; 51 Ohio St. 209; or killed within the lawful time; 60 N. Y. 10; 95 U. S. 465. The police power residing in the state authorizes it to forbid the killing of game within the state with the intention of procuring its transportation beyond the state limits, and such a prohibition is constitutional; 61 Conn. 144; s. c. 161 U. S. 516, Field & Harlan, J.J., dissenting; nor is such prohibition in violation of the interstate commerce clause of the constitution; 56 Ark. 267; but such an act is unconstitutional when applied to imported game sold in the original packages; 103 Col. 476. See also as to the keeping of game in cold storage; 7 Mo. App. 524; and the catching of trout artificially propagated; 160 Mass. 157.

See, generally, Austin, Farm and Game Law; 28 Weekly Law Bul. 325; 30 Law Mag. & Rev. 177; 7 Crim. L. Mag. 227; and as to validity, 31 Cent. L. J. 273.

GAMING. A contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other the winner. Gaming is not an offence *eo nomine*; 25 S. W. Rep. (Tex.) 423.

When considered in itself, and without regard to the end proposed by the players, there is nothing in it contrary to natural equity, and the contract will be considered as a reciprocal gift, which the parties make of the thing played for, under certain conditions.

There are some games which depend altogether upon skill, others which depend upon chance, and others which are of a mixed nature. Billiards is an example of the first; lottery, of the second; and backgammon, of the last. See 8 Ired. 271. The decisions as to what constitutes gaming have not been altogether uniform; but under the statutes making it a penal offence, it may be defined as a staking on chance where chance is the controlling factor; that betting on a horse race is so, see 18 Me. 337; 23 Ill. 493; 3 Blackf. 332; 9 Ind. 35; 4 Mo. 536; 51 Ill. 473; *contra*, 23 Ark. 726; 31 Mo. 85; 8 Gratt. 592; that a billiard table is a gaming table; 28 How. Pr. 247; 39 Iowa 42; *contra*, 15 Ind. 474; 34 Miss. 606. Baseball is a game of skill within the criminal offence to bet on such a game; 58 Ark. 79. The following are additional examples of illegal gaming: cock fighting and betting thereon; 8 Metc. 232; 1 Hump. 486; the game of "equality"; 1 Cra. 585; a "gift enterprise"; 5 Sneed 507; 3 Heisk. 488; "keno"; 48 Ala. 122; 7 La. An. 651; "loto"; 1 Mo. 722; betting on "pool"; 39 Mo. 420; a ten-pin alley; 20 Ala. 33; *contra*, 18 S. E. Rep. (N. C.) 169. See 32 N. J. L. 158; stock-clock; 49 Minn. 443; crap; 32 Tex. Cr. R. 187; throwing dice or playing any game of hazard, to determine who shall pay for liquor or other article bought; 14 Gray 26, 390; or throwing dice for money; 91 Ga. 152; one who keeps tables on which "poker" is played, but is not directly interested in the game, is not guilty of gaming under the Virginia code; 32 Gratt. 894; merely betting at "faro" is not carrying on the game; 53 Cal. 246; the law against any game cannot be evaded by changing the name of the game; 17 Tex. 191; athletic contests, when not conducted brutally, even when played for a stake, have been held lawful; 2 Whar. Cr. L. § 1463; betting upon a foot race is gaming within the meaning of a statute; 149 Mass. 124; pin pool has been held not to be a gambling game; 43 La. Ann. 1076.

In general, at common law, all games are lawful, unless some fraud has been practised or such games are contrary to public policy. Each of the parties to the contract

must have a right to the money or thing played for. He must have given his full and free consent, and not have been entrapped by fraud. There must be equality in the play. The play must be conducted fairly. But, even when all these rules have been observed, the courts will not countenance gaming by giving too easy a remedy for the recovery of money won at play; Bacon, Abr. It has been held that money lost at a game of "five-up" may be recovered; 12 So. Rep. (Miss.) 333. See also 48 Mo. App. 43; 16 S. E. Rep. (Ga.) 90.

But when fraud has been practised, as in all other cases, the contract is void; and in some cases, when the party has been guilty of cheating, by playing with false dice, cards, and the like, he may be indicted at common law, and fined and imprisoned according to the heinousness of the offence; 1 Russ. Cr. 406.

Statutes have been passed in perhaps all the states forbidding gaming for money at certain games, and prohibiting the recovery of money lost at such games; and a court of equity will not lend its aid in a gambling transaction either to the winner to compel payment of his unpaid accounts or to the loser who has paid his losses to enable him to recover them back, whether the loser pays his losses in cash or in negotiable securities; 178 Pa. 525.

Statutes which forbid or regulate places of amusement that may be resorted to for the purpose of gaming or which forbid altogether the keeping of instruments made use of for unlawful games, are within the police power of the legislature, and therefore constitutional; Cooley, Const. Lim. 749. See 8 Gray 488; 29 Me. 457; 38 N. H. 426.

The uncorroborated testimony of an accomplice is sufficient to warrant a conviction of gaming; 89 Ga. 393.

See, generally, Oliphant, Gaming (58 L. L.); 4 Pothier 549-53; 5 Crim. L. Mag. 529; 6 id. 507; 18 Myer's Fed. Dec. 615; 4 Lawson, Crim. Dec. 636, 732; GAMING HOUSES; WAGER; HORSE RACE; PRIZE FIGHT.

GAMING CONTRACTS. See WAGER.

GAMING HOUSES. In Criminal Law. Houses kept for the purpose of permitting persons to gamble for money or other valuable thing. They are nuisances in the eyes of the law, being detrimental to the public, as they promote cheating and other corrupt practices; 1 Russ. Cr. 299; Rosc. Cr. Ev. 663; 3 Den. 101. See 53 N. J. L. 664; 85 Me. 237; 53 Mo. App. 571.

In an indictment under a statute prohibiting gaming houses, the special facts making such a house a nuisance must be averred; Whar. Cr. Law § 1466; Whar. Cr. Pl. and Pr. §§ 154, 230; 5 Cra. 378. The proprietor of a gaming establishment cannot take advantage of a statute enabling a person losing money at a game of chance to recover it back; 14 Bush 538.

They are sometimes prosecuted as disorderly houses (*q. v.*).

GANANCIAL. In Spanish Law. Property held in community.

The property of which it is formed belongs in common to the two consorts, and, on the dissolution of the marriage, is divisible between them in equal shares. It is confined to their future acquisitions *durante el matrimonio*, and the *frutos* or rents and profits of the other property. See 1 Burge, Conf. Laws 418; Aso & M. Inst. b. 1, t. 7, c. 5, § 1.

All that which is increased or multiplied during marriage. By multiplied is understood all that is increased by onerous cause or title, and not that which is acquired by a lucrative one; 22 Mo. 254. See 18 Tex. 634; COMMUNITY.

GANANCIAL PROPERTY. See GANANCIAL.

GANANCIAS. In Spanish Law. Gains or profits from the employment of ganancial property. White, N. Rec. b. 1, tit. 7, c. 5.

GANG-WEEK. In England, the time when the bounds of the parish are lustrated or gone over by the parish officers—Roga-

tion week. Lond. Encyc.

GANGIATORI. Officers in ancient times whose duty it was to examine weights and measures. Skene.

GANTELOPE. A military punishment, in which the criminal running between the ranks receives a lash from each man. Lond. Encyc. This was called "running the gauntlet," the word itself being pronounced "gauntlett."

GAOL. (This word, sometimes written *jail*, is said to be derived from the Spanish *jaulu*, a cage (derived from *caula*), in French *gôle*, *gaol*. 1 M. & G. 222, note a.) A place for the confinement of persons arrested for debt or for crime and held in the custody of the sheriff. Webster, Dict.

A prison or building designated by law or used by the sheriff for the confinement or detention of those whose persons are judicially ordered to be kept in custody. See 6 Johns. 22; 14 Viner, Abr. 9; Bacon, Abr.; Dane, Abr. Index; 4 Com. Dig. 619. It may be used also for the confinement of witnesses; and, in general, now there is no distinction between a jail and a prison, except that the latter belongs to a greater extent of country; thus, we say a state's prison or penitentiary and a county jail. Originally, a jail seems to have been a place where persons were confined to await further proceedings—*e. g.* debtors till they paid their debts, witnesses and accused persons till a certain trial came on, etc.—as opposed to prison, which was for confinement, as punishment. See 2 Poll. & Maitl. 514, 518. A gaol is an inhabited dwelling-house, and a house within the statutes against arson; 2 W. Bla. 682; 1 Leach, 4th ed. 69; 2 East, Pl. Cr. 1020; 2 Cox, Cr. Cas. 65; 18 Johns. 115; 4 Call. 109; 4 Leigh. 683. See PENITENTIARY; PRISON; JAIL.

GAOL-DELIVERY. In English Law. To insure the trial, within a certain time, of all prisoners, a patent, in the nature of a letter, was issued from the king to certain persons, appointing them his justices and authorizing them to deliver his gaols. 3 Bla. Com. 60; 4 id. 269. This was the humblest of the temporary judicial commissions so frequent in the fourteenth century; 1 Poll. & Maitl. 179; but so few men were kept in prison, that the work was regarded as easy work which might be entrusted to knights of the shire; 2 id. 643. See GENERAL GAOL DELIVERY; OYER AND TERMINER.

GAOL LIBERTIES, GAOL LIMITS. A space marked out by limits, which is considered as a part of the prison, and within which prisoners are allowed to go at large on giving security to return. Owing to the rigor of the law which allowed *capias*, or attachment of the person, as the first process against a debtor, statutes were from time to time passed enlarging the gaol liberties, in order to mitigate the hardships of imprisonment; thus, the whole city of Boston was held the "gaol liberties" of its county gaol. And so with a large part of New York city. Act of March 13, 1830. The prisoner, while within the limits, is considered as within the walls of the prison; 6 Johns. 121.

GAOLER. The keeper of a gaol or prison; one who has the legal custody of the place where prisoners are kept.

It is his duty to keep the prisoners in safe custody, and for this purpose he may use all necessary force; 1 Hale, Pl. Cr. 601; and a prisoner who assaults him in endeavoring to break gaol may lawfully be killed by him; 1 Russ. Cr. Sharsw. ed. 860, 895. But any oppression of a prisoner, under a pretended necessity, will be punished; for the prisoner, whether he be a debtor or a criminal, is entitled to the protection of the laws from oppression. He was indictable if by oppression he induced a prisoner to accuse another; 4 Bla. Com. 123; but this statute was repealed by 4 Geo. IV. c. 64, s. 1, *id.* note. He is also indictable for suffering an escape (*q. v.*), or for extortion; 1 Russ. Cr. Sharsw. ed. 208.

When a county court delivers persons

convicted by it of murder to a gaoler for safe-keeping till brought back for execution, the governor has no authority to countermand a subsequent order of that court requiring the gaoler to deliver them up, nor will the fact that a writ of error and supersedeas had been awarded each of the prisoners by the supreme court justify the gaoler in refusing to deliver up the prisoners on the order of the court that committed them; but the fact that a court having jurisdiction has granted the prisoners a writ of habeas corpus will justify such a refusal; 23 S. E. Rep. (Va.) 296.

GARAGE. A public or private place for the care and storage of motor vehicles; or a place in which such vehicles are kept for hire. Berry, *Automobiles* (4th ed.) § 1365.

GARANDA, or GARANTIA. A warranty. Spel. Gloss.

GARANTIE. In French law, this word corresponds to warranty or covenants for title in English law. In the case of a sale this *garantie* includes two things: (1) Peaceful possession of the thing sold; and (2) absence of undisclosed defects (*défauts cachés*) Brown.

GARATHINX. In old Lombardic law. A gift; a free or absolute gift; a gift of the whole of a thing. Spel. Gloss.

GARAUTOR. In old English Law. A warrantor or vouchee, who is obliged by his warranty (*garantie*) to warrant (*garanter*) the title of the warrantee (*garantie*), that is, to defend him in his seisin, and if he do not defend, and the tenant be ousted, to give him land of equal value. Britt. c. 75.

GARB, or GARBA. A bundle or sheaf of corn; bundle. Fleta 1, 2, c. xii.

GARBALLO DECIMÆ or GARBAILLES DECIMÆ (l. Lat.; from *garba*, a sheaf). In Scotch Law. Tithes of corn: such as wheat, barley, oats, pease, etc. Also called parsonage tithes (*decimæ rectoriæ*). Erskine, Inst. b. 11, tit. 10, § 13.

GARBLE. In English statutes, to sort or cull out the good from the bad in spices, drugs, etc. Cowel.

A *garbler of spices* was anciently in London an officer to inspect drugs and spices, with power to enter and search any shop or warehouse and garble and clean the goods or direct it to be done. Stat. 6 Anne, c. 16; Mozl. & Whit.

GARCEONS, GARCEONES. Servants who follow a camp. Journeymen. Kelham, Wals. 242.

GARCIO STOLÆ (O. Fr. *Garceons*, servant). Groom of the stole. Pl. Cor. 21 Edw. I.

GARDE, or GARDIA (*Garder*, to watch). Wardship; custody; care. The judgment. The wardship of a city. Kelham.

GARDEIN. A constable; a keeper; a guardian. Kelham.

GARDEN. A piece of ground appropriated to raising plants and flowers.

A garden is a parcel of a house, and passes with it; 2 Co. 82; Plowd. 171; Co. Litt. 5 b, 56 a, b; Wood, Landl. and Tenn. 809. But see F. Moore 24; Bac. Abr. *Grants*, I. See CURTILAGE.

GARDEYN. Another form of GARDEIN (q. v.). Also, a garden. Burrill. See GARDIEN; GARDIAN.

GARDEYNE. Another form of GARDIAN (q. v.). Burrill.

GARDIA or GUARDIA. A word used among the feudists for custodia, or custody. Cunningham. See GARD.

GARDIAN, or GARDEYNE. Old forms of GUARDIAN (q. v.). Burrill. See also GARDEIN; GARDEYN; GARDIEN.

GARDIANUS. A guardian; defender; protector.

A warden. *Gardianus ecclesiæ*, a church-warden. *Gardianus quinque portuum*, warden of the Cinque Ports (q. v.). In feudal law, *gardiio*. Spelman, Gloss.

GARDIEN. Warden. Burrill. See GARDEIN; GARDEYN; GARDIAN.

GARDINUM. In Old English Law. A garden. Reg. Orig. 1, b. 2.

GARENE (L. Fr.). A warren; a privileged place for keeping animals.

GARLANDA. A chaplet, coronet, or garland.

GARNESTURA. In Old English Law. Victuals, arms, and other implements of war, necessary for the defence of a town. Mat. Par. 1250. See GARNISTURA.

GARNISH. In English Law. Money paid by a prisoner to his fellow-prisoners on his entrance into prison.

To warn. To garnish the heir is to warn the heir. Obsolete.

GARNISHEE. In Practice. A person who has money or property in his possession belonging to a defendant, which money or property has been attached in his hands, with notice to him of such attachment; he is so called because he has had warning or notice of the attachment.

From the time of the notice of the attachment, the garnishee is bound to keep the money or property in his hands, to answer the plaintiff's claim, until the attachment is dissolved or he is otherwise discharged. See Serg. Att. 88; Wade, Att. 831; Drake, Att.; Comyns., Dig. *Attachment*, E.

Ordinarily all persons or corporations who may be sued, may also be summoned as garnishees; but a municipal corporation cannot be; 92 Ga. 261; 95 id. 747; 95 Tenn. 492; 11 Utah 209; 16 So. Rep. (Ala.) 713; 38 Ill. App. 27; 43 Kan. 294; 11 Mo. 60; nor can a receiver; 11 Ga. 13; 23 Texas 508; 115 Mass. 67; 114 Ill. 287; or trustee appointed by the court; 12 Md. 124; 106 Pa. 418; 44 N. H. 127; and the garnishment of an agent is insufficient as a garnishment of the principal; 62 Mo. App. 50; but an attorney may be summoned as garnishee of his client in some cases; 3 Ala. 312; 99 Mass. 187; 77 Me. 105; 20 La. Ann. 188; 63 N. H. 166.

Any rights of the garnishee under existing contracts with the principal debtor, he is entitled to have the benefit of, as against the attaching creditor; 152 U. S. 586. No judgment can be rendered against a garnishee unless one is obtained against the principal defendant; 46 Ill. App. 458. It is competent for garnishees to represent in their own defence the rights of a third party to whom they are in law liable; 121 U. S. 430. A garnishee has the right to set up any defence against attachment process which he could have done against the debtor in the principal action; 120 U. S. 506.

There are garnishees also in the action of detinue. They are persons against whom process is awarded, at the prayer of the defendant, to warn them to come in and interplead with the plaintiff; Brooke, Abr. *Detinue*. See ATTACHMENT.

GARNISHMENT. A warning to any one for his appearance, in a cause in which he is not a party, for the information of the court and explaining a cause. Cowel.

Now generally used of the process of attaching money or goods due a defendant in the hands of a third party. The person in whose hands such effects are attached is the *garnishee*, because he is *garnished*, or warned, not to deliver them to the defendant, but to answer the plaintiff's suit. The use of the form "garnishee" as a verb is a prevalent corruption in this country.

It is attachment in the hands of a third person, and so is a species of seizure by notice; 41 Kan. 297, 506.

For example, in the practice of Pennsylvania, when a writ of attachment issues against a debtor, in order to secure to the plaintiff a claim due by a third person to such debtor, it is served on such third person, which notice or service is a garnish-

ment, and he is called the garnishee.

In detinue, the defendant cannot have a *sc. fa.* to garnish a third person unless he confess the possession of the chattel or thing demanded; Brooke, Abr. And when the garnishee comes in, he cannot vary or depart from the allegation of the defendant in his prayer of garnishment. The plaintiff does not declare *de novo* against the garnishee; but the garnishee, if he appears in due time, may have oyer of the original declaration to which he pleads.

Where plaintiff in execution paid to the sheriff \$1,000 as the value of the debtor's homestead interest, and the land was sold under execution, the money in the sheriff's hands was subject to garnishment at the instance of the other judgment creditors; 60 Ill. App. 63; money taken from a person without his consent by a sheriff acting as trespasser in so doing, and delivered by him to a third person claiming title thereto, is not subject of garnishment in the hands of the sheriff or to the third parties as the property of the person from whom it was taken; 40 Pac. Rep. (Wash.) 228.

See Brooke, Abr.; Drake; Wade; Shinn, Attachment; ATTACHMENT.

GARNISTURA. In Old English Law. Garniture; whatever is necessary for the fortification of a city or camp, or for the ornament of a thing. 8 Rymr 328; Du Cange; Cowel; Blount. See GARNESTURA.

GARROTE. A mode of capital punishment practised in Spain and Portugal formerly by a simple strangulation. The victim, usually in a sitting posture, is fastened by an iron collar to an upright post, and a knob, operated by a screw or lever, dislocates the spinal column, or a small blade severs the spinal cord at the base of the brain. Cent. Dict.; Encyc. Dict.

GARSUMME. In Old English Law. An amercement or fine. Cowel. See GRESSUME; GROSSOME; GERSUMA.

GARTH. In English Law. A yard; a homestead in the north of England. Cowel; Blount.

A yard, garden, or backside. Kelham.

GARYTOUR. In Old Scotch Law. Warder. 1 Pitt. Crim. Tr. pt. 1, p. 8.

GAS. An aeriform fluid, used for illuminating purposes and for fuel.

From a legal point of view it is to be considered with respect to the companies by which it is usually furnished, their status and obligations as affected by the nature of the business; and also whether the gas furnished by them is manufactured or natural.

Nature of the business. The business is not an ordinary one in which any person may engage as of common right, but a franchise of a public nature which, in the absence of constitutional restriction, may be granted by the legislature; 115 U. S. 650; id. 683; 33 Fed. Rep. 659; 84 Ky. 166. A grant of the right to lay pipes is valid, but it is a franchise to be strictly construed, and is void if the conditions are not complied with, pursuant to the legislative declaration in the grant; id. 46. Such a company cannot sell, lease, or assign its corporate privileges without consent of the legislature; 85 Me. 532.

They are not, however, always treated as strictly public corporations, but in some cases such a company is said to be simply "a private manufacturing corporation which furnishes gas to individuals as agreed. This of itself does not make it a public corporation;" 63 N. Y. 326. A company furnishing gas to a municipality under contract is not performing such public service as to exempt it from ordinary taxation; 20 S. W. Rep. (Ky.) 434.

A gas company having power to manufacture and sell gas has an implied power to make all contracts necessary to that end; 86 Mo. 495.

Natural Gas. The gas obtained from wells in coal and oil regions, and used for lighting and heating. In nature and character, such gas has been termed "a char-

eral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with more careful consideration of the principles involved than of the mere decisions. . . . Water and oil, and still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferre nature*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain;' (per Agnew, C. J. in 80 Pa. 147). They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his." Per Mitchell, J., in 130 Pa. 235.

Under a lease of land for the sole purpose of drilling and operating for oil and gas, the lessee's right in the surface of the land is in the nature of an easement of entry and examination, with a right of possession where the particular place of operation is selected, and the easement of ingress and egress, transportation and storage; *id.*

Whether the words "other valuable volatile substance" in a lease when they were used with petroleum, rock, or carbon oil, will include gas is a question for a jury, as the words have no settled meaning; 11 Pa. 81. The words oil and gas in a lease have been held not synonymous; 6 Atl. Rep. (Pa.) 74; it is a fuel; 114 Ind. 338; but it has been held that a company incorporated for supplying heat cannot also furnish natural gas; 108 Pa. 126.

Natural gas is as much an *article of commerce* as any other product of the earth; 120 Ind. 575; and a state statute making it unlawful for any person to conduct natural gas out of the state violates the provisions of the federal constitution vesting in congress the regulation of interstate commerce; *id.*; 118 Pa. 468.

The business of transporting and furnishing natural gas is a *public use*, and the right of eminent domain may be constitutionally granted to companies engaged in it; 5 Cent. Rep. (Pa.) 564; the business is transportation of freight; 118 Pa. 408. Because of the public nature of the business taxation may be authorized for supplying it to municipal corporations; 39 Fed. Rep. 251; and any unreasonable restraint upon the business is against public policy; 130 Ill. 268. It was held that under the Pennsylvania general incorporation act of 1874, under which companies for the manufacture and supply of gas were formed, natural gas companies could not be incorporated; 108 Pa. 111; 111 *id.* 35. Consequently a general law was passed providing for such companies under which, when lawfully incorporated, may they exercise the right of eminent domain and the grant of the power is constitutional; 120 Ind. 581; 63 Barb. 437; 115 Pa. 4; 160 *id.* 367; and the use of city streets for that purpose imposes no additional servitude; *id.* In Pennsylvania, the courts of common pleas may hear and determine controversies between natural gas companies and municipalities as to the manner of laying their pipes; 145 Pa. 4.

A right to take natural gas from land under the Pennsylvania act of Apr. 7, 1870, P. L. 58, is not land held in fee, subject to be sold under a special *fi. fa.* against an insolvent corporation; 162 Pa. 78. The lessee for oil and gas, having drilled a well and tapped the gas-bearing strata (the only one in the land), has both the possession of the gas and the right to it, and the owner will be enjoined from drilling; 130 Pa. 235. A lessee for oil only who took from the well both oil and gas was held not accountable to the lessee for the gas, which is, like air and water, the subject only of qualified

property by occupancy; 28 W. Va. 210. From the nature of the gas, a lease of well-rights is necessarily exclusive so far as concerns the leased premises themselves; *id.*; 130 Pa. 235. A person who has a natural gas well on his premises has the right to explode nitro-glycerine therein for the purpose of increasing the flow, although such explosion may have the effect to draw gas from the land of another; 131 Ind. 599.

See also as to natural gas, 30 Cent. L. J. 497; 29 Am. L. Reg. 93, 102; 34 Am. & Eng. Corp. Cas. 40-8.

The rights and liabilities of gas companies are, in the main, the same, whether they are engaged in the business of supplying artificial or natural gas.

Municipal lighting. The business is usually carried on by companies acting either under a legislative or municipal franchise or contract, or directly by the municipality under express legislative authority or implied power.

As to the implied power of a municipality to light its streets, etc., see ELECTRIC LIGHT.

A municipal corporation having power to light its own streets, and erect and maintain gas works has implied power to contract with others to do so; 34 Ky. 166. A municipal council exceeds its power, in granting an exclusive privilege; 43 Ohio St. 257; at least, without legislative authority; 3 Cent. Rep. (Pa.) 921. The authority to lay mains and pipes in streets and provide gas does not give an exclusive right to the use of the streets for that purpose; 21 Ohio L. J. 94.

A city engaged in making and selling gas is *quoad hoc* a private corporation, not legislating but making contracts which bind it as a natural person, and cannot be impaired by the legislature; 31 Pa. 175.

The grant of an exclusive privilege is a contract none the less because the business requires supervision by public authority, and such grant does not restrict the power of regulation by the state; 115 U. S. 630. A grant by a city, under legislative authority, of an exclusive privilege for a term of years of supplying the city and its people with gas, does not prevent the city from erecting its own gas works under a state law giving it power to do so; 146 U. S. 258. The grant of an exclusive privilege with an option to the city to buy the plant does not bind the city to maintain it when the sale of the plant is refused on application, but the city must elect whether it will purchase at the price fixed by referees before they are chosen, and until the city does so agree it is not a breach of contract for the company to refuse to join in selecting referees; 87 Ala. 245. Under a grant for a term of years of the exclusive privilege for this purpose, the right to use the streets for light other than gas is not implied and must be authorized; 11 Ky. L. Rep. 840. In this case it was held that the city had power to contract with another person for electric lighting, and pay for both gas and electricity, but it could not dispense with the gas company's gas without liability for breach of contract. When an exclusive privilege of lighting the city and using the streets was given by the city to one company for a term of years, in consideration of low rates, to citizens, it did not estop the municipal corporation from subscribing to the stock of a new gas company seeking to introduce gas; 8 Wall. 64. As to municipal authority to light streets, see 150 Mass. 592; 8 L. R. A. 487; ELECTRIC LIGHT.

The use of highways. The right to lay gas pipes in public highways can in general be granted only by the legislature. Such is the established rule both in England and in this country; 16 Q. B. 1012; 23 L. J. Q. B. 42; 2 Ex. Div. 429; 4 Bell, App. Cas. 374; 3 El. & El. 650; 29 N. J. Eq. 242; 18 Ohio St. 262. In a city it may be granted by the municipal or local authorities when empowered by the legislature to do so; 25 Conn. 19; 80 Barb. 24; in Massachusetts it was said to be not clear whether the city could act without authority from the state; per Gray, J., in 18 Allen 160; but in Michigan it was held to be essentially a matter of local control; 88 Mich. 154. The city

may forbid opening the streets within certain periods as a regulation, but a prohibition of digging up the street to introduce gas on the opposite side of it is an unreasonable exercise of authority; 12 Pa. 318. In rural highways the laying of gas pipes is held to impose a new servitude not contemplated in the condemnation; 62 N. Y. 386; Mills, Em. Dom. § 55; 160 Pa. 367; but in city streets it does not; *id.* See 12 Am. & Eng. Corp. Cas. 334; EMINENT DOMAIN; HIGHWAY; STREET.

Obligation to supply gas. The difference of opinion as to the public character of gas companies necessarily results in contradictory decisions as to whether the companies are under a public duty to supply gas on request. By the more recent decisions they are held to be subject to the duty of furnishing gas upon reasonable terms to any one who applies for it, especially if the franchise is exclusive; 25 Md. 1; 7 Gas J. 418; 14 *id.* 927; 17 *id.* 663; 6 Wis. 539; 12 Rob. La. 378; 67 Cal. 120; 4 Cush. 60; and the rule also applies where it is not; 52 Mich. 499; and companies may be compelled to do so by mandamus; 45 Barb. 136. On the other hand it has been held that they are under no public duty to supply gas; 30 Conn. 521; 6 C. B. N. S. 239; 20 U. C. Q. B. 233; 12 Allen 75; L. R. 15 Eq. 157; 27 N. J. L. 245. The last case was put solely on the lack of precedent and is practically overruled; 29 N. J. Eq. 77. See 34 N. E. Rep. (Ind.) 818.

The principle of *Munn v. Illinois* has been applied to gas works; 47 Ohio St. 1. But the right to regulate rates is not arbitrary, even where given to a municipality by the legislature; the right to charge reasonable rates is part of the contract of the company with the state, and this reasonableness is a matter for judicial determination; 72 Fed. Rep. 818. See RATES.

A gas company which has been granted the exclusive privilege of supplying gas in a city for a certain number of years, under an agreement that at all times it would supply the citizens for private use with a sufficient quantity of gas, need not leave a gas meter in the house of a citizen who is using electric light, furnished by another company, so that in case of accident to the electric light he may use the gas; 13 So. Rep. (Ala.) 618.

Rules and Regulations. In the conduct of their business such companies may make and enforce rules and regulations if fair and reasonable. Regulations have been held to be reasonable, requiring a deposit; 6 Wis. 539; 52 Mich. 499; and that a written application should be signed; 11 Wis. 234; but such an application cannot be made to embrace an agreement to be bound by illegal rules and regulations; 15 Wis. 818. Regulations may be enforced respecting the care and treatment of meters; 12 Phila. 611; and inspection of the same, and of pipes; 30 Gas J. 336; but visits must be made at stated times and with notice; 6 Wis. 539. Regulations held unreasonable or oppressive, and therefore non-enforceable, are that after the admission of gas the pipes may not be opened without a permit under penalty of treble damage; *id.*; that meters be placed upon main pipes of apartment buildings instead of smaller pipes of individual occupants; 104 Mass. 95; that rents should be payable half yearly in advance with penalty twenty days after default enforceable by cutting off the attachment until payment of the arrears and additional half year in advance; 29 N. J. Eq. 77.

The right to cut off the supply. The company or the municipality has, as a general rule, the right to cut off the supply of gas if the bill for supplying it is not paid within a limited period. Such a provision by ordinance is a reasonable regulation; 182 Pa. 288; and furnishing gas without objection or account of former indebtedness is not a waiver of the right to shut off the gas for such prior indebtedness; 45 Barb. 136; but in New York the right was held not to extend to indebtedness of a former occupant of the premises; 38 N. Y. Super. Ct. 185; L. R. 4 C. P. D. 410; 12 Rob. (La.) 307. Even when the company has the right by statute to cut off the supply for non-

payment of regular charges it does not extend to charges for special service; 20 U. C. Q. B. 233; nor can the supply be cut off from one house for non-payment for another supplied under a different contract; 25 Md. 1; 7 Grant, U. C. 112; and even when the contract authorizes refusal to continue a supply in case of default in payment for "any premises" of the owner it will apply only to future defaults; 1 Mackey 331. Whenever there is a controversy as to the indebtedness the consumer may have an injunction; 66 How. Pr. 314. As to the measure of damages see that title. See also WATER.

Liability for negligence. Gas companies and others using or generating gas, artificial or natural, are subject to the general principle that one who uses a force which he cannot control is liable for the consequences, and where it may be controlled by due care and scientific knowledge and appliances he who receives the profit must bear the responsibility; 3 C. B. 1; they are liable for negligence which must involve the omission of, required by, or the doing of something forbidden by, reasonable care; 122 Mass. 219; 2 Fost. & F. 437; what is such care is not capable of exact definition but must vary with and conform to the exigencies of the situation; 8 Gray 123; 129 Mass. 318; the obligation is increased by the dangerous character of the force under control; 152 Pa. 355; 12 R. I. 149; 31 S. W. Rep. (Mo.) 115, affirmed, 34 id. 508; and it extends to the company's agents and servants; 82 Ky. 432; 12 R. I. 149. The company is liable for such consequences as were natural and probable and, in view of the nature of the agency, ought to have been foreseen; 99 Pa. 1; 152 id. 355; 8 Allen 169; 3 id. 410. See CATSA PROXIMA NON REMOTA; 78 Cal. 517; 44 N. Y. 459.

Where the municipality is held liable in damages for an injury resulting from the negligence of a gas company in failing to keep in repair its apparatus located under the sidewalk, the company is liable over to the municipality; 161 U. S. 316.

The company is bound to exercise reasonable care in the location, structure, and repair of its pipes to prevent escape of gas so as to become dangerous to life or property; L. R. 7 Exch. 96; 129 Mass. 318; 129 Ind. 472; Whether by reason of explosion or inhalation; 65 Hun 878; it must also provide with the like care for the inspection of pipes and repairing leaks; 84 S. W. Rep. (Ark.) 547; 4 Fost. & F. 324; and the discovery of such leaks; 82 Md. 113; 165 Mass. 411; 148 N. Y. 112; 152 Pa. 355; and the safe condition of its apparatus authorized to be placed under the streets; 161 U. S. 316. The failure to use such care makes the company jointly liable with one who seeks for the leak with a lighted match, for the results of an explosion; 34 S. W. Rep. (Ark.) 549. The mere fact that the gas was exploded by a lighted match will not relieve the company whose negligence caused the leak; 152 Pa. 355. It is not contributory negligence to search for a gas leak with a lighted match; 33 S. W. Rep. (Ark.) 547; or a candle; 147 N. Y. 529. A city as a manufacturer and distributor of gas is liable for negligence of its officers, and its agents are bound to the exercise of due care in like manner as those of a private corporation; 105 Pa. 41; but not unless there is negligence; 13 Phila. 173.

Where the gas company is authorized by the legislature the public may not recover damages, but it will be liable to a private person; 64 Barb. 55; 6 Lans. 407. A gas company before turning on gas into an apartment house must use reasonable precautions to ascertain that the pipes in the building are in such condition that it will not flow out into the apartments of tenants, who have not applied for it, to their injury; per Peckham, J., in 147 N. Y. 529. For an elaborate note on the liability for negligence in the escape and explosion of gas, see 29 L. R. A. 337; 16 Alb. L. J. 466. See also NEGLIGENCE. As to gas as a nuisance, see that title.

Remedies. An injunction will be granted

to restrain a company from improperly cutting off the supply on the ground of irreparable injury; 64 How. Pr. 33; L. R. 28 Ch. D. 138; 14 Gas J. 927; a private owner cannot ask for an injunction against acts of companies in laying pipes until a request to the municipal authorities to do it and their refusal; 142 Mass. 417; and one company will not be restrained at suit of another; 40 N. J. Eq. 427. When the gas becomes a nuisance by defective pipes, the municipality may abate it and will not be restrained, but when it is not a nuisance a bill for injunction will not be sustained at suit of the municipality; 5 Cent. Rep. (Pa.) 669.

Mandamus. Will lie to compel a supply of gas either artificial; 4 Cush. 60; 56 Cal. 431; 45 Barb. 137; or natural; 34 N. E. Rep. (Ind.) 818.

A claim that gas is of poor quality is no defence to an action for the supply of it; 32 Gas J. 5; 3 id. 5; but it may be shown that the gas was put out by air passing through the tubes, the contract being to pay for gas only, and the meter not being conclusive; 65 Hun 621. An action will not lie against a gas company by a consumer for the failure of the company to give him a supply of gas of the amount and purity required by law; [1896] 1 Q. B. 592.

Connecting a rubber pipe with gas mains and taking off the gas therefrom is larceny; Dears. C. C. 203; 1 Cr. Cas. Res. 172.

As to pipes in the ground, whether real or personal, see 12 Am. & Eng. Corp. Cas. 334; and as to gas apparatus generally, see FIXTURES.

See, generally, Foote & Everett, Inc. Comp. operating under Mun. Franchises; Greenough, Dig. Cas. as to Gas Comp.; Harris, Damages; 2 Lawson, Rights and Remedies 570; 27 Am. L. Reg. 277; 4 Am. & Eng. Corp. Cas. 70, 567; 16 id. 588-615.

GASTALDERS. A temporary governor of the country. Blount. A steward or bailiff. Spel. Gloss.

GASTEL (L. Fr.). Wastel; wastel-bread; the finest kind of wheat bread. Britt. c. 30; Kelham.

GASTINE (L. Fr.). Waste or uncultivated ground. Britt. c. 57.

GATE (Sax. *geat*) at the end of names of places, signifies way or path. Cunningham, Law Dict.

In the words *beast-gate* and *cattle-gate*, it means a right of pasture: these rights are local to Suffolk and Yorkshire respectively; they are considered as corporeal hereditaments, for which ejectment will lie; 2 Stra. 1084 1 Term 137; and are entirely distinct from right of common. The right is sometimes connected with the duty of repairing the *gates* of the pasture: and perhaps the name comes from this.

GATE-WAYS. See THROUGH ROUTE.

GAUDIES. A term used in the English universities to denote double commons.

GAUGER. An officer appointed to examine all tuns, pipes, hogsheads, barrels, and tierces of wine, oil, and other liquids, and to give them a mark of allowance, as containing lawful measure.

GAUGETUM. A gauge or guaging; a measure of the contents of any vessel.

GAUNTLET. See GANTELOPE.

GAVEL. In Old English Law. Tribute; toll; custom; yearly revenue, of which there were formerly various kinds. Jacob, Law Dict.; Taylor, Hist. Gavelkind, 26, 102. See GABEL.

GAVELBRED. In English Law. Rent reserved in bread, corn, or provision; rent payable in kind. Cowel.

GAVELCESTER. See GAVELSESTER.

GAVELCHESTER. A certain measure of rent-ale. Cowel.

GAVELET. An obsolete writ, a kind of *cessavit* (q. v.), used in Kent. Cowel. The Kentish custom of forfeiture. IS Harv. L. R. 40. See THREE-WEEKS COURT.

GAVELGELD. Sax. *gavel*, rent, *geld*, payment). That which yields annual profit or toll. The tribute or toll itself. 3 Mon. Angl. 153; Cowel; Du Cange, *Gavelgida*.

GAVELHERTE. A customary service of ploughing. Du Cange.

GAVELKIND. The tenure by which almost all lands in England were held prior to the Conquest, and which is still preserved in Kent.

All the sons of a tenant of gavelkind lands take equally, or their heirs male and female by representation. The wife of such tenant is dowable of one-half the lands. The husband of such tenant has curtesy, whether issue be born or not, but only of one-half while without issue. Such lands do not escheat, except for treason or want of heirs. The heir of such lands may sell at fifteen years old, but must himself give livery. The rule as to division among brothers in default of sons is the same as among the sons. Digb. R. P. 46.

Coke derives *gavelkind* from "gave all kinde;" for this custom gave to all the sons alike; 1 Co. Litt. 140 a; Lambard, from *gavel*, rent,—that is, land of the kind that pays rent or customary husbandry work, in distinction from lands held by knight service. Perambulations of Kent, 1636, p. 585. See Encyc. Brit.; Blount; 1 Bla. Com. 74; 2 id. 84; 4 id. 408; 1 Poll. & Maitl. 165; 2 id. 289, 416.

GAVELLER. An officer of the English crown, who had the management of the mines and quarries in the Forest of Dean and Hundred of St. Briavels, subject, in some respects, to the control of commissioners of woods and forests. He granted gales to free miners in their proper order, accepted surrenders of gales, and kept the registers required by the acts. There was a deputy-gaveller who appears to have exercised most of the gaveller's functions. Sweet.

The First Commissioner of Woods, Forests and Land Revenues is now *ex-officio* the gaveller. He is empowered to appoint deputies, and the deputies grant gales to free miners (q. v.) in their proper order, accept surrenders of gales, and keep the registers required by statute. Byrne. See GALE.

GAVELMAN. A tenant who is liable to tribute. Somner, Gavelkind, p. 33; Blount. Gavelingmen were tenants who paid a reserved rent, besides customary service. Cowel.

GAVELMED. A customary service of mowing meadow-land or cutting grass (*consuetudo falcandi*). Somner, Gavelkind, App.; Blount.

GAVELREE. In Old English Law. Bedreap or bidreap; the duty of reaping at the bid or command of the lord. Somn. Gavelkind 19, 21; Cowel.

GAVELSESTER, or GAVELCESTER. A certain measure of rent-ale. Wharton.

GAVELWERK (called also *Gavelweek*). A customary service, either *manuopera*, by the person of the tenant, or *carropera*, by his carts or carriages. Phillips, Purveyance; Blount; Somner, Gavelkind 24; Du Cange.

GAYNER. See GAINER.

GAZETTE. The official publication of the British government, also called the *London Gazette*. It is evidence of acts of state, and of everything done by the queen in her political capacity. Orders of adjudication in bankruptcy are required to be published therein, and a copy of the *Gazette* containing such publication is conclusive evidence of the fact, and of the date thereof. Moz. & W.

GEBOCED (Anglo-Saxon). Conveyed.

GEBUR (Sax.). A boor. Maitl. Domesd. 37.

GEBURSCIPA, or GEBURSCIR. Neighborhood, or adjoining district. Cun-

GEBURSCRIPT. Neighborhood or adjoining district. Cowel.

GEBURUS. In Old English Law. A country neighborhood; an inhabitant of the same gabsurscript, or village. Cowel.

GEBOCIAN (from Sax. *boc*). To convey *boc land*,—the grantor being said to *gebocian* the grantee of the land: 1 Reeve, Hist. Eng. Law. 10. But the better opinion would seem to be that *boc land* was not transferable except by descent. See Du Cange, *Liber*; *BOCLAND*; *FOLCLAND*.

GELD (from Sax. *gildan*; Law Lat. *geldum*). A payment; tax, tribute. Laws of Hen. I. c. 2; Charta Edredi Regis apud Ingulfum, c. 81; Mon. Ang. t. 1, pp. 52, 211, 379; t. 2, p. 161; Du Cange; Blount. The compensation for a crime.

We find geld added to the word denoting the offence, or the thing injured or destroyed, and the compound taking the meaning of compensation for that offence or the value of that thing. Capitulare 3, anno 813, cc. 23, 25; Carl Magn. So, *wergeld*, the compensation for killing a man, or his value; *orfgeld*, the value of cattle; *angeld*, the value of a single thing; *octogeld*, the value eight times over, etc. Du Cange, *Geldum*.

GELDABILIS. In Old English Law. Taxable.

Same as *geldable* (q. v.). Jacob.

GELDABLE. Liable to be taxed. 1 Poll. & Maitl. 552; Kellham.

GELDING. A horse that has been castrated, and is thus distinguished from a horse in his natural and unaltered condition. 4 Tex. App. 220.

GEMMA (Lat). In the Civil Law. A gem; precious stones. Gems are distinguished by their transparency: such as emeralds, chrysolites, amethysts. Dig. 84, 2, 19, 17.

GEMOT (*gemote*, or *mote*; Sax., from *gemettand*, to meet or assemble; L. Lat. *gemotum*). An assembly; a mote or moot, meeting or public assembly.

There were various kinds: as, the *witena-gemot*, or meeting of the wise men; the *folc-gemot*, or *folc-moot*, the general assembly of the people; the *shire-gemot*, or county court; the *burg-gemot*, or borough court; the *hundred-gemot*, or hundred court; the *half-gemot*, or court-baron; the *halmote*, a convention of citizens in their public hall; the *holy-mote*, or holy court; the *swainmote*, or forest court; the *ward-mote*, or ward court; Cunningham, Law Dict. And see the several titles.

GENEALOGY. The summary history, or table of a family, showing how the persons there named are connected together.

It is founded on the idea of a lineage or family. Persons descended from the common father constitute a family. Under the idea of degrees is noted the nearness or remoteness of relationship in which one person stands with respect to another. A series of several persons, descended from a common progenitor, is called a *line*. Children stand to each other in the relation either of full blood or half-blood, according as they are descended from the same parents or have only one parent in common. For illustrating descent and relationship, genealogical tables are constructed, the order of which depends on the end in view. In tables the object of which is to show all the individuals embraced in a family, it is usual to begin with the oldest progenitor, and to put all the persons of the male and female sex in descending, and then in collateral, lines. Other tables exhibit the ancestors of a particular person in ascending lines, both on the father's and the mother's side. In this way four, eight, sixteen, thirty-two, etc., ancestors are exhibited, doubling at every degree. Some tables are constructed in the form of a tree, after the model of canonical law (*arbor consanguinitatis*), with the progenitor beneath, for the root or stem. See *CONSAQUINITY*.

GENEARCH. The head of the family.

GENEATH. In Saxon Law. A villein, or agricultural tenant (*villanus villicus*); a hind, or farmer (*fmarius rusticus*). Spel. Gloss.

GENER (Lat.). A son-in-law.

GENERAL ACCEPTANCE. An acceptance is general when it imports an absolute acceptance precisely in conformity

to the tenor of the bill itself. It is conditional or qualified when it contains any qualification, limitation or condition, different from what is expressed on the face of the bill, or from what the law implies, upon a "general acceptance." It is *qualified* when the drawee absolutely accepts the bill, but makes it payable at a different time or place, or for a different firm, or in a different mode from that which is the tenor of the bill. 3 Bush (Ky.) 628. See *CONDITIONAL ACCEPTANCE*.

GENERAL (or PUBLIC) ACT. An act of the legislature which regards the whole community; a universal rule, of which the courts of law are bound to take notice judicially and *ex officio*. 1 Bl. Com. 85, 86. See *PUBLIC ACT*.

GENERAL AGENT. See *AGENT*.

GENERAL APPEARANCE. See *APPEARANCE*, *COMMON APPEARANCE*.

GENERAL ASSEMBLY. A name given in some of the states to the senate and house of representatives, which compose the legislative body. See *JUDICATORIES*.

GENERAL ASSIGNMENT. An assignment of all one's property for the benefit of his creditors, and necessarily includes an assignee who shall by the terms of the instrument, or as an inference from those terms, take as a trustee for the creditors. 18 N. Y. S. 234.

A general assignment for the benefit of creditors embraces any conveyance by a debtor of substantially all his property to a party in trust to collect the amounts owing to him, to sell and convey the property, to distribute the proceeds of the property among his creditors, and to return the surplus, if any, to the debtor. It includes the ordinary form of conveyance to an assignee for the benefit of creditors, a deed of trust (q. v.), or a bill of sale for the benefit of creditors. 1 Loveland, Bankruptcy 4th ed., § 152. See *ASSIGNMENT*.

GENERAL AVERAGE. A loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of a ship and cargo. 19 S. W. Rep. (Ky.) 10.

The scuttling of a ship by the municipal authorities of a port, without the direction of her master, to extinguish a fire in her hold, is not a general average loss; 157 U. S. 386; which see generally on the subject. See *AYERAGE*; *FOLLOWING BASIS*.

GENERAL CHALLENGE. A challenge for cause to a particular juror, upon a ground which disqualifies him from serving in any case. Cal. Pen Code § 1071. See *CHALLENGE*.

GENERAL CHARACTER. The general character is the estimation in which a person is held in the community where he has resided, and, ordinarily, the members of that community are the only proper witnesses to testify as to such character. Accordingly a witness who goes to the place of the former residence of a party to learn his character will not be allowed to testify as to the result of his inquiries. 2 Wend. 354. See *CHARACTER*.

GENERAL CHARGE. The charge or instruction of the court to the jury upon the case, as a whole, or upon its general features and characteristics. See *CHARGE*.

GENERAL CIRCULATION. That of a general newspaper only, as distinguished from one of a special or limited character; 1 Lack. Leg. N. (Pa.) 114.

For a paper to have a general circulation, it was held not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, nor that it circulate in every county in the state, but it must extend beyond the county in which it is published. The court said: "If the circulation of a paper in one county is a general circulation, then why is not the same true if it circulates in a village, township, or other subdivision of a county?" 14 A. & E. Encyc. 949; 35 Neb. 676. Where a statute required publi-

cation in three papers of general circulation, it was held that this required only a publication in a general newspaper as distinguished from one of special or limited character. *Id.*; 1 Lack. Leg. N. (Pa.) 114.

GENERAL COUNCIL. A council of bishops of the Roman Catholic Church, from different parts of the world.

A name sometimes applied to the British parliament.

GENERAL COURT. The official name of the legislature in Massachusetts and New Hampshire. Stand. Dict.

May be the legislature of any state, so called from having had, in colonial days, judicial power. Webster.

GENERAL CREDIT. The character of a witness as one generally worthy of credit. There is a distinction between this and particular credit, which may be affected by proof of particular facts relating to the particular action; 5 Abb. Fr. N. S. 232.

GENERAL CUSTOM. See *CUSTOM*.

GENERAL DAMAGES. See *DAMAGES*.

GENERAL DEMURRER. See *DEMURRER*.

GENERAL DENIAL. See *DENIAL*; *PLEA*; *TRAVERSE*.

GENERAL DEPOSIT. Of money in a bank, it means one to be returned to the depositor in a like sum, but not the same money which was deposited. 43 Ill. App. 340; 43 Ala. 138. See *DEPOSIT*; *SPECIAL DEPOSIT*. Same as irregular deposit (q. v.).

GENERAL ELECTION. An election of officers of the general government, either federal or state, as distinguished from an election of local officers.

One held to choose an officer after the expiration of the full term of the former officer, as distinguished from one held to fill a vacancy occurring before the expiration of the full term for which the incumbent was elected. 52 Cal. 164.

In England. An election, following a dissolution of Parliament, in which every constituency elects a member. Stand. Dict. See *ELECTION*; *SPECIAL ELECTION*.

GENERAL EXECUTOR. See *EXECUTOR*.

GENERAL FIELD. A number of separate lots or parcels of land inclosed together and fenced as a single field. 14 Mass. 440.

GENERAL FUND. A phrase used in some states as a collective designation of all the assets of the state available for the support of the state government and for defraying the ordinary appropriations of the legislature. It is so used in New York; 27 Barb. 575, 588; and also in Delaware in the messages of the governor and other state papers to distinguish such funds as are available in the hands of the state treasurer for general purposes from assets of a special character, such as the school fund.

GENERAL GAOL DELIVERY. In English Law. One of the four commissions issued to judges holding the assizes, which empowers them to try and deliverance make of every prisoner who shall be in the gaol when the judges arrive at the circuit town, whether an indictment has been preferred at any previous assize or not.

It was anciently the course to issue special writs of gaol delivery for each prisoner, which were called, writs *de bono et malo*; but, these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. 4 Steph. Com. 333, 334; 2 Hawk. Pl. Cr. 14, 23.

Under this authority it was necessary that the gaol be cleared and delivered of all prisoners in it, whenever or before whomever indicated or for whatever crime. Such deliverance took place when the person is either acquitted, convicted, or sentenced to punishment. Bract. 110. See *COURTS OF OYER AND TERMINER* and *GENERAL GAOL DELIVERY*; *ASSIZE*.

GENERAL IMPARLANCE. In Pleading. One granted upon a prayer in which the defendant reserves to himself no exceptions.

GENERAL INCLOSURE ACT. The Stat. 41 Geo. III. c. 109, which consolidated a number of regulations respecting the inclosure of common fields and waste lands. See 8 and 9 Vict. c. 118; INCLOSURE.

GENERAL ISSUE. In Pleading. A plea which denies or traverses at once the whole indictment or declaration, without offering any special matter to evade it. It is called the general issue because, by importing an absolute and general denial of what is alleged in the indictment or declaration, it amounts at once to an issue. 2 Bla. Com. 305. In the early manner of pleading, the general issue was seldom used except where the party meant wholly to deny the charges alleged against him. When he intended to excuse or palliate the charge, a special plea was used to set forth the particular facts. See 2 Poll. & Maitl. 617.

But now, since special pleading is generally abolished, the same result is secured by requiring the defendant to file notice of special matters of defence which he intends to set up on trial, or obliging him to use a form of answer adapted to the plaintiff's declaration, the method varying in different systems of pleading. Under the English Judicature Acts, the general issue is no longer admissible in ordinary civil actions, except where expressly sanctioned by statute.

In criminal cases the general issue is, not guilty. In civil cases the general issues are almost as various as the forms of action: in assumpsit, the general issue is *non assumpsit*; in debt, *nil debet*; in detinue, *non detinet*; in trespass, *non culpabilis* (not guilty); in replevin, *non cepit*, etc. Steph. Pl. 232.

GENERAL LAND OFFICE. A bureau in the United States government which has the charge of matters relating to the public lands.

It was established by the act of April 23, 1812, 2 Story, Laws 1238. Another act was passed March 24, 1824, 3 Story 1938, which authorized the employment of additional officers. And it was reorganized by an act entitled "An act to reorganize the General Land Office," July 4, 1836. It was originally a bureau of the treasury department, but was transferred in 1859 to the department of the interior. The statutes on the subject are comprised in U. S. Rev. Stat. §§ 446-461. As to the organization of the executive departments of the federal government, see DEPARTMENT. See also Zabriske's Pub. Land Laws of U. S.

GENERAL LAW. Laws which apply to and operate uniformly upon all members of any class of persons, places, or things, requiring legislation peculiar to themselves in the matters covered by the laws. Binney, Restrictions upon Local and Special Legislation.

Statutes which relate to persons and things as a class. 77 Pa. 348. Laws that are framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves. 40 N. J. L. 123.

The later constitutions of many of the states place restrictions upon the legislature as to passing special laws in certain cases. In some states there is a provision that general laws only may be passed, in cases where such can be made applicable. Provisions requiring all laws of a general nature to be uniform in their operation do not prohibit the passage of laws applicable to cities of a certain class having not less than a certain number of inhabitants, although there be but one city in the state of that class; 18 Ohio N. S. 85; Cooley, Const. Lim. 156. See 37 Cal. 366.

The wisdom of these constitutional pro-

visions has been the subject of grave doubt. See Cooley, Const. Lim. 156, n.

When thus used, the term "general" has a twofold meaning. With reference to the subject-matter of the statute, it is synonymous with "public" and opposed to "private"; 37 Cal. 366; 14 Wis. 872; 46 *id.* 218; Dwarrris, Stat. 629; Sedgw. Stat. L. 80; but with reference to the extent of territory over which it is to operate, it is opposed to "local," and means that the statute to which it applies operates throughout the whole of the territory subject to the legislative jurisdiction; 4 Co. 71a; 1 Bla. Com. 85; 83 Ill. 585; 87 Tenn. 304; 10 Wis. 180. Further, when used in antithesis to "special" it means relating to all of a class instead of to men only of that class; 70 Ill. 398; 26 Ind. 431; 22 Ia. 391; 77 Pa. 348; 32 Pac. Rep. (Nev.) 440.

When the constitution forbids the passing of special or local laws in specified cases, it is within the discretion of the legislature to decide whether a subject not named in the constitution is a proper subject for general legislation; the fact that a special law is passed in relation thereto is evidence that it was thought that a general law would not serve; and in such a case clear evidence of mistake is required to invalidate the enactment; 81 Cal. 489; 92 Ind. 286; 107 *id.* 15; 77 Ia. 513.

In deciding whether or not a given law is general, the purpose of the act and the objects on which it operates must be looked to. If these objects possess sufficient characteristics peculiar to themselves and the purpose of the legislation is germane thereto, they will be considered as a separate class, and legislation affecting them will be general; 49 N. J. L. 356; 41 Minn. 74; 131 Ind. 446; 87 Mich. 217; 124 Ill. 666; 87 Tenn. 214; but if the distinctive characteristics of the class have no relation to that purpose of the legislature, or if objects which would appropriately belong to the same class have been excluded, the classification is faulty, and the law not general; 87 Ga. 444; 91 Cal. 238; 32 Kan. 431; 51 N. J. L. 403; 52 *id.* 303; 19 Nev. 43; 2 N. Dak. 270; 106 Pa. 377. The effect, not the form of the law, determines its character; 20 Ia. 338; 71 Mo. 645; 82 *id.* 231; 53 N. J. L. 4; 45 Ohio St. 63; 48 *id.* 211; 88 Pa. 258.

See 42 N. J. L. 357; *id.* 533; 40 *id.* 123; 31 Wis. 257. See LEGISLATIVE POWER; SPECIAL LAW; STATUTE.

GENERAL LEGACY. A pecuniary legacy, payable out of the general assets of a testator. 2 Bl. Com. 512. See LEGACY.

GENERAL LIEN. The right which the bailee of a chattel has to retain possession of it from the owner, until payment be made not only for the particular article, or some labor, service or expense performed, incurred or laid out upon or in relation to it, but of any balance that may be due on general account in the same line of business.

See LIEN.

GENERAL MALICE. See MALICE.

GENERAL MEETING. See MEETING.

GENERAL OCCUPANT. The man who could first enter upon lands held *pur autre vie*, after the death of the tenant for life, living the *cestui que vie*. At common law he held the lands by right for the remainder of the term; but this is now altered by statute, in England, the term going to the executors if not devised; 29 Car. II. c. 3; 14 Geo. II. c. 20; 2 Bla. Com. 258. This has been followed by some states; 1 Md. Code 666, s. 220, art. 93; in some states the term goes to heirs, if undevise; Mass. Gen. Stat. c. 91, § 1.

GENERAL ORDERS. Orders or rules of court, entered for the guidance of practitioners and the general regulation of procedure, or in some branch of its general jurisdiction; as opposed to a rule or an order made in a particular case. The rules of court.

GENERAL OWNER. The general

owner of a thing is one who has the primary title to it; as distinguished from a *special* owner, who has a special interest in the same thing, amounting to a qualified ownership, such, for example, as a bailee lien. One who has both the right of property and of possession.

GENERAL PARTNERSHIP. See PARTNERSHIP.

GENERAL PROPERTY. The right and property in a thing enjoyed by the general owner (*q. v.*).

GENERAL RELIEF. See RELIEF.

GENERAL RESTRAINT OF TRADE. A contract which forbids the party to it from engaging in a particular business without limitation either of time or locality. Such contracts are void. 2 Add. Cont., Abb. & Wood ed. 737.

One which forbids the person to employ his talents, industry, or capital in any undertaking within the limits of the state or country. 9 How. Pr. 337. See RESTRAINT; GOOD WILL.

GENERAL RETAINER. See RETAINER.

GENERAL RETURN DAY. In any court the day for the return of all process, such as writs of summons, subpoena, etc., issued returnable to a particular term of the court. See RETURN OF WRITS.

GENERAL RULES. Standing orders of a court for the regulation of its practice. See GENERAL ORDERS.

GENERAL SESSIONS. See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

GENERAL SHIP. One which is employed by the charterer or owner on a particular voyage, and is hired by a number of persons, unconnected with each other, to convey their respective goods to the place of destination. A ship advertised for general receipt of goods to be carried on a particular voyage. The advertisement should state the name of the ship and master, the general character of the ship, the time of sailing, and the proposed voyages. See 1 Pars. Mar. Law 130; Abb. Shipp. 123.

The shippers in a general ship generally contract with the master; but in law the owners and the masters are separately bound to the performance of the contract, it being considered as made with the owners as well as with the master; Abb. Shipp. 319.

GENERAL SPECIAL IMPARLANCE. In Pleading. One in which the defendant reserves to himself "all advantages and exceptions whatsoever." 2 Chitty, Pl. 408. See IMPARLANCE.

GENERAL STATUTE. See GENERAL LAW.

GENERAL TAIL. See FEE-TAIL.

GENERAL TENANCY. A tenancy which is not fixed and made certain, as to its duration, by agreement of the parties. 22 Ind. 122. Tenancy from year to year. See TENANT.

GENERAL TERM. A phrase used in some jurisdictions to designate the regular session of a court, for the trial and decision of causes, as distinguished from a special term, for the hearing of motions or arguments, or the despatch of routine or formal business, or the trial of a special list or class of causes or a particular case. It is also sometimes used to designate a sitting of the court in banc (*q. v.*).

GENERAL TRAVERSE. See TRAVERSE.

GENERAL USAGE. See USAGE.

GENERAL VERDICT. See VERDICT.

GENERAL WARRANT. A process which used to issue from the state secretary's office, to take up (without naming any person in particular) the author printer,

and publisher of such obscene and seditious libels as were particularly specified in it. The practice of issuing such warrants was common in early English history, but it received its death blow from Lord Camden, in the time of Wilkes. The latter was arrested and his private papers taken possession of under such a warrant, on a charge of seditious libel in publishing No. 45 of the North Briton. He recovered heavy damages against Lord Halifax who issued the warrant. Pratt, C. J., declared the practice to be "totally subversive of the liberty of the subject," and with the unanimous concurrence of the other judges condemned this dangerous and unconstitutional practice. See May, Const. Hist. of England; 5 Co. 91; 2 Wils. 151, 275; 10 Johns. 263; 11 id. 500; Cooley, Const. Lim. 369. Such warrants were declared illegal and void for uncertainty by a vote of the house of commons. Com. Jour. 22, April, 1766; Whart. Law Dict.

A writ of assistance.

The issuing of these was one of the causes of the American republic. They were a species of general warrant, being directed to "all and singular justices, sheriffs, constables and all other officers and subjects," empowering them to enter and search any house for uncustomed goods, and to command all to assist them. These writs were perpetual, there being no return to them. They were not executed, owing to the eloquent argument of Otis before the supreme court of Massachusetts against their legality. See Tudor, Life of Otis 66; Story, Const. 1901.

GENERAL WARRANTY. See COVENANT OF WARRANTY; WARRANTY.

GENERAL WORDS. Such words of a descriptive character as are used in conveyances in order to convey, not only the specific property described, but also all kinds of easements, privileges, and appurtenances which may possibly belong to the property conveyed. Such words are in general unnecessary; but are properly used when there are any easements or privileges reputed to belong to the property not legally appurtenant to it.

Such words are rendered unnecessary by the English conveyancing act of 1881, under which they are presumed to be included.

See, as to the effect of such words in deeds, 1 Show. 150; 4 M. & S. 423; 1 Ld. Raym. 235, 662; 2 Tyrw. 178; Loft 398; 4 Mo. 448; in a will; 1 P. Wms. 302; in a lease; 2 Moo. 592; in a release; 3 Mod. 277; 3 Lev. 273; in a covenant; 3 Moo. 703; in a statute; 1 Bla. Com. 88; Cowp. 360; 12 Mod. 166; 2 Co. 46; 1 Ld. Raym. 321.

General words are taken in their general sense. Where general words follow an enumeration of particular cases, such words apply only to cases of the same kind as those expressly mentioned. Anderson; 5 McLean 183-4. The meaning of general words will be restricted to carry out the legislative intent. *Id.*, 13 Wall. (U. S.) 165. Where particular words, in a statute, are followed by words of a general character, the latter are to be restricted to the objects particularly mentioned. If the act begins with words which speak of things or persons of an inferior degree and concludes with general words, the latter are not to be extended to a thing or person of a higher degree. If a particular class is mentioned and general words follow, they must be treated as referring to matters of the same kind, thus subordinating general terms to the preceding particulars. *Id.*; 83 Ky. 100. General words in any instrument or statute are strengthened by exceptions, and weakened by enumeration. *Id.*; 21 Pa. 161.

GENERATIO. The issue or offspring of a mother monastery.

GENERATION. A simple succession of living beings in natural descent; the age or period between one succession and another. It is not equivalent to degree. 107 N. C. 609.

GENS (Lat.). In Roman Law. A union of families, who bore the same name; who were of an ingenuous (free) birth, *ingenui*, none of whose ancestors had been a slave, and who had suffered no *capitis diminutio* (reduction from a superior to an inferior condition), of which there were three degrees, *maxima*, *media*, *minima*. The first was the reduction of a free man to the condition of a slave, and was undergone by those who refused or neglected to be registered at the census, who had been condemned to ignominious punishments, who refused to perform military service, or who had been taken prisoners by the enemy, though those of the last class, on recovering their liberty, could be reinstated in their rights of citizenship. The second degree consisted in the reduction of a citizen to the condition of an alien (*Latinus* or *peregrinus*), and involved in the case of a *Latinus*, the loss of the right of legal marriage, but not of acquiring property, and in the case of the *peregrinus*, the loss of both. The third degree consisted in the change of condition of a *pater familias* into that of a *filius familias*, either by adoption or by legitimation.

Gentiles sunt, qui inter se eodem nomine sunt; qui ab ingenuis oriundi sunt; quorum majorum nemo servitutem servivit; qui capite non sunt diminuti. This definition is given by Cicero (Topic 6), after Scævola's position, not establishing this high authority, the question as to the organization of the *gens* is involved in great obscurity and doubt. The definition of Festus is still more vague and unsatisfactory. He says, "*Gentilis dicitur et ex eodem genere ortus, et is qui simili nomine appellatur, ut ait Cincius: Gentiles mihi sunt, qui meo nomine appellantur.*" *Gens* and *gens* are convertible terms; and Cicero defines the latter word, "*Gens autem est quod sui similes communione quadam, specie autem differentes, duas aut plures complectitur partes.*" De Oratore, 1, 42. The *gens* is that which comprehends two or more particulars, similar to one another by having something in common, but differing in species. From this it may fairly be concluded that the *gens* or race comprises several families, always of ingenuous birth, resembling each other by their origin, general name, *nomen*, and common sacrifices or sacred rites, *sacra gentilitia* (the latter from *potione quadam*), but differing from each other by a particular name, *cognomen* and *agnatio* (*specie autem differentes*). It would seem, however, from the litigation between the Claudii and Marcelli in relation to the inheritance of the son of a freedman, reported by Cicero, that the *gens*, whose succession was in controversy, belonging to the gens Claudii, was the foundation of their claim was the *gentile rights*. *gentie*; and the Marcelli (plebeians belonging to the same *gens*) supported their pretensions on the ground that he was the son of their freedman. This fact has been brought by some writers to contradict that part of the definition of Scævola and Cicero where they say, *quorum majorum nemo servitutem servivit*. And Niebuhr, in a note to his history, concludes that the definition is erroneous; he says, "The claim of the patrician Claudii is at variance with the definition in the Topics, which excludes the posterity of freedmen from the character of *gentiles*; probably the decision was against the Claudii, and this might be the ground on which Cicero denied the title of *gentiles* to the descendants of freedmen. I conceive in so doing he must have been mistaken. We know from Cicero himself (de Leg. 1, 22) that no bodies or ashes were allowed to be placed in the common sepulchre unless they belonged to such as shared in the *gens* and its sacred rites; and several freedmen have been admitted into the sepulchre of the Scipios." But in another place he says, "The division into houses was so essential to the patrician order that the appropriate ancient term to designate that order was a circumscription—the *patrician gentes*; but the instance just mentioned shows beyond the reach of a doubt that such a *gens* did not consist of patricians alone. The Claudian contained the Marcelli, who were plebeians, equal to the Apulii in the splendor of the honors they attained to, and incomparably more wealthy than the majority of the patricians; such plebeian families must evidently have arisen from marriages of disparagement, contracted before there was any right of intermarriage between the orders. But the Claudian house had also a very large number of insignificant persons who bore its name—such as the M. Claudius who disputed the freedom of Virginia may, according to an account of earlier times, as the very case in Cicero proves, it contained the freedmen and their descendants. Thus, among the Gaels, the clan of the Campbells was formed by the nobles and their vassals: if we apply the Roman phrase to them, the former had the clan, the latter only belonged to it." It is obvious that, if what is here, concerning part of the passage last quoted be correct, the definition of Scævola and Cicero is perfectly consistent with the theory of Niebuhr himself; for the definition, of course, refers to the original stock of the *gens*, and not to such as might be attached to it or stand in a certain legal relation towards it. In Smith's Dictionary of Greek and Roman Antiquities, edited by that accomplished classical scholar, Professor Anthon, the same distinction is intimated, though not fully developed, as follows:—"But it must be observed, though the descendants of freedmen might have no claim as *gentiles*, the members of the *gens* might, as such, have claims against them; and in this sense the descendants of freedmen might be *gentiles*." This article by George Long is much

quoted and contains references to the principal German authorities, and it may be consulted with profit. Hugo, in his history of the Roman law, vol. 1, p. 83, says, "Those who bore the same name, belonged all to the same *gens*: they were *gentiles* with regard to each other. Consequently, as the freedmen took the name of their former master, they adhered to his *gens*, or, in other words, stood in the relation of *gentiles* to him and his male descendants. Livy refers in express terms to the *gens* of an enfranchised slave (b. 39, 19), "*Tecenia Hispana... gentis enusio*;" and the right of inheritance of the son of a freedman was conferred on the ground of civil relationship, *gentis*. But there must necessarily have been a great difference between those who were born in the *gens* and those who had only entered it by adoption, and their descendants; that is to say, between those who formed the original stock of the *gens*, who were all of patrician origin, and those who had entered the family by their own enfranchisement or that of their ancestors. The former alone were entitled to the rights of the *gentiles*; and perhaps the appellation itself was confined to them, while the latter were called *gentilii*, to designate those against whom the *gentiles* had certain rights to exercise." In a lecture of Niebuhr on the Roman *Gentes*, vol. 1, p. 70, he says, "Such an association, consisting of a number of families, from which a person may withdraw, but into which he cannot be admitted at all, or only by being adopted by the whole association, is a *gens*. It must not be confounded with the *family*, the members of which are descended from a common ancestor; for the patronymic names of the *gentes* are nothing but symbols, and are derived from heroes." This gives the following exposition of the subject:—"The people of Rome were divided into the three tribes of the Ramnenses, Titienses, and Luceres, and each of these tribes was divided into ten *curie*; it would be more correct to say that the union of ten *curie* formed the *tribus*, and that the *gens* was the junction of certain original elements, and these were neither the tribes, nor even the *curie*, but the *gentes* or houses which made up the *curie*. The first element of the whole system was the *gens*, or house, a union of several families who were bound together by the joint performance of certain religious rites. Actually, where a system of houses existed within historical memory, the several families who composed a house were not necessarily related to one another; they were not really cousins more or less distant, all descended from a common ancestor. But there is no reason to doubt that in the original idea of a house the bond of union between its several families was truly sameness of blood; such was likely to be the earliest acknowledged tie, although afterwards, as names are apt to outlive their meaning, an artificial bond may have succeeded to the natural one, and a house, instead of consisting of relations, was a collection of names, up sometimes of families of strangers, whom it was proposed to bind together by a fictitious tie, in the hope that law and custom and religion might together rival the force of nature." 1 Arnold, Hist. 31.

Maine, in his chapter on the origin of property, selects the village community as a type of settlement, and says, "an organized patriarchal society and an organized co-proprietors" which "ought at once to rive our attention from its exactly fitting in with the ideas which our studies in the law of persons would lead us to entertain respecting the original condition of property;" Anc. 1, 262. After describing it somewhat fully he says: "The type of which we have compared is evidently not the Roman family, but the Roman *gens* or house. The *gens* was also a group on the model of a family; it was the family extended by a variety of fictions of which the exact nature was lost in antiquity. In historical times, its leading characteristics were the very two which Elphinstone remarks in the village community. There was always the assumption of a common origin, an assumption sometimes notoriously at variance with fact; and, to repeat the historian's words, 'if a family became extinct, its share returned to the common stock.' In old Roman law, unclaimed inheritances escheated to the *gens*. It is further suspected by all who have examined their history that the communities, like the *gentes*, have been very generally adulterated by the admission of strangers, but the exact mode of absorption cannot now be ascertained; cf. 236. Another writer considers that the *gens* was a *gens* very nearly identical with a Celtic clan, the identity or similarity of the being always supposed to have arisen from relationship, and not from similarity of occupation, as in the case of the Smiths, Taylors, Lormers, etc., of modern Europe. There was this peculiarity, however, about the *gens*, which did not belong to the clan—viz., that it was possible for an individual to be born in it to cease to belong to it by *capitis diminutio*, or by adoption (by a family not of the same *gens*), or adoption as it was called when the person adopted was *sui juris*." Int. Cyc.

A recognized authority on the civil law refers to the obscurity of this subject in treating of successions. Under the twelve tables there were recognitions, (1) *heredes*; (2) *agnati*; (3) *gentiles*, and in default of the latter the inheritance lapsed to the state. The pretors called the *cognati* the "first time to the succession," "probably because" says Sandars (Inst. 290), "at the time of the pretor's legislation there were few families that could boast a descent so pure and accurately known as to satisfy the law of the *gens*." *Gentiles* were also said in the same connection. "The subject of *gentiles* is, however, obscure, and repays investigation too little, to permit us to enter into it here. Probably the original notion of *gentiles* was that of members of some pure uncorrupted patrician stock, though not necessarily of the same ancestor, but bearing the same name, and having the same *sacra*. Probably, also, freedmen and clients of *gentiles* were in some degree considered as themselves *gentiles*; probably if their property was not claimed by their patron it went to the members of his *gens*, but they had not any claim on the property of any other *gentiles*. We know also that the *gentiles* were plebeians, formed probably by the marriage of a patrician with a plebeian before the plebs received the *conubium*. Members of ple-

belan *gentes* would, we may suppose, have the rights of *gentilitas* towards other members of the same plebeian *gens*, and it would seem that they had them towards the members of the patrician *gens*, from which they were an offshoot; *Cic. de Orat.* i. 39. Of the mode in which the *gentiles* took the inheritance, we know nothing of, nor at how late a period of history the *gentes* were still really in existence. Gaius (ii. 17), treats the subject as one of mere antiquarian interest. In his introduction to the Institutes, Savignius gives generally his understanding of the nature of the *gens*. The body of Roman citizens was composed of two distinct divisions, the *populus* and the *plebs*. The former consisted of three tribes, each of ten curiae, and each curia was divided into ten *decuriae*. For the latter another name was *gens*, and it included a great number of distinct families, united by having common sacred rites, and bearing a common name. In theory at least, the members of the same *gens* were descended from a common ancestor, and the families of the *gens* were subdivisions of the same ancestral stock, but both individuals and groups were occasionally admitted from outside. A pure unspotted pedigree was claimed by every member of a *gens*, and there was a theoretical equality among all the members of the whole tribe. The heads of the distinct families in these *gentes* met together in a great council, called the council of the curies (*comitia curiata*). A small body of three hundred, answering in number to the *gentes* in each of the three tribes, and called the senate, was charged with the office of initiating the more important questions submitted to the great council; and a king, nominated by the senate, chosen by the curies, presided over the whole body, and was charged with the functions of executive government.

The gentiles inherited from each other in the absence of agnates. The rule of the Twelve Tables is, "*Sci agnatos nec erant, gentile familiam nancitor*," which has been paraphrased, "*Sci agnatus non erant, tum gentilis heres esto*."

GENTLEMAN. In English Law. A person of superior birth.

According to Coke, he is one who bears coat-armour, the grant of which adds gentility to a man's family. The eldest son had no exclusive claim to the degree; for, according to Littleton, "every son is as great a gentleman as the eldest." Co. 2d Inst. 667. Sir Thomas Smith, quoted by Blackstone, 1 Com. 404, says, "As for gentlemen, they are made good cheap in this kingdom; for whosoever studies the laws of the realm, who studies in the universities, who professeth liberal sciences, and (to be short) who can live idly and without manual labor, shall bear the title, charge, and countenance of a gentleman, shall be called master, and be taken for a gentleman." In the United States, this word is unknown to the law. See Poethier, Proc. Crim. sec. 1, App. § 3; 1 C. P. D. 60; 1 Ch. Div. 577; 3 H. & N. 382.

GENTLEWOMAN. An addition formerly appropriate in England to the state or degree of a woman. Co. 2d Inst. 667.

GENTOO LAW. See HINDU LAW.

GENUINE. Not false, fictitious, simulated, spurious, counterfeit. 37 N. Y. 492.

GEORGIA. The name of one of the original thirteen states of the United States of America.

It was called after George II., king of Great Britain, under whose reign it was colonized.

George II. granted a charter, dated June 9, 1732, to a company consisting of General James Oglethorpe, Lord Peterel, and nineteen others, who planted a colony, in 1733, on the bank of the Savannah river, a short distance from its mouth.

The corporation thus created was authorized, for twenty-one years, to erect courts of judicature for all civil and criminal causes, and to appoint a governor, judges, and other magistrates. The territory was to be held, as of the manor of Hampton Court in Middlesex, in free and common socage, and not *in capite*.

This charter was to expire by its own limitation in 1753; and under it the colony was governed by trustees, who, on December 19, 1751, in anticipation of the expiration of the charter, offered to surrender it up to the crown. The offer was accepted and on June 23, 1752, the trustees closed their accounts, made their last grant, and affixed the seal to the deed of surrender, and the colony became a royal province, of which the first governor was appointed August 6, and landed October 29, 1754; the colony having in the meantime been governed by the Board of Trade and Plantations.

A state constitution was adopted in 1777, another in 1789, and a third in 1793, which, with some amendments, remained in force until the civil war. The state seceded January 19, 1861, and was readmitted to the Union under act of congress approved July 15, 1870.

GEREFA. Reeve, which see.

GERMAN. Whole or entire, as respects genealogy or descent: thus "brother-german" denotes one who is brother both by the father's and mother's side; "cousin-german," those in the first and nearest degree, *i. e.* children of brothers or sisters. Tech. Dict.; 4 M. & G. 56.

GERMAN DUTY. A tax imposed by the German Government on merchandise when sold by manufacturers for consumption or sale in the markets of Germany but is remitted by that Government when the

goods are purchased in bond or consigned while in bond for exportation to a foreign country. 169 U. S. 16. See BONTIFICATION OF TAX.

GERONTOCOMI. In Civil Law Officers appointed to manage hospitals for poor old persons. *Clef des Lois Rom. Ad ministrateurs.*

GERSUME (Sax.). In Old English Law. Expense; reward; compensation; wealth; especially, the consideration or fine of a contract: *e. g.* *et pro hac concessione dedit nobis predictus Jordanus 100 sol. sterling de gersume*. Old charter, cited Somner, Gavelkind, 177; Tabul. Reg. Ch. 377; 9 Mon. Ang. 720; 3 id. 128. It is also used for a fine or compensation for an offence. 2 Mon. Ang. 973.

GESTATION, UTERO-GESTATION. In Medical Jurisprudence. The time during which a female, who has conceived, carries the embryo or fetus in her uterus.

This directly involves the duration of pregnancy, questions concerning which most frequently arise in cases of contested legitimacy. The descent of property and peage may be made entirely dependent upon the settlement of this question, as to which see PREGNANCY.

There are some women to whom it is peculiar always to have the normal time of delivery anticipated by two or three weeks. Montgomery, Preg. 264. So, also, there are many cases establishing the fact that the usual period is sometimes exceeded by one, two, or more weeks, the limits of which it is difficult or impossible to determine. Coke seems inclined to adopt a peremptory rule that forty weeks is the longest time allowed by law for gestation. Co. Litt. 123 b. But although the law of some countries prescribes the time from conception within which the child must be born to be legitimate, that of England and America fixes no precise limit, but admits the possibility of the birth's occurring previous or subsequent to the usual time. The following are cases in which this question will be found discussed: 3 Bro. Ch. 349; Gardner Peage case, Le Marchant Report; Cro. Jac. 686; 7 Hazard, Reg. of Penn. 863; 2 Wh. & Stillé, Med. Jur. § 4; 2 With. & Beck. Med. Jur. 264. See PREGNANCY.

GESTIO (Lat.). In Civil Law. The doing or management of a thing. *Negotium gestio*, the doing voluntarily without authority business of another. L. 20. C. de neg. gest. *Gestio negotiorum*, one who so interferes with business of another without authority. *Gestio pro herede*, behavior as heir; such conduct on the part of the heir as indicates acceptance of the inheritance and makes him liable for ancestor's debts universally: *e. g.* an entry upon, or assigning, or letting any of the heritable property, releasing any of the heritable property, releasing any of the debtors of the estate, or meddling with the title-deeds or heirship movables, etc. Erskine, Inst. 3. 8. 82 *et seq.*; Stair, Inst. 3. 6. 1.

GET BY. The expression to "get by" means that the person referred to has done some act and has escaped the injurious and detrimental consequences which usually attend such an act. 162 Ky. 298, 172 S. W. 530.

GETTING. The word "getting" used in an indictment for obtaining money under false pretenses, instead of the word "obtaining," does not render the indictment defective. 151 Ky. 639, 152 S. W. 773.

GEWRITE. In Saxon Law. Deeds or charters; writings. 1 Reeve, Hist. Eng. Law, 10.

GIFT. A voluntary conveyance or transfer of property; that is, one not founded on the consideration of money or blood.

A voluntary, immediate and absolute transfer of property without consideration. 139 Pa. 640.

As used by the old text writers it signified a distinct species of deed, applicable

said that the word denotes rather the motive of the conveyance: so that a feoffment or grant may be called a gift when gratuitous. A gift is of the same nature as a settlement; neither denotes a form of assurance, but the nature of the transaction. Watk. Conv. 199. The operative words of this conveyance are *do*, or *dedit*—*I give*, or *I have given*. The maker of this instrument is called the donor, and he to whom it is made, the donee, and the entail the gift or donation, the issue taking *per formam doni*. 2 Bla. Com. 816: Littleton to the creation of an estate tail; while a feoffment was strictly confined to the creation of a fee-simple estate. This use is almost obsolete: Wharton. It has been 59; Shepp. Touchst. c. 11; 2 Poll. & Mailt. 12, 81, 211.

Gifts inter vivos are gifts made from one or more persons, without any prospect of immediate death, to one or more others. *Gifts causa mortis* are gifts made in prospect of death.

Gifts inter vivos have no reference to the future, and go into immediate and absolute effect. Delivery is essential. Without actual possession, the title does not pass. A mere intention or naked promise to give, without some act to pass the property, is not a gift. There may be repentance (the *locus poenitentiae*) as long as the gift is incomplete and left imperfect in the mode of making it; 1 Pars. Contr. 245; 7 Johns. 26; but see 79 Ga. 11, where it was held that a *donatio inter vivos*, as distinguished from a *donatio mortis causa*, does not require actual delivery; and it is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership of the chattels has been changed.

The subject of the gift must be certain; and there must be the mutual consent and concurrent will of both parties. There must be an intention on the part of the donor to make a gift; Thortn. Gifts & Adv. § 70, and expressions of it are admissible as part of the *res gesta*; 1 Wils. Ch. 212; 2 Redf. 251, 261, 265; 117 N. Y. 943; and also declarations of the donor prior to the gift; 25 Barb. 35; if followed up by proof of delivery; 29 Ohio St. 13; and subsequent to the gift to support it; 87 Ga. 573; 140 Mass. 157; 169 Ind. 403; but not to disprove it; 12 Allen 114. See Thortn. Gift §§ 222-232. Acceptance is also necessary; 58 N. H. 302; 28 Md. 327; 107 Mo. 459; and this is true under both the common and civil law; 39 Cal. 120. It must be in the life-time of the donor; 34 La. Ann. 709; but it is presumed if the gift is of value; 24 Tex. 468; 63 Mich. 181. Delivery must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. If the thing be not capable of actual delivery, there must be some act equivalent to it; something sufficient to work an immediate change in the dominion of the property; 45 Mo. App. 160. The donor must part not only with the possession, but with the dominion. If the thing given be a *chose in action*, the law requires an assignment or some equivalent instrument, and the transfer must be executed; 1 Swanst. 436; 1 Dev. 309. Delivery first and gift afterwards of a chattel capable of delivery, is as effectual as gift first and delivery afterwards; 64 Law T. 645. The presumption of a resulting trust in favor of the donor arises where a conveyance has been made, without consideration, to one of an estate or other property which has been purchased with the money of another; but this presumption is rebutted where the purchase may fairly be deemed to be made for another from motives of natural love and affection; 85 Pa. 84; 83 Md. 78. Knowledge by the donee that the gift has been made is not necessary; L. R. 2 Ch. Div. 104. The gift is complete when the legal title has actually vested in the donee; 108 E. C. L. R. 485; and in cases of gifts by husband to wife, or parent to child living at home, the necessity for an actual change of possession does not exist; 61 Pa. 52. Where a father gives money deposited in

bank to his infant son, the gift will not be defeated by the failure of the father to deliver to the son the pass book evidencing the gift, the father as natural guardian being the proper custodian of such book during the infancy of the son; 62 Hun 194. The instances here given are merely illustrative of the cases on the subject of the necessity of delivery, the number of which is almost without limit. For a full discussion of the subject, see *Thornt. Gifts & Adv.* ch. ix., where the cases are collected; 15 Am. L. Reg. n. s. 701, n.; 15 Va. L. J. 737; 82 Cent. L. J. 11; 25 Ir. L. T. 4, 409. As to what circumstances will dispense with actual physical delivery, see 9 *id.* 639; 26 Am. L. Reg. 587; Law Q. Rev. 446; see also *DONATIO MORTIS CAUSA*, with respect to delivery, the requisites of which in the two classes of gifts are the same; *Thornt. Gifts* § 130; 1 Nott & McC. 287; 2 Sandf. Ch. 400. "Gifts *inter vivos* and gifts *causa mortis* differ in nothing, except that the latter are made in expectation of death, become effectual only upon the death of the donor, and may be revoked. Otherwise, the same principles apply to each." 46 Me. 48; 3 Del. Ch. 51; 89 Mo. 546; 80 N. Y. 422; 78 Ky. 572; 54 Md. 175. A parol gift of land is valid when possession is taken and valuable improvements are made thereunder; 83 Tex. 563.

When the gift is perfect it is then irrevocable, unless it is prejudicial to creditors or the donor was under a legal incapacity or was circumvented by fraud; except in case of *donatio mortis causa* (q. v.), as to which one of the distinguishing characteristics is that it is revocable during the donor's life.

If a man, intending to give a jewel to another, say to him, *Here I give you my ring with the ruby in it*, etc., and with his own hand delivers it to the party, this will be a good gift notwithstanding the ring bear any other jewel, being delivered by the party himself to the person to whom given; Bacon, Max. 87. See 62 Hun 622.

Where a father bought a ticket in a lottery, which he declared he gave to his infant daughter E., and wrote her name upon it, and after the ticket had drawn a prize he declared that he had given the ticket to his child E., and that the prize money was hers, this was held sufficient for a jury to infer all the formality requisite to a valid gift, and that the title in the money was complete and vested in E. See 10 Johns. 293. Where notes are endorsed by the owner, placed in a pocketbook, and the packet marked with the name of the donee, a delivery to one of the donees is sufficient, though he at once returns the packet to the donor to keep for the present; 51 Mo. App. 237.

A certificate of deposit may be the subject of gift, and, when endorsed and delivered for such purpose, the gift is perfect and cannot be revoked by the donor before the money is collected; 97 Ala. 700. A written assignment, under seal, of money in the hands of a third person, delivered to the assignee, constitutes a valid gift and acceptance of the money; 141 N. Y. 179.

See two papers containing an extended examination and discussion of the authorities on the subject of gifts *causa mortis* of checks and orders published after the title on that subject had gone through the press; 36 Am. L. Reg. 247, 289.

A special act directing a board of supervisors of a city to pay a certain sum as compensation for the improvement of streets to an individual was held to be a gift of public money to an individual, and hence within the inhibition of the constitution and void; 99 Cal. 17.

See, generally, Thornton, Gifts and Advancements, and an elaborate classified list of authorities in the St. Louis Law Library Catalogue. *DONATIO INTER VIVOS*; *DONATIO MORTIS CAUSA*; *DONATIO MORNING GIFT*.

GIFT ENTERPRISE. A scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme; the phrase has at-

tained such a notoriety as to justify courts in taking judicial notice of what is meant and understood; 81 Ind. 17; 106 Mass. 422. See *LOTTERY*; *SALE*.

A business, such as the selling of books or works of art, the publication of a newspaper, etc., in which presents are given to purchasers as an inducement. 14 A. & E. Ency. 2nd ed., 1005.

GIFTOMAN. In Swedish Law. He who has a right to dispose of a woman in marriage.

The right is vested in the father, if living; if dead, in the mother. They may nominate a person in their place; but for want of such nomination the brothers-german, and for want of them the consanguine brothers, and in default of the latter the uterine brothers, have the right; but they are bound to consult the paternal or maternal grandfather. Swed. Code, *Marriage*, c. 1.

GILDA MERCATORIA (L. Lat.). A mercantile meeting.

If the king once grants to a set of men to have *gilda mercatoria*, mercantile meeting assembly, this is alone sufficient to incorporate and establish them forever. 1 Bla. Com. 473. A company of merchants incorporated. Stat. Will. Reg. Scot. c. 35; Leg. Burgorum Scot. c. 99; Du Cange; Spelman, Gloss.; 8 Co. 125 a; 2 Ld. Raym. 1134.

GILDO. In Saxon Law. Members of a *gild* or decennary. Oftener spelled *congildo*. Du Cange; Spelman, Gloss. *Geldum*.

GILL. A measure of capacity, equal to one-fourth of a pint. See *MEASURE*.

GIN. See *INTOXICATING LIQUOR*.

GIN MEN. "Gin men" are men employed in coal mines who have no specific work to do, but are hired to do general work, or any kind of work they are ordered to do. 131 Ky. 196, 114 S. W. 785.

GIRANTEM. An Italian word which signifies the drawer. It is derived from *girare*, to draw, in the same manner as the English verb to murder is transformed into *murdrare* in our old indictments. Hall, Mar. Loans 183, n.

GIRTH. A girth, or yard, is a measure of length. The word is of Saxon origin, taken from the circumference of the human body. Girth is contracted from *girdeth*, and signifies as much as girdle. See *ELL*.

GIRTH AND SANCTUARY. In Scotch Law. A refuge or place of safety given to those who had slain a man in heat of passion (*chaude medley*) and unpremeditatedly. Abolished at the Reformation. 1 Hume 235; 1 Ross, Lect. 381.

GIST (sometimes, also, spelled *git*).

In Pleading. The essential ground or object of the action in point of law, without which there would be no cause of action. Gould, Pl. c. 4, § 12; 19 Vt. 102. The cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of a suit, without which there is not a cause of action. 101 Ill. 394. In stating the substance or gist of the action, everything must be averred which is necessary to be proved at the trial. The moving cause of the plaintiff's bringing the action, and the matter for which he recovers the principal satisfaction, is frequently entirely collateral to the gist of the action. Thus, where a father sues the defendant for a trespass for the seduction of his daughter, the gist of the action is the trespass and the loss of his daughter's services; but the collateral cause is the injury done to his feelings, for which the principal damages are given. See 1 Viner, Abr. 598; Tayl. Ev. 334; Bac., Abr. *Pleas*; B.; Doctr. Plac. 85; *DAMAGES*.

GIVE. A term used in deeds of conveyance. At common law, it implied a covenant for quiet enjoyment; 2 Hill. R. P. 366. So in Kentucky; 1 Pirtle, Dig. 211. In

Maryland and Alabama it is doubtful; 7 G. & J. 311; 5 Ala. n. s. 555. In Ohio, in conveyance of freehold, it implies warranty for the grantor's life; 2 Hill. R. P. 366. In Maine it implies a covenant; 6 Me. 227; 23 *id.* 219. In New York it does not, by statute. See 14 Wend. 83. It does not imply a covenant in North Carolina; 1 Murph. 343; nor in England, by statute 8 & 9 Vict. c. 106, § 4. See *COVENANT*; *GIFT*.

The word give, in a statute providing that no person shall give away any intoxicating liquors, etc., does not apply to giving such liquor at private dwellings; etc., unless given to a habitual drunkard, or unless such dwelling, etc., becomes a place of public resort. 144 U. S. 323. See *LIQUOR LAWS*.

GIVE, GRANT, CONVEY. The words "give, grant and convey" are as comprehensive as any that can be used to convey a legal title, and are as efficient in law to transfer the title. 1 T. B. Mon. (Ky.) 31.

GIVER. He who makes a gift. By his gift, the giver always impliedly agrees with the donee that he will not revoke the gift.

GIVING IN PAYMENT. In Louisiana. A term which signifies that a debtor, instead of paying a debt he owes in money, satisfies his creditor by giving in payment a movable or immovable. See *DATION EN PAIEMENT*.

GIVING TIME. An agreement by which a creditor gives his debtor a delay or time in paying his debt beyond that contained in the original agreement. When other persons are responsible to him, either as drawer, indorser, or surety, if such time be given without the consent of the latter, it discharges them from responsibility to him; and the same effect follows if time is given to one of the joint makers of a note; 2 Dan. Neg. Inst. 299. See *SURETYSHIP*; *GUARANTY*.

GLADIUS (Lat.). In old Latin authors, and in the Norman laws, this word was used to signify supreme jurisdiction: *jus gladii*.

GLANVILLE. The author of the most ancient treatise on English law, written in Latin, about A. D. 1181.

GLEANING. The act of gathering such grain in a field where it grew, as may have been left by the reapers after the sheaves were gathered.

There is a custom in England, it is said, by which the poor are allowed to enter and glean upon another's land after harvest, without being guilty of a trespass; 3 Bla. Com. 212. But it has been decided that the community are not entitled to claim this privilege as a right; 1 H. Bla. 51. In the United States, it is believed, no such right exists. It seems to have existed in some parts of France. Merlin, *Rép. Gleanage*. As to whether gleaning would or would not amount to larceny, see Wood, Landl. & T. 242; 2 Russ. Cr. 99. The Jewish law may be found in the 19th chapter of Leviticus, verses 9 and 10. See Ruth ii. 2, 3; Isaiah xxii. 6.

GLEBE. In Ecclesiastical Law. The land which belongs to a church. It is the dower of the church. *Gleba est terra qua consistit dos ecclesie*. 9 Cra. 329.

In Civil Law. The soil of an inheritance. There were serfs of the glebe, called *glebe addicti*. Code 11. 47. 7, 21; Nov. 54, c. 1.

GLOSS (Lat. *glossa*). Interpretation; comment; explanation; remark intended to illustrate a subject,—especially the text of an author. See Webster, Dict.

In Civil Law. *Glossæ*, or *glossemata*, were words which needed explanation. Calvinus, Lex. The explanations of such words. Calvinus, Lex. Especially used of the short comments or explanations of the text of the Roman Law, made during the twelfth century by the teachers at the schools of Bologna, etc., who were hence called *glossators*, of which glosses Accursius made a compilation which possesses great authority, called *glossa ordinaria*. These glosses were at first written between the lines of the text (*glossæ interlineares*),

afterwards, on the margin, close by and partly under the text (*glossæ marginales*). Cush. Intr. to Rom. Law 130.

GLOSSATOR. A commentator or annotator of the Roman law. One of the authors of the Gloss.

GLOUCESTER, STATUTE OF. An English statute, passed 6 Edw. I., c. 1, A. D. 1278; so called because it was passed at Gloucester. It was the first statute giving to a successful plaintiff "the costs of his writ purchased." There were other statutes made at Gloucester which do not bear this name. See stat. 2 Rich II.; Costs.

GO. To issue, as applied to the process of a court. 1 W. Bla. 50; 5 Mod. 421; 18 C. B. 35. Not frequent in modern use.

To be discharged from attendance at court. See **GO WITHOUT DAY**.

In a statute of descents, to go to is to vest in.

In a statute stating that property shall go to the survivor, etc., held to mean shall vest. 14 A. & E. Encyc. 1072; 121 Cal. 131. The words "take effect," "be in force," "go into operation," are used interchangeably. *Id.*; 4 Ind. 348. Where it is agreed that a paper shall go in evidence, it should be considered in evidence whether read in evidence or not. "Shall go in evidence" is tantamount to "shall be considered in evidence." *Id.*; 81 Ill. 88. The words "to go" in a will have been held equivalent to the word "descend." *Id.*; 106 Pa. St. 181.

GO BAIL. To become surety in a bail bond.

GO IN EVIDENCE. To be considered in evidence. 14 A. & E. Encyc. 2nd ed., 1072; 81 Ill. 88.

GO TO. May mean to be given to, to descend to. Anderson.

GO TO PROTEST. Of negotiable paper, to be protested for non-payment or non-acceptance.

GO WITHOUT DAY. Words used to denote that a party is dismissed the court. He is said to go without day, because there is no day appointed for him to appear again, or because the suit is discontinued.

GOAT, GOTE (Law Lat. *gota*; Germ. *gote*). A canal or sluice for the passage of water. Charter of Roger, Duke de Basingham, anno 1220, in *Tabularis S. Bertini*; Du Cange.

A ditch, sluice, or gutter. Cowel, *Gote*; stat. 23 Hen. VIII. c. 5. An engine for draining waters out of the land into the sea, erected and built with doors and perculles of timber, stone, or brick,—invented first in Lower Germany. Callis, *Sewers* 66.

GOD AND MY COUNTRY. When a prisoner is arraigned, he is asked, How will you be tried? he answers, *By God and my country*. This practice arose when the prisoner had the right to choose the mode of trial, namely, by ordeal or by jury, and then he elected by *God*, or by *his country*, that is, by ordeal or by jury. It is probable that originally it was *By God or my country*; for the question asked supposes an option in the prisoner, and the answer is meant to assert his innocence by declining neither sort of trial. 1 Chitty, Cr. Law 416; Barring, Stat. 73, note. See **ORDEAL**; **WAGER OF BATTLE**.

GOD BOTE. In Ecclesiastical Law. An ecclesiastical or church fine imposed upon an offender for crimes and offences committed against God.

GOD'S PENNY. In Old English Law. Money given to bind a bargain; earnest-money. So called because such money was anciently given to God,—that is, to the church and the poor.

"All over western Europe the earnest becomes known as the God's penny or Holy Ghost's penny (*denarius Dei*). Sometimes we find that it is to be expended in the purchase of tapers for the patron saint of the town, or in works of mercy. Thus the law contract is put under divine protection. In the law merchant as stated by Fleta we seem to see God's penny yet afraid, if we may so speak, to proclaim itself as what it really is, namely, a sufficient vest-

ment for a contract of sale. A few years later Edward I. took the step that remained to be taken, and by his *Corta Mercatoris*, in words which seem to have come from the south of Europe, proclaimed that among merchants the God's penny binds the contract of sale so that neither party may renege from it. At a later day this new rule passed from the law merchant into the common law." 2 Poll. & Maitl. 207. See **DENARIUS DEI**; **EARNST**.

GOING. The "going" of sheep in Barnham in Norfolk meant that the sheep should be pasture fed. 3 B. & Ad. Rep. 543.

GOING CONCERN. An existing and prosperous company. 14 A. & E. Encyc. 2nd ed., 1072.

One that is still continuing to transact its ordinary business, though it may be insolvent. Anderson. See **GOING VALUE**.

GOING FREE. A nautical phrase meaning sailing with eased sheets. Stand. Dict. See **GOING OFF LARGE**.

GOING OFF LARGE. A nautical phrase, signifying having the wind free on either tack. Steam vessels, in that their impetus is controlled by human skill, are considered as vessels "going off large," or navigating with a fair wind. Abbott. See **GOING FREE**.

GOING RATE. "Going rate" as to freight, like "market price" for produce, means a fixed and established price for the time. To make a market price there must be buying and selling, purchase and sale. 14 A. & E. Encyc. 1072; 1 Flipp. 519.

GOING VALUE. The value arising from having an established going business. The added value of a plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return. Not equivalent to good-will (*q. v.*), but of a somewhat similar nature. 7 Fletch. Corp. § 4537; 212 U. S. 9. See **GOING CONCERN**.

GOING WITNESS. One who is going out of the jurisdiction of the court, although only into a state or country under the same general sovereignty: as, for example, if he is going from one to another of the United States, or, in Great Britain, from England to Scotland. 2 Dick. Ch. 454. See **DEPOSITION**; **WITNESS**.

GOLD. Contracts expressly stipulating for payment in gold and silver dollars can only be satisfied by the payment of coined dollars; Bronson v. Rodas, 7 Wall. 229; where it was said: "A contract to pay a certain number of dollars in gold or silver coins is nothing else than an agreement to deliver a certain weight of standard gold to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight." This case was followed in 7 id. 278; 96 U. S. 619; 162 U. S. 291. In the last case it was said: "This court has held that parties may contract for the payment of an obligation in gold, or any other money or commodity, and it must then be paid in the medium contracted for." It has been pointed out in 29 L. R. A. 593, note, that the rule in Bronson v. Rodas has not been affected in any way by the Legal Tender Cases in 12 Wall. 457. In Trebilcock v. Wilson, 12 Wall. 687, where a note in dollars was made payable in specie, it was held that the designated number of dollars must be paid in so many gold or silver dollars of the coinage of the United States, reversing the supreme court of Iowa, which had held that a tender of greenbacks or United States legal tender notes was sufficient.

In Gregory v. Morris, 96 U. S. 619, the party was entitled to recover a certain amount in gold coin; it was held that where the party, with the approbation of the court, takes judgment which might be discharged in currency, it should be entered for a sum in currency equivalent to the specified amount of that coin as bullion. A decision of a state court, which holds a tender of legal tender notes as valid in the payment of a contract payable only in specie, will be reviewed by the supreme court of the United States; 12 Wall. 687. The doctrine

of the latter court is therefore binding upon all the state courts.

A contract to pay a certain number of dollars in gold; 4 Colo. 169; a draft for a certain number of gold dollars; 43 N. Y. 209; a note payable "in gold or silver"; 21 Ohio St. 406; a ground rent payable in "gold or silver lawful money of the United States"; 61 Pa. 263; are all enforceable according to their terms. A ground rent payable in "gold or silver money of the United States" must be paid in coin or its equivalent; 61 Pa. 263. In this case Agnew, J., said that the distinction taken in the earlier Pennsylvania cases between contracts for a specific article and contracts for lawful money (coin or currency) had become unimportant since the decision in Bronson v. Rodas. In such cases it is held that payment in currency is to be computed upon the value of gold at the time of payment; 4 Colo. 169. Where rent was payable "in current money of the State of New York equal in value to money of Great Britain," it was held that if payment was made in legal tender notes, the amount paid must equal the value of the stipulated amount of coin; 65 Barb. 392.

Where an act authorized a city to issue negotiable bonds, it was held to authorize the issue of bonds payable in gold coin; 87 Ala. 240; s. c. 4 L. R. A. 742; so of bonds "payable in gold coin of the present standard weight and fineness;" 60 Fed. Rep. 961. To the same effect, 3 Dill. 195; but, *contra*, of levee bonds which were issued payable "in gold coin," under an act which authorized the levee board to borrow money and issue its bonds therefor; 66 Miss. 298. But this judgment was reversed by the supreme court of the United States (162 U. S. 291), which held: That the inquiry as to the medium in which the bonds were payable raised a federal question and that the bonds were legally saleable in the money of the United States, whatever its description, and not in any particular kind of money, and that they were not void because of a want of power to issue them. Field, J., concurring, said that no transaction of commerce or business, etc., that is not immoral in its character, and which is not in its manifest purpose detrimental to society, can be declared invalid because made payable in gold coin or currency when that is established or recognized by the government.

An injunction will not lie to restrain the issue of municipal bonds payable "in gold or lawful money of the United States, at the option of the holder;" 96 Ga. 312. But where a statute authorized the issue of bonds payable "in gold coin or lawful money of the United States," an issue of bonds payable in gold coin of the United States of the present standard of weight and fineness was held invalid; 29 L. R. A. (Cal.) 512.

In the absence of stipulation in the contract, a right to demand payment in coin will not be implied, although it appears that payment in coin was the only method of payment recognized by law when the contract was entered into and that the parties no doubt expected that payment would be made in coin; 22 Wall. 105. So when the consideration in a note was a loan of gold and silver and there was no stipulation to pay in such money; 25 Cal. 502.

An insurance company in an action against an agent who had collected premiums in gold; 104 Mass. 192; and a hotel guest in an action against an innkeeper to recover for gold coin left at the inn for safe keeping; 46 N. Y. 291, are entitled to judgment in gold coin. In an action against an express company for failure to deliver gold coin which it received for transportation, judgment was entered in currency notes for the amount of the gold coin with the premium on gold added with interest from the date of demand; 98 Mass. 550. Where a person deposited both coin and treasury notes in a bank in 1861, it was held that the bank need not pay him in coin unless there was an express agreement to that effect; 5 Wall. 683.

Dollars payable in gold means that every such dollar is a piece of gold certified to be a certain weight and purity, by the form and

impress given to it at the mint of the United States. Any number of such dollars is the number of grains of standard gold or silver in one dollar multiplied by the given number. A contract to pay a certain number of dollars in gold coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. 7 Wall. (U. S.) 250.

GOLD CERTIFICATES. Certificates issued by the United States as currency, redeemable in gold deposited for their redemption. English.

GOLDEN RULE AND SACRED ADVICE. In Law. "Agree with thine adversary quickly whilst thou art in the way with him." 5 T. B. Mon. (Ky.) 416.

GOLDSMITH'S NOTES. In English Law. Banker's notes: so called because the trades of banker and goldsmith were originally joined. Chitty, Bills 423.

GONORRHEA. "Gonorrhea," if contracted by voluntary act, is a loathsome disease within the meaning of the statute entitling a wife to a divorce on such grounds. 41 S. W. 27.

GOOD. In an action for the breach of a contract calling for the delivery of "good merchantable corn," an instruction using the phrase "sound merchantable corn" is not erroneous for the words "sound" and "good" mean substantially the same. 132 Ky. 496, 116 S. W. 784. See **FOR GOOD CAUSE**.

GOOD AND LAWFUL FENCE. Every strong and sound fence of rails, or plank, or wire, or wire and plank, or iron, or of hedge, four and one-half feet high, and being so close that cattle cannot creep through, or made of stone and brick, four and one-half feet high, or a ditch three feet deep, and three feet broad, with a hedge two feet high, or a rail, plank, stone, smooth or barbed wire, or brick fence two and one-half feet high on the margin thereof, the hedge or fence being so close that cattle cannot creep through, shall be deemed a "good and lawful fence." 153 Ky. 816, 156 S. W. 861.

GOOD AND LAWFUL MEN. Those qualified to serve on juries; that is, those of full age, citizens, not infamous or *non compos mentis*; and they must be resident in the county where the venue is laid, Bacon, Abr. *Juries* (A); Cro. Eliz. 654; Co. 3d Inst. 30; 2 Rolle 82; Cam. & N. 38.

GOOD AND VALID. Legally firm: e. g. a good title. Adequate; responsible: e. g. his security is good for the amount of the debt. Webster. A note satisfies a warranty of it as a "good" note if the makers are able to pay it, and liable to do so on proper legal diligence being used against them. 28 Vt. 406.

GOOD BEHAVIOR. Conduct authorized by law. Surety of good behavior may be demanded from any person who is justly suspected, upon sufficient grounds, of intending to commit a crime or misdemeanor. Surety for good behavior is somewhat similar to surety of the peace, but the recognizance is more easily forfeited, and it ought to be demanded with greater caution; 1 Binn. 98, n.; 14 Vin. Abr. 21; Dane, Abr. As to what is a breach of good behavior, see 2 Mart. La. N. S. 693; Hawk. Pl. Cr. b. 1, c. 61, s. 6; 1 Chitty, Pr. 678.

See **SURETY OF THE PEACE**.
A judge holding office for life also holds it during good behavior, *dum se bene gesserit*.

GOOD CONSIDERATION. See **CONSIDERATION**.

GOOD FAITH. An honest intention to abstain from taking any unconscientious advantage of another, even though the forms, or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. 2 S. Dak. 334. See 84 Ill. 888; 65 id. 200; 46 Ala. 73; 17 Hun 442.

That honesty, of intention and freedom from knowledge, of circumstances which ought to put him on inquiry, which protects a purchaser, holder, or creditor from being implicated in an effort by one with whom he is dealing to defraud some party in interest. 111 U. S. 80. Good faith, in a statute regulating chattel mortgages, and declaring unrecorded mortgages to be invalid as against purchasers and mortgagees in good faith, means such as parted with something of value, or otherwise altered their position irretrievably, on the strength of the apparent ownership, and without notice. Good faith in this connection means actual reliance upon the ownership of the vendor or mortgagor, because without notice of the incumbrance. 21 N. J. Eq. 536.

Good faith is presumed in favor of the holder of negotiable paper; 93 U. S. 94; 94 id. 754; 3 N. Y. Sup. Ct. 360; it is a presumption of law; 116 U. S. 609; and outweighs a presumption of payment; 107 Ind. 442; and such holder takes the paper free from any infirmity in its origin except such as make it void for illegality of consideration or want of capacity in the maker; 141 Mass. 296; 96 U. S. 51. While the presumption of law is sufficient in the absence of evidence, if the good faith of a party is put in issue by his adversary, he has a right to give affirmative evidence of it; 97 U. S. 272; as, where his ownership of negotiable paper is put in issue he may prove he became the owner in good faith; 105 U. S. 728. A person to whom the want of good faith is imputed in a statement shown to have been made by him may be asked if he believed this statement to be correct; 27 N. Y. 282. After proof of circumstances relied on as showing want of good faith by putting a person on inquiry, he may explain them by showing the reasons why he did not pursue the inquiry; 54 N. Y. 288; and after stating the explanation received upon inquiry he may testify that he was satisfied with it; 73 N. Y. 236. Where the knowledge of the third person is in issue proof of general reputation is sometimes competent as tending to show reasonable ground of belief or suspicion; 69 Mass. 594; 6 N. Y. Sup. Ct. 446; 96 Barb. 205. Good faith is not disproved by a forgotten conversation; 29 Hun 214.

One who has purchased for value and without notice, or his transferee, is termed a holder in good faith; 94 U. S. 432.

Trustees and persons acting in a fiduciary capacity are held to the utmost good faith. See **TRUST**; **TRUSTEE**; **FIDUCIARY**.

So long as the parent, in correcting his child, acts in good faith and without malice the criminal law will not interfere with him, however severe and unmerited the punishment, unless it produces permanent injury; Bish. New Cr. L. § 881; 95 N. C. § 88. See **FATHER**.

GOOD HABITS. The term "good habits" does not mean absolutely correct according to the strict rules of ethics, but that they are and always have been ordinarily good. 12 Bush (Ky.) 39.

GOOD HEALTH. The term "good health" is relative. It is not every indisposition, such as an occasional headache, or pains in the stomach or abdomen, or a discharge from the womb, that will justify a woman in saying that she is not in "good health." 145 Ky. 610, 140 S. W. 1018.

GOOD MORAL CHARACTER. The naturalization laws require that in order to be admitted to citizenship the applicant must, during his residence in the United States since his declaration of intention, have "behaved as a man of good moral character"; U. S. Rev. Stat. § 2165.

What is a good moral character may vary in some respects in different times and places, but "it would seem that whatever is forbidden by the law of the land ought to be considered for the time being immoral within the purview of this statute"; 5 Sawy. 195. Accordingly a person who commits perjury is not a man of good moral character, and is therefore not entitled to naturalization; *id.* But a distinction is drawn between acts which are *mala in se* and those which are *mala prohibita*;

and it is said that a single act of the former grade is sufficient to establish immoral character, but only habitual acts of the latter character; *id.* It has been held that an alien who lives in a state of polygamy or believes that it may be rightfully practiced in defiance of the laws to the contrary, is not a person of good moral character entitled to naturalization; Ex parte Douglass, cited in 2 Bright. Fed. Dig. 25, from 5 West. Jur. 171.

Under the English excise laws it was held that the mere fact that a man lived in a state of concubinage was not such an absence of good character as would justify his conviction under the excise law for making and using a certificate of good character knowing it to be false; 16 C. B. N. S. 584. "Good or bad character does not depend on what a man knows of himself; it means his general reputation in the estimation of his neighbors; . . . the fact of a man's living with a woman without marrying her may possibly admit of some palliating circumstances"; *id.*

The question what is a good moral character under the Pennsylvania license law of 1887 has recently been considered and passed upon by a divided court, the applicant for renewal having received his license upon stipulation not to apply again. It was held by Sulzberger, J., that the act "is not to be understood as setting up the highest ethical character. It means good moral character as it is used among men in the ordinary business of life, not that high type which ought to form the ideal of every virtuous person." McMichael, J., said: "I cannot consider a citizen of the United States one of good moral character who voluntarily files a stipulation that he will not apply again for the succeeding year before this court, and in violation of that agreement does make an application for a license. . . . But when a man has made a promise last year not to apply for a license this year, and has come into court with an application for a license in violation of that promise, my judgment and my judicial opinion is that he is not a man of good moral character as contemplated by the Act of Assembly." An appeal is now pending and undecided. Appeal of Donoghue. Superior Court, Pa. Oct. 3, 1897.

GOOD ORDER. A clause in a bill of lading stating goods were received in "good order," should be considered as referring to the exterior and apparent condition, and to the internal only so far as it might be inferred from external appearances. 9 B. Mon. (Ky.) 114.

GOOD ORDER AND CONDITION. The general statement in a bill of lading that the goods have been shipped "in good order and condition," amounts to an admission by the shipowner that, insofar as he and his agents had the opportunity of judging, the goods were so shipped. Carser, Carl of Goods by Sea, § 73, as between the shipowner and indorsee, who, on the faith of that admission, has become indorsee for value of the bill of lading.

GOOD REPAIR. A stipulation in a lease that lessee is to repair, or leave the premises in good repair at the expiration of the lease, does not obligate the tenant to restore the building which is destroyed by fire or other casualty without his fault. 103 Ky. 764, 46 S. W. 486.

GOOD REPUTE. An expression synonymous with and meaning only "of good reputation." 18 S. W. Rep. (Mo.) 924.

GOOD AND SUFFICIENT DEED. A "good and sufficient deed" is a marketable deed, one that will pass a good title to the land it purports to convey. 147 Ky. 844, 145 S. W. 1129.

GOOD TITLE. Such a title as a court of chancery would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment by any claimant. 6 Exch. 873. See 23 Barb. 870. See **TITLE**.

GOOD WILL. The benefit which

arises from the establishment of particular trades or occupations. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities, or prejudices. *Story, Partn.* § 99; 30 Cent. L. J. 155. See 1 Hoffm. 68; 16 Am. Jur. 87; 23 Beav. 84; 60 Pa. 161; 5 Russ. 29; 10 So. Rep. (La.) 616.

The advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor. 47 Fed. Rep. 465.

"The term good will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good will has a marketable value, whether the business is that of a professional man or of any other person. But it is plain that good will has no meaning except in connection with a continuing business; it may have no value except in connection with a particular house, and it may be so inseparably connected with it as to pass with it, under a will, or deed, without being specially mentioned." *Lindl. Partn.*, Wentworth's ed. 440.

"The good will . . . is nothing more than the probability that the old customers will resort to the old place." *Per Eldon, C.*, in 17 Ves. 335; but this is said to be too narrow a definition by Wood, V. C., who said that the term meant every advantage . . . that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the late business. *Johns. (Eng. Ch.)* 174.

The point of the opinion of Lord Eldon, so much referred to, was that there is no implied covenant or promise on the part of the vendor or assignor of the good will of a business, not to set up the same trade, in opposition to the purchaser, in the neighborhood; accordingly an injunction to prevent him from doing so was refused; 17 Ves. 335; *Colly. Partn.* 174. Since this case the English decisions, after passing through a period of vacillation, seemed recently to have established the implied contract of one who simply sells the business and good will upon a much more substantial basis. It was held by Lord Romilly in *Labouchere v. Dawson* that an outgoing partner may not solicit the old customers privately by letter or by a travelling agent if he has sold the good will to his former partners. This went upon the principle that a grantor may not derogate from his grant. This was considered to have gone beyond any previous case and was overruled in *Pearson v. Pearson*, 27 Ch. D. 145, where Cotton, L. J., said: "It is admitted that a person who has sold the good will of his business may set up a similar business next door and say that he is the person that carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place." See 74 L. T. 243. Between the rendering of these judgments *Jessel, M. R.*, had enjoined the solicitation of old customers but not the dealing with them; 14 Ch. D. 603; in that case good will is defined as "the formation of that connection which has made the value of the thing that the late firm sold," and is frequently the only thing saleable. This definition was quoted with approval by Lord Herschell in *Trego v. Hunt, infra*. Another decision of *Jessel, M. R.*, restraining a former partner from dealing with old customers was reversed by the court of appeal, but the order in this

case, restraining the solicitation, was not appealed from; the court said that "to enjoin a man against dealing with people whom he has not solicited is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty which anybody in the country might have of dealing with whom they like;" 15 Ch. D. 306. But the court of appeal, affirming the same judge, held that on the compulsory sale of a good will in bankruptcy proceedings, the bankrupt would not be restrained from solicitation. All the decisions based upon *Labouchere v. Dawson* were overturned by the case in 27 Ch. D. 145, which was followed by 44 Ch. D. 616. But in the recent case of *Trego v. Hunt*, [1896] App. Cas. 7, reversing [1895] 1 Ch. 462, the later decisions were overruled and the doctrine of *Labouchere v. Dawson*, was approved. There the good will remained with the old concern and the outgoing partner who had sold it to his former partner employed a clerk in the firm to keep the names and addresses of the firm's customers so that he might solicit their business on his own account. This the house of lords restrained him from doing. Lord MacNaghten designated the good will as "the very sap and life of the business, without which the business would yield little or no fruit," the result "of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money."

The vendor or retiring partner "may not sell the custom and steal away the customers. It is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own." But "he may do everything that a stranger in the ordinary course of business would be in a position to do. He may set up where he will. He may push his wares as much as he pleases." In the same case it was said by Lord Davy, "that the idea of good will and what is comprised in the sale of business has silently been developed and grown since the days of Lord Eldon."

In this country the expressions of the courts as to what is the precise effect of a sale of good will, without restrictive covenants, vary as much as might be expected from the indefinable nature of the subject. The opinion of Lord Eldon has been, in the main, very closely followed, though often criticised in both countries. Such a sale has been said to carry with it only the probability that the business will continue in the future as in the past; 33 Cal. 620; or the favor which the management has won from the public and the possibility that the customers will continue their patronage; 50 Mich. 401; and commend it to others; 54 *id.* 215. A recent writer concludes, that it amounts to nothing more than the right to succeed to the business and carry it on as a successor to the old concern; 33 Am. L. Reg. N. S. 217; and a recent federal decision terms it, "those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and the repute of his predecessors;" 47 Fed. Rep. 467, affirmed 55 *id.* 895. The principle of *Labouchere v. Dawson* that the vendor would not be permitted to solicit trade from the customers of the old business was maintained in this country in cases prior to the English decisions; 1 Pars. Eq. Cas. (Pa.) 476; 14 Allen 211; 36 Ohio St. 261; nor has he the right to hold himself out as the successor of the old firm or as continuing its business; 60 Pa. 458; 113 Mass. 175; 47 Fed. Rep. 465; affirmed, 55 *id.* 895; 44 N. H. 335; 3 L. T. N. S. 447; 11 *id.* 299; but he may set up a similar business; 35 La. Ann. 60; 32 N. W. Rep. (Wis.) 551; 143 Mass. 592; 3 Brewst. Pa. 133; 5 Allen 345; 2 Tenn. Ch. 347; 123 N. Y. 650 (but in this case there was no conveyance of the good will in terms). See 129 *id.* 156. The vendor may bind himself not to engage in the same business within a limited time or distance, by ex-

press covenant, which, if reasonable, is valid. See RESTRAINT OF TRADE.

The question has been much discussed whether good will is an incident of the business, of the premises, or of the person. It has been held to be personal and not local; 21 La. Ann. 891; 25 L. J. N. S. 194; but it is said to be the general rule that the good will is an incident of the premises; 60 Pa. 161; 84 N. Y. 556; 35 La. Ann. 60; where a widow carried on the business of a licensed victualler on leased premises and assigned all her goods, stock in trade, etc., without mentioning the good will, in trust prior to her second marriage, the good will passed by the assignment as an incident to the stock and license, and not to the husband with the premises; 6 Beav. 269. It is said by the United States supreme court, that good will is only an incident, as connected with a going concern, of business having locality or name, and is not susceptible of being disposed of independently; 149 U. S. 436. See 36 Fed. Rep. 722.

As between partners, it has been held that the good will of a partnership trade survives; 5 Ves. 539; but this appears to be doubtful; 15 Ves. 227; and is not in accord with modern authorities; 27 Beav. 446; *id.* 236; 28 *id.* 453. A distinction in this respect has been suggested between commercial and professional partnerships; 3 Madd. 79; 2 De G. & J. 620; but see 14 Am. L. Reg. N. S. 10, where the distinction is said to be untenable. It has been held that the firm name constitutes a part of the good will of a partnership; *Johns. (Eng. Ch.)* 174; 6 Hare 325; *contra*, 19 How Pr. 14. Where a partner sells out his share in a going concern, he is presumed to include the good will; *Johns. (Eng. Ch.)* 174; see 46 Ill. App. 188; 128 U. S. 514; and he cannot use the firm name in a business of like character carried on by him in the vicinity; 33 N. E. Rep. (Ohio) 88; or a name so similar to that of the first as to mislead and draw off business; 54 Mich. 215. When a partnership is dissolved by death, bankruptcy, or otherwise, the good will is an asset of the firm, and should be sold and the proceeds distributed among the partners; 15 Ves. 218; 1 Pars. Eq. Cas. (Pa.) 270; *Lindl. Partn.* Wentworth's ed. 443. On the death of a partner the good will does not go to the survivor, unless by express agreement; 22 Beav. 84; 26 L. J. N. S. 391. It has been held, however, that on the dissolution of a partnership by the death of one of its members, the surviving partners may carry on the same line of business, at the same place, without liability to account to the legal representative of the deceased partner for the good will of the firm, in the absence of their own agreement to the contrary; 37 Neb. 158. The dissolution of the firm during the life time of all the partners gives each of them the right to use the firm name; 34 Beav. 566; *contra*, 4 Sandf. Ch. 379. See 19 Alb. L. J. 502; 13 Cent. L. J. 161. The good will of a trade or business is a valuable right of property; 33 Cal. 450; 10 Exch. 147; it is an asset of the business; 17 Neb. 137; or of a decedent; 21 La. Ann. 891; but it does not include the use of the name of a deceased person; 8 N. Y. Supp. 652. It may be bequeathed by will; 27 Beav. 446. It may be sold like other personal property; see 3 Mer. 452; 1 J. & W. 530; 1 V. & B. 505; 17 Ves. 346; 2 Madd. 220; 3 B. & Ad. 341; 4 *id.* 592, 596; 5 Russ. 29; 2 Watts 111; 1 S. & S. 74; 75 La. 178; 62 Pa. 81. The right to use a name on a medicine may be assigned to an outgoing partner or to a successor in business, as an incident to its good will; 139 U. S. 540. In the United States the subject of good will has in the original technical sense less relative prominence than in England, but the subject has developed very great importance in connection with the use of trademarks and trade names, which titles see.

A good will may be mortgaged, assigned, or taken in execution, in connection with the business; *id.*; 39 L. J. Ch. N. S. 79; but not if dependent on the ability and skill of the proprietor; 25 Ch. D. 472. The vendor

of a business and good will who stipulates against carrying on the business in the same place, may be enjoined from doing so as the agent of another; 88 Me. 357. The purchaser who finds there is no good will is without remedy unless he can show fraudulent representation or suppression of fact by the vendor; 7 Misc. Rep. 484.

The purchaser of a good will and firm name is entitled to receive letters and telegrams addressed to it and to the advantage of business propositions from customers of the old firm contained in them; 27 S. W. Rep. (Ky.) 985.

The measure of damages for the breach of a contract of sale of good will is the loss suffered by the vendee, not the profits made by the vendor; 110 Cal. 150.

See, generally, 14 Am. L. Reg. N. S. 1, 329, 649, 713; 33 *id.* 216; 30 Cent. L. J. 155; 34 Sol. J. 204; Lindl. Partn. Wentworth's ed. 440-9; Allan, Law of Goodwill.

GOODS. In Contracts. The term goods is not so wide as chattels, for it applies to inanimate objects, and does not include animals or chattels real, as a lease for years of house or land, which chattels does include. Co. Litt. 118; 1 Russ. 376.

Goods will not include fixtures; 2 Mass. 495; 4 J. B. Moore 73; a subscription for stock; 77 Md. 92; or teams and wagons, notes and accounts due; 55 Ia. 520. In a more limited sense, goods is used for articles of merchandise; 2 Bla. Com. 389. It has been held in Massachusetts that promissory notes were within the term goods in the Statute of Frauds; 3 Metc. Mass. 365; but see 24 N. H. 434; 4 Dudl. 28; so stock or shares of an incorporated company; 20 Pick. 9; 3 H. & J. 38; 15 Conn. 400; so, in some cases, bank notes and coin; 2 Stor. 52; 5 Mas. 537; 12 Wend. 486. The word "goods" is always used to designate wares, commodities, and personal chattels; the word effects is the equivalent of the word movables; 83 Pa. 126.

In Wills. In wills goods is *nomen generalissimum*, and, if there is nothing to limit it, will comprehend all the personal estate of the testator, as stocks, bonds, notes, money, plate, furniture, etc.; 1 Atk. 180; 1 P. Wms. 207; 1 Bro. C. C. 128; 4 Russ. 370; Wms. Ex. 1014; 1 Rep. Leg. 250; but in general it will be limited by the context of the will; see 2 Belt, Suppl. Ves. 287; 1 Ves. 63; 2 Dall. 142; Sugd. Vend. 493. See 1 Jarm. Wills 751; and the titles **BIENS, CHATELLETS; FURNITURE.**

GOODS AND CHATELLETS. In Contracts. A term which includes not only personal property in possession, but choses in action and chattels real, as a lease for years of house or land, or emblements. 12 Co. 1; 1 Atk. 182; Co. Litt. 118; 1 Russ. 376; see 31 Gratt. 131; it includes railroad ties; 39 Minn. 145.

A merchant's stock in trade is "goods and chattels permanently located," provided such goods and chattels are taxable in the city or county where they are so located; 28 Atl. Rep. (Md.) 284.

In Criminal Law. Choses in action, as bank notes, mortgage deeds, and money, do not fall within the technical definition of "goods and chattels." And if described in an indictment as goods and chattels, these words may be rejected as surplusage; 4 Gray 416; 3 Cox, Cr. Cas. 460; 1 Den. Cr. Cas. 450; 1 Dears. & B. 426; 2 Zab. 207; 1 Leach 241, 4th ed. 468. See 5 Mas. 537.

In Wills. If unrestrained, these words will pass all personal property; Wms. Ex. 1014 Am. notes. See 1 Jarm. Wills 751; Add. Contr. 31, 201, 912; Beach, Wills 470.

GOODS SOLD AND DELIVERED. A phrase used to designate the action of assumpsit brought when the sale and delivery of goods furnish the cause.

A sale, delivery, and the value of the goods must be proved. See **ASSUMPSIT.**

GOODS, WARES, AND MERCHANDISE. A phrase used in the Statute of Frauds. Fixtures do not come within it; 1 Cr. M. & R. 275. Growing crops of potatoes, corn, turnips, and other

annual crops, are within it; 8 D. & R. 314; 10 B. & C. 446; 4 M. & W. 347; *contra*, 2 Taunt. 38. See Addison, Contr. 31; Blackb. § 4, 5; 2 Dana 203; 2 Rawle 161; 5 B. & C. 829; 10 Ad. & E. 753. As to when growing crops are part of the realty and when personal property, see 1 Washb. R. P. 3. A contract for the sale of apples, peaches, and blackberries which might be raised during certain years, are chattels personal and not within the statute; 37 Mo. App. 56. Promissory notes and shares in an incorporated company, and, in some cases, money and bank-notes, have been held within it; see 2 Pars. Contr. 330; and so have a bond and mortgage; 55 N. J. Law 168; 29 Mo. App. 206; the term "merchandise" as used in the revised statutes of the United States includes goods, wares, and chattels of every description capable of being imported; R. S. § 2766. See 109 Mo. 78; **GOODS AND CHATELLETS.**

GORGE. A defile between hills or mountains, that is a narrow throat or outlet from a region of country. 25 Kan. 214.

GOTTEN BY. "Gotten by" means that the person referred to had done some act and has escaped the injurious and detrimental consequences which usually attend such an act. 162 Kv. 298, 172 S. W. 530.

GOUT. In Medical Jurisprudence. A nutritional disorder associated with an excessive formation of uric acid, and characterized by attacks of acute inflammation of the joints, by the gradual deposit of urate of sodium in and about the joints, and by the occurrence of irregular constitutional symptoms. Osler, Practice of Med.

In case of insurance on lives, when there is warranty of health, it seems that a man subject to the gout is capable of being insured, if he has no sickness at the time to make it an unequal contract; 2 Park, Ins. 350.

GOVERNMENT (Lat. *gubernaculum*, a rudder. The Romans compared the state to a vessel, and applied the term *gubernator*, helmsman, to the leader or actual ruler of a state. From the Latin, this word has passed into most of the modern European languages. That institution or aggregate of institutions by which a state makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming a state.

We understand, in modern political science, by *state*, in its widest sense, an independent society, acknowledging no superior, and by the term *government*, that institution or aggregate of institutions by which that society makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming that society by those who possess the power or authority of prescribing them. Government is the aggregate of authorities which rule a society. By *administration*, again, we understand in modern times, and especially in more recent times, the aggregate of those persons in whose hands the reins of government are for the time-being (the chief ministers or heads of departments). But the terms *state*, government, and administration are not always used in their strictness. The government of a state being its most prominent feature, which is most readily perceived, government has frequently been used for *state*; and the publicists of the last century almost always used the term *government*, or form of government, when they discussed the different political societies or states. On the other hand, government is often used, to this day, for administration, in the sense in which it has been explained. We shall give in this article a classification of all governments and political societies which have existed and exist to this day.

Governments, or the authorities of societies, are, like societies themselves, grown institutions. See **INSTITUTION.**

They are never actually created by agreement or compact. Even where portions of government are formed by agreement, as, for instance, when a certain family is called to rule over a country, the contracting parties must previously be conscious of having authority to do so. As society originates with the family, so does authority or government. Nowhere do men exist without authority among them, even though it were but in its mere incipency. Men are forced into this state of things by the fundamental law that with them, and with them alone of all mammals, the period of dependence of the young upon its parents outlasts by many years the period of lactation; so that, during this period of post-lactational dependence, time and opportunity are given for the development of affection and the habit of obedience on the one hand, and of affection and authority on the other, as well as of mutual dependence. The family is a society, and expands

into clusters of families, into tribes and larger societies, collecting into communities, always carrying the habit and necessity of authority and mutual support along with them. As men advance, the great and pervading law of mutual dependence shows itself more and more clearly, and acts more and more intensely. Man is eminently a social being, not only as to the necessities of subsistence, but also as to mental and affectional development, and not only as to a given number of existing beings, or what we will call *to extent*, but also as to descent of generation after generation, or, as we may call it, transmission. Society, and its government along with it, are continuous. Government exists and continues among men, and laws have authority for generations which neither made them nor had any direct representation in making them, because the necessity of government—necessary according to the nature of social man and to his wants—is a continuous necessity. But the family is not only the institution from which once, at a distant period, society, authority, government arose. The family increases in importance, distinctness, and intensity of action as man advances, and continues to develop authority, obedience, affection, and social adhesiveness, and thus acts with reference to the state as the water with reference to the canal; the state originates daily anew in the family.

Although man is an eminently social being, he is also individual, morally, intellectually, and physically; and though his individuality may endure even beyond his life, he is compelled, by his physical condition, to appropriate to himself, and to imprint his individuality upon the material world around, to create property. But man is not only an appropriating and producing, he is also an exchanging being. He always exchanges and always intercommunicates. This constant intertwining of individualism and socialism creates mutual claims of protection, rights, the necessity of rules, of laws: in one word, as individuals and as natural members of society, men produce and require government. No society, no cluster of men, no individuals banded together even for a temporary purpose, can exist without some sort of government springing up, and some sort of government is natural to men and characteristic. No animals have a government; no authority exists among them; instinct and physical submission alone exist among them. Man alone has laws which ought to be obeyed but may be disobeyed. Expansion, accumulation, development, progress, relapses, disintegration, violence, error, superstition, the necessity of intercommunication, wealth and poverty, peculiar disposition, temperament, configuration of the country, traditional types, pride and avarice, knowledge and ignorance, sagacity of individuals, taste, activity and sluggishness, noble or cringing bias, superstition, geographical and chronological, all that affects numbers of men affects their governments, and an endless variety of governments and political societies has been the consequence; but, whatever form of government may present itself to us, the fundamental principle, however rudimentary, is always the same, protection of society and its members, security of property and person, the administration of justice therefor, and the united efforts of society to furnish the means to authority to carry out its objects.—contribution, which, viewed as imposed by authority, is taxation. Those bases of government are occasionally have risen in disintegrating societies, and India, and who merely robbed and devastated, avowing that they did not mean to administer justice or protect the people, form no exception, although the extent of their soldiery and the periodicity of their raids caused them to be called governments. What little of government continued to exist was still the remnant of the communal government of the oppressed hamlets; while the robbers themselves could not exist without a government among themselves.

Aristotle classified governments according to the seat of supreme power, and he has been generally followed down to very recent times. Accordingly, we had Monarchy, that government in which the supreme power is vested in one man, to which was added, at a later period, the idea of hereditaryness. Aristocracy, the government in which the supreme power was vested in a few persons, to which, in this case, the *best*, but the exalting ones, the prominent, i. e. by property and influence. Privilege is its characteristic. Its corresponding degenerate government is the Oligarchy (from *oligos*, little, few), that government in which supreme power was exercised by a few persons, to which no general principle have derogated the power. Democracy, that government in which supreme power is vested in the people at large. Equality is one of its characteristics. Its degenerate correspondent is the ochlocracy (from *ochlos*, the rabble), for which at present the barbarous term mobocracy is frequently used.

But this classification was insufficient even at the time of Aristotle, when, for instance, theocracies existed; nor is the seat of supreme power the only characteristic, nor, in all respects, by any means the chief characteristic. A royal government, for instance, may be based upon a hereditary or an elective government. In order to group together the governments and political societies which have existed and are still existing, with philosophical discrimination, we must pay attention to the chief-power-holder (whether he be one or whether there are many), to the pervading spirit of the administration or wielding of the power to the benefit of the people or the influencing interests of the same, to the limitation or entirety of public power, to the peculiar relations of the citizen to the state. Indeed, every principle, relation, or condition characteristically influencing or shaping society or government in particular may furnish us with a proper division. We propose, then, the following

Grouping of Political Societies and Governments.

I. According to the supreme power-holder or the placing of supreme power, whether really or nominally so.

The power-holder may be one, a few, many, or all; and we have, accordingly:

A. **Principality**, that is, states the rulers of which are set apart from the ruled, or inherently differ from the ruled, as in the case of the theocracy.

1. **Monarchy**.

- a. Patriarchy.
- b. Chieftain government (as our Indians).
- c. Sacerdotal monarchy (as the States of the Church; former sovereign bishoprics).
- d. Kingdom, or Principality proper.
- e. Theocracy (Jehovah was the chief magistrate of the Israelite state).

2. **Dyarchy**. It exists in Siam, and existed occasionally in the Roman empire; not in Sparta, because Sparta was a republic, although her two hereditary generals were called kings.

B. **Republic**.

1. **Aristocracy**.

- aa. Aristocracy proper.
- ab. Aristocracies which are democracies within the body of aristocrats (as former Polish government).
- bb. Organic internal government (as Venice formerly).
- cc. Oligarchy.
- d. Sacerdotal republic, or Hierarchy.
- e. Plutocracy; if, indeed, we adopt this term from antiquity for a government in which it is the principle that the possessors of great wealth constitute the body of aristocrats.

2. **Democracy**.

- a. Democracy proper.
- b. Ochlocracy (Mob-rule), mob meaning unorganized multitude.

II. According to the unity of public power, or its division and distribution.

A. **Unrestricted power, or absolutism**.

1. According to the form of government.
 - a. Absolute monarchy, or despotism.
 - b. Absolute aristocracy (Venice); absolute sacerdotal aristocracy, etc. etc.
 - c. Absolute democracy (the government of the Agora, or market democracy).
2. According to the organization of the administration.
 - a. Centralized absolutism. Centralism, called bureaucracy when carried on by writing; at least, bureaucracy has very rarely existed, if ever, without centralism.
 - b. Provincial (satraps, pashas, proconsuls).

B. **According to divisions of public power**.

1. Governments in which the three great functions of public power are separate, viz., the legislative, executive, judiciary. If a distinct term contradistinguished to centralism be wanted, we might call these co-operative governments.
2. Governments in which these branches are not strictly separate, as, for instance, in our government, but which are nevertheless not centralized governments; as Republican Rome, Athens, and several modern kingdoms.

C. **Institutional government**.

1. Institutional government comprehending the whole, or constitutional government.
 - a. Deputative government.
 - b. Representative government.
 - aa. Bicameral.
 - bb. Unicameral.
2. Local self-government. See V. We do not believe that any substantial self-government can exist without an institutional character and subordinate self-governments. It can exist only under an institutional government (see Lieber's Civil Liberty and Self-Government, under "Institution").

D. **Whether the state is the substantive or the means, or whether the principle of socialism or individualism preponderates**.

1. Socialism. That state of society in which the socialist principle prevails, or in which government considers itself the substantive; the ancient states absorbing the individual or making citizenship the highest phase of humanity; absolutism of Louis XIV. Indeed, all modern absolutism is socialistic.

2. Individualism, that system in which the state remains acknowledged a means, and the individual the substantive; where primary claims, that is, rights, are felt to exist, for the obtaining and protection of which the government is established,—the government, or even society, which must not attempt to absorb the individual. The individual is immortal, and will be of another world; the state is neither.

III. According to the descent or transfer of supreme power.

A. **Hereditary governments**.

- Monarchies.
- Aristocracies.
- Hierarchies, etc.

B. **Elective**.

- Monarchies.
- Aristocracies.
- Hierarchies.

C. **Hereditary-elective governments**, the rulers of which are chosen from a certain family or tribe.

D. **Governments in which the chief magistrate or monarch has the right to appoint the successor; as occasionally the Roman emperors, the Chinese, the Russian, in theory, Bonaparte when consul for life.**

IV. According to the origin of supreme power, real or theoretical.

- A. According to the primordial character of power.

1. Based on *jus divinum*.

- a. Monarchies.
- b. Communism, which rests its claims on a *jus divinum* or extra-political claim of society.
- c. Democracies, when proclaiming that the people, because the people, can do what they list, even against the law; as the Athenians once declared it, and Napoleon III. when he desired to be elected president a second time against the constitution.

2. Based on the sovereignty of the people.

- a. Establishing an institutional government, as with us.
- b. Establishing absolutism (the Bonaparte sovereignty).

B. **Delegated power**.

1. Chartered governments.
 - a. Chartered city governments.
 - b. Chartered companies, as the reform great East India Company.
 - c. Proprietary governments.
2. Vice-Royalties; as Egypt, and, formerly, Algiers.
3. Colonial government with constitution and high amount of self-government,—a government of great importance in modern history.

V. **Constitutions**. (To avoid too many subdivisions, this subject has been treated here separately. See II.)

Constitutions, the fundamental laws on which governments rest, and which determine the relation in which the citizen stands to the government, as well as each portion of the government to the whole, and which therefore give feature to the political society, may be:

A. As to their origin.

1. Accumulative; as the constitutions of England or Republic.
2. Enacted constitutions (generally, but not philosophically, called written constitutions).
- a. Octoroy constitutions (as the French, by Louis XVIII.).
- b. Elected by the people, as our constitutions. ["We the people charter governments; formerly governments chartered the liberties of the people."]

3. Pacts between two parties, contracts, as Magna Charta, and most charters in the Middle Ages. The medieval rule was that as much freedom was enjoyed as it was possible to conquer,—*expugnare* in the true sense.

B. As to extent or uniformity.

1. Broadcast over the land. We may call them national constitutions, popular constitutions, constitutions for the whole state.
2. Special charters. Chartered, accumulated and varying franchises, medieval character. (See article Constitution in the Encyclopedia Americana.)

VI. As to the extent and comprehension of the chief government.

- A. **Military governments**.
 1. Commercial government; one of the first in Asia, and that into which Asiatic society relapses, as the only remaining element, when barbarous conquerors destroy all bonds which can be torn by them.
 2. Tribal government.
 - a. Stationary.
 - b. Nomadic. We mention the nomadic government under the tribal government, because no other government has been nomadic, except the patriarchal government, which indeed is the incipency of the tribal government.
 3. City government (that is, city-states; as all free states of antiquity, and as the Hanseatic governments in modern times).
 4. Government of the Medieval Orders extending over portions of societies far apart; as the Templars, Teutonic Knights, Knights of St. John. Political societies without necessary territory, although they had always landed property.
 5. National states; that is, populous political societies spreading over an extensive and cohesive territory beyond the limits of a city.

B. **Confederacies**.

1. As to admission of members, or extension.
 - a. Closed, as the Amphictyonic council, Germany.
 - b. Open, as ours.
2. As to the federal character, or the character of the members, as states.
 - a. Leagues.
 - aa. Tribal confederacies; frequently observed in Asia; generally of a loose character.
 - bb. City leagues; as the Hanseatic League, the Lombard League.
 - cc. Congress of deputies, voting by states and according to instruction; as the Netherlands republic and our Articles of Confederation, Germanic Confederation.
 - dd. Present "state system of Europe" (with constant congresses, if we may call this "system.") a federative government in its incipency.
 - b. Confederacies proper, with national congress.

C. **Mere agglomerations of one ruler**.

- aa. With ecclesiastical or democratic congress (Achaean League).
 - bb. With representative national congress, as ours.
- C. Mere agglomerations of one ruler.
 1. As the early Asiatic monarchies, or Turkey.
 2. Several crowns on one head; as Austria,

Sweden, Denmark.

VII. As to the construction of society, the title of property and allegiance.

A. As to the classes of society.

1. Castes, hereditarily dividing the whole population, according to occupations and privileges. India, ancient Egypt.
2. Special castes.
 - a. Government with privileged classes or caste; nobility.
 - b. Government with degraded or oppressed caste; slavery.
 - c. Governments founded on equality of citizens (the uniform tendency of modern civilization).

B. As to property and production.

1. Communism.
2. Individualism.
- C. As to allegiance.
 1. Plain, direct; as in unitary governments.
 2. Varied; as in national confederacies.
 3. Graduated or *encapsulated*; as in the feudal system, or as in the case with the serf.

D. **Governments are occasionally called according to the prevailing interest or classes; as**

- Military states; for instance, Prussia under Frederick II.
- Maritime state.
- Commercial.
- Agricultural.
- Manufacturing.
- Ecclesiastical, etc.

VIII. According to simplicity or complexity, as in all other spheres, we have—

- A. Simple governments (formerly called *pure*; as pure democracy).
- B. Complex governments, formerly called mixed. All organisms is complex.

See STATE; FEDERAL GOVERNMENT; EXECUTIVE POWER; JUDICIAL POWER; LEGISLATIVE POWER; UNITED STATES OF AMERICA, and the titles concerning the several states and countries. See LOCAL GOVERNMENT; MILITARY GOVERNMENT; REPUBLICAN FORM OF GOVERNMENT.

GOVERNMENT AS A CONTRACT. Although, in the absence of special laws, the Government, purely as a contractor, may stand like a private person, it does not, by making a contract, waive its sovereignty or give up its power to make laws which render criminal a breach of the contract. 206 U. S. 246.

GOVERNMENTAL PURPOSES. See PUBLIC PURPOSE.

GRACE. Favor or indulgence, as distinguished from right.

GRACE, DAYS OF. See DAYS OF GRACE.

GRADE. Used in reference to streets: (1) The line of the street's inclination from the horizontal; (2) a part of a street inclined from the horizontal. Cent. Dict. That is, it sometimes signifies the line established to guide future construction, and at other times, the street wrought to the line; 56 Ark. 28.

Grades of crime, in legal parlance, are always spoken of and understood as higher or lower in grade, or degree, according to the measure of punishment attached and meted out on conviction, and the consequences resulting to the party convicted; 61 Barb. 619.

GRADE CROSSING. A place where one highway crosses another: in particular, a place where a railroad is crossed at grade by a public or private road, or by another railroad. The term is most frequently used with reference to the crossing of a public highway by a railroad.

At such a crossing it is the duty of the railroad company to construct and maintain safe and proper crossings; and it is liable for all injuries resulting from a failure to perform this duty; 91 Ind. 119; 49 Ia. 234; 80 Ky. 147; 98 Ohio St. 436; 56 Pa. 280; but the most numerous class of cases relating to grade crossings, arises from accidents to persons who are using the crossing, caused by the operation of trains thereon.

The rule that the roadbed and track of a railroad company are its private property, and that one who gets thereon does so at his own peril, does not apply to a highway crossing; 20 So. Rep. (Fla.) 558. At such a place the company holds its roadbed, subject to the right of the public to cross it; and that circumstance creates mutual

rights and obligations. Both parties must use ordinary care in the exercise of their own rights. Theoretically, the rights of the company and a person who intends to cross are equal; practically, the more onerous duty of avoiding danger rests upon the latter, on account of the difficulty in stopping a train in rapid motion. But this fact, on the other hand, imposes upon the railroad company the duty of using every practicable agency consistent with the operation of its trains, to give due warning of their approach; 94 U. S. 165; 72 Ill. 285; 70 Ga. 261; 82 Ind. 435; 79 Ky. 442; 65 Md. 502; 58 N. Y. 451; 65 Pa. 269. Thus, the whistle must be sounded on approaching a crossing; 94 U. S. 161; 109 N. C. 472; 30 Pa. 454; and the better view is that watchmen should be stationed at every much-used crossing; 94 U. S. 161. But this rule is not uniformly held; and some courts have decided that the railroad company, unless required by statute, is under no obligation to give warning; 22 Minn. 163; 114 Mass. 350. This duty is now, however, generally prescribed by statute; and a failure to discharge it is in such a case always evidence of negligence, though not conclusive; 72 N. Y. 26; 84 S. C. 444; 90 Tenn. 144; 24 Ga. 75; 129 Mass. 310; 61 Ia. 452; 65 Ga. 120; 123 N. Y. 496; 125 N. Y. 715; 109 N. C. 472; 64 N. H. 823. As to the duty of the railway in the operation of its line at grade crossings, see Patterson, Ry. Acc. L. § 155, 172.

The railroad company is not alone bound to the exercise of care in approaching a crossing. A traveller who intends to cross is also bound to use ordinary prudence, by which is to be understood such as is fairly commensurate with the risk. He must, therefore, look for an approaching train, if he has a fair view of the track; and if his view is obstructed, he must also listen. If he does not do so, and is injured, he cannot recover; but if he does, and is nevertheless injured by the negligence of the company, the latter is liable to him; 110 Ill. 114; 49 Ia. 469; 81 La. Ann. 490; 67 Nev. 100; 143 Ind. 524; 39 Md. 574; 105 Mass. 203; 129 Mass. 440; 46 Minn. 220; 52 Mass. 808; 76 Mo. 138; 42 N. J. L. 180; 58 N. Y. 451; 92 N. Y. 658; 75 N. Y. 437; 24 Ohio St. 419; 73 Pa. 504; 81 id. 274; 6 Heisk. 174; 41 Wis. 44. It is not necessary to leave to the jury whether a prudent man would look and listen before attempting to cross a railroad track. It is the duty of the court to declare that a failure to do so is negligence; 75 Fed. Rep. 644; it is a conclusion of law; 61 Ark. 549; 43 N. E. Rep. (Ind.) 1019; 14 C. C. A. 535; s. c. 67 Fed. Rep. 591; 54 id. (C. C. A.) 301.

One, who, on approaching a double-track railroad, looked to the north, and seeing no train, concentrated his attention on a switch-engine on the nearer track for a minute and a half, and then, without looking again to the north, started across and was struck by a train coming from that direction on the further track, was held guilty of negligence; 75 Fed. Rep. 644. See 159 U. S. 603; 3 App. D. C. 101; 14 C. C. A. 394; s. c. 67 Fed. Rep. 277. It is held in Pennsylvania that a traveller is required to stop, look, and listen for an approaching train; 73 Pa. 504; 90 Pa. 328; 97 id. 91; 102 id. 425. But this rule does not prevail in other courts, and in a recent Pennsylvania case it is said that without relaxing the rule just stated, "yet when the facts are not clear and simple, and where the existence of contributory negligence depends upon inferences to be drawn from the evidence, the question must go to the jury for decision;" 179 Pa. 227.

There are three very well-recognized exceptions to the rule which requires a traveller to look and listen for approaching trains. These are thus classified in a Rhode Island case; 14 R. L. 102: (1) When the view of the track is obstructed, and hence the injured party, not being able to see, is obliged to act upon his judgment at the time; 94 U. S. 161; 159 id. 608; L. R. 3 C. P. 368; 3 App. Cas. 1155; 57 Me. 117; 118 Mass. 431; 35 Pa. 60; (2) where the injured person is a passenger going to, or

alighting from, a train, under the implied invitation and assurance of the company that he may cross the track in safety; L. 104 Mass. 157; 105 Mass. 203; 26 N. J. Eq. 474; 84 N. Y. 241; and (3) when the direct act of some agent of the company has put the person off his guard and induced him to cross the track without precautions; e. g. when the flagman beckons to him to cross; 29 Ia. 55; 10 Allen 368; 29 N. Y. 383. To these may be added cases where the traveller (as might happen to a stranger on a dark night) is ignorant of the nearness of the railroad, and when the driver of a horse, which becomes suddenly frightened, is obliged to choose between the risk of an upset or a collision. See Patterson, Ry. Acc. L. §§ 173-183, where the cases on the subject of contributory negligence at grade-crossings are collected.

It is also the general rule outside of Pennsylvania, that if the company maintains safety-gates at a crossing, which are closed at the approach of a train, a traveller who sees them standing open has the right to presume upon the implied invitation to cross; and may do so without looking and listening; 13 Wall. 270; 81 Cal. 326; 104 Mass. 108; 120 Mass. 257; 115 id. 190; 87 Ill. 401; 30 Minn. 482; 14 Nev. 351; 376; 40 N. J. L. 189; 78 N. Y. 518; 79 N. Y. 72; 24 Ohio St. 654; 48 Wis. 603.

The fact that one's sight or hearing is defective does not exonerate him from the exercise of due care, but rather raises the standard to be observed by him. The employees of the company have a right to presume that his sight and hearing are normal; and he must observe all the added precautions necessary to make him as safe as if his faculties were normal. If he does not, he is guilty of contributory negligence; 28 La. An. 320; 72 Mo. 168; 6 Oreg. 417.

As to the power of the states to require railroad companies to change, alter, or abolish grade crossings, see 4 Thomp. Corp. § 5505; POLICE POWER. As to signals at crossings; 37 Am. Rep. 443; as to care at crossings; 26 id. 207.

See CROSSING; RAILROAD; NEGLIGENCE; HIGHWAY; STREETS.

GRADED SCHOOL. "Graded schools" are common schools. 135 Ky. 488, 122 S. W. 813.

GRADED SCHOOL DISTRICT. The words "graded school district" and "common school district" as used in a statute are used as synonymous or interchangeable terms, and where the words "common school district" are used it applies to common school, graded or ungraded, white or colored. Middleton v. Stone, 163 Ky. 571, 174 S. W. 6.

GRADUATE. One who has taken a degree in a college or university. It is said to be a word of elastic meaning, involving infinite variety in the methods and standards of graduation which may be adopted; 40 La. Ann. 463.

GRADUS (Lat. a step). A measure of space. Vicat, Voc. Jur. A degree of relationship (*distantia cognatorum*). Heinemann, Elem. Jur. Civ. § 153; Bract. fol. 134, 374; Fleta, lib. 6, c. 2, § 1, lib. 4, c. 17, § 4.

A step or degree generally; e. g. *gradus honorum*, degrees of honor. Vicat, Voc. Jur. A pulpit; a year; a generation. Du Cange.

A port; any place where a vessel can be brought to land. Du Cange.

GRAFFER (Fr. *greffier*, a clerk, or prothonotary). A notary or scrivener. See stat. 5 Hen. VIII. c. 1.

GRAFFIUM. A register; a ledger-book or cartulary of deeds and evidences. 1 Anal. Eccles. Menevensio, apud Angl. Sacr. 653.

GRAFIO. A baron, inferior to a count. 1 Marten, Anecd. Collect. 13. A fiscal judge. An advocate. Gregor. Turon. l. 1, de Murac. c. 33; Spelman, Gloss.; Cowel. For various derivations, see Du Cange.

GRAFT. In Equity. A term used to designate the right of a mortgagee in premises to which the mortgagor at the

time of making the mortgage had an imperfect title, but afterwards obtained a good title. In this case the new title is considered a *graft* into the old stock, enuring to the benefit of the mortgagee, and arising in consideration of the former title; 1 Ball & B. 40, 46, 57; 1 Pow. Mort. 190. See 9 Mass. 34. "It is well settled that when a mortgage of land is made, purporting to convey the land in fee, any title afterward acquired by the mortgagor will feed the mortgage and enure to the benefit of the mortgagee." 1 Pingree, Mort. § 304; 76 Am. Dec. 449; 57 Cal. 507; 67 id. 275. And this is so where the title was in the government when the mortgage was made and a patent afterwards issued to the mortgagor; 1 Pingree, Mort. § 304; 71 Wis. 279. See 4 Wall. 232; 21 How. 228. But it is the prevailing doctrine that in the absence of statutory enactment there must be a covenant of warranty or something tantamount to it, to give this effect to the mortgage; 86 Mich. 383; 90 Ala. 178; 47 Ark. 111. See 1 Pingree, Mort. §§ 696-706. The purchase of a paramount title by a purchaser from the mortgagor does not inure to the benefit of the mortgagee; id. § 1012; and in some cases the mortgagee may be estopped to assert the after-acquired title of the mortgagor against an innocent purchaser; id.; 52 Pa. 359. The same principle has obtained by legislative enactment in Louisiana. If a person contracting an obligation towards another, says the Civil Code, art. 3271, grants a mortgage on property of which he is not then the owner, this mortgage shall be valid if the debtor should ever require the ownership of the property, by whatever right. This principle is also adopted by statute in other states, as Arkansas; Mansf. Dig. § 642; and California; Civ. Code § 2930. See MORTGAGE.

GRAFTER. A "grafter" means a dishonest official. 133 Ky. 668, 118 S. W. 929.

GRAIN. The twenty-fourth part of a pennyweight.

For scientific purposes the grain only is used, and sets of weights are constructed in decimal progression, from ten thousand grains to one-hundredth of a grain.

Wheat, rye, barley, or Indian corn sown in the ground. It may include millet and oats; 34 Ga. 455; 29 N. J. L. 337; flaxseed; 55 Ia. 323; peas; 2 Strobl. 474; sugar cane seed; 84 Ga. 455. See AWAY-GOING CROP.

GRAINAGE. In English Law. The name of an ancient duty collected in London, consisting of one-twentieth part of the salt imported into that city.

GRAMME. The French unit of weight. The gramme is the weight of a cubic centimetre of distilled water at the temperature of 4° C. It is equal to 15.4341 grains troy, or 5.6481 drachms avoirdupois.

GRAND ASSIZE. An extraordinary trial by jury, instituted by Henry II., by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous custom of trial by battle. For this purpose a writ *de magna assize eliganda* was directed to the sheriff to return four knights, who were to choose twelve other knights to be joined with themselves; and these sixteen formed the grand assize, or great jury to try the right between the parties; 3 Bla. Com. 351. Abolished by 3 and 4 Wm. I. c. 42.

A later work says: "It is abundantly clear that, whatever may have been the practice at a later time, the grand assize was a body of twelve, not of sixteen, knights; in other words, the four electors took no part in the verdict." 2 Poll. & Maitl. 618, n. 3.

Although the jury were theoretically to speak only about matter of fact, the principle was long latent and tacit. "The recognitors in a grand assize were called upon to say whether the demandant had greater right than the tenant, and in so doing they had an opportunity of giving effect of law. . . . We must not suppose that in such a case they followed the ruling of the justices;" id. 627.

The assize of novel disseisin, the requirement of a royal writ to compel a man to answer for his free tenement, and the grand assize, are considered by the writers last quoted, to have been fashioned at the same time to uphold three principles founded upon the idea of the sacredness of a freehold and intended to assure the royal protection of posses-

sion. "No one is to be disseised of his free tenement unjustly and without a judgment," (nor) even by a judgment unless he has been summoned to answer by a royal writ; no one is to be forced to defend his seisin of a free tenement by battle. The ordinance that instituted the grand assize was a one-sided measure, a protection of possessors. The claimant had to offer battle; the possessor, if he pleased, might refuse battle and put himself upon the grand assize;" 1 id. 123. As to its place in the history of possessory actions. See 2 id. 62.

GRAND BILL OF SALE. In English Law. The name of an instrument used for the transfer of a ship while she is at sea. 7 Mart. La. 318; 3 Kent. 133. See BILL OF SALE.

GRAND CAPE. In English Law. A writ judicial which lieth when a man has brought a *precept quod reddat*, of a thing that toucheth plea of lands, and the tenant makes default on the day given him in the writ original, then this writ shall go for the king, to take the land into the king's hands, and if he comes not at the day given him by the *grand cape*, he has lost his lands. Old N. B. fol. 161, 162; Regist. Judic. fol. 2 b; Brac. lib. 5, tr. 3, cap. 1, nu. 4, 5, 6. So called because its Latin form began with the word *cape*, "take thou," and because it had more words than the *petit cape*, or because *petit cape* summons to answer for default only. *Petit cape* issues after appearance to the original writ, *grand magnum cape* before. These writs have long been abolished. In Glanvill's day three successive summons preceded the *cape*. See 2 Poll. & Maitl. 580.

GRAND COUTUMIER. Two collections of laws bore this title. One, also called the Coutumier of France, is a collection of the customs, usages, and forms of practice which had been used from time immemorial in France; the other, called the Coutumier de Normandie (which indeed, with some alterations, made a part of the former), was composed, about the fourteenth of Henry III., A. D. 1229, and is a collection of the Norman laws, not as they stood at the conquest of England by William the Conqueror, but some time afterwards, and contains many provisions probably borrowed from the old English or Saxon laws. Hale, Hist. Com. Law c. 6. The work was reprinted in 1881 with notes by William L. De Gruchy. The Channel Islands are still for the most part governed by the ducal customs of Normandy; 1 Steph. Com. 100.

GRAND DAYS. In English Practice. Those days in the term which are solemnly kept in the inns of court and chancery, viz.: Candlemas-day in Hilary Term, Ascension-day in Easter Term, St. John the Baptist's day in Trinity Term, and All Saints' day in Michellmas Term, which are *dies non juridici*, or no days in court, and are set apart for festivity. Jacob, Law Dic.

All this is now altered: the grand days, which are different for each term of court, are those days in each term in which a more splendid dinner than ordinary is provided in the hall; Moz. & W.

GRAND DISTRESS (Lat. *magna districtio*). An ancient kind of distress, more extensive than the writs of *grand* and *petit cape*, extending to all the goods and chattels of the party distrained within the county. T. L.; Cowel. The writ lay in real actions, and was so called on account of its quality and great extent. It lay in two cases, either when the tenant or defendant was attached, and did not appear, but made default; or when the tenant or defendant had once appeared, and afterwards made default. Fleta lib. 3. c. 69; Cowell; Holt-house. See WRIT OF GRAND DISTRESS.

GRAND JURY. In Practice. A body of men, consisting at common law of not less than twelve nor more than twenty-four, respectively returned by the sheriff of every county to every session of the peace,oyer and terminer, and general gaol delivery, to whom indictments are preferred. 4 Bl. Com. 302; 1 Chitty, Cr. Law 310, 311; 1 Jur. Soc. Papers; 31 Fla. 340, 356.

There is reason to believe that this institution ex-

isted among the Saxons; Crabb, Eng. Law 35. By the constitution of Glarendon, enacted 10 Hen. II. (A. D. 1154), it is provided that "if such men were suspected whom none wished or dared to accuse, the sheriff, being thereto required by the bishop, should swear twelve men of the neighborhood, or village, to declare the truth" respecting such supposed crimes, the jurors being summoned as witnesses or accusers rather than judges. It seems to be pretty certain that this statute either established grand juries, if this institution did not exist before, or reorganized them if they already existed; 1 Spence, Eq. Jur. 63. But a later work (passing over the question of the relation of the old Frankish inquest to the initiation of criminal proceedings by presentment by indictment) says of the accusing jury of the time of Henry II.: "The ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute." 3 Poll. & Maitl. 630; 1 id. 180; 2 id. 644; and the conclusion reached is, "a great deal yet remained to be done before that process of indictment by a 'grand jury' and trial by a 'petty jury' with which we are all familiar would have been established. The details of this process will never be known until large piles of records have been systematically perused. This task we must leave for the historian of the fourteenth century. Apparently the change was intimately connected with the discontinuance of those cumbersome old eyres which brought 'the whole county' and every hundred and vill in it before the eyes of the justices;" 2 id. 646.

Organization. Where the common law prevails, unmodified by statutory or constitutional provisions, the law requires that twenty-four citizens shall be summoned to attend as grand jurors; but in practice not more than twenty-three are sworn, because of the inconvenience which might arise of having twelve, who are sufficient to find a true bill, opposed to another twelve who might be against it; 2 Hale, Pl. Cr. 161; 1 Bish. Cr. Proc. 854; 6 Ad. & El. 233; 2 Caines 98. There is no distinction between the qualification of grand and petit jurors; 35 S. C. 334.

In the United States the number is a matter of local regulation, and while in the main the common-law system has been continued, there is in this country a growing disposition to reduce the number of jurors by statute where it was practicable, and by constitutional provision where that was held to be necessary. It is beyond the present purpose to state in detail all the changes, or to do more than to indicate the existence of a prevailing tendency to simplify the proceedings, which, however, is coupled with a great respect for the grand jury as one of the common-law institutions protected by constitutional guaranty. For the regulations in force at any particular time in the several states, reference should be had to the local law.

The question has been much discussed whether in states having constitutional provisions for indictment by a grand jury a legislative change in the number required to find an indictment at common law is permissible. In several states this question has been answered in the negative where the constitutional provision specified "indictment by grand jury;" at least so far as to forbid a change making less than twelve sufficient to find an indictment; 107 N. C. 913; 31 Fla. 255, 340; 16 Wis. 334. See 25 Ga. 220. But the provision of the federal constitution securing the "due process of law" does not prevent the states from varying the common-law rule as to a grand jury; 85 Va. 703; 13 Col. 155; or even from dispensing with it; 110 U. S. 516. Where the state constitution prescribes a number it is obligatory; 34 S. W. Rep. (Tex.) 120; but where the grand jury consisted of less than the required number but as many jurors concurred as were necessary to find an indictment it was sufficient; 56 N. W. Rep. (Ia.) 545; and where the requisite number do concur, the fact that the panel was not full, either by reason of the discharge, or improper excusing of one or more members, or any like cause, does not invalidate an indictment; 25 Tex. App. 293, 314; 22 id. 572; 77 La. 417; 46 Fed. Rep. 381; 69 Ga. 11; 60 Vt. 142; 89 Ill. 571; 19 Wis. 563; 68 Ala. 92. A discharge of a juror is presumed to be proper; 54 Ark. 611; 4 Ind. 193; but if improper and void it does not affect the legal organization; 19 Tex. App. 95. It will be presumed that a grand jury was legally organized; 34 La. Ann. 216; 3 Colo. 325; and where the court

has power to fill up the panel it will be presumed to have been rightly done; 129 Ill. 290. It has been held that when, on calling the grand jury, some of them fail to appear, the court may orally direct the sheriff to fill the vacancy without issuing a precept; 53 La. 84, 154; in other states a new *venue facias* is necessary; 63 Ala. 163; 20 N. J. L. 218. The power to excuse grand jurors confers upon the court, by implication, the power to fill the vacancy; 129 Ind. 290. If more are present than the statute permits the indictment is bad; 34 Miss. 614; 1 Utah 226; 92 Ky. 605; 2 Pears. Pa. 461, 466. A constitutional provision fixing the number of the panel and prescribing how many must concur is held to be self-executing; 18 S. W. Rep. (Ky.) 528; 9 Mont. 167.

Constitutional and statutory provision. In Indiana, Illinois, Iowa, Nebraska, Oregon, and Colorado, the constitution gives the legislature authority to make laws dispensing with a grand jury in any case. And in Alabama and Mississippi there is provision for other process in criminal cases. In Nebraska, the legislature may provide for holding persons to answer for criminal offences on the information of a public prosecutor. In a majority of the states there is an adherence to twelve as the number required to concur in finding an indictment, although in many of these less than twenty-three may be summoned, the change being in some cases by statute and in others by constitutional provision. Of these states, the required number is thirteen to eighteen in Alabama, Mississippi, and Tennessee; see 15 Miss. 53; sixteen in Arkansas and Louisiana; see 28 La. Ann. 187; sixteen to twenty-three in Wisconsin; eighteen in South Carolina and Vermont; see 11 Rich. 581; 35 S. C. 344; nineteen in California, but seventeen have been held sufficient; 6 Cal. 214; see 92 Cal. 239; seventeen to twenty-three in Arizona; thirteen to twenty-three in Rhode Island. In Montana, Idaho, and Oregon the number is seven, of whom five must concur; and in Colorado, Georgia, Kentucky, Missouri, and Texas, the number is twelve, of whom nine must concur; in Virginia, it is nine to twelve, of whom seven must concur; in Florida twelve to fifteen, of whom eight must concur; and in Indiana six, of whom five must concur; while in Iowa there is a provision for from five to fifteen according to the population of the county, with a corresponding variation in the number for concurrence. In Utah fifteen were held sufficient; 93 U. S. 145; and see 1 Utah 11. In some cases when twenty-three were required, the provision was held to be directory merely; 2 Cush. 149.

Objections. An objection must be properly made as to time and manner; 140 U. S. 575; 170 Pa. 167; 55 Md. 345; 6 Ohio 435; 67 Mo. 488; 2 Ad. & El. 236; 1 Nev. & P. 187. A person summoned to testify before the grand jury *de facto* cannot question its organization; 91 Cal. 545. An objection to the competency of a grand juror must be raised before the general issue; 30 Ohio St. 542; s. c. 27 Am. Rep. 478; Whart. Cr. Pl. 350. It has been held that an objection comes too late after the jury has been empanelled and sworn; 9 Mass. 110; 8 Wend. 314; but on this point the authorities are conflicting; see *contra*, 12 R. I. 492; s. c. 34 Am. Rep. 704, n. The proper method of taking objection to the organization of a grand jury is by plea in abatement; 19 Ala. 240; 106 Ind. 886; 13 Ark. 96; 2 Lea 29; and not by demurrer; 2 Stew. 388; 1 Okla. 252; or motion to quash; 73 N. C. 437; 3 Wyo. 140; 6 Black. 248; or motion in arrest of judgment; 5 Ala. 73; or collaterally on *habeas corpus*; 28 Fla. 371; 87 Wis. 340. A plea in abatement must specify the objection with particularity; 86 Mo. 371; 89 Va. 136; 14 Wis. 394; 15 Ill. 511; 84 Kan. 256; 12 Neb. 61. If a method of objection is prescribed by a statute it must be followed strictly; 96 N. Y. 149; 51 Ala. 18; 33 Tex. 570; 86 Ind. 400; 17 Ohio St. 588.

Federal courts may, on their own motion, enforce other objections to grand jurors than those prescribed by state statute; 69

Fed. Rep. 978.

See an elaborate note upon the organization of grand jury in which are collected the cases relating to defects of every kind in the summoning, organization, and proceedings of grand jury; 27 L. R. A. 476; and one on the qualification of grand jurors; 28 *id.* 195; as to the number of grand jurors necessary or proper to act and the constitutional and statutory provisions relating thereto in states which have changed the common-law rule, see 27 *id.* 546; and as to the number necessary to concur in finding an indictment; 28 *id.* 33.

Proceedings. Being called into the jury-box, they are usually permitted to select a foreman, whom the court appoints; but the court may exercise the right to nominate one for them.

The foreman then takes the following oath or affirmation, namely:—"You, A. B., as foreman of this inquest for the body of the —, of —, do swear (or affirm) that you will diligently inquire, and true presentment make of all such articles, matters, and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service; the commonwealth's counsel, your fellows, and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; nor shall you leave any one unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding. So help you God." It will be perceived that this oath contains the substance of the duties of the grand jury. The foreman having been sworn or affirmed, the other grand jurors are sworn or affirmed according to this formula:—"You and each of you do swear (or affirm) that the same oath (or affirmation) which your foreman has taken on his part, you and every one of you shall well and truly observe on your part." In Massachusetts it is not necessary to show that those affirming had conscientious scruples about taking the oath; 7 Gray 492; 9 Mass. 107; but in New Jersey it was originally held that it would be necessary to show the oath or indictment would be invalid; 6 N. J. L. 405; 9 *id.* 305; 7 *id.* 433; but since then by the N. J. Crim. Code § 53, it is provided that objection to the indictment for form or substance shall be by demurrer or motion to quash before the jury are sworn in and not after, and an objection to affirmation not made as so provided will not avail.

On being sworn or affirmed, and having received the charge of the court, the grand jury are organized, and may proceed to transact the business which may be laid before them; 2 Burr. 1088; Bacon, *Abr. Juries*, A. See 12 Tex. 210. The grand jury constitute a regular body until discharged by the court, or by operation of law, as where they cannot continue, by virtue of an act of assembly, beyond a certain day. But although they have been formally discharged by the court, if they have not separated, they may be called back and fresh bills be submitted to them; 9 C. & P. 43. When properly organized, in some states, it meets and adjourns upon its own motion, and it may lawfully proceed in the performance of its duties whether the court is in session or not, until the final adjournment of the court; 39 Ill. App. 481. In other states it is always discharged from time to time by the court, to which it reports at each session. The grand juries in the federal courts usually meet and adjourn on their own motion.

The jurisdiction of the grand jury is co-extensive with that of the court for which they inquire, both as to the offences triable there and the territory over which such court has jurisdiction.

The mode of doing business. The foreman acts as president, and the jury usually appoint one of their number to perform the duties of secretary. No records are to be kept of the acts of the grand jury, except for their own use, because their proceedings are to be secret. Bills of indictment against offenders are then supplied by the attorney-general, or other officer representing government. See 11 Ind. 478; Hempst. 176; 2 Blatchf. 435. On these bills are indorsed the names of the witnesses by whose testimony they are supported. The jury are also required to make true presentment of all such matters as have otherwise come to their knowledge. These presentments, which are technically so called, are, in practice, usually made at the close of the session of the grand jury, and include offences of which they had personal knowledge; they should name the authors of the offences, with a view to indictment. The

witnesses in support of a bill are to be examined in all cases under oath, even when members of the jury itself testify,—as they may do.

When the number required by law (*supra*) concur in finding a true bill, the foreman must write on the back of the indictment, "A true bill," sign his name as foreman, and date the time of finding. On the contrary, where there is not sufficient evidence to authorize the finding of the bill, the jury return that they are ignorant whether the person accused committed the offence charged in the bill, which is expressed by the foreman indorsing on the bill, "Ignoramus," "Not a true bill," or similar words, signing his name as before, and dating the indorsement. The grand jury cannot find a bill, true for part, and false for part; 1 Russ. Cr., Sharsw. ed. 430.

A grand jury cannot indict without a previous prosecution before a magistrate; except in offences of public notoriety, such as are within their own knowledge, or are given them in charge by the court, or are sent to them by the prosecuting officer of the commonwealth; Whart. Cr. Pl. & Pr. § 338; 67 Pa. 30.

As to the witnesses, and the power of the jury over them. The jury examine all the witnesses in support of the bill, or enough of them to satisfy themselves of the propriety of putting the accused on trial, but none in favor of the accused. The jury are the sole judges of the credit and confidence to which a witness before them is entitled. It is decided that when a witness, duly summoned, appears before the grand jury, but refuses to be sworn, and behaves in a disrespectful manner towards the jury, they may lawfully require the officer in attendance upon them to take the witness before the court, in order to obtain its aid and direction in the matter; 8 Cush. 338; 14 Ala. N. S. 450. Such a refusal, it seems, is considered a contempt; 14 Ala. N. S. 450; the disobedience of this order of the court constituting the contempt; 17 Colo. 252; but the governor of a state is exempt from the powers of *subpoena*, and this immunity extends to his official subordinates; 81 Pa. 433. A person having knowledge of a crime has the right to go before the grand jury, and disclose his knowledge, without being summoned; 45 La. Ann. 1164.

As to the competency of evidence before grand jury see 28 L. R. A. 318; and as to the sufficiency of evidence to sustain indictment; *id.* 324; as to improper influence or interference with a grand jury; *id.* 367.

Of the secrecy to be observed. This extends to the vote given in any case, to the evidence delivered by witnesses, and to the communications of the jurors to each other. The disclosure of these facts, unless under the sanction of law, would render the imprudent juror who should make them public liable to punishment. Giving intelligence to a defendant that a bill has been found against him, to enable him to escape, is so obviously wrong that no one can for a moment doubt its being criminal. The grand juror who should be guilty of this offence might, upon conviction, be fined and imprisoned. One who stealthily listens to a grand jury while in the performance of their duties commits the offence of eavesdropping; 3 Head 290. The duration of the secrecy depends upon the particular circumstances of each case; 20 Mo. 326. In a case, for example, where a witness swears to a fact in open court, on the trial, directly in opposition to what he swore before the grand jury, there can be no doubt that the injunction of secrecy, as far as regards this evidence, would be at an end, and the grand jurors might be sworn to testify what this witness swore to in the grand jury's room, in order that the witness might be prosecuted for perjury; 3 Russ. Cr., Sharsw. ed. 520; 4 Me. 439; 1 Bish. Cr. Proc. 857; 92 Ky. 120; 77 Md. 110; 65 Mass. 137. A member of the grand jury may testify as to how the jury acquired knowledge of an alleged offence; 126 Pa. 531; 157 *id.* 611; but see *contra*, 2 Halst. 347; 1 C. & K. 512. It has been held that the foreman of a grand jury may be called as a witness concerning

an admission of gaming made by defendant when testifying before the grand jury concerning another offence, since the statute enjoining secrecy as to proceedings before the grand jury is intended only for the protection of the jurors and of the public; 8 Utah 21.

A grand juror is not competent to testify in a civil case as to the statements of a witness before the grand jury; 61 N. W. Rep. (Minn.) 138. It is not error to reject evidence of grand jurors disclosing testimony given before the grand jury; 105 Mo. 24. As to grand jurors as witnesses under statutory provisions, see 12 Crim. L. Mag. 583. Statements of the prosecuting officer as to what occurred in the grand jury room are inadmissible; 115 Mo. 480. The fact that a stenographer, at the request of the prosecuting attorney, attended before the grand jury and took the testimony of the witnesses, is no ground for quashing the indictment; 5 Ind. App. 356; the presence of the state's attorney while inquiry is being made by the grand jury is not objectionable; 45 Ill. App. 110; but the presence of a private prosecutor is ground for reversal of a judgment of conviction; 70 Miss. 595.

The privilege given by the fifth amendment to the constitution, that no person shall be compelled in any criminal case to be a witness against himself, extends to a proceeding before a grand jury; 142 U. S. 547. See INDICTMENT; PRESENTMENT; CHARGE; INFORMATION.

GRAND LARCENY. In Criminal Law. By the English law simple larceny was divided into grand and petit: the former was committed by the stealing of property exceeding twelve pence in value; the latter, when the property was of the value of twelve pence or under; Stat. West. 1 (3 Edw. I.), c. 15. This distinction was abolished in England by 7 & 8 Geo. IV. c. 29, and is recognized in only a few of the United States. Grand larceny was a capital offence, but clergyable unless attended with certain aggravations. Petty larceny was punishable with whipping, "or some such corporal punishment less than death;" and, being a felony, it was subject to forfeiture, whether upon conviction or flight. See 1 Bish. Cr. L. § 679; LARCENY.

GRAND REMONSTRANCE. The Grand Remonstrance was a document presented by Parliament to King Charles I., Nov. 22, 1641, protesting against his misgovernment: A forerunner of the Civil War that preceded the Commonwealth (1649-1653). Stand. Dict.

GRAND SERJEANTY. See SERJEANTY.

GRANDCHILDREN. The children of one's children. Sometimes these may claim bequests given in a will to children; though in general they can make no such claim; 6 Co. 16.

The term grandchildren has been held to include great-grandchildren; 2 Eden 194; but *contra*, 3 Barb. Ch. 488, 505; 3 N. Y. 538.

See CHILD; CONSTRUCTION.

GRANDFATHER. The father of one's father or mother. The father's father is called the paternal grandfather; the mother's father is the maternal grandfather.

GRANDFATHER CLAUSE. A clause in the constitution of some of the southern states allowing descendants of voters prior to the Civil War to vote without regard to the customary property and literacy requirements. Stand. Dict.

GRANDMOTHER. The mother of one's father or mother. The father's mother is called the paternal grandmother; the mother's mother is the maternal grandmother.

GRANGE. A farm furnished with barns, granaries, stables, and all conveniences for husbandry. Co. Litt. 5 a.

A combination, society, or association of farmers for the promotion of the interests of agriculture, by abolishing the restraints and

burdens imposed on it by railway and other companies, and by getting rid of the system of middlemen or agents between the producer and the consumer. Encyc. Dic.

The members of such associations are called grangers, from which was derived the name, applied to certain leading cases, of granger cases, which see.

GRANGER. A member of a grange association. Formerly, a farm steward. Webster. See GRANGE; GRANGER LEGISLATION.

GRANGER CASES. A name applied to six cases decided by the supreme court of the United States in 1876, which are reported in 94 U. S. 113, 155, 165, 170, 180, 181, those most frequently cited being *Munn v. Illinois*, and *C. B. & Q. R. Co. v. Iowa*. They are so called because they arose out of an agitation commenced by the grangers which resulted in the enactment of statutes for the regulation of the tolls and charges of common carriers, warehousemen, and the proprietors of elevators. The enforcement of these acts was resisted and their constitutionality questioned. The supreme court affirmed the common-law doctrine that private property appropriated by the owner to a public use is thereby subjected to public regulation. They also held that the right of regulation was not restrained by the prohibition of the fourteenth amendment of the federal constitution against the taking by the states of private property without due process of law. A text writer, who was at that time a member of the court, says of these cases: "But these decisions left undecided the question how far this legislative power of regulation belonged to the States, and how far it was in the congress of the United States"; Miller, Const. U. S. 397.

As to what are public uses see EMINENT DOMAIN.

GRANGER LEGISLATION. Certain stringent statutes, for the regulation of railway charges, passed by some of the Western states during the decade from 1870 to 1880, the litigation that arose from which is known as the Granger cases. 3 Moore, Carriers 2nd ed., § 9.

Acquired its name from the fact that it was supposed to be in the interest of the farmers. Dembitz, Law Language, p. 163. See GRANGE; GRANGER.

GRANT. A generic term applicable to all transfers of real property. 3 Washb. R. P. 181, 358.

A transfer by deed of that which cannot be passed by livery. Wms. R. P. 147, 149.

An act evidenced by letters patent under the great seal, granting something from the king to a subject. Cruise, Dig. tit. 33, § 4.

A technical term made use of in deeds of conveyance of lands to import a transfer. 3 Washb. R. P. 378; Devl. Deeds 12; 84 Tex. 107.

"This word is taken largely where anything is granted or passed from one (the grantor) to another (the grantee). And in this sense it doth comprehend feoffment, bargains and sales, gifts, leases, charges, and the like; for he that doth give or sell doth grant also. . . . And so some grants are of the land or soil itself; and some are of some profit to be taken out of, or from the soil, as rent, common, etc.; and some are of goods and chattels; and some are of other things, as authorities, elections, etc."; Shepp. Touchst. 228.

The term grant was anciently and in strictness of usage applied to denote the conveyance of incorporeal rights, and it is the appropriate word for that purpose. Such rights are said to lie in grant, and not in livery; for, existing only in idea, in contemplation of law, they cannot be transferred by livery of possession. Of course at common law, a conveyance in writing was necessary; hence they were said to lie in grant, and to pass by the delivery of the deed. By the act of 8 & 9 Vict. c. 106, § 2, and also by statute in some states, as New York, Maine, and Massachusetts, all corporeal hereditaments are said to lie in grant as well as in livery. See 40 N. Y. 140; 59 Me. 100. Grant is now therefore both sufficient,

and technically proper, as a word of conveyance of a freehold estate, and in the largest sense the term comprehends everything that is granted or passed from one to another, and is now applied to every species of property. But although the proper technical word, its employment is not absolutely necessary, and it has been held that other words indicating an intention to grant will answer the purpose; Wms. R. P. 6th Am. ed 201; 5 T. R. 124; 5 B. & C. 101. As to the effect of the word grant in conveyances and how far any covenant is implied therefrom see COVENANT.

Grant was one of the usual words in a feoffment; and a grant differed but little from a feoffment except in the subject-matter; for the operative words used in grants are *dedi et concessi*, "have given and granted." But the simple deed of grant has superseded the ancient feoffment, leases, and releases which were used to convey freehold estates in possession. See, generally, 1 Dav. Conv. 73; 2 id. 76.

The word is also applied in the case of copyholds to indicate the acceptance by the lord of a person as tenant. It is termed an *ordinary grant* when the tenant is admitted in pursuance of a surrender by the preceding tenant; and *voluntary grant* when the land is in possession of the lord discharged from all rights of any tenant, or as it is termed "in hand;" in that case the lord regrants the land to the new tenant to be holden by copy of court roll.

A *grant of personality* is a method of transferring personal property, distinguished from a gift, which is always gratuitous, by being founded upon some consideration or equivalent. Such grants are divided as to their subject-matter into grants of chattels real, which includes leases, assignments, and surrenders of leases, and grants of chattels personal, which consist of transfer of the right and possession of them whereby one renounces and the other acquires all title and interest therein. 2 Sharsw. Bla. Com. 440, and see also id., notes 1, 2, and 3. Such a grant may be by parol; 3 M. & S. 7; but they are usually by assignment or bill of sale in writing. The proper legal designation of such a grant is an "assignment" or bargain or sale; 2 Steph. Com. 102.

Office grant applies to conveyances made by some officer of the law to effect certain purposes where the owner is either unwilling or unable to execute the requisite deeds to pass the title.

Among the modes of conveyance included under office grant are levies and sales to satisfy execution creditors, sales by order or decree of a court of chancery, sales by order or license of court, sales for non-payment of taxes and the like. See Blackw. Tax Title, *passim*; 3 Washb. R. P. 208.

Private grant is a grant by the deed of a private person. See DEED.

Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government.

The public lands of the United States and of the various states have been to a great extent conveyed by deeds or patents issued in virtue of general laws; but many specific grants have also been made, and were the usual method of transfer during the colonial period. See 3 Washb. R. P. 181; 3 Wheat. 543; 6 Pet. 548; 16 id. 367. See LAND GRANT. Uninterrupted possession of land for a period of twenty years or upward, has been often held to raise a presumption of a grant from the state; 4 Harr. (Del.) 521; 20 Ga. 467; 4 Dev. & B. L. 241; 6 Pet. 498; 3 Head 432; 85 Tex. 357; 66 Hun 633; 27 S. W. Rep. (Mo.) 409.

By the word grant, in a treaty, is meant not only a formal grant, but any concession, warrant, order, or permission to survey, possess, or settle, whether written or parol, express, or presumed from possession. Such a grant may be made by law, as well as by patent pursuant to a law; 12 Pet. 410. See 9 Ad. & E. 532; 5 Mass. 472; 9 Pick. 60; TREATY.

The term grant is applied in Scotland to original disposition of land, as when a lord grants land to his tenants; and to gratuitous deeds; in the latter case the donor is said to

grant the deed, an expression unknown in English law; Moz. & W.

The term grant is also applied to the creation or transfer by the government of such rights as pensions, patents, charters, and franchises. See Chit Prerog. 384; and also these several titles.

The word grant is also sometimes used with reference to the allowance of probate, and the issue of letters testamentary, and of administration, as to which see the several titles relating thereto. See LIMITED ADMINISTRATION.

GRANT (v.). To concede; the conferring of something by one person upon another. Synonymous with "give" and "bestow." 249 U. S. 39.

GRANT AND DEMISE. In a lease for years these words create an implied warranty of title and a covenant for quiet enjoyment; 82 U. S. 107. See COVENANT.

GRANT, BARGAIN AND SELL. Words used in instruments of conveyance of real estate. See CONSTRUCTION. From these words, in many states, is implied a covenant of seisin. See COVENANT.

GRANTEE. He to whom a grant is made.

GRANTOR. He by whom a grant is made.

GRANTZ. In Old English Law. Grantees or noblemen. Jac. L. Dict.

GRASS. See EMBLEMENTS.

GRASS WEEK. Rogation week. A term anciently used in the inns of court and chancery.

"Rogation week, so called in the Inns of Court and Chancery because the commons of that week consist chiefly of sallets, with hard eggs, green sauce, etc." Byrne. See ROGATION WEEK; GANG-WEEK.

GRASSHEARTH. In Old English Law. The name of an ancient customary service of tenants' doing one day's work for their landlord.

GRASSON, or GRASSUM. A fine paid upon the transfer of a copyhold estate.

GRATIFICATION. A reward given voluntarily for some service or benefit rendered, without being requested so to do, either expressly or by implication.

GRATIS (Lat.). Without reward or consideration.

When a bailee undertakes to perform some act or work *gratis*, he is answerable for his gross negligence if any loss should be sustained in consequence of it; but a distinction exists between non-feasance and misfeasance,—between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it: in the latter case he is responsible, while in the former he would not, in general, be bound to perform his contract; 4 Johns. 84; 5 Term 148; 2 Ld. Raym. 913.

An appearance *gratis* is one entered without service of process.

GRATIS DICTUM (Lat.). A saying not required; a statement voluntarily made without necessity.

Mere naked assertions, though known to be false, are not the ground of action, as between vendor and vendee. Thus it is not actionable for a vendor of real estate to affirm falsely to the vendee that his estate is worth so much, that he gave so much for it, etc. But fraudulent misrepresentations of particulars in relation to the estate, inducing the buyer to forbear inquiries he would otherwise have made, are not *gratis dicta*; 6 Metc. Mass. 246.

GRATUITOUS. Without valuable or legal consideration. A term applied to deeds of conveyance.

In Old English Law. Voluntary; without force, fear, or favor. Bract. fols. 11, 17.

GRATUITOUS BAILMENT. See

BAILMENT.

GRATUITOUS CONTRACT. In Civil Law. One the object of which is for the benefit of the person with whom it is made, without any profit, received or promised, as a consideration for it: as, for example, a gift. It is sometimes called a contract of beneficence. It is the result of the motive for making them, under which they are termed either gratuitous or onerous. A contract is onerous when a party is required by its terms or nature to do or give something as a consideration. Howe, *Studies in the Civil Law* 107.

GRATUITOUS DEED. One made without consideration. 2 Steph. Com. 47.

GRATUITY. See BONUS; BOUNTY.

GRAVA. In English Law. A grove; a small wood; a coppice or thicket. Co. Litt. 4b.

A thick wood of high trees. Blount.

GRAVAMEN (Lat.). The grievance complained of; the substantial cause of the action. See Greenl. Ev. § 66. The part of a charge which weighs most heavily against the accused. In England, the word is especially applied to grievance complained of by the clergy to the archbishop and bishops in convocation; Phill. Eccl. 1944.

GRAVARE. In old English law, to grieve or aggravate; to injure or oppress. Burrill.

GRAVATIO. An accusation or impeachment. Leg. Ethel. c. 19.

See GRAVARE ET GRAVATIO.

GRAVE. A place where a dead body is interred.

The violation of the grave, by taking up the dead body, or stealing the coffin or grave clothes, is a misdemeanor at common law; 1 Russ. Cr. 414; 6 Sawy. 442; and has been made the subject of statutory enactment in some of the states. See 2 Bish. Cr. L. § 1188; Dears. & B. 169; 19 Pick. 304; 4 Blackf. 328; DEAD BODY.

When a body has once been buried, no one has the right to remove it without the consent of the owner of the grave, or leave of the proper ecclesiastical, municipal, or judicial authority; 130 Mass. 423; 42 Pa. 293.

A singular case, illustrative of this subject, occurred in Louisiana. A son, who inherited a large estate from his mother, buried her with all her jewels, worth two thousand dollars; he then made a sale of all he inherited from his mother for thirty thousand dollars. After this, a thief broke the grave and stole the jewels, which, after his conviction, were left with the clerk of the court, to be delivered to the owner. The son claimed them, and so did the purchaser of the inheritance: it was held that the jewels, although buried with the mother, belonged to the son, and that they passed to the purchaser by a sale of the whole inheritance; 6 Rob. La. 488. See 23 Ir. L. T. 405; CEMETERY; DEAD BODY.

GRAVIA. See GRAVIUS.

GRAVIS. Grievous; great. *Ad grave damnum*, to the grievous damage. 11 Coke 40.

GRAVIUS. A graf; a chief magistrate or officer. A term derived from the more ancient "*grasto*" and used in combination with various other words as an official title in Germany; as *Margravius*, *Rhein-gravius*, *Landgravius*, etc. Spel. Gloss.

GRAY WOOL. See WOOL.

GRAY'S INN. See INNS OF COURT.

GREAT BODILY INJURY. In an instruction as to the danger one must reasonably have apprehended before he may take life the words "great bodily injury" are equivalent to enormous injury, "enormous bodily injury" and "dreadful injury." 47 N. W. Rep. (Ia.) 867.

GREAT ASSIZE. An edict whose date is uncertain, but which was probably

issued during the first years of Henry II.'s reign, developed and set in full working order the imperfect system of "recognition" established by the Norman kings. See RECOGNITION.

GREAT CHARTER. See MAGNA CHARTA.

GREAT LAKES. A name commonly used to designate the five great lakes, viz., Superior, Michigan, Huron, Ontario, and Erie.

The open waters of the Great Lakes are "high seas" within the meaning of the Revised Statutes; 150 U. S. 249. It had been held otherwise in 32 Fed. Rep. 406. The common-law doctrine, as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; 146 U. S. 387. See ADMIRALTY; LAKE.

GREAT LAW, THE, or "The Body of Laws of the Province of Pennsylvania and Territories thereunto belonging. Past at an Assembly held at Chester, *alias* Up-land, the 7th day of the tenth month, called December, 1682."

This was the first code of laws established in Pennsylvania, and is justly celebrated for the provision in its first chapter for liberty of conscience. See Linn's Charter and Laws of Pennsylvania (Harrisburg, 1879), pp. 107, 478, etc.

GREAT SEAL. A seal by virtue of which a great part of the royal authority is exercised. The office of the lord chancellor, or lord keeper, is created by the delivery of the great seal into his custody. There is one great seal for all public acts of state which concern the United Kingdom. The seal of the United States, or of a state, used in the execution of commissions and other public documents is usually termed the great seal of the United States, or of the state, as the case may be.

GREAT TITHES. In Ecclesiastical Law. The more valuable tithes: as, corn, hay, and wood. 3 Burn, Eccl. Law 630, 631; 3 Steph. Com. 127. See TITHE.

GREATLY. The use of the word "greatly" in instructions in a personal injury case, by calling attention to the injury by the repeated expressions "greatly injured," "greatly wounded" and "suffered greatly" is error, either to mislead the jury to understand there could be no recovery unless the injury was great, or to give them the impression that the trial judge considered the injury great. 137 Ky. 696, 126 S. W. 362.

GREE. Satisfaction for an offence committed or injury done. Cowel.

GREEN CLOTH. An English board or court of justice, composed of the lord steward and inferior officers, and held in the royal household; so named from the cloth upon the board at which it was held.

GREEN SILVER. A feudal custom in the manor of Writtel, in Essex, where every tenant whose front door opens to Greenbury shall pay a half-penny yearly to the lord, by the name of "green silver" or "rent." Cowel.

GREEN WAX. In English Law. The name of the estreats of fines, issues, and amercements in the exchequer, delivered to the sheriff under the seal of that court, which is made with green wax.

GREENBACK. This term is the ordinary and almost exclusive name popularly applied to all United States Treasury issues, and is not applied to any other species of money; 23 Ind. 121; but this term alone is not a proper denomination for these notes; 61 Ala. 222. See LEGAL TENDER.

GREENHEW. In Forest Law. The same as Vert. (*q. v.*). *Termes de la Ley*.

GREFFE. A prothonotary's office. English. See PROTHONOTARY.

GREFFIERS. In French Law. Registrars, or clerks of the courts. They

are officials attached to the courts to assist the judges in keeping the minutes, writing out judgments, orders, and other decisions given by the tribunals, and deliver copies thereof to the applicants.

GREGORIAN CALENDAR. See CALENDAR.

GREGORIAN CODE. See CODE.

GREGORIAN EPOCH. The time from which the Gregorian calendar or computation dates; i. e. from the year 1582.

GREMIO. In Spanish Law. The union of merchants, artisans, laborers, or other persons who follow the same pursuits and are governed by the same regulations. The word *guild*, in English, has nearly the same signification.

GREMIUM (Lat.). Bosom. Ainsworth, Dict. *De gremio mittere*, to send from their bosom; used of one sent by an ecclesiastical corporation or body. *Alatere mittere*, to send from his side, or one sent by an individual: as, a legate sent by the pope. Du Cange. In English law, an inheritance is said to be in *gremio legis*, in the bosom or under the protection of the law, when it is in abeyance. See IN NUBIBUS.

GRENVILLE ACT. The statute 10 Geo. III. c. 16, by which the jurisdiction over parliamentary election petitions was transferred from the whole house of commons to select committees. Repealed by 9 Geo. IV. c. 22.

GRESSUME (variously spelled *Gres-same*, *Gressum*, *Grossome*; Scotch, *grasum*).

In Old English Law. A fine due from a copyholder on the death of his lord. Plovid. fol. 271, 285; 1 Stra. 654. Cowel derives it from *gersum*.

In Scotland. *Grassum* is a fine paid for the making or renewing of a lease. Paterson.

GRETNA GREEN. A farmstead near the village of Springfield, Dumfriesshire, Scotland, eight miles northwest of Carlisle. Cent. Dict. The name was afterward applied to the village which became notorious for the celebration of irregular marriages. By the law of Scotland nothing was required to constitute a marriage but the mutual declaration of the parties in the presence of witnesses—a ceremony which could be performed instantly, and it was immaterial whether or not the parties were minors. These conditions afforded an easy method of evading the Marriage Act, 26 Geo. II. c. 33, which required the publication of banns or a license. By act 19 & 20 Vict. c. 96, § 1, no irregular marriage in Scotland is now valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage.

GRETNA GREEN MARRIAGE. See GRETNA GREEN.

GREVA. In old records. The seashore, sand, or beach. 2 Mon. Angl. 635; Cowel.

GREVE. A word of power or authority. Cowel.

GREY MERINO. See WOOL.

GRIEVED. Aggrieved. 8 East 22.

GRITH. Peace; protection. *Termes de la Ley*.

GRITHBRECH (Sax. *grith*, peace, and *brych*, breaking). Breach of the king's peace, as opposed to *frithbrech*, a breach of the nation's peace with other nations. Leges Hen. I. c. 36; Chart. Willielm, Cong. Eccles. S. Pauli in Hist. ejusd. fol. 90.

GRITHSTOLE. A place of sanctuary. Cowel.

GROCER. In Old English Law. A merchant or trader who engrossed all vendible merchandise; an engrosser (*q. v.*). St. 87 Edw. III. c. 5.

GROCERIES. Articles of provision; the wares of a grocer; general supplies for table and household use.

Shovels, pails, and buckets have been held not to be groceries, although usually kept in a country grocery shop; 113 Mass. 385. It is a question of fact whether wines and liquors are groceries; 12 Mich. 135. A grocery has been held to be an "offensive trade or calling" within a prohibition of use of a dwelling-house; 101 Mass. 531. Groceries kept as part of the stock, by a merchant, are not "provisions found on hand for family use," within the meaning of an exemption law; 73 Mo. 575. See **PROVISIONS**.

GROOM. The name of a servant in some inferior place, generally applied to servants in stables. Jacob.

The designation, with an explanatory affix, of various offices in the British royal house hold, as Grooms in Waiting, and Groom of the Robes; also, formerly, Groom Porter, Groom of the Stole (q. v.), etc. Byrne.

GROOM OF THE STOLE. In England an officer of the royal household who has charge of the king's wardrobe.

GROOM PORTER. An officer belonging to the royal household. Jacob.

GRONNA. A bog; a deep hollow or pit. Cowel. A deep pit or place where turfs are dug for fuel. Hoved. 438.

GROSS. Absolute, entire. A thing in gross exists in its own right, and not as an appendage to another thing. See **IN GROSS**. WILFUL.

GROSS ADVENTURE. In Maritime Law. A maritime or bottomry loan. It is so called because the lender exposes his money to the perils of the sea, and contributes to the gross or general average. Pothier; Pardessus, Dr. Com.

GROSS AVERAGE. In Maritime Law. That kind of average which falls on the ship, cargo, and freight, and is distinguished from particular average. See **AVERAGE**.

GROSS EARNINGS. See **EARNINGS**.

GROSS NEGLIGENCE. "Gross neglect" is either an intentional wrong, or such a reckless disregard of security and right, as to imply bad faith, and, therefore squints at fraud, and is tantamount to the *magna culpa* of the civil law, which in some respects, is *quasi criminal*. 4 Bush (Ky.) 509. See **WILFUL NEGLIGENCE**.

GROSS NEGLIGENCE. The omission of that care which even inattentive and thoughtless men never fail to take of their own property. Jones, Bailm.; 23 Conn. 437; 3 Hurlst. & C. 337.

Such as evidences wilfulness; such a gross want of care and regard for the right of others as to justify the presumption of wilfulness or wantonness; 2 Thomp. Neg. 1264, § 52; such as implies a disregard of consequences or a willingness to inflict injury; Deering, Neg. § 29; 139 Ill. 506.

Lata culpa, or, as the Roman lawyers most accurately called it, *dolo proxima*, is, in practice, considered as equivalent to *dolus*, or fraud itself. It must not be confounded, however, with fraud; for it may exist consistently with good faith and honesty of intention, according to common-law authorities; 32 Vt. 652; Shearm. & Red. Neg. § 3; Webb, Poll. Torts 538, n.

The distinction between degrees of negligence is not very sharply drawn in the later cases. See **BAILMENT**; **NEGLIGENCE**.

The intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another; a thoughtless disregard of consequences without the exertion of any effort to avoid them. 21 S. W. Rep. (Tex.) 775; 87 Mich. 400. It has been held to have no legal significance which imports other than a want of due care; 13 So. Rep. (Ala.) 80.

GROSS WEIGHT. The total weight

of goods or merchandise, with the chests, bags, and the like, from which are to be deducted tare and tret.

GROSSE AVANTURE (Fr.). In French Marine Law. The contract of bottomry. Ord. Mar. liv. 3, tit. 5.

GROSSE AVENTURE, CONTRAT A LA. In French marine law, a contract of bottomry (q. v.). Burrill. See **GROSS ADVENTURE**.

GROSSE BOIS. Timber. Cowel.

GROSSEMENT (L. Fr.). Largely; greatly. *Grossement enciente or ensient.* Big with child; in the last stage of pregnancy. Plowd. 76.

GROSSOME. In Old English Law. A fine paid for a lease. Corrupted from *gersum*. Plowd. fol. 270, 285; Cowel.

GROUND. Land; soil; earth. See **LAND**.

It may include an improved town lot; 76 Pa. 378.

GROUND ANNUAL. In Scotch Law. An annual rent of two kinds; *first*, the feu-duties payable to the lords of erection and their successors; *second*, the rents reserved for building-lots in a city, where *sub-feus* are prohibited. This rent is in the nature of a perpetual annuity. Bell, Dict.; Erskine, Inst. 11. 3. 52.

GROUND LANDLORD. The grantor of an estate on which a ground-rent is reserved.

GROUND OF ACTION. The foundation, basis, or data, upon which a cause of action rests. See 24 Com. 33.

GROUND RENT. A rent reserved to himself and his heirs, by the grantor of land in fee-simple, out of the land conveyed. See 9 Watts 262; 8 W. & S. 185; 2 Am. L. Reg. 577.

In Pennsylvania, it is real estate, and in cases of intestacy goes to the heir; 14 Pa. 444. See 147 id. 319. The interest of the owner of the rent is an estate altogether distinct and of a very different nature from that which the owner of the land has in the land itself. Each is the owner of a fee-simple estate. The one has an estate of inheritance in the rent, and the other has an estate of inheritance in the land out of which the rent issues. The one is an incorporeal inheritance in fee, and the other is a corporeal inheritance in fee; Irwin v. Bank of United States, 1 Pa. 349, per Kennedy, J.; 47 Md. 300. So, the owner of the rent is not liable for any part of the taxes assessed upon the owner of the land out of which the rent issues; 1 Whart. 72; 4 Watts 98. Being real estate, it is bound by a judgment, and may be mortgaged like other real estate. It is a rent-service; 1 Whart. 337.

A ground-rent, being a rent-service, is, of course, subject to all the incidents of such a rent. Thus, it is distrainable of *common right*, that is, by the common law; Co. Litt. 142 a; 9 Watts 262. So, also, it may be apportioned; 1 Whart. 337; 58 Md. 323; 56 id. 61. And this sometimes takes place by operation of law, as when the owner of the rent purchases part of the land; in which case the rent is apportioned, and extinguished *pro tanto*; Littleton 232. And the reason of the extinguishment is that a rent-service is given as a return for the possession of the land. Thus, upon the enjoyment of the lands depends the obligation to pay the rent; and if the owner of the rent purchases part of the land, the tenant, no longer enjoying that portion, is not liable to pay rent for it, and so much of the rent as issued out of that portion is, consequently, extinguished. See 2 Bla. Com. 41; 1 Whart. 235, 352; 3 id. 197, 365.

At law, the legal ownership of these two estates—that in the rent and that in the land out of which it issues—can coexist only while they are held by different persons or in different rights; for the moment they unite in one person in the same right, the rent is merged and extinguished; 2

Binn. 142; 6 Whart. 382; 5 Watts 457. But if the one estate or intestate be legal and the other equitable, there is no merger; 6 Whart. 238. In equity, however, this doctrine of merger is subject to very great qualification. A merger is not favored in equity; and the doctrine there is that although in some cases, where the legal estates unite in the same person in the same right, a merger will take place against the intention of the party whose interests are united (see 8 Whart. 421, and cases there cited), yet, as a general rule, the *intention*, actual or presumed, of such party will govern; and where no intention is expressed, if it appears most for his advantage that a merger should not take place, such will be presumed to have been his intention; and that it is only in cases where it is perfectly indifferent to the party thus interested that, in equity, a merger occurs; 5 Watts 457; 8 id. 146; 4 Whart. 421; 6 id. 283; 1 W. & S. 487.

A ground-rent being a freehold estate, created by deed and perpetual by the terms of its creation, no mere lapse of time without demand of payment raises, at common law, a presumption that the estate has been released; 1 Whart. 229. But this is otherwise in Pennsylvania now, by act of April 27, 1855, sec. 7, P. L. 369, whereby a presumption of a release or extinguishment is created where no payment, claim, or demand is made for the rent, nor any declaration or acknowledgment of its existence made by the owner of the premises subject to the rent, for the period of twenty-one years. This applies to the estate in the rent; and comprehends the future payments. And this act makes no exception in behalf of persons under disability when the title accrues, nor of persons taking as heirs at law or distributees; where a life tenant in ground rent released the same absolutely, as against the remainderman the limitation commenced to run from the date on which the first payment thereafter became due and unpaid, rather than at the death of the life tenant; 152 Pa. 258. It has been held that this act, affecting the remedy merely, is not unconstitutional as impairing the obligation of a contract; Biddle v. Hooven, 120 Pa. 221. But this case is criticised and the Pennsylvania cases reviewed in 34 Am. L. Reg. n. s. 557. But independently of this act of assembly, *arrearages* of rent which had fallen due twenty years before commencement of suit might be presumed to have been paid; 1 Whart. 229. These *arrearages* are a lien upon the land out of which the rent issues; but, as a general rule, the lien is discharged by a judicial sale of the land, and attaches to the fund raised by the sale. See 2 Binn. 140; 3 W. & S. 9; 4 Whart. 516; 2 Watts 378; 1 Pa. 349.

Ground rents in Pennsylvania were formerly made irredeemable, usually after the lapse of a certain period after their creation. But now the creation of such is forbidden by statute. Act of 22 April, 1850. But this does not prohibit the reservation of ground-rents redeemable only on the death of a person in whom a life interest in the rents is vested; 11 W. N. Cas. (Pa.) 11. The Act of April 15, 1869, providing for the extinguishment of irredeemable ground-rents, therefore created, by legal proceedings instituted by the owner of the land, without the consent of the owner of the ground-rent, was declared unconstitutional; 67 Pa. 479.

As ground-rent deeds are usually drawn, the owner of the rent has three remedies for the recovery of the *arrearages*, viz., by action (of debt or covenant; but debt is now seldom employed), distress, and (for want of sufficient distress) the right to re-enter and hold the land as of the grantor's former estate. See 2 Am. L. Reg. 577; 3 id. 63; Cadw. Gr. Rents; Mitch. R. P.

The term "ground rents" held to import not merely the rents that were to accrue during the residue of a lease . . . but included the reversion as well, it appearing that the entire beneficial interest of the owner of the ground rents and the reversion was undoubtedly the subject of the sale and within the contemplation of the buyer and seller. 229 U. S. 530.

GROUNDAGE. In Maritime Law. The consideration paid for standing a ship in a port. Jacob, Law Dict.

GROWING CROPS. Growing crops of grain, potatoes, turnips, and all annual crops raised by the cultivation of man, are in certain cases personal chattels, and in others, part of the realty. A crop is to be considered as growing from the time the seed is put in the ground, at which time the seed is no longer a chattel, but becomes part of the realty, and passes with a sale of it: 69 Ala. 435. If planted by the owner of the land, they are a part of the realty, but may by sale become personal chattels, if they are fit for harvest, and the sale contemplates their being out and carried off, and not a right in the vendee to enter and cultivate. So even with trees: 4 Metc. Mass. 590; 9 B. & C. 561; 7 N. H. 522; 11 Co. 50. The distinction has been made that growing crops of grain and annual productions raised by cultivation and the industry of man are personal chattels; while trees, fruit, or grass and other natural products of the earth are parcel of the land; 1 Denio 550. But if the owner in fee conveys land before the crop is severed, the crop passes with the land as appertaining to it; 41 Ill. 466; 33 Pa. 254; 9 Rob. (La.) 258; and the same rule applies to foreclosure sales; 8 Wend. 534; 29 Pa. 68; 42 N. Y. 150. See 20 Am. L. Reg. 615, n. But before the foreclosure sale is confirmed, the purchaser has no title, with right to possession in the crops growing on the land at the time of sale, that will entitle him to maintain replevin therefor after they have been severed by the person in possession; 46 Wis. 801. Though growing crops, unless reserved, pass under a conveyance of the land, they are subject to levy and sale the same as other personal property; 47 Minn. 525. If a tenant, who holds for a certain time, plant annual crops, or even trees in a nursery for the purposes of transplantation and sale, they are personal chattels when fit for harvest; 1 Metc. Mass. 27, 313; 4 Taunt. 316, per Heath, J. If planted by a tenant for an uncertain period, they are regarded, whether mature or not, in many respects as personal property, but liable to become part of the realty if the tenant voluntarily abandons or forfeits possession of the premises; 5 Co. 116 a; 5 Halst. 128; Co. Litt. 55; 2 Johns 418, 421, n. See 2 Dana 206; 2 Rawle 161; 1 Washb. R. P. 3.

See as to validity and effect of mortgages on crops planted and unplanted, **MORTGAGE.**

Between the lessor of lands and his lessee on shares, growing crops are personal property, and they may be sold by parol as against a subsequent grantee, especially where the latter has notice of such sale; 39 Ill. App. 404. The grantor of farm lands may reserve the growing crops by oral agreement; 36 N. E. Rep. (Ind.) 914.

The measure of damages for the destruction of a crop planted, but not yet up, is the rental value of the land and the cost of the seed and labor; but when the crop is somewhat matured, so that the product can be fairly determined, the value thereof when destroyed is the measure of damages; 43 Ill. App. 108. See 56 Ark. 612; 57 id. 512. Where a crop is lost through the wrongful act of another, the measure of damages is the market value of the crop less the cost of producing, harvesting, and marketing it; 8 Wash. 337; 4 Tex. Civ. App. 550. See 25 S. W. Rep. (Tex.) 1023.

GROWTH HALFPENNY. A rate paid in some places for the tithe of every fat beast, ox, or other unfruitful cattle. Clayt. 92.

GRUARI. The principal officers of a forest.

GUADALUPE HIDALGO, TREATY OF. A treaty effected in 1848 between the United States and Mexico which ceded to the United States New Mexico and Upper California in return for a payment of fifteen million dollars. Followed in 1853-54 by the Gadsden Treaty or Purchase (q. v.) by which new acquisitions of land were made, and which attempted to settle the differences

which had arisen between the two powers under the earlier treaty. 3 Von Holst, Const. Hist. U. S., p. 344-347; 5 id., p. 6.

GUADIA. A pledge; a custom. Spel. Gloss; Calv. Lex. See **WADIA.**

GUARANTEE. He to whom a guaranty is made. Also, to make oneself responsible for the obligation of another.

The guarantee is entitled to receive payment, in the first place, from the debtor, and, secondly, from the guarantor. He must be careful not to give time, beyond that stipulated in the original agreement, to the debtor, without the consent of the guarantor. The guarantee should, at the instance of the guarantor, bring an action against the principal for the recovery of the debt; 2 Johns. Ch. 554; 17 Johns. 384; 8 S. & R. 116; 10 id. 33; 2 Bro. Ch. 579, 582; 2 Ves. 542. But the mere omission of the guarantee to sue the principal debtor will not, in general, discharge the guarantor; 8 S. & R. 112; 6 Binn. 292. See **GUARANTY.**

Treaty. The best means of securing treaties, and one which is still in use generally, is the guarantee of such other States as are not directly affected by the treaty. Such guarantee is a kind of accession (q. v.) to the guaranteed treaty, and a treaty in itself—namely, the promise of the guarantor eventually to do what is in his power to compel the contracting party or parties to execute the treaty. Guarantee of a treaty is a species only of guarantee in general. Opp. Int. L. I § 528.

GUARANTEED STOCK. See **Stock.**

GUARANTOR. He who makes a guaranty.

GUARANTY. An undertaking to answer for another's liability, and collateral thereto. A collateral undertaking to pay the debt of another in case he does not pay it. Shaw, C. J., 24 Pick. 252.

A provision to answer for the payment of some debt, or the performance or some duty in the case of the failure of some person who, in the first instance, is liable for such payment or performance; 60 N. Y. 438; Bayl. Sur. & Guar. 2.

A promise to answer for the debt, default, or miscarriage of another person; 94 Cal. 98. See 73 Ill. 13.

It is distinguished from suretyship in being a secondary, while that is a primary, obligation; or, as sometimes defined, guaranty is an undertaking that the debtor shall pay; suretyship, that the debt shall be paid. Or again, a contract of suretyship creates a liability for the performance of the act in question at the proper time, while the contract of guaranty creates a liability for the ability of the debtor to perform the act; Bayl. Sur. & Guar. 3. Guaranty is an engagement to pay on a debtor's insolvency, if due diligence be used to obtain payment; 52 Pa. 440.

The undertaking is essentially in the alternative. A guarantor cannot be sued as a promisor, as the surety may; his contract must be specially set forth. A guarantor warrants the solvency of the promisor, which an indorser does not; 8 Pick. 423.

The distinction between suretyship and guaranty has been expressed as follows: A surety is usually bound with his principal by the same instrument, executed at the same time, and on the same consideration. He is an original promisor and debtor from the beginning, and is held, ordinarily, to know every default of his principal. Usually, he will not be discharged, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often supported on a separate consideration from that supporting the contract of the principal. The original contract of his principal is not his contract,

and he is not bound to take notice of its non-performance. He is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the default of the principal. Brandt, Sur. & Guar. § 1. See also, 53 Pa. 438, 525; 87 Ind. 560; 63 Ala. 419; 135 N. Y. 423. A written guaranty which fails to show on its face the person to whom the guaranty is made is void; 17 N. Y. Supp. 509; and where a contract contains no guaranty, parol evidence of one is inadmissible; 146 U. S. 42.

At common law, a guaranty could be made by parol; but by the Statute of Frauds, 29 Car. II. c. 3, re-enacted almost in terms in the several states, it is provided that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

While, under this statute "no action shall be brought" on a contract not in writing, etc., yet such a contract may be enforced by a court against an attorney, by summary proceedings; 1 Or. & J. 374.

"Any special promise" in the act does not apply to promises implied in law; Brandt, Sur. & Guar. § 53.

The following classes of promises have been held not within the statute, and valid though made by parol.

First, where there is a liability pre-existent to the new promise.

1. Where the principal debtor is discharged by the new promise being made; 3 Bingham, N. C. 889; 28 Vt. 185; 8 Gray 233; 1 Q. B. 933; 8 Johns. 376; 13 Md. 181; Bro. Stat. Fr. §§ 166, 193; and an entry of such discharge in the creditor's books is sufficient proof; 3 Hill, S. C. 41. This may be done by agreement to that effect; 1 Allen 405; by novation, by substitution, or by discharge under final process; 1 B. & Ald. 297; 18 S. W. Rep. (Tex.) 646; but mere forbearance, or an agreement to forbear pressing the claim, is not enough; 1 Sm. L. Cas. 387; 6 Vt. 668.

2. Where the principal obligation is void or not enforceable when the new promise is made, and this is contemplated by the parties. But if not so contemplated, then the new promise is void; Burge, Surety 10; 1 Burr. 373. But see, on this point, 17 Md. 288; 18 Johns. 175; 6 Ga. 14.

3. So where the promise does not refer to the particular debt, or where this is unascertained; 1 Wils. 305.

In these three classes the principal obligation ceases to exist after the new promise is made.

4. Where the promisor undertakes for his own debt. But the mere fact that he is indebted will not suffice, unless his promise refers to that debt; nor is it sufficient if he subsequently becomes indebted on his own account, if not indebted when he promises, or if it is then contingent; 4 Hill, N. Y. 211. See 32 Tex. 255. The provision of the statute does not apply whenever the main purpose of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, although it may be in form a promise to pay the debt of another; 141 U. S. 479. So, if the vendee of land promise to pay the purchase-money on a debt due by the vendor; 82 Tex. 255.

5. Where the new promise is in consideration of property placed by the debtor in the promisor's hands; 1 Gray 391; 41 Me. 559; 23 Cal. 187; 73 Ill. 442. And where the new promise is made in a transaction which is in substance a sale to the promisor; Brandt, Sur. & Guar. § 65.

6. Where the promise does not relate to the promisor's property, but to that of the debtor in the hands of the promisor.

7. Where the promise is made to the debtor, not the creditor; because this is not the debt of "another" than the promisee; 1 Gray 76; 11 Ad. & E. 438.

8. Where the creditor surrenders a lien against the debtor or on his property, which the promisor acquires or is benefited by; 1 Guar. c. 2; Brandt, Sur. & Guar. §§ 62-64; 7 Johns. 463; 2 B. & Ald. 613; 21 N. Y. 412; but not so where the surrender of the lien does not benefit the promisor; 8 Metc. Mass. 396; 21 N. Y. 412; 3 Esp. 84.

In the five last classes, the principal debt may still subsist concurrently with the new promise, and the creditor will have a double remedy; but the fulfilment of the new promise will discharge the principal debt, because he can have but one satisfaction. The repeated dicta, that if the principal debt subsists, the promise is collateral and within the statute, are not sustainable; 30 Vt. 641. But the general doctrine now is that the transaction must amount to a purchase, the engagement for the debt being the consideration therefor, in whole or in part; 1 Gray 391; 5 Cush. 488.

Where one owes a debt to another, and promises to pay his debt to a creditor of such other party, the promise is not within the statute; 5 Greenl. 81; 3 B. & C. 842.

Second, if the new promise is for a liability then first incurred, it is original, if exclusive credit is given to the promisor; 5 Allen 370; 13 Gray 613; 28 Conn. 544; Browne, Stat. Fr. § 195. Whether exclusive credit is so given is a question of fact for the jury; 7 Gill 7. Merely charging the debtor on a book-account is not conclusive.

Whether promises merely to indemnify come within the statute is not wholly settled; Browne, Stat. Fr. § 153; Brandt, Sur. & Guar. §§ 59, 61. In many cases they are held to be original promises, and not within the statute; 15 Johns. 425; 4 Wend. 657. But few of the cases, however, have been decided solely on this ground, most of them falling within the classes of original promises before specified. On principle, such contracts seem within the statute if there is a liability on the part of any third person to the promisee. If not, these promises would be original under class seven, above. Where the indemnity is against the promisor's own default, he is already liable without his promise to indemnify; and to make the promise collateral would make the statute a covert fraud; 10 Ad. & E. 453; 1 Gray 391; 10 Johns. 242; 1 Ga. 294; 5 B. Monr. 332; 20 Vt. 205; 10 N. H. 175; 1 Conn. 519; 5 Me. 504. The weight of American authority is said to be in favor of applying the statute to cases of indemnity; Brandt, Sur. & Guar. § 59, n. When the promise to indemnify is in fact a promise to pay the debt of another it is within the statute. See 21 N. Y. 412. A promise to indemnify another against loss in becoming surety on a replevin bond is within the statute; 12 Ohio St. 219. So on a bond for stay of execution; 111 Pa. 471. But a promise to indemnify one if he will become bail in a criminal case has been held not within the statute; 4 B. & S. 414; 119 Ind. 85.

Third, guaranties may be given for liabilities thereafter to be incurred, and will attach when the liability actually accrues. In this class the promise will be original, and not within the statute, if credit is given to the promisor exclusively; 2 Term 80; 1 Cowp. 227. See 40 Ill. App. 275. But where the future obligation is contingent merely, the new promise is held not within the statute, on the ground that there is no principal liability when the collateral one is incurred; Browne, Stat. Fr. § 196. But this doctrine is questionable if the agreement distinctly contemplates the contingency; 1 Cra. C. C. 77; 5 Hill, N. Y. 453. An offer to guarantee must be accepted within a reasonable time; but no notice of acceptance is required if property has been delivered under the guaranty; 8 Gray 211; 2 Mich. 511; 54 Fed. Rep. 846; 104 U. S. 159.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor, at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty; or if the receipt from him of a valu-

able consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor, without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract;" 115 U. S. 524. See 84 Am. L. Reg. & Rev. 257.

The agreement of a *del credere* agent to pay for goods sold by him is not within the statute; 23 Vt. 720; 14 N. Y. 267.

The form of the writing is not material: it may consist of one or more writings (provided they refer to each other on their face; 27 Mo. 388; 11 East 142; but see 14 How. 446); in such case it is enough if one be signed; 11 East 142. A minute of a vote of a corporation is sufficient; 14 Allen 407.

There is a conflict of authority as to whether the consideration need appear in the writing. It was finally settled in England that it must; 5 East 10; 4 B. & Ald. 595; but this is now changed by statute 19 & 20 Vict. The cases are reviewed in Brandt, Sur. & Guar. § 82. A seal imports a consideration; *id.* As to the signature of the party to be charged, a seal alone is generally held sufficient; Stra. 764; so is a mark; 49 Barb. 62; 2 M. & S. 286; and a signature by the initials only; 1 Den. 471; 9 Allen 474; and a signature on a telegram; 35 Barb. 463. The signature need not be at the foot of the writing; 2 M. & W. 653.

Guaranty may be made for the tort as well as the contract of another, and then comes under the term *miscarriage* in the statute; 2 B. & Ald. 613; 2 Day 457; 1 Wils. 305; 9 Cow. 154; 14 Pick. 174.

All guaranties need a consideration to support them, none being presumed as in case of promissory notes. A guaranty of the payment of a negotiable promissory note, written by a third person upon a note before its delivery, need express no consideration, even where the law requires the consideration of the guaranty to be expressed in writing; but the consideration which the note upon its face implies to have passed between the original parties is sufficient; 149 U. S. 233. Forbearance to sue is good consideration; Cro. Jac. 683; Browne, Stat. Fr. § 190; 4 Johns. 257; 6 Conn. 81; 27 L. J. Exch. 120; 21 Fed. Rep. 836; 77 Ind. 1. Where the guaranty is contemporaneous with the principal obligation, it shares the consideration of the latter; 8 Johns. 29; 1 Paine 580; 2 Pet. 170; 3 Mich. 336; 36 N. H. 73.

A guaranty may be for a single act, or may be continuous. The cases are conflicting, as the question is purely one of the intention of the particular contract; Brandt, Sur. & Guar. 156. The tendency in this country is said to be against construing guaranties as continuing, unless the intention of the parties is so clear as not to admit of a reasonable doubt; Bayl. Sur. & Guar. 7, citing 33 Ohio St. 177; s. c. 30 Am. R. 572; Lent v. Padleford, 2 Am. Lead. Cas. 141; 24 Wend. 82; 145 Ill. 488. If the object be to give a standing credit to be used from time to time, either indefinitely or for a fixed period, the liability is continuing; 40 Ill. App. 333; 3 Ind. App. 1; but if no time is fixed and nothing indicates the continuance of the obligation, the presumption is in favor of a limited liability as to time; Bayl. Sur. & Guar. 7; 62 Barb. 351. A guaranty of any bills of account for goods sold another to a certain amount is a continuing guaranty; 40 Ill. App. 333. A sealed continuing guaranty is revoked by the death of the guarantor; 22 W. N. C. (Pa.) 457.

The authorities are not agreed as to the negotiability of a guaranty. It is held that a guaranty which is a separate and distinct instrument is not negotiable separately; 3 W. & S. 272; 4 Chandl. 151; 14 Vt. 233; 31 Me. 536; 31 Barb. 92; 21 Pick. 140. The right of the acceptor of a bill, to the benefit of a guaranty given to him, is not transferable

to a holder of the bill, unless it was given for the purpose of being exhibited to other parties; 3 Ch. App. 756. But if a guaranty is on a negotiable note, it is negotiable with the note; and if the note is to bearer, the guaranty has been held to be negotiable in itself; 24 Wend. 456; 6 Humphr. 261. But an equitable interest passes by transfer, and the assignee may sue in the name of the assignor; 12 S. & R. 100; 20 Vt. 506. It has been held that no suit can be maintained upon a guaranty except by the person with whom it was made; Bayl. Sur. & Guar. 14; 8 Watts 361; but it has also been held that a guaranty of a note may be sued on by any person who advances money on it, but that it is not negotiable unless made upon the note the payment of which it guarantees; Bayl. Sur. & Guar. 15; 26 Wend. 425.

It is held that a guaranty is not enforceable by others than those to whom it is directed; 3 McLean 279; 1 Gray 317; 6 Watts 182; 10 Ala. N. S. 793; although they advance goods thereon; 4 Cra. 224.

In one case it was held that the guarantor was not bound where the guaranty was addressed to two and acted on by one of them only; 3 Tex. 199. It was held, also, that the guaranty was not enforceable by the survivor of two to whom it was addressed, for causes occurring since the decease of the other; 7 Term 254.

In the case of promissory notes, a distinction has sometimes been made between a guaranty of payment and a guaranty of collectibility; the latter requiring that the holder shall diligently prosecute the principal debtor without avail; 4 Wis. 190; 25 Conn. 576; 6 Barb. 547; 26 Me. 358; 4 Conn. 527; 48 Minn. 207.

It has in some cases been held that an indorsement in blank on a promissory note by a stranger to the note was *prima facie* a guaranty; 37 Ill. App. 616. A second acceptance on a bill of exchange may amount to a guaranty; 2 Camp. 447.

A guarantor is discharged by a material alteration in the contract without his consent. Brandt, Sur. & Guar. § 378; 137 N. Y. 307; 85 Ia. 617. Modification of a contract made by the contractor and the owner will not release the guarantor, if they are such as are permitted by the terms of the contract; 155 Pa. 36. See SURETYSHIP.

The guarantor may also be discharged by the neglect of the creditor in pursuing the principal debtor. The same strictness as to demand and notice is not necessary to charge a guarantor as is required to charge an indorser; but in the case of a guaranteed note the demand on the maker must be made in a reasonable time, and if he is solvent at the time of the maturity of the note, and remains so for such reasonable time afterwards, the guarantor does not become liable for his subsequent insolvency; 2 H. Bla. 612; 13 Pick. 554. Notice of non-payment must also be given to the guarantor; 2 Ohio 430; but where the name of the guarantor of a promissory note does not appear on the note, such notice is not necessary unless damage is sustained thereby, and in such case the guarantor is discharged only to the extent of such damage; 12 Pet. 497. One who guarantees that another will pay promptly for goods to be purchased is not liable where the purchaser becomes insolvent after the guaranty is given, and the seller gives the guarantor no notice of the purchaser's failure to pay; 145 Ill. 488. A presentment for payment is now decided not to be necessary in order to charge one who guarantees the due payment of a bill or note; 5 M. & G. 559. It is not necessary that an action should be brought against the principal debtor; 7 Pet. 113. See, also, 2 Watts 128; 11 Wend. 620.

From the close connection of guaranty with suretyship, it is convenient to consider many of the principles common to both under the head of suretyship, which article see.

Where an innocent person acts upon a guaranty, the execution of which was procured by misrepresentation, the burden devolves upon the guarantor to show that

he was free from negligence; the rule in such cases being the same with respect to the execution of guaranties as to that of negotiable instruments; 17 N. Y. Supp. 764.

Whether a guaranty is absolute or special is a question of fact; 37 Ill. App. 616.

Where the guaranty of a written contract is executed on the same paper, notice of acceptance by the person for whose benefit it is made, is unnecessary; 130 Ind. 194. See SURETSHIP.

It is not within the general scope of a partner's authority to give guaranties in the name of the firm; Wood's Byles, Bills 48; 35 Minn. 229. And an officer of a company cannot bind it as surety or guarantor; 91 Pa. 367.

Consult Fell on Guaranty; Burge; Theobald; Putman on Suretyship; Browne; Reed, on Statute of Frauds; Addison; Chitty; Parsons; Story on Contracts. Brandt, Suretyship & Guaranty.

See, generally, SURETSHIP.

GUARANTY COMPANY.

A "guaranty company" is such a corporation as may become surety for another, and an insurance company is not a guaranty or security company within the ordinary meaning of the term. 115 Ky. 787, 74 S. W. 1052.

See SURETY COMPANY.

GUARANTY FUND. A depositor's guaranty fund is a fund created by law in many states for the purpose of securing to bank depositors the full repayment of their deposits in case of the insolvency of any of the banks existing under the laws of the state. Accumulated by an assessment on each bank of a certain per cent of its average daily deposits, and under the control of a state banking board. 219 U. S. 109.

As used and defined in the New York Banking Law, "the term 'guaranty fund' means a fund created by a mutual non-stock corporation from its earnings or from contributions, which is not available for the payment of expenses, so long as such corporation has any undivided profits, or for the payment of dividends, and against which losses upon its investments, whether resulting from the depreciation in the value of its securities or otherwise, may be charged, without encroaching upon its undivided profits or net earnings, until such guaranty fund is exhausted."

GUARANTY INSURANCE. See INSURANCE.

GUARDAGE. The condition of one who is under a guardian. A state of wardship.

GUARDIA. See GARDIA.

GUARDIAN. One who legally has the care and management of the person, or the estate, or both, of a child during his minority. Reeve, Dom. Rel. 311.

The term Guardian has been held to be synonymous with "next friend"; 80 Fla. 210.

A person having the control of the property of a minor without that of his person is known in the civil law, as well as in some of the states of the United States, by the name of curator. 1 Lec. él. du Droit Civ. Rom. 241. The guardian of the person is called "tutor." Tiff. Pers. & Dom. Rel. 295.

Guardian by chancery. This guardianship, although unknown at the common law, is well established in practice now. It grew up in the time of William III., and had its foundation in the royal prerogative of the king as *parens patrie*. 2 Fonbl. Eq. 246.

This power the sovereign is presumed to have delegated to the chancellor; 10 Ves. 63; 2 P. Wms. 118; Reeve, Dom. Rel. 317. By virtue of it, the chancellor appoints a guardian where there is none, and exercises a superintending control over all guardians, however appointed, removing them for misconduct and appointing others in their stead; Co. Litt. 89; 1 P. Wms. 703; 1 Ves. 100; 2 Kent 227. But only, it is said, where the minor has property; Tiffany, Dom. Rel. 800; 2 Russ. 1, 20.

An infant with property becomes a ward of court (1) if an action is commenced in his name; (2) if an order is made on petition or summons for the appointment of a guardian; if an order is made in like manner for maintenance; (4) if a fund belonging to an infant is paid into court under the acts for the relief of trustees; Brett, L. Cas. Mod. Eq. 95. See Simpson, Inf. 2d. ed. 241; 1 Sharsw. Bla. Com. 462 note 8.

This power, in the United States, resides in courts of equity; 1 Johns. Ch. 99; 2 id. 439; 139 Ind. 268; but more commonly by statute in probate or surrogate courts; 2 Kent 226; 30 Miss. 458; 3 Bradf. Surr. 183.

Guardian by nature is the father, and, on his death, the mother; 2 Kent 220; 2 Root 320; 2 Wend. 158; 4 Mass. 675.

This guardianship, by the common law, extends only to the person, and the subject of it is the heir apparent, and not the other children,—not even the daughter when there are no sons; for they are but presumptive heirs only, since their right may be defeated by the birth of a son after their father's decease. But as all the children male and female equally inherit with us, this guardianship extends to all the children, as an inherent right in their parents during their minority; 2 Kent 220. In default of both parents, the natural guardian is the grandfather or grandmother, or next of kin; 114 U. S. 218; 60 N. W. Rep. (La.) 614.

The mother of a bastard child is its natural guardian; 6 Blackf. 357; 2 Mass. 109; but not by the common law; Reeve, Dom. Rel. 314, note. The power of a natural guardian over the person of his ward is perhaps better explained by reference to the relation of parent and child. See DOMICIL. It is well settled that the court of chancery may, for just cause, interpose and control the authority and discretion of the parent in the education and care of his child; 8 Paige, Ch. 47; 10 Ves. 52.

A guardian by nature is not entitled to the control of his ward's personal property; 34 Ala. N. S. 15, 565; 1 P. Wms. 285; 6 Conn. 474; 7 Wend. 354; 3 Pick. 213; 95 Ill. 519; unless by statute. See 19 Mo. 345; 110 U. S. 42. The father must support his ward; 2 Bradf. Surr. 341. But where his means are limited, the court will grant an allowance out of his child's estate; *id.*; 1 Bro. Ch. 887. But the mother, if guardian, is not obliged to support her child if it has sufficient estate of its own; nor is she entitled, like the father, when guardian, to its services, unless she is compelled to maintain it. But where the mother, who is guardian of her son, engages board for him, she incurs liability personally and not as guardian; 5 Ind. App. 204.

A father as guardian by nature has no right to the real or personal estate of his child; that right, whenever he has it, must be as a guardian in socage, or by some statutory provision; 15 Wend. 631.

Guardian by nurture. This guardianship belonged to the father, then to the mother.

The subject of it extended to the younger children, not the heirs apparent. In this country it does not exist, or, rather, it is merged in the higher and more durable guardianship by nature, because all the children are heirs, and, therefore, the subject of that guardianship; 2 Kent 221; Reeve, Dom. Rel. 315; 6 Ga. 401. It extended to the person only; 6 Conn. 494; 4 L. & Eq. 109; and terminated at the age of fourteen; 1 Bla. Com. 461.

Guardian in socage. This guardianship arose when socage lands descended to an infant under fourteen years of age; at which period it ceased if another guardian was appointed, otherwise it continued; 5 Johns. 66.

The person entitled to it by common law was the next of kin, who could not by any possibility inherit the estate; 1 Bla. Com. 461. If the lands descended from a paternal relative, the mother or next of kin on her part was the guardian; if from a maternal relative the father, or next of kin on his part was; 2 Wend. 153. Although recognized in New York, it was never com-

mon in the United States; 5 Johns. 66; 7 id. 157; because, by the statutes of descents generally in force in this country, those who are next of kin may eventually inherit. Wherever it has been recognized, it has been in a form differing materially from its character at common law; 15 Wend. 631. Such guardian was also guardian of the person of his ward as well as his real estate; Co. Litt. 87, 89. Although it did not arise unless the infant was seized of lands held in socage, yet when it did arise it extended to hereditaments which do not lie in tenure and to the ward's personal estate. See Hargrave's note 67 to Co. Litt. This guardian could lease his ward's estate and maintain ejectment against a disseisor in his own name; 2 Bacon, Abr. 683. A guardian in socage cannot be removed from office, but the ward may supersede him at the age of fourteen, by a guardian of his own choice; Co. Litt. 89. In New York guardians in socage have neither common law nor statutory right to control the personal estate of the wards; 138 N. Y. 333.

There was anciently a guardianship by chivalry at the common law, where lands came to an infant by descent which were holden by knight-service; Co. Litt. 88, 11, note. That tenure being abolished by statute Car. II., the guardianship has ceased to exist in England, and has never had any existence in the United States.

Guardians by statute are of two kinds: first, those appointed by deed or will; second, those appointed by court in pursuance of some statute.

Testamentary guardians are appointed by the deed or last will of the father; 88 Ga. 722; and they supersede the claims of all other guardians, and have control of the person and the real and personal estate of the child till he arrives at full age.

This power of appointment was given to the father by the stat. 12 Car. II. c. 24, which has been pretty extensively adopted in this country, though in some states the appointment is limited to will. Under it, the father might thus dispose of his children, born and unborn; 7 Ves. 315; but not of his grandchildren; 5 Johns. 278. Nor does it matter whether the father is a minor or not; 2 Kent 225. It continues during the minority of a male ward, both as to his estate and person, notwithstanding his marriage; Reeve, Dom. Rel. 328; 2 Kent 224; 4 Johns. Ch. 380. There seems to be some doubt as to whether marriage would determine it over a female ward; 2 Kent 224. It is more reasonable that it should, inasmuch as the husband acquires in law a right to the control of his wife's person. But it would seem that a person marrying a testamentary guardian is not entitled to the money of the ward; 12 Ill. 431. In England and most of the United States a mother cannot appoint a testamentary guardian, nor can a putative father, nor a person *in loco parentis*; 1 Bla. Com. 462, n.; but by statute in Illinois she may make an appointment, if the father has not done so, provided she be not remarried after his death; 2 Kent 225. In New York, the consent of the mother is required to a testamentary appointment by the father; Schoul. Dom. Rel. 400. A man cannot by law appoint his son testamentary guardian for the children of the latter; 79 Ga. 397.

Guardians appointed by court. The greater number of guardians among us, by far, are those appointed by court, in conformity with statutes which regulate their powers and duties. In the absence of special provisions, their rights and duties are governed by the general law on the subject of guardian and ward.

Appointment of guardians. All guardians of infants specially appointed must be appointed by the infant's parent; or by the infant himself; or by a court of competent jurisdiction.

After the age of fourteen, the ward is entitled to choose a guardian, at common law, and generally by statute; Reeve, Dom. Rel. 320; 15 Ala. N. S. 687; 30 Miss. 458; 11 Jur. 114. His choice is subject, however,

to the rejection of the court for good reason, when he is entitled to choose again; 14 Ga. 594. So guardianship by the sole appointment of the infant cannot now be said to exist. If the court appoint one before the age of choice, the infant may appear and choose one at that age, without any notice to the guardian appointed; 30 Miss. 459; 15 Ala. N. S. 687; 50 Ga. 332; 38 Conn. 304. But if none be chosen, then the old one acts. It seems that in Indiana the old one can be removed only for cause shown; in which case, of course, he is entitled to notice; 8 Ind. 307. See 96 Pa. 243. As to the method of appointment by the Ward see 1 Sharsw. Bla. Com. 462, note 8. A probate, surrogate, or county court has no power to appoint, unless the minor resides in the same county; 2 Bradf. Surr. 214; 7 Ga. 362; 9 Tex. 109; 16 Ala. N. S. 759; 27 Mo. 290; 45 Mo. App. 415; but where the ward is a nonresident, guardianship is frequently recognized for the collection and preservation of his estate in the jurisdiction, and in such cases, the court where the property is situated will appoint a guardian, the existence of the property determining the jurisdiction; 4 Allen 466; 27 E. L. & Eq. 249. Persons residing out of the jurisdiction will not usually be appointed guardians; but this rule is not invariable, except in those states which require resident guardians by statute; Schoul. Dom. Rel. 419.

It has been a subject of much doubt whether a married woman may be a guardian; while there are cases which sustain their acts while acting as guardians, clear precedents for their actual appointment are wanting. See 2 Dougl. 433. It has been held, however, that a married woman may be co-guardian with a man, though her sole appointment is improper; L. R. 1 Ch. 387. See 29 Miss. 195; 1 Paige 488; 19 Ind. 88. A single woman by her marriage loses her guardianship, it would seem; but she may be reappointed; 2 Kent 225, n. b; 2 Dougl. 433. It seems probable that recent statutes relating to the rights of married women will modify these cases. Where there is a valid guardianship unrevoked, the appointment of another is void; 23 Miss. 550.

The court has jurisdiction to interfere with and remove the guardian of a child who has no property, on proof of misconduct of the guardian towards the child or on proof that it is for the welfare of the child that the guardian should be removed; [1893] 1 Ch. 143.

Powers and liabilities of guardians. The relation of a guardian to his ward is that of a trustee in equity, and bailee at law; 2 Md. 111. It is a trust which he cannot assign; 1 Pars. Contr. 116. He will not be allowed to reap any benefit from his ward's estate; 2 Comyns 230, except for his legal compensation or commission; but must account for all profits, which the ward may elect to take or charge interest on the capital used by him; 17 Ala. N. S. 306; he cannot purchase lands belonging to him; 54 Ark. 627. He can invest the money of his ward in real estate only by order of court; 3 Ind. 320; 3 Yerg. 336; 21 Miss. 9, 38 Me. 47; 56 N. W. Rep. (S. Dak.) 82; 56 Fed. Rep. 699. And he cannot convert real estate into personalty without a similar order; Field, Inf. 109; 25 Mo. 548; 4 Jones 15; 16 B. Monr. 289; 1 Rawle 293; 1 Ohio 232; 1 Dutch. 121; 2 Kent 280. The law does not favor the conversion of the real estate of minors; 14 Pa. 372; but if it be clearly to the interest of a minor that his real estate be sold and converted into money, the court will award an order of sale, notwithstanding that in the event of his death during minority, the proceeds would go to other parties than those to whom the land would have descended had it not been converted; 6 Phila. 157. The rule is different in England; there land converted into money, or money into land, retains its character of land or money, as the case may be, during the nonage of the minor; 6 Ves. 6; 11 Ill. 278. They cannot bind their wards by contracts as to the proportion of the claims against the estate each shall bear; 2 Colo. App. 306.

He may lease the land of his ward; 1 Pars. Contr. 114; 2 Mass. 56; but if the lease extends beyond the minority of the ward, the latter may avoid it on coming of age; 1 Johns. Ch. 561; 10 Yerg. 160; 2 Wils. 129; 5 Halst. 183. He may sell his ward's personally without order of court; 27 Ala. N. S. 198; 19 Mo. 345; 152 U. S. 499; and dispose of and manage it as he pleases; 2 Pick. 248. He is required to put the money out at interest, or show that he was unable to do this; 21 Miss. 9; 2 Wend. 424; 1 Pick. 527; 7 W. & S. 48; 13 E. L. & Eq. 140; 92 Mich. 275; 39 Ill. App. 382. And in the absence of evidence to the contrary, it will be presumed that a guardian might have kept funds of his ward at interest; 39 Ill. App. 382. If he spends more than the interest and profits of the estate in the maintenance and education of the ward without permission of the court, he may be held liable for the principal thus consumed; 1 S. & M. 545; 26 Miss. 393; 6 B. Monr. 1292; 2 Strobb. 40; 2 Sneed 520; 99 N. C. 118.

If he erects buildings on his ward's estate out of his own money, without order of court, he will not be allowed any compensation; 11 Barb. 22; 11 Pa. 326; 23 Miss. 189; 17 Or. 115. He is not chargeable with the services of his wards if for their own benefit he requires them to work for him; 12 Gratt. 608. A married woman guardian can convey the real estate of her ward without her husband joining; 2 Dougl. 433. On marriage of a female minor in Mississippi, her husband, although a minor, is entitled to receive her estate from her guardian; 3 Miss. 893. A guardian who deposited the moneys of his ward, as guardian, in a bank that was solvent, with his sureties held not liable for loss upon the failure of the bank; 144 Pa. 499.

Joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases; 4 Pick. 283; see 101 Mass. 593; and where one guardian consents to his co-guardian's misapplication of funds, he is liable; 11 S. & R. 66; 18 Pa. 175. Guardians like other trustees—executors and administrators excepted—may portion out the management of the property to suit their respective taste and qualifications, while neither parts irrevocably with the control of the whole; and in such case each is chargeable with no more than what he received, unless unwarrantable negligence in superintending the others' acts can be shown; 8 W. & S. 143; and the discharge of one who has received no part of the estate relieves him from liability; 33 Pa. 466.

Contracts between guardian and ward immediately after the latter has attained his majority are unfavorably regarded by the courts, and will be set aside where they redound to the profit of the guardian; Bisp. Eq. 234; 4 S. & R. 114; 8 Md. 280; 23 Miss. 737; 14 B. Monr. 638; 12 Barb. 84; 10 Ala. N. S. 400. Neither is he allowed to purchase at the sale of his ward's property; 2 Jones, Eq. 285; 22 Barb. 167; 54 Ark. 627. But the better opinion is that such sale is not void, but voidable only; 2 Gray 141; 10 Humphr. 275. He is not allowed, without permission of court under some statute authority, to remove his ward's property out of the state; 24 Ala. N. S. 486; 45 La. Ann. 1062. He cannot release a debt due his ward; 1 J. J. Marsh. 441; 11 Mo. 649; although he may submit a claim to arbitration; 23 Miss. 118; 11 Me. 326; 6 Pick. 269; Dy. 216; but he cannot do so when he is interested adversely to them in the subject-matter of the arbitration; 86 Tex. 172. He may collect or compromise and release debts due to the ward, subject to the liability to be called to account for his acts; 152 U. S. 499. He cannot by his own contract bind the person or estate of his ward; 1 Pick. 314; nor avoid a beneficial contract made by his ward; 13 Mass. 237; Co. Litt. 17b, 89a. He becomes liable for negligence for failure to sue on a note due his ward's estate until the parties thereto are insolvent; 113 N. C. 102.

He is entitled to the care and custody of the person of his ward; 7 Humphr. 111; 4 Bradf. Surr. 221; even against parents in

England; L. R. 8 Q. B. 153; but latterly, the wishes and best interests of the child will be consulted; 41 Ind. 92; 50 Mich. 261. If a female ward marry, the guardianship terminates both as to her person and property. It has been thought to continue over her property if she marries a minor. If a male ward marries, the guardianship continues as to his estate, though it has been held otherwise as to his person. If he marries a female minor, it is said that his guardian will also be entitled to her property; Reeve, Dom. Rel. 328; 2 Kent 226.

A guardian may change the residence of his ward from one county to another in the same state. But it seems that the new county may appoint another guardian; 4 Bradf. Surr. 221. Whether he has the right to remove his ward into a foreign jurisdiction has been a disputed question; Field, Inf. 114. In England, a guardian, being a parent, can change the child's domicile; 10 Cl. & F. 42; otherwise probably if the guardian be not a parent; Tiffany, Dom. Rel. 317. A natural guardian may change the domicile of his ward; 60 N. W. Rep. (Ia.) 614. So held of a paternal grandfather, as guardian; *id.* Guardians who are not natural guardians can change the municipal domicile of a ward, in the same state; Tiff. Dom. Rel. 317; but not to another state; 146 Pa. 585; 112 U. S. 472; but see 52 Barb. 294; 3 MacArth. 95. By the common law, his authority both over the person and property of his ward was strictly local; 1 Johns. Ch. 156; 1 N. H. 193; 12 Wheat. 169; 10 Miss. 532. And this is the view maintained in most of the states. See Story, Conf. Laws § 540. But see, on this question, 5 Paige, Ch. 596; 8 Ala. N. S. 789; 18 id. 34; 11 Ired. 36; 9 Md. 227; 3 Mer. 67; 5 Pick. 20; DOMICIL.

The court of chancery may interfere to prevent a guardian from attempting an important change in the religious impressions of a ward if upon examination such change seems dangerous and improper; 8 D. M. & G. 760. See Brett, L. Cas. Mod. Eq. 90 and note.

Nor can a guardian in one state maintain an action in another for any claim in which his ward is interested; 11 Ala. N. S. 343; 13 Miss. 529; see 31 Barb. 304; 36 Miss. 69; 30 Conn. 508; Story, Conf. Laws § 499; a guardian appointed in one state has no authority in another, except by comity, but the modern tendency is to support the authority of the guardian appointed in the domicile; 103 U. S. 6, 13; L. R. 2 Eq. 704. He cannot waive the rights of his ward,—not even by neglect or omission; 2 Vern. 368; 14 Ill. 417. No guardian, except a father, is bound to maintain his ward at his own expense. But it is his duty to maintain and educate the ward, in a suitable manner from the income of the ward's estate; 48 Me. 279; 101 Mich. 313. It is discretionary with a court whether to allow a father anything out of his child's estate for his education and maintenance; Reeve, Dom. Rel. 324; 6 Ind. 66.

Rights and liabilities of wards. A ward owes obedience to his guardian, which a court will aid the guardian in enforcing; 3 Atk. 721; 7 Kulp 66. The general rule is that the ward's contracts are voidable; 13 Mass. 237; yet there are some contracts so clearly prejudicial that they have been held absolutely void; such as contracts of suretyship; 4 Conn. 376.

A ward cannot marry without the consent of his or her guardian; Reeve, Dom. Rel. 327. And any one marrying or aiding in the marriage of a ward without such consent is guilty of contempt of court; 2 P. Wms. 562; 3 id. 116; but this whole subject is peculiar to the laws of England and has no application in the United States; Schoul. Dom. Rel. 517. Infants are liable for their torts in the same manner as persons of full age; 5 Hill, N. Y. 391; 3 Wend. 391; 9 N. H. 441. A ward is entitled to his own earnings; 1 Bouvier, Inst. 849. He attains his majority the day before the twenty-first anniversary of his birthday; 8 Harring. 557; 4 Dana 597; 1 Salk. 44. He can sue in court only by his guardian or *prochein ami*; 4 Bla. Com. 464. He could not bring an action at law against his guard-

ian, but might file a bill in equity calling him to account; 2 Vern. 342; 3 P. Wms. 119; 3 Atk. 25; 1 Ves. 91; 92 Tenn. 459. Minors who are kept occupied by their tutor, to teach them habits of industry, cannot exact compensation of him; 45 La. Ann. 134. By the practice in chancery, he was allowed one year to examine the accounts of his guardian after coming of age; 7 Paige 46. See 73 Hun 532; 86 Wis. 99. The statute of limitations will not run against him during the guardianship; 34 Ala. n. s. 15. But see LIMITATIONS.

Sale of infant's lands. It is probable that the English court of chancery did not have the inherent original power to order the sale of minors' lands; 2 Ves. 23; 1 Moll. 525. But, with the acquiescence of parliament, it claims and exercises that right for the purpose of maintaining and educating the ward. This power is not conceded as belonging to our courts of chancery in this country by virtue of their equity jurisdiction, nor to our probate courts as custodians of minors; 6 Hill 415; 2 Kent 229, n. c. It must be derived from some statute authority; 27 Ala. n. s. 198; 7 Johns. Ch. 154; 2 Pick. 243; Ambl. 419. There being no inherent authority in a guardian by virtue of his office to convey lands of his wards, a deed by him will not, in the absence of evidence of sharing his authority, convey any title; 69 Tex. 27.

It has been a much-disputed question whether an infant's lands can be sold by special act of the legislature. On the ground that the state is the supreme guardian of infants, this power of the legislature has been sustained where the object was the education and support of the infant; 29 Miss. 146; 5 Ill. 127; 20 Wend. 353; 8 Blackf. 10; 16 Mass. 326. See 103 U. S. 613; 56 Mo. 211. So it has been sustained where the sale was merely advantageous to his interest; 11 Gill & J. 87; 14 S. & R. 435. There has been some opposition on the ground that it is an encroachment on the judiciary; 4 N. H. 565, 575; 10 Yerg. 59. Such sales have been sustained where the object was to liquidate the ancestor's debts; 4 T. B. Monr. 95. This has been considered questionable in the extreme; 10 Am. Jur. 297; 10 Yerg. 59; *contra*, 16 Ill. 548. It has also been exercised in the case of idiots and lunatics, and sustained on the same reasons as in the case of infants; 7 Metc. 358.

A ward's title to land passes by his guardian's deed therefor, and not by the confirmation of the sale by the court; 97 Cal. 360.

By statute, we have also guardians for the insane and for spendthrifts; 2 Barb. 153; 8 Ala. n. s. 796; 18 Me. 384; 8 N. H. 539; 19 Pick. 506. This guardian is sometimes designated as the committee; Schoul. Dom. Rel. 389.

A guardian to a lunatic cannot be appointed till after a writ de *lunatico inquirendo*; 21 Ala. n. s. 504. An order removing a guardian is equivalent to an order to pay over the money in his hands to his successor; 9 Mo. 225, 327. In some states the court is authorized to revoke for non-residence of the guardian; *id*.

A keeper or protector; one who has the charge or custody of any person or thing. In a stricter sense, one who has or is entitled to the custody of the person or property of an infant.

GUARDIAN AD LITEM. A guardian appointed to represent the ward in legal proceedings to which he is a party defendant.

The appointment of such is incident to the power of every court to try a case; 2 Cow. 430; and the power is then confined to the particular case at bar; Co. Litt. 89, n. 16. His duty is to manage the interest of the infant when sued. In criminal cases no guardian is appointed: the court acts as guardian; Reeve, Dom. Rel. 318; Field, Inf. 163. A guardian *ad litem* cannot be appointed till the infant has been brought before the court in some of the modes prescribed by law; 16 Ala. n. s. 509; 1 Swan 75; 2 B. Monr. 453. See 86 Ky. 198. Such guardian cannot waive service of pro-

cess; 2 Ind. 74; and his powers are not limited to defence, objection, and opposition merely, but he may file a cross bill to protect the infant's interest involved in the litigation, and appeal from a decree dismissing the same; 45 Ill. App. 17. The writ and declaration in actions at law against infants are to be made out as in ordinary cases. In English practice where the defendant neglects to appear, or appears otherwise than by guardian, the plaintiff may apply for and obtain a summons calling on him to appear by guardian within a given time; otherwise the plaintiff may be at liberty to proceed as in other cases, having had a nominal guardian assigned to the infant; Macphers. Inf. 339. A like rule prevails in New York and other states; 6 Cow. 50; 12 N. H. 515; Schoul. Dom. Rel. 596.

The omission to appoint a guardian *ad litem* does not render the judgment void, but only voidable; 8 Metc. 196. See 89 Kan. 548. It will be presumed, where the chancellor received the answer of a person as guardian *ad litem*, that he was regularly appointed, although it does not appear of record; 19 Miss. 418; 98 Mich. 493. See 2 Swan 197. It is error to decree the sale of a decedent's property on the petition of the representatives, without the previous appointment of a guardian *ad litem* for the infant heirs; 16 Ala. n. s. 41. Where the general guardian petitions for a sale of his ward's lands, the court must appoint a guardian *ad litem*; 13 B. Monr. 779; 21 Ala. n. s. 363; 30 Miss. 258; 1 Ohio St. 544; but this is not necessary where the application is for leave to invest money of the ward in land; 79 Ga. 753.

It seems that a guardian *ad litem* can elect whether to come into hotch-pot; 15 Ala. 85. An appearance of the minor in court is not necessary for the appointment of a guardian to manage his interest in the suit; 11 E. L. & Eq. 156; 15 id. 317. If an infant comes of age pending the suit, he can assert his rights at once for himself, and if he does not he cannot generally complain of the acts of his guardian *ad litem*; 1 Metc. (Ky.) 602; 50 Me. 62; 48 Wisc. 89.

The appointment of a guardian *ad litem* is valid, although the infant has not been regularly served with process, but has only accepted service thereof; 97 N. C. 21. The rule that a next friend or guardian *ad litem* cannot by admissions or stipulation, surrender the rights of the infant, does not prevent a guardian *ad litem* or *prochein ami* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved; 134 U. S. 650. A married woman cannot be a guardian *ad litem* or next friend; 34 Ch. D. 435.

GUARDIAN, OR WARDEN, OF THE CINQUE PORTS. A magistrate who has the jurisdiction of the ports or havens which are called the "Cinque Ports" (*q. v.*). This office was first created in England in imitation of the Roman policy, to strengthen the sea-coasts against enemies, etc.

GUARDIAN OF THE SPIRITUALITIES. The person to whom the spiritual jurisdiction of any diocese is committed during the vacancy of the see.

The archbishop, or one whom he appoints, is guardian of the spiritualities on the vacancy of any see within his province, but when the archiepiscopal see is vacant, the dean and chapter of the archbishop's diocese are guardians. Jacob. See GUARDIAN OF THE TEMPORALITIES.

GUARDIAN OF THE TEMPORALITIES. The person to whose custody a vacant see or abbey was committed by the crown.

GUARDIANSHIP. The power or protective authority given by law, and imposed on an individual who is free and in the enjoyment of his rights, over one whose weakness on account of his age renders him unable to protect himself.

The authority of all guardians is derived

from the state, such guardians being appointed when the occasion for them arises, or is expected to arise. The nature of guardianship is that of a trust, the execution of which is at all times superintended by the state. 60 Okl. Cr. Rep. 509.

GUARDIANUS. A guardian, warder, or keeper. Spel. Gloss.

GUARENTIGIO. In Spanish Law. A term applicable to the contract or writing by which courts of justice are empowered to execute and carry into effect a contract in the same manner as if it were decreed by the court after the usual legal formalities. This clause, though formerly inserted in contracts of sale, etc., stipulating the payment of a sum of money, is at present usually omitted, as courts of justice ordinarily compel the parties to execute all contracts made, by authentic acts, that is, acts passed before a notary, in the presence of two witnesses.

GUARNIMENTUM. In old European Law. A provision of necessary things. Spel. Gloss.

GUASTALD. One who had the custody of the royal mansions.

GUERPI, GUERPY (L. Fr.). Abandoned; left; deserted; Britt. c. 33.

GUERRA, GUERRE. War. Spel. Gloss.

GUERRILLA PARTY (Span. *guerra*, war; *guerrilla*, a little war).

In Military Law. Self-constituted bodies of armed men, in times of war, who form no integral part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war, chiefly by raids, extortion, destruction, and massacre. Lieber, Guerr. Part. 18. See Halleck, Int. Law 386; Wools. Int. Law 299.

Partisan, free-corps, and guerrilla are terms resembling each other considerably in signification; and, indeed, partisan and guerrilla are frequently used in the same sense. See Halleck, Int. Law 386.

Partisan corps and free-corps both denote bodies detached from the main army; but the former term refers to the action of the troop, the latter to the composition. The partisan leader commands a corps whose object is to injure the enemy by action separate from that of his own main army; the partisan acts chiefly upon the enemy's lines of connection and communication, and outside of or beyond the lines of operation of his own army, in the rear and on the flanks of the enemy. But he is part and parcel of the army, and, as such, considered entitled to the privileges of the law of war so long as he does not transgress it. Free-corps, on the other hand, are troops not belonging to the regular army, consisting of volunteers generally raised by individuals authorized to do so by the government, used for petty war, and not incorporated with the *ordre de bataille*. The men composing these corps are entitled to the benefit of the laws of war, under the same limitations as the partisan corps.

Guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners; or the sacking of places, are proved upon them.

The law of war, however, would not extend a similar favor to small bodies of armed country people near the lines, whose very smallness shows that they must resort to occasional fighting and the occasional assuming of peaceful habits and brigandage; Lieber, Guerr. Part. 20.

GUEST. A traveller who stays at an inn or tavern with the consent of the keeper. Bacon, Abr. Inns. C 5; 8 Co. 32; Story, Bailm. § 477. It is not now deemed essential that a person should have come from a distance to constitute him a guest; 63 Wis. 6; 35 Conn. 183.

And if, after taking lodgings at an inn,

he leaves his horse there and goes elsewhere to lodge, he is still to be considered a guest; 26 Vt. 816; but not if he merely leaves goods for keeping which the landlord receives no compensation; 1 Salk. 388; 3 Ld. Raym. 866; Cro. Jac. 188. And where one leaves his horse with an innkeeper with no intention of stopping at the inn himself, he is not a guest of the inn, and the liability of the landlord is simply that of an ordinary bailee for hire; 68 Md. 489; 83 N. Y. 577. The length of time a man is at an inn makes no difference, whether he stays a day, a week, or a month, or longer, or only for temporary refreshments, so always that, though not strictly *transiens*, he retains his character as a traveller; 5 Term. 278; 5 Barb. 560. But if a person comes upon a special contract to board at an inn, he is not, in the sense of the law, a guest, but a boarder; Bacon, Abr. *Inns*, C 5; Story, Bailm. § 477; Wand. Inns 64; but this is a question of fact to be determined by a jury; 33 Wis. 118; 98 Cal. 678. The payment of a stipulated sum per week does not of itself change the relation of a party from that of a guest to that of a lodger; 7 Cush. 417; 88 Cal. 557; 98 id. 678; 20 Alb. L. J. 64. The relation exists where one who keeps a house for the entertainment of all who choose to visit it, extends a general invitation to the public to become guests, although the house is situated on enclosed grounds; 93 Cal. 253. See BAILEE; INNKEEPER; BOARDER.

GUEST-TAKER. See AGISTER.

GUET. In French Law. Watch. Ord. Mar. liv. 4, tit. 6.

GUIA. In Spanish Law. A right of way for narrow carts. White, New Recop. 1, 2, c. 6.

GUIDAGE. In English Law. A reward for safe conduct, through a strange land or unknown country. Cowel. The office of guiding of travellers through dangerous or unknown ways. 2 Inst. 526.

GUIDON DE LA MER. The name of a treatise on maritime law, written in Rouen in Normandy in 1671, as is supposed. It was received on the continent of Europe almost as equal in authority to one of the ancient codes of maritime law. The author of this work is unknown. This tract or treatise is contained in the "*Collection de Lois maritimes*," by J. M. Pardessus, vol. 2, p. 371 *et seq.*

GUILD, GILD. A brotherhood or company governed by certain rules and orders made among themselves by king's license; a corporation, especially for purposes of commerce; so called because on entering the *guild* the members pay an assessment or tax (*gild*) towards defraying its charges. T. L.; Du Cange. A guild held generally more or less property in common,—often a hall, called a *guild-hall*, for the purposes of the association. The name of *guild* was not, however, confined

to mercantile companies, but was applied also to religious, municipal, and other corporations. A mercantile meeting of a guild was called a *guild merchant*.

A *fridborg* (q. v.), that is, among the Saxons, ten families' mutual pledges for each other to the king. Spelman. See 8 Steph. Com. 81; Turner's Hist. Ang. Sax. v. iii. p. 98.

The earliest corporations in Scotland were not for trading but to perpetuate some public service; and they took their rise from Papal bulls, royal charters, etc., or frequently such charter was presumed; Ersk. Pr. 811.

GUILD HALL (Law Lat. *gildhalla*, variously spelled *ghildhalla*, *guilhalla*, *guhalla*; from Sax. *gild*, payment, company, and *halla*, hall). A place in which are exposed goods for sale. Charter of Count of Flanders; Hist. Guinensi, 202, 203; Du Cange. The hall of a guild or corporation. Du Cange; Spelman: e. g., *Gildhalla Teutonicorum*. The chief hall of the city of London, where the mayor and commonalty hold their meetings. The hall of the merchants of the Hanseatic League in London, otherwise called the "Stylard." Id.

GUILD MERCHANT. See GUILD.

GUILD RENTS. Rents payable to the crown by any guild, or such as formerly belonged to religious guilds, and came to the crown on the dissolution of the monasteries. Toml.

GUILDHALL SITTINGS. The sittings held in the Guildhall of the city of London for city of London cases.

Also known sometimes as the London Sittings. In 1885, these sittings were abandoned, and all such cases as had been tried before them were transferred to the Royal Courts of Justice. Resumed again for a short time in 1891, but not for long. Byrne. See GUILD HALL; LONDON AND MIDDLESEX SITTINGS.

In English Parliamentary Practice.

The setting of dates for the discussion of different stages of a measure, for applying the closure, and for taking a division. Stand. Dict.

GUILLotine. An apparatus for beheading criminals with a single blow, used in some countries, as France and Greece, for capital punishment. A form of it was in use in the middle ages, but, being improved by Dr. Guillotin at the time of the French Revolution, it received its present name. Cent. Dict.

GUILT. In Criminal Law. That which renders criminal and liable to punishment.

That disposition to violate the law, which has manifested itself by some act already done. The opposite of innocence. See Ruthenf. Inst. b. 1, c. 18, s. 10.

In general, every one is presumed innocent until guilt has been proved; but in

some cases the presumption of guilt overthrows that of innocence; as, for example, where a party destroys evidence to which the opposite party is entitled. The spoliation of papers material to show the neutral character of a vessel furnishes strong presumption against the neutrality of the ship; 2 Wheat. 227.

GUILTY. The state or condition of a person who has committed a crime, misdemeanor, or offence.

This word implies a malicious intent, and can only be applied to something universally allowed to be a crime. Cowp. 275.

In Pleading. A plea by which a defendant who is charged with a crime, misdemeanor, or tort admits or confesses it. In criminal proceedings, when the accused is arraigned, the clerk asks him, "How say you, A. B., are you guilty or not guilty?" His answer, which is given *ore tenus*, is called his plea; and when he admits the charge in the indictment, he answers or pleads *guilty*; otherwise, *not guilty*. See CULPRIT.

GUINEA. A coin issued by the English mint during the time of Wm. IV. These coins were called in. The word now means only the sum of £1. 1s. First coined in 1662. of gold brought from Guinea. Worcester.

GULA-THING, THE. A law in force in the southern part of Norway dating from the 11th century. This, along with the law called the Frostathing (in force in the more northerly division of Drontheim) are the two most important of those Scandinavian codes which, it is said, help us to understand more especially the law prevailing in the northern parts of England, where the Danish influence was the strongest. 2 Holdsw. Hist. E. L. 3rd ed., 32, 33.

GULE OF AUGUST. The first of August, being the day of *St. Peter ad Vincula*. T. L.

GULES. The heraldic name of the color usually called "red." The word is derived from the Arabic word "gule," a rose, and was probably introduced by the Crusaders. Gules is denoted in engravings by numerous perpendicular lines. Heralds who blazoned by plants and jewels called it "Mars" and "ruby;" Wharton.

GWABR MERCHED. Maid's fee. A British word signifying a customary fine payable to lords of some manors on marriage of tenant's daughter, or otherwise on her incontinence. Cowel, *Marchet*.

GWALSTOW. A place of execution. Cowel.

GYLTWITE OR GUILTWIT (Sax.). Compensation for fraud or trespass. Grant of King Edgar, anno 964; Cowel.

H.

H. The eighth letter of the alphabet. See ABBREVIATIONS.

HABE OR HAVE (Lat.). Sometimes used in the titles of the codes of Theodosius and Justinian for *Ave* (hail). Calv. Lex.; Spel. Gloss.

HABEANT EOS AD RECTUM. See AD RECTUM.

HABEAS CORPORA JURATORUM (Lat. that you have the bodies). In English Practice. A writ issued out of the common pleas, commanding the sheriff to compel the appearance of a jury in a cause between the parties. It answered the same purpose as a *distingas juratores* in the king's bench. See 3 Bla. Com. 354. It is abolished by the Common-law Procedure Act.

HABEAS CORPUS (Lat. that you have the body). A writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.

Habeas Corpus is an appropriate proceeding for determining whether one held under an extradition warrant is a fugitive from justice; and he should be discharged if he shows by competent evidence, overcoming the presumption of a properly issued warrant, that he is not a fugitive from the demanding State. 207 U. S. 100.

Although the power exists and will be exercised in cases of great importance and urgency, a Federal court or a Federal judge will not ordinarily interfere by *habeas corpus* with the regular course of the procedure under state authority, but will leave the petitioner to exhaust the remedies afforded by the State for determining whether he is legally restrained of his liberty, and then to bring his case to this court by writ of error under § 709, Rev. Stat. 205 U. S. 478.

This is the most famous writ in the law; and, having for many centuries been employed to remove illegal restraint upon personal liberty, no matter by what power imposed, it is often called the great writ of liberty. It takes its name from the characteristic words it contained when the process and records of the English courts were written in Latin:

Procipimus tibi quod corpus A B in custodia vestra detentum, ut dicatur, cum causa captionis et detentionis sue, quocunque nomine idem A B censetur in eadem, habeas coram nobis apud Westm. ec. ad subjiendum et recipiendum ea quo curia nostra de eo ad tunc et ibidem ordinari contigerit in hac parte, etc.

There were several other writs which contained the words *habeas corpus*; but they were distinguished from this and from one another by the specific terms declaring the object of the writ, which terms are still retained in the nomenclature of writs: as, *habeas corpus ad respondendum*, *ad testificandum*, *ad satisfaciendum*, *ad prosequendum*, and *ad faciendum et recipiendum*, *ad deliberandum et recipiendum*.

This writ was in like manner designated as *habeas corpus ad subjiendum et recipiendum*; but, having acquired in public esteem a marked importance by reason of the nobler uses to which it has been devoted, it has so far appropriated the generic term to itself that it is now, by way of eminence, commonly called The Writ of *Habeas Corpus*.

The date of its origin cannot now be ascertained. Traces of its existence are found in the Year Book 48 Ed. III. 22; and it appears to have been familiar to, and well understood by, the judges in the reign of Henry VI. In its early history it appears to have been used as a means of relief from private restraint. The earliest procedure where it was used against the crown are in the reign of Henry VII. Afterwards the use of it became more frequent, and in the time of Charles I. it was held an admitted constitutional remedy; Hurd, Hab. Corp. 146; Church, Hab. Corp. 3. In writing of procedure in the thirteenth century the recent work which throws so much new light upon the early history of English law, says: "Those famous words *habeas corpus* are making their way into divers writs, but for any habitual use of them for the purpose of investigating the cause of impris-

onment we must wait until a later time." There is also a reference to what is termed the use of *habeas corpus* as "at one time a part of the ordinary mesne process in a personal action," also referred to as "the Bractonian process which inserts a *habeas corpus* between attachment and distress," which (*habeas corpus*) a little later seems to disappear. No other allusion is made to the subject; 2 Poll. & Matl. 584, 591.

A still later writer who is as earnest in tracing the fountains of English law to a Roman source, as the writers last quoted are indisposed to do so, says on the subject:

"The presence in the Pandects of every important doctrine of *habeas corpus* is an interesting fact, and suggests that the proceeding probably came to England, as it did to Spain, from the Roman law. There is no evidence, so far as I have been able to discover, that the process was of British or Teutonic origin. It is fully described in the forty-third book of the Pandects. The first text is the line from the 'Perpetual Edicts,' *ait prator: quem liberum dolo malo retines, exhibeas*. 'The prator declares: produce the freeman whom you unlawfully detain.' The writ was called the *interdict* or order '*de homine libero exhibendo*.' After quoting this article of the Edict, the compilers of the Pandects introduced the commentary of Ulpian to the extent of perhaps two pages of a modern law book, and the leading rules which he derives from the text are law, I believe, to-day in England and America. Thus he says:—

"This writ is devised for the preservation of liberty to the end that no one shall detain a free person."

The word freeman includes every freeman, infant or adult, male or female, or many, whether *sui juris*, or under the power of another. For we only consider this: Is the person free?

He who does not know that a freeman is detained in his house is not in bad faith; but as soon as he is advised of the fact he becomes in bad faith."

The prator says *exhibere* (produce, exhibit). To exhibit a person is to produce him publicly, so that he can be seen and handled."

"This writ may be applied for by any person; for no one is forbidden to act in favor of liberty."

And to this commentary of Ulpian the compilers also add some extracts from Venuleius, who, among other things says:

"A person ought not to be detained in bad faith for any time; and so no delay should be granted to the person who thus detains him." In other words, a writ of *habeas corpus* should be returnable and heard instantly.

"It seems certain that this writ might have been applied for in Britain during the four centuries of Roman occupation, at least when not suspended by a condition of martial law; and after the restoration of the Christian Church in the seventh century, and the occupation of judicial positions by bishops and other learned clerics, familiar with such procedure, it is not unreasonable to assume that it was revived and took its place in English law." Howe, Studies in the Civil Law 64.

After the use of it became more common, abuses crept into the practice, which in some measure impaired the usefulness of the writ. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third were issued before he produced the party; and many other vexatious devices were practised to detain state prisoners in custody; 3 Bla. Com. 135.

Greater promptitude in its execution was required to render the writ efficacious. The subject was accordingly brought forward in parliament in 1668, and renewed from time to time until 1679, when the celebrated Habeas Corpus Act of 31 Car. II. was passed. The passage of this act has been made the theme of the highest praise and congratulation by British authors, and is even said to have "extinguished all the resources of oppression;" Hurd, Hab. Corp. 93; Church, Hab. Corp. 37.

This act being limited to cases of commitments for "criminal or supposed criminal matters," every other species of restraint of personal liberty was left to the ordinary remedy at common law; but, doubts being entertained as to the extent of the jurisdiction of the judge to inquire into the truth of the return to the writ in such cases, an attempt was made, in 1757, in the house of lords, to render the jurisdiction more remedial. It was opposed by Lord Mansfield as unnecessary, and failed, for the time, of success. It was subsequently renewed, however; and the act of 36 Geo. III. c. 100 supplies, in England, all the needed legislation in cases not embraced by the act of 31 Car. II.; Hurd, Hab. Corp.

The English colonists in America regarded the privilege of the writ as one of the "dearest birth-rights of Britons;" and sufficient indications exist that it was frequently resorted to. The denial of it in Massachusetts by Judge Dudley in 1689, and the Rev. John Wise, imprisoned for resisting the collection of an oppressive and illegal tax, was made the subject of a civil action against the judge, and was, moreover, denounced, as one of the grievances of the people, in a pamphlet published in 1689 on the authority of "the gentlemen, merchants, and inhabitants of Boston and the country adjacent." In New York in 1707 it served to effect the release of the Presbyterian ministers Makemie and Hampton from an illegal warrant of arrest issued by the governor, Cornbury, for preaching the gospel with-

out license. In New Jersey in 1710 the assembly denounced one of the judges for refusing the writ to Thomas Gordon, which, they said, was the "undoubted right and great privilege of the subject." In South Carolina in 1682 the assembly adopted the act of 31 Car. II. This act was extended to Virginia by Queen Anne early in her reign, while in the assembly of Maryland in 1723 the benefit of its provisions was claimed, independent of royal favor, as the "birth-right of the inhabitants." The refusal of parliament in 1774 to extend the law of *habeas corpus* to Canada was denounced by the continental congress in September of that year as oppressive, and was subsequently recounted in the Declaration of Independence as one of the manifestations on the part of the British government of tyranny over the colonies; Hurd, Hab. Corp. 100-120.

It is provided in art. i. sec. 9, § 2 of the constitution of the United States that "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

Similar provisions are found in the constitutions of most of the states. In Virginia, Vermont, Louisiana, and North Carolina, however, it is forbidden to suspend the privilege of the writ in any case; but in the constitution of Maryland, the writ is not mentioned. In Massachusetts the suspension cannot exceed twelve months, and in New Hampshire, three months. In Florida the governor is authorized to suspend the writ in case of insurrection or rebellion.

In 1861, C. J. Taney decided in the U. S. circuit court of Maryland, that congress alone possessed the power under the constitution to suspend the writ; 9 Am. L. Reg. 524; Taney 246; this view was also taken by other courts; 16 Wis. 360; 44 Barb. 98; 21 Ind. 370; *contra*, 5 Blatchf. 63. In the beginning of the war of the rebellion, President Lincoln suspended the privilege of the writ of *habeas corpus* on his own authority, and without the sanction of an act of congress. He was supported in his opinion of his right to suspend by some of the legal writers of the time, notably by Horace Binney of Philadelphia; but the better opinion has always been that this suspension without the sanction of congress was unconstitutional. For the history of this controversy see 3 Political Science Quarterly 454; 5 Am. Lawyer 169. The privilege of the writ is, however, necessarily suspended whenever martial law is declared in force; for martial law suspends all civil process. A prisoner of war, therefore, or one held by military arrest under the law martial, is not a subject for the *habeas corpus* writ; 1 Bish. Cr. L. § 63. See MARTIAL LAW. Nor is a prisoner in the military or naval service whose offence is properly cognizable before a court martial; 158 U. S. 109. Congress, by act of March 3, 1863, 12 Stat. L. 755, authorized the president to suspend the privilege of the writ throughout the whole or any part of the United States, whenever in his judgment the public safety might require it, during the rebellion. Under the provisions of this act, a partial suspension took place, but it was held that the suspension of the privilege of the writ does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it; 4 Wall. 115. Nor does the suspension of the writ legalize a wrongful arrest and imprisonment; it deprives the person thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability for damages, nor from criminal prosecution; 21 Ind. 472; *contra*, 1 Pacific L. Mag. 360; 1 Bishop, New Crim. L. § 64.

The power has never been exercised by the legislature of any of the states, except that

of Massachusetts, which, on the occasion of "Shay's Rebellion," suspended the privilege of the writ from November, 1786, to July, 1787. And in the Confederate States, the privilege was suspended during the war of the rebellion; 2 Winston 143; 27 Tex. 705.

Congress has prescribed the jurisdiction of the federal courts under the writ; but, never having particularly prescribed the mode of procedure, they have substantially followed in that respect the rules of the common law.

In most of the states statutes have been passed, not only providing what courts or officers may issue the writ, but, to a considerable extent, regulating the practice under it; yet in all of them the proceeding retains its old distinctive feature and merit,—that of a summary appeal for immediate deliverance from illegal imprisonment.

Jurisdiction of state courts. The states, being in all respects, except as to the powers delegated in the federal constitution, sovereign political communities, are limited, as to their judicial power, only by that instrument; and they, accordingly, at will, create, apportion, and limit the jurisdiction of their respective courts over the writ of *habeas corpus*, as well as other legal process, subject only to such constitutional restriction: Church, Hab. Corp. 67.

The restrictions in the federal constitution on this subject are necessarily implied from the express grants of judicial power therein to the federal courts in certain cases specified in art. iii. sec. 2, and in which the decision of the supreme court of the United States is paramount over that of all other courts and conclusive upon the parties.

Jurisdiction of the federal courts. This is prescribed by several acts of congress. By the 14th sec. of the Judiciary Act of September 24, 1789, 1 Stat. L. 81, it is provided that the supreme, circuit, and district courts may issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law; and that either of the justices of the supreme court, as well as judges of the district courts, may grant writs of *habeas corpus* for the purpose of inquiring into the cause of commitment; "provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

By the seventh section of the "Act further to provide for the collection of duties or imposts," passed March 2, 1833, 4 Stat. L. 634, the jurisdiction of the justices of the supreme court and judges of the district courts is extended to "all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority or law for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof." The federal courts may grant the writ to inquire into the cause of restraint of any person in jail under the authority of a state in violation of the constitution or of a law or treaty of the United States, but except in cases of peculiar urgency they will not discharge the prisoner in advance of a final hearing of his cause in the courts of the state, and even after such final determination in those courts will generally leave the petitioner to his remedy by writ of error from this court; 160 U. S. 231. See also 155 U. S. 89. This decision was rendered necessary by the practice of using the writ of *habeas corpus* as a means to take an appeal from state tribunals to the supreme court of the United States for the purpose of delaying the trial or execution of criminals, and the evil of it has been well set forth by Hon. Seymour D. Thompson in 30 Am. Law Rev. 289, 290.

By the "Act to provide further remedial justice in the courts of the United States," passed August 29, 1842, 5 Stat. L. 539, the

jurisdiction of the justices and judges aforesaid is further extended "to all cases of any prisoner or prisoners in jail or confinement, when he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined or in custody under or by any authority or law, or process founded thereon, of the United States, or of any of them, for or on account of any act done or omitted under any alleged right, title, or authority, privilege, protection, or exemption set up or claimed under the commission or order or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

By the third section of the "Act for the government and regulation of seamen in the merchant service," passed July 20, 1790, 1 Stat. L. 131, it is provided that refractory seamen in certain cases shall not be discharged on *habeas corpus* or otherwise.

By an act approved February 6, 1867, it is provided that when, in any suit begun in a state court and removed to the circuit court of the United States, the defendant is in actual custody under state process, the clerk of the circuit court shall issue a writ of *habeas corpus cum causa* to the marshal to take the prisoner into custody to be dealt with in said circuit court according to its rules of law and order; R. S. § 642.

By act of congress, May 3, 1885, an appeal may be taken from the judgment of the United States circuit courts in *habeas corpus* cases to the supreme court. Since the passage of this act it has been generally held that the supreme court will not issue the writ where it may be done as well in the proper Circuit Court, unless there are special circumstances making action by the supreme court expedient or necessary; 119 U. S. 584; 137 U. S. 63. The writ will not be issued when it appears by the petition that the question has already been decided against the petitioner by another judge in the same court; 45 Fed. Rep. 241. In cases where the right of appeal seems inadequate by reason of its delay, the court may hold the person entitled to the writ as a means, of speedy determination of the question; 40 Fed. Rep. 399. In 128 U. S. 395, a judge of the supreme court refused to grant the writ in chambers to the captain of a steamer committed under the laws of Pennsylvania for selling liquor on the steamer without license on the ground that the federal question if any could be raised by writ of error.

Federal courts cannot grant the writ upon a petition that the person is held under the *capias* of a state court issued upon a judgment that has been vacated; 39 Fed. Rep. 869. A district court cannot, by issuing a writ, declare a judgment of a state criminal court a nullity where such court had full jurisdiction over the crime; 43 Fed. Rep. 661. But the writ can be issued to test the question as to the arrest and imprisonment of a supposed fugitive from justice on the charge of a different offence from that for which he was extradited; 45 Fed. Rep. 471. See also 43 Fed. Rep. 517. In general the writ may be issued by federal courts in every case where a party is restrained of his liberty without due process of law in the territorial jurisdiction of such courts; 40 Fed. Rep. 66; 135 U. S. 1. The granting of the writ is within the discretion of the court and will not be reversed unless an abuse thereof be shown; 33 Fed. Rep. 117. But where the petitioner had been convicted on the indictment of a grand jury impanelled by a court without authority, it was held that the writ became a writ of right and the court having power to issue it could not exercise sound discretion against issuing it; 40 Fed. Rep. 66. A medical director in the navy notified by the secretary of the navy that he was under arrest and should confine himself to the city of Washington is not under such restraint as to sustain the writ; 114 U. S. 564.

The writ does not issue as a matter of course from the federal courts and the petition must show a *prima facie* right thereto; 52 Fed. Rep. 795; 61 *id.* 434; 49 *id.* 238. And only in rare cases will federal courts discharge prisoners held under pro-

cess of state courts; 79 Fed. Rep. 305, 308. See 30 Am. L. Reg. 209.

The supreme court issues the writ by virtue of its appellate jurisdiction; 4 Cra. 75; 108 U. S. 553; and it will not grant it at the instance of the subject of a foreign government to obtain the custody of a minor child detained by a citizen of one of the states; for that would be the exercise of original jurisdiction; 2 How. 65. An appeal lies to the supreme court from a final order of the supreme court of the Territory of New Mexico ordering a writ of *habeas corpus* to be discharged; 164 U. S. 612.

It will grant it on the application of one committed for trial in the circuit court on a criminal charge; 4 Cra. 75; 3 Dall. 17; and where the petitioner is committed on an insufficient warrant; 3 Cra. 443; and where he is detained by the marshal on a *capias ad satisfaciendum* after the return-day of the writ; 7 Pet. 558; also for the purpose of inquiring into the cause of the restraint of the liberty of prisoners in jail under or by color of the authority of the United States, and all persons who are in custody in violation of the constitution or laws of the United States; 128 U. S. 289. An alien immigrant may have a writ to test the lawfulness of his restraint from landing by a federal office; 142 U. S. 651.

None of the courts of the United States have authority to grant the writ for the purpose of inquiring into the cause of commitment, where the prisoner is imprisoned under process issued from the state courts, excepting where he is denied, or cannot enforce, in the judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of citizens of the United States; R. S. § 641; 2 Woods 343. It was refused by the supreme court where the party for whose benefit the application was made had been convicted in a state court of levying war against the state; 3 How. 103. Federal courts will proceed with great caution upon applications for writ of *habeas corpus* in behalf of a person imprisoned under process of the state courts, and, when practicable, will investigate the questions raised before issuing the writ; 49 Fed. Rep. 238. See also paper by Seymour D. Thompson on the abuse and too rigorous use of the writ of *habeas corpus* by the federal judges; 6 Rep. Am. Bar. Assoc. 243.

It was refused by the circuit court where the petitioner, a secretary attached to the Spanish legation, was confined under criminal process issued under the authority of the state of Pennsylvania; 1 Wash. C. C. 232; also where the petitioner, a British seaman, was arrested under the authority of an act of the legislature of the state of South Carolina, which was held to conflict with the constitution of the United States; 2 Wheel. Cr. Cas. 56.

It will be granted, however, where the imprisonment, although by a state officer, is under or by color of the authority of the United States, as where the prisoner was arrested under a governor's warrant as a fugitive from justice of another state, requisition having been regularly made; 3 McLean 121; or where extradited under a treaty with a foreign country upon the charge of a certain offence for which he was afterwards tried and acquitted, and immediately thereafter he was arrested under a charge entirely separate and distinct from the former one; 39 Fed. Rep. 204. It will also be granted where U. S. Marshals or their deputies are arrested by state authority for using force or threats in executing process of the federal courts; 47 Fed. Rep. 802; but see 51 *id.* 277. Federal judges should grant writs to persons imprisoned for any act done in pursuance of a law of the United States; 135 U. S. 1.

The power of the federal courts to issue the writ is confined to cases in which the prisoner is in custody under or by order of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody

in violation of the constitution, or of a law or treaty of the United States, or being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or where it is necessary to bring the prisoner into court to testify; R. S. § 753.

If it appears from the petition itself that the applicant for the writ of *habeas corpus* is not entitled thereto, the writ need not be awarded; 128 U. S. 289; 52 Fed. Rep. 795. The writ cannot be made to perform the office of a writ of error to review the decision of a committing magistrate in extradition proceedings; 161 U. S. 502. Nor will the writ lie, except in rare and exceptional cases, where there is a remedy by writ of error or appeal; 159 U. S. 95. The writ may be issued to determine the right to the custody of an infant as between parents who are living apart; 42 Fed. Rep. 113.

Proper use of the writ. The true use of the writ is to cause a legal inquiry into the cause of imprisonment, and to procure the release of the prisoner where that is found to be illegal.

If the imprisonment be claimed by virtue of legal process, the validity and present force of such process are the only subjects of investigation; 5 Hill 164; 4 Barb. 31; 4 Harr. Del. 575.

But such process cannot, in this proceeding, be invalidated by errors which only render it irregular. The defects, to entitle the prisoner to be discharged, must be such as to render the process void; for the writ of *habeas corpus* is not, and cannot perform the office of, a writ of error; 3 Vt. 114; 4 Day 436; 3 Hawks 25; 2 La. 422, 587; 2 Park. Cr. Cas. 650; 1 Hill, N. Y. 154; 4 C. & P. 415; 7 Ohio St. 81; 81 Wis. 158; 25 Fla. 214; 16 Or. 83; 131 U. S. 267; 133 *id.* 333; 148 *id.* 162; 150 *id.* 637; 51 Fed. Rep. 434; 118 Mo. 377; but will only be issued if applied for to relieve from imprisonment under the order or sentence of some inferior federal court, when such court has acted without jurisdiction, or has exceeded its jurisdiction, and its order is for that reason void; 4 U. S. App. 73.

Although the writ of *habeas corpus* does not lie for the determination of mere errors where a conviction has been had and the commitment thereunder is in due form, yet if the court had no jurisdiction of the offence charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which under the law constitutes no crime, the judgment is void and the prisoner should be discharged; 73 Cal. 120, 363; 127 U. S. 731; 131 *id.* 176; 19 Nev. 178; 79 Ga. 785.

It cannot be used to oust another competent and acting jurisdiction, or to divert or defeat the course of justice therein; 5 Ark. 424; 1 Ill. 198; 1 Md. Ch. Dec. 351; 19 Ala. n. s. 438; 2 Wheat. 532; 3 Yerg. 167; 1 Edw. Ch. 551; 1 Harr. Del. 392; 6 Miss. 80; 1 Curt. 178; 2 Green, N. J. 312; 4 McCard 233; 1 Watts 66; 7 Cush. 285; 8 Ohio St. 599; 139 U. S. 449. It was not intended by congress that the federal courts should, by writs of *habeas corpus*, obstruct the ordinary administration of the criminal laws of the states through their own tribunals; 140 U. S. 278; 142 *id.* 155.

The only ground on which a court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void; 149 U. S. 70; 134 *id.* 136; 131 *id.* 176.

The writ is also employed to recover the custody of a person where the applicant has a legal right thereto: as, the husband for his wife, the parent for his child, the guardian for his ward, and the master for his apprentice; 35 W. Va. 698; 35 Fed. Rep. 354; [1892] App. Cas. 326. But in such cases, as the 'true' object of the proceeding is rather

to remove illegal restraint than to enforce specifically the claims of private custody, the alleged prisoner, if an adult of sound mind, is generally permitted to go at large; if an infant of sufficient age and discretion, it is usually permitted to elect in whose custody it will remain, provided that it does not elect an injurious or improper custody; and if of tender years, without such discretion, the court determines its custody according to what the true interests and welfare of the child may at the time require; Hurd, Hab. Corp. 450.

Application for the writ. This may be made by the prisoner, or by any one on his behalf, where for any reason he is unable to make it.

It is usually made by petition in writing, verified by affidavit, stating that the petitioner is unlawfully detained, etc., and, where the imprisonment is under legal process, a copy thereof, if attainable, should be presented with the petition; for where the prisoner is under sentence on conviction for crime, or in execution on civil process, or committed for treason or felony plainly expressed in the warrant, he is not, in most of the states, entitled to the writ; Hurd, Hab. Corp. 209; Church, Hab. Corp. 91. The application must set forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what authority, if known; 131 U. S. 280.

Where, with ample opportunity to do so, an accused did not apply for the writ of *habeas corpus* until after the jury had been sworn and his trial begun in a state court, the federal court will not interpose at that stage of the cause; 146 U. S. 183.

The return. The person to whom the writ is directed is required to produce the body of the prisoner forthwith before the court or officer therein named, and to show the cause of the caption and detention; 5 Term 89; 2 South. 645. The return must specify the true cause of the detention; and the party imprisoned may deny any of the facts set forth in the return, or may allege other facts that may be material in the case, so that the facts may be ascertained and the matter disposed of as law and justice require; 131 U. S. 280. No evidence is necessary to support the return, as it imports verity until impeached; 137 U. S. 86.

If the writ be returned without the body, the return must show that the prisoner is not in the possession, custody, or power of the party making the return, or that the prisoner cannot, without serious danger to his life, be produced; and any evasion on this point will be dealt with summarily by attachment; 5 Term 89; 10 Johns. 328; 1 Dudl. 46; 5 Cra. 622.

Where the detention is claimed under legal process, a copy of it is attached to the return. Where the detention is under a claim of private custody, all the facts relied on to justify the restraint are set forth in the return.

The hearing. The questions arising upon the return or otherwise in the proceeding, whether of fact or of law, are determined by the court or judge, and not by a jury; Hurd, Hab. Corp. 299.

The evidence on the hearing is such as is allowed in other summary proceedings in which the strictness exacted on the trial in civil actions or criminal prosecutions is somewhat relaxed, the practice sometimes permitting affidavits to be read where there has been no opportunity for cross-examination; but the introduction of such evidence rests in the sound discretion of the court; Archb. Cr. Pl. & Pr. 204; Cox 403; Sandf. 701; 20 How. S. Tr. 1876; 1 Burr's Trial 97. The court is not concluded by the finding of a committing magistrate, but may go behind his order of commitment, and by certiorari look into the evidence before him; 5 Blatchf. 308; 32 Pa. 520. See 49 Fed. Rep. 599.

Pending the hearing the court may commit the prisoner for safekeeping from day to day, until the decision of the case; 14 How. 134; Bac. Abr. *Habeas Corpus* (B 13); 5 Mod. 22.

If the imprisonment be illegal, it is the

duty of the court to discharge the prisoner from that imprisonment; but if the court or officer hearing the *habeas corpus* be invested with the powers of an examining and committing magistrate in the particular case, and the evidence taken before the court, or regularly certified to it in the *habeas corpus* proceeding, so far implicate the prisoner in the commission of crime as to justify his being held for trial, it is usual for the court, in default of bail, to commit him as upon an original examination; 3 East 157; 16 Pa. 575; 2 Cra. C. C. 612; 5 Cow. 12. Where a prisoner is held under a valid sentence and commitment, the illegality of a second sentence will not be inquired into as *habeas corpus* till the term under the first sentence has expired; 17 Nev. 139.

If the prisoner is not discharged or committed *de novo*, he must be remanded, or, in a proper case, let to bail; and all offences are bailable prior to the conviction of the offender, except "capital offences when the proof is evident or presumption great;" Hurd, Hab. Corp. 430.

Recommitment after discharge. The act of 31 Car. II. prohibited, under the penalty of five hundred pounds, the reimprisoning for the same offence of any person set at large on *habeas corpus*, except by the legal order and process of such court wherein such prisoner was bound by recognizance to appear, or other court having jurisdiction of the cause. Somewhat similar provisions are found in the statutes of many of the states. But these provisions are not held to prevent the subsequent arrest of the prisoner on other and more perfect process, although relating to the same criminal act; 9 Pet. 704; 2 Miss. 163.

HABEAS CORPUS ACTS. See HABEAS CORPUS.

HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM (Lat.). A writ which is issued to remove, for trial, a person confined in one county to the county or place where the offence of which he is accused was committed. Bac. Abr. *Habeas Corpus*, A; 1 Chitty, Cr. L. 132. Thus, it has been granted to remove a person in custody for contempt to take his trial for perjury in another county; 1 Tyrwh. 185.

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM (Lat.). A writ usually issued in civil cases to remove an action from an inferior court, where the defendant is sued and imprisoned, to some superior court which has jurisdiction over the matter, in order that the cause may be determined there. This writ is commonly called *habeas corpus cum causa*, because it commands the judges of the inferior court to return the day and cause of the caption and detainer of the prisoner; Bac. Abr. *Habeas Corpus*, A; 3 Bla. Com. 130; Tidd, Pr. 296.

This writ may also be issued at the instance of the bail of the defendant, to bring him up to be surrendered in their discharge, whether he is in custody on a civil suit or on a criminal accusation; Tidd, Pr. 298; 1 Chitty, Cr. L. 132.

HABEAS CORPUS AD PROSEQUENDUM (Lat.). A writ which issues when it is necessary to remove a prisoner in order to prosecute in the proper jurisdiction wherein the fact was committed. 3 Bla. Com. 130.

HABEAS CORPUS AD RESPONDENDUM (Lat.). A writ which is usually employed in civil cases to remove a person out of the custody of one court into that of another, in order that he may be sued and answer the action in the latter. 2 Mod. 198; 3 Bla. Com. 129; Tidd, Pr. 300.

This writ lies also to bring up a person in confinement to answer a criminal charge; thus, the court issued it to the warden of the fleet, to take the body of the prisoner confined there before a magistrate to be examined respecting a charge of felony or misdemeanor; 5 B. & Ald. 730.

But it was refused to bring up the body of a prisoner under sentence for a felony,

for the purpose of having him tried for a previous felony.

HABEAS CORPUS AD SATISFACIENDUM (Lat.). A writ which is issued to bring a prisoner from the prison of one court into that of another, in order to charge him in execution upon a judgment of the last court. 3 Bla. Com. 130; Tidd, Pr. 301.

HABEAS CORPUS AD SUBJICIENDUM. See **HABEAS CORPUS**.

HABEAS CORPUS AD TESTIFICANDUM (Lat.). A writ which lies to bring up a prisoner detained in any jail or prison, to give evidence before any court of competent jurisdiction. Tidd, Pr. 739; 3 Bla. Com. 130; 20 Iowa 372; 91 Mo. 250; 3 Burr. 1440; Whart. Cr. Ev. § 351.

The allowance of this writ resting in the discretion of the court, it will be refused if the application appear to be in bad faith or a mere contrivance; 3 Burr. 1440.

It was refused to bring up a prisoner of war; 2 Dougl. 419; or a prisoner in custody for high treason; Peake, Add. Cas. 21.

It would of course be refused where it appear from the application that the prisoner was under sentence for crime which rendered him incompetent as a witness.

The application for the writ is made upon affidavit, stating the nature of the suit and the materiality of the testimony, together with the general circumstances of restraint which render the writ necessary; Cowp. 672; 2 Cow. & H. Notes to Phill. Ev. 658.

HABEAS CORPUS CUM CAUSA. See **HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM**.

HABENDUM (Lat.). In Conveyancing. The clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by grantee. 3 Washb. R. P. 436.

It commences with the words "to have and to hold," *habendum et tenendum*. It is not an essential part of a deed, but serves to qualify, define, or control it; Co. Litt. 6 a, 299; 4 Kent 468; 8 Mass. 162, 174; and may be rejected if clearly repugnant to the rest of the deed; Shepp. Touchst. 102; Skinn. 543. See, generally, 3 Washb. R. P. 436; 4 Kent 468; 4 Greenl. Cruise, Dig. 273; Elph. Deeds 217.

HABENTES HOMINES (Lat.). Rich men. Du Cange.

HABENTIA. Wealth; Riches. Mon. Ang. t. 1. 100.

HABERE (Lat.). To have. It is said to designate the right, while *tenere* (to hold) signifies the possession, and *possidere* (to possess) includes both. Calv. Lex.

HABERE FACIAS POSSESSIONEM (Lat.). In Practice. A writ of execution in the action of ejectment; originally to recover possession of a chattel interest in real estate.

The sheriff is commanded by this writ that, without delay, he cause the plaintiff to have possession of the land in dispute which is therein described: *a. fl. fa. or ca. sa.* for costs may be included in the writ. The duty of the sheriff in the execution and return of that part of the writ is the same as on a common *fl. fa. or ca. sa.* The sheriff is to execute this writ by delivering a full and actual possession of the premises to the plaintiff. For this purpose, he may break an outer or inner door of the house; and, should he be violently opposed, he may raise the *posse comitatus*; 5 Co. 91 b; 1 Leon. 145.

The name of this writ is abbreviated *hab. fac. poss.* See 10 Vinet, Abr. 14; Tidd, Pr. 1081; 2 Arch. Pr. 58; 3 Bla. Com. 412.

HABERE FACIAS SEISINAM (Lat.). In Practice. The name of a writ of execution, used in most real actions, by which the sheriff is directed that he cause the demandant to have seisin of the lands which he has recovered. 3 Bouvier, Inst. n. 3374. It lay to recover possession

of the freehold, while to recover a chattel interest in real estate the *habere facias possessionem* was the appropriate writ. It was practically abolished in England by the Common Law Procedure Acts of 1852 and 1860, but is still known in some of the states in connection with the action of dower.

This writ may be taken out at any time within a year and a day after judgment. It is to be executed nearly in the same manner as the writ of *habere facias possessionem*, and for this purpose the officer may break open the outer door of a house to deliver seisin to the demandant; 5 Co. 91 b; Com. Dig. Execution, E. The name of this writ is abbreviated *hab. fac. seis.*

HABERE FACIAS VISUM (Lat.). In Practice. The name of a writ which lay when a view is to be taken of lands and tenements. Fitzh. N. B. Index, View.

HABERE LICERE. See **SALRE**.

HABERGEON. A diminutive of hauberk, a short coat of mail without sleeves. Blount.

HABERJECTO. A cloth of mixed color. Magna charta, c. 26.

HABETO TIBI RES TUAS. Have or take thy property to thyself. A phrase used in connection with the Roman law of divorce. Calv. Lex. Where a marriage in one of their modes, by which the wife passed in *manum viri*, was dissolved by divorce, the husband had to restore the *dos*, as in case of the wife's death, unless her misconduct was the cause; Sand. Just. 152.

HABILIS (Lat.). Fit; suitable; 1 Sharsw. Bla. Com. 436. Active; useful (of a servant). Du Cange. Proved; authentic (of Book of Saints). Du Cange. Fixed; stable (of authority of the king). Du Cange.

HABIT. A disposition or condition of the body or mind acquired by custom or a frequent repetition of the same act. See 2 Mart. La. n. s. 622; 18 Pa. 172; 5 Gray 851. The customary conduct, to pursue which one has acquired a tendency, from frequent repetition of the same acts. 105 U. S. 354.

The *habit of dealing* has always an important bearing upon the construction of commercial contracts. A ratification will be inferred from the *mere habit of dealing* between the parties: as if a broker has been accustomed to settle losses on policies in a particular manner, without any objection being made, or with the silent approbation of his principal, and he should afterwards settle other policies in the same manner, to which no objection should be made within a reasonable time, a just presumption would arise of an implied ratification: for, if the principal did not agree to such settlement, he should have declared his dissent. See **USAGE**.

The habit of an animal is, in its nature, a continuous fact, to be shown by proof of successive acts of a similar kind; 131 U. S. 22. See **GOOD HABITS**.

HABIT AND REPUTE. Applied in Scotch law to a general understanding and belief of something's having happened: *e. g.* marriage may be constituted by *habit and repute*; Bell, Dict.

HABITABLE REPAIR. Such a state of repair that leased premises may be occupied, not only with safety, but with reasonable comfort. 2 Mood. & R. 186.

HABITANCY. See **INHABITANT**.

HABITANT. A resident; an inhabitant (*q. v.*). A native of Canada of French descent, particularly of the peasant or farming class; a tenant who kept hearth and home on the seignior.

HABITATIO (Lat.). A habitation, or dwelling.

HABITATION (Lat. *Habitatio*). In Civil Law. The right of a person to live

in the house of another without prejudice to the property.

It differed from a usufruct in this, that the usufructuary might apply the house to any purpose,—as of a store or manufactory; whereas the party having the right of habitation could only use it for the residence of himself and family; 1 Bro. Civ. Law 184; Domat, l. 1, t. 11, s. 2, n. 7.

In Estate. A dwelling-house; a home stall. 2 Bla. Com. 4; 4 *id.* 220.

HABITUAL CRIMINALS ACT. The stat. 32 & 33 Vict. c. 99. Its object was to give the police greater control over convicted criminals at large, and to provide for the registration of criminals. Now repealed and other provisions substituted for it, by the Prevention of Crime Act, 34 & 35 Vict. c. 112. Moz. & W.

In Massachusetts it is held that the state habitual criminal act is not contrary to the United States constitution prohibiting *ex post facto* laws; 155 Mass. 163; 158 *id.* 598.

HABITUAL DRUNKARD. A person given to inebriety or the excessive use of intoxicating drink, who has lost the power or the will, by frequent indulgence, to control his appetite for it. 18 Pa. 172; 5 Gray 85. One who has the habit of indulging in intoxicating drinks so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. 35 Mich. 210. The custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual use of them; the habit should be actual and confirmed, but need not be continuous, or even of daily occurrence; 9 So. Rep. (La.) 750. If there is a fixed habit of drinking to excess, so as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance; 19 Cal. 267; but see 53 La. 511.

Habitual drunkenness of a husband does not entitle the wife to a divorce; L. R. 1 P. & M. 46; *contra*, 1 Bish. Mar. Div. & Sep. 1781. The fact that a man has had delirium tremens once does not prove, as a matter of law, that he is habitually intemperate, so as to contradict his representation to the contrary; 122 U. S. 501.

By the laws of some states, such persons are classed with idiots, lunatics, etc., in regard to the care of property; and in some, they are liable to punishment. See 8 N. Y. 388; Crabbe 558; 6 Wash. 271. See **ROGERS, DRINKS, etc.**; **DRUNKENNESS**; **DELIRIUM TREMENS**; **INTOXICATION**.

HABITUALLY. Customarily; by frequent practice or use. It does not mean entirely or exclusively; 91 Cal. 274.

HABLE. A seaport; a harbor; a naval station. Stat. 27 Hen. VI. c. 3.

HACIENDA. In Spanish Law. A generic term, applicable to the mass of the property belonging to a state, and the administration of the same. Also a private estate or plantation.

As a science, it is defined by Dr. Jose Canga Arguells, in his "Diccionario de Hacienda," to be that part of civil economy which teaches how to aggrandize a nation by the useful employment of its wealth.

A royal estate. Newman & B. Dict.

HACKNEY CARRIAGES. Carriages plying for hire in the street. The driver is liable for negligently losing baggage; 2 C. 13, 877; 33 How. Pr. 481. They are usually regulated in large cities by statute or ordinance; 17 & 18 Vict. c. 86; 122 Mass. 60.

HADBOTE. In English Law. A recompense or amends made for violence offered to a person in holy orders.

HADD. A boundary or limit. A statutory punishment defined by law, and not arbitrary. Moz. & W.

HADERUNGA. Hatred; ill-will; prejudice. Spelman.

HADGONEL. A tax or mulct. Jacob.

HAEC EST CONVENTIO (Lat.). This is an agreement. Words with which agreements anciently commenced. Yearb. H. 6 Edw. II. 191.

HAEC EST FINALIS CONCORDIA (L. Lat.). This is the final agreement. The words with which the foot of a fine commenced. 2 Bl. Com. 351.

HEREDA. The name, under the Gothic constitutions, of the hundred court (q. v.). 3 Bla. Com. 35; 3 Steph. Com. 281, 282, n. (q.).

HEREDE ABDUCTO. An ancient writ that lay for the lord, who, having by right the wardship of his tenant under age, could not obtain access to his person, by reason of the ward having been carried away by another person. Old Nat. Brev. 98; Cowel.

HEREDE DELIBERANDO ALTERI QUI HABET CUSTODIAM TERRÆ. An ancient writ, directed to the sheriff, requiring him to command one who had taken away an heir under age, being his ward, to deliver him to the person whose ward he was by reason of his land. Reg. Orig. 161.

HEREDERAPTO. An ancient writ that lay for the ravishment of the lord's ward. Reg. Orig. 163.

HEREDES. Heirs. Plural of *Hæres*, which see, together with titles immediately following it.

HEREDIPETA (Law Lat.). In Old English Law. The next heir to lands. Laws of Hen. I; Du Cange. And who seeks to be made heir (*qui cupit hereditatem*). Concil. Compostel. anno 1114 can. 18, inter Hispan. t. 3, p. 324; Du Cange.

HEREDITAS (Lat. from *heres*). In Civil Law. "*Nihil aliud est hereditas, quam successio in universum jus, quod defunctus habuit.*" Inheritance is nothing else than succession to every right which the deceased possessed. Dig. 50. 17; 50. 16; 5. 2; Mack. C. L. § 605; Bracton 62 b. See *HÆRES*.

In Old English Law. An estate transmissible by descent; an inheritance. Marten, Anecd. Collect. t. 3, p. 269; Co. Litt. 9.

HEREDITAS DAMNOSA. A burdensome inheritance. See *DAMNOSA HÆREDITAS*.

HEREDITAS JACENS (Lat.). In Civil Law. A prostrate inheritance. The inheritance left to a voluntary heir was so called so long as he had not manifested, either expressly or by silence, his acceptance or refusal of the inheritance, which, by a fiction of law, was said to sustain the person (*sustinere personam*) of the deceased, and not of the heir. Mack. C. L. § 685 a. An estate with no heir or legatee to take. Code, 10. 10., 1; Howe, Stud. Civ. L. 68.

In English Law. An estate in abeyance; that is, after the ancestor's death and before assumption of heir. Co. Litt. 342 b. An inheritance without legal owner, and therefore open to the first occupant. 2 Bla. Com. 259.

HEREDITAS LUCTUOSA. The succession of parents to the estate of deceased children. 4 Kent 397. It was called a mournful inheritance because out of the ordinary and natural course of mortality. It was sometimes termed *tristis successio*.

HÆRES. In Roman Law. One who succeeds to the rights and occupies the place of a deceased person, being appointed by the will of the decedent. It is to be observed that the Roman *hæres* had not the slightest resemblance to the English heir. He corresponded in character and duties almost exactly with the *executor* under the English law.

The institution of the *hæres* was the essential

characteristic of a *testament*: if this was not done, the instrument was called a *codicillus*. Mack. C. L. §§ 682, 680.

Who might not be instituted. Certain persons were not permitted to be instituted in this capacity: such as, persons not Roman citizens, slaves of such persons, persons not in being at the death of the testator, and corporations, unless especially privileged. Also, the emperor could not be made *hæres* with the condition that he should prosecute a suit of the testator against a subject. Nor could a second husband or wife be instituted *hæres* to a greater portion of the estate than was left to that child of the first marriage which received least by the will. So, a widow who married before the expiration of her year of mourning could not institute her second husband as *hæres* to more than a third of her estate. And a man who had legitimate children could not institute as *hæres* a concubine and her children to more than a twelfth of his estate, nor the mother alone to more than one-twenty-fourth; Mack. C. L. § 681.

The institution of the *hæres* might be *absolute* or *conditional*. But the condition, to be valid, must be *suspensive* (condition precedent, see *CONDITION*), *possible*, and *lawful*. If, however, this rule was infringed, certain conditions, as the *resolutive* (condition subsequent, see *CONDITION*), the *impossible*, and the *immoral* or *illegal*, would be null and void, while others invalidated the appointment of the *hæres*,—as the *preposterous* and *capitatory*, i. e. the appointment of a *hæres* on condition that the appointee should, in turn, institute the testator or some other person *hæres* in his testament. In regard to limitations of time, they must be valid, commence *ex die incerto*, a condition that a should become *hæres* after a certain day, or that he should be *hæres* up to a day whether certain or uncertain, was nugatory. The testator might assign his reasons for the institution of a particular *hæres*, but a mistake in the facts which formed the basis of the reasons based did not, in general, affect the validity of the appointment. The institution might be accompanied with a direction that the *hæres* should apply the inheritance either wholly or in part to a specified purpose, which he was bound to comply with in case he accepted the inheritance, unless it was physically impossible to do so, or unless the *hæres* himself was the only person affected by such directions. The *hæres* might be instituted either *simply*, without any interest in the estate, or with a fixed share therein, or with regard to some particular thing; Mack. C. L. § 683. It was customary in order to provide against a failure to accept on the part of the direct *hæres*, to substitute one or more *hæredes* to him. This substitution might be made in various forms; but the result was the same in all,—that if the first of the direct *hæredes* failed to accept the inheritance, whether from indisposition, permanent incapacity, or from dying before the testator, the substitute stood in his stead. There might be several degrees of substitutes, each ready to act in case of the failure of all the preceding; and the rule was *substitutio substituto est substitutio instituto*: so that in case of a failure of all the intermediate substitutes, the lowest in rank succeeded to the position of the instituted *hæres*. This was called *substitutio vulgaris*. There was another, the *substitutio pupillaris*, which was nothing more than the appointment, by the testator, of a *hæres* to a minor child under his authority,—which appointment was good in case the child died after the testator, and still a minor. It was, in fact, making a testament for such minor—an act which he could not perform for himself; Mack. C. L. §§ 663, 669.

Persons entitled to the inheritance. Though, generally speaking, the testator might institute as *hæres* any person whatever not within the exceptions above mentioned, yet his relatives, within certain limits, were considered as peculiarly entitled to the office, and if he instituted any one else they could not be entirely excluded, but were admitted to a share of the inheritance, which share, called *portio legitima*, or *pars legitima*, was fixed by law. The rules in regard to the persons entitled to this share of the estate, and its amount, are very intricate, and too voluminous to be introduced here. They may be found in the *Digest*, §§ 654–667, among those entitled to the *hereditas legitima*, the immediate ascendants and descendants of the testator were peculiarly distinguished in this, that they must be mentioned in the testament, either by being formally instituted as *hæredes*, or by being formally excluded, while the other relatives so entitled might receive their shares as a legacy, or in any other way, without being formally instituted. From this necessity of mentioning this class of relatives, they were called *successores necessari*.

Acquisition of the inheritance. Except in the case of a slave of the testator (*hæres necessarius*), a person under his authority (*potestatis*) could not die *hæres* (*hæres sui*) after his death, the institution of a person as *hæres* did not oblige him to accept the office. A formal acceptance was requisite in the case of all other persons than the two classes just mentioned, whence such persons were called *hæredes voluntarii*, and in opposition to the *sui hæredes*, extranei *hæredes*. The acceptance might be expressed (*aditio hereditatis*), or tacit, i. e. by performing some act in relation to the inheritance which admitted of no other construction than that the person named as *hæres* intended to accept the office. The refusal of the office, if expressed, was called *repudiatio*; if tacit, through the neglect of the *hæres* to make use of his rights within a suitable period, it was called *omissio hereditatis*. The acceptance could not be coupled with a condition; and a refusal was final and irrevocable; Mack. C. L. §§ 681–683.

Rights and liabilities of the *hæres*. The fundamental idea of the office is that as regards the estate the *hæres* and the testator form but a single person. Hence it follows that the private estate of the *hæres* and the estate of the testator are united (*confusio bonorum defuncti et heredis*); the *hæres* acquires all rights of property, and becomes liable for all demands, except those purely personal, to which the testator was entitled and subject, and is,

consequently, responsible for all the debts of the deceased, even if the estate left by the latter is not sufficient to pay them. He must, moreover, recognize as binding upon him all acts of the testator relating to the estate. He is bound to obey the directions of the will, especially to perform the trusts and pay the legacies imposed upon him, yet this only so far as the residue of the estate, after liquidating the debts, enables him to do so.

These were the strict rules of the law; but two modes, the *spatium deliberandi* and the *beneficium inventarii*, were in course of time contrived for relieving the *hæres* from the risk of loss by an acceptance of the office.

The *spatium deliberandi* was a period of delay granted to the *hæres*, upon application to the magistrate, in order that he might investigate the condition of the estate before deciding whether to accept or reject the office. If the *hæres* was pressed by the other *hæredes*, or by the creditors of the estate, to decide whether to accept or reject the office he must decide immediately, or apply for the *spatium deliberandi*, which when allowed by the emperor continued for a year, and when by a judge, for nine months, from the day of its allowance. If the *hæres* had not decided at the expiration of this period, he was held to have accepted. If he was not pressed to a decision by the other *hæredes* or by the creditors, he was allowed a year from the day he was notified of the inheritance having been conferred upon him, to deliberate whether to accept or not. If, after deliberating for the allotted period, he should accept the inheritance, he became responsible for the debts of the testator, without regard to whether the estate was sufficient or not to pay them.

The *beneficium inventarii* was an extension to all *hæredes* of the privilege belonging to soldiers not to be responsible for the debts beyond the assets. The privilege to the *hæres* was conditional, and commenced an inventory within thirty days and completing it within sixty from the time he became notified of his appointment. The inventory must be prepared in the presence of a notary, and must be signed by the *hæres*, with a declaration that it included the whole of the hereditary estate which he might be obliged to make oath. He then became liable only to the extent of the assets. He was allowed, before paying the debts, to deduct the expenses of the funeral, of establishing the testament, and of making the inventory. He could not be forced to pay debts or legacies during the preparation of the inventory, and afterwards he paid the claimants in full in the order in which they presented themselves, and when the assets were exhausted could not be required to pay any more. His own claims against the estate might be paid first, and his debts to the estate were deducted next. If he neglected to prepare the inventory within the legal period, he forfeited the privileges of it; which also was the case if he applied for the *spatium deliberandi*; so that he must choose between the two.

The creditors and legatees of the testator were allowed the *beneficium separationis*, by which, when the *hæres* was deeply in debt, and, by reason of the *confusio bonorum defuncti et heredis*, they were in danger of losing their claims, they were permitted to have a separation of the assets from the private estate of the *hæres*. Application for this privilege must have been made within five years from the acceptance of the inheritance; but it would not be granted if the creditors of the testator had in any way recognized the *hæres* as their debtor. If it was granted, they were in general restricted to the assets for payment of their claims, and the private estate of the *hæres* was discharged. If the assets were not exhausted in satisfying the creditors and legatees of the testator, the creditors of *hæres* might come in upon the balance; but these latter were not entitled to the *beneficium separationis*.

The *hæres* might transmit the inheritance by will; but, in general, he could not do so till after acceptance. To this, however, there were numerous exceptions.

The remedies of the *hæres* are too intimately connected with the general system of Roman jurisprudence to be detailed; a full explanation is given in C. L. §§ 692, 693; Dig. 5. 8; Cod. 3. 81; Gaius, iv. § 144, etc.; Maine, Anc. Law.

Cohæredes. When several *hæres* have accepted a joint inheritance, each, *ipso jure*, becomes entitled to a proportional share in the assets, and liable to a proportional share of the debts, though the testator may, if he choose, direct otherwise, and they may also agree otherwise among themselves; but in both these cases the creditors are not affected, and may pursue each *hæres* to the extent of his legal share of liability, and no further.

One of the *coheredes* has a right to compel a partition of the assets, and liable to do so, however, to an agreement among themselves, or a direction by the testator, that the inheritance shall remain undivided for a time; Mack. C. L. §§ 694, 696.

HÆRES ASTRARIUS. In Old English Law. An heir in actual possession of the house of his ancestor. Bract. 85, 267 b. See *ASTRARIUS HÆRES*.

HÆRES DE FACTO. An heir, made so by reason of the disseisin or other wrongful act of his ancestor. An heir in fact in contradistinction to an heir *de jure*.

HÆRES EX ASSE. In Civil Law. Sole heir. In inheritances and other money matters where a division was made the *as* (a unit) with its parts, was used to designate the portions, thus: *Hæres ex asse*, heir to the whole; *hæres ex semisse*, heir to one-half; *hæres ex dodrante*, heir to three-fourths; and so, *hæres ex besse*, *triente*, *quadrante*, *sextante*, etc.

HÆRES EXTRANEUS (Lat.). In Civil Law. An extraneous or foreign heir, that is one who is not a child or slave of the testator. Those only could be extraneous heirs who had a capacity of accepting the inheritance both at the time of making the will and at the death of the testator. Halifax, Anal. b. 11, c. 6, § 38.

HÆRES FACTUS (Lat.). An heir appointed by will. This expression is applicable in the Roman law and systems founded on it, but not in the English common law; Moz. & W.

Otherwise called *haeres ex testamento*, and *haeres institutus*. Burrill; Inst. 2. 9. 7.

HÆRES FIDEI-COMMISSARIUS (Lat.). See FIDEI COMMISSUM.

HÆRES FIDUCIARIUS (Lat.). See FIDEI COMMISSUM.

HÆRES LEGITIMUS (Lat.). A lawful heir, being a legitimate child of parents who were married.

HÆRES NATUS (Lat.). An heir who is such by birth or descent. This is the only form of heirship recognized in the English law: Wms. R. P., 6th Am. ed. 96.

One born heir, as distinguished from one made heir (*haeres factus*, *q. v.*). An heir at law, or by intestacy; the next of kin by blood, in cases of intestacy. Burrill; Story's Conflict of Laws, § 507.

HÆRES NECESSARIUS (Lat.). In Civil Law. A necessary heir, *i. e.* a slave instituted heir. He was so-called because whether he wished it or not, on the death of the testator he became instantly free and necessarily heir. A person suspecting that he was insolvent usually made a slave his heir so that his goods would be sold, if that were necessary, in the name of this heir and not as those of the testator. Inst. 2. 19. 1; *id.* l. 6. 1; Sand. Intro. § 76.

HÆRES PROXIMUS (Lat.). The child or descendant of the deceased. Dalt. Feud. 110.

HÆRES RECTUS (Lat.). In Old English Law. A right heir. Fleta, l. 6, c. 1, § 11.

HÆRES REMOTIOR (Lat.). A more remote heir. A kinsman, not a child or descendant.

HÆRES SUUS (Lat.). In Civil Law. One's own heir; the natural heir of the decedent; his lineal descendants. Persons who were in the power of the testator but became *sui juris* at his death. Inst. 2. 13; *id.* 3. 1. 4. 5.

HÆRES SUUS ET NECESSARIUS (Lat.). In Civil Law. An heir by relationship and necessity. The descendants of an ancestor in direct line were so-called, *sui*, denoting the relationship, and *necessarii*, the necessity of law which made them heirs without their election, and whether the ancestor died testate or intestate. Halifax, Anal. b. 11, c. 6, § 38; Mack. Civ. L. § 681; Inst. 2. 19. 2.

HÆRETARE. To give a right of inheritance or make a donation hereditary to the grantee and his heirs. Cowel.

HÆRETICO COMBURENDO. A writ for the burning of heretics last executed in the ninth year of James I., and abolished in 1677. See *DE HÆRETICO COMBURENDO*.

HAFNE. A haven or port. Cowel.

HAFNE COURTS (*hafne*, Dan. a haven, or port). Haven courts; courts anciently held in certain ports in England. Spelman, Gloss.

HAG. A division of a coppice or wood on which timber was cut annually by the proprietor. Ersk. Pr. 222.

HAGA. A house in a city or borough. Scott.

HAGIA. A hedge. Mon. Angl. tome 2, 273.

HAGNE. A little hand-gun. Stat. 33 Hen. VIII. c. 6.

HAGNEBUT. A hand-gun larger than the hagne. Stat. 2 & 3 Edw. VI. c. 14; 4 & 5 P. & M. c. 2.

HAGUE ARBITRATION CONVENTION. See HAGUE CONFERENCE.

HAGUE CONFERENCE. A meeting of the representatives of practically every important State which was held at The Hague in 1899, in order to promote disarmament, a more humane method of conducting wars, and arbitration as a means of preventing wars. The most important result was the signing of the Hague Arbitration Convention, under which a permanent court—known as the Panel of Arbitrators, or the Permanent Hague Court, or the Tribunal of the Hague—was established for the settlement of international disputes. The court worked very well as regards various questions—such as the Newfoundland Fishery dispute—but it obviously could not prevent such a calamity as the war of 1914–18.

The conference reassembled in 1907 in order to consider various suggestions for the mitigation of the horrors of war and as to contraband, etc.: but little came of this further meeting. Byrne. See INTERNATIONAL ARBITRATION.

HAIA. An enclosed park. Cowel.

HAIEBOTE. A permission to take thorns, etc., to repair hedges. Blount.

HAILL. Whole. All and hail are common words in Scotch conveyances. 1 Bell, App. Cas. 499.

HAIRWORKFOLK. Holy work folk. Persons who held lands of which the tenure was the service of defending or repairing some church or monument.

HAIMHALDARE. In Old Scotch Law. To seek restitution of one's own goods and gear and bring the same home again. Skene de Verb. Sign.

HAISUCKEN. See HAMESUCKEN.

HAIR. A capillary outgrowth from the skin. It has been held not to include the bristles of animals; 13 Blatch. 251.

HAIEBOTE. See HAIEBOTE.

HAKETON. A military coat of defence.

HAKEH. Truth; the true God; a just or legal prescriptive right or claim; a perquisite claimable under established usage by village officers. Wilson, Gloss. Ind.

HAHXDAR. The holder of a right. Moz. & W. See HAKH.

HALAKAR. The realization of the revenue. Wilson, Gloss. Ind.; Moz. & W.

HALF-BLOOD. A term denoting the degree of relationship which exists between those who have one parent only in common.

By the English common law, one related to an intestate of the half-blood only could never inherit, upon the presumption that he is not of the blood of the original purchaser; but this rule has been greatly modified by the 3 & 4 Will. IV. c. 106.

In this country, the common-law principle on this subject may be considered as not ordinarily in force, though in many states some distinction is still preserved between the whole and the half-blood; 4 Kent 498, n.; 2 Yerg. 115; 1 M'Cord 456; 81 Pa. 293; Dane, Abr. Index; Reeves, *descents, passim*; 2 Washb. R. P. 411. See DESCENT AND DISTRIBUTION.

HALF-BROTHER, HALF-SISTER. Persons who have the same father, but different mothers; or the same mother, but different fathers.

HALF-CENT. A copper coin of the United States, of the value of one two-hundredth part of a dollar, or five mills, and of the weight of ninety-four grains. The first half-cents were issued in 1793, the last in 1857.

HALF-DEFENCE. See DEFENCE.

HALF-DIME. A silver coin of the

United States, of the value of five cents, or the one-twentieth part of a dollar.

It weighs nineteen grains and two-tenths of a grain,—equal to four-hundredths of an ounce Troy,—and is of the fineness of nine hundred thousandths; nine hundred parts being pure silver, and one hundred parts copper. The fineness of the coin is prescribed by the 8th section of the general mint-law, passed Jan. 18, 1837; 5 Stat. L. 187. The weight of the coin is fixed by the 1st section of the act of Feb. 21, 1853; 10 Stat. L. 160. The second section of this last-cited act directs that silver coins issued in conformity to that act shall be a legal tender in payment of debts for all sums not exceeding five dollars. This provision applies to the half-dollar and all silver coins below that denomination. The first coinage of half-dimes was in 1793. A few half "dimes," with a likeness of Mrs. Washington, the wife of the president, upon the obverse of the coin, were issued in 1792; but they were not of the regular coinage.

By act of 9 June, 1879, 21 Stat. L. 7 (Rev. Stat. 1 Supp. 488), silver coin of smaller denominations than one dollar shall be a legal tender in all sums not exceeding ten dollars. The coining of the half-dime was abolished by act of 12 Feb. 1873, c. 131, s. 16. Its place was supplied by a five-cent piece composed of three-fourths copper and one-fourth nickel, of the weight of seventy-seven and sixteen-hundredths grains Troy. The minor coins, *viz.*, the five, three, two, and one cent pieces, are a legal tender for any amount not exceeding twenty-five cents in any one payment.

HALF-DOLLAR. A silver coin of the United States, of half the value of the dollar or unit, and to contain one hundred and eighty-five grains and ten-sixteenth parts of a grain of pure, or two hundred and eight grains of standard, silver. Act of April 2, 1792. 1 Stat. L. 348. Under the provisions of this law, the fineness of the silver coins of the United States was 892.4 thousandths of pure silver.

The weight and fineness of the silver coins were somewhat changed by the act of Jan. 18, 1837, 5 Stat. L. 187; the weight of the half-dollar being by this act fixed at two hundred and six and one-quarter grains, and the fineness at nine hundred thousandths; conforming, in respect to fineness with the coinage of France and most other nations.

The weight of the half-dollar was reduced by the provisions of the act of February 21, 1853, 10 Stat. L. 160, to one hundred and ninety-two grains.

The half-dollars coined under the acts of 1792 and 1837 (as above) were a legal tender at their nominal value in payment of debts to any amount. Those coined since the act of February 21, 1853, were, under it, a legal tender in payment of debts for all sums not exceeding five dollars. Sec. 2. The silver coins struck in the year 1853, under this last-cited act, may be distinguished from the others of that year by the arrow-heads on the right and left of the date of the piece. In 1854, and subsequent years, the arrow-heads are omitted.

By the act of 12 Feb. 1873, c. 131, s. 15, the weight of the half-dollar shall be twelve and one-half grains (192.9 grains), and by act of June 9, 1879, Rev. Stat. 1 Supp. 488, it is a legal tender for sums not exceeding ten dollars. The same act enables the holder of any silver coins of a smaller denomination than one dollar, to exchange them in sums of twenty dollars, or any multiple thereof, at the U. S. Treasury, for lawful money of the United States.

HALF-EAGLE. A gold coin of the United States, of the value of five dollars.

The weight of the piece is 129 grains (act, June 28, 1894) of standard fineness, namely, nine hundred thousandths of pure gold, and one hundred of alloy of silver and copper: "provided that the silver do not exceed one-half of the whole alloy." Act of Jan. 18, 1837, 5 Stat. L. 186. For the proportion of alloy in gold coins of the United States since 1833, see EAGLE.

For all sums whatever the half-eagle was a

legal tender of payment of five dollars. It is now a legal tender to any amount, when not below the standard weight, and then in proportion to its actual weight. Act of February 12, 1873.

HALF ENDEAL or **HALFEN DEAL**. A moiety or half of a thing.

HALF-KINEG. In Saxon Law. Half-King. A title accorded to aldermen of all England. Crabb. Eng. L. 28; Spel. Glos.

HALF-MARK. A noble; six shillings, eight pence.

HALF-PROOF. In Civil Law. That which is insufficient as the foundation of a sentence or decree, although in itself entitled to some credit. Vicat, *Probatio*.

HALF-SEAL. A seal used in the English chancery for the sealing of commissions to delegates appointed upon any appeal, either in ecclesiastical or marine causes. 8 Eliz. c. 8.

HALF-TIMER. In England a child employed in a factory who, under the factory act of 1878, must give one school attendance on each work-day when employed on the morning and afternoon set, or two attendances on each non-working day, if employed on the alternate day system. "Experience has established the fact, that in proportion to the hours spent in school, these 'half-timers' make more rapid progress than the whole-day scholars; at the same time, whether they are designed to be factory workers for life or not, they are acquiring habits of industry and manual dexterity which are of essential use in any future employment." See Int. Cyc. Tit. Factory Acts, Education.

HALF-TONGUE. A jury half of one tongue or nationality and half of another. Vide *De medietate linguæ*, Jacob, Law Dict.

HALF-YEAR. In the computation of time a half year consists of one hundred and eighty-two days. Cro. Jac. 166; Co. Litt. 135 b; N. Y. Rev. Stat. part 1, c. 19, t. 1, § 8.

HALL. A man employed in ploughing. Wilson, Gloss. Ind.; Moz. & W.

HALIMAS. In English Law. The feast of all-Saints, on November 1. One of the cross-quarters of the year was computed from Halimas to Candlemas. Whart.

HALIMOTE. See **HALMOTE**.

HALL. A public building used either for the meetings of corporations, courts, or employed to some public uses: as, the city hall, the town hall. Formerly this word denoted the chief mansion or habitation.

HALL-MARK. An official stamp affixed by the goldsmiths upon articles made of gold or silver as an evidence of genuineness, and hence used to signify any mark of genuineness. "The power of free alienation is the 'hall-mark' of a fee-simple absolute." Rand. Em. Dom. § 206.

HALLAGE. A toll or license fee on goods vended in a hall. Jac. L. Dict.; 6 Co. 62.

A toll due to the lord of a market or fair, on commodities vended in the common hall. Cowel.

Particularly applied to a fee or toll due for cloth brought for sale to Blackwell Hall in London. Lords of fairs or markets are entitled to this fee. Tomlin; 6 Rep. 62.

HALLAMAS. See **HALIMAS**.

HALLAZCO. In Spanish Law. The finding and taking possession of something which previously had no owner, and which thus becomes the property of the first occupant. Las Partidas, 3. 5. 28, 5. 48. 49, 5. 20. 50.

HALLE-GEMOTE. See **HALMOTE**.

HALLUCINATION. In Medical Jurisprudence. The perception by any of the senses of an object which has no

existence. The conscious recognition of a sensation of sight, hearing, feeling, taste, or smell which is not due to any impulse received by the perceptive apparatus from without, but arises within the perceptive apparatus itself. A false perception in contradistinction to a *delusion* or false belief. Wood, Am. Text-Book of Med.

An error, a blunder, a mistake, a fallacy; and when used in describing the condition of a person, does not necessarily carry an imputation of insanity. 64 Vt. 233.

An instance is given of a temporary hallucination in the celebrated Ben Jonson, the poet. He told a friend of his that he had spent many a night in looking at his great toe, about which he had seen Turks and Tartars, Romans and Carthaginians, fight in his imagination. 1 Collin. Lun. 84. It is often of being temporary, this affection of his mind had been permanent, he would doubtless have been considered insane. See, on the subject of spectral illusions, Hibber, Alderson, and Farrar's Essays; Scott on Demonology, etc.; 8 Boston, Physiology 91, 161; 1 Esquirol, *Maladies Mentales* 159. See **INSANITY**.

HALMOTE or **HALIMOTE**. A court baron (*q. v.*). It was sometimes used to designate a convention of citizens in their public hall and was also called folk-mote and hallmote. The word hallmote rather signifies the lord's court or a court baron held in a manor in which the differences between the tenants were determined. Cunn. L. Dict.; Cowel.

The etymology is from the meeting of the tenants of one hall or manor. The name is still kept up in several places in Herefordshire. It has sometimes been taken for a convention of citizens in their public hall, where they held their courts, which was also called folk-mote and hallmote. But the word hallmote is rather the lord's court held within the manor, in which the differences between the tenants were determined. Jacobs; Leg. Hen. I. c. 10.

"Furthermore," it is said, "it seems to have been a common practice for a wealthy abbey to keep a court, known as a hallmote, on each of its manors, while in addition to these manorial courts it kept a central court, a *libera curia* for all its greater freehold tenants. And we may now and again meet with courts which are distinctly called courts of honors. The rule then was not merely this, that the lord of a manor may hold a court for the manor; but rather this, that a lord may hold a court for his tenants." 1 Poll. & Maitl. 578.

HALYWERCFOLE. Those who held by the service of guarding and repairing a church or sepulchre, and were excused from feudal services. Hist. Dunelm. apud Whartoni Ang. Sax. pt. 1, p. 749. Especially in the county of Durham, those who held by service of defending the corpse of St. Cuthbert. Jacob, Law Dict.

HAM. A place of dwelling; a home-close; a little narrow meadow. Blount. A house or little village. Cowel.

A village or town; hence the termination of some of the towns, as Nottingham, Buckingham, etc. Jacob; Blount. See **HAMLET**.

HAMA. A hook; an engine with which a house on fire is pulled down. Yel. 60. A piece of land.

HAMBLING or **HAMELING**. Expedition (*q. v.*).

HAMEL, **HAMELETA**, or **HAMLETA**. A hamlet.

HAMESUCKEN. In Scotch Law. The crime of hamesucken consists in "the felonious seeking and invasion of a person in his dwelling-house." 1 Hume 312; Burnett 86; Allison, Cr. Law of Scotl. 199. By some authorities the word is written Hamesecken; Cowel; 4 Bla. Com. 223.

The mere breaking into a house, without personal violence, does not constitute the offence, nor does the violence without an entry with intent to commit an assault. It is the combination of both which completes the crime, and the injury to the person must be of a grievous character. The punishment of hamesucken, in aggravated cases of injury, is death; in cases of inferior atrocitv. an arbitrary punishment;

Allison, Cr. Law of Scotl. ch. 6; Erskine, Inst. 4. 9. 23.

This term was formerly used in England instead of the now modern term *burglary*; 4 Bla. Com. 223.

But in Hale's Pleas of the Crown it is said, "The common genus of offences that comes under the name of *hamesucken* is that which is usually called house-breaking; which sometimes comes under the common appellation of *burglary*, whether committed in the day or night to the intent to commit felony: so that house-breaking of this kind is of two natures." 1 Hale, Pl. Cr. 547; 22 Pick. 4.

HAMFARE. This word by some is said to signify the freedom of a man's house; but Cowel seems to think that it signifies the breach of peace in a house. Holthouse.

HAMLET. A small village; a part or member of a vill. It is the diminutive of *ham*, a village. Cowel.

HAMMA. A close joining to a house; a croft; a little meadow. Cowel.

HAMMER. Used in connection with auction sales; as to bring or come to the hammer, to sell or be sold at auction. Cent. Dict.

On a stock exchange, to depress values or prices of. On the London Stock Exchange, to expel from membership on account of failure to meet engagements. Stand. Dict.

HAMMER, TO BRING TO THE. To put up at auction. Webster.

HAMMER, UNDER THE. Refers to public sales by a sheriff or auctioneer. Anderson.

HAMSOCUE (Saxon from *ham*, house, *socue*, liberty, immunity. The word is variously spelled *hamsoca*, *hamsocua*, *hamsoken*, *hamsuken*, *hamesaken*). The right of security and privacy in a man's house. Du Cange. The breach of this privilege by a forcible entry of a house is breach of the peace; Anc. Laws & Inst. of Eng. Gloss.; Du Cange; Bracton, lib. 3, tr. 2, c. 2, § 3. The right to entertain jurisdiction of the offence. Spelman; Du Cange. Immunity from punishment for such offence. *Id.*; Fleta, lib. 1, c. 47, § 18. An insult offered in one's own house (*inuitus factus in domo*). Brompton, p. 957; Du Cange.

HANAPER. A hamper or basket in which were kept the writs of the court of chancery relating to the business of a subject, and their returns; 5 & 6 Vict. c. 113; 10 Ric. II. c. 1; equivalent to the Roman *jacus*. According to Spelman, the fees accruing on writs, etc., were there kept; Du Cange; 3 Bla. Com. 49. The office where it was kept was called the *Hanaper office*.

HANAPER, CLERK OF THE. See **CLERK OF THE HANAPER**.

HAND. A measure of length, four inches long; used in ascertaining the height of horses.

In legal parlance, handwriting or written signature, as "witness my hand," etc.; 18 Colo. 538; 10 Mod. 103.

HAND-BILL. A written or printed notice displayed to inform those concerned of something to be done.

HAND-BOROW (from hand, and Saxon *borow*, a pledge). Nine of a decenary or friborg (*q. v.*) were so called, being inferior to the tenth or head borow,—a *decena* or *friborga* being ten freemen or frankpledges, who were mutually sureties for each other to the king for any damage. Du Cange, *Friborg*, *Head-borow*.

HAND DOWN. To announce or file an opinion in a cause. Used originally and properly of the opinions of appellate courts transmitted to the court below; but in later usage the term is employed more generally, but inaccurately, with reference to any decision by a court upon a case or point reserved for consideration.

HAND-FASTING. Betrothment.

HAND-GRITH. Peace or protection

given by the king with his own hand used in the laws of Henry I. Tomlin; Cowel; Moz. & W.; Stat. Hen. I. c. 18.

HAND-HABEND. In Saxon Law. One having a thing in his hand; that is, a thief found having the stolen goods in his possession.—*latro manifestus* of the civil law. See Laws of Hen. I. c. 59; Laws of Athelstane § 6; Eleta, lib. 1, c. 88, § 1; Britton p. 73; Du Cange, *Handhabenda*.

Jurisdiction to try such thief. *Id.*

HAND MONEY. Earnest (*q. v.*) when it is in cash. See **HANDSALE**.

HANDSALE. Anciently, among all the northern nations, shaking of hands was held necessary to bind a bargain,—a custom still retained in verbal contracts: a sale thus made was called *handsale*, *venditio per mutuum manuum complexionem*. In process of time the same word was used to signify the price or earnest which was given immediately after the shaking of hands, or instead thereof. In some parts of the country it is usual to speak of hand-money as the part of the consideration paid or to be paid at the execution of a contract of sale. See 3 Bla. Com. 448; Heineccius, *de Antiquo Jure Germanico*, lib. 2, § 335; Toulrier, liv. 3, t. 3, c. 2, n. 33; **EARNEST**.

HANDESEL. Earnest; handsale (*q. v.*).

HANDWRITING. Anything written by a person. The manner in which a person writes, including the formation of the characters, the separation of the words, and other features distinguishing the written matter, as a mechanical result, from the writing of other persons.

That branch of the law of evidence which treats of handwriting is largely concerned with the determination of the genuineness or falsity of signatures. As to what constitutes a writing, generally, see that title, and, as to writing as required by the statutes of wills, see **WILL**.

With respect to proof of handwriting a signature by a person unable to write, or, as it has been held, by one who can write, may be by mark, which is proved as the handwriting would be in case of a written signature. See **MARK**. The law of evidence as to handwriting applies also where it is in a disguised hand; 4 Esp. 117; 5 Cush. 295; 9 Conn. 55; or when a cipher is used; 135 Mass. 533.

One's own testimony is not the best evidence on this subject, and the writer need not be called; 2 Camp. 508; 1 Hawks 190; 49 N. J. L. 26. See 67 Barb. 124. Whether it is evidence at all is a question confused by the general disqualification of parties who were naturally in most cases those to whom the question would arise, and it has been of late assumed by many writers that since the statutes allowing parties to be witnesses they may be such, for this as well as any other purpose. See 5 Mass. 261; 5 Ohio 5; s. c. 22 Am. Dec. 767, with note citing cases. The handwriting of attesting witnesses after thirty years need not be proved; Stark. Ev. Sharsw. ed. 521; so also of unattested documents taken from proper depositaries; 7 East 279; 62 Me. 414. The extrajudicial admissions of a party as to his handwriting are evidence to prove the same, though not of a very satisfactory nature; Whart. Ev. 705.

It is said that a witness has three means of becoming acquainted with a person's handwriting: (1) by seeing him write; (2) by having seen his writing; and (3) by a comparison of the writing in question with other writings shown to be genuine; Best, Ev. § 233; Steph. Ev. Art. 51.

As to the first, it is generally held that it is enough that the witness has seen the party write only once; 22 Gratt. 405; 17 N. H. 71; 135 Mass. 533; 26 Pa. 388; 8 C. & P. 380; 104 Ill. 327; 142 id. 453; 42 Mich. 473. The contrary, however, was held in one case, in which it was said:

"It is not enough that he (the witness) had seen the person, as is the proof of this case, write but once, and then under circumstances showing that the attention of the witness was not specially directed to the peculiarities of the penmanship;" 1

Bond 51.

Any person who has seen one write and has acquired a standard in his own mind of the general character of the writing is competent to testify as to his belief of the genuineness of a writing; 45 La. Ann. 207. Merely seeing the party write his surname once was held insufficient to warrant testifying to the full signature; 2 Stark. 164; but seeing the surname written several times was sufficient; Mood. & M. 39. See 1 Disney 539; 8 Gill 77. It is sufficient although the witness never saw the person write before the date of the paper in question; 10 Cush. 453; or although he had not seen him write for many years before the trial; 8 Gill 87 (three years); *id.* 18 (six years); 8 Scott 384 (ten years); 25 How. St. Tr. 71 (nineteen years); but not that he has seen writing that is done with reference to his testifying at the trial either at or before it; 90 Pa. 89; 16 N. J. L. 267; with this exception the circumstances under which the witness has seen the party write affect his credit, not his competency; Jones, Ev. § 559; 54 N. Y. 398; 26 Pa. 388; 135 Mass. 533.

As to the second method it is not necessary that the witness has seen the party write, as such personal acquaintance may be acquired by having seen papers purporting to be genuine and which have been acknowledged to be such by the writer; 49 Minn. 420; 38 S. C. 385; 5 Tex. Civ. App. 375; 54 N. Y. 398; 17 Pa. 514; 45 Ill. App. 462; but this is not always sufficient; 108 Mass. 344. The witness is qualified, as such, by knowledge derived from correspondence, including letters received from a person in answer to those written and addressed to him; 3 Allen 598; 62 Ga. 100; 103 Ind. 419; 41 Miss. 216; 39 Neb. 660; 83 Ala. 351; 1 Cra. 491; 25 Pa. 133; 46 Mich. 482; 21 Wend. 557; 5 A. & E. 740; but the mere receipt of letters is insufficient to prove that they were written by the person purporting to sign them; 124 Ind. 495; there must be a ratification or recognition; 21 Wend. 557; 113 Mass. 274; 46 Vt. 228; 40 Ill. 346; 59 Tex. 411; *contra*, 2 C. & P. 744; 2 C. & P. 21; but such knowledge may be gained in the ordinary course of business, as by seeing documents written by the person; 27 Gratt. 313; 8 Hun 175; 28 Ill. App. 445; and only seeing letters addressed to strangers purporting to be those of the person in question; 113 Mass. 275; 28 Pa. 318. Such knowledge may be that of a clerk who sees correspondence or documents; 12 Wall. 317; 2 Johns. Ch. 211; 2 Metc. 523; 5 C. & P. 213; 10 Mo. 597; a clerk in a bank; 56 Wis. 156; 35 Ala. 370; a servant who has taken his master's letters to the post; 5 A. & E. 740; or a public officer who has seen many official documents filed in his office, signed by a justice, may prove his signature; 47 Cal. 294; 2 Metc. 522; 12 Wall. 317. The weight of the testimony will depend on the means of knowledge; 37 Fed. Rep. 331. The witness must have an opinion; 38 Ill. 363; and may give it if the handwriting is disguised; 5 Cush. 301; s. c. 32 Am. Dec. 711; 36 N. H. 182; but positive knowledge or certainty is not necessary; 8 Ves. 474; 80 Ia. 180; 32 N. Y. 669; 116 Mo. 605; he need not swear to belief, an opinion is sufficient; 25 Pa. 133; 38 Ill. 363; Whart. Ev. § 709. A witness has been permitted to testify that the signature was like the writing of the party whose signature it is alleged to be; 4 Esp. 37.

The witness in such case need not be an expert; 72 Ala. 19; 5 Tex. Civ. App. 575; or familiar with the person's handwriting generally if he is so with the signature; 105 Mass. 62; as, e. g. he may prove the signature of a firm, when unacquainted with the handwriting of any partner; where he testifies that in his opinion, the handwriting was the same as that of many notes he had presented to the firm, and which had been paid by them; 10 Ired. 385.

A signature upon an ancient writing may be proved by a witness who has become familiar with it by the inspection of other authentic ancient documents on which the same signature appeared; 8 Wend. 426; 15 id. 111. If a witness says that he knows a

party's handwriting, he is *prima facie* competent to testify with respect to it and, if not cross-examined, his knowledge is taken to be admitted; 8 Watts 485; 17 Pick. 490; 5 McLean 186; *contra*, 8 Ill. 644; 17 Ohio 16; he may be cross-examined as to the extent of his knowledge; 56 Md. 439; which goes to the weight of his testimony; 72 Ala. 79. But if want of knowledge appear; 46 Vt. 228; 38 Kan. 601; 3 Humph. 367; or his testimony is insufficient; 2 Cra. 253; 27 Tex. 345; 30 N. J. L. 387; 8 V. & B. 172; it may be rejected. But see 66 Pa. 253. A witness may testify as to handwriting who cannot read or write himself; 132 Mass. 105.

A witness may be asked if he would act upon the signature which he testifies to as genuine; 147 U. S. 150; *contra*, 44 N. Y. 514; his knowledge cannot be tested by irrelevant papers; 13 Gray 525; 11 A. & E. 322; 91 Mo. 399; 104 Ill. 327; 44 N. Y. 514. But see 2 M. & E. 536; 14 Me. 478; 41 Ala. 626; 1 Whart. Ev. § 10. But he may refresh his memory by reference to papers from which his knowledge is derived; 4 Cra. 312; 66 Md. 113; 26 Pa. 388; 42 Mich. 113; 6 Rand. 316.

The third method of proving handwriting is what is termed comparison. It is defined to be a mode of deducing evidence of the authenticity of a written instrument, by showing the likeness of the handwriting to that of another instrument proved to be that of the party whom it is sought to establish as the author of the instrument in question. 1 Greenl. Ev. § 578.

Another much cited definition is "when other witnesses have proved the paper to be the handwriting of a party, and then the witness on the stand is desired to take the two papers in hand, compare them, and say whether or not they are the same handwriting; the witness collects all his knowledge from comparison only; he knows nothing of himself; he has not seen the party write nor held any correspondence with him;" Duncan, J., 6 S. & R. 571.

But more briefly, though with great precision, Starkie says: "By comparison is meant a comparison by the juxtaposition of two writings in order, by such comparison, to ascertain whether both were written by the same person." Stark. Ev. Metc. ed. pt. 4, 664.

Scarcely any title of the law, certainly none in the law of evidence, has given rise to more discussion in England and in this country and the "confusion, obscurity, and contradiction" which is to be observed in the cases quite justifies the criticism of Woodward, J., in 43 Pa. 9, that much of the difficulty of the subject has arisen from the failure of judges to observe the essential rule "that terms be first correctly defined and then always used in the defined sense." A very pregnant cause of the confusion was the failure to preserve the distinction between comparison properly defined and the use of admittedly genuine signatures merely to enable a witness to refresh the memory as to his ideal standard formed by previous knowledge of the handwriting of the person whose signature was in issue. The latter process is in no sense a proper application of the term comparison as understood in the law of evidence, though often so used by judges. It is true as said by Patteson, J., in *Doe v. Suckermore*, 5 A. & E. 703 (and repeated in almost the same words by Judge Woodward in the case just cited), that all evidence of handwriting, except in the single instance where the witness saw the document written, is in its nature, comparison of hands. It is the belief which the witness entertains, upon comparing the writing in question with the exemplar in his mind derived from some previous knowledge. This language aptly expresses the idea which was in the mind of its author, but it has been quoted time and again by judges who apparently did not have clearly in mind the distinction which it was intended to emphasize and has contributed, perhaps, not a little to the continued misuse of the word comparison in this connection. Where a witness testifies from the comparison (used in what might be termed the colloquial sense referred to,

by Justice Patteson) of the writing in question with a mental standard derived from previous knowledge of the handwriting, he is simply stating his opinion, not based in the sense of opinion evidence, but based upon his own knowledge. When a witness examines the writing in question and, placing it in juxtaposition with other writings proved to be genuine, having no previous knowledge, and testifies to his belief from the similitude, or want of it, it is properly and technically, evidence by comparison of hands. This distinction is stated with precision in some very early cases; *Peake, N. P. 20*; *21 How. St. Tr. 810*; *Rex v. Tandy, cited McNally, Ev. 409*. It is in this latter technical sense that the phrase comparison of hands is here used and the cases properly relating to the subject apply to the two questions: (1) whether such comparison may be made by the jury, genuine writings, otherwise irrelevant, being admitted for that purpose; (2) whether it may be made by expert witnesses and their conclusions proved for the information of the jury.

Such evidence was admissible in the Roman law; *1 Whart. Ev. § 711*, citing *De Prob. de Lit. Comp. L. 20, c. iv. 21*; *Nov. 49, cap. 2*; and also under the Code Napoleon, by three sworn experts appointed by the court, or agreed upon, and the writings must be executed before a notary or admitted; *Gen. Code Proc. pt. 1, l. 2, tit. 10, s. 200*.

At common law the genuineness of a contested writing could not be proved by comparison, by a witness, of such writing with other writings acknowledged to be genuine; *1 Cr. & J. 47*; *1 Nev. & P. 1*; *7 C. & P. 548, 595*; *1 Mood. & R. 133*; *5 A. & E. 708*. It was otherwise in the ecclesiastical courts; *id.*; *1 Phil. 73*. See *2 Addams 53, 79, 91, note a*; *1 id. 162, 214, 216*.

Ancient writings could be proved by comparison; *14 East 327, n. a*; *7 East 279, 232*; *Mood. & R. 141*; *10 Cl. & F. 193*; *2 H. L. Cas. 534, 557*. The right of the jury to make comparisons, though denied by Lord Kenyon when the jurors were illiterate; *Peake, N. P. C. 20*; was allowed by him when the jury were considered competent; *id. 27*; and it was afterwards fully established; *1 Cr. & J. 47*; *1 N. & P. 1*; *4 C. & P. 267*. Comparison by experts, after some fluctuation, it was settled could not be made; *5 C. & P. 196*; *5 B. & A. 330*; *5 A. & E. 708*.

It had required infinite discussion to settle the rule of these cases. Something called comparison was known in very early cases; *10 How. St. Tr. 312*; *12 id. 183, 306*; *12 Mod. 72*; but at this period the terms comparison of hand and similitude of hands were used to describe every method of the proof of writing except by one who had seen the document written. It is therefore necessary that the cases should be critically reviewed with reference to the varied meaning with which these terms were employed at different periods. This work has been very well done by Professor John H. Wigmore in *30 Am. L. Rev. 481*. The conclusion reached is thus stated:—“(1) That the classes of witnesses who may testify to handwriting have increased in number by successive enlargements; (2) that the whole meaning of ‘comparison of hands’ has changed; (3) that the mere process of juxtaposition *coram iudicio*, whether for witness or for the jury, was historically orthodox and unquestionable; and (4) that the opposite fates, at common law, of juxtaposition by experts and juxtaposition by jury—exclusion for the former but sanction (limited) for the latter—were due simply to the fact that the former had never been attempted till the 1800s and was merely prevented from coming into existence, while the latter had always existed and was thus able to survive the attempts on its life.” The entire article should be referred to in any examination of this subject, as, on the whole, throwing new light upon it from a point of view not elsewhere so well treated. It may be added that the historical development of the English rule has not lost its importance by reason of its being superseded in England by

statute. It is of primary importance in considering the decisions in those American jurisdictions which adhere to the old rule, and scarcely less so in properly estimating those in the jurisdictions which have abandoned it. See *infra*.

The question was set at rest by *17 & 18 Vict. c. 125, s. 27*, authorizing comparison with a writing proved to the satisfaction of the judge to be genuine to be made by witnesses, and such writings to be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. Under this act the jury may make comparison with papers relevant or not; *1 F. & F. 270*; *2 id. 24*; *4 id. 490*. The court must determine the genuineness of the document offered for comparison and its decision is appealable; *30 L. T. 223*.

The rule of the English courts (prior to this statute) forbidding the admission of documents irrelevant to the matter in issue for the sole purpose of comparison is known as the English rule, and is so referred to by American courts, including those which have and those which have not adopted it.

The objections to permitting comparison of the disputed paper with others conceded to be genuine but admitted for the sole purpose of comparison, which led to the adoption of the English rule, have been thus summarized: “First, that the writings offered for the purpose of comparison with the documents in question might be spurious, and consequently that, before any comparison between them and it could be instituted, a collateral issue must be tried to determine their genuineness. Nor is this all,—if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury and delay in the administration of justice. Secondly, that the specimens might not be fairly selected. Thirdly, that the persons composing the jury might be unable to read, and consequently be unable to institute such comparison.” *Best, Ev. § 238*.

The rule is followed, generally, by the federal courts. It is specifically adopted by the supreme court; *91 U. S. 270*; *125 id. 397*; *151 id. 303*; *6 Pet. 763*. In the circuit and district court while the rule of the supreme court is generally followed; *56 Fed. Rep. 384*; there is opportunity for some variation, growing out of the frequent necessity in those courts for the administration of local law. Comparison was allowed by both jury and experts in *12 Blatchf. 390*; *31 Fed. Rep. 19*; *82 id. 198, contra*, *10 id. 469*. No comparison was permitted by experts in *1 Baldwin 49*; *1 Wash. C. C. 1*; *4 id. 729*; but it was allowed by the jury with papers otherwise in evidence; *3 Wall. Jr. 88, 115*; and with papers offered for comparison, merely; *1 Gall. 170*. In the fourth circuit the supreme court rule was directly followed; *29 Fed. Rep. 247*; and that of course is to be considered the rule of the federal courts unless the case is controlled by local law.

Many of the state courts have also followed the old English rule, and while permitting comparison by the jury, with papers in evidence in the case, they exclude irrelevant papers; *72 Ala. 79*; *84 id. 53*; *96 id. 357*; *11 So. Rep. (Ala.) 365*; *82 Ark. 337*; *5 Col. 840*; *40 Ill. 846*; *64 id. 356*; *142 id. 802 (contra)*, *46 Ill. App. 598*; see *31 id. 592*; *144 Ill. 632*; *147 id. 659*; *13 B. Monr. 237* (see also *85 Ky. 259*); *11 Md. 148*; *56 id. 439* (a genuine and disputed signature on the same page are not subject to comparison by the jury; *14 id. 666*); *42 Mich. 473*; *67 id. 222* (but in a later case irrelevant papers were admitted which had been shown to the party, denying the signature in dispute, on cross-examination; the court expressly stating that the case was different; *69 Mich. 287*); *3 Mont. 262*; *1 Pac. Rep. (N. Mex.) 170*; *1 N. Dak. 30*; *2 R. I. 319*; *10 W. Va. 49*; *28 Tex. 211*; *67 id. 567*; *69 id. 700*; *82 id. 259*; but papers otherwise in the case must be admitted or proved to be genuine; *47 id. 503*; *29 W. Va. 147*.

In some if not all of the states in which the subject is now regulated by statute the prior decisions were in support of this rule; *5 Houst. 220*; *5 Neb. 247* (see *31 id. 124*); *75 N. Y. 288*; *95 id. 73*; *2 Heisk. 206*; *3 Baxt. 42* (but where no objection was interposed signatures admitted to be genuine were given to the jury for comparison; *90 Tenn. 167*); *32 Wis. 84*.

In some states the decisions indicate a tendency to allow comparison by the jury and experts where the genuineness is not denied or is conceded or the party is estopped to deny it. In Missouri earlier decisions excluded irrelevant papers but permitted comparison both by jury and experts with papers otherwise in the case; *29 Mo. 886*; *83 id. 693*; and later ones permitted it with other papers as to which no collateral issue could be raised, as if the genuineness was proved or the party was estopped to deny it or if they belonged to the witness who was acquainted with the handwriting in dispute; *15 Mo. App. 460*; *67 Mo. 380* (and see *91 Mo. 399*); and in North Carolina comparison by the jury was not permitted even with papers in the case; *1 Ired 16*; *3 Jones 407*; *101 N. C. 119*; but it has been allowed by experts with papers admitted to be genuine and otherwise in evidence; *76 id. 142*; and see *113 id. 688*.

In Indiana the decisions are conflicting but comparisons are allowed, in most cases both by jury and experts, if the paper is genuine, otherwise by experts alone; *32 Ind. 472*; *43 id. 381*; *46 id. 38*. See *60 id. 241*; *66 id. 123*; *78 id. 64*. The later cases allowed comparison by experts as well as by the jury; *103 Ind. 14*; *126 id. 106*.

In many states comparison is permitted with genuine documents, without respect to relevancy; and usually when it is allowed at all it may be made by experts as well as by the jury.

There has, however, been some indisposition to permit experts to make the comparison. It has been permitted by the jury and experts; *1 Root 308*; *9 Conn. 55*; *10 Kan. 335*; *47 id. 242*; *17 Pick. 490*; *85 Minn. 425*; *Wright 293*; *36 Ohio St. 195*; *8 Utah 11*; in some cases it has been allowed by the jury; *14 Me. 432*; *143 Mass. 23*; *5 Vt. 533*; *39 id. 235*; *58 N. H. 156*; and in others by experts; *52 Me. 9*; *116 Mass. 331*; *50 Miss. 24*; *53 N. H. 452*; *64 id. 453* (after much fluctuation); *82 Va. 1*; *80 Cal. 82*; but it was not permitted with a press copy of a disputed writing, though *seem* that the original might have been used; *60 Cal. 535*. The signatures used for comparison must be genuine; *80 Conn. 218*.

In Pennsylvania and South Carolina until the late statute of the former state, *infra*, the decisions were substantially in accord. When there was conflicting direct evidence, only the jury might make comparison with papers duly proved; *10 S. & R. 110*; *3 Watts 321*; *83 Pa. 211*; *96 id. 480*; *115 id. 453*; *1 McMull. 120*; *2 McCord 516*; *3 Brev. 551*. The evidence of genuineness of a paper offered for comparison must be conclusive; *6 Whart. 284*; *93 Pa. 123*; and comparison could only be made by witnesses acquainted with the party's writing; *1 S. & R. 333*; *23 Pa. 318*. In criminal cases expert testimony is allowed; Pennsylvania act of 1860, March 31, § 55, P. L. 284.

A recent statute of Pennsylvania (1895, May 15, P. L. 69), codifying the law on this subject, enacts, (1) That the opinion of those acquainted with the handwriting of the supposed writer, and of experts, shall be deemed relevant; (2) That experts may compare the disputed writing with others admitted or proved to the judge's satisfaction to be genuine; (3) That experts may be required by counsel to state in full the ground of their opinions; (4) That the question shall still be one entirely for the jury; and (5) That the act shall apply to all courts and all persons having authority to receive evidence.

In several states, including some in which the courts had adhered to the English rule, the question has been settled by statute permitting the comparison of handwriting. Among the states which have legislated upon the subject are California, Delaware,

Georgia, Iowa, Louisiana, Nebraska, New Jersey, New York, Tennessee, Wisconsin, and Pennsylvania as above stated. The most common form of such statutes is to authorize comparison of a disputed writing with any writing proved to the court to be genuine, to be made by a witness and to permit the submission of such writings and evidence of witnesses respecting the same, to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. The tendency in the United States is in the direction of the rule established under these statutes. It is not within the present purpose to state all the decisions or to indicate the exact condition of the law in the several states. For any special case recourse should be had to the decisions and statutes of the particular state.

Under a statute providing that "evidence respecting the handwriting may also be given by comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine, by the party against whom the evidence is offered" papers not otherwise competent are admissible for the purpose of enabling the jury to make a comparison; 147 U. S. 150; 56 Fed. Rep. 384.

Prior to the statute of 17 and 18 Vict. already cited, the English rule as to comparison was subject to certain exceptions which have been said to be as well settled as the rule itself; Bradley, J., in 91 U. S. 270; one of these was the admission of ancient writings; see *supra*; the other is that if a paper admitted to be in the handwriting of the person in question is in evidence for some other purpose in the cause, the signature in question may be compared with it by the jury. This is a settled rule of the American courts, including those which adhere to the English rule against comparison as well as those which, either under statute or decision, admit it; 75 N. Y. 298; 113 N. C. 688; 126 Ind. 106; 144 Ill. 652; 72 Mich. 265; 90 Ia. 678; 56 Fed. Rep. 384; 125 U. S. 397, 414; 151 *id.* 308; 157 *id.* 127.

A writing specially prepared for the purpose of comparison is inadmissible on a question of genuineness; 151 U. S. 303. A party cannot himself write specimens for the instruction of witnesses; Whart. Ev. § 715; nor can he make test writings to be used for a comparison of hands; 110 Mass. 155; 128 *id.* 46; 64 Cal. 334; 151 U. S. 303.

In England, by statute, a person whose handwriting is in dispute, may be called upon by the judge to write in his presence, and such writing may be compared with the writing in question; Whart. Ev. § 706. See 4 F. & F. 490; 45 Me. 534, *contra*, 62 Conn. 515.

On cross-examination, other writings not in the case may be shown to the witness, and he may be asked whether they are in the handwriting of the party in question; if so declared by the witness, they may be shown not to be genuine and given to the jury for comparison; Whart. Ev. § 710; see 11 Ad. & E. 322.

Experts may be permitted to testify as to whether handwriting is natural or feigned; Tayl. Ev. 1209, 1590; 43 Pa. 9; 69 *id.* 225; 116 Mass. 331; 37 Miss. 461; as to the nature of the ink used; 30 N. Y. 385; 34 Pa. 365; whether the whole of an instrument was written by the same person, at the same time, and with the same pen and ink; 34 Pa. 365; 11 Gray 250; 90 Mich. 112; whether the figures in a check have been altered; 18 Ind. 329; see 7 Abb. (N. Y.) N. Cas. 113; 32 N. J. Eq. 819; 77 Pa. 20; 62 Ga. 100; 61 Ala. 33; 47 Wis. 530; 39 Md. 36.

An expert witness need not be a professional; 18 S. C. 506; a merchant and dealer in commercial paper is by his vocation qualified to some extent to testify as to the genuineness of a signature to a note; 45 Mo. App. 346. But the value of expert testimony as to handwriting, is to be determined by his opportunity and circumstances. If an illiterate man seldom brought by his business into familiarity with handwriting, his opinion is entitled to much less weight than if educated and accustomed to

correspondence, and seeing people write; 37 Fed. Rep. 331.

The jury are not bound by expert evidence further than it accords with their own opinions or than they think it is to be credited; 31 *id.* 19; proof of a genuine signature to a document whose authenticity is denied casts upon the opposite party the burden of showing that the writing above the signature was forged; 150 U. S. 812.

On a question of the genuineness of the signatures of makers of an accommodation note, testimony of an expert that the ordinary handwriting of the nominal payee, as shown in letters, was such as to convince him that the payee could not successfully imitate the handwriting of one of the witnesses as easily as that of one of the makers of the note, though possibly irrelevant, is unimportant and its admission is not ground for reversal; 147 U. S. 150.

Forgeries of handwriting, and paper and ink to imitate various degrees of age, are so skilfully made, that examination and comparison, even by so-called experts, in the way heretofore usual in courts of justice, are often inadequate and misleading. A scientific use of the microscope, photography, and chemical agents, will generally prove a much surer means of discovering truth. See at large on this branch of the subject, Dr. Frazier's valuable Manual of the Study of Documents. See, generally, works on Evidence; Hogan, on Disputed Handwriting; 16 Am. L. Rev. 569; 17 *id.* 21; 10 Cent. L. J. 121, 141; 12 *id.* 507; 32 *id.* 531; 15 Can. L. J. 149, 181; 17 Myers, Fed. Dec. 369; 20 Weekly L. B. 350; 29 Sol. J. 534; 18 Am. L. Reg. 273; 21 *id.* 425, 489; 6 Am. St. Rep. 177; 9 *id.* 29; 27 Am. L. Reg. 273; EXPERT; OPINION.

HANGED, DRAWN, AND QUARTERED. A phrase used to describe an ancient punishment in England for high treason (*q. v.*), which consisted of first hanging the convicted person, of then taking him down while he was still alive and removing and burning his bowels, and finally of severing his head from his body and dividing the body into four quarters. Byrne.

HANGING. Death by the halter, or the suspending of a criminal, condemned to suffer death, by the neck, until life is extinct. A mode of capital punishment.

In Utah a person convicted of a capital crime has a right of election between hanging and shooting; Comp. L. § 5131. See CRIMES; CAPITAL PUNISHMENT; EXECUTION.

In Old English Law. Pending, as hanging the process. Co. Litt. 18a, 266a. Remaining undetermined. 1 Show. 77.

HANGING IN CHAINS. An ancient practice of hanging a murderer, after execution, upon a gibbet, in chains, near the place where the murder was committed. Abolished by 4 & 5 Will. IV. c. 26.

HANGMAN. An executioner. The name usually given to a man employed by the sheriff to put a man to death, according to law, in pursuance of a judgment of a competent court and lawful warrant.

HANGWITE (from Saxon *hangian*, to hang, and *wite*, fine). Fine, in Saxon law, for illegal hanging of a thief, or for allowing him to escape. Immunity from such fine. Du Cange.

HANIG. Some customary labor to be performed. Holthouse.

HANSE. A commercial confederacy for the good ordering and protection of the commerce of its members. An imposition upon merchandise. Du Cange, *Hansa*.

HANSE TOWNS. A number of towns in Europe which joined in a league for mutual protection of commerce as early as the twelfth century.

Amsterdam and Bremen were the first two that formed it, and they were joined by others in Germany, Holland, England, France, Italy, and Spain, numbering ninety at one time. They made war and peace to protect their commerce, and held countries in sovereignty, as a united commonwealth. They had a common treasury at Lubeck, and power to call an assembly as often as they chose. For

purposes of jurisdiction, they were divided into four colleges or provinces. Great privileges were granted them by Louis VI. of France and succeeding monarchs. One of their principal magazines was at London. Their power became so great as to excite the jealousy of surrounding nations, who forced the towns within their jurisdiction which belonged to the league to renounce it. Their number and power became thus gradually reduced, beginning from the middle of the fifteenth century; and the last general assembly, representing six cities, was held in Lubeck in 1660. Of the last three remaining cities, Hamburg and Bremen were incorporated into the German Zoll-Verein in 1888, and Lubeck some years previously, and are now, in substance, free cities or states constituting part of the German Empire. See Zimmern, The Hansa Towns. See CODE.

HANSGRABE. The head officer of a company or corporation.

HANTELODE (German *hant*, a bond, and load, *loid*). An arrest. Du Cange; Toml.; Moz. & W.; Holthouse.

HAP. To catch. Thus "hap the rent," "hap the deep-poll," were formerly used. Tech. Dict.

HAPPINESS. The "pursuit of happiness," as used in the United States Constitution, is said to be the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase one's prosperity, or develop one's faculties, so as to give to one his highest enjoyment. 111 U. S. 757.

HAQUE. In Old Statutes. A handgun, about three-quarters of a yard long.

HAQUEBUT. A gun. It is all one with an *harquebuz*. Termes de la Ley; 2 and 3 E. 6. c. 14.

HARACIUM. In English Law. A stud of horses and mares kept for breeding. Spel. Glos.

HARBINGER. An officer of the king's household. Toml.

HARBOR (Sax. *here-berga*, station for an army). A place where ships may ride with safety; any navigable water protected by the surrounding country; a haven. It is public property.

Harbor is to be distinguished from "port," which has a reference to the delivery of cargo. See 7 M. & G. 870; 9 Metc. 371-377; 2 B. & Ald. 460. Thus, we have the "said harbor, basin, and docks of the port of Hull." 2 B. & Ald. 60. But they are generally used as synonymous. Webster, Dict.

In the United States the control of harbors and regulation of dock lines and the like is exercised by the states, although under the power to regulate commerce the federal government annually expends large sums of money in the improvement of navigation in harbors as well as other navigable waters.

A state may enact police regulations for the conduct of shipping in any of its harbors; 7 Cow. 351; Cooley, Const. Lim. 730; and congress has full power to make regulations on the same subject; 12 How. 299; 21 Ind. 450; 2 Wall. 450; 36 N. Y. 292. A statute passed for the protection of a harbor, which forbids the removal of stone, gravel, and sand from the beach, is constitutional; 11 Metc. 55; and the United States has the authority to make a contract for the removal of rock from a harbor; 134 N. Y. 156.

New harbor lines may be established without further legislative authority, and such establishment is a practical discontinuance of the old lines; 60 Conn. 278. The state board of harbor commissioners has power to establish harbor lines in front of towns; 4 Wash. 6; and an act which provides for the disestablishment of such lines is contrary to the state constitution and void; 13 Wash. 65; such an act on the part of such commissioners does not deprive a riparian owner of the right of access to his land, but merely determines the line to which he may fill without encroaching on public rights; 18 R. I. 504. The mere establishment of general harbor lines by such commissioners is not of itself an injury or a taking of the property and cannot be enjoined; 152 U. S. 59; 5 Del. Ch. 433. The authority to make improvements in harbors implies the power to employ all necessary means thereto; 44 Pac. Rep. (Cal.) 238.

In England, as well as Scotland, the right to erect and hold ports and havens is vested in the crown; though a subject may have such right by charter, grant, or prescription, but in all cases charged with the right of the public to use it. In England such grantee is bound to repair, but in Scotland only to the extent of the dues received.

The insufficiency of the common-law power led to an extended course of legislation for the control of ports and harbors, through what is known in Great Britain as the *harbor authority*, which is vested in commissioners or bodies corporate or otherwise. Such bodies are charged with the duty of general supervision of the construction, extension, improvement, and lighting of the harbor and collection of dues therefrom. The general consolidation act of 10 Vict. c. 271, defined these duties and powers in detail as did the general act of 24 & 25 Vict. c. 47, supplemented by various local acts.

In Torts. To receive clandestinely or without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same. 2 Wall. Jr. 317. See 5 How. 215; 3 McLean 631. For example, the harboring of a wife or an apprentice in order to deprive the husband or the master of them; or, in a less technical sense, it is the reception of persons improperly; Poll. Torts 275; 10 N. H. 247; 5 Ill. 498.

It may be applied to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, and under certain circumstances, may be equally applicable to those acts divested of any accompanying secrecy; 55 Fed. Rep. 415.

The harboring of such persons will subject the harbinger to an action for the injury; but, in order to put him completely in the wrong, a demand should be made for their restoration, for in cases where the harbinger has not committed any other wrong than merely receiving the plaintiff's wife, child, or apprentice, he may be under no obligation to return them without a demand; 1 Chit. Pr. 564; 2 No. C. Law Rep. 249; 5 How. 215, 227. See ENTICE.

HARD CASES. A phrase used to indicate decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law. It is said of such: Hard cases make bad law. Hard cases must not make bad equity more than bad law; 6 Ia. 279.

HARD LABOR. In those states where the penitentiary system has been adopted, convicts who are to be imprisoned, as part of their punishment, are sentenced to perform *hard labor*. This labor is not greater than many freemen perform voluntarily, and the quantity required to be performed is not at all unreasonable. In the penitentiaries of Pennsylvania it consists in being employed in weaving, shoemaking, and such like employment.

Hard labor was first introduced in English prisons in 1706. By the Prison Act of 1805, it is divided into two classes, one for males above sixteen years old the other for males below that age and females; Moz. & W.

HARDHEIDIS. In old Scotch Law. Lions; coins formerly of the value of half pence. 1 Pitt. Crim. Tr. pt. 1. 64, note.

HARDSHIP. See HARD CASES.

HARIOT. The same as heriot (q. v.). Cowell; *Ternes de la Ley*. Sometimes spelled Harriott; Wms. Seis. 203. See HERIOT.

HARMONIZE. Though not strictly synonymous with the word "reconcile," it is not improperly used by a court in instructing the jury that it is their duty to "harmonize" conflicting evidence if possible. 3 S. Dak. 134.

HARNASCA. Defensive armor; harness. Spel. Glos.

HARNESS. The defensive armor of a soldier or knight. All warlike instruments.

Hoved. 725. In modern poetical sense a suit of armor. The term is sometimes used to denote the trappings of a war-horse.

Harness was the early name for body armor of all kinds. Modern writers have tried to discriminate between harness as the armor of the eleventh, twelfth, and thirteenth centuries, and armor as confined to the plate suits of the fourteenth and fifteenth centuries; but armor is the modern English word for defensive garments of all sorts, and *harness* in this sense, is a poetical archaism. Cent. Dict.

The tackle or furniture of a ship.

HARO, HARRON. An outcry, or hue and cry, after felons and malefactors. Cowell. The original of the *clamour de haro* comes from the Normans. Moz. & W.

HART. A stag or male deer of the forest five years old complete.

HARTER ACT. An act of congress of February 13, 1893, 2 Supp. R. S. 81, which provides that—"If the owner . . . shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agents or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel."

Under this act it has been held that due diligence is not satisfied by the mere appointment of competent persons to repair. Due diligence in repair and equipment must be exercised in fact; 68 Fed. Rep. 919; 69 *id.* 470; 74 *id.* 253. See SHIPPING.

HASP AND STAPLE. A mode of entry in Scotland by which a bailee declared a person heir on evidence brought before himself, at the same time delivering the property over to him by the *hasp* and *staple* of the door, which was the symbol of possession. Bell; Ersk. Pr. 433.

HASPA. In Old English Law. A name anciently given to the hasp of a door, which was often used in giving livery of seisin of premises which included a house.

The hasp or clasp of a book. Cunningham.

HASTA (Lat.). A spear which in Roman law was the sign of an auction sale. *Hastæ subjece*, to put under the spear, like the modern phrase put under the hammer signified put up at auction. Calv. Lex.

In feudal law it was the symbol of the investiture of a fee. Lib. Feud. 2, 2.

HAT MONEY. In Maritime Law. Primage; a small duty paid to the captain and mariners of a ship.

HAUBER. A great baron or lord. Spel. Glos.

HAUGH, or HOUGH. Low-lying rich lands, lands which are occasionally overflowed. Encyc. Dict.

A green plot in a valley. Wharton.

HAUL. In an indictment for larceny this word is a sufficient substitute for carry, in the statutory phrase steal, take and carry away, being in the sense used equivalent to it. 103 Ind. 171.

HAULM, or HELM. Straw Webster.

HAUR. In the laws of William the Conqueror, hatred. Toml.

HAUSTUS (Lat. from *haurire*, to draw).

In Civil Law. The right of drawing water, and the right of way to the place of drawing. L. 1, D. de *Servit. Præd. Rustic.*; Flota, l. 4, c. 27, § 9.

HAUT CHEMIN (L. Fr.). Highway. Yearb. M. 4 Hen. VI. 4.

HAUT ESTRET (L. Fr.). High street; highway. Yearb. P. 11 Hen. VI. 2.

HAUTHONER. A man armed with a coat of mail. Jac. L. Dict.

HAVE. See HABENDUM; HABE.

HAVEN. A place calculated for the reception of ships, and so situated, in regard

to the surrounding land, that the vessel may ride at anchor in it in safety. Hale, *de Port. Mar.* c. 2; Chitty, *Com. Law* 2; 15 East 304, 305. See CREEK; PORT; HARBOR; ARM OF THE SEA.

HAW. A small parcel of land so called in Kent; houses. Cowell.

HAWAII. A group of islands in the Pacific Ocean about one thousand five hundred miles from the western coast of California. A republic was proclaimed and a new constitution promulgated July 4, 1894, succeeding a provisional government formed in January, 1893. The constitution provides for a president who is elected for six years and a cabinet of four members, a council of state of fifteen members, and a house of representatives of fifteen members. Justice is administered by a supreme court sitting in Honolulu with a chief justice and two associate justices. There are also circuit and district judges as prescribed by the legislature. The common law is administered as in England and the United States and the judicial decisions of those countries are of authority in the same way as those of each country are referred to in the other.

A treaty for the annexation of Hawaii to the United States has recently been negotiated and submitted to the United States Senate for its approval.

HAWBERK or HAWBERT. A shirt of mail. Moz. & W. See FIEF D'HAUBERK.

HAUGH or HOWGH. A valley. Co. Litt. 5 b.

HAWKER. An itinerant or travelling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this, though perhaps not essential, is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them, as goods for sale, by an actual exhibition or exposure of them by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish; 12 Cush. 495. To prevent imposition, hawkers are generally required to take out licenses, under regulations established by the local laws of the states. See 46 Minn. 435; and these laws have generally been held to be constitutional; 117 Pa. 207; 116 Mass. 254; 51 Ala. 52; 57 Ind. 74; PEDDLER. One who goes about a village carrying samples and taking orders for a non-resident firm is not a hawker or peddler; 135 Ill. 36. It is termed *Hawking*. See 107 Ind. 505.

See 7 Lawy. Rep. Ann. 667, note.

HAY. In a bequest, "Hay" in a barn is included in the words "All the household furniture and other property in and about the buildings." 63 Me. 350.

HAYBOTE (from *haye*, hedge, and *bote*, compensation). Hedgebote: one of the estovers allowed a tenant for life or for years; namely, material to repair hedges or fences, or to make necessary farming utensils. 2 Bla. Com. 35; 1 Washb. R. P. 99.

HAYWARD (from *haye*, hedge, and *ward*, keeping). In Old English Law. An officer appointed in the lord's court to keep a common herd of cattle of a town; so called because he was to see that they did not break or injure the hedges of inclosed grounds. His duty was also to impound trespassing cattle, and to guard against pound-breaches. Kitch. 46; Cowell.

HAZADOR. See HAZARD.

HAZARD. To engage in a wager of any kind is a "hazard" within the meaning of a statute, providing for a fine for any person engaging in any "hazard," or game on which money or property is bet, won or lost. 100 Ky. 2, 37 S. W. 152.

HAZAR-ZAMIN. A bail or surety for

the personal attendance of another. *Moz. & W.*

HAZARD. An unlawful game of dice. *Hazardor.* One who plays at it. *Jac. L. Dict.*

HAZARDOUS. Risky; perilous; involving hazard or special danger. See next title.

HAZARDOUS CONTRACT. A contract in which the performance of that which is one of its objects depends on an uncertain event. *La. Civ. Code, art. 1769.* See 1 J. J. Marsh. 596; 3 *id.* 84; *MARITIME LOAN.*

In a fire insurance policy, the terms "hazardous," "extra hazardous," "specially hazardous," and "not hazardous," are well understood technical terms, having distinct meanings. A policy covering only goods "hazardous" and "not hazardous" cannot be made to cover goods or merchandise "extra hazardous" or "specially hazardous;" 33 N. Y. 364.

On the other hand, it has been held that "hazardous" and "extra hazardous" are terms having no technical meaning, but are to be taken in their popular sense of dangerous and extra dangerous; 50 Minn. 409. See *RISKS AND PERILS.*

HAZING. "Hazing" is defined to be striking, laying open hands upon, treating with violence, or offering to do bodily harm to a new cadet with intent to punish or injure him; or other treatment of a tyrannical, abusive, shameful, insulting or humiliating nature. 158 Ky. 207, 164 S. W. 808.

HE. Properly a pronoun of the masculine gender, but usually construed in statutes to include both sexes and corporations. Where in a written instrument, a person, whose name was designated by an initial is referred to as "he," it is not conclusive that such person is a man, but the contrary may be shown by parol; 71 Cal. 38. See *HIS.*

HE WHO SEEKS EQUITY MUST DO EQUITY. This is a general principle applicable to all classes of cases whenever necessary to promote justice, and requires that any person seeking the aid of equity shall have accorded, shall offer to accord, or will be compelled to accord, to the other party all the equitable rights to which the other is entitled in respect to the subject matter. Relief inconsistent with the equities of the adverse party will be denied, and where the granting of relief raises equitable rights in favor of the defendant, the according of such rights will be imposed as a condition of granting the relief. It is on this principle that one who has failed to perform his own obligations under a contract cannot compel the others to perform. 161 Ky. 264, 170 S. W. 642.

HEAD. The principal source of a stream. *Webst. Dict.* The head of a creek will be taken to mean the head of its longest branch, unless there be forcible evidence of common reputation to the contrary; 2 Bibb 112.

The principal person or chief of any organization, corporation, or firm.

HEAD-COURT. Courts formerly held in Scotland yearly by sheriffs, stewards, and barons who had certain civil and criminal jurisdiction prior to 20 Geo. II. c. 50, by which the obligation of the vassals to attend these courts was abolished. *Ersk. Prin.* 34-40.

HEAD OF A CREEK. The "head of a creek" means the source of the longest branch unless general reputation had given the appellation to another. 2 Bibb. (Ky.) 112.

HEAD OF A DEPARTMENT. In 169, Rev. Stats., the term means the Secretary in charge of a great division of the executive branch of the Government like the State, Treasury, and War, who is a member of the Cabinet. It does not include heads of bureaus or lesser divisions. 252 U. S. 515, quoting 99 U. S. 510.

HEAD OF A FAMILY. Householder, one who provides for a family. 19 Wend. 476. There must be the relation of father and child, or husband and wife; 3 Humph. 216; 17 Ala. n. s. 486; *contra*, 20 Mo. 75; 41 Ga. 153. The father being dead, the mother is the head of the family; 62 Pa. 475. See 16 Mass. 135; 45 Ga. 158; 2 How. 581. See *FAMILY*; *HOMESTEAD.*

HEAD-LAND. In Old English Law. A narrow piece of unploughed land left at the end of a ploughed field for the turning of the plough. Called, also, *butt*. *Kennett, Paroch. Antiq.* 587; 2 Leon. 70, case 93; 1 Litt. 13.

HEAD MONEY. A name popularly applied to a tax on aliens landing in the United States under U. S. Rev. Stat. 1 Supp. 370. Such tax by a state is unconstitutional; 92 U. S. 259; but as a federal regulation of commerce it is valid; 112 *id.* 580. See *IMMIGRATION.*

Under the act of Congress of August 3, 1882, 22 Stat. 214, an act to regulate immigration, the first section provides that there shall be levied, collected, and paid a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States. This tax upon such passengers has been termed "head money," "capitation tax," etc. 112 U. S. 589. Such a tax is constitutional when imposed by Congress (*Id.*), but unconstitutional when imposed by a State. 92 U. S. 275. See *COMMERCE WITH FOREIGN NATIONS.*

HEAD-NOTE. The syllabus of a reported case.

A statement of the points decided in a case, and preceding the printed report thereof. *Anderson.*

HEAD-PENCE. An exaction of 40d. or more, collected by the sheriff of Northumberland from the people of that county twice in every seven years, without account to the king. Abolished by 23 Hen. VI. c. 6, in 1444. *Cowel.*

HEAD-SILVER. A name sometimes given to a Common Fine (*q. v.*). Also said to be a fine of £40 levied by the sheriff upon the inhabitants of Northumberland, twice in seven years.

Dues paid to lords of leets. Also given as synonymous with "head-pence" (*q. v.*). *Wharton.*

HEAD OF A STREAM. In determining the "head of a stream" which has several branches it was held that branch to be the main fork which furnishes the main volume of water. 64 S. W. 501.

HEADBOROUGH. In English Law. An officer who was formerly the chief officer in a borough, who is now subordinate to the constable. Originally the chief of the tithing, or frank pledge. *St. Armand, Leg. Power of Eng.* 83. See *DECENNARY.*

HEADER. As Used in Mining. "Headers" are long pieces of plank supporting a large area of the roof and supported by two props, one at each end. 160 Ky. 671, 170 S. W. 14.

HEAFODWEARD. A service rendered by a thane or a geneath or villain, the precise nature of which is unknown. *Anc. Eng. Inst.*

HEAL-GEOTE. Halimote (*q. v.*).

HEALSFANG (from Germ. *hals*, neck, *fangen*, to catch). A sort of pillory, by which the head of the culprit was caught between two boards, as feet are caught in a pair of stocks.

"The fine which every man would have to pay in commutation of this punishment, had it been in use,"—for it was very early disused, no mention of it occurring in the laws of the Saxon kings. *Anc. Laws & Inst. of Eng. Gloss*; *Spelman, Gloss.*

HEALTH. Freedom from pain or sickness; the most perfect state of animal life. It may be defined as the natural agreement and concordant disposition of the parts of the living body.

Public health is an object of the utmost importance, and has attracted the attention of the national and state legislatures.

By the act of Congress of the 25th of February, 1796, it is enacted: *sect. 1.* That the quarantines and other restraints, which shall be established by the laws of any state, respecting any vessels arriving in or bound to any port or district thereof, whether coming from a foreign port or some other port of the United States, shall be observed and enforced by all officers of the United States in such places; *sect. 4.* In times of contagion the collectors of the revenue may remove, under the provisions of the act, into another district; *sect. 5.* The judge of any district court may, when a contagious disorder prevails in his district, cause the removal of persons confined in prison under the laws of the United States, into another district; *sect. 6.* In case of the prevalence of a contagious disease at the seat of government, the president of the United States may direct the removal of any or all public offices to a place of safety; *sect. 7.* In case of such contagious disease at the seat of government, the chief justice, or, in case of his death or inability, the senior associate justice, of the supreme court of the United States, may issue his warrant to the marshal of the district court within which the supreme court is by law to be held, directing him to adjourn the said session of the said court to such other place within the same or adjoining district as he may deem convenient; and the district judges, under the same circumstances, have the same power to adjourn to some other part of their several districts.

By the act of March 3, 1879, ch. 202, § 1, R. S. Suppl. 480, enforced by subsequent acts, a National Board of Health was established, and its members appointed by the president, and of four members detailed from the departments, whose duties shall be to obtain information upon all matters affecting the public health, to advise the heads of departments and state executives, to make necessary investigations at any places in the United States, or at foreign ports, and to make rules guarding against the introduction of contagious diseases into the country, and their spread from state to state. See 143 U. S. 578.

The protection of cattle from contagious diseases has received legislative notice in some of the states. In Pennsylvania, the governor may make proclamation whenever pleuro-pneumonia exists among the cattle in any county, and adopt means, such as the quarantining of affected places, to prevent its spread; act May 1, 1873. The introduction of cattle into Virginia between March 10, and October 10, without careful inspection, is forbidden; act April 2, 1879.

Closely connected with the subject of health is the adulteration of food. See *ADULTERATION.* The English Sale of Food and Drugs Act (38 & 39 Vict. c. 84, § 8) provides that "no person shall sell to the prejudice of the purchaser any article of food" not of the quality demanded, and authorizes the appointment of a public analyst with power to examine and certify samples of food, drinks, and drugs. L. R. 4 Q. B. D. 238; L. R. 3 Ex. D. 176. A state analyst with similar powers has been appointed in most states. This is a more practical measure than has been attempted in the previous legislation throughout the country, where the mode of detection and proof have been left to the operation of general rules.

In Scotland the care of the public health is vested in the county council acting through the district committee. These authorities are charged with the regulation of sewerage, privies, scavenging, nuisances, lodging-houses and cellar dwellings, and with the prevention of infection. *Earsk. Fr.* 619; Act 1867, § 94; 52 Vict. c. 50.

Public policy requires that health officers be not disturbed in the exercise of their powers, unless clearly transcending their authority; 3 Paige 218; 1 Dill. § 369; but in so acting such officers must not interfere with the natural right of individuals; 21 Vt. 13; 67 *id.* 502; the people "shall be secure in their persons and homes from unreasonable searches and seizures"; 10 Phila. 94; 40 N. J. Eq. 325. See 146 N. Y. 68, which case, overruling 33 N. Y. 317, held that health officers may not quarantine persons refusing to be vaccinated when small-pox is imminent. A board of health is not a natural or an artificial person, and cannot sue or be sued; 2 Lack. Leg. N. (Pa.) 181. A court of chancery can only interfere with the trustees of a sanitary district where such trustees have acted in violation of the law or in a fraudulent manner; 53 Ill. App. 306.

Offences against the provisions of the health laws are generally punished by fine and imprisonment. They are offences against public health, punishable by the common law by fine and imprisonment, such, for example, as selling unwholesome provisions. 4 Bla. Com. 162; 2 East, Pl. Cr. 822; 6 *id.* 133; 3 Maule & S. 10; 4 Campb. 10.

Mandamus will issue to compel a board of health to award compensation to one

whose property it has occupied or destroyed to prevent the spread of contagious disease, when such board of health has refused so to do; 67 N. W. Rep. (Mich.) 1094.

Injuries to the health of particular individuals are, in general, remedied by an action on the case, or perhaps, in some instances, for breach of contract, and may be also by abatement, in some cases of nuisance. See 4 Bla. Com. 197; 81 Ky. 171; 26 Mo. App. 253; Billings; Parker & Worthington, Pub. Health; Upton, Health Stat.; NUISANCE; ABATEMENT; QUARANTINE; CONTAGIOUS DISEASES; VACCINATION. GOOD HEALTH.

HEALTH OFFICER. The name of an officer invested with power to enforce the health laws. The powers and duties of health officers are regulated by local laws.

HEALTHY. Free from disease or bodily ailment or from a state of the system susceptible or liable to disease or bodily ailment. 13 Ired. 557.

HEARING. In Chancery Practice. The trial of a chancery suit. 24 Wis. 165; 112 Mass. 359.

The hearing is conducted as follows. When the cause is called on in court, the pleadings on each side are opened in a brief manner to the court by the junior counsel for the plaintiff; after which the plaintiff's leading counsel states the plaintiff's case and the points in issue, and submits to the court his arguments upon them. Then the depositions (if any) of the plaintiff's witnesses, and such parts of the defendant's answer as support the plaintiff's case, are read by the plaintiff's solicitor; after which the rest of the plaintiff's counsel address the court. Then the same course of proceedings is observed on the other side, excepting that no part of the defendant's answer can be read in his favor if it be replied to. The leading counsel for the plaintiff is then heard in reply; after which the court pronounces the decrees. 14 Vinor. Abr. 283; Com. Dig. Chancery, (T1, 2, 3); Daniell, Chanc. Pract.

In Criminal Law. The examination of a prisoner charged with a crime or misdemeanor, and of the witnesses for the accused. See EXAMINATION, FINAL HEARING.

HEARSAY EVIDENCE. That kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part on the veracity and competency of some other person. 1 Phill. Ev. 185.

Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge; this species of testimony supposes some better which might be adduced in a particular case and its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that it is inadmissible; 110 U. S. 581; 7 Cra. 295.

The term applies to written as well as oral matter; but the writing or words are not necessarily hearsay, because those of a person not under oath. Thus, information on which one has acted; 2 B. & Ad. 845; 9 Johns. 45; the conversation of a person suspected of insanity; 3 Hagg. Eccl. 574; 2 Ad. & E. 3; 7 id. 813; see 51 Kan. 720; 24 S. W. Rep. (Tex.) 894; replies to inquiries; 8 Bing. 320; 5 Mass. 444; 11 Wend. 110; 1 Conn. 387; 29 Ga. 718; general reputation; 2 Esp. 482; 33 Ala. n. s. 425; 87 Mich. 69; expressions of feeling; 8 Bing. 376; 8 Watts 355; 4 M'Cord 38; 18 Ohio 97; 7 Cush. 531; 1 Head 873; see 45 Me. 393; general repute in the family, in questions of pedigree; 13 Ves. 140, 514; 2 C. & K. 701; 4 Rand. 607; 3 Dev. & B. 91; 19 Johns. 37; 2 Conn. 347; 6 Cal. 197; 4 N. H. 871; 1 How. 281; 155 Mass. 461; see 84 Ky. 403; 28 Vt. 416; a great variety of declarations; see DECLARATION; EVIDENCE; entries made by third persons in the discharge of official duties; 3 B. & Ad. 890; 4 Q. B. 132; and see 8 Wheat. 326; 15 Mass. 380; 6 Cow. 162; 16 S. & R. 89; 4 Mart. La. n. s. 383; 12 Vt. 178; 15 Conn. 206; entries in the party's shopbook; 9 S. & R. 285; 4 Mass. 435; 2 M'Cord 328; 1 Halst. 95; 1 Ia. 53; 1 Greenl. Ev. §119; Tayl. Ev. 620; or other books kept in the regular course of business; 10 Ad. & E. 598; 8 Wheat. 320; 15 Mass. 380; 20 Johns. 168; 15 Conn. 206;

indorsements of partial payments; 2 Campb. 321; 4 Pick. 110; 17 Johns. 182; 2 M'Cord 419; declarations as to boundaries; 125 U. S. 321; have been held admissible as original evidence under the circumstances, and for particular purposes. One may testify to his own age, where it is shown that his father and mother are dead; 49 Kan. 730; 53 N. W. Rep. (Minn.) 541; 108 N. C. 747. See as to age, 11 Cent. L. J. 401.

As a general rule, hearsay reports of a transaction, whether oral or written, are not admissible as evidence; 1 Greenl. Ev. §124; 9 Ind. 572; 5 Iowa 539; 14 La. Ann. 830; 6 Wis. 63; 68 Hun 412; 97 Ala. 639; 5 C. C. App. 220; 6 id. 428; 86 Ky. 605; 77 Ga. 563. The rule applies to evidence given under oath in a cause between other litigating parties; 1 East 373; 3 Term 77; 7 Cra. 296.

At one time in England it was held on the authority of Luttarell v. Reynell, 1 Mod. 282, that hearsay evidence of a witness' previous declarations might be admitted to confirm his testimony by showing that he "was constant to himself"; but this theory of confirming a sworn statement by declarations not under oath was abandoned in England; Buller, J., in 3 Doug. 242; and (except in a few cases which followed the earlier English case) repudiated in the United States; Stark. Ev. Sharsw. ed. 253, n. 2; 12 Am. L. Reg. 1, where the cases are collected.

Matters relating to public interest, as, for example, a claim to a ferry or highway, may be proved by hearsay testimony; 1 Stark. Ev. 195; 6 M. & W. 234; 1 M. & S. 679; 19 Conn. 250; but the matter in controversy must be of public interest; 2 B. & Ad. 245; 29 Barb. 593; 14 Md. 398; 6 Jones, N. C. 459; the declarations must be those of persons supposed to be dead; 11 Price 162; 1 C. & K. 58; 12 Vt. 178; and must have been made before controversy arose; 13 Ves. 514; 3 Campb. 444; 4 id. 417. See 103 N. C. 208. The rule extends to deeds, leases, and other private documents; 10 B. & C. 17; 1 M. & S. 77; maps; 2 Moore & P. 525; 19 Conn. 250; and verdicts; 1 East 355; 9 Bingh. 465; 10 Ad. & E. 151; 7 C. & P. 181. Testimony based on daily market reports from a commercial center comes from a public authentic source and is not hearsay; 5 Tex. Civ. App. 186.

Ancient documents purporting to be a part of the *res gesta* are also admissible, although the parties to the suit are not bound; 5 Term 413, n.; 5 Price 312; 4 Pick. 160. See 2 C. & P. 440; 9 Johns. Cas. 283; 1 H. & J. 174; 4 Denio 201. So also declarations which form part of the *res gesta*, which explain and give character to what was done at the time are not liable to the objection that they are hearsay; Stark. Ev. Sharsw. ed. 53, note 1, 89, note 1, where the cases illustrating this branch of the subject are collected and classified by the American editor.

When two persons not speaking a common language voluntarily agree on a third to interpret between them, the latter is to be regarded as the agent of each to translate and communicate what he says to the other, and such communication to the interpreter is not hearsay, and the party to whom it is made may testify to it; 50 Minn. 91; 51 Ia. 25; the weight only of such being affected thereby and not its competency; 157 Mass. 393.

See Works on Evidence; Stark. Ev. Sharsw. ed. 43-66, 185-191; 3 Sm. L. Cas. 9th Am. ed. 1768; 37 Alb. L. J. 130; 29 Sol. J. 181; 5 L. Q. Rev. 265; and as to corroboration, 12 Am. L. Reg. 1; DECLARATION; DYING DECLARATIONS; EVIDENCE; PEDIGREE; RES GESTA.

HEARTH-MONEY. A tax, granted by 13 & 14 Car. II. c. 10, abolished 1 Will. & Mary, St. 1, c. 10, of two shillings on every hearth or stove in England and Wales. Jacob, Law Dict. Commonly called chimney-money. *Id.*

See FUMAGE; WINDOW TAX; INHABITED HOUSE DUTY.

HEARTH-SILVER. A sort of *modus*

for tithes, viz.: a prescription for cutting down and using for fuel the tithe of wood. 2 Burn, Eccl. Law 304.

HEAT OF PASSION. This does not mean passion or anger which comes from an old grudge, or no immediate cause or provocation; but passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. 106 Mo. 198.

HEBBERMAN. An unlawful fisher in the Thames below London bridge; so called because they generally fished at ebbing tide or water. 4 Hen. VII. c. 15; Jacob, Law Dict.

HEBBERTHEF. The privilege of having goods of a thief and trial of him within such a liberty. Cartular, S. Edmundi MS. 163; Cowel.

HEBBING-WEARS. A device for catching fish in ebbing water. Stat. 23 Hen. VIII. c. 5.

HEBDOMAD. A week; a space of seven days.

HEBDOMADIUS. A week's man; a canon, or prebendary in a cathedral church, who has the care of the choir and the officers belonging to it, for his own week. Cowel.

HECCAGIUM. Rent paid to the lord for liberty to use engines called hecks. Toml.

HECKS. The name of an engine to take fish in the river Owse near York, anno 23 Hen. 8. cap. 18. Cunningham.

HECTARE. A measure of land used in Mexican land grants, containing 2,471 acres. 161 U. S. 219. See VARA; CORDEL; CABALLERIA; SITIO.

HEDA. A small haven, wharf, or landing-place.

HEDAGIUM (Sax. *heda*, *hiha*, port). A toll or custom paid at the *hiha* or wharf, for landing goods, etc., from which an exemption was granted by the king to some particular persons and societies. Cartular. Abbatiae de Redinges; Cowel.

HEDGE-BOTE. Wood used for repairing hedges or fences. 2 Bla. Com. 35; 16 Johns. 15; HAYBOTE.

HEDGE PARSON. See HEDGE PRIEST.

HEDGE-PRIEST. A hedge-parson; specifically, in Ireland, formerly, a priest who has been admitted to orders directly from a hedge-school, without preparation in theological studies at a regular college. Cent. Dict.

HEDGE SCHOOL. Formerly, in Ireland, a school kept in a hedge corner. An open air school. English. See HEDGE PRIEST.

HEDGING. A means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired. 198 U. S. 249.

HEGEMONY. The leadership of one among several independent confederate states.

HEGIRA. The epoch or account of time used by the Arabians and the Turks, who begin the Mohammedan era and computation from the day that Mahomet was compelled to escape from Mecca to Medina which happened on the night of Thursday, July 15th, A. D. 622, under the reign of the Emperor Heraclius. Townsend, Dict. Dates; Wilson, Gloss. The era begins July 16th. The word is sometimes spelled Hejira

but the former is the ordinary usage. It is derived from *hijrah*, in one form or another, an oriental term denoting flight, departure.

As the years of the Hegira consist of only 354 days, they are reduced to the Julian calendar by multiplying the year of the Hegira by 354, dividing the product by 365, subtracting the intercalary days, or as many times as there are four years in the quotient, and adding 622 to the remainder. Tomlin.

HEIFER. A young cow which has not had a calf. A beast of this kind two years and a half old was held to be improperly described in the indictment as a cow; 2 East, Pl. Cr. 616; 1 Leach 105.

HEIR. At Common Law. He who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor. Thus, the word does not strictly apply to personal estate. Wms. Per. Pr.

Ordinarily used to designate those persons who answer this description at the death of the testator. In its strict and technical import applies to the person or persons appointed by law to succeed to the estate in case of intestacy. 2 Bla. Com. 201; 52 Ill. 62; 139 *id.* 433; 37 S. C. 255.

The term heir has a very different signification at common law from what it has in those states and countries which have adopted the civil law. In the latter, the term applies to all persons who are called to the succession, whether by the act of the party or by operation of law. The person who is created universal successor by a will is called the testamentary heir; and the next of kin by blood is, in cases of intestacy, called the heir-at-law, or heir by intestacy. The executor of the common law is in many respects not unlike the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law, executors—unless expressly authorized by the will—and administrators have no right except to the personal estate of the deceased; whereas the heir by the civil law is authorized to administer both the personal and real estate. 1 Brown, Civ. Law 344; Story, Conf. Laws § 508.

No person is heir of a living person. A person occupying a relation which may be that of heirship is, however, called heir apparent or heir presumptive; 2 Bla. Com. 203; and the word heir may be used in a contract to designate the representative of a living person; 9 Conn. 272. A monster cannot be heir; Co. Litt. 7 b; nor at common law could a bastard; 2 Kent 208. See **BASTARD**; and **DESCENT AND DISTRIBUTION**.

In the word heirs is comprehended heirs of heirs *in infinitum*; Co. Litt. 7 b, 9 a; Wood, Inst. 69. The words "heir" and "heirs" are interchangeable, and embrace all legally entitled to partake of the inheritance; 83 Va. 724.

According to many authorities, heir may be *nomen collectivum*, as well in a deed as in a will, and operate in both in the same manner as the word heirs; 1 Rollé, Abr. 253; Amb. 453; Cro. Eliz. 313; 1 Burr. 38. But see 2 Prest. Est. 9, 10. In wills, in order to effectuate the intention of the testator, the word heirs is sometimes construed to mean the next of kin; 1 Jac. & W. 393; 51 N. J. Eq. 1; and statutory next of kin; 41 L. T. Rep. n. s. 209; 2 Hawks 472; the word "heir" can be construed as "distributees" or "representatives"; 84 Penn. 245; and children; Amb. 273; 36 S. C. 88; 87 Ga. 299; 91 Tenn. 119; 63 N. H. 558; 117 Ind. 808; it can be construed to mean "heirs of his body"; 75 Md. 141; and grand-children; 81 Va. 40. Under the term "heirs-at-law" a widow has been allowed to share; 158 Mass. 392; 63 Ind. 72; but see 137 N. Y. 106. See 12 Lawy. Rep. Ann. 721; 13 *id.* 46; Jarm. Wills 905. See **FELLOW-HEIR**; and **JOINT-HEIR**.

In a bequest of personalty the word "heirs" is used to mean those entitled under the statute of distribution in case of intestacy; 136 Pa. 158.

In Civil Law. He who succeeds to the rights and occupies the place of a deceased person. See the following titles, and **HERES**.

HEIR APPARENT. One who has an

indefeasible right to the inheritance, provided he outlive the ancestor. 2 Bla. Com. 208.

HEIRS, BENEFICIARY. In Civil Law. Those who have accepted the succession under the benefit of an inventory regularly made. La. Civ. Code, art. 879. If the heir apprehend that the succession will be burdened with debts beyond its value, he accepts with benefit of inventory, and in that case he is responsible only for the value of the succession.

HEIR, COLLATERAL. One who is not of the direct line of the deceased, but comes from a collateral line: as, a brother, sister, an uncle and aunt, a nephew, niece, or cousin, of the deceased.

HEIR, CONVENTIONAL. In Civil Law. One who takes a succession by virtue of a contract—for example, a marriage contract—which entitles the heir to the succession.

HEIR BY DEVISE. One to whom lands are devised by will; a devisee of lands.

HEIR, FORCED. One who cannot be disinherited. See **FORCED HEIRS**.

HEIR, GENERAL. Heir at common law.

HEIR, IRREGULAR. In Louisiana. One who is neither testamentary nor legal heir, and who has been established by law to take the succession. See La. Civ. Code, art. 874. When the deceased has left neither lawful descendants, nor ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the state; *id.* art. 911. This is called an irregular succession.

HEIR AT LAW. He who, after his ancestor dies intestate, has a right to all lands, tenements, and hereditaments which belonged to him or of which he was seised. The same as heir general.

In its general definition heir at law is not limited to children; it may be and is often used, in cases where there are no children; it includes parents, brothers, sisters, etc.; 7 U. S. App. 63.

HEIR, LEGAL. In Civil Law. A legal heir is one who is of the same blood as the deceased and who takes the succession by force of law. This is different from a testamentary or conventional heir, who takes the succession in virtue of the disposition of man. See La. Civ. Code, art. 873, 875; Dict. de Jurisp. *Héritier légitime*. There are three classes of legal heirs, to wit: the children and other lawful descendants, the fathers and mothers and other lawful ascendants, and the collateral kindred. La. Civ. Code, art. 883. See Howe, Stud. Civ. L. 229.

HEIR-LOOM. Chattels which, contrary to the nature of chattels, descend to the heir along with the inheritance, and do not pass to the executor.

This word seems to be compounded of *heir* and *loom*, that is, a frame, viz. to weave in. Some derive the word *loom* from the Saxon *loma*, or *geloma*, which signifies utensils or vessels generally. However this may be, the word *loom*, by time, is drawn to a more general signification than it bore at the first, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscots, and which, by the custom of some countries, having belonged to a house, are never inventoried after the decease of the owner as chattels, but accrue to the heir with the house itself. Minshew; 2 Poll. & Maitl. 361.

Charters, deeds, and other evidences of the title of the land, together with the box or chest in which they are contained, are the keys of a house, and fish in a fish-pond, are heirlooms. Co. Litt. 3 a, 185 b; 7 Co. 17 b, Cro. Eliz. 372; Brooke, Abr. *Charters*, pl. 13; 2 Bla. Com. 427; 14 Vin. Abr. 291; Darl. P. P. 16.

Diamonds bequeathed to one "as head of the family" and directed "to be deemed heirlooms in the family" are held in trust for the legatee and his successors; 23 W. R. 592; chattels bequeathed upon trust to permit the same to go and be enjoyed by the person possessed of the title, in the na-

ture of heirlooms, vest absolutely in the first taker; 23 Ch. D. 153; and to the testator's nephew to go to and be held as heirlooms by him and his eldest son on his decease, is held to create an executory trust with a life interest in the first taker; L. R. 6 Eq. 540. An election, by one who takes heirlooms under a deed of trust, to take under a will did not operate as a forfeiture of the heirlooms as the interest in them was unassignable; 31 Ch. D. 466.

HEIR PRESUMPTIVE. One, who, in the present circumstances, would be entitled to the inheritance, but whose rights may be defeated by the contingency of some nearer heir being born. 2 Bla. Com. 203. In Louisiana, the presumptive heir is he who is the nearest relation of the deceased capable of inheriting. This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it; La. Civ. Code, art. 876.

HEIR, TESTAMENTARY. In Civil Law. One who is constituted heir by testament executed in the form prescribed by law. He is so called to distinguish him from the legal heirs, who are called to the succession by the law; and from conventional heirs, who are so constituted by a contract *inter vivos*. See **HERES FACTUS**; and **DEVISEE**.

HEIR, UNCONDITIONAL. In Louisiana. One who inherits without any reservation, or without making an inventory, whether the acceptance be express or tacit. La. Civ. Code, art. 878.

HEIRESS. A female heir to a person having an estate of inheritance. When there are more than one, they are called *co-heiresses*, or *co-heirs*.

HEIRS. The word "heirs," in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as "heirs." 165 U. S. 578.

HEIRS OF THE BODY. The term "heirs of the body," when used in a deed should ordinarily be given its technical meaning. 150 Ky. 60, 150 S. W. 6.

There is a well settled distinction between the import and technical effect of the words "heirs of the body" and the word "children" as used in wills. 2 Met. (Ky.) 335; 2 Met. (Ky.) 469.

"Heirs of the body" mean such of the issue or offspring as may by law inherit. 10 B. Mon. (Ky.) 193.

Where the term "heirs of her body" is used interchangeably with the words "her children," and it is apparent that the latter were used in the primary sense and the former as descriptive, they will be construed as words of purchase, and not of limitation. 160 Ky. 684, 170 S. W. 31.

"HEIRS" AND "CHILDREN." While the word "heirs" if used as a term of purchase in a will may signify whoever may be such at the testator's death, the word "children" as used in the deed . . . should be construed as including only those persons answering the description at the time of execution. 228 U. S. 109.

HEIRSHIP MOVABLES. In Scotch Law. The movables which go to the heir, and not to the executor, that the land may not go to the heir completely dismantled, such as the best of furniture, horses, cows, etc., but not fungibles. Hope, Minor Pr. 538; Erskine, Inst. 3. 8. 13-17; Bell, Dict.

HELD. See **HOLD**.

HELL. The name given to a place under the exchequer chamber, where the king's debtors were confined. Rich. Dict.

HELM. A tiller; the handle or wheel of a ship; a defensive covering for the head; a helmet; thatch or straw.

HELOWE-WALL. The end-wall covering and defending the rest of the building.

Paroch. Antiq. 573.

HELSING. A Saxon brass coin, of the value of an English half-penny.

HEMIPLEGIA. See PARALYSIS.

HEMOLDBORH, or HELMELBORCH. A title to possession. The admission of this old Norse term into the laws of the Conqueror is difficult to be accounted for; it is not found in any Anglo-Saxon law extant. Whart.

HENCHMAN. A footman; one who holds himself at the bidding of another.

HENEDPENNY. A customary payment of money instead of hens at Christmas; a composition of eggs. Cow. Dic.

HENFARE. A fine for flight on account of murder. Domest.

HENGEN. A prison for persons condemned to hard labor. Anc. Inst. Eng.

HENGHEN (*ergastulum*). In Saxon Law. A prison, or house of correction. Anc. Laws & Inst. of Engl. Gloss.

HENGWYTE. In Old English Law. An acquittance from a fine for hanging a thief. Fleta, lib. 1, c. 47, § 817.

HENGWYTE, HENGWITE. See HANGWITE.

HENRY I., LAWS OF. See LEGES HENRICI PRIMI.

HEORDFESTE. The master of a family; from the Saxon *hearthfaest*, fixed to the house or hearth. Moz. & W.

Distinguished from a lower class of freemen—*viz.*, *folgeras* (*folgariti*), who had no habitations of their own, but were house retainers of their lords. Wharton; Anc. Inst. Eng.

HEORDPENNY. Peter-pence. Cow. Dic.

HEORDWERCK. In Saxon Law. The service of herdsman, done at the will of their lord.

HEPBURN ACT. An act of Congress, passed in 1906, stating that a carrier may not by contract limit the liabilities imposed on it by the Interstate Commerce Act, and making the initial carrier of an interstate shipment liable for any loss or injury thereto caused by any connecting carrier. 4 Mich. Carriers, § 3696.

HEPTARCHY. The name of the kingdom or government established by the Saxons on their establishment in Britain: so called because it was composed of seven kingdoms, namely, Kent, Essex, Sussex, Wessex, East Anglia, Mercia, and Northumberland.

HER. In an indictment for rape the use of this word is sufficient to show that the person alluded to is a female; 54 Ark. 680; but it has been held that in a written instrument the use of the pronoun "his" to designate a person therein named is not conclusive that such person is a male, and parol evidence will be admitted to show that such person is a female; 71 Cal. 38.

HERALD (from French *herault*). An officer whose business it is to register genealogies, adjust ensigns armorial, regulate funerals and coronations, and, anciently, to carry messages between princes and proclaim war and peace.

In England, there are three chief heralds, called *kings-at-arms*, of whom *Garter* is the principal, instituted by king Henry V., whose office is to attend the knights of the Garter at their solemnities, and to marshal the funerals of the nobility. The next is *Clarencieux*, instituted by Edward IV., after he became duke of Clarence, and whose proper office is to arrange the funerals of all the lesser nobility, knights, and squires on the south side of Trent. The third *Norroy* (*north roy*), who has the like office on the north side of Trent. There are, also, six inferior heralds, who were created to attend dukes or great lords in their military expeditions. The office, however, has grown much into disuse,—so much falsity and confusion having crept into their records that they are no longer received in evidence in any court of justice. This difficulty was attempted to be remedied by a standing order of the house of lords, which requires *Garter* to deliver to that house an exact pedigree of each peer and his family on the

day of his first admission; 8 Bla. Com. 105; Encyc. Brit.

HERALDRY. (1) The science of heralds; (2) an old and obsolete abuse of buying and selling precedence in the paper of causes for hearing. 2 North's Life of Lord-Keeper Guilford, 2d ed. 86.

HERALDS' COLLEGE. In 1450, the heralds in England were collected into a college by Richard II. The earl marshal of England was chief of the college, and under him were three kings-at-arms (styled *Garter*, *Clarencieux*, *Norroy*), six heralds-at-arms (styled of York, Lancaster, Chester, Windsor, Richmond, and Somerset), and four pursuivants-at-arms (styled *Blue Mantle*, *Rouge croix*, *Rouge dragon*, and *Portcullis*). This organization still continues. Encyc. Brit.

HERBAGE. In English Law. An easement which consists in the right to pasture cattle on another's ground. A right to herbage does not include a right to cut grass, or dig potatoes, or pick apples; 4 N. H. 303.

HERBAGIUM AUTERIUS. The first cutting of hay or grass, as distinguished from the aftermath. Paroch. Antiq. 459.

HERBERGAGIUM. Lodgings to receive guests in the way of hospitality. Cowel. See HERBERGARE.

HERBERGARE. To harbor; to entertain.

HERBERGATUS. Spent in an inn. Cowel. See HERBERGARE.

HERBERY, or HERBURY. An inn. Cowel.

HERCE, or HERCIA. A harrow. Fleta, lib. 2, c. 77.

It signifies also a candlestick set up in churches, made in the form of a harrow, in which many candles were placed at the head of a cenotaph. Tomlin.

HERCIARE. To harrow. 4 Inst. 270.

HERCIATURE. In Old English Law. Harrowing; work with a harrow. Fleta, lib. 2, c. 82, § 2.

HERCISCUNDA. In Civil Law. To be divided. *Familia herciscunda*, an inheritance to be divided. *Actio familie herciscundæ*, an action for dividing an inheritance. *Herciscunda* is more commonly used in the civil law. Dig. 10, 2; Inst. 3 28, 4.

HERD-WERCK. Customary uncertain services as herdsman, shepherds, etc. Anno 1166, Regist. Ecclesiæ Christi Cant. MS.; Cowel.

HEREAFTER. Used as an adverb, it does not necessarily refer to unlimited time; it is not a synonym for "forever." It rather indicates the direction in time merely to which the context refers, and is limited by it. 50 N. J. Eq. 640.

A term, which of itself will make a statute prospective, and save pending suits. Anderson; 48 Ark. 520.

In the future, as contrasted with "heretofore" meaning in time past. In statutes and constitutions the words "hereafter" and "heretofore" usually relate to the time when the enactment takes effect, and not to the time of its passage. 15 A. & E. Ency. 2nd ed. 336; 63 Ga. 562. But the terms are sometimes held to refer to the date of passage. *Id.*; 60 Iowa 29. The word "hereafter," it has been held, will of itself render a statute prospective and save pending actions. *Id.*; 48 Ark. 520. See HERETOFORE.

HEREBANNUM. Calling out the army by proclamation. A fine paid by freemen for not attending the army. A tax for the support of the army. Du Cange.

HEBOTE. The king's edict commanding his subjects into the field. Moz. & W.; Cowel. See HEBOTE.

HEREDAD. In Spanish Law. A portion of land that is cultivated. Formerly it meant a farm, *haciendo de campo*, real estate.

HEREDAD YACENTE (From Lat. "hereditas jacens," *q. v.*). In Spanish Law. An inheritance not yet entered upon or appropriated. White, New Recop. b, 2, tit. 19, c. 2, § 8.

HEREDERO. In Spanish Law. Heir; he who, by legal or testamentary disposition, succeeds to the property of a deceased person. "*Heres censeatur cum defuncto una eademque persona.*" Las Partidas, 7, 9, 13.

HEREDITAGIUM. In Sicilian and Neapolitan Law. That which is held by hereditary right; the same *hereditamentum* (*hereditament*) in English Law. Spel. Gloss.

HEREDITAMENTS. Things capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, and including not only lands and everything thereon, but also heir-looms, and certain furniture which, by custom, may descend to the heir together with the land. Co. Litt. 5 b; 2 Bla. Com. 17; Chas. R. P. 43; 23 Barb. 338; 84 Iowa 407. By this term such things are denoted as may be the subject-matter of inheritance, but not the inheritance itself; it cannot, therefore, by its own intrinsic force, enlarge an estate *prima facie* a life estate, into a fee; 2 B. & P. 251; 8 Term 508.

HEREDITARY. That which is the subject of inheritance.

HEREDITARY RIGHT TO THE CROWN. The crown of England, by the positive constitution of the kingdom, has ever been descendible, and so continues, in a course peculiar to itself, yet subject to limitation by parliament; but, notwithstanding such limitation, the crown retains its descendible quality, and becomes hereditary in the prince to whom it is limited. 1 Bla. Com. c. 3.

HEREFARE (Sax.). A going into or with an army; a going out to war (*profectio militaris*); an expedition. Cowel; Spel. Gloss.

HEREGEAT. A heriot (*q. v.*).

HEREGELD. A tribute or a tax levied for the maintenance of an army. Moz. & W.; Spel. Gloss.

HERENACH. An arch-deacon. Cowel.

HERES. See HERES.

HERESCHIP. In Old Scotch Law. Theft or robbery. Pitc. Crim. Tr. pt. 2, pp. 26, 89.

HERESLITA, HERESSA, HERESSIZ. A hired soldier who departs without license. 4 Inst. 128.

HERESSA. See HERSLITA.

HERESSIZ. See HERESLITA.

HERESY. An offence which consists not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed. What in old times used to be adjudged heresy was left to the determination of the ecclesiastical judge; and the statute 2 Hen. 4, c. 15, defines heretics as teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church. Various laws have been passed before and after the reformation explaining wholly or partially what is meant by heresy. Heresy is now subject only to ecclesiastical correction, by virtue of Stat. 29 Car. 2, c. 9; 4 Bl. Com. 44; 4 Steph. Com. 203. See EXCOMMUNICATION. (Cf. MISCREANT.)

HEREPOCH. A general, leader, or commander, also a baron of the realm. Du Fresne.

HERETOFORE. Time past in, dis-

inction from time present and time future. 40 Conn. 156.

The word in a constitution adopted in 1846, means before 1846, and cannot, to limit its meaning, be carried back to the date of a previous constitution. Abbott; 13 N. Y. 378.

Heretofore, in a recording act providing for recording of mortgages heretofore given, construed to include mortgages which ought to have been recorded under a previous law. *Id.*; 1 N. J. L. 272. Cf. **HEREAFTER**.

HERETUM. In Old Records. A court or yard for drawing up guards or military retinue. Cowel.; Jac. L. Dict.

HEREZELD. In Scotch Law. A gift or present made or left by a tenant to his lord as a token of reverence. Skene.

HERGE. In Saxon Law. Offenders who joined in a body of more than thirty-five to commit depredation.

HERIGALDS. In Old English Law. A sort of garment. Cowel.

HERIOT. In English Law. A customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land. If a man fell before his lord in battle, no heriot was demanded; 1 Poll. & Maitl. 296.

Heriot service is such as is due upon a special reservation in the grant or lease of lands, and therefore amounts to little more than a mere rent. Heriot custom arises upon no special reservation whatsoever, but depends merely upon immemorial usage and custom. See 2 Bla. Com. 97, 422; Comyns, Dig. *Copphold* (K 18); Bacon, Abr.; 2 Saund.; 1 Vern. 441.

HERISCHILD. A species of English military service.

HERISCHULDÆ. A fine for disobedience to proclamation of warfare. Skene.

HERISCINDIUM. A division of household goods. Blount.

HERISLET. Laying down of arms. Blount. Desertion from the army. Spel. Gloss.

HERISTALL. A castle; the station of an army; the place where a camp is pitched. Spel. Gloss.

HERITABLE. See **INHERITANCE**.

HERITABLE BOND. In Scotch Law. See **BOND**.

HERITABLE JURISDICTION. In Scotch Law. Grants of criminal jurisdiction made to great families for the better execution of justice. Abolished by 20 Geo. II. c. 43. Bell, Dict.

HERITABLE OBLIGATION. One whose rights and duties descend to the heir, so far as the heir accepts the succession. Howe, Stud. Civ. L. 183. One which permits the heirs of one party to the obligation to compel, if necessary, the heirs of the other party to carry out the latter's agreement. English. See **OBLIGATION**.

HERITABLE RIGHTS. In Scotch Law. Rights which go to the heir; generally, all rights in or connected with lands. Bell, Dict. *Heritable*.

HERITABLE SECURITY. Security constituted by heritable property. Encyc. Dict.

HERITAGE. In Civil Law. Every species of immovable which can be the subject of property: such as lands, houses, orchards, woods, marshes, ponds, etc., in whatever mode they may have been acquired, either by descent or purchase. 3 Toullier 472. See Co. Litt. s. 781.

HERITOR. In Scotch Law. A proprietor of land. 1 Kames, Eq. Prin.

HERMANDAD (called also, *Santa Hermandad*). In Spanish Law. A fraternity formed among different towns and villages to prevent the commission of

crimes, and to prevent the abuses and vexations to which they were subjected by men in power.

To carry into effect the object of this association, each village and town elected two *alcaldes*,—one by the nobility and the other by the community at large. These had under their order inferior officers, formed into companies, called *cuad villeros*. Their duty was to arrest delinquents and bring them before the *alcaldes*, when they were tried substantially in the ordinary form. This tribunal, established during the anarchy prevailing in feudal times, continued to maintain its organization in Spain for centuries; and various laws determining its jurisdiction and mode of proceeding were enacted by Ferdinand and Isabella and subsequent monarchs. Nov. Recop. tit. 35, b. 12, § 7. The abuses introduced in the exercise of the functions of the tribunals caused their abolition, and the *santas hermandades* of Ciudad Rodrigo, Talavera, and Toledo, the last remnants of these anomalous jurisdictions, were abolished by the law of the 7th May, 1835.

HERMAPHRODITES. Persons who have in the sexual organs the appearance of both sexes. They are adjudged to belong to that sex which prevails in them; Co., Litt. 2, 7; Domat, Lois Civ. liv. 1, t. 2, s. 1, n. 9.

The sexual characteristics in the human species are widely separated, and the two sexes are very rarely united in the same individual; there are a few cases on record, however, in which both ovaries and testicles were present. In one there were two ovaries, a rudimentary uterus, and a single testicle containing spermatozoa. Am. Text Book of Gynecology. Cases of malformation are occasionally found, in which it is very difficult to decide to which sex the person belongs. See 2 Med. Exam. 314; 1 Briand, Med. Leg. c. 2, art. 2, § 2, n. 2; Guy Med. Jur. 42, 47; 1 Beck, Med. Jur. 11th ed. 184 et seq.; Wharton & S. Med. Jur. § 408 et seq.

HERMENEUTICS (Greek, *ἐρμηνευτική*, to interpret). The art and science, or body of rules, of truthful interpretation. It has been used chiefly by theologians; but Zachariæ, in "An Essay on General Legal Hermeneutics" (Versuch einer allg. Hermeneutik des Rechts), and Dr. Lieber, in his work on Legal and Political Hermeneutics, also makes use of it. See **INTERPRETATION**; **CONSTRUCTION**.

HERMER. A great lord. Jacob.

HERMOGENIAN CODE. See **CODE**.

HERNESCUS. A heron. Cowel.

HERNESIUM, or **HERNASIUM**. Household goods; implements of trade or husbandry; the rigging or tackle of a ship. Cowel.

HEROUDES. Heralds. Du Cange.

HERPEX. A harrow. Spel. Gloss.

HERPICATIO. In Old English Law. A day's work with a harrow. Spel. Gloss.

HERRING SILVER. This was a composition in money for the custom of supplying herrings for the provision of a religious house. Whart.

HERSHIP. The crime, in Scotland, of carrying off cattle by force; it is described as "the masterful driving off of cattle from a proprietor's grounds." Bell; Moz. & W.

HERUS. A master. *Servus facit ut herus det*, the servant does (the work), in order that the master may give (him the wages agreed on). *Herus dat ut servus faciat*, the master gives (or agrees to give, the wages), in consideration of, or with a view to, the servant's doing (the work). 2 Bla. Com. 445.

HESIA. An easement. Du Cange.

HEST CORN. Corn or grain given or devoted to religious persons or purposes. Cowel.; 2 Mon. Ang. 867 b.

HESTA or **HESTHA**. A small loaf of bread.

HIDAGE. In Old English Law. A tax levied, in emergencies, on every *hide* of land; the exemption from such tax. Bract.

lib. 2, c. 56. It was payable sometimes in money, sometimes in ships or military equipments; e. g. in the year 904, when the Danes landed in England, every three hundred hides furnished a ship to king Ethelred, and every eight hides one pack and one saddle. Jacob, Law Dict.

HIDALGO (spelled, also, *Hijodalgo*). In Spanish Law. He who, by blood and lineage, belongs to a distinguished family, or is noble by descent. *Las Partidas* 2. 12, 3.

HIDE (from Sax. *hyden*, to cover; so, Lat. *tectum*, from *tegere*). In Old English Law. A building with a roof; a house.

As much land as might be ploughed with one plough. The amount was probably determined by usage of the locality; some make it sixty, others eighty, others ninety-six, others one hundred or one hundred and twenty, acres. Co. Litt. 5; 1 Plowd. 167; Shepp. Touchst. 93; Du Cange.

A hide was anciently employed as a unit of taxation. 1 Poll. & Maitl. 847, such tax being called *hidegild*.

As much land as was necessary to support a *hide*, or mansion-house. Co. Litt. 69 a; Spelman, Gloss; Du Cange, *Hida*; 1 Introd. to Domesday 145. At present the quantity is one hundred acres. Anc. Laws & Inst. of Engl. Gloss. See **FUR**. **MANSIO**.

HIDE AND GAIN. In English Law. A term anciently applied to arable land. Co. Litt. 85 b.

HIDE LANDS. In Old English Law. Lands appertaining to a *hide*, or mansion. See **HIDE**.

HIDEL. In Old English Law. A place of protection; a sanctuary. St. 1 Hen. VII. cc. 5, 6; Cowel.

HIDGILD, or **HIDEGILD**. A sum of money paid by a villein or servant to save himself from whipping. Fleta, l. 1, c. 47, § 20.

HIERARCHY. Originally, government by a body of priests. Stubbs, Const. Hist. § 376. Now, the body of officers in any church or ecclesiastical institution, considered as forming an ascending series of ranks or degrees of power and authority, with the correlative subjection, each to the one next above.

HIGH. "High" and low are relative terms. A thing is said to be too high or too low when compared to other things. A structure is said to be high or low according to the uses to which it is to be put. 65 S. W. 454.

HIGH-BALL SIGNAL. As Used in Railroad Parlane. The "high-ball" signal means that the train can proceed without stopping. 156 Ky. 414, 161, S. W. 246.

HIGH BAILIFF. An officer attached to an English county court. His duties are to attend the court when sitting; to serve summonses; and to execute orders, warrants, writs, etc. Stats. 9 & 10 Vict. c. 95, § 33; Poll. C. C. Pr. 16. He also has similar duties under the bankruptcy jurisdiction of the county courts. Bankruptcy Rules 1870, 58.

HIGH COMMISSION COURT. In English Law. An ecclesiastical court of very extensive jurisdiction, for the vindication of the peace and dignity of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities.

It was erected by stat. 1 Eliz. c. 1, and abolished by 16 Car. II. c. 11.

HIGH COURT OF ADMIRALTY. See **ADMIRALTY**.

HIGH COURT OF CHANCERY. See **CHANCERY**; **COURT OF CHANCERY**.

HIGH COURT OF DELEGATES. In English Law. See COURT OF DELEGATES.

HIGH COURT OF JUSTICE. See JUDICATURE ACTS.

That branch of the Supreme Court of Judicature which exercises (i) the original jurisdiction formerly exercised by the Court of Chancery, the Courts of Queen's Bench, Common Pleas and Exchequer, the Courts of Probate, Divorce and Admiralty, the London Court of Bankruptcy, the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, and the Courts of the judges or commissioners of assize, and (ii) the appellate jurisdiction of such of those courts as heard appeals from inferior courts. It is a Superior Court of Record, and was originally composed of the Lord Chancellor (who is the president but never—except occasionally, as in the case of Lord Birkenhead, for the purpose of dealing with accumulation of work—sits as a judge in the High Court) the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the three Vice-Chancellors of the former Court of Chancery, such of the puisne judges of the old common law courts as had not been transferred to the Court of Appeal, the judge of the former Probate and Divorce Court, the judge of the former Admiralty Court; and subsequently has consisted of the Lord Chancellor and the judges of Her Majesty's High Court of Justice who were appointed after the Judicature Act came into operation. *Byrne*. See COURTS OF ENGLAND.

HIGH COURT OF JUSTICIARY. See COURT OF JUSTICIARY.

HIGH COURT OF PARLIAMENT. In English Law. The English Parliament, as composed of the house of peers and house of commons.

The house of lords sitting in its judicial capacity.

This term is applied to parliament by most of the law writers. Thus, parliament is said by Blackstone to be the supreme court of the kingdom, not only for the making but also for the execution of the laws; 4 *Bla. Com.* 259. Lord Coke and Lord Hale also apply the term "court" to the whole parliament; and see *Finch, Law* 233; *Fleta*, lib. 3, c. 2. But, from the fact that in general judicial proceedings the house of commons takes no part, but only in the trial of impeachments, and then only as prosecutor, and from the fact that the house of commons disclaimed possession of judicial powers at the deposition of Richard II., and the twelve judges made a similar decision in 1 Hen. VII., the propriety of this use of the term has been questioned; *Bla. Com.* Warren, Abr. 215. The propriety of its application would seem to be derived from the claim of parliament to be considered as the successor of the *curia regis*, which was a judicial as well as a legislative body, and, if the succession is established, would be applicable although the judicial power may have been granted to the various courts. See *COURTS*; *HOUSE OF LORDS*; *IMPEACHMENT*.

HIGH CRIMES AND MISDEMEANORS. The constitution of the U. S. provides that the president, vice-president, and all civil officers of the U. S. shall be removed from office on impeachment for treason, bribery, and other high crimes and misdemeanors. This does not apply to senators and members of congress, but does to U. S. circuit and district judges; *Blount's Trial* 102; *Peck's Trial*; 10 *Law Trials*; *Chase's Trial*; 11 *id.* See 6 *Conn.* 417. See *IMPEACHMENT*.

HIGH SEAS. The uninclosed waters of the ocean, and also those waters on the seacoast which are without the boundaries of low-water mark. 1 *Gall.* 624; 5 *Mas. C. C.* 290; 1 *Bla. Com.* 110; *Bened. Adm.*; 2 *Hagg. Adm.* 398.

The act of congress of April 30, 1790, s. 8, enacts that if any person shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, etc., which if committed within the body of a county would, by the laws of the United States, be punishable with death, every such offender, being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. See 4 *Dall.* 426; 3 *Wash. C. C.* 515; 1 *Mas.* 147; 1 *Gall.* 624; 4 *Blatchf.* 420.

It was held in 82 *Fed. Rep.* 406 that the Great Lakes are not high seas, and that these words have been employed from time immemorial to designate the ocean below low-water mark, and have rarely if ever been applied to interior or land-locked waters of any kind; but the supreme court of the United States has held otherwise, saying that this term is also applicable to the open, unenclosed waters of the Great Lakes; 150 *U. S.* 249. See *FAUCES TERRÆ*; *GREAT LAKES*.

HIGH TREASON. In English Law. Treason against the king, in contradistinction from petit treason, which is the treason of a servant towards his master, a wife towards her husband, a secular or religious man towards his prelate. See *PETIT TREASON*; *TREASON*.

HIGH-WATER MARK. That part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest. 6 *Mas.* 435; 1 *Pick.* 180; 1 *Halst.* 1; 1 *Russ. Cr.* 107; 2 *East, Pl. Cr.* 803.

Wherever the presence of the water is so common as to mark on the soil a character, in respect to vegetation, distinct from that of the banks; it does not include low lands which, though subject to periodical overflow, are valuable for agricultural purposes. 58 *N. W. Rep. (Minn.)* 295. See *SEA-SHORE*; *TIDE*.

HIGHWAY. A passage, road, or street which every citizen has a right to use. 3 *Kent* 432; 3 *Yeates* 421.

The term *highway* is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers; 6 *Mod.* 255; *Ang. Highw. c.* 1; 3 *Kent* 432. *A cul de sac* is also a highway; 11 *East* 375, note; 18 *Q. B.* 870; 8 *Allen* 242; 24 *N. Y.* 559 (overruling 23 *Barb.* 103); 37 *Ill.* 189; s. c. 29 *Am. Rep.* 49; 60 *N. W. Rep. (Mich.)* 1048; but an alley would not be; 32 *Mich.* 111; 90 *Mich.* 104.

Highways are created either by legislative authority, by dedication, or by necessity.

First, by legislative authority. In England, the laying out of highways is regulated by act of parliament; in this country, by general statutes, differing in different states. In England, the uniform practice is to provide a compensation to the owner of the land taken for highways. In the act authorizing the taking, in the United States, such a provision must be made, or the act will be void under the clause in the federal and in the several state constitutions that "private property shall not be taken for public use without just compensation." The amount of such compensation may be determined either by a jury or by commissioners, as shall be prescribed by law; 1 *Bla. Com.* 139; *Ang. Highw. c.* 2; *Thomp. Highw.* 233; 8 *Price* 535; 18 *Pick.* 511; 25 *Wend.* 462; 21 *N. H.* 358; *Baldw.* 222; 3 *Watts* 292; 16 *N. Y.* 97; 14 *Wis.* 609. In case the statute makes no provision for indemnity for land to be taken, an injunction may be obtained to prevent the taking; 3 *Paige, Ch.* 45; 2 *Johns. Ch.* 162; 9 *Ind.* 433; 34 *Me.* 247; see 132 *Ind.* 4; or an action at law may be maintained after the damage has been committed; 5 *Cow.* 165; 16 *Conn.* 98; and cases cited above.

See 32 *Amer. & Eng. Corp. Cas.* 88; *EMINENT DOMAIN*.

Second, by dedication, which title see.

Third, by necessity. If a highway be impassable, from being out of repair or otherwise, the public have a right to pass in another line, and, for this purpose, to go on the adjoining ground, even when sown with grain and enclosed with a fence; but they must do no unnecessary damage; *Cro. Car.* 886; 7 *Cush.* 408; 2 *Show.* 28; 7 *Barb.* 309. This right, however, is only temporary and gives the public no permanent easement; 44 *N. H.* 628.

A highway is simply an easement or servitude, carrying with it, as its incidents, the right to use the soil for the purposes of repair and improvement; and, in cities, for the more general purposes of sewerage, the distribution of light and water, and the furtherance of public morality, health, trade, and convenience. The owner of the land over which it passes retains the fee and all rights of property not incompatible with the public enjoyment, such as the right to the herbage, the trees and fruit growing thereon, or minerals below, and may work a mine, sink a drain or cellar, or carry water in pipes beneath it, or sell the soil if it be done without injury to the highway; 4 *Viner, Abr.* 502; *Com. Dig. Chemin (A 2)*; *Ang. Highw. c.* 7; 1 *N. H.* 16; 1 *Sumn.* 21; 3 *Rawle* 495; 10 *Pet.* 25; 6 *Mas.* 454; 15 *Johns.* 447; 31 *N. Y.* 151; 34 *Vt.* 336; 28 *Conn.* 165; 83 *Me.* 508; 88 *Va.* 985; 45 *La.* Ann. 426; 37 *N. E. Rep. (Ohio)* 710; [1893] 1 *Q. B.* 142; 40 *Minn.* 337; 164 *Mas.* 350; but see 125 *N. Y.* 164; 25 *Pac. Rep. (Kan.)* 894. The title to a spring within the right of way of a turnpike company is in the owner, who may use the water as he pleases, and the turnpike company has no easement in such spring; 172 *Pa.* 400. The owner may maintain ejectment for encroachments on the highway or an easize if disseized of it; 3 *Kent* 432; *Adams, Eject.* 19; 9 *S. & R.* 26; 1 *Conn.* 135; 2 *Sm. Lead. Cas.* 141; 35 *S. W. Rep. (Mo.)* 581; or trespass against one who builds on it; 2 *Johns.* 357; or who digs up and removes the soil; 12 *Wend.* 98; [1893] 1 *Q. B.* 142; or cuts down trees growing thereon; 1 *N. H.* 16; or damages them in putting up telephone wires; 2 *Can. S. C. R.* 276; 37 *N. E. Rep. (Ohio)* 710; or who stops upon it for the purpose of using abusive or insulting language; 11 *Barb.* 390. A landowner has the right to the lateral support of the soil in the adjoining street, and a city is liable for any damage occasioned by removing this lateral support in grading the street; 40 *Minn.* 389. A steam railroad used for the purposes of transporting persons, and property upon a highway is an additional servitude for which an abutting owner is entitled to compensation; 2 *E. D. Sm.* 97; 3 *Hill* 567; 4 *Zabr.* 592; 16 *Miss.* 649; 38 *Mich.* 62; 67 *Ill.* 444; 4 *Cush.* 63; and so with any railroad which carries both passengers and freight, irrespective of the method of propulsion; 28 *Minn.* 373. See 41 *Cal.* 256; 52 *Ind.* 428; 48 *id.* 178; 6 *Miss.* 279; 46 *La.* 366; 47 *Mich.* 398. As to a railway for passengers only the question depends upon the character and extent of the use, and not upon the motive power; 35 *Minn.* 112; 79 *Me.* 363; 41 *Fed. Rep.* 556; 87 *Mich.* 361; 27 *N. Y.* 188; 21 *Ill.* 516; but when such a road seriously interferes with the rights of an abutting owner, it is held an additional servitude. This rule applies to an elevated railroad, which is considered an obstruction to the easement of air and light and the easement of access; 104 *N. Y.* 268; 99 *id.* 122; 91 *id.* 148; 106 *N. Y.* 147; 43 *Ohio* St. 190; and to any railroad which causes changes of grade in the street; 59 *Cal.* 290; 7 *Barb.* 508; 17 *Neb.* 548; 83 *Ill.* 535; 6 *Pac. Rep. (Cal.)* 325; 22 *Minn.* 527; 121 *Mas.* 241; 83 *Ind.* 435; but only in states which so provide by their constitutions or by statutes; 1 *Pick.* 418; 6 *Ind.* 237; 79 *id.* 491; 26 *Ark.* 276. Where the horse is the motive power of a passenger railway on a street or highway, and the grade is unchanged, no new servitude is imposed; 78 *Ind.* 261; an electric railway is held to come within this rule; 5 *Dist. Rep. Pa.* 18; 8 *Ohio Cir. Ct. Rep.* 535; 167 *Pa.* 62; 30 *Atl. Rep. (N. J.)* 351; 93 *Tenn.* 492; 82 *Conn.* 579; 62 *Md.* 242; 27 *Wis.* 194; 85 *Mich.* 634; 139 *Pa.* 419; and a cable road; 32 *Fed. Rep.* 270; 121 *N. Y.* 536, reversing 56 *Hun* 527; *contra*, 1 *N. Y. Supp.* 197; the erection of poles and stringing of wires by a telephone company is not an additional servitude; 63 *N. W. Rep. (Minn.)* 111 (*contra*, 49 *Fed. Rep.* 113); nor by an electric light company; 54 *Hun* 469. But the occupation of a country road by an electric light company constitutes an additional servitude; 39 *N. Y. Supp.* 522; or by a telegraph company; 143 *N. Y.* 133; or by an

electric railway company; 167 Pa. 62; or a gas company; 62 N. Y. 386. See POLES; WIRES. As to other uses of city streets and compensation to abutters for damages resulting therefrom, see EMINENT DOMAIN.

The owners on the opposite sides *prima facie* own respectively to the centre line of the street; 93 Pa. 124; 86 Hun 424; 17 N. J. Eq. 75. And a grant of land "by," or "on," or "along" a highway carries, by presumption, the fee to the centre line, if the grantor own so far, though this presumption may be rebutted by words showing an intention to exclude the highway, such as, "by the side of," "by the margin of," or other equivalent expressions; Ang. Highw. § 815; 11 Me. 463; 4 Day 228; 13 N. H. 381; 8 Metc. 266; 2 R. I. 508; 60 N. Y. 609; 5 Whart. 18. But, while in most of the states this is the rule, there are exceptions as, in Kansas and Nebraska, where the fee of highways is vested in the county; 25 Pac. Rep. (Kan.) 894; 46 N. W. Rep. (Neb.) 627; and in New York city where by act of 1813 the fee is vested in the municipality in trust for the public; 27 N. Y. 188; 45 *id.* 732; 63 *id.* 593; 125 *id.* 164; and in Illinois, in the municipality in trust for the public; 75 Ill. 301; 11 *id.* 554; 67 *id.* 439; and it is held that even where the abutting owner does not own the fee in the highway, he has special easements therein not enjoyed by the public, as those of light, air, and access; 36 Hun 437; 84 *id.* 121; 9 *id.* 246; 4 Paige 510; 102 Ill. 64; 21 Fed. Rep. 309; 7 Wall. 272; 7 Col. 113; 39 Ohio St. 333; 41 Hun 117; 44 N. J. Eq. 120; 103 Ind. 29. See FRONTAGE. Where the fee of a highway is in the adjoining owner, it reverts to him upon a discontinuance, vacation, or abandonment; 8 Bosw. 372; 4 Mass. 429; 110 Pa. 370; 36 Barb. 136; 10 Pet. 26; 15 Johns. 447; 28 Kan. 470. But in Illinois it is held that such land reverts to the original owner and not to the abutter who acquires title to it after the establishment of the way; 75 Ill. 301.

In England, the inhabitants of the several parishes are *prima facie* bound to repair all highways lying within them, unless by prescription or otherwise they can throw the burden upon particular persons; Shelf. Highw. 44; 5 Burr. 1700; 12 Mod. 409. In this country, the English parochial system being unknown, this feature of the common law does not prevail. The liability to repair is here determined by statute, and, in most of the states, devolves upon the towns, or other local municipalities; 8 Barb. 645; 13 Pick. 343; 1 Humphr. 217; 125 Pa. 24; 74 Iowa 644. The liability being thus created, its measure is likewise to be ascertained by statute, the criterion being, generally, safety and convenience for travel, having reference to the natural characteristics of the road and the public needs; Ang. Highw. § 259; 2 W. & M. 337; 19 Vt. 470; 4 Cush. 307, 365; 14 Me. 198. For neglect to repair, the parish in England, and in this country the town or body chargeable, is indictable as for a nuisance; 2 Wms. Saund. 158, n. 4; 28 N. H. 195; Ang. Highw. § 275; and, in many states, is made liable, by statute, to an action on the case for damages in favor of any person who may have suffered special injury by reason of such neglect; 17 How. 161; 3 Cush. 174; 22 Pa. 384; 31 Me. 299; Ang. Highw. § 286; 33 Va. 355; 71 Tex. 280. But to make a county liable, the defect in the highway must have been the sole cause of the injury; 31 W. Va. 477. Contributory negligence defeats recovery for injuries caused by a defective highway; 29 S. C. 140; 97 Mo. 151; 31 W. Va. 477; 77 Ga. 288. The duty of repair may, in this country, rest on an individual to the exclusion of the town; 23 Wend. 446; or on a corporation who, in pursuance of their charter, build a road, and levy tolls for the expense of maintaining it; 7 Conn. 86. The taking of toll is *prima facie* evidence of the duty; 1 Hawks 451.

In Pennsylvania any one or more taxpayers in a township or road district may, upon proper proceedings, and giving a bond, acquire a right to make, repair, etc., all the roads, and thereupon be free from road taxes for a year; act of June 12, 1893.

Any act or obstruction which incommodates or impedes the lawful use of a highway by the public, except such as arises by necessity from unloading wagons, putting up buildings, etc., is a common-law nuisance; 4 Steph. Com. 294; 1 Hawk. Pl. Cr. c. 76; Ang. Highw. § 345; 1 Denio 524; 8 Ohio St. 358; 29 Am. L. Reg. 342; 145 Pa. 453; 23 Atl. Rep. (Pa.) 1115; 43 Pac. Rep. (Cal.) 196; 46 Ill. App. 67. A fruit stand on a city street is an obstruction; 6 Gill 425; 73 Ind. 185. The drawing large crowds before a shop window; 1 S. & R. 219; the stopping teams or vehicles for such a time or at such a place as unreasonably to interfere with public travel; 3 Campb. 226; 54 Md. 148; 39 Ohio St. 333; 85 N. C. 522; (but a reasonable necessity will justify a temporary obstruction; 72 Wis. 199); collecting a noisy and disorderly crowd by music or speaking; 19 Pa. 412; 64 N. H. 48; conducting an execution sale on the street; 13 S. & R. 403; are nuisances and may be abated by any one whose passage is thereby obstructed; 3 Steph. Com. 5; 5 Co. 101; 10 Mass. 70; 18 Wis. 265; or the person causing or maintaining the same may be indicted; 1 Hawk. Pl. Cr. c. 76; Thomp. Highw. 805; 2 Saund. 158, note; 7 Hill, N. Y. 575; 13 Metc. Mass. 115; 2 R. I. 493; 29 Am. L. Reg. 342; or may be sued for damages in an action on the case by any one specially injured thereby; Co. Litt. 56 a; 1 Binn. 463; 7 Cow. 609; 19 Pick. 147; 6 Oreg. 378; s. c. 25 Am. Rep. 531, and note; 2 Ill. 229; 53 Barb. 629; 5 Blackf. 35; and a court of equity will take jurisdiction of a civil action to abate and enjoin the maintenance of an obstruction to a highway which is a public nuisance; 47 N. W. Rep. (Minn.) 255. At common law the public have no right to pasture cattle on the highways; 2 H. Bla. 527; 16 Mass. 33; 5 Wis. 27.

Disobedience of a city ordinance forbidding the leaving of horses unhitched on the street of a city is negligence, for which the employer of the driver must answer in damages to a person sustaining injuries therefrom; 8 Houst. 562.

The legislature has power to authorize certain obstructions which would otherwise be a public nuisance, such as the laying of railroad tracks or bridging of streams or constructing sewers, etc., or laying gas and water pipes; 14 Gray 93; 12 Ia. 246; 65 Mo. 325; 16 N. Y. 97; 31 Wis. 316; 57 Me. 481; 84 Mich. 462; 68 N. Y. 71.

It is the duty of travellers upon highways, for the purpose of avoiding collision and accident, to observe due care in accommodating themselves to each other. To observe this purpose, it is the rule in England, that, in meeting, each party shall bear or keep to the left; and in this country, to the right; 2 Steph. N. P. 934; Story, Bailm. § 599; Thomp. Highw. 384; 2 Dowl. & R. 255; 158 Mass. 46. This rule, however, may and ought to be varied, where its observance would defeat its purpose; 8 C. & P. 103; 12 Metc. 415; 23 Pa. 196. The rule does not apply to equestrians and foot-passengers; 24 Wend. 465; 2 D. Chipp. 128; 8 C. & P. 373, 691; 2 Misc. Rep. 238; but it has been held to apply to bicyclists; 32 Atl. Rep. (Pa.) 652. It is another rule that travellers shall drive only at a moderate rate of speed, furious driving on a thronged thoroughfare being an indictable offence at common law; 1 Pet. 590; 13 *id.* 181; 8 C. & P. 694. In case of injury by reason of the non-observance of these rules or of other negligence, as by the use of unsuitable carriages or harness, or horses imperfectly trained, the injured party is entitled to recover his damages in an action on the case against the culpable party, unless the injury be in part attributable to his own neglect; Ang. Highw. § 345; 1 Pick. 345; 11 East 60; 63 Conn. 150; 5 W. & S. 544; 5 C. & P. 379; 19 Wend. 399. The legislature has complete power to regulate the highways in a state, and may prescribe what vehicles may be used on them with a view to the safety of the passengers over them and the preservation of the roads; 97 N. C. 477; it may regulate the improvement for the public good of highways, whether on land or by water, subject to the right of congress to

interpose when such highways are the means of interstate and foreign commerce; 119 U. S. 548. See Thompson; Pope, Highw.; Elliott, Roads & Streets; Booth, Street Ry.; 24 Alb. L. J. 464; 33 Amer. & Eng. Corp. Cas. 460.

And see BICYCLE; BRIDGE; TURNPIKE; RAILROAD; CANAL; FERRY; GRADE CROSSING; RIVER; STREET; WAY; NEGLIGENCE; NAVIGABLE WATERS, ALONG A HIGHWAY.

HIGHWAYMAN. A robber on the highway.

HIGHWAYS, ROYAL. In ancient times there were four royal highways in Yorkshire, England, three by land and one by water where the king claimed all forfeitures, even when they ran through the land of the archbishop or of the earl. Mail. Domesday Book and Beyond 87; D. B. i. 238 h, Alvestone.

HIGLER. In English Law. A person who carries from door to door, and sells by retail, small articles of provisions, and the like.

HIGUELA. In Spanish Law. The written acknowledgment given by each of the heirs of a deceased person, showing the effects he has received from the succession.

HIS TESTIBUS. Words formerly used in deeds, signifying these being witness. They have been disused since Henry VIII. Co. Litt.; Cowel.

Words anciently added in deeds, after '*In cuius rei testimonium.*' These witnesses were first called, then the deed read, and their names entered down. This clause of *his testibus* disused since the reign of King Henry VIII. Tomlin; Co. Lit. 6.

HIJRA. Flight; departure. Given by some authorities for Hegira (q. v.). Moz. & W.

HILARY TERM. In English Law. A term of court, beginning on the 11th and ending on the 31st of January in each year. Superseded (1875) by Hilary Sittings, which begin January 11th and end on the Wednesday before Easter. See TERM.

HINDAS. See HINDENI HOMINES.

HINDENI HOMINES. A society of men in the Saxon times. Toml.

In the time of the Saxons, all men were ranked into three classes, and value as to satisfaction for injuries, etc. according to the class in which they were. The highest class were valued at twelve hundred shillings, and were called *twelf hindmen*; the middle class valued at six hundred shillings, and called *sezhindmen*; and the lowest at ten pounds, or two hundred shillings, called *tyghindmen*; their wives were termed *hndas*. Jacobs; Brompt. Leg. Alfred, cap. 12, 30, 31.

HINDER. To interpose obstacles or impediments. 5 Bush. (Ky.) 582. See OBSTRUCT AND HINDER.

HINDER AND DELAY. A phrase used to signify an act amounting to an attempt to defraud rather than a successful fraud. To put some obstacle in the path of, or interpose some time unjustifiably, before a creditor can realize what is owed out of his debtor's property. 42 N. Y. Super. Ct. 63; 74 N. Y. 597. The question of fraudulent intent is one of fact; 9 Col. 8. The word "hinder" is not synonymous with "delay"; 66 Mo. 435.

HINDMEN. See HINDENI HOMINES.

HINDU LAW. The system of native law prevailing among the Gentooes, and administered by the government of British India.

In all the arrangements for the administration of justice in India, made by the British government and the East India Company, the principle of reserving to the native inhabitants the continuance of their own laws and usages within certain limits has been uniformly recognized. The laws of the Hindus and Mohammedans have thus been brought into notice in England, and are occasionally referred to by writers on English and American law. The native works upon these subjects are very numerous. The chief English republications of the Hindu law are, Colebrooke's Digest of Hindu Law, London 1801; Sir Wm. Jones's Institutes of Hindu Law,

London, 1797. For a fuller account of the Hindu Law, and of the original Digests and Commentaries, see Morley's Law of India. London, 1858, and Macnaghten's Principles of Hindu and Mohammedan Law, London, 1860. The principal English republications of the Mohammedan Law are Hamilton's Hedaya, London, 1791; Baillie's Digest, Calcutta, 1806; *Précis de Jurisprudence musulmane selon le Rite malikite*, Paris, 1848; and the treatises on Succession and Inheritance translated by Sir William Jones. See, also, Norton's Cases on Hindu Law of Inheritance; Rattigan, Hindu Law. An approved outline of both systems is Macnaghten's Principles of Hindu and Mohammedan Law; also contained in the "Principles and Precedents" of the same law previously published by the same author.

HINE or HIND. A servant, or one of the family, but more properly a servant at husbandry; and he that oversees the rest is called the *master hine*. Cowel; Moz. & W.

HINE-FARE. The loss or departure of a servant from his master. Domesd.

HINEGELD. A ransom for an offence committed by a servant. Cowel. See HIND GILD.

HIPOTECA. In Spanish Law. A mortgage of real property. Johnson, Civ. Law of Spain, 156 [149]; White, New Recop. b. 2, tit. 7.

HIRE. A bailment in which compensation is to be given for the use of a thing, or for labor and services about it. 2 Kent 456; Story, Bailm. § 359. The divisions of this species of contract are denoted by Latin names.

Locatio operis faciendi is the hire of labor and work to be done or care and attention to be bestowed on the goods let by the hirer, for a compensation.

Locatio operis mercium vehendarum is the hire of the carriage of goods from one place to another, for a compensation. Jones, Bailm. 85, 86, 90, 103, 118; 2 Kent 456.

Locatio rei or *locatio conductio rei* is the bailment of a thing to be used by the hirer for a compensation to be paid by him.

This contract is voluntary, and founded in consent; it involves mutual and reciprocal obligations; and it is for mutual benefit. In some respects it bears a strong resemblance to the contract of sale; the principal difference between them being that in cases of sale the owner parts with the whole proprietary interest in the thing, and in cases of hire the owner parts with possession only for a temporary purpose. In a sale, the thing itself is the object of the contract; in hiring, the use of the thing is its object; Vinnius, lib. 3, tit. 25, *in pr.*; Pothier, *Louage*, nn. 2-4; Jones, Bailm. 86; Story, Bailm. § 371. See Edwards, Jones, Story, Schouler, Bailments; Parsons, Story, Contracts; 2 Kent 456; BAILMENT. See USING FOR HIRE.

HIREMAN. A subject. Du Cange. From the Sax. to obey. Or it may be one who serves the king's hall, to guard him; from hire, *aula*; and man, *homo*. Jacobs; Du Fresno; Cowell.

HIRER. He who hires. See 18 S. W. Rep. (Tex.) 578; BAILMENT.

HIRST or HURST. In Old English Law. A wood. Domesd; Co. Litt. 4 b.

HIS. A demise by A to B for the term of "his" natural life may enure as a demise either for the life of A or that of B according to circumstances; 2 Nev. and M. 338.

In a policy of insurance the word "his" instead of "their" as descriptive of the property of the assured, does not render the policy void, if the assured has an insurable interest, although the interest may be qualified or defeasible or even an equitable interest; 10 Pick. 40; 29 Conn. 10; 16 Wend. 385; 122 Mass. 94; but where the policy expressly requires that a statement be made whether the insured owns the sole interest in the premises, the use of the word "his" instead of "their" amounts to a misrepresentation, if the insured is not the sole owner; 63 Mo. 127. REPRESENTATION.

The ninth clause of the thirty-ninth section of the bankruptcy act does not apply to an accommodation indorser of negotiable paper whose indorsement is in no way con-

nected with the business of the indorser, as such paper is not "his" commercial paper within the meaning of said clause; 2 Dill. 533.

HIS CHILDREN FOREVER. "His children forever" is equivalent to the words "heirs or heirs of his body." (q. v.) 98 Ky. 291, 33 S. W. 75.

HIS EXCELLENCY. A title given by the constitution of Massachusetts to the governor of that commonwealth. Mass. Const. part 2, c. 2, s. 1, art. 1. This title is customarily given to the governors of the other states, whether or not it be the official designation in their constitutions and laws.

HIS HONOR. A title given by the constitution of Massachusetts to the lieutenant governor of that commonwealth. Mass. Const. part 2, c. 2, s. 2, art. 1. It is also customarily given to some inferior magistrates, as the mayor of a city.

HISSA. A lot or portion; a share of revenue or rent. Wilson's Gloss. Ind.

HIWISC. A hide of land.

HLAFORDSWICE (Sax. *hlaford*, lord, literally bread-giver, and *vice*). In Old English Law. Betraying one's lord; treason. Crabb, Hist. Eng. Law 59, 301.

HLASOCNA. The benefit of the law. Du Cange; Toml.

HLOTH (Sax.). An unlawful company. Moz. and W.

HLOTHBOTE (Sax. *hloth*, company, and *bote*, compensation). In Old English Law. Fine for presence at an illegal assembly. Du Cange, *Hlothbota*.

HOCH. See HOGA.

HOCK-DAY. A festival formerly observed in England on the second Tuesday after Easter, in commemoration of the destruction of the Danes in the time of Ethelred. Worcester. Also called HOKE-DAY of HOCK-TIDE. Webster. See HOCK-TUESDAY MONEY.

HOCKTIDE. See HOCK-DAY.

HOCK-TUESDAY. See HOCK-DAY.

HOCK-TUESDAY MONEY. A duty given to the landlord, that his tenants and bondmen might solemnize the day on which the English mastered the Danes, being the second Tuesday after Easter week. Cowel.

HODGE-PODGEACT. A name given to a legislative act which embraces many subjects. Such acts, besides being evident proofs of the ignorance of the makers of them, or of their want of good faith, are calculated to create a confusion which is highly prejudicial to the interests of justice. Instances of this wretched legislation are everywhere to be found. See Barrington, Stat. 449. In Pennsylvania, and in other states, bills, except general appropriation bills, can contain but one subject, which must be expressed in the title. Const. of Penn. art. 3, sec. 3.

HOE. An implement for loosening the earth after digging the same. It is *per se* a deadly weapon; 113 Ill. 38.

HOG. This word may include a sow; 2 S. C. 21; a pig; 60 Ala. 60; 58 id. 355; and may refer to the dead as well as the living animal; 7 Ind. 195; 55 Ala. 140; 16 Fla. 564; and it is synonymous with swine; 10 Tex. App. 177.

HOGA. In Old English Law. A hill or mountain. Domesday.

HOGGUS or HOGICTUS. A hog or swine. Cowel.

HOGHENHYNE (from Sax. *hogh*, house, and *hine*, servant). A domestic servant. Among the Saxons, a stranger guest was, the first night of his stay, called *uncuth*, or unknown; the second, *gust*, guest; the third, *hoghenhyne*; and the entertainer was responsible for his acts as for those of his own servant. Bract. 124 b; Du

Cange, *Agenhine*; Spelman, Gloss. *Homehine*.

HOGSHEAD. A liquid measure, containing half a pipe; the fourth part of a tun, or sixty-three gallons.

HOKE-DAY. Same as HOCK-DAY (q. v.). Webster.

HOLD. A technical word in a deed introducing with "to have" the clause which expresses the tenure by which the grantee is to have the land. The clause which commences with these words is called the *tenendum*. See TENENDUM; HABENDUM.

For the distinction between the power to hold and the power to purchase, see 7 S. & R. 313; 14 Pet. 122.

To decide, to adjudge, to decree: as, the court in that case *held* that the husband was not liable for the contract of the wife, made without his express or implied authority.

To bind under a contract: as, the obligor is *held* and firmly bound.

In the constitution of the United States it is provided that no person *held* to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due. Art. iv. sec. ii. § 3. The main purpose of this provision in the constitution no longer exists, through the abolition of slavery; but it includes apprentices; 1 Am. L. Reg. 654. See FUGITIVE SLAVE.

HOLD PLEAS. To hear or try causes. 3 Bla. Com. 35, 298.

HOLDER. The holder of a bill of exchange is the person who is legally in the possession of it, either by indorsement or delivery, or both, and entitled to receive payment either from the drawee or acceptor, and is considered as an assignee. 4 Dall. 53. And one who indorses a promissory note for collection, as an agent, will be considered the holder for the purpose of transmitting notices; 20 Johns. 372; 2 Hall N. Y. 112; 6 How. 248. No one but the holder can maintain an action on a bill of exchange; Byles, Bills 2. See BILL OF EXCHANGE, BONA FIDE HOLDER.

Holder for Value. Where value has at any time been given for the instrument, the holder is deemed a "holder for value" in respect to all parties who became such prior to that time. Instruments Law, § 26.

HOLDER IN DUE COURSE. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. § 52 Uniform Neg. Inst. Law; Baldwin's L. Dict., p. 230.

Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. *Id.*

HOLDING. See AGRICULTURAL HOLDING; AGRICULTURAL HOLDINGS ACTS.

HOLDING CORPORATION. A corporation organized for the purpose of owning and holding the stock of other corporations. Such a corporation may acquire a part of all of the capital stock of any other corporation, either manufacturing or quasi public. It is managed by a board of directors, and as owner of a majority of the stock of any other corporation the board of directors of the latter becomes the mere instrument or pliant tool for carrying out the purposes and designs of the holding corporation. Where any one holding corporation owns all or a majority of the stock of several corporations organized for similar purposes, it can manage, control, and manipulate

these as its designing directors may desire. 4 Thomp. Corp., 2nd ed., 638.

Certain restrictions and limitations have been placed upon the power of holding corporations to hold stock of other corporations. The rule has been established that any arrangement or agreement by which a holding corporation, or individuals as trustees, are to hold a majority of the stock of competing corporations, either carriers or manufacturing companies, would be illegal and void where it resulted in preventing competition, or where it tended to create and foster a monopoly. *Id.*, p. 640.

HOLDING OVER. The act of keeping possession by the tenant, without the consent of the landlord, of premises which the latter, or those under whom he claims, had leased to the former, after the term has expired.

When a proper notice has been given, this injury is remedied by ejectment, or, under local regulations, by summary proceedings. See **LANDLORD AND TENANT**; **FORCEFUL ENTRY AND DETAINER**.

The term is also applied to the retaining possession of a public office by an incumbent, after his term has expired, which is not always unlawful, as such action is sometimes authorized by statute or common law, to prevent an interregnum.

HOLIDAY. A religious festival; a day set apart for commemorating some important event in history; a day of exemption from labor. Webster, Dict. (Webster applies *holiday* especially to a religious, *holiday* to a secular festival.) In England they are either by act of legislation, or by ancient usage, and are now regulated by the Bank Holiday Act of 1871, extended by the act 38 Vict. c. 13. Fasts and thanksgiving days are also occasionally appointed by the crown. See Wharton, Dict.; 2 Burn, Eccl. Law 508.

In the United States there are no established holidays of a religious character having a legal status without legislation, and the lack of precision in the earlier statutes on the subject has given rise to much confusion and a great variety of definition. It has been said that a legal holiday is, *ex vi termini, dies non juridicus*; 38 Wis. 673; but this case does not warrant so broad a statement; 29 Am. L. Reg. 139. One thing which seems to be absolutely settled is that a legal holiday does not have the legal relations of Sunday, which was clothed with the idea of sanctity and is in its very nature *dies non juridicus*. Legal holidays are, however, merely the creation of statute law, and the lack of uniformity in the statutes of the several states makes the term itself very difficult of exact definition. The various definitions of the term holiday are collected in an article on the subject in 29 Am. L. Reg. 137, the writer of which thus states the conclusion reached after a critical examination of them: "Legal holidays as distinguished from the first day of the week are those days which are set apart by statute or by executive authority for fasting and prayer, or those given over to religious observance and amusements, or for political, moral or social, duties or anniversaries, or merely for popular recreation and amusement under such penalties and prohibitions alone as are expressed in positive legislative enactments."

The earlier statutes in the United States had for their object, mainly, the regulation of commercial paper falling due on days which were by general consent observed as holidays. Under such statutes it is simply provided that such paper payable upon the day named shall be due and payable on the day before or the day after. The difference in the statute law of several states as to this point is stated *infra*. As in the statutes, the day is specified and they are construed with exactness, there is little in the way of decision on this subject. It has been held that usage at a bank known to the parties to a note is sufficient to make a holiday such as to change the day for demanding payment, at least so far as to authorize a tender by the endorser on the

following day; 8 Pick. 414. In most of the states it is the rule, and such is the general commercial usage, to allow only two days of grace where the third would fall on a holiday, and to authorize demand of payment and protest on the day next preceding it. The question when a note falling due on a legal holiday which happens to be Sunday is legally payable is to be determined as in the case of any other note falling due on Sunday. This is so by general usage without special provision by statute, though in some states there is such provision.

The rule of commercial paper as affected by holidays has been applied for the sake of uniformity to other maturing contracts; 39 Wis. 533. In some states, as California, the Dakotas, Idaho, and Massachusetts, the statutes extend the time for the performance of all contracts, except works of charity or necessity, to the next following day.

When a note falls due on Sunday, or a statutory holiday, it is usually considered due on the preceding day unless otherwise provided by statute.

Judicial proceedings are usually invalid on holidays, and in most of the state statutes such proceedings are expressly prohibited, but a mere statutory provision requiring that public offices be closed does not prevent the sitting of courts or the discharge of judicial duties by judges; 47 Hun 129; which are valid unless prohibited by a statute; 19 Fla. 54.

HOLOGRAFO. In Spanish Law. Olographi. A term applicable to the paper, document, disposition, and more particularly to the last will of a person, which in order to be valid must be wholly written, signed, and dated by the testator. "*Holographum, apud Testum, appellatur testamentum, quod totum manu testatoris scriptum est et subscriptum.*"

HOLOGRAPH. What is written with one's own hand. See **OLOGRAPH**.

HOLY ORDERS. In Ecclesiastical Law. The orders or dignities of the church. Those within holy orders are archbishops, bishops, priests, and deacons. The form of ordination in England must be according to the form in the Book of Common Prayer. Besides these orders, the church of Rome had five others, viz.: subdeacons, acolytes, exorcists, readers, and ostiaries. 2 Burn, Eccl. Law 39.

HOMAGE (anciently *hominium*, from *homo*). A mere acknowledgment of tenure made by a tenant by knight-service upon investiture, in the following form:—

The tenant in fee or fee-tail that holds by homage shall kneel upon both his knees, ungridded, and the lord shall sit and hold both the hands of his tenant between his hands, and the tenant shall say, "I become your man (*homo*) from this day forward of life, and member, of earthly honor, and to you shall be faithful and true, and shall bear to you faith for the lands that I claim to hold of you, saving that faith that I owe to our lord the king;" and then the lord so sitting shall kiss him. The kiss is indispensable (except sometimes in the case of a woman. Du Cange). After this the oath of fealty (*q.v.*) is taken; but this may be taken by the steward, homage only to the lord. *Termes de la Ley*. This species of homage was called *homagium planum* or *simplex*, 1 Bla. Com. 367, to distinguish it from *homagium ligium*, or liege homage, which included fealty and the services incident. Du Cange; Spelman, Gloss.

Liege homage was that homage in which allegiance was sworn without any reservation, and was, therefore, due only to the sovereign; and, as it came in time to be exacted without any actual holding from him, it sunk into the oath of allegiance. *Termes de la Ley*.

HOMAGE ANCESTRAL. Homage was so called where time out of mind a man and his ancestors had held by homage; and in this case the lord who had received the homage was bound to acquit the tenant of all services to superior lords, and, if vouched, to warrant his title. If the tenant by homage ancestral aliened in fee, his

alienee held by homage, but not by homage ancestral. *Termes de la Ley*; 2 Bla. Com. 300.

HOMAGE JURY. The jury of a lord's court, or court baron; so called because generally composed of those who owed homage to the lord, or the *pares curie*. Kitchen; 2 Bla. Com. 54, 366.

HOMAGER. One that is bound to do homage to another. Jacob, Law Dict.

HOMAGIO RESPECTUANDO. A writ to the escheator commanding him to deliver seisin of land to the heir of full age, notwithstanding his homage not done which ought to be performed before the heir had livery, except there fall out some reasonable cause to hinder him. *Termes de la Ley*.

HOMAGIUM LIGIUM. See **HOMAGE**.

HOMAGIUM PLANUM. See **HOMAGE**.

HOMAGIUM REDDERE. The renunciation of homage, as when a vassal made a final declaration of defying his lord, of which there was a set form and method prescribed by the feudal law. Jac. L. Dict.

HOMBRE BUENO. In Spanish Law. The ordinary judge of a district.

Hence, when the law declares that a contract, or some other act, is to be conformable to the will of the *hombre bueno*, it means that it is to be decided by the ordinary judge. *Las Partidas* 7, 34, 31.

In matters of conciliation, it applies to the two persons, one chosen by each party, to assist the constitutional alcalde in forming his judgment of reconciliation. Art. 1, chap. 3, decree of 9th October, 1812.

Arbitrators chosen by litigants to determine their differences.

Persons competent to give testimony in a cause. L. 1. t. 8. b. 2, *Fuero Real*.

HOME. That place or country in which one in fact resides with the intention of residence, or in which he has so resided, and with regard to which he retains either residence or the intention of residence. Dicey, Conf. L. 81.

"Home" and "domicil" do not correspond, yet "home" is the fundamental idea of "domicil." The law takes the conception of "home," and moulding it by means of certain fictions and technical rules to suit its own requirements, calls it "domicil." Or perhaps this may be best expressed by slightly altering Westlake's statement, "Domicil is, then, the legal conception of residence," etc., and saying, "Domicil is, then, the legal conception of home." "Domicil" expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home." Jac. Dom. c. 3, § 72.

Dwelling-place, or home, means some permanent abode or residence, with intention to remain; and it is not synonymous with domicil, as used in international law, but has a more restricted meaning; 19 Me. 293.

A home and dwelling-place do not, necessarily, continue until another is acquired; it may be abandoned, and the individual cease to have any home; *id.* One who abandons his home or dwelling-house, with or without design of acquiring one elsewhere, has no home by construction, in the place abandoned; *id.*

HOME PORT. Any port within a state in which the owner of a ship resides.

The question as to what constitutes a foreign port has usually arisen respecting the claims of material-men for supplies furnished to the master, and in this respect it has been held that the home port of a vessel does not necessarily imply the limits of the state in which her owner resides; 9 Wheat. 401; *contra*, 1 Blatchf. & H. 66; where Charleston, S. C., was held a foreign port in respect to New York.

In England by the Mercantile Law Amendment Act it is provided that every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any one of them, being part of the dominions of Her Majesty,

shall be deemed a home port; 19 and 20 Vict. c. 97. See *BOTTOMRY*; *PORT*.

HOMESTEAD. The mansion-house.

HOMESTEAD. The home place—the place where the home is. It is the home—the house and the adjoining land—where the head of the family dwells—the home farm. 86 N. H. 186.

The place of a home or house; that part of a man's landed property which is about and contiguous to his dwelling-house; the land, or town, or city lot, upon which the family residence is situated. 24 Ark. 158; 55 *id.* 303; 47 Kan. 580.

The term necessarily includes the idea of a residence; 24 Tex. 224. It must be the owner's place of residence—the place where he lives; 23 Tex. 522.

The homestead laws of various states are constitutional or statutory provisions for the exemption of a certain amount or value of real estate occupied by a debtor as his homestead from a forced sale for the payment of his debts. In some cases restraints are placed upon the alienation by the owner of his property, and in some cases the exempt property, upon the death of the owner, descends to the widow and minor children, free from liability for his debts. They are of a comparatively recent origin; 51 N. H. 261; but are now said to exist in all but seven states; *Thomp. Hom. & Ex.* Their policy has been enlarged in many decided cases. See 4 Cal. 26; 1 Iowa 439; 18 Tex. 415; *Thomp. Hom. & Ex.* § 1.

Homestead acts have generally received a liberal construction; 45 Miss. 182; 36 Vt. 271; 46 N. H. 43, *contra*, 28 La. Ann. 594, 665; 3 Minn. 53. They cannot be considered as in derogation of the common law, inasmuch as, at common law, real estate was not liable to execution for the payment of debts; *Thomp. Hom. & Ex.* § 4; 7 Mont. 206; but see 16 Minn. 161; 7 Mich. 601; 3 Ia. 287. Exemption laws giving a right to a homestead are for protection of the citizens of the state only; 87 Tenn. 78; 93 N. C. 304; 98 *id.* 462.

In some states there is a money limit put to the homestead; in others a limit of the quantity of land exempted. The value, under the statute, is the value at the time the homestead is designated; 42 Tex. 199; *contra*, 37 Cal. 180. The courts cannot exempt money instead of land; 7 Mich. 500; but see 37 Cal. 180, where it was held that if the homestead exceeded the constitutional limit of value, and enough of it could not be separated and subjected to execution to reduce the value to that limit; the property would be sold and the constitutional amount set apart to the debtor. But where it can be separated, it will be, although it is within the same enclosure and used in connection with the dwelling for the use of the family; 39 Ill. App. 380. In 60 Mo. 308, it was held that the law confers a homestead right only in land and not in the proceeds of the sale of land.

The owner of an undivided interest in land is not entitled to a homestead exemption therein; 3 Lea 76; 80 La. Ann. 1180 (*contra*, 55 Miss. 89; 38 Tex. 210); so where land is held by the parties as partners; 5 Sawy. 843. A learned author gives as the conclusive test of a homestead—"that the form, physical characteristics, and geography of the premises must be such as, when taken in connection with their use by the owner, and their value when the statute creates a limit as to value, will convey notice to persons of ordinary prudence who deal with him that they are his homestead." *Thomp. Hom. & Ex.* § 104, citing 21 Wall. 481, 42 Tex. 195, 44 *id.* 597, as sustaining this doctrine.

"The courts have generally held that the mere fact that the debtor carries on his business upon his homestead premises or rents out a portion thereof, as in case of one who keeps a country tavern; 16 Cal. 181; or uses the lower part of his dwelling for business purposes; 22 Mich. 260; or who, living in town, keeps boarders and lodgers; 1 Nev. 607; or one who lets rooms in his dwelling to tenants; 11 Allen 194; or who rents out part for a store and uses another part for a printing office; 10 Minn. 154;

does not deprive it of its homestead character." *Thomp. Hom. & Ex.* § 120; nor does he, where he leases the greater part of his house to be used as a boarding-house, he retaining several rooms in which he and his family lived; 94 Cal. 291. A building may not be used exclusively as a residence and yet retain the character of a homestead; 80 Wis. 474. A store; 58 Ill. 425; or mill; 2 Woods 637 (*per Bradley, J.*); situated on the homestead lot; a smithshop separated from it by a highway; 42 Vt. 27; a brewery in which the debtor lives with his family; 3 Dill. 339; a lawyer's office in a separate block; 19 Tex. 371; and a garden adjoining the dwelling; 76 Cal. 815; a business block, partly a residence; 3 Okla. 80; part store-room and part dwelling; 44 Neb. 269; have been included within the rule. A house built in the business part of the town and used principally as a store-building, though the owner sleeps in a small back room and takes his meals elsewhere, is not a homestead; 95 Ala. 96. And in Iowa a building occupied at once for a dwelling and for business purposes may be divided horizontally and the business part sold in execution; 4 Ia. 369; but see, *contra*, *Thomp. Hom. & Ex.* § 134, n.; 9 Wis. 70; "and in other states a homestead cannot be reserved in tenements and separate buildings occupied by tenements, although upon the enclosure whereon is situated the debtor's dwelling;" *Thomp. Hom. & Ex.* § 120; 36 N. H. 153; 33 Cal. 220; 16 Wis. 114. Nor can a person have two homesteads at the same time; 62 Mich. 373; 74 Cal. 266; 69 Tex. 248. Where land was occupied by a tenant at the time of levy and execution, the levy is not void as on a homestead because the owner intended at some future time to occupy it as a house; 92 Mich. 427.

In Illinois it is said that the homestead laws are not to be taken only to save a mere shelter for the debtor and his family, but to give him the full enjoyment of the entire lot of ground exempted, to be used either in the cultivation of it, or in the erection and use of buildings on it, either for his own business or for deriving income in the way of rent; 74 Ill. 206; and the homestead right may be conveyed separately from the fee; 144 Ill. App. 645.

There is a conflict of decision as to whether a tract of land detached from the one on which the homestead dwelling-house is built, but used by the debtor in connection with it, is exempt. The opinion supported by the weight of authority is that it is not; *Thomp. Hom. & Ex.* § 145; 86 Ia. 394; 15 Minn. 116; 16 Gray 146; 15 Wis. 635; 47 Kan. 580; 53 Ark. 303; 83 Ala. 159; *contra*, 69 N. C. 289; 33 Tex. 212; 84 *id.* 398; 62 Mo. 498; 56 Miss. 30. A homestead may be designated in an undivided interest in lands; 1 Kan. App. 599; but not in partnership real estate; 64 N. W. Rep. (Mich.) 334; or by a co-tenant in lands held in common; 110 Cal. 198; or by a remainderman, though after the estate vests in possession it may be held as a homestead against a judgment creditor; 115 N. C. 426; s. c. 26 L. R. A. 814. It may be claimed in lands situated in different counties; 116 N. C. 520.

A homestead law, so far as it attempts to withdraw from the reach of creditors property which would have been within their reach under the laws in force at the time the debt was contracted, is unconstitutional; 15 Wall. 610, reversing s. c. 44 Ga. 333; 6 Baxt. 225.

Provisions exist in most of the states forbidding the alienation of the property designated as a homestead, except when the deed is joined in by the wife. 81 Tex. 317; 97 N. C. 344. In others the payment of purchase money can be secured by a mortgage; so may the payment of purchase money and money borrowed for improvements on the property. Where the existence of a homestead is made to depend upon a selection by the debtor, the latter may alien the property at any time prior to such selection, by the usual formalities; 2 Mich. 465. The purchaser in good faith of a homestead succeeds to the debtor's rights and will be protected

against his creditors; 11 Ill. App. 27. A homestead right is not forfeited by a conveyance of land with the intent to defraud creditors; 98 N. C. 190; 87 Ky. 554; 40 Minn. 193; 29 S. C. 175.

Homesteads may be designated by one of three ways:—1, by a public notice of record; 2, by visible occupancy and use; 3, by the actual setting apart of the homestead under the direction of a court of justice; *Thomp. Hom. & Ex.* § 230. Statutory provisions, if they exist, must be followed. In the absence of a statutory provision, filing a declaration of intention to designate a certain property as a homestead has no legal effect; 4 Cal. 28. The right to a homestead existing at the time the statute is passed is not affected by a declaration under the statute; 47 La. 663. As to construction of declarations and what is sufficient, see 93 Ga. 819; 105 Cal. 95. A declaration enures to the benefit of the wife whether she knows of it or not; 108 *id.*; 214; and a wife may make a declaration; 96 Ga. 338. As to the designation of a homestead by occupancy, "it may be laid down as the prevalent doctrine that actual residence by the head of the family prior to the contraction of the debt, etc., he occupying it as a home and with the intention of dedicating it to the uses of a residence for his family, will be sufficient to impress upon the premises so occupied the character of a homestead." *Thomp. Hom. & Ex.* § 260. This designation will be sufficient to preserve the homestead character for the benefit of the widow and minor children; 29 Ark. 280. In order to give the character of a homestead, the purchase must always be with the intent of present, and not simply future, occupancy; 21 Kan. 533; 72 Tex. 491; 71 Mich. 150. And temporary absence of the owner will not divest him of the right to the same; 48 Kan. 16; 55 Ark. 55. Actual occupancy is necessary; 47 Ia. 414; 20 S. W. Rep. (Tex.) 48; 21 S. W. Rep. (Ark.) 34; 107 Ala. 465; but one occupying a house with persons whom he is under no obligation to support, is not a household within the homestead act; 159 Ill. 148. When one occupies a homestead but has a fixed intention of occupying and holding other lands as such and is prevented by death, the latter will be treated as his homestead; 72 Miss. 361.

Of the debts for which a homestead is liable, the first is taxes; 96 Ga. 220. An assessment for municipal improvements is not a "tax" within the provision of a state constitution permitting a homestead to be subjected to a forced sale for taxes; 88 Tex. 458, overruling 58 *id.* 549. This view is said to be supported by an almost unbroken line of decisions; 4 Ballard's Ann. of R. P. § 346, note; 3 *id.* § 720. A homestead may be sold on a judgment for alimony; 59 Minn. 347.

Homesteads have also been held liable to an equitable lien for materials furnished for their improvement; 105 Ala. 933; to prior liens on the land; 56 Kan. 170; or contracts existing when the statute is enacted; 93 Ga. 540; 62 Minn. 380. When the statute makes it liable to debts existing at the time of its purchase this includes renewal of prior notes; 67 Vt. 128; s. c. 27 L. R. A. 303.

When the exemption does not apply to a debt contracted for the purchase of the homestead, it has been held that the homestead cannot be sold to pay money borrowed from a third person to pay off that debt; 94 Tenn. 232; 50 Ill. 500; 62 Kan. 126; *Contra*; 32 S. W. Rep. (Ky.) 679. There is, however, a conflict of authority on this point from which it is said to be impossible to extract any consistent rule. See *Thomp. Hom. & Ex.* §§ 338-347; *Waples, Hom. & Ex.* 337-346; 99 Am. Dec. 571 note.

Money due on an insurance policy upon homestead property is not subject to garnishment; 88 Tex. 218; 89 Ia. 342; 50 Cal. 101; 43 N. Y. 183; 29 Vt. 289; 29 Minn. 309; 81 Ark. 652; 5 S. W. Rep. (Ky.) 193.

The right of exemption is lost by the unequivocal abandonment of the homestead

by the owner, with the intention of no longer treating it as his place of residence; *Thomp. Hom. & Ex.* § 263, citing 87 Tex. 572; 69 *id.* 248; *Waples, Hom. & Ex.* 558; 4 N. H. 51. A lease of land for more than a year, and a residence elsewhere, was held to forfeit the homestead; 59 Ala. 560; also the owner's removal from the state; 87 Ga. 761; 91 *id.* 367; 101 N. C. 311. The building situated on the homestead loses its exemption from seizure and sale upon being segregated from the homestead property; 33 Ark. 303; 55 *id.* 126.

To establish an abandonment there must be a removal with the intention of not returning; 44 Neb. 269; but when removal for a temporary purpose is permitted by statute, it must be for a fixed and temporary purpose or for a temporary reason; 89 Wis. 558. To leave a homestead farm and move in town to become a merchant, intending to return "if he quit business," was an abandonment; 60 Ark. 262. See also 67 Ala. 558; 75 Mo. 559. Leaving a tenant at will in possession is not abandonment; 32 S. W. Rep. (Ky.) 1084; nor is storing goods in the house and sleeping in it at times, the wife being insane; *id.* 201. An abandonment does not relate back so as to give validity to a void prior sale of the homestead under an execution; 10 Wash. 379.

It has been held that the homestead may be abandoned by a husband's conveyance and the removal to another place against the desire of the wife; 89 Tex. 421; 14 Cal. 507; *Thomp. Hom. & Ex.* § 276; *contra*, 95 Ga. 415. See **ABANDONMENT**.

A deed or mortgage of a homestead must be the joint conveyance of the husband and wife; 109 Cal. 165; 63 N. W. Rep. (Ia.) 333. A mere release of dower by the wife is not sufficient; 60 Ark. 269; nor an execution by the husband under a power of attorney from the wife; 54 Kan. 442. And a conveyance by the claimant to his or her wife or husband, not subscribed or acknowledged by the latter is a nullity; 159 Ill. 93. Even when the wife is insane, a conveyance by the husband is void; 18 So. Rep. (Ala.) 315; 61 Ia. 160; 35 Neb. 829; and so also where the wife is living apart from her husband; 72 Wis. 558; 47 Kan. 587; 29 Ark. 280; 95 N. C. 281. See 65 Am. Dec. 481.

This right of exemption depends upon the construction of statutes in various states. The decisions are, therefore, far from harmonious. The subject has been fully and very ably treated in Judge Thompson's work frequently cited above. See also 36 Am. Rep. 728; 10 Am. L. Reg. N. S. 1, 137; *id.* 641, 705 (by Judge Dillon). See **FAMILY; EXEMPTION; MANOR; MANSION**.

Every person who is the head of a family, or is over 21 years of age and is a citizen, or has declared his intention to become such, also soldiers, seamen, and members of the marine corps, including officers, who have served in the rebellion for ninety days, and remained loyal to the government, may take up a quarter section or less of unappropriated public lands, as a homestead; *R. S.* § 2289 *et seq.*

HOMICIDE (Lat. *homo*, a man, *cedere*, to kill). The killing any human creature. 4 Bla. Com. 177.

Excusable homicide is that which takes place under such circumstances of accident or necessity that the party cannot strictly be said to have committed the act wilfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of a felonious homicide.

Felonious homicide is that committed wilfully under such circumstances as to render it punishable.

Justifiable homicide is that committed with full intent, but under such circumstances of duty as to render the act one proper to be performed.

According to Blackstone, 4 Com. 177, homicide is the killing of any human creature. This is the most extensive sense of this word, in which the intention is not considered. But in a more limited sense,

it is always understood that the killing is by human agency; and Hawkins defines it to be the killing of a man by a man. 1 Hawk. Pl. Cr. c. 8, § 2. See Dalloz, Dict.; 5 Cush. 303. Homicide may perhaps be described to be the destruction of the life of one human being, either by himself or by the act, procurement, or culpable omission of another. When the death has been intentionally caused by the deceased himself, the offender is called *felo de se*; when it is caused by another, it is justifiable, excusable, or felonious homicide.

The distinction between justifiable and excusable homicide is that in the former the killing takes place without any manner of fault on the part of the slayer; in the latter there is some slight fault, or at any rate the absence of any duty rendering the act a proper one to be performed, although the blame is so slight as not to render the party punishable. The distinction is very frequently disregarded, and would seem to be of little practical utility; See 2 Bish. Cr. Law § 617. But between justifiable or excusable and felonious homicide the distinction, it will be evident, is of great importance. 1 East, Pl. Cr. 260, gives the following example: "If a person driving a carriage happen to kill another, if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; if he might have seen the danger, but did not look before him, it will be manslaughter; but if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death and excusable homicide." See 4 Bla. Com. 176; *Rosc. Cr. Ev.* 580; *Cl. Cr. L.* 131.

There must be a person in actual existence; 6 C. & P. 349; 7 *id.* 814, 850; 9 *id.* 25; 24 S. W. Rep. (Tex.) 235; but the destruction of human life at any period after birth is homicide, however near it may be to extinction from any other cause; 2 C. & K. 784; 2 Bish. Cr. Law § 632; but a child in the act of being born would not be included; 5 C. & P. 539; and the death must have occurred within a year and a day from the time the injury was received; 1 Dev. 139; 6 Cal. 210; 41 Tex. 496; 66 Mo. 125; 101 Mass. 6. It is not necessary that the injury inflicted was the sole cause of the death; provided it contributed mediately or immediately in a degree sufficient for the law's notice; 38 La. Ann. 797; 2 Bish. Cr. Law §§ 637, 638; 10 Nev. 108. A person illegally arrested may use such force as is necessary to regain his liberty, and should there be reasonable ground to believe that the officer making the arrest intends shooting the prisoner to prevent his escape, such prisoner may shoot the officer in self-defence; 29 S. W. Rep. (Tex.) 1074. So where one is assaulted and there is reasonable ground for him to fear loss of his life, or great bodily harm, he is not obliged to retreat nor consider whether he may so act in safety, but he is entitled to stand his ground and meet any attack made upon him with a deadly weapon, even if in so doing he cause the death of his assailant; 15 Sup. Ct. Rep. 962; 40 N. E. Rep. (Ind.) 745. The person killed, to constitute the homicide felonious, must have been entitled to his existence. Thus, a soldier of the enemy in time of war has no right to his life, but may be killed. A criminal sentenced to be hanged has no right to his life; but no person can take it but the authorized officer, in the prescribed manner. See **MURDER; MANSLAUGHTER; SELF-DEFENCE; ADEQUATE CAUSE**.

HOMICIDAL MANIA. "Homicidal mania" is recognized as irresponsible insanity; 6 Bush (Ky.) 276.

HOMICIDE SE DEFENDENDO. Homicide in self-defence; the killing of a person in self-defence upon a sudden affray.

HOMICIDE PER INFORTUNUM. Homicide by misfortune or accidental homicide. See **HOMICIDE; EXCUSABLE HOMICIDE**.

HOMINE CAPTO IN WITHER-NAM. See **DE HOMINE CAPTO IN WITHER-NAM**.

HOMINE ELIGENDO (Lat.). In English Law. A writ directed to a corporation, requiring the members to make choice of a new man, to keep the one part of a seal appointed for statutes merchant. *Tech. Dict. Reg. Orig.*

HOMINE REPLEGIANDO. See **DE HOMINE REPLEGIANDO**.

HOMINES (Lat.). In Feudal Law. Men; feudatory tenants who claimed a privilege of having their causes, etc., tried only in their lord's court. *Paroch. Antiq.* 15. See **HINDENI HOMINES**.

HOMINES LIGII. In Feudal Law. Liege men; feudal tenants or vassals, especially those who held immediately of the sovereign. 1 Bla. Com. 367.

HOMIPLAGIUM. In Old English Law. The maiming of a man. *Blount*.

HOMMES DE FIEF (Fr.). In Feudal Law. Men of the fief; feudal tenants; the peers of the lord's court. *Montesq., Esprit des Loix*, liv. 28, c. 27.

HOMMES FEODaux (Fr.). In Feudal Law. Feudal tenants; the same with *hommes de fief* (q. v.). *Montesq., Esprit des Loix*, liv. 28, c. 36.

HOMO (Lat.). A human being, whether male or female. Co. 2d Inst. 45.

In Feudal Law. A vassal; one who, having received a feud, is bound to do homage and military service for his land; variously called *vassalus*, *vassus*, *miles*, *clens*, *feodalis*, *tenens per servitium militare*, sometimes *baro*, and most frequently *leudes*. *Spelman, Gloss.* *Homo* is sometimes also used for a tenant by socage, and sometimes for any dependent. A *homo* claimed the privilege of having his cause and person tried only in the court of his lord. *Kennett, Paroch. Antiq.* 152.

Homo chartularius. A slave manumitted by charter. *Homo commendatus*. In feudal law. One who surrendered himself into the power of another for the sake of protection or support. See *COMMENDATION; Homo ecclesiasticus*. A church vassal; one who was bound to serve a church, especially to do service of an agricultural character. *Spel. Gloss.* *Homo exercitulis*. A man of the army (*exercitus*); a soldier. *Homo feodalis*. A vassal or tenant; one who held a fee (*feodum*), or part of a fee. *Spel. Gloss.* *Homo fiscalis*, or *fiscalinus*. A servant or vassal belonging to the treasury or *fuscus*. *Homo francus*. In old English law. A freeman. A Frenchman. *Homo ingenuus*. A free man. A free and lawful man. A yeoman. *Homo liber*. A freeman. *Homo ligius*. A liege man; a subject; a king's vassal. The vassal of a subject. *Homo novus*. In feudal law. A new tenant or vassal; one who was invested with a new fee. *Spel. Gloss.* *Homo pertinens*. In feudal law. A feudal bondman or vassal, one who belonged to the soil (*qui glebe adscriptus*). *Homo regius*. A king's vassal. *Homo Romanus*. A Roman. An appellation given to the old inhabitants of Gaul and other Roman provinces, and retained in the law of the barbarous nations. *Spel. Gloss.* *Homo trium litterarum*. A man of three letters: that is the three letters, "f," "u," "r"; the Latin word *fur* meaning "thief."

HOMOLOGACION. In Spanish Law. The tacit consent and approval, inferred by law from the omission of the parties, for the space of ten days, to complain of the sentences of arbitrators, appointment of syndics, or assignees, of insolvents, settlements of successions, etc. Also, the approval given by the judge of certain acts and agreements for the purpose of rendering them more binding and executory. *Escriche*.

HOMOLOGATION. In Civil Law. Approbation; confirmation by a court of justice; a judgment which orders the execution of some act; as, the approbation of an award and ordering execution on the same. *Merlin, Répert.* La. Civ. Code; Dig. 4, 8; 7 *Toullier*, n. 234. See *L. R. 3 App. Cas.* 1026. To homologate is to say the like, *similiter dicere*. 9 *Mart. La.* 324.

A judgment homologating, as far as not opposed, the account of distribution of a syndic, is *res judicata*, except as to opponents, whether the account was correct or not; 14 So. Rep. (La.) 90.

In Scotch Law. An act by which a person approves a deed, so as to make it binding on him, though in itself defective. *Erskine, Inst.* 8. 3. 47; 2 *Bligh*, 197; 1 *Bell, Com.* 144.

HOND HABEND. See **HAND HABEND.**

HONOR. In *English Law*. The seignior of a lord paramount. 2 Bla. Com. 91.

In *Common Law*. To accept a bill of exchange; to pay a bill accepted, or a promissory note, on the day it becomes due. 7 Taunt. 164; 1 Term 172.

HONORABLE. A title of distinction or respect.

In England it is given to the younger sons of earls, to the children of viscounts and barons, to persons occupying official places of trust and honor, and to the house of commons as a body. In the United States it is usually given to persons who hold or have held positions of importance under the national or state government.

HONORARIUM. Something given in gratitude for services rendered.

A voluntary donation in consideration of services which admit of no compensation in money; in particular to advocates at law, deemed to practice for honor or influence, and not for fees. 14 Ga. 89.

It is so far of the nature of a gift that it cannot be sued for; 5 S. & R. 412; 1 Chitty, Balm. 38; 2 Atk. 332; 3 Bla. Com. 28. Of this character are in England, the professional fees of barristers and of physicians. The same rule once prevailed in Pennsylvania, but was afterwards rejected; 19 Pa. 95; and now prevails in New Jersey; 3 Green 35; and to some extent in the federal courts, as applied to counsel in the special sense of the term; Weeks, Atty. 548; 2 Cra. C. C. 144. In many states the contrary rule has been expressly laid down; 10 Tex. 81; 6 Fla. 214; 14 Mo. 54; 26 Wend. 452 (a full discussion by Walworth, C.); 1 Pick. 415. The payment of the fees of English solicitors, attorneys, and proctors is provided for by statute and rules of court. See Weeks, Atty. 536. See 3 Sharsw. Bla. Com. 28.

HONORARY CANONS. Those without emolument. 3 & 4 Vict. c. 113, § 28.

In *England*. Clergymen selected by the bishops from their dioceses to be attached to the cathedral churches as canons in a purely honorary capacity, with no emolument and no place in the various chapters. Byrne.

HONORARY FEUDS. Titles of nobility which were not of a divisible nature, but could only be inherited by the eldest son in exclusion of the rest. 2 Bla. Com. 56; Wright, Tenures 32.

HONORARY SERVICES. Services by which lands in grand serjeantry were held; such as, to hold the king's banner, or to hold his head in the ship which carried him from Dover to Whitesand, etc. 2 Sharsw. Bla. Com. 78, and note.

HONOUR. The term frequently applied (instead of 'manor') to the seignior of one of the king's greater barons, especially if it had belonged to an ancient feudal baron, or had been at any time in the hands of the crown. 2 Bla. Com. 91.

HOO. A hill. Co. Litt. 5 b.

HOOK. The verb "to hook" may not be equivalent to "to steal." 7 Blackf. 117.

HOPCON. A valley. Cowel.

HOPE. A valley. Co. Litt. 5 b.

HOPE. As Used in Will. The word "hope" as used in a will is considered sufficient to raise a trust where the subject and object are sufficiently certain. 78 Ky. 128.

Hope, Wish, Request. A trust will be created by such precatory words as "hope," "wish," "request," etc., if they be not so modified by the context as to amount to no more than mere suggestions, to be acted on or not, according to the caprice of the immediate devisee, or negated by other expression indicating a contrary intention, and the subject and object be sufficiently

certain. 79 Ky. 382.

HORA AURORÆ. The morning bell. *Ignilegium, or coverfeu* was the evening bell. Wharton.

HORÆ JUDICII (Lat.). Hours judicial, or those in which judges sit in court. In Fortesque's time, these were from 8 to 11 A. M., and the courts of law were not open in the afternoon. Co. Litt. 185 a; Co. 2d Inst. 246; Fortesque 51, p. 120, note.

HORDA. In old records a cow in calf.

HORDERA. A treasurer. Du Cange.

Hence we have the hord or hoard, as used for treasuring or laying up a thing. Jacobs; Leg. Athelstan, cap. 2.

HORDERIUM. A hoard, treasury, or repository. Cowel.

HORDEUM PALMALE. Beer barley. Cowel.

HORN TENURE. Tenure by winding a horn on approach of an enemy, called tenure by *cornage*. If lands were held by this tenure of the king, it was grand serjeantry; if of a private person, knight-service. Many anciently so held their lands towards the Picts' Wall. Co. Litt. § 156; Camd. Britan. 609.

HORNBOOK. A book containing the first principles of any science or branch of knowledge; a primer.

Horn book law. The elementary or rudimentary law.

So called because a sheet of horn covered the small, thin board of oak, or the slip of paper on which the alphabet, digits, etc., were written or printed; a primer. Webster.

HORNBOOK LAW. See **HORNBOOK.**

HORNGELD. A forest tax paid for horned beasts, also an acquittance thereof, which was granted by the king unto such as he thought good. Cowel; Toml.

HORNING. In *Scotch Law*. A process issuing on a decree of court of sessions, or of an interior court, by which the debtor is charged to perform, in terms of his obligation, or on failure made liable to *caption*, that is, imprisonment. Bell, Dict. *Horning Letters of; Diligence.* The name comes from the ancient custom of proclaiming letters of horning not obeyed, and declaring the recusant a rebel, with three blasts of a horn, called putting him to the horn. 1 Ross, Lect. 258, 308.

HORREUM. A place for keeping grain, a storehouse. Calvinus, Lex; Bract. fol. 48.

HORS DE SON FEE (Fr. out of his fee).

In *Old English Law*. A plea to an action brought by one who claimed to be lord for rent-services as issuing out of his land, by which the defendant asserted that the land in question was out of the fee of the demandant. 9 Co. 80; 2 Mod. 104.

HORS WEALH. In *Old English Law*. The wealth, or Briton who had the care of the king's horses.

HORS WEARD. In *Old English Law*. A service or *corvée*, consisting in watching the horses of the lord. Anc. Inst. Eng.

HORSE. Until a horse has attained the age of four years he is called a colt. 1 Russ. & R. 416. This word is sometimes used as a generic name for all animals of the horse kind; 44 Ga. 263; 3 Brev. 9. See Yelv. 67 a; 84 N. C. 226.

It is also used to include every description of the male, as gelding or stallion, in contradistinction to the female; 38 Tex. 555. In a statute giving a remedy against railroad companies for injuries to horses and cattle, it includes mules; 50 Ill. 184; 47 id. 462. The exemption of a horse from execution has been held to include whatever is essential to his enjoyment, as shoes and saddle; 21 Tex. 449; and it may include an ass or a jackass; 2 Heisk. 222; 47 Ill. 463;

but not a stallion not kept for farm work; 38 Cal. 383.

HORSE GUARDS. The name applied to the public office in Whitehall appropriated to the departments under the general-commanding-in-chief. The term is also used conventionally to signify the military authorities at the head of army affairs, in contradistinction to the civil chief, the secretary of state for war.

HORSE RACE. Any race in which any horse, mare, or gelding is run or made to run in competition with any other horse, mare, or gelding or against time, for any prize of what nature or kind soever, or for any bet or wager made or to be made in respect to any such horse, mare, or gelding or the riders thereof, and at which more than twenty persons are present. Stat. 42 & 43 Vict. c. 18, s. 1.

The first statute regarding horse-racing was passed in 1664, entitled an act against deceitful, disorderly, and excessive gaming; but this act being found insufficient to prevent the abuses at which it was directed, the statute 9 Anne, c. 14, was passed in 1710, reciting that all mortgages and instruments, where the consideration was money won by gaming or betting, or the repayment of money lent at such gaming and betting, should be void; and that the loser of ten pounds or upward on such gaming or betting might, within three months, sue and recover back treble the value of his losses; and that any person winning ten pounds or upwards might be indicted and, on conviction, forfeit five times the value so won, and if won by cheating, the winner should be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury. This act, being only directed to races at which betting of ten pounds or over was indulged, increased the number at which the limit was below that amount to such an extent that it was found necessary to restrict still further the practice, and in 1740 and 1745 the acts 13 Geo. II. c. 19 and 18 Geo. II. c. 34 went into effect. The latter, as an encouragement to breeders, legalized those races at which the stakes amounted to fifty pounds, and also made a distinction between matches and races. So much of the acts 16 Car. II. c. 7 and 9 Anne, c. 14 as rendered void any note, bill or mortgage given for a gambling contract was repealed during the reign of William IV. and they were amended so as to make such instruments not void, but given for an illegal consideration; 5 & 6 Will. IV. c. 41. This statute is still in force. The acts 3 & 4 Vict. c. 5 and 8 & 9 Vict. c. 109 repealed the former acts of 16 Car. II. c. 7, and all of 9 Anne, c. 14 that had not already been altered by 5 & 6 Will. IV. c. 41. The act 17 & 18 Vict. c. 88 was supplementary to 8 & 9 Vict. 109, as were also 87 Vict. c. 15 and 42 & 43 Vict. c. 18, and 55 Vict. c. 9.

Contributions or subscriptions towards any plate, prize, or sum of money to be awarded to the winner of any lawful horse race are not unlawful and do not constitute a wager; 1 Q. B. D. 189; [1895] 1 Q. B. 698; but a match between two horses, for a sum of money contributed by their respective owners, although legal, is a void contract within the statute 8 & 9 Vict. c. 109; and money in the hands of a stakeholder or loser cannot be recovered by the winner in an action at law; 1 C. P. D. 573; and see 2 Ex. D. 442 (overruling 5 C. B. 831); 5 App. Cas. 342 approving 2 Ex. D. 442.

The stakeholder is bound to retain the money in his hands until it is clearly decided which party is entitled to it; 2 M. & W. 369; but he is merely a stakeholder, and has no right to the stakes until he actually receives them in his hands; 5 C. & P. 147. Where the race has not been, and cannot be, run, the position of the stakeholder is that of a debtor to each party for the amount contributed by each, and a specific demand of the stake from him is unnecessary; but where there is a possibility that the race may still be run and decided, each party must make a specific demand of his stake from the stakeholder before he can recover from him; 28 L. J. Q. B. 126. In a lawful horse race, the payment of entrance money to the stakeholder constitutes a legal contract, and such money cannot be recovered back unless there is a mutual rescission of the contract; 2 M. & W. 369. See also 25 L. J. Ex. 169. As to the recovery back of money paid to a stakeholder pending the result of an illegal contest, it has been held that it may be recovered before the contest takes place, but not afterwards; 8 B. & C. 226; 46 N. W. Rep. (Neb.) 161; but the former case, although regarded as an authority; 5 H. & N. 928; 1 Q. B. D. 193; [1895] 1 Q. B. 698; 110 Cal. 159; has been doubted;

14 M. & W. 712; and held irreconcilable with the statute; 9 Ir. C. L. R. 18. In *Diggle v. Higgs*, 2 Ex. D. 443, the court say "what legal right there may be to recover back money, paid under such a contract, the statute leaves it untouched." In the United States it is held that the depositor may revoke the stakeholder's authority to pay over the stakes and bring an action against him for its recovery; 9 Col. 212; and if, after the receipt of such notice, the stakeholder pay over the money to the winner, he is liable to the depositor; 48 Mo. App. 48; 110 Cal. 159.

If the owner of a horse entered for a race is aware of its disqualification he may recover his money back before the race, but not afterwards; 2 C. & P. 608.

Money expended by one part owner of a racehorse for the common benefit of another owner and himself, with the understanding that the owners are to share alike in the winnings of such horse, is recoverable (from the second owner), to the amount of one-half the sum expended where the horse loses the race; 26 L. J. C. P. 181.

In this country the decisions as to whether horse racing constitutes gaming within the statutes are not uniform. It has been held, to be gaming or a gambling device; 83 Ala. 428; 23 Ark. 726; 30 id. 428; 2 Coldw. 235; 9 Col. 214; 8 Blackf. 332; 2 Bush 263; 4 Harr. Del. 554; 69 Ga. 609; 7 Cow. 252; 1 Den. 170; 23 Ill. 493; 51 id. 184; 9 Ind. 35; 1 Allen 563; 51 Mich. 212; 16 Minn. 290; 39 id. 153; 4 Mo. 536; 81 id. 85; 13 Johns. 88; 43 Tex. 634; 18 Me. 337; 1 Head 154; 2 Swan 279; *contra*, 8 Gratt. 592; 4 Mo. 375; 81 Md. 85.

Racing a horse on or along a public road, though no bet has been offered on the result of such race, has been held an indictable offence; 7 Humph. 502; and the fact that a charter has been granted for a race-course will not authorize betting thereon; 2 Bush 263. To trot a horse in another state for a wager or for stakes is not *prima facie* illegal in that state; 81 N. Y. 539. In many of the states, however, the times at, and seasons in, which horse-racing may be indulged are regulated by statutes which tax and license the racing associations. The trotting for a purse or premium contributed or subscribed by other persons is not trotting for a wager; 67 Vt. 596; 46 N. E. Rep. (N. Y.) 296, affg. 39 N. Y. Supp. 865; 81 N. Y. 532; 57 Ia. 431; 13 Or. 125; 71 Wis. 296; 63 Ind. 58; but see 85 N. Y. Supp. 245; 94 Pa. 132; 24 Mich. 441.

Pools on horse races are games within the statute against gaming; 51 Mich. 203; 154, Ill. 234; 164 Mass. 203; *contra*, 63 Md. 242; and the rule applies to pools sold in one state on a race to be run in another; 8 Lea 411; 92 Tenn. 275; 24 S. E. Rep. (Va.) 930; but not where only the orders for bets were taken and transmitted by telegraph, as it was held that the actual betting was done out of the state; 17 S. E. Rep. (Va.) 546; 89 Va. 878.

The general rule against betting on horse races applies to all betting wherever done; 49 N. J. L. 463; and all pooling schemes are within the statute; 79 Ky. 618; but in some states betting or pool-selling with reference to races run on a licensed track are excepted from the statutory prohibition; 1 Humph. 384; 7 id. 501; 2 Coldw. 235; 2 Swan 279; but not otherwise; 92 Tenn. 275.

One who keeps a room as a resort for persons who bet on horse races is guilty of keeping a disorderly house; 23 Atl. Rep. (N. J.) 681; so where one maintains a partly enclosed place for the purpose of making books and selling pools; 154 Ill. 284.

Blackboards, sheets, manifold books, and policy slips for placing bets on horse races are gambling devices; 160 Mass. 310; 39 Minn. 153; *contra*, 93 Mich. 631.

Although the business of pool selling is illegal, the crime of embezzlement may be committed by the agent who receives the money, in appropriating it to his own use; 80 Mo. 858.

Money lent for the purpose of betting on

a gambling device cannot be recovered; 24 N. E. Rep. (Ill.) 867; nor can a note given for money lent for such a purpose; 43 N. H. 497; and see 1 Flap. 410. In the District of Columbia, it is held that the Statute 9 Anne, c. 14, s. 1, *supra*, is still in force and that all notes given for gambling contracts are void, even in the hands of a *bona fide* purchaser; 21 D. C. 88; *contra*, 48 Ala. 512. A promissory note given for an interest in a race horse is not void; 62 Ill. App. 650. See Byles, Bills 141; Oliphant, Horses 307; 2 McClain, Cr. L. § 1297 GAMING; GAMING HOUSE; LOTTERY; WAGER; STAKEHOLDER; BETTING.

HORSE STEALING. Obtaining possession of a horse under the false pretense of hiring it, without intending to return it, but with the felonious intent to convert it, and permanently deprive the owner of it, is "horse stealing," without a subsequent sale or wrongful disposition of the horse. 118 S. W. 314; 112 S. W. 615.

HORTUS (Lat.). In the Civil Law. A garden. Dig. 32. 91. 5.

HOSPITAL. An institution for the reception and care of sick, wounded, infirm, or aged persons; generally incorporated, and then of the class of corporations called "eleemosynary" or "charitable." See CHARITABLE USES; CHARITIES; PUBLIC HOSPITAL.

HOSPITALIERS. The knights of a religious order, so called because they built a hospital at Jerusalem, wherein pilgrims were received. All their lands and goods in England were given to the sovereign by 32 Hen. VIII. c. 24.

HOSPITATOR (Lat.). A host or entertainer.

Hospitator communis. An innkeeper. 8 Co. 32.

Hospitator Magnus. The marshal of a camp.

HOSPITIA. Inns. *Hospitia communia*, common inns. Reg. Orig. 105.

Hospitia curie, inns of the court. *Hospitia cancellarie*, inns of chancery. Crabb. Eng. Law 428; 4 Reeve, Hist. Eng. Law 102.

HOSPITICIDE. One who kills his guest or host.

HOSPITIUM. An inn; a household.

A monastery serving as an inn for entertaining travellers, chiefly applied, in modern times, to the inns on St. Bernard and St. Gothard in Switzerland, where travellers to and from Italy are entertained. Worcester.

HOSPODAR. A Turkish governor in Moldavia or Wallachia.

HOSTAGE. A person delivered into the possession of a public enemy in the time of war, as a security for the performance of a contract entered into between the belligerents.

Hostages were frequently given as a security for the payment of a ransom-bill; and if they died their death did not discharge the contract; 3 Burr. 1734; 1 Kent 106; Dane, Abr. Index.

HOSTELER. An innkeeper. Now applied, under the form *ostler*, to those who look to a guest's horses. Cowel.

HOSTELLAGIUM. In English Law. A right reserved to the lords to be lodged and entertained in the houses of their tenants.

HOSTES. Enemies. *Hostes humani generis*, enemies of the human race; *i. e.* pirates. See HOSTIS.

HOSTIA. In Old Records. The hostbread, or consecrated wafer, in the eucharist. Cowel.

From this word Somner derives the Sax. *husel*, used for the Lord's supper, and *hustan*, to administer the sacrament, which were kept long in old English, under *housel*, and to *housal*. Toml.; Paroch. Antiq. 270.

HOSTILARIA, HOSPITALARIA. A place or room in religious houses used for the reception of guests and strangers.

HOSTILE. When applied to the possession of an occupant of real estate holding adversely it is not to be construed as showing ill-will, or that he is an enemy of the person holding the legal title; but it means an occupant who holds and is in possession as owner, and therefore against all other claimants of the land. 83 Neb. 861.

Belonging to an enemy; appropriate to an enemy; showing ill will and malevolence, or a desire to thwart and injure; occupied by an enemy or a hostile people; inimical; unfriendly; as, hostile forces, hostile intentions, etc. 15 A. & E. Ency. 2nd ed., 765.

HOSTILE EMBARGO. One laid upon the vessels of an actual or prospective enemy. See EMBARGO.

HOSTILE WITNESS. A witness who manifests so much hostility or prejudice under examination in chief that the party who has called him, or his representative, is allowed to cross-examine him, *i. e.* to treat him as though he had been called by the opposite party. Whart. See WITNESS.

HOSTILITY. A state of open enmity; open war. Wolff, *Droit de la Nat.* § 1119.

Permanent hostility exists when the individual is a citizen or subject of the government at war.

Temporary hostility exists when the individual happens to be domiciliated or resident in the country of one of the belligerents; in this latter case the individual may throw off the national character he has thus acquired by residence, when he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*; 3 C. Rob. 12; 3 Wheat. 14. See ENEMY; DOMICIL.

HOSTIS (Lat.). An enemy; one who makes war by an open formal proclamation of hostility. Plural, *hostes*.

A host or army. This sense of the word was common in ancient European laws, proceedings of councils, and authors of the middle ages. Burrill.

HOT WATER ORDEAL. See ORDEAL.

HOTCHPOT (spelled, also, *hodge-podge*, *hotch-potch*). The blending and mixing property belonging to different persons, in order to divide it equally. 2 Bla. Com. 190.

The bringing together all the personal estate of the deceased, with the advancements he has made to his children, in order that the same may be divided agreeably to the provisions of the statute for the distribution of intestates' estates.

In bringing an advancement into hotchpot, the donee is not required to account for the profits of the thing given; for example, he is not required to bring into hotchpot the produce of negroes, nor the interest of money. The property must be accounted for at its value when given; 1 Wash. Va. 224; 17 Mass. 358; 8 Pick. 450; 2 Des. 127; 3 Rand. 117, 559. See ADVANCEMENT.

HOTEL. See INNKEEPER; BOARDER; GUEST.

An inn or hotel is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home. Abbott; 3 Abb. Pr. N. S. 26.

HOUGH. A valley. English. See HOO; HAUGH.

HOUR. The twenty-fourth part of a natural day; the space of sixty minutes of time. Co. Litt. 135.

HOURS OF SERVICE ACT. Under the "hours of service act" an employee is not engaged in service within the meaning of the act unless he is actually engaged in or connected with the movement of a train. 158 Ky. 176, 164 S. W. 818.

Dead-Heading. A brakeman who is "dead-heading" from one point to another on the road under direction of the company so that he may be able to report for duty at the place to which he is going, is not, while so "dead-heading," engaged in service within the meaning of the act, when he has no duties to perform in connection with the movement of the train on which he is "dead-headed." 158 Ky. 176, 164 S. W. 818.

HOUSAGE. A fee paid for housing goods by a carrier, or at a wharf or quay, etc. Tomlin; Shep. Epit. 1725.

HOUSAL. See HOSTIA.

HOUSE. A place for the habitation and dwelling of man.

A collection of persons; an institution; a commercial firm; a family.

In a grant or demise of a house, the curtilage and garden will pass, even without the words "with the appurtenances" being added; Cro. Eliz. 89; 3 Leon. 214; 1 Plowd. 171; 2 Wms. Saund. 401, n. 2; 4 Pa. 93; 113 Mo. 27. In a grant or demise of a house with the appurtenances, no more will pass although other lands have been occupied with the house; 1 P. Wms. 603; Cro. Jac. 526; 2 Co. 32; 1 Litt. 5 d, 36 a, b; 2 Wms. Saund. 401, n. 2.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other subsists, in such case the several apartments are considered as distinct houses; 6 Mod. 214; Woodf. L. & T. 178.

A church is a "house" within a statute prescribing a street line for houses; L. R. 15 Eq. 159; a smoke house is a house; 37 Tex. 412; but a theatre is not a house; 14 M. & W. 181.

As to what the term includes in cases of arson and burglary, see ARSON; BURGLARY; DWELLING-HOUSE; FLAT; APARTMENT. See, also, ARREST; ANY HOUSE.

HOUSE-BOTE. An allowance of necessary timber out of the landlord's woods for the repairing and support of a house or tenement. This belongs of common right to any lessee for years or for life. Housebote is said to be of two kinds, *estoverium ædificandi et ardendi*. Co. Litt. 41 b.

HOUSE-DUTY. A tax on inhabited houses imposed by 14 and 15 Vict. c. 36, in lieu of window-duty, which was abolished.

A tax assessed in England on inhabited dwelling-houses, according to their annual value, payable by the occupier, the landlord being deemed the occupier where the house is let to several persons. R. & L. Dict. See also FUMAGE; HEARTH-MONEY.

HOUSE OF COMMONS. One of the constituent houses of the English parliament.

It is composed of the representatives elected by the people, as distinguished from the house of lords, which is composed of the nobility. It consists of six hundred and seventy members; four hundred and ninety-five from England and Wales, seventy-two from Scotland, and one hundred and three from Ireland. See PARLIAMENT; HIGH COURT OF PARLIAMENT.

HOUSE OF CORRECTION. A place for the imprisonment of those who have committed crimes of lesser magnitude.

HOUSE OF ILL-FAME. In Criminal Law. A house resorted to for the purpose of prostitution and lewdness. 5 Fred. 803.

A disorderly house need not be a dwelling house. "However lexicographers may define the word 'house,' it is clear the legislature has used it as generic, and has applied it to nearly all kinds of buildings;" 38 Conn. 77. A flat boat, floating on a river, with a cabin on it, with men and women

eating, sleeping, and living on it, may be such; 35 Ia. 199; so also a tent, of which it has been said, "such structures are more apt to become disorderly nuisances than houses of brick or stone, owing to the facility with which noises made within could be heard from without;" 2 Tex. App. 222. So it has been held of one room of a steamship, though the latter is not an inn; 118 Mass. 456.

Keeping a house of ill-fame is an offence at common law; 3 Pick. 26; 17 id. 80; 1 Russ. Cr. 322; 1 Bish. Cr. L. 1082. So the letting of a house to a woman of ill-fame, knowing her to be such, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law; 3 Pick. 26; 11 Cush. 600. And it is no defence that the landlord did not know the character of the tenant; 96 Ala. 1. If a lodger lets her room for the purpose of indiscriminate prostitution, she is guilty of keeping a house of ill-fame, as much as if she were the proprietor of the whole house; 2 Raym. 1197; 15 R. I. 24. A married woman who lives apart from her husband may be indicted alone, and punished, for keeping a house of ill-fame; 1 Metc. Mass. 151. See 11 Mo. 27; 10 Mod. 63. The house need not be kept for lucre, to constitute the offence; 21 N. H. 345; 2 Gray 357; 18 Vt. 70. See 17 Pick. 80; 6 Gill 425; 4 Ia. 541; 2 B. Monr. 417.

It is not necessary, in order to sustain a charge of keeping such a house, that the indecency, disorder, or misconduct should be patent from the outside; L. R. 1 C. C. R. 21; and it has been said evidence of its general reputation as a house of ill-fame is admissible; 2 Cra. C. C. 675; 70 Ia. 742; 105 Ind. 271; 61 Cal. 380; Dudley 346; 20 Ont. 489; contra, 32 Md. 281; 45 N. H. 466; 1 S. & R. 841; 24 How. Pr. 276; 4 Cra. C. C. 338; 39 Ia. 379; 64 Me. 523; but evidence of the reputation of the women frequenting the house and the character of their conversation and acts in and about it is admissible; id., 7 Gray 328; 1 Allen 8. Wharton says: "It has been ruled, though on questionable authority, that the 'ill-fame,' or bad repute, may be proved"; 2 Whart. Cr. L. 10th ed. § 1452; but the doubt cast by this language on the cases referred to is not warranted by the cases, a long list of which, in addition to those above cited, may be found in a note to the section quoted. And indeed the same author in another work says: "On indictments, however, for keeping houses of ill-fame, when such is the statutory term describing the offence, the ill-fame or bad reputation of the house may be put in evidence. The bad reputation of the visitors is, in any view, competent evidence. But of a disorderly house the reputation is inadmissible, being secondary evidence of disorder, which is susceptible of immediate proof;" Whart. Cr. Ev. 9th ed. § 261. On indictment for keeping a house of ill-fame the reputation of the house as such must be proved; 17 Conn. 467; 88 id. 523; but it must be "ill-repute in the vicinity. . . Rumors at a distance do not make up reputation"; 79 Mich. 110. But the reputation where admitted at all must be connected in time with the person who is now the proprietor; 22 Tex. App. 639. It is not necessary to prove who frequents the house; it is enough to show that unknown persons were there behaving as charged; 1 Term 748. Contracts of lease of such a house, or to furnish goods for the purposes of the business, if made with knowledge of the use intended, are illegal and void; L. R. 1 Eq. 626; and see L. R. 4 Q. B. 309; L. R. 1 Ex. 213. See BAWDY HOUSE; BROTHEL; DISORDERLY HOUSE.

HOUSE OF LORDS. One of the constituent houses of the English parliament. It is at present composed of twenty-six lords spiritual (bishops and archbishops), and five hundred and thirty-four lords temporal; but the number is liable to vary. See PARLIAMENT; HIGH COURT OF PARLIAMENT.

HOUSE OF REFUGE. A prison for juvenile delinquents. See 55 Am. Rep. 456-62.

HOUSE OF REPRESENTATIVES. The name given to the more numerous branch of the federal congress, and of the legislatures of several of the states of the United States.

The constitution of the United States, art. I. s. 2, § 1, provides that the "house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors of each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." No person can be a representative until he shall have attained the age of twenty-five and has been seven years a citizen of the United States, and unless he is at the time of his election an inhabitant of the state in which he is chosen; U. S. Const. art. I. sec. 2, § 2. A representative cannot hold any office under the United States; art. I. s. 6, § 2; nor can any religious test be required of him; art. VI. § 3; nor is any property qualification imposed upon him. Representatives are apportioned (Amend. XIV. sec. 2) among the several states according to their respective numbers, excluding Indians not taxed; with a proviso, that, if the right to vote for state or U. S. officers is denied to any male inhabitants of a state, of 21 years of age and citizens of the United States, except for participation in rebellion or other crime, the representation in such state shall be proportionately reduced. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; U. S. Const. art. I. sec. 1. A reapportionment among the states is made every tenth year. Under the act of Feb. 7, 1891 (26 Stat. L. 735), it consists of 356 members, which is based upon the census of 1890. The house of representatives has the exclusive right of originating bills for raising revenues, but the senate may concur with amendments, U. S. Const. I. sec. 7; Story on Const. 571. See CONGRESS; QUORUM; SPEAKER; MAJORITY.

HOUSEBREAKING. In Criminal Law. The breaking and entering the dwelling house of another by night or by day, with intent to commit some felony within the same, whether such felonious intent is executed or not. Housebreaking by night is burglary. Cl. Cr. L. 237.

This crime is of a local character, and the evidence respecting the place must correspond with the allegation in the indictment. An indictment for housebreaking must allege the ownership of the house; 31 W. Va. 355. See BURGLARY; BREAKING.

HOUSEHOLD. Those who dwell under the same roof and constitute a family. Webster. But it is not necessary that they should be under a roof, or that the father of the family be with it, if the mother and children keep together so as to constitute a family; 18 Johns. 402.

Belonging to the house and family; domestic. Webster, Dict.

HOUSEHOLD EFFECTS. All the furnishings of one's residence. 132 Ky. 589, 116 S. W. 769.

HOUSEHOLD FURNITURE. By this expression, in wills, all personal chattels will pass that may contribute to the use or convenience of the household or the ornament of the house; as, plate linen, china, both useful and ornamental, and pictures. 2 Wms. Exec. 1185; 1 Rep. Leg. 273. But goods or plate in the hands of testator in the way of his trade will not pass, nor books, nor wines; 1 Jarm. Wills. 591, 596, notes; 1 Ves. Sen. 97; 2 Will. Ex. 1017; 1 Johns. Ch. 329.

But books and wines have been held, on the other hand, to pass in a bequest, where the testator had made them part of the household furniture by his use of them; 1 Robt. 21; see 2 Am. L. Reg. N. s. 489; 83 Me. 535; 60 Pa. 220; and so has plate; 3 Ves. 313; 29 Beav. 573; bronzes, statuary, pictures; 124 Mass. 228. See FIXTURES; FURNITURE.

HOUSEHOLD GOODS. In a will this

expression will pass everything of a permanent nature (that is, articles of household which are not consumed in their enjoyment) that were used or purchased, or otherwise acquired by the testator, for his house, but not goods in the way of his trade. Plate will pass by this term, but not articles of consumption found in the house, as malt, hops, or victuals, nor guns and pistols, if used in hunting or sport, and not for defence of house. A clock in the house, if not fixed to it, will pass; 1 Jarm. Wills 589; 1 Rop. Leg. 253; 2 Will. Exec. 464. See 2 Munf. 284; 83 Me. 585.

HOUSEHOLDSTUFF. Words sometimes used in a will. Plate will pass under the term; 3 Freem. 64; but not apparel, books, cattle, victuals, and choses in action, which do not fall within the natural meaning of the word, unless there be an intention manifest that they should pass; 15 Ves. 319. Goods, as seven hundred beds in possession of testator for purposes of trade, do not pass under the term "utensils of household stuff;" 2 P. Wms. 302. In general, "household stuff" will pass all articles which may be used for the convenience of the house; Swinb. Wills 434. See **FIXTURES**; **HOUSEHOLD FURNITURE**.

HOUSEHOLDER. Master or chief of a family; one who keeps house with his family. Webst. But a man who has absconded from the state, and left his wife and children remaining together as a family, was for their benefit held to be a householder; 18 Johns. 402; 19 Wend. 475.

A keeper of a tavern or boarding-house, or a master or mistress of a dwelling-house; 11 N. Y. Leg. Obs. 248. A person having and providing for a household. The character is not lost by a temporary cessation from housekeeping; 14 Barb. 456; 19 Wend. 475; 51 How. Pr. 45. For purposes of bail, one who rents and occupies part of a building as an office has been held a householder; 83 How. Pr. 323. See 3 Code R. 17; 37 Ala. 106; 52 *id.* 161; 1 Q. B. 72; 59 How. Pr. 71.

HOUSEKEEPER. One who occupies a house.

A person who, under a lease, occupies every room in the house except one, which is reserved for his landlord, who pays all the taxes, is not a housekeeper; 1 Chitty, Bail. 502. Nor is a person a housekeeper who takes a house which he afterwards underlets to another, whom the landlord refuses to accept as his tenant: in this case the undertenant paid the taxes, and let to the tenant the first floor of the house, and the rent was paid for the whole house to the tenant, who paid it to the landlord; *id.* note.

In order to make the party a housekeeper, he must be in actual possession of the house; 1 Chitty, Bail. 288; and must occupy a whole house. See 1 B. & C. 178; 2 Term 406; 8 Petersd. Abr. 103, note; 2 Mart. La. 813. See **HOUSEHOLDER**. **BONA FIDE HOUSEKEEPER**.

HOUSEL. See **HOSTIA**.

HOVEL. A place used by husbandmen to set their ploughs, carts and other farming utensils, out of the rain and sun. Law. Lat. Dict. A shed; a cottage; a mean house.

HOWE. In Old English Law. A hill. Co. Litt. 5 b.

HOWGH. See **HATGH**.

HOY. A small vessel usually rigged as a sloop, and employed in conveying passengers and goods from place to place on the sea coast. Webster.

HOYMAN. The master or captain of a hoy.

Hoymen are liable as common carriers; Story, Bailm. § 496.

HUDEFAEST. See **HEORDFESTE**.

HUDE-GELD. In Old English Law. A compensation for an assault (*transgressio illata*) upon a trespassing servant (*servus*). Supposed to be a mistake or misprint in Fleta for *hinegeld*. Fleta, lib.

1, c. 47, § 20. Also, the price of one's skin, or the money paid by a servant to save himself from a whipping. Du Cange.

HUE AND CRY. In Old English Law. A pursuit of one who had committed felony, by the highway.

The meaning of hue is said to be *about*, from the Saxon *huer*; but this word also means *foot*, and it may be reasonably questioned whether the term may not be *up foot and cry*, in other words, run and cry after the felon. We have a mention of hue and cry as early as Edward I.; and by the Statute of Winchester, 13 Edw. I., "Immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and county to county, by horsemen and footmen, to the seaside. The constable (the person being described, etc.) is to call upon the parishioners to assist him in the pursuit in his precinct; and to give notice to the next constable, who is to do the same as the first, etc. If the county will not answer the bodies of the offenders, the whole hundred shall be answerable for the robberies there committed, etc." A person engaged in the hue and cry apprehending a felon was, on the felon's conviction, entitled to forty pounds, on a certificate of the judge or justice before whom there was conviction, as well as to the felon's horse, furniture, arms, money, and other goods taken with him, subject to the rights of other persons therein; Wood, Inst. 370. See 2 Hale, Pl. Cr. 100.

HUEBRA. In Spanish Law. An acre of land, or as much as can be ploughed in a day by two oxen. 2 White, Recop. 49.

HUISSERIUM. A ship used to transport horses. Also termed "*affer*."

It is mentioned in Hoveden by the name of *visers*. Some say the word is derived from the French *huis*, i. e. a door, because when the horses are on shipboard, the doors or hatches are shut upon them to keep out water. Cunningham; Cowell, edit. 1727.

HUISSIER. An usher of the court. An officer who serves process.

In France, an officer of this name performs many of the duties of an English sheriff or constable. In Canada there may be many huissiers in each county, whose acts are independent of each other, while there can be but one sheriff, who is presumed cognizant of the acts of his subordinates. The French huissier certifies his process; the Canadian merely serves what is put into his hands.

HULKA. A hulk, or small vessel. Cowel.

HULKS, THE. Old, dismasted ships formerly used in England as prisons. Webster.

HULL AND MACHINERY. Terms frequently used together in marine insurance policies to designate the frame or body of a vessel as distinguished from its machinery. An insurance upon a hull and machinery was held not to cover provisions. 15 A. & E. Ency. 2nd ed., 783; 2 Q. B. 380. Neither does it cover those things included by "disbursement" policies, such as coals, stores, and expenses. 4 Joyce, Insurance, 2nd ed., 4731. Often the hull and machinery are separately valued. *Id.*; p. 4524; 3 Best & S. 873.

HULLUS. A hill. Cowel; 2 Mon. Angl. 292.

In *hullis et holmis*, in hills and dales. Jacob; Mon. Angl. tom. 2 p. 292.

HUMAGIUM. A moist place. Mon. Angl.

HUNDRED. In English Law. A division of a county, which some make to have originally consisted of one hundred hides of land, others of ten *tithings*, or one hundred free families. See 60 Conn. 124.

It differed in size in different parts of England; 1 Steph. Com. 122. In many cases, when an offence is committed within a hundred, the inhabitants are liable to make good the damage if they do not produce the offender. See 12 East 244.

This system was probably introduced by Alfred (though mentioned in the Penitential of Egbert, where it seems to be the addition of a later age), being borrowed from the continent, where it was known to the Franks, under the name *centena*, in the sixth century. See Charlemagne Capit. l. 3, c. 10; 1 Poll. & Maitl. 543.

It had a court attached to it, called the hundred court, or hundred lgh. like a court baron, except in its larger territorial jurisdiction. It was governed by the hundredary (*hundredarius*); 9 Co. 25. The

jurisdiction of this court has devolved upon the county courts. Jacob, Law Dict.; Du Cange. Hundred-penny was a tax collected from the hundred by its lord or by the sheriff. Hundred-fetena signified the dwellers in the hundred; Charta Edg. Reg. Mon. Angl. to. 1, p. 16. In Delaware the subdivisions of a county are called hundreds. They correspond to towns in New England, townships in Pennsylvania, parishes in Louisiana, and the like.

HUNDRED COURT. An inferior court, long obsolete, and practically abolished by the County Courts Act of 1887, sec. 28, whose jurisdiction extended to the whole territory embraced in a hundred. They were courts not of record; the freeholders were the judges; they were held before the steward of the manor as register; and they resembled courts baron in all respects except in their territorial jurisdiction; 3 Bla. Com. 34, 35.

HUNDRED-FECTA. The performance of suit and service at the hundred courts.

HUNDRED-FETENA. Dwellers or inhabitants of a hundred.

HUNDRED GEMOTE. An assembly among the Saxons of the freeholders of a hundred.

It met twelve times in the year, originally; though subsequently its meetings became less frequent.

It had an extensive jurisdiction, both civil and criminal, and was the predecessor of the county court and sheriff's tourn, and possessed very similar powers; Spelman, Gloss. *Hundredum*; 1 Reeve, Hist. Eng. Law 7.

HUNDRED LAGH (Sax.). Liability to attend the hundred court. Spelman, Gloss. See Cowel; Blount.

HUNDRED-PENNY. The *hundred-feh*, or tax collected by the sheriff or lord of a hundred.

HUNDRED ROLLS. In 1274 Edward I. sent out commissioners to enquire by what warrant the great landowners were exercising *jura regalia* (q. v.). The result of these enquiries is embodied in what are known as the Hundred Rolls. Byrne.

HUNDREDARIUS. The chief officer of a hundred. Cowel.

HUNDREDARY (hundredarius). The chief magistrate of a hundred. Du Cange.

HUNDREDES EARLDOR, or HUNDREDEDES MAN. The presiding officer in the hundred-court. Anc. Inst. Eng.

HUNDREDORS. The inhabitants of a hundred, who, by several statutes, are held to be liable, in the cases therein specified, to make good the loss sustained by persons within the hundred by robbery or other violence, therein also specified. The principal of these statutes are 13 Edw. I. st. 2, c. 1, s. 4; 23 Edw. III. c. 11; 27 Eliz. c. 13; 29 Car. II. c. 7; 8 Geo. II. c. 16; 22 Geo. II. c. 24.

Persons serving on juries, or fit to be empanelled thereon, dwelling within the hundred where the land in question lies. 35 Hen. VIII. c. 6. And some such were necessarily on every panel till the 4 & 5 Anne, c. 16. 4 Steph. Com. 370. One that had the jurisdiction of the hundred. The bailiff of the hundred. Horne, Mirr. of Just. lib. 1; Jacob, Law Dict.

HUNG. Sometimes applied to a jury which fails to agree upon a verdict. Anderson, L. Dict.

HUNGER. The desire to eat. Hunger is no excuse for larceny; 1 Hale, Pl. Cr. 54; 4 Bla. Com. 31. As, to death from hunger, see **DEATH**.

HUNTING. The act of pursuing and taking wild animals; the chase.

The chase gives a kind of title by occupancy by which the hunter acquires a

right or property in the game which he captures. In the United States the right of hunting is universal, and limited only so far as to exclude hunters from committing injuries to private property or to the public—as, by shooting on public roads—or from trespassing. See *FERÆ NATURÆ*; *OCCUPANCY*.

HURDEREFERST. A domestic; one of a family.

HURDLE. In English Law. A species of sledge, used to draw traitors to execution.

HURBLEGA. See *HURST*.

HURST, HYRST, HERST, or HIRST. A wood or grove of trees. *Co. Litt.* 4 b.

There are many places in Kent, Sussex, and Hampshire, which begin and end with this syllable; and the reason may be, because the great wood called Anderswood extended through those counties. Tomlin; Cowell. Hurst Castle is so called because situated near the woods. *Hurslega* is a woody place; and probably from thence is derived Hurley, a village in Berkshire. *Id.* See *HIRST*.

HUSBAND. A married man; a man who has a wife.

His obligations at common law. He was bound to receive his wife at his home, and to furnish her with all the necessities and conveniences which his fortune and his rank enabled him to do, and which her situation required; 9 C. & P. 643; 1 Hurl. & N. 641; 33 Minn. 348; but this did not include such luxuries as, according to her fancies, she deemed necessities; 76 Ia. 638. He was required to fulfil toward her his marital promise of fidelity, and could, therefore, have no carnal connection with any other woman without a violation of his obligations. See *ADULTERY*; *CRIM. CON.*; *DIVORCE*. As he was bound to govern his house properly, he was liable for its misgovernment, and he could be punished for keeping a disorderly house, even where his wife had the principal agency. See *BAWDY HOUSE*; *DISORDERLY HOUSE*; *HOUSE OF ILL-FAME*. He was liable for her torts; 11 Gray 437; 112 Mass. 287; 5 Car. & P. 484; 115 Mo. 1; 44 Ill. 42; 26 Ohio St. 9; *Add. Pa.* 13; 21 Ind. 427; 48 Me. 348; 56 Mo. 361; 49 N. H. 314; 37 Vt. 448; 8 Minn. 236; 64 N. W. Rep. (Minn.) 912; 101 Mass. 344; and for her crimes, if committed in his presence, except treason and murder where they were jointly liable; 15 Ohio 72; 94 Ala. 31; 10 South 506; 74 Ia. 589; see 10 Mass. 154; 111 N. Y. 401; 45 La. Ann. 1221; but he may introduce evidence to rebut the presumption of coercion; 74 Ia. 589; and he should not be joined for trespass committed by her in the management of her separate estate; 135 N. Y. 201. He was liable for his wife's debts incurred before coverture; 1 P. Wms. 462, 469; 47 N. Y. 351; 41 Vt. 311; 19 Wis. 333; 13 Mass. 384; 88 Ga. 255; 13 Ind. 44; 10 B. Monr. 411; 89 Va. 786; provided they were recovered from him during their joint lives; *Id.*; and this rule applies where the husband was an infant; 9 Wend. 238; 7 Metc. 164; 25 Vt. 220; and, generally, for such as were contracted by her after coverture, for necessities, or by his authority, express or implied, and for her funeral expenses; 12 C. B. 344; 1 H. Bla. 90; 98 Mass. 538; 41 Mich. 596. See *DEAD BODY*.

His rights. Being the head of the family, the husband had the right to establish himself wherever he pleased, and in this he could not be controlled by his wife; 63 Pa. 450; 10 Rich. Eq. 163; 29 N. J. Eq. 96; 87 Ill. 250; 11 Fost. 11. See *DOMICIL*. He was entitled to her her earnings; 2 Man. & G. 172; 1 Salk. 114; 7 Pick. 65; 77 Ill. 155; 46 Id. 18; 23 Me. 305; 94 U. S. 580; 51 Ind. 61; 2 J. J. Marsh. 82; 32 Miss. 279; 15 N. J. Eq. 478; 68 Pa. 421; 64 N. Y. 589; and formerly he might use such gentle force to restrain her of her liberty as might seem necessary; 2 Kent 181; 1 Strange 678; but this is now otherwise; 1 Q. B. D. 671; although it has been held that he may restrain her from committing a crime; 1

Grant, Cas. 389; or from interfering with the exercise of his parental control over his children; 42 Tex. 221. He also had the right to moderately chastise her; 1 Bla. Com. 445; 1 Phil. N. C. 457; but this is no longer recognized, and any chastisement inflicted on the wife renders him guilty of assault and battery; 108 Mass. 458; 1 Swab. & T. 601; 2 Paige 501; [1891] 1 Q. B. 671; 87 Me. 304; 8 N. H. 307; and excessive cruelty or frequent repetition of slight abuses is in many states a ground of divorce. See *DIVORCE*; *CRUELTY*.

As to the rights of husband and wife in property owned either jointly or separately, and as to their respective rights in suits both by and against either party, see *MARRIED WOMAN*. See also *COMMUNITY*; *DESCENT AND DISTRIBUTION*; *TRUST*.

HUSBAND LAND. In Old Scotch Law. A piece of land containing about six acres. Skene.

HUSBAND OF A SHIP. See *SHIP'S HUSBAND*.

HUSBAND AND WIFE. At Common Law. Husband and wife are regarded as one person, and the legal existence of the wife is suspended during marriage, or, in other words, is merged in that of the husband. 15 A. & E. Ency. 2nd ed., 790; 23 Cal. 563.

In Equity, however, this common-law principle has been much modified; and for many purposes the courts of equity recognize husband and wife as distinct persons. *Id.*

By Statute. Here, also, in all jurisdictions in modern times, the principle after has been greatly restricted in its application or has been removed altogether. *Id.*

HUSBANDMAN. See *FARMER*.

HUSBRECE. Housebreaking; burglary.

HUSCABLE. A menial servant. Domesd.

It signifies properly a stout man, or a domestic; also the domestical gatherers of the Danes' tributes were anciently called *huscables*. Tomlin; Domesd.

HUSEL. See *HOSTIA*.

HUSFASTNE. He that holdeth house and land. *Termes de la Ley*; Cowell.

HUSGABLE. House rent or house tax. Toml.

HUSH MONEY. A colloquial expression to designate a bribe to hinder information; pay to secure silence. See *BLACKMAIL*.

HUSTAN. See *HOSTIA*.

HUSTINGS. In English Law. The name of a court held before the lord mayor and aldermen of London: it was the principal and supreme court of that city. See *Co. 2d Inst.* 327; *St. Armand, Hist. Essay on the Legisl. Power of England* 75.

The place of meeting to choose a member of parliament.

The term is used in Canadian as well as English law. Formerly the manner of conducting an election in Canada and England for a member of the legislative body was substantially as follows. Upon warrant from the proper officer, a writ issued from the clerk of the crown in chancery, directed to the sheriff, registrar, or other returning officer of the electoral division. He thereupon issued and posted in public places a proclamation appointing a day, place, and hour for his holding an election, and also fixing a day when a poll would be opened, if one were demanded and granted. The first day was called nomination day. On this day he proceeded to the hustings, which were in the open air and accessible to all the voters, proclaimed the purpose of the election, and called upon the electors present to name the person they required to represent them. The electors then made a show of hands, which might result in an election, or a poll might be demanded by a candidate or by any elector. On such demand, a poll was opened in each township, ward, or parish of the election district, at

the places prescribed by statute. Now, however, by statute 35 & 36 Vict. c. 33, the votes are given by ballot in accordance with certain fixed rules.

It is also applied to a local court in Virginia. Va. Code, 1887, § 3072; 6 Gratt. 696.

HUTESIUM ET CLAMOR. Hue and cry (q. v.).

HYDROMETER. An instrument for measuring the density of fluids: being immersed in fluids, as in water, brine, beer, brandy, etc., it determines the proportion of their density, or their specific gravity, and thence their quality. See *Act of Congr. Jan. 12, 1825, 3 Story, Laws 1976*.

HYPNOTISM. Artificial catalepsy; induced somnambulism; a method of artificially inducing sleep; artificial somnambulism.

The following summary of the physical manifestations accompanying hypnotism, is given in the *International Cyclopaedia*:

This is a term invented by the late Mr. Braid, of Manchester, to designate certain phenomena of the nervous system which in many respects resemble those which are induced by animal magnetism, but which clearly arise from the physical and psychical condition of the patient, and not from any emanation proceeding from following states. The directions of Mr. Braid, for inducing the phenomena, and especially the peculiar sleep-like condition of hypnotism. Take a silver lancet-case, or other bright object, and hold it between the fingers of the left hand, about a foot from the eyes of the person experimented on, in such a position above the forehead as to present the greatest strain on the eyes compatible with a steady fixed stare at the object. The patient must be directed to rivet his mind on the object at which he is gazing. His pupils will first contract, but soon dilate considerably; and if they are well dilated, the first and second fingers of the operator's right hand, extended and a little separated, are carried from the object towards the eyes; the eyelids will most probably close with a vibratory motion. After 10 or 15 seconds have elapsed, it will be found that the patient retains his arms and legs in any position in which the operator places them. It will also be found that all the special senses, excepting sight, are at first extremely exalted, as also are the muscular sense, and the sensibility of heat and cold; but after a time the exaltation of function is followed by a state of depression far greater than the torpor of natural sleep. The patient is now thoroughly hypnotized. The rigidity of the muscles and the profound torpor of the nervous system may be instantly removed and an opposite condition induced by directing a current of air against the muscles which we wish to render flaccid, or the organ we wish to excite to action; and then by more rapidly the senses will speedily regain their original condition. If a current of air directed against the face is not sufficient to arouse the patient, pressure and friction should be applied to the eyelids, and the arm or leg sharply struck with an open hand.

From the careful analysis of a large number of experiments Mr. Braid is led to the conclusion that by a continual fixation of the mental and visual eye upon an object, with absolute repose of body and general quietude, a feeling of stupor supervenes, which renders the patient liable to be readily affected in the manner already described. As the experiment succeeds with the blind, he considers that it is not so much the optic, as the sentient, motor, and sympathetic nerves, and the mind through which the impression is made. See *Tuke's Sleepwalking and Hypnotism* (1884).

Many of the minor operations of surgery have been performed on patients in the hypnotized state without pain, and hypnotism has been successfully employed as a therapeutic agent in numerous forms of disease, especially such as have their seat in the nervous system. An interesting memoir on *Hypnotic Therapeutics* was published by Mr. Braid in the 17th volume of *The Monthly Journal of Medical Science* (1853). Int. Cyc. sub v.

A committee of the British Medical Association made a report to the annual meeting in 1892, in the course of which they say:

"The experiments which have been carried out by members of the committee have shown that this condition is attended by mental and physical phenomena, and that these differ widely in different cases.

"Among the mental phenomena are altered consciousness, temporary limitation of the will power, increased receptivity of suggestion from outside, sometimes to the extent of producing passing delusions, illusions, and hallucinations, an exalted condition of the attention and post-hypnotic suggestions.

"Among the physical phenomena are vascular changes (such as flushings of the face and altered frequency of pulsations), dilatations of the pupils, frequency of deglutition, slight muscular tremors, inability to control suggested movements, altered muscular sense, anaesthesia, modified power of muscular contraction, catalepsy, and rigidity, often intense. It must, however, be understood that all these mental and physical phenomena are rarely present in any one case. The committee takes this opportunity of pointing out that the term hypnotism is somewhat misleading, inasmuch as sleep, as ordinarily understood, is not necessarily present. The committee are of opinion that, as a therapeutic agent, hypnotism is frequently effective in relieving pain, procuring sleep, and alleviating many functional ailments. As to its permanent efficacy in the treatment of drunkenness, the evidence before the committee is encouraging, but not conclusive."

In the trial of Czysnki, referred to *infra*, some interesting opinions were expressed by the scientific experts. Dr. Fuchs of Bonn gave his opinion of hypnotism in general, and his view was a total denial of its power. He does not consider it an instrument by which the human will can be controlled in a permanent or irresistible way. Nobody would succeed in inducing one who simulates disease to relinquish simulation. Of course witnessing the exhibitions of practitioners, the impression is made that their orders are implicitly obeyed. His conviction was that all the subjects practiced on were stupid people. They are under no other compulsion than the desire to make themselves interesting, or from some inducement to do the practitioner a favor.

Hypnotism will not succeed with any person who has the feeling of serious responsibility. He has the conviction that all the instances of hypnotism which he had seen were only a farce. And this opinion was given after seeing experiments of such men as Luys and Charcot. Dr. Grashey, of Munich, thus defined hypnotic influence and suggestion: "Suggestion means to suggest to somebody a certain thought, to persuade him that a certain idea transferred is his own. Suggestions play a great role in the intellectual life of men, and especially in education. Children have no independent judgment and rapidly adopt the thoughts suggested to them by their parents, teachers, and friends. But suggestive effect is due not merely to words, but also to example. A person can be suggested to go to sleep. Such a sleep, induced by suggestion, is called hypnosis, and the inducement of hypnosis is called hypnotism. The person who hypnotizes another is called a hypnotizer. Hypnotism is induced by suggestion, has the peculiarity that the subject remains in mental rapport with the hypnotizer, who can suggest or transfer thoughts to the hypnotized person, and then the latter can offer less resistance than in a wakeful state. Hypnosis has also the peculiarity that it can be produced easier and easier as the operation is repeated. . . . According to my conception the grown man can be held devoid of his free will irresponsible then only when the action is exclusively or predominantly the product of abnormal or diseased factors, abnormal or diseased illusions, abnormal or diseased feelings, disposition, and will impulses. . . . If, however, as it is generally assumed, the suggestibility increases with every new production of hypnosis, the will power, as against the will of the hypnotizer, decreases by degrees, and the interferences with the freedom of the subject will increase as well as the restriction of the power of will. . . . And thus we see a hypnotizer attain finally such power over his subject that a single word, a single look, may put him to sleep. . . . Not only in regard to the time of going to sleep at the beginning of hypnosis, is the person hypnotized dependent upon the hypnotizer, but also in regard to thoughts and feelings. A thought which is slightly opposed during the first condition of hypnosis in a less degree than in the normal condition will meet with less opposition as the hypnotizing process is continued; sentiments and dispositions which were but slightly indicated during the first operation will grow, become stronger and more intense as the process is repeated."

"Again a hypnotizer who has gained a certain power over an individual by a repetition of hypnotic procedures can suggest successfully a thought or a sentiment which in the normal consciousness hardly have been received, and thus the hypnotized individual falls into a condition of subservency in ideas and sentiments at the cost of his own freedom of will;" 14 Med. Leg. J. 159-162.

The principal legal interest in the subject of hypnotism arises out of the question, whether, and if so to what extent, crime may be induced by hypnotic suggestion, or the will of the hypnotic subject sufficiently controlled to enable the hypnotizer to obtain the unconscious execution of papers such as wills or promises to pay money, without knowledge or consciousness on the part of the subject. Though the existence of this force cannot be questioned, it has been the subject of extended discussion, much of which is unprofitable and often based upon newspaper reports of legal proceedings which have proved to be entirely untrustworthy. The sensational character of much that has been written on the subject, even in influential legal journals, has tended to obscure the questions which really require consideration both by courts and by the legislature. These questions are carefully considered in an article on Hypnotism and the Law in 13 Med. Leg. J. 47, one on the same subject, 95 L. T. 500, and another on Hypnotism in the Criminal Courts, 13 Med. Leg. J. 351. The first article is based mainly on the answers received from leading scientists to four questions as follows:—(1) Can crime be committed by the hypnotizer, the subject being the unconscious and innocent agent and instrument? (2) If the subject is unconscious, and even unwilling, has the hypnotizer such power and domination over the hypnotized as would control action to the extent of the commission of a crime? (3) Is it certain or possible to remove by hypnotic suggestion from the mind of the subject all memory of acts or occurrences which happen in the hypnotic

state? (4) Would it be possible for a hypnotizer so to control a hypnotized subject as, for example, to make him sign (a) a will in the presence of third persons, declare it to be his will, and request them to sign their names as witnesses, without subsequent consciousness of the occurrence; (b) or a note of hand or a check?

The answers to these questions show a very decided difference of opinion among American scientific men who have given special attention to the subject, and the same difference appears to exist in a marked degree in European thought. It is impossible as yet to state any satisfactory conclusion from this diversity of opinion, and there has as yet been no recognition of the subject by the courts, notwithstanding the amount of discussion in the press,—much of it thoughtless and unprofitable,—of cases popularly, though erroneously, supposed to touch the question of the procurement of crime by hypnotic suggestion. In spite of this difference, however, and leaving the questions above quoted to be answered by further investigations, so far as they may be, there is a practical question much mooted as to the necessity or propriety of any recognition of hypnotism by the law and of its legal regulation, at least to the extent of forbidding public exhibitions of it, or its use except by those skilled in the science to which it may be a legitimate adjunct; and even as to whether its use by physicians and surgeons may not be a proper subject of legal regulation. Another question raised is whether hypnotism is a justifiable inquisitorial agent. Such use of it is said to be permitted under the law of Holland; 95 L. T. 500; and it is quite possible that in countries accustomed to the inquisitorial character of investigations of crime, as in continental Europe, it may be thought proper. It may be assumed that it would be so entirely foreign to American and English ideas as to be unlikely to receive serious consideration in either country.

The consensus of medical opinion would seem to be in favor of regulation. The committee of the British Medical Association, in the report above quoted, stated that they had "satisfied themselves of the genuineness of the hypnotic state," and that dangers may arise in its use "from want of knowledge, carelessness, or intentional abuse, or from too continuous repetition of suggestions in unsuitable cases." And the conclusion was that, when used for therapeutic purposes, it should be confined to qualified medical men, and under no circumstances employed for female patients except in the presence of a relative or a person of their own sex. The report also expressed strong disapproval of public exhibitions of hypnotic phenomena, and a hope that some legal restrictions may be put upon them; 11 Med. Leg. J. 73. A report of a similar committee of the American Medico-Legal Society suggested the legal questions involved in the subject of Hypnotism and evoked a general discussion which may be found in 8 Med. Leg. J. 263, 353; 13 *id.* 47, 351. These references are valuable only to direct the inquirer to the variety and contrariety of opinion upon the subject. One of the best considered discussions from a legal point of view will be found in the paper on the forensic aspect of hypnotism in 3 Am. Lawy. 534, in which the writer, after carefully considering the cases with which hypnotism has been connected in the popular mind, reaches the conclusion that it has no place in the law. He contends that the person hypnotized cannot be compelled to commit an act which is repugnant and offensive to his sense of morality or, as in case of signing a will, opposed to his instinct of self-preservation, although, under its influence, he may do many things inconsistent with his reason. This writer further considers that the mind of the patient while in a hypnotic state is clear as to what he is doing and his acts are performed in pursuance merely of a desire to please the hypnotizer. The restriction of its use to physicians is disapproved on the ground that, as a class, medi-

cal practitioners are not more familiar with its use than are any other class of scientists, and it would be unsafe for the legislature to assume the existence of a monopoly of virtue among medical men."

A very decided inclination towards the views thus summarized will be found among legal minds directed to the subject, as also a very weighty, if not the preponderance of, scientific opinion. The view that the commission of crime cannot be procured by hypnotic suggestion unless in the case of a person whose moral character is such that he might do the act in a normal state, will be found well reasoned and stated in a paper on Hypnotism and Crime; 13 Med. Leg. J. 240, to which reference may be made for authorities and opinions of great value. Dr. Cocke, an investigator of recognized authority, concludes that there are few cases in which the hypnotized subject will not refuse to do a wrong act or to submit to a crime, no matter if it be suggested; 18 Crim. L. Mag. 100.

Considering the vast amount of discussion which this subject has evoked, it is surprising to find upon how slight a basis of actual legal proceedings it rests. Cases seriously discussed are found upon examination to have no connection with the subject.

Two cases in Europe have been much commented on in connection with hypnotism. The first of these, the Bonnard case, excited such wide attention that the main facts of it are generally understood and the details of it were much confused by the theatrical accessories to the trial in the French courts. The effort was made to show that a murder was the result of hypnotic suggestion, and it is believed to be the general impression of those who have examined the case that that was, to a greater or less extent, an element in the crime. The character of the trial, however, greatly lessens its value as a factor in reaching conclusions either valuable or accurate. There was also so wide a difference of opinion among the experts that it has been very truly remarked: "This trial does not, therefore, clear the air of the difficulties of the medico-legal inquiry, whether crime can be committed by the suggestion of the hypnotizer, of which the subject is the innocent and also unconscious actor;" *id.* 353. For report of the case see Jurid. Rev. Jan. 1890; see also Int. Cyc. N. Y. 1893, p. 763. Considerable research has failed to discover any other case involving the direct question.

The Czysnki case, at Munich, seems to be the only authentic one in which a conviction of hypnotism was really secured. The prisoner was charged with having had recourse to hypnotic suggestions in order to win the affections of a woman of high social position and to obtain her consent to live with him in illicit intercourse, and, subsequently, after he had subjected her to his will, to inveigle her into a false marriage performed by a friend of the prisoner who personated a priest. The accused had given public exhibitions of his hypnotic powers in Dresden and claimed to be able to treat maladies by touching with his hands the parts of the body affected while the patient was in a hypnotized state. His arrest and trial in 1894 created a profound sensation throughout Europe. He was convicted and sentenced to three years' imprisonment. For a full report of the trial, see 14 Med. Leg. J. 150.

The Kansas case of *State v. Gray* was reported and extensively commented upon by the newspaper press and some influential legal journals (51 Alb. L. J. 87 and 3 Am. Lawy. 8) as having turned upon the ground of hypnotic influence, but this was clearly a misrepresentation, the actual decision being that one who aids, abets, counsels, or assists in the commission of a crime is equally guilty as one who actually commits the same; 39 Pac. Rep. 1030. One of the journals cited *supra* in a subsequent issue corrected its error as to the facts of that case and published a letter from the trial judges which states that, "The question of hypnotism was never raised, never insisted upon, either in the evidence, the

arguments, or the instructions," and "the only reference, either direct or remote, during the whole trial that was made to the question of hypnotism," was the remark of counsel for the defence to the jury that "we might almost say that Gray possessed a hypnotic power over McDonald." McDonald as principal and Gray as accessory, being charged with murder, upon a severance, the latter was tried first and convicted and afterwards the former was acquitted on the ground of self-defense; 3 Am. Lawy. 45; 13 Med. Leg. J. 51.

The case of Hayward, tried at Minneapolis for the murder of Katherine Ging, and afterwards hanged, and the case at Eau Claire, Wisconsin, in which a young man named Pickens was charged with hypnotizing two young girls, have both been shown to have no connection with hypnotism; 18 Crim. L. Mag. 100. The facts of both cases may be found in 13 Med. Leg. J. 241.

In a California case of a woman on trial for murder, in whose behalf it was alleged that she was hypnotized by her husband, it was held that evidence that she was told by her husband to commit the act does not tend to show that she was hypnotized, and does not render admissible evidence of the effect of hypnotism on persons subject to its influence; 105 Cal. 166.

Notwithstanding the drift of opinion indicated above there are writers of authority on medico-legal subjects who think differently. In discussing the possibility of rape committed upon a person in the hypnotic state, a late work, after alluding to the lack of attention given to hypnotism in England and America, continues: "Like other theories and investigations received at first with ridicule, hypnotism has been placed on a sure scientific basis, thanks to the labor of Charcot and his successors. It has found a place in French, Austrian, and Hungarian law, and must, sooner or later, creep into the Anglo-Saxon. The great French experts in legal medicine, so far as we know, without an exception (Tardieu, Devergie, Brouardel, Vibert, Tourdes, Tourrette) recognize the possibility that the will may be entirely abolished under hypnotic influence." It is further asserted that the crime mentioned is not frequent, but that it undoubtedly exists in a small number of authentic cases. See 2 Witth. & Beck. Med. Jur. 452, where these cases are narrated, and the authorities given. It will be found that they are all open to the criticism and doubt which affect the question of rape on a sleeping woman, and which are inherent in the nature of the crime. In addition to the authorities herein cited see also 2 Ham. Leg. Med. 212; Tourette, *Hypnotisme au Point de Vue Médico-Légal*; *Etude Méd. Lég. sur les Attentats au Mœurs*; N. Y. Med. J., Jan. 26, 1895; Gould, *Illustr. Dict. Med. sub. v.*; *Contemp. Rev. Oct. 1890*, "Hypnotism and Crime"; Moll, *Hypnotism*; Dessoir, *Bibliographie des modernen Hypnotismus*.

HYPOBOLUM (Lat.). In Civil Law. The bequest or legacy given by the husband to his wife, above her dowry. Tech. Dict.

HYPOTHECATE. To pledge a thing without delivering the possession of it to the pledgee.

HYPOTHECATION. A right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold, in order to be paid his claim out of the proceeds.

There are two species of hypothecation, one called pledge, *pignus*, and the other properly denominated hypothecation. Pledge is that species of hypothecation which is contracted by the delivery by the debtor to the creditor of the thing hypothecated. Hypothecation, properly so called, is that which is contracted without deliv-

ery of the thing hypothecated; 2 Bell, Com. 25.

In the common law, cases of hypothecation, in the strict sense of the civil law, that is of a pledge of a chattel without possession by the pledgee, are scarcely to be found; cases of bottomry bonds and claims for seamen's wages against ships are the nearest approach to it; but these are liens and privileges, rather than hypothecations; Story, *Bailm.* § 288. It seems that chattels not in existence, though they cannot be pledged, can be hypothecated, so that the lien will attach as soon as the chattel has been produced; 14 Pick. 497.

In Scotland *hypothec* is the landlord's right, independently of any stipulation, over the crop and stocking of his tenant, giving the landlord a security over the crop of each year for the rent of that year; Bell.

Conventional hypothecations are those which arise by agreement of the parties. Dig. 20. 1. 5.

General hypothecations are those by which the debtor hypothecates to his creditors all his estate which he has or may have.

Legal hypothecations are those which arise under any contract therefor between the parties, expressed or implied.

Special hypothecations are hypothecations of a particular estate.

Tacit hypothecations are such as the law gives in certain cases, without the consent of the parties, to secure the creditor. They are a species of legal hypothecation.

Thus, the public treasury has a lien over the property of public debtors; Code, 8. 15. 1. The landlord has a lien on the goods in the house leased, for the payment of his rent; Dig. 20. 2. 2; Code 8. 15. 7. The builder has a lien, for his bill, on the house he has built; Dig. 20. 1. The pupil has a lien on the property of the curator for the balance of his account; Dig. 46. 6. 22; Code, 5. 37. 20. There is hypothecation of the goods of a testator for the security of the legacy; Code 6. 43. 1.

See, generally, Pothier, *de l'Hyp.*; Pothier, *Mar. Contr.* 145, n. 26; Merlin, *Répert.*; 2 Brown, *Civ. Law* 195; Abbott, *Shipping*; Parsons, *Mar. Law*; 42 Tex. 244; 24 Ark. 27.

HYPOTHEQUE. In French Law. Hypothecation; the right acquired by the creditor over the immovable property which has been assigned to him by his debtor as security for his debt, although he be not placed in possession of it.

It thus corresponds to the mortgage of real property in English law, and is a real charge, following the property into whose-soever hands it comes. It may be *legale*, as in the case of the charge which the state has over the lands of its accountants, or which a married woman has over those of her husband; *judiciaire*, when it is the result of a judgment of a court of justice; and *conventionelle*, when it is the result of an agreement of the parties; Brown.

HYPOTHETICAL QUESTION. A question put to an expert witness containing a recital of facts assumed to have been proved or proof of which is offered in the case, and requiring the opinion of the witness thereon.

It must present fairly the state of facts which the counsel claims to have proved or which the testimony of the witnesses tends to prove; 49 N. Y. 42; 83 id. 358; 90 id. 640; 97 id. 501; 66 Ind. 94; 70 id. 15; 118 id. 42; 104 id. 409; 34 Minn. 430; 88 id. 511; 112 Mass. 470; 152 id. 589; 48 Vt. 335; 87 Ga. 69; 72 Ia. 84; 74 id. 352; 65 Miss. 204; 68 id. 233; 30 Fla. 41; 10 Or. 448; 32 Ill. App. 463; 48 Mo. 291; 31 W. Va. 659; 35 id. 692; 66 Md. 419; 75 Tex. 667; 42 Mich. 206; 88 id. 567; 63 Wis. 664; 76 Cal. 328; and such state of facts must be relevant to the issue; 97 N. Y. 501; 138 id.

428; 35 Vt. 398; 28 Ohio St. 547; 63 Conn. 393; 64 Fed. Rep. 689. The question must contain all the facts proved when it was put; 2 Misc. Rep. 335; 62 Mo. App. 563; and the witness will not be allowed to answer a question which excludes from his consideration testimony which is essential to the formation of an intelligent opinion concerning the matter; 80 Wis. 523; 55 Mo. App. 540; but the authorities as to this point are conflicting, as it has been held that a question should not be rejected because it does not include all the facts in the case; 135 Ind. 254; 63 Conn. 393; unless it thereby fails to present the case fairly; 63 Conn. 393. A question put to an expert witness calling for his opinion may refer him to the testimony in the case if he has heard it, instead of stating the facts which the answer tends to prove, but in such a case the witness must assume the testimony to be true; 43 Minn. 279; 12 Misc. Rep. 13; and it has been held that he may not base his opinion on the testimony but must confine himself to the hypothetical statement; 57 Hun 123, 586; 136 N. Y. 1. The witness may not assume for himself from the testimony the facts on which he bases his opinion without informing the jury what he supposes the facts to be; 15 N. Y. Supp. 176; he may, however, include as a basis of his opinion, facts known to be true as well as those stated in the question; 75 Tex. 501; 90 Wis. 405.

The truth of the facts assumed by the question is, in doubtful cases, a question for the jury, and if they find that the assumed facts are not proved, they should disregard the opinions based on such hypothetical questions, and the court will so instruct them; 64 Mich. 148; 69 id. 400; but the court is not required to submit the matter to the jury unless there is some substantial evidence tending to establish the hypothesis; 70 Ind. 15. If there is no testimony in the case tending to prove the facts assumed in the question, it is improper; the facts must be proved or proof of them must be offered; 69 Mich. 400; 64 id. 148; 52 Me. 304; 39 Iowa 615; 115 Pa. 599; 28 Ohio St. 547; 63 Wis. 664; 65 Miss. 204; 107 Ill. 365.

The length of the question is to be regulated, largely, by the discretion of the trial judge; 120 U. S. 73; it has been held an error to permit it to be so long and complicated as to confuse the witness or baffle his memory; 53 Mich. 531; 107 Ill. 365; but to obviate this difficulty the court may require the question to be reduced to writing; 88 Mich. 598. If unfair and misleading, hypothetical cases assumed in framing questions are to be considered in determining whether or not a fair trial has been had; 32 Ill. App. 463; but it cannot be expected that the interrogatory will include the proofs or theory of the adversary, since this would require a party to assume the truth of that which he generally denies; 96 Ind. 550. Hypothetical questions cannot be asked of an ordinary observer; 40 Pa. 199; 46 Mo. 224; 14 Gray 335; 53 Miss. 367; 117 Mass. 143; 27 Conn. 192. And, as to this, a professional man, in a matter of which he has not made special study is regarded as an ordinary observer; 64 Barb. 364.

See Jones; Chambers; Greenleaf, *Evidence*; EXPERT; OPINION; EVIDENCE.

HYPOTHETICAL YEARLY TENANCY. The basis in England of rating lands and hereditaments to the poor-rate, and to other rates and taxes that are expressed to be leviable or assessable in like manner as the poor-rate.

HYSTEROTOMY. The cesarian operation.

HYTHE. A port, wharf, or small haven used for the purpose of embarking or landing merchandise. Blount.

I.

I. O. U. In Common Law. A memorandum of debt in use among merchants and others. It is not a promissory note, as it contains no direct promise to pay; 4 C. & P. 324; 1 Mann. & G. 46; 1 C. B. 543; Pars. Bills & Notes; but if words are superadded to the acknowledgment from which an intention to accompany it with an engagement to pay may be gathered, it will be construed as a promissory note; 1 Dan. Neg. Inst. 33; if it contains an agreement that it is to be paid on a given day it is a promissory note; Byles, Bills 19. It is evidence of an account stated but not of money lent; 16 M. & W. 449. A due bill has been held to be a promissory note; 7 Mo. 42, 569; 6 Dana 341. A due bill to bearer without specifying the date of payment is a promissory note payable immediately; 29 Barb. 80. An I. O. U. not addressed to any one will be evidence for the plaintiff if produced by him; 16 M. & W. 449; 1 M. & G. 46.

IBERNAGIUM. The season for sowing winter corn. Curt. Antiq. MSS.

IBID. An abbreviation of *ibidem*.

IBIDEM (Lat.). The same. The same book or place. The same subject. See ABBREVIATIONS, *ib.*, *Id.*

IBIMUS. We will go.

ICE. Ice formed in a stream not navigable is part of the realty, and belongs to the owner of the bed of the stream, who has a right to prevent its removal; 33 Ind. 402; 54 Conn. 462; 80 Wis. 531; 101 Ill. 46; but see, *contra*, 41 Mich. 318, where it is said that the ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and therefore a sale of ice already formed, as a distinct commodity, should be held a sale of personality whether in the water or out of the water. See, also, 32 Am. Rep. 160, note; 32 Am. L. Reg. 166. Riparian owners on navigable streams have no title to the ice which forms on such streams, as an incident to their ownership of the bank; and if a statute gives them title to the ice opposite their property, and prescribes a remedy for invasion of their rights therein, that remedy is exclusive; 11 Misc. Rep. 197. The right of taking ice either for use or sale from a pond which is a public water, is a public right which may be exercised by any citizen who can obtain access to the pond without trespassing on the lands of other persons, or unreasonably interfering with their rights; 7 Allen 153; 121 Mass. 539; 26 Kan. 682. A landowner cannot cut ice for sale from a pond situated on his land, where its removal works an actual injury to one having a pondage right therein; 62 Conn. 398; but the owner of land abutting on a mill-pond may take ice from the pond if it does not interfere with the use of the mill; 42 Neb. 238. Ice in an ice-house is a subject of larceny, but before being gathered it is not, being part of the pond or river; 3 Hill 395; 6 id. 144. See Bish. N. Cr. L. §763, n. 2. See, generally, as to ice and the property therein, 32 Am. L. Reg. n. s. 66; 27 id. 231, 240; 30 Cent. L. J. 6; 37 id. 357; 3 Alb. L. J. 386; 43 id. 504.

ICENI. The ancient name for the people of Suffolk, Norfolk, Cambridgeshire, Huntingdonshire.

ICONA. A figure or representation of a thing. Du Cange.

ICTUS. In Old English Law. A stroke or blow from a club or stone; a bruise, contusion, or swelling produced by

a blow from a club or stone, as distinguished from "*plaga*" (a wound). Fleta, lib. 1, c. 41, 3.

ICTUS ORBIS (Lat.). In Medical Jurisprudence. A maim, a bruise, or swelling; any hurt without cutting the skin.

When the skin is cut, the injury is called a wound. Bracton, lib. 2, tr. 2, c. 5 and 24. *Ictus* is often used by medical authors in the sense of *percussus*. It is applied to the pulsation of the arteries, to any external lesion of the body produced by violence; also, to the wound inflicted by a scorpion or venomous reptile. *Orbis* is used in the sense of circle, circuit, rotundity. It is applied, also, to the eyeballs: *oculi dicuntur orbis*. Castelli. Lex. Med.

ID EST (Lat.). That is. Commonly abbreviated *i. e.*

IDAHO. One of the states of the United States.

It was a part of the Louisiana purchase but was included in the portion affected by the joint occupation of the United States and Great Britain under the treaty of 1818 which was terminated in 1846. It was a part of the Oregon territory organized under act of August 14, 1848, and afterwards of the territory of Washington organized under act of March 2, 1853; it was organized as a separate territory under its present name by act of March 3, 1863. It then included Montana and part of Wyoming, which were afterward separately organized, and the present boundaries of Idaho were settled by act of July 25, 1863, setting apart Wyoming as a territory. Under a constitution adopted August 6, and ratified November 2, 1833, it was admitted as a state July 3, 1890; U. S. Rev. Stat. 1. Supp. 754.

IDEM (Lat.). The same. According to Lord Coke, "*idem*" has two significations, *sc. idem syllabis seu verbis* (the same in syllables or words), and *idem re et sensu*, (the same in substance and in sense). 10 Coke 124 a.

Referring to a volume, the same series or set; also, the same book or page. Abbreviated, *id.* Anderson.

IDEM PER IDEM. The same for the same. An illustration of a kind that really adds no additional element to consideration of the question.

IDEM SONANS (Lat.). Having the same sound.

In indictments and pleadings, when a name which it is material to state is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient. The following have been held to be *idem sonans*, Seagrave for Seagrave; 2 Stra. 889; Whyneard for Winyard; Russ. & R. 412; Benedetto for Beneditto; 2 Taunt. 401; Keen for Keene; Thach. Cr. Cas. 67; Deadema for Diadema; 2 Ired. N. C. 346; Hutson for Hudson; 7 Mo. 142; Conraad for Conrad; 8 Miss. 291; Gibney for Giboney; 81 Tex. 422; Allen for Allain; 144 Ill. 32; Emery for Emley; 1 Tex. Civ. App. 695; Johnston for Johnson; 50 Kan. 420; Busse for Bosse; 86 Tex. 336; Chambles for Chambless; 28 Ala. 53; Conly for Conolly; 2 Greene (Iowa) 88; Usrey for Usury; 10 Ala. 370; Faust for Foust; 163 U. S. 452; Bubb for Bopp; 39 Pa. 429; Heckman for Hackman; 88 id. 120; Shaffer for Shafer; 29 Kan. 337; Woolley for Wolley; 21 Ark. 462; Penryn for Pennyryne; 14 Md. 121; Barbra for Barbara; 52 Kan. 35; Isreal B. for Israel B.; 32 Tex. Cr. Rep. 637; Alwin for Alvin; 50 Ill. App. 202; Helmer for Hillmer; 34 Tex. Cr. Rep. 415; July for Julia; id. 1; Elliott for Ellett; 85 Tenn. 171; Chegwagwequay for Chegwagoquay; 75 Mich. 289; Kealiher, Keolhier, Keliher,

Kellier, Keolhier, Kelhier, all sufficient for Kealiher; 81 Me. 531; Luckenbough for Luckenbach; 78 Ia. 101; Rooks for Rux; 83 Ala. 79. The rule seems to be that if names may be sounded alike without doing violence to the power of letters found in the various orthography, the variance is immaterial; 27 Tex. App. 30; 1 Whart. Cr. L. 309; 1 Bish. Cr. Proc. § 688; 28 Am. Rep. 435. Whether or not the names are *idem sonantia* was held a question for the jury, where the name was laid Darius C (pronounced in Dorset dialect D'rius) and it was in fact Trius; 2 Den. Cr. Cas. 231; 3 Russ. Cr. Sharsw. ed. 317. See 6 Ala. n. s. 679; 147 Mass. 414. In the following cases the variances there mentioned were declared to be fatal; McCarn for McCann; Russ. & R. 351; Shakspeare for Shakespeare; 10 East 83; Calver for Calvert and Day for Dai; 2 Cr. & M. 189; Moores for Mohr; 55 Mo. App. 325; Mulette for Merlette; 100 Ala. 42; Siemson for Simonson; 21 S. W. Rep. (Mo.) 610; Bart for Bartholomew; 29 Ill. 508; Comyns for Cummins; 24 Ill. 602; Grautis for Gerardus; 4 Cow. 148; Henry for Harry; 21 Ill. 535; Jeffery for Jeffries; 1 Hempst. 299; Byerly for Byrly; Baldw. 83.

The same principle applies to words as well as names, and a verdict is not vitiated by misspelling if the words are *idem sonans*, as murder for murder, turn for term, too for two; but a verdict for damages was void when given for *impunitive damages*, or when a burglar was found guilty of *bergetlery*, or where the defendant was found *guilty* instead of *guilty*, there being no such words as the last three in English; 2 Tex. App. 487; *id.* 504; 4 id. 527; 36 Tex. 152.

See, generally, 3 Chitty, Pr. 231, 232; 4 Term 611; 3 B. & P. 559; 3 Campb. 29; 6 M. & S. 45; 2 N. H. 557; 7 S. & R. 479; 3 Cai. 219; 1 Wash. C. C. 285; 4 Cow. 148; 3 Stark. Ev. § 1678; 4 U. S. App. 524; 143 Ill. 634; 24 Alb. L. J. 444; 27 Am. St. Rep. 785; 13 L. R. A. 541; Harris, Identification, Ch. III.

IDENTITATE NOMINIS (Lat.). In English Law. The name of a writ which lay for a person taken upon a *capias* or *exigent*, and committed to prison, for another man of the same name: this writ directs the sheriff to inquire whether he be the person against whom the action was brought, and if not, then to discharge him; Fitzh. N. B. 267. In practice, a party in this condition would be relieved by *habeas corpus*.

IDENTITY. Sameness. Identity of persons is a phrase applied especially to those cases in which the issue before the jury is, whether a man be the same person with one previously convicted or attainted. 4 Bla. Com. 396; 4 Steph. Com. 468.

In cases of larceny the question of the identity of property is for the jury and a verdict will be set aside where the court said in the charge that one of the stolen "*bills* was positively identified;" 17 Wis. 675. The question of identity of a prisoner as well as of property may arise. In a case of larceny of a hog the question of identity both of prisoner and hog was submitted to the jury; 1 Tex. App. 638; and evidence of a confession given by a fellow-prisoner of the accused (who had conversed with him through soil pipes in the gaol) that he recognized him by his voice was allowed to go to the jury on the question of identity; 76 Pa. 319. As to the modes of identifying different kinds of personal property, see Harris, Identification, Ch. XIII. And

as to the different kinds of evidence resorted to for proving the identity of a prisoner, see *id.* Ch. IV. In cases of larceny, trover, and replevin, the things in question must be identified; 4 Bla. Com. 390. So, too, the identity of articles taken or injured must be proved in all indictments where taking property is the gist of the offence, and in actions of tort for damage to specific property. See 2 Crim. Law Mag. 287; 84 La. Ann. 1082. Many other cases occur in which identity must be proved in regard either to persons or things. One case in which such questions arise under chattel mortgages, in which this identification need be such only as would enable identification by a third person aided by inquiry, and not such as would enable a stranger to select it; Jones, Chat. Mortg. § 54; 24 Ia. 323; 74 Ind. 495; 66 Ala. 258; 7 Ohio St. 194; 13 Gray 517. The question is sometimes one of great practical difficulty, as in case of the death of strangers, reappearance after a long absence, and the like. See Ryan, Med. Jur. 301; 1 Beck, Med. Jur. 509; 1 Hall, Am. L. J. 70; 6 C. & P. 677; 1 Cr. & M. 780; 53 Ga. 496; 1 Hagg. Cons. 180; Shelf. Marr. & D. 226; Best, Pres. App. Case 4; 88 Ill. 498; Wills, Circ. Ev. 143; 4 Bla. Com. 396; 4 Steph. Com. 468; Harris, Identif.

Identity of the name of a grantor or grantee is *prima facie* evidence of identity of the person; 85 Neb. 587; and a conveyance by a grantee of the same name as the holder of the title is presumably sufficient; 78 Ia. 499; even where the names are not identical in spelling, as Savery and Savory; 80 Tex. 120; 15 Daly 479. These cases apply a general principle, that a presumption of identity of persons arises from identity of name, and the former is recognized as *prima facie* evidence of the latter in a great variety of cases; 108 U. S. 47; 87 Mo. 197, 642; 4 Q. B. 626; 9 Cow. 140; 18 N. Y. 86; 75 Cal. 240; 46 Mich. 320; 78 Me. 176; 39 Vt. 179; 83 Ala. 528; 76 Tex. 1; *contra*, 9 M. & W. 75; 1 Dana 155; 2 R. I. 319; 5 Ia. 486; 29 N. H. 420. But it has been held that it is a question for the jury to determine the identity of a grantor with the former grantee; 28 Cal. 231; or that a person pleading former conviction is the same party; 39 Me. 154; or that a person bearing the name of a deceased is one of his heirs; 6 Jones, L. 528. The identity of a family name and initials raises no presumption of identity; 27 Mich. 489. As between father and son of the same name it is presumed that the former is intended if there is no distinguishing mark; 10 Paige 170; Hob. 390; 90 Ill. 612; 1 Stark. 106; 9 N. H. 519.

As to the effect of variation in names with respect to records as notice, see 4 L. R. A. 122; 9 *id.* 471; 12 *id.* 58. And as to names in a record index, see 14 *id.* 398.

IDEO (Lat.). Therefore. Calv. Lex.

IDEO CONSIDERATUM EST. Therefore it is considered. See **CONSIDERATUM EST PER CURIAM.**

IDEOT. An old form for idiot (*q. v.*).

IDES (Lat.). In Civil Law. A day in the month from which the computation of days was made.

The divisions of months adopted among the Romans were as follows: The calends occurred on the first day of every month, and were distinguished by adding the name of the month: as, *calendis Januariis*, the first of January. The *nonas* occurred on the fifth of each month, with the exception of March, July, October, and May, in which months they occurred on the seventh. The *ides* occurred always on the ninth day after the *nonas*, thus dividing the month equally. In fact the *ides* would seem to have been the primal division, occurring in the middle of the month, nearly. Other days than the three designated were indicated by the number of days which would elapse before the next succeeding point of division. Thus, the second of April is the *quarto nonas Aprilis*; the second of March, the *sextio nonas Martii*; the eighth of March, *octavio idus Martii*; the eighth of April, *sextus idus Aprilis*; the sixteenth of March, *decimus septimus calendis Aprilis*.

This system is still used in some chanceries in Europe; and we therefore give the following

Table of the Calends, Nonas, and Ides.

	Jan., Aug. Dec., 31 days.	March, May, June, 31 days.	April, June, Sept., Nov., 30 days.	Feb. 29, bissextile, 29 days.
1	Calendis	Calendis	Calendis	Calendis
2	4 Nonas	6 Nonas	4 Nonas	4 Nonas
3	3 Nonas	5 Nonas	3 Nonas	3 Nonas
4	Prid. Non.	4 Nonas	Prid. Non.	Prid. Non.
5	Nonis	3 Nonas	Nonis	Nonis
6	8 Idus	Prid. Non.	8 Idus	8 Idus
7	7 Idus	Nonis	7 Idus	7 Idus
8	6 Idus	8 Idus	6 Idus	6 Idus
9	5 Idus	7 Idus	5 Idus	5 Idus
10	4 Idus	6 Idus	4 Idus	4 Idus
11	3 Idus	5 Idus	3 Idus	3 Idus
12	Prid. Idus	4 Idus	Prid. Idus	Prid. Idus
13	Idibus	3 Idus	Idibus	Idibus
14	19 Cal.	Prid. Idus	18 Cal.	18 Cal.
15	18 Cal.	Idibus	17 Cal.	17 Cal.
16	17 Cal.	17 Cal.	16 Cal.	16 Cal.
17	16 Cal.	16 Cal.	15 Cal.	15 Cal.
18	15 Cal.	15 Cal.	14 Cal.	14 Cal.
19	14 Cal.	14 Cal.	13 Cal.	13 Cal.
20	13 Cal.	13 Cal.	12 Cal.	12 Cal.
21	12 Cal.	12 Cal.	11 Cal.	9 Cal.
22	11 Cal.	11 Cal.	10 Cal.	8 Cal.
23	10 Cal.	10 Cal.	9 Cal.	7 Cal.
24	9 Cal.	9 Cal.	8 Cal.	6 Cal.
25	8 Cal.	8 Cal.	7 Cal.	5 Cal.
26	7 Cal.	7 Cal.	6 Cal.	4 Cal.
27	6 Cal.	6 Cal.	5 Cal.	3 Cal.
28	5 Cal.	5 Cal.	4 Cal.	Prid. Cal.
29	4 Cal.	4 Cal.	3 Cal.	
30	3 Cal.	3 Cal.	Prid. Cal.	
31	Prid. Cal.	Prid. Cal.		

¹ If February is bissextile, *Sexto Calendas* (6 Cal.) is counted twice, viz., for the 24th and 25th of the month. Hence the word *bissextile*.

IDIOCHIRA (from *Gr. idios*, private, and *chein*, hand). In Civil Law. An instrument privately executed, as distinguished from one publicly executed. Vicat, Voc. Jur.

IDIOCY. In Medical Jurisprudence. Mental deficiency of varying grades down to extreme stupidity resulting from imperfect development or disease of the nervous centers either *prenatal* or occurring before the evolution of the mental faculties in childhood. Brush in *Cyclopedia of Diseases of Children*. A condition of defective brain-development. See 3 With. & Beck, Med. Jur. 384 *et seq.*; 2 Ham. Leg. Med. 80 *et seq.*

It always implies some defect or disease of the brain, which is generally smaller than the standard size and irregular in its shape and proportions. Hydrocephalus is an occasional cause of idiocy. The senses are very imperfect at best, and one or more are often entirely wanting. None can articulate more than a few words; while many utter only cries or muttered sounds. Some make known their wants by signs or sounds which are intelligible to those who have charge of them. The head, the features, the expression, the movements, all convey the idea of extreme mental deficiency. The reflective faculties are entirely wanting, whereby they are utterly incapable of any effort of reasoning. The perceptive faculties exist in a very limited degree, and hence they are rendered capable of being improved somewhat by education, and redeemed, in some measure, from their brutish condition. They have been led into habits of propriety and decency, have been taught some of the elements of learning, and have learned some of the coarser industrial occupations. The moral sentiments, such as self-esteem, love of approbation, veneration, benevolence, are not unfrequently manifested; while some propensities, such as cunning, destructiveness, sexual impulse, are particularly active.

In some parts of Europe a form of idiocy prevails endemically, called cretinism. It is associated with disease or defective development of other organs besides the head. Cretins are short in stature, their limbs are attenuated, the belly tumid, and the neck thick. The muscular system is feeble, and their voluntary movements restrained and undecided. The power of language is very imperfect, if not entirely wanting. In the least degraded forms of this disease the perceptive powers may be somewhat developed, and the individual may evince some talent at music or construction. In Switzerland they make parts of watches. Cretinism like idiocy is frequently congenital, and its causation is very obscure.

Both idiocy and cretinism exhibit various degrees of mental deficiency, but they never approximate to any description of men supposed to be rational, nor can any amount of education efface the chasm which separates them from their better-endowed fellow-men. The older law-writers, whose observation of mental manifestations was not very profound, thought it necessary to have some test of idiocy; and accordingly, Fitzherbert says, if he have sufficient understanding to know and understand his letters, and to read by teaching or information, he is not an idiot. *Natura Brevium* 588. Again, he says, a man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. The inference was, no doubt, that such a man is responsible for his criminal acts. At the present day, such an idea would not be entertained for a moment, nor are we aware of any case on record of an idiot suffering capital punishment. See **INSANITY**; **DEMENTIA**; **IMBECILITY**.

IDIOT. A person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. Shelf. Lun. 2; 3 With. & Beck, Med. Jur. 371.

It is an imbecility or sterility of mind, and not a perversion of the understanding; Chitty, Med. Jur. 327, note s, 345; 1 Rus. Cr. 6; Bacon, Abr. *Idiot* (A); Brooke, Abr.; Co. Litt. 246, 247; 3 Mod. 44; 1 Vern. 16; 4 Co. 126; 1 Bla. Com. 303; Tayl. Med. Jur. 688. When a man cannot count or number twenty, nor tell his father's or mother's name, nor how old he is, having been frequently told of it, it is a fair presumption that he is devoid of understanding; Fitzh. N. B. 238. See 1 Dow, P. Cas. n. s. 892; 3 Bligh, n. s. 1. Persons born deaf, dumb, and blind were presumed to be idiots; for, the senses being the only inlets of knowledge, and these, the most important of them, being closed, all ideas and associations belonging to them are totally excluded from their minds; Co. Litt. 42; Shelf. Lun. 3. See 118 Mo. 127. But this is a mere presumption, which, like most others, may be rebutted; and doubtless a person born deaf, dumb, and blind, who could be taught to read and write, would not be considered an idiot. A remarkable instance of such a one may be found in the person of Laura Bridgman, who was taught how to converse, and even to write. See Locke, Hum. Und. b. 2, c. 11, § 2, 13; Ayliffe, Pand. 234; 4 Comyns, Dig. 610; 8 *id.* 644. See **DEAF AND DUMB**; **DEAF, DUMB AND BLIND**; **IDIOCY**.

Idiots are incapable of committing crimes, or entering into contracts. They cannot, of course, make a will; but they may acquire property by descent.

IDIOTA. In the Civil Law. An unlearned, illiterate, or simple person. Calv. Lex. A private man; one not in office.

In Common Law. An idiot or fool.

Idiota a nativitate, an idiot from birth, or natural fool. Burrill; 1 Bl. Com. 303 *Purus idiota*, an absolute fool. *Id.*

IDIOTA INQUIRENDO, WRIT DE. This is the name of an old writ which directs the sheriff to enquire whether a man be an idiot or not. The inquisition is to be made by a jury of twelve men. Fitzh. N. B. 232.

IDONEUM SE FACERE. IDONEARESE. To purge one's self by oath of a crime of which one is accused.

IDONEUS (Lat.). Sufficient; fit; adequate. He is said to be *idoneus homo* who hath these three things, honesty, knowledge, and civility; and if an officer, etc., be not *idoneus*, he may be discharged; 8 Co. 41. If a clerk presented to a living is not *persona idonea*, which includes ability in learning, honesty of conversation, etc., the bishop may refuse him. And to a *quare impedit* brought thereon, "*in literatura minus sufficiens*" is a good plea, without setting forth the particular kind of learning;" 5 Co. 58; 6 *id.* 49 b; Co. 2d Inst. 631; 8 Lev. 311; 1 Show. 88; Wood, Inst. 32. So of things: *idonea quantitas*; Calvinus, Lex.; *idonea paries*, a wall sufficient or able to bear the weight.

In Civil Law. Rich; solvent; e. g. *idoneus tutor*, *idoneus debitor*. Calvinus, Lex.

IFUNGIA. The finest white bread, formerly called "cocked bread." Blount.

IGLISE (L. Fr.). A church. Kelham. Another form of "*eglise*."

IGNIS JUDICIUM (Lat.). In Old English Law. The judicial trial by fire.

IGNITEGIUM. The curfew (*q. v.*). Cowel. (*ignis*, Lat., fire, and *tego*, to cover.) See **HORA AUROREAE**.

IGNOMINY. Public disgrace; infamy; reproach; dishonor. Ignominy is the opposite of esteem. Wolff § 145. See 38 Ia. 220.

IGNORAMUS (Lat.) we are ignorant or unignorant. In Practice. The word which is written on a bill by a grand jury

when they find that there is not sufficient evidence to authorize their finding it a true bill. They are said to ignore the bill, which is also said to be *thrown out*. The proceedings being now in English, the grand jury indorse on the bill, *Not found, No bill*, or, *No true bill*. 4 Bla. Com. 305.

IGNORANCE. The lack of knowledge. Ignorance is distinguishable from error. Ignorance is want of knowledge; error is the nonconformity or opposition of ideas to the truth. Considered as a motive of actions, ignorance differs but little from error. They are generally found together, and what is said of one is said of both.

Essential ignorance is ignorance in relation to some essential circumstance so intimately connected with the matter in question, and which so influences the parties that it induces them to act in the business; Pothier, Vente, nn. 3, 4; 2 Kent 367.

Non-essential or *accidental ignorance* is that which has not of itself any necessary connection with the business in question, and which is not the true consideration for entering into the contract.

Ignorance of fact is the want of knowledge as to the fact in question; as if a man marry a married woman, supposing her unmarried; 11 Allen 23.

It is not yet fully settled, at least in this country, whether a person who does a criminal act, supposing it to be lawful through ignorance of fact, can properly be convicted; 13 Am. L. Rev. 469. Such a conviction was held proper; 11 Allen 23 (where a man was convicted of adultery, in innocently marrying a woman whose husband was living); 114 Mass. 566; 108 id. 444; 96 id. 6; 124 id. 324; 89 Ill. 601; 24 Wis. 60; 56 Mo. 546; *contra*, 53 Ga. 229; 24 Ind. 113; 90 Ohio St. 382. See 63 Ala. 141; 46 Ind. 459. The doctrine was adhered to in a late Massachusetts case, where a belief that the husband was dead was held no defence in a prosecution for bigamy; 163 Mass. 453. The opposite conclusion was reached in England by nine out of fourteen judges; 23 Q. B. D. 163. The Massachusetts court took issue directly with the English case. Mr. Bishop severely criticises the Massachusetts doctrine and, reviewing the authorities, strongly approved the English rule; 1 Bish. N. Cr. L. § 308 a, note. Nevertheless, it is generally well established that ignorance of facts is a defence, where a knowledge of certain facts is essential to an offence, but no defence where a statute makes an act indictable, irrespective of guilty knowledge. Thus there can be no conviction of murder, larceny, or burglary, without proof of the intention, *mens rea*, to commit these crimes; but where selling liquor to minors is by statute indictable, the mistaken belief that the vendee is of full age, is no defence; 98 Mass. 6; 158 id. 499; see 19 Alb. L. J. 64; 1 Whar. Cr. L. § 88; 2 id. § 1704; 23 S. W. Rep. (Tex.) 427; 37 W. Va. 1; 127 Pa. 330; but see 116 Ind. 495; 71 Mich. 548. Nor is it any defence that the party selling intoxicating liquor did not know that it was intoxicating; 52 Kan. 69; 148 Mass. 428; 66 Miss. 502.

Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the actions of a party to the contract, is not such a mistake as will authorize equitable relief; 132 U. S. 313. Nor is ignorance of facts a sufficient ground for equitable relief, if it appear that the requisite knowledge might have been obtained by reasonable diligence; 99 U. S. 35, 47.

See Brett, L. Cas. Mod. Eq. 84; **MISTAKE.** Ignorance of the laws of a foreign government, or of another state, is ignorance of fact; 9 Pick. 112, where there will be found a discussion of the difference between ignorance of law and ignorance of fact. See also *Clef des Lois Rom. Fait*.

Ignorance of law consists of the want of knowledge of those laws which it is our duty to understand, and which every man is presumed to know.

The principle that ignorance of the law is no defence, *ignorantia legis neminem excusat*, is generally recognized. It was a

maxim of the Roman law, in which this case was put, to illustrate the distinction between ignorance of law and fact:—If the heir is ignorant of the death of his ancestor, he is ignorant of a fact; but if, being aware of his death, and of his own relationship, he is, nevertheless, ignorant that certain rights have thereby become vested in himself, he is ignorant of the law; D. 22. 6. 1. See 1 Spence, Eq. Jur. 633. The English rule is that every man is presumed to know the law, subject to certain qualifications with respect to questions of doubtful construction, practice, and the like; Broom, Leg. Max. 8th Am. ed. 254; 6 Cl. & Fin. 911; 11 Exch. 840. In a later case it was held that the court will only relieve against a payment of money under mistake of law, if there be some equitable ground which renders it inequitable that the party who received the money should retain it; 3 Ch. D. 351. This case is said by Brett to "contain probably the best statement . . . of the principles upon which the courts proceed in relieving or declining to relieve on the ground of mistake of law;" L. Cas. Mod. Eq. 80. The case itself proceeded upon the ground that an erroneous construction of an instrument was a mistake of law, and it was so held in several cases; 4 Ch. D. 389; id. 693; L. R. 14 Eq. 85; 6 H. L. Cas. 798, 811; but for a *dictum, contra*, see L. R. 6 H. L. 223, 234; and see also 42 Ch. D. 98; [1893] 1 Ch. 101, 111. The same general rule is recognized by American courts, though earlier cases indicate hesitation on the part of the courts before it was definitely settled. It was said in an early case that whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable perplexity; 9 Pick. 112; and that when one makes a promise as an "expression of an opinion of what he should be obliged to allow, rather than of what he was willing to allow, and being under a mistake of his right, he is not bound by it;" 1 Binn. 27, 37. But it may be considered as well established that money paid with full knowledge of all the facts and circumstances cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not; 9 Cow. 674, 681; 74 Pa. 371; 90 Ind. 244; 60 Ga. 304 (practically overruling 7 id. 64 and 31 id. 117); 35 N. J. L. 290; 46 Ark. 167; 15 Minn. 35; 46 Mo. 200; 16 Cal. 143; 1 Or. 292; *contra*, 2 Metcalf (Ky.); and a person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts; 1 Johns. Ch. 512, 516. See 1 Atk. 591; 1 V. & B. 23, 30; 1 Ch. Cas. 84; 3 Vern. 243; 18 S. E. Rep. (Va.) 285; 77 Ga. 340. Ignorance of one's legal right does not take a case out of the rule of equitable estoppel where one encourages a purchaser to take land from one having a color of title when otherwise he would be entitled to interpose an equitable bar to the latter's legal title; 6 id. 105.

It has been said that whatever rule may prevail elsewhere, in the equity courts of the United States, there is no relief from a mistake of law alone; 80 Fed. Rep. 466; 1 Pet. 15; 12 id. 55; 91 U. S. 50, 51; 97 id. 185; 99 id. 46. But there is to be found by careful reading of the Federal cases the same disposition apparent in English cases, to avoid the establishment of an inflexible rule which shall preclude relief if there be any other circumstances or any feature of the case itself to warrant it. In the familiar case of Hunt v. Rousmanier, 2 Mas. 244, 8 Wheat. 174, 1 Pet. 1, the United States supreme court said, where an instrument is executed by the parties, which contains a mistake of the draughtsman either of fact or law it may be reformed but not when it was executed in the form agreed upon under a misapprehension of the law as to its nature or effect; that a mistake of law is not a ground for reforming a deed and the exceptions are both few and peculiar, but it was not the intention to lay down a rule that there might not be relief against

a plain mistake arising from ignorance of law; and in a later case the court quoted this expression with approval and also the declaration from 1 Sto. Eq. Jur. Redf. ed. § 138 e, that established misapprehension of the law does afford a basis for relief resting on discretion and to be exercised only in flagrant and unquestionable cases; 96 U. S. 85, 91.

In some cases the laches of the other party affects the liability of one who promises under a mistake of law, as, when one, through a mistake of the law, as an endorser of a bill of exchange, acknowledges himself under an obligation which the law will not impose on him, as payment after failure of the holder to give reasonable notice of protest for non-acceptance, he shall not be bound thereby; 7 Mass. 452, 488. See also 12 East 38; 3 J. & W. 269; 3 B. & C. 280; the operation of the rule is adjusted to the equitable conditions existing as between the parties. "If a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back; [1 Wend. 355; 18 Cal. 265; 17 N. H. 573; 50 Me. 130]; but where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back;" 1 Term 285; 15 Am. Rep. 171, 184.

The subject may be well summed up by the collation of two or three cases which show the substantial uniformity of the application of the doctrine. "The maxim *ignorantia legis neminem excusat* is not universally applicable, but only when damages have been inflicted or crimes committed. It is true that the law will not permit the excuse of ignorance of the law to be pleaded for the purpose of exempting persons from damages for breach of contract, or from punishment for crimes committed by them, but on other occasions and for other purposes, it is evident that the fact that such ignorance existed will sometimes be recognized so as to affect a judicial decision;" 44 N. J. L. 244; and "there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequences of his acts;" Lush, J., in L. R. 3 Q. B. 639; "it would be too much to impute knowledge of this rule of equity" (the doctrine of election); Westbury, Ld. Ch., in 11 H. L. Cas. 602.

Ignorance was held no defence in the case of a woman convicted of illegal voting, who set up a defence that she believed she had a legal right to vote; 11 Blatch. 200, 374; 57 Barb. 625; so in an indictment for adultery, where defendant erroneously believed she had been legally divorced; 65 Me. 30; so in the conviction of a man for polygamy, who, knowing that his wife was living, married again in Utah, and set up the Mormon doctrine as a defence; 98 U. S. 145. It was held not a defence that the defendant believed that, by reason of the absence of the first wife, the marriage was void and that he was released from it, as that was a mistake of law; 32 Tex. Cr. Rep. 214. A Jew may be indicted under a state law, for working on Sunday; 122 Mass. 40; so where one shoots another through criminal negligence, his ignorance of the law can form no basis for acquittal; 36 Pac. Rep. (Cal.) 13.

An elector's ignorance of a law disqualifying a candidate at an election does not make his vote a nullity; he must have knowledge both of the law and the fact which constitutes the disqualification; 50 N. Y. 463; L. R. 3 Q. B. 639.

Involuntary ignorance is that which does not proceed from choice, and which cannot be overcome by the use of any means of knowledge known to a person and within his power: as, the ignorance of a law which has not yet been promulgated.

Voluntary ignorance exists when a party might, by taking reasonable pains, have acquired the necessary knowledge. For example, every man might acquire a knowledge of the laws which have been promulgated; Doctor & Stud. 1, 46; Plowd. 343.

See, generally, 3 Smith, L. Cas. 9th Am. ed. 1713; Terry, Pr. Ang. Am. L. §§ 252-5; Broom, Leg. Max. 8th Am. ed. 253 (where

there will be found a discriminating discussion of the subject; Eden, Inf. 7; 1 Fonbl. Eq. b. 1, c. 2, § 7, n. v; Bishp. Eq. 187; Merlin, Répert.; Savigny, Droit Rom. App. VIII. 387; 1 Bro. C. C. 92; 14 Johns. 501; 12 Am. L. Rev. 471; 4 So. L. J. N. S. 153; 10 Am. Dec. 323; 37 W. Va. 715; 28 N. J. L. 274; 76 Va. 315; 63 Wis. 332; MISTAKE.

IGNORANTIA (Lat.). Ignorance; want of knowledge. See **IGNORANCE**.

IGNORANTIO ELENCHI. An overlooking of the adversary's counter position in an argument.

IGNORE. To be ignorant of. Webster, Dict. To pass over as if not in existence. A grand jury is said to ignore a bill when they do not find the evidence such as to induce them to make a presentment. Brande.

IKBAL. Acceptance (of a bond, etc.). Wilson's Gloss. Ind.

IKBAL DAWA. Confession of judgment. Wilson's Gloss. Ind.

IKRAH. Compulsion; especially constraint exercised by one person over another to do an illegal act, or to act contrary to his inclination. Wilson's Gloss. Ind.

IKRAR. Agreement, assent, or ratification. Wilson's Gloss. Ind.

IKRAR NAMA. A deed of assent and acknowledgment. Wilson's Gloss. Ind.

ILL. In Old Pleading. Bad; defective in law; null; naught; the opposite of good or valid.

Contracted from "evil"; as in ill-fame. Also, contrary to rule or practice; as in ill-pleading; ill for want of certainty. Anderson.

ILL-FAME. A technical expression, which not only means bad character as generally understood, but applies to every person, whatever may be his conduct and character in life, who visits bawdy-houses, gaming-houses, and other places which are of ill-fame. 2 Hill, N. Y. 558; 17 Pick. 80; 1 Hagg. Eccl. 720, 767; 1 Hagg. Cons. 302; 2 Greenl. Ev. § 44.

The common interpretation of the term "house of ill-fame" is as a mere synonym for "bawdy-house," having no reference to the fame of the place. Yet, in evidence, some courts allow proof of the fact to be aided by the fame; 1 Bish. Cr. L. § 1088. See **DISORDERLY HOUSE**; **HOUSE OF ILL-FAME**.

ILLATA ET INVECTA. Things brought into the house for use by the tenants were so called, and were liable to the *jus hypothecæ* of Roman law, just as they are to the landlord's right of distress at common law.

ILLEGAL. Contrary to law; unlawful. Cf. **ERRONEOUS**.

ILLEGAL CONDITIONS. All conditions that are impossible, or contrary to law, immoral, or repugnant to the nature of the transaction. See **CONDITION**.

ILLEGAL CONSIDERATION. See **CONSIDERATION**.

ILLEGAL CONTRACT. See **CONSIDERATION**; **CONTRACT**; **UNLAWFUL AGREEMENT**; **VOID**; **VOIDABLE**.

ILLEGAL COVENANTS. See **COVENANT**.

ILLEGAL PRACTICES. In English Law. Certain acts so termed in, and prohibited by, the Corrupt and Illegal Practices Prevention Acts, 1883 and 1895. Both of those acts were passed in order to put an end to such practices (and also to corrupt practices, *q. v.*) at parliamentary elections.

The Municipal Elections (Corrupt and Illegal Practices) Act, 1884, was passed in order to purify municipal elections in like manner: It has been extended to county council elections by the Local Government Act, 1888, and to parish and district council, and other local government elections by the

Local Government Act, 1894, and by various orders made under statutory powers.

Illegal practices are: Payments for conveyance of voters to the poll, or for exhibition of addresses, bills or notices, or for excessive number of committee rooms; publishing false statement of withdrawal of candidate; publishing a bill, etc., without name and address of the printer; payment made by election agent after the authorized time or otherwise improperly made; election expenses in excess of maximum permitted, or election expenses paid otherwise than through the election agent; voting by prohibited persons; failing to make return of election expenses; false statements as to the personal character of a candidate. Byrne. See **CORRUPT PRACTICES**.

ILLEGAL TRADE. That which is carried on in violation of law, municipal or international. See **ILLICIT**.

A term sometimes used in reference to domestic buying and selling, irrespective of any obligations arising from the existence of war. But they are used in the decisions upon the laws of war in a special sense, signifying buying and selling which a subject of a government engaged in a war carries on with the enemy or enemy subjects, in violation of his allegiance. This is to be distinguished from traffic which a subject of a neutral nation carries on in violation of the obligations of neutrality only. Abbott. See **ILLICIT**.

ILLEGALITY. That which is contrary to the principles of law, as contradistinguished from mere rules of procedure. It denotes a complete defect in the proceedings. 2 Tex. App. 74; 1 Abb. Pr. N. S. 432; 2 Halst. 203.

ILLEGITIMACY. The status of a child born of parents not legally married at the time of birth. Moz. & W.

ILLEGITIMATE. That which is contrary to law; it is usually applied to children born out of lawful wedlock. 25 Alb. L. J. 131. See **BASTARD**.

ILLEVIABLE. A debt or duty that cannot or ought not to be levied. *Nihil* set upon a debt is a mark for *illeviable*.

ILLICENCIATUS. In Old English Law. Without license. Fleta, lib. 3, c. 5, 12.

ILLICIT. What is unlawful; what is forbidden by the law.

This word is frequently used in policies of insurance, where the assured warrants against illicit trade. By illicit trade is understood that "which is made unlawful by the laws of the country to which the object is bound." It is distinguished from "contraband trade," though sometimes used interchangeably with it. 1 Pars. Mar. Ins. 614. The assured, having entered into this warranty, is required to do no act which will expose the vessel to be legally condemned; 2 La. 337, 338. See **INSURANCE**; **WARRANTY**.

ILlicITE. Unlawfully.

This word has a technical meaning, and is requisite in an indictment where the act charged is unlawful; as, in the case of a riot; 2 Hawk. Pl. Cr. 25, § 96.

ILlicITUM COLLEGIUM. An unlawful corporation.

An illegal college, (society or assembly). Tayler's L. Gloss.

ILLINOIS. One of the states of the United States, being the twenty-eighth admitted to the Union.

Civil government was organized under the jurisdiction of the United States, by the ordinance of the Continental Congress, in 1787, the present state being then a part of the northwestern territory. In 1800 that territory was divided, and a territorial government was created in the Indiana territory, including this present state. In 1809 the territory of Illinois was created, and continued under the same ordinance and the laws of the Indiana territory. For a fuller statement of the territorial history, see Ohio.

In 1818 Illinois formed a constitution and was admitted into the Union.

ILLITERATE. Unacquainted with letters.

When an ignorant man, unable to read, signs a deed or agreement, or makes his mark instead of a signature, and he alleges and can prove that it was falsely read to him, he is not bound by it, in consequence of the fraud. And the same effect would result if the deed or agreement were falsely read to a blind man who could have read it before he lost his sight, or to a foreigner who did not understand the language. For a plea of "laymen and unlettered," see 4 Rawle 85, 94, 95.

To induce an illiterate man, by false representations and false reading, to sign a note for a greater amount than that agreed on, is indictable as a cheat; 1 Yerg. 76. See, generally, 2 Nel. Abr. 946; 2 Co. 3; 11 id. 28; F. Moore 143; 2 Bish. Cr. L. § 156.

ILLNESS. Pregnancy may create an illness within the meaning of 11 & 13 Vict. c. 43, § 17, so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who, owing to pregnancy is proved to be unable to travel; 8 Q. B. D. 426.

Illness is a word which may include, properly, an attack of a less grave and serious character than disease; an illness may be slight or severe; in either case it is an illness. 112 U. S. 259, quoting the Circuit Court of the United States for the Southern District of New York.

In an insurance policy, held that "illness" meant a disease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition, which does not tend to undermine and weaken the constitution of the insured. 15 A. & E. Ency. 2nd ed., 1018; 20 Fed. Rep. 596.

Paralysis of speech has been held to constitute an illness. *Id.*; 26 L. J. M. C. 136. But mere nervousness is not an illness. *Id.*; 38 J. P. 390. See **DISEASE**; **AFFECTION**.

ILLOCABLE. Not capable of being let out or hired.

ILLUD (Lat.). That.

ILLUMINATING GAS. See **GAS**.

ILLUSION. A term loosely applied to both delusions and hallucinations, but more frequently to the latter (*q. v.*). By some it is restricted to the perception of objects in characters which they do not possess.

The patient is deceived by the false appearance of things, and his reason is not sufficiently active and powerful to correct the error; and this last particular is what distinguishes the same from the insane. Illusions are not unfrequent in a state of health, but reason corrects the errors and dissipates them. A square tower seen from a distance may appear round, but on approaching it the error is corrected. A distant mountain may be taken for a cloud, but as we approach we discover the truth. To a person in the cabin of a vessel under sail, the shore appears to move; but reflection and a closer examination soon destroy this illusion. An insane individual is mistaken in the qualities, connections, and causes of the impressions he actually receives, and he forms wrong judgments as to his internal and external sensations; and his reason does not correct the error; 1 Beck. Med. Jur. 598; Tayl. Med. Jur. 683; Esquirol, *Maladies Mentales*, 1re partie, III, tome 1, p. 202; *Dict. des Sciences Médicales*, *Hallucination*, tome 20, p. 64. See **HALLUCINATION**.

ILLUSORY APPOINTMENT. Such an appointment or disposition of property under a power as is merely nominal and not substantial.

Illusory appointments are void in equity; Sugd. Pow. 489; 1 Vern. 67; 1 Term 438, note; 4 Ves. 785; 16 id. 26; 1 Taunt. 289. The rule at common law was, to require some allotment, however small, to each person, where the power was given to appoint to and among several persons; but the rule in equity requires a real substantial portion to each, a mere nominal allotment being deemed fraudulent and illusory; 4 Kent 342; 5 Fla. 52; 2 Stockt. Ch. 164.

In England equity jurisdiction on this point was ended by the statute 1 Wm. IV. c. 46, which declares that no appointment shall be impeached in equity, on the ground that it was unsubstantial, illusory, or nominal; but the entire exclusion of any object of a power not in terms exclusive was illegal, notwithstanding that act, until 1874. In that year the statute 37 and 38 Vict. c. 37 was passed, providing that,

under a power to appoint among certain persons, appointments may be made excluding one or more objects of the power; *Moz. & W. Dict.*

IMAGINE. In English Law. In cases of treason the law makes it a crime to imagine the death of the king. In order to complete the offence, there must, however, be an overt act,—the terms *compassing* and *imagining* being synonymous. It has been justly remarked that the words to compass and imagine are too vague for a statute whose penalty affects the life of a subject. *Barrington, Stat. 248.* See **FICTIO**.

IMBARGO. Obsolete for embargo (*q. v.*).

IMBASING OF MONEY. Mixing the species with an alloy below the standard of sterling, which the king by his prerogative may do. *Toml.*

IMBECILITY. In Medical Jurisprudence. A form of mental disease consisting in mental deficiency, either congenital or resulting from an obstacle to the development of the faculties supervening in infancy. *Idiocy.*

Generally, it is manifested both in the intellectual and moral faculties; but occasionally it is limited to the latter, the former being but little, if at all, below the ordinary standard. Hence it is distinguished into intellectual and moral. In the former there are seldom any of the repulsive features of idiocy, the head, face, limbs, and movements, being scarcely distinguishable, at first sight, from those of the race at large. The senses are not manifestly deficient, nor the power of articulation; though the use of language may be very limited. The perceptive faculties exhibit some activity; and thus the more obvious qualities of things are observed and remembered. Simple industrial operations are well performed, and, generally, whatever requires but little intelligence is readily accomplished. Occasionally a solitary faculty is prominently, even wonderfully, developed,—the person excelling, for instance, in music, in arithmetical calculations, or mechanical skill, far beyond the ordinary measure. For any process of reasoning, or any general observation or abstract ideas, imbeciles are totally incompetent. Of law, justice, morality, property, they have but a very imperfect notion. Some of the affective faculties are usually active, particularly those which lead to evil habits, thieving, incendiarism, drunkenness, homicide, assaults on women.

The kind of mental defect here mentioned is universal in imbecility, but it exists in different degrees in different individuals, some being hardly distinguishable, at first sight, from ordinary men of feeble endowments, while others encroach upon the line which separates them from idiocy; *Tayl. Jur. 689.*

The various grades of imbecility, however interesting in a philosophical point of view, are not very closely considered by courts. They are governed in criminal cases solely by their tests of responsibility, and in civil cases by the amount of capacity in connection with the act in question, or the abstract question of soundness or unsoundness.

Touching the question of responsibility, the law makes no distinction between imbecility and insanity. See **1 C. & K. 129.**

In civil cases, the effect of imbecility is differently estimated. In cases involving the validity of the contracts of imbecile persons, courts have declined to gauge the measure of their intellects, the only question with them being one of soundness or unsoundness, and "no distinction being made between important and common affairs, large or small property;" *4 Dane, Abr. 561. See 4 Cow. 207.* Courts of equity, also, have declined to invalidate the contracts of imbeciles, except on the ground of fraud; *1 Story, Eq. Jur. § 238.* Of late years, however, courts have been governed by other considerations. If the contract were for necessities, or showed no mark of fraud or unfair advantage, or if the other party, acting in good faith and ignorant of the other's mental infirmity, cannot be put *in statu quo*, the contract has been held to be valid; *Chitty, Contr. 112; Story, Contr. § 27; Poll. Contr. 88; 4 Exch. 17.*

The same principles have governed the courts in cases involving the validity of the marriage contract. If suitable to the condition and circumstances of the party, and manifestly tending to his benefit, it has been confirmed, notwithstanding a considerable degree of incompetency. If, on the other hand, it has been procured by improper influences, manifestly for the ad-

vantage of the other party, it has been invalidated; *1 Hagg. 355; Ray, Med. Jur. 100.* The law has always showed more favor to the wills of imbeciles than to their contracts. "If a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent, as it were, betwixt a wise man and a fool,—yea, though he rather inclined to the foolish sort, so that for his dull capacity he might worthily be called *grossum caput*, a dull pate, or a dunce,—such a one is not prohibited to make a testament;" *Swinb. Wills, part 2, s. 4.* Whether the testament be established or not, depends upon the circumstances of the case; and the English ecclesiastical courts have always assumed a great deal of liberty in their construction of these circumstances. The general principle is that if the will exhibits a wise and prudent disposition of property, and is unquestionably the will of the testator, and not another's, it should be established, in the face of no inconsiderable deficiency; *1 Hagg. 384.* Very different views prevailed in a celebrated case in New York; *Stewart v. Lispenard, 26 Wend. 256.* The mental capacity must be equal to the act; and if that fact be established, and no unfair advantage have been taken of the mental deficiency, the will, the marriage, the contract, or whatever it may be, is held to be valid.

The term moral imbecility is applied to a class of persons who, without any considerable, or even appreciable, deficiency of intellect, seem to have never been endowed with the higher moral sentiments. They are unable to appreciate fully the distinctions of right and wrong, and, according to their several opportunities and tastes, they indulge in mischief as if by an instinct of their nature. To vice and crime they have an irresistible proclivity, though able to discourse on the beauties of virtue and the claims of moral obligation. While young, many of them manifest a cruel and quarrelsome disposition, which leads them to torture brutes and bully their companions. They set all law and admonition at defiance, and become a pest and a terror to the neighborhood. It is worthy of notice, because the fact throws much light on the nature of this condition, that a very large proportion of this class of persons labor under some organic defect. They are scrofulous, rickety, or epileptic, or, if not obviously suffering from these diseases themselves, they are born of parents who did. Their progenitors may have been insane, or eccentric, or highly nervous, and this morbid peculiarity has become, unquestionably, by hereditary transmission, the efficient cause of the moral defect under consideration. Thus lamentably constituted, wanting in one of the essential elements of moral responsibility, they are certainly not fit objects of punishment; for though they may recognize the distinctions of right and wrong in the abstract, yet they have been denied by nature those facilities which prompt men more happily endowed to pursue the one and avoid the other. In practice, however, they have been regarded with no favor by the courts; *Ray, Med. Jur. 112.* See **INSANITY; DEMENTIA.**

IMBLADARE. To plant or sow grain. *Bract. fol. 176 b.*

IMBRACERY. See **EMBRACERY.**

IMBROCUS. A gutter; a brook; a water passage. *Cowel.*

IMMATERIAL. Unnecessary or non-essential; impertinent (*q. v.*); indecisive.

IMMATERIAL AVERMENT. In Pleading. A statement of unnecessary particulars in connection with, and as descriptive of, what is material. *Gould, Pl. c. 3, § 186.* Such averments must, however, be proved as laid, it is said; *Dougl. 665;* though not if they may be struck out without striking out at the same time the cause of action, and when there is no variance; *Gould, Pl. c. 3, § 188.* See **1 Chitty, Pl. 282.**

IMMATERIAL ISSUE. In Pleading. An issue taken upon some collateral matter, the decision of which will not settle the question in dispute between the parties in action. For example, if, in an action of debt on bond, conditioned for the payment of ten dollars and fifty cents at a certain day, the defendant pleads the payment of ten dollars according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon the payment, it is manifest that, whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled to maintain his action, or not; for, in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is whether the exact sum was paid or not, and the question of payment of a part is a question quite beside the legal merits; *Hob. 113; 5 Taunt. 386; Cro. Jac. 585; 2 Wms. Saund. 319 b.* A repleader will be ordered when an immaterial issue is reached, either before or after verdict; *2 Wms. Saund. 319 b, note; 1 Rolle, Abr. 86; Cro. Jac. 585.* See **REPLEADER.**

IMMEDIATE. As to time. Present; without delay or postponement. Strictly it implies not deferred by any lapse of time, but as usually employed, it is rather within reasonable time having due regard to the nature and circumstances of the case. This word and immediately (*q. v.*) are of no very definite signification and are much subject to the context. In legal proceedings they do not impart the exclusion of any interval of time; *31 N. J. L. 313.* As to immediate delivery, see *36 N. J. L. 148.* "Immediate" notice may be construed as meaning "reasonable notice;" *27 S. W. Rep. (Mo.) 439. See 7 Cent. L. J. 15, 73.*

As to place, etc. Not separated by any intervening space, cause, right, object, or relation. See *2 Lev. 77; 7 Mann. & G. 493; 29 Pa. 198; 43 Wis. 316, 479; IMMEDIATELY; FORTHWITH.*

As to descent. Judge Story says it may be mediate or immediate with respect to the estate or right, or with respect to the pedigree or degrees of consanguinity; *6 Pet. 112.*

Danger. By "immediate danger" the law means such as is then and there present and about to be inflicted. *11 Bush (Ky.) 688.*

Notice. The term "immediate notice" in an insurance policy means that notice must be furnished within a reasonable time. *140 Ky. 610, 131 S. W. 523; 149 Ky. 735, 149 S. W. 1025.*

IMMEDIATELY. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time," and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case; *4 Q. B. Div. 471. See 4 Yo. & Colly. Ch. 511; 8 M. & W. 281.*

Within a reasonable time. *Anderson;* Never, or very rarely, employed to designate an exact portion of time. *Id.; 8 M. & W. 286-9.* Imports "as soon as conveniently could be done." *R. & L. Dict.; 4 Com. Dig. 671 n. (b).* Not synonymous with "then and there." *Id.; 1 Mo. App. 3, 6.*

IMMEMORIAL POSSESSION. In Louisiana. Possession of which no man living has seen the beginning, and the existence of which he has learned from his elders. *2 Mart. La. 214; 7 La. 46; 3 Toulhier p. 410; Poth. Contr. de Société, n. 244.*

IMMEMORIAL USAGE. Prescription; custom which has existed so long that the memory of man runneth not to the contrary.

IMMEUBLES. In French Law. Immoveables. They derive their character as such (1) from their own nature as lands, etc.; (2) from their destination, as animals or implements furnished to a tenant by his landlord; and (3) by the object to which they are annexed.

IMMIGRANTS. See **ALIEN IMMIGRANTS.**

IMMIGRATION. The removing into one place from another. It differs from emigration, which is the moving from one place into another.

By an act of congress, passed August 3, 1882, it was provided that there should be collected "a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States. . . . The money thus collected shall be paid into the United States treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the secretary of the treasury, to defray the expense of regulating immigration under this act and for the care of immigrants arriving in the United States." This has been termed the head-money tax. This act of congress is similar in its essential features to statutes enacted by many states of the Union for the protection of their own citizens, and for the good of the immigrants who land at seaports within their borders. A statute of New York, covering this ground was, however, held void as infringing upon the ground of national legislation; 92 U. S. 259, 273, and 107 *id.* 59. The question arose under the act of congress in the supreme court of the United States in what were called the head-money cases; 112 *id.* 580; and that act was held valid. See POLICE POWER.

The immigration of the Chinese has been and continues to be the subject of important legislation. The act of congress of March 3, 1875, Rev. Stat. §§ 2158-2164, prohibits any vessels being built or registered in the United States for the purpose of procuring from any port the subjects of China, Japan, or any other oriental country, known as "coolies," to be transported to any foreign place, to be disposed of or sold as servants or apprentices; § 2158. Vessels so employed shall be forfeited; § 2159. Building, fitting out, or otherwise preparing or navigating vessels for such trade, is punishable by fine and imprisonment; §§ 2160, 2161. But this act does not interfere with voluntary immigration; § 2162; and no tax shall be enforced by any state, upon any person immigrating thereto from a foreign country, which is not equally imposed upon every person immigrating thereto, from any other foreign country; § 2164. The immigration of convicts and women for purposes of prostitution is also prohibited; Supplement to Rev. Stat. p. 181, §§ 3 & 5; 18 Stat. L. 477; 53 Fed. Rep. 1001; also alien laborers; 23 Stat. L. 332; and also all Chinese laborers, whether under contract or not; 25 Stat. L. 476, 504.

The act which provides for the exclusion from admission of certain classes of aliens, and which makes the decision of the inspectors of immigration adverse to the right of any alien to land, final and conclusive unless appeal is taken to the superintendent of immigration, is a constitutional exercise of the power of congress; 142 U. S. 651.

The government of the United States, through the action of the legislative department, can exclude aliens from its territory, although no actual hostilities exist with the nation of which the aliens are subjects; 130 U. S. 581. See ALIEN; CHINESE; DEPORTATION.

IMMIGRATION LAWS. Laws passed by Congress to regulate immigration into the United States. *E. g.*, Congress has provided that all idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and persons assisted by others to immigrate shall be excluded from the United States. The statute further provides for the regulation of transportation companies, the appointment of inspectors and the retransportation of aliens entering in defiance of the act. The statute also makes several exceptions from its provisions. 15 A. & E. Ency. 2nd ed., 1026.

IMMISCERE (Lat.). In Civil Law. To put or let into, as a beam into a wall. Calv. Lex.

In Old English Law. To turn cattle out on a common. Fleta, lib. 4, c. 20, § 7. To mix or mingle with; to meddle with; to join with. Burrill; Calv. Lex.

To take or enter upon an inheritance. A term applied to those heirs called *haeredes sui*, corresponding with *adire*, which was applied to *haeredes extranei*. *Id.*; Calv. Lex.

IMMOBILIS (Lat.). Immovable. *Immobilia*, or *res immobiles*, immovables (*q. v.*).

IMMORAL CONSIDERATION. One contrary to good morals, and therefore invalid. Contracts based upon an immoral consideration are generally void; Poll. Con. 236. An agreement in consideration of future illicit cohabitation between the parties; 3 Burr. 1568; 1 Esp. 13; 1 B. & P. 340 & 341; an agreement for the value of libelous and immoral pictures; 4 Esp. 97, or for printing a libel, 2 Stark. 107, or for an immoral wager, Chitty, Contr. 156; cannot, therefore, be enforced. For whatever arises from an immoral or illegal consideration is void; *quid turpi ex causa promissum est non valet*; Inst. 3, 20, 24.

It is a general rule that whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties where it finds them; when the agreement has been executed, the court will not rescind it; when executory, the court will not help the execution; 4 Ohio 419; 4 Johns. 419; 11 *id.* 388; 12 *id.* 306; 19 *id.* 341; 3 Cow. 213; 2 Wils. 341. See CONSIDERATION.

IMMORALITY. That which is *contra bonos mores*.

In England, it is not punishable, in some cases, at the common law, on account of the ecclesiastical jurisdictions: *e. g.* adultery. But except in cases belonging to the ecclesiastical courts, the court of king's bench is the *custos morum*, and may punish *delicta contra bonos mores*; 3 Burr. 1433; 1 W. Blackst. 94; 2 Stra. 788.

IMMOVABLES. In Civil Law. Property which, from its nature, destination, or the object to which it is applied, cannot move itself or be removed. Pothier, *des Choses*, § 1; *Clef des Lois Rom. Immeubles*.

IMMUNITY. An exemption from serving in an office, or performing duties which the law generally requires other citizens to perform. See Dig. lib. 50, t. 6; 1 Chitty, Cr. Law 821; 4 H. & M.H. 341.

IMPAIRING THE OBLIGATION OF CONTRACTS. By Article First, Section 10, Clause 1, of the Constitution of the United States "No state shall pass . . . any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

There has been much discussion as to the reasons which led the Convention of 1787 to insert this clause in the constitution. They seem to have intended that it should prevent the states from passing stay laws and bankrupt laws (Bradley, J., 99 U. S. 745), and other acts which would interfere with private contracts or engagements previously formed. Stay laws to prevent the collection of debts had been passed in many of the states, especially in the South. In the Dartmouth College case, 4 Wheat. 518, Chief Justice Marshall said that he thought it more than possible that the convention had not intended by the clause to preserve the integrity of the charters of corporations. But in Pennsylvania the legislature had revoked the charter of the College of Philadelphia and virtually confiscated its property by taking it away from its trustees and giving it to another set of trustees who were of the political party which controlled the legislature. The same legislature had annulled the charter of the Bank of North America to which it was hostile, and would have succeeded in wrecking it, if the bank had not had another charter from congress, and soon after obtained one from the state

of Delaware. These acts of spoliation alarmed all men of property, and James Wilson, a Pennsylvania member of the convention, who had been interested in both the bank and the college, was most active in procuring the adoption of the clause. Fisher's "Pennsylvania: Colony and Commonwealth" 375, 383; Fisher's "Evolution of the Constitution" 262; Shirley's "Dartmouth College Case" 213, 220; Alfred Russell's Address before Grafton and Coos Bar Association of New Hampshire, 1895 (reprinted Am. Law Rev. vol. 30, p. 321).

This article of the constitution forbids only the states to pass laws impairing the obligation of contracts, and there is no express provision prohibiting congress from passing such laws. It would seem, moreover, as some have argued, that there is an implied power in congress to pass such laws, for we find in the constitution a number of general prohibitions in which both congress and the states are prohibited from passing bills of attainder and *ex post facto* laws; 1 Pet. 22. The omission of the prohibition in one case and the expression of it in the other might seem to imply that the power to pass laws impairing the obligation of contracts remained in congress; and congress is expressly given power to pass bankrupt laws which impair the obligation of contracts between debtors and creditors; 4 Wheat. 122; and, under the decisions of the supreme court, congress may issue notes as legal tender in satisfaction of antecedently contracted debts. But the general exercise of such a power by congress has been said to be contrary to the first principles of the social compact and to every principle of sound legislation; Federalist No. 44. Bradley, J., in a dissenting opinion in the Sinking-Fund Cases, 99 U. S. 746, took the same view of the origin of this provision, and said further that it fully explained the fact that no such inhibition was laid upon the national legislature, and he was further of opinion that the absence of such inhibition furnished no ground of argument in favor of the proposition that congress can pass arbitrary and despotic laws with regard to contracts any more than with regard to any other subject-matter of legislation.

The provision of the constitution is, however, not applicable to laws enacted by the states before the first Wednesday in March, 1789; 5 Wheat. 420.

All contracts, whether executed or executory, express or implied, are within the prohibition; 6 Cranch 135; 7 *id.* 164; 8 Wheat. 1; 109 U. S. 285; 15 Wall. 300; 116 U. S. 131; and also judgments founded upon contracts; 103 U. S. 358; 105 *id.* 228, 733. A state law annulling private conveyances is also within the prohibition, as are laws repealing grants and corporate franchises; 3 Hill, N. Y. 531; 1 Pick. 224; 2 Yerg. 534; 13 Miss. 112; 9 C. R. A. 43, 292; 2 Pet. 657; 4 Wheat. 656; 6 How. 301.

A state constitution is not a contract, the obligation of which the state is prohibited by the federal constitution from impairing; 121 U. S. 282; nor is a judgment for a tort; 109 U. S. 285; 131 U. S. 405. But the prohibition applies to state constitutions as well as to the laws of a state; 10 Wall. 511; 115 U. S. 650; 116 *id.* 631; and to a decision of a state court altering a former construction of a law, subsequently to which construction the contract was made. The prohibition does not apply to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of making the contract; 163 U. S. 273; citing 121 *id.* 358; 150 *id.* 18; 159 *id.* 103. "The sound and the true rule is that, if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law." Taney, C. J., in 16 How. 432; approved in Geipelcke v. Dubuque, 1 Wall. 175. See, also, *id.* 678; 101 U. S. 677; 105 *id.* 728.

The judgment of a state court declaring a contract invalid does not impair the obligation of the contract, unless such judgment gives effect to some provision of the state constitution, or some act which is claimed by the unsuccessful party to impair the obligation of the contract in question; 121 U. S. 388. In such cases, the supreme court of the United States does not accept as conclusive the judgment of the state court as to the non-impairment of the contract; 101 U. S. 791; 109 *id.* 244.

An act may regulate or limit existing remedies on a contract, provided it leaves a substantial remedy in force; for instance, by providing that service of process may be made on any officer or agent of a corporation; 95 U. S. 168; an act may abolish imprisonment for debt as a remedy for breach of contract; 103 U. S. 714; may invalidate technically defective mortgages; 108 U. S. 477; and conveyances by *femes covert*; 23 Wall. 137; grant new trials; 11 How. 202; repeal usury laws, though if not repealed they would have rendered a contract void; 108 U. S. 143; may reduce the period of limitation for bringing suits if it leaves a reasonable period for suits for breaches of existing contracts; 104 U. S. 660; require the recording of existing mortgages, if it allow a reasonable time before the act takes effect; 108 U. S. 514; may provide for the reorganization of an insolvent corporation, and that creditors who have notice and do not dissent, shall be bound thereby; 109 U. S. 401.

An act is invalid which, after a contract is made, changes the measure of damages to be recovered for a breach; 115 U. S. 566; also, which imposes as a condition precedent to enforcing a right that the plaintiff shall prove that he never aided the rebellion against the United States; 16 Wall. 234. So is an act which, after a judgment has been enrolled, materially increases the debtor's exemption; 15 Wall. 610; and an act which, after the execution of a mortgage, increases the period of redemption after foreclosure; 24 How. 461; and an act which forbids a sale on the foreclosure of a mortgage at which less than two-thirds of the appraised value of the mortgage premises is realized; 1 How. 311.

The law, as declared by a decision of the supreme court, when not a construction of a statute, does not enter into contracts made thereafter, and the subsequent reversal of the decision does not, therefore, impair the obligation of contracts; 121 U. S. 388; 159 *id.* 108. See 2 Hare, Am. Const. L. 726.

Contracts to which a state is a party are within the protection of this constitutional prohibition; 6 Cra. 87; and a provision in a charter of a toll bridge company that it shall not be lawful for any person to erect another bridge within a specified distance of the bridge authorized by said charter constitutes a contract which binds the state not to authorize the construction of such other bridge; 3 Wall. 51. A contract between a state and a party, whereby he is to perform certain duties for a specified period for a stipulated compensation, is within the protection of the constitution; 108 U. S. 5. It being held that where a state descends from the plane of its sovereignty, it is regarded, *pro hac vice*, as a private person itself and is bound accordingly.

A state is bound by its grants of franchises and exclusive privileges, such as the privilege of supplying a municipality with water; 115 U. S. 674; or gas; *id.* 650, 668. A state is bound by the issue of bonds and coupons under the terms of an act which provided that such coupons should be receivable for taxes, etc., and a subsequent act which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon-holders; 114 U. S. 270; 116 *id.* 572; 121 *id.* 105.

A state, when it borrows money and promises to pay it with interest, cannot, by its own ordinance, relieve itself from performing to the letter all that it has expressly promised to its creditors; 96 U. S. 433. But with regard to grants, this clause of the constitution was not intended to control

the exercise of the ordinary functions of government. It was not intended to apply to public property, to the discharge of public duties, to the exercise or possession of public rights, or to any changes or qualifications in these which the legislature of a state may at any time deem expedient; 1 Ohio St. 603, 609, 657; 5 Me. 339; 13 Ill. 27; 13 Ired. 175; 1 Green, N. J. 553; 1 Dougl. Mich. 225; 17 Conn. 79; 6 S. & R. 322; 13 Pa. 133; 1 H. & J. 236; 6 How. 548; 1 Sumn. 277. See 4 Wheat. 427; 19 Pa. 258; 4 N. Y. 419; 3 How. 133.

One of the first applications of the doctrine of the impairment of contracts was to the charter of a corporation in the Dartmouth College case; 4 Wheat. 518; which held that the charter was a contract the obligation of which could not afterwards be impaired by the legislature without the corporation's consent. Since then charters of incorporation which are granted for the private benefit or purposes of the corporation have always been held to be contracts between the legislature and the corporation, having for their consideration or liability the duties which the corporation assumes by accepting them; Cooley, Const. Lim. 279; Moraw. Priv. Corp. 1044; Hare, Am. Const. L. 421, 527; 146 U. S. 258. To guard against the danger which the growth of great corporations, under the protection of this principle, has developed, the new constitutions of many of the states forbid the granting of corporate powers except subject to amendment and repeal. Provisions of this sort have become so general that the effect of the doctrine that a state cannot pass an act impairing the obligation of a contract has been largely modified. The decisions of the supreme court of the United States have also worked further modifications. The first was in the famous Charles River Bridge case in 1837, 11 Pet. 420, where the court held that when the legislature had chartered a bridge company with the right to take tolls there was no implied contract that they would not charter another company to build a bridge alongside of the first which would in effect destroy the profits of the first by competition. The next modification was in the Granger cases in 1876; 94 U. S. 113 to 187; which held that the regulation by the legislature of the rates to be charged by railroads and elevators was not an impairment of the obligation of a contract. See also 143 U. S. 339. This doctrine having been carried to great lengths in allowing the legislature to regulate the rates to be charged, the supreme court has now modified the doctrine by declaring that the power to regulate is not a power to destroy, and that a legislature, under the pretence of regulating fares and freights, cannot require a railroad to carry persons and property without profit; 164 U. S. 578, 593.

On the general subject of the power of the legislature under its right reserved to alter, amend, and repeal, see 109 Mass. 103; 63 Me. 569; 41 Ia. 297; 9 R. L. 194; Cooley, Const. Lim. 279, note; Moraw. Priv. Corp. 1093; 146 U. S. 258; 133 *id.* 287.

In general, only contracts are embraced in this provision which respect property or some object of value and confer rights which can be asserted in a court of justice. Debts are not property. A non-resident creditor of a state cannot be said to be, by virtue of a debt which it owes him, a holder of property within its limits; 96 U. S. 432.

The following acts have been held void as impairing the obligation of a contract: The Insolvent Act of 1812 of Pennsylvania, so far as it attempted to discharge the contract; 6 Wheat. 131; the Insolvent Law of Indiana affecting debts to citizens of other states; 5 How. 295; the Act of Maryland of 1841 taxing stockholders in banks impaired the obligation in the Act of 1821 organizing banks; 3 How. 133; the Act of Ohio of 1851, taxing the state bank; 16 How. 369; General Tax Law of North Carolina as applied to a railroad whose charter exempted it from taxation; 13 Wall. 264; the same in South Carolina; 16 Wall. 244; the same in New Jersey; 95 U. S. 104; the same in Illinois as applied to the charter of a

university; 90 U. S. 309; the same in Louisiana applied to the charter of an asylum; 105 U. S. 362; the Act of Illinois of 1841 restricting mortgage sales impaired the obligation of a mortgage contract; 1 How. 311; the Acts of Arkansas withholding assets of state banks from creditors impaired contracts with creditors; 15 How. 304; the Act of New York of 1855 authorizing a bridge to be built impaired the obligation in a charter to another company; 3 Wall. 51; the Act of Georgia of 1868 exempting property from execution impaired the obligation of a prior judgment; 13 Wall. 646; the same in Georgia; 15 Wall. 610; the same in North Carolina; 96 U. S. 595; the Act of Virginia of 1876 as to the deduction of taxes from coupons on state bonds impaired the obligation to the state bondholders under the Funding Act of 1871; 102 U. S. 672; the Ordinance of New Orleans of 1881 authorizing a light company to furnish New Orleans with gas impaired the obligation to another company under another act; 115 U. S. 550; so in Kentucky; 115 U. S. 683.

Grants of exclusive privileges by state governments are subject to the exercise of the right of eminent domain by the state. The legislature has full authority to exercise an unlimited power as to the management, employment, and use of the eminent domain of the state, and to make all provisions necessary to the exercise of this right or power, but no authority whatever to give it away or take it out of the people directly or indirectly; 6 How. 552; 20 Johns. 75; 17 Conn. 61; 23 Pick. 360; 15 Vt. 745; 3 N. H. 398; 8 Dana 289; 9 Ga. 517; 84 Va. 271. See EMINENT DOMAIN; FRANCHISES.

The power of one legislature to exempt altogether from taxation certain lands or property, and in this way to bind subsequent legislatures and take from the people one of their sovereign rights, may, where a consideration has been given, be considered now as distinctly settled by the supreme court of the United States, though not without remonstrance on the part of state courts; and the abandonment of this taxing power is not to be presumed where the deliberate purpose of the state does not appear; 4 Pet. 514; 3 How. 133; 4 Mass. 305; 2 Hill, N. Y. 353; 10 N. H. 138; 5 Gill 231; 13 Vt. 525; 30 Pa. 442; 1 Ohio St. 563, 591, 603; 7 Cra. 164; 10 Conn. 495; 8 Wall. 430; 20 *id.* 36. See 143 U. S. 192; 143 *id.* 1; 37 Fed. Rep. 24; 86 Tenn. 614. The grant of the power of taxation by the legislature to a municipal corporation is not a contract, but is subject to revocation, modification, and control by the legislature; 139 U. S. 189.

In relation to marriage and divorce, it is now settled that this clause does not operate. The obligation of the marriage contract is created by the public law, subject to the public will, and to that of the parties; 7 Dana 181; 125 U. S. 190; 1 Bish. Mar. & D. § 9. The prevailing doctrine seems to be that the legislature has complete control of the subject of granting divorces, unless restrained by the constitution of the state; but in a majority of the states the constitutions contain this prohibition; Cooley, Const. Lim. 133; and there the jurisdiction in matters of divorce is confined exclusively to the judicial tribunals, under the limitations prescribed by law; 2 Kent 106. But where the legislature has power to act, its reasons cannot be inquired into; marriage is not a contract but a *status*; the parties cannot have vested rights of property in a domestic relation; therefore the legislative act does not come under condemnation as depriving parties of rights contrary to the law of the land; 8 Conn. 541; Cooley, Const. Lim. 112.

In relation to bankruptcy and insolvency, the constitution, art. 1, § 8, cl. 4, gives to congress the power of making a bankrupt law. But it seems to be settled that this power is not exclusive; because the several states may also make distinct bankrupt laws,—though they have generally been called *insolvency laws*,—which will only

be superseded when congress chooses to exercise its power by passing a bankruptcy law; 4 Wheat. 122; 12 *id.* 213; 13 Mass. 1. See 3 Wash. C. C. 313; Bish. *Insolv.* Debt. 59.

Exemption from arrest affects only the remedy, an exemption from attachment of the property, or a subjection of it to a stay law or appraisal law, impairs the obligation of the contract. Such a statute can only be enforced as to contracts made subsequently to the law; 1 How. 311; 8 Wheat. 1, 75; see 9 Pet. 359; 4 Wall. 535; 96 U. S. 69; but a law abolishing distress for rent has been held to be applicable to cases in force at its passage; 14 N. Y. 22. With regard to exemption from arrest the supreme court holds that in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy, or so embarrass it with conditions or restrictions as seriously to impair the value of the right; 103 U. S. 720. See 135 U. S. 662. Whatever belongs, merely, to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of a contract; 134 U. S. 515.

It is admitted that a state may make partial exemptions of property, as of furniture, food, apparel, or even a homestead; 1 Denio 128; 1 N. Y. 129; 2 Dougl. Mich. 38; 4 W & S. 218; 17 Miss. 310. A homestead exemption may be made applicable to previously existing contracts; 66 N. C. 164; *contra*, 22 Gratt. 266; 6 Baxt. 225. But a law preventing all legal remedy upon a contract would be void; 13 Wall. 662; 1 S. C. N. s. 63; 15 Wall. 610. A contract providing that dower or right of dower shall not be subject to seizure or execution for the husband's debts during his lifetime, cannot affect the rights of creditors whose claims arose before the passage of the act; 109 N. C. 665. See 101 *id.* 382.

Nothing in the constitution prevents a state from passing a valid statute to divest rights which have been vested by law in an individual, provided it does not impair the obligation of a contract; 3 Dall. 386; 2 Pet. 412; 8 *id.* 89; 5 Barb. 48; 9 Gill 299; 1 Md. Ch. Dec. 66. See 54 Fed. Rep. 660; 129 U. S. 36; 134 *id.* 296. This inhibition in the constitution is wholly prospective, and the states may legislate as to contracts thereafter made as they see fit; 96 U. S. 603; 128 U. S. 489; 121 *id.* 388; 145 *id.* 454.

Insolvent laws are valid which are in the nature of a *cessio bonorum*, leaving the debt still existing, or which provide for the discharge of the debt, but refer only to subsequent contracts, or which merely modify or affect the remedy, as by exempting the person from arrest, but still leave means of enforcing. But a law exempting the person from arrest and the goods from attachment on mesne process or execution would be void, as against the constitution of the United States; 6 How. 338; 16 Johns. 233; 6 Pick. 440; 9 Conn. 314; 1 Ohio 236; 9 Barb. 382; 4 Gilm. 221; 13 B. Monr. 285; the right of antecedent creditors are protected by the constitution; 129 U. S. 36. The state insolvent laws in practice operate in favor of the citizens of the particular state only, as to other citizens of the same state, and not against citizens of other states, unless they have assented to the relief or discharge of the debtor expressly, or by some equivalent act, as by becoming a party to the process against him under the law, taking a dividend, and the like; 1 Gall. 371; 3 Mas. 88; 5 Mass. 509; 13 *id.* 18, 19; 2 Blackf. 366; 3 Pet. 41; but the mere circumstance that the contract is made payable in the state where the insolvent law exists will not render such contract subject to be discharged under the law; 1 Wall. 223, 234; 4 *id.* 409.

Some states refuse to aid a citizen of another state in enforcing a debt against a citizen of their own state, when the debt was discharged by their insolvent law. In such cases the creditor must resort to the court of the United States within the state; 1 Gall. 168; 8 Pick. 194; 2 Blackf. 394; Baldw. 296; 9 N. H. 478. See *INSOLVENT*

LAWS.

A statute of limitation does not impair the obligation of a contract, or deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit; 137 U. S. 245; 137 *id.* 258, note; 135 *id.* 662.

The law of place acts upon a contract, and governs its construction, validity, and obligation, but constitutes no part of it. The law explains the stipulations of parties, but never supersedes or varies them.

This is very different from supposing that every law is applicable to the subject-matter, as statutes of limitation and insolvency, or enters into and becomes a part of the contract. This can neither be drawn from the terms of the contract, nor presumed to be contemplated by the parties.

There is a broad distinction taken as to the obligation of a contract and the remedy upon it. The abolition of all remedies by a law operating *in presenti* is, of course, an impairing of the obligation of the contract. But it is admitted that the legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, and bars suits not brought within such times as may be prescribed. A reasonable time within which rights are to be enforced must be given by laws which bar certain suits; 3 Pet. 290; 1 How. 311; 2 Gall. 141; 8 Mass. 430; 1 Blackf. 36; 14 Me. 344; 7 Ga. 103; 21 Miss. 335; 1 Hill, S. C. 328; 7 B. Monr. 163; 9 Barb. 459.

The meaning of obligation is important with regard to the distinction taken between the laws existing at the time the contract is entered into and those which are enacted afterwards. The former are said to have been in contemplation of the parties, and so far entered into their contract. The latter are said to impair, provided they affect the contract at all. See cases *supra*.

The weight of authority is that this clause of the constitution, like that which relates to the regulation of commerce by the congress of the United States, does not limit the power of a state to enact general police regulations for the preservation of public health and morals; 8 How. 163; 1 Ohio St. 15; 12 Pick. 194; 7 Cow. 349, 585; 27 Vt. 149; 17 Colo. 376. See 8 Mo. 607, 697; 3 Harr. Del. 442; 5 How. 504; 7 *id.* 283; 11 Pet. 102. See, generally, Story, *Const.* § 1368; Sergeant, *Const. Law* 356; Hare, *Am. Const. L.* 768; Rawle, *Const.*; Dane, *Abr. Index*; 10 Am. Jur. 273; 2 Pa. 22; 150 *id.* 245; 16 Miss. 9; 3 Rich. S. C. 389; 8 Wheat. 1; 8 Ark. 150; 4 Fla. 23; 4 La. Ann. 91; 2 Dougl. Mich. 197; 10 N. Y. 281; 111 *id.* 132; 2 Gray 43; 3 Mart. La. 588; 26 Me. 191; 142 U. S. 79; 127 Ill. 240; 2 Pars. Contr. 509; Shirley, Dartmouth College Case; Cooley, *Const. Lim.* 279; Patterson, *Fed. Restr. on State Action*; RATES; GROUND RENT; *INSOLVENCY*.

IMPAIRMENT

Earning Power. The phrase "impairment of the power to earn money" implies that the injured person can perform some service or follow some wage-earning occupation and that his ability to earn money although reduced, is not totally destroyed. 140 Ky. 488, 131 S. W. 278.

"Temporary impairment of power to earn money" means "loss of time." 126 S. W. 120.

Impairing. The word "impairing" in the federal constitution, does not mean destroying. 4 Litt. (Ky.) 47.

IMPALARE. To impound. DuCange.

IMPANEL. In Practice. To write the names of jurors on a panel (*q. v.*), which is a schedule or list, in England of parchment: this is done by the sheriff, or other officer lawfully authorized.

In American practice, the word is used of a jury drawn for trial of a particular cause by the clerk, as well as of the general list of jurors returned by the sheriff. Grah. Pr. 275. See 1 Archb. Pr. 365; 3 Bla. Com.

354; 7 How. Pr. 441. Strictly speaking and at common law, juries are impanelled when the jurymen are selected and ready to be sworn; 55 Fed. Rep. 928.

IMPARCATUS. Shut up; confined in prison. Burrill.

IMPARGANCUTUM. The right to impound cattle.

IMPARLANCE (from Fr. *parler*, to speak).

In Pleading and Practice. Time given by the court to either party to answer the pleading of his opponent: as, either to plead, reply, rejoin, etc.

It is said to be nothing else but the continuance of the cause till a further day: Bacon, *Abr. Pleas* (C). In this sense imparlance are no longer allowed in English practice; 3 Chitty, Gen. Pr. 700; Andr. Steph. Pl. 162.

Time to plead. This is the common signification of the word; 2 Wms. Saund. 1, n. 2; 2 Show. 310; Barnes 346; Laws, Civ. Pl. 93. In this sense imparlance are not recognized in American law, the common practice being for the defendant to enter an appearance, when the cause stands continued, until a fixed time has elapsed within which he may file his plea. In the act of congress of May 19, 1828, § 2, the word imparlance was originally used for "stay of execution," but the latter phrase has been substituted for it: Rev. Stat. § 988. See CONTINUANCE.

A general imparlance is the entry of a general prayer and allowance of time to plead till the next term, without reserving to the defendant the benefit of any exception; so that after such an imparlance the defendant cannot object to the jurisdiction of the court, or plead any matter in abatement. This kind of imparlance is always from one term to another.

A general special imparlance contains a saving of all exceptions whatsoever, so that the defendant after this may plead not only in abatement, but he may also plead a plea which affects the jurisdiction of the court, as privilege. He cannot, however, plead a tender, and that he was always ready to pay, because by craving time he admits that he is not ready, and so falsifies his plea; Tidd, Pr. 418.

A special imparlance reserves to the defendant all exception to the writ, bill, or count; and therefore after it the defendant may plead in abatement, though not to the jurisdiction of the court.

See Comyns, Dig. *Abatement* (I) 19, 20, 21, *Pleader* (D); 1 Chitty, Pl. 420; 1 Sell. Pr. 265; Bacon, *Abr. Pleas* (C).

IMPARSONEE. A clergyman who by induction (*q. v.*) is in possession of a benefice. He is then termed *persona impersonata*—a parson imparsonnee. 1 Bla. Com. 391; Co. Litt. 300.

IMPARTIALLY. See FAITHFULLY.

IMPEACHMENT. A written accusation usually by the house of representatives of a state or of the United States to the senate of the state or of the United States against an officer.

The constitution declares that the house of representatives shall have the sole power of impeachment; art. 1, s. 2, cl. 5; and that the senate shall have the sole power to try all impeachments; art. 1, s. 3, cl. 6.

The persons liable to impeachment are the president, vice-president, and all civil officers of the United States; art. 2, s. 4. A question arose upon an impeachment before the senate, in 1799, whether a senator was a civil officer of the United States within the purview of this section of the constitution; and it was decided by the senate, by a vote of fourteen against eleven, that he was not; Senate Jour. Jan. 10, 1799; Story, *Const.* § 791; Rawle, *Const.* 213; Von Holst *Con. Hist.* 160. See UNITED STATES COURTS.

The offences for which a guilty officer may be impeached are treason, bribery, and other high crimes and misdemeanors; art. 2, s. 4. The constitution defines the

crime of treason; art. 3, s. 8. Recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law in order to ascertain what they are; *Story, Const.* § 795. It is said that impeachment may be brought to bear on any offense against the constitution or the laws which is deserving of punishment in this manner or is of such a character as to render the officer unfit to hold his office. It is primarily directed against official misconduct, and is not restricted to political crimes alone. The decision rests really with the senate; *Black, Const. L.* 121. The guilt of the accused must be established beyond a reasonable doubt; 37 *Neb.* 96.

The mode of proceeding in the institution and trial of impeachments is as follows: When a person who may be legally impeached has been guilty, or is supposed to have been guilty, of some malversation in office, a resolution is generally brought forward by a member of the house of representatives, either to accuse the party, or for a committee of inquiry. If the committee report adversely to the party accused, they give a statement of the charges and recommend that he be impeached. When the resolution is adopted by the house, a committee is appointed to impeach the party at the bar of the senate, and to state that the articles of impeachment against him will be exhibited in due time and made good before the senate, and to demand that the senate take order for the appearance of the party to answer to the impeachment. The house then agree upon the articles of impeachment, and they are presented to the senate by a committee appointed by the house to prosecute the impeachment. The senate then issues process, summoning the party to appear at a given day before them, to answer to the articles. The process is served by the sergeant-at-arms of the senate, and a return is made of it to the senate under oath. On the return-day of the process, the senate resolves itself into a court of impeachment, and the senators are sworn to do justice according to the constitution and laws. The person impeached is called to answer, and either appears or does not appear. If he does not appear, his default is recorded, and the senate may proceed *ex parte*. If he does appear, either by himself or attorney, the parties are required to form an issue, and a time is then assigned for the trial. The final decision is given by yeas and nays; but no person can be convicted without the concurrence of two-thirds of the members present; *Const.* art. 1, s. 2, cl. 6. See "Chase's Trial," and "Trial of Judge Peck;" also proceedings against Judge Humphreys, June 26, 1862, *Congress. Globe*, pt. 4, 3d sess., 32d Congress, pp. 2942-2959; and Trial of President Johnson, March 5, 1868, *Congress. Globe*, pt. 5, supplement, 40th Congress, 2d sess.; Lecture by Prof. Theo. W. Dwight, before Columbia Coll. Law School, 6 Am. Law Reg. 257; Article by Judge Lawrence, of Ohio, same volume, p. 641.

When the president is tried, the chief justice presides. The judgment, in cases of impeachment, does not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. Disqualification, as a punishment, is discretionary with the senate; *Black, Const. L.* 122. The party impeached remains liable to trial and punishment according to law. See UNITED STATES COURTS. Proceedings on impeachments under the state constitutions are somewhat similar.

In England, the articles of impeachment are a kind of indictment found by the house of commons, and tried by the house of lords. It has always been settled that a peer could be impeached for any crime. It was formerly believed that a commoner could only be impeached for high misdemeanors, not for capital offences; 4 *Bl. Com.* 260; but it seems now settled they

may be impeached for high treason; *May's Parl. Prac. Ch.* 23. Impeachments have been very rare in England in modern times.

In Evidence. An allegation, supported by proof, that a witness who has been examined is unworthy of credit.

Every witness is liable to be impeached as to his character for truth; and, if his general character is good, he is presumed at all times to be ready to support it; 49 *Ill.* 290. See 97 *Ala.* 14.

It is not admissible to impeach a defendant's testimony by showing that at a former trial for a like offence, he raised a similar issue and was contradicted; 155 *Mass.* 168. An accused person who testifies in his own behalf, is subject to impeachment, as other witnesses, by evidence of previous contradictory statements; 98 *Ala.* 169; 86 *Tenn.* 259. A witness cannot be impeached by the contradiction of immaterial statements; 58 *Ark.* 125; nor can he be as to collateral and irrelevant matter on which he was cross-examined; 66 *Miss.* 196; 75 *Cal.* 108; 76 *La.* 67; 39 *Kan.* 115; 97 *N. C.* 443; 69 *Tex.* 730; 61 *Vt.* 53; 32 *W. Va.* 177. Statements out of court inconsistent with those made by a witness in court are admissible to impeach him, where the proper foundation has been laid; 97 *Mo.* 165; 77 *Ga.* 781; 23 *Neb.* 683; 40 *Minn.* 65; 77 *La.* 623; 86 *Ala.* 110; 25 *Tex. App.* 686. In order to impeach a witness by showing his contradictory statements on other occasions, his attention must be first called to the time, place, and circumstances of the statements, whether they are in writing or were made orally; 137 *U. S.* 507; 132 *id.* 394.

IMPEACHMENT OF WASTE. A restraint from committing waste upon lands or tenements; or, a demand of compensation for waste done by a tenant who has but a particular estate in the land granted, and, therefore, no right to commit waste.

All tenants for life or any less estate are liable to be impeached for waste, unless they hold *without impeachment of waste*; in the latter case they may commit waste without being questioned, or any demand for compensation for the waste done; 11 *Co.* 82. See WASTE.

IMPECHIARE. To impeach, accuse, or prosecute for felony or treason. *Cowel.*

IMPEDIATUS. Disabled from mischief by expiation (*q. v.*). *Cowel.*

IMPEDIENS. One who hinders; the defendant or deforciant in a fine. *Cowel*; *Blount.*

IMPEDIMENTO. In Spanish Law. A prohibition to contract marriage, established by law between certain persons.

The disabilities arising from this clause are two-fold, viz.:

Impedimento Dirimente. Such disabilities as render the marriage null, although contracted with the usual legal solemnities. The disabilities arising from this source are enumerated in the following Latin verses:—

"Error, conditio, votum, cognatio, crimen, Cultus disparitas, vis, ordo, ligamen, honestas, Si sis affinis, si forte coire nequis, Si parochi sit duplicis desit presentia testis, Raptave sit mulier, nec pariter reddita tute, Hec facienda vetant conubia, facta retractant."

Among these impediments, some are *absolute*, others *relative*. The former cannot be cured, and render the marriage radically null; others may be removed by previous dispensation.

In Spain, marriage is regarded in the twofold aspect of a civil and a religious contract. Hence the disabilities are of two kinds, viz.: those created by the local law and those imposed by the church.

In the earlier ages of the church, the emperors prohibited certain marriages: thus, Theodosius the Great forbade marriages between cousins-german; Justinian, between spiritual relations; Valentinian, Theodosius, and Arcadius, between persons of different religions.

The Catholic church adopted and extended the disabilities thus created, and by the third canon at the twenty-fourth session of the Council of Trent, the church reserved to itself the power of dispensation. As the Council of Trent did not determine, being divided, who had the power of granting dispensation, it is accorded in Italy to the pope, and in France and Spain, with few exceptions, to the bishops. The dispositions of the Council of Trent being in force in Spain (see Schmidt, *Civ. Law of Spain*, p. 6, note a), the ecclesiastical authority is alone invested with this power in Spain.

For the cases in which it may be granted, see

Schmidt, *Civ. Law* c. 2, s. 14.

Impedimento, Impediente, or Prohibitivo.—Such disabilities as impede the contracting of a marriage, but do not annul it when contracted.

Anciently, the impediments expressed in the following Latin verses were of this nature:—

"Incestus, raptus, sponsalia, mors mulieris, Susceptus proprie sobolis, mors presbyterialis, Vel si pontifex solemniter, aut monialis Accipiat quicumque, votum simplex, catechismus, Ecclesiam vetitum, nec non tempus feriarum, Impediunt fieri, permittunt facta temerari."

For the effects of these impediments, see Eschriche, *Dict. Raz. Impedimento Prohibitivo.*

IMPEDIMENTS. Legal hindrances to making contracts. Some of these impediments are minority, want of reason, coverture, and the like. See CONTRACT; INCAPACITY.

In Civil Law. Bars to marriage.

Absolute impediments are those which prevent the person subject to them from marrying at all, without either the nullity of marriage or its being punishable.

Diriment impediments are those which render a marriage void; as, where one of the contracting parties is already married to another person.

Prohibitive impediments are those which do not render the marriage null, but subject the parties to a punishment.

Relative impediments are those which regard only certain persons with regard to each other; as, the marriage of a brother to a sister.

IMPENSÆ (Lat.). In Civil Law. Expense; outlay. Divided into *necessariae*, for necessity, *utiles*, for use, and *voluptuariae*, for luxury; *Dig.* 79. 6. 14; *Voc. Jur.*

IMPERATIVE. Mandatory as opposed to directory, as used of a statute (*q. v.*).

IMPERATOR. Emperor. The title of the Emperor in Rome and used also for the Kings of England in charters before the conquest. 1 *Bl. Com.* 242.

IMPERFECT OBLIGATIONS. Those which are not, in view of the law, of binding force.

IMPERFECT RIGHTS. See RIGHTS.

IMPERFECT TRUST. An executory trust (*q. v.*).

IMPERITIA. Want of skill.

IMPERIUM. The right to command, which includes the right to employ the force of the state to enforce the laws: this is one of the principal attributes of the power of the executive. 1 *Toullier*, n. 58.

IMPERSONALITAS. Impersonality. An expression used where no particular person is referred to, as where the words *ut dicitur* are used. *Co. Litt.* 352 b.

IMPERTINENT (Lat. in, not, pertinens, pertaining or relating to).

In Pleading. IN EQUITY. A term applied to matters introduced into a bill, answer, or other proceeding in a suit which are not properly before the court for decision at that particular stage of the suit. 1 *Sumn.* 506; 3 *Stor.* 13; 1 *Paige*, Ch. 555; 5 *Blackf.* 439; 15 *Fed. Rep.* 561. Impertinent matter is not necessarily scandalous; but all scandalous matter is impertinent.

The rule against admitting impertinent matter is designed to prevent oppression, not to become oppressive; 1 *T. & R.* 489; 6 *Beav.* 444; 27 *N. H.* 38. No matter is to be deemed impertinent which is material in establishing the rights of the parties or ascertaining the relief to be granted; 3 *Paige*, Ch. 606; 12 *Beav.* 44; 10 *Sim.* 345; 13 *id.* 583.

A pleading may be referred to a master to have impertinent matter expunged at the cost of the offending party; *Story*, Eq. Pl. § 266; 19 *Me.* 214; 4 *Hen. & M.* 414; 2 *Hayw.* 407; 4 *C. E. Gr.* 343; but a bill may not be after the defendant has answered; *Coop. Eq. Pl.* 19. In England, the practice of excepting to bills, answers, and other proceedings for impertinence has been abolished. The 27th Equity Rule of the United States courts requires that exceptions for scandal or impertinence shall point out the

exceptionable matter with certainty; 6 Paige 288; 1 Dan. Ch. Pr. *343, n., *350, n.

AT LAW. A term applied to matter not necessary to constitute the cause of action or ground of defence; 5 East 275; 2 Mass. 288. It constitutes surplage, which see.

In Practice. A term applied to evidence of facts which do not belong to the matter in question. That which is immaterial is, in general, impertinent, and that which is material is not, in general, impertinent. 1 M'C. & Y. 337. Impertinent matter in the interrogatories to witnesses or their answers, in equity, will be expunged after reference to a master at the cost of the offending party; 2 Y. & C. 445.

IMPESCARE. To impeach or accuse. *Impescatus*, impeached. Jac.; Blount.

IMPETITIO VASTI. Impeachment of waste, which title see.

IMPETRATION. The obtaining any thing by prayer or petition. In the ancient English statutes it signifies a pre-obtaining of church benefices in England from the church of Rome which belonged to the gift of the king or other lay patrons.

IMPIER. Umpire (q. v.).

IMPIERMMENT. Impairing or prejudicing. Jac. L. Dict.

IMPIGNORATA. Pledged; given in pledge (*pignori data*); mortgaged. A term applied in Bracton to land. Bract. fol. 20.

IMPIGNORATION. The act of pawning or pledging.

IMPLICARE (Lat.). To implead; to sue.

IMPLEAD. In Practice. To sue or prosecute by due course of law. 9 Watts 47.

IMPLEMENTS (Lat. impleo, to fill). Such things as are used or employed for a trade, or furniture of a house. 11 Metc. 82.

Whatever may supply wants: particularly applied to tools, utensils, vessels, instruments of labor: as, the *implements* of trade or of husbandry. Webster, Dict.; 23 Iowa 359; 6 Gray 298; or a music teacher's piano; 39 Ill. 338. The word does not include horses or other animals; 11 Metc. 79; 5 Ark. 41; 44 Conn. 98.

IMPLICATA (Lat.). Small adventures for which the freight contracted for is to be received although the cargo may be lost. Targa, c. 84; Emerigon, Mar. Loans § 5.

IMPLICATION. An inference of something not directly declared, but arising from what is admitted or expressed. See CONTRACT; DEED; EASEMENT; WAY; WILL.

IMPLIED. This word is used in law as contrasted with "express;" i. e., where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties.

IMPLIED ABROGATION. See ABROGATION.

IMPLIED AGREEMENT. See AGREEMENT.

IMPLIED ASSUMPSIT. See ASSUMPSIT.

IMPLIED COLOR. See COLOR.

IMPLIED CONSENT. See CONSENT.

IMPLIED CONSIDERATION. One that is implied by law, or presumed to exist in contradistinction to an expressed consideration (q. v.). In a case of a sealed instrument or negotiable paper the consideration is presumed. See CONSIDERATION.

IMPLIED CONTRACT. See CONTRACT.

IMPLIED COVENANT. See COVENANT.

IMPLIED MALICE. See MALICE.

IMPLIED POWER. See POWER.

IMPLIED TRUST. See TRUST.

IMPLIED USES. See RESULTING USE; USE.

IMPLIED WARRANTY. See CAVEAT EMPTOR; SALE; WARRANTY.

IMPORTATION. In Common Law. The act of bringing goods and merchandise into the United States from a foreign country. 5 Cra. 368; 9 id. 104, 120; 2 M. & G. 155, note a.

To prevent the mischievous interference of the several states with the national commerce, the constitution of the United States, art. 1, s. 10, provides as follows: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress." Story, Const. § 1618. Under this section it has been held that a state law imposing a license tax on importers of foreign liquors was unconstitutional; 12 Wheat. 419. See 5 How. 504; 7 id. 238; 12 id. 299; 11 Pet. 102. As was a state law imposing a tax on the tonnage of vessels entering her ports; 24 U. S. 238. But a state tax on the gross receipts of a railroad company, where freights are received partly from another state, is not a tax on imports; 8 Wall. 128; 15 id. 284. An importation is not complete, within the revenue laws, until a voluntary arrival within some port of entry; 2 Cra. 104; 13 Pet. 486; 4 Wash. C. C. 158; 1 Gall. 200; but see 1 Pet. C. C. 256; and the duties accrue at the time of such arrival; 1 Deady 124; but the importation, as between the importer and the government, is not complete as long as the goods remain in the custody of the officers of the customs, and until delivered to the importer, they are subject to any duties on imports which congress may see fit to impose; 2 Cliff. 512. See EXPORTATION.

Importation, in an ordinary sense, consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a customs house is not of the essence of the act. 262 U. S. 122.

As distinguished from "migration," see IMPORT.

IMPORTED. This word, in general, has the same meaning in the tariff laws that its etymology shows, *im, porto*, to bear; to carry. To "import" is to bear or carry into. An "imported" article is one brought or carried into a country from abroad. 49 Fed. Rep. 99. See IMPORTS; IMPOSTS.

IMPORTS. Goods or other property imported or brought into the country from foreign territory. Story, Const. § 949. See U. S. Const. art. 1, § 8; 10; 7 How. 477; 9 id. 619; 8 Wall. 110, 128.

Imports cease to be "imported articles" within the constitution, after the packages are broken up, or, after the first wholesale disposition of them; 1 Dev. & B. L. 19; but imported goods, after having been sold by the importer, are subject to state taxation, even though still in the original packages; 5 Wall. 479. See ORIGINAL PACKAGE. Persons cannot be considered imports; 4 Metc. 282.

To bring in from abroad; to introduce from without; especially, to bring wares or merchandise into a place or country from a foreign country, in the transactions of commerce. Opposed to "export." Webster.

Also, used to imply the bringing in of persons involuntarily, such as slaves, as distinguished from the voluntary migration of a free person. The two words "migration" and "importation" refer to the different conditions of this race (the African race) as regards freedom and slavery. When the free black man came here, he migrated; when the slave came, he was imported. 17 Otto (U. S.) 62. See IMPORTED.

IMPORTUNITY. Urgent solicitation, with troublesome frequency and pertinacity.

Wills and devises are sometimes set aside in consequence of the importunity of those who have procured them. Whenever the importunity is such as to deprive the divisor of the freedom of his will, the devise becomes fraudulent and void; Dane, Abr. c. 127, a. 14, s. 5, 6, 7; 2 Phill. Eccl. 551.

IMPOSED TAX. See TAX.

IMPOSITIONS. Imposts, taxes, or contributions. See 104 Mass. 470.

IMPOSSIBILITY. A thing which under the law or according to the due course of nature cannot be done or performed.

Impossibility of performance is an important head of the law of contract, and the questions arising as to its effect may be affected by the classification to which the impossibility is assigned, the time at which it arises, and whether it affects the promise or the consideration for it.

There may be an impossibility of fact, existing in the nature of things, or arising out of the circumstances of the case or a legal impossibility created by law.

Of the first kind there may be a contradiction in the contract resulting from promises inconsistent with each other when made. There may also be a physical impossibility as when the thing contracted for is against the course of nature. Of the latter class examples are suggested of an agreement "to make two spheres of the same substance, but one twice the size of the other of which the greater should fall twice as fast as the smaller when they were both dropped from a height; or to construct a perpetual motion; the former having been considered an elementary fact before Galileo's experiment and the latter being still attempted, though as yet unsuccessfully. Wald, Pol. Cont. 350.

A physical impossibility may be either absolute, which means impossible in any case, as if one should contract to reach the moon; or relative, as to make a payment to one who is dead. Of this kind is what is termed practical impossibility, as when a ship is so injured that it cannot be repaired except at an excessive or unreasonable cost; in this case it is treated as a total loss, being physically but not practically possible to repair. Certain accidents occurring from death, tempests, and the like are characterized by the phrase "impossibility arising by the act of God" (q. v.).

A contract or condition, the performance of which is made impossible by a rule of law, is termed a legal impossibility; as if one should give a bond to secure a simple contract with a collateral agreement that there should be no merger of the contract debt. A logical impossibility exists when the agreement is inconsistent with the nature of the transaction, as where a gift is made to one expressly for his own benefit with a condition that he immediately transfer it to a third person.

The impossibility may exist at the time of making the agreement, in which case it is said to be original; or it may be caused by matter arising *ex post facto*, as where the party to be benefited dies after the contract to be executed though before the performance. Such subsequent impossibility may be caused by the act of the party making the promise or the party to be benefited, or of a stranger, as a public enemy (q. v.), or by the act of God (q. v.).

An agreement to perform an impossibility whether in law or in fact is void; Wald, Pol. Cont. 352; Leake, Cont. 358; 3 Add. Cont. 8th Am. ed. 1196; Harr. Cont. 24, 174. See L. R. 5 C. P. 577. There may, however, be the liability in damages for the breach of an unqualified undertaking to perform an impossibility; id.; 149 U. S. 1; the real question in such a case is the existence of the liability; id.; 2 Q. B. 680; it is a question of construction, whether the language of the contract is to be treated as not applying to a situation which renders its literal performance impossible; Harr. Cont. 176. A contract to perform a notorious impossibility known to the parties to be such at the time of making the contract is void; 15 M. & W. 253; L. R. 6 Q. B. 124; L. R. 5 C. P. 577; if the impossibility has arisen after the making of the contract, although without any fault of the covenantor, he is not discharged from liability under it; 160 U. S. 514; an impossibility is no defence if occasioned by the act of a stranger; 2 Ld. Raym. 1164; 2 El. & Bl. 698; or of alien enemies; Aleyn 26. Where, in an action of

breach of promise of marriage, a plea that consummation had become impossible by reason of bodily disease endangering the life of the defendant was held by four judges to three in the Exchequer chamber to be no defence, the court of the queen's bench having been equally divided; *El. Bl. & El. 748, 29 L. J. Q. B. 45*; but of this case it is said that "it is so much against the tendency of the latter cases that it is of little or no authority beyond the point actually decided;" *Wald, Poll. Cont. 378*; and in an American case upon analogous facts the court approved the criticism upon the English case and refused to follow it. The cases upon this subject are necessarily of infinite variety, as is natural where the question is so largely one of construction. To examine them in detail would be impossible within the scope of this title, but they will be found collected and classified in the various works on contracts. See *Wald, Pol. Cont. ch. vii.*; 3 *Add. Cont. 8th Am. ed. 1196*; *Leake, ch. iii. sec. iii.*; *Harr. Cont. ch. v. sec. 2*; 16 *Cont. L. J. 105*; *Keener, Quasi-Cont. ch. iv. sec. iii.*; **CONTRACT; UNLAWFUL AGREEMENT; CONDITION; PERFORMANCE.**

The question whether an act is possible is of importance in law, with reference to the performance of conditions and agreements. With reference to the nature of the act required, an impossibility is either physical, legal or logical.

Physical Impossibility. An act is PHYSICALLY IMPOSSIBLE when it is contrary to the course of nature. Such an impossibility may be either absolute, *i. e.*, impossible in any case (*e. g.* for A. to reach the moon), or relative (sometimes called impossible in fact, *i. e.* arising from the circumstances of the case. *E. g.* for A. to make a payment to B., he being a deceased person. *R. & L. Dict.*; 3 *Sav. Syst. 157, 164*; *Pol. Cont. 330*).

Practical Impossibility. To the latter class belongs what is sometimes called PRACTICAL IMPOSSIBILITY, which exists when the act can be done, but only at an excessive or unreasonable cost. Thus, when a ship is so injured that it is not worth while repairing her, the same effect with respect to the liability of the insurer is produced, as if it were physically as well as practically impossible to repair her. *Id.*; *Leake Cont. 2nd ed., 682*.

Legal or Judicial Impossibility. An act is LEGALLY or JURIDICALLY IMPOSSIBLE when a rule of law makes it impossible to do it, *e. g.* for A. to make a valid will before his majority. This class of acts must not be confounded with those which are possible, although forbidden by law, as to commit a theft. *Id.*; 3 *Sav. 169*.

Logical Impossibility. An act is logically IMPOSSIBLE when it is contrary to the nature of the transaction, as where A. gives property to B. expressly for his own benefit, on condition that he transfers it to C. *Id.*; 3 *Sav. 159*.

Original Impossibility. With reference to the time when the impossibility first exists, the act may be either ORIGINALLY IMPOSSIBLE (*ab initio*), or become impossible by MATTER SUBSEQUENT (*ex post facto*). Thus, if A. contracts with B. to pay money into the hands of C., and C. was dead at the time the contract was entered into, then the payment was originally impossible; if C. was alive at the time, but dies before the payment, it becomes impossible by matter subsequent. *Id.* The latter class is again divisible according as the performance of the act required is rendered impossible by the person creating the requirement, by the person for whose benefit the act was to be done, by the person required to do it, by a stranger, such as the public enemy, by the act of God, by a change in the law, etc. *Id.*; *Leake Cont. 692 et seq.*

IMPOSSIBLE CONTRACT. One which the law will not hold binding upon the parties because of the natural or legal impossibility of the performance by one party of that which is the consideration for

the promise of the other. 7 *Wait, Act. & D. 124*. See **IMPOSSIBILITY**.

Perhaps the only contracts that are impossible in the true sense are those in which the consideration is impossible. A distinction must be drawn between impossibility of consideration and impossibility of performance. If the consideration for the promise is obviously and absolutely impossible of performance and such fact is apparent upon the face of the contract and is known to the parties, the consideration is unreal and will not support the contract. 3 *Elliot, Cont. 35*; 14 *Pick. (Mass.) 156*. "If the covenant be within the range of possibility, however absurd or impossible the idea of execution may be, it will be upheld. To bring the case within the rule of dispensation, it must appear that the thing to be done can not by any means be accomplished; for if it be only improbable, or out of the power of the obligor, it is not deemed in law impossible." *Id.*; 27 *N. J. L. 513*. Mere impossibility of performance of the consideration by the individual promisor does not necessarily relieve such promisor from his liability on the contract. *Id.*; 113 *Ky. 372*. (Inability to perform is not synonymous with impossibility of performance.) See **IMPOSSIBILITY**.

IMPOSTS. Taxes, duties, or impositions. A duty on imported goods or merchandise. *Federalist*, no. 80; *Elliott, Deb. 289*; *Story, Const. § 949*; *Cooley, Tax. 8*.

The Constitution of the United States gives congress power "to lay and collect taxes, duties, excises, and imposts," and prohibits the states from laying "any imposts or duties on exports or imports" without the consent of congress; *U. S. Const. art. 1, § 8, n. 1*; *art. 1, § 10, n. 2*. See *Bacon, Abr. Smuggling*; *Davis, Imp.*; *Co. 2d Inst. 62*; *Dig. 165, n.*; 7 *Wall. 433*; 9 *Rob. (La.) 324*.

IMPOTENCE. In Medical Jurisprudence. Inability on the part of the male organ of copulation to perform its proper function. Impotence applies only to disorders affecting the function of the organ of copulation, while sterility applies only to lack of fertility in the reproductive elements of either sex. *Dennis, System of Surgery*.

Impotence may be considered as incurable, curable, accidental, or temporary. Absolute or incurable impotence is that for which there is no known relief, principally originating in some malformation or defect of the genital organs. Its existence or non-existence is not to be determined by mere anatomical appearances, and the mere fact of age alone is never sufficient to imply absence of the procreative power; 2 *With. & Beck. 396*. It may also be the result of infirmity rather than of age or deformity, as the effect of vicious habits: *id.* 398.

Ability to procreate is not the test; it is enough if the parties are able to have sexual intercourse; 18 *Kan. 871*; 5 *Paige 554*; 3 *Phill. Ecc. 325*; and impotency arising after the marriage does not avoid it; 80 *J. Prob. Mat. & Adm. 73*. Unless otherwise by statute, impotence renders a marriage voidable, not void; *L. R. 1 Ex. 246*; 24 *N. J. Eq. 19*.

It has been held that, in a divorce case, an examination may be ordered of a defendant alleged to be impotent; 47 *Ia. 376-83*; 29 *Kan. 466, 474*. See also 19 *Cent. L. J. 144-45* and 2 *Bish. M. & D. § 590*, and cases cited in both.

Impotence is a statutory ground of divorce in most states, and in some courts it is held that jurisdiction of suits for nullity, is impliedly conferred with jurisdiction in divorce; *Tiffany, Pers. & Dom. Rel. 89*. See 35 *Vt. 365*; 33 *Md. 401*. Where this defect existed at the time of the marriage and was incurable, by the ecclesiastical law and the law of several of the American states, the marriage may be declared void *ab initio*; *Comyns, Dig. Baron and Femme (C 3)*; *Bacon, Abr. Marriage, etc. (E 3)*; 1 *Bla. Com. 440*; 1 *Beck, Med. Jur. 67*; *Code, §. 17, 10*; 5 *Paige, Ch. 554*; 25 *N. H. 267*; but see *Hopk. Ch. 557*. Impotency arising from idiocy intervening after the marriage is no

ground for divorce in Vermont; 2 *Atk. 188*; see *Merlin, Rep. impuissance*. But it seems the party naturally impotent cannot allege that fact for the purpose of obtaining a divorce; 3 *Phill. Ecc. 147*; 1 *Eng. Ecc. 184*. See 2 *Phill. Ecc. 10*; 3 *id. 325*; 1 *Eng. Ecc. 408*; 1 *Chitty, Med. Jur. 377*; *Ryan, Med. Jur. 95-111*; *Bish. Marr. & D.*; 1 *Bla. Com. 440*; 1 *Hagg. 725*. See, as to the signs of impotence, 1 *Briand, Méd. Leg. c. 2, art. 2, § 2, n. 1*; *Dictionnaire des Sciences médicales, art. Impuissance*; and generally, *Trebuchet, Jur. de la Méd. 100*; 1 *State Tr. 815*; 8 *id. App. no. 1, p. 23*; 3 *Phill. 147*; 1 *Hagg. Ecc. 523*; *Fodéré, Méd. Lég. § 237*.

IMPOTENTIAM, PROPERTY PROPTER. A qualified property, which may subsist in animals *feræ naturæ*, on account of their inability, as where hawks, herons, or other birds build in a person's trees, or coney, etc., make their nests or burrows in a person's land, and have young there, such person has a qualified property in them till they can fly or run away, and then such property expires. 2 *Steph. Com. 7th ed. 8*.

IMPOUND. To place in a pound goods or cattle distrained or astray. 3 *Bla. Com. 12*; 126 *Mass. 364*. Also, to retain in the custody of the law. A suspicious instrument produced at a trial is said to be impounded, when it is ordered by the court to be retained, in case criminal proceedings should be taken.

IMPRESCRIPTIBILITY. The state of being incapable of prescription.

A property which is held in trust is imprescriptible: that is, the trustee cannot acquire a title to it by prescription; nor can the borrower of a thing get a right to it by any lapse of time, unless he claims an adverse right to it during the time required by law.

IMPRESCRIPTIBLE RIGHTS. Such as a person may use or not, at pleasure, since they cannot be lost to him by the claims of another founded on prescription.

IMPRESSION. A case involving a new state of facts or a question yet undetermined and therefore without precedent is usually termed a "case of first impression."

IMPRESSMENT. The arresting and retaining mariners for the king's service. 1 *Bla. Com. 420*; 3 *Steph. Com. 594*.

It was "the mode formerly resorted to of manning the British navy. The practice had not only the sanction of custom, but the force of law, for many acts of parliament, from the reign of Philip and Mary to that of George III., had been passed to regulate the system of impressment. Impressment consisted in seizing by force, for service in the royal navy, seamen, river-watermen, and at times landmen, when state emergencies rendered them necessary. An armed party of reliable men, commanded by officers, usually proceeded to such houses in the seaport towns as were supposed to be the resort of the seafaring population, laid violent hands on all eligible men and conveyed them forcibly to the ships of war in the harbor. As it was not in the nature of sailors to yield without a struggle, many terrible fights took place between the press-gangs and their intended victims—combats in which lives were often lost. In point of justice there is little, if anything, to be said for impressment, which had not even the merit of an impartial selection from the whole available population;" *Int. Cyc.*

IMPREST MONEY. Money paid on enlisting or impressing soldiers or sailors.

In Old English Law. Money given out for a certain purpose to be afterwards accounted for. Money advanced by the crown to be employed for its own purpose in connection with the government, as in the case of secret service money. See *Man. Exch. Pr. 17*; 18 *Eliz. c. 4*; 1 *Mad. Exch. c. 10, 13, p. 387*; 6 *Price 424 a*; and *Public Revenues Acts of New Zealand*.

IMPRETIABILIS (Lat.). Beyond price; invaluable.

IMPRIMATUR (Lat.). A license or allowance to one to print.

At one time, before a book could be printed in England, it was requisite that a permission should be obtained: that per-

mission was called an *imprimatur*. In some countries where the press is liable to censorship, an *imprimatur* is required.

IMPRIMERE. To press upon; to impress or press; to imprint or print.

IMPRIMERY. In some of the ancient English statutes this word is used to signify a printing office; the art of printing; a print or impression.

IMPRIMIS (Lat.). In the first place. It is commonly used to denote the first clause in an instrument, especially in wills, *item* being used to denote the subsequent clauses. This is also its classical and literal meaning. Ainsworth, Dict. See Fleta, lib. 2, c. 64. *Imprimis* and *imprimum* also occur. Du Cange; Prec. Ch. 430; Cases temp. Talb. 110; 6 Madd. 81; Magna Cart. 9 Hen. III.; 2 Anc. Laws & Inst. of Eng. The use of *imprimis* does not import a precedence of the bequest to which it is prefixed; 59 Me. 325; 1 Rop. Leg. 426.

IMPRISON. To confine; to put in prison; to detain in custody.

IMPRISONMENT. The restraint of a man's liberty.

The restraint of a person contrary to his will. Co. 2d Inst. 569; Bald. 239, 600.

It may be in a place made use of for purposes of imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever; 9 N. H. 491; 7 Humphr. 43; 13 Ark. 43; Webb, Poll. Torts 259; 1 W. Bla. 19; 7 Q. B. 742; but it cannot be applied to the detention of a youth in a reform school; 52 N. W. Rep. (Minn.) 935. A forcible detention in the street, or the touching of a person by a peace-officer by way of arrest, are also imprisonments; Bac. Abr. *Trespass* (D. 3); 1 Esp. 451, 526; 3 Harr. (Del.) 416. See 7 Humphr. 43; 26 How. Pr. 84. It is not necessary to touch the person, but it is enough if he is within the power of the officer and submits; 100 Mass. 79. Forcibly taking a person in an omnibus across a city; 92 Mich. 498; or where a person is constantly guarded by detectives so that he is at no time free to come and go as he pleases, but his movements are at all times subject to the control and direction of those who have him in charge; 36 Fed. Rep. 252; constitute imprisonment. It has been decided that lifting up a person in his chair and carrying him out of the room in which he was sitting with others, and excluding him from the room, was not an imprisonment; 1 Chitty, Pr. 48; and the merely giving charge of a person to a peace-officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party, to avoid it, next day attend at a police court; 3 B. & P. 211; 1 C. & P. 153; and if, in consequence of a message from a sheriff's officer holding a writ, the defendant execute and send him a bail bond, such submission to the process will not constitute an arrest; 6 B. & C. 528; D. & R. 233. No other warrant is necessary for the detention of a prisoner than a certified copy of the judgment against him; 32 Cal. 45; or of the precept on which the arrest was made; 9 N. H. 185.

It is not error in a judgment in a criminal case, to make one term of imprisonment commence where another terminates; 153 U. S. 308.

See, FALSE IMPRISONMENT; ARREST; INFAMY; FELONY; ACCUMULATIVE SENTENCES; PERSONAL LIBERTY.

IMPRISTI. Followers; partisans; adherents; supporters. Those who take the part of or side with another in attack or defence.

IMPROBATION. In Scotch Law. An act by which falsehood and forgery are proved. Erskine, Inst. 4. 119; Stair, Inst. 4. 20.

The setting aside of deeds or other writings *prima facie* probative, on the ground of falsehood or forgery. Bell, Dict.

Under the Scotch division of action into ordinary and reclusory the latter are further divided into (1) actions of proper impropriations; (2) actions of reduction-improbatum; (3) action of simple reduction.

Proper impropriations are brought for declaring writings false or forged. The proof in this proceeding is either by the testimony of the writer and the instrument witnesses, or indirect from circumstances or insinuating arguments. If one of two instrument witnesses supports the writing and the other does not, the writing is nullified; but the user will not be subjected to the payment of falsehood being supported by one witness. Where witnesses test the deed without knowing the grantor and seeing him subscribe, or hearing him own his subscription, the deed is not only improbatum but such witnesses are declared accessory to forgery; Ersk. Pr. iv. 1. 5, iv. 47.

Reduction-improbatum is an action whereby a person who may be hurt or affected by a writing, insists on its production in court in order to have it set aside or its effects ascertained under the certification if the writing, if not produced, shall be declared false and forged. This certification is a fiction of law, introduced for the production of the writing may be effectually forced; and therefore it acts only in the effects of the pursuer; so that the writing, though declared false, continues in full force in all questions with third party; *id.* iv. 1. 5.

In simple reduction the certification is only temporary, the writ then, and not the force, being to declare the writings null until within the period allowed with opening up decrees in absence, or on default they be produced; so that they recover their full force after production, even against the pursuer himself; *id.* iv. 1. 8. The most usual grounds of reduction of writings are, the want of the requisite solemnities; or that the grantor was minor; or interdicted; or inhibited; or, formerly, that he signed the deed on his death-bed; or, both formerly and now, that he was compelled or frightened into it; or was circumvented; or that he granted it in prejudice of his lawful creditors; *id.* iv. 1. 9.

IMPROPER. Not suitable; unfit; not suited to the character, time, and place. 48 N. H. 196.

Improper conduct is such as a man of ordinary and reasonable care and prudence, under the circumstances, would not have been guilty of. 16 A. & E. Ency. 2nd ed., 57; 48 N. H. 211.

IMPROPER FEUD. "Under the title of improper or derivative feuds were comprised all such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honorable service, or upon a rent, in lieu of military services; such as were in themselves, alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud." 1 Bla. Com. 58. See FEUDUM.

IMPROPER NAVIGATION. The navigation of a ship without due care and skill. It includes anything wrongly done with a ship, or any part of it, in the course of the voyage; L. R. 6 C. P. 563.

IMPROPRIATION. In Ecclesiastical Law. The act of employing the revenues of a church living to one's own use; it is also a parsonage or ecclesiastical living in the hands of a layman, or which descends by inheritance. Techn. Dict.

The transfer to a layman of a benefice to which the cure of souls is annexed with an obligation to provide with a performance of the spiritual duties attached to the benefice is said to be nearly the same as an appropriation. Holth. Before the Reformation the terms were used without a very clear distinction, and appropriations by spiritual persons and incorporation were termed *impropriation*. Later the use of the latter word was restricted by Spelman and others to appropriation by laymen. Moz. & W.

The distinction is thus clearly stated: The practice of *impropriation* differs from the somewhat similar, but more ancient, usage of *appropriation*, inasmuch as the latter supposes the revenues of the appropriated benefice to be transferred to ecclesiastical or quasi-ecclesiastical persons or bodies, as to a certain dignity in a convent, a college, a hospital; while *impropriation* applies that the temporalities of the benefice are enjoyed by a layman; the name, according to Spelman, being given in consequence of their thus being *improperly* applied, diverted from their legitimate use. The practice of *impropriation*, and still more that of *appropriation*, as in the case of monasteries, etc., and other religious houses, prevailed extensively in England before the Reformation; and of the suppression of the monasteries, all such rights were (by 27 Henry VIII. c. 28, and 31 Henry VIII. c. 13) vested in the crown, and were by the crown freely transferred to laymen, to whose heirs have thus descended, not only the right to the tithes, but also in many cases the entire property of rectories. The spiritual duties of such rectories are discharged by a clergyman, who is called a vicar, and who receives a cer-

tain portion of the emoluments of the living, generally consisting of a part of the glebe-land of the parsonage, together with what are called the "small tithes" of the parish. Int. Cyc.

The word *impropriation* is said to be derived from *in propriatem*, because the living is held as a lay property. Phill. Ecc. L. 376.

An *impropriate* rectory was the term applied to a lay rectory as opposed to a spiritual rectory; and tithes in the hands of a lay owner were called *impropriate* tithes, as those in the hands of a spiritual owner were termed *appropriate* tithes.

See 1 Bla. Com. 384; 2 Steph. Com. 678; Brown, Dict. 1. APPROPRIATION.

IMPROVE. To cultivate; to reclaim. 4 Cow. 190.

"Improved" land may mean simply land "occupied;" it is not a precise technical word; 8 Allen 215; it includes ground appropriated for a railroad; 68 Pa. 396.

Land on which there are three dwellings, besides suitable farm buildings, which has been farmed for the last twenty years, and from which, in the last eighteen years, there has been received \$12,000 in rents, besides a share of the landlord in the growing crops, is not "unimproved real estate," as that phrase is used in a will; 173 Pa. 320; and the fact that the property was bought by the testator for the purpose of being cut into city lots, and sold as such, does not render it "unimproved" land; *id.*

In Scotch Law. To impeach as false or forged. To improve a lease means to grant a lease of unusual duration, to encourage a tenant, when the soil is exhausted, etc. Bell, Dict.; Stair, Inst. 676.

IMPROVEMENT. An amelioration in the condition of real or personal property effected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes. It includes repairs or addition to buildings, and the erection of fences, barns, etc.; 70 Pa. 98; 16 How. Pr. 220; 10 So. Rep. (Ala.) 157; 1 Cush. 98; 78 N. Y. 1, 581; or a windmill; 49 Kan. 434.

As between the rightful owner of lands and an occupant who in good faith has put on improvements, the land with its improvements belongs to the rightful owner of the land, without compensation for the increased value at common law; 8 Wheat. 1; 1 Dana 451; 3 Ohio St. 463; 4 McLean 489; 5 Johns. 372; 3 Paine 74; 66 Miss. 21; 7 Ind. App. 561; though the rule may be otherwise in equity; 3 Atk. 134; 8 Sneed 228; 1 Yerg. 360; 24 Vt. 560; 2 Johns. Cas. 441; 133 U. S. 553; see 133 *id.* 21; and by statute in some of the states; 10 Cush. 451; 2 N. H. 115; 20 Vt. 614; 13 Ala. N. S. 31; 9 Me. 62; 13 Ohio 308; 9 Ill. 87; 9 Ga. 183; 12 B. Monr. 195; 16 La. 423; 3 Cal. 69; 1 Zab. 248; 38 Minn. 433; 37 Fed. Rep. 756; and their value may be offset to an action for mesne profits at common law; 3 Wash. C. C. 165; 4 Cow. 168; 4 Dev. N. C. 95; 6 Humphr. 324; 1 Story 478; 2 Greene 151; 3 La. 63. See 95 Mich. 619; 153 Pa. 238. A life tenant is not entitled to payment for improvements made by him without the consent of the remaindermen; 127 Pa. 348; 37 Fed. Rep. 756; 40 Minn. 450. In determining the right to recover for improvements placed on land, ordinary repairs necessary for the enjoyment of the object sold cannot be classed as improvements; 41 La. Ann. 6.

As to dower in improvements, see DOWER, and as to improvement in Patent Law, see PATENT, LOCAL IMPROVEMENT; ORIGINAL IMPROVEMENT. PUBLIC UTILITY.

IMPROVIDENCE. Such want of care and foresight in the management of property as would be likely to render it less valuable and impair the interests of those who may be or become entitled to it. Such is the construction of the word in a statute excluding one found incompetent by reason of improvidence, to perform the duties of an administrator; 1 Barb. Ch. 45. See also 14 N. Y. 449; 4 Redf. 218.

IMPRUAMENTUM. Improvement of land, from *impruare*, to improve it.

IMPUBER (Lat.). In Civil Law. One who is more than seven years old, or

out of infancy, and who has not attained the age of puberty; that is, if a boy, till he has attained his full age of fourteen years, and if a girl, her full age of twelve years. *Domat, Liv. Prél. t. 2, s. 2, n. 8.*

IMPULSE. See IRRESISTIBLE IMPULSE.

IMPULSIVE INSANITY. That form of insanity by which the person is irresistibly impelled to the commission of an act. It is sometimes accompanied by delusions, and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. The cases are to be carefully distinguished from those where persons are impelled by passion merely. 15 Wall. (U. S.) 590.

IMPUNITY. Freedom or safety from punishment. The phrase *impunitive damages* was said to be unintelligible; 36 Tex. 153.

IMPUTATIO. In Civil Law. Legal liability.

IMPUTATION OF PAYMENT. In Civil Law. The application of a payment made by a debtor to his creditor.

The rules covering this subject are thus stated, substantially, in Howe, *Studies in the Civil Law*, 156:—

1. The debtor may apply his payment as he pleases, with the exception that in case of a debt carrying interest it must be first applied to discharging the interest.

2. If the debtor makes no application, the creditor may apply the funds by informing the debtor at the time of payment.

3. The law imputes in the neglect of the parties to do so, and it will be made by the law in favor of the debtor. It directs that imputation which would have been best for the debtor at the time of payment. Hence it applies the funds to obligations most burdensome to the debtor: e. g. to a debt which is not disputed, rather than to one that is; to a debt that is due rather than to one that is not; to one on which the debtor may be arrested, rather than to one on which he cannot; to a debt for which the debtor has given sureties, rather than to one which he owes singly; to a debt for which the debtor is principal obligor, rather than one of which he is merely surety; to a mortgage rather than to an unsecured debt, and to a debt which would render the debtor insolvent if unpaid, rather than to any less important one.

4. Of debts of equal grade, if there be no imputation by the parties, the application will be to that of the longest standing.

5. To debts of the same date, and in other respects equal, the application will be *pro rata*.

6. As to debts bearing interest, the imputation is to interest before principal.

When the creditor is to pay himself out of a fund realized,—for example, from the sale of property pledged,—he should apply the money to the debt secured by the pledge, rather than to some other; to interest before principal; to the debt of the highest rank, rather than to those of lower rank; and if there are several of equal rank then *pro rata*.

Some of these rules have been followed in England and America, some decisions following the exact language of the Roman law. See 1 Sto. Eq. Jur. 13th ed. § 459; but see APPROPRIATION OF PAYMENTS.

In Louisiana the preceding civil law rules are in force. The statutory enactment, Civ. Code, art. 2159, is a translation of the Code Napoléon, art. 1253-1256, slightly altered. See Pothier, Obl. n. 523, by Evans, and notes. Payment is imputed first to the discharge of interest; 1 Mart. La. N. S. 571; 5 La. Ann. 738. But if the interest was not binding, being usurious, the payment must go to the principal; 2 La. Ann. 363; 5 id. 616. The law applies a payment to the most burdensome debt; 10 La. 1, 357; 2 La. Ann. 405, 520. A creditor's receipt is an irrevocable imputation, except in cases of surprise or fraud; 2 La. Ann. 24; 3 id. 351, 810. See APPROPRIATION OF PAYMENTS.

IMPUTED NEGLIGENCE. See NEGLIGENCE.

IN. A preposition which is used in real estate law to designate title, seisin, or possession, or when one is said to be "in by lease of his lessor." It may be as an abbreviation of invested or intitled, or of in possession.

In English, as a preposition means within, inside of, surrounded by. *Anderson*; 31 Hun, 245. Under a statute requiring notices to be posted "in" public places, a posting "at" such places may not be sufficient. *Id.*; 51 Wis. 71. In a bond payable "in twenty-five years" means, at the end of that period, not within nor at any time during the period. *Id.*; 115 Pa. 446.

In English, as an adverb: not out, within; invested with title or possession: as, "in" by descent, "in" by purchase. *Id.*

In Latin. In; into; upon; against. *Abbott*.

"IN ACCORDANCE WITH THIS ACT." The Supreme Court of the Territory of New Mexico construed the words "in accordance with this act" as meaning "under this act." 231 U. S. 169.

IN ACTION. A thing is said to be *in action* when it is not in possession, and for its recovery, the possessor unwilling, an action is necessary. 2 Bla. Com. 396. See CHOSE IN ACTION.

IN ACTUAL USE. In the statute which provides for the exemption from duty of certain importations, the words "not merchandise" relate to the words "wearing apparel in actual use" as well as to the words "personal effects." The words "not merchandise" thus used may properly be regarded as explaining and defining the words "in actual use," and the clause may be rightly construed as if those were synonymous or correlative terms. 111 U. S. 206. See ACTUAL.

IN ADDITION TO. The words "in addition to" do not carry with them any idea of sequence or order of time, but as being synonymous with also, moreover, likewise, they not only fail to aptly express the idea of dependence or sequence, but they do not express it at all. 14 Bush (Ky.) 625.

IN ADVERSUM. Where a decree is obtained against one who resists, it is termed "a decree not by consent but *in adversum*." 3 Sto. 318.

IN ADIFICATIO (Lat.). In Civil Law. Building on another's land with one's own materials, or on one's own land with another's materials. L. 7, §§ 10, 18, D. de *Acquis. Rer. Domin.*; Heineccius, Elem. Jur. Civ. § 363. The word is especially used of a private person's building so as to encroach upon the public land. *Calvinus, Lex.* The right of possession of the materials yields to the right to what is on the soil. *Id.* See ACCRETION.

IN AËQUA MANU. In equal hand. *Fleta*, l. 3, c. 14, § 2.

IN AËQUALI JURE (Lat.). In equal right. See MAXIMS.

IN AËQUALI MANU. In equal hand; held indifferently between two parties. Where an instrument was deposited by the parties to it, in the hands of a third person, to hold it under certain conditions or stipulations it was said to be held *in aequali manu*. *Reg. Orig.* 28.

IN ALIENO SOLO. On another's land. 2 Steph. Com. 20.

IN ALIO LOCO. See CEPIT IN ALIO LOCO.

IN AMBIGUA VOCE LEGIS (Lat.). In an ambiguous expression of law.

IN AMBIGUO. In doubt.

IN AMITY. The fact that an Indian tribe which committed depredations was carrying on hostilities only to resist the opening of a military road does not permit

its being considered a tribe "in amity" with the United States within the meaning of the act of congress of March 3, 1891, concerning a claim for Indian depredations; 161 U. S. 391.

IN ANTEA (L. Lat.). Henceforth; in future.

IN APERTA LUCE. In open daylight; in the day-time. 9 Co. 65 b.

IN APICIBUS JURIS. Among the subtleties or extreme doctrines of the law. 1 Kames, Eq. 190.

IN ARBITRIUM JUDICIS. At the pleasure of the judge.

IN ARCTA ET SALVA CUSTODIA. In close and safe custody. 3 Bla. Com. 415.

IN ARTICULO. In a moment; immediately. C.1, 34, 2.

IN ARTICULO MORTIS. At the point of death.

IN AUTRE, or AUTER, DROIT (L. Fr.). In another's right. As representing another. An executor, administrator, or trustee sues *in autre droit*.

Where two estates come to one person, so that if in the same right they would merge, if one of them be *in autre droit*, there will be no merger. 2 Bla. Com. 177, but see *Sharsw.* note 17.

IN AUTER SOILE (L. Fr.). In or on another's land.

IN BANCO. In banc (q. v.).

The judges of the three superior courts of common law in England sit during the term, and also in vacation, if they so determine, for the dispatch of business, in their full courts, but the puisne Judges sit by rotation, in each term, or otherwise, as they agree among themselves, so that no greater number than three of them sit at the same time *in banc*, unless in the absence of the Lord Chief Justice or Chief Baron, the number of the Judges forming the full court *in banc* being limited to four. The usual business brought on before the court *in banc* are arguments on demurrers, rules in arrest of judgment, and for new trials, etc. *Wharton*.

IN BLANK. Without restriction. Applied to indorsements on promissory notes where no indorse is named. See INDORSEMENT.

IN BONIS. Among the goods, or property; in actual possession. *Inst.* 4, 2, 2. *In bonis defuncti*, among the goods of the deceased.

IN CAMERA. A case is said to be heard *in camera* when the doors of the court are closed and only persons concerned in the case are admitted. This is done when the facts are such as to make a private hearing expedient, as in some divorce cases. The term belongs rather to the English law of practice in which the power to grant private hearings in certain cases is established, though there has been a difference of opinion as to its exact limitations.

It was said by Lord Eldon that it was the uniform practice in chancery, as long as the court had existed, in the case of family disputes, on the application of counsel on both sides, to hear the same in the chancellor's private room, and that what was so done was not the act of the judge but of the parties; *Coop. t. Eldon* 106; in a later case, on application for a private hearing relating to the custody of a young lady who was a ward of the court, Lord Brougham directed the case to be heard in private on the assurance of counsel that such course was proper, notwithstanding that one party withheld his consent; 2 Russ. & M. 688; and it is noted that this course was frequently followed by the same judge; *id.* In a patent case, the court being of opinion that the patent was valid, permitted the defendant to state his secret process *in camera*; 24 Ch. D. 156; an application for an injunction to restrain a solicitor from disclosing confidential in-

formation was ordered to be heard in private without consent of defendant, upon the statement of plaintiff's counsel that in his opinion a public hearing would defeat the object of the action; 81 Ch. D. 55; 9 Ch. App. 522; but this will not be done without consent of both parties unless it is clear that such would be the result of a public hearing; *id.* Jessell, M. R., considered that a private hearing was not within the power of the court, even by consent, except in cases affecting lunatics, or wards of court, or where the object of the action would be otherwise defeated, or in those cases where the practice of the old ecclesiastical courts is continued; 4 Ch. D. 173. It has been held that, following that practice, suits for nullity of marriage or judicial separation may be heard *in camera*, but not a petition for dissolution of marriage; L. R. 1 P. & D. 640; this case was put upon the ground that the matter was controlled, to that result, by 20 & 21 Vict. c. 85, § 22; but in a later case there was a distinct disapproval of the limitation, and it was said that as the ecclesiastical courts had the power to hear nullity suits in private when it was desirable for the sake of public decency, the same power must exist in other cases where it was required for the same reason; 1 L. R. 3 P. & M. 230. It is also held that under the present English practice, a law court has power to try a case *in camera*, without a jury, when the parties consent; 53 J. P. 822.

The term *in camera* is not used in American law, but the constitutional provision in most of the state constitutions and in the sixth amendment of the federal constitution, securing the right of a person accused to a speedy and public trial, gives rise to a question of constitutional law entirely different from the question of practice under English law. As to this subject, see OPEN COURT. A hearing *in camera* also differs from one at chambers (*q. v.*); the former being a private hearing by a court and the latter a hearing by a judge not in a regular session of court.

IN CAPITA (Lat.). To or by the heads or polls. Thus, where persons succeed to estates *in capita*, they take each an equal share; so, where a challenge to a jury is *in capita*, it is to the polls, or to the jurors individually, as opposed to a challenge to the array. 3 Bla. Com. 361. *Per capita* is more commonly used in the former instance.

IN CAPITIS (Lat.). In chief. A tenant *in capite* was one who held directly of the crown, 2 Bla. Com. 60, whether by knight's service or socage. Chal. R. P. 5. But tenure *in capite* was of two kinds, general and special; the first from the king (*caput regni*), the second from a lord (*caput feudi*). A holding of an honor in the king's lands, but not immediately of him, was yet a holding *in capite*; Kitch. 127; Dy. 44; Fitzh. N. B. 5. Abolished by 12 Car. II. c. 24.

IN CASU PROVISIO. In a (or the) case provided. *In tali casu editum et provisum*, in such case made and provided. Touch. Pt. 164, 165.

IN CAUSA. In the cause, as distinguished from *in initialibus* (*q. v.*), a term in Scotch practice. 1 Brown, Ch. 252.

IN CHIEF. Principal; primary; directly obtained. A term applied to the evidence obtained from a witness upon his examination in court by the party producing him, in relation to the matter in issue at the trial. The examination so conducted for this purpose.

Evidence or examination *in chief* is to be distinguished from evidence given on cross-examination and from evidence given upon the *voir dire*.

Evidence *in chief* should be confined to such matters as the pleadings and the opening warrant; and a departure from this rule will be sometimes highly inconvenient, if not fatal. Suppose, for example, that two assaults have been committed, one in January and the other in February, and the plaintiff prove his cause of action to have

been the assault in January; he cannot abandon that, and afterwards prove another committed in February, unless the pleadings and openings extend to both; 1 Campb. 473. See, also, 6 C. & P. 73; 1 Mood. & R. 282.

This matter, however, is one of practice; and a great variety of rules exist in the different states of the United States, the leading object, however, being in all cases the same,—to prevent the plaintiff from introducing in evidence a different case from the one which he had prepared the defendant to expect from the pleadings.

IN THE CLEAR. In Railroad Parlance. A conductor whose train is on a siding and which is too long to be "in the clear" of the main track at both ends, is guilty of negligence in giving an order to back up when he knows by so doing he will run the rear of the train into a closed switch, and injure property and derail cars. 156 Ky. 550, 161 S. W. 557.

IN COMMENDAM (Lat.). The state or condition of a church living which is void or vacant, and which is commended to the care of some one. In Louisiana, there is a species of limited partnership called partnership *in commendam*. See COMMENDAM.

IN COMMUNI. In common. Fleta, lib. 3, c. 4, § 2.

IN CONCURSO. See CONCURSO.

IN CONSIDERATIONE EJUS. In his sight or view. 12 Mod. 95.

IN CONSIDERATIONE INDE. In consideration thereof. 3 Salk. 64, pl. 5.

IN CONSIDERATIONE LEGIS. In consideration or contemplation of law; in abeyance. Dyer 102 b.

IN CONSIDERATIONE PRÆMIS-SORUM. In consideration of the premises. 1 Strange 535.

IN CONSPETU EJUS. In his sight or view. Burrill; 12 Mod. 95.

IN CONTINENTI. Immediately; without any interval or intermission. Dig. 44, 5, 1. Sometimes written in one word, "*incontinenti*."

IN CORPORE. In body or substance; in a material thing or object.

IN COURT. See IN PAIS.

IN CRASTINO. On the morrow. *In crastino Animarum*, on the morrow of All Souls. 1 Bla. Com. 342.

IN CUJUS REI TESTIMONIUM. In testimony whereof; *q. v.*

IN CURRENT FUNDS. "In current funds" used in a certificate of deposit means lawful money of the United States. 3 Ky. Opin. 524.

IN CUSTODIA LEGIS (Lat.). In the custody of the law. In general, when things are *in custodia legis*, they cannot be distrained, nor otherwise interfered with by a private person, or by another officer acting under authority of a different court or jurisdiction; 10 Pet. 400; 20 How. 583, and cases cited; 75 Md. 445. See CUSTODIA LEGIS.

IN DEFENSO. In defence; in a state of prohibition; in fence; inclosed. A term applied, in old English Law, to lands either actually surrounded by an enclosure, or otherwise exclusively appropriated. Burrill. See DEFENSUM; DEFENSA; DEFENDERE.

IN DELICTO. In fault. See IN PARI DELICTO.

IN DIEM. For a day; for the space of a day. Calv. Lex.

On, or at a day. *In diem debitum*; a debt due at a certain day. Burrill.

IN DOMINICO. In demesne. *In dominico suo ut de feodo*, in his demesne as of fee.

IN DORSO. On the back, from which come indorse, indorsement. 2 Bla. Com. 468. *In dorso recordi*, on the back of the record. 5 Co. 45.

IN DUBIO. In doubt; either in a condition of uncertainty, or in a doubtful case.

IN DUE COURSE. See INDORSEE IN DUE COURSE.

IN DUPLO. In double. *Damna in duplo*, double damages. Fleta, 4. 10. 1.

IN EADEM CAUSA. In the same state or condition. Calv. Lex.

IN EMULATIONEM VICINI. In hatred or envy of a neighbor. Where an act is done or action brought, solely to hurt or distress another, it is said to be *in emulationem vicini*. 1 Kames, Eq. 56.

IN EQUITY. In a court of chancery in contra-distinction to a court of law; within the contemplation or purview of equity jurisprudence; according to the doctrine of equity.

IN ESSE (Lat.). In being. In existence. An event which may happen is *in posse*; when it has happened, it is *in esse*. The term is often used of liens or estates. A child in its mother's womb is, for some purposes, regarded as *in esse*; 3 Barb. Ch. 488.

IN EST DE JURE (Lat.). It is implied of right or by law.

IN EVIDENCE. The proofs in a cause which have been offered and admitted are said to be in evidence.

IN EXCAMBIA. In exchange. The technical and formal words in an old deed of exchange.

IN EXECUTION AND PURSUANCE OF. Words used to express the fact that the instrument is intended to carry into effect some other instrument, as in case of a deed in execution of a power. They are said to be synonymous with "to effect the object of;" 7 Biss. 129.

IN EXITU. In issue. *De materia in exitu*, of the matter in issue. 12 Mod. 372.

IN EXTENSO. Fully; at length; a copy of a document made *verbatim*.

IN EXTREMIS (Lat.). At the very end. In the last moments; on the point of death.

IN FACIE CURIÆ. In the face of the court. Dyer 28.

IN FACIE ECCLESIAE (Lat.). In the face or presence of the church. A marriage is said to be made *in facie ecclesie* when made in a consecrated church or chapel, or by a clerk in orders elsewhere; and one of these two things is necessary to a marriage in England in order to the wife's having dower, unless there be a dispensation or license; 1 Bish. Mar. Div. & Sep. 404, 405. But see 6 & 7 Will. IV. c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 72. It was anciently the practice to marry at the church-door, and there make a verbal assignment of dower. These verbal assignments, to prevent fraud, were necessarily held valid only when made *in facie et ad ostium ecclesie*. See 2 Bla. Com. 103; Taylor, Gloss.

IN FACIENDO (Lat.). In doing. Story, Eq. Jur. § 1308.

IN FACT. Words used in pleading to introduce an amount of fact,—as "the said plaintiff (or defendant) further in fact saith,"—indicating that what follows is a statement of acts of parties as distinguished from a legal conclusion or intentment. The latter in equity pleading, when it may frequently be proper, after a statement of the facts on which the conclusion rests, begins,—"*and the defendant is advised that, etc.*" When pleadings were in Latin the words *in facto* were used, thus *in facto dicit*, he, in fact, says. See 1 Salk. 22 Pl. 1.

In reality; in a matter of fact. Opposed to "in law" (*q. v.*); in a matter of law; empowered by law; imputed in law; as, an

attorney in fact, and an attorney at-law; error or fraud in fact and in law.

"Fact" is contrasted with "law." Law is a principle, fact is an event; law is conceived, fact is actual; law is a rule of duty, fact is that which accords with or contravenes the rule. Anderson.

Facts, not evidence, are to be pleaded; and are proven by moral evidence. Questions of fact are said to be solved by the jury, questions of law by the court. *Id.*

Questions, issues, conclusions, and errors are of law or of fact, or of mixed law and fact. *Id.*

IN FAVOREM LIBERTATIS (Lat.). In favor of liberty.

IN FAVOREM VITÆ (Lat.). In favor of life.

IN FEODO. In fee. Bract. f. 207; Fleta, l. 2, c. 64, § 15. *Seisitus in feodo*, seised in fee. *Id.* 8. 7. 1.

IN FIERI (Lat.). In process of completion. A thing is said to rest *in fieri* when it is not yet complete: e. g. the records of a court were anciently held to be *in fieri*, or incomplete, till they were recorded on parchment, but now till the giving of judgment, after which they can be amended only during the same term. 2 B. & Ad. 791; 3 Bla. Com. 407. It is also used of contracts.

IN FINE (Lat.). At the end. A term used with a citation to denote that it is at the end of the section, chapter, book, law, or paragraph.

IN FORMA PAUPERIS (Lat.). In the character or form of a poor man.

When a person is so poor that he cannot bear the charges of suing at law or in equity, upon making oath that he is not worth five pounds, and bringing a certificate from a counsellor at law that he believes him to have a just cause, he is permitted to sue *in forma pauperis*, in the manner of a pauper; that is, he is allowed to have original writs and subpoenas gratis, and counsel assigned him without fee; 3 Bla. Com. 400. See 3 Johns. Ch. 65; 1 Paige, Ch. 588; 3 *id.* 273; 5 *id.* 58; 2 Moll. 475.

IN FORO. In the forum (*q. v.*; before the tribunal or court.

IN FORO CONSCIENTIÆ (Lat.). Before the tribunal of conscience; conscientiously. The term is applied to moral obligations as distinct from the obligations which the law enforces. In the sale of property, for example, the concealment of facts by the vendee which may enhance the price is wrong *in foro conscientie*, but there is no legal obligation on the part of the vendee to disclose them, and the contract will be good if not vitiated by fraud; Pothier, Vent. part 2, c. 2, n. 233; 2 Wheat. 155, note v.

IN FORO CONTENTIOSO. In the tribunal or forum of litigation.

In a contentious court. Taylor's L. Gloss.

IN FORO ECCLESIASTICO. In an ecclesiastical forum, tribunal, or court. Fleta, l. 2, c. 67, § 14. Early in the reign of Henry III., the Episcopal constitutions were published, forbidding all ecclesiastics to appear as advocates *in foro seculari*, nor did they long continue to act as judges there, not caring to take the oath of office which was found necessary. 1 Bla. Com. 20.

IN FORO SÆCULARI. In a secular court. See last title; 1 Bla. Com. 20; Fleta 2. 57. 14.

IN FRAUDEM CREDITORUM (Lat.). In fraud of creditors or with an intent to defraud them. Inst. l. 6. 3.

IN FRAUDEM LEGIS (Lat.). In fraud of the law; contrary to law. Taylor, Gloss. Using process of law for a fraudulent purpose. If a person gets an affidavit of service of declaration in ejectment, and thereupon gets judgment and turns the tenant out, when he has no manner of title in a house, he is liable as a felon, for he

used the process of law *in fraudem legis*; 1 *Ld. Raym.* 276; *Sid.* 254.

An act done *in fraudem legis* cannot give a right of action in the courts of the country whose laws are evaded; 1 Johns. 433.

IN FULL. Complete, or without abbreviation, e. g. a copy of a paper. Of the entire amount due, as used in a receipt for money.

IN FULL LIFE. Neither physically nor civilly dead. The term life alone has also been taken in the same sense, as including natural and civil life: e. g. a lease made to a person *during life* is determined by a civil death, but if *during natural life* it would be otherwise. 2 Co. 48. It is a translation of the French phrase *en plein vie*. Law Fr. & L. Lat. Dict.

IN THE FULLEST CONFIDENCE. As Used in Will. The phrase "in the fullest confidence" as used in a will is considered sufficient to raise a trust where the subject and object are sufficiently certain. 78 Ky. 128.

IN FUTURO. At a future time. The alternative expressions are *in presenti* and *in esse*. 2 Bla. Com. 166, 175.

IN GENERALI PASSAGIO (L. Lat.). In the general passage; *passagium* being a journey, or, more properly, a voyage, and especially when used alone or with the adjectives *magnum*, *generale*, etc.,—the journey to Jerusalem of a crusader, especially of a king. 36 Hen. III.; 3 Prynne, Collect. 767; Du Cange.

In generali passagio was an excuse for non-appearance in a suit, which put off the hearing *sine die*; but *in simplici peregrinatione* or *passagio*—i. e. being absent on a private pilgrimage to the Holy Land—put off the hearing for a shorter time. Bracton 338.

IN GENERE (Lat.). In kind; of the same kind. Things which when bailed may be restored *in genere*, as distinguished from those which must be returned *in specie*, or specifically, are called *fungibles*. Kaufman's Mackelley, Civ. Law § 148, note. Heineccius, Elem. Jur. Civ. § 619, defines *genus* as what the philosophers call *species*, viz.: a kind. See Dig. 12. 1. 2. 1. See LOAN FOR CONSUMPTION.

IN GREMIO LEGIS (Lat.). In the bosom of the law. This is a figurative expression, by which is meant that the subject is under the protection of the law: as, where the title to land is in abeyance. See GREMIUM; IN NUBIBUS; ABEYANCE.

IN GROSS. At large; not appurtenant or appendant, but annexed to a man's person: e. g. common granted to a man and his heirs by deed is common in gross; or common in gross may be claimed by prescriptive right. 2 Bla. Com. 34. See EASEMENT.

IN HAC PARTE. In this behalf; on this part or side.

IN HAEC VERBA. In these words.

IN HOC. In this.

IN HUNC MODUM (L. Lat.). After this manner.

IN IISDEM TERMINIS. In the same terms. 9 East 487.

IN INDIVIDUO. In the distinct individual, specific, or 'identical form. Sto. Bailm. § 97.

IN INFINITUM. Indefinitely; import to infinity.

IN INITIALIBUS (Lat.). In Scotch Law. In the preliminaries. Before a witness is examined as to the cause in which he is to testify, he must deny bearing malice or ill-will, being instructed what to say, or having been bribed, and these matters are called *initialia testimoni*, and the examination on them is said to be *in initialibus*: it is similar to our *voir dire*. Bell, Dict. *Initialia Testimoni*; Erskine, Inst. p. 451; Halkerton, Tech. Terms.

IN INITIO. At the beginning; in the beginning, as *in initio legis*, at the outset of the suit. Bract. f. 400.

IN INTEGRUM (Lat.). The original condition. See RESTITUTIO IN INTEGRUM. Vicat, Voc. Jur. *integer*.

IN INVITUM (Lat.). Unwillingly. Taylor, Gloss. Against an unwilling party (or one who has not given his consent); by operation of law. Wharton, Dict.

IN IPSIS FAUCIBUS. In the very throat. A vessel just entering a port is said to be *in ipsis faucibus portæ*.

IN ITINERE (Lat.). On a journey; on the way. Justices *in itinere* were justices in eyre, who went on circuit through the kingdom for the purpose of hearing causes. 3 Bla. Com. 351; Spelman, Gloss. *In itinere* is used in the law of lien, and is there equivalent to *in transitu*; that is, not yet delivered to vendee.

IN JUDGMENT. In a court of justice.

A case is said to be in judgment when it has proceeded so far as that the successful party is entitled to judgment.

In a judgment seat; Lord Hale was characterized "one of the greatest and best men who ever sat in judgment." 1 East 306.

IN JUDICIO (Lat.). In or by a judicial proceeding; in court. *In iudicio non creditur nisi iuratis*, in judicial proceedings no one is believed unless on oath. Cro. Car. 64. See Bracton, fol. 98 b, 106, 287 b.

In Civil Law. The proceedings before a praetor, from the bringing the action till issue joined, were said to be *in iure*; but after issue joined, when the cause came before the *iudex*, the proceedings were said to be *in iudicio*. See JUDEX.

IN JURE (Lat. in law). **In Civil Law.** A phrase which denotes the proceedings in a cause before the praetor, up to the time when it is laid before a *iudex*; that is, till issue joined (*litis contestatio*); also, the proceedings in causes tried throughout by the praetor (*cognitiones extraordinariae*). Vicat, Voc. Jur. *Jus*.

In English Law. In law; rightfully; in right. *In iure, non remota causa, sed proxima, spectatur*.

IN JURE ALTERIUS. In another's right. Hale, Anal. § 26.

IN JURE PROPRIO. In one's right. Hale, Anal. § 26.

IN JUS VOCARE. To call, cite, or summon to court. Inst. 4. 16, 3; Calv. Lex. *In jus vocando*, summoning to court. 3 Bla. Com. 279.

IN KIND. Of the same class, description, or kind of property, as a deposit, mandate, or loan which is said to be returnable in kind where the terms and character of the transaction do not require the return of the identical money, security, or thing, but only its equivalent in amount or kind. See IN GENERE; LOAN FOR CONSUMPTION. **KIND.**

A payment of money, the delivery or deposit of an object, as of rent, or services rendered, are made or rendered "in kind," when of a thing or services which correspond in class or general nature to that intended. Opposed, in specie: in the identical state or condition, in exact terms. Anderson.

IN LAW. In contemplation of law; implied by law; subsisting by force of law. See IN FACT.

IN LECTO MORTALI. On a death-bed. Fleta, 5, 28, 12.

IN LIBERAM ELEMOSINAM (ELEMOSYNAM). In (or as of) a free gift (or alms). Taylor's L. Gloss.

IN LIEU OF DOWER. The phrases "in lieu of dower" and "as dower" are often used interchangeably. 112 S. W. 911. See AS DOWER; DOWER.

IN LIKE MANNER. See Also.

IN LIMINE (Lat.). In or at the beginning. This phrase is frequently used: as, the courts are anxious to check crimes *in limine*.

IN LITEM (Lat.). For a suit; to the suit. Greenl. Ev. § 348.

IN LOCO. In place; in lieu; instead; in the place or stead. Townsh. Pl. 38.

IN LOCO PARENTIS (Lat.). In the place of a parent: as, the master stands towards his apprentice *in loco parentis*. See APPRENTICESHIP; GUARDIAN.

IN MAJORE CAUTELAM. For greater security. 1 Stra. 105.

IN MALAM PARTEM. In a bad sense; so as to wear an evil appearance.

IN THE MANNER PROVIDED. See AS PROVIDED.

IN MANU. See MANUS MARRIAGE.

IN MEDIAS RES (Lat.). In the middle of things; into the heart of the subject, without preface or introduction.

IN MEDIO. Intermediate.

In Scotch Law. A term denoting a fund in controversy in an action of double or multiple-poining, which is a species of interpleader resorted to by a debtor distressed or threatened by two or more persons claiming the debt. While the subject in controversy continues *in medio*, any third person who conceives he has right to it may, though he should not be cited as a defender, produce his titles as if he were an original party to the suit, and he will be admitted for his interest in the competition. Ersk. Pr. 4, 1, 30.

IN MERCY. To be in mercy is to be at the discretion of the king, lord, or judge in punishing any offence not directly censured by the law. Thus, to be in the *grievous mercy* of the king is to be in hazard of a great penalty; 1 Hen. VI. c. 6. So, where the plaintiff failed in his suit, he and his pledges were in the mercy of the lord, *pro falso clamore suo*. This is retained nominally on the record; 3 Bla. Com. 376. So the defendant is in mercy if he fail in his defence; *id.* 398. See MERCY.

IN MISERICORDIA (Lat. in mercy). The entry on the record where a party was in mercy was, *Ideo in misericordia*, etc. The phrase was used because the punishment in such cases ought to be moderate. See Magna Cart. c. 14; Bracton, lib. 4, tr. 5, c. 6. Sometimes *misericordia* means the being quit of all amercements (*q. v.*)

IN MITIORI SENSU (Lat. in a milder acceptance).

A phrase denoting a rule of construction formerly adopted in slander suits, the object of which was to construe phrases, if possible, so that they would not support an action. Ingenuity was continually exercised to devise or discover a meaning which by some remote possibility the speaker might have intended; and some ludicrous examples of this ingenuity may be found. To say of a man who was making his livelihood by buying and selling merchandise, "He is a base, broken rascal; he has broken twice, and I'll make him break a third time," was gravely asserted not to be actionable,—"ne poet dar porter action, car poet estre intenc de *business de belly*," Latch 114. And to call a man a thief was declared to be no slander, for this reason: "perhaps the speaker might mean he had stolen a lady's heart."

The rule now is to construe words agreeably to the meaning usually attached to them. It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words, and before the favorite doctrine of construing words in their mildest sense, in direct opposition to the finding of the jury, was finally abandoned by the courts. "For some inscrutable reason," said Gibson, J., "the earlier English judges discouraged the action of slander by all sorts of evasions, such as the doctrine of *mitiori sensu*, and by requiring the slanderous charge to have been uttered with the technical precision of an indictment. But, as this discouragement of the remedy by process of law was found inversely to encourage the remedy by battery, it has been gradually falling into disrepute, inasmuch that the precedents in Croke's Reports are beginning to be considered apocryphal." 30 Pa. 102; 7 S. & R. 451; 1 N. & M.C. 217; 2 *id.* 511; 3 Mass. 248; 1 Wash. Va. 159; 1 Kirb. 12; Heard, Lib. & S.L. § 162.

IN MODUM ASSISÆ. In the man-

ner or form of an assize. Bract. fol. 183 b. *In modum jurate*, in manner of a jury. *Id.* fol. 181 b.

IN MORA (Lat.). In delay; in default. In the civil law a borrower *in mora* is one who fails to return the thing borrowed at the proper time; Sto. Bailm. § 254. In Scotch law a creditor is *in mora* who has failed in respect to the diligence required in levying an attachment on the property of the debtor. Bell, Dict.

IN MORTUA MANU (Lat. in a dead hand). Property owned by religious societies was said to be held *in mortua manu*, or in mortmain, since religious men were *civilitur mortui*. 1 Bla. Com. 479; Taylor, Gloss.

IN NOMINE DEI, AMEN. In the name of God, Amen. A phrase, anciently used in wills and many other instruments, the translation of which is often used in wills at the present day, but chiefly by ignorant draughtsmen or testators.

IN NOTIS. In the notes.

IN NUBIBUS (Lat.). In the clouds; in abeyance; in custody of law. *In nubibus, in mare, in terra vel, in custodia legis*: in the air, sea, or earth, or in the custody of the law. Taylor, Gloss. In case of abeyance, the inheritance is figuratively said to rest *in nubibus*, or *in gremio legis*: e. g. in case of a grant of life estate to A, and afterwards to heirs of Richard, Richard in this case, being alive, has no heirs until his death, and, consequently, the inheritance is considered as resting *in nubibus*, or in the clouds, till the death of A, when the contingent remainder either vests or is lost and the inheritance goes over. See 2 Sharsw. Bla. Com. 107, n.; 1 Co. 137; ABEYANCE.

IN NULLIUS BONIS. Among the goods or property of no person; belonging to no person, as treasure-trove and wreck were anciently considered.

In the civil law, things sacred and religious were considered as not the subjects of private property. Inst. 2. 1. 7. Animals, while they remain wild, are accounted *nullius in bonis*, the common property of mankind. Burrill; 2 Steph. Com. 17.

IN NULO EST ERRATUM (Lat.). In Pleading. A plea to errors assigned on proceedings in error, by which the defendant in error affirms there is no error in the record. As to the effect of such plea, see 1 Ventr. 252; 1 Stra. 684; 9 Mass. 532; 1 Burr. 410; T. Raym. 231. It is a general rule that the plea *in nullo est erratum* confesses the fact assigned for error; Yelv. 57; Dane, Abr. Index; but not a matter assigned contrary to the record; 7 Wend. 55; Bacon, Abr. Error (G).

IN ODIUM SPOLIATORIS (Lat.). In hatred of a despoiler. All things are presumed against a despoiler or wrongdoer: *in odium spoliatoris omnia presumuntur*. See MAXIMS.

If a man wrongfully opened a bundle of papers, sealed and left in his hands, so that he may have altered them or abstracted some, all presumptions will be taken against him in settling an account depending on the papers; 3 Macq. Sc. App. 766; the same rule is applied if one withhold evidence bearing on the case; 1 Stark. 35; 18 Jur. 703; or an agreement with which he is charged; 9 Cl. and Fin. 775. See at large 1 Sm. L. Cas. 9th Am. ed. 638-9; Br. Leg. Max. 8th Am. ed. 938; SPOLIATION.

IN OMNIBUS. In all things; on all points. "A case parallel *in omnibus*;" 10 Mod. 104. A modern phrase to the same effect is "on all fours" (*q. v.*).

IN OPERATION. A salary contract fixing a lower salary upon the employer's factory when not in operation, does not require the factory to be in full operation to entitle the employee to full salary. 143 Ky. 4, 145 S. W. 1122.

IN PACATO SOLO. In a country which is at peace.

IN PACE DEI ET REGIS. In the peace of God and the king. Fleta 1, c. 31, § 6. Formal words in old appeals of murder.

IN PAIS. This phrase, as applied to a legal transaction, primarily means that it has taken place without legal formalities or proceedings. Thus a widow was said to make a request *in pais* for her dower when she simply applied to the heir without issuing a writ; Co. Litt. 32b. So conveyances are divided into those by matter of record and those by matter *in pais*. In some cases, however, "matters *in pais*" are opposed not only to "matters of record," but also to "matters in writing," i. e. deeds, as where estoppel by deed is distinguished from estoppel by matter *in pais*; *id.* 352 a; 4 Kent 260.

In the country, as distinguished from "in court," out of court, or without judicial process; by deed, or not of record. Matter *in pais* is distinguished from matter of record. Burrill.

Common assurances are of four kinds: (1) By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to the old common law) upon the very spot to be transferred. (2) By matter of record, or an assurance transacted only in the king's public court of record. (3) By special custom. (4) By devise. 2 Bl. Com. 294. See ESTOPPEL IN PAIS.

IN PAPER. In English Practice. A term used of a record until its final enrolment on the parchment record. 3 Bla. Com. 406; 10 Mod. 88; 3 Lilly, Abr. 322; 4 Geo. II.

IN PARI CAUSA (Lat.). In an equal cause. It is a rule that when two persons have equal rights in relation to a particular thing, the party in possession is considered as having the better right: *in pari causa possessor potior est*. Dig. 50, 17, 128; 1 Bouvier, Inst. n. 952. See MAXIMS; PRESUMPTION.

IN PARI DELICTO (Lat.). In equal fault; equal in guilt. Neither courts of law nor of equity will interpose to grant relief to the parties, when an illegal agreement has been made and both parties stand *in pari delicto*. The law leaves them where it finds them, according to the maxim, *in pari delicto potior est conditio defendentis (or, possidentis)*. 15 Kan. 157. See MAXIMS; DELICTUM.

IN PARIMATERIA (Lat.) Upon the same matter or subject. Statutes *in parimateria* are to be construed together; 7 Conn. 456.

IN PATIENDO. In suffering, permitting, or allowing.

IN PECTORE JUDICIS. In the breast of the judge. Latch 180. A term applied to a judgment.

IN PEJOREM PARTEM. In the worst part; on the worst side. Latch 159.

IN PERPETUAM REI MEMORIAM (Lat.). For the perpetual memory or remembrance of a thing. Gilbert, For. Rom. 118.

IN PERPETUUM REI TESTIMONIUM. In perpetual testimony of a matter; for the purpose of declaring and settling a thing forever. 1 Bla. Com. 86.

IN PERSON. A party, plaintiff or defendant, who sues out a writ or other process, or appears to conduct his case in court himself, instead of through a solicitor or counsel, is said to act and appear in person. Any suitor, but one suing *in forma pauperis*, may do this.

IN PERSONAM (Lat.). A remedy where the proceedings are against the person, in contradistinction to those which are against specific things, or *in rem* (*q. v.*).

See JUDGMENT RENDERED IN PERSONAM.
See JUDGMENT IN REM.

IN PIOS USUS. For pious uses; for religious purposes. 2 Bla. Com. 505.

IN PLENO COMITATU. In full county court. 3 Bla. Com. 36.

IN PLENO LUMINE. In public; in common knowledge; in the light of day.

IN PLENO VITA. In full life. Yearb. P. 18 Hen. VI. 2.

IN POSSE (Lat.). In possibility; not in actual existence: used in contradistinction to *in esse*.

IN POTESTATE PARENTIS. In the power of a parent. Inst. 1, 8, pr.; *id.* 1, 9; 2 Bla. Com. 498.

IN PRÆMISSORUM FIDEM. In confirmation or attestation of the premises. A notarial phrase.

IN PRÆSENTI (Lat.). At the present time: used in opposition to *in futuro*. A marriage contracted *per verba de præsenti* is good: as, I take Paul to be my husband, is a good marriage; but words *de futuro* would not be sufficient, unless the ceremony was followed by consummation. 4 La. Ann. 347; 6 Binn. 405.

IN PRENDER (L. Fr.). In taking. Such incorporeal hereditaments as a party entitled to them was to take for himself were said to be *in prender*. Such was a right of common. 2 Steph. Com. 15.

IN PRIMIS. In the foremost place. A term used in argument. Usually written *imprimis* (*q. v.*).

IN PRINCIPIO (Lat.). At the beginning. This is frequently used in citations: as, Bacon, Abr. *Legacies*, *in pr.*

IN PROMPTU. In readiness; at hand. Usually written *inpromptu*.

IN PROPRIA PERSONA (Lat.). In his own person; himself: as, the defendant appeared *in propria persona*; the plaintiff argued the cause *in propria persona*. Sometimes abbreviated on the printed court lists, P. P.

IN RE (Lat.). In the matter: as, *in re A B*, in the matter of A B. In the headings of legal reports these words are used more especially to designate proceedings in bankruptcy or insolvency, or the winding up of estates or companies.

IN REBUS (Lat.). In things, cases, or matters.

IN REM (Lat.). A technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*.

Proceedings *in rem* include not only those instituted to obtain decrees or judgments against property as forfeited in the admiralty or the English exchequer, or as prize, but also suits against property to enforce a lien or privilege in the admiralty courts, and suits to obtain the sentence, judgment, or decree of other courts upon the personal *status* or relations of the party, such as marriage, divorce, bastardy, settlement, or the like. 1 Greenl. Ev. §§ 625, 541; 2 Bish. Mar. Div. & Sep. 14, 24.

Courts of admiralty enforce the performance of a contract, when its performance is secured by a maritime lien or privilege, by seizing into their custody the very subject of hypothecation. In these suits, generally, the parties are not personally bound, and the proceedings are confined to the thing *in specie*; Brown, Civ. & Adm. Law 98. See Bened. Ad. 270, 362; 2 Gall. 200; 3 Term 269.

There are cases, however, where the remedy is either *in personam* or *in rem*. Seamen, for example, may proceed against the ship or freight for their wages, and this is the most expeditious mode; or they may proceed against the master or owners; 4 Burr. 1944; 2 Bro. Civ. & Adm. Law, 396. See, generally, 1 Phill. Ev. 254; 1

Stark. Ev. 228; Dane, Abr.; Serg. Const. Law 202, 212; Pars. Marit. Law; Bened. Adm. 503. No action *in rem* lies for damages incurred by loss of life; 145 U. S. 835. A contract for launching a vessel carried some distance up the beach by a storm, is a maritime contract, for which the vessel is liable *in rem*; 48 Fed. Rep. 569. See ADMIRALTY; BOTTOMRY; LIEN. JUDGMENT IN REM.

IN RENDER. A thing in a manor is said to lie *in render* when it must be rendered or given by the tenant, *e. g.* rent; to lie *in prender*, when it may be taken by the lord or his officer when it chance. West, Symbol. pt. 2, *Fines*, § 126.

IN REBUM NATURA (Lat.). In the nature (or order) of things; in existence. Not *in rerum natura* is a dilatory plea, importing that the plaintiff is a fictitious person.

In Civil Law. A broader term than *in rebus humanis*: *e. g.* before quickening, an infant is *in rerum natura*, but not *in rebus humanis*; after quickening, he is *in rebus humanis* as well as *in rerum natura*. Calvinus, Lex.

IN SCRINIO JUDICIS. In the writing-case of the judge; among the judge's papers. "That is a thing that rests *in scrinio judicis*, and does not appear in the body of the decree," Hardr. 51.

IN SEPARALI. In several; in severally. Fleta 2, c. 54, 20.

IN SIMILI MATERIA. Dealing with the same or a kindred subject-matter.

IN SIMPLICI PEREGRINATIONE. In simple pilgrimage. Bract. fol. 338. A phrase in the old law of essoins. See IN GENERALI PASSAGIO.

IN SOLIDUM, IN SOLIDO (Lat.). In Civil Law. For the whole; as a whole. An obligation or contract is said to be *in solido* or *in solidum* when each is liable for the whole, but so that a payment by one is payment for all: *i. e.* it is a joint and several contract. 1 W. Bla. 388.

Possession is said to be *in solidum* when it is exclusive. "*Duo in solidum precario habere non magis possunt, quam duo in solidum vi possidere aut clam; nam neque juste neque injuste possessiones duæ concurrere possunt.*" Savigny, lib. 3, § 11. The phrase is commonly used in Louisiana.

IN SOLO. In the soil or ground. *In solo alieno*, in another ground. *In solo proprio*, in one's ground. 2 Steph. Com. 20.

IN SPECIE (Lat.). In the same form: *e. g.* a ship is said to no longer exist *in specie* when she no longer exists as a ship, but as a mere congeries of planks. 8 B. & C. 561; Arnould, Ins. 1012. To decree a thing *in specie* is to decree the performance of that thing *specifically*. See IN KIND; KIND

IN STATU QUO (Lat.). In the same situation as; in the same condition as. See STATUS QUO.

IN STIRPES. In the law of descent, according to roots or stocks; by representation as distinguished from *succession per capita*. More commonly written *per stirpes* (*q. v.*).

A term derived from the ancient Roman law of succession, and still frequently applied to cases where, in the distribution of estates, persons take the share which their parent, (the *stirpes*, stock or root whom they represent), would have done, had he been living. Burrill; 2 Bl. Com. 217. See PER CAPITA.

IN STORE. Personal property received by a corporation for use either as stock or equipment in its business; is not received "in store," within the meaning of a statute, so as to authorize the corporation to issue warehouse receipts therefor. 106 Ky. 7, 50 S. W. 2, 20 R. 1684.

IN TANTUM. In so much; so much; so far; so greatly. Reg. Orig. 97, 106.

IN TERMINIS TERMINANTI-BUS. In terms of determination; exactly in point. 11 Co. 40 b. In express or determinate terms. 1 Leon. 93.

IN TERROREM (Lat.). By way of threat, terror, or warning. For example, when a legacy is given to a person upon condition not to dispute the validity or the dispositions in wills and testaments, the conditions are not, in general, obligatory, but only *in terrors*: if, therefore, there exist *probabilis causa litiganda*, the non-observance of the conditions will not be a forfeiture. 1 Hill, Abr. 253; 3 P. Wms. 344; 1 Atk. 404. But when the acquiescence of the legatee appears to be a material ingredient in the gift, the bequest is only *quousque* the legatee shall refrain from disturbing the will; 2 P. Wms. 52; 2 Ventr. 352. See DURESS.

IN TERROREM POPULI (Lat.) to the terror of the people).

A technical phrase necessary in indictments for riots. 4 C. & P. 373.

Lord Holt has given a distinction between those indictments in which the words *in terrors populi* are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consists in going about armed, etc., without committing any act, the words are necessary, because the offence consists in terrifying the public; but in those riots in which an unlawful act is committed, the words are useless; 11 Mod. 116; 10 Mass. 518.

IN TESTIMONIUM. In witness or in evidence whereof. The first words of the attestation clause of certain legal instruments.

IN TOTIDEM VERBIS (Lat.). In just so many words: as, the legislature has declared this to be a crime *in totidem verbis*.

IN TOTO (Lat.). In the whole; wholly; completely: as, the award is void *in toto*. In the whole the part is contained; *in toto et pars continetur*. Dig. 50. 17. 123.

IN TRAJECTU. In the passage over; on the voyage over. 3 C. Rob. Adm. 338.

IN TRANSITU (Lat.). During the transit, or removal from one place to another. See STOPPAGE IN TRANSITU.

IN VACUO (Lat.) in what is empty). Without concomitants or coherence. Whart.

IN VADIO (Lat.). In pledge; in gage.

IN VENTRE SA MERE (L. F.). In his mother's womb. It is written differently in this form, or *en ventre sa mere* (*q. v.*).

See POSTHUMOUS CHILD; CURTESY; DOWER; INFANT; INJUNCTION.

IN VINCULIS. In chains; in actual custody. Gilb. For. Rom. 97.

Applied also, figuratively, to the condition of a person who is compelled to submit to terms which oppression and his necessities impose on him; 1 Story, Eq. Jur. § 302.

IN VIRIDIOBSERVANTIA. Present to the minds of men, and in full force and operation.

IN WITNESS WHEREOF. These words, which, when conveyancing was in the Latin language, were in *cujus rei testimonium*, are the initial words of the concluding clause in deeds: "In witness whereof the said parties have hereunto set their hands," etc.

INADEQUATE PRICE. A term applied to indicate the want of a sufficient consideration for a thing sold, or such a price as, under ordinary circumstances, would be considered insufficient.

Inadequacy of price is generally connected with fraud, gross misrepresentations, or an intentional concealment of defects in the thing sold. In these cases it is clear that the vendor cannot compel the buyer

to fulfil the contract; 1 Bro. P. C. 187; L. R. 12 Eq. 320; 6 Johns. 110; 3 Cra. 270; 6 Verg. 508; 11 Vt. 315; 1 Metc. Mass. 93; 20 Me. 462; 1 Brown, Ch. 440.

In general, however, inadequacy of price is not sufficient ground to avoid an executed contract, particularly when the property has been sold by auction; 7 Ves. 30, 35, n.; 3 Bro. Ch. 228; 104 Mass. 420; if there is no fraud and the parties deal at arm's length, upon their independent judgment, it will be held good; 19 Ala. 765; 102 Mass. 60; 75 Mo. 681; 81 Fed. Rep. 369. But if an uncertain consideration, as a life annuity, be given for an estate, and the contract be executory, equity, it seems, will enter into the adequacy of the consideration; 7 Bro. P. C. 184; 1 Bro. Ch. 156. See Sugd. Vend. 189; 1 B. & B. 165; 1 M'Ord, Ch. 383; 4 Des. Ch. 651; 97 Mass. 180. And if the price be so grossly inadequate and given under such circumstances as to afford a necessary presumption of fraud or imposition, a court of equity will grant relief; 6 Ga. 515; 49 Miss. 582; 8 B. Monr. 11; 2 Harr. & G. 114; 11 N. H. 9; 1 Metc. Mass. 93; 3 McLean 332; 19 How. 303; 58 Ill. 191; 110 id. 390; 20 Fla. 157; 71 Iowa 428; 50 Me. 438; 118 U. S. 89; Story, Eq. Jur. § 244; Leake, Contr. 1150. As to cases of sales of their interests by heirs and reversioners for inadequate price, see CATCHING BARGAIN; EXPECTANCY.

See CONSIDERATION; POST ORBIT; MACEDONIAN DECREE; JUDICIAL SALE.

INADMISSIBLE. What cannot be received. Parol evidence, for example, is ordinarily inadmissible to contradict a written agreement.

INADVERTENTLY. By the expression "inadvertently" drawn, mistake is intended, and may be understood. 1 J. J. Mar. (Ky.) 87.

INALIENABLE. A word denoting the condition of those things the property in which cannot be lawfully transferred from one person to another. Public highways and rivers are inalienable. There are also many rights which are inalienable, as the rights of liberty or of speech.

INAUGURATION. A word applied by the Romans to the ceremony of dedicating a temple, or raising a man to the priesthood, after the *augurs* had been consulted.

It was afterwards applied to the installation of emperors, kings, and prelates, in imitation of the ceremonies of the Romans when they entered the temple of the *augurs*. It is applied in the United States to the installation of the chief magistrate of the republic, and of the governors of the several states.

INBLAURA. Profit or product of the ground. Cowell.

INBORH. A security, pledge, or hypotheca, consisting of the chattels of a person unable to obtain a personal "borg" or surety.

A pledge for persons going in. *Inborh & outborh*; a pledge for persons going in and out. Burrill; Blount.

Englishmen in ancient times called an entry and forecourt or gate-house, "in-borow." Tomlin; Cowell.

INCAPACITY. The want of a quality legally to do, give, transmit, or receive something.

In general, the incapacity ceases with the cause which produces it. If the idiot should obtain his senses, or the married woman's husband die, their incapacity would be at an end. See LIMITATIONS, STATUTE OF.

INCASTELLARE. To make a building serve the purpose of a castle. Jacob.

INCAUSTUNO or ENCAUSTUNO. Ink. Fleta, l. 2, c. 27, § 5.

INCENDIARY (Lat. *incendium*, a kindling). One who maliciously and wilfully sets another person's building on fire; one guilty of the crime of arson. See ARSON; BURNING.

INCEPTION. The commencement; the beginning. In making a will, for example, the writing is its inception. 3 Co. 31 b; Plowd. 343.

INCERTÆ PERSONÆ. Uncertain persons as posthumous heirs, a corporation, the poor, a juristic person, or persons who cannot be ascertained until after the execution of a will. Sohm. Inst. Rom. L. 104, 458.

INCEST. The carnal copulation of a man and a woman related to each other in any of the degrees within which marriage is prohibited by law. 1 Bish. Marr. & D. 112, 376, 442. It involves the assent of both parties; 39 Mich. 124; but it is held that it may exist as to the man although without the consent of the woman; 53 N. W. Rep. (Ia.) 1090; 99 Cal. 359. It is punished by fine and imprisonment, under the laws of most, if not all, of the states, but seems not at common law to be an indictable offence; 4 Bla. Com. 64; 78 N. C. 469. See 31 Tex. Cr. R. 186.

Preparations for an attempted incestuous marriage have been held not indictable; 14 Cal. 159. A man indicted for rape may be convicted of incest; 2 Met. 193; 1 Bish. Cr. Proc. § 419. See DAPE, ABR. INDEX; 6 Conn. 446; 11 Ga. 53; 1 Park. Cr. 344. See 20 Or. 437. And as to whether the crime is rape or incest may be left to the jury; 96 Mich. 449. Proof of one commission of the offence is sufficient for conviction; 18 S. W. Rep. (Ky.) 380.

INCESTUOSI. Those offspring incestuously begotten. Mack. Rom. L. § 143.

INCH (Lat. *uncia*). A measure of length, containing one-twelfth part of a foot; originally supposed equal to three grains of barley laid end to end.

INCHOATE. That which is not yet completed or finished. Contracts are considered inchoate until they are executed by all the parties. During the husband's life, a wife has an inchoate right of dower; 2 Bla. Com. 130; so with the right of an unborn child to take by descent; 2 Paige, Ch. 35; and a covenant which purports to be tripartite, and is executed by only two of the parties, is incomplete, and no one is bound by it; 2 Halst. 142. See LOCUS PENITENTIAE.

INCIDENT. This term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion. 1 Hill. R. P. 243; while the right of alienation is necessarily incident to a fee-simple at common law, and cannot be separated by a grant; 1 Washb. K. P. 54. So a court baron is inseparably incident to a manor; in England; Kitch. 36; Co. Litt. 151. All nominate contracts and all estates known to common law have certain incidents which they draw with them and which it is not necessary to reserve in words. So the costs incurred in a legal proceeding are said to be incidental thereto. See Jacob, Law Dict.

INCIPITUR (Lat.). In Practice. This word, which means "it is begun," signifies the commencement of the entry on the roll on signing judgment, etc. The custom is no longer necessary in England, and was unknown here. But see 3 Steph. Com. 566, n.

INCLOSURE. The extinction of common rights in fields and waste lands. 1 Steph. Com. 655.

The separation and appropriation of land by means of a fence, hedge, etc., together with such fence or hedge. 36 Wis. 44; 34 id. 672; 39 Vt. 331; 63 Ind. 530; 8 Hun 269; where, in a will, the executors were directed to inclose with an iron fence meeting-house grounds, school-house grounds, and burial ground, it was held that the intention was clear to inclose each of the grounds on all sides; 112 Pa. 52.

A paper or letter inclosed with another in an envelope.

The act of freeing land from rights of common, commonable rights, and generally all rights which obstruct cultivation and the productive employment of labour on the soil, by vesting it in some person as absolute owner. Inclosure may be effected in three ways: (1) In the case of manorial wastes (a) by the lord of the manor alone under his right of appurement; (b) by the lord under a special custom enabling him, with the consent of the homage, to grant parcels of the waste, to be held of him by copy of court-roll; (c) by the tenants themselves under various special customs; (d) by encroachments, or unauthorised inclosures legalized by lapse of time. (2) By agreement between the commoners and the owner of the soil. (3) By Act of Parliament. (For the latter, see title INCLOSURE COMMISSION ACT. Byrne.

INCLOSURE ACTS. English statutes regulating the subject of inclosure. The most notable was that of 1801, 41 Geo. III. c. 109.

INCLOSURE COMMISSION ACT, 1845. The statute 8 and 9 Vict. c. 118, establishing a board of commissioners for England and Wales and empowering them, on the application of persons interested to the amount of one-third of the value of the land, and provided the consent of persons interested to the amount of two-thirds of the land and of the lord of the manor (in case the land be waste of a manor) be ultimately obtained, to inquire into the case and to report to parliament as to the expediency of making the inclosure. 1 Steph. Com. 655.

INCLUDE (Lat. *in claudere* to shut in, keep within). In a legacy of "one hundred dollars including money trusted" at a bank, it was held that the word "including" extended only to a gift of one hundred dollars; 132 Mass. 218; but in a bequest of a sum of money inclusive of a note of the legatee, it was held that the note was included in the legacy; 154 Pa. 340. In a contract to furnish a street paving machine, exclusive of patterns which were to be furnished by defendant, such patterns were found to be defective and incomplete, and on a second bid, where plaintiff agreed for increased cost to build the machine "including revised patterns and drawings," these words were held not to change the contract so as to require the plaintiffs to furnish a machine that would "work satisfactorily, as a machine," but that it only required the parts designed and constructed by them to be suitable for the intended purpose and all the machinery and workmanship to be good; 160 Pa. 317.

INCLUDING. The words "and including" following a description do not necessarily mean "in addition to," but may refer to a part of the thing described. 221 U. S. 425.

INCLUSIVE. Comprehended in computation. In computing time, as ten days from a particular time, the last day is generally to be included and the first excluded. See EXCLUSIVE; TIME; 154 Pa. 340, as to its use in a legacy.

INCOLA (Lat. from *incolere*, to inhabit). An inhabitant of a place, not a native. English.

A dweller or resident. Properly, one who has transferred his domicile to any country. Burrill. One who comes from abroad, and takes up his abode in a place, with the view of residing there. The peculiar sense of the word seems to be derived from the component particle *in*, having the sense of into, or entry. Domicil made a person an "incola," as birth made him a "civis" (q. v.). *Id.*; Cod. 10. 40. 7; Phil. on Dom., 25, 26.

In Old English Law. A subject. *Id.*; Stat. Marlbr. pr.

INCOME. The gain which proceeds from property, labor, or business; it is applied particularly to individuals. The in-

come of the state or government is usually called revenue. The word is sometimes considered synonymous with "profits," the gain as between receipts and payments; 4 Hill 23; "rent, and profits," "income," and "net income" of the estate are equivalent expressions; 5 Me. 203; it may mean "money" or the expectation of receiving money; 14 Blatch. 71; 15 Wall 63; and a note is ground for expecting income, and in the sense of a statute taxing incomes the amount thereof is to be returned when paid; *id.* 1. See 14 La. Ann. 815; 30 Barb. 637; 16 Fed. Rep. 14. In the ordinary commercial sense "income" especially when connected with the word "rent," may mean clear or net income. "Produce" or "product" as a substituted word may relieve a will from obscurity; 100 Pa. 481; 44 *id.* 347. In a gift of the income, etc., of shares of stock, it is not synonymous with increase, and while it will include dividends from the stock, will not embrace the sum by which the stock has increased; 62 Conn. 62. As to when dividends are to be considered as income, see 31 A. & E. Corp. Cas. 386, n; 136 Pa. 43; *DIVIDEND*.

It has been held that a devise of the income of land is in effect the same as a devise of the land itself; 9 Mass. 372; 80 N. Y. 320; 92 Pa. 254; s. c. 3 Am. Prob. Rep. 196; 72 Me. 109; and a gift of the income of a fund is a gift of the fund; 1 Johns. Ch. 494; 32 N. J. Eq. 591; and the income of property is a gift of the property; 53 Conn. 259; 105 Pa. 441; 2 Rep. Leg. 371.

Income, within the meaning of the Corporation Tax Law of 1909, includes the proceeds of ore mined by a corporation from its own premises. 231 U. S. 399.

Gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. 255 U. S. 517, quoting 252 U. S. 207, in turn quoting 231 U. S. 399, and 247 U. S. 179. Income shall also include gains derived from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit. 257 U. S. 168. Not everything in the form of a dividend must be treated as income, but that which is derived in the way of dividends. 257 U. S. 169. See *TAXABLE INCOME*.

Under Income Tax of 1913. For income taxable to a domestic corporation under the Income Tax Act of 1913, see 251 U. S. 345.

Converted Capital not Income. Accumulations that accrued to corporation through surplus earnings or appreciation in property value prior to the Act of 1913, regarded as capital and not income. 247 U. S. 335.

Income from Exports. Net income of a corporation derived from exporting goods from States and selling them abroad is part of "entire net income arising or accruing from all sources" under § II, Act of 1913. 247 U. S. 165.

Under Corporation Tax of 1909. Income employed in natural and obvious sense, as importing something distinct from principal or capital, and conveying idea of gain or increase from corporate activities. 247 U. S. 185.

Conversion of Preexisting Capital not Income. While conversion of capital may result in income, in sense of Act of 1909, where proceeds include increment of value, such is not the case where increment existed when Act took effect. *Id.* 179.

INCOME TAX. See *TAX*.

INCOMMUNICATION. In Spanish Law. The condition of a prisoner who is not permitted to see or to speak with any person visiting him during his confinement.

A person accused cannot be subjected to this treatment unless it be expressly ordered by the judge, for some grave offence, and it cannot be continued for a longer period than is absolutely necessary. Art. 7. Reglamento de 26 Setiembre, 1835.

This precaution is resorted to for the purpose of preventing the accused from knowing beforehand the testimony of the witnesses, or from attempting to corrupt them and concert such measures as will efface the traces of his guilt. As soon, therefore, as the danger of his doing so has ceased, the interdiction ceases likewise. Escriche.

INCOMPATIBILITY. Incapability of existing or being exercised together.

Thus the relations of landlord and of tenant cannot exist in one man at the same time in reference to the same land. Two offices may be incompatible either from their nature or by statutory provisions. See U. S. Const. art. 6, § 3, n. 5, art. 1, § 6, n. 2; 4 S. & E. 277; 17 *id.* 219; 46 How. Fr. 170; 9 S. C. 179; *OFFICE*.

Incompatibility is ordinarily not a ground for divorce; 12 La. Ann. 882; 6 Am. L. Reg. o. s. 740; 4 Greene 324; though in some states it is. See *DIVORCE*.

INCOMPATIBLE. Legally inconsistent; that cannot be legally united in the same person.

INCOMPETENCY. Lack of ability or fitness to discharge the required duty.

At Common Law. Judges and jurors are said to be incompetent from having an interest in the subject-matter. A judge is also incompetent to give judgment in a matter not within his jurisdiction. See *JURISDICTION*. With regard to the incompetency of a judge from interest, it is a maxim in the common law that no one should be a judge in his own cause (*aliquis non debet esse iudex in propria causa*); Co. Litt. 141 a. See 4 Com. Dig. 6; 43 La. Ann. 924; 31 Fla. 594. The greatest delicacy is constantly observed on the part of judges, so that they never act when there is the possibility of doubt whether they can be free from bias; and even a distant degree of relationship has induced a judge to decline to sit; 1 Knapp 376. Where one has acted as counsel, he cannot, subsequently, sit in judgment on the matter in which he has given his advice; 30 Fla. 595; 31 Tex. Cr. R. 449; 111 Mo. 526. The slightest degree of pecuniary interest is considered an insuperable objection. But at common law interest forms the only ground for challenging a judge. It is not a ground of challenge that he has given his opinion before; 2 Binn. 454. See 4 Mod. 236; 13 Mass. 340; Coxe 190; 3 Ohio 289; 3 Cow. 725; 12 Conn. 88; 1 Penning. N. J. 185; 4 Yeates 466; 4 Tex. Civ. App. 648; 69 Tex. 300; 83 Ga. 151; Salk. 396; Bac. Abr. *Courts* (B). In New York it is held that a conviction of larceny, when one of the members of the trial court is related to the prisoner within the sixth degree, is void; 142 N. Y. 130. See *JUDGE*; *JURY*; *COMPETENCY*; *INTEREST*.

In Evidence. A witness may be at common law incompetent on account of a want of understanding, a defect of religious belief, a conviction of certain crimes, infamy of character, or interest; 1 Phill. Ev. 15. The last ground of incompetency is removed to a considerable degree in most states; and the second is greatly limited in modern practice. See *WITNESS*.

In French Law. Inability or insufficiency of a judge to try a cause brought before him, proceeding from lack of jurisdiction.

INCONCLUSIVE. Not finally decisive. Inconclusive presumptions are capable of being overcome by opposing proof.

INCONSULTO. In the Civil Law. Unadvisedly; unintentionally. Dig. 28, 4, 1.

INCONTINENCE. Impudicity; indulgence in unlawful carnal connection.

INCONTINENTI. Forthwith; immediately; without any interval; incontinently. Burrill; Bract. fol. 163 b. In the civil law, this word did not always import instantaneous succession, but admitted of the existence of a moderate interval. *Id.*; Calv. Lex.

INCORPORALIS. Incorporeal; not material; not having a body or substance.

INCORPORATED. See *INCORPORATION*.

INCORPORATED LAW SOCIETY. A society of attorneys and solicitors whose function it is to carry out the acts of parliament and orders of court with reference to articulated clerks; to keep an alphabetical roll of attorneys and solicitors; to issue certificates to persons duly admitted and enrolled, and to exercise a general control over the conduct of solicitors in practice, and to bring cases of misconduct before the judges. 8 Steph. Com. 217.

A society, known as the "Law Society," was formed in 1825, and received a charter of incorporation in 1831. In 1845, it received a further royal charter in which it is referred to as "The Society of Attorneys, Solicitors and Proctors, and others, not being barristers, practising in the Courts of Law and Equity of the United Kingdom." In 1843, the Society was made registrar of attorneys and solicitors: the custody of the roll of solicitors, which previously had been with the Clerk of the Petty Bag, was transferred to it in 1888. Since 1877 no person can be admitted as a solicitor unless he has obtained from the Society a certificate that he has passed certain examinations: it issues the annual certificate without which a solicitor cannot practice. Under the act of 1888, the committee of the Society investigated complaints against solicitors, and in a suitable case brought the matter before the Court in order to have the solicitor struck off the roll; and now, under the act of 1919, the committee, in addition to investigating, can itself strike off the roll, the offender being, however, given a right of appeal to the Court. Byrne.

INCORPORATION. The act of creating a corporation; that which is incorporated. A legal or political body formed by the union of individuals under certain conditions, rules, and laws, and having certain privileges and partial or perpetual succession.

In Civil Law. The union of one domain to another.

INCORPORATION BY REFERENCE. The bringing into one document in legal effect, of the contents of another by referring to the latter in such manner as to adopt it.

INCORPOREAL. Having no body, or corpus; not material, or tangible; not an object of sense, but existing only in contemplation of law.

INCORPOREAL CHATTELS. The incorporeal rights or interests growing out of personal property, such as copyrights and patent rights, stocks and personal annuities. 2 Sandf. 552, 559; 2 Steph. Com. 9.

INCORPOREAL HEREDITAMENT. Anything, the subject of property, which is inheritable and not tangible or visible. 2 Woodd. Lect. 4. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. 2 Bla. Com. 20; 80 Wis. 222; 1 Washb. R. P. 10; Chal. R. P. 47; 18 Colo. 298.

Their existence is merely in idea and abstract contemplation, though their effects and profits may be frequently the object of the bodily senses; Co. Litt. 9 a; Pothier, *Traite des Choses* § 2. According to Blackstone, there are ten kinds of incorporeal hereditaments: viz. advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents. 2 Bla. Com. 20. In the United States there are no advowsons, tithes, dignities, nor corodies, commons are rare, offices rare or unknown, and annuities have no necessary connection with land. 3 Kent 402, 454. And there are other incorporeal hereditaments not included in this list, as remainders and reversions dependent on a particular estate of freehold, easements of light, air, etc., and equities of redemption; 1 Washb. R. P. *11.

Incorporeal hereditaments were said to be in grant; corporeal, in livery: since a simple deed or grant would pass the former,

of which livery was impossible, while livery was necessary to a transfer of the latter. But this distinction is now done away with, even in England. See 8 & 9 Vict. c. 108, § 2; 1 Washb. R. P. 10; Will. R. P. 279, 364, 370; 13 Mass. 483.

INCORPOREAL PROPERTY, In Civil Law. That which consists in legal right merely. The same as choses in action at common law.

INCORRIGIBLE. Incapable of being corrected, amended, or improved.

Under the statute 17 Geo. II. c. 5, incorrigible rogues were subjected to two years' imprisonment in the house of correction, and for escaping from confinement therein were made felons and liable to transportation for seven years. A similar breach and escape by a vagabond or rogue constituted him an incorrigible rogue; 4 Bla. Com. 169.

INCORRUPTIBLE. That which cannot be affected by immoral or debasing influences, such as bribery or the hope of gain or advancement.

INCREASE. That which grows out of land or is produced by the cultivation of it. 23 Tex. 27. As to increase of risk in an insurance policy, see RISKS AND PERILS.

INCREASE, COSTS OF. See COSTS DE INCREMENTO; ACCRETION; INCOME; PROFIT.

INCRIMINATION. The 5th Amendment to the Constitution of the United States declares that no person shall be compelled in any criminal case to be a witness against himself. The meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself; but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime. 142 U. S. 547. The manifest purpose of the constitutional provision is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness. *Id.* The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself. 116 U. S. 616.

INCUPLICATE. To accuse of crime; to impute guilt to; to bring or expose to blame; to censure. Webster.

INCUMBENT. In Ecclesiastical Law. A clerk resident on his benefice with cure; he is so called because he does, or ought to, bend the whole of his studies to his duties. In common parlance, it signifies one who is in possession of an office; as, the present incumbent. One does not become the incumbent of an office, until legally authorized to discharge its duties, by receiving his commission and taking the official oath; 11 Ohio St. 46.

INCUMBRANCE. Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee. 2 Greenl. Ev. § 242; 4 Mass. 629; 113 N. Y. 81.

A public highway; 2 Mass. 97; 3 N. H. 335; 10 Conn. 431; 12 La. Ann. 541; 27 Vt. 739; 13 So. Rep. (Ala.) 545; 47 Ill. App. 278 (but see 46 Pa. 232; 16 Ind. 142; 23 Wis. 628; 87 Ala. 220; 58 N. W. Rep. (Ia.) 1081); a private right of way; 15 Pick. 68; 5 Conn. 497; an easement which is open, visible, and well known; 113 N. Y. 81; a claim of dower; 4 Mass. 630; 23 Ala. N. S. 616; though inchoate only; 2 Me. 22; 22 Pick. 447; 3 N. J. 260; an outstanding mortgage; 5 Me. 94; 30 id. 392; 133 U. S. 610; (other than one which the covenantee is bound to pay; 2 N. H. 458; 12 Mass. 804; 11 S. R. 109; 4 Halst. 189; see 88 Mich. 94; 63 Vt. 53); a liability under the tax laws; 30 Vt. 665; 5 Ohio St. 271; 5 Wis. 407; see 148 Mass. 102; (but no tax or assessment can exist so as to be an incum-

brance, until the amount is ascertained or determined; 113 N. Y. 644); an attachment resting upon land; 43 Conn. 129; 116 Mass. 392; a condition, the non-performance of which by the grantee may work a forfeiture of the estate; 4 Metc. Mass. 412; a paramount title; 3 Cush. 809; restriction as to the kind of building which may be erected on land; 75 Hun 70; a mechanic's lien; 51 Wis. 293; have been held incumbrances within the meaning of the covenant against incumbrances, contained in conveyances; Warv. Vend. 994. The term does not include a condition on which an estate is held; 3 Gray 515; 6 id. 572.

The vendor of real estate is bound in England to disclose incumbrances, and to deliver to the purchaser the instruments by which they were created or on which the defects arise; and the neglect of this is to be considered fraud; Sudg. Vend. 6; 1 Ves. Sen. 96. See 6 Ves. 198; 10 id. 470; 1 Sch. & L. 227; 7 S. & R. 73.

The interest on incumbrances is to be kept down by the tenant for life; 1 Washb. R. P. 95, 257, 573; 5 Johns. Ch. 482; 5 Ohio 28; to the extent of rents accruing; 31 E. L. & Ex. 345; Tudor, Lead. Cas. 60; and for any sum paid beyond that he becomes a creditor of the estate; 2 Atk. 463; 1 Bail. Eq. 397.

When the whole incumbrance is removed by a single payment, the share of the tenant for life is the present worth of an annuity for the life of the tenant equal to the annual amount of the interest which he would be obliged to pay; 1 Washb. R. P. 93, 573. The rule applies to estates held in dower; 10 Mass. 315, n.; 10 Paige, Ch. 71, 158; 3 Md. Ch. Dec. 324; 7 H. & J. 367; in curtesy; 1 Washb. R. P. 142; in tail only in special cases; 1 Washb. R. P. 80; Tudor, Lead. Cas. 613; 3 P. Wms. 229. See COVENANT AGAINST INCUMBRANCES.

INCUR. To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. 15 How. Pr. 56.

Men contract debts, they incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by act or operation of law. Incur means something beyond contracts,—something not embraced in the word debts. *Id.*

A bond to indemnify plaintiff against "all costs, charges, and expenses which he shall incur," is not broken by his merely becoming liable for costs, etc.; but he must first be damaged by their payment. *Id.*; 14 Barb. 202.

INDEBITATUS ASSUMPSIT (Lat.). In Pleading. That species of action of assumpsit in which the plaintiff alleges, in his declaration, first a debt, and then a promise in consideration of the debt to pay the amount to the plaintiff.

It is so called from the words in which the promise is laid in the Latin form, translated in the modern form, *being indebted he promised*. The promise so laid is generally an implied one only. See 1 Chitty, Pl. 334; Steph. Pl. 318; 4 Co. 92 b. This form of action is brought to recover in damages the amount of the debt or demand; upon the trial the jury will, according to evidence, give verdict for whole or part of that sum; 3 Bla. Com. 155; Selw. N. P. 68.

Indebitatus assumpsit is in this distinguished from *debt and covenant*, which proceed directly for the debt, damages being given only for the detention of the debt. Debt lies on contracts by specialty as well as by parol, while *indebitatus assumpsit* lies only on parol contracts, whether express or implied; Bro. Act. at Law 317.

For the history of this form of action, see 3 Reeve, Hist. Com. Law; 2 Comyns, Contr. 549; 1 H. Bl. 550; 3 Bla. Com. 154; Yelv. 70; Papers by J. B. Ames, 2 Harv. L. Rev. 1, 53, 377. See ASSUMPSIT.

INDEBITI SOLUTIO (Lat.). In Civil Law. The payment to one of what is not due to him. If the payment was

made by mistake, the civilians recovered it back by an action called *condictio indebiti*; with us, such money may be recovered by an action of *assumpsit*.

INDEBTEDNESS. The state of being in debt, without regard to the ability or inability of the party to pay the same. See 1 Story, Eq. Jur. § 43; 2 Hill, Abr. 421.

But in order to create an indebtedness there must be an actual liability at the time, either to pay then or at a future time. If, for example, a person were to enter and become surety for another, who enters into a rule of reference, he does not thereby become a debtor to the opposite party until the rendition of the judgment on the award; 1 Mass. 134. As to indebtedness of a municipality, see MUNICIPAL CORPORATIONS.

INDECENCY. An act against good behavior and a just delicacy. 2 S. & R. 91.

The law, in general, will repress indecency as being contrary to good morals; but, when the public good requires it, the mere indecency of disclosures does not suffice to exclude them from being given in evidence; Tayl. Ev. 816.

The following are examples of indecency: the exposure by a man of his naked person on a balcony, to public view; or bathing in public; 2 Campb. 89; 3 Day 103; 1 D. & B. 208; 18 Vt. 574; 5 Barb. 203; see 46 N. J. L. 16; or in the house of another in the presence of a young girl; 128 Mass. 52; or the exhibition of bawdy pictures; 2 Chitty, Cr. Law 42; 2 S. & R. 91. This indecency is punishable by indictment. See 1 Kebl. 620; 2 Yerg. 482, 589; 1 Mass. 8; 1 Russ. Cr. 302; 4 Bla. Com. 65, n.; Burn, Just. Lewdness. And an ordinance making such exposure an offence without reference to the intent which accompanies the act, is a valid exercise of police power; 93 Mich. 135.

INDECENT ASSAULT. See ASSAULT.

INDECENT EXHIBITION. Any exhibition *contra bonos mores*, as the taking a dead body for the purpose of dissection or public exhibition. 2 T. R. 734.

INDECENT EXPOSURE. See EXPOSURE OF PERSON.

INDECENT LIBERTIES. See ASSAULT.

INDECENT PUBLICATIONS. Statutes forbidding the keeping, exhibiting, or sale of indecent books or pictures, and providing for their destruction, if seized, are within the police power of a state, and are constitutional. Cooley, Const. Lim. 748. See OBSCENITY; MAIL.

INDECIMABLE. Not tithable.

INDECOROUS. "Indecorous," as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting.

It does not necessarily, or indeed generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered; while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult. 85 Ky. 312, 3 S. W. 530.

INDEFEASIBLE. That which cannot be defeated or undone. This epithet is usually applied to an estate or right which cannot be defeated.

INDEFEASIBLE TITLE IN FEE SIMPLE. A bond to make an "indefeasible title in fee simple," such as the State makes, demands a deed with general warranty. 3 Bibb. (Ky.) 317.

INDEFENSUS (Lat.). One sued or impleaded who refuses or has nothing to answer.

INDEFINITE. See DEFINITE; FAILURE OF ISSUE.

INDEFINITE FAILURE OF ISSUE. See FAILURE OF ISSUE.

INDEFINITE NUMBER. A number which may be increased or diminished at pleasure.

When a corporation is composed of an indefinite number of persons; any number of them consisting of a majority of those present may do any act, unless it be otherwise regulated by the charter or by-laws.

INDEFINITE PAYMENT. That which a debtor who owes several debts to a creditor makes without making an appropriation; in that case the creditor has a right to make such appropriation.

INDEFINITE TIME. Held that "an indefinite time" as applied to an intent to reside, meant that no end to such time was then contemplated. 232 U. S. 619.

INDEFINITUM (L. Lat.). Indefinite; undefined; without specification, or particular designation.

INDEMNIFY. To secure or save harmless against loss or damage, of a specified character, which may happen in the future.

To compensate or reimburse one for a loss previously incurred; L. R. 14 Eq. 479. See 14 Minn. 467.

To indemnify is said to be synonymous with "to save harmless." 1 Root 292.

Indemnification is the act of indemnifying or making good a loss. **Indemnificatus**, indemnified. **Indemnitis** (formerly *indempnis*), without damage; harmless. **Indemnitor**, one who enters into a contract of indemnity for the benefit of another; **indemnitee**, one who is to be benefited by such a contract.

INDEMNITY. That which is given to a person to prevent his suffering damage. 2 M'Cord 279.

It is a rule established in all just governments that when private property is required for public use, indemnity shall be given by the public to the owner. This is the case in the United States. See EMINENT DOMAIN.

Contracts made for the purpose of indemnifying a person for doing an act for which he could be indicted, or an agreement to compensate a public officer for doing an act which is forbidden by law, or for omitting to do one which the law commands, are absolutely void. But when the agreement with an officer was not to induce him to neglect his duty, but to test a legal right, as to indemnify him for not executing a writ of execution, it was held to be good; 1 Bouvier, Inst. n. 780.

In general, a mere promise of indemnity to a third person is not within the statute of frauds; [1894] 2 Q. B. 885, aff. 8 B. & C. 728; 19 L. R. Eq. 198; 8 T. L. R. 668; 80 S. W. Rep. (Ky.) 406; 145 N. Y. 446; 62 N. W. Rep. (Mich.) 1000; and this rule applies to a promise to indemnify the surety on a liquor-dealer's bond; 64 Conn. 264; to a contract of agency, by which the agent agrees to be responsible for the non-payment of debts which may thereafter become due by others; 69 L. T. N. S. 354; to a promise to indemnify one if he will indorse K.'s notes, so that K. can have them discounted; 145 N. Y. 446; and to a verbal promise of A to B to indemnify him if he will become surety for C for a debt of the latter to D; 41 Neb. 516. But it is held in Illinois, that a guarantee of indemnity to a surety is within the statute; 45 Ill. App. 155; 41 N. E. Rep. (Ill.) 164; aff. 49 Ill. App. 509. See GUARANTY; SURETYSHIP; INSURANCE.

INDEMNITY INSURANCE. See INSURANCE.

INDEMNITY LANDS. Those lands which are, by the grant in aid of a railroad, allowed to be selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. 117 U. S. 232; 133 id. 513.

Title to indemnity lands does not vest in a railroad company until they are actually selected and the selection approved by the

secretary of the interior; 141 U. S. 358.

INDENT (Lat. *in*, and *dens*, tooth). To cut in the shape of teeth.

Deeds of *indenture* were anciently written on the same parchment or paper as many times as there were parties to the instrument, the word *chirographum* being written between, and then the several copies cut apart in a zigzag or notched line (whence the name), part of the word *chirographum* being on either side of it; and each party kept a copy. The practice now is to cut the top or side of the deed in a waving or notched line; 2 Bla. Com. 295.

To bind by indentures; to apprentice; as, to indent a young man to a shoemaker. Webster, Dict.

In American Law. An indented certificate issued by the government of the United States at the close of the revolution for the principal or interest of the public debt. Ramsay, Hamilton, Webster; Eliot, Funding System 35; 5 McLean 178; Acts of April 30, 1790, sess. 2, c. 9, § 14, and of March 3, 1825, sess. 2, c. 65, § 17. The word is no longer in use in this sense.

INDENTURE. A formal written instrument made between two or more persons in different interests, as opposed to a deed poll, which is one made by a single person, or by several having similar interests.

Its name comes from a practice of *indenting* or scalloping such an instrument on the top or side in a waving line. This is not necessary in England at the present day, by stat. 8 & 9 Vic. c. 106, § 5, but was in Lord Coke's time, when no words of indenture would supply its place; 5 Co. 20. In this country it is a mere formal act, not necessary to the deed's being an indenture. See Bac. Abr. *Leases*, etc. (E 2); Com. Dig. *Fait* (C, and note d); Littleton § 370; Co. Litt. 143 b, 229 a; Cruise, Dig. t. 32, c. 1, s. 24; 2 Bla. Com. 294; 2 Washb. R. P. 587; 1 Steph. Com. 447; Will. R. P. 177. The ancient practice was to deliver as many copies of an instrument as there were parties to it. And as early as King John it became customary to write the copies on the same parchment, with the word *chirographum*, or some other word written between them, and then to cut them apart through such word, leaving part of each letter on either side the line, which was at first straight, afterwards *indented* or notched; 1 Reeve, Hist. Eng. Law 89; Du Cange; 2 Washb. R. P. 587. See INDENT.

INDENTURE OF A FINE. Indentures made and engrossed at the chirographer's office and delivered to the cognizor and the cognizee, usually beginning with the words: "*Hæc est finalis concordia*." And then reciting the whole proceedings at length. 2 Bla. Com. 351; Moz. & W.

Indentures of the conclusion of a fine including the whole matter, reciting the parties, day, year, and place, and before whom the fine was acknowledged or levied. 2 Bl. Com. 351.

INDEPENDENCE. A state of perfect irresponsibility to any superior. The United States are free and independent of all earthly power.

Independence may be divided into *political* and *natural* independence. By the former is to be understood that we have contracted no ties except those which flow from the three great natural rights of safety, liberty, and property. The latter consists in the power of being able to enjoy a permanent well-being, whatever may be the disposition of those from whom we call ourselves independent. In that sense a nation may be independent with regard to most people, but not independent of the whole world. See DECLARATION OF INDEPENDENCE.

Questions as to the power of municipalities to appropriate money for the celebration of the anniversary of the Declaration of Independence have arisen. It has been held that no such power exists; 2 Denio 110; 22 Conn. 522; Allen 103.

INDEPENDENT CONTRACTOR.

One who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work. 88 Tenn. 692.

The term is also defined to denote one who has the right to select, employ, and control the action of the workmen; 40 N. Y. Sup. Ct. Rep. 104; 66 Cal. 509; 80 Ill. App. 185; one who is subject to his employer as to the results of his work only. 7 Lea 367.

A still broader definition has been given as follows:—"Where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, without any restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of servant under the control of the master, but is an independent contractor." 101 N. Y. 877.

Any one who follows a recognized independent calling has been held to be an independent contractor; as a slater; 71 Me. 318; an architect; 30 Md. 179; a horse trainer; 11 Bradw. 39; a manufacturer of shingles; 46 Wis. 138; a builder; 11 Bush 464; a licensed public carman; 2 Daly 271; or drayman; 2 Mich. 368; or drover; 12 Ad. & El. 737; a plumber; 6 Phila. 256; and a stevedore; 19 Fed. Rep. 926; 88 Pa. 269; 6 L. R. C. P. 24; 11 Hun 354; 29 La. Ann. 791; and the mode of payment and the fact that materials are furnished by the employer have been held to have but little weight in determining whether the employee is an independent contractor or not; 15 Fed. Rep. 875; 61 Miss. 581. The rule is that where a person is under the entire direction and control of another he is to be considered his servant, no matter who pays him; 6 M. & W. 497; 5 B. & C. 560. The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation representing the will of his employer only as to the result of his work and not as to the means by which it was accomplished; 101 N. Y. 385.

In cases of an independent contract, the employer is not responsible; 3 Gray 349; 103 Mass. 194; 30 Barb. 229; 5 N. Y. 48; 30 Hun 391; 86 Pa. 153; 103 id. 32; 25 Ill. 438; 83 id. 354; 88 Ala. 591; 39 Ohio St. 466; 66 Cal. 509; 28 La. Ann. 943; 7 H. & N. 826; 4 Exch. 244; 2 C. P. Div. 369; 57 Vt. 252; 19 Neb. 620; 61 Miss. 581; 11 Wis. 180. In 1 Bos. & P. 404, the rule was laid down that not only was the employer liable for the negligence of a contractor, but for that of a servant of a sub-contractor. This decision was followed in some of the earlier English and American cases, but the weight of authority in both countries has overruled it, the question of its authority having been decisively settled in each country, in what have become leading cases; 4 Exch. 244; 3 Gray 349. But see 6 H. & N. 488, and 2 Black 418, with the criticism of these cases in 87 Va. 711.

A like rule governs the question of the liability of the employer and the contractor for the negligence and torts of the sub-contractor or his servants; 7 H. & N. 826; 11 C. B. 867; 2 C. P. Div. 369; 80 Pa. 102; 64 N. Y. 138.

If he undertakes to provide the material, he is liable for an injury caused by his failure to provide it; 5 Bosw. 447; and generally, he is liable if the contract reserves to him such a power of supervision or control of the work as will destroy the free agency of the contractor, whether the supervision be exercised by himself or by persons designated by him; 92 N. Y. 10; 39 Ohio St. 466; 57 Pa. 374; 111 Pa. 316; 80

Wis. 965; 61 Ill. 431; 7 La. Ann. 321; 9 Col. 554; but not if the power of supervision reserved is not such as to interfere with the discretion of the contractor in the manner of executing the work, but is confined to seeing that the intended result is produced; 41 Ill. 502; 124 Ind. 376. A recent case accurately expresses the exact rule as to supervision to be that the employer, through its chief engineer, may reserve the right to criticize the work but not to control it; 87 Va. 711.

The employer will be held liable if the injurious act complained of was contemplated by the contract; 28 Minn. 156; 46 Wis. 138; 26 Ill. App. 263; if the contract work is necessarily dangerous or harmful; 84 Ala. 469; 41 Ohio St. 465; 19 W. Va. 323; 103 Mo. 172; 3 L. R. H. L. 330; and when work is *per se* dangerous and the employer does not stipulate that the contractor shall use proper precautions to avoid injury to others, the employer is liable; 2 Duv. 137; 6 Daly 469; or when the work contracted for becomes or occasions a public nuisance, unless it be due solely to the negligence of the contractor; 44 Ia. 27; 111 Ind. 195; 116 N. Y. 588; 83 Ill. 854; 111 Pa. 316; 112 Mass. 96; or when the contractor is incompetent; 80 Hun 60; 35 N. J. L. 17; and that the employer was ignorant of such incompetency will not excuse him; *id.*; but see 114 Mo. 55; 4 E. D. Smith 281. But it was held that when the defendants employed a carpenter and bridge builder of experience to build a bridge, it was not enough for the plaintiff to show that the work was unskillfully done; it must appear that the defendants were guilty of negligence in selecting him; that they either knew, or with proper diligence ought to have known, his incompetency; and the law presumes they made a proper selection; hence the burden of showing the contrary rests upon those who assert it; 91 Pa. 185, 191.

After acceptance of the contract work, the employer will be liable for an injury caused by a defect in it; 125 Mass. 232; 15 Minn. 304; 118 Pa. 362; 123 *id.* 220; 92 N. Y. 10; 29 Cal. 243; 51 Tex. 503; 18 Kan. 84; and, if ratified by him, for the tortious acts of the contractor; 102 Mass. 211; 81 Ga. 387.

As to the liability of a municipal corporation it has been held that such a corporation cannot rid itself of responsibility for the acts of an independent contractor; 66 N. Y. 181; as he is acting under the authority of the district or city council, and without such authority, he would be a trespasser on the streets; 74 L. T. Rep. 69; and notwithstanding the nature of the work to be performed, it is the duty of the municipality to see that the streets are in a safe condition for travel; 14 Bush 87; 49 Ga. 316; 53 Md. 110; 41 Barb. 881; 2 Mo. App. 571; 9 Humph. 760; *contra*, 46 Pa. 213; or, as recently held in England, so to construct its sewers as not to injure the gas mains or other underground conveniences, and the municipality was held liable even when there was an independent contractor for the injury caused by an explosion in a private house because of an escape of gas from a main broken by the negligence of the contractor; [1896] 1 Q. B. 335.

And this rule is to be applied even though the contractor has stipulated that he will be responsible for all damages that may be caused in the execution of the work; 49 Mo. 119; 42 Mo. App. 392; 116 N. Y. 558; 18 Ore. 426; *contra*, 53 Barb. 629. It has been held that where there is a statutory requirement that the contract be given to the lowest bidder, the municipality was not liable; 6 Cal. 528. See 31 Am. L. Reg. N. S. 352; 29 Am. L. Rev. 229; 3 Alb. L. J. 261. See MASTER AND SERVANT; MUNICIPAL CORPORATION; NEGLIGENCE.

One who contracts to produce a specified result, the will of the employer being represented only in the result of the work, and not in the means by which it was accomplished. 143 U. S. 622. The constant right or supervision by the employer, and the continuing duty of the contractor of satisfying the judgment of the employer do not alter

the status of the contractors as independent. *Id.*

INDEPENDENT COVENANT.

An "independent covenant" is where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be compensated in damages, and an action may be maintained for a breach, without averring a performance of the other conditions. 163 Ky. 599, 174 S. W. 25. See COVENANT.

INDEPENDENT PROMISES. Those made in a contract or agreement upon which one party has a right of action against the other for any injury sustained by him by reason of a breach of the covenants or promises in his favor, and where an allegation of non-performance of his covenant by the plaintiff is no defence to such action.

When the performance of one depends or is conditional on the prior performance of the other, the agreements or covenants are said to be dependent. 4 Rawle 26; 5 Wend. 496. Where performance of each is dependent or conditional upon performance of the other, they are mutually dependent.

Where there are promises on both sides in an agreement,—executory considerations,—it always becomes a question whether one party is bound to perform his before the opposite party shall be required to perform those on his side. When the agreements are dependent, neither party is bound actually to perform his part of the agreement to entitle him to an action for a breach by the other; it is enough that he was able to perform his part and offered to do so; 14 Conn. 479; 14 Me. 476; 15 La. Ann. 675.

Where the consideration is executory, technically speaking, the promise and not the performance is the consideration, and hence the obligation of one may be independent of the performance of the other. Upon examination and proper construction of mutual promises, it may appear "that the obligation of the one promise is made expressly or impliedly conditional upon the due performance of the other; and then the performance of the promise, constituting the executory consideration, is a condition precedent to the liability to perform the other promise; in the latter case the mutual promises are called dependent, and in the former they are called independent." Leake, Cont. 344.

In *Jones v. Barkley*, 2 Dougl. 684, Lord Mansfield thus classified mutual promises: "There are three kinds of covenants. 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenants. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act." In this case, it was clearly laid down that the criterion by which it is determined whether promises are dependent or not, is the intention of the parties, and this is to be determined from the whole contract; *id.*; 2 W. & S. 227; 4 *id.* 527; 13 How. 307; 3 Bing. N. S. 355; 29 L. J. C. P. 253; 30 *id.* 65; or as Lord Kenyon aptly says, "It must depend on the good sense of the case;" 6 Term 570. The rule was clearly stated in a recent case: "The question whether covenants are dependent or inde-

pendent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and, under settled principles of judicial decision, should not be controlled by the supposed inconvenience or hardship that may follow such construction. If the parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract;" 153 U. S. 564, 576; and the intention is to be discovered from the order of time in which the acts are to be done, rather than from the construction of the agreement or the arrangement of the words; 4 Wash. C. C. 714; 6 Harr. & J. 85. See also 11 Pick. 151; 2 Cush. 287; 26 Conn. 176; 6 Gray 407.

It is said that the dependency may be expressed or implied, as the condition is expressed or implied, and that the doctrine of implied dependency was introduced by Lord Mansfield, in *Kingston v. Preston*, cited in 2 Dougl. 684, before which, if there was no expressed dependency, a breach by one party was no defence to an action by the other and only gave him a cross-action; Harr. Cont. 153.

What is meant by implied dependency may be briefly stated: From the definition of dependency it is clear that the term is used to describe certain conditions which necessarily belong only to bilateral contracts. As these conditions must originate in the intention of contracting parties, if expressed in the contract, they are governed by the law of conditions generally. In the absence of precise expression, the law imputes an intention, which creates an implied condition. The principles which regulate these conditions constitute the law of implied dependency and they are peculiar to the subject; Langd. Sum. Cont. 134.

The question of dependency is so much a matter of intention that there is much truth in the remark "that arbitrary rules are useless"; Harr. Cont. 153. Nevertheless certain rules of construction have been generally agreed upon and applied in the interpretation of contracts, with respect to this subject.

A note to *Pordage v. Cole*, 1 Wms. Saund. 319, termed by Pollock "the classic on the subject," Poll. Cont. 386, gives the five rules of Mr. Serjeant Williams which are most referred to (Langd. Sel. Cas. Cont. 641, n. 5). These rules are adopted, in a different order, in Leake, Cont. 345-7, and substantially the same general principles have been grouped in four rules; 1 Bouv. Inst. 701; Platt, Cov. 80. These classifications are extremely interesting as affording a good illustration of what is practically an early codification of the principles governing an important branch of the law of contract, and, while the first is accessible, their repetition here is proper, as they must necessarily be referred to in connection with the brief statement which present limitations permit, of the rules of construction generally accepted.

The rules of Mr. Serjeant Williams are: 1. If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration or the money or other act. 2. But when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be

maintained for a breach of the covenant on the part of the defendant without averring performance thereof. 4. But, where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 5. Where two acts are to be done at the same time, as, where A covenants to convey an estate to B on such a day, and, in consideration thereof, B covenants to A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all classes of sale. 1 Wms. Saund. 320 b.

The rules referred to as given by Bouvier are: When the mutual covenants go the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other.

Where the act of one party must necessarily precede any act of the other, as, where one agrees to manufacture an article from materials to be furnished by the other, or to pay for goods on delivery, or to pay money on demand, the covenants are independent, and one act is a condition precedent to the other.

When mutual covenants go only to a part of the consideration on both sides, and when a breach may be paid for in damages, the defendant has a remedy on his covenant, and is not allowed to plead it as a condition precedent.

When a day is appointed for the payment of money, and the day comes before the thing for which the money is to be paid can be done, then, though the agreement is to pay the money before the doing of the thing, yet an action may be brought for the money before the performance; because the agreement is positive that the money shall be paid on that day, and the presumption is that the party intended to rely on his remedy and not on a previous performance. Bouv. Inst. 701.

Benjamin also lays down five rules based on those of Williams, but not following them in detail. The first combines rules 1 and 2; the second, third, and fourth are rules 3, 4, and 5 respectively; and the fifth is a brief statement, substantially, of the rule of intention of Lord Mansfield in *Jones v. Barkley*, which it is said "remains unchanged"; *Benj. Sales* § 561. For these rules of Benjamin see *id.* § 562.

Dependent promises can only exist as part of the same contract, but more than one contract may be included in one instrument; *Harr. Cont.* 159; *Langd. Sum. Cont.* § 115. So, on the other hand, each of two mutual promises may be contained in a separate instrument, each complete in itself and neither making any reference to the other. In such case, it has been said, there is no doubt that each forms a separate unilateral contract; *id.* § 117.

To be dependent, a simultaneous performance must have been intended; 8 Term 366; 84 Ill. 448; 13 Pick. 281; it is not sufficient that the performance of each promise was intended to be within the same period; 11 H. L. Cas. 337. They must be capable of performance at the same time and place, and involve an exchange of rights; *Langd. Sum. Cont.* § 133; but if a time is fixed for the performance of one, and not the other, they are dependent; *id.*; 4 H. & N. 500; 7 Term 125.

All the stipulations of a contract should be considered in determining the question of dependency, which may be general,—as to the whole consideration on each side,—or, it may exist only as to two distinct promises. Thus a contract may be partly bilateral and partly unilateral and as to the former part, the promises may be dependent.

A unilateral contract, from its nature, can contain only independent promises.

The conditions which must exist to render implied dependency possible are thus enumerated: "1st. The subject of implied dependency must be a covenant or a promise, as distinguished from a debt. 2dly. The subject of dependency and the thing upon which it depends must be of the same nature, i. e. they must both be covenants or both be promises. 3dly. The covenants or the promises must be mutual. 4thly. They must each be a part of the same contract; and it does not follow that they are so because they are made at the same time, or are contained in the same instrument. 5thly. If in writing, they must each be contained in the same instrument, or in different instruments which refer to each other. 6thly. The contract which contains the covenants or the promises must be wholly bilateral, or else it must clearly appear that the covenants or promises in question were given and received in payment for each other. 7thly. The performance of each of the covenants or promises must, it seems, be equally certain in legal contemplation;" *Langd. Sum. Cont.* § 120.

When the mutual contracts go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other, but where a covenant goes only to a part of the consideration, it is not a condition precedent, but an action lies for the breach of it; 1 H. Bla. 273, note; 2 W. Bla. 1312; 11 Pick. 151; 21 N. Y. 547; 1 Wms. Saund. 320 e, rules 3 & 4; 29 L. J. Ex. 73. Professor Langdell goes further and insists that two promises are not mutually dependent unless the performance of one is full payment for the performance of the other; *Langd. Sum. Cont.* §§ 133, 136; but Professor Harriman considers this "theory of equivalency," though "most ingeniously developed," as not "based on satisfactory authority"; *Harr. Cont.* 158. This difference of opinion between these able writers on the subject is itself sufficient to show that the point is not definitely settled. Possibly the lack of precise authority upon this single point of a subject, of which the substantial principles have been settled for more than a century, might be considered as fairly indicating that it is more interesting than material,—rather theoretical than practical. See [1894] App. Cas. 266. It should, perhaps, rather be said that differences of opinion (of which another on a very practical point is noted *infra*) between these two writers who have, more than any others, philosophically examined the subject, indicate that the generalizations of Mr. Serjeant Saunders, while containing the essential principles, are to be applied only with some modification to modern conditions. It is therefore essential that the student or practitioner in dealing with particular cases should include in his researches both the ancient learning and the modern investigations which have illuminated the topic. To these it is hoped that this title may furnish a reference,—it is manifestly possible to do little more, in the way of critical examination and comparison of cases.

Where a day is appointed for payment of money or doing any act, and such day must or may happen before the thing which is the consideration of the payment or performance of the other act, is to be made or done, the promises are independent; 6 Term 570; 1 Wms. Saund. 320 b, rule 1; 14 Wend. 219; 2 Johns. 272; 5 *id.* 78; 2 Pick. 300; a distinction has been drawn, however, as to whether the time of the latter payment or performance is fixed entirely by reference to the former, and when it is so, the first is a condition precedent; 6 Cow. 296; otherwise, if it is to be determined without reference to the other; 10 A. & E. 50; 10 M. & W. 355; 6 C. B. 108.

It is the second of Serjeant Williams' rules, and the view is supported by Leake (*Cont.* 346), that if the day appointed is to happen after the act or payment, the promises are dependent; the cases cited being 18 C. B. 673 and 25 L. J. C. P. 254. The view that the last promise to be performed is dependent,—the other not,—is supported by Langdell, *Summary of Contracts* § 122, on the authority of *Grant v. Johnson*, 1 Seld. 247, which is put directly upon that rule. But Harriman dissents from this view and considers the authority relied upon by Langdell as "unsound in its reasoning," and he subjects it to severe criticism, as the result of what he terms the "peculiar and erroneous doctrine" of the New York courts; *Harr. Cont.* 154. In this connection it is to be observed also that the rule thus questioned is not included in the fundamental rules of construction set forth in Bouvier's *Institutes*, citing Platt on *Covenants*, *supra*.

If two acts are to be done at the same time the promises are mutually dependent; 1 Wms. Saund. 320 e, rule 5; 9 C. B. 132; 9 Q. B. 164; but each must be capable of performance concurrently, i. e. in a moment of time; the object of both must be an exchange of property or right; and it must be between the immediate parties to the contract and capable of being performed at the same place; *Langd. Sum. Cont.* § 69; 6 Cow. 296.

In case of contracts for payment of pur-

chase money of land by instalments it is said that the promises to pay those instalments which become due before the date set for the delivery of the deed are absolute and independent, and in no way affected by a failure to deliver the deed at the time specified. But where the deed is to be delivered *simultaneously* with the payment of the last instalment, then on payment of the previous instalments the tender of the deed and the tender of the last instalment become mutual concurrent conditions; 13 Pick. 231; 84 Ill. 448; 5 *id.* 561; 39 *id.* 854; *Harr. Cont.* 156.

Where a contract is made for the sale of goods to be delivered in instalments each to be paid for on delivery, it was held that the promises were dependent, and the failure to deliver one instalment as stipulated released the other party from the obligation to accept future deliveries; 115 U. S. 188. In this case the supreme court reviewed the English cases and considered the doctrine of *Hoare v. Rennie*, 5 H. & N. 19, as better supported by English authority than *Simpson v. Crippin*, L. R. 8 Q. B. 14, and *Brandt v. Lawrence*, 1 Q. B. Div. 344; the case relied upon to establish this view was *Bowes v. Shand*, 2 App. Cas. 455, and it was considered as not contravened by *Mersey Co. v. Naylor*, 9 App. Cas. 434. See, also, 97 N. Y. 216; 12 R. I. 82; 60 Pa. 132; *contra*, 2 Allen 492; 25 Am. L. Reg. N. S. 59; 21 *id.* 398, n.

See, generally, Leake, *Cont.* 344-356; *Langd. Sum. Cont.* 105-147; *Harr. Cont.* 152, 160; *Cutter v. Powell*, and notes, 2 Sm. L. Cas., 9th Am. ed. 1212; *Benj. Sales*, *Bennett's ed.* B. 4, pt. 1, and notes; 3 B. & S. 751; 32 L. J. Q. B. 204; 11 H. L. Cas. 337.

INDETERMINATE. That which is uncertain, or not particularly designated: as, if I sell you one hundred bushels of wheat, without stating what wheat. See *CONTRACT*.

INDIAN. The name of the aboriginal inhabitants of America.

In general, Indians have no political rights in the United States; they cannot vote at the general elections for officers, nor hold office. In New York they are considered as citizens, and not as aliens, owing allegiance to the government and entitled to its protection; 20 Johns. 189, 693. But it was ruled that the Cherokee nation in Georgia was a distinct community; 6 Pet. 515. See 8 Cow. 189; 9 Wheat. 673; 14 Johns. 181, 332; 18 *id.* 506. The title of the Indians to land was that of occupation merely, but could be divested only by purchase or conquest; 2 Humph. 19; 1 Dougl. 546; 2 McLean 412; 3 Wheat. 571; 2 Washb. R. P. 521; 3 Kent 378.

By act of March 3, 1871, no Indian nation or tribe within the United States shall be recognized as an independent nation with whom it may contract by treaty, but prior treaties are not to be thereby impaired.

By act of March 8, 1885, any Indian committing upon the person or property of another Indian or any other person, murder, manslaughter, rape, assault with intent to kill, arson, burglary, or larceny, within any territory and within or without an Indian reservation, is subject to the laws of the territory, and shall be tried in the same manner and be subject to the same penalties as other persons charged with the same crimes; and if such offence be committed within a reservation in a state, he shall be subject to the same laws, etc., as if it were committed within the exclusive jurisdiction of the United States. This act was held constitutional in 118 U. S. 375. See 151 U. S. 577; 81 Fed. Rep. 625.

The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is not an offence against the United States; 163 U. S. 376.

The indictment, the venue of the trial, and the jury on the prosecution of an Indian for murder committed in a territory are to be according to the territorial laws; 130 U. S. 843. See 2 Harv. L. Rev. 169; *Rep. Am. Bar Assn.* 1891, 261.

The provisions in the treaty of February

4. 1869, with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that "they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon," etc., does not give them the right to exercise this privilege within the limits of that state in violation of the laws: 163 U. S. 504.

The act of February 8, 1887, provides for the allotment of lands to Indians in severalty. By it Indians receiving allotments thereby have the benefit of, and are subject to, the laws both civil and criminal of the state or territory in which they reside. Every Indian born in the United States to whom an allotment shall have been made by this act, or under any law or treaty, and any Indian born within the United States who has voluntarily taken up his residence therein apart from any Indian tribe and adopted the habits of civilized life, is made a citizen of the United States, without impairing his right to tribal property.

An Indian woman who marries a citizen of the United States, voluntarily resides apart from her tribe, and adopts the habits of civilized life, becomes a citizen of the United States and of the state in which she resides; 57 Fed. Rep. 959; but in a few states, marriages between white persons and Indians are forbidden by statute; Tiff. Pers. & Dom. Rel. 26. See CITIZENS; INDIAN TRIBE.

INDIAN COUNTRY. The term "Indian country" as used in §§ 2145, 2146, Rev. Stats., is not confined to lands to which the Indians retain their original right of possession, but includes those set apart out of the public domain as reservations for, and not previously occupied by, the Indians. 228 U. S. 244.

INDIAN DEPREDACTIONS ACTS. As early as May 19, 1796, an act was passed by the United States congress, providing an eventual indemnification to citizens of the United States for depredations committed by Indians in taking or destroying their property; 1 St. L. 472. Other acts of a similar character were passed from time to time. By the act of March 3, 1891, congress conferred on the court of claims "jurisdiction and authority to inquire into and finally adjudicate all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for;" this embraced cases theretofore examined and allowed by the Interior Department, and cases authorized to be examined under the act of congress making appropriations for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1898, approved March 3, 1885, and under subsequent acts. See 1 Sup. Rev. Stat. 913.

INDIAN RESERVATIONS. See INDIAN COUNTRY.

INDIAN TRIBE. A separate and distinct community or body of the aboriginal Indian race of men found in the United States.

Such a tribe, situated within the boundaries of a state, and exercising the powers of government and sovereignty, under the national government, is deemed politically a state,—that is, a distinct political society, capable of self-government; but it is not deemed a foreign state in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe may properly be deemed in a state of pupillage; and its relation to the United States resembles that of a ward to a guardian; 5 Pet. 1, 16; 20 Johns. 193; 3 Kent 308; Story, Const. § 1096; 118 U. S. 384; 4 How. 567; 1 McLean 254; 6 Hill 546; 8 Ala. N. S. 48. "They were and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulat-

ing their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided;" 118 U. S. 375. See 163 *id.* 84. Their local self-government is subject to the supreme legislative authority of the United States; 135 U. S. 641.

The United States has power to pass such laws as may be necessary to their full protection and to punish all offences committed against them or by them within their reservation; 151 U. S. 577. No state can, either by its constitution or other legislation, withdraw the Indians within its limits from the operation of the laws of congress regulating trade with them; notwithstanding any rights it may confer on them as electors or citizens; 3 Wall. 407; 5 *id.* 737, 761. See 53 Minn. 354; nor can it authorize leases of Indian lands; 82 Hun 396. Several Indian tribes within the limits of the United States have an organized government. See CHOCTAW NATION; CHICKASAW NATION; CHEROKEE NATION. The pueblo Indians of New Mexico are not an Indian tribe within the meaning of the acts of congress; 94 U. S. 614. The Indians residing in Maine, whose tribal organizations have ceased to exist, are not "Indian Tribes," within the treaty-making power of the federal government; 84 Me. 465. The policy of congress is to vest in the courts of the Cherokee nation jurisdiction of all controversies between Indians, or in which a member of the nation is the only party; 141 U. S. 107. See IN AMITY; INDIAN.

INDIANA. The name of one of the states of the United States.

This state was admitted into the Union by virtue of a resolution of congress, approved December 11, 1816.

The boundaries of the state are defined, and the state has concurrent jurisdiction with the state of Kentucky on the Ohio river, and with the state of Illinois on the Wabash. As to the soil, the southern boundary of Indiana is low-water mark on the Ohio river.

The first constitution of the state was adopted in the year 18th.

INDICARE. In the Civil Law. To show or discover. To fix or tell the price of a thing. Calv. Lex.

INDICATE. See SHOW

INDICATIF. An abolished writ by which a prosecution was in some cases removed from a court-christian to the Queen's Bench. Encyc. Lon.

INDICATION. In the Law of Evidence. A sign or token; a fact pointing to some inference or conclusion. Bur. Circ. Ev. 251, 263.

That which points to or gives direction to the mind; may be merely a symptom. Differs from "show" which means to make apparent or clear by evidence, to prove. 16 A. & E. Ency. 2nd ed. p. 239; 104 Pa. St. 133.

INDICATIVE EVIDENCE. This is not evidence so called, but the mere suggestion of evidence proper, which may possibly be secured if the suggestion is followed up. Brown.

INDICAVIT. A writ or prohibition that lay for a patron of a church where the clergyman presented by him to a benefice is made defendant in an action of tithes commenced in the ecclesiastical court of another clergyman, where the tithes in question extended to the fourth part of the benefice; for in this case the suit belonged to the king's court (*i. e.* the common law court) by the Stat. Westminster, 2, c. 5. Cowel. The person sued might also avail himself of this writ. Toml.

INDICIA (Lat.). Signs; marks. Conjectures which result from circumstances not absolutely certain and necessary, but merely probable, and which may turn out not to be true, though they have the appearance of truth.

The term is much used in the civil law in a sense nearly or entirely synonymous with circumstantial evidence. It denotes facts which give rise to inferences, rather than the inferences themselves. However numerous indicia may be, they only show that

a thing may be, not that it has been. An indicium can have effect only when a connection is essentially necessary with the principal. Effects are known by their causes, but only when the effects can arise only from the causes to which they are attributed. When several causes may have produced one and the same effect, it is, therefore, unreasonable to attribute it to any particular one of such causes.

The term is much used in common law of signs or marks of identity: for example, in *replevin* it is said that property must have *indicia*, or ear-marks, by which to distinguish it from other property of the same kind. So it is much used in the phrase "*indicia* of crime," in a sense similar to that of the civil law.

INDICT. To accuse by the finding or presentment of a grand jury; to find an indictment against.

INDICTABLE. Capable of being indicted; liable to be indicted; as, an *indictable* offender.

That forms a subject or ground of indictment; as, an indictable offence. Encyc. Dict.

INDICTED. Having had an indictment found against him.

INDICTEE. One who is indicted. See INDITEE.

INDICTION. The space of fifteen years.

It was used in dating at Rome and in England. The institution of indication dates from the time of Constantine I., Sept. 1, or, according to some authorities, Sept. 15, 312; but the first instance of their use is mentioned in the Theodosian Code, under the reign of Constantius II. The papal court adopted computation by indications about 800, the commencement of the first indication being referred to Jan. 1, 813. The first year was reckoned the first of the first indication, and so on till the fifteen years afterwards. The sixteenth year was the first year of the second indication; the thirty-first year was the first year of the third indication, etc.

INDICTMENT. In Criminal Practice. A written accusation against one or more persons of a crime or misdemeanor, presented to, and preferred upon oath or affirmation by a grand jury legally constituted. 4 Bla. Com. 299; Co. Litt. 126; 2 Hale, Pl. Cr. 152; Bac. Abr.; Com. Dig.; 1 Chitty, Cr. Law 168.

An accusation at the suit of the crown, found to be true by the oaths of a grand jury (*q. v.*).

A written accusation of a crime presented upon oath by a grand jury.

The word is said to be derived from the old French word *inditer*, which signifies to indicate, to show, or point out. Its object is to indicate the offence charged against the accused. Rey, *des Inst l'Angl.* tome 2, p. 347.

A presentment and indictment differ; 2 Inst. 739; Comb. 225. A presentment is properly that which the grand jurors find and present to the court from their own knowledge or observation. Every indictment which is found by the grand jurors is presented by them to the court; and therefore every indictment is a presentment, but not every presentment is an indictment; 9 Gray 291; Story, Const. § 1784.

The essential requisites of a valid indictment are,—first, that the indictment be presented to some court having jurisdiction of the offence stated therein; and the indictment must allege specifically that the crime was committed within its jurisdiction; 22 Neb. 418; 25 Tex. App. 453, 454; 37 W. Va. 812; second, that it appear to have been found by the grand jury of the proper county or district; third, that the indictment be found a true bill, and signed by the foreman of the grand jury; fourth, that it be framed with sufficient certainty; for this purpose the charge must contain a certain description of the crime or misdemeanor of which the defendant is accused, and a statement of the facts by which it is

constituted, so as to identify the accusation; Cowp. 682; 2 Hale, Pl. Cr. 167; 4 S. & R. 194; 4 Bla. Com. 301; 4 Cra. 167; 26 Tex. App. 540; it should set out the material facts charged against the accused; 7 Nev. 153; 143 U. S. 197; 124 *id.* 483; but need not specify the statute on which founded; 88 Ga. 584. An indictment may charge a statutory offence in the language of the statute without greater particularity when, by that means, all that is essential to constitute the offence is stated fully and directly, without uncertainty or ambiguity; 17 Or. 358; 100 N. C. 449; 89 Kan. 152; 40 La. Ann. 170; *fifth*, the indictment must be in the English language. But if any document in a foreign language, as a libel, be necessarily introduced, it should be set out in the original tongue, and then translated, showing its application; 6 Term 162.

The formal requisites are, — first, the *venue*, which at common law should always be laid in the county where the offence has been committed, although the charge be in its nature transitory, as a battery; Hawk. Pl. Cr. b. 2, c. 25, s. 35. See 74 Cal. 94. The venue is stated in the margin thus: "City and county of —, to wit." *Second*, the *presentment*, which must be in the present tense, and is usually expressed by the following formula: "the grand inquest of the commonwealth of —, inquiring for the city and county aforesaid, upon their oaths and affirmations present." See, as to the venue, 1 Ark. 171; 9 Yerg. 357; 6 Metc. 225; 92 Cal. 277. *Third*, the *name and addition of the defendant*; but in case an error has been made in this respect, it is cured by the plea of the defendant; Bac. Abr. *Misnomer* (B), *Indictment* (G 2); 2 Hale, Pl. Cr. 175; 1 Chitty, Pr. 202; Russ. & R. 489. Where the defendant's name is stated differently in different parts of the indictment, it is fatally defective; 21 Tex. App. 348; or where it fails to state his given name, or aver that it is not known, a plea of misnomer in abatement should be sustained; 40 Ill. App. 17; 25 Tex. App. 402; or where it gives a wrong name; 90 Ga. 95. See *IDEM SONANS*. *Fourth*, the *names of third persons*, when they must be necessarily mentioned in the indictment, should be stated with certainty to a common intent, so as sufficiently to inform the defendant who are his accusers. When, however, the names of third persons cannot be ascertained, it is sufficient, in some cases, to state "a certain person or persons to the jurors aforesaid unknown." 2 East, Pl. Cr. 651, 781; 2 Hale, Pl. Cr. 181; Plowd. 85; 8 C. & P. 773. *Fifth*, the *time when the offence was committed* should, in general, be stated to be on a specific year and day. In some offences, as in perjury, the day must be precisely stated; 2 Wash. C. C. 328; but although it is necessary that a day certain should be laid in the indictment, yet, in general, the prosecutor may give evidence of an offence committed on any other day previous to the finding of the indictment; 5 S. & R. 316. See 11 S. & R. 177; 1 Chitty, Cr. Law 217, 224; 17 Wend. 475; 2 Dev. 567; 6 Miss. 14; 4 Dana 495; 1 Cam. & N. 369; 1 Hawks 460; 44 Ky. 52; 147 Mass. 539; 30 Tex. App. 480; 131 N. Y. 478; 140 U. S. 118. It is not material, except where time is of the essence of the offence, to charge in an indictment the true day on which an offence was committed, or to prove the day as charged; 97 N. C. 462. *Sixth*, the *offence should be properly described*. This is done by stating the substantial circumstances necessary to show the nature of the crime, and next, the formal allegations and terms of art required by law. Steph. Cr. Proc. 156. An omission of matter of substance in an indictment is not aided or cured by verdict; 124 U. S. 483. An indictment charging a crime "on or about" a certain date is not defective, these words being surplusage, the real date being that specifically charged; 44 La. Ann. 323.

As to the substantial circumstances. The whole of the facts of the case necessary to make it appear judicially to the court that the indictors have gone upon sufficient premises should be set forth; but there

should be no unnecessary matter, nor anything which on its face makes the indictment repugnant, inconsistent, or absurd. And if there is no necessary ambiguity, the court is not bound, it has been observed, to create one by reading the indictment in the only way which will make it unintelligible. It is a clear principle that the language of an indictment must be construed by the rules of pleading, and not by the common interpretation of ordinary language; for nothing indeed differs more widely in construction than the same matter when viewed by the rules of pleading and when construed by the language of ordinary life; 16 Q. B. 846; 1 Ad. & E. 448; 2 Hale, Pl. Cr. 183; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 3); 2 Leach 660; 2 Stra. 1226. Averments of matters not material or necessary ingredients in the offence charged may be rejected as surplusage; 51 N. J. L. 259. An indictment is not insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant; 152 U. S. 211. All indictments ought to charge a man with a particular offence, and not with being an offender in general: to this rule there are some exceptions, as indictments against a common barrator, a common scold, and a keeper of a common bawdy-house; such persons may be indicted by these general words; 1 Chitty, Cr. Law 230, and the authorities there cited. The offence must not be stated in the disjunctive, so as to leave it uncertain on what it is intended to rely as an accusation: as, that the defendant erected or caused to be erected a nuisance; 2 Gray 501; 6 D. & R. 143; 2 Stra. 900; 2 Rolle, Abr. 31.

There are certain terms of art used, so appropriated by the law to express the precise idea which it entertains of the offence, that no other terms, however synonymous they may seem, are capable of filling the same office: such, for example, as traitorously (*q. v.*), in treason; feloniously (*q. v.*), in felony; 44 Ky. 354; 112 N. C. 848; 115 Mo. 389; burglariously (*q. v.*), in burglary; maim (*q. v.*), in mayhem, etc.

Seventh, the conclusion of the indictment should conform to the provision of the constitution of the state on the subject, where there is such provision; as in Pennsylvania; Const. art. 5, s. 11, which provides that all "prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude against the peace and dignity of the same"; see 35 W. Va. 280; it is not necessary that each count should so conclude; 81 Tex. Cr. R. 294. As to the necessity and propriety of having several counts in an indictment, see 1 Chitty, Cr. Law 248; Steph. Cr. Proc. 153; COUNT; as to joinder of several offences in the same indictment, see 1 Chitty, Cr. Law 253; Archb. Cr. Pl. 60; in one count, see 9 Lawy. Rep. Ann. 182, note. A count in an indictment may refer to allegations in other counts to avoid repetition; 5 Park. Cr. R. 184; 63 Hun 579; 153 U. S. 308. Several defendants may, in some cases, be joined in the same indictment; Archb. Cr. Pl. 59; as where one is charged with assault with intent to kill, and another as accessory before the fact; 65 N. H. 284; 155 Mass. 224.

At common law an indictment cannot be amended by the court. It was said by Lord Mansfield in *Rex v. Wilkes*: "Indictments are found upon the oaths of a jury, and ought only to be amended by themselves;" 4 Burr. 2527. The rule has been continuously adhered to; Hawk. P. C. b. 2, c. 25, § 97; Stark. Cr. Pl. 287; Whart. Cr. Pl. & Pr. § 90; 3 Cush. 279; 3 Hawks 184. "It is a well-settled rule of law that the statute respecting amendments does not extend to indictment;" Shaw, C. J., in 13 Pick. 200; 3 Hawks 184; and "an amendment cannot be allowed even with the consent of the prisoner;" 16 Pick. 120; 4 Park. Cr. Rep. 387. The caption, however, may be amended, being, as it is said, no part of the indictment itself; 2 McCord 301; 42 N. J. L. 504; 5 Wis. 337.

In England the rule forbidding an amend-

ment of an indictment has been changed by stat. 14 and 15 Vict. c. 100. In this country the subject does not rest on the common law, but there is also to be considered the constitutional guaranty to an accused of a trial, "on a presentment or indictment by a grand jury." It was settled by the United States Supreme Court that in the federal courts an indictment cannot be amended by the court, both by reason of the common-law rule and the constitutional provision; 121 U. S. 1. The question whether the rule could be changed by statute was not actually involved, but it would seem to be settled in the negative by the reasoning of the opinion in that case. The question had been considered in some state courts, and it has been held that without amendment of the state constitution, the legislature may authorize amendment of indictments by the court, not changing the offence; 53 Miss. 408; 55 *id.* 484, 528; in other cases it was held that the legislature might dispense with or regulate matter of form; 29 Mich. 232; 7 Nev. 157; but they could not "dispense with such allegations as are essential to reasonable particularity and certainty in the description of the offence;" 45 Ind. 383.

It is said by Bishop that "if a statute should authorize a material amendment to be made in an indictment for an offence which, by the constitution of the state was punishable only by indictment, the statutory direction would be a nullity." Bish. Cr. Proc., 2d ed. § 97; 26 Am. L. Reg. n. s. 446.

An indictment may be quashed at common law for such deficiency in body or caption as will make a judgment given on it against the defendant erroneous, but it is a matter of discretion; Bac. Abr. *Indictment*, K; 1 Chitty, Cr. Law 298; Archb. Cr. Pl. 66.

After verdict in a criminal case, it will be presumed that those facts without proof of which the verdict could not have been found were proved, though they are not distinctly alleged in the indictment; provided it contains terms sufficiently general to comprehend them in reasonable intendment; 1 Den. Cr. Cas. 356; 2 C. & K. 968; 1 Tayl. Ev. § 73; Steph. Cr. Proc. 171. After verdict, defective averments in the second indictment may be cured by reference to sufficient averments in the first count; 2 Den. Cr. Cas. 340. A single good count in an indictment is sufficient to sustain a verdict of guilty and judgment thereon; 53 N. J. L. 601; 94 Ala. 55.

It is not error to join distinct offences in one indictment, in separate counts, against the same person; 155 U. S. 494.

In an indictment for a statutory offence, while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing the offence, yet, if such language is, according to the natural import of the words, fully descriptive of the offence, then it ordinarily is sufficient; 155 U. S. 498.

The fact that a grand jury has ignored an indictment is not a bar to the subsequent finding of a true bill for the same offence; 50 Fed. Rep. 918. The finding of an indictment must appear from the order book of the court in which defendant was indicted; if it does not so appear, a verdict against him will be set aside; 89 Va. 156; 29 Fla. 511. The fact that the foreman of the grand jury in signing his name to the indorsement of "a true bill" used his initials instead of his full Christian name, is not ground for quashing the indictment; 4 Ind. App. 583; 106 Mo. 111. One cannot be convicted of a higher degree of offence than that charged in the indictment; 193 Ind. 427; but there may be a conviction of a lesser offence; 12 So. Rep. (Fla.) 640.

INDICTOR. He who causes another to be indicted. The latter is sometimes called the indictor.

INDIFFERENT. To have no bias or partiality. 7 Conn. 229. A juror, an arbitrator, and a witness ought to be indifferent; and when they are not so they may be challenged. See 9 Conn. 42.

INDIGENA (Lat. from *indu*, old form of *in*, *in*, and *geno*, *gigno*, to beget). A native; born or bred in the same country or town. Ainsw. A subject born or naturalized by act of parliament. Opposed to *alienigena*. Rymer, to 15, p. 87; Co. Litt. 8 a.

INDIGENT. The needy, the poor, those who are destitute of property and the means of comfortable subsistence. 16 A. & E. Ency. 2nd ed., 239; 75 Va. 62.

A gift "to aid indigent young men" of a certain town or state "in fitting themselves for the evangelical ministry" is not void for uncertainty. The words "indigent" and "evangelical" are sufficiently definite, within ordinary intelligence. "They describe a man who is without sufficient means of his own, and whom no person is bound and able to supply, to enable him to prepare himself for preaching the Gospel" Anderson; 54 Conn. 352.

INDIGENT INSANE. In a statute providing for the care of the indigent insane, it was held that the term "indigent insane" meant all those who had no income over and above what was sufficient to support those who might be legally dependent on the estate. 16 A. & E. Ency. 2nd ed., 239; 119 N. C. 359.

INDIRECT EVIDENCE. Evidence which does not prove the fact in question, but one from which it may be presumed.

Inferential evidence as to the truth of a disputed fact, not by testimony of any witness to the fact, but by collateral circumstances ascertained by competent means. 1 Stark. Ev. 15; Wills, Circ. Ev. 24; Best, Ev. 21, § 27, note; 1 Greenl. Ev. § 13.

INDITEE (L. Fr.). In Old English Law. A person indicted. Mirr. c. 1, § 3; 9 Coke.

INDIVIDUUM (Lat.). In the Civil Law. That cannot be divided. Calv. Lex.

INDIVISIBLE. That cannot be separated.

The effect of the breach of a contract depends in a large degree upon whether it is to be regarded as indivisible or divisible; i. e. whether it forms a whole, the performance of every part of which is a condition precedent to bind the other party or is composed of several independent parts, the performance of any one of which will bind the other party *pro tanto*. This question is one of construction, and depends on the circumstances of each case; and the only test is whether the whole quantity of the things concerned, or the sum of the acts to be done, is of the essence of the contract. It depends, therefore, in the last resort, simply upon the intention of the parties; 68 Md. 47; 110 N. C. 251. See 9 Q. B. D. 648; 69 N. Y. 548; 151 Pa. 584; 47 N. J. L. 290; 40 N. J. Eq. 612; 115 U. S. 188; 143 Mass. 1; 12 R. I. 82; 102 N. Y. 805.

When a consideration is entire and indivisible, and it is against law, the contract is void *in toto*; 11 Vt. 592; 2 W. & S. 285. When the consideration is divisible, and part of it is illegal, the contract is void only *pro tanto*. In such case, it has been said, the connection between the different contracts is physical, not legal. See, generally, Harriman, Cont. 132-136; 1 Wall. 221.

To ascertain whether a contract is divisible or indivisible is to ascertain whether it may or may not be enforced in part, or paid in part, without the consent of the other party. See ENTIRETY; INDEPENDENT PROMISES.

INDIVISIBLE PROPERTY. Property in which the several parts after a division would not be worth as much as the property would be as a whole, or in an undivided state 145 Ky. 19, 139 S. W. 1096.

INDIVISUM (Lat.). That which two or more persons hold in common without partition; undivided.

INDORSAT. In Old Scotch Law. Indorsed. 2 Pitt. Crim. Tr. 41.

INDORSE. To write on the back. Bills of exchange and promissory notes are indorsed by a party's writing his name on the back. See INDORSEMENT. Writs in Massachusetts are indorsed in some cases by a person's writing his name on the back, in which case he becomes liable to pay the costs of the suit.

INDORSEE. The person or party to whom a bill of exchange is indorsed, or transferred by indorsement. See INDORSEMENT.

INDORSEE IN DUE COURSE. An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer. Civil Code, Cal. 3123.

INDORSEMENT. In Commercial Law. That which is written on the back of an instrument in writing and which has relation to it.

Writing one's name on the back of a promissory note or other negotiable instrument. 20 Vt. 499.

Written on the back of an original instrument, or on an "allonge" attached thereto, if there be not sufficient space on the original paper. 141 Ill. 461. It need not appear that it was physically impossible to indorse on the instrument. It may be on another paper when necessity or convenience requires it; 16 Wis. 616.

An indorsement is generally made primarily for the purpose of transferring the rights of the holder of the instrument to some other person. It has, however, various results, such as rendering the indorser liable in certain events; and hence an indorsement is sometimes made merely for the purpose of additional security. This is called an accommodation indorsement when done without consideration.

A blank indorsement is one in which the name of the indorser only is written upon the instrument. It is commonly made by writing the name of the indorser on the back; 13 S. & R. 315; but a writing across the face may answer the same purpose; 18 Pick. 63; 16 East. 12. Its effect is to make the instrument thereafter payable to bearer; Byles, Bills *151.

A conditional indorsement is one made subject to some condition without the performance of which the instrument will not be or remain valid. 4 Taunt. 30. A bill may be indorsed conditionally, so to impose on the drawee who afterwards accepts a liability to pay the bill to the indorsee or his transferees in a particular event only; Byles, Bills *150. An indorsement on a note, making it payable on a contingency does not affect its negotiability; 15 Wend. 562.

An indorsement in full, or a special indorsement, is one in which mention is made of the name of the indorsee. Chitty, Bills 170. The omission of the words "or order" is not material, for the indorsee takes it with all its incidents, including its negotiable quality; Byles, Bills *151. The omission of the words "or order" in a special indorsement will not restrain the negotiability of a bill; 2 Burr. 1216; 1 Stra. 557.

A qualified indorsement is one which restrains, or limits, or qualifies, or enlarges the liability of the indorser, in any manner different from what the law generally imports as his true liability, deducible from the nature of the instrument. Chitty, Bills 201; 7 Taunt. 160. The words commonly used are *sans recours*, without recourse; 2 Mass. 14. An indorsement without recourse, or at the indorsee's "own risk," will not expose the indorser to any liability; 30 Mo. 196; 12 Wis. 639; 2 Allen 434; 46 Pa. 140; 1 Cow. 512. But such an indorsement warrants the genuineness of all prior signatures; 18 Ohio St. 516; that the indorser has title to the note; 6 Leigh

230; that the note is valid between the original parties, and not illegal, or without consideration; 58 Me. 437; 22 Kan. 157; and that the parties were competent to contract; *id.* The assignment without recourse leaves the assignor liable as vendor; 40 Ill. App. 108.

A restrictive indorsement is one which restrains the negotiability of the instrument to a particular person or for a particular purpose; 1 Rob. La. 222. Such are "Pay A. B. or order, for my use," or "for my account," or "only."

By the law merchant, bills and notes payable to order can be transferred only by indorsement; 16 Mass. 314; 73 Ill. 485; 63 Ga. 380; 101 U. S. 68; 17 Fed. Rep. 575; Sto. Prom. N. § 120; 34 Kan. 223. Indorsement is not complete before delivery of the note; 24 Conn. 333; 15 Colo. 445; hence the word *indorsee* in a declaration on a bill imports a delivery; Wood's Byles, Bills § 153.

An instrument promising to pay a sum certain with interest, as per annexed coupons, reciting that note and coupons were secured by mortgage, was negotiable; but an indorsement, "for value received, we hereby assign and transfer the within bond, together with all our interest in, and rights under the same, without recourse," was not a commercial indorsement, but a mere assignment passing an equitable interest subject to the defenses of the makers, and the negotiability of the instrument was thereby destroyed, and the subsequent indorsement of the transferee did not make him liable for payment in the absence of any independent contract; 59 Fed. Rep. 853.

When, by such an assignment, the legal title is left in the payee, the equitable interest merely passing to the transferee, it necessarily follows that the negotiable character of the instrument is destroyed; 39 Mich. 171. And a subsequent indorsement by the transferee does not, in the absence of a special contract, render him liable; Dan. Neg. Inst. 666; 4 Watts 400; 44 Pa. 454; 126 Id. 194. The indorsement of a non-negotiable note without proof of a special contract to become responsible means nothing and creates no liability; 1 Greene (La.) 334; Dan. Neg. Inst. 709. See also 6 Kan. 490; 52 Mich. 525; 71 Mo. 627. The person making such indorsement guarantees the note to be genuine, and that it is what it purports to be; nothing more. He does not guaranty its payment, although he might do this by independent contract expressed in the contract or otherwise; 1 Greene (La.) 334.

The effect of the indorsement of a negotiable promissory note or bill of exchange is to transfer the property in the note to the person mentioned in the indorsement when it is made in full; 30 S. C. 356; or to any person to whose possession it may lawfully come thereafter even by mere delivery, when it is made in blank, so that the possessor may sue upon it in his own name at law, as well as if he had been named as the payee; 11 Pet. 80; 2 Hill N. Y. 80; 34 Neb. 903; 1 Misc. Rep. 91; 6 C. C. App. 423.

Any person who has possession of the instrument is presumed to be the legal *bona fide* owner for value, until the contrary is shown; 60 Ill. 289.

The payee of a note can restrain its negotiability, but a subsequent indorser can revive its negotiable quality; 1 Bay 160.

The parties are presumed to stand to each other in the relations in which their names appear. Where the holder has knowledge, the facts may be shown as between him and the other parties; 42 N. H. 9.

An indorsement on the last day of grace is good; 36 N. H. 278; *contra*, 11 Gray 88. An indorsement is presumed to be of the same date as the instrument; 16 Ind. 265; 28 Ill. 397; or at least to have been made before maturity; 53 Tex. 136; 94 U. S. 753.

An indorsement may be made before the bill or note itself, and so render the indorser liable to all subsequent parties; Byles, Bills *167; 30 Md. 264. A blank indorsement upon a blank piece of paper, with intent to give a person credit, is, in effect, a letter of credit; if a promissory note is

afterwards written on the paper, the indorser cannot object; Dougl. 496; 6 Cra. 142; but if the holder had notice of any fraud he cannot fill in the blanks; 3 Q. B. D. 648.

When the indorsement is made before the note becomes due, the indorsee and all subsequent holders are entitled to recover the face of the note against the maker, without any right on his part to offset claims which he may have against the payee; or, as it is frequently stated, the indorsee takes it free of all equities between the antecedent parties of which he had no notice; 8 M. & W. 504; 8 Conn. 505; 13 Mart. La. 150; 16 Pet. 1. The indorser of a promissory note before maturity without recourse is responsible thereon if the note is fraudulent, fictitious, or forged; 32 Neb. 778.

An indorser admits the signatures and capacity of every prior party; Byles, Bills *155.

The blank indorsement of a non-negotiable bill has been held to operate as the drawing of a bill payable to bearer; 33 L. J. Q. B. 209. The indorsement of a non-negotiable note by a payee operates to assign the payee's rights to the indorser, who takes the former's place; 33 Wis. 427.

After a bill is due, the indorsee takes it on the credit of the indorser and subject to all equities; 4 M. & G. 191; as was said by Lord Ellenborough, "it comes disgraced to the indorsee;" 1 Campb. 19. But the maker can only set up such defenses as are connected with the note, not those arising out of an independent transaction; 35 Mo. 99; 3 H. & N. 891; such as set-off as against the holder; 15 Ia. 79; 10 Exch. 572. It is otherwise as to a check, which may be transferred by indorsement after it is payable; Byles, Bills *171; but taking a check six days old is a circumstance from which the jury may infer fraud; 9 B. & C. 388. A note payable on demand is not to be taken as overdue without some evidence of demand of payment and refusal; 4 B. & C. 327; although it is several years old and no interest has been paid on it; Byles, Bills *171; a promissory note payable on demand is intended to be a continuing security; 9 M. & W. 15; but it has been held to be overdue and dishonored after a reasonable time; 2 Mich. 401; so after three months; 41 N. Y. 531 (but see 42 Barb. 50); after ten months; 41 Vt. 24.

A bill or note cannot be indorsed for part of the amount due the holder, as the law will not permit one cause of action to be cut up into several, and such an indorsement is utterly void as such, but when it has been paid in part, it may be indorsed as to the residue; 36 Tex. 305.

Indorsers, also, unless the indorsement be qualified, become liable to pay the amount demanded by the instrument upon the failure of the principal, the maker of a note, or the acceptor of a bill, upon due notification of such failure, to any subsequent indorsee who can legally claim to hold through the particular indorser; Story, Bills § 224.

The indorsement of a draft to a fictitious indorsee is usually treated as making it payable to bearer; see FICTITIOUS PAYEE; 140 N. Y. 556; but it is said not to be so unless the maker knows the payee to be fictitious and actually intends the paper to be made payable to a fictitious person; 36 S. W. Rep. (Tenn.) 387; 126 N. Y. 318; 46 Ohio St. 512; contra, 26 Kan. 691.

In most of the cases a person not a party to the instrument who writes his name on the back of it before delivery is in many states considered an original promisor; 36 Me. 147; 9 Mass. 314; 30 Mo. 225; 14 Tex. 275; 20 Vt. 355; but in Pennsylvania one who indorses before the payee is not liable to the payee, though he is to a subsequent indorser; and it cannot be shown by parol that he was a guarantor to the payee; 59 Pa. 144. The cases on the effect of irregular indorsements are very numerous and conflicting in different states. See Wood's Byles, Bills 150, note 7, where they are collected.

A plaintiff, in suing the first indorsee may omit to state in his declaration all the indorsements but the first indorsement in

blank, and aver that the first blank indorser indorsed directly to himself; but in such case all the intervening indorsements must be struck out; Byles, Bills *155; 20 La. Ann. 377.

An indorsement by an officer of a corporation, where the fact appears on the instrument, does not render him individually liable; 39 La. Ann. 813.

An indorsement by one of several executors will not transfer the property; 2 C. & K. 37; 9 Mass. 320; contra, in case of administrators; 6 J. J. Mar. 446; and see 9 Cow. 84. An executor cannot complete his testator's indorsement by delivering the instrument, which has already been signed by the testator; Wood's Byles, Bills 58; 1 Exch. 32.

By the general law merchant, the indorser of a negotiable instrument is bound instantly, and may be sued after maturity, upon demand and notice of non-payment. But by the statutes of some of the states the maker must first be sued and his property subjected; 1 Col. 385; 54 Ill. 349, 473; 43 Miss. 46.

The effect of acceptance upon a bill is to remove the acceptor to the head of the list as principal, while the drawer takes his place as first indorser.

A recent course of decisions with respect to restrictive indorsement has given rise to much discussion, resulting in so general a change in clearing-house rules as to amount to a revolution in banking methods.

The litigation arising from the relations between a bank, its depositor, and the indorsee of a check or draft commences with the early English case of Price v. Neal, followed in England and this country, in which it was held by Lord Mansfield that if the drawee pays a bill which he afterwards finds to be forged, he has no recourse against an innocent indorser; 3 Burr. 1354; nor has a bank which paid a forged check; Taunt. 76; 1 Binn. 27. See also 10 Wheat. 333; 59 Hun 495. The precise principle on which the doctrine of Price v. Neal was founded, has been a subject of varying opinion and the different theories concerning it, as also a voluminous citation of the cases, will be found in an article by Professor J. B. Ames in 4 Harv. L. Rev. 297. An extended review and discussion of the cases will also be found in Keener, Quasi-Cont. 154, note 1. While it is true that a bank pays a forged check at its own peril, if the depositor be free from negligence; 126 N. Y. 319; it was held that no title passed through a forged indorsement, and hence payment by a bank made on the faith of it may be recovered from an indorsee even if bona fide for value; 1 Hill 290.

A late decision has had a very far-reaching effect with respect to the effect of restrictive indorsements.

What has been characterized as "the doctrine, newly announced by the courts," has been thus stated: "Where a draft is indorsed to a bank for collection or for account of the indorser, the form of indorsement carries notice to the bank of payment that the bank to whom the paper is thus indorsed is a mere agent of the indorser to collect, having no proprietary interest in the paper; hence if the paper turns out to be forged (i. e. raised in amount, or payee's indorsement forged), the agent bank's own indorsement is not a guaranty of genuineness, and it is under no liability to repay the amount collected, after it has paid the same over to its principal." 13 Banking L. J. 75.

The first case was Park National Bank v. Seaboard National Bank, 114 N. Y. 28, and this, it was said at a convention of bankers, "proved a revelation to many of us, and pointed out the great danger which lurked in checks and other paper having restrictive indorsements," and the second case, National City Bank of Brooklyn v. Westcott, 113 N. Y. 468, was said "to have opened the eyes of banks, heretofore unacquainted with the decision (of the Seaboard Bank case), to the real status of liability in case of restrictive indorsement;" address of S. G. Nelson, 13 Bkg. L. J. 445. The same doctrine was followed in other cases, so that it

is fully established in New York and some other states and in the Federal circuit court; 45 Fed. Rep. 337; 70 id. 232; 129 N. Y. 647; 70 Mo. 648; 90 Hun 285; 62 N. W. Rep. (Minn.) 327; 17 S. W. Rep. (Mo.) 982; and the basic principle of these decisions was already approved by the United States supreme court, which held that "the words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds." 1 Wall. 166, 173; which was followed in a case of indorsement "for collection"; 148 U. S. 50; and as to an indorsement "for account," it was said, "It does not purport to transfer the title of the paper, or the ownership of the money when received;" 102 U. S. 658. In one state the contrary view has been taken and the bank of deposit of a draft with a forged indorsement, although a mere "indorsee for collection," was held liable to refund to its correspondent bank which had paid the money; 8 Colo. 49. See 64 Fed. Rep. 703.

The result of the decisions cited was the general adoption of a rule by most of the clearing-house associations, substantially like that of New York, excluding, from the exchanges, paper having a qualified or restricted indorsement, such as "for collection" or "for account of," unless the same was guaranteed. In Chicago such paper was absolutely excluded. The result has been to make the question, what is a restrictive indorsement, one of vital importance and the judicial opinion is not uniform. The following have been held to be restrictive: "for collection"; 1 Wall. 166, 173; 26 Md. 520; "for account"; 102 U. S. 658; "for my use"; 5 Mass. 543; "credit my account"; 1 Bond 387; "Pay to P. or order only"; 4 Call 411; "for deposit"; 50 Fed. Rep. 647 (contra, 77 Ala. 168); "for deposit to the credit of"; 87 Ga. 45; contra (by a divided court), 79 Md. 192; but while the presumption is that it is restrictive, the bank may show by extrinsic evidence that it was not so, either by reason of a special agreement; 50 Fed. Rep. 647; or because the proceeds were passed to the depositor's credit and subject to check before collection; 89 Ga. 108.

Where a bank to which a forged check was sent for collection credited the person sending it with the amount, without actually remitting the money, it could, on discovering the forgery, charge back the amount; 15 So. Rep. (Ala.) 440. See articles critically reviewing the cases, in the latter of which the conclusion is reached that an indorsement for deposit is restrictive; 13 Banking L. J. 361, 429; and see also Norton, Bills & N. 123; Daniel, Neg. Instr. §§ 636-7, 698.

See GUARANTY; BILLS OF EXCHANGE; PROMISSORY NOTES; NEGOTIABILITY.

In Criminal Law. An entry made upon the back of a writ or warrant.

When a warrant for the arrest of a person charged with a crime has been issued by a justice of the peace of one county, which is to be executed in another county, it is necessary, in some states, that it should be indorsed by a justice of the county where it is to be executed: this indorsement is called backing. See IN FULL.

INDORSER. The person who makes an indorsement.

The indorser of a bill of exchange, or other negotiable paper, by his indorsement undertakes to be responsible to the holder for the amount of the bill or note, if the latter shall make a legal demand from the payer, and, in default of payment, give proper notice thereof to the indorser. But the indorser may make his indorsement conditional, which will operate as a transfer of the bill if the condition be performed; or he may make it qualified, so that he shall not be responsible on non-payment by the payer; Chitty, Bills 179, 180.

To make an indorser liable on his indorse-

ment to parties subsequent to his own indorsement, the instrument must be commercial paper; for the indorsement of a bond or single bill will not, *per se*, create a responsibility; 13 S. & K. 311. See *Story, Bills* 202; 11 Pet. 80.

When there are several indorsers, the first in point of time is generally, but not always, first responsible; there may be circumstances which will cast the responsibility, in the first place, as between them, on a subsequent indorsee; 5 Munf. 252; 69 Md. 352; 72 Mich. 393.

The fact that an indorsee, when he puts his name on a draft, did not think it would render him liable as an indorser, will not relieve him; 52 N. W. Rep. (Ia.) 559. Where the owner and holder of a promissory note after maturity sells and indorses the note, signing his name after that of the original payee, he is an indorser and not a joint maker; 44 Kan. 594. See *INDORSEMENT*.

One who transfers the title to negotiable paper and assumes a conditional liability thereon by an indorsement; and also, in a less exact sense, one who by a writing upon the paper assumes the liability of an indorser without transferring the title. 4 A. & E. Ency. 2nd ed., 257; Chalmers, *Bills of Exchange*, 5th Eng. ed., 6.

INDUCEMENT. In Contracts. The benefit which the promisor is to receive from a contract is the inducement for making it.

In Criminal Law. The motive. Confessions are sometimes made by criminals under the influence of promises or threats. When these promises or threats are made by persons in authority, the confessions cannot be received in evidence. See *CONFESION*.

In Pleading. The statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it. Such matter as is not introductory to, or necessary to elucidate the substance or gist of, the declaration, plea, etc., nor collaterally applicable to it, is surplusage.

An inducement is, in general, more a matter of convenience than of necessity, since the same matter may be stated in the body of the declaration; but by its use confusion of statement is avoided; 1 Chitty, Pl. 259.

But in many cases it is necessary to lay a foundation for the action by a statement by way of inducement, of the extraneous or collateral circumstances which give rise to the plaintiff's claim. For instance, in an action for a nuisance to property in the possession of the plaintiff, the circumstances of his being possessed of the property should be stated as inducement, or by way of introduction to the mention of the nuisance; 1 Chitty, Pl. 292; Steph. Pl. 257; Bac. Abr. *Pleas*, etc. (12).

When a formal traverse is adopted, it should be introduced with an inducement, to show that the matter contained in the traverse is material; 1 Chitty, Pl. 38. See *TRAVERSE*; *INUENDO*; *COLLOQUIUM*.

In an indictment there is a distinction between the allegation of facts constituting the offence, and those which must be averred by way of inducement. In the former case, the circumstances must be set out with particularity; in the latter, a more general allegation is allowed. An "inducement to an offence does not require so much certainty." Com. Dig. *Indictment* (G 5). In an indictment for an escape, "*debito modo commissus*" is enough, without showing by what authority; and even "*commissus*" is sufficient; 1 Vent. 170. So, in an indictment for disobedience to an order of justices for payment of a church-rate, an averment, by way of inducement, that a rate was duly made as by law required, and afterwards duly allowed, and that the defendant was by it duly rated, was held sufficient, without setting out the facts which constituted the alleged due rating, etc., although in the statement of the offence itself it would not have been sufficient; 1 Den. Cr. Cas. 222.

INDUCIÆ (Lat.). In Civil Law. A truce; cessation from hostilities for a time agreed upon. Also, such agreement itself. Calv. Lex. So in international law; Grotius, *de Jure Bell.* lib. 3, c. 2, § 11; Huber, *Jur. Civ.* p. 743, § 22.

In Old Practice. A delay or indulgence allowed by law. Calvinus, Lex.; Du Cange; Bract. fol. 352 b; Fleta, lib. 4, c. 5, § 8. See Bell. Dict.; Burton, *Law of Scotl.* 561. So used in old maritime law; e. g. an *induciæ* of twenty days after safe arrival of vessels was allowed in case of bottomry bond, to raise the principal and interest; Locceivus, *de Jure Marit.* lib. 2, c. 6, § 11.

INDUCIÆ LEGALES (Lat.). In Scotch Law. The days between the citation of the defendant and the day of appearance; the days between the teste day and day of return of the writ.

INDUCTIO. In the Civil Law. Obliteration, by drawing the pen or stylus over the writing. Dig. 28, 4; Calv. Lex.

INDUCTION. In Ecclesiastical Law. The giving a clerk, instituted to a benefice, the actual possession of its temporalities, in the nature of livery of seisin. Ayliffe, *Parerg.* 299.

INDULGENCE. Forbearance (q. v.); delay in enforcing a legal right.

As to the effect on the discharge of a surety of giving indulgence to a debtor, see *SURETSHIP*.

INDULTO. In Spanish Law. The condonation or remission of the punishment imposed on a criminal for his offence. L. 1, t. 32, pt. 7. This power is exclusively vested in the king.

The right of exercising this power has been often contested, chiefly as impolitic for the reason set forth in the following Latin verses:—

"Plus sæpe nocet patientia regis
Quam regis: ille nocet paucis; hæc incitat omnes,
Dum se ferre suos sperant impune reatus."

INDUSTRIAL INSURANCE. See *INSURANCE*.

INDUSTRIAL AND PROVIDENT SOCIETIES. Societies formed in England for carrying on any labor, trade, or handicraft, whether wholesale or retail, including the buying and selling of land, and also (but subject to certain restrictions) the business of banking (L. and P. Soc. Act, 1876, 6). Such a society (which must consist of seven persons at least) when registered under the act becomes a body corporate with limited liability, and with the word "limited" as the last word in its name (*id.* 7, 11), and is regulated by rules providing for the amount of the shares, the holding of meetings, the mode in which the profits are to be applied, etc.; *id.* 9.

In English Law. These are societies which are regulated by the English Industrial and Provident Societies Acts, 1893 to 1913. The Act of 1893, which repealed, re-enacted, and amended the previous legislation on the subject, defines an industrial and provident society which may be registered under that act as "a society for carrying on any industries, businesses or trades specified in or authorized by its rules, whether wholesale or retail, and including dealings of every description with land," and provides that no member, other than another such registered society, may have an interest exceeding £200 in the shares of such society, and that the business of banking is to be carried on subject to the provisions of the act. Such a society (which must consist of seven persons at least), when registered under the act becomes a body corporate with limited liability, and with the word "limited" as the last word in its name and is regulated by rules, providing for the holding of meetings, the appointment of officers, the mode in which the profits are to be applied, etc. Down to 1918 such societies, subject to compliance with certain conditions, were exempted from income tax, but by the Income Tax Act of 1918, became taxable.

Industrial and provident societies originated in the adoption of the principle of co-operation by working men for the purpose of buying goods for their own consumption at wholesale prices and selling them among themselves at a price sufficient to pay the expenses and realize a small profit. Many such societies also offer inducements for saving, by having the capital divided into shares of a small amount payable by weekly or monthly instalments. Sometimes part of the profits is applied in paying interest at a certain rate on the shares, and the balance for any purpose authorised by the Friendly Societies Acts. Sometimes also the shares are not transferable, but the investment of each member is accumulated for the benefit of his family. Byrnes.

INDUSTRIAM, PER (Lat.). A qualified property in animals *feræ nature* may be acquired *per industriam*, i. e. by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty. 2 Steph. Com. 5. By exertion or labor. Anderson.

INE, LAWS OF. The earliest laws of the Kingdom of Wessex. They were probably promulgated between 688 and 694. Here are some of them: "If any one within the borders of our Kingdom commits an act of robbery or seizes anything with violence, he shall restore the plunder and pay a fine of 60 shillings." "The wergeld of a Welsh horseman who is in the King's service and can ride on his errands shall be 200 shillings," etc. Byrnes. The full text of the laws, with an English translation, will be found in "The Laws of the Earliest English Kings," edited by F. L. Attenborough (1922), at p. 36.

INEBRIATE. See *HABITUAL DRUNKARD*.

INEBRIETY. See *DIPSOMANIA* *DRUNKENNESS*.

INELIGIBILITY. The incapacity to be lawfully elected; disqualification to hold an office if elected or appointed to it. 28 Wis. 99.

This incapacity arises from various causes; and a person may be incapable of being elected to one office who may be elected to another: the incapacity may also be perpetual or temporary.

Among perpetual disabilities may be reckoned, the inability of women to be elected to certain public offices; and of a citizen born in a foreign country to be elected president of the United States.

Among the temporary disabilities may be mentioned, the holding of an office declared by law to be incompatible with the one sought; the non-payment of the taxes required by law; the want of certain property qualifications required by the constitution; the want of age, or being too old.

As to the effect on an election of the candidate having the highest number of votes being ineligible, see *ELECTION*. See also *ELIGIBILITY*.

INEVITABLE ACCIDENT. A term used in the civil law, nearly synonymous with *fortuitous event*. 10 Miss. 572.

Any accident which cannot be foreseen and prevented. Though used as synonymous with *act of God* (q. v.), it would seem to have a wider meaning, the *act of God* being any cause which operates without aid or interference from man; 4 Dougl. 287, 290, per Lord Mansfield; 21 Wend. 198; 3 Blackf. 223; 2 Ga. 349; 10 Miss. 572. In *Story on Bailments* § 489, the two phrases are treated as synonymous, but in a later edition, the editor, Judge Bennett, notes the distinction just mentioned and considers the phrase inevitable accident one of wider significance. See 41 Pa. 379, where this and similar expressions are discussed and distinguished; Webb, *Poll. Torts* 160.

Inevitable accident is a relative term and must be construed not absolutely but

reasonably with regard to the circumstances of each particular case, and where having reference to a collision, it may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill; 2 Wall. 560; 2 E. L. & E. 559. With reference to this subject Chief Justice Drake said that inevitable accident occurs only when the disaster happens from natural causes, without negligence or fault on either side; and when both parties have endeavored, by every means in their power, with due care and caution, and with a proper display of nautical skill, to prevent the occurrence of the accident; 12 Ct. Cl. 491; 24 How. 807.

Where a rat made a hole in a box where water was collected in an upper room, so that the water trickled out and flowed on the plaintiff's goods in a lower room; L. R. 8 Ex. 217; where pipes were laid down with plugs, properly made, to prevent the pipes bursting, and a severe frost prevented the plugs from acting and the pipes burst and flooded the plaintiff's cellar; 11 Ex. 781; where a horse took fright without any default in the driver or any known propensity in the animal, and the plaintiff was injured; 3 Esp. 538; where a horse, travelling on the highway, became suddenly frightened at the smell of blood; 30 Wisc. 257; where a horse, being suddenly frightened by a passing vehicle, became unmanageable and injured the plaintiff's horse; 1 Bingh. 13; where a mill dam, properly built, was swept away by a freshet of unprecedented violence; 8 Cow. 175; it was held that no action would lie; otherwise when the falling of the tide caused a vessel to strand, as this could have been foreseen; 42 Cal. 237. A bailee is exempt from liability for loss of the consigned goods arising from inevitable accident; he may, however, enlarge his liability by contract; 150 U. S. 312.

INFALISTATUS. In Old English Law. Exposed upon the sands, or seashore. A species of punishment mentioned in Hengham. Cowel.

INFAMIA (Lat.). Infamy; ignominy or disgrace.

By *infamia juris* is meant infamy established by law as the consequence of crime; *infamia facti* is where the party is supposed to be guilty of such crime, but it had not been judicially proved. 17 Mass. 515, 541.

INFAMIS (Lat.). In Roman Law. One who, in consequence of the application of a general rule, and not by virtue of an arbitrary decision of the censors, lost his political rights but preserved his civil rights. Savigny, Droit Rom. § 79.

INFAMOUS CRIME. A crime which works infamy in one who has committed it.

The fifth amendment of the constitution of the United States declares that, with certain exceptions not here material, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." A similar provision is contained in many of the state constitutions, although in some later ones there is a tendency to abridge the common-law strictness of requiring indictment by a grand jury.

It is settled that the provision of the federal constitution above quoted restricts only the United States so that a state may authorize an offence—capital or infamous—to be prosecuted by information; 21 La. Ann. 574; this rule of construction has been uniformly applied to the general restrictions contained in the first eight amendments; 7 Pet. 243; 2 Cow. 815; 3 id. 686; 12 S. & R. 220; Pom. Const. L. § 231-8.

It was said by Mr. Justice Miller, "There has been great difficulty in deciding what was meant a hundred years ago by the phrase infamous crime, which is used in this constitutional amendment. That difficulty is not diminished by the fact of the obscurity of the language itself as construed by what is known of the laws and usages of our ancestors at that time, in connection with the fact that both

state and federal legislation in regard to crime may have made that infamous since, which would not have been so considered then;" Miller, Const. U. S. 504. The question was not authoritatively decided by the supreme court until 1885, when in *Ex parte Wilson* the theory that the true test is the nature of the crime, as understood at common law, was distinctly negatived, and it was said by Mr. Justice Gray for the court: "When the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury;" and the fifth amendment, declaring in what cases a grand jury should be necessary, practically affirmed the rule of the common law. This was that information was not allowed for capital crimes nor for any felony, i. e. an offence which caused a forfeiture; 4 Bla. Com. 94, 95, 310; thus the requirement of an indictment depended upon the consequences of the convict, and it was concluded that the constitutional substitution of the words "a capital or otherwise infamous crime" for capital crimes or felonies, "manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses. The leading word capital describing the crime by its punishment only, the associated words or otherwise infamous crime must, by an elementary rule of construction, include crimes subject to any infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them."

Having determined that the character of the punishment was to be the criterion applied in such cases, the court discussed the question what punishment would be considered infamous, and carefully confining the decision to the requirements of the case, continued thus: "Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime, punishable by imprisonment for a term of years at hard labor, is an infamous crime, within the meaning of the Fifth Amendment of the constitution;" 114 U. S. 417, 426, 429.

This decision was followed by a number of others which adhered to the same doctrine and decided that imprisonment in a state prison or a penitentiary with or without hard labor was an infamous punishment; 117 U. S. 348; 121 id. 1; id. 281; 128 id. 393; 134 id. 160; 135 id. 263; 140 id. 200.

Before this decision there had been a tendency on the part of the courts towards the doctrine that the question of infamy was to be determined by the nature of the crime and not at all by the character of the punishment.

Prior to the independence of the United States there were understood to be two kinds of infamy,—one based upon the opinion of the people respecting the mode of punishment, and the other having relation to the future credibility of the offender; Eden, Penal L. ch. 75. Because the legal bearing of the subject was mainly if not entirely with respect to the settlement of rules determining what crimes would disqualify the perpetrator from testifying. Accordingly the classification of crimes other than treason or felony, which were held to be infamous, were naturally those the commission of which would tend to cast discredit upon the veracity of the criminal,—denominated generally by the term *crimen falsi*. The manifest purpose of the constitutional provision under consideration was the incorporation into fundamental law of one of the great guarantees of liberty. And it was said by Foster, J., in the Maine supreme judicial court: "A mere reference to the history and adoption of this provision into the federal constitution is sufficient to show that it was not a question of competency or incompetency to testify that the framers of our government were considering, but rather in consequences to the liberty of the individual in securing him against accusa-

tion and trial for crimes of great magnitude, without the previous interposition of a grand jury;" 84 Me. 25.

As was said by Shaw, C. J., in an opinion quoted with approval in *Ex parte Wilson*, "The state prison for any term of time is now by law substituted for all the ignominious punishment formerly in use; and, unless this is infamous, then there is now no infamous punishment other than capital."

It is said in a case subsequent to that in which the supreme court settled the principle, under the laws of the United States, an infamous crime is one for which the statutes authorized the courts to award an infamous punishment. Its character as being infamous does not depend on whether the punishment ultimately awarded is an infamous one, but whether it is in the power of the courts to award an infamous punishment, or whether the accused is in danger of being subjected to an infamous punishment; 40 Fed. Rep. 71; 114 U. S. 417; 84 Me. 25.

The authoritative settlement of this question by the supreme court renders it unnecessary to refer to the earlier decisions of the federal courts, which in some cases supported a different view. Many of them are referred to in the opinion of the supreme court, and the theories on which they are based are expressly disapproved. In some of the state courts the same conclusion was reached; 108 N. C. 593; 97 Mo. 669; 84 Me. 25.

It has also been held that a crime to the conviction and punishment of which congress has superadded a disqualification to hold office, is thereby made infamous; 113 U. S. 76; 114 id. 417. The course of decisions cited renders the cases as to particular crimes of little value, but of those held to be infamous under the principle stated are, larceny; 3 N. M. 367; 40 Fed. Rep. 71; assault with intent to kill; id. 81; selling liquors without paying a revenue tax; 35 id. 411; 135 U. S. 263; refusing to register voters; 43 Fed. Rep. 570; counterfeiting United States securities; 114 U. S. 417; embezzlement and making false entries by an officer of a national bank; 128 id. 393; 121 id. 1; 140 U. S. 200. When a state authorizes prosecution by information, one accused of grand larceny before its admission as a state cannot be so prosecuted; 10 Mont. 537. See 3 Cr. L. Mag. 77; 12 Myer, Fed. Dec. 795; INFAMY; INDICTMENT; INFORMATION.

"The Construction of the Fifth Amendment to the Constitution is this: An infamous crime is one that carries infamous punishment; the test does not depend upon the punishment that ultimately happens to be inflicted, but upon the punishment the court has power to inflict."

It has been decided that a crime takes on the quality of infamy if it be one punishable by imprisonment at hard labor or in a penitentiary, and must be proceeded against upon presentment or indictment of a grand jury. 114 U. S. 417; 117 U. S. 348; 258 U. S. 433; 263 U. S. 10.

INFAMOUS PUNISHMENT. Imprisonment at hard labor, whether in a penitentiary or elsewhere, is an infamous punishment within the meaning of the Fifth Amendment, and prosecution for a crime so punishable must be by indictment or presentment by a grand jury. 163 U. S. 228; 114 U. S. 417; 178 U. S. 304; 258 U. S. 433. See INFAMOUS CRIME.

INFAMY. That state which is produced by the conviction of crime and the loss of honor, which renders the infamous person incompetent as a witness, or juror.

The loss of character or position which results from conviction of certain crimes, and which formerly involved disqualification as a witness and juror.

When a man was convicted of an offence inconsistent with the common principles of honesty and humanity, the law considered his oath of no weight, and excluded his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to deprive another of life, liberty,

or property; Tayl. Ev. 1187; 2 Bulstr. 154; 1 Phill. Ev. 23; Bull. N. P. 291; 67 Pa. 386; 3 Wash. C. C. 99.

The statutory abolition of this disqualification, see *infra*, has rendered the subject obsolete in England; Stark. Ev. (Sharsw. ed.) 118; and equally so in the United States as a question of evidence, but the constitutional guarantee against conviction of an infamous crime, otherwise than by indictment, has to a considerable extent involved the discussion of the common-law definition of such crimes. As to this branch of the subject, see INFAMOUS CRIME.

The crimes which at common law rendered a person incompetent were treason; 5 Mod. 16, 74; felony; 2 Bulstr. 154; Co. Litt. 6; 1 T. Raym. 369; larceny; 62 Ala. 164; even petit larceny at common law; 5 Mod. 75; 71 Ala. 17, 271; but not if reduced to a misdemeanor; 80 Va. 287; 3 Tex. App. 114; receiving stolen goods; 7 Metc. 560; 5 Cush. 287; see 3 Clark 290; all offences founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman Law; Leach 496; as perjury and forgery; Co. Litt. 6; Fost. 209; 3 Ohio St. 229; piracy; 2 Rolle, Abr. 886; swindling, cheating; Fost. 209; barratry; 2 Salk. 690; conspiracy; 1 Leach 442; subornation of perjury; 2 G. & B. 145; suppression of testimony by bribery or by a conspiracy to procure the absence of a witness, or other conspiracy to accuse one of a crime and barratry; 1 Leach 442; bribing a witness to absent himself from a trial in order to get rid of his evidence; Fost. 208. From the decisions, Greenleaf deduces the rule "that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of false evidence and fraud;" 1 Greenl. Ev. § 373.

But the attempt to procure the absence of a witness, not amounting to a conspiracy; 8 Vt. 57; keeping a gaming house; 1 R. & M. N. P. 270; a bawdy house; 14 Mo. 348; adultery; 39 N. H. 505; maliciously obstructing railroad cars; 8 Cush. 384; deceptions in false weights, etc.; 1 Greenl. Ev. § 373; false pretences; 33 Fed. Rep. 544; 68 Mo. 458; embezzlement under some conditions of the law; 67 Pa. 386; conspiracy to cheat and defraud creditors; 33 *id.* 463; were held not infamous. The test has been said to be "whether or not the crime shows such depravity or such a disposition to pervert public justice in the courts as creates a violent presumption against the truthfulness of the offered witness,—the difficulty being in the application of this test." 1 Bish. New Cr. L. 974. By statute in England and in most of the United States, the disqualification of infamy is removed, but a conviction may usually be proved to affect credibility; 99 Mass. 420; 56 N. Y. 208; 21 Mich. 561; 50 N. H. 242. But the difference in statutory regulations is such as to preclude general statement and to require reference to the local law in particular cases.

In Alabama one convicted of an infamous crime cannot execute the office of executor, administrator, or guardian, and conviction extinguishes all private trusts not susceptible of delegation, and also disqualifies him from holding office or voting; 83 Ala. 84. Other disabilities have been created by statute in other states. See 15 Am. Dec. 322.

As the law was administered prior to the statutory removal of the disability to testify, it was the crime not the punishment which rendered the offender unworthy of belief; 1 Phill. Ev. 25; but that is not now recognized as the true test by which to determine what, in the sense of the American constitutional law, is an infamous crime. See that title.

In order to incapacitate the party the judgment must have been pronounced by a court of competent jurisdiction; 2 Stark. 183; 1 Sid. 51. The disqualification came only from the final judgment of the court; Bull. N. P. 392; 48 Me. 327; 69 N. Y. 107;

and not from the crime; 1 McMull. 494; or mere conviction, or the infamous nature of the punishment; 1 Bish. New Cr. L. § 975. The proof of the crime was by the record of conviction; 5 Gray 478.

It has been held that a conviction of an infamous crime in another country, or another of the United States, does not render the witness incompetent on the ground of infamy; 17 Mass. 515; 11 Metc. 304; *contra*, 3 Hawks 393; though this doctrine appears to be at variance with the opinions entertained by foreign jurists, who maintain that the state or condition of a person in the place of his domicile accompanies him everywhere; Story, Conf. Laws § 620, and the authorities there cited; Foelix, *Traité de Droit Intern. Privé* 31; Merlin, *Répert. Loi*, 6, n. 6. In some states such a record has the same effect as a domestic one; 15 Nev. 64; 10 N. H. 22; in some it is admitted only on the question of credibility; 9 Pick. 496; and again it has been held that the full faith and credit, required to be given to records of other states, does not extend to enforcing in one state personal disabilities imposed upon a person convicted of crime in another state; 75 N. Y. 466; reversing 12 Hun 231, and expressly disapproving 10 N. H. 24 and 3 Hawks 393. The question is to be determined by the law of the forum, and therefore the record should set forth a copy of the indictment; 9 Wis. 140. In some states the record is rejected altogether; 7 Gratt. 706; 23 Ala. 44. See 2 Harr. & McH. 120, 380; 1 *id.* 572; 1 Jones N. C. 526; 63 N. C. 294.

The competency of such a witness was restored by pardon; 2 Cra. C. C. 528; 33 N. H. 888; 41 Ala. 405; unless the disability is annexed to the conviction, by statute; 24 Ill. 298; whether granted before sentence; 4 Wall. 332; or after it has been complied with; 2 Whart. 451. See 142 U. S. 450; 144 *id.* 261; 21 Tex. App. 1. But the completion of the sentence does not remove the disability; 4 Cra. C. C. 607; 16 La. Ann. 273; *contra*, 7 *id.* 379. A pardon does remove it even if it contains a clause declaring that it is intended to relieve from imprisonment and not from legal disabilities incident to conviction, such clause being held repugnant; 3 Johns. Cas. 333; but after a pardon the conviction is admissible to affect credibility; 5 Hill 196; 50 N. H. 242.

The judgment for an infamous crime, even for perjury, did not preclude the party from making an affidavit with a view to his own defence; 2 Salk. 461; 2 Stra. 1148; 1 Greenl. Ev. § 374. He might, for instance, make an affidavit in relation to the irregularity of a judgment in a cause in which he was a party; for otherwise he would be without a remedy. But the rule was confined to defence; and he could not, at common law, be heard upon oath as complainant; 2 Salk. 461; 2 Stra. 1148. When the witness became incompetent from infamy of character, the effect was the same as if he were dead; if he had attested any instrument as a witness, previous to his conviction, evidence might be given of his handwriting; 2 Stra. 833; Stark. Ev. pt. 2, § 193, pt. 4, p. 723.

A person infamous cannot be a juror, if indeed the disqualification of infamy does not extend to more crimes in jurors than in witnesses; 1 Bish. New Cr. L. § 977; 1 Co. Litt. 6 b.

See INFAMOUS CRIME.

INFANCY. The state of an infant; nonage, or minority; the state of being under age, or under the age of twenty-one years. 4 Bl. Com. 22.

INFANGENETHEF, INFANG-THEF. The right of the lord of the manor to sit in judgment on the thief caught on his own land.

The jurisdictional powers granted in the charters of the thirteenth century frequently included this right, which extended to the hanging of the thief so caught, and, for this purpose, the manorial gallows was erected on the land of the lord. The privilege of *ufangenethef*, more rarely

given, conferred the right of hanging the thief, wherever caught, if he had upon his person the stolen goods, and if he were prosecuted by the loser of the goods; 1 Poll. & Maitl. 564. See GALLOWES.

INFANS. In the Civil Law. A child under the age of seven years; so called "*quasi impos fandi*" (as not having the faculty of speech). Cod. Theodos. 8, 18, 8.

Infans non multum a furioso distat. An infant is not far removed from (not very unlike) a madman. Burrill; Inst. 3. 20. 9.

INFANT. One under the age of twenty-one years. Co. Litt. 171.

But he is reputed to be twenty-one years old, or of full age, the first instant of the last day of the twenty-first year next before the anniversary of his birth; because, according to the civil computation of time, which differs from the natural computation, the last day having commenced, it is considered as ended. Savigny, *Dr. Rom.* § 182; 6 Ind. 447. Accordingly, a man is held entitled to vote on the day before the twenty-first anniversary of his birth; 3 Harring. 507. See AGE.

If, for example, a person were born at any hour of the first day of January, 1810 (even a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the thirty-first of December, 1830, although nearly forty-eight hours before he had actually attained the full age of twenty-one years, according to years, days, hours, and minutes, because there is in this case no fraction of a day; 1 Sid. 162; 1 Kebl. 589; 1 Salk. 44; Raym. 84; 1 Bla. Com. 463, 464; 1 Lilly, Reg. 67; Comyns, Dig. *Infant* (A); Savigny, *Dr. Rom.* §§ 383, 384. See FULL AGE; FRACTION of a DAY.

A curious case occurred in England of a young lady who was born after the house-clock had struck, while the parish clock was striking, and before St. Paul's had begun to strike, twelve, on the night of the fourth and fifth of January, 1806; the question was whether she was born on the fourth or fifth of January. Mr. Coventry gives it as his opinion that she was born on the fourth because the house-clock does not regulate anything but domestic affairs, that the parochial clock is much better evidence, and that a metropolitan clock ought to be received with implicit acquiescence. Coventry, *Ev.* 182. It is conceded that this can only be *prima facie*; because, if the facts were otherwise, and the parochial and metropolitan clocks should both have been wrong, they would undoubtedly have had no effect in ascertaining the age of the child.

The sex makes no difference at common law; a woman is, therefore, an infant until she has attained the age of twenty-one years; Co. Litt. 161. It is otherwise, however, in some of the United States; 18 Ill. 209; 4 Ind. 464. In Idaho, act 1864, females come of age at the age of eighteen. The same rule exists in Vermont, Ohio, Illinois, Iowa, Minnesota, Kansas, Nebraska, Maryland, Missouri, Arkansas, California, Colorado, Oregon, Nevada, and Washington; see 18 Ill. 209; 65 Ga. 400; 90 Vt. 41; 24 Minn. 194; 21 Neb. 680; 4 Colo. 263. Before arriving at full age, an infant may do many acts. A male at fourteen is of discretion, and may consent to marry; and at that age he may disagree to and annul a marriage he may before that time have contracted; he may then choose a guardian, and if his discretion be proved, may, at common law, make a will of his personal estate; he may act as executor at the age of seventeen years. A female at seven may be betrothed or given in marriage; at nine she is entitled to dower; at twelve she may consent or disagree to marriage; and, at common law, at seventeen she may act as executrix. Considerable changes of the common law have taken place in many of the states. In New York and several other states an infant is now deemed competent to be an executor; in Pennsylvania, Massachusetts, and other states, if an infant is named as executor in the will, administration with the will annexed will be granted during his minority, unless there shall be another executor who shall except, when the minor on arriving at full age may be admitted as joint executor; Tyler, *Inf.* & Cov. 133.

In general, an infant is not bound by his contracts, unless to supply him necessities; Selw. N. P. 137; Bacon, *Abr. Infancy*, etc. (13); 9 Viner, *Abr.* 391; 1 Comyns, *Contr.* 150, 151; 3 Rawle 351; 1 South. 87; but see 6 Cra. 226; 3 Pick. 492; 1 N. & M'C. 197; or unless, by some legislative pro-

vision, he is empowered to enter into a contract; as, with the consent of his parent or guardian, to put himself apprentice, or enlist in the service of the United States; 4 Binn. 487; 30 Vt. 357; but a contract of enlistment is not voidable like other contracts of an infant; 137 U.S. 157. A dwelling-house is not within the definition of necessities, so as to render an infant liable on a contract for its erection; 78 Hun 603.

At common law, contracts for articles other than necessities made by an infant, after full age might be ratified by him, and would then become in all respects binding. In England Lord Tenderden's Act, 9 Geo. IV. c. 14, § 8, required the ratification to be in writing. But now by the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62, "All contracts entered into by infants for the repayment of money lent, or to be lent, or for goods supplied, or to be supplied (other than contracts for necessities), and all accounts stated shall be absolutely void," and "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Contracts made with him may be enforced or avoided by him on his coming of age; 20 Ark. 600; 12 Ind. 76; 4 Sneed 118; 13 La. Ann. 407; 32 N. H. 345; 24 Mo. 541; 154 Mass. 458; 39 Kan. 495; but must be avoided within a reasonable time; 15 Gratt. 329; 29 Vt. 465; 25 Barb. 399; 156 Pa. 91. See 148 Ill. 357. But to this general rule there may be an exception in case of contracts for necessities; because these are for his benefit. See NECESSARIES. 2 Head 38; 18 Ill. 63; 18 Md. 140; 32 N. H. 345; 11 Cush. 40; 14 B. Monr. 232; but an infant is not liable upon a bill of exchange at the suit of an indorsee of the bill, although it was accepted for the price of necessities; [1891] 1 Q. B. 413; bills and notes of an infant, whether negotiable or not, are voidable; 8 Ala. 725; 43 N. H. 413; 23 Me. 517; 63 Ind. 567. The privilege of avoiding a contract on account of infancy is strictly personal to the infant, and no one can take advantage of it but himself; 3 Green, N. J. 343; 2 Brev. 438; 6 Jones, N. C. 494; 23 Tex. 252; 30 Barb. 641; 31 Miss. 32; 94 Ala. 223. See 48 Fed. Rep. 810. When the contract has been performed, and it is such as he would be compellable by law to perform, it will bind him; Co. Litt. 172 a. And all the acts of an infant which do not touch his interest, but take effect from an authority which he has been trusted to execute, are binding; 3 Burr. 1794; Fonbl. Eq. b. 1, c. 2, § 5, note c. The contracts of an infant, when not intrinsically illegal, are voidable, not void, and may be ratified by him upon arriving at maturity; 17 Colo. 506.

The contract cannot be avoided by an adult with whom the infant deals; 29 Barb. 160; 12 Ind. 76; 5 Sneed 695; 53 Mich. 288; 47 N. J. L. 457; 73 Me. 252; or by a third person in a collateral proceeding; 56 Me. 527; 96 N. Y. 201; 129 Mass. 129. See 136 U. S. 519.

The doctrine of estoppel is inapplicable to infants; 5 Sand. 228; 25 Cal. 147; 92 Ky. 500. Even where an infant fraudulently represented himself as being of full age, he was not estopped from setting up a defence of infancy to a contract entered into under the fraudulent representation; 11 Cush. 40; 10 N. H. 154; *contra*, 17 Tex. 341. But an infant cannot retain the benefits of his contract, and thus affirm it, after becoming of age, and yet plead infancy to avoid the payment of the purchase money; 33 N. Y. 526; 1 App. D. C. 359; but see 154 Mass. 458; 36 Neb. 51.

A conveyance of land by a minor without consideration is void; 90 Tenn. 705. The deed of an infant is not void but voidable only; 85 Ky. 288; and so is a mortgage; 66 N. C. 45; 43 N. H. 413; 33 Md. 128; but the deed may be ratified after reaching his majority, either expressly or impliedly; 84 Va. 509; but see 86 Ala. 442; 86 Ky. 572; and not before; 83 Ind. 182; 50 Mo. 82; 102 U. S. 300.

An infant is not competent to appoint an agent; 85 Wis. 504; his property is not liable to a mechanic's lien for material purchased by him during infancy; 36 Neb. 51. When avoiding an executory contract relating to

his personal property, he need not refund the money received, where he has squandered it; 68 Hun 589.

The protection which the law gives an infant is to operate as a shield to him, to protect him from improvident contracts, but not as a sword to do injury to others; 7 Mont. 171. An infant is, therefore, responsible for his torts, as for slander, trespass, and the like; 29 Barb. 218; 29 Vt. 465; 2 Misc. Rep. 236; but he cannot be made responsible in an action *ex delicto*, where the cause arose on a contract; 3 Rawle 351; 15 Wend. 238; 9 N. H. 441; 10 Vt. 71; 5 Hill, S. C. 391. But see 6 Cra. 226; 15 Mass. 359; 4 M'Cord 887. It is well settled that an infant bailee of a horse is liable in an action *ex delicto* for every tortious wilful act causing injury or death to the horse, the same as though he were an adult; 2 Wend. 137; 50 N. H. 235; Field, Inf. 32.

With regard to the responsibility of infants for crimes, the rule is that no infant within the age of seven years can be guilty of felony or be punished for any capital offence; for within that age an infant is, by presumption of law, *doli incapax* and cannot be endowed with any discretion; and against this presumption no averment shall be received. The law assumes that this legal incapacity ceases when the infant attains the age of fourteen years, but subjects this assumption to the effect of proof; 40 Vt. 585. Between the age of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*; but in this case the maxim applies, *matritia supplet etatem*: malice supplies the want of mature years; 1 Russ. Cr. 2, 3; 31 Ala. N. s. 323; 45 La. Ann. 1172; and the question whether such a child is capable of committing an assault with intent to murder, is for the jury; 15 So. Rep. Ala. 438. See 56 N. W. Rep. Ia. 403; 1 Bishop, N. Cr. L. § 368.

Infant defendants are not properly before the court when not served with summons, and there is no appointment of a guardian *ad litem* to represent them; 36 S. C. 354. Where infant defendants have no special or separate defence, no separate answer is necessary, but joinder in the general answer of defendants is sufficient; 94 Cal. 54. See GUARDIAN AD LITEM.

As to liability for necessities, see 12 L. R. A. 859; 35 Cent. L. J. 203; 2 id. 762; 23 Am. L. Reg. N. s. 607; 25 id. 695; 29 Sol. J. 42. As to the duty of the divorced father of an infant, see 19 Cent. L. J. 35; as to contracts of infants, generally, see 22 Am. L. Reg. N. s. 273; 24 Ir. L. T. 525; 2 Cent. L. J. 280; to marry; 20 Am. L. Reg. 447, 459; marriage settlement; 26 Ir. L. T. 694; power of attorney; 31 Cent. L. J. 104; partnership; 26 Am. L. Reg. N. s. 713; 27 id. 528.

INFANTICIDE. In Medical Jurisprudence. The murder of a new-born infant. It is thus distinguished from abortion and *feticide*, which are limited to the destruction of the life of the *fetus in utero*.

The crime of infanticide can be committed only after the child is wholly born; 5 C. & P. 329; 6 id. 249. But the destruction of a child *en ventre sa mère* is a high misdemeanor; 1 Bla. Com. 129. See 2 C. & K. 794; 7 C. & P. 850.

This question involves an inquiry, *first*, into the signs of maturity, the data for which are the length and weight of the foetus, the relative position of the centre of its body, the proportional development of its several parts as compared with each other, especially of the head as compared with the rest of the body, the degree of growth of the hair and nails, the condition of the skin, the presence or absence of the *membrana pupillaris*, and in the male the descent or non-descent of the testicles; Dean, Med. Jur. 140; Tayl. Med. Jur. 834.

Second, was it born alive? The second point presents an inquiry of great interest both to the legal and medical professions and to the community at large. In the absence of all direct proof, what organic facts proclaim the existence of life subsequent to birth? These facts are derived principally from the circulatory and respiratory systems. From the former the proofs are gathered—from the *character of the blood*, that which is purely fetal being wholly dark, like venous blood, and forming coagula much less firm and solid than that which has been subjected to the process of respiration. From the condition of the heart and blood-

vessels. The circulation anterior and subsequent to birth must necessarily be entirely different. That anterior, by means of the foetal openings—the *foramen ovale*, the *ductus arteriosus*, and the *ductus venosus*,—is enabled to perform its circuit without sending the entire mass of the blood to the lungs for the purpose of oxygenation. When the extra-uterine life commences, and the double circulation is established, these openings usually close; so that their closure is considered probable evidence of life subsequent to birth; 1 Ben. 100; Jur. 478; Dean, Med. Jur. 142. From the difference in the distribution of the blood in the different organs of the body. The two organs in which this difference is most perceptible are the liver and the lungs,—especially the latter. The circulation of the whole mass of the blood through the lungs distends and fills them with blood, so that their relative weight will be nearly doubled, and any incision into them will be followed by a free effusion.

From the respiratory system proofs of life subsequent to birth are derived. From the *thorax*: its size, capacity, and arch are increased by respiration. From the *lungs*: they are increased in size and volume, are projected forward, become rounded and obtuse, of a pinkish-red hue, and their density is inversely as their volume; Dean, Med. Jur. 142 *seq.* The fact of the expansion of the lungs being diminished in proportion to their diminution in density gives rise to a celebrated test,—the hydrostatic,—the relative weight of the lungs with water; 1 Beck, Med. Jur. 426 *et seq.* The rule is, that lungs which have not respired are specifically heavier than water, and will sink; but if they have respired, their increase in volume and decrease in density render them specifically lighter than water, and when placed within it they will float. There are several objections to the sufficiency of this test; for example lungs which have never respired may become so distended with putrefactive gases as to float, and, on the other hand, lungs which have respired may be the seat of congestion or inflammation which would cause them to sink; but it is fairly enough on its due weight, and the answer to this question; Dean, Med. Jur. 154 *et seq.* From the *state of the diaphragm*: prior to respiration it is found high up in the thorax. The act of expanding the lungs enlarges and arches the thorax, and, by necessary consequence, the diaphragm descends.

The fact of life at birth being established, the next inquiry is, how long did the child survive? The proofs here are derived from three sources. The *foetal openings*, their partial or complete closure. The more perfect the closure, the longer the life. The series of changes in the umbilical cord. These are—1, the withering of the cord; 2, its desiccation or drying, and 3, its separation or dropping off,—occurring usually four or five days after birth; 4, cicatrization of the umbilicus,—occurring usually from ten to twelve days after birth. The changes in the skin, in the process of exfoliation of the epidermis, which commences on the abdomen, and extends thence successively to the chest, groin, axillæ, interscapular space, limbs, and, finally, to the hands and feet.

As to the modes by which the life of the child may have been destroyed. The usual modes most commonly resorted to are—1, suffocation; 2, drowning; 3, cold and exposure; 4, starvation; 5, wounds, fractures, and injuries of various kinds; a mode not unfrequently resorted to is the introduction of sharp-pointed instruments in different parts of the body; also, laceration and fracture of the neck, accomplished by forcibly twisting the head of the child, or pulling it backwards; 6, strangulation; 7, poisoning; 8, intentional neglect to tie the umbilical cord; and, 9, causing the child to inhale air deprived of oxygenous gases, or gases very deleterious. All these modes of destroying life, together with the natural or accidental ones, will be found fully discussed by the writers on medical jurisprudence. 1 Beck, Med. Jur. 509; Dean, Med. Jur. 178; Ryan, Med. Jur. 137; Dr. Summings, Proof of Infanticide Considered; Storer & Beard, Criminal Abortion; Brown, Infanticide; Toulmouche, *Etudes sur Infanticide*.

INFANZON. In Spanish Law. A person of noble birth, who exercises within his domains and inheritance no other rights and privileges than those conceded to him.

INFEOFFMENT. The act or instrument of feoffment. In Scotland it is synonymous with *saisine*, meaning the instrument of possession; formerly it was synonymous with investiture. Bell, Dict. The word as used in Scotch law was *infeffment*, which was, in its proper sense, the whole feudal right, but, afterwards, the instrument or attestation of a notary that possession was actually given. Ersk. Prin. 133.

INFERENCE. A conclusion drawn by reason from premises established by proof.

A deduction or conclusion from facts or propositions known to be true. 44 Wis. 386.

It is the province of the judge who is to decide upon the facts to draw the inference. When the facts are submitted to the court, the judges draw the inference; when they are to be ascertained by a jury, the jury must do so. The witness is not permitted, as a general rule, to draw an

inference and testify that to the court or jury. It is his duty to state the facts simply as they occurred. Inferences differ from presumptions.

INFERIOR CIVIL COURTS. See COURTS OF ENGLAND.

INFERIOR COURTS. An inferior court is a court of special and limited jurisdiction, and it must appear on the face of its proceedings that it has jurisdiction, and that the parties were subjected to its jurisdiction by proper process, or its proceedings will be void. Cooley, Const. Lim. 508. Another distinction between superior and inferior courts is: in the latter case, a want of jurisdiction may be shown even in opposition to the recitals contained in the record; *id.* 509; citing 5 N. Y. 431, 497; 26 Conn. 273; this is the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions; Cooley, Const. Lim. 509; citing 1 B. & B. 432; Freem. Judg. § 523; 10 Wis. 16; 16 Mich. 225.

INFERRED. Derived from the Latin *inferre*, compounded of "*in*" from, and "*ferre*" to carry or bring, and its strict meaning is to bring a result or conclusion from something back of it, that is, from some evidence or data from which it may be logically deduced. 46 Conn. 385. *Cf.* PRESUME.

INFICIATIO (Lat.). In Civil Law. Denial. Denial of fact alleged by plaintiff, —especially, a denial of debt or deposit. Voc. Jur. Utr.; Calvinus, Lex.

INFIDEL. One who does not believe in the existence of a God who will reward or punish in this world or that which is to come. Willes 550. One who professes no religion that can bind his conscience to speak the truth. 1 Greenl. Ev. § 368. One who does not recognize the inspiration or obligation of the Holy Scriptures, or generally recognized features of the Christian religion. 37 N. Y. 580.

This term has been very indefinitely applied. Under the name of infidel, Lord Coke comprises Jews and heathens: Co. 2d Inst. 506; Co. 3d Inst. 185; and Hawkins includes among infidels such as do not believe either in the Old or New Testament; Hawk. Pl. Cr. b. 2, c. 46, s. 148.

The objection to the competency of witnesses who have no religious belief is removed in England and in most of the United States by statutory enactments; 1 Whart. Ev. § 395.

It has been held that at common law it is only requisite that the witness should believe in the existence of a God who will punish and reward according to desert; 1 Atk. 21; 2 Cow. 431; 5 Mas. 18; 18 Vt. 362; 26 Pa. 274; that it is sufficient if the punishment is to be in this world; 14 Mass. 184; 4 Jones, No. C. 25; *contra*, 7 Conn. 66. And see 17 Wend. 460; 2 W. & S. 262; 10 Ohio 121. A witness's belief is to be presumed till the contrary appear; 2 Dutch. 463, 601; and his disbelief must be shown by declarations made previously, and cannot be inquired into by examination of the witness himself; 1 Greenl. Ev. § 370, n.; 17 Me. 157; 14 Vt. 535. See 17 Ill. 541; 80 Ky. 248; 53 N. H. 55. See Tayl. Ev. 1178.

INFIHT (Sax.). An assault upon an inhabitant of same dwelling. Gloss. Anc. Inst. & Laws of Eng.

INFIRM. Weak, feeble.

When a witness is infirm to an extent likely to destroy his life, or to prevent his attendance at the trial, his testimony *de bene esse* may be taken at any age. 1 P. Wms. 117. See WITNESS.

INFIRMATIVE. Weakening. Webster, Dict. Tending to weaken or render infirm; disprobabilizing. 3 Benth. Jud. Ev. 13, 14. Exculpatory is used by some authors as synonymous. See Wills, Circ. Ev. 120; Best. Pres. § 217.

INFLUENCE. Most frequently used in connection with "undue," and refers to persuasion, machination, or constraint of will presented or exerted to procure a disposition of property, by gift, conveyance, or will. Anderson, L. Dict.

The influence which is undue in cases of gifts *inter vivos* differs from that which is required to set aside a will. In testamentary cases, undue influence is always defined as coercion or fraud, but, *inter vivos*, no such definition is applied. Where parties occupy positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice independently of the other. Anderson; 34 N. J. E. 575.

Influence, to vitiate an act, must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; not the mere desire of gratifying the wishes of another. There must be proof that the act was obtained by coercion, by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force or fear. *Id.*; 59 Cal. 561.

Undue influence is often defined by the courts to be "a fraudulent and controlling influence." In any application, the phrase savors of what is meant by fraud. *Id.*; 89 N. C. 383.

When a person, from infirmity and mental weakness, is likely to be easily influenced by others, a transaction entered into by him, without independent advice, will be set aside, if there is any unfairness in it. Thus, where there is a great weakness of mind in a grantor, arising from age, sickness, or other cause, though not amounting to absolute disqualification, and the consideration is grossly inadequate, a court of equity, upon proper and seasonable application of the person injured, his representatives or heirs, will set the conveyance aside. In such case, it is sufficient to show: great mental weakness, not amounting to insanity or extreme imbecility; and inadequacy of consideration. *Id.*; 94 U. S. 511-12.

Influence obtained by modest persuasion and arguments addressed to the understanding or by mere appeal to the affections, cannot be termed "undue"; but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency or constrain him to do, against his will, what he is unable to refuse, is "undue." *Id.*; 58 Mich. 106.

The undue influence for which a deed or will will be annulled must be such that the party making it has no free will but stands *in vinculis*. "It must amount to force or coercion, destroying free agency." The ground upon which courts of equity grant relief is that one party by improper means has gained an unconscionable advantage over another. Each case must be decided on its own merits. *Id.*; 118 U. S. 127.

Where a testator embraced spiritualism as practiced by his beneficiary, and became possessed by it, and this belief was used by the beneficiary to alienate him from his only child, his will was set aside. *Id.*; 14 F. R. 902.

INFORMALITY. Want of customary or legal form.

INFORMATION. In French Law. The act or instrument which contains the depositions of witnesses against the accused. Pothier, Proc. Civ. sect. 2, art. 5.

In Practice. A complaint or accusation exhibited against a person for some criminal offence. 4 Bla. Com. 308.

An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. 1 Bish. Cr. Proc. § 141.

It differs in no respect from an indictment in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government, *ex officio*, without the intervention of a grand jury; 4 Bla. Com. 308. The process has not been formally put in motion by congress for misdemeanors, but is common in civil prosecutions for penalties and forfeitures; 3 Story, Const. 659. The information is usually made upon knowledge given by some other person than the officer called the relator. "It comes from the common law without the aid of statutes; 5 Mod. 459; it is a concurrent remedy with indictment for all misdemeanors except misprision of treason, but not permissible in any felony." Bish. Cr. Pr. § 14; 5 Mass. 257; 9 Leigh 665.

As to the power of a legislature to dispense with indictment, see INFAMOUS CRIME.

Under United States laws, informations are resorted to for illegal exportation of goods; 1 Gall. 3; in cases of smuggling; 1 Mas. 482; and a libel for seizure is in the nature of an information; 3 Wash. C. C. 464; 1 Wheat. 9; 9 *id.* 381. The provisions of the U. S. constitution which provide that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment, etc., of a grand jury, have been held to apply only to the proceedings in the federal courts; Whart. Cr. Pl. & Cr. 88; 24 Ala. 672; 8 Vt. 57.

An information is sufficiently formal if it follows the words of the statute; 9 Wheat. 381; 14 Conn. 487; but enough must appear to show whether it is found under the statute or at common law; 3 Day 103. It must, however, allege the offence with sufficient fullness and accuracy; 10 Ind. 404; and must show all the facts demanding a forfeiture, as in a penal action, when it is to recover a penalty; 4 Mass. 462; 10 Conn. 461. Where it is for a first offence, the fact need not be stated; 9 Conn. 560; otherwise, where it is for a second or subsequent offence for which an additional penalty is provided; 2 Metc. Mass. 408. It need not show that there has been a preliminary examination or a waiver thereof; 48 Kan. 752. It cannot be amended by adding charges; 1 Dana 466; *contra*, that it can be amended before trial; 12 Conn. 101; 33 N. H. 314; 1 Salk. 471. By the common law a mistake in an information may be amended at any time; 64 Vt. 372. The information charging a statutory offence cannot be amended after verdict so as to include another offence found by the jury; 88 Mich. 359. It must be signed by the officer before filing; 15 Kan. 404; but not necessarily in Texas; 1 Tex. App. 664; and must conclude with "against the peace and dignity of the state;" 27 Tex. App. 538. In England, a verification was not required; but it is usually otherwise by statute in America; 4 Ind. 524; 1 McArthur. 466.

A part of the defendants may be acquitted and a part convicted; 1 Root 226; and a conviction may be of the whole or a part of the offence charged; 4 Mass. 187. In some states it is a proceeding by the state officer, filed at his own discretion; 9 N. H. 468; 6 Ind. 281; 4 Wis. 567; in others, leave of court may be granted to any relator to use the state officer's name, upon cause shown; 7 Halst. 84; 2 Dall. 112; 1 M'Cord 55, 52. See 45 La. Ann. 25. In England, the right to make an information was in the attorney-general, who acted without the interference of the court; 3 Burr. 2089. In former times the officer proceeded upon any application, as of course; 4 Term 285; but by an act passed in 1692, it was provided that leave of court must be first obtained and security entered; see 2 Term 190. It is said to be doubtful whether leave of court is necessary in this country; 1 Bish. Cr. Pr. § 144. A prosecuting officer may, on his own motion, present a bill to the grand

jury, without presenting an affidavit charging the offence, if he deems it necessary for the public good; and his action in doing so will be disturbed only in case of abuse of discretion; 20 S. E. Rep. (S. C.) 1010.

See INDICTMENT; GRAND JURY; INFAMOUS CRIME. See NO KNOWLEDGE OR INFORMATION

INFORMATION OF INTRUSION. A proceeding instituted by the state prosecuting officer against intruders upon the public domain. See 3 Pick. 234; 6 Leigh 588.

INFORMATION IN THE NATURE OF A QUO WARRANTO. A proceeding against the usurper of a franchise or office. See QUO WARRANTO.

INFORMATUS NON SUM (Lat.). In Practice. I am not informed: a formal answer made in court or put upon record by an attorney when he has nothing to say in defence of his client. Styles, Reg. 372.

INFORMER. A person who informs or prefers an accusation against another, whom he suspects of the violation of some penal statute.

When the informer is entitled to the penalty or part of the penalty, upon the conviction of an offender, he is or is not at common law a competent witness, according as the statute creating the penalty has or has not made him so; 1 Phill. Ev. 97; Ros. Cr. Ev. 107; 5 Mass. 57; 1 Dall. 68; 1 Saund. 262, c. See 16 Pet. 213; 4 East 180. The court is not bound to instruct the jury that the testimony of such a witness is to be received with great caution and distrust, since the credibility of witnesses is for the jury, and counsel are permitted to argue the question to them; 15 R. I. 1.

INFORTIATUM (Lat.). In Civil Law. The second part of the Digest or Pandects of Justinian. See DIGEST.

This part, which commences with the third title of the twenty-fourth book and ends with the thirty-eighth book, was thus called because it was the middle part, which, it was said, was supported and fortified by the two others. Some have supposed that this name was given to it because it treats of successions, substitutions, and other important matters, and, being more used than the others, produced greater fees to the lawyers.

INFRA (Lat.). Below, under, beneath, underneath. The opposite of *supra*, above. Thus, we say, *primo gradu est—supra, pater, mater, infra, filius, filia*: in the first degree of kindred in the ascending line, above is the father and the mother, below, in the descending line, son and daughter. Inst. 3, 6, 1.

In another sense, this word signifies *within*: as, *infra corpus civitatis*, within the body of the country; *infra presidia*, within the guards. So of time, *during: infra furorem*, during the madness. This use is not classical. The sole instance of the word in this sense in the Code, *infra anni spatium*, Code, b. 5, tit. 9, § 2, is corrected to *intra anni spatium*, in the edition of the Corpus Jur. Civ. of 1833 at Leipsic. The use of *infra* for *intra* seems to have sprung up among the barbarians after the fall of the Roman empire.

INFRA ETATEM (Lat.). Within or under age.

INFRA ANNUM LUCTUS (Lat.). Within the year of grief or mourning. 1 Bla. Com. 457; Cod. 5. 9. 2. But *intra anni spatium* is the phrase used in the passage in the Code referred to. See Corp. Jur. Civ. 1833, Leipsic. *Intra tempus luctus* occurs in Novella 23, c. 40. This year was at first ten months, afterwards twelve. 1 Beck, Med. Jur. 612.

INFRA BRACHIA (Lat.). Within her arms. Used of a husband *de jure* as well as *de facto*. Co. 2d Inst. 317. Also, *inter brachia*. Bracton, fol. 148 b. It was in this sense that a woman could only have an appeal for murder of her husband *inter*

brachia sua. Woman's Lawyer, pp. 332, 335.

INFRA CORPUS COMITATUS (Lat.). Within the body of the county.

The common-law courts have jurisdiction *infra corpus comitatus*: the admiralty, on the contrary, has no such jurisdiction, unless, indeed, the tide-water may extend within such county. 5 How. 441, 451. See ADMIRALTY; FAUCES TERRÆ.

INFRA DIGNITATEM CURIÆ (Lat.). Below the dignity of the court. Example: in equity a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. See 4 Johns. Ch. 183; 4 Paige, Ch. 364.

INFRA HOSPITIUM (Lat.). Within the inn. When once a traveller's baggage comes *infra hospitium*, that is, in the care and under the charge of the innkeeper, it is at his risk. See GUEST; INNKEEPER.

INFRA PRÆSIDIA (Lat.) within the walls. A term used in relation to prizes, to signify that they have been brought completely in the power of the captors; that is, within the towns, camps, ports, or fleet of the captors. Formerly the rule was, and perhaps still in some countries is, that the act of bringing a prize *infra præsidia* changed the property; but the rule now established is that there must be a sentence of condemnation to effect this purpose. 1 C. Rob. 134; 1 Kent 104; Chitty, Law of Nat. 98; Abbott, Shipp. 14; Hugo, Droit Romain § 90.

INFRACTION (Lat.) *infrango*, to break in upon). The breach of a law or agreement; the violation of a compact. In the French law this is the generic expression to designate all actions which are punishable by the Code of France.

INFRINGEMENT. In Patent Law. A word used to denote the act of trespassing upon the incorporeal right secured by a patent or copyright. Any person who, without legal permission, shall make, use, or sell to another to be used, the thing which is the subject-matter of any existing patent, is guilty of an infringement, for which damages may be recovered at law by an action on the case, or which may be remedied by a bill in equity for an injunction and an account.

The manufacture, sale, or use of an invention protected by letters patent, within the area and time described therein by a person not duly authorized to do so. Robt. Pat. § 890.

Infringement is a mixed question of law and fact; 113 U. S. 609. Whether a device is an infringement is determined by the claims of the patent, and not by the actual invention; 9 Blatchf. 363; 5 Fish. 285. There is no infringement unless the invention can be practised completely by following the specifications. An infringement is a copy made after, and agreeing with, the principle laid down in the patent; and if the patent does not fully describe everything essential to the thing patented, no infringement will take place by the fresh invention of processes which the patentee has not communicated to the public; 1 Fish. 298. Where the same advantages are gained by substantially the same means, there is infringement; 12 Fed. Rep. 790. The test is whether the defendant uses anything which the plaintiff has invented; 7 Fed. Rep. 199, 204.

However different, apparently, the arrangements and combinations of a machine may be from the machine of the patentee, it may in reality embody his invention, and be as much an infringement as if it were a servile copy of his machine. According to the Patent Law, if the machine complained of involves substantial identity with the one patented, it is an infringement. If the invention of the patentee be a machine, it is infringed by a machine which incorporates, in its structure and operation, the substance of the invention,—that is, an arrangement which performs the same service, or produces the same effect, in the

same way, or substantially the same way; 3 Blatchf. 535. And a device may be an infringement though it be itself a new invention; 16 Fed. Rep. 539. To obtain the same result by the same mode of operation constitutes infringement; 30 Fed. Rep. 68; and so does a mere formal change; 11 Fed. Rep. 880; or variations in size, form, and degree; 27 Fed. Rep. 684; 13 id. 456.

An invention limited to certain forms is infringed only by the use of those forms; 31 Fed. Rep. 918.

Where the same result is accomplished, the same function performed, and the mode of operation is the same, a mere difference in the location of parts will not avoid infringement; 42 O. G. 297.

An improvement may be an infringement; 12 Fed. Rep. 621. An improvement and its original are separate inventions, and the inventor of one infringes by the use of the other; 29 Fed. Rep. 358; 15 id. 448. It is, however, presumed that use under one patent does not infringe another; 1 MacArthur 459; and the grant of a second patent is *prima facie* evidence that the inventions are different, and that the later patented invention is not an infringement of the former; 1 Bann. & A. 428; 3 Blatch. 190.

To experiment with a patented article for scientific purposes, or for curiosity, or amusement, is said not to constitute infringement; 4 Blatchf. 493; but this cannot be invariably true. To make and exhibit a device at a fair, but not for use or sale, is not an infringement; 15 Fed. Rep. 360; nor is mere exposure for sale; 4 A. & E. 251; nor advertising an invention; 19 O. G. 727; but the latter is strong evidence of infringement; 19 O. G. 727. To make an article for sale abroad is an infringement; 8 Fed. Rep. 586.

An infringement may be committed by repairing as well as making the invention, if it involves reconstruction either in whole or in part; 3 Bann. & A. 471. To make a part with intent to use it, or to sell it to be used, in connection with the other parts of the invention, is infringement; 30 Fed. Rep. 437.

One who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination, is guilty of infringement; 80 Fed. Rep. 712; 132 U. S. 425; but not where the article made by the alleged infringer was not separately patented and was of a perishable nature (sheets of toilet paper); *id.* It has been held that replacing broken or worn-out parts is not necessarily infringement; 77 Fed. Rep. 789; 75 id. 1009. See 77 id. 283, citing many cases.

No act of making, use, or sale can be an infringement of a patented invention unless it is performed during the life of the patent; 128 U. S. 605; 37 Fed. Rep. 354; see 163 U. S. 55. An infringement may be committed by the use, after the patent issues, of a device constructed before the creation of the monopoly, notwithstanding the good faith of its purchaser or maker and his belief that it will never be protected by a patent; 3 Rob. Pat. § 907; 84 Fed. Rep. 789.

One who buys a patented article of manufacture from one authorized to sell it at the place where it is sold, becomes possessed of an absolute property in it, unrestricted in time or place; 157 U. S. 659; whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers was not decided in the case. A licensee of a patent for Michigan sold pipes to be laid in Connecticut, where he had no patent right; it was held that he was not liable for infringement; 149 U. S. 355; see 17 Wall. 453.

A re-issue is not infringed by an act committed before the surrender of the original patent; 2 Rob. Pat. § 696. A re-issue with a broader claim is not infringed by the use of devices made before the original patent, though they are covered by the new claim; 11 Fed. Rep. 510; 20 Blatchf. 333. A device which does not infringe the original cannot infringe the re-issue, if the scope of the original is measured by its de-

scription and not by its claims alone; 4 Bann. & A. 159.

A patent for a combination of old elements is not infringed by using less than all the elements, where the two combinations are not the same in operation; 3 Fed. Rep. 456. A claim for a combination of three elements is not infringed by the use of two only, though the third is useless, for the patentee must stand by his claim; 1 Bann. & A. 78. A combination is not infringed where one essential element is omitted and another is substituted accomplishing the same result in a different way; 12 Fed. Rep. 563.

A patent for a manufacture is infringed in whatever way the article is made; 30 Fed. Rep. 437; 3 Bann. & A. 235.

Where a product is patented as the result of a certain process it is infringed only when made by that process; 111 U. S. 293.

A patent for a composition of matter is infringed if the new element does the same thing as the one for which it is substituted, though otherwise it is different; 5 Fish. 357. A composition of matter is not infringed, if elements are substituted producing different results; 27 Fed. Rep. 69.

One is not liable in damages as an infringer if the patentee put his invention on the market unstamped, unless he had notice of the patent; 21 Fed. Rep. 122; 152 U. S. 244; 155 *id.* 584. The burden is on the complainant to prove actual or constructive notice; 152 U. S. 244.

Speaking in the general sense, it is doubtless true that the test of infringement in respect to the claims of a design-patent is the same as in respect to a patent for an art, machine, manufacture, or composition of matter; but it is not essential to the identity of the design that it should be the same to the eye of an expert. If in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer and sufficient to induce him to purchase, one supposing it to be the other, the one first patented is infringed by the other; 5 Fed. Rep. 359; 14 Wall. 511.

That the United States government, when it grants letters patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention, which cannot be appropriated or used by the government itself without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt. The constitution gives to congress power to "promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,"—which could not be effected if the government had a reserved right to publish such writings or to use such inventions without the consent of the owner; 104 U. S. 356.

The United States is liable, under its contract, for the use of a patented article, but it is not liable in tort; 156 U. S. 552. While it has no right to use a patented device, yet no suit will lie against it without its consent; 161 U. S. 10; jurisdiction to recover royalties or compensation under a contract is in the court of claims; 128 U. S. 262. It is doubtful whether a government official who uses an invention solely for the benefit of the government can be sued for infringement, and whether the case is not one solely for the court of claims; 104 U. S. 356. Where an officer of the United States uses, in his official capacity, a patented device made and used by the United States, the patentee is not entitled to an injunction, and cannot recover profits, if the only profit is a saving to the United States; but such officers, although acting under its orders, are personally liable to be sued for their own infringement of a patent; 161 U. S. 10; see 163 *id.* 49. A city is liable for an infringement by its officers for its benefit; 3 Fed. Rep. 338; 5 Bann. & A. 486.

The managing officers of an infringing corporation may be made co-defendants

and individually enjoined; 30 Fed. Rep. 123. An officer of a corporation acting for it in renting machines is a proper party defendant with such users, in a bill for an injunction; 7 Blatchf. 5.

It would be a great hardship if the directors of a railway or manufacturing corporation were bound, at their personal peril, to find out that every machine that the company uses is free of all claim of monopoly. No case precisely in point has been cited; but the practice certainly is to ask for damages only against the corporation. Joinder in equity for purposes of discovery and injunction is another matter; but I have not known damages to be asked for against the directors of a corporation, excepting in one case, which did not come to trial, but was discontinued as to the directors. I am of opinion that the only persons who can be held for damages are those who should have taken a license, and that they are those who own or have some interest in the business of making, using, or selling the thing which is an infringement; and that an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement; 13 Fed. Rep. 392. But it has also been held that all who join in an infringement are liable for damages, though some are mere officers of corporations; 19 Fed. Rep. 514. In a suit against a corporation for infringement of a patent, officers of the company, who are simply employes receiving a fixed salary, not dependent upon the sale of the alleged infringed article, and who have not personally been guilty of infringement, are neither necessary nor proper parties defendant; 73 Fed. Rep. 212.

Expert evidence is admissible in determining a question of identity between two devices; 1 Fish. 298.

State statutes of limitations formerly applied; 155 U. S. 610; by act of congress, March 3, 1897, the period is six years.

See PATENT; COPYRIGHT; TRADE-MARKS; UNITED STATES COURTS; SYLLABUS; PIRACY.

INFUSION. In Medical Jurisprudence. A pharmaceutical operation, which consists in pouring a hot or cold fluid upon a substance whose medical properties it is desired to extract. The product of this operation. An infusion differs from a decoction in that the latter is produced by boiling the drug.

Although *infusion* differs from *decoction*, they are said to be *ejusdem generis*; and in the case of an indictment which charged the prisoner with giving a decoction, and the evidence was that he had given an infusion, the difference was held to be immaterial; 8 Campb. 74.

INGENIUM (Lat. of middle ages). A net or hook. Du Cange; hence, probably, the meaning given by Spelman of artifice, fraud (*engin*). A machine, Spelman, Gloss., especially for warlike purposes; also, for navigation of a ship. Du Cange.

INGENUI (Lat.). In Civil Law. Those freemen who were born free. Vicat. Vocab.

They were a class of freemen, distinguished from those who, born slaves, had afterwards legally obtained their freedom: the latter were called, at various periods, sometimes *liberti*, sometimes *libertini*. An unjust or illegal servitude did not prevent a man from being *ingenuus*.

INGRESS, EGRESS, AND REGRESS. These words are frequently used in leases to express the right of the lessee to enter, go upon, and return from the lands in question.

INGRESSU (Lat.). An ancient writ of entry, by which the plaintiff or complainant sought an entry into his lands. Abolished in 1833. Tech. Dict.

INGROSSING. In Practice. The act of copying from a rough draft a writing in order that it may be executed: as ingrossing a deed.

INHABITANT (Lat. *in, in, habeo*, to

dwell). One who has his domicile in a place; one who has an actual fixed residence in a place. As used in the federal jurisdiction act of 1789, it means citizen. 145 U. S. 444.

A man's intention to remove to a place will not make a man an inhabitant of such place, although, as a sign of such intention, he may have sent his wife and children to reside there; 1 Ashm. 126. Nor will his intention to quit his residence, unless consummated, deprive him of his right as an inhabitant; 1 Dall. 153, 490. See 10 Ves. 339; 14 Viner, Abr. 420; 6 Ad. & E. 153.

"The words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home;" Cooley, Const. Lim. 756 and note; 16 S. E. Rep. (W. Va.) 535. But the terms "resident" and "inhabitant" have also been held not synonymous, the latter implying a more fixed and permanent abode than the former, and importing privileges and duties to which a mere resident would not be subject; 40 Ill. 197; 5 Sandf. 44; 1 Bradf. 69; 2 Gray 484; 23 N. J. L. 517. Where a question was to be submitted to the "inhabitants" of a municipality it has been held to mean legal voters; 106 U. S. 683. When relating to municipal rights, powers, or duties, the word inhabitant is almost universally used as signifying precisely the same as domiciled; 133 Mass. 98. See 17 Pick 231.

The inhabitants of the United States are native or foreign born. The natives consist, first, of white persons, and these are all citizens of the United States, unless they have lost that right; second, of the aborigines, and these are not, in general, citizens of the United States, nor do they possess any political power; third, of negroes, or descendants of the African race; fourth, of the children of foreign representatives, who are citizens or subjects as their fathers are or were at the time of their birth.

Inhabitants born out of the jurisdiction of the United States are, first, children of citizens of the United States, or of persons who have been such; they are citizens of the United States, provided the father of such children shall have resided within the same; Act of Congress of April 14, 1802, § 4; second, persons who were in the country at the time of the adoption of the constitution; these have all the rights of citizens; third, persons, who have become naturalized under the laws of any state before the passage of any law on the subject of naturalization by congress, or who have become naturalized under the acts of congress, are citizens of the United States, and entitled to vote for all officers who are elected by citizens, and to hold any office except those of president and vice-president of the United States; fourth, children of naturalized citizens, who were under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, are, if then dwelling in the United States, considered as citizens of the United States, and entitled to the same rights as their respective fathers; fifth, persons who resided in a territory which was annexed to the United States by treaty, and the territory became a state; as, for example, a person who, born in France, moved to Louisiana in 1806, and settled there, and remained in the territory until it was admitted as a state, it was held that, although not naturalized under the acts of congress, he was a citizen of the United States; Desbois Case, 2 Mart. La. 185; sixth, aliens or foreigners, who have never been naturalized, and these are not citizens of the United States, nor entitled to any political rights whatever.

Property conveyed to the inhabitants of a town as a body politic and corporate vests in the town as a corporation; 45 N. H. 87. See ALIEN; CITIZEN; DOMICIL; NATURALIZATION; HOME.

INHABITED HOUSE DUTY. See HOUSE DUTY, INHABITED.

INHANCING OF MONEY. See IMBRASING OF MONEY.

INHERENT POWER. An authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another.

INHERITABLE BLOOD. Blood of an ancestor which, while it makes the person in whose veins it flows a relative, will also give him the legal rights of inheritance incident to that relationship. See 2 Bla. Com. 254, 255. Descendants can derive no title through a person whose blood is not inheritable. Such, in England, are persons attainted and aliens. But attainder is not known in this country. See 4 Kent 413, 424; 1 Hill, R. P. 148; 2 id. 190.

INHERIT. To take by inheritance; to take as heir, on the death of the ancestor.

INHERITANCE. A perpetuity in lands to a man and his heirs; the right to succeed to the estate of a person who dies intestate. Dig. 50. 16. 24. The term is applied to lands.

It includes all the methods by which a child or relation takes property from another at his death, except by devise, and includes as well succession as descent; as applied to personal property, it can mean nothing else than to signify succession; 33 N. J. L. 413.

The property which is inherited is called an inheritance.

The term inheritance includes not only lands and tenements which have been acquired by descent, but every fee-simple or fee-tail which a person has acquired by purchase may be said to be an inheritance, because the purchaser's heirs may inherit it; Littleton § 9. This would now be called an estate of inheritance; 1 Steph. Com. 231. See ESTATES.

In Civil Law. The succession to all the rights of the deceased. It is of two kinds: that which arises by testament, when the testator gives his succession to a particular person; and that which arises by operation of law, which is called succession *ab intestat*. Heineccius, Lec. El. §§ 494, 495.

INHERITANCE ACT. The English statute of 3 & 4 Will. IV. c. 106, regulating the law of inheritance. 2 Chitty, Stat. 575; 2 Bla. Com. 37; 1 Steph. Com. 388; Will. R. P. 119.

INHERITANCE TAX. An "inheritance tax" is not one on property by devise or descent. It is the creature of the law, and not a natural right or privilege; and, therefore, the authority which confers it may impose conditions upon it. 130 Ky. 101, 113 S. W. 61. See DEATH DUTIES.

INHIBITION. In Civil Law. A prohibition which the law makes or a judge ordains to an individual. Halifax, Anal. p. 126.

In English Law. The name of a writ which forbids a judge from further proceeding in a cause depending before him; it is in the nature of a prohibition. *Termes de la Ley*; Fitzh. N. B. 39. Also a writ issuing out of a higher court christian to a lower and inferior, upon an appeal; 2 Burn, Ec. L. 389. In the government of the Protestant Episcopal church, a bishop can inhibit a clergyman of his diocese from performing clerical functions.

In Scotch Law. A personal prohibition which passes by letters under the signet, prohibiting the party inhibited to contract any debt or to do any act by which any part of the heritable property may be aliened or carried off, in prejudice of the creditor inhibiting. Erskine, Pr. b. 2, tit. ii. s. 2. See DILIGENCE.

INHIBITION AGAINST A WIFE. In Scotch Law. A writ in the sovereign's name, passing the signet, which prohibits all and sundry from having transactions with a wife or giving her credit. Bell,

Dict.: Erskine. Inst. 1. 6. 26.

INITIAL (from Lat. *initium*, beginning). Beginning; placed at the beginning. Webster. Thus, the initials of a man's name are the first letters of his name: as, G. W. for George Washington. Initials are no part of a name; 147 U. S. 47. A middle name or initial is not recognized by law; 1 Hill, N. Y. 102; 4 Watts 329; 26 Vt. 509; 28 N. H. 561; 8 Tex. 376; Wharton, Am. Cr. Law 68; 37 W. Va. 665; 2 N. Dak. 295; 83 Ga. 382. But see 1 Pick. 388; but the first initial is, and a variance therein is fatal to an indictment; 30 Tex. App. 470. In an indictment for forgery, an instrument signed "T. Tupper" was averred to have been made with intent to defraud Tristram Tupper, and it was held good; 1 McMull. 236. Signing of initials is good signing within the Statute of Frauds; 12 J. B. Moore 219; 1 Campb. 513; 2 Mood. & R. 221; Add. Contr. 46, n.; 1 Den. 471. But see Erskine, Inst. 3. 2. 8. When in a will the legatee is described by the initials of his name only, parol evidence may be given to prove his identity; 3 Ves. 148. The fact that the foreman of the grand jury in signing his name to the indorsement of "a true bill" on the indictment, used only the initials of, instead of his full Christian name, is not ground for quashing the indictment; 4 Ind. App. 563. As to the use of an initial in a ballot, see ELECTION. See, generally, NAME.

INITIALIA TESTIMONII (Lat.). In Scotch Law. A preliminary examination of a witness to ascertain what disposition he bears towards the parties whether he has been prompted what to say, whether has received a bribe, and the like. It resembles in some respects an examination on *voir dire* in English practice.

INITIATE. Commenced.

A husband was, in feudal law, said to be tenant by the curtesy *initiate* when a child who might inherit was born to his wife, because he then first had an inchoate right as tenant by the curtesy, and did homage to the lord as one of the *pares curtis* (peers of the court); whence *curtesy*. This right became consummated on the death of the wife before the husband. See 2 Bla. Com. 127; 1 Steph. Com. 247.

INITIATE TENANT BY CURTESY. A husband becomes tenant by curtesy *initiate* in his wife's estate of inheritance upon the birth of issue capable of inheriting the same. The husband's estate by curtesy is not said to be consummate till the death of the wife. 2 Bla. Com. 127, 128; 1 Steph. Com. 365, 366.

INITIATIVE. In French Law. The name given to the important prerogative conferred by the *charte constitutionnelle*, art. 16, on the king to propose, through his ministers, projects of laws. 1 Toullier, n. 89. See VETO.

INJUNCTION. A prohibitory writ, issued by the authority and generally under the seal of a court of equity, to restrain one or more of the defendants or parties, or quasi parties, to a suit or proceeding in equity, from doing, or from permitting his servants or others who are under his control to do, an act which is deemed to be inequitable so far as regards the rights of some other party or parties to such suit or proceedings in equity. Eden, Inj. c. 1; Kerr, Inj. 9; Jeremy, Eq. Jur. b. 3, c. 2, § 1; Story, Eq. Jur. § 861; Will. Eq. Jur. 341; 2 Green, Ch. 186; 1 Madd. 126.

The writ of injunction may be regarded as the correlation of the writ of mandamus, the one enjoining the performance of an unlawful act, the other requiring the performance of a lawful or neglected act; Beach, Inj. § 9.

Under the present practice in England, injunction is not by writ, but the order of the court has the same effect.

The interdict of the Roman law resembles, in many respects, our injunction. It was used in three distinct but cognate senses. 1. It was applied to signify the

edicts made by the prætor, declaratory of his intention to give a remedy in certain cases, chiefly to preserve or to restore possession; this interdict was called *edictal*: *edictale, quod prætoris edictis proponitur, ut sciant omnes ea forma posse implorari*. 2. It was used to signify his order or decree, applying the remedy in the given case before him, and was then called *decretal*: *decretale, quod prætor re nata implorantibus decrevit*. It is this which bears a strong resemblance to the injunction of a court of equity. 3. It was used, in the last place, to signify the very remedy sought in the suit commenced under the prætor's edict; and thus it became the denomination of the action itself. Livingston on the Batture case, 5 Am. Law Jour. 271; 2 Story, Eq. Jur. § 865.

Mandatory injunctions command the defendant to do a particular thing. **Preventive**, commands him to refrain from an act. The former are resorted to rarely and are seldom allowed before a final hearing; 40 N. Y. 191; 68 Pa. 370; 10 Ves. 192; 20 Am. Dec. 389; 45 N. J. Eq. 178.

Preliminary or interlocutory injunctions are used to restrain the party enjoined from doing or continuing to do the wrong complained of, either temporarily or during the continuance of the suit or proceeding in equity in which such injunction is granted, and before the rights of the parties have been definitely settled by the decision and decree of the court in such suit or proceeding.

Final or perpetual injunctions are awarded, or directed to be issued, or the preliminary injunction already issued is made final or perpetual, by the final decree of the court, or when the rights of the parties so far as relates to the subject of the injunction are finally adjudicated and disposed of by the order or decree of the court; 2 Freem. Ch. 106; 4 Johns. Ch. 69; 3 Yerg. 366; 1 Bibb. 184; Kerr, Inj. *12.

In England, injunctions were divided into common injunctions and special injunctions; Eden, Inj. 178, n.; Will. Eq. Jur. 342; Saxt. Ch. 504. The common injunction was obtained of course when the defendant in the suit in equity was in default for not entering his appearance, or for not putting in his answer to the complainant's bill within the times prescribed by the practice of the court; Eden, Inj. 59, 68, 93, n.; Story, Eq. Jur. § 892; 18 Ves. 523; Jeremy, Eq. Jur. Special injunctions were founded upon the oath of the complainant, or other evidence of the truth of the charges contained in his bill of complaint. They were obtained upon a special application to the court or to the officer of the court who was authorized to allow the issuing of such injunction, and usually upon notice of such application given to the party whose proceedings were sought to be enjoined; Story, Eq. Jur. § 893; 4 Eden, Inj. 78, 290; Jeremy, Eq. Jur. 339; 3 Mer. 475; 18 Ves. 522. By the Judicature Act of 1873, no proceeding at any time pending in the high court of justice, or before the court of appeal, shall be restrained by injunction, and any court may issue injunctions of all kinds; Moz. & W.; Brown, Dict. In the United States courts and in the equity courts of most of the states of the Union, the English practice of granting the common injunction has been discontinued or superseded, either by statute or by rules of the courts. And the preliminary injunctions are, therefore, all special injunctions in the courts of this country where such English practice has been superseded.

When used. The injunction is used in a great variety of cases, of which cases the following are some of the most common: to stay proceedings at law by the party enjoined; Story, Eq. Jur. §§ 51, 874; Jeremy, Eq. Jur. 338; R. M. Charl. 93; 6 Gill & J. 123; 1 Sumn. 89; 4 Johns. Ch. 17; 23 How. 500; 27 Conn. 579; 4 Jones, Eq. 33; 5 R. L. 171; 23 Ga. 139; see 1 Beas. 223; 13 Cal. 596; 20 Tex. 661; 35 Miss. 77; 128 Ill. 293; 122 U. S. 241; to restrain the transfer of stocks, of promissory notes, bills of exchange, and other evidences of debt; Story,

Eq. Jur. §§ 906, 955; 1 Russ. 412; 2 Vern. 132; 3 Bro. Ch. 476; 9 Wheat. 738; 4 Jones, Eq. 237; 134 Ind. 442; 45 La. Ann. 120; to restrain the transfer of the title to property; 1 Beal. 252; 14 Md. 69; 7 Ia. 83; 6 Gray 562; 37 Fed. Rep. 12; or the parting with the possession of such property; Story, Eq. Jur. § 953; 3 V. & B. 168; 4 Cow. 440; to restrain the party enjoined from setting up an unequivocal defence in a suit at law; Story, Eq. Jur. § 903; Mitf. Eq. Pl. 134; to restrain the collection of illegal taxes; 97 Mo. 300; 85 Ky. 537; 74 Mich. 892; or taxes imposed in contravention of the U. S. constitution; 149 U. S. 164; to restrain the infringement of a patent; Story, Eq. Jur. § 930; 2 Blatchf. 39; 4 Wash. C. C. 259, 514, 534; 1 Paine 441; 36 Fed. Rep. 592; 35 id. 206; or a copyright, or the pirating of trade-marks; 17 Ves. 424; 1 Hill, N.Y. 119; 2 Bosw. 1; 44 N. J. Eq. 394; 118 Ind. 105; 37 Fed. Rep. 360; to restrain a party from passing off his goods as those of another by means of simulating his labels, packages, etc.; 138 U. S. 537; to prevent the removal of property; 3 Jones, Eq. 253; or the evidences of title to property, or the evidences of indebtedness, out of the jurisdiction of the court; to restrain the committing of waste; 4 Kent 161; 2 Johns. Ch. 148; 12 Md. 1; 4 Jones, Eq. 174; 2 Ia. 496; 32 Ala. N. S. 723; to prevent the creation or the continuance of a private nuisance; 12 Cush. 454; 28 Ga. 30; 11 Cal. 104; 29 W. Va. 48; 86 Ala. 587; 149 U. S. 157; or of a public nuisance particularly noxious to the party asking for the injunction; Mitf. Eq. Pl. 124; 6 Johns. Ch. 46; 14 La. Ann. 247; 50 Ark. 466; 77 Ga. 809; to restrain illegal acts of municipal officers; 12 Cush. 410; 29 Barb. 396; 8 Wis. 485; 10 Cal. 273; 71 Mich. 87; 140 U. S. 1; to prevent a purpresture; 12 Ind. 467; to restrain the breach of a covenant or agreement; 1 D. M. & G. 619; 1 Holmes 258; to restrain the publication of a libel; [1891] 2 Ch. 269; 92 Mich. 558; [1892] 1 Ch. 571; but see L. R. [1891] 2 Ch. 294; to restrain the alienation of property pending a suit for specific performance; 3 D. J. & S. 63; to restrain the disclosure of confidential communications, papers, and secrets; Kerr, Inj. § 436; Bishop, Eq. 427; 38 N. Y. Supp. 487; 9 Hare 255; to restrain the publication of unpublished manuscripts, letters, etc.; 4 H. L. C. 867; 2 Mer. 437; to restrain members of a firm from doing acts inconsistent with the partnership articles, etc.; 12 Beav. 414; to restrain waste, even though the title be in litigation; 113 U. S. 537; to restrain the cutting of timber on land the title to which is in dispute; 54 Fed. Rep. 1005; to restrain the construction of a permanent tunnel through a lot; 64 Cal. 62; or a continuous trespass, where a party claims a right of way over the land, the use of which if permitted will ripen into an easement; 63 Vt. 278; 78 Cal. 454; see 65 Miss. 391; 75 Cal. 426; 84 Ky. 254; to restrain trespass, leaving the question of title to be settled by a suit at law; 37 Fed. Rep. 36; to restrain a railway from entering and taking possession of land without first having acquired the right to do so; 117 Ind. 465; 97 Mo. 457; to restrain intimidation of workmen by labor unions; 51 Fed. Rep. 260; (see LABOR); to restrain a boycott; 45 Fed. Rep. 135; to restrain a defaulting or insolvent executor or administrator from getting in assets; Kerr, Inj. § 451; 1 Will. Exec. 275; to restrain a trustee from the misuse of his powers; 1 Hare 146; to protect certain liens, as that of an equitable mortgagee, or of a solicitor upon his client's papers; 1 Y. & C. 303; 7 D. M. & G. 288; to restrain companies from doing illegal acts, either as against the public or third parties, or the members thereof; 13 Beav. 45; Kerr, Inj. § 473; to restrain the unlawful diversion of water; 75 Cal. 426; 128 Ill. 271; or the pollution of a stream; 42 N. W. Rep. Ill. 891; or the flowage of land by a water company, unless the award is paid; 46 N. E. Rep. (Ill.) 1083; to restrain the erection of a house across a public alley; 81 Ga. 723. It lies to prevent a threatened breach of trust in the diversion of corporate funds by illegal payment out of its capital or profits; 157 U. S. 429; at the

suit of a private person to prevent the publication of his picture (but not where the person is of public reputation); 64 Fed. Rep. 280; but not to restrain the publication of a biography of the complainant or of a member of his family; 57 Fed. Rep. 434; but see 15 N. Y. Supp. 787. But equity will enjoin the publication of a picture of a deceased member of complainant's family, where the respondent had not observed the conditions under which he obtained it; 57 Fed. Rep. 434. Equity will enjoin the construction of a street railway over a part of a turnpike road, the fee of which is owned by the complainant; 6 D. R. Pa. 289; at the suit of a wife, whose title is not disputed, will enjoin her husband's creditors from selling her property for payment of his debts; 18 C. C. R. Pa. 560; and will enjoin a hardware store situated in a populous district from keeping and selling dynamite, and from overloading its building with a stock of hardware, when it thereby becomes a menace to passers-by; 8 Kulp, Pa. 433.

An injunction will be granted to restrain a company in voluntary liquidation from distributing its assets among its shareholders without providing for future liabilities under a lease; 32 Ch. D. 41; to restrain a husband from going to his wife's house settled to her separate use, in a case where proceedings are pending between them for divorce or a judicial separation, and they are living apart; 24 Ch. 346; to enjoin a husband from dealing with his property where alimony is claimed; [1893] P. 284; [1896] P. 36, but see [1896] P. 35; against trades unionists who maliciously induce employer's contractees to break their contracts; [1893] 1 Q. B. 715; for maliciously inducing an employer to dismiss his employees; [1895] 2 Q. B. 21; against picketing; [1896] 1 Ch. 811; to restrain the publication of notes of a lecture where the audience was limited and were admitted by ticket; 28 Ch. D. 374; to restrain the publication of any valuable information, e. g. of prices communicated to a limited public for a limited purpose; [1896] 1 Q. B. 147; to restrain the sale of a volume of letters; 2 Atk. 341; to restrain the publication of confidential information obtained during service; 19 Q. B. D. 629; such as drawings; [1892] 2 Ch. 518; advertisements; [1893] 1 Ch. 218; to restrain the vendor of a good will from soliciting his former customers; [1896] App. Cas. 7; or a photographer who had taken a negative likeness of a lady in order to supply her with copies for money, from selling or exhibiting copies; 40 Ch. D. 345; to restrain a nuisance; De G. & S. 323; or to prevent a fraudulent transfer or removal from the jurisdiction of a debtor's property, in aid of an execution; 136 N. Y. 252.

An injunction will not be granted, as a rule, to take property out of the possession of one party and put it into that of another whose title has not been established by law; 144 U. S. 119; 40 W. N. C. Pa. 121; nor to restrain a defendant in a case pending for the infringement of letters patent, from issuing circulars alleging that the plaintiff's patent in suit is invalid; 29 Fed. Rep. 95; 28 id. 773; (contra, 34 id. 46; 65 Ga. 452; and it lies in England by statute; 14 Ch. Div. 763; 28 Fed. Rep. 774; L. R. 7 Eq. 488); nor to restrain a patentee who has begun, and is proceeding with, a suit on his patent, from notifying a manufacturer's customers, in a courteous way, that he intends to enforce his rights; 58 Fed. Rep. 577; nor to restrain defendant from falsely representing that a patentee's invention is an infringement of his, and thus deterring purchasers; 119 Mass. 484.

It is necessary to the obtaining an injunction, as to other equitable relief, that there should be no plain, adequate, and complete remedy at law; 30 Barb. 549; 5 R. I. 472; 121 N. Y. 45; 31 Pa. 387; 32 Ala. N. S. 723; 37 N. H. 254; 61 Hun 140; 145 U. S. 459; but where there is adequate remedy at law one will not be granted; 141 Ill. 572; 49 Fed. Rep. 517; 37 id. 67; 34 id. 357; 129 Md. 464; 109 N. C. 21; 83 Wis. 426; 115 Mo. 618. An injunction will not be granted

ed while the rights between the parties are undetermined, except in cases where material and irreparable injury will be done; 3 Bosw. 607; 1 Beal. 247, 542; 15 Md. 23; 13 Cal. 156, 190; 6 Wis. 680; 16 Tex. 410; 28 Mo. 210; 24 Fla. 542; but where it is irreparable and of a nature which cannot be compensated, and where there will be no adequate remedy, an injunction will be granted; 39 N. H. 182; 12 Cush. 410; 27 Ga. 499; 1 McAll. 271; 54 Fed. Rep. 1005; 64 Vt. 648. A preliminary injunction against the infringement of a patent will not be granted in case of doubt as to the infringement; 37 Fed. Rep. 691; 38 id. 112; 36 id. 691; where defendant confessedly intends to regain possession of certain premises by force, such act being punishable as a breach of the peace, he will not be restrained by injunction; 45 id. 721.

The owner of a dwelling-house, called for 60 years "Ashford Lodge," is not entitled to an injunction restraining the proprietor of an adjoining house known as "Ashford Villa" for 40 years from changing its name to "Ashford Lodge"; 10 Ch. D. 294. An injunction will not lie to prevent a club from carrying out the decision of the members when acting under their rules, unless it be shown that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been bad faith in a decision; 5 Eq. 63; 13 Ch. D. 346; 17 Ch. D. 615. A bill in equity for an injunction against a crime or misdemeanor does not lie; but equity will interfere if the alleged criminal acts go further and operate to the destruction or diminution of value of property. A member of an incorporated club has a standing in equity for an injunction to restrain the club from carrying out its declared purpose of committing an act which, if found to be criminal, will imperil the charter of the club; 177 Pa. 224.

Where there was a conspiracy to prevent workmen by intimidation or persuasion, from entering into or continuing in the plaintiff's employment, an injunction was granted to restrain the maintenance of a patrol of two men in front of the plaintiff's premises, placed there in furtherance of such conspiracy; 44 N. E. Rep. Mass. 1077; but a corporation is not entitled to an injunction against persons or organizations, on the ground that they have conspired to exterminate it by compelling its members to leave it; 43 Pac. Rep. Col. 451. See BOYCOTT.

Where a city had power to build water-works, the fact that by so doing it would violate contract rights of an existing water company does not give an individual property owner the right to enjoin the city on the ground that his taxes would be increased thereby; 60 Fed. Rep. 961.

Equity will not enjoin a municipal corporation in the exercise of its lawful powers, unless the proposed act is *ultra vires* and would work irreparable injury; 43 Fed. Rep. 308; but a resident taxpayer and real estate owner is entitled to bring a suit to enjoin the execution of a municipal contract illegally awarded, whatever may be alleged to be his ulterior purpose; 8 D. R. Pa. 266; 137 Pa. 561.

Where a statute creates a new offence and neglects the penalty, the ancillary remedy of injunction may be claimed as well as the penalty; Brett, L. C. Mod. Eq. 327.

An injunction against a newspaper to restrain it from copying literary matter from another newspaper will not be refused because such is the practice of newspapers; [1892] 3 Ch. 489, where the cases are collected. An injunction will not lie to restrain the publication of an encyclopedia of the same name as complainant's, except as to copyright articles, where defendant has used no means to lead the public to believe that its publication is that of complainant; 44 Fed. Rep. 793.

In England, equity, in special cases of contracts for personal services, will restrain the violation of the contract, whenever the legal remedy of damages would be inadequate and the contract is of such a kind

that its negative specific enforcement is possible. This rule was at first applied to contracts which were in form expressly negative, but has since been extended to affirmative contracts which imply negative stipulations; Pom. Eq. Jur. § 1343; 1 De G. & G. 604; L. R. 16 Eq. 149; 1 McCra. 558, 565; 1 Holmes 253. But where there was a contract for personal service containing a stipulation by the employer that he will "act exclusively for" his employer, the employed will not be restrained by injunction from entering the employ of another person in the absence of a negative covenant in the contract, express or implied, which is clear and definite; 75 L. T. Rep. 536; 47 N. J. Eq. 270.

The American cases are said to have usually either refused to follow the English decisions or have considerably modified them; see 53 Cal. 201; 8 Baxt. 54, 242; 42 Md. 460. Equity will restrain a breach of his contract by a baseball player who had contracted to play with the plaintiff; 8 C. C. R. 57; *contra*, 8 C. C. R. 337; see also 42 Fed. Rep. 198.

An injunction will lie where the remedy at law, though there be one, is inadequate; thus: to protect an innocent purchaser of the stock and good-will of a business by enjoining the sale thereof by the sheriff, where the damages recoverable would be only for the value of the stock, without compensation for the loss of business; 138 U. S. 271; to prevent the illegal sale of a church-pew under an attachment, upon the ground that it would be an outrage to the owners' religious feelings; 27 Weekly Law Bull. (Ohio) 20; to prevent the illegal issue of corporate bonds; 113 Ind. 22; 5 Wall. 74; to prevent the destruction of ornamental trees on the plaintiff's grounds; 7 Md. 408; to restrain the cutting off of the supply of natural gas furnished under a contract; 50 N. W. Rep. (Ia.) 283; where the redress at law would be inadequate by reason of the defendant's insolvency; 133 N. Y. 499. An injunction will lie to enjoin a public nuisance if it be continuous and peculiarly injure the plaintiff or his property; 135 N. Y. 239. An injunction will not be granted on the application of a private person, to protect purely public rights; Beach, Inj. § 13; 139 Ill. 419; nor, except in a great emergency, to interfere with public improvements; 40 N. J. Eq. 350; nor to restrain the abuse of a public trust, unless the complainant can show some peculiar interest therein; 102 Ill. 379; nor to compel the lessees of an opera house to allow the plaintiff to use the house under a contract therefor, where the effect would be to compel the lessee to break a contract with an innocent third party; 43 Fed. Rep. 831; nor to prevent the maintenance of a nuisance on a highway where it could be abated by indictment; 49 N. J. Eq. 11. Where a criminal prosecution is threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, an injunction will lie; 80 Fed. Rep. 218.

Criminal acts may be restrained by injunction if they are of such a nature as to constitute a public nuisance; 147 Mass. 550. This recent development of equity jurisdiction is well settled. Its efficiency has been in preventing the evils of strikes. See Judge Taft's Address, Report of Amer. Bar Assn., 1895, p. 265; 6 L. R. Eq. 551; 51 Fed. Rep. 260; 54 Fed. Rep. 730; 60 Fed. Rep. 803; 63 Fed. Rep. 310; 62 Fed. Rep. 824; 158 U. S. 564; 18 Chic. L. News 306; 32 S. W. Rep. (Mo.) 1106; 33 Am. L. Reg. N. S. 609. An injunction has also been granted to restrain a prize fight; 28 L. R. A. 727; 35 Am. L. Reg. (N. S.) 100; an injunction will lie to restrain railroad employees from acts of violence and intimidation and from enforcing rules of labor unions resulting in irreparable injury to the company and the public, such as those requiring an arbitrary strike without cause; 54 Fed. Rep. 746; and also to restrain a railroad company and its employees from refusing to interchange interstate commerce, freight, and traffic facilities with a connecting line of railway; 54 Fed. Rep. 730.

The granting of an injunction is not limited to a case where damages could not be recovered in an action at law; 27 Abb. N. C. 387; but as a general rule it will not be granted where the party may be compensated in damages; 99 N. C. 11.

Injunctions are used by courts of equity in a great number and variety of special cases; and in England and in the United States this writ was formerly used by such courts as the means of enforcing their decisions, orders, and decrees. But subsequent statutes have in most cases given to courts of equity the power of enforcing their decrees by the ordinary process of execution against the property of the party; so that an injunction to enforce the performance of a decree is now seldom necessary.

Injunctions may be used by courts of equity, in the United States as well as in England, to restrain the commencement or the continuance of proceedings in foreign courts, upon the same principles upon which they are used to restrain proceedings at law in courts of the same state or country where such injunction is granted, the jurisdiction in this class of cases, however, being purely *in personam*; 3 Myl. & K. 104; Story, Eq. Jur. § 899; High, Inj. § 103; Bisph. Eq. 424. But a state court will not grant an injunction to stay proceedings at law previously commenced in one of the United States courts. But it is otherwise when the state court has first acquired jurisdiction; 9 C. E. Green 238; 15 Wisc. 401; 53 N. Y. (s. c.) 76. Nor will a United States court grant an injunction to stay proceedings at law previously commenced in a state court, except where such injunction may be authorized by any law relating to proceedings in bankruptcy; 4 Cra. 179; 96 U. S. 340; Rev. Stat. § 720; High, Inj. § 109. See generally 37 Cent. L. J. 4. And upon the ground of comity, as well as from principles of public policy, the equity courts of one state of the Union will not grant an injunction to stay proceedings previously commenced in a court of a sister state, where the courts of such sister state have the power to afford the party applying for the injunction the equitable relief to which he is entitled; 2 Paige, Ch. 401; 31 Barb. 364; 84 Ill. 20; but in a proper case, the equity courts of one state can restrain persons within their jurisdiction from the prosecution of suits in another state; 133 U. S. 107. A very strong case should be made out to warrant a court of equity in interfering with a judgment at law; 76 Ga. 9; 51 Ark. 341; but it will enjoin a judgment at law if the matters set up in the bill, as a ground of relief, constitute equities unavailable as a defence in the action at law; 128 U. S. 374; no injunction against proceedings at law will issue where the plaintiff has a good defence at law; 40 Fed. Rep. 517. An injunction will lie to restrain a multiplicity of suits; 64 Fed. Rep. 40.

In the United States, an injunction bill is usually sworn to by the complainant, or is verified by the oath of some other person who is cognizant of the facts and charges contained in such bill, so far at least as relates to the allegations in the bill upon which the application for the preliminary injunction is based. And an order allowing such injunction is thereupon obtained by a special application to the court, or to some officer authorized by statute, or by the rules and practice of the court, to allow the injunction, either with or without notice to the party enjoined and with or without security to such party, as the law or the rules and practice of the court may have prescribed in particular classes of cases; 1 W. & M. 280. Unless a preliminary injunction is to be applied for, a bill ordinarily need not be sworn to.

The bill must disclose a primary equity in aid of which this secondary remedy is asked; 4 Jones, Eq. 29; 28 Ga. 585; 14 La. Ann. 108; 12 Mo. 315.

Where the plaintiff has slept on his rights and allowed the alleged wrong to exist for a long time, he is not entitled to an injunction; 145 U. S. 317; 143 *id.* 224, 553; 62 Tex. 205; as where the plaintiff had

permitted the completion of the building which he sought to enjoin; 143 Pa. 487; and where the plaintiff who was the owner of land bounded by a highway permitted a railway to be built on the highway; 22 S. W. Rep. (Mo.) 616. But it is otherwise where the plaintiff seeks the aid of an injunction for the protection of his legal rights, there being laches, but nothing to constitute an estoppel; 29 N. Y. Supp. 821. But delay in bringing suit is not a defence if it appear that matters still remain *in statu quo*; 2 Sim. N. s. 78. An injunction in a patent case will not be granted where, by reason of the plaintiff's delay, the defendant would be subjected to special hardship; 56 Fed. Rep. 152; nor where the plaintiff has been guilty of misrepresentations as to his goods, covered by a trade-mark; 108 U. S. 213; 28 Mass. 477; 96 Cal. 518. An injunction will not be granted when the plaintiff's right is doubtful; 54 Fed. Rep. 214; 26 *id.* 884; nor, it has been held, where the right on which it is claimed is, as a matter of law, unsettled; 29 N. J. Eq. 299; 43 *id.* 71.

Formerly the plaintiff could not obtain relief by injunction until his rights had been settled at law; 2 Johns. Ch. 163; but this doctrine is now not maintained.

Injunctions are not granted where complainant's rights are not clear, and where an injury more or less irreparable is not likely to result unless defendants are enjoined; 21 Ohio L. J. 390; 45 N. J. Eq. 50.

An injunction is ordinarily preventive, and will not be granted to correct a wrong already done or restore to a party rights of which he has been deprived; 43 Ill. App. 25; 58 Mich. 286.

There must be at least a reasonable probability of injury to the plaintiff in order to justify an injunction; 122 N. Y. 505; 96 Cal. 243; a mere threat of injury is not ordinarily a sufficient ground for an injunction; 107 N. C. 139; 55 Fed. Rep. 487. There must be a well-grounded apprehension of immediate injury; 83 Mich. 285; 25 Fla. 656; 4 Nev. 142. It is not necessary to prove that a wrong has actually been committed; where rights had been infringed, and the party has good reason to believe they will be infringed, an injunction will issue; 4 Blatch. 184. A bill will lie for an injunction, if a patent right has been admitted, upon the well-grounded proof of an intention to violate the right; 3 Story 749. A bill in equity will lie for an injunction to prevent an anticipated infringement of a patent, no infringement having actually occurred; 35 Fed. Rep. 149; where there was no proof of actual sales, but the defendant had exhibited his lamps at a fair, and distributed circulars to the public and otherwise advertised his lamps for sale, it was held that if sales had not actually been made, such a wrong was threatened, and that was sufficient to call for an injunction; 10 *id.* 291. Where the defendant had formerly been engaged in infringing, the mere fact that since the commencement of the suit he had ceased to do so and did not threaten to renew his sales, is not an answer to an application for a preliminary injunction to restrain the continuance or renewal of such infringement. Perhaps as safe a criterion of what is to be apprehended from defendant as can be obtained, is to look at that which he has done, and in his answer justified the right to do, rather than to look to the fact of his having discontinued the alleged injury and his declaration of want of intention of renewing the same; 3 Fish. Pat. Cas. 112. See Rob. Pat. § 1191.

An injunction should contain upon its face sufficient to inform the party enjoined of what he is restrained from doing or from permitting to be done by those who are under his control, without the necessity of his resorting to the complainant's bill on file to ascertain what he is to refrain from doing or from permitting to be done; 10 Cal. 347. Where a preliminary injunction is needed, the complainant's bill should contain a proper prayer for such pro-

cess; 2 Edw. Ch. 188; 4 Paige, Ch. 229, 444; 3 Sim. 273. The order granting an injunction is to be construed in the light of the prayer for the same; 81 Ga. 567. Damages for breach of covenant may be decreed in conjunction with relief by injunction; 160 Pa. 529. A court of equity may impose any terms in its discretion as a condition of granting or continuing an injunction; 120 U. S. 206.

The remedy of the party injured by the violation of an injunction by the party enjoined is by an application to the court to punish the party enjoined for his contempt in disobeying the process of the court; Hill. Inj. 173; 78 Hun 154; 61 Fed. Rep. 494.

Where an injunction had issued against cutting timber, the agent of the party enjoined who had cut timber in breach of the injunction was held guilty of contempt; 11 Beav. 180. Where trustees of a friendly society who had been enjoined from distributing certain funds, resigned, and their successors, with notice of the injunction, proceeded to make the forbidden distribution, both sets of trustees were held to be in contempt and were committed; 51 L. J. Ch. 414. See 66 L. T. Ch. D. 267. To render a person amenable to an injunction, it is neither necessary that he be a party to the suit or served with a copy of it, so long as he appears to have had actual notice; 166 U. S. 548.

Equity will restrain the commission of injuries outside of its territorial jurisdiction, by a decree in *personam*, where it has acquired jurisdiction over the defendants. Such are suits for the specific performance of contracts, for the enforcement of trusts, for relief on the ground of fraud, for settling partnership accounts; Pom. Eq. Jur. § 1818. Penn. v. Lord Baltimore, 1 Ves. Sen. 144; 100 Mass. 267; 66 Mo. 563; 53 Ga. 514; 16 Pet. 25; a defendant may be enjoined from committing waste upon property situated abroad; 32 Fed. Rep. 124. But where the suit is strictly local, the subject-matter is specific property, and the relief such that, if granted, it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the place where the subject-matter is situated, as a suit to abate a nuisance; Pom. Eq. Jur. § 1818; 2 Black 485.

In the United States courts special injunctions are granted only on notice, but in cases of danger of irreparable injury an order may issue (R. S. § 718) restraining the threatened act till the motion can be heard; and such order may be with or without security. Injunctions shall not be granted to restrain proceedings in the state courts except in bankruptcy proceedings; R. S. § 720; nor suit for the purpose of restraining the assessment or collection of any taxes; R. S. § 8224. Injunction in a state court in cases afterwards removed to a federal court, remain in full force until dissolved or modified; 18 Stat. L. 470. See 84 Fed. Rep. 481; 46 *id.* 546.

Under the new equity rules in Pennsylvania evidence on a motion for a preliminary injunction is taken in open court.

An injunction, when granted, will usually not be modified or dissolved except by the judge who granted it; 35 Fed. Rep. 98.

By the federal practice a motion to dissolve an injunction should always, when practicable, be addressed to the judge who granted it; and, in case of his death, it would seem advisable that two judges should hear the motion to dissolve; 77 Fed. Rep. 783.

The sole object of a preliminary injunction is to preserve the *status quo* until the merits can be heard. The *status quo* is the last actual peaceable uncontested *status* which preceded the pending controversy, and a wrongdoer cannot shelter himself behind a sudden or recently changed *status*, though made before the chancellor's hand actually reached him; 180 Pa. 572.

As to injunctions in particular cases, see the title of the particular subject to which

the remedy is to be applied.

In Equity. A writ remedial, issuing by order of a court of equity, (and in some cases by courts of common law in the exercise of equitable jurisdiction), and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act. Wm. Joyce on Injunctions, 1, cited by Bispham, Prin. of Eq. 634. See MANDATORY INJUNCTION; PERPETUAL INJUNCTION; PRELIMINARY INJUNCTION; PROVISIONAL INJUNCTION.

INJURED. Obstructing access to property, or the drainage therefrom, is within a statutory provision requiring compensation for property injured; 111 Pa. 354; 124 *id.* 560; 151 *id.* 30.

INJURIA (Lat.). Injury; wrong; the privation or violation of right. 3 Bl. Com. 2.

INJURIA ABSQUE DAMNO (Lat.). Wrong without damage. Wrong done without damage or loss will not sustain an action. The following cases illustrate this principle: 6 Mod. 46; 1 Show. 64; Willes 74, n.; 1 Ld. Raym. 940, 948; 2 B. & P. 86; 5 Co. 72; 9 *id.* 113; Bull. N. P. 120.

INJURIES TO THE PERSON.

Action for. The phrase "an action for an injury to the person" of the plaintiff refers to those cases where the personal injury is the gist of the action, such as actions for assault and battery, and the like. 110 S. W. 891.

INJURIOUS WORDS. In Louisiana. Slander, or libellous words.

INJURY (Lat. in, negative, jus, a right). A wrong or tort.

Absolute injuries are injuries to those rights which a person possesses as being a member of society.

Private injuries are infringements of the private or civil rights belonging to individuals considered as individuals.

Public injuries are breaches and violations of rights and duties which affect the whole community as a community.

Injuries to personal property are the unlawful taking and detention thereof from the owner; and other injuries are some damage affecting the same while in the claimant's possession or that of a third person, or injuries to his reversionary interests.

Injuries to real property are ousters, trespasses, nuisances, waste, subtraction of rent, disturbances of right of way, and the like.

Relative injuries are injuries to those rights which a person possesses in relation to the person who is immediately affected by the wrongful act done.

It is obvious that the divisions overlap each other, and that the same act may be, for example, a relative, a private, and a public injury at once. For many injuries of this character the offender may be obliged to suffer punishment for the public wrong and to recompense the sufferer for the particular loss which he has sustained. The distinction is more commonly marked by the use of the terms *civil injuries* to denote private injuries, and of *crimes, misdemeanors, etc.*, to denote the public injury done; though not always; as, for example, in case of a public nuisance which may be also a private nuisance.

Injuries arise in three ways: *first*, by non-feasance, or the not doing what was a legal obligation, or duty, or contract, to perform; *second*, misfeasance, or the performance in an improper manner of an act which it was either the party's duty or his contract to perform; *third*, malfeasance, or the unjust performance of some act which the party had no right or which he had contracted not to do.

The remedies are different as the injury affects private individuals or the public.

When the injuries affect a private right and a private individual, although often also affecting the public, there are three descriptions of remedies: *first*, the preventive, such as defence, resistance, recaption, abatement of nuisance, surety of the peace, injunction, etc.; *second*, remedies for compensation, which may be by arbitration, suit, action, or summary proceed-

ings before a justice of the peace; *third*, proceedings for punishment, as by indictment, or summary proceedings before a justice. When the injury is such as to affect the public, it becomes a crime, misdemeanor, or offence, and the party may be punished by indictment, or summary conviction for the public injury, and by civil action at the suit of the party for the private wrong. But in cases of felony the remedy by action for the private injury is generally suspended until the party particularly injured has fulfilled his duty to the public by prosecuting the offender for the public crime; and in cases of homicide the remedy is merged in the felony; 1 Chitty, Pr. 10; Ayliffe, Pand. 592.

There are many injuries for which the law affords no remedy. In general, it interferes only when there has been a visible physical injury inflicted, while it leaves almost totally unprotected the whole class of the most malignant mental injuries and sufferings, unless in a few cases where, by a fiction, it supposes some pecuniary loss, and sometimes affords compensation to wounded feelings. A parent, for example, cannot sue, in that character, for an injury inflicted on his child, and when his own domestic happiness has been destroyed, unless the fact will sustain the allegation that the daughter was the servant of her father, and that by reason of such seduction he lost the benefit of her services; but the proof of loss of service has reference only to the form of the remedy. And when the action is sustained in point of form, damages may be given not only for the loss of service, but also for all that the plaintiff can feel from the nature of the injury; 20 Pa. 354; 9 N. W. Rep. 599; 14 Cent. L. J. 12. Another instance may be mentioned. A party cannot recover damages for verbal slander in many cases: as, when the facts published are true; for the defendant would justify, and the party injured must fail. Nor will the law punish criminally the author of verbal slander imputing even the most infamous crimes, unless done with intent to extort a chattel, money, or valuable thing. The law presumes, perhaps unnaturally enough, that a man is incapable of being alarmed or affected by such injuries to his feelings. See 1 Bish. Cr. L. § 591; Cl. Cr. L. 347.

The true and sufficient reason for these rules would seem to be the uncertain character of the injury inflicted, the impossibility of compensation, and the danger, supposing a pecuniary compensation to be attempted, that injustice would be done under the excitement of the case. The sound principle, as the experience of the law amply indicates, is to inflict a punishment for crime, but not put up for sale, by the agency of a court of justice, those wounded feelings which would constitute the ground of the action.

The rule as indicated above has its limitations, however, in particular cases; 71 Me. 227. Thus, it has been held that, when bodily pain is caused, mental pain follows necessarily, and the sufferer is entitled to damages for the mental pain as well as for the bodily; 29 Conn. 390; 13 Cal. 599; 63 Pa. 290; 62 Barb. 484; but damages for the mental suffering of one person, on account of physical injury to another, are too remote to be given by court or jury; 2 C. & P. 292.

There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word injury denotes the illegal act, the term damages means the sum recoverable as amends for the wrong; 103 Ind. 319.

In Civil Law. A delict committed in contempt or outrage of any one, whereby his body, his dignity, or his reputation is maliciously injured. Voet, *Com. ad Pand.* 47, t. 10, n. 1.

A *real injury* is inflicted by any act by which a person's honor or dignity is affected; as, striking one with a cane, or even aiming a blow without striking;

spitting in one's face; assuming a coat of arms, or any other mark of distinction proper to another, etc. The composing and publishing defamatory libels may be reckoned of this kind; *Erskine*, Pr. 4. 4. 45.

A *verbal injury*, when directed against a private person, consists in the uttering contumelious words, which tend to injure his reputation by making him little or ridiculous. Where the offensive words are uttered in the heat of a dispute and spoken to the person's face, the law does not presume any malicious intention in the utterer, whose resentment generally subsides with his passion; and yet even in that case the truth of the injurious words seldom absolves entirely from punishment. Where the injurious expressions have a tendency to blacken one's moral reputation or fix some particular guilt upon him, and are deliberately repeated in different companies, or handed about in whispers to confidants, the crime then becomes slander, agreeably to the distinction of the Roman law; *Dig.* 15, § 12 de *Injur.*

See IRREPARABLE INJURY; PERSONAL INJURY; ACTION FOR INJURY, etc.

INLAGARE, INLEGIARE. To restore to protection of law. Opposed to *utlagare*. *Bract* lib. 3, tr. 2, c. 14, § 1; *Du Cange*.

INLAGATION. Restoration to the protection of law.

INLAGH. A man who is under the protection of the law, and not outlawed. *Cowel*.

INLAND. Within the same country. The demesne reserved for the use of the lord. *Cowel*. Inland, or domestic, navigation is that carried on in the interior of the country, and does not include that upon the great lakes; 24 *How.* 1; 10 *Wall.* 577. As to what are inland bills of exchange, see *BILLS OF EXCHANGE*.

INMATE. One who dwells in a part of another's house, the latter dwelling at the same time in the said house. *Kitch.* 45 b; *Com. Dig. Justices of the Peace* (B 85); 1 B. & C. 578; 2 M. & R. 227; 2 *Russ. Cr.* 937; 1 M. & G. 88; 28 *Cal.* 545. See *LODGER*.

INN. A house where a traveller is furnished with everything he has occasion for while on his way. *Bac. Abr. Inns* (B): 3 B. & Ald. 283; 9 B. Monr. 72. A public house of entertainment for all who choose to visit it. 5 *Sandf.* 247; 93 *Cal.* 253; 84 *Ala.* 451. A coffee-house or a mere eating-house is not an inn. To constitute an inn there must be some provision for the essential needs of a traveller upon his journey, namely, lodging as well as food; per *Brown, U. S. D. J.*, in 18 *Rep.* 299, citing 54 *Barb.* 316. See *INNKEEPER; HOTEL*.

INNAVIGABLE. A term applied in foreign insurance law to a vessel not navigable, through irremediable misfortune by a peril of the sea. The ship is relatively innavigable when it will require almost as much time and expense to repair her as to build a new one. *Targa*, 288, 256; *Emerigon*, to. 1, 577, 591; 3 *Kent* 323, n.

INNINGS. Lands gained from the sea by draining. *Cunningham, Law Dict.*; *Callis, Sewers* 88.

INNKEEPER. The keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. *Bac. Abr. Inns*, etc.; *Story, Bailm.* § 475. Any one who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them, their horses and attendants, is an innkeeper. *Edw. Bailm.* § 450; even though the house is situated on enclosed grounds; 93 *Cal.* 253. But one who entertains strangers occasionally, although he may receive compensation for it, is not an innkeeper; 2 D. & B. 424; 7 *Ga.* 296; 1 *Morr.* 164. See *GUEST; BOARDER*. It is not necessary that he should furnish accommodations for horses and carriages; 3 B. & Ald. 283; the keeper of a tavern; *id.*: and of a hotel is

an innkeeper; 2 *Chitty* 484. So is one who keeps a hotel on what is called the European plan, furnishing lodging to guests, and keeping an eating-house where they may purchase meals at their option; 2 *Daly* 200. But the keeper of a mere restaurant is not an innkeeper if he only furnishes meals to his guests; 1 *Hilt.* 193; 13 *Rep.* 299. Nor is the keeper of a coffee-house, or of a boarding house, or lodging-house; 8 *Co.* 82; 2 E. & B. 144; 100 *Mass.* 495; 35 *Wisc.* 118. One who receives lodgers and boards them under a special contract for a limited time, or who lets rooms to guests by the day or week, and does not furnish them entertainment, is not an innkeeper, 2 *Daly* 15. See 87 *Cal.* 483. Where the plaintiff attended a ball given by an innkeeper, stabled his horse at the inn, drank and paid for liquors, and paid for his ticket of admission to the ball, it was held that the relationship of innkeeper and guest did not exist; 17 *Hun* 126. Where one boarded with his family at a hotel in New York, paying a specified amount for his rooms, and an additional amount for board if he took his meals regularly, and if not, paying for whatever he ordered at the restaurant attached to the hotel, it was held that the innkeeper was liable for personal property stolen from the plaintiff's room; 17 *Hun* 279 (criticized in 20 *Alb. L. J.* 64, citing many cases); and see 23 *Minn.* 468. Where one merely leaves his horse with an innkeeper, the relation of innkeeper and guest does not exist; 68 *Me.* 489; so where he leaves goods at the inn without indicating any intention to become a guest; 60 *Hun* 409. So when a guest paid his bill and left the inn, having deposited money with a clerk to be kept till his return; 2 *Lea* 312; but it terminates where the guest delivers his baggage to a porter to be checked for safe keeping, the porter having no authority to receive it, and pays his bill, and in his absence the baggage is stolen, the innkeeper is not liable therefore; 93 *Ala.* 342.

He is bound to take in and receive all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; *Wand. Inns*, 46; 3 B. & Ald. 285; 7 C. & P. 213; 4 *Exch.* 367. See 89 *Cal.* 156. For a refusal to do so he is liable civilly and criminally; 7 C. & P. 213. It is no defence that the traveller did not tender the price of his entertainment, or that the guest was travelling on Sunday, or that the innkeeper had gone to bed, or that the guest refused to tell his name, otherwise if the guest was drunk, or was behaving in an improper manner; *Edw. Bailm.* § 471; 34 *Pa.* 86; 7 C. & P. 213. The innkeeper may demand prepayment; 9 *Co.* 87. He may not exclude persons from entering the inn and going into the public room on lawful business; 8 *N. H.* 523. He must guard their goods with proper diligence. He is liable only for the goods which are brought within the inn; 8 *Co.* 82; 58 *N. W. Rep.* (S. Dak.) 555. A delivery of the goods into the personal custody of the innkeeper is not, however, necessary in order to make him responsible; for, although he may not know anything of such goods, he is bound to pay for them if they are stolen or carried away, even by an unknown person; *Wand. Inns* 100; *Dig.* 4, 9, 1; 3 B. & Ald. 283; 1 *Holt N. P.* 209; 1 *Bell Com.* 469; 1 *Sm. L. C.* 47; 14 *Barb.* 193; 8 *Co.* 82; 93 *Cal.* 253; 2 *Ind.* *App.* 303; 54 *Mo. App.* 567; 1 *Hayw.* 41; 14 *Johns.* 175; 23 *Wend.* 642; 7 *Cush.* 114; 62 *Pa.* 92; 27 *Miss.* 668. Thus, when a guest's luggage was, at his suggestion, taken to the commercial room, 8 B. & C. 9; and when a lady's reticule with money in it was left for a few minutes on a bed in her room; 2 B. & Ald. 803; the innkeeper was held liable; and if he receive the guest, the custody of the goods may be considered as an accessory to the principal contract, and the money paid for the apartments as extending to the care of the box and portmanteau; *Jones, Bailm.* 94; *Story, Bailm.* § 470; 1 *Bla. Com.* 430; 2 *Kent* 458. The particular responsibility of an innkeeper does not extend to goods

lost or stolen from a room occupied by a guest for a purpose of business distinct from his accommodation as guest, such as the exhibition of samples of merchandise; 121 *U. S.* 883. The liability of an innkeeper is the same in character and extent with that of a common carrier; 7 *Cush.* 417; 9 *Humphr.* 746; 1 *Cal.* 221; 8 B. & C. 9; 53 *Me.* 103; 8 *Blackf.* 585. Even where the plaintiff's horse and wagon containing goods of value were destroyed in the night by fire, the cause of which was unknown, it was held that the innkeeper was liable; 33 *N. Y.* 571; *contra*, 30 *Mich.* 259; s. c. 18 *Am. Rep.* 127, n. See 6 *L. R. A.* 488, n. In a recent English case in the Luton county court against the proprietor of the George Hotel, Luton, an innkeeper was held liable for the loss of a bicycle, lost while the owner was at luncheon in the hotel.

He is responsible for the acts of his domestics and servants, as well as for the acts of his other guests, if the goods are stolen or lost; 7 *Cush.* 417; 5 *Barb.* 560; 54 *Mo. App.* 567; but he is not responsible for any tort or injury done by his servants or others to the person of his guest, without his own co-operation or consent; 8 *Co.* 82. The innkeeper will be excused whenever the loss has occurred through the fault of the guest, the act of God, or of the public enemy; 4 M. & S. 306; 1 *Stark.* 251, n.; 27 *Tex.* 547; 93 *U. S.* 218; 87 *Pa.* 376; 184 *id.* 262. An omission on the part of the guest to lock his door will not necessarily prevent his recovery; 6 H. & N. 265; 3 *Sweeny* 705. See 14 *Daly* 114. Where a guest was given a room temporarily and in his absence his baggage was placed in the hall, the innkeeper was held liable for its loss; [1891] 2 Q. B. 11. When the guest misleads the innkeeper as to the value of a package and thus throws him off his guard, it has been held that he cannot recover; *Edw. Bailm.* § 466. See 46 *N. Y.* 266. The failure of a guest to inform an innkeeper that his valise placed in the cloak or baggage room, contains valuables, is not negligence; 2 *Ind. App.* 303; 83 *Ga.* 696. It has been held that a guest who does not confide his goods to the innkeeper cannot recover; *Schoul.*, *Bailm.* 302; 1 *Yeates* 34; but the guest may retain personal custody of necessary wearing apparel and jewelry worn daily, for which the innkeeper becomes liable; 93 *Cal.* 253; a guest may recover for the loss of goods brought into the inn in the usual manner; 27 *Miss.* 657; 37 *Ga.* 242. An innkeeper may make reasonable regulations as to the manner in which he will receive and keep goods; 9 *Wend.* 85, 114. He must furnish reasonable accommodations. See 8 M. & W. 269. When the proprietor of a hotel employs a servant to receive and keep the property of guests while at meals, his liability for the default of this servant in the custody of property so received is not affected by the fact that he has also provided a check-room for the safekeeping of such property; 54 *Mo. App.* 567.

The innkeeper is entitled to a just compensation for his care and trouble in taking care of his guest and his property; and, to enable him to obtain this, the law invests him with some peculiar privileges, giving him a lien upon the goods brought into the inn by the guest, and, it has been said, upon the person of his guest (*contra*, 3 M. & W. 248), for his compensation; 3 B. & Ald. 287; see 61 *N. Y.* 34; 1 *Rich.* 213; 26 *Vt.* 335; 3 M. & W. 248; 13 *Or.* 482; and thus although the goods belong to a third person, if the innkeeper was ignorant of the fact; *Schoul.*, *Bailm.* § 26; 12 Q. B. 197; 23 *Pa.* 193; 11 *Barb.* 41; 99 *N. C.* 523; 27 *Wis.* 202; 52 *Minn.* 516; a lien was also held to attach upon the goods of the wife; 25 Q. B. Div. 491. Sewing machines were sent by his principal to a commercial traveller while he was at an inn, to be used in the course of business for sale to customers in the neighborhood. The innkeeper had express notice that they were the property of the employer but he received them as the baggage of the traveller, who left the inn without paying his bill; the English Court of Appeal held that the innkeeper had a lien on the goods for the amount of the bill;

[1895] 2 Q. B. 501, affirming *id.* 78. The court below considered that the question of knowledge was immaterial, because "the goods in question were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the regular apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while they were there. Here it is true that the goods were not brought by G— to the inn—they were sent to him while he was staying there. But that can make no difference. The defendant was bound to receive them and take care of them as a part of his duty towards his guest. It follows that the lien attached to them."

At common law this lien could be enforced only by legal proceedings, and not by a sale; 11 Barb. 41; Edw. Bailm. § 476. This has been changed in New York by statute. As to detaining the horse of a guest, see 25 Wend. 654; 9 Pick. 280. The landlord may also bring an action for the recovery of his compensation. Where an innkeeper owes his guest for labor more than the guest owes for board, he has no lien; 3 Col. App. 519. An innkeeper's lien does not attach to goods in possession of one who is received as a boarder and not as a guest or traveller; 52 Minn. 516.

An innkeeper in a town through which lines of stages pass has no right to exclude the driver of one of these lines from his yard and the common public rooms where travellers are usually placed, who comes there at proper hours, and in a proper manner, to solicit passengers for his coach and without doing any injury to the innkeeper; 8 N. H. 523. The common-law liability of innkeepers has been changed in England and in most of the states by statute which provides that the innkeeper shall not be liable for money, etc., if he provides a safe for safe-keeping, and duly notifies his guests thereof. It has been held that a hotel-keeper, in whose safe a regular boarder deposits money for safe-keeping, is no more than a bailee for him, and when the money is stolen from the safe by his night clerk, is not liable therefor, in the absence of any proof of want of ordinary care in employing him; 62 N. W. Rep. (Mich.) 716.

INNOCENCE. The absence of guilt. See PRESUMPTION OF INNOCENCE.

INNOCENT. The law presumes the defendant innocent until proven guilty beyond a "reasonable doubt." (*q. v.*) 120 U. S. 439

INNOCENT AGENT. One who does the forbidden thing, moved thereto by another person, yet incurs no legal guilt, because either not endowed with sufficient mental capacity or not acquainted with the necessary facts. Bish. Cr. L. § 310; 21 Tex. App. 107.

INNOCENT CONVEYANCES. In English Law. A technical term used to signify those conveyances made by a tenant of his leasehold which do not occasion a forfeiture: these are conveyances by lease and release, bargain and sale, and a covenant to stand seised by a tenant for life. 1 Chitty, Pr. 243.

INNOMINATE CONTRACTS. In Civil Law. Contracts which have no particular names, as permutation and transaction. Inst. 2. 10. 13. There are many innominate contracts; but the Roman lawyers reduced them to four classes, namely, *do ut des, do ut facias, facio ut des, and facio ut facias*. Dig. 2. 14. 7. 2.

INNONIA. In Old English Law. A close or inclosure (*clausum inclausura*). Spel. Glos.

INNOTESCIMUS (Lat.). In English Law. An epithet used for letters patent, which are always of a charter of feoffment, or some other instrument not of record, concluding with the words *Innotescimus per presentes*, etc. Tech. Dict.

INNOVATION. In Scotch Law. The exchange of one obligation for another, so that the second shall come in the place of the first. Bell, Dict. The same as NOVIATION.

INNOXIARE. To purge one of a fault and declare him innocent. Toml.

INNS OF COURT. Voluntary non-corporate legal societies seated in London having their origin about the end of the 13th and the beginning of the 14th century. Encyc. Brit. They consist of the Inns of Court and Chancery.

The four principal Inns of Court are the Inner Temple and Middle Temple (formerly belonging to the Knights Templar), Lincoln's Inn, and Gray's Inn (anciently belonging to the earls of Lincoln and Gray). The other inns are the two Serjeants' Inns, one of which also called Faryndon Inn is in Chancery Lane, and the other in Fleet Street. The Inns of Chancery were probably so called because they were once inhabited by such clerks as chiefly studied the forming of writs, which regularly belonged to the cursitors, who are officers of chancery. These are Thavie's Inn, the New Inn, supposed to have been formed on the old foundation of St. George's Inn, Symond's Inn, Clement's Inn, Clifford's Inn, Staple's Inn, Lion's Inn, Furnival's Inn, and Barnard's Inn. These are connected with the respective Inns of Court. There were other inns, such as Chester Inn, Strand or Strode Inn, and Scrope Inn.

Of the origin of the Inns of Court Inderwick says: "The fixture of a certain court for the trial of civil causes in London also encouraged the calling or profession of advocacy, and led to the institution of the Inns of Court, where students of the law could congregate as at a University, hear lectures on the Roman law and the laws of their country, and prepare themselves for their future duties." King's Peace 91. "Each inn is self governing, and quite distinct from all others, all, however, possessing equal privileges; but latterly they have joined in imposing certain educational tests for the admission of students. It is entirely in the discretion of an inn of court to admit any particular person as a member, for no member of the public has an absolute right to be called to the bar, there being no mode of compelling the inn to state its reasons for refusal. But practically, no objection is ever made to the admission of any person of good character. Each inn has also the power of disbarring its members, that is, of withdrawing from them the right of practising as counsel. This right has been rarely exercised, but of late years there have been examples of persons abusing their profession, and indulging in dishonest practices; in such cases, the inn has its own mode of inquiring into the facts affecting the character of a member, and is not bound to make the investigation public. By this high controlling power over its members, a higher character is supposed to be given to the bar as a body, than if each individual was left to his own devices, unchecked, except by the law." Int. Cyc. See also Encyclo. Brit.

INNUENDO (Lat. *innuere*, to nod at, to hint at; meaning. The word was used when pleadings were in Latin, and has been translated by "meaning").

In Pleading. A clause in the declaration, indictment, or other pleading containing an averment which is explanatory of some preceding word or statement.

An averment of the meaning of alleged libellous words. 152 Pa. 187. The defamatory meaning which the plaintiff sets on words complained of, in an action for libel; its office is to show how they came to have that defamatory meaning and how they relate to him. 84 Wis. 129.

It derives its name from the leading word by which it was always introduced when pleadings were in Latin. It is mostly used in actions of slander, and is then said to be a subordinate averment, connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully. 1 Stark. Sland. 431.

It is the office of an innuendo to define the defamatory meaning which the plaintiff sets on the words, to show how they come to have that meaning, and also to show how they relate to the plaintiff, whenever that is not clear on the face of them; Ogd. Lib. & Sl. *100. See COLLOQUIUM. It may be used to point to the plaintiff as the person intended in the defendant's statement. It may show that a general imputation of crime is intended to apply to the plaintiff;

Heard, Sland. § 226; 1 H. L. Cas. 637; 2 Hill, N. Y. 282; but it cannot be allowed to give a new sense to words where there is no such charge; 8 Q. B. 825; 7 C. B. 280. See 47 Minn. 278.

Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary, though often inserted; 98 Mich. 119; 3 Col. App. 568; where the words *prima facie* are not actionable, an innuendo is essential to the action; Ogd. Lib. & Sl. *99.

It may point to the injurious and actionable meaning, where the words complained of are susceptible of two meanings; 8 Q. B. 841; Moore & S. 737; and generally explain the preceding matter; 7 C. B. 251; 15 id. 360; 1 M. & W. 245; 12 Ad. & E. 317; but cannot enlarge and point the effect of language beyond its natural and common meaning in its usual acceptation; Heard, Sland. § 219; Newell, Def. Fland. & L. 619, 620; 6 B. & C. 154; 9 Ad. & E. 282; 15 Pick. 335; 19 D. C. 534; unless connected with the proper introductory averments; 1 Cr. & J. 143; 1 C. B. 728; 6 id. 239; 2 Pick. 320; 16 id. 1; 11 Metc. 473; 9 N. H. 246; 12 Vt. 51; 11 S. & R. 343; 5 Johns. 215. These introductory averments need not be in the same count; 2 Wils. 114; 2 Pick. 329. Where the language of an alleged libel was ambiguous, the innuendo does averring the meaning plaintiff claimed should be attached to the words complained of, are proper; 63 Hun 626.

For the innuendo in case of an ironical libel, see 7 Dowl. 210; 4 M. & W. 446.

If not warranted by preceding allegations, it may be rejected as superfluous; Heard, Sland. § 225; but only where it is bad and useless,—not where it is good but unsupported by evidence, even though the words would be actionable without an innuendo; Newell, Def. Sland. & L. 629; 3 H. L. Cas. 395; 1 Cr. & M. 675; 1 Ad. & E. 558; 2 Bingh. N. C. 402; 4 B. & C. 655; 3 Campb. 461; 9 East 93; Cro. Car. 512; Cro. Eliz. 609. See 3 Misc. Rep. 314.

In the case of words not *per se* actionable, the innuendo must be pleaded and proved: 51 Mo. App. 102.

INOFFICIOSUS (Lat.) In Civil Law. Inofficious; contrary to natural duty or affection. Used of a will of a parent which disinherited a child without just cause, or of that of a child which disinherited a parent, and which could be contested by *querela inofficiosi testamenti*; designated by Blackstone as remarkable on the ground "that the testator had lost the use of his reason"; 1 Com. 447; 2 id. 502; 2 Steph. Com. 589; Dig. 2. 5. 3, 13; Paulus, lib. 4, tit. 5, § 1. Even a brother or sister could set aside such a testament if the person actually instituted heir was *turpis* or infamous. The old writ *de rationabili parte bonorum*, in the English law, resembled in some respects the *querela inofficiosi testamenti*; but there is nothing which corresponds to it in the English law at the present day; Moz. & W.

INOFFICIOUS TESTAMENT. In Civil Law. A testament contrary to the natural duty of the parent, because it totally disinherited the child, without expressly giving the reason therefor. See next title.

INOFICIOSIDAD. In Spanish Law. Every thing done contrary to a duty or obligation assumed, as well as in opposition to the piety and affection dictated by nature: *inoficiosum dicitur id omne quod contra pietatis officium factum est*. The term applies especially to testaments, donations, dower, etc., which may be either revoked or reduced when they affect injuriously the rights of creditors or heirs.

INOPS CONSILII (Lat.). Destitute of or without counsel. In the construction of wills a greater latitude is given, because the testator is supposed to have been *inops consilii*.

INORDINATUS. An intestate.

INPENY and OUTPENY. Money which by the custom of some manors is paid by an incoming and an outgoing tenant. Spelm.; Holth.

INQUEST. A body of men appointed by law to inquire into certain matters: as, the inquest examined into the facts connected with the alleged murder. The grand jury is sometimes called the *grand inquest*.

The judicial inquiry itself by a jury summoned for the purpose, is called an inquest. The finding of such men, upon an investigation, is also called an inquest, or an inquisition.

The most familiar use of the word is to designate the inquiry by a coroner (*q. v.*) into the causes of death, whether sudden, violent, or in prison. To justify an inquest it is not necessary that a death should be both sudden and violent; either is sufficient; 2 Grant, Pa. 262. The authority to hold an inquest extends to bodies brought into the county; 105 N. Y. 146; and when a person died in one county and was buried in another it was held that the inquest should be held by the coroner of the latter. After the verdict is returned the duty is completed and a second inquest cannot be held unless the first is quashed by a competent court; 3 El. & El. 187; 4 Park. Cr. Rep. 519. No inquest can be held in any case except upon view of the body; this is jurisdictional and can be waived by no one; 1 Witth. & Beck. Med. Jur. 341; 3 B. & A. 260; if buried it may be exhumed, but must be reburied; *id.* 260; 2 Hawk. P. C. 77. A *post-mortem* examination may be ordered; 3 Pa. 462; 4 *id.* 269; but it should not be made before the jury have viewed the body; 1 Witth. & Beck. Med. Jur. 336; nor should it be in the presence of the jury, but they are to be instructed by the testimony of the physicians designated to make it; 105 N. Y. 146.

In holding an inquest the coroner acts judicially; 3 Gray 463; 44 Cal. 452; 32 Mo. 375; 1 Witth. & Beck. Med. Jur. 333. No person is entitled by reason of being suspected of causing the death, to be present, or to have counsel, or cross-examine the witnesses or produce others; 2 Hawk. P. C. 77; 20 How. Pr. 111; 11 Abb. Pr. 406; 81 N. Y. 623, *aff. 15 Hun* 200. The coroner may select and summon the jurors of inquest and fine any who are absent for non-attendance; T. U. P. Charl. 310; they must be sworn; 3 B. & A. 260; and this must appear in the certificate or be proved *alibunde*; 22 Wend. 167; they are the sole arbiters of the facts; but the coroner may instruct them in the law; *id.*; and compel the attendance of witnesses, for which purpose he has common-law powers; 11 Phila. 387.

After hearing the evidence the jury should retire to deliberate upon their verdict, without the presence of the coroner, and, when agreed upon, it should be put in writing and is final, and the inquisition should be signed by the coroner and jury; 6 C. & P. 179, 602; the jury may sign by marks; 27 La. Ann. 297; and if several bear the same Christian and surname they need not be distinguished in the caption by abode or otherwise; 7 C. & P. 588.

The effect of the inquisition is to authorize the arrest and commitment of the person charged by it, and upon his arrest he may make his own statement and have it returned with the inquisition, but he cannot be discharged until his case is passed upon by the grand jury; 11 Abb. Pr. 406; 20 How. Pr. 111; except of course after hearing by a judge upon *habeas corpus*.

The testimony of a witness, not charged with crime, given at the inquest may be used against him, if afterwards accused; he must claim his privilege if he wishes to protect himself; 29 Pa. 102; 7 Neb. 320; but if at the time of inquest he is in custody on suspicion, he cannot be examined as a mere witness, but only as an accused party in the same manner as if brought before a committing magistrate; 103 N. Y. 211; the doctrine that silence gives consent does not apply to a coroner's inquest;

92 *id.* 29. These rules were settled by the New York court of appeals as the result of a series of cases; 15 *id.* 13; 15 *id.* 384; 41 *id.* 7; 103 *id.* 211; 91 *id.* 241.

Preventing a coroner from holding an inquest over a dead body, when it is required by law, is indictable; 13 Q. B. D. 381; 7 Mod. 10. Where the captain of a man-of-war, mistaking his legal duty, had prevented the coroner from holding an inquest on the body of a man hanging on his ship, the court, granting an information, refused to proceed also against his boatswain, who had participated in the transaction under his order; Andr. 281; but, adds Bishop, "an information is in a measure discretionary with the court, and perhaps on an indictment the boatswain would have been deemed liable;" 1 Bish. N. Cr. L. § 688 (3).

In Massachusetts there is now no coroner, but an inquest is held in such cases by a justice of certain designated courts, after an examination by regular medical examiners and a report that the death was caused by violence, or without such report upon the direction of the prosecuting officer; Pub. Stat. c. 26. See CORONER.

INQUEST OF OFFICE. An inquiry made by the king's officer, his sheriff, coroner, or escheator, either *virtute officii*, or by writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. It is done by a jury of no determinate number,—either twelve, or more, or less; 3 Bla. Com. 258; Finch, Law 323. An inquest of office was bound to find for the king upon the direction of the court. The reason given is that an inquest concluded no man of his right, but only gave the king an opportunity to enter, so that he could have his right tried; 3 Bla. Com. 260; 4 Steph. Com. 61; F. Moore 730; 3 Hen. VII. 10; 2 Hen. IV. 5. An inquest of office was also called, simply, "office." As to "office" in the United States, see OFFICE.

INQUEST OF SHERIFFS. A general inquiry (1170) into the methods in which the sheriffs had been conducting the local government of the country. 1 Holdsw. Hist. E. L. 21. In the 12th century the power of the sheriffs was very great in England. It is clear from this inquest that the crown was already viewing them with some suspicion. *Id.*, 3rd ed., 82, 313.

INQUIRY, WRIT OF. A writ sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the *venue* is laid, and commands him to inquire, by a jury of twelve men, concerning the amount of damages. The sheriff thereupon tries the cause in his sheriff's court, and some amount must always be returned to the court. But the return of the inquest merely informs the court, which may, if it choose, in all cases assess damages and thereupon give final judgment. 2 Archb. Pr., Waterman ed. 952; 3 Bla. Com. 398; 3 Chitty, Stat. 495, 497.

INQUISITION. In Practice. An examination of certain facts by a jury impaneled by the sheriff for the purpose. The instrument of writing on which their decision is made is also called an inquisition. The sheriff or coroner, and the jury who make the inquisition, are called the inquest.

An inquisition on an untimely death, if omitted by the coroner, may be taken by justices of gaol delivery and oyer and terminer, or of the peace; but it must be done publicly and openly; otherwise it will be quashed. Inquisitions either of the coroner or of the other jurisdictions are traversable; 1 Burr. 18, 19.

INQUISITOR. A designation of sheriffs, coroners *super visum corporis*, and

the like, who have power to inquire into certain matters.

In Ecclesiastical Law. The name of an officer who is authorized to inquire into heresies, and the like, and to punish them. A judge.

INROLMENT, ENROLMENT (Law Lat. *irrotulatio*). The act of putting upon a roll.

Formerly, the record of a suit was kept on skins of parchment, which, best to preserve them, were kept upon a roll or in the form of a roll; what was written upon them was called the inrolment. After, when such records came to be kept in books, the making up of the record retained the old name of inrolment. Thus, in equity, the *inrolment* of a decree is the recording of it, and will prevent the rehearing of the cause, except on appeal to the house of lords or by bill of review. The decree may be enrolled immediately after it has been passed and entered unless a *caveat* has been entered; 2 Freem. 179; 4 Johns. Ch. 199; 14 Johns. 501. And before signing and inrolment a decree cannot be pleaded in bar of a suit, though it can be insisted on by way of answer; 3 Atk. Ch. 809; 2 Ves. 577; 4 Johns. Ch. 199. See Saunders, Ord. in Ch. *Inrolment*.

Transcribing upon the records of a court deeds, etc., according to the statutes on the subject. See 1 Chitty, Stat. 425, 426; 2 *id.* 69, 76-78; 3 *id.* 1497. Placing on file or record generally, as annuities, attorneys, etc.

INSANE DELUSION. An "insane delusion" is an idea or belief which springs spontaneously from a diseased or perverted mind without reason or without foundation in fact; it is distinguishable from a belief which is founded upon prejudice or aversion no matter how unreasonable or unfounded the prejudice or aversion may be. If it is the product of a reasoning mind, no matter how slight the evidence upon which it is based, it cannot be classed as an "insane delusion." 160 Ky. 420, 169 S. W. 852.

The fact that one believes in spiritualism is not an evidence of an unsound mind, and will not be held an "insane delusion" sufficient to invalidate the will of one so believing. 143 Ky. 116, 146 S. W. 400.

An "insane delusion" is the spontaneous production of a diseased mind leading to a belief in the existence of something which either does or does not exist, or does not exist in the manner believed. 156 Ky. 350, 160 S. W. 1071.

INSANE PERSON. This includes every one who is: (1) An "idiot,"—from a person destitute of ordinary intellectual powers from any cause, and dating from any time; but, in common use, a person without understanding from birth. (2) "Lunatic"—A person of any form of unsoundness of mind other than idiocy; mental derangement, with intermittent, strictly periodically intermittent, lucid intervals. (3) "Non compos," which embraces "idiot" and "lunatic." (4) "Deranged," which embraces all the natural born idiots. Code W. Va. p. 124; 36 W. Va. 563.

INSANITY. In Medical Jurisprudence. The prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual in health.

Insanity is such a deprivation of reason that the subject is no longer capable of understanding and acting with discretion in the ordinary affairs of life. 142 Ill. 60.

Legal insanity, which exonerates from crime or incapacitates from civil action, is a mental deficiency with reference to the particular act in question and not a general incapacity. It is the latter only as the result of judicial ascertainment that a person is *non compos mentis*, by inquisition in lunacy, or similar statutory proceeding, and this only results in a general civil disability and not, *proprio vigore*, in immunity from punishment for crime.

It results that there can be no general definition of legal insanity. It is a state or condition which must be noted with refer-

ence to each class of actions to which it is applied.

In criminal law it "is any defect, weakness, or disease of the mind rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime." 1 Bish. N. Cr. L. § 381.

As a cause of civil incapacity it is such defect or weakness as prevents rational assent to a contract or due consideration of the facts properly and naturally entering into the testamentary disposition of one's estate. It is a want of due proportion in quality or quantity, or both,—between the mental capacity and power and the particular act, civil or criminal, as to which the inquiry arises.

The legal and the medical ideas of insanity are essentially different, and the difference is one of substance. The failure to keep it in mind has been the fruitful cause of confusion in trials involving the question of mental capacity for crime or contract, and has tended to render valueless and often absurd the testimony of witnesses called as experts. Many of these have testified without any conception of the real nature and definition of the insanity, which alone could have relation to the case.

The distinction between the medical and the legal idea of insanity has, perhaps, not been better stated than by Ray, who is quoted by Ordonaux, and again by Witt- hauss & Becker: "*Insanity in medicine* has to do with a prolonged departure of the individual from his natural mental state arising from bodily disease." "*Insanity in law* covers nothing more than the relation of the person and the particular act which is the subject of judicial investigation. The legal problem must resolve itself into the inquiry, whether there was mental capacity and moral freedom to do or abstain from doing the particular act." 1 Witt- & Beck. Med. Jur. 181; 35 Fed. Rep. 730.

Of late years this word has been used to designate all mental impairments and deficiencies formerly embraced in the terms *lunacy*, *idiotcy*, and *unsoundness of mind*. Even to the middle of the last century the law recognized only two classes of persons requiring its protection on the score of mental disorder, viz.: *lunatics* and *idiots*. The former were supposed to embrace all who had lost the reason which they once possessed and their disorder was called *dementia accidentalis*; the latter, those who had never possessed any reason, and this deficiency was called *dementia naturalis*. Lunatics were supposed to be much influenced by the moon; and another prevalent notion respecting them was that in a very large proportion there occurred *lucid intervals*, when reason shone out, for a while, from behind the cloud that obscured it, with its natural brightness. It may be remarked, in passing, that *lucid intervals* are far less common than they were once supposed to be, and that the restoration is not so complete as the descriptions of the older writers would lead us to infer. In modern practice, the term *lucid interval* signifies merely a remission of the disease, an abatement of the violence of the morbid action, a period of comparative calm; and the proof of its occurrence is generally drawn from the character of the act in question. It is hardly necessary to say that this is an unjustifiable use of the term, which should be confined to the genuine *lucid interval* that does occasionally occur.

It began to be found at last that a large class of persons required the protection of the law, who were not idiots, because they had reason once, nor lunatics in the ordinary signification of the term, because they were not violent, exhibited no very notable derangement of reason, were independent of lunar influences, and had no *lucid intervals*. Their mental impairment consisted in a loss of intellectual power, of interest in their usual pursuits, of the ability to comprehend their relations to persons and things. A new term—*unsoundness of mind*—was therefore introduced to meet this exigency; but it has never been very clearly defined.

The law has never held that all lunatics and idiots are absolved from all responsibility for their civil or criminal acts. This consequence was attributed only to the severest grades of these affections,—to lunatics who have no more understanding than a brute, and to idiots who cannot "number twenty pennies nor tell how old they are." Theoretically the law has changed but little, even to the present day; but practically it exhibits considerable improvement; that is, while the general doctrine remains unchanged, it is qualified, in one way or another, by the courts, so as to produce less practical injustice. Insanity implies the presence of disease or congenital defect in the brain, and though it may be accompanied by disease in other organs, yet the cerebral affection is always supposed to be primary and predominant. It is to be borne in mind, however, that bodily diseases may be accompanied, in some stage of their progress, by mental disorder which may affect the legal relations of the patient. To give a definition of insanity not congenital, or,

in other words, to indicate its essential element, the present state of our knowledge does not permit. Most of the attempts to define insanity are sensational descriptions of the disease, rather than proper definitions. For all practical purposes, however, a definition is unnecessary, because the real question at issue always is, not what constitutes insanity in general, but whether it consists in the insanity of this or that individual. Neither sanity nor insanity can be regarded as an entity to be handled and described, but rather as a condition to be considered in reference to other conditions. Men vary in the character of their mental manifestations, inasmuch that conduct and conversation perfectly proper and natural in one might in another, differently constituted, be indicative of insanity. In determining, therefore, the mental condition of a person, he must not be judged by any arbitrary standard of sanity or insanity, nor compared with other persons unquestionably sane or insane. He can properly be compared only with himself. When a person, without any adequate cause, adopts notions he once regarded as absurd, or indulges in conduct opposed to all his former habits and principles, or changes completely his ordinary temper, manners, and disposition,—the man of plain practical sense indulging in speculative theories and projects, the miser becoming a spendthrift and the spendthrift a miser, the staid, quiet, unobtrusive citizen becoming noisy, restless, and boisterous, the gay and joyous becoming dull and disconsolate even to the verge of despair, the careful, cautious man of business plunging into hazardous schemes of speculation, the discreet and pious becoming shamefully reckless and profligate,—no stronger proof of insanity can be had. And yet not one of these traits, in and by itself alone, disconnected from the natural traits of character, could be regarded as conclusive proof of insanity. In accordance with this fact, the principle has been laid down, with the sanction of the highest legal and medical authority, that it is the prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual, when in health, which is the essential feature of insanity. Gooch, Lond. Quart. Rev. xliii. 385; Combe, Ment. Derang. 195; Meldway v. Croft, 3 Curt. Ecol. 671.

Insanity produced by alcoholism is of two kinds: Delirium tremens, caused by the breaking down of the person's system by long continued or habitual drunkenness, and brought on by abstinence from drink, and called "settled insanity," to distinguish it from "temporary insanity" or drunkenness, directly resulting from drink; 31 Tex. Cr. R. 318. See DRUNKENNESS.

Criminal Responsibility. There is a concurrence in the law of civilized countries in absolving persons mentally unsound from criminal responsibility. In France, Germany, and Austria the rule is in substance that if a person is unconscious of the nature of his act, or his will is affected or the character of the act is not perceived, there is no crime; 1 Witt- & Beck. Med. Jur. 181; Krafft-Ebing, Ger. Psycho-Path.

That insanity, in some of its forms, annuls all criminal responsibility, and, in the same or other forms, disqualifies its subject from the performance of certain civil acts, is a well-established doctrine of the common law. In the application of this principle there has prevailed, for many years, the utmost diversity of opinion. The law as expounded by Hale, who divided insanity into partial insanity as to certain subjects, partial as to degree, and total insanity, was that partial insanity was not sufficient to excuse a person in the committing of any capital offence; 1 Hale, P. C. 30; and his doctrine was received without question until the beginning of the present century; 8 How. St. Tr. 322; 16 id. 764; 19 id. 947.

This ancient doctrine received its first serious shock in Hadfield's case, 27 id. 1281, 1311, in which Erskine, for the defense, admitted the language used by Coke and Hale as to requiring deprivation of memory and understanding to absolve from crime, but contended that, if taken literally, the words would apply to idiocy alone. He insisted that "of all the cases that have filled Westminster Hall with complicated considerations, the insane persons have not only had the most perfect knowledge and recollection of all the relations in which they stood towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness; and that delusion of which the criminal act in question was the immediate unqualified offspring, was the kind of insanity which should rightly exempt from punishment." These views prevailed and Lord Kenyon held that the prisoner was deranged immediately prior to the act and that it was unlikely that he had meanwhile

recovered, though, strictly speaking, proof might be required of his condition at the very moment of the shooting; accordingly the prisoner was acquitted with the approbation of the court. Subsequently, in Bellingham's case, 1 Collinson, Lun. 686; Shelf, Lun. 462, Lord Mansfield held that it must be proved that the prisoner was incapable of judging between right and wrong; that at the time of the act he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse crime. Similar language was used in Parker's case, Collin. Lun. 477; Higginson's case, 1 C. & K. 129; Stokes' case, 3 C. & K. 185, and so for about a generation the law of England was practically as settled by Hadfield's and Bellingham's cases, though there were occasional variations from it. The special feature of the law of that period was that, to make a person responsible for crime, there must be a knowledge of right and wrong in the abstract. But the tendency of the cases was towards the modification of the test, so as to make the knowledge of right and wrong refer solely to the act in question; 5 C. & P. 168; 9 id. 525; 1 Cox, Cr. Cas. 80; 3 id. 275. This was formally pronounced to be the law by the English judges, in their reply to the questions propounded by the House of Lords on the occasion of the McNaghten trial, 10 Cl. & F. 200, where it was said by Tindal, C. J., for himself and the other judges: "To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing; or, if he did know it, that he was not aware he was doing what was wrong." Most of the English cases will be found in 1 Russ. Cr., Shars. ed. 14, and in the notes will be found a collection of American cases.

The test laid down in McNaghten's case has been generally applied in England and this country. In the former it has been definitely recognized as the law, and in the latter it has been generally adopted, though with frequent variations as will appear *infra*.

In Coleman's case, in New York, Davis, J., charged the jury that the "test of the responsibility for criminal acts, when insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time and with respect to the act which is the subject of inquiry." He left it to the jury to determine "whether or not at the time the accused committed the act she knew what she was doing, and knew that in shooting him she was doing a wrongful act." 1 N. Y. Cr. Rep. 1. With variations of expression this is the prevailing doctrine of the American courts; 15 Wall. 590; 62 Cal. 50; 5 Harring. 512; 1 Houst. Cr. Cas. 166, 371; 45 Ga. 57, 190, 225; 67 Me. 574; 25 Kan. 183; 81 Fed. Rep. 184; 35 id. 730; 11 Gray 808; 56 Miss. 269; 62 id. 187; 38 Mich. 482; 10 Minn. 223; 74 Mo. 199, 247; 11 Neb. 537; 14 id. 573; 21 N. J. L. 196; 8 Jones, N. C. 469; 40 Tex. 60; 3 Heisk. 348; 109 Ill. 635; 30 S. C. 74; 1 Brewst. 356; 4 Pa. 264; 6 McLean 121; 4 Denio 9; 88 N. Y. 86; 2 Ohio St. 70; 10 id. 599. In many of the cases it is difficult to distinguish with certainty between what the court intends for a statement of the law and what is rather in the nature of practical suggestions addressed to the jury. In a New Hampshire case it was held that no one of the circumstances ordinarily relied upon is, as a matter of law, a test of mental disease, but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury; 49 N. H. 399; and the same doctrine has been followed in other states; 31 Ill. 385; 31 Ind. 492, 495. Very similar were the remarks addressed to the jury by the Lord Justice Clerk in a Scotch Justiciary case: "The question is one of fact, that matter of fact being whether when he committed this crime the prisoner was of an unsound

mind. The counsel for the crown very properly said that this was entirely for you. It is not a question of medical science, neither is it one of legal definition, although both may materially assist you. It is a question for your common and practical sense." 3 Couper 16.

It was said that mental unsoundness, to render one free from criminal liability, must be such on the particular subject out of which the acts charged as an offence are claimed to have sprung, as to render him incapable of discerning the wrong of committing the same; 35 Fed. Rep. 730; 11 Colo. 258. Occasionally the court has thought it sufficient for the jury to consider whether the prisoner was sane or insane,—of sound memory and discretion, or otherwise; see *State v. Cory*, *State v. Prescott*, in *Ray*, *Med. Jur.* '55. The capacity to distinguish between right and wrong has been held not to be a safe test in all cases; 25 Ia. 27, per Dillon, C. J.; 15 Wall. 590. See also 78 Pa. 122. In *Whart. & St. Med. Jur.* § 120, this test is said to be generally satisfactory, but not to cover all cases. An instruction has been sustained, where there was a defence of insanity, that the defendant was not responsible unless he was conscious of his act at the time it was committed; 91 Cal. 35.

The definition of insanity, in the trial of a case involving that issue, is for the court; *Whart. & St. Med. Jur.* § 112; see 1 F. & W. 87.

The rule already stated as to partial insanity applies equally to delusions, which as has been stated were first brought within the law of mental irresponsibility for crime by *Hadfield's case*, *supra*. In *McNaghten's case*, *supra*, the question as to delusions was answered thus: "That if a person was acting under an insane delusion, and was in other respects sane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. That is to say, that the acts of the criminal should be judged as if he had really been in the circumstances he imagined himself to be in. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take his life, and he kills him, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted an injury upon him in character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." In the *Guiteau case*, the jury were charged by Cox, J., on this subject, as follows: "An insane delusion is never the result of reasoning and reflection. It is not generated by them and it cannot be dispelled by them. . . . Whenever convictions are founded on evidence, on comparison of facts and opinions and arguments, they are not insane delusions. The insane delusion does not relate to mere sentiments or theories, or abstract questions of law, politics, or religion. All these are the subject of opinions, which are beliefs founded on reasoning and reflection. These opinions are often absurd in the extreme, and result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient data, ignorance of men and things, credulous dispositions, fraudulent imposture, and often from perverted moral sentiments. But still, they are opinions, founded upon some kind of evidence, and liable to be changed by better external evidence or sounder reasoning. But they are not insane delusions." 10 Fed. Rep. 161. Following this opinion it was said that: "An insane delusion is an incorrigible belief, not the result of reasoning in the existence of facts which are either impossible absolutely or impossible under the circumstances of the individual." 20 Neb. 333.

It is a logical result of the nature of delusion and its legal relations as shown by these definitions that it will be of no avail as a defence unless, if true, the facts supposed to exist would have excused the crime; *id.*; 32 *id.* 224; 138 N. Y. 898; 55 Ark. 259. This rule is well illustrated by

a case in which it was held that an instruction that "defendant would not be responsible if he killed deceased under an insane delusion that deceased was trying to marry defendant's mother, and that this delusion caused the killing," was properly refused; 54 Ark. 588.

In order that delusion may be a defence it must be connected with the crime, and if a person has an insane delusion upon any one subject, but commits a crime not connected therewith, he is equally guilty as if he were in all respects sane; 13 Minn. 341; 30 Miss. 600; 21 Mo. 464. "A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints." Gibson, C. J., in 4 Pa. 264. See also *Alison*, Cr. L. 647; *Ray*, *Insan.* 106, 135, 227; 3 Couper 357; 71 Mo. 538; 1 Bish. N. Cr. L. 394.

"Where a defendant is acting under an insane delusion as to circumstances which, if true, would relieve the act from responsibility, such delusion is a defence;" *Whart. & St. Med. Jur.* § 125; but such delusions must involve an honest mistake as to the object to which the crime is directed; *id.* § 127; 3 F. & F. 339. The term delusion as applied to insanity, does not mean a mere mistake of fact, or being induced by false evidence to believe that a fact exists which does not exist; 45 N. J. Eq. 726.

A disposition to multiply the tests, so as to recognize essential facts in the nature of insanity, has been manifested in this country to a much greater extent than in England.

The existence of an irresistible impulse to commit a crime has been recognized in the law; *Steph. Cr. L.* 91; and medical authorities are generally in agreement that, as it is put by Bishop, "the mental and physical machine may slip the control of its owner; and so a man may be conscious of what he is doing, and of its criminal character and consequences, while yet he is impelled to it by a power to him irresistible." 1 New Cr. L. 387; 3 With. & Beck. 270, 275; 1 Beck, *Med. Jur.*, 10th ed. 723; *Ray*, *Insan.*, 8d ed. §§ 17, 18, 22. But the writer last quoted adds: "Whether or not such is truly so must, in the nature of things, be a pure question of fact, it cannot be of law."

In England the courts have refused to recognize this ground of exemption from responsibility and limit the test to ability to distinguish between right and wrong; *Clarke*, Cr. L. 56; 1 Bish. N. Cr. L. § 387; 3 C. & K. 185; 1 F. & F. 666; 3 *id.* 772; 3 Cox, C. C. 275.

The American cases are very difficult to classify with reference to this test, as indeed they are on most branches of the subject, nor is such the present purpose; all that is possible being, by reference to a selection of the cases, to illustrate the progress of the law and the direction in which, but not, critically, the precise extent to which, changes have been made since Lord Hale's time, keeping pace with the growth of scientific knowledge.

A full understanding of the scope of the doctrine now under consideration involves the further subject of power of resistance, which enters largely into this class of cases and is also more particularly referred to, *infra*.

In *Roger's case*, 7 Metc. 500, the jury were directed to consider, in addition to the test of right and wrong, whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; and this case has been much relied on in American courts; *Ray*, *Med. Jur.* 58.

In *Frith's case*, 3 Phila. Pa. 105, Judge Ludlow charged: "If the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will, or subjugate his intellect, and was not actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal," etc.

In the leading case of *State v. Harrison* it was said by Brannon, J.: "This irresistible-impulse theory test has been only recently presented, and while it is supported

by plausible arguments, it is rather refined, and introduces what seems to me a useless element of distinction for a test, and is misleading to juries, and fraught with great danger to human life, so much so that even its advocates have warningly said it should be very cautiously applied and only in the clearest cases. What is this irresistible impulse? How shall we of the courts and juries know it? Does it exist when manifested in one single instance, as in the present case, or must it be shown to be habitual, or, at least, to have evinced itself in more than a single instance? . . . I admit the existence of irresistible impulse and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override judgment and obliterate the sense of right as to the acts done, and deprives the accused of power to choose between them;" 36 W. Va. 729.

For other cases in which irresistible impulse is regarded as a defence, see 81 Ind. 485; 23 Ohio St. 146; 23 Ia. 67; 15 Wall. 580; but it is held that no impulse, however irresistible, is a defence, where there is a knowledge as to the particular act between right and wrong; 8 Jones, N. C. 463; 111 Mo. 542; 81 Tex. Cr. R. 491; 91 Cal. 35; 71 Miss. 345; 86 Ga. 70; 94 Tenn. 106; *Tayl. Med. Jur.* 720; and that it was a crime morally, and punishable by the laws of the country; 30 S. C. 74; 50 Ark. 611.

As a perfectly natural outgrowth of the doctrine of irresistible impulse, there is to be found in the American cases a tendency more noticeable in late years, to add an additional qualification to the right and wrong test. These cases hold, not merely that the accused, to be considered accountable, must be able to distinguish between right and wrong with respect to the act in question, but must have sufficient mental power to control his impulses.

As the theory of irresistible impulses owes much of its development to the courts of Pennsylvania, so also has this correlative doctrine of the necessity of power to control it received great attention in that state. In *Moeler's case*, 4 Pa. 264, Gibson, C. J., said: "His insanity must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will and making the commission of the act, in his apprehension, a duty of overruling necessity. The law is, that, whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action." And this language is repeated in *Ortwein's case*, 76 Pa. 414, by Agnew, C. J., who declares it to be the law of the state. The essential relation of power to such cases is thus put, in *Haskell's case*, 3 Brewst. 49, by Brewster, J.: "A review of all the authorities I have been able to examine satisfies me that the true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? In these cases has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate? If he possess this power over his imagination he will be able to expel all delusive images, and the like control over his will would subdue all homicidal and other monomania. . . . I use the word power with reference to that control which humanity can expect from humanity."

Other cases supporting this view are, 1 Duv. Ky. 224; 7 Metc. 500.

Other cases seem to hold that one mentally disordered, though knowing right and wrong, and that the act is forbidden and punishable, is criminally responsible whether he has power over his conduct or not; 26 Hun 67; 62 How. Pr. 436; 52 N. Y. 467; 102 *id.* 238; 42 Ga. 9; 45 *id.* 57; 47 *id.* 553; 58 *id.* 296; 62 Cal. 120; 11 Or. 413;

41 Minn. 365; 1 Houst. Cr. Cas. 249; 92 Mo. 300. In a late case it was said, though a crime is committed through lack of sufficient will power to control the conduct, and under an irresistible and uncontrollable impulse, the offender is responsible for the act; 111 Mo. 542. In discussing this class of cases Bishop considers that a doctrine that "our law punishes any man for what he does under a necessity which it is impossible for him to resist," would be an "unprecedented horror." He assumes that the cases which appear to hold it are to be explained upon the theory that the judges do not believe in the existence of an irresistible or uncontrollable impulse. He himself does not assume to know whether as a fact there is, but as the experts assert it, he deems it to be the duty of a judge, where there is evidence tending to support the theory, to submit it to the jury and cast the responsibility upon them. 1 Bish. N. Cr. L. § 383 b, 397.

To this remarkable diversity of views may be attributed, in some measure, no doubt, the actual diversity of results. To any one who has followed with some attention the course of criminal justice in trials where insanity has been pleaded in defence, it is obvious that, if some have been properly convicted, others have just as improperly been acquitted. It must be admitted, however, that the verdict in such cases is often determined less by the instructions of the court than by the views and feelings of the jury and the testimony of experts.

The defence of irresistible impulse has been the subject of legislation in some states, as in New York and Michigan, where by statute a morbid propensity, or uncontrollable impulse to commit a crime, in the mind of one who is conscious of the nature of the act or that it is wrong, or to be incapable of such knowledge, is no defence. See N. Y. Pen. Code § 21; Mich. Pen. Code §§ 19, 20.

What is sometimes called moral insanity, as distinguished from mental unsoundness, is not a defence to a charge of crime; Whart. & St. Med. Jur. §§ 164, 174; Tayl. Med. Jur. 677; 6 Jur. 201; 4 Cox, C. C. 149; 11 Gray 803; 52 N. Y. 467; 47 Cal. 134; 73 id. 222; 2 Ohio St. 184; Guiteau's case, 10 Fed. Rep. 161; 100 N. C. 457; 126 N. Y. 269; 52 id. 469; but see 1 Duv. 224; 4 Metc. Ky. 227; 43 Conn. 514; 6 Bush 268. See also Mann, Med. Jur. of Insan. 66, 120, 135. Morbid religious feelings may be of such a character as to amount to partial insanity, which, though sometimes the basis of delusions affecting criminal cases, is more frequently met with in connection with the subject of undue influence. In a case in which it was alleged that a testator was insane on the subject of spiritualism, it was held that, as an abstract proposition, a belief in spiritualism, though a person may be a monomaniac on that subject or any other form of religion, does not prove insanity; 72 Cal. 556; 32 Wis. 557; 52 id. 543; 3 Wall. Jr. 88; nor belief in the transmigration of souls; 16 Abb. Pr. n. s. 128.

Insanity is not necessarily established by mere eccentricity of mind, manifesting itself in absurd opinions or extravagancies of dress and manners; 21 Barb. 407; 4 McCord 183; Milw. 65; or an irritable temper and an excitable disposition; 32 N. Y. 715; or depression coupled with a monomania or delusion that, by the lands wearing out and buildings going to ruin, starvation and the poorhouse were threatened; 5 Jones L. 157. Insanity produced by continued dissipation is a good defence; 9 Houst. 369; *mania a potu* is a species of insanity; 3 Harr. 551; and so is *delirium tremens*; 62 How. Pr. 436; 5 Ohio St. 77; 31 Tex. Cr. Rep. 216; but it must be shown to exist at the time the act is perpetrated, not antecedently; 3 Jones, L. 335. As to drunkenness in its varied forms, see that title. Suicide is not conclusive evidence of insanity, but is admissible to show the absence of a sound and disposing mind; 4 Humph. 491. Epilepsy alone does not establish insanity which will excuse crime; 81 Tex. Cr. Rep. 491; 153 Pa. 535; and in its milder

forms, causing temporary fits of insanity, the *prima facie* presumption is in favor of mental soundness; 7 Ia. 60. See 3 Witth. & Beck. Med. Jur. 319. Proof that insanity was hereditary was admissible; 61 Ark. 241; but that alone is insufficient when the other evidence clearly shows that defendant knew that he was committing a wrong; 81 Tex. Cr. Rep. 491; 28 Ill. 306.

In reply to a defence of want of criminal capacity proof was admitted that defendant had sometimes feigned insanity; 143 Ind. 299.

As to mental unsoundness produced by or connected with hypnotism, kleptomania, mesmerism, and somnambulism, see those titles.

The effect of the plea of insanity has sometimes been controlled by the instructions of the court in regard to the burden of proof and the requisite amount.

In many of the American states, there has been a tendency towards a relaxation of the rule settled in England, and which formerly prevailed in almost all the states, to treat a plea of insanity as being strictly one in confession and avoidance which must be proved by the defendant either beyond a reasonable doubt or, as was said in many American cases, by a preponderance of evidence. See BURDEN OF PROOF.

The English rule was thus stated in McNaghten's case: "Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction;" 10 Cl. & F. 200; and it is the settled law of England; 3 C. & K. 188; 4 Cox, C. C. 149; 3 id. 155.

As to whether such proof must be by a preponderance of evidence or beyond a reasonable doubt, the language of the English judges is not entirely free from ambiguity, but it is understood to mean the latter; 14 Am. L. Reg. n. s. 28; 16 id. 454.

In many of the American cases this rule is adhered to; 21 N. J. L. 202; 76 Pa. 414; 145 id. 289; 8 Jones, L. 463; 109 N. C. 780; 5 Bush 362; 92 Ky. 630; 81 Tex. App. 491; 22 id. 379; 63 Ala. 307; 89 id. 150; 54 Ark. 588; 90 Cal. 195; 80 Ga. 650; 34 La. Ann. 186; 47 id. 1088; 57 Me. 574; 7 Metc. 500; 34 Minn. 430; 92 Mo. 310; 23 Ohio St. 349; 24 S. C. 439; 33 Gratt. 807; 11 W. Va. 747; see 36 Am. Rep. 467, n.; but many courts have held the contrary; 35 Fed. Rep. 730; 10 id. 161; 40 Conn. 136; 26 Fla. 11; 133 Ill. 382; 121 Ind. 433; 11 Kan. 32; 32 id. 205; 17 Mich. 9; 56 Miss. 269; 43 N. H. 224; 75 N. Y. 159; 88 id. 81; 91 Tenn. 617; 82 Wis. 295; and the Supreme Court of the United States has accepted this latter doctrine; 160 U. S. 469, where it was held that the jury, to convict, must be "able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." As to the rule on the subject, applied by the class of cases last referred to, see BURDEN OF PROOF. The cases of the former class, which put the burden on the defendant, in very many instances hold that a preponderance of proof only is required; and in some states the later cases show a virtual abandonment of the rule formerly adhered to by them. As for example in Massachusetts as will appear by the review of cases in that state in 160 U. S. 481-3. It results that it is not practicable to state what might be designated as a prevailing American rule. The subject is very fully discussed by Mr. Justice Harlan in the case last cited. The cases holding different views of the subject will be found collected in the opinion and argument in that case and also in 14 Am. L. Reg. n. s. 25; 16 id. 449; Cl. Cr. L. 58; Mann, Med. Jur. of Insan. ch. iii.; Witth. & Beck. 508.

In England, under 46 & 47 Vict. c. 88, relating to the trial of lunatics, the jury returns a verdict that the prisoner is "guilty, but insane at the time," whereupon the court records the verdict and orders the prisoner to be imprisoned during the pleasure of the Crown. Under 39 & 40 Geo. III. c. 94, the verdict was "not guilty, on

the ground of insanity."

In some states in this country, where the verdict is an acquittal by reason of insanity, the fact must be so returned by the jury, and in such case the court are required to direct the confinement of the prisoner in an insane asylum.

Side by side with this doctrine of the criminal law which makes persons, who from a medical point of view are considered insane, responsible for their criminal acts is another equally well authorized, viz.: that a kind and degree of insanity which would not excuse a person for a criminal act may render him legally incompetent for the management of himself or his affairs; Bellingham's case, 5 C. & P. 168. This implies that the mind of an insane person acts more clearly and deliberately, and with a sounder view of its relations to others, when about to commit a great crime than when buying or selling a piece of property. It is scarcely necessary to add that no ground for this distinction can be found in any knowledge of mental disease. On the contrary, we know that the same person who destroys his neighbor, under the delusion that he has been disturbing his peace or defaming his character, may, at the very time, dispose of his property with as correct an estimate of its value and as clear an insight into the consequences of the act as he ever had. If a person is incompetent to manage property, it is because he has lost some portion of his mental power; and this fact cannot be justly ignored in deciding upon his responsibility for criminal acts. Insanity once admitted, it is within the reach of no mortal comprehension to know exactly how far it may have affected the quality of his acts. To say that, possibly, it may have had no effect at all, is not enough; it should be proved by the party who affirms it. See Maudsley, Responsibility in Mental Disease 111.

By the French penal code there can be no crime nor offence if the accused were in a state of madness at the time of the act. Art. 64. The same provision was introduced into Livingston's Code and into the Revised Statutes of New York, vol. 2, § 997. The law of Arkansas provides that a lunatic or insane person without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged; Rev. Stat. 236. In New York, however, in spite of this clear and positive provision of law, the courts have always acted upon the doctrine of the common law, and instructed the jury respecting the tests of that kind of insanity which annuls criminal responsibility; 4 Den. 27. In this case, the court declared that the insanity mentioned in the statute means only insanity in reference to the criminal act, and therefore its qualities must be defined.

Civil Incapacity. The general principle governing the civil incapacity of a person of an unsound mind is that any civil act is invalid if the actor was at the time laboring under such mental defect as to render him incapable of performing the act in question, rationally and without detriment to any person affected thereby.

The rule as to *contracts* is that insanity is such a defect as precludes rational assent, with respect to the nature of the contract, whether marriage, partnership, sale, or the like.

A judicial ascertainment of the insanity of a person is said to deprive him of contractual capacity, as a matter of law, and subsequent contracts are void; 4 Co. 123 b; Bac. Abr. *Idiots and Lunatics* (F.); 8 N. Y. 388; 128 id. 312; 14 Pick. 280; 31 Pa. 243; but when no conservator was appointed and there was no appearance of incapacity, a purchase was held valid; 85 Ill. 62. See also 5 B. & C. 170; 5 C. & P. 30; 2 Atk. 412; 56 Me. 308; 13 Ired. 106.

Such incapacity is not retroactive; 30 S. C. 377; prior acts are not void but voidable; 2 Cow. 552; but the condition is conclusively presumed to continue, after the finding, until it is superseded; 101 N. Y. 590; 100 id. 215; but see 6 Ohio Cir. Ct. Rep. 481; 89 Ga. 645. A deed or mortgage executed by such person during the period of lunacy, as found, is voidable, the presumption being against validity, but subject to be overcome by proof of sanity; 116 N. Y. 67; and see 49 N. J. Eq. 192; 1 Gr. Ev. § 566.

The *marriage* of a person insane is void; 12 Mass. 365; 5 Ired. L. 487; 1 Speer, Eq. 569; 18 Kan. 371; 4 Johns. Ch. 343; L. R. 1 P. & D. 335; 22 Ohio St. 271; 1 Edm. Sel. Cas. 344; 21 N. H. 52; 22 id. 553. A marriage contracted while one party was insane from *delirium tremens* was held void; 3 Rich. L. 93; but mere weakness of mind not amounting to derangement is not sufficient; 28 Ala. 565; 3 Ired. Eq. 91; and for that merely, or intoxication, a court has no power to declare a marriage null and void; 1 Houst. 308. The same degree of mental capacity which enables a person to make a valid deed or will is sufficient to enable him to marry; 46 Me. 510. It was

held that a marriage celebrated by a person while insane might be affirmed upon recovery without a new solemnization; 5 Sneed 57.

Other civil contracts made by insane persons are voidable, not void; 53 Md. 65; 34 Ark. 618; 77 Ind. 419; 46 Ia. 62; 9 N. Y. 45; 10 Mo. 277; Ordron. Jud. App. Insan. ch. 6; 15 Alb. L. J. 292; 3 Abb. N. c. 274, 280, note; 21 Am. L. Reg. n. s. 35, 670.

With respect to contracts, persons *non compos mentis* and infants are said to be parallel, both in law and reason; 3 Mod. 301; 11 Pick. 304; 1 J. J. Marsh. 236. A power of attorney made by an insane person is absolutely void; 15 Wall. 9; and a contract executory on both sides cannot be enforced against an insane person; Ewell, L. Cas. Disab. 525, where the cases are collected.

The test of legal capacity to contract, it was said, is that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the object of his bounty; the particular act being attended with the consent of his will and understanding; 82 Va. 863.

Follock enumerates three different theories as to contracts by insane persons which "have, at different times, been entertained in English courts and supported by respectable authority;" Poll. Cont. 87. These theories, with some of the authorities cited in support of them, are substantially as follows:—1. That it is no ground, whatever, for avoiding a contract; Co. Litt. 2; 4 Co. 123 b; Bract. fol. 100 a, 186 b. As to this it is characterized as a frivolous technicality and doubtful whether it was really supported by the authorities Coke had before him; Poll. Cont. 89. 2. If one who contracts is too drunk or insane to know what he is about, his agreement is void for want of the consenting mind, but if his mind is only so confused or weak that he may know what he is about, but not fully understand the terms and effect, and this is known to the other party, the contract will be voidable at his option. The first division of this class would be simply void for want of consent; 2 Stra. 1104; 3 Campb. 38; 37 Ind. 307; 29 N. H. 106; the second would come under the head of fraud; 26 Mich. 249; 12 B. Monr. 55; 35 Conn. 170. 3. The doctrine which has prevailed as already stated that all contracts by insane persons are voidable, not void, see *supra*.

In some cases what has been termed the Massachusetts doctrine prevails that contracts of insane persons are voidable without any reference to the knowledge of the other party; 11 Pick. 304; in others what is termed the English doctrine (because supported by more recent English authorities) that they are voidable if the other party knows of the insanity; 139 U. S. 176 and 46 Fed. Reg. 724 (under La. Civ. Code); [1892] 1 Q. B. 599; 78 Pa. 407; and reasonable ground for knowledge is equivalent there to; 32 Vt. 652; and there is still a third doctrine supported by some courts that if the other party was ignorant and the contract reasonable and not capable of rescission, so that the parties could be restored to their original position, the contract will be sustained; 38 N. J. L. 536; 48 N. H. 133; 94 Ind. 535; 84 N. Y. 320; 68 Ia. 73; 92 Pa. 438; 51 Mich. 529.

The cases last cited rest upon Molton v. Camroux, 2 Ex. 487; 44 Id. 17, which is considered the cornerstone of the law as to contracts with insane persons; Poll. Cont. 92; Leake, Cont. 248; but has been recently characterized as containing "loose statements" which have given rise to "an anomalous doctrine;" Harr. Cont. 235.

Whatever may be said of it, the case undoubtedly settled the law that such a contract was voidable and not void, and this was confirmed inferentially by a later case which held that such a contract might be ratified after the disability had passed; L. R. 8 Ex. 132.

It is generally considered that contracts for necessities for an insane person are binding, if suited to their condition in life; 5 B. & C. 170; 13 Ired. L. 106; 3 J. J. Marsh. 658; 31 Ga. 512; 2 Bradf. Sur. 122; 27 Cal. 376; 17 Miss. 94; and this rule has been extended to other things which were reasonable and proper; 10 Allen 59; but if the other party has knowledge of the insanity the nature of the liability is rather quasi-contractual; 44 Ch. D. 94; 56 Me. 308; 53 N. H. 627; Keener, Quasi-Cont. 20. This liability is not removed by the appointment of a committee, where necessities are furnished in good faith and the committee has failed to provide them; 66 Barb. 452; 63 Vt. 244.

Deeds executed by persons of unsound mind are absolutely void; 51 N. Y. 378; 95 Id. 508; 2 Ired. 28; 5 Whart. 371; 3 Witht. & Beck. Med. Jur. 386. In other cases it has been held that such a deed is voidable only; 6 Metc. 415; 1 Gray 434; 24 Ind. 23; 12 Dana 452. Other cases again hold that want of perfect soundness of mind does not affect the conveyance if there is still capacity for fully comprehending the import of the act; 55 Me. 56; 36 Ill. 109; 44 N. H.

531; 21 Wend. 142; 3 Hill 513; 4 Ired. Eq. 443; see 3 Lea 567; 1 Patt. & H. 307. See 1 Pinger. Mortg. § 349.

As to testamentary capacity as affected by insanity, see WILL; DEMENTIA; UNDUE INFLUENCE.

In most states the statutes of limitation do not run against a person insane, nor does adverse possession ripen into title while the person out of possession is insane; 59 N. W. Rep. (Ia.) 52; but a plaintiff's claim is not affected by the insanity of the defendant's ancestor after the statute had begun to run; 111 N. C. 251. The time of sanity required in order to allow the statute to begin to run is such as will enable the party to examine his affairs and institute an action, and is for the jury; 1 Metc. Ky. 35.

Insanity is not a defence in an action of tort; but damages are compensatory and not punitive; 121 Ill. 660; 3 Barb. 647; 24 Atl. Rep. (N. H.) 902; 54 Fed. Rep. 116; 143 N. Y. 442.

As to lucid intervals and the competency of insane persons as witnesses, see LUCID INTERVALS.

See, generally, text books on Insanity and Medical Jurisprudence, and for a great variety of articles on various phases of the subject, see Jones, Index to Law Periodicals and St. Louis Law Library Catalogue. See also, BURDEN OF PROOF; APOPLEXY; DELIRIUM FEVERILE; DELIRIUM TREMENS; DEMENTIA; DRUNKENNESS; HYPNOTISM; IMDOCY; ILLUSION; IMBECILITY; KLEPTOMANIA; LUCID INTERVALS; MANIA; SOMNAMBULISM; SUICIDE.

This is a social or legal concept, and is applied to cases where the abnormality is great enough to warrant commitment to an institution. Bridges, Outline Ab. Psych. 127. See AMENTIA; DEMENTIA; IMPULSIVE INSANITY; MENTAL DISEASE; PSYCHIATRY; PSYCHOSIS.

INSCRIPTION. In Civil Law. An engagement which a person who makes a solemn accusation of a crime against another enters into that he will suffer the same punishment, if he has accused the other falsely, which would have been inflicted upon him had he been guilty. Code, § 1. 10; 9. 2. 16 and 17.

In Evidence. Something written or engraved.

Inscriptions upon tombstones and other proper places, as rings, and the like, are held to be evidence of pedigree; Bull. N. P. 233; Cowp. 591; 10 East 120; 13 Ves. 145. But their value as evidence depends largely on the authority under which they were made, and the length of time between their establishment and the events they commemorate; 62 Ga. 407; 75 Miss. 253; 22 Mich. 415; 39 Miss. 326; 83 Hun 323; 1 Greenl. Ev. § 106. See DECLARATION; HEARSAY EVIDENCE.

INSCRIPTIONES (Lat.). The name given by the old English law to any written instrument by which anything was granted. Blount.

INSENSIBLE. In Pleading. That which is unintelligible is said to be insensible. Steph. Pl. 378.

INSIDIATORES VIARUM (Lat.). Persons who lie in wait in order to commit some felony or other misdemeanor.

INSIMUL COMPUTASSENT (Lat.). They had accounted together. See ASSUMPSIT.

INSINUACION. In Spanish Law. The presentation of a public document to a competent judge, in order to obtain his approbation and sanction of the same, and thereby giving it judicial authenticity.

"*Insinuatio est ejus quod traditur, sine agitur, coram quocunque iudice in scripturam redacta.*"

This formality is requisite to the validity of certain donations *inter vivos*. Escriche, voc. *Insinuacion*.

INSINUATION. In Civil Law. The transcription of an act on the public registers, like our recording of deeds. It was not necessary in any other alienation

but that appropriated to the purpose of donation. Inst. 2. 7. 2; Pothier, *Traité des Donations, Entre Vifs*, sec. 2, art. 3, § 3; 8 Toullier, n. 198.

INSINUATION OF A WILL. In Civil Law. The first production of it; or, leaving it in the hands of the register in order to its probate. 21 Hen. VIII. c. 5; Jacob, Law Dict.

INSOLIDE (L. Lat.). Solidly; without any separation of possession or ownership.

INSOLVENCY. The condition of a person who is insolvent (*q. v.*). Inability to pay one's debts.

Bankruptcy, which is one species or phase of insolvency, denotes the condition of a trader or merchant who is unable to pay his debts in the course of business; 2 Bell. Com. 162; 1 M. & S. 338; 5 Dowl. & R. 218; 4 Hill, N. Y. 860; 4 Cush. 184. Insolvency, then, as distinguished from strict bankruptcy, is the condition or status of one who is unable to pay his debts; and insolvent laws are distinguished from strict bankruptcy laws by the following characteristics:

Bankruptcy laws apply only to traders or merchants; insolvent laws, to those who are not traders or merchants. Bankrupt laws discharge absolutely the debt of the honest debtor; 12 Wheat. 280; 4 Id. 122, 209; 2 Mas. 161; 3 Blackf. 394; 3 Cal. 154; 26 Wend. 43; 4 B. & Ald. 654; Baldw. 206. Insolvent laws discharge the person of the debtor from arrest and imprisonment, but leave the future acquisitions of the debtor still liable to the creditor; 1 Wheat. 122; 3 H. & J. 61. Both laws contemplate an equal, fair, and honest division of the debtor's present effects among his creditors *pro rata*. A bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law; per Marshall, C. J., 4 Wheat. 195; 1 V. & M. 115. And insolvent laws quite extensive with the English bankrupt system have not been unfrequent in our colonial and state legislation, and no distinction was ever attempted to be made in the same between bankruptcies and insolvencies; 3 Sto. Const. 11; Bish. Insolv. Det. 4.

Under the United States constitution the power to pass a bankrupt law is vested in congress, and this is held to include power to pass an act which provides for voluntary bankruptcy, or, strictly speaking, an insolvent law. So in the absence of congressional action, the states have passed laws which, though called insolvent laws, were in fact bankrupt laws, and their right to do so has been sustained, such laws being held valid; see BANKRUPT; except as limited by the prohibition against impairing the obligation of contracts, which title see; see also 9 Metc. 16; 2 Ind. 463; 5 How. 295; 1 Cush. 430; 14 N. H. 38; 10 Metc. 594; 26 Me. 110; 1 Woodb. & M. 115; 5 Gill 437; 1 Wall. 229; Cooley, Const. Lim. 360; Miller, Const. U. S. 616. So far as the jurisdiction of the state extends, its insolvent laws may have all the essential operation of a bankrupt law, not being limited to a mere discharge of the person of the debtor on surrendering his effects. But a creditor out of a state who voluntarily makes himself a party and accepts a dividend, is bound by his own act, and is deemed to have waived his ex-territorial immunity and right; 4 Wheat. 122; 12 Id. 213; 8 Pick. 194; 3 Pet. C. 411; 3 Story, Const. 252; 9 Conn. 314; 2 Blackf. 394; Baldw. 206; 9 N. H. 478. See 8 B. & C. 477; 3 Cal. 154; 4 B. & Ald. 654; 26 Wend. 43; 2 Gray 43; 4 Bosw. 459; 32 Miss. 246.

The effect of a discharge upon non-resident creditors is examined at large in 6 Harv. L. Rev. 349, where also may be found what is believed to be a complete list of all adjudications, federal and state, upon the subject. The conclusion reached is that it is the generally accepted doctrine that, in such case, a discharge will be of no effect (even in the courts of the state where the discharge is granted) against a non-resident, unless he becomes a party by voluntary appearance or personal service. The correctness of this conclusion, though it is admitted as established, is seriously challenged on grounds of expediency which are stated at large.

Insolvency may of course be simple or notorious. Simple insolvency is attended by no badge of notoriety. Notorious or legal insolvency, with which the law has to do, is designated by some public act or legal proceeding. This is the situation of a person who has done some notorious act to divest himself of all his property; as,

making an assignment, applying for relief, or having been proceeded against *in invitum* under bankrupt or insolvent laws; Bish. Insolv. Debt. 8, n. 1; 1 Pet. 195; 2 Wheat. 396; 7 Toullier, n. 45; Domat, liv. 4, tit. 5, nn. 1, 2; 3 Bell, Com. 165.

It is with regard to the latter that the *insolvency laws* (so called) are operative. They are generally statutory provisions by which the property of the debtor is surrendered for his debts; and upon this condition, and the assent of a certain proportion of his creditors, he is discharged from all further liabilities; 9 Mass. 431; 16 id. 53; 2 Kent 321; Ingr. Insolv. 9. This legal insolvency may exist without actual inability to pay one's debts when the debtor's estate is finally settled and wound up. (See definition). Insolvency, according to some of the state statutes, may be of two kinds, voluntary and involuntary. The latter is called the proceeding against the creditor *in invitum*. Voluntary insolvency, which is the more common, is the case in which the debtor institutes the proceedings, and is desirous of availing himself of the insolvent laws, and petitions for that purpose.

Involuntary insolvency is where the proceedings are instituted by the creditors *in invitum*, and so the debtor forced into insolvency. The circumstances entitling either debtor or creditors to invoke the aid of the insolvent law are in a measure peculiar to each state. But their general characteristics are as follows:

Proceedings by creditors may usually be taken for fraudulent concealment, conveyance, or collusive attachment, of property; by petition in the designated tribunal, on notice to the debtor; possession of the property is taken by an officer of the courts, usually after proof of the allegations, and a meeting of creditors is called for the choice of an assignee by a vote of creditors, having relation both to number and amount. The assignee becomes practically the owner, in trust, with power to wind up the estate; he acts under the general direction of the court, calling meetings of creditors when required. The right to a discharge varies in different states, in some being conditioned upon payment of a certain percentage or the assent of the majority of creditors or upon more stringent conditions in case of subsequent insolvency. The statutes vary as to the grounds of refusing a discharge for fraud, as in cases of paying or securing debts within a certain time before the application, or when the debtor is insolvent, or has reasonable cause to believe himself so. As to all these details the state statutes should be referred to.

As to American and English bankrupt law proper, see BANKRUPT LAWS; BANKRUPT.

The English act 34 Geo. III. ch. 69, was called an insolvent debtor's act; but the first act of insolvency properly so called was passed in 1836. And the act of 7 & 8 Viet. cap. 70, called "an act for facilitating arrangements between debtor and creditor," is properly an insolvency law. This provided for the discharge of a non-trading debtor if he had a certain concurrence from his creditors. This was one-third, both in value and number, to the initiatory steps. To the discharge, a proportional consent at an initiatory meeting, and, finally, the consent of three-eighths in both number and value, or nine-tenths in value of creditors to the sum of twenty pounds and upwards.

Many of the states have laws for the distribution of insolvent estates, and also laws for the relief of poor debtors. These are not properly called insolvent laws in the sense in which we have used the words, though the latter relieve the debtor's body from restraint upon a surrender of his goods and estate, and leave his future acquisitions still liable. See POOR DEBTORS.

INSOLVENCY, ACT OF. See ACT OF INSOLVENCY; CONTEMPLATION OF INSOLVENCY.

INSOLVENT (Lat. *in*, privative, *solvo*, to pay). The condition of a person who is insolvent or unable to pay his debts. 2 Bla. Com. 285, 471; 9 N. Y. 589.

One who is unable to pay his debts as they fall due in the usual course of trade or business. 2 Kent 389; 3 Dowl. & R. 218; 1 M. & S. 338; 1 Campb. 492, n.; Sudd. Vend. 487; 3 Gray 600; 86 Me. 246;

116 Mo. 226; although his assets in value exceed the amount of his liability; 110 Cal. 488; or the embarrassment is only temporary; 26 So. W. Rep. (Tex.) 255; but it was held that mere liability to pay debts promptly as they mature is not conclusive; 26 id. 509; that one who has sufficient property subject to legal process to satisfy all legal demands is not insolvent; 10 So. Rep. (Ala.) 334; and also that a person who suspended business because of difficulties arising out of the commencement of an action was not necessarily an insolvent; 63 Hun 632.

One who is unable to pay commercial paper in the due course of business is insolvent; 10 Blatchf. 498; 33 Pac. Rep. (Cal.) 884.

A corporation is insolvent when its assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue; 98 Ala. 68.

The clearing house rules, making members responsible for clearances of outside banks, for which they engage to clear, for one day after notice of the termination of their agreement, require payment of checks of such outside bank though known to be insolvent; and a contract for a deposit by the latter of cash and notes as indemnity for such clearances is valid, and the payments are not within a statute forbidding payments by an insolvent corporation made with intent to prefer creditors, and the money and securities held under the aforesaid contract are applicable to the amount of the checks so paid; 40 N. E. Rep. (N. Y.) 871.

An insolvent building association may make an assessment on stock of a borrowing member to cover losses, and thereby equalize the members, so that they may go out on an equal footing at the closing up of the association; 40 N. E. Rep. (Ind.) 694.

The word "insolvent," as used in Rev. Stats., § 3466, and of insolvency therein referred to is limited by the language to cases where "a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment," etc. Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part. 6 Pet. (U. S.) 29, 35; 2 Cranch (U. S.) 353, 390; 10 Pet. (U. S.) 596, 611; 261 U. S. 259.

INSOLVENT ESTATES OF PERSONS DECEASED. See ADMINISTRATION.

INSPECTION (Lat. *inspicere*, to look into). The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. The decision of the inspectors is not final; the object of the law is to protect the community from fraud, and to preserve the character of the merchandise abroad; 8 Cow. 45. See 1 Johns. 305; 13 id. 331; 2 Cal. 312. Quantity is as legitimate a subject of inspection as quality; 40 La. Ann. 465.

In Practice. Examination. As to the right to inspect public records, see RECORDS.

INSPECTION LAWS. The right in the states to enact inspection laws, quarantine and health laws is undoubted and is recognized in the constitution; Story, Const. 515; Cooley, Const. Lim. 730. These may be carried to the extent of ordering the destruction of private property, when infected with disease or otherwise dangerous; id.; 5 How. 632.

Under the general powers reserved by the states in the regulation of its internal commerce and to protect its citizens from fraud, a state may declare that certain

articles shall not be sold within its limits without inspection, and charge the cost of the inspection on those offering the article for sale; 53 Fed. Rep. 690. A state cannot, under the guise of exerting its police powers, or of enacting inspection laws, make discrimination against the products and industries of some of the states in favor of the products and industries of its own or of other states; 138 U. S. 78; 141 id. 62.

INSPECTOR. The name given to certain officers whose duties are to examine and inspect things over which they have jurisdiction: as, inspector of bark, one who is by law authorized to examine bark for exportation, and to approve or disapprove of its quality. Inspectors of customs are officers appointed by the general government.

INSPEXIMUS (Lat.). We have seen. A word sometimes used in letters patent, reciting a grant, *inspeximus* such former grant, and so reciting it verbatim: it then grants such further privileges as are thought convenient. 5 Co. 54.

INSTALLATION, INSTALMENT. The act by which an officer is put in public possession of the place he is to fill. The president of the United States, or a governor, is installed into office, by being sworn agreeably to the requisition of the constitution and laws.

INSTALMENT. A part of a debt due by contract, and agreed to be paid at a time different from that fixed for the payment of the other part. For example, if I engage to pay you one thousand dollars, in two payments, one on the first day of January and the other on the first day of July, each of these payments or obligations to pay will be an instalment.

In such case, each instalment is a separate debt so far that it may be tendered at any time, or the first may be sued for although the other shall not be due; 3 Dane, Abr. 493, 494; 1 Esp. 129, 226; 2 id. 235; 3 Salk. 6, 18; 1 Maule & S. 706.

A debtor who by failing to pay three instalments of rent due on a lease would forfeit his estate, may, in order to save it, tender one instalment to prevent the forfeiture, although there may be two due at the time; and he is not bound to tender both; 6 Toullier, n. 688.

As to sales on instalment, see SALES.

INSTANCE. Literally, standing on, hence, urging, solicitation. Webster, Dict.

In Civil and French Law. In general, all sorts of actions and judicial demands. Dig. 44, 7, 58.

In Ecclesiastical Law. Causes of instance are those proceeded in at the solicitation of some party, as opposed to causes of office, which run in the name of the judge. Halif. Anal. p. 122.

In Scotch Law. That which may be insisted on at one diet or course of probation. Whart.

INSTANCE COURT. In English Law. That branch of the admiralty court which had the jurisdiction of all matters except those relating to prizes. By the Judicature Acts (q. v.) the jurisdiction of the admiralty courts was transferred to the high court of justice.

The term is sometimes used in American law for purposes of explanation, but has no proper application to admiralty courts in the United States, where the powers of both instance and prize courts are conferred without any distinction; 3 Dall. 6; 1 Gall. 563; 3 Kent 355, 378.

See ADMIRALTY.

INSTANCIA. In Spanish Law. The institution and prosecution of a suit from its inception until definitive judgment. The first instance, "*primera instancia*," is the prosecution of the suit before the judge competent to take cognizance of it at its inception: the second instance, "*segunda instancia*," is the exercise of the same action before the court of appellate jurisdic-

tion; and the third instance, "*tercera instancia*," is the prosecution of the same suit, either by an application of revision before the appellate tribunal, that has already decided the cause, or before some higher tribunal, having jurisdiction of the same.

All civil suits must be tried and decided, in the first instance, within three years; and all criminal, within two years.

As a general rule, three instances are admitted in all civil and criminal cases. Art. 285, Const. 1812.

INSTANTER (Lat.). Immediately; presently. This term, it is said, means that the act to which it applies shall be done within twenty-four hours; but a doubt has been suggested by whom is the account of the hours to be kept, and whether the term *instanter* as applied to the subject-matter may not be more properly taken to mean "before the rising of the court," when the act is to be done in court, or "before the shutting of the office the same night," when the act is to be done there; 1 Taunt. 843; 6 East, 587; Tidd, Pr., 3d ed. 508, n.; 3 Chitty, Pr. 112. See 3 Burr. 1809; Co. Litt. 157.

INSTANTLY. Immediately; directly; without delay; at once. The word is a frequent occurrence in indictments for murder where the death is charged as having been the immediate result of a wound or blow inflicted. Where the killing has been alleged to have been caused by a battery it is necessary to allege an assault and to specify the time when the mortal stroke was given and the time of the death; the allegation that he "instantly did die" is insufficient; 9 Mo. 666; as was an indictment which described the assault and then charges that of the mortal wound inflicted by defendant the deceased "did instantly die"; 65 *id.* 217; otherwise had the averment been that the deceased "did then and there instantly die"; *id.* 218.

INSTAR (Lat.). Like; resembling; equivalent: as, *instar dentium*, like teeth; *instar omnium*, equivalent to all.

INSTIGATION. The act by which one incites another to do something, as, to injure a third person, or to commit some crime or misdemeanor, to commence a suit, or to prosecute a criminal. See **ACCOMPLICE**.

INSTITOR (Lat.). In Civil Law. A clerk in a store; an agent.

He was so called because he watched over the business with which he was charged; and it is immaterial whether he was employed in making a sale in a store, or whether charged with any other business. *Institor appellatus est ex eo, quod negotio gerendo instet; nec multum facit tabernæ sit prepositus, an culibet alii negotiationi*; Dig. lib. 14, tit. 3, 1, 2, Mr. Bell says that the charge given to a clerk to manage a store or shop is called institorial power; 1 Bell, Com. 479, 5th ed.; Erskine, Inst. 3. 8. 46; 1 Stair, Inst. by Brodie, b. 1, tit. 11, §§ 12, 18, 19; Story, Ag. § 8.

INSTITUTE. In Scotch Law. The person first called in the tailzie; the rest, or the heirs of tailzie, are called substitutes; Erskine Pr. 3. 8. 8. See **TAILZIE**, **HEIR OF**; **SUBSTITUTES**.

In Civil Law. One who is appointed heir by testament, and is required to give the estate devised to another person, who is called the substitute.

To name or to make an heir by testament; Dig. 28. 5. 65. To make an accusation; to commence an action.

INSTITUTES. Elements of jurisprudence; text-books containing the principles of law made the foundation of legal studies.

The word was first used by the civilians to designate those books prepared for the student and supposed to embrace the fundamental legal principles arranged in an orderly manner. Two books of Institutes were known to the civil lawyers of antiquity,—Gaius and Justinian.

I. COKE'S INSTITUTES. Four volumes of commentaries upon various parts of the English law.

Sir Edward Coke wrote four volumes of Institutes, as he was pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive commentary upon an excellent little treatise of tenures, compiled by Judge Littleton in the reign of Edw. IV. This comment is a rich mine of valuable common-law learning, collected and heaped together from the ancient reports and year-books, but greatly defective in method. The second volume is a comment on many old acts of parliament, without any systematic order; the third, a more methodical treatise on the pleas of the crown; and the fourth, an account of the several species of courts. These Institutes are usually cited thus: the first volume as Co. Litt., or 1 Inst.; the second, third, and fourth as, 2, 3, or 4 Inst., without any author's name. 1 Bla. Com. 72.

II. GAIUS'S INSTITUTES. A tractate upon the Roman law, ascribed to Caius or Gaius.

Of the personal history of this jurist nothing is known. Even the spelling of his name is matter of controversy, and he is known by no other title than Gaius, or Caius. He is believed to have lived in the reign of Marcus Aurelius. The history of Gaius's Institutes is remarkable. In 1816, Niebuhr was sent to Rome by the king of Prussia. On his way thither, he spent two days in the cathedral library of Verona, and at this time discovered these Institutes, which had been lost to the jurists of the middle ages. In 1817, the Royal Academy of Berlin charged Goeschen, Bekker, and Hollweg with the duty of transcribing the discovered manuscript. In 1819, Goeschen gave the first completed edition, as far as the manuscript could be deciphered, to his fellow-jurists. It created an unusual sensation, and became a fruitful source of comment. It formed a new era in the study of Roman law. It gave the modern jurist the signal advantage of studying the source of the Institutes of Justinian. It is believed by the best modern scholars that Gaius was the first original tractate of the kind, not being compiled from former publications. The language of Gaius is clear, terse, and technical,—evidently written by a master of law and a master of the Latin tongue. The Institutes were unquestionably practical. There is no attempt at criticism or philosophical discussion: the disciple of Sabinus is content to teach law as he finds it. Its arrangement is solid and logical, and Justinian follows it with an almost servile imitation.

The best editions of Gaius are Goeschen's 2d ed., Berlin, 1824, in which the text was again collated by Blumhe, and the 8d ed. of Goeschen, Berlin, 1842, edited by Lachman from a critical revision by Goeschen which had been interrupted by his death. Gneist's edition (1857) is a recension of all the German editions prior to that date. In France, Gaius attracted equal attention, and we have three editions and translations: Boulet, Paris, 1827; Domenget, 1848; and Pellat, 1844.

In 1859, Francesco Lisi, a learned Italian scholar, published, at Bologna, a new edition of the first book of Gaius, with an Italian translation *en regard*. The edition is accompanied and enriched by many valuable notes, printed in both Latin and Italian.

The reader who may wish to pursue his Gaiian studies should consult the list of some thirty-odd treatises and commentaries mentioned in Mackeldey's Lehrbuch des Röm. Rechts, p. 47, note (b), 13th ed., Wien, 1851; Huschke, Essay Zur Kritik und Interpret. von Gaius Inst., Breslau, 1880; Haubold's Inst. Juris Rom. Præv. Line., pp. 151, 152, 505, 506, Lipsie, 1826; Boecking's Gaius, Preface, pp. 11–18, Lips., 1845; Lisi's Gaius, Preface, pp. x. xi., Bologna, 1859.

The following treatises on Gaius are noted by Vangerow, as of peculiar value: Schrader, under the title "was gewinnt die

römische Rechtsgeschichte durch Gai. Institut." Heidel. 1823; Haubold, quantum fructum cepit Rom. juris. e Gaii. inst.; Werke, 1–665; Göeschen's ed. of Gaius, giving the history of the discovery and its value; Gans, Scholien zu Gaius, Berlin, 1821; Dupont, disquisitiones, etc., 1822; Broekdorf, Comment, etc., 1824; Heffter, Comment. 1827; Assen, adnotatio, etc., 1826; Unterholzner, Conject., etc., 1823; Scheurl, Beiträge, etc.; Puchta, Comm. 1837; Pöschman, Studien, 1854, 1860; Huschke, revised ed. 1861. See a valuable essay in Holzendorff's Rechtslexicon (1870), I. 97, 100. See, also, Abdy and Walker's translation of Gaius, published in 1876, and Poete's translation and commentary, published in 1871.

III. JUSTINIAN'S INSTITUTES are an abridgment of the Code and Digest, composed by order of that emperor and under his guidance, with an intention to give a summary knowledge of the law to those persons not versed in it, and particularly to students. Inst. Proem. § 3.

The lawyers employed to compile it were Tribonian, Theophilus, and Dorotheus. The work was first published on the 21st of November, 529, and received the sanction of statute law by order of the emperor. They are divided into four books: each book is divided into titles, and each title into separate paragraphs or sections, preceded by an introductory part. The first part is called *principium*, because it is the commencement of the title; those which follow are numbered, and called paragraphs. The work treats of the rights of persons, of things, and of actions. The first book treats of persons; the second, third, and the first five titles of the fourth book, of things; and the remainder of the fourth book, of actions. The method of citing the Institutes should be understood, and is now commonly by giving the number of the book, title, and section, thus: Inst. I. 2. 5.—thereby indicating book I. title 2, section 5. Where it is intended to indicate the first paragraph, or *principium*, thus: Inst. B. I. 2. pr. Frequently the citation is simply I. or J. I. 2. 5. A second mode of citation is thus: § 5, Inst. or I. 5.—meaning book I, title 2, paragraph 5. A third method of citation, and one in universal use with the older jurists, was by giving the name of the title and the first words of the paragraph referred to, thus: § *senatusconsultum est I de jure nat. gen. et civil.*—which means, as before, Inst. B. I. tit. 2, § 5. See 1 Colquhoun, a. 61.

The first printed edition of the Institutes is that of Schoyffer, fol., 1488. The last critical German edition is that of Schrader, 4to, Berlin, 1832. This work of Schrader is the most learned and most elaborate commentary on the text of Justinian in any language, and was intended to form a part of the Berlin Corpus Juris; but nothing further has been yet published. It is impossible in this brief article to name all the commentaries on these Institutes, which in all ages have commanded the study and admiration of jurists. More than one hundred and fifty years ago one Homberg printed a tract *De Multitudine nimia Commentatorum in Institutiones Juris*. But we must refer the reader to the best recent French and English editions. Ortolan's Institutes de l'Empereur Justinien avec le texte, la traduction en regard, et les explications sous chaque paragraphe, Paris, 3 vols. 8vo, sixth edition. This is, by common consent of scholars, regarded as the best historical edition of the Institutes ever published. Du Caurroy's Institutes de Justinien traduites et expliquées par A. M. Du Caurroy, Paris, 1851, 8th ed. 2 vols. 8vo. The Institutes of Justinian: with English Introduction, Translation, and Notes, by Thomas Collet Sanders, M. A., London, 1858, 8vo; 2d ed. 1860. This work has been prepared expressly for beginners, and is founded mainly upon Ortolan, with a liberal use of LaGrange, Du Caurroy, Warnkönig, and Puchta, as well as Harris and Cooper. The English edition of Harris,

and the American one of Cooper, have ceased to attract attention.

The most authoritative German treatises on the Pandects are the following: Windscheid, Dr. B., 3d ed., Dusseldorf, 1863; 2 vols.; Vangerow, Dr. K. A., 7th ed., Marburg, 1863; Brintz, Dr. A. B., 2d ed., Erlangen, 1879; Ihering, Dr. R., Jena, 1881. Incomparably the most philosophical exposition of the Roman system of jurisprudence is Savigny's *Gesch. des röm. Rechts*, coupled with his *System des heut. röm. Rechts*, the latter published in Berlin in 1840. Of both, French translations have been published by Guenoux. See also Sandars' Justinian, with an introduction by William G. Hammond (1876), and Abdy and Walker's translation of the Institutes (1876).

IV. THEOPHILUS' INSTITUTES. A paraphrase of Justinian, made, it is believed, soon after A. D. 533.

It is generally supposed that in A. D. 534, 535, and 536, Theophilus read his commentary in Greek to his pupils in the law school of Constantinople. He is conjectured to have died some time in A. D. 536. This paraphrase maintained itself as a manual of law until the eighth or tenth century. This text was used in the time of Hexabiblos of Harmenipulus, the last of the Greek jurists. It is also conjectured that Theophilus was not the editor of his own paraphrase, but that it was drawn up by some of his pupils after his explanations and lectures, inasmuch as it contains certain barbarous phrases, and the texts of the manuscripts vary greatly from each other.

It has, however, always been somewhat in use, and jurists consider that its study aids the text of the Institutes; and Cujas and Hugo have both praised it. The first edition was that of Zuichem, fol., Basle, 1531; the best edition is that of Reitz, 2 vols. 4to, 1751, Haag. There is a German translation by Wüsterman, 1823, 2 vols. 8vo; and a French translation by Mons. Irégier, Paris, 1847, 8vo, whose edition is prefaced by a learned and valuable introduction and dissertation. Consult Moretueil, *Hist. Du Droit Byzanz.*, Paris, 1843; Smith, *Dict. Biog.* London, 1849, 3 vols. 8vo; 1 Kent 533; *Profession d'Avocat* tom. ii. n. 536, page 95; *Introd. à l'Etude du Droit Romain*, p. 124; *Dict. de Jurisp.*; Merlin, *Répert.*; *Encyclopédie de d'Alembert*.

INSTITUTION (Lat. *instituere*, to form, to establish).

In Civil Law. The appointment of an heir; the act by which a testator nominates one or more persons to succeed him in all his rights active and passive. Halifax, *Anal.* 39; Pothier, *Tr. des Donations testamentaires*, c. 2, s. 1, § 1; La. Civ. Code, 1598; *Dig.* 28. 5; 1, 1; 23. 6. 1, 2, § 4.

In Ecclesiastical Law. To become a parson or vicar, four things are necessary, viz.: holy orders, presentation, institution, induction. Institution is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk,—previous to which the oath against simony and of allegiance and supremacy are to be taken. By institution the benefice is full: so that there can be no fresh presentation (except the patron be the king), and the clerk may enter on parsonage-house and glebe and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. See 1 Bla. Com. 389; 1 Burn, *Eccl. Law* 169.

Of Education. A gymnastic association, where regular gymnastic exercises are taught, and a teacher in physical culture is constantly employed, is an "institution of education." 117 Ky. 958, 80 S. W. 201, 25 R. 2105.

In Political Law. A law, rite, or ceremony enjoined by authority as a permanent rule of conduct or of government; as, the Institutions of Lycurgus. Webster, *Dict.* An organized society, established either by law or the authority of individ-

uals, for promoting any object, public or social. A private school or college may, by courtesy, be called an institution; but in legal parlance it implies foundation by law, by enactment or prescription; one may open and keep a private school, but cannot properly be said to institute it; 50 N. W. Rep. (Wis.) 1103.

In Practice. The commencement of an action; as, A B has instituted a suit against C D to recover damages for trespass.

INSTRUCTIONS. In Common Law. Orders given by a principal to his agent in relation to the business of his agency.

The agent is bound to obey the instructions he has received; and when he neglects so to do he is responsible for the consequences, unless he is justified by matter of necessity; 4 Binn. 361; 1 Liverm. Ag. 368. See AGENT.

In Practice. The statement of a cause of action given by a client to his attorney, and which, where such is the practice, are sent to his pleader to put into legal form of a declaration. Warren, *Law Stud.* 284.

Instructions to counsel are their indemnity for any aspersions they may make on the opposite party; but attorneys who have a just regard to their own reputation will be cautious, even under instructions, not to make any unnecessary attack upon a party or witness. For such unjustifiable conduct the counsel will be held responsible. *Eunom. Dial.* 2, § 43, p. 132. For a form of instructions, see 3 Chitty, Pr. 117, 120, n.

Also the written or oral address of the presiding judge, in jury trials, delivered usually at the close of the arguments of counsel to the jury, informing them of the law applicable to the cause at trial, and their duties thereunder. A. & E. Encyclo.

An omission to give instructions is not assignable as error where no request was made therefor in the court below; 112 N. C. 851; 101 *id.* 153, 188; 26 Tex. App. 706; 69 Tex. 273; 71 *id.* 156; 75 Ia. 185; 72 Wis. 234; 77 *id.* 115; 76 Ga. 3; 123 Pa. 53; 37 Minn. 493; 97 Cal. 459; 138 N. Y. 595; and errors or inaccuracies in charging the jury cannot be considered on appeal unless duly excepted to on the trial; 37 Minn. 351; 130 U. S. 396; 66 Miss. 310; 74 Ia. 438; 50 Ark. 348; 25 Neb. 75; 101 N. C. 223; a refusal to give instructions not excepted to may be complained of on appeal; 126 Ill. 282. Where a charge correctly states the law of the case, a judgment will not be reversed because the charge was abstract; 97 Ala. 47; 111 Mo. 576; but an instruction is wrong which states hypothetically facts as to which there is no evidence; 88 Ga. 784; 45 La. Ann. 46; 48 Mo. App. 263. It is not error to recall a jury and charge them again at their request; 31 Tex. Cr. R. 304. The improper admission of evidence is cured by an instruction not to consider the evidence so admitted; 97 N. C. 222; 98 *id.* 566; 77 Iowa 54; 97 Mo. 62; 83 Ala. 287. Refusal to give correct instructions is not error if the court has already given them on the same point; 76 Ia. 105; 76 Cal. 521; 76 Ga. 452; 126 Ill. 408; 115 Ind. 394; 84 Va. 498; or where given in different language; 144 U. S. 408; 143 *id.* 60; 135 *id.* 554; 132 *id.* 172.

The principles governing the subject of peremptory instructions were clearly stated by Harlan, J., in the recent case of *Travelers' Ins. Co. v. Randolph*, 78 Fed. Rep. 754:

"It is well settled that if, at the close of the plaintiff's evidence, the court refuses to give a peremptory instruction for the defendant, such refusal cannot be assigned for error if the defendant does not stand upon the case made by the plaintiff, but introduces evidence in support of his defence" (citing 106 U. S. 700; 120 *id.* 527, 530; 144 U. S. 202, 206; 153 U. S. 610, 612; 161 U. S. 91, 95). "But the failure of the defendant, at the close of the plaintiff's evidence, to ask a peremptory instruction will not, of itself, preclude such a motion at the close of the whole evidence." *Id.* 759.

"A mere scintilla of evidence in favor of one party does not entitle him of right to go to the jury (citing 14 Wall. 442, 448). Nor can it "be

withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontradicted, or if, upon any issue dependent upon facts, there is no evidence whatever in favor of one party, or what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case. If a verdict is rendered contrary to the evidence, the remedy of the losing party is a motion for a new trial." *Id.* 759.

The conclusions were thus stated:

"That there must be something more than a scintilla of evidence supporting the case of the party upon whom the burden of proof rests, to require the submission of the case to the jury; that where there is a real conflict of evidence on a question of fact, whatever may be the opinion of the judge who tries the case as to the value of that evidence, he must leave the consideration of it for the decision of the jury; that where there are material and substantial facts which, if credited by the jury, would in law justify a verdict in favor of one party, it is not error for the trial judge to refuse a peremptory instruction to the jury; that it is not a 'proper standard to settle for a peremptory instruction that the court, after weighing the evidence in the case, would, upon motion for a new trial, set aside the verdict,' and that the court 'may, and often should, set aside a verdict, when clearly against the weight of the evidence, where it would not be justified in directing a verdict'; that, upon reason and authority, 'there is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict for insufficiency of evidence'; and that 'in the latter case it must be so insufficient in fact as to be insufficient in law.'" *Id.* 760 (citing 20 C. C. A. 596, 74 Fed. Rep. 483).

In French Law. The means used and formality employed to prepare a case for trial. It is generally applied to criminal cases, and is then called criminal instruction; it is then defined the acts and proceedings which tend to prove positively a crime or delict, in order to inflict on the guilty person the punishment which he deserves. See VERBAL ADMONITIONS.

INSTRUMENT. A document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying, or terminating a right; a writing executed and delivered as the evidence of an act or agreement.

The writing which contains some agreement, and is so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters or memoranda. The agreement and the instrument in which it is contained are very different things,—the latter being only evidence of the existence of the former. The instrument or form of the contract may be valid, but a contract itself may be void on account of fraud. See Ayliffe, *Parerg.* 305; Dun. *Adm. Pr.* 220. A forthcoming bond is an "instrument for the payment of money." 11 Wis. 72. A bank check payable in confederate currency was held not "an instrument payable in money" under the Alabama Code in relation to commercial paper; 42 Ala. 108.

A statute requiring "any instrument of writing" sued on to be filed, does not apply to a contract signed by both parties and deposited with a third person for safe keeping, it applies only to obligations executed only by the party sued; 55 Mo. 446.

Transferable by Delivery Merely. "Instruments transferable by delivery merely" mean bills of exchange or negotiable paper which the holder takes free of defenses, good between the original parties. 133 Ky. 816, 119 S. W. 168.

INSTRUMENT OF SASINE. An instrument in Scotland by which the delivery of "sasine" (i. e. seisin) is attested. Moz. & W.

INSTRUMENTA (Lat.). That kind of evidence which consists of writings not under seal; as, court-rolls, accounts, and the like. 3 Co. Litt., Thomas ed. 487.

INSTRUMENTALITY. See DANGEROUS INSTRUMENTALITY.

INSUBORDINATION. Continued

disobedience on the part of a pupil in school constitutes "insubordination." 129 Ky. 35, 110 S. W. 346. See DISOBEDIENCE.

INSUFFICIENCY. In Chancery Practice. After filing of defendant's answer, the plaintiff has six weeks in which to file exceptions to it for *insufficiency*,—which is the fault of not replying specifically to specific charges in the bill. Smith, Ch. Pr. 344; Mitf. Eq. Pl. 376, note. Sanders, Ord. in Ch., Index; Beach, Mod. Eq. Pr. 413.

Under the Judicature Act, 1875, order xxxi., rules 6, 9, 10, interrogatories are to be answered by affidavit, and if the party interrogated answers insufficiently, the party interrogating may apply to the court for an order requiring him to answer further. Moz. & W.

INSULA (Lat. island). A house not connected with other houses, but separated by a surrounding space of ground. Calvinus, Lex.

INSUPER. Moreover; over and above. An old exchequer term, applied to a charge made upon a person in his account. Blount.

INSURABLE INTEREST. Such an interest in a subject of insurance as will entitle the person possessing it to obtain insurance.

It is essential to the contract of insurance, as distinguished from a wager, that the assured should have a legally recognizable interest in the insured subject, the pecuniary value of which may be appreciated and computed or valued. A recent examination of the subject, as connected with life insurance, results in the conclusion from the authorities, that at common law that contract was not one of indemnity, and wagering policies were not unlawful, and therefore that logically, in such policies, an insurable interest should not be required, but that the American courts adopted what has been termed a rule of American common law that all wagers were void on grounds of public policy and, therefore, that there must be an insurable interest; 35 Am. L. Reg. n. s. 65. This rule, it was said, obtains in all the states except New Jersey and Rhode Island; 24 N. J. L. 576; 9 R. I. 354; and see 11 *id.* 439. The case of *Godsall v. Boldero*, 9 East 72, was so generally cited and relied on in the American cases that it is not easy to estimate the influence of that case before it was overruled by *Dalby v. I. & L. L. Assurance Company*, 15 C. B. 365. It is of special interest to note that the New Jersey case in which the court expressly refused to follow *Godsall v. Boldero*, was decided about the time of the case which overruled it, but before it was reported in the United States. See also 2 Sm. L. Cas., 9th Am. ed. 1530-64, where both the English cases mentioned are reported, and the authorities in both countries are collected, the conclusion of the American editors being, that as to fire, marine, and life insurance there must be some interest in the insurer. See also Biddle, Ins. § 184, where it is said that wagering policies were not void in England at common law. See WAGER.

Where the subject-matter is property, as in fire and marine insurance, the question whether there is an insurable interest is generally free from difficulty and the rule established by the decisions is comparatively simple. It is not requisite that the insured party should have an absolute property in the insured subject, or that the subject or interest should be one that can be exclusively possessed or be transferable by delivery or assignment. Insurable interest involves neither legal nor equitable title; 1 Pet. 121; 12 Ia. 287; 1 Sprague 565. The subject or interest must, however, be such that it may be destroyed, lost, damaged, diminished, or intercepted by the risks insured against. The interests usually insured are those of the owner in any species of property, of mortgagor, mortgagee, holder of bottomry or respondentia bond, of an agent, consignee, lessee, factor, carrier, bailee, or party having a lien or entitled to

a rent or income, or being liable to a loss depending upon certain conditions or contingencies, or having the certainty or probability of a profit or pecuniary benefit depending on the insured subject; 1 Phill. Ins. c. 8; 11 E. L. & Eq. 2; 28 *id.* 312; 34 *id.* 116; 48 *id.* 292; 11 Pa. 429; 6 Gray 192; 2 Md. 111; 62 N. Y. 47, 54; 20 Am. Dec. 510; 63 Hun 82; 85 Ala. 607; 133 U. S. 387.

It was formerly held that the interest in property insured must exist when the insurance was effected, as well as the time of the loss; 3 Den. 301; 16 Or. 283; 38 Me. 414; Biddle, Ins. § 157. This is not now the rule; Arnould, Ins. 59; and in a case in which the insurance was upon a cargo, "on account of whom it may concern," the author just cited is approvingly quoted by Mr. Justice Swayne to the effect that, "it is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and the assured need not also allege or prove that he was interested at the time of effecting the policy," and he adds, "This is consistent with reason and justice, and is supported by analogies of the law in other cases." 98 U. S. 528.

It has been held that there is an insurable interest in an attaching creditor; 86 Me. 518; a purchaser in possession under a contract of sale; 63 Fed. Rep. 680; 5 Wash. 276; 21 N. Y. 378; 135 *id.* 298; 21 Can. S. C. R. 288; a person admitted as a partner, though the consideration was unpaid; 31 S. W. Rep. (Tex.) 1100; a husband, in personal property in the name of his wife; *id.*; a commission merchant in goods consigned to him; 19 Ia. 364; persons liable by contract, statute, or common law for the safe keeping of property, as bailees; 5 Metc. 386; 36 N. Y. 655; for repair or manufacture; 14 Ala. 325; common carriers; 12 Barb. 595; railroad companies; 113 Mass. 77; warehousemen; 86 S. C. 213; a pipeline company in oil in its tanks; 145 Pa. 347; a sheriff in goods levied on; 26 N. Y. 117; 31 Ia. 464; one liable as indorser of a mortgage note; 107 Mass. 377; or a trustee liable for the safe-keeping of property; 5 Wall. 509; or who gives bond for its delivery; 13 B. Mon. 311; one in possession for life under a parol agreement to pay repairs, taxes, and insurance; 132 N. Y. 49; a carpenter or builder erecting or repairing a building, to be paid for on completion; 15 B. Mon. 411; a vendor of land before payment in full; 46 N. Y. 421; (but not one paid in full who has not conveyed; 2 N. S. W. L. R. 289); a lessor; 80 Ill. 532; a tenant; *id.*; or subtenant; 49 Miss. 80; (but not a tenant of glebe land after death of the lessor; 20 U. C. C. P. 170); a tenant by the curtesy; 50 Pa. 341; a simple contract creditor of the estate of a deceased person in lands of the latter, though subject to dower and homestead rights; 101 Ala. 522; a mechanic's lien holder; 12 Ia. 371; the successful bidder at an execution sale; 5 Sneed 139; the owner of lands, on buildings in process of erection; 71 Hun 369; the grantee of property conveyed in fraud of creditors; 34 Neb. 704; one holding property in trust; 132 N. Y. 193; or who has an equitable interest; 18 Vt. 305; a mortgagee, to the extent of his mortgage interest; 52 Me. 333; 1 Curt. C. C. 193; and a mortgagor, on his interest in the same building; 9 Wend. 405; 10 Pick. 40; but the interests are independent and insurance by the mortgagor cannot be claimed by the mortgagee; 20 Ohio 185; where the mortgagor insures and makes the loss payable to the mortgagee, as his interest may appear, the company is estopped to deny the insurable interest; 46 Wis. 23; a mortgagor who conveys subject to the mortgage, has an insurable interest in the real estate, being liable to the mortgagee for any deficiency; 67 N. W. Rep. (Neb.) 774. A partner may have an insurable interest in a building erected by the partnership on land of the other partner; 10 Cush. 37; and an agent in control may insure the property in his own name; 165 Pa. 55; a master of a ship, his right to prime on freight; 1 Sprague 565; or a half-owner of property in possession, may, if so authorized

by the other owners, insure all the property in his own name; 55 Ill. App. 275.

A partnership has been held to have no insurable interest in household furniture and wearing apparel of one of the partners; 94 Ga. 630; so also an administratrix in real estate of the intestate; 8 Abb. Pr. 261, note; a charterer, who advances on the personal credit of the owner, who must pay, without regard to the issue of the voyage; 16 Md. 190; a stockholder as an individual, in the property of the corporation; 20 Ohio 174. It was held that an interest in the profit to be derived by the insured from the adventure of laying an Atlantic cable was insurable; though the insured was a shareholder in the company and would derive his profits from dividends; L. R. 2 Exch. 139.

The insurable interest in life insurance rests upon a different basis from that on property. It has been said "that while in fire and marine insurance it is the interest and not the thing that is insured, in life insurance it is the thing and not the interest;" 35 Am. L. Reg. n. s. 79.

With regard to the nature and amount of interest necessary for a policy of life insurance, no definite general principle seems yet to have been established, though the classes of insurable interests have been increasing. Every person has an insurable interest in his own life; 94 U. S. 561; 120 Ill. 121; 98 Mass. 381; 108 Pa. 6; 1 Moo. & Rob. 481. It has been a much mooted question whether the beneficiary must have an interest. It has been held in many cases that a person may insure his own life and pay the premiums, for a beneficiary designated by him; 98 Mass. 381; 120 Ill. 12; 50 Mo. 44; 85 N. Y. 593; Biddle, Ins. § 194; and there are *dicta* to this effect, frequently referred to, of Sharswood, J., 26 Pa. 189, and Paxson, J., in 108 Pa. 6. To the contrary are, 104 Pa. 74; 122 *id.* 324; 21 Fed. Rep. 698; and see 46 Mich. 473, and a *dictum* in 94 U. S. 561. If the beneficiary pays the premiums, it is generally held that he must have an interest; 79 Tex. 683; 111 Ind. 578; 104 Pa. 74; 168 *id.* 617. See Biddle, Ins. § 194; 35 Am. L. Reg. n. s. 79-87, where the authorities are collected.

It was held that when the policy is caused by the assured to be issued to another, the effect is the same as if issued to the applicant and assigned to the other, and an insurable interest is not required; 84 Hun 350. A member of a beneficial association may change the beneficiary according to the rule and substitute a new one without regard to insurable interest; 23 Wash. L. Rep. 329; and where the policy was for the benefit of the insured unless he sustained a fatal accident, and in that case to a nephew, the latter contingency having happened, the nephew was not required to show an insurable interest; 68 Fed. Rep. 873.

The interest required to support an insurance on the life of another has been found by the courts difficult to define, and indeed as was said they "have left it very much undefined;" 9 R. I. 346. Many attempts to formulate a definition have been made, but they are similar mainly in their vagueness and generality. One of those most quoted was that of Chief Justice Shaw, in 6 Gray 396: "It must appear that the insured has some interest in the life of the *cestui que vie*; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantages in life will be impaired so that the real purpose is not a wager, but to secure such advantage, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. . . . We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in that of a parent, not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." The United States Supreme Court quoted this, with approval,

in 94 U. S. 457, and in the opinion, Bradley, J., added some observations not more definite: "Precisely what interest is necessary in order to take a policy out of the category of a mere wager has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. . . . Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. . . . The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." In the same court, later, Field, J., in 104 U. S. 775, says: "It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. . . . But in all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." The last quotation was much approved in 113 Pa. 438.

Notwithstanding the high authority both of these judges and the courts for which they were speaking, their utterances have been characterized as *dicta*, and such they are technically, but they undoubtedly fairly represent the views of those courts and all others who recognize that the interest may be based upon kinship and need not be pecuniary. Any effort to extract a more precise definition from the American cases is likely to end in the conclusion of another able judge, who said: "The question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly yet be said to have been given;" Hoar, J., in 15 Gray 249.

In England a pecuniary interest is required and must be proved; 10 B. & C. 724; [1892] 1 Q. B. 864; with the possible exception that it is presumed in case of a wife who insures the life of her husband; Peake, Add. Cas. 70. The American courts take a less restricted view as shown by the definitions quoted, but no certain rule can be stated and the cases must be referred to, to ascertain whether any given relationship has been held sufficient.

A creditor may always insure the life of the debtor; 143 Pa. 238; 126 Ill. 387; 70 Md. 261; 101 N. C. 122; and in such case it has been termed a contract of indemnity, differing from other life insurance; Sharswood, J., in 4 Big. L. & Ac. Cas. 458; but this would be only as to the creditor; 15 C. B. 365; 79 Tex. 638; 144 U. S. 621; and it is said that there is no further interest after the payment of the debt; *id.*; 143 Pa. 238; 144 *id.* 223; but the question of interest is determined at the time of insurance and not of loss; see *infra*; Biddle, Ins. § 189. When the debtor pays the premiums, and assigns the policy as collateral security, the policy is in trust for him, and he is entitled to have it delivered up to him on payment; 2 Giff. 337; L. R. 5 Ch. App. 32; but it is otherwise if the creditor pays the premiums and there is no agreement for redemption; 2 De G. & J. 582; 113 Pa. 438.

In cases other than these of creditors it may be said, in the language of Mr. Justice Bradley, that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insur-

able interest in such life; 94 U. S. 457; s. c. 16 Am. L. Reg. n. s. 392, n.; 10 Cush. 244; 23 Pa. 65; 122 *id.* 324; 23 Conn. 244; 22 Barb. 9; 28 Mo. 383; 28 E. L. & Eq. 312; 92 Mich. 584.

It has been held that there was an insurable interest in a tenant, in the life of the landlord who had a life estate; 108 Pa. 6; or of one partner in the life of another; 20 N. Y. 32; whose interest was not fully paid for; 108 U. S. 498; 23 Conn. 244; 24 N. J. L. 576.

When an adequate interest exists at the time of the insurance, it is immaterial if there occur before death a diminution or entire cessation of it; 16 Fed. Rep. 650; 32 Hun 306; 27 N. Y. 282; 94 U. S. 457; and see note by J. D. Brannan on the last case in 16 Am. L. Reg. n. s. 399. But see 16 Or. 283.

On the subject of relationship there is little but confusion. It is said to be only of importance as tending to give rise to a reasonable expectation of pecuniary benefit from the continuance of the life of the insured; May, Ins. § 107; Bliss, Ins. § 31; 122 Pa. 324; 35 La. Ann. 293; or when there is a legal claim on the insured for support or service; *id.*; 47 Mo. 419; 115 Pa. 446. The interest has been held to exist in the case of a wife in the life of her husband; 128 U. S. 195; Peake, Add. Cas. 70; 28 Mo. 383 (but see 47 *id.* 419); 46 N. Y. 674; 128 U. S. 195 (and see criticism of this case in 25 Am. L. Rev. 185 and 35 Am. L. Reg. n. s. 171); and the husband in the life of the wife; 41 Ga. 388; 57 Vt. 496; the marriage gives an interest; 115 Pa. 446; 2 Dill. 166; and it has been held that before marriage a *feme sole* has an interest in the life of her betrothed; 53 Mo. 213; and so, *semble*, in Pennsylvania; 113 Pa. 438. As to other relations, it has been held that a son has an interest (on different grounds) in the life of his father; 81 Pa. 154; 80 Ill. 35; but not merely as son; *id.*; 89 Ind. 572; (*contra*, 50 Hun 50); a father, in that of a minor son; 45 Me. 104; or an adult son; 81 Pa. 154; 128 U. S. 195; 6 Gray 396; 15 Hun 74; (*contra*, in England, 1 Ch. D. 419); and the interest exists when relationship is by adoption; 76 Ga. 272; as where the relation of father is assumed; 161 Pa. 9; but a stepson has no interest in the life of his stepfather; 122 Pa. 423; nor a son-in-law in the life of the mother-in-law; 22 W. N. C. Pa. 407. A grandmother has an interest in the life of a grandchild; 155 Pa. 295; an old woman who lived with her daughter and the father-in-law of the latter, who had promised to keep her for life, had an interest in his life; 16 Ins. L. J. 682. There is much difference of opinion as to brother and sister, but it is said that the relationship, without more, does not give an interest; Biddle, Ins. § 193; 89 Conn. 100; *contra*, 94 U. S. 561; however, it has been held that a policy will stand if there is dependence, or indebtedness; 12 Mass. 115; 16 W. N. C. Pa. 188; see 78 N. Y. 490; [1892] 1 Q. B. 864; the last being the case of a stepsister. No interest exists in case of uncle or aunt and nephew or niece; 166 Pa. 617; 66 Mo. 63; but an aunt who stands in *loco parentis* to a nephew has an insurable interest in his life; 172 Pa. 111.

An insurance procured by a religious society, supported largely by voluntary contributions, on the life of one of its members, is void; 113 N. C. 244. In the absence of any insurable interest, the law will presume that the policy was taken out for the purpose of a wager or speculation; 122 Pa. 324; and wagering contracts in life insurance are not valid; 144 U. S. 621.

The amount of insurable interest is the value of the insured subject as agreed by the policy, or its market value, or the pecuniary loss to which the assured is liable by the risks insured against, though the insured subject—for example, life or health—has not a market value; 18 Barb. 206; 7 N. Y. 530; 24 N. H. 234; 2 Pars. Mar. Law, c. 2, sec. 2.

In insurance cases generally an interest must be averred and some proof thereof be made; Biddle, Ins. § 197, and cases cited; but on fire policies if the application or

policy shows an interest, it is generally sufficient, *prima facie*; *id.*; and so it was held on a life policy; 89 Conn. 100; and the fact that the policy was made payable to plaintiff made a *prima facie* case; 26 Mo.

App. 511. The facts showing interest are to be determined by the jury; 32 Ia. 421 80 Ill. 37; 26 W. N. C. Pa. 569.

See, generally, articles by Erskine Hazard Dickinson, 35 Am. L. Reg. n. s. 65, 161.

INSURANCE. A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.

"An agreement by which one party, for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the contract of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." 105 Mass. 149, 160.

An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage, to a certain property named in the policy, by reason of certain perils to which it may be exposed. 29 Atl. Rep. (Del.) 1039.

"In fire insurance and marine insurance the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case neither the time and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract;" 105 Mass. 160; 2 S. Dak. 324.

Any one *sui juris* and capable of contracting generally may be insured, but insurance has been held not to be a necessary for which an infant might contract and be held liable against his option on coming of age; 32 N. H. 845; 53 Mich. 238. In recent years, contracts of insurance by married women have been generally held valid, usually under statutes; 15 R. I. 573; 86 Ala. 424; 52 Ill. 53; 47 Mo. 419.

Any one otherwise capable of contracting may become an insurer, and formerly the business was largely conducted by partnerships, but, with the exception of risks taken at Lloyds (*q. v.*) and some other large partnerships, the business is now conducted, mainly, by insurance companies (*q. v.*), though, in England, quasi corporations organized under the Joint Stock Companies Acts insure under the authority of letters patent securing limited liability. See JOINT STOCK COMPANY.

The insurer is sometimes called the *underwriter*, and the insured, the *assured*. The agreed consideration is called the *premium*; the written contract, a *policy*; the events insured against, *risks or perils*; and the subject, right, or interest to be protected, the *insurable interest*. See these several titles. As to insured and assured, see 108 U. S. 504.

The policy is usually issued upon the application (*q. v.*) of the insured in writing, which contains the statement of facts entering into and forming a part of the contract. See REPRESENTATION; WARRANTY.

Whether facts concealed or misstated in an application are material is a question for the jury; 44 Pac. Rep. (Colo.) 756.

The happening of the event insured against and the consequent damage to the subject-matter, is termed the *loss* (*q. v.*).

Where the insurance is on property, an alienation will terminate the contract unless the insurance be transferred with the consent of the underwriter. See ASSIGNMENT. An alienation of part of the property or diminution of the interest of the insured will not, in the absence of an express condition, avoid the policy; 102 Pa.

568; 16 Wend. 885; 16 Fed. Rep. 650; 2 Pick. 249; 58 Mich. 806; 14 U. C. Q. B. 342; 27 *id.* 54; 18 U. C. C. P. 223; 25 Beav. 444; and the sale of a part does not avoid a policy forbidding merely "sale or transfer;" 10 W. Va. 507; 48 Ohio St. 538.

There is usually a clause, varying in exact terms, forbidding any change in title or possession, and, in such case, the sale of an undivided half interest is within its meaning and avoids the policy; 1 Mich. N. P. 118; but a distinction has been taken between a sale of an interest in property and a sale of the property, and the assignment by a new partner to his firm of his insured property as firm assets was not a forfeiture; 4 Biss. 511; 52 N. Y. 502. Clauses against alienation are conditions precedent; 125 N. Y. 82; 42 Ill. App. 475; and the question usually is whether there is a sale outright or by reason of something in the nature of a defeasance, either in law or by contract, the insured has not wholly parted with the property. As to such cases it is difficult, if not impossible, to lay down any general rule, and each case must be governed by the application of the general principles of the law of contracts and conditions to the particular form of the policy and the facts of the case. If there is, in fact, a total alienation, the opinion or motives of the parties in respect to it is not material; 22 Minn. 193. A conveyance upon a condition to be performed before title vests will not avoid; 20 Vt. 546; so where the owner of an equity of redemption sells with a stipulation for payment of the mortgage by the purchaser and is compelled to take back the title for non-performance; 12 Allen 354; or where, for other reasons, the sale is not carried out and there is a reconveyance before loss; 19 La. 28; but see 71 La. 532.

Policies of insurance also usually contain conditions for forfeiture in case of incumbrance without notice, or in case the property be "levied upon or taken into possession or custody," and such conditions are valid; 29 Atl. Rep. (Del.) 1039. A breach renders the policy void; *id.*; 82 Hun 380; and the question whether the execution of a mortgage increased the risk is immaterial; 89 N. E. Rep. (Ind.) 757; breach of any promissory warranty avoids the policy irrespective of its materiality; 44 Pac. Rep. (Cal.) 922; nor does it matter that the loss was not produced or contributed to by the breach; 1 N. Y. App. Div. 93. A judgment recovered *in invitum* is not within such condition; 39 W. Va. 689; but a confession of judgment is; 86 Pa. 227; 128 *id.* 128; and so was an agreement by one heir to pay the other heirs, in instalments, for property taken under a will; 168 *id.* 350. A technical seizure where the possession is unchanged is not an avoidance; 63 Hun 82; 89 Pa. 287; 5 Ont. App. 605. A provision for forfeiture for the levy of an execution relates to personality and not to land; 54 N. Y. 595; 54 Wis. 73.

Under these conditions, a breach as to part of the insured property, which is not destroyed or injured, may not avoid the policy as to another part unaffected by the breach. Thus it was held that a recovery, under a live-stock policy, for a cow killed would not be prevented by the existence of incumbrances, in violation of a covenant in the policy, where the property actually lost was not encumbered; 32 Neb. 750. Such contract is severable and any breach of the condition would avoid only such property as was covered by the incumbrance; 102 N. Y. 260; 11 Fed. Rep. 478; 46 U. C. Q. B. 334; 10 Ont. 236; 14 U. C. C. P. 549; 54 Ill. 164. The same principle applies to the defence that the property insured was sold and conveyed; if the contract is severable, a breach as to one part does not operate as a defence with respect to property not included; 83 Neb. 340.

In insurance on manufacturing establishments it is usual to stipulate for avoidance if operations should cease without the consent of the insurer, and such provision is valid and is violated though a watchman was employed and the risk not increased; 29 Atl. Rep. (Del.) 1039; and the same is true of all conditions which are warranties.

As to the distinction between *representation* and *warranty* and the law as to both, see those titles; and as to increase of risk, see RISKS AND PERILS.

Insurance on buildings or their contents is usually upon condition that if the former is suffered to be vacant or unoccupied, the policy will be void. In such case the forfeiture does not depend upon the insured's knowledge of the fact of vacancy; 161 Ill. 437; and a purchaser of the house and assignee of the policy is bound by the condition; 67 N. W. Rep. (Mich.) 967. Temporary absence of a tenant will not work a forfeiture; 92 Hun 223; 61 Ark. 108; nor will merely sleeping in the house occasionally and daily visits of the owner's wife to get provisions prevent forfeiture; 82 Md. 88; or visits twice a day by an employee; 16 Misc. Rep. 483. The insurer cannot establish a forfeiture without proving that the premises were unoccupied for any purpose; 2 Mo. App. Rep. 934.

Keeping on hand certain articles is usually prohibited, either specifically or as a class. The breach of a condition against keeping inflammable substances does not prevent recovery, when the use of the particular substance was a necessary and usual incident of the subject insured; 95 Ga. 604; as the use of gasoline, in a silver-plating business, one day's supply only being brought in at once; 170 Pa. 151; or keeping an inflammable substance for sale as was customary where there was a clause, written in ink on the policy, containing the words "merchandise such as is usually kept in a country store;" 44 Pac. Rep. (Cal.) 189; 91 Wis. 158; 35 Atl. Rep. (Vt.) 75; and where a typewritten rider stipulated for insurance on such articles as are usually kept in a painter's shop, it prevailed against a printed condition against keeping benzine on the premises; 35 Atl. Rep. (Vt.) 75.

As to hazardous and extra-hazardous risks, generally, see RISKS AND PERILS.

In order to promote the accurate adjustment of the loss, there is usually included in policies of insurance, on such property as a stock of merchandise, what is known as the "iron safe clause," which, in one form or another, provides that the books of the insured showing all business transactions, and the last inventory of the business, shall be kept in a fireproof safe at night and when the store is not opened for business. Such a clause is an express promissory warranty; 60 Ill. App. 39; 28 S. W. Rep. (Tex.) 1027; 29 *id.* 218; 30 *id.* 384; 31 *id.* 321; but a substantial compliance only is required; 36 *id.* 591; (*contra*, 34 *id.* 35.) Keeping the books in the safe at night, does not mean from sunrise to sunset, but from the close of business of the day according to custom; 88 Fed. Rep. 19; and where according to custom the door was locked but customers could get in by knocking, and the clerk who was in the store writing up books was absent for a short time when the fire occurred, the store was "opened for business" and the policy was not void; 54 Ark. 376. But where the insurance was on a stock of liquor in a saloon, it did not excuse the violation of the iron safe clause that the same books were kept for a hotel and the saloon, the latter being opened night and day except Sunday, and the books being needed for constant settlements with the guests in the hotel; 61 Ark. 207; (distinguishing the last two cases.) The clause was held not to have been violated by failure to keep a blotter, containing the record of the sales of the day before, locked in the safe; 35 S. W. Rep. (Tex.) 1060 (reversing 34 *id.* 463); 36 *id.* 590; and in the United States Circuit Court of Appeals, where a cash sales book covering twenty-one days before the sale was inadvertently left out of the safe and burned, and the books were kept in a primitive manner but showed purchases and credit sales, some cash sales, and an inventory, taken shortly before the fire, it was held that a finding of compliance with the policy was warranted; 68 Fed. Rep. 708; in another case it was said not to be an excuse for violation that through oversight the books were not put in the safe the night

before the fire; 48 La. Ann. 238.

Where the bookkeeper, fearing the safe would not stand, took out the books to remove them to a safe place, and some of them fell and were burned, it was held that the covenant was not broken unless he was negligent; 25 S. W. Rep. (Tex.) 720.

Where such a provision was inserted by fraud, a verdict for the plaintiff was not disturbed; 84 Ga. 759; and where the application showed in answer to inquiry that the books were kept in a dwelling at night a breach of the condition was not enforced; 13 S. W. Rep. (Ark.) 799.

The insurer must prove that the fire occurred at a time mentioned in the stipulation; 32 S. W. Rep. (Tex.) 243.

The character of the safe is not warrantable; 18 So. Rep. (Miss.) 928; and it is sufficient if it be one of a kind ordinarily known as fireproof; 4 Tex. Civ. App. 82. See FIRE-PROOF.

The stipulation in such a clause, that a set of books should be kept, including a record of all business transactions, does not require a book known as a "cash book," or any particular system of bookkeeping; 94 Ga. 785. The lost inventory of the business, within this clause, means the lost inventory of the goods insured; 35 S. W. Rep. (Tex.) 722. The clause is complied with, by an inventory made, and books kept from the date of the policy, but an invoice is not an inventory; 71 Miss. 608. The question whether there was reasonable time between the issue of the policy and the fire to make an inventory is for the jury unless the evidence is undisputed; 64 N. W. Rep. (Mich.) 15. Where the inventory was shown to the adjuster after the fire, and afterwards lost, there was a performance of the condition; 13 S. W. Rep. (Ark.) 1103. But where the books do not furnish the necessary data, to verify the accounts rendered, the policy is avoided; *id.*

Policies of insurance are frequently made available as collateral security to a mortgagee or other lienholder, by what is known as a *mortgage clause*, which see as to the rights of the several parties thereunder and the effect thereof upon the insurance and the right of action. See also MORTGAGE.

Conditions may be waived and the general principles of the law of *waiver* (*q.v.*) are to be applied, but it has been held that a waiver of the condition on one payment cannot be construed to cover violations on another which were not assented to; 29 Atl. Rep. (Del.) 1039.

Though a policy is the usual instrument by which insurance is effected, it is not necessary; 19 N. Y. 305; 25 Ind. 536; 26 La. Ann. 326; and it may be evidenced by a memorandum or note; 25 N. H. 169; 76 L. T. n. s. 228; 3 Grant, Pa. 123; or a letter; 1 Ohio N. P. 71; 14 L. C. Jur. 219. Where the correspondence was held sufficient to create a valid contract for a policy of fire insurance, it was held that, after the property had been destroyed by fire, the insured was entitled to a decree for the amount agreed to be insured, less premium; 94 U. S. 621. In the absence of a statute forbidding it, it may be verbal; 2 Dill. 26; 5 Pa. 339 (though this had been questioned; 4 Yeates 468); 73 Ill. 168; 94 U. S. 574; 21 S. E. Rep. (W. Va.) 854; 31 Ohio St. 633, overruling 16 Ohio 148; 63 Fed. Rep. 382; and when made without specifying any date for the insurance to take effect, commences immediately; *id.* A usage to show a parol contract was inadmissible; 14 Ins. L. J. (Mass.) 427. In Canada it was held that to recover at law, on a contract of insurance by a corporation, there must be a sealed policy, but on a parol contract the plaintiff may sue for a breach to deliver a policy, or proceed in equity; 16 U. C. Q. B. 477. The agreement to pay a premium is sufficient to support a verbal contract; 20 Fed. Rep. 766. See generally as to verbal contracts, Biddle, Ins. § 188, where the subject is treated historically.

An offer by a newspaper in each issue to pay a sum named to the heirs of one accidentally dying within twenty-four hours from the last issue, provided that the printed slip containing the offer should be

found on the person of the deceased, is a contract of insurance; 15 Pa. Co. Ct. Rep. 468.

The usual practice is for the agent, upon the payment of the premium, to issue what is termed a *binding receipt*, which is, in effect, an executory contract to issue a policy if the risk is accepted by the company, and, meanwhile, the insurance is in force. Such contracts are valid and will be enforced at law and in equity; 9 N. Y. 280; 73 Cal. 216; 11 Paige 547; and a charter provision requiring "all policies or contracts" to be signed by certain officers has been held not to apply to such agreements; 73 Mo. 371; 20 Wall. 560; 19 N. Y. 305; 31 Ohio St. 633. See AGREEMENT FOR INSURANCE.

Where a loss occurs, the ascertainment of the amount due upon the policy is termed *adjustment (q. v.)*. Notice of the loss must be given in accordance with the terms of the condition, which is precedent to recovery; 86 Ala. 558; L. R. 20 Ir. 93; 43 N. H. 621. This is distinct from *proof of loss (q. v.)*, which must be also made as stipulated, or, in default of express provision, in a reasonable time; 128 Pa. 392. See LOSS.

Other insurance may be taken on the same property without restriction unless there be such in the contract; 70 Md. 400; 14 Q. L. R. 298; 9 R. I. 346; and no notice is required unless so stipulated; 2 Wash. C. C. 186; but when the insurance is on property only one indemnity can be collected, and there is a right of contribution among insurers; 18 Ill. 553; 146 Pa. 561; but it is usual to stipulate that each insurer, if there are more than one, shall be liable only *pro rata*; 9 Fed. Rep. 813. As to excessive insurance on the same property, see DOUBLE INSURANCE.

It is usual in policies to have a time limit requiring an action to be brought within a designated period of the loss. Such condition is precedent to a recovery; 67 Ia. 338; 14 L. C. Jur. 256; and will apply in a forum other than that of the domicile of the insurer; 7 Gray 61. In some courts the time of the limitation is held to be computed from the date of the event which causes the loss; 91 Ill. 92; 47 Fed. Rep. 863; 51 Conn. 17; 19 Nov. Scot. Rep. 372; 18 Ont. 355; in others, from the time the loss was payable; 39 N. Y. 45; 132 Id. 334; 83 Cal. 473; 81 Ia. 135; 17 Fed. Rep. 568.

Efforts have been made both by contract and by statute to limit the right of suit on a policy to a particular jurisdiction; such provisions in a policy or by law have been held illegal; 6 Gray 174, 185, 596; 31 Mo. 518; May, Ins. § 490. Statutes which attempt thus to limit the jurisdiction are strictly construed, and as they generally provide that, after a loss, the directors shall meet and adjust the loss, and if it is not paid in a given time, suit may be brought in a particular court, the limitation is in many states confined to the exact case mentioned, and it is only where the amount has been so determined that it takes effect; 25 N. H. 22; 53 Me. 419; 22 Wis. 516; 4 Metc. 212; 7 Ind. 25; but in other cases the limitation has been enforced without reference to such previous ascertainment of the loss; 18 Ohio St. 455; 6 Id. 599; 17 Vt. 369. See May, Ins. § 491.

So, with respect to the effort to provide in the policy that the law of a certain state should determine its construction, where life policies have been issued in a state other than the same state of the company, it has been held that they are governed by statutory provisions in the state of the insured, although the policies stipulated that the contract was to be governed by the law of the same state. See LEX LOCI.

As to the rights and remedies of and against insurance companies in countries or states other than those of their domicile, and the effect of non-compliance with statutes regulating the manner of doing business, see FOREIGN CORPORATIONS.

It has been held that a provision that where there are several underwriters each is liable *pro rata*, the assured shall not sue more than one of the underwriters at one

time, and that a final decision in any action thus brought shall be decisive of the claim of the assured against each of the underwriters, who agree to abide the event of the suit, is not void as against public policy, but valid as tending to prevent a multiplicity of suits; and in an action to which all the underwriters were made parties defendant, a plea that it was brought in violation of the agreement was sustained; 6 N. Y. App. Div. 540. And under such condition timely service on one of the defendants is sufficient to prevent the running of the statute as against all the underwriters; *id.*

An insurer is entitled to subrogation (*q. v.*) in cases where such right would attach under the general principles applying to that subject; as, when payment is made for loss or damage to goods in transit, there is a subrogation to the rights of the owner against the carrier; 31 S. W. Rep. (Tex.) 660; 63 Fed. Rep. 34; 165 Pa. 428; 80 Minn. 382. And, on payment by the insurer of a loss which he was not legally bound to pay, he has a right of action against one through whose negligence the property was destroyed; 60 Ark. 325; he becomes entitled *pro tanto*, and should join the owner as plaintiff in an action for negligent burning; 66 N. W. Rep. (Wis.) 1144. So, an insurer of title who paid off liens prior to a mortgage, as to which the mortgagee was indemnified by bond of the mortgagor, was subrogated to the right of action of the latter on the bond; 67 N. W. Rep. (Minn.) 543.

In a recent English case it was held that, since a policy of fire insurance is a contract of indemnity, the insurer is entitled to recover from the insured not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the insured against third parties which have been renounced by him, and to which, but for that renunciation, the insurer would have a right to be subrogated; [1896] 2 Q. B. 377.

As to subrogation in insurance cases, see 54 Alb. L. J. 109 (credited to Sol. J.); 29 Am. L. Reg. N. S. 42; 13 Id. 737.

Expected profits may be insured, as crops, against hail and frost or other risks, even before they are sown, but the profits must be insured as such; 3 N. & M. 819; 2 East 544; 5 Metc. 391; 2 Johns. Cas. 36; 1 Sandf. 551; 2 Rob. La. 131; or the future profits of one to whom the insured has advanced money to pursue an enterprise; 32 Conn. 244; 10 Cush. 282; 2 E. D. Sm. 168; or a portion of the cargo of a ship expected to arrive, even if the insured has no property in such cargo, but has only purchased, for a specified sum, the right to take such goods for a further specified sum; 16 Pick. 397; but even if the insured has an ownership in the property, if he becomes insolvent before the arrival of the cargo and the goods are intercepted by the vendor, by right of stoppage *in transitu*, there can be no recovery on the policy; 10 B. & C. 99.

As to reinsurance, see that title.

See, generally, Beach; Biddle; May; Richards; Wood, Insurance; Finch, Dig. 1889-96; Sansum, Dig. 1877.

The several forms of insurance contracts are classified mainly with reference to the character of the perils insured against. See *infra*.

A contract by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation if, or when, the event shall happen by which the loss is to accrue. Holland, Jurispr. 12th ed., 303.

See CONCURRENT INSURANCE; EMPLOYERS' LIABILITY INSURANCE.

Accident Insurance. That form of insurance which provides for specified payments in case of an accident resulting in bodily injury or death, as distinguished from *casualty insurance*, which is a term applied to insurance against loss or dam-

age to property occasioned by accident. 155 Mass. 404. A foreign corporation, although an accident insurance company, has been held authorized to issue "horse or vehicle policies," "elevator policies," "general liability policies," and "outside liability policies;" *id.*

Accident insurance is intended to furnish indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to that proposition. In case of doubt or uncertainty the construction should be liberal in favor of the insured; 133 Ill. 556, reversing 85 Ill. App. 17.

A form of insurance common in England is against accident caused by vehicles. Under such a policy where the amount of liability was limited to £250 in respect of any one accident and £1,500 in any one year, where forty persons were injured by the overturning of one vehicle, it was held that the injury caused to each person was a separate accident; 60 L. J. R. N. S. 360. An insurance by the owner of a vehicle against damage suffered by him for injuries caused by the vehicle to passengers is termed a third party risk; 29 Scot. L. Rep. 836.

The usual language of such policies insures against death through external, violent, and accidental means. This has been held to cover death from shock and physical strain resulting from being run away with in a covered carriage, where there was no mark of physical injury nor contact with any physical object; 80 Me. 251; and see [1896] 2 Q. B. 248; suicide by an insane man; 120 U. S. 527; death from drowning; 5 H. & N. 211; s. c., on appeal, 6 Id. 839; falling into the water in a fit; 23 L. T. N. S. 820; 6 Q. B. Div. 42; death from inhaling illuminating gas; 112 N. Y. 472; 59 Ill. App. 297; 144 Pa. 79; 84 Va. 52; by taking poison; 133 Ill. 556; or an overdose of medicine; 44 Hun 599; 85 N. Y. 319; 105 Ind. 212; death caused by a piece of beef-steak passing into the windpipe while eating; 94 Ky. 547; death from blood-poisoning, caused by the bite of a mosquito (although poison was expressly excepted); 40 S. W. Rep. (Ky.) 906; falling into the water as the result of a wound; 47 N. Y. 52; falling on a railroad track in a fit and being run over; 7 Q. B. Div. 216; being struck by the handle of a pitchfork while making hay and having peritonitis as a result of it; 69 Pa. 43; spraining the back while lifting a heavy weight; 1 F. & F. 503; being attacked and killed by a highwayman; 89 Ky. 300; 2 Bigelow, L. & Acc. Cas. 738; accidental shooting by a deputy sheriff who did not know at whom he was shooting and did not intend to kill the assured (there being an exception of death from design either of the insured or another person); 65 Mich. 545; hernia resulting from an accidental fall (although the policy excluded hernia); 17 C. B. N. S. 122; rupture of a blood-vessel sustained while exercising with Indian clubs; 8 Biss. 362; falling from the cars while walking in the sleep; 58 Wis. 13.

It has been strongly contended that such cases as those enumerated were not within the ordinary accident policy because there was no extraordinary injury according to the ordinary meaning of the term, but, in reply to this in a leading case of drowning, the court said: "That argument if carried to its extreme length would apply to every case where death was immediate;" 6 H. & N. 839; and in a case of death from the inhalation of gas, the court said: "We think it a sufficient answer that the gas in the atmosphere as an extraordinary cause was a violent agency in the sense that it worked on the intestate so as to cause his death; that death is the result of accident or is unnatural, imports the extraordinary and violent agency of the cause;" 112 N. Y. 472. The view which these courts considered untenable was, however, taken by the Supreme Court of Pennsylvania on a policy exactly similar. The court said: "The object of the company is to insure bodily injuries produced in a certain man-

ner specified, that is, caused by external, violent, and accidental means; not injuries caused by any one of these means, but by all of them combined;" 103 Pa. 290; but this language seems to be a *dictum*, because there was a condition in the policy excepting death or injury caused by the taking of poison, and the point of the case was that an involuntary taking of poison by mistake was within the exception; but in a New York case of death from inhaling gas there was also a proviso excepting death caused by inhaling gas, and the court construed it "to mean a voluntary and intelligent act by the assured and not an involuntary and unconscious act;" 112 N. Y. 472. This case and the Pennsylvania case are therefore in direct opposition on the construction of the condition, and the former was decided after consideration of and with express dissent from the latter.

An exception that if the insured should die by his own hand, sane or insane, the policy should be void, "covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane, if the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its performance;" 65 Mich. 199. In this case it was held that whether a fall six weeks before the insured shot himself was the cause of the killing was too conjectural to be submitted to the jury as a direct cause of the suicide. See *CAUSA PROXIMA*.

It has been held that death was not the result of accident within the meaning of the policy where it was occasioned by epilepsy; 31 Fed. Rep. 322; sunstroke; 3 El. & El. 478; rupture caused by jumping from a train where nothing unforeseen happened from the time the insured left the platform to the time he alighted on the ground; 34 Conn. 574; 181 U. S. 100.

Where the insured was assassinated, there could be no recovery under a policy which excepted death or injury inflicted by design of himself or another; 127 U. S. 661; 87 Ky. 300; but where the death was the result of an accident, the fact that the negligence of the assured may have contributed to it is no defence in the absence of an express stipulation in the policy to that effect; 24 Wis. 28; 32 Md. 310; 6 Lans. 71.

Accident policies usually cover the risk incident to a specific occupation, a substantial change of which will, if it increase the risk, render the policy void. Such a stipulation is held to mean engaging in another employment as a usual business; 49 Ill. 180; but it was not such a change for a school teacher while disengaged to be employed in building operations; *id.*; or for one to engage in pitching hay while visiting his grandfather; 69 Pa. 43; or for a locomotive engineer to climb over the tender to apply the brakes on a car; 32 Md. 310. In all such cases the question what is a substantial change of occupation is to be left to the jury; 34 N. J. L. 371.

The expression "voluntary exposure to unnecessary danger," used in stating the exceptions to the liability of an insurance company upon an accident policy, refers only to dangers of a real and substantial character which the insured recognized, but to which he, nevertheless, purposely and consciously exposed himself, intending at the same time to assume all the risks of the situation. Voluntary riding upon the platform of a rapidly moving railroad car is not, of itself and as a matter of law, a voluntary exposure to unnecessary danger and presents a question of fact for the jury. Where an accident insurance policy exempts the insurer from liability for injuries received while violating rules of a corporation, the question is for the jury as to whether the insured knew of a rule of the corporation which he is alleged to have violated, and the court should charge that in order to bind insured, it must be one which the corporation enforced or used reasonable effort to enforce; 73 Fed. Rep. 754; opinion by Harlan, J., considering all the cases at length; and see 7 Am. L. Rev. 590, where the question whether death from

freezing while climbing Mount Blanc was or was not a voluntary exposure to unnecessary danger was discussed with reference to a case in which the point was raised but not settled, the suit being compromised.

In an exception prohibiting exposure to obvious or unnecessary danger and requiring due diligence on the part of the assured, there can be no recovery where death was caused by being struck by a railroad train while running along the tracks in front of it in the night-time for the purpose of getting on a train approaching in an opposite direction on a parallel track; 184 Mass. 175; nor where it was caused by falling from the platform of a railroad car between eleven and twelve o'clock at night when the train was in motion; 15 Blatchf. 216; or from unnecessarily passing on a dark and rainy night over a trestle known to be dangerous with two packages in his hands, although it was the usual route home of the assured and many others; 80 Ga. 541; or where a shop hand of a railway company went on the platform when the train was in motion to leave the train when it should stop to cross over by a switch to another track (the exception not being applicable to the exposure of railway employees in the performance of their duty); 41 Minn. 231; but where the insured by a voluntary act exposed himself to a hidden danger, the existence of which he had no reason to suspect, and thereby lost his life, his death was caused by accident and the company is liable; 102 Pa. 262; a clause prohibiting voluntary exposure to unnecessary danger does not prohibit one from walking or being on a railway bridge or road-bed; 74 Fed. Rep. 457; 39 N. Y. Supp. 912; see also where a passenger is overcome by the heat of the car, or nausea, and goes upon the platform; 39 Fed. Rep. 321; or getting from the platform at a depot upon the cars while in motion at a rate of speed less than that of a man walking; 24 Wis. 28; going to the rescue of a shipwrecked crew, although the policy prohibited the insured from engaging in the business of wrecking; 50 Hun 50; or by falling from the second story of a barn which the insured was having built, in consequence of the breaking of a joist having a secret defect; 34 N. J. L. 371.

The exception against death or injury happening while the insured was intoxicated, or in consequence thereof, prevents a recovery, without reference to the question whether the condition was the cause of the injury or not; 94 Ala. 434; 66 N. Y. 441; as, where the deceased, being under the influence of liquor, was killed by a pistol shot while dining with a friend; *id.* To be under the influence of intoxicating liquor within the meaning of such exception means to have drunk enough to disturb the action of the mental and physical faculties so that they are no longer in their normal condition; *id.*; the expression is equivalent to "intoxicated"; 94 Ala. 434. Where the death was caused by inadvertently taking an overdose of opium which had been prescribed by a physician, it was held within the exception of any death caused wholly or in part by medical treatment for disease; 14 Blatchf. 143.

The question frequently arises what is total disability for which the policy entitles the insured to claim indemnity. In an English case in which this question was much discussed, it was held that a solicitor who had sprained his ankle while riding on horseback and was under the care of a surgeon for six weeks, unable to leave the house or transact business which could not be attended to in the house, but could write letters, read law, and the like while lying on a couch, was not totally disabled; 5 H. & N. 546. This judgment was affirmed in Exchequer Chamber. The provision in this and similar cases is usually for a weekly allowance in case of accident causing any bodily injury of so serious a nature as wholly to disable the insured from following his business. Under such a clause total disability to labor must be shown; 5 Lans. 71; by it is meant dis-

ability from doing substantially all kinds of the plaintiff's accustomed labor to some extent, and that the assured must be deprived of the power to do to any extent substantially all the kinds of his usual labor; 8 Am. Law Reg. N. S. 233; where the provision was for total disability there could be no recovery if the assured were able to do some parts of the accustomed work pertaining to his business or, if totally disabled in his own pursuit, he should be able to engage in some other; 46 La. 681.

Where the provision was that the injured must be "wholly disabled to prevent him from the prosecution of any and every kind of business pertaining to his occupation," it was held error to instruct the jury that the defendant was to pay the amount agreed, if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor, that is, to do substantially all kinds of his accustomed labor to some extent;" 67 Wis. 174. See, as to total disability, 4 Harv. L. Rev. 176.

It has been held that the meaning of the word accident, as used in a policy, is for the jury, as it is also to determine whether there was exposure to unnecessary danger; 50 Ill. App. 223; or whether the total loss of three fingers and a part of another on the same hand, destruction of the thumb, and a cutting of the hand is a loss of the hand causing "immediate, continuous, and total disability" within the meaning of that clause in an accident insurance policy; 61 N. W. Rep. (Wis.) 292; and see 84 N. Y. Supp. 545, where the plaintiff's hand was cut off a short distance above the knuckles, leaving nearly the whole palm and part of the second joint of the thumb, and it was held to be a loss of the entire hand within the meaning of the policy; overruling 30 *id.* 881. See REPRESENTATION; ACT OF GOD.

A provision in a policy that the medical adviser of the insurer may examine the body of the insured or attend any *post mortem* examination which may be held, only authorizes examination of the body unburied and does not warrant exhumation and autopsy, nor does an exception of injuries of which there is no visible mark; 11 Misc. Rep. 36.

See, generally, Cook, L. & Acc. Ins.; Niblack, Mut. Ben. & Acc. Insurance.

Assessment Insurance: That where the benefit to be paid is dependent upon the collection of such assessments as may be necessary for paying the amount insured, it constitutes assessment insurance when the payments are not unalterably fixed by the contract. In old-line policies the amount of the premium is fixed unalterably, and the insurer's liability is definitely fixed. 1 Joyce, Insurance, 2nd ed., 82; 161 Mo. App. 579. A mutual benefit association provides insurance "upon the assessment plan," even though it agrees to pay a definite sum and has fixed rates of assessment which it has authority to receive in advance, where it has no "legal reserve," but only an "emergency fund," and it has the reserved right to increase or lower the rates of assessment. *Id.*; 83 Wis. 667. In insurance and business circles the words "assessment company," as distinguished from "old-line mutual" company, mean that in such first-named company the money to pay a death loss is collected by an assessment made upon those members who survive the member, the insurance upon whose life is paid. *Id.*; 85 Va. 643.

Insurance against Birth of Issue. A form of insurance common in England by which the heir presumptive protects his interest against either the birth of an heir apparent or the attainment of majority, or to a particular age by an existing heir apparent. It is also and more commonly practised by tenants for life under settlements, who are entitled to reversions in

fee simple subject to estates tail in their own issue by a particular marriage, and who, by this method, are enabled to mortgage their estates without burdening their life interests with premiums on life insurance. In this form of insurance the principal elements to consider are the age and the health of the party and the age at which women will cease to bear children. See *Jac. Ch.* 585, 586; 4 *Hare* 124; 5 *De G. & S.* 226; 10 *Beav.* 468; 19 *id.* 585; 13 *Jur.* 666; 17 *id.* 342.

Burial Insurance: A contract based upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum. It is a valid contract, and constitutes life insurance. 1 *Joyce, Insurance*, 2nd ed., 87; 171 *Ind.* 296. Such a contract has, however, been held void as against public policy and in restraint of trade, where the purpose of the association was to provide at their death a funeral and proper burial for the members, and the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings and outfit were to be furnished by and through a designated undertaker, or official undertaker. *Id.*; 86 *Ohio St.* 181.

Casualty Insurance. A contract by which a person is indemnified against loss or damage to property, occasioned by accident. The term is thus applied in contradistinction to *accident insurance* by the Massachusetts Supreme Court, in 155 *Mass.* 404. The question was whether a foreign company licensed to do business in the state, but by statute restricted to one kind or class of business, was authorized to issue policies covering special classes of accidents, involving bodily injury and death. In this connection the court said: "The distinguishing feature of what is known in our legislation as 'accident insurance' is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property, although occasioned by accident. So far as that class of insurance has been developed, it has been with reference to boilers, plate-glass, and perhaps to domestic animals and injuries to property by street cars, and is known as 'casualty insurance.'"

The distinction is founded in reason and the terminology is well adapted to the subject. Its precision is in sharp contrast to the vagueness and want of definiteness which characterize the references of text writers and judges to the various forms of insurance which have come into use with the increase in number of perils to life and property.

Among the perils covered by this kind of insurance are included: the loss of horses and cattle, theft of valuables, breakage of plate glass, loss by tornadoes or force of the elements, explosion or bursting of boilers, etc. These policies usually stipulate certain exceptions against which they will not insure, as fire and lightning; but such a policy was held to cover a loss by flood; 87 *Atl. Rep. (Pa.)* 402.

A carrier may lawfully insure against liability for loss of goods occasioned by the negligence of a servant; 66 *N. W. Rep. (Minn.)* 132; in such a case the liability of the insured becomes fixed on the happening of the accident, although the amount is contingent, to the extent that the amount which the insured may be adjudged to pay has not yet been ascertained; 82 *Md.* 535.

A policy against loss or damage to property, and loss of life or injury to employees of the insured or other persons, payable to the insured or the benefit of such persons or their legal representatives, is a contract of indemnity, and a person who is injured by such explosion cannot sue the insurer; 4 *N. Y. Supp.* 450.

In a policy on live stock the insurer is estopped to deny that the sum named in the policy is the insurable value of the horse; 58 *Ill. App.* 557. Where the policy covering "two horses" was cancelled as to

one, the insured may show that it was cancelled as to a mare covered by the policy; 64 *N. W. Rep. (Minn.)* 1018. The provision for notice to the insurer by telegram, of the sickness of an animal, did not require such notice of a sickness which lasted only ten minutes and did not recur for seven weeks; 67 *N. W. Rep. (Minn.)* 215. Where the insured had given notes for the horse, and in his contract for purchase stipulated that in case of the death of the animal within a certain time the vendor should take the insurance and give up the notes, it was not a breach of the stipulation in the policy that the vendee "is the sole, absolute, and unconditional owner;" *id.* The insurer is not bound by the consent of his agent to kill the horse insured, although suffering from an incurable disease; 59 *N. W. Rep. (Ia.)* 1.

Where plate glass was insured and the insurer, exercising his option, employed a person with whom he had a contract for that purpose to replace it (the policy providing that the insured should when necessary remove any woodwork, gas fixtures, or other obstruction), the negligent removal of gas pipes by the contractor and a resulting explosion causing a breakage of the new glass, did not render the insurer liable; 88 *N. Y. Supp.* 773.

Credit Insurance. A contract by which the insured is indemnified against loss by the failure of his customers to pay for goods sold to them. It is insurance against excess loss by the insured, *i. e.* against a loss which is in excess of a specified percentage of gross sales. It usually limits the losses insured against to a fixed amount by reason of sales to any one person, and limits the sales, covered by the policy, to customers having at least a specified minimum commercial rating by a specified commercial agency.

The insured is frequently termed the "indemnified," and so referred to in the policy.

A contract by which a corporation, though called a guarantee or surety company, undertakes, in consideration of premiums paid, to indemnify the other party to such contract against losses of uncollectable debts, is not a contract of suretyship, but a policy of insurance; 73 *Fed. Rep.* 95; 66 *N. W. Rep. (Wis.)* 528.

It is like any other insurance contract and is governed largely by the same rules; *id.* 68; *id.* 529; 41 *id.* 742; 132 *N. Y.* 540; 165 *Mass.* 501. It falls within the implied prohibition of a statute authorizing specified forms of insurance, against all not mentioned, and not being authorized by the Massachusetts Insurance Act it is invalid; *id.* The agent who solicits it is within the purview of a statute making him the agent of the insurer; 66 *N. W. Rep. (Wis.)* 528.

There is a distinction between this loss and other kinds of insurance with respect to the value of the policy, which has been thus stated: The loss provable on a policy of insurance is ordinarily the reserve value of the policy, or the amount sufficient to re-insure the holder in a solvent company for the same amount, to be paid upon a loss happening on the same conditions and within the same time. Credit insurance is peculiar; there does not appear to be any reserve value to the policies, nor are there any general tables to show the rate of re-insurance, nor any other solvent company in which re-insurance could be obtained. When no losses occurred it may be assumed that the premium is a fair price for the risk, and the loss may be taken to be a proportionate part of the premium. When actual losses have been sustained after the insolvency and before the proof, these losses may be accepted as evidence of the value of the policy. 19 *N. J. L. J.* 18; s. c. 32 *Atl. Rep. (N. J.)* 690.

Under a policy of indemnity to the insured, to the extent of \$10,000, against losses in excess of one-fourth of one per cent. of their annual sales, twelve per cent. additional to be deducted from the total gross losses, the claim not to exceed \$7,500, in any one firm, where there was a loss

with one firm of \$20,000, the total gross loss from which deductions were to be made was \$7,500, and the balance was the indemnity to be paid; 164 *Mass.* 285.

A policy of credit insurance was terminated by the insolvency of the insured, and the deduction to be made before the "excess" was ascertained was calculated on the amount of sales made up to the time of insolvency and not on the amount stipulated for the term of the policy; 26 *Ins. L. J.* 842.

A provision in such a policy that amounts realized from other security or indemnity shall be deducted before the adjustment of a loss, does not entitle the insurer to deduct the proceeds of a policy in another company which provides that it shall not cover losses insured by the first company, but shall only attach when that company's policy is exhausted; 73 *Fed. Rep.* 81. One who is the agent of the insurer for the purpose of soliciting such insurance, transmitting applications, and collecting premiums, and who receives pay therefor, has power to make an additional agreement providing that if the customer is not rated in Dun's and is rated in Bradstreet's, the latter shall be binding on the insurer; 66 *N. W. Rep. (Wis.)* 528; and to vary details of the policy as to credit rating; *id.*

Employer's Liability Insurance. A contract by which the company agrees to reimburse an employer for any loss occasioned by his liability for damages to an employee, injured in his service.

The liability of the insurer becomes fixed on the happening of the accident or casualty, even though the amount of such liability is contingent, to the extent that the amount which the insured may be adjudged to pay has not been ascertained; 82 *Md.* 535.

Under a policy of insurance against damage for which the insured may be liable under an employer's liability act (*g. v.*) where the workman has recovered damages for injuries in a common-law action, and not under the statute, the insurer will not be liable to reimburse the amount so recovered; 16 *Can. S. C.*, 4th ser. 212; but where the policy contained a clause agreeing to indemnify the insured against damages sustained by the employee while engaged in operations connected with the business of iron work, it was held to cover injuries received by reason of the construction of a building for the use of such business; 67 *N. W. Rep. (Wis.)* 46.

A policy which provides that the employer shall not settle with an employee without the consent of the insurer, who was to assume control of litigation, is a contract of indemnity against liability, and payment by the employer of a judgment recovered against him is not a condition precedent to the insurer's liability; *id.*; and a person who is injured cannot sue the insurer; 4 *N. Y. Supp.* 450. But where the insurer was prohibited from suing until after judgment against him, in which case an action might be brought within thirty days after such judgment, it was held that the contract was not one of indemnity merely, so that an action would lie after judgment was recovered against the employer, though it was paid by him, such payment not being a condition precedent to recovery; 65 *N. W. Rep. (Minn.)* 353; nor is a discharge of liabilities by the insured, under a clause in the policy promising to pay "all damages with which the insured may be legally charged," such a contract being not one of indemnity alone, but also a contract to pay liabilities; 86 *S. W. Rep. (Ark.)* 1051. When the insured was required to give immediate notice to the insurer upon the occurrence of an accident and notice of any claim on account of it, the notice under the condition is not required until an accident happens and the employer has received notice of a claim made on account thereof; 65 *N. W. Rep. (Minn.)* 353.

Such a policy is in no sense a contract between the insurer and the employee, and any sum paid by the company to the employer on account of the death of an em-

policy, whose widow had a right of action, is not an asset of the estate of the deceased; 22 S. W. Rep. (Ga.) 141.

It is generally provided in such policies that the insurer shall have control of the defence of any suits against the employer on claims covered by the insurance, and such a condition is strictly enforced; 15 Can. L. T. 86.

Employers' Liability Insurance. Insurance taken out by an employer to protect him against loss on account of injury to his employees while engaged in his service. 142 Ky. 530, 134 S. W. 877.

Endowment Insurance: A contract evidenced by an instrument styled a policy, by which one party, for a consideration called the premium, promises to pay a specific sum of money at a time stated, or at the payee's death if it occurs earlier than the date fixed for payment. 11 A. & E. Ency. 2nd ed., 24; 1 Biddle, Ins. § 5. In its broadest sense it includes tonnage insurance (*q. v.*) as all tonnage policies are written on the endowment plan combined with the survivorship feature. *Id.*

Fidelity Insurance. A contract to indemnify the insured against loss by reason of the default or dishonesty of the employee.

Bonds of indemnity given by fidelity insurance companies are analogous to ordinary policies of insurance, and are governed by the same principles of interpretation; 68 Fed. Rep. 459.

All conditions in the policy must be complied with as in other cases of insurance, and where one of them is the prosecution of the person whose action is insured against, before he can recover, against the insurer, it was held, by an equally divided court, that the insured must conform to this condition even if he thereby became liable to an action for damages; 9 Ins. L. J. 160.

A statement in the application as to the frequency of measures usually taken by the employer to secure the fidelity of the employee is a warranty the breach of which will defeat recovery; 28 Scot. L. Rep. 394; but in an application for insurance, declarations of the integrity of a clerk, in answer to questions which manifestly relate to the course of business of the employer, are mere representations and not warranties; 7 Exch. 744. Where the bond provides that answers made to questions asked in the application shall be warranties, and the answers are made on the employer's "best knowledge and belief," mere falsity of the answers is not sufficient to avoid the bond, but the company must show that they are "knowingly false"; 68 Fed. Rep. 459; and if such answers involved no misrepresentation or concealment, the contract could not be affected by loose parol statements, or concealment of facts about which no inquiry was made, or conduct on which no reliance was placed; 63 *id.* 48.

A representation that the person whose integrity is insured "has never been in arrears or default of his accounts" covers any which may have occurred prior to the time when he entered the service of the insured; 30 U. C. C. P. 360. To charge an embezzling employee with interest on the money embezzled converts the embezzlement into a debt and the insurer is not liable therefor; 66 N. W. Rep. (Wis.) 360.

Leaving money temporarily in an insecurely locked room when there were various means of safe-keeping available, was held a violation of a guarantee of "diligent and faithful performance of his duty," for which an insurer was liable; 6 Leg. N. (Can.) 311; 16 Can. L. J. 384. So allowing a customer to make an overdraft on a bank was held negligence in the bank's agent who permitted it, the agent and the customer being together involved in brokerage transactions; 7 *Revue Legale* 57; s. c. 14 L. C. Jur. 186.

Where the employer retains the employee in his service after he knows of the latter's dishonesty, and without notice to and assent of the insurer, he cannot recover; 71 N. W. Rep. (Minn.) 261; but this rule will

not apply to mere breaches of duty or contract obligation, not involving dishonesty of the servant or fraud and concealment on the part of the master; *id.*

The employee is bound to reimburse the insurer for the loss sustained through him; 65 N. W. Rep. (Minn.) 351; but, upon the payment of a loss, the insurer is subrogated to the rights of the employer in the prosecution of dishonest employees; 22 Fed. Rep. 66; 639; as to any securities held with respect to the matter insured; 2 Vt. 518. And a stipulation between the insurer and the employee that the evidence of payment by the insurer to the employer should be conclusive evidence against the employee as to the fact and extent of his liability to indemnify the insurer, is void as against public policy; *id.*

Where the indemnity was for one year, and it was provided that a claim under the bond or any renewal thereof should embrace only acts during its currency, it was held that each renewal was a separate contract, and the discovery, during the term of the renewal of theft committed during the running of the bond under a previous renewal, would not make the company liable therefor, when the discovery was too late to hold the insurer under the bond on the renewal in force when the thefts were committed; 33 S. W. Rep. (Ky.) 323; and when it was provided that any claim under the bond should cover only defaults committed during its currency, and within twelve months prior to its discovery, it was held that it did not cover a default committed more than twelve months prior to such discovery which would have occurred within the year but for the falsification of the books within the year preceding; 71 Fed. Rep. 116, reversing 67 *id.* 874.

In a recent federal decision on this subject, it was held (1) Where a policy stipulates for a notification of the dishonesty of the employee as soon as practicable after the occurrence of the act, and the evidence as to when the dishonesty was discovered was conflicting, the question what is a reasonable time is for the jury. (2) It is not necessary to give notice of suspicions of dishonesty. (3) The fact that the insured corporation has passed into the hands of a receiver will not absolve the insurer from liability. (4) Where proof of loss under the bond is set forth with reasonable plainness and in a manner which a person of ordinary intelligence cannot fail to understand, a failure to explicitly aver that a loss has been caused is immaterial. (5) The fact that one member of a corporation was cognizant of an employee's dishonesty, and that fraudulent collusion existed between them, cannot make the corporation responsible for a false certificate of character issued by him without the knowledge of other directors; 72 Fed. Rep. 470.

Fire Insurance. A contract by which the insurer, in consideration of a certain premium received by him, either in a gross sum or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain to a certain amount, in his property mentioned in the policy, by fire during the time agreed upon. Fire insurance is said to be in effect a contract of indemnity against loss or damage suffered by an owner or person having an interest in the property insured. 86 Me. 518.

The principles applying to the subject are, in general, those governing marine policies and other kinds of insurance of property against the various perils which attend its use and ownership, and therefore the point to be mainly considered, as applied to fire insurance alone, is the exact definition of the peril insured against. With respect to the nature of the contract as an indemnity, the necessity of an interest in the property, the policy and the application, the effect of warranties and representations, respectively, and the loss and its adjustment, reference should be had to the discussion of the subject, generally, *supra*, and in the various titles referred to.

It has frequently been said that to re-

cover under a fire policy there must be an actual fire or ignition, and that it is not sufficient that there has been an injurious increase of heat which caused damage to the insured property, while nothing had taken fire which ought not to be on fire. The authority usually relied upon, for this general statement, is the early and leading case of *Austin v. Drewe*, 6 Taunt. 436, but this case has been much criticised; *Cushing J.*, in 10 Cush. 356; 1 Bennett, Fire Ins. Cas. 104, note; 13 Ill. 676; May, Ins. § 402.

A fire in a theatre, caused by the excessive heating of its walls by a fire outside, was held to be covered by the policy; 11 Allen 386; and when a building is blown up by gunpowder to prevent the spreading of fire the insurer against fire is liable if, but for being blown up, it would have been burned; 21 Wend. 367; 3 Phila. Pa. 323; 41 Ill. App. 395; L. R. 3 Exch. 71. These cases are distinguished from explosion, which is not fire, within a fire policy, when it occurs some distance off; 19 C. B. N. s. 126; 15 La. Ann. 217; even though it was caused by fire; *id.*; and when the explosion is within the building, there must be ignition to bring it within the fire insurance; 11 N. Y. 516; but damage from fire, caused by explosion on the premises is covered; 10 Cush. 356; 103 Mo. 595 (unless it is expressly excepted; 3 Phila. Pa. 323); so also if the damage is from explosion caused by fire, as where a steamboat was burned as the result of an explosion of gunpowder; 11 Pet. 213; or when coals were thrown out of the stove; 127 Mass. 346. In this case the policy contained the provision that "if a building shall fall, except as the result of a fire," the insurance should cease; and this was held to apply to inherent defects in the building. And when, under a similar policy "against fire originating in any case," there occurred an explosion and loss, it was held immaterial whether the fire resulted in combustion or explosion; 33 Mo. App. 394.

A loss by reason of fire started by an explosion caused by a fire coming in contact with escaping gas was not within a policy which excepted loss by reason of or resulting from any explosion whatever; 2 Ins. L. J. 190. When damages by explosion are excepted unless caused by fire, the insurer is held liable only for the result of fire and not of the explosion which caused it; L. R. 3 Exch. 71; or by one caused by fire in its course; *id.*; *contra*, 2 Fed. Rep. 633; 56 Md. 70.

A fire in a chimney, caused by accidental ignition of soot, or smoke issuing from such fire, is within a policy covering all loss or damage by fire to all goods contained in the building; 166 Mass. 67. So also a loss by spontaneous combustion was held to be within a fire policy; 9 L. C. Q. B. 443; but see a criticism of this case in 65 Md. 162. Where a policy insures against explosion and accident and there was an exception of explosion or loss caused by the burning of the building, a destruction of the property by an explosion caused by raising a cloud of starch dust in an endeavor to extinguish flames was held a fire loss and not within the policy; 57 Fed. Rep. 294, reversing 48 Fed. Rep. 198.

Fire insurance does not cover damage by lightning without combustion; 37 Me. 256; 14 N. H. 341; even when the policy covers "fire, by lightning;" 4 N. Y. 326. It is quite usual to add to a fire policy what is known as a "lightning clause," which covers loss from that cause with or without fire; but a company authorized to take fire risks is not thereby authorized to insure against lightning; 37 Me. 256. A policy of insurance against lightning was held to cover destruction by tornado when the former accompanied the latter; 54 Wis. 433.

Under a lightning clause attached to a fire policy, on horses "contained in" a barn, the insurer was held liable for a brood mare pasturing in a field. The policy against loss by lightning was said to be a contract of insurance of a peculiar kind, which must be construed in a reasonable, common-sense view, and so as not to reduce the contract to an absurdity; 114 Pa. 431; 20 W. N. C.

Pa. 370; in these cases the insurance was on horses alone, and, on that ground, they were distinguished in a later case, in which the policy embraced also property kept in a barn, other than live stock, and the company was held not liable for a horse killed by lightning while in pasture; 130 Pa. 113.

Where an insurance policy excepts loss caused directly or indirectly by fire it is an accident, and not a fire, policy, and the complaint must show that the loss was not caused directly or indirectly by fire; 51 Fed. Rep. 155.

When the insurance was against loss by "fire or storm," it did not cover damage by a freshet caused by melting snow with prevailing south winds and rain; 3 Phila. Pa. 38.

The exception of "loss by fire occasioned by mobs or riots," does not extend to a loss from the burning of a bridge by military authorities in time of war; 50 Pa. 341; of the risks of this class, usurped power is not an ordinary mob but a rebellious one or one having political purpose; 2 Wilson 363; it is "rebellion conducted by authority;" Lord Mansfield in *Langdale v. Mason*, 2 Marsh. Ins. 792; but it is not necessary that the destruction be commanded by a superior officer; 42 Mo. 156; insurrection is "a seditious rising against the government, a rebellion, a revolt;" 1 Jones, N. C. 126; and a riot is "where three or more persons actually do an unlawful act, either with or without a common cause . . . the intention with which the parties assemble, or at least act, being unlawful;" *id.*; but in another case it was held that the destruction of property in a riot is within the exception even if the rioters assembled originally for a lawful purpose; 5 La. Ann. 482.

The exemption of loss "by explosion of any kind, by means of invasion," etc., means by explosion and invasion, etc., not explosion caused by invasion; 14 W. Va. 33. See CIVIL COMMOION; INSURRECTION; INVASION; MOB; RIOT; USURPED POWER.

Losses caused by the effort made to prevent the destruction of property by fire must be borne by the insurers and not by the insured; 3 Phila. Pa. 193; as by water; 19 La. Ann. 297; 10 Gray 159; or theft; 34 Pa. 96; 49 Me. 200; 30 Mo. 160; unless expressly excluded; 17 La. Ann. 181; or removal when required by due diligence, according to the circumstances; 11 Mich. 425; 13 Ill. 676 (but see 3 Pa. 407); or falling of walls after an interval of a day; 7 So. Seas. Cas., 1st ser. 52; but the fire must be the proximate cause; 37 Mo. 429. See 10 Gray 15.

Insurance against fire covers a loss by the negligence of the insured not amounting to fraud; 58 Pa. 419. The contract of fire insurance is to be construed with reference to the laws of the state in which the property is situated and the policy issued; 164 Mass. 291; 33 Atl. Rep. (N. H.) 731.

An insane person cannot be held, in setting fire to his property, to have had such a fraudulent or wrongful design as to defeat the insurance thereon, though his estate may afterwards be called upon to respond for the act; 20 N. Y. S. 344; 35 Hun 475.

See, generally, Clement, Dig. F. Ins. Dec.; Bennett, Cases; Flanders; Wood; Ostrander, Fire Ins.; Hine & Nicholas, Digest; Litt. & B. Dig.

Guaranty Insurance. This term has sometimes been used to express indiscriminately the classes of insurance herein entitled Credit, Fidelity, and Title insurance, (*q. v.*). The latter designations are conceived to be better adapted to the subject-matter, and their employment is not only the better usage but undoubtedly leads to a clearer understanding of the varied subject-matter now involved in the law of insurance.

The expression "Guaranty Insurance" has, however, an extended use in England and Canada, and is there used to designate insurance of the integrity of employes, the phrase "policy of guaranty" being in frequent use by the courts; 7 Jur. n. s. 1109; 30 U. C. C. P. 360; 16 Can. L. J. 334; 14 L. C. Jur. 186.

The term is also used in a few English cases involving the guaranty of merchants against losses in business from the bankruptcy, insolvency, or assignment with preference of their customers; 7 H. & N. 5.

In an American case of a date long prior to the use of these modern forms of insurance, an action of debt was sustained upon a policy of insurance guaranteeing to the bearer the payment of a note, and it was held that there was authority to issue such a policy under charter powers such as were at that time conferred upon insurance companies generally, and it was also held that the policy passed by delivery; 8 G. & J. 166.

Indemnity Insurance. See EMPLOYER'S LIABILITY INSURANCE, *supra*.
See PAID UP LIFE POLICY; TRAVELER.

Industrial Insurance: Except where otherwise defined by statute, an insurance upon life, for a small or limited amount in consideration of a premium payable in small instalments and collectible weekly, or at some other short periodical interval. It includes both adult and child insurance, and amounts in fact to burial insurance (*q. v.*).

A policy of contract is *industrial*, and not *accident*, insurance where it contains the limitation above stated, and also the provision that in the event of death from accident within six months from date of the policy "the full amount of insurance named in the first schedule will be paid." It is not the giving of direct affirmative benefits of a special kind on account of the accident. It constitutes simply an exception of this class of cases from the ordinary rights of an insured person, which limitation was established to prevent fraud of a kind bearing no relation to deaths by accident. 1 Joyce, Insurance 2nd ed., 85, 86; 208 Mass. 386.

Life Insurance. The insurance of the life of a person is a contract by which the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time.

An agreement by the insurer to pay to the insured or his nominee a specified sum of money, either on the death of a designated life, or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended. Biddle, Ins. § 2. Bunyon's definition varies little, as does that of Park, but the latter elaborates the consideration which is described as "a certain sum proportioned to the age, health, profession, and other circumstances of the person whose life is the object of insurance. Park, Ins. ch. xxii. In a leading case it was said by Parke, B., to be "a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed, it is constant and invariable;" 15 C. B. 365.

A mutual contract by which the insurer, on the one hand, comes under an obligation to pay a certain sum of money upon the death of the insured, who, on the other hand, becomes bound to pay certain sums, either annually or otherwise, in the name of premiums, and these obligations are counterparts of one another. 3 Can. S. C. 4th ser. 1078.

This form of insurance, it has been said, "is substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money;" Biddle, Ins. § 4.

The person whose life is insured is frequently termed the "life."

The sum to be paid in case of loss depends entirely upon the stipulation in the policy, and not at all upon the amount of the pecuniary interest in the life; 23 Conn. 244.

It is settled that there must be an insurable interest, as to which see that title.

A large proportion of life insurance is now effected through the medium of beneficial associations (*q. v.*); they are generally formed under state incorporation laws and are subject to their own rules and regulations so far as they are consistent with the general or statutory law of the state. The benefits and advantages conferred by these associations are held to be insurance, and subject to regulation by the insurance laws of the state; 41 N. W. Rep. (Ia.) 4; 67 Md. 117. While the rules and regulations enter into and become a part of the contract of insurance, the usage of the association will not bind courts in construing the contract, if the latter be clear and unambiguous; and words having a fixed meaning, either general or technical, will be interpreted according to that meaning as in other cases; 31 Fed. Rep. 122. See INSURANCE COMPANY.

Some of the conditions of policies of life insurance are peculiar to this class of insurance. Among the most important of these are those relating to self-destruction and insanity, as to which see SUICIDE.

Entering the military service is also usually stipulated against, but death at the hands of a roving band of thieves and robbers, while engaged as an engineer in building a bridge, under the direction of a military commander, is not within such a stipulation; 48 N. Y. 34; but even an involuntary entrance will defeat a recovery; 44 Ga. 119; as also, serving on the staff of a general, although the insured received no commission; Mitchell v. Mutual Life Ins. Co. of New York, cited in Bliss, Ins. 643. The receipt of the premium by the insurer, after a known violation of the condition against residence abroad, is a waiver of the right to a forfeiture; 23 Conn. 244; whether the knowledge be actual or constructive; 5 De G. M. & G. 265; L. R. 11 Eq. 197. Where a condition against absence from home beyond a stipulated time is violated, the insured will be excused if he be detained by reason of illness occurring within the time specified; 3 Bosw. 530; but not where the illness occurs after the limits of the stipulation; 5 R. I. 38. Where the contract restricts the insured to the settled limits of the United States, it covers all regions within the boundaries of the country, whether inhabited or not; 22 N. Y. 427; and a permission to travel by sea in "a first rate vessel" will cover any mode of travel whether by cabin or steerage; 13 Gray 434.

The weight of decision has been in favor of the view, that the contract of *life insurance* between citizens of different states is not dissolved, but only suspended, by a war between the states; 45 N. Y. 54; 9 Blatchf. 234; 9 Am. Rep. 169; 10 id. 535; 13 Wall. 159; but, *contra*, 41 Conn. 272; 93 U. S. 24.

See, generally, Bacon; Bliss; Bunyon; Cook; Crawley; Farnen, Life Ins.; Dowdeswell; Meech, Tables; Hine and Nichols, Assignment of Life Ins. Policies; Bigelow, Cases.

Lloyd's Insurance. See LLOYD'S INSURANCE.

Marine Insurance. A contract of indemnity by which one party, for a stipulated premium, undertakes to indemnify the other, to the extent of the amount insured, against all perils of the sea, or certain enumerated perils, to which his ship, cargo, and freight, or some of them, may be exposed during a certain voyage or fixed period of time.

A contract of indemnity (not perfect but approximate; 1 H. L. Cas. 287; 4 App. Cas. 755); against all losses accruing to the subject-matter of the policy from certain perils during the adventure. This subject-matter need not be strictly a property in the ship, goods, or freight; 2 B. & P. N. R. 269; L. R. 7 Q. B. 302; any reasonable expectation of pecuniary profit from the preservation of the subject-matter is insurable as a marine risk; as, where the joint

owners of a vessel and cargo engaged in a joint adventure have a lien for their several interests and for advancements, each part-owner had an insurable interest in the joint venture; 124 Pa. 61.

The insured must have a lawful interest at the time of the loss. See *INSURABLE INTEREST*.

The contract is one recognized by the general law and usage of nations, and therefore either native or alien may be insured. It was settled in England after much judicial discussion (and some temporary legislation) that the insurance of enemy's property is illegal; 4 East 896; 13 Ves. 64; see 3 Kent 254. The same rule was recognized by continental jurists; *id.* 255, note (b); Val. Com. ii. 32; and in this country; 16 Johns. 438, where the subject was extensively discussed, and it is said that "it may be considered the established law of this country;" 3 Kent 256. Such contracts, made before the outbreak of war, are annulled by it; Snow, Lect. Int. L. 101.

It may also be in favor of A, or whom it may concern, but those general words will only apply to a person with an interest in the subject and who was in the contemplation of the contract; 2 Wash. C. C. 391; 98 U. S. 528; 6 Paige 433; 129 N. Y. 237; if such person has authorized or adopted it; 44 N. H. 238. The intention of the insurer need not have fastened upon the very person, who seeks to take the benefit; an intention covers a person who takes such relation to the insurer as brings him within the clauses of the policy; 129 N. Y. 237. See 40 Me. 181; 5 Bosw. 369. The insurance "on advances" is distinct from the ship itself; 1 U. S. App. 183.

As to who may be insurers in a marine policy there is no special rule.

An insurance on a ship named makes the latter a part of the contract and no other can be substituted, but a cargo may be changed from one ship to another; 3 Kent 257; and the master may be changed; 12 Johns. 188. An insurance on the ship includes everything appurtenant to it; Boulay-Paty iii. 379; 1 Term 611, note. An insurance on goods need not name the ship, but may be "on any ship or ships;" Emer. i. 173; 2 H. Bla. 343.

Marine policies in England and this country usually contain the words "lost or not lost," and in such case they cover losses already accrued as well as future ones; 27 N. J. L. 645. It is so without the words in other foreign countries; Roccus, *de Ass.* n. 51; 3 Kent 259; and it was said by Story, J., that "it would be so without reference to the words;" 2 Summ. 397.

The most perfect good faith is required in this contract with respect to representations, warranties, and concealment, as to all of which see the several titles.

The insured is required both to pay the premium, and to represent fully and fairly all the circumstances relating to his subject-matter of the insurance, which may influence the determination of the underwriters in undertaking the risk or estimating the premium. A concealment of such facts amounts to a fraud, which avoids the contract; 1 Marsh. Ins. 464; Park. Ins.; 3 Kent 282-7 and notes.

Where a policy covers a loss by perils of the sea or other perils, the insured may recover for a loss occasioned by the negligence of the master or crew or other persons employed by him; 11 Pet. 213; 2 Metc. 432; 14 How. 351; L. R. 4 C. P. 117; 117 U. S. 323. As to the perils insured against generally, see *PERILS OF THE SEA*; *RISKS AND PERILS*; and as to the different kinds of marine policies, see *POLICY*.

If, before the termination of the adventure, the assured has parted with all interest in the subject-matter of the insurance, he cannot recover on any loss subsequent to his transfer of the property; 11 M. & W. 10; L. R. 7 Q. B. 302; and the insurer can take nothing by subrogation but the rights of the assured; 1 Pet. 193; 12 How. 466; 17 *id.* 152; 13 Wall. 367; 105 U. S. 630; 111 *id.* 584; 103 Mass. 219.

See, generally, Arnold; Emerigon; Duer, *Marine Ins.*; Hine & Nichols. Dig.; 3 Kent,

Lect. 48. See *HULL AND MACHINERY*.

Mutual Insurance. See *MUTUAL INSURANCE COMPANY*.

Insurance on Profits. See *INSURANCE, Rental Insurance*.

Rent Insurance; Rent Guaranty Insurance: Rent insurance is that class of underwriting which offers indemnity or a guarantee to the lessor, against loss of rents resulting from fire rendering the property untenable; or against loss to a tenant, where his lease does not exempt him therefrom, by reason of an obligation to pay rent while the premises, as the result of fire, remain untenable (155 Cal. 521); or to vendors, against loss of rentals in case the vendee fails to make certain improvements on realty and complete certain buildings within a specified time. 1 Joyce, *Insurance*, 2nd ed., 110, 111; 228 Pa. 373. Insurance against loss of rentals is in the nature of or analogous to insurance on profits, (38 Ins. L. J. 491), and also to a valued policy. *Id.*; 155 Cal. 521.

Strike Insurance: A contract whereby, for a consideration, the insurer agrees to indemnify and guarantee firms, corporations or other persons carrying on manufacturing, against damage or loss, directly or indirectly, resulting from any interference with, or suspension or interruption of business or the use and operation, wholly or partly of a manufacturing establishment by reason of employees strike. 1 Joyce, *Insurance*, 2nd ed., 111; 83 Conn. 393.

Title Insurance. A contract to indemnify the owner or mortgagee of real estate from loss by reason of defective titles, liens, or incumbrances.

Answers to questions in applications for such policies are held to amount to a warranty and the question of materiality cannot be raised; 50 Minn. 429.

Where a title insurance company undertook to defend the interest of insured in the premises against a lien, it was bound to protect him through all stages of the proceeding to enforce the lien, as well after as before judgment therein, or notify him that it could not do so, and furnish him necessary information of the status of the proceeding in time to enable him to protect himself; and if, after giving such notice, the company defended the proceeding, but thereafter abandoned the defence, it was necessary for it to give insured another such notice; 66 N. W. Rep. (Minn.) 364.

Where an insurer agrees to indemnify a mortgagee against loss not exceeding \$2,200 by reason of incumbrances, and to defend the land against such claims, a loss occurring by reason of the negligence of the insurer is not limited to the \$2,200; 62 N. W. Rep. (Minn.) 287.

Under a title insurance policy, the fact that the conveyancing was done, not by the insurer but by the conveyancer of the insured, was held no defence, and the right of the insurer to do conveyancing, draw deeds, write wills, or the like, was denied, and their action in assuming such right, unwarranted by their charter, was declared to be a usurpation on the commonwealth; 9 Pa. Co. Ct. Rep. 634.

In cases of defective title, or an incumbrance requiring removal, the insured would be entitled, in an action on the policy, to recover the costs and expenses incurred in curing the defect or removing the incumbrance; but in case of total loss of title the value of the property lost is the measure of damages, and where the insured had been compelled to pay more than the amount of the policy to get a good title, judgment was entered for that sum; *id.*

When the title was insured under a policy to the mortgagee and the latter bought in the property at a foreclosure sale, the purchase did not cancel the mortgage so as to annul the policy, but the insurer was liable to redeem the property from a sale under prior mechanic's liens; 70 Fed. Rep. 194.

See *LIEN*; *MORTGAGE*; *TITLE*; *WARRANTY*.

Tontine. A system of insurance which under various forms is based upon the idea of a loan or investment of property for the benefit of a number of persons, the income at first being divided among all and the shares of members who die passing not to their own legal representatives but to increase the interest of the surviving member, until, at last, after the number of members has gradually diminished by successive deaths, the last survivor takes the whole income, or, if such be the terms agreed upon, the whole principal. The system took its name from Lorenzo Tonti, an Italian of the seventeenth century, who first conceived the idea and put it in practice. Merlín, *Repert.*; Dalloz, *Dic.*; 5 Watts 351.

A policy of this character was the subject of litigation in the Massachusetts Supreme Court in a case in which the system is illustrated. It was to continue ten years if the insured should so long live, but in case of his death before that time, the dividends would not inure to the benefit of his estate, but be held by the company for the benefit of other policy holders and forfeited by him. The estate of the deceased received only the amount of the policy, which, however, would be forfeited for non-payment of premiums during the tontine term; policies of this character are kept in classes of ten, fifteen, or twenty years, called respectively the tontine periods, and accounts are kept with the funds of each class to ascertain the amount due upon each policy at the expiration of its tontine term, at which time the surplus profits are apportioned equitably among such policies as complete the term; 145 Mass. 56. Under such an insurance the failure of the company to place all dividends accruing upon a policy in a reserve fund in accordance with the terms of the policy did not excuse the non-performance of his contract by the insured, and a suit by such policy holder for an accounting by the company cannot be maintained on the ground of the failure to keep and invest the fund accruing from the dividends separately; 101 N. Y. 328. No trust relation exists between the company and the insured but it is simply one of contract measured by the terms of the policy; 50 N. Y. 610; 78 *id.* 114; 98 *id.* 627. The situation of the parties is that of debtor and creditor merely, the amount of the debt being determined by the equitable apportionment to be made by the corporation through its officers; 101 N. Y. 421; 145 Mass. 56. The apportionment of the fund is not absolutely conclusive upon the policy holders. It is *prima facie* right, but may be shown to be based on erroneous principles; *id.* The rights under such a policy being absolutely vested, the possession by another of the evidence of their rights cannot change or affect them; 108 U. S. 498.

Workmen's Industrial Insurance; State Insurance; Compulsory Insurance; Workmen's Compensation: These terms mean those statutory provisions which cover the relation of master and servant and industrial accidents suffered by employees. The several systems embrace accidents, non-fatal or fatal to employees, sickness, unemployment, old age, and invalidity. Except where such enactments provide for insurance which is non-compulsory, either expressed or implied, they relate rather to economic or sociologic conditions than to the contract of insurance or to the principles governing that contract, or, at the most, they create new remedies or are but an evolution of the employer's liability principle. These enactments, in their general nature are designated as either compulsory or elective or voluntary insurance or purely compensation laws, with an element that might be construed as coercive or in the nature of a penalty. 1 Joyce, *Insurance*, 2nd ed., 88 *et seq.*; 147 Wis. 327.

INSURANCE AGENT. An agent for effecting insurance may be such by appointment or the recognition of his acts done as such; 2 Phill. Ins. § 1848; 4 Cow.

645. He may be agent for either of the parties to the policy, or for distinct purposes for both; 16 T. B. Monr. 252; 20 Barb. 68.

An insurance agent's powers may be more or less extensive according to the express or implied stipulations and understandings between him and his principals. They may be for filling up and issuing policies signed in blank by his principals, for transmitting applications to his principals filled up by himself, as their agent or that of the applicant, for receiving and transmitting premiums, for adjusting and settling losses, or granting liberties and making new stipulations, or for any one or more of these purposes; 19 N. Y. 305; 25 Conn. 53, 465, 542; 12 La. 122; 37 N. H. 35; 12 Md. 348; 1 Grant, Cas. 472; 23 Pa. 50, 72; 26 *id.* 50; 82 Tex. 631; 23 Or. 576.

A general agent is one who represents the insurer in the conduct of the business generally in a particular place or territory. The powers of the general agent are thus stated by Dwight, Com., in 65 N. Y. 6, "It is clear that a person authorized to accept risks, to agree upon and settle the terms of insurance, and carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company." (43 Barb. 351.) The possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of a general agency. (40 Barb. 292.) The power of such an agent of a stock company is plenary as to the amount and nature of the risk, the rate of premium, and generally as to the terms and conditions, and he may make such memoranda and indorsements, modifying the general provisions of the policy, and even inconsistent therewith, as in his discretion seems proper, before the policy is delivered, and in some cases even afterward. (May, Ins. 129.) He may also insert, by memorandum or indorsement, a description of the property inconsistent with the description of the same contained in the application, and such change will be effectual to protect the insured, although the policy itself provides that all conditions named in the application are to be fully complied with and that the application shall be a part of the policy, and a warranty on the part of the insured. (May, Ins. 129; 5 Gray 497.)

An agent holding a commission from an insurance company authorizing him to take risks generally, without placing any limitation thereon, either as to the kinds of risks or as to the territory within which they may be, is a general agent; and the fact that the policy provides that, in any matter relating to the insurance, no person shall be deemed the agent of the company unless authorized in writing, and that the agent's commission states that he shall be subject to the rules of the company, and to such instructions as may be given him from time to time, do not impose on one dealing with the agent a duty to ascertain his authority to issue a policy on a risk extra-hazardous and located in a place other than the town in which is situated the agent's office; 48 N. E. Rep. (Ind.) 41.

The resident agent of an insurance company having general authority to issue policies and renewals, fix rates and accept risks, collect premiums and cancel insurance, and perform all the duties of a recording agent, is a general agent for the locality; 56 Ill. App. 629. If the agent acts as such for both the company and the insured the contract may be avoided by either party who, at the time of the contract, did not know of such business agency for the other party or had, not knowing the facts, ratified it; 40 Pac. Rep. (Colo.) 147.

When an insurance agent solicited business in an adjoining state, assumed to act with full authority, received the premium and issued the policy, he may be considered as a general agent and not a special agent without authority to make the contract; 33 Pac. Rep. (Or.) 688.

It was held in a recent federal case that, before the execution of a policy, the power and authority of a local and soliciting agent are co-extensive with the business entrusted to his care, and his positive

knowledge as to material facts and his acts and declarations within the scope of his employment are obligatory on his principal, unless restricted by limitations well known to the other party at the time of the transaction; 74 Fed. Rep. 114.

The powers of agents were extensively discussed by the Kansas supreme court, which said:

"The bulk of the fire insurance business of the state is done by eastern companies, who are represented here by agents." "It is a matter of no small moment therefore that the exact measure and limit of the powers of these agents be understood. All the assured knows about the company is generally through the agent. All the information as to the powers of, and limitations upon, the agent is received from him. Practically, the agent is the principal in the making of the contract. It seems to us therefore that the rule may be properly thus laid down that an agent authorized to issue policies of insurance and consummate the contract binds his principal by every act, agreement, representation, or waiver, within the ordinary scope and limit of insurance business which is not known by the insured to be beyond the authority granted to the agent;" 43 Kan. 497; s. c. 23 Pac. Rep. 637; and it was held in that case that an insurance company might, through its agents, by a parol contract, waive provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions; 33 Mich. 143; the court, in considering the question whether an agent of a company might change by parol the conditions of a policy wherein it was provided that it could only be done upon the consent of the company written thereon, held that a written bargain is of no higher legal degree than a parol one. "Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it;" 11 Kan. 533; 49 Kan. 78.

"Where insurance companies deal with the community through a local agency, persons having transactions with the company are entitled to assume, in the absence of knowledge as to the agent's authority, that the acts and declarations of the agent are valid as if they proceeded directly from the company;" 20 Or. 547.

An attempted restriction upon the power of the officer or agents, acting within the scope of their general authority, to waive provisions of the policy, unless such waiver is written upon the policy itself, is ineffectual; 65 N. W. Rep. (Wis.) 742.

A provision in the application or in the policy making the person procuring the application the agent of the insured and not of the company, cannot change the legal status of such person as agent of the company or the law of agency if he is in fact the agent of the company; 23 S. E. Rep. (W. Va.) 738.

A broker was held to be the agent of the company where he solicited applications which were sent by him to the agent, by whom policies were sent to the broker and the premiums were charged to the broker; in such case the finding by the jury that the broker was the duly authorized agent of the company within the meaning of the provisions in the policy requiring payments of the premiums to the company or its duly authorized agent within a certain time, will not be disturbed; 33 Atl. Rep. (N. H.) 515. In the absence of direct proof of the broker's authority to act for the insurer or insured he may establish his agency by showing that the act relied on was within the scope of his authority; 84 Atl. Rep. (Md.) 373. Where insurance is procured through a broker, though at his solicitation, he is the agent of the insured and his acts will not bind the company, but when his employment extends only to the procurement of the policy he ceases to be an agent of the insured on the execution and delivery; *id.* A broker employed by a firm of insurance agents to solicit business

on commission, having a desk in their office, is not such an agent as that notice to him by a policy holder is notice to the firm; 49 Hun 610; and one is a mere broker who only represented the company in a single transaction and whose name did not appear on the policy, though he may have told the insurer that he represented the company, collected the premiums, and delivered the policy; 54 N. W. Rep. (Minn.) 1117.

An agent has no power to delegate his authority so as to impose a liability on the company; 15 Can. L. T. 49; 34 Atl. Rep. (N. J.) 931.

But an insurance company is bound by the acts of a clerk of its agent in accepting risks and issuing policies against the same in the performance of his duties, and one dealing with the clerk, as such, is not bound to inquire into his authority as to those matters; *id.*

An agent's solicitor who took applications on which policies were issued has been held the agent of the company in effecting such insurance; 31 Atl. Rep. (Pa.) 868.

It has been held that a general agent (appointed by contract in this case) had power to waive cash payments of premiums and extend credit; 66 N. W. Rep. (Neb.) 445; 36 S. W. Rep. (Ark.) 1051; to receive notice of loss; 42 N. E. Rep. (Ind.) 286; waive proofs of loss; 2 Mo. App. Rep. 1375; 99 Mo. 50; *contra*, 65 N. W. Rep. (Minn.) 635. An agent who has power to adjust losses may by parol waive formal proofs of loss; 40 N. Y. Supp. 300. He cannot waive the iron safe clause, when that authority is expressly withheld from him by the policy; 35 S. W. Rep. (Tex.) 955. He can insure goods subject to chattel mortgage by indorsement on, or annexation to, the policy, though it is forbidden in the printed conditions; 40 N. Y. Supp. 300. Local agents cannot bind the company by consenting to vacancies; 32 S. W. Rep. (Tex.) 593; or that insurance on a risk, not usually taken by the company should take effect from the application (nor will it matter that a special agent, having no power to contract, was present and approved); 41 Pac. Rep. (Cal.) 298.

An agent, during the continuance of his agency, may at any time, even after loss, correct a policy issued by him by inserting the property included in the contract but omitted by mistake from the policy; 67 N. W. Rep. (Ia.) 577. The agent of a company, whose authority has been revoked by the execution by it of an assignment for the benefit of creditors, has thereafter no authority to cancel policies and pay rebates or to set off rebates against a claim by the assignee for premiums collected; 35 N. Y. Supp. 612. The agent is liable for failure to cancel policy when directed to do so; 1 Pa. Super. Ct. 320; and when directed to cancel or reinsure a risk cannot reinsure in another company for which he is agent without its assent; 133 N. Y. 446.

It was held that a lodge officer who receives money for dues to the corporation does so as agent and must pay it over to the company. He cannot return it to those from whom it was collected because he fears that his principal may not be able to perform the contract; 52 Leg. Int. 473.

Notice to an agent of matters within his commission is such to the company; 16 Barb. 159; 1 E. L. & Eq. 140; 6 Gray 14; 50 Kan. 449; 111 N. C. 45; 142 N. Y. 382. See May, Ins. Ch. v.

The insurer has been held bound or estopped by the knowledge or action of or notice to the agent in the following cases: By his knowledge of foreclosure proceedings; 65 N. W. Rep. (Wis.) 742; of the existence of a mortgage, and his attaching a clause making the loss payable to the mortgagee; 18 So. Rep. (Miss.) 414; of a chattel mortgage; 149 N. Y. 477; of incumbency; 36 S. W. Rep. (Tex.) 125; 67 N. W. Rep. (Wis.) 719; 40 N. Y. Supp. 300; where the agent is informed as to incumbencies and fills out the application, describing the property as not incumbered; 23 S. E. Rep. (W. Va.) 733; 33 Atl. Rep. (N. H.) 781;

where the agent, having power to issue and cancel policies, allowed a policy to remain in force after notice of an in-cumbrance; 82 S. W. Rep. (Tex.) 810; where the application stated that no other company had refused to insure, and the agent had notice to the contrary; *id.*; where the agent incorrectly stated the title of the insured, after being correctly informed thereof; 44 Pac. Rep. (Col.) 756; where the agent was acquainted with premises of the insured and could have made an accurate description through his knowledge of them, the company is estopped to avoid its obligation by showing a mis-description of the property; 36 S. W. Rep. (Tex.) 146. Where the insured makes true answers to the questions in an application, the validity of the insurance is not affected by the falsity of the answers inserted by the agent; 37 N. Y. Supp. 146; 17 Misc. Rep. 115; 173 Pa. 16. In such case he will be regarded as the agent of the company, and not of the applicant and his knowledge of the falsity of the answer will be imputed to the company; 25 S. E. Rep. (Ga.) 338. The company is not estopped by the agent's knowledge when that is acquired by him by virtue of his relation as attorney for the insured in a transaction with which the company was not connected; 71 Fed. Rep. 473; or when the knowledge of the agent is acquired after the issuance of the policy; 67 N. W. Rep. (La.) 577; 77 Fed. Rep. 114. Or where the notice was to one of a firm of insurance agents, another member of which issued the policy in suit and was given several months before the policy was applied for; 85 S. W. Rep. (Tex.) 829; and it was held that when the policy provided that no agent could stipulate for a modification of its provisions not brought to the knowledge of his principal officer, knowledge of the general superintendent that material statements in the application were false was not knowledge of the company; 66 Conn. 227. See, generally, an extended discussion and collection of cases on the authority of insurance agents, 84 Am. L. Reg. N. S. 654; WARRANTY.

INSURANCE BROKER. A broker through whose agency insurances are effected. 3 Kent's Com. 260. See INSURANCE AGENT.

INSURANCE COMPANY. A company which issues policies of insurance,—an incorporated company, and either a stock company, a mutual one, or a mixture of the two. In a stock company, the members or stockholders pay in a certain capital which is liable for the contracts of the company. In a mutual company, the members are themselves the parties insured; in other words, all the members contribute premiums to the fund, which is liable for indemnity to each member for loss, according to the terms of the contract. In the mixed class, certain members, who may or may not be insured, contribute a certain amount of the capital, for which they hold certificates of shares, and are entitled to interest on the same at a stipulated rate, or to an agreed share of the surplus receipts, after the payment of losses and expenses, to be estimated at certain periods.

There are in some states companies formed upon the plan combining a stock capital with mutual insurance and issuing both bonds of mutual insurance and stock policies based upon the capital.

In New York it has been held that, under the statutes then in force regulating the formation of insurance companies and their organization, they could not be organized upon this plan so as to accept premium notes from some customers and cash premiums from others and assess the premium notes to pay losses in either branch of the business; 28 Barb. 576. See also 16 N. Y. 310.

Beneficial societies are sometimes held to be insurance companies within the meaning of the statutes regulating such companies; 46 Fed. Rep. 459; and see 72 Mo. 146; 105 Mass. 149; 33 N. W. Rep. (Minn.) 787; 118 Ill. 492. In Iowa it is said that

where the main purpose of an order is that of life insurance, and insurance against sickness and disability, whatever purposes it may have, it is amenable to the laws of that state relating to insurance companies; it therefore must comply with the requirements of the statutes of that state (if the order is organized under the laws of another state), as to foreign insurance companies, before it can do business in that state; 78 Ia. 747. But in Wisconsin an association incorporated for the purpose of fraternal benevolent insurance upon the co-operative or assessment plan was a charitable and benevolent order within the meaning of the statute which, in line with the defined policy of the state, was exempted from the general laws relating to life insurance; 75 Wis. 832. In Pennsylvania a foreign mutual aid association of the same character was held not liable for violation of the laws regulating insurance companies; 94 Pa. 481; and the same association was held not to be a mutual insurance company in Ohio, the state of its incorporation; 26 Ohio 19; so in many other states such associations are held not to be insurance companies within the purview of the general insurance laws of the state; 35 Kan. 61; 83 Ky. 102; 59 Ia. 125; 90 Ill. 166; 63 How. Pr. 386; 142 Mass. 224; 4 Mo. App. 429; 72 Mich. 603; 50 N. W. Rep. (Minn.) 1028. In Pennsylvania it was explicitly decided that an association organized not to do business for profit or gain but to aid pecuniarily the widows, orphans, heirs, and devisees of its members, is not an insurance company; 154 Pa. 99.

INSURANCE POLICY. See POLICY.

INSURED. A person whose life or property interest is covered by a policy of insurance. See INSURANCE.

INSURER. The underwriter in a policy of insurance; the party agreeing to make compensation to the other. Sometimes applied improperly to denote the party insured. See INSURANCE.

INSURGENTS. Rebels contending in arms against the government of their country who have not been recognized by other countries as belligerents. Insurgents have no standing in international law until recognized as belligerents. When recognized as belligerents the rules relating to contraband and other rules of war apply to them, but until so recognized their acts are merely the acts of individuals which may be piracy or any other crime according to the circumstances. The United States and other countries have statutes regulating dealings with insurgents in other countries and filibustering expeditions, as they are called, and expeditions to supply insurgents with arms and ammunition are forbidden; Snow, Lect. Int. Law 132.

In general insurgents have no belligerent rights. Their war vessels are not received in foreign ports, they cannot establish blockades which third powers will respect, and they must not interfere with the commerce of other nations. In the older books on international law they were usually treated as pirates. Their hostilities are never regarded as legal war. As late as 1885 in *The Ambrose Light*, 25 Fed. Rep. 408, this subject was discussed and the authorities fully reviewed, and it was held that the liability of a vessel to seizure as piratical, turned wholly on the question whether the insurgents had obtained any previous recognition of belligerent rights, either from their own or any other government. The court only refrained from entering a decree of forfeiture of the vessel, as a pirate, because of an implied recognition of the insurgents as belligerents, contained in a letter of the secretary of state of the date of the seizure. In recent years, however, a certain amount of recognition has been accorded to insurgents. In 1894, when insurgents were bombarding Rio Janeiro, Admiral Benham took the position that American merchant vessels, moving about the harbor and discharging

cargoes, did so at their own risk. But any attempt on the part of the insurgents to prevent legitimate movements of our merchant vessels at other times was not to be permitted. Of this official action it has been said: "This establishment of this point, which seemed to be the logical outcome of recent practice, almost recognizes an imperfect status, or right of action aloft, for insurgents;" Snow, Lect. Int. L. 25.

In *U. S. v. Trumbull*, 48 Fed. Rep. 69, it was held that insurgents may purchase arms in the United States without violating U. S. Rev. Stat. § 5288, provided the arms are not designed to constitute any part of the furnishings or fittings of the vessel which carries them. This case was a prosecution in connection with the *Itata* which was also libelled for forfeiture by the United States. There was much discussion as to the meaning of the word "people" as used in the statute. It had been previously said to be one of the denominations of a foreign power; 6 Pet. 467; and that a vessel could not be said to be in the service of a foreign people, etc., unless they had received recognition as belligerents; 87 Fed. Rep. 800; the case of *The Salvador*, L. R. 8 C. P. 218, cited to the contrary, is distinguishable as resting on the broader provisions of the English foreign enlistment act; but in the *Itata* case the question was not raised by the facts, and it was simply held that the neutrality laws did not cover the case of a vessel which receives arms and munitions of war, in this country, with intent to carry them to a party of insurgents in a foreign country, but not with intent that they shall constitute any part of the fittings or furnishings of the vessel herself; and that she could not be condemned as piratical on the ground that she is in the employ of an insurgent party, which has not been recognized by our government as having belligerent rights; 56 Fed. Rep. 505, aff. 49 *id.* 646. See also 5 Wall. 62; 6 *id.* 91; Snow, Lect. Int. L. 185.

In *The Three Friends*, 166 U. S. 1, the vessel was seized for a violation of U. S. Rev. St. § 5288, and was released by the district court upon the ground, *inter alia*, that the libel did not show that the vessel was fitted out and armed with intent that it should "be employed in the service of a foreign prince or state, or of any colony, district, or people with whom the United States are at peace." The libel was amended so as to read "in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba." The district court held that the word "people" was used in an individual and personal sense and not as an organized and recognized political power in any way corresponding to a state, prince, colony, or district. The supreme court reversed the decree, holding that the vessel had been invidiously released, and that the word "people" in the statute covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized; and although the political department of the government had not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, it had recognized the existence of insurrectionary warfare, and the case sharply illustrated the distinction between recognition of belligerency, and of a condition of political revolt. See BELLIGERENCY.

INSURRECTION. A rebellion of citizens or subjects of a country or state against its government.

Any open and active opposition of a number of persons to the executive of the laws of the United States, of so formidable a character as to defy, for the time being, the authority of the government, constitutes an insurrection, even though not accompanied by bloodshed and not of sufficient magnitude to make success possible; 62 Fed. Rep. 828.

As to the distinctions involved in the several words used to express organized resistance to governmental authority, see

REBELLION.

The constitution of the United States, art. 1, s. 8, gives power to congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

Whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders, for that purpose, to such officer or officers of the militia as he shall think proper. And in case of an insurrection in any state against the government thereof, it shall be lawful for the president of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection; U. S. Rev. Stat. pp. 387, 1029.

Whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the next session of congress.

Whenever it may be necessary, in the judgment of the president, to call forth the militia or force hereby directed to be called forth, the president shall forthwith, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time; U. S. Rev. Stat. § 5300.

The president may declare by proclamation whenever the inhabitants of any state or part thereof are found by him to be in a state of insurrection, that such inhabitants are in a state of insurrection against the United States and thereupon all commercial intercourse between them and the citizens of the United States shall be unlawful and shall cease so long as such condition of hostility continues, and all goods and chattels, wares and merchandise coming from such state or section into other parts of the United States or proceeding from other parts of the United States to such state or section together with the vessel or vehicle conveying the same shall be forfeited to the United States; but commercial intercourse may, in the discretion of the president, be permitted and licensed with loyal persons residing in such insurrectionary section, so far as to supply such persons with necessities; U. S. Rev. Stat. §§ 5300-5304.

Capital cases for insurrection by a citizen of the United States against the government of any foreign countries having treaties with the United States may be tried before the minister of the United States in such country; *id.* § 4090. See INSURGENTS. CIVIL WAR.

INTAKERS. In English Law. The name given to receivers of goods stolen in Scotland, who take them to England. 9 Hen. V. c. 27.

INTEGER (Lat.). Whole; untouched. *Res integra* means a question which is new and undecided. 3 Kent 177.

INTEMPERATE. If the habit is to drink to intoxication whenever occasion offers, and sobriety or abstinence is the exception, then the charge of intemperate habits is established, and it is not necessary that this custom should be an every-day rule; 63 Ala. 152. See 76 Ill. 213; 9 R. I. 355. See HABITUAL DRUNKARD; DRUNKENNESS.

"Sober and temperate" does not imply total abstinence from intoxicating liquor. The moderate, temperate use of intoxicating liquors is consistent with sobriety. Anderson; 9 J. R. 253. See DRUNKENNESS.

INTENDANT. One who has the charge, management, or direction of some office, department, or public business.

INTENDED TO BE RECORDED. This phrase is frequently used in conveying, in deeds which recite other deeds which have not been recorded. In Pennsylvania, it has been construed to be a covenant, on the part of the grantor, to procure the deed to be recorded in a reasonable time; 2 Rawle 14.

INTENDENTA. In Spanish Law. The immediate agent of the minister of finance, or the chief and principal director of the different branches of the revenue, appointed in the various departments in

each of the provinces of the Spanish monarchy. See Escribiche, *Intendente*.

INTENDMENT OF LAW. The true meaning, the correct understanding, or intention, of the law; a presumption or inference made by the courts. Co. Litt. 78.

It is an intendment of law that every man is innocent until he is proved to be guilty; see PRESUMPTION OF INNOCENCE; that every one will act for his own advantage; that every officer acts in his office with fidelity; that the children of a married woman, born during the coverture, are the children of the husband. See BASTARDY. Many things are intended after verdict, in order to support a judgment; but intendment cannot supply the want of certainty in a charge in an indictment for a crime; 5 Co. 121. See Com. Dig. *Pleader* (C 25), (S 31); Dane. Abr. Index; 14 Viner, Abr. 449; 1 Halst. Ch. N. J. 132.

INTENT. See COMMON INTENT. CRIMINAL INTENT; LEGISLATIVE INTENT.

INTENTIO (Lat.). In Civil Law. The formal complaint or claim of a plaintiff before the praetor. "*Reus exceptionem velut intentionem implet*;" *id est*, reus in exceptione actor est. The defendant makes up his plea as if it were a declaration; *i. e.* the defendant is plaintiff in the plea.

In Old English Law. A count or declaration in a real action (*narratio*). Bracton, lib. 4, tr. 2, c. 2; Fleta, lib. 4, c. 7; Du Cange. See FORMULAE.

INTENTION. A design, resolve, or determination of the mind.

In Criminal Law. To render an act criminal, a wrongful intent must exist; 1 Leach 280; 7 C. & P. 428; Paine 16; 2 McLean 14; 2 Ind. 207; 30 Me. 132; 1 Rice 145; 4 Harring. 315; 19 Vt. 564; 3 Dev. 114; 90 N. C. 741. And with this must be combined a wrongful act; as mere intent is not punishable; 9 Co. 81 a; 2 C. & P. 414; 2 Mass. 138; 2 B. Monr. 417; 10 Vt. 353; 1 Dev. & B. 121; Gilp. 306; 5 Cra. 311; but see Jebb 48 n.; R. & R. 308; 1 Lew. Cr. Cas. 42; and generally, perhaps always, the intent and act must concur in point of time; 1 Bish. Cr. L. § 207; Cl. Cr. L. 45, 238, 265; but a wrongful intent may render an act otherwise innocent criminal; 1 C. & K. 600; C. & Marsh. 236; 2 Allen 181; 1 East, Pl. Cr. 255; 6 Conn. 9; 22 *id.* 153.

Generally, where any wrongful act is committed, the law will infer conclusively that it was intentionally committed; 2 Gratt. 594; 4 Ga. 14; 2 Allen 179; 103 N. Y. 360; as the intent to take life may be inferred from the character of the assault, the use of a deadly weapon and the attendant circumstances; 94 Ala. 85; 82 Wis. 571; and also that the natural, necessary, and even probable consequences were intended; 3 Maule & C. S. 11, 15; 5 C. & P. 538; 3 Wash. C. S. 515; 18 Wend. 87; 3 Pick. 304; 2 Gratt. 594; 1 Bay 245; 9 Humphr. 66; 1 Ov. 305; 98 U. S. 67.

Generally speaking, when a statute makes an act indictable, irrespective of guilty knowledge, ignorance of fact is no defence; 118 Mass. 441; L. R. 2 C. C. 154; 58 Mo. 546; see 41 N. J. L. 552; *contra*, 32 Ohio St. 450; s. c. 30 Am. Rep. 614, where the subject is fully treated. See IGNORANCE.

When by the common law, or by the provision of a statute, a particular intention is essential to an offence, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegations with proof. On the other hand, if the offence does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed, and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved; Bigelow, C. J., 2 Allen 180. See 1 Chitty, Cr. Law 233; 6 East 474; 5 Cush. 306; 153 U. S. 608; 93 N. C. 516.

This proof may be of external and visible acts and conduct from which the jury may infer the fact; 8 Co. 146; or it may be by proof of an act committed, as, in case of burglary with intent to steal, proof of burglary and stealing is conclusive; 5 C. & P. 510; 9 *id.* 729; 2 Mood. & R. 40. When a man intending one wrong fails, and accidentally commits another, he will, except where the particular intent is a substantive part of the crime, be held to have intended the act he did commit; 13 Wend. 159; 21 Pick. 515; 1 Gall. 624; 1 C. & K. 746; Rosc. Cr. Ev. 272.

Where intent is a material ingredient of the crime it is necessary to be averred, but it may always be averred in general terms; 153 U. S. 584, 608.

In Contracts. An intention to enter into the contract is necessary; hence the person must have sufficient mind to enable him to intend.

In Wills and Testaments. The intention of the testator governs unless the thing to be done be opposed to some unbending rule of law; 6 Cruise, Dig. 295; 6 Pet. 68. This intention is to be gathered from the instrument, and from every part of it; 3 Ves. 105; 58 N. H. 511; 23 W. Va. 166; 103 Ill. 607; 128 Mass. 374; 60 Ala. 605; and from a later clause in preference to an earlier; 74 Me. 418; 94 Ill. 158; 62 Ala. 510. See WILLS; CONSTRUCTION.

As to statutes, see INTERPRETATION; CONSTRUCTION; STATUTES.

To Kill. If one knows, or has reason to know that to do a certain act will endanger the life of another and such act results in a death of another an "intention to kill" may be inferred. 140 Ky. 652; 131 S. W. 517.

INTENTIONAL. The word "intentional" refers alone to the person inflicting the injury, and if as to the person injured the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was accidental. 99 Ky. 445, 36 S. W. 170.

INTENTIONE. A writ that lay against him who entered into lands after the death of a tenant in dower, or for life, etc., and held out to him in reversion or remainder. Fitz. N. B. 203.

INTER (Lat.). Between; among.

INTER ALIA (Lat.). Among other things; as, "the said premises, which, *inter alia*, Titius granted to Caius."

INTER ALIOS (Lat.). Between other parties, who are strangers to the proceeding in question.

INTER APICES JURIS. See APEX JURIS.

INTER CÆTEROS. Among others; in a general clause; not by name (*nominationem*). A term applied in the civil law to clauses of disinheritance in a will. Inst. 2, 13, 1; *id.* 2, 13, 3.

INTER CANEM ET LUPUM (Lat.). between the dog and the wolf. The twilight; because then the dog seeks his rest, and the wolf his prey. Co. 3d Inst. 63.

INTER PARTES (Lat. between the parties). A phrase signifying an agreement professing in the outset, and before any stipulations are introduced, to be made between such and such persons; as, for example, "This indenture, made the — day of —, 1848, between A B of the one part, and C D of the other." It is true that every contract is in one sense *inter partes*, because to be valid there must be two parties at least; but the technical sense of this expression is as above mentioned; Addison, Contr. 9.

This being a solemn declaration, the effect of such introduction is to make all the covenants comprised in a deed to be covenants between the parties and none others; so that should a stipulation be found in the body of a deed by which "the

said A B covenants with E F to pay him one hundred dollars," the words "with E F" are inoperative, unless they have been used to denote for whose benefit the stipulation may have been made, being in direct contradiction with what was previously declared, and C D alone can sue for the non-payment; it being a maxim that where two opposite intentions are expressed in a contract, the first in order shall prevail; 8 Mod. 116; Rolle 196; 7 M. & W. 63. But this rule does not apply to simple contracts *inter partes*; 2 D. & R. 277; 3 id. 273.

When there are more than two sides to a contract *inter partes*, for example, a deed, as, when it is made between A B of the first part, C D of the second, and E F of the third, there is no objection to one covenanting with another in exclusion of the third. See 5 Co. 182; 8 Taunt. 245; 4 Q. B. 207.

INTER SE, INTER SESE (Lat.). Among themselves. Story, Partn. § 405.

INTER-STATE LAW. See EXTRADITION; FUGITIVE FROM JUSTICE; COMMERCE; Rorer, Int. St. Law; 10 Am. L. Reg. N.S. 416.

INTER VIVOS (Lat.). Between living persons; as a gift *inter vivos*, which is a gift made by one living person to another. It is a rule that a fee cannot pass by grant or transfer *inter vivos*, without appropriate words of inheritance. 2 Pres. Est. 64. See DONATIO CAUSA MORTIS; GIFTS INFLUENCE.

INTERCALARE. In the Civil Law. To introduce or insert a day or between others; to introduce a day or month into the calendar; to intercalate. Dig. 50, 16, 96, pr.

INTERCEDERE. In the Civil Law. To become bound for another's debt.

INTERCHANGEABLY. By way of exchange or interchange. This term properly denotes the method of signing deeds, leases, contracts, etc., executed in duplicate, where each party signs the copy he delivers to the others.

INTERCOMMON. To enjoy a right of common mutually with the inhabitants of a contiguous town, vill, or manor. When the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common, this is called *intercommoning*. 2 Bla. Com. 33; *Termes de la Ley*.

INTERDICT. In Civil Law. The formula according to which the praetor ordered or forbade anything to be done in a case concerning true or *quasi* possession until it should be decided definitely who had a right to it. But in modern civil law it is an extraordinary action, by which a summary decision is had in questions of possession or *quasi* possession. Heineccius, Elem. Jur. Civ. § 1287. Interdicts are either prohibitory, restitutory, or exhibitory; the first being a prohibition, the second a decree for restoring possession lost by force, the third a decree for the exhibiting of accounts, etc.; id. 1290; Howe, Stud. Civ. L. 252; Dig. 4, 15, 2. It is said by the writers of the Institutes that some (including Gaius) thought that from the true etymology of the word *interdict*, it should be applied only to prohibitory orders, and that those which were restitutory or exhibitory were properly *decreta*, but that "the usage has obtained of calling them all interdicts as they are pronounced between two parties, *inter duos dicuntur*;" id. Interdicts were decided by the praetor without the intervention of a *judez*, differing in this from actions (*actiones*).

According to Isidorus, however, the derivation is from *quod interim dicitur*. See Voc. Jur. Utr.; Sand. Just. 489; MacKeldy, Civ. Law §§ 258-64. In the formulary procedure the interdict was preliminary and conservative, and afterwards made final or not according to the result of the litigation. After the disappearance of this procedure, as a recent writer says, "no doubt the remedies remained by the forms

of action which succeeded. Some of the most important of these were really injunctions, either prohibitory or mandatory." Howe, Stud. Civ. L. 253. Like an injunction, the interdict was merely personal in its effects; and it had also another similarity to it, by being temporary or perpetual. Dig. 43. 1. 1, 3, 4. This similitude prompts the suggestion by the author last quoted, that "it is easy to perceive how they may have been adopted from the Roman and Canon law into the equity practice of England, and thence into that of America;" Howe, Stud. Civ. L. 254. See Story, Eq. Jur. § 865; Halifax, Anal. ch. 6. See INJUNCTION.

In Ecclesiastical Law. An ecclesiastical censure, by which divine services are prohibited either to particular persons or particular places. These tyrannical edicts, issued by ecclesiastical powers, have been abolished in England since the reformation, and were never known in the United States. See 2 Burn, Eccl. Law 340. Baptism was allowed during an interdict; but the eucharist was denied, except in the article of death, and burial in consecrated ground was denied, unless without divine offices. For the ancient form of an interdict, see Tomlin's L. Dict. h. t.

INTERDICTION. A prohibition of commercial intercourse between the citizens or subjects of the country enacting or proclaiming it and some other specified country or port.

By act of March 1, 1809, congress interdicted commercial intercourse between the United States and Great Britain, and in a case arising under this act, the United States supreme court held that the term interdiction means an entire cessation, for the time being, of all trade whatever.

It has been held in England and in this country that interdiction of commerce with the port of destination is not a loss within a policy of marine insurance; 11 East 22; 6 Wheat. 176; 3 Mas. 6; *contra*, 4 Dall. 417; 9 East 283; 3 Wheat. 183; 12 S. & R. 440; 1 Wash. C. C. 582. See 3 Kent 293.

In Civil Law. A judicial decree, by which a person is deprived of the exercise of his civil rights.

The condition of the party who labors under this incapacity.

There can be no voluntary interdiction, as erroneously stated by some writers: the status of every person is regulated by the law, and can in no case be affected by contract.

Interdiction is the civil law proceeding by which, as by inquisition in lunacy (q. v.) under English and American law, a person is found to be incapable of the management of himself and his estate. It is devised for the special protection of the rights and persons of those who are unable to administer them themselves, and although the person interdicted is not permitted to exercise his legal rights, he is by no means deprived of their enjoyment. These rights are exercised for his benefit by a curator, who is held to a strict accountability, and the fidelity of whose administration is secured, in most cases, by a bond of security, and always by a tacit mortgage on all his property.

By the law of the twelve tables, prodigals alone could be interdicted. Curators were appointed for those afflicted with mental aberration, idiocy, or incurable diseases, *qui perpetuo morbo laborant*; but no decree of interdiction was pronounced against them. By the modern civil law, prodigality and prodigality are not sufficient reasons for interdiction; but whenever a person is prostrated, either by mental or physical disease, to such a degree as to be permanently disabled from administering his estate, he may be interdicted.

A decree of interdiction can be pronounced only by the court having jurisdiction of the domicile of the person to be affected. The causes assigned are imbecility, insanity, and madness.

The application may be by any relative, or wife or husband; or, in case of madness, the public law officer must apply, or in case of imbecility or insanity he may do so. The proceeding is by petition; the acts relied on are stated in writing; and the opinion of the family council is taken, the petitioners not participating. The judgment must be given at a public sitting, and, pending the proceedings, temporary administration may be provided for. Even

if the application is rejected, the person against whom the proceedings are taken may be forbidden to go to law, compromise, borrow, receive payment of capital or give discharges, conveyances, or mortgages without advice of counsel appointed by the same judgment.

An appeal is provided, and there may be another examination. The decree must be duly served and recorded, and posted in the tribunal of birth. From the day of judgment all acts are void, and it may have a retroactive effect, by which previous acts are annulled.

After death a person's sanity can only be attacked if he has been interdicted, unless the insanity result from the act questioned.

A guardian or curator is appointed, as in case of minors, to which it is by statute assimilated; the husband for his wife, as of right; the wife may be appointed for her husband, in which case the family council regulate the manner of administration.

No one is compelled to act as guardian for more than ten years. The income must be used primarily to better the condition of the interdicted person. If his child marry, the family council fix the dowry. Interdiction ceases with the causes which made it necessary, and it may be withdrawn by proceedings similar to those by which it was obtained.

Such are substantially the rules on the subject of interdiction found in the law of Louisiana; Civ. Code, Tit. ix, Art. 389-426, and the French Code, Art. 489-512, Cashard's translation. They are substantially the same in all the modern codes having the civil law for their basis.

In Louisiana it has been held that mental weakness is not sufficient unless interdiction be necessary for protection of person or property; 31 La. Ann. 757; the motives of the party applying should be fully investigated; 29 id. 302; trial by jury cannot be demanded and judgment may be at chambers; 38 id. 523; a non-resident cannot be interdicted; 32 id. 679; testimony of experts does not control the court and is of little weight when they had seen defendant only once; 81 id. 757; and opinions of non-experts are of little weight; they should state facts; 36 id. 563; costs of proceeding to interdict a wife, include fees of her lawyers, and are a debt of the community; 30 id. 336.

A judge may in the exercise of a sound legal discretion, without a special statutory authority, exclude relations from a family meeting to recommend a curator, and he is not restricted to a narrow construction of the term "conflicting interest" in the statute disqualifying persons, having such an interest, for participating in the family meeting; 44 La. Ann. 1027. In the selection of a curator the family meeting is not limited to applicants, nor to persons suggested by relations of the interdict; id.

In Scotch Law. A legal restraint laid upon persons liable to be imposed upon, though having, to some extent, the exercise of reason, to prevent them from signing any deed affecting heritage, to their own prejudice, without the consent of their curators or interdictors. It is nearly superseded in practice by voluntary trusts. In cases where a trust cannot be obtained, the law relating to unconscionable bargains and to facility and circumvention is usually sufficient protection. Interdiction was either *voluntary*, which was generally executed in the form of a bond, obliging the grantor to do no deed affecting his estate without the consent of certain friends therein mentioned, or *judicial*, imposed by the court of sessions upon an action commenced by a near kinsman to the party and sometimes by the *nobile officium* of the court. The latter sort of interdiction must be taken off by the authority of the court which imposed it. Voluntary interdiction cannot be recalled at the pleasure of the person interdicted, but it may be: 1. By a sentence of the court of sessions declaring that there was *ab initio* no sufficient ground, or that it no longer exists. 2. By the joint

action of the person interdicted and the interdictor. 3. The restraint ceases where the bond requires a certain number of the quorum, if they be reduced by death below that number; *Ersk. Prin. I. vii. 30-32.*

INTERDICTION OF FIRE AND WATER. Banishment by an order forbidding all persons to supply the person banished with fire or water, they being considered the two necessities of life. This banishment was termed by Livy *legitimum exilium*.

INTERDICTIONUM SALVIANUM (Lat.) In Roman Law. The Salvian interdict. A process which lay for the owner of a farm to obtain possession of the goods from his tenant who had pledged them to him for the rent of the land. *Inst. 4, 15, 3.*

INTERESSE (Lat.) Interest. The interest of money; also an interest in lands.

INTERESSE TERMINI (Lat.) An interest in the term. The demise of a term in land does not vest any estate in the lessee, but gives him a mere right of entry on the land, which right is called his interest in the term, or *interesse termini*. See *Co. Litt. 46*; 2 *Bla. Com. 144*; 10 *Viner, Abr. 348*; *Dane, Abr. Index*; *Watk. Conv. 15*; 1 *Washb. R. P. Index*.

INTEREST (Lat. it concerns; it is of advantage).

In Contracts. The right of property which a man has in a thing. See **INSURABLE INTEREST**.

On Debts. The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.

The compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money. 3 *Tex. Civ. App. 81*.

Legal interest is the rate of interest established by the law of the country, which will prevail in the absence of express stipulation; *conventional interest* is a certain rate agreed upon by the parties. 2 *Cal. 568*.

Who is bound to pay interest. The contractor who has expressly or impliedly undertaken to pay interest is, of course, bound to do so.

Executors; 12 *Conn. 350*; 7 *S. & R. 264*; *administrators*; 4 *Gill & J. 453*; 35 *Miss. 321*; *assignees of bankrupts or insolvents*; 2 *W. & S. 557*; but see 149 *U. S. 95*; *guardians*; 29 *Ga. 82*; 14 *La. Ann. 764*; and *trustees*; 1 *Pick. 528*; 10 *Gill & J. 175*; 15 *Md. 75*; 29 *Ca. 82*; 61 *id. 564*; 11 *Cal. 71*; who have kept money an unreasonable length of time; 18 *Pick. 1*; 29 *Ga. 82*; and have made or might have made it productive; 4 *Gill & J. 453*; 1 *Pick. 530*; 3 *Woods 542*, 724; *Myrick, 3, 168*; are chargeable with interest. Where a litigant claiming money as his own, was permitted to collect and retain it, subject only to the order of the court should it afterwards be decided he was not entitled to it, he is chargeable with interest; 93 *Ky. 129*. When a loan is negotiated, the retention of a portion of it for an unreasonable time entitles the borrower to a rebate of interest; 144 *U. S. 451*.

Tenants for life must pay interest on incumbrances on the estate; 4 *Ves. 33*; 1 *Vern. 404, n.*; *Story, Eq. Jur. § 487*; 5 *Johns. Ch. 482*. Where interest is reserved by contract, a mere readiness to pay will not relieve the debtor from liability therefor; 24 *Pa. 110*.

Who are entitled to receive interest. The lender upon an express or implied contract for interest. Executors, administrators, etc., are in some cases allowed interest for advances made by them on account of the estates under their charge; 10 *Pick. 77*; 6 *Halst. Ch. 44*. See 9 *Mass. 37*. The rule has been extended to trustees; 1 *Binn. 488*; and compound interest, even, allowed them; 16 *Mass. 228*.

On what claims allowed. When the debtor expressly undertakes to pay interest, he or his personal representatives having assets

are bound to pay it. But if a party has accepted the principal, it has been determined that he cannot recover interest in a separate action: 1 *Esp. N. P. 110*; 3 *Johns. 220*. See 1 *Campb. 50*; 1 *Dall. 315*; 45 *Me. 542*; 9 *Ohio St. 452*.

On contracts where, from the course of dealings between the parties, a promise to pay is implied; 1 *Campb. 50*; 3 *Brown, Ch. 436*; *Kirb. 207*; 2 *Wend. 501*; 33 *Ala. n. s. 459*; 8 *La. 163*. **On account stated** or other liquidated sum, whenever the debtor knows precisely what he is to pay and when he is to pay it; 2 *W. Bla. 761*; 2 *Ves. 365*; 2 *Burr. 1085*; 5 *Esp. 114*; 1 *Hayw. 173*; 2 *Cox 219*; 20 *N. Y. 463*; 13 *Ind. 475*; 8 *Fla. 161*; 86 *Ky. 668*. But interest is not due for unliquidated damages, or on a running account where the items are all on one side, unless otherwise agreed upon; 1 *Dall. 265*; 4 *Cow. 496*; 5 *Vt. 177*; 1 *Spears 209*; 1 *Rice 21*; 2 *Blackf. 313*; 1 *Bibb 443*; 20 *Ark. 410*; 7 *Utah 510*; see 63 *Hun 624*; 8 *Mont. 312*; but when the damages are to be assessed on the principle of compensation, and with reference to a definite standard, the jury may give additional damages in the nature of interest. This, however, is not strictly interest, but compensation for delay, measured by the rate of interest; 124 *Pa. 571*; 130 *Pa. 37*. **On the arrears of an annuity secured by a specialty;** 3 *Atk. 579*; 9 *Watts 530*; or given in lieu of dower; 1 *Harr. Del. 106*; 3 *W. & S. 437*. **On bills and notes** if payable at a future day certain, after due; 3 *D. & B. 70*; 5 *Humphr. 406*; 19 *Ark. 690*; 13 *Mo. 252*; 50 *Kan. 440*; if payable on demand, after a demand made; 5 *Ves. 133*; 15 *S. & R. 264*; 1 *McCord 370*; 6 *Dana 70*; 1 *Hempst. 155*; 18 *Ala. n. s. 300*; 94 *Mich. 411*. See 4 *Ark. 210*; 83 *Tex. 446*. But see 40 *Ill. App. 613*, where interest on a note due on demand was held to run from its date. Where the terms of a promissory note are that it shall be payable by instalments, and on the failure of any instalment the whole is to become due, interest on the whole becomes payable from the first default; 4 *Esp. 147*. Where, by the terms of a bond or a promissory note, interest is to be paid annually, and the principal at a distant day, the interest may be recovered before the principal is due; 1 *Binn. 165*; 2 *Mass. 563*. An accepted draft bears interest from the time of delivery, when no time of payment is stated therein; 65 *Hun 625*.

When not stipulated for by contract or authorized by statute, interest is allowed by the courts as damages for the detention of money or property; 136 *U. S. 211*.

On a deposit by a purchaser, which he is entitled to recover back, paid either to a principal or an auctioneer; *Sugd. Vend. 327*; 3 *Campb. 258*; 5 *Taunt. 625*. But see 4 *Taunt. 334*. **For goods sold and delivered, after the customary or stipulated term of credit has expired;** 2 *B. & P. 337*; 2 *Dall. 193*; 11 *Ala. 451*; 1 *McLean 411*; 12 *N. H. 474*; 26 *Ga. 465*; 8 *La. 163*. **On judgment debts;** 2 *Ves. 162*. In a judgment on *sci. fa.* the interest is calculated on the old judgment and the new judgment entered for a lump sum; 5 *Binn. 61*; 1 *H. & J. 754*; 8 *Wend. 496*; 4 *Metc. 317*; 6 *Halst. 91*; 3 *Mo. 36*; 4 *J. J. Marsh. 244*; *T. U. P. Charl. 133*. See 3 *McCord 166*; 1 *Ill. 52*; 14 *Mass. 239*; 50 *Ark. 416*. **On judgments affirmed in a higher court;** 4 *Burr. 2128*; 2 *H. Bla. 267*, 284; 2 *Campb. 428, n.*; 3 *Taunt. 503*. See 3 *Hill, N. Y. 426*; 9 *C. C. App. 468*. In an accounting for profits made by selling an article contrary to contract, interest should be allowed; 45 *Fed. Rep. 789*; also on the amount found as damages for breach of contract; 82 *Tex. 608*. **On money obtained by fraud,** or where it has been wrongfully detained; 9 *Mass. 504*; 1 *Campb. 129*; 3 *Cow. 426*. **On money paid by mistake, or recovered on a void execution;** 1 *Pick. 212*; 9 *S. & R. 409*; 3 *Sumn. 336*; 64 *Hun 632*; see 160 *Mass. 438*. **On money lent or laid out for another's use;** 2 *W. Bla. 761*; 1 *Dall. 349*; 2 *Hen. & M. 331*; 1 *Hayw. 4*; 9 *Johns. 71*; 2 *Wend. 413*; 1 *Conn. 32*; 7 *Mass. 14*; 1 *Mo. 718*. **On money had and received after demand;** *Perl. Int. 122*; 1 *Ala. n. s. 452*; 4 *Blackf. 21*, 164. **On the value of an animal in an action for causing**

its death; 50 *Ark. 169*; 125 *Pa. 24*. **On purchase-money** which has lain dead, where the vendor cannot make a title; *Sugd. Vend. 327*. **On purchase-money** remaining in purchaser's hands to pay off incumbrances; 1 *Sch. & L. 134*. See 1 *Wash. Va. 125*; 5 *Munf. 343*; 6 *Binn. 485*. **On taxes** wrongfully collected; 72 *Tex. 509*. See 159 *Mass. 383*. **Rent in arrear** due by covenant bears interest, unless under special circumstances, which may be recovered in action; 6 *Binn. 159*. See 46 *Ohio St. 66*; but no distress can be made for such interest; 2 *Binn. 246*. Interest cannot, however, be recovered for arrears of rent payable in wheat; 1 *Johns. 276*. See 2 *Call 249*; 3 *Hen. & M. 463*.

Interest cannot be recovered as damages for the detention of the principal, after the principal sum has been paid; 153 *U. S. 456*. Where interest is recoverable, not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld; 135 *U. S. 271*; 140 *id. 694*. Interest allowed for non-payment of a judgment is in the nature of statutory damages; 146 *U. S. 162*.

On legacies. On specific legacies interest is to be calculated from the date of the death of the testator; 2 *Ves. Sen. 563*; 5 *W. & S. 30*; 3 *Munf. 10*.

A general legacy, when the time of payment is not named by the testator, is not payable till the end of one year after testator's death, at which time the interest commences to run; 13 *Ves. 383*; 1 *Sch. & L. 10*; 5 *Binn. 475*; 3 *V. & B. 183*; 16 *R. I. 98*; 20 *W. Va. 738*; and this is so whether the will has been proved during the year or not; 149 *Mass. 82*. But where only the interest is given, no payment will be due till the end of the second year; 7 *Ves. 89*.

Where a general legacy is given, and the time of payment is named by the testator, interest is not allowed before the arrival of the appointed period of payment, and that notwithstanding the legacies are vested; *Prec. in Ch. 387*. But when that period arrives, the legatee will be entitled although the legacy be charged upon a dry reversion; 2 *Atk. 106*. See, also, 3 *Atk. 101*; 3 *Ves. 10*; 4 *Brown, Ch. 149, n.*; 1 *Cox, Ch. 138*. When the executor can pay a legacy without any possible inconvenience to the estate, it has been held that interest begins to run at once; 113 *N. Y. 207*. When a legacy is given payable at a future day with interest, and the legatee dies before it becomes payable, the arrears of the interest up to the time of his death must be paid to his personal representatives; *McClel. 141*. And a bequest of a sum to be paid annually for life bears interest from the death of testator; 5 *Binn. 475*; 26 *W. N. C. Pa. 374*. And so also for a legacy of income for the support and maintenance of the legatee; 106 *Pa. 268*; especially is this so when the legacy is to be paid by the executors transferring to the trustees for the legatee interest-bearing securities belonging to the testator's estate; *id.*

Where the legatee is a child of the testator, or one towards whom he has placed himself *in loco parentis*, the legacy bears interest from the testator's death, whether it be particular or residuary, vested but payable at a future time, or contingent if the child have no maintenance. In that case the court will do what in common presumption the father would have done—provide necessaries for the child; 2 *P. Wms. 81*; 3 *Ves. 13*, 387; *Bacon, Abr. Legacies (K 3)*; 3 *Atk. 432*; 1 *Dick. Ch. 310*; 2 *Brown, Ch. 59*; 2 *Rand. 409*; 44 *N. J. Eq. 506*; 106 *Pa. 283*. In case of a child *en ventre sa mère* at the time of the father's decease, interest is allowed only from its birth; 2 *Cox, Ch. 425*. Where maintenance or interest is given by the will, and the rate specified, the legatee will not, in general, be entitled to claim more than the maintenance or rate specified; 3 *Atk. 697*, 716; 3 *Ves. 286, n.* And see further, as to interest in cases of legacies to children; 15 *Ves. 363*; 1 *Brown, Ch. 267*; 4 *Madd. 275*;

1 Swanst. 553; 1 P. Wms. 783; 1 Vern. 251; 3 V. & B. 183.

Interest is not allowed by way of maintenance to any other person than the legitimate children of the testator; 3 Ves. 10; 4 id. 1; unless the testator has put himself *in loco parentis*; 1 Sch. & L. 5, 6. A wife; 15 Ves. 301; a niece; 3 Ves. 10; a grandchild; 6 Ves. 546; 1 Cox. Ch. 183; are, therefore, not entitled to interest by way of maintenance. See 2 Wms. Exec. 743. Nor is a legitimate child entitled to such interest if he have a maintenance, although it may be less than the amount of the interest of the legacy; 1 Sch. & L. 5; 3 Ves. 17. But see 4 Johns. Ch. 103; 2 Roper, Leg. 202; 106 Pa. 268, cited above.

Where an intention, though not expressed, is fairly inferable from the will, interest will be allowed; 1 Swanst. 581, n.

Interest is not allowed for maintenance, although given by immediate bequest for maintenance, if the parent of the legatee, who is under moral obligation to provide for him, be of sufficient ability: so that the interest will accumulate for the child's benefit until the principal becomes payable; 3 Atk. 399; 1 Brown, Ch. 386; 3 id. 60, 416. But to this rule there are some exceptions; 3 Ves. 730; 4 Brown, Ch. 223; 4 Madd. 275, 289.

Where a fund, particular or residuary, is given upon a contingency, the intermediate interest undisposed of—that is to say, the intermediate interest between the testator's death, if there be no previous legatee for life, or, if there be, between the death of the previous taker and the happening of the contingency—will sink into the residue for the benefit of the next of kin, or executor of the testator, if not bequeathed by him; but if not disposed of, for the benefit of his residuary legatee; 1 Brown, Ch. 57; 4 id. 114; 2 Atk. 329.

Where a legacy is given by immediate bequest, whether such legacy be particular or residuary, and there is a condition to divest it upon the death of the legatee under twenty-one, or upon the happening of some other event, with a limitation over, and the legatee dies before twenty-one, or before such other event happens, which nevertheless does take place, yet, as the legacy was payable at the end of the year after the testator's death, the legatee's representatives, and not the legatee over, will be entitled to the interest which accrued during the legatee's life, until the happening of the event which was to divest the legacy; 1 P. Wms. 501; 5 Ves. 335, 522.

Where a residue is given, so as to be vested, but not payable at the end of the year from the testator's death, but upon the legatee's attaining twenty-one, or upon any other contingency, and with a bequest over divesting the legacy, upon the legatee's dying under age, or upon the happening of the contingency, then the legatee's representatives in the former case, and the legatee himself in the latter, shall be entitled to the interest that became due during the legatee's life or until the happening of the contingency; 2 P. Wms. 419; 1 Brown, Ch. 81, 335; 3 Mer. 335.

Where a residue of personal estate is given, generally, to one for life with remainder over, and no mention is made by the testator respecting the interest, nor any intention to the contrary to be collected from the will, the rule appears to be settled that the person taking for life is entitled to interest from the death of the testator, on such part of the residue bearing interest as is not necessary for the payment of debts. And it is immaterial whether the residue is only given generally, or directed to be laid out, with all convenient speed, in funds or securities, or to be laid out in lands. See 6 Ves. 520; 9 id. 89, 549, 553. Interest, in case of a remainder in an estate in money, does not run until the death of the life tenant; 81 Ga. 229.

But where a residue is directed to be laid out in land, to be settled on one for life, with the remainder over, and the testator directs the interest to accumulate in the mean time until the money is laid out in land, or otherwise invested on security, the

accumulation shall cease at the end of one year from the testator's death, and from that period the tenant for life shall be entitled to the interest; 6 Ves. 520; 7 id. 95; 2 S. & S. 396. Where a gift is made of the residue of the testator's estate to one person for life, and the principal is given over to another one at the death of the life tenant, the legatee is entitled to interest from the testator's death; 44 N. J. Eq. 506.

Where no time of payment is mentioned by the testator, annuities are considered as commencing from the death of the testator; and, consequently, the first payment will be due at the end of the year from that event; if, therefore, it be not made then, interest, in those cases wherein it is allowed at all, must be computed from that period; 5 Binn. 475. See 6 Mass. 37; 1 Hare & W. Lead. Cas. 356.

How much interest is to be allowed. As to time. In actions for money had and received, interest is allowed from the date of service of the writ; 1 Mass. 436; 15 Pick. 500; 12 N. H. 474. See 100 U. S. 119. On debts payable on demand, interest is payable only from the demand; 15 Pick. 500; 5 Conn. 222; 1 Mas. 117. See 12 Mass. 4; and *supra*. The words "with interest for the same" carry interest from date; Add. 323; 1 Stark. 452, 507; 57 N. W. Rep. (Minn.) 315. Interest upon a *quantum meruit* for services rendered, does not begin to run until a demand is made; 81 Wis. 230. It is allowed on the amount found as damages for breach of contract, from the date they accrued; 82 Tex. 608. Interest coupons bear interest from maturity of the coupons; 114 N. Y. 122; 64 Hun 120; 149 U. S. 122; 132 id. 107. Interest on a dividend declared by a receiver should be allowed from the time it was declared and ought to have been paid; 133 U. S. 433. Interest runs on liability of shareholders to creditors of a national bank from the time it goes into liquidation; 127 U. S. 27.

Interest may be computed from the commencement of an action for the balance due on a general account and the enforcement of lien; 73 Wis. 520; 39 Kan. 452.

The mere circumstance of war existing between two nations is not a sufficient reason for abating interest on debts due by the subjects of one belligerent to another; 1 Pet. C. C. 524; 4 H. & McH. 161. But a prohibition of all intercourse with an enemy during war furnishes a sound reason for the abatement of interest until the return of peace; Perl. Int. 145; 2 Dall. 102, 132; 1 Wash. Va. 172; 1 Call 194; 3 Wash. C. C. 396; 8 S. & R. 103; 62 Ala. 58. See *infra*.

A debt barred by the statute of limitations and revived by an acknowledgment bears interest for the whole time; 16 Vt. 297.

As to the allowance of simple and compound interest. Interest upon interest is not allowed, except in special cases; 1 Eq. Cas. Abr. 287; 81 Vt. 679; 34 Pa. 210; and the uniform current of decisions is against it, as being a hard, oppressive exaction, and tending to usury; 1 Johns. Ch. 14; Cam. & N. 361; 13 Vt. 430; 21 Or. 333. But interest on interest may be allowed if made after the interest which is to bear interest becomes due; 81 W. Va. 410; 79 Ga. 213. By the civil law, interest could not be demanded beyond the principal sum, and payments exceeding that amount were applied to the extinguishment of the principal; Ridley's Views of the Civil, etc., Law 84; Authentica, 9th Coll.

Where a partner has overdrawn the partnership funds, and refuses, when called upon to account, to disclose the profits, recourse would be had to compound interest as a substitute for the profits he might reasonably be supposed to have made; 2 Johns. Ch. 213.

When executors, administrators, or trustees convert the trust-money to their own use, or employ it in business or trade, or fail to invest, they are chargeable with compound interest; 1 Pick. 528; 1 Johns. Ch. 820. Nothing but very culpable conduct will justify the compounding of interest against an administrator; 87 Tenn. 172; 71 Mich. 356. Interest cannot ordi-

narily be compounded against a guardian; 73 Mich. 220; 118 Ind. 512; but it may be in some cases; 99 N. C. 367.

In actions for negligence, interest cannot be allowed by the jury as such, but they may, in computing their verdict, consider the lapse of time since the cause of action arose; 125 Pa. 24.

In an action to recover the annual interest due on a promissory note, interest will be allowed on each year's interest until paid; 2 Mass. 588; 8 id. 445; 1 N. H. 179; 16 Vt. 45; 9 Dana 331; 2 N. & McC. 38; 10 Am. Dec. 560; 69 N. C. 89; 26 Ohio St. 59; 61 Ga. 275; 34 Am. Rep. 101; *contra*, 8 Mass. 455; 2 Cush. 92; 1 Binn. 152, 165; 5 Pa. 98; 67 N. Y. 162. A note which provides for a conventional rate of interest, but omits to provide for the rate of interest after maturity, draws the legal rate; 22 How. 118; 100 U. S. 72; 68 Ind. 202; 42 L. J. Rep. N. s. 666; 39 Minn. 122; 39 Kans. 73; 135 N. Y. 354; but a different view has been held; 112 Mass. 63; 12 Vroom 349; 23 Alb. L. J. 130. See, as to charging compound interest, 1 Johns. Ch. 550; Cam. & N. 361; 1 Binn. 165; 1 Hen. & M. 4; 3 id. 89; 1 Viner, Abr. 457, *Interest* (C); Com. Dig. *Chancery* (3 S 3); 1 Hare & W. Lead. Cas. 371. An infant's contract to pay interest on interest after it has accrued will be binding upon him when the contract is for his benefit; 1 Eq. Cas. Abr. 286; 1 Atk. 489; 3 id. 613. The including in a note payable a year after date with a certain rate of interest, until paid, of a year's interest, is not compounding interest; 18 S. W. Rep. (Ky.) 1034. As to interest on interest coupons, see *infra*.

As limited by the penalty of a bond. It is a general rule that the penalty of a bond limits the amount of the recovery; 2 Term 388. But in some cases the interest is recoverable beyond the amount of the penalty; 4 Cra. 333; 15 Wend. 76; 10 Conn. 95; Paine 661; 6 Me. 14; 8 N. H. 491. The recovery depends on principles of law, and not on the arbitrary discretion of a jury; 3 Caines 49.

The exceptions are—where the bond is to account for moneys to be received; 2 Term 388; where the plaintiff is kept out of his money by writs of error; 2 Burr. 1094; or delayed by injunction; 1 Vern. 349; 16 Viner, Abr. 303; if the recovery of the debt be delayed by the obligor; 6 Ves. 92; 1 Vern. 349; if extraordinary emoluments are derived from holding the money; 2 Bro. P. C. 251; or the bond is taken only as a collateral security; 2 Bro. P. C. 338; or the action be on a judgment recovered on a bond; 1 East 436. See, also, 4 Day 30; 3 Caines 49; 1 Taunt. 218; 1 Mass. 308; Com. Dig. *Chancery* (3 S 2); Viner, Abr. *Interest* (E).

But these exceptions do not obtain in the administration of the debtor's assets where his other creditors might be injured by allowing the bond to be rated beyond the penalty; 5 Ves. 339. See Viner, Abr. *Interest* (C 5).

Upon a bond given to appear in a United States court to answer to an indictment, no interest can be recovered; 127 U. S. 212.

As to the allowance of foreign interest. The rate of interest of the place of performance is to be allowed, where such place is specified; 10 Wheat. 367; 20 Johns. 102; 8 Pick. 194; 12 La. An. 815; 1 B. Monr. 29; 2 W. & S. 327; 23 Vt. 286; 21 Ga. 135; 22 Tex. 108; 7 Ired. 424; 5 C. & F. 1; otherwise, of the place of making the contract; 11 Ves. 314; 1 Wash. C. C. 521; 3 Wheat. 101; 12 Mass. 4; 1 J. J. Marsh. 406; 5 Ired. 590; 17 Johns. 511; 25 N. H. 474; 1 Ala. 387; 13 La. 91; 25 H. & J. 193; 8 Conn. 253; 5 Tex. 87, 282. But the rate of interest of either place may be reserved; and this provision will govern, if an honest transaction and not a cover for usury; 2 Pa. 85; 14 Vt. 33; 20 Mart. La. 1; 2 Johns. Cas. 355; 10 Wheat. 367. Coupons after their maturity bear interest at the rate fixed by the law of the place where they are payable, where there is no stipulation as to the rate after maturity; 149 U. S. 123; 132 id. 107. See also Dicey, *Conf. L.*, Moore's ed. 616, 625.

How computed. In casting interest on

notes, bonds, etc., upon which partial payments have been made, every payment is to be first applied to keep down the interest; but the interest is never allowed to form a part of the principal so as to carry interest; 2 Wash. C. C. 187; 1 Halst. 408; 2 Hayw. 17; 17 Mass. 417; 14 Conn. 445; 140 U. S. 247.

When a partial payment exceeds the amount of interest due when it is made, it is correct to compute the interest to the time of the first payment, add it to the principal, subtract the payment, cast interest on the remainder to the time of the second payment, add it to the remainder, and subtract the second payment, and in like manner from one payment to another, until the time of judgment; Peri. Int. 168; 1 Pick. 194; 4 Hen. & M. 431; 8 S. & R. 453; 2 Wash. C. C. 167. See 3 *id.* 350, 396; 3 Cow. 86.

The same rule applies to judgments; 2 N. H. 169; 8 S. & R. 452.

Where a partial payment is made *before* the debt is due, it cannot be apportioned part to the debt and part to the interest. As, if there be a bond for one hundred dollars, payable in one year, and at the expiration of six months fifty dollars be paid in, this payment shall not be apportioned part to the principal and part to the interest, but at the end of the year, interest shall be charged on the whole sum, and the obligor shall receive credit for the interest of fifty dollars for six months; 1 Dall. 124.

When interest will be barred. When the money due is tendered to the person entitled to it, and he refuses to receive it, the interest ceases; 3 Campb. 296; 60 Conn. 343; 83 Tex. 11; 38 Fed. Rep. 36. See 134 U. S. 68. A tender by a junior mortgagee to a senior mortgagee of the amount due on the senior mortgage, with accrued costs of foreclosure, does not, unless kept good, prevent the running of interest; 132 N. Y. 288.

Where the plaintiff was absent in foreign parts beyond seas, evidence of that fact may be given in evidence to the jury on the plea of payment, in order to extinguish the interest during such absence; 1 Call 138; 3 McCord 340; 1 Root 178. But see 9 S. & R. 263.

Whenever the law prohibits the payment of the principal, interest during the prohibition is not demandable; 2 Dall. 102; 1 Pet. C. C. 524; 2 Dall. 132; 4 *id.* 286.

If the plaintiff has accepted the principal, he cannot recover the interest in a separate action; 1 Esp. 110; 3 Johns. 229. See 14 Wend. 116.

For or against Government or State. Interest is not to be awarded against a sovereign government, unless its consent has been manifested by an act of its legislature or by a lawful contract of its executive officers; 136 U. S. 211. The United States is not liable to pay interest or claims against it, in the absence of express statutory provision therefor; 127 U. S. 251; 23 Ct. Cls. 144; 164 U. S. 213; but it must be allowed to the United States under U. S. Rev. St. § 906; *id.* A city is not liable for interest on its loans, after maturity, if it has provided funds to pay them; 131 Pa. 305.

The legal rate of interest is five per cent. in Illinois and Louisiana; seven per cent. in Arizona, California, Georgia, Idaho, Minnesota, Nebraska, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, and Washington; eight per cent. in Alabama, Colorado, Florida, Oregon, Utah, and Wyoming; ten per cent. in Montana; and six per cent. in the remaining states and territories.

Any rate may be agreed upon by contract in Arizona, California, Colorado, Maine, Massachusetts, Montana, Nevada, Rhode Island, and Utah; but the rate by contract cannot be more than seven per cent. in Illinois; eight per cent. in Alabama, Georgia, Indiana, Iowa, Louisiana, Michigan, Missouri, Ohio, and South Carolina; ten per cent. in Arkansas, District of Columbia, Florida, Indian Territory, Kansas, Minnesota, Mississippi, Nebraska, Oregon, Texas, and Wisconsin; twelve per cent. in Idaho, Oklahoma, New Mexico, North Da-

kota, South Dakota, Washington, and Wyoming; and six per cent. in the remaining states. In New York demand loans of not less than \$5,000, with collateral, may be made at any rate of interest agreed upon in writing.

In Ontario and Quebec the legal rate is six per cent.; in the former there is no limit on the rate by contract, and in the latter it is seven per cent.

For exceeding the legal rates of interest the penalty is variously fixed by the different states. See USURY.

In Practice. Concern; advantage benefit.

Such a relation to the matter in issue as creates a liability to pecuniary gain or loss from the event of the suit; 11 Metc. 395, 396.

When used as a criterion of the proper parties to a suit it means interest in the object, not interest in the subject-matter; 89 Va. 253.

A person may be disqualified to act as a judge, juror, or witness in a cause by reason of an interest in the subject-matter in dispute.

As to the disqualifying interest of judges, see JUDGE; as to the disqualifying interest of jurors, see CHALLENGE.

An interest disqualifying a witness must be legal, as contradistinguished from mere prejudice or bias arising from relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced; Leach 154; 2 Hawk. Pl. Cr. 46, s. 25; must be present; 1 Hoffman. 31; 14 La. Ann. 417; 33 W. Va. 616; must be certain, vested, and not uncertain and contingent; 2 P. Wins. 287; 5 Johns. 256; 7 Mass. 25; 25 Ga. 337; 2 Metc. Ky. 608; 35 Pa. 351; must be an interest in the event of the cause, or the verdict must be lawful evidence for or against him in another suit, or the record must be an instrument of evidence for or against him; 22 Tex. 295; 3 John. Cas. 83; 1 Phill. Ev. 36. See 142 Ill. 302. But an interest in the question does not disqualify the witness; 4 Johns. 302; 1 S. & R. 32; 1 Hen. & M. 165, 168; or the fact that he has a case of the same kind pending; 87 Pac. Rep. (Cal.) 144.

An attorney will under most circumstances be permitted to testify in behalf of his client; but the courts do not look with favor upon the practice; 72 Pa. 239. See 32 Tex. Cr. R. 102.

The magnitude of the interest is altogether immaterial; a liability for costs is sufficient; 5 Term 174; 2 Me. 194; 11 Johns. 57.

Interest will not disqualify a person as a witness if he has an equal interest on both sides; 7 Term 480; 1 Bibb 298; 2 Mass. 108; 6 Pa. 322; 89 Ga. 532.

The objection to incompetency on the ground of interest may be removed by an extinguishment of that interest by means of a release, executed either by the witness, when he would receive an advantage by his testimony, or by those who have a claim upon him, when his testimony would be evidence of his liability. The objection may also be removed by payment. Stark. Ev. 757. In England and the United States it is no longer a cause of objection to the competency of witnesses in most cases that they have an interest in the subject-matter in issue. A growing consciousness that the truth in judicial investigations is best brought out by the production of all relevant testimony has led to the universal abrogation of the old rule of the common law; Tayl. Ev. 1137; 63 Pa. 156; 32 Tex. 141. In the trial of suits against the United States no person is excluded as a witness because he is a party to or interested therein; 1 Sup. Rev. Stat. 561; *id.* 403; *id.* 915. The interest of a party in the result of an action makes his credibility a question for the jury; 76 Hun 3. See, generally, Geenleaf; Starkie; Phillips; Wharton; Miller, Evidence.

See COUPLED WITH AN INTEREST; VESTED ESTATE, or INTEREST.

INTEREST-BEARING STOCK. See STOCK.

INTEREST, COUPLED WITH AN. The phrase "coupled with an interest," in connection with a power of attorney, does not mean an interest in the exercise of the power, but an interest in the property on which the power is to operate. 203 U. S. 126, following, 8 Wheat. U. S. 174.

INTEREST, MARITIME. See MARITIME INTEREST.

INTEREST OR NO INTEREST. A provision in a policy of insurance, which imports that the policy is to be good though the insured have no insurable interest in the subject-matter. This constitutes a *waiver policy*, which is bad in England, by statute 19 Geo. II. c. 37, and generally, from the policy of the law; 2 Par. Mar. Law 89, note. See INSURABLE INTEREST; POLICY.

INTERFERENCE. See PATENTS.

INTERIM (Lat.). In the mean time; meanwhile. An assignee *ad interim* is one appointed between the time of bankruptcy and appointment of the regular assignee. 2 Bell, Com. 355.

INTERIM CURATOR. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the Crown of an administrator or administrators for the same purpose. Moz. & W.

INTERIM FACTOR. In Scotch Law. A judicial officer elected or appointed under the bankruptcy law to take charge of and preserve the estate until a fit person shall be elected trustee. 2 Bell, Com. 357.

INTERIM ORDER. An order to take effect provisionally, or until further directions. The expression is used especially with reference to orders given pending an appeal. Moz. & W.

INTERLAQUEARE. In Old Practice. To link together, or interchangeably. Writs were called *interlaqueata* where several were issued against several parties residing in different counties, each party being summoned by a separate writ to warrant the tenant, together with the other warrantors. Fleta, lib. 5, c. 4, § 2.

INTERLINEATION. Writing between two lines.

Interlineations are made either *before* or *after* the execution of an instrument. Those made before should be noted previously to its execution; those made after are made either by the party in whose favor they are, or by strangers.

When made by the party himself, whether the interlineation be material or immaterial, they render the deed void; 1 Gall. 71; 35 N. J. 227; s. c. 10 Am. Rep. 232; unless made with the consent of the opposite party. See 11 Co. 27 a; 9 Mass. 307; 15 Johns. 293; 1 Halst. 215. But see 5 H. & J. 41; 2 La. 290; 4 Bingh. 123; Fitzg. 207, 223; 2 Pa. 191. See 126 *id.* 247.

When the interlineation is made by a stranger in an instrument in the hands of the promisee, though without his knowledge, if it be immaterial, it will not vitiate the instrument, but if it be material, it will, in general, avoid it; 11 Co. 27 a; L. R. 10 Ex. 330; see 6 Wash. 418; otherwise if the instrument be not then in the possession of a party; 6 East 309. If made while in the possession of an agent of the promisee, it avoids the instrument; L. R. 10 Ex. 330; *contra*, 35 N. J. 227; s. c. 10 Am. Rep. 232. The insertion of the words "or order" without the consent of the maker constitutes a material alteration which avoids the note; 20 S. W. Rep. (Tex.) 53. An interlineation made in a bond, after its execution, by an agent of the obligee, without authority, will not invalidate it, but is only an act of spoliation; 86 Mich. 581.

The decisions vary as to the effect of interlineations, when an instrument is put in evidence. In a late case the rule is stated

thus: If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink, in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution; 3 Fed. Rep. 16. See 155 Pa. 152. Where interlineations in a deed are in the handwriting of the officer who attested it officially, the presumption is that they were made at or before the execution of the instrument; 89 Ga. 793; but it has been held that an alteration appearing on the face of a deed is presumed to have been made after its execution, and the burden is upon the party presenting it to explain the alteration; 44 Ill. App. 81.

If an instrument appears to have been altered, it is incumbent on the party offering it to explain its appearance. Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument; but if there is ground of suspicion, the law presumes nothing, but leaves the questions of the time when, the person by whom, and the intent with which it was done, to the jury, upon proofs to be adduced by the party offering the instrument; 1 Greenl. Ev. § 564; Tayl. Ev. 1547; 63 Mo. 63; 108 id. 352; 23 Pa. 244; 157 id. 478; 82 Tex. 352. See 45 Ill. App. 234. In cases of negotiable instruments, the holder is held to clearer proof than in cases of deeds; 2 Dan. Neg. Instr. § 1417. See 40 Minn. 531. In a carefully considered case, 20 Vt. 205, the court adopt what it calls the old common-law rule that an alteration of an instrument, if nothing appear to the contrary, should be presumed to have been made at the time of the execution. So, also, 1 Shepl. 886; 2 Johns. Cas. 198; *contra*, 11 N. H. 395; 48 Ind. 459. It has been held, when a place of payment was inserted, that it was a question for the jury, but that it lay on the plaintiff to account for the alteration, etc.; 6 C. & P. 273; 6 Ala. N. S. 707; such an insertion after delivery is a material alteration; 14 So. Rep. (Ala.) 411; 91 Ga. 827. But in 39 Conn. 164, it was held that the burden of proof of accounting for an alteration is not necessarily on the party producing the instrument. See 44 Ill. App. 81.

In 25 Kans. 510; s. c. 37 Am. Rep. 259, it was held that a negotiable note offered in evidence, bearing on its face an apparent material alteration, is admissible in evidence, and the question as to the time of alteration is for the jury. The court said: If there is neither extrinsic nor intrinsic evidence as to when the alteration was made, it is to be presumed that it was made before or at the time of the execution. Perhaps there might be cases where the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the note to go to the jury without some explanation, etc. This title is fully treated in a note in 37 Am. Rep. 260. As to alteration of negotiable instruments, see 7 Harv. Law Rev. 1. See ALTERATION; ERASURE.

INTERLOCUTOR. Properly means a judgment or judicial order pronounced in the course of a suit, which does not finally determine the cause. But in Scotch practice, the term is extended to the judgments of the Court of Session or the Lord Ordinary, which exhaust the point at issue, and which if not appealed against will have the effect of finally deciding the case. Bell; Moz. & W.

INTERLOCUTORY. Something which is done between the commencement and the end of a suit or action which decides some point or matter, which, however, is not a final decision of the matter in issue: as, interlocutory judgments, or decrees, or orders. See DECREE; JUDGMENT; ORDER; FINAL DECREE.

INTERLOPERS. Persons who interrupt the trade of a company of merchants, by pursuing the same business with them in the same place, without lawful authority.

INTERN. To shut within a particular place; confine within a town or fortress; send to or keep in an interior place; place under restraint. Stand. Dict.

In International Law. Used to denote one of the duties of neutrals in reference to warships or troops of the belligerent which are in its ports or have entered its territory. Such warships or troops must either depart within twenty-four hours, or disarm and be interned for the remainder of the war. Maxey, Int. Law, 540, 541.

INTERNAL REVENUE. See REVENUE; TAXATION.

INTERNATIONAL. The word "international" is a generic term, pertaining to relations between nations, and when applied to business or to transactions of private character it imports dealings of some sort in matters or with people of different nations, or which have some relation to them. It is in common use, and in its nature it is descriptive, and ordinarily characterizes the business to which it pertains, rather than its origin or proprietorship; and, so treated, the use of it cannot be exclusively appropriated by any party. 142 Ky. 531, 134 S. W. 877.

INTERNATIONAL ARBITRATION. The hearing and decision of disputes or differences between sovereign states by arbitrators or umpires chosen by mutual agreement.

Such an agreement may be by a special treaty negotiated with reference to the particular case or by a general treaty of arbitration.

Treaties of arbitration, with respect to special matters between the United States and Great Britain, have been frequently negotiated and carried into effect, and also, in many cases, between each of those countries and other nations. A summary of arbitrations to which the United States have consented is given *infra*.

The first instance of international arbitration is related by Herodotus as occurring between Artabazanes and Xerxes and was decided by Darius.

National arbitrations were known to the Greeks among themselves. They did not cover political questions but usually were confined to disputes touching commerce, religion, boundaries, and the possession of contested territories. Thus in the time of Solon five Spartans were chosen to decide between the Athenians and the Megarians as touching the possession of the island of Salamis.

The Romans were never willing to arbitrate their disputes with neighboring countries, though they acted as arbitrators in disputes between other nations.

The practice of arbitration appears to have obtained in the barbarian world. There are historical instances of arbitration, especially after the Church exercised a preponderating influence and the Bishops of Rome called to their tribunal all differences between peoples and kings.

Saint Louis was called upon to arbitrate between Henry III. and his barons in 1263. Occasionally a city assumed the duties of arbitrator. Thus the Treaty of Westminster of October 23, 1655, stipulated that the Republic of Hamburg should act as arbitrator between France and England. The parliaments of France were chosen to settle disputes between foreign sovereigns.

Sometimes eminent lawyers were employed as arbitrators; thus the doctors of the Italian universities were often employed to settle disputes between the different states of Italy.

It has been said that arbitrations anterior to the seventeenth century were frequently cases rather of amicable settlement than of strict arbitration.

The first attempt by the United States to arbitrate with England was under the Treaty of 1794, commonly called the Jay Treaty, which provided for mixed commissions. Under this the northeast boundary line was settled in 1795. Another commission met in Philadelphia in 1797 to determine the compensation due British subjects in consequence of impediments which certain of the United States had, in violation of the provisions of the Treaty of Peace, interposed to the collection of debts by British creditors. It was unsuccessful, and the claims were afterwards adjusted by the Treaty of January 8, 1802.

Another commission under the Jay Treaty finished its report in 1804. The question before it related to contraband, the rights of neutrals, and the finality of the decisions of prize courts.

The Treaty of Ghent, December 24, 1814, provided for three arbitrations. One related to certain islands in Passamaquoddy Bay, the second related to the ascertainment of the northeastern boundary of the United States. The commissioners failed to agree and each made a separate report to its own government, and finally in 1827 the points of difference were referred to the King of the Netherlands. The third was to determine the Northern boundary of the United States along the middle of the Great Lakes and thence to the Lake of the Woods. These questions were not determined until the Treaty of August 9, 1842, generally known as the Webster-Ashburton Treaty, and the boundary from the northwest angle of the Lake of the Woods to the Rocky Mountains under the Treaty of 1846, was settled by a joint-commission of which the American member was appointed by Act of Congress of March 19, 1872.

Differences arose as to England's performance of the obligation touching slaves under the Treaty of Ghent. This was referred to the Emperor of Russia, who decided that Great Britain had failed to keep her obligations and must make indemnity. A convention was concluded between the two countries for a commission to determine the amount of the indemnity to be paid by Great Britain, upon whose decision that country paid \$1,204,960 in full settlement of all claims.

On February 8, 1853, there was a convention at London for a general settlement of all claims pending between the United States and Great Britain. It sat from September 15, 1853, to January 15, 1855. On July 1, 1856, a convention was concluded between the two countries to determine the compensation due to the Hudson's Bay Company and the Puget Sound Agricultural Company on claims for damages as well as for the transfer to the United States of all their property and rights in territory acknowledged by the treaty of 1846 to be under the sovereignty of the United States. The commission met in 1856 and made an award September 10, 1857.

The Treaty of Washington of May 8, 1871, provided for four distinct arbitrations, the principal of which was that held at Geneva covering the demands of the United States arising out of acts of confederate cruisers of British origin and generically known as the Alabama claims.

This arbitration declined to make an award to the United States for the loss in the transfer of the American merchant marine to the British flag; for enhanced payment of marine insurance; for the prolongation of the war and the increased expenditures for the suppression of the rebellion. It also declined by a majority of three to two to award compensation for expenses incurred in pursuit of the confederate cruisers, but awarded as a direct loss growing out of the destruction of vessels and the cargoes the sum of \$15,500. This arbitration began December 15, 1871, and ended September 14, 1872.

The dispute as to the San Juan water boundary was referred to the Emperor of Germany, who, on October 21, 1872, made an award in favor of the United States. Claims of British subjects against the United States, and of citizens of the United States against Great Britain (excepting the Alabama claims) arising out of injuries during the Civil War, were referred to a mixed commission respectively appointed by the United States, Great Britain, and Spain.

The fourth arbitration under the Treaty of Washington was to determine the compensation due to Great Britain for privileges accorded by that treaty to the United States in the northeastern fisheries. It was conducted by the sum of three persons, a citizen of the United States, a British subject, and a Belgian. It met June 15, 1877, and on November 23 following, awarded Great Britain the sum of \$5,500,000.

Under the Treaty of February 29, 1892, the United States and Great Britain submitted certain questions relating to the protection of the fur seals in Behring Sea to a tribunal of arbitration which sat in Paris.

The only arbitration between the United States and France was one to determine the claims of citizens of France for injury to their persons and property during the Civil War, and for claims of the citizens of the United States for like injuries during the war between France and Germany. It sat from November, 1880, to March 1884.

The United States has had four arbitrations with Spain, one in 1795, relating to claims for illegal captures of vessels by Spanish subjects. In 1871, relating to claims growing out of the insurrection in Cuba. In 1870, relating to the seizure of a steamer by the Spanish authorities in 1870. In 1884, relating to damages to be paid by Spain for the wrongful seizure or detention of an American vessel.

There have been two arbitrations between Mexico and the United States, the first under the Treaty of April 11, 1839, the second under the Treaty of July 4, 1880, for the adjustment of miscellaneous claims. By the convention of March 1, 1893, a permanent board, called an International Boundary Commission, was established for the determination of questions growing out of changes in the course of the Rio Grande and the Colorado River where they form a boundary between the two countries.

The treaty of Guadalupe Hidalgo was entered into between the United States and Mexico on February 2, 1848, and contained a general proposition to arbitrate under which all subsequent arbitration between the two countries may be in a measure referred. Under this treaty the two nations agreed to "endeavor in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves, using, for this end, mutual representations and pacific negotiations." In case of failure, a resort shall not be had to reprisals or hostility of any kind "until the government of that which deems itself aggrieved shall have maturely considered, in the spirit

of peace and good neighborhood, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."

There have been three arbitrations between the United States and Haiti, under a protocol of May 24, 1864, by which two claims against Haiti were referred to Mr. Justice Strong of the supreme court of the United States. His awards were adverse to Haiti, but the United States has thus far declined to enforce them. On March 7, 1885, there was an agreement for a mixed commission of two Americans and two Haitians to adjust the claims of citizens of the United States growing out of civil disturbances in the island. Under the protocol of May 22, 1888, Alexander Porter Morse, of Washington, was named as an arbitrator to consider the claim for damages on the part of Van Bokkelen, a United States citizen, who was imprisoned in Haiti for debt.

A commission was appointed between the United States and Venezuela under a convention of January 19, 1892, to settle the claims of an American steamship company for the seizure of its steamers on the Orinoco.

Three mixed commissions have been appointed under treaty with Colombia, the first and second under conventions concluded September 10th, 1867, and February 10th, 1864, covering rights under the treaty with New Granada of 1846. The third, August 17, 1874, for an award for the capture of the American steamer *Montijo* by insurgents in the State of Panama. Two commissions have sat for the adjustment of miscellaneous claims under conventions of January 12, 1865, and December 4, 1868, one with Costa Rica under the Treaty of July 2, 1860, and one with Ecuador under the Treaty of November 25, 1862.

Under a convention with Peru, December 30, 1862, claims against Peru for the seizure of two vessels were referred to the King of the Belgians, but they were afterwards withdrawn.

By a convention of February 4, 1869, the claims of the United States against Paraguay were referred to a commission composed of a representative of each government. The decision was against the claim, but the United States have regulated the award and endeavored to settle it by negotiation.

The questions between the United States and Portugal arising out of the destruction of the American privateer *General Armstrong* in the port of Fayal, were referred to Louis Napoleon under the Treaty of February 26, 1861. The award was adverse to the claim. After an attempt on the part of the claimants to set it aside the United States paid the claim out of its own treasury. Another arbitration between the United States and Portugal under a protocol signed June 15, 1891, to which Great Britain is also a party in relation to the seizure of the *Delagosa Bay* railway, is now pending.

The United States and Chile by the convention of November 10, 1863, referred to the King of the Belgians a claim growing out of the seizure of the American brig *Macedonian* by the Chilean navy. An award was made in 1868, in favor of the United States. Under the Treaty of August 7, 1892, these two nations provided for a general arbitration of claims by means of a mixed commission.

In 1890, the congress of the United States adopted a concurrent resolution requesting the president to enter into negotiations with the government of Great Britain between it and other governments may be referred to arbitration and possibly adjusted. On July 15, 1893, the British House of Commons adopted a resolution referring in terms to the above resolution of congress and expressing the sympathy of that house with and asking the British government to co-operate with the government of the United States.

The Institute of International Law, at its session in 1874 and 1875, discussed the subject of rules for the procedure of international tribunals of arbitration, and at the latter session adopted provisional rules. At the International American Conference held on April 8, 1890, and attended by delegates from North, Central, and South America, the plan of a permanent tribunal of arbitration was adopted.

Proposed rules for the International Tribunal of Arbitration were submitted by William Allen Butler to the Universal Peace Congress in Chicago in 1894.

In 1890, certain members of the British and French Parliaments formed at Paris a parliamentary union to be composed of members of the legislative assemblies of various states for the purpose of considering the development of international arbitration. At its session at Brussels in 1890, it adopted certain provisions which it recommended to the consideration of the governments of civilized states.

A conference of a number of prominent men was held at Washington April 22 and 23, 1904, for the purpose of furthering international arbitration. In the same year a treaty was negotiated between the United States and Great Britain providing for a tribunal to which all disputes of a certain class between those two nations were to be referred; but it failed to be ratified by the senate.

See Report on International Arbitration, by committee of American Bar Association, August 30, 1906, Vol. XIX, 10, 386; Historical Notes on the Subject of International Arbitration by John B. Moore, of New York, published in the report of this conference from which the above brief statement has been taken.

See also International Arbitration, by Hon. Frederick R. Coudert, *Am. Law Rev.* Vol. XXXI, 321; also *Traité Théorique et Pratique de l'Arbitrage International*, by M. A. Merignhac; Address of the Lord Chief Justice of England before the American Bar Association, *Report*, 1894, p. 253.

International disputes are occasionally submitted to arbitration by disinterested persons, frequently rulers of other states,

and the contending parties are concluded by the decision of the arbitrators unless it is outside the terms of the submission or there is evident fraud or denial of justice. 16 A. & E. Encyc. 2nd ed., 1139; Hall, *Int. Law* 4th ed., § 118 *et seq.*

In recent years the availability and desirability of arbitration as a means of settling international disputes have been much discussed, and at the peace conference at The Hague, held in 1899, to which most of the civilized nations sent representatives, a plan was adopted for the establishment of an international bureau of arbitration. According to this plan, the diplomatic representatives of the signatory powers accredited to the Hague were to form a council which should organize and direct the bureau or arbitration. Each power was to appoint four international lawyers of character and ability, and from those lawyers the parties to any international dispute would, upon notification to the bureau, be asked to choose arbitrators, and those so chosen would decide to dispute according to certain rules of procedure to be formulated. *Id.*; Hasell's *Annual* for 1900, 462.

The conference reassembled in 1907 in order to consider various suggestions for the mitigation of the horrors of war and as to contraband, etc.; but little came of this further meeting. Byrne.

INTERNATIONAL LAW.* The system of rules which Christian states acknowledge to be obligatory upon them in their relations to each other and to each other's subjects. It is the *jus inter gentes*, as distinguished from the *jus gentium*.

[Another definition by President Woolsey is: "International law, as we have viewed it, is a system of rules adopted by the free choice of certain nations for the purpose of governing their intercourse with each other, and not inconsistent with the principles of natural justice." *Introd.* to *Int. L.* § 203. This, it is to be observed, differs materially from the first, with respect to a point to some extent discussed *infra*.

That body of rules which governs the actions of states in their intercourse with one another. These rules are the outgrowth of the customs of nations, of international agreements, and of state acts which have, in the lapse of time, been accepted as binding by the civilized states of the world. It differs from the municipal or national law of individual states in that it has no superior or supreme tribunal whose function it is to enforce the law in the case of its infraction. Nevertheless, it is obeyed for the most part without question, and it is only on rare occasions that resort is had to war. Indeed, most states have adopted it as a part of their municipal law, and a great majority of the cases that arise under it are adjudicated upon by the courts of law of the individual states; Snow, *Int. L.* 17.

A distinction is sometimes drawn between public international law, which is the subject here treated, and private international law, as it is termed by continental jurists, or the conflict of laws (*q. v.*), as it is more frequently designated in England and America. The former title is however used by many writers in the last-named countries. There is a concurrence of authority that they are but different names for the same subject. Dicey, *Conf. L.* 5. Professor Lorimer objects very earnestly to the term Private International Law, and denies that it is International Law at all, and Professor Holland agrees with him; 1 *Law Quar. Rev.* 100. See also Whart. *Com. Am. L.* ch. v.; Whart. *Conf. L.* 1; Woolsey, *Int. L.* 69; Westlake, *Priv. Int. L.* 1, 4.

A different terminology has been suggested, which attempts to differentiate Private International Law and the Conflict of Laws.

* This title being reprinted without alteration of the text as written by the late President Woolsey, such additions as seemed necessary or desirable have been made within brackets, and to preserve the original completeness of the treatment of the subject, some parts of it are undisturbed, although relating to subjects elsewhere treated under the various titles of International Law.

"The aggregate of rules and limitations which sovereign states agree to observe in their intercourse and relations with each other. As it deals with the relations of states in their sovereign capacity, it is sometimes called *Public International Law*, to distinguish it from that branch of the science which has to do with the relations of states to the citizens or subjects of other states, which is called *Private International Law*; or, as it is in question whether the court of a state shall apply their own municipal laws or those of another state in the determination of a given cause, this branch of the subject has sometimes been called the *Conflict of Laws*" (*q. v.*); Davis, *Int. L.* 2.

The only authority cited is Amos, *Science of Law*, and the quotations, made at some length, apply mainly to controversies between citizens of different states.

A recent division of the subject is as follows: "It is divided into three departments: the principles that should regulate the conduct (1) of states to each other; (2) of private parties arising out of the conduct of states to each other; (3) of private parties as affected by the separate internal codes of distinct nations. Its leading principles are three: (1) that every nation possesses an exclusive sovereignty and jurisdiction in its own territory; (2) that no state or nation can by its laws directly affect or bind property out of its own territory, or persons not resident therein, natural born subjects or others; (3) that whatever force the laws of one country have in another depends solely on the municipal laws of the latter." Encyc. Dict.]

The scientific basis of these rules is to be found in natural law, or the doctrine of rights of the state; for nations, like smaller communities and individuals, have rights and correlative obligations, moral claims and duties. Hence it might seem as if the science consisted simply of deductions from certain fundamental propositions of natural right; but this is far from being the case, for national intercourse is the most voluntary possible, and takes a shape widely different from a system of natural justice. It would be true to say that this science, like every department of moral science, can require nothing unjust; but, on the other hand, the actual law of nations contains many provisions which imply a waiver of just rights; and, in fact, a great part of the modern improvements in this code is due to the spirit of humanity controlling the spirit of justice, and leading the circle of Christian nations freely to abandon the position of rigorous right for the sake of mutual convenience or good will.

[The operation of this law is upon sovereign states, as that of municipal law is upon the individual person (*q. v.*), using this word in its larger sense. Formerly the definitions of International law like that first above given applied the subject to Christian nations, the idea being that this branch of the law was in a special degree the outgrowth of an effort to apply to states the moral obligations and duties the recognition of which is largely and primarily due to Christianity.

It is true that President Woolsey recognized that the views embodied in International Law were beginning to spread beyond the bounds of Christendom, but he ascribed it to the fact that "Christian states are now controllers of opinion." *Introd.* *Int. L.* 20.

Sir R. Phillimore thus expressed the idea which generally prevailed, "the consent of nations to things which are naturally, that is by the law of God, binding upon them." But the extension of these very principles, which Christian states alone were assumed to regard, to such an extent that non-Christian nations have been gradually brought more and more within the pale of their influence, and led to the acceptance, more or less, of civilized ideas of government, requires some modification of the older phraseology.

It is now some years since Professor E. Robinson said, evidently with this thought

pressing upon his mind, with much less reason for it than now exists: "In modern times, at least, it has included all the states of the Christian world; but at one time it excluded non-Christian states, and at this moment it would be difficult to say to what extent it covers the relation of such states *inter se* and with the Christian states of Europe and America;" Encyc. Brit.

And now with Mohammedan Turkey to a considerable extent recognizing some amenability to the rules of international law (even admitting that it is external and not internal influence which produces this result), and Japan, almost completely, and China, to a less degree, recognized as admitted to the family of nations, it may fairly be said that the definition of the subject must be broadened so as to apply, not merely to Christian states but to civilized sovereign states, using that term broadly.

Nor is it entirely consistent with the truth of history to assume that international law owes its origin entirely to Christian nations. All that can be positively affirmed is that international law had no existence as a science until moulded into a scientific system by the master mind of Grotius. But no more did he create it than did Coke and Blackstone create the common law. Nor can it be said without qualification that the principles of morality which underlie the scientific expression of international law are the product of Christianity. They are rather a part of that great body of fundamental principles which belong to humanity, and which we express by the term Divine Law, because, although inherent in the nature of man, they are conceived to have been imbedded there by the Divine Author of his existence, and lying dormant through centuries of human history, now and then dimly manifesting themselves through human strivings and human reason, they could only become fully operative after humanity had passed through the general refining process which was the result of the teachings of the founder of Christianity. These principles have the same relation to the Christian system which is borne by those principles of what is termed natural law or natural morality, which have been found in a greater or less degree in the beginning of all the great religions of the world. It is in this sense, and this only, that international law finds its connection with Christianity and the so-called Christian nations.

Hence we find in systems of law prior to Christianity the recognition of fundamental principles of justice and morality which underlie international law, as of those which find their natural development and expression in various branches of municipal law.

Thus the independent Hellenic sovereignties recognized, and their existence as such favored the recognition of certain general customs which may be considered, as suggested by a writer already quoted, as, at least, a parallel to modern international law. And the latter finds its prototype, if not more, in the *jus feciale* of the Romans which doubtless would have developed largely as a general system but for the fact that the universal domination of the Roman Empire reduced its operation to a minimum and practically terminated the necessity of its preservation as a distinct branch of the civil law. But this very fact contributed to its influence in the direction of forming a new system, even if it be not admitted as contended by many authorities that it was in fact its origin. A thoughtful writer, however, has said that the *jus feciale* "differs radically from the modern science of international law which is founded upon the consent of nations and presupposes the existence of many independent states, and rather expresses the imperfect and one-sided views of international obligation which were held by the most powerful state of the ancient world;" Davis, Int. L. 4. The strong concurrence of opinion is unquestionably in favor of the theory that the Roman law was a factor of the first importance. Mr. Carter, in his argument referred to

infra, said, "The Roman law, that wonderful result of reason working upon a basis of abstract right, is largely appealed to in international discussions, as containing rules which, at least by analogy, may serve to settle international disputes. No one can be an accomplished diplomatist without a familiar acquaintance with much of this immortal code" (quoting Phill. Int. Law 14-28). "Not only," says another commentator, "has the Roman law been preserved in the municipal and ecclesiastical jurisprudence of modern Europe: it has also exercised a marked influence on the growth of that body of rules by which the states of Europe are bound together in one moral commonwealth." Morey, Rom. Law § 207.

And Sir Henry Maine, in endeavoring to determine the place of international law in the general development of European jurisprudence, concludes that we may answer pretty confidently that its rapid advance to acceptance by civilized nations was a stage, though a very late stage, in the diffusion of Roman law over Europe; Int. L. 16. And the same writer says further on: "It is sometimes difficult to be quite sure how Grotius and his successors distinguished rules of the Law of Nature from religious rules prescribed by inspired writers. But that they did draw a distinction is plain. Grotius' famous work, the *De Jure Belli ac Pacis*, is in great part composed of examples supplied by the language and conduct of heathen statesmen, generals, and sovereigns, whom he could not have supposed to know anything of inspired teaching. If we assume him to have believed that the most humane and virtuous of the acts and opinions which he quotes, were prompted by an instinct derived from a happier state of the human race, when it was still more directly shaped and guided by Divine authority, we should probably have got as near his conception as possible. As time has gone on, some parts of this basis of thought have proved to be no longer tenable. . . . But nevertheless the system founded on an imaginary reconstruction of it, more and more calmed the fury of angry belligerency, and supplied a framework to which more advanced principles of humanity and convenience easily adjusted themselves."

It may be suggested that not alone through the *jus feciale* is the intimate connection of Roman law with modern international law to be sought. Those laws it is truly said concerned mainly, if not only, embassies, the declaration of war, and the making of peace; see *FECIAL LAWS*; but, after all, the relation of Rome to other states involved little more than questions of war or peace, and with these their only embassies were concerned. So that those laws did control all of foreign relations which then existed.

But after the *jus civile*, the law of a city, was replaced by the *jus gentium*, the law for the civilized world, as Sohm aptly puts it (Inst. Rom. L. § 13), we find the real foundation on which Grotius and those who came after him erected a stately modern structure. The *jus gentium* was an expression of what is variously termed natural law, universal morality, moral law, divine law, applied to the relations of states,—not independent ones (for there were none such contemplated under the empire), but readily adapted to the relations of sovereign and equal states. Perhaps the system and the principles framed for use by states bound together by the bonds of the empire were not less easily adapted to the use to which they have been put by the family of nations, in theory absolutely independent, but in practice rendered more interdependent even than the components of the empire by community of interest, commercial relations, mutual reliance on the exchange of products, and above all the unifying influence of modern civilization in its annihilation of the natural barriers of time and space.]

So much for the general foundation of international law. The particular sources are the *jural* and the *moral*. The jural elements are, *first*, the rights of states

as such, deducible from the nature of the state and from its office of a protector to those who live under its law; *second*, those rights which the state shares with individuals, and in part with artificial persons, as the rights of property, contract, and reputation; and, *third*, the rights which arise when it is wronged, as those of self-protection and redress. To these have been joined by some the rights of punishment and of conquest,—the latter, at least, without good reason; for there is and can be no naked right of conquest, irrespective of redress and self-protection. The moral elements are the duties of humanity, comity, and intercourse.

[The propriety of the phrase "international law" has been challenged as being, strictly speaking, inexact. Among those who have taken this view was the late Lord Coleridge, who said that "Law implies a lawgiver and a tribunal capable of enforcing it and coercing its transgressors." This view, however, accepts the theory of Austin's definition of the law, as the command of a superior with coercive power. Lord Russell of Killowen, in his address before the American Bar Association in 1896, contended for the substantial accuracy of the term *law* in this connection; he considered Austin's definition as applying rather to the later development of arbitrary power than to that body of customary law which, in earlier stages of society, precedes law strictly so called, but which is made up of rules and customs which are laws in every real sense of the word, as for example the law merchant. And he continues; "in stages later still, as government becomes more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands, imposed by a coercive authority and acquire more and more the character of customary law founded on consent."

Addressing himself to the question what is international law, he defines it to be "the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another." He takes issue with the theory that there is any *a priori* rule of right of reason or of morality, or law of nature, which, by its own force, apart from and independently of the consent of nations, is part of the law of nations, and insists that international law is neither more nor less than what civilized nations have agreed shall be binding on one another as international law.

This was a repetition from an academic standpoint of views expressed by their author in a forensic spirit before the Paris tribunal of arbitration in 1893.

At that time the opposing view of the foundation and sources of international law was stated with great clearness by Mr. James C. Carter, counsel for the United States, substantially as follows: The rules which govern the mutual relation of states in their corporate capacity are "properly law, because they have been established by particular states as a part of their own municipal system, and are enforced . . . in the same manner as other portions of the local codes. They are in fact principles of the law of nature or morality put in the form of human command, and clothed with a human sanction." International law, in its general sense, he terms international morality, consisting of rules founded upon justice and equity and deduced by right reason, having no binding force in themselves as law, but observed in deference to the general public opinion of Christendom by a conviction that they are right in themselves, or at least expedient, or by fear of provoking hostilities. This moral sanction is so strong that it may be said to create rights and corresponding duties which belong to and devolve upon independent states; accordingly, a large portion of international law is rather a branch of ethics than of positive human jurisprudence, the sources of which are: 1. The Divine law; 2. enlightened reason; 3. the consent of nations. He contended that international law could not be confined within the limits of mere precedents

or previously recognized rules for regulating the action of sovereign states, but being largely the result of enlightened reason acting upon the abstract principles of morality, "it is, as a science, the most progressive of any department of jurisprudence or legislation. The improvement of civilized nations in culture and refinement, the more complete understanding of rights and duties, the growing appreciation of the truth that what is right is also expedient, have told, and still do tell upon it with sudden and surprising effect.

"The result is that doctrines which were universally received a generation since are as universally rejected now; that precedents which were universally considered as binding a quarter of a century ago, would, at the present, be passed by as without force; as acts which could not endure the light of more modern investigation."

In the same line is the view of Professor Lorimer, who in his *Institutes of the Law of Nations* defines it to be: "the law of nature, realized in the relations of separate political communities."

On the other hand the view of Lord Russell of Killowen is thus expressed by Mr. Hall in his *Treatise on International Law*: "Existing rules are the sole standard of conduct or law of present authority; and changes and improvements in those rules can only be effected through the same means by which they were originally formed, namely, by growth in harmony with changes in the sentiments and external conditions of the body of states."

Various divisions of international law have been proposed, but none are of any great importance. One has been into natural and voluntary law, in which latter conventional or treaty law and customary are embraced. Another, somewhat similar, separates international rules into those which are deducible from general natural *jus*, those which are derived from the idea of estate, and those which grow out of simple compact. Whatever division be made, it is to be observed that nations are voluntary, *first*, in deciding the question what intercourse they will hold with each other; *second*, that they are voluntary in defining their rights and obligations, moral claims and duties, although these have an objective existence beyond the control of the will of nations; and, *third*, that when international law has arisen by the free assent of those who enter into certain arrangements, obedience to its provisions is as truly in accordance with natural law—which requires the observance of contracts—as if natural law had been intuitively discerned or revealed from heaven and no consent had been necessary at the outset.

The aids in ascertaining what international law is or has been, are derived from the sea codes of mediæval Europe, especially the Consolato del Mare; from treaties, especially those in which a large part of Europe has had a share, like the treaties of Westphalia; from judicial decisions, state papers on controverted points, and the treatises of text-writers. Among the latter, Grotius led the way in the seventeenth century, while Puffendorf, fifty years afterwards, from his having confounded the law of nature with that of nations, has sunk into deserved oblivion. In the next century, Cornelius van Bynkershoek, although the author of no continuous work embracing the whole of our science, ranks among its ablest expounders, through his treatises entitled, *De Dominio Maris*, *De Foro Legatorum*, and *Questiones Juris Publici*. In the middle of the eighteenth century, Vattel, a disciple of the Wolfian philosophy, published a clear but somewhat superficial treatise, which has had more than its due share of popularity down to the present day. Of the very numerous modern works we can only name that of Klüber, in French and German (1819 and since), that of De Martens, which came to a fifth edition in 1855, and those of Wheaton and of Heffter, which last two are leading authorities,—the former for the English-speaking lands, the latter for the

Germans. The literature of the science must be drawn from Von Ompteda and his continuator, Von Kamptz, or from the more recent work of Von Mohl (Erlangen, 1855-58), in which, also, an exposition of the history is included. The excellent works of Ward (*Inquiry into the Foundation and History of the Law of Nations*, etc.), and of Wheaton (*History of the Law of Nations from the Earliest Times to the Treaty of Washington in 1842*), are of the highest use to all who would study the science, as it ought to be studied as the offshoot and index of a progressive Christian civilization.

[See also Phillimore, *Com. Int. L.*; Twiss, *Law of Nations*; Maine; Pomeroy; Calvo; Upton; Wildman; Hall; Halleck; Davis, *International Law*; Lawrence, *Essays Mod. Int. L.*; Manning; Chitty, *Laws of Nations*; Snow, *Lect. Int. Law*; Whart. *Dig. Int. L.*; Story; Wharton, *Conf. Laws*. For admirable collections of the bibliography of the subject see Snow and Davis, *Int. L.*, and 1 *Law Quar. Rev.* 100.]

Among the provisions of international law, we naturally start from those which grow out of the essence of the individual state. The rights of the state, as such, may be comprised under the term sovereignty, or be divided into sovereignty, independence, and equality; by which latter term is intended equality of rights. Sovereignty and independence are two sides of the same property, and equality of rights necessarily belongs to sovereign states, whatever be their size or constitution; for no reason can be assigned why all states, as they have the same powers and destination in the system of things, should not have identically the same rights. States are thus, as far as other states are concerned, masters over themselves and over their subjects, free to make such changes in their laws and constitutions as they may choose, and yet incapable, by any change, whether it be union, or separation, or whatever else, of escaping existing obligations. With regard to every state, international law only asks whether it be such in reality, whether it actually is invested with the properties of a state. With forms of government international law has nothing to do. All forms of government, under which a state can discharge its obligations and duties to others, are, so far as this code is concerned, equally legitimate. See GOVERNMENT; SOVEREIGNTY.

Thus, the rule of non-intervention in the affairs of other states is a well-settled principle of international law. In the European system, however, there is an acknowledged exception to this rule, and also a claim on the part of certain states to a still wider departure from the rule of non-intervention, which other states have not as yet admitted. See INTERVENTION.

It is conceded that any political action of any state or states which seriously threatens the existence or safety of others, any disturbance of the balance of power, may be resisted and put down. This must be regarded as an application of the primary principle of self-preservation to the affairs of nations.

But while certain states claim a right to interfere in the internal affairs of others in order to suppress constitutional movements and the action of a people without its own sphere, this is as yet an unauthorized ground of interference. The plea here is, on the part of those states which have asserted such a right, especially of Austria, Prussia, Russia, and at times of France, that internal revolutions are the result of wide-spread conspiracies, and if successful anywhere, are fatal to the peace and prosperity of all absolute or non-constitutional governments. The right, if admitted, would destroy by an international law all power of the people in any state over their government, and would place the smaller states under the tutelage of two or three of the larger. England has always protested against this enlargement of the right of interference, and France has established more than one revolutionary government

in spite of it. See INTERVENTION.

In the notion of sovereignty is involved paramount exclusive jurisdiction within a certain territory. As to the definition of territory, international law is tolerably clear. Besides the land and water included within the line of boundary separating one state from another, it regards as territory the coast-water to the distance of a marine league, and the portions of sea within lines drawn between headlands not very remote, or, in other words, those parts of the sea which are closely connected with a particular country when it needs to defend itself against attack. The high sea, on the other hand, is free, and so is every avenue from one part of the sea to another, which is necessary for the intercourse of the world. It has been held that rivers are exclusively under the jurisdiction of countries through which they flow, so that the dwellers on their upper waters have no absolute right of passage to and from the sea; but practically, at present, all the rivers which divide or run through different states are free for all those who live upon them, if not for all mankind. It has been claimed that ships are territory; but it is safer to say that they are under the jurisdiction of their own state until they come within that of another state. By comity, public vessels are exempt from foreign jurisdiction, whether in foreign ports or elsewhere. See HIGH SEAS; FAUCES TERRÆ; NAVIGABLE WATERS.

The relations of a state to aliens, especially within its borders, come next under review. Here it cannot be affirmed that a state is bound, in strict right, to admit foreigners into or to allow them transit across its territory, or even to hold intercourse with them. All this may be its duty and perhaps, when its territory affords the only convenient pathway to the rest of the world, or its commodities are necessary to others of mankind, transit and intercourse may be enforced. But, aside from these extreme cases, intercourse is only a duty, and not definable with precision, as is shown by the endless varieties of commercial treaties. It can only be said that the practice of Christian states is growing more and more liberal, both as regards admitting foreigners into their territories and to the enjoyment of those rights of person and property which the natives possess, and as regards domiciling them, or even incorporating them, afterwards, if they desire it, into the body politic. See ALIEN; NATURALIZATION.

[Formerly all criminals of one country who escaped into another were safe from pursuit. In modern times extradition treaties have been made providing for their return, but extradition has been regarded as a matter of treaty, and not an international duty. Political offenders are not usually extradited. In Spain and the Spanish American States a legation may grant asylum to persons charged with offences, but this right is not allowed in other countries. Nor can ships of war, as a rule, grant asylum except possibly in cases of political offenders. French naval officers are given the right to refuse asylum under any circumstances, but are forbidden to permit any pursuit or search of their vessels provided a refugee is once given asylum; Snow, *Int. Law* 38. See 17 *Law Mag. & Rev.*, 4th. 98; Whart. *Dig. Int. L.* § 104; EXTRADITION; ASYLUM; FUGITIVE FROM JUSTICE.]

The multiplied and very close relations which have arisen between nations in modern times, through domiciled or temporary residents, have given rise to the question: What law, in particular cases involving personal status, property, contracts, family rights, and succession, shall control the decisions of the courts? Shall it be always the *lex loci*, or sometimes some other? The answers to these questions are given in private international law, or the *conflict of law*, as it is sometimes called,—a very interesting branch of law, as showing how the Christian nations are coming from age to age nearer to one another in their views of the private relations of men. See CONFLICT OF LAWS; LEX LOCI.

Intercourse needs its agents, both those whose office it is to attend to the relations of states and the rights of their countrymen in general, and those who look after the commercial interests of individuals. The former share with public vessels, and with sovereigns travelling abroad, certain exemptions from the law of the land to which they are sent. Their persons are ordinarily inviolate; they are not subject to foreign civil or criminal jurisdiction; they are generally exempt from imposts; they have liberty of worship, and a certain power over their trains, who likewise share their exemptions. Only within five centuries have ambassadors resided permanently abroad—a change which has had an important effect on the relations of states. Consuls have almost none of the privileges of ambassadors, except in countries beyond the pale of Christianity. See **AMBASSADOR**.

Nations, like individuals, have the right of contracts, and their treaties are subject to the same rules of interpretation and of morality which govern in municipal law. An interesting description of treaties are those of guaranty, by which sometimes a right of intervention in the affairs of other states is secured beforehand.

But treaties may be broken, and all other rights invaded; and there is no court of appeal (except by arbitration) where wrongs done by states can be tried. The rights of self-defence and of redress now arise, and are of such importance that but for redress by force or war, and to prevent war, international law would be a very brief science. The laws and usages of modern warfare show a great advance of the nations in humanity since the middle ages. The following are among the leading principles and usages:—

That declarations of war, as formerly practised, are unnecessary; the change in this respect being due chiefly to the intimate knowledge which nations now have, through resident ambassadors and in other ways, of each other's movements and dispositions.

That at the opening of war the subjects of one hostile state within the territory of another are protected in their persons and property, and this notwithstanding it is conceded that by strict right such property is liable to confiscation.

That war is waged between states, and by the active war agents of the parties, but that non-combatants are to be uninjured in person and property by an invading army. Contributions or requisitions, however, are still collected from a conquered or occupied territory, and property is taken for the uses of armies at a compensation.

That combatants, when surrendering themselves in battle, are spared, and are to be treated with humanity during their captivity, until exchanged or ransomed.

That even public property, when not of a military character, is exempt from the ordinary operations of war, unless necessity requires the opposite course.

That in the storming of inhabited towns great license has hitherto been given to the besieging party; and this is one of the blots of modern as well as of ancient warfare. But humane commanders avoid the bombardment of fortified towns as far as possible; while mere fortresses may be assaulted in any manner.

The laws of sea-warfare have not as yet come up to the level of those of land-warfare. Especially is capture allowed on the sea in cases where it would not occur on the land. Yet there are indications of a change in this respect; privateering has been abandoned by many states (the first article of the Declaration of Paris recites that "Privateering is and remains abolished"), and there is a growing demand that all capture upon the sea, even from enemies, except for violation of the rules of contraband, blockade, and search, shall cease. See **CAPTURE**; **PRIVATEER**.

When captures are made on the sea, the title, by modern law, does not fully vest in the captor at the moment, but needs to pass under the revision of a competent court. The captured vessel may be ran-

somed on the sea, unless municipal law forbids, and the ransom is of the nature of a safe-conduct. If a vessel is recaptured, or rescued from other perils, a compensation is due to the rescuer, which is called salvage, which see.

In modern international law, questions of neutrality play a great part. A neutral is one, strictly, who affords assistance to neither party; for assistance afforded to both alike, in almost every case, would benefit one party and be of little use to the other. The neutral territory, on land and sea, must be untouched by the war; and for all violations of this rule the neutral can take or demand satisfaction.

The principal liabilities of neutral trade are the following:—

In regard to the nationality of goods and vessels, the rule, on the whole, has been that enemy's goods were exposed to capture on any vessel, and neutral's goods were safe on any vessel, and that the neutral vessel was not guilty for having enemy's goods on board. Owing to the declaration of the Peace of Paris in 1856, the humane rule that free ships make free goods will no doubt become universal.

Certain articles of especial use in war are called contraband, and are liable to capture. But the list has been stretched by belligerents, especially by England, so as to include naval stores and provisions; and then, to cure the hardship of the rule, another—the rule of pre-emption—has been introduced. The true doctrine with regard to contraband seems to be that nothing can be so called unless nations have agreed so to consider it; or, in other words, that articles cannot become occasionally contraband owing to the convenience of a belligerent. See **CONTRABAND**.

An attempt of a neutral ship to enter a blockaded place is a gross violation of neutrality; and, as in cases of contraband trade the goods, so here the guilty vessel is confiscated. But blockade must exist in fact, and not alone upon paper, must be made known to neutrals, and, if discontinued, must be resumed with a new notification. See **BLOCKADE**.

To carry out the rights of war, the right of search is indispensable; and such search ought to be submitted to without resistance. Search is exclusively a war right, excepting that vessels in peace can be arrested near the coast on suspicion of violating revenue laws, and anywhere on suspicion of piracy. The slave trade, not being piracy by the law of nations (though it is piracy by statute in the United States, Great Britain, and other countries), vessels of other nations cannot be searched on suspicion of being engaged in this traffic. And here comes in the question which has agitated the two leading commercial states of Christendom: How shall it be known that a vessel is of a nationality which renders search unlawful? The English claim, and justly, that they have a right to ascertain this simple fact by detention and examination; the United States contend that if in so doing mistakes are committed, compensation is due, and to this England has agreed. See **BELLIGERENCY**; **INSURGENCY**; **SEA**; **THREE MILE LIMIT**; **RIVERS**; **EXTRATERRITORIALITY**; **PIRACY**; **NATIONALITY**; **NATURALIZATION**; **TREATIES**; **REPRISAL**; **RETORSION**; **PACIFIC BLOCKADE**; **WAR**; **PRIVATEERS**; **TRUCE**; **POSTLIMINIUM**; **UTI POSSIDETIS**; **NEUTRALITY**; **SEARCH**; **PRIZE**; **POLITICAL CRIME**; **SOVEREIGN**; **SURRENDER**; **SUZERAINTY**; **FLAG**; **INTERNATIONAL PRIVATE LAW**; **INTERNATIONAL PUBLIC LAW**.

INTERNATIONAL MILITARY COMMISSION. A conference of most of the European powers held at St. Petersburg in 1868 which drew up the famous Declaration of St. Petersburg prohibiting the use in war of explosive or inflammable bullets. *Bordwell, Law of War*, p. 87, 88.

INTERNATIONAL PRIVATE LAW. The law of nations is divided into two branches, (1) public international law, which regulates the political relation of nation to nation; and (2) private international law, which, though based upon the

first, regulates the reciprocal and personal relations of the inhabitants of different states. International private law is a system of rules established by the comity of nations for the prevention of conflict of laws.

Connection between International Private Law and Public. Rules concerning the purely private relations of individuals, and which relate to rights depending upon the law of one state whose enforcement may be forbidden in the court of another, can only be connected with international law proper by virtue of the fact that the tacit consent which upholds the system of reciprocal concessions is a part of the code regulating the intercourse of nations. The law of the state actually enforced within the territory of another is *national law*; the rule by virtue of which it is so enforced is an *international rule*. In that way only in international private law, whose province it is to prevent conflict in matters of purely individual right, connected with international public law which is strictly confined to the relation of states with states. Taylor, *Int. Law* 153, 209. See **COMITY**.

INTERNATIONAL PUBLIC LAW. See **INTERNATIONAL PRIVATE LAW**.

INTERNATIONAL REGULATION. A regulation which belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. 92 U. S. 273.

INTERNATIONAL RULES OF NAVIGATION. See **NAVIGATION RULES**.

INTERNUNCIO. A Papal minister of the second order, accredited to minor states where there is no nuncio (*q. v.*).

INTERPELLATE. To question imperatively, as a minister or other executive officer, in explanation of his conduct; generally on the part of a legislative body. Webster.

INTERPLEAD. To discuss or try a point incidentally arising, before the principal cause can be determined, by making the parties concerned litigate it between them.

INTERPLEADER. In Practice. A proceeding in the action of detinue, by which the defendant states the fact that the thing sued for is in his hands, and that it is claimed by a third person, and that whether such person or the plaintiff is entitled to it is unknown to the defendant, and thereupon the defendant prays that a process of garnishment may be issued to compel such third person so claiming to become defendant in his stead. 3 Reeve, *Hist. Eng. Law* c. 23; *Mitf. Eq. Pl.* 141; *Story, Eq. Jur.* § 800; *Beach, Mod. Eq. Pr.* 141. Interpleader is allowed to avoid inconvenience; for two parties claiming adversely to each other cannot be entitled to the same thing; Brooke, *Abr. Interpleader* 4; hence the rule which requires the defendant to allege that different parties demand the same thing.

If two persons sue the same person in detinue for the thing, and both actions are depending in the same court at the same time, the defendant may plead that fact, produce the thing (*e. g.* a deed or charter) in court, and aver his readiness to deliver it to either as the court shall adjudge, and thereupon pray that they may interplead. In such a case it has been settled that the plaintiff whose writ bears the earliest teste has the right to begin the interpleading, and the other will be compelled to answer; Brooke, *Abr. Interpleader*, 2.

For the law in regard to interpleader in equity, see **BILL OF INTERPLEADER**.

Under the Pennsylvania practice, when goods levied upon by the sheriff are claimed by a third party, the sheriff takes a rule of interpleader on the parties, upon which, when made absolute, a feigned issue is framed, and the title to the goods is tested. The goods, pending the proceedings, remain in the custody of the defendant upon the execution of a forthcoming bond.

INTERPOLATION. In Civil Law. The act by which, in consequence of an agreement, the party bound declares that he will not be bound beyond a certain time. Wolff, Inst. Nat. § 752.

In the case of a lease from year to year, or to continue as long as both parties please, a notice given by one of them to the other of a determination to put an end to the contract would bear the name of interpolation.

INTERPRETATION. The discovery and representation of the true meaning of any signs used to convey ideas. Lieber, Leg. and Pol. Hermeneutics.

The "true meaning" of any signs is that meaning which those who used them were desirous of expressing. A person adopting or sanctioning them "uses" them as well as their immediate author. Both parties to an agreement equally make use of the signs declaratory of that agreement, though one only is the originator, and the other may be entirely passive. The most common signs used to convey ideas are words. When there is a contradiction in signs intended to agree, resort must be had to construction,—that is, the drawing of conclusions from the given signs, respecting ideas which they do not express. Construction is usually confounded with interpretation; and in common use, construction is generally employed in the law in a sense that is properly covered by both, when each is used in a sense strictly and technically correct; Cooley, Const. Lim. 49. A distinction between the two, first made in the Leg. and Pol. Hermeneutics, has been adopted by Greenleaf and other American and European jurists. Hermeneutics includes both. See CONSTRUCTION.

Close interpretation (interpretatio restricta) is adopted if just reasons, connected with the formation and character of the text, induce us to take the words in their narrowest meaning. This species of interpretation has generally been called literal, but the term is inadmissible. Lieber, Herm. 66.

Extensive interpretation (interpretatio extensiva, called, also, *liberal interpretation*) adopts a more comprehensive signification of the word.

Extravagant interpretation (interpretatio excedens) is that which substitutes a meaning evidently beyond the true one: it is, therefore, not genuine interpretation.

Free or unrestricted interpretation (interpretatio soluta) proceeds simply on the general principles of interpretation in good faith, not bound by any specific or superior principle.

Limited or restricted interpretation (interpretatio limitata) is when we are influenced by other principles than the strictly hermeneutic ones. Ernesti, *Institutio Interpretis*.

Predestined interpretation (interpretatio predestinata) takes place if the interpreter, laboring under a strong bias of mind, makes the text subservient to his preconceived views or desires. This includes artful interpretation (*interpretatio vaser*), by which the interpreter seeks to give a meaning to the text other than the one he knows to have been intended.

The civilians divide interpretation into:—*Authentic (interpretatio authentica)*, which proceeds from the author himself.

Usual (interpretatio usualis), when the interpretation is on the ground of usage.

Doctrinal (interpretatio doctrinalis), when made agreeably to rules of science. Doctrinal interpretation is subdivided into extensive, restrictive, and declaratory: extensive, whenever the reason of a proposition has a broader sense than its terms, and it is consequently applied to a case which had not been explained; restrictive, when the expressions have a greater latitude than the reasons; and declaratory, when the reasons and terms agree, but it is necessary to settle the meaning of some term or terms to make the sense complete.

The following are the elementary principles and rules of interpretation and construction, which are here given together on account of their intimate connection and

the difficulty of separating them.

There can be no sound interpretation without good faith and common sense. The object of all interpretation and construction is to ascertain the intention of the authors, even so far as to control the literal signification of the words; for *verba ita sunt intelligenda ut res magis valeat quam pereat*. Words are, therefore, to be taken as those who used them intended, which must be presumed to be in their popular and ordinary signification, unless there is some good reason for supposing otherwise, as where technical terms are used: *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*. When words have two senses, of which one only is agreeable to the law, that one must prevail; Cowp. 714; when they are inconsistent with the evident intention, they will be rejected; 2 Atk. 32; when words are inadvertently omitted, and the meaning is obvious, they will be supplied by inference from the context, see 54 N. W. Rep. (Minn.) 933. When language is susceptible of two meanings, one of which would work a forfeiture, while the other would not, the latter must prevail; 71 Wis. 177.

In Constitutions. The following principles governing the construction of state constitutions are laid down by Judge Cooley. The construction must be uniform and unvarying; 13 Mich. 188; 19 How. 393; and sensible, so as to effectuate the legislative intention, and, if possible, avoid an unjust or absurd conclusion; 144 U. S. 47. The object of construction is to give effect to the intent of the people in adopting it; this intent is to be found in the instrument itself; Miller, Const. U. S. 100; Ordrón. Const. Leg. 575; 2 Hill, N. Y. 35. The whole is to be examined with a view to arriving at the true intention of each part; it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law; if different portions should seem to conflict, the courts should harmonize them, if practicable, and should lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory; 8 W. Va. 320; 2 Paine 584; 27 Wisc. 478. It must be presumed that words have been employed in their natural and ordinary meaning; 9 Wheat. 188; but technical words are presumed to have been employed in their technical sense. See Cooley, Const. Lim. ch. iv. Where two provisions of a constitution are irreconcilably repugnant, that which is last in order of time and local position will prevail; 7 Ind. 570.

In Statutes. In construing written laws, it is the intent of the law-giver which is to be enforced; this intent is found in the law itself. The first resort is to the natural significance of the words employed, in their order of grammatical arrangement; 7 N. Y. 9, 97; Cooley, Const. Lim. 70; 130 U. S. 670; 60 Ill. 86. The whole law is to be examined, with a view to arrive at the true intention of each part; Co. Litt. 381 a. It is a general rule, in the construction of writings, that a general intent appearing, it shall control the particular intent; but a particular intent plainly expressed in one place must sometimes prevail over a general intent deduced from other parts of the writing; 5 Tex. 441.

Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction; 130 U. S. 671; 90 id. 72; 2 Cranch 399. Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion; 144 U. S. 47.

Penal statutes must be strictly interpreted; remedial ones liberally; 1 Bla. Com. 88; 6 W. & S. 276; 3 Taunt. 377; see 120 U. S. 678; 134 id. 624; and generally, in regard to statutes, the construction given them in the country where they were enacted will be adopted elsewhere. Though

penal statutes are to be strictly construed, yet the intention of the legislature must govern; 184 U. S. 624.

Statutes should be so construed, if practicable, that one section will not destroy another, but explain and support it; 147 U. S. 242.

The change of conditions as well as of the meaning of words in their ordinary use frequently creates difficulties in the application of statutes which in England led to the passage, in 1889, of the stat. 52 and 53 Vict. c. 63, known as the General Interpretation Act, which was intended to cover the whole subject of statutory interpretation. A synopsis of its provisions, together with an instructive collation of words having a marked difference in their ordinary and judicial meaning, will be found in Ordrónaux, Const. Leg. c. xi. In this country the subject is not so comprehensively treated, but there will usually be found in the general statutes of each state a chapter defining the meaning of certain words as used in the statutes.

In the exposition of statutes and constitutions, every word is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it, and there cannot be imposed upon the words any recondite meaning or any extraordinary gloss. 253 U. S. 398, quoting 1 Story, Const. § 451; 130 U. S. 662.

Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. 250 U. S. 381.

The language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by other parts of the act, and words used may be qualified by their surroundings and connections. 203 U. S. 76. Though in actions of slander, words were formerly construed in the mildest sense that they would admit, they are now to be taken according to their ordinary import and meaning. 1 Dall. (U. S.) 114. Where a criminal statute does not define a word used therein, its etymology must be considered and its ordinary meaning applied. 241 U. S. 73.

When several words are followed by a clause which is applicable as much to the first and other words as to the last, the clause should be read as applicable to all. 253 U. S. 348.

In Contracts. There must always be reference to the surrounding circumstances and the object the parties intended to accomplish; 116 Ind. 60; 77 Ga. 36; and when the language is indefinite or ambiguous and of doubtful construction, the practical interpretation by the parties is of great weight, if not controlling; 123 U. S. 121. Where there was a doubt as to the nature of a contract, the court adopted its view of it, and held that even if the meaning were doubtful, the court would follow the interpretation put upon it by both parties in good faith; 74 Fed. Rep. 183. Impossible things cannot be required. The subject-matter and nature of the context, or its objects, causes, effects, consequences, or precedents, or the situation of the parties, must often be consulted in order to arrive at their intention, as when words have, when literally construed, either no meaning at all or a very absurd one. The whole of an instrument must be viewed together and not each part taken separately; and effect must be given to every part, if possible; 37 Minn. 388. Assistance must be sought from the more near before proceeding to the remote. When one part is totally repugnant to the rest, it will be stricken out; but if it is only explanatory, it will operate as a limitation. Reference to the *lex loci* or the usage of a particular place or trade is frequently necessary in order to explain the meaning; 2 B. & P. 164; 3 Stark. Ev. 1036; 16 S. & R. 126. A court of law should read a written contract according to the obvious intention of the parties, in spite of clerical errors or omis-

sions which can be corrected by perusing the whole instrument; 55 N. J. L. 182; 16 Or. 288.

In the construction of a contract it is proper to consider the course of dealing between the parties, and the construction they had by their actions put on previous contracts between them of the same general character; 155 Pa. 22; 12 U. S. App. 198; 44 Ill. App. 627; 8 Misc. Rep. 61; 50 Fed. Rep. 764; 124 U. S. 505.

Words spoken cannot vary the terms of a written agreement; they may overthrow it. Words spoken at the time of the making of a written agreement are merged in the writing; 5 Co. 26; 2 B. & C. 634; 4 Taunt. 779. Where there is a latent ambiguity which arises only in the application and does not appear upon the face of the instrument, it may be supplied by other proof; *ambiguitas verborum latens verificatione suppletur*; 1 Dall. 426; 3 S. & R. 609.

The rule that an agreement is to be construed most strongly against the party benefited can only be applied in doubtful cases; 125 U. S. 260; and when other rules of interpretation fail; 11 Col. 50. The more the text partakes of a solemn compact, the stricter should be its construction.

General expressions used in a contract are controlled by the special provisions therein. In agreements relating to real property, the *lex rei sitæ* prevails, in personal contracts the *lex loci contractus*, except when they are to be performed in another country, and then the law of the latter place governs; 2 Mass. 88; 1 Pet. 317; Story, Conf. Laws § 242; 4 Cow. 410, note; 2 Kent 39, 457. When there are two repugnant clauses in a deed, which cannot stand together, the first prevails. With a will the reverse is the case. In all instruments the written part controls the printed, if the two are inconsistent; 78 Hun 23; 13 Gray 37; 150 U. S. 312; 25 Neb. 849; 62 Mich. 546; 84 Ala. 109; when a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other; 24 Fla. 560; 98 Mo. 315; 86 Ky. 141; 41 Kan. 763.

In addition to the above rules, there are many presumptions of law relating to agreements, such as, that the parties to a simple contract intend to bind their personal representatives; that where several parties contract without words of severality, they are presumed to bind themselves jointly; that every grant carries with it whatever is necessary to its enjoyment; when no time is mentioned, a reasonable time is meant; and other presumptions arising out of the nature of the case. It is the duty of the court to interpret all written instruments; see 10 Mass. 384; 3 Cra. 180; 3 Rand. 586; 10 U. S. App. 352; 7 Misc. Rep. 710; 150 Pa. 8; written evidence; 2 Watts 347; and foreign laws; 1 Pa. 388; and where the terms of a parol agreement are shown without any conflict of evidence; 47 Mo. App. 1; 114 Mo. 55; 155 Pa. 67; contracts are to be construed liberally in favor of the public, when the subject-matter concerns the interests of the public 138; U. S. 1.

See CONSTRUCTION; IN MITIORI SENSU. See TITLE OF ACT, ETC.; USE OF WORD-CONTEMPORANEOUS CONSTRUCTION; GENERAL WORDS; LIBERAL.

INTERPRETATION CLAUSE. A clause frequently inserted in Acts of Parliament, declaring the sense in which certain words used therein are to be understood. Moz. & W.

A section of a statute which defines the meaning or certain words occurring frequently in the other sections. R. & L. Dict.

INTERPRETER. One employed to make a translation.

An interpreter should be sworn before he translates the testimony of a witness; 4 Mass. 81; 5 id. 219; 2 Caines 155.

A person employed between an attorney and a client to act as interpreter is considered merely as the organ between them,

and is not bound to testify as to what he has acquired in those confidential communications; 1 Pet. C. C. 256; 4 Munf. 278; 8 Wend. 387.

Communications made to an interpreter are not hearsay when he translates and communicates what has been said to him, and the party to whom it is made may testify to it; 50 Minn. 91. Conversations carried on through an interpreter may be shown by either party thereto or a third person who hears it, its weight only and not its competency being affected thereby; 157 Mass. 393.

INTERREGNUM (Lat.). The period, in case of an established government, which elapses between the death of a sovereign and the accession of another, is called interregnum. The vacancy which occurs when there is no government.

INTERROGATOIRE. In French Law. An act, or instrument, which contains the interrogatories made by the judge to the person accused, on the facts which are the object of the accusation, and the answers of the accused. Pothier, Proc. Crim. s. 4, art. 2, § 1.

INTERROGATORIES. Material and pertinent questions in writing, to necessary points, exhibited for the examination of witnesses or persons who are to give testimony in the cause.

They are either original and direct on the part of him who produces the witnesses, or cross and counter, on behalf of the adverse party, to examine witnesses produced on the other side. Either party, plaintiff or defendant, may exhibit original or cross interrogatories.

The form which interrogatories assume is as various as the minds of the persons who propound them. They should be as distinct as possible, and capable of a definite answer; and they should leave no loop-holes for evasion to an unwilling witness. Care must be observed to put no leading questions in original interrogatories, for these always lead to inconvenience; and for scandal or impertinence interrogatories will, under certain circumstances, be suppressed. See Willis, Int. *passim*; Gressl. Eq. Ev. pt. 1, c. 3, s. 1; Viner, Abr.; Hind. Ch. Pr. 317; 4 Bouvier, Inst. n. 4419 *et seq.*; Daniell, Ch. Fr.

INTERRUPTION. The effect of some act or circumstance which stops the course of a prescription or act of limitations. 3 Bligh, n. s. 444; 4 M. & W. 497.

Civil interruption is that which takes place by some judicial act.

Natural interruption is an interruption in fact. 4 Mas. 404; 2 Y. & J. 285. See EASEMENTS; LIMITATIONS; PRESCRIPTION.

In Scotch Law. The true proprietor's claiming his right during the course of prescription Bell, Dict.

INTERSECTION. The point of intersection of two roads is the point where their middle lines intersect. 78 Pa. 127; 74 id. 259.

INTERSTATE. "Interstate," as used in a state tax statute, can fairly be construed as including all commerce other than "intrastate" when the evident purpose is to tax only the earnings subject to state taxation. 232 U. S. 577.

INTERSTATE COMMERCE. Comprehends all commercial intercourse between different States and all the component parts of that intercourse, and is not confined to transportation from one State to another. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. 12 Wheat. (U. S.) 446. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. 196 U. S. 143. Commerce is a term of the largest import. It comprehends intercourse, for the purposes of trade in any and all its

forms, including the transportation, purchase, sale, and exchange of commodities. 91 U. S. 280. Buying and selling and the transportation incidental thereto constitute commerce. 128 U. S. 20. See also, 175 U. S. 241.

Intercourse for the purpose of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities, between the citizens of different states. 171 U. S. 597, quoting 91 U. S. 275. Subject, by the Constitution, to the exclusive regulation of Congress, whose enactments in regard to it are administered and enforced by the Interstate Commerce Commission (q. v.). 3 Moore, Carriers, 2nd ed., 1758, 1759. See CARRIER; COMMERCE; DISCRIMINATION; INTERSTATE COMMERCE ACT.

INTERSTATE COMMERCE ACT.

An act of Congress, passed in 1887, for the purpose of regulating interstate commerce, and creating a commission, known as the Interstate Commerce Commission, charged with the administration and enforcement of the act and all later amendments to it. The principal objects of the act were "to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar conditions and circumstances; to prevent undue and unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights." 3 Moore, Carriers 2nd ed., 1759. See INTERSTATE COMMERCE; INTERSTATE COMMERCE COMMISSION; DISCRIMINATION; COMMERCE; HEPBURN ACT.

The Interstate Commerce Act embraces the whole field of interstate commerce; it does not exempt such foreign commerce as is carried on a through bill of lading, but in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment. 209 U. S. 57.

The Interstate Commerce Act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discrimination and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates. 204 U. S. 426.

INTERSTATE COMMERCE COMMISSION.

A commission created by the Interstate Commerce Act (q. v.) of 1887, charged with the administration and enforcement of the Act and all subsequent amendments. It consisted originally of five members to be appointed by the President for terms ranging from two to six years; enlarged in 1906 to seven members, with terms of seven years each. It has no legislative powers, and no judicial power, except of a *quasi* judicial nature, but is simply an administrative board exercising administrative powers. 3 Moore, Carriers 2nd ed., 2068, 2096, 1759, 1760. See INTERSTATE COMMERCE; INTERSTATE COMMERCE ACT.

The Constitution of the United States, Art. I, Sec. 8, gives to Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The Interstate Commerce Act was passed on February 4th, and took effect on April 6th, 1887. It was amended March 2, 1890; February 10, 1891; February 8, 1893; supplementary acts were passed February 11, 1893; March 2, 1893; August 7, 1898. It applies to all common carriers "engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment," between states or states and territories; between states or territories and the District of Columbia; between places in the United States and any adjacent foreign country; between places in the United States when any part of the transportation is through an adjacent foreign country; and to transportation of property from any place in the United States to a foreign country which is carried from such place to a port of transshipment, and to property shipped from a foreign country to any place in the United States, and carried to such place from a port of entry, either in the United States or an adjacent foreign country. It does not apply to the transportation of persons or property, etc., wholly within a state and not shipped to or from a foreign

country. It extends to bridges and ferries used in connection with any railroad. It declares that all charges for services rendered in connection therewith shall be reasonable and just and prohibits all unjust and unreasonable rates.

Sec. 2. The charging of any greater or less compensation for any service rendered any shipper or person than is charged or collected from another for a like and contemporaneous service, etc., is declared to be unlawful.

Sec. 3 forbids giving any undue or unreasonable preference to one person, etc., or locality over another person or place, or to one description of traffic over another, and prohibits the carrier from subjecting any shipper, locality, or traffic to any undue or unreasonable prejudice or disadvantage. It imposes a duty to afford reasonable, proper, and equal facilities to connecting carriers, for the interchange of business, without discrimination.

Sec. 4 prohibits charging any greater compensation in the aggregate for the transportation of persons or of like kind of property, under substantially similar conditions, for a shorter than is charged for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

Sec. 5 prohibits any agreement between carriers for the pooling of facilities of competing railroads or for dividing their joint earnings.

Sec. 6 provides that the carriers shall print schedules of their rates, duly classified, and file copies with the Commission and post copies in all their stations and offices for public inspection. These must specify terminal charges and any rules affecting the rates. These rates can only be advanced after ten days' public notice and an amendment of the schedules accordingly; nor can they be reduced except after three days' similar notice and the like amendment. Copies of all agreements between two or more carriers for making a line of through transportation are also required to be filed with the Commission. If joint tariffs of rates are provided for, copies of these tariffs must be filed with the Commission. Such publicity is to be given to these joint tariffs as the Commission may direct. This section contains no requirement as to ten days' notice in any advance and three days' notice of any reduction in the joint rates, as is prescribed respecting the rates of the individual carrier.

Sec. 7 prohibits any scheme between carriers to prevent the continuous transportation of property without change of cars. No breaking of bulk, etc., unless necessary, shall be considered as breaking the continuous passage.

Sec. 8 provides that any carrier committing a breach of this act shall be liable in damages to the person injured, including a counsel fee to be taxed as costs.

By sec. 9 any person aggrieved may complain before the Commission or bring suit in the circuit or district court having jurisdiction, for damages. In the latter cases the court may compel all officers, etc., to appear and testify and to produce the books of the company; but no evidence which they may give shall be used against them in any criminal proceeding.

By sec. 10 any carrier, or, if a corporation, any officer, etc., thereof, guilty of an infraction of the act, shall be guilty of a misdemeanor, and subject to a fine of not to exceed \$5,000, or if the offense is an unlawful discrimination in rates, to imprisonment for not to exceed two years, or both in the discretion of the court. False billing, classification, etc., of goods is made a misdemeanor, whether by the carrier or its officer, or by the shipper, and so the act of inducing a common carrier to discriminate unjustly.

Sec. 11 creates the Commission, who have authority, by sec. 12 to inquire into the management of the business of common carriers and to enforce the act; they may institute proceedings for that purpose and for the punishment of violations of the act; they may require the production of all necessary books, contracts, etc.

By sec. 13 any person, corporation, association, or any mercantile, agricultural, or manufacturing society, or any other political or municipal organization or State Railroad Commission may complain before the Commission of any infraction of the act, and the Commission itself may institute any inquiry on its own motion.

By sec. 15 if the Commission find that the act has been contravened, they may notify the carrier thereof. By sec. 16 if any carrier refuses to obey an order of the Commission, the latter or any party interested may apply to the circuit court of the district where such carrier has its principal office. Such court shall hear the case speedily, without formal pleadings; the findings of fact of the Commission shall be *prima facie* evidence of the matter therein stated. If it appear that any lawful order of the Commission has been disobeyed, the court shall enjoin further disobedience thereof. If the matter in dispute exceeds \$2,000, either party may appeal.

Common carriers are required to make annual reports to the Commission, and the latter may prescribe a uniform system of keeping accounts.

The act expressly excepts the carriage of property free, or at reduced rates, for the United States, state, or municipal governments, or for charitable purposes, or to and from exhibitions, etc., or the free carriage of destitute persons transported by charitable societies; or the issuance of mileage, excursion, or commutation passenger tickets; or giving reduced rates to ministers of religion; or to certain indigent persons; or the exchange of passes between the officers of railroad companies for their officers and employees.

The provisions of the act are declared to be in addition to all remedies by common law or by statute.

By the act of March 2, 1889, the United States courts are given jurisdiction to issue writs of peremptory mandamus commanding the movement of interstate traffic, or the furnishing of cars and other transportation facilities.

By the act of February 11, 1883, no person shall be excused from testifying before the Commission, upon the ground that his evidence, documentary

or otherwise, will tend to criminate him, etc.; but no person shall be prosecuted (except for perjury before the Commission) by reason of such evidence.

The Commission is made a body corporate, with legal capacity to be a party plaintiff or defendant in the federal courts, by reason of the provision in the act that it "shall have an official seal, which shall be judicially noticed," and that making it lawful for it to apply by petition for the enforcement of its orders; 51 C. C. Rep. 405; s. c. 162 U. S. 197. It has only administrative powers of supervision and investigation, which fall far short of making it a court, or its action judicial. Its action or conclusions upon matters brought before it is neither final nor conclusive; nor is it vested with any authority to enforce its decision or award. It hears, investigates, and reports upon complaints made before it, but subsequent judicial proceedings are contemplated and provided for in all cases, where the party against whom the decision is rendered does not yield voluntary obedience thereto. Its findings of facts are *prima facie* evidence in subsequent judicial proceedings brought to enforce its orders. The circuit court is not the mere executioner of the Commission's orders or recommendations. The suit in that court is an original, independent proceeding, and the court hears and determines the cause *de novo* upon proper pleadings and proofs. The Commission may be regarded as the general referee of the court. The jurisdiction of the court depends upon the fact that it relates to a subject over which congress has exclusive control, independently of the citizenship of the parties; 37 Fed. Rep. 567; see also 56 id. 925. The Commission is authorized and required to execute and enforce the provision of the act. It can investigate, find facts, reach conclusions, and make orders, on complaint made by others, or upon inquiry instituted on its own motion. The conclusions and orders have no binding force; its reported findings of fact alone have legal effect, and its conclusions and recommendations can only be enforced through the courts; 3 I. C. Rep. 151; s. c. 41 C. C. R. 116. The Commission is not a court but a special tribunal whose duties though largely administrative, are sometimes semi or quasi judicial; 51 C. Rep. 656 (U. S. C. C., M. D. of Tenn.); 3 id. 830; s. c. 51 C. C. R. 166; it is required to investigate and report, but its final act is not considered as a judgment; *id.*; its opinion has not the effect of a judicial determination, and, to enforce it, the court, in an original proceeding, hears the complaint *de novo*; 5 I. C. Rep. 282 (C. C., S. D. of Ohio); s. c. 62 Fed. Rep. 690; the order of the Commission is administrative, and not final or conclusive like the judgment or decree of a court; and the order of the circuit court enforcing it does not make it a final judgment, so that change or modification cannot be made when changed traffic conditions arise; and when the Commission files a petition in a federal court to enforce its findings, they are not conclusive of the facts or entitled to greater weight than a complaint filed by an individual; 49 Fed. Rep. 177; but the finding and opinion were said in another case to be entitled to great weight; 5 I. C. Rep. 656 (U. S. C. C., M. D. of Tenn.); s. c. 73 Fed. Rep. 409.

The Commission has authority to investigate and deal with violation of the law independently of any formal complaint; 3 I. C. Rep. 151; it can only determine whether existing rates are in conflict with the statute, and not make rates itself; 5 id. 391; s. c. 162 U. S. 184; 76 Fed. Rep. 183.

It has no power to prescribe rates, either maximum, minimum, or absolute, and it cannot secure the same result indirectly by determining what in reference to the past was reasonable and just, and then endeavor to obtain from the courts a peremptory order that in the future the railroad com-

pany should follow such rates; 167 U. S. 479. It can apply the act only where an overt violation of its provisions by a carrier subject thereto is made to appear; 1 I. C. Rep. 323; s. c. 11 C. C. R. 102.

Subject to the two leading prohibitions that their charges shall not be unreasonable or unjust, and that they shall not unjustly discriminate, so as to give undue preference to persons or traffic similarly circumstanced, the act leaves common carriers as they were at common law, free to make special contracts, to classify their traffic, to adjust and apportion their rates, and generally, to manage their important interests upon the same principles which are regarded as sound in other pursuits; 162 U. S. 184; s. c. 5 I. C. Rep. 391 (C. C. of A.); id. 685. The act was not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination. It is not all discriminations that are prohibited, but only those that are unjust and unreasonable; 145 U. S. 263, affirming 43 Fed. Rep. 37. The act is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts and adopt proper business methods, further than its terms and recognized purposes require; a railroad company may lawfully charge low rates on coal in the summer months, if its rates are equal to all persons; 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

The act should be liberally construed in favor of commerce among the states, but when complaint is made solely or mainly in the interest of the common carriers engaged in such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred; 37 Fed. Rep. 567.

Where a railroad company by a contract with a bridge company had the right to use a bridge for its traffic, the railroad company is subject, as a common carrier, to the act, but the bridge company cannot invoke it to compel railroad companies to transact business with it; *id.* Carriers by water are not under the act except "when both are used under a common control, etc., for a continuous carriage, etc.;" 2 I. C. Rep. 486.

The act does not apply to express companies, independently organized; 43 Fed. Rep. 448; nor to the carriage of property by rail or otherwise wholly within a state; 30 id. 867; when the carrier issues no bills of lading to points beyond its line, receives no freight on through bills of lading, and has no arrangement with other roads for a conventional division of charges or a common management; 77 id. 942; but if a railroad company, whose line is entirely within one state, issues through bills of lading to points in other states, it is within the act; 11 C. Rep. 315. Receivers of railroad companies are common carriers and subject to the act; 6 I. C. Rep. 379; and a carrier subject to the act cannot, by leasing its road, free itself from liability for practices illegal under the act, nor after the termination of the lease escape liability for damages for injuries sustained during the lease; 6 I. C. Rep. 378.

The act does not come within the constitutional prohibition as to impairing the obligation of contracts, although its effect may be to prevent the literal enforcement of pre-existing contracts; 2 I. C. Rep. 102; s. c. 2 I. C. R. 162; 45 Am. & Eng. R. Cas. (Mont.) 284.

The act requires that all charges by common carriers subject to its provisions "shall be reasonable and just," and this is the sole requirement of the law upon the subject of rates which such carriers may demand for the transportation of interstate traffic; 37 Fed. Rep. 567. The terms "reasonable, just," "unreasonable, unjust," "undue or unreasonable preference or advantage," "undue or unreasonable advantage in any respect whatsoever," used in the act imply

* The decisions of the Commission have been published in a series of Interstate Commerce Commission Reports, 5 vols. The Interstate Commerce Reports, 6 vols., contain the decisions of the Commission and commerce cases in the courts. The former series has been discontinued; it is cited as I. C. C. R.; the latter as I. C. Rep.

comparison of relative locations, natural and acquired advantages, of the reasonableness of charges *per se* and in their relations to other roads or lines which serve competing localities, and consideration of all the facts and circumstances which affect rates to different communities; 6 I. C. Rep. 458.

The act is for the protection of the public only; 2 I. C. Rep. 187; s. c. 2 I. C. C. R. 231.

The mere circumstance that there is in a given case a preference does not, of itself, show that such preference is unreasonable; 5 I. C. Rep. 685 (C. C. of A.); s. c. 74 Fed. Rep. 715. See DISCRIMINATION.

Evidence that the rates on a certain commodity are higher in certain cases than certain other rates, and that they produce a large revenue to the carrier, does not make a *prima facie* case that they are unreasonable. The reasonableness must be determined by an examination of the whole subject; 2 I. C. Rep. 162. The fact that a road earns little more than operating expenses is not to be overlooked in fixing rates, but it cannot be made to justify grossly excessive rates. Wherever there are more roads than the business, at fair rates, will remunerate, they must rely upon future earnings for the return of investments and profits; 2 I. C. Rep. 289.

There is nothing in the act requiring connecting lines of interstate carriers to make through routes and through rates with one connecting line because it has done so with another; 37 Fed. Rep. 567.

The relative fairness of a rate is not determined alone by its being low. Low rates to one place may not be just if still lower rates are given to another place; 2 I. C. Rep. 187. The legitimate interests of carrying companies, as well as of traders and shippers, should be considered in determining the lawfulness of rates under the act. Ocean competition may constitute a dissimilar condition, and conditions which exist beyond the seaboard of the United States can be legitimately regarded for the purpose of justifying a difference in rates charged by railroads between import and domestic traffic; 5 I. C. Rep. 405; s. c. 162 U. S. 197.

Trade centres are not, as a matter of right, entitled to have more favorable rates than the smaller towns for which they form distributive centres; and carriers may give the smaller places rates as favorable as the larger ones; when the rates are impartial in themselves as between large and small towns, the fact that one large centre may have an advantage over another in the business of the small places does not make out a case of undue preference. Impartial rates are not rendered illegal by their effect upon the business of localities; 2 I. C. Rep. 32; that rates should be fixed in inverse proportion to the natural advantages of competing towns with the view of equalizing "commercial conditions" is at variance with justice; 4 I. C. Rep. 65; 7 *id.* 180. A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination; 2 I. C. Rep. 393.

A railroad company is under special obligation to give reasonable rates for its local business. It may accept business from other carriers on through rates which, when divided between them, will give to any one of them for its division less than its own local rates; 2 I. C. Rep. 414.

Through transportation over connecting lines is favored by the act, and the rate is correctly adjusted upon the distance through, and not upon the shorter distances over, the several lines; 3 I. C. Rep. 460. While the question of distance is important in establishing rates, it is not an absolute and unconditional right from which a departure may not be justified by other considerations. The public benefits, the greater volume of business warranting lower rates to all, and the force of competition may furnish reasons that outweigh a claim of right founded merely on geographical considerations; 2 I. C. Rep. 436. See *id.* 604.

When rates are on their face disproportionate or relatively unequal, the burden is on the carrier to justify them; 2 I. C. Rep. 604. In determining rates on a short local line, where the cost of service is great, owing to steep grades, sparse population, and light traffic, such circumstances should have much controlling weight. This rule was applied where a road existing under such conditions was charged with unjust rates in transporting oil, as compared with the cost of piping it to the same point; 2 I. C. Rep. 298.

Ordinarily there is no better measure of railroad service in carrying goods than distance, though it is not always controlling. And where the rates for carrying freight from a certain territory over one road are considerably greater than the rates charged by another road from neighboring territory to the same place, the higher rates will be held excessive; 2 I. C. Rep. 609. Greater compensation in the aggregate for the shorter, than for the longer, haul over a direct line is unlawful; 6 I. C. Rep. 361.

Mileage, while a circumstance to be considered with the conditions in fixing rates, is by no means controlling or the most important; 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

There may be cases in which a carrier legitimately engaged in serving some territory is compelled by some new and aggressive competition to reduce normal and reasonable rates, to retain business on its line, and where corresponding reductions at points not affected, or less affected, by such competition, might be unreasonable. But when a carrier voluntarily enters a field of competition where, by reason of a disadvantageous route, or the rigor of the competitive conditions, remunerative rates cannot be charged, and its service to a portion of its patrons is unprofitable, it accepts the legal obligation that its service shall be impartial to all who sustain similar relations to the traffic, and for whom the service itself is not substantially dissimilar; 3 I. C. Rep. 115. Where there has been a consolidation of competing lines that have formerly served the same territory in competitive traffic to the same market, the consolidated lines cannot deprive the public of fair competition, nor give oppressive discrimination with a view to its own interest; 3 I. C. Rep. 162.

In fixing reasonable rates on such articles as food products, the operating expenses, bonded debt, fixed charges, dividends on the stock and other necessary expenses are all to be considered, but the claim that any particular rate is to be measured by these as a fixed standard, below which the rate cannot lawfully be reduced, is subject to some qualifications, one of which is that these obligations must be actual and in good faith; 37 Fed. Rep. 567; nor, on the other hand, can these rates be so limited that the shipper may, in all cases, realize actual cost of production; 3 I. C. Rep. 93; S. c. 4 I. C. C. R. 48; in the carriage of great staples which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only moderate profit to the carrier are both necessary and justifiable; *id.*

The fact that one company controls parallel lines affords no warrant for giving superior advantages to the patrons of one line and denying similar advantages to those of the other line; 1 I. C. Rep. 608.

Ordinarily no adequate reason exists for a difference in rates for a solid carload of one kind of freight from one consignor and a like carload from the same point to the same destination consisting of freight from more than one consignor to one consignee, etc., and such difference is not justified by the difference in the cost of handling; 2 I. C. Rep. 742.

The Commission has no power to require the adoption of rates on a uniform and equal mileage basis; 2 I. C. Rep. 9.

The expense of carrying fruit, etc., from Jersey City, the railroad terminal, to New York, may be added to the rate charged to the latter place; 6 I. C. Rep. 295. As to

the effect of free cartage at terminals, see 167 U. S. 633.

Party-rate tickets are not commutation tickets, and when party rates are lower than the fare for single passengers they are illegal; 2 I. C. Rep. 729. A sale of mileage tickets to commercial travellers, and a refusal to sell to other passengers except at a higher rate, is unjust discrimination within the act; and the fact that the former release the carrier from liability, or that they may influence business in favor of the road, does not justify such discrimination; 1 I. C. Rep. 369. The placing of passenger tickets in the hands of ticket brokers to be disposed of at reduced rates, under the pretence of paying a commission, is a violation of the act; 2 I. C. Rep. 340. A passenger rate war in which rates are repeatedly reduced by carriers without filing tariffs or reducing intermediate rates, is unlawful; *id.*; granting free transportation to city officials is unjust discrimination within the act; 3 I. C. Rep. 793; s. c. 5 I. C. C. R. 153.

Where the established rate for single passengers is three cents a mile, it is not unlawful to issue what are termed "party-rate tickets" for not less than ten persons, at two cents a mile, which is less than the established rate for single passengers, where such tickets are offered to the public generally; 145 U. S. 263. See 2 I. C. Rep. 445, where the Commission held that party rates and passenger carload rates lower than for single passengers are illegal.

The provision of sec. 22 that nothing in the act shall apply "to the issuance of mileage passenger tickets" applies only to the issuing of such tickets; the terms upon which they are issued must be in accordance with the general provisions of the act; 1 I. C. Rep. 369.

If a reduction in passenger rates be made between competing points, the rates must also be reduced between intermediate points; 2 I. C. Rep. 340.

A greater charge for a shorter haul than for a longer haul is permissible, if the conditions are not in fact "substantially similar," and the carrier may determine this question for itself, subject to a liability for violating the act. It is not necessary first to obtain a ruling from the Commission; 50 Fed. Rep. 295; s. c. 50 Am. & Eng. R. Cas. 93.

The act does not prevent the making of the charge less in proportion to the distance for a long than for a short haul; 1 I. C. Rep. 764. The provision of sec. 4 prohibiting a greater charge for a shorter than for a longer distance, the shorter being included within the longer distance, is limited to cases in which the circumstances are substantially similar; nor is it a sufficient justification for such greater charge that the short haul is more expensive to the carrier, unless it be exceptionally so, or that the long haul traffic is exceptionally inexpensive; nor that the lesser charge on the longer haul has for its motive the encouragement of some branch of industry, or to build up business or trade centres, or that it is merely a continuation of favorable rates under which they have been built up; 1 I. C. Rep. 278. The long and short haul clause can be suspended only in exceptional cases, and not where there is only a general reason therefor, however serious the consequences of a refusal may be; *id.* 73.

The fact that a railroad company makes an unreasonably low rate does not authorize a rival, extending between the same points, to make greater charges for the shorter haul to intermediate points than it does to the terminal; 2 I. C. Rep. 137.

Where a road makes the same charge to one point that it does to another which is only from a third to two-thirds of the same distance, the charge to the shorter point is presumptively illegal; 2 I. C. Rep. 137. Actual water competition of controlling force relating to traffic important in amount, may justify a lower charge for a longer distance than for a shorter distance included therein; 3 I. C. Rep. 80; but disturbance of rates, secret or open, will

not; 7 I. C. Rep. 61; nor will competition between markets or between carriers subject to the act; 7 I. C. Rep. 224; nor possible water competition; 8 I. C. Rep. 198. Water competition must be such that the freight would go to its destination by water, if the lower rate were not given; 8 I. C. Rep. 682; s. c. 4 I. C. C. R. 744.

On the ground that "through failure of crops" the people of long distance localities were without necessary food for themselves and animals, a temporary order was made in 6 I. C. Rep. 293, authorizing a carrier to charge less for a longer distance than they were authorized to charge for a shorter distance. And the need of additional facilities for passengers travelling to Chicago during the World's Fair was considered a ground for the same relief; 6 I. C. Rep. 323. An intermediate local rate should never exceed the through rate plus the local rate back to the intermediate place; 2 I. C. Rep. 1.

The classification of freight is expressly recognized by the act; 2 I. C. Rep. 742. But in classifying freights the carrier must respect the interests of the shipper on the basis of relative equality and justice; 2 I. C. Rep. 742. Common carriers should be held responsible for the correctness of the weight and classification of freight received, and in turn should hold every station agent responsible; 1 I. C. Rep. 813.

Lower rates on carload lots than on less quantities are not unlawful; but if the difference be so wide as to destroy competition between large and small dealers, especially upon articles that are of general and necessary use, and that furnish a large volume of business, the act is violated; 2 I. C. Rep. 742. When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for carloads than that which applies to less than carload quantities, but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers; 4 I. C. Rep. 285.

It is the duty of a carrier to equip its road with suitable cars for its traffic and to furnish them alike to all who have occasion for their use; 3 I. C. Rep. 162. The public must be justly and equally served in furnishing cars; if in a time of special pressure, some one must wait, regular customers of the road are not entitled to preference; 1 I. C. Rep. 787. A carrier is not justified in refusing less desirable freights because more money can be made by using its cars in carrying another kind; 1 I. C. Rep. 787. See FACILITIES.

In an action for unjust discrimination in freight charges, under sec. 2, it is sufficient to set out the rates charged plaintiff and another shipper, and the circumstances and conditions under which plaintiff's shipment was made, with an allegation that the smaller charges made the other shipper were for like services, under substantially the same circumstances and conditions, without setting out such circumstances and conditions; 81 Fed. Rep. 80.

It is the duty of a carrier of live stock to provide proper facilities for receiving and discharging live stock free from all charges except the regular transportation charges; and it cannot receive and discharge such live stock at a depot, access to which must be purchased; 1 I. C. Rep. 601.

Under the statute shippers are not to be put in a position of subservience to common carriers, and are not required to ask for rates, but are entitled to equal and open rates at all times; 2 I. C. Rep. 203.

Complaints, though brought by an individual, may challenge the entire schedule of rates to competing points; 6 I. C. Rep. 458.

The Commission can rehear a particular case and amend its original order therein, although the circuit court may have refused to enforce such original order; 6 I. C. Rep. 548.

In proceedings before the Commission, all offending carriers need not be made parties defendant, but the case may proceed only against the carrier whose lines the complainant uses; 6 I. C. Rep. 548.

The jurisdiction of the circuit court is

limited to approval or disapproval, and to an enforcement, or a refusal to enforce, an order of the Commissioners. It cannot modify it; 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

The right asserted by a petitioner in the circuit court under the act arises and is claimed under a law of the United States which relates to a subject over which congress has exclusive control; and this is sufficient to sustain the jurisdiction; 87 Fed. Rep. 567; 2 L. R. A. 289. A state court has no jurisdiction; 43 La. Ann. 511.

It is not necessary that a person making a complaint before the Commission should have a pecuniary interest in the violation of the statute complained of; it is sufficient if a responsible party complains of a matter which amounts to a public grievance; 1 I. C. Rep. 571; 7 I. C. Rep. 92.

It is not proper for railroad companies to withhold the larger part of their evidence from the Commission, and first adduce it in the circuit court in proceedings by the Commission to enforce its order; the purposes of the act call for a full inquiry by the Commission in the first instance; 5 I. C. Rep. 391; s. c. 162 U. S. 184. It is not necessary to file with a petition for the enforcement of an order of the Commission the transcript of the evidence taken before it, under the provision of the statute making the findings of the fact of the Commission *prima facie* evidence of the matter stated, but either party may use as evidence any competent testimony taken before the Commission; 5 I. C. Rep. 181; s. c. 64 Fed. Rep. 961. Where the Commission applies for an injunction to restrain a railroad company from disobeying an order of the Commission, a preliminary injunction will not be granted when the company's answer denies the facts upon which the order was based; 49 Fed. Rep. 177. A preliminary injunction will not be granted where the question involved is a new one; or where the injury to the defendant is likely to be greater than the benefit to the plaintiff; *id.* It is doubtful if a preliminary injunction should ever be granted; 62 Fed. Rep. 690; s. c. 5 I. C. Rep. 287. An action against the carrier for a violation of the act in making unlawful discriminations may be maintained in the name of the United States by the district attorney; 5 I. C. Rep. 106 (U. S. C. C., D. of Kans.). No appeal now lies to the supreme court from decisions of the Commission; 149 U. S. 264.

Under the 5th amendment to the constitution of the United States, which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself," a person under examination by a grand jury, in an investigation into certain alleged violations of the act and its amendments, is not obliged to answer questions where he states that his answers might tend to criminate him; although section 860 of the Revised Statutes provides that no evidence given by him shall in any manner be used against him in any court of the United States in any criminal proceedings. The object of this constitutional provision is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime; 142 U. S. 547.

The provision in the act of February 11, 1893, "that no person shall be excused from attending and testifying or from producing books, etc., before the" Commission, on the ground that the testimony, may tend to criminate him or subject him to a penalty or forfeiture; but that no such person shall be prosecuted or subjected to any penalty or forfeiture on account of any matter concerning which he may testify or produce such evidence, affords absolute immunity against prosecution and deprives the witness of his constitutional right to refuse to answer; 161 U. S. 591; s. c. 5 I. C. Rep. 369. This act is said to have been passed in view of the decision in 142 U. S. 547, *supra*; see 161 U. S. 594.

The act of February 4, 1887, is not inconsistent with the act of July 2, 1890. "To protect trade and commerce against unlaw-

ful restraints and monopolies;" 166 U. S. 290.

So far as congress adopted the language of the English Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language; and intended to incorporate it into the statute; 145 U. S. 268.

INTERSTATE RENDITION. See FUGITIVE FROM JUSTICE.

INTERVENING DAMAGES. Damages suffered by an appellee from delay caused by the appeal. 1 Tyler 267.

INTERVENOR. One not originally a party who, by leave of the court, intervenes in a suit and becomes a party thereto to protect a right or interest in the subject-matter.

A person who intervenes in a suit, either on his own behalf or on the behalf of the public. See INTERVENTION.

INTERVENTION (Lat. *intervenio*, to come between or among). In Practice. The admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings.

Persons who are not parties to a suit cannot in general file a petition therein for a stay of proceedings or any other cause; the remedy is by original bill. Exceptions are: where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like; creditors are allowed to prove debts and persons belonging to a class on whose behalf the suit is brought are regarded as *quasi* parties and, of course, may have a standing in court; per Bradley, J., in 2 Woods 628. Third persons may be driven to intervene for their rights in equity if those rights are to be affected, and if at the hearing the court would be compelled to notice their absence and order the case to stand over until they were brought in; 19 Fed. Rep. 659. See 1 Dan. Ch. Pr. 287; Story, Eq. Pl. § 220. It is not necessary to the right of intervention, in order to participate in a trust fund in the custody of the law, that the intervenor should first obtain judgment at law or should have any lien upon the fund. Intervention will be granted, after a foreclosure decree against a railroad company, to unsecured note-holders who pray to have their debts established as equitable liens upon the property and funds of the company paramount to the lien of the mortgage; 21 Fed. Rep. 264. A holder of railroad bonds secured by a mortgage under foreclosure has an interest in the amount of the trustee's compensation, which entitles him to intervene and to contest it and to appeal from an adverse decision; 111 U. S. 684. Where a part of a canal was sold and the fund brought into court, it was held that the contractor who built the canal could intervene for the protection of his rights either upon the fund or against the purchaser; 105 U. S. 509. Bondholders in a foreclosure suit brought by the trustee of the mortgage are *quasi* parties and may be heard for the protection of their interests; 53 Fed. Rep. 850.

If one who is a necessary party to a case in a state court is wrongfully excluded and denied leave to file a proper cross bill and answer and to present a motion for removal to the federal court, he will be treated by the latter court as if a party; 23 Fed. Rep. 356. A case in 8 Fed. Rep. 97 was based on special facts.

Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder, and the trustees for the bondholders named in the land grant mortgages of the company, and the bill charged that the officers of the company were squandering its property, and the purpose of the suit was the preservation and administration of the assets of the company, and a decree *pro confesso* had been entered and a receiver appointed, individual stockholders were not permitted

to intervene and file a cross bill on a general charge of fraud and collusion on the part of the receiver and erroneous judgment on the part of the court in making the order referred to. In such a suit, it is not the proper practice to allow individual stockholders to intervene to set aside the proceedings or to interpose obstacles to the progress of the suit. Such stockholders may come in to take the benefit of the proceedings and decree, but not to oppose and nullify them. Rival creditors by proceedings before the master may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object of the suit, to obtain an administration of the company's assets and property. Persons will not be allowed to intervene as general defendants unless they show that they have an interest in the results as stockholders, and are also able to show fraud and collusion between the plaintiff in the suit and the officers of the company; per Bradley, J., in 2 Woods 323. In 3 Hughes 320, the Amsterdam Bondholders' Committee, representing a very large number of bonds, filed a petition setting out the grounds for disapproving their trustees' management of the foreclosure suit, and praying intervention, but leave to intervene was denied; 55 Fed. Rep. 448.

Where the holder of a large amount of bonds, on which foreclosure proceedings were pending, asked leave to intervene, and it appeared that the mortgage trustee was already a party, and there was no allegation that it was not acting properly for the interests of all bondholders, leave to intervene was refused (even for the mere purpose of requiring notice to such bondholder of successive steps in the proceedings), on the ground of excessive inconvenience in the administration of the cause; Dallas, J., in the Reading Railroad foreclosure, U. S. C. C.

The practice in respect of intervention in ordinary railroad foreclosure cases probably differs somewhat in different circuits, and varies considerably in different cases. The question of the right to intervene by members of a class already represented on the record appears to be rather a matter of discretion, in view of what is deemed best for the due conduct of the cause. Probably the right to be heard will not ordinarily be refused in any case.

There would seem to be a distinction between the intervention of parties for the purpose of sharing in a fund and the intervention of parties in the course of the administration of a railroad property, during receivership. In the latter class of cases, it would appear, from the authorities, that unless good cause be shown for the intervention of new members of a class already represented on the record they will not be allowed to come in, upon the ground stated by Dallas, C. J., in the Reading foreclosure, — the excessive inconvenience in the administration of the cause.

In a suit to foreclose a railroad mortgage, certain persons prayed leave to intervene, alleging that the defendant company was made up by an illegal consolidation of three other companies, of one of which they were stockholders, that they never consented to the consolidation and were not bound by it nor by the mortgage, that the original company had no officers to defend for them, and that the consolidated company declined to set up the defence which they desired to make; leave to intervene was refused as there was no charge of fraud or collusion, and the proper remedy was by an independent suit; 43 Fed. Rep. 14.

A purchaser at a foreclosure sale may be admitted as a party to the record and allowed to appeal; 1 Wall. 655; 2 id. 609; upon failure to ask leave to come in, the court should compel him to become a party of record; 49 Fed. Rep. 426. The purchaser at a foreclosure sale under a junior mortgage who takes subject to a prior mortgage, will be made a party to proceedings to foreclose such prior mortgage; 44 Fed. Rep. 115. Parties given leave to intervene in an equity

suit after a decree *pro confesso* have a right of appeal from a decree affecting their rights, and the supreme court will enforce this right by a *mandamus*; 94 U. S. 248. See 111 U. S. 684.

When a creditor's bill in equity is properly removed from a state court to a federal court on the ground that the controversy is wholly between citizens of different states, the jurisdiction of the latter is not ousted by admitting in the circuit court as co-plaintiffs other creditors who are citizens of the same state as the defendants; 115 U. S. 61.

When property in the possession of a third person claiming ownership, is attached on mesne process issuing out of the United States circuit court, as the property of a defendant and citizen of the same state, as the person claiming it, such person may seek redress in the circuit court by ancillary proceedings; as, for instance, if the original proceeding is in equity, by a petition *pro interesse suo*, or by ancillary bill, or by summary motion, according to circumstances; or, if it is at common law, by a summary motion or by a proceeding in the nature of an interpleader; or, if proceedings authorized by statutes of the state afford an adequate remedy, by adopting them as part of the practice of the court; Matthews, J., in 110 U. S. 276. Where, in a suit in equity, an execution is issued and a levy and sale made of certain lands, a third party claiming to be the real owner cannot intervene for the purpose of moving to set aside the execution when there is no privity of estate between him and the defendant in the execution; 55 Fed. Rep. 17.

On a creditors' bill, judgment creditors who choose to intervene may share ratably with complainants in the proceeds of a sale of the property, even if some do not intervene until after the decree of sale; 44 Fed. Rep. 117. The practice of permitting judgment creditors to come in and make themselves parties to a creditors' bill is well settled; 5 Wall. 205.

Stockholders of a corporation who have been allowed to put in answers in the name of the corporation cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, equity may allow a stockholder to become a party defendant for the protection of his own interest and that of such other stockholders as may join him in the defence; 2 Wall. 283. Where any fraud has been perpetrated by the directors of a company by which the interests of the stockholders are affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud; 8 Biss. 193.

The state can intervene in proceedings to foreclose a railroad mortgage only where it is entitled as a bond or lien holder to share in the proceeds of a sale, or where public interests are at stake which are seriously threatened by the proposed disposition of the property. An intervening petition filed by a state in railroad foreclosure proceedings alleging that bonds and the mortgage securing them were void, and that the railroad company, by collusion and neglect to defend, was about to allow judgment to go against it by default, that the company in consideration of large land grants from the state had agreed to maintain low rates of transportation, which, by foreclosure, would be increased, gives no right of intervention, especially where neither the charter of the company nor any subsequent legislation showed any such contract as the one alleged; 81 Tex. 530. Permission will not be granted to a state to intervene for the stay of the sale of a railroad under foreclosure proceedings; 2 Woods 628.

In a controversy between two states in relation to the boundary line between them, the attorney-general of the United States may appear on behalf of the United States and adduce evidence, though he does not thereby become a party in the technical

sense of the word, and no judgment will be entered for or against the United States; 17 How. 478.

A petition to intervene need not be as formal as a bill of complaint, yet it should exhibit all the material facts relied on, embodying so much of the record in the original suit as is essential, and proceedings taken therein which would fortify the right of the intervenor should be incorporated in the petition by amendment, and if this is not done, such proceedings cannot be noticed on a demurrer to the petition; 77 Fed. Rep. 700.

In bills brought on behalf of a class, an intervening member of the class will ordinarily be joined as a plaintiff and this will not generally deprive the court of jurisdiction; 115 U. S. 61. If there should be any danger that it would, he may be joined as a defendant or, if he intends to act in hostility to the original complainant, the court may make him a defendant; 1 Post. Fed. Prac. § 201; 5 Blatchf. 525; 2 Woods 328.

A person claiming a right to share in a fund or claiming a right to property in the hands of a receiver is generally allowed to intervene *pro interesse suo*; 1 Post. Fed. Pr. § 201.

One who, in an action at law, has been denied the right to intervene, because of his status, cannot afterwards maintain a bill in equity in the same court to enjoin the proceedings and to be permitted to intervene; 81 Fed. Rep. 753.

Under Codes. There are provisions in the codes of several of the states, which appear to have been originally adopted from Louisiana, permitting any person who has an interest in any matter in litigation to intervene by rule of court. This interest must be of such a direct and important character that the intervenor will either gain or lose by the direct effect of the judgment; the interest must be that created by a claim in suit or a lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property or some part thereof which is the subject of litigation; 13 Cal. 62, per Field, J. See 144 U. S. 518; 1 La. 425. Where, under a judgment, there were attachments against property, one who held attachments upon the same property subsequent to those of the plaintiff in the suit, sought to intervene, alleging that the notes upon which the judgment was based were fraudulent, and that the suit and attachment were in execution of a collusive scheme between the plaintiff and defendant to defraud the intervenor, it was held that when the judgment was entered against the defendants the whole subject-matter of the suit was disposed of and that the writ of attachment was a part of the remedy and had nothing to do with the cause of action; also, that the vindication of the right as against the attached property involved an independent judicial inquiry, and leave to intervene was therefore refused; 28 Minn. 428.

See A. & E. Enc., *Intervention*.

In Patent Law. Where a third party asked to be made a party defendant, alleging that it was the manufacturer of machines claimed to infringe; that the defendant was its vendee; that it desired to settle the question as to whether or not the machines did infringe, both the complainant and the third party being non-residents, the petitioner was allowed to become a party defendant; 32 Fed. Rep. 835. In a suit against a railway company for infringing a patent upon oil cars, the defendant set up that it merely transported the cars under its obligation as a common carrier; and upon petition by the owner of the cars, he was allowed to intervene and defend the suit; 54 Fed. Rep. 521.

In Admiralty. Any person may intervene in a suit *in rem* for his interest and he may do so notwithstanding the *res* has been delivered to a claimant on a stipulation in a certain sum to abide by and perform the decree, the stipulation as far as it goes standing for the *res*; 45 Fed. Rep. 62. An administrator may intervene in a suit *in rem* to recover the damages allowed

by a law of the state for the death of his intestate, caused by the wrongful act or omission of the person in charge of the *res*; 43 Fed. Rep. 78. When a vessel libelled by a material man has been taken possession of by the court, other material men may intervene by libel praying warrants of arrest in order to retain the property in case security be given for its release; 57 Fed. Rep. 248. See Admiralty Rule 43.

In International Law. The right of one state to interfere in the internal affairs of another is a question that has been much debated in international law. The Holy Alliance which existed for so many years was a combination of European states to suppress all attempts to overthrow monarchy in any country, and religion and humanity have frequently given excuses for the exercise of the right. The United States, however, has usually adhered to the policy of non-intervention, but with some exceptions not extending to armed intervention but tending in that direction, as in Mexico, during Maximilian's rule, in the war between Chile and Peru, and in the recent difficulty between Great Britain and Venezuela. See Snow, Lect. Int. L. 57. It is sometimes termed interference. See Davis, Int. L. 74.

The doctrine has been thus spoken of by a distinguished writer, "Historicus": "Its essence is illegality and its justification is its success." Instances of intervention are in China, Armenia, Madagascar, and Nicaragua. In 1861 France made an armed intervention in Mexico. Coercive intervention has long been looked upon as justifiable in cases where one state has been guilty of undue punishment of citizens of another state, or of any arbitrary or capricious unfairness towards subjects; 20 Law Mag. and Rev. 4th ser. 242. See INTERNATIONAL LAW.

In Civil Law. The act by which a third party becomes a party in a suit pending between other persons.

The intervention is made either to be joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Pothier, Proc. Civ. 1ère part, ch. 2, s. 6, § 3.

In English Ecclesiastical Law. The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chitty, Pr. 492; 3 Chitty, Com. Law 633; 2 Hagg. Cons. 137; 3 Phill. Eccl. 586; 1 Add. Eccl. 5; 4 Hagg. Eccl. 67; Dunlop, Adm. Pr. 74. The intervenor may come in at any stage of the cause, and even after judgment, if an appeal can be allowed on such judgment; 2 Hagg. Cons. 137; 1 Eng. Eccl. 480; 2 id. 18.

Intervention is allowed in certain cases, especially in suits for divorce and nullity of marriage, by 23 & 24 Vict. c. 144, and 36 & 37 Vict. c. 31, where it is usual for the queen's proctor to intervene, where collusion is suspected; Moz. & W.

In Possession and Administration of the Deceased. "Intervene in the possession and administration of the deceased" as the expression is used in the Argentine Treaty of 1853, is to be construed as permitting the consul of either contracting nation to temporarily possess the estate of his national for the purpose of protecting it, before it comes under the jurisdiction of the laws of the country, or to protect the interests of his national in an administration already instituted otherwise than by him. 223 U. S. 317. See MEDIATION.

INTESTABILIS. A witness incompetent to testify. Calv. Lex.

INTESTABLE. One who cannot lawfully make a testament.

An infant, an insane person, or one civilly dead, cannot make a will, for want of capacity or understanding; a married woman cannot make such a will without some special authority, because she is under the

power of her husband. They are all intestable.

INTESTACY. The state or condition of dying without a will.

INTESTATE. Without a will. A person who dies, having made no will, or one which is defective in form. In that case, he is said to die intestate, and his estate descends to his heirs at law.

This term comes from the Latin *intestatus*. Formerly, it was used in France indiscriminately with *de-confesse*; that is, without confession. It was regarded as a crime, on account of the omission of the deceased person to give something to the church, and was punished by privation of burial in consecrated ground. This omission, according to Fournel, *Hist. des Avocats*, vol. 1, p. 116, could be repaired by making an ampliative testament in the name of the deceased. See Vely, tom. 6, page 145; Henrion de Pansey, *Autorité judiciaire* 129, and note. DESCENT AND DISTRIBUTION; WILL.

INTESTATE SUCCESSION. A succession is called *intestate* when the deceased has left no will, or when his will has been revoked, or annulled as irregular. Therefore the heirs to whom a succession has fallen by the effects of the law only are called "heirs *ab intestato*." Civil Code La. art. 1096.

INTESTATO. In the Civil Law. Intestate; without a will. Calv. Lex.

INTESTATUS. In the Civil and Old English Law. An intestate. One who dies without a will. Dig. 50, 17, 7.

INTIMACY. As generally applied to persons, it is understood to mean a proper, friendly relation of the parties, but it is frequently used to convey the idea of an improper relation; an intimacy at least disreputable and degrading. 152 Pa. 187. See 157 Mass. 478.

INTIMATION. In Civil Law. The name of any judicial act by which a notice of a legal proceeding is given to some one; but it is more usually understood to mean the notice or summons which an appellant causes to be given to the opposite party, that the sentence will be reviewed by the superior judge.

In Scotch Law. An instrument of writing, made under the hand of a notary, and notified to a party, to inform him of a right which a third person had acquired: for example, when a creditor assigns a claim against his debtor, the assignee or cedent must give an intimation of this to the debtor who, till then, is justified in making payment to the original creditor. Kames, Eq. b. 1, p. 1, s. 1.

INTIMIDATING. See ALARMING.

INTIMIDATION. The act of intimidating or making fearful; the state of being intimidated.

In Old English Law. Every person commits a misdemeanor, punishable with a fine or imprisonment, who wrongfully uses violence to, or intimidates, any other person, or his wife or children, with a view to compel him to abstain from doing, or to do, any act which he has a legal right to do or abstain from doing. (Stat. 38 and 39 Vict. c. 86, § 7.) This enactment is chiefly directed against outrages by trades-unions and there are similar statutes in many of the States. R. & L. Dict. See BOYCOTTING.

INTIMIDATION OF VOTERS. Statutes have been enacted in some states to punish the intimidation of voters. Under an early Pennsylvania act, it was held that to constitute the offence of intimidation of voters, there must be a preconceived intention for the purpose of intimidating the officers or interrupting the election; 8 Yeates 429.

INTO. Prohibiting the transporting of liquor "into" a State does not preclude its transportation through such a State, as the word "into" refers to the State of destination,

and not to the means by which that end is reached. 249 U. S. 375.

INTOL AND UTTOL. Toll or custom paid for things imported, or exported, or bought in or sold out. Tom.; Calv. Lex.

INTOXICATING BEVERAGE. See ANY, Intoxicating Beverage.

INTOXICATING LIQUOR. In the National Prohibition Act of 1919 (in effect 1920), title II and title III, the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes. Thorpe, National and State Prohibition, 141.

INTOXICATION. See DRUNKENNESS.

INTRA VIRES. An act is said to be *intra vires* ("within the power") of a person or corporation when it is within the scope of his or its powers or authority. It is the opposite of *ultra vires* (q. v.).

INTRINSECUM SERVITIUM. Common and ordinary duties with the lord's court. Kenn. Glos.

Such service as was due out of the land by a tenant who held of the lord, as contrasted with *forinsecum servitium*, which meant such service as was due to the superior of whom the lord himself held the land. The *intrinsecum servitium* was "inside," and arose out of the bargain between the lord and the tenant: the *forinsecum servitium* was "outside," and existed independently of any such bargain. Byrne.

INTRINSIC. The intrinsic value of a thing is its true, inherent, and essential value, not depending upon accident, place, or person, but the same everywhere and to every one. 5 Ired. L. 698.

INTRODUCE INTO COMMERCE of United States. See "ATTEMPT TO INTRODUCE INTO COMMERCE OF UNITED STATES."

INTRODUCTION. That part of a writing in which are detailed those facts which elucidate the subject.

INTROMISSION. In Scotch Law. The assuming possession of property belonging to another, either on legal ground, or without any authority: in the latter case it is called *vicious intromission*. Bell, Dict.

In English Law. Dealing with stocks, goods, or cash of a principal coming into the hands of his agent, to be accounted for by the agent to his principal. 29 Eng. Law & Eq. 891. See AGENT.

INTRONISATION. In French Ecclesiastical Law. The installation of a bishop in his episcopal see. *Clef des Lois Rom.*; André.

INTRUDER. One who, on the death of the ancestor, enters on the land, unlawfully, before the heir can enter.

INTRUSION. The entry of a stranger after the determination of a particular estate of freehold, before the entry of him in reversion or remainder.

This entry and interposition of the stranger differs from an abatement in this, that an abatement is always to the prejudice of an heir or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. 3 Bla. Com. 169; Fitzh. N. B. 203; Archb. Civ. Pl. 12; Dane, Abr. Index; 3 Steph. Com. 443.

The name of a writ brought by the owner of a fee simple, etc., against an intruder. New Nat. Brev. 458. Abolished by 8 & 4 Will. IV. c. 57.

INUNDATION. The overflow of waters by coming out of their bed.

Inundations may arise from three causes:

from public necessity, as in defence of a place it may be necessary to dam the current of a stream, which will cause an inundation to the upper lands; they may be occasioned by an invincible force, as by the accidental fall of a rock in the stream, or by a natural flood or freshet; or they may result from the erection of works on the stream. In the first case, the injury caused by the inundation is to be compensated as other injuries done in war; in the second, as there was no fault of any one, the loss is to be borne by the unfortunate owner of the estate; in the last, when the riparian proprietor is injured by such works as alter the level of the water where it enters or where it leaves the property on which they are erected, the person injured may recover damages for the injury thus caused to his property by the inundation; 9 Co. 59; 1 B. & Ald. 258; 4 Day 244; 1 Rawle 213; 3 Mas. 172; 7 Pick. 198; 3 Hill, N. Y. 531; 32 N. H. 90, 316; 1 Cox 480; 3 H. & J. 231; 27 Ala. n. s. 127; 3 Strobb. 348. See 79 Ga. 731; 155 Pa. 523; 112 Mo. 6; 111 N. C. 80; 43 Ill. App. 108; Schultes, Aq. R. 122; Angell, Wat. C. § 330; Pom. Ripar. Rt. 72; DAM; BACKWATER; IRRIGATION; WATER; WATER COURSE.

INURE. To take effect; to result. See **ENURE**.

INUREMENT. Use; user; service to the use or benefit of a person. 100 U. S. 583.

INVADIARE. To mortgage lands. Toml.

INVADIATIO (L. Lat.). A pledge or mortgage.

INVADIATUS. One who is under pledge; one who has had sureties or pledges given for him. Spel. Glos.

INVADE A JUDGE. Assaulting a judge. Patterson.

INVALID. Not valid; of no binding force.

INVASION. The entry of a country by a public enemy, making war. See **INSURRECTION**.

INVASIONES. The inquisition of serjeants and knights' fees. Cowel; Calv. Lex.

INVECTA ET ILLATA (Lat.). In Civil Law. Things carried and brought in. Things brought into a building hired (*ædes*), or into a hired estate in the city (*prædium urbanum*), which are held by a tacit mortgage for the rent. Voc. Jur. Utr.; Domat, Civ. Law.

INVENT. To create. 248 U. S. 45. Distinguished from "furnish" which means to supply. *Id.*

INVENTIO. In the Civil Law. Finding; one of the modes of acquiring title to property by occupancy. Heinecc. lib. 2, tit. 1, § 50.

In Old English Law. A thing found; as goods, or treasure-trove. Cowel. The plural, "inventiones," is also used.

INVENTION. See **PATENT**.

INVENTIONES. A word used in some ancient English charters to signify *treasure-trove*.

INVENTOR. One who contrives or produces a thing which did not before exist. One who makes an invention. The word is generally used to denote the author of such contrivances as are by law patentable. See **PATENT**.

INVENTORY. A list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and, in some cases, the land and tenements, of a person or persons. A conservatory act, which is made to ascertain the situation of an intestate's estate, the estate of an insolvent, and the like, for the purpose of securing it to those entitled to it.

When the inventory is made of goods and estates assigned or conveyed in trust, it must include all the property conveyed. It is *prima facie* evidence of the value as against the administrator; 5 Misc. Rep. 560; 74 Hun 358.

In case of intestate estates, it is required to contain only the personal property, or that to which the administrator is entitled. The claims due to the estate ought to be separated; those which are desperate or bad ought to be so returned. The articles ought to be set down separately, as already mentioned, and separately valued. It is not the duty of an administrator to inventory property which was conveyed by his intestate in fraud of creditors; 17 R. I. 751. The duty of having an appraisal and inventory made of a testator's estate, rests on the executor and not on the adult legatees; 65 Hun 619. An item inserted in the inventory by mistake may be stricken out after it is sworn to; 78 Hun 292.

The inventory is to be made in the presence of at least two of the creditors of the deceased, or legatees, or next of kin, or of two honest persons. The appraisers must sign it, and make oath or affirmation that the appraisement is just to the best of their knowledge. See, generally, 14 Vin. Abr. 465; Bac. Abr. *Executors*, etc. (E 11); Ayl. Par. 305; Com. Dig. *Administration* (B 7); 2 Add. Eccl. 319; 2 Eccl. 322; Shoul. Ex. & Ad. 230; 2 Bla. Com. 514; 8 S. & R. 128.

INVENTUS. See **FOUND**.

INVEST (Lat. *investire*, to clothe). To put in possession of a field upon taking the oath of fealty or fidelity to the prince or superior lord. Also, to lay out capital in some permanent form so as to produce an income.

The term would hardly apply to an active capital employed in banking; 15 Johns. 358. It would cover the loaning of money; 37 Ind. 122. Whenever a sum is represented by anything but money, it is invested; 23 N. Y. 242.

When speaking of the capital of a business corporation or partnership, (such as the Revenue Act of Oct. 3, 1917 deals with) "to invest" imports a laying out of money, or money's worth, either by an individual in acquiring an interest in the concern with a view to obtaining income or profit from the conduct of its business, or by the concern itself in acquiring something of permanent use in the business; in either case involving a conversion of wealth from one form into another suitable for employment in the making of the hoped-for gains. 256 U. S. 387.

INVESTED CAPITAL. In the Revenue Act of Oct. 3, 1917, § 207 (taking place of the Act of Mar. 3, 1917): In the case of a corporation or partnership: (1) Actual cash paid in, (2) the actual cash value of tangible property paid in other than case, for stock or shares in such corporation or partnership, at the time of such payment, and (3) paid in or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year.

As used in this Act does not include stocks, bonds (other than obligations of the United States), or other assets, nor money or other property borrowed. 256 U. S. 384. It includes nothing but money, or money's worth actually contributed or converted in exchange for shares of the capital stock, or actually acquired through the business activities of the corporation or partnership (involving again a conversion) and coming in *ab extra*, by way of increase over the original capital stock. *Id.* 388. In short; invested capital is defined in the statute according to the original cost of the property instead of its present value; *Id.* 391. See also **INVEST**.

INVESTITURE. The act of giving possession of lands by actual seisin. The ceremonial introduction to some office of dignity.

When livery of seisin was made to a

person by the common law, he was invested with the whole fee: this the foreign feudists, and sometimes our own law-writers, call investiture; but generally speaking, it is termed by the common-law writers the seisin of the fee. 2 Bla. Com. 209, 313; Fearn, Rem. 223, n. (2).

By the canon law, investiture was made *per baculum et annulum*, by the ring and crossier, which were regarded as symbols of the episcopal jurisdiction. Ecclesiastical and secular fiefs were governed by the same rule in this respect,—that previously to investiture neither a bishop, abbot, nor lay lord could take possession of a fief conferred upon him by the prince.

Pope Gregory VI. first disputed the right of sovereigns to give investiture of ecclesiastical fiefs, A. D. 1045; but Pope Gregory VII. carried on the dispute with much more vigor, A. D. 1073. He excommunicated the emperor Henry IV. The popes Victor III., Urban II., and Paul II. continued the contest. This dispute, it is said, cost Christendom sixty-three battles, and the lives of many millions of men. De Pradt.

INVESTIVE FACT. The fact by means of which a right comes into existence; e. g. a grant of a monopoly, the death of one ancestor. Holl. Jur. 132.

INVESTMENT. A sum of money left for safekeeping, subject to order, and payable not in the specific money deposited, but in an equal sum; it may or may not bear interest, according to the agreement. 144 Pa. 499; 54 N. W. Rep. (Wis.) 11.

As to investment of trust funds, see **TRUSTEE**.

An investment is the loaning or placing of money so as to produce interest or profit. 17 A. & E. Ency. 2nd ed., 425. Also, it is the loaning or placing by a fiduciary of money in his hands in such capacity, so as to produce interest or profit for the benefit of the one for whom he holds. *Id.* A sum is "invested" whenever its amount is represented by anything but money. *Id.*; 23 N. Y. 242. See **INVEST**.

INVIOABILITY. That which is not to be violated. The persons of ambassadors are inviolable. See **AMBASSADOR**; **TELEGRAM**.

INVITO. Against, or without the assent or consent; unwilling.

INVITO DEBITORE. Against the will of the debtor.

INVITO DOMINO (Lat.). In Criminal Law. Without the consent of the owner.

In order to constitute larceny, the property stolen must be taken *invito domino*; this is the very essence of the crime. Cases of considerable difficulty arise when the owner has, for the purpose of detecting thieves, by himself or his agents, delivered the property taken, as to whether they are larcenies or not: the distinction seems to be this, that when the owner procures the property to be taken, it is not larceny; and when he merely leaves it in the power of the defendant to execute his original purpose of taking it, in the latter case it will be considered as taken *invito domino*; 2 Russ. Cr. 66, 105; 2 East, Pl. Cr. 666; Bac. Abr. *Felony* (C); 2 B. & P. 508; 1 Carr. & M. 217; **LARCENY**.

INVOICE. In Commercial Law. An account of goods or merchandise sent by merchants to their correspondents at home or abroad, in which the marks of each package, with other particulars, are set forth. Marsh. Ins. 408; Dane, Abr. Index. An invoice ought to contain a detailed statement, which should indicate the nature, quantity, quality, and prices of the things sold, deposited, etc.; 1 Pard. n. 248. See 2 Wash. C. C. 118, 155. Invoice carries no necessary implication of ownership, but accompanies goods consigned to a factor for sale, as well as in the case of a purchaser; 4 Abb. App. Dec. 76. See **BILL OF LADING**. *Invoice Price.* The prime cost, or invoice of the cost. 7 Johns. 343.

INVOLUNTARY. An involuntary act is that which is performed with constraint (*q. v.*), or with repugnance, or without the will to do it. An action is involuntary which is performed under duress. Wolfius, Inst. § 5.

INVOLUNTARY MANSLAUGHTER. See MANSLAUGHTER; HOMICIDE.

IOWA (an Indian word denoting "the place or final resting place"). The name of one of the states of the United States, being the sixteenth admitted to the Union.

This state was admitted to the Union by an act of congress approved December 28, 1846.

INVOLUNTARY SERVITUDE.

In the Thirteenth Amendment to the Constitution of the United States, has a larger meaning than "slavery." They include slavery of whatever name and form and all its badges and incidents; any state of bondage. Control by which the personal service of one man is disposed of or coerced for another's benefit is the essence of involuntary servitude. 219 U. S. 241. See PEONAGE.

IPSISSIMIS VERBIS (Lat.). In the identical words: opposed to *substantially*. 7 How. 719; 5 Ohio St. 346.

IPSO FACTO (Lat.). By the fact itself. By the mere fact. A proceeding *ipso facto* void is one which has not *prima facie* validity, but is void *ab initio*.

IPSO JURE (Lat.). By the operation of law. By mere law.

IPSWICH, DOMESDAY OF. A local record which is printed pp. 16-209 of Vol. II. of the Black Book of the Admiralty (*q. v.*). It contains amongst other things the Ipswich code of sea-laws. Byrne.

IRRECUSABLE. A term used to indicate a certain class of contractual obligations recognized by the law which are imposed upon a person without his consent and without regard to any act of his own. They are distinguished from recusable obligations which are the result of a voluntary act on the part of a person on whom they are imposed by law. A clear example of an irrecusable obligation is the obligation imposed on every man not to strike another without some lawful excuse. A recusable obligation is based upon some act of a person bound, which is a condition precedent to the genesis of the obligation. These terms were first suggested by Prof. Wigmore in 8 Harv. Law Rev. 200. See Harr. Contr. 6, where this classification is very fully discussed. See CONTRACTUAL OBLIGATION.

IRREGULAR. Out of rule; not according to rule; to express violation of rule.

IRREGULAR DEPOSIT. See DEPOSIT.

IRREGULAR JUDGMENT. See ERRONEOUS.

IRREGULARITY. In Practice. The doing or not doing that in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. 2 Ind. 232. The term is usually applied to such informality as does not render invalid the act done; thus an irregular distress for rent due is not illegal *ab initio*.

A party entitled to complain of irregularity should except to it previously to taking any step by him in the cause; Lofft 323, 353; because the taking of any such step is a waiver of any irregularity; 1 B. & P. 342; 3 East 547; 2 Wils. 380. See ABATEMENT.

The court will, on motion, set aside proceedings for irregularity. On setting aside a judgment and execution for irregularity, they have power to impose terms on the defendant, and will restrain him from bringing an action of trespass, unless a strong case of damage appears. 1 Chitty, Bail. 133, n. And see Baldw. 246; 3 Chitty, Pr. 509.

In Canon Law. Any impediment which prevents a man from taking holy orders.

IRRELEVANCY. The quality or state of being inapplicable or impertinent to a fact or argument.

Irrelevancy, in an answer, consists in statements which are not material to the decision of the case; such as do not form or tender any material issue. 18 N. Y. 315, 321.

IRRELEVANT. Not pertinent; inapplicable. Anderson.

In pleading, said of a fact or allegation which has no bearing upon the subject-matter and cannot affect the decision of the court. *Id.*; 9 Neb. 321. Testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability of the fact in controversy. *Id.* 33 Me. 367. A statement not material to the decision of the case is irrelevant; as, an answer which does not form or tender a material issue. *Id.*; 18 N. Y. 321. A pleading is irrelevant which has no substantial relation to the controversy between the parties to the suit. "Irrelative" is, perhaps, more appropriate. In parliamentary debate in England, "irrelevant" means "unassisting, unrelieving." *Id.*; 6 How. Pr. 313-14. Facts, in an answer to a bill in equity, not material to the decision are "impertinent." The test is whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties. *Id.*; 1 Johns. Ch. *106. See IRRELEVANT EVIDENCE.

IRRELEVANT EVIDENCE. That which does not support the issue, and which, of course, must be excluded. See EVIDENCE.

In the law of evidence, collateral, disconnected facts are generally irrelevant. But from one part similar qualities of another part may be inferred. Evidence of prior ignitions is admissible against a railroad company charged with the negligent use of fire. Anderson; 1 Whart. Ev. Ch. II.

Evidence is admissible which "tends" to prove the issue, or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it. *Id.*; 1 Greenl. Ev. § 51 a.

IRREMOVABILITY. The status of a pauper in England, who cannot be legally removed from the parish or union in which he is receiving relief, notwithstanding that he has not acquired a settlement there. Thus a pauper who has resided in a parish during the whole of the preceding year is irremovable. Stat. 28 and 29 Vict. c. 79, § 8.

IRREPARABLE INJURY. As a ground for injunction, it is that which cannot be repaired, retrieved, put back again, atoned for. 28 Fla. 387; it does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; 142 Ill. 404. See INJUNCTION.

Injury of such nature that the party wronged cannot be adequately compensated in damages, or when the damages which may result cannot be measured by any certain pecuniary standard. Anderson; 39 Wis. 164.

All that is meant is, that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages. The term does not mean that there must be no physical possibility of repairing the injury. *Id.*; 76 Va. 306. The word "irreparable" is unhappily chosen to express the rule, that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages estimable only by conjecture and not by an accurate standard. *Id.*; 24 Pa. 160. In the sense in which used in conferring jurisdiction upon courts of equity, does not necessarily mean that the injury complained of is incapable of being measured by a pecuniary standard. *Id.*; 58 Mich. 485. Literally, anything is irreparable injury which cannot be restored in

specie. In law nothing is irreparable which can be fully compensated in damages. To entitle a party to an injunction, he must show that the injury complained of is irreparable because the law affords no adequate remedy. *Id.*; 35 Pitts. Leg. J. 406.

IRREPLEVIBLE. That cannot be replevied or delivered on sureties. Spelled, also, irreplevisable. Co. Litt. 145; 18 Edw. I. c. 2.

IRRESISTIBLE FORCE. A term applied to such an interposition of human agency as is, from its nature and power, absolutely uncontrollable; as, the inroads of a hostile army. Story, Bailm. § 25; *Lois des Batim.* pt. 2, c. 2, § 1. See INEVITABLE ACCIDENT.

IRRESISTIBLE IMPULSE. The "irresistible impulse" recognized by the law is that only resulting from mental disease, from the derangement of the mind caused by a disease of the mind. It is not material how recently the derangement may have occurred. A person acts under the insane, "irresistible impulse" when, by the duress of mental disease, he has lost the power to choose between right and wrong, to avoid doing the act in question, his free agency being at the time destroyed. 114 Ky. 621, 71 S. W. 658.

IRREVOCABLE. Which cannot be revoked or recalled. A power of attorney in which the attorney has an interest granted for consideration is irrevocable. See WILL; POWER OF ATTORNEY.

IRRIGATION. The operation of watering lands or causing water to flow over lands by artificial means for agricultural purposes.

"The word *irrigation*, in its primary sense, means a sprinkling or watering; but the best lexicographers give it an agricultural or special signification, thus: 'The watering of lands by drains or channels' (Worcester); 'The operation of causing water to flow over lands for nourishing plants' (Webster). The term *irrigation* as used in Colorado, in the constitution and statutes and judicial opinions, in view of the climate and soil, is in its *special* sense, to wit: 'The application of water to lands for the raising of agricultural crops and other products of the soil.'" 12 Colo. 529.

In Egypt as well as in other countries of the East and also among the ancient races of South America, irrigation was to a great extent a necessity, and its methods of accomplishment and the laws covering the rights incident to it were well known. But in England and until recently in all other countries where the common law prevailed, irrigation was seldom necessary and the law relating to it was but little developed.

At common law the right of the riparian proprietor to divert the water of a stream for the purposes of irrigation was well recognized, and it was described as an artificial use of the water and not a natural use like taking the water for drinking, domestic purposes, and watering cattle, which would allow the use of all the water in the stream. A riparian owner could use for domestic purposes and watering cattle as much of the water of the stream as he chose, and if he found it necessary, take all the water in the stream, but in using the water for irrigation he was allowed to take only a reasonable amount of it and could not diminish the flow of the stream, so as to cause loss to other riparian owners; Gould, Waters 217; Kinney, Irrig. § 66; 98 Am. Dec. 543 and note; 37 Tex. 173; 4 Mas. 400; Ang. Water C. 34; 2 Conn. 584.

This doctrine of the common law was sufficient for any irrigation that had been found necessary in England or in the United States east of the Mississippi River. But as civilization advanced into what was once known as the Great American Desert and is now called the Arid Region west of the Mississippi, "there has grown up or evolved out of the necessities of the people and the exigencies of the communities interested, a great body of law, custom, regulation, and judicial interpretation.

These statutes in general form the principle of prior appropriation as wrought out by the earlier miners, and embodied in federal law, and then by the states and territories, being steadily sustained by the courts, with a few exceptions, as the common law of an arid region such as ours. The development of the beneficial use of water has of course modified the practice of prior appropriations to a first or prior *pro rata* share of the natural waters, when taken from bed or source for industrial purposes;" Senate Report on Irrigation, 1890.

The arid region in the United States covers an area of about a thousand miles from north to south and fifteen hundred miles from east to west, lying between the 100th meridian and the Coast Range of Mountains in California, extending from the British possessions to Mexico and including Arizona, New Mexico, Utah, Wyoming, Idaho, Colorado, Nevada, and portions of North Dakota, South Dakota, Nebraska, Kansas, Texas, Montana, California, Oregon, and Washington. The Arid Region Doctrine, however, was first worked out, not in the arid region itself, but in the mining districts of California.

After the discovery of gold in California had brought great numbers of people to that region, the miners developed a sort of code of their own, called the Mining Customs, which in 1851 were recognized by the legislature of California and made a part of the law of the state. By these customs a new principle in water rights was developed, called the Law of Priority of Appropriation, by which the person who first uses the water of a stream is by virtue of priority of occupation entitled to hold the same, and may use all the water in the stream for the purpose of carrying on his mining operations; Kinney, Irrig. § 104; 20 Pac. Rep. (Idaho) 42. This doctrine beginning in the Mining Customs and sanctioned by the legislature of California and the supreme court of that state, was afterwards approved by the supreme court of the United States, and congress not only passed acts which sanctioned the doctrine as regarded mines, but extended it to all other beneficial uses or purposes for which water may be essential, as irrigation for the purposes of agriculture and horticulture and to milling, manufacturing, and municipal purposes, in the Arid Region, and this development was all based upon the principle that the portions of the United States known as the Arid Region require it; Kinney, Irrig. sec. 122.

An appropriator of water for the operation of a quartz stamping mill is liable to a prior appropriator for irrigation purposes for any injury to the land by tailings or debris discharged from the mill; 75 Fed. Rep. 884.

In order to make an appropriation of water valid under the Arid Region Doctrine, there must be a *bona fide* intention to use the water for some beneficial purpose; 21 Cal. 374; 6 Col. 540; 32 Cal. 33; 1 Mont. 543; 14 Nev. 167; 2 Utah 535; 17 Col. 146; 18 *id.* 1; 69 Cal. 255. The intention to appropriate must be shown by the work and labor usual in such enterprises to accomplish the end. If there is no actual intention to appropriate the water for a beneficial purpose, or if there is unnecessary delay in the completion of the works for the appropriation of the water, a subsequent appropriator who diverts and applies the water for a beneficial purpose has the superior right; 87 Cal. 505; 15 *id.* 271; 58 *id.* 90; 20 Wall. 682; 98 U. S. 453. In a case where a ditch or canal company appropriates or diverts the water and then sells it to other persons who apply it to beneficial purposes, there has been some doubt whether the ditch company, being only an appropriator of the water and not itself applying it to a beneficial purpose, could divert the water. The better opinion seems to be that it can, provided the water is all applied to beneficial purposes by the persons to whom it is sold, but if a company appropriates and diverts more water than is actually used for a beneficial

purpose, this surplus water is open for reappropriation; 9 Col. 248; 16 *id.* 61; 17 *id.* 141. It is also necessary to the validity of an appropriation that the water be used continuously. If allowed to run to waste for any length of time it will be treated as abandoned and open for a fresh appropriation. But water once lawfully appropriated is not lost by a change in its use; 27 Cal. 476; 32 *id.* 26; 2 Col. 530; 7 *id.* 148.

All persons in the Arid Region competent to hold lands have also the right to appropriate water; 3 Nev. 507; 18 Col. 105; 68 Cal. 43; 11 Mont. 489. But under the Arid Region Doctrine an appropriator need not necessarily be a riparian owner of land. The right to appropriate is not an incident of the soil, but is simply a possessory right acquired by valid appropriation; 5 Cal. 445; 16 Col. 61; 3 Col. App. 212; 10 Nev. 217; 20 Wall. 670; 101 U. S. 276; 51 Cal. 288; Kinney, Irrig. § 156.

A provision that no land shall be included in an irrigation district, except such as may be benefited by the system of irrigation used in that district, means that the land must be such that it may be substantially benefited. It is not sufficient that such irrigation creates an opportunity thereafter to use the land for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it has produced in reasonable quantities, and with ordinary certainty, without the aid of irrigation; 164 U. S. 112.

In order to make an appropriation valid there must be sufficient notice to the public of the intention to appropriate; and the notice may be in any form which gives the name of the appropriator and a description of the stream and of the purposes for which the water is to be taken; 56 Cal. 571.

In *Krall v. U. S.* 79 Fed. Rep. 241, it was held by the circuit court of appeals that the previous establishment of a government reservation below the point of appropriation does not affect the right, except so far as the waters of the stream have been previously appropriated for the use of such reservation. But Gilbert, J., dissented on the authority of *Steer v. Berk*, 133 U. S. 541, which held that a homestead entryman on land over which the waters of a creek flowed had the right to the natural flow of the water as against a subsequent appropriation.

The rights of an appropriator of water for irrigating purposes are not interfered with by a subsequent appropriation for mining purposes at a point further up the stream, unless the use for the latter purpose impairs the value of the water for the purpose of irrigation. The liability of an irrigation company for failing to supply a certain volume of water to the holders of water rights, according to contract, cannot be determined on the theory that the company is a common carrier; 1 Col. App. 490.

Although in the Arid Region the doctrine of appropriation generally prevails, the old common-law doctrine of the reasonable use of water by a riparian owner for irrigation is not entirely abolished in all the jurisdictions. In some states the common-law doctrine has been entirely abolished, but in others it exists side by side with the doctrine of appropriation, and is applied usually in the case of riparian owners who, making no claim to an appropriation, wish to use some of the waters of a stream for irrigation; Kinney, Irrig. 273.

The constitution of California declares the use of all water a public use and subject to the control of the state, the rates for water supplied by any person or corporation to be fixed annually by the supervisors of the district. The constitution of Colorado declares all natural streams, not theretofore appropriated, to be the property of the public, and subject to appropriation as provided by law; and that the right to divert unappropriated water shall never be denied. Priority of appropriation shall give the better right as between those using water for the same purpose, when water is not sufficient for all, those who require it for

domestic use have the preference, and those using it for agricultural purposes have the preference over those using it for manufacturing purposes.

Somewhat similar provisions will be found in the constitutions of Idaho, Montana, North Dakota, Washington, and Wyoming.

See, generally, Black's Pomeroy on Waters; Hall; Kinney, Irrig.; 98 Am. Dec. 543-5; 5 Special Consular Reports, 1891; Gould, Waters § 217; 99 Cal. 255; Senate Report on Irrigation, 1890, where all the acts in the irrigation states are set forth, together with a digest of reported cases; Mills, Constitutional Annotations §§ 510-13 and notes, where the cases on this subject and constitutional provisions are collected.

IRRITANCY. In Scotch Law. The happening of a condition or event by which a charter, contract, or other deed, to which a clause irritant is annexed, becomes void. Erskine, Inst. b. 2, t. 5, n. 25. Irritancy is a kind of forfeiture. It is legal or conventional. Burton, Real Prop. 298.

IRRITANT CLAUSE. In Scotch Law. A provision by which certain prohibited acts specified in a deed are, if committed, declared to be null and void. A resolution clause dissolves and puts an end to the right of a proprietor on his committing the acts so declared void.

IRROTULATIO (Law Lat.). An inrolling; a record. 2 Rymer, Foed. 673; Du Cange; Law Fr. & Lat. Dict.; Bracton, fol. 293; Fleta, lib. 2, c. 65, § 11.

IS DIRECTED TO GIVE. As Used in a Will. The phrase "is directed to give" has been construed to be effective words to give an immediate interest in the estate. 110 Ky. 390, 62 S. W. 1036.

ISH. In Scotch Law. The period of the termination of a tack or lease. 1 Bligh 522. See TACK.

If the tack does not mention the ish, it is good for one year only, unless an intention appear to continue it for more than that period, in which case it is limited to the minimum period the words admit of. If the tack is in perpetuity, the ish being indefinite, it has not the benefit of the statute giving effect to a tack for its full term, no matter into whose hands the lands might come. Ersk. Prin. II. VI. 10.

ISLAND. A piece of land surrounded by water.

When new islands arise in the open sea, they belong to the first occupant; but when they are newly formed so near the shore as to be within the boundary of some state, they belong to that state.

Islands which arise in rivers when in the middle of the stream belong in equal parts to the riparian proprietors. When they arise mostly on one side, they belong to the riparian owners up to the middle of the stream.

The owner in fee of the bed of a river or other submerged land is the owner of any bar, island, or dry land which may be subsequently formed thereon; 138 U. S. 226.

Where an island springs up in a navigable river, and by accretion to the shores of the island and the mainland, they are united, the owner of the mainland is not entitled to the island, but only to such accretion as formed on his land; 117 Mo. 33.

See ACCESSION; ACCRETION; BOUNDARY; 3 Washb. R. P. 56; 3 Kent 428.

ISSINT (Norm. Fr. thus, so). In Pleading. A term formerly used to introduce a statement that special matter already pleaded amounts to a denial.

In actions founded on deeds, the defendant may, instead of pleading *non est factum* in the common form, allege any special matter which admits the execution of the writing in question, but which, nevertheless, shows that it is not in law his deed, and may conclude with, "and so it is not his deed;" as, that the writing was delivered to A B as an escrow, to be delivered over on certain conditions, which

have not been complied with, "and so it is not his act," or that at the time of making the writing the defendant was a feme covert, "and so it is not her act." *Bac. Abr. Pleas* (H 3), (1 3); Gould, Pl. § 64.

An example of this form of plea, which is sometimes called the special general issue, occurs in 4 Rawle 83.

ISSUABLE. In Practice. Leading or tending to an issue. An issuable plea is one upon which the plaintiff can take issue and proceed to trial.

ISSUABLE TERMS. Hilary and Trinity Terms were so called from the making up of the issues, during those terms, for the assizes, that they might be tried by the judges, who generally went on circuit to try such issues after these two terms. But for town causes all four terms were issuable. 3 Bla. Com. 350; 1 Tidd, Pr. 121. Since the Judicature Acts of 1873 and 1875 this distinction has become obsolete.

ISSUE. In Real Law. Descendants. All persons who have descended from a common ancestor. 3 Ves. Ch. 257; 17 *id.* 481; 19 *id.* 547; 1 Roper, Leg. 90.

In a will it may be held to have a more restricted meaning, to carry out the testator's intention; 7 Ves. Ch. 522; 1 Roper, Leg. 90. 2 Wills. Exec. 386, n.; but it has been held that a devise to "issue" means *prima facie* legitimate issue, and an intention to include illegitimates must appear from the will itself without resort to extrinsic evidence; 66 Fed. Rep. 182. See *Bac. Abr. Courtesy* (D), *Legatee*.

If the term be used in the sense of heirs, that is, as comprehending a class to take by inheritance, it is to be interpreted as a term of limitation, and brings the case within the rule in Shelley's case; and this is the interpretation that *prima facie* will be given it; 70 Pa. 70; 79 *id.* 383; 24 Atl. Rep. (Pa.) 297. But if the context indicate a different intention, it will be sustained as a word of purchase; 2 Wms. R. P. 603. In a deed it is always taken as a word of purchase; 63 Pa. 483; 4 Fed. Rep. 299; 2 Ves. Sr. 681; 2 Wms. R. P. 604.

In Pleading. A single, certain, and material point, deduced by the pleadings of the parties, which is affirmed on the one side and denied on the other.

The entry of the pleadings. 1 Chitty, Pl. 630.

Several connected matters of fact may go to make up the point in issue.

An *actual issue* is one formed in an action brought in the regular manner, for the purpose of trying a question of right between the parties.

A *collateral issue* is one framed upon some matter not directly in the line of the pleadings; as, for example, upon the identity of one who pleads diversity in bar of execution. 4 Bla. Com. 396.

A *common issue* is that which is formed upon the plea of *non est factum* to an action of covenant broken.

This is so called because it denies the deed only, and not the breach, and does not put the whole declaration in issue, and because there is no general issue to this form of action. 1 Chitty, Pl. 482; Gould, Pl. c. 6, pt. 1, § 7.

An *issue in fact* is one in which the truth of some fact is affirmed or denied.

In general, it consists of a direct affirmative allegation on one side and a direct negative on the other. Co. Litt. 126 a; *Bac. Abr. Pleas* (G 1); 2 W. Bla. 1312; 5 Pet. 149. But an affirmative allegation which completely excludes the truth of the preceding may be sufficient; 1 Wils. 6; 2 Stra. 1177. Thus, the general issue in a writ of right (called the mise) is formed by two affirmatives; the demandant claiming a greater right than the tenant, and the tenant a greater than the demandant. 3 Bla.

Com. 195, 305. And in an action of dower the count merely demands the third part of [] acres of land, etc., as the dower of the demandant of the endowment of A B, heretofore the husband, etc., and the general issue is that A B was not seised of such estate, etc., and that he could not endow the demandant thereof, etc.; which mode of denial, being argumentative, would not, in general, be allowed. 2 Saund. 329.

A *feigned issue* is one formed in a fictitious action, under direction of the court, for the purpose of trying before a jury some question of fact.

Such issues are generally ordered by a court of equity, to ascertain the truth of a disputed fact. They are also frequently used in courts of law, by the consent of the parties, to determine some disputed rights without the formality of pleading; and by this practice much time and expense are saved in the decision of a cause; 3 Bla. Com. 452. Suppose, for example, it is desirable to settle a question of the validity of a will in a court of equity.

For this purpose an action is brought, in which the plaintiff by a fiction declares that he laid a wager for a sum of money with the defendant, for example, that a certain paper is the last will and testament of A, then avers it is his will, and therefore demands the money; the defendant admits the wager, but avers that it is not the will of A; and thereupon that issue is joined, which is directed out of chancery, to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. A feigned issue is also formed for trial by a jury in certain interpleader proceedings; as in proceedings to test the title to goods levied upon by the sheriff and claimed by a third party.

The name is a misnomer, inasmuch as the issue itself is upon a real, material point in question between the parties, and the circumstances only are fictitious. It is a contempt of the court in which the action is brought to bring such an action, except under the direction of some court; 4 Term 402.

A *formal issue* is one which is framed according to the rules required by law, in an artificial and proper manner.

A *general issue* is one which denies in direct terms the whole declaration: as, for example, where the defendant pleads *nil debet* (that he owes the plaintiff nothing), or *nil disseisin* (no disseisin committed). 3 Greenl. Ev. § 9; Steph. Pl. 220; 3 Bla. Com. 305. See *GENERAL ISSUE*.

An *immaterial issue* is one formed on some immaterial matter, which, though found by the verdict, will not determine the merits of the cause, and will leave the court at a loss how to give judgment. 2 Wms. Saund. 319, n. 6. See *IMMATERIAL ISSUE*.

An *informal issue* is one which arises when a material allegation is traversed in an improper, or inartificial manner. *Bac. Abr. Pleas* (G 2), (N 5); 2 Wms. Saund. 319 a, n. 7. The defect is cured by verdict, by the statute 33 Hen. VIII. c. 30.

A *material issue* is one properly formed on some material point which will, when decided, settle the question between the parties.

A *special issue* is one formed by the defendant's selecting any one substantial point and resting the weight of his cause upon that. It is contrasted with the general issue. Comyns, Dig. *Pleader* (R 1, 2). See *MATTER IN ISSUE*.

ISSUE IN LAW. An issue upon matter of law, or consisting of matter of law, being produced by a demurrer on the one side, and a joinder in demurrer on the other. 3 Bl. Com. 314.

ISSUE ROLL. In English Law. The name of a record which contained an

entry of issue as soon as it was found. It was abolished by the rules of Hilary Term, 1834. Moz. & W. Dict.

ISSUED AND OUTSTANDING STOCK. See *STOCK*.

ISSUES. In English Law. The goods and profits of the lands of a defendant against whom a writ of *distingas* or *distress infinite* has been issued, taken by virtue of such writ, are called *issues*. 3 Bla. Com. 280; 1 Chitty, Crim. Law 351.

ISSUES ON SHERIFFS. Fines and amercements inflicted on sheriffs for neglects and defaults, levied out of the issues and profits of their lands. Toml.

ISTIMRAR. Continuance; perpetuity; especially a farm or lease granted in perpetuity by government or a zemindar (q. v.). Wilson's Gloss. Ind.

ISTIMRARDAR. The holder of a perpetual lease. Moz. & W.

ITA EST (Lat.). So it is.

Among the civilians, when a notary dies, leaving his register, an officer who is authorized to make official copies of his notarial acts writes, instead of the deceased notary's name, which is required when he is living, *ita est*.

ITA QUOD (Lat.). The name or condition in a submission, which is usually introduced by these words, "so as the award be made of and upon the premises," which, from the first words, is called the *ita quod*.

When the submission is with an *ita quod*, the arbitrator must make an award of all matters submitted to him of which he had notice, or the award will be entirely void. 7 East 81; Cro. Jac. 200; 2 Vern. Ch. 109; Rolle, Abr. *Arbitrament* (L. 9).

ITEM (Lat.). Also; likewise; in like manner; again; a second time. These are the various meanings of this Latin adverb.

It is used to introduce a new paragraph, or chapter, or division; also to denote a particular in an account. It is used when any article or clause is added to a former, as if there were here a new beginning. Du Cange. Hence the rule that a clause in a will introduced by *item* shall not influence or be influenced by what precedes or follows, if it be sensible, taken independently; 1 Salk. 239; or if there is no plain intent that it should be taken in connection, in which cases it may be construed conjunctively, in the sense of *and*, or *also*, in such a manner as to connect sentences. If, therefore, a testator bequeath a legacy to Peter, payable out of a particular fund or charged upon a particular estate, *item* a legacy to James, James's legacy as well as Peter's will be a charge upon the same property; 1 Atk. 436; 1 Bro. Ch. 482; 1 Mod. 100; Cro. Jac. 368; Vaugh. 262; 1 Salk. 234. See *ALSO*.

ITER (Lat.). **In Civil Law.** A way; a right of way belonging as a servitude to an estate in the country (*prædium rusticum*). The right of way was of three kinds: 1, *iter*, a right to walk, or ride on horseback, or in a litter; 2, *actus*, a right to drive a beast or vehicle; 3, *via*, a full right of way, comprising right to walk or ride, or drive beast or carriage. Heineccius, Elem. Jur. Civ. § 408. Or, as some think, they were distinguished by the width of the objects which could be rightfully carried over the way; e. g. *via*, 8 feet; *actus*, 4 feet, etc. Mackeldey, Civ. Law § 290; Bracton 232; 4 Bell, H. L. 390.

In Old English Law. A journey, especially a circuit made by a justice in eyre, or itinerant justice, to try causes according to his own mission. Du Cange; Bracton, lib. 3, c. 11, 12, 13; Britton, c. 2; Cowell; EYRE.

ITINERANT. Wandering; travelling; who make circuits. See *EYRE*.

JACENS. In abeyance. Toml.

JACENS HEREDITAS. See *HÆREDITAS JACENS*.

JACERE (Lat.). To lie. To lie, as an action, or proceeding in an action, to have place, to be applicable or available; to be competent or legally proper. To be fallen, or in a state of prostration; to be unclaimed, to be in abeyance. To be overthrown or defeated in a suit. Lying; fallen; prostrate Burrill; Bract. fol. 84.

JACET IN ORE. It lies in the mouth. Fleta, lib. 5, c. 5, § 49.

JACOBUS. A gold coin an inch and three-eighths in diameter, in value about twenty-five shillings, so called from James I., in whose reign it was first coined.

It was also called *broad, laurel*, and *broad-piece*. Its value is sometimes put at twenty-four shillings, but Macaulay speaks of a salary of eight thousand Jacobuses as equivalent to ten thousand pounds sterling. Hist. Eng. ch. xv. A cut of this coin showing both sides will be found in the Century Dictionary, *sub v. broad*.

JACTATION. Boasting of something which is challenged by another. Moz. & W.

The word is used principally with reference to *jactitation of marriage*, which title see. In Louisiana, it is the name used as an action for slander of title to land.

Jactitation of right to a seat in a church appears to be the boasting by a man that he has a right or title to a pew or sitting in a church to which he has legally no title.

Jactitation of tithes is the boasting by a man that he is entitled to certain tithes, to which he has legally no title. See Rog. Ecc. L. 482.

Assertions repeated to the prejudice of another's right; false boasting. Abbott. The term designates a wrong which, in certain aspects, is cognizable under the canon law, in the ecclesiastical courts. The wrong known in the common law as slander of title is in its nature a species of jactitation, and the Louisiana code allowed an action of jactitation to protect the ownership of lands from disturbance by slander of title. *Id.*

JACTITATION OF MARRIAGE. In English Ecclesiastical Law. The untruthful boasting by an individual that he or she has married another, from which it may happen that they will acquire the reputation of being married to each other. 3 Bla. Com. 93. It was held that the boasting must be malicious as well as false; 2 Hagg. 220, 290.

The ecclesiastical courts formerly might in such cases entertain a libel by the party injured, and on proof of the facts enjoin the wrong-doer to perpetual silence, and, as a punishment, make him pay the costs; 3 Bla. Com. 93; 2 Hagg. Cons. 423, 285; 2 Chitty, Pr. 459.

The jurisdiction of such a suit would now be in the Probate, Divorce, and Matrimonial Division, but the remedy is now rarely resorted to, as, in general, since Lord Hardwicke's act (1766), there is sufficient certainty in the forms of legal marriage in England to prevent any one being in ignorance whether he or she is really married or not—a reproach which, however, is often made against the law of Scotland. The Scotch suit of a declarator of putting to silence, which is equivalent to jactitation of marriage, is often resorted to, a notorious instance of its use being that in the Yel-

verton marriage case; 1 Sc. Sess. Cas. 3d ser. 161.

JACTURA (Lat. *jaceo*; to throw). A jettison (*q. v.*).

JACTUS (Lat.). A throwing goods overboard to lighten or save the vessel, in which case the goods so sacrificed are a proper subject for general average. Dig. 14. 2, *de lege Rhodia de jactu*; 1 Pardessus, *Collec. des Lois marit.* 104; Kuricke, *Inst. Marit. Hanseat* tit. 8; 1 Par. Mar. Law 288, note.

JACTUS LAPILLI (Lat. the throwing down of a stone). In Civil Law. A method of preventing the acquisition of title by prescription by interrupting the possession. The real owner of land on which another was building, and thereby acquiring title by usucapion (*q. v.*), could challenge the intrusion and interrupt the prescription by throwing down a stone from the building before witnesses called upon to note the transaction.

JAIL. See GAOL; PRISON.

JAILER. See CORONER.

JAMUNLINGI, JAMUNDILINGI. Freemen who delivered themselves and property to the protection of a more powerful person, in order to avoid military service and other burdens. Spelman, Gloss. Also, a species of serfs among the Germans. Du Cange. The same as *commendati*.

JAMUNLINGUS. Commendatus (*q. v.*).

JANITOR. A person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to look and unlock them, and generally to care for them. 84 N. Y. 352. See FLAT.

Formerly, a door-keeper. Fleta, lib. 2, c. 24.

JAVELOUE. In Scotch Law. Jailor or gaoler. 1 Pitt. Crim. Tr. pt. 1, p. 33.

JEFOAILE (L. Fr.). I have failed; I am in error.

Certain statutes are called statutes of amendments and jefoailes, because, where a pleader perceives any slip in the form of his proceedings, and acknowledges the error (jefoaile), he is at liberty, by those statutes, to amend it. The amendment, however, is seldom made; but the benefit is attained by the court's overlooking the exception; 3 Bla. Com. 407; 1 Saund. 228, n. 1; Doct. Pl. 297; Dane, Abr. These statutes do not apply to indictments.

JEOPARDY. Peril; danger.

The term is used in this sense in the act establishing and regulating the post-office department. The words of the act are, "or if, in effecting such robbery of the mail the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender shall suffer death." 3 Story, Laws U. S. 1992. See Baldw. 93-95.

The situation of a prisoner when a trial jury is sworn and impanelled to try his case upon a valid indictment, and such jury has been charged with his deliverance. 1 Bail. 655; 7 Blackf. 191; 1 Gray 490; 38 Me. 574, 586; 23 Pa. 12; 12 Vt. 93.

It is the peril in which a prisoner is put when he is regularly charged with a crime before a tribunal properly organized and competent to try him; 121 Pa. 109.

This is the sense in which the term is

used in the United States constitution: "no person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb," U. S. Const. art. v. Amend., and in the statutes or constitutions of most if not all of the states.

This provision in the constitution of the U. S. binds only the United States; 2 Cow. 519; 5 How. 410; 20 S. C. 392; 1 Bish. N. Cr. L. § 961. At one time it was not uniformly so considered, and it was held *contra*, 2 Pick. 521; 18 Johns. 187; Walker, Miss. 134. This was the same fluctuation of judicial opinion as to the effect of the early constitutional amendments which affected other questions. See EMINENT DOMAIN. In this country this rule depends in most cases on constitutional provisions. In England it is said to be one of the universal maxims of the common law; 4 Bla. Com. 335; and Stephen in repeating the expression adds in a note that although Blackstone uses the term "jeopardy of his life," it is not confined to capital offences, and extends to misdemeanors; 4 Steph. Com. 384; 3 B. & C. 502. In a leading case where the question was considered whether the rule applied when a jury had been discharged for want of agreement it was held that the court had authority in its discretion to discharge the jury in such a case, and that such action did not operate as an acquittal. This is also the prevailing opinion in this country. See *infra*. In the English case referred to, it was said by Cockburn, C. J., that in considering the question of the right to discharge a jury in such case they were not dealing with one of those principles which lie at the foundation of the law, but with a matter of practice, which has fluctuated at various times, and "even at the present day may perhaps be considered as not finally settled;" L. R. 1 Q. B. 259. This would seem to be a more reasonable construction of the language of Lord Cockburn than that sometimes put upon it. See 1 Bish. N. Cr. L. § 962. That which he characterized as a mere matter of practice was not the existence of the doctrine of jeopardy, but whether it was applicable.

The constitutional provision, which refers to "life or limb," properly interpreted, extends only to treason and felonies, but it has usually been extended to misdemeanors; 1 Bish. Cr. L. § 990; 26 Ala. 185; but not to proceedings for the recovery of penalties, nor to applications for sureties of the peace; 1 Bish. Cr. L. § 990.

A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; Cooley, Const. Lim., 4th ed. 404; approved in 9 Bush 338; 21 Alb. L. J. 398; 77 Cal. 183.

The discharge of a competent jury without defendant's consent, express or implied, without sufficient cause, operates as an acquittal; 62 Mich. 307; 76 Cal. 57; 83 Ala. 96.

But where the indictment was good and the judgment erroneously arrested, the verdict was held to be a bar; 2 Yerg. 24.

After a jury has been impanelled and sworn in a criminal case, the trial cannot stop short of a verdict without the defendant's consent except for imperative reasons, such as the illness of a juror, the judge, or the defendant, the absence of a juror, or a disagreement. The absence of a witness for the state is not sufficient unless by consent of the accused, and his consent is not established by the mere fact that, being

without counsel, he does not object to a postponement; 25 S. E. Rep. (S. C.) 220. The discharge of a jury on the last day of the term after they have for five days failed to agree upon a verdict, made against the objection of the defendant, bars another trial for the same offence; 121 Pa. 109; *contra*, 111 N. C. 695; 15 So. Rep. (Ala.) 602.

Where one of the jurors is discharged because of the death of his mother, and the court declared a mistrial, a plea of former jeopardy is not good; 91 Ga. 881.

An order of an examining magistrate, either committing or discharging the accused, is not a bar to a second hearing on the same charge; 18 So. Rep. (Ala.) 729.

But it has been held by the United States Supreme Court, that where a jury in a criminal case is discharged during the trial and the defendant subsequently put on trial before another jury, he is not twice put in jeopardy within the meaning of the fifth amendment to the United States Constitution; 149 U. S. 148; and in a later case it is said that a jury may be discharged from giving any verdict, whenever the court is of opinion that there is a manifest necessity for the act, or that the ends of public justice would otherwise be defeated, and may also order a trial before another jury, and a defendant is not thereby twice put in jeopardy; 155 U. S. 271. This case is quite in accord with an English decision made upon much consideration; L. R. 1 Q. B. 289; and Bishop, as the result of a very extended examination and citation of authorities, concludes: "But in England and Ireland, at present, and in most of our states, when a reasonable time for discussion and reflection has been given the jury, and they have in open court declared themselves unable to agree, and the judge is satisfied of the truth of the declaration, they may be discharged and the prisoner held to be tried anew. And this doctrine is applied as well in felony as in misdemeanor." *Bish. Cr. L.* § 1033. See *JURY*.

It has been held that the accused was not in jeopardy, and may be again put upon trial, if the court had no jurisdiction of the cause; 7 Mich. 161; or one of its members is related to the prisoner and under a statute the conviction is void; 142 N. Y. 180; or if the indictment was so defective that no valid judgment could be rendered upon it; 36 Ga. 447; 105 Mass. 53; or if by any overruling necessity the jury are discharged without a verdict; 9 Wheat. 579; 68 N. C. 203; or if the term of the court comes to an end before the trial is finished; 5 Ind. 290; or the jury are discharged with the consent of the defendant, express or implied; 9 Metc. 572; or if after verdict against the accused it has been set aside on his motion for a new trial or on writ of error, or the judgment thereon has been arrested; 13 Johns. 351; 8 Kan. 232; s. c. 12 Am. Rep. 469, n.; 7 Mont. 489; 127 Ill. 507; 41 Minn. 50; 111 N. C. 695; 64 Cal. 260; 33 Fla. 389; or where there is any irregularity of verdict which will compel a reversal upon the application of the accused; 83 Ala. 96; 77 Cal. 213. See *Cooley, Const. Lim.*, 4th ed. 404-5; *Von Holst, Const. L.* 260; *Story, Const.* § 1787.

Where a prisoner during his trial fled the jurisdiction, and it became necessary to discharge the jury, it was held that he was never in jeopardy; 13 Reporter 105; s. c. 59 Cal. 357.

The constitutional guaranty is against two trials for the same offence, and the decisions as to what constitutes identity of the offences are not uniform. They are collected in 1 N. Cr. L. §§ 1048-69, by Mr. Bishop, who lays down the following rules as sustained by just principle: "They are not the same when (1) the two indictments are so diverse as to preclude the same evidence from maintaining both; or when (2) the evidence to the first and that to the second relate to different transactions, whatever be the words of the respective allegations; or when (3) each indictment sets out an offence differing in all its elements from that in the other, though both relate to one transaction,—a proposition of which the exact limits are difficult to de-

fine; or when (4) some technical variance precludes a conviction on the first indictment, but does not appear on the second. On the other side, (5) the offences are the same whenever evidence adequate to the one indictment will equally sustain the other. Moreover, (6) if the two indictments set out like offences and relate to one transaction, yet if one contain more of criminal charge than the other, but upon it there could be a conviction for what was embraced in the other, the offences, though of different names, are, within our constitutional guaranty, the same." The author considers the test to be, "whether if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be;" *id.* § 1052, and cases cited in notes.

Where the greater offence includes a lesser one, a verdict on an indictment for the minor offence only is a bar to a trial on an indictment for the greater offence, and the same principle applies if the jury are out in the first case when the second is called; 149 Pa. 35. In this case, this was said to be not a mere technical rule of procedure, but a substantial one founded in reason, and in harmony with the constitutional mandate that no person shall be subject to be twice in jeopardy for the same offence.

There is some difference of opinion, however, in the application of this rule in homicide cases. If a prisoner is put on trial for murder and convicted of manslaughter and that verdict is set aside, on defendant's application for a new trial or an appeal, he cannot again be tried for murder; 11 Ia. 350; 54 Ill. 325; 41 La. Ann. 610; on this principle it has been held that if a prisoner has been indicted for murder, convicted of murder in the second degree, and afterwards granted a new trial on his own motion, he cannot, on the second trial, be convicted of a higher crime than murder in the second degree; 33 Wis. 121; s. c. 14 Am. Rep. 748, n.; 35 Mo. 105; 61 N. W. Rep. (Ia.) 246; 31 Fla. 262; 72 Ala. 201 (see 99 Cal. 237); *contra*, 20 Ohio St. 572; 8 Kan. 232; s. c. 12 Am. Rep. 469, n. A distinction has been made in some cases based upon the theory that the two lower grades of homicide do not bear the same relation to the offence charged. Manslaughter is clearly a different crime from that charged, and a conviction of that offence is therefore an acquittal of the graver one. But it has been said that the division of murder into two degrees does not make two offences and the same rule should not apply; 65 Cal. 232; 67 Vt. 465. Indeed the whole theory is that, when the defendant obtains a reversal, the conviction of the lesser crime is an acquittal of the graver one, so that another trial would be within the prohibition against putting the accused twice in jeopardy; 18 Neb. 57; 20 Ohio St. 572; 8 Kan. 232; 60 Ind. 291; 83 Ky. 1; 11 Mo. App. 92. But it is said that "the weight of authority is that securing a new trial only operates to set aside conviction and not the verdict so far as it operates as an acquittal;" 1 McClain, Cr. L. § 390; 30 Wis. 216; 13 Tex. 168. If it is an acquittal *pro tanto* nothing less than constitutional amendment can remove the effect of the general provision as to jeopardy; 107 U. S. 221. In some state constitutions, as those of Arkansas, Colorado, Georgia, and Missouri, the usual declaration securing a person from being put twice in jeopardy is modified by a further provision that if the jury disagree, or if the judgment be arrested after verdict or reversed for error in law, the accused shall not be deemed to have been in jeopardy; Ark. II. 8; Colo. II. 18; Ga. I. 8; Mo. II. 23.

Statutes which provide for a severer punishment when a criminal is convicted of a second or third offence are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence. The doctrine is that the subsequent punishment is not imposed for the first offence, but for persistence in crime;

2 Pick. 165; 158 Mass. 506; 115 Ill. 588; 48 Wis. 647; 47 Cal. 113; 159 U. S. 673, aff. 121 Mo. 514.

The question of former jeopardy cannot be passed upon by the supreme court *en habeas corpus* proceedings, but is a proper plea in bar, to be tried by the lower court; 32 Pac. Rep. (Wash.) 1063.

Whether an offence is one against the laws of the state or against the United States, and whether the same act may be an offence against both, punishable by each, without infringing upon the constitutional guaranty against being twice put in jeopardy for the same offence, are questions which a state court of original jurisdiction is competent to decide in the first instance, and the proper time to invoke the jurisdiction of the Supreme Court of the United States is after the highest state court has passed upon the question adversely to the accused; 155 U. S. 89. See *NON BIS IN IDEM*; *AUTREFOIS ACQUIT*; *JURY*.

See *FORMER JEOPARDY*.

JERGUER. In English Law. An officer of the custom-house, who oversees the waiters. *Techn. Dict.*

JERK. In Operation of Train. A "jerk" in the operation of a heavy freight train might be violent, and nevertheless necessary and usual in such operation. 156 Ky. 415, 161 S. W. 246.

Jerking a Car In. By "jerking a car in" is meant giving it a jerk with the engine and letting it run without the engine being attached to it. 114 Ky. 746, 71 S. W. 905.

JET. In French Law. *Jettison* (q. v.).

JETSAM. Goods thrown into the sea from a vessel in danger of wreck, for the purpose of lightening her and which remain under water, without coming to land. 1 Bl. Com. 292.

JETTISON, JETSAM. The casting out of a vessel, from necessity, a part of the lading. The thing so cast out.

It differs from *flotsam* in this, that in the latter the goods float, while in the former they sink, and remain under water. It differs also from *ligan*.

The jettison must be made for sufficient cause, and not for groundless timidity; 66 Fed. Rep. 776; 57 *id.* 403. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or is laboring upon rocks or shallows, or is closely pursued by pirates or enemies.

If the residue of the cargo be saved by such sacrifice, the property saved is bound to pay a proportion of the loss. In ascertaining such average loss, the goods lost and saved are both to be valued at the price they would have brought at the place of delivery on the ship's arrival there, freight, duties, and other charges being deducted; *Marsh. Ins.* 246; 3 Kent 185; *Park. Ins.* 123; *Pothier, Charte-partie*, n. 108; *Boulay-Paty, Dr. Com. tit. 13*; *Pardessus, Dr. Com. n. 734*; 1 Ware 9. The owner of a cargo jettisoned has a maritime lien on the vessel for the contributory share from the vessel on an adjustment of the average, which may be enforced by a proceeding *in rem* in the admiralty; 19 How. 162; 2 Pars. Marit. Law, 373. See *Abbott*; *Kay, Shipping*; *AVERAGE*; *ADJUSTMENT*; *DERELICT*.

JEUX DE BOURSE. In French Law. A kind of gambling or speculation, which consists of sales and purchases which bind neither of the parties to deliver the things which are the object of the sale, and which are settled by paying the difference in the value of the things sold between the day of the sale and that appointed for delivery of such things. 1 Pardessus, *Droit Com. n. 162*.

JEWEL. A precious stone; a gem; a personal ornament, consisting more or less of precious stones. Ornaments intended to be worn on the person.

The precise meaning of the word was discussed by Shaw, C. J., in 14 Pick. 870.

He said: "The question whether plain gold earrings and knobs, without any precious stone, pearl, or other gem set in them, constitute jewelry." "Jewelry is not found in any English dictionary, and is probably an Americanism. It is defined in Webster to be jewels in general. He defines 'jewel' to be 'an ornament worn by ladies,' 'a pendant in the ear.' It is manifest, however, that these are put by way of instances, and not intended as strict definitions. The term '*bijou*,' which seems to be nearly analogous to it in the French language, is defined to be 'a little work of ornament, valuable (*precieux*) for its workmanship or by its material. *Cette femme a de beaux bijoux.*' *Dict. de l'Acad.* The counsel on both sides cited passages of Scripture to show, on the one side, that the translators of the common version included ornaments of gold under the name of jewels, and on the other, to show that by a distinct enumeration they excluded them. These instances do little more than show that, though the argument founded on them is at first view plausible, it would be entirely unsafe to rely upon it as a ground of legal construction. Nor can much more reliance be placed upon lexicographers; they are necessarily confined, in a considerable degree, to generalities, and cannot ordinarily go into minute and very accurate distinctions. On the best consideration we have been able to give the subject, we are satisfied that the legislature, in the use of the word 'jewelry,' intended to employ it as a generic term, of the largest import, including all articles under the genus. Without attempting to define the term used in the statute, we are all of opinion that earrings and ear-knobs are included under the term jewelry, as it was used in the statute."

It has been held that a watch is not a "jewel ornament," "it is not carried or used as a jewel or ornament, but as a time-piece or chronometer, an article of ordinary wear by most travellers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as in the day-time. It is carried for use and convenience, and not for ornament." 43 N. Y. 539. See also, to the same effect, 33 N. Y. Sup. Ct. 271.

The meaning of the word is most frequently drawn into question in cases involving the construction of statutes limiting the liability of innkeepers for money, jewelry, or valuables not deposited in the safe. In such a case it was said, "The watch, and pen and pencil case are certainly valuables, and perhaps might be called jewels, but I think should be considered a part of the traveller's personal clothing or apparel. The legislature certainly did not expect the traveller, after retiring, to send down his ordinary clothing or apparel to be deposited in the safe;" 36 Barb. 70; but under a similar statute specifying money, jewelry, and articles of gold and silver manufacture, a gold watch was held to be included as an article of gold manufacture; 24 Wis. 241.

The meaning of the word is also frequently involved in cases arising under the tariff laws, which usually contain also the term "imitation jewelry." In such a case Lacombe, J., said: "The word jewelry is generally used as including articles of personal adornment, and the word further imports that the articles are of value in the community where they are used. . . . The articles of value used for personal adornment in our civilization are, and for centuries have been, the precious metals gold and silver, to which, I think, platina is now generally added, and what are known as the precious stones, the diamond, sapphire, ruby, etc." "There is such a thing as imitation jewelry. . . . If by a pleasing combination of appropriate materials, by an attractive arrangement of parts, an article is produced bearing a general resemblance to real jewelry ornaments, and suitable for similar uses, it may fairly be called imitation jewelry." 33 Fed. Rep. 709.

Where a jeweller claimed an exemption as tools of a debtor, of those which he himself worked with on watches as well as of those which his apprentice worked with on jewelry, and it being found by the jury that the principal business was that of jeweller, both were held to be exempt. The court said that the circumstance that he was also engaged in the business of repairing watches did not make him a watchmaker in distinction to a jeweller; . . . "this is rather part of the employment of a jeweller, as exercised in this country, than a distinct and separate occupation by himself." 2 Pick. 80.

Family jewels constitute one of the kinds of personal property for the unlawful detention of which the remedy at law is considered inadequate and equitable relief is sustained; Ad. Eq., 8th ed. 91.

They are also included in the paraphernalia (*q. v.*), and "even the jewels of a peeress have been held such;" 2 Bla. Com. 436.

Jewels of the wife, though given by her husband's will to her for life, were decreed to her absolutely, as her paraphernalia (*q. v.*), as against creditors who sought to have them sold to pay debts charged on real estate in aid of the testator's personal estate; 1 Bro. C. C. *576.

JEWS. The name given to the descendants of the patriarch Abraham.

The Jews were exceedingly oppressed during the middle ages throughout Christendom. In France, a Jew was a serf, and his person and goods belonged to the baron on whose demesnes he lived. He could not change his domicile without permission of the baron, who could pursue him as a fugitive even on the domains of the king. Like an article of commerce, he might be lent or hired for a time, or mortgaged. If he became a Christian, his conversion was considered a larceny of the lord, and his property and goods were confiscated. They were allowed to utter their prayers only in a low voice and without chanting. They were not allowed to appear in public without some badge or mark of distinction. Christians were forbidden to employ Jews of either sex as domestics, physicians, or surgeons. Admission to the bar was forbidden to Jews. They were obliged to appear in court in person when they demanded justice for a wrong done them; and it was deemed disgraceful to an advocate to undertake the cause of a Jew. If a Jew appeared in court against a Christian, he was obliged to swear by the ten names of God and invoke a thousand imprecations against himself if he spoke not the truth. Sexual intercourse between a Christian man and a Jewess was deemed a crime against nature, and was punishable with death by burning. *Quia et rem habere cum eone, rem habere a Christiano cum Judaque caxis reputatur; sic comburi debet;* 1 Pournel, *Hist. des Avocats*, 108, 110. See Merlin, *Répert. Juifs*.

Under the Roman law the Jews were the subject of severe restrictive laws and were classed in the enactments of the Church with heretics, apostates, heretics, and heathens; Mack. Rom. L. §152. Marriage with them was forbidden; id. §555; and a Jew could not be the tutor of a Christian; id. §616.

In the fifth book of the Decretals it is provided that if a Jew have a servant that desired to be a Christian, the Jew shall sell him to sell him to a Christian for twelve pence; that it shall not be lawful for them to take any Christian to be their servant; that they may repair their old synagogues, but not build new; that it shall not be lawful for them to open their doors to women of good life; that their wives shall neither have Christian nurses, nor themselves be nurses to Christian women; that they wear different apparel from the Christians, whereby they may be known, etc. See Ridley's View of the Civ. and Eccl. Law, part 1, chap. 5, sect. 7. Madox, *Hist. of Exch.*

In England, the Jew could have nothing that was his own, for whatever he acquired he acquired not for himself but for the king; Bract. f. 386 b. For about a century and a half they were important elements in English history, as their greatest privilege was to be allowed to do things that were forbidden to Christians, notably, to take interest on money. This money-lending business required some governmental regulation, the king having a deep interest in it, for what was potentially owed to the Jew was owed to the king, and this matter could hardly be left to the English tribunals as they would do but scant justice to the Jew, and therefore but scant justice to the king who stood behind the Jew. In 1194, an edict was issued about the Jewish loans. In every town in which the Jews lived an office was established for the registration of their deeds. All loans and payments of loans were to be made under the eye of certain officers, some of them Christians, some of them Jews, and a copy or part of every deed was to be deposited in an ark or chest under official custody. A few years later a department of the royal exchequer—the exchequer of the Jews—was organized for the supervision of this business. At its head were a few "Justices of the Jews." This exchequer was, like the great exchequer, both a financial bureau and a judicial tribunal. It managed all the king's transactions—and there were many—with the Jews, saw to the execution of the sales, ransoms, arrests, and forfeitures, and also acted judicially, not merely as between king and Jew, but also as between king and gentle, when, as often happened, the king had for some cause or another seized into his hand the debts due to one of his Jews by Christian debt-

ors. Also it heard and determined all manner of disputes between Jew and Christian. 1 Pol. & M. 451.

This system could not work well; it oppressed both Jew and Englishman, and from the middle of the thirteenth century the king was compelled to rob them of their privileges, to forbid them to hold lands, and some efforts were made to induce them to give up their profession of usury, as was also done in France and elsewhere during the same period, but the fact is, that they were so heavily taxed by the sovereigns or governments of Christendom, and at the same time debarr'd from almost every other trade or occupation—partly by special decrees, partly by the vulgar prejudice—that they could not afford to prosecute ordinary vocations. In 1293 the Jews—no longer able to withstand the constant hardships to which they were subjected in person and property—begged of their own accord to be allowed to leave the country. Richard of Cornwall, however, persuaded them to stay. Ultimately, in 1290 A. D., they were driven from the shores of England, pursued by the execrations of the infuriated rabble, and leaving in the hands of the king all their property, debts, obligations, and mortgages, they emigrated for the most part to France and Germany.

Practically, the only disabilities to which Jews are now subject in England are, incompetence to fill certain high offices in the state (e. g. that of lord chancellor), and inability to present to an ecclesiastical benefice attached to an office in her majesty's gift. 8 Steph. Com. 88.

JOB. The whole of a thing which is to be done. In this sense it is employed in the Civil Code of Louisiana, art. 2727: "To build by plot, or to work by the job," says that article, "is to undertake a building for a certain stipulated price." See Duranton, *du Contr. de Louage*, liv. 3, t. 8, nn. 248, 268; Pothier, *Contr. de Louage*, nn. 392, 394. See **DEVATION**.

JOBBER. In Commercial Law. One who buys and sells articles in bulk and resells them to dealers. Stock-jobbers are those who buy and sell stocks for others. This term is also applied to those who speculate in stocks on their own account.

See **STOCK-JOBBER**.

JOCALIA (Lat.). Jewels (*q. v.*). This term was formerly more properly applied to those ornaments which women, although married, call their own. When these *joculia* are not suitable to her degree, they are assets for the payment of debts; 1 Rolle, Abr. 911.

JOCKEY CLUB. An association of persons for the purpose of regulating all matters connected with horse racing.

A corporation owning and operating a race track 2 Misc. Rep. 512.

Such a club is a private and not a quasi-public corporation, and may refuse to allow certain persons to enter horses for its races; 22 N. Y. S. 394; s. c. 2 Misc. Rep. 512. A grant by the state to such a corporation to make and register bets and sell pools on the result of its races is not a grant of state aid, but is merely a removal of the statutory prohibition against the exercise of a right existing at common law; *id.*

JOHN DOE. See **DOE, JOHN**.

JOINDER. In Pleading. Union; concurrence.

OF ACTIONS. IN CIVIL CASES. The union of two or more causes of action in the same declaration.

At common law, to allow a joinder, the form of actions must be such that the same plea may be pleaded and the same judgment given on all the counts of the declaration, or, the counts being of the same nature, that the same judgment may be given on all; 2 Saund. 177 c; Comyns, *Dig. Actions* (G); 16 N. Y. 548; 4 Cal. 27; 12 La. Ann. 873; 33 N. H. 495. And all the causes of action must have accrued to the plaintiff or against the defendant; 12 La. Ann. 44; in the same right, though it may have been by different titles. Thus, a plaintiff cannot join a demand in his own right to one as representative of another person, or against the defendant himself to one against him in a representative capacity; 2 Viner, Abr. 62; Bacon, Abr. *Action in General* (C); 21 Barb. 245; 54 Fed. Rep. 985. See 25 Mo. 357. Nor can a cause of action in tort and in contract be joined; 28 Abb. N. C. 317; nor a tort with a claim for money had and received; 89 Ga. 154.

In *real actions* there can be but one count.

In *mixed actions* joinder occurs, though but infrequently; 8 Co. 876; Poph. 24; Cro. Eliz. 290.

In *personal actions* joinder is frequent.

By statutes, in many of the states, joinder of actions is allowed and required to a greater extent than at common law.

IN CRIMINAL CASES. Different offences of the same general nature may be joined in the same indictment; 1 Chitty, Cr. Law 253, 255; 29 Ala. n. s. 63; 28 Miss. 267; 4 Ohio St. 440; 6 McLean 596; 4 Denio 183; 18 Me. 103; 1 Cheves 103; 4 Ark. 56; 158 Mass. 164; 25 Neb. 581; see 14 Gratt. 687; 80 Tex. App. 638; and it is no cause of arrest of judgment that they have been so joined; 29 E. L. & Eq. 536; 29 N. H. 184; 11 Ga. 235; 2 W. & M. 164; see 1 Strobb. 455; but not in the same count; 5 R. I. 385; 24 Mo. 353; 1 Rich. 260; 4 Humphr. 25; see 9 Lawy. Rep. Ann. 183, note; and an indictment may be quashed, in the discretion of the court, where the counts are joined in such manner as will confound the evidence; 17 Mo. 544; 19 Ark. 563, 577; 20 Miss. 468.

No court, it is said, will, however, permit a prisoner to be tried upon one indictment for two distinct and separate crimes; Steph. Cr. Proc. 154; 29 N. H. 184. See 5 S. & R. 59; 10 Cush. 580.

Where, out of precaution to meet every aspect of a single offence, an indictment charges distinct crimes, and no attempt is made to convict accused of disconnected offences, the state will not be compelled to elect on which he shall be tried; 91 Ala. 87. Three separate offences, but not more, against the provisions of U. S. Rev. Stat. § 5480, prohibiting the use of the mails with intent to defraud, when committed within the same six calendar months, may be joined, and when so joined there is to be a single sentence for all, but this does not prevent other indictments for other offences under the same statute committed within the same six calendar months; 123 U. S. 672.

In *Demurrer*. The answer made to a demurrer. Co. Litt. 71 b. The act of making such answer is merely a matter of form, but must be made within a reasonable time; 10 Rich. 49.

Of *Issue*. The act by which the parties to a cause arrive at that stage of it in their pleadings, that one asserts a fact to be so, and the other denies it. For example, when one party denies the fact pleaded by his antagonist, who has tendered the issue thus, "And this he prays may be inquired of by the country," or, "and of this he puts himself upon the country," the party denying the fact may immediately subjoin, "And the said A B does the like;" when the issue is said to be joined.

Of *Parties*. IN CIVIL CASES. IN EQUITY. All parties materially interested in the subject of a suit in equity should be made parties, however numerous; Miff. Eq. Plead. 144; 2 Eq. Cas. Abr. 179; 1 Pet. 299; 18 id. 359; 7 Cra. 72; 2 Mas. 181; 5 McLean 444; 2 Paine 536; 1 Johns. Ch. 349; 2 Bibb 184; 24 Me. 20; 7 Conn. 342; 11 Gill & J. 426; 4 Rand. 451; 7 Ired. Eq. No. C. 261; 2 Stew. Ala. 280; either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all; 183 U. S. 233, 579. But, where the parties are very numerous, and sue in the same right, a portion may in some cases appear for all in the same situation; Beach, Eq. Pr. § 63; 16 Ves. 321; 16 How. 288; 11 Conn. 112; 3 Paige, Ch. 223; 19 Barb. 517. See 152 Mass. 123.

Mere possible or contingent interest does not render its possessor a necessary party; 6 Wheat. 550; 8 Conn. 354; 5 Cow. 719. And see 8 Bibb 86; 6 J. J. Marsh. 425. Contingent remaindermen are not necessary parties to a suit to set aside the deed creating the remainder; 143 Ill. 200; nor a residuary legatee to a bill filed by a legatee or creditor to assert a claim against the estate of a testator; 17 N. J. Eq. 156.

There need be no connection but community of interest; 2 Ala. n. s. 209. It is not indispensable that all the parties to a suit should have an interest in all the matters contained in the suit, but it will be suf-

ficient if each party has an interest in some material matters in the suit, and they are connected with the others; 128 U. S. 403.

A court of equity, even after final hearing on the merits and on appeal to the court of last resort, will compel the joinder of necessary parties; 89 Mo. 284.

PLAINTIFFS. All persons having a unity of interest in the subject-matter; 3 Barb. Ch. 397; 2 Ala. n. s. 209; and in the object to be attained; 2 La. 55; 113 Mo. 348; 89 Va. 455; who are entitled to relief; 14 Ala. n. s. 135; may join as plaintiffs. The rights claimed must not arise under different contracts; 3 Pet. 123; 5 J. J. Marsh. 154; or be vested in the same person in different capacities; 1 Busb. Eq. 196. And see 1 Paige 637; 5 Mete. 118. Persons representing antagonistic interests cannot be joined as complainants; 14 So. Rep. (Ala.) 705.

Assignor and assignee. The assignor of a contract for the sale of lands should be joined in a suit by the assignee for specific performance; 3 Sandf. Ch. 614; and the assignor of part of his interest in a patent in a suit by assignee for violation; 3 McLean 350.

But he should not be joined where he has parted with all his legal and beneficial interest; 32 Me. 208, 343; 18 B. Monr. 210. The assignee of a mere chose in action may sue in his own name, in equity; 17 How. 43; 5 Wisc. 270; 6 B. Monr. 540; 7 id. 273.

Corporations. Two or more may join if their interest is joint; 3 Ves. 706. A corporation may join with its individual members to establish an exemption on their behalf; 8 Anstr. 738. Corporations themselves are indispensable parties to a bill which affects their corporate rights or liabilities; 148 U. S. 603.

Husband and wife must join where the husband asserts an interest in behalf of his wife; 6 B. Monr. 514; 3 Hayw. 252; 5 Johns. Ch. 196; 9 Ala. 133; as, for a legacy; 5 Johns. Ch. 196; or for property devised or descended to her during coverture; 5 J. J. Marsh. 179, 600; or where he applies for an injunction to restrain a suit at law against both, affecting her interest; 1 Barb. Ch. 313. Where a widow sues to set aside a deed executed by herself and husband on the ground that it was procured by fraud, the administrator of the husband is not a necessary party; 58 Hun 605.

Under modern statutes for the enlargement of the rights and remedies of married women, it is in many cases unnecessary to join the husband in suits to which he was formerly a necessary party. See MARRIED WOMAN.

Idiots and lunatics may be joined or not in bills by their committees, at the election of the committee, to set aside acts done by them whilst under imbecility; 1 Ch. Cas. 112; 1 Jac. 377; 7 Johns. Ch. 139. They must be joined in suits brought for the partition of real estate; 3 Barb. Ch. 24. In England it seems to be the custom to join; 2 Vern. 678. See Story, Eq. Pl. § 64, and note; Story, Eq. Jur. § 1836, and note.

Infants. Several may join in the same bill for an account of the rents and profits of their estate; 2 Bland 68.

Trustee and cestui que trust should join in a bill to recover the trust fund; 5 Dana 128; but need not to foreclose a mortgage; 5 Ala. 447; 4 Abb. Pr. 106; nor to redeem one made by the trustee; 2 Gray 190. And see 3 Edw. Ch. 175; 7 Ala. n. s. 386.

An appeal may be prosecuted by one party to the record, as against another, without joining other parties who are in no way interested in the controversy; 80 Fed. Rep. 961.

DEFENDANTS. In general, all persons interested in the subject-matter of a suit who cannot be made plaintiffs should be made defendants. They may claim under different rights if they possess an interest centering in the point in issue; 4 Cow. 682. In order to obtain the rescission of a contract of sale, all of the parties interested in the property involved must be brought before the court; 52 Kan. 227.

Bills for discovery need not contain all the parties interested as defendants; 1

M'Cord, Ch. 301; and a person may be joined merely as defendant in such bill; 3 Ala. 214. A person should not be joined as a party to such bill who may be called as a witness on trial; 18 Ill. 212; 3 Barb. Ch. 483. And see 1 Chandl. 286.

Assignor and assignee. An assignor who retains even the slightest interest in the subject-matter must be made a party; 2 Dev. & B. Eq. 395; 1 Green, Ch. 347; 2 Paige 289; 11 Cush. 111; as a covenantor in a suit by a remote assignee; 1 Dana 585; or an assignee in insolvency, who must be made a party; 3 Johns. 543; 1 Johns. Ch. 339; 10 Paige 20; or the original plaintiff in a creditor's bill by the assignee of a judgment; 4 B. Monr. 594.

A fraudulent assignee need not be joined in a bill by a creditor to obtain satisfaction out of a fund so transferred; 1 Paige 637. The assignee of a judgment must be a party in a suit to stay proceedings; 11 Paige 438.

Corporations and associations. A corporation charged with a duty should be joined with the trustees it has appointed, in a suit for a breach; 1 Gray 399; 7 Paige 281. Where the legal title is in part of the members of an association, no others need be joined; 1 Gilm. 187. The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark; 53 Fed. Rep. 124. When discovery is sought, the officer from whom the information is to be obtained should be made a co-defendant with the corporation; 93 Ala. 542.

Officers and agents may be made parties merely for purposes of discovery; Beach, Eq. Pr. § 61, n.; 9 Paige 188.

Creditors who have repudiated an assignment and pursued their remedy at law are properly made parties to a bill brought by the others against the trustee for an account and the enforcement of the trust; 3 Wisc. 367. So, when judgments are impeached and sought to be set aside for fraud, the plaintiffs therein are indispensable parties to the bill; 20 Ala. 200. To a bill brought against an assignee by a creditor claiming the final balance, the preferred creditors need not be made parties; 28 Vt. 465. See, also, 20 How. 94; 1 Md. Ch. 299; 3 Mete. 474; 11 Paige 49.

Debtors must in some cases be joined with the executor in a suit by a creditor; though not ordinarily; Story, Eq. Pl. § 227; 1 Johns. Ch. 305. Where there are several debtors, all must be joined; 1 M'Cord, Ch. 301; unless utterly irresponsible; 1 Mich. 446. Judgment debtors must in some cases be joined in suits between the creditor and assignees or mortgagees; 5 Sandf. 271. In an action by judgment creditors for the appointment of a receiver, to take charge of property belonging to their debtor, the payees of unpaid purchase-money notes given for such property are necessary parties; 12 So. Rep. (Miss.) 596.

Executors and administrators should be made parties to a bill to dissolve a partnership; 21 Ga. 6; to a bill against heirs to discover assets; 7 B. Monr. 127; to a bill by creditors to subject lands fraudulently conveyed by the testator, their debtor, to the satisfaction of their debt; 9 Mo. 304. See, also, 21 Ga. 433; 6 Munf. 520; 7 E. L. & Eq. 54.

Foreclosure suits. All persons having an interest, legal or equitable, existing at the commencement of a suit to foreclose mortgaged premises, must be made parties, or they will not be bound; Tiedm. Eq. Jur. § 441; 4 Johns. Ch. 605; 10 Paige 307; 10 Ala. n. s. 283; 3 Ark. 384; 6 McLean 416; 11 Tex. 536; including the mortgagor within a year after the sale of his interest by the sheriff; 4 Johns. Ch. 649; and his heirs and personal representative after his death; 2 Bland 684. But bond-holders for whose benefit a mortgage has been made by a corporation to a trustee need not be made parties; 5 Gray 162; Jones, Corp. Bonds & Mortg. § 398. A person claiming adversely to mortgagor and mortgagee cannot be made a defendant to such suit; 3 Barb. Ch. 438.

Heirs, distributees, and devisees. All the heirs should be made parties to a bill respecting the real estate of the testator; 3

N. Y. 261; 2 Ala. n. s. 571; 4 J. J. Marsh. 231; 5 Ill. 452; although the testator was one of several mortgagees of the vendee, and the bill be brought to enforce the vendor's lien; 6 B. Monr. 74; but need not to a bill affecting personality; 1 McCord, Ch. 280. Where, in a suit to set aside a deed for fraud, one of the heirs did not join as plaintiff, he may be made a party defendant, even if he should elect to affirm the deed; 156 Mass. 203. All the devisees are necessary parties to a bill to set aside the will; 2 Dana 155; or to enjoin executors from selling lands belonging to the testator's estate; 2 T. B. Monr. 80. All the distributees are necessary parties to a bill for distribution; 1 B. Monr. 27; to a bill by the widow of the intestate against the administrator to recover her share of the estate; 4 Bibb 543; and to a bill against an administrator to charge the estate with an annual payment to preserve the residue; 1 Hill, Ch. 51. See, also, 11 Paige 49; 2 T. B. Monr. 95; 5 *id.* 573. A bill cannot be filed against the heirs and devisees jointly for satisfaction of a debt of the deceased; 9 Paige 28.

*Idiot*s and *lunatics* should be joined with their committees when their interests conflict and must be settled in the suit; 2 Johns. Ch. 242; 3 Paige 470.

Partners must, in general, be all joined in a bill for dissolution of the partnership, but need not if without the jurisdiction; Lind. Part. 460; 17 How. 468; 12 Metc. 329. And see 3 Sto. 335.

Assignees of insolvent partners must be joined; 10 Me. 255.

Dormant partners need not be joined when not known in the transaction on which the bill is founded; 7 Blackf. 218.

Principal and agent should be joined if there be a charge of fraud in which the agent participated; 3 Sto. 611; 12 Ark. 720; and the agent should be joined where he binds himself individually; 3 A. K. Marsh. 484.

Trustee and cestui que trust. If a trustee has participated with the trust fund, the *cestui que trust* may proceed against the trustee alone to compel satisfaction, or the fraudulent assignee may be joined with him at the election of the complainant; 2 Paige 278. Where a claimant against the estate of a deceased person seeks to follow the assets into the hands of a trustee, it is not necessary to make the beneficiaries parties; 45 Ch. Div. 444.

On a proceeding in equity for the appointment of trustees under a mortgage, where two of the three trustees have died, and there is no provision in the mortgage for filling the vacancies, the mortgagor and the surviving trustee are necessary parties; 85 Me. 79.

The trustees under a settlement of real estate, against whom a trust or power given to them to sell the estate is to be enforced, are necessary parties to a suit for that purpose; 89 E. L. & Eq. 76. See, also, *id.* 225; 24 Miss. 597; 19 How. 376; 5 Du. N. Y. 168; 6 Md. 84.

AT LAW. In *actions ex contractu*. All who have a joint legal interest or are jointly entitled must join in an action on a contract, even though it be in terms several, or be entered into by one in behalf of all; 1 Saund. 153; Archb. Civ. Pl. 58; 8 S. & R. 308; 15 Me. 295; 3 Brev. 249; 3 Ark. 565; 16 Barb. 325; as, where the consideration moves from several jointly; 2 Wms. Saund. 116 a; 4 M. & W. 295; or was taken from a joint fund; 19 Johns. 218; 1 Meigs 394.

Some contracts may be considered as either joint or several, and in such case all may join, or each may sue separately; but part cannot join leaving the others to sue separately.

In an action for a breach of a joint contract made by several, all the contracting parties should be made defendants; 1 Saund. 153, n.; even though one or more be bankrupt or insolvent; 2 Maule & S. 33; but see 1 Wils. 89; or an infant; but not if the contract be utterly void as to him; 3 Taunt. 807; 5 Johns. 160, 280; 1 Pick. 500.

On a joint and several contract, each may be sued separately, or all together; 1 Pet. 73; 1 Wend. 524.

A corporation is a necessary party to a suit brought by its stockholders to enforce its rights; 149 U. S. 478.

Executors and administrators must bring their actions in the joint names of all; Crosw. Ex. & Adm. § 639; 5 Scott, n. n. 738; 1 Saund. 291 g; 2 N. & M. C. 70; 1 Dutch. 374; even though some are infants; Broom, Part. 104.

All the executors who have proved the will are to be joined as defendants in an action on the testator's contract; 1 Cr. M. & R. 74; 4 Bingh. 704. But an executor *de son tort* is not to be joined with the rightful executor. And the executors are not to be joined with other persons who were joint contractors with the deceased; 2 Wheat. 344; 6 S. & R. 273; 5 Cal. 173.

Administrators are to be joined, like executors; Comyns, Dig. *Administrators* (B 12). Foreign executors and administrators are not recognized as such, in general; 2 Jones, Eq. 376; 10 Rich. 393; 7 Ind. 211.

Husband and wife must join to recover rent due the wife before coverture on her lease while sole; Co. Litt. 55 b; Cro. Eliz. 700; on the lease by both of lands in which she has a life estate, where the covenant runs to both; 20 Barb. 269; but on a covenant generally to both, the husband may sue alone; 1 B. & C. 448; in all actions in implied promises to the wife acting *in autre droit*; Comyns, Dig. *Baron & F. (V)*; 9 M. & W. 694; 4 Tex. 283; as to suit on a bond to both, see 2 Penning. 827; on a contract running with land of which they are joint assignees; Woodf. Landl. & T., 1st Am. ed. 529; Cro. Car. 603; in general, to recover any of the wife's choses in action where the cause of action would survive to her; Comyns, Dig. *Baron & F. (V)*; 1 Chitty, Pl. 17; 1 M. & S. 180; 13 Wend. 271; 10 Pick. 470; 9 Ired. 163; 21 Conn. 557; 24 Miss. 245; 2 Wisc. 22.

They may join at the husband's election in suit on a covenant to repair, when they become joint grantees of a reversion; Cro. Jac. 399; to recover the value of the wife's choses in action; 5 Harring. 57; 24 Conn. 45; 2 Wisc. 22; 2 M. & S. 396, n.; in case of joinder the action survives to her; 6 M. & W. 426; 10 B. & C. 558; in case of an express promise to the wife, or to both where she is the meritorious cause of action; Cro. Jac. 77, 205; 1 Chitty, Pl. 18; 5 Harring. 57; 32 Ala. n. s. 30.

They must, in general, be joined in actions on contracts entered into by the wife *dum sola*; 2 Term. 480; 7 *id.* 348; 8 Johns. 149; 1 Grant, Cas. 21; 5 Harring. 357; 25 Vt. 207; see 15 Johns. 408; 7 Mass. 291; where the cause of action accrues against the wife *in autre droit*; Cro. Car. 518. They may be joined when the husband promises anew to pay the debt of the wife contracted *dum sola*; 7 Term 349; for rent or breaches of covenant on a joint lease to both for the wife's benefit; Broom, Part. 178. In an action on a contract against a husband and wife, a contract signed by the husband alone is insufficient to support a judgment against the wife; 158 Pa. 295.

Joint tenants must join in debt or an avowry for rent; Broom, Part. 24; but one of several may make a separate demise, thus severing the tenancy; Bacon, Abr. *Joint Ten.* (H 2); 3 Campb. 190; and one may maintain ejectment against his cotenants; Woodf. Landl. & T. 789.

Partners must all join in suing third parties on partnership transactions; 2 Campb. 302; 18 Barb. 534; 7 Rich. 118; including only those who were such at the time the cause of action accrued; Broom, Part. 65; although one or more may have become insolvent; 2 Cr. & M. 318; but not joining the personal representative of a deceased partner; 4 B. & Ald. 374; 9 B. & C. 538. See 118 Ind. 313; with a limitation to the actual parties to the instrument in case of specialties; 6 M. & S. 75; and including dormant partners or not, at the election of the ostensible partners; Pars. Part. § 202; 10 B. & C. 671; 4 B. & Ald. 437. See 4 Wend. 628; 71 Mich. 475. A partner who has sold his interest to another partner is not a necessary party to an action for an

accounting of the partnership affairs; 190 U. S. 505. Where one partner contracts in his name for the firm, he may sue alone, or all may join; 4 B. & Ad. 815; 4 B. & Ald. 437; but alone if he was evidently dealt with as the sole party in interest; 1 M. & S. 249. Partners cannot sue or be sued in their copartnership name, but the individual names of its members must be set out; 5 So. Rep. (Miss.) 112; 17 Or. 256.

The surviving partners; 3 Ball & B. 30; 1 B. & Ald. 29, 522; 18 Barb. 592; must all be joined as defendants in suits on partnership contracts; 1 East 30. And third parties are not bound to know the arrangements of partners amongst themselves; 4 M. & S. 482; 8 M. & W. 703, 710.

A partner need not be joined if he was not known as such at the time of making the contract and there was no indication of his being a partner; Lind. Part. 281; 1 Bosw. 28; 19 Ark. 701. And see PARTNERSHIP.

Tenants in common should join in an action on any joint contract; Comyns, Dig. *Abatement* (E 10).

Trustees must all join in bringing an action; 1 Wend. 470.

In *actions ex delicto*. Joint owners must, in general, join in an action for a tortious injury to their property; 1 Saund. 291 g; 11 N. H. 141; in trover, for its conversion; 5 East 407; in replevin, to get possession; 6 Pick. 571; 8 Mo. 522; 15 Me. 245; or in detinue, for its detention, or for injury to land; 3 Bingh. 455; 29 Barb. 9.

So may several owners who sustain a joint damage; 1 W. & M. 233.

The grantor and grantee of land cannot join in a counter-claim for continuing trespasses on the land sold, since their rights of action are not joint; 6 Ind. App. 663.

For injury to the person, plaintiffs cannot, in general, join; 2 Wms. Saund. 117 a; Cro. Car. 512; Cro. Eliz. 472.

Partners may join for slanders; 3 Bingh. 452; Lind. Part. 278; 8 C. & P. 708; for false representations; 17 Mass. 182; injuring the partnership. The joinder or non-joinder of a dormant partner constitutes no objection to the maintenance of a suit in any manner whatever; 71 Mich. 475.

In a suit against joint contractors, one of whom is dead, the survivors only should be made parties, the administrator of the deceased partner not being necessary; 44 Ill. App. 114.

An action for the infringement of letters patent may be brought jointly by all the parties who at the time of the infringement were the holders of the title; 1 Gall. 429; 1 MoAll. 82.

In cases where several join in the commission of a tort, they may be joined in an action as defendants; 6 Taunt. 29; 14 Johns. 493; as, in trover; 1 M. & S. 588; in trespass; 2 Wms. 117 a; for libel; Broom, Part. 249—not for slander; Cro. Jac. 647; in trespass; 1 C. & M. 96.

Husband and wife must join in action for direct damages resulting from personal injury to the wife; Schoul. Husb. & W. 167; 3 Bla. Com. 140; 4 Iowa 430; see 11 So. Rep. (La.) 541; in detinue, for the property which was the wife's before marriage; 2 Tayl. 266; 37 W. Va. 377; see 30 Ala. n. s. 532; for injury to the wife's property before marriage; 2 Jones, N. C. 59; where the right of action accrues to the wife *in autre droit*; Comyns, Dig. *Baron & F. (V)*; 2 B. & P. 407; and, generally, in all cases where the cause of action by law survives to the wife; 4 B. & Ald. 523; 10 Pick. 470; 35 Me. 89.

They may join for slander of the wife, if the words spoken are actionable *per se*, for the direct injury; 4 M. & W. 5; 22 Barb. 396; 2 T. B. Monr. 56; 25 Mo. 590; 4 Ia. 420; 11 Cush. 10; 112 N. C. 293; (but she may maintain an action in her own name; 89 Ga. 829); and in ejectment for lands of the wife they may join; Broom, Part. 235; 1 Bulstr. 21. An action for permanent injury to community property must be brought by husband and wife jointly; 8 Wash. 78.

They must be joined as defendants for torts committed by the wife before mar-

riage; Co. Litt. 351 b; 5 Binn. 48; or during coverture; 19 Barb. 321; 2 E. D. Smith 99; 17 S. E. Rep. (S. C.) 851; or for libel or slander uttered by her; 5 C. & P. 484; and in an action for waste by the wife, before marriage, as administratrix; 3 Wms. Ex. 1441.

They may be joined in trespass for their joint act; 3 B. & Ald. 887; 6 Gratt. 215.

Joint tenants and parceners, during the continuance of the joint estate, must join in all actions *ex delicto* relative thereto, as in trespass to their land, and in trover or replevin for their goods; 2 Bla. Com. 182, 188; Bacon, Abr. *Joint Ten.* (K); 29 Barb. 29. Joint tenants may join in an action for slander of the title to their estate; 3 Bingh. 455. They should be sued jointly, in trespass, trover, or case, for anything respecting the land held in common; Comyns, Dig. *Abatement* (F 6); 1 Wms. Saund. 291 c. Joint tenants should join in an *avowry* or cognizance for rent; 3 Salk. 207; or for taking cattle damage feasant; Bacon, Abr. *Joint Ten.* (K); or one joint tenant should *avow* in his own right, and as *baillif* to the other; 3 Salk. 207. But a tenant in common cannot *avow* the taking of the cattle of a stranger upon the land damage feasant, without making himself *baillif* or servant to his co-tenant; 2 H. Bla. 388; Bacon, Abr. *Replevin* (K).

Master and servant, where co-trespassers should be joined though they be not equally culpable; 5 B. & C. 559. **Partners** may join for a joint injury in relation to the joint property; 3 C. & P. 196. They may be joined as defendants where property is taken by one of the firm for its benefit; 1 C. & M. 93; and where the firm makes fraudulent representations as to the credit of a third person, whereby the firm gets benefit; 17 Mass. 182. In an action against a corporation for a tort, the corporation and its servants by whose act the injury was done may be joined as defendants; 98 N. C. 34.

Tenants in common must join for a trespass upon the lands held in common; Littleton § 315; 8 Cow. 304; 28 Me. 136; or for taking away their common property; Cro. Eliz. 142; or for detaining it; 1 Hill, N. Y. 234; or for a nuisance to their estate; 14 Johns. 246.

IN CRIMINAL CASES. Two or more persons who have committed a crime may be jointly indicted therefor; 7 Gratt. 619; 6 McLean 505; 10 Ired. 153; 8 Blackf. 205; only where the offence is such that it may be committed by two jointly; 3 Sneed 107; and not where there are distinct and different offences; 97 N. C. 474. A principal and accessory may be joined in one indictment; 155 Mass. 234; 65 N. H. 284.

They may have a separate trial, however, in the discretion of the court; 15 Ill. 536; 1 Park. Cr. Ca. 424; 7 Gratt. 619; 10 Cush. 530; 5 Strobb. 85; 9 Ala. n. s. 137; and in some states as a matter of right; 1 Park. Cr. Ca. 371.

See *Dicey, Parties*; *Steph. Pl.*; *PARTIES*. As to the effect of *Misjoinder* and *Nonjoinder*, and how and when advantage should be taken of either, see those titles.

JOINT. Joined together; united; shared by two or more. The term is used to express a common property interest enjoyed or a common liability incurred by two or more persons; as applied to real estate it involves the idea of survivorship. See *ESTATE IN JOINT TENANCY*; *ESTATE IN COMMON*.

With respect to the ownership of choses in action, the term implies that the interest and right of action are united so that all the owners must be joined in a suit to enforce the obligation jointly held. See *JOINT AND SEVERAL*.

A joint liability on choses in action implies that though each person subject to it is liable for the whole, they are all treated in law as together constituting one legal entity and must be sued together or a release to one will operate in favor of all. One who pays the debt is entitled to contribution (*q. v.*).

As applied to property (other than choses in action), "joint" signifies that it belongs to two or more persons in such a way that on

the death of one of them without having disposed of his interest *inter vivos*, it passes to the survivors, and so on until they have all died but one, who then takes the whole by survivorship. This quality distinguishes a joint ownership from an ownership in common, and also, in the case of land, from the form of ownership known as coparcenary. As to the rules relating to joint ownership and ownership in common, see *ESTATE IN COMMON*; *JOINT TENANCY*.

In the case of bonds, covenants, contracts and other choses in action, when the right of action is vested in two or more persons, so that they must all join in suing upon the bond, etc., then the bond, etc., is said to be joint, as opposed to one which is several, namely, where each of the obligees has a separate interest, and may therefore sue alone. Whether a bond, covenant or the like is joint or several depends much more upon the subject-matter than upon the words employed, for if each of the obligees has a separate interest, the right of action will be several, although expressed to be joint and several. A bond, covenant, or the like, entered into with several obligees, cannot be joint or several at their election, but must be either one or the other. If one obligee releases the obligor, this is sufficient to bar all the obligees; and if one of several joint obligees dies, his interest passes to the survivors. In the case of partners in trade, however, the share of a deceased partner devolves in equity on his personal representatives, and the surviving partners become trustees for them of his share. The same rule applies where two or more persons advance money and take the security to themselves jointly.

A joint ownership of a chose in action cannot be severed at law by either or both of the obligees, but the parties may make a severance which will be binding in equity. *Byrne*.

JOINT ACTION. An action brought by two or more as plaintiffs or against two or more as defendants. See *JOINT AND SEVERAL*; *ACTIONS*; *JOINDER*.

JOINT ADMINISTRATORS. See *ADMINISTRATOR*.

JOINT BOND. The bond of two or more obligors, the action to enforce which must be joint against them all.

JOINT COMMITTEE. A committee composed of members of both houses of a legislature. See *May, Parl. Pr.*

JOINT CONTRACT. One in which the contractors are jointly bound to perform the promise or obligation therein contained, or entitled to receive the benefit of such promise or obligation.

It is a general rule that a joint contract survives, whatever may be the beneficial interests of the parties under it. When a partner, covenantor, or other person entitled, having a joint interest in a contract not running with the land, dies, the right to sue survives in the other partner, etc.; 1 Dall. 65, 248; Add. Contr., 9th ed. 239. And when the obligation or promise is to perform something jointly by the obligors or promisors, and one dies, the action must be brought against the survivor; *Hamm. Partn.* 166.

When all the parties interested in a joint contract die, the action must be brought by the executors or administrators of the last surviving obligee against the executors or administrators of the last surviving obligor; Add. Contr. 239. See *CONTRACTS*; *PARTIES*; *CO-OBLIGOR*.

JOINT DEBTORS. Two or more persons jointly liable for the same debt.

To sustain a suit against joint debtors, a joint and subsisting indebtedness must be shown; 18 Johns. 459; and by proceeding to judgment against one or more of joint debtors the debt is merged in the judgment as to all; *id.*

JOINT DEBTORS' ACTS. Statutes enacted in many of the states, which provide that judgment may be given for or

against one or more of several plaintiffs, and for or against one or more of several defendants, and that, "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." The name is also given to statutes providing that where an action is instituted against two or more defendants upon an alleged joint liability, and some of them are served with process, but jurisdiction is not obtained over the others, the plaintiff may still proceed to trial against those who are before the court, and, if he recovers, may have judgment against all of the defendants whom he shows to be jointly liable. 1 Black, *Judg.* §§ 208, 235.

Such judgments are generally held to bind the common property of the joint-debtors, as well as the separate property of those served with process; and, while they are binding personally on the former, they are regarded as either not personally binding at all or only *prima facie* binding on the latter. *Id.*; 91 U. S. 168.

JOINT EXECUTORS. Those who are joined in the execution of a will. See *EXECUTOR*.

JOINT FIAT. A fiat which was formerly issued against two or more trading partners.

Only those partners of a firm who have committed acts of bankruptcy, can be made bankrupts and none but a joint creditor can issue a joint fiat. *Wharton*; 6 Geo. IV., c. 16, § 16.

JOINT FINE. The fine which might be levied upon a whole vill.

Such a fine was considered good because of necessity. But, in other cases, fines for offences were to be severally imposed on each particular offender, and not jointly upon all of them. *Abbott*; 1 Roll. Rep. 33; 11 Rep. 42.

JOINT HEIRS. Co-heirs.

JOINT INDICTMENT. One indictment brought against two or more offenders, charging the defendants jointly. It may be where there is a joint criminal act, without any regard to any particular personal default or defect of either of the defendants; thus, there may be a joint indictment against the joint keepers of a gaming-house; 1 Ventr. 302; 2 Hawk. Pl. Cr. 240.

JOINT LIVES. An expression used to designate the duration of an estate or right, limited or granted to two or more persons, to be enjoyed during the lives of both or all of them.

An annuity to two for their lives is payable until the death of one. Where the survivor is to be benefited, the conveyance or devise is usually expressed to be "to hold their joint lives and the life of the survivor."

JOINT OWNERSHIP. See *JOINT*.

JOINT PROPERTY. Property held jointly or in partnership or in coparcenary or in common. Section 732, Subsection 29, Civil Code of Kentucky.

JOINT RATE. See *THROUGH ROUTE*.

JOINT RESOLUTION. A resolution adopted by both houses of congress or a legislature. When such a resolution has been approved by the president or passed with his approval, it has the effect of a law. 6 Op. Atty. Gen. 680.

The distinction between a joint resolution and a concurrent resolution of congress, is that the former requires the approval of the president while the latter does not.

JOINT AND SEVERAL. A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option. *Dicey, Parties* 280.

Where one is compelled to pay the whole debt or more than his proper share, he is entitled to contribution (q. v.). In case of the death of one his liability remains against his estate; Wms. Pers. Prop. 363. As a general rule all the transactions of partners are said to be joint and several. See PARTNERSHIP.

As to joint and several debtors, Lord Mansfield said in *Rice v. Shute*, Burr. 2611, that "all contracts with partners were joint and several, and every partner was liable to pay the whole." But it was remarked by Spencer, C. J., that "it would be straining Lord Mansfield's opinion unreasonably to say; that he meant technically that all contracts with partners were joint and several, for, then, the non-joinder of any of the partners never could be pleaded in abatement, which all the court expressly decided. In equity they are joint and several; and so they were as regarded that suit, the defendant having neglected to avail himself of the objection in a legal manner. Surely it cannot be said that in a legal sense, when there are a plurality of debtors, that their contract is joint and several, when they have engaged jointly to pay the debt. Each debtor is bound for the whole, until the debt is paid; but as regards the remedy to coerce payment, there is a material and settled distinction. If they have undertaken severally to pay, separate suits may be brought against each; but when their undertaking is joint, unless they waive the advantage, by not interposing a plea in abatement, they must be sued jointly, if in full life, and neither has been discharged by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy." 18 Johns. 459.

JOINT AND SEVERAL BOND.

A bond of two or more obligors, who bind themselves jointly and severally to the obligees, who can sue all the obligors jointly, or any one of them separately, for the whole amount, but cannot bring a joint action against part,—that is, treat it as joint as to some and several as to others.

JOINT AND SEVERAL CREDITOR. One for whose debt a firm is jointly, and all or some or one of its members are or is also separately, liable. (Robts. Bankr. 616.) Thus, if A. and B. are trading in partnership under the firm of A. and Company, and a bill of exchange is accepted by A. and Company, and indorsed by A., the holder of the bill would, in the event of A. and B.'s bankruptcy, be a joint and several creditor, and, therefore, entitled to prove against both the joint estate of the firm and the separate estate of A. R. & L. Dict.; L. R. 7 Ch. 178.

JOINT AND SEVERAL OBLIGATION. One in which all the obligees are to be held either collectively or as individuals. Anderson.

JOINT-STOCK ASSOCIATION. See JOINT STOCK ASSOCIATION.

JOINT STOCK BANKS. In English Law. A species of *quasi corporations*, or companies regulated by deeds of settlement. See JOINT STOCK COMPANY.

JOINT STOCK COMPANY. An association of individuals for purposes of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares of which each member possesses one or more, and which are transferable by the owner. Shelf. Jt. St. Co. 1.

A *quasi* partnership, invested by statutes in England and many of the states with some of the privileges of a corporation. See 10 Wall. 556; L. R. 4 Eq. 695.

A partnership whereof the capital is divided, or agreed to be divided, into shares so as to be transferable without the express consent of the co-partners. Pars. Part. § 435.

Such associations are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or

less liable to contribute to the debts of the collective whole. Incorporated companies are intermediate between corporations known to the common law and ordinary corporations and partake of the nature of both. 1 Lindl. Partn., 1st ed. 6.

They are to be distinguished from limited partnerships chiefly in that there is, in a joint stock company, no *dilectus personarum*, that is, no choice about admitting partners, the shares are transferable without involving a dissolution of the association, the assignee of shares becomes a partner by virtue of the transfer, and the rights and duties of the members are determined by articles of association, or in England by a deed of settlement; 1 Pars. Contr., 8th ed. 144.

The power to manage the business is vested exclusively in the directors, and a shareholder, as such, has no power to contract for the company; 2 H. L. Cas. 520. Generally the number of shares is fixed by the charter, but it is sometimes provided that there shall not be less than a certain number nor more than a certain number. In such cases it is left for the company to determine the number within the limits prescribed; 45 Me. 254; but where the charter fixes the amount of the capital stock, and provides that it may be increased from time to time at the pleasure of the corporation, the directors have no power to increase the amount of the stock, although the charter provides that all the corporate powers shall be vested in, and exercised by a board of directors, and such officers and agents as such board shall appoint; 18 Wall. 238.

In New York joint stock companies have all the attributes of a corporation except the right to have and use a common seal, and an action is properly brought for or against the president as such, and the judgment and execution against him bind the joint property of the association, but do not bind his own property; 74 N. Y. 234; but it has been held that the provisions in the New York statutes are merely local in their operation, and that the members may be sued in other states as partners; 128 Mass. 445; 60 Me. 468. They may be served with summons in another state in the same manner that corporations are served; 44 N. E. Rep. (Ohio) 506; and on an issue as to whether an association was a joint stock company or a corporation, its classification by the statutes of New York, where it was created, has been held not conclusive; 1 Ohio, N. P. 259. A joint stock company having some of the characteristics of a corporation and some of a partnership, including the right to a common seal, ownership of the property by the association, and the right to sue and be sued in the corporate name, is as much a citizen of the state which created it as a corporation organized under its laws, and when sued in another state is entitled to a removal to the federal court irrespective of the citizenship of its individual members; 46 Fed. Rep. 209; 1 Flap. 611; 10 Biss. 273.

At common law they are held not corporations but are to be sued as partners; 128 Mass. 445; 60 Me. 468; 4 Metc. 585; 64 Ia. 220. But in states where there are statutory provisions concerning them the indebtedness of joint stock companies will be charged *pro rata* to the solvent members; 34 S. W. Rep. (Tex.) 178. An English joint stock company (in this case a fire insurance company) endowed by its deed of settlement with the following powers and faculties, 1. A distinctive artificial name by which it can make contracts. 2. A statutory authority to sue and be sued in the name of its officers as representing the association. 3. A statutory recognition of it as an entity distinct from its members by allowing them to sue it or be sued by it. 4. A provision for its perpetuity by transfer of its shares so as to secure succession of membership, was held to be a corporation in this country; 10 Wall. 556; 100 Mass. 531; notwithstanding the acts of parliament declaring it should not be so considered, and the court held that such corporations, whether organized under the

laws of a state of the Union or a foreign government, may be taxed by another state for the privilege of conducting their corporate business therein.

When such a company is not organized under the statutes a suit brought by or against it should be in the name of all the partners or of one or more for the use of all; 1 Ia. 369; 58 Me. 537; and a defective certificate of organization will render all the parties liable to a common-law action as partners; 127 Pa. 255. A mere subscription for shares in an unincorporated joint stock company will not make the subscribers liable as partners to third persons dealing with the company; they must have intended to become members and share in the profits of the business, but an unexplained subscription is evidence of that fact; 53 Mo. App. 245.

It is an incumbent duty on the part of a joint stock company not to permit a transfer of stock until fully satisfied of the shareholder's authority to transfer; L. R. 9 Eq. 181; 152 Pa. 233; 129 Mass. 46; 2 Bing. 393; and as to the nature of shares in such an association see SHARES.

An authority conferred on the directors to make contracts and bargains, and to transact all matters requisite for the affairs of the company will not, in general, authorize the directors to draw bills; 19 L. J. Ex. 34; 9 C. B. 674; 20 L. J. Q. B. 160; but if the directors have authority to bind the company by bills, and they regularly accept, in the name of the company, a bill drawn on the company, every member is liable as a joint acceptor to any holder who is not also a member of the company; 8 M. & H. 834; 10 id. 132; 19 L. J. Ex. 34; 5 E. & B. 1; so the acceptance of a bill by an agent who is also a member of the company binds him personally; 9 Exch. 154.

To a suit for a dissolution or winding up of the affairs of a joint stock company, all the shareholders, however numerous, must be parties; 1 Keen 24; and any member of the company may institute an action for its dissolution; 92 Hun 432. The fact that such a company has conducted business for twenty-three years without making dividends for its stockholders, is good ground for its dissolution at suit of one of them; 35 Atl. Rep. (Vt.) 459. A society that cannot be incorporated because organized to resist the enforcement of laws cannot sue in the society name for the collection of a debt; 44 Mich. 313. See Bissett; Buckley; Wordsworth, Joint Stock Companies; Ang. & Ames; Thompson, Corporations; Lindl. Partn.; Lindl. Company Law; CORPORATION; DIRECTOR; STOCKHOLDER; PARTNERS; PARTNERSHIP.

JOINT TENANCY. In the case of joint tenancy, all the tenants have together, in the theory of the law, but one estate in the land and this estate each joint tenant owns conjointly with the other cotenants. All the joint tenants, whether only two or more than two, constitute for some purposes but one tenant, or, as it has been more specifically stated, each joint tenant is regarded as the tenant of the whole for purposes of tenure and survivorship, while for purposes of alienation and forfeiture each has an undivided share only. (Co. Litt. 186 a 1 Preston, Estates, 136.) As between themselves each is entitled to a share of the rents and profits. (Williamson, Real Prop., 21st ed., 136.)

In a joint tenancy there are said (2 Bl. Com. 180) to be four unities, to wit, unity of interest, or title, of time, and of possession, or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. 1 Tiffany, Real Prop., 2nd ed., 625. See CO-OWNERSHIP; TENANCY IN COMMON; COPARCENARY; TENANCY BY ENTIRETIES; COMMUNITY PROPERTY; PARTNERSHIP PROPERTY.

In "joint tenancy," the tenants thereof must have one and the same interest, arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. The chief peculiarity

of this estate is the right of survivorship, by which, upon the death of one joint tenant, the entire tenancy remains to the surviving co-tenants, not to the heirs or other representatives of the deceased, the last survivor taking the whole estate. 108 Ky. 424, 56 S. W. 682.

JOINT TENANTS. Two or more persons to whom are granted lands or tenements to hold in fee-simple, fee-tail, for life, for years, or at will. *Freem. Coten. & Par. § 9*; 2 Bla. Com. 179. The estate which they thus hold is called an estate in joint tenancy. See *ESTATE OF JOINT TENANCY*; *JUS ACCRESCENDI*; *SURVIVOR*.

JOINT TORTFEASORS. Wrongdoers; two or more who commit a tort.

When several persons join in an offense or injury, they may generally be sued jointly, or any number less than the whole may be sued, or each one may be sued separately; 10 Wend. 654. Each is liable for himself, because the entire damages sustained were occasioned by each, each sanctioning the acts of the others, so that by suing one alone, he is not charged beyond his just proportion. Any number less than the whole may be sued, because each is answerable for his companion's acts. Thus, a joint action may be brought against several for an assault and battery, or for composing and publishing a libel; 3 Saund. 117*a*; Bacon, *Abr. Actions in General* (C); 2 Tyl. 129.

But to this rule that for a joint injury a joint action may be brought, there is an exception, namely, that no joint action can be maintained for a joint slander; this exception, seems to proceed upon the ground that each man's slander is his own, and it cannot by any means be considered that of another. Although this exception appears to be fully established, yet it is difficult to see the reason of it; when one of several trespassers gives the blow, he is considered as acting for the others, and, if they acted jointly, they may be jointly sued; why not consider the speaker, when acting in concert with others, as the actor for the whole in uttering the words? The blow is no more that of the person who did not give it than the words are the words of him who only united with the other in an agreement that they should be spoken. In either case, upon principle, the maxim, *qui facit per alium facit per se*, ought to have its force. Such, however, is not the law.

Where a person is injured by a joint tort and accepts satisfaction from one of the wrongdoers, he cannot sue the other; 28 Atl. Rep. (N. J.) 582.

A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability; [1892] 2 Q. B. 511; nor does the dismissal of an action against one together with an executor for a valuable consideration, of an agreement not to sue him, release the other; 143 Ill. 358; nor does the fact that where property is jointly converted by two persons, and one of those converting accounts to the owner, who accepts part of the proceeds, remove the other's liability; 5 Tex. Civ. App. 341.

JOINT TRESPASSERS. Two or more who unite in committing a trespass.

JOINT TRUSTEES. Two or more persons who are intrusted with property for the benefit of one or more others. See *TRUSTEE*.

JOINTRESS, JOINTURESS. A woman who has an estate settled on her by her husband, to hold during her life, if she survive him. Co. Litt. 46.

JOINTURE. A competent livelihood of freehold for the wife, of lands and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least.

Jointures are regulated by the statute of 27 Hen. VIII. c. 10, commonly called the statute of uses.

To make a good jointure, the following circumstances must concur, namely: It must take effect, in possession or profit, immediately from the death of the husband.

It must be for the wife's life, or for some greater estate. It must be limited to the wife herself, and not to any other person in trust for her. It must be made in satisfaction for the wife's whole dower, and not of part of it only. The estate limited to the wife must be expressed or averred to be in satisfaction of her whole dower. It must be made before marriage. See 37 Ohio St. 60, where it is said that it may also be made after marriage. A jointure attended with all these circumstances is binding on the widow, and is a complete bar to the claim of her dower; or, rather, it prevents its ever arising. See 4 Kent 55.

But there are other modes of limiting an estate to a wife, which, Lord Coke says, are good jointures within the statute, provided that the wife accepts them after the death of the husband. She may, however, reject them, and claim her dower; Cruise, Dig. tit. 7; 2 Bla. Com. 137. As to the effect of jointure as a bar of dower, see *Wms. R. P.*, 6th ed. 235, and the American notes. See DOWER. It is held that a jointure cannot be affected by a post-nuptial agreement; 7 Houst. 102; s. c. 30 Atl. Rep. 735.

In its more enlarged sense, a jointure signifies a joint estate limited to both husband and wife. 2 Bla. Com. 137. See 14 Vin. Abr. 640; 3 Bac. Abr. 190; Bouvier, Inst. 176; Washb. R. P.

JOUR. A French word signifying day. It is used in our old law-books: as, *tout jours*, forever. It is also frequently employed in the composition of words: as, *journal*, a day-book; *journeyman*, a man who works by the day; *journeys account*.

JOURNAL. In Maritime Law. The book kept on board of a ship or other vessel which contains an account of the ship's course, with a short history of every occurrence during the voyage. Another name for log-book. Chitty, Law of Nat. 199.

In Commercial Law. A book used among merchants, in which the contents of the waste-book are separated every month, and entered on the debtor and creditor side, for more convenient posting in the ledger.

In Legislation. An account of the proceedings of a legislative body.

The constitution of the United States, art. 1, s. 5, directs that "each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy. See 2 Sto. Const., 5th ed. § 889.

The constitutions of the several states contain similar provisions.

On a reference to the journal of the federal house of representatives to ascertain whether a duly authenticated law was passed, the court is bound to assume that the journal speaks the truth, and cannot receive oral evidence to impeach its correctness; 144 U. S. 1; but the debates in congress may not be resorted to for the purpose of discovering the meaning of a statute; 166 id. 290.

The journal of either house is evidence of the action of that house upon all matters before it; 7 Cow. 613; Cowp. 17. It is a public record of which the courts may take judicial notice; 1 Greenl. Ev. § 482; 5 W. Va. 85; s. c. 17 Am. Rep. 28; 16 id. 647; 94 U. S. 280; 60 Ia. 549; 79 Va. 280; 1 Wyo. 85; Cooley, Const. Lim. 135; *contra*, 45 Ill. 119; 2 Cent. L. J. 407. If it should appear therefrom that any act did not receive the requisite vote, or that the act was not constitutionally adopted, the courts may adjudge the act void; Cooley, Const. Lim. 164. Failure to comply with certain constitutional provisions in the passage of an act can be shown only by the journals; 27 S. E. Rep. (Ga.) 183; and if the journal sufficiently shows on its face a substantial compliance with constitutional requirements, a mere clerical omission in the journals of either house will not vitiate an act; 27 S. E. Rep. (W. Va.) 218. Where they are silent as to the observance of any constitutional requirement, it will not be

presumed that such requirement was disregarded, and where they do not expressly show whether the act was constitutionally passed it will be held valid unless there is an omission of some matter expressly required by the constitution to be entered therein; 47 Pac. Rep. (Utah) 670.

Where the constitution requires that the yeas and nays be entered on the journals, they are conclusive as against not only a printed statute published by law, but a duly enrolled act; 25 S. E. Rep. (N. C.) 966.

In determining whether an act was passed in accordance with a constitutional provision requiring the assent of two-thirds of the members, recourse may be had to the journals, if the certificate of the presiding officer fails to show by what vote the bill was passed; 42 N. E. Rep. (N. Y.) 1088.

The journals need not show that a bill was read by sections on its final passage, as required by the constitution, the presumption being that it was read; 18 So. Rep. (Fla.) 767. And where they affirmatively show non-compliance with an essential requirement to the enactment of a bill, or fail to show any essential step in the enactment which the constitution requires them to show, the enrolled bill as evidence of the law is overcome; 18 So. Rep. (Fla.) 767.

Where a bill, as approved, contains important clauses which the journals show were stricken out by the amendment in the houses it is invalid; 68 N. W. Rep. (Wis.) 759.

The journals cannot be resorted to by the court for the purpose of inquiring into the motive which actuated the legislature or any member of it in enacting a law; 45 Pac. Rep. (Ida.) 890.

The journals are inadmissible to show that parts of the bill, as passed by the houses, were omitted from the enrolled bill as signed by the presiding officers of the two houses and the governor, where all bills are required to be signed by the governor after having passed the legislative assembly; 42 Pac. Rep. (Ariz.) 1025. Every reasonable presumption is made in favor of the action of a legislative body; it will not be presumed from the mere silence of the journals that either house disregarded a constitutional requirement in the passage of an act, unless in cases where the constitution has required the journals to show the action that has been taken; 25 Ill. 181; 11 Ind. 424; 3 Ohio St. 475; and the presumption that a properly authenticated bill was passed is not overcome by the failure of the journals to show any fact which is not specifically required by the constitution to be entered therein; 67 N. W. Rep. (Minn.) 632. Such a bill properly enrolled, signed, and approved cannot be impeached by reference to the journals of either house, to show that it was enacted in conformity to constitutional requirements; 35 S. W. Rep. (Ky.) 3; *id.* 275.

JOURNEY. Originally a day's travel. It is now applied to travel from place to place, without restriction of time. But when thus applied, it is employed to designate a travel which is without the ordinary habits, business, or duties of the person, to a distance from his home, and beyond the circle of his friends or acquaintances. 53 Ala. 521.

JOURNEYS ACCOUNT. In English Practice. A new writ which the plaintiff was permitted to sue out within a reasonable time after the abatement, without his fault, of the first writ. This time was computed with reference to the number of days which the plaintiff must spend in journeying to reach the court; hence the name of *journeys account*, that is, *journeys accomptes* or *counted*. This writ was *quasi* a continuance of the first writ, and so related back to it as to oust the defendant or tenant of his voucher, plea of *non-tenure*, *joint tenancy fully administered*, or any other plea arising upon matter happening after date of the first writ; Co. Litt. fol. 9 b.

This mode of proceeding has fallen into

disease, the praetor now being to permit that writ to be quashed, and to sue out another. See *Termes de la Ley*; Bacon, *Abr. Abatement* (Q); 14 Viner, *Abr.* 558; 4 Comyn, *Dig.* 714; 7 M. & G. 702; 8 Cra. 84.

JOUSTS. See *Jousts*.

JURILACION. In Spanish Law. The right of a public officer to retire from office, retaining his title and his salary, either in whole or in part, after he has attained the age of fifty years and been in public service at least twenty years, whenever his infirmities prevent him from discharging the duties of his office.

JUDAISMUS (Lat.). The religion and rites of the Jews. Du Cange. A quarter set apart for residence of Jews. Du Cange. A usurious rate of interest. 1 Mon. Angl. 889; 2 id. 10, 665. See *marcas sterlingorum ad acquietandam terram predictam de Judaismo, in quo fuit impignrata*. Du Cange. An income anciently accruing to the king from the Jews. Blount.

JUDEX (Lat.). In Old English Law. A juror. Spelman, *Gloss.* A judge, in modern sense, especially—as opposed to *justiciarius*, i. e. a common-law judge—to denote an ecclesiastical judge. Bracton, fol. 401, 402.

In Roman Law. One who, either in his own right or by appointment of the magistrate for the special case, judged causes.

Thus, the praetor was formerly called *judex*. But, generally, praetors and magistrates who judge of their own right, were distinguished from *judices*, who were private persons, appointed by the praetor, on application of the plaintiff, to try the cause, as soon as issue was joined, and furnished by him with instructions as to the legal principles involved. They were variously called *judices delegati*, or *ad hoc*, or *speciales*. It has been said that they resembled in many respects jurors: thus, both are private persons, brought in at a certain stage of the proceedings, viz., issue joined, to try the cause, under instructions from the judge as to the law of the case. But civilians are nowise so, whether the *judex* had to decide the fact alone, or the law and fact. The *judex* resembles in many respects the arbitrator, or arbiter, the chief differences being, first, that the latter is appointed in cases of trust and confidence, the former in cases where the relation of the parties are governed by strict law (*stricti iuris stricta*); second, the latter has the whole control of cases, and decides according to equity and good conscience, the former by strict formulae; third, that the latter may be a magistrate, the former must be a private person; fourth, that the award of the arbitrator derives its force from the agreement of submission, while the decree of the *judex* has its sanction in the command of the praetor to try the cause; Calvinius, *Lex*; 1 Spence, *Eq. Jur.* 210, note; Mackeldey, *Civ. Law*, Kaufmann ed., § 193, note.

It has been said that there was generally one *judex*, sometimes three,—in which case the decision of two, in the absence of the third, had no effect; Calvinius, *Lex*. But another careful writer says that "although there could never be more than one *judex*, there were sometimes several *arbitri*, but the *arbitrator* was chosen from the same class as the *judex*." Sand, *Inst. Just. Intro.* lxxiii.

Down to the time of handing over the cause to the *judex*, that is, till issue joined, the proceedings were before the praetor, and were said to be *in iure*; after that, before the *judex*, and were said to be *in factis*. In all this we see the germ of the Anglo-Saxon system of judicature; 1 Spence, *Eq. Jur.* 67.

A judge who conducted the trial from beginning to end; *magistratus*. The practice of calling in *judices* was disused before Justinian's time; therefore, in the Code, Institutes, and Novels, *judex* means judge in its modern sense. Heineccius, *Elem. Jur. Civ.* § 1827.

The term *judex* is used with very different significations at different periods of Roman law. The distinctive features of the position of the *judex* belong to the earlier history of the Roman law.

A recent writer defines very clearly the functions of the *judex* at that period as distinguished from those of the magistrate: "In the earlier history of civil procedure in Rome, we find two sharply defined divisions,—the proceedings which were said to be *in iure*, and those which were said to be *in factis*. The former took place before the magistrate, who represented officially the judicial power of the State. This magistrate in this capacity decided, in the first instance, whether the claim of the complaining party was cognizable at all,—whether there was any form of procedure by which it could be enforced. If it was controverted, and there seemed to be any action that would fit the case, the *litis contestatio* was formed, by a solemn appeal addressed by each party to his witnesses, and the controversy was then referred to the *judex*, or in some cases to a body or college of *judices*. These *judices* were not magistrates, and did not represent the power of the State. They were, it would seem, more in theory like referees. They took up the issue which had been stated by

the magistrate, heard the testimony, and pronounced the *sententia*, and this finding was afterwards enforced by the magistrate." Howe, *Stud. Civ. L.* 245.

This relates to the period during which the sharply defined distinction between proceedings *in iure* and those *in factis* was strictly observed. If, for example, a dispute concerned property it was assigned temporarily to the possession of one party, who gave security for its restoration if required, and the *judex* simply decided which litigant was right; Morey, *R. L.* 18, 380. The growth of the proceeding by formula during the next period was due to the fact that the praetor, as a means of conveying to the *judex* the instructions of the magistrate with respect to the case referred to him. The new proceeding tended very much to increase the flexibility of the law in its application to particular cases, as it has been said there was no tradition to fetter the formula of the praetor. In the old *litis contestatio* the issue was formulated in narrowly prescribed terms; in the new formula the terms used were informal and freely chosen by the magistrate. "The formula was thus well adapted as a means for directly submitting to the decisions of a *judex in iudicio* any question, or complex of questions, which the praetor deemed actionable. The praetor himself was now in a position, while formulating the legal issue, to give the *judex* at the same time direct instructions in reference to the decision of such questions. Those who were condemned or acquitted depended now solely on the manner in which the praetor formulated the question in dispute." Sohm, *Inst. Rom. L.* 177. It was now for the first time that the *judex* became in effect an official, he ceased to be an independent private person bound only by the positive law, and his action was dominated by the limitations of the praetor's edict. Thus the latter became a dominating force in legal procedure, and the *judex* in some sense a subordinate official, and the result was "that the formula procedure obliterated beyond recovery the clear sharp line which had hitherto severed *jus* and *judicium*." This naturally resulted from the fact that by the formula the *judex* was converted into an organ or instrument not only of the civil, but also of the praetor, made law, and the proceedings in *iudicio* were now, in fact, wholly controlled by the same authority; id. 178, 220. In the last period of Roman procedure during the later empire the praetor lost his former power of directing the administration of the law, and when the edict came to be fixed by the will of the emperor the praetor and the *judex* were bound by it equally with the *judex* and in the same way that the latter had before been limited by their own edict. Its publication by the praetor was merely formal, and he became a mere instrument for applying the law, and his duties became more and more ministerial in proportion as, on the one hand, scientific jurisprudence developed and defined the contents of the existing law and, on the other hand, the imperial power, superseding all other agencies, appropriated to itself the function of developing the law. Thus the *judex* gradually became an official whose duty it was to assist the praetor, and, in the same way, the praetor became in reality an official whose duty it was to assist the emperor; id. 230.

For a long period senators alone were qualified to act as judges, and during that time any member of the senate could act, if justified, by mutual consent of the parties, or if they could not agree by law. There were also plebeian judges called *centumviri* elected by the *comitia* constituting a *collegium* divided into sections and having special jurisdiction of citizenship and successions; their jurisdiction was exclusive where it existed. As to the duties of the *judex* see *Inst.* l. 1, § 17; Sand, *Intro.* xlii, xlii, lxi, lxxv; Sohm, *Inst. Rom. L.* § 24-27; Palæstræ; *REURPATOES*; *JUDICIO*; *IN JURE*.

Judex Ordinarius (Lat.). In Civil Law. A judge who had jurisdiction by his own right, not by another's appointment. Calvinius, *Lex*; Vicat, *Voc. Jur.* Blackstone says that *judices ordinarii* decided only questions of fact, while questions of law were referred to the *centumviri*; but this would seem to be rather the definition of *judices selecti*; and not all questions of law were referred to the *centumviri*, but particular actions: e. g. *querela inofficiosi testamenti*. See 2 Bla. Com. 815; Vicat, *Voc. Jur. Utr. Centumviri*.

Judex Pedaneus. Inferior judges; deputy judges; "*petit judges that try only trifling cases (so-called because they had only a low seat and no tribunal).*" Harper's *Lat. Dict.*; Dig. 8. 1. 1. 6.

The name was given to the *judex* who was delegated to hear the whole cause. Their appointment is said to have been due, in the first instance, to the great increase in the volume of judicial business, which led the emperor Diocletian to authorize the provincial governors to refer cases of minor importance to them. They were not *judices* in the strict sense of the word, but, according to the opinion of Ortolan, permanent magistrates entrusted with the special duty of conducting such cases as the governor might see fit to refer to them. No other view of the character of these officers seems consistent with the autocratic spirit, which permeated the whole Imperial system. Morey, *Rom. L.* 142. A recent writer says, "About the end of the third century, the *praesides provinciarum* were in the habit of proceeding *extra ordinem* in civil actions, i. e. they were in the habit of either giving judgment themselves, or of delegating to the whole case to a deputy judge, a *judex pedaneus*. This deputy judge (who is also called *judex datus* or *judex delegatus*) is now in form as well as in substance an official who acts in lieu of the magistrate; he is not

merely entrusted, like the old *judex privatus*, with the conduct of the proceedings *in iudicio*, but is deputized—and this is the reason why no formula is used—to hear and determine the whole cause, including the proceedings *in iure*. Like the proceedings before the *praeses* himself, the proceedings before this subordinate judge are *extra ordinem*." Sohm, *Inst. Rom. L.* 228. It has been said with respect to these judges that the praetors and other great magistrates did not themselves decide the actions which arose between private individuals; these were submitted to judges chosen by the parties, and these judges were called *judices*. In choosing them, the plaintiff had the right to nominate, and the defendant to accept or reject those nominated; Heineccius, *Antiq. lib.* 4, tit. b. n. 40; 7 Toullier, n. 353. As to *judices pedanei*, generally, see Zimmermann, *Gen. Rom. Priv.* § 18.

Judex Questionis. A magistrate who decided the law of a criminal case, when the praetor himself did not sit as a magistrate. Morey, *Rom. L.* 88.

The director of the criminal court under the presidency of the praetor. Harper's *Lat. Dict.*; Cic. *Brut.* 76, 364.

Judex Selectus. A select or selected judge or judge.

The judges in criminal suits selected by the praetor. Harper's *Lat. Dict.*; Cic. *Verr.* 2, 13, § 32.

These *judices selecti* were used in criminal cases, and between them and modern *judges* points of resemblance have been noticed; 3 Bla. Com. 306. They were first returned by the praetor, then drawn by lot, subject to challenge; they were sworn and talesmen were struck. So many points of resemblance were thought to exist between them and the *jurors* of the Greeks and our juries that the English institution has been thought to be derived from the former ones; id. note (n). But the root idea of both systems is sufficiently natural and logical to have been indigenous in both countries. See *Jury*.

JUDGE. A public officer lawfully appointed to decide litigated questions according to law.

An officer so named in his commission, who presides in some court.

In its most extensive sense the term includes all officers appointed to decide litigated questions while acting in that capacity, including justices of the peace, and even jurors, it is said, who are judges of the facts. 4 Dall. 229; 3 Yeates 300. In ordinary legal use, however, the term is limited to the sense of the second of the definitions here given; 15 Ill. 888; unless it may be that the case of a justice or commissioner acting judicially is to be considered an extension of this meaning. See 3 Cush. 584.

By the common law every court, while engaged in the exercise of its lawful functions, has the authority to preserve order, decency, and silence in its presence, and may apprehend and punish the offender without examination or proof; but if the offence be committed out of court the party is entitled to notice and a hearing in his defence; 1 Cal. 153; 28 Ind. 205. See *CONTEMPT*.

An assault on a judge sitting in court is not only punishable as a contempt, but indictable, as a crime against public justice, and more aggravated than an ordinary assault, or even than an assault committed upon another person in a court; 2 Bish. N. Cr. L. § 250; this principle comes from the common law and was, as early as 25 Edw. 3, embodied in a statute, under which such an offence was punishable by the loss of the right hand, forfeiture of lands and goods, and perpetual imprisonment. In Neagle's case, 135 U. S. 1, it was held that "an assault upon a judge of a court of the United States, while in discharge of his official duties, is a breach of the peace of the United States, as distinguished from the peace of the State in which the assault takes place." In this case the petitioner was a United States deputy marshal, appointed for the express purpose of guarding Mr. Justice Field against a threatened attack, which took place, and the killing was held by the court to have been caused by a just apprehension that an attack would result in the death of the justice, and was justifiable and a judgment of the circuit court, discharging him from the custody of the sheriff, by whom he was held, under process of the state court, was affirmed.

So any insult, disrespect, or insolence to a judge is punishable; 2 Bish. N. Cr. L. §

350. On this subject, it was said by Holroyd, J.: "In the case of an insult to (the judge) himself, it is not on his own account that he commits; for that is a consideration which should never enter his mind. But though he may despise the insult, it is a duty which he owes to the station to which he belongs not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that in his presence, at least, it shall not be infringed;" 4 B. & Ald. 329, 339.

Within this principle it was held to be a contempt to write a letter to a judge, libelling or abusing him in regard to one of his decisions; 18 Kan. 72; or when the judge of an inferior tribunal refuses obedience to processes from a superior one; 18 Wend. 664; 1 Eng. L. & Eq. 516; 2 Caines 97; 2 Johns. Cas. 118; 6 B. Monr. 639; T. U. P. Chart. 43, 815.

It has been held that abusing a judge out of court, with reference to expressions made by him on a trial, was a contempt; 2 Va. Cas. 408; but in another case it was held that newspaper articles in regard to the conduct of a judge during a trial, and charging him with being an abettor of a person against whom an indictment for murder was pending, could not be visited as a contempt; 4 Sm. & M. 751. In the federal courts, and in many states, the subject is regulated by statute; U. S. Rev. Stat. § 725; 16 Fed. Rep. 353; 1 Flipp. 108; 19 Wall. 505; 64 Ill. 195; 89 N. C. 23; 8 W. & S. 77; 110 Ind. 301. The question whether a contempt can be committed otherwise than in court cannot be said to be settled, but Bishop is of the opinion that the English and better American doctrines recognize such contempts, yet, under limitations easily defined; 2 Bish. N. Cr. L. § 258. In all such cases the offence is against the state, not the judge; *id.* § 269; 7 Wheat. 38; 36 Wis. 355; 86 Ind. 196; 7 Blatch. 23.

In a recent case a judge who was a candidate for re-election, instituted contempt proceedings against the editor of a newspaper and a lawyer who wrote a communication in the newspaper criticising his judicial conduct. An order adjudging both parties in contempt was entered, but its execution was prevented by a writ of prohibition from the supreme court of Wisconsin, which said: "Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge, and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such doctrine is that all unfavorable criticism of a sitting judge's past official conduct can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press and subvert freedom of speech, we do not know where to find it. Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our opinion no such divinity 'doth hedge about' a judge—certainly not when he is a candidate for public office;" 18 N. Y. L. J. 23, where the subject of contempt out of court is discussed generally.

The question has recently been raised, "Can a judge be guilty of contempt of court?" In a county court in England the judge made some strong observations on the conduct of a bankrupt who applied for his discharge, characterizing him as being guilty of "bare-faced and impudent robbery." It is suggested in this connection that while liable to abuse, on the whole, the rule exempting judges from prosecution of any kind for observations made upon the bench is a rational one; 56 Alb. L. J. 202.

Bribery or attempting to bribe a judge was, at common law, a very grave offence. Indeed the earlier definitions of bribery seem to confine the offence to judicial officers; 4 Bla. Com. 139; 8 Inst. 145; and they have been criticised upon this ground for being too narrow. See 1 East 183; 4

Burr. 2494; 2 Bish. N. Cr. L. § 85, n. 1. Upon the same ground are condemned sinister approaches, with intent to influence judges indirectly, though not amounting to bribery; *id.*; and on this subject it was said by Lord Cottenham: "Every private communication to a judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought, more frequently than it is, to be treated, as what it really is, high contempt of court;" 1 Macon. & G. 116, 122.

Judges are appointed or elected in a variety of ways in the United States. For the federal courts they are appointed by the president, by and with the consent of the senate; in some of the states they are appointed by the governor, the governor and senate, or by the legislature. The judges of the federal courts, and of the courts of some of the states, hold their offices during good behavior; of others, during good behavior, or until they shall attain a certain age; and of others, for a limited term of years. The federal judges must have the tenure of office during good behavior conferred upon them before they can be invested with any portion of the judicial power of the government; 37 Fed. Rep. 567.

Impartiality is the first duty of a judge; if he has any (the slightest) interest in the cause, he is disqualified from sitting as a judge; *Aliquis non debet esse iudex in propria causa*; 8 Co. 118; 6 Pick. 109; 4 Ohio 675; 17 Ga. 253; 23 N. H. 478; 19 Conn. 585; 43 La. Ann. 924; 91 Cal. 342; 75 Ia. 159. See 38 Ill. App. 441; 83 Tex. 99; such as his relationship to the parties; 142 N. Y. 130; even where such party is administrator only; 37 S. W. Rep. (Tex.) 846; (but relationship to plaintiff's attorney will not disqualify him; 38 S. W. Rep. (Tex.) 53.) Either party may make the objection that the judge is of kin to one of them; 10 Ind. 299; and it is for the judge to determine, in the exercise of sound judicial discretion, whether by reason of kinship, etc., it would be improper for him to hear a particular case; he cannot be compelled to vacate the bench by the affidavit of the litigant; 84 Ky. 18. A pecuniary interest in the case on trial will incapacitate him from sitting in the cause, both by the common law and the statutes; 12 Fla. 138; 9 Md. 324; 13 Mass. 340; as where he is interested as a stockholder in a railroad corporation making an application for a commission to appraise land, his interest is such as to invalidate the report of the commissioners; 4 Ohio St. 675; and where the lord chancellor who was a shareholder in a company in whose favor the vice-chancellor had made a decree, affirmed this decree, it was reversed on that ground; 3 H. L. Cas. 759; but it has been held that where the interest of the judge is merely that of a corporator in a municipal corporation, the legislature may provide that this shall constitute no disqualification when the corporation is a party, apparently on the ground that the interest is insignificant; 1 Gray 475. But it is doubtful whether even the legislature can go beyond this class of cases and abolish the maxim; Cooley, Const. Lim. 516.

If one of the judges is disqualified on this ground, a judgment rendered will be void, even though the proper number may have concurred in the result, which includes the interested judge; 6 Q. B. 753; or though the parties agree to waive objections to the jurisdictions; 38 S. W. Rep. (Tex.) 10. The objection may be raised for the first time in the appellate court; 6 Cush. 332; 2 H. L. Cas. 387; but in Iowa it was held that an objection to a judge of the court of original jurisdiction on the ground of interest must be made in that court; 1 Ia. 486.

In a suit on a collector's bond by the chosen freeholders of a county, one who was an inhabitant, a freeholder, and a taxpayer in the same county was incompetent to sit as judge; 21 N. J. L. 656. A judge is

not disqualified to try a case because he has tried an action in trespass concerning the same property; 35 Atl. Rep. (Vt.) 338.

The interest which disqualifies a judge of the supreme court so that a judge of the circuit court may sit in his stead must be immediate, certain, and dependent on the result of the case, and not remote, uncertain, or speculative; 10 Fla. 218.

The general rule that it is irregular and improper for a judge to try any cause in which he has such an interest as would disqualify as a witness does not apply to orders purely formal in their character, and it is doubtful whether it would extend to a case in which no other judge could try and determine the cause. If the judge is deprived of authority to act, by statutory inhibition, the proceedings are void, otherwise voidable only, and therefore valid until avoided; 27 Ala. 428.

It is said to be discretionary with him whether he will sit in a cause in which he has been of counsel; 2 A. K. Marsh. 517; Cox, N. J. 164. See 2 Binn. 454; 5 Ind. 230; 83 Tex. 484. But the practice is to refuse to sit in such case. And in 5 Coldw. 217, it was held that where the judge who rendered the judgment in the case had been counsel in it, the judgment was a nullity; 30 Fla. 595. The question arose in Delaware at the time of the appointment of Bates, Chancellor, in 1885, whether he was legally disqualified from sitting in such cases, so as to bring them within the constitutional provision, giving jurisdiction to the chief justice in all cases in which the chancellor was interested. In view of the desire of the chancellor not to sit in cases in which he had been of counsel, the question was considered by him and Gilpin, C. J., and the conclusion reached that there was not a legal disqualification. This conclusion was communicated by the chancellor to the legislature with a suggestion that provision should be made for the appointment of a chancellor *ad litem* in such cases; MSS. notes of Bates, Chancellor. A magistrate authorized to sign writs cannot sign them in his own case; 47 Conn. 316.

Where there is no other tribunal that can act, the judge may hear the case; Freeman, Judg. § 146; 5 H. L. C. 83; 19 Johns. 501; *contra*, Hopk. Ch. 2; 105 Mass. 231. See Cooley, Const. Lim., 2d ed. 207, 506, 509; 25 Mich. 63.

It was held that the absence of a judge from the court-room for a considerable time during the arguments of the jury without the consent of the parties was reversible error; 70 N. E. Rep. (Wis.) 682.

A judge is not competent as a witness in a cause trying before him, for this among other reasons, that he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another; 1 Greenl. Ev. § 364; 2 Mart. La. n. S. 312; 2 Cal. 358. See Comyn, Dig. Courts (B. 4), (C. 2), (E. 1), (P. 16), *Justices* (1, 2, 3); Bacon Abr. Courts (B); 1 Kent 291, 1899 ed.; CHARGE.

While acting within the bounds of his jurisdiction, the judge is not responsible for any error of judgment or mistake of law; 12 Co. 23; 2 Dall. 160; 3 N. & M'C. 168; 1 Day, Conn. 315; 5 Johns. 282; 9 Id. 395; 3 A. K. Marsh. 76; 1 South. 74; 1 N. H. 374; 45 La. Ann. 1299; 8 Mo. 148; 21 Me. 550; 26 Ala. 527; 1 Bish. N. Cr. L. § 490; unless, possibly, a mistake was induced by gross carelessness or ignorance partaking of a criminal quality; 19 Mod. 493. An action will not lie against a judge of a court of record for any act done by him in his judicial capacity; 6 B. & C. 611. An action of a judge, to be criminally or even civilly cognizable, must be wilful and corrupt; 1 W. Bla. 19; 2 Mo. 23; 47 Me. 462; 26 Ala. 527; 9 Johns. 395; 8 Mo. 148, 254.

It is a rule sometimes asserted to be absolute and sometimes only *prima facie* that a judicial officer has no protection against the consequences of an act not within his jurisdiction; 2 Gray 120, 410, 570; 13 Wall. 335; 4 Conn. 407; 1 Id. 40. But a distinction has sometimes been suggested between acts in excess of jurisdiction and those out-

side of it. For the latter it has been said that a judge of a court of superior jurisdiction is not liable; Lord De Grey, C. J., in 2 W. Bla. 1141. Of this case it is said by a writer cited *infra*, who dissents from the doctrine: "It is true this rule is a mere dictum, and also that the decision has been since overruled; but this dictum has sometimes been referred to with approval in subsequent cases;" 15 Am. L. Rev. 440. And Field, J., in 7 Wall. 523, said that such a judge is not liable when he acts in excess of his jurisdiction, except for malice. This expression, like that of Lord De Grey, was *obiter*, inasmuch as the case sustained the jurisdiction which had been questioned. In 78 N. Y. 12, this point was so decided, but the court drew a distinction between the case where the judge had acquired no jurisdiction at all, and the case where the act was merely in excess of jurisdiction after jurisdiction had been acquired. There the judge of the circuit court had imposed a re-sentence upon a prisoner, and he was accordingly imprisoned; the supreme court held the second sentence illegal, and discharged the prisoner. These cases and the doctrine asserted in them have been doubted and criticised by Arthur Biddle in 15 Am. L. Rev. 442 and note, where the authorities cited and relied on are critically examined. More recently the distinction has been discussed by Bishop, who states the doctrine of distinction between excess and absence of jurisdiction with approval, and even goes further, considering that where the jurisdiction is a close one and it is decided by the judge or magistrate carefully and earnestly in favor of his jurisdiction, "in reason and not quite without support from authority," he should not "suffer, though another or even a higher court held the contrary"; 1 Bish. N. Cr. L. § 460; Bish. Non-Contr. § 783.

There is no distinction between a judge acting in court and acting judicially out of court, that is, in chambers; 3 Moore, P. C. 52; Wilm. 208. See 46 Pac. Rep. (Kan.) 24.

"A judge of a court not of record is not liable for any injury sustained which is the result of an honest error of judgment in a matter wherein the court has jurisdiction, and when the act done is not of a purely ministerial nature." The rule is thus stated in 15 Am. L. Rev. 444. See further an article in Ir. L. T. and Sol. J., Nov. 13, 1880; 6 Am. Dec. 303; 29 Am. Rep. 80, n.; 23 Am. Rep. 690. See CORAM NON JUDICE.

One circuit judge has no power to review and revise the action of another circuit judge; 16 S. C. 362; 35 *id.* 273; nor has a judge when without the state, power to grant an injunction; 131 Ind. 437.

The acts of a judge *de facto* are not open to collateral attack; 140 U. S. 118.

A judge who acts corruptly may be impeached; 5 Johns. 282; 8 Cow. 178; 4 Dall. 225. See IMPEACHMENT.

See, generally, JUDICIAL POWER; JUDGE-MADE LAW.

Under the Roman law a judge, by whose act or default in deciding or conducting a lawsuit, a party to the suit was injured, was liable to an action for damages, the amount of which was left to the discretion of the judge. Such action was regarded as *quasi-delictual*, because it was available, not only in cases of deliberately unfair decisions, but also in cases of less serious errors committed by the judge, as overlooking the day fixed for trial or disregarding the rules of law concerning adjournment and the like (*imprudencia iudicis*). In such a case he was termed *iudex qui litem suam fecit* (who makes the suit his own). The action in question, however, could not be taken on the ground that the judgment was unjust in substance; Sohm, Inst. Rom. L. 330; Mack, Rom. L. § 506; Morey, Rom. L. 333.

See a JUDGE or JUSTICE OF THE PEACE; COUNTY JUDGE; COURT.

JUDGE ADVOCATE. An officer of a court-martial who is to discharge certain duties at the trial of offenders. His duties are to prosecute in the name of the United

States; but he shall so far consider himself as counsel for the prisoner, after the prisoner shall have made his plea, as to object to leading questions to any of the witnesses or any question to the prisoner the answer to which might tend to criminate himself. He is, further, to swear the members of the court before they proceed upon any trial, and may also administer oaths for purposes of military justice and other purposes of military administration; U. S. Rev. Stat. 2 Supp. 524.

There are eight judge advocates of the army with the rank of major of cavalry, who perform their duties under the direction of the judge-advocate-general (*q. v.*), and have power to issue process for witnesses and to appoint reporters of court to which they are assigned; U. S. Rev. St. §§ 1200-2. See Rules and Articles of War, art. 69; 2 Story, U. S. Laws 1001; Holt. Dig. *passim*.

JUDGE-ADVOCATE - GENERAL.

An officer of the army of the United States, provided for by Rev. St. § 1194, who is the head of the bureau of military justice and has the rank of brigadier-general; *id.* 1198. His duty is to receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and perform such other duties as have heretofore been incident to the office; *id.* § 1199.

By the act of July 5, 1884, the bureau of military justice and the corps of judge advocates were consolidated under the title of judge-advocate-general's department, consisting of one judge-advocate-general, with the rank and pay of a brigadier-general, one assistant with the rank and pay of colonel, three deputies with rank and pay of lieutenant-colonel, and three judge-advocates, each with rank and pay of a major; U. S. Rev. Stat. 1 Supp. § 457.

A similar officer was provided for the navy under the act of June 8, 1880, with the title of judge-advocate-general of the navy. He has the rank and pay of a captain in the navy, or colonel of the marine corps, as the case may be. His duties are to receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for examination of officers, for retirement and promotion, in the naval service, and such other duties as were heretofore performed by naval judge-advocates-general; U. S. Rev. St. 1 Supp. § 290; 2 *id.* § 500.

JUDGE'S CERTIFICATE. In English Practice. The written statement of the judge who tried the cause that one of the parties is entitled to costs in the action. It is very important in some cases that these certificates should be obtained at the trial. See Tidd, Pr. 879; 3 Chitty, Pr. 458, 456; 3 Campb. 316; 5 B. & Aid. 796. A statement of the opinion of the court, signed by the judges, upon a question of law submitted to them by the chancellor for their decision.

Under the County Courts Act of 1867, in order to entitle a plaintiff to costs if he brings action in the high court, it is necessary that the judge before whom the action was tried shall certify that there was sufficient reason for bringing the action in the superior court, if he do not recover as much as £20 in an action of contract, or £10 in one of tort.

Under some English statutes the plaintiff is entitled to double or treble costs if the judge before whom the action is tried certifies that he is entitled to them; Archb. Pr. 430. See 3 Bla. Com. 453; CASE STATED.

JUDGE-MADE LAW. A phrase used to indicate judicial decisions which construe away the meaning of statutes, or find meanings in them the legislature never intended. It is sometimes used as meaning, simply, the law established by judicial precedent. Cooley, Const. Lim., 4th ed. 70, n. See Austin, Prov. of Jur. where the necessity of judicial legislation and its uses are discussed *in extenso*.

The expression judge-made law is undoubtedly more frequently used in the

former sense, and as expressing a certain degree of opprobrium. It is, however, unavoidable that in the distribution of powers which is now recognized as a necessary element of civilized government, there should be found at times some uncertainty as to the line of demarcation between the legislative and judicial powers as well as between each of them and the executive. The necessity of what is called judge-made law in the proper sense, and the possibility of its existence in the other sense, arises from the power of construction which necessarily exists, and though salutary when properly exercised, is susceptible of abuse, and in such case, difficult, if not impossible, to remedy. Of this power of construction it has been said that it "is a mighty one, and, unrestrained by settled rules, would tend to throw a painful uncertainty over the effect that might be given to the most plainly worded statutes, and render courts, in reality, the legislative power of the state. Instances are not wanting to confirm this. Judge-made law has overrode the legislative department. It was the boast of Chief Justice Pemberton, one of the judges of the despot Charles II., and not the worst even of those times, that he had entirely outdone the parliament in making law." 5 Ind. 41, 46. A recent philosophical writer thus characterizes that kind of judicial legislation which is necessary and proper under such a system as the common law; "Although it is considered necessary in all free states to keep the legislative, executive, and judicial powers for the most part separate, and all our American constitutions provide for this, yet it cannot be completely done. The judges, it is well known, actually make a great deal of law, and this judicial legislation cannot be avoided, and indeed much of the best work that we get in this line is done by them. But this they do as delegates of the sovereign people, as much as congress or the state legislatures;" Terry, Anglo-American Law 11.

Mr. Bishop earnestly contends that there is no judge-made law; he says that "law preceded writing, and no writing can be made comprehensive enough to include all law, and no blundering of the judge is so monstrous as denial of right to a suitor who is simply unable to find his case laid down in the statute law or in a previous decision." His view is that more errors are committed by failure to administer justice according to "the general principles of our jurisprudence and the collective conscience of mankind," for want of statute or precedent, than in all other ways. The common-law system was built up when there were few statutes and the judges derived "principles for their decisions from the known usages of the country and from what they found written by God in the breasts of men." Such, he considers, should be the action of judges now, and he assumes that they will always find principles on which to adjudicate any matter unprovided for by statutes or previous decisions. He argues that in view of "the ceaseless variety of changes in human affairs," while precedents are properly followed, yet, now, as in the earlier periods, they have not covered the entire ground, and it is absurd that questions of right or remedy should depend, not upon the abstract right or the convenience or propriety of a decision either way, but "solely on the accident, whether it arose in early times, received then an adjudication, and the adjudication found a reporter." 1 Bish. N. Cr. L. § 18, 19.

In a case for which he could find no precedent, Jessel, M. R., said: "I am afraid that, whatever I may call my decision, it will, in effect, be making law, which I never have any desire to do; but I cannot find that the point is covered by any decided case, or even appears to have been discussed in any decided case. The only satisfaction I have in deciding the point is this, that it will in all probability be carried to a higher court, and it will be for that court to make the law, or, as we say, declare the law, and not for me." L. R. 13 Ch. Div. 798, 805.

It has been said that the phrase judicial

legislation carries on its face the notion of judicial usurpation, and is habitually used by the courts as a term of reproach; but it is contended by the writer who admits this current use of the phrase, that, properly used, it means the growth of the law at the hand of the judges, and in that sense, so far from being an evil, "it is a desirable, and indeed a necessary, feature of our system." 5 Harv. L. Rev. 178. In the discussion of the subject the writer last cited considers that with respect to much that has been written on the subject of judicial legislation, the meaning cannot be fully understood without taking into consideration the different theories as to the nature of law. Those writers who accept the theory of Austin and Bentham are naturally found to use the terms judge-made law and judicial legislation as terms meriting contempt, and indeed Bentham so characterizes the whole common law. On the other hand, those writers who take the opposite view and maintain that the origin of law is not command but custom, not only eliminate from consideration the ideas of judicial legislation, but go so far as to limit the function of the legislature itself in the effort "to assist society in getting rid of its old customs and forming new ones." Recent supporters of this view are James C. Carter, Rep. Am. B. Assn. 1890, and Prof. Hammond, 1 Bla. Com., Hammond's ed. § 2. See also INTERNATIONAL LAW. The writer in the Harvard Law Review already cited discusses these conflicting views, giving preference to a third theory, intermediate between these two extremes, developed by Lawrence, Essay, Int. L., 2d ed. ch. i. The result is that, in what has been written on the subject of judicial legislation by the advocates of these various theories, there is less difference than is apparent on the surface, and that the process itself is recognized by all, though under different names. The importance of the subject is greatly enhanced in English law by the binding authority which is attributed to former decisions, and the reverence which is accorded to precedent. The conclusion reached is that judicial legislation is a necessary element in the development of the common law, but no precise rules can be laid down either as to the extent to which it should properly go, or how far a judge, in carrying on the process, may undertake to discard old doctrines and substitute new ones. Lord Esher, M. R., in a recent case attempted to distinguish between "fundamental propositions of law" which might be changed only by parliament, and the "evidence of the existence of such a proposition," which was within the disposition of the court; 25 Q. B. Div. 57; but as it is very properly remarked, there is no test suggested to enable a court to make this discrimination. "Even when a reform seems most plainly desirable, the conditions under which the judge works often make it preferable that the change should come from the legislature. One step by the court unless followed up can cause nothing but confusion; and the fact that the actual decision alone is binding makes it often doubtful how far a later court will continue the course upon which its predecessor has entered. Whether such a course should be begun depends on all the circumstances of the case. The only sure guides are common sense, and a knowledge of the law which is founded upon a knowledge of its history." 5 Harv. L. Rev. 201. See JUDICIAL POWER; DICTUM; JUDICIAL DECISIONS; PRECEDENTS.

JUDGE'S NOTES or MINUTES.

Short statements, noted by a judge on the trial of a cause, of what transpires in the course of such trial.

They usually contain a statement of the testimony of witnesses, of documents offered or admitted in evidence, of offers of evidence, and whether it has been received or rejected, and the like matters.

In general, judge's notes are not evidence of what transpired at a former trial, nor can they be read to prove what a deceased witness swore to on such former trial; for

they are no part of the record, and he is not officially bound to make them. But in chancery, when a new trial is ordered of an issue sent out of chancery to a court of law, and it is suggested that some of the witnesses in the former trial are of an advanced age, an order may be made that, in the event of death or inability to attend, their testimony may be read from the judge's notes; 1 Greenl. Ev. § 166.

JUDGMENT. In Practice. The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit. Tidd, Pr. 930; 33 Md. 147; 143 Ill. 587. It may be on the main question, or on all of the questions, if there are several; 49 Ohio St. 364.

The decision or sentence of the law, given by the court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury. 3 Bla. Com. 395; 13 Minn. 487. It is said to be the end of the law; 51 Pa. 373. It affects only parties and privies; 40 Minn. 281; 83 Ala. 171; 97 N. C. 113; 17 Or. 49; 139 U. S. 156.

The language of judgments, therefore, is not that "it is decreed," or "resolved," by the court; but "it is considered" (*consideratum est per curiam*) that the plaintiff recover his debt, damages, or possession, as the case may require, or that the defendant do go without day. This implies that the judgment is not so much the decision of the court, as the sentence of the law pronounced and decreed by the court, after due deliberation and inquiry.

Litigious contests present to the courts facts to appreciate, agreements to be construed, and points of law to be resolved. The judgment is the result of the full examination of all these.

DEFINITIONS. The various forms of judgment are designated by the following terms:

Judgment of assets in futuro, is one against an executor or heir, who holds at the time no property on which it can operate. See QUANDO ACCIDERINT.

Judgment of cassetur breve or billa (that the writ or bill be quashed) is a judgment rendered in favor of a party pleading in abatement to a writ or action. Steph. Pl., Andr. ed. § 97.

Judgment by confession is a judgment entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea and other allegations.

Contradictory judgment is a judgment which has been given after the parties have been heard; either in support of their claims or in their defence. 11 La. 366. It is used in Louisiana to distinguish such judgments from those rendered by default.

Judgment de melioribus damnis is a judgment entered at the election of the plaintiff for the highest amount where damages have been differently assessed against several defendants. See DE MELIORIBUS DAMNIS.

Judgment by default is a judgment rendered in consequence of the non-appearance of the defendant. The term is also applied to judgments entered under statutes or rules of court, for want of affidavit of defence, plea, answer, and the like, or for failure to take some required step in the cause.

Judgment in error is a judgment rendered by a court of error on a record sent up from an inferior court.

Final judgment is one which puts an end to a suit.

As to *judgment in rem, inter partes, or in personam*, see those titles.

Interlocutory judgment is one given in the progress of a cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit. 3 Bla. Com. 396.

Judgment on the merits is one rendered after argument and investigation, and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or merely

technical point, or by default, and without trial.

Judgment of nil capiat per breve or per billam is a judgment in favor of the defendant upon an issue raised upon a declaration or peremptory plea.

Judgment by nil dicit is one rendered against a defendant for want of a plea.

Judgment of nolle prosequi is a judgment entered against the plaintiff where after appearance and before judgment he says "he will not further prosecute his suit." Steph. Pl., Andr. ed. § 97.

Judgment of non obstante veredicto is a judgment rendered in favor of one party without regard to the verdict obtained by the other party.

Judgment of non pros. (non prosequitur) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time. See NON PROS.

Judgment of non suit, a judgment rendered against the plaintiff when he, on trial by jury, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to make an appearance. See NON-SUIT.

Judgment by non sum informatus is one which is rendered when, instead of entering a plea, the defendant's attorney says he is not informed of any answer to be given to the action. Steph. Pl., Andr. ed. § 97.

Judgment nunc pro tunc, is one entered on a day subsequent to the time at which it should have been entered, as of the latter date. See NUNC PRO TUNC.

Judgment pro retorno habendo is a judgment that the party have a return of the goods.

Judgment quando acciderint, is such a judgment against an executor or heir as binds only future assets. See QUANDO ACCIDERINT.

Judgment quod computet is a judgment in an action of account-render that the defendant do account.

Judgment quod partitio fiat is the interlocutory judgment in a writ of partition that partition be made.

Judgment quod partes replacent is a judgment for replacer. See REPLEADER.

Judgment quod recuperet is a judgment in favor of the plaintiff (that he do recover) rendered when he has prevailed upon an issue in fact or an issue in law other than one arising on a dilatory plea. Steph. Pl., Andr. ed. § 97.

Judgment of respondent ouster is a judgment given against the defendant after he has failed to establish a dilatory plea upon which an issue in law has been raised.

Judgment of retraxit is one given against the plaintiff where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit."

See these several titles where they are separately treated.

CLASSIFICATION. Judgments in civil causes, considered with respect to the method of obtaining them, may be thus classified.

1. When the result is obtained by the trial of an issue of fact. In this case the trial may involve questions both of law and fact, but the law is applied incidentally to the trial of the disputed facts, as in the admission or rejection of evidence, the conduct of the trial, and the instruction of the jury or, it may be, in the determination of the question whether the evidence is sufficient either in quality or quantity to be submitted to the jury. In these cases the law is admitted or applied to facts found by a jury or the court.

Judgments upon facts found are the following:

(1) Judgment of *nil tiel record* (q. v.) occurs when some pleading denies the existence of a record, and issue is joined thereon; the record being produced is compared by the court with the statement in the pleading which alleges it; and if they correspond, the party asserting its existence obtains judgment; if they do not correspond, the other party obtains judgment of *nil tiel record*.

(2) Judgment upon *verdict* (q. v.) is the

most usual of the judgments upon facts found, and is for the party obtaining the verdict.

(3) Judgment *non obstante veredicto* is a judgment rendered in favor of the plaintiff notwithstanding the verdict for the defendant; this judgment is given upon motion (which can only be made by the plaintiff) when, upon an examination of the whole proceedings, it appears to the court that the defendant has shown himself to be in the wrong, and that the issue, though decided in his favor by the jury, is on a point which does not at all better his case; Smith, Act. 161. This is sometimes called a judgment upon confession, because it occurs after a pleading by defendant in confession and avoidance and issue joined thereon, and verdict found for defendant, and then it appears that the pleading was bad in law and might have been demurred to on that ground. The plea being substantially bad in law, of course the verdict which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea being in confession and avoidance involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. Sometimes it may be expedient for the plaintiff to move for judgment *non obstante veredicto*, even though the verdict be in his favor; for, in a case like that described above, if he takes judgment *as upon the verdict* it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession*; Cro. Eliz. 778; 2 Rolle, Abr. 99; 1 Bingh. N.C. 767. See, also, Cro. Eliz. 214; 6 Mod. 10; 8 Taunt. 413; Rastell, Ent. 622; 1 Wend. 307; 5 id. 513; 6 Cow. 225. See NON OBSTANTE VEREDICTO.

(4) A judgment of *repleader* is given when issue is joined on an immaterial point, or one on which the court cannot give a judgment which will determine the right. On the award of a repleader, the parties must recommence their pleadings at the point where the immaterial issue originated. See REPLEADER. This judgment is interlocutory, *quod partes replacent*. See Bacon, Abr. Pleas, 4 (M); 3 Hayw. 159.

2. When the facts are admitted by the parties, leaving only issues of law to be determined, which are as follows:

(1) Judgment upon a *demurrer* against the party demurring concludes him, because by demurring, a party admits the facts alleged in the pleadings of his adversary, and relies on their insufficiency in law. See DEMURRER.

(2) It sometimes happens that though the adverse parties are agreed as to the facts, and only differ as to the law arising out of them, still these facts do not so clearly appear on the pleadings as to enable them to obtain the opinion of the court by way of *demurrer*; for on *demurrer* the court can look at nothing whatever except the pleadings. In such circumstances the statute 3 & 4 Will. IV. c. 42, § 25, which has been imitated in most of the states, allows them after issue joined, and on obtaining the consent of a single judge, to state the facts in a *special case* for the opinion of the court, and agree that a judgment shall be entered for the plaintiff or defendant by *confession* or *nolle prosequi* immediately after the decision of the case; and judgment is entered accordingly, called judgment on a case stated.

(3) Sometimes at the trial the parties find that they agree on the facts, and the only question is one of law. In such case a verdict *pro forma* is taken, which is a species of admission by the parties, and is general, where the jury find for the plaintiff generally, but subject to the opinion of the court on a *special case*, or *special*, where they state the facts as they find them, concluding that the opinion of the court shall decide in whose favor the verdict shall be, and that they assess the damages accordingly. The judgments in these cases are called respectively, judgment on a general verdict subject to a special case, and judgment on a special verdict. See CASE STATED; POINT RESERVED; VERDICT.

3. Besides these, a judgment may be based upon the admissions or confessions of one only of the parties.

(a) Such judgments when for defendant upon the admissions of the plaintiff are:

(1) Judgment of *nolle prosequi*, where, after appearance and before judgment, the plaintiff says he "will not further prosecute his suit."

(2) Judgment of *retrahit* is one where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit," whereupon judgment is rendered against him. The difference between these is that a *retrahit* is a bar to any future action for the same cause; while a *nolle prosequi* is not, unless made after judgment; 7 Bingh. 716; 1 Wms. Saund. 207, n.

(3) A plaintiff sometimes, when he finds he has misconceived his action, obtains leave from the court to *discontinue*, on which there is a judgment against him and he has to pay costs; but he may commence a new action for the same cause.

(4) A *stet processus* is entered where it is agreed by leave of the court that all further proceedings shall be stayed; though in form a judgment for the defendant, it is generally, like discontinuance, in point of fact for the benefit of the plaintiff, and entered on his application, as, for instance, when the defendant has become insolvent, it does not carry costs; Smith, Act. 162.

(b) Judgments for the plaintiff upon facts admitted by the defendant are:

(1) Judgment by *cognovit actionem*, *cognovit* or confession, where, instead of entering a plea, the defendant chooses to acknowledge the rightfulness of the plaintiff's action.

(2) Judgment by confession *relicta verificatione*, where, after pleading and before trial, he both confesses the plaintiff's cause of action to be just and true and withdraws or abandons his plea or other allegations. Upon this, judgment is entered against him without proceeding to trial.

Analogous to this is the judgment confessed by warrant of attorney: this is an authority given by the debtor to an attorney named by the creditor, empowering him to confess judgment either by *cognovit actionem*, *nil dicit*, or *non sum informatus*. This differs from a *cognovit* in that an action must be commenced before a *cognovit* can be given; 3 Dowl. 278; per Parke, B.; but not before the execution of a warrant of attorney. Judgments by *nil dicit* and *non sum informatus*, though they are in fact founded upon a tacit acknowledgment on the part of the defendant that he has no defence to the plaintiff's action, yet as they are commonly reckoned among the judgments by default, will be explained under that head.

4. A judgment is rendered on the default of a party, on two grounds: it is considered that the failure of the party to proceed is an admission that he, if plaintiff, has no just cause of action, or, if defendant, has no good defence; and it is intended as a penalty for his neglect; for which reason, when such judgment is set aside or opened at the instance of the defaulting party, the court generally require him to pay costs.

(a) Such judgments against the defendant are:

(1) Judgment by default is against the defendant when he has failed to appear after being served with the writ; to plead, after being ruled so to do, or, in Pennsylvania and some other states, to file an affidavit of defence within the prescribed time; or, generally, to take any step in the cause incumbent on him. The practice of permitting judgment to be entered by default for want of a sufficient affidavit of defence, when the cause of action is a record, or is sworn to, has become practically universal. Under it courts usually refuse a judgment in cases in which motion on the affidavits raises a doubtful question. When such decisions can be reviewed, an order refusing judgment will rarely be reversed; 163 Pa. 688.

(2) Judgment by *non sum informatus* is a species of judgment by default, where,

instead of entering a plea, the defendant's attorney says he is "not informed" of any answer to be given to the action.

(3) Judgment by *nil dicit* is rendered against the defendant where, after being ruled to plead, he neglects to do so within the time specified.

(b) Such judgments against the plaintiff are:

(1) Judgment of *non pros.* (from *non prosequitur*) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time.

A judgment by default is just as conclusive between the parties of whatever is essential to support it as one rendered after answer and contest; 157 U.S. 683.

(2) Judgment of *non suit* (from *non sequitur*, or *ne suit pas*) is where the plaintiff, after giving in his evidence, finds that it will not sustain his case, and therefore voluntarily makes default by absenting himself when he is called on to hear the verdict. The court give judgment against him for this default; but the proceeding is really for his benefit, because after a nonsuit he can institute another action for the same cause, which is not the case—except in ejectment, in some states—after a verdict and judgment against him.

Judgments are further classified with reference to the stage of the cause at the time they are rendered.

1. *Interlocutory* judgments are such as are given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. Any judgment leaving something to be done by the court, before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory; Freeman, Judg. § 12; 3 Bla. Com. 396. A judgment which is not final is called "interlocutory"; that is, an interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties, or finally put the case out of court. Thus, a judgment or order passed upon any provisional or accessory claim or contention is, in general, merely interlocutory, although it may finally dispose of that particular matter; 1 Black, Judgm. 21.

Such is a judgment for the plaintiff upon a plea in abatement, which merely decides that the cause must proceed and the defendant put in a better plea. But, in the ordinary sense, interlocutory judgments are those incomplete judgments whereby the right of the plaintiff is indeed established, but the quantum of damages sustained by him is not ascertained. This can only be the case where the plaintiff recovers; for judgment for the defendant is always complete as well as final. The interlocutory judgments of most common occurrence are where a demurrer has been determined for the plaintiff, or the defendant has made default, or has by *cognovit actionem* acknowledged the plaintiff's demand to be just. After interlocutory judgment in such case, the plaintiff must ordinarily take out a writ of inquiry, which is addressed to the sheriff, commanding him to summon a jury and assess the damages, and upon the return of the writ of inquiry final judgment may be entered for the amount ascertained by the jury. It is not always necessary to have a writ of inquiry upon interlocutory judgment; for it is said that "this is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages;" 3 Wils. 62, per Wilmot, C. J.; and accordingly, if the damages are matter of mere computation, as, for instance, interest upon a bill of exchange or promissory note, it is usual for the court to refer it to the master or prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry; 4 Term 275; 1 H. Bla. 541; 4 Price 134. But in actions where a specific thing is sued for, as in actions of

debt for a sum certain, the judgment upon demurrer, default, or confession is not interlocutory, but is absolutely complete and final in the first instance.

2. *Final judgments* are such as at once put an end to the action by determining the right and fixing the amount in dispute. Such are a judgment for defendant at any stage of the suit, a judgment for plaintiff after verdict, a judgment for a specific amount confessed upon warrant of attorney, and a judgment signed upon the return of a writ of inquiry, or upon the assessment of damages by the master or prothonotary. Judgment for plaintiff is final also in an action brought for a specific sum, as debt for a sum certain, although entered upon a demurrer or default, because here, the amount being ascertained at the outset, the only question at issue is that respecting the right, and when that is determined nothing remains to be done. The question what is a final judgment becomes material in many cases where as to such there is a right of review on error or appeal, but not as to interlocutory judgments, as under the constitution and laws of the United States the final judgment of a state court of last resort, in which there is a federal question, may be reviewed by the Supreme Court of the United States. The term final judgment has been variously defined. A judgment which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. 3 Bla. Com. 398. A judgment which determines a particular cause and terminates all litigation on the same right. 1 Kent, Com. 316. A judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon. 24 Pick. 300; 2 Pet. 294; 6 How. 201, 209. A judgment is final which completely settles the rights of the parties. 86 Ky. 381.

When by any direction of a supreme court of a state, an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation, and is subject to review in the supreme court of the United States; 93 U. S. 108; but when the state court remands a cause for further proceedings in the lower court it is not a final judgment; 91 U. S. 1: 124 *id.* 320; 130 *id.* 167; 144 *id.* 197; 146 *id.* 354.

3. When an issue in fact, or an issue in law arising on a peremptory plea, is determined for the plaintiff, the judgment is "that the plaintiff do recover," etc., which is called a judgment *quod recuperet*; Steph. Pl. 126; Comyn, Dig. Abatement (I 14, I 15); 2 Archb. Pr. 3. When the issue in law arises on a dilatory plea, and is determined for the plaintiff, the judgment is only that the defendant "do answer over," called a judgment of *respondent ouster*. In an action of account, judgment for the plaintiff is that the defendant "do account," *quod computet*. Of these, the last two, *quod computet* and *quod respondent ouster*, are interlocutory only; the first, *quod recuperet*, is either final or interlocutory, according as the quantum of damages is or is not ascertained at the rendition of the judgment.

4. Judgment in error is either in affirmation of the former judgment; in recall of it for error in fact; in reversal of it for error in law; that the plaintiff be barred of his writ of error, where a plea of release of errors or of the statute of limitations is found for the defendant; or that there be a *venire facias de novo*, which is an award of a new trial; Smith, Act. 196. A *venire facias de novo* will always be awarded when the plaintiff's declaration contains a good cause of action, and judgment in his favor is reversed by the court of error; 24 Pa. 470. Frequently, however, when judgment is reversed, the court of error not merely overturns the decision of the court below, but will give such a judgment as the court below ought to have given; Smith, Act. 196.

NATURE OF THE OBLIGATION. The question whether a judgment is a contract is an old one very much discussed, and in some

cases it was held to be such, chiefly upon the authority of Blackstone, who rested his opinion as to the propriety of this classification upon the doctrine of the social compact. The relations of a judgment to the idea of a contract or a quasi-contract have of late received much attention, in connection with the more careful investigation and accurate understanding of that class of obligations known as quasi-contracts. Blackstone said, "Upon showing the judgment, once obtained, still in full force and yet unsatisfied, the law immediately implies that, by the original contract of society, the defendant hath contracted a debt, and is bound to pay it;" 3 Bla. Com. 160. Of this expression it has been said, "This is certainly a very remarkable statement, and involves large assumptions in regard to 'an original contract of society' and its supposed binding force upon a judgment debtor of the nineteenth century;" Howe, Stud. Civ. L. 188. This early theory of an "original contract of society" has been long since abandoned, and after the time of Blackstone's Commentaries Lord Mansfield, in a carefully considered case, said, "A judgment is no contract, nor can it be considered in the light of a contract, as *judicium redditur in invitum*;" 3 Burr. 1545. The same view of the question was taken by the United States supreme court, which held that a judgment was not a "contract within the meaning of the constitutional prohibition against impairing the obligation of a contract;" 113 U. S. 452. That court has, in two other important cases, discussed the question of the nature of a judgment and the obligation which is created by it, and in both cases it strongly dissents from the view of Blackstone and the earlier text-writers. In *Louisiana v. Mayor*, 108 U. S. 285, 288, the court said: "A judgment for damages, estimated in money, is sometimes called, by text-writers, a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. But this action cannot convert a transaction, wanting the assent of the parties, into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed on the losing party, by a higher authority, against his will and protest. The prohibition of the federal constitution was intended to secure the observance of good faith, in the stipulation of parties, against state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition." In this case it was held that the conversion of a statutory right to demand compensation for damages caused by a mob into a judgment does not make it a contract within the constitutional prohibition against impairing the obligation of a contract. In the more recent case of *Hilton v. Guyot*, 159 U. S. 113, in referring to the doctrine of Blackstone, with reference to a foreign judgment, the court held that the idea that such judgment imposed or created an obligation or duty was a remnant of an ancient fiction, and "while the theory in question would serve to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law; and it might be safer to adopt the maxim applied to foreign judgments by Chief Justice Weston, speaking for the supreme judicial court of Maine, *judicium redditur in invitum*, or as given by Lord Coke, in *presumptione legis judicium redditur in invitum*;" 15 Me. 167; Co. Lit. 248b." In New York it is held that a judgment is in no sense a contract or agreement; 1 Cow. 316; even a judgment founded upon a contract; 50 N. Y. 176; and the same doctrine is asserted with great vigor in a later case; 95 *id.* 428; this is also the prevailing doctrine in other states; 35 Cal. 155; 33 Ala. n. s. 706; 56 *id.*

56; 18 Me. 168; 87 N. C. 404; 15 Ohio St. 364; 2 S. C. n. s. 326; 3 G. Greene 489; (and see 30 Ia. 288); 17 Ill. 572; some cases are cited *contra*: 3 Gray 411; 19 Vt. 43; 4 Keyes 335; s. c. 4 Abb. N. Y. App. Cas. 382. The last case alone was relied on as the authority for the proposition that a judgment is a contract by Harlan, J., dissenting, in *Louisiana v. Mayor*, *supra*, but the case so relied upon is in a collection omitted from the regular reports and is in direct contradiction to cases cited *supra*, in which the opposing doctrine is emphatically stated by the same court, one decided four and the other sixteen years later. See also 9 Kan. 658. The most recent text books concur in supporting the statement already made as to the weight of authority. In one a judgment is said to be not under any circumstances a contract (1 Black. Judgt. § 10), and in another it is said that though a judgment is not a contract, it may be treated in some cases as a contract or as included in that term in certain statutes; 1 Freem. Judgt. § 4. Cases in which the contrary has been held will usually be found within this classification. See CONTRACT.

The civil law conception of the judgment is said to be correctly represented by the Louisiana case of *Gustine v. Bank*, 10 Rob. La. 412, in which it was held that "a judgment does not create, add to, nor detract from, the indebtedness of a party; it only declares it to exist, fixes its amount, and secures to the suitor the means of enforcing payment, and it is therefore necessary to look to the obligation upon which the judgment is based and ascertain whether it has arisen from contract or quasi-contract, from a delict or quasi-delict, or merely from the operation of law; the obligation is simply enforced and increased or diminished by the decree of the court. "It is declared to exist; it is interpreted; it is applied; it is put in the way of enforcement by the judicial power of the state;" Howe, Stud. Civ. L. 190.

In an interesting criticism upon the terminology adopted by Prof. Keener, in his work on quasi-contracts, a writer in the Harvard Law Review objects very seriously to the use of the term quasi-contract as an expression of the obligation of a judgment, which he says is "founded upon the mandate of the court, and depends for its validity upon the right of a court to adjudicate between contending parties;" 10 Harv. L. Rev. 213.

REQUISITES AND VALIDITY. To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires. A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it when there was no court held, or out of his district, or if he rendered a judgment before the cause was prepared for a hearing.

"The fact that one judge presided when the cause was heard and another when judgment was rendered, does not invalidate the judgment;" 65 N. W. Rep. (Ia.) 380.

The judgment must confine itself to the question raised before the court, and cannot extend beyond it. For example, where the plaintiff sues for an injury committed on his lands by animals owned and kept carelessly by defendant, the judgment may be for damages, but it cannot command the defendant for the future to keep his cattle out of the plaintiff's land. That would be to usurp the power of the legislature. A judgment declares the rights which belong to the citizen, the law alone rules future actions. The law commands all men, it is the same for all because it is general; judgments are particular decisions, which apply only to particular persons, and bind no others; they vary like the circumstances on which they are founded.

"The validity of a judgment is to be determined by the laws in force when it is rendered, and is not affected by subsequent changes therein;" 24 S. E. Rep. (Va.) 269. "A judgment is not void merely because it is not dated;" 65 N. W. Rep. (Ia.) 380. Courts should not render judgments which

cannot be enforced by any process known to the law; 74 Cal. 430. "In an action at law the court cannot render a conditional judgment;" 2 Mo. App. 1191.

The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry, and in this respect a court of another state is to be regarded as a foreign court; 137 U. S. 287; and a judgment in a state court having jurisdiction of the subject-matter and the parties, is binding upon the parties thereto in a suit in another state between the same parties, where the subject-matter and the issues are the same as in the former suit; 147 U. S. 87.

OPERATION AND EFFECTS. The judgment of a court of general jurisdiction is presumed to have been rendered in the due exercise of that jurisdiction over person and subject-matter, unless the contrary be shown; 60 Ill. App. 309; and after twenty years the presumption of due notice to the parties becomes conclusive; 161 Ill. 76.

Final judgments are commonly said to conclude the parties; and this is true in general, but does not apply to judgments for defendant on *non suit*, as in case of *non suit*, by *nolle prosequi*, and the like, which are final judgments in one sense, because they put an end to all proceedings in the suit, but which nevertheless do not debar the plaintiff from instituting another suit for the same cause. With this qualification, the rule as to the effect of a judgment is as follows: The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive, between the same parties upon the same matter directly in question in another court. The judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. *Duchess of Kingston's case*, 20 Howell, St. Tr. 538; 2 Smith, L. C. 424; *Harr. Cont.* 295. See, also, 2 Gall. 229; 4 Watts 123. The rule above given relates to the effect of a judgment upon proceedings in another court; if the court is the same, of course the rule holds *a fortiori*. Moreover, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the proceedings. All privies whatever in estate, in blood, or in law, are, therefore, estopped from litigating that which is conclusive upon him with whom they are in privity; 1 Greenl. Ev. §§ 523, 536. A decree or judgment on a matter outside of the issue raised by the pleading is a nullity; 43 N. J. Eq. 77; and so is the judgment of a court which is without jurisdiction; 124 U. S. 200.

A further rule as to the conclusiveness of judgments is sometimes stated thus: "A judgment of a court of competent jurisdiction cannot be impeached or set aside in any collateral proceeding except on the ground of fraud." See, generally, 1 Greenl. Ev. pt. 3, ch. 5; 84 Ky. 14; 85 Tenn. 171; 24 Neb. 490; 97 Mo. 406; 130 U. S. 565; 161 Pa. 455. A judgment of a court having jurisdiction both of the subject-matter and the parties, however erroneous it may be, is a valid, binding, and conclusive judgment, as to the matter in controversy, upon the parties thereto and those claiming under them; 83 Ga. 168; 86 Ky. 614; 118 Ind. 345; 83 Va. 129; 29 W. Va. 794; 130 U. S. 565; 144 Id. 610; 146 Id. 279; 152 Id. 327.

This does not prevent a judgment from being attacked directly by writ of error or other proceeding in the nature of an appeal; and its validity may be impeached in other direct proceedings, as by motion to open or set it aside, and in contests between creditors in regard to the validity of

their respective judgments; in this latter class of cases the court will sometimes award a feigned issue to try questions of fact affecting the validity of the judgment.

If the record of a judgment show that it was rendered without service of process or appearance of the defendant, or if that fact can be shown without contradicting the recitals of the record, it will be treated as void in any other state; 97 Mass. 538; 46 N. Y. 30; s. c. 7 Am. Rep. 299; 48 Ga. 50; s. c. 15 Am. Rep. 660. But this fact cannot be shown in contradiction of the recitals of the record; *Rorer, Int. St. L.* 128; 17 Vt. 302; 2 McLean 511; 65 Pa. 105; *contra*, 46 N. Y. 30; 24 Tex. 551; 18 Wall. 457. See *Cooley, Const. Lim.*, 2d ed. 27. Nor will it be presumed to be void because of the absence of the return of service on the summons; 82 Va. 690. A judgment is not less conclusive because rendered by default; 122 U. S. 306; but a default judgment is void unless service has been had according to law; 7 Mont. 100, 288; 17 Or. 204; 31 W. Va. 364; and a money judgment against a non-resident defendant who is not personally served within the jurisdiction, and who does not voluntarily appear, is void; 73 Tex. 547; 70 Id. 588; 147 Mass. 536. In the leading case of *Pennoyer v. Neff*, it was held that a personal judgment is without any validity, if it is rendered by a state court in an action upon a money demand against a non-resident of the state, who was served by a publication of summons, but upon whom no personal service of process within the state was made and who did not appear; no title to property passes by a sale under an execution issued upon such a judgment; 95 U. S. 714.

Matters of defence arising since the judgment may be taken advantage of by a writ of *audita querela*, or, which is more usual, the court may afford summary relief on motion.

Although a judgment is vitiated by fraud it is not thereby rendered absolutely void; it is valid as between the parties to the fraud, and can be avoided only by a person injured by it; 1 Morr. (Ia.) 467; as where one holding a judgment against a railroad brought a suit to have another judgment, and a lease of the road to secure it, declared void for fraud, and obtained a decree accordingly, it was held, that the decree did not affect the validity of the judgment and the lease as between the parties thereto; 3 Wall. 704.

All the judgments, decrees, or other orders of courts, however conclusive in their character, are under the control of the court which pronounced them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court; 24 Neb. 803; 140 U. S. 25; but after the term has ended, unless proceedings to correct the errors alleged have been taken before its close, they can only be corrected by writ of error or appeal, as may be allowed in a court which by law can reverse the decision; 14 Cent. L. J. 250; 102 U. S. 107; 9 Wall. 103. To this rule there is an exception founded on the common-law writ of *coram nobis*, which brought before the court where the error was committed certain mistakes of fact not put in issue or passed upon by the court, such as the death of one of the parties when the judgment was rendered, coverture if a female party, infancy and failure to appoint a guardian, error in the process, or mistake of the clerk. But if the error was in the judgment itself, the writ did not lie. What was formerly done by this writ is now attained by motion and affidavits when necessary; 14 Cent. L. J. 253; 7 Pet. 147. See 128 Ill. 595; 86 Ky. 128. A judge has the power to amend a record at any time, so as to make it speak the truth; 100 N. C. 297; 84 Ala. 36.

A joint judgment which is void as to one of the parties is void as to all; 6 Mackey 548. A judgment against several persons, one of whom dies before its rendition, is voidable as to all; 129 Ill. 241. See *RES JUDICATA*.

MERGER. The question how far the cause

of action is merged in a judgment sometimes becomes very material, as affecting the right to sue on the former in another jurisdiction. The general principle has been thus stated with respect to the operation of the judgment with both parties to it. "The judgment of a court of competent jurisdiction discharges the obligation which the action is brought to enforce. The judgment may operate either to merge the original obligation, in so far as judgment is rendered for the plaintiff; or to estop the plaintiff from subsequently setting up his original claim, in so far as judgment is rendered for the defendant." *Harr. Cont.* 295.

The effect of the merger of the cause of action is often very serious; one having a right of action against two or more persons may, by recovering judgment against one of them, lose his remedy against the others. As where the plaintiff, in an action upon a joint contract obligation elected to enter judgment against one defendant, in default of plea or answer, the judgment was held a bar to a subsequent action against the other, the debt being merged in the judgment; 67 N. W. Rep. (Minn.) 1015; 89 Hun 44; but the cause of action does not merge in a void judgment; 36 S. W. Rep. (Tenn.) 378.

Where the cause of action has arisen in a foreign country, the plaintiff has the option to sue on a judgment obtained there, or ignoring the judgment to proceed upon the original cause of action, in both cases subject to certain exceptions, as where the judgment is to enforce a penalty or for a tort on which there is no action here; 2 Curt. C. C. 539. This choice of remedy does not exist in the case of judgments in sister states; a cause of action in such case is merged and the remedy is confined to an action on the judgment; *Freeman, Judgments* § 241; 105 Mass. 504; 31 N. J. L. 317; 16 Pa. 241; *contra*, 2 Gratt. 532. The rule as stated is subject to the exception that there is no merger of the cause of action in the judgment unless the latter is general. Where the judgment was in a penal action, the action was held not to abate on the death of a party, because the judgment having been entered, the action thereafter had the attributes of a contract; 119 N. Y. 117.

It has been held that in an action of tort, the tort merges in the judgment, so as to allow an attachment as on the contract; 2 Ia. 535; although a tort cannot be set up as a counter-claim, the judgment upon it may, as constituting a contract; 4 Keyes 335; so it was held that a judgment so far extinguished the original debt that a set-off available in the suit on the debt by reason of a claim against an assignor of said debt was no longer available after judgment; 38 Ind. 429.

Although a contract could have been attacked as usurious, it was not so after judgment, and a mortgage given to secure the latter could not be objected to on account of the original usury; 12 Mass. 268.

The doctrine of the merger of the cause of action is not carried to such extreme as to defeat the equities or just rights of the defendant or plaintiff. Thus it has been held with some frequency that it can be shown against a judgment that the same was obtained upon a debt which was provable against defendant in proceedings in insolvency, and being so provable was barred by the discharge in insolvency, and as the discharge barred the debt, it barred the judgment resting on the debt; 3 N. Y. 216; 3 Barb. Ch. 360; 3 Barb. 429.

Where the defendant was sued in Massachusetts, in debt on a judgment, he pleaded a discharge under the New York insolvency law, and it was held that the court would look behind the judgment and see whether under the facts giving rise to it, it was so discharged; 12 Pick. 572; and, on the other hand, a judgment apparently discharged by insolvency proceedings, but found to be based on notes executed before the passage of the insolvent law was held not affected by the latter and enforceable; 1 Cow. 316; 3 Id. 147; so it was held that a judgment

does not prevent a creditor from taking an attachment as a non-resident creditor: 3 Md. 457.

In this case the principle is very well stated thus: Though a judgment is to some purposes a merger of the original contract, and constitutes a new debt, yet when the essential rights of the parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the original contract was.

The principle of the cases last cited has been frequently enunciated. In the case in 3 N. Y. 216, Hurlbert, J., said, that "a judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt, in a new form, so as to prevent a technical merger from working injustice." In the case in 12 Pick. 572, Shaw, C. J., said: "Although a judgment, to some purposes, is considered as a merger of the former, and as constituting a new cause of action, yet when the essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the nature of such original cause of action was. Any other decision would carry the technical doctrine of merger to an inconvenient extent and cause it to work injustice."

FORM. The form of the judgment varies according to the nature of the action and the circumstances, such as default, verdict, etc., under which it is obtained. Anciently great particularity was required in the entries made upon the judgment roll; but now, even in the English practice, the drawing up the judgment roll is generally neglected, except in cases where it is absolutely necessary, as where it is desirable to give the proceedings in evidence on some future occasion; Smith, Act. 169. In this country the roll is rarely if ever drawn up, the simple entry on the trial list and docket, "judgment for plaintiff," or "judgment for defendant," being all that is generally considered necessary; and though the formal entries are in theory still required to constitute a complete record, yet if such record should subsequently be needed for any purpose, it may be made up after any length of time from the skeleton entries upon the docket and trial list. See 11 Pa. 399. When the record is thus drawn up in full, the ancient formalities must be observed, at least in a measure.

JUDGMENTS ON VERDICT. A judgment on a verdict virtually overrules all demurrers to the declaration; 37 W. Va. 645. The form of such verdicts varies according to the action and frequently also with the character in which a party sues or is sued.

In *account*, judgment for the plaintiff is interlocutory in the first instance, that the defendant do *account, quod computet*; 4 Wash. C. C. 84; 2 Watts 95; 1 Pa. 138.

In *assumpsit*, judgment for the plaintiff is that he recover the damages assessed by the jury, and full costs of suit; 1 Chitty, Pl. 100. Judgment for the defendant is that he recover his costs. For the form, see Tidd, Pr. Forms 165.

In *case, trover, and trespass*, the judgment is the same in substance, and differs but slightly in form from that of *assumpsit*; 1 Chitty, Pl. 100, 147.

A judgment in *trover* passes title to the goods in question; 53 Mo. App. 652; 16 So. Rep. (Ala.) 704; but only where the value of the thing converted is included in the judgment; 5 H. & N. 288; and it is held that an unsatisfied judgment does not pass the property; L. R. 6 C. P. 584; 3 Wall. 1, 16; 27 Pac. Rep. (N. M.) 327. In a somewhat analogous case it was held that a judgment for the value of horses lost to the owner by negligence of the defendant, of itself passes title to the horses to the defendant becoming liable for their value; 78 Tex. 298. But see 1 Rawle 121. Where personal property had been sold and partly paid for, title being retained by the vendor, and he recovered in *trover* both the property and instalments due, on appeal it was directed that the judgment be discharged on payment within a time limited of pur-

chase money, interest, and cost, otherwise the original judgment below to stand of full force; 87 Ga. 280.

In *covenant*, judgment for the plaintiff is that he recover the amount of his damages as found which he has sustained by reason of the breach or breaches of the defendant's covenant, together with costs of suit; 1 Chitty, Pl. 116. Judgment for defendant is for costs.

In *debt*, judgment for the plaintiff is that he recover his debt, and in general nominal damages for the detention thereof; and in cases under the 8th & 9th Will. III. c. 11, for successive breaches of a bond conditioned for the performance of a covenant, it is also awarded that he have execution for such damages, and likewise full costs of suit; 1 Chitty, Pl. 108. But in some penal and other actions the plaintiff does not always recover costs; Esp. Pen. Act. 154; Hull, Costs 200; Bull. N. P. 333; 5 Johns. 251. Judgment for defendant is generally for costs; but in certain penal actions neither party can recover costs; 5 Johns. 251. See the form, Tidd, Pr. Forms 176.

In *detinue*, judgment for the plaintiff is in the alternative that he recover the goods or the value thereof if he cannot have the goods themselves, with damages for the detention, and costs; 1 Chitty, Pl. 121, 122; 1 Dall. 458. See the form, Tidd, Pr. Forms 187.

If judgment in any of the above personal actions is against the defendant in the character of *executor*, it confines the liability of the defendant for the debt or damages to the amount of assets of the testator in his hands, but leaves him personally liable for costs. See the form, Tidd, Pr. Forms 168. If the executor defendant has pleaded *plene administravit*, judgment against him confines his liability to such amount of the assets as shall hereafter come to his hands. See the form, Tidd, Pr. Forms 174. A general judgment for costs against an administrator plaintiff is against the estate only.

A judgment against an executor or heir where the plea is false, to the defendant's own knowledge, may be a general judgment as if the recovery was for his own debt, but in other cases a judgment against an executor is generally special, to be levied of the goods or land of his testator; 7 Taunt. 580; 5 id. 554.

A judgment on a covenant of a *married woman* against her separate estate may be entered as a personal judgment against her; 20 S. E. Rep. (W. Va.) 917; such judgment must be entered in a special form; 14 Ch. D. 837; but the record need show no special fact fixing her liability; 2 Pa. Dist. R. 690.

In *dower*, judgment for demandant is interlocutory in the first instance with the award of a writ of *habere facias seisinam*, and inquiry of damages, on the return of which final judgment is rendered for the value of the land detained, as ascertained by the jury, from the death of the husband to the suing out of the inquisition, and costs of suit. See the form, 3 Chitty, Pl. 583.

In *ejectment*, judgment for plaintiff is final in the first instance, that he recover the term, together with the damages assessed by the jury, and the costs of suit, with award of the writ of *habere facias possessionem*, directing the sheriff to put him in possession. See the form, 3 Bla. Com. App. xii; Tidd, Pr. Forms 188. A judgment in *ejectment* is conclusive as to title between the parties thereto, unless the jury find for the plaintiff less than the fee; 78 Ga. 142. A consent verdict in *ejectment* is conclusive on the parties and their privies; 78 Ga. 142.

In *partition*, judgment for plaintiff is also interlocutory in the first instance; *quod partitio fiat* with award of the writ *de partitione facienda*, on the return of which final judgment is rendered,—"therefore it is considered that the partition aforesaid be held firm and effectual forever," *quod partitio facta firma et stabilis in perpetuum teneatur*; Co. Litt. 169. See the form, 2 Sell. Pr. 319, 2d ed. 222.

In *replevin*. If the replevin is in the *deti-*

nuit, i. e. where the plaintiff declares that the chattels "were detained until replevied by the sheriff," judgment for plaintiff is that he recover the damages assessed by the jury for the taking and unjust detention, or for the detention only where the taking was justifiable, and also his costs; 5 S. & R. 133; Hamm. N. P. 488. If the replevin is in the *detinet*, i. e. where the plaintiff declares that the chattels taken are "yet detained," the jury in giving a verdict for plaintiff find, in addition to the above, the value of the chattels each separately; for the defendant will perhaps restore some, in which case the plaintiff is to recover the value of the remainder; Hamm. N. P. 489; Fitzh. N. B. 159 b; 5 S. & R. 130.

If the replevin be *abated*, the judgment is that the writ or plaint abate, and that the defendant, having avowed, have a return of the chattels.

If the plaintiff is *unsuited*, the judgment for defendant, at common law, is that the chattels be restored to him, and that without his first assigning the object of the taking, because by abandoning his suit the plaintiff admits that he had no right to dispossess the defendant by prosecuting the replevin. The form of this judgment is simply "to have a return," *pro retorno habendo*, without adding the words "to hold irreplevisable;" Hamm. N. P. 490. For the form of judgments of *unsuit* under the statutes 21 Hen. VIII. c. 19, and 17 Car. II. c. 7, see Hamm. N. P. 490; 2 Chitty, Pl. 161; 8 Wentw. Pl. 116; 5 S. & R. 132; 1 Saund. 195, n. 3; 2 id. 286, n. 5. In these cases the defendant has the option of taking his judgment *pro retorno habendo* at common law; 5 S. & R. 132; 1 Lev. 255; 3 Term 349.

When the avowant succeeds upon the merits, the common-law judgment is that he "have return irreplevisable;" for it is apparent that he is by law entitled to keep possession of the goods; 5 S. & R. 145; Hamm. N. P. 493; 1 Chitty, Pl. 162. For the form of judgment in such case under the statutes last mentioned, see Hamm. N. P. 494.

AFTER VERDICT, the general form of judgment for plaintiff in actions on contracts sounding in damages, and in actions founded on *torts* unaccompanied with violence, is this: "Therefore it is considered that the said A B do recover against the said C D his damages aforesaid, and also — for his said costs and charges, by the court now here adjudged of increase to the said A B, with his assent; which said damages, costs, and charges in the whole amount to —. And the said C D in mercy, etc." In *debt* for a sum certain, the general form is "— that the said A B do recover against the said C D his said debt, and also — for his damages which he has sustained, as well on occasion of detaining the said debt as for his costs and charges by him about his suit in this behalf expended, by the court now here adjudged to the said A B, and with his assent. And the said C D in mercy, etc." In actions founded on *torts* accompanied with violence, the form of judgments for plaintiff is, "— that the said A B do recover against the said C D his damages aforesaid, and also — for his said costs and charges by the court now here adjudged of increase to the said A B, and with his consent; which said damages, costs, and charges in the whole amount to —. And let the said C D be taken, etc."

Final judgment for the defendant is in these words: "Therefore it is considered that the said A B take nothing by his writ but that he be in mercy, etc. (or that he and his pledges to prosecute be in mercy, etc.), and that the said C D do go thereof without day, etc. And it is further considered —." Then follows the award of costs and of execution therefor. See Tidd, Pr. Forms 189.

This is the general form of judgment for defendant, whether it arise upon interlocutory proceedings or upon verdict, and whatever be the form of action. This is sometimes called judgment of *nil capiat per breve* or *per billam*; Steph. Pl., And.

ed. § 97.

The words "and the said—in mercy, etc., or, as expressed in Latin, *quod sit in misericordia pro falso clamore suo*, were formerly an operative part of the judgment, it being an invariable rule of the common law that the party who lost his cause was punished by amercement for having unjustly asserted or resisted the claim. And on this account pledges of prosecution were required of the plaintiff before the return of the original, who were real and responsible persons and liable for these amercements. But afterwards the amercements ceased to be exacted,—perhaps because the payment of costs took their place,—and, this portion of the judgment becoming mere matter of form, the pledges returned were the fictitious names John Doe and Richard Roe. Baçon, *Abr. Fines, etc.* (C 1); 1 *Ld. Raym.* 273.

The words "—and let the said—be taken," in Latin, *capitur pro fine*, which occur above in the form of judgment in actions founded on torts accompanied with violence, were operative at common law, because formerly a defendant adjudged to have committed a civil injury with actual violence was obliged to pay a fine to the king for the breach of the peace implied in the act, and was liable to be arrested and imprisoned till the fine was paid. This was abolished by stat. 5 W. & M. c. 12; but the form was still retained in entering judgment against defendant in such actions. See Gould, *Pl.* §§ 38, 82; Bacon, *Abr. Fines, etc.* (C 1); 1 *Ld. Raym.* 273. Style 346.

These are called, respectively, judgments of *misericordia* and of *capitur*.

JUDGMENTS IN OTHER CASES. On a plea in abatement, either party may demur to the pleading of his adversary or they may join issue.

On demurrer, judgment for the plaintiff is that the defendant have another day to plead in chief, or, as it is commonly expressed, that he answer over; *quod respondeat ouster*; and judgment for defendant is that the writ be quashed; *quod casetur billa* or breve. But if issue be joined, judgment for plaintiff is *quod recuperet*, that he recover his debt or damages, and not *quod respondeat*; judgment for defendant is the same as in the case of demurrer, that the writ be quashed. But the plaintiff may admit the validity of the plea in abatement, and may himself pray that his bill or writ may be quashed, *quod casetur billa* or breve, in order that he may afterwards sue or exhibit a better one; Steph. *Pl.* And, ed. § 97; Lawes, *Civ. Pl.* See the form, Tidd, *Pr. Forms* 195. Judgment on demurrer in other cases, when for the plaintiff, is interlocutory in *assumpsit* and actions sounding in damages, and recites that the pleading to which exception was taken by defendant appears sufficient in law, and that the plaintiff ought, therefore, to recover; but the amount of damages being unknown, a court of inquiry is awarded to ascertain them. See the form, Tidd, *Pr. Forms* 181. In *debt* it is final in the first instance. See the form, *id.* p. 181. Judgment on demurrer when for the defendant is always final in the first instance, and is for costs only. See the form, *id.* 195.

Judgment by default, whether by *nil dicit* or *non sum informatus*, is in these words, in *assumpsit* or other actions for damages, after stating the default: "wherefore the said A B ought to recover against the said C D his damages on occasion of the premises; but because it is unknown to the court, etc., now hear what damages the said A B hath sustained by means of the premises, the sheriff is commanded, etc." Then follows the award of the writ of inquiry, on the return of which final judgment is signed. See the forms, Tidd, *Pr. Forms* 195. In *debt* for a sum certain, as on a bond for the payment of a sum of money, the judgment on default is final in the first instance, no writ of inquiry being necessary. See the form, *id.* 169.

Plaintiff cannot take a default where

there is no declaration on file; 55 *Ill. App.* 350; and a default cannot be entered after defendant has interposed a plea in bar; 14 *So. Rep.* (Ala.) 680; but the mere filing of an answer will not prevent a judgment by default, there must also be a subsequent appearance by defendant to protect his rights; 4 *Tex. Civ. App.* 490.

It is error to enter judgment by default while a plea to part and a demurrer to the rest of the declaration are on file; 50 *Ill. App.* 131; but the rendition of a judgment by default, where the petition states the facts sufficient to maintain the cause of action, is within the discretion of the trial judge; 8 *Ohio, Dec.* 57; and so is the opening of a judgment by default; 39 *Pac. Rep.* (Okl.) 281; 61 *N. W. Rep.* (Minn.) 824; 17 *Misc. Rep.* 389; where an answer failed to reach the court in time through the fault of the postmaster, it was held that a default should be set aside; 55 *Ill. App.* 668.

Judgment by *cognovit actionem* is for the amount admitted to be due, with costs, as on a verdict. See the form, *id.* 176. In Pennsylvania by statute, the plaintiff may take judgment for an amount admitted to be due and proceed to trial for the remainder of his claim.

Judgment of *non pros.* or *non suit* is final, and is for defendant's costs only, which is also the case with judgment on a *discontinuance* or *nolle prosequi*. See *id.* 189.

MATTERS OF PRACTICE. Of docketing the judgment. By the stat. 4 & 5 W. & M. c. 20, all final judgments are required to be regularly docketed: that is, an abstract of the judgment is to be entered in a book called the judgment-docket; 3 *Bla. Com.* 398. And in these states the same regulation prevails. See 37 *Minn.* 533. Besides this, an index is required to be kept in England of judgments confessed upon warrant of attorney, and of certain other sorts of judgments; 3 *Sharsw. Bla. Com.* 396, n. In most of the states this index is required to include all judgments. The effect of docketing the judgment is to notify all interested persons, including purchasers or incumbrancers of land upon which the judgment is a lien, and subsequent judgment creditors, of the existence and amount of the judgment. *Freem. Judg.* § 343. Judgments only become liens from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated; 133 *U. S.* 534. In Pennsylvania, the judgment index is for this purpose conclusive evidence of the amount of a judgment in favor of a purchaser of the land bound thereby, but not against him: if the amount indexed is less than the actual amount, the purchaser is not bound to go beyond the index; but if the amount indexed is too large, he may resort to the judgment-docket to correct the mistake; 1 *Pa.* 408. A failure to index the abstract of a judgment is fatal to the lien; 70 *Tex.* 434, 458; 77 *La.* 381.

Now, in England, judgments, in order to affect purchasers, mortgagees, and creditors, must be registered in the common pleas, and renewed every five years. See 2 & 3 *Vict. c.* 11, s. 5.

Of the time of entering the judgment. After verdict a brief interval is allowed to elapse before signing judgment, in order to give the defeated party an opportunity to apply for a new trial, or to move in arrest of judgment, if he is so disposed. This interval, in England, is four days; *Smith, Actions* 150. In this country it is generally short; but, being regulated either by statute or by rules of court, it of course may vary in the different states, and even in different courts of the same state.

See ARREST OF JUDGMENT; ASSUMPSIT; ATTACHMENT; CONFLICT OF LAWS; COVENANT; DEBT; DETINUE; EJECTMENT; CASE; DECREE; FOREIGN JUDGMENT; LIEN; REPLEVIN; TRESPASS; TROVER. See Freeman; Black, Judgments.

JUDGMENT. The judgment or decree

is not the decision, but follows, and is based upon the verdict of the jury or the decision of the court. 134 *Ind.* 573-4. See DECISION; IN PERSONAM; JUDGMENT INTER PARTES; JUDGMENT IN REM; MONEY JUDGMENT; VERDICT.

A judgment rendered in *personam* against a defendant without jurisdiction of his person is not only erroneous but void, and is not required to be enforced in other States under full faith and credit clause of the Constitution or the act of Congress passed in aid thereof, § 905, *Rev. Stat.* 205 *U. S.* 141.

Conformity to Verdict. A judgment "must follow and conform to the verdict" not only as to the amount of the recovery, but also as to the nature and measure of relief and as to the parties; and, it cannot go beyond the verdict in settling the rights of the parties or admeasuring the recovery, or declaring or foreclosing liens, except that in cases where the evidence would have authorized the court to direct a verdict in adjusting the equities of the parties. 163 *Ky.* 385, 173 *S. W.* 1122.

JUDGMENT BOOK. A book which is required to be kept by a clerk among the records of the court, for the entry of judgments. Code *N. Y.* § 279.

JUDGMENT CREDITOR. See CREDITOR, JUDGMENT.

JUDGMENT DEBT. See DEBT.

JUDGMENT INTER PARTES or IN PERSONAM. One which operates only upon those who have been duly made parties to the record and their privies, being against a person merely, and not settling the status of any person or thing. See 3 *Sm. L. Cas.*, 9th Am. ed. 2016; JUDGMENT; JUDGMENT IN REM.

A judgment in *personam* is more accurately called a judgment *inter partes* for an adjudication upon the status of a particular person is as much a judgment *in rem* as an adjudication on the status of a thing. (2 *Sm. Lead. Cas.* 784 *et seq.*) In an ordinary action (i contract or tort, where a judgment given against A. cannot be binding on B. unless he or some one under whom he claims was party to it. *Id.* 788; *R. & L. Dict.* See JUDGMENT IN REM; IN REM; IN PERSONAM.

JUDGMENT FOR MONEY. A "judgment for money," is not *stricti juris*, a contract; but it imposes a civil liability, and is even more conclusive evidence of a debt than any contract by specialty can be. 4 *Dana* (Ky.) 578.

JUDGMENT NISI. A judgment entered on the return of the nisi prius record with the postea indorsed, which will become absolute according to the terms of the "postea" unless the court out of which the nisi prius record proceeded shall, within the first four days of the following term, otherwise order.

Under the compulsory arbitration law of Pennsylvania, on filing the award of the arbitrators, judgment nisi is to be entered, which judgment is to be valid as if it had been rendered on a verdict of a jury, unless an appeal is entered within the time required by law.

JUDGMENT NOTE. A promissory note given in the usual form, and containing, in addition, a power of attorney to appear and confess judgment for the sum therein named. On this account it is not negotiable; 77 *Pa.* 131; but see 19 *Ohio* 130.

It usually contains a number of stipulations as to the time of confessing the judgment; 11 *Ill.* 623; against appeal and other remedies for setting the judgment aside; see 9 *Johns.* 80; 20 *id.* 296; 2 *Cowp.* 465; 2 *Pa.* 501; 15 *Ill.* 356; an attorney's commission for collection, waiver of exemption, and other conditions.

JUDGMENT PAPER. In English Practice. An *incipitur* of the pleadings, written on plain paper, upon which the master will sign judgment. 1 *Archb. Pr.* 229, 306, 348.

JUDGMENT INTER PARTES. See JUDGMENT IN REM.

JUDGMENT IN PERSONAM. See JUDGMENT INTER PARTES; IN PERSONAM.

JUDGMENT RECORD. In English Practice. A parchment roll on which are transcribed the whole proceedings in the cause, deposited and filed of record in the treasury of the court, after signing of judgment. 3 Steph. Com., 11th ed. 601. See JUDGMENT ROLL. In American practice, the record is signed, filed, and docketed by the clerk, all of which is necessary to suing out execution; Graham, Pr. 341.

JUDGMENT RECOVERED. A plea by a defendant that the plaintiff has already recovered that which he seeks to obtain by his action. This was formerly a species of *snam plea*, often put in for the purpose of delaying a plaintiff's action. M. & W.

JUDGMENT IN REM. An adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose. 3 Sm. L. Cas., 9th Am. ed. 2015.

An adjudication against some person or thing, or upon the *status* of some subject-matter; which, wherever and whenever binding upon any person, is equally binding upon all persons. 10 Mo. App. 78.

The universal effect of a judgment *in rem* depends upon the principle that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; which very declaration operates accordingly upon the *status* of the thing adjudicated upon, and *ipso facto*, renders it such as it is thereby declared to be; 3 Sm. L. Cas., 9th Am. ed. 2015-16, 2032, 2043.

The most frequent cases of such judgment are found in the courts exercising jurisdiction of cases in admiralty. So also a foreign court in a case of divorce which is recognized as establishing the *status* of a person is a judgment *in rem*.

In the leading case of *Pennoy v. Neff*, the United States supreme court said: "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in this state, they are substantially proceedings *in rem* in the broader sense which we have mentioned." 95 U. S. 734. A judgment against a railway company in favor of an assignee of claims for labor performed for a subcontractor, which forecloses a statutory lien on the property of the company for debt, and orders a sale of the property, cannot be construed as a judgment *in personam*; 12 Am. & Eng. R. Cas. 258; 69 Tex. 587. See IN REM.

Thus, a court of admiralty having in certain cases a right to condemn ships and goods, its judgment is conclusive against all the world that the property so condemned was liable to seizure. (2 Sm. Lead. Cas. 785.) So, in England, a declaration of legitimacy, and (it would seem) a judgment of outlawry, are in effect judgments *in rem*. A judgment of divorce pronounced by a foreign court is in certain cases recognized by our courts, and is then a judgment *in rem*. *Id.* 784; R. & L. Dict. See JUDGMENT INTER PARTES; IN PERSONAM.

JUDGMENT ROLL. In English Law. A record made of the issue roll (which see), which, after final judgment has been given in the cause, assumes this name. Steph. Pl., Andr. ed. § 97; 3 Chitty, Stat. 514; Freem. Judg. § 75. The Judicature Act of 1875 requires every judgment to be entered in a book by the proper

officer.

JUDICARE. To judge; to decide or determine judicially; to give judgment or sentence.

JUDICATIO. In Civil Law. Judging; the pronouncing of sentence; after hearing a cause. Halifax, Civil Law b. 3, c. 8, no. 7.

JUDICATORES TERRARUM. Certain tenants in Chester, who were bound by their tenures to perform judicial functions. In case of an erroneous judgment being given by them, the party aggrieved might obtain a writ of error out of Chancery, directing them to reform it. They then had a month to consider of the matter. If they declined to reform their judgment, the matter came on writ of error before the king's bench; and if the court of king's bench held the judgment to be erroneous they forfeited £100 to the king by the custom. Jenk. Cent. (ii. 34), p. 71.

JUDICATORIES. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all. These are called, in the language of the church organs, "judicatories," and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases. 13 Wall (U. S.) 727.

JUDICATURE. The state of those employed in the administration of justice; and in this sense it is nearly synonymous with judiciary. This term is also used to signify a tribunal; and sometimes it is employed to show the extent of jurisdiction: as, the judicature is upon writs of error, etc. Comyn, Dig. Parliament (L 1). And see Comyn, Dig. Courts (A).

JUDICATURE ACTS. The English acts under which the present system of courts was organized and is continued.

The statutes of 36 & 37 Vict. c. 65, and 38 & 39 Vict. c. 77, which went into force Nov. 1, 1875, with amendments in 1877, 40 & 41 Vict. c. 9, 1879, 42 & 43 Vict. c. 78, and 1881, 44 & 45 Vict. c. 68, made most important changes in the organization of, and methods of procedure in, the superior courts of England, consolidating them together so as to constitute one Supreme Court of Judicature, consisting of two divisions: Her Majesty's High Court of Justice, having chiefly original jurisdiction, and Her Majesty's Court of Appeal, whose jurisdiction is chiefly appellate. To the former was transferred the jurisdiction of the court of chancery (both at common law and equity, queen's bench, common pleas (at Westminster, Lancaster, and Durham), exchequer (as a court of revenue as well as a common-law court), admiralty, probate, divorce, and the assize court, with certain exceptions, of which the most important is the appellate jurisdiction of the court of appeal in chancery. The London courts of bankruptcy were included in this list by the act of 1873, but excluded by that of 1875. To Her Majesty's Court of Appeal is transferred the jurisdiction exercised by the lord chancellor and lords justices of the court of appeal in chancery, the court of exchequer chamber, the judicial committee of the privy council on appeal from the high court of admiralty, or from any order in lunacy made by the lord chancellor, or any other person having jurisdiction in lunacy. This was the transfer, by 14 & 15 Vict. c. 38, of the appellate jurisdiction, theretofore exercised by the lord chancellor, to the court of appeal, consisting of the lord chancellor and two lords justices, with an appeal, "only on matters of law or equity, or on the admission or rejection of evidence." By the act of 1873, no appeals were to be brought from the High Court or Court of Appeal to the house of lords or the privy council, but by the Appellate Jurisdiction Act of 39 & 40 Vict. c. 59, the house of lords retains for all practical purposes here, its powers and functions to hear appeals from Her Majesty's Court of Appeal in England, and from the courts of Scotland and Ireland. (See JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.) Her Majesty's Court of Appeal practically takes the place of the exchequer chamber in appeals in common-law actions, and also hears appeals in chancery, previously heard by the chancellor or by the court of appeal in chancery. In the exercise of its appellate jurisdiction, and of the same court as a court of appeal in bankruptcy. It consists of five *ex-officio* judges, viz., the lord chancellor as president, the lord chief justice of England, the master of the rolls, the president for the time being of the probate, divorce, and admiralty division of the High Court of Justice, and five ordinary judges of the court of appeal, to be styled, by the act of 40 & 41 Vict. c. 9, lords justices of appeal, the first three of whom are to be made by the transfer of three judges from the High Court of Justice.

The High Court of Justice originally consisted of five divisions as follows: 1. The chancery division consisted of the lord chancellor, the master of the rolls (but by the act of 44 & 45 Vict. c. 68, the master

of the rolls ceases to belong to the high court, and provision is made for a judge in his place, who shall be in the same position as a puisne judge under the acts of 1873 and 1875), and such of the vice chancellors of the court of chancery as shall not be appointed ordinary judges of the court of appeal. The Judicature Act of 1877, 40 & 41 Vict. c. 6, provides for the appointment of a new judge, to be attached to the chancery division, and entitles the puisne judges, justices of the high court. The lord chancellor is not to be deemed a permanent judge of the High Court of Justice.

2. The queen's bench division, consisting of the lord chief justice of England, and such other of the judges of the court of queen's bench as shall not be appointed ordinary judges of the Court of Appeal.

3. The common pleas division, consisting of the lord chief justice of the common pleas, and such other judges of the court of common pleas as shall not be appointed ordinary judges of the Court of Appeal.

4. The exchequer division, consisting of the lord chief baron of the exchequer, and certain other barons of the court of exchequer.

5. The probate, divorce, and admiralty division, consisting of two judges, one of whom shall be the judge of the court of probate and of the court for divorce and matrimonial causes, and the judge of the high court of admiralty, or "C. A.," and such other judges of the court of common pleas as shall not be appointed ordinary judges of the Court of Appeal.

Crown cases reserved were decided by the judges of the High Court of Justice, or at least five of them, of whom the lord chief justice of England, the lord chief justice of the common pleas, and the lord chief baron of the exchequer, or one of them, should sit. Their determination was final, and if some error of law upon the record, as to which no question should have been reserved for their decision, under 11 & 12 Vict. c. 78.

By an Order in Council of Dec. 16, 1880, the offices of lord chief baron of the exchequer and lord chief justice of the common pleas abolished, and the common pleas and exchequer divisions were merged in the queen's bench division, to which the judges of the other two divisions were attached. The court therefore now consists of three divisions only, chancery, queen's bench, and probate, divorce, and admiralty.

Any judge of any of the above divisions may be transferred by Her Majesty from one to another of the said divisions. Divisional courts of the high courts of justice may be held for the transaction of special business, consisting usually of two judges.

The reports of the judges of the cases reserved under the first division of the court, arranged thus:—

Appeal cases. Cases decided by the house of lords and privy council, cited as App. Cas. They are reported with the cases of the division from which the appeal was taken, and are indicated as, "In the court of appeal," or "C. A.;" chancery division, cited as Ch. Div.; common pleas division, cited as C. P. Div.; exchequer division, cited as Ex. Div.

Probate division. Cases decided by the probate, divorce, and admiralty divisions, cited as P. Div.

Queen's bench division, cited as Q. B. Div. There are now four series: Appeal cases, Chancery, Queen's Bench, and Probate, Divisions. Since January 1, 1881, the year of the report proceeds, the reference to the court, as: [1895] 1 Q. B. 476; [1894] 9 Ch. 302, and a new series of volumes is begun each year.

These acts provide for a concurrent administration of legal and equitable remedies, according to seven rules, which substantially provide that any one of the courts, included in the acts shall give the same equitable relief to any plaintiff or defendant claiming it as would formerly have been granted by chancery; no double relief will be granted against third persons, who parties, who have brought in by notice; all equitable estates, titles, rights, duties, and liabilities will be taken notice of as in chancery; no proceeding shall be restrained by injunction, but every matter of equity on which an injunction might formerly have been obtained may be relied on by way of defence, and the courts may in any cause direct a stay of proceedings. Subject to these and certain other provisions of the act, effect shall be given to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law, custom, or statute, as before the acts; the acts of the courts shall grant, either absolutely or on terms, all such legal or equitable remedies as the parties may appear entitled to; so that all matters may be completely and finally determined, and multiplicity of legal proceedings avoided.

Eleven new rules of law are established, which will be found in the act of 1873, c. 65, § 23, amended by the act of 1875, c. 77, § 10, of the following nature: 1. In the administration of insolvent estates, the same rules shall prevail as may be in force under the law of bankruptcy; 2. No claim of a *cestui que trust* against his trustee, for property held on an express trust, shall be subject to any statutory limitations; 3. A tenant for life shall have no right to commit equitable waste, unless such right is expressly conferred by the instrument creating the estate; 4. There shall be no merger by operation of law only, of any estate, the beneficial interest in which would not be merged in equity; 5. A mortgagor entitled for the time being to the possession of the profits of land, as to which the mortgagee shall have given no notice of his intention to take possession, may sue for such possession, or for the recovery of such profits, or to prevent or recover damages in respect of any trespass, or other wrong relative thereto, in his own name, or, unless the cause of action arises upon a lease or other contract made jointly with any other person; 6. Any absolute assignment of a chose in action, of which express notice in writing shall have been given to the debtor, shall pass the legal right thereto from the date of notice, and all remedies, who same shall have the power to give a good discharge; provided, that if the debtor, etc., shall have had notice of any conflicting claims to such debt, he shall be entitled to call upon such claimants to interplead; 7. Stipulations as to time or otherwise, which would not have been deemed of the essence of the contract in

equity, shall receive the same construction as formerly in equity; 8. A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order, which may be made either unconditionally or on terms; and an injunction may be granted to prevent threatened waste or trespass, whether the estates be legal or equitable, or whether the person against whom the injunction is sought is or is not in possession under any claim of title, or does or does not claim a right to do the act sought to be restrained under color of title; 9. In proceedings arising from collisions at sea, where both ships are in fault, the rules hitherto in force in the court of admiralty shall prevail; 10. In questions relating to the custody of infants, the rules of equity shall prevail; 11. Generally, in all matters in which there is any conflict between the rules of common law and the rules of equity, the latter shall prevail. As to discovery under the Judicature Acts, see 11 Harv. L. Rev. 187, 206.

By the act of 1891, c. 53, to settle doubts said to exist on the subject, it was enacted that the high court should be a prize court within the meaning of the Naval Prize Act of 1864, and the jurisdiction was assigned to the probate, divorce, and admiralty division of the court. An appeal was given only to the queen in council. By the same act the house of lords was authorized to call in the aid of assessors in admiralty cases.

The act of 1894, c. 16, was directed mainly to the restricting the right of appeal.

The division of the legal year into terms is abolished so far as relates to the administration of justice, but where they are used as a measure for determining the time at or within which any act is required to be done, they may continue to be referred to. Numerous other regulations are established for the arrangement of business and course of procedure under the new system, for which reference must be had to the acts. We will merely note that nothing is to affect the law relating to jury trials, and the existing forms of procedure are to be used as far as consistent with these acts. It was provided that nothing should affect the practice or procedure in—1. Criminal proceedings; 2. Proceedings on the crown side of the queen's bench division; 3. Proceedings on the revenue side of the exchequer division; 4. Proceedings for divorce and matrimonial causes. The Chancery Procedure Acts and the Common Law Procedure Acts remain in full force, except so far as impliedly or expressly repealed by the Judicature Acts. Many sections of the former Acts are repealed by subsequent legislation, all which may be found in Chitty's English Statutes, where the acts are published together as amended.

The present writer on the English courts, in summing up the results of the present system, considers that much advantage has accrued to the public through the rearrangement of the business of the courts; pleading and practice have been assimilated and simplified, and the power of each court to dispose in one action of all differences between parties has lessened the cost and delay of litigation. It has not accomplished what was expected to be the result of the change in the direction of the fusion of law and equity. This, it is thought, results largely from the fact that English law is very much older than the law of other countries, and that there is no code or *corpus juris* to which disputes may be referred, and, aside from which, there are no legal rights or obligations. Nevertheless, the dividing line between the two jurisdictions, simplified and improved in their course of procedure, has thus become one more clear and accentuated, and there is every indication that the present working of those courts is satisfactory to the public and to all branches of the legal profession; Inderwick, King's Peace 226.

JUDICATURE ACTS (IRELAND).

The act of 40 & 41 Vict. c. 57, which went into operation Jan. 1, 1878, established a supreme court of judicature in Ireland, under which acts and subsequent ones a system essentially similar in its constitution to that in England is in force.

JUDICES. See JUDEX.

JUDICIAL. Belonging to the office of a judge; as judicial authority.

JUDICIAL ACT. See ACT.

JUDICIAL ADMISSIONS. Admissions of the party which appear of record in the proceedings of the court. See ADMISSIONS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. In English Law. A tribunal formerly composed of members of the privy council, established by 2 & 3 Wm. IV. c. 92, and subsequent acts, for hearing appeals from colonial and ecclesiastical courts and the courts of admiralty, and from certain orders in lunacy. By 34 & 35 Vict. c. 91, provision was made for the appointment of four additional members; no one was qualified who was not, when appointed, or had not been a judge of the superior courts at Westminster, or a chief justice of the High Court in Calcutta, Madras, or Bombay. The qualification now required is that the appointee must be one who has held "high judicial office," as to the definition of which see JUDICIAL OFFICE.

Much of this jurisdiction, including ad-

miralty and lunacy appeals, has been transferred to the court of appeals. See JUDICATURE ACT; LUNACY ACTS. But the changes under the Judicature and Appellate Jurisdiction Acts do not seem to have disturbed the jurisdiction of the judicial committee over appeals from India and the colonies, which was, and still is, the principal function of that body. It has been said that "as the house of lords is the supreme court of appeal for Great Britain and Ireland, so also is the judicial committee of the privy council and supreme court of appeal for India, the colonies, and the Channel Islands, and as the area of British sovereignty extends, so also is extended the right of appeal to her majesty in council." 2 Brett, Com. Present Laws, Eng. 775. Recent orders in council extend this right of appeal to include Fiji, Cyprus, and Zululand.

The committee is also empowered upon reference by her majesty in council to hear appeals in ecclesiastical matters, appeals from vice-admiralty courts, petitions against schemes of the charity commissioners, and petitions for the extension of letters patent; *id.*

See also Macpherson's Practice of the Judicial Committee of the Privy Council, the introduction of which contains an extract from Lord Brougham's eloquent description of the jurisdiction.

JUDICIAL CONFESSIONS. See CONFESSIONS; PRELIMINARY EXAMINATION.

JUDICIAL CONVENTIONS. Agreements entered into in consequence of an order of court; as, for example, entering into a bond on taking out a writ of sequestration. 6 Mart. La. N. S. 494.

JUDICIAL DECISIONS. The opinions or determinations of the judges in causes before them. Hale, Hist. Cr. Law 68; Willes 666; 3 B. & Ald. 122; 1 H. Bla. 63; 5 M. & S. 185. See DICTUM; JUDGE-MADE LAW; PRECEDENTS.

JUDICIAL DECLARATION. In Scotch Law. The statement made by one of the parties to a suit, when judicially examined as to the particular facts on which the case rests. The term corresponds with admissions (*q. v.*) in English law.

JUDICIAL DISCRETION. See DISCRETION.

JUDICIAL DOCUMENTS. The papers and proceedings which constitute or become part of the record of a litigation. They include the writs, pleadings, documentary proofs, verdicts, inquisitions, judgment, and decrees incident to a cause or judicial proceeding.

Inquisitions, examinations, depositions, affidavits, and other written papers, when they have become proofs of its proceedings and are found remaining on the files of a judicial court, are judicial documents. A deposition after being received and filed as such is a judicial document and can only be proved as such, and is not admissible as a written statement or confession of deponent. It cannot be received in part and excluded in part; 27 Me. 308.

Judicial documents are thus classified by Starkie: 1. Judgments, decrees, and verdicts. 2. Depositions, examinations, and inquisitions, taken in the course of a legal process. 3. Writs, warrants, pleadings, bills, and answers, etc., which are incident to judicial proceedings.

As to the admissibility and effect of such documents, see, generally, Stark. Ev., Sharsw. ed. [316].

JUDICIAL DUTY. Within the meaning of a constitution, such a duty as legitimately pertains to an officer in a department designated by the constitution as judicial. 115 Mo. 36.

JUDICIAL ETHICS.] See ETHICS, LEGAL.

JUDICIAL FACTOR. In Scotch Law. An administrator or steward appointed by the court of session for the management of an estate which for any reason is *in custodia legis*. See Ersk. Pr. 258.

JUDICIAL FUNCTION. The exercise of the judicial faculty or office.

The capacity to act in the specific way which appertains to the judicial power, as one of the powers of government.

The term is used to describe generally those modes of action which appertain to the judiciary as a department of organized government, and through and by means of which it accomplishes its purposes and exercises its peculiar powers.

JUDICIAL LEGISLATION. See JUDGE-MADE LAW.

JUDICIAL LIABILITY. See JUDGE; 6 Am. Dec. 333.

JUDICIAL MORTGAGE. In Louisiana. The lien resulting from judgments, whether these be rendered on contested cases, or by default, whether they be final or provisional, in favor of the person obtaining them.

JUDICIAL NOTICE. A term used to express the doctrine of the acceptance by a court for the purposes of the case, of the truth of certain notorious facts without requiring proof.

The classes of facts of which judicial notice will be taken are judicial, legislative, political, historical, geographical, commercial, scientific, and artistic, in addition to a wide range of matters arising in the ordinary course of nature or the general current of human affairs which rest entirely upon acknowledged notoriety for their claims to judicial recognition; Wade, Notice 1403.

If unacquainted with such fact, the court may refer to any person or any document or book of reference for his satisfaction in relation thereto; or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference; Steph. Ev. Art. 59.

Courts will take judicial notice:—of legislative enactments—which are recognized as public acts within the state or territory in which the court is held; 20 Ind. 82; 137 U. S. 214; 123 *id.* 1; 117 *id.* 401; 22 U. S. App. 187; 9 How. 127; 7 Kan. 426; 28 Tex. 452; 17 Md. 309; 13 Mich. 481; 16 Cal. 220; 69 Me. 314; 41 N. J. L. 29; 43 La. Ann. 959; 80 Wis. 407; 75 Mo. 182; and of a private act when expressly recognized and amended by a public act; 6 Ill. App. 157; of a long prevailing construction of a statute by executive officers; 29 L. R. A. (Fla.) 507; of the public statutes of the several states; 15 U. S. App. 332; of the statutes under which city improvements are made; 99 Cal. 17 (but not of a city ordinance; 80 Md. 493); that a city is duly incorporated; 132 Ind. 189; of the corporate existence and names of the counties of a state; 93 Ala. 388.

A court takes judicial notice of its own action in the same cause; 110 Mo. 350; or a state court of the decision of the supreme court of the United States setting the law of the same case; 17 S. W. Rep. (Ky.) 287; of the acts of congress; 70 Cal. 163; 30 Ill. 279; 134 N. Y. 156; 83 Mo. 21; 28 Tex. 452; 10 Ind. 536; 6 Wis. 89; 37 Tex. 13; 16 Gratt. 284; of the rules and regulations of the principal departments of the government under express authority of an act of congress in which the public are interested; 152 U. S. 211; of acts of the executive in relation to declaring a guano island to be within the jurisdiction of the United States; 137 U. S. 224; but not of regulations of the land office; 49 Fed. Rep. 54. The lower courts of the United States and the supreme court, on appeal from their decisions, take judicial notice of the constitution and public laws of each of the states of the Union; 112 U. S. 452; 114 *id.* 218; 159 *id.* 657; of the laws of Pennsylvania existing prior to the constitution; 6 U. S. App. 649. Without special enactment, the law merchant, governing the transfer of commercial paper by indorsement, will be noticed by the courts, where such law has not been abrogated by statute; 41 N. J. L. 29; 12 Cl. & F. 787; 3 C. B. 519; as will the general usage and customs of merchants; 91 U. S. 37 (if they are intel-

ligible without extrinsic proof; 23 Beav. 370; military orders of a general character within the district in which the courts are held, when such orders affect judicial proceedings, and are issued by officers of recognized authority, will be noticed; 20 La. Ann. 141; 36 Tex. 141. In states where the common law has been adopted, it will be presumed that the same law prevails in a foreign state, unless otherwise proved; 1 Houst. 538; 28 Miss. 156; 23 Tex. 639; 80 Ind. 185; 11 N. Y. 437; 39 Ala. 468; 28 Vt. 776; but courts will in general refuse to notice a common-law rule different from their own; 19 Mo. 84; 11 Ind. 331; and although the supreme court take judicial notice of the laws of each state in the Union, yet courts of the several states, which are considered as foreign to one another, are not bound to take judicial notice of the laws of any other state; 2 Freem. Judg. § 571. See FOREIGN LAW.

Judicial notice will be taken of the existence and titles of all the sovereign powers in the civilized world which are recognized by the government of the United States, of their respective flags and seals of state; 7 Wheat. 273, 335; L. R. 2 Ch. App. 585; the status of sovereigns; [1894] 1 Q. B. 149; of the law of nations; 14 Wall. 170, 188; of foreign admiralty and maritime courts; 4 Cra. 299, 434; and their notaries public; 8 Wheat. 326, 333; of a treaty with a foreign government; 17 U. S. App. 427; or with Indian tribes; 46 Fed. Rep. 363; 15 *id.* 489; 3 Wis. 709; of the date of the consummation of such treaties; 5 Minn. 78; 16 *id.* 525; of the laws and regulations of Mexico prior to the cession under the treaty of Guadalupe Hidalgo; 141 U. S. 546; of the accession of the chief executive of the nation, and of their own state or territory, his powers and privileges; 33 Miss. 508; 5 Wis. 308; 34 Neb. 435; and the genuineness of his signature; 4 Mart. La. 635; the heads of departments and principal officers of state; 91 U. S. 37; and the public seal; 2 Halst. 553; 3 Johns. 310; the election and resignation of a senator of the United States, or the appointment of a cabinet or foreign minister; 91 U. S. 37; 2 Rob. La. 466; marshals and sheriffs; 27 Ala. 17; 80 Wis. 150; and the genuineness of their signatures; 10 Mart. La. 196; of the law regulating an officer's fee; 129 Ind. 535 (but not their deputies; 10 Ark. 142); of courts of general jurisdiction, their judges; 2 Ohio St. 223; 34 N. E. Rep. (Ind.) 613; their seals, regular terms, rules, and maxims in the administration of justice and course of proceeding; 10 Pick. 470; 17 Ala. 229. The supreme court, on appeal from the circuit court, takes judicial notice of the days of general public elections of members of the legislature, and of members of the constitutional convention of a state, as well as of the time of the commencement of its sitting, and the date when its acts take effect; 159 U. S. 651; see 91 *id.* 37; 6 Wall. 499; 117 U. S. 401. Courts take judicial notice that primary elections are an essential part of our political system; 125 Ind. 207; see 135 *id.* 526; of public proclamation of war and peace and special days of fast and thanksgiving; 4 Md. 409; 110 Mo. 286; see 51 Fed. Rep. 260; of the public proclamations of pardon and amnesty; 145 U. S. 546; of the sittings of congress and also of their own state and territorial legislatures and their established and usual course of proceeding, and the privileges of the members, but not the transactions on the journals; 13 Wall. 154; 45 Ill. 119; 8 Ind. 156; 14 Bush 284; *contra* (as to the journals), 48 Ala. 115; 13 Mich. 481. The English courts have refused to take notice of journals of the house of commons; Hob. 109; but they take notice of the privileges of the house; 9 Ad. & E. 107; 4 Jur. 70; 3 P. & D. 330; and of its standing orders; L. R. 2 Eq. 364.

Courts will take judicial notice of the general geographical features of their own country, or state, and of their judicial district, as to the existence and location of its principal mountains, rivers, and cities; 27 Ind. 233; 128 *id.* 555; 133 *id.* 178; 40 N. H. 420; 131 N. Y. 617; 141 Ill. 469; 7

C. C. App. 444; 99 Cal. 577; 19 U. S. App. 266; 121 Pa. 109; 57 Ark. 359; 86 Ala. 88; 150 Mass. 221; and that certain places constitute the chief cities or commercial centres of a state; 83 Tex. 650; and of the geographical position and distances of foreign countries and cities in so far as the same may be fairly presumed to be within the knowledge of most persons of ordinary intelligence and education within the state or district in which the court is held; 91 U. S. 37; and see 58 Fed. Rep. 729; and of the boundaries of the several states and judicial districts; 91 U. S. 37; of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government; 137 U. S. 214; 117 *id.* 401; that the districts into which the United States are divided for revenue purposes have defined geographical boundaries; 104 *id.* 41.

The state courts will take judicial notice of the local political divisions of their own state into counties, cities, townships, and the like; 40 N. H. 420; 2 Me. 453; of the population of cities and towns according to the census reports; 3 Ind. App. 399; 94 Ill. 430; 64 Cal. 87; 81 Wis. 440; 133 Ind. 178; and of the length of time ordinarily required to complete an enumeration of the inhabitants of a state; 135 N. Y. 473; of their relative positions but not of their boundaries, further than described in public statutes; 39 Me. 263; 28 Ind. 429; 19 Ia. 319. As to geographical facts, see 10 Abb. N. C. 116.

Judicial notice is also taken of any matters of public history affecting the whole people, and also public matters affecting the government of the nation, or of their own particular state or district; 16 How. 416; 91 U. S. 37; 56 N. J. L. 696; 147 Ill. 66; 1 Abb. 169; 67 Ga. 260; 50 Ala. 537; 13 Ct. Cl. 117; 64 Ind. 553; 2 Cal. 183; but see 28 Tex. 294; 6 Heisk. 202; of the general facts of natural history; 5 C. C. App. 359; 55 Fed. Rep. 964; of the rules of arithmetic; 97 Ala. 159; of legal weights and measures; 4 Tenn. 314; and coins; 5 M'Lean 23; 10 Ind. 36; the character of the general circulating medium, and the public language in reference to it; 3 Monr. 149; but not the current value of the notes of a bank at any particular time; 40 Ala. 391; of the custom of the road as to passing to the right or left; 8 C. & P. 104; and of the sea, if general and notorious; L. R. 3 P. C. 44; and the United States courts especially take judicial notice of the ports and waters of the United States, in which the tide ebbs and flows; 91 U. S. 37.

Of all things which must have happened according to the ordinary course of nature; as the coincidence of days of the week with those of the month; 97 Ala. 647; 6 Ind. App. 97; 84 Me. 111; the ordinary limitation of human life as to age; 97 Ala. 159; of the average height of a man; 23 N. E. Rep. (N. Y.) 9; of the Carlisle Tables in estimating the probable length of life; 151 U. S. 463; of the period of gestation; 2 East 202; the course of time of the heavenly bodies; 6 Ohio Cir. Ct. R. 230; 61 Cal. 404; 47 Conn. 179; 65 Md. 11; the mutation of seasons, and their general relations to the maturity of crops; 91 U. S. 37; of the meaning of words in the vernacular language, but not of catch-words, technical, local, or slang expressions; 20 Pick. 206; 15 Md. 276; 107 Cal. 187; 3 N. Dak. 407 (although formerly the local use of language was noticed; 11 M. & W. 295; 1 Bul. 174; Rolle, *Abrr. Court* C. 6, 7; 12 Q. B. 624); such ordinary abbreviations as by common use may be regarded as universally understood; as abbreviations of Christian names, and the like; 91 U. S. 37; 37 Ala. 216; 13 Mo. 89; 54 N. W. Rep. (N. Dak.) 404; but not those which are in any degree doubtful or difficult of interpretation; 8 Tex. 205.

That railroad passenger trains are operated to carry passengers for hire; 32 U. S. App. 182, that a street railway company is a common carrier of passengers; 65 Conn. 201; that two railroads touching the same points are parallel and competing lines; 72 Tex. 404; of notorious customs of rail-

road companies regarding passengers and freight; 82 Ia. 312; 13 U. S. App. 183; that telegraph lines are necessary to the operation of railroads; 133 Ind. 69; of the relation between the conductor and brakeman of a freight train; 111 N. C. 482; of the duty of passenger conductors to enter and leave their trains while in motion; 102 Mich. 289.

That the attendants of a church are not limited to its members; 161 Mass. 269; that many unincorporated church societies have been in existence; 158 Ill. 631; of the contents of the Bible and the general doctrines maintained by different religious sects; 76 Wis. 177; 18 R. L. 258; but see 16 Kan. 192; 31 Barb. 49.

And, finally, all such matters as may be considered as within the common experience or knowledge of all men; 28 Ala. 83; as, that natural gas is a dangerous agency; 128 Ind. 555; but that it will not explode spontaneously without some other agency acting upon it; *id.* 335; that leaks occurring in gas pipes require immediate repair; 140 Ind. 107; that horses well broken and kind will take fright at a moving vehicle drawn by an invisible motor; 56 N. J. L. 696; that cattle in Texas are infected with a microbe or germ of the Texas or Spanish fever, which can be communicated to other cattle; 126 Mo. 168; of the objectionable character of an undertaker's establishment, in a residential portion of a city; 139 N. Y. 93; of the ordinary duties of a bank cashier; 31 Fed. Rep. 697; that beer is a fermented liquor; 44 Mo. App. 81; 2 Tex. Civ. App. 296; 54 Fed. Rep. 138; 44 *id.* 438; that whiskey is an intoxicating drink, as is also a whiskey-cocktail; 75 *id.* 637; that the selling of a proprietary medicine depends less on its merits than upon advertising; 37 Fed. Rep. 863; that hoppers with chutes beneath them are used for many different purposes; 159 U. S. 611.

It has been said that the courts should exercise this power with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be solved promptly in the negative; per Swayne, J., in 91 U. S. 43. In that case the court took judicial notice, in a patent case, of the principle of operation of an ice-cream freezer, and the subject of judicial notice was there fully discussed.

See, generally, 2 Cent. L. J. 393, 409; 3 *id.* 364; 14 *id.* 114, 125; 5 So. L. Rev. N. S. 214; Wade, Notice §§ 1403, 1417; and see 3 Harv. L. Rev. 285; Elliott, General Practice §§ 182, 188, 408, 426; Thompson, Trials; 4 L. R. A. 33; 24 Am. L. Reg. 553; 28 *id.* 193, 321, 449; 3 Field, Lawy. Br. 248; Rob. Pat. § 1009.

JUDICIAL OFFICE. A term used to define qualifications of additional members of the judicial committee of the Privy Council (*q. v.*) provided for by 34 & 35 Vict. c. 91. By the later acts the phrase "high judicial office" is defined to mean the office of Lord Chancellor of Great Britain or Ireland, judge of the high courts in England or Ireland, judge of the court of appeal of England, judge of the court of session in Scotland, paid judge of the judicial committee, lord of appeal in ordinary, or member of the judicial committee. 39 & 40 Vict. c. 59, § 25; 50 & 51 Vict. c. 70, § 5.

JUDICIAL POWER. The authority vested in the judges.

The authority exercised by that department of government which is charged with the declaration of what the law is and its construction so far as it is written law.

The power to construe and expound the law as distinguished from the legislative and executive functions.

The use of the term judicial power in sec. 2, Art. III. of the Constitution of the United States furnished an occasion to Mr. Justice Miller for a comment upon the difficulty of defining the term; he says, "It will not do to answer that it is the power exercised by the courts, because one of the very things to be determined is what power

they may exercise. It is, indeed, very difficult to find any exact definition made to hand. It is not to be found in any of the old treatises, or any of the old English authorities or judicial decisions, for a very obvious reason. While in a general way it may be true that they had this division between legislative and judicial power, yet their legislature was, nevertheless, in the habit of exercising a very large part of the latter. The house of lords was often the court of appeals; and parliament was in the habit of passing bills of attainder as well as enacting convictions for treason and other crimes.

"Judicial power is, perhaps, better defined in some of the reports of our own courts than in any other place, and especially so in the Supreme Court of the United States, because it has more often been the subject of comment there, and its consideration more frequently necessary to the determination of questions arising in that court than anywhere else. It is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, Const. U. S. 314.

Another writer directs attention to the absence of a real and just boundary line between judicial and legislative power in the early English jurisprudence. "In the early ages of the English system, however, the line between the judiciary and the legislature was not distinctly marked, and Parliament, consisting of one great chamber, in which sat both lords and commons, not only made but also interpreted the laws. But it has now long been settled in England that the interpretation of statute law belongs to the judiciary alone, and in this country they have claimed and obtained an equal control over the construction of constitutional provisions." Sedg. Const. L. 18.

"The power conferred upon courts in the strict sense of that term; courts that compose one of the great departments of the government; and not power in its judicial nature, or quasi judicial, invested from time to time in individuals, separately or collectively, for a particular purpose and limited time." 1 Blatch. 635; 65 Barb. 444, 448.

"Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." 9 Wheat. 738.

Nevertheless, leaving out of question the greater necessity of real definition and separation of the legislative and judicial power in American constitutional law there is a distinction between judicial power and political power which was fully recognized in English law, continues to be so in American law, and is entirely independent of the case growing out of the constitutional delimitation and separation of the three powers of government.

The distinction between judicial and political questions was fully considered in *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, and it was held by Lord Hardwicke, L. C., that while the dispute as to original boundaries between provinces was a political question to be determined by the king and council, yet where the case arose under an agreement between the parties it was a judicial question.

In *The Nabob of Carnatic v. East India Co.* (1 Ves. Jr. 371) a plea that the defendant was invested with sovereign powers, and therefore not answerable with respect to the exercise of them in a court of justice, was overruled; but after the case came to hearing the bill was dismissed upon the ground that the case involved a treaty between persons acting as independent states, and the circumstance that the defendants were subjects merely with relation to England had nothing to do with the matter which was not a subject of private municipal jurisdiction; 2 *id.* 56.

The Cherokee nation was held to be a state but not a foreign state in the sense of the constitution, and therefore could not

maintain an action against the state of Georgia in the courts of the United States; 5 Pet. 1. In this case Chief Justice Marshall said that the propriety of interposition by the court to control the state legislature "savors too much of the exercise of political power to be within the province of the judicial department." Mr Justice Thompson in a dissenting opinion which upheld the jurisdiction was careful to say, "I do not claim for this court the exercise of jurisdiction upon any matter properly following under the denomination of political power, and again I do not claim as belonging to the judiciary the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief." 5 Pet. 51. See also 4 Dall. 4.

It was very earnestly discussed in one of the early cases concerning the boundary between two states, whether the jurisdiction in such cases, now so well established, was included in the judicial power as understood by the constitution of the United States, and it was held that although the constitution did not in terms extend the judicial power to all controversies between two or more states, yet it in terms excluded none, whatever might be their nature or object; 13 Pet. 657. In this case the court recognized the distinction between political and civil controversies and held that the case in question was the latter because it depended first upon a fact, and second upon the question whether an agreement between the states was void or valid, both of these presenting not a political but a judicial controversy. And it was said that where there was submission by sovereigns or states of a controversy between them, from that moment the question ceased to be a political one but comes immediately within the judicial power for determination by a court.

In *Georgia v. Stanton* (6 Wall. 50, 71) it was said that the distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country that we need do no more than refer to some of the authorities on the subject. The suit invoked the power of the court to restrain the Secretary of War and his subordinates from executing acts of congress which, it was alleged, would annul and abolish the existing state government. In refusing the injunction the court said that it could hardly be denied that the case called for the judgment of the court upon political questions and upon rights, not of persons or property, but of a political character. "For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in judicial form, for the judgment of the court." 6 Wall. 77.

The separation of the three departments among which, in modern systems, the sovereign powers of government are distributed, and to some extent the difficulty involved in the effort to distribute those powers, are discussed in the title EXECUTIVE POWER, which, with the title LEGISLATIVE POWER, should be read and referred to in connection with the present title.

Separation of powers, though generally adopted, does not always rest upon a constitutional basis. Whether it does or does not do so affects very materially the judicial power with respect to its stability and independence. In England, not only the supreme legislative authority, but the power of deciding upon the constitutionality of its acts, is vested in parliament, there being no fundamental law in the nature of a written constitution to which that body must conform. The phrase English constitution is one of constant use, and there is, undoubtedly, a body of fundamental principles which are recognized as having been finally accepted as inviolable and which are grouped under that name.

A recent writer says that it "is made up of certain views which have been read out or read into English history and embodied in short and governmental acts,"—"It is in a large part a matter of theory and opinion," and "the substance of it may be summed up in one sentence. All the powers of government are in the hands of parliament." Macy, Eng. Const. 14.

Practically modern opinion is undivided as to this omnipotence of parliament, and under no form of law can its action be restrained or reviewed. Such restraint as is imposed upon it is a moral one which exists only in the potency of certain principles which, in the United States, have been crystallized into constitutional safeguards, while in England they remain, as it were, in solution, affecting, however, and giving form and tone to the government and the body politic. The highest judicial power in England is subordinate to the legislative power, and bound to obey any law that parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Charta, or the Petition of Rights. Taney, C. J., in 117 U. S. 699, appendix.

It is doubtless true that the parliament could, as a matter of law, abolish the courts and assume to itself the administration of justice, but even in that case there would still exist the judicial power now administered by courts, and it would be equally distinct as now from the legislative function, even if both were exercised by the same agency of government.

The French constitution of Sept. 3, 1791 (the first written constitution in Europe), recited that the judicial power cannot in any case be exercised by the legislative body or by the king, and that tribunals cannot interfere with the exercise of the legislative power nor suspend the execution of the laws, nor encroach upon administrative functions, nor cite any administrators to appear before them on account of their functions. This comprehensive limitation attributed by a thoughtful writer on this subject to the French judicial constitution, which were hostile to any judicial competency to criticize legislation for unconstitutionality. It is to this influence that the writer referred to attributes the different views on this subject which are found in the French constitution referred to and that of the United States. Coxe, Jud. Pow. 78. From a historical review on the subject the author last cited concludes that in France long before 1787 the French judicial power had been used to declare legislation to be void because contrary to the views of right entertained by the court; and that, by the further contrast to American views, the judicial power question existed under an unwritten constitution and was expressly prohibited under a subsequent written constitution.

Under the Swiss constitution the federal government is organized to some extent upon the idea of the separation of powers, but as it has been observed, "the separation of powers is not very strictly observed between the federal assembly and the federal council, nor indeed . . . between the judicial authority and the political federal authorities;" Adams and Juske, *Federalism on the Swiss Confederation*, 48. The Swiss federal tribunal is bound by all laws passed by the federal assembly without qualification; which is not competent to decide whether the federal law be constitutional or unconstitutional; this is declared not to be a judicial question, nor is it such a question as to whether a constitution or a law of a canton contains anything contrary to the constitution of the confederation, such a question is extra-judicial and is decided by the federal assembly; Vincent, *Swiss Government* 34, 142. Another writer says that the Swiss federal court, although instituted in imitation of the American, differs from it in an essential point, while in the United States judicial power alone extends to declaring a law unconstitutional, under the Swiss constitution some points of cantonal law are reserved and the federal legislature is made to share its own powers with the authorized interpreter of the constitution; 1 Bryce, *Am. Com.* 254.

In Germany it is said that the law of a state must yield in case of conflict between it and constitutional law of the empire, and that the judicial tribunal decide between them, but that it was uncertain whether such tribunal can decide upon a question of the constitutionality of a law of the empire; Coxe, *Jud. Pow.* 96.

In Canada it is said that the supreme court and the privy council in England have concurred in recognizing the rights of provincial courts to pass upon the constitutionality of the laws enacted by the provincial legislatures and the Dominion parliament; Doutre, *Const. of Canada*, preface.

For an extended historical commentary on previous systems of law, with respect to the limitations of judicial power in passing upon the validity or effect of legislation, see Coxe, *Jud. Pow.* pt. 1.

The English doctrine of the absolute inviolability of a legislative act never did acquire a footing in this country. It was repudiated by James Otis nearly a quarter of a century before the framing of the American constitution. He contended before the superior court of judicature for the province of Massachusetts, that the validity of statutes must be determined by courts of justice. This doctrine afterwards became the principle of American constitutional law. Before 1787, the colonial courts refused to grant writs of assistance, on the ground that general writs of assistance were unconstitutional; Quin. 504; and see 1 Bay 252, where an act passed by the colonial legislature was declared void; Mart. (N. C.) 49. Judicial questions of a national character were, under the confederation, determined by a court;

Articles of Confederation, Art. 9; and the framers of the constitution ordained and established a judiciary as a necessary department, and used in it the phrase *judicial power* as one well understood and not needing definition in the instrument itself. Federalist, Nos. 22, 28, 80, 81; 3 Elliott's Deb. 142, 143.

It is the settled law in this country that the judicial power extends to and includes the determination of the constitutionality and validity of legislative acts, although the propriety of this conclusion is still sometimes challenged. For a discussion of the subject, its history, and the authorities, see CONSTITUTIONAL.

But a court has no power to declare a duly enacted statute unconstitutional simply because it may seem to the court that such legislation does not conform to the general theory upon which the government is founded; 51 Fed. Rep. 774.

The constitution of the United States declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." Art. 3, s. 1.

It has been remarked that the essential character of its judiciary is a distinct recognition by the constitution of the nationality of the federal government; Pom. Const. L. § 108.

By the constitutions of the several states, the judicial power is vested in such courts as are enumerated in each respectively. See the articles on the several states. There is nothing in the constitution of the United States to forbid or prevent the legislature of a state from exercising judicial functions; 2 Pet. 413; but even in the absence of special limitations in the state constitutions, legislatures cannot exercise powers in their nature essentially judicial; 13 N. Y. 391. The different classes of power have been apportioned to different departments, and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others; Cooley, Const. Lim. 106. The legislative power cannot from its nature be assimilated to the judicial; the law is made by the one, and applied by the other; 1 N. H. 204; 11 Pa. 494; 19 Ill. 282; 1 Ohio St. 81; 13 N. Y. 391; 54 N. J. L. 288; 29 Fla. 1. In the oft-repeated phrase of Chief Justice Marshall, "the legislature makes, the executive executes, and the judiciary construes, the law." 10 Wheat. 1, 46.

Two capital distinctions have been noted between the judicial power in England and in the United States,—the first grows out of the existence in the latter country of a written constitution restricting the power of the legislature, from which springs the duty of the courts to declare invalid any act which is expressly prohibited by or which is not authorized by the constitution, either expressly or by implication. The other results from the power of construction imposed upon the American judge by the brevity of the constitution. Continuing the last thought, it is said:

"The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general words cannot be foreseen until they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes, which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretations are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American constitution, as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work but the work of the judges, and most of all one man, the great Chief Justice Marshall." Bryce, Am. Com. 246.

The American system of leaving consti-

tutional questions to be settled by the courts is considered by the author quoted to secure very great advantages over the theory which was advanced at the time of the formation of the federal government of subjecting the acts of the state legislature to the veto of congress. The result is, as he puts it, that "the court does not go to meet the question; it waits for the question to come to it. When the court acts, it acts at the instance of a party, sometimes the plaintiff or the defendant may be the national government or a state government, but far more frequently both are private persons, seeking to enforce or defend their private rights." He illustrates this by the fact that the doctrine of *Fletcher v. Peck*, 9 Cra. 87, that a repeal of a grant by the state to an individual impairs the obligation of the contract, was determined in an action between individuals, the result being that the decision upon the validity of the action of the state is relieved from those opinions which might affect its determination, if the state itself were a party; 1 Bryce, Am. Com. 252. A more far-reaching case which might be used as an illustration is the Dartmouth College Case, 4 Wheat. 518, in which an action between an individual and a private corporation, resulted in placing upon the states a limitation of power second to few if any contained in their constitutions.

Under the American constitutional system, there is to be found no force more potent, effective, and far-reaching than this power of constitutional construction which is now unquestionably vested in the courts. Through it the judicial power, in a way, approaches much more nearly to the absolute ultimate authority of the English Parliament than does the legislative power. It has recently been said: "We proceed upon the theory that our constitution is written: and in our written constitutions, state and national, we have provided courts for the purpose of passing upon the laws enacted by the legislatures and determining their constitutionality. We do not know, therefore, whether a governmental act is valid or not until a court of competent jurisdiction has passed upon it. We depend upon our courts to tell us what our constitution means. Our real constitutions are thus found not wholly in the written documents bearing the name, but in the decisions of the supreme court of the United States and in those of the highest courts in the various states. The study of the American constitution is in large part, from beginning to end, a study of judicial decisions." Macy, Eng. Const. 89.

Mr. Bryce considers it a weak point in the federal constitution that a decision of the supreme court may be obtained in reversal of a former one by the appointment of judges to fill vacancies favorable to such reversal, or in case there be no vacancy, by the joint action of congress and the executive in increasing the number of judges. Of the former method, he instances the *Legal Tender Cases*, 1 Am. Const. 264, 269, 297. This reference served to put in a very definite form the somewhat widespread impression that appointments of judges were made for the purpose of reversing the previous decision of the court. The possibility of such action in any case by the executive is so serious a contingency that this particular charge has been recently made the subject of critical examination by Senator Hoar, whose brother was then attorney general of the United States. His pamphlet is a valuable historical document, and shows by the dates that the appointments in question were made prior to the decision, and from the testimony of members of the cabinet, that they had been agreed upon long before, neither the president nor any member of the cabinet having any knowledge as to the probable decision; see 5 Am. Lawy. 4.

The fact that the suggestion of any motive in the appointment of judges has so rarely been made may be considered strong evidence that the danger alluded to is not a serious one. But even if it were, it is a danger necessarily incident to all human institutions. No system of checks and bal-

ances has ever been devised, and probably none ever will be, so perfect as to dispense with the need of integrity and good faith in the administration of government.

It may be noted here, as already stated under CONSTITUTIONAL, that Chief Justice Gibson, in 12 S. & R. 345 (1825), ably contended, after the decision in *Marbury v. Madison*, 1 Cra. 176, that a state court is bound to execute an act repugnant to the constitution of a particular state, but not one repugnant to the federal constitution; though in 2 Pa. 281, he said to counsel that he had modified his opinion on this subject.

A state legislature cannot annul the judgments nor determine the jurisdiction of the courts of the United States; 5 Cra. 115; 2 Dall. 410; nor authoritatively declare what the law is or has been, but what it shall be; 2 Cra. 272; 4 Pick. 28; 3 Mart. La. 248; 10 id. 1; 3 Mart. La. N. S. 551; 5 id. 519.

Congress cannot interfere with or control state courts except in so far as the federal courts have appellate jurisdiction.

Congress cannot without the consent of the state constrain the state courts to entertain or act upon applications for naturalization; 32 Atl. Rep. (N. J.) 743.

The judicial powers of the United States, first under the constitution as originally adopted, extended to cases "between a state and citizens of another state," but the very early case of *Chisholm v. Georgia*, 2 Dall. 419, in which the plaintiff as executor brought an action of *assumpsit* against the state, which was sustained by the court, resulted in the adoption of the 11th amendment. As a consequence it was held that cases past or present in which the state was a party were removed from the jurisdiction of the court; 3 Dallas 378; but the mere fact that a state may be interested does not oust the jurisdiction; 9 Wheat. 739; in a comparatively late case the soundness of the opinion in the case of *Chisholm v. Georgia* was doubted, the suggestion being that the clause of the constitution giving jurisdiction in such cases was properly limited to cases cognizable in the courts of a state or suits by a state against citizens of another state; 134 U. S. 1. The grant of judicial power in all cases in law and equity, etc., was held not to authorize a writ of error in the circuit court of the District of Columbia in a criminal case; 3 Cra. 159; but this provision is held generally to include criminal as well as civil proceedings, and the power so vested in the federal courts is independent of the judiciary of the states; 100 U. S. 257.

In the *United States v. Smith* (1 South. N. J. 33) the action was to recover a penalty under the provisions of an act of congress. The question was raised by plea whether under the act jurisdiction would properly be given to a state court. A demurrer to the plea was overruled, and in a dissenting opinion Southard, J., discusses at length the question, what is the judicial power of the United States.

The distinctive features which characterize the three great departments of government are in the main easily recognized. There is little difficulty in determining whether a power is judicial or executive, and the questions arising with respect to those distinctions result not so much from inherent difficulty in the subject as from a tendency in modern constitutions and legislation to confuse the functions of the two departments in the classes of cases of which illustrations have been already cited. So it may be said that ordinarily there ought to be little difficulty in distinguishing legislative and judicial powers. Properly understood, the two functions are entirely different, and yet there are points of contact from which spring disputed cases, such, for example, as the regulation of procedure, the application of rules of evidence, the attempt to regulate judicial discretion, and many others. This may involve, on the one hand, an unconstitutional delegation of legislative power, or, on the other, the assumption by the legislature of some portion of the authority which belongs to the courts. The

cases in which it is a question whether a certain power is legislative or judicial are mainly considered under the title of LEGISLATIVE POWER, to which reference should be made. As a reason why there is naturally found much debatable ground between the judiciary and the legislature, it has been suggested that:

"In most countries the courts have grown out of the legislature; or rather, the sovereign body, which, like parliament, was originally both a law and a legislature, has delivered over most of its judicial duties to other persons, while retaining some few to be still exercised by itself." 1 Bryce, Amer. Com. 235. The author just quoted enumerates the points in which America has followed the English practice. There are no separate administrative tribunals, but officials are sued or indicted in the regular courts; judges are secure in their tenure; judicial proceedings are recognized in law and not set aside by a statute within the competence of the legislature. He considers that America has improved on England in forbidding the legislature to exercise the powers of a criminal court, by acts of attainder, etc., and stands behind England in continuing to use a legislative body as a court of impeachment, the trial of disputed election cases by committees, and the disposition of public franchises, or the appropriation of private property, by legislative rather than judicial methods. Thus three pieces of ground debatable between the legislature and the judiciary, which all originally belonged to the legislature, and in America still do, have been in England made the subject of judicial power and method; *id.* 235-6. The judicial power extends to and includes only such acts as are in their nature judicial. Upon judges, as such, no functions can be imposed except those of a judicial nature." 118 Ind. 83.

It is not a judicial function to entertain appeals from county commissioners upon the propriety of annexing territory to a city, and the act authorizing such appeals is invalid; 71 Fed. Rep. 443; nor to make an arrangement for the business intercourse of common carriers such as in the opinion of the court they ought to make for themselves; 46 Neb. 682; nor to prevent the submission to the people, as directed by the legislature, of a question involving an amendment to the constitution, by enjoining the secretary of state from certifying a question; 68 N. W. Rep. (S. D.) 202.

An act authorizing a court to appoint a municipal board of review to consist of members of different political parties was held to impose political and not judicial powers, and it was not binding on the court; 27 Wkly. L. Bul. 334.

An act of congress of 1792 devolved upon the circuit courts the duty of examining pension claims and certifying them to the secretary of war. In 2 Dall. 409, the attorney general moved for a mandamus to compel the judges to proceed to hear the cases under the act, but the case was not decided, as the act was repealed. The reasons given by the circuit judges for refusing to perform the duties imposed upon them by the act are set forth in 2 Dall. 410, n. Under an act of 1793 the nature of the duties assigned to the judges were somewhat changed. This act came before the supreme court in *U. S. v. Yale Todd*. Both of these decisions are set forth in a note of Taney, C. J., in 13 How. 52, where it is said that the result of the opinions in these two cases is that the power thus conferred was not a judicial power, and therefore could not be exercised by the courts, and that as the act intended to confer the power on the court as a judicial function, it could not authorize the judges to exercise it out of court as commissioners, and this decision has ever since been regarded as constitutional law.

Acts held valid as not conferring powers other than judicial are, requiring a certificate by the court as to the value of the services of an informer; 70 Fed. Rep. 310; conferring on the court the power to establish towns; 35 S. W. Rep. (Ky.) 1112; to

establish county boundaries; 35 S. W. Rep. (Tex.) 1020; but merely ministerial powers in relation to committing inebriates cannot be assigned to the judiciary; 67 N. W. Rep. (Minn.) 207. The court has jurisdiction to determine the constitutionality of an act apportioning the state into legislative districts; 42 N. E. Rep. (Ind.) 929.

An act authorizing judges to appoint a bridge committee is not a violation of a constitutional provision prohibiting the judicial department from exercising executive functions; 29 Pac. Rep. (Or.) 356; nor is an act providing for the appointment of jury commissioners by the court in violation of the provision of an express constitutional provision prohibiting the legislature from conferring on the court or judge any power of appointment to an office; 14 S. E. Rep. (W. Va.) 407; in this case it was considered that jury commissioners were not public officers, but officers of the court.

Power may be conferred upon a judge to appoint justices of the peace; 90 Va. 679.

Where the constitution forbids the legislature to create or enlarge municipal bodies by special act, it is competent to confer upon the courts the power to determine whether the conditions prescribed by general law for such creation or enlargement have been complied with; 68 Fed. Rep. 774.

It is within the scope of judicial power to inquire whether rates of compensation, fixed by municipalities and corporations for the use of appropriated water in California, operated to deprive the owner of his property without just compensation; 74 Fed. Rep. 79.

An act authorizing a court on appeal from county commissioners to fix the salary of the county attorney is not unconstitutional as imposing legislative functions and duties on the judiciary; 47 Minn. 219.

The legislature cannot constitute the court a board to try contested elections, that power not being essentially judicial; 51 N. W. Rep. (Neb.) 137.

But while the courts are not permitted to have non-judicial duties imposed upon them, so, on the other hand, are the other departments of the government forbidden to invade or usurp the judicial power. And this is held to extend to and include everything necessarily or even properly incident to the exercise of their jurisdiction.

The power to punish contempts is strictly judicial and cannot be abridged by the legislature; 45 N. E. Rep. (Ohio) 199; 17 Col. 252; 47 Pac. Rep. (Okla.) 829; but reasonable regulations by the legislature touching the exercise of this power are binding; *id.*; but the power cannot be conferred upon an executive board; 131 Ind. 471; and an order directing a sheriff to commit a person to jail until he answers questions propounded to him by commissioners appointed to take his examination before trial is erroneous as an attempted delegation of judicial power in allowing the sheriff to determine what is compliance with the order; 17 S. E. Rep. (N. C.) 69.

Where an act provided for filling vacancies in municipal offices by a person elected by the council to serve until "the next city election," it was held that a subsequent act providing that the words quoted should be construed to mean the election at which the voters would have elected the successor without respect to the vacancy, was an invasion of judicial power as seeking to compel the courts to construe the previous act in a way contrary to its letter and spirit; 172 Pa. 140. In this case, however, Mitchell, J., filed an able dissenting opinion in which he maintained that the judgment was an "unprecedented and unwarranted invasion by the judiciary of the legislative authority," that expository acts had been in use in Pennsylvania from colonial days, and that they were "a legislative formula never heretofore questioned." See also 132 Pa. 627; where they are held to be a common form of legislative expression to which future effect must be given. In 2 Pa. 22, it was held that

"explanatory acts must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute."

A statute providing that certain corporations should be accepted by courts as "sole security" was void as an attempt to control the discretion of the court; 17 Pa. Co. Ct. R. 274.

Wherever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges; Holt, C. J., 1 Salik. 200. In this case the censors of the College of Physicians under their charter fined and imprisoned a physician for administering unwholesome pills and noxious medicines, and it was held that a certiorari would lie.

An act declaring that a failure of assessors to comply with certain provisions of the law shall not invalidate the tax is invalid, as an invasion of the judicial function; 46 Wis. 163; but an act making properly certified tax bills *prima facie* evidence of the validity of charges against the property is not; 106 Mo. 137.

The power to hear and decide proceedings for the summary disposition of tenants was held to be a judicial power, and, as such, included in the powers of the recorder conferred on the city judge of New York, and a writ of prohibition will not lie to restrain him from proceeding; 19 Abb. Pr. 136; 29 How. Pr. 176.

The phrase judicial power, as adopted in American constitutional law, includes the determination of questions of fact in equity cases. The term must be construed as vesting such power as the courts under the English and American system of jurisprudence always exercised in that class of actions, and it is not competent for the legislature to withdraw from the courts invested by the constitution with judicial power, as to matters in equity, the determination of questions in fact, as one of the established elements of that power; 23 Wis. 343, 349.

The power of laying out or altering streets vested in the mayor and aldermen of the city, whenever in their opinion the safety or convenience of the inhabitants shall require it, is judicial, and certiorari lies to remove their proceedings in such a case; 8 Pick. 218.

The court may determine whether a particular regulation of a useful business is a reasonable restriction on the constitutional right of citizens to engage in such business; 98 Cal. 73.

It frequently happens that the courts are concluded by the result of an inquiry, quasi-judicial in its character, which under some very general definitions, such as that of Lord Holt, *supra*, might be referred to the judicial power, but is required in this particular case and by the legislature or executive as a guide to their own action.

In cases where the existence of certain facts is necessary to be ascertained as a basis for determining whether it is wise to enact a statute, the ascertainment of the fact by the legislature will be considered conclusive, and its decision will not be reviewed by the courts in a collateral proceeding. As where the establishment of a court depended upon the fact that the county had a population exceeding fifty thousand, the court refused to question the action of the legislature, although it appeared by the United States census that the population of the county was less than the required amount; 112 Mo. 591; and where the legislature prohibited parents from procuring or consenting to the employment of a female child under the age of fourteen years as a dancer, the court would not review its decision that such legislation was necessary to protect the health and morals of children on the ground that the law infringed the rights of parents in some particular cases; 8 N. Y. Cr. Rep. 383.

Where a reapportionment of representatives, based upon relative changes of population, was made by act of congress to take effect two years later, it was held to be a political and not a judicial question, and the courts could not give redress for any injustice resulting therefrom; 36 Neb.

181; but with respect to apportionment of the acts of a legislature, it was held that mandamus proceedings to test their validity presented a judicial question of which the courts had jurisdiction, and not a political question with which they would not interfere; 133 Ind. 178; 83 Wis. 90; 19 N. Y. Supp. 978.

The decision of congress recognizing a claim as an equitable obligation of the government and appropriating money for its payment can rarely be the subject of review by the courts; 163 U. S. 427.

A court or judge cannot be authorized to perform legislative duties; 68 Cal. 194.

An act of the legislature provided that before any railway company should construct its roads in the streets of a city, the city authorities, or the superior court, or a judge thereof, on appeal, should approve the plan of construction. It was held that the power which the superior court or a judge thereof was required to exercise was legislative and not judicial, and therefore could not be exercised by them; 37 Atl. Rep. (Conn.) 1680.

The case discusses the question fully.

An act authorizing the court or judge allowing a mandamus to direct the manner of serving it is not a delegation of legislative powers; 63 N. W. Rep. (Minn.) 1085.

The act of July 25, 1882, authorizing judges and clerks of United States courts to issue subpoenas upon the application of the commissioner of pensions for the examination of witnesses concerning pension claims, is constitutional and under it the courts can compel witnesses to appear and testify on that subject; 78 Fed. Rep. 107. A statute authorizing judges to fix salaries of deputies or assistants employed by county officers is not unconstitutional as a delegation of legislative power to a judicial tribunal; 39 S. W. Rep. (Ky.) 49, overruling 26 *id.* 581.

Questions frequently arise as to the validity of legislative acts requiring of executive officers duties quasi-judicial in their character, the propriety of which is challenged upon the ground that they impose judicial functions upon executive officers. Such are provisions of law authorizing the removal of subordinate officers, the constitution of boards for taxation, assessment, and the like. It is a well-settled principle that "judicial functions or duties can be conferred only upon courts and judicial officers;" 118 Ind. 361; 39 Wis. 390; 83 Cal. 111. But it has been held that there is no invasion of the judicial power in making state executive officers *ex officio* of a state board of taxation; 133 Ind. 513; *id.* 609; or charging them with the duty of assessing property or serving on a board of equalization; 21 Nev. 390. So it was held that the act, authorizing the establishment of a public park in the District of Columbia, or providing that in case of disagreement between the land owner and the park commissioners the appraisal should be submitted to the president, if his approval did not impose a judicial function upon the president whose duty was merely to decide whether the United States would have the land at the appraised value, and not to decide whether such value was reasonable as respects the property owner; 147 U. S. 293; such an act merely makes the president the agent of congress to decide whether the proceedings shall be completed or abandoned; 20 D. C. 204.

A constitutional provision prohibiting the legislature from creating other courts than those mentioned in the constitution does not prevent it from authorizing appeals to a court from the decision of a license board; 33 S. W. Rep. (Ky.) 96; and where the judicial power was vested by the constitution in certain named courts, it was still competent for the legislature to provide for the removal of administrative officers in cities by the board of aldermen "sitting as a court," such power being held not strictly judicial; 36 S. W. Rep. (Ky.) 524.

The fact that the law confers on jury commissioners judicial powers in the selection of citizens for jury services does not

involve a conflict with the fourteenth amendment of the constitution; 163 U. S. 101.

Judicial powers were not conferred on the governor by authorizing him to investigate charges of official misconduct of state officers with a view to their removal; 56 Kan. 231; or by an act authorizing him to remove any officer appointed by him; 2 Okl. 277; and the action of a governor in removing an officer under such act will not be reviewed by the courts; *id.* 47 La. Ann. 53.

The power to remove city officers for cause is administrative, not judicial, and may therefore be conferred on a non-judicial body; 90 Wis. 612;

Questions of power between the judiciary and the executive have generally arisen upon applications for a mandamus to compel or an injunction to prevent action of an executive officer.

The question of power to issue a mandamus in such cases is discussed under the title EXECUTIVE POWER, and the authorities are there collected. A discussion of the subject, not strictly in a suit at law, but as the result of one, the participants in which were a judge and a quasi-judicial officer, may be referred to here.

In *Gilchrist v. The Collector of Charleston* it was held that the circuit court has no power to issue a mandamus to a collector, commanding him to grant a clearance, and that all instructions from the executive which are not supported by law are illegal, and no inferior officer is bound to obey them; 4 Hall, Am. L. J. 429. This decision was the subject of a letter from Cæsar A. Rodney, attorney general, to the president criticising the action of the court and challenging its jurisdiction; *id.* 433. In reply to this letter Mr. Justice Johnson, who presided at the trial, made some remarks, in the course of which he says: "Jurisdiction in a case is one thing: the mode of exercising that jurisdiction is quite another;" the jurisdiction of the court must be derived from the constitution, and he expressly disclaims "any other origin of our jurisdiction, especially the unpopular grounds of prerogative and analogy to the king's bench."

In asserting the necessity of the recognition of the right of the courts to coerce an executive officer by a judicial order, he insists that such authority is necessarily involved in the use of the term *power* in the constitution: "The term judicial power conveys the idea both of exercising the faculty of judging and of applying physical force to give effect to a decision. The term power could with no propriety be applied, nor could the judiciary be denominated a department of government, without the means of enforcing its decrees. In a country where laws govern, courts of justice necessarily are the medium of action and reaction between the government and the governed. The basis of individual security and the bond of union between the ruler and the citizen must ever be found in a judiciary sufficiently independent to disregard the will of power, and sufficiently energetic to secure to the citizen the full enjoyment of his rights. To establish such a one was evidently the object of the constitution." He contends that the establishment of a judiciary without power to enforce its decrees would have been to no purpose, and that where a jurisdiction is conferred and no forms prescribed for its exercise, there is an inherent power in the court to adopt a mode of proceeding adapted to the exigency of each case; 4 Hall, Am. L. J. 446.

In *Missouri* it is held that by reason of the division of the power of government into three departments and the prohibition of the exercise by the one department of powers belonging to another, a mandamus will not lie to compel the governor to perform any duty pertaining to his office, ministerial or political, and whether commanded by the constitution or by law; 25 S. W. Rep. (Mo.) 376. But the mayor of a city is not such an executive officer as is exempt from judicial control; 50 Mo. App. 524.

It has been a subject of controversy how far the decisions of the court of claims control the executive departments of the government of the United States in their action on similar cases. It was said by Richardson, C. J., that the decisions of the court of claims in general, not appealed from, are guides to the executive officers of the government, and furnish precedents for the executive departments in all like cases; 13 Wash. L. Rep. 123. This decision was thus criticised by Comptroller Lawrence: The court of claims undoubtedly had a right (1) to lay down law for itself, but it has no authority to lay down law (2) for the executive officers of the government, yet the opinion referred to assumes to do so. This is the necessary effect of the words employed by it, and whether so intended or not, it is their logical effect. For if the court of claims can prescribe not only its own duties and the rules and principles of law governing its own action, but also the same for accounting officers in the executive administration of the executive business of the government, it may for like reasons do the same for heads of executive departments and even the president himself; 6 Dec. First Comp. 238.

The federal courts will not interfere with the pension officers in the exercise of their discretion; 14 Pet. 499; 7 Wall. 347; 116 U. S. 423.

Questions purely political or arising out of international relations the courts do not assume to determine, but leave them to what they term the political departments of the government and follow the decisions of the executive. Such a question is the recognition of independence or belligerency which is discussed at length under the title of EXECUTIVE POWER.

The power of the courts to enjoin executive officers rests upon the same principles as those applicable to a mandamus. It is the general rule that the official action of the executive department of the government or of the state cannot be controlled by a writ of injunction; 32 W. Va. 1; 3 Pickle 319; 109 Ind. 1. The execution of orders of the president for removing intruders from government land will not be interfered with by injunction; 1 Okl. 454.

An injunction may be obtained to protect a *de facto* officer whose title is disputed as well as that of one *de jure*, but it is not an appropriate means of determining a title to an office; 124 U. S. 210; 44 La. Ann. 333. In neither of these cases, however, is there involved any question of conflict between the executive and judicial power, inasmuch as the latter legitimately extends to and includes proceeding for the trial of title to office by *quo warranto*, which title see.

The power of staying the execution of a death sentence pending an appeal conferred by law on a court is not the granting of a reprieve within the meaning of a constitutional grant of executive power, but is a judicial power included in the separation of government into three independent departments; 35 N. E. Rep. (Ind.) 179. See 97 Ind. 373.

In *State ex rel. Drake v. Doyle*, Sec. of State (40 Wis. 175), which was an application for a mandamus against the state officer seeking to require him to revoke the license of an insurance company, return was made pleading an injunction of the circuit court of the United States to restrain the Secretary of State from revoking the license, and it was held that "where a suit is prosecuted in a federal court by a private party against a state officer who has no personal interest or liability in the action, but is sued in his official capacity only, to affect a right of the state only, the state is the real defendant, within the prohibition of the 11th amendment to the federal constitution. A circuit court of the United States has therefore no jurisdiction of a suit by a foreign corporation to restrain a state officer from revoking (as required by the law of the state) a license granted the plaintiff corporation to do business in the state."

So also the power to exclude or to expel

aliens, being a power affecting international relations, is vested in the political departments of the government and is to be regulated by treaty or by act of congress and, to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute or is required by the paramount law of the constitution to intervene; 149 U. S. 698.

Of all the instances of what appears to an American legal mind the confusion of powers under the English system, none is more striking than the commingling of executive and judicial duties found in the office of the lord chancellor.

In commenting upon the alteration in his customary position by the powers of an administrative character conferred upon him by the Judicature Acts, a recent writer says, "It would appear, to the independent observer, that the tenure, the power of appointments, and the administrative duties of the chancellor, though necessarily pertinent to his high office, are inconsistent with his position as chief judge, co-equal and co-ordinate with the others, and that if the intention of the statute was to confer that position upon him, it was contrary to English usage, if not unconstitutional." Inderwick, *King's Peace* 283.

There has been much recent discussion as to whether the courts, in late decisions dealing with labor strikes and public commotion arising out of them, have extended their jurisdiction beyond recognized principles. In this discussion the phrase "government by injunction" has been constantly used. The cases are cited under the titles: INJUNCTION; CONTEMPT; LABOR UNION; CONSPIRACY; COMBINATION; BOYCOTT; STRIKES; and do not require further discussion here. See also, 18 Law Quart. Rev. 347; 31 Am. L. Reg. N. S. 1, 782; 84 *id.* 576; 87 *id.* 1; 3 Va. L. Reg. 625; Rep. Am. Bar. Assn. 1894, p. 299; 29 Am. L. Rev. 282.

See DELEGATION; EXECUTIVE POWER; LEGISLATIVE POWER; CONSTITUTIONAL; JUDGE-MADE LAW; JURISDICTION; JURY; JUDGE.

JUDICIAL PROCEDURE. That body of rules of evidence, pleading and practice which regulates the application for, and the exercise of official action consistently with the principles of a constitutionalism. Its established and fixed rules of operation safeguard the rights of the citizen. These may be either expressed in a constitution or imported by construction. Hughes, *Pro.* 1092. See PROCEDURE.

JUDICIAL PROCEEDINGS. Proceedings relating to, practised in, or proceeding from, a court of justice.

Conclusive presumptions are made in favor of judicial proceedings. Thus, it is an undoubted rule of pleading that nothing shall be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged; 1 Saund. 74; 10 Q. B. 411, 455-459. So also, it is presumed, with respect to such writs as are actually issued by the superior courts at Westminster, that they are duly issued, and in a case in which the courts have jurisdiction, unless the contrary appears on the face of them; and all such writs will of themselves, and without any further allegation, protect all officers and others in their aid acting under them; and this, too, although they are on the face of them irregular, or even void in form; 6 Co. 54 a; 10 Q. B. 411, 455.

The rule is well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, military, and ecclesiastical bodies; and they are only restrained by

this rule, viz., that they shall be made in good faith to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry; Newell, *Def. Lib. & Sland.* 424; Heard, *Lib. & S.* § 101. The rule that no action will lie for words spoken or written in the course of any judicial proceeding has been acted upon from the earliest times. In 4 Co. 14 b, it was adjudged that if one exhibits articles to justices of the peace, "in this case the parties shall not have, for any matter contained in such articles, any action upon the case, for they had pursued the ordinary course of justice in such cases; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation." And it has been more recently decided, that, though an affidavit made in a judicial proceeding is false, slanderous, and malicious, no action will lie against the party making it; 18 C. B. 126; 4 H. & N. 568.

The general rule is subject to this qualification: that in all cases where the object or occasion of the words or writing is redress for an alleged wrong, or a proceeding in a tribunal or before some individual or associated body of men, such tribunal, individual, or body must be vested with authority to render judgment or make a decision in the case, or to entertain the proceeding, in order to give them the protection of privileged communications. This qualification of the rule runs through all the cases where the question is involved; *Odg. Lib. & Sl.* 188, n; Heard, *Lib. & S.* § 104.

Statements made extra-judicially to a magistrate with a view to asking his advice are not a judicial proceeding; 8 B. & C. 24.

Official Records of the States. The constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. This applies as well to the judgments and records of the courts of the several territories; 48 Minn. 168. Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof. The term records includes all executive, judicial, legislative, and ministerial acts, constituting the public records of the state; *Desty, Fed. Const.* 203; 20 How. 250; 16 Tex. 509.

Legislative acts must be authenticated by the seal of the state; 4 Dall. 412.

As to the effect of judicial proceedings under this provision, see FOREIGN JUDGMENTS. As to records generally, see RECORDS.

See generally, JUDGE; JUDGE-MADE LAW; JUDICIAL DOCUMENTS; JUDICIAL POWER; JURY.

JUDICIAL PROCESS. "Judicial process" is but the command of the sovereign by whose authority the tribunal out of which it issues was established, commanding the person or officer to whom it is directed, or who is authorized to execute it, to do certain acts therein specified, and it is, therefore, appropriate that such process shall run in the name of the Government. But whether appropriate or necessary or not, the Constitution requires it, and what that instrument requires should be done without hesitation or inquiry into the question whether, abstractly considered, the thing required is essential or not. 160 Ky. 754, 170 S. W. 171.

JUDICIAL PROOF. See PROOF.

JUDICIAL RATIFICATION. In Scotch Law. The declaration by a married woman before a judge that a disposition or deed of alienation of her heritable property has been made voluntarily and

without fear or coercion on her part. See ACKNOWLEDGMENT.

JUDICIAL SALE. A sale, by authority of some competent tribunal, by an officer authorized by law for the purpose. The term includes sales by sheriffs, marshals, masters, commissioners, or by trustees, executors, or administrators, where the latter sell under the decree of a court.

A sale, whether public or private, made by a receiver, pursuant to the direction or authority given by the court, is a judicial sale. 114 N. Y. 821.

It is premature and erroneous to decree a sale of property to satisfy incumbrances thereon before ascertaining the amounts and priorities of the liens binding such property; 23 S. E. Rep. (Va.) 110, reversing 27 *id.* 838.

A decree confirming a master's sale, and declaring that the title be vested in the purchaser "upon the payment of the purchase money," vests no title in such purchaser until the purchase money is paid; 41 S. W. Rep. (Tenn.) 1078.

The officer who makes the sale conveys all the rights of the defendant, and all other persons legally affected by the proceedings, in the property sold. Under such a sale there is no warranty, either express or implied, of the thing sold; 9 Wheat. 616; 51 N. J. Eq. 135; 104 Ind. 185. A sale of real estate does not conclude one not a party to those proceedings; and whatever title he had to the property so sold remains unaffected by the sale; 147 U. S. 431. Where the property sold under a decree is correctly represented by a plat, referred to in the advertisement and exhibited at the sale, which discloses an encroachment on a street, the purchaser cannot plead ignorance thereof; 91 Va. 114. A purchaser at a judicial sale, not made under compulsory process, can set up eviction of a paramount title as a defence in an action for the purchase money, but where land is sold in equity to pay the debts of an estate, and a judgment has to be rendered against the purchaser for the purchase money, he cannot enjoin its collection because of eviction; 41 S. C. 508.

The doctrine of *caveat emptor* applies, to a sale under a decree foreclosing a mortgage, and the purchaser cannot rely upon statements made by the officer conducting the sale that he will get a title free from incumbrance; 58 N. W. Rep. (Neb.) 953, aff. 35 Neb. 466.

The purchaser of a leasehold interest at a sheriff's sale is charged with notice of the lease and subject to its covenants and conditions; 158 Pa. 401; and a purchaser at such sale of an heir's interest is bound by notice given at the sale by decedent's heirs that the interest was subject in the purchaser's hands to the right, if any, of decedent's estate to charge the heir's indebtedness against his share; *id.* 292. Where a conveyance from a life tenant is procured by fraud and the property sold under a judgment against a vendee, a purchaser at that sale with knowledge of the fraud can hold against the devisees in remainder; 94 Ga. 664. The title of a purchaser of land at judicial sale duly confirms any rendered invalid by fraud in prior transfer of a decree of sale if the sale itself was free from fraud; 42 Neb. 156. A decree homologating proceedings at a family meeting to sell a child's property will protect a purchaser in good faith; 47 La. Ann. 882. Equity will not relieve a purchaser from complying with the terms of sale because of a defect in the title, rendering the title unmarketable, of which the purchaser was cognizant; 81 Md. 525. Where land is sold under a condition not authorized by the decree of sale, the purchaser will not be compelled to take the title although his son signed the condition without apprehending its effect; 71 Hun 54. It is well settled that "the title of an innocent purchaser of land at a judicial sale under a mortgage is not affected by the usurious character of such mortgage." *Saulsbury, Ch.*, in 5 Del. Ch. 302; 1 Johns. Cas. 158; 10 Johns. 185; 53 Barb. 285. See as to *bona fide* purchaser,

JUDICIAL SALE

21 L. R. A. 88. When real estate is sold by the sheriff or marshal, the sale is subject to the confirmation of the court, or it may be set aside. See 4 Wash. C. C. 45, 322.

An officer at a sale on execution conducted by himself cannot act as agent, with full discretionary powers of an absent person in the purchase of property, since the law casts on him the duty of fidelity to the execution debtor, and such purchase by the officer is void, and confers no title on his principal; 65 Vt. 457.

Any statements made with a purpose to deter bidding may avoid the sale; 88 Mich. 144; 161 Pa. 418; 38 S. C. 357; 89 Ga. 696.

It is generally said to be a rule that mere inadequacy of price is not of itself sufficient ground for setting aside a judicial sale; 49 N. J. Eq. 356; 22 S. W. Rep. (Ky.) 325; 21 Nev. 291; 145 U. S. 349; and that there must be shown in addition to inadequacy some fraud, accident, mistake, or other special circumstance to warrant rescission of the contract; 89 Va. 886. But the general rule as stated is not sustained without qualifications, since the inadequacy may be so gross as to shock the conscience of the court, as it is frequently expressed, and to be regarded as of itself sufficient ground for setting aside the sale; 36 W. Va. 598; 51 N. J. Eq. 304; as where land valued at \$8,000, with incumbrances amounting to \$2,700, was sold at \$2,000; 56 Minn. 12; or where the same land brought at a subsequent sale \$1,500; 60 *id.* 262. Where the price is grossly inadequate, the court will be quick to seize upon any other circumstance impeaching the fairness of the transaction; 161 U. S. 334; or the least irregularity in the proceeding; 63 Mo. App. 456. See as to inadequacy, 2 S. W. Rep. (Ky.) 556.

A sale of property as a whole may be confirmed if the decree that it be so sold is not objected to, and there is no offer of a better bid in case the bidding be reopened; 60 Fed. Rep. 9. The objection that different parcels of real estate were sold together cannot be made by one who has suffered no injury therefrom; 18 So. Rep. (Ala.) 988.

Combinations to prevent competitive bidding, and any conduct at the sale upon the part of interested parties which is fraudulent in fact, or the circumstances attending which induce the court to treat it as fraudulent, will make the sale void, as where there was an agreement between judgment creditors without knowledge of the debtor that one should refrain from bidding, in consideration of a promise to pay his judgment, made by the other, the sale was held void for fraud; 161 Pa. 418; and where a mortgagor publicly announced at the sale that she was a widow dependent upon the premises for support, that she intended to bid, and that she requested no one to bid against her, the sale was set aside; 38 S. C. 357. One intending to purchase commits fraud by hiring another not to bid against him; 43 Neb. 49; 43 Ohio 554; and on disclosure of the facts after sale, payment of purchase money, and conveyance, an administrator's sale may be set aside; 88 Ga. 696; and to show such fraud evidence is admissible of the amount intended to be bid by the competitor who was hired not to bid; *id.*; but where the competitor is induced by an execution creditor under a secret agreement to refrain from bidding, it is incompetent for the creditor to show on a petition for subrogation that the property brought less than its market value; 24 Pittsb. Leg. J. (Pa.) N. S. 92. Where during an administrator's sale, one of the bidders arranged with the others for a consideration to stop bidding, and he thereby obtained the property for less than its market value, the sale was void; 149 Ill. 163; but where there is an agreement between two persons to prevent bidding, and one of them purchases the land, the sale will not be set aside at the instance of the other on the ground that he was prevented from bidding by reason of inducement offered by the purchaser; 106 N. C. 97. An agreement between five lien holders, any one of whom was financially unable to bid for himself, that one should bid on the property

as trustee for them all, was not invalid as a combination to discourage bidding; 41 Neb. 796.

An agreement between parties interested in a judicial sale of land, that one of them shall bid enough to cover certain liens on which the other might be collaterally liable, and that the other shall not bid against him, no plan being formed or means used to procure for either an unjust advantage over third persons, or to prevent bidding by them, is not unlawful.

Upon the refusal of a purchaser at a judicial sale to fulfil his contract, the estate may be resold and such purchaser held liable for any deficiency in price arising upon the second sale; 127 U. S. 518. But it has been held that to be held liable he must be served with a rule, awarded after the sale was reported, to show cause why he should not complete his purchase, or in default, the property to be resold; 23 S. E. Rep. (W. Va.) 571. See as to defaulting purchaser, 27 Alb. L. J. 508.

See an unusually elaborate and valuable note on the subject of injunctions against judicial sales in 30 L. R. A. 98-143; and a similar note upon the protection accorded to purchasers and who is a *bona fide* purchaser, in 21 *id.* 33-54.

See, generally, Rorer, Judicial Sales; Tiedeman, Sales ch. 17; FRANCHISE; EXECUTION; MORTGAGE; SALE; TAX SALE; VOID. And see as to proceedings and conduct of sale, 8 L. R. A. 440; 75 Am. Dec. 704; of franchise, 20 L. R. A. 737; of equity of redemption, 7 Can. L. J. 257; interest sold, 29 Am. St. Rep. 653.

JUDICIAL SEPARATION. See SEPARATION.

JUDICIAL STATISTICS. Statistics, published by authority, of the civil and criminal business of the United Kingdom, and matters appertaining thereto. Annual reports are published separately for (1) England and Wales, (2) Ireland, (3) Scotland. The statistics for England and Wales contain statements of the police establishments and expenses, and the number of offences committed and offenders apprehended; statements of the number of inquests held by coroners; of the number of persons committed for trial at assizes and sessions, with the result of the proceedings; of the state of prisons, with returns of reformatory and industrial schools, and of criminal lunatics; of the causes in the superior courts of common law and equity, etc., and the county courts; also of the appeals to the Privy Council, and the judicial proceeding of the House of Lords. The same matters, though with some difference in the arrangement, form the bulk of the report for Ireland. Kindred matters are dealt with in the report for Scotland, though there is a wider divergence, rendered necessary by the variation between the laws of Scotland and England; Moz. & W.

JUDICIAL TRUSTEE. See PUBLIC TRUSTEE.

JUDICIAL WRITS. In English Practice. The *capias* and all other writs subsequent to the original writ not issuing out of chancery, but from the court to which the original was returnable.

Being grounded on what had passed in that court in consequence of the sheriff's return, they are called *judicial* writs, in contradistinction to the writs issued out of chancery, which were called *original* writs; 3 Bla. Com. 282.

JUDICIARY. The system of courts of justice in a country. The department of government charged or concerned with the administration of justice. The judges taken collectively; as, the liberties of the people are secured by a wise and independent judiciary. The term is in very current use in designating the method of selecting judges in a state or country,—as, an elective judiciary.

As an adjective: Of or pertaining to the administration of justice or the courts; judicial,—the judiciary act, the judiciary amendment, the judiciary question, etc.

See COURT; JUDGE; 3 Story, Const., 5th ed. § 1576. See MINISTERIAL DUTY.

JUDICIARY ACT. The act of congress of Sept. 24, 1789, establishing the federal courts of the United States.

This act, of which the authorship is attributed to Oliver Ellsworth, has remained in force without substantial change, save in the extension of the system as required by the growth of the nation. Its provisions are embodied in the Revised Statutes.

This act, "considering the complex and highly artificial nature of the federal jurisdiction, is justly regarded as 'one of the most remarkable instances of wise, sagacious, and thoroughly considered legislative enactments in the history of the law.'" 66 Ga. 371, 373.

The wisdom and forethought with which it was drawn have been the admiration of succeeding generations. And so well was it done that it remains to the present day, with a few unimportant changes, the foundation of our system of judicature, and the law which confers, governs, controls, and limits the powers of all the federal courts, except the Supreme court, and which largely regulates the exercise of its powers." 3 Wall. 407, 412.

The powers conferred by that act on the several courts which it created, and the lines by which it divided the powers of those courts from each other, and limited the powers of all of them under the Constitution, were intended to provide a general system for the administration of such powers as the Constitution authorized the Federal courts to exercise. 3 Wall. (U. S.) 407, 414.

JUDICIO SISTI. The caution *judicio sisti*, given in a Scotch court, is a security to abide judgment within the jurisdiction of the court. By the ordinary form of the bond the surety undertakes that the principal shall appear to answer any action to be brought within six months. Bell. See Ersk. Prin. III. iii. 28.

JUDICIUM. In Roman Law. The proceeding before a judge or *judex* (*q. v.*) to obtain his decision of the legal issue, presented as the result of the proceedings *in jure*. Sohn, Inst. Rom. L. § 34. See IN JUDICIO; IN JURE.

In Old English Law. This Latin word is used in several senses: for judicial authority or jurisdiction, in the abstract; for a court or tribunal; for a judicial hearing, investigation, or other proceeding; and sometimes in the sense of verdict or judgment. Abbott.

JUDICIUM CAPITALE. In English Law. Judgment of death; capital judgment. Fleta, lib. 1, c. 39, § 2. Called also "*judicium vite amissionis*," judgment of loss of life. *Id.* lib. 2, c. 1, § 5.

JUDICIUM DEI (Lat. the judgment or decision of God).

In Old English Law. A term applied to trials by ordeal; for, in all trials of this sort, God was thought to interfere in favor of the innocent, and so decide the cause. These trials are now all abolished.

JUDICIUM PARIUM. In English Law. Judgment of the peers; judgment of one's peers; trial by jury. Magna Charta, c. 29. See JURY.

JUDICIUM VITAE AMISSIONIS. See JUDICIUM CAPITALE.

JUGE. In French Law. A judge. R. & L. Dict.

JUGE D'INSTRUCTION. In French Law. An officer subject to the *Procureur-General*, who in cases of criminal offences receives the complaints of the parties injured, and who summons and examines witnesses upon oath, and after communication with the *procureur-general* draws up the forms of accusation. They have also the right, subject to the approval of the same superior officer, to admit the accused to bail. They are appointed for three years, but are re-eligible for a further period of office. They are usually chosen from among the regular judges. The criminal procedure as administered by these officers has been characterized by the most inquisitorial methods, opposed in every sense to English and American ideas on the subject. By the act of December 8,

1897, promulgated while this title is in press, changes of the most radical character have been introduced. Under the new law, within twenty-four hours of his arrest, an accused person must be conducted before the procureur de la république, who must require the juge d'instruction to question him immediately. In case of his refusal, absence, or other obstacle, the accused must be examined without delay by the official designated by the public minister. In default of examination within the time prescribed, the public prosecutor must order him to be set at liberty, and any person kept confined for more than twenty-four hours in the place of detention without examination, or without being brought before the public prosecutor shall be considered as arbitrarily detained, and all violations of this law by officials are to be prosecuted as outrages against liberty. At the examination the magistrate having verified the identity of the accused, is required to make known to him the facts charged against him and receive his declaration, first having warned him that he is free not to make any. Mention of this warning must be made in the procès-verbal. If the accusation is sustained, the magistrate shall inform the accused of his right to choose a counsel, and if he makes no choice, shall himself appoint one, if the accused demands it. Mention of this formality must be made in the procès-verbal. If the accused has been found outside of the arrondissement where the warrant was issued, and at a distance of more than ten myriameters (about 60 miles) from the principal place of the arrondissement, he is conducted before the public prosecutor of the one in which he was found and by him examined. The accused is not removed from this jurisdiction against his consent, and if when the inquiry is made of him, that is refused, information is sent to the officer who signed the warrant, with a statement of facts bearing on the identity of the person. The warning must be given to the accused at this examination that he is free not to make any declarations, and it must be mentioned in the procès-verbal. The juge d'instruction charged with the matter decides immediately upon the receipt of this message whether there is reason to order the transfer. In case of flagrant crime the juge d'instruction can proceed to examine him immediately if there is urgency resulting from the condition of a witness in danger of death, or the existence of indications likely to disappear, or even if he is taken away from the place. If the accused remains in custody, he can immediately have the first examination and communicate freely with his counsel. Provisions of the law of July 14, 1865, amending article 613 of the code of criminal instruction are abrogated in all that concerns places of detention subjected to the cell régime. There may be an interdiction of communication ordered by the juge d'instruction for ten days, which may be once only renewed for ten days more. In each case the interdiction of communication shall not apply to the counsel of the accused. He must make known the name of his counsel, and whether detained or set free, cannot be examined unless with his express consent except in the presence of his counsel. The counsel can only act for him after having been authorized by the magistrate, and in case of refusal, a note should be made of the incident in the procès-verbal. The counsel should be summoned by letter at least twenty-four hours in advance. The counsel is entitled to be informed by the recorder of the inquiries to which the accused is to be subjected and of every order made by the judge. *Journal Officiel de la République Française*, Dec. 10, 1897.

JUGE DE PAIX. An inferior judicial functionary, appointed to decide summarily controversies of minor importance, especially such as turn mainly on questions of fact. He has also the functions of a police magistrate. Abbott; Ferrière.

JUICIO. In Spanish Law. A trial

or suit. White, New Recop. n. 3, tit. 4, c. 1.

JUICIO DE APEO. In Spanish Law. The decree of a competent tribunal directing the determining and marking the boundaries of lands or estates.

JUICIO DE CONCURSO DE ACREDORES. In Spanish Law. The decree obtained by a debtor against his creditors, or by the creditors against their debtor, for the payment of the amount due, according to the respective rank of each creditor, when the property of the debtor is insufficient to pay the whole of his liabilities.

JUMPING BAIL. A colloquial expression describing the act of the principal in a bail bond in violating the condition of the obligation by failing to do the thing stipulated, as, not appearing in court on a particular day to abide the event of a suit or the order of court, but instead, withdrawing or fleeing from the jurisdiction. Anderson's L. Dict.

JUNIOR. Younger. This has been held to be no part of a man's name, but an addition by use, and a convenient distinction between a father and son of the same name. 10 Paige, Ch. 170; 7 Johns. 549; 1 Pick. 388; 17 id. 200; 3 Metc. Mass. 330. See 131 Mass. 184.

Any matter that distinguishes persons renders the addition of *junior* or *senior* unnecessary; 1 Mod. Ent. 35; Salk. 7. But if the father and son have both the same name, the father shall be *prima facie* intended, if *junior* be not added, or some other matter of distinction; Salk. 7; 6 Co. 20; 11 id. 39; Hob. 330. If father and son have the same name and addition, and the former use the latter, the writ is abatable unless the son have the further addition of *junior*, or the younger. But if the father be the defendant and the son the plaintiff, there is no need of the further addition of *senior*, or the elder, to the name of the father; 2 Hawk. Pl. Cr. 187; Laws of Women 380.

JUNIOR BARRISTER. A barrister under the rank of queen's counsel. Moz. & W. Also the junior of two counsel employed on the same side in a case.

JUNIPERUS SABINA (Lat.). In Medical Jurisprudence. This plant is commonly called savin.

It is used for lawful purposes in medicine, but too frequently for the criminal purpose of producing abortion, generally endangering the life of the woman. It is usually administered in powder or oil. The dose of oil for lawful purposes, for a grown person, is from two to four drops. Parr, Med. Dict. *Sabina*. Foderé mentions a case where a large dose of powdered savin had been administered to an ignorant girl in the seventh month of her pregnancy, which had no effect on the fetus. It, however, nearly took the life of the girl. Foderé, tome iv. p. 431. Given in sufficiently large doses, four or six grains, in the form of powder, it kills a dog in a few hours; and even its insertion into a wound has the same effect. 3 Orfila, *Traité des Poisons* 42. For a form of indictment for administering savin to a woman quick with child, see 3 Chit. Cr. L. 798. See 1 Beck, Med. Jur. 316.

JUNK-SHOP. A place where odds and ends are purchased and sold. 12 Rich. L. 470. In this case it was said that "it is perfectly immaterial whether it is a large or a small shop," and a person was properly indicted and convicted for keeping such a house without license who bought from other shops, and also from persons bringing to his shop the articles which make a junk-shop. Where a tax was laid upon "stores" in which the stock never exceeds in value \$2,000, the term was held to cover a store kept by a dealer in old iron and other metals, old glass, old rope, and old paper stock; 72 Miss. 181.

Acts prohibiting the keeping of such

shops without license and prescribing a fine for violation of the act are constitutional; 45 Ohio St. 63; although they impose different licenses upon dealers in general merchandise and those who sell specified articles; 29 La. Ann. 283; but such a tax was held invalid when a municipal ordinance clearly showed that it was for revenue, an act for raising revenue not being an exercise of police power; 72 Miss. 181.

See as to Pawnbrokers, Junk-dealers, etc., 32 L. R. A. 116; PAWNBROKERS.

JUNK SHOP. A place where odds and ends are sold and purchased. 72 Miss. 181, quoting 12 Am. & Eng. Encyc. L. 243; 12 Rich. (S. C.), 476. A place at which is accumulated for shipment and occasional sales old iron, glass, ropes, wool, hides, fur, cotton, old paper and the like, is a store within the meaning of § 3390, code 1892. *Id.*, 184.

JURA. As to titles based on this word, see the corresponding titles under *JUS*.

JURA FISCALIA (Lat.). Rights of the exchequer. 8 Bla. Com. 45.

JURA IN RE (Lat.). In Civil Law. Rights in a thing, as opposed to rights to a thing (*jura ad rem*). Rights in a thing which are not gone upon loss of possession, and which give a right to an action *in rem* against whoever has the possession. These rights are of four kinds: *dominium, hereditas, servitus, pignus*. Heineccius, Elem. Jur. Civ. § 333. See *JUS IN RE*.

JURA PERSONARUM (Lat.). In Civil Law. Rights which belong to men in their different characters or relations, as father, apprentice, citizen, etc. 1 Sharsw. Bla. Com. 122, n.

JURA REGALIA (Lat.). Royal rights. 1 Bla. Com. 117, 119, 240; 3 id. 45. See 21 & 22 Vict. c. 45.

JURAMENTA CORPORALES (Lat.). Corporal oaths, q. v.

JURAMENTUM CALUMNIÆ (Lat. oath of calumny). In Civil and Canon Law. An oath required of plaintiff and defendant, whether the parties themselves insist on it or not, that they are not influenced in seeking their right by malice, but believe their cause to be just. It was also required of the attorneys and procurators of the parties. Called, also, *juramentum* or *sacramentum calumnie*. Calv. Lex.; Vicat, Voc. Jur. Utr.; Clerke, Pr. tit. 42.

JURAMENTUM JUDICIALE (Lat.). In Civil Law. An oath which the judge, of his own accord, defers to either of the parties.

It is of two kinds: *first*, that which the judge defers for the decision of the cause, and which is understood by the general name *juramentum judiciale*, and is sometimes called suppletory oath, *juramentum suppletorium*; *second*, that which the judge defers in order to fix and determine the amount of the condemnation which he ought to pronounce, and which is called *juramentum in litem*. Pothier, Obl. p. 4, c. 3, s. 3, art. 3.

JURAT. In Practice. That part of an affidavit where the officer certifies that the same was "sworn" before him.

The jurat is usually in the following form, viz.: "Sworn and subscribed before me, on the — day of —, 1842. J. P., justice of the peace."

In some cases it has been held that it was essential that the officer should sign the jurat, and that it should contain his addition and official description; 3 Cal. 128; 2 Disn. 472. But see 2 Wend. 283; 12 id. 223; 2 Cow. 552; 2 Johns. 479; 17 Ind. 294; Proff. Not; 136 Ind. 630. A jurat being no part of an affidavit, a general demurrer to the sufficiency of the affidavit will not reach a failure to add to the name of the person who administered the oath his official designation; 93 Ga. 252.

An officer in some English corporations, chiefly in certain towns in Kent and Sussex, whose duties are similar to those of

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aldermen in others; stat. 1 Edw. IV.; 2 & 3 Edw. VI. c. 30; 13 Edw. I. c. 26.

Officers in the island of Jersey, of whom there are twelve, members of the royal court, and elected for life; 1 Steph. Com., 11th ed. 103; L. R. 1 P. C. 94.

JURATA (Lat.). In Old English Law. A jury of twelve men sworn. Especially, a jury of the common law, as distinguished from the *assize*, or jury established or re-established by stat. Hen. II.

The *jurata*, or common-law jury, was a jury called in to try the cause, upon the prayer of the parties themselves, in cases where a jury was not given by statute Hen. II., and as the jury was not given under the statute of Henry II., the writ of *attaint* provided in that statute would not lie against a *jurata* for false verdict. It was common for the parties to a cause to request that the cause might be decided by the *assize*, sitting as a *jurata*, in order to save trouble of summoning a new jury, in which case "*cadit assize et vertitur in juratam*," and the cause is said to be decided *non in modum assize*, but *in modum jurate*. 1 Reeve, Hist. Eng. Law 335, 336; Glanville, lib. 13, c. 20; Bracton, lib. 3, c. 30. But this distinction has been long obsolete.

Jurate were divided into: *first*, *jurata dilatoria*, which inquires out offenders against the law, and presents their names, together with their offences, to the judge, and which is of two kinds, *major* and *minor*, according to the extent of its jurisdiction; *second*, *jurata judicaria*, which gives verdict as to the matter of fact in issue, and is of two kinds, *civilis*, in civil causes, and *criminalis*, in criminal causes. Du Cange.

A clause in *nisi prius* records called the *jury clause*, so named from the word *jurata*, with which its Latin form begins. This entry, *jurata ponitur in respectu*, is abolished. Com. Law Proc. Act, 1852, § 104; Whart. Law Lex.; 9 Co. 32; 59 Geo. III. c. 46; 4 Bla. Com. 342. Such trials were usually held in churches, in presence of bishops, priests, and secular judges, after three days fasting, confession, communion, etc. Du Cange.

A certificate placed at the bottom of an affidavit, declaring that the witness has been sworn or affirmed to the truth of the facts therein alleged. Its usual form is, "Sworn (or affirmed) before me, the — day of —, 18—." A *jurat*.

JURATORY CAUTION. A security sometimes taken in Scotch proceedings, when no better can be had, viz.: an inventory of effects given up upon oath, and assigned in security of the sums which may be found due. Bell, Dict.

JURE DIVINO (Lat.). By divine right. Divine Right is the name generally given to the theory of government which holds monarchy to be the only legitimate form of government. The monarch and his legitimate heirs being, by divine right, entitled to the sovereignty, cannot forfeit that right by any misconduct, or any period of dispossession. But where the knowledge of the right heir is lost, the usurper, being in possession by the permission of God, is to be obeyed as the true heir. Sir Robert Filmer, the most distinguished exponent of the theory, died about 1650.

JURE PROPINQUITATIS (Lat.). By right of relationship. Co. Litt. 10 b.

JURE REPRESENTATIONIS (Lat.). By right of representation. See *PER STRIPES*. 2 Sharsw. Bla. Com. 219, n. 14, 224.

JURE UXORIS (Lat.). By right of a wife.

JURIDICAL. Relating to administration of justice, or office of a judge. Webster, Dict.

Regular; done in conformity to the laws of the country and the practice which is there observed.

JURIDICAL DAY. A day on which the court is open or in session. 153 Ky. 116, 154 S. W. 931.

JURIDICAL IMPOSSIBILITY.

See IMPOSSIBILITY.

JURIDICUS. Belong to law; relating to the administration of justice in, or by a court. See *JURIDICAL*.

JURIS CONSULTUS (Lat. skilled in the law). **In Civil Law.** A person who has such knowledge of the laws and customs which prevail in a state as to be able to advise, act, and to secure a person in his dealings. Cicero.

The early juriconsults gave their opinions gratuitously, and were also employed in drawing up written documents. From Augustus to Adrian, only those allowed by the emperor could be juriconsults; before and after those emperors, any could be juriconsults who chose. If their opinion was unanimous, it had the force of law; if not, the prætor could follow which opinion he chose. Vicat, Voc. Jur. Utr.

There were two sects of juriconsults at Rome, the Proculians and Labianians. The former were founded by Labeo, and were in favor of innovation; the latter by Capito, and held to the received doctrines. Cushing, Int. Rom. Law. §§ 5, 6.

JURIS ET DE JURE (Lat.). Of right and by law. A presumption is said to be *juris et de jure* when it is conclusive, i. e. when no evidence will be admitted to rebut it, in contradistinction to a presumption, which is simply *juris*, i. e. rebuttable by evidence; 1 Greenl. Ev. § 15, note; Wills, Circ. Ev. 29; Best, Pres. 20, § 17; Best, Ev. 43.

JURIS ET SEISINÆ CONJUNCTION (Lat.). The union of seisin, or possession, and the right of possession, forming a complete title. 2 Bla. Com. 190, 311.

JURIS VINCULUM. A bond of law, or legal tie. Burrill; Bract. fol. 99. The nature of an obligation, as a tying of two persons together, is deeply fixed in Roman Law. It is implied in the old contract of nexum. Hunter, Rom. L. 453.

JURISDICTION. See NORRO.

JURISDICTION (Lat. *jus*, law, *dicere*, to say). The authority by which judicial officers take cognizance of and decide causes. 60 Vt. 618. The power to hear and determine a cause. 3 Ohio 494; 6 Pet. 709; 2 How. 338. The right of a judge to pronounce a sentence of the law, on a case or issue before him, acquired through due process of law. It includes power to enforce the execution of what is decreed. 9 Johns. 239; 3 Metc. Mass. 460; Thach. 202.

The right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, the proper parties must be present; and third, the point decided upon must be, in substance and effect, within the issue; 1 Black, Judg. § 242; 55 Ark. 200.

Ancillary jurisdiction. Where one court of chancery entertains a bill in aid of a suit commenced in another chancery jurisdiction, both being designed to operate upon the same subject-matter or property right, but where the first suit is inadequate to give complete relief for want of territorial jurisdiction over the entire subject of litigation, the subsequent suits are said to be ancillary to the first. A familiar illustration is a bill to foreclose a mortgage on a railroad passing through two or more states, in which ancillary bills are filed in states other than that in which the first suit is brought, without regard to the citizenship of the parties.

Appellate jurisdiction is that given by appeal or writ of error from the judgment of another court.

Assistant jurisdiction is that afforded by a court of chancery in aid of a court of law; as, for example, by a bill of discovery,

or for the perpetuation of testimony, and the like.

Auxiliary jurisdiction is another name given to this jurisdiction in aid of a court of law.

Jurisdiction of the cause is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists.

Civil jurisdiction is that which exists when the subject-matter is not of a criminal nature.

Concurrent jurisdiction is that which is possessed over the same parties or subject-matter at the same time by two or more separate tribunals.

Consultative jurisdiction. Where one court aids another by giving an opinion on a matter which the latter has under consideration the court which gives the opinion is said to exercise a consultative jurisdiction. 4 App. Cas. 30.

Criminal jurisdiction is that which exists for the punishment of crimes.

Exclusive jurisdiction is that which gives to one tribunal sole power to try the cause.

General jurisdiction is that which extends to a great variety of matters. General jurisdiction in law and equity is jurisdiction of every kind that a court can possess, of the person, subject-matter, territorial, and generally the power of the court in the discharge of its judicial duties. 63 Hun 367.

Limit d jurisdiction (called, also, *special and inferior*) is that which extends only to certain specified causes.

Original jurisdiction is that bestowed upon a tribunal in the first instance.

Jurisdiction of the person is that obtained by the appearance of the defendant before the tribunal. 9 Mass. 462.

Territorial jurisdiction is the power of the tribunal considered with reference to the territory within which it is to be exercised. 9 Mass. 462.

Cooley speaks of "courts of general jurisdiction, by which is meant that their authority extends to a great variety of matters, while others are only of special and limited jurisdiction," that is, have authority extending only to certain specified cases; Const. Lim., 5th ed. 502. The inferior federal courts, though of limited jurisdiction, are not technically inferior courts; 10 Wheat. 192. There are courts which are competent to decide on their own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, which can be questioned only in an appellate court; other courts are so constituted that their judgments "can be looked through for the facts and evidence which are necessary to sustain them," whose decisions are not evidence of themselves to show jurisdiction and its lawful exercise; 2 How. 341.

Jurisdiction is given by the law; 22 Barb. 323; 8 Tex. 157; and cannot be conferred by consent of the parties; 5 Mich. 331; 23 Conn. 112; 2 Ohio St. 228; 23 Ala. n. s. 155; 34 Me. 233; 4 Cush. 27; 4 Gilm. 181; 6 Ired. 199; 4 Yerg. 579; 3 M'Cord 280; 12 Miss. 549; 32 N. E. Rep. (Ind.) 1025; 82 Wis. 644; 65 Hun 489; 52 Fed. Rep. 770; nor can silence or positive consent of parties confer on a federal court jurisdiction denied by statute; 53 Fed. Rep. 18. Where the jurisdiction of a court as to the subject-matter is limited, the consent of parties cannot confer it; 91 Ill. 319. Where under a contract parties agree that in case of a breach one might be served with a writ in Scotland, the court refused to allow service on the defendant domiciled there; no agreement between individuals can empower a court to do an act which it is, by rules made under a statute, forbidden to do; [1896] 1 Q. B. 35. But a privilege defeating jurisdiction may be waived if the court has jurisdiction over the subject-matter; 14 Ga. 589; 6 Tex. 379; 13 Ill. 432; 1 Ia. 94; 1 Barb. 449; 7 Humphr. 209; 4 Mass. 593; 4 M'Cord 79; 3 McLean 587; 5 Cra. 288; 8 Wheat. 699; see 76 Hun 543; and parties may admit facts which show jurisdiction; 22 Wall. 322, where the

files of the record were lost and the court thereupon presumed that they contained all necessary jurisdictional facts.

Jurisdiction given by the law of the sovereignty of the tribunal is held sufficient everywhere, at least as to all property within the sovereignty; 2 Blatchf. 427; 10 Rich. Eq. 19; 27 Mo. 594; 1 R. I. 285; and as to persons on whom process is actually and personally served within the territorial limits of jurisdiction, or who appear and by their pleadings admit jurisdiction; 6 Tex. 275; 4 N. Y. 375; 8 Ga. 83. See 11 Barb. 309; 50 Kan. 732. But the appearance of a person on whom no personal service of process has been made, merely to object to the jurisdiction is not such an admission; 37 N. H. 9; 9 Mass. 462. And see 2 Sandf. 717.

In an action for breach of promise of marriage brought against the sultan of a Malay state, it appeared that the contract had been made in England and the sultan had resided there under an assumed name. It was held that the court would take judicial notice of the status of a foreign sovereign; that the court would accept as conclusive the certificate of the proper department of the government that the sultan was an independent sovereign; that the courts of England would not take jurisdiction over any foreign sovereign, unless he elected to submit to their jurisdiction; that a foreign sovereign does not waive his right by going to England *incognito*, nor by any act short of submission in court to the jurisdiction. Such submission would be by notice when sued that he would not claim his privilege or by suing in an English court, in which case he must submit to a counter claim; *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149.

Jurisdiction must be either of the *subject-matter*, which is acquired by exercising powers conferred by law over property within the territorial limits of the sovereignty, or of the *person*, which is acquired by actual service of process or personal appearance of the defendant. The question as to the possession of the former is to be determined according to the law of the sovereignty; *Dav. 407*; of the latter, as a simple question of fact. See **CONFLICT OF LAWS; FOREIGN JUDGMENTS**.

Jurisdiction in a personal action cannot be obtained by service on a defendant outside of the jurisdiction; 95 U. S. 714. The courts of one state have no jurisdiction over persons of other states unless found within their territorial limits; 18 Wall. 367.

Jurisdiction *in rem* over a non-resident's property can be obtained by proceedings against it, of which notice should be given in order to give a binding effect to the proceedings; such notice may be actual or constructive; 95 U. S. 714; see 70 Tex. 588. Any judgment obtained in such proceedings has no effect beyond the property in question; no other property can be reached under it; nor can any suit be maintained on it, either in the same court or elsewhere; 10 Wall. 317.

Where the jurisdiction of a court is based upon the amount in controversy, some cases hold that the test is in the amount alleged in the pleadings to be due; 81 Cal. 599; 13 Md. 314; 6 W. & S. 66; but not if the amount is so alleged in bad faith; 83 Mich. 561; it will be determined by the allegations of the complaint and not on *ex parte* affidavits; 82 Fed. Rep. 209. Where, on an appeal from a justice of the peace, it appears by testimony at the trial that the plaintiff's demand exceeded the statutory jurisdiction, there is no jurisdiction; 37 Pa. 387. Where the amount in controversy appeared by the pleadings to be sufficient to give jurisdiction, but the jury found for a sum less than the jurisdictional amount, it was held that the court did not have jurisdiction; 67 Ind. 546; 42 Wis. 478; but it is also held that in such cases the judgment will stand, but without costs; 13 Md. 314. Where a defence is made to a part of a claim and the jury find for less than the full claim, the jurisdiction is not affected; 42 Fed. Rep. 652.

"By matter in dispute is meant the sub-

ject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined;" 1 Wall. 339. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; 97 U. S. 565. In actions sounding in damages, the damages claimed give jurisdiction; 116 U. S. 559; in cases impeaching the right to an office, the amount of the salary attached to the office is the criterion; 130 U. S. 175; in ejectment the value of the land claimed determines the jurisdiction; 135 *id.* 195; and so it is in a bill to set aside a fraudulent conveyance as a cloud on the title; 46 Fed. Rep. 317. In all cases facts on which the jurisdiction of a federal court depends must in some form appear on the face of the record; its jurisdiction is limited, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appear; 119 U. S. 237; until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but when it is shown that the sum demanded is not the real matter in suit, the sum shown and not the sum demanded will prevail; 109 U. S. 174; the amount of damages laid in the declaration is not conclusive upon the question of jurisdiction; if the court find that the amount of damages stated in the declaration is colorable for the purpose of creating a case within the jurisdiction of the circuit court, the jurisdiction is defeated, and it is the duty of the court to dismiss the proceedings; this may be shown by evidence or depositions taken in the cause; however done it should be upon due notice to the parties to be affected by the dismissal; 129 U. S. 326. If this be made to appear "to the satisfaction of the circuit court at any time after suit has been brought," the court must dismiss the suit; Act of March 3, 1875 (18 Stat. L. 472). It seems that if, from plaintiff's evidence at the trial, the amount laid in the complaint appears to have been beyond reasonable expectation of recovery, the action should be dismissed; 82 Fed. Rep. 209.

A plea of set-off will not deprive the court of jurisdiction, though, if established, it would reduce the plaintiff's recovery below the jurisdictional amount; 9 W. & S. 66; 81 Cal. 599.

In a creditor's bill several judgments held by different creditors cannot be added to make up the jurisdictional amount in the circuit court; 154 U. S. 556. But it is otherwise where several plaintiffs are interested collectively under a common title, the validity of which is before the court; 143 *id.* 42. A reasonable attorney's fee, stipulated by the parties in case of a suit, may be added to the debt to make up its jurisdictional amount; 80 Fed. Rep. 759. Where the judgment in the supreme court of a territory exceeded \$5,000 the supreme court of the United States has jurisdiction though the judgment in the trial court was for a less sum, and the amount is reached by adding interest to that judgment; 145 U. S. 428. On the appeal it must be shown that the amount in controversy in the appellate court is sufficient; 33 W. Va. 60; the plaintiff in error must show this fact; 119 U. S. 387.

A court of general jurisdiction is presumed to be acting within its jurisdiction till the contrary is shown; *Brown, Jur.* § 202; 10 Ga. 371; 10 Barb. 97; 3 Ill. 269; 15 Vt. 46; 2 Dev. 431. A court of limited jurisdiction, or a court acting under special powers, has only the jurisdiction expressly delegated; 27 Ala. N. s. 291; 26 Mo. 65; 1 Dougl. Mich. 384; 7 Hill, S. C. 89; and it must appear from the record that its acts are within its jurisdiction; 5 Harr. Del. 337; 1 Dutch. 554; 2 Ill. 554; 27 Mo. 101; 23 Barb. 323; 28 Miss. 737; 26 Ala. N. s. 568; 5 Ind. 157; 21 Me. 340; 16 Vt. 246; 2 How. 319; see 128 U. S. 536; unless the legislature, by general or special law, remove this necessity; 24 Ga. 245; 7 Mo. 373; 1 Pet. C. C. 36. See 1 Salk. 414; *Bac. Abr. Courts* (C, D).

When the record of a court of general jurisdiction in another state discloses nothing in regard to the method of process or notice, and there is no evidence on the subject, there is a presumption of jurisdiction over the person, the record itself importing sufficient proof of jurisdiction without disclosing the different steps by which it was acquired; 18 N. Y. L. J. 675.

Where one of two courts of concurrent jurisdiction has taken cognizance of a cause, the other will not entertain jurisdiction of the same cause; *Brown, Jur.* § 95; 16 Ohio 373; 27 Vt. 518; 25 Barb. 513; 8 Md. 254; 4 Tex. 242; 19 Ala. N. s. 438; 1 Fla. 198; 6 McLean 355; 36 Fed. Rep. 337; 93 U. S. 199; 116 Mass. 84. See 4 U. S. App. 438.

The leading general principle as to concurrent jurisdiction is that whichever court of those having such jurisdiction first acquires possession of a cause will retain it throughout; *Wells, Jurid.* § 156; 19 Ala. 438; 25 Barb. 513; 1 Md. Ch. Dec. 351. A court which has acquired rightful jurisdiction of the parties and subject-matter will retain it for all purposes within the general scope of the equities to be enforced; 93 U. S. 199; 47 Ind. 274; where concurrent jurisdiction may be exercised by the federal and state authorities, the court which first takes jurisdiction can be interfered with by no other court, state or federal. It is a subversion of the judicial power to take a cause from a court having jurisdiction, before its final decision is given; 6 McLean 355; 107 Ill. 534. The supreme court and the common pleas have concurrent jurisdiction in matters of equity; and pending a bill in the common pleas, the supreme court will not entertain jurisdiction for the same cause; 1 Grant 212.

The jurisdiction of the court thus first exercising jurisdiction extends to the execution of the judgment rendered; 10 Bush 431. Courts have no power to interfere with the judgments and decrees of other courts of concurrent jurisdiction; 8 Cal. 26, 66.

The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility become involved with it; 3 Wall. 334; 4 Biss. 368.

Where the first court, because of its limited jurisdiction or mode of proceeding, is not capable of determining the whole controversy, another court may take jurisdiction and accomplish it; 19 Ala. 438.

At common law the rule is well established that the pendency of a prior suit *in personam* in a foreign court, between the same parties for the same cause of action, is no sufficient cause for stay or bar of a suit instituted in a local court. This rule obtains in regard to actions pending in another state of the Union; 1 Curtis 494; 2 W. & S. 129; 44 Pa. 326; but see 3 McLean 221, where it was held that the pendency of a suit between the same parties and respecting the same subject-matter in another state, may be pleaded in abatement in the federal courts, but to make such plea effectual it must show that the court where suit is has jurisdiction.

The pendency of an action in a state court will not bar an action in a United States court to determine the same question between the same parties; 50 Fed. Rep. 656, which was a mortgage foreclosure proceeding, with an oral opinion by Hanford, J.

It is provided by federal statute that "every person who commits murder within any fort, arsenal, dockyard, magazine, or in any other place or district of the county under the exclusive jurisdiction of the United States . . . shall suffer death." 1 U. S. Rev. Stat. § 5539. Under this provision the criminal jurisdiction of the United

States was held exclusive under an act of cession of land for forts in Nebraska, which provided "that the jurisdiction of the State of Nebraska in and over the military reservation known as Fort Robinson and Fort Niobrara be and the same is hereby ceded to the United States." It was also provided that the jurisdiction ceded should continue no longer than the premises concerned were occupied and used by the federal government; 74 Fed. Rep. 31. So it was held by Tenney, J., that the federal court had jurisdiction in a case of homicide on the battleship Indiana, while she was lying within territory used for naval purposes, under an act ceding "jurisdiction over all the lands used and occupied by the United States as a navy yard and naval hospital, according to the plans furnished by the Navy Department." 18 N. Y. L. J. 518; s. c. 30 Chic. Leg. N. 114, distinguishing 3 Wheat. 386, where the naval vessel was in state waters.

But it has been recently held by the supreme court of New York, appellate division, that the provision of the federal constitution giving to congress exclusive jurisdiction over lands purchased by consent of the state legislature for such purposes (Art. I, § 8, subs. 17), does not oust the jurisdiction of state courts to try civil actions of tort, since congress has not provided for them; 47 N. Y. Supp. 757. The court said further:

"Although the injury to recover damages for which the plaintiff brought this action was sustained on land over which the national government had exclusive jurisdiction, it had no more exclusive jurisdiction over such territory than the respective legislatures of the neighboring States of Massachusetts, Pennsylvania, or Ohio have over their respective territories. Had the injury of which the plaintiff complains occurred within the limits of either of said states, an action could have been maintained. In the supreme court of this state to recover damages therefor (3 Hun 70; 12 N. Y. Supp. 310; 54 Barb. 31; 6 Abb. Prac. 156; 45 Barb. 327; 17 Wend. 328; 9 Johns. 67; 14 Johns. 134; 1 Cow. 543), although it has been held that our courts may, in their discretion, refuse to entertain jurisdiction of an action between citizens of a foreign state for acts committed within their state (120 N. Y. 420). If an action can be maintained in the courts of this state, by a citizen thereof, for a personal injury suffered in another state or country, we can see no good reason why such an action cannot be maintained when the injury was committed in this state on land purchased by, and ceded to the United States. The effect of such cession and purchase is merely to create, so to speak, within our territory, a foreign state or territory."

The court of appeals of that state held that jurisdiction of such actions unquestionably remained in the state in the absence of legislation by congress; 135 N. Y. 336. And in reference to the effect of legislation by congress the court said:

"We are not disposed to hold that even then the judicial power of the courts of this state would be powerless to redress private injuries committed thereon, or that the injured party would be compelled to seek justice in some other jurisdiction. The state did cede such political jurisdiction to the federal government with respect to the lands in question, with certain reservations. Congress has not, however, made any new regulations touching the administration of justice ceded to the federal government with respect to the lands in question, and until some such regulations have been made, the municipal laws of the state for the protection and enforcement of private rights through the courts remain unchanged (114 U. S. 542; 114 U. S. 523). The cession of territory by one sovereignty to another does not abrogate the laws in force at the time of the cession for the administration of private justice. Not, at least, until the new sovereignty has abrogated or changed them, do such laws cease to operate, except, possibly, so far as they may be in conflict with the political character, institutions, and constitution of the government to which the territory is ceded."

In the same case the United States supreme court upheld the judgment on the ground that the federal jurisdiction had lapsed under the terms of the cession and declined to determine the other question; 162 U. S. 399. See 18 N. Y. L. J. 740.

In another class of cases it has been held that a jurisdiction executed by the state courts may be entirely ousted by the interposition of congress by a statute conferring on the federal courts exclusive jurisdiction. An action against a foreign consul may be so brought in the state court; 50 Pac. Rep. (Cal.) 758.

Any act of a tribunal beyond its jurisdiction is null and void, and of no effect whatever; 38 Me. 414; 13 Ill. 432; 21

Barb. 9; 26 N. H. 232; whether without its territorial jurisdiction; 21 How. 506; 15 Ga. 457; or beyond its powers; 22 Barb. 271; 13 Ill. 432; 1 Dougl. Mich. 390; 5 T. B. Monr. 261; 16 Vt. 246.

Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits; such illegality is waived only when, without having insisted upon it, he pleads in the first instance to the merits; 98 U. S. 476. The filing of a general appearance is not a waiver of defendant's right to move to dismiss for want of jurisdiction, where that was based on diverse citizenship and the action was brought in the wrong district; 82 Fed. Rep. 337. But where the court had jurisdiction of the subject-matter and service was made in the jurisdiction, a defence on the merits after a motion to quash the service of summons had been overruled was held to waive the objection to the jurisdiction; 49 Id. 807.

It is held that the question must be raised before making any plea to the merits, if at all, when it arises from formal defects in the process, or when the want is of jurisdiction over the person; 7 Cal. 581; 19 Ark. 241; 23 Mo. 319; 22 Barb. 333; 6 Cush. 560; 13 Ga. 318; 20 How. 541; 87 Ga. 193; 43 Ill. App. 374; 76 Hun 543. See 2 R. I. 450; 30 Ala. N. S. 63; 16 Colo. 539; 4 U. S. App. 247; 36 Mo. App. 234; 89 Tenn. 304.

Objection to jurisdiction may be taken by motion to dismiss; 37 Pa. 337; 71 Ind. 417; at common law, by a plea in abatement; 144 U. S. 653; 18 Ill. 292; 3 Johns. 105; it can be raised in the federal courts by a plea in abatement; 46 Fed. Rep. 317; and under the codes, by demurrer, if the want of jurisdiction appear in the complaint; Works, Courts and Juris. 106; or if it be in a court of special jurisdiction, by demurrer, answer, or motion in arrest of judgment; *id.* 106.

Where the subject-matter is not within the jurisdiction, the court may dismiss the proceedings of its own motion; 22 Barb. 271; 4 Ill. 133; 103 Ind. 79; and a remedy may be had by a writ of prohibition; 3 Bla. Com. 12. See PROHIBITION.

If the objection is only to a defective service, it must be raised in the court below; 95 U. S. 714.

Where the citizenship of the parties appears in the petition, defect of jurisdiction on that ground may be raised by demurrer, in the absence of a general appearance; 41 Fed. Rep. 65.

It is rarely, if ever, too late to object to the jurisdiction of a court where the want of power to hear and determine appears on the face of the proceedings; per Bronson, J., 2 Hill, N. Y. 159. Thus, an appellant from chancery to the court of errors may avail himself in the latter court of an objection to the chancellor's jurisdiction, though it was not made before him, when the objection, if valid, is of such a kind that it could not have been obviated, had it been started at an earlier stage in the proceedings; *id.* See 18 Civil Proc. R. 98. The objection that the complainant has an adequate remedy at law when made for the first time in an appellate court is looked upon with supreme disfavor; 4 U. S. App. 336. See 60 Fed. Rep. 323.

The judgment of a court of another state is always subject to impeachment for the want of jurisdiction, either as to subject-matter or parties. Jurisdiction of the subject-matter of an action or judicial proceeding is the power to decide the general question involved therein, and does not depend upon the facts of a particular case, or the ultimate existence of a good cause of action; 13 N. Y. L. J. 575.

Courts of dernier resort are conclusive judges of their own jurisdiction; 1 Park. Cr. Cas. 360; 1 Bail. 294.

It is a general principle of law that an agreement in advance in which an attempt is made to oust the ordinary jurisdiction of the court is illegal and void; 6 Thomp.

Corp. § 7466. Parties cannot by contract oust the courts of their jurisdiction; 79 Pa. 480; nor can individuals or corporations create judicial tribunals for the final and conclusive settlement of controversies; 102 Ind. 269; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant; 5 H. L. Cas. 811; 4 App. Cas. 674; 10 App. Cas. 229; but it has been held that a provision for submitting the whole question of liability to arbitrators as a condition precedent to a right of action is invalid; L. R. 1 Q. B. D. 563. But this case is said not to be in harmony with the other English authorities, though it follows the doctrine of Coleridge, J., in 8 Exch. 497, a case which was affirmed in 5 H. L. Cas. 811, but upon broader grounds. See 11 Harv. L. Rev. 239. In Massachusetts, the decisions appear to distinguish between agreements to arbitrate all disputes and those for the submission of the question of damages only, or questions of that kind which do not go to the root of the action; the former are invalid; the latter valid; see 135 Mass. 216; 100 *id.* 117; 153 *id.* 143. In Maine, parties may, by agreement, impose conditions with respect to preliminary and collateral matters, such as do not go to the root of the action, but cannot be compelled, even by their own agreements, to refer the whole cause of action to arbitration, and thus oust the courts of jurisdiction; 79 Me. 221; see 88 *id.* 435. It is said that the rule that a general covenant to submit any differences is a nullity, is too well settled to be questioned; 50 N. Y. 250. See 33 Wis. 331. An agreement that the decision of an engineer, in case of any dispute, shall be obligatory, is binding; 4 W. & S. 205; 3 Wall. Jr. 243; *contra*, 1 Cliff. 439. The subject is ably treated in 11 Harv. L. Rev. 234.

Stipulations in a policy of marine insurance, that any dispute in relation to loss shall be referred to referees; that no policyholder shall maintain any claim thereon until he shall have offered to submit to such reference; and that in case any suit shall be begun without such offer, the claim shall be dismissed and the company exempted from liability under it, are void; 54 Me. 55, 70. A clause in an insurance policy providing for arbitration of any dispute as to loss, and that no action should be maintained till such arbitration was had, does not oust the jurisdiction of the courts; the condition is revocable, though its breach may subject the party to an action for a breach of it; 79 Pa. 478.

A by-law of a mutual fire insurance corporation, to which their policies are expressed to be subject, that any suit on a policy shall be brought in the courts where the company is established, is not binding on the assured; 6 Gray 174.

An agreement by a foreign insurance company, in conformity with a state statute, that if sued in a state court, it will not remove the suit to a federal court, is invalid; 20 Wall. 445.

An Iowa statute which requires that every foreign corporation named in it shall, as a condition for obtaining a permit to transact business in Iowa, stipulate that it will not remove into the federal court certain suits which it would by the laws of the United States have a right to remove, is void because it makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States; 121 U. S. 186; the state might as well pass an act to deprive a citizen of another state of his right of removal; *id.* 200. See INSURANCE.

Mutual benefit societies may prescribe regulations as to procedure in enforcing claims, and may require appeals to superior bodies before instituting suit, but they cannot entirely take away the right to invoke the aid of the courts in enforcing claims existing in favor of its members upon contracts; 102 Ind. 269.

An agreement by which the members of an association undertake to confer judicial

powers, in respect to the common property, upon its officers, selected out of the association, as a tribunal having general authority to adjudicate upon alleged violations of the rules, and to decree a forfeiture of the rights, to such property, of the parties, is void. The court will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in case of submission to arbitration of specific matters of controversy; 16 N. Y. 112.

The powers both of courts of equity and of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient; as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law; 110 U. S. 276.

When a prisoner after pleading guilty is allowed to go out of custody without bail, the court has no further jurisdiction over him, and cannot, at a subsequent term, order his rearrest, and pronounce sentence upon him; 39 N. E. Rep. (Ill.) 568.

As to jurisdiction of a justice of the peace, see that title.

Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction can not be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. 263 U. S. 305.

As distinguished from merits, jurisdiction is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. *Id.*

Between States. "Jurisdiction" as generally used in compacts between States has more limited sense than "sovereignty." 209 U. S. 473.

See UNITED STATES COURTS; EXECUTOR; THREE MILE LIMIT; HIGH SEAS; SOVEREIGN; FOREIGN JUDGMENTS; EQUITY; COMMON LAW; ADMIRALTY; JUDGMENTS; JUDGE; JUDICIAL POWER; RECORD.

See FOREIGN JURISDICTION; MARTIAL LAW; MILITARY GOVERNMENT; MILITARY JURISDICTION; MILITARY LAW, JURISDICTION UNDER.

JURISDICTION CLAUSE. In Equity Practice. That part of a bill which is intended to give jurisdiction of the suit to the court, by a general averment that the acts complained of are contrary to equity and tend to the injury of the plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity, is called the *jurisdiction clause*. Mitf. Eq. Pl. 43.

This clause is unnecessary; for if the court appear from the bill to have jurisdiction, the bill will be sustained without this clause; and if the court have not jurisdiction, the bill will be dismissed though the clause may be inserted. Story, Eq. Pl. § 34.

JURISPRUDENCE. The science of the law. The practical science of giving a wise interpretation to the laws and making a just application of them to all cases as they arise.

By science, in the first definition, is understood that connection of truths which is founded on principles either evident in themselves or capable of demonstration,—a collection of truths of the same kind, arranged in methodical order. In the latter sense, it is the habit of judging the same questions in the same manner, and by this course of judgments forming precedents. 1 Ayliffe, Pand. 3. See Austin, Amos, Markby, Heron, Phillimore, Lorimer, Lindley, on Jurisprudence.

Analytical. Jurisprudence formed by

analysis and comparison of legal conceptions. Stand. Dict.

Comparative. The analytical comparison of systems of law prevailing in different countries and nations, ancient and modern. Stand. Dict.

Equity. See EQUITY JURISPRUDENCE.

Medical. The branch of jurisprudence pertaining to questions, requiring technical knowledge of the medical sciences for their elucidation and determination. Stand. Dict.

JURIST. One versed in the science of the law. One skilled in the civil law. One skilled in the law of nations.

JURISTIC PERSON. The usual form of a juristic person is a corporation. Indeed, corporations are the only juristic persons known to the common law (except the State). Gray, Nature and Sources of Law 47.

JURO. In Spanish Law. A certain pension granted by the king on the public revenues, and more especially on the salt-works, by favor, either in consideration of meritorious services or in return for money loaned the government or obtained by it through forced loans. It is a portion of the yearly revenue of the state, assigned as a rightful indemnity, either in perpetuity or as an annuity.

JUROR (Lat. *juror*, to swear). A man who is sworn or affirmed to serve on a jury.

Any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impanelled and sworn or not. 43 La. Ann. 907.

JURY (Lat. *jurata*, sworn). A body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them.

The term "jury," as used in the constitution, means twelve competent men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party; duly impanelled, and sworn to render a true verdict, according to the law and the evidence; 11 Nev. 39.

A late writer considers that the best theory regards the jury system as having been derived from Normandy, where, as in the rest of France, it had existed since its establishment under the Carolingian kings. It made its appearance in England soon after the Norman Conquest. No trace of it is to be found in Anglo-Saxon times, nor was it, as is often supposed, established by Magna Charta; 10 Harv. L. Rev. 150, by J. E. R. Stephens. The same writer finds the idea of unanimity re-established in the time of Edward IV., a majority verdict having previously sufficed; in the Year Books of 33 Edward III. is the first indication of the jury deciding on evidence produced before them in addition to their own knowledge. Early in the reign of Henry IV. evidence was required to be given at the bar of the court, and the modern practice or method of jury trials had its origin; *id.* 150.

Prof. J. B. Thayer finds the origin of the jury in the Frankish inquisition; it existed in Normandy and went thence to England in the eleventh century; 5 Harv. L. Rev. 249. The use of a jury both for civil and criminal cases is mentioned for the first time in English statute law in the Constitutions of Clarendon; *id.* 156.

The origin of trial by jury is said by another recent writer to be rather French than English, rather royal than popular, rather a livery of conquest than a badge of freedom. Originally juries were called in, not to hear, but to give evidence. They were the neighbors of the parties and were presumed to know when they came into court the facts about which they were to testify. They were chosen by the sheriff to represent the neighborhood. The verdict was the sworn testimony of the countryside. By slow degrees the jury acquired a new character. Sometimes when the jurors knew nothing of the facts, witnesses who did know the facts would be called in to supply the requisite information. They became more and more dependent on the evidence given in their presence by those witnesses who were summoned by the parties. In the fifteenth century the change had taken place, though in yet later days a man who had been summoned as a juror and sought to escape on the ground that he already knew something of the facts, might be told that he had given a very good reason for his being placed in the jury box. It may well be said, therefore, that trial by jury, though it had its roots in the Frankish inquest, grew up on English soil; 1 Social England 255, 260. So also 1 Poll. & Maitl. 117-121.

Another writer of freedom foundation in Norman institutions and its establishment by positive legislation in the time of Henry II. Lesser, Hist. of Jury Syst. 172.

A common jury is one drawn in the usual and regular manner.

A grand jury is a body organized for certain preliminary purposes.

A jury de medietate lingue is one composed half of aliens and half of denizens.

Such juries might formerly be claimed, both in civil and criminal cases, where the party claiming the privilege was an alien born, by virtue of 23 Edw. III. c. 13, and by an earlier statute, where one party was a foreign merchant; 27 Edw. III. c. 8. Such a jury was provided in criminal cases by a statute of Edward I. It was abolished by 38 Vict. c. 14. The right has been recognized in this country; 1 Dall. 78; 2 Johns. 381; 11 Leigh 890; *contra*, 4 Cra. C. C. 573; 4 Hawks 200. It has been generally abolished by statute; Thomp. & Merr. Juries 19; excepting in Kentucky, where it still exists; *id.*

A petit or traverse jury is a jury who try the question in issue and pass finally upon the truth of the facts in dispute. The term jury is ordinarily applied to this body distinctively.

A special jury is one selected by the assistance of the parties.

This is granted in some cases upon motion and cause shown, under various local provisions. The method at common law was for the officer to return the names of forty-eight principal freeholders to the proper officer. The attorneys of the respective parties, being present, strike off each twelve names, and from the remaining twenty-four the jury is selected. A similar course is pursued in these states where such juries are allowed. See 8 Sharps, Bla. Com. 357. The earliest rule of court on the subject was made in 8 Will. III.; 1 Salk. 405. It formerly was granted only in cases of special consequence or great difficulty; but later, a special jury has usually been granted in ordinary cases. In some states such a jury is of course; in New York, statutes provide for such only in cases of special importance or intricacy, as to which the court must decide.

A struck jury is a special jury. See 4 Zab. 843.

Trial by jury is guaranteed by the constitution of the United States in all criminal cases except upon impeachments, and in all suits at common law where the subject-matter of the controversy exceeds twenty dollars in value. The right to such a trial is also provided in many of our state constitutions. It has been held, however, not to be an infringement of this federal constitutional right, where a statute provides that in all criminal prosecutions the party accused, if he shall so elect, may be tried by the court instead of by a jury; Miller, Const. U. S. 494; 5 Ohio St. 57; 30 Mich. 116; 46 Conn. 349; see 16 Am. L. Reg. N. S. 705. It was held by the United States supreme court that a jury trial may be waived when there is a positive legislative enactment giving the right to do so; 146 U. S. 314. This clause of the constitution does not apply to state courts; Hare, Am. Const. L. 860; 134 U. S. 31; 7 Pet. 247; 21 Wall. 557; Cooley, Const. Lim. 410; and therefore the states may in their own constitutions dispense with trial by jury both in civil and criminal cases; Ordrton. Const. Leg. 261, and cases *supra*. It does not apply to cases in the court of claims; 102 U. S. 426; nor to proceedings for disbarring an attorney; 107 U. S. 265; nor for assessing damages; Baldw. 202; nor to equity cases in the federal courts; 104 U. S. 726; nor to cases where the right is antecedently and voluntarily relinquished; 4 Wheat. 235; nor does a like provision in a state constitution apply to any proceedings in which a jury was not required at common law; *e. g.*, a justice's court; 30 Mo. 600; 62 Barb. 16; nor to any court which exercised its functions without the aid of a jury prior to the adoption of a constitution; Thomps. & Merr. Juries 11; 74 N. Y. 406.

A jury trial is not guaranteed by a state constitution providing for "due process of law"; 13 N. Y. 378; nor even by the provision for it in the fourteenth amendment; 92 U. S. 90; "due process of law" simply requires that there shall be a day in court, and the legislature may take away or change a remedy; 70 N. Y. 228; but it has been held in some cases that the expression does guarantee a jury trial; 87 Me. 165; 63 N. H. 405; 8 Gray 329; 110 U. S. 516, opinion of Harlan, J., dissenting.

An act providing for the trial of a contested election to a public office which deprives the party of a trial of disputed facts

by jury is not unconstitutional; 43 Pa. 884.

In the Delaware constitution of 1897, provision is made for the trial of criminal offenses outside the election laws, by the court without a jury. See DELAWARE.

The number of jurors must be twelve; and it is held that the term jury in a constitution imports, *ex vi termini*, twelve men; 20 Ohio 81; 74 N. Y. 406; 6 Metc. 231; 4 Ohio St. 177; 2 Wis. 22; 8 id. 219; whose verdict is to be unanimous; 12 N. Y. 190. See 11 Nev. 39, *supra*.

Where a constitution preserves the right of trial by jury inviolate, the legislature cannot change the number of jurors in either civil or criminal cases; Thomp. & Merr. Juries 10; 35 Mo. 408; 51 Ga. 264.

The question whether the common law requirement of twelve jurors may be changed has in recent years received much attention in the courts. There has been a growing tendency, at least, towards the serious consideration of changes in the jury system as administered at common law and secured by the state and federal constitutions. See GRAND JURY. The decided weight of authority is that, where the right to trial by jury is secured by the constitution, the legislature cannot authorize a verdict by a less number than twelve; that the constitutional reservation implies a right to the concurrent judgment of that number, and any statute limiting it is unconstitutional and void; 41 N. H. 550; 33 Fla. 608; 1 Okl. 366; 36 Pac. Rep. (Ariz.) 499. It is held *contra* in all civil cases in Utah; 37 Pac. Rep. 262; 39 id. 541; 9 Utah 61. In the last case the question is considered in an elaborate opinion, which argues that the requirement is no more an essential part of the jury system than those common-law qualifications of jurymen which have not been continued in force. The court says: "Wherever this provision has been tried, it has been found to be a distinct benefit. Such a provision is simply a change in the procedure of applying legal remedies. It is general in its application; it is fair and just to all. No man's property rights are injured by it, and no man can be said to have a vested right in the unanimous action of a jury, any more than in the fact that a juror was anciently required to be a freeholder. All litigants could waive in civil trials at common law and under our constitution this unanimity of verdict. If they could waive it, then it was not one of the requisites which must be preserved in order to preserve a jury trial in civil actions. For these reasons because society progresses, and modes and legal procedure must change with that progress, because this enactment is a just and reasonable expression of the public will, because it is calculated to be a great benefit to all classes of litigants, because it reaches justly, fairly, and impartially all classes of men, because it is claimed only to be an infringement of a broad and general statement in the constitution which ought not to be so narrowly construed as to be a bulwark against progress, we hold that this law was a rightful subject of legislation." But see 166 U. S. 484, reversing the supreme court of Utah (10 Utah 147), where it was held that litigants in common-law actions in the courts of the territory of Utah, while it remained a territory, had a right to trial by jury which involved unanimity of verdict, and this right could not be taken away by territorial legislation. As to unanimity of a verdict in a state court see *infra*. See also 36 Cent. L. J. 437; 89 Ga. 393.

There would seem to be no legal objection to permitting this change by constitutional provision, but even that, it has been held, will not sustain a statute providing that in certain contingencies, at the discretion of the trial court, a jury may consist of less than twelve men; 93 Mich. 399. In California, in civil cases and misdemeanors, the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court. And the number of jurors may be limited in Colorado, Florida, Idaho, Iowa, Louisiana, Michigan, Missouri, Montana, Nebraska,

New Jersey, North Dakota, Washington, and Wyoming. See 36 Cent. L. J. 437.

Unanimity in giving a verdict was not universal in the early days of the common law; at times eleven sufficed; in some cases a majority. Probably it was only in the second half of the fourteenth century that unanimity became an established principle; 5 Harv. L. Rev. 296, by Prof. J. B. Thayer. The requirement of unanimity of twelve jurors arose from the custom which taught men to regard it as the proper amount of evidence to establish the credibility of a person accused of an offense; Forsyth, Trial by Jury 240. At common law, except as above stated, unanimity was essential to a verdict, so that it has been held that a conviction by eleven jurors, even where the accused waived a trial by twelve jurors, would be set aside; 18 N. Y. 128. "Unanimity was one of the peculiar and essential features of trial by jury at common law;" 166 U. S. 464, in which case while the court considered it a matter of dispute as to whether the seventh amendment alone invalidated a statute dispensing with unanimity it was held that, under the constitution and a law that no person shall be deprived of the right of trial by jury, a statute of Utah authorizing a verdict in civil cases on the concurrence of nine jurors was invalid; but the court expressly said that the power of a state to change the rule as to unanimity was not before them, and cited 92 U. S. 90; 110 U. S. 516. Changes in this respect have been made in many states. In civil actions in California, Idaho, Louisiana, Nevada, Texas, and Washington, three-fourths may render a verdict; two-thirds in Montana in civil actions and crimes less than felonies, and five-sixths in Idaho, in all cases of misdemeanor. In Iowa the legislature may authorize a verdict by less than twelve in inferior courts.

Unanimity is still required in England. In a late case before the Judicial Committee of the Privy Council, where a British subject was convicted of murder in Japan, the court being comprised of a British judge and five jurors, established under a British treaty, it was argued by Sir Frank Lockwood that the British government could not establish such a court with a jury of less than twelve, but the court held that the conviction was lawful. [1897] App. Cas. 719.

A modification of the jury system, much considered and quite generally adopted, is the provision authorizing the parties to waive a jury and elect to have the facts tried by the court. This course in civil cases is authorized in most of the states, as well as in the federal courts. It is provided for in the constitutions of Arkansas, California, Colorado, Florida, Maryland, Michigan, Minnesota, Nevada, New York, North Carolina, Pennsylvania, Vermont, Wisconsin, Washington, and West Virginia. By statute a like practice obtains in Illinois, Missouri, New Jersey, and Wyoming, and also by the bill of rights in Arizona and by statute in New Mexico. There can be a waiver in civil cases and in criminal cases not amounting to felony in Idaho, Montana, North Dakota, and California.

The general principle is, however, that in criminal cases, the accused can neither waive his right to a trial by a jury of twelve nor be deprived of it by the legislature; 18 N. Y. 128; 54 Ind. 461; 63 Ia. 190 (*contra*, 51 Ia. 578); 41 N. H. 550; 66 Mo. 684; 44 Ala. 393; 12 Ohio St. 622; 1 Mont. 118; 43 Mich. 443. Judge Cooley, after stating that less than twelve would not be a common-law jury, or such as the constitution guarantees, adds, "And the necessity of a full panel could not be waived—at least in case of felony—even by consent." Const. Lim., 4th ed. 395. It was held that where one juror was an alien the failure to challenge him was not a waiver of the objection, and on the refusal of the court to set aside the judgment, it would be reversed, on error; 16 Mich. 356; *contra*, 2 Bay 150.

As to waiver of full panel, see 12 Cr. L. Mag. 12; by criminal; 25 Am. L. Reg. n. s. 403; 21 Cent. L. J. 230. On the trial of a

misdemeanor, a full jury may be waived; 12 Cush. 80, per Shaw, C. J.; 2 Metc. (Ky.) 1; 59 Fed. Rep. 110; or where the penalty is only a fine; 1 Metc. (Ky.) 365; 41 Mo. 470. A jury may be waived in all civil cases, without any statute; 89 Va. 767.

The fact that a court of chancery may summon a jury to try an issue of fact is not equivalent to the right of trial by jury under the seventh amendment of the constitution; 149 U. S. 451. And the constitutional right does not relate to suits over which equity exercised jurisdiction when the constitution was adopted; 26 S. E. Rep. (W. Va.) 557; but the right cannot be defeated by giving equity jurisdiction over an action in which the right applies; *id.* It is not impaired by an act giving the appellate court authority to reverse for excessive damages; 36 Atl. Rep. (Pa.) 296; s. c. 178 Pa. 481. In that case it was held that this act which gives the supreme court "power in all cases to affirm, reverse, amend, or modify a judgment, order, or decree appealed from and to enter such judgment," etc., as it may deem proper and just, does not infringe upon the right of trial by jury and is constitutional; and in a later case this decision was adhered to, and it was further held that where the supreme court had reversed a judgment, without awarding a new venire, it might subsequently amend the judgment of reversal by adding thereto a formal judgment in favor of defendant; 183 Pa. 142.

Qualifications. Jurors must possess the qualifications which may be prescribed by statute, must be free from any bias caused by relationship to the parties or interest in the matter in dispute, and in criminal cases must not have formed any opinion as to the guilt or innocence of the accused.

"1. They are to be good and lawful men. 2. Of sufficient freeholds, according to the provisions of several acts of parliament. 3. Not convict of any notorious crime. 4. Not to be of the kindred or alliance of any of the parties. 5. Not to be such as are prepossessed or prejudiced before they hear their evidence." Cond. Gen. 297. As to bias by reason of opinion, see 15 Wkly. L. Bul. 305; 20 Am. L. Reg. n. s. 117; impressions; 8 Cr. L. Mag. 559.

At common law there was a freehold qualification, but to no certain amount; by 2 Hen. V. it was 40s.; Thomp. & Merr. Juries 20; Proffatt, Jury Trial § 115. See 20 Am. L. Reg. n. s. 436, 497.

An alien may serve as a juror, that is, a foreigner intending to be naturalized; 66 Mich. 154; *contra*, 3 Ala. 546, and see Proffatt, Jury Trial § 116; 6 Cr. L. Mag. 336. An atheist has been held to be disqualified; 3 Harr. & McH. 301. Women could not serve as jurors at common law, except upon a jury to try an issue under a writ *de ventre inspiciendo* (q. v.); 3 Bla. Com. 362. They are now qualified in some states.

The federal constitution provides that in criminal trials the jury shall be taken "from the state and district where the crime shall have been committed." State constitutions usually confine the selection to the county or district, except where, in some states, a provision is made in case jurors cannot conveniently be found in the county. The right to a trial by a jury of the vicinage is an essential part of trial by jury.

In some states the qualifications of jurors are regulated by the constitution; e. g., Florida requires them to be taken from the registered voters. Georgia requires that jurors shall be upright and intelligent persons. Subject to the constitutional provisions as to impairing the right of trial by jury, the legislature has power to define the qualifications of jurors. It may dispense with the freehold qualification required by common law; 96 Ill. 206; 103 Mass. 412; but see 20 Am. L. Reg. 436; Proffatt, Jury Trial § 115.

In some states conviction for certain high crimes disqualifies; some states require citizenship; others that jurors shall be selected from the qualified voters; others impose tests of integrity, or intelligence or education. Freehold or property tests are

required in some states. That the jurors shall be over twenty-one years of age is probably a universal requirement; while in some states those past a certain age cannot serve; Proffatt, *Jury Trial* § 117.

In the federal courts the qualifications are the same as those relating to the highest courts of law in the respective states; U. S. Rev. St. § 800; but this does not require a minute adherence to the state practice; 1 Woods 499, per Bradley, J. A statute confining the selection of jurors to white citizens is invalid under the fourteenth amendment; the right to serve on a jury is an incident of citizenship; 100 U. S. 308; 103 *id.* 370.

The intelligence and ability of a juror are matters within the sound discretion of the court, and it is sufficient if he knows the English language and can understand the testimony and the argument of counsel; 44 La. Ann. 969. It rests with each state to prescribe such qualifications as it seems proper for jurymen, taking care only that no discrimination in respect to such service be made against any class of citizens solely because of their race; 140 U. S. 291.

As to qualifications generally, see 3 L. Mag. & Rev. N. s. 165; 24 Wkly. L. Bul. 438; disqualifications; 3 Alb. L. J. 81.

The selection of jurors is to be made impartially; and elaborate provisions are made to secure this impartiality. In general, a sufficient number are selected, from among the qualified citizens of the county or district, by the sheriff, or a similar executive officer of the court, and, in case of his disqualification, by the coroner, or, in some cases, by still other designated persons. See *ELISORS*. From among these the requisite number is selected at the time of trial, to whom objection may be made by the parties.

Sir Matthew Hale says that the writ to return a jury issues to the sheriff who is entrusted to elect and return the jury without the nomination of either party. The jurors were to be such persons as for estate and quality were fit to serve on that employment. They were to be of the neighborhood of the fact to be inquired, or at least of the county. Cond. Gen.

At common law jurors were selected, usually, by the sheriff or coroner. It is done in this country in various ways; by judges of election; by town authorities or by various officials or special boards or commissions. Statutory provisions as to the time and mode of selecting jurors are said to be usually directory only and need not be strictly complied with; Thomp. & Merr. *Juries* 44; but this is not the case with all such requirements.

In the federal courts the panel of jurors is selected by the clerk of the court and a commissioner appointed by the court, who must be taken from the opposite political party to that to which the clerk belongs; the clerk and the commissioner place names in the jury box alternately without regard to party affiliations. Any judge may order the names to be drawn from the boxes used by the state authorities in selecting jurors in the highest court of the state; no person may serve as a petit juror more than once in a year. See *CHALLENGE*.

Exemption. Usually public officials are exempt; and persons engaged in various classes of occupations are often exempt; thus in New York, clergymen, physicians, lawyers, professors, and teachers, persons engaged in certain kinds of manufacturing, canal officials, those employed on steam vessels, employees of railroad and telegraph companies, members of the militia and fire department, etc. Exemption is only during actual employment; 70 N. C. 660; and the right of exemption is a personal privilege and usually not a ground of challenge; 10 Kan. 288; 90 Ill. 221; or a disqualification; 11 Tex. 257; 52 Maine 328; 43 N. H. 89.

The members of an association formed to aid in the prosecution of a particular class of offences, and those who are in sympathy with the association, and contribute money for the purposes of its organi-

zation, are not competent to sit as jurors on the trial of an indictment for an offence of the class for the prosecution of which the association is formed and the money contributed; 19 So. Rep. (La.) 285. A juror was disqualified at common law by openly declaring his opinion that the party was guilty; 2 Hawk. Pl. C. ch. 48, § 27. Yet if such declaration was made from his knowledge of the case and not out of any ill-will to the party, it is no cause of challenge; 2 *id.* § 28.

Where a statute disqualifies persons related within certain degrees of affinity from serving as jurors on the trial of a cause to which their affinities are parties, husbands whose wives are second cousins are not affinities; 42 N. E. Rep. (Ind.) 549.

In Tennessee it has been held that a statute disqualifying from service, either on grand or petit juries, persons engaged in a conspiracy against law and order is not unconstitutional; 32 S. W. Rep. (Tenn.) 363. In this case the statute in question was for the suppression of what are known as White Caps, and disqualified for jury duty all persons who had been guilty of any offence under the statute. So also a similar disqualification of all persons violating the act for the suppression of polygamy was held valid; 114 U. S. 477.

Swearing the jury. At common law it appears to have been the practice to swear each jurymen as he is drawn and accepted; Joy, Conf. 220; 18 Conn. 166. The present practice is to swear the entire jury after the panel is completed. Either practice is lawful; 18 Cal. 128. It is not irregular to swear all the jurors when the court opens, to try all the issues that may be brought before them; Thomp. & Merr. *Juries* 318; 6 Wend. 548. But this practice has been disapproved of in criminal cases on the ground of the salutary effect both on the prisoner and the jury of the formality of administering an oath in the presence of the prisoner; 22 Ill. 160. It is also considered the better practice in criminal cases to have the panel full before the oath is administered; Thomp. & Merr. *Juries* 319; 9 Fla. 215.

The impanelling and final acceptance of a jury by a court is a judicial determination that the jurors are competent; and if any objection to the qualifications of a juror is known to a party before such determination, it cannot be raised afterwards, unless on exception to the overruling of a challenge; 56 Mich. 154.

Influencing the jury. An attempt to influence a jury corruptly by promises, persuasions, entreaties, money, entertainments, and the like is a misdemeanor at common law; 95 N. C. 685; 2 Bish. Cr. L. 384; 2 Nev. 288; 5 Cow. 503. Arguments of counsel in open court at the trial of a cause are a legitimate use of influence and are not within this rule, but it would be a crime to take advantage of the opportunity afforded in order to influence the jurors corruptly; 70 Cal. 532. Where an attempt to influence a jury, amounting to embracery, is made, it is immaterial whether they give any verdict or not, and if they give a verdict, it is no defence that it is a true one. This crime may be committed by a juror if he corruptly attempts to influence other jurors; Cl. Cr. L. 326; or if he by indirect practices gets himself sworn on the tales to serve on one side; 1 Litt. 573.

As to the effect of improper influence on, or misconduct of, the jury, see *NEW TRIAL*.

"If they eat and drink before or after they are agreed of their verdict, they are to be fined; only with this difference, that if they eat at their own charge, the verdict shall stand; but if at the charge of the party, it shall be set aside; 1 Leon. 133; some of them have been fined for having figs and pippins in their pockets, though they did not eat them; *id.*; Moor 599.

Separation during trial. At common law the jury was kept together until they had agreed upon their verdict. Even the right to adjourn a trial from day to day was doubted; 24 How. St. Tr. 414. At present jurors in civil cases are allowed to separate each day; and so in trials for mis-

demeanors, at the discretion of the court. In some cases also in trials for felony, even in capital cases. But in an able work the opinion is maintained that in cases of capital felonies the jury should not be allowed to separate, as they were not at common law; Thomp. & Merr. *Juries* 367; but absolute isolation is not required; they may be kept under the charge of a sworn officer who shall exercise a reasonable oversight; *id.* 370. The officer in charge must be sworn; 2 Hale, P. C. 296; although if he be a sheriff or constable and *ex officio* in charge of the jury, he need not be specially sworn; 16 Wis. 294.

Affidavits of jurors will not be received to impeach a verdict; Thomp. & Merr. *Juries* 539, citing numerous cases; 6 Houst. 60; 39 Pac. Rep. (Cal.) 59; 50 Cal. 438; 15 Ark. 403; 45 Ill. 37. Nor will statements of third parties who derived their information from a member of the jury; Thomp. & Merr. *Juries* 547; 62 N. W. Rep. (Neb.) 43; 22 S. W. Rep. (Mo.) 447. The court may question the jury as to the grounds upon which they based their verdict, if there was more than one ground; 12 Metc. 281. A jurymen may be heard to show misconduct on the part of third parties; 7 S. & R. 458; and jurymen should report to the court any attempt to influence them; 45 Ill. 37. But affidavits appear to be admissible to impeach the verdict, in Tennessee; 7 Baxt. 273; and to a certain extent in Iowa; 20 Ia. 195; and Kansas; 22 Kan. 277; and to show that a verdict was decided by lot; 35 Ark. 109.

The province of the jury is to determine the truth of the facts in dispute in civil cases, and the guilt or innocence of the person accused in criminal cases. Thorn. Jur. § 133. See *CHARGE*. If they go beyond their province, their verdict may be set aside; 4 Maule & S. 192; 3 B. & C. 357; 2 Price 282; 2 Cow. 479; 10 Mass. 39.

The question whether the jury are judges of the law as well as of the fact, or whether it is the function of the court conclusively to instruct the jury upon the law, particularly in criminal cases, has been very much discussed from the earliest times and has recently been the subject of critical examination by the United States supreme court. See *infra*.

Coke says: "As the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they so far may decide upon the law as well as fact, such a verdict naturally involving both. In this I have the authority of Littleton himself, who hereafter writes, 'that if the inquest will take upon themselves the knowledge of the law upon the matter, they may give their verdict generally.'"

He further says in substance: "Questions of law generally and more properly belong to the judges. The immediate and direct right of declaring upon questions of law is entrusted to the judges; that in the jury is only incidental." Co. Litt. 156 a, n. (5).

Though the question had not, until recently, been the subject of a direct decision of the United States supreme court, it had frequently arisen in England and America. In the former country, in the case of the Dean of St. Asaph, the court alluded to the admission by both parties of an ancient rule of the common law, that the law should be determined by the court and the facts by the jury; but they differed as to what was law and what fact, it being contended on one side that the question of guilt in a libel case, after the fact of publication and truth of the innuendoes are found by the jury, was a question of law, and on the other side that the guilt of the defendant was a question of fact. This concurrence of views on the point in question "affords strong proof that, up to the period of our separation from England, the fundamental definition of trials by jury depended on the universal maxim, without an exception, *ad questionem facti respondent juratores, ad questionem juris respondent iudices*."

The doctrine that a jury may disregard

the law as declared by the court finds its principal, original support in Bushell's case, Vaughan 185, where the question was on habeas corpus whether jurors were liable to be fined and imprisoned for non-payment of fine for having found a general verdict in opposition to the instructions of the court. Vaughan, C. J., held that because a general verdict of necessity resolves "both law and fact complicately and not the fact by itself," it could not be proved that the jurors did not proceed upon their view of the evidence. This line of argument is implicitly relied upon by the advocates of the extreme right of the jury, but has been rightly characterized as narrow; though conclusive in the case to which it related; 1 Curt. C. C. 23; Hallam, Const. Hist. c. 13; 5 Gray 185. The line of argument in the English case, taken together with the criticisms upon it, well illustrate the difficulties of the subject which arise necessarily in every case which is submitted to a jury upon mixed questions of law and fact. However frankly it may be stated that the jury are bound by the views of the law delivered to them by the court, the obligation to accept those views is rather moral than susceptible of rigid practical enforcement. Early English cases supporting the doctrine that the jury are judges of the fact and not of the law are, 1 Plowd. 111; *id.* 233; 2 *id.* 493; 2 Stra. 766; Lord Hardwicke said:—"The thing that governs greatly in this determination is, that the point of the law is not to be determined by juries; juries have a power by law to determine matters of fact only; and it is of the greatest consequence to the law of England and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." Cas. temp. Hardwicke 23. Foster, after stating the rule that the ascertainment of all the facts is the province of the jury, says:—"For the construction the law puteth upon facts stated and agreed, or found by a jury is in this, as in all other cases, undoubtedly the proper province of the court." And he adds that in cases of difficulty, a special verdict is usually found, but, where the law is clear, the jury, under the direction of the court as to the law, may and, if well advised, always will find a general verdict conformably to such direction; Fost. Cr. L. 3d ed. 255. To the same effect, it has been urged, is the settled current of English authority; Wynne's Eunomus, Dial. III. §§ 53, 523; 1 Steph. Hist. Cr. L. 551; 2 Hawk. P. C. c. 22, § 21; 3 Term. 428; 4 Bing. 195; 8 C. & P. 94; *contra*, Vaughan 135; 4 B. & Ald. 145.

The question arose most frequently in England in connection with prosecutions for libel, and it was contended that Fox's Libel Act changed the common-law rule, but this was not the case. In a leading case arising under that act, it was held that it was for the judge to define the offence and then for the jury to say whether the publication under consideration was within that definition; 6 M. & W. 104 (see as to this case, 156 U. S. 97; 1 Curt. C. C. 55); 2 Jur. 137. In the House of Lords the unanimous opinion of the judges was given by Tindal, C. J., in answer to a question whether, if a fine were received in evidence, it ought to be left to the jury to say whether it barred an action of *quare impedit*, that "the judge who tried the cause should state to the jury whether in point of law the fine had that effect, or what other effect on the rights of the litigant parties, upon the general and acknowledged principle *ad questionem juris non respondent iuratores*." 4 Cl. and Fin. 445.

In state courts it has been held to be "a well-settled principle, lying at the foundation of jury trials, admitted and recognized ever since jury trial had been adopted as an established and settled mode of proceeding in courts of justice, that it was the proper province and duty of judges to con-

sider and decide all questions of law, and the proper province and duty of the jury to decide all questions of fact;" 10 Metc. 263; 5 Gray 185; 13 N. H. 536; 29 Mich. 173; 6 R. I. 33; 44 Cal. 65; 65 Vt. 1, 34 (overruling 23 *id.* 14, and every case which followed it); 3 J. J. Marsh. 132. The citations include both civil and criminal cases. There undoubtedly exists a power in the jury to override the law as declared by the court and to make their action effective by an acquittal in a criminal case which cannot be set aside. This has received frequent expression from judges and courts of great authority. "The unquestionable power of juries to find general verdicts, involving both law and fact, furnishes the foundation for the opinion that they are judges of the law, as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled to decide legal questions, having the right to find special verdicts, giving the facts, and leaving the legal conclusions, which result from such facts, to the court. When they find general verdicts, I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of law or fact, or of ascertaining the grounds upon which their verdicts are based;" 26 N. Y. 588; see also 1 Park. Cr. Cas. 147; *id.* 474. In Pennsylvania there has been, in some cases, a very strong expression of the idea that in criminal cases the juries are judges of the law as well as of the fact. This was very earnestly stated by Sharswood, C. J., who said that the power of the jury to judge of the law in a criminal case was one of the most valuable securities guaranteed by the bill of rights of Pennsylvania; 89 Pa. 522; but this unqualified statement is not sustained by the leading cases in that state. In Commonwealth v. Sherry, reported in Whart. Hom. (App.) 481, Rogers, J., said: "You are, it is true, judges in a criminal case, in one sense, of both law and fact; for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. . . . It is important for you to keep this distinction in mind, remembering that, while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. . . . For your part, your duty is to receive the law, for the purposes of this trial, from the court. If an error injurious to the prisoner occurs, it will be rectified by the revision of the court in banc. But an error resulting from either a conviction or acquittal, against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court and the facts to the jury."

Other expressions substantially to the same effect are: "If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it;" Gibson, C. J., in 4 Pa. 269.

"The court had an undoubted right to instruct the jury as to the law, and to warn them as they did against finding contrary to it. This is very different from telling them that they must find the defendant guilty, which is what is meant by a binding instruction in criminal cases;" 90 Pa. 503. In 143 Pa. 64, it was held "that the statement by the court was the best evidence of the law within the reach of the jury, and that the jury should be guided by what the

court said as to the law," and this, Paxson, C. J., speaking for the court, declared to be in harmony with the case in which is found the expression of Sharswood, C. J., *supra*.

In this case Mr. Justice Mitchell filed a vigorous and very able concurring opinion in which he says: "Upon one point I would go further and put an end once for all to a doctrine that I regard as unsound in every point of view, historical, logical, or technical. . . . The jury are not judges of the law in any case, civil or criminal; neither at common law, nor under the constitution of Pennsylvania, is the determination of the law any part of their duty or their right. The notion is of modern growth and arises undoubtedly from a perversion of the history and results of the right to return a general verdict, especially in libel cases, which ended in Fox's Bill." He then considers the question historically, and on the authorities, and says that there is not a single respectable English authority for the doctrine, and that, against a "solid phalanx" of American authorities, there is but a single authority in its favor (23 Vt. 14), which was by a divided bench and which has been since overruled; 65 Vt. 1, *supra*. He concludes that "the jury were never judges of the law in any case, civil or criminal, except as involved in the mixed determination of law and fact by a general verdict." In an annotation of the case in 65 Vt. 1, which overruled what is here characterized as practically the only authority in support of the doctrine, it is said: "The ghost of the doctrine that juries in criminal cases are to judge of the law as well as the facts would seem to be effectually laid by the above decision. . . . That solitary authority (23 Vt. 14), which has often been attacked and discredited, is now by the case above reported completely overruled." 19 L. R. A. 145.

In the United States courts, prior to the direct decision of the supreme court already referred to, the question had been frequently examined. The most elaborate discussion of the subject was by Mr. Justice Curtis, whose opinion is very much relied upon by the supreme court. His conclusion was "that when the constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as in civil cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the constitution when it adopts a trial by jury." 1 Curt. C. C. 23. Following in a much later case, also by the supreme court justices, sitting on circuit, the principle was clearly laid down: "There prevails a very general, but an erroneous, opinion that in all criminal cases the jury are the judges as well of the law as of the fact—that is, that they have the right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury." "It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury." Field, J., in 4 Sawy. 457; and to the same effect are, 2 Sumn. 240; 5 Blatch. 204; 5 Cra. C. C. 573; 19 Fed. Rep. 633.

The authorities which have been sometimes relied upon to support the contrary view are, 8 Dall. 1; 1 Burr's Trial 470; 9 *id.* 422; Whart. St. Tr. 48, 84; Chase's Trial App. 44. These authorities received a very critical examination both by Mr. Justice Curtis in 1 Curt. C. C. 23, and by Mr. Justice Harlan, who delivered the opinion of the court in Sparf et al. v. United States, 156 U. S. 51; and in the dissenting opinion of Mr. Justice Gray (and except by the latter) they were not considered, when prop-

erly read, as sustaining the view in support of which they are usually cited. The opinion of Mr. Justice Harlan, last referred to, contains a full discussion of the subject, and in it will be found most of the authorities herein cited. It was held that where there was no evidence upon which the jury could properly find the defendant guilty of an offence included in it less than the one charged, it is not error to instruct them that they cannot return the verdict of any lesser offence. In support of the rule laid down in this decision, see also Cooley, Const. Lim. 323; 1 Greenl. Ev. § 49; Thomp. Tr. § 1016; and the valuable note by Dr. Wharton in 1 Crim. Law Mag. 51. By way of explanation of some of the expressions so much relied upon in support of a contrary view, Mr. Justice Harlan in his opinion referred to, *supra*, says: "The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be explained by the fact that in 'many of the states the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much popular importance.' Wharton's Cr. Pl. & Pr., 8th ed. § 806; Williams v. State, 32 Miss. 389, 396."

The argument for the right of the jury to decide the law in criminal cases has been most recently fully presented in the dissenting opinion of Mr. Justice Gray, with whom concurred Mr. Justice Shiras, in *Sparf et al. v. United States*. In this opinion from a long and careful examination of the authorities, the conclusion is thus stated: "It is our deep and settled conviction, confirmed by a re-examination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue." It may be noted that of three cases cited in this opinion as containing the ablest discussion of the subject on both sides, and taking the same view as that advocated by Mr. Justice Gray, two opinions, those of Chancellor Kent and Mr. Justice Thomas in favor of the right, were also dissenting opinions and that of Judge Hall, of Vermont, on the other side, the only one of the three which was an authority, has lately been overruled, as stated *supra*. The English authorities are very fully discussed, and much attention is given to cases which are claimed as authorities in favor of the views presented which have already been cited, *supra*, and of which those who argue against the right of the jury to decide the law, question either the authority or the application. The contention of this dissenting opinion is that the result of the English authorities is in favor of the ultimate right of the jury to decide the law, notwithstanding the instructions of the court, and that the earlier American authorities are to the same effect. It is admitted that in the later American cases, "the general tendency of decision in this country has been against the right of the jury, as well as in the courts of the several states, including many states where the right was once established, as in the circuit courts of the United States. The current has been so strong, that in Massachusetts, where counsel are admitted to have the right to argue the law to the jury, it has yet been held that the jury have no right to decide it, and it has also been held, by a majority of the court, that the legislature could not constitutionally confer upon the jury the right to determine, against the instructions of the court, questions of law involved in the general issue in criminal cases; and in Georgia and in Louisiana, a general provision in the constitution of the state, declaring that 'in criminal cases the jury shall be judges of the law and fact,' has been held not to authorize them to decide the law against

the instructions of the court" (156 U. S. 168); to those urged with the late constitutional construction should "have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage." These cases contain all the learning on the subject on both sides and may be referred to for the full statement and full criticism of authorities which is not practicable within the limits of this title.

See, generally, 15 Law Rep. 1; 11 Am. L. Reg. N. S. 401; 30 *id.* 731, 744; 2 Cr. L. Mag. 664, 671; 3 *id.* 484; 7 *id.* 654; 10 S. E. Rep. (Va.) 745; Hargrave's note to Co. Litt. 155 b.; 5 So. L. Rev. N. S. 352.

Directing the verdict. The most frequent expression of the rule is that, where there is no evidence tending to prove the facts set up by the party who sustains the burden of proof, the court is bound, on request, to direct the jury to return a verdict for the opposite party; 15 Ga. 91; 36 Mo. 484; 87 *id.* 462. On the other hand, where there is any evidence tending to prove such facts, the court cannot so direct the verdict, but must submit the evidence to the jury and leave it to them to determine whether it is sufficient to that end; 63 Mo. 397; 85 *id.* 247; Thomp. Tr. § 2245.

When the testimony is all in one direction, or when all the evidence for the plaintiff has been given, and it has no tendency whatever to prove the particular issue relied on to recover, and there is no question in regard to the credibility of the witnesses who have given the evidence, the court may determine the whole case as a question of law; 36 Mo. 491; 32 Vt. 612.

It is only where the evidence, with all fair and legitimate inferences, and viewed in the most favorable light, is insufficient to justify a verdict for the plaintiff, that the court may direct a verdict for the defendant; 143 Ill. 243; 147 *id.* 120; 52 Fed. Rep. 87; 42 Ill. App. 536; 95 Wis. 4; see 141 N. Y. 514. A federal court may direct a verdict for either party whenever, under the state of the evidence, it would be compelled to set aside one returned the other way; 3 C. C. App. 280. Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict; 85 Neb. 372; 95 Ala. 397; 98 *id.* 157; 67 Hun 518; 95 Mich. 140; 8 Misc. Rep. 512. Where the right of recovery depends on questions of fact, there must be a submission to the jury; 160 Pa. 314. A direction to find for the defendant was held proper, in an action against a railroad for interference with the plaintiff's business, where no evidence was offered showing the injury caused by such interference; 154 Pa. 463. Where it is shown by an open statement of counsel for the plaintiff that the contract on which the suit is brought is void, the court may direct the jury to find a verdict for the defendant; 103 U. S. 261. There can be no serious doubt but that the court can at any time direct the jury when the facts are undisputed, and that the jury should follow such direction; *id.*

For a clear statement of the doctrine of peremptory instructions, as recently laid down by Mr. Justice Harlan, see INSTRUCTIONS. See also CHARGE; VERDICT.

The removal of a case from the consideration of a jury, in criminal cases, can only take place by consent of the prisoner; 6 C. & P. 151; 1 C. & K. 201; 5 Cox, Cr. Cas. 501; 1 Humph. 103; 6 Ala. N. S. 616; or by some necessity; 5 Ind. 290; 10 Yerg. 536; 26 Ala. N. S. 135; 3 Ohio St. 239; 1 Dev. 491; 2 Gratt. 570; 3 Ga. 60; 4 Wash. C. C. 411; so as to compel the prisoner to be tried again for the same offence; 4 Bla. Com. 350. But where such necessity exists as would make such a course highly conducive to purposes of justice; 2 Gall. 364; 6 S. & R. 536; 2 D. & B. 166; 18 Johns. 205; 9 Leigh. 630; 13 Q. B. 734; 3 Cox, Cr. Cas. 495; it may take place. The question of necessity seems to be in the decision of the court which tries the case; 2 Pick. 503; 4 Harr. Del. 581; 6 Ohio 399; 13 Wend. 55; 9 Wheat. 579. But see 1 Cox, Cr. Cas. 210; 13 Q. B. 734; 5 Ind. 292. A distinction has

been taken in some cases between felonies and misdemeanors in this regard; 8 D. & B. 115; 18 Ired. 283; 7 Gratt. 662; 2 Sumn. 19; 6 Mo. 644; 74 N. C. 391; but is of doubtful validity; 18 Johns. 187; 9 Mass. 494; 5 Litt. 137; 26 Ala. N. S. 135; 11 Ga. 353; 1 Benn. & H. Lead. Cr. Cas. 389.

Among cases of necessity which have been held sufficient to warrant the discharge of a jury without releasing the prisoner are *sickness of the judge*; 8 Ala. 73; 8 Bax. 571; or of his wife; 59 Ia. 471; *sickness*; 3 Rawle 498; 2 Mood. & R. 249; 8 Crawford & D. 212; 8 Campb. 207; 1 Thach. Cr. Cas. 1; 2 Mo. 185; 10 Yerg. 632; 5 Humphr. 601; 6 *id.* 249; 9 Leigh 618; 65 Ala. 129; 69 Vt. 84; or other *incapacity of a juror*; 1 Curt. 23; 13 Wend. 351; 8 Ill. 326; 3 Ohio St. 239; 12 Gratt. 689; but see 8 B. & C. 417; C. & M. 647; 8 Ad. & E. 831; 2 Cra. 412; 1 Bay 150; 4 Ala. 454; 1 Humphr. 253; 2 Blackf. 114; 1 Leigh 599; 4 Halst. 256; *sickness of the prisoner*; 2 Leach 546; 2 C. & P. 413; 9 Leigh 623, n.; 68 N. C. 203; 26 Ark. 260; or the *death or insanity of a judge or juror*; 88 Cal. 487; 32 Ind. 480; *expiration of a term of court*; 1 Dev. 491; 1 Miss. 134; 5 Litt. 138; 4 Ala. N. S. 173; 2 Hill, S. C. 680; 2 Wheel. Cr. Cas. 472; and see 5 Ind. 290; 3 Cox, Cr. Cas. 489; *inability of the jury to agree*; 2 Johns. Cas. 201; 275; 2 Pick. 521; 6 Ohio 399; 9 Wheat. 579; 53 Minn. 232; 67 Ind. 354; 47 Conn. 121; 61 Miss. 117; 35 La. Ann. 483; 90 N. C. 664; 27 Fed. Rep. 616; *contra*, 6 S. & R. 577; 3 Rawle 498; 26 Ala. N. S. 135; 10 Yerg. 532; 2 Gratt. 167; 3 Crawford & D. 212; 1 Cox, Cr. Cas. 210; L. R. 1 Q. B. 289; 121 Pa. 109. But see 7 Gratt. 632; 3 D. & B. 115; 13 Ired. 283. In some states, statutes have provided for a discharge upon a disagreement; 26 Ark. 260; 5 W. Va. 510; 41 Cal. 211.

Insufficiency of the evidence to convict; 2 Stra. 984; 8 Blackf. 540; 2 Park. Cr. Cas. 676; 2 McLean 114; and *sickness or other incapacity of a witness*; 1 Crawford & D. 151; 1 Mood. 186; Jebb 270; are not sufficient necessities to warrant the discharge of a jury. See 17 Pick. 399; 2 Gall. 364; 2 Benn. & H. L. Cr. Cas. 337; JEOPARDY.

It is within the discretion of the trial judge to refuse to discharge the jury until they arrive at a verdict; 2 Misc. Rep. 127. A jury may be discharged from giving any verdict, whenever the court is of the opinion that there is a manifest necessity for the act, or that the ends of public justice would otherwise be defeated, and may even order a trial before another jury, and a defendant is not thereby twice put in jeopardy; 155 U. S. 271.

When a jury in a criminal case is discharged during the trial, and the defendant subsequently put on trial before another jury, he is not thereby twice put in jeopardy within the meaning of the fifth amendment to the United States constitution; 142 U. S. 148.

Duties and privileges of. Qualified persons may be compelled to serve as jurors under penalties prescribed by law. They are exempt from arrest in certain cases. See PRIVILEGE. They are liable to punishment for misconduct in some cases.

The federal constitution provides (Am. vii.) that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This includes only a new trial or proceedings in an appellate court; it applies to the facts tried by a jury in a state court, and renders invalid an act providing for the removal of a cause from a state to a federal court after it has been tried in the former; 9 Wall. 274.

A frequent variation from the common-law jury system is to permit the jury to impose the punishment (this being formerly considered a matter for judicial discretion), or, as in some states, to divide the responsibility between the judge and jury; and such legislation is held constitutional; 7 Ind. 332; 70 Ia. 442; 1 Bish. N. C. L. § 934.

In criminal cases, in Scotland, a jury consists of fifteen and a majority may convict. In Belgium, criminal and political

charges and offences of the press are tried before a jury. Trial by jury has existed in Greece since 1884. In Sweden it exists in cases of offences of the press; and in Italy, in criminal cases, and a majority may convict. In Norway, it was established in 1887, and there also a majority may convict. In Russia, since 1864, all criminal cases involving severe penalties, except political offences, are tried by juries. Hawaii has a jury of twelve, both in civil and criminal cases, of whom nine may render a verdict. In South America, all the states have the jury system. In France, trial by jury exists in cases of felony, and it is provided in Germany, by the imperial code, in all criminal cases except treason, political crimes and offences of the press.

Of the Vicinage. "Jury of the vicinage" signifies the neighborhood where the crime was committed. 118 Ky. 894, 82 S. W. 643.

See, generally, HIRSH; Thompson & Merriam, Juries; Best; Forsyth; Proffatt; Spooner; Starkie; Stephen, Jury Trial; Lossler, History of the Jury System; Edwards, Jurymen's Guide; Best, Unanimity of Juries; 1 Am. L. Reg. N. S. 524; 26 id. 986; 13 Alb. L. J. 176; 14 id. 115; 19 id. 469; 20 id. 68, 129, 297; 17 Am. L. Rev. 398; 20 id. 661; 21 id. 859; 26 id. 666; 4 Cr. L. Mag. 15; 3 So. L. Rev. N. S. 903; 7 L. Quar. Rev. 15; 24 Ir. L. T. 477; 18 Wkly. L. Bul. 95; and as to its development, 5 Harv. L. Rev. 349, 295, 357. See also ASSIZE; CHALLENGE; DUE PROCESS OF LAW; ELSORS; INQUEST; INSTRUCTION; JEOPARDY; JUDEX; NEW TRIAL; TRIAL; GRAND JURY; JURATA; STANDING ASIDE.

Consult Edwards; Forsyth; Ingersoll, on Juries; 1 Kent 638, 640.

See FOREIGN JURY; MIXED JURY

JURY BOX. A place set apart for the jury to sit in during the trial of a cause.

JURY LIST. A paper containing the names of jurors impanelled to try a cause, or it contains the names of all the jurors summoned to attend court.

JURYMEN. A juror; one who is impanelled on a jury. Webster, Dict.

JURY PROCESS. In Practice. The writs for summoning a jury, viz.: in England, *venire juratores facias*, and *districus juratores*, or *habeas corpora juratorum*. These writs are now abolished, and jurors are summoned by precept. 1 Chitty, Archb. 344; Com. Law Proc. Act, 1852, § 104; 3 Chitty, Stat. 519.

JURY OF WOMEN. A jury of women is given in two cases; viz.: on writ *de ventre inspiciendo*, which was a writ directed to the sheriff, commanding him that, in the presence of twelve men and as many women, he cause examination to be made whether a woman therein named is with child or not, and if with child, then about what time it will be born, and that he certify the same. It is granted in a case when a widow, whose husband had lands in fee-simple, marries again soon after her husband's death, and declares herself pregnant by her first husband, and, under that pretext, withholds the lands from the next heir; Cro. Eliz. 506; Fleta, lib. 1, c. 15. In that case, although the jury was made up of men and women, the examination was made by the latter; 1 Madd. Ch. 11; 2 P. Wins. 591. Such a writ was issued in the case of *In re Blackburn*, 14 L. J. N. S. Ch. 336. In New York it is said that an application was made for such a jury in the Rollwagen will case and denied upon the ground that "as the lady was not going to be hanged and did not herself solicit the investigation, there was no power to compel her to submit to it;" 10 Alb. L. J. 3. In the opinion of the court in 141 U. S. 250 the statement is made by Mr. Justice Gray that this writ has never been used in this country. The authorities cited in this title show that this statement is too broad both as to the use of the common-law writ and as to physical examination, which title see further as to this case.

Where pregnancy is pleaded by a condemned woman, in delay of execution, a

jury of twelve discreet matrons was called from those in court, who were impanelled to try the fact and report to the court. They chose a fore-matron from their own number. On their returning a verdict of "eniente," the execution was delayed until the birth, and in some cases the punishment was commuted to perpetual exile. When the criminal was merely *præventim eniente*, and not *quick* (see QUICKENING), there was no respite. See 2 Hale, Pl. Cr. 412; Taylor, Med. Jur., Bell's ed. 530; Archb. Cr. Pl. 187. The proceeding has been said to be obsolete, though it has been recognized in America; and at a very recent date in England, in *Reg. v. Webster*, tried before Lord Denman at the Old Bailey in London in July, 1879. The plea of pregnancy was interposed before sentence, and immediately "a jury of matrons selected from a crowd of females in the gallery were impanelled" and sworn, and the inquisition was held forthwith before the judge. The result was a verdict that the prisoner was not quick with child and she was sentenced. The *verbatim* report of the proceedings may be found in 9 Cent. L. J. 94. In *State v. Arden*, 1 Bay 487, the plea was allowed and an inquisition held, but the prisoner was found not pregnant and sentenced to death. In *State v. Holeman*, 13 Ark. 105, the plea was overruled in a larceny case where a woman was convicted of a penitentiary offence. In the case of Mrs. Bathsheba Spooner, who was tried in Massachusetts in 1778 for the murder of her husband, she being under sentence of death, petitioned the governor and council for a respite on account of pregnancy. A writ *de ventre inspiciendo* was issued by the council to the sheriff directing him to summon a jury of two men midwives and twelve discreet and lawful matrons "to ascertain the truth of her plea." The verdict was that she "is not quick with child," and she was executed, but a *post mortem* examination proved that her assertion was true; 3 Harv. L. Rev. 44; 99 Alb. L. J. 326.

It is difficult to see by what reason or authority this proceeding can be assumed not to be available, according to the course of the common law, in jurisdictions in which that system of jurisprudence is in force, particularly where, as in some states, it is imbedded in the constitution. It has been said on this point: "While the cases are very rare, there is no evidence (or authority, it might be added) that a jury of women is not a part of the machinery of the law in those states in which the common law prevails." 12 A. & E. Encyclo. of L. 331.

It may be safely affirmed that no woman who pleads pregnancy in delay of execution will in any common-law jurisdiction be sentenced to death without examination into the truth of the fact pleaded, and in the absence of other statutory provision, it is difficult to see how she could be deprived of this common-law right. It is undoubtedly true that the proceeding is antiquated and ill adapted to the purpose, and therefore the subject is well worthy of legislative attention. Doubtless the rarity of such legislation is due to the infrequency of capital trials of women. In one state at least the contingency is provided for. In New York it is provided by statute that if there is reasonable ground to believe that a female defendant sentenced to death is pregnant, a jury of six physicians shall be impanelled to inquire into the fact, and if it is found by the inquisition that she is "quick with child," the execution is to be suspended until the governor issues a warrant directing it, which he may do as soon as he is satisfied that she is no longer "quick with child," or he may commute her punishment to imprisonment for life; N. Y. Code Crim. Proc. §§ 501-2. See *DE VENTRE INSPICIENDO*; *REPRIVE*.

JURY WHEEL. A mechanical contrivance, usually a circular box revolving on a crank, in which the names of persons subject to jury duty are placed, by the officers, and at the times and places prescribed

by law, and from which the proper number to constitute the jury panels for any particular term of court are drawn by lot.

JUS (Lat.). Law; right; equity. Story, Eq. Jur. § 1. In the Roman law the word had two distinct meanings. It was either a body of law, as the *jus honorarium*, or an individual right, as the *jus suffragit*. See Sohm, Inst. Rom. L. § 7, where this distinction is developed in the course of a discussion of fundamental conceptions. A third use of the word was in apposition to *judicium*, as to which see *IN JUDICIO*; *IN JURE*; *JUDEX*; *LEX*.

JUS ABUTENDI (Lat.). The right to abuse. By this phrase is understood the right to abuse property, or having full dominion over property. 8 Toullier, n. 86. The right of destruction or consumption, and free disposition. Morey, Rom. L. 283. See *DOMINIUM JUS UTENDI*.

JUS ACCRESCENDI (Lat.). The right of survivorship. See *SURVIVOR*.

In Roman Law. The right of accretion. This exists in two cases: According to the general rule a person could not die partly testate and partly intestate, and if any part of the estate was unprovided for, either by the oversight of the testator or any of the heirs, it was ratably distributed among the heirs; Morey, Rom. L. 825; so if the same thing were left to two or more persons each took an equal share; if one of them should die before he had received the legacy, the share of the one so dying passed to the remaining joint legatee or legatees by this right; id. 334. It has been suggested that the germ of this right is to be found in the succession by necessity; Sohm, Inst. Rom. L. § 100.

JUS ACTUS. In Roman Law. A rural servitude giving to a person a passage for carriages, or for cattle.

JUS AD REM (Lat.). In Civil Law. A right to a thing. It is generally treated as a right to property not in possession, as distinguished from *jus in re*, which implies the absolute dominion. In English law, this distinction is illustrated by Blackstone, by reference to ecclesiastical promotions, where, although the freehold passes to the person promoted, corporal possession is required to vest the property completely in the new proprietor, who acquires *jus ad rem*, an inchoate, or imperfect, right of nomination and institution, but not the *jus in re*, or complete and full right, unless by corporal possession; 2 Bla. Com. 312. The distinction expressed by these terms in the Roman law is analogous to the common-law distinction between the effect of a right of entry and that of actual entry, which in English real property law is expressed in the maxim *non jus, sed seisin, facit stipitem*; id. *Jus ad rem* is said to be merely an abridged expression for *jus ad rem acquirendam*, and it properly denotes the right to the acquisition of a thing. Austin, Jur. Lect. 14; Moz. & W.

"On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal expressed by writers of the middle ages, on the analogy of terms found in the writings of the Roman jurists, by the phrases *jura in re* and *jura ad rem*. A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*, is a right to have a thing to the exclusion of all other men. A personal right, *jus ad rem*, or, to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of right, as well as a thing as its object, a right which gives its possessor a power to oblige another person to give, or procure, or do, or not do, or something." Sand. Inst. Just. Intro. xlviii.

A right which belongs to a person only mediately and relatively, and has for its foundation an obligation incurred by a particular person.

The *jus in re*, by the effect of its very nature, is independent and absolute, and is exercised *per se ipsum*, by applying it to its object; but the *jus ad rem* is the faculty of demanding and obtaining the performance of some obligation by which another is bound to me *ad aliquid dandum vel faciendum, vel prestandum*. Thus, if I had the ownership of a horse, the usufruct of a flock of sheep, the right of habitation of a house, a right of way over your land, etc., my right in the horse, in the flock of sheep, in the house, or the land, belongs to me directly, and without any intermediary; it belongs to me absolutely, and independently of any particular relation with another person; I am in direct and immediate relation with the thing itself which forms the object of my right, without reference to any other relation. This constitutes a *jus in re*. If, on the other hand, the horse is lent to me by you, or if I have a claim against you for a thousand dollars, my right to the horse or to the sum of money exists only relatively, and can only be exercised through you; my relation to the object of the right is mediate, and is the result of the immediate relation of debtor and creditor existing between you and me. This is a *jus ad rem*. Every *jus in re*, or real right, may be vindicated by the *actio in rem* against him who is in possession of the thing, or against any one who contests the right. It has been said that the words *jus in re* of the civil law convey the same idea as thing in possession at common law. This is an error, arising from a confusion of ideas as to the distinctive characters of the two classes of rights. Nearly all the common-law writers seem to take it for granted that by the *jus in re* is understood the title or property in a thing in the possession of the owner; and that by the *jus ad rem* is meant the title or property in a thing not in the possession of the owner. But it is obvious that possession is not one of the elements constituting the *jus in re*; although possession is generally, but not always, one of the incidents of this right, yet the loss of possession does not exercise the slightest influence on the character of the right itself, unless it should continue for a sufficient length of time to destroy the right altogether by prescription. In many instances the *jus in re* is not accompanied by possession at all; the usufruct is not entitled to the possession of the thing subject to his use; still, he has a *jus in re*. So with regard to the right of way, etc. See DOMINIUM.

A mortgage is considered by most writers as a *jus in re*; but it is clear that it is a *jus ad rem*: it is granted for the sole purpose of securing the payment of a debt or the fulfillment of some other personal obligation. In other words, it is an accessory to a principal obligation and corresponding right; it can have no separate and independent existence. The immovable on which I have a mortgage is not the object of the right, as in the case of the horse of which I am the owner, or the house of which I have the right of habitation, etc.: the true object of my right is the sum of money due to me, the payment of which I may enforce by obtaining a decree for the sale of the property mortgaged. 2 Marcadé 350.

JUS ÆLIANUM. A body of laws upon the same plan as the *jus flavianum* (q. v.) though more complete. It was published about B. C. 200 by Sextus Ælius and consisted of three parts: (1) The law of the XII. Tables; (2) The interpretation of the same; (3) The description of the *legis actiones* or forms of procedure. Morey, Rom. L. 85.

JUS ÆSNECIÆ. The right of the eldest-born to inherit; primogeniture.

JUS ALBINATUS. The right of the king by confiscation or escheat to the property of a deceased foreigner unless he had a peculiar exemption. This prerogative was abolished in 1790. Moz. & W.; 1 Bla. Com. 373; 2 Steph. Com. 409, n. It was the *Droit d'Aubaine* of the French law, which title see.

JUS ANGLORUM. The laws and customs of the West Saxons, in the time of the Heptarchy, by which the people were for a long time governed, and which were preferred before all others. Wharton.

JUS AQUEDUCTUS (Lat.). In Civil Law. The name of a servitude which gives to the owner of land the right to bring down water through or from the land of another, either from its source or from any other place.

Its privilege may be limited as to the time when it may be exercised. If the source fails, the servitude ceases, but revives when the water returns. If the water rises in, or naturally flows through, the land, its proprietor cannot by any grant divert it so as to prevent it flowing to the land below; 2 Rolle, Abr. 140, l. 25; *Lois des Bat.* part 1, c. 3, s. 1, art. 1. But if it had been brought into his land by artificial means, it seems it would be strictly his property, and that it would be in his power to grant it; Dig. 8, 3, 1, 10; 3 Burge, Confl. Laws 417. See Washb. Easem.; JUVEX; WATER-COURSE.

JUS AQUÆHAUSTUS. In Roman Law. A rural servitude giving to a person a right of watering cattle on another's field, or of drawing water from another's well.

JUS ÆQUUM. Equitable law. A term used by the Romans to express the adaptation of the law to the circumstances of the individual case as opposed to *jus strictum* (q. v.).

JUS BELLI. So much of international law as regulates the relations of nations to each other with respect to a state of war, including belligerency and neutrality, which several titles see.

The right of war so far as it concerns the treatment which may be properly accorded to an enemy; Grot. *De Bell. et Pac.* I. 1, § 3.

JUS BELLUM DICENDI. The right of making a declaration of war.

JUS CIVILE (Lat.). In Roman Law. The private law, in contradistinction to the public law, or *jus gentium*. 1 Savigny, *Dr. Rom.* c. 1, § 1.

The local law of the city of Rome. It is said that the twelve tables marked the starting-point in the development of the Roman law so far as it can be historically authenticated, and that its development advanced steadily in uninterrupted progression until it culminated in the *corpus juris civilis* of Justinian; Sohm, *Inst. Rom. L.* § 10. It is, however, rather more accurate to say that the culmination of the Roman law, as a system, was not reached until the period of the development side by side of the *jus civile* and *jus gentium*. For an interesting discussion of the origin and growth of this system, see Morey, *Rom. L.* 14, 24. See *JUS GENTIUM*. *JUS SCRIPTUM*.

JUS CIVITATIS (Lat.). In Roman Law. The full franchise of citizenship, comprising, on the one hand, public rights, including the right of holding office and the right of voting; and on the other hand, private rights, including the right to hold and dispose of property, according to the forms of the civil law, and the right of marriage, and all domestic relations Morey, *Rom. L.* 48.

The collection of laws which are to be observed among all the members of a nation. It is opposed to *jus gentium*, which is the law which regulates the affairs of nations among themselves. 2 Lepage, *El. du Dr.* c. 5, 1. It was very much what is understood in modern terminology by municipal law.

JUS CLOACÆ (Lat.). In Civil Law. The name of a servitude which requires the party who is subject to it to permit his neighbor to conduct the waters which fall on his grounds over those of the servient estate.

JUS COMMUNE. The common law, applicable to all persons alike. The ordinary law, as opposed to *jus singulare* (q. v.). Also, common right; natural justice. Abbott.

JUS CORONÆ. The right of succession to the throne of Great Britain. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

JUS CURIALITATIS ANGLIÆ. The right of curtesy. See CURTESY.

JUS DARE (Lat.). To enact or to make the law. *Jus dare* belongs to the legislature; *jus dicere*, to the judge.

JUS DELIBERANDI (Lat.). The right of deliberating, given to the heir, in those countries where the heir may have benefit of inventory (q. v.), in which to consider whether he will accept or renounce the succession.

In Louisiana he is allowed ten days before he is required to make his election. La. Civ. Code art. 1023.

JUS DEVOLUTUM. A phrase for-

merly used in Scotch ecclesiastical law to designate the right which devolved on the presbytery to present a minister to a vacant parish or benefice, in case the patron should neglect to exercise his right within the time limited by law, by presenting within six months a properly qualified person. Int. Cyc.

JURE DICENDI. In the Roman Law. The right to publish edicts. An attribute of Roman magistrates. English.

JUS DICERE (Lat.). To declare the law. It is the province of the court *jus dicere*, to declare what the law is.

JUS DISPONENDI (Lat.). The right to dispose of a thing.

In a general sense it means the right of alienation, and is frequently applied in the case of a married woman with respect to her separate estate. In a special or limited sense, it is applied to the reservation by a vendor of chattels or the ultimate ownership of goods with the possession of which he has parted. It is said to be often a matter of great nicety to determine upon a contract of sale, whether or not the vendor's purpose or intention was to reserve a *jus disponendi*. Benj. Sales, Ch. VI. § 382. See SALE.

The reservation of this right is essential where the property in the thing sold is reserved as a security for deferred payments or purchase-money, and it is permitted in many cases in which it is not permissible at common law. The great increase in the number of transactions in which such reservation is customary, as car trusts, installment sales, etc., makes the subject one of increased importance and interest.

JUS DISTRAHENDI. The right of sale of goods pledged in case of non-payment. See PLEDGE; DISTRESS.

JUS DIVIDENDI. The right of testamentary disposition of real estate.

JUS DUPLICATUM (Lat. double right). When a man has the possession as well as the property of anything, he is said to have a double right, *jus duplicatum*. Bracton, l. 4, tr. 4, c. 4; 2 Bla. Com. 199.

JUS EDICERE, JUS EDICENDI. The right to issue edicts. It belonged to all the higher magistrates, but special interest is attached to the praetorian edicts in connection with the history of Roman law. See PRÆTOR.

JUS EX NON SCRIPTO. Law constituted by custom or such usage as indicates the tacit consent of the community.

The definition of Ulpian was: "*Disturna consuetudo pro jure et lege in his qua non ex scripto descendunt, observari solet*;" D. 1, 8, 35. This is well, though freely, translated thus: "Whatever has existed for a long period of time, and is in harmony with the moral judgment of the community is regarded as having the force of law, and the judicial authority is bound to recognize it as such, even though it has never been expressed in a legal enactment." Morey, *Rom. L.* 22. The same author says with respect to such law: "It was also a maxim of the Romans, that not only can laws be established by custom; they can also be abrogated by custom—that is, by contrary usage. It is unnecessary to consider here the objections raised by some modern jurists, such as Austin, to this view of customary, or unwritten, law. It is enough for our present purpose to say that this was the conception of the Roman jurists regarding the origin of a portion of the positive law, and a conception which has been adopted by the majority of modern civilians;" *Id.* Another phrase by which this law was known was *jus moribus constitutum*. See LAW.

JUS FECIALE (Lat.). In Roman Law. Feclal law (q. v.). It has been termed that species of international law which had its foundation in the religious belief of different nations: such as the international law which now exists among the Christian people of Europe. Savigny, *Dr. Rom.* c. 2, § 11. But the earlier writers on the civil law gave to it more of a characterization as international law than is attributed to it by the more thoughtful modern writers. See FECIAL LAW; INTERNATIONAL LAW.

JUS FIDUCIARUM (Lat.). In Civil Law. A right to something held in trust. For this there was a remedy in conscience.

2 Bla. Com. 328. See FIDEI COMMISSUM.

JUS FLAVIANUM. A publication of the *legis actiones* or a practical manual of the procedure, including a list of *dies fasti* (q. v.).

Of this publication it is said: "The first step which led to the decline of the *legis actiones* was due to their publication. As long as the knowledge of legal forms was restricted to the patrician class, the people at large were helpless in their efforts to obtain an impartial administration of justice." Morey, *Rom. L.* 88. The author was Cneius Flavius, who was a scribe or clerk of Appius Claudius. His publication was a. c. 304. It was followed about a century later by the *Jus Edictum* (q. v.). See also Sohm, *Inst. Rom. L.* § 14, n. 2.

JUS FODIENDI. In Civil Law. The name of a rural servitude which permits digging on the land of another. *Inst.* 2, 8, 2; Dig. 8, 8, 1, 1. A similar right was recognized in early English law; *Bract.* 222.

JUS GENTIUM (Lat.). The law of nations. It has been said that although the Romans used these words in the sense we attach to law of nations, yet among them the sense was much more extended. Falck, *Encyc. Jur.* 102, n. 42. It has been termed a system made up by the early Roman lawyers of the common ingredients in the customs of the old Italian tribes, for the purpose of adjudicating questions arising in Rome between foreigners or natives and foreigners. Maine, *Anc. Law* 49.

The *jus gentium* is differently characterized by the later writers on the civil law from the meaning given to the phrase by the earlier writers who treated it, as more identical with the idea of modern international law than it is now considered to have been.

The distinction between the *jus gentium* and the *jus civile* is thus admirably expressed: "The *jus gentium*, on the other hand, came to be regarded as a universal law of all mankind, common to all nations, because resting on the nature of things and the general sense of equity which obtains among all men, the '*jus gentium quod apud omnes gentes per seque custoditur*,' a sort of natural law, exacting recognition everywhere in virtue of its inherent reasonableness. It would, however, be erroneous to suppose that the Romans attempted to introduce a code of nature such as the philosophers had devised. The *jus gentium* was, and never had been anything else but a portion of positive Roman law, which commercial usage and other sources of law, more especially the praetorian edict (q. v.), had clothed in a concrete form. Nor again must it be imagined that the Romans simply transferred a portion of foreign (Hellenic) law bodily into their own system. In the few quite exceptional cases where they did so (as e. g. in the case of hypotheca), they did not fail to impress their institutions with a national Roman character. The antithesis between *jus civile* and *jus gentium* was merely the outward expression of the growing consciousness that Roman law, in absorbing the element of greater freedom, was commencing to discard its national peculiarities and transform itself from the special local law of a city into a general law for the civilized world. The *jus gentium* was that part of the private law of Rome which was essentially in accordance with the private law of other nations, more especially with that of the Greeks, which would naturally predominate along the seaboard of the Mediterranean. In other words, *jus gentium* was that portion of the positive law of Rome which appeared to the Romans themselves in the light of a '*ratio scripta*,' of a law which obtains among all nations and is common to all mankind." Sohm, *Inst. Rom. L.* § 18.

The origin of the *jus gentium* was undoubtedly to be found in the adjustment of the Roman law to the relations existing between Roman citizens and foreigners, and between foreigners themselves. The growth of a different system was a not unnatural result of the administration of law in cases where both parties were not Roman citizens, by the foreign praetors, who were not bound by the strict rules of the *jus civile*, but from going about from place to place, and administering a kind of equitable jurisdiction in the settlement of disputes, they might not inaptly be termed peripatetic or itinerant arbitrators. The growth of a system of law administered by them alongside of the *jus civile* was not unlike the growth of the equity jurisprudence alongside of the common law. Then, too, the fact that these officers were constantly engaged in settling disputes, to which at least one party was a foreigner, naturally led to their becoming familiar with the principles of other systems of law, and in applying them to the case in hand, so far as they commended themselves to their sense of

justice. The new system was afterwards extended to the whole non-citizen class. And while in the first instance it was treated as an entirely distinct system from the *jus civile*, it gradually supplanted the latter, and by a process which was originally the absorption of much of the *jus gentium* into the *jus civile*, it subsequently became recognized as a constituent part of Roman Law, and was gradually welded into a complete system of jurisprudence. See Morey, *Rom. L.* 59-71; INTERNATIONAL LAW; JUS CIVILE; JUS NATURAL.

JUS GLADII (Lat. the right of the sword). Supreme jurisdiction. The right to absolve from or condemn a man to death.

JUS HABENDI (Lat.). The right to have a thing. The right to be put into actual possession of property to which one is entitled.

JUS HABENDI ET RETINENDI. The right to have and retain the offerings, tithes, and profits of a parsonage or rectory. *Toml.*; *Moz. & W.*

JUS HEREDITATIS. The right of succession as an heir, or of inheritance. See DESCENT AND DISTRIBUTION; HERES; HEIR.

JUS HONORARIUM. In Civil Law. A name applied to the praetorian edicts and also to the edicts of the *curule aediles*, when on certain occasions they were published. *Inst.* 1, 2, 7.

This system of law was simply the usual development of an expanding and elastic jurisprudence, which naturally resulted from the increase in Rome of population and power, and the greater complication of her civilization; *Howe, Stud. Civ. L.* 10; it was spoken of as having a distinct place by the side, and as the complement, of the *jus civile*; *Sand. Introd. Inst. Just.* xxi. It was a system of judge-made law (q. v.) in the proper sense. Its vigorous development was coincident with the formulary procedure, which was well adapted to give it scope and effect; *Sohm, Introd. Rom. L.* 178.

Its place and function in the Roman jurisprudence are thus described: "The praetorian law, being a law made by officials, '*jus honorarium*,' was opposed to the *jus civile*, i. e. law, in the strict and proper sense of the term, the law made by the people, developed by popular enactments and popular customs. Thus both the *jus civile* and the *jus honorarium* contained elements of *jus gentium*, but in the *jus honorarium*, the influence of the *jus gentium* predominated. The praetorian edict was, in the main, the instrument by means of which the free principles of *jus equum* gained their victory over the older *jus strictum*. Though at first the edict may merely have served the purpose of giving fuller effect to the *jus civile*, and then of supplementing the *jus civile*, nevertheless, in the end, borne along by the current of the times, it boldly assumed the function of reforming the civil law." *Id.* 54. See JUDEX; PRÆTOR. JUS PRÆTORIUM.

JUS HONORUM. In Roman Law. The right of holding offices. See JUS SUFFRAGII.

JUS IMAGINIS. In Roman Law. The right of displaying the pictures and statues of one's ancestors, somewhat as in the English law of Heraldry, there is a right to the coat-of-arms.

JUS IMMUNITATIS. The law of exemption from the liability to hold public office.

JUS INCOGNITUM (Lat.). An unknown law. This term is applied by the civilians to obsolete laws, which, as Bacon truly observes, are unjust; for the law to be just must give warning before it strikes. *Bacon, Aph. 8, s. 1*; *Bowyer, Mod. Civ. Law* 33. But until it has become obsolete no custom can prevail against it. See OBSOLETE.

JUS INTRANDI. See JUS RECUPERANDI.

JUS ITALICUM. In Roman Law. A right bestowed upon a community by which it acquired "the privileges of a colonia Italica (i. e. an old colony of Roman citizens endowed with full legal rights), that its soil is therefore exempt from the land-tax and capable of quiritary ownership, in other words, is placed on the same footing as the *fundus italicus*," *Heisterbergk, Name und Begriff des jus italicum* (1885). *Sohm, Inst. Rom. L.* § 22, n. 2.

JUS ITINERIS. In Roman Law. A rural servitude giving to a person the right to pass over an adjoining field, on foot or horseback.

JUS LATII. The right or privilege conferred upon the various communities of Latium.

This has been termed a "kind of qualified citizenship (*civitas sine suffragio*), such as Rome had, in early times, granted to the inhabitants of Cære." *Morey, Rom. L.* 50. These rights originally included the rights of intermarriage and of commercial intercourse between Rome and the inhabitants of the Latin towns. The author last cited says: "The possession of these rights formed the essential feature of the early *jus Latii*, or *Latinitas*. In later times, however, the right which went under this name and which was bestowed upon the Latin colonies outside of Latium, included the *commercium* only;" *id.* *Sohm* says that from the earliest times the members of the town communities of Latium who were the original Latins had the same private marriage law as the Romans. It was, in fact, their original law, and it was because they were allies governed by the same law that they enjoyed the *jus commercii* and the *jus connubii* of the Romans. They did not, of course, possess the public rights of a Roman, until the powerful interest attaching to those rights resulted in the granting of Roman citizenship first to the Latin allies then to all the Italian communities; *Sohm, Inst. Rom. L.* § 22. There were two forms of the *jus Latii*, *latium minus* which was the older and usual one, and the *latium majus*. In communities in the former, only officials acquired Roman citizenship. In those which had the latter it was extended to the decuriones. See DECURIONES; *id.* § 23, n. 2. Another authority confines the two forms to magistrates and defines them thus: "The *latium majus* raising to the dignity of Roman citizens not only the magistrate himself, but also his wife and children; the *latium minus* raising to that dignity only the magistrate himself." *Bro. L. Dict.*

JUS LEGITIMUM (Lat.). In Civil Law. A legal right which might have been enforced by due course of law. 2 Bla. Com. 328.

JUS LIBERORUM. In Roman Law. The privilege conferred upon a woman who had three or four children. In order that she should be able to take all the property given her by will, she must have had this privilege conferred upon her. *Sohm, Inst. Rom. L.* § 86. In the time of Hadrian, a decree was made conferring upon a mother, as such, who, being an *ingenua*, had the *jus trium liberorum*, or being a *libertina*, the *jus quatuor liberorum*, a civil law right to succeed her intestate children; *id.* § 98.

Another author defines this privilege as one by which exemption was given from all troublesome offices. *Brown, L. Dict.* And still another ascribes to it exemption from guardianship, priority of office-holding and a treble proportion of corn. *Ad. Rom. Ant.* 227.

JUS MANENDI. See JUS SPATIENDI.

JUS MARITI (Lat.). In Scotch Law. The right of the husband to administer, during the marriage, his wife's goods and the rents of her heritage.

In the common law, by *jus mariti* is understood the rights of the husband, as *jus mariti* cannot attach upon a bequest to the wife, although given during coverture, until the executor has assented to the legacy. 1 Bail. Eq. 214.

JUS MERUM (Lat.). A simple or bare right; a right to property in land, without possession, or the right of possession. See JUS PROPRIETATIS.

JUS MORIBUS CONSTITUTUM. See JUS EX NON SCRIPTO.

JUS NATURALE. The name given to those rules of conduct which are universally binding upon men and which are sanc-

tioned by the dictates of right reason, as opposed to rules of conduct prescribed and enforced by the sovereign power of the state which are called positive law, known to the Romans as *jus civile*, and in modern jurisprudence as municipal law.

A much quoted definition of Ulpian was that which nature attaches to animals. Of this it has been said that it was peculiar, and the conception exercised little or no influence upon the judicial thought of Rome. Morey, *Rom. L.* 111, where also are collected many definitions of the Roman jurists.

Sandars considers the passage from Ulpian unfortunately borrowed by Justinian and thereby removed from the connection in which it was used, which was a subsidiary and divergent line of thought, and had nothing to do with the main theory. Accordingly "in considering what the Roman jurists meant by *jus naturale* this fragment of Ulpian may be dismissed almost entirely from our notice." Sand. *Inst. Just.* 7.

The conception of the *jus naturale* came from the Stoics and has been termed "by far the most important addition to the system of Roman law, which the jurists introduced from Greek philosophy." Sand. *Inst. Just. Intro. xxii.* And Maine says of it that "the importance of this theory to mankind has been very much greater than its philosophical deficiencies would lead us to expect." Anc. *L.* 71.

While it is undoubtedly true that the highest conception of law is that natural law and positive law should be entirely harmonious, it is in the domain of international law that this conception more nearly approaches realization. The *jus gentium* was a system largely based upon the *jus naturale*, and it is due to that fact that the Roman system so largely formed the basis upon which Grotius commenced to build, the system which has developed into modern international law. It has been said that while he "rejected Ulpian's definition of the *jus naturale*, he accepted the idea of natural law expressed in the later *jus gentium* of the Romans as a body of principles based upon the common reason of mankind. It was therefore possible for him to extend the equitable principles already developed in the Roman *jus gentium* to the relations existing between sovereign states. States were looked upon as moral persons—subjects of the natural law, and as equal to each other in their moral rights and obligations." Morey, *Rom. L.* 208. See *JUS GENTIUM*; *LAW OF NATURE*; *LAW*.

It was distinguished from the *jus civile*, in being based on natural and universal, rather than artificial and local, precepts. It applied to all living beings, human or otherwise. Hunter's *Rom. L.* 2nd ed., 117-119. See *LAW OF NATURE*.

JUS NECIS. See *JUS VITAE NECISQUE*.

JUS NON SACRUM. In Roman Law. That portion of the *jus publicum* which regulated the duties of magistrates.

Non-sacred law; that which dealt with the duties of civil magistrates, the preservation of public order, and the rights and duties of persons in their relation to the state. Morey, *Rom. L.* 223. It was analogous to that which would now be called the police power.

JUS NON SCRIPTUM. See *JUS EX NON SCRIPTO*.

JUS ONERIS FERENDI. An urban servitude in the Roman Law, the owner of which had the right of supporting and building upon the house wall of another.

JUS PAPIRIANUM. A collection of *leges regiae* said to have been collected from the early periods of Roman history in the time of Romulus, Numa, and other kings.

They were a private compilation described as "fragments of a collection," which, "though clearly showing the religious spirit of the early law, are yet meagre and unsatisfactory." Morey, *Rom. L.* 25. Though a private collection, it is suggested that they received the name of royal laws merely because the regulations which they contained were placed under the immediate protection of the kings. They were concerned in the main with sacred matters, i.e. they were essentially of a religious and moral character, and bear clear testimony to the closeness of the original connection between law and religion; Sohm, *Inst. Rom. L.* § 11, n. 2.

The civil law of Papirius. The title of the earliest collection of Roman law, also said to have been made in the time of Tarquin, the last of the kings, by a pontifex maximus of the name of Sextus or Publius Papirius. Dig. 1. 2. 2. 2. Very few fragments of this collection now remain, and the authenticity of these has been doubted. Burrill; 1 Kent's *Com.* 517.

JUS PASCENDI. In Roman Law. The rural servitude giving the right of pasturage on another's land.

JUS PATRONATUS (Lat.). In Ecclesiastical Law. A commission from the bishop, directed usually to his chancellor

and others of competent learning, who are required to summon a jury, composed of six clergymen and six laymen, to inquire into and examine who is the rightful patron. 3 *Bla. Com.* 246.

JUS IN PERSONAM. A personal right. Considered by some writers as a more correct expression for *jus ad rem*, which see. According to the Roman law, property could not be transferred by mere agreement. The latter, even though in form a legal contract, had the effect only of expressing the intention of the parties and creating a personal right against the one making the agreement in a real right to the property itself. Morey, *Rom. L.* 307. See *JUS AD REM*.

A right which gives its possessor a power to oblige another person to give or procure; to do or not to do, something. R. & L. *Dict.* See *IN PERSONAM*.

JUS PERSONARUM (Lat.). The right of persons. See *JURA PERSONARUM*.

JUS PISCANDI. See *JUS VENANDI ET PISCANDI*.

JUS POSSESSIONIS. The simple right of possession which may exist independently of ownership.

"Possession and ownership may, and generally do, coincide. But as a person may be the owner of a thing and not possess it, so a person may be the possessor of a thing and not be the owner. It is when the possessor is not the legal owner that it becomes important to consider to what rights he is entitled by virtue of his possession." Morey, *Rom. L.* 235. See *JUS POSSIDENDI*.

JUS POSSIDENDI. The right of possessing, which is the legal consequence of ownership. It is to be distinguished from the *jus possessionis* (q. v.), which is a right to possess which may exist without ownership.

JUS POSTLIMINII (Lat.). The right to claim property after recapture. See *POSTLIMINIUM*.

JUS PRÆTORIUM. A body of laws developed from the exercise of discretion by the prætors, as distinguished from the *leges* or positive law. See *PRÆTOR*.

JUS PRECARIUM (Lat.). In Civil Law. A right to a thing held for another, for which there was no remedy. 2 *Bla. Com.* 328.

JUS PRESENTATIONIS. The right of presentation.

JUS PRIVATUM. The municipal law of the Romans as distinguished from the *jus publicum*.

"The relations of power subsisting between persons and the world of things, or the equivalents of things, are the subject-matter of private law. Private law, in other words, has to do with the dominion of persons over things. Its pith is, therefore, contained in the law of property. The subject-matter of public law are the relations of power which subsist between persons and persons. Here, the power is ideal, in the sense that its object is the free-will of another, i.e. something invisible and outwardly intangible. Public law, then, has to do with the dominion of persons over persons. The rights of control with which such private law is concerned are reducible to a money value; the rights of control with which public law is concerned are not thus reducible. In private law, again, the subject of a right appears in his individual capacity, as commanding the world of material things. In public law, on the other hand, the subject of a right appears in his capacity as a member of a community, which it is his part to serve in order that he may share in the benefits it confers. Finally, as against their object, the rights of private law merely confer a power, the rights of public law, on the other hand, impose, at the same time, a duty on the person to whom the right pertains. The distinction is clearly exemplified in the case of the right of ownership in a thing, on one side, and the right of a sovereign over his people on the other." Sohm, *Inst. Rom. L.* § 7.

JUS PROJICIENDI (Lat.). In Civil Law. The name of a servitude by which the owner of a building has a right of projecting a part of his building towards the adjoining house, without resting on the latter. It is extended merely over the ground. Dig. 50. 16. 242; 8. 2. 25; 8. 5. 8. 5.

JUS PROPRIETATIS. The right of property, as Blackstone phrases it: "the mere right of property without either pos-

session or even the right of possession. This is frequently spoken of in our books under the name of mere right," *jus merum* (q. v.); 2 *Bla. Com.* 197. See *RIGHT OF PROPERTY*.

JUS PROTEGENDI (Lat.). In Civil Law. The name of a servitude: it is a right by which a part of the roof or tiling of one house is made to extend over the adjoining house. Dig. 50. 16. 243. 1; 8. 2. 25; 8. 5. 8. 5.

JUS PROTISESEOS. The right of pre-emption of a landlord in case the tenant wishes to dispose of his rights as a perpetual lessee. Sohm, *Inst. Rom. L.* § 57.

JUS PROVINCiarUM. A franchise conferred upon provincials much more limited than that conferred upon the people of Italy.

It has been described as "equivalent to the *jus italicum* minus the freedom from land taxation which the latter right involved. In short, the provincials possessed no status as Roman citizens; and even their capacity of ownership in their own land was qualified by their tributary obligations to Rome. The civil incapacity of the provincials had reference, however, merely to their exclusion from the strictly legal rights sanctioned by the *jus civile*." Morey, *Rom. L.* 81.

JUS PUBLICUM. See *JUS PRIVATUM*.

JUS QUÆSITUM (Lat.). A right to ask or recover: for example, in an obligation there is a binding of the obligor, and a *jus quesitum* in the obligee. 1 *Bell, Com.* 323.

JUS QUIRITUM. Quiritarian ownership, so called under the ancient *jus civile*, because, strictly speaking, there was recognized but this one form of ownership. It could be acquired only through the technical forms of civil law, and never by a foreigner. The strictness which was observed in this respect was due to the fact that this was the form of private ownership, which, under Roman law, was as developed from the general right of dominion and ownership by the state. To prevent hardships and injustice in the strict application of the rules of law, it was permitted to the prætor to issue possessory interdicts to protect the possession of those who had not complied with all the technical conditions of ownership. In this way, legal sanction was given to the right of possession which amounted substantially to a right of property. This affords another illustration of the many points in which the Roman system presents a strict similarity to the English equity jurisprudence as long afterwards developed. Morey, *Rom. L.* 21, 74, 258; Sand. *Inst. Just. Intro. xx.*

The old law of Rome, that was applicable originally to Patricians only, and under the Twelve Tables, to the entire Roman people, was so called, in contradistinction to the *jus prætorium* (q. v.) or equity. R. & L. *Dict.*; Brown.

JUS IN RE (Lat.). A right which belongs to a person, immediately and absolutely, in a thing, and which is the same against the whole world,—*idem erga omnes*. See *JUS AD REM*.

The objection to using the term *jus in re* is that the expression occurs in the classical jurists as meaning an interest in a thing short of ownership, as the interest of a mortgagee in the thing pledged, and on this ground the term *jus in rem*, which in this sense is not found in the classical jurists, but is supported by the analogy of the familiar term *actio in rem*, seems preferable." Sand. *Inst. Just.* xlix. See *JUS AD REM*.

JUS IN RE ALIENA. An easement on servitude, or right-in, or arising out of, the property of another.

JUS IN RE PROPRIA. The right of enjoyment which appertains to full and complete ownership of property. Frequently, by relation, the full ownership or property itself.

JUS RECUPERANDI, INTRAN-
DI, ETC. The right of recovering and

entering upon land.

JUS RELICTÆ (Lat.). In Scotch Law. The right of a wife, after her husband's death, to a third of movables if there be children, and to one-half if there be none. See *Ersk. Prin. III. IX. 6*.

JUS RELICTI (Lat.). In Scotch Law. The right of the husband in his wife's estate, which is divided in the same manner as that of the husband, in case of his predecease; one third each to the *jus relictæ*, *legitimæ*, and dead man's part (*q. v.*).

JUS RERUM (Lat.). The right of things. Its principal object is to ascertain how far a person can have a permanent dominion over things, and how that dominion is acquired.

JUS SACRUM. In Roman Law. That portion of the public law which was concerned with matters relating to public worship and including the regulation of sacrifices and the appointment of priests. There was a general division of the *jus publicum* into *jus sacrum* and *jus non sacrum* (*q. v.*).

JUS SANGUINIS. The right of blood. Under the Scotch law there was a rule that no right could be lost by prescription unless it had the effect to establish it in another. Hence it was said to be a rule *juri sanguinis nunquam præscribitur*; *Ersk. Prin. III. VII. 17*. According to the Roman and early Germanic principle of the *jus sanguinis*, nationality is based primarily upon descent or parentage. (*Cf. Jus SOLI*.) Thus, according to this system, children born outside a state's territory to parents who are citizens, are clothed with the nationality of their parents, whereas those born within a state's territory to alien parents are regarded as foreigners.

This system prevails in Germany, Austria, Hungary, Sweden and Switzerland. *Hershey, Essentials Int. Law, 237-8*. See *Jus SOLI*.

JUS SCRIPTA. Written law. After stating that the Roman law was written and unwritten just as it was among the Greeks, Justinian adds: "The written part consists of laws, *plebiscita*, *senatus-consulta*, enactments of emperors, edicts of magistrates, and answers of jurists." *Sand. Inst. Just. 1, 2, 3*. See *Jus EX NON SCRIPTA*.

In the Roman law, all law actually committed to writing, without regard to its origin or mode of enactment or promulgation. The Roman *jus scripta* (*q. v.*) includes statute (*lex*), decree of the commons (*plebiscitum*), decree of the senate (*senatus consultum*), the decisions of the emperors (*principum placita*), the edicts of magistrates having the right to issue edicts, and the answers of learned men (*responsa prudentium*). *Abbott; Hunt. R. Law, 40*.

In English Law, statute law, as distinguished from the common law; more generally designated as *lex scripta*. *Id.*

The terms *Jus Scriptum* and *Non Scriptum*, as explained in the Institutes (i. tit. 2), comprehended the whole of the *Jus Civile*. *R. & L. Dict.*

JUS SINGULARE. A law which is an exception to the ordinary law. A special rule applicable to an individual case or class of cases. Where it benefits particular classes of persons, it is called privilege, in an objective sense; privilege in a subjective sense is a particular right conferred upon a definite person by *leges speciales*.

JUS SOLI. The *jus soli* is of feudal origin and was originally based upon the territorial relation of a fief to its lord. During the middle ages it gradually supplanted the more ancient *jus sanguinis* (*q. v.*) which was again given wide currency in Europe through the adoption of the Napoleonic Code.

According to the feudal principle of the *jus soli*, nationality is primarily determined by the place or locality of birth. Consequently, children born to alien parents within the state's territory are clothed with

its nationality. Modern states also claim for children born abroad to its citizens the nationality of their parents. *Hershey, Essentials Int. Law, 237*.

The *jus soli* prevails in principle in Great Britain, the United States, Portugal, and most of the states in Latin America. See *Jus SANGUINIS*.

JUS SPATIENDI ET MANENDI. (The right to stray and remain.) Neither the public at large nor the inhabitants of a particular place have any such right. The public at large may have the right to pass across a particular open space, that is to say, there may be a public right of way, and the inhabitants of a particular place may have the right to play lawful games upon an open space; but the rights of neither the one nor the other go any farther. *Byrne*.

JUS STILLICIDII VEL FLUMINUS RECIPIENDI. In Roman Law. An urban servitude giving the owner a right to project his roof over the land of another or to open a house drain upon it.

JUS STRICTUM (Lat.). A Latin phrase, which signifies law interpreted without any modification, and in its utmost rigor. *Jus ÆQUUM*.

JUS SUFFRAGII. In Roman Law. The right of voting. This and the *jus honorum* (*q. v.*) were the public rights of the Roman citizen.

JUS TERTII. The right of a third person. This is set up by way of defence in many actions where it is sought to establish relations of landlord and tenant, or bailor and bailee, by the plea of setting up the *jus tertii*.

For example, when a person who is prima facie liable to A., on being sued by him sets up as a defence that the money or property claimed does not belong to A., but belongs by a paramount title to B., he is said to set up the *jus tertii* (right of a third person).

The general rule is, that a wrongdoer cannot set up the *jus tertii*. Therefore when A. seized goods in the possession of B., and on being sued by B. set up as a defence that B. had no title because the assignment from C. under which he claimed was fraudulent as against A., and that the goods belonged to A. under a valid assignment from C., it was held that A., being guilty of conversion, and therefore a wrongdoer, could not set up the *jus tertii* against B. So an agent cannot refuse to account to his principal or otherwise dispute his title by setting up the *jus tertii*, unless he does so under the authority of the third person. *Byrne*.

JUS TIGNI IMMITTENDI. In Roman Law. An urban servitude which gave the right of inserting a beam into the wall of another.

JUS TRIPERTITUM. A threefold right. The term is used by Justinian who says that the requisites of the Roman testament seem to have had a triple origin (*ut hoc jus tripartitum esse videatur*). *Sand. Inst. Just. 2, 10, 3*. "It is out of regard to this threefold derivation from the prætorian edict, from the civil law, and from the imperial constitutions, that Justinian speaks of the law of wills in his own days as *jus tripartitum*." *Maine, Anc. L. 207*.

JUS UTENDI (Lat.). The right to use property without destroying its substance. It is employed in contradistinction to the *jus abutendi*. *3 Toullier, n. 86*.

JUS VENANDI ET PISCANDI. The right of hunting and fishing.

JUS VITÆ NECISQUE. The right of life and death. Under the ancient Roman law in the time of the XII. Tables, this was included in the absolute power of another.

JUST. This word is frequently used in legal phraseology in combination with other words, such as reasonable, equitable, convenient.

Where, as a foundation for an attachment, an affidavit was required that the

plaintiff's claim is just, it is not sufficient if it does not state positively, but only inferentially, that his claim is just, and it does not amount to the same thing to say that the plaintiff "ought justly to recover the amount," or that "said several sums are justly due;" *5 Kan. 293*.

In the English Traffic Act, in the phrase "just and reasonable," it was said to mean, to the advantage of the customer; *51 L. J. Q. B. 601*.

Where conditions of traffic companies are to be just and reasonable, the reasonableness is a question of law, not of fact; *18 C. B. 805, 829*.

It is a "just and reasonable" provision in by-laws to disqualify by reason of bankruptcy or notorious insolvency; *10 H. L. Cas. 404*.

An agreement to pay what an individual (who was a taxing officer of the court of chancery) should say was a just and reasonable compensation for the services rendered by the complainant's solicitor in a suit commenced in that court, and settled before decree, obliges the party so agreeing to pay the bill of costs regularly taxed by the individual named in the agreement; *1 Den. 508*. The terms "just and reasonable," as employed by the legislature in the Practice Act, obviously have reference to the rules of practice then existing by the common law, and contemplate no other or different terms than would be just and reasonable, as judged of by that practice; *1 Bradw. 39*.

The words "just and fair" within the meaning of the New York statute, authorizing the imprisonment of a fraudulent debtor, were thus construed: "Where the debtor has procured from the creditor, at whose suit he is imprisoned, property by fraud, even if he has spent the proceeds in any way that would be unobjectionable, if they were his own, and if by loss or accident he is deprived of them, his proceedings are not just and fair, and where the debtor has combined or united with others to fraudulently obtain the property of the creditor, at whose suit he is imprisoned, even if such others got the proceeds of the fraud, and he kept none, his proceedings are not 'just and fair' within the meaning of the statute," authorizing the examination of an imprisoned debtor, in proceedings for his discharge from imprisonment, if it appear that his proceedings have not been "just and fair" towards the creditor under whose judgment he is imprisoned; *59 How. Pr. 136, 145*.

Just and equitable may as well apply to authorized as unauthorized expenditures, and a claim for services and materials might be so overcharged, both as to the amount rendered, as well as the price for the same, as to make the aggregate of the demand unjust and inequitable, under an act which permits the credit of so much thereof as is just and equitable; *23 Hun 50*. In the English Companies Act, 1862, it is "just and equitable" to wind up a company when the whole substratum of the business which was the object of the company had become strictly impossible; *1 Ch. 213; 3 K. & J. 78; 20 Ch. Div. 169; Buckley, Comp. Act 215*.

In the phrase a "just cause" for a court to do anything, the word just "does not add much weight, though it may add a little; it means some substantial reason must be shown;" *Jessel, M. R., in 21 Ch. Div. 397*.

To be "just and convenient" to appoint a receiver or grant an injunction or mandamus, respect must be given to what is just according to settled principles, as well as to what is convenient; *9 Ch. Div. 89*.

"All my just debts" includes all debts; *Wms. Ex. 1719; L. R. 4 H. L. 506*. A direction to pay debts or just debts included a mortgage debt in exoneration of the property, but *80 and 81 Vict. c. 69, s. 1*, did away with that reasoning; *9 Ch. Div. 13*, per *Jessel, M. R.* A direction to pay just debts did not include a note of the testator made before he was of age, and therefore voidable; *9 Mass. 62*. See also

1 Binn. 209; 1 Denio 508; 9 N. Y. 396.

JUST BEFORE. "At the time when," was the construction of these words in a plea to justify the killing of a dog; *Ir. C. L.* 156.

JUST COMPENSATION. See **EMINENT DOMAIN**.

Just compensation is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy. 261 U. S. 123.

In fixing just compensation, the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits if it had been fully performed. *Id.*, 523.

JUSTICE. The constant and perpetual disposition to render every man his due. Justinian, *Inst.* b. 1, tit. 1; *Co. 2d Inst.* 56. The conformity of our actions and our will to the law. *Toullier, Droit Civ. Fr.* tit. pré. n. 5.

Commulative justice is that virtue whose object it is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, that no one may be a gainer by another's loss.

Distributive justice is that virtue whose object it is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have unequal things nor unequal persons things equal. *Tr. Eq.* 8; and *Toullier's* learned note, *Droit Civ. Fr.* tit. pré. n. 7, note.

In the most extensive sense of the word, it differs little from virtue; for it includes within itself the whole circle of virtues. Yet the common distinction between them is, that that which considered positively and in itself is called virtue, when considered relatively and with respect to others, has the name of justice. But justice, being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought.

Toullier exposes the want of utility and exactness in this division of distributive and commutative justice, adopted in the *compendium* or abridgments of the ancient doctors, and prefers the divisions of *internal* and *external* justice,—the first being a conformity of our act, and the latter a conformity of our actions to the law, their union making perfect justice. Exterior justice is the object of jurisprudence; interior justice is the object of morality. *Droit Civ. Fr.* tit. pré. n. 6, 7.

According to the *Frederician Code*, part 1, book 1, tit. 2, s. 27, justice consists simply in letting every one enjoy the rights which he has acquired in conformity of the laws. And, as this definition includes all the other rules of right, there is properly but one single general rule of right, namely: *Give every one his own.*

In Norman French. Amenable to justice. *Kelham, Dict.*

In Feudal Law. Feudal jurisdiction, divided into high (*alta justitia*), and low (*simplex inferior justitia*), the former being a jurisdiction over matters of life and limb, the latter over smaller causes. *Leg. Edw. Conf. c. 26*; *Du Cange*. Sometimes high, low, and middle justice or jurisdiction were distinguished.

An assessment; *Du Cange*; also, a judicial fine. *Du Cange*.

At Common Law. A title given in England and America to judges of common-law courts, being a translation of *justitia*, which was anciently applied to common-law judges, while *judez* was applied to ecclesiastical judges and others; *e. g. judez fiscalis*. *Leges Hen. I.* §§ 24, 63; *Anc. Laws & Inst. of Eng. Index*; *Co. Litt.* 71 b.

The judges of king's bench and common pleas, and the judges of almost all the supreme courts in the United States, are properly styled "justices."

The term justice is also applied to the lowest judicial officers: *e. g.* a trial justice; a justice of the peace. See **CORONER**; **COURT**.

JUSTICE AYRES. In Scotch Law. The circuits through the kingdom made for

the distribution of justice. *Erskine, Inst.* 1. 3. 25.

JUSTICE, DEPARTMENT OF. The act of September 24, 1789 (1 Stat. L. 92), organized the judicial business of the United States, made provision for an attorney-general, and charged him with the duty of prosecuting all suits in the supreme court in which the United States was in anywise interested, and of furnishing advice and opinions upon all questions of law when called upon to do so by the president or the heads of the other executive departments of the government. The federal constitution provides that "the executive power shall be vested in the President of the United States," and although it does not specify any subordinate ministerial or administrative officers, yet there is an inferential recognition of such officers in the provision that the president may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of his department, and in the provision for the appointment of certain inferior officers "by the heads of departments." The organization of these departments is by the constitution left to the congress, and it was for the purpose of providing for a department which should administer the legal branch of the government that the above act was passed; 6 Op. Att. Gen. 327.

The Department of Justice as it now exists was created by the act of June 22, 1870; 16 U. S. Rev. Stat. 1 Supp. 162; *Rev. Stats. U. S. Title VIII., passim*. See also 1 U. S. Rev. Stat. 1 Supp. pp. 773, 916, 403, 472, and 560. By this act the attorney-general is made the head of this department. He is the chief law officer of the government. He represents the United States in matters involving law questions; gives his advice and opinion when they are required by the president or by the heads of the other executive departments on questions of law arising in the administration of their respective departments; he exercises a general superintendency and direction over all United States district attorneys and marshals in all judicial districts in the states and territories; he is authorized to provide for special counsel for the United States whenever required by any department of government; he is directed to supervise and direct the defence of actions against officers of either house of congress for official acts; he designates penitentiaries for convicts in United States courts; and has general supervision and control over all United States jails and penitentiaries. In the performance of his duties he is assisted by the solicitor-general, four assistant attorneys-general, and six assistant attorneys, as well as by a certain clerical force, for the routine work of the office.

By the act of June 22, 1870, provision was made for "an officer learned in the law to assist the attorney-general in the performance of his duties, called the solicitor-general." He assists the attorney-general in the performance of his general duties, and by special provision of law, in the case of a vacancy in the office of attorney-general or in his absence, exercises all of the duties of that officer. Except when the attorney-general otherwise directs, the solicitor-general conducts and argues all cases in the supreme court and in the court of claims in which the United States is interested; and when he so directs, any such case in any court of the United States may be conducted and argued by the solicitor-general, and in the same way the solicitor-general may be sent by the attorney-general to attend to the interests of the United States in any state court or elsewhere.

By the act of 1870, provision is also made for three officers learned in the law called assistant attorneys-general, who assist the attorney-general and solicitor-general in the performance of their duties. By the act of March 3, 1891, an additional assistant attorney-general was created for the purpose of defending the United States in suits brought in the court of claims under that act, for Indian depredations. Of these

assistant attorneys-general, one is charged with the defence of the United States in suits brought against the government in the court of claims under its special and general jurisdiction. And he is assisted in the performance of his duties by six assistant attorneys, who, under his general supervision and direction, represent the interests of the United States in the preparation and argument of all cases in that court. The solicitor-general and assistant attorneys-general are appointed by the president of the United States by and with the advice and consent of the senate, while the assistant attorneys are appointed by the attorney-general.

The act creating the Department of Justice also provides for a solicitor of the treasury, an assistant solicitor of the treasury, solicitor of internal revenue, a naval solicitor, and an examiner of claims for the Department of State, commonly called the Solicitor of the Department of State. They are appointed by the president by and with the advice and consent of the senate, and exercise their functions under the supervision and control of the head of the Department of Justice, although they are assigned to duty in the respective departments for which they are appointed. There is also provided an assistant attorney-general for the Department of the Interior and for the Post Office Department, who likewise perform their duties under the general supervision and control of the attorney-general.

The opinions of the attorney-general are reported and have authority the same in kind, if not in degree, with the decisions of courts of justice; 6 Op. Att. Gen. 333.

JUSTICE IN EYRE, CHIEF. See **CHIEF JUSTICE IN EYRE**.

JUSTICE IN EYRE OF THE FOREST. See **CHIEF JUSTICE IN EYRE**.

JUSTICE, FLEEING FROM. In order to come within the exception of "fleeing from justice" in R. S. 1045, it is sufficient that there is a flight with the intention of avoiding prosecution whether a prosecution has or has not been begun. It is not necessary that there should be an intent to avoid the justice of the United States; it is enough that there is an intent to avoid the justice of the state which has jurisdiction over the same act; 160 U. S. 128. See **FUGITIVE FROM JUSTICE**.

To be a fugitive from justice, as that term is used in the Constitution of the United States, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction and is found within the territory of another. 116 U. S. 97. **EXTRADITION**; **RENDITION**.

JUSTICE OF THE PEACE. A public officer invested with judicial powers for the purpose of preventing breaches of the peace and bringing to punishment those who have violated the laws.

These officers, under the constitution of some of the states, are appointed by the executive; in others, they are elected by the people and commissioned by the executive. In some states they hold their office during good behavior; in others, for a limited period.

Justices of the peace were created by 36 Edw., cap. 12. By 12 Rich. 2, cap. 10, it was provided that there should be no more than six in every county. They were said to be judges of record. They were required to be men of the best reputation, the most prevalent men in the county, together with some lawyers; substantial persons dwelling in the county, men of good governance. They were "not qualified unless they have £12 per annum, except Men of the Law;" *Cond. Gen.* 145.

In *People ex rel. Burley v. Howland*, it

was held by the New York appellate division of the supreme court that the legislature could not abolish the office of justice of the peace; 55 Alb. L. J. 819. The court said: "The office of justice of the peace is one of the oldest known to the English law. Originally it was merely a peace officer, with no civil jurisdiction, but from a time long antedating the constitution (of New York) it was an office with both civil and criminal jurisdiction. Its most important functions are those of conservators of the peace, and administrators of the criminal law. The statutes conferring the powers and duties of the office date so far back in the history of English law that they may be said to be common-law powers, adopted by us with the office and inseparable therefrom."

At common law justices of the peace have a double power in relation to the arrest of wrong-doers: when a felony or breach of the peace has been committed in their presence, they may personally arrest the offender, or command others to do so, and; in order to prevent the riotous consequences of a tumultuous assembly, they may command others to arrest affrayers when the affray has been committed in their presence. If a magistrate be not present when a crime is committed, before he can take a step to arrest the offender an oath or affirmation must be made, by some person cognizant of the fact, that the offence has been committed, and that the person charged is the offender, or there is probable cause to believe that he has committed the offence.

Probably the most important function of justices of the peace, in the administration of criminal law, is their power of committing magistrates. This they have always, and in most states they have also jurisdiction, either sole or concurrent, with some criminal court of petty offences.

The constitution of the United States directs that "no warrants shall issue but upon probable cause, supported by oath or affirmation." Amendm. IV. After his arrest, the person charged is brought before the justice of the peace, and after hearing he is discharged, held to bail to answer to the complaint, or, for want of bail, committed to prison.

In some states it is held that where there are criminal courts of record in the county, justices of the peace have no trial jurisdiction in criminal cause, but can act only as committing magistrates; 33 Fla. 620; 45 La. Ann. 1012.

A justice who erroneously and in good faith excludes persons from a criminal case as spectators is not liable therefor; 86 Me. 80.

In some of the United States, justices of the peace have jurisdiction in civil cases, given to them by local regulations. The jurisdiction is usually confined to actions of contract, express or implied, replevin, and the like, where a small amount is involved. The limit ranges from \$100 to \$300, and usually torts and actions for unliquidated damages are not included. The local statutes must be consulted, but the statutes regulating the jurisdiction are sufficiently similar to make the citation of a few cases fairly illustrative of the principles generally applied.

In Philadelphia, under the constitution of 1873, police magistrates take the place of justices of the peace.

The civil jurisdiction of a justice of the peace did not exist by the common law, but depends upon the constitutional warrant or statutory enactment, and there are no intendment in favor of his jurisdiction; 90 Ala. 480.

Where a justice of the peace has been appointed by the proper authorities, his qualifications cannot be questioned before him; 44 Pac. Rep. (Wash.) 270; but where one elected a justice before his term begins files his bond but does not take the oath or perform any official function, a writ of replevin by him before his term actually begins is void; 8 So. Rep. (Miss.) 545. Where a justice has no jurisdiction the filing of an answer by defendant after the

overruling of a motion to dismiss will not give him jurisdiction; 51 Ia. 41. Where the appointment was void the consent of parties cannot give jurisdiction to the justice; 29 S. W. Rep. (Tex.) 102.

Where an action would lie in either contract or tort and suit is begun before a justice, in order to sustain the jurisdiction the action will be presumed to have been brought upon the contract; 24 S. E. Rep. (N. C.) 709.

Jurisdiction is sufficiently shown if it appears from the entire record of the proceeding; 53 Mo. App. 44.

It is no objection to the jurisdiction that plaintiff remitted a part of his claim to bring it within the jurisdiction; 60 Ark. 146; 115 N. C. 298; 20 S. E. Rep. (S. C.) 91; even where unliquidated damages are claimed; 29 S. E. Rep. (W. Va.) 527. But where the sum claimed is in excess of the amount limited by statute the defect cannot be cured and jurisdiction given by a stipulation that the justice may render judgment for the amount to which his jurisdiction is limited; 50 N. W. Rep. (S. D.) 961.

And where lumber was delivered by instalments and the total amount exceeded the jurisdiction, the claim could not be split up into separate actions for the different deliveries in order to bring it within the jurisdictional amount; 109 N. C. 571.

Where a stipulated attorney's fee would increase the amount beyond the jurisdiction the fee may be considered in estimating the amount in controversy; 17 S. W. Rep. (Tex.) 1085; even if the stipulation for the fee is void; 64 N. E. Rep. (S. D.) 535.

Justices of the peace have been held to have no jurisdiction in trespass for the negligent killing of an animal; 16 Pa. Co. Ct. R. 548; or negligently allowing a dangerous animal to go at large; 2 Lack. Leg. N. Pa. 143; or for injuries to a horse by a defective culvert; 5 Pa. Dist. R. 73; or in a suit on a foreign judgment; 7 Houst. 327; in an action on the case for nuisance; 4 Pa. Dist. 290; or for consequential damages due to negligence; *id.* 83. But the jurisdiction was sustained in an action for the destruction of fruit in baskets, run over and crushed by the wheels of defendant's wagon, consequential damages not being involved; 8 Houst. 19; so also there was jurisdiction of an action for killing a horse by a railroad company, because of a breach of contract to maintain cattle guards; 38 W. Va. 711.

The jurisdiction of a justice in a garnishment proceeding does not depend upon the amount the garnishee may owe; 59 Ill. App. 329; in an attachment the jurisdiction is determined by the amount in controversy, not the value of the property attached; 35 S. W. Rep. (Ark.) 214; 24 S. E. Rep. (N. C.) 671. Where the justice has jurisdiction in "matters of contract," it will cover an action for unliquidated damages for breach of contract within the jurisdiction; 55 Ark. 547.

A justice of the peace has no power to vacate a judgment unless it be one of default or non-suit; 61 Mo. App. 288; nor to settle a bill of exceptions; 44 Neb. 10; for the purpose of preserving testimony on a hearing of a motion to discharge the attachment; 43 *id.* 260; nor to grant a nonsuit where a case is on trial before a jury; 24 S. E. Rep. (Ga.) 407.

The court of a justice of the peace has been held a court of record; 57 Ind. 56; 12 Conn. 49; for the reason that it is bound to keep a record of its proceedings and has power to fine and imprison; 7 Blackf. 272. But it has also been held *contra*; 1 Pa. 307; 10 *id.* 157; Hempst. 20; Ga. Dec. pt. II. 50.

Justices of the peace are within the principle that judicial officers are not liable for damages for judicial acts, and only on ministerial acts in cases of intentional violation of law or gross negligence; 7 D. C. 264; 67 N. W. Rep. (Mich.) 982. It was held that he is not liable for rendering a judgment and issuing an order of sale in an action on which he had no jurisdiction, unless he knowingly acted outside of it; 35 S. W. Rep. (Tex.) 416; or unless he did

not act in good faith; 61 N. W. Rep. (Ia.) 1004.

The refusal of a justice to approve an appeal is a ministerial act, for which an action will lie against him if he acted corruptly or maliciously; 8 Houst. 154.

Though magistrates and other quasi-judicial and sometimes ministerial officers are within the principle that an error of judgment or mistake of law is not punishable, in proceedings against them for acting corruptly in their office, their misapprehensions of the law may be set up in answer to the charge of corruption; 1 Term 653; 13 Q. B. 240; 4 Harring. 555, 556; 75 N. C. 281; 2 Bay 1, 385; 36 Ia. 499; 1 Mass. 227; 1 Bish. N. Cr. L. § 299.

If the action of a justice of the peace is strictly judicial and he has jurisdiction, he is not liable to a civil action, however, it may be as to criminal prosecution, though corruption is alleged; 8 Cow. 178; 88 Me. 530; 21 Barb. 207; 11 Allen 31; 23 Ill. 100; 7 Jones N. C. 525; 65 Ind. 106.

All the acts of a justice of the peace from the commencement to the close of a suit seem to be considered judicial, rather than ministerial, so far as concerns questions of his responsibility; 1 Bish. N. Cr. L. § 463, n. 3; 80 Mo. 420; see 13 Md. 340; but he is liable for exercising authority where he has none; 3 A. K. Marsh. 70; where he acts upon inadequate allegation, but has jurisdiction over the subject-matter, he is not liable; 21 Wend. 552.

As to the powers of justices of the peace, see 3 Ohio, L. J. 671; their jurisdiction; 16 Am. St. Rep. 919; summary jurisdiction; 3 L. Mag. & Rev. N. s. 1007; liability; 15 Am. L. Rev. 493; 25 Am. Rep. 698-701; authentication of judgment; 5 Am. L. Rep. 577; criminal examinations, 9 Alb. L. J. 17, 183; 11 *id.* 36; ousting jurisdiction by questions of title to land; 24 Ir. L. T. 553, 563, 577; judgments; 2 L. R. A. 831. As to the administration of this jurisdiction before there were justices of the peace, see JUSTICES IN EYRE.

See, generally, Burn; Davis; Graydon; Justice; Bache, Manual of a Justice of the Peace; Comyn, Dig.; 15 Viner, Abr. 3; Bacon, Abr.; 2 Sell. Pr. 70; 2 Phil. Ev. 239; Chitty, Pr.; 11 Myer, Fed. Dig. 773.

In English Law. One of several persons who are appointed by the Crown to be, or who *ex officio* are, justices within a certain district, as a county or a borough, for the conservation of the peace, and for the execution of divers things comprehended within their commission and within divers statutes committed to their charge. They act either ministerially or judicially, ministerially in cases of felony or misdemeanor, where they merely initiate the proceedings by issuing a warrant of apprehension, taking the depositions, and committing for trial; judicially in quarter sessions (*q. v.*), and in all cases where they have summary jurisdiction, whether criminal or civil. Byrne. See COURT OF THE GENERAL QUARTER SESSIONS OF THE PEACE; CUSTOS ROTULORUM; CLERK OF THE PEACE; COUNTY COUNCIL.

JUSTICES OF THE BENCH. The justices of the Court of Common Bench or Common Pleas. R. & L. Diet.

JUSTICES COURTS. In American Law. Inferior tribunals, with limited jurisdiction, both civil and criminal. There are courts so called in the states of Massachusetts and New Hampshire, and probably other states.

JUSTICES IN EYRE. Certain judges established, if not first appointed, A. D. 1176, 23 Hen. II.

England was divided into certain circuits, and three justices in eyre—or justices itinerant, as they were sometimes called—were appointed to each district, and made the circuit of the kingdom once in seven years, for the purpose of trying causes. They were afterwards, when the judicial functions assumed greater importance, directed, by Magna Charta, c. 12, to be sent into every county once a year. The itinerant justices were sometimes mere justices of assize or dower, or of general jail delivery, and the like.

Speaking of the 12th century it is said that "the visitation of the counties by itinerant justices has been becoming systematic." The holding of the

assize on circuit was evidently committed to judges of great prominence. "From the early years of the reign (Henry II.) we hear of pleas held on circuit by Richard Lucy the chief justiciar, by Henry of Essex the constable, and by Thomas Becket the chancellor. . . . In 1170, to execute the assize of Northampton, eighteen justices were employed, and the country was divided into six circuits; in 1179, twenty-two justices were employed, and the country was divided into four circuits; indeed from 1170 onwards hardly a year went by without there being a visitation of some part of England. These itinerant justices seem to have been chiefly employed in hearing the pleas of the crown (for which purpose they were equipped with the power of obtaining accusations from the local justices), and in entertaining some or all of the new possessory actions. The court that they held was, as already said, *curia regis*, but it was not *capitalis curia regis*, and probably their powers were limited by the words of a temporary commission. They were not necessarily members of the central court, and they might be summoned before it to bear record of their doings; still it was usual that each party of justices should include some few members of the permanent tribunal." 1 Poll. & Maitl. 184.

These justices in eyre in the reign of Henry III. are thus described: "But we may distinguish the main types of these commissions. What seems treated as the humblest is the commission to deliver a jail. This . . . is done very frequently; generally it is done by some three or four knights of the shire, and thus long before the institution of justices of the peace, the country knights had been accustomed to do high criminal justice. In order to dispose of the possessory assizes of novel disseisin and mort d'ancestor, a vast number of commissions were issued in every year. Early in Henry's reign this work was often entrusted to four knights of the shire; at a later time one of the permanent justices would usually be named and allowed to associate some knights with himself. Apparently a justice of assize had often to visit many towns or even villages in each county; he did not do all his work at the county town. It must have been heavy work, for these actions were extremely popular. Above all the other commissions rank the commission for an *iter ad omnia placita*, or more briefly for an *iter*, or eyre. An eyre had come to be a long and laborious business. In the first place, if we suppose an eyre in Cambridgeshire announced, this has the effect of stopping all Cambridgeshire business in the bench. Litigants who have been told to appear before the justices at Westminster will now have to appear before the justices in eyre at Cambridgeshire. There is no business before the bench at Westminster if an eyre has been proclaimed in all the counties. Then again the justices are provided with a long list of interrogatories (*capitula itineraria*) which they are to address to local jurors. Every hundred, every vill in the county must be represented before them. These interrogatories—their number increases as time goes on—ransack the memories of the jurors, and the local records for all that has happened in the shire since the last eyre took place come seven years ago; every crime, every invasion of royal rights, every neglect of police duties must be presented. The justices must sit in the county town from week to week and even from month to month before they will have got through the tedious task and inflicted the due tale of fines and amercements. Three or four of the permanent judges will be placed in the commission; with them will be associated some of the magnates of the district; bishops and even abbots, to the scandal of strict churchmen, have to serve as justices in eyre. From this it was thought expedient that some of the great freeholders of the country should be commissioned, in order that no man might say that his judges were not his peers. An eyre was a sore burden; the men of Cornwall fled before the face of the justices; we hear assertions of a binding custom that an eyre shall not take place more than once in seven years. Expedients are being adopted which in course of time will enable the justices of assize to preside in the country over the trial of actions which are pending before the benches; thus without the terrors of an eyre, the trial of actions can take place in the counties and jurors need no longer be ever journeying to Westminster from their remote homes. But these expedients belong for the most part to Edward's reign; under his father a jury wearily travelling from Yorkshire or Devonshire towards London must have been no very uncommon sight." 1 Poll. & Maitl. 179, 180, 181.

See 3 Bla. Com. 58; Crabb, Eng. Law 108; Co. Litt. 293.

JUSTICES OF THE JEWS. See JEWS.

JUSTICES OF THE PAVILION (*justiciaris pavilionis*). Certain judges of a pypeword court, of a most transcendent jurisdiction, authorized by the bishop of Winchester, at a fair held at St. Giles Hills near that city, by virtue of letters-patent granted by Edw. IV. Prynne's Animadv. on Coke's 4th Inst. fol. 191.

JUSTICES OF TRAIL BASTON. Justices appointed by Edward I. during his absence in the Scotch and French wars, about the year 1305. They were so styled; it is said, from *trailing* or drawing the *baston* (q. v.), or staff of justice. They were a sort of justices in eyre, with large and

summary powers. Their office was to make inquisition, throughout the kingdom, of all officers, and others, touching extortion, bribery, and such like grievances of intruders into other men's lands, barrators, robbers, breakers of the peace, and divers other offenders; Cowel; Toml.; Holt; Old. N. B. fol. 52; 12 Co. 25.

JUSTICIABLE. A dispute of a justiciable nature is one which can properly be determined in a judicial proceeding. 185 U. S. 388. Controversies justiciable in their nature are those the parties to which or the property involved in which may be reached by judicial process. Speaking generally, the judicial power of a nation extends to all controversies of a justiciable nature. 206 U. S. 83.

JUSTICIAR, JUSTICIER. In Old English Law. A judge or justice. Baker, fol. 118; Mon. Angl. One of several persons learned in the law, who sat in the *aula regis*, and formed a kind of court of appeal in cases of difficulty.

The chief justiciar (*capitalis justiciarius totius Anglie*) was a special magistrate, who presided over the whole *aula regis*, who was the principal minister of state, the second man in the kingdom, and by virtue of his office, guardian of the realm in the king's absence. 3 Bla. Com. 37; Spelman, Gloss. 330; 2 Hawk. Pl. Cr. 6. The last who bore this title was Philip Basset, in the time of Hen. III.

JUSTICIARII ITINERANTES (Lat.). Justices in eyre (q. v.).

JUSTICIARII RESIDENTES (Lat.). Justices or judges who usually resided in Westminster: they were so called to distinguish them from justices in eyre. Co. Litt. 293.

JUSTICIARY. Another name for a judge. In Latin, he was called *justiciarius*, and in French, *justicier*. Not used. Bacon, Abr. Courts (A).

JUSTICES (from verb *justiciare*, 2d pers. pres. subj., do you do justice to).

In English Law. A special writ, in the nature of a commission, empowering a sheriff to hold plea in his county court of a cause which he could not take jurisdiction of without this writ: e. g. trespass *vi et armis* for any sum, and all personal actions above forty shillings. 1 Burn. Just. 449. So called from the Latin word *justities*, used in the writ, which runs, "*præcipimus tibi quod justities A B*," etc.; we command you to do A B right, etc. Bracton, lib. 4, tr. 6, c. 13; Kitch. 74; Fitzh. N. B. 117; 3 Bla. Com. 3, 6.

JUSTIFIABLE HOMICIDE. That which is committed with the intention to kill, or to do a grievous bodily injury, under circumstances which the law holds sufficient to exculpate the person who commits it. A judge who, in pursuance of his duty, pronounces sentence of death, is not guilty of homicide; for it is evident that, as the law prescribes the punishment of death for certain offences, it must protect those who are entrusted with its execution. A judge, therefore, who pronounces sentence of death, in a legal manner, on a legal indictment, legally brought before him, for a capital offence committed within his jurisdiction, after a lawful trial and conviction of the defendant, is guilty of no offence; 1 Hale, Pl. Cr. 496.

Magistrates, or other officers intrusted with the preservation of the public peace, are justified in committing homicide, or giving orders which lead to it, if the excesses of a riotous assembly cannot be otherwise repressed; 4 Bla. Com. 178, 179. So a homicide is justifiable, when committed by an officer in defending a judge of the United States, engaged in the discharge of his judicial duties; 135 U. S. 1.

An officer intrusted with a legal warrant, criminal or civil, and lawfully commanded by a competent tribunal to execute it, will be justified in committing homicide, if in the course of advancing to discharge his

duty he be brought into such perils that without doing so he cannot either save his life or discharge the duty which he is commanded by the warrant to perform. And when the warrant commands him to put a criminal to death, he is justified in obeying it; Cl. Cr. L. 184. See 113 N. C. 722. In endeavoring to make an arrest an officer has the right to use all the force that is necessary to overcome all resistance, even to the taking of life; 90 Mo. 866.

A soldier on duty is justified in committing homicide, in obedience to the command of his officer, unless the command was something plainly unlawful.

A man may be justified in killing another to prevent the debauching of his wife; 90 Ga. 472.

A private individual will, in many cases, be justified in committing homicide while acting in self-defence; 184 Ind. 46; 30 Fla. 142; 97 Ala. 32; 31 Tex. Cr. R. 56. If a trespass on the person or property of another amounts to a felony, the killing of the trespasser will be justifiable, if necessary in order to prevent it; 90 Ga. 701. It is not true as a general proposition that one who is assaulted by another with a dangerous weapon is justified in taking the life of the party so assaulting him; 45 La. Ann. 14. The same circumstances that will justify or excuse the homicide where the assault is upon one's self, will also excuse or justify the slayer if the killing is done in defence of his family or servant; 32 Fla. 56. See 86 Ky. 440. See DEFENCE.

An instruction to a jury requiring a justification of homicide to be established beyond a reasonable doubt is erroneous; 65 Hun 420.

To establish a case of justifiable homicide it must appear that the assault upon the prisoner was such as would lead a reasonable person to believe that his life was in peril; 164 U. S. 492.

See, generally, 4 Bla. Com. 178; 1 Hale, Pl. Cr. 496; 1 East, Pl. Cr. 219; 1 Russ. Cr. 598; 2 Wash. C. C. 515; Mass. 391; 1 Hawks 210; 1 Cox, N. J. 424; 5 Yerg. 459; 9 C. & P. 22; ARREST; HOMICIDE; JUSTIFICATION.

JUSTIFICATION. In Pleading. The allegation of matter of fact by the defendant, establishing his legal right to do the act complained of by the plaintiff.

Justification admits the doing of the act charged as a wrong, but alleges a right to do it on the part of the defendant, thus denying that it is a wrong. Excuse merely shows reasons why the defendant should not make good the injury which the plaintiff has suffered from some wrong done. See ATOWAY.

Trespasses. A warrant, regular on its face, and issued by a court of competent jurisdiction, is a complete justification to the officer to whom it is directed for obeying its command, whether it be really valid or not. But where the warrant is absolutely void, or apparently irregular in an important respect, or where the act done is one which is beyond the power conferred by the warrant, it is no justification. See ARREST; TRESPASS. So, too, many acts, and even homicide committed in *self-defence*, or defence of wife, children, or servants, are justifiable; Archb. Cr. P. by Pom. 681, n.; see SELF-DEFENCE; DEFENCE; JUSTIFIABLE HOMICIDE; or in *preserving the public peace*; see ARREST; TRESPASS; or under a *license*, express or implied; 3 Cai. 261; 2 Bail. 4; 3 McLean 571; see 13 Me. 115; including entry on land to demand a debt, to remove chattels; 3 W. & S. 225; 12 Vt. 273; see 2 Humphr. 425; to ask lodgings at an inn, the entry in such cases being peaceful; to exercise an incorporeal right; 21 Pick. 272; or for *public service* in case of exigency, as pulling down houses to stop a fire; Year B. 13 Hen. VIII. 16 b; destroying the suburbs of a city in time of war; Year B. 8 Edw. IV. 85 b; entry on land to make forfeitures or in *preservation of the owner's rights of property*; 14 Conn. 255; 4 D. & B. 110; 7 Dana 230; Wright, Ohio 333; 25 Me. 453; 6 Pa. 313; 12 Metc. 53.

Libel and slander may be justified in a civil action, in some cases, by proving the truth of the matter alleged, and gener-

ally by showing that the defendant had a right upon the particular occasion either to write and publish the writing or to utter the words: as, when slanderous words are found in a report of a committee of congress, or in an indictment, or words of a slanderous nature are uttered in the course of debate in the legislature by a member, or at the bar by counsel when properly instructed by his client on the subject. Comyns, Dig. *Pleader*. See **SLANDER**.

Matter in justification must be specially pleaded, and cannot be given in evidence under the general issue. See **LICENSE**. A plea of justification to an action for slander, oral or written, should state the charge with the same degree of certainty and precision as is required in an indictment. The object of the plea is to give the plaintiff, who is in truth an accused person, the means of knowing what are the matters alleged against him. It must be direct and explicit. It must in every respect correspond with, and be as extensive as the charge in, the declaration.

The justification, however, will be complete if it covers the essence of the libel. But it must extend to every part which could by itself form a substantive ground of action. Where the slander consists in an imputation of crime, the plea of justification must contain the same degree of precision as is requisite in an indictment for the crime, and must be supported by the same proof that is required on the trial of such an indictment. It is a perfectly well-established rule that where the charge is general in its nature, yet the plea of justification must state specific instances of the misconduct imputed to the plaintiff. And, even for the purpose of avoiding proximity, a plea of justification cannot make a general charge of criminality or misconduct, but must set out the specific facts in which the imputed offence consists, and with such certainty as to afford the plaintiff an opportunity of joining issue precisely upon their existence. *Heard, Lib. & Sl. § 240*. See **LIBEL**.

When established by evidence, it furnishes a complete bar to the action.

In Practice. The proceeding by which bail establish their ability to perform the undertaking of the bond or recognizance.

It must take place before an authorized magistrate; 5 Binn. 461; 6 Johns. 124; 13 *id.* 423; and notice must, in general, be given by the party proposing the bail, to the opposite party, of the names of the bail and the intention to justify; 3 Harr. N. J. 508. See 3 Halst. 369.

It is a common provision that bail must justify in double the amount of the recognizance if exceptions are taken; 2 Hill, N. Y. 379; otherwise, a justification in the amount of the recognizance is, in general, sufficient.

It must be made within a specified time, or the persons named cease to be bail; 1 Cow. 54. See *Baldw.* 148.

JUSTIFICATORS. A kind of compurgators, or those who, by oath, justified the innocence or oaths of others, as in the case of wages of law.

JUSTIFYING BAIL. **In Practice**. The production of bail in court, who there justify themselves against the exception of the plaintiff. See **BAIL**; **JUSTIFICATION**.

JUSTITIUM. **In Civil Law**. A suspension or intermission of the administration of justice in courts; vacation time. *Calv. Lex*.

JUSTIZA. **In Scotch Law**. The name anciently given to a high judicial magistrate, or supreme judge, who was the ultimate interpreter of the laws, and possessed other high powers.

JUSTLY. The words "to act justly" or "do justice" to relatives do not create a precatory trust; 4 Ch. Div. 238.

JUSTS or **JOUSTS**. Exercises between martial men and persons of honor, with spears, on horseback; different from tournaments, which were military exercises between many men in troops. 24 Hen. VIII. c. 13.

JUVENILE COURTS. Courts to regulate the treatment, control, and custody of dependent, neglected and delinquent children. This jurisdiction is, in some states, conferred on the county courts, in which case, strictly speaking, no new court is created, and no jurisdiction heretofore conferred upon the courts to try offenses is

taken away. Additional duties are placed upon the county courts, and a different method of bringing children before the courts to be dealt with is provided. 60 Okl. Cr. 495 *et seq.*

The purpose of acts conferring such jurisdiction is generally that the care and custody and discipline of the child shall approximate, as nearly as may be, that which should be given by its parents, and that, as far as practicable, any delinquent child shall be treated, not as a criminal, but as misdirected and misguided, and needing aid, encouragement, help and assistance. *Id.*, 503.

Commitments of children to juvenile institutions can be distinguished into three essential classes: Commitments as a punishment for crime, commitments where the proceedings are quasi criminal; and commitments for care and guardianship.

The object of detention of incorrigible children is not punishment, but reform and moral training. Proceedings under statutes authorizing such commitment have been held valid on ground that sovereign right to care for the education of its members belongs of strict right to the state, under whose sanction the custody or charge of the minor is thus transferred from the guardian, who declares his inability to fulfill the purposes of guardianship. 6 Okl. Rep. 507; 31 Md. 329.

JUXTA (Lat.). According to.

JUXTA CONVENTIONEM. According to the covenant. *Fleta*, lib. 4, c. 16, § 6.

JUXTA FORMAN STATUIT. According to the form of the statute.

JUXTA TENOREM SEQUENTEM. According to the tenor following. 2 Salk. 417. A phrase used in the old books when the very words themselves referred to were set forth. *Id.*; 1 *Ld. Raym.* 415.

JUEGADO. **In Spanish Law**. The collective number of judges that concur in a decree, and more particularly the tribunal having a single judge.

K.

K. B. King's Bench. Anderson. See **COURTS OF ENGLAND.**

K. C. King's council, or counsel. Anderson.

KAIAGIUM (Lat.). Kayage or wharfage.

KAIN. In Scotch Law. A payment of fowls, etc., reserved in a lease. It is derived from *canum*, a word used in ancient grants to signify fowls or animals deliverable by the vassal to his superior as part of the *reddendum*. Erskine, Inst. 11. 10. 32; 2 Ross, Lect. 236, 405.

KALENDÆ. Rural chapters or conventions of the rural deans and parochial clergy, formerly held on the calends of every month. Kenn. Paroch. Antiq. 604.

KALENDARIUM. In Civil Law. A book containing a list of such capital sums as were lent out at interest. Sohm, Rom. L. 305.

KANSAS. The name of one of the states of the United States of America.

The state was carved out of a portion of the Louisiana purchase, and a small portion of the territory ceded to the United States by Texas. The territory of Kansas was organized by an act of congress, dated May 30, 1854.

The constitution was adopted at Wyandotte July 29, 1859, and Kansas was admitted into the Union as a state, by an act of the congress, approved, January 30, 1861.

Under the constitution, the powers of the state government are divided into three departments, viz.: executive, legislative, and judicial.

"The body of the laws of England as they existed in the fourth year of the reign of James I. (1607) constitutes the common law of this state." 9 Kan. 252.

KAVIL. In Scotch Law. A lot. Originally the stick or rune-staff used in casting lots. Written also cavel. See Ersk. Prin. 220; Cent. Dict.

KEELAGE. The right of demanding money for the bottom of ships resting in a port or harbor. The money so paid is also called *keelage*.

KEELS. This word is applied, in England, to vessels employed in the carriage of coals. Jacob, Law Dict.

KEEP. To heed; observe; regard; attend to.

Neither a single act of play at a gaming-table, called a sweat cloth, at the races, nor even a single day's use of it on the race-field, is a keeping of a common gaming-table, within the Penitentiary Act for the District of Columbia; 4 Cr. C. C. 659. When it is said that a certain man keeps a woman, the popular inference is, that the relation is one which involves illicit intercourse; 36 Ala. 717. See 3 Allen 101; 52 N. H. 363. To keep a street in safe condition, means to have it so; to make and remake it so; 76 Ga. 585. To keep premises in repair is to have them at all times in that condition; 1 B. & Ald. 585.

Keep down interest. To pay interest periodically as it becomes due, but the phrase does not extend to the payment of all arrears of interest which may have become due on any security from the time when the instrument was executed. 4 El. & Bl. 211.

KEEPER. To warrant the conviction of one as the keeper of a common gaming house, he need not be the proprietor or lessee; it is sufficient if he has the general superintendence. 67 Ill. 587.

KEEPER OF A FERRY. In the

Act of 1820 means, not the ferryman, but a grantee, lessee, or other person having a beneficial interest in, and control over, the ferry. 8 Dana (Ky.) 159.

KEEPER OF THE FOREST (called, also, the chief warden of the forest). An officer who had the principal government over all officers within the forest, and warned them to appear at the court of justice-seat on a summons from the lord chief-justice in eyre. Manw. For. Law, part 1, p. 156; Jacob, Law Dict. See **FOREST LAW.**

KEEPER OF THE GREAT SEAL (lord keeper of the great seal). A judicial officer who is by virtue of his office a lord, and a member of the privy council. Through his hands pass all charters, commissions, and grants of the crown, to be sealed with the *great seal*, which is under his keeping. The office was consolidated with that of lord chancellor by 5 Eliz. c. 18; and the lord chancellor is appointed by delivery of the great seal, and taking oath; Co. 4th Inst. 87; 1 Hale, Pl. Cr. 171, 174; 3 Bla. Com. 47. See **CANCELLARIUS**; **CHANCELLOR.**

KEEPER OF THE KING'S CONSCIENCE. The lord chancellor—formerly an ecclesiastic. Anderson.

KEEPER OF THE PRIVY SEAL. The officer through whose hands go all charters, pardons, etc., signed by the king before going to the great seal, and some which do not go there at all. He is of the privy council *virtute officii*. He was first called clerk of the privy seal, then guardian, then lord privy seal, which is his present designation. 12 Ric. II. c. 12; Rot. Parl. 11 Hen. IV.; Stat. 34 Hen. VIII. c. 4; 4 Inst. 55; 2 Bla. Com. 347.

KEEPING. In an insurance policy a clause prohibiting the keeping or having benzine in insured premises, was held to be intended to prevent the permanent and habitual storage of the prohibited articles, and that taking it on the premises for the purpose of cleaning machinery was not within the prohibition; 92 Pa. 15.

KEEPING BOOKS. Preserving an intelligent record of a merchant's or tradesman's affairs with such reasonable accuracy and care as may properly be expected from a man in that business. An intentional omission, or repeated omissions, evincing gross carelessness will vitiate; an accidental failure to make a proper entry will not; 16 Bankr. Reg. 152.

KEEPING HOUSE. In English Law. As an act of bankruptcy, it is when a man absents himself from his place of business and retires to his private residence, so as to evade the importunity of creditors. The usual evidence of "keeping house" is denial to a creditor who has called for money. Robson, Bkcy.; 6 Bing. 363.

KEEPING OPEN. A statute prohibiting shops to be kept open on Sunday is violated where one allows general access to his shop for purposes of traffic, though the outer entrances are closed. 11 Gray 308; 16 Mich. 472.

KEEPING THE PEACE. See **SURETY OF THE PEACE.**

KEEPING TERM. In English Law. A duty performed by students of law, consisting in eating a sufficient number of dinners in hall to make the term count for the purpose of being called to the

bar. Moz. & W.

KEEPING A TIPLING HOUSE. "Keeping a tippling house" imports an unlawful selling of spirituous liquors by retail, without license. 5 Bush (Ky.) 312.

KELP-SHORE. The land between high and low water mark. Stroud. Jud. Dict.

But when the conveyance, "with the kelp-shore" by the metes and bounds given, manifestly excluded the land between high and low water mark, it was held to be excluded, and parol proof could not be received of the intention to include it; 10 Ir. C. L. 150.

KENILWORTH, DICTUM OF. An award made by Henry III. and parliament in 1266 for the pacification of the kingdom.

This is printed (under this title) in the Statutes of the Realm as 51 and 52 Hen. 3. In the Statutes at Large (vol. 9, App., p. 1), it is printed simply as the *Dictum de Kenilworth*. It was not in fact a statute: it was merely a declaration of the terms arranged between Edward I. (then Prince Edward) and the barons who had been on the side of Simon de Montfort. Byrne.

KENNING TO THE TERCE. In Scotch Law. The ascertainment by a sheriff of the just proportion of the husband's lands which belongs to the widow in virtue of her *terce* or third. An assignment of dower by sheriff. Erskine, Inst. 11. 9. 50; Bell, Dict.

KENO OR FARO BANK. A "keno or faro bank" is the implement of a professional gambler. 13 S. W. 108.

KENTLEDGE OR KINTLEDGE. The permanent ballast of a ship. Ab. Sh. 6.

KENTUCKY. The name of one of the states of the United States of America.

This state was formerly a part of Virginia, which by an act of its legislature, passed December 18, 1793, consented that the district of Kentucky within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state. By the act of congress of February, 1791, 1 Story, Laws 168, congress consented that, after the first day of June, 1792, the district of Kentucky should be formed into a new state, separate from and independent of the commonwealth of Virginia. And by the second section it is enacted, that upon the aforesaid first day of June, 1792, the said new state, by the name and style of the state of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.

KEPT. In § 21 of the National Prohibition Act, denouncing as a nuisance, "any room, house, building, . . . or place where intoxicating liquor is manufactured, sold, kept," etc., the word "kept" means kept for sale or barter or other commercial purposes. 254 U. S. 92.

KEROSENE. A rock or earth oil. 69 N. Y. 26; 30 Wis. 534.

It is, in a commercial sense, a refined coal or earth oil, and is embraced within those terms as used in an insurance policy. 81 N. Y. 372.

It is not petroleum, but made from the latter by a process of a distillation and refinement; 69 N. Y. 26; 81 *id.* 275.

A court will not take judicial notice that kerosene is an "inflammable fluid" within the meaning of an insurance policy, it must be proved as a fact; 46 N. Y. 421; nor that it comes under the words "burning fluid"; 24 Hun 565. See 30 Wis. 534.

It is a question for the jury whether kerosene is a burning fluid or chemical oil;

93 Pa. 15; or a drug; 53 Vt. 418; where the court, after quoting Webster's definition of a drug, as "any mineral substance used in chemical operations," declined to say as matter of law that benzine is not included in that term. See RISKS AND PERILS; OIL.

KEY. An instrument made for shutting and opening a lock.

The keys of a house are considered as real estate, and descend to the heir with the inheritance; Mitch. R. P. 21; 11 Co. 50 b; 80 E. L. & Eq. 598; but although they follow the inheritance, they are not fixtures, so far as that the taking of them is not larceny; 5 Blackf. 417; 5 Taunt. 518.

When the keys of a warehouse are delivered to a purchaser of goods locked up there, with a view of effecting a delivery of such goods, the delivery is complete. The doctrine of the civil law is the same; Dig. 41. 1. 9. 6; 18. 1. 74; Benj. Sales, 6th Am. ed. § 1043; 1 East 192; 8 Term 461. See DONATIO MORTIS CAUSA; GIFT.

Keys are implements of housebreaking within statute 14 & 15 Vict. c. 19, § 1; for, though commonly used for lawful purposes they are capable of being employed for purposes of housebreaking; and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, with the intention of using them as implements of housebreaking; 3 C. & K. 250; 2 Den. Cr. Cas. 472; and the statute was held to include skeleton, or any other kind of key used for purposes of housebreaking; *id.* Entering by a key left in the door locked on the outside is not housebreaking; 1 Swint. Jus. Cas. 433. See BURGLARY.

KEY OR QUAY. "Key" or "quay" is defined to be a wharf to land or ship goods or wares at. 8 B. Mon. (Ky.) 253.

KEYAGE. A toll paid for loading and unloading merchandise at a quay or wharf.

KEYS. The twenty-four chief commoners in the Isle of Man who form the local legislature. 1 Steph. Com., 11th ed. 100.

KIDEL or KIDDLE. An open weir whereby fish are caught. 2 Inst. 38.

"Weirs (kidelli or gurgites) were the means usual in ancient times for appropriating and enjoying several fisheries in tidal waters." Lord Selborne, L. C., in 8 App. Cas. 144.

KIDNAPPING. The forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another. 4 Bla. Com. 219. At common law it is a misdemeanor; Comb. 10.

There is no wide difference in meaning between kidnapping, false imprisonment, and abduction. The better view seems to be that kidnapping is a false imprisonment, which it always includes, aggravated by the carrying of the person to some other place; Archb. Cr. P. by Pom. 984; 2 Bish. Cr. L. § 750. See 85 Cal. 309. It has been held that transportation to a foreign country is not necessary, though this conflicts with Blackstone's definition, *supra*; 8 N. H. 550. See 1 East, P. C. 429. The consent of a mature person of sound mind prevents any act from being kidnapping; otherwise as to a young child; a child of nine years has been held too young to render his consent available as a defence; Cl. Cr. L. 221; 41 N. H. 53; 5 Allen 518; Thach. Cr. Cas. 488; 74 Ga. 191; 17 Blatchf. 423; but a female fourteen years of age is not kidnapped, if taken away with her consent for the purpose of marriage, and she actually marries; 61 Ga. 763; so, going away by previous arrangement with an unmarried woman who, becoming intoxicated, remained for some days, in illicit intercourse, and was then brought back at her request, was not kidnapping; 35 N. E. Rep. (Ind.) 1023. Physical force need not be applied, threats will suffice; 8 Allen 69; or fraudulently acquiring consent; 109 N. Y. 226; 88 *id.* 192. The crime may be ef-

fected by means of menaces; 20 Ill. 315; or by getting a man drunk; 25 N. Y. 378. Where the custody of a child is assigned to one of two divorced parents, and the other, or a third person employed for the purpose, carries it off, it is kidnapping; 41 N. H. 53; 5 Allen 518. It was held that within the meaning of the statute against kidnapping, any place where a child has a right to be is its residence; Wallace v. State, 47 N. E. Rep. (Ind.) 13. In this case two children who were acrobats had been sent away from home for the purpose of giving exhibitions to raise money with which to relieve the necessities of the family. While absent from their parents they were decoyed away by defendant, who was indicted for kidnapping under the Indiana statute. The court held that they had not acquired a permanent residence, but they were at a place they had a right to be—to which they had been sent by their parents, engaged in the business for which they had been sent. "The purpose of the statute here under consideration certainly was not that a child might be kidnapped at its father's house, but not if it were on a visit at a friend's in a near or distant city. The evident purpose was rather to provide against the kidnapping of a person from any place where he has a right to be, whether that be the place of his 'temporary sojourn or permanent domicile.' A child may be kidnapped, not only from its domicile or the home of its parents, but likewise from a neighbor's house, from church, or school, or hotel, from a hall of public entertainment, or, in fact, from any place where it has a right to be; and it is in that sense that the word 'residence' is here used." 17 N. Y. L. J. 842.

One who takes his child of tender years out of the state, with its consent and with the consent of the mother to whom its custody has been awarded in divorce proceedings, to prevent its presence at a criminal trial in which it had been subpoenaed as a witness, is not guilty of kidnapping; 44 Pac. Rep. (Wyo.) 51. New York, Illinois, and other states have passed statutes on kidnapping. See ABDUCTION; 1 Russ. Cr. 962; 3 Tex. 282; 12 Metc. 56; 2 Park. Cr. Ca. 590; 47 Hun 308; 146 Pa. 24. Where defendant procured an adjudication that the person alleged to have been kidnapped was insane, and, without using force, publicly conveyed her to a lunatic asylum, though she was not insane at the time, he was not guilty of the offence of kidnapping; 139 N. Y. 87.

The indictment must be found in the county in which the person was seized and not in one through which he was carried; 3 Harring. 538.

It has been held, however, that the carrying away is not essential; 8 N. H. 550. The crime includes a false imprisonment; 2 Bish. Cr. Law § 671. See 1 Russ. Cr. 716; 2 Harr. Del. 538; 3 Tex. 282; 12 Metc. 56; ABDUCTION.

It has been held that in order to rescue a kidnapped person his friends may use such force as will be necessary, and that where there is an attack upon the rescuers, a killing of the kidnapper in self-defence is excusable homicide; 25 S. W. Rep. (Ky.) 830.

Kidnapping Act, 1872. The stat. 35 & 36 Vict. c. 19, for the prevention and punishment of criminal outrages upon natives of the islands of the Pacific Ocean. Amended by the 38 & 39 Vict. c. 61.

KILDERKIN. A measure of capacity, equal to eighteen gallons.

KILL (Dutch). Originally the bed of a river or creek, and by relation used to mean the stream itself. It is so used in Delaware and New York, but has been said to have no distinct legal signification. 1 N. Y. 96.

An Irish word, signifying a church or cemetery, which is used as a prefix to the names of many places in Ireland. R. & L. Dict.; Ency. Lond.

KILL (v.) To deprive of life. It is appropriate to express privation of life of

any and all beings; if taking human life, distinctively, is intended, homicide (*q. v.*) is the appropriate technical word. Abbott.

KIN. Legal relationship; properly relations by blood, but often including those by marriage. It has been held to include a son-in-law under a statute disqualifying a justice of the peace, in cases to which his kin were parties; 16 Wis. 635; and a second cousin, of a mother under a statute disqualifying jurors in cases where persons of kin were parties; 74 Mo. 271. See NEXT OF KIN.

KIND. The agreement that a collector of taxes was to receive his commission "in kind" means the same kind of funds in which the tax is collected; 51 Ark. 213.

Another kind quoted is not synonymous with another quality quoted; 3 Q. B. D. 341. In this case the reference was to seed. As to loans of property to be repaid "in kind," see IN KIND; LOAN FOR CONSUMPTION.

KINDES KINDER. "Kindes kinder" is a German idiom corresponding with our words "children's children." 152 Ky. 731, 154 S. W. 11.

KINDRED. Relations by blood. 2 Jarm. Wills 643; 63 Ga. 144; quoting 2 Wms. Ex. 815. It is in some cases, however, used to include relations in law, as children by adoption in a statute; 85 Ky. 671; but not a grandson adopted as a son, so as to make kindred include the adopting parent; 148 Mass. 619. It was held that as the word kindred in the statute of descents means lawful kindred, that term did not include the mother of a bastard, when the right accrued prior to the act enabling illegitimate children to inherit; 38 Me. 153. See 100 Ind. 280; 50 Ia. 532; 129 *id.* 243; 144 Ill. 40. See BASTARD; DESCENT AND DISTRIBUTION.

Nature has divided the kindred of every one into three principal classes. 1. His children, and their descendants. 2. His father, mother, and other ascendants. 3. His collateral relations; which include, in the first place, his brothers and sisters, and their descendants; and, secondly, his uncles, cousins, and other relations of either sex, who have not descended from a brother or sister of the deceased. All kindred, then, are descendants, ascendants, or collaterals. A husband or wife of the deceased, therefore, is not his or her kindred; 14 Ves. 372. See Wood. Inst. 50; Ayliffe, Parerg. 425; Dane, Abr.; Toulhier, Ex. 382; 2 Sharsw. Bla. Com. 516, n.; Pothier, *Des Successions*, c. 1, art. 3.

KING. The chief magistrate of a kingdom, vested usually with the executive power. See REGNAL; SOVEREIGN.

KING CAN DO NO WRONG. This maxim means that the king is not responsible legally for aught he may please to do, or for any omission. Aust. Jur. sec. VI. It does not mean that everything done by the government is just and lawful, but that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king; 2 Steph. Com., 11th. ed. 486; Moz. & W.

This maxim has no place in the system of constitutional law of the United States, as applicable either to the government or any of its officers, or of the several states or any of their officers; 101 U. S. 843. Our government is not liable for the wrongful and unauthorized acts of its officers, however high their place, and though done under a mistaken zeal for the public good; 21 Alb. L. J. 397; 2 Wall. 561; 7 *id.* 123; 8 *id.* 269. See, generally, 114 U. S. 290.

KING'S BENCH. See COURT OF KING'S BENCH.

KING'S CHAMBERS. Those portions of the seas, adjacent to the coasts of Great Britain, which are inclosed within headlands so as to be cut off from the open sea by imaginary straight lines drawn from one promontory to another. They appear to have always formed part of the territorial

waters of the Crown. BYRNE.

KING'S or QUEEN'S COUNSEL. Barristers or sergeants who have been called within the bar and selected to be the king's counsel. They answer in some measure to the *advocati fisci*, or advocates of the revenue, among the Romans. They must not be employed against the crown without special leave, which was, however, always granted, at a cost of about nine pounds; 3 Sharsw. Bla. Com. 27, note.

KING'S EVIDENCE. An accomplice in a felony, who, on an implied promise of pardon if he fully and fairly discloses the truth, is admitted as evidence for the crown against his accomplices. 1 Phill. Ev. 81. A jury may, if they please, convict on the unsupported testimony of an accomplice; Tayl. Er. 330; 4 Steph. Com. 393. On giving a full and fair confession of truth, the accomplice has a strong claim to a recommendation to mercy. He cannot be admitted to testify as king's evidence after judgment against him; 2 Russ. Cr. 956. In the United States, this is known as state's evidence. See ACCOMPLICE.

KING'S PEACE. See CONSERVATOR OF THE PEACE; PEACE.

KING'S PROCTOR. See QUEEN'S PROCTOR.

KING'S SILVER. A fine or payment due to the king for leave to agree in order to levy a fine (*finalis concordia*). 2 Bla. Com. 350; Dy. 320, pl. 19; 1 Leon. 249, 250; 2 id. 56, 179, 233, 234; 5 Co. 39.

KING'S WIDOW. A widow of the king's principal tenant, who was obliged to take oath in chancery not to marry without the king's consent. Whart. Lex.

KINGDOM. A country where an officer called a king exercises the powers of government, whether the same be absolute or limited. Wolff. Inst. Nat. § 994. In some kingdoms, the executive officer may be a woman, who is called a queen.

KINSBOTE (from *kin*, and *bote*, a composition). In **Saxon Law**. A composition for killing a kinsman. Anc. Laws & Inst. of Eng. Index, *Bote*.

KINSMAN. A man of the same race or family; one related by blood. Webster.

KIRBY'S QUEST. An ancient record remaining with the remembrancer of the English exchequer; so called from being the inquest of John de Kirby, treasurer to Edward I.

KISSING THE BOOK. A ceremony used in taking the corporal oath, the object being, as the canonists say, to denote the assent of the witness to the oath in the form it is imposed. The witness kisses either the whole Bible, or some portion of it; or a cross in some countries. See the ceremony explained in Oughton's *Ordo*. tit. lxxx.; Consist. on Courts, part 3, sect. 1, § 3; Junkin, Oath 173, 180; 2 Pothier, Obl., Evans ed. 234. In Pennsylvania, by act of 1895, the witness places his right hand on the Bible, but does not kiss it.

KLEPTOMANIA. Insanity in the form of an irresistible propensity to steal. Wharton. See 10 Tex. Cr. App. 520. A form of insanity which is said to manifest itself by a propensity to acts of theft; Tayl. Med. Jur., Bell's ed. 766. It is said to be often shown in cases of women, laboring under their peculiar diseases or of those far advanced in pregnancy. There have been instances of well-educated persons who have taken acts of no value and without apparent motive. If it appears that the accused was incompetent to know that the act was wrong, the facts may establish a plea of insanity; *id.*, quoting Tindal, C. J.

A sharp distinction is made between kleptomania and the tendency to steal so commonly observed in the well defined forms of insanity; the former is a defec-

tive mental characteristic approaching the confines of insanity on one subject alone, while the individual, on all other subjects, is perfectly sane. It differs from shoplifting in that the shoplifter steals for a purpose, and only those articles which are of value, while the kleptomaniac takes goods of any description, often of no use to herself and with no motive for their possession; 4 Am. Lawy. 533.

In determining the responsibility of such persons for their acts, the principal subjects to be considered are the absence of any real motive, the knowledge of previous acts of a similar character, the history of hereditary taint, and the presence of a neurotic condition; 3 With. & Beck. Med. Jur. 279.

Kleptomania is regarded as similar to homicidal insanity; 18 Tex. App. 287; 10 id. 520; 1 Bish. N. Cr. L. § 388; and it has been held a valid defence; 18 Tex. App. 287; but when it was rejected as a defence, the court would not disturb the verdict; 9 Co. Ct. Rep. Pa. 164.

As to irresistible impulse as a defence in criminal cases, see INSANITY.

In an English case, tried in 1875, a clergyman charged with stealing, had taken goods when the shopkeeper's back was turned and concealed them in his pocket. He at first denied taking them, then offered to pay for them and then attempted to leave. At the trial there was medical evidence that he had suffered from brain disease, and had been quite deranged at times. The opinion of medical experts was that the accused did not know the nature or quality of the act he had committed, at the time he had committed it, and he was acquitted. Tayl. Med. Jur., Bell's ed. 767.

KNACKER. "A person whose trade or business it is to kill any cattle not killed for the purpose of being used as butchers meat" (Protection of Animals Act, 1911, s. 15 e). "Cattle" includes any horse, ass, mule, bull, sheep, goat or pig" (*ib.*).

No knacker's yard can be established anew in the metropolis since 31st December, 1891, without the consent of the county council, and every knacker's yard must have an annual license from the county council. Outside the metropolis, knackers are licensed annually by the district councils. No one licensed as a knacker can be a horse dealer while so licensed. Every knacker must observe the conditions set out in the First Schedule to the Protection of Animals Act, 1911 s. 5. BYRNE.

KNAVE. A false, dishonest, or deceitful person. This signification of the word has arisen by a long perversion of its original meaning, which was merely servant or attendant.

To call a man a knave has been held to be actionable; 1 Rolle, Abr. 52; 1 Freeman. 277; 5 Pick. 244.

KNAVESHIP. In **Scotch Law**. A certain quantity of grain or meal to which the servant of the mill was entitled as of right. See SEQUEL.

KNEEL. To bend the knees in worship without resting on them is to kneel. 36 L. J. Ecc. 10.

KNIGHT. In **English Law**. The next personal dignity after the nobility. In the administration of royal justice, much of the work was formerly done by the knights; as for the more solemn, ancient, and decisive processes. To swear to a question of possession, free and lawful men were required, but to give the final and conclusive verdict about a matter of right, knights were necessary. In administrative law, therefore, knights were liable to special burdens, but in no other respect did he differ from the mere free man; 1 Poll. & Maitl. 394. Of knights there are several orders and degrees. The first in rank are knights of the Garter, instituted by Edward III. in 1344; next follows, a knight banneret; then come knights of the Bath instituted by Henry IV., and revived by George I.; and they were so called from a

custom of bathing the night before their creation. The last order are knights bachelors, who, though the lowest, are yet the most ancient, order of knighthood; for we find that King Alfred conferred this order upon his son Athelstan. 1 Bla. Com. 403. These are sometimes called knights of the chamber, being such as are made in time of peace, and so called because knighted in the king's chamber, and not in the field. Co. 2d Inst. 666. Knights were called *equites*, because they always served on horseback; *aurati*, from the gilt spurs they wore; and *milites*, because they formed the royal army, in virtue of their feudal tenures.

KNIGHT - MARSHAL. See MARSHAL-SEA.

In Old English Law. An officer of the king's house having jurisdiction and cognizance of transgressions within the king's house, and in the neighborhood thereof; also of contracts made within the house to which members of the household were a party. Jacob. See COURT OF MARSHAL-SEA.

KNIGHT'S FEE was anciently so much of an inheritance in land as was sufficient to maintain a knight; and every man possessed of such an estate was obliged to be knighted, and attend the king in his wars, or pay a pecuniary sum in lieu thereof, called *escuage*. In the time of Henry II. the estate was estimated at twenty pounds a year; but Lord Coke, in his time, states it to be an estate of six hundred and eighty acres. Co. Litt. 69 a. See 1 Poll. & Maitl. 232.

KNIGHT'S SERVICE. Upon the Norman conquest, all the lands in England were divided into knight's fees, in number above sixty thousand; and for every knight's fee, a knight was bound to attend the king in his wars forty days in a year, in which space of time a campaign was generally finished. If a man only held half a knight's fee, he was only bound to attend twenty days; and so in proportion. But this personal service, in process of time, grew into pecuniary commutations, or aids; until at last, with the military part of the feudal system, it was abolished at the restoration, by the statute of 12 Car. II. c. 24. 1 Bla. Com. 410; 2 id. 62; Will. Real Pr. 144; 1 Poll. & Maitl. 230.

A species of feudal tenure, which differed very slightly from a pure and perfect feud, being entirely of a military nature; and it was the first, most universal, and most honorable of the feudal tenures. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee (*q. v.*) (*feodum militare*). The measure of which was estimated at twelve plough-lands. Abbott; Spelm. 219; 2 Co. Inst. 596.

KNOCKED DOWN. A phrase used with reference to an auction, when the auctioneer by the fall of his hammer, or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid, according to the terms of the sale. 7 Hill 439.

KNOW ALL MEN BY THESE PRESENTS. See PRESENTS.

KNOW. To have knowledge; to possess information, instruction, or wisdom. 106 Mo. 135.

"It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly if he be a reasonable being." Strong, J., in 101 U. S. 557.

KNOWINGLY. In a statute imposing a penalty upon any one who shall knowingly sell, supply, etc., actual personal knowledge. 4 Lans. 17. In an indictment, a charge that one wilfully testified falsely, includes the assertion that he knowingly so testified; 51 N. W. Rep. (Minn.) 474. The word "knowingly," or "well knowing," will supply the place of a positive averment, in an indictment or declaration, that the defendant knew the facts subsequently stated; if notice or knowledge be

unnecessarily stated, the allegation may be rejected as surplusage. See *Comyns, Dig. Indictment* (G 6); 2 Cuch. 577; 2 Stra. 904; 2 East 452; 1 Chitty, Pl. 367.

KNOWLEDGE. Information as to a fact.

The act of knowing; clear perception of the truth; firm belief; information. Knowledge "is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties." 106 Mo. 135. Where in a charge in a homicide case the court used the expression "knowledge to explain," circumstances proven "tending to show that the defendant was connected with the homicide," it was held to be synonymous with "ability to explain"; 28 Fla. 511.

"Knowledge is information and information knowledge." 1 Heming, 1; 5 Esp. 53.

"Absolute knowledge can be had of but few things." 8 Allen, 35.

"In a legal sense it may be classified as positive and imputed—imputed, when the means of knowledge exist, known and accessible to the party, and capable of communicating positive information. When there is knowledge, notice, as legally and technically understood, becomes immaterial. It is only material when, in the absence of knowledge, it produces the same results. However closely actual notice may, in many instances, approximate knowledge and constructive notice may be its equivalent in effect, there may be actual notice without knowledge; and when construc-

tive notice is made the test to determine priorities of right, it may fall far short of knowledge and be sufficient." 81 Ala. 145.

Many acts are perfectly innocent when the party performing them is not aware of certain circumstances attending them; for example, a man may pass a counterfeit note, and be guiltless, if he did not know it was so; he may receive stolen goods, if he were not aware of the fact that they were stolen. In these and the like cases it is the guilty knowledge which makes the crime.

Such guilty knowledge is made by the statute a constituent part of the offence; and therefore it must be averred and proved as such. But it is in general true, and may be considered as a rule almost necessary to the restraint and punishment of crimes, that when a man does that which by the common law or by statute is unlawful, and in pursuing his criminal purpose does that which constitutes another and different offence, he shall be held responsible for all the legal consequences of such criminal act. When a man, without justifiable cause, intends to wound or maim another, and in doing it kills him, it is murder, though he had no intention to take life. It is true that in the commission of all crimes a guilty purpose, a criminal will and motive, are implied. But, in general, such bad motive or criminal will and purpose, that disposition of mind and heart which is designated by the generic and significant term "malice," is implied from the criminal act

itself. But if a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act or concur in it, it is matter of defence, to be averred and proved on his part, if it does not arise out of the circumstances of the case adduced on the part of the prosecution. Per Shaw, C. J., in 2 Metc. Mass. 192. Thus, it is not necessary, in an indictment against an unmarried man for adultery with a married woman, to aver that he knew, at the time when the offence was committed, that she was a married woman; nor is it necessary to prove such knowledge at the trial; 2 Metc. Mass. 190. See, as to the proof of guilty knowledge, 1 B. & H. Lead. Cr. Cas. 185-191. See INTENTION; IGNORANCE OF LAW. As to the doctrine of imputed knowledge, see NOTICE.

The statement that one has "no knowledge or information" is equivalent to saying that one has no sufficient knowledge or information to form a belief. 8 S. W. 876.

See ACTUAL KNOWLEDGE; NO KNOWLEDGE OR INFORMATION; FAIR KNOWLEDGE.

KNOWN HEIRS. In a statute relating to the sale of property of unknown heirs, it has been held to mean those persons who are known, and whose right to inherit, or the extent of whose right, to inherit, is dependent on the non-existence of other persons nearer or as near as the ancestor in the line of descent. 65 Hun 175.

L

L. The twelfth letter of the alphabet. As a Roman numeral it stands for 50. In the English money the small *l* is the sign for pounds. It is also an abbreviation for *liber* (book), law, lord. *L. 5.* means *Long Quinto*, which is the designation of one of the parts of the Year Books.

LA CHAMBRE DES ESTELLLES. The Star chamber. See COURT OF STAR CHAMBER.

LABES REALIS, or VITIUM REALE, in the law of Scotland, is an inherent vice or defect in the title by which anything has been acquired, which affects even the rights of purchasers and creditors who have obtained it innocently. Bell; Moz. & W.

LABEL. A slip of ribbon, parchment, or paper, attached to a deed or other writing to hold the appended seal.

In the ordinary use of the word, it is a slip of paper attached to articles of manufacture for the purpose of describing them or specifying their quality, etc., or the name of the maker. The use of a label has been distinguished from a trade-mark proper; Browne, Trade-Marks §§ 183, 537, 538. The use of labels will be protected by a court of equity under some circumstances; *id.* 538. See TRADE-MARK; INFRINGEMENT; UNION LABEL LAWS. A copy of a writ in the English Exchequer. Yidd, Pr. *150.

LABOR. Work requiring exertion or effort, either physical or mental; toil.

Labor and business are not synonymous; labor may be business, but it is not necessarily so, and business is not always labor. Making an agreement for the sale of a chattel is not within a prohibition of common labor on a Sunday, though it is (if by a merchant in his calling) within a prohibition against business; 2 Ohio St. 387. See SUNDAY.

The labor and skill of one man are frequently used in a partnership, and valued as equal to the capital of another.

The act of February 26, 1885, forbids any person or corporation to prepay transportation or in any way assist or encourage the importation of aliens into the United States, under contract of any kind made previous to their importation, to perform labor or service therein; such contracts are declared void. The penalty is \$1,000, which may be sued for by the United States or any person (including the alien) who may first bring his action therefor, as debts of like amount are now recovered in the circuit court, the proceeds to go to the treasury. The district attorney is required to prosecute the suit at the expense of the United States. Masters of vessels knowingly infringing the act are made liable to fine and imprisonment. The act does not extend to foreigners temporarily resident here who may employ servants or clerks; nor to skilled workmen imported to carry on some new industry not at present established, if such cannot be obtained here; nor to actors, artists, lecturers, or singers, nor to strictly domestic servants; nor to persons who may assist relations or friends to emigrate here. The amendment of Feb. 23, 1887, provides for the detention and return of such aliens.

The act is a constitutional exercise of the power to regulate commerce; 28 Fed. Rep. 795; it was passed to protect the health, morals, and safety of the people of this country; 5 U. S. App. 656. It must appear that the alien did in fact emigrate, and that the person who assisted him knew

that he was under contract; 41 Fed. Rep. 751; there must have been a contract made previous to the importation, to perform labor here; 13 U. S. App. 472. Where an alien writes to a resident proposing to come here and enter the service of the resident and the latter accepts the offer and pays his passage, it is not within the act; 4 U. S. App. 41. A laborer on a dairy farm is not a domestic servant; 32 Fed. Rep. 75; a milliner is not a professional artist; 41 Fed. Rep. 28; a clergyman brought to this country under contract to take charge of a church as a rector is not within the act; 143 U. S. 457. One is not liable to deportation as a laborer who at the time of the passage of the act requiring alien laborers to register was a merchant and who subsequently became a laborer on a fruit farm which he leased; 71 Fed. Rep. 690; nor is a chemist on a sugar plantation, though his expenses are paid; 163 U. S. 258.

A clause in the constitution of California forbidding the employment by a corporation of any Chinese or Mongolian has been held in conflict with the treaty of the United States with China and void; 1 Fed. Rep. 481; so in New York a statute forbidding a contractor on public work to employ an alien was held a violation of the treaty with Italy and unconstitutional; 34 N. Y. Suppl. 942. See ALIEN; CITIZEN. As to new industries, see 53 Fed. Rep. 554, where the court, in charging the jury, held that the manufacture of lace, in which two or three concerns were "struggling for existence, experimenting, hoping," was a new industry, within the meaning of the act, and that it was a question of law for the court, and directed an acquittal. See LABORER; MASTER AND SERVANT; WAGES.

LABOR ARBITRATION. The investigation and determination of disputed matters between employers and employees.

In many of the states, state boards of arbitration have been provided by statute for the hearing and adjustment of differences between employers and their employees, and a recent federal statute applying only to railroad and transportation companies authorizes the executive to appoint commissioners for such investigation and to determine the best methods of righting the grievances of the employees; U. S. Laws, 1888, ch. 1063.

In Missouri, Colorado, and North Dakota the functions of the state board of arbitration are filled by the labor commissioner, and in New York, Ohio, New Jersey, California, Maryland, Texas, Massachusetts, Wisconsin, and Montana, there are statutory provisions for private boards of arbitration. The constitution of Wyoming provides that appeals from the decisions of compulsory boards of arbitration may be taken to the supreme court of the state, and the manner of taking such appeals must be prescribed by law; Const. Wyo. ch. 19, sec. 2.

Objections to bringing labor troubles before the state board of arbitration must be urged before such board before application to the courts; 47 La. Ann. 874; and it devolves on the board in the first instance to pass on questions of regularity and compliance with statutory provisions in the steps taken to bring the matter to its notice; *id.* See Stimson, Lab. L. §§ 67, 68.

It is a curious fact that during the struggle in this country to devise some effective system of labor arbitration, little or no attention seems to have been paid to some very successful efforts in that direction in England which long antedated any American legislation. At a very early period the regula-

tion of wages was controlled by two masters and two journeymen, or, in default of agreement, by a magistrate after hearing both sides, but this was terminated by the separation of the masters and journeymen into two classes, and thereafter wages were fixed either by the employers or the magistrates. The latter system prevailed under the apprenticeship law of Elizabeth, and this continued until early in the eighteenth century, except in the cotton factories, which were not within the law. In this industry, there was satisfactory regulation by a joint committee of laborers and employers, but towards the latter end of the eighteenth century, the latter obtained general control and the apprentice law was repealed. From then until about 1860, this condition remained undisturbed except by frequent petitions to parliament, although in the book printing business the trades unions secured an arrangement for settling price lists by a joint committee of employers and laborers, which was in operation with good success since 1805.

In 1860 the system of arbitration and agreement originated by a manufacturer, Mr. Mundella, successfully dealt with the labor problem in the various branches of trade involved in the stocking, weaving and glove industries of the three counties of Nottingham, Leicestershire, and Derbyshire. The system, in brief, provided for a court of arbitration and agreement to decide every question relative to wages. It consisted of nine employers and nine laborers, selected respectively by an assembly of their own class for one year. The court had a regular organization with a standing executive committee by which all disputes were disposed of so far as practicable, the final judgment, however, being entered by the court. The two interests involved negotiated with each other on perfect equality and the decisions were binding. Under this system, there was no umpire and no provision for the execution of the judgment, the reliance being entirely upon the moral force of the statute, conscience, and the pressure of public opinion. The practical working of these courts was very successful, and, quoting Mr. Mundella, July 4, 1868, "during eight years we had not a single strike, and never in the history of our city and our industry did there exist such a hearty good understanding between employers and laborers as now." The rules may be found in detail in chap. 18 of *The Relation of Labor to the Law* of To-day, by Brentano, translated by Porter Sherman, from which the historical facts here stated are mainly taken.

Another system of courts of arbitration and agreement was that of Rupert Kettle, a judge of the county court of Worcestershire; the statutes drawn by him were adopted by the employers and laborers in the building trades in Wolverhampton. They were in their main features similar to the Mundella courts, but differed from the latter in the fundamental point of providing an impartial umpire, and through legal provisions, the judgments were made binding in law. These provisions, however, were but seldom required in practice, as the presence of an impartial umpire had a tendency to produce an agreement without can; upon him; *id.* The result of the actual working of these two systems for many years is that they have approached each other, in that those of Kettle have become mere courts of agreement and those of Mundella have in most cases elected an impartial umpire who decides in case of a tie. The relation between the trades unions and the courts of arbitration in many districts has become very intimate, the former making provision in their organization for the labor representation in the latter, paying the laborer's share of the expenses of the courts and enforcing the judgments by expelling members who do not obey them. The courts are similarly supported by societies of employers; *id.*

The work cited sums up the result:—"And from those industries at Nottingham and Wolverhampton since that time the organization of peace has extended from industry to industry and from city to city, until the system has been adopted in a greater or less degree in the most important centres of British industry. But everywhere, where in an industry a court of arbitration according to one or the other of the two systems has been established, there has been since that time neither a strike nor a lockout."

LABOR A JURY. To tamper with a jury; to persuade jurymen not to appear. It seems to come from the meaning of labor, to prosecute with energy, to urge; as *to labor a point*. Dy. 48; Hob. 294; Co. Litt. 157 b; 14 & 20 Hen. VII. 30, 11. The first lawyer that came from England to practise in Boston was sent back for laboring a jury. Washb. Jud. Hist.

LABOR UNION. A combination or association of laborers for the purpose of fixing the rate of their wages and hours of work, for their mutual benefit and protection, and for the purpose of righting griev-

ances against their employers.

In England when the rate of wages was fixed by law or by the determination of a magistrate, and when there was a statutory provision that all conspiracies and covenants among workmen not to make or do their work except at a certain rate or price, it was held a criminal conspiracy for a combination of workmen to refuse to work for so much per diem, though the matter about which they conspired might be lawful for one of them or for any of them to do had they not conspired to do it; 8 Mod. 11; but in the United States, though this decision was followed in the case of the Boot and Shoemakers of Philadelphia; Pamphlet 1806; The Pittsburg Cordwainers; Pamphlet, 1816; and in 14 Wend. 9, and 2 Wheel. Cr. Cas. 262; yet they were decided by inferior courts, and in the first case before the supreme court of Pennsylvania (Com. v. Carlisle) that court held that a combination of employers to reduce the wages of their employees was not unlawful; Bright. 36. In the case of the Master Stevedores v. Walsh, Daly, J., upheld this principle and denied the authority of the English case; 2 Daly 1; as did Shaw, J., in 4 Metc. 111; and these cases may be considered as having definitely settled the law in this country that a combination of laborers for a lawful purpose does not amount to a conspiracy.

In England, however, the Journeymen Tailors case, 8 Mod. 11, was followed as late as 1855, when it was held that a bond signed by eighteen employers to conduct their business as to rates of wages, time of work, etc., was a combination in restraint of trade and null and void at common law; 6 El. & Bl. 47; and in 1869 the court was divided as to whether a labor union whose by-laws countenanced strikes was not thereby rendered illegal; L. R. 4 Q. B. 602. In 1824 the first act was passed in England which legalized the combination of workmen; 5 Geo. IV. c. 99; but this was repealed the following year, and by the repealing act the combination of workmen was made lawful for the purpose of agreeing upon the prices which they might demand and the hours during which they would work, but making punishable any attempt to enforce the laws of the combining workmen by violence and intimidation; 6 Geo. IV. c. 129. In 1871 two acts were passed for the purpose of consolidating and settling the law; 34 & 35 Vict. c. 31; and these were supplemented by the Trades Union Amendment Act of 1876; these statutes going so far as to declare such combinations lawful even when acting (peaceably) in restraint of trade.

The right of entering and leaving the service of an employer is one that every man possesses and is one of the corollaries of personal liberty, and it has almost uniformly been held that the same right might be exercised by any number of men jointly, if conducted in a peaceable and orderly manner and attended with no infringement of the rights of others; 23 Fed. Rep. 748; 106 Mass. 1; 54 Minn. 223; 2 Daly 1; 88 Pac. Rep. (Ore.) 547; *contra*, 32 N. J. L. 151; and labor unions have been recognized by act of congress authorizing their incorporation; U. S. Rev. Stat. 1 Suppl. 498; and by the statutes of most of the states. It has been held that such unions have an entire right to seek to compel employers to deal solely with men belonging to their union by all proper means, as by persuasion or even by a properly conducted strike; 60 How. Pr. 163; that if the means are not unlawful, they have a right to endeavor to persuade those who have been accustomed to deal with an employer to withdraw their trade; 77 Hun 215; that they may agree not to teach their trade to others; 113 Mass. 179; and that where the combination is peaceable and without intimidation, employees may peaceably assemble to argue and persuade concerning a reduction of wages with the expectation of a strike, and the employees will not be charged with any loss resulting from their quitting work; 24 U. S. App. 240; and they may lawfully pay the expenses of those who

leave their employment and may post in their places of assembly the names of those who have contributed to the fund for the support of the workmen who have left; 17 N. Y. S. 264.

But other cases have held differently: A labor union may not prevent an employer from employing certain workmen; 59 Vt. 278; or from obtaining workmen; 54 Fed. Rep. 40; or prevent workmen from obtaining work; 5 Cox, C. C. 162; 110 N. Y. 633; or threaten a boycott; 30 Atl. Rep. (N. J.) 881; 55 Conn. 46; 45 Fed. Rep. 135; 8 R. & Corp. L. J. 561; or carry out a boycott; 63 Fed. Rep. 808; 147 Mass. 212; or strike with the intention of forcing others to join the union; 10 N. Y. St. Rep. 730; or picket the premises of an employer during a strike with the usual accompaniments of insulting and threatening words and gestures to those who work for him; 10 Cox, C. C. 593; 84 L. T. N. S. 58; 152 Pa. 595; [1896] 1 Ch. 811; but the illegality of the action and the irreparable nature of the injury must be clearly alleged; 144 N. Y. 189; 26 Ore. 527. Leaders of a labor union who receive money from an employer for ending a boycott are guilty of extortion; 138 N. Y. 649; 137 id. 29; and it has been held unlawful for an officer of a labor union to order the members thereof not to work for an employer; [1893] 1 Q. B. 715 (but in this case the officer was supplying the employer with goods, and his action was for the purpose of forcing his customer to refrain from acts which he had a right to do, and the action of the officer was held induced for malice); or for a delegate (requested by some of the members of the union) to induce an employer to discharge workmen; [1895] 2 Q. B. 21. If, by threats and intimidation, a labor union drives away the customers of an employer and destroys his trade, it thereby injures him by an unlawful act and is liable for damages to him whether the action was malicious or not; 13 Tenn. 521; and if such union compels a non-union man to leave his employment and prevents him from securing another situation, it is civilly liable for damages to him; 77 Md. 396.

An officer of a labor union may be enjoined from ordering the members to carry out one of the rules of the union; 54 Fed. Rep. 730; and equity may compel a labor union to recall an order to its members; *id.*

A district delegate appointed by the members of a labor union to confer with and advise them in disputes is not the servant or agent of the officers or of the members of the union; [1895] 2 Q. B. 21; and the chairman and secretary of a labor union will not be liable for the action of the district delegate in causing non-union men to be discharged from employment, or for threats of calling upon all union men to strike; *id.*

In a recent English case a trades-union district delegate notified a corporation that if it did not discharge certain of its employees, certain other employees would strike; the former were thereupon discharged and sued the district delegate. The jury found for the plaintiffs and also that the defendant maliciously induced the company to discharge the plaintiffs. Judgment thereon was affirmed by the court of appeals, but was reversed by the house of lords, by a majority of six to three; it was held that malice does not constitute a cause of action in such a case, unless there is some act of actual unlawfulness; and that the gist of this action is procuring a breach of contract, which was not present in this case; Allen v. Flood, 42 Sol. Journ. 108 (Dec. 18, 1897). Few legal decisions have been awaited with more interest than this one. Sir Frederick Pollock says of it: "The House of Lords never deserved better of the Common Law;" 14 Law Quart. Rev. 1. And another English law journal says that the decision "is accepted by the profession as sound. . . . In spite of numbers, the weight of judicial opinion is preponderatingly in favor of the law as now stated. The two ablest judges in courts of first instance agreed

with the four greatest lawyers in the House of Lords—perhaps we should say of our generation. This is enough. It is curious that politics took sides—perhaps involuntarily; and it is also curious that trades unionism should have to be thankful that there is a House of Lords." 104 Law Times 148 (Dec. 18, 1897).

Under recent acts of congress (the Interstate Commerce Act and the Anti-trust Act of 1887 and 1890 respectively), a labor union may be guilty of criminal conspiracy or forming a combination in restraint of trade if their actions tend to obstruct interstate or foreign commerce, though they consist in merely quitting the service of an employer or preventing others from working for him; 54 Fed. Rep. 994; 55 id. 149; 62 id. 801, 824; 64 id. 27; or in delaying a train carrying the mails; 65 id. 210; 67 id. 698; 63 id. 834, 840; and equity will interfere to compel striking railroad employees to perform their duties "so long as they remain in the employment of the company;" 62 Fed. Rep. 796. That a labor union was in its origin lawful was held no ground of defence; 54 id. 994. But in the circuit court for the District of Massachusetts, it was held that it is not sufficient for an indictment to allege a purpose to drive certain competitors out of the field; it must show a conspiracy in restraint of trade by engrossing or monopolizing the market; 65 id. 605; but see 62 id. 801, where the former case was expressly disapproved.

Where the action of a labor union becomes a criminal conspiracy, the remedy is by injunction; and the equitable jurisdiction to prevent conspiracies by combinations of organized labor is justified upon the ground that, though equity will not interfere to prevent the commission of a crime, as such, yet where the acts complained of amount to an infringement of a property right, the court may act; 3 De G. F. & J. 233; or to a nuisance; 147 Mass. 212; or to a boycott; 45 Fed. Rep. 130; or to an intimidation; 51 Fed. Rep. 260. One apprehending injury from such a combination may bring a bill against one or more persons, and obtain at once without waiting for any hearing, or answer by the defendant, a preliminary injunction against not only the defendants named, but all other agents, servants, and subordinates named or unnamed; and, finally, against any person whatever who may have knowledge that such injunction has been granted; 64 Fed. Rep. 320. A disregard of such an injunction amounts to a contempt and subjects the offender to fine and imprisonment, and such offender is not entitled to a jury trial; 53 N. H. 60; 93 Ind. 239; 134 U. S. 31; and from an order in contempt there is no appeal from the court issuing it to a higher court; 71 Wis. 64; although it has been held in some jurisdictions that there may be an appeal where the injunction was issued to protect private interests and not the public; 13 Stew. (N. J.) 673; but even this appeal only goes so far as to give the appellate court the right to investigate and see whether the court below had jurisdiction of the subject-matter; 83 Mich. 75. The person in contempt may, in some jurisdictions, take the matter up by writ of certiorari; 84 Pac. Rep. (Mont.) 39; he may not have a writ of habeas corpus; 158 U. S. 564; 64 Fed. Rep. 724. Jurisdiction was expressly conferred upon the United States circuit court by the Anti-Trust Act of 1890.

A receiver appointed to take charge of property is an officer of the court; any interference with his possession is an interference with the possession of the court and is a contempt, so that a strike by a labor union which tends to interfere with the traffic of a railroad in the hands of a receiver is a contempt; 23 Fed. Rep. 544, 748; 24 id. 217; and it was further held that while the employees of receivers may freely quit their employment, they cannot do it in such a way as intentionally to disable the property, nor can they combine nor conspire to quit without notice, with the object and intent of crippling the property and its operation; 27 Fed. Rep. 443,

where the object of the strike was to compel recognition of a secret labor organization and the right of its officers to control the operations of a railroad, the officers being not even employees; *Pardee, J.*, said: "This intolerable conduct goes beyond criminal contempt of court into the domain of felonious crimes."

Statutes pronouncing a penalty against an employer for discharging an employee for being a member of a labor union have been passed in Massachusetts, 1892; California, Illinois, Indiana, Idaho, Missouri, and New York, 1898; Ohio and New Jersey, 1894; Wisconsin, 1895; Kansas and Pennsylvania, 1897; England, 1874; and they have been held constitutional; 80 Wkly. L. Bul. 342; but *contra* in Missouri on the grounds that such statutes are in contravention of the fifth and of the fourteenth amendments to the constitution of the United States and of the state constitution which provide that no person shall be deprived of life, liberty, or property without due process of law, and also because it is special legislation in that it does not relate to persons and things as a class—to all workmen, etc.—but only to those who belong to some lawful organization or society, evidently referring to a labor union; and the court said further: "It has none of the elements or attributes which pertain to a police regulation, for it does not in terms or by implication promote or tend to promote the public health, welfare, comfort, or safety, and if it did the state would not be allowed, under the guise and pretence of the police regulation, to encroach or trample upon any of the first rights of the citizen which the constitution intended to secure against diminution or abridgment." 81 S. W. Rep. (Mo.) 781.

See Stimson, *Handbook of Labor Law*; 2 Am. & Eng. Dec. in Equity 364, note; *BOYCOTT*; *COMBINATIONS*; *CONSPIRACY*; *EMPLOYEE*; *EIGHT HOUR LAWS*; *FACTORY ACTS*; *INJUNCTION*; *LABOR*; *MASTER AND SERVANT*; *RESTRAINT OF TRADE*; *STRIKES*; *TRADE UNION*.

LABORARIS. An ancient writ against persons who, having not whereof to live, refused to serve. Cow.; Moz. & W. It was also used against persons who, having served in the winter, refused to continue to do so in the summer; Reg. Orig. 189.

LABORER. A servant in husbandry or manufacture not living *intra mania*. What.

He who performs with his own hands the contract he made with his employer. 46 Pa. 57.

One who labors in a toilsome occupation; a man who does work that requires little skill as distinguished from an *artisan*. Webst. In this sense the word is held to be used in an act giving a lien to laborers; 27 Ark. 567; and in an act exempting the wages of laborers from garnishment; 17 Ill. App. 196. In an act giving preference to employees of an insolvent corporation, it is construed to be equivalent to employee; 29 N. J. Eq. 255; and the term has been held not to embrace any officer for whom an annual salary is specifically named and appropriated; 47 Kan. 147.

Under a mechanic's lien law which extends to those who perform labor, an architect has been held to be included; 76 N. Y. 50; 26 N. J. Eq. 29; 13 Minn. 475; *contra*, 6 Mo. App. 445; a house painter; 61 Ill. 422; a teamster; 35 Kan. 11; a drayman; 30 N. J. Eq. 588; 38 Pa. 151; a carriage-maker and a blacksmith; 66 Wis. 481; an overseer and foreman of a body of miners who performs manual labor upon the mine; 104 U. S. 176; 11 Nev. 304; 66 Wis. 481; an overseer and assistant superintendent in the repair of a mill; 1 Or. 189; a master mechanic or machinist; 67 Wis. 590; a plasterer; 7 Gray 429; *contra*, 80 Ga. 525; the manager of a company; 66 Wis. 481; and the superintendent in charge of laborers employed by a railway contractor; 6 How. Fr. 454. Those who have been held not to be laborers entitled to a lien are an engineer; 55 Wis. 465; an assistant chief

engineer; 39 Mich. 47; a consulting engineer; 38 Barb. 390; a civil engineer; 84 Pa. 168; a contractor; 39 Mich. 47; 36 Neb. 154; 183 U. S. 220; foremen, clerks, and timekeepers in the employ of a contractor; 14 Kan. 563; the superintendent of a mining company; 16 Hun 186; a farm overseer; 81 N. C. 340; an architect's draughtsman; 10 Co. Ct. Rep. Pa. 171; a cook; 77 Pa. 107; 40 Cal. 185; a farmer; 12 W. R. 875; a farm overseer; 81 N. C. 340; an agent employed at a monthly salary to superintend the erection of buildings; 2 Mont. 443. One who furnishes labor and material is held not a laborer; 81 Ill. 496; and labor of oxen cannot be included in a lien for labor; 34 Me. 203; *contra*, 44 Mich. 538; 30 N. J. Eq. 588; nor can one who is employed to pay off laborers; 17 Mo. 271.

Under statutes giving a preference to laborers, servants, and employees against insolvent corporations, the word laborer is defined to include all persons doing labor or service of whatever character for or as employees in the regular employ of such corporation; N. J. Rev. Stat. 188, § 63. A superintendent of a natural gas company is a laborer under the act preferring claims of laborers; 124 Ind. 159; an assistant bookkeeper; 52 Hun 151; a head miller; 83 Mich. 513; a drayman and the services of his horses; 30 N. J. Eq. 588; an attorney; 53 N. Y. 397; *contra*, 109 N. Y. 631. A bookkeeper of a corporation, who, though occupying a position as one of the directors thereof, and for that purpose having been made a nominal holder of stock, yet has no pecuniary interest in the corporation, has been held to be a laborer and entitled to a lien for services; 35 Atl. Rep. (N. J.) 157.

Those held not within the meaning of such a statute are the president of a corporation; 41 N. J. Eq. 470; even if he were also its general manager; 35 Fed. Rep. 436; the secretary of a corporation; 1 Fed. Rep. 270; a travelling salesman; 109 N. Y. 631.

Under the statutes making stockholders individually liable for debts owing to laborers and servants, a contractor is not included in the term; 24 N. Y. 482; 46 id. 521; 39 Mich. 586; or a secretary; 37 N. Y. 640, overruling 43 Barb. 163; or a consulting engineer; 38 Barb. 390; or a superintendent; 17 Hun 463; or an assistant superintendent; 82 N. Y. 626, affg. 16 Hun 186; or a general manager; 90 N. Y. 213; or a travelling salesman; 50 Mich. 326; 88 Tenn. 400; but one who acted as a foreman, performed manual labor, kept the time of the men, and collected bills was held within the meaning of the statute; 29 Hun 39.

Under acts exempting the wages of laborers from garnishment a superintendent of the erection of a building; 14 Md. 559; a shipping clerk; 46 Ga. 466; an overseer of a plantation; 25 id. 571; the forwarding clerk of a railroad company; 51 id. 576; 71 id. 748; a bookkeeper; 77 Ga. 306; a teacher; 54 id. 108 (*contra*, 53 Conn. 502); a private secretary to the president of a corporation; 80 Ga. 570; and a telegraph operator; 45 Minn. 81; are held to be included in the term "laborers"; but the "boss" of a department of a factory who directs the operatives and employs and discharges them; 73 Ga. 343; a travelling salesman; 17 Ill. App. 196; 43 La. Ann. 423; an agent who sells goods by sample; 42 Minn. 112; and a railroad conductor; 77 Ga. 386; are not laborers so as to entitle them to an exemption from garnishment.

As to who are laborers under the federal contract importation act, see *LABOR*.

See 18 L. R. A. 305; *EIGHT HOUR LAW*; *EMPLOYEE*; *MASTER AND SERVANT*; *LABOR UNION*.

LABORERS, STATUTES OF. 1. Stat. 23 Edw. III. passed in 1349 by the king in council. After reciting in the preamble that many of the operative class had died of the plague, and the survivors seeing the necessity to which the masters were reduced for want of servants, refused to

work unless for excessive wages, it was enacted that all able-bodied persons (free or bond) under the age of three-score years, not exercising any craft, nor having the means of living or land of his own, should if required to serve in a station suiting his condition be bound to serve for the wages usual in the 20th year of the king under penalty of imprisonment. It was also provided that victuals should be sold at reasonable rates, and that no person should give to a beggar who was able to work and preferred to live in idleness, under pain of imprisonment. This statute was partially repealed by stat. 5 Eliz. c. 4; see *infra*; and finally repealed by stat. 26 & 27 Vict. c. 125, passed in 1863. 2. Stat. 12 Rich. 2, which was passed at Cambridge in 1388, forbidding a servant at the end of his term to go out of his district without a letter under the king's seal, on pain of being put in the stocks. The amount of wages was regulated and penalties inflicted on masters who gave more than the legal amount. There was also provision for the punishment of beggars except religious people and approved hermits, who had testimonial letters from their ordinaries. 3. Stat. 5 Eliz. c. 4, passed 1562, repealing most of the before mentioned statutes, and regulating workmen and apprentices. The justices of the peace were required to hold special sessions for fixing rates of wages, and a justice absenting himself without any lawful excuse was to be fined £10. For giving more wages than the legal amount masters were to be imprisoned for ten days and to forfeit £5. This statute was substantially repealed by subsequent ones; Moz. & W. See *FACTORY ACTS*.

LAC or LAKH. One hundred thousand. It is used in India, as—a lac of rupees is 100,000 rupees, or about £10,000 or \$50,000; Wils. Glos. Ind.; Moz. & W.

LACHES (Fr. *lacher*). Unreasonable delay; neglect to do a thing or to seek to enforce a right at a proper time.

The neglect to do that which by law a man is obliged or in duty bound to do. 80 Fla. 612.

The neglect to do what in law should have been done, for an unreasonable and unexplained length of time and under circumstances permitting diligence. 21 S. E. Rep. (S. C.) 277.

Unlike a limitation, it is not a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced; an inequity founded upon some change in the condition or relation of the property of the parties; 10 U. S. App. 237; 145 U. S. 363. It has been said to involve the idea of negligence; the neglect or failure to do what ought to have been done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time; 88 Mich. 177.

Courts of equity withhold relief from those who have delayed the assertion of their claims for an unreasonable time, and the mere fact that suit was brought within a reasonable time does not prevent the application of the doctrine of laches when there is a want of diligence in the prosecution; 5 Col. App. 391; 151 U. S. 449; 160 id. 171. The question of laches depends not upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances, the plaintiff is chargeable with want of due diligence in not instituting the proceedings sooner; 160 U. S. 171; it is not measured by the statute of limitations; 155 U. S. 449; but depends upon the circumstances of the particular case; 141 U. S. 260. Where injustice would be done in the particular case by granting the relief asked, equity may refuse it and leave the party to his remedy at law; 158 U. S. 41; or where laches is excessive and unexplained; 34 U. S. App. 50. In the absence of negligence by the plaintiff, in the prosecution of his claim, no period short of the legal statute of limitations will bar an ac-

tion on an equitable claim; 23 S. E. Rep. (Va.) 238; and see 78 Fed. Rep. 153, where it was held that "mere delay, for the full period of four years allowed by a state statute of limitations, in bringing a suit in rem to recover damages to a cargo, is not of itself, and in the absence of exceptional circumstances from which laches would be imputable, sufficient to justify the court in declining to entertain the suit;" but where the complainant has remained silent for a longer time, after the discovery of the material facts than the time limited by the statute of limitations, it is laches; 13 U. S. App. 137. Where a statute provides that no claim is barred until the limitation of the statute has accrued, a complainant cannot be denied relief because the action lacks but a few days of being barred by limitation, on the ground of gross laches; 19 So. Rep. (Miss.) 707. Where an equitable right of action is analogous to a legal right of action, and there is a statute of limitations fixing a limit of time for bringing an action at law to enforce such claims, a court of equity will, by analogy, apply the same limit of time to proceedings taken to enforce the equitable right; L. R. 6 H. L. 384. One in possession of land may wait until his title and possession are attacked before setting up equitable demands, without being chargeable with laches; 71 Fed. Rep. 618; as where an unauthorized franchise in a street is given, adjoining property owners are not required to attack the validity of the franchise until their rights are actually invaded; 2 U. S. App. 488. Mere lapse of time not sufficient to bar the corresponding legal remedy will not constitute laches barring a suit, there having been no change in the condition or relation of the property or parties which renders the enforcement of the claim inequitable; 18 So. Rep. (Ala.) 154.

Laches in seeking to enforce a right will, in many cases in equity, prejudice such right, for equity does not encourage stale claims nor give relief to those who sleep upon their rights; 4 Wait, Act. & Def. 473; 9 Pet. 405; 91 U. S. 512; 124 id. 183; 130 id. 43; 142 id. 236; 150 id. 193; 1 App. D. C. 36; 157 Mass. 46; this doctrine is based upon the grounds of public policy which requires for the peace of society, the discouragement of stale claims; 137 U. S. 556. The question whether one is precluded from equitable relief by the staleness of his demand is for the court and not for the jury; 27 Ore. 219.

It has been held to be inexcusable for 36 years; 16 U. S. App. 391; 27 years, unexplained; 145 U. S. 317; 23 years; 146 U. S. 103; 23 years during which the defendant company spent much labor and money in improvements; 161 U. S. 573; 22 years after knowledge of the facts; 152 U. S. 412; 19 years, on a bill to establish a trust; 7 U. S. App. 431; 14 years, in the assertion of title to lands which meantime had been sold to settlers; 4 U. S. App. 160; 10 years, in proceedings to enforce a trust in lands; 158 U. S. 416; 10 years, after the foreclosure and sale of a railroad in a bill by a stockholder to set aside the sale for collusion and fraud which were patent on the face of the proceedings; 146 U. S. 83; 9 years in a suit to have a deed declared a mortgage on the ground that it was obtained by taking advantage of the grantor's destitute condition; 7 U. S. App. 233; 8 years' acquiescence in a trade-mark for metallic paint, during which the defendant had built up an extended market for his product; 17 U. S. App. 145; 8 years in proceedings where complainant in consideration of \$10,000 had released certain claims and sought to set the release aside on the ground that it was entitled to a much larger sum than it received; 159 U. S. 243; 3 years, where a person bought property of uncertain value and after three years brought suit to rescind the contract on the ground of fraudulent representation; 31 U. S. App. 102.

To constitute laches to bar a suit there must be knowledge, actual or imputable, of the facts which should have prompted action or, if there were ignorance, it must be without just excuse; 38 Minn. 197; see 173

Pa. 1; 148 U. S. 300; but where there is ignorance of the party's right, laches may be excused; 2 Mer. 363; 3 Ball & B. 104; 48 Fed. Rep. 35; 66 id. 884; 146 U. S. 88; 153 id. 413; 67 N. W. Rep. (Ia.) 253. Evidence that complainant had arranged to dispose of land bequeathed to her, is evidence that she knew of the existence of a will, and a delay of twenty years in bringing an action to set aside its probate is laches; 68 N. W. Rep. (Mich.) 189. Defence of laches on the ground that one might by inquiry have learned the facts relied on and filed his bill accordingly, is not available to one who is under obligation to disclose such facts without inquiry; 63 Fed. Rep. 869.

One who seeks to impeach a transaction on the ground of fraud must seek redress promptly; 173 Pa. 1; 2 Del. Ch. 247; 58 Fed. Rep. 460; 180 Pa. 539; 169 id. 359. Mere lapse of time will sometimes render a fraudulent transaction unimpeachable; 9 Pet. 405; 83 Va. 451; 37 W. Va. 215; 143 Ill. 409; 153 id. 293; but when the fraud is secret and suit is begun within a reasonable time after its discovery, laches is not a defence; 37 U. S. App. 61. Laches was held not imputable to a delay of more than ten years in filing a bill to set aside a fraudulent conveyance; 62 Ill. App. 193. See 61 Ark. 537. It is not so much the duty of a suitor in equity to be diligent in discovering his rights as to be prompt in asserting them after they become known; 27 U. S. App. 594; and a delay of eleven months in asking for the reformation of a mortgage on the ground of mutual mistakes was held not such laches as to bar the right of a subsequent mortgagee with knowledge of the mistake; 43 N. E. Rep. (Ind.) 259. Laches in assailing a fraud will not be imputed until the discovery of the fraud by the party affected thereby; 34 Fla. 149; and it has been held that delay will not defeat the right to relief in case of fraud, unless the fraud is known or ought by due diligence to have been known; 22 U. S. App. 12. Ignorance of facts complained of as fraud has been held no excuse for laches when the facts were evidenced by public records accessible to all, unless some affirmative act of deception be shown or some misleading device intended to prevent inquiry and exclude suspicion; 71 Fed. Rep. 7.

Laches may also be excused from the obscurity of the transaction; 2 Sch. & L. 437; see 93 Mich. 235; by the pendency of a suit; 1 Sch. & L. 413; and where the party labors under a legal disability, as insanity; 2 Yerg. 193; infancy; 30 Ala. 402; 71 Mo. 358; 55 Ark. 85; 17 R. I. 519; or coverture; 55 Md. 277; 9 N. J. Eq. 572; 19 Ves. 640; poverty is no excuse for laches; 71 Fed. Rep. 21; 149 U. S. 287; nor are ignorance and absence from the country; 4 U. S. 642; and no laches can be imputed to the public; 4 Mass. 522; 143 id. 424; 3 S. & R. 291; 97 Ill. 91; 93 Ind. 107; 85 Ky. 193. Laches on the part of its officers cannot be imputed to the government and no period of delay on the part of the sovereign power will serve to bar its right either in a court of law or equity when it sees fit to enforce it for the public benefit; 9 Wheat. 720; 97 U. S. 584; 130 id. 263; 15 C. C. A. 117; 67 Fed. Rep. 969; but though not ordinarily a defence to a suit brought by the government, where such suit is brought solely to benefit a private individual or where the government sues to enforce a right of its own, growing out of some ordinary commercial transaction, it may be set up as a defence; 127 U. S. 338; 91 id. 389; 67 Fed. Rep. 975; 71 id. 250. It is not a rule of universal application that laches cannot be set up in defence of a suit to enforce a charitable trust; 71 Fed. Rep. 250. Laches of a testator will be imputed to his executor; 34 U. S. App. 50.

The defence of laches may be raised by a general demurrer; 32 Md. 459; 8 App. D. C. 219; 33 Atl. Rep. (R. I.) 876; 157 Ill. 462; 160 id. 563; or by plea or answer, or presented by argument either upon a preliminary or final hearing; 37 U. S. App. 109. That the defence to laches must be made by answer and not by demurrer, see

147 N. Y. 241. Even though laches is not pleaded or the bill demurred to, courts of equity may withhold relief from those who have delayed the assertion of their claims for an unreasonable time; 164 U. S. 502. See INJUNCTION.

LACTA. A lack of weight; deficiency in the weight of money. The verb lactare said to have been used in an assize of statute in the 6th year of King John. Spel. Gloss.

LACUS. In Old English Law. An alloy of silver with base metal. Fieta 1. 22, § 6. In Civil Law. A lake, a receptacle for water which is never allowed to get dry. Dig. 43, 14, 1, 8.

LADA. A method of trial by purgation. In vogue among the Saxons by which a person was purged of an accusation, as of an oath or ordeal. Spel. Gloss. In Old English Law. A laide or load. A water course, a trench or canal for draining marshy lands. Spel. Gloss.

A court of justice. A laide or lath. Cow.

LADEN IN BULK. In Maritime Law. Having the cargo loose in the hold, and not enclosed in boxes, bales, bags, or casks.

LADY. In England, the proper title of any woman whose husband is higher in rank than baronet or knight, or who is the daughter of a nobleman not lower than an earl, though the title is given by courtesy also to the wives of baronets and knights. Cent. Dict.

The word lady is derived from *loefdig* (loaf day), which being applied to the mistress of a house came to be softened into the familiar term lady. On that day, it was the custom for the mistress of the manor to distribute bread to her poorer neighbors. Townsend, Manual of Dates, title Lady; 1 Chamb. Book of Days 154.

In England, the recognised courtesy title of the daughters of dukes, marquises, and earls and of the wife of anyone entitled to the courtesy title of lord. It is the customary title of the wife of a knight or of a baronet; but the formal title of those ladies is Dame; and, except formally, a marchioness, viscountess, or baroness is always spoken of or to as Lady, instead of as the Marchioness, etc. Byrne.

The word is derived from the Saxon *loef dig*, or *loaf-day*, which words have in time been contracted into the present appellation. As to the original application of this expression, it may be observed, that heretofore it was the fashion of those families of affluence, to live constantly at their mansions in the country, and that once a week, or oftener, the lady of the manor distributed to her poor neighbors, with her own hands, a certain quantity of bread; but the practice which gave rise to this title is now as little known as the meaning of it; however, it may be from that hospitable custom, that to this day the ladies in England serve the meat at their own tables. A woman of rank. The title properly belongs to the wives of knights, and of all degrees above them, except the wives of bishops. Wharton; Ency. Lond.

LADY-DAY. The 25th of March, the feast of the Annunciation of the Blessed Virgin Mary. In parts of Ireland, however, they so designate the 15th of August, the festival of the Assumption of the Virgin.

Upon a parol demise, rent to take place from the following Lady day, evidence of the custom of the country is admissible to show that by Lady day the parties meant Old Lady Day; 4 B. & Ald. 583.

LADY'S FRIEND. Previous to the act of 1857, abolishing parliamentary divorces, a functionary in the British house of commons. When the husband sued for a divorce, or asked the passage of an act to divorce him from his wife, he was required to make a provision for her before the passage of the act; it was the duty of the lady's friend to see that such a provision was made. Maq. H. & W. 213.

LAEN. Old Eng. Law. An estate held in trust for the maintenance of divine service. Stand. Dict.

LAENLAND. Land held of a superior whether much or little. 1 Poll. & Matl. 38. Land given to the lessee and to two or three successive heirs of his; synonymous with loan land. This species of tenure seems to have been replaced by that of holding by book or bockland. See Matl. Domesday Book and Bevond 318. See FOCLAND.

In the late Anglo-Saxon period this, as distinguished from *bockland* and *folklund*—both of which were held, but on different titles, from the king—meant land held of a superior other than the king. It thus corresponded more or less to land which, after the Norman Conquest, was held of, not by, a tenant, *in capite*. Byrne.

LAESA MAJESTAS (Lat.). Læse-majesty, or injured majesty; high treason. It is a phrase taken from the civil law, and anciently meant any offence against the king's person or dignity, defined by 25 Edw. III. c. 6. See Glanv. lib. 5, c. 2; 4 Bla. Com. 75; Br. 118; CRIMEN LÆSÆ MAJESTATIS.

LÆSIO ENORMIS. The injury sustained by a party to an owner's contract who is overreached by the other to the extent of more than one-half the value of the thing sold. A rescript of Diocletian permitted a rescission of the sale by a vendor unless the purchaser agreed to the additional amount required to make up the value of the thing sold. Sohm, Inst. Rom. L. § 69.

It was sometimes called *læsio ultra dimidium*. Colq. C. L. § 2094.

LÆSIONE FIDEI, SUITS PRO. Proceedings in the ecclesiastical courts for spiritual offences against conscience, for non-payment of debts, or breaches of civil contracts. This attempt to turn the ecclesiastical courts into courts of equity was checked by the Constitution of Clarendon, A. D. 1164, q. v., 3 Bla. Com. 52; Whart. Lex.

LAET. In Old English Law. One of a class between servile and free. 1 Palg. Rise & Prog. 334.

Of this class a very recent work says: "Thus degrees of servility are possible. A class may stand, as it were, half-way between the class of slaves and the class of free men. The Kentish law of the seventh century as it appears in the dooms of Æthelbert, knows a class of men who perhaps are not free men and yet are not slaves; it knows the *laet* as well as the *theow*. From what race the Kentish *laet* has sprung, and how, when it comes to details, the law will treat him—these are obscure questions, and the latter of them cannot be answered unless we apply to him what is written about the *laeti*, *liti*, and *lidi* of the continent. He is thus far a person that he has a small wergild but possibly he is bound to the soil. Only in Æthelbert's dooms do we read of him. From later days, until Domesday Book breaks the silence we do not obtain any definite evidence of the existence of any class of men who are not slaves but none the less are tied to the land." Matl. Domesd. 27. The *laete* were afterwards termed by the Normans *burii*, *burgs* or *colberts*; id. 36. "His services, we are told, vary from place to place; in some districts he works for his lord two days a week and during harvest-time three days a week; he pays gafol in money, barley, sheep, and poultry; also he has ploughing to do besides his week-work; he pays hearth-penny; he and one of his fellows must hew their own firewood. It is usual to provide him with an outfit of two oxen, one cow, six sheep, and seed for seven acres of his yardland, and also to provide him with household stuff; on his death all these chattels go back to his lord. Thus the boor is put before us as a tenant with a house and a yardland or turgate, and two plough oxen. He will therefore play a more important part in the manorial economy than the cottager who has no beasts. But he is a very dependent person; his beasts, even the poor furniture of his house, his pots and crocks, are provided for him by his lord. Probably it is this that marks him off from the ordinary *villein* or 'townsman' and brings him near the serf. In a sense he may be a free man." id. 37.

In an earlier work of the same author it is said: "Once and only once, in the earliest of our Anglo-Saxon text (Æthelb. 30), we find mention, under the name of *laet*, of the half-free class of persons called *titus* and other like names in continental documents. To all appearance there had ceased to be any such class before the time of Alfred: it is therefore needless to discuss their condition or origin." 1 Poll. & Matl. 13.

LAGA. The Law. The word was also extensively used to designate loss; observed in particular dis-

tricts as Mercen lage, West Saxon lage, Dane lage.

LAGAN (Sax. *liggan*, *cubare*). See LIGAN.

LAGE DAY or **LAGH DAY.** A day of open court; a day of the county court. Cow.; Toml.; Moz. & W.

LAGE MAN or **LAGA MAN.** A juror. Cow. In Old English Law. A man vested with or at least qualified for the exercise of jurisdiction, or sac and soc. Co. Litt. 58 a. See LAWMAN.

LAGEMANNUS. See LAHMAN.

LAGEN or **LAGENA.** A measure of six sextari. Fleta l. 2, c. viii. It was generally used as a measure of ale. Lieutenant of the Tower had the privilege to take one lagen of wine, of all the wine-ships that come up the Thames. Cunningham. *Lagena vini*, a bottle of wine. Id.; Peter Leycester, Ant. of Cheshire.

LAGENA VINI. See LAGEN.

LAGER BEER. See BEER.

LAGHSLITE or **LAHSLIT** (Sax.). A breach of law. Cowel. A mulct for an offence, viz.: twelve "ores." 1 Anc. Inst. & Laws of Eng. 189.

LAGU. See LAGA.

LAHMAN. Anciently a lawyer. Matl. Domesd. 189. It seems to be another form of lage man, which see.

LAICUM FEODUM. See LAICUS.

LAICUM TENEMENTUM. See LAICUS.

LAICUS (Eccl. Lat.). A layman; laic; one not belonging to the priesthood. Harper's Lat. Dic.

Laicum feodum; a lay fee. Burrill; Magna Charta, 9 Hen. III. c. 18. *Laicum tenementum*; a lay tenement. Id.; Mag. Chart. c. 14.

LAID OUT. Used in reference to ways, it describes all conditions of a way, such as a way voted to be built, a way being built, or a way built. The context usually determines the meaning of the expression. 83 Me. 514.

LAIRWITE (from the Sax. *legan*, to lie together, and *wite*, a fine, etc.). "A fine for the offence of adultery and fornication which the lords of some manors had the privilege of imposing on their tenants. Co. 4 Inst. 206; Fleta, lib. 1, c. 47.

LAIS GENTS (O. Fr.). Secular people; laymen; a jury.

LAITY. Those persons who do not make a part of the clergy. They are divided into three states: 1. *Civil*, including all the nation, except the clergy, the army, and navy, and subdivided into the *nobility* and the *commonalty*. 2. *Military*. 3. *Maritime*, consisting of the navy. Whart. Lex. In the United States the division of the people into clergy and laity is not authorized by law, but is merely conventional.

LAIZ, LEEZ (O. Fr.). A legate. Kelh.

LAKE. A body of water surrounded by land, or not forming part of the ocean, and occupying a depression below the ordinary drainage level of the region. Cent. Dict.

The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake; and the fact that a river swells out in broad pond-like sheets with a current does not make that a lake which would otherwise be a river; 14 N. H. 477.

The earlier decisions of the courts in this country tended to support the doctrine that no riparian owner could acquire title to the bed of any lake however small; 7 Allen 158; 13 Pick. 261; 30 Me. 47; 13 id. 198; but they were based upon the Massachusetts ordinance of 1647 (when the terri-

tory of Maine was a part of Massachusetts) which provided that all lakes more than ten acres in extent should be the property of the state for the benefit of the public. Other state courts followed these decisions, however, and while it is a recognized principle in this country that the title to the soil below the waters of a navigable lake is in the state and not in the owner of the abutting soil: 92 N. Y. 463; 34 Ohio St. 492; 34 La. Ann. 838; 19 Barb. 484; 45 Vt. 215; it has been also held that this principle applies to the bed of a non-navigable lake; 43 Wis. 248; 76 Ind. 302; 61 N. W. Rep. (Ia.) 250; 54 N. Y. 377; 120 Ill. 509; but see as to the last case, 140 U. S. 371, which held that the Illinois case did not establish in that state the doctrine that the bed of small lakes does not belong to riparian owners, there being another ground on which the decision was also based; therefore, although it is the practice of the federal courts to follow the decisions of the state courts, they refused in this instance so to do, reversing 16 Fed. Rep. 823. Later decisions in New York also overruled the case of *Wheeler v. Spinola*, 54 N. Y. 377; and hold that the bed of a non-navigable inland lake belongs to the abutting riparian owner; 134 N. Y. 355, reversing 11 N. Y. 8. 87; and see in support of this doctrine, 62 Mich. 626; 32 N. J. L. 369; 58 Ind. 248; 61 N. W. Rep. (S. D.) 479; 47 Ohio St. 326.

Where a non-navigable inland lake is the subject of private ownership, neither the public nor an adjacent land owner has a right to boat upon it or to fish in its waters; 24 N. E. Rep. (Ohio) 686; and such an owner may lease his interest in the bed of the lake for a term of years, reserving to himself the right of fishing therein during such term; 11 Ohio Cir. Ct. Rep. 508.

In North Carolina it has been held that the bed of a lake may be the subject of private ownership, but if the waters are navigable in their natural state, the public have an easement of navigation in them which cannot be obstructed; 100 N. C. 477. The riparian proprietor upon a navigable lake has the exclusive right of access to and from the lake in front of his land and of building wharves in aid of navigation not interfering with the public easement; 42 Wis. 214; 10 Mich. 125. See 45 Vt. 215. In England, a non-tidal lake is the subject of private ownership; L. R. 3 App. Cas. 641.

Where the ownership of the bed of the lake is in the state it has no power to arbitrarily destroy the rights of the riparian owner on such lake without his consent and without due process of law, for the sole purpose of benefiting some other riparian owner or for any other merely private purpose; and an act authorizing the drainage of such a lake without the consent of a riparian owner is unconstitutional; 67 N. W. Rep. (Wis.) 918; nor have a board of supervisors, in the absence of a statute directly conferring it, the right to construct a bridge over such a lake; 42 N. W. Rep. (Ia.) 506.

In the case of a meandered lake the riparian proprietor is held entitled to the middle thereof; 61 N. W. Rep. (S. D.) 479; but in Illinois the title to such waters and the land covered by them is held to be in the state in trust for the people; 161 Ill. 462. Meander lines do not cut off land between such lines and the waters of a meandered lake; 121 Ind. 51; 42 Wis. 233; 44 Mich. 403; 65 Miss. 46; 140 U. S. 371; and derelict land left by the receding waters of a meandered lake is held to belong to the riparian owners; 25 Ark. 120; 32 Pac. Rep. (Utah) 690; but not where the lake is artificially drained; 61 N. W. Rep. (Ia.) 250; and in Illinois, gradual recession of the waters of a meandered lake is held to give the riparian proprietors the right to the new land by following the recession of the waters to their edge; but a considerable body of new land suddenly or perceptibly formed by reliction is held to belong to the state; 161 Ill. 462.

See 18 L. R. A. 695, n.; Ang. Waters, 7th ed. 65; BOUNDARY; GREAT LAKES; HIGH

SEAS; NAVIGABLE WATERS; PONDS; RIPARIAN RIGHTS; WATERS.

LAKH. See LAC

LAMANEUR (Fr.). In French Law. A harbor or river pilot. Ord. Mar. liv. 4, 3.

LAMB. A sheep, ram, or ewe, under the age of one year. 4 C. & P. 216.

LAMBARDE'S ARCHAION. A discourse upon the high court of justice in England, by William Lambarde, published in 1635. Marv. Leg. Bibl.

LAMBARDE'S ARCHAIONOMIA. A collection of the laws of the Anglo-Saxons, William the Conqueror and Henry I. published in 1568 by the same author, keeper of the records in the tower. See Marv. Leg. Bibl.; Allibone, Dict. Authors.

LAMBARDE'S EIRENARCHA. A work by the same author upon the office and duties of a justice of the peace. Editions were published in Latin in 1579 and 1581, and in English it was published in 1590. See Marv. Leg. Bibl.; Allibone, Dict. Authors.

LAMBETH DEGREE. A degree given by the archbishop of Canterbury. 1 Bla. Com. 381, n. Although he can confer all degrees given by the two universities, the graduates have many privileges not shared by the recipients of his degrees.

LAMMAS DAY. The 1st of August. Cowel. It is one of the Scotch quarter days, and is what is called a "conventional term." Moz. & W.

"This was one of the four great pagan festivals of Britain, the others being on 1st November, 1st February, and 1st May. The festival of the Gule of August, as it was called, probably celebrated the realization of the first fruits of the earth, and more particularly that of the grain-harvest. When Christianity was introduced, the day continued to be observed as a festival on these grounds, and, from a loaf being the usual offering at church, the service, and consequently the day, came to be called *Hiaf-mass*, subsequently shortened into *Lammas*. . . . This we would call the rational definition of the word *Lammas*. There is another, but in our opinion utterly inadmissible, derivation, pointing to the custom of bringing a lamb on this day, as an offering to the cathedral church of York. Without doubt, this custom, which was purely local, would take its rise with reference to the term *Lammas*, after the true original signification of that word had been forgotten." Chamb. Book of Days.

LAMMAS LANDS. Open, arable, and meadow land which was kept open and by many owners in severalty during so much of the year as was necessary to receive and remove the crop of the several owners, after which they were held and used in common, not only to the owners, but to inhabitants of the parish, manor, or borough. Since Sept. 2, 1752, such lands are open August 12th, under 24 Geo. II. c. 23, § 5; but their name was derived from the earlier practice of keeping them open from Lammas Day to Lady Day. See Cooke, I. A. 47; Elton, Commons 36; 6 Ch. D. 500.

These lands were thus recently defined: "Lands belonging to the owner in fee simple who is absolutely the owner in fee simple, to all intents and purposes for half the year; and the other half of the year he is still the owner in fee simple, subject to a right of pasturage over the land by other people." Jessel, M. R., in 46 L. J. Ch. 721; 6 Ch. D. 507.

LANA (Lat.). Wool for carding and spinning. Dig. 7, 8, 12; Harper's Lat. Dict.

LANCASTER. See COURTS OF THE COUNTY PALATINE.

LANCETI. Vassals who were obliged to work for their lord one day in the week from Michaelmas to Autumn, either with fork, spade, or flail at the lord's option.

Spel. Glos.

LANES, DEZ (O. Fr.). Of the laity. Kelh.

LANNS MANNUS (O. Fr.). A lord of the manor. Kelh.

LAND. Any ground, soil, or earth whatsoever: as, meadows, pastures, woods, waters, marshes, furzes, and heath. 45 N. H. 313.

An estate of frank tenement at the least. Shepp. Touch. 92.

In a technical sense, freeholds are not included in the term lands; 3 Madd. 535. The term *terra* in Latin was used to denote land from *terendo quia vomere teritur* (because it is broken by the plough), and accordingly, in fines and recoveries, land, i. e. *terra*, was formerly held to mean arable land. Salk. 256; Cowp. 346; Co. Litt. 4 a. But see Cro. Eliz. 476; 4 Bingh. 90; Burt. R. p. 196. See also 2 P. Wms. 458, n.; 5 Ves. 476; 20 Vin. Abr. 203.

At common law the term land has a two-fold meaning. In its more general sense, it includes any ground, soil, or earth whatsoever, as meadows, pastures, woods, marshes, furze, etc.; 1 Inst. 4 a; 2 Bla. Com. 18. In its more limited sense, the term land denotes the quantity and character of the interest or estate which the tenant may hold in land. The land is one thing, and the estate in land is another thing, for an estate in land is a time in land or land for a time. Plowd. 555.

Generally, in wills, "land" is used in its broadest sense; Schoul. Wills § 498; 1 Jarm. Wills 604, n.; 1 Pow. Dev. 186; 10 Paige 140. A freehold estate in reversion or remainder will pass under the term; 2 Vern. 461; 3 P. Wms. 55; 17 Barb. 86; or in a deed; 10 Paige, Ch. 156. But as the word has two senses, one general and one restricted, if it occur in connection with other words which either in whole or in part, supply the difference between the two senses, that is a reason for taking it in its less general sense: e. g. in a grant of lands, meadows, and pastures, the former word is held to mean only arable land. Cro. Eliz. 476, 659; 5 Johns. 440.

If one be seized of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them), in fee-simple, or for life, by this grant shall pass no more but the lands he hath in fee-simple; Shepp. Touchst. 92. But if a man have no freehold estate, "lands," in a will, will pass his leasehold; and now, by statute, leasehold will pass if no contrary intent is shown, and the description is applicable even if he have freehold; 1 Vict. c. 26; 2 B. & P. 303; Cro. Car. 292; 1 P. Wms. 286; 11 Beav. 237, 250.

Incorporeal hereditaments will not pass under "lands," if there is any other real estate to satisfy the devise; but if there is no other such real estate they will pass, by statute; Moore 359, pl. 49. See REAL PROPERTY; FIXTURES. Incorporeal hereditaments have been held not land; 2 Sandf. Sup. Ct. N. Y. 552. See 39 N. Y. 87; contra, 46 N. Y. 46; 82 id. 459; 101 id. 322. The word land does not comprehend rents which are incorporeal, which are not lands, but mere rights or profits issuing out of lands and tenements corporeal; 4 Watts 109; 5 Denio 324. In a statute the term has been held to include an easement, if such construction appears to have been in accordance with the intention of the legislature; 15 L. J. Chan. 306. Land has been held to include servitudes, easements, rents, and other incorporeal hereditaments, and all rights thereto and interests therein, equitable as well as legal; 51 N. W. Rep. (Ia.) 18; 19 N. Y. S. 890; and to be synonymous with the terms real estate and real property; 49 Fed. Rep. 549; and to include leases for years, remainders, reversions, rent-charges, tithes, advowsons, and titles of honor; 30 Ch. Div. 136.

Land has an indefinite extent upward as well as downward; therefore, land legally includes all houses or other buildings standing or built on it, and whatever is in a direct line between the surface and the

centre of the earth; 3 Kent 378, n. See Co. Litt. 4 a; 37 Minn. 4; 9 Day 374; Wood, Inst. 130; 2 Bla. Com. 18; 1 Cruise, Dig. 58; REAL PROPERTY.

The right to develop the natural resources of land. All land is held subject to the right, in the state, of taxation and eminent domain. The right to put his land to the most profitable use for his own benefit is one of the landowner's privileges, but how far this right extends has been the subject of much adjudication by the courts. He may develop its natural resources by mining, even if by so doing he injure the property of an adjacent landowner; 8 Atl. Rep. (Pa.) 620; 113 Pa. 126 (overruling 86 id. 401); and see 24 id. 298, where Black, C. J., laid down the rule that "the necessities of one man's business cannot be the standard of another's rights in a thing belonging to both"; he may make use of springs on his land, even if he thereby drain a stream in which others have a property right; 25 id. 538; he may increase the volume of water in such a stream by draining his own swamp land; 26 id. 407; and if by any of these methods, he injure another, it is a *damnum absque injuria*.

He may not collect upon his land or suffer to accumulate there anything which, if it escape, may do injury to others, without being liable for all the damage it may do; L. R. 3 H. L. 330; he may not erect upon his land a manufacturing establishment, which is not intended to develop its natural resources, without being liable for any nuisance it may create to others; 23 Atl. Rep. (Md.) 845; 62 Hun 306; 145 Pa. 324; and he may be enjoined from maintaining a nuisance on his land, where such nuisance can be avoided, without proof of damage to plaintiff or negligence on the part of defendant. See FIRE.

He may not divert the water of a stream to an unusual course, even if the quantity of water is not diminished thereby; 43 N. Y. S. 29.

He may not obstruct a passway over his land which has been continuously used by the public for more than 15 years; 88 S. W. Rep. (Ky.) 690.

He may explode nitro-glycerine for the purpose of increasing the flow of natural gas, although by so doing he draw gas from the land of another; 31 N. E. Rep. (Ind.) 57, 61; but he is held liable in damages where he uses for that purpose an explosive so powerful as to injure the property of an adjoining owner; 17 N. Y. S. 22; and he may be enjoined from so doing where he can obtain the same result, although at an increased cost to himself; 43 N. Y. Suppl. 1.

As to acts by an adjoining owner, whereby the right of vertical and lateral support to one's land by the subjacent or adjacent soil is interfered with, see LATERAL SUPPORT.

As to acts by an adjoining owner interfering with light and air, see ANCIENT LIGHTS.

As to what covenants run with the land, see COVENANTS.

See also REAL PROPERTY; EASEMENTS; BOUNDARIES; LAKES; WATER COURSES; RIVERS; MINES AND MINING; REMAINDERS; REVERSIONS. ALL, Land. REAL ESTATE. FLOWING LANDS; MILITARY BOUNTY LAND; RESTRICTED LANDS; STATE LANDS.

LAND AGENDE, LAND-HLA-FORD, LAND-RICA. A proprietor of land; lord of the soil. Wharton; Anc. Inst. Eng. See LANDEFRICUS.

LAND BOOK. See LANDBOOK.

LAND CEAP, LAND CHEAP (land, and Sax. *ceapan*, to buy). A fine payable in money or cattle, upon the alienation of land, within certain manors and liberties. Cowel, Gloss.

LAND CERTIFICATE. A certificate given to a registered proprietor of freehold land under the English Land Transfer Act of 1875. A similar certificate is given to the transferee on every sub-

sequent transfer. It contains a description of the land as it appears on the register and the name and address of the proprietor, and is *prima facie* evidence of the truth of the matters therein set forth.

LAND COP. The sale of land which was evidenced in early English law by the transfer of a rod or *festuca* (*q. v.*) as a symbol of possession which was handed by the seller to the reeve and by the reeve to the purchaser. The conveyance was made in court, it is supposed, for securing better evidence of it, and barring the claims of expectant heirs; *Mattl. Domest. B. 323.*

LAND COURT. In American Law. The name of a court which formerly existed in the city of St. Louis, state of Missouri, having sole jurisdiction in St. Louis county in suits respecting lands, and in actions of ejectment, dower, partition. As to the United States courts for the determination of land claims, see **UNITED STATES COURTS.**

LAND GABEL. A tax or duty on land. See **GABEL.** It is said to have been originally a penny for a house; *Spel. Gloss.*; and by another authority, in *Domesday Book* it was a quit-rent for a house site similar to the modern ground rent. *Whart. L. Dict.* Spelled also *Land Gable, Moz. & W.*

LAND GABLE. See **LAND GABEL.**

LAND GRANT. A legislative appropriation of a portion of the public domain either for charitable or eleemosynary purpose, or for the promotion of the construction of a railroad or other public work.

Although the public lands of the United States and of the various states have been to a great extent conveyed by deeds or patents issued in virtue of general laws, many specific grants have also been made, and were the usual method of transfer during the colonial period. See *3 Wash. R. P. 181*; *4 Kent 450, 494*; *8 Wheat. 543*; *6 Pet. 548*; *15 id. 367.*

It is always to be borne in mind in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress; and this intent should not be defeated by applying to the grant the common-law rule making grants applicable only to transfers between private parties; *97 U. S. 491.* Followed in *10 Am. & Eng. R. Cas. 552.* To ascertain that intent courts will look to the condition of the country at the time of making the grants, as well as the purpose of the grants as expressed on their face; *26 Am. & Eng. R. Cas. 513*; *113 U. S. 618.*

All government grants are to be strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language, and nothing can be implied; *23 How. 66*; *23 N. J. Eq. 441.*

The provisions of various acts of congress that the land-grant railroads "shall be and remain a public highway for the use of the government, free from all toll or other charge for transportation of any property or troops of the United States," mean that the government may use the roads, with all fixtures and appurtenances, but not that it may compel the roads to transport property and troops without compensation; *12 Ct. of Cl. 35.* Such a railroad is under a perpetual contract made by the Land Grant Act of May 17, 1856, to carry the mails at such rates as congress may by law direct or the post-master-general determine; *21 Ct. of Cl. 155.*

Priority of grant settles the title of the railroad where the claims conflict and not the priority in filing maps of definite location; *146 U. S. 570*; and when grants are made to two railroads, none of the land passes to the second which comes within the prospective rights of the first; *id. 615.*

Title does not vest until the lands are actually selected and set apart under the direction of the secretary of the interior; *141 U. S. 358*; *52 Minn. 397.*

In case of conflict between railroad land grants the elder title must prevail. So held, where the Northern Pacific Railroad claimed land in Minnesota under a grant of July 2, 1864, and the St. Paul and Pacific Railroad claimed part of the same lands under acts of congress of March 3, 1865, and March 3, 1871; *139 U. S. 1.*

Where lands are granted by acts of congress of the same date, or by the same act, in aid of two railroads that must necessarily intersect, each grantee takes an undivided moiety of the lands within the conflicting limits; *159 id. 349, 372.*

Where congress grants the odd-numbered sections of land for a given distance on each side of a railroad, before the road is located, the title does not pass to any particular sections until the line of the road is made certain, which makes certain also the sections granted; *9 Wall. 95.*

Where an act of congress makes a grant of land of the odd-numbered sections within a certain distance of a railroad, the title of the corporation to the land vests at once, and can only be thereafter divested by the government for a failure to perform conditions imposed, or upon a proper proceeding instituted to revest the title in the government; *32 Fed. Rep. 457.*

The revocation of a land grant to a corporation which has become dormant, and the transfer thereof to another corporation by an act of the state legislature, is not an invasion of private rights and does not, unless so expressed or clearly implied, burden the transfer with the debts of the dormant corporation; *163 U. S. 81.*

Where land is granted to a railroad company before its tract is located, the title to the specific land attaches by a location of the road, and takes effect by relation as of the date of the grant, so as to cut off intervening claims of other roads, claiming under other grants, unless the lands are specially reserved in the statute; *97 U. S. 491.*

The grant to the Northern Pacific R. R. of certain public lands is a grant *in present.* Yet it is in the nature of a float, and the title does not attach to any specific section until capable of identification; but when once identified, the title attaches as of the date of the grant; *15 U. S. App. 279.* A railroad company takes title to the land upon complying with the act and not before; *15 id. 359.*

In acts making land grants to railroad companies, conditions are usually imposed which must be complied with to make the grant operative. Among such conditions are frequently named such as make the grant dependent upon the amount of net earnings, and accordingly, the phrase has been frequently the subject of construction in that connection. "Net earnings," within the meaning of such a law, are ascertained by deducting from gross earnings all ordinary expenses of organization and of operating the road, and expenditures *bona fide* made in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company; *99 U. S. 402.* Followed in *20 Ct. of Cl. 70*; *29 Am. & Eng. R. Cas. 384*; *27 Fed. Rep. 1.* See **LANDS, PUBLIC.**

LAND-MARK. A monument set up in order to ascertain the boundaries between two contiguous estates. For removing a land-mark an action lies. *1 Thomas, Co. Litt. 787.* See **MONUMENTS.**

LAND OFFICE. A government bureau established in 1812, originally connected with the treasury, but since 1849 forming a division of the department of the interior.

The commissioner of the general land office performs, under direction of the secretary of the interior, all executive duties appertaining to the surveying and sales of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private grants of land, and the issuing of patents for all land under the authority of the government; *Rev. Stats. U. S. secs. 446-461*; he has absolute jurisdiction of

any particular grant of public land; *158 U. S. 155*; he has the power to supervise the action of the officers of a local land office and to annul a fraudulent entry, but his action is not conclusive; *4 U. S. App. 332*; and the courts are not concluded by the decision of the land department on a question of law; *159 U. S. 46.*

The general land office has charge of the record of title to the vast area known as the public domain, and all business pertaining to the survey, disposition, and patenting of the public lands of the United States is transacted through it or under its order and supervision. All questions of fact decided by the general land office are binding everywhere, and injunctions and mandamus proceedings will not lie against its officers; *9 Wall. 575*; *7 id. 347*; *9 id. 298*; but a court of equity, after the title has passed from the United States, may relieve against mistakes of law in collateral proceedings, but it must be clear that a mistake of law has been committed; *96 U. S. 535*; and if the alleged mistake be a mixed one of law and fact so that the court cannot separate it so as to see clearly where the mistake of law is, the decision is conclusive; *101 id. 476.*

Decisions of the land office upon questions of fact within their jurisdiction cannot be reviewed in a collateral proceeding; *158 U. S. 240.* Its construction upon an act of congress and its usage for eighteen years is entitled to considerable weight; *148 U. S. 562.* Its decisions upon questions of fact are conclusive; *158 U. S. 155.* Its rules and regulations have the effect and force of law on the due observance of which all citizens have the right to rely; *19 U. S. App. 10.*

In all matters confided by law to their examination and decision the United States land officers act judicially, and their decisions are as final as those of other courts; *5 Minn. 223*; and although such action is generally conclusive, the land office, up to the issuing of the patent in their divestiture of title, cannot by its subsequent action upon a fictitious claim defeat rights already vested. See **LAND PATENT.**

In a bill which seeks to show that a decision of the land department was procured by fraud, it must be shown that some trick or deceit was practised on the officers of the department. Where such a bill attacks such a decision on the ground that the officers of the department have misconstrued and misapplied the law, it must set out the evidence and what the department found the facts to be, so that the court can separate the department's finding of facts from its conclusions of law. It is not necessary to give notice of a contest before the land department to the predecessors in title of a claimant; *80 Fed. Rep. 425.*

LAND PATENT. A muniment of title issued by a government or state for the conveyance of some portion of the public domain.

The issue of a land patent is the conveyance of public lands to the person or persons who, by compliance with the law, have become entitled thereto under a land grant (*q. v.*). It is a conveyance by the government when it has any interest to convey. *121 U. S. 488.*

A patent issued under the act of congress of March 3, 1851, to settle land titles, under the Mexican grant, "is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the government itself cannot question its verity,

nor can parties claiming through the government by title subsequent." Field, C. J., in 18 Cal. 11, 26.

Nature and effect of patents generally. A grant of land is a public law standing on the statute books of the state, and is notice to every subsequent purchaser under any conflicting sale made afterward; 3 U. S. App. 581. The final certificate or receipt acknowledging the payment in full by a homesteader or pre-emptor is not in legal effect a conveyance of the land; 4 *id.* 332. It transfers the full equitable title; 159 U. S. 63. A patent alone passes land from the United States to the grantee; 13 Pet. 498; 20 Mo. 108; 1 Ohio 281; not only as it was at the time of the survey, but as it is at the date of the patent; 134 U. S. 178; and nothing passes a perfect title to public lands but a patent, except where congress grants lands in words of present grant; 13 Pet. 498; though its delivery to the patentee is not essential to pass the title; 103 U. S. 378; and the United States cannot by authority of its own officers invalidate that patent by the issuing of a second one for the same property; 135 U. S. 236; see 21 Wall. 660; 9 Cra. 87; 5 Wheat. 893; 11 *id.* 330; or divest the title by giving a patent to another; 8 Mo. 526. Its office is to define the land; 9 Cal. 332; it has been said to be equivalent to a deed; 20 *id.* 387. After land has been sold by certificate, the United States holds the legal title until the patent issues, but only in trust for the purchaser; and the officers can only act ministerially and issue it to him, and cannot act judicially and determine that another claimant is entitled to it; 2 Ia. 1. A patent is conclusive against all whose rights commence subsequently to its date; 7 Wheat. 212; it conveys the legal title and leaves the equities open; 15 Pet. 93. It relates back to the date of purchase, and title to real estate, acquired under an execution sale, cannot be defeated by the issuing of a patent to the execution defendant, bearing date subsequent to the sale by the sheriff; 5 Ia. 157. But a patent for public land will not be held to take effect by virtue of the doctrine of relation, as of the date of the initial step taken by the patentee, where it appears that the rights by him acquired under such initial step were lost by his lack of diligence, and third parties' rights had intervened; 80 Fed. Rep. 423.

Where the United States has parted with title by a patent legally issued, and upon surveys legally made by itself and approved by the proper department, the title so granted cannot be impaired by any subsequent survey made by the government for its own purposes; 13 La. Ann. 128. A patent founded on a void entry and survey nevertheless passes the legal title from the government to the patentee, but the commencement of the title is the patent; 2 Ohio 216. It passes to the patentee everything connected with the soil, forming any portion of its bed, or fixed to its surface; in short, everything connected with the term "land"; 17 Cal. 199.

A patent for land is the highest evidence of title and is conclusive as against the government, and all claiming under junior patents or titles, until set aside or annulled, unless it is absolutely void on its face; 2 Wall. 525; 13 *id.* 72; *id.* 92; 19 *id.* 646; 23 How. 235; 104 U. S. 636; the presumption being that it is valid and passes the legal title; 18 How. 87. When issued upon confirmation of a claim or a previously existing title, it is documentary evidence, having the dignity of a record of the existence of that title or of such equities respecting the claim as justify its recognition and confirmation; 121 U. S. 488; it must be interpreted as a whole; its various provisions in connection with each other and the legal deduction drawn therefrom must be conformable with the document; 21 How. 305.

A patent for unimproved lands, no part of which was in the possession of any one at the time it was issued, gives a legal seisin and constructive possession of all the lands within the survey; 5 Pet. 485. The identity of the land must be ascertained by

a reasonable construction of the patent, but if rendered wholly unnecessary by inaccurate description the grant is void; 6 *id.* 328.

Government documents are not evidence of titles as against parties claiming pre-existing adverse and paramount title; 124 U. S. 261. A patent issued by the United States cannot be avoided or impeached for fraud in a collateral action; 26 Ia. 498; but it may be collaterally impeached in any action, and its operation and conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; 121 U. S. 488. Where issued by mistake, inadvertence, or other cause, to parties not entitled to it, they will be declared trustees of the true owner and decreed to convey the title to him; 147 *id.* 242. A patent is void at law, if the grantor state had no title to the premises embraced in it, or if the officer who issued the patent had no authority to do so; 142 *id.* 161. In cases of ejectment, where the question is who has the legal title, the patent of the government is unassailable; 139 *id.* 642.

The patent is conclusive evidence that the patentee has complied with the act of congress as concerns improvements on the land, etc.; 3 La. Ann. 205; it is *prima facie* evidence that all legal requirements have been complied with; 7 U. S. App. 597; but a patent fraudulently obtained by illegal issue is void; 4 La. Ann. 262; 2 How. 284; 5 Har. & J. 223.

Patents for mines. The fee of all mineral lands remains in the United States until patent issues therefor; 24 Cal. 339; 1 Mont. 410; Copp's Mining Law 37. The locator possesses only the right to purchase until the payment of the purchase money and the issuance of a receipt by the register and receiver of the local land office; 33 Fed. Rep. 562.

The method of procedure for the application for patent is provided for in U. S. Rev. Stats. § 2325. It requires that the applicant shall file under oath in the proper land office an application showing a compliance with the above-mentioned statute, together with a plat and field notes made by or under the direction of a United States surveyor general, and shall post a copy of the plat, together with a notice of the application, on the land, and then file an affidavit of the posting of such notice and copy in the land office. The act also requires that the register of the land office shall post said notice in his office for sixty days, and shall publish it for the same period in a newspaper nearest to the claim. If at the expiration of the said sixty days no adverse claim shall have been filed with the register and receiver of the local land office, the applicant shall be entitled to a patent upon the payment of \$5.00 per acre for a lode location, and \$2.50 per acre for a placer location, and after the expiration of said sixty days third persons cannot be heard to make objection to the issuance of the patent; see 9 Colo. 208; 4 Sawyer 302; 12 Nev. 320.

The issuance of such a patent is conclusive as to title of land described therein upon a court of law and in controversies between individuals; 3 Mont. 282; 6 *id.* 397; 8 Fed. Rep. 300; 34 *id.* 515. By the act of March 3, 1881, Rev. Stats. 1 Supp. p. 324, it is provided that if in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to verdict. In such case no costs shall be allowed, and the claimant shall not proceed in the land office or be entitled to a patent for the land in controversy until he shall have perfected his title.

Where an application is pending for a patent to mineral lands, any adverse claim must be filed within the sixty days granted by the statute, and must be under the oath of the adverse claimant; Rev. Stat. §§ 2325-2326; 21 Pac. Rep. 492. If such adverse claim be filed, proceedings upon the patent shall be stayed until the controversy shall have been determined by a court of com-

petent jurisdiction, or the adverse claim is waived; 33 Fed. Rep. 562; 114 U. S. 576. This procedure in the court must be begun by the adverse claimant within thirty days after filing his adverse claim, or his claim will be deemed to have been waived; U. S. Rev. Stats. § 2326; 114 U. S. 576; 2 Mont. 421. The person in whose favor a decision is rendered in such a proceeding is entitled to the patent upon compliance with the provisions of law; U. S. Rev. Stats. § 2326; and it is given to the party establishing the better title, the only question before the court being one of the right of possession of the premises; 21 Fed. Rep. 167. It is necessary for an adverse claimant in such a procedure to prove right of possession as against the United States, as well as against the applicant for a patent; 115 U. S. 45; and where neither party shows title neither can receive a patent; 21 Fed. Rep. 167; 9 Colo. 589.

How cancelled and annulled. It is not permissible for courts of law to inquire into the validity of a patent or into any question of fraud in connection with its issuance; 16 Fed. Rep. 829; see 104 U. S. 636. This, of course, applies only to the cases where the department has jurisdiction to act. If such jurisdiction was wanting or if the patent be void upon its face, it may, of course, be collaterally impeached; 104 U. S. 636; 8 Colo. 179. The United States may bring an action to set aside a patent upon allegations of fraud, and such action is triable under the same principles and rules which would obtain between individuals; 114 U. S. 233; 128 *id.* 673; 16 Fed. Rep. 810; *id.* 829, that is when the question arises as to patenting the land to the wrong person; in which case the government merely becomes the instrument by which the right of the individuals can be established and is merely a formal complainant; but if the patent has been obtained from the government by fraud or covers lands which were not subject to patent, the government sues in its sovereign capacity; U. S. v. Amer. Bell Tel. Co. (Berliner Case), where the subject is fully discussed and all the cases cited. See PATENT.

It may proceed by bill in equity for a decree of nullity, and an order of cancellation of a patent issued by the government itself, ignorantly, or in mistake, for lands reserved from sale by law, and a grant of which by a patent was therefore void; 2 Wall. 525; or where a patent issued in mistake, and the government has a direct interest or is under an obligation respecting the relief invoked; 141 U. S. 358; or when the patent was issued by mistake or obtained by fraud; 146 *id.* 120; the initiation and control of such a suit lies with the attorney-general; 125 *id.* 273; 127 *id.* 338.

Misrepresentations knowingly made by the applicant for a patent will justify the government in proceeding to set it aside, as it has a right to demand a cancellation of a patent obtained by false and fraudulent representations; 128 *id.* 673; see 137 *id.* 161; but courts of equity cannot set aside, annul, or correct patents or other evidence of title obtained from the United States by fraud or mistake, unless on specific averments of the mistake or fraud, supported by clear and satisfactory proof; 121 *id.* 325. A bill in equity is the proper remedy; 11 How. 552; although a patent fraudulently obtained by one knowing at the time that another person has a prior right to the land may be set aside by an information in the nature of a bill in equity filed by the attorney of the United States for the district in which the land lies; *id.* A court of equity, upon a bill filed for that purpose, will vacate a patent of the United States for a tract of land obtained by mistake from the officers of the land office, in order that a clear title may be transferred to the previous purchaser; 4 Wall. 232; but a patent for land of the United States will not be declared void merely because the evidence to authorize its issue is deemed insufficient by the court; 16 Ohio 61. A state can impeach the title conveyed by it to a grantee only by a bill in chancery to

cancel it, either for fraud on the part of the grantee or mistake of law; and until so cancelled, it cannot issue to any other party a valid patent for the same land; 149 U. S. 79.

After the issue of a patent, assignment and transfers of the pre-emption right will not be inquired into; 4 McLean 866. The issue of a patent of public lands to a person not equitably entitled to it does not preclude the owner of the equitable title from enforcing it in a court of equity; 147 U. S. 47; and fraud on the part of a grantee under a patent does not prevent the legal title from passing to a *bona fide* purchaser; 7 U. S. App. 128; unless the purchaser had sufficient information to put him on inquiry of fraud, in which case he is not a *bona fide* purchaser; 146 U. S. 120. A patent to a deceased person is void; 12 Pet. 284; 7 Ohio 288. On the acquisition of the territory from Mexico, the United States acquired the title to lands under tidewater, in trust for future states that might be erected out of the territory; but this doctrine does not apply to lands that had been previously granted to other parties by the former government; 142 U. S. 161. See LANDS, PUBLIC; LAND WARRANT; LAND GRANT.

LAND POOR. A phrase used to indicate the possession of a large quantity of unproductive lands, the payment of taxes and loss of interest on which keeps the owner poor. "A man land-poor may be largely responsible;" 46 Mich. 397; s. c. 9 N. W. Rep. (Mich.) 445.

LAND REEVE. One whose business it is to overlook parts of an estate. Moz. & W.

LAND REGISTRY. See LAND TITLE AND TRANSFER; REGISTRATION; RECORDING.

LAND REVENUES. An income derived from crown lands in Great Britain. These lands have been so largely granted away to subjects that they are now contracted within very narrow limits. The crown was so much impoverished in this manner by William III. that the stat. 1 Anne, c. 7, § 5, was passed, with the stat. 34 George III. c. 75, which amends and continues it, makes void all grants or leases from the ground of royal manors or other possessions connected with land for a period exceeding thirty-one years, or three lives. Long prior to this a Scottish stat. 1455, c. 41, had made necessary the consent of parliament in case of the alienation of crown property. It is said that none of these statutes have succeeded in checking the practice. Early at the beginning of the reign of George III. the hereditary crown revenues derived from escheats, manors held *in capite*, estrays, fines, etc., were surrendered by the king to the general funds, and in the place of them he received a specified sum annually for the civil list.

The supervision of such property as still belongs to the crown is vested in commissioners appointed for the purpose, called the commissioners of woods, forests, and land revenues.

LAND STEWARD. An agent who has the management and control of landed estate belonging to an individual or state.

LAND TAX. A tax on the beneficial proprietor of land such as is imposed in many of the states; so far as a tenant is beneficial proprietor, and no farther, does it rest on him. It was first imposed in 1693, a new valuation of the lands in the kingdom having been made in 1692, which has not since been changed. In 1798 it was made perpetual, at a rate of four shillings in a pound of valued rent. Under the provisions of the stat. 16 & 17 Vict. c. 74; this tax is now generally redeemed. See Encyc. Brit. *Taxation*.

LAND TENANT (commonly called *terre tenant*, q. v.). He who actually possesses the land.

LAND TITLE AND TRANSFER. The existing system of land transfer is a long and tedious process involving the ob-

servance of many formalities and technicalities, a failure to observe any one of which may defeat title. Even where these have been most carefully complied with, and where the title has been traced to its source, the purchaser must buy at his peril, there always being, in spite of the utmost care and expenditure, the possibility that his title may turn out bad. Yeakle, *Torrens System* 209.

For the past 50 years the project of simplifying land titles and transfer has been agitated in England. For the purpose of considering the best method of so doing, a royal commission was appointed in 1854, and its report in 1857 recommended a limited plan of registration of title. In 1862 the Lord Westbury Act, 25 & 26 Vict. c. 53, 57, provided for the registration of indefeasible titles, but they were confined to good marketable titles. In 1875 the Lord Cairns bill was passed, which provided for the permissive use of a scheme for the registration of title, and was a modified form of the Torrens system, but, as the friends of that system pointed out, the provisions of the bill were not stringent enough, and comparatively little use has been made of it.

This act was amended in several particulars by the Land Transfer Act, 1897. In addition to these changes this amendatory act of 1897 makes some very vital changes in the real estate law of England; it provides as follows: "Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representative or representatives from time to time as if it were a chattel real vesting in them or him." This applies to any real estate over which the testator "has a general power of appointment." Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate. Subject to the powers, rights, duties, and liabilities imposed in the act, the "personal representatives hold the real estate as trustee for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate." "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration, etc., of personal estate and the powers, rights, etc., of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real, etc., save that some or one only of such joint personal representatives" cannot sell or transfer the real estate without the authority of court.

"In the administration of the assets of a person dying after the commencement of the act, his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, etc., as if it were personal estate, provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in and towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies." In granting letters of administration the court "shall have regard to the rights and interests of the persons interested in the real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next of kin."

At any time after the death of the owner "his personal representative may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, . . . either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or con-

veyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance." After the expiration of a year from the owner's death, "if the personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the court may, if it thinks fit, on the application of that person and after notice to the personal representatives, order that the conveyance be made, or in case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly, with the personal representatives. The production of an assent by the personal representatives to the registrar is authority to him to register the transfer. The personal representatives, etc., may, in the absence of any express provision to the contrary . . . with the consent of the person entitled to any legacy . . . or to a share in his residuary estate, etc., appropriate any part of the residuary estate in or towards satisfaction of that legacy of share," placing their own valuation on "the whole or any part of the property of the deceased person," first giving notice to all persons interested in the residuary estate. In case of registered land such appropriation is authority to the registrar to register the person to whom the property is appropriated as proprietor. The act provides that the title to registered land, adverse to or in derogation of the title of the register proper, shall not be acquired by any length of possession."

It also repeals the act of 32 Hen. 8, c. 9, which prohibits sales and other dispositions of land of which the grantor or his predecessor in title had not been in possession for one whole year previously to the dispossessor's being made.

It provides that the queen may, by an order in council, as respects any county or part of a county, declare registration of title to be compulsory on sale.

Six months' notice before the order in council is made is required to be given to the *council of the county* in question, and if within three months after receipt of notice with a draft of the proposed order, two-thirds of the members of the *county council* notify the Privy Council that, in their opinion, compulsory registration of title would not be desirable, the order in council shall not be made. The first order in council made under this act shall not affect more than one county. The act reserves to parliament certain rights to disapprove of any order in council by which it shall become void. The act makes provision for an indemnity payable thereunder by setting apart a portion of the receipts from fees taken in the land register. If the indemnity fund is insufficient the deficiency is charged to the consolidated fund of the United Kingdom.

Provision is made for regulations by the lord chancellor, with the advice and assistance of certain officials, for the conduct of official searches, and for enabling the registered proprietor to apply for such searches, etc., by telegraph and to receive reply by telegraph.

The act went into effect January 1st, 1898, and is to be cited as the Land Transfer Act, 1897, and construed with the Land Transfer Act, 1875, and the two together are to be cited as Land Transfer Acts, 1875 and 1897.

The system of registration of *deeds* prevails in Scotland, in Middlesex and Yorkshire, in Ireland, France, Belgium, Italy, Spain, part of Switzerland, and the British colonies, excepting Australasia and most of Canada, and in the South American republics, as well as in the United States. The system of registration of *title* prevails in Germany, Austria-Hungary, Australasia, part of Switzerland, and the greater part of Canada; 9 Jurid. Rev. 155. The Torrens system, so called from its author, Sir Robert Torrens, has been in use in New South Wales and Victoria since 1862; in

South Australia, 1858; Queensland, 1861; Tasmania, 1863; New Zealand and British Columbia, 1870; Western Australia, 1874; Ontario, 1884; Manitoba, 1888; Duffy & Eggleston, Land Transfer Act, 1890, § 3.

The essential point of this system is an official guarantee of title; it is the registration of title as distinct from the registration of deeds. The latter ascertains the deeds which must be examined under every transfer, while the former renders such examination unnecessary; 9 Jurid. Rev. 155. Under the Torrens system the registrar holds the same relation to the landowner that a company or bank holds to the shareholder.

In Germany the state keeps what may be called a ledger account for each property, and pledges itself to keep it correctly and in such plain fashion that any person of ordinary intelligence can at once, and without examining any deed of any kind, ascertain who stands as owner of the property (which means that his title is perfect), and what debts or other incumbrances exist. In Prussia all transfers are made by word of mouth, without any deed or conveyance. The simplest way is to have both parties to appear before the registrar, and declare their contract, and the purchaser is then entered as owner; 9 Jurid. Rev. 155. For a detailed account of the system of registration of title in Central Europe, see 2 Jour. Com. Leg. 112 (June, 1897).

In the United States the subject of registration of land titles has been considered in many of the states. In New York city the accumulation of record books has become so great in the registry of deeds that searches of title can no longer be carried on by private persons. In that state an attempt was made to simplify and classify these records, by adopting what is known as a block system of registration by which deeds and other instruments are classified and indexed according to the location of the property. While this is a partial relief, it by no means remedies the evils due to a lengthening chain of title, where no part is stronger than its weakest link; Yeakle, Torrens System 215. See Rep. Am. Bar Assn. (1890) 265.

With some modifications, in order to obviate the constitutional questions which might arise under it in this country, the Torrens system was recently adopted in California, Illinois, and Ohio, but in the last two states it has been adjudged unconstitutional, in that it attempts to confer judicial power upon the registration officer; 47 N. E. Rep. (Ohio) 551; 185 Ill. 527; 29 Chic. Leg. N. 93.

In 1897 Illinois passed an act to remedy these defects in the statute, and California passed an amendatory act to the effect that the original act shall be liberally construed by the court. Massachusetts indicated a disposition favorable to this system by providing for the appointment of a committee to draft and prepare an act and report to the next legislature.

See, generally, 85 Am. L. Reg. 605; 36 *id.* 111; 11 Harv. L. Rev. 301; 4 *id.* 271; 6 *id.* 410; Rep. Am. Bar Assn. (1890) 265; Yeakle, Torrens System; Duffy & Eggleston, Transfer of Land Act, 1890; 11 Law Quart. 357; TORRENS SYSTEM.

LAND TRANSFER ACT. See LAND TITLE AND TRANSFER.

LAND WAITER. In English Law. A custom-house officer who superintends the landing of goods, and who examines, measures, tastes, or weighs them and takes account of it. They are also sometimes required to superintend the shipment of goods where drawbacks are allowed, and to certify the shipping of them on the debentures. They are sometimes called Coast Waiters or Landing Waiters.

LAND WARRANT. A negotiable government certificate entitling its holder to be put in possession of a designated quantity of public land, under a land grant or other appropriation of land by congress. The possession of a warrant at the land office is sufficient authority to make loca-

tions under it, and letters of attorney are unnecessary; 4 Pet. 333. The locator of a warrant undertakes himself to find waste and unappropriated land, and his patent issues under his information to the government and at his own risk; he cannot be considered as a purchaser without notice; 5 Cra. 234. A power of attorney given by the holder of a land warrant from the general court authorities, the attorney to locate the land for his own sole use and benefit, and to sell the same and receive payment therefor, is manifestly designed to transfer the interest of the holder of the warrant in violation of the act of congress in that respect, and is void; 8 Chand. 189. Evidence of the payment of the purchase money due the state of Pennsylvania on a land warrant clothes the person paying it with the ownership of the warrant and with the right to maintain ejectment for the land; 152 U. S. 398. Land warrants are not to be regarded as real estate in a probate settlement; 44 Me. 57. See LANDS, PUBLIC; LAND PATENT.

The evidence in writing which the state, on good consideration, gives that the person therein named (the warrantee) is entitled to the quantity of land specified. Anderson; 6 Yerg. 205.

The issue of the warrant and the rights of the warrantee are regulated by statute. The application marks the inception of the title, and prevails against a later settler with notice; but not so as to a warrant and survey which differ from the application. *Id.*; 7 Pa. 75. Presumption of abandonment from neglect to return a warrant is rebutted by possession in the warrantee. *Id.*; 53 Pa. 427. A warrant descriptive of the land confers title from date, if followed up with diligence in obtaining a survey. *Id.*; 27 Pa. 9.

The first survey, under a military land-warrant, in Virginia, gave the prior equity. The survey is the act of appropriation. The certificate of survey was sufficient evidence that the warrant was in the hands of the surveyor. 5 Cra. (U. S.) 233.

LANDBOC. A charter or deed whereby lands or tenements were given under early English law. Cow.; Moz. & W. See BOCLAND.

Occasionally it is said a bishop or abbot in support of claims of the highest jurisdictional powers "would rely on the vague large words of some Anglo-Saxon land book. But to do this was to make a false move; the king's lawyers were not astute paleographers or diplomatists, but any charter couched in terms sufficiently loose to pass for one moment as belonging to the age before the conquest could be met by the doctrine that the king was not to be deprived of his rights by 'obscure and general words.'" 1 Poll. & Maitl. 571.

LANDEA. In Old English Law. A ditch to drain marshy land. Spel. Gloss.; Du Cange.

LANDED. As used in a revenue act levying tolls on goods, the clear meaning and purport is "substantially imported," and stones shot from boats to the shore below high-water mark, there to remain until shipped for exportation, were not landed. L. R. 4 Ex. 260.

Timber, floated into a salt water creek, where the tide ebbs and flows, leaving the ends resting in mud at low water and prevented from floating away at high water by booms, is landed; 8 Cra. 110.

When merchandise is sent on shore, and afterwards being in the ship's boat for the purpose of being re-shipped, it is violently seized and detained, either by the orders of a sovereign or by thieves, it is not *safely landed*, under an insurance on the goods, until the same should be discharged and safely landed; 6 Mass. 197, 204.

LANDED ESTATE OR PROPERTY. A colloquial or popular phrase to denote real property (*q. v.*). Landed estate ordinarily means an interest in and pertaining to lands. 10 La. Ann. 676. In a tax law it "clearly embraces not only the

land, but all houses, fixtures, and improvements of every kind thereon, and all machinery, neat cattle, horses, and mules, when attached to and used on a plantation or farm." *Id.*

A person holding such an estate is termed a landed proprietor, and it is immaterial whether the lands are improved or not; 10 La. Ann. 676. A devise of "all my landed property" carries the fee; 1 N. H. 163; and so does "my landed estate"; 12 Wend. 602; but a devise of "all my landed estate," followed by a particular description of tracts devised, does not include a lot not enumerated, which descends to the heir at law, though excluded from all testator's estate with a shilling legacy; 2 McCord, Ch. 214, 264.

Landed securities are mortgages or other incumbrances affecting land, and this is what must be implied from the direction in a will to lay out a fund in some real security; 3 Atk. 805, 808.

LANDED ESTATES COURT. In English Law. Tribunals established by statute for the purpose of disposing more promptly and easily than could be done through the ordinary judicial machinery, of incumbered real estate. These courts were first established in Ireland by the act of 11 & 12 Vict. c. 48, which being defective was followed by 12 & 13 Vict. c. 77. The purpose of these was to enable the owner, or a lessee for any less than 63 years unexpired, of land subject to incumbrance, to apply to commissioners who constituted a court of record to direct a sale. This court was called the Incumbered Estates Court. A new tribunal called the Landed Estates Court was created by 21 & 22 Vict. c. 72, which abolished the former court and established a permanent tribunal. It is said that these statutes facilitated a great revolution in the tenure of land in Ireland, supplying the means by which a great part of the soil passed rapidly from cottier tenants and an embarrassed and non-resident gentry to capitalist farmers and to landlords who cultivated the soil themselves. The result was agricultural prosperity, but great hardship to the tenants, upon whom in Ireland rested the burden of permanent improvements which elsewhere would be borne by the landlord. The sales under the Landed Estates Act deprived the tenants of opportunity to make claim for compensation in the adjustment of rent. Demands for increased rent under penalty of eviction compelled small farmers to emigrate, move to the towns, or remain as servants on their old farms. The acts of retaliation for these changes led to the passage of the Irish Land Act of 1870, followed by that of 1881. Under the latter the tenant farmers obtained very unexampled privileges, and a new court was created for fixing rent. See Int. Cyc., tit. Incumbered Estates Court, and authorities there cited.

A similar court was established for West Indian estates by 17 & 18 Vict. c. 117, the sittings of which were held at Westminster.

LANDEFICUS, LANDGAGENE. The lord of the soil; landlord (*q. v.*).

LANDEGANDMAN. An inferior tenant of a manor. Spel. Gloss.

LANDGRAVE. In Germany, in the middle ages a *graf* or count entrusted with special judicial functions, extending over a large extent of territory; later, the title of sovereign princes of the empire who inherited certain estates called *land-gravates*, of which they were invested by the emperor. Cent. Dict.; Lond. Encyc.

LANDHLAFORD. A proprietor of land; lord of the soil. Anc. Inst. Eng. See LANDEFICUS. See LAND AGENT.

LANDIMERS. Measures of land. Cow.

In Scotch Law. Measurers of land. Skene.

LANDING. A place for loading or unloading boats, but not a harbor for them. 74 Pa. 373.

LANDING PLACE. A place laid out by a town as a common landing place and used as such, but not designated as for the particular benefit of the town, is a public landing place. It is not, however, a town-way and liable to be discontinued as such by the town. If a public landing place is no longer of use the power to discontinue it is in the legislature; 2 Pick. 44.

A place on a river or other navigable water for lading and unlading goods, or for the reception and delivery of passengers. The terminus of a road on a river or other navigable water, for the use of travelers, and the loading and unloading of goods. Anderson; 1 Strobh. 111. Whether it is public or private, depends on the character of the road which leads to it. *Id.*; 1 Strobh. 111. Either the bank or wharf to from which persons or things may go from or to some vessel in the contiguous water; or the yard or open place used for deposit and convenient communication between the land and the water. *Id.*; 15 Rich. L. 310. A road to it is essential to make it public, unless where it may be used only in connection with transportation by water. Obstructing the road one hundred yards from the landing is not obstructing the landing itself. *Id.*; 15 Rich. L. 310.

The public use of the land of an individual, adjoining navigable waters, as a landing place, for a period of twenty years, with the knowledge of the owner, will not confer a right, nor raise a presumption of a dedication; 20 Wend. 111; 22 *id.* 425, 559; 1 Greenl. 111. When a highway is extended to navigable waters, the riparian owner has no exclusive right of landing; 19 Barb. 204.

Under authority to regulate landings and watering places, commissioners of highways have no right to lay out and establish a new landing place; 17 Wend. 9; but when a road has been laid out and used as a highway to a public landing place for twenty years prior to March 21, 1797, but not sufficiently described, they may ascertain, describe, and enter of record such road, if it was constantly worked and used for six years next preceding; *id.* The selectmen of a town have no authority to lay out a public landing; 1 Greenl. 111.

LANDIRECTA. Rights charged upon land. Toml. See TRINODA NECESSITAS.

LANDLOCKED. Wholly surrounded by land of some other person or persons, as when the owner of a close surrounded by his own land grants the land and reserves the close. L. R. 13 Ch. Div. 798. In that case it was held that the implied right to a way of necessity operated by way of a regrant from the grantor of the land, and was limited by the necessity which created it; it was not a way of necessity for all purposes, but only such as the close was used for in the condition it happened to be at the time of the grant. *Semble*, the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land; *id.*

LANDLORD. The lord or proprietor of land, who, under the feudal system, retained the dominion or ultimate property of the feud, or fee of the land; while his grantee, who had only the possession and use of the land, was styled the feudatory, or vassal, which was only another name for the tenant or holder of it. In the popular meaning of the word, however, it is applied to a person who owns lands or tenements which he rents out to others.

LANDLORD AND TENANT. A term used to denote the relation which subsists by virtue of a contract, express or implied, between two or more persons, for the possession or occupation of lands or tenements either for a definite period, from year to year, for life, or at will.

When this relation is created by an express contract, the instrument made use of for the purpose is called a lease. See LEASE. But it may also arise by necessary implication from the circumstances of the case and the relative position of the parties to each other; for the law will imply its

existence in many cases where there is an ownership of land on the one hand and an occupation of it by permission on the other; and in such cases it will be presumed that the occupant intends to compensate the owner for the use of the premises; 4 Pet. 84; 39 Ill. 578; 60 N. Y. 102. In an action for possession of land and damages for holding over after expiration of a term, proof that plaintiff was owner, that defendant paid rent to him, and that he was duly notified to surrender possession, establishes the relation of landlord and tenant; 3 Ind. App. 207. A tenancy is created by the occupation or temporary possession of land, the title to which is in another; 34 Ill. App. 357.

The intention to create. This relation may be inferred from a variety of circumstances; but the most obvious acknowledgment of its existence is the payment of rent; and this principle applies even after the expiration of a lease for a definite term of years; for if a tenant continues to hold over, after his term has run out, the landlord may, if he chooses, consider him a tenant, and he is, in fact, understood to do so, unless he proceeds to eject him at once. If the landlord suffers him to remain, and receives rent from him, or by any other act acknowledges him still as tenant, a new tenancy springs up, usually from year to year, regulated by the same covenants and stipulations entered into between the parties at the creation of the original term in so far as they are applicable to the altered nature of the tenancy; 15 Johns. 505; 4 M'Cord 59; 2 C. & P. 848; 43 Ind. 212; 43 Md. 446; 42 Cal. 316.

The payment of money, however, is only a *prima facie* acknowledgment of the existence of a tenancy; for if it does not appear to have been paid as rent, but has been paid by mistake or stands upon some other consideration, it will not be evidence of a subsisting tenancy; 4 Bingh. 91; 3 B. & C. 418; 4 M. & G. 143. Neither does a mere participation in the profits of land, where the owner is not excluded from possession, nor the letting of land upon shares, unless the occupant expressly agrees to pay a certain part of the crop as rent, in either case amount to a tenancy; 1 Gill & J. 266; 3 Zab. 390; 2 Rawle 11; 42 Vt. 94; 60 N. Y. 221; 21 Ill. 200. The relation of landlord and tenant did not exist where the occupancy was simply by military force during the war of the rebellion; 23 Ct. Cls. 188.

But the relation of landlord and tenant will not be implied when the acts and conduct of the parties are inconsistent with its existence; 142 U. S. 896; nor will it be inferred from the mere occupation of land, if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause; as, for instance, between a vendor and vendee of land, where the purchaser remains in possession after the agreement to purchase falls through. For the possession in that case was evidently taken with the understanding of both parties that the occupant should be owner, and not tenant; and the other party cannot without his consent convert him into a tenant, so as to charge him with rent; Wood. L. & T. 12; 6 Johns. 46; 21 Me. 525; 8 M. & W. 118; 10 Cush. 259; 16 Vt. 257; 11 N. H. 148; 60 Barb. 463; 46 Me. 456; 12 B. Monr. 504; 16 Pet. 25; 17 Ind. 509; Under such a contract the fact that a note given for the first instalment recites that it is given in part payment for rent, does not imply that in default of payment at maturity the relation of landlord and tenant becomes substituted for it; 54 Ark. 16. Where one entered on land under a bond for title, proof of declarations that he had agreed to pay rent is not evidence of abandonment, when he subsequently refused to surrender the bond for his notes, as a condition to renting the premises for another year; 112 N. C. 27. Where, by the terms of a trust deed, the grantor sold and delivered the possession to the trustee, and the latter leased to the grantor at a given rate until sale thereof, the grantor binding himself to surrender possession within ten days of

that sale, it was held that the instrument created the relation of landlord and tenant; 45 Mo. App. 339. But see 75 Cal. 342.

The same principle applies to a mortgagor and mortgagee, as well as to that of a mortgagor and an assignee of the mortgage; for no privity of the estate exists in either case; and, as a general rule, a tenancy by implication can never arise under a party who has not the legal estate of the premises in question; 2 M. & R. 308; 6 Ad. & E. 265; Tayl. Landl. & T. § 25; 16 Vt. 371.

Where mortgagees gave notice of the existence of the mortgage to the tenant of the mortgagor, and required him to pay them the rent thereafter, and the tenant remained in possession after the receipt of the notice, these circumstances alone were not sufficient to support an inference of an agreement that he should become tenant to the mortgagees; 2 Q. B. 484.

The question whether a transaction is a sale on instalments, with a pledge or mortgage to secure purchase money, or a tenancy, is one which frequently arises under the multiplicity of sales on instalments which are now made of both real and personal property. As, where real estate was mortgaged for a sum payable in instalments, with interest, and there was a provision that "the mortgagees lease to the mortgagor the said lands," the rent to be paid precisely as to amounts and times as was appointed for payment of the money secured, and to be in satisfaction thereof, with no clause authorizing distress or possession by the mortgagor until default, and the instrument was not executed by the mortgagees, it was held not to create the relation of landlord and tenant; 18 Can. S. C. R. 483. See SALE.

The relation of landlord and tenant has been held to exist, where a ranch was let, by a written covenant for a term of years, for a share of the produce, with provision for the sale of stock and produce, and division of profits; 96 Cal. 95; also under an agreement between the owner of stone quarry and another person that the latter shall work the quarry, sell the stone, and pay one-fifth of the proceeds to the former; 1 Misc. Rep. 240; 69 Hun 88; where a husband and wife live separately and he is in possession of her land with her knowledge; 38 Neb. 756; under a contract for a number of years at a certain rental per year, provided that all crops that may be made on said land are bound for said rent; 113 N. C. 444; where an occupant of land who without dissent hears the owner say that he would be considered as a tenant for a year at a specified rental unless he vacated immediately; 50 Mo. App. 80; where one had purchased land under a power of sale in a mortgage, which provided that the completion of the sale shall entitle the purchaser to immediate possession of the premises, and any holding of the same thereafter should be as tenant; 36 S. C. 274. The relation of landlord and tenant exists, so as to authorize a forcible detainer against a tenant in possession, whose lease was not enforceable because the premises were leased knowingly for immoral purposes; 25 S. W. Rep. (Tex.) 312. So where mortgagees of a stock of goods in a leased store building took possession of the goods therein, by permission of the mortgagors, and used the building to display and sell the goods, and kept the usual accounts of a retail store, they took possession of and occupied the building as tenants of its owner, and not as licensees of the mortgagors; 34 Atl. Rep. (N. J.) 938.

But a riparian owner holding the lease of a water-right of another riparian proprietor is not a tenant; 70 Cal. 103. Nor does the relation exist where a father deeds lands in fee-simple to his son, who is to give the father one-third of his crops until the latter should be in better financial condition, the son meanwhile to go ahead and improve the land as his own; 136 Ind. 349. Where the owner of a farm rented a house for one year for the use of his tenant who farmed on shares, and at the end of his term held over for a few weeks and then rented the farm under a new lease from the grantee,

the latter was held not liable for the rent of the tenant-house for the new year; 84 Ill. App. 306. Occupation of lands by a person without recognizing the owner as his landlord, or any agreement to hold under and in subordination to him, is merely a trespass and does not create the relation of landlord and tenant; 21 Nev. 65. One in possession and use of premises under an agreement to keep off trespassers is practically a tenant; 79 Mich. 86. Where the crop growing on leased premises was sold under execution, the purchaser, who was also assignee of the judgment for rent under which the crop was sold, did not become a tenant of the lessor and could go upon the land to harvest the crop without incurring any liability to the lessor for the use of the land while the crop was ripening; 43 Kan. 216. One who rented from a mere occupant (the title being in a third person), could recover possession against the lessor who had entered upon the premises under proceedings for forcible entry and detainer; 8 Houst. 507.

Where a husband leased his wife's land for one year, with the option to the tenant for a further term of four years without authority from her, the receipt by the wife of the share of the farm products reserved by the lease for the first year did not operate by way of estoppel to create a five-years' term, not being an assent in writing as required by the statute of frauds; 30 Atl. Rep. (N. J.) 619.

The possessor of real estate under an unrecorded lease has no rights as against an attaching creditor; 45 La. Ann. 853. One who takes a secret lease from a third party without the knowledge of his landlord will not thereby change his possession; 33 W. Va. 236.

One who, when applying to lease a building, pays one month's rent which is returned to him upon the termination of negotiations for said rent without any lease being signed, has no rights in the premises; 143 Ill. 192.

A tenant who rents his half of the premises to his co-tenant is his landlord and entitled to a preference lien on the tenant's goods for his rent; 26 S. W. Rep. (Tex.) 486.

A tenant for life may lease his estate for the term of his life, and so retain his landlord's rights, on the lessee's default in an annual payment, to sue to remove him as a tenant holding over, and to recover the rent due; 90 Ga. 482.

Generally, the rights and obligations of the parties will be considered as having commenced from the date of the lease, if there be one, and no other time for its commencement has been agreed upon; or, if there be no date, then from the delivery of the papers. If, however, there be no writings, it will take effect from the day the tenant entered into possession, and not with reference to any particular quarter-day; 4 Johns. 280; 15 Wend. 656; 3 Camp. 510; Tayl. Landl. & T. 135 (11th ed.). And these rights and duties attach to each of the parties, not only in respect to each other, but also with reference to other persons who are strangers to the contract. The landlord retains certain rights over the property, although he has parted with its possession, while the tenant assumes obligations with respect to it which continue so long as he is invested with that character.

After the making of a lease, the right of possession, in legal contemplation, remains in the landlord until the contract is consummated by the entry of the lessee. When the tenant enters, this right of possession changes, and he draws to himself all the rights incident to possession. Where in a store building the lofts above were unconnected with the store and the access to them was by a separate door, the delivery of the store key with the continued use and occupation of the store was not a symbolic delivery of the lofts above, the separate keys of the door leading to them not being delivered; 3 App. Div. N. Y. 511. The landlord's rights in the premises during the term of the lease are confined to those expressly or impliedly derived from the contract of lease and to the protection

of his reversionary interest. And he would have no right, in the nature of an easement, to use a sewer under the premises leased, in such manner as to make the latter untenable; 147 N. Y. 248. He may maintain actions for such injuries as would, in the ordinary course of things, continue to affect his interest after the determination of the lease. But such injuries must be of a character permanently to affect the inheritance; such as breaking the windows of a house, cutting timber, or damming up a rivulet, whereby the timber on the estate becomes rotten; Woodf. L. & T. 973; 11 Mass. 519; 1 M. & S. 234; 3 Me. 6; 5 Duer 494; 26 How. Pr. 103.

The landlord usually reserves the right to go upon the premises peaceably, for the purpose of ascertaining whether any waste or injury has been committed by the tenant or other persons, first giving notice of his intention. But he has no such right unless he reserves it in the lease. He may also use all ways appurtenant thereto, and peaceably enter the premises to demand rent, to make such repairs as are necessary to prevent waste, or to remove an obstruction; 1 B. & C. 8; 7 Pick. 76; 5 Harr. 378. The entry of a landlord into demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent and not to his entire exclusion; 151 Pa. 101. But if the rent is payable in hay or other produce, to be delivered to him from the farm, he is not entitled to go upon the land and take it, until it is delivered to him by the tenant, or until after it has been severed and set apart for his use; 9 Me. 137; 5 Blackf. 317.

Where the tenant abandoned the land, and executed a bill of sale of the crops, and the landlord entered before the delivery of the bill of sale, the latter passed no title as against the landlord, whose entry was held justified by the abandonment; 1 Marvel, Del.

The landlord's responsibilities in respect to possession, also, are suspended as soon as the tenant commences his occupation; 4 Term 318; 2 Sandf. 301; 2 Mo. App. 66. But if a stranger receive injuries from the ruinous state of the premises at the time of the demise, or from any fault in their construction, or from any nuisance thereon, even though it be created by a tenant's ordinary use of the premises, the landlord remains liable; 43 Barb. 482; L. R. 2 C. P. 311; 116 Mass. 67; 4 Hun 24; 20 Pa. 387; 2 Colo. App. 534; and if the landlord has undertaken to keep the premises in repair, and the injury be occasioned by his neglect to keep up the repairs, or if he renew the lease with a nuisance upon it, he will be likewise liable; 2 H. Bla. 350; 1 Ad. & E. 822; 67 Ill. 47. See 65 Hun 625. The landlord may be liable for not disclosing a concealed source of danger not discoverable by the tenant, if he not only knows the source of danger but also knows, or common experience shows, that it is dangerous; 147 Mass. 471. In an action by lessee for breach of covenant in a lease to repair, the measure of damages is the difference between the rent the lessee agreed to pay and the rental value of the premises without the repairs having been made; 76 Md. 409.

The principal obligation on the part of the landlord, which is, in fact, always to be implied from the operative words of the lease, but is also usually inserted as a distinct covenant, is that the tenant shall enjoy the quiet possession of the premises,—which means, substantially, that he shall not be turned out of possession of the whole or any material part of the premises by one having a title paramount to that of landlord, or that the landlord shall not himself disturb or render his occupation uncomfortable by the erection of a nuisance on or near the premises, which the law holds tantamount to an eviction; Jack. & Gr. L. & T. § 935; 8 Co. 80 b; 13 N. Y. 151; 5 Day 283; 29 Md. 35; 10 Gray 253; 3 Duer 464; 6 Dowl. & R. 349. But express covenants for quiet enjoyment are framed usually only against eviction by a paramount title and against the lessor, his

heirs, and those claiming under them; implied covenants have a similar effect. *So that if the tenant be ousted by a stranger, that is, by one having no title, or if the molestation proceeds from the acts of a third person, the landlord is in neither case responsible for it; 1 Term 671; 5 Hill, N. Y. 599; 13 East 72; 25 Barb. 594; Tayl. Landl. & T. § 304. See 160 Mass. 421.

Another obligation which the law imposes upon the landlord, in the absence of any express stipulation in the lease, is the payment of all arrears of ground-rent, or interest upon mortgages to which the property leased may be subject. The tenant of property subject to ground-rent is not personally liable unless by express contract in writing he has assumed payment of it; 36 Atl. Rep. (Pa.) 923. The same rule applies as regards all taxes chargeable on the premises, though, as regards these, statutes, both in England and in almost all the United States, have been passed expressly imposing the duty of paying them on the landlord. Sometimes covenants to that effect are inserted in the lease. In general, every landlord is bound to protect his immediate tenant against all paramount claims; and if a tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payment which ought, as between himself and his landlord, to have been made by the latter, he may call upon the landlord to reimburse him, or he may set off such payment against the rent due or to become due; 3 B. & Ald. 647; 3 M. & W. 312; 19 Mo. 501.

There is no implied warranty on the part of the landlord that the premises are safe or reasonably fit for habitation, for the purpose for which they are intended; 25 Wend. 669; 71 Pa. 383; 3 Gray 323; 48 Me. 316; 147 Mass. 471; 70 Tex. 727; 147 U. S. 413 (but see 3 Rob. La. 53). In the absence of fraud or deceit the landlord is not liable for damages suffered by the lessee because of the unfitness of the premises; 65 Vt. 478; and a railroad company letting a house on a mountain side where snow-slides sometimes occurred, was held not bound to notify the tenant of the danger, although the company knew of it, but the tenant did not and had never lived in a region where snow-slides occurred, and, in the absence of deceit or misrepresentation, the company was not liable for injuries to the tenant or death of members of her family, by the destruction of the house by snow-slide; 147 U. S. 413; but where a building is let to different tenants, the landlord is charged with the duty of keeping the halls and those portions of the building which are for the common use of the tenants in safe condition, and properly furnished with light at night; 84 Atl. Rep. (N. J.) 886. So the landlord is charged with the duty of guarding an elevator shaft for the protection of persons properly in and about the premises, if he rents the building to different tenants; 13 Misc. Rep. 496; or retains control of a portion of the premises himself; 40 Pac. Rep. (Cal.) 950; and where the premises were let with a nuisance on them, which was the cause of an injury to a third person, the owner was liable; 81 Pac. Rep. (Col.) 507; 64 Hun 179. So the owner is liable to one injured by the falling of a fire wall and cornice when the building was leased to several tenants, the portions falling not being in the control of any one of them and there being no agreement for repairs by the tenants; 13 S. W. Rep. (Tex.) 953. But where the owner of an apartment house failed to light the hall in which were two adjacent doors, one opening on the stairs and the other into a water-closet used by all the occupants of the house, and a visitor opened the wrong door, and fell downstairs, it was held that the owner was not negligent in failing to light the hall and to keep the stair door locked; 131 N. Y. 674. And the owner of an apartment house was held not liable for injuries, caused by defective steps, received by a visitor going from a wake held in the house to which she had neither an express invita-

tion nor one by implication as a relative or friend of the deceased; 156 Mass. 475; nor was a landlord liable for injuries received by a third person by falling into a coal-hole where there was no fault in its construction, and it was not out of repair; 17 R. I. 137.

Subject to such expressions as those indicated above, it has been the rule that the occupant and not the owner of premises is liable for injuries caused by failure to keep them in repair; 156 Mass. 34; and accordingly, the landlord is not liable to third persons, rightfully upon the premises, for injuries caused by the defective condition thereof unless charged with notice, or by reasonable diligence he could have acquired knowledge; 37 Ill. App. 160; 44 *id.* 105; whether such third persons be in a hotel kept by the tenant; 82 Wis. 839; 156 Mass. 329; or persons visiting the tenant socially; 66 Hun 633; or servants of the tenant; 3 Wash. 723; 156 Mass. 511; but where the landlord is in control of machinery within the leased building and furnishes the power for it, and is negligent in that regard, an employee of the tenant is entitled to recover; 154 Mass. 539. See APARTMENT; FLAT.

The English court of appeal has recently laid down two rules. One is "that the landlord of a house let on a weekly tenancy is under no liability to the tenant to let or to maintain it in good repair." The other is, "that such landlord is not responsible to a person who is in the house on the tenant's business for injuries caused by a structural defect in the premises which existed at the time of the letting." The landlord may be held liable for an injury to a passer-by due to a defect which dates from the time the house was let; [1894] 1 Q. B. 164; and he is liable to a stranger on the highway for injuries caused by a defect in a coalplate, which was not proved to have existed at the beginning of the tenancy; 57 L. J. Q. B. 507; but the ground of this decision has been questioned; 55 Alb. L. J. 27.

The landlord is, in the absence of any express covenant or agreement, under no obligation to make any repairs; 42 Neb. 376; 153 Pa. 626; and a promise to repair, made by the landlord during the tenancy without any other consideration than the existence of such tenancy, is without consideration and cannot be enforced; 16 Misc. Rep. 528; but a provision in the lease by which the lessee is "to keep the fences in repair, the material for which to be furnished by the lessor" creates an express covenant of the lessee to repair, performance of which was not excused by the lessor's failure to furnish the material; 174 Pa. 588.

Where the lease provides that repairs shall be made at the tenant's expense "unless by special agreement the lessor undertakes to pay for the same," a subsequent agreement by lessor to pay for repairs is binding upon him; 29 S. W. Rep. (Tex.) 166. Where the lessor covenants to keep the outside of the building in good repair, he is obliged to put it in good repair where that is needed at the time of the execution of the lease; 33 Atl. Rep. (R. I.) 445. In Philadelphia, by custom, certain substantial repairs are to be made by the landlord; 7 Phila. 472; and it is said that a covenant by the lessor to repair includes the duty of rebuilding in case of fire; 53 Ill. App. 87. And it is not in the power of a tenant to make repairs at the expense of his landlord, unless there is a special agreement between them authorizing him to do so; for the tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent; 6 Cow. 475; 1 Ry. & M. 357; 7 M. & G. 576; 52 N. Y. 512; 51 Ill. 492; 33 Cal. 341; 1 Sandf. 321; 22 Ind. 114; 36 Vt. 40; 7 Ind. App. 561; 26 S. W. Rep. (Ark.) 193. Even if the premises have become uninhabitable by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him to expend the money so recovered in rebuilding, unless he has expressly engaged to do so; nor can he, in such an event, protect himself from the payment of rent during the unexpired balance of the term;

Jack. & Gr. L. & T. § 1049; 8 Paige 437; 1 Sim. 146; 1 E. & E. 474; 52 N. Y. 512; 81 Ill. 607; 85 Ala. 99. See 40 La. Ann. 264; 134 N. Y. 349; 3 Misc. Rep. 237.

It has been held that even where the owner of a building had recovered on a fire policy the full loss sustained by the burning of his building caused by the storage of cotton by his tenants in violation of their lease, he may sue and recover from the lessees for the damage to the building; 33 S. W. Rep. (Tenn.) 615.

On the part of the tenant, we may observe that on taking possession he is at once invested with all the rights incident to possession, and is entitled to the use of all privileges and easements appurtenant to the premises.

A tenant has an implied right to use appurtenances of a building, a portion of which is rented by him; 125 Mass. 287; 145 *id.* 1; 158 *id.* 577. Where the lease of a salesroom provided that the lessee should be allowed the use of the elevator to bring goods from an upper floor in an adjoining estate connecting with the elevator, and subsequent leases were made letting rooms in an upper part of the building to the same lessee, with "one-horse power only," and no lease gave the express right to use the elevator to carry goods from the basement to the sidewalk or *vice versa*, it was held that there was no evidence from which the right to such use could be implied, although the lessor permitted it; 47 N. E. Rep. (Mass.) 618. The tenant may also maintain an action against any person who disturbs his possession or trespasses upon the premises, though it be the landlord himself; 2 B. & Ad. 97; 1 Den. 91; 17 C. B. N. S. 678; 8 Cush. 119; 1 Ohio 251; 4 Wash. 749; 3 Tex. Civ. App. 483; he is entitled to an injunction to restrain a nuisance affecting health and comfort in the use of the premises; 46 La. Ann. 78; and may sue for damages to his crops by the overflow of his lands caused by the wrongful construction of a railroad bank; 55 Ill. App. 251; and even after the expiration of his term may recover for injuries done during the period of his tenancy; 2 Rolle, Abr. 551; Holt, N. P. C. 553. One who enters upon land by the permission, sufferance, or consent of the tenant, is at once charged by the law with the allegiance due from the tenant to his lessor; 99 N. C. 551. As occupant, he is also answerable for any neglect to repair highways, fences, or party-wall. He is liable for all injuries produced by the mismanagement of his servants, or by a nuisance kept upon the premises, or by an obstruction of the highway adjacent to them, or the like; for, as a general rule, where a man is in possession of property, he must so manage it that other persons shall not be injured thereby; 3 Q. B. 449; 2 Ld. Raym. 792; 22 N. Y. 355; 65 Ill. 160; 1 M. & W. 435; 51 Pa. 429; 3 Hun 708.

Another obligation which the law imposes upon every tenant, independent of any agreement, is to treat the premises in such a manner that no substantial injury shall be done to them, and so that they may revert to the landlord at the end of the term, unimpaired by any wilful or negligent conduct on his part. In the language of the books, he must keep the buildings wind-and-water-tight, and is bound to make fair and tenable repairs, such as the keeping of fences in order, or replacing doors and windows that are broken during his occupation. Except where the lease contains a special exemption from that duty, the tenant is responsible for any waste committed on the demised premises; 57 Ill. App. 659. If it is a furnished house, he must preserve the furniture, and leave it, with the linen, etc., clean and in good order; 5 C. & P. 239; 4 M. & G. 95; 12 M. & W. 327; 55 Md. 71.

Where he had a covenant to keep the premises in a cleanly and healthy condition, he was justified in abandoning them where the landlord constantly rendered them uninhabitable by filling up an open sewer under the premises after the tenant had cleaned it out; 147 N. Y. 248. A covenant to keep in repair imposed on the tenant is

ordinarily one to keep the premises in as good repair as they were when the lease was made; 36 S. W. Rep. (Mo.) 602.

But he is not bound to rebuild premises which have accidentally become ruinous during his occupation; nor is he answerable for ordinary wear and tear, nor for an accidental fire, nor to put a new roof on the building, nor to make what are usually called general or substantial repairs. Neither is he bound to do painting, white-washing, or papering, except so far as they may be necessary to preserve exposed timber from decay. In general he need do nothing which will make the inheritance better than he found it; 6 C. & P. 8; 12 Ad. E. 476; 1 Marsh. 567; 10 B. & C. 299; 2 Daly 140; 10 Q. B. 135; Jack. & Gr. L. & T. § 965.

There is no implied contract binding the lessee to restore buildings which have been destroyed by accident; 180 Pa. 409. Under a covenant by the lessee to deliver up the premises in as good condition as when the lease was made, unavoidable (or inevitable) accident excepted, the landlord is not liable for the repairs to a window broken by a storm; 43 Neb. 376; or for one broken by a stone kicked by a passing horse; 43 Ill. App. 360. If there be an express covenant by the tenant to repair, he must do so though the premises be destroyed by fire; 91 Pa. 88; *contra*, if there is no express covenant to repair; 94 U. S. 53. Where the lease required the tenant to "cash any repairs" on the leased premises to a specified amount, the landlord acquires no right to charge the tenant with repairs made by himself; 44 Neb. 818. Under a covenant that the tenant shall "make the necessary repairs," he is liable for the breaking of a plate glass in the building, though without his fault; 9 Misc. Rep. 326. Where an explosion occurred in a leased building, the landlord was not relieved of the burden of showing negligence of the lessee; 36 Atl. Rep. (Pa.) 923.

Where the tenant had covenanted to make the repairs but the landlord authorized his agent to do some repairing in the course of which, by reason of unskilful workmanship, the wall fell upon a tenant's goods, the landlord was liable; 28 S. W. Rep. (Tex.) 1017.

With respect to farming leases, a tenant is under a similar obligation to repair; but it differs from the general obligation in this, that it is confined to the dwelling-house which he occupies,—the burden of repairing and maintaining the out-buildings and other erections on the farm being sustained either by the landlord, or the tenant, in the absence of any express provision in the lease, by the particular custom of the country in which the farm is situated. He is always bound, however, to cultivate the farm in a good and husband-like manner, to keep the fences in repair, and to preserve the timber and ornamental trees in good condition; and for any violation of any of these duties he is liable to be proceeded against by the landlord for waste, whether the act of waste be committed by the tenant or, through his negligence, by a stranger; Co. Litt. 53; 1 Taunt. 198; 1 Denio 104; 55 Pa. 347; 70 Ill. 527; 94 U. S. 53; 5 Term 373. As to what constitutes waste, see WASTE.

The tenant's general obligation to repair also renders him responsible for any injury a stranger may sustain by his neglect to keep the premises in a safe condition; as, by not keeping the covers of his vaults sufficiently closed, so that a person walking in the street falls through, or is injured thereby. If he repairs or improves the building, he must guard against accident to the passers-by in the street, by erecting a suitable barricade, or stationing a person there to give notice of the danger; 109 Mass. 398; 22 N. Y. 366; 65 Barb. 214; L. R. 2 C. P. 311; L. R. 5 Q. B. 501. For any unreasonable obstruction which he places in the highway adjoining his premises, he may be indicted for causing a public nuisance, as well as rendered liable to an action for damages, at the suit of any individual injured. Nor may the tenant keep danger-

ous animals on the premises; 4 Den. 500; 15 Vt. 404. At common law, if a fire began in a dwelling-house and spread to neighboring buildings, the tenant of the house where the fire began was liable in damages to all whose property was injured. But by a statute of Queen Anne, amended by stat. 14 Geo. III. c. 78, this right of action has been taken away. The statute is generally re-enacted in the United States; *vide* Tayl. L. & T. § 196.

The tenant's *chief duty*, however, is the *payment of rent*, the amount of which is either fixed by the terms of the lease, or, in the absence of an express agreement, is such a reasonable compensation for the occupation of the premises as they are fairly worth. If there has been no particular agreement between the parties, the tenant pays rent only for the time he has had the beneficial enjoyment of the premises; but if he has entered into an express agreement to pay rent *during the term*, no casualty or injury to the premises by fire or otherwise, nothing, in fact, short of an eviction, will excuse him from such payment; Woodf. L. & T. 819; 4 Paige, Ch. 355; 1 H. & J. 42; 16 Mass. 240; 7 Gray 560; 10 M. & W. 321; 6 Phila. 457; 72 Pa. 685; 61 N. Y. 356; 80 Ill. 532; 4 Harr. & J. 564. See 1 App. D. C. 447; 8 Misc. Rep. 307. But this is not the law in South Carolina; 1 Bay 499; 4 McCord 447. But, if he has been deprived of the possession of the premises by the landlord, or by a third person, under a title paramount to that of the landlord, or if the latter annoys his tenant, or erects or causes the erection of such a nuisance upon or near the premises as renders the tenant's occupation so uncomfortable as to justify his removal, he is in either case discharged from the payment of rent; 4 N. Y. 217; 4 Rawle 339; Co. Litt. 148 b; 75 Ill. 536; 117 Mass. 262; 106 Mass. 201; 18 N. Y. 509; 63 Ill. 430; 2 Ired. Eq. 350; 17 C. B. 30. If, however, part only of the premises be recovered by paramount title, the rent is apportioned, and the tenant remains liable in proportion to the part from which he has not been evicted; Woodf. L. & T. 1115; 2 East 575; 39 Barb. 59; 1 Allen 489. See RENT. A tenant's liability for rent is not affected by condemnation of part of the demised premises, but it ceases where the estate in the entire premises is extinguished; 136 Ill. 37; 144 *id.* 537.

The obligation to pay rent may be *apportioned*; for, as rent is incident to the reversion, it will become payable to the assignees of the respective portions thereof whenever that reversion is severed by an act of the parties or of the law. But the tenant's consent is necessary for an apportionment when made by the landlord, unless the proportion of rent chargeable upon each portion of the land has been settled by the intervention of a jury; 22 Wend. 121; 5 B. & Ald. 876; 1 M. & G. 577; 6 Halst. 262; 22 Pick. 569. A tenant, however, cannot get rid of or apportion his rent by transferring the whole or a part of his lease; for if he assigns it, or underlets a portion of it, he still remains liable to his landlord for the whole; Cro. Eliz. 633; 24 Barb. 333. Instances of an apportionment by act of law occur where there is a descent of the reversion among a number of heirs, or upon a judicial sale of a portion of the premises; for in such cases the tenant will be bound to pay rent to each of the parties for the portion of the premises belonging to them respectively. So, if a man dies, leaving a widow, she will have a right to receive one-third of the rent, while the remaining two-thirds will be payable to his heirs; so, if a part of the demised premises be taken for public purposes, the tenant is entitled to an apportionment; Co. Litt. 148 a; 25 Wend. 456; 13 Ill. 625; 20 Mo. 24; 57 Pa. 271; 3 Whart. 357. At common law rent could not be apportioned as to time; 2 Ves. Sr. 672; 3 Watts 394. But various statutes, such as 11 Geo. II. c. 19, both in England and the United States, have mitigated the hardships resulting from an enforcement of this rule. See Tayl. L. & T. § 389; Mitch. R. P. 69.

A tenant is estopped to deny the validity

of his landlord's title; 8 U. S. App. 149; 38 W. Va. 607; 8 Misc. Rep. 268; 147 Ill. 269; 113 N. C. 410; 4 App. Div. N. Y. 523; 3 Okl. 223, 260; 16 So. Rep. (Ala.) 14; 69 Wis. 394; 107 Cal. 107; unless he first surrenders to him the possession; 98 *id.* 422. Under this rule one who goes into possession under the guardian of minor heirs cannot question their title; 62 N. W. Rep. (Mich.) 174; even after the expiration of the lease, the tenant is bound by the same rule, unless he surrenders possession or give notice that he will thereafter claim under another and valid title; 26 Or. 494; this applies to persons who have entered by the owner's permission, and while in possession never denied his title, and their assignees are likewise estopped; 8 Wash. 603. After the termination of the lease, the lessee may, without a surrender of possession, assert a claim to a superior title; 2 Tex. Civ. App. 441; but a tenant in possession under a lease, who afterwards obtains an outstanding title to an undivided interest in the premises, cannot sue the lessor for partition without first surrendering the possession to the lessor; 97 Ala. 414. Where a widow joined in a lease with heirs, who conveyed to the tenant, the latter was still estopped to deny the tenancy as to the widow and was liable to her for her share of the rents; 6 Misc. Rep. 413. A lessee who takes a lease from an adverse claimant to the title is estopped to deny the title of the latter when sued for rent; 158 Pa. 457. The tenant is not estopped from showing that the title under which he entered has expired or been extinguished by operation of law; 34 Fla. 610; 32 *id.* 304; or that the landlord has parted with his title; 24 Ore. 475; although one who enters under a tenant cannot deny the title of the landlord without surrendering possession, yet if he enters under a valid lease, he is not estopped from defending his possession under it, but the landlord is estopped in such a case from denying the right of the lessee to possession under a lease expressly conferring such a right; 107 Cal. 455; nor is the lessee estopped to deny the lessor's title where the land was public domain, not the subject of lease without right from the state; 30 S. W. Rep. (Tex.) 822.

The fact that by inadvertence or mistake the tenant paid rent to the landlord after his interest terminated does not constitute a continuance of the tenancy; 55 Mo. App. 662. Where there was a fraudulent agreement between the landlord and tenant to evade the homestead laws, it was held that a general rule did not apply, and that the tenant might set up and prove the fraudulent agreement in an action of ejectment by the landlord; 55 Kan. 259; so where the landlord has induced one to become his tenant by fraud or mistake the latter may contest the title of the former; 118 Mo. 286. A third person having brought goods upon the land by permission of the tenant, and not claiming possession, is not estopped from disputing the title of the landlord; [1893] 2 Q. B. 168.

One who is a tenant of the grantee by a dower right, and as such in possession of lands, will be, after the death of the doweress, a tenant at sufferance of the reversioners, and if he permits the lands to be sold for taxes, he cannot purchase them and set up the title against the reversioners without notice, but his purchase is to be considered a redemption in favor of the landlord; 19 So. Rep. (Miss.) 348.

These rights and liabilities are not confined to the immediate parties to the contract, but will be found to *attach to all persons* to whom the estate may be transferred, or who may succeed to the possession of the premises, either as landlords or tenants. This principle follows as a necessary consequence of that privity of estate which is incident to the relation of landlord and tenant. A landlord may not violate his tenant's rights by a sale of the property; neither can a tenant avoid his responsibilities by substituting another tenant in his stead without the landlord's consent. The purchaser of the property

becomes in one case the landlord, and is entitled to all the rights and remedies against the tenant or his assignee which the seller had; while in the other case the assignee of the lessee assumes all the liabilities of the latter, and is entitled to the same protection which he might claim from the assignee of the reversion; in the case of express covenants, the original lessee is not by the transfer discharged from his obligations; 24 Barb. 365; 19 N. Y. 68; 1 Ves. & B. Ch. 11; 4 Term 94; 17 Vt. 626; 2 W. & S. 556; 12 Miss. 43; 3 Misc. Rep. 95; 47 Mo. App. 45; 155 Pa. 38; 34 Pac. Rep. (Col.) 840. In case of implied covenants he is discharged if the landlord specially accept the assignee as his tenant; 9 Vt. 191; 3 Rep. 22; 1 Sm. L. Cas. *176; and the liability of the assignee may be at any time terminated by him, by a transfer of the estate assigned, even if the transfer be made to a pauper with express intent to evade liability; 3 Y. & C. 96; 9 Cow. 88; 9 Vt. 181. A tenant who accepts a lease from and attorns to one who succeeds to the ownership of the land, is estopped, in an action to recover possession, from setting up any defence under a lease from a former owner, under which he had entered; 167 Ill. 564, aff'g 68 Ill. App. 361. And it has been held that a tenant is under a legal obligation to pay rent to one to whom the lease is assigned by the landlord, without any formal act of attornment; 71 N. W. Rep. (Mich.) 836. A lessor who accepts rent from an assignee of the lease thereby waives a provision of the lease that it shall be void if assigned without the lessor's consent; 78 Hun 443.

The relation of landlord and tenant may be *terminated* in several ways. If it is a *tenancy for life*, it will of course terminate upon the decease of him upon whose life the lease depends; 6 Misc. Rep. 377; but if it be for life, or for a certain number of years, and depend upon some particular event, the happening of that event will determine the tenancy. So if it be for a certain number of years, independent of any contingency, it will expire at the last moment of the last day of the tenancy. See 55 N. J. L. 217; 76 Hun 67. And in all these cases depending upon the express conditions of the lease, no notice to quit will be necessary in order to dissolve the relation of the parties to each other; Co. Litt. 216; 9 Ad. & E. 879; 5 Johns. 128; 1 Pick. 43; 2 S. & R. 49; 18 Me. 264; 7 Halst. 99. A tenant after the expiration of his term becomes a trespasser, though his holding is in good faith under a color and reasonable claim of right; and the landlord without legal process may forcibly enter, therefore, and eject him; 16 R. I. 524; 17 *id.* 731; and by holding over after the expiration of the term, a tenant for years does not become a tenant for another year, unless the landlord so elects; 157 Ill. 90; if he holds over after a notice of increase of rent, the effect is to make him a tenant for another year upon the terms of the old lease with the single exception of the increased rent; 58 Ill. App. 238; and a tenant for one year, with the privilege of three, is bound for the latter if he elected to hold over; 2 Mo. App. 1047.

But a *tenancy from year to year, or at will*, can only be terminated on the part of the landlord by a *notice to quit*. This notice might at common law be by parol, but by statute in England and in most of the United States must now be in writing; 3 Burr. 1603; 2 Brewst. 528; it must be explicit, and require the tenant to remove from the premises; 2 Clark, Pa. 219; 2 Gray 335; Dougl. 175; 5 Ad. & E. 850; it must be served upon the tenant, and not upon an under tenant; it must run in the name of the landlord, and not of his agent; 10 Johns. 270. But personal service of the notice on the tenant is not absolutely essential, and it is sufficient if the notice be left at the tenant's usual residence with his wife or servant; 4 Tenn. 464; L. R. 5 H. L. 134; 103 Mass. 154; 44 Mo. 581. An estate at will must be mutual; if one party can terminate the lease at any time, so can the other; 83 Va. 547. Such a tenancy is terminated by the alienation of the prem-

ises, without notice to the tenant; 38 Atl. Rep. (Me.) 540. Whether a tenant from year to year is in any event bound to give notice to determine the tenancy seems doubtful. See the authorities collected in Bright, Pa. 463. At common law this notice was required to be one of half a year, ending with the period of the year at which the tenancy commenced; 1 W. Bl. 596; 7 Q. B. 638; 4 Bing. 362; and this rule prevails in Kentucky, Tennessee, North Carolina, Vermont, Illinois, and New Jersey as to tenancies from year to year; 1 Johns. 322; 23 Vt. 88; 4 Ired. 291; 8 Green, N. J. 181; 4 Kent 113; 6 Yerg. 481; 8 Cow. 13; 39 Ill. 878. In Delaware, Pennsylvania, South Carolina, New Hampshire, Massachusetts, and Michigan, three months' notice is required; Del. Rev. Code Ch. 120, § 4; 4 Fost. 219; 2 Rich. S. C. 346; 11 Pa. 473; 34 Id. 96; 113 Mass. 214; while the New York statutes provide for its termination by giving one month's notice wherever there is a tenancy at will or by sufferance, created by the tenant holding over after the term or otherwise; 1 R. S. 475, § 7; 3 Misc. Rep. 99.

In case of such a tendency, in default of notice, the landlord has no right of entry until the term granted has terminated by legal notice, and in default of such notice, the tenant may hold over; 8 Houst. 507. The subject is in general governed by statutory rules too numerous and complicated to set forth. Where a lease provides for the termination of a tenancy upon the tenant's ceasing to work for the landlord and the tenant voluntarily ceases so to work, no notice of the termination of the lease to the tenant is necessary; 8 U. S. App. 149.

The relation of landlord and tenant will also be dissolved when the tenant incurs a forfeiture of his lease by the breach of some covenant or condition therein contained. At common law a forfeiture was incurred if the tenant did any act which was inconsistent with his relation to his landlord; as if he impugned the title of his lessor by affirming by matter of record the fee to be in a stranger, claimed a greater estate than he was entitled to, or undertook to alienate the estate in fee; Co. Litt. 251 b, 252 a; 12 East 444. But these causes of forfeiture, founded upon strict feudal principles, have been generally abolished in the United States; and a forfeiture of a term of years now only occurs in consequence of a breach of some express stipulation contained in the lease, as for the commission of waste, non-payment of rent, or the like; 7 Paige, Ch. 350; 5 B. & C. 855; 22 Md. 122; 20 Ill. 125; 32 Mich. 315. In order to work a forfeiture for non-payment of rent, a demand must be made for the rent, though such demand may be in the form of a notice to quit; 35 Neb. 766; 140 U. S. 25. A delay of a few days in declaring a lease forfeited for non-payment of rent does not constitute a waiver of the right of forfeiture; 145 Ill. 238. A provision of a lease that failure of the lessee to make a payment when due should render the lease null and void, and not binding on either party, does not make the lease void, except at the option of the lessor; 159 Pa. 184. A forfeiture may be waived by an acceptance of, or distraining for, rent which became due after a breach committed by the tenant, or by giving a notice to quit, or by any other act which acknowledges the continuance of the tenancy; 8 Watts 51; 2 N. H. 163; 3 H. & M. 436; 1 M. & W. 408; 6 Wisc. 323; L. R. 7 Q. B. 344; 21 Wend. 537; 40 Mo. 449; 96 Cal. 95; 6 Misc. Rep. 408; and will be relieved against by the courts in all cases where it happened accidentally, or where the injury is capable of compensation, the damages on equitable principles being a mere matter of computation; 12 Ves. Ch. 475; 2 Price 208; 9 Mod. 22; Story, Eq. § 1314; 62 N. Y. 486; 44 Vt. 285; and it is always at the election of the lessor to avail himself of his right of re-entry for conditions broken or not as he pleases; 6 B. & C. 519; and *vide* 7 W. & S. 41; 88 Pa. 346; 12 Barb. 440; 5 Cush. 281; 29 Conn. 331; 1 Wall. 64. Another means of dissolving a tenancy is

by an operation of law, termed a *merger*,—which happens where a tenant purchases the fee of the reversion, or the fee descends to him as heir at law, the lease becoming thereby merged in the inheritance, the lesser estate being absorbed in the greater. To produce this result, however, it is necessary that the two estates should meet in the same person and in the same right; for if he who has the reversion in fee marries the tenant for years, or if a tenant makes the landlord his executor, the term of years is in neither case merged, because in either case he holds the fee for his own benefit, while the term of years is taken in one case for his wife's use, and in the other for the benefit of the estate he represents as executor; Woodf. L. & T. 1188; 12 N. Y. 526; Co. Litt. 288 b; 1 Washb. R. P. 354; 13 Pa. 16; 35 N. Y. 279. See 86 Tenn. 642. But the universal current of opinion now sets against the operation of the doctrine of merger wherever a result will be produced contrary to the intentions of the parties or prejudicial to the interests of third parties; 34 N. Y. 320; 4 Gray 385; 4 De G. M. & G. 474; 3 Hill 96; 4 Paige 403.

In addition to the several methods of putting an end to a tenancy already mentioned, we may add that it is, of course, competent for a tenant at any time to *surrender* his lease to the landlord; 117 Mass. 357; 16 Johns. 28; 19 Cal. 354; but a mere agreement to surrender a lease, is inoperative unless accompanied by the act; 41 Ill. App. 223. An express surrender can only be made by deed in England, since the Statute of Frauds, and this provision is in some of the states re-enacted; 8 Taunt. 270; 11 Wend. 616; 8 Allen 202; 8 Wisc. 141. But a surrender by operation of law is a case excepted out of the statute; as, for example, where, during the period of the old lease, a new one, inconsistent with it in its terms, is accepted, the old lease is at an end; 8 Johns. 394; 99 Mass. 18; Tayl. L. & T. 512; 117 Mass. 357; 53 Minn. 480. If the subject-matter of the lease *wholly* perishes; 26 N. Y. 498; 118 Mass. 125; 38 Cal. 259; or is required to be taken for public uses; 38 Mo. 143; 20 Pick. 159; 57 Pa. 271; 119 Mass. 28; 43 N. Y. 377; or the tenant disclaims to hold under his landlord, and therefore refuses to pay his rent, asserts the title to be in himself or unlawfully attorns to another, the tenancy is at an end, and the landlord may forthwith resume the possession; 3 Pet. 43; 4 Wend. 633; 21 Cal. 342; 8 Watts 55; 5 Dana 101; 23 Gratt. 332.

Where the tenant, by consent of his landlord, continues in possession after the expiration of his term, in the absence of a new agreement, the law will imply a tacit renewal of the former one; 41 Ill. App. 209; 88 Ga. 610; [1893] 1 Q. B. 736. See 49 Mo. App. 631; 38 W. Va. 607.

After the tenancy has ended, the right of possession reverts to the landlord, who may re-enter upon the premises if he can do so without violence. But if the tenant holds over and the landlord takes possession forcibly, so as to endanger a breach of the peace, he runs the risk of being punished criminally for a forcible entry (see FORCIBLE ENTRY AND DETAINER) as well as of suffering the consequences of an action of trespass; 121 Mass. 309; 59 Me. 568; 4 Am. Law Rev. 429; 1 M. & G. 644; 1 W. & S. 90. The landlord should, therefore, in all such cases, call in the law to his assistance, and receive possession at the hands of the sheriff.

The tenant, on his part, is bound quietly to yield up the possession of the entire premises; 148 Ill. 192. And for refusal to perform this duty he will be liable for rent; 51 N. Y. 509; 84 Ill. 62; 62 Me. 248; E. B. & E. 326.

If the tenant, after surrendering possession, resumed it under any agreement with his landlord or his agent, though made by the latter without authority, he is not liable for holding over; 1 App. Div. N. Y. 449; and where a tenant vacated a building and delivered up the key, leaving a press on the premises, which was used by

his employees, who had entered the building some days after without his knowledge, he did not hold over; 5 id. 124. Where the lessee holds over, he may be treated by the landlord at his option as a tenant or a trespasser; 15 Pa. Co. Ct. R. 248; 12 Misc. Rep. 348. The tenant cannot avoid his responsibility for the rent of another term by notice that he is going to quit, and then not doing it; 169 Pa. 460. Where the agent of the lessor failed to make an answer to the tenant's proposition to hold over as tenant by the month, he was not thereby relieved from the consequences of holding over; 168 Pa. 541. The burden is on the tenant to relieve himself from an action for unlawful detainer by showing the agreement for the renewal of the tenancy; 56 Mo. App. 440.

But where a tenant for years had planted a crop, after a decree foreclosing a mortgage on the leased land under which the land was sold before the crop matured, and the purchaser having notified the tenant that he would expect rent in money or in kind, the latter was held entitled to the crop; 62 N. W. Rep. (Neb.) 32. Upon the abandonment of a farm by a tenant before the end of the term, the possessory right in whatever property is on the farm, including harvested crops, reverts to the lessor; 9 Houst. 281.

The tenant has a reasonable right of egress and regress for the purpose of removing his goods and chattels; 2 Bla. Com. 14; 24 Me. 424; L. R. 5 C. P. 834. He may, also, in certain cases, take such estovers as are attached to the estate and the *emblems* or annual profits of the land after his tenancy is ended, as to which his rights are largely affected by local customs (see ESTOVERS; EMBLEMENTS); 86 Ala. 508; 56 Conn. 374; but a tenant for years is not entitled to them; 48 Mo. App. 430; nor where the landlord re-enters and takes possession because of the failure of the tenant to pay rent; 69 Hun 588; and, unless restricted by some stipulation to the contrary, may remove such *fixtures* as he has erected during his occupation for his comfort and convenience, particularly if for trade purposes. As between landlord and tenant, whatever is affixed to the land by the tenant for the purpose of trade, whether it be made of wood or brick, is removable at the end of the term; 142 U. S. 396; 139 N. Y. 432. See FIXTURES.

The ordinary common-law remedy by which a landlord proceeds to recover the possession of his premises is by an action of ejectment, and in these cases it is a general rule that the tenant is never permitted, for reasons of sound public policy, to controvert his landlord's title, or to set up against him a title acquired by himself during his tenancy which is hostile in its character to that which he acknowledged in accepting the demise; 3 B. & C. 413; 2 Denio 451; 3 Ad. L. & E. 188; 15 N. Y. 327; 61 Me. 590; 54 Pa. 196; 42 Md. 81; 72 N. C. 204; 18 Wall. 431; 183 Ind. 14. But to this rule there are some exceptions: of these the chief are cases where the landlord's interest has expired during the lease; 2 Zab. 261; Tayl. L. & T. § 708; or where he has sold and conveyed the land; 10 Md. 833; 50 Ill. 232; 99 Mass. 15; or where the tenant has been evicted by title paramount, and accepted a new lease under the real owner of the premises; 69 Pa. 316; 66 Me. 167; 32 Mich. 285.

But the slow and measured progress of the action of ejectment in most cases affords a very inadequate remedy to the landlord; and in order, therefore, to obviate the evils arising from its delays, the statutes of the different states provide a summary proceeding, by which a landlord may be speedily reinstated, upon short notice, in cases where a tenant abandons the premises before the end of the term without surrendering the lease, leaving rent in arrear, continues to hold over after the expiration of his term, or has become unable or unwilling to pay rent for the use of the premises; 22 Wend. 611; Tayl. L. & T. § 713.

See, further, on the subject of this article, Woodfall; Smith; Taylor; Arch-

bold; Comyns; Cootes; and Smith & Soden, on the Law of Landlord and Tenant; Platt on Leases; Washburn on Real Property, 5th ed. *292.

LANDLORD'S WARRANT. A warrant of distress. A written authority from a landlord to a constable or bailiff authorizing him to make a distress upon the tenant's goods and chattels in order to force the payment of rent or some covenant in a lease. See **DISTRESS**; **LANDLORD & TENANT**.

LANDMARKS. Objects or monuments fixing the boundary of an estate or piece of property. R. & L. Dict. See **MONUMENTS**.

LANDS. See **LAND**; **LANDS, PUBLIC**.

LANDS CLAUSES CONSOLIDATION ACTS. Important acts, beginning in 1845, and last amended by 32 & 33 Vict. c. 18, the object of which was to provide legislative clauses in a convenient form for incorporation, by reference in future special acts of parliament, for taking lands, with or without the consent of their owners, for the promotion of railways, and other public undertakings. Moz. & W.

These statutes or some designated part thereof are incorporated in all acts of parliament, authorizing public works which require the acquisition of land, and they correspond to the grant of the delegated right of eminent domain in legislative charters in the United States. The scope of these acts of parliament includes provision for the purchase of lands by agreement between the promoters of an undertaking of a public nature and the owners of the land required; and also for the acquisition of the land otherwise than by agreement, in which contingency the compensation to be paid is settled either by the verdict of a jury or by arbitrators. In the case of persons under disability or absent from England, provision is made for the valuation of their compensation. Forms of covenants are prescribed, and upon their execution the fee-simple of the lands is vested free of all terms for years and other qualifications; or in case of copyholds, the covenants must be enrolled on the court rolls, and must be thereafter enfranchised. Mortgages on the lands purchased may be redeemed and released of rent charges, and the surrender of leases may be procured upon such terms as may be agreed upon, or in default of agreement as may be settled by the verdict of a jury or by arbitration. The acts also authorize the sale of superfluous lands by the promoters, the original owner having the option to repurchase them, and next after him the nearest adjoining owners unless the land is built upon, suitable for building, or situated within a town. It is usually provided that the costs are borne by the promoters. See 2 Brett, Com. 661; **PROMOTER**.

LANDS, PUBLIC. Under the title public lands of the United States is comprised such land as is open to sale or other disposition under general laws. 145 U. S. 588; 92 id. 763; 10 Nev. 260. In a statute authorizing location of script, it does not include tidelands; 153 U. S. 273. Nor does the term include lands to which any claims or rights of others have attached; 145 id. 538.

GOVERNMENT OWNERSHIP. The public domain embraces lands known in the United States as "public lands," lying in certain states and territories known as "land states and territories," and was acquired by the government of the United States by treaty, conquest, cession by states or other nations, and purchase, and is disposed of under and by authority of the national government, when the Indian title thereto (which is one of possession merely) has been extinguished by treaty stipulations or otherwise.

The fee in unsold lands is either in the federal or state governments. The Indians have only a right of use, which, however, cannot be divested, except by purchase or war; 2 McLean 412.

They have the unquestionable right to the lands which they occupy until extinguished by a voluntary cession to the government; 92 U. S. 783; id. 760; while the claim of the government extends to the complete ultimate title, charged with the right of possession by the Indians, and to the exclusive power of acquiring that title of possession; 8 Wheat. 603; 6 Cra. 87; 17 Wall. 211; 95 U. S. 517.

The English possessions in America were not claimed by right of conquest, but by right of discovery. The discoveries were made by persons acting under the authority

of the government for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domain; 16 Pet. 409. See also 8 Wheat. 595. The United States hold the public lands within the new states by force of the deeds of cession and the statutes connected with them and not by any municipal sovereignty which it may be supposed they possess or have reserved by compact with the new states, for that particular purpose; 3 How. 224.

The interest of the United States in lands held by it within state boundaries is simply proprietary, the sovereignty residing within the state, and its rights differ from those of any ordinary land-holder in the state, only as provided in the constitution of the United States, and by the terms of the compact between the general and the state government at the time of the admission of the latter into the Union; 5 Minn. 223.

All lands in the territories not appropriated by competent authority before they were acquired are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times and in such modes and by such titles, as the government may deem most advantageous to the public; 20 How. 561.

The United States is the sole owner of the soil, and has entire and complete jurisdiction over it. Through congress, it provides the methods of disposition under grants, settlement laws, or sales, public or private; may prevent trespasses, and in all methods retain the entire control over it until sold or otherwise disposed of. Congress has the same power over it as over any other property belonging to the United States, and this power is vested in congress without any limitation; 4 McLean 517; 13 Wall. 92; 20 How. 558; 14 Pet. 526; 13 id. 436; and any change of political condition, as in a territory becoming a state, or change of boundary of a territory or state, in no wise affects the absolute and complete proprietary power of the national government over the public domain. It remains until the last acre is disposed of. It cannot be taxed by a state; 4 How. 169; nor can a state exercise any power or control over the public lands which may lie within its limits; 5 McLean 344; 14 Pet. 526; 4 How. 169; 6 McLean 517.

The control of the United States over their own property is independent of locality, and no state or territory can interfere with their control, enjoyment, or disposal of such property; nor are the contracts of the government with respect to subjects within its constitutional competency, local, or confined in their effect and operation strictly to the *situs* of the subjects to which they relate; 20 How. 558.

For the amount of the public lands and the manner in which it was acquired by the national government, see Donaldson's History of the Public Domain, p. 10; H. R. Misc. Docs. No. 45, part 4, 2d Sess. 47th Cong., vol. 10.

NATIONAL CONTROL AND DISPOSITION. The constitution of the United States (Article 4, section 3, par. 2) provides that: "The congress shall have the power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States," the word property in the above quotation meaning lands; 6 McLean 517. Under the authority thus conferred upon it, the congress has provided a complete system for the regulation and disposal of the public domain. In the early stages of the history of the government the public domain was put within the jurisdiction and control of the secretary of the treasury, but on March 3, 1849, congress created the home, now the interior department, and by section 3 of that law provided that "the secretary of the interior shall perform all the duties in relation to the general land office of supervision and appeal now discharged by the secretary of the treasury." Thereafter the general land office became and still continues to be a bureau in the interior department. The secretary of the

interior is now charged with the supervision of the public business relating to the public lands, including mines and pension and bounty lands. Rev. Stats. chaps. 2 and 3, pp. 74-78. See **LAND OFFICE**.

Under the supreme control which has been vested in it by the constitution, the congress has divided the public domain into various land districts, and has provided for the appointment of a surveyor general for the states and territories, and of certain deputy surveyors; U. S. Rev. Stat. §§ 2207-2233. It has also provided for the appointment of various registers and receivers, and the creation of what is known as local land offices in the various land districts. The duties of these officers is to receive applications to enter the public lands under the various land laws, and to hear contests concerning the same, with rights of appeal to the general land office and from thence to the secretary of the interior. See U. S. Rev. Stat. §§ 2234-2247. For the various land districts and their creation, see U. S. Rev. Stat. § 2248.

KINDS OF LAND AND METHODS OF ACQUIRING SAME. The public lands may be divided with respect to their character into, first, agricultural lands, which are acquired under the various laws, such as pre-emption, homestead, etc., at the price of \$1.25 per acre when they lie without, and \$2.50 per acre when they lie within, the limits of any grant made by congress in aid of the construction of a railroad; U. S. Rev. Stat. § 2357; 160 U. S. 136; second, mineral lands, which are sold at \$5.00 per acre, under which term we include lands containing placer deposits of minerals, which are sold at \$2.50 per acre; third, coal lands, which are sold at \$20.00 per acre when situated within 15 miles of any completed railroad, otherwise at \$10.00 per acre; fourth, desert lands, which are sold at \$1.25 per acre, provided they do not lie within the limits of a railroad grant; 160 U. S. 136; and fifth, saline lands, sold at \$1.25 per acre.

Various methods for the sale or other disposition of the public domain have been enacted from time to time, a very interesting history of which may be found in Donaldson's History of the Public Domain 196, 208, 676. The provisions of law which formerly existed relative to the acquisition of public lands by private entry and public sale and through the timber culture laws have been repealed; R. S. 1 Supp. pp. 682, 940. The methods of acquiring the agricultural lands of the United States are now, through the operation of the pre-emption law, superseded by the provisions of the amended homestead law and the desert land act.

Pre-emption. The provisions of the law formerly existing with relation to the acquisition of title under the pre-emption laws were repealed and superseded by the act of March 3, 1891; Rev. Stat. 1 Supp. pp. 939, 940, especially section 3 of said act, p. 942. The acts of March 3, 1877, 19 Stat. L. 404, May 27, 1878, and June 14, 1878, 20 Stat. L. 63-113, permitting pre-emptioners who have changed to homestead entries to credit their time from original settlement, are superseded as to future permanent operations by the act of March 3, 1891, *supra*. See also act of March 2, 1889; Rev. Stat. 1 Supp. p. 633. Various other acts contain provisions common to pre-emption and homestead entry, and are by this act superseded as to the former. This act, however, does not affect entries made under the pre-emption laws prior to its passage. See sec. 4 of said act, and 15 Land Decisions 432.

Desert Land Act. Desert lands are such as will not, without artificial irrigation, raise an agricultural crop. These lands are confined to what is known as the arid regions which are situated in certain western states and territories. Provision is made for the acquisition of lands of this character by conducting water thereon, and performing certain other requirements, as provided in the act of March 3, 1877; Rev. Stat. 1 Supp. p. 137. For sections 4 and 8 added to this act, see act of March 3, 1891,

Rev. Stat. 1 Supp. pp. 940, 941.

Saline lands. Provision for the sale of land of this character is made by the act of January 13, 1877; Rev. Stat. 1 Supp. 127. Under its provisions a hearing is ordered and witnesses are examined as to the character of the land in question, and the testimony taken at the hearing is transmitted to the general land office for its decision. Should the tract be adjudged agricultural, it will be subject to disposition as such. Should the tract be adjudged to be of saline character it will be offered at public sale to the highest bidder for cash at a price of not less than \$1.25 per acre. In case it is not sold, it is subject to private sale at a price not less than \$1.25 per acre, in the same manner as other public lands are sold. *Quere:* Whether this act is repealed by section 9 of the act of March 3, 1891? U. S. Rev. Stat. 1 Supp. 943.

Coal lands. For the provisions relating to the acquisition of lands of this character, see Rev. Stat. U. S. § 2347. See also Donaldson's History of the Public Domain 1277, 1278.

MINERAL LANDS, RESOURCES, AND CLAIMS; location of, under U. S. Laws. The existing provisions and regulations relative to the acquisition of mineral lands, the title of which is in the government, are to be found in United States Revised Statutes, §§ 2318-2353, and in 1 Supp. Rev. Stats. pp. 168-7; 276, 63, 324, 949, 950. For a history of the attempted legislation prior to the passage of the act of 1866 (the first mining law), see Yale on Mining Claims 340-350; and Weeks on Mineral Lands, Addenda, chap. 1, for the act of 1866.

Requisites of location. All valuable mineral deposits in lands belonging to the United States, whether surveyed or unsurveyed, are "free and open to exploration and purchase by citizens of the United States, or those who have declared their intention to become such" (Rev. Stats. § 2319), and citizenship or declared intention is a condition precedent to the right of location; 19 Fed. Rep. 82; 12 Pac. Rep. (Ida.) 904. A state corporation is a citizen for this purpose, provided the members thereof are citizens and qualified to make the location; 21 Pac. Rep. (Col.) 1019; 13 Colo. 105; 180 U. S. 630. Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made; 19 Fed. Rep. 78; and an alien locator may convey to a citizen so as to give title from date of conveyance, provided no third person acquires rights prior to such conveyance; 1 Fed. Rep. 537. See 6 Wall. 122. A location made jointly by aliens and citizens is a good location by the citizens; 1 Fed. Rep. 537.

A mineral location can only be made on the unsold, unappropriated and unoccupied lands of the United States; 3 Wall. 304; 24 Cal. 562; 67 Cal. 656; 14 Cal. 461; 6 Colo. 393; but the right to possession is derived solely from a valid location; 4 Mont. 370; 4 id. 527; and cannot be held as "occupied" so as to defeat a subsequent location unless all the laws, including the yearly assessment work, etc., are complied with; 104 U. S. 284; 115 id. 408; 59 Cal. 613; 6 Mont. 53. The act describes mineral lands as "valuable mineral deposits." This means lands which may be profitably mined in the usual manner; Copp's Mining Lands 324. Lands containing minerals, but not in profitable quantities, are not mineral lands; 115 U. S. 392; 28 Fed. Rep. 482; 45 Cal. 482. But non-mineral lands, to the extent of 5 acres, may be located as mill sites, when in connection with a lode location or separately; Rev. Stats. § 2337. Title to mineral lands can only be acquired in the precise manner provided by the laws relating to such lands; and a patent obtained under the provisions of any other law is void; Rev. Stats. § 2318; 21 Wall. 660; 115 U. S. 392, 408. If a patent issue for agricultural land on which there is a known lode, title to such lode does not pass; 5 Oreg. 104; but *contra* if subsequently discovered; Copp's Min. Lands 124; 17 Cal. 199. The right to locate is initiated by discovery and appropriation, which forms the

source of title; development being the requisite of continued possession; 113 U. S. 537; 116 id. 418; 22 Pac. Rep. (Cal.) 804. A location before an actual discovery confers no rights upon the locator; 1 Fed. Rep. 530; 11 id. 676.

No specific time is designated by the statutes within which the location must be completed; but if one begin a location and then depart he cannot return and complete the location so as to hold it against one who, during such absence, has made a complete location; 65 Cal. 419. A location is dependent, primarily, upon what is found in the discovery shaft, the discovery of ore elsewhere being, as a rule, unavailing; 8 Fed. Rep. 725; but see 8 Utah 94; 6 Colo. 581; 15 Nev. 383, where evidence was admitted in proof of discovery to show the existence of a vein other than at the location point. The work leading up to the discovery need not have been done by the locator, provided the existence of the vein was known to him at the time of location; 7 Mont. 30.

It is not priority of discovery, but priority of compliance with the various requirements of the law that gives the right to the mine; 13 Nev. 455. As to the proper manner of staking out a claim so as to conform to the lode or vein, see 98 U. S. 463. See also 6 Colo. 393; 13 Nev. 442. Laws and regulations for the location, development, and working of mines may be made by the states and by the miners themselves; Rev. Stats. §§ 2319-2324.

As to the extent of ground open to location and the method of staking it off, see Rev. Stats. § 2320, and for the provisions relating to placer locations, see Rev. Stats. §§ 2329, 2333. See 128 U. S. 673; Copp's Min. Lands 52.

The term "placer claim," as used in Rev. Stats. § 2329, means "ground between defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in piece, that is, not fixed in rock, but which are in a loose state, and may, in most cases, be collected by washing or amalgamation, without milling." 128 U. S. 679.

It is incumbent upon one in possession of a placer claim whereon is a vein or lode, to state that fact in his application for a patent, or the patent will not carry such vein or lode. If discovered subsequent to the issuance of the patent, however, such vein or lode is covered by the placer patent; Rev. Stats. § 2333; 87 Cal. 286; 116 U. S. 687.

The statutory requirements concerning the description of the location, Rev. Stats. §§ 2318, 2324, are: (1) that the location shall be along the vein or lode; (2) that it shall be distinctly marked on the ground so that the boundaries can be readily traced and that such description shall be by reference to some permanent object for the identification of the claim; (3) that all the lines shall be parallel—the last requirement being directory only, the object being to prevent a party from claiming more width of vein outside his surface lines than within them; 83 Cal. 203. All other details of location are governed by the rules and regulations of miners and state laws; Rev. Stats. § 2324.

Although the federal laws do not require the posting of any notice of location on the claim, but only require the recording of such notice in the mining district, yet the posting of a notice is almost universally required by the miners' regulations, and by state laws; 113 U. S. 537; 10 Cal. 446; 40 Fed. Rep. 787. See *LODE; VEIN*.

Re-location. A mining claim is subject to re-location where the owner has failed to comply with the statutory requirements, or has failed to observe local rules; Rev. Stats. § 2324; 73 Cal. 520; 12 Nev. 312; 1 Mont. 325. But the forfeiture must have actually occurred before re-location, otherwise the re-location is invalid and the re-locator a trespasser; 11 Fed. Rep. 680; 1 Idaho 107; 21 Pac. Rep. (Ida.) 413; 104 U. S. 279. A re-location is made in the same manner and carries the same rights as original location; 6 Colo. 393; 9 id. 339; 20 Pac. Rep. (N. M.) 798.

Annual work. It is provided by federal statute that during each year, after location and until a patent issues, there shall be performed on the claim not less than \$100 worth of labor on improvements; Rev. Stats. § 2324; and this provision is applicable alike to placer claims and to lode claims; 65 Cal. 40. The work may be done anywhere upon the surface of the claim within its surface lines or below the surface within the lines extended vertically downward, but it must be done as a necessary means of extracting ore; 5 Sawy. 439; 6 Mont. 138. See also 109 U. S. 440; 104 id. 655. By act of February 11, 1875, U. S. Rev. Stats. 1 Supp. 62, it is provided that where a tunnel has been run for the purpose of developing a lode, the tunnel shall be considered as expended on said lode, and that it shall not be required to perform work on the surface of the lode as required in § 2324 Rev. Stats. See 111 U. S. 355.

This work may be done by any party in interest, whether such party have a legal or equitable claim; 11 Fed. Rep. 680. The amount of work required by the statute cannot be decreased by any state law or miners' regulation; 7 Colo. 443; 60 Cal. 631; and may be done at any time within the year; 104 U. S. 279; 8 Colo. 41.

Failure to perform the work will be excused if brought about by actual existing fear of bodily harm, or prevented by coercion or duress actually and presently existing; 7 Fed. Rep. 331; 113 U. S. 527.

Where claims are held in common, this annual work may be done on any one claim; Rev. Stats. § 2324; 111 U. S. 350; 109 id. 440.

The apex rule. Ordinarily the locator would be confined to the limits of his surface measurements both as to surface possession and beneath it, but by the apex rule the locator is entitled not only to the surface included within the lines of his location, but also to all of the veins, lodes, and ledges throughout their entire depth, the apex of which lies inside of such surface lines extending downward vertically, albeit such veins, lodes, or ledges may depart from a perpendicular course in such wise as to extend outside of the side lines of the location, provided such right shall not extend beyond the entire lines of the location projecting in their own line or until they intersect the veins or ledges; Rev. Stats. § 2322; 11 Fed. Rep. 670; 23 Pac. Rep. (Ida.) 547; 42 Fed. Rep. 626. But this right does not carry with it power to follow into the lands of an adjoining proprietor holding title to agricultural lands; 36 Fed. Rep. 668. But see 42 Fed. Rep. 98. This rule of the apex has been a fruitful source of litigation, the following being a few of the more important cases: 118 U. S. 196; 75 Cal. 78; 3 Fed. Rep. 368; 8 id. 725; id. 297; 42 id. 98; 2 McCrary 121; 114 U. S. 576; 98 id. 463; 42 Fed. Rep. 98; 8 id. 297; 1 Ari. 426; 2 Utah 355.

PRIVATE ACQUISITION. The rule is well settled, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular tract or lot is to be regarded as the equitable owner thereof, and the land is no longer open to location. Any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside; 98 U. S. 121; see 13 Pet. 498; and when different grants cover the same premises, the earlier takes the title; 130 U. S. 1.

Public lands of the United States may be granted by statute or by treaty, as well as by patent; 1 Doug. Mich. 546. As to the latter method, see *LAND PATENT*.

After public lands have been entered at the land office and a certificate of entry obtained, they are private property, the government agreeing to make a conveyance as soon as it can, and in the meantime holding the naked legal fee in trust for the purchaser, who has the equitable title; 133 U. S. 496; 123 id. 456; and they cease to be public; 132 id. 837.

Courts have power to protect the private

he having paid it before in Wales. Reg. Orig. 279.

LANNS MANUS. A lord of the manor. English.

LANO NIGER. A sort of base coin, formerly current in England. Cow.

LANZAS. In Spanish Law. A certain contribution in money paid by the grantees and other high officers in lieu of the soldiers they ought to furnish government in time of war.

LAPIDATION. The act of stoning a person to death. Webster.

LAPSE. In Ecclesiastical Law. The transfer, by forfeiture, of a right to present or collate to a vacant benefice from a person vested with such right to another in consequence of some act of negligence by the former. Ayl. Par. 331.

Upon six months' neglect of the patron, the right lapses to the bishop; upon six months' neglect of bishop, to archbishop; upon his six months' neglect, to king. The day on which the vacancy occurs is not counted, and the six months are calculated as a half-year. 2 Burn, Ec. L. 355.

To glide; to pass slowly, silently, or by degrees. To slip; to deviate from the proper path. Webster, Dict. See LAPSED DEVISE; LAPSED LEGACY.

LAPSE PATENT. A patent issued to a petitioner for land. A patent for which land to another party has lapsed through neglect of patentee. The lapse patent relates to date of original patent, and makes void all mesne conveyances. 1 Wash. Va. 39. See LAND PATENT.

LAPSED DEVISE. A devise which has lapsed, or does not take effect because of the death of the devisee before that of the testator.

The subject-matter of the lapsed devise will, if no contrary intention appear, be included in the residuary clause (if any) contained in the will. In England, by stat. 1 Vict. c. 26, §§ 25, 26, 32, 33, if the devise be to children or other issue of the devisor, and the issue of the devisee be alive, the devise will not lapse, if no such intention appear in the will. A devise always lapses at common law if the devisee dies before the testator, and such was the general rule in this country; 37 N. Y. 54; 2 Yeates 523; but in many if not all the states, if made to a son or grandson of the testator, it takes effect, by force of statute, in favor of his heirs, if he die before the testator. In North Carolina, a devise to a child dying before the testator does not lapse, but goes to the issue of such child; 107 N. C. 507; so in Massachusetts, in the case of a devise to a child or other relative; 3 Washb. R. P. *523; 101 Mass. 38.

In Maryland, the provision against lapse goes much further, and it is provided that no devise or bequest shall fail by reason of the death of the devisee or legatee before the testator, and it takes effect in like manner as if they had survived him; 6 Har. & J. 54. See 1 Jarm. Wills, 6th Am. ed. *307, n.; 4 Kent 541. In regard to a lapsed devise where the devisee dies during the life of the testator, the heir of the devisee will not take; 1 Dana 201; but the estate will go to the testator's heir, notwithstanding a residuary devise. But if the devise be void, as where the devisee is dead at the date of the will, or is made upon a condition precedent which never happens, the estate will go to the residuary devisee, if the words are sufficiently comprehensive; 2 Vern. 894; 15 Ves. 589; 3 Whart. 477; 1 Harring. 524; 4 Kent 541. But some of the courts hold in that case even, that the estate goes to the heir; 6 Conn. 293; 3 Jones, Eq. 141; 4 Ired. Eq. 320; 13 Md. 415, where it was said that there was no solid distinction between a lapsed and a void devise, and that in both cases the heir at law should take, and not the residuary devise.

When the devise is to the person deceased, with such words as "and his heirs"

added, they are generally held to be words of limitation, and not of description. So a devise of the proceeds of land to three persons, one-third to each, and to "their heirs respectively for ever," lapsed on the death of one as to his share, the word heirs designating the estate, not the takers; 36 W. N. C. Pa. 247; so where a residuary devise was to two persons, "their heirs and assigns"; 162 Mass. 448. The rule that devises lapse by the death of the devisee is not changed by adding to the devise the words "to have and to hold the same to them, their heirs and assigns for ever"; 113 N. Y. 396. And where land was devised to a daughter for life and then to be "equally divided among the lawful heirs of" another daughter, it was held that the word heirs must be taken in a technical sense, and as the last mentioned daughter was alive at the death of the first, the devise to the heirs lapsed; 1 Rich. Eq. 396.

In case of gifts to a class, the rule is that there is no lapse, but they go to the other members of the class; Theobald, Wills 643. It is, however, held that the gift is not to a class if the members of the class are named; 11 Sim. 397; 2 J. & H. 656; nor if to "five daughters of A" or "my nine children"; 9 Ch. D. 117; 15 Ch. D. 84; and where the residue was given to sons named, there being nothing to show that testator intended otherwise, they took as individuals and not as a class, and the share of the son who died before his father's death lapsed, and passed as intestate real estate; 15 R. I. 138. See LAPSED LEGACY.

In case of a devise to two as joint tenants, if one die before the testator, where survivorship in a joint tenancy has been abolished, his share has been held to fall in the residue; Wins. Eq. 89. Where land was devised to a son who was also appointed executor, and he died and the testator by codicil appointed another executor, referring to the death of his son, it was held that the devise did not lapse, and should be construed as a devise to the son's heirs; 6 Dana 51.

A devise to one for life with a remainder does not lapse by the death of the first taker before that of the remainderman; 15 Ark. 682. The refusal or incapacity of the first taker of a devise or legacy to several in succession does not cause it to lapse, but it passes to the next; 28 N. H. 459; 43 id. 17. If one is appointed by will to take in case of the death of the first devisee, and on that event, the appointee can take as contemplated by the will, there will be no lapse, although the devisee dies before the testator, but the ulterior gift will take effect immediately on testator's decease as a direct unconditional gift; 14 B. Mon. 333.

A devise in trust for a son, and "in the event of the son dying childless" then over, lapsed by the death of the son in the lifetime of the testatrix, and the devise over did not take effect; 152 Mass. 24.

A devise made to a wife for life, with remainder to the daughter, and with power to the wife to sell and invest the proceeds for the benefit of the daughter, does not lapse during the lifetime of the wife, being for the benefit of the latter as well as the former; 142 N. Y. 160.

In England, by the Wills Act § 32, a devise of an estate tail does not lapse, if at the death of the testator there is any issue who would inherit under the entail, and it was held that the section applies to a gift to a child dead at the date of will; 2 Sm. & G. 396.

With a single important exception, the same principles apply to devises and legacies with respect to lapse, and as to that difference, and also for other cases on the subject, see LAPSED LEGACY.

See also Green, Lapse (App'x to Wythe's Va. Reports); Tudor, Real Property 94; 20 L. Mag. 163; 9 Am. L. Rec. 503; 64 Am. Dec. 155-60; WILL.

LAPSED LEGACY. A legacy which, on account of the death of the legatee before the period arrives for the payment of the legacy, lapses or deviates from the course prescribed by the testator, and falls

into the residuum. 1 Wms. Ex., 7th Am. ed. *1071; 10 S. & R. 351.

A legacy which has never vested or taken effect; one which, originally valid, afterwards fails, because the capacity or willingness of the donee to take has ceased to exist before he obtained a vested interest in the gift. 126 N. Y. 615.

A distinction exists between a lapsed devise and a lapsed legacy. A devise which lapses does not fall into the residue unless so provided by the will, but descends to the heir at law; on the contrary, personal property passes by the residuary clause, where it is not otherwise disposed of; Beach, Wills 316; 2 Bouv. Inst. 2158, 2116; 15 Ves. 709; 2 Mer. 393; 3 Whart. 477. See LAPSED DEVISE.

A lapsed legacy passes by a general residuary clause; 27 Abb. N. C. 437; so also did a legacy which lapsed because it was void; 63 Hun 352. A lapsed or void legacy goes to the residuary legatee unless an intention to the contrary clearly appear; 1 Sm. & M. 589; 8 Edw. Ch. 79; 2 Tayl. 315; 2 Root 487.

The reason assigned for this difference is that a bequest of personal property refers to the state of the property at the time of the death of the testator, and that a devise operates only on land of which the testator was seised when he made his will; and it is not to be presumed he intended to devise by a residuary clause, a contingency which he could not have foreseen, nor to embrace in it lands contained in a lapsed devise; 1 Dana 207; Willes 293; 6 Conn. 292; 3 Harr. & McH. 333. "How far the alteration of the law of those states where after-acquired lands may be devised will destroy this distinction, it is difficult to say." 1 Bouv. Inst. 2150.

The Pennsylvania act of 1879, June 4, P. L. 88, made the law respecting the devolution of a lapsed devise the same as that of a lapsed legacy, but it was held that this applied only to lapsed specific devises in the body of the will, and that as to lapsed shares of the residue no change was intended; 15 W. N. C. Pa. 417. And the same provision exists, except where the will requires a different construction, in Virginia, North Carolina, West Virginia; but in the last state, if there is no residuary devise, it goes to the heir at law.

The common-law distinction between lapsed devises and lapsed legacies with reference to falling into the residuum has been abrogated by statute in New York, and lapsed devises as well as lapsed legacies fall into the residuum; 152 N. Y. 475.

In Kentucky, in case of lapse, neither real nor personal property passes as part of the residue, but both are intestate property, unless the contrary intention appear in the will.

Where a testator gave a share of his residuary personal estate to his widow who took under the will, and another share to a daughter who died before him without issue, it was held that the testator died intestate as to the share given to the daughter, and that the widow was entitled to one-third of it under the intestate laws; 82 Pa. 428.

Where the rent of a house was given for life to testator's daughter, and at her death to be sold, the proceeds to go to her children when twenty-one years of age, and the income meanwhile to be applied to their maintenance, it was held that the legacy to the children was vested, and on their death in the lifetime of the mother there was no lapse, but the property vested in the life-tenant in fee as the heir of her children as against the heir at law of the original testator; 19 Wall. 167, reversing 7 D. C. 226.

If a legacy is payable out of real estate in consequence of a deficiency of personal property, it will go to the heir at law in case of lapse, and if the personal estate is sufficient to pay debts and legatees, it will go to the residuary legatee; 9 Paige 94. A legacy to one for life with remainder to another does not lapse upon the death of the first taker during the testator's life; 4 Desaus. 305; 3 Ired. Eq. 581. If a legacy is payable out of a particular debt due the

testator, it does not fail on failure of payment of the debt; 6 Watts 473.

Unless the legatee survive the testator, as a rule neither he nor his representatives have any claim to the legacy; 2 W. & S. 450; 18 Pick. 41; 4 Strobb. Eq. 179; 64 Me. 363; 62 Conn. 140; and the same rule applies where a legacy is given to a man and his executors, etc.; 1 P. Wms. 83; 3 Bro. C. C. 128; 108 Mass. 382; 39 Conn. 219; though the testator may expressly provide otherwise; 1 Bro. C. C. 84; L. R. 14 Eq. 843. A declaration that a legacy shall not lapse is not sufficient to prevent it unless the intention is clear that it shall go to the estate of the legatee; 8 Ves. 493; 4 Beav. 818; 27 *id.* 418; 4 D. M. & G. 633; but gifts to A and his executors and administrators with the direction that it shall not lapse is sufficient; 2 Atk. 572. A direction that a legacy should vest from the date of the will is not sufficient to prevent lapse; 14 Eq. 843. From a devise of the remainder of an estate in distinct parcels there arises an inference that the testator did not intend that lapsed legacies should fall into the residue; 24 Ga. 84.

A gift to A, and in case of his death to his executors and administrators, will go to A's executors in the event of his death before the testator; 64 L. J. Ch. 648, aff'g 82 W. R. 516 and overruling 1 Myl. & K. 470.

Where a testator bequeathed his estate to several legatees, and having learned of their death, interlined in his will between the words "as follows" and the list of the legatees the words "or to their heirs," and after the names added words signifying their decease and republished the will, the legacies did not lapse; 154 Pa. 523, distinguishing 2 Rawle 28 and 104 Pa. 342. Where a legacy was given to one in trust for his wife, the income for her life, with power of appointment by will, and in default thereof "it shall be equally divided among my children or their legal representatives," the words legal representatives meant executors and administrators, and not next of kin, and the legacy to any child who died without issue in the lifetime of the testator lapsed; 1 Ohio N. P. 314. A bequest of personal property to one and "heirs and assigns" are words of limitation, and the legacy lapsed on the death of the legatee before that of the testator; 159 Mass. 280; so also to one and "his heirs"; 27 Abb. N. C. 437.

Where a legacy is given to a class it is generally held that the death of one of the class before the testator does not create a lapse, but simply reduces the number of the class; 2 Bradf. 172; in such a case, when one in whom the right is vested dies before distribution, his interest goes to his representatives; 2 Dev. & B. L. 125; 3 Metc. (Ky.) 463. See LAPSED DEVISE.

Where a residue was devised in trust for four sons, the intention was clear that their enjoyment was to be several and not joint, and the share of one who died before the testator was held not to go to the survivors, but to be disposed of as intestate real estate; 5 Allen 249; but where an estate was bequeathed to all the children in a family by name, the tenor of the whole will indicating that they were intended to take as a class, the share of one who died without issue before the testator went to the survivors; 14 *id.* 528. It was early provided by statute in Alabama that the death of a devisee or legatee, leaving a descendant, before the testator, should not cause a lapse, but the gift would vest in the descendant; 37 Ala. 646.

Under a Maine statute making an adopted child the same as a lawful child, such child is a lineal descendant of its adopting parents within the meaning of the statute to prevent the lapse of legacies to such descendants; 84 Me. 483.

Where there was a legacy to executors in trust for a person for life, afterwards to be divided into four equal parts for four named residuary legatees, the title to the residue vested subject to the trust estate, and the share of a residuary legatee did not lapse on his death before the time of distribution; 140 N. Y. 122.

Where separate sums are bequeathed to two named persons who take also the residuary estate, no intention appearing on the will to make them joint tenants, the separate estate and the share of the residue of the one who died before the testator were held to lapse; 84 Me. 866.

Where property is bequeathed to collateral relatives named, shares of those who died during the lifetime of the testator lapse; 62 Conn. 140.

The doctrine of lapse applies to an appointment by will; 2 Ves. Sen. 61; L. R. 3 Eq. 658; 47 L. J. Ch. 65; or an appointment under a covenant; 3 Ch. 182; or a gift to a debtor of his debt,—whether the debt be given or forgiven; 1 P. Wms. 83; 3 Ves. 231; 2 Pr. 34.

If there is a gift to a charitable society by name and it has existed, but at the time of the testator's death has ceased to do so, the legacy fails; 1 Drew 643; 29 Ch. Div. 560; [1895] 1 Ch. 19. If the charity existed at the death of the testator and expired before administration of the estate, the *cy pres* doctrine is applied; 5 Russ. 113; [1891] 2 Ch. 236. A gift for a clearly defined and particular charitable use will fail if the subject becomes impossible; 1 Myl. & C. 123; 56 L. T. 147; and see as to the limits of the doctrine, L. R. 6 P. C. 96; 35 Ch. 460; 58 L. T. 538. See, generally, as to failure of charitable bequests, Theobald, Wills 304; and see CHARITABLE USE.

By the English law a residuary bequest operates upon all the personal estate which the testator is possessed of at the time of his death, and will include such as would have gone to pay specific legacies which lapse or are void; 4 Ves. Jr. 708, 732; 4 Paige 115; 4 Hawks 215; 1 Dana 206; 1 D. & B. Eq. 115; 82 Pa. 428; 1 Jarm. Wills. 6th Am. ed. *716.

See LAPSED DEVISE; LEGACY; WILL.

LARBOARD. The left side of a ship or boat when one stands with his face towards the bow. The opposite term is starboard, which is the right-hand side looking forward. The word is now, however, no longer used, the term port having been substituted for it. The change was made by order of the English admiralty, for the very obvious reason that larboard was apt to be confused with the opposite term.

LARCENOUS. Thieving; pertaining to, characterized by, or tainted with, larceny; as a larcenous taking.

Larcenous purpose. an intention to commit larceny. See LARCENY.

LARCENY. The felonious taking of the property of another without his consent and against his will, with the intent to convert it to the use of the taker. 2 Leach 1089.

The felonious taking and carrying away of the personal goods of another. 4 Bla. Com. 299.

The appropriation, either to the use of the taker or to that of any other person, of money or personal property with intent to deprive or defraud the true owner of its use and benefit, or the withholding or secreting of the same. 71 Hun 72.

The wrongful and fraudulent taking and carrying away by one person of the mere personal goods of another from any place, with a felonious intent to convert them to his, the taker's, use, and make them his property without the consent of the owner. 2 East, Pl. Cr. 553; 4 Wash. C. C. 700; 37 Mo. 463.

This definition was criticised by Parke, B., who said: "Perhaps this was the more accurate definition; but it needed some addition; the taking should be not only wrongful and fraudulent, but also 'without any color of right';" Den. C. C. 370; but the words "felonious intent" are considered by an authoritative text writer to exclude any color of right; 2 Russ. Cr. 9th Am. ed. 146.

That this offence is the most technical in its distinctions of all the common-law felonies is, perhaps, to be found in the fact that inasmuch as the higher grade of the offence was, until Blackstone's time, punishable capitally, the courts were inclined to find technical reasons to avoid the infliction of that penalty for mere wrong done with reference to the property. By reason of the depreciation of money and the consequent appreciation of the money value of the property which took place within two centuries and a half after the passage of the Statute of Westminster I, (A. D. 1275), ch. 15; which

made grand larceny to consist of the stealing of property above the value of twelve pence, cases of larceny became capital which would not have been such at the time the statute was passed; and therefore Lord Coke suggests that the valuation of property in determining whether the offence was grand larceny ought to be reasonable; 1 McClain, Cr. L. § 534.

Larceny was formerly in England, and still is, perhaps, in some states, divided into *grand* and *petit* or *petty* larceny, according as the value of the property taken was great or small; 3 East, Pl. Cr. 736; 3 McCord 187; 5 Hull, N. Y. 304; 1 Hawks 463; 8 Blackf. 498. In England this distinction is now abolished, by 7 & 8 Geo. IV. c. 90, § 2; and the same is true of many of the United States, although in some a difference is made, similar in theory, between cases where the amount stolen is more and where it is less than one hundred dollars or some fixed sum.

Compound larceny is larceny under circumstances which, in view of the law, aggravate the crime. The law in relation to this branch of larceny is to a great extent statutory.

The property of the owner may be either general; 2 Den. Cr. Cas. 440; or special; 10 Wend. 165; 14 Mass. 217; 13 Ala. n. s. 163; 21 Me. 14; 8 Tex. 115; 4 Harring. 570; 6 Hill 144; 9 C. & P. 44.

There must be an actual removal of the article; 1 Leach 236, n. 330; 7 C. & P. 552; 9 Yerg. 198; 63 Miss. 58; and at least a temporary possession in the thief; 94 Ala. 534; 65 N. C. 305; 88 Mo. 354; 35 Ga. 207; 16 Tex. App. 495; 64 Miss. 77; 71 Hun 72; 75 Cal. 388; but the having the property under control even for a short space of time is sufficient, though it is abandoned before being effectually appropriated by the wrong-doer; 106 N. C. 784; 23 W. Va. 779; 1 Moody 14; 20 Ohio St. 508; 30 Mo. 92; 88 *id.* 354. The taking and carrying away may be committed by setting in motion an agency, innocent or otherwise, by which the property is asported from the possession of the owner to that of the thief or his accomplice; 125 Mass. 390; 4 Allen 308; 11 Q. B. D. 21; 2 C. & B. 423; 45 Ia. 673.

A person who is seen to thrust his hand into the pocket of another and withdraw it empty can be convicted of an attempt to commit larceny, even though the pocket is empty; 123 N. Y. 54, reversing 7 N. Y. S. 582. See ATTEMPT.

The mere unlawful taking and carrying away of the property of another is not larceny unless it is done with criminal intent or *animo furandi*; 44 Ala. 396; 53 Ill. 384; 108 Mo. 611; 84 Neb. 250; 24 Tex. App. 35; 95 Cal. 227; but see 88 S. C. 348. The question whether the goods were taken *animo furandi* is one of fact for the jury; [1895] 2 Q. B. 484. If the taking is under a *bona fide* claim of right, there can be no larceny; 4 Col. 182; as where the purpose of taking is to test a right; 2 Doug. 517; or to protect one's own property; 4 B. & S. 189; 9 Tex. App. 164. One is not guilty of larceny in selling an article under the belief that it is his own property, though it belong to another; 41 S. W. Rep. (Tex.) 606. See 11 Fla. 295; 47 Ia. 684; 62 Miss. 108; or in taking property in the belief that he has a right so to do; 25 Tex. App. 383; 79 Ga. 564; 25 Neb. 444; 24 Fla. 358; but the belief of ownership of right which will constitute a defence must be an honest belief and not a mere impression or pretence; 8 Ia. 540; 9 Tex. App. 70; 95 N. C. 596; 77 Ala. 71. Secrecy is not such an essential accompaniment of larceny that an attempt to conceal the taking must be shown; 114 N. C. 780; 103 *id.* 424.

An intent to convert to the thief's own use is not necessary; all that is required is the intent to deprive the owner of his property; 28 Cal. 880; 17 Tex. 531; 4 Dutch. 23; 35 Miss. 214; 10 Gratt. 758; 14 Ind. 36; but see 1 McCa. 196, where the accused took and carried away muskets to prevent others from using them against himself and his friends, and it was held larceny.

It is not an essential element of the crime that the taking should be *lucri causa*, for the sake of gain; 35 W. Va. 73.

The property must be of some value, though but slight; 4 Rich. 350; 3 Harring. 503; 7 Metc. 475. See 3 Pa. 260; 6 Johns. 103; 9 C. & P. 347; 39 Ill. 233; 20 Fla. 841; 63 Mo. 98; but the fact that the thief treated the property as of value will

amount to proof of such value by inference; 64 N. C. 127; 8 Heisk. 120; 18 Ark. 66. Any intrinsic value whatever is sufficient; 1 Bailey 380; 14 Gray 376; and it is not necessary that the value should be of some particular coin; 75 Va. 909.

There must be a taking against the consent of the owner; 8 C. & P. 291; 1 Den. Cr. Cas. 381; 9 Yerg. 198; 20 Ala. n. s. 428; 1 Rich. 30; 2 N. & M'C. 174; Cox, N. J. 439; 106 Mo. 635; 36 Kan. 416; 18 Tex. App. 358; and the taking will not be larceny if consent be given, though obtained by fraud; 15 S. & R. 93; 9 C. & P. 741; 7 Cox, Cr. Cas. 289; but see 85 Ala. 17. But where one retains money paid by mistake, it is larceny, for the consent of the owner in parting with his property was only apparent, not real; 8 Ore. 394; s. o. 34 Am. Rep. 590; 6 Hun 121.

Whenever the defendant can be regarded in the light of the servant or agent of the owner, he is guilty of larceny; 1 Den. 120; Whart. Cr. Law, 9th ed. §§ 956-970; 86 Ala. 64; 94 Cal. 573. Where a master paid his servant a \$10 note, thinking it was a \$1 note, and the servant took it innocently, but afterwards discovered the mistake and made up his mind to appropriate the note, it was held by a divided court that this was not larceny; [1895] 2 I. R. 709.

By stat. 24 and 25 Vict. c. 96, a bailee who fraudulently converts the property entrusted to him to his own use is guilty of larceny; Cox & Saunders, Cr. L. 26. The possession of the bailee is the possession of the owner, and a larceny thereof from the former is a larceny from the owner; 101 Mo. 316. When the possession of an article is entrusted to a person, who carries it away and appropriates it, this is no larceny; 4 C. & P. 545; 1 Pick. 375; 20 Ala. n. s. 428; 17 N. Y. 114; see 2 M'Mull. 382; 4 Mo. 461; 33 Me. 127; 11 Cush. 488; 13 Gratt. 808; 11 Tex. 769; but when the custody merely is parted with, such misappropriation is a larceny; 6 T. B. Monr. 130; 1 Den. 120; 11 Q. B. 929. One who obtains possession of property by fraud, from one who intends to retain the ownership, and subsequently carries it away, is guilty of larceny, though he would not be if he obtained both possession and ownership by fraud; 49 La. Ann. 1337. The crime of larceny may be committed by a finder of lost money or goods, who, knowing or having reason to know who is the owner of the same, instead of restoring them to him, conceals or fraudulently appropriates them to his own use; 6 Houst. 46; 87 Va. 554. See 116 Mass. 42; 23 Minn. 104; 16 Tex. App. 122. Abandoned property having no owner cannot be the subject of larceny; 6 Sawy. 640; 36 Tex. 375; 43 Id. 650. See FINDER.

The decisions have not been entirely uniform as to whether the fraudulent retention of money delivered to be changed is larceny. It has been held in England not to be so, but here the contrary view has been taken; 56 N. Y. 394; 25 Minn. 66; s. c. 35 Am. Rep. 455, n. See 9 C. & P. 741; 11 Cox, Cr. Cas. 32.

The taking must be in the county where the criminal is to be tried; 9 C. & P. 29. But when the taking has been in the county or state, and the thief is caught with the stolen property in another county than that where the theft was committed, he may be tried in the county where arrested with the goods; as, by construction of law, there is a fresh taking in every county in which the thief carries the stolen property; 7 Metc. 175; 42 La. Ann. 223; 43 Ill. 397; 76 Mo. 236; and the circuit court of the latter county has jurisdiction of the offence; 15 S. W. Rep. (Ky.) 861. One who steals property in a foreign country, and brings it into this, is guilty of larceny here, on the ground that as the legal possession remains in the owner when the first taking is felonious, every asportation of the property is a fresh taking; and on a prosecution for such an offence the courts will presume that the laws of the foreign country are the same as our own, and that the original taking there was criminal, upon proofs of acts which would make it

criminal here; 33 Atl. Rep. (Vt.) 1070. Whether an indictment for larceny can be supported where the goods were proved to have been originally stolen in another state, and brought thence into the state where the indictment was found, is a point on which the decisions are contradictory. Where property was stolen in one of the British Provinces and brought by the thief into Massachusetts, it was held not larceny there; 8 Gray 494. See *contra*, 11 Vt. 650.

The property must be personal, and there can be no larceny of things fixed to the soil; 1 Hale, P. C. 510; but as the taking and carrying away would necessarily terminate the character of the property as realty even if it were such, the important point of this distinction is that if the severance from the realty of anything which is a part thereof, or annexed thereto so as to go with the realty by descent, or in case a conveyance is made by the wrongdoer himself, so that the taking and carrying away is a continuous act, the offence is not larceny, because the taking and carrying away is not of the personal property of another, that which was severed not having been in his possession as a chattel, but only as the portion of a realty; and one which has not been mined or otherwise severed, so as to convert it into a chattel, is not the subject of larceny; 64 N. C. 619; 8 Nev. 262; nor is water or ice, unless the ice is cut or stored in an ice-house; 6 Hill 144; 33 Ind. 402; or the water is pumped into supply pipes; 11 Q. B. D. 21; sea-weed lying ungathered on the shore is part of the realty and not the subject of larceny; 4 Ir. R. C. L. 6 (but see 156 Pa. 400, where waste coal was carried upon land by a stream and deposited there and the appropriator was held guilty of larceny). It is not larceny to detach any portion of a building and carry it away; 5 Harr. 492; 14 Bush 31; 23 La. Ann. 77; 96 Ala. 44; 3 Taunt. 48; but the courts have expressed their disapproval of a doctrine so technical even while compelled to follow it; 35 Cal. 671; and in many cases of constructive annexation have held the taking and carrying away to be larceny, such as window sashes not permanently annexed to the building; 1 Leach 20; chandeliers; 14 Bush 31; doors taken from their hinges; 34 Tex. 155; rails in a fence; 4 Tex. App. 26; belts belonging to a mill; 11 Ohio St. 104; valves in a portable pump; 96 Ala. 44; the key of a door; 5 Blackf. 417; 1 McClain, Cr. L. § 536.

If once severed by the owner, a third person, or the thief himself, as a separate transaction, any part of the realty becomes the subject of larceny; Cl. Cr. L. 245; 11 Ired. 70; 3 Hill, N. Y. 395; 7 Taunt. 188. The common-law rule has been modified from time to time in England, so as to afford protection to things fixed to the freehold. The rule was never satisfactory, and the courts in modern times have been inclined to confine it within the narrowest limits; 30 Am. Rep. 159, n.; s. c. 4 Tex. Ct. App. 26; 11 Ohio 104. At common law there can be no larceny of animals, in which there is neither an absolute nor a qualified property, as beasts *feræ nature*; 1 Greene 106; 7 Johns. 16; 1 C. & K. 494; 9 Pick. 15; 78 N. C. 481; but otherwise of animals reclaimed or confined, as deer, or rabbits in a park, fish in a tank, pheasants, etc., in a mew; 65 N. C. 815; all valuable domestic animals, and all animals *domitæ nature*, which serve for food. But all other animals which do not serve for food, as dogs, unless taxed, are not subjects of larceny. But oysters, when planted for use, are so, as is the flesh of dead animals; 1 Whart. Cr. Law § 864. But under statute in some of the states there may be a larceny of dogs, and actions may be maintained for injury to them; 4 Parker, C. C. 386; 27 Ala. 490; 11 Kan. 490; s. c. 15 Am. Rep. n.; 84 Ky. 681; a horse is a subject of larceny, although at the time he has been removed or strayed from the premises of his owner; 88 Ala. 36. By statutes passed in 1897, stealing electric currents from wires is made a crime in Connecticut, Montana, New Jersey, Tennessee, and Washington.

See Hale; Hawkins, Pleas of the Crown; Wharton; Bishop; Gabbett; Clarke; McClain, Criminal Law; Roscoe, Criminal Evidence; 14 Crim. Law Mag. 705; 2 Alb. L. J. 101; 6 Harv. Law Rev. 244; Russell, Crimes.

LARCENY AND EMBEZZLEMENT.

The terms "larceny" and "embezzlement" in a bond or policy sued on are used as generic terms to indicate the dishonest and fraudulent breach of any duty, or obligation, upon the part of an employee to pay over to his employer, or account to him for any money, securities or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employee. 115 Ky. 863, 75 S. W. 197.

LARD. The clarified semi-solid oil of hog's fat. Cent. Dict. The pure fat of healthy swine. 81 La. 642.

An act making a regulation for the sale of lard by which the public may know by inspection of the package the ingredients used in its preparation is not an unwarranted interference with trade and does not violate the constitutional provisions as to due process of law; *id.* See HEALTH.

LARDING MONEY. A small yearly rent paid by the tenants in the manor of Bradford in Wilts, for liberty to feed their hogs with the masts (acorns) of the lord's wood. Also a commutation for some customary service in connection with the word larder as carrying salt or meat. Whart. Lex.

LARGE (L. Fr.). Broad; having much size; complete; ample; *at large*, free from restraint or confinement; *at liberty*. It was formerly written *at his large*.

LARGE NUMBER. The expression "a large number of voters," means any number that the draftsman may have upon his mind, viz., ten, a hundred, etc., but it does not mean a majority of the legal votes cast. 93 Ky. 223.

LAS PARTIDAS. The name of a code of Spanish law. It is sometimes called *las siete partidas*, or the seven parts, from the number of its principal divisions. It is a compilation of the civil law, the customary law of Spain, and the canon law. It was compiled by four Spanish juriconsults, by the direction of Alfonso X., A. D. 1250, and published in Castile in 1261, but first promulgated as the law by Alfonso XI., A. D. 1348. The maritime law contained in it is given in vol. 6 of Pardess. Col. of Mar. Law. He follows the editions of 1807, at Paris. It has been translated into English. Such of its provisions as are applicable are in force in Florida, Louisiana, and Texas. 1 Bla. Com. 66; 1 White, Rec. 354.

LASCIVIOUS CARRIAGE. A term including those wanton acts between persons of different sexes, who are not married to each other, that flow from the exercise of lustful passions, and which are not otherwise punished as crimes against chastity and public decency. 2 Swift, Dig. 343; 2 Swift, Syst. 331. It includes, also, indecent acts by one against the will of another. 5 Day 81.

LASCIVIOUS COHABITATION.

The act or state of a man and woman, not married, who dwell together in the same house, behaving themselves as man and wife.

In statutes forbidding unlawful cohabitation that term involves the idea of habitual sexual intercourse, or living together in such a way as to hold out the appearance of being husband and wife, and it is the scandal resulting therefrom which constitutes the mischief against which the statutes are directed; 23 Fla. 339; and proof of occasional acts of illicit intercourse is not sufficient; 83 Va. 115; 42 W. Va. 215; 8 So. Rep. (Miss.) 257; but it has been held that such occasional acts may constitute the offence, unless there was no intention of continuing the intercourse, as desire and

opportunity might arise; 18 So. Rep. (Ala.) 941. To constitute the offence there must be both lewd and lascivious intercourse and living together; 80 Va. 20; 28 Fla. 735; though it is said that there need not be actual assertion of the existence of marriage; 57 Miss. 132; 32 Ark. 187; and where the dwelling together is a lawful relation, as that of master and servant, the offence is not established; 39 Mo. App. 872. It is not sustained by evidence of acts of secret adultery or mere familiarity; 49 Mo. App. 323; nor where a man and woman stopped for one night only at a house and assumed marital relations; 60 Ark. 259; 10 Mass. 153; 56 Mo. 147; but it is said that it is not necessary that the cohabitation should be notorious; 2 Humph. 414. General reputation in the neighborhood is not admissible to prove the fact of cohabitation; 3 How. 328. Whether the facts proved constituted a living together in such relation is a question for the jury; 28 Fla. 735.

There must be averment and proof of habitual sexual intercourse which is the gist of the offence; 69 Miss. 393. In Massachusetts, the words "abide and cohabit" are sufficient where the statute used the word "associated"; 159 Mass. 61. An indictment alleging fornication and adultery, and that the parties lived together and were not married, was held sufficient, the language of the statute that they should "lewdly and lasciviously associate" being implied; 108 N. C. 774. The offence may be proved by admission made out of court, and proved by two witnesses; 6 Utah 981. Evidence of previous lascivious cohabitation is sometimes admitted in support of other crimes, as on prosecution for incest; 96 Mich. 449; 102 Cal. 239; 33 Tex. Cr. R. 86. It is not essential in a prosecution against one to prove that both parties had a guilty intent; 109 N. C. 764. When the charge is of such cohabitation of a married man with an unmarried woman, the marriage must be strictly proved, and it cannot be established by reputation; 39 Mo. App. 56. It has been held that a man and woman living together as man and wife, in the belief that they are married, cannot be convicted of "open lewdness"; 127 Mass. 459; 57 N. J. L. 209. See 111 U. C. 725.

Under the United States anti-polygamy act of March 22, 1882, Stat. L. p. 31, § 33, on prosecution for cohabitation with two women as wives, proof of the existence of the marriage relation is pertinent, and it may be proved by general reputation; 46 Fed. Rep. 750; 5 Utah 436; but evidence of general repute of guilt is not sufficient; the facts must be proved, and inferences left to the jury; 21 Pac. Rep. (Ida.) 409. In an indictment under the act it is sufficient to use the word cohabit and not to set out its meaning; *id.* 407, 409; it need not allege that defendant was a male person; 4 Utah 122.

LASCIVIOUS LEWDNESS. Lewd and lascivious conduct in public, or at least practised with such publicity as to be punishable as *contra bonos mores*.

It is an offence sometimes distinguished from lascivious cohabitation (*q. v.*), and is described as *open* and lascivious lewdness; McClellan, Cr. L. § 1135. The specific characterization of the offence is the openness and publicity of the act as distinct from a secret act; 128 Mass. 52; 88 Wis. 180. The offence need not be a joint one,—one person only may be guilty therein; 8 Baxt. 576; and when two are charged so that both must have been guilty if one was, one may be convicted and the other acquitted; 81 Ia. 72.

An indictment must follow the statute; 4 Allen 813; and it must be averred that the parties were not married to each other and that the offence was open and public; 1 Swan 136. The crime cannot be established by general reputation; 4 Coldw. 171; but it may be by circumstantial evidence; 10 Humph. 98; and proof has been admitted of similar acts proved at a previous trial for the same offence; 8 Lea 47.

LASCIVIOUSNESS. Lascivious desires or conduct; lustfulness; wantonness; lewdness.

That form of immorality which has reference to sexual impurity; 51 Fed. Rep. 41. See the titles next preceding.

Lasciviousness and lewdness are generally treated as interchangeable if not synonymous terms. In both cases the principal use of the two words is now in each case in a secondary or derived meaning. The primary meaning of *lascivus*, from which the first is derived, is sportiveness, and its use in a bad sense is said to be post-Augustine, and never by Cicero; the other is derived from the Anglo-Saxon *læwed*, lay or unlearned.

LASHBITE. The ordinary Danish forfeiture, which was twelve ores, every ore being about 16 pence. M. & W. Also written *Lashite*, *Lashite*. Encyc. Lond.

LAST. The same as last court (*q. v.*). Cent. Dict. A burden; and a measure of weight for bulky commodities, such as leather, wool, corn. Whart. L. Lex.

Where the plaintiff added new defendants after answer, the last answer was held to mean the last answer of the original defendants; 13 L. J. Ch. 99; 2 Hare 632.

In English Law. The *Assisa de Ponderibus*, etc. enacted that a *dakir* of hides should consist of ten hides that twenty *dakirs* should make a last. This was not the only measure known as a last. The enactment above mentioned provided that twelve sacks of wool should make a last of wool, and that ten thousand (really 12,000) herrings should make a last of herrings. Byrne.

LAST CLEAR CHANCE. If the plaintiff by his own negligence has put himself in a position of peril, and the defendant discovers his danger, or, by reason of some duty owing by him to the plaintiff, ought to discover it, and after that fails to exercise ordinary care to avoid the injury, then the defendant is liable notwithstanding this prior negligence of the plaintiff, because, having the "last clear chance," or opportunity, to prevent the accident, his negligence, and not that of the plaintiff, is regarded as the proximate cause. 144 Ky. 151, 137 S. W. 1066.

LAST COURT. A court held by the twenty-four jurors in the marshes of Kent and summoned by the bailiffs. It made orders for levying taxes, and imposing penalties for the preservation of marshes. M. & W.; Encyc. Lond.

LAST DAY OF THE TERM. See Rise.

LAST HEIR. He to whom the lands come if they escheat for want of lawful heirs: viz., sometimes the lord of whom the lands are held, sometimes the king. Bract. lib. 5, c. 17.

LAST RESORT. The highest court in any jurisdiction, beyond which there is no appeal, is termed court of last resort.

LAST SICKNESS. That of which a person dies.

The expenses of this sickness are generally entitled to a preference in payment of debts of an insolvent estate; La. Civ. Code, art. 8166.

To prevent impositions, the statute of frauds requires that nuncupative wills shall be made during the testator's last sickness. Roberts, Frauds 556; 20 Johns. 502.

LAST WILL (Lat. *ultima voluntas*). A disposition of real estate to take effect after death.

Generally speaking, last will means the one latest in date, though there may be two or more wills, all speaking from the death of the testator; 35 L. J. Ch. 389; L. R. 1 Eq. 510; 55 Bea. 321. The phrase "This is my last will, and testament" does not, of itself, revoke a former will; 9 Moo. P. C. 131; but may be confirmatory proof of an intention to revoke; 16 Bea. 173; 22 L. J. Ch. 185; 1 W. R. 8. "My last will dated," etc., giving the date of the first will, was held to mean the last will in fact, the

date given been rejected as a mistake; 46 L. J. P. D. & A. 80; 2 P. D. 111; 37 L. J. P. & M. 72, n.

It is strictly distinguishable from testament, which is applied to personal estate; 1 Wms. Exec., 7th Am. ed. § 4, n.; but the words are generally used together, "last will and testament," in a will, whether real or personal estate is to be disposed of. See WILL.

LASTAGE. A custom anciently exacted in some fairs and markets to carry things where one will; also a custom paid for goods sold by the last (a certain weight or measure); the ballast of a ship. Cow. Stowage room for goods in a vessel. Young, Naut. Dict.

LATA CULPA. Gross neglect. See BAILMENT.

LATCHING. An underground survey. Whart. L. Lex.

LATE. "Existing not long ago, but now departed this life." 17 Ala. 190. See 7 Cal. 215; 16 N. J. L. 47; 3 Pa. 328.

Last or recently in a place, as, A. B., late a resident, etc. Anderson; 7 Cal. 233. Recently in office, as A. B., late sheriff. *Id.*

LATELY. This word has come to have "a very large retrospect," as we say, lately deceased of one dead ten or twenty years; 2 Show. 294.

LATENS (Lat.). Latent (*q. v.*).

LATENT. Hidden; concealed; not appearing on the surface or face of a thing.

Applying equally to two or more different things; opposed to patent: as, a latent ambiguity (*q. v.*). Anderson.

LATENT AMBIGUITY. One which does not appear on the face of the instrument. A latent ambiguity is where words apply equally to two different things or subject-matters; 15 M. & W. 561; but where the parties may have intended either of the two things in dispute, the term does not apply. 10 Ohio 534.

It is settled both in England and in this country that extrinsic evidence is admissible to explain a latent ambiguity, but there has been some difficulty in defining precisely when and under what circumstances such evidence may be introduced to show the intention. Two rules are laid down in 2 Eng. Rul. Cas. 718, 726, as illustrated by two leading English cases. The first rule is: "Where a determinate intention appears to be expressed by the written instrument, extrinsic evidence is admissible to show that the description of an object contained in the instrument is applicable with legal certainty to either of two objects; and, a latent ambiguity having been thus disclosed, evidence of the surrounding circumstances is admissible to show which of the objects was meant by the description; and if, on this evidence, one of the objects is indicated with sufficient certainty, direct evidence of declarations of intention is not admissible." 9 L. J. Ex. 27; s. c. 5 M. & W. 368. In that case the language of the court was: "If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will." A good illustration of the uncertainty as to the person was, "where a testatrix gave a share of her residue to her 'cousin, Harriet Cloak,' and the testatrix had no cousin of that name, but had a married cousin, Harriet Crane, whose maiden name was Cloak, and a cousin T. Cloak, whose wife's name was Harriet; evidence was admitted to show the testatrix's knowledge of an intimacy with the members of the Cloak family. In the event 'cousin' was read in the secondary sense of 'wife of a cousin,' and the claim of Harriet,

the wife of T. Cloak, allowed." 84 Ch. D. 255; 56 L. J. Ch. 171. Cited in the American note to the above case as "a good type of the American doctrine," was a devise to "the four boys," where the testator had seven sons, of whom three were shown to be minors living at home; 118 Ill. 827. And in the case of Hardy v. Warren reported, Browne, Parol Evidence 461, there was a bequest by a woman to her "husband" when she had obtained a void divorce and was living with another man as his wife. These were held to be cases of latent ambiguity to explain which extrinsic evidence was admissible to determine the persons who were to take.

The other rule laid down by the work referred to is: "Assuming that the intention appears on the face of the instrument to be determinate, if, after exhausting such evidence of the surrounding circumstances as is necessary to place the court at the point of view of the maker of the instrument, there is still an ambiguity as to which of two objects is meant,—the description being sufficient to point with legal certainty to either if there were no other,—the intention as between those objects may be proved by direct evidence outside the instrument." 2 M. & W. 129; S. C. 6 L. J. Ex. 59. It is said that courts of law are very jealous of the admission of extrinsic evidence to explain the intention of the testator, and that it should be permitted only where an ambiguity is introduced by extrinsic circumstances; 4 Dow. 65; in this case illustrations are given of ambiguity both as to person and subject-matter, as a devise of an estate called Blackacre when the testator had two estates so called; or if a devise be given to a son, naming him, and there are two sons by that name; or to a nephew "William" where the testator had no nephew of that name. The rule as laid down by the American cases has been stated to be that where the terms describing the object of the testator's bounty apply indifferently to more than one person or thing, evidence may be introduced of any material fact relating to the property claimed, and the circumstances and affairs of the testator, his family, and of the claimant, "and the testator's declarations made before, at, or after the making of the will, are admissible in this view, but no evidence of mere mistake on the part of the testator or the draftsman is admissible." Browne, Par. Ev. § 126; 124 Mass. 314; 2 Dall. 70; 43 Pa.-102; 45 Wis. 211; 1 Wend. 549.

It was held by the United States supreme court that a bequest "to be equally divided between the board of foreign and the board of home missions," may be shown by parol to have been intended for the Presbyterian boards thus named, there being similar boards controlled by other religious denominations; 120 U. S. 586. See also, as to the admissibility of parol evidence to show intention, LEGACY.

See Chamberlayne's Best, Ev. 231; Tayl. Ev., Chamberlayne's ed. §§ 1206-26; Stark. Ev., Sharsw. ed. 652-5 and notes; AMBIGUITY; MAXIMS, *Ambiguitas*, etc.; PATENT AMBIGUITY.

LATENT DEED. One kept for twenty years or more in a person's strong box. See 7 N. J. L. 177.

LATENT DEFECT. A defect or blemish in any article sold, known to the seller but not apparent to the purchaser, and which cannot be discovered by mere observation, which, not being discoverable from mere observation, was concealed from the purchaser. See 21 N. Y. 552.

LATENT FAULT. Latent defect (*q. v.*).

LATERAL RAILROAD. A branch railroad. One running from some point on a main line intended as a connecting line or feeder.

A lateral road is said to be "one proceeding from some point on the main trunk between its termini." 14 Ill. 273. "The general route of the lateral road must lie

at an acute angle with the main trunk;" *id.* "A lateral road is another name for a branch road;" *id.* The definition of such a structure does not depend on its length or direction, it may be a "direct extension" from the terminus as well as "merely an offshoot of the main road;" 107 Pa. 548; and it may run in the same direction as the main line so as to be in effect an extension; 66 Mo. 228; it may be an elevated road over a wharf; 107 Pa. 548. When authorized, the necessity and the location are in the discretion of the directors; *id.*; but the lateral railroad cannot be constructed without authority expressly granted or necessarily implied from the charter; 48 Pa. 355. When it is authorized, the right to acquire lands by the exercise of the power of eminent domain is implied as on the main line; 14 Ill. 273; 73 Mich. 206; 59 Ia. 563. Where there is a limitation of time for completing the main line, it does not apply to a branch road, certainly not to one for which the land has been acquired within the time limited; 66 Mo. 228.

The power is as large as the power granted for construction of the main line; 48 Pa. 355; and a power to construct such roads in the discretion of the directors is a continuing one, not to be abridged by a subsequent act giving to the company a time limited for completing the main line with sidings, appurtenances, etc.; 159 *id.* 331. The word appurtenances does not include branches; *id.*

The same reasonable rules as to furnishing, and having proper switches, turnouts, etc., apply to lateral roads as to other railroads; 2 Pittsb. 444; so also the same statutory requirements apply as to crossing highways; 1 B. & Ad. 441.

Words permitting the construction of such lines are not obligatory; 2 Macq. H. L. Cas. 514; and impose no duty which will be enforced by mandamus; 1 El. & Bl. 874. A charter power to construct branch or lateral roads includes the right to build one running in the same general direction and connecting the main line with another railroad; 86 Va. 618. When a railroad company has power to construct lateral or branch roads and purchases another road under an act authorizing its use under the charter of the purchaser, the latter may extend the purchased road; 94 Pa. 435. The mere fact that the building of a lateral railroad may add to the earnings of the main line will not authorize its construction in the absence of power in the charter; 116 Ill. 449; 138 *id.* 453.

A power "to construct such roads from the main line to other points or places in the several counties through which said road may pass," is limited to such as begin and end in the same county; 5 McLean 425. A lateral railroad may cross an ordinary railroad to reach a navigable river to which its construction is authorized and the continuity of the lateral road is not thereby destroyed; 74 Pa. 373. A statute authorizing a railroad company to subscribe to and acquire an interest not exceeding one-fifth, in any lateral or connecting road, confers a distinct privilege or franchise which renders the gross receipts derived from such interest liable to a state tax, notwithstanding an exemption of the principal company from such tax on its own gross receipts; 49 Md. 49. Branch railroads, under the Missouri act of March 21, 1868, are practically independent lines and not included in an exemption from taxation in the charter of the main line; 120 U. S. 589; 99 Mo. 30. Reduction of the number of trains on a branch road of which the business is lessened by charter of a competing line, will not operate as a forfeiture of the charter of the main line; 12 Gray 180.

The Pennsylvania acts of 1832, May 5, and 1865, April 18, limit the width of lateral railroads to 20 feet, whether single or double track, and under these acts the width has been held to be a jurisdictional fact, which may be taken advantage of at any stage of the proceedings; 111 Pa. 95. See RAILROAD; EMINENT DOMAIN.

LATERAL SUPPORT. The right of having one's land and the structures erected thereon supported by the land of a neighboring proprietor.

Each of two adjoining land-owners is entitled to the support of the other's land. The right of lateral support exists only with respect to the soil in its natural condition; 90 U. S. 635; and it is an incident to the land in that condition; 19 Barb. 383. If any excavation cause damage whilst the soil remains in this condition, an action will lie, but in the absence of negligence in excavating, or prescription, or grant, in favor of the neighbor, no action will lie for injury occasioned to the latter if he has increased the lateral pressure by building on the land; 122 Mass. 207; 2 Thomp. & C. 277; 10 H. L. Cas. 333; 22 Mo. 566; 58 Mo. App. 586; 37 Vt. 99. A land-owner has a right to assume that the soil will be permitted to remain in its natural state, and for a violation of this right, an action will lie independently of the question of negligence; 2 Rolle, Abr. 565; 25 Vt. 465; 25 N. J. L. 362. But see 47 La. Ann. 814, where it was held that an adjoining land-owner was liable for weakening his neighbor's wall, by the construction of a building on his own land.

A person's right to the support of the land immediately around his house is not so much an easement, as it has been called, as it is the ordinary right of enjoyment of property. Professor Washburn characterizes the right as "of a nature somewhat akin to the easement of light."

The doctrine of lateral support has been thus carefully stated by this eminent author: "This right exists independently of grant or prescription, and is also an absolute right; so that, if his neighbor excavates the adjoining land, and in consequence A's land falls, he may have an action, although A's excavation was not carelessly or unskillfully performed. This natural right does not extend to any buildings A may place upon his land; and therefore, if A builds his house upon the verge of his own land, he does not thereby acquire the right to have it derive its support from the land adjoining it until it shall have stood and had the advantage of such support for twenty years. In the meantime such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or recklessly; and if, in so doing, the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. It was his own folly to place it there. But if it shall have stood for twenty years with the knowledge of the adjacent proprietor, it acquires the easement of a support in the adjacent soil. . . . But this right of a land-owner to support his land against that of the adjacent owner does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erect a house upon his own land, so near the boundary line thereof as to be injured by the adjacent owner's excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall if it had not been loaded with an additional weight, it would be *damnum absque injuria*,—a loss for which the person so excavating would not be responsible in damages;" 2 Washb. R. P., 5th ed. 380.

It is settled law that "the unquestionable right of a land-owner to remove the earth from his own premises adjacent to another's building is subject to the qualification that he shall use ordinary care to cause no unnecessary damage to his neighbor's property in so doing." 110 Mo. 234; 25 N. Y. 334; 2 Allen 131; 76 Ill. 240; and as it is put by another author: "In exercising his rights over his land, the owner is bound to use ordinary care and skill for the purpose of avoiding injury to his neighbor. Thus, while, as a general rule, he is not bound to continue the support his land gives to a structure upon, or other artificial arrangement of, adjoining land, and is,

therefore, not liable for the natural consequences of his withdrawing this support, yet in doing so, he must act with such care and caution that (as nearly as by reasonable exertion it is possible to secure such a result) his neighbor shall suffer no more injury than would have accrued if the structure had been put where it is without ever having had the support of his land."

The principle underlying this rule is that "if a man in the exercise of his own rights of property do damage to his neighbor, he is liable if it might have been avoided by the use of reasonable care;" 23 Mo. 573; 54 Kan. 339. In the absence of a statutory rule it is said that "the care required of a party so excavating is that of a man of ordinary prudence in the circumstances of the particular situation. . . . The particular circumstances so largely shape and indicate the duty that any attempt to reduce the rule to greater certainty would probably tend to impede rather than to promote the administration of justice;" 110 Mo. 234. It has been recently held that prior notice to the neighbor whose property may be endangered by the excavation is an essential part of the ordinary care referred to; 53 N. J. L. 443; 13 L. R. A. 569. In this case there was so much of a dissent that, standing alone, it could hardly be considered sufficient authority for the proposition. On this point it is said that "one who digs away land which affords support to an adjoining house ought to give the owner reasonable notice of his intention to do so, and he must allow the latter all reasonable facilities for obtaining artificial support, including a temporary privilege of shoring up the house by supports based upon the former owner's land;" 2 Shearm. & Redf. Neg., 4th ed. § 701. A more recent text writer says: "Thus the authorities are agreed that one who proposes to excavate, or make other alterations or improvements upon his own land, which may endanger the land or house of his neighbor, is bound to give the latter reasonable notice of what he proposes to do, to enable him to take the necessary measures for the preservation of his own property. But, after giving such notice, he is bound only to reasonable and ordinary care in the prosecution of the work." 1 Thomp. Neg. 276. In many cases it is held that after notice from the owner who proposes to excavate, it is the duty of his neighbor to shore up his own building; 44 Md. 268; 4 Paige 169; 9 B. & C. 725. And where a neighbor has no right to support by grant or by prescription, it is said that he must shore up his own house; 8 B. Monr. 333; but there is no obligation on the part of the owner of a building about to be removed to shore up the other buildings; Goddard, Easem., Bennett's ed. 48.

The owner of land cannot be deprived of his right to excavate his own land by the action of his neighbor in building at or near the boundary line, and if he conduct his operations with due care, and no right by grant or prescription has been acquired by his neighbor; he is not liable, even though the building of the latter be ruined; 3 B. & Ad. 871; 76 Ill. 237; 18 Pick. 117; 4 N. Y. 201; 20 Conn. 533.

In the case of a party wall (*q. v.*) the joint owners of it have no easement of reciprocal support from each other's buildings, and if one proposes to remove the building, and injury to his neighbor is liable to result from it, he must notify him of his intention that he may look to his own protection, at the same time using reasonable care and precaution to protect the neighbor, and if this is done, and still injury results, no action will lie; 98 Ky. 284.

With respect to a right by prescription for the support of buildings, there is a difference between the tendency of judicial opinion in England and the United States. In the former country the tendency, "as in the case of all rights affecting real estate, is strongly in favor of the recognition of this right as acquired by prescription;" L. R. 6 App. Cas. 740; 19 Ch. Div. 281; 2 C. & K. 250. See 1 El. Bl. & El. 622; 9 H. L. Cas. 508. The American doctrine,

after some fluctuation, is now considered as settled that an easement for the support of a building cannot be acquired by prescription; 98 Cal. 346; 42 Mo. App. 551 (overruling 13 *id.* 575); 49 Ga. 19; 7 Watts 460; 80 Va. 1 (overruling 27 Gratt. 77); 12 Mass. 280. See note on this branch of the subject, 20 L. R. A. 730.

The measure of damages in actions for removing the lateral support of another's land is the amount required to restore the property to its former condition with as good, means of lateral support, and special damages must be specially pleaded; 7 Houst. 219; or the diminution of the value of the land by falling, caving, or washing, as the natural result of the excavation; 25 N. J. L. 356; 57 Minn. 493; 64 *id.* 123; 149 Pa. 155; 155 *id.* 256; 3 S. Dak. 44; 3 Sutherland, Damages 417. See 121 Ind. 195; s. c. 6 L. R. A. 449.

The right of lateral support may be asserted as well against a municipal corporation's making excavations in changing the grade of a street as against private individuals; 88 Va. 902. But see 28 Abb. N. C. 154. So where a city built a sewer in a public street opposite land, under which and the street was a stratum of silt and quicksand which flowed into the sewer trench so that a building on the land was damaged, the city was held liable; 44 N. E. Rep. (Mass.) 344. In this case three judges dissented on the authority of 4 L. R. Exch. 244, in which it was held that there is no right of recovery for damages occasioned by the sinking in of land, and that this doctrine extended to a quicksand flowing so freely as to be raised by a pump.

Where a house is injured as an indirect effect of the improper working of mines, the right of action arises at the time the mischief is felt, and the statute of limitations runs from that time; 9 H. L. Cas. 503.

For a collection of cases depending on particular facts and illustrating the right of lateral support, see 67 Vt. 630.

In California it is made unlawful by statute for a land-owner to remove the lateral support of adjoining land without taking reasonable precautions to support it; Cal. Civ. Code § 832. It was held that this liability was not avoided by proof that the work was done by a contractor, but that where the excavation was done under contract, and no precaution was taken with respect to lateral support, both the owner and the contractor were liable to the owner of adjoining land which fell in; 105 Cal. 52.

See, generally, 13 L. R. A. 569, note; Ray, Neg. Imp. Dut. 190; EASEMENT; PRESCRIPTION.

LATERAN COUNCILS. The general name given to the numerous councils held in the Lateran Church at Rome.

The first of these was convened A. D. 649 to consider the doctrine of the Monothelites. This council held five sessions, during which the writings of the leading advocates of the theory were examined and condemned, and all persons anathematized who did not confess their belief in the existence of both the divine and the human will in the person of Jesus Christ. The second of the councils, held in the years 1106, 1112, 1116, and 1123, settled the controversy between the pope and the emperor as to the investiture of bishops, prescribed the methods of ordinations and elections, by which, although the pope apparently made large concessions to the emperor, he was, in fact, able to practically control the elections, and passed additional decrees to enforce the celibacy of the clergy. The third council, convened in 1139, condemned the antipope and deposed all who received office under him and promulgated thirty canons of discipline among which were several against simony, marriage, and immorality among the clergy. The fourth council (1179) decreed that the election of the pope should be confined to the college of cardinals, two-thirds of the votes of which should be requisite for an election, instead of a majority, as had previously been necessary. It condemned the Albigenses and the Waldenses. The fifth council convened in the year 1215. It is usually called the fourth Lateran and was the most important as marking the summit of the papal power. It decreed that the doctrine of transubstantiation be one of the articles of faith, required all persons who had reached the age of discretion to confess once a year, arranged for the place of assembly and the time for the next crusade, and anathematized all heretics whose belief was opposed to the faith, decreeing that after their condemnation they should be handed over to the secular authorities, excommunicating all who received, protected, or maintained them, and threatening all bishops with deposition who did not use their

utmost endeavors to clear their dioceses of them. The sixth council (1512-17) abolished the Pragmatic Sanction and substituted a concordat agreed upon by Leo X. and Francis I. in which the liberties of the Church were greatly restricted.

Some authorities recognize five only, omitting the first above stated and numbering the others from one to five.

LATHE, LATH (L. Lat. *laestrum* or *leda*. Law Fr. and Eng. Dict.). A division of certain counties in England, intermediate between a county or shire and a hundred, sometimes containing three or four hundreds, as in Kent and Sussex. Cowel. But in Sussex the word used for this division is *rape*. 1 Bla. Com. 116. There was formerly a *lathe-reeve* or bailiff in each *lathe*. *Id.* This division into *lathes* continues to the present day. In Ireland, the *lathe* was intermediate between the *tything* and the hundred. Spencer, Ireland. See T. L.

LATHREEVE, LEDGREEVE, or TRITHREE-GREVE. An officer under the Saxon government who had authority over a *lathe*. Cowel.

LATIFUNDIUM (Lat.). In Civil Law. Great or large possessions; a great or large field; a common. Ainsworth. A great estate made up of smaller ones (*funds*), which began to be common in the latter times of the empires. Schmidt, Civ. Law. Introd. n. 17.

LATIFUNDUS (Lat. *late possidens*). A possessor of a large estate made up of smaller ones. Du Cange.

LATIMER. A word used by Sir Edward Coke for an interpreter. Cunningham; 2 par. Inst. fol. 515. It seems that the word is incorrect, and should be "latiner" because heretofore he that understood Latin, which in the time of the Romans was the prevailing language, might be a good interpreter. Camden agrees that it signifies a Frenchman or interpreter, and says the word is used in an old inquisition. Britan. fol. 593, and may be derived or corrupted from the French *latiner*, *q. d. latiner*. *Id.*; Cowell, edit. 1727.

LATIN. The language of the ancient Romans. See LANGUAGE.

Three causes made the Latin language useful and important in early English jurisprudence: (1) Its conciseness, expressiveness, and adaptability to condensation fitted it, in early times, to be the medium of preserving the principles of jurisprudence, in the same manner as it has been widely preferred for communication of philosophic, scientific thought, and information generally. (2) The civil and canon laws, and many of the early European Codes, were couched in Latin, and were received by the English people in that language; hence they might often be quoted in the original, as well as translated. (3) The conflict, after the Norman conquest, between the Saxon and the French tongues naturally promoted the use of any neutral speech which might be available. Other influences of less importance co-operated with these; hence Latin was, in ancient English jurisprudence, the language of statutes and formal treatises; and by Stat. 36 Edw. III. ch. 15, all pleas were directed to be debated in English, but to be recorded in Latin. English gradually predominated, however, until Stats. 4 Geo. II. ch. 26, and 6 Geo. II. ch. 14, declared that all judicial proceedings and records should be in English. Abbott.

During the gradual decline in the use of Latin in the courts, faulty and erroneous employment of it was, of course, frequent. Early legal authorities discriminate between three kinds of law Latin:

(1) Good Latin, allowed by the grammarians and lawyers. (2) False or incongruous Latin, which in times past would abate original writs; though it would not make void any judicial writ, declaration, or plea, etc. (3) Words of art, known only to the sages of the law, and not to grammarians, called "lawyers' Latin." *Id.*; Wharton; 1 Lit. Abr. 146.

LATIN UNION. A monetary alliance of France, Belgium, Switzerland, and Italy for the establishment of a mutual and uniform monetary policy and the maintenance of a uniform and interchangeable coinage of gold and silver based on the French franc. Greece and Roumania joined the association in April, 1867.

The convention was made at Paris, Dec. 23, 1865, and provided that certain named gold and silver coins and no others should be used by each state, and that they should be received interchangeably when not worn to one-half per cent. or the device effaced. Silver coins were made a legal tender between individuals of the state which issued them to the sum of fifty francs; but the state itself should receive them in any amount, and the public banks receive them to the sum of one hundred francs of each country to the sum of one hundred francs. The contracting governments agreed to redeem the small coins in gold or five-franc silver pieces, when presented in sums of not less than one hundred francs. It was agreed that of silver coins of two francs and less there should not be issued more than six francs for each inhabitant, the amount for each country being specified according to the estimated population in 1865. Provision was made for any other nation to join the convention by accepting its obligations and adopting the monetary system of the Union. The treaty was limited to remain in force till Jan. 1, 1890.

January 30th, 1874, a supplementary treaty was made, further limiting the coinage of 1874, and the same limitations were made for 1875 and 1876. In the conference of 1877 the coinage of five-franc pieces was suspended except nine million francs for Italy. In 1878 Belgium passed a law to suspend the coinage of silver entirely, and France did the same in 1876, and the law of Switzerland was to the same effect. Separate legislation to limit the coinage was permissible, as the treaty of 1865 only limited the maximum but did not make any coinage obligatory.

In 1878 through a conference in Paris the same nations renewed the monetary treaty as it was "in all that relates to fineness, weight, denomination, and currency of their gold and silver coin." The free coinage of gold (excepting five-franc pieces, of which the coinage was suspended) was guaranteed each state, and the coinage of silver five-franc pieces was provisionally suspended to be resumed only by unanimous agreement. This treaty was in force, by its terms, until January 1st, 1886.

In November, 1885, France, Greece, Italy, and Switzerland renewed the convention for five years, absolutely, with the further agreement that after Jan. 1, 1891, it should be subject to termination on one year's notice. Belgium after some hesitation gave her assent. Silver coinage was made redeemable and no addition to it permitted.

See, generally, *Int. Cyc. tit. Latin Union.*
Another group of European nations acting under a joint monetary convention includes Norway, Sweden, and Denmark, which have had a treaty known as the Scandinavian Monetary Convention, dated in 1873, for the mutual regulation of their coinage. In addition to the countries named as belonging to the Latin Union, Spain, Austria-Hungary, Finland, Roumania, Servia, Bulgaria, and Monaco have also coined large amounts of either or both gold and silver into money of weight, fineness, and value exactly proportionate to or identical with that of the countries included in the Latin Union.

LATINER. An interpreter. Co. 2 Inst. 515. See *LATIMER*.

LATINI COLONIARI. The free inhabitants of a colony founded with the *jus latii*, or of a country upon which the *jus latii* had been conferred. By the *constitutio Antoniana*, Caracalla extended to them the privilege of full Roman citizenship.

LATINI JUNIANI. Such freedmen as enjoyed their liberty *tuitione prætoria*, and who, under the *lex junia norbana*, were made legally free, their freedom, however, being only of the kind enjoyed by the *latini coloniarii*. They possessed only the *jus commercii* and not the *jus connubii*, and even in regard to the former they were restricted, in that they had the *commercium inter vivos*, but not the *commercium mortis causa*. They could neither make a will nor take anything under a will, and when a *latinus junianus* died, his property reverted to his master as though he had remained a slave all his life. The privilege of Roman citizenship conferred upon the *latini coloniarii* did not include the *latini juniani*. See Sohm, *Rom. L.* § 22.

In the Roman Law. A class of freedmen (*libertini*) intermediate between the two other classes of freedmen called respectively "*Cives Romani*" and "*Dediticii*." Slaves under thirty years of age at the date of their manumission, or manumitted otherwise than by *vindicta*, *census*, or *testamentum*, or not the *quiritary* property of their manumissors at the time of manumission, were called "*Latini*." By reason of one or other of these three defects, they remained slaves by strict law even after their manumission,

but were protected in their liberties first by equity, and eventually by the *Lex Junia Norbana*, A. D. 19, from which law they took the name of *Juniani* in addition to that of *Latini*. R. & L. Dict.; Brown. See *MANUMISSION*.

LATINS. See *JUS LATI*.

LATITAT (Lat. he lies hid). In English Law. The name of a writ calling a defendant to answer to a personal action in the king's bench. It derives its name from a supposition that the defendant lurks and lies hid, and cannot be found in the county of Middlesex (in which the said court is holden) to be taken there, but is gone into some other county, and therefore requiring the sheriff to apprehend him in such other county. Fitz. N. B. 78. Abolished by stat. 2 Wm. IV. c. 39.

LATTER-MATH. A second mowing; the aftermath.

LATOR. A bearer; a messenger. Whart. L. Lex.

LAUDAMENTUM. See *LAUDARE*.

LAUDARE. To advise or persuade; to arbitrate. Whart.

In Civil Law. To cite or quote; to name; to show one's title or authority. Calv. Lex.

Laudamentum. The finding or award of a jury. 2 Bla. Com. 285.

LAUDATIO. Testimony delivered in court concerning an accused person's good behavior and integrity of life. It resembled the practice which prevails in our trials, of calling persons to speak to a prisoner's character. Wharton.

(Lat., laudare, to praise.) **In the Civil Law.** A praising or commending; a speaking in one's favor. Burrill.

LAUDATOR. A witness to character. A person to decide some point at issue between others.

LAUDEMEO. In Spanish Law. Taxes paid by possessors of land held by quit-rent or emphyteusis to the owner of the estate when the tenant alienates his right in the property. Escriche.

It was provided that "the tenant may alienate the land, acquitting the lord who has the right of preemption (*tanteo*), with the price that another has offered; and he not giving that price, or being silent with respect thereto, for two months the tenant may sell, but to a person from whom the lord may recover the rent, in order that he shall execute a new deed of lease, and for which he is entitled to a relief (*laudemio*), which is the fiftieth part of the price or value." L. 29, tit. 8 p. 5; 1 White, Rec., 87; Schmidt, *Civil Law of Spain and Mexico* 74.

LAUDEMIUM (Lat. *a laudando domino*). In Roman Law. A fiftieth part of the purchase-money or (if no sale) of the value of the estate paid to the landlord (*dominus*) by a new *emphyteuta* on his succession to the estate, not as heir, but as singular successor. Voetius, Com. ad Pand. lib. 6, tit. 3, §§ 26-35; Mack. R. L. § 328.

In Old English Law. The tenant paid a *laudemium* or acknowledgment-money to the new landlord on the death of the old. Called also *laudatium*. See Blount, *Acknowledgment-Money*.

LAUDUM. Award or arbitrament.

In Scotch Law. Judgment or sentence; dome or doom. 1 Pitc. Cr. Tr. pt. 2, p. 8.

LAUGHE. Frank-pledge. 2 Reeves, Hist. Eng. L. 17.

LAUNCEGAY or **LAUCEGAY.** A spear or javelin, the use of which was prohibited by 7 Ric. III. c. 13.

LAUNCH. The movement by which a ship or boat descends from the shore into the water when she is first built, or afterwards.

A vessel already in the water cannot be launched; 70 Me. 352.

A large, long, low, flat-bottomed boat. Mar. Dict. The long boat of a ship. R. H. Dana. A small vessel employed to carry

the cargo of a large one to and from the shore.

The goods on board of a launch are at the risk of the insurers till landed; 5 Mart. La. n. s. 387. The duties and rights of the master of a launch are the same as those of the master of a lighter.

When the master of a vessel agreed to take cotton on board his vessel from the cotton-press, and employed a steam-lighter for that purpose, and the cotton was lost by an explosion of the steam-boiler of the lighter, it was held that his vessel was liable *in rem* for the loss; 23 Bost. L. Rep. 277.

LAUNDRY. A place where clothes are washed. 105 Ky. 265, 49 S. W. 28.

LAUNDRYMAN. A "laundryman" is one who conducts a place where clothes are washed. 105 Ky. 265, 49 S. W. 28.

LAUREATE or **LAUREAT.** An officer of the English sovereign. His duty formerly consisted only in composing an ode annually, on the sovereign's birthday, and on the New Year; sometimes also, though rarely, on occasions of any remarkable victory. The annual birthday ode has been discontinued since the conclusion of the reign of George III. The title has been said to be derived from the circumstance that in classical times and in the middle ages, the most distinguished poets were solemnly crowned with laurel. Out of this association of ideas sprang the custom of the presentation of a laurel wreath to graduates in rhetoric and versification at the English universities, the king's laureate simply meaning a rhetorician in his service. In allusion to this custom Selden, in his *Titles of Honor*, speaks of the laurel crown as an ensign of the degree of mastership in poetry. A relic of the old university practice of crowning distinguished students of poetry exists in the term "laureate," which is still used at one of the Scotch universities (St. Andrews), to signify the taking of the degree of Master of Arts.

A succession of poets from Chaucer to Spenser acted occasionally as informal poets laureate, or court poets: and the academic use of the title poets laureatus ceased. The first actual appointment as poet laureate was that of Ben Jonson in 1617. Since then the office has been conferred by letters patent on various poets, of whom Dryden, Southey, Wordsworth, and Tennyson were the most notable. From 1670 the laureate got annually a butt of canary; and there has always been also a stipend which is at present £72 a year. Now the laureate has no definite duties. Byrne.

LAUREL. An English gold coin worth twenty shillings, or about five dollars, coined in 1619 by James I., so-called because the head of the king was wreathed with laurel, and not crowned as on English coins.

LAW. That which is laid down; that which is established. A rule or method of action, or order of sequences.

The rules and methods by which society compels or restrains the action of its members.

The aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of its members.

The aggregate of rules set by men as politically superior or sovereign, to men as politically subject. Aust. Jur., Campbell's ed. 86.

A rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong. 1 Bla. Com. 44.

A rule of civil conduct prescribed by the supreme power in a state. 1 Steph. Com. 25.

The general body of rules which are addressed by the rulers of a political community to the members of that society, and which are generally obeyed. Markby, Ele-

ments of Law 3.

A rule of conduct contained in a command of a sovereign addressed to the subject. Encyc. Brit.

A general rule of human action, taking cognizance of external acts only, enforced by a definite authority, which authority is human, and among human authorities is that which is paramount in a political society. More briefly, a general rule of external human action enforced by a sovereign political authority. Holland, Jur. 87.

All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only. *Id.*

A rule or enactment promulgated by the legislative authority of a state; a long-established local custom which has the force of such an enactment. 10 Pet. 18.

The doctrines and procedure of the common law of England and America, as distinguished from those of equity.

An oath. So used in the old English practice, by which wager of law was allowed. See WAGER OF LAW.

Perhaps few terms whose use requires equal precision serve in so many diverse meanings as the term law. In its root it signifies that which is laid down; that which is established. "In the largest sense," says Montesquieu (*Esprit des Loix*, b. 1, ch. 1), "laws are the necessary relations which arise from the nature of things; and, in this sense, all beings have their laws, God, his laws, the material universe has its laws, intelligences superior to man have their laws, animals have their laws, man has his laws. In this sense, the idea of a command proceeding from a superior to an inferior is not necessarily involved in the term law. It is frequently thus used to denote simply a statement of a constant relation of phenomena. The laws of science, thus, are but generalized statements of observed facts." "It is a perversion of language," says Paley, "to assign any law as the efficient operative cause of anything. A law presupposes an agent: this is only the mode according to which an agent proceeds."

It has been said that "the one idea that is common to all meanings of the word law is that of order or regularity in the happening of events. Starting from this, the meanings divide into two groups which may be distinguished as law in the scientific and in the juristic sense." Terry, *Anglo-Am. L. L.* The author cited continues that "the former seems to contain no elements in addition to the one above mentioned. A scientific law can be expressed as a mere formula," but law in the juristic sense involves the further ideas that the regularity manifested is the result of an act or omission of a rational being, produced by an attempt to conform his conduct to some standard or ideal more or less clearly conceived. The result of this process is the evolution in any community of individuals of common principles of action, which as soon as reason takes cognizance of them become laws in the most general, juristic sense of the word. With the advance of civilization new elements come into being: (1) The idea of force is added to that of order and is applied to compel obedience, or, going one step further, to change, modify, or add to these rules of action. (2) The primitive law becomes differentiated from other bodies of rules with which it is at first confounded, so that in the end what is termed law in the stricter sense may conflict with other recognized principles of action which are termed laws in the more general sense, as the natural or the moral law. *Id.*

In its relation to human affairs there is a broad use of the term, in which it denotes any of those rules and methods by which a society compels or restrains the action of its members. Here the idea of a command is more generally obvious, and has usually been thought an essential element in the notion of human law.

A distinction is to be observed in the outset between the abstract and the concrete meaning of the word. That which is usually intended by the term "laws" is not coextensive with that which is intended by the term "law." In the broadest sense which it bears when used in the abstract, law is a science. It treats of the theory of government, the relation of states to each other and to individuals, and the rights and obligations of states, of individuals, and of artificial persons and local communities among themselves and to each other.

An analysis of the science of law presents a view, first, of the rights of persons, distinguishing them as natural persons and artificial persons, or bodies politic or corporations. These rights are deemed either absolute, as relating to the enjoyment of personal security, liberty, and of private property, or, on the other hand, as relative,—that is, arising out of the relation in which several persons stand. These relations are either (1) public or political, viz.: the relation of magistrates and people; or, (2) private, as the relations of master and servant, husband

and wife, parent and child, guardian and ward, to which might be added relations arising out of private contracts, such as partnership, principal and agent, and the like. Under the head of the rights of persons as arising out of public relations may be discussed the constitution and polity of the state, the distribution of powers among the various departments of the government, the political status of individuals, as aliens, citizens, and the like.

In the second place, the analysis presents the rights of property, which is divided into personal property or chattels, viz. that which is movable, and real property, or that which is immovable, viz., lands, including nearly all degrees of interest therein, as well as such chattels as by a peculiar connection with land may be deemed to have lost their character as legally movable: these rights of property are viewed in respect to the origin of title, the transmission of title, and the protection of the enjoyment thereof.

In the third place, the analysis presents a view of private wrongs, or those injuries to persons for which the law provides a redress for the aggrieved party; and under this head may be considered the tribunals through which the protection of rights or the redress of wrongs may be obtained, and the various modes of procedure to those ends.

Lastly, the analysis presents a view of public wrongs, or crimes and misdemeanors, in which may be considered the theory of crime and punishment, the persons capable of committing crimes, the several degrees of guilt of principals and accessories, the various crimes of which the law takes cognizance,—as, those against religion, those against the state and its government, and those against persons and property,—with the punishment which the law affixes to each, and also the tribunals and procedure by which crimes threatened may be prevented, and crimes committed may be punished. *Bla. Com.*

In a stricter sense, but still in the abstract, law denotes the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of members of the community.

It is the aggregate of legal rules and principles, as distinguished from any particular rule or principle. No one statute, nor all statutes, constitute the law of the state; the principles laid down by the courts and the regulations of municipal bodies, as well as, to some extent, the universal principles of ethics, go to make up the body of the law. It includes principles, which rest in the common sense of justice and right, as well as positive rules or regulations, which rest in ordinance. It is the aggregate of the rules or principles only which the governing power in the community recognizes, because that power, whether it be deemed as residing in a monarch, an aristocracy, or in the people at large, is the source of the authority and the sanction of those rules and principles. It is the aggregate of those rules and principles which are recognized as the law by that power, rather than those which are actually enforced in all cases; for a statute is none the less a law because the community forbear to enforce it, so long as it is officially recognized by them as that which, in theory at least, should be enforced; nor does a departure from the law by the governing power in itself abrogate the law. It comprises not only those rules and principles which are to be enforced, but also those which are simply permissive; for a very large part even of modern statute-law—which is commonly defined as a rule commanding or prohibiting—in reality neither commands nor prohibits, except in the most distant and indirect sense, but simply authorizes, permits, or sanctions; and this is much more generally true of those principles of the law which rest in custom and the adjudications of the courts. It is only those which relate to the members of the community in question; for laws, as such, have no extra-territorial operation.

The state has in general two, and only two, articulate organs for law-making purposes—the legislature and the tribunals. The first organ makes new law; the second attests and confirms old law, though under cover of doing so it introduces many new principles. Holland, Jur. 65. "The statute law is the fruit of the conscious power of society, while the unwritten and customary law is the product of its unconscious effort. The former is indeed to a certain extent a creative work; but, as we have already seen, the condition of its efficacy is that it must limit itself to the office of aiding and

supplementing the unconscious development of the unwritten law." Address of James C. Carter, Rep. (1890) Am. Bar Assn. 236.

The earliest notion of law was not an enunciation of a principle but a judgment in a particular case. When pronounced in the early ages, by a king, it was assumed to be the result of direct divine inspiration. Afterwards came the notion of a custom which a judgment affirms or punishes its breach. In the outset, however, the only authoritative statement of right and wrong is a judicial sentence rendered after the fact has occurred. It does not presuppose a law to have been violated, but is enacted for the first time by a higher form into the judge's mind at the moment of adjudication. Maine, *Anc. Law* (Dwight's ed.) pp. xv, 5. See PRECEDENT. As to Primitive Notions of Law, see 10 Am. L. Rev. 422.

The idea of law has commonly been analyzed as composed of three elements: (1) a command of the lawgiver, which command must prescribe not a single act merely, but a series or class of acts; (2) an obligation imposed thereby on the citizen; (3) a sanction threatened in the event of disobedience; Benth. *Frag. on Gov.*; Austin, *Prov. Jur.*; Maine, *Anc. Law*. Hamilton declared a sanction essential to the idea of law. *Federalist*, No. 15.

The latter clause of Blackstone's definition has been much criticised. Mr. Chitty modifies it to "commanding what shall be done or what shall not be done"; 1 *Bla. Com.* 44, note; and Mr. Stephen omits it in his definition. See *supra*. As to Law and Command, see 1 *Law Mag. & Rev. N. S.* 189.

These definitions, though more apt in reference to statutes and edicts than to the law in general, seem, even in reference to the former sort of law, to look rather at the usual form than at the invariable essence of the thing. The principle of law, that a promise without a consideration is void, neither commands men to provide a consideration for every promise nor forbids them to promise without consideration, for this is lawful; nor does it forbid them to fulfil such promises. It simply amounts to this, that if men choose to break such promises, society will not interfere to enforce them. And even many statutes have no form of a command or prohibition; and, moreover, some that are such in form are not in reality. An enactment that no action shall be brought on a simple contract after the lapse of six years from the time the cause of action accrued cannot aptly be said to command men to bring actions within six years, nor even, in fact, to forbid them to bring such actions after that time; for it is still lawful to sue on an outlived demand, and, if the defendant do not object, the plaintiff may succeed. It may be deemed a command to dismiss such actions; but as a rule of civil conduct it amounts simply to this, that when an obligation has become stale to a certain degree, society will sanction the debtor in repudiating it.

A recent work on legal history disclaims philosophical analysis and definition of law, as belonging neither to the historical nor to the dogmatic science of law, but to the theoretical part of politics. Legal science is said to be "not an ideal or ethical result of political analysis; it is the actual result of facts of human nature and history." Accordingly, "law may be taken for every purpose save that of strictly philosophical inquiry to be the sum of the rules administered by courts of justice." When, therefore, "a man is acquainted with the rules which the judges of the land will apply to any subject of dispute between citizens or to any act complained of as against the common weal, and is further acquainted with the manner in which the decisions of the common court can be enforced, he must be said to know the law to that extent." It is not necessary that he should "have opinions on the metaphysical analysis of laws or legal duty in general, or the place of the topic in hand in a scientific arrangement of legal ideas." 1 *Poll. & Maitl. Intro.*

As to philosophy of the law, see 1 *Law Mag. & Rev. N. S.* 577.

The difficulty of defining law is nowhere more clearly shown than in a late work on English and American law, in which the leading definitions are enumerated and criticised. It is truly said that the expression "our law," adopted by the author, does not mean moral law, although rules regulating civil conduct may "be imported by

the tribunals when necessary for the purposes of the actual decision of causes, from the field of morality," when they become invested with the quality of law to the extent that they are recognized and enforced by the judges. The author referred to agrees with Mr. Justice Markby (Elem. of Law § 12) that no greater service was rendered by Austin than the definition of the boundaries of jurisprudence which separate it from ethics or morality. This separation was too much overlooked by continental jurists, with the result, particularly in Germany, of merging "the scientific treatment of law in the larger region of ethical inquiry." (Amos, Science of Law ch. i., ii., iii.) Nor does the law include the science of politics or government, which falls "within the domain of the statesman or legislator" (see also Pollock, Hist. Science of Politics). So law and legislation are not synonymous; the latter is the usual and effective instrument for changing and amending the former or making additions to it. Leaving behind him what the law is not and pausing before undertaking to define what it is, the author remarks, "It requires a bolder man than I to propound a definition of the law of the land which is both comprehensive and accurate." He criticises the definitions of Blackstone, Markby, and Austin (*supra*) as being defective in that the words "prescribed," "command," "addressed," "set," would require an elasticity not consonant with their general or appropriate use. These definitions are apt and accurate as describing the *ordained* or *enacted* law of a state, but would exclude a large body of what is, unquestionably, law. He adopts Holland's as sufficiently accurate for his purpose, "although with a conscious sense of its inadequacy." It answers the purpose because "law, as the lawyer has to deal with it, is concerned only with the legal rights . . . coercion by the state is the essential quality of the law, distinguishing it from morality or ethics." The conclusion is, "If you ask me to define law, I can, speaking as a lawyer, do no better than to adopt Professor Holland's definition already given. If you ask me to enumerate all the ultimate sources whence legal rights and duties originate and how these are evolved, I hide my diminished head and confess my inability to satisfactorily formulate an answer." Dillon, Laws and Jur. Lect. 1.

This emphatic statement gathers added force when the thoroughness of the author's research, as shown by his notes, is considered. Among them is found a reference to the elaborate and learned examination of the subject by Professor Clark, who devotes sixteen chapters each to "The Definition and Origin of Law" and "The Form of Law" in his "Practical Jurisprudence: A Comment on Austin." See, as to definition of law, 10 L. Quart. Rev. 228.

This criticism of the most frequently quoted definitions leads naturally up to a reference to the clear and forcible views of Mr. James C. Carter in his address upon The Ideal and The Actual in the Law. Reference has already been made to another address of Mr. Carter in the title International Law (*q. v.*), to which subject much of what is here said is particularly applicable. Concluding his discussion of the sources of law generally, he thus states the result of his argument against the conception of Austin: "Law is not a body of commands imposed upon society from without, either by an individual sovereign or superior, or by a sovereign body constituted by representatives of society itself. It exists at all times as one of the elements of society springing directly from habit and custom. It is, therefore, the unconscious creation of society or a growth. For the most part it needs no interpreter or vindicator. The members of society are familiar with its customs and follow them, and in following custom they follow the law. It is only for the exceptional instances that judicial tribunals or legislative enactments are needed. In those cases where the customs are doubtful or conflicting, the expert is needed to ascertain or

reconcile them, and hence the origin of the judicial establishment. . . . New customs, new modes of dealing, must be contrived to meet new exigencies, and society by the unconscious exercise of its ordinary forces proceeds to furnish itself with them. But this is a gradual and slow process attended with difficulty and loss. Another agency is needed to supplement and assist the work of society, and legislation springs into existence to supply the want." Rep. Am. Bar Assn. (1890) 217.

It has been very truly said that much of the obscurity involving the origin of law and the mutual relations and proportions of customary, statute, and case law is caused by ambiguous uses of the term source. It is employed (1) to indicate whence we obtain our knowledge of the law; (2) the mode in which or the person through whom have been formulated rules which have acquired the force of law; (3) the authority which gives them that force. The last two uses are most frequently confused. Recognition by the state is the sole source of laws in the sense of that which impresses upon them their legal character. Their sources, in the sense of the causes to which they owe their existence as rules, are thus classified: (1) usage which becomes law at the moment at which it receives the *imprimatur* of the state; (2) religion, the influence of which cannot be left out of account in studying the development of any secular system of law; (3) adjudication, whatever theory be accepted as to its nature as a source of law; (4) scientific discussion; (5) equity, as particularly exemplified in the administrations of law by the Roman praetor and the English chancellor; (6) legislation, whether by the supreme power of the state or by subordinate authorities exercising a delegated function. Holland, Jur. Ch. 5.

When used in the concrete, the term law usually has reference to statutes or expressions of the legislative will. "The laws of a state," observes Mr. Justice Story, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws." 16 Pet. 18. Hence, he argues, "in the ordinary use of language it will hardly be contended that the decisions of courts constitute laws." In the Civil Code of Louisiana they are defined to be "the solemn expression of the legislative will." See 145 U. S. 454.

The constitution of a state is a law of the state, within the meaning of the United States constitution; 148 U. S. 187; but a municipal ordinance is not; 146 U. S. 258.

But, as has already been said, "law" in the abstract involves much more. Thus, a reference in a statute to "the cases provided by law" includes not only those cases provided by former statutes, but also those contemplated by the common or unwritten law; 18 N. Y. 115.

The law of the land, an expression used in Magna Charta and adopted in most of the earlier constitutions of the original states, means, however, something more than the legislative will; it requires the due and orderly proceeding of justice according to the established methods. See 8 Gray 329; 21 Cent. L. J. 147; DUE PROCESS OF LAW.

When the term law is used to denote enactments of the legislative power, it is frequently confined, especially by English writers, to permanent rules of civil conduct, as distinguished from other acts, such as a divorce act, an appropriation bill, an estates act. Report of Eng. Stat. L. Com., March, 1856.

In the United States, the organic law of a state is termed the constitution, and the term "laws" generally designates statutes or legislative enactments, in contradistinction to the constitution. See STATUTES.

Law, as distinguished from equity, denotes the doctrine and procedure of the common law of England and America, from which equity is a departure. As to where separate courts of law and equity are maintained, see EQUITY.

Law is also used in contradistinction to

fact. Questions of law are, in general, for the decision of the court; while it is for the jury to pass upon questions of fact. See JURY; JUDICIAL POWER.

In respect to the ground of the authority of law, it is divided as natural law or the law of nature or of God, and positive law.

The classification and arrangement of the law is a subject as to which the lack of systematic discussion is in striking contrast to the measureless volume of treatises upon particular legal topics. The extent to which the latter overlap each other, and thus add to the labor of the patient investigator of any given title, has been frequently suggested, but there is to be found in legal literature little more than the merest recognition of the necessity of a remedy. As to Legal Chaos, see 2 Pol. Sci. Quart. 91.

The familiar analysis based on the arrangement of Blackstone's Commentaries remains after the lapse of more than a century without the recognition of a substitute which warrants the omission of its substance from the place heretofore assigned to it in this title, inadequate as it is.

Like the classification of Blackstone, of much suggestive interest, but inadequate for modern purposes, is Sir Matthew Hale's Analysis of the Law, a posthumous tract frequently bound with the History of the Common Law.

The subject of classification forms a large part of the able work on jurisprudence by Professor Holland, but it is there dealt with in sections, and without any attempt to present as a whole a comprehensive analysis or classification. The work does furnish most valuable material to be used in making one. Of value for similar use will be found Digby's Introduction to the History of the Law of Real Property, appendix to Part I. with tables; papers by O. W. Holmes, Jr., 5 Am. L. Rev. 1; 7 id. 46; Hammond's Blackstone, notes on Book I. Ch. I., and Introduction to Sandars' Justinian. See also an article by Sir Frederick Pollock, "Divisions of Law," 8 Harv. L. Rev. 188, in which he contends that "it is not possible to make any clear-cut division of the subject-matter of legal rules." He discusses some of the more obvious general divisions of the law, but his view as to a complete classification is thus expressed: "Ambitious writers have sometimes gone to work as if it were possible to reduce the whole contents of a legal system to a sort of classified catalogue where there would be no repetition or cross references, and the classification would explain itself. Ambition on that scale is destined to disappointment by the nature of things." The subject was brought to the attention of the American Bar Association in 1888 by a letter of Professor Henry T. Terry, which is printed in the annual report of 1889, p. 327. A committee was appointed, and made a report in 1891, which discussed with much ability the importance of the subject and the difficulty of its practical accomplishment. The conclusion reached was that a classification could only be successfully attempted with respect to one legal system, and that it must be made in harmony with the spirit of the law as it grows and in the light of legal history. The objects are, first, arrangement to enable the mind to comprehend the law as a whole; second, the cataloguing of topics, to the end that authorities may be collected under a well recognized title of each principal topic of the law. The two methods are not consistent, one being required for the jurist and the scholar and the other for the judge and the lawyer. Both, therefore, are needed, but the last is of more general importance. The committee reported a tentative classification under the first head only, leaving the other for a further report, which has not yet been made. Rep. Am. Bar Assn. (1891) 379-402. In 1896, the subject was revived, and a brief report expressed the belief that it was possible "to determine more definitely the sphere of each of the ordinary topics of the law and determine where each subject may be looked for." Rep. Am. Bar Assn. (1896) 405. Nothing further has been done by the committee, which has been continued with the

promise of further attention to the subject. Report (1897) 53.

For more elaborate discussions of the subject, see, generally, Austin Lect. Jur. outline of the course; Amos, Science of Jurisprudence; Terry, Anglo-American Law, Ch. XVI.; 24 Am. L. Rev. 211, 874, 1027; 25 id. 817, 829.

Arbitrary law. A law or provision of law so far removed from consideration of abstract justice that it is necessarily founded on the mere will of the law-making power, so that it is rather a rule established than a principle declared. The principle that an infant shall not be bound by his contract is not arbitrary; but the rule that the limit of infancy shall be twenty-one years, not twenty nor twenty-two, is arbitrary.

The term is also sometimes used to signify an unreasonable law,—one that is in violation of justice.

Irrevocable laws. All laws which have not in their nature or in their language some limit or termination provided are, in theory, perpetual: but the perpetuity is liable to be defeated by subsequent abrogation. It has sometimes been attempted to secure an absolute perpetuity by an express provision forbidding any abrogation. But it may well be questioned whether one generation has power to bind their posterity by an irrevocable law. See this subject discussed by Bentham, Works, vol. 2, 402-407; and see Dwarrit, Stat. 479.

Municipal law is a system of law proper to any single state, nation, or community. See MUNICIPAL LAW.

A **penal law** is one which inflicts a penalty for its violation.

Positive law is the system naturally established by a community, in distinction from natural law. See POSITIVE LAW.

Private law is a term used to indicate a statute which relates to private matters which do not concern the public at large.

A **prospective law** or statute is one which applies only to cases arising after its enactment, and does not affect that which is already past.

A **public law** is one which affects the public, either generally or in some classes.

A **retrospective law** or statute is one that turns backward to alter that which is past or to affect men in relation to their conduct before its enactment. These are also called **retroactive laws**. In general, whenever a retroactive statute would take away vested rights or impair the obligation of contracts, it is in so far void, because opposed to the constitution of the United States; 3 Dall. 391. But laws which only vary the remedies, or merely cure a defect in proceedings otherwise fair, are valid; 10 S. & R. 102, 103; 15 id. 72; 2 Pet. 390, 627; 8 id. 88; 11 id. 420. See RETROSPECTIVE.

As used in the 5th amendment to the constitution, it embraces all legal and equitable rules defining human rights and duties, and providing for their enforcement; not only as between man and man, but also between the state and its citizens; 30 Pac. Rep. (Utah) 760.

See AGRARIAN LAWS; BANKRUPT LAWS; BREHON LAW; CANON LAW; CIVIL LAW; CODE; COLONIAL LAWS; COMMERCIAL LAW; COMMON LAW; CONSTITUTIONAL; CONSUETUDINARY LAW; CORN LAWS; CRIMINAL LAW; CROWN LAW; CUSTOM; DICTUM; DUE PROCESS OF LAW; ECCLESIASTICAL LAW; EDICT; EQUITY; EX POST FACTO; FEACIAL LAW; FEUDAL LAW; FICTION; FOREIGN LAW; FOREST LAW; GAME LAWS; HINDU LAW; INTERNATIONAL LAW; JUDGE-MADE LAW; JUS; LAW MERCHANT; LAW OF NATURE; LEX; MARTIAL LAW; MILITARY LAW; MOHAMMEDAN LAW; MUNICIPAL LAW; POSITIVE LAW; PRECEDENT; REPORTS; STATUTES; STARE DECISIS.

Of the Case. The phrase "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to open what has been decided—not a limit to their power. 225 U. S. 436.

Of Another State. The "law of another State" is a fact to be pleaded and

proved, and in the absence of pleading and proof it will be presumed that the common law is in force, and that it is the same as the common law prevailing in this jurisdiction. 162 Ky. 833, 173 S. W. 162.

Of the State. The "laws of the State" are such enactments as its Legislature promulgates, and as expounded by its courts. 131 Ky. 551, 115 S. W. 703.

Of United States. The expression "law of the United States," referred to in clause 6 of § 250, Judicial Code, regulating appeals from and writs of error to the Court of Appeals of the District of Columbia, "embraced only laws of the United States of general operation" and does not therefore include "laws of the United States local in their application to the District of Columbia."

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. 213 U. S. 356.

See CASE LAW; COMMON LAW; CONSTITUTIONAL LAW; EUGENICS LAWS; JURISDICTION UNDER; LOCAL LAW; MARTIAL LAW; MILITARY LAW; STATUTE LAW; SUPREME LAW OF THE LAND; TREATY, As a Law.

LAW AGENTS. In Scotch Law. Solicitors whose qualifications are provided for by 36 and 87 Vict. and several acts of sederunt.

A law agent has a right to retain his client's papers (not being part of a process), which have come lawfully into his possession in the course of his employment, in security of his business account, though incurred before the possession. This is the only case in which writs may be held in pledge as things distinct from the property to which they relate. It gives no active right. The purpose of the possession is immaterial, unless there be an express obligation to surrender the writs when that purpose has been accomplished. They are no security for payment of cash advances or salary or commissions. If the client becomes bankrupt, the agent must surrender the documents to the trustee or liquidator under reservation of his lien. The right gives a preference against all sundry—the client, his successors, universal and singular, his trustee in bankruptcy, or an inhibitor, but not as against one who has a better title to the writs than the client. A law agent is subject like a counsel to certain unwritten rules of the legal profession. One of these is that in the conduct of a cause he shall follow the directions of counsel, with the resulting benefit of escaping personal liability.

The courts are jealous of the purity of this important and powerful class of men that they will direct a return of a gift made by a client in excess of the sums fixed for professional charges; and will demand proof of the utmost independence and freedom from undue influence before allowing a testator's legacy to his solicitor to pass. Ersk. Prin. pp. 272, 323, 376.

Any person entitled to practise as an agent for another in a court of law in Scotland. Abbott; M. & W.

LAW OF ARMS. Ordinances which regulated proclamations of war, leagues, treaties, etc. Cowel.

This law was necessary between two strange princes of equal power who have no other method of determining their controversies, because they have no superior or ordinary judge, but are supreme and public persons. Jacob; Treat. Laws 57.

It is a kind of law among all nations, that in case of war, the Prince who conquers gains a right of dominion, as well as property over the things and persons he has subdued. Jacob; Hale's Hist. L. 73, 74.

LAW BORGH. In Old Scotch Law. A pledge or surety for appearance.

LAW-BURROWS. In Scotch Law. Security for the peaceful behavior of a party; security to keep the peace. This process was much resorted to by the government of Charles II. for political purposes.

The action for contravention of law-burrows is penal. It proceeds on a decree of law-burrows (from borgh, a cautioner). The decree is obtained in the sheriff's or justice of the peace court, after service of a petition setting forth dread of bodily harm, and after proof taken—in which parties are competent witnesses. Failing caution, the decree orders imprisonment for not more than six months

or fourteen days, according as the case is brought before a sheriff or a justice. The complainant does not require to alight the defender in prison. Instead of caution being ordered, the defender may be directed, on pain of imprisonment, to give his own bond. So that the old rules are annulled whereby letters of law-burrows (not now issued) did not require the previous citation of the party complained upon, on the ground that the caution which the law required was only for doing what was every man's duty; and that before the letters were executed against him the complainant had to make oath that he dreaded bodily harm from him. These proceedings can only be quashed by suspension or by suspension and liberation on proof of malice and want of probable cause. Ersk. Prin. p. 492.

LAW OF THE CASE. A doctrine which applies to cases in their progress towards final decision. When a point of law has been decided by an intermediate appellate court, that decision is binding on the trial court and on the intermediate appellate court itself in all subsequent stages of the case, until it is carried up to a higher court of appeal. If the decision is by a court of last resort, it is binding on the lower courts on retrial or rehearing. Their duty is to apply that decision to the facts. If the case comes before a court of last resort on second appeal, it is held in some jurisdictions that the court is bound by its own former ruling, even though it be now recognized as erroneous. In other jurisdictions this rule is relaxed for the purpose of correcting palpable error. This doctrine, like that of *res judicata* (q. v.), applies only to the particular case, and the particular facts in evidence, and they affect only the parties to that case and their privies. Other courts in the same jurisdiction, or the same court subsequently, may reach different conclusions in other cases, similar in facts, but with different parties. Nevertheless, the former case cannot be reopened. The parties have had their day in court, and must abide by the conclusions reached. This doctrine differs from *res judicata* in that it applies to cases in their progress towards final decision, whereas *res judicata* applies only to final judgments, by which is meant either judgments by courts of last resort, or by courts not of last resort when the parties to an action have neglected appeal until it is no longer allowable. See *RES JUDICATA*. Hicks, Mat. & Meth. Leg. Res. 83, 84.

LAW CHARGES. Costs incurred in court in the prosecution of a suit, to be paid by the party cast. 17 La. 206; 11 Rob. La. 28. See 3 Mart. La. 282.

LAW OF CITATIONS. In the Civil Law. The most important of the laws of citation were those enacted by Valentinian III. A. D. 426, which enacted that the writings of the jurists Papinian, Paulus, Ulpian, Gaius, and Modestinus, as well as of all those who were cited by these writers (the limits of classic literature being thus determined), should possess quasi-statutory force so that their opinions should be binding on the judge. If the opinions differed on the same question, that opinion should prevail which was supported by the largest number of the jurists; if the numbers were equal, Papinian's opinion should prevail, or, if Papinian had expressed no opinion on the subject, the judge was to exercise his discretion. Valentinian the Third's law of citations marks the completion, for the time being, of that development which had commenced with the *responsa* of the old pontifices and the *ius respondendi* of Augustus. See Sohm, Inst. Rom. L. 84.

LAW CLERK. A person serving a certain period in the office of a practising attorney or solicitor, in order to qualify himself to practice as an attorney or solicitor. Burrill. See ARTICLED CLERK.

LAW COURT OF APPEALS. In American Law. An appellate tribunal, formerly existing in the state of South Carolina, for hearing appeals from the courts of law.

LAW DAY. The day fixed in a mortgage or defeasible deed for the payment of the debt secured. 24 Ala. N. S. 149: 10

Conn. 280; 21 N. Y. 845. This does not occur now until foreclosure, and the use of the term is confusing; 21 N. Y. 845.

IN OLD ENGLISH LAW. A leet or sheriff's tourne. *Termes de la Ley*. Law day or lago day denoted a day of open court; especially the more solemn courts of a county or hundred. The court-leet, or view of frankpledge.

LAW OF THE FLAG. See FLAG.

LAW FRENCH. See LANGUAGE.

LAW OF THE LAND. The general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property, and immunities under the protection of the general rules which govern society. 4 Wheat. 518; 49 Fed. Rep. 833. See DUE PROCESS OF LAW.

LAW LATIN. See LANGUAGE, LATIN.

LAW LIBRARY. A collection of books, manuscripts, pamphlets, etc., relating to legal subjects. Under a bequest of "Law Library and books of antiquity," Dugdale's Monasticon, Domesday Book, and State Trials were held to pass. 4 L. J. O. S. Ch. 74.

LAW LIST. In English Law. An annual publication of a quasi-official character, comprising various statistics of interest in connection with the legal profession. The present law list is *prima facie* evidence that the persons therein named as solicitors or certified conveyancers are such. 23 & 24 Vict. c. 127.

The contents include, among other information, the following matters: A list of judges, queen's counsel, and sergeants-at-law; the judges of the county courts; benchers of the inns of court; barristers, in alphabetical order; the names of counsel practising in the several circuits of England and Wales; London attorneys; country attorneys; officers of the courts of chancery and common law; the magistrates and law officers of the city of London; the metropolitan magistrates and police; recorders, etc. Abbott; M. & W.

LAW LORDS. In English Law. Peers who have held high judicial office, or have been distinguished in the legal profession. Moz. & W.

LAW OF MARQUE. See LETTER OF MARQUE AND REPRISAL.

LAW MARTIAL. See MILITARY LAW.

LAW MERCHANT. The general body of commercial usages in matters relative to commerce. Blackstone calls it the *custom of merchants*, and ranks it under the head of the particular customs of England, which go to make up the great body of the common law. 1 Bla. Com. 75. Since, however, its character is not local, nor its obligation confined to a particular district, it cannot with propriety be considered as a *custom* in the technical sense; 1 Steph. Com. 54. It is a system of law which does not rest exclusively on the positive institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world. 3 Kent 2.

These usages, being general and extensive, partake of the character of rules and principles of law, not of matters of fact, as do usages which are local or special. They constitute a part of the general law of the land, and, being a part of that law, their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio*; Winch 24; and this application is not confined to merchants, but extends to all persons concerned in any

mercantile transaction. See Beawes, *Lex Mercatoria Rediviva*; Caines, *Lex Mercatoria Americana*; Comyns, Dig. Merchant (D); Chitty, Com. Law; Pardessus, *Droit Commercial*; *Collection des Lois maritimes antérieures au dix-huitième Siècle*, par Dupin; Capmany, *Costumbres Maritimas*; *Il Consolato del Mare*; *Us et Coutumes de la Mer*; Piantandia, *Della Giurisprudenza Marittima Commerciale, Antica e Moderna*; Valin, *Commentaire sur l'Ordonnance de la Marine, du mois d'Août*, 1681; Boulay-Paty, *Droit Comm.*; Boucher, *Institutions au Droit Maritime*; Parsons, Marit. Law; Smith, Merc. Law.

LAW OF NATIONS. See INTERNATIONAL LAW.

LAW OF NATURE. That law which God, the sovereign of the universe, has prescribed to all men, not by any formal promulgation, but by the internal dictate of reason alone. It is discovered by a just consideration of the agreeableness or disagreeableness of human actions to the nature of man; and it comprehends all the duties which we owe either to the Supreme Being, to ourselves, or to our neighbors: as, reverence to God, self-defence, temperance, honor to our parents, benevolence to all, a strict adherence to our engagements, gratitude, and the like; Erskine, Fr. Sc. Law 1. 1. 1. See Ayliffe, Pand. tit. 2, p. 2; Cicero; de Leg. lib. 1.

The divine will, or the dictate of right reason, showing the moral deformity or moral necessity there is in any act, according to its suitability or unsuitableness to a reasonable nature. Sometimes used of the law of human reason, in contradistinction to the revealed law, and sometimes of both, in contradistinction to positive law.

They are independent of any artificial connections, and differ from mere presumptions of law in this essential respect, that the latter depend on and are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, without the aid or control of any particular rule of law, but simply from the course of nature and the habits of society. These presumptions fall within the exclusive province of the jury, who are to pass upon the facts. 3 Bouv. Inst. n. 3064; Greenl. Ev., 15th ed. § 44.

The primitive laws of nature may be reduced to six, namely: comparative sagacity, or reason; self-love; the attraction of the sexes to each other; the tenderness of parents towards their children; the religious sentiment; sociability.

When man is properly organized, he is able to distinguish moral good from moral evil; and the study of man proves that man is not only an intelligent but a free being, and he is, therefore, responsible for his actions. The judgment we form of our good actions produces happiness; on the contrary, the judgment we form of our bad actions produces unhappiness.

Every animated being is impelled by nature to his own preservation, to defend his life and body from injuries, to shun what may be hurtful, and to provide all things requisite to his existence. Hence the duty to watch over his own preservation. Suicide and duelling are, therefore, contrary to this law; and a man cannot mutilate himself, nor renounce his liberty.

The attraction of the sexes has been provided for the preservation of the human race; and this law condemns celibacy. The end of marriage proves that polygamy and polyandry are contrary to the law of nature. Hence it follows that the husband and wife have a mutual and exclusive right over each other.

Man from his birth is wholly unable to provide for the least of his necessities; but the love of his parents supplies for this weakness. This is one of the most powerful laws of nature. The principal duties it imposes on the parents are to bestow on the child all the care its weakness requires, to provide for its necessary food and cloth-

ing, to instruct it, to provide for its wants, and to use coercive means for its good, when requisite.

The religious sentiment which leads us naturally towards the Supreme Being is one of the attributes which belong to humanity alone; and its importance gives it the rank of the moral law of nature. From this sentiment arise all the sects and different forms of worship among men.

The need which man feels to live in society is one of the primitive laws of nature whence flow our duties and rights; and the existence of society depends upon the condition that the rights of all shall be respected. On this law are based the assistance, succors, and good offices which men owe to each other, they being unable to provide each every thing for himself. See JUS NATURALE; INTERNATIONAL LAW.

LAW AND ORDER ASSOCIATIONS. Societies formed for the preservation of the public health and morals and the prosecution of those who offend against them.

Knowledge and approval of the members of such a league that one of its officers had retained counsel to prosecute violations of the law, will not render them personally liable for his services, if they believed the expenses incurred would be paid from a fund contributed for that purpose and placed at the disposal of the officers; 133 N. Y. 89.

LAW OF THE ROAD. See RULE OF THE ROAD; NAVIGATION RULES.

LAW SOCIETY. See INCORPORATED LAW SOCIETY.

LAW OF THE STAPLE. See LAW MERCHANT.

LAW REPORTS. See REPORTS.

LAW SOCIETY. See INCORPORATED LAW SOCIETY.

LAW SPIRITUAL. Ecclesiastical law (q. v.).

LAW STUDENT. See PRIVILEGED COMMUNICATIONS.

LAW TERMS. Those periods of the year during which the law courts sit in banc or in full court. See TERM.

LAWFUL. Legal. That which is not contrary to law. That which is sanctioned or permitted by law. That which is in accordance with law. The terms "lawful," "unlawful," and "illegal" are used with reference to that which is in its substance sanctioned or prohibited by the law. The term "legal" is occasionally used with reference to matter of form alone; thus, an oral agreement to convey land, though void by law, is not properly to be said to be unlawful, because there is no violation of law in making or in performing such an agreement; but it is said to be not legal, or not in lawful form, because the law will not enforce it, for want of that written evidence required in such cases.

LAWFUL AGE. Majority. This usually means twenty-one years, but in some of the states, for certain purposes, a woman attains lawful age at eighteen. 4 Md. Ch. 228.

LAWFUL AUTHORITIES. The expression "lawful authorities," used in our treaty with Spain, refers to persons who exercised the power of making grants by authority of the crown. 9 Pet. 711.

LAWFUL CAUSE. Under a statute forbidding a priest to deny the communion without lawful cause, that the person was an open and notorious evil liver was held such a cause. 45 L. J. P. C. 1; 1 P. D. 80.

Whether a coroner's absence is from any lawful or reasonable cause is a question for the judge. Such a cause was his taking a vacation, even though part of it was spent in shooting; 42 L. J. M. C. 41; L. R. 2 C. C. R. 15.

LAWFUL DISCHARGE. Such a discharge in insolvency as exonerates the

debtor from his debts. 12 Wheat. 370.

LAWFUL GOODS. Whatever is not prohibited to be exported by the positive law of the country, even though it be contraband of war, for a neutral has a right to carry such goods at his own risk. 1 Johns. Cas. 1; 2 id. 77; id. 120.

LAWFUL HEIR. See **HEIR**; **NEXT OF KIN**.

LAWFUL ISSUE. In a devise to A for life, and on her death to her lawful issue, etc., these words are to be given the same effect as "heirs"; 3 Edw. I.; 21 Tex. 804. Under the term lawful issue, bastards cannot take a remainder in a life estate to the mother; 10 B. Mon. 188. See **ISSUE**.

LAWFUL MONEY. Money which is a legal tender in payment of debts: *e. g.* gold and silver coined at the mint. 2 Salk. 446; 5 Mod. 7; 3 Ind. 358; 2 How. 244; 3 id. 717; 16 Ark. 83. See **Hempst.** 236. See **GOLD**; **MONEY**.

LAWFUL MONEY OF THE UNITED STATES. Is lawful money of any State or territory. See **LAWFUL MONEY**.

LAWFUL TRADE. A clause in an insurance policy against loss "in lawful trade" was construed to mean during employment by the owner in lawful trade; 51 L. J. Q. B. 472.

LAWFULLY BEGOTTEN. In a will such a limitation creates an entail. 7 Taunt. 85; 51 L. J. Q. B. 472; 9 Q. B. D. 463; 8 App. Cas. 393.

In such expressions as "lawful heirs," "lawful issue," "heirs lawfully begotten," the words "lawful" or "lawfully begotten" are mere redundances and do not affect the meaning of the words "heir" or "issue." *Byrne*.

LAWFULLY POSSESSED. In a statute concerning forcible entry and detainer, it is equivalent to peaceably possessed. 45 Mo. 35.

LAWING OF DOGS. Mutilating the fore-feet of mastiffs, to prevent them from running after deer. 3 Bla. Com. 71. See **EXPEDITATION**; **COURT OF REGARD**.

LAWLESS COURT. An ancient local English court, said to have been held in Essex once a year, at cock-crowing, without a light or pen and ink, and conducted in a whisper.

LAWLESS MAN. An outlaw.

LAWMAN. A man authorized to declare the law.

Anciently the particular citizen of a Scandinavian community, who acted as a popular spokesman against the king and the court at public assemblies, etc., and the guardian of the law, president both of the legislative bench and of the law courts. The president of the supreme court of Orkney and Shetland while the islands remained under Norse rule. Cent. Dict.

A Danish magistrate in an English town; his office was hereditary. The presiding officer in the Supreme Court of Shetland and Orkney under the rule of the Norse. English.

LAWND OR LOUND. Synonymous with frythe (*q. v.*).

LAWS OF OLERON. See **CODE**.

LAWS OF WAR. See **MILITARY LAW**.

LAWSUIT. An action at law, or litigation. This is, however, only the vernacular expression for a case before the courts in which there is a controversy between two parties. Technically we speak of a suit in admiralty or equity, an action at law, a prosecution in a criminal court, etc. The term lawsuit may include an arbitration; 7 Cow. 434.

LAWYER. One skilled in the law. Any person who, for fee or reward, prosecutes or defends causes in courts of record or other judicial tribunals of the United

States, or of any of the states, or whose business it is to give legal advice in relation to any cause or matter whatever. Act of July 13, 1868, § 9, Stat. L. 121. See **ATTORNEY**; **BARRISTER**; **PROCTOR**; **SOLICITOR**.

LAY. In English Law. That which relates to persons or things not ecclesiastical. In the United States, the people are not by law divided, as in England, into ecclesiastical and lay. The law makes no distinction between them. The word is also used in the sense of opposed to professional. Also applied to a share of the profits of a fishing or whaling voyage, allotted to the officers and seamen, in the nature of wages; 3 Story 108.

In Pleading. To state or to allege. The place from whence a jury are to be summoned is called the venue, and the allegation in the declaration of the place where the jury is to be summoned is, in technical language, said to *lay the venue*. 3 Steph. Com. 574; 3 Bouvier, Inst. n. 2830.

To lay damages. To state at the conclusion of the declaration the amount of damages which the plaintiff claims. And, Steph. Pl. § 220.

LAY CORPORATION. See **CORPORATION**.

LAY DAYS. In Maritime Law. The time allowed to the master of a vessel for loading and unloading the same. In the absence of any custom to the contrary, Sundays are to be computed in the calculation of lay days at the port of discharge; 10 M. & W. 381. See 3 Esp. 121; 3 Kent 202; 2 Steph. Com. 141; 65 Hun 625. See **DEMURRAGE**.

LAY FEE. A fee held by ordinary feudal tenure, as distinguished from the ecclesiastical tenure of *frankalmoign*, by which an ecclesiastical corporation held of the donor. The tenure of *frankalmoign* is reserved by stat. 12 Car. II., which abolished military tenures. 1 Bla. Com. 101.

LAY IMPROPRIATOR. Lay rector, to whom the greater tithes are reserved, the lesser going to the vicar. 1 Burn, Eccl. Law 75, 76.

LAY INVESTITURE. See **INVESTITURE**; **ANNULUS ET BACULUS**.

LAY OUT. This term has come to be used technically in highway laws as embracing all the series of acts necessary to the complete establishment of a highway. 28 Conn. 363; 121 Mass. 382; 83 Me. 514. See 11 Ired. 94.

LAY PEOPLE. Jurymen. Finch, Law 381.

LAYING THE VENUE. See **LAY**.

LAYMAN. In Ecclesiastical Law. One who is not an ecclesiastic nor a clergyman. One who is not a member of the legal profession. One who is not a member of any profession.

LAZARET, LAZARETTO. A place, selected by public authority, where vessels coming from infected or unhealthy countries are required to perform quarantine. See **HEALTH**.

LEA. Pasture. Co. Litt. 4 b.

LE ROIS' AVISERA, or LA REINE S'AVISERA. The king will consider of it. This phrase is used by the English monarch when he gives his dissent to an act passed by the lords and commons. This power was last exercised in the year 1707, by Queen Anne; May, P. L. ch. 18. The same formula was used by the king of the French for the same purpose. 1 Toullier, n. 52. See **VETO**.

LE ROI LE VEUT. The king assents. This is the formula used in England, and formerly in France, when the king approved of a bill passed by the legislature. 1 Toullier, n. 52.

LE ROI VEUT EN DELIBERER. The king will deliberate on it. This is the formula which the king of the French used when he intended to veto an act of the leg-

islative assembly. 1 Toullier, n. 42.

LEADING A USE. A term applied to a deed executed before a fine is levied, declaring the use of the fine: *i. e.* specifying to whose use the fine shall enure. If executed after the fine, it is said to *declare* the use. 2 Bla. Com. 363. See **DEED**.

LEADING CASE. A case decided by a court of last resort, which decides some particular point in question, and to which reference is constantly or frequently made, for the purpose of determining the law in similar questions.

Many elements go to the constitution of a case as a leading case: among which are, the priority of the case, the character of the court, the amount of consideration given to the question, the freedom from collateral matters or questions. The term is applied to cases as leading either in a particular state or at common law. A very convenient means of digesting the law upon any subject is found to be the selection of a leading case upon the subject, and an arrangement of authorities illustrating the questions decided. See B. & H. Lead. Cr. Cas. 2 v.; Sm. Lead. Cas.; Sm. L. Cas. Comm. L.; Hare & W. Sel. Dec. 2 v.; Tudor, Cas. R. P. 1 v.; Tudor, L. Cas. Merc. L. 1 v.; Sedgwick, Damages; Bigelow, L. C. Torts; Redf. & Bigel. Bills & Notes; Redfield, Railw. Cas.; English Ruling Cases; Lawyers' Reports Annotated; Lawson, L. Crim. Cas. Simplified; Lawson, L. Eq. & Const. Cas. Simplified; Lawson, L. Law Cas. Simplified; Sharsw. & Budd, L. Cas. R. P.; Brett, L. Cas. Mod. Eq.; Langdell, Sel. Cas. Cont.; Thayer, Cas. Const. L.; Shirley, L. Cas. Com. L.; Shirley, L. Cas. Crim. L.; Ames, Cas. Bills & Notes; Bigelow, Life and Acc. Ins. Cas.; Pattee, Cas. Contr.; Pattee, Cas. Realty; Pattee, Cas. Personality & Sales; Langdell, Sel. Cas. Sales, and a variety of others.

The French *Causés Célèbres* correspond to the English state trials.

LEADING COUNSEL. That one of two or more counsel employed on the same side in a cause who has the principal management of the cause. Sometimes called the leader. So called as distinguished from the other, who is called the *junior counsel*.

LEADING QUESTION. In Practice. A question which puts into the witness' mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him. 7 S. & R. 171; 4 Wend. 247. In that case the examiner is said to *lead* him to the answer. It is not always easy to determine what is or is not a leading question.

Such questions cannot, in general, be put to a witness in his examination in chief; 3 Binn. 130; 1 Phill. Ev. 221; 1 Stark. Ev. 123; unless he is a hostile witness; 43 Ill. App. 180. But, in an examination in chief, questions may be put to lead the mind of the witness to the subject of inquiry; and they are allowed when it appears that the witness wishes to conceal the truth or to favor the opposite party, or where from the nature of the case the mind of the witness cannot be directed to the subject of inquiry without a particular specification of such subject; 1 Campb. 43; 1 Stark. 100; 49 Ill. App. 357; 53 Mo. App. 383. The permitting of such questions is within the discretion of the trial court; 35 Neb. 351; 97 Ala. 681; 75 Hun 17; 85 Wis. 615; 91 Ga. 319; 154 U. S. 134; 52 Mo. App. 103. Where the answers of a witness have been taken by surprise the party calling him, the court may permit such party to put leading questions to the witness; 154 U. S. 134.

In cross-examinations, the examiner has generally the right to put leading questions; 1 Stark. Ev. 132; Whart. Ev. § 501; but not perhaps when the witness has a bias in his favor; Best, Ev. 805. See **WITNESS**.

As the allowance of leading questions to a witness is largely in the discretion of the trial judge, the appellate court will reverse for such cause only where it appears that this discretion has been abused; 91 Mich. 611; 139 Ill. 644.

While it cannot be safely said that in no case can a court of errors take notice of an exception of the trial court in permitting leading questions, such conduct must appear to be a plain case of the abuse of discretion; 158 U. S. 271.

LEAGUE. A measure of length, which consists of three geographical miles. The jurisdiction of the United States extends into the sea, a marine league. See Acts of Congress of June 5, 1794, 1 Story, Laws 352; and April 20, 1818, 3 Story, Laws 1694; 1 Wait, State Papers 195.

A conspiracy to do an unlawful act. The term is but little used.

An agreement or treaty between states. Leagues between states are of several kinds: *First*, leagues offensive and defensive, by which two or more nations agree not only to defend each other, but to carry on war against their common enemies. *Second*, defensive, but not offensive, obliging each to defend the other against any foreign invasion. *Third*, leagues of simple amity, by which one contracts not to invade, injure or offend the other: this usually includes the liberty of mutual commerce and trade, and the safeguard of merchants and traders in each other's domain. Bacon, Abr. *Pre-rogative* (D 4). See CONFEDERACY; CONSPIRACY; PEACE; TRUCE; WAR.

LEAKAGE. The waste which has taken place in liquids, by their escaping out of the casks or vessels in which they were kept. See 107 Mass. 140, 145.

By the act of March 2, 1799, s. 59, it is provided that there be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon, and ten per cent. on all beer, ale, and porter in bottles, and five per cent. on all other liquors in bottles, to be deducted from the invoice quantity, in lieu of breakage; or it shall be lawful to compute the duties on the actual quantity, to be ascertained by tale, at the option of the importer, to be made at the time of entry.

Where in a bill of lading a clause is inserted exempting the owner of the ship from loss caused by "rust, leakage, or breakage," he will be liable if damage from these causes be occasioned by the negligence of himself or his servants in stowing; L. R. 2 A. & E. 375; 38 L. J. Adm. 63; 37 L. J. C. P. 3; L. R. 3 C. P. 14; 52 L. J. Q. B. 230; 10 Q. B. D. 521. The primary and natural meaning of the stipulation is that the shipowner will not be answerable if the thing comprised in the bill of lading shall itself rust, leak, or break, and therefore it furnishes him no protection against his liability to compensate for consequential damage happening to that thing by reason of some other thing's rusting, leaking, or breaking; 46 L. J. C. P. 402; 2 C. P. D. 432.

LEAL. Loyal; that which belongs to the law.

LEAP YEAR. See BISSEXTILE.

LEARNING. Doctrine. 1 Leon. 77.

LEASE. A species of contract for the possession and profits of lands and tenements either for life or for a certain period of time, or during the pleasure of the parties.

A conveyance by way of demise, always for a less term than the party conveying has in the premises. Tayl. Landl. & Ten. § 16; 47 Minn. 189.

One of its essential properties is, that its duration must be for a shorter period than the duration of the interest of the lessor in the land; for if he disposes of his entire interest it becomes an *assignment*, and is not a lease. In other words, the granting of a lease always supposes that the grantor reserves to himself a reversion in the leased premises.

And a distinction is to be noted between a lease and a mere agreement for a lease. The whole question, however, resolves itself into one of construction, and an instrument is to be considered either a lease or an

agreement for a lease, according to what appears to be the intention of the parties; 26 Pick. 401; 16 Barb. 621; 9 Ad. & E. 644; 81 Me. 56; 75 N. C. 154; though, generally, if there are apt words of demise followed by possession, the instrument will be held a lease; 8 N. Y. 44; 3 C. & P. 441; 102 Mass. 392; 4 Ad. & E. 225; otherwise, if a fuller lease is to be prepared and executed before the demise is to take effect and possession to be given; 21 Vt. 172; 24 Wend. 201; 8 Stor. 325; 4 Conn. 238; 75 Ill. 44; L. R. 2 Ex. Div. 355; 5 B. & C. 41.

The party who leases is called the *lessor*, he to whom the lease is made the *lessee*, and the compensation or consideration of the lease is the *rent*. The words *lease* and *demise* are frequently used to signify the estate or interest conveyed; but they properly apply to the instrument of conveyance. When a lessee parts with the estate granted to him, reserving any portion thereof, however small, he makes an *underlease*; Tayl. L. & T. § 16; 5 Den. 454; 36 N. Y. 569; 12 Iowa 319; 16 Johns. 159.

The estate created by a lease, when for years, is called a *term* (*terminus*), because its duration is limited and determined,—its commencement as well as its termination being ascertained by an express agreement of the parties. And this phrase signifies not only the limitation of time or period granted for the occupation of the premises, but includes also the estate or interest in the land that passes during such period. A term, however, is perfected only by the entry of the lessee; for previous to this the estate remains in the lessor, the lessee having a mere right to enter, which right is called an *interesse termini*; 1 Washb. R. P. 292, 297; 5 Co. 128 b; Co. Litt. 46 b; 1 B. & Ald. 593.

Any thing corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease; and therefore not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments, are included in the common-law rule; Shepp. Touchst. 268; 110 Mass. 175; 24 Mich. 279; 33 N. Y. 251; 66 Me. 229; 17 C. E. Green 130; 27 Conn. 164. Rent cannot properly be said ever to issue out of chattels; 3 H. & M. 470; 35 Barb. 295; 15 Ohio, N. S. 186; 5 Rep. 16; but goods, chattels, or live stock upon or about real property may be leased with it and a rent contracted for, to issue from the whole, upon which an action for rent in arrear may be maintained as upon such lease; Co. Litt. 57 a; 81 Pa. 20; 24 Wend. 76; 9 Paige 310.

Leases are made either by *parol* or by *deed*. The former mode embraces all cases where the parties agree either orally or by a writing not under seal. The technical words generally made use of in the written instrument are, "*demise, grant, and to farm let*;" but no particular form of expression is required in any case to create an immediate demise; 9 Ad. & E. 650; 15 Wend. 379; 111 Mass. 30; 71 Ill. 317; 7 Blackf. 403; 12 Me. 135; 6 Watts 362; 1 Den. 602; Will. R. P. 327; 83 Ind. 536; see 72 Pa. 286; 66 Mo. 430. An ordinary receipt expressing the nature and terms of the tenancy may be considered a lease; 111 Mass. 30; 73 Ill. 317. Any permissive holding is, in fact, sufficient for the purpose, and it may be contained in any written memorandum by which it appears to have been the intention of one of the parties voluntarily to dispossess himself of the premises for any given period, and of the other to assume the possession for the same period; Tayl. L. & T. § 26; 1 Washb. R. P. 300.

By the English statute of frauds of 29 Car. II. c. 3, §§ 1, 2, 3, it is declared that "all leases, estates, or terms of years, or any uncertain interest in lands, created by livery only, or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised."

"And that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered unless in writing." The principles of this statute have been adopted, with some modifications, in nearly all the states of the Union. 4 Kent 95; 1 Hill, Abr. 130. For a summary of the provisions of the statutes in the various states, see Browne, Frauds. App.; 1 Stims. Am. Stat. L. §§ 4143, 1471; and for the provisions as to a particular state, reference should be made to its statutes. See STATUTE OF FRAUDS.

It has been held that a lease to take effect in *futuro* is not within the statute of frauds; 5 N. Y. 463; 61 id. 518; 53 Mich. 462; *contra*, 19 Ill. 576; 78 id. 125; 8 Ore. 251; and see note on these authorities, 23 Am. L. Reg. N. S. 387. A tenancy from year to year is not a lease or a "term" exceeding one year within the statute; 60 Wis. 1.

As to the surrender or assignment of parol leases for less than three years, it is said that with the exception of Connecticut, perhaps, Pennsylvania stands alone in denying the English rule which holds such parol assignments invalid; Browne, Frauds § 46. See also 16 Am. L. Reg. N. S. 641, where both the English and Pennsylvania cases are collected.

A lease signed by an agent who had no written authority to do so, and also executed by the lessee, was held void within the statute of frauds; 2 Cal. 603; and such a lease cannot be effective as evidence until the agency is shown by evidence of equal dignity; 19 La. Ann. 158.

A written agreement is generally sufficient to create a term of years. But in England, by statute, all leases that are required to be in writing must also be under seal; 8 & 9 Vict. c. 106. See 77 Cal. 296. In Massachusetts and Maryland, leases for more than seven years must be by deed. So in Virginia, of those for more than five, and in Delaware, Rhode Island, and Vermont, of those for more than one. A letting by parol for a sum certain per month, without anything being said about a year, constitutes a lease from month to month, and not a lease from year to year; 100 Pa. 206. A lease is valid and binding on the lessee, who has signed the same and occupied the premises under it, though it is not signed by the lessor; 71 Hun 536.

All persons seized of lands or tenements may grant leases of them, unless they happen to be under some legal disability; as, of unsound mind, immature age, or the like; 8 C. & P. 679. See as to infants, 10 Pet. 65; 7 Cow. 179; 11 Johns. 539; 3 Mod. 310. Contracts by them are voidable only and not void, and may be affirmed or disaffirmed by them on attaining their majority; 17 Wend. 119; 29 Vt. 465; 11 Johns. 539; 6 Conn. 494. As to persons of unsound mind, see 3 Camp. 126; 51 N. Y. 384; 11 Pick. 304; 8 C. & P. 679; intoxicated persons, 2 Paige 30; 18 Ves. 16; 4 Harring. 285; married women, Sm. L. & T. 43; 1 Tayl. L. & T. § 101. The execution of a lease by an authorized agent of a corporation is valid and effectual to create a term without the use of the corporate seal; 43 N. J. L. 329; 87 Ind. 505. A lease made by one railroad corporation to another, neither of which is expressly authorized by law to enter into the lease, is *ultra vires* and void; 131 U. S. 371; 130 id. 1. See PARTIES; CONTRACTS. But it is essential to the validity of a lease that the lessor has, at the time he undertakes to make the grant, possession of the premises; otherwise, whatever he does will amount to nothing more than the assignment of a *chose in action*; Cro. Car. 109; Shep. Touchst. 269. But possession is always presumed to follow the title unless there is a clearly marked adverse possession.

And although a lease may not be sufficient to authorize a lessee to demand possession for the want of a possessory title in his lessor, it will still operate by way of *estoppel*, and enure to his benefit if the lessor afterwards comes into possession of the land before the expiration of the lease; Bacon, Abr. *Leases* (14); 61 N. Y. 6; 7 M. &

G. 701; 3 Pick. 52; 13 How. 82; 6 Watts 60; 2 Hill N. Y. 554; 10 Johns. 110, 201; 5 Ark. 693. See 8 Wash. 603.

The power to lease will, of course, depend upon the extent of the lessor's estate in the premises; and if he has but an estate for life, his lease can only be coextensive therewith; when for a term of years, its commencement as well as its termination must be ascertained, for certainty in these respects is of the essence of a term of years. But although this term may not at first appear to be certain, it may be rendered so by reference to some fact or event; *id certum est quod certum reddi potest*. Thus, if a lease be made to a man for so many years as he has in the manor of Dale, and he happens to have a term of two years in that manor, the lease will be good for that period; Co. Litt. 45 b; 1 M. & W. 533; 3 Co. 346; 97 Mass. 200; 102 *id.* 93; 10 R. I. 355.

Lord Coke states that, originally, express terms could not endure beyond an ordinary generation of forty years, lest men might be disinherited; but the doctrine had become antiquated even in his day, and at the present time there is no limitation to a term of years except in the state of New York, where land cannot be leased for agricultural purposes for a longer period than twelve years; see Co. Litt. 45 b, 46 a; 13 Ohio 334; 1 Wash. R. P. 310; 41 N. Y. 490; 62 N. Y. 524.

In all leases of uncertain duration, or if no time has been agreed upon for the continuation of the term, or if after the expiration of a term the tenant continues to hold over, without any effort on the part of the landlord to remove him, the tenancy is at the will of either party. And it remains at will until after the payment and receipt of rent on account of a new tenancy, or until the parties concur in some other act which recognizes the existence of a tenancy, from which event it becomes a tenancy from year to year, invested with the qualities and incidents of the original tenancy. After this, neither party has a right to terminate it before the expiration of the current year upon which they have entered, nor then without having first given due notice to the other party of his intention to do so. See 126 Pa. 390; 85 Ky. 260; 62 Mich. 141. The length of this notice is regulated by the statutes of the different states; 11 Wend. 616; 4 Ired. 294; 3 Zab. 111. Where a person enters in possession under a verbal lease for one month and continues in possession thereafter, paying rent monthly, in contemplation of law a new letting commences with each monthly term; 37 Ill. App. 160. See LANDLORD AND TENANT.

When leases provide for the renewal of the term, such renewal is a mere continuance of the old term, for the preservation and protection of rights acquired therein; 49 N. J. Eq. 619. See 61 Hun 521. A lease for a term exceeding the period prescribed by the statute against perpetuities is not void on that account, as it does not suspend the power of alienation; 81 Hun 566.

The formal parts of a lease by deed are: first, the date, which will fix the time for its commencement, unless some other period is specified in the instrument itself for that purpose; but if there is no date, or an impossible one, the time will be considered as having commenced from the delivery of the deed; 2 Johns. 230; 4 B. & C. 908; 17 Wend. 103; 12 N. H. 52. Second, the names of the parties, with respect to which the law knows but one Christian name; and therefore the middle letter of the name of either party is immaterial, and a person may always show he is as well known by one name as another; 14 Pet. 322; 36 Ill. 362; 55 N. Y. 390. The entire omission of the lessee's name from a lease will render the instrument simply void; 8 Md. 118; 24 N. Y. 336; 6 Allen 305; 19 Iowa 290; 2 Wall. 24. See 25 Hun 136; 116 Mass. 155; 33 Ind. 94; 40 Conn. 522. Third, recitals of title or other circumstances of the case. Fourth, some consideration must appear, although it need not be what is technically called rent, or a periodical render of com-

pensation for the use of the premises; but it may be a sum in gross, or the natural affection which one party has for the other. It may also consist of grain, animals, or the personal services of the lessee; 3 Hill N. Y. 345; 1 Spears 408; Tayl. L. & T. § 152; 29 Barb. 171; or a promise to pay rent; 107 Ill. 33; and when the lease does not stipulate for the cessation of rent upon the destruction of a building by fire, or that the lessor shall repair, a tenant is not relieved from the payment of rent by a partial destruction of the building; 85 Ala. 99. See LANDLORD AND TENANT. Fifth, the operative words of the lease are usually "demise, grant, lease, and to farm let;" 50 N. Y. 414; 53 N. H. 513; 27 Md. 173. Sixth, the description of the premises need not specify all the particulars of the subject-matter of the demise, for the accessories will follow the principal thing named; thus, the garden is parcel of a dwelling-house, and the general description of a farm includes all the houses and lands appertaining to the farm; 9 Conn. 374; 11 C. E. Green 82; 4 Rawle 330; 9 Cow. 747; 72 Mich. 438; 41 N. H. 337; and a building includes the land on which it stands; 37 Minn. 4. But whether certain premises are parcel of the demise or not is always matter of evidence; 14 Barb. 434; 3 B. & C. 870; 14 B. Mon. 8. Seventh, the rights and liabilities of the respective parties are regulated by law in the absence of any particular agreement in respect thereto; but express covenants are usually inserted in a lease, for the purpose of limiting or otherwise defining their rights and duties in relation to repairs, taxes, insurance renewals, residence on the premises, modes of cultivation, fixtures, and the like. Certain covenants are also implied in law from the use of certain technical terms in leases. The intention of the parties to a lease must be gathered from the instrument taken as a whole; 83 Va. 319.

In every well-drawn lease, provision is made for a forfeiture of the term in case the tenant refuses to pay rent, commits waste, or is guilty of a breach of the covenant to repair, insure, reside upon the premises, or the like. This clause enables the lessor or his assigns to re-enter in any such event upon the demised premises and eject the tenant, leaving both parties in the same condition as if the lease were a nullity; but in the absence of a proviso for re-entry the lessor would possess no such power, the mere breach of a covenant enabling him to sue for damages only; 3 Wils. 127; 2 Cow. 591; 2 Overton 235; 1 Dutch. 285; 15 Cal. 233. The forfeiture will generally be enforced by the courts, except where the landlord's damages are a mere matter of computation and can be readily compensated by money; 7 Johns. 285; 4 Munf. 382; 2 Price 200; 44 Vt. 285; 9 Hare 688; 5 E. I. 144; 60 Pa. 131; 20 Vt. 415; 81 Conn. 468; 40 N. H. 434. One condition essential to the forfeiture of a lease by the lessor is a demand of the rent; 140 U. S. 25; 35 Neb. 766. But in case of a forfeiture for the non-payment of rent, the proviso is allowed to operate simply as a security for rent, and the tenant will be relieved from its effects at any time by paying the landlord or bringing into court the amount of all arrears of rent, with interest and costs. The right to terminate the lease for the non-payment of rent will not give the lessee any right to avoid the lease or his liability for agreed rent; 150 U. S. 665; 11 Tex. Civ. App. 701.

Where under a provision in a lease that if the lessee keeps all its conditions he may purchase the land, the acceptance of the landlord of the rent after it is due, without objection, waives a breach of the condition as to the time of its payment; 30 Atl. Rep. (Vt.) 686.

A lease may be surrendered by any agreement between the parties that the term shall be terminated, which is irrevocably acted upon by both; 34 Neb. 455; but a mere agreement, unless accompanied by the act, is inoperative; 41 Ill. App. 223.

A lease may also be terminated before the prescribed period if the premises are required to be taken for public uses or im-

provements, or the subject-matter of demise wholly perishes or is turned into a house of ill-fame; 29 Barb. 116; 119 Mass. 28; 46 N. Y. 297; 38 Mo. 143; 58 Pa. 271; 118 Mass. 125; 38 Cal. 259; 5 Ohio 303. A lessor who knows that the premises are to be used for gambling cannot recover rent; 62 Ill. App. 134. The same result will follow when the tenant purchases the fee, or the fee descends to him as heir at law; for in either case the lease is merged in the inheritance; since there would be a manifest inconsistency in allowing the same person to hold two distinct estates immediately expectant on each other, while one of them includes the time of both, thus uniting the two opposite characters of landlord and tenant; 3 C. & P. 347; 25 Ill. 19; 6 Johns. Ch. 417; 13 Pa. 16; Tayl. L. & T. § 503. A lease of land is not terminated by the death of the lessee, but an action will lie against his administrator for rent during the remainder of the term; 63 Miss. 664.

A provision in a lease that the lessee may buy the land "at the option of the parties" means that the lessee may buy at his own option; 30 Atl. Rep. (Vt.) 686.

The general rule that a deed cannot be varied by parol applies to leases, and it has been enforced with respect to their date; 3 Scott. N. R. 49; the amount of the rent; 1 Man. & Gr. 589; the contemporaneous grant of rights and privileges inconsistent with the terms of the lease; 19 Cal. 354; 17 La. Ann. 153; time of payment of rent; 7 Blackf. 303; that the lessee agreed to pay taxes; 6 Ves. Jr. 334, n.; or that the lessor, at the time of the lease, agreed to repair; 2 E. D. Sm. 248; though a subsequent agreement for a consideration may be proved; 5 Sandf. 542; 67 N. W. Rep. (Minn.) 1036; but an allegation that the lessee was induced to occupy the premises by the lessor's promise to put in fixtures, made after the execution of the lease, does not show such consideration; 32 S. W. Rep. (Tex.) 426. See as to this rule, generally, and the exceptions to it, PAROL EVIDENCE; CONTRACT; DEED. It was held that the question whether there had been a modification, as between lessor and lessee, was for the jury unless it was admitted by the pleadings; 57 Mo. App. 454.

An assignment of a lease does not become complete and valid until there is consent by the proposed assignee; 7 Mont. 320.

An agreement not to assign without the written consent of the lessor does not bind the lessee where he signs the lease, and at the request of the lessor assigns it to a third person, to whom it is never, in fact, delivered; 114 Cal. 511.

There is no implied warranty on the part of a landlord that a building is adapted for the purposes for which it is leased; 70 Tex. 737; 123 N. Y. 306; 156 Mass. 348.

A corporation authorized to hold real estate may lease its real estate, to be used in a business different to that which the corporation is authorized to carry on; 6 A. & E. Corp. Cas. N. S. (Mass.) 247. A corporation may lease a portion of its real estate to its directors subject to ratification by the stockholders; *id.* See also 122 N. Y. 91; 49 Minn. 488. As to the nature of the interest and liability for rent under gas and oil leases, see GAS; OIL. See, generally, LANDLORD AND TENANT.

Lease of railroad. A lease by a railroad company of all its road, rolling stock, and franchises, for which no authority is given in its charter, is *ultra vires* and void; 101 U. S. 71, the leading case. The decision is based upon the ground that such a company exercises its functions in a large measure for the public good, and that it is forbidden by public policy to disable itself to perform its duties to the public without the consent of the state; *id.* The ordinary clause in a charter authorizing the company to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads does not authorize a lease of the road and its franchises; *id.* Unless specially authorized by its charter or some legislative action, a railroad company cannot, by lease or

other contract, turn over to another company for a long period of time its road and appurtenances or the use of its franchises and the exercise of its powers, nor can any other railroad company make a contract to run and operate such road, property, and franchises. Such a contract is not among the ordinary powers of a railroad company; 118 U. S. 290. See also 180 *id.* 1; 85 Ala. 573; 115 Mass. 347; 24 Neb. 143; 24 N. J. Eq. 455; 63 Me. 68; 98 N. Y. 609; 68 Tex. 49. If it were otherwise, a railroad company, by leasing its road to irresponsible persons, might enjoy all the benefits conferred by its charter and practically leave the public generally, as well as individuals, without any of the protection which the obligations imposed by its charter, as well as the general law of the state, were designed to afford; 28 S. C. 401. The authority to the lessee company to make such lease is not authority to the lessor company for that purpose; 130 U. S. 1. Where a railroad company of New Jersey leased its franchises and roads to a railway corporation of another state, the lease being not only not authorized, but expressly forbidden by law, and its effect being to combine coal producers and carriers of anthracite coal, it was held to be an excess of corporate power which tended to monopoly and the public injury; 61 Am. & Eng. R. Cas. 1; 24 Atl. Rep. (N. J.) 964; and the lessor road is subject to forfeiture; 32 Am. & Eng. R. Cas. 388.

A valid lease will not release the lessor from the obligation to discharge its charter obligations, unless the law authorizing it contains a provision to this effect; 63 Me. 68; 23 Am. & Eng. R. Cas. 50.

Power under the law to mortgage or sell property, or lease it for a term, does not extend to the franchises of a corporation, including the right of way and other property essential to such franchises; 1 Tex. App. 168.

A corporation of one state lawfully leasing a railroad in another state is, as to it, subject to local legislation to the extent to which the lessee would have been subject had there been no lease; 116 U. S. 347. The laws of a state granting to a railroad company authority to lease its roads do not authorize a lease of a part of it which runs in the Indian country, without the consent of the United States expressly given; 40 Fed. Rep. 280.

A lease is not necessarily void because it extends beyond the time of the lessor's corporate existence, it may be valid for the period of the company's corporate existence; 19 Abb. N. C. 193. The fact that the majority of the directors of a lessor company are personally interested in the lessee company will not make the lease void, but merely voidable at the election of the lessor, or at the suit of stockholders brought within a reasonable time; 43 Fed. Rep. 453.

Where the rental was reduced by directors who were substantially the same in both companies, it was held that this action was voidable at the election of either company, so far as the power of the directors was concerned, but that as their act had been approved by the stockholders, it was valid; 11 N. Y. S. R. 732. But where the rental was reduced on account of the financial embarrassment of the lessee, it was held within the power of the board of directors; 39 Am. & Eng. R. Cas. 199.

A lessee is not estopped to deny the validity of a lease by the fact that he has paid rental under it for three years; 145 U. S. 52; but see 93 N. Y. 609; but a stockholder who has waited nineteen years cannot then object; 33 Fed. Rep. 440.

Two railroads contracted that one should operate the other for a term of years, the operating road to receive 65 per cent. of the gross earnings of the line so operated, and out of the remaining 35 per cent. pay interest on the road's bonds, and pay the residue to the company owning the road; this was held not to be a lease; 7 Am. & Eng. R. Cas. 249; 103 Ill. 492.

A corporation in debt cannot transfer its entire property by lease so as to prevent the application of the property at its full value

to the satisfaction of its debts; 184 U. S. 276; where a company which was in debt had transferred its entire property by lease so as to prevent the application of it to the satisfaction of its debts, equity may decree the payment by the lessee of a judgment debt of the lessor; 118 U. S. 116; 118 *id.* 276; 26 Fed. Rep. 320.

A lease requires the consent of a majority of the stockholders, which must be expressed at a stockholders' meeting; 12 Fed. Rep. 513; 37 *id.* 907; 188 Mass. 123; 14 Abb. N. C. 103; 15 Am. & Eng. R. Cas. 1; so also does a modification of a lease; *id.*; and the action of a majority of the stockholders in favor of a lease will not be upheld where it appears that the interests of the minority will be seriously prejudiced by it; 41 N. J. Eq. 1. But it has been held that if power to lease its railroad is conferred upon a corporation by its charter or by statute, the board of directors may execute a lease thereof; 39 Am. & Eng. R. Cas. 199. Where one company owns substantially all the stock and bonds of another, a lease of the latter's line is not void for want of consideration; 51 Am. & Eng. R. Cas. 162; 51 Fed. Rep. 309. The mere fact that the same persons were directors of both corporations is not of itself sufficient to avoid the lease at the instance of stockholders against the will of the corporation. The fact alone might entitle either corporation to avoid the lease, but does not give the right to a stockholder; 12 Hun 460. The lease of a railroad does not dissolve the corporation, and it remains liable for debts incurred prior to the lease; 1 Fed. Rep. 700. A lessee assumes all the duties of the lessor in relation to the property as well as its rights and privileges, but this would not include the payment of the debts of lessor; 131 U. S. 371; 35 Fed. Rep. 444.

Where a lease of a railroad provided for the payment of the net earnings to mortgage bondholders who were creditors of the lessor, the agreement between the lessor and lessee, having been assented to by the bondholders, operated as an irrevocable assignment to them of the net earnings; 78 Fed. Rep. 690.

Without a law authorizing it, railroads cannot guarantee the performance of a lease of a road entered into by two other roads, the leased road being outside of the states creating the guaranteeing roads, and not connecting with their lines; 24 Am. & Eng. R. Cas. 53; 118 U. S. 290.

Where, under a void lease, the property had been used for a time, the railroad company may recover compensation for the use of its property; 2 Fed. Rep. 117; 118 U. S. 290; see 139 U. S. 24; but a lessee, who had received nothing, but had been paying out money under a void contract, cannot be compelled to pay more money under the same contract; 118 U. S. 290; but relief in such case must be based on the invalidity of the contract, and not in aid of its enforcement; 118 U. S. 290. The lessee of a railroad under a lease which all parties admit to be illegal, cannot be compelled by *mandamus* to operate the road; 42 Fed. Rep. 638.

Where a railroad lease for ninety-nine years contained covenants for monthly instalments of rent to keep the road in repair, etc., a bill which shows failure to pay rent, depreciation of the road, and a combination between the guarantors of the lease and the lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction when it prays for the specific performance of the obligations of the lease. A suit at law on each instalment of rent is not an adequate remedy; 118 U. S. 290.

A lease does not vest in the lessee the right of eminent domain as to the lessor company; 109 Mass. 103; 14 Neb. 389; 117 Ill. 611.

A receiver does not become liable upon the covenants of a lease because of his position of receiver, but only by virtue of an election to adopt the lease, if he sees fit to make such election; and even if the lessee is solvent, the lessor cannot force upon the receiver the adoption of the lease; 77 Fed.

Rep. 700. It is well settled that a receiver may take and retain possession of leasehold interests for such period as will enable him to elect intelligently whether it is best to adopt the lease or return the property; 74 Fed. Rep. 91; 142 U. S. 331; 145 *id.* 82; 150 *id.* 287; 58 Fed. Rep. 257, 288; and he is not required to pay rental for a depot property as stipulated by the railway company, and is liable only for a reasonable rental if he occupies the property; 74 Fed. Rep. 88; 145 U. S. 82. He takes possession of leasehold property and holds for the court; *id.* The appointment of a receiver is not an eviction of a lessee; 8 Biss. 456.

As to the relative liability of the lessor and lessee for injuries committed in the operation of the road, the following rules have been laid down in a recent work on the law of railroads: 1. The lessee is liable for all injuries resulting from the negligent operation of the road. 2. Where the lease is void the liability of the lessor continues. 3. Where the lease is valid, some authorities hold that the lessor is relieved from liability for injuries resulting from the negligent operation of the road; 86 Va. 629; 14 Ore. 436; 63 Tex. 549; 14 S. W. Rep. (Ky.) 346. But the last rule admits of serious question, unless the lease contains a specific provision for the lessor's exemption from liability; 70 Ga. 464; 119 Ill. 68; 26 Neb. 159; 145 Mass. 64. Some of the cases hold that the lessor cannot be relieved from liability unless there is express authority in the statute; 57 Fed. Rep. 165; 21 Am. & Eng. R. Cas. 226; 25 *id.* 497; 119 Ill. 68; 26 Neb. 159. See also Wood, Railroads 2054. In 80 Me. 62, the rule was thus laid down: "An unauthorized lease without any exemption clause absolves the lessor from the torts of the lessee resulting from negligence in the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owing to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility," and a covenant in the lease to save the lessor harmless does not affect the case. The lessee is liable whether the lease is valid or invalid; 49 Am. & Eng. R. Cas. 603. But it has been held that though the lease is void, a servant of the lessee company cannot recover against the lessor company for injuries sustained in the operation of the road; 72 Fed. Rep. 745; 80 N. Y. 27; 72 Tex. 375; 88 Tenn. 310. While the lessor may be liable to a party injured by the negligence of its lessee's servants, the lessee is also liable; 35 Am. & Eng. R. Cas. 440.

In some states statutes provide for the joint and several liability of both lessor and lessee; 43 Ind. 354; 36 Ia. 327; 46 Me. 95; 145 Mass. 64; 27 Mo. App. 394.

See Patterson, Railw. Acc. Law § 1301, which lays down the rule that where the lease is valid, the lessor is not liable for the lessee's torts in the operation of the road.

See REVERSIONARY LEASE; SUB-LEASE.

LEASE AND RELEASE. A species of conveyance much used in England, consisting theoretically of two instruments, but which are practically united in the same instrument.

It was invented by Sergeant Moore, soon after the enactment of the statute of uses. It is thus contrived: a lease, or rather bargain and sale upon some pecuniary consideration for one year, is made by the tenant of the freehold to the lessee or bargainee. This, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for one year, and then the statute immediately annexes the possession. Being thus in possession, he is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession, and accordingly the next day a release is granted to him.

The lease and release, when used as a

conveyance of the fee, have the joint operation of a single conveyance; 2 Bla. Com. 339; 4 Kent 482; Co. Litt. 207; Cruise, Dig. tit. 32, c. 11.

LEASEHOLD. The estate held by virtue of a lease. In practice the word is generally applied to an estate for a fixed term of years. A lease of chattels is not a leasehold interest; 48 L. J. Ex. 35.

LEASING-MAKING. In Scotch Law. Verbal sedition, viz.: slanderous and untrue speeches to the disdain, reproach, and contempt of his majesty, his council and proceedings, etc. Bell, Dict.; Erskine, Inst. 4. 4. 29.

LEAVE. See TICKET OF LEAVE.

LEAVE OF COURT. Permission granted by the court to do something which, without such permission, would not be allowable.

The statute of 4 Anne, c. 16, s. 4. provides that it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defence. The principles of this statute have been adopted by most of the states of the Union.

When the defendant, in pursuance of this statute, pleads more than one plea in bar to one and the same demand or thing, all of the pleas except the first should purport to be pleaded with leave of the court. But the omission is not error nor cause of demurrer; Lawes, Pl. 132; 2 Chitty, Pl. 421; And. Steph. Pl. 167; Story, Eq. Pl. 72, 76; Gould, Pl. c. 8, § 21; Steph. Pl. 272; 3 N. H. 523.

Asking leave of court to do any act is an implied admission of jurisdiction of the court, and in those cases in which the objection to the jurisdiction must be taken, if at all, by plea to the jurisdiction, and it can be taken in no other way, the court, by such asking leave, becomes fully vested with the jurisdiction. Bacon, Abr. Abatement (A); Bacon, Abr. Pleas, etc. (E 2); Lawes, Pl. 91; 6 Pick. 391. But such admission cannot aid the jurisdiction except in such cases.

LEAVE TO DEFEND. The bills of exchange act 1855 (18 & 19 Vict. c. 67) allowed actions on bills and notes commenced within six months after being due to be by writ of summons in a form provided by the act, and unless the defendant should within twelve days obtain leave to appear and defend the action, allowed the plaintiff to sign judgment on proof of service. This procedure was retained by the judicature act, but abolished in 1890. It is now provided that in all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money or possession where a tenancy has expired or been determined by notice to quit, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered after giving credit for any payment or set-off; in which case, if the defendant fail to appear, judgment may be signed for the amount claimed; and it is further provided that where the defendant appears on a writ of summons especially indorsed, the plaintiff may, on affidavit verifying the cause of action and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs; and the court or judge may, unless the defendant, by affidavit or otherwise, satisfy the court or judge that he has a good defence on the merits or disclose sufficient facts to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly. Whart. Lex.

LEAVE AND LICENSE. A defence to an action of trespass setting up the con-

sent of the plaintiff to the trespass complained of. Whart. Lex.

LECCATOR. A debauched person. Cowel.

LECTOR DE LETRA ANTICA. In Spanish Law. The person duly authorized by the government to read and decipher ancient documents and titles, in order to entitle them to legal effect in courts of justice.

LECTORES. A term sometimes applied to notaries in the middle ages. So. Afr. L. Dict.

LECTRINUM. A pulpit. Mon. Ang. iii. p. 243.

LECTURER. An instructor; a reader of letters who has the copyright in them if he be an author by 5 & 6 Wm. IV. c. 63. See COPYRIGHT.

A clergyman who assists rectors in preaching. 7 & 8 Vict. c. 59; 18 & 19 Vict. c. 127. Whart. Lex.

Assistants appointed to the rectors of churches. They are chosen by the vestry or chief inhabitants. Within the meaning of the term a readership is not an ecclesiastical preferment; 4 D. & R. 720; 3 B. & C. 49; nor is it included under the definition of benefice given by 1 & 2 Vict. c. 106. The power of the bishop over the lecturer is limited to the right to judge of his qualification and fitness for the office; he may not determine his right to a particular lectureship; 18 East 419; 3 Salk. 87. In the absence of a custom to employ a lecturer, and where the lectureship is to be supported by voluntary contributions, and where the rector has refused his consent to the person applying for the lectureship, the ordinary is the proper judge as to whether or not a lecturer should be admitted; 1 Wils. 11; 1 Term 331; 4 id. 125. In the language of Lord Mansfield, "No person can use the pulpit of another unless he consents. But if there has been an immemorial usage, the law supposes a good foundation for it; and if the lectureship be endowed, that furnishes a strong argument to support the custom." 1 Term 331.

The court will not grant a *mandamus* to compel a bishop to grant a licence to a clergyman to preach as lecturer to a parish; 1 Wils. 11; 2 Str. 1192. Trustees of a lecture to be preached at a convenient hour may appoint any hour they please and vary their appointment; 1 W. Bla. 210. As to the right of and qualification for voting in the nomination of a lecturer, the usage of the parish is, if consistent with the deed of trust, a safe criterion; 1 Ves. 43; 14 id. 7; 3 Atk. 599; 2 Vern. 387; but no person can be a lecturer, although elected by the parishioners, without the rector's consent, unless there be an immemorial custom to such effect; 1 Add. 97; 4 B. & C. 569. See 2 Burn, Eccl. L. 398.

LEDGER. In Commercial Law. A book in which are inscribed the names of all persons dealing with the person who keeps it, and in which there is a separate account, composed generally of one or more pages for each. There are two parallel columns, on one of which the party named is the debtor, and on the other the creditor, and presents a ready means of ascertaining the state of the account. As this book is a transcript from the day-book or journal, it is not evidence *per se*.

LEDGER BOOK. In Ecclesiastical Law. The name of a book kept in the prerogative courts in England. It is considered as a roll of the court, but, it seems, it cannot be read in evidence. Bacon, Abr.

LEEMAN'S ACTS. Acts 30 Vict. c. 29 and 35 & 36 Vict. c. 91, by which contracts for the sale of bank shares are void unless the number of the shares are set forth in the contract; 9 Q. B. D. 546; and by which are authorized the application of the funds of municipal corporations and other governing bodies under certain conditions towards promoting or opposing parliamentary and other proceedings for

the benefit or protection of the inhabitants.

A name by which the Banking Companies (Shares) Act, 1867, and the Borough Funds Act, 1872, is known. Byrne.

LEGA or LACTA. The alloy of money. Spelman.

LEGACY. A gift of personal property by last will and testament.

A gift or disposition in one's favor by a last will. Schoul. Ex. & Ad. § 459. The term is more commonly applied to a bequest of money or chattels, although sometimes used with reference to a charge upon real estate; 2 Wms. Ex. 1051; see 9 Cush. 297; 18 Ired. Eq. 450; 7 Ves. 391, 522. A direction to the executor to support and maintain a person during his life gives him a legacy; 4 Mass. 634; but a recommendation "to give from time to time some little assistance to A" does not; 5 La. Ann. 890. It is said that the word legacy in a will may include real as well as personal property; 1 Law Repos. N. C. 107.

An absolute legacy is one given without condition, to vest immediately; 1 Vern. 234; 19 Ves. 86; Comyns, Dig. Chancery (I 4); they are usually absolute; Schoul. Ex. & Ad. § 466; 19 Ves. 86; Comyns, Dig. Chancery (I 4).

An additional, or, more technically, a cumulative legacy is one given to a legatee to whom a legacy has already been given. It may be given by the same will in which a legacy has already been bequeathed, or by a codicil thereto; 1 Bro. C. C. 90; 17 Ohio 597; 22 Conn. 371.

An alternate legacy is one by which the testator gives one of two or more things without designating which.

A conditional legacy is a bequest the existence of which depends upon the happening or not happening of some uncertain event; 1 Rep. Leg. 645. The condition may be either precedent; 2 Conn. 196; 9 W. & S. 103; 17 Wend. 893; 14 N. H. 315; 10 Cush. 139; or subsequent; 23 Me. 529; 33 N. H. 235; 3 Pet. 376; 55 Md. 575.

A demonstrative legacy is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security; Wms. Ex. 360; 23 N. H. 154; 19 Gratt. 439; 10 Pa. 387; 2 Dev. & B. Eq. 453; 16 N. Y. 365. See DEMONSTRATIVE LEGACY.

A general legacy is one so given as not to amount to a bequest of a particular thing or money, of a particular fund, distinguished from all others of the same kind; 1 Rep. Leg. 170; 8 N. Y. 516; 6 Madd. 92.

An indefinite legacy is a bequest of things which are not enumerated or ascertained as to numbers or quantities; as, a bequest by a testator of all his goods, all his stocks in the funds; Lownd. Leg. 84; Swinb. Wills 435; Ambl. 641; 1 P. Wms. 697; of this class are generally residuary legacies.

A lapsed legacy is one which, in consequence of the death of the legatee before the testator or before the period for vesting, has never vested. See LAPSED LEGACY.

A legacy for life is one in which the legatee is to enjoy the use of the legacy for life.

A modal legacy is a bequest accompanied with directions as to the mode in which it should be applied for the legatee's benefit; for example, a legacy to Titius to put him an apprentice; 2 Vern. Ch. 431; Lownd. Leg. 151.

A pecuniary legacy is one of money. Pecuniary legacies are in most cases general legacies, but there may be a specific pecuniary legacy, for example, of the money in a certain bag; 1 Rep. Leg. 150, n. In Maryland pecuniary legacies are by statute to be paid out of the real estate if the personal is insufficient; Laws 1894, ch. 438.

A residuary legacy is a bequest of all the testator's personal estate not otherwise effectually disposed of by his will; Lownd. Leg. 10; Bacon, Abr. Legacies (I); 6 H. L. Cas. 217. An ordinary residuary bequest cannot be treated as specific, but from its very nature must be considered as a general legacy; L. R. 3 Ch. D. 309; even though some of its particulars are enumerated in the will; 4 Hare 628; but a bequest

of the remainder of a particular thing or fund after the payment of other legacies or of all one's estate in a particular locality may be specific so long as the identity of the thing or fund is not destroyed; 5 Ves. 150; Schoul. Ex. & Ad. § 462.

A *specific legacy* is a bequest of a specified part of the testator's personal estate, distinguished from all others of the same kind; 3 Beav. 349; 20 Me. 105; 3 Rawle 287; 23 N. H. 154; 49 Id. 107; L. R. 20 Eq. 304; 85 N. J. Eq. 461; 128 Mass. 433; 13 Pa. 189. Such a legacy may be the undistributed balance of a partnership or a goodwill; Amb. 309; 81 Beav. 603; or debt due testator; 2 Del. Ch. 200; 122 Mass. 283; 15 Co. Ct. Rep. Pa. 285; in such case it is rendered worthless by insolvency; Schoul. Ex. & Ad. § 461. A specific legacy may be of animals or inanimate things, provided they are specified and separated from all other things, as money in a bag, or money marked and so described; as, I give two eagles to A B, on which are engraved the initials of my name. Such a legacy may also be given out of a general fund; Amb. 310; 4 Ves. 565; 3 V. & B. 5. If the specific article given be not found among the assets of the testator, the legatee loses his legacy.

All natural persons and all corporations are capable of becoming legatees, unless prohibited by statute or alien enemies. The statute under which it is created must be resorted to in order to ascertain whether a corporation has legal capacity to take a legacy, but the act of incorporation or legislative confirmation of the rights may be secured after the legacy takes effect; 53 Md. 466; 4 Dem. 271; 6 W. & S. 218. The right of a corporation to take by will is subject to the general laws of the state passed after the incorporation; 79 N. Y. 327. See CORPORATION; FOREIGN CORPORATION. A bequest to the United States from which came the Smithsonian Institute was held valid in the English chancery court; Schoul. Ex. & Ad. § 460, note; but under the terms of the state statute a devise of lands in New York to the United States was held void; 94 U. S. 315; 52 N. Y. 530. As to the difference of the law applicable to real and personal property, see CONFLICT OF LAWS. Legacies to the subscribing witnesses to a will are by statute often declared void. See 2 Wms. Ex. 1053; Rop. Leg. 201; 3 Russ. 437; L. R. 13 Eq. 381; 106 Mass. 474; 1 Moo. & R. 288. It was held in England that a subscribing witness to whom a legacy was given was incompetent by reason of interest, and that the will would fail unless there was enough witnesses without him; 2 Stra. 1253. To save the will it was enacted that the legacy should be void; 25 Geo. II. c. 6. Similar statutes have been enacted in most of the states; Schoul. Wills § 357 and note; 1 Stims. Am. St. L. § 2650. In most of these, if there are enough witnesses without the legatee, the legacy is saved, but in a few states it is said that it seems that it may be void in any case; *id.* Requests to superstitious uses are prohibited by many of the English statutes; 2 Beav. 151; 5 Myl. & C. 11. But in the United States the free toleration of all religious opinions would seem to make it almost impossible to hold any use superstitious; 1 Watts 218; 2 Dana 170. Legacies by Roman Catholics for masses for the repose of the soul were held in England void as for superstitious uses; 2 Myl. & K. 684; but in this country have been held valid; 2 Dem. 87; 134 Mass. 426; *contra*, McHugh will case, Wis. Sup. Ct. Oct. 22, 1897. But the courts will not intervene to support and maintain a legacy for any purpose which is illegal or subversive of public policy; 63 Pa. 465. Requests to charitable uses are favored both in England and the United States. See CHARITABLE USE.

Construction of legacies. First, the technical import of words is not to prevail over the obvious intent of the testator; 6 Ad. & E. 167; 7 M. & W. 1, 491; 1 M. & K. 571; L. R. 11 Eq. 280; 11 Pick. 257, 375; 1 Root 332; 1 Not. & M'C. 69; 12 Johns. 389; 86 Me. 216; 58 Pa. 427; 51 N. H. 443; 64 Me.

490; 86 Tenn. 81; 70 Tex. 523. Second, where technical words are used by the testator, or words of art, they are to have their technical import, unless it is apparent they were not intended to be used in that sense; 3 Brown, Ch. 68; 1 Younge & J. 512; 5 Mass. 500; 2 M'Cord 66; 5 Denio 646; 75 Pa. 220; 3 Green 218; 1 Sumn. 239; 18 N. Y. 417; 25 Wend. 119. Words are to be construed with reference to the surrounding of the testator when the will was made; 70 Tex. 523. The particular intent will always be sacrificed to the general intent; 11 Gray 469; 70 Pa. 335; 106 Mass. 24; 26 Mo. 590; 6 Pet. 68. Third, the intent of the testator is to be determined from the whole will; 1 Coll. Ch. 681; 3 Pet. 377; 4 Rand. 218; 8 Blackf. 387; 100 Mass. 342; 51 N. H. 83; 78 Pa. 40; 35 Ind. 198; 52 N. Y. 450; 22 Me. 413; 83 Va. 343. In ascertaining this intention, courts should not seek it in particular words and phrases, or confine it by technical objections, but should find it by construing the provisions of the will with the aid of the context and by considering what seems to be the entire scheme of the will; 113 N. Y. 115; 69 Tex. 227; 84 Ky. 206; 86 Id. 354; and should put itself in the position occupied by a testator; 134 U. S. 572. See 3 C. C. App. 649. Fourth, every word shall have effect, if it can be given without defeating the general purpose of the will, which is to be carried into effect in every reasonable mode; 2 B. & Ald. 448; 3 Pick. 360; 7 Ired. Fq. 267; 10 Humphr. 368; 2 Md. 82; 6 Pet. 68; 9 H. L. Cas. 420; 40 N. H. 500; 53 Pa. 106; 12 Gratt. 196; 19 N. Y. 348. But where it is impossible to form a consistent whole the latter part will prevail; 5 Beav. 100; 52 Me. 287; 52 N. Y. 12; 29 Pa. 234; 78 Id. 484; 73 Iowa 564; 40 La. Ann. 284. Fifth, the will will be favorably construed to effectuate the testator's intent, and to this end words may be transposed, supplied, or rejected; 21 Beav. 143; 7 H. L. Cas. 68; 8 Sim. 184; 30 Iowa 294; 4 Rich. Eq. 22; 63 N. C. 331; 105 Mass. 338; 22 Me. 429; L. R. 14 Eq. 54; 10 Wheat. 204; 35 Md. 198; 54 Pa. 245; 20 Ohio St. 416; 84 Va. 523; 60 N. J. Eq. 547; it will be so construed when not inconsistent with rules of law; 127 U. S. 300; 74 Cal. 98; 77 Ga. 636; 24 Neb. 215. Sixth, in the case of a will of personality made abroad, the *lex domicilii* must prevail, unless it appear the testator had a different intent; Story, Conf. Laws § 479 a, 490; 1 De G. F. & J. 404; L. R. 1 H. L. 401; 99 Mass. 136; 52 Me. 165; 34 N. Y. 584; 14 How. 426. Seventh, a will of personality speaks from the time of testator's death; 8 De G. M. & G. 391; 34 N. Y. 201; 22 N. H. 434; 21 Conn. 610; 41 Barb. 50. In interpreting a will several of the states provide by statute that they are to be construed and take effect, as of the date of the death of testator, with respect to both real and personal property, unless a contrary intention appear in the will. It is so provided in Pennsylvania, Virginia, West Virginia, North Carolina, Kentucky, and Tennessee. And in Georgia words of survivorship refer to the death of the testator in order to vest remainders. In Louisiana a legacy must be delivered with everything appertaining to it in the condition in which it was on day of testator's decease. In some states where death or survivorship are referred to, the words relate to the time of testator's death unless possession is actually postponed, in which case they refer to time of possession. Such is the statute law in California, the Dakotas, Montana, and Utah; Stims. Am. Stat. L. § 2806.

In interpreting a will, the true inquiry is not what the testator meant to express, but what the words used express; 29 W. Va. 784; 83 Va. 724; and effect cannot be given to unexpressed intention; 11 Ky. L. Rep. 87; 84 Va. 880. As to the weight to be given to previous decisions upon the construction of certain words, it may be said that if the words are identical they are not strictly binding, much less so if the words are only similar; L. R. 10 Ch. 397; 22 Ch. D. 488; and this is true even of the decision of the appeal court; 23 Ch. D. 111.

The general policy of the law and the rules of interpretation require that legacies in all cases, unless clearly inconsistent with the intention of the testator, should be held to be vested rather than contingent; 45 N. J. Eq. 473; 124 Pa. 10; 84 Ky. 317.

Whether cumulative or repeated. Where a testator has twice bequeathed a legacy to one person it becomes a question whether the legatee is entitled to both or one only. Where there is *internal evidence* of the intention of the testator, that intention is to be carried out; 2 Beav. 215; 7 Id. 107; 3 Hare 620; 2 Drur. & W. 133; 3 Ves. 462; 5 Id. 389; 2 Sim. & S. 145; 4 Hare 219; L. R. 3 Ch. Div. 738; 10 Johns. 156; 4 Harr. N. J. 127; 1 Zab. 573; and evidence will be received in support of the apparent intention, but not against it; 5 Madd. 351; 2 Beav. 115; 1 My. & K. 589; 2 Bro. Ch. 528; 4 Hare 216; 1 Drur. & W. 94, 113. Where there is no such internal evidence, certain presumptions are recognized; 10 Sim. 453; and the following positions of law appear to be established. First, if the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, in that case he can claim the benefit of only one legacy; Toll. Ex. 335; 2 Hare 432. Second, where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the same instrument, there also the second bequest is considered a mere repetition, and he is entitled to one legacy only; 1 Bro. C. C. 30; 4 Ves. 75; 8 Myl. & K. 29; 10 Johns. 156. See 4 Gill 280; 1 Zab. 573; 16 Pa. 127; 5 De G. & S. 693; 16 Sim. 423. Third, where two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee entitled to both; Finch 267; 2 Bro. C. C. 225; 3 Hare 620. Legacies not of the same kind are presumed to be cumulative; 2 Russ. 237; otherwise the presumption is slight and easily shaken; 17 Ves. 34, 41. Fourth, where two legacies are given *simpliciter* to the same legatee by different instruments, in that case also the latter shall be cumulative, whether its amount be equal; 1 Cox 392; 17 Ves. Ch. 34; 1 Coll. Ch. 495; 4 Hare 216; or unequal to the former; 1 Ch. Cas. 801; 1 P. Wms. 423; 5 Sim. 431; 1 Myl. & K. 589; 4 H. L. Cas. 393; 1 De G. F. & J. 183; L. R. 12 Eq. Cas. 535; 7 Ch. App. 448. And see 1 Bro. Ch. 272; 2 Beav. 215; 2 Drur. & W. 133; 1 Bligh, N. s. 491; 1 Phil. 294. For recent cases where they were held cumulative, see 63 N. H. 129; 55 Vt. 317; 107 Pa. 95. See, generally, on this subject notes to Hooley v. Hatton, 2 Lead. Cas. Eq. *346; Schoul. Ex. & Ad. § 468, n. 3.

Description of legatee.—Children. This may have reference to the time of the testator's death, or that of making the will. The former is the presumed intention, unless from the connection or circumstances the latter is the apparent intent, in which case it must prevail; 2 Cox 191; 11 Sim. 43; 2 Wms. Ex. 1089; 11 Gill & J. 185; 21 Conn. 16; 59 Me. 325; 2 Dev. & B. 80; 101 Mass. 132; 54 N. Y. 88; 110 Mo. 184; 44 La. Ann. 605; 2 Jarm. Wills 154, 156, and Bigelow's notes. And this rule extends to grandchildren, issue, brothers, nephews, and cousins; 3 De G. M. & G. 649; 1 Hous. 561; 146 Mass. 345; Schoul. Wills § 529. The judicial disposition to let in subsequent issue and near relations of a class as generously as possible has resulted in a rule thus stated by the author last cited: "Hence the English rule, confirmed by many American precedents, that the devise or bequest of a corpus or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death, but so as to open and let in children who may come into existence afterwards, at any time before the fund is distributable." *Id.* § 530; 1 Bro. C. C. 537; 2 Madd. 129; 72 Md. 67; 5 R. L. 129; 37 Miss. 65; 38 Ill. 206. This rule also extends to grandchildren, issue, brothers, nephews, and cousins; 3 De G. M. & G. 649.

This term will include a child *en ventre sa mère*; 2 H. Bla. 899; 1 Sim. & S. 181; 1 Meigs 149; 15 Pick. 255; 30 Pa. 178; 124 id. 10; L. R. 1 Ch. Div. 460; 84 Ala. 48; 80 Ga. 681; see 109 N. C. 675. Such a child is included in a devise by a father to his children "living" at his death; 2 Ired. Eq. 226. The rule of construction by which a child *en ventre sa mère* is in law considered as a child *in esse* is not confined to cases in which the unborn child is benefited by its application; [1895] 2 Ch. 497; 13 Reports 689.

Where the division of a fund to legatees is postponed until a certain event or period, the word "child" will apply to all those answering that description when the fund is to be divided; 8 Ves. 38; 9 Leigh 79; 1 Hill, Ch. 322; 1 McCart. 159; 4 Sandf. 36; 101 Mass. 138; 19 So. Rep. (Ala.) 435. But it will sometimes have a more restricted application, and thus be confined to children born before the death of the testator. But children born after the period of distribution take no share; L. R. 12 Eq. 427; 45 N. H. 270; 8 Conn. 49; 5 Jones Eq. 208; 1 Houst. 561. See 147 Pa. 121. And it will make no difference that the bequest is to children begotten, or to be begotten, or which "may be born"; 2 Myl. & K. 46; 14 Beav. 453; 5 R. I. 318; 1 Rep. Leg. 61; unless such be the testator's clear intent; 19 Ves. 566; 16 Gray 303; 4 Sneed 254; 4 R. I. 121; 3 Head 498; 8 Jones Eq. 490; 2 Jarm. Wills 84.

"Children," when used to designate one's heirs, may include grandchildren; 12 B. Monr. 115, 121; 5 Pa. 365; 37 N. Y. 42; 63 Mass. 289; 33 Me. 464; Rep. Leg. 68; 5 Binn. 606; 7 Cal. 594; 28 Atl. Rep. (Vt.) 819; but see 71 Md. 175. But if the word children is used, and there are persons to answer it, then grandchildren cannot be comprehended under it; 4 Myl. & C. 60; L. R. 11 Eq. 91; 29 Md. 443; 14 Allen 205; 6 C. E. Green 85; 2 Whart. 376; 5 Ired. Eq. 421. The general rule is, that a bequest to a man and his children, he having children living at the time the will takes effect, creates a joint estate in the father and children; but if he have no children, he takes an absolute estate; 5 Sim. 548; L. R. 12 Eq. 316; L. R. 14 Eq. 415; L. R. 7 Ch. App. 253; 5 Gray 336. But in both cases slight circumstances will warrant the court in holding the limitation to be for life to the father, with remainder over to the children; 4 Madd. 361; 13 S. & R. 68; 16 B. Mon. 309; 1 Bailey Eq. 357; 5 Jones Eq. 219; 23 Ala. 705.

The term children will not include illegitimate children, if there are legitimate to answer the term; 98 Pa. 479; 14 N. J. Eq. 159; 2 Russ. & M. 336; see 2 Wms' Ex. 1100 (but see 117 Ind. 390; 113 N. C. 301); otherwise, it may or may not, according to circumstances; 1 Ves. & B. 422; 1 Bail. Eq. 351; 6 Ired. Eq. 135; 9 Paige 88; 2 Sneed 625; 31 N. J. Eq. 398; L. R. 10 Eq. 160; L. R. 1 Ch. Div. 644; 37 Conn. 429; L. R. 7 H. L. 576; L. R. 4 P. C. 164. See Schoul. Wills § 534 and notes. Nor will it include a child adopted after the will was made; 84 Ala. 48. In a recent English case it is said that although, *prima facie*, the word "children" in a will means legitimate children, there may be sufficient explanation, in the light of surrounding circumstances, that the word is not used in its primary meaning, and the word was held to mean stepchildren; 13 Reports 637. But a legacy to a natural child of a certain man still *en ventre sa mère* was held void, as contravening public morals and decency; 1 P. Wms. 529; 2 Myl. & R. 769; *contra*, L. R. 3 Ch. Div. 773; 5 Harr. & J. 10. It is said that the term grandchildren will not usually include great-grandchildren; 2 Ves. & B. 59; 4 Myl. & C. 60; 8 Beav. 247; but it has been held otherwise in the absence of anything to show a contrary intent; 2 Pittsb. L. J. Pa. n. s. 403. See CHILD. The same rule applies to adopted children who are not *prima facie* included; 54 Pa. 304.

It is held that a bequest to "my beloved wife," not mentioning her by name, applies exclusively to the wife at the date of the will, and is not to be ex-

tended to an after-taken wife; 8 Hare 131; L. R. 8 Eq. Cas. 65; 31 Beav. 398. One not lawfully married may, nevertheless, take a legacy by the name or description of the wife of the one to whom she is reputed to be married; 9 Sim. 615; 1 De G. J. & S. 177; 11 W. R. 614; but not if the reputed relation is the motive for the bequest; 4 Ves. 802; 5 Myl. & C. 145; L. R. 2 Ex. 319. But see 1 Keen 685.

Nephew and niece are terms which, in the description of a legatee, will receive their strict import, unless there is something in the will to indicate a contrary intention; 14 Sim. 214; 27 Beav. 480; 2 Yeates 196; 3 Barb. 475; 3 Halst. Ch. 462; 10 Hare 63; 7 De G. M. & G. 494; L. R. 6 Ch. App. 351; 2 Jones Eq. 302. "All my nephews and nieces" was held to include only those of the testatrix and not those of her husband; 42 Pa. 25; but "nephews and nieces on both sides" was held to include those by marriage; 3 De G. F. & J. 486; and such was the inference where a testator had no nephews or nieces of his blood; L. R. 8 Ch. 928; L. R. 15 Eq. 305; great-nephews and great-nieces are not usually included; 43 Ch. D. 589; but may be if such intention is shown by the context; 57 Conn. 24. A provision that the residue was to be divided among the testator's grand-nephews and grand-nieces does not include the nephews and nieces; 27 Abb. N. C. 437.

The term *cousins* will be restricted in its signification, where there is something in the will to limit its meaning; 9 Sim. 457. A rule of convenience limits the term to first cousins only, if there be such, or if there are cousins of different degrees, to the nearer rather than the more remote; 6 De G. M. & G. 68; 31 Beav. 305; and "first cousins" does not include first cousins once removed; 4 Myl. & C. 56; but "all the first and second cousins" embraced equally first cousins once removed and first cousins twice removed; 2 Bro. C. C. 125; 1 Sim. & Stew. 301; 3 Russ. 140.

Terms which give an estate tail in lands will be construed to give the absolute title to personality; 8 H. L. Cas. 571; 3 Md. Ch. 36; 10 Yerg. 287; 23 Pa. 9; 4 Dev. & B. 478; L. R. 5 Eq. Cas. 338.

A legacy to one and his heirs, although generally conveying a fee-simple in real estate and the entire property in personality, may, by the manner of its expression and connection, be held to be a designation of such persons as are the legal heirs of the person named, and thus they take as purchasers by name; 4 Bro. C. C. 542; 10 B. Mon. 104; 108 Mass. 579; 64 Me. 490; 15 N. J. 404; 15 Ohio 559. But the authority of these cases is doubtful. The word "heirs," when used to denote succession or substitution, is understood in the case of a legacy to mean persons entitled under the intestate law; 63 Me. 368; 59 N. Y. 151; 9 Pet. 483; L. R. 9 Eq. 258; 100 Mass. 348; 3 Pa. 305. But if not so used, the word heir is construed in its ordinary and legal sense; 63 Me. 379; 59 N. Y. 149; 37 Pa. 9; 108 Mass. 579; 3 H. L. Cas. 557; L. R. 7 Eq. Cas. 151; see 51 N. J. Eq. 1; 26 S. W. Rep. (Ky.) 187; 87 Ga. 239; the words heir and heirs are interchangeable, and embrace all legally entitled to partake of the inheritance; 83 Va. 724. See HEIR.

The word "*issue*," used as a word of purchase, comprises all descendants of him to whose issue the bequest is made; 23 Beav. 40; 7 Allen 76; 63 Pa. 434; 103 Mass. 288; 26 Atl. Rep. (R. I.) 36; 65 Hun 155. It may mean heirs at law; 3 Misc. Rep. 192; children and not descendants generally; 69 Hun 228. See 185 Pa. 626. See ISSUE.

The word descendants cannot be construed to include any but lineal heirs without clear indications in the will of a different purpose; Schoul. Wills § 585; 2 Bradf. 413; 8 Gray 101; a sister's child is not a descendant; 1 Bradf. 314; this word, like issue, is very general, but is said to be less flexible in construction, requiring a stronger context to confine it to such; Schoul. Wills § 536; 2 Jarm. Wills 98-100. See DESCENDANTS.

The term "*relations*" includes those only who would otherwise be entitled under the

statute of distributions; 1 Bro. C. C. 31; 54 Me. 291; 20 N. H. 481; 8 S. & R. 45; and so of the word "*family*"; 9 Ves. 323; 19 Beav. 590; L. R. 9 Eq. Cas. 623; 9 R. I. 412; see 63 Conn. 324. The term family is very flexible and may mean, according to circumstances, a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding the wife; or if he has no wife and children, it may mean his brothers and sisters, or his next of kin; or it may mean the genealogical stock from which he sprung, since all these applications of the word and even others are found in common parlance; 1 Keen 181. The word family may include an illegitimate child; L. R. 6 Ch. 597. See FAMILY; RELATIONS. Nearest relations means brothers and sisters to the exclusion of nephews and nieces; 45 N. J. Eq. 97. "Poor relations, equally," was held to include testator's brothers and sisters, and the mother of his wife *per capita*, as if the word "poor" were not used; 8 S. & R. 43.

A legacy to A and his executors and administrators, legal representatives or personal representatives (which titles see), gives A an absolute interest in the legacy; 15 Ves. 537; 118 Mass. 198; 18 Gratt. 529; L. R. 4 Eq. 359. But in some instances these words will be taken as words not of limitation but of purchase; L. R. 4 Eq. 359; 2 Beav. 67; 25 Md. 401. Generally when persons take under this description they will be bound to apply the legacy as the personal estate of the testator or intestate; 8 Bro. C. C. 224; 2 Yeates 587; 8 Sim. 323.

Mistakes in the name or description of legatees may be corrected whenever it can be clearly shown by the will itself what was intended; 10 Hare 345; 8 Md. 496; 15 N. H. 317; 4 Johns. Ch. 607; 23 Vt. 336; 7 Ired. Eq. 201; 15 Gray 347; 59 N. Y. 441; L. R. 10 Eq. 29.

The only instances in which parol evidence is admissible to show the intention of the testator as to a legatee imperfectly described, is that of a strict equivocation: that is, where it appears from extraneous evidence that two or more persons answer the description in the will; 5 M. & W. 363; L. R. 2 P. & D. 8; L. R. 11 Eq. Cas. 578; 15 N. H. 330; 49 Me. 288; 24 Pa. 199; 59 N. Y. 441; 133 U. S. 216; see 120 id. 586; and to explain names in the will, which the testator has used and which are peculiar or incomprehensible owing to testator's idiosyncrasies or other reasons; 2 P. Wms. 141; 4 John. Ch. 607; 5 H. L. Cas. 168. See 50 N. J. Eq. 554. Extrinsic evidence is admissible to remove latent ambiguity in a will; but as to the character and extent of such evidence see LATENT AMBIGUITY.

By statute in Massachusetts legacies may be distributed by order of court to such persons as seem indicated by will. Laws 1895, ch. 134.

Interest of legatee. Property given specifically to one for life, and remainder over, must be enjoyed specifically during the life of the first donee, although that may exhaust it; 4 Myl. & C. 299; 2 Myl. & K. 703; L. R. 11 Eq. 80; 45 N. H. 261; 6 Gill & J. 171; 17 S. & R. 293; 2 Md. Ch. 190. But where the bequest is not specific, as where personal property is limited to one for life, remainder over, it is presumed that the testator intended the same property to go over, and if any portion of it be perishable, it shall be sold and converted into permanent property, for the benefit of all concerned; 2 Myl. & K. 699; 7 Ves. 187; 4 Myl. & C. 298; L. R. 4 Eq. Cas. 295. See 76 Iowa 386.

In personal property there cannot be a remainder in the strict sense of the word, and therefore every future bequest of personal property, whether it be preceded or not by any particular bequest, or limited on a certain or uncertain event, is properly an executory bequest, and falls under the rules by which that mode of limitation is regulated; Fearn, Cont. Rem. 401, n. An executory bequest cannot be prevented or destroyed by any alteration whatsoever in the estate, out of which or after which it is limited; 8 Co. 96 a; 10 id. 476. And this

privilege of executory bequests, which exempts them from being barred or destroyed, is the foundation of an invariable rule, that the event on which a limitation of this sort is permitted to take effect must be such that the estate will necessarily vest in interest from the time of its creation within a life or lives in being and twenty-one years thereafter and the fraction of another year, allowing for the period of gestation, afterwards; *Fearne, Cont. Rem.* 431.

Where the legacy is payable at a future time a question often arises as to when the legacy vests. The rule seems to be that if a legacy is payable or to be paid at a future time, then a vested interest is conferred on the legatee *eo instanti* the testator dies, transmissible to his executors or administrators; 31 *Beav.* 425; 44 *N. H.* 281; 1 *Ves.* 217; 2 *Sim. & S.* 505; 48 *Me.* 257; 9 *Cush.* 516; 2 *Edw. Ch.* 156. But if it be payable at, if, when, in case, or provided a certain time comes or contingency arrives, then the legatee's right depends upon his being alive at the time fixed for payment; 62 *Me.* 449; 37 *Pa.* 105; 3 *R. I.* 226; 106 *Mass.* 28; 4 *Dana* 572; 5 *Beav.* 391. For exceptions to this rule see 2 *Will. Ex.* 1234.

No particular form of words is requisite to constitute one a residuary legatee. It must appear to be the intention of the testator that he shall take the residue of the estate, after paying debts and meeting all other appointments of the will; 2 *Jac. & W.* 399; 44 *N. H.* 235; 9 *Leigh* 361; 40 *Conn.* 264. The right of the executor to the residue of the estate when there is no residuary legatee is well established, both at law and in equity, in England, except so far as it is controlled by statute; 2 *P. Wms.* 340; 3 *Atk.* 228; 7 *Ves.* 288; but the rule has been controlled in equity by aid of slight presumptions in favor of the next of kin; 1 *Bro. C. C.* 201; 14 *Sim.* 8, 12; 2 *Sm. & G.* 241; 14 *Ves.* 197; and is now altered by stat. 11 *Geo. IV.* and 1 *Wm. IV. c.* 40. The rule never obtained in this country, it is believed, to any great extent; 3 *Binn.* 557; 9 *S. & R.* 424; 6 *Mass.* 153; 2 *Hayw.* 298; 4 *Leigh* 163; 1 *Penning.* 44.

A general residuary clause carries property, a gift of which has failed by reason of misdescription; 53 *N. W. Rep. (Ia.)* 345; and though a general residuary clause carries lapsed or void legacies, it does not include any part of the residue itself which fails; 15 *R. I.* 138. See, generally, 9 *Lawy. Rep. Ann.* 200, n.

The assent of the executor to a legacy is requisite to vest the title in the legatee; 1 *Bail.* 504; 4 *Fla.* 144; 19 *Ala.* 666; 11 *Humphr.* 559; 11 *Gratt.* 724; 8 *How.* 170; 2 *Dev. & B.* 254. But this seems to be merely a necessary requirement to adjust the matter to the reasonable convenience of the executor; *Schoul. Ex. & Ad.* § 483. This will often be implied or presumed; 23 *Ala.* 326; 6 *Pick.* 126; 1 *Bail. Ch.* 517; 10 *Hare* 177; 9 *Exch.* 680; as where the legatee was in possession of the thing at the decease of the testator, and the executor acquiesces in his right; 47 *Fed. Rep.* 250. See 6 *Call* 55. The premature assent of an executor named where another qualifies will not avail; 4 *Dev. & B.* 401; nor will an assent before the issue of letters testamentary; 19 *Ala.* 666; otherwise in England where the doctrine was that the authority of the executor was derived from the will; *Wms. Exrs.* 303, 1378. If the assent is unreasonably withheld, it may be compelled by a court of equity; 2 *Md. Ch. Dec.* 162; 6 *Dana* 148; 1 *Ind.* 570; 3 *Redf.* 514; *Crowst. Ex. & Ad.* 491.

A legatee cannot sue for his legacy until the time given to the executor for payment has expired. This time is commonly one year; 16 *Beav.* 298; 15 *Ala.* 507; 2 *Edw. Ch.* 202. So also the assent of the legatee is required to complete the gift, although it is presumed, after the will is proved, unless the legacy is actually declined, and in that case the bequest is subject to distribution as intestate property; 15 *Me.* 207; *Schoul. Ex. & Ad.* § 489. Of cumulative legacies one onerous and the other beneficial, the latter cannot be accepted and the former declined; 3 *Myl. &*

K. 254; but an intention will control if expressed in the will; 11 *Jur. N. S.* 824; *Wms. Ex.* 1448.

Abatement. The general pecuniary legacies are subject to abatement whenever the assets are insufficient to answer the debts and specific legacies. The abatement must be upon all *pro rata*; 4 *Bro. Ch.* 349, 350; 106 *Mass.* 100; 71 *Pa.* 333; but a residuary legatee has no right to call upon general legatees to abate proportionally with him; 1 *Dr. & S.* 623; *L. R.* 3 *Ch. App.* 537; 1 *Story, Eq. Jur.* § 555. And, generally, among general legatees there is a preference of those who have relinquished any right in consideration of their legacy over mere volunteers; 106 *Mass.* 100; *L. R.* 3 *Ch. Div.* 714. Specific legatees must abate, *pro rata*, when all the assets are exhausted except specific devises, and prove insufficient to pay debts; 1 *P. Wms.* 679; 2 *Bla. Com.* 513; but in ordinary cases of a deficiency of assets, the specific legacy will not be liable to abate with the general legacies; 1 *Vern.* 31; 1 *P. Wms.* 423; 3 *id.* 365; 3 *Bro. C. C.* 100; 3 *Wms. Ex.* 436. See 1 *Rop. Leg.* 150; 1 *Belt, Supp. Ves.* 209, 231; 2 *id.* 112. Specific bequests and devises cannot be forced to abate in relief of a pecuniary legacy by contributing to payment of costs of administration and funeral expenses; *Moore's Estate (O. Ct.)*, 19 *Pa. Co. Ct.* 459. A bequest to a widow in lieu of dower is not subject to abatement in case of a deficiency of assets, but will be preferred to other general legacies; 5 *Misc. Rep.* 123. Demonstrative legacies will not abate with general legacies; 11 *Ves.* 607; 11 *Cl. & F.* 509; 25 *N. Y.* 128. Where an estate is insufficient to pay all the legacies, the general will abate before the specific legacies; 115 *N. C.* 398. Demonstrative legacies are subject to abatement, but specific legacies are not; 40 *W. Va.* 349. Demonstrative legacies are a prior claim on the fund out of which they are payable, but if it is insufficient the legacies must be reduced proportionally; 22 *S. E. Rep. (Va.)* 853. In default of special provision the following order is observed in calling upon the estate to supply a deficiency of assets; (1) General residuary estate; (2) Estate devised for payment for debts; (3) Real estate descended; (4) Real estate devised subject to debts; (5) General legacies; (6) Specific legacies and devises *pro rata*; 11 *Pa.* 72. Legacies given by a codicil are on the same footing as legacies in the original will, when the estate is insufficient to pay them all in full; 16 *R. I.* 98. See **ABATEMENT; DEMONSTRATIVE LEGACY.**

Ademption of legacies. A specific legacy is revoked by the sale or change of form of the thing bequeathed: as, by converting a gold chain into a cup, or wool into cloth, or cloth into garments; 2 *Bro. C. C.* 110; 7 *Johns. Ch.* 262; see 113 *N. Y.* 560; so if a debt specifically bequeathed be received by the testator the legacy is adeemed; 3 *Bro. C. C.* 431; 7 *Johns. Ch.* 262; 23 *N. H.* 218; 10 *Ohio* 64; 48 *La. Ann.* 278; and so of stock, which is partially or wholly disposed of by testator before his death; 6 *Pick.* 212; 28 *Pa.* 363; 1 *Ves. Sen.* 426; 7 *Johns. Ch.* 258.

A demonstrative legacy is not adeemed by the sale or change of the fund; 15 *Ves.* 384; 6 *H. L. Cas.* 883; 11 *Cl. & F.* 509; 16 *Pa.* 275; 25 *N. Y.* 128; 13 *Allen* 256; 118 *Ind.* 147.

The doctrine of ademption does not apply to demonstrative legacies inasmuch as they are payable out of the general estate, if the fund out of which they are payable fail; 3 *Pom. Eq. Jur.* § 1131; 2 *Wms. Ex.* 632. Where a legacy is given for a specified purpose, it is in the nature of a specific legacy, and if such purpose is accomplished by the testator in his lifetime there is an ademption of the legacy; 38 *N. J. Eq.* 91; so where a legacy was given expressly to pay a debt, the legacy was held adeemed or satisfied; 39 *Barb.* 507; 6 *Ch. App.* 136. Where the payment made by the testator subsequent to the execution of a will is equal to or exceeds the amount of the legacy, it will be deemed a satisfaction or an ademption thereof, but where it is less than the amount of the legacy, it is deemed a

satisfaction *pro tanto*, and if the difference between the amounts be slight, it may be deemed a complete satisfaction or ademption; 2 *Story, Eq. Jur.* § 1111; 47 *N. E. Rep. (Ill.)* 376. A bequest to a son of a certain sum payable out of the shares of the daughter's children, and providing that on such payment the son shall surrender an agreement of the daughter to pay him the amount of such legacy, is a bequest for a particular purpose, and hence is adeemed by payment by the testator, during his life of the daughter's debt to the son; 47 *N. E. Rep. (Ill.)* 376. See **ADEMPTION.**

A legacy to a child is regarded in courts of equity as a portion for such child; hence, when the testator, after giving such a legacy, settles the child and gives a portion, it is regarded as an ademption of the legacy. And it will make no difference that the portion given in settlement is less than the legacy; it will still adeem the legacy *pro tanto*; 5 *My. & C.* 29; *L. R.* 14 *Eq.* 236; 16 *N. Y.* 9; 15 *Pa.* 212; 5 *Rand.* 577; 2 *Story Eq. Jur.* § 1111. See 81 *Ga.* 734; 126 *Ill.* 37. The principle of the ademption of legacies by gifts made during testator's life is applicable to a residuary legacy, where such appears to be the clear intent; 1 *Misc. Rep.* 58.

Payment of legacies. A legacy given generally, if no time of payment be named, is due at the death of the testator, although not payable until the executor has time to settle the estate in due course of law. See **DEVISE.** Legacies are not due by the civil law or the common law until one year after the decease of the testator and from that time interest is chargeable on them. The same term is generally allowed the executor in the American states to dispose of the estate and pay debts, and sometimes, by special order of the probate court, this is extended, from time to time, according to circumstances; 12 *N. Y.* 474; 41 *N. H.* 391; 21 *Md.* 156; 105 *Mass.* 431; *Rop. Leg.* 856; 4 *Cl. & F.* 276; 5 *Binn.* 475.

The great rule in legacies is, that if the testator's estate is not sufficient for paying all his debts and legacies, first, the debts must be paid in full; secondly, the specific legacies are to be paid; thirdly, general legacies are to be paid, in full if possible, if not, *pro rata*.

If given by will, an annuity is a legacy; 61 *Miss.* 372; and under a charge of legacies, an annuity will be included unless the testator expressly distinguishes between annuitants and legatees; 3 *App. Cas.* 989; 3 *De G. & G.* 601; 2 *Ves. Jr.* 216. See **CHARGE.**

An annuity given by will shall commence at the death of the testator, and the first payment fall due one year thereafter; 3 *Madd.* 167; 1 *Sumn.* 19; 42 *Barb.* 533; 5 *W. & S.* 80.

In the civil law a distinction is made between an annual legacy and the legacy of a usufruct in that whereas the legacy of a usufruct was only one legacy of a right to enjoy as long as it shall last, an annual legacy contained as many legacies as it may last years; *Dom. Civ. L.* § 3572; *Mack. Rom. L.* § 763; and a similar distinction is made between gifts of the income and profits of particular funds and annuities payable from time to time, in that the latter are at each time of payment gross sums to be regarded as separate legacies at each recurring period. In this respect it is often difficult to determine to which particular class a gift belongs. A bequest of the income of certain shares of bank stock during life was held not an annuity, and the devisee was required to pay the tax on the stock, the court admitting the difficulty and citing 18 *Pick.* 123, as an authority for the opposite view; 10 *R. I.* 455.

The importance of the distinction is evident when it is remembered that the gift of the produce of a fund, without limit as to time, has been held to amount to a gift of the fund itself whether the gift be made directly or through a trustee; 44 *N. J. Eq.* 450; 50 *id.* 522; 151 *Mass.* 241; while an annuity charged upon personality is usually dependent on the legatee's life, the fund reverting to the residuary legatee; 6 *Johns.*

Ch. 70; 125 Mass. 88.

It has been held that there is no substantial difference between the gift of an annuity for life and of the interest or income of a fund for life; nor between the gift simply of interest and of interest payable annually; 136 Pa. 874; 170 id. 242.

A distinction is taken between an annuity and a legacy, in the matter of interest. In the latter case, no interest begins to accumulate until the end of one year from the death of the testator; 1 Sch. & L. 301; 17 S. & R. 590; 2 Rep. Leg. 1253; 25 Atl. Rep. (R. I.) 632. In cases where a legacy is given a child as a portion, payable at a certain age, this will draw interest from the death of the testator; L. R. 1 Eq. 369; 11 Ves. 2; 5 Binn. 477; 49 & Rawle 113; but this rule does not apply when any other provision is made for the child; 9 Beav. 164; 19 Pa. 49; 16 N. J. Eq. 243; 41 N. H. 393; 14 Allen 239. The qualified recognition of a legacy by an executor will not carry with it the right to interest thereon, prior to demand for its delivery; 45 La. Ann. 932. See INTEREST.

Where legatees are under disabilities, as infancy or coverture, the executor cannot discharge himself by payment, except to some party having a legal right to receive the same on the part of the legatee, which in the case of an infant is the legally-appointed guardian; 1 Johns. Ch. 3; 106 Mass. 586; 1 P. Wms. 285; and, at common law, in the case of a married woman, the husband; 1 Vern. 261; but in the latter case the executor may decline to pay the legacy until the husband make a suitable provision out of it for the wife, according to the order of the court of chancery; 8 Bligh 224; Bisph. Eq. § 109. By statute in England and in some of the United States the executor is allowed in such cases to deposit the money on interest, subject to the order of the court of chancery; 2 Will. Ex. 1407.

The executor is liable for interest upon legacies, whenever he has realized it by investing the amount; L. R. 5 Ch. App. 233; 114 Mass. 404; 16 How. 542; and usually with annual rests; 29 Beav. 586; 23 N. J. Eq. 192; 109 Mass. 541. Where an executor was compelled to pay money out of his own funds on account of the *devastavit* of a co-executor, and the matter had lain along for many years on account of the infancy of the legatees, no interest was allowed under the special circumstances until the filing of the bill; 9 Vt. 41.

The better opinion is that at common law no action lay against an executor for a general legacy; 5 Term 690. But in case of a specific legacy it will lie after the assent of the executor; 5 Gray 67; 114 Mass. 26; and in the United States *assumpsit* will generally lie for all legacies even before assent by the executor; 30 N. H. 505; 6 N. J. L. 432; 12 Pa. 341; 2 Johns. 243; 6 Conn. 176; 2 Hayw. 153; 63 Me. 587.

The proper remedy for the recovery of a legacy is in equity; 5 Term 690; 35 N. H. 349; 71 N. C. 281; 35 N. H. 339; Wms. Ex. 2005. See 64 Vt. 598. In most of the United States statutory proceedings to recover legacies are provided in the orphans' or probate courts. As to federal jurisdiction over the administration of estates, see EXECUTOR.

By a recent statute in Louisiana it is provided that a legatee who has paid a debt for which bequeathed realty was mortgaged has no recourse against heirs or legatees under universal title; Laws 1896, ch. 72.

Doubtful points in the settlement of an estate are sometimes settled by mutual agreement of all parties interested, *if sui juris*; Schoul. Ex. & Ad. § 475. This right is sometimes extended by legislation permitting the executor, etc., in cases deemed proper by a court of equity, to bind future contingent interests of persons not capable of acting for themselves; *id.* See FAMILY ARRANGEMENT.

Satisfaction of debt by legacy. In courts of equity, if a legacy equal or exceed the debt, it is presumed to have been intended to go in satisfaction; but if the legacy be less than the debt, it shall not be deemed satisfaction *pro tanto*; 16 Vt. 150; 12 Mass. 391; 38 S. & R. 54; 8 Cow. 246; 1 Lowell 418.

This rule, founded on a series of equity precedents, was said by Judge Redfield to maintain "a kind of dying existence;" 2 Redf. Wills 185, 186; and it is termed by a later author "whimsical and unsatisfactory"; Schoul. Ex. & Ad. § 469. See Bronson, J., in 2 Hill 576; Wms. Ex. 1297. The courts allow very slight circumstances to rebut this presumption of payment; as, where the debt was not contracted until after the making of the will; 2 P. Wms. 843; 3 P. Wms. 353; 4 Madd. 325; or the debt is unliquidated; 1 P. Wms. 299; or due upon a bill or note negotiable; 3 Ves. 561; 1 Root 159; 1 Allen 129; where the legacy is made payable after the debt falls due; 3 Atk. 96; where the intention appears otherwise; 2 Ves. 635; 2 G. & J. 185; 1 P. Wms. 410; or where the legacy is of a different nature from the debt; 1 Atk. 428; 3 id. 65; 2 Sto. Eq. Jur. § 1110. Satisfaction is not favored in America.

Release of debt by a legacy. If one leave a legacy to his debtor, it is not to be regarded as a release of the debt unless that appears to have been the intention of the testator; 4 Bro. C. C. 226; 15 Sim. Ch. 554; 5 Ala. 245; 153 Pa. 402; and parol evidence is admissible to prove this intention; 5 Ves. 341; 23 Beav. 404; 2 Dev. Ch. 488.

Where one appoints his debtor his executor, it is at law regarded as a release of the debt; Co. Litt. 264; 8 Co. 136 a; but this is now controlled by statute in England and in many of the United States; 116 Mass. 552; 15 Pa. 533; 9 Conn. 470; 7 Cow. 781. But in equity it is considered that the executor is still liable to account for the amount of his own debt; 13 Ves. Ch. 262, 264.

Where one appoints his creditor executor, and he has assets, it operates to discharge the debt, but not otherwise; 2 Will. Ex. 1316; 1 Salk. 304. See CHARGE; DEVISE; LAPSED LEGACY; WILL. BEQUEST.

LEGACY DUTY. A legacy tax in Great Britain, the rate of which rises according to the remoteness of the relationship of the legatee, and reaches its maximum where he is not related to the testator. See 53 L. J. Ch. 645; 26 Ch. Div. 538; COLLATERAL INHERITANCE TAX; TAX.

A duty of trifling amount was first imposed only on legacies of the value of £20 and upwards. Later, a duty was imposed on the value of legacies of the like value and also upon every part of any residuary personal estate of the value of £100, the rate of the duty running from two per cent. in the case of any brother, sister, nephew, or niece, to six per cent. in the case of a stranger. The incidence and the rate of duty were subsequently varied by a multiplicity of acts; and now legacy duty is payable in respect of a deceased person domiciled in the United Kingdom on every legacy and on every succession upon the intestacy of such a person, except where exemption is specifically allowed. Leaseholds are not subject to legacy duty; but succession duty is paid on them. The effect of the Stamp Act, 1815, s. 2, Sch. (Pt. III.) and of the Finance Act, 1910, is that the rates of the duty are in the case of (1) a husband or wife or lineal ancestor or lineal descendants of the deceased, one per cent., (2) of brothers or sisters of the deceased or their lineal descendants, five per cent., and (3) of any other person whatsoever, ten per cent. But no legacy duty and no succession duty is payable (1) where the principal value of the property passing and liable to estate duty (excluding property in which the deceased never had an interest and property of which he was never competent to dispose and which on the death passes to anyone other than the husband, wife or lineal ancestor or descendant) does not exceed £15,000 and (2) where the total legacies or successions derived by the same person do not exceed £1,000 or, in the case of a widow or child under twenty-one of the deceased, £2,000 (Finance Act, 1910, s. 58). Except in these cases, legacy duty is payable on everything except realty in addition to estate duty. Byrne. See DEATH DUTIES.

LEGAL. That which is according to

law. It is used in opposition to equitable: as, the legal estate is in the trustee, the equitable estate in the *cestui que trust*.

LEGAL ASSETS. Such property of a testator in the hands of his executor as is liable to debts in temporal courts and to legacies in the spiritual, by course of law; equitable assets are such as are liable only by help of a court of equity. 2 Will. Ex. 1408-1431. The distinction is not important in the United States; 1 Ashm. 347. See STORY, Eq. Jur. § 551; 2 Jarm. Wills, 543; Crossw. Ex. & Ad. 421, 423.

LEGAL CONSIDERATION. See CONSIDERATION.

LEGAL COSTS. The term "legal costs" of said suits could mean only such costs as the law required the State to pay. 101 Ky. 601, 42 S. W. 108.

LEGAL CRUELTY. Such conduct on the part of a husband as will endanger the life, health, or limb of his wife, or create a reasonable apprehension of bodily hurt; such acts as render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife; 36 Ga. 286; 2 Curt. Eccl. 281; 19 Cal. 626; 44 Ala. 698; 103 Ill. 477; 50 Wis. 254; 60 How. Pr. 151; 73 N. Y. 369; 33 N. J. Eq. 458. That which merely wounds the feelings without being accompanied by bodily injury or actual menace does not amount to legal cruelty; 30 Gratt. 807; 3 Metc. 257; 9 C. E. Greene 338; 10 Neb. 144; as the infliction of mental suffering cannot constitute cruelty unless it endangers the life or health of the person injured; [1895] Prob. 315; 61 N. W. Rep. (Minn.) 666; 48 La. Ann. 1194; 32 S. W. Rep. (Tex.) 328; but it has been held that there may be such legal cruelty as to endanger the health of the wife without threats of bodily injury; as where a husband subjected his wife to a severe course of what he deemed to be affectionate moral discipline, and by so doing broke down her health and rendered a serious malady imminent; L. R. 2 P. & M. 31; 111 Mass. 827; so compelling a wife to live at times in an attic without any conveniences whatever, leaving her for a period of six weeks without means to pay her board, and using insulting and abusive language to her is legal cruelty; 103 Mich. 646; and falsely accusing her of unchastity; 8 Ore. 100; 45 Mich. 150; 60 How. Pr. 151 (but *contra* where the husband has reason to suspect his wife of infidelity; 73 N. Y. 369). A public accusation of unchastity, either in or out of the presence of the wife, is a greater degree of legal cruelty than one made in private; 76 Ind. 136; 34 La. Ann. 611; 45 Pac. Rep. (Ore.) 761; and it is legal cruelty for a wife to accuse her husband constantly, publicly, and without cause, of unfaithfulness to her, thereby disgracing him and endangering his means of livelihood; 49 Mich. 417; but it has been held that adultery itself is not cruelty; 54 Cal. 263. Where acts of violence have been condoned, wilfully depriving a wife of her proper position in the household, neglecting her, degrading her to the level of a servant, and compelling her to do the menial work of the house, and to take her meals and to sleep apart from the rest of the household, was held, in itself, legal cruelty; 73 L. T. 295. The husband is responsible for the ill-treatment of his wife by persons whom he supports in his house in spite of her remonstrances, and where she is justified in apprehensions of personal violence from them, she is entitled to a divorce on the ground of cruel and inhuman treatment and personal indignities; 9 Ore. 432; excessive sexual intercourse is legal cruelty, and it may be shown by the wife's testimony; 53 N. H. 509. See 32 N. J. Eq. 475. A husband who unreasonably and brutally effects sexual intercourse with his wife to the injury of her health, when he knows that it will cause her injury and suffering, is guilty of intolerable cruelty such as will authorize a divorce; 61 Conn. 283. The refusal of a husband to have sexual intercourse with his wife is not cruel

and inhuman treatment or ground for a divorce *a vinculo*; 83 Wis. 553.

Desertion and failure to support a wife when during the time she had been seriously ill and greatly in need of the assistance, and of the society, nursing, and comfort of her husband, was held legal cruelty on the ground that it inflicted on her mental suffering and public disgrace; 79 Ind. 383. A wife is entitled to a divorce for legal cruelty where the acts complained of are the result of insane delusion; 33 N. J. Eq. 458. But it has been held that a single act of personal violence does not constitute cruelty; 51 Md. 72; and that insulting and degrading language to her is not ground for a divorce, although in case of actual cruelty it may be shown in aggravation; 69 Ala. 84; and misunderstandings and difficulties between husband and wife will not afford a foundation for a divorce; 34 La. Ann. 135; nor will a succession of petty annoyances, complaints, fault-finding, and disparagement of the husband's common sense constitute legal cruelty to him; 49 Mich. 639. In the case of Russell v. Russell the English court of appeal held that: (1) A false charge of having committed an unnatural crime circulated by a wife against her husband, although published to the world and persisted in after she did not believe its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation; (2) but was enough to justify the court in refusing a petition of the wife for a restitution of conjugal rights; [1895] Prob. 315. This case had been tried before Pollock, B., and a special jury in April, 1895, and on questions put by the court to the jury, the latter found that Lady Russell had been guilty of cruelty, and that in her conduct and correspondence she had not acted *bona fide*. The judge (1) made a decree for judicial separation in favor of the husband and (2) dismissed the petition of the wife for restitution. On appeal of Lady Russell the decision was as stated *supra*, reversing on (1) and affirming on (2). *Both parties appealed to the House of Lords, when the appeal of the countess was withdrawn and a motion for reinstatement denied, leaving the refusal of restitution by the court of appeal the final decision; while the decision that a judicial separation was not warranted was affirmed by the Lords; [1897] App. Cas. 395. See 23 Am. L. Reg. 640; CRUELTY; DIVORCE.

LEGAL DUTY. That which the law requires to be done or forborne to a determinate person, or to the public at large, and is correlative to a right vested in such determinate person. 111 N. C. 94. See DUTY.

LEGAL ESTATE. One the right to which may be enforced in a court of law. It is distinguished from an equitable estate, the right to which can be established only in a court of equity.

The party who has the legal title has alone the right to seek a remedy for a wrong to his estate, in a court of law, though he may have no beneficial interest in it. The equitable owner is he who has not the legal estate, but is entitled to the beneficial interest.

The person who holds the legal estate for the benefit of another is called a trustee; he who has the beneficiary interest and does not hold the legal title is called the beneficiary, or, more technically, the *cestui que trust*.

When the latter has a claim, he must enforce his right in a court of equity for he cannot sue any one at law in his own name; 1 East 497; 8 Term 322; 1 Saund. 168, n. 1; 2 Bingh. 20; still less can he in such court sue his own trustee; 1 East 497.

LEGAL FRAUD. See FRAUD.

LEGAL HEIRS. See HEIR, LEGAL.

LEGAL IMPOSSIBILITY. See IMPOSSIBILITY.

LEGAL INCAPACITY. See INCAPACITY; LIMITATIONS.

LEGAL INTEREST. See INTEREST.

LEGAL IRREGULARITY. See IRREGULARITY.

LEGAL MALICE. An expression used as the equivalent to constructive malice or malice in law. 53 Me. 502. See MALICE.

LEGAL MERCHANDISE. Under the words "other legal merchandise" in a charter party, the charterer is at liberty to ship any lawful article he pleases, but is bound to pay the same amount of freight the vessel would have earned if loaded within the terms of the charter. 18 L. J. C. P. 74; 6 C. B. 791.

LEGAL MORTGAGE. A first mortgage. This is unquestionably so as regards land, because it is only the first mortgage which can grant the legal estate in land; and it has been held that where there was an agreement to give a legal mortgage of a ship, the expression signified a first mortgage. 11 W. R. 23.

A conveyance expressly intended to be a mortgage. Anderson. A transfer of the legal title to land with the right to redeem the same. English.

LEGAL NEGLIGENCE. See NEGLIGENCE.

LEGAL NOTICE. Such notice as is adequate in point of law, such notice as the law requires to be given for the specific purpose or in the particular case. A legal notice to quit is a notice provided by law as distinguished from one provided by contract. 57 L. J. Q. B. 225; 20 Q. B. D. 374.

LEGAL OBLIGATION. See DUTY; OBLIGATION.

LEGAL PERSONAL REPRESENTATIVES. See LEGAL REPRESENTATIVES.

LEGAL PROCESS. See PROCESS.

LEGAL REPRESENTATIVES. The primary meaning of the terms "representatives," "legal representatives," "personal representatives," or "legal personal representatives," is executors and administrators in their official capacity; 36 L. J. Ch. 793; L. R. 4 Eq. 359; and it cannot be construed as excluding them; 99 Mass. 342; see 45 N. Y. 563; 83 Me. 295; but the meaning may be controlled by the context; 32 Mo. App. 211. It may mean the next of kin; 8 W. N. C. Pa. 209; 4 De G. & J. 477; 26 Beav. 26; 61 N. W. Rep. (Minn.) 331; 28 L. J. Ch. 885; 16 Sim. 329. It has been held to mean next of kin according to the statute of distribution; 13 L. J. Ch. 147; Willard, Ex.; and heirs or legal descendants; 71 Ill. 91; and heirs, assignees or receivers; 26 Cal. 23; 78 Md. 59; 15 Ill. 574; 45 Ohio St. 133; 92 U. S. 724; see 117 U. S. 591, where the term was said to be not necessarily restricted to the personal representatives of the deceased, but is sufficiently broad to cover all persons who with respect to his property stand in his place and represent his interests, whether transferred to them by his act or by operation of law, reversing 11 Fed. Rep. 573. When used with reference to land, it ordinarily means those to whom the land descends; 130 Ind. 251. See PERSONAL REPRESENTATIVES; LAPSED LEGACY.

Within the meaning of a life insurance policy it has been held to mean wife and children rather than administrators; 125 N. Y. 411, reversing 56 Hun 12; 23 Ill. App. 608; and the widow, orphan, heir, assign, or legatee of the member; 2 Mackey 70; but it has been held, where nothing shows that the words were used with a different meaning, the words legal representatives make the proceeds a part of the assets of the insured; 78 Ill. 147. The words families, heirs, or legal representatives are held to include those who would take property as in cases of intestacy; 112 N. Y. 627, reversing 43 Hun 478; and where the benefit appears to have been intended for the

family it may mean heirs or next of kin; 41 Mo. 538.

The rule that devises lapse by the death of the devisee is not changed by adding to the devise the words "to have and to hold the same to them, their heirs and assigns forever;" 113 N. Y. 396. See LAPSED DEVISE; LAPSED LEGACY.

One who represents the person and controls the rights of another, usually an executor or administrator. The term imports a higher authority than agent; for an agent acts for his principal, who retains the beneficial right; but the legal representative succeeds to the place of the former owner, and is vested with his title. Abbott. The term is used to describe a party in interest whose identity is uncertain, but who has succeeded, or will succeed, to the right of the deceased, either by operation of law or by grant. *Id.*; 18 Ill. 472.

LEGAL RESIDENCE. If a person has actually removed to another place with the intention of remaining there for an indefinite time and as a place of fixed domicile, it is deemed his "legal residence," notwithstanding he may entertain a "floating intention" to return at some future period. 162 Ky. 685, 173 S. W. 109.

A "legal residence" (domicile) can not, in the nature of things, co-exist in the same person in two States or countries. 87 Ky. 245, 8 S. W. 440.

LEGAL TENDER. That currency which has been made suitable by law for the purposes of a tender in the payment of debts.

The following descriptions of money are legal tender in the United States:—

All the gold coins of the United States are a legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece, and, when reduced in weight below such standard tolerance, they are a legal tender at valuation in proportion to their actual weight.

Treasury notes and standard silver dollars for all payments.

Silver coins of a smaller denomination than one dollar, for all sums not exceeding ten dollars.

The minor coins, five, three, two, and one cent pieces, for all amounts not exceeding twenty-five cents.

As to trade dollars, see DOLLAR. See EAGLE; HALF EAGLE.

By acts of Feb. 25, 1862, July 11, 1862, and March 3, 1863, congress authorized the issue of notes of the United States, declaring them a legal tender for all debts, public and private, except duties on imports and interest on the public debt. 12 Stat. L. 345, 532, 709. These notes are obligations of the United States, and are exempt from state taxation; 7 Wall. 26; but where a state requires its taxes to be paid in coin, they cannot be discharged by a tender of these notes. A debt created prior to the passage of the legal tender acts, and payable by the express terms of the contract in gold and silver coins, cannot be satisfied by a tender of treasury notes; 7 Wall. 229, 258; 12 id. 687. The legal tender acts are constitutional as applied to pre-existing contracts, as well as to those made subsequent to their passage; 12 Wall. 457, per Strong, J., overruling the previous opinion of the court in 8 Wall. 604, per Chase, C. J. See 17 Am. L. Reg. 193; 19 id. 73; 25 id. 601. Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war; 110 U. S. 421.

A postage currency has also been authorized, which was receivable in payment of all dues to the United States less than five dollars. They were not, however, a legal tender in payment of private debts. (Act of Congress, approved July 17, 1862.) See GOLD; MONEY; SILVER.

LEGALIS HOMO (Lat.). A person who stands *rectus in curia*, who possesses all his civil rights. A lawful man. One who stands *rectus in curia*, not outlawed

nor infamous. In this sense are the words *probi et legales homines*.

LEGALIZATION. The act of making lawful.

By legalization is also understood the act by which a judge or competent officer authenticates a record, or other matter, in order that the same may be lawfully read in evidence.

LEGALIZE. To confirm acts already done, not to authorize new proceedings in the future. 102 Mass. 123.

To give the authority of law to that which lacks such authority: as, to legalize a nuisance; length of time will not legalize a nuisance; slavery was a legalized social relation. Anderson. *Id.*

LEGATINE CONSTITUTIONS.

The name of a code of ecclesiastical laws, enacted in national synods, held under legates from Pope Gregory IX. and Clement IV., in the reign of Hen. III., about the years 1230 and 1238. 1 Bla. Com. 83. Burn says, 1237 and 1268. 2 Burn, Eccl. Law, 30 d.

LEGATARY. One to whom anything is bequeathed; a legatee. This word is sometimes though seldom, used to designate a legate or nuncio.

LEGATEE. The person to whom a legacy is given.

The court will apply the popular rather than the technical meaning to the term "legatee" in a will, and read it as if it were "distributee," when, after looking at all the circumstances, and all the clauses of the will, the alternative is between this disposition and a total failure of the dispositive scheme for want of certainty, and that seems to have been the testator's meaning; 23 Ga. 571. See LEGACY.

See ALL LEGATEES; LEGATEE AND DEVISEE.

LEGATEE AND DEVISEE. Recognizing the generally careless, inadvertent, and interchangeable use of these words, it was held that the words "legatee" and "devisee" shall each be held to convey the same idea; and to embrace and include either real or personal property, or both. 112 S. W. 627.

LEGATES. Legates are extraordinary ambassadors sent by the pope to catholic countries to represent him and to exercise his jurisdiction. They are distinguished from the ambassadors of the pope who are sent to other powers.

Legatus à latere hold the first rank among those who are honored by a legation; they are always chosen from the college of cardinals, and are called *à latere*, in imitation of the magistrates of ancient Rome, who were taken from the court or *side* of the emperor. *Legati missi* are simple envoys.

Legati nati are those who are entitled to be legates by birth.

Legati dati are those who have authority from the pope by special commissions. See A LATERE. FOREIGN MINISTER.

LEGATION. An embassy; a mission. All persons attached to a foreign legation, lawfully acknowledged by the government of this country, whether they are ambassadors, envoys, ministers, or attachés, are protected by the act of April 30, 1790, from violence, arrest, or molestation; 1 Dall. 117; 1 Wash. C. C. 232; 11 Wheat. 467; 1 Miles 366; 1 N. & M'C. 217; 1 Baldw. 240. See AMBASSADOR; ARREST; PRIVILEGE.

LEGATORY. The third part of a freeman's personal estate, which by the custom of London, in case he had a wife and children, the freeman might always have disposed of by will. Bacon, *Abr. Customs of London* (D 4). See DEAD MAN'S PART.

LEGATUM. A legacy given to the church or an accustomed mortuary. Cowel.

LEGEM HABERE. Capable of giving evidence upon oath.

LEGEM JUBERE. See LEGEM SCISCERE.

LEGEM SCISCERE (Lat.). To give consent or authority to a proposed law.

LEGES (Lat.). In Civil Law. Laws proposed by a magistrate of the senate and adopted by the whole people in *comitia centuriata*. See POPULISCITUM; LEX.

In English Law. Laws.

Leges scriptæ, written or statute laws. *Leges non scriptæ*, unwritten or customary laws; the common law, including general customs, or the common law properly so called; and also particular customs of certain parts of the kingdom, and those particular laws that are, by custom, observed only in certain courts and jurisdictions. 1 Bla. Com. 67. "These parts of law are therefore styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding force from long and immemorial usage." 1 Steph. Com. 40, 46. See LAW; JUS; LEX; JUS PRAETORIUM.

LEGES BARBARORUM. Folk Laws. The oldest monuments of Teutonic legal history have received the name of *Leges Barbarorum*. But the title is apt to be misleading. Even in the Frank kingdoms, where the conscious imitation of Rome was strongest, there is at first no attempt at legislation in the modern sense. Beyond doubt the *Leges* were, in most cases, the work of kings, to the extent that they were drawn up by royal direction, and published under royal auspices. Quite possibly, too, the kings who collected them took the opportunity of modifying certain details during the process. But the notion of the king, i. e. the State, as the source of legislation is yet far distant. Several of these codes profess to give their own account of the way in which they were drawn up, and despite of all the criticism which has been directed against the more extravagant pretensions of the so-called historical school, there can be little doubt that these accounts contain a large element of truth. Jenks, 1 Sel. Essays in Anglo-Am. Leg. Hist. 69.

LEGES ET CONSUETUDINES REGNI. A regular collective name of English law since the latter half of the 12th century at the latest, in other words, ever since English law has had any terminology of its own; in the 14th century "*lex et consuetudo regni nostri*" was well established as meaning the Common Law. Pollock, 1st Book of Jurispr. 4th ed., 253.

LEGES EDWARDI CONFESSORIS. Profess to be an official collection of laws, drawn up in 1070 from the mouths of local juries by wise and skillful officials. Unfortunately there is no reason to suppose that it was; and, if it were, the result is certainly not to be found in the *Leges Edwardi*. Byrne; Jenks' Short Hist. Eng. L.

LEGES HENRICI PRIMI. Laws of Henry I. So called because they are laws which commence with a charter of that monarch. They were compiled probably about the year 1118 and are an attempt to compile a general statement of the principles of English law. They are printed in Thorpe's Ancient Laws of England; i. 497-608. Byrne.

LEGES JULIÆ. Laws enacted during the reign of Augustus or of Julius Cæsar which, with the *lex ædua*, effectually abolished the *legis actiones*.

Lex Julia Anitibus. A law to repress illegal methods of seeking office. Inst. 4, 18.

Lex Julia cænia Bonorum. A law allowing debtors to make a voluntary assignment of their property. Inst. 3, 12; Sohm, Rom. L. 211.

Lex Julia de Adulteris. The law relating (1) to divorce, requiring the presence of seven witnesses and a *libellus repudi* to show the fact of repudiation and (2) prohibiting the husband from alienating or mortgaging any *fundus italicus* comprised in the *dos*. This provision was extended by Justinian to any *fundus dotalis* whatever. Sohm, Rom. L. 374, 382.

Lex Julia de Annona. A law to repress combinations for heightening the price of provisions.

Lex Julia de Maritandis Ordinibus. A law forbidding senators and their children to intermarry with freedmen or infames, and freedmen to marry

infames. Inst. 2, 9.

Lex Julia de Residuis. A law punishing those who gave an incomplete account of public money committed to their charge. Inst. 4, 18.

Lex Julia de Papia Poppæ. See LEX PAPIA POPPÆ.

Lex Julia Majestatis. A law which inflicted the punishment of death on all who attempted anything against the emperor or state, and condemning the wrongdoer after his death. Inst. 4, 18.

Lex Julia Peculatus. A law punishing those who had stolen public money or property or anything sacred or religious. Magistrates and those who had aided them in stealing public money during the administration were punished capitally; other persons were deported. Inst. 4, 18, 9.

Lex Julia Repetundarum. A law for the punishment of magistrates and judges who received bribes. Inst. 4, 18.

LEGES PUBLILIAE. Roman laws (B. C. 339) which made the confirmation of the Roman senate (*patrum auctoritas*) unnecessary to the validity of the law of the plebeians. The *patres* were required to ratify beforehand the votes of the *comitia centuriata*, and one of the two censors was to be a plebeian. Hunter, Rom. L. 7, 13, 62.

LEGIOSUS. Subjected to a course of the law. Cow.

LEGIS ACTIO. *Actio* represented a right of the plaintiff not only as against the defendant, but also against the magistrate—a right to have a *judicium* placed at his disposal or to have a private individual appointed for the purpose of deciding by his judgment the question at issue between him and his adversary. The *actio* rested in early times on *lex* or on custom with the force of *lex*, and for this reason it was called *legis actio*.

There were five of the *legis actiones*: (1) the *legis actio sacramenti*, (2) the *legis actio per judicis postulationem*, (3) the *legis actio per condictionem*, (4) the *legis actio per manus injectionem*, (5) the *legis actio per pignoris captionem*. Private law granted a *legis actio* either directly or indirectly, and a private right which was not directly enforceable by the ordinary civil procedure could nevertheless secure a trial or *actio* by a solemn affirmation or a solemn act of execution, which latter could be either personal or real. The general form of action was *actio sacramenti*, the other forms being restricted to such cases as were determined by statute (*lex*) or ancient custom with statutory force. The special *legis actiones* were all modes of enforcing obligatory rights, or, in other words, they were forms of so-called personal actions. But whenever the claim was not personal, but real, the *legis actio sacramenti* was the sole form available. Sohm, Rom. L. 153. The procedure in these actions was open only to Roman citizens and the parties were almost always obliged to appear personally, but an *asseritor libellatus* could appear to claim the freedom of a person wrongfully treated as a slave. The necessity of adherence to the prescribed forms was so rigid that if in an action for damage to a vineyard, the plaintiff used the word *vitis* instead of the general word *arbore* employed in the law of the Twelve Tables, he lost his action, and if an action failed, even on the most technical ground, the plaintiff had no further legal remedy. The sentence was ordinarily to give the thing demanded, not a pecuniary equivalent. Sand. Just. Introd. § 96.

LEGISLATION. The act of giving or enacting laws. See STATUTE; CONSTITUTIONAL; LEGISLATIVE POWER. LOCAL LEGISLATION.

LEGISLATIVE INTENT. Where the Legislature has enacted two or more statutes, which from their wording appear to be inconsistent, or in conflict with the State or Federal Constitutions, there is an ambiguity, the courts construing the statutes are permitted to look beyond their words as to the legislative purpose. 131 Ky. 551, 115 S. W. 703.

LEGISLATIVE POWER. Authority exercised by that department of government which is charged with the enactment of laws as distinguished from the executive and judicial functions. The law-making power of a sovereign state.

The authority conferred by or exercised under the constitution of a state or of the United States, to make new laws or to alter or repeal existing ones.

A law in the sense in which the word is implied in these definitions is a rule of civil conduct, or a statute described by the legislative will, and not law in the more general sense in which the term is applicable to that which owes its origin, either wholly or in part, to the judicial power. See LAW; JUDGE-MADE LAW; JUDICIAL.

POWER. The separation of the three powers of government which underlie all modern civilized government has been discussed under the title **EXECUTIVE POWER**, in which, as well as in the title **JUDICIAL POWER**, many of the questions arising in connection with the difference of the spheres of action of these three powers have been discussed, and to these titles reference should be made and they should be read in connection with this title.

"Legislation is essentially an act of sovereign power; . . . the very definition of law, . . . shows the intrinsic superiority of the legislature. It may be said, the power of the legislature, also, is limited by prescribed rules. It is so. But it is nevertheless the power of the people and sovereign as far as it extends." Gibson, J., in 12 S. & R. 390.

"Plenary power in the legislature for all the purposes of civil government is the rule. A prohibition to exercise a particular power is the exception." 15 N. Y. 532.

"The legislative power of a state extends to everything within the sphere of such power, except as it is restricted by the Federal Constitution or that of the state." Swayne, J., in 19 Wall. 576.

"The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless, by the fundamental law, power is elsewhere reposed." Fuller, C. J., in 146 U. S. 25. "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a state, except those imposed by its written constitutions." Fuller, C. J., in 148 U. S. 661.

It is in the legislative department that the supreme and absolute authority is vested; 1 Bla. Com. 53, 142; Locke, Govt. ch. xii. xiii. par. 153.

"The legislative power is that which has the right to direct how the force of the community shall be employed for preserving the community and the members of it." Locke, Govt. ch. xii. par. 143. But it was only upon the ruins of the royal prerogative, so far as concerned the right to dispense with any statute, that the foundations were laid on which by a steady, if at times an interrupted growth, was built up the final omnipotence of parliament. The power of the king was defined by the decision in *Godden v. Hales*, Comb. 21; S. C. Show, 475. See also 1 Thayer, Cas. Const. L. 29, n.

A state constitution, adopted before that of the United States, is a result of all the plenary legislative power of the people untrammelled by any higher law; 154 N. Y. 61.

It has always been understood that the sovereignty of the federal government is in congress, though limited to specified objects. "The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse." 9 Wheat. 187, per Marshall, C. J.

Legislative discretion is of two kinds, legal and political. "Legal discretion is limited. It is thus defined by Lord Coke: *Discretio est discernere per legem quid sit iustum*. Political discretion has a wider range. It embraces, combines, and considers all circumstances, events, and projects, foreign or domestic, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds on which political discretion may have proceeded." Hall, Am. L. J. 255.

While each of the three departments of government is essential to the existence of a state, as modern government

is understood, it is undoubtedly true that the strongest is the legislative. That would result from its control of the public purse, if from nothing else; but notwithstanding this fact, the judiciary which is in theory the weakest of the departments has held its own place as a co-equal and co-ordinate department, and after the lapse of a century it is said "that the three departments still retain their balance, each with its prerogatives unimpaired." 1 Post. Const. § 45.

Besides the vantage ground which the legislative department naturally occupies as contrasted with the other two by reason of the character of its functions, it has been said that it is the branch of the government which has grown the most. And it is suggested, that coming as it does from the people, much is tolerated which would not be permitted in the other departments; Miller, Const. U. S. 95. It has been maintained by some writers that congress has encroached permanently upon the other departments, but this opinion is controverted; 1 Post. Const. § 45, n. 11. There is no question as to the importance of the constitutional restraint upon the power of congress. Montesquieu said that the English constitution would perish if the legislative power should become more corrupt than the executive; and a later writer considered that while it was important to restrain the executive power, it was still more important to restrain the legislative; De Lolme, Const. 190.

It has been said that: "in the United States, all legislative power exists in two forms, viz. —1st. As political or sovereign power, the nation as a whole embodying the political sovereignty supreme and unlimited; 2d. As civil or delegated power, the legislature representing the legal sovereignty as bounded by constitutional limitations. Political legislation, therefore, being among the powers of sovereignty, belongs exclusively to the people as a nation.

Civil legislation, being morally an act of agency performed by the delegates or representatives of the people, belongs to the legislature proper, and indirectly to the judiciary in the exercise of a supervisory power arising out of actual controversy. In the hierarchy of government the people frame the constitution, the constitution creates the legislature, and the legislature enacts the laws." Ordon, Const. Leg. 15.

The legislative institutions of England are considered by the best constitutional historians to have been of Teutonic origin; id. 62; Freeman, Eng. Const. 18.

The ancient Teutonic assembly in its twofold operation is thus described by Tacitus: "About minor matters the chiefs deliberate; about the more important, the whole tribe. Yet even when the formal decision rests with the people, the affair is always thoroughly discussed by the chiefs. They assemble, except in the case of sudden emergency, on certain fixed days, either at new or at full moon, for this they consider the most auspicious season for the transaction of business. Their freedom has this disadvantage, that they do not meet simultaneously, or as they are bidden, but two or three days are wasted in the delays of assembling. When the multitude think proper, they sit down armed. Silence is proclaimed by the priests, who have on these occasions the right of keeping order. Then the king or the chief, according to age, birth, distinction in war, or eloquence, is heard, more because he has influence to persuade, than because he has power to command. If his sentiments displease them, they reject them with murmurs; if they are satisfied, they brandish their spears. The most complimentary form of assent is to express approbation with their weapons." Church and Brodribb's translation of *Agricola and Germania*, 95, 96.

"Such," it is said, "was the earliest form of our racial legislature of which there is record. And in it were the germs of all that came after it. The essential features of Saxon mark-moot, shire-moot, folk-moot and witenagemot; of Norman great council; of parliament; of colonial and state legislature; and of the American congress, were historically derived from this ancient and original Teutonic source." Stevens, Sources of the Constitution 60. The same view of the origin of our legislative institutions is taken by another writer on the subject who says: "The present congress of the United States is a national legislature, and its source may be traced through the British parliament to the meetings in the woods described by Tacitus." 1 Post. Const. 397. So also it was said by the great Frenchman by whom first was given verbal expression to the modern system of government: "Ce beau système a été trouvé dans les bois." (This splendid system was found in the forest.) Montesquieu, *L'Esprit des Loix*, xl. ch. vi. Foster gives

an interesting account of some primitive legislative assemblies of a whole people which are still in existence; of which probably no more perfect democracy has ever existed than the town meeting of New England. See 1 Post. Const. § 47; Spencer, Pol. Inst. § 1.

Town Meeting. Going back still further it is said that the Aryan instinct of popular government finds expression in representative government, and confides the law-making power to a legislature rather than to a personal sovereign, the latter system being always adhered to among the Oriental nations and those of Europe not affected by Aryan origin or admixture; Ordonaux, Const. Leg. 5.

The legislative system of America is undoubtedly derived from that of England; the senate being a development from the house of lords and the privy council, and the house of representatives confessedly from the house of commons. The earliest impressions which were received of legislative authority in England, reflected the characteristic powers of ancient Teutonic assemblies,—the exercise of authority over tribal or national affairs, and the combining of judicial with legislative functions." Stevens, Sources of the Constitution 66. This authority gives an interesting and instructive sketch of the growth of legislative power as it is known in England and America. Prior to Edward the Confessor, the powers of the witenagemot were very great, extending to the making and unmaking of kings; including lease, taxation, treaties, land grants, control of military and naval forces, and ecclesiastical officers, including also the functions of a supreme court of justice. It survived the Norman conquest theoretically with the same powers but practically they were minimized by the conqueror and his successors at the same time that they observed the formality of professing to act by its counsel and advice. With the Plantagenets the legislative power increased, and under Edward I. parliament attained the perfected organization of the two houses, and the removal of its subsequent authority which was subject to fluctuations. Subsequent alternations of power and weakness led up to the contest with the Stuarts and the final overthrow both of the throne and the lords, which, it is said, was "a disastrous that neither has since fully recovered the original position in the fabric of the state." After a partial reaction, the revolution of 1688 finally established the legislative power in England, and through the opposing forces of the rise of the cabinet system, the feebleness of the first two Georges, and on the other hand, the assertion of the royal power by George III., there happened to be at the period of colonial growth in America, and the establishment of American independence, that condition of distinct and independent executive and legislative power which left its impress upon the American constitutions; although in England the result of the cabinet system was the development of the final domination of the crown by parliament; id. ch. 4.

The same author finds several points in which the legislative procedure in the United States is traced naturally to the English system. The system of initiating legislation by bills passed by both houses and submitted to the approval or veto of the executive, he traces back to the period when parliament began to take the initiative, and legislation arose from its petitions to the king. A like origin is attributed to certain privileges possessed by each of the houses, such as, on the one hand, the judicial rights of the senate and the power of impeachment and of initiating money bills in the house. So also the privileges of members of both houses of freedom of speech, freedom from arrest, and the provision that each house is to judge of the election and qualification of its members; id.

Most of the American constitutions provide, in express though in different terms, for the separation of the three powers of government. See **EXECUTIVE POWER**. The constitutions of the United States, and, a few of the states, do not have such a formal provision, but simply vest in the legislature, the legislative power; in the courts, the judicial power; in the executive, the executive power. These various constitutional provisions are collected in Stimson, Am. Stat. L. § 200. In most of them there is not only an express separation of powers, but also a prohibition against the assumption or discharge of the functions of any one department by a person or persons exercising the functions of another. And the Ohio constitution, Art. 2, § 32, provides that the legislature can exercise no judicial power not expressly conferred by the constitution. It is generally conceded, however, that those constitutions which simply vest the three powers in three distinct departments operate as clearly and distinctly as enjoining the separation of the departments as those in which there is an express provision, and this may be accepted as a settled principle of American constitutional law. In an early case it was said that "no power can be properly a legislative and properly a judicial power at the same time; and as to mixed powers, the separation of the departments in the manner prescribed by the constitution precludes the possibility of their existence." 2 D. Chip. 77. It is true, as suggested by another court, that there are many minor duties devolving upon a government which

cannot be assigned, strictly speaking, to any one of the three departments; 34 Cal. 520. A suggestion has been made to characterize these nondescript duties as "administrative," but it is very truly remarked that this "does not much mend the matter, for it is at once obvious that this does not make a fourth department, but merely gives a name to a group of duties taken from the legislative and executive departments." 31 Am. L. Reg. N. S. 438. It might be added that the term administrative in this sense might have an application under the systems of continental Europe, where the executive exercises certain legislative functions not belonging to the office as we understand it. See EXECUTIVE POWER. The three departments are not merely equal, but exclusive, in respect to their duties, and absolutely independent of each other; 109 Ind. 8; one cannot inquire into the motives underlying the action of another; 8 id. 298. The executive power is much more easily defined than the other two. The greater difficulty of determining the boundary line between legislative and judicial power has been already alluded to under the latter title, as also have some of the reasons why the legislature has continued to exercise some powers which in their nature are judicial, even after the general acceptance of the theory that they should be separated. The difficulties of the subject arise more particularly in the determination of what are legislative and what are judicial acts, rather than in the scientific definition of the distinctive powers. The statement of the principles upon which the definitions rest is comparatively easy, and the cases abound in statements which in varying terms express the difference with sufficient accuracy; some of these cases have been cited in the other titles referred to. A terse expression is that of Mr. Justice Field: "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." 99 U. S. 761. Another early statement of the distinction is: "A marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what the law is upon existing cases. In fine, the law is applied by the one and made by the other. To do the first, therefore, to compare the claims of the parties with the law of the land before established, is, in its nature, a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is, in its nature, a legislative act." 1 N. H. 204. "The distinction between legislative and judicial acts is that the former establishes a rule regulating and governing matters occurring after its passage, while the latter determines rights and obligations concerning matters which already exist, and have transpired before the judicial power is invoked to pass upon them." 68 Cal. 197; 4 Ill. 238; 1 N. H. 204. In cases where the doubt can be otherwise resolved, probably the best solution of the difficulty may be found in the suggestion that: "Since the legislative department is the broadest in scope, and perhaps corresponds most nearly to the original depositary of all the powers," or, it might be added, of the ultimate sovereignty, "it seems logical to leave to it the residuum, and say that everything not clearly executive or clearly judicial is legislative." 81 Am. L. Reg. N. S. 438. "And, in general, it is to be borne in mind that the question always is, not what is the etymological meaning of legislative and judicial, but what were in fact the functions of legislature and courts, respectively, at the time the constitution in question was framed." *Id.*; 90 W. Va. 482; 55 N. H. 179.

It is of course to be borne in mind that this question is to be dealt with, so far as

the states are concerned, solely with reference to the state constitution. There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions; 2 Pet. 413.

In the earlier development of constitutional government in the United States the separation of the powers of government was less strictly observed than has been necessarily done under the later constitutions, in which it is expressly provided for and insisted upon; it may be remarked that the provisions of later constitutions on this subject are directed more particularly to the restraint of the legislative power within what are considered its proper bounds, with the view to abolish or avoid the abuses thought to attend the exercise of it in the past.

Mr. Justice Miller, in alluding to the settlement of the principle that the courts under the United States constitution are purely judicial bodies, observes that, under United States laws, the converse of this proposition does not hold good as to legislative bodies. He illustrates this by a case in which it was held that a territorial statute of Oregon divorcing a husband and wife, the former being a resident of Oregon and the latter with her children residents of Ohio, where they had been left by the husband under a promise to return or send for them, was a legitimate exercise of legislative power according to the then prevailing judicial opinion of the country, and the understanding of the legal profession at the date of the act creating the territorial government; 125 U. S. 190; and he adds by way of comment: "So extreme a case as this, where manifest injustice was done under the form of law, shows that legislatures ought not to exercise judicial powers; or, at least, if they do exercise them, should be required to cite in all interested parties before they do it." Miller, Const. U. S. 356. The passage of divorce bills by legislatures has, at times, been very frequent in some states; but the tendency of public opinion is decidedly in the line of the comment of Mr. Justice Miller above cited. It is undoubtedly the most extreme case of exercise of legislative power which verges nearly upon the judicial.

In many of the later state constitutions the legislature is expressly prohibited from passing divorce bills, but in the absence of such provision it has been held that the legislature has the power; 2 Kelly 191; 8 Yerg. 77; 125 U. S. 190. The recognition of this power in the United States was simply a continuance of the rule which was in force in England at the time of our independence; and it was treated as a matter of history that the power existed. The English parliament has always passed such bills, and may do so at the present time, except so far as the power may be considered modified by the divorce act of 1857; L. R. 11 App. Cas. 294; 12 id. 312, 361, 364; 13 id. 741.

In states where there was an express division of governmental powers the question has arisen in several cases whether the power to grant a divorce was so far judicial as to make its exercise by the legislature unconstitutional. It has been so held in several cases; 4 Mo. 147; 12 id. 498; 17 id. 590; 28 id. 192; 4 Fla. 28; see 12 Pa. 351. In some cases it has been held that a legislative divorce was valid where the court had no jurisdiction; 51 Me. 490; 2 G. Greene 604; but not otherwise, under a constitution separating the powers; 16 Me. 479. On the other hand it has been held that such action by the legislature is not an invasion of the judicial power; 8 Conn. 547; 2 Md. 429; 2 Wash. Ter. 3; and the United States supreme court in a case cited *supra* held that the separation of governmental powers, and the implied prohibitions resulting therefrom were not intended to exclude the legislative power over the marriage relation; 125 U. S. 190. In Delaware, where the practice of legislative divorces has always prevailed, while as an original question it was considered that the power might be doubted, it was

considered that too many rights of person and property would be disturbed to warrant the court in doing otherwise than to uphold legislative divorces; 4 Harring. 442. And in Kentucky there have been a number of intimations on the subject, the result of which seems to be that the separation of the governmental powers would be violated by legislative divorces; 3 B. Monroe 90; at least after the commencement of a suit in the courts; 9 id. 295; that where it was founded on the application of one party for breach of contract by the other, it was judicial; 7 Dana 184; but not where it was for the benefit of and acquiesced in by both parties; 1 Metc. (Ky.) 319. The theory of the last case would seem to violate the doctrine which underlies divorce as a judicial proceeding, that no divorce should be obtainable by collusion. It is very well understood that this principle is constantly violated, but usually *sub silentio* and certainly without formal recognition by the court. See also 18 L. R. A. 95, where cases arising under different constitutional provisions are collected; DIVORCE.

In some early cases efforts were made to obtain legislative relief from what were considered "hard cases" in the courts, and acts granting an appeal in a special case were held to be an encroachment upon the judicial power; 2 D. Chip. 77; 3 Greenl. 298; but in a similar case from Connecticut it was held an act of judicial and not legislative authority, but was sustained upon the ground that under the then existing constitution of Connecticut, judicial power was not forbidden to the legislature; 3 Dall. 398. Though the idea of the effect of the constitutional separation of powers was not at first easily understood, it was made apparent as cases were passed upon by the courts that their judgments were subject to no control by the other departments of the government except such as might be given to them by constitutional provisions concerning pardons; 31 Gratt. 105; nor is interference by the legislature permissible "to change the decision of cases pending before the courts, or to impair or set aside their judgments, or to take cases out of the general courts of judicial proceedings;" 2 Allen 361. It has been held that the legislature cannot regulate the issuing of injunctions; 5 Cal. 73; interpret such existing laws as do not apply to its own duties; 43 Mo. 410; 16 N. Y. 424; grant a new trial, or direct the court to order it; 15 Pa. 18; open a judgment to let in garnishees to amend and set aside a verdict obtained against them; 4 R. I. 324; make a judgment of a justice of the peace final and conclusive (under the constitution of the state); 5 Ark. 358; authorize the sale and conversion into personalty of land devised in perpetuity for a charitable use; 1 Houst. 580; give construction to a charter; 64 Miss. 378; legalize defective pleadings without first requiring them to be amended; 31 Cal. 196; remit fines and forfeitures; 26 Ala. 439; provide by resolution that a criminal should be discharged by a court; 7 Humph. 162; validate a transaction which the courts have held void; 139 Mass. 559; or ascertain indebtedness and direct payment between parties; 10 Yerg. 59; 4 Ill. 238. In short, the determination of a question of right, or obligation, or of property as the foundation of a proceeding is a judicial act and not within the legislative power; 68 Cal. 197; 99 U. S. 761. The legislature cannot declare what the law was, but what it will be; 2 Cra. 272.

"It is perhaps true that the lines which separate the legislative and the judicial power are sometimes not very clearly defined, but they are becoming more and more so. That is a judicial power which, in a controversy, decides the right to property between citizens or proper parties. Such a determination is not a legislative power. If a legislature, or at least such a body acting within the dominion of the government of the United States, should undertake to declare that certain property which belonged to A should become the property of B, it would be an invasion of

the judicial function, and therefore wholly inoperative and void. No court would hesitate to declare that such a determination was within the province of the courts alone; that the legislature could not effect it, because of this separation of the judicial and legislative powers which is made by the constitution." Miller, Const. U. S. 348. See 1 De Tocqueville, Dem. in America 83.

The legislature has power when unrestrained by a constitutional provision to make a void thing valid by a curative statute; 18 Ind. 358; to declare that executions provisionally issued by justices of the peace, more than two and less than five years after the judgments on which they were issued were rendered, shall not be invalid on that account; 19 Miss. 17; or to authorize the reopening of judgments in which the state is plaintiff for the purpose of setting up a new defence; 26 Cal. 135. But it cannot overthrow judgments by legislative mandate, curative statutes, or otherwise; 107 Ind. 31; nor render valid a judgment which would otherwise be void, since the effect would be the rendition of a judgment by the legislature which is beyond its power; 58 Mich. 364; 40 N. J. L. 393; even if expository statutes be held effective from their date, being practically a new enactment to give them retroactive effect would reverse decisions already made, and they cannot control the interpretation of the courts in dealing with causes of action already accrued; 2 Cra. 194; 11 Mass. 396; 11 Pa. 489; Cooley, Const. Lim. [94]; 81 Am. L. Reg. N. S. 440. See RETROSPECTIVE; STATUTE; EX POST FACTO.

In most of the cases above referred to the distinction between judicial and legislative power is sharply defined, but the cases which present difficulty are of a different character. Cases of a class presenting more difficulty arise under statutes authorizing the organization of municipal corporations and the change of their boundaries by the courts. Such acts have been held to present judicial questions; 43 Ia. 252; 23 Neb. 426; 42 Kan. 627; 44 id. 577; 46 id. 738; 5 id. 673. A critical examination of these cases and the authorities upon which they were based results in the conclusion that they did not "afford a very secure foundation for a decision that needs authority to rest on and . . . will be generally regarded as out of harmony with the principles heretofore laid down as settled." The real nature of the proceedings it is said are "more apparent in the Kansas cases because they masquerade less in the guise of an ordinary lawsuit." 31 Am. L. Reg. N. S. 443. The writer just cited suggests that the mere necessity of determining facts does not constitute a judicial act, nor is a question judicial simply because it calls for judgment and discretion. The subdivision of a state for the purpose of local government is preeminently a subject for legislative action. The practical effect of the Kansas statute was said by the court to be the submission to a judge in advance of its enactment the question of the legality of a city ordinance; 43 Kan. 633; and this it is suggested was sufficient to cast doubt upon its validity.

The decision of questions of public policy relating to the organization of municipal corporations cannot be exercised by a judge, but properly belongs to the legislative department; 54 N. J. L. 293; in this case it was held that a justice of the supreme court could not be authorized by an act of assembly to decide within what territory resident voters should be permitted to assume municipal existence and authority. It is well settled that mere abstract questions or moot cases cannot be submitted for the decision of the court; Cooley, Const. L. 139; 1 Ind. 21; 8 Mo. 313; accordingly it has been held that: "Whether cities, towns or villages should be incorporated, whether enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a question of policy to be determined by the legislative department." 75 Ill. 153; 33 Minn. 540; 29 Mich. 451; 24 N. Y. 88; 70 Cal. 461. Upon the same

principle it was held that the division of a state into drainage districts and their organization was a legislative function and could not be delegated to executive officers if it could be delegated at all; 69 Cal. 624. So an act authorizing a court upon petition of taxpayers to supersede, revoke, and annul municipal ordinances was a grant of legislative power and void; 30 W. Va. 479; there is no legislative power to confer upon the judiciary the power of taxation; 43 N. J. L. 348; or to require courts to state in writing the reasons of their decisions; 13 Cal. 24; or to appoint surveyors; 58 Mich. 364; or judges to write headnotes for their opinions; 118 Ind. 83; or to fix railroad rates of transportation; 72 N. W. Rep. (Minn.) 718.

But courts have no power to inquire into the necessity for an act creating a new judicial district, as that is purely a legislative question; 32 Pac. Rep. (Wyo.) 850.

The question whether a law is wise or just is a legislative and not a judicial question; 130 U. S. 581. So congress can determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the government; 103 U. S. 427.

The courts have no power to inquire whether notice of an application to the legislature for local or special legislation required by the state constitution, and legislation defining it, has been given. But the legislature is the sole judge of that, and the passage of an act is a legislative judgment that it was properly done; 29 Fla. 1.

The provision of the Chinese Deportation Act of May 6, 1892, which puts the burden of proof upon a Chinese laborer arrested for having no certificate, and requires proof by one capable white witness that he was a resident of the United States at the time of the passage of the act, is within the legislative power to prescribe rules with respect to the admissibility and effect of evidence; 149 U. S. 698.

Legislative power to pass a statute is not established by the enactment of previous statutes of the same character, unless such legislation has been uniform and its validity acquiesced in; 6 App. Div. N. Y. 277.

The legislative power has been held to authorize acts—to make conspiracy to do an act punishable more severely than the doing of the act itself; 159 U. S. 590; to prohibit the removal into a court of errors and appeals of cases of contested elections; 33 Atl. Rep. (N. J.) 880; to provide that courts shall be open at any place in the district where the judge may be; 42 Pac. Rep. (N. M.) 167; to deprive individuals of the right to engage in liquor traffic, though such power is not expressly granted by the constitution, and there is a general reservation to the people of all rights not enumerated; 42 S. C. 222; to prohibit the manufacture and sale of intoxicating liquors; 123 U. S. 623; to authorize a particular person to act as guardian without bond; 116 N. C. 795; to convert real into personal estate for purposes beneficial to those interested, not *sui juris*; 16 Mass. 326; but not for those who are *qui juris*; 53 N. Y. 245; 2 Seld. 358.

A provision in the charter of a railroad company authorizing the guardian of a minor to agree upon the amount of damages for taking the land of a minor is not an invasion of the judicial power but is an exercise of legislative power only; 69 Miss. 339.

The legislature has no power to reimburse a public officer for money lost in his official capacity, particularly where the money belonged to the state school fund, and was not raised by taxation; and the officer repaid the money lost out of his private funds; 188 Ind. 321.

A question which has given rise to much discussion is the authority of the legislature to require what are known as advisory

opinions from courts or judges upon general questions submitted as distinguished from the questions naturally arising in a litigated case. As to the effect of such opinions as precedents, see PRECEDENT. It was early settled as to the federal judges that their judicial duties did not require or empower them to answer such questions; see 4 Am. Jur. 293; 2 Dall. 410, n.; 13 How. 52, n. In some states there are constitutional provisions authorizing the request for such opinions, and in other states there are statutes merely, at least one of which has been held unconstitutional; 10 Minn. 78; s. c. 1 Thayer, Cas. Const. L. 181-3, and notes; and it has been said, "one would expect the same decision with regard to the others if they were contested;" 31 Am. L. Reg. N. S. 456.

In Massachusetts, where there is a constitutional authority for such questions (with reference to a statute making education compulsory), the justices declined to give an opinion when "required" to do so by the legislature, assigning the reason that the legislature had power to ask for such opinions only "upon important questions of law and upon solemn occasions;" 148 Mass. 623. This decision is criticised in an elaborate article, which discusses the power historically and reviews the opinions given by judges in all the states having constitutional provisions on the subject; 24 Am. L. Rev. 369. See also 126 Mass. 557; Thayer, Legal Effect of Opinions of Judges (Famphlet).

Not only is it beyond the power of the legislature to confer non-judicial functions upon courts and judges, but also, to vest judicial power in any one else. Hence a statute authorizing the election, by agreement of parties, of a member of the bar to try a case in which a judge is interested, was held void; 39 Wis. 390.

Congress can neither withdraw from judicial cognizance any matter which from its nature is the subject of a suit at common law, or in equity, or admiralty, nor bring under the judicial power a matter which, from its nature, is not a subject for judicial determination; 18 How. 272.

As to the legislative power to provide for taking private property for public use, and the legislative function of determining what is a public use, see EMINENT DOMAIN.

As to the authority of the courts to declare statutes unconstitutional and invalid, see CONSTITUTIONAL AND JUDICIAL POWER. In the former is also discussed the theory sometimes advanced, but having no substantial basis of authority, that upon some higher ground than that of constitutionality the acts of the legislature may be reviewed by the courts. In a line with the authorities there cited on this subject, and speaking upon the point that the legislative power operating upon proper subject-matter is uncontrolled otherwise than by constitutional restriction, it was said by Storrs, J., speaking for the supreme court of Connecticut: "The defendant insists that we should pronounce the law now in question to be void, on the ground that it is opposed to natural right, and the fundamental principles of civil liberty. We are by no means prepared to accede to the doctrine involved in this claim, that, under a written constitution like ours, in which the three great departments of government, the executive, legislative, and judicial, are confided to distinct bodies of magistracy, the powers of each of which are expressly confined to its own proper department, and in which the powers of each are unlimited in its appropriate sphere, except so far as they are abridged by the constitution itself, it is competent for the judicial department to deprive the legislature of powers which they are not restricted from exercising by that instrument. It would seem to be sufficient to prevent us from thus interposing, that the power exercised by the legislature is properly legislative in its character, which is unquestionably the case with respect to the law we have been considering, and that the constitution contains no restriction upon its exercise in regard to the subject of it." 25 Conn. 290. "I am opposed to

the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside the constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the constitution itself. This is hostile to the theory of the government. The constitution is the only standard for the courts to determine the question of statutory validity." Hubbard, J., in 18 N. Y. 378; 13 N. Y. 430; Iredell, J., in 3 Dall. 386.

It is well settled* that the validity of an exercise of legislative power is presumed, and must be sustained by the court unless it can be clearly shown to be in conflict with the constitution. The principle is thus well stated: "But it is to be borne in mind, that in determining the question whether a statute is within the legitimate sphere of legislative action, it is the duty of courts to make all reasonable presumptions in favor of its validity. It is not to be supposed that the law-making power has transcended its authority, or committed, under the form of law, a violation of individual rights. When an act has been passed with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is therefore incumbent on those who deny the validity of a statute, to show that it is a plain and palpable violation of constitutional right." 16 Gray 417. It is a well-settled principle of American constitutional law that the legislative power of the state is unlimited except by constitutional prohibition, while that of the Federal congress, though equally unlimited within the scope of its granted powers, is limited to the exercise of these powers. "The distinction between the United States constitution and our state constitution is, that the former confers upon congress certain specified powers only, while the latter confers on the legislature all legislative power. In the one case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised." Church, C. J., in 46 N. Y. 401, 404.

"With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one that we have here considered is of this character." 16 How. 369.

Among the administrative rules laid down by Judge Cooley and quoted with great approval by Professor Thayer, is this: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force." Cooley, Const. Lim. 188 and cases cited; 1 Thayer, Cas. Const. L. 175. Other authorities, however, have taken a different view, and the expression that a law is declared by the courts to be unconstitutional and void has been characterized as a common misapprehension as to the effect of a judicial decision upon the constitutionality of a law. It is said that what the court really does in such a case is to ignore the statute and decide the case in hand as if it did not exist; 30 W. Va. 479; the question is simply whether the act furnishes the rule to govern the particular case, and the general abstract question of the constitutionality of an act cannot be directly presented; 9 Ohio St. 543; "The act is not stricken from the statute book, and it is not

superseded, revoked, or annulled. If the courts afterwards change their minds, as did the Supreme Court of the United States in the legal tender cases, the statute is just as effective as if it had never been pronounced unconstitutional." 31 Am. L. Reg. N. S. 448. The latter view is undoubtedly correct. It was an early custom for the legislature to repeal laws which had been held to be unconstitutional; 19 Am. L. Rev. 188. It is nevertheless true that the practice of the government would rather have seemed to have settled down to the view expressed by Judge Cooley as it is customary where serious doubt is expressed regarding the constitutionality of a law, to have presented to a court a test case and when a decision has been rendered by the court of last resort adverse to the statute, it is acquiesced in by the other departments of the government. Familiar and recent instances of this were the decisions adverse to the federal income tax law and the Pennsylvania alien tax law, each of which were held to be unconstitutional and thereupon no further attempt was made to enforce them.

It is a familiar principle that one legislature cannot limit or control the legislative actions of its successors and needs no citation to support it; 5 Cow. 538. In a late case this principle was reiterated and it was said to be necessary that each successive body should be left untrammelled except by the restraints of the fundamental law; 111 N. Y. 132; 153 U. S. 628.

The legislature has power to make a contract binding on the state; it is a necessary attribute of sovereignty; 16 How. 369; and it may by such contract, based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period or permanently; 8 Wall. 430, 439; see also 3 How. 133. In these cases there was a line of very vigorous dissenting opinions in one of which Mr. Justice Miller said: "We do not believe that any legislative body sitting under a state constitution of the usual character has a right to sell, to give, or to bargain away forever the taxing power of the state." 8 Wall. 441.

Nor can the police power be bartered away or shackled by any one legislature. It may, for example, create a corporation with power to do the business of handling and slaughtering live stock, but it cannot continue that right so that no future legislature can repeal or modify it, or grant similar privileges to others; it cannot by contract with an individual restrain the power of a subsequent legislature to legislate for the public welfare and to that end to suppress practices tending to corrupt public morals; 111 U. S. 746; 48 Miss. 147; 84 N. Y. 657, 663; 97 U. S. 25, 28; 101 *id.* 814; 197 U. S. 659.

When its power has not been exceeded and the state is bound by its action, a legislature has no power to revoke its own grants; 6 Cra. 87; 8 Wheat. 1.

Some of the most important questions under this title relate to the subject of the delegation of power. The general doctrine as to delegation of governmental powers has been briefly stated, and some authorities cited, elsewhere. See DELEGATION.

The general principle that the legislative power cannot be delegated is thus tersely expressed by Chief Justice Gibson: "Under a well-balanced constitution the legislature can no more delegate its proper function than can the judiciary." 5 W. & S. 283. And see Locke, Civ. Govt. § 142.

It has very often been said,—that legislative power cannot be delegated is elementary law. The difficulty is in determining what authority or discretion may be conferred on a body other than the legislature without contravening constitutional principle. The general question was the subject of extended discussion in a case sustaining the validity of an act conferring upon railroad commissioners the power to determine what are reasonable rates for transportation; 38 Minn. 281.

In that case the court quotes from a previous de-

cision (39 Minn. 474) the general rule against the delegation of legislative power, as requiring the legislature to pass upon two things, the authority to make, and the expediency of, the enactment. The court then proceeds to lay down a limitation for the rule growing out of the necessity of the exercise of discretion and judgment in the exercise of certain powers. Attention is directed to the difficulty in many cases of discriminating between what is properly legislative and what may be executive or administrative duty, and it is said that, while still recognizing the difference between the departments of government, "the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not necessarily enter. (10 Wheat. 1, 46.) The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. All laws are carried into execution by officers appointed for the purpose; some with more, others with less, but all clothed with power sufficient for the efficient execution of the law. These powers often necessarily involve in a large degree the exercise of discretion and judgment even to the extent of investigating and determining the facts, and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked and the sovereign state find itself hopelessly entangled in the meshes of its own constitution." A number of examples are given of statutes granting discretionary powers to officers charged with the execution of the laws; power given to boards in control of public institutions to make contracts, adopt rules, etc.; the assessment of property for the purpose of taxation; the exercise of the police power in requiring and granting licenses, and the conclusion is stated in the exact words of Judge Ranney, quoted *infra*.

The decision of the Minnesota case was reversed by the Supreme Court of the United States upon grounds not affecting this general statement of the doctrine of the delegation of legislative power; 134 U. S. 418.

This question was elaborately considered by the supreme court in *Field v. Clark*, 143 U. S. 649. In this case it was held that the authority conferred by a tariff act upon the president to suspend by proclamation the free introduction of sugar, etc., when he should be satisfied that any country producing such articles imposed duties or other exactions upon agricultural or other products of the United States, did not conflict with the recognized principle that congress could not delegate its legislative power to the president. The law was complete when it was declared that the suspension should take effect upon a named contingency, the president was the mere agent to ascertain the event upon which the legislative will was to take effect. The court quotes with approval the language, often cited, of Ranney, J., in 1 Ohio St. 88: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Two Pennsylvania cases are quoted with approval as follows: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." 21 Pa. 188, 202. "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction, the court said, was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be subject to inquiry and determination outside of the halls of legislation." 72 Pa. 491, 498.

The authority given by congress to the secretary of war to prescribe rules and

regulations for the use, administration, and control of canals, etc., owned or operated by the United States, is held not to be a delegation of legislative power, and rules made pursuant thereto have the force of law; 74 Fed. Rep. 207. So also an act is valid which authorizes the secretary of war in his discretion to require the alteration of bridges which are obstructions to navigation; 82 Fed. Rep. 592.

A very important branch of this subject is the question of legislative power to make the enactment of a law depend in one form or another upon the result of a submission to a popular vote. There have been many cases upon the subject and some conflict of opinion, but the right of the legislature to refer to the voters of a district or territory, such as a county or municipality, a question local in its nature would seem to be quite well settled. Such questions are the division of a county or township and the formation of a new one; 5 Gill 1; see also 24 Wis. 149; 55 Mo. 295; the reuniting of two separate ones which were formerly one; 8 Pa. 391; 51 Ill. 94; 46 Me. 206; 49 Cal. 478; whether a general school law shall be operative in a particular municipality; 45 Mo. 458; as to the location of a county seat; 10 Pa. 214; 38 Wis. 504; 51 Ill. 37; or its removal; 82 Md. 526; so whether a municipality may make an improvement or incur a debt; 8 Leigh 120; 45 Ala. 696; 28 N. Y. 439; 12 Ohio n. s. 596, 624; 21 How. 539, 547; 23 id. 381; 3 Wall. 327, 654; 44 Mo. 504; 17 Cal. 23; 24 Ill. 75; or have a revision of its charter; 54 Ga. 317; or the regulation of live stock in a subdivision of a county; 87 Tex. 598. Such questions as these, it is said, may always with propriety be referred to the voters of a municipality for decision; Cooley, Const. Lim. [120], where a very large number of cases are collected.

Upon the question whether this principle may be applied to the state at large and the operation of a law be made to depend upon the result of a popular vote, the weight of judicial opinion is decidedly to the effect that it is an unlawful delegation of legislative power; 2 La. 165; 9 id. 203; 48 Cal. 279, 313; 26 N. Y. 470; 17 Mo. 529; 45 id. 453; 93 id. 606; 17 Tex. 441; 4 Ore. 132; 73 Ga. 604; 25 Md. 562; 73 id. 428.

Earlier cases, however, have maintained this view more strongly than later ones. The ground upon which the doctrine of the invalidity of such legislation is based is very well stated in the leading case of *Bartow v. Himrod*, 8 N. Y. 489. In that case it was said by Ruggles, C. J., that the exercise of such power by the people is forbidden by necessary implication. The entire power of legislation is vested in the legislature, and it has no power to submit a proposed law to the people who voluntarily surrendered the power of direct legislation when they adopted as a form of government a representative democracy.

There are, however, opposing opinions expressed with much force. Redfield, C. J., considers the arguments by which the doctrine is sustained to be "the result of false analogies and so founded upon a latent fallacy," though he admits that he was "at first, without much examination, somewhat inclined to the same opinion." 26 Vt. 357.

The argument pressed as against the prevailing doctrine is that it is competent for the legislature to pass a law which shall only take effect upon the happening of a contingency and that it is no extension of this principle to provide that the contingency shall be a popular vote in its favor; *Dixon, C. J.*, in 26 Wis. 291. In the Vermont case the act held valid was to take effect in any contingency; but in case of a popular vote being against it, the time when it should take effect was postponed to a later day; and in the Wisconsin case an act taxing shares in national banks was to take effect only after approval of a majority of the electors voting on the subject at a general election. In another case similar to that in Vermont the court was equally divided; 3 Mich. 343.

This question of the submission of the

legislation to a popular vote has been specially considered in connection with so-called local option laws as to which there has been strong pressure of public opinion tending towards the relaxation of the strictness of the earlier rule and the tendency to hold that the question, whether a general police regulation should be of force in a particular locality, might be submitted to the voters of the district. As to cases on this subject, see *DELEGATION; LIQUOR LAWS; LOCAL OPTION*.

With respect to any subject matter proper to be submitted to a popular vote it is held that the expression of the sovereign will of the legislature that a particular proposition or question be so submitted need not take the form of a law, but it may be in the form of a joint resolution; the secretary of state must certify to the proper officers of the various counties in the state a joint resolution passed by the legislature, that the question whether a constitutional convention should be held should be submitted to the people; and in case of his refusal he may be compelled by mandamus to do so; 68 N. W. Rep. (N. Dak.) 418.

Acts held invalid as an improper delegation by the legislature of the police power are a provision that a boiler inspector's act shall not apply to boilers inspected by insurance companies and certified by their authorized inspectors to be safe; 68 N. W. Rep. (Minn.) 77; an act providing that hogs shall not run at large in a county, if the county courts on petition of voters direct that the act be enforced therein; 23 S. E. Rep. (W. Va.) 666; an act directing the insurance commissioner to prescribe a standard policy and forbidding the use of any other; 166 Pa. 72; acts authorizing insurance commissioners to adopt a printed form of fire policy with conditions indorsed thereon, which, as nearly as possible, in type and form shall conform to that adopted by another state; 65 N. W. Rep. (Wis.) 788; 59 Minn. 182. In the last case it was admitted that an act similar to that of Pennsylvania would be invalid, but it was unsuccessfully contended that the legislative direction to conform as nearly as possible to a specified policy would take the case out of the principle laid down by the Pennsylvania court. So also was an act permitting a justice to put a person charged with drunkenness as a disorderly person under recognizance to take the treatment of a private corporation administering a cure for drunkenness, and providing that on reports showing compliance, he should be acquitted and discharged; 99 Mich. 117.

A law providing for the adjustment of state bonds, and authorizing judges to decide which of two sections of the act should take effect, gives them legislative power and is void; 39 Minn. 474; in this case the subject was very elaborately argued, and the distinction between legislative and judicial power is very clearly stated by the court. See *supra*.

The legislature cannot leave to commissioners the power to decide in what proportion the expense of laying out and opening a public avenue should be imposed on townships of a county or wards of a city; 87 N. J. L. 12.

Acts held not to be a delegation of legislative power and therefore valid, are authorizing the fish commissioners to give permits to take fish for propagation at times and by methods otherwise prohibited; 101 Mich. 98; requiring carriers of passengers to furnish their agents with certificates of authority to sell tickets, on which a license shall be issued by the state; 57 Minn. 347; authorizing a court to issue certificates of incorporation to municipalities; 39 W. Va. 179; permitting the board of supervisors of counties to determine whether a county shall come within or remain without the provisions of an act to establish law libraries; 99 Cal. 571; providing that an act in relation to public roads shall not go into effect until recommended by the grand jury; 91 Ga. 770; authorizing railroad and warehouse commissioners to make a schedule of a maxi-

mum rate of charges for each railroad company in the state; 149 Ill. 361; authorizing the union of two railroad companies and that the united company may discontinue such operations of the road as the directors deem necessary; 66 N. H. 569; authorizing railroad commissioners to regulate freights; 70 Ga. 694; or to make reasonable regulations for the prevention of excessive charges and unjust discrimination; 111 N. C. 463; or to order a company to remove grade crossings and on its failure to do so to determine the portion of the expense thereof which is to be paid by the company; 62 Conn. 527; to provide that the mayors of cities of a certain class may be elected by the people or appointed by the council as provided by ordinance; 30 S. W. Rep. (Ky.) 629; to authorize park commissioners to determine where and of what material sidewalks and road beds shall be constructed; 62 N. W. Rep. (Mich.) 405; to authorize a state medical board to exercise powers of registration and examination; 38 Ohio L. J. 239; s. c. 47 N. E. Rep. (Ohio) 1041.

Authority to transfer cases pending in a territorial court to the federal courts may be delegated to a constitutional convention, upon the admission of the territory as a state; 82 Fed. Rep. 340.

The legislature cannot delegate its law-making power, but it has the power to create municipal corporations and to invest them with the powers of local government, including particularly local taxation and police regulation; Cooley, Const. Lim. [191]. Judge Cooley considers that local self-government being a part of the English and American system, it is to be understood that even if it is not expressly recognized in a constitution, the instrument is presumed to contemplate its existence and continuance; *id.* [35]; 28 Mich. 228; 55 N. Y. 50. It is a legitimate exercise of sovereignty belonging to the legislative power of a state to create corporate bodies for municipal purposes with the means of self-government; 8 Humph. 1; or to delegate to municipal assemblies the power of enacting ordinances relating to local matters; 164 U. S. 471. This is not regarded as a delegation of legislative power, because the local board or municipal body which is invested with such powers is regarded as exercising them as an agency for local legislation of the sovereign power of the state. The settled judicial opinion is thus well expressed: "It seems to be generally conceded that powers of local legislation may be granted to cities, towns, and other municipal corporations. And it would require strong reasons to satisfy us that it could have been the design of the framers of our constitution to take from the legislature a power which has been exercised in Europe by governments of all classes from the earliest history, and the exercise of which has probably done more to promote civilization than all other causes combined; which has been constantly exercised in every part of our country from its earliest settlement, and which has raised up among us many of our most valuable institutions." Bell, J., in 10 Fost. 292; 114 Mass. 214; 65 Pa. 76; 29 Wis. 415; 15 N. Y. 532; 45 Mo. 458; 50 Ala. 486. The creation of such corporations and the grant to them of powers of local legislation do not divest or impair the general legislative power and control of the state legislature, which may increase, diminish, or take away such powers, amend the charter, overrule their legislative action, or abolish them altogether. There can be acquired by the municipal corporation as against the state no vested right in the rights and franchises granted to it, and the municipal charter does not constitute a contract, so that such legislation would be considered in violation of the constitutional provision protecting the obligation of contracts; Cooley, Const. Lim. [192]. This principle is recognized in the Dartmouth College case; 4 Wheat. 518; Dillon, Municipal Corporations §§ 24, 30, 37; see 24 Mich. 87; and it may be affirmed that it is supported by a uniform current of authority. It is true that here and there may be found

expressions by courts and judges, which, to the casual reader, would give the impression that there may be some inviolable character attached to a grant of municipal franchises, but an examination of such cases will usually, if not invariably, disclose the fact that the expressions referred to go beyond the proper consideration of the case in question, and in any case are unsupported by authority. The true principle is thus stated: "Public corporations are but parts of the machinery employed in carrying on the affairs of the state; and they are subject to be changed, modified, or destroyed as the exigencies of the public may demand. The state may exercise a general superintendence and control over them and their rights and effects, so that their property is not diverted from the uses and objects for which it was given or purchased;" 13 Ill. 30. The complete legislative control over municipal corporations is said to be subject to some limits, of which some are "expressly defined; others spring from the usages, customs, and maxims of our people; they are a part of its history, a part of the system of local self-government, in view of the continuance and perpetuity of which all our institutions are framed, and of the right to which the people can never be deprived through express renunciation on their part." Cooley, Const. Lim. [230]. See IMPAIRING THE OBLIGATION OF CONTRACTS.

Such is the right of choosing under forms and restrictions prescribed by the legislature, officers of local administration, and the determination by the local administration of the pecuniary burdens it will assume; Cooley, Const. Lim. [230]; so it has been held that the legislature cannot divest a municipal corporation, of property legally acquired by it; R. M. Charl. 342. As the rule is sometimes expressed, municipal powers may be changed by the legislature if vested rights acquired thereunder are saved; 13 Cal. 343; 27 How. Pr. 342.

Where the legislature uses its power to change or modify the political rights and privileges of municipal corporations, a distinction is drawn between those rights and mere property rights acquired by the corporation, which are protected for the same reasons and upon the same principle as are similar rights in individuals; Cooley, Const. Lim. [237], where the cases are collected.

In any state the legislative power must spend its force within its own territorial limits. It cannot make laws by which people outside of the jurisdiction must govern their actions except as they choose to resort to the remedies provided by the state or deal with property situated within it. See FOREIGN CORPORATIONS; *LEX FORI*. It can have no authority upon the high seas beyond state lines because that is the point of contact with other nations and brings into operation and consideration the principles of international law with which the federal government alone can deal. See FISHERY; *SEA*. As a general rule the state cannot provide for the punishment of acts committed beyond the state boundary, because such acts, if offenses at all, are such only against the sovereignty within whose limits they have been done; Cooley, Const. Lim. [128]. In some cases, however, where "the consequences of an unlawful act committed outside the state, have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such state." *Id.* Such cases arise most frequently where property is stolen in one jurisdiction and carried into another, or where a homicide is committed by a mortal blow in one jurisdiction while death results in another; see 8 Mich. 320; 11 Id. 327; 2 Park. Cr. R. 590; 36 Miss. 593; 16 Wis. 338; 35 N. C. 603.

The legislative power over a place purchased by the United States with the consent of the legislature of the state, is transferred from the state to the federal government, except as restrained by some qualification in the expression of state consent; 53 Pa. 432. See JURISDICTION.

See, generally, CONTRACT; CONSTITUTION-

AL; CORPORATION; DELEGATION; DUE PROCESS OF LAW; EMINENT DOMAIN; EXECUTIVE POWER; FOREIGN CORPORATIONS; IMPAIRING THE OBLIGATION OF CONTRACTS; JUDICIAL POWER; LIBERTY OF CONTRACT; LIQUOR LAWS; POLICE POWER; STATUTE; and titles on the different subjects of legislation.

LEGISLATURE. That body of men which makes the laws for a state or nation. See LEGISLATIVE POWER. The deliberative, representative bodies that make the laws for the people of the respective States. 253 U. S. 227.

LEGITIM. (Called otherwise Bairn's Part of Gear.) In Scotch Law. The legal share of the father's free movable property due on his death to his children. See BAIRN'S PART; DEAD MAN'S PART; LEGITIME.

LEGITIMACY. The state of being born in lawful marriage. See BASTARD; PRESUMPTION; INTENDMENT OF LAW; CHILD.

LEGITIMACY DECLARATION ACTS. English statutes which provide that any natural born subject of the queen, being domiciled in England or Ireland, or claiming any real or personal estate in England, may apply to the high court of justice for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring that his own marriage was valid. 21 & 22 Vict. c. 93.

LEGITIMATE. That which is according to law.

To make lawful; to confer legitimacy; to place a child born before marriage on the same footing as those born in lawful wedlock. 26 Vt. 653.

LEGITIMATION. The act of giving the character of legitimate children to those who were not so born.

Legitimation is a fiction of the law, whereby one born out of lawful wedlock is considered the offspring of the marriage between the parents. 24 La. Ann. 580.

In Louisiana, the Civil Code, art. 217, enacts that "children born out of marriage, except those who are born of an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before their marriage, or by the contract of marriage itself."

The legitimation of natural children was permitted in none of the earlier German codes, except the Lombard, and was strongly opposed to the whole spirit of German family law, but that the father could, by symbolic forms, acknowledge his natural child and give him a place and protection within his household is proved from German and Scandinavian sources. Among the Anglo-Saxons, a child born in unlawful marriage had no rights of inheritance, and it may be inferred that all other rights of kindred were denied to it except that of protection, even when acknowledged by the father. Essays, Ang.-Sax. L. 126. In the conflict between the church and the law at the Merton parliament in regard to the question whether a bastard could be legitimated, the barons declared with one voice that they would not change the laws of England, and that nothing could make a bastard legitimate, although it was contended that the old English custom authorized legitimation by allowing the parents on the occasion of their marriage to place such children beneath the cloak under which they stood whilst the marriage ceremony was performed, the children thereby becoming "mante children," but this practice the king's court of Henry II. had rejected and that of Henry III. refused to retreat from the precedent. 2 Poll. & Maitl. 395.

In Maine, Pennsylvania, Illinois, Michigan, Iowa, Minnesota, California, Oregon, Nevada, Washington, the Dakotas, Idaho, Montana, and New Mexico, marriage of the parents legitimizes an illegitimate child. In Massachusetts, Vermont, Illinois, Indiana, Wisconsin, Nebraska, Maryland, Virginia, West Virginia, Kentucky, Missouri, Arkansas, Texas, Colorado, Idaho, Wyoming, Georgia, Alabama, Mississippi, and Arizona, in addition to the marriage of the parents the father must have acknowledged or recognized the child as his.

In New Hampshire, Connecticut, and Louisiana, both parents must acknowledge, but in the last named state the acknowledgment is made either by an authentic act before marriage or by the contract of marriage, and an exception is made of those children born of an incestuous or adulterous connection. In California, Nevada, the Dakotas, and Idaho, a public acknowledgment by the father of an illegitimate child, receiving such child (with the consent of his wife, if married) into his family, and otherwise treating it as if it were legitimate, thereby renders it legitimate for all purposes. Acknowledgment by either or both parents, or by the father with the consent of his wife, or by the mother with the consent of her husband, will legitimize a child. In Michigan, if the father, by writing executed, acknowledged, and recorded like deeds of real estate, but with the judge of probate, acknowledge such child, he is legitimate for all purposes. In North Carolina, Tennessee, Georgia, and New Mexico the putative father of a bastard has a process in court by which he may legitimize the child.

A question considerably discussed in England is where one who is domiciled in a country sustaining the doctrine *legitimatio per subsequens matrimonium* marries a woman who had before the marriage a child by him, the husband having been domiciled prior thereto in a country where the doctrine does not prevail. In one case the exact question arose where the husband domiciled in England went to France, and before changing his domicile cohabited with a French woman who had by him a daughter, and afterwards becoming domiciled in France, he married the woman at the British Embassy in English form, and later in French form with recognition of the child, but the latter was held not to be legitimate; 2 K. & J. 595; s. c. 25 L. J. Ch. 621. This case is the subject of severe criticism in an article in 22 Law Mag. & Rev., 4th. 171, where the English cases touching upon the subject are carefully reviewed, with the conclusion that "it is not rash to say that before the case last mentioned such authority as existed on the point was in favor of the legitimacy." See 7 Cl. & F. 817, 842; 11 Eq. 474; 17 Ch. Div. 286; 24 Ch. Div. 637; [1892] 3 Ch. 88; L. R. 1 H. L. Sc. 441. See BASTARD; DESCENT AND DISTRIBUTION; CHILD.

LEGITIME. In Civil Law. That portion of a parent's estate of which he cannot disinherit his children without a legal cause.

The civil code of Louisiana declares that donations *inter vivos* or *mortis causa* cannot exceed two-thirds of the property of the disposer, if he leaves at his decease a legitimate child; one-half if he leaves two children; and one-third if he leaves three or a greater number. Under the name of children are included descendants of whatever degree they may be; it must be understood that they are only counted for the child they represent.

In Holland, Germany, and Spain, the principles of the Falcidian law, more or less limited, have been generally adopted; Coop. Just. 516.

In the United States, other than Louisiana, and in England, there is no restriction, except as to the widow's rights, on the right of bequeathing. But this power of bequeathing did not originally extend to all a man's personal estate; on the contrary, by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, one of which went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso* if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal; Glanville, l. 2, c. 5; Bracton, l. 2, c. 26; 2 Poll. & Maitl. 346. The shares of the wife and children were called their reasonable part;

2 Bla. Com. 491. See DEAD MAN'S PART; BAIN'S PART; FALCIDIAN LAW.

LEGITIMI HÆREDES. *Agnati*, because the inheritance was given to them by the laws of the Twelve Tables, whereas the *cognati* only received it from the prætor. Sand. Just. 280.

In Roman Law. Legitimate heirs. English.

LEGENITA. A fine for criminal conversation with a woman. Whart. Lex.

LEGULEIUS. One skilled in the law. Calvinus. Lex.

LEHURECHT. The German feudal law. 1 Poll. & Maitl. 214.

LEIDGRAVE. See LATHREEVE.

LEIPA. A fugitive; one who escapes or runs away from service. Spelman.

LELVES. See LEWES.

LEND. In a will, the words "I do lend to B's four children, C, D, E, and F, all my estate, real and personal," with a further direction that the estate should be kept together until C arrived at 21 years, when it was to be equally divided among the children, their heirs and assigns forever, the word lend was held not to tie up the estate to the time of the death of the children. 5 Ired. L. 361.

LENDER. He from whom a thing is borrowed. The bailor of an article loaned. See BAILMENT; LOAN.

LENT. The annual forty days of penitence and fast from Ash Wednesday until Easter. (Sax., *lenten*, the springs). The quadragesimal fast. A time of abstinence Wharton.

LEOD. The people; the nation; the country. Spelman, Leodes.

LEODES. A vassal or liege man; service; a were gild. Spelman.

LEOHT-GESCEOT. A tax for supplying a church with lights. Anc. Inst. Eng.

LEONINA SOCIETAS. An attempted partnership in which one party was to bear all the losses, and have no share in the profits. This was a void partnership in the Roman law. Brown.

LEP AND LACE. A custom in the manor of Writtle in Essex, that every cart, except that of a nobleman, which went over Greenbury within that district should pay 4d. to the lord. Blount.

This Greenbury was conceived to have been accidentally a market-place, on which account this privilege was granted. *Id.*

LEPPE AND LASSE. See LEP AND LACE.

LEPROZO AMOVENDO. An ancient writ that lay to remove a leper or leprosy who thrust himself into the company of his neighbors in any parish. Reg. Orig.

LESE MAJESTÉ (Fr.). High treason. Burrill; 2 Reeves' Hist. Eng. L., 6.

LESION. In Civil Law. A term used to signify the injury suffered, in consequence of inequality of situation, by one who does not receive a full equivalent for what he gives in a commutative contract.

The remedy given for this injury is founded on its being the effect of implied error or imposition; for in every commutative contract equivalents are supposed to be given and received. Persons of full age, however, are not allowed in point of law to object to their agreements as being injurious, unless the injury be excessive; Pothier, Obl. p. 1, c. 1, s. 1, art. 3, § 4. But minors are admitted to restitution, not only against any excessive inequality, but

against any inequality whatever; Pothier, Obl. p. 1, c. 1, s. 1, art. 3, § 5; La. Code. art. 1858. See FRAUD; GUARDIAN; SALE.

LESPIGEND. An inferior officer in the forests who cared for the vert and venison.

LESS. In a mining lease, a covenant to pay certain royalties where "less than" a stated quantity is gotten, is applicable to a case where none is gotten. 26 L. J. Ex. 41; 1 H. & N. 195. The words "less than" have been held synonymous with "not exceeding"; 21 L. J. Ex. 160; 7 Ex. 591.

LESSA. A legacy. Mon. Ang., t. 1, p. 562.

LESSEE. He to whom a lease is made. He who holds an estate by virtue of a lease. The word has been held to include the assignee of a lease. Cab. & El. 348. See LANDLORD AND TENANT.

LESSOR. He who grants a lease. See LEASE; LANDLORD AND TENANT.

LESTAGE, LASTAGE (Sax. Inst., burden). A custom for carrying things to fairs in markets. Fleta, l. 1, c. 47; T. L. See LASTAGE.

LESWES. Pastures. Co. Litt. 4 b.

LET. Hindrance; obstacle; obstruction.

To lease; to grant the use and possession of a thing for compensation. It is the correlative of hire. As an operative word in a lease, it is synonymous with demise; 12 M. & W. 68; 13 L. J. Ex. 135; 1 C. P. D. 158; 45 L. J. C. P. 405. See DEMISE; HIRE. To award a contract of some work to a proposer, after proposals have been received. 35 Ala. 33.

LETTER. He who, being the owner of a thing, lets it out to another for hire or compensation. Story, Bailm. § 369. See HIRING.

LETTER. An epistle; a despatch; a written message, usually on paper, folded up and sealed, and sent by one person to another. 1 Cal. 582. It will include the envelope in which it is sent. 10 Blatchf. 10.

Property in. Letters written by one person to another are the property of the latter, and he has a right not only to have them produced for use in litigation, but delivered up to him as the true owner. A writer of letters has a special property in them to prevent their publication or communication to other persons; 50 How. Pr. 194; 2 Story 100; 6 McLean 128; 5 Blatchf. 285. See 7 Alb. L. J. 19.

Letters written to a wife by a former husband belong to her and not to his estate, or to her second husband; 2 Bush 480; see 64 Vt. 450; and the recipient of a letter has no such property in it as passes to his executor as an asset of the estate; 22 How. Pr. 198.

Where a bill in equity charged that the defendant surreptitiously and illegally took from the trunk of the plaintiff's son and from the plaintiff's own bureau certain letters written by the plaintiff to her son, and by her son to her, it was held that the special right in the letters written by plaintiff was one that could only be adequately protected in equity, and that the court having jurisdiction for discovery should go on and order all the letters to be restored; 180 Pa. 14. See INJUNCTION; PRIVACY.

Letters in evidence. A letter is not admissible in evidence without proof of its being genuine, and such proof cannot be supplied solely by what appears on its face, as its contents, the letter head, etc.; 93 Ga. 648; but letters received in the regular course of business responsive to letters on the same subject, with proper letter-heads, envelopes, etc., are presumably authentic, according to their purport; 61 Fed. Rep. 804. In order to prove a memorandum, under the statute of frauds, a letter and envelope are considered as one document; 76 L. T. Rep. 441.

Letters in themselves inadmissible are so if they communicate any fact to the party

against whom they are read which either affects the right in question or explains his subsequent conduct; 22 E. C. L. R. 273, 345. A letter stating particular facts cannot be read in evidence merely because it was sent, but if the party to whom it was addressed wrote an answer, such answer might be read as evidence against the party who wrote it, and the letter to which it was an answer would be admissible for the purpose of explaining such answer. A letter and answers thereto are subject to the same rule as applies to a conversation; if part is given in evidence by one party, the other party is entitled to have the whole produced; 4 Rob. 12; 41 Miss. 81. Failure to answer a letter is not generally deemed an admission of its contents; 87 N. Y. 1.

Letters in evidence fall within the general rule as to written documents; 27 L. J. C. P. 193; their construction is for the court unless extrinsic circumstances be capable of explaining them; 27 L. J. Ex. 34; but if they are written in so dubious a manner as to be capable of different constructions, or to be unintelligible without the aid of extrinsic circumstances, their meaning becomes a question for the jury; 1 Term 182; 8 C. B. 44; so the jury must deal with the whole question, where a contract is made partly by letter and partly oral; 17 C. B. N. s. 107.

It is a general *prima facie* presumption that all documents were made on the day they bear date, and this presumption obtains where the document is a letter; 2 Ex. 191, 196; 6 Bing. N. C. 301; 2 B. & Ad. 509; 2 M. & H. 583; but the date of a letter is not evidence that it was forwarded on that day; 53 Fed. Rep. 485; 102 Mass. 177; nor can the date of the receipt of a letter be established by witnesses who base their calculations upon its date; the date of a letter does not prove the date of its receipt, or the time of mailing it, or that it was ever mailed; 53 Fed. Rep. 485. In an action for criminal conversation, where the letters offered are those of a wife to a husband, to show the terms on which they lived; evidence must show when they were written; 1 B. & Ald. 90; 9 C. & P. 198; 2 Stark. 198.

Postmarks on letters are *prima facie* evidence that the letters were in the post at the time and place specified; 3 Stark. 64; 7 East 65; 29 How. St. Tr. 103; 3 Fed. Rep. 484; 1 Camp. 215; 2 *id.* 620; 7 M. & W. 515; 7 H. L. Cas. 646; although it be shown that in aid of justice, postmasters sometimes furnish empty envelopes bearing the post-office stamp, where they have never in fact been in the mail; 1 Fed. Rep. 126. Postmarks are evidence that the letter was mailed and sent, rather than that it was merely put in the post office; 15 Conn. 206; 16 Vt. 63; 4 R. I. 525; 3 Dill. 571.

The burden of proving the receipt of a letter rests upon the party who asserts it; 105 Mass. 391; 111 U. S. 185. If a letter properly directed is proved to have been either put in the post office or delivered to the postman, it is presumed to have reached its destination at the regular time, and to have been received by the person to whom it is addressed; 2 H. Bla. 509; 16 M. & W. 124; 1 H. L. Cas. 381; 48 L. J. Ex. 577; 6 Wheat. 102; see 4 R. I. 525, where it is held that any further evidence of the receipt of a letter than that it was properly directed and mailed would be wholly unnecessary, always difficult and often impossible. But this presumption is not one of law, but solely one of fact; 148 Pa. 405; 45 Me. 50; founded upon the probability that the officers of the government will do their duty, and the usual course of business; 105 Mass. 391; 111 U. S. 185. It may be rebutted by evidence showing that it was not received; 69 N. Y. 571; 93 Ala. 215; 12 Col. 589; 148 Pa. 405. But the fact of non-return of a letter bearing a request for return in case of failure to deliver so strengthens the presumption of receipt from mailing that it becomes well-nigh conclusive; 154 Pa. 325. On proof of the posting of a letter, properly addressed, the fact that it was not returned to the

dead letter office is evidence of its receipt; 16 M. & W. 124. The facts that all letters put in a certain place were in the proper course of business put in the mail, and that a particular letter was put in such place, are evidence that it was despatched; 4 Campb. 193. See L. R. 3 Ch. Div. 574; 61 N. Y. 362; 58 N. H. 97.

In the absence of evidence that a letter was stamped before mailing, no presumption arises as to its receipt; 31 S. W. Rep. (Mo.) 938; but when one alleges that he duly mailed a letter, the court will presume that the requirements of the law as to stamping, etc., were complied with; 80 Fed. Rep. 337. The question of the receipt of the letter is for the jury; 115 Pa. 539; 148 id. 405; 130 Mass. 186; 138 N. Y. 473. See Taylor, Ev., Chamberlayne ed. 183. See PRESUMPTION.

Contract by letter. The rule that a contract is complete at the instant when the minds of the parties meet is subject to modification where the negotiation is carried on by letter, for it is in that case impossible that both parties should have knowledge of the moment it becomes complete. The offer and acceptance cannot occur at the same moment of time; nor can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence. The acceptance must succeed the offer after the lapse of some interval of time, and if the process is to be carried further in order to complete the bargain, a notice of the acceptance must be received; the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other; Benj. Sales § 69. When an offer is made by letter, it is presumed to continue during such period as is determined by, or is reasonable with regard to, the terms of the offer, or until notice of its recall has reached him to whom the offer is made; 1 B. & Ald. 681; 6 Eng. Rul. Cas. 80; even if, through fault of the sender, the letter containing the offer is delayed; 6 Wend. 103; 13 Conn. 433; provided the offer is standing at the time of the acceptance; 6 Wend. 104; and where a proposal is made by letter, the mailing of a letter containing an acceptance of the proposal completes the contract; 6 Wend. 104; 1 B. & Ald. 681; 1 H. L. Cas. 331; 5 Pa. 339; 9 How. 390; 149 U. S. 411; 63 Ia. 434; 55 Ga. 438; 32 Md. 196; 67 Tex. 163; 42 Wis. 152; 15 R. I. 330; 16 Fed. Rep. 646; L. R. 7 Ch. 537; 20 Q. B. Div. 640; although the acceptance may be delayed or may not be received through fault of the mail; 9 How. 390; 36 N. Y. 307; 48 N. H. 14; 3 Metc. (Ky.) 80; 4 Ga. 1; 31 Md. 99; 161 Mass. 496; and this seems to be the general rule both in this country and in England, although it has been held that the contract is not complete until the letter of acceptance has been received by the party who makes the offer; 1 Pick. 281; L. R. 6 Ex. 108, overruled in 4 Ex. D. 216; but if undue delay or failure of delivery of the letter of acceptance is caused by the acceptor, there is no contract; 10 Pick. 326; 55 Ga. 438. Placing the acceptance in a letter box at the defendant's place of business completes the contract; 61 N. Y. 362; but entrusting it to a messenger for delivery is not sufficient, where there is no evidence that it was received; 4 Misc. Rep. 614.

The acceptance must be unconditional and in accordance with the terms of the offer and within the time prescribed by the offer; 21 Minn. 155; 53 Me. 20; 3 Johns. 534; 4 Wheat. 225; 43 N. Y. 240; 37 Ia. 186; 59 Wis. 315; 159 Pa. 612; even where the offer called for reply by return mail, compliance was held essential; 90 Ill. 525; 67 Ia. 678; and where in answer to a letter of proposal, the accepting party merely writes that he is willing to make arrangements on the terms proposed, it was held to be not an unconditional acceptance; 47 Hun 494; 49 N. E. Rep. (Ind.) 40; 22 Fed. Rep. 596.

Where there is no limitation as to time in the offer, the acceptance must be within a reasonable time; 63 Ia. 484; 50 Am. Rep.

752; the following day will suffice; 1 H. L. Cas. 331; but four months will not; 43 N. Y. 240. See 6 Eng. Rul. Cas. 91.

In the leading case of *Cooke v. Oxley* the rule was laid down that one who gives time to another to accept or reject an offer is not bound to wait until the specified time expires, if no consideration has been given for the offer; 3 Term 738; see Pothier, *Contrat de Vêrité*, No. 82; 3 Cush. 153; 5 Stew. & P. 264; 48 N. H. 16; but in this case the offer was not by letter, and the question as to the revocation of such an offer (when the offer was made by mail) was for a long time unsettled. In 1 Pick. 278 it was held that a revocation of an offer not then accepted takes effect from the time it is posted, although not received by the other party until after he had mailed his acceptance, and that no contract existed because, at the moment the acceptance was sent, the mind of the party offering had changed; in L. R. 6 Ex. 108; the same doctrine is laid down, but this case was doubted in 7 Ch. App. 592; and the English and American rule is now well settled that the offer cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before the letter of acceptance has been mailed; 9 How. 390; 49 L. J. C. P. 316; 5 Q. B. D. 351. The withdrawal of the offer after the acceptance has been posted is inoperative; as a state of mind not notified cannot be regarded in dealings between man and man, and an uncommunicated revocation is, for all practical purposes, no revocation at all; 5 C. P. D. 344; 5 Q. B. D. 346; 2 App. Cas. 666; 46 N. Y. 467. The posting of a letter of withdrawal is not a communication to the person to whom it is sent; 5 C. P. D. 344. See Wald, Poll. Contr. 26; Benj. Sales § 65; 6 Eng. Rul. Cas. 80. A revocation of an offer is not complete till it is brought to the mind of the offeree; merely mailing a letter of revocation is not a revocation; [1892] 2 Ch. 27, C. A. Nor is the mere posting of a letter allotting shares in a company to an applicant such a communication as to bind the applicant; L. R. 11 Eq. 86; 20 L. T. R. N. S. 729.

It is said to be an open question in England as to the effect of a revocation of an accepting letter communicated to the other party before the accepting letter is received by him; Chit. Contr., 13th ed. 15, where it is submitted that in such case there should be no contract; see also, 4 Ex. D. 235; 9 Shaw & Dun. 109. Other writers are of opinion that the mailing of an accepting letter fixes the contract, and that a revocation by telegram or a messenger, outstripping the accepting letter, would have no effect; Poll. Contr. 35; see also, Ans. Contr. 27; Story, Contr. § 198; and it was so held in 2 Dutch. N. J. 268.

Contracts by telegraph, under most of the authorities, obey the same rule as contracts by mail; Hare, Contr.; 3 Dill. 571.

Payments may be made by letter at the risk of the creditor, when the debtor is authorized, expressly or impliedly, from the usual course of business, and not otherwise; Peake 67; 1 Ex. 477; Ry. & M. 149; 3 Mass. 249.

See, generally, as to contracts by letter, 32 Am. Rep. 40, n.; Wald, Poll. Contr. 26; 6 Eng. Rul. Cas. 80, n.; Benj. Sales §§ 44, 69; 9 Jurid. Rev. 291; 3 Add. Contr. App. 4-13; Smith, Contr. 164; 9 L. Quart. Rev. 185, 265, n.; Langd. Contr. 15; Story, Contr. § 198. See SALE; DECOY LETTER; MAIL; OFFER.

LETTER OF ADVICE. A letter containing information of any circumstances unknown to the person to whom it is written; generally informing him of some act done by the writer of the letter.

It is usual and perfectly proper for the drawer of a bill of exchange to write a letter of advice to the drawee, as well to prevent fraud or alteration of the bill, as to let the drawee know what provision has been made for the payment of the bill. Chitty, Bills 185.

LETTER OF ADVOCATION. In Scotch Law. The decree or warrant of the supreme court or court of sessions, discharging the inferior tribunal from all further proceedings in the matter and advocating the action to itself. This proceeding is similar to a *certiorari* issuing out of a superior court for the removal of a cause from an inferior.

LETTER OF ATTORNEY. In Practice. A written instrument, by which one or more persons, called the constituents, authorize one or more other persons, called the attorneys, to do some lawful act by the latter for or instead, and in the place, of the former; 1 Moody, 52, 70. It may be parol or under seal. See POWER OF ATTORNEY.

LETTER BOOK. A book containing the copies of letters written by a merchant or trader to his correspondents.

A press copy in a letter book stands in the same relation to the original as a copy taken from the letter book; both are secondary evidence, and are receivable on the loss of, or after notice to produce, the original; but the decisions are not entirely uniform on this point; 3 Camp. 805; 37 Conn. 555; 102 Mass. 362; see 1 Whart. Ev. §§ 72, 93, 133; 1 Greenl. Ev. § 116; 44 N. Y. 116; 35 Md. 123; 73 Ill. 161. See COPY; EVIDENCE; PRESS COPY.

LETTER CARRIER. A person employed to carry letters from the post-office to the persons to whom they are addressed. See various provisions in U. S. Rev. Stat.

Eight hours constitute a day's labor for letter carriers; 1 Supp. R. S. p. 587. For time employed in excess of eight hours a day, he is entitled to extra pay; 148 U. S. 124; and time worked in excess of eight hours in one day cannot be set off against a deficiency on another when he worked less than eight hours; 148 U. S. 134. See EIGHT-HOUR LAWS.

LETTER CLAUS. See LETTERS CLOSE.

LETTER OF CREDENCE. In International Law. A written instrument addressed by the sovereign or chief magistrate of a state to the sovereign or state to whom a public minister is sent, certifying his appointment as such, and the general object of his mission, and requesting that full faith and credit may be given to what he shall do and say on the part of his court.

When it is given to an ambassador, envoy, or minister accredited to a sovereign, it is addressed to the sovereign or state to whom the minister is delegated; in the case of a *chargé d'affaires*, it is addressed by the secretary or minister of state charged with the department of foreign affairs to the minister of foreign affairs of the other government; Whart. Int. L. §§ 217-321; Piquetot, de l'Ambassadeur, l. 1, § 15.

LETTER OF CREDIT. An open or sealed letter, from a merchant or bank or banker, in one place, directed to another, in another place or country, requiring him, if a person therein named, or the bearer of the letter, shall have occasion to buy commodities, or to want money to any particular or unlimited amount, either to procure the same, or to pass his promise, bill, or other engagement for it, the writer of the letter undertaking to provide him the money for the goods, or to repay him by exchange, or to give him such satisfaction as he shall require, either for himself or the bearer of the letter. Pars. N. & B. 108; Byles, Bills, Wood's ed. 173; 3 Chitty, Com. Law 336.

These letters are either general or special: the former is directed to the writer's correspondents generally, wherever the bearer of the letter may happen to go; the latter is directed to some particular person. When the letter is presented to the person to whom it is addressed, he either agrees to comply with the request, in which case he immediately becomes bound to fulfil all the engagements therein mentioned; or he refuses, in which case the bearer should return it to the giver

without any other proceeding, unless, indeed, the one to whom the letter is directed is a debtor of the one who gave the letter, in which case he should procure the letter to be protested; 3 Chitty, Com. Law 337; 1 Beaw. Lex Mer. 607; Hall, Adm. Pr. 14; 4 Ohio 197.

A letter requesting one person to make advances to a third person on the credit of the writer is a letter of credit; 4 Duer 480; 18 N. Y. 599; 5 Hill 634; 7 L. R. A. 209.

In England it seems questionable whether an action can be maintained by one who advances money on a general letter of credit; 2 Story 214; 11 M. & W. 383; the reason given being that there is no privity of contract between the mandant and the mandatory. But in this country the contrary doctrine is well settled; 8 N. Y. 214; 5 Hill, N. Y. 643; 58 Pa. 103; 54 Miss. 1; s. c. 28 Am. Rep. 347, n. In England, a letter of credit is not negotiable; 1 Macq. 513; Grant, Bank. ch. 15; except when it relates to bills of exchange; L. R. 2 Ch. App. 397; 3 *id.* 154. The same rule has been generally followed here, but it has been held that a general letter of credit, if it authorize more than a single transaction with the party to whom it is granted, may be honored by several persons successively, keeping within the specified aggregate; 3 N. Y. 203; 22 Vt. 160. A telegram authorizing the use of a person's name for a certain sum of money is not in the nature of a general or continuing letter of credit, and does not extend the right to use the name beyond the amount specified; 139 Ill. 633.

The debt which arises on such letter, in its simplest form, when complied with, is between the mandatory and the mandant; though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory. *First*, when the letter is purchased with money by the person wishing for the foreign credit, or is granted in consequence of a check on his cash account, or procured on the credit of securities lodged with the person who granted it, or in payment of money due by him to the payee, the letter is, in its effects, similar to a bill of exchange drawn on the foreign merchant or banker. The payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter, but raises no debt to the person who pays on the letter, against him to whom the money is paid. *Second*, when not so purchased, but truly an accommodation, and meant to raise a debt on the person accommodated, the engagement generally is, to see paid any advances made to him, or to guaranty any draft accepted or bill discounted; and the compliance with the mandate, in such case, raises a debt both against the writer of the letter and against the person accredited; 1 Bell, Com. 371, 5th ed. The bearer of the letter of credit is not considered bound to receive the money; he may use the letter as he pleases, and he contracts an obligation only by receiving the money; Pothier, *Contr. de Change*, 237.

LETTER OF EXCHANGE. See BILL OF EXCHANGE.

LETTER OF LICENSE. An instrument or writing made by creditors to their insolvent debtor by which they bind themselves to allow him a longer time than he had a right to, for the payment of his debts, and that they will not arrest or molest him in his person or property till after the expiration of such additional time. Since the general abolition of imprisonment for debt, and under the modern system of laws for settling insolvents' estates, it is seldom, if ever, used.

LETTER OF MARQUE AND REPRISAL. A commission granted by the government to a private individual, to take the property of a foreign state, or of the citizens or subjects of such state, as a reparation for an injury committed by such state, its citizens or subjects. The prizes

so captured are divided between the owners of the *privateer*, the captain, and the crew. A vessel loaded with merchandise, on a voyage to a friendly port, but armed for its own defence in case of attack by an enemy, is also called a *letter of marque*. 1 Boulay-Paty, tit. 3, § 2, p. 300.

Letter of marque is now used to signify the commission issued to a privateer in time of war.

By the constitution, art. 1, § 8, cl. 11, congress has power to grant letters of marque and reprisal. And by another section of the same instrument this power is prohibited to the several states. The granting of letters of marque is not always a preliminary to war or necessarily designed to provoke it. It is a hostile measure for unredressed grievances, real or supposed; Story, Const. § 1356. This is a means short of actual war, well recognized in international law, for terminating differences between nations; Wheat. Int. Law § 290. Special reprisals are when letters of marque are granted in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation; they are to be granted only in case of clear and open denial of justice; *id.* § 291. As the constitution empowers congress to grant letters of marque and reprisal, it has been doubted whether it could abrogate this provision by joining in a treaty by which privateering is abolished; 24 Am. L. Rev. 902; 28 *id.* 615; 19 L. Mag. & Rev. (4th ser.) 35. See REPRISAL; PRIVATEER; DECLARATION OF PARIS.

LETTER MISSIVE. In English Law. A letter from the king or queen to a dean or chapter, containing the name of the person whom he would have them elect as bishop. 1 Steph. Com. 666. See CONGE D'ELIRE. A request addressed to a peer, peeress, or lord of parliament, against whom a bill has been filed, desiring the defendant to appear and answer to the bill. It is issued by the lord chancellor, on petition, after the filing of the bill; and a neglect to attend to this places the defendant, in relation to such suit, on the same ground as other defendants who are not peers, and a subpoena may then issue; 2 Madd. Ch. Pr. 196; Coop. Eq. Pl. 16; 1 Dan. Ch. Pr. 366-369.

LETTER PRESS COPIES. See PRESS COPIES.

LETTER OF RECALL. A written document addressed by the executive of one government to the executive of another, informing the latter that a minister sent by the former to him has been recalled.

LETTER OF RECOMMENDATION. In Commercial Law. An instrument given by one person to another, addressed to a third, in which the bearer is represented as worthy of credit. 1 Bell, Com. 5th ed. 371; 8 Term 51; 7 Cra. 69; Fell, Guar. c. 8; 6 Johns. 181; 13 *id.* 224; 1 Day Conn. 23. See 13 How. 198; RECOMMENDATION. A letter commending the former services of the holder and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment. 174 Ill. 402. See CLEARANCE CARD.

LETTER OF RECREDENTIALS. A document delivered to a minister by the secretary of state of the government to which he was accredited. It is addressed to the executive of the minister's country. This is in reply to the *letter of recall*.

LETTERS OF ABSOLUTION. Letters whereby, in former times, an abbot released a monk *ab omni subjectione et obedientia*, etc., and enabled him to enter some other religious order. Jacob.

LETTERS OF ADMINISTRATION. An instrument in writing, granted by the judge or officer having jurisdiction and power of granting such letters, thereby authorizing the person or persons to whom

they are granted to administer upon the personal estate of an intestate. According to the usual form there is given to the administrator (naming him) "full power to administer the goods, chattels, rights, and credits, which were of the said deceased," in the county or district in which the said judge or officer has jurisdiction; "as also to ask, collect, levy, recover, and receive the credits whatsoever of the said deceased, which at the time of his death were owing, or did in any way belong, to him, and to pay the debts in which the said deceased stood obliged, so far forth as the said goods and chattels, rights and credits, will extend, according to the rate and order of law." Original and general administration granted by a probate court corresponds to letters testamentary issued to an executor. As to the various limited and special forms of administration, see that title.

Generally in England the crown claimed the right of administering the personal property of intestates, and the ecclesiastical persons who were entrusted with the duty, appropriated large portions of them upon the pretext of pious uses, until they were required by stat. 31 Edw. III. c. 11, § 1, to grant administration to "the next and most lawful friends of the person intestate," who were held accountable in the common law court as executors were. The administration of personal estates then became assimilated to the exclusion of wills, and the function of the ecclesiastical courts was merely the grant of letters and the supervision of their execution. The jurisdiction in England was taken away from the ecclesiastical court by stat. 20 & 21 Vic. c. 77, and in the United States, what is known as probate jurisdiction of letters of administration is exercised generally by courts known as probate courts.

The method of procuring letters of administration is similar to that by which letters testamentary are issued to executors. Application is made by the person claiming the right to administer (see ADMINISTRATION) to the probate officer, and in most of the states this application is made by a petition and is followed by a citation to be served upon parties interested or published according to law; any person interested in the estate may appear and show cause against the appointment of the applicant, who is required to show the facts essential to the grant of letters. In England, parties contesting the right must proceed *pari passu*, and propound their several interests. Before letters are granted a satisfactory bond is usually required from the person selected. The grant of letters is entered as a judicial record, and the letters themselves should be duly authenticated under the seal of the court; Schoul. Ex. & Ad. § 118. For the form of letters, see Smith, Prob. Pract. App.; 22 Ga. 112. The grant of letters has been held to be *prima facie* evidence of all the essential jurisdictional facts; 56 Ala. 31; but it is generally considered that the probate court, in granting letters of administration does not adjudicate that the person is dead, but that letters shall be granted to the applicant; 60 N. Y. 121; 10 Pick. 515; and the letters are not legal evidence of the death; 91 U. S. 238. Letters of administration upon the estate of a person who is in fact alive have no validity or effect as against him; 154 U. S. 34. A statute authorizing the grant of letters of administration upon the estate of a person who has not been heard from for seven years is held to deprive a living person of property without due process of law, and therefore unconstitutional; 38 L. R. A. (R. I.) 294.

A grant of letters which includes two estates under one administration would be irregular and objectionable, but it has been held not to be void; 15 Tex. 333; the letters should be signed by the judge or other probate officer; 26 La. Ann. 329; but see 85 N. C. 258; and they are not void if the seal of the court is affixed in the wrong place; 64 Cal. 9. The effect of letters of administration, and the powers and duties

of those to whom they are issued are similar to those arising under letters testamentary, which title see. See also ADMINISTRATION.

LETTERS OF BAILERY. In Scotch Law. Commissions by which a heritable proprietor appointed a baron-bailie, to hold courts, appoint officers under him, etc.

LETTERS OF CAPTION. See CAPTION.

LETTERS CLOSE. Those letters commonly sealed with the royal signet, or privy seal, so called in contradistinction to letters patent which were left open and sealed with the broad seal. They are sometimes called *Letters Claus.* Whart. Lex. See CLOSE ROLL.

LETTERS OF COLLECTION. Letters issued for the temporary purpose of enabling some one to collect and hold the assets pending a controversy as to the right to have letters of administration or letters testamentary.

In the Roman Law. If the deceased died wholly intestate, in defect of certain ways of administration of the estate, the administration might be committed to such discreet person as was approved of, or letters *ad colligendum* granted, which neither made the person to whom they were granted executor nor administrator, his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as were entitled to the property of the deceased. 2 Bl. Com. 505.

LETTERS AD COLLIGENDUM BONA DEFUNCTI. In Practice. In default of the representatives and creditors to administer to the estate of an intestate, the officer entitled to grant letters of administration may grant to such person as he approves, *letters to collect the goods of the deceased*, which neither make him executor nor administrator; his only business being to collect the goods and keep them in his safe custody. 3 Bla. Com. 505. See LETTERS OF COLLECTION.

LETTERS OF EJECTION. In Scotch Law. Letters under the royal signet authorizing a sheriff to eject a tenant who had been decreed to remove, and who had disobeyed the charge to remove, proceeding on letters of horning on the decree. Cent. Dict.

LETTERS OF FIRE AND SWORD. See FIRE AND SWORD.

LETTERS OF HORNING. See HORNING.

LETTERS OF INTERCOMMUNING. In Scotch Law. Letters from the privy council prohibiting all persons from holding any kind of intercourse or communication with those therein denounced.

LETTERS PATENT. The name of an instrument granted by the government to convey a right to the patentee: as, a patent for a tract of land; or to secure to him an exclusive right to a new invention or discovery. Letters patent are matter of record. They are so called because they are not sealed up, but are granted open. See PATENT.

LETTERS OF REQUEST. In English Ecclesiastical Law. An instrument by which a judge of an inferior court waives or remits his own jurisdiction in favor of a court of appeal immediately superior to it.

Letters of request, in general, lie only where an appeal would lie, and lie only to the next immediate court of appeal, waiving merely the primary jurisdiction to the proper appellate court, except letters of request from the most inferior ecclesiastical court, which may be direct to the court of arches, although one or two courts of appeal may by this be ousted of their jurisdiction as courts of appeal; 2 Add. Eccl. 406. The effect of letters of request is to give jurisdiction to the appellate court in the first instance. See a form of letters of request

in 2 Chitty, Pr. 498, note *h*; 8 Steph. Com. 806. The same title was also given to letters formerly granted by the Lord Privy Seal preparatory to granting letters of marque.

LETTERS ROGATORY. An instrument sent in the name and by the authority of a judge or court to another, requesting the latter to cause to be examined, upon interrogatories filed in a cause depending before the former, a witness who is within the jurisdiction of the judge or court to whom such letters are addressed.

They are sometimes denominated commissions *sub mutua vicissitudine obtenta, ac in iuris subsidium*, from a clause which they generally contain. Where the government of a foreign country, in which witnesses purposed to be examined reside, refuses to allow commissioners to administer oaths to such witnesses, or to allow the commission to be executed unless it is done by some magistrate or judicial officer there, according to the laws of that country, *letters rogatory* must issue.

These letters are directed to any judge or tribunal having jurisdiction of civil causes in the foreign country, recite the pendency of the suit in court, and state that there are material witnesses residing there, whose names are given, without whose testimony justice cannot be done between the parties, and then request the said judge or tribunal to cause the witnesses to come before them and answer to the interrogatories annexed to the letters rogatory, to cause their depositions to be committed to writing and returned with the letters rogatory; 1 Greenl. Ev. § 320. In letters rogatory there is always an offer, on the part of the court whence they issued, to render a mutual service to the court to which they may be directed, whenever required. The practice of such letters is derived from the civil law, by which these letters are sometimes called letters requisitory. A special application must be made to court to obtain an order for letters rogatory, and it will be granted in the first instance without issuing a commission upon satisfactory proof that the authorities abroad will not allow the testimony to be taken in any other manner; 1 Hoffman, Ch. Pr. 482; 2 Dan. Ch. Pr., 8d Am. ed. 553.

Though formerly used in England in the courts of common law; 1 Rolle, Abr. 530, pl. 13; they have been superseded by commissions of *dedimus protestatem*, which are considered to be but a feeble substitute. Dunl. Adm. Pr. 228, n.; Hall, Adm. Pr. 37. The courts of admiralty use these letters; and they are recognized by the law of nations. See Foelix, *Droit Intern.* liv. 2, t. 4, p. 300; Denisart; Dunlap, Adm. Pr. 221; Bened. Adm. § 533; 1 Hoffm. Ch. 482.

In *Nelson v. United States*, 1 Pet. C. C. 236, will be found a copy of letters rogatory, issued to the courts of Havana, according to the form and practice of the civil law, on an occasion when the authorities there had prevented the execution of a commission, regarding any attempts to take testimony under it as an interference with the rights of the judicial tribunals of that place. See also, 8 Paige 446; 2 Ves. Sr. 536; 6 Wend. 475.

The United States revised statutes provide for the taking of testimony of witnesses residing within the United States to be used in any suit for the recovery of money or property depending in any court, in any foreign country, with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest. Where a commission of letters rogatory to take such testimony upon interrogatories has been issued from the court in which such suit is pending, it may be produced before the district judge of the district in which the witness resides or is found, and on proof to the judge that the testimony of a witness is material, he shall issue summons to the witness requiring him to appear before the officer or commissioner named in the commission or letters rogatory. The summons must specify the time and place, which shall be within one hundred miles of the place where the witness resides or is served. In case of neglect of a witness to attend and testify he is liable to the same penalties incurred for the like offence in the trial of a suit in the district court of the United States, and he is entitled to the same fees and mileage as are allowed to witnesses in that court. No witness shall be required to criminate himself on such ex-

amination; U. S. Rev. Stat. §§ 4072-4. When letters rogatory are addressed from a foreign court to any circuit court of the United States the commissioner appointed by the latter court shall have power to compel witnesses to appear and testify; id. § 875, as amended by U. S. Stat. 1 Supp. 266.

When a commission or letter rogatory is issued to take testimony of a witness in a foreign country, a suit in which the United States are parties or have any interest, after being executed by the commissioner it is to be returned to the minister or consul of the United States nearest the place where it is executed, and by him transmitted to the clerk of the court from which it was issued; and when so taken and returned the testimony shall be read as evidence, without objection, by the method of returning the same; U. S. Rev. Stat. § 875.

Among the class of cases held not to be within the statutes are criminal proceedings; 1 Ben. 235; and proceedings relating to an investigation as to the smuggling of some cases of cotton; 86 Fed. Rep. 306. See, generally, 1 Fost. Fed. Prac., 2d ed. § 290, in the notes to which will be found a great deal of interesting matter relating to the diplomatic correspondence on this subject. See, also, 1 Gall. 166; 1 Hall, Adm. Pr. 37, 38, 55-60; Clerke, Praxis, tit. 27; 3 Whart. Int. L. § 418; 1 Oughton, *Ordo Judiciorum* 150-152; 1 Rolle, Abr. 530, pl. 15.

LETTERS OF SAFE CONDUCT. See SAFE CONDUCT.

LETTERS TESTAMENTARY. An instrument in writing granted by the judge or officer having jurisdiction of the probate of wills, after the probate of a will, to an executor, authorizing him to act as such.

It is issued by the probate officer under his hand and official seal, making known that at a certain date the last will and testament of A B (naming the testator) was duly proved before him; that the probate and grant of administration was within his jurisdiction, and certifying accordingly "that the administration of all and singular the goods, chattels, and credits of the said deceased, and any way concerning his will, was granted" to C D, "the executor named in the said will," "he having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory, etc., and to exhibit the same, etc., and also to render a just and true account thereof."

In England, the original will is deposited in the registry of the ordinary or metropolitan, and a copy thereof made out under his seal; which copy and the letters testamentary are usually styled the probate. This practice has been followed in some of the United States; but where the will needs to be proved in more than one state, the impounding of it leads to much inconvenience. In other states, the original will is returned to the executor, with a certificate that it has been duly proved and recorded, and the letters testamentary are a separate instrument. The letters are usually general; but may be limited as to the locality within which the executor is to act, as to the subject-matter over which he is to have control, or otherwise, as the exigencies of the case or the express directions of the testator may require.

Letters testamentary are granted in case the decedent dies testate; letters of administration, in case he dies intestate, or fails to provide an executor; see ADMINISTRATION, EXECUTOR; but in regard to all matters coming properly under the heads of letters of administration or letters testamentary, there is little or no difference in the law relating to the two instruments.

Letters testamentary and of administration are, according to their terms and extent, conclusive as to personal property while they remain unrevoked. They cannot be questioned in a court of law or of equity, and cannot be impeached, even by evidence of fraud or forgery. Proof that the testator was insane, or that the will was forged, is inadmissible; 12 Ves. 295; 21 Wall. 503; 27 Me. 17; 49 N. H. 298; 75 Pa. 503; 16 Mass. 439; 19 Johns. 886; 10 Ala. 977; 18 Cal. 493; 60 N. Y. 123; 14 Ga. 185; 33 Neb. 509; 113 N. Y. 511; 24 Fla. 287. But if the nature of the plea raise the issue, it may be shown that the court granting the supposed letters had no jurisdiction, and that its action is therefore a nullity; 3 Term 130; see 77 Hun 230; or that the seal attached to the supposed probate has been forged, or that the letters have been revoked, or that the testator is alive; 15 S. & R. 42; 9 Dana 41; 8 Cra. 9; 3 Allen 87; 25 Ala. 408; 70 Tex. 538. Where an executor qualified and acted for many years under his appointment, he will not be allowed to dispute the recitation in his appointment that citation to the heirs was issued and served; 95 Cal. 84.

At common law the executor or administrator has no power over real estate; nor is

the probate even admissible as evidence that the instrument is a will, or is an execution of a power to charge land; Wms. Ex. 562. By statute, in some states, the probate is made *prima facie* or conclusive evidence as to reality; 17 Mass. 68; 23 Conn. 1; 10 Wheat. 470; 3 Pa. 498; 8 B. Monr. 340; 5 La. 388. In some states the probate is made after the lapse of a certain time conclusive as to reality; 9 Pet. 180; 75 Pa. 512; 8 Ohio 246; 26 Ala. 524; 6 Gratt. 564; 8 Wright 189. Land in England under the Land Title and Transfer Act of 1897 goes to the executor or administrator. See LAND TITLE AND TRANSFER.

Though the probate court has exclusive jurisdiction of the grant of letters, yet where a legacy has been obtained by fraud, or the probate has been procured by fraud on the next of kin, a court of equity would hold the legatee or wrong-doer as bound by a trust for the party injured; Wms. Ex. 552. While a court of equity cannot remove an executor, it may restrain him from acting, and even take the estate out of his hands and place it in the custody of a receiver; 44 N. J. Eq. 385.

Letters may be revoked by the court which made the grant, or an appeal to a higher tribunal, reversing the decision by which they were granted. Special or limited administration will be revoked on the occasion ceasing which called for the grant. An executor or administrator will be removed when the letters were obtained improperly; Wms. Ex. 571.

Of their effect in a state other than that in which legal proceedings were instituted.

In view of the rule of the civil law, that *personalia sequuntur personam*, certain effect has been given by the comity of nations to a foreign probate granted at the place of the domicile of the deceased, in respect to the personal assets in other states. At common law, the *lex loci rei sitæ* governs as to real estate, and the foreign probate has no validity; but as to personalty the law of the domicile governs both as to testacy and intestacy. It is customary, therefore, on a due exemplification of the probate granted at the place of domicile, to admit the will to probate, and issue letters testamentary, without requiring original or further proof.

A foreign probate at the place of domicile has in itself no force or effect beyond the jurisdiction in which it was granted, but on its production fresh probate will be granted thereon in all other jurisdictions where assets are found. This is the general rule, but is liable to be varied by statute, and is so varied in some of the states of the United States.

Letters testamentary or of administration confer no power beyond the limits of the state in which they are granted, and do not authorize the person to whom they are issued to maintain any suit in the state or federal courts in any other state; 139 U. S. 156; 108 *id.* 256; the executor or administrator has therefore, as such, no right of control over property in another state or country; 32 Ga. 260; 27 Ind. 432; 4 McLean 577; 41 Barb. 431; 5 Ired. Eq. 365; he cannot interfere with assets, collect or discharge debts, control lands, sue or be sued; Schoul. Ex. & Ad. § 173, and cases cited. The principle is, that a grant of power to administer the estate of a decedent operates only as of right within the jurisdiction which grants the letters, and in order that a foreign representative may exercise any such function he must be clothed with authority from the jurisdiction into which he comes, and conform to the requirements imposed by local law; *id.*; 42 Pa. 467; 64 N. C. 464; 5 McLean 4; 38 Ala. 678; 25 S. C. 1; 143 U. S. 215; 41 Fed. Rep. 63; 55 Mich. 568. In most, probably all, of the American states there is statutory provision, either for the grant of ancillary letters or for authorizing and regulating suits by foreign executors and administrators. In many of them these officers properly qualified abroad are permitted to sue for and recover local assets without other qualification, within the new jurisdiction, than putting on record their authority as con-

ferred by the home jurisdiction, and such authority must be strictly followed. In many of the states there is authority to sue and defend without ancillary administration; 147 U. S. 557; 15 N. J. Eq. 97; 91 Ky. 88; 70 Cal. 403; 32 S. C. 598; and this right to sue has been extended to a foreign corporation duly authorized to act in its own jurisdiction; 5 Houst. 416; in some states there is express authority to defend suits; 3 Bush 505; but it has been held that statutory authority to sue does not imply capacity to be sued; 77 Ga. 149; nor to sue for intestate lands where they were made by statute assets in the hands of a domestic administrator; 54 Ark. 324; but to sue for the grant of local administration; 40 *id.* 195; where no suit is necessary a foreign executor or administrator has been permitted to remove personal property and carry it away for the purpose of administration; 32 N. Y. 21; 45 Minn. 242; 62 Ga. 200; 46 Conn. 370; and in the absence of local administration payment to a foreign representative is recognized; 103 U. S. 256; 109 *id.* 656; 20 N. Y. 108.

The latter may assign choses in action belonging to the estate, and the assignee may sue thereon in his own name in another state, unless prevented by its laws respecting assignments from so doing; 108 U. S. 256; 64 Ia. 425; 33 Tex. 244; 32 N. Y. 21; he may also sue in another state on a judgment there recovered; 16 Mass. 71; 1 Pet. 686; 4 Mason 16; 41 Md. 539; or he may sue in his individual capacity in another state, on a judgment recovered by him in his official capacity in his own state; 107 Mo. 500; 33 Pac. Rep. (Ariz.) 555; upon a contract made with himself as such a foreign executor or administrator may sue; 8 Greenl. 346; 30 Ark. 230; Sto. Conf. L. § 513-516. The term foreign as applied to executors and administrators refers to the jurisdiction from which their authority is derived and not to residence; 86 Va. 1045; 125 N. Y. 400. The estate of a deceased person is substantially one estate, in which those entitled to the residue are interested as a whole, even though situated in various jurisdictions, and though each distinct part of it must be settled in the jurisdiction by which letters were granted whether for the purpose of ancillary or principal administration; Schoul. Ex. & Ad. § 174; ordinarily it is the practice to recognize the person appointed executor or administrator at the domicile of the deceased as the person to whom ancillary letters will be granted; 4 Redf. 151; Whart. Conf. L. § 608; but there is no privity between persons appointed in different jurisdictions whether they be different or the same, and the executor or administrator in one state is not concluded in a subsequent suit by the same plaintiff in another state against a person having administration on the estate of the deceased; 139 U. S. 156; 143 Ill. 367; 36 Pac. Rep. (Mon.) 38; 39 S. C. 247. But a different rule has been applied where different executors are appointed by the will in different states, and they are held to be in privity with each other, and a judgment against those in one state is evidence against those in another; 13 How. 458, 469.

When any surplus remains in the hands of a foreign or ancillary appointee after the discharge of all debts in that jurisdiction, it is usually, as a matter of comity, ordered to be paid over to the domiciliary appointee; 56 Ala. 69; 50 L. J. Ch. 740; and in his hands becomes applicable to debts, legacies, and expenses; Schoul. Ex. & Ad. § 174, note 2. It is the policy of the law with respect to these matters to encourage the spirit of comity in subordination to the rights of local creditors who are considered to be entitled to the benefit of assets within their own jurisdiction, rather than to be driven to the assertion of their claims in a foreign state or country; *id.*; but see LEX FORI.

As a general rule it is the duty of the principal personal representative to collect and make available to the estate all such assets as are available to him consistently with foreign law; 4 M. & W. 171; 1 Cr. & J. 157; even to the extent of seeing that

foreign letters are taken out for the collection of foreign assets; or of collecting and realizing upon property and debts so far as it may be done by him, without resort to a foreign jurisdiction; 4 Mason 38; 88 N. Y. 397; 12 Metcalf 421; 103 Mass. 245; but the domestic representative is not to be held in this respect to too onerous a responsibility with respect to foreign property which he cannot realize by virtue of his appointment. See Sto. Conf. L. § 514 *a*; Schoul. Ex. & Ad. § 175.

There is some difference of opinion as to whether a voluntary surrender of assets to the domiciliary representative protects the debtor against claims made by virtue of an administration within his own jurisdiction. The United States supreme court, supported by the current of American authority, maintains that, as between the states such payment or delivery of assets is sufficient to discharge the local debtor in the absence of local administration; 18 How. 104; 9 Wall. 741; 108 U. S. 256; 65 Ala. 39; 20 N. Y. 103.

The English doctrine is otherwise; Whart. Conf. L. § 626; Schoul. Ex. & Ad. § 176; Sto. Conf. L. § 515 *a*. See Dicey, Conf. L. ch. X. (c), ch. XVII. (B) with Moore's American notes.

See, generally, Williams; Crosswell, Executors; Wharton; Story, Conf. L.; LETTERS OF ADMINISTRATION; EXECUTOR; ADMINISTRATOR; CONFLICT OF LAWS; LEX LOCI; ADMINISTRATION.

LETTING OUT. In American Law. The act of awarding a contract.

This term is much used in the United States, and most frequently in relation to contracts to construct railroads, canals, or other commercial works. When such an undertaking has reached the point of actual construction, a notice is generally given that *proposals* will be received until a certain period, and thereupon a *letting out*, or award of portions of the work to be performed according to the proposals, is made. See 35 Ala. n. s. 55.

LEVANDÆ NAVISCAUSA (Lat.). In Civil Law. For the sake of lightening the ship. See *Leg. Rhod. tit. de Jactu*. Goods thrown overboard with this purpose of lightening the ship are subjects of a general average.

LEVANT AND COUCHANT (Lat. *Levantes et cubantes*). A term applied to cattle that have been so long on the ground of another that they have lain down, and are risen up to feed, until which time they cannot be distrained by the owner of the lands, if the land were not sufficiently fenced to keep out cattle. 3 Bla. Com. 8; 9; Mozl. & W.

LEVARI FACIAS (Lat. that you cause to be levied). In Practice. A writ of execution directing the sheriff to cause to be made of the lands and chattels of the judgment debtor the sum recovered by the judgment.

Under this writ the sheriff was to sell the goods and collect the rents, issues, and profits of the land in question. It has been generally superseded by the remedy by *elegit*, which was given by statute Westm. 2d (18 Edw. I.), c. 18. In case, however, the judgment debtor is a clerk, upon the sheriff's return that he has no lay fee, a writ in the nature of a *levari facias* goes to the bishop of the diocese, who thereupon sends a sequestration of the profits of the clerk's benefice, directed to the churchwardens, to collect and pay them to the plaintiff till the full sum be raised. The same course is pursued upon a *fi. fa.*; 2 Burn. Eccl. Law, 329. See Comyns, Dig. Execution (c. 4); Finch, Law, 471; 3 Bla. Com. 471; Tr. & H. Fr. 967.

In American Law. A writ used to sell lands mortgaged after a judgment has been obtained by the mortgagee, or his assignee, against the mortgagor, under a peculiar proceeding authorized by statute.

LEVATO VELO (Lat.). An expression used in the Roman law, *Code*, 11. 4. 8, and applied to the trial of wreck and sal-

vage. Commentators disagree about the origin of the expression; but all agree that its general meaning is that these causes shall be heard summarily. The most probable solution is that it refers to the place where causes were heard. A sail was spread before the door and officers employed to keep strangers from the tribunal. When these causes were heard, this sail was raised, and suitors came directly to the court, and their causes were heard immediately. As applied to maritime courts, its meaning is that causes should be heard without delay. These causes required despatch, and a delay amounts practically to a denial of justice. Emerigon, *Des Assurances* c. 26, sect. 8.

LEVEES. Embankments to prevent overflow in rivers. See **RIVERS**.

A state, in the exercise of police powers, has the exclusive right to determine the propriety, location, and mode of building levees within her borders. After she has so decided, and contracted for the enterprise, a person, on whose land the levee is to be built, cannot require that it be constructed differently; and, in case of non-compliance with his demand, he cannot hold the state liable for compensation for the property taken or for any injury sustained. Anderson; 34 La. An. 494.

LEVITICAL DEGREES. Those degrees of kindred set forth in the eighteenth chapter of Leviticus, within which persons are prohibited to marry. 1 Bish. Mar. Div. & Sep. 737.

LEVITY. By the Act of 1815 and the general law on divorce, it is necessary to establish that the complaint "is not made out of levity or by collusion (*q. v.*) between said husband and wife, and for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the said petition or libel."

Exactly what the word "levity" means in the statute, has never been decided. . . . It may well be that the term "levity" in the Act of 1815 is intended to describe the offense which is generally called *connivance*. 30 Pa. Co. Ct. Rep. 359. See **COLLUSION**.

LEVY. To raise. Webster, Dict. To levy a nuisance, *i. e.* to raise or do a nuisance, 9 Co. 55; to levy a fine, *i. e.* to raise or acknowledge a fine, 2 Bla. Com. 357; 1 Steph. Com. 236; to levy a tax, *i. e.* to raise or collect a tax; to levy war, *i. e.* to raise or begin war, to take arms for attack, 4 Bla. Com. 81; to levy an execution, *i. e.* to raise or levy so much money on execution. Reg. Orig. 298.

In Practice. A seizure; the raising of the money for which an execution has been issued.

In order to make a valid levy on personal property, the sheriff must have it within his power and control, or at least within his view; and if, having it so, he makes a levy upon it, it will be good if followed up afterwards within a reasonable time by his taking possession in such manner as to apprise everybody of the fact of its having been taken into execution. See 84 Wis. 80; 99 N. C. 21; 83 Va. 459. To constitute a levy, a seizure is necessary, if from the nature of the property that is possible, but if not, then some act as nearly equivalent as practicable must be substituted for it; 97 N. C. 236. It is not necessary that an inventory should be made, nor that the sheriff should immediately remove the goods or put a person in possession; 8 Rawle 405; 1 Wash. C. C. 29; 46 Pa. 294. See 51 N. J. L. 148. A levy of an attachment effected in the night time by opening a window, or forcing an outer door of the house containing the goods, is valid; 85 Tenn. 368. A levy on a leasehold need not be in view of the premises if sufficiently descriptive; 77 Pa. 103. The usual mode of making levy upon real estate is to describe the land which has been seized under the execution, by metes and bounds, as in a deed of conveyance; 1 T. & H. Pr. § 1216. See 23 Neb.

736. The lien of an attachment on real estate levied upon, dates from the time the officer indorses the levy on the writ; 69 Tex. 198.

It is the duty of the sheriff, in Illinois, to notify the defendant in execution, before making the levy, and to apply to him for the payment of the execution; 129 Ill. 180. Property cannot be placed in *custodia legis* by an unauthorized levy; 36 Fed. Rep. 770. Retaining possession under a levy is not necessary to preserve the lien of the levy against a subsequent deed of assignment by the debtor; 103 N. C. 79; where the debt and costs are paid before seizure there is no levy; 9 L. J. Q. B. 232; 3 P. & D. 511; or where the *fi. fa.* was, after seizure but before sale, set aside for irregularity; 31 L. J. C. P. 361; or where the sale was prevented by a compromise between the parties; 5 Term 470. See **POUNDAGE**; **EXECUTION**.

It is a general rule that when a sufficient levy has been made the officer cannot make a second; 12 Johns. 208; 8 Cow. 192.

If an officer violates his duty, by making an excessive levy on property pointed out, he is liable for such special damages as the defendant may incur thereby; 77 Ga. 83; and when damages result from the wrongful seizure under judicial process of property exempt, not only the officer making the seizure but those for whom it was made and who ratified the act, as well as those who direct it, are liable in damages; 70 Tex. 661. See **ATTACHMENT**.

LEVY COURT. That body charged with the administration of the ministerial and financial duties of Washington County. It was charged with the duty of laying out and repairing roads, building bridges, and keeping them in good order, providing poorhouses, and the general care of the poor; and with laying and collecting the taxes which were necessary to enable it to discharge these and other duties, and to pay the other expenses of the county. It had the capacity to make contracts in reference to any of these matters, and to raise money to meet these contracts. It had perpetual succession. Its functions were those which, in the several States, are performed by "county commissioners," "overseers of the poor," "county supervisors," and similar bodies with other designations.

If not a corporation in the full sense of the term, it was a *quasi* corporation, and could sue and be sued, in regard to any matter in which, by law, it had rights to be enforced, or was under obligations which it refused to fulfill. 2 Wall (U. S.) 507, 508.

LEVYING WAR. In Criminal Law. The assembling of a body of men for the purpose of effecting by force a treasonable object; and all who perform any part, however minute or however remote from the scene of action, and who are leagued in the general conspiracy, are considered as engaged in levying war, within the meaning of the constitution; 4 Cra. 473, 474; Const. art. 3, s. 3. See **TREASON**; **Fries Trial**, Pamph. This is a technical term, borrowed from the English law, and its meaning is the same as it is when used in stat. 25 Ed. III.; 4 Cra. 471; U. S. v. Fries, Pamph. 167; Hall, Am. L. J. 351; Burr's Trial; 1 East, Pl. Cr. 62; 9 C. & P. 129. Where war has been levied, all who aid in its prosecution by performing any part in furtherance of the common object, however minute, or however remote from the scene of action, are guilty of treason; 2 Abbott 304. See **INSURRECTION**.

LEWDNESS. That form of immorality which has relation to sexual impurity. 51 Fed. Rep. 41. See **LASCIVIOUSNESS**.

Licentiousness; an offence, when of an open and notorious character; as by frequenting houses of ill-fame, or by some grossly scandalous and public indecency. R. & L. Dict.

LEX (Lat.). A rule of law which magistrates and people had agreed upon by means of a solemn declaration of consensus.

Sohm, Inst. R. L. 28.

In the later empire, which dates from the fourth century, there were two groups of the sources of the law, *jus (q. v.)*, *i. e.* the old traditional law, and *leges* which had sprung from imperial legislation. *Jus* was based upon the law of the Twelve Tables, *plebiscite*, *senatus-consulta*, the praetorian edict, and the ordinances of the earlier emperors, which, partly owing to their language and partly on account of the bald sententiousness, and the pregnant phraseology in which they were couched, came to be mainly used, both by the praetor and by the parties, through the classic literature where their results were set forth and worked out. This resulted in identifying *jus* with jurist-made law, and on the edict of the Law of Citations (*q. v.*) by Valentinian III., the distinction between *jus* and *lex* was practically lost. See Inst. 1. 2. 3; Sohm, Inst. R. L. 82; **JUS SCRIPTA**.

In England there was no careful discrimination between *jus*, and *lex*, and *consuetudo*, although they were not, in all contexts, used with exactly similar meaning. *Leges* was sometimes applied by both Glanville and Bracton to the unwritten laws of England, and although Bracton contrasts *consuetudo* with *lex*, there was no general definite theory as to the relation between enacted and unenacted law—the relation between law and custom, and the relation between law as it was and law as it ought to be. The king's justices claimed a certain power of improving the law, but they might not change the law, and the king might issue new writs without the consent of a national assembly, but not where such writs were contrary to the law. *Jus commune* was used by the canonists to distinguish the general and ordinary law of the universal church from any rules peculiar to a particular national or provincial church, and from the papal *privilegia*, and the phrase was also used in the dialogue on the Exchequer, but it was not until the time of Edward I. that it was superseded by *lex communis*, or that the common law could be contrasted with the statute law, the royal prerogative or local custom. 1 Poll. & Maitl. 154. See **JUS SCRIPTUM**.

LEX AEBUTIA. The law which, with the *leges Juliae*, in part abolished the *legis actiones*. It was confined to legal proceedings before the *praetor urbanus*, *i. e.* to those cases where a *judicium* was appointed to try a cause between Roman citizens within the first milestone from Rome. It provided that a *judicium* could be instituted in a city court without *legis actio*, merely by means of the formula or praetorian decree of appointment, and placed the *legis actio* and the formula, so far as the civil law was concerned, on a footing of equality. In cases falling under the jurisdiction of the centumviral court, cases of voluntary jurisdiction, and *damnum infectum*, the *legis actio* remained in use; as, according to the praetorian law in such cases, no *judex* was appointed, and consequently no formula was granted, and it was only in cases where there was no formula and no decree of appointment that the *legis actio* survived. Sohm, Rom. L. 173. See **JUDEX**; **FORMULAE**.

LEX AELIA SENTIA. The law restraining the manumission of slaves. Morey, R. L. 99. See **MANUMISSION**.

The Aelian Sentian law, respecting wills. R. & L. Dict.

LEX AGRARIA. See **AGRARIAN LAW**.

LEX AMISSA. The law concerning outlaws.

LEX ANASTASIANA. The law admitting as agnati the children of emancipated brothers and sisters. Inst. 3. 5.

The Anastasian Rescript, A. D. 503. A form of emancipation which did not require the presence of the parties to go through the fictitious sale, as formerly. *Anastasius* made provision whereby a *paterfamilias* away from

home might emancipate his children. He did not abolish the old forms, but introduced this novelty as an additional means of releasing children from the potestas. A petition must be sent to the Emperor, and his favorable answer obtained. The answer must be registered, produced in a court having jurisdiction over emancipation, and deposited along with the petition to the Emperor; and if the persons emancipated were not infants, their consent must be given. The act was perfected by the formal consent of the Emperor. Hunter, Rom. L., 213, 214; C. 8, 49, 5.

LEX APULEIA. A law establishing a kind of partnership between the different *sponsors* or *fide promissors*, and allowing any one of them who had paid the whole debt to recover from the others what he had paid in excess of his own share by an action *pro socio*. Inst. 3, 20.

LEX AQUILIA. The law, superseding the earlier portions of the Twelve Tables, providing a remedy for wilful and negligent damage to corporeal property.

Although an action founded upon the text of this law could only be brought when the damage was caused by actual contact of the offending party with the body of the injured thing, the praetor subsequently extended it in the shape of an *actio utilis*, to cases where the damage was merely the indirect result of the act of the defendant, and in certain cases, he even granted an *actio in factum* after the pattern of the *lex aquilia* in cases where there was not, strictly speaking, any damage to the thing, but where the owner was deprived of it in such a manner as to make it tantamount to a destruction of the thing.

By this law, if the slave or animal were wrongfully killed, the owner could recover from the slayer, not the actual value of the property at the time of the death, but the greatest value that it had possessed during the previous year, and when the damage consisted of any other injury to corporeal things, he was obliged to pay the highest value of such property within the month immediately preceding. If the wrongdoer denied his liability and judgment was against him, he was obliged to pay double damages. This law also provided for an action against adstipulators who abused their formal rights, but this portion of it fell into disuse because the recognition by the civil law of the obligation by *mandatum* enabled the injured party to sue the fraudulent adstipulator by the *actio mandati directa* for full damages. See Sohm, Rom. L. 326; Morey, Rom. L. 381.

LEX ATILIA. The law which conferred upon the magistrate the right of appointing guardians. It applied only to the city of Rome; Sohm, Inst. Rom. L. 400.

LEX ATINIA. A plebiscitum named after its proposer, Atinius Labeo, 557. It provided that things stolen or seized by violence could not be acquired by use, although they have been possessed *bona fide* during the length of time prescribed by *usucapion* (q. v.). Inst. 2, 6, 3.

LEX BREHONIA. The Brehon law, which see.

LEX BRETOISE. The law of the Ancient Britons or Marches of Wales. Cowel.

LEX CALPURNIA. The law which extended the scope of the action allowed by the *lex Silia*, q. v., to all obligations for any certain definite thing.

Condictio. A law by which the *condictio* (a form of action in Roman Law) was extended to the recovery of any specific thing. Hunter Rom. L. p. 464. See *CON-DICTIO*; *LEX SILIA*.

Repetundae. Another law, by the same title, instituted the first of those courts called Standing Commissions, for the trial of persons charged with malversation in the provinces, B. C. 149. *Id.* p. 56, 57.

LEX CANULEIA. The law which conferred upon the plebeians the *connubium*, or the right of intermarriage with Roman citizens. Morey, Rom. L. 48.

By this concession of the *connubium*, it was open to plebeians to share in the peculiar religious observances of the patrician caste, and in the *auspicio* by which was ascertained the will of the gods (not to mention the will of the patrician magistrates) in respect to the Roman state. The levelling effects of this legal mixture of patrician and plebeian

blood, socially and politically are not to be easily over-estimated. But the political results, the removal of intolerable political disabilities, formed the aim and object of the plebeian contention at that time. Hunter, Rom. L., 25.

LEX CINCIA. The law which prohibited certain kinds of gifts.

An old Roman Statute, B. C. 204, that continued to exist up to the time of Constantine, but fell into desuetude before Justinian, prohibiting gifts beyond a certain amount, except as between certain relatives. Gifts to the extent to which they exceeded the limit, but no further, were void. It seems, however, that if the donor did not revoke the gift during his life or by will, the gift was confirmed. Hunter, Rom. L. 319; Frag. Vat. 266, 294.

LEX CLAUDIA. The law abolishing agnatic guardianship over women of free birth.

LEX COMMISSORIA. The law which provided that the debtor and creditor might agree that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. This law was abolished by a law of the Emperor Constantine as unjust and oppressive, and having a growing asperity in practice. 2 Kent 583.

LEX COMMUNIS (L. Lat.). The common law.

LEX ET CONSUETUDO REGNI NOSTRI. The law and the custom of our realm; one of the names of the common law. R. & L. Dict. See *LEGES ET CONSUETUDINES REGNI*.

LEX CORNELIA. The Cornelian law which, among the Romans, provided remedies for injuries to person or property. R. & L. Dict.

LEX CORNELIA DE AEDICTIS. The law forbidding a praetor to depart during his term of office from the edict he had promulgated at its commencement. Sohm, Rom. L. 51. See *PRÆTOR*.

LEX CORNELIA DE FALSIS. The law which provided that the same penalty should attach to the forgery of a testament of a person dying in captivity as to that of a testament made by a person dying in his own country. Inst. 2, 12, 5.

The Cornelian Law on forgery and on wills. It provided that if a captive died in captivity his death should be held to date, not from the actual moment of his decease, but from the time he was captured; so that, although he lived a prisoner, he died free. (D. 49, 15, 18.) This convenient fiction prevented the ill consequences that would have resulted from striking out in a family a link in the chain of hereditary succession. Hunter, Rom. L. 216.

The law also imposes a penalty on the man that writes seals, publicly reads, or foists in a will or other document that is forged; or that makes, cuts, or moulds a spurious seal wilfully and maliciously. The penalty is, for slaves, the last punishment of the law, as upheld in the statute on poisoners and assassins; for freemen, deportation. (J. 4, 13, 7.) *Id.*, 1062.

Corrupting a judge, or causing him to be corrupted, was punishable under this same statute. (D. 48, 10, 21.) *Id.*, 1066.

The law also provided that to obtain money by threatening an accusation of crime was visited with punishment. (D. 47, 13, 2.) *Id.*, 1070.

LEX CORNELIA DE INJURIIS. The law providing a civil action for the recovery of a penalty in certain cases of bodily injury. Sohm, R. L. 329.

The *lex Cornelia* (B. C. 81) speaks of *injuriae*, and brought in a special *actio injuriarum*. This action lay when a man alleged that he had been beaten or scourged,

or that his house had been entered by force. And by "house" in this case was understood his own house in which he dwelled, or a hired house, or one in which he lived rent-free or as a guest. (J. 4, 4, 8.) In one sense this latter offence can hardly be considered as directed against the person of the occupier but it was against his dignity; for the majesty of a Roman citizen was supposed to extend beyond his strict personality to his immediate belongings, and even to his clothes. (D. 47, 10, 9, pr.) Hunter, Rom. L. 149.

In cases where the *lex Cornelia* applied, involving an injury to reputation, the defendant was allowed to take an oath and clear the plaintiff's character, thereby escaping punishment. (D. 47, 10, 5, 8.) *Id.* 155.

LEX CORNELIA DE SICARIIS. The law respecting assassins and poisoners, and containing provisions against other deeds of violence. It made the killing of the slave of another person punishable by death or exile, and the provisions of this law were extended by the Emperor Antoninus Pius to the case of a master killing his own slave. Inst. 1, 8.

Poisoners were likewise condemned, who, by the hateful arts of poisons and magic spells they whispered, had killed men, or who have publicly sold evil drugs. (J. 4, 18, 5.) Hunter, Rom. L. 1061, 1062.

To procure the conviction of a person of an offence punishable with death by false testimony was forbidden by the *lex Cornelia de Sicariis*. The punishment was, death for common people; deportation, for persons of rank. (D. 48, 8, 16.) *Id.* 1066. Those who offered sacrifices to injure their neighbors, even if no evil result followed were punished under this statute. *Id.* 1068 *et seq.*

LEX CORNELIA DE SPONSU. A law prohibiting one from binding himself for the same debtor to the same creditor in the same year for more than a specified amount. Inst. 2, 20.

And although a sponsor or *fidepromissor* should bind himself for a greater sum than the maximum twenty-thousand sesterii, say one hundred thousand, he is condemned to pay only twenty. By money lent was meant not only that directly given on loan, but all that at the time the obligation was contracted was certain to become due; that is, for which the debtor had come to be bound unconditionally. Further, the name money in that statute embraced property of every kind. Hunter, Rom. L. 572.

LEX CORNELIA DE TESTAMENTARIA. See *LEX CORNELIA DE FALSIS*.

LEX DOMICILII. See *DOMICIL*; *LEX LOCI*.

LEX FABIA (FABIA) DE PLAGIARIIS. The Fabian law on kidnappers. To imprison a man, or forcibly keep him as a slave, knowing him to be free, was an offence dealt with by a statute *lex Fabia* or *Fabia*, in existence before Cicero. That statute imposed only a pecuniary penalty, and it fell into disuse when kidnapping freemen was made a crime. Hunter, Rom. L. 147; (D. 48, 15, 7; C. 9, 20, 7.)

LEX FALCIDIA. See *FALCIDIAN LAW*.

LEX FORI (Lat. the law of the forum). The law of the country to the tribunal of which appeal is made. 5 Cl. & F. 1.

The local or territorial law of the country to which a court, wherein an action is brought, or other legal proceeding is taken, belongs. Dicey, Conf. Laws 66.

The forms of remedies, modes of procedure; 112 U. S. 452; and execution of judgments are regulated solely and exclusively by the laws of the place where the action is instituted; 8 Cl. & F. 121; 11 M. & W. 877; 1 B. & A. 284; 5 L. 295; 2 Rand. 303; 6 Humphr. 45; 2 Ga. 158; 13 N. H. 321; 4 Zab. 333; 9 Gill 1; 17 Pa. 91; 4 McLean 540; 11 Ind. 385; 12 Vt. 48; 91 U. S. 406; 36 Conn. 39; 2 Woods, C. C.

244; 26 Ark. 368; 83 Ill. 365; 27 Ia. 251; 43 Miss. 444; 53 N. Y. 429; 135 U. S. 809; 143 id. 187; 88 Ala. 463; Rorer, Int.-St. Law 69. See 44 Ill. App. 535; PARTIES.

A cause of action arising in one state, under the common law as there understood, may be enforced in another state where it would not constitute a cause of action, if the variance in these laws does not amount to a fundamental difference of policy; 160 Mass. 571.

The *lex fori* is to decide who are proper parties to a suit; 11 Ind. 485; 33 Miss. 423; Merlin, *Rép. Etrang.* § II.; Westl. Priv. Int. Law 409.

The *lex fori* governs as to the nature, extent, and character of the remedy; 17 Conn. 500; 37 N. H. 86; 2 Pat. & H. 144; as, in case of instruments considered sealed where made, but not in the country where sued upon; 5 Johns. 239; 1 B. & P. 380; 3 Gill & J. 234; 3 Conn. 523; 27 Ia. 251; 91 U. S. 406; 9 Mo. 56, 157.

Arrest and imprisonment may be allowed by the *lex fori*, though they are not by the *lex loci contractus*; 5 Cl. & F. 1; 14 Johns. 346; 3 Mass. 88; 10 Wheat. 1.

For the law of interest as affected by the *lex fori*, see CONFLICT OF LAWS. For the law in relation to damages, see DAMAGES.

The forms of judgment and execution are to be determined by the *lex fori*; 3 Mass. 88; 4 Conn. 47; 14 Pet. 67.

The *lex fori* decides as to deprivation of remedy in that jurisdiction.

Where a debt is discharged by the law of the place of payment, such discharge will, it is said, amount to a discharge everywhere; 12 Wheat. 360; 1 W. Bla. 258; 13 Mass. 1; 16 Mart. La. 297; 7 Cush. 15; 1 Woodb. & M. 115; 23 Wend. 87; 5 Binn. 332; 16 Me. 206; 2 Blackf. 366; see 6 Dak. 91; LEX LOCI; unless such discharge is held by courts of another jurisdiction to contravene natural justice; 13 Mass. 6; 1 South. 192. It must be a discharge from the debt, and not an exemption from the effect of particular means of enforcing the remedy; 14 Johns. 346; 8 B. & C. 479; 7 Me. 387; 11 Mart. La. 730; 15 Mass. 419; 5 Mass. 387.

The insolvent laws of the various states which purport to discharge the debt are, at most, allowed that effect only as against their own citizens; as between their own citizens and strangers, where the claims of the latter have not been proved, they only work a destruction in the remedy; 5 Mas. 375; 4 Conn. 47; 14 Pet. 67; 12 Wheat. 213, 358, 369; 8 Pick. 194; 3 Ia. 299; 71 Wis. 350; 123 Ill. 222; 123 Pa. 452; at least, if there be no provision in the contract requiring performance in the state where the discharge is obtained; 9 Conn. 814; 13 Mass. 18, 20; 7 Johns. Ch. 297; 1 Breese 16; 4 Gill & J. 509. In the United States and some state courts, the discharge of a citizen of the state, granting a discharge from an obligation, is not a bar against a citizen of another state, although the contract creating the obligation was to be performed in the state granting the discharge; 1 Wall. 223; 3 Keyes 30; 5 Md. 1; 25 Conn. 603; 48 Me. 9; 2 Blackf. 394; but see 2 Gray 43. If claims are proved, the submission to the jurisdiction may work a discharge; 3 Johns. Ch. 435; 3 Pet. 411; 5 How. 295, 299; 7 Cush. 45; 2 Blackf. 394. See INSOLVENCY.

Statutes of limitation affect the remedy only; and hence the *lex fori* is to be the governing law; 5 Cl. & F. 1; 8 id. 121, 140; 11 Pick. 30; 7 Ind. 91; 2 Paine 437; 86 Me. 362; 83 Ill. 365; 68 N. Y. 33; 51 Fed. Rep. 188; 77 Ga. 202; 65 Hun 17; 111 U. S. 31; L. R. 4 Q. B. 653; 72 Tex. 806. But these statutes restrict the remedy for citizens and strangers alike; 10 B. & C. 908; 5 Cl. & F. 1; 3 Johns. Ch. 190; 6 Wend. 475; 9 Mart. La. 526. For the effect of a discharge by statutes of limitation, where they are so drawn as to effect a discharge, in a foreign state, see Story, Conf. Laws § 582; 11 Wheat. 361; 2 Bingh. N. C. 202; 6 Rob. La. 15; 3 Hen. & M. 57. The restriction applies to a suit on a foreign judgment; 5 Cl. & F. 1; 13 Pet. 312; 4 Cow. 528; 1 Gall. 371; 9 How. 407. If a statute

in force in the place where the cause of action arose extinguishes the obligation, and does not merely bar the remedy, no action can be maintained in another jurisdiction after it has taken effect; 148 Pa. 146; 6 Dak. 91. In some states, by statute, where suit is brought on a contract made in another state, the statute of limitations in the jurisdiction where the cause of action arose is made to apply.

The right of set-off is to be determined by the *lex fori*; 2 N. H. 296; 6 B. Monr. 301; 18 Oreg. 57; 83 Ill. 365; 3 Johns. 263. See 13 N. H. 126. Liens, implied hypothecations, and priorities of claim, generally, are matters of remedy; 13 La. Ann. 289; but only, it would seem, where the property affected is within the jurisdiction of the courts of the *forum*; Whart. Conf. L. § 317; 5 Cra. 289. See L. R. 3 Ch. App. 434. A prescriptive title to personal property, acquired in a former domicile, will be respected by the *lex fori*; 17 Ves. 88; 3 Hen. & M. 57; 5 Cra. 358; 11 Wheat. 361; 1 Coldw. 43; 5 B. Monr. 521; 16 Hun 80.

Questions of the admissibility and effect of evidence are to be determined by the *lex fori*; 12 La. Ann. 410; 12 Barb. 631; 7 Ohio St. 134; 106 U. S. 124; 115 Mass. 304; also questions of costs; 36 Neb. 507. Exemption laws are ordinarily governed by the *lex fori*; 31 Kan. 180; 70 Miss. 344. See 97 Ala. 275; EVIDENCE.

The administration of a deceased person's movables is governed wholly by the law of the country where the administrator acts and from which he derives his authority to collect them (*lex fori*); and without regard to the domicile of the deceased; but the distribution of the distributable residue is governed by the *lex domicilii*; Dicey, Conf. Laws 674, 677; 28 Ch. D. 175; 72 Ala. 311; 70 Ga. 528; 152 Mass. 74; 31 W. Va. 790; 143 Ill. 25. Usually the distributable residue is remitted to the administration of the domicile for distribution; 88 Pa. 131; but it is in the discretion of the court of the ancillary administration to distribute such residue; 152 Mass. 74; 25 S. C. 1; 161 Pa. 218. See LETTERS TESTAMENTARY.

An action in *tort* for an act done in a foreign country will not lie in England unless the act was a tort both in such foreign country and in England; Dicey, Conf. Laws 660. So in the United States; 86 Tex. 68; 126 N. Y. 10; 50 Ark. 155; 72 Md. 144. But it is ordinarily assumed that the laws of the two countries are the same; 160 Mass. 571.

Whether an act constitutes an actionable wrong in England which is tortious by the law of England, and not strictly justifiable under the law of the country where it was done, though not actionable there, is doubtful; Dicey, Conf. Laws 661; 10 Q. B. D. (C. A.) 521; 1 H. & C. 219. An action lies in one state on a wrong done in another state, which is actionable there, although it would not be actionable in the state where suit is brought unless it be contrary to its own public policy; 146 U. S. 643; 81 Fed. Rep. 294.

The damages recoverable from an employer for the death of his employee, caused by the negligence of the former, are controlled by the law of the place where the contract of employment was made and the accident occurred, though the death took place and the action was brought in another state; 154 U. S. 190. The statutes of one state giving an action for wrongful death may be enforced in the federal courts of another state, if not inconsistent with the statutes and policy thereof; 145 U. S. 593. An action of tort will lie in England to be tried under the rules of the maritime law, in case of a collision on the high seas, between two foreign ships; 10 Q. B. D. (C. A.) 521. See, also, the Merchants Shipping Act, 1894. In the United States, in case of a collision on the high seas between ships of different nationalities, the general maritime law governs, as administered in the courts of the country in which the action is brought, except that if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or

obligation, such law, if shown to the court, should be followed, although different from the maritime law of the country of the *forum*; 114 U. S. 355. See also 14 Wall. 170; 105 U. S. 24.

The law of the *forum* as to the validity of a bequest will be applied to a gift by will to a foreign corporation, especially when this carries out and does not frustrate the testator's intention, although the law of the state which created the corporation may be different; 35 L. R. A. (Md.) 693.

As to the proof of foreign law, see FOREIGN LAW.

LEX FUFIA CANINIA. A Roman Law passed in A. D. 8 which placed severe restrictions on the enfranchisement of slaves. The freedmen were felt to be too numerous. For example, the statute set a fixed limit to the manumission of slaves by will as follows: The owner of more than 2, and not more than 10, was allowed to free any number not exceeding one-half; the owner of more than 10, and not more than 30, was allowed to free any number not exceeding one-third, etc. But, in each number, where only one-third, one-fourth, or one-fifth could be freed, one might always manumit as many as were allowed to the lower number that went before. To manumission not by will this statute did not apply. Hunter, Rom. L. 182; G. I., 42-43. The statute ordered that slaves were to be freed by name, for freedom could not be given to an indeterminate person. *Id.*, 922; G. 2, 238.

LEX FURIA DE SPONSU. The law limiting the liability of sponsors and fidepromissors to two years, and providing that as between several co-sponsors or co-fidepromissors, the debt should be *ipso jure*, divided according to the number of the sureties without taking the solvency of individual sureties into account. It applied only to Italy. Sohm, Rom. L. 299, n.; Inst. 3. 20.

LEX FURIA TESTAMENTARIA. A law enacting that a testator might not bequeath as a legacy more than one thousand asses.

The Furian Law on Wills. This was designed to prevent a man spending his whole patrimony in legacies. The statute failed to effect its purpose, however, for although one was forbidden by it to take more than a certain amount of a man's patrimony as a legacy, the patrimony could be divided among several persons, a limited amount bequeathed to each. Hunter, Rom. L. 750, 751; G. 2, 225.

LEX GABINIA, JUBELLARIA. (B. C. 139). A Roman law introducing the ballot in the election of magistrates. Hunter, Rom. L. p. 63.

LEX GERNICIA. A law declaring interest illegal. Inst. 3. 13.

LEX HORATIO ET VALERIA. In B. C. 449, immediately upon the re-establishment of the tribuneship, the privileges of the plebeians were confirmed by the *leges Valeriae et Horatiae*, passed by the *comitia centuriata* on the proposal of the consuls Valerius and Horatius. (See LEX HORTENSIA.) By one of these laws it was enacted that henceforth the resolutions of the *comitia* should be binding on the whole people. By a second Valerian-Horatian law the right of appeal was renewed, under the severest sanctions; whoever should procure the election of a magistrate from whose sentence there should be no appeal was threatened with outlawry and death. The plebeians were thus confirmed in their right of appeal from the decision of a patrician magistrate to the assembly of the tribes. A third provision revived and confirmed by law the sacred and inviolable character of the tribunes and the aediles. Hunter, Rom. L. 25, 26.

LEX HORTENSIA. The law giving the plebeians a full share in the *jus publicum* and the *jus sacrum*. Sand. Just. Intro. § 9.

The Hortensian Law of B. C. 287, which enacted that the resolutions of the assembly of the tribes should be directly, without modification or control or delay, binding on the whole Roman people. This law was a complete triumph of the plebeians in their struggle for political equality with the patricians. Hunter, Rom. L. 25, 26.

LEX JULIA. See LEGES JULIÆ.

LEX JUNIA NORBANA. The law conferring legal freedom on all such freedmen as were *tuitio prætoris*. See LATINI JUNIANI. *Lex Junia Villejani* conferred the same right on posthumous children born in the lifetime of the testator, but after the execution of the will, as were enjoyed by those born after the death of the testator. Sohm, Rom. L. 463.

By this law, all slaves, whose personal freedom was guaranteed by the Prætor, were raised to the condition of Latin colonists. Hunter, Rom. L. 27, 172. There were two kinds of manumission, formal and informal. At first the forms of manumission were strict and ceremonial, and they conferred the title of citizen; at a later stage, the inconveniences arising from a strict adherence to these forms became a serious evil, and through the edict of the Prætor and the *lex Junia Norbana* slaves released by their masters informally were protected in their liberty and raised to the condition of Latin colonists. *Id.*, 173.

LEX KANTLÆ. The body of customs prevailing in Kent during the time of Edward I. A written statement of these customs was sanctioned by the king's justices *in eyre*. They were mainly concerned with the maintenance of a form of land tenure known as gavelkind (q. v.). 1 Poll. & Maitl. 166.

LEX LÆTORIA. See LEX PRÆTORIA.

LEX LOCI (Lat.). The law of the place. This may be either *lex loci contractus* (the law of the place of making a contract); *lex loci rei sitæ* or *lex situs* (the law of the place where a thing is situated); *lex loci actus*, or *lex actus* (the law of the place where a legal transaction takes place); *lex loci celebrationis* (the law of the place where a contract is made); *lex loci solutionis* (the law of the place where a contract is to be performed); *lex loci delicti commissi* (the law of the place where a tort is committed).

In general, however, *lex loci* is only used for *lex loci contractus*. As will appear *infra*, *lex loci contractus* is used in a double sense in many of the cases. It is used sometimes to denote the law of the place where the contract was made, and at other times to denote the law by which the contract is to be governed, which may or may not be the same as that of the place where it was made. The earlier cases do not regard the distinction, and are to be read with this fact in mind. See *infra*, where the distinction is made clear by Dicey, Conf. of Laws.

CONTRACTS. In the older cases it is held that it is a general principle applying to contracts made, rights acquired, or acts done relative to personal property, that the law of the place of making the contract, or doing the act, is to govern it and determine its validity or invalidity, as well as the rights of parties under it, in all matters touching the modes of execution and authentication of the form or instruments of contract; and also in relation to the use and meaning of the language in which it is expressed, the construction and interpretation of it, the legal duties and obligations imposed by it and the legal rights and immunities acquired under it; 8 Cl. & F. 121; 1 Pet. 317; 2 N. H. 42; 6 Vt. 103; 7 Cush. 30; 3 Conn. 253, 472; 14 id. 583; 22 Barb. 118; 17 Pa. 91; 2 H. & J. 193; 3 Dev. 161; 8 Mart. La. 55; 4 Ohio St. 241; 14 B. Monr. 556; 19 Mo. 84; 4 Fla. 404; 23 Miss. 42; 13 La. Ann. 607; 3 Stor. 465; Ware 402; 91 U. S. 406; 24 N. J. L. 319; 36 Conn. 39; 2 Woods, C. C. 244; 65 Barb. 265.

This principle, though general, does not, however, apply where the parties at the time of entering into the contract had the law of another country in view, or where the *lex loci* is in itself unjust, *contra bonos mores* (against good morals), or contrary to the public law of the state, as regarding the interest of religion or morality, or the general well-being of society; 9 N. H. 271; 6 Pet. 172; 1 How. 160; 17 Johns. 511; 13 Mass. 23; 5 Cl. & F. 11; 8 id. 121; 6 Whart. 331; 1 B. Monr. 32; 5 Fred. 590; Story, Conf. Laws § 280; see 35 W. Va. 390; 58 Fed. Rep. 796; or the rights of citizens of the forum; 12 Barb. 631; 13 Mass. 6. And where the place of performance is different from the *locus contractus*, it is presumed the parties had the law of the former in mind; 55 Fed. Rep. 223; App. Cas. D. C. 277.

Where an oral promise was made in South Carolina to accept a draft payable in New York, it was held that matters bearing on the execution, interpretation, and validity of the contract are determined by the law of the place where it is made; those connected with its performance are regulated by the law prevailing at the place of performance, and that the contract in question was governed by the law of South Carolina; 26 U. S. App. 133.

Where residents of two different states enter into a contract which would be invalid in one state, but valid in the other, and by its terms make it a contract of the latter state, and to be there performed, it will be presumed that they intended it to be governed by the laws of such state; 88 Fed. Rep. 403.

The validity or invalidity of a contract as affected by the *lex loci* may depend upon the capacity of the parties or the legality of the act to be done.

The capacity of the parties as affected by questions of minority or majority, incapacities incident to coverture, guardianship, emancipation, and other personal qualities or disabilities, is, it has been said, to be decided by the law of the place of making the contract; Story, Conf. Laws § 108; 1 Grant 51. See *infra*.

The question of disability to make a contract on account of infancy is to be decided by the *lex loci*; 3 Esp. 163, 597; 17 Mart. La. 597; 8 Johns. 189; 1 Grant 51; 2 Kent 238. So, also, as to contracts made by married women; 8 Johns. 189; 13 La. 177; 5 East 31.

Personal disqualifications not arising from the law of nature, but from positive law, and especially such as are penal, are strictly territorial, and are not to be enforced in any country other than that where they originate; Story, Conf. Laws §§ 91, 104, 620; 2 Kent 459. See Whart. Conf. L. § 101; 67 Barb. 9.

Natural disabilities, such as insanity, imbecility, etc., are everywhere recognized, so that the question whether they are controlled by the *lex loci* or *lex domicilii* seems to be theoretic rather than practical. On principle there seems to be no good reason why they should come under a different rule from the positive disabilities.

It is said that the weight of American authority is in favor of holding that a contract which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicile, be deemed capable of making it; 125 Mass. 374; see 84 N. Y. 393; 69 Me. 105. But Dicey (Conf. Laws) is of opinion that the capacity to contract is governed by the *lex domicilii*; and in 112 U. S. 452, it is said that "as a general rule the law of the domicile governs the status of a person." See, also, 87 Tenn. 445, 644.

The legality or illegality of the contract will be determined by the *lex loci*, unless it affects injuriously the public morals or rights, contravenes the policy, or violates a public law of the country where a remedy is sought; 2 Kent 458.

A contract illegal by the law of the place of its making and performance will generally be held so everywhere; 1 Gall. 375; 2 Mass. 88; 2 N. H. 42; 2 Mas. 459; 18 Pet. 65, 78; 2 Johns. Cas. 355; 1 N. & M'C. 178;

2 H. & J. 193, 221, 225; 17 Ill. 338; 16 Tex. 344; 2 Burr. 1077; 2 Kent 458; Story, Conf. Laws § 243. See 38 Fed. Rep. 800; 42 Ch. D. (C. A.) 321; but see 112 N. C. 59; but Dicey, Conf. Laws 560, is of opinion that this rule, though sound in principle, does not rest, in England, upon an unassailable foundation of authority.

An exception is said to exist in case of contracts made in violation of the revenue laws; Cas. t. Hardw. 85; 2 C. Rob. 6; 2 Cr. M. & R. 311; 2 Kent 458.

A contract legal by the *lex loci* will be so everywhere; 13 La. Ann. 117; 146 Ill. 523; unless—

It is injurious to public rights or morals; 2 C. & P. 347; 1 B. & P. 340; 6 Mass. 379; 2 H. & J. 193; or *contravenes the policy*; 23 Ark. 523; 60 Ala. 380; 2 Sim. Ch. 194; 16 Johns. 488; 5 Harring. 51; 1 Green, Ch. 326; 17 Ga. 253. See 82 Ga. 142; 112 N. C. 59; or *violates a positive law of the lex fori*; or, in England, *violates any English rule of procedure*; Dicey, Conf. Laws 542. The application of the *lex loci* is a matter of comity; and that law must, in all cases, yield to the positive law of the place of seeking the remedy; 13 Pick. 193; 1 Green, Ch. 326; 12 Barb. 631; 17 Miss. 247. See 10 N. Y. 58.

It is held generally that the claims of citizens are to be preferred to those of foreigners. Assignments, under the insolvent laws of a foreign state, are often held inoperative as against claims of a citizen of the state, in regard to personal property in the jurisdiction of the *lex fori*; 1 Green, Ch. 326; 5 Harring. 31; 32 Miss. 246; 13 La. Ann. 290; 21 Barb. 198; but see 12 Md. 54. But there appears to be a distinction. This rule is well settled in all cases where the assignment of the property of an insolvent is made, *in invitum*, by a court in a foreign jurisdiction, to a receiver; assignee, etc.; 6 Thomp. Corp. § 7388; 14 Allen 355; 128 Ind. 477; 81 Cal. 551. But where a *voluntary* assignment is made, if good where made and made in conformity with the law where the property is situated, it is valid in the latter state, *ex proprio vigore*; 117 Pa. 30; 10 Mo. App. 7; 6 Thomp. Corp. § 7347; Story, Conf. L. § 111.

A contract made with a view to violate the law at the place of performance is invalid; 14 R. I. 398; 62 Ind. 587. An immoral contract, e. g. to bribe or corruptly influence the officers of a foreign government, will not be enforced wherever made; 103 U. S. 261; or one that violates good morals; 42 Miss. 444; 37 N. J. L. 23; but Sunday laws are not considered as rules of positive morality; 67 Miss. 405; nor, ordinarily, are usury laws; 103 Mass. 323; 77 N. Y. 578. See Moore's note to Dicey, Conf. Laws 532. It was said, in a case of usury, that if a contract is valid by the law of the state where it is made, and is not immoral, the courts of another state will enforce it, although its own laws prohibit such a contract; 81 Fed. Rep. 516.

In an action in Pennsylvania on a promissory note governed as to the contract by the law of New Jersey, the question of whether parol evidence will be admitted to vary the contract must depend upon the law of New Jersey, and not upon the *lex fori*. It was said that the right to introduce proof *dehors* the instrument for the purpose of showing what, in fact, the contract was, is an essential part of the contract itself, and not a mere incident to the remedy; 6 Pa. Super. Ct. 115, citing 110 Pa. 478; 143 Pa. 146; and 154 Mass. 213.

A statute requiring a foreign corporation, as a condition of doing business within the state, to stipulate not to remove suits into the federal court, is void because it makes the right to a permit dependent on the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States; 121 U. S. 186; 20 Wall. 445. See JURISDICTION.

The interpretation of contracts is to be governed by the law of the country where the contract was made; 2 B. & Ad. 746; 10 B. & C. 908; 2 Hagg. Cons. 60, 61; 8 Pet. 361; 30 Ala. n. s. 253; 4 McLean 540; 2 Bl. Com. 141; Story, Conf. Laws § 270.

The *lex loci* governs as to the formalities and authentication requisite to the valid execution of contracts; Story, Conf. Laws §§ 123, 260; 11 La. 14; 2 Hill N. Y. 227; 37 N. H. 86; 30 Vt. 42. But in proving the existence of, and seeking remedies for, the breach, as well as in all questions relating to the competency of witnesses, course of procedure, etc., the *lex fori* must govern; 11 Ind. 385; 9 Gill 1; 17 Pa. 91; 18 Ala. N. S. 248; 4 McLean 540; 5 How. 88; 6 Humphr. 75; 17 Conn. 500; 9 Mo. 56, 157; 4 Gilm. 521; 26 Barb. 177; Story, Conf. Laws §§ 567, 634. See LEX FORI.

The *lex loci* governs as to the obligation and construction of contracts; 11 Pick. 32; 8 Vt. 325; 12 N. H. 520; 12 Wheat. 213; 2 Keen 293; 1 B. & P. 138; 12 Wend. 439; 13 Mart. La. 202; 14 B. Monr. 556; 15 Miss. 798; unless, from their tenor, it must be presumed they were entered into with a view to the laws of some other state; 13 Mass. 1; 11 Colo. 118. This presumption arises where the place of performance is different from the place of making; 31 E. L. & Eq. 433; 17 Johns. 511; 13 Pet. 65; 9 La. Ann. 185; 13 Mass. 23; 91 U. S. 406; 2 Woods 244.

It has been held that a lien or privilege affecting personal estate, created by the *lex loci*, will generally be enforced wherever the property may be found; 8 Mart. 95; 5 La. 295; Story, Conf. Laws § 402; but not necessarily in preference to claims arising under the *lex fori*, when the property is within the jurisdiction of the court of the forum; 5 Cra. 289, 298; 12 Wheat. 361; Whart. Conf. L. § 324. It is said that the former rule that the assignment of a movable is invalid unless it be made in accordance with the *lex domicilii*, is now rejected by the English courts, which now hold that a transfer of goods in accordance with the *lex situs* gives a good title in England; Dicey, Conf. Laws 532. But it is held in this country that a transfer of movables made in the place of the owner's domicile and in accordance with its laws will be enforced by the courts of the place where the movables are situated, although the method of transfer be different from that prescribed by the latter country; but not when the statutes of the place where they are situated or the policy of its laws prescribe a different rule; Moore's note to Dicey, Conf. Laws 538; 7 Wall. 139; 147 U. S. 476. See *supra*.

A discharge from the performance of a contract under the *lex loci* is a discharge everywhere; 5 Mass. 509; 7 Cush. 15; 4 Wheat. 123, 209; 12 id. 213; 2 Mas. 161; 2 Blackf. 394; 24 Wend. 43; 2 Kent 394. A distinction is to be taken between discharging a contract and taking away the remedy for a breach; 3 Mas. 88; 4 Conn. 47; 12 Wheat. 347; 8 Pick. 194; 9 Conn. 314; 2 Blackf. 394; 9 N. H. 478.

As to the effect of a discharge from an obligation by a state insolvent law upon a debt due a citizen of another state, see LEX FORI.

Statutes of limitations ordinarily apply to the remedy, but do not discharge the debt; 9 How. 407; 20 Pick. 310; 2 Paine 437; 2 Mas. 751; 6 N. H. 557; 6 Vt. 127; 8 Port. (Ala.) 84. See LIMITATIONS, STATUTE OF; LEX FORI.

A question of some difficulty often arises as to what the *locus contractus* is, in the case of contracts made partly in one country or state and partly in another, or made in one state or country to be performed in another, or where the contract in question is accessory to a principal contract.

Where a contract is made partly in one country and partly in another, it is a contract of the place where the assent of the parties first concurs and becomes complete; 2 Parsons, Contr. 94; 27 N. H. 217, 244; 11 Ired. 303; 3 Strobb. 27; 1 Gray 336.

As between the place of making and the place of performance, where a place of performance is specified, the law of the place of performance governs as to the obligation, interpretation, etc.; 5 East 124; 1 Gall. 371; 12 Vt. 648; 12 Pet. 456; 1 How. 132; 8 Paige, Ch. 261; 5 McLean 448; 27 Vt. 8; 14 Ark. 189; 7 B. Monr. 575; 9 Mo. 56,

157; 4 Gilm. 521; 21 Ga. 135; 30 Miss. 59; 7 Ohio 134; 4 Mich. 450; 62 N. Y. 151; 24 Ia. 412; 150 Pa. 466. Contracts made in one place to be performed in another are, as a general rule, to be governed by the law of the place of performance; 142 U. S. 101; 38 W. Va. 390. Where there is nothing to show that the parties had in view, in respect to the execution of a contract, any other law than that of the place of performance, that law must determine the rights of the parties; 142 U. S. 115. See 81 Ga. 522.

Where the contract is to be performed generally, the law of the place of making governs; 2 B. & Ald. 301; 5 Cl. & F. 12; 1 Metc. Mass. 82; 6 Cra. 221; 6 Ired. 107; 17 Miss. 220.

If the contract is to be performed partly in one state and partly in another, it will be affected by the law of both states; 91 U. S. 406; 14 B. Monr. 556; 22 Barb. 118. But see 2 Woods 244; 24 Ia. 412. A contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, must be governed by the law of that country, unless the parties, when entering into the contract, clearly manifested a mutual intention that it should be governed by the laws of some other country; 129 U. S. 397.

In cases of indorsement of negotiable paper, every indorsement is a new contract, and the place of each indorsement is in its *locus contractus*; 2 Kent 460; 17 Johns. 511; 9 B. & C. 208; 13 Mass. 1; 25 Ala. N. S. 189; 19 N. Y. 436; 17 Tex. 102.

The place of payment is the *locus contractus*, however, as between indorsee and drawer. See 19 N. Y. 436; 53 Fed. Rep. 474; 9 C. C. App. 261.

The place of acceptance of a draft is regarded as the *locus contractus*; 3 Gill 430; 1 Q. B. 43; 4 Pet. 111; 8 Metc. 107; 4 Dev. 124; 6 McLean 622; 9 Cush. 46; 13 N. Y. 290; 18 Conn. 138; 17 Miss. 220; 142 U. S. 116.

A bill of exchange drawn in Indiana, accepted in Michigan, to be discounted in Indiana and paid in Michigan, is an Indiana contract; 52 Fed. Rep. 291.

A note made in one state and payable in another, is not subject to the usury laws of the latter state, if it was valid in that respect in the state where it was made; 60 id. 730. A note executed in one state and payable in another is governed, as to defences against an indorsee, by the law of the latter state, though sued on in the state where made; id. 780. See PROMISSORY NOTES; BILLS OF EXCHANGE; as to what is presumed to be *lex loci*, see FOREIGN LAWS; LEX FORI.

Dicey, in his recent and very able work on the Conflict of Laws, defines *lex loci contractus* merely as the law of the place where the contract is entered into, and uses it only in that sense. To designate the law by which the contract is governed, he uses the phrase, "the proper law of the contract," which may be, and usually is, the *lex loci contractus*, or may be, by the express will of the parties, or by inference, the law of some other place. He maintains that the capacity to contract is governed by the law of the domicile (except, probably, in the case of ordinary mercantile contracts which are governed by the law of the place where the contract is made; and except, of course, contracts relating to land). The formal validity of the contract is governed by the law of the place where it is made, except contracts relating to land and contracts made in one country in accordance with the local form in respect of a movable situated in another country, which, he thinks, may possibly be invalid if they do not comply with the special formalities (if any) required by the law of the country where the movable is situated at the time of the making of the contract, and except, possibly, a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, even though not made according to the local form, if made in accordance with the form required, or allowed by the law of the country where the contract is to op-

erate. This last exception is not, however, in his opinion, supported by adequate authority.

The essential validity of a contract is governed by what he terms the "proper law of the contract," which he defines as the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed. This may be the law of the place where the contract was made, or it may be the place of performance. But there are, he says, wide exceptions to this rule. The contract must not be opposed to English interests, or the policy of English law, or to the moral rules upheld by English law. The contract must not be unlawful by the law of the country where it is made; and its performance must not be unlawful by the law of the country where it is to be performed; and it must not form part of a transaction which is unlawful by the law of the country where the transaction is to take place, though this probably does not apply to contracts in violation of the revenue laws of a foreign country.

The interpretation of a contract, and the rights and obligations under it of the parties thereto, are to be determined by the "proper law of the contract." This law may be designated by the express words of the contract, indicating the intention of the parties, which, in general, governs; or their intention may be inferred from the terms and nature of the contract, and from the general circumstances of the case. In the absence of counteracting considerations, the proper law of the contract is, *prima facie*, presumed to be the law of the country where the contract is made; especially when the contract is to be performed in the country where it is made, or may be performed anywhere, but it may apply to a contract partly, or even wholly, to be performed in another country. Where the contract is to be performed wholly or partly in another country, the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place. These presumptions are said to be grounded on the probable intention of the parties.

The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract, that is, the law to which the parties, when contracting, intended to submit themselves. But this writer says there is a lack of decided authority on this point.

The same writer, after saying that the reports and text books of authority reiterate the rule that a contract is governed by the law of the place where it is made, points out that when English courts first began to deal with the conflict of laws, they referred everything, except matters of procedure, to the *lex loci contractus*, by which they meant the law of the place where the contract was actually entered into. When they subsequently found it necessary to give effect to other laws than those of the place where the contract was made, and especially to the laws of the place of performance, the change of doctrine was combined with a verbal adherence to an old formula not really consistent with the new theory. They retained the expression *lex loci contractus*, but reinterpreted it to mean the law of the country with a view to the law whereof the contract was made. This might be the law of the country where the contract was made, or it might be the law of some other country, and was frequently the law of the country where the contract was to be performed. The same result was sometimes attained by another method of reasoning. It was laid down that a person must be assumed to have contracted at the place where his contract was to be performed. By either method of interpretation an actual reference to the law contemplated by the parties was masked under a nominal reference to the law of the place of the contract. This adherence to the term *lex loci contractus* has produced two effects. It has until recent years concealed from English lawyers the principle

that the interpretation, as contrasted with the formal validity, of a contract is governed by the law (of whatever country) contemplated by the parties, and that this law is constantly the law of the place of performance, and it has led English judges to give a preference to the *lex loci contractus*, upon which the English courts fall back in doubtful cases. But English judges, as well as foreign courts and writers, both adopt the principle that the interpretation of a contract and the obligation arising under it are, in so far as they depend on the will of the parties, to be determined in accordance with the law contemplated by the parties; Dicey, *Conf. Laws* 726.

The phrase *lex loci contractus* is used in a double sense, to mean, sometimes the law of a place where a contract is entered into; sometimes that of the place of its performance. And when it is employed to designate the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have either expressly or presumptively incorporated into their contract, as constituting their obligation; 106 U. S. 124. "In every forum a contract is governed by the law with a view to which it was made;" 10 Wheat. 1.

It is said by an able writer that the cases often fail to distinguish between formal validity and essential validity, or between the making and the performance of the contract; and not infrequently it is held, in respect of matters of essential validity, that the validity of a contract is to be determined by the law of the place where the contract is made; J. B. Moore's note to Dicey, *Conf. Laws* 590, citing as instances 154 Mass. 213; 55 Minn. 509.

The form of the contract is regulated by the law of the place of its celebration; 106 U. S. 124. The presumption is that a contract is to be performed at the place where it is made and to be governed by its laws, if there is nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention; *id.* 137. See, also, 39 S. C. 484.

In a contract the foreign law may, by the act and will of the parties, become part of their agreement; 106 U. S. 129. It is the will of the contracting parties and not the law which fixes the place of performance—whether by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves; 4 Phil. Int. L. 469; approved in 106 U. S. 137. But it has been held that a stipulation in a bill of lading which would substitute the English law for our own as to the question of limited liability is invalid; 57 Fed. Rep. 403; and that stipulations which are held void, because against the public policy of the United States, are not made valid by the stipulation of the parties; 56 *id.* 602, 124; 168 U. S. 119, and cases cited; and that a clause in a shipping contract providing that all questions arising under the contract shall be settled according to English law, is a nullity, as an attempt to impress upon the contract a construction which our law rejects as contrary to public policy; 50 *id.* 561. See FLAG, LAW OF.

A policy of life insurance which was delivered, and the first premium thereon paid in the state in which the assured resided, is governed by the laws of that state; 58 *id.* 541; though the policy contained a clause that it was to be a contract under the laws of the domicile of the insurer, such clause being invalid when it sought to avoid the force of statutes of the state in which the insurance was taken; 54 *id.* 580; and though signed by the insurer at the company's office in its home state; 50 *id.* 511; and a policy issued by a New York company upon an application signed in Missouri, where the first premium was paid, is subject to the Missouri statutes which cannot be waived by any stipulation of the contract; 140 U. S. 228. A domiciled Englishman effected three policies of in-

surance on his life in a New York company in favor of his wife and children. It was held that the intention of the parties must determine the law applicable, and that it was clearly intended here that the interests of the beneficiaries should be decided by the law of the domicile of the party insuring; 78 L. T. R. 60.

The validity of a contract cannot be secured by apparently subjecting it to a law by which it is not properly governed; 69 Miss. 770; 96 Mich. 243.

A contract executed in England, whereby an English corporation agrees to transport a citizen of the United States to this country, is to be construed according to English law; 60 Fed. Rep. 624.

A federal court assuming jurisdiction of a controversy between the master and the seaman of a foreign vessel, under a foreign flag, growing out of a contract made in their own country, will administer relief, by comity, in accordance with the law of the flag of the vessel; 35 *id.* 663. The question concerning the ultimate responsibility of the owner for the master's acts and engagements, arising out of sea damages, as one of the incidents of the voyage in the prosecution of foreign commerce, is to be determined by the law of the ship's home; *id.* 767. See FLAG, LAW OF.

It is said by a learned writer that the failure to comply with local requirements as to form, not affecting the obligation of the agreement, will not invalidate the contract; Whart. *Conf. L.* § 685.

A contract valid by the laws of the place where it was made, although not in writing, will not be enforced in the courts of a country where the Statute of Frauds prevails. But where the law of the forum and that of the place of the execution of the contract coincide, it will be enforced, although required to be in writing by the law of the place of performance, because the form of the contract is regulated by the law of the place of its celebration, and the evidence of it by that of the forum; 106 U. S. 135.

The general rule is that a defence or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every place where the question may come to be litigated; 106 U. S. 132, citing Story, *Conf. L.* § 331.

TORTS. Damages for the commission of a tortious act are to be measured by the law of the place where the act is done; 1 P. Wms. 395; 1 Pet. C. C. 225; Story, *Conf. Laws*, § 307.

An action for a tort committed in a foreign country will lie only when it is based upon an act which will be considered as tortious both in the place where committed and in the *locus fori*; in such case the law of the place where the tort was committed governs; L. R. 1 P. D. 107; *id.* 6 Q. B. 1; 2 P. C. 193. See 1 H. & C. 219; Whart. *Conf. L.* § 478; 54 Barb. 31. See LEX FORI.

MARRIAGE. As to the conflict of laws in relation to marriage, see MARRIAGE.

As to divorce, see DIVORCE; DOMICIL. The law of all acts relating to real property is governed by the *lex rei sitæ*. Taking a mortgage as security does not, however, divest the *lex loci* of its force. See LEX REI SITÆ.

Touching the subjects considered in this title, see an elaborate collection of cases on conflict of laws, 5 Eng. Rul. Cas. 708-975.

LEX LOCI ACTUS. See LEX LOCI.

LEX LOCI CELEBRATIONIS. See LEX LOCI.

LEX LOCI CONTRACTUS. See LEX LOCI.

LEX LOCI DELICTI COMMISSI. See LEX LOCI.

LEX LOCI SOLUTIONIS. See LEX LOCI.

LEX LONGOBARDORUM (Lat.). The name of an ancient code in force among the Lombards. It contains many evident traces of feudal policy. It survived the destruction of the ancient government of

Lombardy by Charlemagne, and is said to be still partially in force in some districts of Italy.

LEX MANIFESTA (L. Lat.). Manifest or open law; the trial by duel or ordeal.

LEX MERCATORIA (Lat.). That system of laws which is adopted by all commercial nations, and which, therefore, constitutes a part of the law of the land. See LAW MERCHANT.

LEX NATURALE. Natural law. See JUS NATURALE.

LEX NON SCRIPTA. The unwritten or common law, which included general and particular customs, and particular local laws. 1 Steph. Com. 40-68. See JUS EX NON SCRIPTA.

LEX PAPIA POPPÆ. The law which exempted from tutelage women who had three children. It is usually considered with the *Lex Julia de maritandis ordinibus* as one law. See LEGES JULIÆ.

LEX PATRIÆ. The law of one's country. English.

LEX PETRONIA. The law forbidding masters to expose their slaves to contests with wild beasts. Inst. 1. 8.

This also enacted that this species of cruelty should be adopted only as a public punishment for the misconduct of the slave. Hunter, Rom. L. 158; D. 48, 8, 11, 2.

LEX PLETORIA. The law for the protection of young persons who had attained the age of puberty. Inst. 1. 23.

This law seems to have fixed majority at twenty-five. The law permitted minors to apply to the Praetor, who, on proof of their incapacity to manage their affairs, would give them a curator. This enactment also provided for the appointment of *tutores* to spendthrifts and the insane. Hunter, Rom. L., 608, 734.

LEX PLAUTIA. The law which conferred the full rights of citizenship on Italy below the Po. Sand. Just. Introd. § 11.

LEX POETELIA. The law abolishing the right of a creditor to sell or kill his debtor. Sohm, Rom. L. 210.

From this date (B. C. 325 or 313) one may reckon the rule of law that liberty is inalienable. Whether this law, which put an end to the voluntary alienation of personal freedom, also extinguished its involuntary alienation through the execution of judgment debts, is uncertain. The imprisonment of the debtor in a public prison took the place of his reduction to slavery. Hunter, Rom. L. 33, 1035; C. 7, 71, 1.

LEX POMPEIA DE PARRICIDIIS.

A Roman statute on the murder of blood relations (B. C. 55). This law provided that if a man murdered an ascendant or a son, or in any way attempted anything included under the designation parricidium, whether he dared it secretly or openly, should be punished with the penalty of parricidium; further, that if any one wilfully brought about such a crime, or was an accomplice, then, even though he were an outsider, the result should be the same. Hunter, Rom. L., 1062; J. 4, 18, 6.

The offender was by this law to be sewn up in a sack with a dog, a cock, a viper, and an ape, and thrown into the sea or a river, so that even in his lifetime he might begin to be deprived of the use of the elements; that the air might be denied him whilst he lived and the earth when he died. Inst. 4. 18. 6.

LEX PUBLILIA. The law providing that the *plebiscita* should bind the whole people. Inst. 1. 2. The *lex Publilia de sponsu* allowed sponsores, unless reimbursed within six months, to recover from their principal what they had paid by a special *actio*. See LEGES PUBLILIAE.

LEX REGIA. The law of the emperor. That which he ordains by rescript, or decides in adjudging a cause, or lays down by edict, is law. Inst. 1. 2. 6.

LEX REI SITÆ (Lat.). The law of the country where a thing is situate. Dicey, Conf. Laws 66.

It is the universal rule of the common law that any title or interest in land, or in other real estate, can only be acquired or lost agreeably to the law of the place where the same is situated; 6 Pick. 268; 1 Paige, Ch. 230; 2 Ohio 124; 5 B. & C. 438; 6 Madd. Ch. 16; 10 Wheat. 192, 465; 1 Gill 290; 6 Binn. 559; Story, Conf. Laws §§ 865, 426; 152 U. S. 65; 184 id. 316; 127 id. 719; and the law is the same in this respect in regard to all methods whatever of transfer, and every restraint upon alienation; 12 E. L. & Eq. 206. The *lex rei sitæ* governs as to the capacity of the parties to any alienation, whether testamentary or *inter vivos*, or to make a contract with regard to a movable, or to acquire or succeed to a movable as affected by questions of minority or majority; 17 Mart. 569; of rights arising from the relation of husband and wife; Story, Conf. Laws § 454; 9 Bligh 127; 8 Paige, Ch. 261; 2 Md. 297; 1 Miss. 281; 4 La. 881; 3 Strobb. 562; 9 Rich. Eq. 475; 107 Mo. 422; L. R. 8 Ch. 342; see 87 Tenn. 445; parent and child, or guardian and ward; 2 Ves. & B. 127; 1 Johns. Ch. 153; 4 Gill & J. 832; 9 Rich. Eq. 311; 14 B. Monr. 544; 11 Ala. n. s. 843; 18 Miss. 529; but see 7 Paige, Ch. 236; and of the rights and powers of executors and administrators, whether the property be real or personal; 2 Hamm. 124; 8 Cl. & F. 112; 4 M. & W. 71, 192; 3 Cra. 319; 5 Pet. 518; 12 Wheat. 169; 2 N. H. 291; 4 Rand. 158; 2 Gill & J. 493; 5 Me. 261; 5 Pick. 65; 20 Johns. 239; 3 Day 74; 7 Ind. 211; 10 Rich. 393 (see EXECUTORS); of heirs; 5 B. & C. 451; 9 Cra. 151; 9 Wheat. 566; and of devisee or devise; Story, Conf. Laws § 474; 14 Ves. 337; 9 Cra. 151; 10 Wheat. 192; 87 N. H. 114.

So as to the forms and solemnities of alienation, and the restrictions, if any, imposed upon such alienation, the *lex rei sitæ* must be complied with, whether it be a transfer by devise; 2 P. Wms. 291; 10 Wheat. 192; 4 Johns. Ch. 260; 2 Ohio 124; 37 N. H. 114; 5 R. I. 112; 2 Jones N. C. 998; 97 Mo. 223; 60 Fed. Rep. 310; 109 U. S. 608; 20 Fla. 849 (but in Maine, under statutes, an attestation made in conformity with the law of the place where the will was executed, was held valid; 85 Me. 874); or by conveyance *inter vivos*; 2 Dowl. & C. 349; 1 Pick. 81; 1 Paige, Ch. 220; 11 Wheat. 465; 11 Tex. 753; 13 Pa. 170; 12 E. L. & Eq. 206. So as to the amount of property or extent of interest which can be acquired, held, or transferred; 3 Russ. Ch. 338; 2 Dow. & C. 393; and the question of what is real property; 1 W. Bla. 234; 6 Paige, Ch. 630; 8 Deac. & C. 704. The law of a country where a thing is situate determines whether the thing itself, or any right, obligation, or document connected with the thing is to be considered an immovable (land), or a movable; Dicey, Conf. Laws 513.

And, generally, the *lex rei sitæ* governs as to the validity of any such transfer; 4 Sandf. 353; 23 Miss. 42; 11 Mo. 314; 2 Bradf. Surr. 339; 138 Ill. 559. As to the disposition of the proceeds, see 12 E. L. & Eq. 206.

The validity, construction, and effect of wills of movables depend upon the *lex rei sitæ*; 1 N. Dak. 216; 50 Fed. Rep. 310; 112 N. C. 798; but the law of the state where the will was made may be considered by the court of the *situs* in determining the meaning of certain words in it; 73 Ga. 506. The validity of a charitable devise; 107 U. S. 174; and a direction for accumulation; 95 N. Y. 509; depend upon the *lex rei sitæ*, and so does the execution of a power of appointment of lands under a will; 132 Mass. 131; and the devolution of land, whether in case of intestacy or under a will; Dicey, Conf. Laws 519.

The acquisition of a title to land by lapse

of time (prescription) must be determined by the same law, except so far as the limitation to an action to recover land depends on the *lex fori*; id. 523; and see Whart. Conf. Laws § 378.

As to whether mere contracts with regard to immovables or land are determined by the *lex rei sitæ*, as to their material validity, or by the "proper law of the contract," is doubtful; Dicey, Conf. Laws 769; but the capacity of the parties thereto and the formalities necessary to the validity of such a contract are, almost certainly, governed by the law of the *situs*; id. As to the "proper law of the contract," see LEX LOCI.

A contract for the conveyance of land, valid by the *lex fori*, will be enforced in equity by a decree in *personam* for a conveyance valid under the *lex rei sitæ*; 1 Ves. 144; 2 Paige, Ch. 606; Wythe 135; 6 Cra. 148.

An executory foreign contract for the conveyance of lands not repugnant to the *lex rei sitæ* will be enforced in the courts of the latter country by personal process; 8 Paige, Ch. 201; 23 E. L. & Eq. 288; 4 Bosw. 266.

As to the transfer of movables, while, if made at the place of the owner's domicile and in accordance with its laws, they are valid in the courts of the place where the property is situated, yet it is otherwise when the statutes, or the general policy of the law, of the latter place prescribes a different rule; 7 Wall. 139; 147 U. S. 478; 155 Mass. 112; 140 N. Y. 230. Where a special form of transfer of a movable is prescribed by the law of the *situs* a transfer not made in accordance therewith is invalid; 96 N. Y. 248; see Dicey, Conf. L. 551.

Courts of the *situs* may refuse to enforce foreign assignments for creditors as against domestic creditors; 123 Ill. 551; 96 N. Y. 248; but see *supra*, for contrary decisions.

All simple contract debts are assets at the domicile of the testator; 109 U. S. 654; but a bond is said to be assets for the purpose of administration at the place where it is found; 73 N. Y. 292. A ship at sea is presumed to be situated in the state where it is registered; 16 Wall. 610. As to the English rules relating to the *situs* of movables, see Dicey, Conf. Laws 318.

LEX DE RESPONDIS PRUDENTUM. The law of citations (q. v.).

LEX RHODIA DE JACTU. The Rhodian Law on jettison. The Roman Law adopted, so far as not inconsistent with itself, the maritime law of Rhodes. The maritime law of Rhodes applied wherever it was not opposed to special legislation. (D. 14, 2, 9.) Hunter, Rom. L. 514. The law provided that if, in order to save a ship, a portion of its cargo was thrown overboard, the owners of the vessel and cargo had to share with the owners of the goods thrown overboard the loss they sustained. (D. 14, 2, 1.) *Id.* Further, contribution was required from those whose property had been saved by the jettison, upon the equitable ground that the loss was incurred to save their goods. (D. 14, 2, 5.) No contribution could have been required on account of free persons saved, because their lives constituted a value that could not be expressed in money. But they had to contribute on account of their garments and jewelry saved from shipwreck; not, however, for food and the like consumable articles. Also, the owner of the vessel must contribute because his vessel was saved. (D. 14, 2, 2.) *Id.*, 515.

LEX ROMANA. See CIVIL LAW; ROMAN LAW. LEX ROMANA VISIGOTHORUM.

LEX ROMANA VISIGOTHORUM or **BREVIARIUM ALARICI.** The Roman law promulgated among the Visigoths in Gaul was drawn up, by order of Alaric II., and under the superintendence of Gojaric, count of the palace, probably by a commission largely if not wholly composed of Roman jurists; and it was decreed at Aire in Gascony, A. D. 506, with the assent

of the ecclesiastics, nobles, and provincial electors representing the people. The extant copy is one addressed to a certain count, Timotheus, and officially subscribed by Anianus, the secretary, by order of the king. No law or juristic opinion outside this compilation was permitted to be quoted in a court of law. The work contains—(1) constitutions (*leges*) extracted from the Theodosian code, and a series of *Novellæ* from Theodosius to Libius Severus; and (2) extracts, on the principle of the Law of Citations, from a few eminent jurists—namely, the Institutes of Gaius abridged (with omission of the fourth book and several other portions as obsolete), Paul's *Sententiæ* (five books), the Gregorian code (thirteen articles), the Hermogenian code (two articles), and Papinian's *Responsa* (two lines from the first book). With the exception of Gaius, the texts are accompanied by a very useful running commentary in the Latin of the day. The compilation has been named *Breviarium Alaricianum* (or *Alarici*), or *Aniani*; also, in the middle ages, *Lex Theodosiana*, *Corpus Theodosianum*, *Liber Legum*, *Lex Romana*. It has preserved fragments of Roman law not otherwise known to us. It was more widely obeyed and more enduring than any of the similar bodies of law. Hunter, Rom. Law, 89.

LEX SALICA. The law of the Salian Franks. 12 Harv. L. R. 445. See SALIC LAW.

LEX SCRIBONIA. The law abolishing the *usucapio servitutis*. Sohm, Rom. L. 265.

But servitudes were capable of being acquired or lost by long *quasi*-possession. (D. 8, 5, 10, 1.) This law further abolished usucapion of incorporeal things, unless simply as appurtenances of land so acquired. (D. 41, 3, 10, 1.) Hunter, Rom. L. 64, 289, 419.

LEX SCRIPTA. Written or statute law. See JUS EX NON SCRIPTA.

So called because originally reduced into writing before it is enacted or receives any binding power. Burrill; Hale's Hist. Com. Law 2, 21. See STATUTE LAW.

LEX SEMPRONIA. The law forbidding senators from being judges and allowing the office to the knights. Sand. Just. Introd. § 12.

LEX SILIA. A law concerning personal actions. Sohm, Rom. L. 155.

LEX SITUS. See LEX REI SITÆ.

LEX TALIONIS (Lat.). The law of retaliation: an example of which is given in the law of Moses, an eye for an eye, a tooth for a tooth, etc.

Amicable retaliation includes those acts of retaliation which correspond to the acts of the other nation under similar circumstances.

Jurists and writers on international law are divided as to the right of one nation punishing with death, by way of retaliation, the citizens or subjects of another nation. In the United States no example of such barbarity has ever been witnessed; but prisoners have been kept in close confinement in retaliation for the same conduct towards American prisoners. See Rutherford, Inst. b. 2, c. 9; Martens, Law of Nat. b. 8, c. 1, s. 3, note; 1 Kent 93; Wheaton, Int. Law, pt. 4, c. 1, § 1.

Vindictive retaliation includes those acts which amounts to war. See RETORSION.

LEX TERRÆ (Lat.). The law of the land. See DUE PROCESS OF LAW.

LEX THEODOSIANA. See LEX ROMANA VISIGOTHORUM.

LEX VALERIA. See LEX HORATIA ET VALERIA.

LEX VOCONIA. A *plebiscitum* forbidding a legatees to receive more than each heir had. Inst. 2, 22.

Although this statute provided that the heirs would get something, a little defect

sprang up; for by dividing his patrimony among many legatees, the testator could leave so little to the heir that it was not to the heir's advantage to undertake, for the sake of this gain, the burden of the whole inheritance. (G. 2, 226.) Hunter, Rom. L., 750.

LEY (Old French; a corruption of *loi*). Law. For example, *Termes de la Ley*, Terms of the Law. In another, and an old technical, sense, *ley* signifies an oath, or the oath with compurgators; as, *il tend sa ley au pleyatiffe*. Britton, c. 27.

LEY GAGER. Wager of law. An offer to make an oath denying the cause of action of the plaintiff, confirmed by compurgators (*q. v.*), which oath used to be allowed in certain cases. When it was accomplished, it was called the "doing of the law," "*fesans de ley*." *Termes de la Ley*; 2 B. & C. 538; 3 B. & P. 297; 3 & 4 Will. IV. c. 42, § 16.

LEYES DE ESTILLO. In Spanish Law. Laws of the age. A book of explanations of the *Fuero Real*, to the number of two hundred and fifty-two, formed under the authority of Alonzo X. and his son Sancho, and of Fernando el Emplazado, and published at the end of the thirteenth century or beginning of the fourteenth; some of them are inserted in the New Recopilacion. See 1 New Recop. 354.

LIABILITY. Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action; 36 Ia. 226; 57 Cal. 209; 36 N. J. L. 145. This liability may arise from contracts either express or implied, or in consequence of torts committed.

The state of being bound or obliged in law or justice. 36 N. J. L. 145; 36 Ia. 226.

Liability of Ours. The clause "liabilities of ours" includes all liabilities. 43 S. W. 684. See JOINT AND SEVERAL LIABILITY.

LIBEL (Lat. *liber*). In Practice. The plaintiff's written statement of his cause of action and of the relief which he seeks, made and exhibited in a judicial process, with some solemnity of law.

A written statement by a plaintiff of his cause of action, and of the relief he seeks to obtain in a suit. Law, Eccl. Law 17; Ayliffe, Par. 346; Shelf. Marr. & D. 506; Dunl. Adm. Pr. 111. It performs substantially the same office in the ecclesiastical and admiralty courts as the bill in chancery does in equity proceedings and the declaration in common-law practice; Bish. Mar. Div. & Sep. 572-587. In the United States the practice of the ecclesiastical courts has been continued in the use of the terms libel and libellant in divorce proceedings.

The libel should be a narrative, specific, clear, direct, certain, not general nor alternative; Law, Eccl. Law 147; Dunl. Adm. Pr. 113. It should contain, substantially, the following requisites: (1) the name, description, and addition of the party, who makes his demand by bringing his action; (2) the name, description, and addition of the party against whom it is brought; (3) the name of the judge, with a respectful designation of his office and court; (4) the thing or relief, general or special, which is demanded in the suit; (5) the grounds upon which the suit is founded.

The form of a libel is either simple or articulate. The simple form is when the cause of action is stated in a continuous narration, when the cause of action can be briefly set forth. The articulate form is when the cause of action is stated in distinct allegations or articles; 3 Law, Eccl. Law 148; Hall, Adm. Pr. 123; 7 Cra. 394. The material facts should be stated in distinct articles in the libel, with as much exactness and attention to times and circumstances as in a declaration at common law; 4 Mas. 541.

Although there is no fixed formula for libels, and the courts will receive such an instrument from the party in such form as his own skill or that of his counsel may en-

able him to give it, yet long usage has sanctioned forms, which it may be most prudent to adopt. The parts and arrangement of libels commonly employed are:

First, the address to the court.

Second, the names and descriptions of the parties. Persons competent to sue at common law may be parties libellants. The same regulations obtain in the admiralty courts and the common-law courts respecting those disqualified from suing in their own right or name. Married women prosecute by or with their husbands, or by *prochein ami*, when the husband has an adverse interest to hers; minors, by guardians, tutors, or *prochein ami*; lunatics and persons *non compos mentis*, by tutor, guardian *ad litem*, or committee; the rights of deceased persons are prosecuted by executors or administrators; and corporations are represented and proceeded against as at common law.

Third, the averments or allegations setting forth the cause of action. These should be conformable to the truth, and so framed as to correspond with the evidence. Every fact requisite to establish the libellant's right should be clearly stated, so that it may be directly met by the opposing party by admission, denial, or avoidance: this is the more necessary, because no proof can be given, or decree rendered, not covered by and conformable to the allegations; 1 Law, Eccl. Law 150; Hall, Pr. 126; Dunl. Adm. Pr. 113; 7 Cra. 394. But the requirements upon these points are not so strict as in cases of declarations at common law; 7 Cra. 389; 9 Wheat. 386, 401. In no case is it necessary to assert anything which amounts to matters of defence to the claimant; 2 Gall. 485.

Fourth, the conclusion, or prayer for relief and process: the prayer should be for the specific relief desired; for general relief, as is usual in bills in chancery; the conclusion should also pray for general or particular process; 3 Law, Eccl. Law 149; 3 Mas. 503.

Interrogatories are sometimes annexed to the libel; when this is the case, there is usually a special prayer, that the defendant may be required to answer the libel, and the interrogatories annexed and propounded. This, however, is a dangerous practice, because it renders the answers of the defendant evidence, which must be disproved by two witnesses, or by one witness corroborated by very strong circumstances.

The libel is the first proceeding in a suit in admiralty in the courts of the United States; 3 Mas. 504.

"The requirement that a libel *in rem* must state that the property is in the district does not prevent the court from acquiring jurisdiction in the case of a vessel which, being within the district at the time the libel is verified, departs before it is filed, but, returning after the filing, is then seized on *alias monition*." 78 Fed. Rep. 155. (61 Fed. Rep. 213, reaffirmed.)

No *mesne* process can issue in the United States admiralty courts until a libel is filed; 1st Rule in admiralty of the U. S. supreme court. The twenty-second and twenty-third rules require certain statements to be contained in the libel; and to those, and the forms in 2 Conkling, Adm. Pract., the reader is referred. And see Parsons, Marit. Law; Dunl. Adm. Pr.; Hall, Adm. Pr.; Ben. Adm.

In Torts. That which is written or printed, and published, calculated to injure the reputation of another by bringing him into ridicule, hatred, or contempt. 15 M. & W. 344.

Everything, written or printed, which reflects on the character of another and is published without lawful justification or excuse, is a libel, whatever the intention may have been. 15 *id.* 435.

A malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. Bac. Abr. tit. *Libel*; 1 Hawk. Pl. Cr. b. 1, c. 73, § 1; 4 Mass. 168; 2 Pick. 115; 9 Johns. 214; 1 Den. 347; 9 B. & C.

172; 4 M. & R. 127; 85 Ala. 519; 18 S. W. Rep. (Mo.) 1134; 76 Ga. 280; 91 *id.* 494; 84 Wis. 129; 68 Hun 467; 2 Kent 13; Foll. Torts § 286.

A censorious or ridiculous writing, picture, or sign, made with a malicious or mischievous intent towards government, magistrates, or individuals. 8 Johns. Cas. 354; 9 Johns. 215; 5 Binn. 340; 68 Me. 295.

A written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiff, injurious to his trade, or holding him up to hatred, contempt, or ridicule. 7 App. Cas. 741.

There is a great and well-settled distinction between verbal slander and written, printed, or pictured libel; and this not only in reference to the consequences, as subjecting the party to an indictment, but also as to the character of the accusations or imputations essential to sustain a civil action to recover damages. To write and publish maliciously anything of another, which either makes him ridiculous or holds him out as an unworthy man, is held to be actionable, or punishable criminally, when the speaking of the same words would not be so; 1 Saund., 6th ed. 247 a; 4 Taunt. 355; 5 Binn. 219; Heard, Lib. & S. § 74; 6 Cush. 71; 19 Johns. 349; 6 Vt. 489.

The reasons for this distinction between libel and slander are thus stated: (1) a libel is permanent and may circulate through many hands; (2) it shows greater malignity on the part of its author than a slander; (3) it is more likely to lead to a breach of the peace; Brett, Eng. Com. 453.

The presumption that words are defamatory arises much more readily in cases of libel than in cases of slander; 152 Pa. 187.

The reduction of the slanderous matter to writing or printing is the most usual mode of conveying it. The writing may be on any substance and made with any instrument. The exhibition of a libellous picture is equally criminal; 2 Campb. 512; 5 Co. 125 b; 2 S. & R. 91; Odg. L. & Sl. 6, 20, 22. Fixing a gallows at a man's door, burning him in effigy, or exhibiting him in any ignominious manner, is a libel; Hawk. Pl. Cr. b. 1, c. 73, s. 2; 11 East 226; 14 Atl. Rep. (Pa.) 495. So a libel may be published by speaking or singing it in the presence of others; 7 Ad. & E. 233; or by a caricature, a chalk mark on a wall, or a statue; Brett, Eng. Com. 452.

The publication of a libel subjects the person who is legally responsible for it to both civil and criminal liability. The party may bring an action to recover damages and the offender is indictable at common law.

Publication. It must be shown by evidence that there was a writing and that it was published; 7 App. Cas. 741. To constitute a publication the writer must communicate the matter complained of to at least one third person; [1891] 1 Q. B. 527; and a communication to a wife containing reflections on her husband is a publication; 13 C. B. 836; but not where the communication is from her husband; 20 Q. B. Div. 635. The plaintiff must prove the publication; 4 B. & Ald. 143. To read a libellous letter to another is a publication; 16 Misc. Rep. 453; or to dictate it to a stenographer who gives it to another clerk to be copied; [1891] 1 Q. B. 524; but the sending of a writing in an unsealed envelope is not a publication where it is not shown to have been read by others; 95 Tenn. 678. The communication of libellous matter to another, requesting or intending that the latter should publish it, renders one liable as the publisher of a libel; 9 Eng. Rul. Cas. 16; see 36 L. J. Ex. 105; and a client who communicates defamatory facts to his attorney is responsible; 16 So. Rep. (La.) 556.

Where the defendant kept a pamphlet shop and the libel was sold by the defendant's servant in her absence and without her knowledge of its contents, it was held that the defendant was guilty of publishing a libel; 1 Barnardiston, K. B. 806; 2 Sessions Cases 33; see also 5 Burrows 2686, where Mansfield, C. J., said in a like

case that proof of such facts was *prima facie* evidence of publication of the matter, but liable to be contradicted; see also *Lofts* 776.

Where the action was against news vendors for publishing libel by selling a copy of a newspaper containing it, and the jury found that the defendant did not know that it contained any libel and were not negligent in failing to have such knowledge, it was held that they were not liable; 16 L. R. Q. B. Div. 354; 80 Wis. 455; so of a porter who delivers parcels containing libellous handbills in ignorance of the contents of the parcel and in performance of his ordinary occupation; 2 M. & R. 54.

It is well settled that the sale of a newspaper is, *prima facie*, the publication of a libel contained in it, but not if it is shown that the vendor did not know that the paper contained a libel, and that his ignorance was not due to any negligence on his part, that he had no ground for supposing that the paper was likely to contain libellous matter; 80 Wis. 455. An action against the seller of a newspaper containing a libel is not maintainable without proof that some one read the libel; 50 N. Y. Super. Ct. R. 12.

Every repetition of defamatory words is a new publication and constitutes a new cause of action. In publishing a libel one is presumed to intend the natural consequences of his act; 57 Conn. 73; 7 App. Cas. 741. It is not the law of the place where libellous articles are printed but where they are published which makes the words actionable; 25 U. S. App. 90. If a sovereign of a foreign state be the subject of a libel on his character or be defamed, he is entitled to the same redress in the municipal courts of the country of the libeller as any subject of that country; but he cannot complain if the judgment, after a fair trial according to the laws of the country, be adverse to him; 2 Phill. Int. L. 135. See *LEX LOCI*. And an action can be sustained under a statute though the words were also actionable at common law; 25 U. S. App. 99.

Evidence of publication in order to sustain an indictment upon a libel must be to the same effect as in case of a civil action brought thereon. The publication of the libel in order to warrant either civil action or indictment must be malicious; evidence of the malice may be either express or implied. Express proof is not necessary; for where a man publishes a writing which on the face of it is libellous, the law presumes he does so from that malicious intention which constitutes the offence, and it is unnecessary, on the part of the prosecution, to prove any circumstance from which malice may be inferred; 4 B. & C. 247; 18 Md. 177; 3 How. 266; 12 Conn. 262; 16 Mich. 447. See 77 Ga. 172; 81 Wis. 353; 43 Ill. App. 294. Malice need not be shown, and absence of it will only go in mitigation of damages; 68 Hun 474.

What constitutes a libel. One is not liable for words not in their nature defamatory, though special damage result from their publication; 37 Atl. Rep. (R. I.) 637; 17 R. I. 388; 117 Ind. 105. The words must be defamatory in their nature and must in fact disparage the character; 17 N. Y. 57; and if they do not, no action will lie, no matter what the author intended; 119 Ind. 244; see 40 Minn. 291. If the matter is understood as scandalous, and is calculated to excite ridicule and abhorrence against the party intended, it is libellous and indictable as such, however it may be expressed; 13 Metc. 68; 9 N. H. 84; 7 Conn. 266; 10 S. & R. 173; 32 Me. 530; 1 Den. 41; 6 Houst. 52; 76 Hun 314; but wherever the words sued on are susceptible of two meanings, it is a question for the jury to decide what meaning was in fact conveyed to the readers; 7 App. Cas. 741; Newell, Slan. & L. 769.

When suit is brought on words not in themselves actionable, an allegation must be made that they contain a libellous meaning, and where the claim fails to show what that meaning was, there is a failure to show any cause of action; 7 App. Cas. 748.

Any publication which has a tendency to disturb the public peace or good order of society is *indictable* as a libel. "This crime is committed," says Professor Greenleaf, "by the publication of writings blaspheming the Supreme Being, or turning the doctrines of the Christian religion into contempt and ridicule; or tending by their immodesty to corrupt the mind and to destroy the sense of decency, morality, and good order; or wantonly to defame or indecorously to calumniate the economy, order, and constitution of things which make up the general system of law and government of the country; to degrade the administration of government or of justice; or to cause animosities between our own and any foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; and by malicious defamations expressed in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is living, and thereby to expose him to public hatred, contempt, and ridicule. This descriptive catalogue embraces all the several species of this offence which are indictable at common law; all of which it is believed are indictable in the United States, either at common law or by virtue of particular statutes." 3 Greenl. Ev. § 164. See 4 Mass. 163; 9 Johns. 214; 4 M'Cord 317; 4 Mass. 115; 34 Me. 223; 3 How. 266; 5 Co. 125; 4 Term 126; 5 Binn. 281; 81 Wis. 120; 49 Kan. 42.

Libels have been classified according to their objects: (1) libels which impute to a person the commission of a crime; (2) libels which have a tendency to injure him in his office, profession, calling, or trade; (3) libels which hold him up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man. Newell, Slan. & L. 67.

In the following cases the publications have been held to be *actionable*: to write to a person soliciting relief from a charitable society, that she prefers unworthy claims, which it is hoped the members will reject forever, and that she has squandered away money, already obtained by her from the benevolent, in printing circulars abusive of the secretary of the society; 12 Q. B. 624; to publish of the plaintiff, that, although he was aware of the death of a person occasioned by his improperly driving a carriage, he had attended a public ball in the evening of the same day; 1 Chit. Bail. 480; to publish of a Protestant archbishop that he endeavors to convert Roman Catholic priests by promises of money and preferment; 5 Bingh. 17; to charge in a publication that persons have confederated to mismanage the affairs of a company, so as to destroy the value of its stock and injure the other shareholders; 73 Tex. 8; to publish a ludicrous story of an individual in a newspaper, if it tend to render him the subject of public ridicule, although he had previously told the same story of himself; 6 Bingh. 409; to publish of a candidate for congress that he is a "pettifogging shyster"; 40 Mich. 241; or to write and publish of any man that he is "thought no more of than a horse thief and a counterfeiter"; 10 Mo. 649; or that he is slippery; 67 N. W. Rep. (Minn.) 646; or that he is a dangerous, able, and seditious agitator; 64 id. 931; or to publish of a member of congress, "He is a fawning sycophant, a misrepresentative in congress, and a grovelling office seeker"; 9 Johns. 214; or to charge one with joining the Mormons; 17 N. Y. S. 491; or in a newspaper article to call a person named Buckstaff, Bucksriff, because of its similitude to "Pecksniff"; 84 Wis. 139; or for a notary public falsely and maliciously to protest for non-payment the acceptance of a manufacturer and then send the draft with such protest to the source from whence it came; 88 Ga. 308; but see 83 Tex. 452; publications that a party was arrested and lodged in jail charged with theft; 84 Tex. 450; or words

imputing want of chastity; 152 Pa. 187; 6 Ind. App. 510. See 3 Cra. 8; 43 Vt. 352; 17 Gratt. 250; 47 Cal. 207; 105 Mass. 394; 13 L. R. A. 97, note.

A declaration which alleges that the defendant charged the plaintiff, an attorney, with being guilty of "sharp practice," which is averred to mean disreputable practice, charges a libellous imputation; 4 M. & W. 446.

An advertisement describing a horse as stolen and naming the supposed thief is libellous; 83 Minn. 249; so a newspaper article setting forth that the plaintiff was living in extreme poverty and destitution was held a libel; 3 Hun 26; so words which tend to impeach the honesty and integrity of jurors in their office are libellous; 2 Col. Ter. 603; and the publication of false and malicious statements about a church member, accusing him of disturbing the peace of the church and censuring him therefor, is actionable in itself; 93 Ind. 19; and the publication of the suicide of a man falsely charging that it was induced by the actions of his wife; 59 Wis. 309.

A publication in a newspaper of symptoms of a patient who had taken a certain patent medicine, such article being used as an advertisement, is libellous where it tended to hold the person up to contempt and ridicule; 76 Ga. 280; a letter from the publisher of a newspaper, or an article published in a newspaper in the form of a letter from the publisher to the proprietor of a medicine, saying: "Your advertisement will not be received in the columns of the L. although you offer us big pay. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled out of their money," was held libellous *per se*; 95 Wis. 164; a publication stating that a man has been arrested on account of his criminal evidence in a certain case is libellous; 23 W. N. C. Pa. 541; or that he would be an anarchist if he thought it would pay; 32 Atl. Rep. (Md.) 246; and a publication charging that a breach of promise suit was about to be brought against a person is libellous, the plaintiff having been at the time and a number of years before a married man with a family; 128 N. Y. 207.

An editor copying a libellous article from another paper, giving his authority but expressing his disbelief of some of the charges, although neither affirming nor denying the libellous charges, may be guilty of libel, whether malice be shown or not; 2 Hill 510. The headlines of a publication are important in determining the question of a libel, and they cannot be disregarded, for they often render a publication libellous on its face, which without them would not necessarily be so; 63 N. W. Rep. (Minn.) 615.

Libel or slander against a patent right is actionable; 20 Fed. Rep. 501; 65 Ga. 452; 119 Mass. 484; and a public denial of a patent right, if malicious, is also actionable; Big. Lead. Cas. Torts 42; but not unless special damage is caused; 5 Q. B. 324; L. R. 9 Ex. 218. A public denial that the patentee or his assignor was a true inventor is actionable if it be malicious and cause special damage to the owner of the patent; L. R. 15 Ch. Div. 514; 34 Fed. Rep. 46. But an assertion of title in such cases by way of warning or defence, if made in good faith, is not actionable; Webb's Poll. Torts 389.

A patentee may warn the public not to buy patented articles except from him; 33 Sup. Ct. N. Y. 523; 59 How. Fr. 356; and it is not a libel to issue a circular forbidding persons to buy articles claimed to be an infringement, if it is done in good faith; L. R. 25 Ch. Div. 1. There must be malice or that want of good faith which is, by legal intendment, equivalent thereto; 19 Ch. Div. 386; L. R. 4 Q. B. 780, in which it was termed "an action of a new kind." But see L. R. 9 Ex. 218, in which a declaration was held good where the disparagement was a statement that the goods were inferior, and alleging special damage. In that case Bramwell, B., said that the gist

of the action which makes it maintainable is the publication of an untrue statement productive of special damage. The nature of the action was thus characterized in [1892] 2 Q. B. 527: "Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title." The latter, it is said, having been formerly confined to real estate, has been extended "to the protection of title to chattels and of exclusive interests analogous to property, though not property in the strict sense, like patent-rights and copyright." Webb's Poll. Torts 389. The suggestion that these rights are not property in any sense is liable to provoke criticism in this country, and it may be suggested that it is their full recognition as property which affords the basis of their protection by right of action at law in such cases.

But not alone are patents within the protection of this principle. It is a general rule that for false and malicious statements respecting his personal property the owner may have an action if he show (1) that statements were made (2) which were untrue (3) to the special damage of the plaintiff; 9 Eng. Rul. Cas. 130; 5 Q. B. 624; L. R. 9 Ex. 218; 122 Mass. 235; 144 id. 258; 146 id. 219; 4 Wend. 587; 63 Pa. 46; 4 U. C. Q. B. o. s. 24; Townsh. Sl. & Lib. § 204; Newell, Defamation 216.

The rule has been applied in case of disparaging statements as to a public dinner served at a hotel; 144 Mass. 258; the "Cardiff Giant"; 122 id. 235; a race-horse; 35 Minn. 471; milk sold by plaintiff; 91 N. Y. 83; copyrighted books; 5 Cush. 104.

Defences. When publication is proved, the defendant may show either that the words complained of are true or that they are not malicious. These two defences are known as justification and privilege.

In prosecutions the common-law rule was that the person charged may not justify by pleading the truth in evidence; 11 Mod. 99; because, if the publication is malicious, it is equally to the public interest to punish the publisher of it, whether it was true or not.

By Lord Campbell's Act 6 & 7 Vict. c. 96, § 6, it is provided that in an indictment for libel, the truth may be inquired into, but shall not amount to a defence unless it is for the public benefit that the matters charged should be published. This statute does not apply to blasphemous, obscene, or seditious publications; 9 Ir. L. R. 329; 2 Cox. C. C. 45; 15 id. 180; 12 L. R. Ir. 29; and where the statute does not apply, truth is no defence; 10 Cox. C. C. 356; 5 Q. B. D. 1; 4 F. & F. 1089; 49 L. J. M. C. 1; 28 W. R. 183. In this country it has been held that on an indictment for libel the truth is a justification and may be given in evidence; 4 Wend. 114; 3 Johns. Cas. 336; 1 Va. Cas. 175; 30 Ohio St. 115; and that though ordinarily not a defence, it may be given to negative malice where justifiable purpose is shown; 3 Pick. 304; but the law in Massachusetts was subsequently changed by statute so that the truth, with good motives and for justifiable ends, is a complete justification; 9 Eng. Rul. Cas. 194. As to statutes in other states, see *infra*.

In a criminal prosecution, it is sufficient publication if the libel has been shown to the prosecutor and to no other person, as such a publication tends to a breach of the peace; Hob. 215; 1 Stark. 471; 7 Cox. C. C. 25.

By the Libel Law Amendment Act, 1888, § 8, the permission of a judge has to be obtained previously to the institution of criminal proceedings against a libellor, and such permission is only given when, from the circumstances of the case, a remedy by civil action will not be sufficient; [1892] 1 Q. B. 86; 61 L. J. M. C. 91; 40 W. R. 175; 17 Cox. C. C. 464. See 9 Eng. Rul. Cas. 185; LIBERTY OF THE PRESS.

Justification. In civil actions for libel the defendant may justify by pleading the truth in evidence; 1 R. I. 263; 6 La. Ann. 254; 5 Sandf. 54; 4 Sneed 520; 15 Wash.

542; but the truth must be as broad as the defamatory accusation in order to constitute a complete defence; 37 Minn. 285. It is not sufficient merely to allege that the charge is true; 29 Mo. 429; 5 Blatch. 332; 13 W. Va. 158; and the plea of justification is that the whole statement is substantially true; 7 Moo. 200; 3 B. & Ald. 673; gross exaggeration destroys the plea; 6 Bing. 266. The existence of a rumor to the same effect as a libel is not admissible as evidence on a plea of justification; 8 Q. B. D. 491.

It has been held that if the defendant fails to plead a complete justification, he will not be allowed to prove his defence; 1 Abb. N. C. 268; although the rule is generally established that a defendant may justify part of a libel containing several distinct charges; 7 East 493; 2 Bing. N. C. 664. Either party is entitled to a bill of particulars of any charge not set forth with sufficient detail in the pleadings to enable the party to meet it; 59 N. Y. 176; 15 Pick. 321; 126 Ill. 150; 91 Pa. 493; but see 1 Abb. N. C. 268, where it was held that the proper practice to obtain particulars of a justification is by motion to make the answer more definite.

A plea of justification is no evidence of malice; 7 Q. B. 63; 14 L. J. Q. B. 196; 18 Law Times 527. In an action for libel, under plea of not guilty, evidence is admissible in mitigation of damages that there was a general suspicion and belief of the truth of the charge, and under the plea of privileged publication such evidence is admissible as pertinent to the question of express malice; 23 Fla. 595.

Privilege. Publications considered privileged in actions for libel are divided into those which are absolutely privileged and those which are conditionally or qualifiedly privileged; 38 Fla. 240. All charges made before a proper church tribunal are privileged, whether made as the foundation for action or during the course of the proceedings; 51 Vt. 501; 88 Ga. 620 (but slanderous words spoken to a former pastor of a church are not privileged; 26 Atl. Rep. (Vt.) 488). A plea that an accusation against a clergyman (otherwise libellous *per se*) is a good plea of qualified privilege when it asserts that it was preferred according to the usage and discipline of the church; 61 N. W. Rep. (Neb.) 588; and the collecting of evidence against a school principal and sending a copy of charges against her to the board of education and to her, is privileged and not a publication; 31 N. Y. Supp. 561. Pleadings filed in a proceeding before the Interstate Commerce Commission are privileged; 72 Fed. Rep. 803. Communications between a stockholder and the managing agent of a corporation concerning an employee are privileged; 78 Fed. Rep. 460. A commercial agency which makes it its business to pry into the affairs of another to give information thereof to others must see to it that it communicates nothing that is false, and if it does, it will be liable in damages to the party injured; 77 Ga. 172; publications of such agencies issued to their subscribers generally are not privileged communications; 72 Tex. 115; a false publication that a business house is insolvent is libellous *per se*; 116 Mo. 226. The publication of a railroad company in a monthly circular to their servants of the name of a former employee and the reason of his dismissal was held to be privileged; 2 Q. B. (1891) 189. No allegation, however false and malicious, contained in answers to interrogatories in affidavits duly made, or any other proceedings in courts of justice, or petitions to the legislature, are indictable; 4 Co. 14 b; 2 Burr. 807; 1 Saund. 131, n. 1; 2 S. & R. 23; 81 Ga. 238; 76 La. 593; 72 Tex. 583; 46 Ill. App. 813; see 97 Mo. 122; 1 Q. B. 65; 61 L. J. Q. B. 21, 727; 83 Ky. 375; 104 N. C. 575; 43 La. Ann. 454; 64 Hun 118.

In all cases of libels published confidentially, and other privileged communications, express malice must be shown, or inferred from circumstances, and this is always a question for a jury; 8 B. & C.

579; 30 Me. 466; 3 Pick. 379; 1 Hawks 472; 87 Pa. 385. See 73 Mich. 445; 40 Minn. 475; 83 Va. 106.

Libels in special cases. The public acts of public men may be lawfully made the subject of comment and criticism, not only by the press but also by the public; but while criticism, if in good faith, is privileged, however severe, false allegations of fact are not privileged, and if the charges are false, good faith and probable cause are no defence, though they may mitigate the damages; 16 U. S. App. 613; 4 Mass. 169; 81 N. Y. 116; 40 Mich. 307.

The freedom of criticism upon public men is confined to fair comment on their official acts and does not permit an assault on their private character; 55 Fed. Rep. 456. The imputation of base, unworthy, or corrupt motives is not privileged; for the falseness of the charge is *prima facie* evidence of malice, and malice will render even the truth actionable; 33 N. E. Rep. (Ohio) 921; nor does the right of criticism embrace any right to make a false statement of his acts, involving his integrity or faithfulness in the discharge of his duties; 48 N. W. Rep. (Mich.) 507. Memorials or petitions addressed to those in authority praying for the removal of inferior officers, or the redress of fancied grievances, are *prima facie* privileged, and express malice must be shown before that privilege can be taken away; 1 Lev. 140; 6 C. & P. 548; 5 El. & Bl. 344; 3 How. 266; 17 N. Y. 190; 15 R. I. 72; if presented to the wrong party under a *bona fide* mistake, it will still be privileged; 5 B. & Ald. 642; 13 U. C. Q. B. 534; *contra*, 10 Q. B. 899; but if malice be shown, the mere fact that it is vented through a petition will not privilege the publication; 21 Wend. 319; 2 S. & R. 23. Malice may be inferred when it is printed and circulated but never presented before the legislature; 9 N. H. 34; the publication of falsehood and calumny against public officers or candidates for public office is an offence most dangerous to the people and deserves punishment, because the people may be deceived and reject the best citizens to their great injury; 151 Mass. 50; 79 Mich. 266; 74 Tex. 89; 93 Ky. 347; 103 Cal. 114; 117 Pa. 620; 5 Johns. 1.

With regard to candidates for public office, a somewhat broader license is allowed, as it is claimed that the very fact of candidacy puts the character of the candidate in issue, so far as his qualifications and fitness for the office are concerned, and that the public have a right to be informed as to the character of those who seek their votes; 4 Mass. 163; 1 N. & McC. 347. In some cases it is held that where there is an honest belief in the truth of the charges made, and the publication is in good faith, one is not responsible, even for publishing an untrue; 46 Ia. 533; 60 id. 251; 64 Tex. 354; 111 Pa. 404; but the weight of authority tends to uphold the principle that false allegations are not privileged, and good faith and probable cause constitute no defence; 59 Fed. Rep. 530; 8 C. & P. 222; 21 Fla. 431; 136 Mass. 164; 36 S. W. Rep. (Tex.) 765; 66 Mich. 307; 17 Wend. 63; 16 La. 176; 69 Pa. 103; 42 N. E. Rep. (N. Y.) 270. See JUDGE. Charging a candidate for office with having violated the laws and taken unlawful fees is libellous *per se*. Although the charge was made on a proper occasion and from a proper motive, the defendant is liable when he not only fails to show the truth of the statement, but also that it was based on probable cause. It is not enough to show that the defendant had information which led him to believe it to be true; the circumstances leading to that belief must be shown in order that it may appear whether or not his belief was well founded; 4 Pa. Super. Ct. 253.

In criticising a publication one may make use of ridicule however poignant, as every man who publishes a book commits himself to the judgment of the public; 1 Campb. 355; 66 N. W. Rep. (Mich.) 225; but a critic may not attack the private character of the author; 7 Car. & P. 621; 3 id. 311; 2 Moo. & R. 3.

If the author's writings are ridiculous he

may be ridiculed; if they show him to be vicious his reviewer may say so; 24 Wend. 434; but to accuse one of writing and disseminating works calculated to debauch and demoralize the public mind is libellous; 6 Abb. Pr. n. s. 9; and it is a question for the jury, whether a criticism of a dramatic work is such as might be pronounced by any fair man, however prejudiced and however obstinate his views; L. R. 20 Q. B. Div. 275; and so where the criticism concerns an artistic production it is held that any man may express his opinion, however mistaken that opinion may be, and however unfavorable to the merits of the artist or architect, if fairly reasonably and temperately expressed, even though through the medium of ridicule 1 Moo. & M. 741, 187.

International law forbids a libel on a state for the same reason that municipal law forbids a libel on an individual. This right of the state is not invaded by a free discussion of, and criticism upon, the external acts of the state. A state has no complaint if it has the same protection as the individual. And courts of justice are open in both cases for the vindication of the offended party; 2 Phill. Int. L. 48.

Extent of the liability of newspapers for libellous articles. The proprietor of a newspaper is responsible for a libel therein, although inserted without his knowledge by the editor; 104 Pa. 408; and where the proprietor is also the editor he is liable for a libel inserted by his assistant editor; 19 N. Y. 175; the mere fact that he was absent, although he had left instructions not to insert libellous matter, will not exonerate him; 1 Ind. 345; see 121 N. Y. 199. The general principal is well established that the publisher is civilly liable for all that appears in his paper, whether with or without his knowledge; 60 Ill. 51; 25 La. Ann. 170; 35 Mich. 371; 48 Mo. 152; even where it is the result of mistake; L. R. 10 C. P. 502; but not where the mistake was caused innocently by the compositor in setting up illegible copy; 46 Mich. 408. The secretary and treasurer of a public corporation who is also one of the stockholders is not personally liable for a publication in the absence of anything to show that he knew of or consented to it; 10 Daly 202; but if the stockholder is also the general manager of the paper he will be liable if the publication is unjustifiable; 3 Cent. Rep. (Pa.) 301. This liability is not affected by the fact that he does not know of the publication of the article, for it is his business to know, and mere want of knowledge is no defence; 65 N. W. Rep. (Wis.) 744; one of the partners is liable for what is done by the others in publishing libellous matter; 2 Dill. 244; and the malicious intent of one partner renders his co-partner liable; 133 Mass. 471. Where the libellous matter is inserted by a reporter without the knowledge or consent of the proprietor, the latter is liable only to the extent of compensatory damages and he will be visited with punitive damages only upon proof by which his approval of his employees' conduct can be legally inferred; 50 N. J. L. 481.

In Massachusetts when the truth of the publication is established there must be shown, in order to render the proprietor liable, that he, in a legal sense, actually participated in or authorized the publication with an actual malicious intent; 136 Mass. 441.

During the present decade there has been a tendency towards legislation mitigating the rigor of the common-law liability for libel on the part of publishers of newspapers, and the agitation on this subject has resulted in the passage of statutes in several states having this purpose in view. The demand for this legislation has been in no sense the result of popular recognition of a general grievance, but an effort on the part of the newspaper press to escape liability for the natural results of the modern tendency to the violation of the most ordinary rights of privacy.

Utah provides in behalf of newspapers of that state, that if it appears that the libel

was published in good faith or by mistake, and a retraction was published in full as conspicuously and in the same place as the libel, within a specified time, the plaintiff can recover only actual damages; but this does not apply to a statement about a candidate for public office unless retraction is made by an editorial a certain time before election. Laws 1896, ch. 32. By a statute of Indiana the publisher is protected against punitive damages by a full retraction; it also requires that before bringing action a notice must be served upon the publisher specifying the matter complained of; Laws 1895, ch. 45. A Michigan statute makes the granting of punitive damages dependent on a request for retraction; Laws 1895, ch. 216. In New York the delivery of a libellous statement for publication is constituted a misdemeanor. Laws 1890, ch. 340. A statute in Missouri requires that in actions of libel justification and mitigation shall be stated separately by the defendant. Laws 1891, ch. 70. Georgia limits the common-law liability of newspaper publishers in actions of libel by enacting that "a fair and honest report of the proceedings of legislative or judicial bodies, or court proceedings, or a truthful report of information received from any arresting officer or police authorities, shall be deemed privileged communication, and in any action brought for newspaper libel the rule of the law as to privileged communications shall apply." Laws 1894, ch. 131.

By the Pennsylvania Libel Act of July 1, 1897, it is enacted: § 1. That in criminal prosecutions for libel "if the matter charged as libellous is in the opinion of the court proper for public information, the truth may be given in evidence." § 2. That no defendant can be convicted of the same libel upon the same individual in more than one county. § 3. A plea of justification shall be adequate when it alleges "that the publication is substantially true in every material respect and is proper for public information; and if such plea shall be established to the satisfaction of the court and jury there shall be no recovery. Damages in a civil action are limited to just restitution actually sustained." Laws 1897, ch. 204.

It is for the jury to say what the defendant charged against the plaintiff, and what the reading public might reasonably suppose he intended to charge; 59 Fed. Rep. 530. Where the purport of the publication is plain and not ambiguous, the question in a civil action whether it is libel or not is a question for the court; 60 Fed. Rep. 592.

On a plea of justification, evidence is admissible to prove that the character of the plaintiff is bad; 4 Watts 347; this testimony is admissible for the purpose of establishing a measure of justice between the parties, because the extent of the injury, if any, which the plaintiff sustains, depends in some degree at least upon the goodness or badness of his general character before the publication of the libel, and the amount of compensation ought to be commensurate with, and bear some proportion to, the extent of the injury; 178 Pa. 481; but evidence as to reputation upon the question of damages must be confined to the reputation for that particular trait of character which is involved in the libellous charge; 16 U. S. App. 613.

A publisher cannot be charged with the personal malice of his employee; 2 Moo. & R. 101; and he is not liable for exemplary damages for the actual malice of his subordinate unless he participated in or ratified and confirmed the act; 57 Wis. 570. Express malice in libel cases may be shown not only in the existence of animosity against the plaintiff, but also by a reckless and wanton carelessness,—a wanton neglect to ascertain the truth of the publication. In a newspaper the means of ascertaining are readily attainable, and in such cases punitive damages may be awarded; 26 U. S. 167. Evidence that plaintiff had recovered judgment against another newspaper for the publication of the same libel

is immaterial and inadmissible; 78 Fed. Rep. 769, citing the following: Printing Association v. Smith, 14 U. S. App. 173; 8 C. C. C. A. 91; 55 Fed. Rep. 240.

An offer to publish an interview with or a letter from the plaintiff is not a retraction; 38 U. S. App. 394.

Injunction to restrain libels. The power to restrain by injunction, or even by interlocutory injunction, the publication of an alleged libel, on the ground of injury to character and reputation, was a jurisdiction considered unknown to the law of England. Recently, however, it has been held that jurisdiction was conferred by the Common Law Procedure Act, 1854, to prevent by injunction the publication of "atrocious" libels. This alleged jurisdiction has shared with the use of the equitable remedy in connection with labor troubles the credit of giving rise to the phrase, lately so much in vogue,—“government by injunction.” Under the English decisions, it is said to be conceded that the power exists, and that prior to 1883, except in cases where there was injury to property alleged, no such power was ever claimed or exercised; 22 Law Mag. & Rev., 4th ser. 67; Folkhard, Lib. & Sl., ed. 1897, 379; 3 Va. Law Reg. 629; 13 Law Quart. Rev. 361. Speaking with precision, the only case in which an injunction had been granted to restrain the publication of a libel as such was that by Chief Justice Scroggs, in 1680, in a decision which was one of the grounds of his impeachment. See 8 How. St. Tr. 198. In 2 Campb. 511, a dictum of Lord Ellenborough states that an injunction would have been granted against the exhibition of a libellous picture, but it was expressly disapproved in 20 How. St. Tr. 799.

The nearest later approach to it was in the decisions of Malins, V. C., in Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, and Dixon v. Holden, 7 id. 488, so much discussed in connection with labor troubles (see STRIKE), and which were distinctly overruled by the court of appeal as in conflict with settled equity practice, in Prudential Assurance Co. v. Knott, L. R. 10 Ch. App. 143.

It was five years after this that Jessel, M. R., gave expression to his opinion that the Procedure Act gave jurisdiction to the common-law courts to enjoin the publication of libels, an opinion which in that case has been characterized as a dictum, but later the court of appeal held that the power did exist, and the same judge, then sitting, said that an interlocutory injunction might be granted against the publication of a libel however atrocious it might be, and for injuring only character and reputation. The reasoning by which this conclusion was supported was that the Procedure Act, 1854, and the Judicature Act, 1873, transferred all the jurisdiction of the separate courts to the high court and authorized an interlocutory injunction in any case in which it should appear to the court "just or convenient." This he considered gave "unlimited power to grant an injunction in any case where it would be right or just to do so, according to settled legal reasons, or on any legal, settled principle." 20 Ch. Div. 501. The court of appeal again declared in favor of the jurisdiction, but said that it was such "as to require exceptional caution in its use;" [1891] 2 Ch. 260. And this expression was emphasized not only by the refusal of the injunction but also by a quotation from Lord Esher, M. R., that "the jurisdiction is of a delicate nature and should only be exercised in the clearest cases, where, if the jury did not find the matter libellous, the court would set aside the verdict as unreasonable." 3 Times L. R. 846; see, also, 37 Ch. Div. 170.

These cases are examined and the doctrine, admitted to have been declared in them, severely criticised by Folkhard, who concludes: "That the jurisdiction introduces an undesirable and inconvenient degree of uncertainty into the practice and procedure of the courts; that the cautious language with which the courts have dealt with the

subject is sufficient of itself to raise doubt; that the injunction is inappropriate and unconstitutional because it would deprive a defendant of a right secured by Fox's libel act to move in arrest of judgment when tried or convicted of libel. The opinion is further expressed that the manner in which the courts have dealt with the subject indicates a caution which is likely to result in making the new jurisdiction a dead letter; 22 Law Mag. & Rev., 4th ser. 63. This view is thought by him to be justified by the refusal of an injunction in a recent case where he thinks the exercise of the new jurisdiction would have seemed proper if it ever could be so, as after a verdict for heavy damages and judgment against him for libel, the defendant persisted in repetitions of it; [1891] 2 Ch. 294. But in that case the decision was that an interlocutory injunction will not be granted to restrain the publication of a libel unless the court is of the opinion that injury will be caused to the plaintiff's person or property by a continuance of the publication, and hence when the libel, though unjustifiable, is of such a character that no one would attach the slightest weight to it, the injunction would be refused. In another case an action of libel was brought in the Chancery Division and an interlocutory injunction asked which the court refused; [1891] W. N. 64. And it is said that, with the exception of a case of trade libel, the court will not grant an injunction to restrain a libel before the case has been submitted to a jury; 67 Law T. N. s. 263.

An interlocutory injunction was granted to restrain the continuance of the publication of a poster headed "A Black List," which gave the names of non-union men employed by A, it being considered that the motive was to inflict a continuous injury from day to day upon A and his men, and the order was affirmed by court of appeal; 72 L. T. 342; s. c. 11 Times L. R. 228, 180. In this case it was held that the trade union having done more than was necessary for their own protection, the injunction was properly granted.

In this country the subject has been dealt with as it originally stood in England before it was complicated by the question of statutory construction and the resulting decisions. The question in the United States is more or less affected by considerations growing out of the constitutional guaranty of liberty of the press. See *infra*. There is no authority to support the doctrine that a libel may be enjoined except in cases where some right of property is involved, and a large majority of the cases have arisen in connection with statements made or circulars issued concerning patent rights.

It has been held by authorities of great weight that equity will not enjoin the publication of a libel on a patent right; 29 Fed. Rep. 95; 28 Fed. Rep. 773. This latter case was an ancillary bill to enjoin the defendant in pending proceedings on certain patent rights from uttering libellous or slanderous statements concerning the business of the plaintiff, or the validity of their said letters patent or their title thereto. It was filed during the trial of the principal suit, which was brought to restrain the infringement of the patents. Bradley, J., in denying the injunction, said that the application was a novel one. The following cases were cited by him as ruling against it: 114 Mass. 69; 119 Mass. 484; 7 Daly 183; 3 Paige 24; 55 How. Pr. 132; 50 Ga. 70; 3 Mo. App. 173. He did not consider the contrary decision in 59 How. Pr. 356 as a sufficient authority to counteract these cases. He further said that the English authorities (L. R. 7 Eq. 488; 14 Ch. Div. 763, 864; 26 Ch. Div. 306) were based upon statutes and not upon general principles of equity jurisprudence. He cites the case in 10 Ch. App. 143, Cairns, C., as in line with the American cases referred to by him. As to the English cases, see *supra*.

This decision by Bradley, J., went so far as to hold expressly that even if malice were shown an injunction would not be granted against the wrong threatened.

This case was undoubtedly in accord with the view prevailing at the time it was decided, and there are later cases which hold that an injunction will not be granted to restrain a publication which is a libel on the plaintiff's business; 1 Ohio N. P. 266; or to restrain one who believes that he is the owner of a patent, and that no other person has title thereto, from stating his claim as a mere belief; 60 Ill. App. 372; or to restrain slander of title to property on the mere allegation of defendant's insolvency; 36 Fla. 99. So an interlocutory injunction restraining the publication of a libel until the trial of the action was refused where there were conflicting affidavits as to whether the plaintiff had or had not consented to the publication; [1894] 1 Q. B. 671, where it is considered under what circumstances an interlocutory injunction will be granted in cases of libel.

It was held that an injunction will not be granted against the circulation of a slander or libel, even where it appeared that it might tend to injure the business or employment of the person affected; 47 N. J. Eq. 519; 110 Mo. 492; nor even interlocutory until trial; *id.* The power to grant injunctions has also been denied in cases of libel or trade-mark; 55 How. Pr. 132; 56 N. Y. 115; 19 Ch. Div. 886.

But the doctrine upon which these decisions rest, that in no case would an injunction issue to restrain such publication, has not been uniformly followed, and an instructive note in which many cases are collected concludes that "the weight of authority as shown by the later cases is to the effect that such an injunction may be granted if the threats to prosecute for infringement are not made in good faith, and only in such cases;" 16 L. R. A. 243; 59 How. Pr. 356; 57 N. Y. 119; 38 Barb. 210; 45 N. J. L. 167. Where false circulars were issued for the purpose of intimidation, threatening suits for infringement, and a collusive decree was obtained purporting to be an adjudication on the merits, an injunction was granted against the use or publication of such decree; 92 Mich. 558; but equity will not restrain the plaintiff in a patent case from publishing a notice that the defendant therein had been enjoined; 32 Fed. Rep. 345.

And where the defendant issued circulars threatening to bring suits for infringement against persons dealing in plaintiff's patented article, and the charges of infringement were not made in good faith, but with malicious intent to injure plaintiff's business, the court distinguished the case from that in 28 Fed. Rep. 773, *supra*, because the defendant appeared to have threatened suits which he did not intend to bring, and an injunction was granted; 34 Fed. Rep. 46, per Blodgett, J.

In a still later case Mr. Justice Brown thus states the limits within which equity will permit the use of an injunction:

"It is sufficient to say that, even if it be conceded that a court of equity has power upon petition of a defendant to enjoin the plaintiff from publishing libellous statements concerning his business, there would seem to be no good reason why a patentee may not notify persons using his device of his claim, and call attention to the fact that, by selling or using it, they are making themselves liable to a prosecution. There is undoubtedly authority for holding that, if the language of such letters or circulars be false, malicious, offensive, or opprobrious, or used for the wilful purpose of inflicting an injury, the party is entitled to his remedy by injunction; and this is the extent to which the authorities go. Upon the other hand, it would seem to be an act of prudence, if not of kindness, upon the part of the patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others, and in such cases an injunction has been uniformly denied." 44 Fed. Rep. 19; see also, 81 Fed. Rep. 904.

As to whether an injunction against a publication is an interference with the constitutional guaranty of the freedom of speech and of the press, the decisions, al-

though apparently conflicting, support the doctrine that where property rights are involved, this provision is no bar to equitable interference, where the question of libel has been determined in an action at law; 7 Daly 183; 13 Weekly L. Bul. (Ohio) 335; 8 Paige 24; 110 Mo. 892; 13 Mo. App. 173. In the last case an injunction was refused, although the statements were injurious to a property right, and it was held "that courts of justice can do nothing by way of judicial sentence which the general assembly has no power to sanction," and as the general assembly can pass no law abridging the liberty of speech or of the press, that the right to speak, write, or print cannot be suspended by the court. In 135 Ind. 471, it was expressly decided that the constitutional guaranty of freedom of the press and of speech is not a protection against equitable interference with the publication of false and injurious statements, accompanied by threats.

Where a publication is in violation of a contract it will be enjoined, and the liberty of the press will not protect the wrongdoer; 31 Mich. 490; 24 S. E. Rep. (N. C.) 212. See 32 L. R. A. 829, n. See LIBERTY OF THE PRESS.

The question what are the respective powers and duties of court and jury in trials of indictments for libel has given rise to one of the most interesting of legal controversies. For the history of the controversy upon the right of the jury to determine both law and fact in criminal cases, and the American and English authorities, see JURY.

Lord Mansfield, in 5 Burr. 2661, and in 20 How. St. Tr. 892, and Mr. Justice Buller, in the Dean of St. Asaph's case, 21 How. St. Tr. 847, charged the jury that the only questions for them were whether the defendants had printed and published the paper in question, and whether the innuendoes therein were truly intended as avowed in the indictment, and that it was for the court alone to say whether the paper was a libel or not. This was stoutly denied to be the true state of the law, and accordingly an act known as "Fox's Libel Act" was passed in 1792, declaring that the jury may give a general verdict of guilty or not guilty in all such cases upon the whole matter put at issue, and shall not be required to find defendant guilty on mere proof of publication, and of the sense ascribed to the same in the indictment.

This statute is now generally conceded to be declaratory of the common law. The judge should instruct the jury as to what a libel is, and then leave it to them to say whether the facts necessary to constitute the offence have been proved to their satisfaction; 63 Pa. 253; 18 id. 489; 1 Minn. 156; 23 Vt. 14; 2 Campb. 478; 13 Metc. 120; 29 Me. 323; 21 How. St. Tr. 922; see 96 Mich. 587. See, generally, Wharton; Bishop, Crim. Law; Starkie; Heard; Townsend; Odger, Lib. & Sl.; 9 L. R. A. 621, note. See LIBERTY OF PRESS; JUSTIFICATION; MALICE; PRIVILEGED COMMUNICATION; INJUNCTION; NEWSPAPER; CRITICISM; SLANDER; JUDGE; JURY; SCANDALUM MAGNATUM. CRIMINAL LIBEL; LIBELOUS.

LIBEL OF ACCUSATION. In Scotch Law. The instrument which contains the charge against a person accused of a crime. Libels are of two kinds, namely, indictments and criminal letters.

LIBELLANT. The party who files a libel in an ecclesiastical, divorce, or admiralty case, corresponding to the plaintiff in actions in the common-law courts.

LIBELLEE. A party against whom a libel has been filed in proceedings in an ecclesiastical court or in admiralty, corresponding to the defendant in a common-law suit.

LIBELLUS (Lat.). In Civil Law. A little book. *Libellus supplicis*, a petition, especially to the emperor; all petitions to whom must be in writing. L. 15. D. in *jus voc.* *Libellum rescribere*, to mark on such petition the answer to it. L. 2, § 2, Dig. de

jur. fisc. *Libellum agere*, to assist or counsel the emperor in regard to such petitions, L. 12 D. de *dist. pign.*; and one whose duty it is to do so is called *magister libellorum*. There were also *promagistri*. L. 1, D. de *offic. pref. pract.* *Libellus accusatorius*, an information and accusation of a crime. L. 17, § 1, & L. 29, § 8, D. ad *leg. Jul. de adul.* *Libellus divortii*, a writing of divorce. L. 7, D. de *divort. et repud.* *Libellus rerum*, an inventory. Calv. Lex. *Libellus or oratio consultoria*, a message by which emperors laid matters before the senate. Calvinus, Lex.; Suet. Cæs. 56.

A writing in which are contained the names of the plaintiff (actor) and defendant (reus), the thing sought, the right relied upon, and name of the tribunal before which the action is brought. Calvinus, Lex. *Libellus appellatorius*, an appeal. Calvinus, Lex.; L. 1, § ult., D. ff. de *appellat.*

In English Law (sometimes called *libellus conventionalis*). A bill. Bracton, fol. 112.

LIBELLUS FAMOSUS. (Lat.). A libel; a defamatory writing. L. 15, D. de *pœn.*; Vocab. Jur. Utr. sub "*famosus*." It may be without writing: as, by signs, pictures, etc. 5 Rep. de *famosis libellis*.

LIBELOUS. Any defamatory words calculated to degrade or injure the reputation of a person in society when written and published maliciously are "libelous." 116 Ky. 282, 76 S. W. 20.

A writing is "libelous" if it subjects the person referred to, to odium or ridicule or tends to subject him to obloquy. 140 Ky. 373, 181 S. W. 1.

LIBER (Lat.). In Civil Law. A book, whatever the material of which it is made; a principal subdivision of a literary work: thus, the *Pandects*, or *Digest* of the Civil Law, is divided into fifty books. L. 52, D. de *legat.*

In Civil and Old English Law. Free: e. g. a free (*liber*) bull. Jacobs. Exempt from service or jurisdiction of another. Law Fr. & Lat. Dict.: e. g. a free (*liber*) man. L. 3, D. de *statu hominum*.

LIBER ASSISARUM (Lat.). The book of assigns or pleas of the crown; being the fifth part of the Year-Books.

LIBER AUTHENTICORUM. The authentic collection of the novels of Justinian, so called to distinguish them from the *Epitome Juliani*. Sohm. Rom. L. 14.

A Latin collection of unknown origin, containing 134 novels with Latin translation of such as were promulgated in Greek, and widely circulated in Italy under the title of *Authenticæ*, *Libri* or *Corpus Authenticarum* or simply *Authenticum*. Hunter, Rom. L. 92. This collection was so called either in contrast to the abridgment of Julian, or in accordance with the tradition that those were the very novels promulgated by Justinian in Italy. The last reason was the origin of another title of the collection, *Versio Vulgata*. Id.

LIBER FEUDORUM (Lat.). A code of the feudal law, which was compiled by direction of the emperor Frederick Barbarossa, and published in Milan, in 1170. It was called the *Libri Feudorum*, and was divided into five books, of which the first, second, and some fragments of the others still exist, and are printed at the end of all the modern editions of the *Corpus Juris Civilis*. Giannone, b. 13, c. 3; Cruise, Dig. prel. diss. c. 1, § 31.

LIBER HOMO (Lat.). A free man; a freeman lawfully competent to act as juror. Ld. Raym. 417; Kebl. 563.

In London, a man can be a *liber homo* either—1, by service, as having served his apprenticeship; or, 2, by birthright, being a son of a *liber homo*; or, 3, by redemption, i. e. allowance of mayor and aldermen. 8 Rep., Case of City of London. There was no intermediate state between *vilein* and *liber homo*. Fleta, lib. 4, c. 11, § 22. But a *liber homo* could be vassal of another.

Bract. fol. 25.

In Old European Law. An allodial proprietor, as opposed to a feudatory. Calvinus, Lex. *Alode*.

LIBER JUDICIARUM (Lat.). The book of judgment, or doom-book. The Saxon *Domboc*. Conjectured to be a book of statutes of ancient Saxon kings. See Jacob, *Domboc*; 1 Bla. Com. 64.

LIBER ET LEGALIS HOMO (Lat.). A free and lawful man. One worthy of being a jurymen; he must neither be infamous nor a bondman. 3 Bla. Com. 340, 362; Bract. fol. 14 b; Fleta, l. 6, c. 25, § 4; l. 4, c. 5, § 4.

LIBER LEGUM See *LEX ROMANA VISIGOTHORUM*.

LIBER QUADRIPARTITUS. See *QUADRIPARTITUS*.

LIBERA. A delivery of so much corn or grass to a customary tenant, who cut down or prepared the said grass or corn and received some portion of it as a reward or gratuity. Cowel.

LIBERAL (Lat. *liberalis*, of or belonging to a freeman—from *liber*, free). Free in giving; generous; not mean or narrow-minded; not literal or strict.

Where a jury was instructed that in the award of compensation "it should be liberal," an exception to the remark was overruled; no request had been made for a different instruction, and the expression objected to was preceded by a caution to the jury against crediting any extravagant statement of the injuries. And as if to qualify this caution, it was added that it should be liberal; 9 Otto 659.

By *liberal interpretation* is meant not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument; 2 How. 183.

An offer of a *liberal reward* for information leading to the apprehension of a fugitive and a specified sum for his apprehension entitles the party giving information leading to the arrest to the liberal reward, but not to the sum named where the arrest was not in fact made by him or by his agent; 92 U. S. 73.

LIBERATE (Lat.). In English Practice. A writ which issues on lands, tenements, and chattels, being returned under an extent on a statute staple, commanding the sheriff to deliver them to the plaintiff, by the extent and appraisement mentioned in the writ of extent and in the sheriff's return thereto. See Comyns, Dig. *Statute Staple* (D 6).

LIBERATION. In Civil Law. The extinguishment of a contract, by which he who was bound becomes free or liberated. Wolff, *Dr. de la Nat.* § 749. Synonymous with payment. Dig. 50. 16. 47.

LIBERIA. A republic of western Africa. The president is elected for two years. The senate consists of eight members and is elected for four years, and a house of representatives elected for two years. In every inhabited district there is an "administrator of justice." The code of law is based on English and American law.

LIBERTI, LIBERTINI. In Roman Law. The condition of those who, having been slaves, had been made free, 1 Brown, Civ. Law 99.

There is some distinction between these words. By *libertus* was understood the freedman when considered in relation to his patron, who had bestowed liberty upon him; and he was called *libertinus* when considered in relation to the state he occupied in society subsequent to his manumission. *Lec. El. Dr. Rom.* § 93. See Morey, Rom. L. 236.

LIBERTIES. In colonial times this term was used as meaning laws or legal

rights resting upon them. The early colonial ordinances in Massachusetts were termed laws and liberties, and the code of 1641 the "Body of Liberties"; 7 Cush. 70.

The term is also used in the expression, rights, liberties, and franchises, as a word of the same general class and meaning with those words and privileges. This use of the term is said to have been strictly conformable to its sense as used in *Magna Charta* and in English declarations of rights, statutes, grants, etc.; 7 Cush. 70.

It was intended to secure to corporations as well as to individuals the rights enumerated in the bill of rights; 1 Murphy 58.

LIBERTY (Lat. *liber*, free; *libertas*, freedom, liberty). Freedom from restraint. The faculty of willing, and the power of doing what has been willed, without influence from without.

A privilege held by grant or prescription, by which some men enjoy greater privileges than ordinary subjects.

The place within which certain privileges or immunities are enjoyed, or jurisdiction is exercised, as the liberties of a city. See *FREEDOM OF THE CITY*.

Liberty, "on its positive side, denotes the fullness of individual existence; on its negative side it denotes the necessary restraint on all, which is needed to promote the greatest possible amount of liberty for each." Amos, Science of Law p. 90.

Civil liberty is the greatest amount of absolute liberty which can in the nature of things be equally possessed by every citizen in a state.

The right to do everything permitted by the laws. *Ordr. Const. Leg.* 87.

The term is frequently used to denote the amount of absolute liberty which is actually enjoyed by the various citizens under the government and laws of the state as administered. 1 Bla. Com. 125.

The fullest political liberty furnishes the best possible guarantee for civil liberty.

Lieber defines civil liberty as guaranteed protection against interference with the interests and rights held dear and important by large classes of civilized men, or by all the members of a state, together with an effectual share in the making and administration of the laws, as the best apparatus to secure that protection, including Blackstone's divisions of civil and political under this head.

Under the Roman law, civil liberty was the affirmation of a general restraint, while in our law it is the negation of a general restraint; *Ordr. Const. Leg.*

Natural liberty is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consistent with their happiness, on condition of their acting within the limits of the law of nature and so as not to interfere with an equal exercise of the same rights by other men. Burlam. c. 3, § 15; 1 Bla. Com. 125. It is called by Lieber *social liberty*, and is defined as the protection or unrestrained action in as high a degree as the same claim of protection of each individual admits of.

Personal liberty consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law. 1 Bla. Com. 134; Hare, *Const. L.* 777.

Political liberty is an effectual share in the making and administration of the laws. Lieber, *Civ. Lib.*

Liberty, in its widest sense, means the faculty of willing, and the power of doing what has been willed without influence from without. It means self-determination, unrestrainedness of action. Thus defined, one being only can be absolutely free,—namely, God. So soon as we apply the word liberty to spheres of human action, the term receives a relative meaning, because the power of man is limited; he is subject to constant influences from without. If the idea of unrestrainedness of action is applied to the social state of man, it receives a limitation still greater, since the equal claims of unrestrained action of all necessarily involves the idea of protection against interference by others. We thus come to the definition, that liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protec-

(tion of his rights, claims, interests, as man or citizen, or of his humanity, manifested as a social being. (See RIGBT.) The word liberty, as applied to men in their political state, may be viewed with reference to the state as a whole, and in this case means the independence of the state, of other states (see AUTONOMY); or it may have reference to the relation of the citizen to the government, in which case it is called political liberty; or it may have reference to the status of a man as a political being, contrasted with his position as a private individual, and distinguished from him who is not considered master over his own body, will, or labor—the slave. This is called personal liberty, which, as a matter of course, includes freedom from prison.

For purposes of convenience and justice alike, in all well governed communities, the natural right of citizens are held in abeyance and subject to conditional limitations as having lost some portion of their absolute character. This is but an affirmation of the doctrine that every individual in order to live peacefully in society must submit to some abridgment of his natural right; for any acknowledgment of government, says Brownson, implies that the citizen consents to submit his will to that of a governing will located in the administration of the state; Am. Republic; Ord. Const. Leg.

Constitutional guarantees are the last and best resort of civil liberty. The bulwarks of civil liberty consist of public acts passed for the purpose of defining and regulating the exercise of the sovereign powers of the state. It is only in this way that the personal rights of the citizen can be secured against invasion by the supreme authority. These acts are the guarantee of the good faith of the citizens towards each other and towards the common sovereignty under which they are united. They consist of grants of power together with limitations upon its exercise. Part of these rules being unwritten form the common law of the land, and part consist of provisions enacted as constitutional provisions which may be enforced in competent tribunals; Ord. Const. Leg. 168.

Liberties are nothing until they have become rights—positive rights formally recognized and consecrated. Rights, even when recognized, are nothing so long as they are not within the grasp of the citizen. And guarantees are nothing so long as they are not maintained by forces independent of them in the limit of their right. Convert liberties into rights—surround rights by guarantees—entrust the keeping these guarantees to forces capable of maintaining them. Such are the successive steps in the progress of free government. 1 Guizot, Rep. Gov. Lect. 6.

"As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." Mill, Liberty, c. 4.

Another, in his work on Civil Liberty, calls that system which was evolved in England, and forms the basis of liberty in the countries settled by English people, Anglican liberty. The principal guarantees, according to him, are:—

1. National independence. There must be no foreign interference. Every country must have the right and power of establishing the government it thinks best.

2. Individual liberty, and, as belonging to it, personal liberty, or the great habeas corpus principle, and the prohibition of general warrants of arrest. The right of free speech belongs to this head.

3. A well-secured penal trial, of which the most important is trial for high treason.

4. The freedom of communion, locomotion, and emigration.

5. Liberty of conscience. The United States constitution and the constitutions of all the states have provisions prohibiting any interference in matters of religion.

6. Protection of individual property, which requires unrestrained action in producing and exchanging, the prohibition of unfair monopolies, commercial and industrial, and the guarantee that no property shall be taken except in the course of law, the principle that taxation shall only be with the consent of the tax-payer, and shall be levied for short periods only, and the exclusion of confiscation.

7. Supremacy of the law. The law must not, however, violate any superior law or civil principle, nor must it be an *ex post facto* law. The executive must not possess the power of declaring martial law, which is merely a suspension of all law. In extreme cases, parliament in England and congress in the United States can pass an act suspending the privilege of habeas corpus.

8. Every officer must be responsible to the person affected for the legality of his act; and no act must be done for which some one is not responsible.

9. It has been deemed necessary in the Bill of Rights and the American constitution specifically to refer to the quartering of soldiers as a dangerous weapon in the hands of the executive.

10. The military force must be strictly submitted to the law, and the citizen should have the right to bear arms.

11. The right of petitioning, and the right of meeting and considering public matters, and of organizing into associations for any lawful purposes, are important guarantees of civil liberty.

The following guarantees relate more especially to the government of a free country and the character of its polity.

12. Publicity of public business in all its branches, whether legislative, judicial, written, or oral.

13. The supremacy of the law, or the protection against the absolutism of one, of several, or of the majority, requires other guarantees. It is necessary that the public funds should be closely held in the hands of the popular branch of the legislature, never of the executive. Appropriations should also be for distinct purposes and short times.

14. It is further necessary that the power of making war reside with the people, and that such the exercise of a declaration of war in the United States is an act of congress.

15. The supremacy of the law requires, also, not only the protection of the minority, but the protection of the majority against the rule of a factious

minority or cabal.

16. The majority, and through it the people, are protected by the principle that the administration is founded on party principles.

17. A very important guarantee of liberty is the division of government into three distinct functions, —legislative, administrative, and judicial. The union of these is absolutism or despotism on the one hand, and slavery on the other.

18. As a general rule, the principle prevails in Anglican liberty that the executive may do what is positively allowed by fundamental or other law, and not all that which is not prohibited.

19. The supremacy of the law requires that, where enacted constitutions form the fundamental law, there be some authority which can pronounce whether the legislature itself has or has not transgressed it. This power must be vested in courts of law.

20. There is no guarantee of liberty more important and more peculiarly Anglican than the representative government. See Lieber, Civ. Lib. p. 168.

In connection with this, a very important question is, whether there should be direct elections by the people, or whether there should be double elections. The Anglican principle favors simple elections, and double elections have often been resorted to as the very means of avoiding the object of a representative government.

The management of the elections should also be in the hands of the voters, and government especially should not be allowed to interfere.

Representative bodies must be free. They must be freely chosen, and when chosen, act under no threat or violence of the executive or any portion of the people. They must be protected as representative bodies; and a wise parliamentary law and usage should secure the rights of each member and the elaboration of the law.

A peculiar privilege is afforded to members of the legislature in England and the United States by their freedom from arrest, except for certain specified crimes.

Every member must possess the right to propose any measure or resolution.

Not only must the legislature be the judge of the right each member has to his seat, but the whole internal management belongs to itself. It is indispensable that it possess the power and privileges to protect its own dignity.

The principle of two houses, or the bicameral system, is an equally efficient guarantee of liberty, by excluding impassioned legislation and embodying in the law the collective mind of the legislature.

21. The independence of the law, of which the independence of the judiciary forms a part, is one of the main stays of civil liberty. It requires a living common law, a clear division of the judiciary from other powers, the public accusatorial process, the independence of the judge, the trial by jury, and an independent position of the advocate. See Lieber, Civil Liberty and Self-Government 206-220.

22. Another constituent of our liberty is local and institutional self-government. It arises out of a willingness of the people to attend to their own affairs, and an unwillingness to permit of the interference of the executive, and administration with them beyond what it necessarily must do, or which cannot or ought not to be done by self-action. A pervading self-government, in the Anglican sense, is organic; it consists in organs of combined self-action, in institutions, and in a systematic connection of these institutions. It is, therefore, equally opposed to a disintegration of society and to despotism.

American liberty belongs to the great division of Anglican liberty, and is founded upon the checks, guarantees, and self-government of the Anglican race. The following features are, however, peculiar to American liberty: republican federalism, strict separation of the state from the church, greater equality and acknowledgment of abstract rights in the citizen, and a more popular or democratic cast of the whole polity. With reference to the last two may be added these further characteristics:—

We have everywhere established voting by ballot. The executive has never possessed the power of dissolving or proroguing the legislature. The list of states has not been closed. We admit foreigners to the rights of citizenship, and we do not believe in inalienable allegiance.

There is no taint of blood. We allow no *ex post facto* laws. American liberty possesses, also, as a characteristic, the enacted constitution, —distinguishing it from the English polity, with its accumulative constitution. Our legislatures are, therefore, not omnipotent, the British parliament, theoretically, is; but the laws enacted by them may be declared by the courts to conflict with the constitution.

The liberty sought for by the French, as a peculiar system, was founded chiefly, in theory, on the idea of equality, and the abstract rights of man. Rousseau's Social Contract. See FREEDOM; PERSONAL LIBERTY, and titles here following.

Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. 219 U. S. 567. See LIBERTY OF CONTRACT. AT LIBERTY; CIVIL LIBERTY.

LIBERTY OF CONTRACT. Liberty of contract consists in having the ability at will, to make or abstain from making, a binding obligation enforced by the sanctions at the law. Judson, Liberty of Contract, Rep. Am. Bar Assn. (1891) 238. Whilst closely allied with property and essential to its use and enjoyment, liberty of contract is really broader in its scope. Ownership of property is a right residing in a person, and prop-

erty is any right of a person over a thing (*in rem*) indefinite in point of user. It is through the abridgment of the right of free contract by denying or restraining the use of property that so-called property rights are invaded in the exercise of the police power; id. 233.

The right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution of the United States. 165 U. S. 578; 198 U. S. 45; 208 U. S. 161. In referring to the Fourteenth Amendment it was said (165 U. S. 589): "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The privilege of contract is both a liberty and a property right of which one cannot be deprived without due process of law; 154 Ill. 98. And the right of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended, since this would subvert the right to enjoy liberty; 58 Ark. 407; but whenever a statute can be seen to be in the substantial interest of public health, safety, and morals, it may legitimately be upheld even though it incidentally interfere with liberty of contract; 46 Pac. Rep. (Utah) 758.

But it has also been recognized that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. 219 U. S. 566, 567; 137 U. S. 89; 197 U. S. 11. Further, it has been said "It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. . . . The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property." 157 U. S. 165, 166. In 219 U. S. 202, the court said on this subject that "there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests." See further 175 U. S. 228.

Among the statutes which, although interfering with the right to contract, have been held constitutional either under the police power of a state or under the power vested in the legislature for the public welfare, are: fixing the maximum of charges for the storage of grain; 94 U. S. 113; 117 N. Y.; giving a city power to regulate the price of bread; 3 Ala. 140; prohibiting the manufacture and sale of any article in imitation of the substance of butter; 105 N. Y. 123; 127 U. S. 878; or of oleomargarine colored to imitate butter; 50 N. J. L. 534; or of oleomargarine unless stamped; 68 Md. 592; or of any article designed to take the place of butter or cheese; 12 Mo. App. 214; prohibiting the sale of cotton in the seed between the hours of sunset and sunrise; 68 Ala. 58; 76 id. 60; 104 N. C. 714; forbidding the sale of baking powder containing alum without a label stating; 44 Minn. 271; making it

unlawful for the vendor of personal property, sold on condition that the title should remain in him until payment in full had been made, to take possession of such property without tendering or refunding to the purchaser the sums already paid by him, after deducting a reasonable compensation for the use; 46 Ohio St. 450; forbidding the sale of stamped and registered bottles without the consent of the person whose stamp it thereon; 139 N. Y. 182; forbidding any one not authorized by law to issue a note, check, or ticket to circulate as money; 63 Mo. 570; reducing the rate of interest on judgments; 145 U. S. 162 (Harlan, Field, and Brewer, JJ., dissenting); giving priority to a mechanic's lien over a mortgage of an earlier date; 62 Mo. 433; limiting the amount of property which incorporated colleges might take by devise, grant, etc.; 156 U. S. 152, affirming 111 N. Y. 66; forbidding the importation of foreign labor; 28 Fed. Rep. 795; 86 *id.* 303; or the employment of Chinese labor; 85 Cal. 274; providing that a failure to perform any condition of an insurance policy shall not be a valid defence of an action unless such condition is printed in type as large as or larger than that known as long primer, or is written with pen and ink in or on the policy; 63 Fed. Rep. 680; restricting insurance business to corporations; 164 Pa. 306; prohibiting foreign insurance companies from carrying on business within its limits; 155 U. S. 648; but see 165 U. S. 578, where a provision in a statute forbidding the insurance of property within the state in a foreign insurance company which has not complied with the laws of such state was held a violation of the right of the individual to contract; the contract having been made in another state; prohibiting citizens from selling intoxicating liquors; 42 S. C. 223; or forbidding the selling or giving of intoxicating liquors to Indians; 105 Cal. 344; or a prohibition act; 123 U. S. 633. Making it a misdemeanor for an attorney to receive more than a specified amount for prosecuting a claim for a pension is valid, as a pension is a bounty over which congress has control; 157 *id.* 60.

Much of the legislation which has been questioned as interfering with the liberty of contract secured to the citizens of the United States under the fourteenth amendment to the constitution, is in relation to the acts passed which aimed to benefit the laborer in his relations to his employer. Although lacking the powers vested in the courts in this country to declare an act unconstitutional, yet the principle on which much of this class of legislation on the liberty of contract rests in the United States is clearly stated by an English court. "When two classes of persons are dealing together and one class, generally speaking, weaker than the other, and liable to oppression either from natural or incidental causes, the law should as far as possible redress the inequality by protecting the weak against the strong." 2 B. & S. 66. Obviously, the intention of the legislature in passing this class of acts was to protect the employees against fraud and oppression on the part of employers, but the objection to statutes prescribing a limitation upon hours of labor and regulating the mode of payment for it are (1) that they interfere with the right secured to every citizen of acquiring and possessing property or with the right to pursue happiness; (2) they are in conflict with that clause of the bill of rights which declares that no one shall be deprived of life, liberty, or property without due process of law; 27 Am. L. Rev. 857.

In many cases the restriction by statute of contracts between employers and employees is held unconstitutional; 58 Ark. 407; 41 Neb. 187; 154 Ill. 198; 8 Ohio Cir. Ct. R. 653; 39 Pac. Rep. (Colo.) 328; 115 Mo. 307; 163 Pa. 153; 113 *id.* 431; and the liberty to enter into contracts by which labor may be employed in such way as the laborer may deem most beneficial and to others to employ such labor is held to be necessarily included in the constitutional guaranty of the right to property; 147 Ill. 66, where the act prescribed that wages be paid weekly. But in Massachusetts a statute requiring

manufacturers to pay the wages of their employees weekly is held within the power of the legislature, as the constitution of that state extends legislative power to "all manner of wholesome and reasonable laws, statutes, and ordinances," and does not, in terms, make any provisions as to liberty of contract; 163 Mass. 589; so in Rhode Island a weekly payment law; 25 Atl. Rep. (R. I.) 249; and in Indiana a bi-weekly payment law, were held constitutional; 22 N. E. Rep. (Ind.) 258.

In New York a law forbidding city contractors to accept more than eight hours for a day's work except in cases of necessity is held not to abridge the privileges or rights of any citizens; 80 N. Y. Sup. 473 (White, J., dissenting); so with a law limiting hours of service on railroads; 136 N. Y. 554; and one forbidding the employment of women and children for more than ten hours a day; 120 Mass. 333; and an act providing that ten hours in twelve consecutive hours shall be a day's labor for railroad laborers and that an employee shall receive proportionate compensation for extra time was held constitutional where the rate of wages was not prescribed by the act and contracts other than by the day were not prohibited by it; 20 N. Y. Supp. 461. But an act prescribing a limit of ten hours for a day's work has been held unconstitutional; 8 Ohio Cir. Ct. R. 653; 39 Pac. Rep. (Colo.) 328; as is an ordinance prescribing eight hours; 85 Cal. 274; 41 Neb. 187; 154 Ill. 198 (where the act limited the restriction of hours to women); and an act forbidding the execution of a contract between a corporation and an employee whereby the latter agrees in consideration of certain benefits from the company, that if he elect to accept benefits when injured he will not look to the company for damages; 1 Ohio N. P. 213.

A statute providing that corporations engaged in manufacturing or in operating a railroad should pay the wages of their employees in legal tender money of the United States, was held valid on the ground that such legislation was necessarily incident to the power of the legislature to amend or alter the corporate charter; 55 Md. 74; and a similar statute regarding payment of wages otherwise than by paper redeemable in lawful money, and prescribing a method of weighing coal at the mouth of the mine, was upheld on the ground that the business of the defendants was one over which the state had supervision, and that the state had power to protect laborers against fraud on the part of employers in the payment of wages and in the mode of ascertaining the amount of the wages earned; 36 W. Va. 802; *contra* as to the last point, 39 Pac. Rep. (Colo.) 431, on the ground that the act attempted to deprive persons of the right to fix by contract the manner of ascertaining compensation, and *contra* as to the payment of wages by any order or script not negotiable and redeemable in lawful money of the United States, 115 Mo. 307; 113 Pa. 431; 33 W. Va. 179, 188; 147 Ill. 66. A statute forbidding the waiving of payment of money in contracts between employer and employee was held constitutional on the ground that it protected and maintained the medium of payment established by the sovereign power of the United States; 123 Ind. 365.

As to the constitutionality of acts forbidding an employer to discharge his employee on account of his membership in a labor union, see LABOR UNION.

See, generally, 32 L. R. A. 789, note; 29 Am. L. Rev. 236; 27 *id.* 857; Rep. Am. Bar Assn. (1891) 231; 32 Am. L. Reg. 816. See LABOR; LABOR UNION; STORE ORDERS; DUE PROCESS OF LAW; FACTORY ACTS POLICE POWER.

LIBERTY OF THE PERSON. See PERSONAL LIBERTY.

LIBERTY OF THE PRESS. The right to print and publish the truth, from good motives and for justifiable ends. 8 Johns. Cas. 394.

The right in the publisher of a newspaper to print whatever he chooses without any previous license, but subject to be held

responsible therefor to exactly the same extent that any one else would be responsible. 13 W. Va. 182.

The right to print without any previous license, subject to the consequences of the law. 8 Term 431.

The right to publish in the first instance as the publisher pleases, and without control; but for proceeding to unwarrantable lengths he is answerable both to the community and to the individual. 4 Yeates 267. Liberty of the press means not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords; Cooley, Const. Lim. [423]. See Story, Const. §§ 1870, 1889, 1891. It is said to consist in this "that neither courts of justice nor any judges whatever are authorized to take notice of writings intended for the press, but are confined to those which are actually printed." De Lome, Const. 254.

At common law liberty of the press was neither well protected nor well defined, and not until after many struggles was it so far recognized in England as to permit the publication of current news without the permission of government censors. May, Const. Hist. c. 7, § 10. The general publication of parliamentary debates dates only from the American revolution, and even then was considered a technical breach of privilege; Cooley, Const. Lim. [418]. A fair publication of a debate is now held to be privileged, and comments on public legislative proceedings are not actionable, so long as a jury shall think them honest and made in a fair spirit, and such as are justified by the circumstances; L. R. 4 Q. B. 73.

In the colonial period the English practice was followed in this country. In 1649 the general laws were published for the first time in Massachusetts under protest by the magistrates, and in Virginia and New York printing was specially prohibited. The constitutional convention of 1787 sat with closed doors, as did the senate until 1793. By the constitution liberty of the press is secured against restraint in the United States, but he who uses it is responsible for its abuse. Like the right to keep firearms, it will not protect the user from annoyance and destruction caused by him; 3 Pick. 313. The Sedition Act, July 1798, attempted a restriction upon the freedom of the press, but by its terms it was self-limited; its constitutionality was always doubted by a large party, and its impolicy was beyond question. See Whart. St. Tr. 333, 659, 686; 2 Rand. Life of Jefferson 417; 5 Hildr. Hist. U. S. 247; Ord. Const. Leg.

Liberty of the press is allowed in publishing (1) naked and impartial statements of judicial proceedings involving a trial and not a mere *ex parte* examination; and when the nature of the case does not render it improper that the same should be published, or constitute such a publication an offence at law; 4 Sandf. 21, 120; 5 *id.* 256; 10 Ohio St. 548; 4 Wend. 138; 2 Hill 513; (2) in publishing news; Ord. Const. Leg. 239. Acts which have been held not in conflict with the constitutional guaranty of liberty of the press are:—An act making the publication of a grossly false and inaccurate report of the proceedings of any court a criminal offence and a contempt; 17 Mont. 140; an act taxing the selling of Sunday papers; 17 Tex. App. 253; an act forbidding the use of the mails for obscene matter; 45 Fed. Rep. 414; or for printed matter deemed by the government to be injurious to the people; 148 U. S. 110; 96 *id.* 727; or for sending threatening letters; 135 Mo. 450 (see LABEL); an act forbidding the publication and sale of a newspaper devoted to the publication of scandal and immorality; 136 Mo. 227; an act directed against blasphemy; 20 Pick. 206; and a by-law of the Associated Press of New York, prohibiting a member from receiving or publishing the regular news despatches of any other news organization covering a like territory; 136 N. Y. 333, affg 15 N. Y. Suppl. 887.

A city cannot pass an ordinance declaring a certain named newspaper a public nuisance and forbidding its sale; 22 B. W. Rep. (Tex.) 923; nor can the advertisement of a dramatic production be prevented where the play is based upon the facts of a pending trial, as disclosed at a preliminary hearing and the coroner's inquest; 44 Pac. Rep. (Cal.) 458; and the constitutional guaranty of liberty of the press will not protect one who breaks a contract with a purchaser not to publish or be connected

with another paper in the same locality; 24 S. E. Rep. (N. C.) 312.

As to whether an injunction may be issued to restrain the publication of an alleged libel, see **LIBEL**.

See, generally, **NEWSPAPER**; **LETTER**; **INJUNCTION**.

LIBERTY OF SPEECH. The right to speak facts and express opinions. Whart. Dict.

The liberty of speech which both the federal and state constitutions protect is (1) Liberty of speech of legislators in public assemblies, and while engaged in discussing public matters, or in writing reports, or in the exercise of the functions of their office. This is an official privilege; 4 Mass. 1. (2) Liberty of speech of counsel in judicial proceedings, and while confining himself to matters that are strictly pertinent to the issue. This is also an official privilege; 3 Metc. 194; 1 Binn. 178.

In the discharge of his professional duty, counsel may use strong epithets, however derogatory to other persons they may be, if *pertinent* to the cause, and stated in his instructions, whether the thing were true or false. But if he were maliciously to travel out of his case for the purpose of slandering another, he would be liable to an action, and amenable to a just, and often more efficacious, punishment, inflicted by public opinion; 3 Chitty, Pr. 887.

No action will lie against a witness at the suit of a party aggrieved by his false testimony, even though malice be charged; 50 N. Y. 309; 21 La. Ann. 375; 28 Ia. 51. The remedy against a dishonest witness is confined to the criminal prosecution for perjury; but false accusations, contained in affidavits or other proceedings by which a prosecution is commenced for supposed crime, render the party liable to action if actual malice be averred and proven; 4 Cal. 624; Cooley, Const. Lim. 522.

An act forbidding the use of profane language is not an undue interference with free speech; 113 N. C. 683; 60 Fed. Rep. 921; 16 Blatch. 338; or one taxing itinerant vendors of a drug; 60 N. W. Rep. (Ia.) 496; or an ordinance prohibiting a public address upon any of the public grounds of a city; 163 Mass. 510; but an act which makes it unlawful for certain specified officers to participate in politics by making political speeches or participate in political meetings is unconstitutional; 79 Va. 196.

Maliciously enticing employees of a receiver to leave his employ in pursuance of a combination to prevent the operation of the road is not protected by the constitutional guaranty of free speech; 63 Fed. Rep. 808. Congress has no power to punish individuals for disturbing the assemblies of peaceful citizens. That is a police power belonging to the state alone; 92 U. S. 524. See 83 L. R. A. 829, n.; Cooley, Const. Lim.; Ord. Const. Leg.; **LABOR UNION**; **MALICE**; **SLANDER**; **LIBEL**; **LIBERTY OF THE PRESS**.

LIBERUM MARIAGIUM (Lat.). In Old English Law. Frank-marriage (q. v.). 2 Bla. Com. 115; Littleton § 17; Bract. fol. 21.

LIBERUM SERVITIUM. Free service. Service of a warlike sort by a feudatory tenant; sometimes called *servitium liberum armorum*. Somner, Gavelk. p. 56; Jacob, Law Dict.; 4 Co. 9.

Service not unbecoming the character of a freeman and a soldier to perform: as, to serve under the lord in his wars, to pay a sum of money, and the like. 2 Bla. Com. 60. The tenure of free service does not make a villein a free man, unless homage or manumission precede, any more than a tenure by villein services makes a freeman a villein. Bract. fol. 24.

LIBERUM TENEMENTUM. Freehold. Frank-tenement. 2 Bouv. Inst. n. 1690; 1 Washb. R. P. 46.

In Pleading. A plea in justification by the defendant in an action of trespass, by which he claims that he is the owner of the close described in the declaration, or

that it is the freehold of some third person by whose command he entered. 2 Salk. 453; 7 Term 355; 1 Wms. Saund. 290 b, note.

It has the effect of compelling the plaintiff to a new assignment, setting out the abutments where he has set forth the *locus in quo* only generally in his declaration; 11 East 51, 73; 16 id. 843; 1 B. & C. 499; or to set forth tenancy in case he claims as tenant of the defendant, or the person ordering the trespass; 1 Saund. 299 b. It admits possession by the plaintiff, and the fact of the commission of a trespass as charged; 3 McCord 226; McKel. Pl. 2033; see Greenl. Ev. § 626.

LIBLAC. Witchcraft, particularly that kind which consisted in the compounding and administering of drugs and philters. Leg. Athel. 6; Wharton.

LIBRA PENZA. A pound of money by weight.

In early times, and more especially during periods of debasement of the currency, there was sometimes used as a measure of money a pound which, instead of being the twenty shillings or two hundred and forty silver pennies making up the customary pound, was an actual pound weight of pure silver. Byrne.

LIBRARY. Such books or works of literature, science, art, or business as one may have in his residence or office. 132 Ky. 589, 116 S. W. 769.

LIBRIPENS. A neutral person or balance holder, who was present at a conveyance of real property. He held in his hand the symbolic balance, which was struck by the purchaser with a piece of bronze as a sign of the completion of the conveyance. The bronze was then transferred to the seller as a sign of the purchase money. Morey, Rom. L. 21, 80.

LICENCIADO. In Spanish Law. Lawyer or advocate. By a decree of the Spanish government of 6th November, 1843, it was declared that all persons who have obtained diplomas of "Licentiate in Jurisprudence" from any of the literary universities of Spain are entitled to practice in all the courts of Spain without first obtaining permission by the tribunals of justice.

LICENSE (Lat. *licere*, to permit).

In Real Property Law. A permission. A right, given by some competent authority to do an act, which without such authority would be illegal, or a tort or trespass.

A permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it; it is founded on personal confidence, and not assignable. It may be given in writing or by parol; it may be with or without consideration, but in either case it is usually subject to revocation, though constituting a protection to the party acting under it until the revocation takes place. 24 Mich. 282; 89 id. 815; 3 Wyo. 518.

An authority to do a particular act or series of acts on another's land without possessing any estate therein. 11 Mass. 533; 4 Sandf. Ch. 72; 60 Vt. 702; 1 Washb. R. P. § 398.

The written evidence of the grant of such right.

An *executed license* exists when the licensed act has been done.

An *executory license* exists where the licensed act has not been performed.

An *express license* is one which is granted in direct terms.

An *implied license* is one which is presumed to have been given from the acts of the party authorized to give it.

It may be granted by the owner, or in many cases, by a servant; Cro. Eliz. 246; 2 Greenl. Ev. § 427.

The distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis. The adjudications upon this subject are so numerous and discordant that taken in the ag-

gregate they cannot be reconciled. But there are certain fundamental principles underlying most cases which enable courts to distinguish an easement from a license when construed in the light of surrounding circumstances; 33 N. J. Eq. 254; 94 Tenn. 397. An easement implies an interest in land which can only be created in writing or constructively its equivalent—prescription; 1 Washb. R. P. 629. A license may be created by parol; 13 M. & W. 838; 4 M. & S. 562; 7 Barb. 4; 61 Mo. 422; 60 Tex. 267; by specialty; Pars. Con. 222; or by implication of circumstances; Hob. 62; 2 Greenl. Ev. § 427.

Licenses are of two kinds, simple or revocable, and coupled with a grant or irrevocable. Simple licenses are revocable at the will of the grantor; 11 Mass. 433; 15 Wend. 380; 81 Ga. 461; 78 Cal. 95; 24 N. H. 864; they are revoked *ipso facto* by the grantor's conveying the land to another; 4 M. & W. 538; 119 U. S. 561; or by his doing any other act preventing the user; 13 M. & W. 838; although the licensee has incurred expense; 10 Conn. 378; 24 N. H. 864; 4 Johns. 418; 87 E. L. & Eq. 499; 3 Wis. 117; 2 Gray 302; 1 Dev. & B. 492; 41 Minn. 56; 40 Ill. App. 641; 111 Mo. 387; 63 Hun 634; 90 Mich. 234; but see 14 S. & R. 267; and it is not so with a license closely coupled with a transfer of title to personal property; 3 Metc. 84; 11 Conn. 525.

A license is irrevocable when it is coupled with a grant or when the licensee has on the faith of the license spent money in executing works of a permanent character on the land; 2 B. & Ald. 724; 11 A. & E. 34; 8 East 302; 33 Ala. 600; 7 N. H. 237; 18 M. & W. 838 (but see comments on this case in 4 Del. Ch. 195, note); and in some states even parol licenses without consideration are held irrevocable when executed, on the ground of equitable estoppel; 33 Pa. 169; 59 Ill. 337; 45 Ga. 83; 60 Vt. 702; 40 Mo. App. 134.

The nature of the interest in the land of another which might be created by a parol license is thus stated by Bates, Ch., in Jackson & Sharp Co. v. P. W. & B. R. Co., 4 Del. Ch. 180, where the subject is carefully considered and the authorities collected: "It must be admitted that a license or permission to exercise some privilege upon the land of the licensor can create no estate or interest in the land, such as binds the land and is transmissible from the licensee, the utmost effect of a license being to confer a personal privilege, which is not assignable or transmissible, and is revocable at the licensor's pleasure. Nor does it matter whether the license be oral or in writing, so long as it remains a mere license, not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel, as under some circumstances . . . it may be in equity though not at law. Few points have undergone more discussion, and have at length come to be better settled, than the insufficiency of a license at law to create or transfer an interest in land." It was also said that "at law a license can under no circumstances become irrevocable by estoppel when the effect would be to create an interest in land," there not having been "such conduct as would render the assertion of the legal right a fraud." See an extended note to this case, *id.* 195-8. See also 94 Tenn. 428, where it was held that the privilege to discharge water from an ore wash into a stream, given without words of grant by a lower proprietor to an iron company, with an agreement to accept a certain sum as the full amount of damages done by such water, is a license, not an easement, and does not extend to the grantees of the iron company.

The revocation of a license will not be permitted where such a revocation will amount to a fraud upon the licensee; 166 Pa. 507; 67 Vt. 272; 27 Ore. 849; but revocation may be presumed from a long period of non-user; 125 Mo. 647. Courts of equity will interfere to restrain the exercise of a legal right to revoke a license on the ground of preventing fraud; 4 Del. Ch. 180; and will do so on no other ground; *id.*; but in

such case they will construe the license as an agreement to give the right and compel specific performance by deed; 4 C. E. Green 153; 60 N. C. 546; 1 Washb. R. P. 400; but this does not give the licensee an unqualified right to treat the license as unrevoked; 1 H. & C. 593; 23 Ex. 87; 11 W. R. 119. An occupancy of land under a contract void as against public policy cannot be treated as a possession under a license for the purpose of obtaining relief in equity; 62 N. W. Rep. (Mich.) 1003. An executed license which destroys an easement enjoyed by the licensor in the licensee's land cannot be created without deed; 5 B. & C. 221; and the rule that an executed license cannot be revoked; 2 Gill 221; 8 Duer 255; 7 Bingh. 632; 129 Ind. 475; is not applicable to licenses which, if given by deed, would create an easement, but to those which, if so given, would extinguish or modify an easement; 2 Gray 302. See 47 Ill. App. 293. A license must be established by proof and is not to be inferred by equivocal declarations of a land owner; 31 Atl. Rep. (Pa.) 310.

The effect of an executed license, although revoked, is to excuse the licensee from liability for acts done properly in pursuance thereof and their consequences; 23 Barb. 336; 2 Gray 302; 10 Conn. 378; 13 N. H. 264; 7 Taunt. 374; 5 B. & C. 221.

In Contracts. A permission to do some act which, if lawful, would otherwise be a trespass or tort; the evidence of such permission when it is in writing.

A covenant not within the statute of frauds may be released or discharged wholly or in part by a parol license; 10 Ad. & E. 65; 2 Add. Cont. [1218].

A license by a debtor to a creditor to seize and sell a specific chattel in discharge of a debt not paid at maturity. This is what is termed in civil law imperfect hypothecation. Such license is confined to the parties and is terminated when rights of third parties intervene; and it is not assignable. It gives no title to the chattel until executed, but possession taken under the license clothes the creditor with the ownership. It is annulled by bankruptcy; 2 Add. Cont., 8th Am. ed. [697]. See *HYPOTHECATION*.

Under a license in a lease to a lessor to enter and eject the lessee, he was authorized as between themselves to eject the tenant by main force, and the license was a good plea in bar of an action of trespass; 7 Man. & G. 316; 7 Sc. N. R. 1025.

In International Law. Permission granted by a belligerent state to its own subjects, or to the subjects of the enemy, or to neutrals to carry on a trade interrupted by war. 2 Hall. Int. Law 343.

Licenses operate as a dispensation of the rules of war, so far as their provisions extend. They are *stricti juris*, but are not to be construed with pedantic accuracy. 2 Hall. Int. Law 343; 1 Kent 163, n.; 4 C. Rob. 8. They can be granted only by the sovereign authority, or by those delegated for the purpose by special commission; 1 Dods. 226; Stew. Adm. 367; 8 Term 548; 1 C. Rob. 196; and they must be granted or assented to by both belligerents; Snow. Int. L. xxxi. The Act of Congress, authorizing the president to license certain commercial intercourse with the states in rebellion, did not contemplate the exercise of that authority by subordinate officers of the executive department without the express order of the president; 5 Wall. 530. Licenses constitute a ground of capture and confiscation *per se* by the adverse belligerent party; Wheat. Int. Law 475. They legalize the commerce, and the alien licensee may sue and be sued in respect thereto as a natural-born subject; 2 Add. Cont. 134, 8th Am. ed. [1156]; 15 East 426; 12 id. 340, 3 Taunt. 568. See 2 Halleck, Int. L., Sir S. Baker's ed. ch. xxx.

In Pleading. A plea of justification to an action of trespass, that the defendant was authorized by the owner of the freehold to commit the trespass complained of.

A license must be specially pleaded to an action of trespass; 2 Term 166; but may

be given in evidence in an action on the case; 2 Mod. 6; 8 East 308. See *JUSTIFICATION*.

In Governmental Regulation. Authority to do some act or carry on some trade or business, in its nature lawful but prohibited by statute, except with the permission of the civil authority or which would otherwise be unlawful.

A license to carry on a business or trade is an official permit to carry on the same or perform other acts forbidden by law except to persons obtaining such permit; 85 Tex. 228.

A license of this sort is a personal privilege, and one issued to a partner individually does not extend to his co-partner or to the firm; 27 Ala. 32. It has been held that even the servant of the licensee is not protected by his master's license; 63 Pa. 168; 4 B. Monr. 37; 7 Dana 337; its terms cannot be varied or extended by the licensee, although he may do every thing that is necessary and proper for his enjoyment of it; 3 Lea 328; 30 La. Ann. 1094; 31 id. 210; 78 Va. 438.

In some cases it is held that where a license is for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is for revenue merely, a contract made by an unlicensed person in violation of an act is void; 64 Miss. 221; 4 C. B. n. s. 405; 103 Pa. 501; 27 Ill. App. 270. An innkeeper who fails to secure a license cannot establish a lien upon the goods of his guest; 38 Mo. 92; an attorney cannot recover for his services; 61 Ill. 189; or a surgeon; 37 Eng. L. & Eq. 475; or a physician; 81 Cal. 370 (where a statute made the failure to procure a license a misdemeanor); 105 N. C. 95; L. R. 10 Q. B. 66. But the contracts of unlicensed persons have, in some cases, been held valid; 85 Pa. 329; 23 N. H. 209; 45 Me. 402. See 65 Miss. 365.

A license fee is a tax; 41 La. Ann. 665; which a state may impose upon all citizens within its borders; 16 S. C. 47; but it cannot discriminate between residents and non-residents of the state; 57 Md. 251; or of a city or county; 182 Pa. 630; 5 Coldw. 554; 52 Cal. 606; 107 Ind. 502. Subject to this restriction, a license tax may be imposed upon particular classes of business men; 49 Tex. 279; 6 Sawy. 295; 12 Nev. 263; 9 Baxt. 518; 97 Ga. 114; but a fixed and definite license fee must be named, which all persons engaged in the business specified shall pay; 117 Ind. 221. An occupation tax must be levied only as a means of regulation not of revenue; 42 Neb. 223. Where an act authorizes the granting of licenses, but provides that they may be revoked at the pleasure of the authority granting them, a license granted under the act is not such a contract between the state and the individual that a revocation of it deprives the licensee of any property, immunity, or privilege within the meaning of the constitution; 133 Mass. 579; but in some cases it has been held that a license cannot be revoked without refunding the fee for the unexpired time; 27 N. H. 289; 3 Harring. 441.

The repeal of the act under which the license was granted does not thereby revoke the license; 46 Ala. 329; 1 Ohio St. 15; 119 Pa. 417; but an act prohibiting the business operates at once to revoke the license; 5 Gray 597.

When the power is exercised by municipal corporations, a license is the requirement, by the municipality, of the payment of a certain sum by a person for the privilege of pursuing his profession or calling, whether harmful or innocent, for the general purpose of producing a reliable source of revenue; Tied. Lim. Pol. Pow. 271.

If the occupation is harmful, the sum paid for its prosecution may be said to be a license fee; but if innocent, it is a license tax; 25 Minn. 248; 11 Mich. 49. See 32 N. Y. 261; 26 N. J. L. 298; 60 Pa. 445; 50 Ga. 475; 1 Ohio St. 268. Mere taxation of an unlawful business does not legalize it; 8 L. R. A. Tenn. 280. Where the occupation is not dangerous to the public, either directly or incidentally, it cannot be subjected to

any police regulation which does not fall within the power of taxation; Tied. Lim. Pol. Pow. 273. In the regulation of occupations harmful to the public, it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expense of issuing the license and maintaining the proper supervision. What is a reasonable sum must be determined by the facts of each case; but where it is a plain case of police regulation, the courts are not compelled to be too exact in determining the expense of regulation and supervision, so long as the sum demanded is not altogether unreasonable; Tied. Lim. Pol. Pow. 274; 9 Pick. 415; 89 Conn. 140; 60 Pa. 445; 11 Mich. 347; 31 Ia. 102.

A police regulation is not necessarily invalid because in its incidental operations the receipts of the municipality are augmented; 60 Pa. 445; an ordinance which does not fix a definite fee for the pursuit of any occupation, and permit all persons to engage therein, upon payment of such fee, is invalid; 3 L. R. A. 261.

The fact that the income derived from a license is not directly applied to payment of the municipal expenses of regulation and supervision of the business, does not affect the validity of the license, if the amount is not disproportionate to the cost of issuing the license and regulating the business; 42 Neb. 223.

Revenue derived from licensing a harmful occupation with a view to its partial suppression, in excess of that required to maintain proper supervision of it, is not a tax, since its primary object is to restrict an occupation and not to raise revenue; 32 Mich. 406; 16 Wis. 566.

The courts are said by Tiedman, Lim. Police Power, to be not harmonious as to the grounds justifying a license for all kinds of employment; yet the right to impose a license is generally recognized; 9 Pick. 415; 57 N. Y. 591; 42 N. J. L. 364; 60 Pa. 445; 7 Md. 1; 50 Ga. 590; 27 Ala. 55; 15 Ohio 625; 11 Mich. 43; 29 Ia. 129; 101 Ill. 475. The same author cites the following cases: licensing of hucksters has been held unreasonable; 5 Cow. 462; 42 N. J. L. 384; 29 Wis. 307; 25 Minn. 248; and a license tax upon lawyers and physicians is held to be reasonable; 20 S. W. Rep. (Tex.) 580; 12 Mo. 265; 5 Ohio 21; 36 Ga. 480; 17 Fla. 169; on bakers; 3 Ala. 187; on places of public amusement; 2 La. Ann. 550; 7 Md. 1; on hacks and draymen; 67 N. Y. 591; 58 Pa. 119; 70 Mo. 562; 15 Ohio 625; 122 Mass. 60; 27 Minn. 164; on peddlers; 57 Ind. 74; 57 Cal. 92; 51 Miss. 13; on the sale of milk; 82 N. Y. 324; 100 Ill. 67; on auctioneers; 63 Ill. 372; 58 Ia. 96; on selling liquor; 22 Minn. 812; 21 Vt. 458; 19 Fla. 563; 39 Ind. 429; 11 Neb. 547; 10 Ia. 441; 35 Md. 541; 20 Ohio St. 308; 78 Mo. 302; 92 Ill. 669; 32 Mich. 406; on bicycles; 19 C. C. A. R. 491; on street railway cars; 60 Pa. 445; and on book canvassers; 31 Cent. L. J. 3.

A city ordinance imposing a pole and wire tax upon a telegraph company doing interstate business, in excess of the reasonable expense to the city in the supervision and regulation thereof, is void; 82 Fed. Rep. 797, following 40 Fed. Rep. 615, between the same parties; see 48 Pa. 117; 167 Pa. 406; but an ordinance compelling a telegraph company to pay five dollars per annum "for the privilege of using the streets, alleys and public places" was upheld in 148 U. S. 92. See 156 U. S. 210; 71 Wis. 560. See *PRECEDENT*, for comments on these federal cases.

A license tax upon an agent of a railroad company doing interstate business is unlawful; 136 U. S. 104, diss. Fuller, C. J., Gray and Brewer, JJ.; 136 U. S. 114; and so is one upon drummers soliciting orders for firms in another state; 120 U. S. 439; 128 U. S. 129; 9 L. R. A. Ky. 556; 129 U. S. 141; and upon a telegraph company doing interstate business; 127 U. S. 640. A license can be imposed upon peddlers if there is no discrimination as to residents or products of the state and other states; 156 U. S. 296, where the subject of licenses is fully discussed (by Gray, J.). An

office license tax upon a foreign corporation is not a tax upon the business or property of the corporation and is constitutional; 114 Pa. 256; and licensing transient, non-resident merchants is not a discrimination against them merely because there may be no resident merchants who are compelled to pay the license; 29 L. R. A. Ia. 734.

As to licenses for the sale of liquor, see LIQUOR LAWS; licenses: to marry, see MARRIAGE; licenses on imported goods, see COMMERCE; in patent law, see PATENTS. See also PEDDLER; HAWKER; POLICE POWER; DELEGATION; LOCAL OPTION. See SPECIAL LICENSE.

LICENSE FEE. See LICENSE TAX.

LICENSE TO BE AT LARGE. See TICKET OF LEAVE.

LICENSE TAX. A "license tax" is one imposed on the privilege of exercising certain callings, professions, or vocations, that when collected go into the State treasury, and when applied to municipal taxation, is termed license fees. 97 Ky. 401, 30 S. W. 974.

A "license tax" within the meaning of the constitution is not a burden on property, but on that which results from its enjoyment, or the conduct of the business or calling. 97 Ky. 395, 30 S. W. 974.

LICENTIA. License; liberty; permission. See LICENSE.

LICENTIA CONCORDANDI (Lat. leave to agree). One of the formal steps in the levying a fine. When an action is brought for the purpose of levying a fine, the defendant, knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who accepts them, but, having given pledges to prosecute his suit, applies to the court, upon the return of the writ of covenant, for leave to make the matter up; this, which is readily granted, is called the *licentia concordandi*. 5 Co. 39; Cruise, Dig. tit. 35, c. 2, 22.

LICENTIA LOQUENDI. Imparlance.

LICENTIA SURGENDI. In Old English Law. Liberty of rising. A liberty or space of time given by the court to a tenant, who is essoined, *de malo leati*, in a real action, to arise out of his bed. Also, the writ thereupon. If the defendant can show that the tenant was seen abroad before leave of court, and before being viewed by the knights appointed by the court for that purpose, such tenant shall be taken to be deceitfully essoined, and to have made default. Bract. lib. 5; Fleta, lib. 6, c. 10.

LICENTIA TRANSFRETANDI. A writ or warrant directed to the keeper of the port of Dover, or other seaport, commanding him to let the person who has this license of the king pass over sea. Reg. Orig. 93.

LICENTIOUSNESS. The doing what one pleases, without regard to the rights of others.

It differs from liberty in this, that the latter is restrained by natural or positive law, and consists in doing whatever we please not inconsistent with the rights of others, whereas the former does not respect those rights. Wolf, Inst. § 84.

Lewdness. 23 Fla. 303. See LEWDNESS; LASCIVIOUSNESS.

LICET (Lat.). It is lawful; not forbidden by law.

Id omne licitum est, quod non est legitimum prohibuit, quomobrem, quod, lege permittente, fit, penam non meretur. Licere dicimus quod legitimum, moribus, institutisque conceditur. Cic. Philip. 13.

Although Calvinus, Lex. An averment that, "although such a thing is done or not done," is not implicative of the doing or not doing, but a direct averment of it. Plowd. 127.

LICET SÆPIUS REQUISITUS (although often requested). In Pleading.

A formal allegation in a declaration that the defendant has been often requested to perform the acts the non-performance of which is complained of.

It is usually alleged in the declaration that the defendant, *licet sæpius requisitus*, etc., did not perform the contract the violation of which is the foundation of the action. This allegation is generally sufficient when a request is not parcel of the contract. Indeed, in such cases it is unnecessary even to lay a general request; for the bringing of the suit is itself a sufficient request; 1 Saund. 33, n. 2; 2 id. 118, note 3; 2 H. Bla. 131; 1 Johns. Cas. 99, 319; 3 M. & S. 150. See DEMAND.

LICITACION. In Spanish Law. The sale made at public auction by co-proprietors, or co-heirs, of their joint property which is not susceptible of being advantageously divided in kind See CANT.

LIDFORD LAW. See LYNCH LAW.

LIE. To charge that one swore to a "lie" on the oath which he took as a viewer of a proposed alteration of a road, is not a charge of perjury. 8 B. Mon. (Ky.) 486.

LIEGE (from *liga*, a bond, or *litis*, a man wholly at command of his lord. Blount).

In Feudal Law. Bound by a feudal tenure; bound in allegiance to the lord paramount, who owned no superior.

The term was applied to the lord, or liege lord, to whom allegiance was due, since he was bound to protection and a just government, and also to the feudatory, liegeman, or subject bound to allegiance, for he was bound to tribute and due subjection. 34 & 35 Hen. VIII. *So lieges* are the king's subjects. Stat. 8 Hen. VI. c. 10; 14 Hen. VIII. c. 2. So in Scotland. Bell, Dict. But in ancient times private persons, as lords of manors, had their *lieges*. Jacob, Law Dict.; 1 Bla. Com. 367.

Liege, or *ligius*, was used in old records for full, pure, or perfect; e. g. *ligia potestas*, full and free power of disposal. Paroch. Antiqu. 280. So in Scotland. -See LIEGE POUTIE.

LIEGE POUTIE (*Legitima Potestas*).

In Scotch Law. That state of health which gives a person full power to dispose of, *mortis causa* or otherwise, his heritable property. Bell, Dict.

A deed executed at time of such state of health, as opposed to a death-bed conveyance. *Id.* A person is in liege poutie, or in *legitima potestas*, who is in health and capacity, and *sui juris*. 1 Bell, Com. 85; 6 Cl. & F. 540; Ersk. Prin. III. VIII. 46.

LIEN. A hold or claim which one person has upon the property of another as a security for some debt or charge.

The right which one person possesses, in certain cases, of detaining property placed in his possession belonging to another, until some demand which the former has been satisfied. 2 East 235.

A qualified right which, in certain cases, may be exercised over the property of another. 6 East 25, n.

A right to hold. 2 Campb. 579.

A right, in regard to personal property, to detain the property till some claim or charge is satisfied. Metc. Yelv. 67, n.

The right of retaining or continuing possession till the price is paid. 1 Parsons, Mar. Law, 144.

A lien is defined by statute in California, Utah, New Mexico, and the Dakotas, to be a charge imposed upon specific property by which it is made security for the performance of an act.

In its most extensive signification, the term lien includes every case in which real or personal property is charged with the payment of a debt or duty; every such charge being denominated a lien on the property. It differs from an estate in or title to the property, as it may be discharged at any time by payment of the sum for which the lien attaches. It differs from a mortgage in the fact that a mortgage is made and the property delivered, or otherwise, for the express purpose of security; while the lien attaches as incidental to the main purpose of the bailment, or, as in case of the lien of a judgment, by mere act of the law, without any act of the party. In this general sense the word is com-

monly used by English and American law writers to include those preferred or privileged claim-given by statute or by admiralty law, and which seem to have been adopted from the civil law, as well as the security existing at common law, to which the term more exactly applies. In its more limited as well as commoner sense, the word lien indicates a mere right to hold the property of another as security until some claim is satisfied.

The civil law embraces, under the head of mortgage and privilege, the peculiar securities which, in common and maritime law, and equity, are termed liens. See MORTGAGE; PRIVILEGE; HYPOTHECATION.

In Scotch law what corresponds to the common law lien is included under the rights termed hypothec and retention, though certain rights of retention are also called liens; Ersk. Prin. 374. See RETENTION; HYPOTHECATION.

Common Law Lien. As distinguished from the other classes, a lien at common law consists in a mere right to retain possession until the debt or charge is paid. 2 Story 131; 24 Me. 214; 5 Ohio 88; 10 Barb. 626; 43 Ill. 424; 66 Tex. 159.

In the case of a factor an apparent exception exists, as he is allowed a lien on the proceeds of goods sold, as well as on the goods themselves. But this seems to result from the relation of the parties and the purposes of the bailment; to effectuate which, and at the same time give a security to the factor, the law considers the possession, or right to possession, of the proceeds, the same thing as the possession of the goods themselves; 1 Wall. 166; 9 Bosw. 660; Story, Ag. § 111.

A particular lien is a right to retain the property of another on account of labor employed or money expended on that specific property.

A general lien is a right to retain the property of another on account of a general balance due from the owner. 3 B. & P. 494.

Of course, where a general lien exists, a particular lien is included.

Particular liens constitute the oldest class of liens, and the one most favored by the common law; 4 Burr. 2321; Dougl. 97; 3 B. & P. 126. But courts ceased to originate liens at an early period; 9 East 426; while general liens have been looked upon with jealousy, being considered encroachments upon the common law and founded solely in the usage of and for the benefit of trade; 3 B. & P. 42, 26, 494.

Liens either exist by law, arise from usage, or are created by express agreement.

Liens which exist by the common law generally arise in cases of bailment. Thus, a particular lien exists when goods are delivered to a handicraftsman of any sort for the execution of the purposes of his trade upon them; see *infra*; or where a person is, from the nature of his occupation, under a legal obligation to receive and be at trouble or expense about the personal property of another; 3 B. & P. 42; 3 Vt. 245; 5 B. & Ald. 350.

A lien sometimes arises where there is no bailment, as the maritime liens such as salvage, and a finder's lien for a reward, as to both of which, see *infra*. But this principle does not apply, generally, it is said, to the preservation of things found upon land, where no reward is offered; 2 H. Bl. 354; 2 W. Bl. 1107; 7 Barb. 113; 4 Watts 63; 10 Johns. 102; Story, Bailm. § 621, note a.

Liens which arise by usage are usually general liens, and the usage is said to be either the general usage of trade, or the particular usage of the parties; 3 B. & P. 119; 4 Burr. 2322; 1 Atk. 238; Amb. 252.

The usage must be so general that the party delivering the goods may be presumed to have known it, and to have made the right of lien a part of the contract; 4 C. & P. 153; 3 B. & P. 50. And it is said that the lien must be for a general balance arising from similar transactions between the parties, and the debt must have accrued in the business of the party claiming the lien; 1 W. Bl. 651; and it seems that more decisive proof of general usage is required in those occupations in which the workmen are required to receive their em-

ployment when offered them, such as carriers; 6 Term 14; 6 East 519. But where a general lien has been once established, the courts will not allow it to be disturbed; 1 Esp. 109.

A general lien from particular usage between the parties is presumed from proof of their having before dealt upon that basis; 6 Term 19. If a debtor, who has already pledged property to secure a loan, borrow a further sum, the lien is for the whole debt; 2 Vern. 691.

Liens, general or particular, may be created by *express agreement of parties*; Cro. Car. 271; 6 Term 14; as when property is delivered under such agreement for repair or the execution of any purpose upon it or in case of pawns; 2 Kent 637. And an agreement among tradesmen to require such lien, if known to the bailor, will bind him as by a lien of this kind. A tradesman obliged to accept employment from all comers cannot by mere notice create such lien by implication; express assent must be proved; 3 B. & P. 42; 5 B. & Ald. 350.

LIENS EXISTING BY THE COMMON LAW, IN THE ABSENCE OF ANY SPECIAL AGREEMENT. Every *bailee for hire* who has, by his labor or skill, conferred value on specific chattels bailed to him for that purpose has a particular lien upon them; 2 W. & S. 392; 3 Selw. N. P. 1163; 6 Term 14; 86 Pa. 486; 95 id. 345; 26 Miss. 182; 4 Wend. 292; 60 Wis. 26; 44 N. J. L. 105; so also have *wharfingers*; 7 B. & C. 212; 43 N. Y. 554; 2 Gall. 483; *warehousemen*; 18 Ill. 286; 13 Ark. 437; 1 Minn. 408; 31 Miss. 261; 34 E. L. & Eq. 116; see 26 Abb. N. C. 134; who are entitled to a lien on goods remaining in the warehouse for a general balance of storage due on all goods stored under a single contract; 53 Fed. Rep. 401; *dyers and tailors*; Cro. Car. 271; 9 East 433; 4 Burr. 2214; but a tailor making cloth into clothing as a sub-contractor, under a contract with one who received the cloth from the owner, has no lien on the clothing for his services; 174 Pa. 119; the *finder of lost property* for which a reward is offered; 3 Metc. 352; 8 Gill 213; 7 Barb. 118; 52 Pa. 484; a *vendor of goods*, for the price, so long as he retains possession; 1 H. Bla. 363; 8 H. L. Cas. 338; 6 McLean 472; 93 Wis. 388; 36 W. Va. 391; 131 U. S. 287; Benj. Sales, § 796; *pawnees*, from the very nature of their contract; 15 Mass. 408; 2 Vt. 309; 9 Wend. 345; 3 Mo. 219; 39 Me. 45; but only where the pawnee has authority to make such pledge; 2 Campb. 336, n. A pledge, even where the pawnee is innocent, does not bind the owner, unless the pawnee has authority to make the pledge; 1 Mas. 440; 4 Johns. 103; 1 M. & S. 140; 20 How. 343; 98 Mass. 303; 57 Ga. 274; see, as to stock, 4 Allen 272; 100 Mass. 382; 43 Cal. 99. The pawnee does not have a general lien; 15 Mass. 490; 27 La. Ann. 110; 37 N. Y. 540; and he does not lose his particular lien by a re-delivery for a special and limited purpose; 47 Ill. 198; 18 C. B. n. s. 315; 12 Gray 465. Other liens recognized with respect to the particular property which is the subject matter of the dealings between the parties are as follows:

Common carriers, for transportation of goods; 6 East 519; Wr. Ohio 216; 25 Wis. 241; 1 Minn. 301; 51 Ala. 512; 10 Wall. 15; 104 Mass. 156; 42 Me. 438; but not if the goods are taken tortiously from the owner's possession, where the carrier is innocent; 1 Dougl. Mich. 1; 5 Cush. 137; 6 Whart. 418; 1 B. & Ad. 450; nor if the carrier transports them for a mere hire; 107 Mass. 126. Part of the goods may be detained for the whole freight of goods belonging to the same person; 6 East 622. A carrier has a lien on baggage for the fare of the passenger, which includes the transportation of both; Sto. Bailm. § 604; Hutch. Car. § 719; 2 Campb. 631; 30 Fed. Rep. 94. In the last case it was held by Deady, J., that this lien extended so far as to warrant the detention of the baggage to enforce the payment of an additional fare for the last part of the journey, covered by the ticket, charged by the conductor after the passenger had stopped over without

permission; but this decision is challenged by Professor Ewell, in a note which collects and reviews cases considered as bearing upon the question; 26 Am. L. Reg. n. s. 298. If property is damaged while in charge of a common carrier to a greater amount than the bill for freight, his lien is extinguished; 38 S. C. 78. The lien of a carrier and warehouseman for keeping property is superior to that of a pledgee who has secured the property to be transported and stored; 53 Minn. 327. Where a company refuses to deliver freight to the proper owner or consignee, on the ground that it has a lien thereon for freight charges and storage, and the owner resorts to a suit to recover possession of the property, it cannot claim judgment on the ground that it has a lien for storage, where it has been decided that it had no lien for freight charges; 15 Blatchf. 525.

The carriers' common law lien did not include any right of sale; 6 East 21; 20 Wend. 267; but the right to the lien is recognized and a power of sale given by statute in most states. In some states this right of sale is given to other bailees, as innkeepers, factors, etc. For the statutes on this subject see 1 Stims. Am. Stat. L. §§ 4353-6.

Innkeepers may detain a horse for his keep; 6 Term 141; 9 Pick. 280, 316, 333, though, perhaps, not if the person leaving him be not a guest; 68 Me. 489; 11 Barb. 41; but not sell him; Bacon, Abr. *Inns* (D); 8 Mod. 173; 3 Gray 382; Schoul. Bail. 294; except by custom of London and Exeter; F. Moo. 876; but see *supra*; and cannot retake the horse or any other goods on which he has a lien, after giving them up; 8 Mod. 173; Metc. Yelv. 67; L. R. 3 Q. B. Div. 484. They may detain the goods of a traveller, but not of a boarder; 43 Vt. 30; 27 Misc. 202; L. R. 7 Q. B. 711; 36 Ia. 651; 8 Rich. S. C. 423; 52 Minn. 516. See, generally, 1 Smith, L. Cas., 9th Am. ed. 253, 259. The innkeeper's common law lien is now generally regulated by statutes, many of which also confer on boarding-house keepers all the privileges of innkeepers; 43 N. H. 332; 42 Barb. 623; 27 Wis. 406; 110 Mass. 158. See 53 N. J. L. 277. For reference to these statutes see 1 Stims. Am. Stat. L. § 4393. An innkeeper's lien is a particular lien; 9 East 433; Cro. Car. 271; 2 E. D. Sm. 195; it attaches to goods in the possession of his guest, though they belong to a stranger, provided the innkeeper has no notice of such fact; 53 Minn. 516; 13 Or. 482; but if he owes the guest for labor more than she does for board, he has no lien; 3 Colo. App. 519. Where a husband and wife were guests at a hotel, although credit was given to the husband who made payments on account, yet the wife's luggage which was her separate property, was subject to a lien for the balance of the hotel bill; 25 Q. B. Div. 491. See a full note on the innkeeper's lien, 21 L. R. A. 229. In holding that an innkeeper has a lien on goods which a traveller brings to the inn as luggage, the English court of appeal said that it would not disturb a well-known and very large business carried on in England for centuries, by holding otherwise; [1895] 2 Q. B. 501.

Agistors of cattle and livery-stable keepers have no lien; Cro. Car. 271; 7 Gray 183; 35 Me. 153; 23 Cal. 364; 68 Vt. 220; 73 N. C. 96; 6 East 509; except by statute; 3 Colo. App. 335; 68 Hun 827; 34 Neb. 483; 19 Or. 217; 63 Vt. 436.

An agistor's lien cannot be based upon a breach of the contract of agistment; 58 Mo. App. 1; and when the owner of stock allows it to remain in the hands of the agistor longer than the contract time, the latter may claim a lien for their keeping during such term; *id.* One who boards a horse under contract with a person not the owner thereof has no right to a lien unless it is shown that such person had authority to act for the owner; 63 N. W. Rep. (Mich.) 525. Persons who have been held entitled to a lien for keeping animals are: ranchmen; 7 Mont. 385; stable keeper; 155 Mass. 481; 23 Mo. App. 598; but not a groom merely employed to take charge of the

horse; 67 N. W. Rep. (Minn.) 203. Such lien accrues only to one in possession; 57 Conn. 547; s. c. 6 L. R. A. 83; 46 Ohio St. 560; 12 Wash. 46; 43 Minn. 148; 89 Ia. 350; 26 Ill. App. 315; *contra*, see 23 Mo. App. 617. One wrongfully converting an animal to his own use has no lien; 44 Kan. 543; nor one receiving from a bailee with notice; 41 Mo. App. 416. A liveryman's lien, under the Pennsylvania act, 1807, for boarding a horse does not extend to a carriage and harness kept with it; 14 Lanc. L. Rev. Pa. 255. This lien depends solely upon statutes; 64 Minn. 473.

Factors, brokers, and commission agents, on goods and papers; 3 Term 119; 1 Johns. Cas. 437, n.; 8 Wheat. 268; 28 Vt. 118; 84 Mo. 582; 150 Pa. 481; 38 W. Va. 158; on part of the goods for the whole claim; 6 East 632; or on the proceeds of sale of the goods; 5 B. & Ald. 37; 73 Ill. 226; 15 Mass. 389; but only for such goods as come to them as factors; 11 E. L. & Eq. 528; but not such as are delivered directly by the owner to the purchaser and do not come into possession of the factor; 149 Ill. 9; s. c. 25 L. R. A. 746. If a factor disobey instructions he loses his lien upon money deposited with him as security; 40 Ill. 313; 114 id. 196.

Bankers, on all securities left with them by their employers; 5 Term 488; 1 How. 234; 8 Ill. 233; see 130 U. S. 354. But see also 11 Pa. 291. But not on securities collateral to a specific loan; L. R. 4 App. Cas. 413; 47 Barb. 395; 137 Mass. 263; or for debts not due; 98 Ill. 538; 74 N. Y. 467; or on the account of a firm for the debt of a partner; 35 N. Y. 330; 11 Beav. 546.

The lien of mechanics and material men upon a building or improvement in the construction of which labor or material is used, exists only by virtue of the statutes creating it; 23 Neb. 126. See *Mechanics' Lien, infra*.

As to the lien of attorneys and other court officers for fees, see *Attorneys' Lien, infra*.

As to liens on the assets of insolvent persons or corporations for wages of labor or service, which are purely statutory, having no relation to the common law idea of lien, see *LABORER*.

REQUIREMENTS. There must have been a delivery of the property into the possession of the party claiming the lien, or his agent; 3 Term 119; 6 East 25, n.

Where a person, in pursuance of the authority and directions of the owner of property, delivers it to a tradesman for the execution of the purposes of his trade upon it, the tradesman will not have a general lien against the owner for a balance due from the person delivering it, if he knew that the one delivering was not the real owner; 1 East 335; 2 Campb. 218. Thus, a carrier, who, by the usage of trade, is to be paid by the consignor, has no lien for a general balance against the consignee; 5 B. & P. 64. Nor can a claim against the consignee destroy the consignor's right of stoppage *in transitu*; 3 B. & P. 43. But a particular lien may undoubtedly be derived through the acts of agents acting within the scope of their employment; 9 East 233; 8 B. & P. 119. And the same would be true of a general lien against the owner for a balance due from him.

No lien exists where the party claiming it acquires possession by wrong; 3 Term 485; or by misrepresentation; 1 Campb. 13; or by his unauthorized and voluntary act; 8 Term 310, 610; 9 H. Bla. 254; 3 W. Bla. 1117 (but see 4 Burr. 2318).

Or where the act of the servant or agent delivering the property is totally unauthorized, and the pledge of it is tortious against the owner, whether delivered as a pledge or for the execution of the purposes of a trade thereupon; 5 Ves. 111; 6 East 17.

A delivery by a debtor for the purpose of preferring a creditor will not be allowed to operate as a delivery sufficient for a lien to attach; 4 Burr. 2389; 3 Ves. 85; 2 Campb. 579; 11 East 358.

A mere creditor happening to have in his possession specific articles belonging to his debtor, has no lien upon them; 15 Mass.

490; nor is a lien created by advancing money to enable a purchaser of land to complete his purchase; 3 Johns. Ch. 56; 6 G. & J. 4; nor by an advancement of money to an administrator to pay debts of the intestate; 4 Ohio 495; the owner of land has no lien on property cast upon it by drift; 16 Pa. 393. A lien cannot be created upon a mere right of action for a personal tort; 53 Minn. 249. No lien upon a particular fund is acquired by a creditor by reason of a promise to pay a debt out of it; 18 Wend. 319; nor upon land by the promise to pay out of the proceeds of its sale; 46 Ill. App. 541. Nor can parties contract to extend the area of property to be covered by a lien; 149 U. S. 574. A mere loan or advancement of money to pay the debt of another creates no lien; 72 Ia. 550; 47 Ark. 111; 124 Ind. 545. See 9 L. R. A. 173, note; SUBROGATION. At common law a corporation has no lien upon the stock of one of its members for an indebtedness due to it by him; 50 Pac. Rep. (Wash.) 575; 15 Ore. 413; but see 99 Pa. 513; 75 Va. 327; 77 id. 445, in which cases such lien seems to have been enforced under general statutes. By-laws creating such lien are common and are valid; 23 N. J. Eq. 325; 61 Mo. 319; 58 Miss. 421; 48 Ia. 339; 9 R. I. 308; 2 Sawy. 108; 3 Cliff. 429; not, however, against innocent purchasers; 18 Wall. 559; 59 N. Y. 96; 102 Pa. 488; 63 Cal. 359; 8 Mo. App. 249; 33 La. Ann. 1286. A statutory lien of a corporation on its stock for debts due by a stockholder is good against all the world. A sale of the stock to an innocent third party does not discharge it; 73 N. W. (Minn.) 635. Such is declared to be "the weight of authority" by a work which is itself an authority; 1 Thomp. Corp. § 1032.

WAIVER. Possession is a necessary element of common-law liens; and if the creditor once knowingly parts with it after the lien attaches, the lien is gone; 5 Ohio 88; 6 East 25, n.; 42 Me. 50; 2 Edw. Ch. 181; 5 Binn. 398; 4 Denio 498; 42 Me. 50; 11 Cush. 231; 2 Swan 561; 23 Vt. 217; 43 Fed. Rep. 480; Benj. Sales § 790; Trick. Liens 11, 16, 616; the abandonment of his privilege by a vendor need not be in absolute terms, but it is enough if it can be inferred from the acts of the parties; 40 La. Ann. 615. Parting with possession, if consistent with the contract, the course of business, and the intention of the parties, will not discharge a lien created by a contract; 32 Me. 211. There may be a special agreement extending the lien, though not to affect third persons; 30 Wend. 467. Delivery may be constructive; Amb. 252; and so may possession; 5 Ga. 153. A lien cannot be transferred; 8 Pick. 73; but property subject to it may be delivered to a third person, as to the creditor's servant, with notice, so as to preserve the lien of the original creditor; 2 East 529. But it must not be delivered to the owner or his agent; 2 East 529; 4 Johns. 103. But if the property be of a perishable nature, possession may be given to the owner under proper agreements; 8 Term 199. Generally a delivery of part of goods sold is not equivalent to a delivery of the whole, so as to destroy the vendor's lien, but the lien will remain on the part retained for the price of the whole, if the intention to separate the goods delivered from the rest is manifest; Benj. Sales § 805. A grantor's lien on the premises conveyed for the purchase price is a personal privilege not assignable with the debt, nor can the creditor of the grantor be subrogated to the same; 39 Fed. Rep. 89; 78 Ga. 173; 128 Ill. 178. See 84 Ala. 281.

Neglect to insist upon a lien, in giving reasons for a refusal to deliver property on demand, has been held a waiver; 1 Campb. 410, n.; 7 Ind. 21; 13 Ark. 437.

Where there is a special agreement made, or act done, inconsistent with the existence of the lien, such as an agreement to give credit, or where a distinct security is taken, or the possession of the property is acquired for another distinct purpose, and for that only, or where the property is

attached by the creditor, no lien arises; 2 Marsh. 339; 5 M. & S. 180; 8 N. H. 441; 17 Pick. 140; 4 Vt. 549; 10 Conn. 103. But such agreement must be clearly inconsistent with the lien; 1 Dutch. 443; 33 Me. 319. See 109 U. S. 702.

The only remedy or use of the lien at common law is to allow the creditor to retain possession of the goods; 33 Me. 438; 1 Mas. 319. And he may do this against assignees of the debtor; 1 Burr. 489.

A waiver of exemption by a debtor as to any lien will enure to the benefit of all prior liens, on the principle that a debtor cannot alter the precedence settled by law; 124 Pa. 347.

ATTORNEY'S LIEN. This, under English law, was a lien for costs taxed in the cause. In the early cases the attorney or solicitor was put upon the same footing as other court officers, such as clerks who had a lien on papers; 2 Ves. 25; Beames, Costs 811. The doctrine of attorney's lien as originally held was that it was confined to costs, and the plaintiff might settle the case in the absence of notice from the attorney; 4 Term 124; 13 Ves., Summ. ed. 59, n.; there was also a lien on papers; 6 Madd. 66; but none on the fund; 4 id. 391. There were two classes of liens recognized, active and passive, the former being on the fund for costs, and the latter a right to retain papers; 4 Myl. & Cr. 354. The attorney was not *dominus litis*; 12 M. & W. 440; and his lien would not prevail over a garnishment; 1 H. & M. 171. In the United States many cases sustain the lien upon the fruits of the judgment for fees; 66 Ala. 29; 42 Ark. 402; 6 Fla. 214; 51 Conn. 105; 14 Ga. 89; 17 Kan. 20; 39 Minn. 373; 1 Heisk. 503; 16 W. Va. 378; 10 Wis. 112. Some cases sustain the lien for a fee agreed upon as being within the principle of the common law lien for costs; 51 N. Y. 140; 70 id. 98; but the lien is waived by consent to a payment to the client; 112 id. 157. Others recognize a retaining lien on papers; 138 Ill. 631; 10 Wall. 483; and as between solicitor and client for reasonable compensation on money collected; 105 U. S. 527; 71 Ia. 32; but none, in either of these cases, upon a judgment, or unliquidated damages; 5 Bush 601; or in an action of tort; 66 Me. 237.

In some states the cases sustain a statutory lien for fees; 10 Col. 228; paramount to set-off; 86 Ind. 172; 10 Neb. 574; 15 Johns. 406; 1 Rich. 207; 40 Mich. 218; the lien binds money or papers in possession of the attorney for all professional services, but for them only; 56 id. 135.

In others, statutory liens are held to apply only to taxable fees; 69 Me. 381; 11 Mass. 238; and only after final judgment and execution issued; 103 id. 33. So in New York prior to the code, the common law lien was confined to taxed costs; 1 Paine & Duer, Prac. 190; and did not affect damages recovered until they came into his hands; 12 Wend. 261.

Some cases sustain a lien on papers for a general balance; 11 N. H. 163; and on the recovery in the cause, but not those due in other causes; 4 id. 347; 48 Fed. Rep. 145; others, for costs, but subordinate to set-off; 14 Vt. 247; and ineffective as against an assignment; id. 485.

Liens may be defeated by settlement; 39 Ga. 5; 21 Ia. 523; if there is no collusion; 41 Ill. 136.

The lien is denied absolutely in some states; 1 Bland 98; 43 Md. 46, 212; 44 Miss. 530; 18 Mo. 18; 35 Ohio St. 581; 3 Watts 357; though some cases, denying the lien, hold that fees may be deducted from money in hand; 19 Pa. 95; 30 Tex. 180; see 12 Op. Atty. Gen. 216; but in another case it was said that in the absence of an express agreement, an attorney's lien is not acquired upon a judgment rendered in a suit prosecuted by him, nor upon the money recovered by means of his legal services; 163 Ill. 384.

An attorney has a lien on land for sums expended for his client's benefit in obtaining full title; 48 La. Ann. 54; but not for fees in maintaining title; 40 id. 135; also on a judgment in favor of defendant for costs; 16 Misc. Rep. 515; and the attorney

of a stockholder in a suit to set aside a fraudulent conveyance by the officers of the corporation, has a lien for his fees on the property recovered; 93 Tenn. 691; also on money collected for his client until paid the general balance due him for his services; 66 Vt. 510. An attorney for plaintiff in an action by an administrator to recover damages for the death of his intestate has a lien on the amount recovered; 78 Hun 575; but one retained by a legatee to procure the establishment of a will has none, for his services, on the legacy to his client; 29 Fla. 476. In proceedings to compel an attorney to deliver up property where his claim is indefinite, a reference is properly ordered to ascertain the amount, giving plaintiff the option of making a deposit sufficient to secure whatever amount may be established on the reference, and he is not deprived of his lien simply because his claim is indefinite; 66 Hun 626; 187 N. Y. 605. An equitable lien is acquired by an attorney where, by an agreement with the owner of property condemned for a city street, he procures an increase in the amount of damages awarded; 66 Hun 626. He has a lien upon the cause of action for agreed compensation, which attaches to the judgment and the proceeds thereof, superior to the rights of a receiver appointed in supplementary proceedings; 11 App. Div. N. Y. 238.

It has been held that an attorney has no lien, at common law, on his client's cause of action; 72 Fed. Rep. 563; or, independently of a statute, for services; 65 N. W. Rep. (Ia.) 413; or in a proceeding by a guardian for the removal of funds of his ward to a foreign state, for fees incurred in the proceeding; 36 S. W. Rep. (Tenn.) 188. The lien cannot be asserted against money appropriated by a legislative act, while it is in the hands of the state treasurer; 40 Neb. 854. The attorney employed by a pledgee of notes, impounded in an equity suit, to sue on them at law, has no lien upon the fund realized, as against the other parties to the equity suit; 67 Fed. Rep. 857. An agreement on the settlement of certain cases that the fees of an attorney should be included in the fees to be paid in another case, if a judgment be recovered, does not create a lien on the judgment for fees on the cases settled; 59 Fed. Rep. 750. Where an attorney received money for bail, to be returned on final disposition of the charge, it was held that an attorney's lien did not exist on the money, his agreement being to return it on receiving it back from the magistrate; 24 Ore. 168.

An attorney's lien for services in procuring a judgment is limited to the attorney of record and does not extend to attorneys employed to assist him; 59 Fed. Rep. 750; nor does it extend to prospective services; 48 id. 145.

An attorney whose services are employed merely in defending the title to land has no lien upon the land for his services; 56 Ark. 324; nor is there a lien on land recovered; 36 W. Va. 200. The attorney for defendant is not entitled to any lien so as to prevent a settlement by defendant, where the answer simply sets up a defence and not a counterclaim; 16 App. Div. N. Y. 70. And the right of an attorney to a lien on his client's papers is lost by the substitution of another attorney in his place on his refusal to go on with the case without the payment of fees which he claims to have already earned; 16 App. Div. N. Y. 126. No lien can accrue in favor of the attorney for plaintiff where the action is settled by plaintiff before defendant has notice of the attorney's claim for a lien; 50 Neb. 373. But acceptance of a client's note for his fee is not a waiver of his statutory lien; 86 Ga. 138.

Where an attorney having a lien on a judgment takes an assignment thereof to himself, and claims the absolute ownership of the judgment, he relinquishes whatever rights he might have been entitled to by virtue of his lien; 43 Pac. Rep. (Colo.) 1042; and taking an independent security to secure payment of his fee waives his lien, even though the security proves unavailable; 7 Houst. 182.

It has been held that, where a judgment requires the claim of an intervening creditor of the plaintiff to be first paid out of the amount for which the plaintiff has judgment, the right of the creditor is superior to the lien of an attorney; 65 N. W. Rep. (Ia.) 413. An attorney's lien is subordinate to the right of the adverse party to any proper set-off, or other available defenses; 44 Neb. 900; 3 S. D. 477.

See, generally, Weeks, Attys.; Beamcs, Costs; Cross, Liens; 26 Alb. L. J. 271; 31 Am. Dec. 755-9; 20 Am. L. Rev. 727, 821; 21 *id.* 70; 10 Am. L. Rec. 200; 18 Abb. N. C. 23; 19 Centr. L. J. 394; 27 *id.* 194; 23 Ir. L. T. 851; 12 Fed. Rep. 518; 17 Wkly. L. Bul. 16; 2 Silvern. N. Y. 159-211.

Equitable Liens are such as exist in equity, and of which courts of equity alone take cognizance.

A court of equity will raise equitable liens for the purpose of justice, and if a lien could not be created otherwise, could even make a company execute a conveyance for that purpose; 3 Hughes 320.

A lien is neither a *jus in re* nor a *jus ad rem*; it is not property in the thing, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. In regard to these liens, it may be generally stated that they arise from constructive trusts. They are, therefore, wholly independent of the possession of the thing to which they are attached as an incumbrance; and they can be enforced only in courts of equity; Story, Eq. Jur. § 1215.

An equitable lien on a sale of realty is very different from a lien at law; for it operates after the possession has been changed, and is available by way of charge instead of detainer. Ad. Eq. 127.

Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein identified, a security for a debt or other obligation, or whereby the party promises to convey, assign, or transfer the property as security, creates an equitable lien upon the property so indicated which is enforceable against the property; 30 W. Va. 790.

VENDOR'S LIEN. First in importance among equitable liens is the vendor's lien for unpaid purchase money. The principle upon which it rests is that where a conveyance is made prematurely before payment of the price, the purchase money is a charge on the estate in the hands of the vendee; 4 Kent 151; Story, Eq. Jur. § 1217; Bisph. Eq. 353; 15 Ves. 329; 1 Bro. C. C. 420, 424, n. There has been some discussion as to its exact nature and whether it is to be classed in any sense as an implied trust, but the more reasonable view seems to be that it is not, at least in such sense as to carry with it the idea of any title, but that it is strictly a mere charge, the true nature of which perhaps cannot be better expressed than by the use of the term equitable lien. "The principle upon which such a lien rests has been held to be that one who gets the estate of another ought not, in conscience, to be allowed to keep it without paying the consideration." 147 U. S. 133. "As to the nature and origin of the lien see also 1 Bisph. Eq. 354; Story, Eq. Jur. § 1219; 2 Sugd. Vend. & P. 376; 1 Mas. 191; 1 Pingr. Mort. 319; 1 Wh. & Tud. L. Cas. 366; 118 Mass. 261; 22 Am. St. Rep. 279.

"No other single topic belonging to the equity jurisprudence has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in the different states and even sometimes in the same state, are directly conflicting." 8 Pom. Eq. Jur. § 1251.

Unless waived the lien remains till the whole purchase money is paid; 15 Ves. 329; 1 Vern. 267.

In order to create a vendor's lien there must be a fixed amount of unpaid purchase money due to the vendor. A vendee's obligation to a vendor on a collateral

covenant made at the time of a purchase will not give rise to a vendor's lien, unless the vendor expressly reserves such a lien in his deed; 36 Fed. Rep. 577.

A grantor's lien on the premises conveyed, for the purchase price, is a personal privilege not assignable with the debt; nor can the creditor of the grantor be subrogated to the same; 39 Fed. Rep. 89; 78 Ga. 173; 128 Ill. 178; but see 84 Ala. 281; 4 N. Mex. 347; 70 Tex. 132; 87 Tenn. 41. The lien exists against all the world except *bona fide* purchasers without notice; 1 Johns. Ch. 308; 9 Ind. 490; 12 R. I. 92; it is good against the land in the hands of heirs or subsequent purchasers with notice; 3 Russ. 488; 1 Sch. & L. 135; against assignees in bankruptcy; 2 B. R. 133; 1 Bro. Ch. 430; and whether the estate is actually conveyed or only contracted to be conveyed; 2 Dick. Ch. 730; 12 Ad. & E. 632. But as a general rule the lien does not prevail against the creditors of the purchaser; 7 Wheat. 46; 10 Barb. 626; 2 Sugd. Vend. & P. [681] n.; but whether it will do so it is said "depends upon the relative equities and rights of the disputants in comparison with one another." 1 Wh. & Tud. L. Cas. 374; and see 1 Story, Eq. Jur. § 1228. See as to assignability, 25 Am. L. Reg. n. s. 393, where the cases are collected by states. The question is involved in too much confusion for any successful effort to state a general rule.

The doctrine of vendor's lien, firmly settled in England, has been received with varying degrees of favor in the United States, some of them refusing to accept it. This would be in accord with the disfavor shown in this country to secret liens which has naturally resulted from the universal habit of requiring title papers and charges on real estate to be matters of record. In a general way the American cases may be grouped as follows: (1) Those which follow the English doctrine of *Mackreth v. Symmons*, 15 Ves. 329, sustaining the lien as already defined. In this class are included a majority of the states, though it is to be noted that in the classification of states frequently made with reference to this subject, there is a failure to note an important distinction between those states where the lien is recognized before a conveyance, and those in which the English doctrine is carried to its fullest extent and a grantor's lien sustained. A careful examination of the cases would probably leave the states which go to this extent in a considerable minority, as the lien is frequently recognized in favor of a vendor who has only executed a contract of sale and put the vendee in possession; 29 Neb. 672; 3 Ired. Eq. 117; while the lien is not recognized after a deed; *id.* 182. So in a state usually included among those recognizing the lien; 14 Ore. 268; it has been recently held that "where real estate is granted by absolute deed, followed by delivery of possession to the grantee, no implied equitable lien for the unpaid purchase money remains in the grantor;" 45 Pac. Rep. (Ore.) 290. (2) The implied vendor's lien is abolished by statute in Vermont, Iowa, Virginia, West Virginia, and Georgia. It is recognized and process provided for it in Tennessee, California, the Dakotas, Louisiana, and Arizona. And in Arkansas and Alabama the lien passes to an assignee of the note or bond for purchase money; 1 Stims. Am. Stat. L. § 1950. (3) The doctrine has been expressly disavowed in several states; 29 Me. 410; 13 Kan. 245; 49 Pa. 9; 2 Dessaus. 509; 10 R. I. 334; 118 Mass. 261; 44 N. H. 102; 17 Conn. 575. In Delaware the question remains without direct decision but with judicial expressions strongly adverse; 1 Harring. 69; 3 Del. Ch. 189; 36 Fed. Rep. 860. (4) The federal courts recognize and enforce the lien "if in harmony with the jurisprudence of the state in which the case is brought;" 147 U. S. 133. Classifications of cases in the state courts on this subject may be found in Bisph. Eq. § 353, notes; 1 Pingr. Mortg. 318, notes; Tiedm. R. P. 292, notes; 25 Am. L. Reg. n. s. 393.

In a rather unusual case, it was held that where a vendee, as a consideration, assumes debts of the vendor and settles them at a

compromise, the vendor has a lien for the amount of the rebate; 150 Ill. 212.

Waiver. The lien may be waived by agreement; but postponement of the day of payment is not a waiver, not being inconsistent with the nature of the lien; nor taking personal security; Ad. Eq. 128; 1 Johns. Ch. 308; 2 Humphr. 248; 1 Mas. 192; 2 Ohio 383; 1 Blackf. 246; 3 Ga. 333; 1 Ball & B. 514. An acknowledgment of the payment of the purchase-money in the body of the deed, or by a receipt, will not operate as a waiver or discharge of the vendor's lien if the purchase-money has not in fact been paid; 30 N. J. Eq. 569; 50 Ala. 228; 29 Ark. 357. Taking the note or other personal security of the vendee payable at a future day is generally held merely a means of payment, and not a security destroying the lien; 1 Sch. & L. 135; 2 V. & B. 306; 12 W. Va. 675; 50 Ala. 84; 26 N. J. Eq. 311; 44 Miss. 509; 25 Ark. 510; 21 Vt. 271; 1 Johns. Ch. 308. Where notes were taken of which part were not due and of those due payment had been made or tendered there was no vendor's lien; 24 Ore. 212. And if it be the note of a third party, or an independent security on real estate, it would generally be a waiver; Story, Eq. Jur. § 1228, n.; 4 Kent 151; 4 Wheat. 290; 1 Mas. 212; 4 Mo. App. 292; 67 Ill. 599; 10 R. I. 334; 10 Heisk. 477; 43 Miss. 670; 46 Texas 204; 30 Md. 422; 20 Ohio 546; 15 Ind. 435; 16 N. H. 592; 17 Cal. 70; 2 Mich. 243; 4 N. Y. 312; 66 Mo. 44. And, generally, the question of relinquishment will turn upon the facts of each case; 3 Russ. Ch. 488; 3 Sugd. Vend. c. 18; 8 J. J. Marsh. 553. As to waiver see 4 West. Rep. 780; extinguishment, see 14 Am. St. Rep. 61; estoppel, 5 Cent. L. J. 221.

See, generally, Herman, Mortg.; Miller, Eq. Mortg.; Perry, Trusts § 232; 2 Washb. R. P. 509, n. 6; **EQUITABLE MORTGAGE.**

OTHER EQUITABLE LIENS. In a case analogous to the vendor's lien, where money has been paid prematurely before conveyance made, the purchaser and his representatives have a lien; 3 Y. & J. 264; 11 Price 58; 1 P. Wms. 278.

So where the purchase money has been deposited in the hands of a third person, to cover incumbrances; 1 T. & R. 469; 1 Ves. 478. Yet a lien will not be created for a third party, who was to receive an annuity under a covenant as a part of the consideration for the conveyance; 3 Sim. 499; 1 M. & K. 297; 2 Keen 81.

The deposit of the title-deeds of an estate gives an equitable lien on the estate; 4 Bro. C. C. 269; s. c. 1 Lead. Cas. Eq. 931; L. R. 3 P. C. C. 299; Bisph. Eq. 357; without any express agreement either by parol or in writing. But not when the circumstances of the deposit were such as to show that no such lien was intended; 36 Beav. 27. This equitable lien has been recognized in 2 Sandf. Ch. 9; 2 Hill, Ch. 166; 12 Wisc. 413; 10 Sm. & M. 418; but denied in 2 Disn. 9; 1 Rawle 325. See 8 B. Monr. 435; 18 N. J. Eq. 104. This lien is not favored, and is confined strictly to an actual, immediate, and *bona fide* deposit of the title deeds with the creditor, as a security, in order to create the lien; 12 Ves. 197; Story, Eq. Jur. § 1020; 4 Kent 150. It would not be valid under the recording acts as against a *bona fide* purchaser from the owner of the title, without notice.

One who has a lien for the same debt on two funds, on one only of which another person has a lien, may be compelled in equity by the latter to resort first to the other fund for satisfaction; 8 Ves. 388; 1 Johns. Ch. 318; 1 Story, Eq. § 633; but not where there are prior liens on both funds; 184 Pa. 318.

When a single lien covers several parcels of land, such of them as still belong to the real debtor will be primarily charged, to the exonerated lands transferred to third parties; and if the purchasers are called upon to pay, they will be charged successively in the reverse order of time of transfers to them; 5 Johns. Ch. 440; 1 Pa. 275; but see *contra*, 2 Story, Eq. Jur. § 1233.

One joint tenant has, in many cases, a

lien on the common estate for repairs put on by himself above his share of the liability; 1 Ball & B. 199; Story, Eq. Jur. § 1236; Sugd. Vend. 611.

And equity applies this principle even to cases where a tenant for life makes permanent improvements in good faith; 1 Sim. & S. 552. So where a party has made improvements under a defective title; 6 Madd. 2; 9 Mod. 11.

An agreement between two legatees whereby one purchases the interest of the other and agrees that the executor shall hold his own interest in the estate as security for the payment of the consideration, and shall pay to the vendor any sum due under the will to the vendee, creates an equitable lien on the personal property or its proceeds, to which the vendee is entitled under the will, but not on the real estate; 20 S. Rep. (Ala.) 456.

So, too, there is a lien where property is conveyed *inter vivos*, or is bequeathed or devised by last will and testament, subject to a charge for the payment of debts; or to other charges in favor of third persons; Story, Eq. Jur. § 1344. A distinction must be kept in mind between a devise in trust to pay certain sums, and a devise subject to charges.

An equitable lien may be given by express contract upon future property; 50 Pac. Rep. (Cal.) 546; but it is not created by a mere promise to pay a debt from a particular fund if it should ever come into existence; 78 Fed. Rep. 417.

An acknowledgment in a deed to a firm that a judgment in favor of the grantor against a member of the firm is to stand against a fractional portion of the property conveyed, creates a lien by deed; 88 Atl. Rep. (Pa.) 519.

A covenant to convey and settle lands does not give the covenantee a lien; but was held to do so in case of a covenant to settle lands in lieu of dower; 3 Bro. Ch. 489; 1 Ves. 451; 1 Madd. Ch. Pr. 471.

A court of equity cannot create a lien upon lands to secure a party for a breach of contract, whether under seal or not, when there is no agreement for a lien between the parties; 74 Mich. 57.

A bargain and sale of personal property, accompanied by delivery, divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties; 131 U. S. 287.

An equitable lien upon real estate does not result from the sale of personal property, even though it is used in the erection of buildings thereon; 42 N. E. Rep. (Ind.) 910. As to equitable liens on personality, see 14 Cent. L. J. 42; on chattels, 19 id. 2, 24.

Where the owner of an equity of redemption in mortgaged lands agreed to charge a certain lot with the payment of two mortgages held upon other property, and agreed to execute proper mortgages on said land, or to pay off the mortgage already given, the agreement created an equitable charge in favor of the mortgagees named in the instrument; 26 Can. S. C. R. 41.

The holder of a mere equitable lien cannot compel the owner of the legal estate to account for the rents and profits received by him while occupying the premises; 88 Me. 479.

The holder of the legal title to land cannot, by private sale to a corporation having the right of eminent domain, defeat inchoate liens which would otherwise attach as the result of legal proceedings; 109 Ala. 448.

As to equitable liens generally, see Jones, Liens; 38 Alb. L. J. 188; 4 L. R. A. 247.

Maritime Liens. Maritime liens do not include or require possession. The word lien is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession; 22 E. L. & Eq. 62. See 15 Bost. Law Rep. 555; 16 id. 1, 264; Ben.

Adm. § 271. A distinction is made in the United States between qualified maritime liens, which depend upon possession, and absolute maritime liens, which do not require nor depend upon possession; 7 How. 729; 21 Am. Law Reg. 1. The sole essentials of admiralty jurisdiction in a suit *in rem* for breach of contract are that the contract is maritime and that the property proceeded against is within the lawful custody of the court. The existence of a maritime lien is not jurisdictional, but is a matter going to the merits; 168 U. S. 137. To sustain a maritime lien there must be, either in fact or by presumption of law, a credit of the ship; 60 Fed. Rep. 766.

The shipper of goods has a lien upon the ship, for the value of the goods sent, which can be enforced in admiralty; 1 Blatchf. & H. 300; 22 How. 491; 8 Blatchf. 271, 289; and, generally, every act of the master binds the vessel, if it be done within the scope of his authority; 1 W. Rob. 392; 18 How. 182; where the possession of the master is not tortious, but under a color of right; 6 McLean 484. This does not apply to contracts of material men with the master of a domestic ship; 1 Conkl. Adm. 73; and the act must have been within the scope of the master's employment; 18 How. 182. See 1 C. Rob. 84. This lien follows the ship even in the hands of a purchaser, without notice, before the creditor has had a reasonable opportunity to enforce his lien; 1 Ware 188. If the master borrow money for the ship's necessity, the lender has a lien on the ship for the amount; 4 Dall. 235; 8 Me. 298; 36 Fed. Rep. 197. A sale of the vessel by the master through necessity cuts out the lien of the shipper of the cargo in the vessel; 6 Wall. 18.

The owner of a ship has a lien on the cargo carried for the freight earned, whether reserved by a bill of lading or not; 4 B. & Ald. 630; 6 Pick. 248; 5 Sandf. 97; 5 Ohio 88; 8 Wheat. 605; 2 W. & M. 178.

Where freight has been earned for the transportation of goods before the United States declares them forfeited for a fraudulent custom house entry, and sells them, the freight has a lien on the proceeds, if the vessel owners were innocent; 9 Fed. Rep. 595.

This lien is, at most, only a qualified maritime lien; see 1 Pars. Mar. Law 174, n. The lien exists in case of a chartered ship; 4 Cow. 470; 1 Paine 358; 4 B. & Ald. 630; 8 Wheat. 605; to the extent of the freight due under the bill of lading; 1 B. & Ald. 711; 1 Sumn. 551. But if the charterer takes possession and management of the ship, he has the lien; 8 Cra. 39; 6 Pick. 248; 4 Cow. 470; 4 M. & G. 502. No lien for freight attaches before the ship has broken ground; 1 B. & P. 634; 5 Binn. 392; 3 Gray 92. But see, as to the damages for removing goods from the ship before she sails, 28 E. L. & Eq. 210; 2 C. & F. 354; 2 Gray 92.

No lien exists for dead freight; 3 M. & S. 205. The lien attaches only for freight earned; 3 M. & S. 205; Ware 149. The lien is lost by a delivery of the goods; 38 Fed. Rep. 528; 34 id. 909; 6 Hill 43; but not if the delivery be involuntary or procured by fraud; *id.* So it is by stipulations inconsistent with its exercise; 17 How. 53; 10 Conn. 104; 6 Pick. 248; 4 B. & Ald. 50; as, by an agreement to receive the freight at a day subsequent to the entire delivery of the goods,—a distinction being, however, taken between the unloading or arrival of the ship, and the delivery of the goods; 18 Johns. 157; 14 M. & W. 794; 2 Sumn. 589; 10 Mass. 510.

A third person cannot take advantage of the existence of such lien; 8 East 85. A vendor, before exercising the right of stoppage *in transitu*, must discharge this lien by payment of freight; 15 Me. 314; 3 B. & P. 42.

Master's lien. In England, the master had no lien, at common law, on the ship for wages, nor disbursements; 4 De Gex & J. 334; 1 B. & Ald. 575; 6 How. 112; 15 U. S. App. 229; but by the act of 1854 he has the same lien for his wages as a seaman; and this may be enforced in the

admiralty courts of the United States; 22 Bost. L. Rep. 150; 9 Wall. 435; 3 Fed. Rep. 577; 7 id. 247, 674. The district court may, but is not bound to exercise jurisdiction in favor of a British subject against a British ship; 22 Bost. L. Rep. 150. Its enforcement is only a question of comity; 9 Wall. 435.

In the United States, he has no lien for his wages; 2 Paine 201; 14 Pa. 34; 18 Pick. 580; 36 Fed. Rep. 493. This does not apply to one not master in fact; see 198. As to lien for disbursements, see 2 Curt. C. C. 437; 14 Pa. 34; 11 Pet. 175. He may be substituted if he discharge a lien; 1 Pet. Adm. 223; see 116; 3 Mas. 255. But he has a lien on the freight for disbursements; 4 Mass. 81; 5 Wend. 815; for wages in a peculiar case; Ware 149; and on the cargo, where it belongs to the ship-owners; 14 Me. 180. He may, therefore detain goods against the shipper or consignee, even after payment to owner, if the master give reasonable notice; 11 Mass. 72; 5 Wend. 315. But see 5 D. & R. 552. The master may retain goods till a contribution bond is signed; 11 Johns. 23; 11 Me. 150.

Admiralty has jurisdiction of a libel *in rem* by a master for his wages, where that lien is given by a state statute; 18 Sup. Ct. Rep. 114.

The seamen's lien for wages attaches to the ship and freight, and the proceeds of both, and follows them into whosoever hands they come; 2 Sumn. 443; and lies against a part, or the whole, of the fund; 3 Sumn. 50, 286; but not the cargo; 5 Pet. 675. It applies to proceeds of a vessel sold, under attachment in a state court; 2 Wall. C. C. 592, overruling 1 Newb. 215; and to a vessel while in the hands of a receiver of a state court, for wages accruing during the receivership; 168 U. S. 437.

Seamen discharged by the breaking up of a voyage are entitled to no lien for services not performed, when they could have obtained other employment of like character and at as good or better wages; 37 Fed. Rep. 696.

This lien of a seaman is of the nature of the *privilegium* of the civil law, does not depend upon possession, and takes precedence of a bottomry bond or hypothecation; 2 Pars. Mar. Law 62, and cases cited; 15 Bost. L. Rep. 555; Ware 134; or over subsequent collision liens; 35 Fed. Rep. 665. Taking the master's order does not destroy the lien; Ware 185. And see 2 Hagg. Adm. 136. For services for bringing a vessel into port, moving her about, drying her sails, etc., there is a lien; 59 Fed. Rep. 299; but not for services of a watchman in the home port; 65 Fed. Rep. 236; nor for men hired to watch the cargo of a vessel, by a contractor; 58 Fed. Rep. 908. Generally, all persons serving in a way directly and materially useful to the navigation of the vessel have a lien for their services; Gilp. 505; 3 Hagg. Adm. 876; Ware 83; 1 Blatchf. & H. 423; 1 Sumn. 384. A woman has it if she performs seaman's service; 1 Hagg. Adm. 187; 18 Bost. L. Rep. 672; 1 Newb. 5. Men hired for service on a barge without sails, masts, or rudder, with no duties upon land except in loading and unloading, have a lien on the vessel; 36 Fed. Rep. 607. The lien exists against ships owned by private persons, but not against government ships employed in the public service; 9 Wheat. 409; 3 Sumn. 308. See as to lien for seamen's wages, 4 Can. L. T. 153, 213.

Under the law of England no maritime lien is recognized for personal injuries received by a seaman on board ship; 36 Fed. Rep. 773. The question is unsettled in America, as to whether admiralty has jurisdiction over actions for personal injuries, either *in rem* or even against the owner; Bened. Adm. § 309 a. See 119 U. S. 199.

A ship broker, who obtains a crew, has been held to have a lien for his services and advances for their wages; 1 Blatchf. & H. 189. One who performs towage service on the navigable waters of the United States acquires a lien, which may be enforced by proceedings *in rem*, and cannot be destroyed by the sale of the vessel under a state law;

9 Fed. Rep. 777.

Stewadores are said to have no lien; *Olcott* 190; 1 Wall. Jr. 370. A *stewadore* would not have it, for services on a vessel in the home port; 37 Fed. Rep. 209; *id.* 696; 36 *id.* 493; 81 *id.* 216; and see 35 *id.* 916; 56 *id.* 908; 6 C. C. App. 318; s. c. 57 Fed. Rep. 224; but would in other than the home port; 2 U. S. App. 849; it is said to be a maritime contract when the service is rendered in a foreign port. *Benedict* is of the opinion that the tendency of the authorities is now to favor a *stewadore's* lien. See *Bened.* Adm. § 285; but the latest decision is that in the home port they have not. See a critical review of the cases "incorporated" by the court in its opinion; 81 Fed. Rep. 216.

Material men. By the civil law those who build, repair, or supply a ship have a lien upon the ship for the debt thus contracted, but the courts of the common law do not recognize the lien as a maritime lien, but only recognize the common law lien of the mechanic who by virtue of his possession, and not otherwise, was allowed a lien; *Bened.* Adm. § 271. It is well settled that material men furnishing supplies and materials to a vessel in her home port do not thereby acquire any lien upon the vessel by the general maritime laws in the United States; 21 Wall. 558; 89 Me. 512; 43 U. S. App. 267; but admiralty will enforce a lien given by a state law; 21 Wall. 558; 52 Fed. Rep. 653. The supreme court has decided, 4 Wheat. 438, that unless the local law of the particular state where the supplies are furnished gives a lien, there is no lien in the case of domestic vessels; 94 U. S. 590. Material men are those whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provisions necessary of any kind; see *Bened.* Adm. § 268; 3 Hagg. Adm. 129; 49 Fed. Rep. 383. In regard to foreign ships, it has been held that material men have a lien on the ship only when the supplies were necessary and could be obtained only on the credit of the ship; 19 How. 359; 13 Wall. 329; 61 Fed. Rep. 514; 79 Fed. Rep. 365; which must appear either in fact or by presumption of law; 60 *id.* 766. The lien for repairs continues only as long as possession is retained, on domestic ships; *Wright* (Ohio) 669; 4 Wheat. 438; 1 Story 68; and is gone if possession is lost; 14 Conn. 404; 4 Wheat. 438; 4 Wash. C. C. 453. When the supplies are furnished to a vessel in a foreign port by order of her master, a lien is implied, but for work done by order of the owner no lien will be held to exist unless proved by the agreement of the parties; 50 Fed. Rep. 944. Necessary supplies furnished to a vessel which has not obtained a registry in any port, at a port other than that which is the owner's residence, on the credit of the vessel, and not of the owner, are supplies furnished at a foreign port, for which a lien lies in admiralty; 81 Fed. Rep. 964; 9 Am. L. Rev. 638. There is a maritime lien for coal furnished to a foreign steamer at the wharf for daily use in the presence of the master; 75 Fed. Rep. 684; but not when supplied on the order of a charterer who was required by the charter to provide and pay for the coal and had an office at the port of supply; 165 U. S. 264.

The several states of the United States are foreign to each other in this respect. Where repairs are made at the home port of the owner, the maritime law of the United States gives no maritime lien, the rights of the parties being altogether governed by the local law. The liens given by the state laws have, however, been enforced by the federal courts, not as rights which they were bound to enforce, but as discretionary powers which they might lawfully exercise, when the controversies were within the admiralty jurisdiction; 1 Black 522; 21 Wall. 558; 95 U. S. 69; 1 Fed. Rep. 218; 3 *id.* 384; 8 *id.* 366. The state legislatures cannot create a maritime lien, nor can they confer jurisdiction upon a state court to enforce such a lien by a proceeding *in rem*; but they can authorize their enforcement by common-law remedies; *Bened.* Adm. 270; 4 Wall. 430, 571; 16 *id.* 534; 9 Am.

L. Rev. 638; 94 La. 192; 43 N. Y. 554; 21 Am. L. Reg. n. s. 88; 7 Am. L. Rev. n. s. 193. A lien under a state statute for repairs or supplies, furnished to a vessel in a home port is a right of property in the vessel and enforceable by process *in rem* exclusively in the federal district courts; 167 U. S. 806, reversing 157 Mass. 525. When a right, maritime in its nature and to be enforced by process in the nature of admiralty, has been given by the statute of a state, the admiralty courts of the United States have exclusive jurisdiction to enforce that right according to their own rules of procedure; 148 U. S. 1. When a lien is created by a general maritime law for repairs or supplies in a foreign port, the admiralty jurisdiction *in rem* of the courts of the United States is exclusive; 4 Wall. 411. That there is admiralty jurisdiction to enforce liens given by a state statute was also held in 36 Fed. Rep. 197; 40 *id.* 253; 46 *id.* 797; but see *id.* 136; 53 *id.* 599; 61 *id.* 860. And it is said that if a maritime lien upon a foreign vessel can be conferred by a state statute, a statute giving a lien for repairs, not furnished upon the credit of the vessel, cannot be enforced in a federal court of admiralty; 45 U. S. App. 16.

It is held by the Circuit Court of Appeals that a court of admiralty may entertain jurisdiction *in rem* against a vessel for the death of a passenger caused by a maritime collision; 70 Fed. Rep. 874. This right is based on a state statute giving not only a right of action for death, but a lien and preference over other demands in favor of such cause of action. This statutory provision distinguishes the case from 145 U. S. 335, where the right to a libel *in rem* in such case is denied, although the local law gave a right of action for death, but did not expressly create any lien on the vessel. See 1 L. R. A. 505.

As to the order of precedence of these liens, see *Daveis* 199; *Ware* 505; 2 Curt. C. C. 431; 8 Fed. Rep. 331, 333. In the distribution of funds to pay liens, wages claims will rank first; claims for materials and supplies next; and claims under contracts of affreightment thereafter; 36 Fed. Rep. 493. Maritime liens for necessary advances made or supplies furnished to keep a vessel fit for sea, take precedence of all prior claims upon her, unless for seaman's wages or salvage; 148 U. S. 1. They take priority over a mortgage on the vessel, although it has been duly recorded; 36 Fed. Rep. 501. Liens for damages arising from collision take precedence of the lien for a seaman's wages accruing prior to the collision; 40 Fed. Rep. 331; 49 *id.* 577; 50 *id.* 224. Among the holders of liens equal in dignity, the one who first instituted proceedings to enforce his claim is preferred; 48 Fed. Rep. 385.

Giving credit will not be a waiver of a lien on a foreign ship, unless so given as to be inconsistent with the right to a lien; 7 Pet. 324; 1 Summ. 73; 5 Sandf. 342; 4 Ben. 151. A delay of nine months after midsummer repairs before proceeding to enforce a lien therefor, is not laches, but a year's delay is; 85 Fed. Rep. 665; see 48 *id.* 839. A lien for repairs is in the nature of a proprietary right and is not lost by merely delivering the vessel to the owner before payment; 49 Fed. Rep. 383. A note does not extinguish the lien of the claim for which it is given, unless such is the understanding of the parties at the time; 20 Fed. Rep. 923; 60 *id.* 703; 60 *id.* 926; 3 U. S. App. 109.

Builders' liens may be placed on the common-law ground that a workman employing skill and labor on an article has a lien upon it; 2 Rose 91; 4 B. & Ald. 341; *Wright* (Ohio) 660; 4 Wheat. 438; 1 Stor. 68; also a lien for the purpose of finishing the ship, where payments are made by instalments; 5 B. & Ald. 942.

Collision. In case of collision the injured vessel has a lien upon the one in fault for the damage done; 23 E. L. & Eq. 62; *Crabb* 580; and the lien lasts a reasonable time; 18 Bost. L. Rep. 91; 1 Pars. Sh. & Ad. 531.

A salvage lien exists when a ship or goods come into the possession of a person who

preserves them from peril at sea, to be reimbursed his expenses and compensated; *Sprague* 57; *Daveis* 20; *Edw. Adm.* 175.

A salvage service carries with it a maritime lien on the things saved, whether the vessel is foreign or domestic; 38 Fed. Rep. 671.

A part-owner, merely as such, has no lien whatever, but acquires such a lien when any of the elements of partnership or agency, with bailment upon which his lien may rest, enter into his relation with the other part-owners; 1 Pars. Sh. & Ad. 115. See 35 Fed. Rep. 785.

A part-owner who has advanced more than his share towards building a vessel has no lien on her for such surplus; 6 Pick. 46; and none, it is said, for advances on account of a voyage; 4 Pick. 456; 7 Bingham 709. The relation of partners must exist to give the lien; 20 Johns. 61; 4 B. Monr. 458; 8 B. & C. 612; 6 Pick. 120; 5 Mann. & R. 25. And part-owners of a ship may become partners for a particular venture; 1 Ves. Sr. 497; 3 W. & M. 193; 10 Mo. 701; 9 Pick. 334. But see 14 Pa. 34.

The ship's husband, if a partner, has a partner's lien; if not, he may have a lien on the proceeds of the voyage; 8 B. & C. 612; 16 Conn. 12, 23; 3 W. & M. 193; or of the ship herself, if sold, or on her documents, if any of these have come into his actual possession. And the lien applies to all disbursements and liabilities for the ship. But it is doubtful if his mere office gives him a lien; 2 Curt. C. C. 427; 2 V. & B. 242.

Under the general maritime law, there is no lien on a vessel for marine insurance premiums due from her owner; 49 Fed. Rep. 279; but there is for wharfage for a foreign vessel; 56 Fed. Rep. 609. See 60 *id.* 766.

Deposit of a bill of lading gives a lien for the amount advanced on the strength of the security; 5 Taunt. 558; 2 Wash. C. C. 283.

These liens of part-owners and by deposit of a bill of lading are not maritime liens, however, and could not be enforced in admiralty.

See ADMIRALTY; SALVAGE; JETTISON; BOTTOMRY; RESPONSENTIA; IN REM; COLLISION; SEAMEN; MARSHALLING OF ASSETS; MASTER; MARITIME CAUSE; MARITIME CONTRACT; CAPTAIN; PRIVILEGE.

Statutory Liens. Under this head it is convenient to consider some of those liens which subsist at common law, but have been extensively modified by statutory regulations, as well as those which subsist entirely by force of statutory regulations.

The principal liens of this class are judgment liens, and liens of material men and builders, but there have also been provided by legislation in recent years in many states, liens specially designed for the protection of leading local business interests, such as logging liens, and various agricultural liens intended to facilitate the obtaining of money or credit on the faith of crops unmaturing.

JUDGMENT LIEN. At common law, a judgment is merely a general security and not a specific lien on land; 2 Sugd. Vend. *517; but by stat. 1 & 2 Vict. c. 110, it is made a charge upon all lands, tenements, etc., of which the debtor is owner or in which he is in any way interested, and it binds all persons claiming under him after such judgment, including his issue, and other persons whom he could bar; *id.* *523. By stat. 27 & 28 Vict. c. 113, judgments are not liens upon lands until such lands have been actually delivered in execution.

In the United States generally judgments are liens on lands within the county from the date on which they are docketed or entered. In New Jersey a judgment of the supreme court is a lien throughout the state. In a few of the states the lien attaches immediately when the judgment is recovered. In others it is necessary, in order to make a judgment a lien in any county, that a transcript of the judgment be recorded.

In many states, it requires an execution to create a lien by judgment, which, in some states, must issue within a specific period after judgment, e. g. one year in

Virginia, and two years in West Virginia, while in Delaware the common-law rule that an execution must issue within a year and a day is enforced by the systematic entry on the judgment docket by the prothonotary of the issue of an execution *vice comes* (g. v.), which is, in fact, never issued and is a fiction in all respects except as to the prothonotary's fee.

Judgments in the federal courts have the same lien as those in the respective state courts wherein they are held, except that they extend to all lands of defendant in the district. Judgments in the circuit court for the eastern district of Pennsylvania have been decided to be liens against land in both the eastern and western districts of Pennsylvania.

The time during which a judgment lien continues in force varies in the several states; it is one year in Tennessee; two years in Idaho and Nevada; three years in Arkansas and Missouri; four years in Georgia; five years in Kansas, Nebraska, Ohio, Pennsylvania, Utah, Washington, California, Wyoming and Oklahoma Territory; six years in Colorado and Montana; seven years in Illinois; ten years in Alabama, Indiana, Iowa, Minnesota, New York, North Carolina, North Dakota, Oregon, South Carolina, Texas, Wisconsin, South Dakota, Virginia and West Virginia; twelve years in Maryland; twenty years in New Jersey. There is no statutory limitation in Florida, Louisiana, Mississippi, New Mexico and the District of Columbia, and in Delaware, except in New Castle County, where there is a limitation of ten years. In these latter states the only limitation of the lien is the presumption of payment. In Delaware a judgment is presumed to be paid in twenty years, that being the period which bars proceedings affecting land or actions on specialties. Judgments are no lien in Kentucky, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, Vermont, Arizona and Indian Territory. A verdict is a lien in Pennsylvania.

MECHANICS' LIENS. The lien of mechanics and material men on buildings and for work done and materials furnished is unknown either at common law or in equity; 13 Pa. 167; 6 Wall. 561; but it exists in all of the United States by statute, to a greater or less extent. Each state has its own mechanic's lien law, differing often in minor particulars, but alike in the general provisions. These statutes are remedial and should be liberally construed; 22 Neb. 656, 126. In most of the states, this lien is equal to that of a judgment or mortgage, and can be assigned and enforced in a similar manner; 26 Conn. 317. The lien affects only real estate, and attaches to the materials only when they become real estate by being erected into a building and attached to the land; 2 Vroom 477; but should the building be removed or destroyed, the lien does not remain upon the land; 26 Pa. 246; nor upon any portion of the materials of which the building was composed; 28 Pa. 161.

In many cases a single lien is allowed upon separate buildings; 148 Mass. 104; 76 Md. 327; 120 Mo. 38; 96 Mich. 175; 101 U. S. 731; *contra*, 61 Conn. 578; 167 Pa. 614; 153 *id.* 293; but see 151 Pa. 153; 158 *id.* 238. Two owners of contiguous lots may by their acts connect them so as to constitute one lot and make them subject to lien for work or material; 51 Minn. 364. See note on this subject 17 L. R. A. 314, and a later collection of cases, 3 Gen. Dig. n. s. 891.

The benefits of the statute apply only to the class of persons named therein. The contractor seems to be universally secured by the lien, and in most of the states the sub-contractor and material man are also protected by a lien. In some states these provisions extend to workmen, but generally they do not; Phill. Mech. Liens, 53. A contractor's lien is not defeated by the fact that the work was only partly performed, where such part performance has been accepted; 85 Ala. 211; 74 Wis. 163. A contract by which a contractor agrees that he will not suffer or permit to be filed

any mechanics' lien or liens against a building waives the right to file a lien in his own favor; 121 Pa. 593.

Mechanics' lien laws extend to non-residents as well as residents; 2 Swan 180; 17 Minn. 358.

A New York statute giving a lien to "any person" who has furnished materials for a building in the state is available under a contract made and payable in another state; 38 L. R. A. (N. Y.) 410.

Where the statute was silent on the subject of assigning a mechanic's lien, it was held that an assignee could not prosecute in his own name and avail himself of its privileges; 10 Wisc. 331; 86 Me. 384; but in other states it has been held that the lien may be assigned precisely as any other chose in action, the assignee taking subject to the equities of the parties; 15 Gratt. 83; 12 Pa. 339; 14 All. 139; 14 Abb. Pr. n. s. 281. The right of lien survives to an executor or administrator; 14 Minn. 145.

A mechanic's lien is not released by taking a note on account of it, to be credited when paid, even if the note be discounted; 68 Fed. Rep. 778; 32 U. S. App. 435; but taking a note which will mature after the expiration of the statutory period for enforcing a lien, operates as a waiver of it even under a statute providing that the taking of a note shall not discharge the lien; 64 Minn. 269. Taking a note as security has been held in many cases to affect the right to a lien; 43 N. J. Eq. 282; 85 Ga. 109; 78 Wis. 150; 121 Ill. 571; 21 Can. S. C. 406; 2 N. Dak. 53; 94 Mich. 299; see 96 *id.* 113; in others it has been held that the lien is not affected; 76 Md. 337; 7 Miso. Rep. 79, 609; 91 Ga. 651; 6 S. Dak. 160; 67 Hun 109; 157 Mass. 584; 83 Fed. Rep. 593.

A lien cannot be acquired against certain classes of property which are exempted on the ground of public policy. See 38 Fed. Rep. 565. Thus public school-houses; 37 How. Pr. 520; 10 Pa. 275; 13 Utah 211; 13 Ore. 283; 51 Ia. 70; 89 Cal. 160; court-houses, public offices, or jails, are exempt; 7 W. & S. 197; 47 N. Y. 666; 112 N. C. 335; 38 W. Va. 691; 70 Ia. 479; 89 Wis. 264; 105 N. Y. 139; 110 Ala. 539; 83 Tex. 202, 291; but see 52 Kan. 250; so also are graveyards; 3 Pa. L. J. 343; but a church has been held subject to a mechanic's lien; 44 Pac. Rep. (Ore.) 354. Such a lien cannot extend to the valves constituting part of the water works of a corporation organized to furnish a city with water; 89 Wis. 264; 142 Pa. 610; 60 *id.* 27; or to the plant of such corporation; 89 Wis. 264; or a street railway; 68 Fed. Rep. 966; 29 U. S. App. 698; 3 Wash. 112; but see 10 Lanc. L. Rev. Pa. 73; or a power house connected with the same; 29 U. S. App. 698; 16 Co. Ct. Rep. (Pa.) 18; or to the property of an electric light company having a franchise to occupy streets; 48 Kan. 187; 19 Ore. 61. Some question has arisen whether mechanics' lien laws apply to railroads. When the statute gives a lien on "buildings" they are said not to be covered; 2 Jones, Liens § 1618; otherwise if the word used is "structure," "erection," "improvement"; *id.* § 1624; and a lien has been upheld against ties used in construction; 44 Ia. 71.

The same doctrine of public policy which forbids mechanics' liens on public buildings, etc., has been said to apply to railroads, so far that such a lien, if given by statute, is generally held to attach only to the entire line and not to a section of it; 2 Jones, Liens § 1619 and cases cited; but Deady, J., challenges this statement; 42 Fed. Rep. 470; s. c. 8 L. R. A. 700, where will be found a collection of cases by states on mechanics' liens on railroads; see also 101 U. S. 443. Railroad depots are not exempt; 11 Wis. 214; 10 Ohio St. 372; 37 N. H. 410.

As to mechanic's lien on vessels under state statutes see subtitle Maritime Liens, *supra*.

In some cases it is held that the equitable title of a purchaser of land, who has not fully acquired the title, may be subject to a statutory lien; 33 Fla. 305; 118 Pa. 654; 52 Fed. Rep. 32; 46 Kan. 24, 543; 3 S. Dak. 440; *contra*, 160 Mass. 48; 45 N. J. Eq. 494;

148 N. Y. 673. In such case the lien has been held to be subordinate to the right of the vendor for unpaid purchase money; 48 Neb. 138. A mechanic's lien in such case attaches only to the interest of the purchaser; 46 Kan. 24. That the lien attaches on the completion of the contract of sale was held in 53 Minn. 484.

On the foreclosure of a mortgage, the fund raised takes the place of the land and is subject to a lien; 17 Abb. Pr. 256; so also is a balance in court on the sale of a lessee's interest in land and buildings; 62 Pa. 405.

The remedy is by *scire facias* in some states; 14 Ark. 379; 14 Tex. 37; 23 Mo. 140; 3 Md. Ch. Dec. 180; 14 How. 434; 12 Pa. 45; by petition, in others; 11 Cush. 303; 4 Wis. 451; 14 Ala. n. s. 33; 11 Ill. 519; 1 Ia. 75. When the proceeding is by *scire facias*, obviously it can have no more effect than belongs to that writ, which is substantially a proceeding *in rem*.

Questions constantly arise under the statutes giving liens to mechanics and material men as to the respective priority of their liens over those of mortgagees. Questions as to the respective priority, as between such liens and mortgage liens, must be considered with reference to the statutes. Such liens have been held entitled to priority over a previous mortgage so far as a building is concerned; 15 Ind. App. 393; 43 S. W. Rep. (Tenn.) 19; and also where the labor and materials were furnished upon the mortgagee's agreement that his lien should be subordinated; 49 Neb. 493; but the mere fact that the mortgagee told the contractor to go ahead with the work of building upon the mortgaged premises is not a waiver of priority; 11 Tex. Civ. App. 430. As between mortgages and subsequently filed mechanics' liens, the mortgage was held superior in 92 Ia. 732; 94 Ala. 240; 51 N. J. Eq. 605; 42 Hun 465; and the mechanic's lien was held superior in 109 N. C. 658; 152 Pa. 631; 80 Fed. Rep. 332; 155 Mass. 549; 106 Cal. 234; 58 N. J. L. 445. For collections of cases upon this question of priority see 3 Gen. Dig.; 14 L. R. A. 305.

For statutes relating to mechanics' liens see Stimson, Am. Stat. Law art. 196. See Houck; Nott; Phillips; Richey; Sergeant; Snyder, Mech. Liens.

LOGGING LIENS. In some states, persons employed in logging have a lien for services. It exists in favor of a cook and his assistant at a logging camp; 64 Minn. 420; a blacksmith employed in shoeing horses and mending tools at the camp; *id.*; persons contracting to cut, skid, and haul logs and to peel bark to be paid for by the thousand; 1 Pa. Super. Ct. 387; one who blasts rocks to make a passage for logs; 10 Wash. 84; one who furnishes supplies; 73 Wis. 14; a rafter of logs; 101 Mich. 267; a mill owner; 105 N. Y. 234. But mere contractors have not a lien; 77 Mich. 45; or one who furnishes a horse, harness, and sleds at a specified price per month; 90 Me. 227; or one who employs men to do the work but does not directly labor himself; 11 Wash. 304; or one cutting without right; 70 Mich. 309; or the owner of an ox hired to haul the logs; 87 Wis. 227. Such liens have been held to include not only manual labor of the lienor, but also that performed by his teams and servants, under a contract for a gross sum per month for both; 64 Minn. 420.

The amount of the lien is a question for the jury; 65 N. W. Rep. (Mich.) 235; and so is the question whether a levy under such lien is excessive; *id.* 379; and the lien is not vitiated by an excessive levy; *id.*

The lien of a boom company attaches to part of a single bailment for charges on logs previously delivered, but it is confined to logs of the same mark and not a general lien upon all logs of the same owner; 64 Minn. 103; recording is not required to bind an innocent purchaser, possession being equivalent to notice; *id.* It may be waived either by contract or a course of dealing inconsistent with its existence, or by an extension of time for payment of charges; *id.*

One who cuts and rafts logs under a contract which, by reasonable construction, entitles him to retain possession until paid for his services, has a common-law lien thereon; 101 Mich. 267; but one with whom the owner of timber contracts for its cutting and delivery in his mill-pond has not; 162 Pa. 118.

The execution and performance of a contract for the sale of standing timber at so much per acre, to be cut and hauled by the purchaser who owns a sawmill, is held under the Georgia Civil Code, not to give the seller a lien on the sawmill and products; 27 S. E. Rep. (Ga.) 730.

AGRICULTURAL LIENS. Among these are, a lien of laborers upon crops for their wages, which is held superior to the lien of a mortgage of the crop, executed prior to the laborer's lien; 35 S. W. Rep. (Ark.) 1108; 16 So. Rep. (Miss.) 678; such a lien applies in favor of the overseer of a farm; 71 Miss. 938. Of a similar character is a statutory lien, given in some states, to persons furnishing agricultural supplies; such liens are held to be superior to a conveyance of the property in payment of debt; 47 La. Ann. 743; or to the claim of a mortgage; 114 N. C. 284; or a chattel mortgage on the crop previously executed; 57 Minn. 84.

A statutory lien on crops for advances to a farmer may be secured by agreement recorded, in Florida, Virginia, North Carolina, and Alabama; it has priority in the first named state against all except laborers' liens, and in the two last named on all except a landlord's claim for rent, and in Alabama advances by landlord. An agreement merely in writing is sufficient in Tennessee, South Carolina, and Georgia; 1 Stims. Am. Stat. L. § 1934.

The order of liens on crops in Louisiana is as follows: (1) labor; (2) lessor; (3) overseer; (4) pledges, in the order of record; (5) furnisher of supplies or money, and physician; Laws, 1887, § 89. In Washington, farm laborers have a lien on crops superior to the landlord, who also has a lien on crops for rent; Laws, 1886, 115.

In North Dakota a person furnishing grain for seed, or potatoes for planting, has a lien on the crop.

As to the landlord's lien for rent, see LANDLORD AND TENANT, and for special statutory provisions, see 1 Stims. Am. Stat. L. §§ 2034-39.

For various special liens created by statute, see 1 Stims. Am. Stat. L. art. 464.

See Cross; Jones; Overton; Whittaker, Liens; MORTGAGE; JUDGMENT; RECOGNIZANCE; IN REM; INNKEEPER; BAILEMENT; BAILEE.

LIEU LANDS. In the United States, lands given a railroad on selection in lieu of those lost from a grant by reason of having been disposed of after the grant, but before the definite location of the road. English; see 219 U. S. 387.

LIEUTENANT. This word has now a narrower meaning than it formerly had: its true meaning is a deputy, a substitute, from the French *lieu* (place or post) and *tenant* (holder). Among civil officers we have *lieutenant-governors*, who in certain cases perform the duties of governors (see the names of the several states), *lieutenants of police*, etc. Among military men, *lieutenant-general* was formerly the title of a commanding general, but now it signifies the degree above major-general. *Lieutenant-colonel* is the officer between the colonel and the major. *Lieutenant*, simply, signifies the officer next below a captain. In the navy, a *lieutenant* is the second officer, next in command to the captain of a ship. See LORD LIEUTENANT.

LIFE. "The sum of the forces by which death is resisted." Bichat.

A state in which energy of function is ever resisting decay and dissolution.

It commences, for many legal purposes, at the period of quickening, when the first motion of the fetus in *utero* is perceived by the mother. 1 Bla. Com. 129; Co. 3d Inst. 50. It ceases at death. See DEATH.

But physiology pronounces life as existing from the period of conception, because fetuses in *utero* do die prior to quickening, and then all the signs of death are found to be perfect; Dean, Med. Jur. 129, 130.

For many important purposes, however, the law concedes to physiology the fact that life commences at conception, *en ventre sa mère*. See FETUS. Thus, it may receive a legacy, have a guardian assigned to it, and an estate limited to its use; 1 Bla. Com. 130. It is thus considered as alive for all beneficial purposes; 1 P. Wms. 329.

But for the transfer of civil rights the child must be born alive. The ascertainment of this, as a fact, depends upon certain signs which are always attendant upon life; the most important of these is crying. As to conditions of live birth, see BIRTH; INFANTICIDE.

Life is presumed to continue for one hundred years; 9 Mart. La. 257. As to the presumption of survivorship in case of the death of two persons, at or about the same time, see 14 Cent. L. J. 367, a full article reprinted from the Irish L. Times; DEATH.

LIFE-ANNUITY. See ANNUITY.

LIFE-ASSURANCE. See INSURANCE; POLICY; LOSS.

LIFE-ESTATE. See ESTATE FOR LIFE; TENANT FOR LIFE.

LIFE GUARDS. In England, a part of the King's body-guard. See HORSE GUARDS.

LIFE INSURANCE. See INSURANCE.

LIFE-PEERAGE. See PEERS.

LIFE POLICY. A policy which usually engages, that in consideration of a periodical payment of premium, the company will pay, on the death of some individual, or on his death within a limited period (as the case may be), a certain sum of money therein specified.

LIFE-RENT. In Scotch Law. A right to use and enjoy a thing during life, the substance of it being preserved. See FEE AND LIFE RENT; TERCE; CURTESY.

LIFE-RENTER. In Scotch Law. A tenant for life without waste. Bell, Dict.

LIFE TABLES. Statistical tables exhibiting the probable proportion of persons who will live to reach different ages. Cent. Dict.

Such tables are used for many purposes, such as the computation of the present value of annuities, dower rights, etc., and for the computation of damages resulting from injuries which destroy the earning capacity of a person, or those resulting from the death of a person to those who are dependent upon him.

The principal mortality tables in ordinary use are:

(1) The Carlisle Table, which takes its name from the city of Carlisle and the calculations for which were made by Joshua Milne in 1815. (2) The Northampton Table, based on statistics of that town, in England. This shows a higher rate of mortality than any other, and it has been said that it more nearly shows the mortality of the negro race in the United States than any other life table; G. & McC. Tables 187, n. 1. (3) The Farr Tables, prepared by Dr. Wm. Farr, of the English registrar general's office, from the census returns of England and Wales. A synopsis of the results of these tables may be found in 2 Ins. Cyc. 518-36. (4) Combined Experience, or actuaries' seventeen office experience tables of mortality, prepared by a committee from 62,537 risks, and published in 1843 by Jenkins Jones. This has been characterized as very accurate; Willey, Life Ins., 4th ed. 35, 78. As the calculations of this table are made upon actual life insurance risks its accuracy would have relation rather to that subject than to dower and annuities, and purposes involving merely the average expectation of sound life. (5) The American Experience tables of mortality by Sheppard Homans, an insurance actuary.

This is a legal standard in several states for valuations of life insurance policies, having been adopted in New York in 1868. (6) The Thirty Offices Experience table of mortality published in 1873; "Not yet accepted as a standard table"; G. & McC. Tables 190.

Courts can take judicial notice of the Carlisle Tables, and can use them in estimating the probable length of life, whether they were introduced in evidence or not; 151 U. S. 436. Standard life and annuity tables showing probable duration of life and present value of a life annuity are competent evidence; 91 Ga. 87; or as bearing on the question of compensation for permanent injury, or in case of death to show the deceased's expectation of life at the time of accident; 32 Minn. 125; 66 N. Y. 50; 63 Ia. 487. The Carlisle tables have been admitted; 76 id. 310; 74 Ga. 737; and also Johnson's Encyclopedia, to show these tables; 78 Ia. 509. The fact that the deceased was in poor health only affects the weight to be given them; 29 S. W. Rep. (Tex.) 955; they ought not absolutely to control the jury; 118 U. S. 545, citing approvingly judicial utterances strongly deprecating the use of them by a jury, from 49 L. J. Q. B. 237. In a recent case it was said that they are admissible in actions for personal injuries, but the court should instruct the jury that their value in a particular case depends very much on the plaintiff's state of health, habits, and social condition; 172 Pa. 205.

See Giauque & McClure, Present Value Tables, which also contains Bowditch's Table and Chisholm's Commutation Tables; Jones, Value of Annuities and Reversionary Payments; Lawton & Griffiths, Life Tables.

LIGAN, LAGAN. Goods cast into the sea tied to a buoy, so that they may be found again by the owners. When goods are cast into the sea in storms or shipwrecks, and remain there, without coming to land, they are distinguished by the barbarous names of jetsam, flotsam, and ligan. 5 Co. 108; Hargr. St. Tr. 48; 1 Bla. Com. 292. See 38 Fed. Rep. 509.

LIGEANCE. The true and faithful obedience of a subject to his sovereign, of a citizen to his government. It signifies, also, the territory of a sovereign. See ALLEGIANCE.

LIGEANTIA ACQUISITA. Acquired allegiance. Taylor, Int. Pub. Law 217. See ALLEGIANCE.

LIGEANTIA LEGALIS. Legal allegiance. Taylor, Int. Pub. Law 217. See ALLEGIANCE.

LIGEANTIA LOCALIS. Local allegiance. Taylor, Int. Pub. Law 217. See ALLEGIANCE.

LIGHT. A right to have the access of the sun's rays to one's windows, free from any obstruction by the occupier of the adjoining land. 3 Kent's Com. 448.

LIGHT AND AIR. See ANCIENT LIGHTS; AIR. See also, 3 Eng. Rul. Cas. 1.

LIGHTERMAN. The owner or manager of a lighter. A lighterman is considered a common carrier. See LIGHTERS.

LIGHTERS. Small vessels employed in loading and unloading larger vessels. Boats plying for hire and carrying passengers or goods. 23 L. J. M. C. 156; 3 E. & B. 889.

The owners of lighters are liable like other common carriers for hire. It is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employments for which he offers and holds it forth to the public; it is the immediate foundation of the contract that it is so: the law presumes a promise to that effect on the part of the carrier, without actual proof; and every principle of sound policy and public convenience requires it should be so; 5 East 428; Abb. Sh. 225; Bened.

Adm. § 284.

If a vessel, to earn greater freight, gets the shipper to furnish, at a deeper anchorage, cargo in addition to that furnished at the agreed place, the cost of lightering must be borne by the vessel. Delivery to the lighter is delivery to the vessel; 48 Fed. Rep. 921. See LAUNCH; VESSEL.

LIGHTHOUSE. An act authorizing the secretary of the treasury to acquire lands for a lighthouse by condemnation is constitutional; 160 U. S. 490. See NAVIGATION RULES; EMINENT DOMAIN.

An edifice of peculiar structure, many of which are erected by commercial nations, at exposed or dangerous points along the coast, for the purpose of maintaining a light for guidance of vessels at night. They are erected in the United States by congress, and are regulated by Rev. Stat. 913, tit. 55. Abbott.

LIGHTNING. A sudden discharge of electricity from a cloud to the earth or from the earth to a cloud or from one cloud to another, or from a body positively charged to one negatively charged. 54 Wis. 483.

Any sudden and violent discharge of electricity occurring in nature. *Id.*

A stroke of lightning is an act of God; 26 Me. 181; 26 L. R. A. (Wis.) 101; but one cannot be excused on that ground from the consequences of his own negligence in causing lightning to be conveyed to a building by a wire; 26 L. R. A. (Wis.) 101. See WIRES.

In a policy of insurance against loss by lightning, it is the province of the jury, not reviewable on appeal, to decide how much damage is caused by lightning and how much by other forces; 47 N. Y. S. R. 406; 54 Wis. 483. Where the insurance was against loss by fire and lightning, damages caused by wind accompanying the storm were held not within it; 15 Ins. L. J. 478; nor was damage caused by lightning without combustion covered by a clause against fire by lightning; 4 N. Y. 326. See 37 Me. 256. Where the damage was caused by an explosion of powder resulting from a stroke of lightning, the loss was held to be protected by a fire insurance policy which covered damage by lightning but stipulated against loss by explosion; 36 L. R. A. (Ohio) 236. See INSURANCE.

LIGHTS. Those openings in a wall which are made rather for the admission of light than to look out of. 6 J. B. Moore 47; 9 Bingh. 305. See ANCIENT LIGHTS.

Lamps carried on board vessels, under statutory regulations or otherwise, for the purpose of preventing collisions at night.

Lamps or lights placed in lighthouses, or other conspicuous positions, as aids to navigation at night. See NAVIGATION RULES. FALSE LIGHTS AND SIGNALS.

LIGNAGIUM (from the Lat. *lignor*, to get fuel). The right which a person has to cut or gather fuel out of the woods; sometimes it is said to signify a pecuniary payment due for the same. Cowel.

LIKE. Equal in quantity, quality, or degree, exactly corresponding. 79 N. C. 387. Like does not necessarily mean the same in all parts; 2 Cush. 145. *Like offence.* Sameness in all the essential parts. 147 Mass. 452.

LIKEWISE. In like manner; also; moreover; too. 17 Ind. 71. When used at the beginning of a sentence in a will the word sometimes denotes a severance of what follows from a contingency previously expressed, but the context of the will may rebut this presumption; 1 Jarm. Wills 882. See 5 De G., M. & G. 122; 24 Beav. 105.

LIMB. The word "limb" includes from the hip to the sole of the foot. 113 S. W. 474.

LIMIT. A bound, a restraint, a circumscription, a boundary. 22 N. Y. 429. See 11 C. B. n. s. 637. In a deed the words limit and appoint may operate as words of grant so as to pass a reversion; 5 Term 124.

LIMIT. (v.). To fix the extent or length; to mark the end; to set a bound. To limit an estate, means to mark out or define the period of its duration; and the words employed in deeds for this purpose are thence termed words of limitation, and the act itself is termed limiting the estate. Abbott; Brown. See LIMITATION.

LIMITATION IN LAW. A limitation in law, or an estate limited, is an estate to be held only during the continuance of the condition under which it was granted, upon the determination of which the estate vests immediately in expectancy. 2 Bla. Com. 155.

LIMITATIONS. Of Civil Remedies. In general, by the theory and early practice of the common law, a party who had any legal ground of complaint against another might call the latter to answer in court at such time as suited his convenience; 13 East 449. This privilege, however, it was soon found, might be productive of great inconvenience, and not unfrequently of great injustice. Parties might, and often did, wait till witnesses were dead or papers destroyed, and then proceeded to enforce claims to which at an earlier date a successful defence might have been made. Titles were thus rendered uncertain, the tenure of property insecure, and litigation fostered. To prevent these evils, statutes were passed limiting the time within which a party having a cause of action should appeal to the courts for redress,—hence called statutes of limitation. The doctrine of *finis*, of very great antiquity in the history of the common law, the purpose of which was to put an end to controversies, grew out of the efforts to obviate these evils, and frequent attempts, prior to the accession of James I., by statutes of restricted application, were made to the same end. But till the reign of that prince no general enactment applicable alike to personal and real actions had been passed.

In 1633, however, by stat. 21 Jac. I. c. 16, entitled "An Act for Limitation of Actions, and for avoiding of Suits in Law," known and celebrated ever since as the *Statute of Limitations*, the law upon this subject was comprehensively declared substantially as it exists at the present day in England, whence our ancestors brought it with them to this country; and it has passed, with some modifications, into the statute-books of every state in the Union except Louisiana, whose laws of limitation are essentially the prescriptions of the civil law, drawn from the *Partidas*, or Spanish Code.

In 1 Bla. 287, Wilmut, J., declared it to be a "noble beneficial act," which should be construed liberally; quoted in 1 Yeates 331.

The similarity between the statutes of the several states and those of England is such that the decisions of the British courts and those of this country are for the most part illustrative of all, and will be cited indiscriminately in this brief summary of the law as it now stands. *Vide* 5 B. & Ald. 204; 4 Johns. 317; 2 Caines, Cas. 143. One preliminary question, however, has arisen in this country, growing out of the provision of the national constitution prohibiting states from passing laws impairing the obligation of contracts, for which there is no English precedent. Upon this point the settled doctrine is that unless the law bars a right of action already accrued without giving a reasonable time within which to bring an action, it pertains to the remedy merely, and is valid; 4 Wheat. 122; 3 Dall. 386; 11 Pet. 420; 3 Whart. 15; 2 Gall. 141; 19 Pick. 578; 2 Mas. 169. Subject to this qualification, a law may extend or reduce the time already limited. But a cause of action already barred by pre-existing statutes will not be revived by a statute extending the time; 7 Pa. 292; 25 Vt. 41; 8 Blackf. 506; 2 Sandf. Ch. 61; 18 Pick. 532; 2 Greene Ia. 181; 11 Wisc. 432; 1 Oreg. 176; though if it be not already barred, a statute extending the time will apply; 21 Ark. 95; 24 Vt. 620; 1 T. B. Monr. 424. The fact that a statute continues in

force a previous period of limitation for past contracts, and provides a different period for future contracts, does not render it invalid, as lacking a uniform operation, or as being in the nature of special legislation; 52 Fed. Rep. 791.

Whatever may have been the disposition in the past, the courts are now inclined to construe these statutes liberally, so as to effectuate their intent; they are little inclined to fritter away their effect by refinements and subtleties; 1 Pet. 360; 8 Cra. 84; Ang. Lim. § 23. The statute of limitations is a statute of repose and does not rest merely on presumption of payment; 122 U. S. 231.

Courts of equity, though not within the terms of the statute, have nevertheless uniformly conformed to its spirit, and have, as a general rule, been governed by its provisions, unless special circumstances of fraud or the like require, in the interests of justice, that they should be disregarded; 12 Pet. 56; 7 Johns. Ch. 90; 9 Pick. 242; 17 Ves. 96; 10 Wheat. 152; 10 Ohio 424; 9 N. J. Eq. 425; 28 Ill. 44; 3 R. I. 237; 7 C. C. App. 309; 133 Ind. 169; 12 U. S. App. 187; 130 U. S. 43; 82 Va. 518; 111 N. Y. 214. Courts of equity will apply the statute by analogy; 1 App. D. C. 44; 36 Fed. Rep. 722; 136 U. S. 386; and in cases of concurrent jurisdiction, they are bound by the statute which governs actions at law; 149 U. S. 436; 169 *id.* 189. Some claims, not barred by the statute, a court of equity will not enforce because of public policy, and the difficulty of doing full justice when the transaction is obscured by lapse of time and loss of evidence. This is termed the doctrine of *laches* (q. v.); 94 U. S. 806; Bishp. Eq. § 260.

But in a proper case where there are no laches and where there is fraud undiscovered till the statute has become a bar, or it is the fault and wrong of the defendant that the plaintiff did not enforce his legal rights within the limited time, courts of equity will not hesitate to interfere in the interest of justice, and entertain suits long since barred at law; 4 How. 503; 11 Cl. & F. 714; 23 Ia. 467; 12 Minn. 522; Bishp. Eq. § 203; L. R. 8 Ch. App. 393; 11 Wall. 443. See 21 Neb. 413; 28 *id.* 479; 10 U. S. App. 519. But here, again, courts of equity will proceed with great caution; 7 How. 819; and hold the complainant to allegation and proof of his ignorance of the fraud and when and how it was discovered; 1 Curt. C. C. 390; 1 Watts 401.

And courts of admiralty are governed by substantially the same rules as courts of equity; 3 Mas. 91; 3 Sumn. 286; 2 Gall. 477; Sprague 163; 3 Salk. 227; 36 Fed. Rep. 560; 1 U. S. App. 101. And, although the statute does not apply in terms to probate courts, there seems to be no reason why it should not be applied according to the principles of equity; 1 Bradf. Surr. 1. It is so applied in Pennsylvania by the orphans' court.

State statutes of limitation do not apply to a libel *in rem* to enforce a maritime lien for breach of a contract of affreightment; 57 Fed. Rep. 603.

AS TO PERSONAL ACTIONS. Generally personal actions must be brought within a certain specified time—usually six years or less—from the time when the cause of action accrues, and not after; 3 Binn. 374; 3 T. B. Mon. 113; 13 La. Ann. 101; and hereupon, the question at once arises when the cause of action in each particular case accrues.

Cause of action accrues when. The rule, that the cause of action accrues when and so soon as there is a right to apply to the court for relief, by no means solves the difficulty. When does the right itself so to apply accrue? Upon this point the decisions are so numerous and so conflicting, or, perhaps more accurately speaking, so controlled by particular circumstances, that no inflexible rule can be extracted therefrom. In general, it may be said that in actions of contract the cause of action accrues when there is a breach of the contract. It is also said that whenever there is a plaintiff who can sue and a defendant who can be sued, the statute begins to run;

80 S. C. 291.

When a note is payable on demand, the statute begins to run from its date; 2 M. & W. 467; 9 Pick. 498; 10 N. H. 489; 5 Jones N. C. 139; 39 Me. 492; 7 Halst. 247; 50 Barb. 334; 17 Ohio 9; 3 Rich. S. C. 182; 32 W. Va. 337; 113 N. Y. 243. If payable immediately or when requested or called for, it commences to run immediately; 81 Me. 434. The deposit of securities as collateral to demand notes does not prevent the running of the statute from the date of maturity of such notes; 153 Pa. 530. The rule is the same if the note is payable "at any time within six years;" 39 Me. 492; or borrowed money is to be paid "when called on;" 1 Harr. & G. 439. But this is not true of a premium note payable in such portions and at such times as may be necessary to cover losses. There the statute only runs from the time of loss, and the assessment thereof; 40 N. Y. 820; and the statute runs in the case of an ordinary bank note only from demand and refusal; 2 Sneed 482. Until a demand is made for funds deposited in a bank the statute does not begin to run; 19 Pac. Rep. (Ariz.) 225; and so a demand must first be made by the owner of bank stock for dividends; 84 Ky. 565. If a note be payable in certain days after demand, sight, or notice, the statute begins to run from the demand, sight, or notice; 18 Wend. 267; 8 Dowl. & Ry. 374; 5 Halst. 114; 4 Harring. 246; 24 Ann. Rep. 605; s. c. 86 Mich. 487; demand of a note payable on demand should be made within the time limited for bringing the action on the note; else a note limited to six years might be kept open indefinitely by a failure to make a demand; 10 Pick. 120. Demand of a bill payable "after sight" or "after notice" should be within a reasonable time; 4 Mas. 336; 9 M. & W. 506. And when the note is on interest, this does not become barred by the statute till the principal, or some distinct portion of it, becomes barred; 3 Cush. 92. Demand upon a note or due bill, payable on demand, is not a condition precedent to a right of action; 11 W. N. C. (Pa.) 294. The rule, that a promissory note payable on demand with interest, is a continuing security, does not apply between holder and maker; 41 N. Y. 581; s. c. 1 Am. Rep. 461. If the note be entitled to grace, the statute runs from the last day of grace; 1 Shepl. 412; 13 La. Ann. 603. The indorsement of a promissory note past due, for a valuable consideration, is a new contract, and the statute begins to run in favor of the indorser only from the date of the indorsement; 79 Ga. 72. The statute begins to run in favor of the drawer of a check at latest after the lapse of a reasonable time for the presentment of the check; 87 Neb. 644. Where money is deposited with a person for safe custody, a right of action does not accrue until demand is made thereof; [1893] 3 Ch. 154.

Where money is payable in instalments the statute runs as to each instalment from the time of the failure to pay it; 10 Shepl. 400; 71 Pa. 208. But if the contract provides that on failure to pay one instalment the whole amount shall fall due, the statute runs as to the whole from such failure; 3 G. & D. 402.

Where money is paid by mistake, the statute begins to run from the time of payment; 9 Cow. 674; 25 Pa. 164; sec 7 Misc. Rep. 444; also in case of usury; 6 Ga. 229; 35 Vt. 503; 98 N. C. 244 (but a shorter time is frequently limited by statute); and where money is paid for another as surety; 45 N. Y. 263; 110 Mass. 245. Where money is paid by a bank on a forged check, the right of action to recover the same accrued immediately upon such payment; 128 U. S. 26. An action to recover overpayments made on a contract to deliver logs accrues when the amount delivered was ascertained, rather than at the date of payment; 94 Mich. 223.

The limitation of a right of action for compensation for trespass in removing coal from the mine of another by an adjoining land owner, does not begin to run until the trespass is discovered or its discovery is reasonably possible; 166 Pa. 536.

Where a contract takes effect upon some condition or contingency, or the happening of some event, the statute runs from the performance of the condition; 17 Pick. 407; Ang. Lim. § 118; or the happening of the contingency or event; 3 Pa. 149; 9 Wend. 287; 22 Ct. Cls. 284; and not from the date of the contract. On an agreement to devise, the statute runs from the death of the promisor; 9 Pa. 260. When money is paid, and there is afterwards a failure of consideration, the statute runs from the failure; 14 Mass. 425; 9 Bing. 748.

Where continuous services are rendered, as by an attorney in the conduct of a suit, or by a mechanic in doing a job; 7 Allen 274; 55 Pa. 434; 36 N. Y. 255; 16 Ill. 341; 1 B. & Ad. 15; the statute begins to run from the completion of the service. On a promise of indemnity, when the promisee pays money or is damaged, the statute begins to run; 12 Metc. 130; 8 M. & W. 680; 14 Johns. 368; 3 Rawle 275; 7 Pet. 113.

As to torts quasi ex contractu, the rule is that in cases of negligence, carelessness, unskillfulness, and the like, the statute runs from the time when these happen respectively, and not from the time when damages accrue therefrom; 4 Pet. 172; 4 Ala. 495; 36 Md. 501; 61 Barb. 136; 2 Strobb. 344; 44 Ill. App. 132. Thus, where an attorney negligently invests money in a poor security, the statute runs from the investment; 2 Brod. & B. 73; so, where a party neglected to remove goods from a warehouse, whereby the plaintiff was obliged to pay damages, the statute runs from the neglect, and not from the payment of damages; 3 Johns. 137; so, where the defendant agreed to go into another state and collect some money, and on his return to pay off a certain judgment, the statute was held to run from the return and demand upon him; 3 Ired. 481. A cause of action for an act which is in itself lawful, as to the person who bases thereon an action for injury subsequently accruing, from and consequent upon the act, does not accrue until the injury is sustained; 70 Tex. 233.

The breach of a contract is the gist of the action, and not the damages resulting therefrom; 5 B. & C. 259; 1 Sandf. 98; 3 B. & Ald. 288. Thus, where the defendant had contracted to sell the plaintiff a quantity of salt, but was unable, by reason of the destruction of the salt, to deliver on demand, and prolonged negotiations for settlement till the statutory limitation had expired, and then refused, the statute was held to run from the demand, the non-delivery being a breach of the contract; 1 E. L. & Eq. 44. So, where a notary public neglects to give reasonable notice of non-payment of a note, and the bank employing him was held responsible for the failure, upon suit brought by the bank against the notary to recover the damages it had been obliged to pay, the action was held to be barred, it not being within six years of the notary's default, though within six years of the time when the bank was required to pay damages; 6 Cow. 278.

So, where an attorney makes a mistake in a writ, whereupon, after prolonged litigation, non-suit follows, but not till an action against the indorser on the note originally sued has become barred, the mistake is held to set the statute in motion; 4 Pet. 172; 4 Ala. 495. Where he collects money for a client and uses no fraud or falsehood in regard to its receipt, the statute runs from the time of its collection; 46 Ohio St. 349. When the attorney dies before the legal proceedings are terminated the statute runs from his death; 145 Pa. 531. The statute does not begin to run against an attorney's claim for services until the termination of the action in which they are rendered; 25 N. Y. S. 184.

A captain who barratrously loses his vessel is freed from his liability to the underwriter in six years after the last act in the barratrous proceeding; 1 Campb. 539. Directors of a bank liable by statute for mismanagement are discharged in six years after the insolvency of the bank is made known; 16 Mass. 68.

In some states a distinction has been taken in cases where a public officer has neglected duties imposed on him by law, and the statute is in such cases said to run only from the time when the injury is developed; 26 Conn. 324; but see 8 Shepl. 314; 97 Pa. 47; and it has been held that if a sheriff make an insufficient return, and there is in consequence a reversal of judgment, the statute runs from the return, and not from the reversal of judgment; 16 Mass. 456. So where a sheriff collects money and makes due return but fails to pay over, the statute runs from the return; 11 Ala. 679; or from the demand by the creditor; 10 Metc. 244. If he suffers an escape, it runs from the escape; 2 Mod. 212; if he takes insufficient bail, from the return of non est inventus upon execution against the principal debtor; 17 Mass. 60; 20 Me. 93; if he receive money on a scire facias, from its reception; 9 Ga. 413; if he neglects to attach sufficient property, on the return of the writ, and not from the time when the insufficiency of the property is ascertained; 27 Me. 443. The statute runs on a cause of action for wrongful attachment from the time thereof; 77 Cal. 208; 78 Ia. 115; 45 La. Ann. 1221. An action by a sheriff upon the bond of his deputy for a default accrues when the sheriff has paid the debt occasioned by the default; 38 W. Va. 519, 557.

The same principle applies in cases of torts pure and simple; 24 Pa. 186; 16 Pick. 241; 1 Rawle 27; 4 Ohio 331; 6 Ohio St. 276.

An action against a recorder of deeds for damages caused by a false certificate of search against incumbrances on real property, must be brought within six years from the date of the search, and not from the date of the discovery of the lien overlooked, or of the loss suffered by the plaintiff; 97 Pa. 47; 54 N. W. Rep. (Ia.) 212; 95 Cal. 317.

The statute only begins to run as against a surety claiming contribution when his own liability is ascertained; [1899] 2 Ch. 514.

In cases of nuisance, the statute begins to run from the injury to the right, without reference to the question of the amount of the damage, the law holding the violation of a right as some damage; 8 East 4; 13 Pick. 241; 1 Rawle 27; 10 Wend. 290; 73 Tex. 95. And so when a party having a right to use land for a specific purpose puts it to other uses, or wrongfully disposes of property rightfully in possession, the statute begins to run from the perversion; 24 Pa. 186. In trover, the statute runs from the conversion; 4 H. & J. 393; 21 Ga. 454; 15 Mass. 83; 5 B. & C. 149; in replevin, from the unlawful taking or detention. The limitation, in the statute of James, of actions for slander to two years next after the words spoken, applies only to cases where the words are actionable in themselves, and not when they become actionable by reason of special damage arising from the speaking thereof; 1 Salk. 206; 10 Wend. 167; 5 Watts 308; 33 Wkly. Law Bul. 52. The limitation extends neither to slander of title; Cro. Car. 140; nor to libel; Arch. Pl. 29. In cases of trespass, crim. con., etc., the statute runs from the time the injury was committed; 5 N. H. 814.

Adverse possession of personal property gives title in six years after the possession becomes adverse; 16 Vt. 124; 1 Brev. 111; 16 Ala. n. s. 696; 3 Metc. 137; 17 Tex. 206. But one who holds by consent of the true owner is not entitled to have the statute run in his favor until denial of the true owner's claim; 34 Ala. 188; Ang. Lim. 304, n.; 55 N. H. 61. But different adverse possessions cannot be linked together to give title; 3 Strobb. 31; 11 Humph. 869. The statute acts upon the title to property, and, when the bar is perfect, transfers it to the adverse possessor; but in contracts for payment of money there is no such thing as adverse possession, the statute simply affects the remedy, and not the debt; 18 Ala. n. s. 248.

Computation of time. In computing the time limited, much discussion has been had in the courts whether the day when the statute begins to run is to be included or

excluded, but without any satisfactory result. It is most generally held that when the computation is from an act done, the day upon which the act is done is to be included, and when it is from the date simply, then if a present interest is to commence from the date, the day of the date is included; but if merely used as a terminus from which to compute time, then the day of the date is excluded; 9 Cra. 104; 3 Term 623; 17 Pa. 48; 15 Mass. 193; 2 Cow. 605. This rule, however, of including the day upon which an act is done, is subject to so many exceptions and qualifications that it can hardly be said to be a rule, and many of the cases are wholly irreconcilable with it. It has been well said that whether the day upon which an act is done or an event happens is to be included or excluded, depends upon the circumstances and reasons of the thing, so that the intention of the parties may be effected; and such a construction should be given as will operate most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided; 1 Tex. 107; Ang. Lim. c. VI. Fractions of a day are not regarded, unless it becomes necessary in a question of priority; 2 Story 571; 4 Gilm. (Ill.) 499; 8 Ves. 88; 3 Den. 12; 6 Gray 316; and then only in some cases, usually in questions concerning private acts and transactions; 20 Vt. 653. See FRACTION OF A DAY; DAY; TIME.

Exceptions to general rule. If, when the right of action would otherwise accrue and the statute begin to run, *there is no person who can exercise the right*, the statute does not begin to run till there is such a person; 8 Cra. 84; for this would be contrary to the intent of the various statutes. Thus, if a note matures after the decease of the promisee, and prior to the issue of letters of administration, the statute runs from the date of the letters of administration unless otherwise specified in the statute; 5 B. & Ald. 204; 13 Wend. 267; 9 Leigh 79; 7 H. & Johns. 14; 4 Whart. 130; 32 Vt. 176; 15 Conn. 145; and there must be a person in being to be sued, otherwise the statute will not begin to run; 12 Wheat. 129.

But the courts will not recognize exceptions, where the statute has once begun to run; 126 Pa. 643; 16 Or. 173. So where the statute begins to run before the death of the testator or intestate, it is not interrupted by his death; 4 M. & W. 43; 3 M. & C. 455; 4 Edw. Ch. 733; 3 McLean 568; 30 W. C. 195; 24 Neb. 670; nor by the death of the administrator; 17 Ala. N. S. 291; nor by his removal from the state; 15 Ala. N. S. 545; nor by the subsequent mental incapacity of a party; 151 U. S. 483. So an insolvent's discharge as effectually removes him from pursuit by his creditor as absence from the state; but it is not an exception within the statute, and cannot avail; 1 Whart. 106; 1 Cow. 356; 6 Gray 517. See 85 Tenn. 278. A creditor's absence makes it inconvenient for him to return and sue; but as he can so do, he must, or be barred; 17 Ves. Ch. 87; 1 Johns. 165. And it has ever been held that a *statutory impediment* to the assertion of title will not help the party so impeded; 2 Wheat. 25; but when a state of war exists between the governments of the debtor and creditor, the running of the statute is suspended; 22 Wall. 576; Chase, Dec. 286; 29 Ark. 238; 55 Ga. 274; 62 Mo. 140; 11 Bush 191; 18 Wall. 158; and it revives in full force on the restoration of peace. See 103 N. C. 159. The courts cannot create an exception to the operation of the statute not made by the statute-itself, where the party designedly eludes the service of process; 130 U. S. 320.

There are many authorities, however, to show that if, by the interposition of courts, the necessity of the case, or the provisions of a statute, a person cannot be sued for a limited time, the running of the statute is suspended during that period. In other words, if the law interposes to prevent suit, it will see to it that he who has a right of action shall not be prejudiced thereby; 4 Md. Ch. Dec. 368; 5 Ga. 66; 3 McLean 568; 12 Wheat. 129. But see 21 Pa. 220. Thus, *an injunction* suspends the statute; 1 Md. Ch. Dec. 182; 12 Gratt. 579; 2 Stock. 347;

10 Humphr. 365; 31 N. Y. 345; 13 La. Ann. 57; 106 Mass. 347; as does the presentation of a claim against the United States to the treasury department for examination and allowance; 75 Fed. Rep. 648. And so does an *assignment of an insolvent's effects*, as between the estate and the creditors; 7 Metc. 435; 7 Rich. S. C. 43; 12 La. Ann. 216; though not, as has just been said, as between the debtor and his creditor; 6 Gray 517. But *when the statute does not in terms exclude and limit* a particular case, the court will not extend it, although the case comes within the reason of the statute; 15 Ala. 194; 2 Curt. 480; 17 Ohio St. 548; 53 Pa. 382. See 31 W. Va. 571.

By the special provisions of the statute, *infants, married women, persons non compos mentis, those imprisoned, and those beyond seas, out of the state, out of the realm, or out of the country*, are regarded as affected by the incapacity to sue, or, in other words, as being under disability, and have, therefore, the right of action secured to them until the expiration of the time limited, after the removal of the disability. The statute of limitations cannot be pleaded in bar to an action by a wife against a husband to recover present and future maintenance; 6 Ind. App. 377. But these personal exceptions have been strictly construed, and the party alleging the disability has been very uniformly held to bring himself exactly within the express words of the statute to entitle himself to the benefit of the exception. To bring himself within the spirit or supposed reason of the exception is not enough; 1 Cwo. 356; 3 Green, N. J. 171; 2 Curt. C. C. 480; 17 Ves. Ch. 87; 4 Ben. 459. And this privilege is accorded although the person laboring under the statute disability might in fact bring suit. Thus, an infant may sue before he arrives at his majority, but he is not obliged to, and his right is saved if he does not; 2 Saund. 117. The time during which a negro was held as a slave should not be counted in determining whether an action by him is barred by the statute; 22 S. W. Rep. (Ky.) 654. The disability must, however, be continuous and identical. One disability cannot be superadded to another so as to prolong the time; 37 U. S. App. 129; and if the statute once begins to run, whether before a disability exists or after it has been removed, no intervention of another and subsequent disability can stop it; 29 Pa. 495; 15 B. Mon. 80; 54 Ill. 101; 2 McCord 269; 24 Neb. 670; 87 Tenn. 172; 117 Ind. 539; 147 U. S. 647. When, however, there are two or more coexisting disabilities at the time the right of action accrues, suit need not be brought till all are removed; Plowd. 375; 20 Mo. 530; 1 Atk. Ch. 610; 1 Shepl. 397; 3 Johns. Ch. 129.

The time during which a debtor is absent residing out of the state of his own free will and accord, is to be deducted in estimating the time in which an action must be brought against him; 74 Mich. 235; 52 Kan. 706; notwithstanding that he continues to have a usual place of residence in the state where service of the summons could be made on him; 147 U. S. 647; but a foreign corporation is a person out of the state; 86 Wis. 285. See BEYOND SEAS.

The word *return*, as applied to an absent debtor, applies as well to foreigners, or residents out of the state coming to the state, as to citizens of the state who have gone abroad and have returned; 3 Johns. 267; 11 Pick. 36; 3 R. I. 178. And in order to set the statute in motion the return must be open, public, and such and under such circumstances as will give a party, who exercises ordinary diligence, an opportunity to bring his action; 1 Pick. 263; 3 Gill & J. 158; 15 Vt. 727; 26 Barb. 208. Such a return, though temporary, will be sufficient; 8 Cra. 174. But if the return is such and under such circumstances as to show that the party does not intend that his creditor shall take advantage of his presence, or such, in fact, that he cannot without extraordinary vigilance avail himself of it,—if it is secret, concealed, or clandestine,—it is insufficient. The absence of one of several joint-plaintiffs does not prevent the running

of the statute; 4 Term 516; but the absence of one of several joint-defendants does; 29 E. L. & Eq. 271. This at least seems to be the settled law of England; but the cases in the several states of the Union are conflicting upon these points. See 1 Dutch. 219; 18 N. Y. 567; 18 B. Mon. 312; 4 Sneed 99. If a claimant beyond seas when the claim accrued returned to this country, the statute began to run and was not suspended by his departure to foreign parts; 23 Ct. Cls. 255.

Commencement of process. The question sometimes arises as to what constitutes the bringing an action or the commencement of process, and this is very uniformly held to be the delivery or transmission by mail in due course of the writ or process to the sheriff, in good faith, for service; 14 Wend. 649; 15 Mass. 859; 1 S. & R. 236; 26 Md. 479; 8 Greenl. (Mo.) 447; 1 W. Chip. 94. The date of the writ is *prima facie* evidence of the time of its issuance; 17 Pick. 407; 7 Me. 370; but is by no means conclusive; 2 Burr. 950; 15 Mass. 384. The suit is not "brought" or "commenced" in a federal court, to stop the running of the statute, until there is a *bona fide* attempt to serve the process; 80 Fed. Rep. 309.

If the writ or process seasonably issued *fail of a sufficient service* or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or is abated, or the action is otherwise avoided by the death of any party thereto, or for any matter of form, or judgment for plaintiff be arrested or reversed, the plaintiff may, either by virtue of the statutory provision or by reason of an implied exception to the general rule, commence a new action within a reasonable time; and that reasonable time is usually fixed by the statute at one year, and by the courts in the absence of statutory provision at the same period; 1 Ld. Raym. 434; 2 Pa. 382; 1 Bail. S. C. 542; 10 Wend. 278. See 78 Ga. 790. *Irregularity of the mail* is an inevitable accident within the meaning of the statute; 8 Me. 447. And so is a *failure of service* by reason of the removal of the defendant, without the knowledge of the plaintiff, from the county in which he had resided and to which the writ was seasonably sent; 12 Metc. 15. But a mistake of the attorney as to time of the sitting of the court, and consequent failure to enter, is not; 29 Me. 458. *An abatement by the marriage* of the female plaintiff is no abatement within the statute; it is rather a voluntary abandonment; 8 Cra. 84. And so, generally, of any act of the party or his attorney whereby the suit is abated or the action fails; 3 McCord 452; 29 Me. 458; 1 Mich. 252; 6 Cush. 417. The statute cannot be pleaded to an amended count when it contains only a restatement of the case as contained in the original counts; 42 Ill. App. 126. The filing of a petition will bar the running of the statute, though stricken out because it does not contain the formal allegations required, where it was subsequently amended; 86 Tex. 560. In Pennsylvania a citation to an executor to file an account is equivalent to the commencement of process.

A *nonsuit* is in some states held to be within the equity of the statute; 13 Ired. 123; 4 Ohio St. 172; 12 La. Ann. 672; see 47 Mo. App. 218; but generally otherwise; 1 S. & R. 236; 3 McCord 452; 3 Harr. N. J. 269; 6 Cush. 417. *If there are two defendants*, and by reason of a failure of service upon one an alias writ is taken out, this is no continuance, but a new action, and the statute is a bar; 6 Watts 523. So of an amending bill introducing new parties; 6 Pet. 61; 10 B. Mon. 84; 8 Me. 535. A dismissal of the action because of the clerk's omission seasonably to enter it on the docket is for matter of form, within the Massachusetts statute, and a new suit may be instituted within one year thereafter; 7 Gray 165; and so is a dismissal for want of jurisdiction, where the action is brought in the wrong county; 1 Gray 580. In Maine, however, a wrong venue is not a matter of form; 38 Me. 217. The statute is a bar to an action at law after a dismissal from chancery for want of jurisdiction; 1 Vern. 74;

16 Wend. 572; 2 Munf. 181. Upon the dismissal of an action the court cannot extend the statutory period of limitation for bringing a new action; 39 Minn. 115.

Lex fori governs. Questions under the statute are to be decided by the law of the place where the action is brought, and not by the law of the place where the contract is made or the wrong done. If the statute has run against a claim in one state, the remedy is gone, but the right is not extinguished; and therefore the right may be enforced in another state where the remedy is still open, the time limited by the statute not having expired; 15 East 439; 11 Pick. 36, 522; 7 Md. 91; 23 How. 132; 13 Gray 535. So if the statute of the place of the contract is still unexpired, yet an action brought in another place is governed by the *lex fori*, and may be barred; 1 Cai. 402; 5 Cl. & F. 1. But statutes giving title by adverse possession are to be distinguished from statutes of limitation. Adverse possession gives title; lapse of time bars the remedy only. And a right acquired by adverse possession in the place where the adverse possession is had is good elsewhere; 11 Wheat. 361; 9 How. 407; Story, Conf. L. 582. In Pennsylvania, by a recent statute an action is barred whenever it is so by the law of the state where the cause of action accrued. See *LEX FORI*.

Public rights not affected. Statutes of limitation do not, on principles of public policy, run against the state or the United States, unless it is expressly so provided in the statute itself; 130 U. S. 263; 147 id. 508; 38 Fed. Rep. 1; but the United States is entitled to take the benefit of them; 147 U. S. 508. No laches is to be imputed to the government; 2 Mas. 312; 18 Johns. 228; 4 Mass. 528. But this principle has no application when a party seeks his private rights in the name of the state; 4 Ga. 115; but see 6 Pa. 290; 127 U. S. 338; 132 id. 239; 142 id. 510. Counties, towns, and municipal bodies not possessed of the attributes of sovereignty have no exemption; 4 Dev. 568; 22 Me. 445; 12 Ill. 38; 13 Wall. 62; 38 W. Va. 1; 41 Ark. 45; 133 Ind. 700; but see 8 Ohio 298. And it is held that municipalities are excluded from the operation of the statute, in regard to the title to land, 101 Pa. 27; 51 Pac. Rep. (Cal.) 950; but it is said that municipalities may be estopped from disputing title where justice and equity so require; Dill. Mun. Corp. § 675. If, however, the sovereign becomes a party in a private enterprise, as, for instance, a stockholder in a bank, it subjects itself to the operation of the statute; 8 Pet. 30; 2 Brock. 393. See, generally, 147 U. S. 508.

Particular classes of actions. Actions of trespass, trespass quare clausum, detinue, account, trover, replevin, and upon the case (except actions for slander), and actions of debt for arrearages of rent, and of debt grounded upon any lending or contract without specialty, or simple contract debt, are usually limited to six years. Actions for slander, libel, assault, and the like, are usually limited to a less time, generally two years. Judgments of courts not of record, as courts of justices of the peace and county commissioners' courts, are in some states, either by statute or the decisions of the highest courts, included in the category of debts founded on contract without specialty, and accordingly come within the statute; 13 Metc. 251; 2 Bail. 58; 37 Me. 29; 2 Grant. Cas. 353; 6 Barb. 583; 3 Living. 367. In others, however, they are excluded upon the ground that the statute applies only to debts founded on contracts in fact, and not to debts founded on contracts implied by law; 14 Johns. 480.

Actions of *assumpsit*, though not specifically named in the original statute of James I. as included within the limitation of six years, were held in England, after much discussion, to be fairly embraced in actions of "trespass"; 4 Mod. 105; 4 B. & C. 44; 4 Ad. & E. 912. The same rule has been adopted in this country; 5 Ohio 444; 3 Pet. 270; 1 Morr. Ia. 59. 8 Cra. 98; but see 12 M. & M. 141; and, in fact, *assumpsit* is expressly included in most of the statutes. And it has also been held in this country that

statutes of limitation apply as well to motions made under a statute as to actions; 11 Humphr. 423. Such statutes are in aid of the common law, and furnish a general rule for cases that are analogous in their subject-matter, but for which a remedy unknown to the common law has been provided by statutes; as where compensation is sought for land taken for a railroad; 23 Pa. 371; 32 Conn. 521.

But it must be remembered that in all such cases the debt is not discharged, though the right of action to enforce it may be gone; 13 U. S. App. 57. So, where a creditor has a lien on goods for a balance due, he may hold them, though the statute has run against his debt; 8 Esp. 81; 11 Conn. 160; 26 Me. 330; 28 Ill. 44. And an acceptor may retain funds to indemnify him against his acceptances, though the acceptances may have been outstanding longer than the time limited by statute; 3 Campb. 418.

A set-off of a claim against which the statute has run cannot usually be pleaded in bar; 5 East 16; 3 Johns. 261; 5 Gratt. 360; 14 Pa. 531; though when there are cross-demands accruing at nearly the same time, and the plaintiff has saved the statute by suing out process, the defendant will be allowed to set off his demand; 2 Esp. 569; 2 Green, N. J. L. 545; and, generally, when there is any equitable matter of defence in the nature of set-off, or which might be the subject of a cross-action, growing out of the subject-matter for which the action is brought, courts will permit it to be set up although a cross-action or an action on the claim in set-off might be barred by the statute; 8 Rich. S. C. 113; 9 Ga. 398; 11 E. L. & Eq. 10; 8 B. Monr. 580; 3 Stockt. 44. A set-off is barred by the statute only when the original claim is barred; 134 Ind. 494.

Debts by specialty, as contracts under seal, judgments of courts of record (except foreign judgments, and judgments of courts out of the state, upon which the decisions are very discordant), liabilities imposed by statute, awards under seal, or where the submission is under seal, indentures reserving rent, and actions for legacies, are affected only by the general limitation of twenty years; Ang. Lim. § 77. But a mortgage, though under seal, does not take the note, not witnessed, secured thereby, with it, out of the limitation of simple contracts; 7 Wend. 94. And though liabilities imposed by statute are specialties, a liability under a by-law made by virtue of a charter is not; 6 E. L. & Eq. 309; on the ground that by becoming a member of the company enacting the by-laws, the party consents and agrees to assume the liabilities imposed thereby.

In Massachusetts, Vermont, and Maine, the statute is regulated in its application to witnessed promissory notes. In Massachusetts an action brought by the payee of a witnessed promissory note, his executor or administrator, is excepted from the limitation of simple contracts, and is only barred by the lapse of twenty years. But the indorsee of such a note must sue within six years from the time of the transfer to him; 4 Pick. 384; though he may sue after that time in the name of the payee, with his consent; 1 Gray 261; 2 Curt. C. C. 448. If there are two promisees to the note, and the signature of only one is witnessed, the note as to the other is not a witnessed note; 115 Mass. 599; 18 Shepl. 49. And the attestation of the witness must be with the knowledge and consent of the maker of the note; 8 Pick. 246; 1 Williams Vt. 26. An attested indorsement signed by the promisee, acknowledging the note to be due, is not a witnessed note; 23 Pick. 282; but the same acknowledgment for value received, with a promise to pay the note, is; 1 Metc. Mass. 21. If the note be payable to the maker's own order, witnessed and indorsed by the maker in blank, the indorsement being without attestation, an action by the first indorsee is barred in six years; 4 Metc. Mass. 219. And even if the indorsement be attested, a second indorsee or holder by delivery, not being the original payee, is barred; 13 Metc. 128.

Statute bar avoided, when. Trusts in

general are not within the operation of the statute, where they are direct and exclusively within the jurisdiction of a court of equity, and the question arises between the trustees and the *cestui que trust*; 7 Johns. Ch. 90; 23 Pa. 472; 1 Md. Ch. Dec. 53; 5 R. I. 79; 9 Pick. 212. See 31 W. Va. 810; 149 Mass. 253. And of this character are the trusts of executors, administrators, guardians, assignees of insolvents, and the like. The claim or title of such trustees is that of the *cestui que trust*; 2 Story, Eq. Jur. 608; 2 Sch. & L. 607, 633; 4 Whart. 177; 71 Pa. 106; 1 Johns. Ch. 314; 4 Pick. 283. The relation between directors and a corporation has the elements of an express trust, to which the statute does not apply; 20 N. E. Rep. (Ill.) 671. Special limitations to actions at law are made in some states in favor of executors and administrators, modifying or abrogating the rule in equity; and as these laws are made in the interest of the trust funds, it is the duty of the executor or administrator to plead the special statute which applies to him as such, and protects the estate he represents, though he is not bound to plead the general statute; 13 Mass. 203; 15 N. H. 6; 15 S. & R. 281; 2 Dessaus. 577; 4 Wash. C. C. 639.

If, however, the trustee deny the right of his *cestui que trust*, and claim adversely to him, and these facts come to the knowledge of the *cestui que trust*, the statute will begin to run from the time when the facts become known; 9 Pick. 212; 10 Pet. 223; 22 Md. 142; 52 Mo. 182; 11 Pa. 207; 33 W. Va. 184; 142 U. S. 326. See 77 Cal. 330. Long lapse of time will defeat the enforcement of a resulting trust; 33 W. Va. 14. The rule exempting trusts from the operation of the statute does not apply to a resulting trust in favor of creditors; 39 Minn. 330; 116 Ind. 78.

Principal and agent. The relation of an agent to his principal is a fiduciary one, and the statute does not begin to run so long as there is no breach of the trust or duty; 85 Ky. 322. When, however, there is such a breach, and the principal has knowledge of it, the statute will begin to run; 3 Gill & J. 389; 5 Cra. 560; 4 Jones N. C. 155; 12 Barb. 293; 32 Conn. 520. In many cases a lawful demand upon the agent to perform his duty, and neglect or refusal to comply, are necessary to constitute a breach. As when money is placed in the hands of an agent with which to purchase property, and the agent neglects to make the purchase, there must be a demand for the money before the statute will begin to run; 5 Fred. 507; 6 Cow. 376; 24 Pa. 52; so where property is placed in the hands of an agent to be sold, and he neglects to sell; 2 Gill & J. 389. If, however, the agent's conduct is such as to amount to a declaration on his part that he will not perform his duty, or if he has disabled himself from performing it, it is tantamount to a repudiation of the trust, or an adverse claim against the *cestui que trust*, and the same consequences follow. No demand is necessary; the right of action accrues at once upon the declaration, and the statute then begins to run; 10 Gill & J. 422.

But where a demand is necessary, it should itself be made within the limited time; otherwise an agent might be subject all his lifetime to demands, however stale; 15 Wend. 302; 17 Mass. 145; 66 Pa. 192; unless the agent, by his own act, prevents a demand; 6 Cush. 501. The rendering an untrue account by a collection or other agent would seem to be such a breach of duty as to warrant an action without demand, and would therefore set the statute in motion; 17 Mass. 145. If the custom of trade or the law makes it the clear duty of an agent to pay over money collected without a demand, then if the principal has notice, the statute begins to run from the time of collection; and when there is no such custom or law, if the agent having funds collected gives notice to his principal, the statute will begin to run after the lapse of a reasonable time within which to make the demand, though no demand be made; 4 Sandf. 590.

In equity, as has been seen, *fraud prae-*

tised upon the plaintiff so that the fact of his right to sue does not come to his knowledge till after the expiration of the statute of limitations, is held to open the case so that he may bring his action within the time limited, dating from the discovery of the fraud; *Biagh*, Eq. 203; 83 Va. 451. But herein the courts proceed with great caution, and require not only a clear case of fraudulent concealment, but the absence of negligence on the part of the party seeking to obviate the statute limitation by the replication of fraud; 7 How. 819; 12 Pa. 49; 1 Curt. C. C. 390; 2 Denio 577; 11 Ohio 194; 20 N. H. 187. See 130 U. S. 505. The concealment must be something more than silence or mere general declarations or speeches; it must appear that some trick or artifice has been employed to prevent inquiry or elude investigation, or calculated to mislead or hinder the party from obtaining information by the use of ordinary diligence; or it must appear that the facts were misrepresented to or concealed from the party by some positive act or declaration when inquiry was made; 116 Ind. 78; 145 U. S. 817. In some states, fraudulent concealment of the cause of action is made by statute a cause of exemption from its effect in courts of law as well as of equity. And the courts construe the saving clause with great strictness, and hold that means of knowledge of the concealment are equivalent to knowledge in fact; 8 Allen 130; 39 Me. 404. In the absence of statutory provision, the admissibility of the replication of fraud in courts of law has been the subject of contradictory decisions in the different states. In New York (20 Johns. 30), in Virginia (4 Leigh 474), and in North Carolina (3 Murph. 115), it is inadmissible. But in the United States courts (1 McLean 185; 130 U. S. 684), Pennsylvania (12 S. & R. 128), Indiana (4 Blackf. 85), New Hampshire (8 Fost. 20), South Carolina (8 Rich. Eq. 130), Virginia (83 Va. 451), it is held to be admissible; 5 Mas. 143; and this is the rule generally prevalent in the United States.

Running accounts. Such accounts as concern the trade of merchandise between merchant and merchant were by the original statute of James I. exempted from its operation. The earlier statutes of limitation in this country contained the same exception. But it has been very generally omitted in late revised codes. Among the accounts excepted from the operation of the statute all accounts current were early held to be included; 6 Term 189; if they contained upon either side any item upon which the right of action accrued within six years, whether the accounts were between merchant and merchant or other persons. And this construction of the law, based, as is said in some cases, upon the ground that such accounts come within the equity of the exception in respect to merchants' accounts, and in others upon the ground that every new item and credit in an account given by one party to another is an admission of there being some unsettled account between them, and as an acknowledgment, sufficient to take the case out of the statute, has taken the form of legislative enactment in many states in this country, and, in the absence of such enactment, has been generally followed by the courts; 20 Johns. 576; 6 Pick. 364; 6 Me. 308; 6 Conn. 246; 4 Rand. 488; 12 Pet. 300; 11 Gill & J. 212; 4 M'Cord 215; 3 Harr. N. J. 266; 5 Cra. 15; 1 Md. 383; 25 Pa. 296; 30 Cal. 126.

But there must be a reciprocity of dealing between the respective parties, and the accounts must be such that there may be a fair implication that it is understood that the items of one account are to be a set-off so far as they go, against the items of the other account; 2 Sumn. 410; 40 Mo. 244; 25 Pa. 296; 4 Cra. 696; 1 Edw. Ch. 417; 25 Pa. 296. Where the items of account are all on one side, as between a shopkeeper and his customer, or where goods are charged and payments credited, there is no mutuality, and the statute bars the account; 4 M'Cord 215; 1 Sandf. 220; 17 S. & R. 347; 18 Ala. 274. See 37 Fed. Rep. 394. And where, in the case of mutual account, after

a statement, the balance has been struck and agreed upon, the statute at once applies to such balance as a distinct demand; 2 Saund. 125; 6 Me. 308; 1 Daves 294; 12 Pet. 300; 7 Cra. 147; unless it was made the first item of a new mutual account; 3 Pick. 96; 8 Cl. & F. 121; but see 54 Mo. App. 543.

The statute begins to run against mutual accounts from the date of the last credit and not from the last debit; 65 Vt. 287; and if the last item on either side of a mutual account is not barred, the whole account is saved from the operation of the statute; 115 Mo. 581; 27 Atl. Rep. (R. I.) 214.

A closed account is not a stated account. In order to constitute the latter, an account must have been rendered by one party, and expressly or impliedly assigned to by the other; 8 Pick. 187; 6 Me. 308; 12 Pet. 300. Accounts between merchant and merchant are exempted from the operation of the statute, if current and mutual, although no item appears on either side within six years; 19 Ves. 180; 2 Saund. 124; 8 Bligh 352; 6 Pick. 364; 5 Cra. 15; 13 Pa. 810; 1 Smith (Ind.) 217. A single transaction between two merchants is not within the exception; 17 Pa. 238; nor is an account between partners; 3 R. I. 87; 75 Cal. 566; nor an account between two joint-owners of a vessel; 10 B. Monr. 112; nor an account for freight under a charter-party, although both parties are merchants; 6 Pet. 151.

Surety. The statute begins to run against a surety paying a debt only from the time of payment; 99 N. C. 559; 83 Va. 751.

As to limitation in patent cases, see PATENTS.

New promise to pay debt barred. There is another important class of exceptions, not made by the statute, but by the courts, wherein, although the statutory limitation may have expired, parties bringing themselves within the exception have always been allowed to recover. In actions of assumpsit, a new express promise to pay, or an acknowledgment of existing indebtedness made under such circumstances as to be equivalent to a new promise and within six years before the time of action brought, will take the case out of the operation of the statute, although the original cause of action accrued more than six years before that time; Poll. Contr. 625; 3 Tex. Civ. App. 445. And this proceeds upon the ground that as the statutory limitation merely bars the remedy and does not discharge the debt, there is something more than a merely moral obligation to support the promise,—to wit, a pre-existent debt, which is a sufficient consideration for the new promise; 3 Mas. 151; 8 Gill 155; 19 Ill. 109; 26 Vt. 230; Ans. Contr. 100; 9 S. & R. 128; 85 Tenn. 561. The new promise upon this sufficient consideration constitutes, in fact, a new cause of action; 4 East 399; 6 Taunt. 210; 1 Pet. 351; Hare, Contr. 259.

This was undoubtedly a liberal construction of the statute; but it was early adopted, and has maintained itself, in the face of much adverse criticism, to the present time. While, however, at an early period there was an inclination of the courts to accept the slightest and most ambiguous expressions as evidence of a new promise, the spirit and tendency of modern decisions are towards greater strictness, and seem to be fairly expressed in the learned judgment of Mr. Justice Story, in the case of *Beil v. Morrison*, 1 Pet. 351. "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had [not] received such support as would have made it, what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transactions may have been forgotten, or be incapable of explana-

tion, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate) applicable to such remote times as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit, that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt by a court or jury, that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt, that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and let in evidence, *aliunde*, to establish any debt, however large and at whatever distance of time; it is easy to perceive that the wholesome objects of the statute must be in a great measure defeated, and the statute virtually repealed."

"If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed."

And to the same general purport are the following cases, although it is undeniable that in the application of the rule there seems in some cases to be a looseness and liberality which hardly comport with the rule; 32 Me. 200; 14 N. H. 422; 7 Hill N. Y. 45; 121 Pa. 649; 12 Ill. 140; 4 Fla. 481; 5 Ga. 486; 79 Id. 700; 9 B. Monr. 614; 10 Ark. 134; 11 Ired. 445; 8 Gratt. 110; 20 Ala. N. S. 687; 4 Zabr. 427; 12 Ill. 146; 4 Gray 606; 33 Vt. 9; 5 Nev. 206; 54 Pa. 172; 11 How. 493; 8 Fost. 26; 51 Minn. 493; 179 Mass. 245; 7 Misc. Rep. 264; 86 Tex. 580; 83 Va. 518.

The promise must be made to the party in interest or his agent, in order to toll the statute; 123 Pa. 358; as an acknowledgment to a third person and not intended to be communicated to the creditor will not suffice; 6 Mackey 485.

A new promise to pay the principal only does not except the interest from the operation of the statute; 29 Pa. 189. Nor does an agreement to refer take the claim out of the statute; 1 Sneed 464; nor the insertion, by an insolvent debtor, of an outlawed claim, in a schedule of his creditors required by law; 10 Pa. 129; 7 Gray 274 (but this is not so in Louisiana; 14 La. Ann. 619); 12 Metc. 470; nor an agreement not to take advantage of the statute; 29 Me. 47; 17 Pa. 232; 8 Md. 374; 9 Leigh 381. If such an agreement were valid, it might be made part of the contract, and thus the object of the law would be defeated; 33 Me. 169. Nor will a devise of property to pay debts exempt debts upon which the statute has run prior to the testator's death; 13 Ala. 611; 4 Pa. 56; 13 Gratt. 329; 4 Sandf. 437.

Nor, in general, will any statement of a debt, made officially, in pursuance of special legal requirement, or with another purpose than to recognize it as an existing debt; 12 E. L. & Eq. 191; 9 Cush. 390; 30 Me. 425; 83 Ala. 134. Nor will a deed of assignment made by the debtor for the payment of certain debts, and of his debts generally, and a partial payment by the assignor to a creditor; 1 R. I. 81; 6 E. L. & Eq. 520; nor the entry of a debt in an unsigned schedule of the debtor's liabilities, made for his own use; 30 Me. 425; nor an undelivered mortgage to secure a debt against which the statute has run, though duly executed, acknowledged and recorded; 6 Cush. 151. But if the mortgage be delivered, it will be a sufficient acknowledgment to exempt the debt secured thereby from the operation of the statute; 4 Cush. 559; 18 Conn. 257; 14

Tex. 672. And so will the answer to a bill in chancery which expressly sets forth the existence of such a debt; 4 Sandf. 427; 3 Gill 166. An acknowledgment by a mortgagor to a stranger of the existence of the debt secured by the mortgage, without an express promise to pay the debt, will not prevent the bar of the statute; 64 Cal. 354.

If there is any thing said to repel the inference of a promise, or inconsistent therewith, the statute will not be avoided; 1 Harr. & J. 219; 23 Pa. 452; 6 Pet. 86; 5 Blackf. 496; 11 La. Ann. 713; 14 Me. 300; 4 Mo. 100; 15 Wend. 187. A promise to pay is implied from an acknowledgment of a debt as an existing debt; 159 Mass. 245. "The account is due, and I supposed it had been paid, but did not know of its being ever paid," is no new promise; 8 Cra. 72. If the debtor admits that the debt is due, but intimates his purpose to avail himself of the bar of the statute, the acknowledgment is insufficient; 2 Dev. & B. 82; 2 Browne 35; 29 Conn. 457. So if he says he will pay if he owes, but denies that he owes; 8 Me. 97; 3 Pick. 368; 70 Tex. 327. So if he states his inability to pay; 23 Pick. 291; 18 N. H. 486. So if he admits the claim to have been once due, but claims that it is paid by an account against the claimant; 8 Fairf. 72; 5 Conn. 480; 11 Conn. 160. See 84 Wis. 240; 65 Vt. 287. "I am too unwell to settle now; when I am better, I will settle your account;" held insufficient; 9 Leigh 381. So of an offer to pay a part in order to get the claim out of the hands of the creditor; 2 Bail. So. C. 283; and of an admission that the account is right; 4 Dana 505. An indorsement on a note dated the day before it would outlaw, that "the within note shall not be outlawed," written and signed by the party thereto, will take it out of the statute; 67 Mich. 243; 94 Id. 411; 85 Tenn. 678. Letters which merely acknowledge an indebtedness, but do not refer to any particular account, or mention the amount of the debt, and which are not written to serve as an acknowledgment, are not sufficient; 69 Miss. 225.

If the new promise is subject to conditions or qualifications, is indefinite as to time or amount, or as to the debt referred to, or in any other way limited or contingent, the plaintiff will be held to bring himself strictly within the terms of the promise, and to show that the condition has been performed, or the contingency happened, and that he is not excluded by any limitation, qualification, or uncertainty; 11 Wheat. 809; 8 Metc. 432; 15 Johns. 511; 3 Bingh. 638; 9 Hare 209; 85 Tenn. 214. If the promise be to pay when able, the ability must be proved by the plaintiff; 4 Esp. 56; 13 N. H. 486; 9 Pa. 410; 11 Barb. 254. But see 19 Vt. 308; 30 Ill. 429; 7 Hill 45; 15 Ga. 395; 85 Tenn. 214; 70 Tex. 718. So if it be to pay as soon as convenient, the convenience must be proved; 2 Cr. & M.; or, "if E will say that I have had the timber," the condition must be complied with; 1 Pick. 370.

And if there be a promise to pay in specific articles, the plaintiff must show that he offered to accept them; 8 Johns. 318. The vote of a town to appoint a committee to "settle the dispute" was held to be a conditional promise, requiring, to give it force as against the statute, proof that the committee reported something due; 11 Mass. 452. If the original promise be conditional, and the new promise absolute, the latter will not alter the former; 3 Wash. C. C. 404. But where the promise by A was to pay if the debtor could not prove that B had paid it, it was held that the onus was upon A to prove that B had paid it; 11 Ired. 445. The offer must be accepted altogether or rejected altogether. The liability of the defendant is to be tried by the test he has himself prescribed; 4 Leigh 603; 10 Johns. 35; 1 Gill & J. 497.

It must appear clearly that the promise is made with reference to the particular demand in suit; 6 Pet. 86; 6 Ga. 21; 1 Kay 650; 11 Ired. 86; though a general admission would seem to be sufficient, unless the

defendant show that there were other demands between the parties; 4 Gray 606; 8 Gill 82; 19 Pa. 388; 23 Conn. 453. If the admission be broad enough to cover the debt in suit, according to some authorities, the plaintiff can prove the amount really due *aliunde*. But the authorities are not at one on this point; 12 C. & P. 104; 6 N. H. 367; 23 Pick. 291; 27 Me. 433; 1 Pet. 351; 9 Leigh 381; 2 Dev. & B. 390; 23 Pa. 413.

Part payment of a debt is evidence of a new promise to pay the remainder; 2 Dougl. 552; 19 Vt. 28; 6 Barb. 583; 23 Or. 106. See 65 Hun 625. It is, however, but *prima facie* evidence, and may be rebutted by other evidence; 28 Vt. 642; 27 Me. 370; 4 Mich. 508; L. R. 7 Q. B. 493; 13 Wall. 254; 53 N. Y. 442; 38 Miss. 41; 5 Ark. 638; 7 Ind. App. 417. The payment must be voluntary and made with the intent that it should be applied upon the debt; 60 Vt. 453. Payment of the interest has the same effect as payment of part of the principal; 8 Bingh. 309; 7 Blackf. 537; 17 Cal. 574; 14 Pick. 387; 60 Vt. 566. And the giving a note for part of a debt; 2 Metc. 168; 40 Kan. 1; or for accrued interest, is payment; 13 Wend. 267; 6 Metc. 553; and so is a second mortgage given as payment of interest on the first mortgage; 75 Mich. 167; and so is the credit of interest in an account stated; 6 Johns. 267; and the delivery of goods on account; 4 Ad. & E. 71; 30 Me. 253; 11 How. 493. But the payment of a dividend by the assignee of an insolvent debtor is no new promise to pay the remainder; 7 Gray 387; 6 E. L. & Eq. 520; and it has been held by respectable authorities that new part payment is no new promise, but that in order to take the case out of the statute, the payment must be made on account of a sum admitted to be due, accompanied with a promise to pay the remainder; 6 M. & W. 824; 6 E. L. & Eq. 520; 20 Miss. 663; 7 Gray 274. Payments of part of the sum sued for do not take the case out of the statute, when the evidence does not show that at the time of such payment, the party knew that he owed the sum in suit and the payments were apparently made on account of bills that accrued after the accrual of the debt in suit; 141 N. Y. 489. And a payment intended to cover the whole amount due is ineffectual as part payment to defeat the operation of the statute; 5 Misc. Rep. 213.

Part payment by a surety in the presence of his principal, and without dissent, is payment by the principal; 2 Fost. 219; but part payment by the surety after the statute has barred the debt, is not a new promise to pay the other part; 18 B. Monr. 643. A payment by the maker of a note cannot be relied on to take the note out of the statute as to the surety; 43 Ill. App. 301. A general payment on account of a debt for which several notes were given, without direction as to the application of the payment, may be applied by the creditor to either of the notes, so as to take the note to which the payment is applied out of the statute; but the payment cannot be apportioned to the several notes with the same effect; 19 Vt. 26; 81 E. L. & Eq. 55; 1 Gray 630. With respect to promissory notes and bonds, the general proof of part payment or of interest is the indorsement thereon; 1 Ad. & E. 102; 9 Pick. 42; 42 Barb. 18; 17 Johns. 182. But it must be made *bona fide*, and with the privity of the debtor; 2 Campb. 321; 7 Wend. 408; 45 Mass. 573; 4 Leigh 519.

The payment may be made to an agent, or even a stranger not authorized to receive it, but erroneously supposed to be authorized. It is as much an admission of the debt as if made to the principal himself; 1 Bingh. 480; 10 B. & C. 122. And so with reference to acknowledgments or new promises; 4 Pick. 110; 11 Me. 152; 21 Barb. 351; 86 Iowa 576; 19 Ill. 189. And the weight of authority is in favor of the rule that part payment of a witnessed note or bond will avoid the statute; 30 Me. 164; 9 B. Monr. 438; 12 Mo. 94; 18 Ark. 521. Whether the new promise or payment, if made after the debt is barred by the stat-

ute, will remove the bar, is also a mooted point, the weight of authority perhaps being in favor of the negative; 14 Pick. 387; 10 Ala. n. s. 959; 13 Miss. 564; 2 Const. 523; 2 Kern. 635; 13 La. Ann. 358, 685; 14 Ark. 199. In Ohio it is so, by statute; 17 Ohio 9. For the affirmative, see 18 Vt. 440; 20 Me. 176; 5 Ired. 341; 2 Tex. 503; 8 Humphr. 656; 47 Pa. 383; 6 Barb. 583.

It was long held that an acknowledgment or part payment by one of several joint-contractors would take the claim out of the statute as to the other joint-contractors; Steph. Ev. § 17; 2 Greenl. Ev. 438; 2 H. Bla. 340; and such is the law in some parts of the Union; 4 Pick. 382; 25 Vt. 300; 19 Conn. 37; 1 R. I. 98; 3 Munf. 240; 1 M'Cord 541; 7 Ired. 513; 30 Me. 310; 45 Miss. 367; 18 N. Y. 559. See 85 Wis. 328. But in other courts the contrary rule prevails; 1 Pet. 351; 6 N. H. 124; 7 Yerg. 534; 1 M'Mullin 297; 13 Md. 223; 17 S. & R. 126; 41 Ala. 223. See 69 Md. 499.

An acknowledgment or part payment made by an agent acting within the scope of his authority is, upon the familiar maxim, *qui facit per alium facit per se*, an acknowledgment or part payment by the principal; see Tayl. Ev. 606; and hence if a partner has been appointed specially to settle the affairs of a dissolved partnership, his acknowledgment or part payment by virtue of his authority as such agent will take the claim out of the statute; 6 Johns. 267; 1 Pet. 351; 20 Me. 347; 8 S. & R. 345; as will part payment by a partner without special authority; 156 Mass. 314. A written acknowledgment to take a barred demand out of the statute must be made to the creditor or his agent, and it must be made with knowledge of his agency; 50 Mo. App. 194. And the wife may be such agent as to a claim for goods sold to her during the absence of her husband; 3 Bing. 119; but a wife during coverture, not made specially or by implication of law an agent, cannot make a new promise effectual to take a claim to which she was a party *dum sola* out of the statute; 1 B. & C. 248; 24 Vt. 89; 12 E. L. & Eq. 398; not even though the coverture be removed before the expiration of six years after the alleged promise; 2 Pa. 490.

Nor is the husband an agent for the wife for such a purpose; 15 Vt. 471; but he is an agent for the wife, payee of a note given to her *dum sola*, to whom a new promise or part payment may be made; 6 Q. B. 937; nor is the widow of the maker of notes, although she made payments before the cause of action was barred; 10 Ky. L. Rep. 433. So a new promise to an executor or administrator is sufficient; 8 Mass. 184; 17 Johns. 330; 7 Const. 179; and the weight of authority seems to be in favor of the binding force of a promise or part payment made by an executor or administrator; 13 Cush. 324; 12 B. Monr. 403; 9 Ala. 502; 17 Ga. 96; 9 E. L. & Eq. 80; 10 Md. 242; 4 B. Monr. 36; particularly if the promise be express; 15 Johns. 3; 15 Me. 360; 36 N. J. L. 44. But see contrary; 7 Ind. 442; 9 Md. 817; 14 Tex. 813; 35 Pa. 259; 11 Sm. & M. 9; 7 Conn. 172; see 12 Wheat. 565. A promise by the life tenant to pay taxes may be relied upon as against a remainderman, to remove the bar of the statute; 77 Md. 582.

To put an end to all litigation in England as to the effect of a new promise or acknowledgment, it was enacted by stat. 9 Geo. IV. c. 14, commonly known as Lord Tenterden's Act, that the new promise or acknowledgment by words only, in order to be effectual to take a case out of the statute of limitations, should be in writing, signed by the party chargeable thereby; and this statute has been substantially adopted by most of the states in this country. This statute affects merely the mode of proof. The same effect is to be given to the words reduced to writing as would, before the passage of the statute, have been given to them when proved by oral testimony; 7 Bingh. 163. See 76 Ga. 371. If part payment is alleged, "words only," admitting the fact of payment, though not

in writing, are admissible to strengthen the proof of the fact of payment; 2 Gale & D. 59. See Ang. Lim. § 298.

In construing these statutes it has been held that the return, under citation, by an administrator of the maker of a note, showing the note as one of his intestate's debts, is in writing within the meaning of this statute; 12 Sim. 17; and so is the entry by an insolvent debtor of the debt in his schedule of liabilities; 12 Metc. 470. It was held in the last case that the mere entry was not in itself a sufficient acknowledgment, but being in writing, within the meaning of the statute, it might be used with other written evidence to prove a new promise. But the making one note and tendering it in payment of another is not a new promise in writing; 3 Cush. 355; not even if the note be delivered, if it be redelivered to the maker for the purpose of restoring matters between the parties to the state they were in before the note was given; 1 Metc. 594. An entry in a ledger of a balance due the owner's wife, made by the husband or under his direction, is such an admission that the amount is due as will raise an implied promise to pay the same and will bar the statute; 47 Ill. App. 20; but see 140 N. Y. 150.

A and B had an unsettled account. In 1845, A signed the following: "It is agreed that B, in his general account, shall give credit to A for £10, for books delivered in 1834." Held, no acknowledgment in writing, so as to give B a right to an account against A's estate more than six years before A's death; 85 E. L. & Eq. 195. The writing must be signed by the party himself. The signature of the husband's name by the wife, though at his request, is not a signing by the party to be charged; 2 Bingh. N. C. 776. Nor is the signature by a clerk sufficient; 8 Scott 147. Nor is a promise in the handwriting of the defendant sufficient; it must be signed by him; 12 Ad. & E. 493. And a request by the defendant to the plaintiff to get certain moneys due the defendant from third parties, does not charge the party making the request, because it is not apparent that the defendant intended to render himself personally liable; 8 Ad. & E. 221; 5 C. & P. 209. Since this statute, mutual accounts will not be taken out of the operation of the statute by any item on either side, unless the item be the subject of a new promise in writing; 2 Cr. M. & R. 45; 116 Mass. 529. The effect of part payment is left by the statute as before; 10 B. & C. 122. And the fact of part payment, it is now held, contrary to some earlier cases, may be proved by unsigned written evidence; 4 E. L. & Eq. 514; or by oral testimony; 9 Metc. 482.

AS TO REAL PROPERTY AND RIGHTS. The general if not universal limitation of the right to bring an action or to make entry, is to twenty or twenty-one years after the right to enter or to bring the action accrues, *i. e.* to twenty or twenty-one years after the cause of action accrues. As the rights and interests of different parties in real property are various, and attach at different periods, and successively, it follows that there may be a right of entry in a particular person, accruing after the expiration of antecedent rights at a period from the beginning of the adverse possession, much exceeding twenty or twenty-one years.

Thus, if an estate be limited to one in tail, and the tenant in tail be barred of his remedy by the statute, yet, as the statute only affects the remedy, and the right or estate still exists, the right of entry in the remainder man does not accrue until the failure of the issue of the tenant in tail, which may not happen for many years. The estate still existing in the tenant in tail or his issue supports and keeps alive the remainder man's right of action till the expiration of twenty years after his right of entry accrues; 1 Burr. 60; 3 Binn. 874; 5 Bro. P. C. 689; 15 Mass. 471.

The laches of the owner of a prior right in an estate cannot prejudice the owner of a subsequently accruing right in the same

estate; 4 Johns. 390; 8 Cruise, Dig. 408; 2 Stark. Ev. 887. And where there exist two distinct rights of entry in the same person, he may claim under either. He is not obliged to enter under his earlier right; 1 Pick. 818; 5 C. & P. 568; 29 Ga. 355; 2 Gill & J. 173.

Where it is necessary to prove that an actual entry has been made upon the land within a certain time before bringing suit, such entry must be proved to have been made upon the land in question; 8 Me. 316; Doug. 477; 4 Cra. 387; 11 Gill & J. 283; unless prevented by force or fraud, when a *bona fide* attempt is equivalent; 4 Johns. 389. If the land lie in two counties, there must be an entry in each county; though if the land be all in one county an entry upon part, with a declaration of claim to the whole, is sufficient; Co. Litt. 419; 3 Johns. Cas. 115. The intention to claim the land is essential to the sufficiency of the entry; and whether this intention has existed is to be left in each case to the jury; 9 Watts 567; 4 Wash. C. C. 387; 21 Ga. 113; 27 Ala. 364. An entry may be made by the guardian for his ward, by the remainder man or reversioner for the tenant, and the tenant for the reversioner or remainder man, being parties having privity of estate; 9 Co. 106; 2 Pa. 180. So a *cestui que trust* may enter for his trustee; 1 Ld. Raym. 716; and an agent for his principal; 11 Pa. 212; even without original authority, if the act be adopted and ratified; 9 Pa. 40. And the entry of one joint-tenant, coparcener, or tenant in common will inure to the benefit of the other; 10 Watts 296.

Adverse possession for the necessary statutory period gives title against the true owner; but it must be open, uninterrupted, and with intent to claim against the true owner. The possession must be an actual occupation, so open that the true owner ought to know it and must be presumed to know it, and in such manner and under such circumstances as amount to an invasion of his rights, thereby giving him cause of action; 11 Gill & J. 371; 5 Cow. 219; 2 Pa. 438; 9 Cush. 476; 5 Pet. 438; 4 Wheat. 280; 149 Mass. 201; in Pennsylvania this rule has been announced with special distinctness. "The owner of land," says the supreme court in 1 Watts 341, "can only be barred by such possession as has been actual, continued, visible, notorious, distinct, and hostile or adverse." See 95 Mich. 410; 97 Ala. 588; 144 U. S. 533; 69 Tex. 375; 39 Kan. 706; 84 Ky. 124; 23 Neb. 75.

Title by adverse possession for a period such as is required by statute to bar an action is a fee simple title, and is as effective as any otherwise acquired; 7 Mackey 1. See 144 U. S. 533.

A possession not actual, but constructive, not exclusive, but in participation with the owner or others, falls short of that kind of adverse possession which deprives the true owner of his title; 150 U. S. 597.

Adverse possession must be open, so that the owner may know it or might know it. Many acts of occupation would be unequivocal, such as fencing the land or erecting a house on it; 7 Wheat. 59; 5 Pet. 402; 42 N. W. Rep. (Neb.) 915; actual improvement and cultivation of the soil; 1 Johns. 156; building on land and putting a fence around it; 6 Pick. 172; digging stones and cutting timber from time to time; 14 East 332; 6 S. & R. 21; driving piles into the soil covered by a mill-pond, and thereon erecting a building; 6 Mass. 229; cutting roads into a swamp, and cutting trees and making shingles therefrom; 1 Ired. 56; and setting fish-traps in a non-navigable stream, building dams across it, and using it every year during the entire fishing-season for the purpose of catching fish; 1 Ired. 535. But entering upon uninclosed flats, when covered by the tide, and sailing over them with a boat or vessel for the ordinary purposes of navigation, is not an adverse possession; 1 Cush. 395; though the filling up the flats, and building a wharf there, and using the same, would be if the use were exclusive; 1 Cush. 313; 10 Bosw. 249; nor is the entering upon a lot and marking its boundaries by splitting the

trees; 14 N. H. 101; nor the getting rails and other timber for a few weeks each year from timber-land; 4 Jones 295; nor the overflowing of land by the stoppage of a stream; 4 Dev. 158; nor the survey, allotment, and conveyance of a piece of land, and the recording of the deed; unless there is open occupation; 22 Me. 29. As a rule the nature of the acts necessary to constitute adverse possession varies with the region and character of the ground. If the latter is uncultivated and the region sparsely populated, much less unequivocal acts are necessary on the part of the adverse holder.

It must be continuous for the whole period. If one trespasser enters and leaves, and then another trespasser, a stranger to the former and without purchase from or respect to him, enters, the possession is not continuous; 84 Pa. 33; 17 How. 601; 4 Md. 143; 30 Mo. 99; 20 Pick. 485; 10 Johns. 475; 71 Tex. 438; 38 Minn. 123. But a slight connection of the latter with the former trespasser, as by a purchase by parol contract, will be sufficient to give the possession continuity; 6 Pa. 355; 1 Meigs 613; 31 Me. 533; 23 Ohio St. 42; 1 Term 448. And so will a purchase at a sale or execution; 5 Pa. 126; 24 How. 284. To give continuity to the possession by successive occupants, there must be privity of estate; 5 Metc. Mass. 15; Ang. Lim. § 414; and such a privity that each possession may be referred to one and the same entry; as that of a tenant to his landlord, or of the heir of a disseisor to his ancestor; 1 Rice 10. It is not essential that one and the same person shall have been all the while the adverse holder, if the latter succeeds to the asserted rights of the preceding holders or occupants as grantee or transferee; 85 Ala. 504.

An administrator's possession may be connected with that of his intestate; 11 Humphr. 457; and that of a tenant holding under the ancestor, with that of the heir; Cheeves 200. In some states, however, it is held that whether the possession be held uniformly under one title, or at different times under different titles, can make no difference, provided the claim of title is always adverse; as in Connecticut; 3 Day 269; and in Kentucky; 1 A. K. Marsh 4.

The possession must be adverse. If it be permissive; 3 Jac. & W. 1; or by mistake; 3 Watts 230; or unintentional; 11 Mass. 296; or confessedly in subordination to another's right; 5 B. & Ald. 223; 9 Wheat. 241; 4 Wend. 553; 6 Pa. 210; 9 Metc. 418; 8 Shepl. 240; 2 Ad. & E. 520; it does not avail to bar the statute. The possession of a life tenant and those claiming under him, or subject to his control, is not adverse to those entitled in remainder; 37 W. Va. 834. If the occupation is such and by such a person that it may be for the true owner, it will be presumed to be for him, unless it be shown that the adverse claimant gave notice that he held adversely and not in subordination; 1 Batt. Ch. 873; 5 Burr. 2604. And this notice must be clear and unequivocal. If the act of the tenant or adverse claimant may be a trespass as well as a disseisin, the true owner may elect which he will consider it, regardless of the wishes of the trespasser, who cannot be allowed to qualify his own wrong; 1 Burr. 60; 3 Pick. 575; 12 Mass. 325; 4 Mas. 339. So that if the adverse claimant sets up his trespasses as amounting to adverse possession, the owner may reply they are no disseisin, but trespasses only; while, on the other hand, the true owner may elect, if he please, for the sake of his remedy, to treat them as a disseisin; 19 Me. 388; 8 N. H. 67. This is called a disseisin by election, in distinction from a disseisin in fact, — a distinction which was taken for the benefit of the owner of the land. Whenever the act done of itself necessarily works an actual disseisin, it is a disseisin in fact; as, when a tenant for years or at will conveys in fee. On the other hand, those acts which are susceptible of being made a disseisin by election are no disseisin till the election of the owner makes them so; 1 Johns. Cas. 36.

Evidence of adverse possession must be

strictly construed and every presumption is in favor of the true owner; 73 Wis. 463. The statute does not begin to run in favor of the possession of public land until the title passes from the United States; 97 Mo. 524; 50 Ark. 141; there is no adverse possession against the state; 54 Va. 701.

The claim by adverse possession must have some definite boundaries; 1 Metc. Mass. 528; 10 Johns. 447; 10 S. & R. 384; 4 Vt. 155; 8 H. & S. 13. There ought to be something to indicate to what extent the adverse possessor claims. A sufficient inclosure will establish the limits, without actual continued residence on the land; 3 S. & R. 291; 14 Johns. 405; 3 H. & M.H. 595; 10 Mass. 93; 4 Wheat. 213. But it must be an actual, visible, and substantial inclosure; 7 N. H. 430; 2 Aik. 364; 4 Bibb 455. An inclosure on three sides, by a trespasser as against the real owner, is not enough; 8 Me. 239; 5 Md. 256; nor is an unsubstantial brush fence; 10 N. H. 397; 39 N. W. Rep. (Mich.) 747; nor one formed by the lapping of fallen trees; 3 Metc. Mass. 125; 2 Johns. 230. Natural barriers may be a sufficient inclosure; 75 Cal. 584. And where the claim is by possession only, without any color or pretence of title, it cannot extend beyond the actual limits of the inclosure; 8 H. & M.H. 621; 5 Conn. 305; 28 Vt. 142; 6 Ind. 273. And this must be fixed, not roving from part to part; 11 Pet. 53. Possession and occupancy of land not enclosed by a fence may be adverse; 71 Mich. 391.

Extension of the inclosure within the time limited will not give title to the part included in the extension; 2 H. & J. 391; 8 Ill. 238. Where, however, the claim rests upon *color of title* as well as possession, the possession will be regarded as coextensive with the powers described in the title-deed; 11 Pet. 41; 3 Mas. 330; 3 Ired. 578; 2 Ill. 181; 13 Johns. 406; 5 Dana 232; 4 Mass. 416; 23 Cal. 431; unless the acts or declarations of the occupant restrict it. But the constructive possession of land arising from color of title cannot be extended to that part of it whereof there is no actual adverse possession; 28 Pa. 124; 16 B. Monr. 472; 7 Watts 442; nor will a subsequent conflicting possession, whether under color of title or not, be extended by construction beyond the limits of the actual adverse possession for the purpose of defeating a prior constructive possession; 6 Cow. 677; 11 Vt. 521. Nor can there be any constructive adverse possession against the owner when there has been no actual possession which he could treat as a trespass and bring suit for; 8 Rich. 101. A trespasser who afterwards obtains color of title can claim constructively only from the time when the title was obtained; 16 Johns. 293. If one by mistake enclose the land of another, and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession as owner for the statutory period will work a disseisin, and his title will be perfect; 25 Neb. 764; 75 Cal. 610; 87 Tenn. 575.

This doctrine of constructive possession, however, applies only to land taken possession of for the ordinary purpose of cultivation and use, and not to a case where a few acres are taken possession of in an uncultivated township for the mere purpose of thereby gaining title to the entire township; 22 Vt. 388; 1 Cow. 286; 6 B. Monr. 463; 14 Vt. 400.

In fine, with a little relaxation of strictness in the case of wild, remote, and uncultivated lands, the sort of possession necessary to acquire title is adverse, open, public, and notorious, and not clandestine and secret; possession, exclusive, uninterrupted, definite as to boundaries, and fixed as to its locality.

Color of title is anything in writing, however defective, connected with the title, which serves to define the extent of the claim; 2 Cal. 183; 21 How. 493; 30 Ill. 279; 34 Wis. 425; 16 N. H. 374; 19 Ga. 8; 17 Or. 532; and it may exist even without writing, if the facts and circumstances show clearly the character and extent of the claim; 17 Ill. 498; Ang. Lim. § 404.

It exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims title; 148 U. S. 301.

A fraudulent deed, if accepted in good faith, gives color of title; 8 Pet. 244; so does a defective deed; 4 H. & M.H. 233; 6 Wisc. 527; unless defective in defining the limits of the land; 1 Cow. 276; so does an improperly executed deed, if the grantor believes he has title thereby; 6 Metc. 337; so does a sheriff's deed; 7 B. Monr. 236; 22 Ga. 56; 7 Hill 476; and a deed from a collector of taxes; 4 Ired. 164; 24 Ill. 577; 143 id. 265; 37 Neb. 353; 7 Wash. 617; 133 U. S. 239; unless defective on its face; 29 Wisc. 256; 97 Mo. 356; but see 77 Cal. 485; and a deed from an attorney who has no authority to convey; 2 Murph. 14; 28 N. Y. 9; and a deed founded on a voidable decree in chancery; 1 Meigs 207; and a deed, by one tenant in common, of the whole estate, to a third person; 4 D. & B. 54; 2 Head 674; and a deed by an infant; 4 D. & B. 289; And a deed made by a husband and wife of the wife's interest in a former husband's estate; 132 Ind. 546.

So possession, in good faith, under a void grant from the state, gives color of title; 4 Ga. 115. And if a purchases under an execution against B, takes a deed, and on the same day conveys to C, though the purchase and conveyance be at the request of B, and no money is paid, B has a colorable title; 4 D. & B. 201; 7 Humphr. 367. A will gives color of title; but if it has but one subscribing witness, and has never been proved, it does not; 5 Ired. 711. Nor does the sale by an administrator of the land of his solvent intestate, under a license of the probate court, unless accompanied by a deed from the administrator; 34 N. H. 544; 13 Md. 105. Nor does the sale of property by an intestate to his son, of which the possession is held by the wife, who is administratrix, while the son lives in the family, as against the intestate's creditors; 30 Miss. 472. A person taking possession under a judicial sale has color of title, though the judicial proceedings were void; 184 Ind. 238; 37 W. Va. 215.

If there is no written title, then the possession must be under a *bona fide* claim to a title existing in another; 3 Watts 72. Thus, if under an agreement for the sale of land the consideration be paid and the purchaser enter, he has color of title; 5 Metc. Mass. 173; 10 Fost. 581; 37 Miss. 138; 36 Ala. 308; 2 Strohn. 24; 12 Tex. 195; 17 Ga. 600; though if the consideration be not paid, or be paid only in part, he has not; 2 Bail. 59; 11 Ohio 455; 30 Ga. 311; 2 Dutch. 351; because the fair inference in such case is that the purchaser is in by consent of the grantor, and holds subordinately to him until the payment of the full consideration. There is, in fact, a mutual understanding, and a mutual confidence, amounting to an implied trust; 9 Wheat. 241; 12 Mass. 325; 1 Wash. C. C. 207; 1 Spear 291.

In New York, a parol gift of land is said not to give color of title; 1 Johns. Cas. 86; but it is at least doubtful if that is the law of New York; 6 Cow. 677; see also 5 id. 346; 8 id. 589; 9 id. 530. In a later case it is said that to avoid a deed given by one out of possession, the party in possession must hold adversely, "claiming under a title" and not "under a claim of title"; 39 Barb. 513. In some other states, a parol gift is held to give color of title if accompanied by actual entry and possession. It manifests, equally with a sale, the intent of the donee to enter, and not as tenant; and it equally proves an admission on the part of the donor that the possession is so taken; 13 Conn. 237; 2 B. Monr. 252; 39 Conn. 98; 52 Mo. 108; 87 Miss. 138; 15 Ark. 1; 4 Allen 425; 32 N. J. L. 289; but see, *contra*, 24 Ga. 494. The element of good faith, and the actual belief on the part of the claimant that he has title, give the claimant by color of title his advantage over the mere trespasser, who, as we have seen, is restricted care-

fully to his actual occupation; and it may be said, generally, that whenever the facts and circumstances show that one in possession, in good faith and in the belief that he has title, holds for himself and to the exclusion of all others; his possession must be adverse, and according to his assumed title, whatever may be his relations in point of interest or priority, to others; 5 Pet. 440; 1 Paine 467; 11 Pet. 41. When a man enters under such a claim of title, his entry on a part is an entry on the whole; but if he claims no such title he has no seisin by his entry but by the ouster of him who was seized, which can only be by the actual and exclusive occupation of the land; 4 Mass. 416. See Wood. Lim. § 259.

In cases of mixed possession, or a possession at the same time by two or more persons, each under a separate colorable title, the seisin is in him who has the better or prior title; 4 Wheat. 213; 20 How. 235; 3 Wend. 149; for, though there may be a concurrent possession, there cannot be a concurrent seisin; and, one only being seized, the possession must be adjudged to be in him, because he has the better right; 10 Mass. 151; 3 S. & R. 509; 1 D. & B. 5. Of course, in such a case, if one has color of title, and the other is a mere trespasser or intruder, the possession is in him who has color of title; 2 Harr. & J. 112; 4 S. & R. 465; 5 Du. 273. The possession of the true owner must prevail over the claim by constructive possession by one who holds under mere color of title; 69 Tex. 846. No length of possession of one partner of real estate paid for with partnership funds and conveyed to him, bars the other partners; 133 U. S. 631.

But, with all the liberality shown by the courts in giving color of title, it has been denied that a grant from a foreign government confers it, on the ground that the possession under such a title was rather a question between governments than individuals; 3 H. & McH. 621. Thus, the courts of New York have refused to recognize claims under a grant of the French government in Canada, made prior to the treaty between Great Britain and France in 1763; 4 Johns. 163; 13 id. 365; as conferring color of title. But the soundness of the exception has since been questioned in the same court; 8 Cow. 599; and the grant of another state has been expressly held to give color of title in Pennsylvania, even as against one claiming under her own grant; 2 Watts 37. For political reasons, it has been held that a grant from the Indians gives no color of title; 8 Wheat. 571; nor does a grant by an Indian in contravention of a statute; 41 Fed. Rep. 705; but a sheriff's deed for land in the Southern Confederacy was held to give color of title; 10 Fed. Rep. 531. See COLOR OF TITLE.

One joint-tenant, tenant in common, or coparcener cannot dismiss another but by actual ouster, as the seisin and possession of one are the seisin and possession of all, and inure to the benefit of all; 2 Salk. 422; 7 Wheat. 59; 12 Metc. 357; 11 Gratt. 505; 3 S. & R. 331; 4 Day 473; 116 Ind. 103; 16 Or. 173; actual ouster implies exclusion or expulsion. No force is necessary; but there must be a denial of the right of the cotenant; 5 Burr. 2604; 9 Cow. 530; 22 Tex. 663; 1 Me. 89; 12 Wend. 404; and, like a grant, after long lapse of time it may be presumed; 1 East 568; 3 Metc. 101; 29 Wisc. 236; and inferred from acts of an unequivocal character importing a denial; 3 Watts 77; 1 Me. 89; 3 A. K. Marsh. 77; 97 Mo. 426; 16 Or. 173; 37 Minn. 338; 82 Va. 759; 98 N. C. 307; 78 Ga. 142; 74 Iowa 359; but the possession of the grantee of one tenant in common is adverse to all; 13 B. Monr. 436; 4 Paige 178.

The possession of the tenant is likewise the possession of his landlord, and cannot be adverse unless he distinctly renounce his landlord's title; 2 Campb. 11; 2 Binn. 468; 10 N. Y. 9; 3 Pet. 43; 6 Watts 500; 7 Mont. 288; 84 Ala. 598; id. 203; 112 N. Y. 263; 40 La. Ann. 633; 70 Tex. 547.

Mere non-payment of rent during the time limited, there having been no demand, does not prejudice the landlord's right to

enter and demand it, even though the lease contains a clause giving the right of re-entry in case of non-payment of rent; 5 Cow. 128; 7 East 299; see 110 N. Y. 537; and payment of rent is conclusive evidence that the occupation of the party paying was permissive and not adverse; 3 B. & C. 185; 12 L. J. N. S. Q. B. 236. The defendant in execution after a sale is a quasi tenant at will to the purchaser; and his possession is not therefore adverse; 1 Johns. Cas. 153; 3 Mass. 128. And a mere holding over after the expiration of a lease does not change the character of the possession; 2 Gill & J. 173; nor does the assignment of the lease, or a sub-letting. The assignee and sub-lessees are still tenants, so far as the title by adverse possession is concerned; 4 S. & R. 467; 8 Pet. 43; 6 Cow. 751.

If the tenant convey the premises, as we have before seen, the landlord may treat the grantee as a disseisor by election; but the grantee cannot set up the act as the basis of a title by adverse possession; 5 Cow. 123; unless in the case where the relation of landlord and tenant subsists by operation of law; as where one makes a grant and by the omission of the word "heirs" an estate for life only passes. In such case, after the death of the tenant for life an adverse possession may commence; 7 Cow. 823. So in case the tenant has attorned to a third person and the landlord has assented to the attornment; 6 Cow. 133; 4 How. 289; 10 Sm. & M. 440; 4 Gilman 336. But a mere parol disclaimer, by the lessor, of the existence of the relationship, and of all right in the premises, is not equivalent to an attornment. To admit such disclaimer would lead to fraud and perjury, and is in direct violation of the principles of the statute of frauds; 7 Johns. 186; 5 Cow. 74; but see 13 S. & R. 138.

The possession of one's agent is, within the purview of the statute of limitation, the possession of his principal; 37 Neb. 353. See 112 Mo. 527; 147 U. S. 503.

The possession of the mortgagor is not adverse to the mortgagee (the relation being in many respects analogous to that of landlord and tenant); 3 Pet. 43; 4 Cra. 415; 11 Mass. 125; 30 Miss. 49; 27 Pa. 504; Dougl. 275; see 112 Mo. 527; not even if the possession be under an absolute deed, if intended as a mortgage; 19 How. 289. The relation of mortgagor and mortgagee is very peculiar and *sui generis*. It is sometimes like a tenancy for years; Cro. Jac. 659; sometimes like a tenancy at will; Dougl. 275; and sometimes like a tenancy on sufferance; 1 Salk. 245; but, whatever it may be like, it is always presumed to be by permission of the mortgagee until the contrary be shown. The assignee of the mortgagor, with notice, is in the same predicament as the mortgagor; but if he purchase without notice, and particularly if the mortgage be forfeited at the date of his purchase, his possession will be adverse; 19 Vt. 526; 6 B. Mon. 479; 2 Sandf. 636; 34 Mo. 285; 32 Miss. 312; 19 How. 289.

But, although the possession of the mortgagor be not adverse so as to give title under the statute against the mortgagee, the courts have nevertheless practically abrogated this rule, by holding that where the mortgagor has held during the statutory limit, and has meantime paid no interest nor otherwise recognized the rights of the mortgagee, this raises a presumption that the debt has been paid, and is a good defence in an action to foreclose; 12 Johns. 242; 9 Wheat. 497; 8 Metc. 87. And the reasons for so holding seem to be equally cogent with those upon which rests the well-settled rule that, with certain exceptions, the mortgagee's possession for the time limited bars the mortgagor's right to redeem; 2 J. & W. 434; 6 E. L. & Eq. 355; 1 Johns. Ch. 385; 9 Wheat. 489; 3 Harr. & M'H. 328; 2 Sumn. 401; 13 Ala. 246; 20 Me. 269.

The exceptions to this rule are—*first*, where an account has been settled within the limited time; 2 Vern. 377; 5 Bro. C. C. 187; 5 Johns. Ch. 522; *second*, where within that time the mortgagee, by words spoken or written, or by deed, has clearly and unequivocally recognized the fact that

he held as mortgagee; 2 Bro. 397; 1 Sim. & Stu. 347; 1 Johns. Ch. 594; 10 Wheat. 152; 3 Sumn. 160; by which recognition a subsequent purchaser, with actual or constructive notice of the mortgage, is barred; 7 Paige Ch. 465; *third*, where no time is fixed for payment, as in the case of a mortgage where the mortgagee is by agreement to enter and hold till he is paid out of the rents and profits; 1 Vt. 418; *fourth*, where the mortgagor continues in possession of the whole or of any part of the premises; Sel. Cas. Ch. 55; 1 Johns. Ch. 594; 1 Neb. 342; and, *fifth*, where there is fraud on the part of the mortgagee, or at the time of the inception of the mortgage he has taken advantage of the necessities of the mortgagor; 1 Johns. Cas. 402, 595; 2 Cruise 161.

The trustee of real estate, under an express trust, as well as of personal, as we have seen, holds for his *cestui que trust*, and the latter is not barred of his right unless it be denied and repudiated by the trustee; in which case the statute will begin to run from the denial or repudiation; 5 How. 233; 3 Gray 1; 2 M'Lean 376; 92 W. Va. 184; 126 Ill. 58. In cases of implied, constructive, and resulting trusts, the rule is also the same as with reference to personal property. The statute is a bar even in cases where the conduct of the trustee was originally fraudulent; 5 Johns. Ch. 184; 17 Ves. 151; 2 Bro. C. C. 438.

Where a trustee who holds the legal title to the trust property, permits his right to bring an ejectment for a certain part thereof to become barred, the beneficiary is also barred; 113 Mo. 158.

The lapse of time does not bar a defense resting upon an equitable title and possession; 38 Fed. Rep. 65; and staleness of demand cannot be urged against a right to relief in equity where plaintiff has been in continuous possession of the land; 99 N. C. 436.

The same general rules as regards persons under disabilities apply in cases of real estate as have already been described as applicable to personalty at the time the right descends or the cause of action accrues, and prevent the running of the statute, till their removal; but only such as existed at that time. When the statute once begins to run, no subsequent disability can stop it; 1 How. 37; 4 Mass. 182; 16 Johns. 513; 1 Wheat. 292; 2 Binn. 374; 126 Pa. 643; and there is no distinction in this respect between voluntary and involuntary disabilities; 4 Term 301; 3 Brev. 286. The disability of one joint-tenant, tenant in common, or co-parcener does not inure to the benefit of the other tenants; 8 Johns. 262, 265; 2 Taunt. 441; 10 Ohio 11; 10 Ga. 218; 5 Humphr. 117; 4 Strobb. Eq. 167; 13 S. & R. 350.

It is impracticable here to give a compend, or even an analysis, of the different statutes of the several states. Nor, indeed, would such an analysis be of much service because of the frequent revision, changes, and modifications. The state statutes are substantially the same, differing only in details, and all are derived directly or indirectly from the English statutes.

The English Statutes of Limitations, 21 James I. c. 16 and 9 Geo. IV. c. 14, and a synopsis of that of 3 and 4 Will. IV. c. 27, are printed in the last preceding edition of this work but are now necessarily omitted. A collection of the American and English statutes may be found in Wood, Limitations 2d ed. App'x.

Of Criminal Proceedings. The time within which indictments may be found, or other proceedings commenced, for crimes and offences varies considerably in the different jurisdictions. In general, in all jurisdictions, the length of time is adjusted in some proportion to the gravity of the offence. Indictments for murder, in most, if not all, of the states, may be found at any time during the life of the criminal after the death of the victim. Proceedings for less offences are to be commenced within periods varying from ten years to sixty days. See Whart. Cr. Pl. & Pr. § 316.

Although an offence on the face of the indictment is barred, yet the prosecution may prove, without averring it in the in-

dictment, that the defendant, having fled the state, was without the statute. But the better practice is to aver in the indictment the facts relied upon to toll the statute; 23 W. N. C. Pa. 484 (S. C. of Pa.).

Of Estates. A description either by express words or by intendment of law of the continuance of time for which the property is to be enjoyed, marking the period at which the time of enjoyment is to end. Prest. Est. 25.

The definition or circumscription, in any conveyance, of the interest which the grantee is intended to take.

The term is used by different writers in different senses. Thus, it is used by Coke to denote the express definition of an estate by the words of its creation, so that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail; Co. Litt. 23 b. In Sanders on Uses, 68, the term is used, however, in a broader and more general sense, as given in the second definition above. And, indeed, the same writers do not always confine themselves to one use of the term; see Fearnce, Cont. Rem. Butler's note n, 9th ed. 10; 1 Steph. Com. 11th ed. 364, 527. For the distinctions between limitations and remainders, see **CONDITIONAL LIMITATIONS; CONTINGENT REMAINDER.**

The express confinement and limitation of an estate by the words of its creation, so that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail.

In instruments. A limitation in an instrument is a provision that restricts the interest or property one may have in the subject-matter of such instrument. A. & E. Encyc.

Consult, generally, Angell; Ballantine; Banning; Blanshard; Gibbons; Darby and Bonsanquet; Price; Wood; Wilkinson, on Limitations; Flintoff; Washburn, on Real Property; Barbour; Bishop; Wharton, on Criminal Law.

Of Actions. The restriction, by statute, of the right of action to certain periods of time, beyond which, except in certain specified cases, it will not be allowed. The statutes fixing such periods or limits are termed statutes of limitation.

LIMITED ADMINISTRATION.

An administration of a temporary character, granted for a particular period, or a special or a particular purpose. 1 Wms., Ex., 8th ed. 486.

It is distinguished from an ordinary administration which is not granted subject to such limitations or conditions. Such, for instance, is an administration *durante minore aetate*, which becomes necessary when an infant has been appointed sole executor, or the person upon whom the right to administration devolves is an infant, in which case administration is granted to some other proper person for a limited period; viz., until the infant attains the full age of twenty-one years, and is capable of taking the burden of the administration upon himself. Abbott.

LIMITED COMPANY.

A company in which the liability of each shareholder is limited by the number of shares he has taken, so that he cannot be called on to contribute beyond the amount of his shares. See 1 Lindl. Part. 383; Mozl. & W. Dict.; JOINT STOCK COMPANY.

LIMITED DIVORCE. A divorce for a limited time; a separation from bed and board.

LIMITED LIABILITY. A principle of modern statutory law whereby those interested in a partnership or joint stock company are held liable only to the extent of their own interest in the business. See JOINT STOCK COMPANY; PARTNERSHIP.

The phrase is also used in a less technical and more colloquial sense as applied to restrictions of the liability of certain classes of common carriers, such as steamship, ex-

press, or telegraph companies, either by statute or contract.

LIMITED OWNER. A tenant for life, in tail, or by the courtesy. The Limited Owner's Residences Acts, 33 & 34 Vict. c. 56 and 34 & 35 Vict. c. 84, enable the tenant for life of a settled estate to charge the estate with the expense of building a mansion house. Whart. 1.27.

As to its duration, ownership may be (1) absolute or unlimited (*dominium perpetuum*), as in the case of an estate in fee-simple, or (2) limited (*d. temporale*), i. e., liable to determine at a certain time or on the happening of a given event, as in the case of a lessee or tenant for life. R. & L. Dict.

LIMITED PARTNER. See SPECIAL PARTNER.

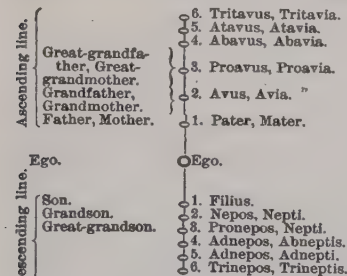
LIMITED PARTNERSHIP. A form of partnership created by statute in many of the United States, wherein the liability of certain special partners, who contribute a specific amount of capital, is limited to the amount so contributed, while the general partners are jointly and severally responsible as in ordinary partnership. All the partners are liable as general partners, unless the statutes upon the subject are strictly, or as some cases say, substantially complied with; 5 Allen 91; 39 Barb. 283; 3 Col. 342; 67 Pa. 330; 62 N. Y. 513; 28 Abb. N. C. 89. See 151 Pa. 79; 1 Lindl. Partn. 383, n., 2d Am. ed. (Ewell) 201, n.; Pars. Part. 424.

One who aids and assists in the organization of a limited partnership cannot thereafter hold the members liable as general partners, upon the ground that such organization was defective; 147 Pa. 111. See PARTNERSHIP.

LIMITING THE ESTATE. See LIMIT.

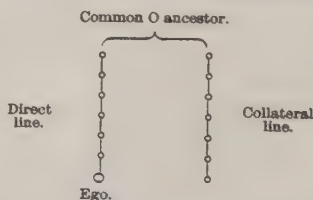
LINCOLN'S INN. See INNS OF COURT.

LINE. In Descents. The series of persons who have descended from a common ancestor, placed one under the other, in the order of their birth. It connects successively all the relations by blood to each other. See CONSANGUINITY; DEGREE.



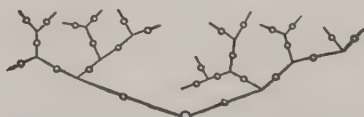
The line is either direct or collateral. The direct line is composed of all the persons who are descended from each other. If, in the direct line, any one person is assumed as the *propositus*, in order to count from him upwards and downwards, the line will be divided into two parts, the ascending and descending lines. The ascending line is that which, counting from the *propositus*, ascends to his ancestors, to his father, grandfather, great-grandfather, etc. The descending line is that which, counting from the same person, descends to his children, grandchildren, great-grandchildren, etc. The preceding table is an example.

The collateral line, considered by itself and in relation to the common ancestor, is a direct line; it becomes collateral when placed alongside of another line below the common ancestor, in whom both lines unite. For example:—



These two lines are independent of each other; they have no connection except by their union in the person of the common ancestor. This reunion is what forms the relation among the persons composing the two lines.

A line is also *paternal* or *maternal*. In the examination of a person's ascending line, the line ascends first to his father, next to his paternal grandfather, his paternal great-grandfather, etc., so on from father to father; this is called the paternal line. Another line will be found to ascend from the same person to his mother, his maternal grandmother, and so from mother to mother; this is the maternal line. These lines, however, do not take in all the ascendants; there are many others who must be imagined. The number of ascendants is double at each degree, as is shown by the following diagram:—



See 2 Bla. Com. 200, b.; Pothier, *Des Successions*, c. 1, art. 3, § 2; ASCENDANTS; CONSANGUINITY.

In Real Property Law. The division between two tracts or parcels of land. Limit; border; boundary.

When a line is mentioned in a deed as ending at a particular monument (*q. v.*), it is to be extended in the direction called for, without regard to distance, till it reaches the boundary: 1 Tayl. 110, 303; 2 Hawks 219. See 106 Mo. 231; 109 N. C. 417. And a marked line is to be adhered to although it depart from the course; 7 Wheat. 7; 4 T. B. Monr. 29; 2 Bibb 261. A crooked line is just as much a line as a straight one; 7 Halst. 308. Ordinarily, if a boundary runs to or by the line of an object, the exterior limit of the object is intended; 141 Mass. 56.

Where a number of persons settle simultaneously or at short intervals in the same neighborhood, and their tracts, if extended in certain directions, would overlap each other, the settlers sometimes by agreement determine upon dividing lines, which are called *consentible lines*. These lines, when fairly agreed upon, have been sanctioned by the courts; and such agreements are conclusive upon all persons claiming under the parties to them, with notice, but not upon *bona fide* purchasers for a valuable consideration, without notice, actual or constructive; 3 S. & R. 323; 17 id. 57; 9 W. & S. 66. See PARALLEL LINES.

Lines fixed by compact between nations are binding on their citizens and subjects; 11 Pet. 209; 1 Ves. Sen. 450; 1 Atk. 2; 2 id. 592; 1 Ch. Cas. 85; 1 P. Wms. 723; 3 S. & R. 331. See BOUNDARIES.

Measures. A line is a lineal measure, containing the one-twelfth part of an inch.

LINE OF BOUNDARY. See BOUNDARY.

LINE OF DUTY. Where a statute provides for a pension for disability or death from wound or injury received, casualty occurring, or disease contracted in the line of duty, "the performance of duty must have relation, or causation, or consociation, mediate or immediate, to the wound, injury, casualty, or disease." Opinion of Atty. Gen. Cushing, 2 Dec. Dept. Int. on Pensions 401, where the meaning of the

phrase and the whole subject are very fully discussed.

LINEA RECTA (Lat.). The perpendicular line; the direct line. The line of ascent, through father, grandfather, etc., and of descent, through son, grandson, etc. Co. Litt. 10, 158; Bract. fol. 67; Fleta, lib. 6, c. 1, § 11. This is represented in a diagram by a vertical line.

Where a person springs from another immediately, or mediately through a third person, they are said to be in the direct line (*linea recta*), and are called ascendants and descendants. Mackeldey, Civ. Law § 129.

LINEA TRANSVERSALIS (Lat.). A line crossing the perpendicular lines. See COLLATERAL KINSMAN.

LINEAGE. Race; progeny; family, ascending or descending.

LINIAL. In a direct line. Lineal descent would be as from father or grandfather to son or grandson. 6 Pet. 112.

LINEAL CONSANGUINITY. That kind of consanguinity which subsists between persons, of whom one is descended in a direct line from the other.

LINEAL WARRANTY. See WARRANTY.

LINEN. A thread or cloth made of flax or hemp. 38 Fed. Rep. 93. See 1 Blatch. 501. In an insurance policy where one insures his stock in trade, household furniture, linen, wearing apparel, and plate, linen in the policy is confined to household linen or linen used by way of apparel; 3 Camp. 423. In a bequest the clause "all my clothes and linen" passes body linen only; 3 Bro. Ch. 311. A bequest of "some of my best linen" was held void for uncertainty; 2 P. Wms. 387.

LINES AND CORNERS. In deeds and surveys. Boundary-lines and their angles with each other. 17 Miss. 459; 21 Ala. 66; 10 Gratt. 445; 16 Ga. 141.

LINK. A single constituent part of a continuous and connected series, as a casual or logical sequence; as a link in a chain of evidence. Stand. Dict.

LIQUIDATE. To pay; to settle, to adjust and gradually extinguish all indebtedness. See 8 Wheat. 322.

LIQUIDATED ACCOUNT. One the amount of which is agreed upon by the parties, or fixed by operation of law. 23 Atl. Rep. (Conn.) 924; 15 Ga. 321; 43 Conn. 469; 20 id. 562.

LIQUIDATED DAMAGES. In Practice. Damages the amount of which has been determined by anticipatory agreement between the parties.

Damages for a specific sum stipulated or agreed upon as part of a contract, as the amount to be paid to a party who alleges and proves a breach of it.

Where there is an agreement between parties for the doing or not doing particular acts, the parties may, if they please, estimate beforehand the damages to result from a breach of the agreement, and prescribe in the agreement itself the sum to be paid by either by way of damages for such breach. See 1 H. Bla. 232; 2 B. & P. 333, 350; 2 Bro. P. C. 431; 4 Burr. 2225; 2 Term 32. The civil law appears to recognize such stipulations; Inst. 3, 16, 7; Toulhier 1, 3, n. 803; La. Civ. Code Art. 1923, n. 5; *Code Civile* 1153, 1153.

Such a stipulation on the subject of damages differs from a penalty in this, that the parties are holden by it: whereas a penalty is regarded as a forfeiture, from which the defaulting party can be relieved.

It is settled both at law and in equity that the courts will not go behind an agreement for liquidated damages, but that a penalty is only security for the sum due or damages actually sustained; 1 Sedgw. Dam. § 394. The word *penalty* in this con-

tradistinction is not used according to its exact definition, but has acquired a settled technical meaning; *id. note*.

The sum named in an agreement as damages to be paid in case of a breach will, in general, be considered as liquidated damages, or as a penalty, according to the intent of the parties; and the mere use of the words "penalty" or "liquidated damages" will not be decisive of the question, if on the whole the instrument discloses a different intent; 6 B. & C. 216; 6 Ired. 186; 78 Mo. 32; 2 Ala. n. s. 425; 8 Mo. 467; 69 N. Y. 45; 4 H. & N. 511; 47 Kan. 126; 47 Ill. App. 153; 76 Ala. 418; 86 Ill. 107; 64 Ia. 308; 58 Md. 261; 58 N. H. 326; 45 N. J. L. 525. See 68 Law T. 857; 125 N. Y. 200. It has been said, however, that if the parties use the word "penalty," it will control the interpretation of the contract; 3 B. & P. 630; 7 Wheat. 13; 38 N. Y. 75; 19 N. H. 275; but in 16 N. Y. 469, the sum named was stated to be "liquidated damages," but was held to be a penalty. Whether the sum mentioned in the agreement to be paid for a breach is to be treated as a penalty or as liquidated damages is a question of law, to be determined by the court upon a consideration of the whole instrument; 7 C. B. 716. The construction must be the same in law and equity; 5 H. L. C. 105. The tendency of the court is to regard the sum named as a penalty rather than liquidated damages; 5 Metc. Mass. 57; 2 B. & P. 346; 97 Mass. 445; yet courts seek to ascertain the intent and are governed by it; *id.* As to the distinction, see also 6 N. Y. Chy. Reprint 470; 30 Am. Rep. 28.

Such a stipulation in an agreement will be considered as a penalty, in the following cases:—

Where the parties in the agreement have expressly declared it or described it as a "penalty," and no other intent is clearly to be deduced from the instrument; 2 B. & P. 340, 350, 680; 7 Wheat. 14; 1 M'Mull. 106; 2 Ala. n. s. 425; 1 Pick. 451; 8 Johns. Cas. 297; 24 Vt. 97; 164 Mass. 457.

Where it is doubtful from the language of the instrument whether the stipulation was intended as a penalty or as liquidated damages; 3 C. & P. 240; 6 Humph. 186; 5 Sandf. 192; 24 Vt. 97; 16 Ill. 475.

Where the agreement was evidently made for the attainment of another object or purpose, to which the stipulation is wholly collateral; 11 Mass. 468; 1 Bro. C. C. 418; 11 App. Div. N. Y. 878.

Where the agreement imposes several distinct duties, or obligations of different degrees of importance, and yet the same sum is named as damages for a breach of either indifferently; 6 Bingh. 141; 7 Scott 864; 5 Sandf. 192; 21 Ore. 194; 77 Ill. 452; 41 Minn. 622; 40 Wis. 503. But see 7 Johns. 72; 15 *id.* 200; 9 N. Y. 551; 77 Ill. 452; 7 Nev. 339; L. R. 4 Ch. Div. 781; and see 19 Centr. L. J. 282, 302; where many authorities are collected.

Where the agreement is not under seal, and the damages are capable of being certainly known and estimated; 2 B. & Ald. 704; 6 B. & C. 216; 4 Dall. 150; 5 Cow. 144; 33 Neb. 126. See 95 Ill. 190; 90 U. S. 471.

Where the instrument provides that a larger sum shall be paid upon default to pay a lesser sum in the manner prescribed; 5 Sandf. 192, 640; 16 Ill. 400; 47 *id.* 41; 14 Ark. 329; 2 B. & P. 346. This case is said to be considered as settling the doctrine of liquidated damages in England; 1 Sedgw. Dam. § 393; and it is cited approvingly in 6 Ves. 815, and the doctrine applied in 6 Bingh. 141, 147. In the latter case, Tindal, C. J., said, "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have in modern times endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement." See also 12 U. C. C. P. 9; 1 Bond 819.

Where the stipulation is made in respect

of a matter certain in value, as the payment of a debt or liquidated money demand, and the sum fixed upon is greater than the debt or demand; L. R. 8 Ch. 1022. If a debt be secured by a stipulation that in case of its not being paid at the appointed time, a larger sum shall become payable, the stipulation for the larger sum is in the nature of a penalty; L. R. 4 H. L. 1; Leake, Contr. 3d ed. 939.

Where a sum named is evidently to evade usury laws or statutory prohibitions, it will be treated as a penalty; 10 Mich. 188; 26 Ga. 403; but see 35 Ill. 324.

Where, by a clause in a building contract, the builder, in default of the completion of the work at a certain time, agreed to pay the owner of the property a stipulated sum for every day the building was delayed after that time, it was held to be a penalty and not an agreement to pay liquidated damages; 113 Mo. 359; but see 55 N. J. L. 132; 57 Ark. 168.

The plaintiff as well as the defendant may show that a stipulated sum is to be considered a penalty and not liquidated damages, and he may prove the actual damages even if greater than the penalty; 60 N. Y. 408.

The stipulation will be sustained as liquidated damages in the following cases:—

Where the agreement is of such a nature that the damages are uncertain, and are not capable of being ascertained by any satisfactory and known rule; 13 M. & W. 702; 1 Ex. 665; 8 Mass. 223; 87 *id.* 304; 101 *id.* 334; 12 Barb. 187, 366; 14 Ark. 315; 2 Ohio St. 519; L. R. 15 Eq. 36; 85 Ala. 552; 91 Tenn. 154; Add. Contr. 267; 36 Wis. 277; 14 Me. 250; 76 Ill. 157; 13 N. H. 351; 147 Pa. 416.

Where, under the contract, a deposit is made of a sum to be forfeited in case of default, it will be considered liquidated damages; 21 Ch. Div. 243; 99 Pa. 560; 70 Tex. 442; but this was held to be so only if the deposit was a part performance and not as security; 122 N. Y. 397.

Under contracts not to carry on a particular business within specified limits of time and place, a sum named to be paid on default is liquidated damages; 79 Pa. 336; 100 Ind. 466; 97 Mass. 445; 49 Vt. 392; 40 Ch. Div. 112; 69 Ga. 764; 110 Cal. 674; but not where the contract describes it as a "penalty"; 164 Mass. 584.

Where, in contracts for government work, provision was made for the retention of percentages, to be forfeited on non-completion, it was treated as a provision for liquidated damages; 30 Ct. Cl. 31; and so were such provisions in a building contract; 13 Wash. 364; and in one for refitting a barge \$50 for each day's delay, designated in the contract a "fine," where the fair rental value of the boat was \$40 per day; 65 N. W. Rep. (Wis.) 863; and generally under contracts for the payment of such daily sum upon failure of completion; 168 Mass. 10; 87 Tex. 440; 56 Ark. 405; 26 Ont. 195; 55 N. J. L. 132; but a similar provision in a contract for railroad ties was held a penalty; 34 S. W. Rep. (Tex.) 329; and see 29 Neb. 385.

Where, from the tenor of the agreement or from the nature of the case, it appears that the parties have ascertained the amount of damages by fair calculation and adjustment; 2 Story, Eq. Jur. § 1818; 2 Greenl. Ev. 259; 1 Bingh. 302; 7 Conn. 291; 11 N. H. 234; 6 Blackf. 206; 13 Wend. 507; 10 Mass. 459; 2 Ala. n. s. 425; 14 Me. 250; 49 Mo. 406.

Where a bond was given in the penal sum of \$10,000 upon condition not to practice as a physician and in case of breach, to pay \$500 for every month in which he practised, the \$10,000 was held to be a penalty and the \$500 stipulated damages; 4 Wend. 468. See 21 N. J. L. 463.

See, as to the distinguishing tests of liquidated damages and penalty, 5 Sandf. 192.

The following has been suggested as a general rule governing the whole subject: "Whenever the damages were evidently the subject of calculation and adjustment between the parties and a certain sum was agreed upon and intended as compensation,

and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." 1 Sedgw. Dam. § 405. To establish a liquidation of damages there must concur all the necessary elements of a valid contract, assent of parties, consideration and performance of the condition, if any; 37 N. J. L. 23. The intent of the parties must be clear, but it must appear from the contract; 1 Sedgw. Dam. § 406. The question of penalty or liquidated damages is a matter of law for the court; 1 Tayl. Ev. Chamb. ed. § 40; 7 C. B. 713. The liquidation must be reasonable; 40 Mich. 517; 18 Abb. N. s. 427; 12 Bush 249; 106 Pa. 237; hence the contract is not conclusive so far as that it would be permitted to violate this principle; 5 Mich. 123.

The penal sum in a bond is usually a penalty, but if a sum be agreed upon in the condition of a bond to be payable upon a breach, the question may arise whether it is liquidated damages or a penalty, and it will be subject to the same principles of construction as in any other forms of contract; Leake, Contr. 3d ed. 938, 1091; 2 Ves. Sen. 580. See 5 H. L. C. 105.

Where the language used is explicit, the extravagance of the sum named as liquidated damages will not be considered; 5 Sandf. 192; 11 Rich. 550. See 145 Pa. 606; 5 Sandf. 192; 75 Pa. 157; 70 Tex. 442; [1892] 1 Q. B. 127.

Some discussion has arisen as to whether the question of liquidated damages is involved in alternative contracts to do a certain thing or pay a certain sum. In such cases what is known as the rule of least beneficial alternative is applied and damages are given upon the theory that the defendant, if he performed, would have chosen the least onerous obligation; L. R. 8 C. P. 475; but in such a case it has been held that a defendant, having failed to exercise his option, must pay the sum as stipulated damages; 24 Wend. 244; 26 *id.* 630; 58 Md. 261; 7 Metc. 583. But see 47 Kan. 146 and note to it, 13 L. R. A. 671.

See, generally, 12 Am. L. Rev. 287; 1 Am. Dec. 331; Sedgw. Dam. ch. XII.; 13 L. R. A. 671, note; Sutherland & Mayne, Damages; 13 Myer, Fed. Dec. 744; 18 Cent. L. J. 149; 4 Silvern. Sup. Ct. N. Y. 579.

LIQUIDATED DEBT. A debt is such when it is certain what is due and how much is due. 20 Ga. 561.

LIQUIDATED DEMAND. A demand the amount of which has been ascertained or settled by agreement of the parties, or otherwise. 20 Ga. 58.

LIQUIDATION. A fixed and determinate valuation of things which before were uncertain.

LIQUOR. See INTOXICATING LIQUOR.

LIQUOR LAWS. Laws regulating, prohibiting, or taxing the sale of intoxicating liquors. See NATIONAL PROHIBITION ACT.

LIRA. The name of a foreign coin.

In all computations at the custom-house, the lira of Sardinia shall be estimated at eighteen cents and six mills; Act of March 22, 1846; the lira of the Lombardo-Venetian kingdom, and the lira of Tuscany at sixteen cents; Act of March 22, 1846.

LIS. A controversy; an action at law.

LIS ALIBI PENDENS. A suit pending elsewhere. Where proceedings are pending in one court between plaintiff and defendant in respect to a given matter, it has been used as a ground for preventing the plaintiff from entering proceedings in another court against the same defendant and for the same cause of action. See AUTER ACTION PENDANT.

LIS MOTA (Lat.). A controversy begun, i. e. on the point at issue, and prior to commencement of judicial proceedings.

The arising of that state of facts on which the claim is founded. 6 C. & P. 552.

Such a controversy is taken to arise on the advent of the state of facts on which the claim rests; and after such controversy has

arisen (*post litem motam*) no declarations of deceased members of the family as to matters of pedigree are admissible; Steph. Ev. § 81; Tayl. Ev. 554; 6 C. & P. 560; 4 Campb. 417; 2 Russ. & M. 161; Greenl. Ev. § 131; 4 M. & S. 497; 1 Pet. 537; 30 Barb. 177.

There is no *lis mota* till a dispute has arisen; it is not enough that a right of action has arisen or a cause of action accrued; 2 Sw. & Tr. 170. The dispute need not be between the same parties; 15 Q. B. D. 114.

LIS PENDENS (Lat.). A pending suit. Suing out a writ and making attachment (on *mesne process*) constitute a *lis pendens* at common law. 21 N. H. 570.

The doctrine of *lis pendens*, as usually understood, is the control which a court has over the property involved in a suit, during the continuance of the proceedings, and until its final judgment has been rendered therein.

"The established rule is that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed." 1 Johns. Ch. 566. This was said to be the "fundamental proposition" of the doctrine; 97 U. S. 106.

The purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise by successive alienations pending the litigation, its judgment or decree could be rendered abortive and thus make it impossible for the court to execute its judgment or decree; 17 Or. 499. The rule will be applied even in a case where it is a physical impossibility that the purchaser could have known of the existence of the suit; 2 Rand. Va. 93. It was formulated in Lord Bacon's twelfth ordinance. There were earlier cases, the first being reported in Cro. Eliz. 677. See Bennett, *Lis Pendens*.

An alienee, during the pendency of a suit, is bound by the proceedings therein subsequent to the alienation, though before he became a party; 4 Beav. 40; 5 Mich. 456; 23 Barb. 166; 27 Pa. 418; 7 Blackf. 242.

Purchasers during the pendency of a suit are bound by the decree in the suit without being made parties; 4 Russ. 372; 1 Dan. Ch. Pr. 375; Story, Eq. Pl. § 351 a; 32 Ala. n. s. 451; 11 Mo. 519; 96 id. 271; 30 Miss. 27; 13 La. An. 776; 6 Barb. 138; 27 Pa. 418; 16 Ill. 225; 9 B. Monr. 220; 11 Ind. 448; see 130 U. S. 565; 78 Cal. 152; and will not be protected because they paid value and had no actual notice of the suit; 35 Conn. 250; 6 Ia. 258; 96 Ky. 240; 181 Ind. 455. A purchaser *pendente lite* cannot litigate, over again in an original independent suit, the matters determined in a suit to which his vendor was a party; 131 U. S. 352; a purchaser is only chargeable with notice when the purchase is from a party to the suit; 121 Pa. 130.

So also is the doctrine applied to a purchaser during a suit to avoid a conveyance as fraudulent; 5 T. B. Monr. 373; 6 B. Monr. 18.

A citizen of the United States residing in a different state from that in which the suit is pending, is bound by the rule regarding purchasers *pendente lite*; 9 Pet. 86; and actual notice of the pendency of the suit is not necessary; 9 Dana 372. See 12 Cent. L. J. 101. It is said that the doctrine has no force or operation beyond the boundaries of the state where the suit is pending; 96 Mo. 149; but this does not, of course apply to a case where the court has jurisdiction of the *res* and of the party. The doctrine cannot be made applicable by state laws or decisions to negotiable instruments so as to affect persons not residing and not being within the state; 119 U. S. 680.

Lis pendens by a mortgagor under a prior unrecorded mortgage is notice to a second mortgagee; 9 Ala. n. s. 921. But see 2 Rand. 98. One taking a mortgage on property while a proceeding to foreclose a vendor's lien thereon is pending, is bound

by a decree in such proceedings as if a party thereto, and has no right of redemption other than that given by statute; 96 Ala. 421.

The rule does not apply where a title imperfect before suit brought, is perfected during its pendency; 4 Cow. 667; 14 Ohio 328.

The doctrine of *lis pendens* has been said to be an equitable doctrine only; 28 Conn. 593; but when one comes into possession of the subject of litigation, during proceedings in ejectment, he will be bound by the judgment, though not a party, and may be ejected under the judgment against his grantor; Wade, Notice; 1 McLean 87; 9 Cow. 233.

In law, the same effect is produced by the rule that each purchaser takes the title of his vendor only; 11 Md. 519; 27 Pa. 418; 6 Barb. 138; 30 Miss. 27; 5 Mich. 456. This doctrine was originally confined to controversies over real estate; 23 Ala. 760; 30 Mo. 463; 2 Johns. Ch. 444; but a purchaser of securities *pendente lite* has been decreed to surrender them upon receiving the sum he had paid for them; 1 Desaus. 167; and the principle has been extended to a bond and mortgage, assigned by a trustee, pending a suit by the *cestui que trust*; 2 Johns. Ch. 441. It is now applied, in some cases to personal property; Freem. Judg. § 194; as stocks; 20 Johns. 554; 48 Barb. 649, reversed in 48 N. Y. 585. See 57 N. Y. 617; furniture; 2 Edw. Ch. 31; steamboats; 15 Mo. App. 551; choses in action, such as a bond and mortgage; 2 Johns. Ch. 441, approved in 97 U. S. 106. Some cases hold that it does not apply to personality; 60 La. 108; 23 Ala. 760. The question is said to be unsettled as to cash and movable personality; 2 Johns. Ch. 441; 97 U. S. 96. It does not apply to negotiable instruments; 97 U. S. 96; 119 id. 680; 100 id. 589; 147 id. 59; 23 Ala. 760; 38 Ga. 18; including municipal bonds; 97 U. S. 96; 111 id. 556; 119 id. 692; 54 Fed. Rep. 759; but see 37 Pa. 355 as to the latter. "Rights to real property and personal chattels, within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities, or by the sale of articles in market over in the usual course of trade;" 119 U. S. 693.

In divorce there is no *lis pendens* before decree as to the property included in the marriage settlement; 7 P. D. 228.

The doctrine does not apply to negotiable paper; 50 Fed. Rep. 155; a *bona fide* holder of which is not subject to it, even if purchased during the pendency of a suit in which its issue was finally declared invalid; 54 Fed. Rep. 759.

The proceedings must relate directly to the specific property in question; 1 Strobb. Eq. 180; 7 Blackf. 242; 7 Md. 537; Story, Eq. 13th ed. § 405; 1 Hill. Vend. 411; and the rule applies to no other suits; 1 McCord Ch. 252.

Lis pendens is said to be general notice to all the world; see Story, Eq. Jur. § 405; Amb. 676; 2 P. Wms. 282; 3 Atk. 343; 1 Vern. 286; 3 Hayw. 147; 1 Johns. Ch. 556 (a leading case); but it has been said that it is not correct to speak of it as a part of the doctrine of notice; the purchaser *pendente lite* is affected, not by notice, but because the law does not allow litigating parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. Per Cranworth, C., in 1 De G. & J. 566. The doctrine rests upon public policy, not notice; 2 Rand. 93; 10 W. N. C. (Pa). 389; Beach, Eq. Jur. § 374; Bisph. Eq. 274; 1 Johns. Ch. 566.

Filing a judgment creditor's bill constitutes a *lis pendens*; 4 Edw. Ch. 29. A petition by heirs to sell real estate is not a *lis pendens*; 14 B. Monr. 164. Generally, suit is not pending till service of process; 57 Mo. 362; 14 Pet. 322; 1 Sandf. 731; Wade, Notice 152; but see 30 Tex. 494; 10 Ark. 479; 64 Mo. 519. Where service is by advertising, *lis pendens* does not attach till the completion of the advertising; 4 Kan. 232. Only unreasonable and unusual negli-

gence in the prosecution of a suit will take away its character as a *lis pendens*; 18 B. Monr. 230; 11 id. 297; 10 Ky. Law. R. 750; but it is held that there must be an active prosecution to keep it alive; 1 Vern. 286; 1 Russ. & M. 617; 30 Mo. 432; 9 Paige 512; 21 Ia. 431. But as long as the court retains jurisdiction, the doctrine applies; Benn. *Lis Pend.* 172.

The court must have jurisdiction over the property involved; Benn. *Lis Pend.* 153; and the property must be sufficiently described to establish its identity; *id.*; and the party who holds the title must be before the court as a party; *id.* 162. But this would not be required in proceedings to enforce a lien on property within the jurisdiction of the court.

Filing the bill and serving a subpoena creates a *lis pendens* in equity; Tiedm. Eq. Jur. § 95; 1 Vern. 318; 7 Beav. 444; 27 Mo. 500; 4 Sneed 672; 26 Miss. 397; 9 Paige Ch. 512; 22 Ala. n. s. 743; 7 Blackf. 242; 130 U. S. 565; 2 Rand. Va. 93; see 155 Pa. 10; which the final decree terminates; 1 Vern. 318. Amendment of the bill after demurrer has been sustained thereto relates back to the filing of the bill, so far as the doctrine of *lis pendens* is concerned; 61 Fed. Rep. 481. In the civil law, an action is not said to be pending till it reaches the stage of *contestatio litis*.

In equity, the *lis pendens* relates to the service of the subpoena, and not to the day on which it was issued; 30 W. Va. 687; 130 U. S. 563.

A voluntary assignment during the pendency of a suit does not affect the rights of other parties, if not disclosed, except so far as the alienation may disable the party from performing the decree of the court; Story, Eq. Pl. § 351; 15 Tex. 495; 22 Barb. 666; as in the case of mortgage by a tenant in common of his undivided interest, and subsequent partition; 2 Sandf. Ch. 88.

An involuntary assignment by a plaintiff, as under the bankrupt or insolvent laws, renders the suit so defective that it cannot be prosecuted if the defendant objects; 7 Paige Ch. 237; 4 Ves. 387; 9 Wend. 649; 1 Hare 621; Story, Eq. Pl. § 349. Not if made under the bankrupt law of 1841; 27 Barb. 252.

The same may be said of a voluntary assignment of all his interest by a sole complainant; 5 Hare 235; Story, Eq. Pl. § 349.

A debtor need not pay to either party *pendente lite*; 1 Paige 490.

The doctrine of *lis pendens* is modified in many of the states of the United States, and by statutes requiring records of the attachment to preliminary proceedings to be made, and constituting such records notice. See stat. 3 and 3 Vict. c. 11, § 7; and statutes of the various states.

The phrase is sometimes incorrectly used as a substitute for *auter action pendant*, (*q. v.*). See 1 La. An. 46; 21 N. H. 870.

"It is part of our fast decaying real property system; it belongs to the palmy days of conveyancing." 11 Law. Quart. Rev. 6.

See Wade, Notice; 4 Cent. L. J. 27; 14 Am. Dec. 774; Whitney, *Lis Pendens* (publication as a serial commenced 57 Alb. L. J. No. 17, since this title was in type). See also 4 Cent. L. J. 27; 26 id. 411; 31 id. 53; 14 Am. Dec. 774; 6 N. Y. Chy. Reprint 1097, note; 7 id. 381, note; 27 Abb. N. C. 318; 7 Can. L. T. 205; 38 Sol. J. 677; 73 Mo. 105; and a comprehensive note upon the subject generally, 2 L. R. A. 48.

LIST. A table of cases arranged for trial or argument; as, the trial list, the argument list.

A list may consist of a single item; 14 N. H. 85. See 83 Ky. 162. Where a notice is required to be directed to a person at his abode as described in a list of voters, it must be at the place therein mentioned, even if erroneous; L. R. 9 C. P. 233. The subscription list of a newspaper is property only as connected with the newspaper plant and not separate from it; 2 Watts 111. See 1 Pars. 270; 5 W. & S. 521. See CIVIL LIST.

LISTERS. This word is used in some of the states to designate the persons ap-

pointed to make lists of taxables. See Vt. Rev. Stat.

LITE PENDENTE. Pending suit.

LITERA BULLATA. A letter, brief, or charter sealed with a *bulia*. (q. v.).

LITERA. Letters. A term which in old English law was applied to instruments in writing, public and private.

LITERÆ MORTUÆ. Dead letters; fulfilling words of a statute. Bacon, Works IV. 189.

LITERÆ PATENTES. Letters patent. Literally, open letters.

LITERÆ PROCURATORIÆ (Lat.). In Civil Law. Letters procuratory. A written authority, or power of attorney (*litera attorney*), given to a procurator. Vicat, Voc. Jur. Utr.; Bracton, fol. 40-43.

LITERAL. According to the language; following the exact words. Literal construction of a document, adheres closely to the words, making no difference for extrinsic circumstances.

LITERAL CONTRACT. In Civil Law. A contract the whole of the evidence of which is reduced to writing, and binds the party who subscribed it, although he has received no consideration. Leo. Elem. § 887.

LITERAL PROOF. In Civil Law. Written evidence.

LITERARY or SCIENTIFIC INSTITUTION. A fraternity held not to be a literary or scientific institution within the meaning of a statute exempting such institutions from taxation. 108 Me. 320.

LITERARY PROPERTY. The general term which describes the interest of an author in his works, or of those who claim under him, whether before or after publication, or before or after a copyright has been secured. 9 Am. L. Reg. 44; 4 Du. N. Y. 379; 11 How. Fr. 49; Curtis, Copyr.; 2 Bla. Com. 405; 4 Viner Abr. 278; Bacon Abr. *Prorogation* (F. 5); 2 Kent 306; 1 Belt Suppl. Ves. Jr. 860; 2 id. 469; Nickl. Lit. Prop.; 1 Chitty Pr. 98; 2 Am. Jur. 248; 10 id. 82; 1 Bell Com. b. 1, part 2, c. 4, s. 2, p. 115; Shortt, Copyr.; Morgan, Law of Lit. A person has a property in his literary productions, and by the common law, as long as they are kept within his possession, he has the same right of exclusive enjoyment of them as of any other species of personal property; 75 Ill. 475. See 4 H. L. C. 962; 50 How. Fr. 194. See COPYRIGHT; MANUSCRIPT.

LITERIS OBLIGATIO. In Roman Law. An obligation created by an entry made in one of the books kept by the head of a Roman family, called the *codex accepti et expensi*. The creditor made an entry to the effect that a certain sum had been paid by him to the debtor, and the debtor made a corresponding entry indicating such a payment to him by the creditor; but it was sufficient if the creditor's entry was made by direction of the debtor, in which case an entry by the debtor was unnecessary. The effect was to constitute an obligation under which the debtor was liable, whether the money was actually paid or not. He was said to be bound *literis*, i. e. by the writing in the *codex* as such. The entry itself created the obligation to pay. It was immaterial whether it was based upon an obligation to pay existing in fact.

The item in the *codex* was called the *nomen*, and the species of contract might either create an obligation or transform one, i. e. operate as a novation, in which case it was called *nomen transcriptivum*. The *literis obligatio* was distinguished from the *nomen arcarium*, another species of entry in the *codex accepti et expensi*. This has been termed a mere cash item. It was an entry of a concrete or existing ground of obligation, in which case the obligation continued to be based on the loan or depositum, or whatever might be its original character, and was not converted into *literis obligatio*. In the time of the empire the literal contract fell into disuse.

The three classes of books kept by the *paterfamilias* were, (1) the *liber patrimonii*, or *libellus familie*, in which was kept inventories of the prop-

erty, and *noer testamenti*, which was a list of capital assets let out at interest; (2) the *codex rationum*, which was the regular account book in which were entered receipts and expenses; (3) the *codex accepti et expensi*, designed not merely to afford evidence of, but also to affect, changes in the state of a person's property.

Gaius, Inst. III. §§ 122-31, describes the *literis obligatio* as being made in two ways: (1) *A re in personam*, where the obligation was entered in the form of a debt under the name of the original purchaser or debtor; (2) *A persona in personam*, where a debt already standing under one *nomen* was transferred by novation from that one to another. Some writers lay great stress upon the fact that the obligation *a re in personam* was first entered as a memorandum in a day book or waste book (*adversaria ephemeris*), but it has been truly remarked that this fact, although indisputable, has no legal importance; and this is apparent from the nature of the two transactions.

There is some difference in the statement of these obligations by different authors, but that which is here given is the result of the more recent investigations, having been established by Voigt, Abhandl. der Koen. Saechs. Gesellschaft der Wissenschaften, vol. 10, 518.

See Sohm, Inst. Rom. L. § 68 and note 1, where reference may be found to the authors on the subject.

LITHOGRAPH. A print from a drawing on stone. Chromo lithographs are dutiable as printed matter and not as manufactures of paper. See 97 U. S. 368; 15 & 16 Vict. c. 12, s. 14.

LITIGANT. One engaged in a suit.

LITIGATION. A contest, authorized by law, in a court of justice, for the purpose of enforcing a right.

In order to prevent injustice, courts of equity formerly restrained a party from further litigation, by a writ of injunction: for example, after two verdicts on trials at bar, in favor of the plaintiff, a perpetual injunction was decreed; Stra. 404. And not only between two individuals will a court of equity grant this relief, as in the above case of several ejectments, but also, when one general legal right, as a right of fishery, is claimed against several distinct persons, in which case there would be no end of bringing actions, since each action would only bind the particular right in question between the plaintiff and defendant in such action, without deciding the general right claimed; 2 Atk. 484; 2 Ves. 587. See EXPENSE OF LITIGATION.

LITIGIOSITY. In Scotch Law. The pendency of a suit: it is an implied prohibition of alienation, to the disappointment of an action, or of diligence, the direct object of which is to obtain possession, or to acquire the property of a particular subject. The effect of it is analogous to that of inhibition. 2 Bell, Com., 5th ed. 152.

LITIGIOUS. That which is the subject of a suit or action; that which is contested in a court of justice. In another sense, litigious signifies a disposition to sue; a fondness for litigation. See VEXATIOUS ACTIONS ACT.

In Ecclesiastical Law. A church is said to be litigious, when two rival presentations are offered to the bishop upon the same avoidance of the living. Moz. & W.; 3 Steph. Com. 417.

LITIGIOUS RIGHTS. In French Law. Those which are or may be contested either in whole or in part, whether an action has been commenced, or when there is reason to apprehend one. Pothier, Vente, n. 584; 9 Mart. La. 183; Troplong, De la Vente, n. 984 & 1003; Eva. Civ. Code, art. 2623; id. 5522, n. 22. See CONTENTIOUS JURISDICTION.

LITIS ESTIMATIO. The measure of damages (q. v.).

LITIS TESTATIO. In Civil Law. The process by which a suit is contested by the opposing statements of the respective parties, to attain an issue; the issue itself.

In Ecclesiastical Law. The issue of an action; the general answer of the defendant denying matter charged against him in a libel. Hallifax, Civ. L. b. 3, c. 11, No. 9.

LITIS DOMINIUM. In Civil Law. Direction of a suit. A fiction of law authorizing the appointment of an attorney,

by which appointment he was supposed to become *dominus litis*.

LITISPENDENCIA. In Spanish Law. Litispendency. The condition of a suit pending in a court of justice.

In order to render this condition valid, it is necessary that the judge be competent to take cognizance of the cause; that the defendant has been duly cited to appear, and fully informed, in due time and form, of the nature of the demand, or that, if he has not, it has been through his own fault or fraud.

The *litispendencia* produces two effects: the legal impossibility of alienating the property in dispute during the pendency of the suit; the accumulation of all the proceedings in the cause, in the tribunal where the suit is pending, whether the same be had before the same judge or other judges or notaries. This cumulation may be required in any stage of the cause, and forms a valid exception to the further proceeding, until the cumulation is effected. Escriche, Dict.

LITRE. A French measure of capacity. It is of the size of a cubic decimetre, or the cube of one-tenth part of a metre. It is equal to 61.037 cubic inches, or a little more than a quart. See MEASURE.

LITTORAL (littus). Belonging to shore: as of sea and great lakes. Webster. Corresponding to riparian proprietors on a stream or small pond are littoral proprietors on a sea or lake. But riparian is also used coextensively with littoral. 7 Cush. 94. See 17 How. 426.

LITURA. In Civil Law. An obliteration or blot in a will or other instrument.

LITUS. In Old European Law. A person who surrendered himself into another's power; a kind of servant.

LITUS MARIS (Lat.). In Civil Law. Shore; beach. *Qua fluctus elideret.* Cic. Top. c. 7. *Qua fluctus adludit.* Quintil. lib. 5, c. ult. *Quousque maximus fluctus a mari pervenit.* Celsus; said to have been first so defined by Cicero, in an award as arbitrator. L. 92, D. de verb. signif. *Qua maximus fluctus exarsuat.* L. 112, D. eod. tit. *Qua tenus hibernus fluctus maximus excurrit.* Inst. lib. 2, de rer. divis. et qual. § 3. That is to say, as far as the largest winter wave runs up. Vocab. Jur. Utr.

At Common Law. The shore between common high-water mark and low-water mark. Hale, de Jure Maris, cc. 4, 5, 6; 8 Kent 427; 2 Hill. R. P. 80.

Shore is also used of a river. 5 Wheat. 385; 20 Wend. 149. See 18 How. 381; 28 Me. 180; 14 Pa. 171. See SHORE.

LIVE. "Live animals" has been held to include singing birds. 7 Blatchf. 385. "Live stock" has been held not to include live fowls. 5 Blatchf. 520.

LIVE AND RESIDE. Where, in the gift of a house, there was a condition that the donee should "live and reside" therein, it was held that the word "live" added nothing to its point. T. & R. 530.

LIVELIHOOD. Means of subsistence or maintaining life; means of living. 3 Atk. 399; 1 Yeates 432. See 16 East 147; 5 L. J. Ex. 263.

LIVERY. In English Law. The delivery of possession of lands to those tenants who hold of the king *in capite* or by knight's service.

The name of a writ which lay for the heir of a lord to obtain possession of the seisin of his lands at the king's hands; abolished by stat. 12 Car. II. c. 24. Fitzh. N. B. 155; 2 Bla. Com. 68.

The distinguishing dress worn by the servants of a gentleman or nobleman, or by the members of a particular guild. "Livery or clothing." Stat. 274. By stat. 1 Rich. II. c. 7, and 16 Rich. II. c. 4, none but the servants of a lord, and continually dwelling in his house, or those above the rank of yeomen, should wear the lord's

LIVERY.

The clothes supplied by a master for his servants' use belong to the master; 3 C. & P. 470. See *Stubbs, Const. Hist.* 470.

Privilege of a particular company or guild. The members of such company are called liverymen. *Whart. Lex.*

LIVERY IN CHIVALRY. In Feudal Law. The delivery of the property of a ward in chivalry out of the guardian's hands, upon the heir's attaining the required age. 2 Bla. Com. 68.

LIVERY OFFICE. In Old English Law. An office for the delivery of lands.

LIVERY OF SEISIN. In Estates. A delivery of possession of lands, tenements, and hereditaments unto one entitled to the same. This was a ceremony used in the common law for the conveyance of real estate; and livery was in deed, which was performed by the feoffor and the feoffee going upon the land and the latter receiving it from the former; or in law, where the same was not made on the land, but in sight of it; 2 Bla. Com. 315.

In America livery of seisin is unnecessary, it having been dispensed with either by express law or by usage. The delivery and recording of the deed have the same effect; 1 Washb. R. P., 5th ed. *14, 34. In Maryland, until more recent times, it seems that a deed could not operate as a feoffment without livery of seisin; but under the Rev. Code of 1878, art. 44, § 6, neither livery of seisin nor indenting is necessary; 5 H. & J. 158. See 4 Kent 381; 1 Mo. 553; 1 Pet. 508; 1 Bay 107; 5 H. & J. 158; 11 Me. 318; 8 Cra. 239; Dane, Abr.; Bingh. Act. and Def. 96; SEISIN.

LIVERY STABLE. A place where horses are groomed, fed, and hired, and where vehicles are let. 30 La. Ann. 1095.

A liveryman who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care; and where a person is injured through such defects, the liveryman is not liable; 157 Mass. 558.

Under the contract of bailment he is required to exercise ordinary care over the property entrusted to him. He is liable for the negligence of his servants in the performance of any duty in regard to the care and custody of the property, within the general scope of his own employment; 79 Me. 480. See LIEN.

LIVERY-STABLE KEEPER. See LIVERYMAN.

LIVERYMAN. In England. A member of such of the City Companies as are Livery Companies. *Byrne.*

In the United States. A livery-stable keeper. In the law of carriers, a company engaged in the livery business does not hold itself out to serve any and all persons, but operates only under a special contract, and deals with such persons only as it chooses, and is in no sense a common carrier. 2 Michie, Carriers, 1488; 148 Mo. App. 621. A livery-stable keeper, who lets a conveyance for a special journey, and furnishes a driver therefor, is merely a private carrier for hire, and is bound only to exercise that degree of care and skill in the selection of a vehicle, team, and driver which a prudent man would bestow in such a matter, and is not liable for injuries caused to a person in the vehicle, occasioned by negligent driving. *Id.*; 114 Tenn. 521.

LIVES. See JOINT LIVES.

LIVING CHILD. A term, it is said, less broad than "issue living." 153 Mass. 527.

LIVING WITH ME. In a bequest to a servant the phrase "living with me" does not mean living in the testator's house but living in his service. 22 L. J. Ch. 155.

LIVRE TOURNOIS. In Common Law. A coin used in France before the revolution. It is to be computed in the *ad valorem* duty on goods, etc., at eighteen and a half cents. Act of March 2, 1798, § 61, 1 Story, Laws 629. See FOREIGN COINS.

LLOYDS. An association in the city of London, the members of which underwrite each other's policies. 2 Steph. Com., 11th ed. 138, n.

The name is derived from Lloyd's coffee house, the great resort for seafaring men and those doing business with them in the time of William III. and Anne. The affairs of the association are managed by a committee called *Lloyd's Committee*, who appoint agents in all the principal ports of the world, whose business it is to forward all such maritime news as may be of importance in guiding the judgment of the underwriters. These accounts, which arrive almost hourly from some part of the world, are at once posted up, and are called *Lloyd's Shipping List*. They are subsequently copied into three books, called *Lloyd's Book*. Lloyd's shipping list, stating the time of a vessel's sailing, is *prima facie* evidence of what it contains; 11 M. & W. 116; 35 Neb. 888; 87 Ga. 697; 89 Mass. 561; 31 Ark. 573; 134 Ill. 572; 21 Md. 350; 11 Beav. 288. See *Moz. & W.*; *Arm. Ins.* See LLOYD'S INSURANCE.

LLOYD'S BONDS. See BOND.

LLOYD'S INSURANCE. A system of insurance similar to the English Lloyds, which is carried on in the United States by unincorporated associations of individuals. It originated in connection with marine risks, but has now been extended to other kinds of insurance. The principal features of the system are, that each individual assumes a liability for a specific amount; that attorneys or managers are appointed by a power of attorney authorizing them to be sued; that suits are brought against such attorneys or managers; and that each underwriter is bound by the fundamental agreement to accept the result of such suit. Such action may be maintained against the attorneys in fact; 17 App. Div. N. Y. 39; and the agreement is not repugnant to public policy; 20 Misc. Rep. 297; it is valid to prevent the institution of separate suits where the attorney is an underwriter; 19 *id.* 239. One who signs such policy as attorney for the underwriters is a "trustee of an express trust," within New York Code Civ. Proc. § 449; 19 Misc. Rep. 239. Proofs of loss are properly served at the office of the association on one acting as its attorney, even if irregularly appointed; 21 Misc. Rep. 285. The provision for simultaneous contribution and making the liability several, not joint, does not prevent the collection of the full proportion from each where only a portion are served; 76 Fed. Rep. 1000.

Such associations have been held subject to prosecution for unlawfully exercising a public franchise; 19 Misc. Rep. 248; 51 Ohio St. 163, where the forms of organization, power of attorney, and policy may be referred to. They are not companies; 163 Pa. 287; 118 Mo. 388; 92 Ga. 8; and unincorporated persons may be prohibited from being insurers; 164 Pa. 306; 113 *id.* 249, three judges dissenting.

LOAD-LINE. The depth to which a ship is loaded so as to sink in salt water.

Every owner of a British ship before entering his ship outwards from any port of the United Kingdom shall mark, in white or yellow on a dark ground, a circular disc, twelve inches in diameter, with a horizontal line eighteen inches long, through its centre, and the centre of this disc is to indicate the maximum load-line in salt water, to which the owner intends to load the ship for that voyage; *Moz. & W.* Coasters under eighty tons burden, fishing ships, and yachts are excepted.

LOADMANAGE. See LODEMANAGE.

LOAN. A bailment without reward. A bailment of an article for use or consumption without reward. The thing so bailed.

A loan, in general, implies that a thing is lent without reward; but, in some cases, a loan may be for a reward: as, the loan of money. 7 Pet. 109.

It would be an inquiry too purely speculative, whether this use of the term loan originated in the times when taking interest was considered usury and improper.

the bailment of money which was to be returned in kind. The supposition would furnish a reasonable explanation of the exception to the general rule that loan includes properly only those bailments where no reward is given or received by the bailee.

Within the statutory and constitutional prohibition against the loaning of public funds, with or without interest, a general deposit of such funds by a public officer subject to check is not a loan; 68 N. W. Rep. (S. D.) 165. See BUILDING ASSOCIATIONS; USURY.

LOAN OR FORBEARANCE. When one allows a debtor for a consideration to prepay a debt, it is not a "loan or forbearance" of money. The privilege of prepaying a debt is as much the subject of sale as any other chattel, and a creditor has as much right to sell or discount negotiable paper to the payer as to any other person and the discount or proceeds of the sale should not for that reason be considered usury. 159 Ky. 680, 167 S. W. 898.

LOAN CERTIFICATES. See CLEARING HOUSE.

LOAN FOR CONSUMPTION. A contract by which the owner of a personal chattel, called the lender, delivers it to the bailee, called the borrower to be returned in kind.

For example, if a person borrows a bushel of wheat, and at the end of a month returns to the lender a bushel of equal value. This class of loans is commonly considered under the head of bailments; but it lacks the one essential element of bailment, that of a return of the property; it is more strictly a barter or an exchange; the property passes to the borrower; 4 N. Y. 76; 8 *id.* 433; 4 Ohio St. 98; 3 Mas. 478; 1 Blackf. 353; Story, Bailm. § 439. Those cases, sometimes called *ventum* (the corresponding civil law term), such as where corn is delivered to a miller to be ground into wheat, are either cases of hiring of labor and service, as where the miller grinds and returns the identical wheat ground into flour, retaining a portion for his services, or constitute a mere exchange, as where he mixes the wheat with his own, undertaking to furnish an equivalent in corn. It amounts to a contract of sale, payment being stipulated for in a specified article instead of money. See IN GENRE; IN KIND; MUTUUM.

LOAN FOR EXCHANGE. A contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing, without reward for its use. Cal. Civ. Code § 1902.

LOAN SOCIETIES. In English Law. A kind of club formed for the purpose of advancing money on loan to the industrial classes. They are authorized and regulated by 3 & 4 Vict. ch. 110, and 21 Vict. ch. 19.

LOAN FOR USE (called, also, *commodatum*). A bailment of an article to be used by the borrower without paying for the use. 2 Kent 573.

An agreement by which a person delivers a thing to another, to use it according to its natural destination, or according to the agreement, under the obligation on the part of the borrower, to return it after he shall have done using it. La. Civ. Code (1899) Art. 2893.

Loan for use (called *commodatum* in the civil law) differs from a loan for consumption (called *mutuum* in the civil law) in this, that the *commodatum* must be specifically returned, the *mutuum* is to be returned in kind. In the case of a *commodatum*, the property in the thing remains in the lender; in a *mutuum*, the property passes to the borrower.

The loan, like other bailments, must be of some thing of a personal nature; Story, Bailm. § 223; it must be gratuitous; 2 Ld. Raym. 913; for the use of the borrower,

and this as the principal object of the bailment; Story, Bailm. § 225; 13 Vt. 161; and must be lent to be specifically returned at the determination of the bailment; Story, Bailm. § 228.

The general law of contracts governs as to the capacities of the parties and the character of the use; Story, Bailm. §§ 50, 162, 302, 380. He who has a special property may loan the thing, and this even to the general owner, and the possession of the general owner still be that of a borrower; 1 Atk. 235; 8 Term 199; 2 Taunt. 268.

The borrower may use the thing himself, but may not, in general, allow others to use it; 1 Mod. 210; 4 Sandf. 8; during the time and for the purposes and to the extent contemplated by the parties; 5 Mass. 104; 1 Const. S. C. 121; 3 Bingh. N. C. 468. He is bound to use extraordinary diligence; 3 Bingh. N. C. 468; 14 Ill. 64; 4 Sandf. 8; Story, Bailm. § 237; is responsible for accidents, though inevitable, which injure the property during any excess of use; 5 Mass. 194; 16 Ga. 25; see 34 Neb. 426; must bear the ordinary expenses of the thing; Jones, Bailm. 67; and restore it at the time and place and in the manner contemplated by the contract; 16 Ga. 25; 12 Tex. 373; Story, Bailm. § 99; including, also, all accessories; 16 Ga. 25; 2 Kent 566. As to the place of delivery, see 9 Barb. 189; 1 Me. 120; 1 N. H. 295; 1 Conn. 255; 16 Mass. 453. He must, as a general rule, return it to the lender; 7 Cow. 278; 1 B. & Ad. 450; 11 Mass. 211.

The lender may terminate the loan at his pleasure; 9 East 49; 8 Johns. 432; 16 Ga. 25; is perhaps liable for expenses adding a permanent benefit; Story, Bailm. § 274. The lender still retains his property as against third persons, and, for some purposes, his possession; 11 Johns. 285; 13 id. 141, 561; 5 Mass. 303; 1 B. & Ald. 59; 2 Cr. M. & R. 659. As to whether the property is transferred by a recovery of judgment for its value, see 26 E. L. & Eq. 328; 5 Me. 147; 1 Pick. 62. See, generally, Edwards; Jones; Story, Bailments; Kent, Lect. 46. **BAILMENT.**

LOBBYIST. One who makes it a business to procure the passage of bills pending before a legislative body.

One "who makes it a business to 'see' members and procure, by persuasion, importunity, or the use of inducements, the passing of bills, public as well as private, which involve gain to the promoters." 1 Bryce, Am. Com. 156.

A contract for the employment of personal influence or solicitation to procure the passage of a public or private law is void; 21 Barb. 361; 16 How. 314; 34 Vt. 274; 15 Ore. 330; as contrary to sound morals and tending to inefficiency in the public service; 93 Wis. 393; if by its terms or by necessary implication, it stipulates for, or tends to, corrupt action or personal solicitations; 69 U. S. 45; 98 Ind. 238; 36 N. Y. 235; 40 id. 543; 137 id. 370; 18 Ohio St. 469; 149 Pa. 375. And if the contract is broad enough to cover services of any kind, either secret or open, honest or dishonest, the law pronounces a ban upon the contract itself; 2 McArthur. 268. It is not required that it tends to corruption. If its effect is to mislead, it is decisive against the claimant. It may not corrupt all, but if it corrupt or tend to deceive some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal; 5 W. & S. 315; 7 id. 152; 59 Pa. 19; 100 id. 561. But it has been held that though the contract contemplates the use of personal solicitation, yet if no personal influence is brought to bear upon the members, and no dishonest, secret, or unfair means employed, to accomplish the object, it is not illegal; 86 Cal. 542.

Where the agreement is for compensation contingent upon success, it suggests the use of sinister and corrupt means for the accomplishment of the desired end. The law meets the suggestion of evil and strikes down the contract from its inception; 69 U. S. 45; 98 Ind. 238; and see 60

Minn. 26. But if the contract does not by its terms or by necessary implication contain anything illegal or tend to any violation of sound morals, the fatal element should not, through an overzealous desire to fortify against the deplorable effects of lobbying contracts, be injected into it by mere suspicion and conjecture that the party intended to do an illegal act or a legal act by illegal means. Presumptions in human affairs are in favor of innocence rather than of guilt, and this rule applies in testing a contract; 93 Wis. 393. In the last two cases, brought by the same plaintiff, the contracts were somewhat similar; but in the first the decision was based mainly on what was done under and before the contract was entered into, whilst that of the latter was upon the construction of the contract.

A contract for services as an attorney before a legislative body is valid; 22 Kan. 692; and where it contains an agreement to labor faithfully before such body to effect the desired end, it is not necessarily illegal; 34 Vt. 275. It is allowable to employ counsel to appear before a legislative committee or the legislature itself to advocate or oppose a measure in which the individual has an interest; 36 N. Y. 241, followed in 52 How. Pr. 144; and an agent may be authorized by the legislature to prosecute claims on behalf of the state which require the procurement of legislation, for a contingent fee; 164 Mass. 241. Services which are intended to reach only the reason of those sought to be influenced rest on the same principles of ethics as professional services and are no more exceptionable. They include drafting the petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee, and other services of a like character; but such services are separated by a broad line of demarcation from personal solicitation, and though compensation can be recovered for them when they stand alone, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good; 21 Wall. 441.

In Massachusetts by statute lawyers or agents endeavoring to secure the passage of a bill must file written authority from their principal; in California, lobbying, openly practised, is declared by the constitution a felony, and in Georgia, a crime.

LOCAL. Relating to place. A particular place.

LOCAL ACTION. In Practice. An action the cause of which could have arisen in some particular county only.

All local actions must be brought in the county where the cause of action arose.

In general, all actions are local which seek the recovery of real property; 2 W. Bla. 1070; 4 Term 504; 7 id. 589; 81 Tex. 382; whether founded upon contract or not; or damages for injury to such property, as waste, under the statute of Gloucester, trespass *quare clausum fregit*, trespass or case for injuries affecting things real, as for nuisances to houses or lands, disturbance of rights of way or of common, obstruction or diversion of ancient water-courses; 1 Chitty, Pl. 271; Gould, Pl. § 105; 130 Ind. 137; but not if there was a contract between the parties on which to ground an action; 15 Mass. 284; 1 Day Conn. 263.

Many actions arising out of injuries to local rights are local: as, *quare impedit*; 1 Chitty, Pl. 241. The action of replevin is also local; 1 Wms. Saund. 247, n. 1; Gould, Pl. § 111. See Gould; Chitty, Pleading; Comyns, Dig. Action; TRANSITORY ACTION.

LOCAL ALLEGIANCE. The allegiance due to a government from an alien while within its limits. 1 Bla. Com. 370; 2 Kent 63, 64.

LOCAL COURTS. Courts limited to a particular territory or district. The term frequently signifies the state courts in opposition to the United States courts. See

COMMUNAL COURTS; FRANCHISE COURTS; FEUDAL COURTS; MANORIAL COURTS.

LOCAL FREIGHT. Freight shipped from either terminus to a way station, or vice versa, or from one way station to another,—that is over a part of a railroad only. 61 Ala. 579.

LOCAL GOVERNMENT. The government of a particular locality; the governmental authority of a municipal corporation over its individual affairs by virtue of power delegated to it by the general government.

The expression has more definite meaning in England, where important statutes exist, known as the local government acts regulating the administration of local affairs by the people concerned, than it has yet acquired in America. Abbott.

LOCAL GOVERNMENT BOARD. A department of State in Great Britain created in 1871 to concentrate in one department of the government the supervision of the laws relating to public health, the relief of the poor, and local government. The president is usually a member of the cabinet and has a staff of permanent assistants. The lord president of the council, all the secretaries of state, the lord privy seal, and the chancellor of the exchequer are *ex officio* members. It has the power of making regulations which have the effect of statutes. It has complete control in poor law matters; very important powers relating to the pollution of streams; the adulteration of food, etc.; vaccination; the supervision of loans by local authorities and auditing their accounts. Local authorities may ask its advice; it may investigate as to the outbreak of diseases; and must report specially as to all bills relating to public matters. See 7 Encyc. of the Laws of England.

LOCAL IMPROVEMENT. An improvement made in a particular locality, by which the real property adjoining or near such locality is specifically benefited. (22 Minn. 494). The phrase is most commonly used to designate a class of street improvements in cities, such as grading, paving, etc. R. & L. Dict.

LOCAL LAW. Primarily, a law that in fact if not in form is directed only to a specific spot. 227 U. S. 56. See STATUTE.

LOCAL LEGISLATION. "Local" or special legislation applies exclusively to special or particular places, or special or particular persons, and is distinguished from a statute intending to be general in its operation, and that relating to classes of persons or subjects. 39 S. W. 50.

LOCAL OPTION. A term often used to designate a right granted by legislative enactments to the inhabitants of particular districts, to determine by ballot whether or not licenses shall be issued for the sale of intoxicating liquors within such districts.

An act of this character passed in Delaware, in 1847, was declared unconstitutional as an attempted delegation of the power to make laws, confided to the legislature; 4 Harr. 479; so, also, in Indiana and Iowa; 4 Ind. 342; 43 Ind. 547; 5 Ia. 495. This kind of legislation has been supported, however, as falling within the class of police regulations; 108 Mass. 27. In Pennsylvania, Agnew, J., in a leading opinion on this subject, says, the true distinction is this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend;" 73 Pa. 491. At this time the weight of authority is in favor of the constitutionality of local option laws; 36 N. J. L. 720; 42 Conn. 364; 42 Md. 71; 96 Mo. 44; 111 id. 553; 91 Mich. 504. See 12 Cent. L. J. 123; 13 Am. L. Reg. N. S. 133; Cooley, Const. Lim., 2d ed. 145. See DELEGATION; LIQUOR LAWS; LEGISLATIVE POWER.

LOCAL PREJUDICE. Prejudice or influence warranting the removal of a cause from a state court to a federal court. 81 Fed. Rep. 53. See REMOVAL; VENUE.

LOCAL STATUTES. See STATUTE.

LOCAL VENUE. In Pleading. A venue which must be laid in a particular county.

LOCATED VEIN. See LODE.

LOCALITY. In Scotch Law. This name is given to a life rent created in marriage contracts in favor of the wife, instead of leaving her to her legal life rent of terce. 1 Bell, Com. 55. See JOINTURE.

LOCATAIRE. In French Law. A lessee, tenant, or renter.

LOCATARIUS. A depositor.

LOCATE. To ascertain the place in which something belongs, as to locate the calls in a deed or survey; to determine the place to which something shall be assigned; to fix or establish the situation of anything. Abbott.

LOCATIO (Lat.). In Civil Law. Letting for hire. Calvinus, Lex.; Voc. Jur. Utr. The term is also used by text-writers upon the law of bailment at common law. 2 Pars. Contr., 8th ed. 121. In Scotch law it is translated location. Bell, Dict.

LOCATIO CONDUCTIO REI. See HIRE.

LOCATIO CUSTODIÆ. In Civil Law. The receiving of goods on deposit for reward.

LOCATIO OPERIS FACIENDI (Lat.). In Civil Law. Hire of services to be performed. See HIRE.

LOCATIO OPERIS MERCUM VEHENDARUM (Lat.). In Civil Law. The carriage of goods for hire.

LOCATION. At Common Law. The act of selecting and designating lands which the person making the location is authorized by law to select.

It is applied among surveyors who are authorized by public authority to lay out lands by a particular warrant. The act of selecting the land designated in the warrant and surveying it is called its location. In Pennsylvania, it is an application made by any person for land, in the office of the secretary of the late land office of Pennsylvania, and entered in the books of said office, numbered and sent to the surveyor-general's office. Act June 25, 1781, § 2. It is often applied to denote the act of selecting and marking out the line upon which a railroad, canal, or highway is to be constructed.

In Mining Law. A parcel of land appropriated according to certain established rules, such as placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local custom. 104 U. S. 649. See also U. S. Rev. Stat. § 2324.

A location cannot be validated by subsequent discovery; a prior discovery is necessary; 7 Mont. 449. See LANDS, PUBLIC.

In Scotch Law. See LOCATIO; BAILMENT; HIRE.

LOCATIVE CALLS. Calls or requirements of a deed, etc., for certain landmarks, describing certain means by which the land to be located can be identified.

Reference to physical objects in entries and deeds, by which the land to be located is exactly described. 2 Bibb 145; 3 id. 414.

Special, as distinguished from general, calls or descriptions; 3 Bibb 414; 2 Wheat. 211; 10 id. 468; 7 Pet. 171; 18 Wend. 157; 10 Gratt. 445; Jones, Law 469; 16 Ga. 141; 5 Ind. 302; 15 Mo. 80.

LOCATOR. In Civil Law. He who

leases or lets a thing for hire to another. His duties are, *first*, to deliver to the hirer the thing hired, that he may use it; *second*, to guarantee to the hirer the free enjoyment of it; *third*, to keep the thing hired in good order in such manner that the hirer may enjoy it; *fourth*, to warrant that the thing hired has not such defects as to destroy its use. Pothier, *Contr. de Louage*, n. 53.

One who locates, or surveys lands.

The claim of a "locator" is peculiar to Kentucky, and is for a portion of the land located in compensation for his services; 4 Pet. 446. See LANDS, PUBLIC.

LOCK-UP HOUSE. A place used temporarily as a prison.

LOCO PARENTIS. See IN LOCO PARENTIS.

LOCOMOTIVE ENGINE. An engine which moves cars by its own forward and backward motion. 84 N. Y. 314. An ordinance regulating the speed of cars includes a locomotive engine; 150 Ill. 587.

LOCUM TENENS. Holding the place. A deputy. See LIEUTENANT.

LOCUS CONTRACTUS. See LEX LOCI.

LOCUS CRIMINIS. The locality or place of a crime.

LOCUS DELICTI. The place where the tort, offence, or injury has been committed.

LOCUS PARTITUS. In Old English Law. A division made between two towns or counties to make trial where the land or place in question lies. Fleta, l. 4, c. xv.

LOCUS PŒNITENTIÆ (Lat.) a place of repentance. The opportunity of withdrawing from a projected contract, before the parties are finally bound; or of abandoning the intention of committing a crime, before it has been completed. 2 Bro. C. C. 569. Until an offer is accepted by the offeree the party making it may withdraw it at any time. So of a bid at auction. "An auction is not inaptly called *locus pœnitentiæ*." 3 Term 148. See ATTEMPT; CONTRACT; REFUSAL.

LOCUS IN QUO (Lat.) the place in which. In Pleading. The place where anything is alleged to have been done. 1 Salk. 94.

LOCUS REI SITÆ. See LEX REI SITÆ.

LOCUS SIGILLI (Lat.) The place of the seal.

In many of the states, instead of sealing deeds, writs, and other papers or documents requiring it, a scroll is made, in which the letters L. S. are printed or written, which is an abbreviation of *Locus sigilli*. This, in some of the states, has all the efficacy of a seal, but in others it has no such effect. See SCROLL; SEAL.

LOCUS STANDI (a place of standing). A right of appearance in a court of justice or before a legislative body, on a given question. A right to be heard.

It is commonly used in England in reference to parliamentary practice and usually as to the passage of private bills. There is a series of reports called *Locus Standi* Reports in the Court of Referees. See May, Parl. Pr. 761; 9 Jurid. Rev. 47, 206; REFERENCE.

LODE. A body of mineral or mineral-bearing rock located within defined boundaries within the general mass of the mountain. 1 McCrary 480.

A body of mineral or mineral-bearing rock in the general mass, so far as it may continue unbroken and without interruption, whatever the boundaries may be. 143 U. S. 394; 116 id. 529.

Veins or lodes as used in the statutes mean lines or aggregations of metal embedded in quartz or other rock in piece; 128 U. S. 679.

"It is difficult to give any definition of the term, as understood and used in the acts of congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks, a strata made by some force of nature, in which a mineral is deposited, was said to be essential to a lode in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it, would equally constitute in his eyes a lode. We are of the opinion, therefore, that the term as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." 116 U. S. 529, citing 4 Sawy. 802.

By act of congress the owner of a mineral vein or lode is entitled not only to that which is covered by the surface lines of his established claim, as those lines are extended vertically, but also to the right to possess and enjoy that lode or vein by following it when it passes outside of those vertical lines laterally; 116 U. S. 529; but this right is dependent upon its being the same vein as that within those limits; and for its exercise, it must appear that the vein outside is identical with and a continuation of the one within these lines; *id.* See 73 Cal. 169; 58 Fed. Rep. 106; LANDS, PUBLIC.

A "known vein or lode" refers to a vein or lode whose existence is known, as contradistinguished from one which has been appropriated by location. It is not to be taken as synonymous with "located vein." 143 U. S. 400; 127 U. S. 353.

LODE MANAGE. The hire of a pilot, for conducting a ship from one place to another. Cowell.

The Lodesmen had a monopoly of pilotage in the *Cinque Ports* (q. v.). Their society was controlled by the court of lodemanage, which was transferred to the Trinity house in 1853. See Lyons, *Cinque Ports*.

LODGE. To make, prefer, as to lodge a complaint or information; to deposit or file with.

In a statute containing the words "not earlier than 60 days after said application is 'lodged' with the judge of said court," the word "lodged" is construed as received. 99 Ky. 229, 35 S. W. 629.

LODGER. One who inhabits a portion of a house of which another has the general possession and custody.

It is difficult to state exactly the distinctions between a lodger, a guest, and a boarder. A person may be a guest at an inn without being a lodger; 1 Salk. 388; 9 Pick. 280; 25 Wend. 633, 242; 16 Ala. n. s. 666; 8 Blackf. 535; 14 Barb. 193; 6 C. B. 132. And boarder includes one who regularly takes his meals with, and forms in some degree a part of, the householder's family; 25 E. L. & Eq. 76. A lodger does not take meals in the house as lodger; but the duration of the inhabitancy is of no importance as determining his character. The difficulty in this respect is in deciding whether a person is an under-tenant, entitled to notice to quit, or merely a lodger, and not entitled to such notice. See Woodf. L. & T., 2d ed. 132, 177; 7 M. & G. 87; BOARDER; GUEST; INN; INNKKEEPER.

LODGING HOUSE ACTS. Various acts for the well ordering of common lodging houses, beginning in 1851 with the stat. 14 & 15 Vict. c. 28.

An act for the regulation and licensing of public lodging houses is a legitimate exercise of the police power; 180 Pa. 47.

LODS ET RENTES. A fine payable to the seigneur upon every sale of lands within his seigniority. 1 Low. C. 59.

Any transfer of lands for a consideration

gives rise to the claim; 1 Low. C. 79; as, the creation of a *rente viagère* (life-rent); 1 Low. C. 84; a transfer under *bail emphyteotique*; 1 Low. C. 295; a promise to sell, accompanied by transfer of possession; 9 Low. C. 272. It does not arise on a transfer by a father to his son subject to a payment by the son of a life-rent to the father, and of the father's debts; 8 Low. C. 5, 84, 324; nor where property is required for public uses; 1 Low. C. 91.

LOG-BOOK. A ship's journal. It contains a minute account of the ship's course, with a short history of every occurrence during the voyage. 1 Marsh. Ins. 408.

The part of the log-book relating to transactions in the harbor is termed the *harbor log*; that relating to what happens at sea, the *sea log*. Young, Naut. Dic.

When a log-book is required by law to be kept, it is an official register so far as regards the transactions required by law to be entered in it, but no further. Abbott, Shipp., 13th ed. 984; 1 Sumn. 373; 4 Mas. 544; 1 Dods. 9; 2 Hagg. Eccl. 159; Gilp. 147.

All vessels making foreign voyages from the United States, or, of the burden of seventy-five tons or more, from a port on the Atlantic to a port on the Pacific, or vice versa, must have an official log-book; Rev. Stat. § 4290; in which must be entered:—Every offence committed by a member of the crew for which it is intended to prosecute or to enforce a forfeiture; every offence for which punishment is inflicted on board, and the punishment inflicted; a statement of the character, conduct, and qualifications of each member of the crew, or a statement that the master declines to give such particulars; every case of illness or of injury to any member of the crew, the nature thereof, and the medical treatment; every death on board and the cause thereof; every birth, with the sex of the infant, and the name of the parents; every marriage, with the names and ages of the parties; the name of any seaman who ceases to be a member of the crew, and the place, time, manner, and cause thereof; a statement of the wages due any seaman or apprentice who dies during the voyage and the gross amount of all deductions to be made; the sale of the effects of the deceased seaman, including a statement of each article sold and the sum received for it. *Id.* §§ 4290-4292.

In suits for seamen's wages, the log-book is to be produced if required, or otherwise the plaintiff may state its contents. The neglect of a seaman to render himself on board, and his absence without leave, are also to be entered on the log-book in certain cases, or the sailor's fault will not forfeit his wages. Acts 20 July, 1790, §§ 2, 5, & 6; 7 June, 1872; 27 Feb. 1877.

In collision actions log-books are not evidence for the ship in which they are kept, though they are against them; L. R. 1 P. C. 378; though the master and mate were both dead; 10 P. D. 31.

For the English law on the subject, see Merch. Shipp. Act 1894; Maude & Poll. Merch. Shipp.

It is the duty of the mate to keep the log-book. Dana, Seaman's Friend 145, 200.

Every entry shall be signed by the master and mate or some other one of the crew, and shall be made as soon as possible after the occurrence to which it relates. For keeping the log in an improper manner the master is punishable by fine; U. S. Rev. Stat. §§ 4291, 4292.

LOG ROLLING. Mutual compacts between members of a legislature by which one assists the passage of a bill in which he has no interest in consideration of like assistance from the interested member.

As to constitutional provisions concerning such practices, see HODGE PODGE ACT; STATUTES.

Embracing in one bill distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and procuring its passage by a combination of the minorities in favor of the separate measures. Anderson; 60 Ala. 369.

LOGICAL IMPOSSIBILITY. See IMPOSSIBILITY.

LOGS. The stems or trunks of trees cut into convenient lengths for the purpose of being afterwards manufactured into lumber of various kinds. 52 Wis. 398.

When logs are driven in a navigable stream in an ordinarily skilful and prudent manner, the owner is not liable for damages sustained by a riparian owner; 67 Wis. 569.

Such logs floating down a stream may be moored to the shore for a reasonable length of time for the purpose of making them into rafts, or for breaking up the rafts, or to enable the owner to sell them; 28 Minn. 430; 3 Ore. 445; 50 Cal. 129; 51 Me. 264. But they may not be so stored as to prevent another from entering with a drive of logs from a tributary; 78 Me. 329; nor may they be run upon adjacent lands or cause water to overflow, to the injury of the riparian proprietor; 14 Ore. 319; 81 Ala. 284; or obstruct a landing place on a navigable river; 145 Mass. 261; and where a boom obstructs navigation or interferes with the use of a dock built in aid of navigation it is a nuisance; 66 Wis. 476.

Boom companies are not insurers of the logs collected by their booms, nor are they liable for logs which escape by inevitable accident; 109 Pa. 57; except where they fail to exercise due care; 90 Me. 125. Where logs drift from a raft broken by a storm without fault of the owner, he is not obliged to re-capture and remove them, when by so doing he must resort to extraordinary methods and unreasonable expense, in order to escape liability caused by a subsequent storm, although he has not abandoned them; 49 La. Ann. 1184. See LIEN; RIVERS; NAVIGABLE WATERS; RIPARIAN RIGHTS; TIMBER; BOOM COMPANIES.

LONDON COURT OF BANKRUPTCY. See COURT OF BANKRUPTCY.

LONDON AND MIDDLESEX SITTINGS. The *nisi prius* sittings held at Westminster or in the Guildhall of London for the trial of causes arising for the most part in London or Middlesex. 3 Steph. Com. 514. See TERM. GUILDHALL SITTINGS.

LONG PARLIAMENT. The parliament which met November, 1640, under Charles I., and was dissolved (informally) by Cromwell on the 10th of April, 1653. The same name is also given to the parliament which met in 1661 and was dissolved Dec. 30, 1678. The latter is sometimes called, by way of distinction, the "Long Parliament of Charles II." Moz. & W.

LONG QUINTO, THE. An expression used to denote part II. of the year-book which gives reports of cases in 5 Edw. IV. Wallace, Reporters.

LONG AND SHORT HAUL. See INTERSTATE COMMERCE COMMISSION.

LONG VACATION. The recess of the English courts from August 12th to October 24th. See TERM.

LONG YEARLINGS. In stockmen's parlance, cattle entering their second year, and before completing it, are called "long yearlings." 115 Ky. 461, 74 S. W. 185.

LONGEVITY PAY. Extra compensation for longevity in actual service in the army or navy. 18 Ct. Cl. 111.

Its introduction was intended (1) to induce men to enter the service and remain in it for life; (2) to remove the depressing influence of long years of service in one grade without increase of pay; (3) to compensate for increased professional knowledge and efficiency of officers by increasing their pay in advance of promotion. *Id.*

The act relating to longevity pay deals with credit for length of service and the additional pay which arises therefrom, and not with the matter of regular salary, and it has no reference to benefits derived from promotion to different grades, but is con-

fined to the lowest grade having graduated pay; 129 U. S. 249; 151 *id.* 862, 866.

Service as midshipman at a naval academy is service as an officer in the navy as respects longevity pay; 125 U. S. 646; 128 *id.* 254; 124 *id.* 309; so is that of a cadet at West Point; 112 U. S. 1; a private in the marine corps who was one of the members of the marine band is entitled to the benefit of the act; 124 U. S. 301; and officers retired from active service; 124 U. S. 391. It is not necessary that one should have entered the service more than once; 123 U. S. 156; but service in a volunteer regiment will not be included in computing the time of service of an officer; 157 U. S. 281.

In a suit for longevity pay, a sum previously paid the claimant for such pay to which he was not entitled, may be deducted from the sum found to be due him; 151 U. S. 366.

LOOK-OUT. A person upon board a vessel, stationed in a favorable position to see, and near enough to the helmsman to communicate with him, and exclusively employed in watching the movements of other vessels. 13 How. 462. See COLLISION; VESSELS; NAVIGATION RULES.

On Railroads. The "lookout" that is contemplated by the law means a "look-out" that will enable the party keeping it, to discover, in the exercise of reasonable care, the presence of persons on the track in time to give them warning of the danger and to prevent injury to them, by the application of the brake or the other means at hand 151 Ky. 750, 152 S. W. 947.

LOQUELA (Lat.). In Practice. An imprecation, *loquela sine die*, a respite in law to an indefinite time. Formerly by *loquela* was meant the allegations of fact mutually made on either side, now denominated the pleadings. Steph. Pl., Andr. ed. § 81.

LORD. In English Law. A person of whom land is held by another as his tenant. Hereditary peers and lords of parliament not hereditary peers. It is not at the present time a title of honor in itself, but an appellation of some particular titles of honor or dignities. By custom it extends to the sons of dukes and marquises and the eldest sons of earls. It is also bestowed on certain official persons in respect of their offices, as mayors of cities, the lord chancellor, judges of the high court, etc. Ency. Laws of Engl.

The relation between the lord and the tenant is called tenure (*q. v.*) and the right or interest which the lord has in the services of his tenant is called a lordship or seignory (*q. v.*). Byrne.

The word is derived from the Saxon *hlaf*, a loaf of bread, and *ford*, to give, because such great men kept extraordinary houses, and fed all the poor; for which reason they were called givers of bread (*hlaford*). Wharton.

LORD ADVOCATE. See ADVOCATE.

LORD CHAMBERLAIN. An officer in the sovereign's household, whose chief duties now consist in attending upon and attiring the sovereign at his coronation; in the care of the ancient palace of Westminster, the charge of and furnishing Westminster hall and the houses of parliament on state occasions, and attendance upon peers and bishops at their creation or doing of homage. 2 Enc. of Laws of Engl. 428.

LORD CHAMBERLAIN OF THE HOUSEHOLD. In Old English Law. He who had the oversight and government of all officers belonging to the king's chamber, except the bed-chamber which was under the groom of the stole (*q. v.*), and also of the wardrobe. Jacob.

In Modern Times. An officer of the British royal household who, amongst other functions, appoints the various royal tradesmen and the professional men who attend the household. Performs no political duties, but is nominated by the Prime Minister for the time being, and goes out of office with

the ministry. He has control of the theatres in London. *Byrne*.

LORD CHANCELLOR. The presiding judge in the court of chancery. *Anderson*. See *CHANCELLOR*.

LORD CHIEF BARON. The title of the chief judge or baron of the court of exchequer. Now obsolete. See *LORD CHIEF JUSTICE OF ENGLAND*.

LORD CHIEF JUSTICE OF THE COMMON PLEAS. The title of the chief judge of the court of common pleas. Now obsolete. See *LORD CHIEF JUSTICE OF ENGLAND*.

LORD CHIEF JUSTICE OF ENGLAND. The title of the lord chief justice of the queen's bench, formerly a popular title and first fully recognized by the judicature act, 1873. He is *ex officio* a judge of the court of appeal, and president of the high court. In the absence of the lord chancellor. He has all the statutory powers of the lord chief justice of the common pleas and the lord chief baron. He alone is entitled to wear on state occasions the collar of SS.

LORD GREAT CHAMBERLAIN. An hereditary office in England dating from the year 1133, the duties of which consist of certain ceremonial attendances at a coronation, of the care of the Houses of Parliament, and of introducing peers and bishops on their first taking their seats in the Lords. *Byrne*.

LORD IN GROSS. He who is lord, not by reason of any manor, but as the king in respect of his crown, etc. *Whart*.

LORD HIGH ADMIRAL. An officer formerly in supreme charge of British naval affairs. *Jacob*. See *ADMIRALTY*; *COURT OF THE LORD HIGH ADMIRAL*.

LORD HIGH CONSTABLE. See *CONSTABLE OF ENGLAND*; *COURT OF CHIVALRY*.

LORD HIGH TREASURER. An officer who had charge of the royal revenues and the leasing of crown lands. His functions are now vested in the lords commissioners of the treasury. *Mozley & W.*

LORD JUSTICE OF APPEAL. See *LORDS JUSTICES OF APPEAL*.

LORD JUSTICE CLERK. In *Scotch Law*. The second judicial officer in Scotland.

LORD KEEPER. Keeper of the Great Seal, originally another name for the Lord Chancellor (*q. v.*). After Henry II's reign the offices were sometimes divided: now there cannot be a Lord Chancellor and Lord Keeper at the same time, for by the statute 5 Eliz. c. 18, they are declared to be the same office. Down to 1760 the Great Seal was sometimes held by a Lord Keeper instead of by a Lord Chancellor; but since that date there has been no Lord Keeper. *Byrne*. See *CANCELLARIUS*.

LORD LIEUTENANT. In *English Law*. Lords lieutenants of counties were first appointed about the reign of Henry VIII. as standing representatives of the crown to keep the counties in military order. They succeeded to the duties of sheriffs and justices of the peace. Till 1871 the militia was under the command of the lord lieutenant. They still retain duties for the preservation of peace. They are appointed by the queen, and may appoint deputy-lieutenants. *Enc. Laws of Engl.* They exist in the countries of England and Wales.

It is also the title of the chief representative of the crown in Ireland.

Their connection with the military forces of the crown was revived by the Territorial and Reserve Forces Act, 1917, which gave the lord lieutenant the option of becoming president of the county association formed

under that act for the purpose of administering the military forces of the crown (other than the regulars and their reserves) within the county. Subject to the approval of the crown, they nominate persons for the lowest rank of officer in the county territorial units. They have also the power of recommending persons for the commission of the peace; and the crown usually, though not invariably, gives effect to their recommendations. The appointment to the office is made by the crown, under the Militia Act, 1882, s. 29. The lord lieutenant, with the consent of the crown, appoints as deputy lieutenants twenty persons having places of residence within the county, or within seven miles thereof, who are "shown to the satisfaction of a Secretary of State to have rendered worthy service as a member of, or in a civil capacity in connection with, His Majesty's naval, military or air forces," or such number, being less than twenty, as there may be of such persons. He may, with the consent of the crown, appoint one of such deputy lieutenants to act for him as vice-lieutenant during his absence, sickness, or other inability to act.

Recruits for the Territorial Army may be attested by any lord lieutenant or deputy lieutenant.

There are separate lords lieutenant for each of the ridings of Yorkshire; and there is also a separate lord lieutenant for the district known as the town and county of Haverfordwest, which is part of Pembrokeshire.

In the city of London the Lord Mayor, although not entitled the Lord Lieutenant, is *ex officio* the head of the city lieutenancy, and recommends to the Crown the names of persons to fill vacancies therein. *Byrne*.

LORD MAYOR. The chief officer of the city of London and some other cities.

The origin of the appellation of lord, which the mayor of London enjoys, is attributed to the fourth charter of Edward III., which conferred on that officer the honor of having maces, the same as royal, carried before him by the sergeants. *Abbott*; *Pull. Laws and Cust. Lond.*

LORD MAYOR'S COURT. In *English Law*. One of the chief courts of special and local jurisdiction in London. It is a court of the queen, held before the lord mayor and aldermen. In this court, the recorder, or, in his absence, the common sergeant, presides as judge; 3 Steph. Com., 11th ed. 816, n.; 2 Brett, Com. 782.

LORD MAYOR'S DAY. In England, November 9th: so called because on that day the Mayor of London makes a formal visit to the Royal Courts of Justice to take the oath of office. *Stand. Dict.*

LORD ORDINARY. In *Scotch Law*. The judge who officiates in the court of session for the time being.

LORD PRIVY SEAL. See *KEEPER OF THE PRIVY SEAL*.

LORD PRESIDENT OF THE COUNCIL. See *PRESIDENT OF THE COUNCIL*.

LORD STEWARD. The chief officer of a department of the queen's household. See *COURT OF THE LORD HIGH STEWARD*.

LORD STEWARD OF THE KING'S HOUSEHOLD. This is an office quite distinct from that of the Lord High Steward. (See *COURT OF THE LORD HIGH STEWARD*.) He originally presided over the now abolished Court of the Lord Steward of the King's Household and was, in theory, one of the two judges of the Palace Court; he still appoints the Coroner of the King's Household; but his main function from the beginning was, and still is, to supervise the servants and the arrangements of the Royal Household, as regards all matters not entrusted to the Master of the House, or the Lord Chamberlain, or not

relating to the Chapels Royal. The office is not hereditary: it is always held by a peer, who is always a member of the political party which is in office for the time being. *Byrne*.

LORD TREASURER. The full title of this officer was the Lord High Treasurer and Treasurer of the Exchequer. As Lord High Treasurer, he was appointed by receiving a white staff from the king; as Treasurer of the Exchequer, he was appointed by letters patent. The office, which dates from the earliest Norman period, was never hereditary. It was in early times always held by some one person; in 1612 it was put in commission; from then until 1714 it was sometimes held personally and was sometimes in commission; and since 1714 it has always been in commission. The Commissioners constitute the Treasury Board, which never meets now, but which used to meet, in gradually diminishing numbers, until the middle of the last century. It now consists of the First Lord of the Treasury (usually either the Prime Minister or the Leader of the House of Commons) who exercises as regards finance only what may be termed an appellate jurisdiction, the Chancellor of the Exchequer (who is for all practical purposes the Lord Treasurer), a couple of Junior Lords, a Patronage Secretary, and a Financial Secretary, all of whom are members of Parliament. *Byrne*.

LORD WARDEN OF CINQUE PORTS. See *CINQUE PORTS*.

LORDS OF APPEAL. Peers of the house of lords of whom at least three must be present to constitute a sitting of the house for judicial business.

LORDS OF APPEAL IN ORDINARY. Two persons who have held high judicial office, appointed to aid the house of lords in the hearing of appeals. They rank as barons for life but vote in the house of lords during the tenure of their office. *App. Jur. Act, 1876, s. 6*.

Persons appointed by the queen of England for the purpose of aiding the House of Lords in the hearing and determination of appeals. They must have held some high judicial office for two years, or have been practicing barristers or advocates for at least fifteen years. *R. & L. Dict.*

LORDS APPELLANT. The five peers who superseded Richard II. in his government, and whom he superseded after a brief control of the government.

Richard II.'s eighteen commissioners (twelve peers and six commoners) took their place, as an embryo privy council acting with full powers, during the parliamentary recess. *R. & L. Dict.*; *Brown*.

LORDS COMMISSIONERS. The persons charged with the duties of a high public office which has been put into commission in lieu of being devolved upon an individual officer.

Thus there is in lieu of the lord treasurer and lord high admiral of former times, the lords commissioners of the treasury, and the lords commissioners of the admiralty; and whenever the Great Seal is put into commission, the persons charged with it are called commissioners or lords commissioners of the Great Seal. *Abbott*; *M. & W.*

LORD'S DAY. Sunday. *Co. Litt. 135*. See *Maxims, Dies Dominicus*.

LORDS OF ERECTION. On the reformation in Scotland, the king, as proprietor of benefices, formerly held by abbots and priors, gave them out in temporal lordships to favorites. *Wharton*.

LORDS JUSTICES OF APPEAL. In *English Law*. The titles of five of the judges of the court of appeal. *Jud. Act, 1881, s. 4*.

LORDS MARCHERS. Those noble-

men who lived on the marches of Wales or Scotland; who in times past had their laws and power of life and death, like petty kings. Abolished by 27 Henry VIII. c. 26, and 6 Edw. VI. c. 10.

LORDS ORDAINERS. Lords appointed in 1312 for the control of the sovereign and court party for the general reform of the country. Brown.

LORDS OF PARLIAMENT. See PARLIAMENT.

LORDS OF REGALTY. In Scotch Law. Persons to whom rights of civil and criminal jurisdiction were given by the crown. Bell, Dict.

LORDS SPIRITUAL. See PARLIAMENT.

LORDS TEMPORAL. See PARLIAMENT.

LORDSHIP. Dominion, manor, domain; also a title of honor given to a nobleman. Also given to judges and other persons in authority.

LOSS. When used in a statute with reference to a loss of goods by common carriers, loss means injury or damage to the goods, as well as their destruction or disappearance, 71 Ga. 40; 88 *id.* 805.

In Insurance. The destruction of or damage to the insured subject by the perils insured against, according to the express provisions and construction of the contract.

These accidents, or misfortunes, or perils, as they are usually denominated, are all distinctly enumerated in the policy. And no loss, however great or unforeseen, can be a loss within the policy unless it be the direct and immediate consequence of one or more of these perils. Marsh. Ins. 1, c. 12.

Loss under a life policy is the death of the subject by a cause the risk of which is not expressly excepted in the policy, and where the loss is not fraudulent, as where one assured, who insures the life of another for his own benefit, procures the death.

Loss in insurance against fire must, under the usual form of policy, be by the partial or total destruction or damage of the thing insured by fire.

In maritime insurance, in which loss by fire is one of the risks usually included, the loss insured against may be absolutely or constructively total, or a partial or general average loss, or a particular average. See AVERAGE.

In other forms of insurance what constitutes a loss is determined by the risks or perils insured against as specified in the policy. As to the various kinds of which see the sub-titles of INSURANCE.

A *partial loss* is any loss or damage short of, or not amounting to, a total loss: for if it be not the latter it must be the former. See 4 Mass. 374; 6 *id.* 102, 122, 317; 12 *id.* 170, 288; 8 Johns. 237; 10 *id.* 487; 5 Binn. 595; 2 S. & R. 553.

Partial losses are sometimes denominated *average losses*, because they are often in the nature of those losses which are the subject of average contributions; and they are distinguished into general and particular averages. See AVERAGE.

A *total loss* is such destruction of, or damage to, the thing insured that it is of little or no value to the owner.

Total losses, in maritime insurance, are absolutely such when the entire thing perishes or becomes of no value. Constructively, a loss may become total where the value remaining is of such a small amount that the whole may be surrendered. See 2 Phill. Ins. ch. xvii.; 2 Johns. 286; Beach, Ins. § 916; 66 Tex. 103; 44 La. Ann. 714; ABANDONMENT.

It is under marine policies that questions of constructive total loss most frequently arise. Such loss may be by capture or seizure by unlawful violence, as piracy; Arn. Ins., 6th ed. § 51; 1 Phil. Ins. § 1106; 2 E. L. & E. 85; or damage to ship or goods over half of the value at the time and place of loss; 1 Curt. C. C. 148; 9 Cush. 415; 5 Den. 342; 19 Ala. N. S. 108; or loss of the voyage; 4 Me. 431; 24 Miss. 461; 19 N. Y. 272; 1 Mart. La. 221; though the ship or goods may survive in specie, but so as not to be fit for use in the same character for the same service or purpose; 2 Caines, Cas. 324; Valin, tom. 2, tit. Ass. a. 46; or by jettison; 1 Caines 196; or by necessity to sell on account of the action and effect of the peril insured against; 5 Gray 154; 1 Cra. 202; or by loss of insured freight con-

sequent on the loss of cargo or ship; 18 Johns. 208.

There may be a claim for a total loss in addition to a partial loss; 17 How. 595. A total loss of the ship is not necessarily such of cargo; 3 Binn. 287; nor is submersion necessarily a total loss; 7 East 88; nor is temporary delay of the voyage; 5 B. & Ald. 597.

A constructive total loss, and an abandonment thereupon of the ship, is a constructive total loss of freight; and a constructive total loss and abandonment of cargo has a like effect as to commissions or profits thereon; and the validity of the abandonment will depend upon the actual facts at the time of the abandonment, as the same may subsequently prove to have been; 2 Phillips, Ins. § 1630; 3 Johns. Cas. 93. See ABANDONMENT.

An insured cannot recover for a total loss of a vessel, in the absence of proof of abandonment and of notice of the same on the insurer; 40 La. Ann. 553.

In determining the proportion which the cost of repairing a vessel must bear to its value, so as to justify its abandonment to the insurers as a constructive total loss, its value as stated in the policy controls, and not its actual value immediately before the accident; 25 N. Y. S. 414.

Under a fire insurance policy it is not necessary to show that all the material of the building was destroyed, to sustain a finding of total loss, and where it is such a loss, a provision of the policy limiting the amount to less than the sum written is invalid; 44 Neb. 549; 90 Tex. 170. The loss has been held to be total where the building was so injured as to lose its identity; 29 S. W. Rep. (Tex.) 93; 93 Wis. 526; or so that it was unsafe and was condemned by the municipal authorities; 47 La. Ann. 1563. But where the roof and interior woodwork of a building were destroyed, leaving the walls standing, it was a question for the jury whether it was a total loss within the meaning of the policy; 85 Hun 250.

The insurance company is liable for goods stolen while being removed to avoid impending loss by fire though the policy reads, "nor shall the company be liable for loss by theft," which evidently applies to theft from show windows. 6 Bush. (Ky.) 639.

PROOFS OF LOSS. It is a usual condition in all policies in insurance that immediate notice of loss shall be given by the insured, and generally some time is named within which the proofs of loss shall be given in writing to the company. Compliance with such is a condition precedent, and notice, or waiver of it, must be shown; 48 Kan. 239; 40 Neb. 700; 60 Mo. App. 673; though there is a mortgage clause; 99 Ga. 65; but where there is such clause, a mortgagee is not required to make proofs; 5 Kan. App. 137.

Failure to make proof is not excused by refusal of the company to furnish blanks; 8 Ohio Cir. Ct. 620. A statement mailed within the time is rendered to the company; 168 Ill. 296; and notice duly addressed, stamped, and mailed is presumed to have been received, if not denied; 3 Ind. App. 332. Where a statute requires notice "accompanied by an affidavit" of the circumstances, they need not be attached together or delivered at the same moment; 84 La. 93. Notice is conclusively shown when the company sends an adjuster; 151 Pa. 607; or telegraphs an adjuster to give it attention; 48 Mo. App. 65. A new proof of loss made long afterwards under promise of settlement if the claim was reduced, was mere surplage and did not affect the rights of the insured; 137 N. Y. 889; and where the policy required duplicate bills, vouchers, etc., it was only necessary to show reasonable effort to obtain them; 162 Pa. 357. An itemized estimate of the cost of rebuilding is sufficient compliance with a requirement of a verified certificate of the value of the building destroyed; 65 Fed. Rep. 292; *contra*, 96 Ia. 224. A false statement in the affidavit of loss, made by mistake, will not vitiate a policy which pro-

vides that it shall be void in case of any false swearing by the insured in relation to the insurance; 107 Mich. 323; and formal defects or irregularities which cannot be obviated will not prevent recovery; 26 Ins. L. J. 695.

Formal or preliminary proofs may be waived by parol; 40 S. W. Rep. (Ky.) 870. A waiver of proofs results from a denial of all liability; 16 Ind. App. 160; 10 App. D. C. 277; 16 Wash. 135; or a denial on other grounds; 97 Tenn. 1; 69 Mo. App. 126; 18 App. Div. N. Y. 444; as from the defence that the policy was never in force; 49 Neb. 811; or the omission to object to the form; 153 Pa. 398; but they are not waived by careful investigation; 42 U. S. App. 81; s. c. 74 Fed. Rep. 507; or by reason of an irresistible conclusion that the company had determined to defend the suit, resulting from assertions made during the negotiations; *id.*; or by an offer of compromise; 42 W. Va. 426; or by a refusal after insufficient proofs are furnished to consider the loss unless a specified claim should be eliminated; 57 Kan. 576; or by the mere denial of liability on the ground that the property destroyed was not covered; 90 Me. 385; 151 Pa. 607; 93 U. S. 572; 83 N. Y. 103; or mere silence; 86 Ala. 558; or a promise by local agents, without authority to adjust, that the loss would be paid; 77 Ia. 376. The act relied on to establish a waiver must occur within the time fixed by the policy; 58 Mo. App. 225. The insured does not lose the benefit of a waiver by making proofs, and he may plead both compliance and the waiver; 98 Ia. 221. The proofs should ordinarily be made by the insured, but where he is not in a position to make them in person, they may be made by an agent; 166 Ill. 400; or mortgagee to whom the policy is made payable; 56 Hun 399; or the company's adjuster; 131 Ind. 572; 85 Wis. 229; and they may be in the name of a firm; 122 N. Y. 545. Where the policy requires proofs "as soon as possible," what is reasonable time is a mixed question of law and fact; 110 Pa. 530; 70 Ia. 704.

ARBITRATION. A common provision in policies for all kinds of insurance is one for compulsory arbitration in case of difference between the parties as to the amount of loss. Such a provision has been held void as ousting the court of its jurisdiction; 21 Misc. Rep. 124; *contra*, 112 Ala. 318; 50 N. J. L. 453. An award is not required as a condition precedent to a right of action, but a refusal for a demand of appraisal may be set up as a bar; 16 Wash. 232, in which rehearing was denied; 47 Pac. Rep. 885; but it has been held a condition precedent; 69 Mo. App. 232; 71 Tex. 5; but not unless requested in writing; 96 Ia. 70; and it is inoperative where no arbitrators are agreed upon; 57 Kan. 95; and is not applicable to a case of total loss; 50 Hun 172; or to the portion of the insured property totally destroyed; 12 App. Div. N. Y. 39; or where the insurer denies liability; 120 N. C. 302; or in case of total loss under valued policy acts; 74 Wis. 67; 36 Neb. 461; 61 Mo. App. 572. Formal notice of the proceedings of appraisers is not necessary to a party who has knowledge of them; 12 App. Div. N. Y. 218. A valuation by the company's adjuster and builders selected by the insured is an appraisal within the policy, without previous effort to agree upon the loss; 36 U. S. App. 327; s. c. 71 Fed. Rep. 120.

Appraisers cannot determine the construction of the policy; 17 App. Div. N. Y. 87; and the award may be set aside where it is grossly below the actual loss; 12 Tex. Civ. App. 572; but not for a mere mistake, not appearing on its face; 12 App. Div. N. Y. 218; and it need not state the manner of arriving at the result; *id.*

Consult Phillips; Arnold; May, Insurance; Pars. Mar. Law; TOTAL LOSS.

LOST CORNER. See BOUNDARY.

LOST INSTRUMENT. A document or paper which has been so mislaid that it cannot be found after diligent search.

Suits to establish lost instruments are within the jurisdiction of equity, but the proof as to the contents must be clear and satisfactory; 35 Fla. 212; and such a suit will not be entertained to establish the lost instrument merely as a piece of written evidence to sustain an action of tort; 66 Fed. Rep. 799.

This equitable jurisdiction extends to ordering the issue of bonds to replace those lost, where the loss or destruction was without fault of the party seeking relief; and it can be done without derogating from positive agreement or violating equal or superior equities in other parties. Such relief has been given in case of bonds stolen and hidden in the ground at the evacuation of Petersburg by the Confederate forces; 45 Md. 102; and for bonds stolen from the vault of a bank; 27 N. J. Eq. 408.

A copy of a deed by joint makers cannot be established without proof of execution by all; 96 Ga. 197; and wherever it is sought to establish title to real property under a lost unrecorded deed, the rules as to the amount of evidence required is very strict; 89 Me. 462.

Formerly in such cases a resort to equity was compelled by the want of any remedy at law, resulting from the necessity of making profit; 1 Ch. Cas. 77; but after profit was dispensed with, the courts of law acquired concurrent jurisdiction and the loss of a paper would not prevent recovery; 1 Ves. 341; 7 id. 19; 3 V. & B. 54. Nevertheless a court of equity still has jurisdiction to establish a lost deed; 142 U. S. 417.

The fact that interest on a bond is payable upon "presentation and delivery of the coupon" will not prevent recovery on a lost coupon; 21 Misc. Rep. 439. Where a note is lost pending an action while in the hands of the justice, indemnity is not required; 43 Pac. Rep. (Colo.) 904; and an allegation of loss after maturity of a note sued on, dispenses with the necessity of tender of indemnity; 141 Ind. 322. An action may be brought on a lost official bond; 57 Ill. App. 674. In an action for the breach of a lost contract, where the fact of its existence is controverted, it is a question for the jury; 24 S. E. Rep. (Va.) 241.

It is held that an action will lie upon a lost negotiable instrument; 10 Ad. & E. 616; 2 Spear. L. 193. The weight of authority seems to be that an action would not lie on a lost negotiable note; 1 Exch. 167; 9 id. 604; 21 Gratt. 556; 46 N. C. 78; 17 Me. 9; 20 D. C. 191 (distinguishing *id.* 26, where the action was maintained on a note accidentally lost after being in evidence in that court); *contra*, 2 Bay 495; 18 Ga. 65; 1 R. I. 401; 3 Yeates 442, but see comments on these cases, 16 L. R. A. 305, n. In some courts the suit has been permitted upon giving indemnity; 34 Conn. 546; 4 Martin La. n. s. 4; 16 Pick. 315.

In some states and in England it is provided by statute that an action may be maintained on a lost negotiable instrument. Under such statutes it is held that they may be maintained without showing the absolute destruction of the instrument; 52 Ind. App. 216; but judgment cannot be recovered without indemnity; 60 Mo. App. 671; 32 S. W. Rep. (Tex.) 248.

Where the remedy at law is denied in the case of a lost negotiable instrument and there is no statute, relief must be sought by a bill in equity to compel payment after tender of indemnity; 7 B. & C. 90; 35 Neb. 693; Pars. N. & B. 262. The loss of a bond is no objection to its payment by the company which issued it, upon indemnity; 40 Vt. 399. The title of the true owner of a lost certificate of stock may be asserted against a subsequent owner even though he be a *bona fide* purchaser; 148 N. Y. 441.

The contents of a lost deed, will, agreement, etc., may be proved by secondary evidence after proof of its existence; 150 Pa. 538; and that diligent search has been made and that it cannot be found; Tayl. Ev. 402; 147 Pa. 447; the party's own evidence is sufficient for this purpose; 1

Atk. 446; 1 Greenl. Ev. § 349; or that of any one who knows the facts; 90 Ga. 731. See WILL.

Even a will proved to be lost may be admitted to probate upon secondary evidence; 1 Greenl. Ev. §§ 84, 509, 575; 1 P. & D. 154; s. c. 17 Eng. Rep. 45, note; but this case has been characterized as going to the "verge of the law"; 11 App. Cas. 474. The fact of the loss must be proved by the clearest evidence; 8 Metc. 487; 2 Add. Ecol. 223; 6 Wend. 173; 1 Hagg. Ecol. 115. Where it has been in the custody of the testator and is not found at his death, it is presumed to have been destroyed, *animo revocandi*; 17 Moak's Engl. Rep. 511; 6 Wend. 173; 11 Biss. 265; especially where the testator knew of the loss while alive and did not produce it; 140 Pa. 242. Its absence is said to be *prima facie* evidence of cancellation; 1 Bay 457; but where no revocation is proved or presumed, declarations, written or oral, made by a testator, both before and after the execution of the will, are admissible as secondary evidence; *id.*; Steph. Ev. § 29; Beach, Wills § 73; 97 Mich. 49; Schoul. Wills § 402. And see 28 W. Va. 113, for an extended historical discussion of the subject. It is also said that chancery, on a bill suitably filed, has exercised a similar jurisdiction; *id.*

The "copy" of a lost instrument intended by the act of congress of January 23, 1874 (for stamping unstamped instruments), is a substantial copy, or such a draft of the original instrument as will identify the subject of the tax; 82 Pa. 280.

LOST, OR NOT LOST. A phrase in policies of insurance, signifying the contract to be retrospective and applicable to any loss within the specified risk, provided the same is not already known to either of the parties, and that neither has any knowledge or information not equally obvious or known to the other. The clause has been adopted only in maritime insurance; though a fire or life policy is not infrequently retrospective, or, under a different phraseology, by a provision that the risk is to commence at some time prior to its date. 1 Phill. Ins. § 925. Such policy on a vessel building "to take effect as soon as water-borne," takes effect at once if she is already water-borne; 6 Gray 192.

LOST PAPERS. See LOST INSTRUMENT.

LOST PROPERTY. See FINDER, where the subject is treated, and see also 33 Ch. D. 566, where a prehistoric boat found by a gas company while excavating on land leased by it was held to belong to the lessor.

LOST TIME. "Lost time" as an element of damage means time that is totally lost. 140 Ky. 495, 131 S. W. 278.

LOT. That which fortuitously determines what we are to acquire.

When it can be certainly known what are our rights, we ought never to resort to a decision by lot; but when it is impossible to tell what actually belongs to us, as if an estate is divided into three parts and one part given to each of three persons, the proper way to ascertain each one's part is to draw lots; Wolff, *Dr. etc., de la Nat.* § 669.

Verdicts reached by a jury by drawing lots, will be set aside; 1 Ky. L. J. 500. See JURY. See also 1 Wash. Ty. 329; s. c. 34 Am. Rep. 808, n.

LOT OF GROUND. A small piece of land in a town or city, usually employed for building, a yard, a garden, or such other urban use. Lots are *in-lots*, or those within the boundary of the city or town, and *out-lots*, those which are out of such boundary and which are used by some of the inhabitants of such town or city.

LOT AND SCOT. Duties to be paid by persons exercising the elective franchise in certain cities before being allowed to vote.

It is said that the practice became uniform

to refer to the poor-rate as a register of "scot and lot" voters, so that the term, when employed to define a right of election, meant only the payment by a parishioner of the sum to which he was assessed on the poor-rate. R. & L. Dict.; Brown.

LOTHERWITE or LEYERWIT. A liberty or privilege to take amends for fighting with a bondswoman without license. See LAIRWITE.

LOTTERY. A scheme for the distribution of prizes by chance. 7 N. Y. 228; 59 Ill. 160.

A scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity, or design cannot enable him to know or determine, until the same has been accomplished. 74 Mich. 264.

A scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor. Bish. St. Crimes § 952.

The word *lottery* "embraces the elements of procuring, through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value." 58 Fed. Rep. 942. It includes policy-playing, gift-exhibitions, prize concerts, raffles at fairs, etc., and various forms of gambling; *id.*

Where a pecuniary consideration is paid, and it is to be determined by chance, according to some scheme held out to the public, as to what and how much he who pays the money is to receive for it, that is a lottery; 56 N. Y. 424. It is well settled that every scheme for the division of property or money by chance is prohibited by law; 61 Ind. 39. Lotteries were formerly often resorted to as a means of raising money, by states as well as individuals, and are still authorized in many foreign countries, but have been abolished as immoral in England, and throughout this country. They were declared a nuisance and prohibited by 10 & 11 Will. III. c. 17, and foreign lotteries were forbidden to be advertised in England by the 6 & 7 Will. IV. c. 66.

Selling boxes of candy, each box being represented to contain a prize, the purchaser selecting his box in ignorance of its contents, is a lottery; 2 Tex. App. 610; so in 89 N. C. 572; 137 Mass. 250; 11 Q. B. Div. 207. Where money was subscribed which was to be invested in funds which were to be divided amongst the subscribers by lot, and divided unequally, it was held a lottery; 11 Ch. Div. 170. Although every ticket in a drawing represents a prize of some value, yet if those prizes are of unequal values, the scheme of distribution is a lottery; 40 Ill. 465.

A scheme for increasing the circulation of a newspaper, whereby all subscribers receive numbered tickets corresponding to numbered coupons, which are drawn from a box by a blindfolded person, prizes to be given to the holders of certain tickets, is a lottery under U. S. Rev. Stat. § 3894, prohibiting carrying through the mails of any newspaper containing any advertisement of any lottery, etc., 58 Fed. Rep. 942; so it was held that an issue of bonds of the Austrian government, payable at a specified time, but with a provision that bonds, as drawn, should be redeemed with a bonus, which was to increase year by year, was within that act, which related to all lotteries, the word "illegal" having been omitted from the original act by amendment in 1890; 147 U. S. 456.

A lottery for the disposal of land is within the prohibition of the Pennsylvania act, where the lots drawn are of very unequal value; 4 S. & R. 151; so when there is a contract for the sale of several lots of land, of unequal value, to several subscribers, which provides that each one's lot shall be determined "by lot" and a certain "prize" lot is to be given to one of the

subscribers by "lot"; 42 N. E. Rep. (Ind.) 103. So where one furnished a cigar to every person who placed a five-cent piece in a slot machine, and the one after whose play the machine indicated the highest card hand was to receive all the cigars; 22 So. Rep. (Ala.) 138; and where every purchaser of dry goods received a key and was told that one key would be given out which would unlock a certain box containing twenty-five dollars, which would go to the person who received this key; 54 Kan. 711. So where every subscriber to a newspaper received a ticket which entitled him to participate in a distribution of prizes by lot; 73 Mo. 647; and of a bond investment scheme, where bonds were issued at a specified price and the value of each bond was determined by its number, the bonds being numbered in the order of application for them; 63 Fed. Rep. 426.

A "missing word" competition, in which the winners are to be those who, upon sending a shilling to the promoter of the competition, select, to fill up a named sentence, a particular word also selected by the promoter, is a lottery within the English act; [1896] 3 Ch. 154.

Raffles at fairs, etc., are as clearly violations of the criminal law as the most elaborate and carefully organized lotteries; 8 Phila. 457. Thus the American Art Union is a lottery; 8 N. Y. 228, 240; so a "gift-sale" of books; 33 N. H. 329; so "prize-concerts"; 97 Mass. 583; and "gift-exhibitions"; 32 N. J. L. 398; 12 Abb. Pr. N. S. 210; 59 Ill. 160; 62 Ala. 334; 74 N. Y. 63. The payment of prizes need not be in money; 7 N. Y. 228; as where a suit of clothing was given at a weekly drawing in a merchant tailor's club; 48 Minn. 555.

On the other hand, where the scheme affords room for the exercise of skill and judgment, it is not a lottery; 60 L. J. M. C. 116. So of a coupon competition in a newspaper, where purchasers of copies of the newspapers fill in on coupons the horses selected by them as likely to come in first, second, third, and fourth in a given race, the purchaser to receive a penny for every coupon filled up after the first, and a money prize to be given to the holder of the coupon who should name the first four horses correctly; [1895] 2 Q. B. 474; where a soap-dealer offered a prize to be drawn by lot, to the person who should most nearly guess the weight of a certain cake of soap, it was held not to be a lottery; 56 Alb. L. J. 95, S. C. of New Brunswick.

The mere determination by lot where there is no giving of prizes, is not a lottery; 8 Phila. 457. Merely determining by lot the time at which certain bonds are to be paid, is not a lottery; 30 Fed. Rep. 499; but it is otherwise if a prize is offered on the bonds so drawn; *id.* To constitute a lottery something of value must be parted with, directly or indirectly, by him who has the chance; 88 Ala. 196; 16 Am. St. Rep. 38 and note. Therefore, where every customer of a shoe store and every applicant received a ticket gratuitously, and a piano was allotted by chance among the holders, it was held not to be a lottery; 18 Colo. 321. Where the element of certainty goes hand in hand with the element of chance in an enterprise offering prizes, the former element does not destroy the existence or effect of the latter; 147 U. S. 449.

The act which forbids conveying in the mails newspapers containing anything relating to a lottery is within the power of congress to establishing postoffices, and does not abridge the freedom of the press; 143 U. S. 110. The right to operate a lottery is not a fundamental right; *id.* Under this act it is an offence to deliver in Illinois a prohibited circular mailed in the city of New York, and such an offence is triable in Illinois; 143 U. S. 207.

It is a valid exercise of power in a state to protect the morals and advance the welfare of the people by prohibiting any scheme bearing any semblance to a lottery or gambling; 74 Md. 565.

A lottery grant is not, in any sense, a contract within the meaning of the constitution of the United States, but is simply

a gratuity and license, which the state, under its police powers, and for the protection of the public morals, may at any time revoke and forbid the further conduct of the lottery; and no right acquired during the life of the grant, on the faith of, or by agreement with, the grantees, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized; 168 U. S. 488, 502, following 101 U. S. 814, where it was said, referring to lotteries:—"Certainly the right to suppress them is governmental, to be exercised at all times by those in power at their discretion." A lottery charter is "in legal effect nothing more than a license."

The fact that one government authorizes lotteries and the sale of lottery tickets, cannot authorize their sale in another government which forbids their sale; 147 U. S. 462.

A purchase of a ticket in a foreign lottery outside the state, is a valid contract; 13 Pa. 328. An ordinance which makes it unlawful "for any person to have in his possession, unless it be shown that such possession is innocent, any lottery ticket," is unconstitutional, inasmuch as it places on the person accused of its violation, the burden of showing the innocence of his possession; 41 Pac. Rep. (Cal.) 693.

Where it was undisputed that the defendant was engaged in the lottery business, evidence that he received an order for lottery tickets such as were subsequently mailed with the letter; that the name used in the address of the letter was the same as that signed to the order; that the tickets bore his stamp, and that the letter enclosed his business card, would justify the conclusion that the defendant deposited the letter in the post-office for mailing; 1 Fed. Rep. 426.

A court of equity will not grant relief where letters addressed to the secretary of a lottery company are detained by a postmaster under the direction of the postmaster-general, if the pleadings fail to show that the letters had no connection with the lottery business; 1 Fed. Rep. 417. The act of June 8, 1872, Rev. S. § 4041, authorizes the postmaster-general to forbid the payment by any postmaster of a money order to any person engaged in the lottery business. But this does not authorize any person to open any letter not addressed to himself.

The act of March 2, 1895, provides that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails from one state to another, any paper, etc., purporting to be or represent a ticket, etc., in a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon chance, or shall cause any advertisement of such lottery, etc., to be brought into the United States, etc., shall be punishable, for the first offence, by imprisonment or fine, or both, and, for further offences, by imprisonment. See 164 U. S. 676. See POPULARITY CONTEST.

LOTTERY BOND. That bond to which is attached the contingent right to a price, or the vested right to chances at lottery. Thus, the lottery bond presents a double character. It is at once (1) a deed of loan, and (2) a lottery ticket. As deed of loan, it confers upon the holder the right to the payment of interest and reimbursement of the capital lent; as lottery ticket, it takes part periodically in drawings of more or less important prizes.

At first sight, lottery bonds have nothing to distinguish them from the ordinary bond. Like the latter they can be made out payable to order or to bearer, are usually provided with coupons representing interest to be paid, and bear the number of issue. But it is precisely the different use of these numbers which marks the difference between the two classes of obligations. In the ordinary bond the number of issue serves solely to facilitate the redemption of the amount loaned. In the lottery bond, however, the number of

issue printed on the instrument prevents a very different character. It is not merely a number of issue which permits the arrangement of a gradual liquidation, but it is primarily the number of a lottery ticket. The essential characteristic of the lottery bond is that the number which it bears shares till its liquidation in periodical drawings of more or less important prizes, together with the other bonds of the same issue which have not been paid. These prizes consist of sums of money which are sometimes of considerable value (200,000 and 500,000 fr.). In practice, the drawings for payment are made to coincide with drawings for prizes, and it is so arranged that the holders of the bonds whose numbers appear first at the drawings for payment shall be the beneficiaries of the prizes.

At present the lottery bond may be found in most of the financial markets of Europe, and of all nationalities. Especially is this true in France. 9 Harv. L. R. 386-7.

LOUAGE. In French Law. The contract of hiring and letting. It may be of things or of labor. (1) Letting of things. (a) *Bail à loyer*, the letting of houses; (b) *Bail à ferme*, the letting of land; (2) Letting of labor.—(a) *Loyer*, the letting of personal service; (b) *Bail à cheval*, the letting of a horse.

LOUISIANA. The name of one of the states of the United States of America.

It was first explored by the French in 1682, under Robert Chevalier de la Salle, and named Louisiana, in honor of Louis XIV. In 1699 a French settlement was begun at Biloxi by Lemoine d'Iberville. His efforts were followed up in 1712 by Anthony Crozat, a man of wealth, who upheld the trade of the country for several years. About 1717 all his interest in the province was transferred to the "Western Company," a chartered corporation, at the head of which was the celebrated John Law, whose speculations involved the ruin of one-half the French nobility. In 1722 the "Company" resigned all their rights to the crown, by whom the whole of Louisiana was ceded to Spain in 1762. By the treaty of St. Ildefonso, signed October 1, 1800, Spain re-conveyed it to France, from whom it was purchased by the United States, April 30, 1803, for \$15,000,000. Louisiana was admitted into the Union by an act of congress, approved April 8, 1812.

The first constitution was adopted January 22, 1812, and was substantially copied from that of Kentucky.

LOW BOTE. A recompense for the death of a man killed in a tumult. Cow.

LOWERS. In French Maritime Law. Wages. Ord. Mar. liv. 1, t. 14, Art. 16.

LOW-WATER MARK. That part of the shore of the sea to which the waters recede when the tide is lowest; *i. e.* the line to which the ebb-tide usually recedes, or the ordinary low-water mark unaffected by drought. 26 Me. 384; 60 Pa. 339. It has been said to be the point to which a river recedes at its lowest stage; 55 Fed. Rep. 854. See 157 Mass. 24; **HIGH-WATER MARK**; **RIVER**; **SEA**; **Dane, Abr.**; 1 Halst. Ch. 1.

LOYAL. Legal, or according to law: as, loyal matrimony, a lawful marriage.

"*Uncoren n'est loyal a homme de faire un tort*" (it is never lawful for a man to do a wrong). Dyer, fol. 38, § 38. "*Et per curiam n'est loyal*" (and it was held by the court that it was not lawful). T. Jones 24. Also spelled *loyal*. Dyer 36, § 38; Law Fr. & Lat. Dict. The Norman spelling is "*loyse*." Kelh. Norm. Dict.

Faithful to a prince or superior; true to plighted faith or duty. Webster, Dict.

LOYAL VOTES. As ordinarily used, its meaning is believed to be quite different from that of the phrases "legal voters," "qualified voters." 1 Duv. (Ky.) 41.

LOYALTY. Adherence to law. Faithfulness to the existing government.

LOW. See **HIGH**.

LUCID INTERVALS. In Medical Jurisprudence. Periods in which an insane person is so far free from his disease that the ordinary legal consequences of insanity do not apply to acts done therein.

A lucid interval is not a perfect restoration to reason, but a restoration so far as to be able, beyond doubt, to comprehend and do the act with such perception, memory, and judgment as to make it a legal act. 3 Del. Ch. 303; Whart. & Stillé, Med. Jur. § 2.

Lucid intervals were regarded as more common and characterized by greater mental clearness and vigor, by earlier medical writers than the later ones. This view was shared by legal authorities, who treated a lucid interval as a complete, though temporary, restoration. D'Aguesseau, in the case of the Abbé d'Orléans, concludes: "It must not be a mere diminution, a remission, of the complaint, but a kind of temporary cure, an intermission so clearly marked as in every respect to resemble the restoration of health." Pothier, Obl., Evans' ed. 579. And Lord Thurlow characterized it as "an interval in which the mind, having thrown off the disease, had recovered its general habit." 3 Bro. C. C. 234. Possibly there may be such intermissions of absolute restoration but they are of rare occurrence. Usually, with apparent clearness, there is a real loss of mental force and acuteness,—not necessarily apparent to a superficial observer, but, upon critical examination, showing confusion of ideas and singularity of behavior indicative of serious though latent disease. In this condition the patient may hold some correct notions, even on a matter of business, and yet be quite incompetent to embrace all the relations connected with a contract or a will, even though no delusion was present to warp his judgment. This conclusion is aided by the recorded experiences of patients after entire recovery. See Georget, *Des Mal. Men.* 46; Reid, *Essays on Hypochondriacal Affections*, Essay 21; Combe, *Men. Derang.* 241; Ray, *Med. Jur.* 376.

Of late years the interest of the courts in connection with lucid intervals both in civil and criminal cases is confined to the ascertainment of the mental capacity of the person concerned with relation to the transaction in question. This idea has even been carried to the excess of treating the reasonableness of the act itself as the test of the capacity of the individual, or the existence of a lucid interval; 1 Phill. Lect. 90; 2 C. & P. 415. But this has been said to be a mere begging of the question, inasmuch as persons undeniably insane constantly do and say things which appear perfectly rational; 2 Hagg. 433, where two wills, both perfectly reasonable, were set aside because within a short time prior to their execution there had been admitted insanity. And it was said: "When there is not actual recovery, and a return to the management of himself and his concerns . . . the proof of a lucid interval is extremely difficult."

In criminal cases this difficulty is intensified, since the very term lucid interval implies that the disease has not disappeared, but only that its outward manifestations have ceased and there remains an abnormal condition of the brain, by whatever name it may be called, whereby the power of the mind to sustain provocations, resist temptations, or withstand any other causes of excitement, is greatly weakened. Being in their nature, as temporary and of uncertain duration, there is no presumption that they will continue; 104 Ala. 642; 30 id. 237; *contra*, 59 Wis. 569; and see 28 Ill. 306.

Lucid intervals are not to be confounded with periods of apparent recovery between two successive attacks of mental disorder, nor with transitions from one phase of insanity to another. These are said to be equivocal conditions during which persons subjected to them labor under a degree of nervous irritability, which renders them peculiarly susceptible to many of those incidents and influences which lead to crime; Ray, *Med. Jur. ch. Luc. Int.*

Both in civil and criminal cases the burden rests upon the party who contends for a lucid interval to prove it, since a person once insane is presumed so until it is shown that he had a lucid interval or has recovered; Co. Litt. 185, n.; 3 Bro. Ch. 441; 1

Pet. 103; 15 N. J. Eq. 348; 46 Ill. 338; 8 Can. S. C. 335. This presumption may be rebutted by proof of a change of mental condition and a lucid interval at the time; 41 Miss. 291; and it arises only where habitual insanity is shown, and in cases of temporary or recurrent insanity, no burden is thrown upon the party seeking to take advantage of the lucid interval; 35 L. R. A. (Miss.) 118; 13 Abb. Pr. n. s. 207; 80 Fla. 170; 116 Mo. 96; 1 Brews. (Pa.) 366.

A contract made during a lucid interval is valid; 92 Ga. 295; 139 Mass. 177. And the same is true of deeds, wills, and of the performances of any civil act. But where a lucid interval is relied upon, it must appear to have been of such a character as to enable the person to comprehend intelligently the nature and character of the transaction; 104 Ala. 642. Proof of a lucid interval, where it is required, must be made to the satisfaction of the jury; 66 Tex. 476. There is no presumption of continuance of a lucid interval, it is temporary in its nature; 104 Ala. 642.

Insane persons, during a lucid interval, are competent witnesses, but the question of their competency is for the court to determine when the witness is produced to be sworn; 3 Abb. N. C. 329, which see for a note on the practice in such cases.

The general rule "is that a lunatic, or person affected with insanity, is admissible as a witness, if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity;" 107 U. S. 519; 10 Allen 64; 158 Ill. 326; L. R. 11 Eq. 420; 97 Ala. 85; 30 Tex. App. 487; 25 Gratt. 865; 28 Conn. 177; 36 W. Va. 563. In *State v. Brown*, 36 Atl. Rep. (Del.) 458 (to be reported in 2 Marvel Del.), the witness was an inmate of an insane asylum and was admitted by an equally divided court to testify in a case of homicide in the asylum. The modern doctrine is that the fact of insanity goes to the credibility rather than to the competency of the witness; 5 Eng. L. & Eq. 547; 2 Den. C. C. 254; 5 Cox, C. C. 259; 4 Heisk. 565. See *Clevenger*, *Med. Jur. of Insan.* 607.

See 35 L. R. A. 117, n.; *INSANITY*.

LUCRATIVE OFFICE. One for which "pay, supposed to be an adequate compensation, is fixed to the performance of" its "duties." 3 Blackf. 329, where, under the Indiana constitution forbidding the holding of more than one lucrative office at one time, the offices of county commissioners and county recorder were held such. So also were prison director; 35 Ind. 111; mayor of a city; 35 id. 111; colonel of volunteers and reporter of the supreme court; 19 id. 351; otherwise as to the office of councilman in a city; 44 id. 405.

LUCRATIVE SUCCESSION. In *Scotch Law*. The passive title of *preceptio hereditatis*, by which, if an heir apparent receive gratuitously a part, however small, of the heritage which would come to him as an heir, he is liable for all the grantor's precontracted debts. *Erskine*, Inst. 3. 8. 87-89; *Stair*, Inst. 3. 7.

LUCRICAUSA (Lat. for the sake of gain). In *Criminal Law*. A term descriptive of the intent with which property is taken in cases of larceny.

Under modern decisions this ingredient is generally considered immaterial. In many English cases there is shown a tendency to resort to sophistical reasoning to avoid directly overruling the doctrine; 1 Den. C. C. 180; *id.* 193; *Russ. & R.* 307. In this country these cases have not been considered as authority; 18 Ala. 461. But the question has not been much discussed and the rule is generally considered well settled that it is sufficient if the taking be fraudulent and with the intent wholly to deprive

the owner of his property. See *LARCENY*. See also 16 Miss. 401; 10 Ala. n. s. 814; 3 Strobb. 506; 1 C. & K. 532; C. & M. 547; Inst. lib. 4. t. 1, § 1; 2 Bish. N. Cr. L. § 842; 30 S. W. Rep. (Tex.) 227; 26 id. 213.

LUCRUM. A small slip or parcel of land.

LUCRUM CESSANS. In *Civil Law*. A cession of gain. The amount of profit lost as distinguished from *dammum emergens*, an actual loss.

The actual loss sustained for the breach of contracts other than the mere non-payment of money which was covered by interest. Damages could be recovered in particular cases for both. *Howe*, *Stud. Civ. L.* 215.

LUGGAGE. Such articles of personal comfort and convenience as travellers usually find it desirable to carry with them. This term is synonymous with baggage: the latter being in more common use in this country, while the former seems to be almost exclusively used in England. 70 Cal. 169. See *BAGGAGE*.

LUMEN. In *Civil Law*. Light of the sun or sky.

LUMINA. Openings to obtain light in a building.

LUMINARE. A lamp or candle set burning on the altar of any church or chapel, for the maintenance whereof lands and rent-charges were frequently given to parish churches. *Kenn. Glos.*

LUMP COAL. In mining parlance, that which remains after the nut, slack and dirt have been separated from it by screening. 57 S. W. 12.

LUNACY. See *INSANITY*; *MANIA*.

LUNAR. Belonging to or measured by the moon.

LUNAR MONTH. See *MONTH*.

LUNATIC. One who is insane. See *INSANITY*; *DE LUNATICO INQUIREND*.

LUPINUM CAPUT GENERE. See *CAPUT LUPINUM*.

LUSHBOROW. A counterfeit coin, made abroad like English money, and brought in during Edward III.'s reign. To bring any of it into the realm was made treason. *Cowel*.

LYEF-GELD. In *Saxon Law*. Leave-money. A small sum paid by customary tenants for leave to plough, etc. *Cowel*; *Somn. on Gavelk.* p. 27.

LUXURY. Excess and extravagance, formerly an offence against public economy. *Whart.*

LYING. Saying that which is false, knowing or not knowing it to be so. Every deceit comprehends a lie, but a deceit is more than a lie on account of the view with which it is practised. 3 Term 56. See *DECEIT*; *MISREPRESENTATION*.

LYING ABOUT. An owner is liable to a penalty for cattle found lying about a highway; 3 Q. B. 345; but not where cattle being driven along a highway lie down for a short time and are then driven on again; *id.*

LYING AT ANCHOR. A vessel is lying at anchor when floating upon the water but held by her cable and anchor; 19 Hun 285; but not where beached with a cable attached to an anchor sunk in the bank; *id.*; or fastened to a pier; 77 N. Y. 453; 32 Ind. 453.

LYING IN GRANT. Incorporal rights and things which cannot be transferred by livery of possession, but which exist only in idea, in contemplation of law, are said to lie in grant, and pass by the mere delivery of the deed. See *GRANT*; *LIVERY OF SEISIN*; *SEISIN*.

LYING ON. Where this term is used in the description of metes, bounds, and

location of land, it imports in law as well as in fact that it extends to borders upon the boundary designated in the description. 4 Houst. 337.

LYING IN PORT. Where a vessel has been lying in port for a long time a policy "at and from" the port attaches as soon as preparations for the voyage are commenced, but if she changes ownership in port, it attaches only when the assured becomes owner; 1 Mas. 127; 2 Johns. Cas. 10; 1 Cai. 75; 2 Cai. Cas. 158.

LYING UP. A vessel insured against perils on the voyage or while lying up, was held to be within the meaning of this clause while she was being towed into the harbor; 5 Robt. 473.

LYING IN WAIT. Being in ambush for the purpose of murdering another.

Lying in wait is evidence of deliberation and intention. Where murder is divided into degrees, as in Pennsylvania, lying in wait is such evidence of malice that it makes the killing, when it takes place, murder in the first degree. See Dane, Abr. Index.

To constitute lying in wait, three things must concur: to wit, waiting, watching, and secrecy. 9 Humph. 651.

LYNCH LAW. A common phrase used to express the vengeance of a mob inflicting an injury and committing an outrage upon a person suspected of some offence. In England this is called Liddford

Law; in Scotland, Cowper Law, Jedburgh Justice.

The Ohio act (see *infra*) defines *lynching* and *mob* as follows: "That any collection of individuals, assembled for any unlawful purposes intending to do damage or injury to any one, or pretending to exercise correctional power over persons by violence, and without authority of law, shall for the purposes of this act be regarded as a 'mob,' and any act of violence exercised by them upon the body of any person, shall constitute a 'lynching.'" 92 Ohio Laws 136.

There are various theories as to the person from whom lynch law derived its name. That most generally accepted credits it to Col. James Lynch, a Virginian, who, in 1780, administered such law to the extent of whipping but not the death penalty against Tory conspirators. For the protection of himself and his associates an act of amnesty was passed by the Virginia legislature in October, 1782, in which their action was described as "not strictly warranted by law, although justified by the imminence of the danger." Another person mentioned in this connection was the founder of the town of Lynchburg, Virginia, and another, an Englishman, sent out in the seventeenth century under a commission to suppress pirates whom he summarily executed without trial. Another account ascribes the term to James Fitz-Stevens Lynch, mayor of Galway in 1493, who tried his son for murder and when prevented from publicly executing him, hanged him from the window of his own house. See Int. Cyc. Ht.; 5 Green Bag 116; 4 id. 561; 2 Inter-coll. L. J. 183.

All who consent to the infliction of capital punishment by lynch law are guilty of murder in the first degree when not executed in hot blood. The act strikingly combines the distinctive features of delib-

eration and intent to take life; 88 Conn. 126; 1 Whart. Cr. Law § 399.

Lynch law differs from mob law in disregarding the forms of ordinary law, while intending to maintain its substance; while mob law disregards both.

In Ohio the act for the suppression of mob violence (*supra*) provided that any person assaulted by a mob and suffering lynching should be entitled to recover from the county \$500; or, if the injury was serious, \$1,000; or if it resulted in permanent disability of earning a livelihood \$5,000. It also gave the county the right of recovering the amount of any judgment rendered against it from any of the parties composing the mob. This provision was held unconstitutional in specifying a definite recovery regardless of the actual damages suffered, being an encroachment of the legislature upon the judicial power, and so far as the damages awarded exceeded the actual damages suffered, it taxed the county for private interests; 15 Ohio Cir. Ct. 167, affirming 4 Ohio N. P. 249. This decision was followed in another county; 39 Wkly. L. Bul. 103.

LYON KING OF ARMS. In Scotch Law. An officer whose duty it formerly was to carry public messages to foreign states.

LYTÆ. In Old Roman Law. A name given to students of civil law in the fourth year of their course. Tayl. Civ. L. 89.

M.

M. The thirteenth letter of the alphabet.

Persons convicted of manslaughter, in England, were formerly marked with this letter on the brawn of the thumb.

This letter was sometimes put on the face of treasury notes of the United States, and signifies that the treasury note bears interest at the rate of one mill per dollar, and not one per centum interest.

MACE BEARER. In English Law. One who carries the mace, an ornamented staff, before certain functionaries. In Scotland an officer attending the court of session, and usually called a macer.

MACE-GREEFF. In Old English Law. One who willingly bought stolen goods, especially food. Brit. c. 29.

MACE-PROOF. Secure against arrest. Wharton.

MACEDONIAN DECREE. In Roman Law. A decree of the Roman senate, which derived its name from that of a certain usurer, who was the cause of its being made, in consequence of his exactions.

It was intended to protect sons who lived under the paternal jurisdiction from the unconscionable contracts which they sometimes made on the expectations after their fathers' deaths; another, and perhaps the principal object, was to cast odium on the rapacious creditors. It declared such contracts void. Dig. 15, 6, 1; Domat, Loix Civ. liv. 1, tit. 6, §4; Foulb. Eq. b. 1, c. 2, §12, note. See CATCHING BARGAIN; POST OBIT.

MACHECOLLARE. A warlike device made over a gate or other passageway through which hot water or offensive things may be cast upon the assailants. Co. Litt. 5 a.

MACHINATION. The act by which some plot or conspiracy is set on foot.

MACHINE. See PATENT.

MACHINE AND REPAIR SHOP. These words do not include woodwork; 23 U. C. C. P. 278.

MACHINERY. A more comprehensive term than machine, including the appurtenances necessary to the working of a machine; 111 Mass. 540; 108 id. 78; as the mains of a gas company; 12 Allen 75; or even a rolling-mill. 2 Sandf. 202.

Parts of a machine considered collectively; also the combination of mechanical means to a given end, such as the machinery of a locomotive, or of a canal lock, or of a watch; 44 La. Ann. 793. Those devices and parts of a car which have no physical operation and connection with the locomotive, except by means of the cars of a train, and the couplers between them are not within the meaning of the word as used in the exemption clause of a bill of lading; 47 U. S. App. 744; 81 Fed. Rep. 289. The mains or pipes laid in streets to distribute gas are "part of the machinery by means of which the corporate business (is) carried on;" 161 U. S. 316, 325. A saw is part of the machinery of a saw-mill; 44 Vt. 629; and iron and steel dies used in the manufacture of tinware are machinery; 111 Mass. 540.

The question of what machinery will pass under a mortgage of realty has been variously decided and will be found discussed under FIXTURES. The cases are collected in 11 Am. Rep. 314, note, and 24 id. 726, note. See 108 Mass. 81; 44 Ia. 64.

See HULL AND MACHINERY.

MACTATOR. A murderer.

MADMAN. See INSANITY.

MAD PARLIAMENT. The parliament held at Oxford in 1368, distinguished for the extreme character and the violence of its proceedings. Byrne. Called also "*Parliamentum Insanum*."

MADE KNOWN. Words used as a return to a writ of *scire facias* when it has been served on the defendant.

MÆG. A kinsman. 2 Poll. & Maitl. 241.

The larger group of individuals into which the Anglo-Saxon family were divided was called the *mægth* or *mægþurn*. At her marriage the wife did not become a member of her husband's *mægth* but remained in her own. If she committed a wrong her own kindred were responsible therefor, and the *wergild* of the husband was paid to his *mægth* as was that of the wife to hers. The *mægth* of the wife entrusted to her husband the guardianship over her, but constantly watched over his administration of the trust and interfered to protect her if necessary. The children belonged to both the *mægth* of the father and to that of the mother. The organization of the *mægth* offered a natural means to the mutual guaranty of personal safety, but as civilization became more advanced both the church and the state encouraged every tendency to weaken the tie of kinship as it became so strong as to threaten the rights of the king. See Essays, Ang. Sax. Fam. L. 121; 2 Poll. & Maitl. 241.

MÆGBOTE. A recompense for the slaying of a kinsman. Cowel. See WERGILD.

MÆL. See MALLUM.

MERE. Famous; great; noted.

MAGIC. Witchcraft and sorcery.

MAGISTER. A master; a ruler; a chief or superior.

MAGISTER AD FACULTATES (Lat.). In English Ecclesiastical Law. The title of an officer who grants dispensations: as, to marry, to eat flesh on days prohibited, and the like. Bacon, Abr. Eccles. Courts (A) 5.

MAGISTER CANCELLARIE. In Old English Law. A master in chancery.

These officers were said to be called *magistri*, because they were priests. Burrill; Whitlock, J. Latch, 133.

MAGISTER LIBELLORUM. Master of requests.

MAGISTER LITIS. Master of a suit.

MAGISTER NAVIS (Lat.). In Civil Law. Master of a ship; he to whom the whole care of a ship is given up, whether appointed by the owner, or charterer. L. 1, ff. *de exercit.*; *idem* § 3; Calvinus, Lex; Story, Ag. § 36.

MAGISTER PALATII. Master of the palace, an officer similar to the modern lord chamberlain. Tayl. Civ. L. 37.

MAGISTER SOCIETATIS (Lat.). In Civil Law. Managing partner. Vicat, Voc. Jur.; Calv. Lex. Especially used of an officer employed in the business of collecting revenues, who had power to call together the *tything-men* (*decumands*), as it were a senate, and lay matters before them, and keep account of all receipts, etc. He had, generally, an agent in the province, who was also sometimes called *magister societatis*. *Id.*; Story, Partn. § 95.

MAGISTRACY. In its most enlarged signification, this term includes all officers, legislative, executive, and judicial. For example, in some of the state constitutions will be found this provision: "the powers of the government are divided into three

distinct departments, and each of these is confided to a separate magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." In a more confined sense, it signifies the body of officers whose duty it is to put the laws in force; as, judges, justices of the peace, and the like. In a still narrower sense, it is employed to designate the body of justices of the peace. It is also used for the office of a magistrate.

MAGISTRALIA BREVIA (Lat.). Writs adapted to special cases, and so called because drawn by the *masters* in chancery. 1 Spence, Eq. Jur. 239. For the difference between these and *judicial writs*, see Bracton 418 b.

MAGISTRATE. A public civil officer, invested with some part of the legislative, executive, or judicial power given by the constitution. In a narrower sense this term includes only inferior judicial officers, as justices of the peace.

The president of the United States is the chief magistrate of this nation; the governors are the chief magistrates of their respective states.

It is the duty of all magistrates to exercise the power vested in them for the good of the people, according to law, and with zeal and fidelity. A neglect on the part of a magistrate to exercise the functions of his office, when required by law, is a misdemeanor. See 15 Viner, Abr. 144; Ayliffe, Pand. tit. 22; Dig. 30, 16, 57; Merlin, Rép.; 13 Pick. 523.

A federal law requiring an affidavit sworn to before a magistrate, is complied with "sworn to before me, J. M., Clerk of the Municipal Court," it being presumed that it was taken in the court; 36 Fed. Rep. 684. See JUDGE; JUSTICE OF THE PEACE.

MAGISTRATE'S COURT. In American Law. See COURT OF MAGISTRATES AND FREEHOLDERS.

MAGISTRATUS. A magistrate. A judicial officer who had the power of hearing and determining causes, but whose office properly was to inquire into matters of law, as distinguished from fact.

MAGNA ASSISA ELIGENDA. See GRAND ASSIZE.

MAGNA CENTUM. The great hundred or six score. Whart.

MAGNA CHARTA. The Great Charter of English liberties, so called (but which was really a compact between the king and his barons, and almost exclusively for the benefit of the latter, though confirming the ancient liberties of Englishmen in some few particulars), was wrung from king John by his barons assembled in arms, on the 19th of June, 1215, and was given by the king's hand, as a confirmation of his own act, on the little island in the Thames, within the county of Buckinghamshire, which is still called "Magna Charta Island."

The struggle to secure from the king some recognition of the rights of person and property and some settled administration of law had been going on for nearly two centuries. In fact it had begun soon after the time of William the Conqueror. That monarch had overthrown the laws he found prevailing in England and had distributed to his followers the lands of the conquered people. But the same arbitrary power which gave these estates could, at a moment's caprice, take them away, and the barons were anxious for a more stable system. The ancient baronial laws of Edward the Confessor contained all that was needed to secure their rights, and these ancient laws they petitioned to have restored. They renewed their efforts from time to time with William I., William Rufus, Henry I., and Stephen, all of whom, except Henry I., suc-

ceeded in putting them off with promises. From Henry a charter was extorted about the year 1100 declaring that the church should be free heirs, should receive their possessions unredeemed, and evil customs should be abolished. In fact it gave the church the privilege of holding lands afterwards embodied in Magna Charta. But in the course of a hundred years nearly all the copies of it were lost and its provisions were forgotten. It was not until John came to the throne in 1199 that the barons had their best opportunity. John's right to assume the crown was weaker than that of his predecessors, the barons he had to promise them the privileges for which they clamored, and with arms in their hands they compelled him to keep his word. Thomson, Magna Charta 2.

The preliminary interview was held in the meadow of Runnymede or Runnymede (fr. Sax. *runn*, council), that is, council meadow, which had been used constantly for national assemblies, and which was situated on the southwest side of the Thames, between Staines and Windsor. Though such formalities were observed, the provisions of the charter were disregarded by John and succeeding kings, each of whom, when wishing to do a popular thing, confirmed this charter. There were thirty-two confirmations between 1216 and 1416, the most celebrated of which were those by Hen. III. (1225) and Edw. I., which last confirmation was sealed with the great seal of England at Ghent, on the 5th November, 1297. Confirmatio Chartarum. The Magna Charta printed in all the books of 9 Hen. III. is really a transcript of the roll of parliament of 25 Edw. I. There were many originals of Magna Charta made, two of which are preserved in the British Museum.

An original was found early in the 17th century by Sir Robert Cotton, the antiquary, in the hands of a tailor, who was just on the point of cutting it into measuring strips, having bought it in a lot of old papers out of an apartment anciently used as a scrivener's office. L. Rec. 654.

It is a misunderstanding to regard the Charter either as containing new principles or as terminating a struggle. On the contrary its character is eminently conservative, setting up "the laws of Henry I." as its standard. At the same time "conservation" of the Charter was a rallying cry of the three next generations, and the constitution progressed up to 1340 is little more than the working out of the Charter's main clauses. 1 Soc. Eng. 267.

The Magna Charta of our statute-book is not exactly the charter that John sealed at Runnymede. It is a charter granted by his son and successor, Henry III., the text of the title of the original document having been modified on more than one occasion. 1 Soc. Eng. 410.

Magna Charta consists of thirty-seven chapters, the subject-matter of which is very various. C. 1 provides that the Anglican church shall be free and possess its rights unimpaired, probably referring chiefly to immunity from papal jurisdiction. C. 2 affixes relief which shall be paid by king's tenants, of full age. C. 3 relates to heirs and their being in ward. C. 4: guardsians of wards within age are by this chapter restrained from waste of ward's estate, *Waste hominum et rerum*, "waste of men and of things," which shows that serfs were regarded as slaves even by this much-boasted charter; and as serfs and freemen were at this time the divisions of society, and as freemen included, almost without exception, the nobility alone, we can see somewhat how much this charter reserves its name. C. 5 relates to the land and other property of heirs, and the delivering them up when the heirs are of age. C. 6: the marriage of heirs. C. 7 provides that a widow shall have quarantine of forty days in her husband's chief house, and shall have her dower set out for her at once, and shall have her dower in it, and in meanwhile to have reasonable estovers; the dower to be one-third of lands of the husband, unless the wife was endowed of less at the church-door; widow not to be compelled to marry, but to find surety that she will not marry without consent of the lord of whom she is held.

C. 8: the goods and chattels of crown-debtor to be exhausted before his rents and lands are distrained; the surety not to be called upon if the principal can pay; if sureties pay the debt, they to have the rents and lands of debtor till the debt is cleared. C. 9: the goods and chattels of cities and boroughs and town barons of the five ports, and all other ports, to have their ancient liberties. C. 10 prohibits excessive distress for more services or rent than was due. C. 11 provides that the courts of common pleas shall not follow the court of the king, but should be held in certain places. They were, accordingly, located at Westminster. C. 12 declares the manner of taking assizes of *novel disseisin* and *mort d'ancestor*. These were actions to recover lost seisin (q. v.), now abolished. C. 13 relates to assizes *darein presentibus*, brought by ecclesiastics to try right to present to ecclesiastical benefices. Abolished. C. 14 provides that amerement of a freeman for a fault shall be proportionate to his crime, and not excessive, and that the villain of any other than the king shall be amerced in the same manner, his farm, utensils, etc., being preserved to him. For otherwise he could not cultivate the lord's land. C. 15 and c. 16 relate to making of bridges and keeping in repair of sewers and seawalls. This is now regulated by local parochial law. C. 17 forbids sheriffs and coroners to hold pleas of the crown. Pleas of the crown are crimes committed by which it is desirable should not be tried by an inferior and perhaps ignorant magistrate. C. 18 provides that if any one holding a lay fee from the crown die, the king's bailiff, on showing letters patent of summons for default from the king, may attach all his goods and chattels, so that nothing be moved away till the debt to the crown be paid off clearly, the residue to go to the executors to perform the testament of the dead; and if there be no debt owing to the crown, all the chattels of the deceased to go to the executors, reserving, however, to the wife and children their reasonable parts. C. 19 relates to purveyance of the king's house; C. 20, to the castle-guard; C. 21, to taking horses, carts, and wood for use of royal castles. The last three

chapters are now obsolete. C. 22 provides that the lands of felons shall go to the king for a year and a day, afterwards to the lord of the fee. The day is added to prevent dispute as to whether the year is exclusive or inclusive of its last day. C. 23 provides that the *weirs* shall be pulled down in the Thames and Medway, and throughout England, except on the sea-coast. These *weirs* destroyed fish, and interrupted the floating of wood and the like down stream. C. 24 relates to the writ of *precipe in capite* for lords against their tenants offering wrong, etc. Now abolished. C. 25 provides a uniform measure. See 2 & 3 Will. IV. c. 68. C. 26 relates to inquisitions of life and member, which are to be granted freely. Now abolished. C. 27 relates to knight-service and other ancient tenures, now abolished.

C. 28 relates to accusations, which must be under oath. C. 29 provides that no freeman shall be taken, or imprisoned, or disseised from his freehold, or liberties, or immunities, nor outlawed, nor excommunicated, nor in any manner destroyed, nor will we come upon him or send against him, except by legal judgment of his peers or the law of the land. We will sell or deny justice to none, nor put off right or justice. This clause is very much celebrated, as confirming the right to trial by jury. C. 30 relates to merchant-strangers, who are to be civilly treated, and, unless previously prohibited, are to have free passage through, and exit from, and dwelling in, England, without any manner of extortions, except in time of war, if they are of a country at war with England, and found in England at the beginning of the war, they are to be kept safely until it is found out how English merchants are treated in their country, and then are to be treated accordingly. C. 31 relates to excommunication. C. 32, the power of alienation in a freeman, which is limited. C. 33 relates to patrons of abbeys, etc. C. 34 provides that no appeal shall be brought by a woman except for the death of her husband. This was because the defendant could not defend himself against a woman in single combat. The crime of murder or homicide is now inquired into by indictment. C. 35 relates to rights of holding county courts, etc. Obsolete. C. 36 provides that a gift of lands in *mortmain* shall be void, and lands so given go to the lord of fee. C. 37 relates to escheat and subsidy. C. 38 confirms the Charter.

The object of this statute was to declare and reaffirm such common-law principles as, by reason of usurpation and force, had come to be of doubtful effect, and needed therefore to be authoritatively announced, that king and subject might alike authoritatively observe them. Cooley, Const. Lm. 30.

Magna Charta is said by some to have been so called because larger than the Charta de Foresta (q. v.), which was given about the same time. Spelman, Gloss. But see Cowel. Magna Charta is mentioned casually by Bracton, Flota, and Britton. Glanville is supposed to have written before Magna Charta. The Mirror of Justices (q. v.) has a chapter on its defects. See Co. 2d Inst.; Barrington, Stat.; 4 Bla. Com. 423. See a copy of Magna Charta in *Laws of South Carolina*, edited by Judge Cooper, p. 78. In the *Penny Magazine* for the year 1836, p. 289, there is a copy of the original seal of King John affixed to this instrument; a specimen of a *fac-simile* of the writing of Magna Charta, beginning at the passage, *Nullo liber homo capiatur vel imprisonetur*, etc. A *fac-simile* has been published by Chitty & Wray, London. A copy of both may be found in the *Magnin Pittoresque* for the year 1834, pp. 52, 53. Magna Charta was published for the first time in America in a tract issued by William Penn called "The excellent Privilege of Liberty and Property," printed by Bradford at Philadelphia in 1687. Besides extensive extracts from Magna Charta and Coke's comments thereon, the tract contains the confirmation of the charters of the liberties of England and of the forest made in the 25 Edward I., the Statute de Tallagio, the royal charter of Pennsylvania, and Penn's charter of liberties to the freemen of the province. This tract having become very scarce, has been reprinted by the Philobiblion Club of Philadelphia, with an historical introduction by Dr. Frederick D. Stone. See Encyc. Brit.; Wharton, Lex.; Thomson; Wells, Magna Charta.

MAGNA NEGLIGENTIA. In Civil Law. Great negligence.

Magna negligentia culpa est. Gross negligence is fault. Burrill; Dig. 50, 16, 226.

MAGNA SERJEANTIA. In Old English Law. The grand serjeanty. Flota, lib. 2, c. 4, § 1.

MAGNUM CAPE. See GRAND CAPE.

MAGNUM CONCILIUM. In Old English Law. The great council, afterwards called "Parliament." 1 Bla. Com. 148.

MAGNUS ROTULUS STATUTORUM. The Great Statute Roll. The first English statute roll which begun with Magna Charta and ended with Edward III. Hale, Com. L. 16, 17.

MAIDEN RENT, or FEE. See MARCHET.

MAIHEM. See MAYHEM; MAIM.

MAIHEMATUS. Maimed or wounded.

MAHL BRIEF. A contract for building a ship, specifying her description, quality of materials, the denomination,

and size, with reservation generally that the contractor or his agent (usually the master of a vessel) may reject uncontract-worthy materials, and oblige the builder to supply others. Jac. Sea Laws 2, 8.

MAIDEN. A young unmarried woman. In an indictment for adultery, not necessarily a virgin. 69 Vt. 428.

An instrument formerly used in Scotland for beholding criminals.

MAIDEN ASSIZE. Originally an assize at which no person was condemned to die. Now a session of a criminal court at which no prisoners are to be tried. Whart.

MAIDEN RENTS. In Old English Law. A fine paid to lords of some manors, on the marriage of tenants, originally given in consideration of the lord's relinquishing his customary right of lying the first night with the bride of a tenant. Cowel.

MAIL. (Fr. *maille*, a trunk). The bag, valise, or other contrivance used in conveying through the post-office letters, packets, newspapers, pamphlets, and the like, from place to place, under the authority of the United States. The things thus carried are also called the mail. See LETTER; DECOY LETTER; POSTAL SERVICE; OBSCURITY.

MAIL MATTER. Letters, packets, etc., received for transmission, and to be transmitted by post to the person to whom such matter is directed. 30 Fed. Rep. 820. See PERIODICAL PUBLICATIONS.

MAIL MATTER, DOMESTIC. Includes matter deposited in the mails for local delivery, or for transmission from one place to another within the United States, or to or from or between the possessions of the United States, and is divided into four classes: **First Class.** Written matter, matter sealed against inspection, postal cards, and private mailing cards. **Second Class.** Periodical publications. **Third Class.** Miscellaneous printed matter (on paper) weighing 4 pounds or less. **Fourth Class.** (Parcel Post.) All mailable matter not included in the previous classes. U. S. Off. Postal Guide, 1924, p. 7. See PARCEL POST; MAILABLE, UNMAILABLE.

MAILABLE AND UNMAILABLE.

Refer to matter which may, or may not, be sent through the mails. For mailable matter see MAIL MATTER. Unmailable domestic matter is matter which is not admissible to the United States mails for dispatch or delivery in the United States or in any of its possessions. It includes: (1) Address defective: All matter illegibly, incorrectly, or insufficiently addressed. (2) Postage not prepaid: First-class matter not prepaid one full rate, and all other matter not fully prepaid. (3) Overweight and oversize: All matter exceeding the limit of weight or size prescribed by law. (4) Game killed or offered for mailing in violation of law. (5) Meat and meat-food products of cattle, sheep, swine, goats, and horses, presented without the required certificate of inspection or exemption. (6) Plants and plant products not accompanied with certificate required. (7) Poisons, liquors, live animals, fowls, etc., all included under the head of harmful articles or intoxicating liquors. (8) Tinsel, glass: Post cards and postal cards, bearing particles of glass, metal, mica, sand, tinsel, or other similar substances, are unmailable, except when enclosed in envelopes tightly sealed to prevent the escape of such particles, or when treated in such manner as will prevent the objectionable substance from being rubbed off. (9) Obscene and indecent matter. (10) Dunning postal cards. (11) Objectionable post cards. (12) Liquor advertisements. (13) Lottery and fraudulent matter. U. S. Off. Postal Guide, 1924, p. 18.

MAILE. In Old English Law. A small piece of money. A rent.

MAILED. As applied to a letter, it

means that the letter was properly prepared for transmission by the servants of the postal department, and that it was put in the custody of the officer charged with the duty of forwarding the mail. 67 Mo. 169. See LETTER.

MAILS AND DUTIES. In Scotch Law. Rents of an estate. Stair, Inst. 2. 13. 32; 2 Ross, Lect. 235, 381, 431-439.

MAIM. In Criminal Law. To deprive a person of such part of his body as to render him less able in fighting or defending himself than he would have otherwise been. Whart. Cr. L. § 581. In New York, under the Rev. Stat., a blow aimed at and delivered upon the head does not constitute the crime of assault and battery, with intent to maim; 50 N. Y. 598. Distinguished from wounding; 11 Cox, Cr. Cas. 125; 11 Ia. 414. See MAYHEM.

In Pleading. The words "Feloniously did maim" must of necessity be inserted, because no other word nor any circumlocution will answer the same purpose. 1 Chitty, Cr. L. 244.

MAIN CHANNEL. See CHANNEL.

MAIN SEA. See SEA.

MAINAD. A false oath; perjury. Cow.

MAINE. The name of one of the states of the United States of America, formed out of that part of the territory of Massachusetts called the district of Maine.

The territory embraced in the new state was not contiguous to that remaining in the state from which it was taken, and was more than four times as large. The legislature of Massachusetts, by an act passed June 13, 1819, gave its consent for the act of the district to become a separate and independent state. They met in convention, by delegates elected for the purpose, and formed a separate state, by the style of the *State of Maine*, and adopted a constitution for the government thereof, October 19, 1819, and applied to congress, at its next session, for admission into the Union. The petition was presented in the house of representatives of the United States, December 8, 1819, and the state was admitted into the Union by the act of congress of March 3, 1820, from and after the fifteenth day of March, 1820.

MAINOUR. In Criminal Law. The thing stolen found in the hands of the thief who has stolen it. See LARCENY.

MAINOVER or MAINŒUVRE. A trespass committed by hand. See 7 Rich. II. c. 4.

MAINPERNABLE. Capable of being bailed; one for whom bail may be taken; bailable.

MAINPERNORS. In English Law. Those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearance.

Mainpernors differ from bail; a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither; but are merely sureties for his appearance at the day; bail are only sureties that the party be answerable for all the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. 6 Mod. 231; 7 id. 77, 85, 98; 3 Bla. Com. 128. See DANE, ABR.; BAIL.

MAINPRISE. In English Law. The taking a man into friendly custody, who might otherwise be committed to prison, upon security given for his appearance at a time and place assigned. Wood, Inst. b. 4, c. 4. The writ of mainprise is now obsolete. See BAIL; BISH. CR. L. PROC. § 248.

MAINSWORN. Forsworn, by making a false oath with *hand (main)* on book. Used in the North of England. Brownl. 4; Hob. 125.

MAINTAINED. In Pleading. A technical word indispensable in an indictment for maintenance. 1 Wils. 325.

MAINTAINORS. In Criminal Law. Those who maintain or support a cause depending between others, not being retained as counsel or attorney. For this they may be fined and imprisoned. 2 Swift, Dig. 328; 4 Bla. Com. 124; Bacon, ABR. *Bar-rator*.

MAINTENANCE. Aid; support; as-

sistance; the support which one person, who is bound by law to do so, gives to another. See FATHER; CHILD; HUSBAND.

Where by the constitution it is made the duty of the state legislature to make sufficient appropriations for the maintenance of the state militia, such a constitutional provision is not intended to make the entire expense of the militia a general state charge, and a provision in the military code making the compensation of certain armorers and others a county charge is not in violation of such a provision; 46 N. E. Rep. (N. Y.) 851.

In Criminal Law. A malicious, or, at least, officious, interference in a suit in which the offender has no interest, to assist one of the parties to it against the other, with money or advice to prosecute or defend the action, without any authority of law. 1 Russ. Cr. 176; Archb. Cr. Pr. & Pl. 1839. See 4 Kent 446; Whart. Cr. L. § 1854.

An unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right. 51 Me. 63.

An officious intermeddling in a suit that no way belongs to one, by assisting either party to the disturbing of the community by stirring up suits. 49 Ohio St. 475.

At common law it signifies an unlawful taking in hand or upholding of quarrels, or sides, to the disturbance or hindrance of common right. The maintenance of one side, in consideration of some bargain to have part of the thing in dispute, is called champerty. Champerty, therefore, is a species of maintenance; 40 Conn. 570.

The intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing the litigation. 2 Pars. Contr. 8th ed. *766. See 4 Term 340; 4 Q. B. 883.

But there are many acts in the nature of maintenance which become justifiable from the circumstances under which they are done. They may be justified, *first*, because the parties have a common interest recognized by the law in the matter at issue in the suit; Bacon, ABR. *Maintenance*; 11 M. & W. 675; 9 Mete. 489, 262; 11 Me. 111; [1895] 1 Q. B. 339; *second*, because the party is of kindred or affinity, as father, son, or heir apparent, or husband or wife; 3 Cow. 623; 90 Tenn. 673; *third*, because the relation of landlord and tenant or master and servant subsists between the party to the suit and the person who assists him; *fourth*, because the money is given out of charity; 1 Bail. 401; *fifth*, because the person assisting the party to the suit is an attorney or counsellor; the assistance to be rendered must, however, be strictly professional, for a lawyer is not more justified in giving his client money than another man; 1 Russ. Cr. 179; Bacon, ABR. *Maintenance*; Brooke, ABR. *Maintenance*. This offence is punishable criminally by fine and imprisonment; 4 Bla. Com. 124; 2 Swift, Dig. 328. Contracts growing out of maintenance are void; 11 Mass. 549; 5 Humphr. 379; 20 Ala. n. s. 521; 5 T. B. Monr. 413; 5 Johns. Ch. 44; 4 Q. B. 883. See 1 Me. 292; 11 Mass. 553; 3 Cow. 647; 4 Wend. 306; 3 Johns. Ch. 508; 7 Dowl. & R. 846; 5 B. & C. 188; 2 Bish. Cr. Law 122; 61 Hun 633; 70 N. H. Rep. (Minn.) 809; 22 Can. S. C. R. 437. See 14 L. R. A. 785, n.; CHAMPERTY.

MAITRE. In French Maritime Law. Master; the master or captain of a vessel. Burrill; Ord. Mar. 2. 1. 1.

MAJESTAS. In Roman Law. The supreme authority of the state or prince.

Also, a contraction for *laesa majestas* or *crimen laesae majestatis*, i. e. treason. Abbott. The term was applied indifferently to that person, or part of the people, where the supreme authority rested. Burrill; Tayl. Civ. Law, 37.

MAJOR. One who has attained his full age and has acquired all his civil rights; one who is no longer a minor; an adult. See MAJORITY.

In Military Law. The officer next in rank above a captain.

For the use of the word in Latin *maxima*, see MAXIMS.

MAJOR-GENERAL. In Military Law. An officer next in rank above a brigadier-general. He commands a division consisting of several brigades, or even an army.

MAJORA REGALIA. The king's dignity, power, and royal prerogative, as opposed to his revenue, which is comprised in the *minora regalia*. 2 Steph. Com., 11th ed. 463; 1 Bla. Com. 240. See MINORA REGALIA.

MAJORES (Lat.). The male ascendants beyond the sixth degree. The term was used among the Romans, and is still retained in making genealogical tables.

MAJORITY. The state or condition of a person who has arrived at full age. He is then said to be a major, in opposition to minor, which is his condition during infancy. See FULL AGE.

The greater number. More than all the opponents.

Some question exists as to whether a majority of any body is more than one-half the whole number or more than the number acting in opposition. Thus, in a body of one hundred voters, in which twenty did not vote on any particular question, on the former supposition fifty-one would be a majority, on the latter forty-one. The intended signification is generally denoted by the context, and where it is not, the second sense is generally intended; a majority on a given question being more than one-half the number of those voting.

In every well-regulated society, the majority has always claimed and exercised the right to govern the whole society, in the manner pointed out by the fundamental laws; and the minority are bound whether they have assented or not, for the obvious reason that opposite wills cannot prevail at the same time, in the same society, on the same subject; 1 Tuck. Bla. Com. Appx. 168; 9 Dane, Abr. 37; 1 Story, Const., 5th ed. § 207.

As to the rights of the majority of part-owners of vessels, see 3 Kent 114; Pars. Marit. Law; PART-OWNERS. As to the majority of a church corporation, see 16 Mass. 488.

In the absence of all stipulations, the general rule in partnerships is that each partner has an equal voice, and a majority acting *bona fide* have the right to manage the partnership concern and dispose of the partnership property notwithstanding the dissent of the minority; but in every case when the minority have a right to give an opinion, they ought to be notified. See PARTNER.

As to the conflict of laws relating to majority, see 19 Am. Dec. 180.

In corporations, in the absence of any provision in the charter or constitution, the general rule is that, within the scope of the corporate affairs, the acts of a majority bind the corporation; 80 Pa. 42; 4 Biss. 78; 33 Conn. 396; see 18 Fed. Rep. 283. It is not necessary that those present at a meeting constitute a majority of all the members; 7 Cow. 42; a majority of those who appear may act; 88 Pa. 42; 104 Mass. 378; 5 Blatch. 525; 57 Ill. 416; s. c. 11 Am. Rep. 24; 33 Beav. 595. When, however, an act is to be performed by a select and definite body, such as a board of directors, a majority of the entire body is required to constitute a meeting; 9 Wend. 394; 16 Ia. 284; but if a quorum is present, a majority of such quorum may act; 23 N. H. 555; 13 Ind. 58. The minority of a committee to which a corporate power has been delegated cannot bind the majority, or do any valid act, in the absence of any special provision otherwise; 127 U. S. 579.

In political elections, a majority of the votes cast at an election on any question means the majority of those who voted on that question; 10 Minn. 107; 1 Sneed 637; 20 Ill. 159; 66 id. 414; 20 Wis. 544; 95 U. S. 389. "All qualified voters who absent themselves from an election duly called are presumed to assent to the express will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and

ought not to be adopted unless the legislative will to that effect is clearly expressed." *Id.* (Miller and Bradley, JJ., dissenting); but the opposite view is held in 35 Mo. 103; 16 Minn. 249; 69 Ind. 505. In the last case an amendment to the constitution received less than a majority of all those who voted at the election, but had a majority of the votes cast for or against the adoption of the amendment; and it was held (two judges dissenting) that the amendment had been neither ratified nor rejected. See 22 Alb. L. J. 44.

The United States House of Representatives has power to transact business when a majority of its members is present, and may prescribe any method which is reasonably certain to determine the presence of a majority; 144 U. S. 1. See ELECTION; MEETING; QUORUM; REORGANIZATION.

MAJUS JUS. A writ proceeding in some customary manors to try a right to land. Cow.

MAKE. To perform or execute; as, to make his law, is to perform that which a man had bound himself to do; that is, to clear himself of an action commenced against him, by his oath and the oath of his neighbors. Old Nat. Brev. 161.

To make default is to fail to appear in proper trial; to fail in a legal duty.

To make oath is to swear according to the form prescribed by law. It is also used intransitively of persons and things, to have effect; to tend. See Hardr. 133.

MAKER. A term applied to one who makes a promissory note and promises to pay it when due.

He who makes a bill of exchange is called the drawer; and frequently in common parlance and in books of reports we find the word drawer inaccurately applied to the maker of a promissory note. See PROMISSORY NOTE.

MAKING HIS LAW. A phrase used to denote the act of a person who wages his law. Bacon, Abr. Wager of Law.

MAL. A prefix meaning wrong or fraudulent.

MAL-TOLTE. In Old French Law. A term supposed to have arisen from the usurious gains of the Jews and Lombards in their management of the public revenue. Steph. Lect. 372.

MALA. (Lat.). Bad.

MALA IN SE. Acts morally wrong; offences against conscience. 1 Bla. Com. 57, 58; 4 id. 8. See MALA PROHIBITA.

Things bad, or wicked, in themselves. Taylor, L. Gloss. To be distinguished from things which are wrong because they are forbidden (*mala prohibita*). Blackstone says that to the offences *mala in se* we are bound in conscience, because we are bound by superior laws; but in relation to those laws which forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty to noncompliance, conscience is no farther concerned than by directing a submission to the penalty in case of our breach of those laws. 1 Bl. Com. 57, 58. Cf. MALA PROHIBITA.

MALA FIDES (Lat.). Bad faith. It is opposed to *bona fides*, good faith.

MALA PRAXIS (Lat.). Bad or unskillful practice in a physician or other professional person, whereby the health of the patient is injured. Present usage adopts rather the English term malpractice. See PHYSICIAN.

MALA PROHIBITA (Lat.). Those things which are prohibited by law, and therefore unlawful.

Crimes, made such, only by reason of statutory prohibition. 1 McClain, Cr. L. § 23.

The distinction was formerly made with respect to the right to recover upon a contract for doing an unlawful act between *mala prohibita* and *mala in se*, but it has been said that this "has been long since exploded," and that "it was not founded upon any sound principle,"—that it makes

no difference whether an act is forbidden because it is against good morals or against the interest of the state; 5 B. & Ald. 335, 340; 13 Pick. 519; 12 Q. B. Div. 121; and "it is now well settled that every contract to do a thing made penal by statute is void as unlawful;" Sharsw. note, 1 Bla. Com. 58.

In the criminal law the distinction is important with reference to the intent with which a wrongful act is done. Thus, a man in the execution of one act, by chance, does another one for which, if he had wilfully committed it, he would be liable to punishment,—if the act that he is doing were lawful or merely *mala prohibita*, he is not punishable for the act arising from chance; but if *mala in se*, it is otherwise. For instance, if a person unauthorized to kill game in England, contrary to the statutes, in unlawfully shooting at game, accidentally kills a man, it is no more criminal than if he were authorized; but if the accidental killing be the result of wantonly shooting at another's fowls, which is *mala in se*, as a trespass, it is manslaughter; 1 Bish. N. Cr. L. § 332; citing 1 East, P. C. 260; and see 37 Conn. 424; 114 Mass. 323; 1 Whart. Cr. L. § 25.

Mr. Bishop also considers that the rule that ignorance of the law is no excuse for crime is particularly harsh when applied to what is only *mala prohibita*; but that at the same time this is less important because most indictable wrongs are *mala in se*; 1 Bish. N. Cr. L. § 295.

It is said that "offences which are *mala in se* attract no additional turpitude from being declared unlawful by human legislation," while "*mala prohibita* are such acts as are in themselves indifferent," and become right or wrong, just or unjust, duties or misdemeanors, as the municipal legislature sees proper for protecting the welfare of society and more adequately carrying on the purposes of civil life; Anderson, Law Dict. In 22 Pick. 476, the court speak of offences "of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law."

"The substance of the distinction between *mala in se* and *mala prohibita* is that the former is more intensely evil than the latter." 1 Bish. N. Cr. L. § 658. Offences which have been judicially characterized in this country as *mala prohibita* are, violations of statutes against gambling and lotteries; 101 U. S. 814, 821; carrying concealed weapons; 90 Mo. 302.

Blackstone mentions as examples, game laws and laws against exercising certain trades without having served a certain apprenticeship, for not performing the statute-work on the public roads, and "for innumerable other positive misdemeanors," the subject of discussion being more particularly the effect of the mere prohibition of an act and affixing a penalty; he adds—"Now these prohibitory laws do not make the transgression a moral offence or sin; the only obligation in conscience is to submit to the penalty, if lawful. It must, however, here be observed that we are speaking of laws that are merely penal where the thing forbidden or enjoined is wholly a matter of indifference and where the penalty involved is an adequate compensation for the small inconvenience supposed to arise from the offence, but where disobedience to the law involves also in direct or public mischief or private injury, there it falls within our former distinction and is also an offence against conscience." 1 Bla. Com. 57. His "former distinction" is as to *mala in se* which we are in conscience bound to abstain from, apart from their being criminal. These views of Blackstone have been the subject of much criticism and are controverted in the notes of Christian, Sharswood, and Chase.

Aside from the considerations suggested by Bishop as above stated, the distinction between *mala prohibita* and *mala in se* is of little, if any, practical utility, and some crimes usually relegated to the former class are so generally recognized as such by statute as to be considered as covered by the criminal law in the same sense as *mala in se*; 1 McClain, Cr. L. § 23. Judicial notice is taken of them in a country where the common law prevails; 11 Mich. 337. See CRIME; MALUM IN SE.

MALADMINISTRATION. A term in law used interchangeably with misadministration and meaning "wrong administration." 14 Neb. 183.

MALANDRINUS. A thief or pirate. Wals. 333.

MALBERGE. A hill where the people assembled at a court, similar to the English assizes. Du Cange.

It was called by the Scotch and Irish "parley hills." Wharton; Du Cange.

MALE. Of the masculine sex; of the sex that begets young; the sex opposed to the female.

MALEDICTION (Lat.). In Ecclesiastical Law. A curse which was anciently annexed to donations of lands made to churches and religious houses, against those who should violate their rights.

MALEFACTOR (Lat.). He who has been guilty of some crime; in another sense, one who has been convicted of having committed a crime.

MALEFICIIUM (Lat.). In Civil Law. Waste; damage; tort; injury. Dig. 5. 18. 1.

MALFEASANCE. The unjust performance of some act which the party had no right, or which he had contracted not, to do. It differs from misfeasance and nonfeasance, which titles see. See 1 Chitty, Pr. 9; 1 Chitty, Pl. 134.

MALICE. In Criminal Law. The doing a wrongful act intentionally without just cause or excuse. 4 B. & C. 255; 9 Metc. 104. A wicked and mischievous purpose which characterizes the perpetration of an injurious act without lawful excuse. 4 B. & C. 255; 9 Metc. 104.

A conscious violation of the law, to the prejudice of another. 9 Cl. & F. 32.

That state of mind which prompts a conscious violation of the law to the prejudice of another. 9 Cl. & F. 32.

In a legal sense malice is never understood to denote general malevolence or unkindness of heart, or enmity towards a particular individual, but it signifies rather the intent from which flows any unlawful and injurious act committed without legal justification. 15 Pick. 337; 90 Ga. 95; 33 Me. 331; 7 Ala. n. s. 728; 2 Dev. 435; 4 Mas. 115; R. & E. 26, 465; 1 Mood. C. C. 93; 30 Fla. 142. It is not confined to the intention of doing an injury to any particular person, but extends to an evil design, a corrupt and wicked notion against some one at the time of committing the crime; Bacon, Max. Reg. 15; 2 Chitty, Cr. Law 737; 3 id. 1104; 90 Ga. 441.

Any formed design of mischief may be called malice. Malice is a wicked, vindictive temper, regardless of social duty, and bent on mischief. There may be malice, in a legal sense, in homicide, where there is no actual intention of any mischief, but the killing is the natural consequence of a careless action; Add. 156; 11 Fred. 261; 3 Cr. Law Mag. 216.

Express malice exists when the party evinces an intention to commit the crime; 3 Bulstr. 171.

Implied malice is that inferred by law from the facts proved; 11 Humphr. 172; 6 Blackf. 299; 1 East, Pl. Cr. 371. See 24 Neb. 838. In cases of murder this distinction is of no practical value; 2 Bish. N. Cr. L. § 675.

"Implied malice" is such as arises or may be inferred from the intentional doing of an unlawful or wrongful act with a wrongful purpose. 136 Ky. 468, 124 S. W. 409.

Malice is implied in every case of intentional homicide; and where the fact of killing is proved, all the circumstances of accident or necessity are to be satisfactorily established by the accused, unless they arise out of the evidence produced against him to prove the homicide and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. It is material to the just understanding of this rule that it applies only to cases where the killing is proved and nothing further is shown; for if the circumstances disclosed tend to exonerate the act, the prisoner has the full benefit of such

facts; 9 Meto. 98; 3 Gray 463.

Malice in fact is synonymous with "express malice," as distinguished from implied malice; 5 Ind. App. 76; 109 N. C. 370.

Malice in law is synonymous with implied malice; 5 Ind. App. 109; it is an act done wrongfully and wilfully, without reasonable or probable cause, and not necessarily an act done from ill feeling or spite, or a desire to injure another; 82 Neb. 444.

It is a general rule that when a man commits an act, unaccompanied by any circumstances justifying its commission, the law presumes he has acted with an intent to produce the consequences which have ensued. And therefore the intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon; 5 Cush. 305. See 3 M. & S. 15; 1 R. & R. Cr. Cas. 207; 1 East, Pl. Cr. 228, 232, 340; 15 Viner, Abr. 506; 98 Ala. 1; 95 id. 5; 89 Va. 379.

In Torts. A malicious act is a wrongful act, intentionally done without cause or excuse. 48 Mo. 152.

A malevolent motive for action without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another. 148 Mass. 368.

Malice "is improper and indirect motive," but a better definition is said to be, "A wish to injure the party, rather than to vindicate the law." Poll. Torts 303.

The evil mind that is regardless of social duty and the rights of others. 98 Tenn. 48.

In a libel. In connection with a privileged communication, malice is any direct and wicked motive which induces the writer to defame the other party. 109 N. C. 270. See 27 Alb. L. J. 184, 149; LIBEL.

In slander it is the absence of legal excuse; 81 Ind. 527; 5 Ind. App. 78. See SLANDER.

This term, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another; 11 S. & R. 39.

Malice consists in one's wilful doing of an act or wilful neglect of an obligation which he knows is liable to injure another, regardless of the consequences, and a malignant spirit or a specific intention to hurt an individual is not an essential element; 86 Fed. Rep. 308, per Brown, J. See 15 S. C. 409; 5 B. & A. 594; 51 Neb. 301.

It has been held that an act done in the exercise of a lawful right and without negligence may be unlawful if done with express malice; 25 Pa. 522; 113 id. 126; 7 H. L. Cas. 387; as persuading another to do, to the prejudice of a third person, something which he has a right to do, may give that third person a cause of action if the persuasion be malicious; [1895] 2 Q. B. 21, but this decision was reversed by the house of lords; [1898] A. C. 1; and the majority of the decisions tend to support the rule that an act in itself lawful is not converted by a malicious motive into an unlawful act, so as to make the doer liable to a civil action; id.; 24 Pa. 308; 72 N. Y. 39; 28 Vt. 49; and that no use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious; [1895] A. C. 587; and see 8 Harv. L. Rev. 1. Pecuniary dishonesty is held malicious; 101 Ill. 391.

A corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element; 86 Fed. Rep. 306. See 21 How. 202. See FALSE IMPRISONMENT; LIBEL; MALICIOUS PROSECUTION.

CF HEAT OF PASSION
LEGAL MALICE; PARTICULAR MALICE.
ADEQUATE PROVOCATION.

MALICE AFORETHOUGHT. A technical phrase employed in indictments, which with the word murder must be used to distinguish the felonious killing called murder from what is called manslaughter. Yelv. 205; 1 Chitty, Cr. L. 242; 1 Bish. Cr. L. § 429. In the description of murder the words do not imply deliberation, or the lapse

of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance; 5 Cush. 306; 116 Mo. 96; and the intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but it may spring up at the instant and may be inferred from the fact of killing; 164 U. S. 493; but premeditation may be an element showing malice when otherwise it would not sufficiently appear; 2 Bish. Cr. L. § 677. See 8 C. & P. 616; 3 Mas. 60; 1 D. & B. 131, 163; 6 Blackf. 299; 3 Ala. N. S. 497.

MALICIOUS. Doing a wrongful act without legal right. 56 S. W. 673. See BY MALICIOUS.

MALICIOUS ABANDONMENT. The forsaking without a just cause a husband by the wife, or a wife by her husband. See ABANDONMENT; DIVORCE.

MALICIOUS ARREST. A wanton arrest made without probable cause by a regular process and proceeding. See MALICIOUS PROSECUTION.

MALICIOUS INJURY. An injury committed wilfully and wantonly, or without cause. 1 Chitty, Gen. Pr. 136. See Whar. Cr., 9th ed. § 126 as to malice. See 4 Bla. Com. 143, 198, 206; 2 Russ. Cr. 544.

MALICIOUS MISCHIEF. An expression applied to the wanton or reckless destruction of property, and the wilful perpetration of injury to the person. Washb. Cr. L. 73.

The term is not sufficiently defined as the wilful doing of any act prohibited by law, and for which the defendant has no lawful excuse. To sustain to a conviction of the offence of malicious mischief, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge. Jacob, Law Dict. *Mischief, Malicious*; Alison, Sc. Law 448; 3 Cush. 558; 2 Meto. 21; 3 Dev. & B. 130; 5 Ired. 364; 8 Leigh 719; 3 Me. 177. See 73 Mich. 172; 26 S. W. Rep. (Tex.) 621; 49 Kan. 584.

This is a common-law offence; 19 Wend. 419; 1 Dall. 385; 9 Pick. 1; 48 Ark. 56; *contra*, 29 N. J. L. 96; 5 Den. 277; but there are in many states statutes on the subject, and it is now considered rather with reference to statutes; 2 McCl. Cr. L. § 811, where will be found an excellent classified collection of the statutes and cases under them. One may be convicted of maliciously injuring the property of another, without knowing who the owner is; 95 Ia. 491; but it is necessary to allege that the rightful possession of the property was in some person other than the defendant; 33 Tex. Cr. Rep. 554. In Georgia the statute is held applicable only to inanimate property and not to the case of a dog killed; 93 Ga. 111; but see 35 Neb. 638. The destruction of a boat by order of the owner of a pond, in an effort to protect his possession of the latter from trespasses of the owner of the boat who had repeatedly taken the boat back to the water after the defendant had hauled it away, is not malicious mischief; 142 N. Y. 366; and see S. C. 131 id. 111, where the advice of counsel was held no defence.

MALICIOUS PROSECUTION. A wanton prosecution made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result. Actions for malicious prosecution are not favored by the law; they are to be carefully guarded and their true principles strictly adhered to; 1 Ld. Raym. 374; 79 Mass. 201; 20 Ill. 354; Newell, Mal. Pros. 21.

Where the defendant commences a criminal prosecution wantonly, and in other respects against law, he will be responsible; 12 Conn. 219. The prosecution of a *civil suit*, when malicious, is a good cause of action, even when there has been no arrest; 11 Conn. 582; 1 Wend. 345. See 106 Mass. 300; Big. Torts 71; 65 Hun 365; 53 Minn. 489; Newell, Mal. Pros. 43. But see 1 Am.

Lead. Cas. 261; 21 Am. L. Reg. N. S. 287; 64 Ia. 741; 64 Pa. 289; 27 Ill. 439. In such cases the want of probable cause must be very palpable; very slight grounds will not justify an action; Big. Torts 71. See L. R. 4 Q. B. 780. On the whole the weight of authority seems to be against the maintenance of an action for the malicious prosecution of a civil suit in which no process other than the summons was issued; 66 Cal. 133; Newell, Mal. Pros. 37; 66 Ill. App. 516. The bringing of an ordinary action, however malicious, and however great the want of reasonable and probable cause, will not support an action for malicious prosecution; 11 Q. B. D. 690, *contra*, 42 Vt. 203; otherwise of bankruptcy proceedings maliciously instituted, without probable cause; 11 Q. B. D. 674; brought after the adjudication in bankruptcy has been set aside; 10 App. Cas. 210; and of civil proceedings begun by attachment, or by arrest; Poll. Torts 303; also, probably, of bringing and prosecuting an action maliciously and without probable cause in the name of a third person; *id*.

The action lies against the prosecutor, and even against a mere informer, when the proceedings are malicious; 9 Ala. 367. But grand jurors are not liable for information given by them to their fellow-jurors, on which a prosecution is founded; Hard. 536. Such action lies against a plaintiff in a civil action who maliciously sues out the writ and prosecutes it; 16 Pick. 453; but an action does not lie against an attorney at law for bringing the action, when regularly retained; 16 Pick. 478. See 6 Pick. 193. The attorney, however, must act in good faith. If an attorney knows that there is no cause of action, and dishonestly and with some sinister view, for some purpose of his own, or for some other ill purpose which the law calls malicious, causes the plaintiff to be arrested and imprisoned, he is liable; 34 Eng. C. L. R. 276; Newell, Mal. Pros. 23.

The action lies against a corporation aggregate if the prosecution be commenced and carried on by its agents in its interest and for its benefit, and they acted within the scope of their authority; 6 Q. B. D. 237; 9 Phila. 189; 23 Conn. 530; 130 Mass. 443; 73 Ind. 430; Poll. Torts 301, *contra*, 11 App. Cas. 250 (a dictum, see *id*. 244, 256). See also Cooley, Torts 131; 7 C. B. N. S. 290; 55 J. P. 264.

The proceedings under which the original prosecution or action was held must have been *regular*, in the ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge and to punish the supposed offender, the now plaintiff; 3 Pick. 379. When the proceedings are irregular, the prosecutor is a trespasser; 3 Blackf. 210.

The burden is on the plaintiff to prove affirmatively that he was prosecuted, that he was exonerated or discharged, and that the prosecution was both malicious and without probable cause; 11 Q. B. D. 440. Webb, Poll. Torts 392; Bish. Non-contr. L. §§ 218-250; 35 Md. 194; 48 Barb. 30; 3 Gill & J. 377; 12 Conn. 219; 8 Mass. 112.

Malice is a question of fact for the jury, and is generally inferred from a want of probable cause; 65 Hun 623; but it is not evidence of malice when the prosecutor honestly believes in the charge; [1891] 2 Q. B. 718; and such presumption is only *prima facie* and may be rebutted; 86 Ala. 250; see 41 La. Ann. 303; 45 Ill. App. 458; 65 Hun 625. Although absence of reasonable and probable cause is sometimes evidence of malice, yet it is not when the prosecutor actually believes in the charge; [1891] 2 Q. B. 718. From the most express malice, however, want of probable cause cannot be inferred; 35 Md. 194; 37 id. 232. Both malice and want of probable cause must concur in order to constitute a cause of action; 20 Nev. 290; 40 La. Ann. 374; 41 id. 311; 69 Tex. 167; 79 Ga. 637; 51 N. J. L. 391; 120 U. S. 141. The plaintiff must show total absence of probable cause, whether the original proceedings were civil or criminal; 1 Camp. 199; 7 Cra. 339; 1 Mas. 24; 11 Ad. & E. 483; 24 Pick. 81; 2 Wend. 424;

1 Hill S. C. 82; 3 G. & J. 877; 9 Conn. 309; 3 Blackf. 445; 47 Kan. 396; 158 Pa. 545.

Probable cause means the existence of such facts and circumstances as would excite the belief in a reasonable mind that the plaintiff was guilty of the offence for which he was prosecuted; 37 Md. 282; 86 Ala. 250. It is such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives; 1 Greenl. 185; a. c. 10 Am. Dec. 48. See, also, 72 Ill. 262; 83 id. 549; 4 Vt. 363; 62 N. Y. 525; 32 Neb. 444. Where there are grounds of suspicion that a crime has been committed and the interests of public justice require an investigation, there is said to be probable cause, however malicious the intention of the accuser may have been; Cro. Eliz. 70; 2 Term 231; 1 Wend. 140, 345; 5 Humph. 357; 3 B. Monr. 4; 55 Fed. Rep. 217. See 1 Pa. 284; 6 W. & S. 286; 1 Meigs 84; 3 Brev. 94; 37 Ill. App. 28. It is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offence with which he is charged; 14 U. S. App. 297. And probable cause will be presumed until the contrary appears; circumstances sufficient merely to warrant a belief by a cautious man are not sufficient, but the belief must be that also of a reasonable and prudent man; 151 Pa. 86. The plaintiff must prove affirmatively the absence of probable cause and the existence of malice, and where the defendant had a very treacherous memory, and went on with the prosecution under the impression that the plaintiff had committed perjury, yet if that was an honest impression, the result of a fallacious memory, and acting upon it, he honestly believed the plaintiff had sworn falsely, the English court of appeals held that the jury would not be justified in finding that the defendant had prosecuted the plaintiff maliciously and without probable cause; 8 Q. B. D. 174. It makes no difference how malicious may have been the private motives of the party in prosecuting; he is protected if there was probable cause; 55 Fed. Rep. 217.

Whether the circumstances relied on are true is a question for the jury; but whether if true they amount to probable cause is a question of law for the court; 2 Q. B. 169; 93 Cal. 222; 27 Me. 266; 10 N. Y. 240; 20 Ohio 119; 10 Q. B. 272; 47 Pa. 94; 93 Cal. 222; 21 Can. S. C. 588. Evidence that the prosecution was to obtain possession of goods, is proof of want of probable cause; 47 Pa. 194; so is evidence that the plaintiff began the prosecution for the purpose of collecting a debt. See 144 Ill. 83; 86 Tex. 497. Probable cause depends upon the prosecutor's belief of guilt or innocence; 48 Barb. 30; see *supra*; rumors are not, but representations of others are, a foundation for belief of guilt; 52 Pa. 419. The foreman of the grand jury, who has testified that the criminal prosecution was dismissed, cannot be asked why it was dismissed, because his testimony merely proves that the prosecution is at an end and has no bearing on the question of probable cause; and evidence that the prosecution was dismissed at the instance of the defendant without the plaintiff's knowledge is irrelevant either in bar of suit or in mitigation of damages; 81 Md. 518. When the defendant, in instituting the prosecution, went before a magistrate with his counsel, expecting to make the complaint in writing and that the warrant would be issued in the usual manner, he is not liable for the act of the magistrate in directing the arrest of the defendant without a warrant; 63 N. W. Rep. (Mich.) 301.

A warrant for the arrest of a person issued upon an affidavit which charged such person with being "guilty of lying and misrepresentation" is void as a criminal prosecution, and it has been held that it cannot serve as the basis of an action for malicious prosecution; 27 S. E. Rep. (Ga.) 680.

Malice may be inferred from the zeal and activity of the prosecutor conducting the

prosecution; 36 Md. 246. The advice of counsel who has been fully informed of the facts is a complete justification; 25 Pa. 275; 125 id. 453; 151 id. 86; 61 N. W. Rep. 390; 37 Minn. 147; 40 id. 418; otherwise, where it does not appear that a full disclosure of all the facts was made; 41 La. Ann. 303; 35 Fed. Rep. 466; 39 Minn. 107; 2 Misc. Rep. 303; and where the defendant acts on the advice of a magistrate or one not learned in the law; 36 Md. 246; 159 Pa. 374; 81 Ga. 668; but see 84 Me. 261; 96 Mich. 408. Where he acted on the advice of a public prosecuting officer, probable cause is established if he shows a disclosure to such officer of all the facts within his knowledge, or which he had reasonable ground to believe, though there were exculpatory facts which he might have ascertained by diligent inquiry; 49 Pac. Rep. (Oreg.) 803.

A waiver of preliminary examination by the defendant in a criminal prosecution raises a presumption of probable cause; 49 Pac. Rep. (Oreg.) 803.

The advice of counsel is not, however, conclusive of want of malice; 69 Tex. 167; and while a full and complete statement of facts to a reputable attorney is a complete defence, yet though the facts may be established beyond doubt the question of good faith is for the jury, when different minds might draw different conclusions from the evidence; 67 N. W. Rep. (Wis.) 49.

The fact that an attorney was consulted before prosecuting the plaintiff for opening his mail, is not admissible as proof of probable cause, when it also appears that the attorney gave defendant no advice, but referred him to the United States officers; 61 N. W. Rep. (Ia.) 390. See 33 Am. L. Rep. N. S. 391.

The malicious prosecution or action must be ended, and the plaintiff must show it was groundless, either by his acquittal or by obtaining a final judgment in his favor in a civil action; 1 Root 553; 7 Cow. 715; 2 Dev. & B. 492; 17 Or. 447. But see *contra*, as to civil suits; Big. Torts 73; 14 East 216; because the plaintiff in a civil suit can terminate it whenever he wishes to do so. The finding by the examining court that there was probable cause to believe the plaintiff guilty and the binding him over for trial is only *prima facie* evidence of probable cause, and probable cause cannot be shown by admission of the plaintiff after his arrest nor by the finding of property on his premises, similar to that stolen, if that fact was not known to the defendant when he began his prosecution; 13 Ind. App. 10; 63 N. W. Rep. (Ia.) 348. Any act which is tantamount to a discontinuance of a civil suit has the same effect; as where the plaintiff had been arrested in a civil suit, and the defendant had failed to have the writ returned, and to appear and file a declaration at the return term; 109 Mass. 158.

In criminal cases also, when the prosecuting officer enters a dismissal of the proceedings before the defendant is put in jeopardy, this act, in some jurisdictions, gives no right to the prisoner against the prosecutor; for instance, where, in a prosecution for arson, the prosecuting officer enters a *nolle prosequi* before the jury is sworn; 4 Cush. 217. See 56 Conn. 493; 151 Pa. 86; 73 Hun 547; 7 Ind. App. 581; 117 N. C. 31. The law on this point is unsettled. But it would seem that where the entry of the *nolle prosequi* is the mere act of the prosecuting attorney and no action of the court is had on it, the entry will not be an end of the proceedings, and for that reason would not warrant any action which could not be had before the proceedings were at an end. But when the court enters a judgment of discharge upon a *nolle prosequi* it seems to be a sufficient termination of the prosecution.

The remedy for a malicious prosecution is an action on the case to recover damages for the injury sustained; 5 Stew. & P. 367; 2 Conn. 700; 11 Mass. 500; 6 Me. 421; 3 Gill & J. 377. See CASE. The elements of damage in this action are very vague. The jury may consider the natural effect of the prosecution on reputation and feelings, the consequences of arrest, loss of time, injury

to property, and expense; 57 Ia. 474; 52 Ill. 85; Newell, Mal. Pros. 494. If the prosecution was begun without probable cause, and persisted in for some private end, punitive damages may be given; 37 Md. 282. See full article in 21 Am. L. Reg. N. S. 281. To be relieved from an action the defendant must rebut the *prima facie* proof of implied malice against him, by showing honest belief, grounded on probable and reasonable cause; 41 La. Ann. 303. It is sufficient if the facts or appearances are sufficient to induce a reasonable probability that the acts which constitute the crime have been done; 35 Fed. Rep. 261.

MALICIOUSLY. With deliberate intent to injure. 30 Conn. 85.

Maliciously suing out an attachment means not only malevolent intention to do injury, but also that careless disregard of the rights of others which, without real ill-will, the law implies as malice. Anderson; 12 F. R. 268. In a spirit of wicked revenge toward a person, or of wanton cruelty toward an animal. *Id.*; 7 Ala. 728. In misdemeanors and felonies, imports a criminal motive, intent or purpose. *Id.*; 9 Gray 303.

See WANTONLY and MALICIOUSLY.

MALIGNARE. To malign or slander; also to maim.

MALINGERING. See PARALYSIS.

MALITIA (Lat.). An express evil design. 4 Bl. Com. 199. Wickedness of purpose; malice. See MALICE.

MALITIA PRÆCOGITATA. Malice aforethought.

MALLEABLE. Capable of being drawn out and extended by beating; capable of extension by hammering; reducible to laminated form by beating. 46 Fed. Rep. 845.

MALLUM. In Old English Law. A court of the higher kind in a county in which the more important business was dispatched by the count or earl.

A public national assembly. Burrill; 1 Rob. Charles V. App. n. 40. Spelman considers this word to be of Saxon origin, but the radical import of it to be doubtful. The Saxon *mael* has the several meanings of an assembly, a plea or plaint, law or judgment, and a banquet. *Id.*

MALO ANIMO. With an evil intention; with malice.

MALO GRATO. In spite; unwillingly.

MALT LIQUOR. A general term for an alcoholic beverage produced merely by the fermentation of malt, as opposed to those obtained by a distillation of malt or mash (*q. v.*). Thorpe, National and State Prohibition, 158; 153 Ark. 317. See SPIRITUOUS LIQUORS.

MALT-TAX. An excise duty imposed upon malt in England. 1 Bla. Com. 813.

MALPRACTICE. See PHYSICIAN.

MALUM (L. Lat.). A misfortune; an infirmity; a sudden indisposition, by which a party was prevented from appearing in court when summoned.

MALUM PROHIBITUM (Lat.). A wrong prohibited; an act prohibited as wrongful; an act involving an illegality resulting from positive law. See MALA PROHIBITA; MALA IN SE.

MALUM IN SE (Lat.). Evil in itself. A crime by reason of its inherent nature. 1 McClain, Cr. L. § 23.

An offence *malum in se* is one which is naturally evil, as murder, theft, and the like; offences at common law are generally *malum in se*. An offence *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden, as playing at games which, being innocent before, have become unlaw-

ful in consequence of being forbidden. See Bacon, *Abr. Assumpsit* (a); 1 Kent 468; *MALA PROHIBITA*.

MALVEILLES. Ill will. In some ancient records this word signifies malicious practices, or crimes and misdemeanors.

MALVEIS PROCURORS. Such as used to pack juries, by the nomination of either party in a cause, or other practice. Cow.

MALVERSATION. In French Law. This word is applied to all punishable faults committed in the exercise of an office, such as corruptions, exactions, extortions, and larceny. Merlin, *Répert.*

MAN. A human being. A person of the male sex. A male of the human species above the age of puberty.

In its most extended sense the term includes not only the adult male sex of the human species, but women and children: examples: "of offences against man, some are more immediately against the king, others more immediately against the subject." Hawk. Pl. Cr. b. 1, c. 2, s. 1. "Offences against the life of man come under the general name of homicide, which in our law signifies the killing of a man by a man." *Id.* book 1, c. 8, s. 2.

It was considered in the civil or Roman law that although man and person are synonymous in grammar, they had a different acceptance in law; all persons were men, but all men—for example, slaves—were not persons, but things. See Barringt. Stat. 216.

MAN OF WAR. See SEAMAN.

MANACLE. See FETTERS.

MANAGE. Direct; control; govern; administer; oversee. 144 Pa. 377.

In so far as the use of the word is drawn in question in adjudications, it is generally applied to affairs somewhat complex and extended, and requiring a degree of authority, discretion, and judgment, to ensure satisfactory conduct of them. Abbott.

MANAGEMENT. In the Harter Act, relates to management on the voyage and not to the master's acts in stowing the ship with reference to her stability and seaworthiness; 81 Fed. Rep. 665.

Direction; oversight. In speaking of corporations, management is sometimes used for the body of persons charged with the conduct of the corporate affairs, in the same way as the direction or the directory is sometimes used for the board having the management or direction. Abbott. The management of an engine consists in part of the management of whatever generates the motive force. Anderson. 10 R. I. 28.

MANAGER. A person appointed or elected to manage the affairs of another. A term applied to those officers of a corporation who are authorized to manage its affairs.

One who has the conduct or direction of anything. 144 Pa. 377.

One of the persons appointed on the part of the house of representatives to prosecute impeachments before the senate.

In banking corporations these officers are commonly called directors, and the power to conduct the affairs of the company is vested in a board of directors. In some private corporations, such as railroad companies, canal and coal companies, and the like, these officers are called managers. Being agents, when their authority is limited, they have no power to bind their principal beyond such authority; 17 Mass. 29; 1 Me. 81.

In England and Canada the chief executive officer of a branch bank is called a manager. His duties are those of our presidents and cashiers combined. His signature is necessary to every contract binding on the bank, except entries in the pass-books of customers. He indorses bills, signs bills of exchange and drafts, and con-

ducts the correspondence of the bank. He is under the control of the board of directors of the bank, and there is usually a local or branch board of directors, at which he acts as presiding officer. Sewell, Bank.

MANAGING AGENT. An agent having general supervision over the affairs of a corporation. Anderson; 16 Wis. 235. Distinguishes a person, representing a corporation, who is invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee who acts in an inferior capacity; and under the discretion and control of superior authority, both in regard to the extent of the work and the manner of executing it. *Id.*; 19 Hun. 408. Such agent need not have charge of the whole business of the corporation. *Id.*; 35 Hun. 371. In several cases in New York, it has been held that "managing agent" means a person exercising the functions of an officer in the control and management of the business of a company or corporation, and does not include a person having charge of some special work, as, a baggage-master in respect to baggage, or a person employed to purchase horses and feed, or an assistant secretary, or a person who sells tickets, or who has charge of the transfer of the stock and the transmission of assessments. The adjudications have not gone so far as to hold that no agent is a "managing agent" who does not participate in the control of every part of the corporate business, and of every corporate act. *Id.*; 31 F. R. 295.

In England and Canada. The chief executive officer of a branch bank. *Id.* A member of the impeaching branch of a legislature, selected to assist as counsel at a trial. *Id.*

MANBOTE. A compensation paid the relations of a murdered man by the murderer or his friends.

MANCHE PRESENT. A bribe; a present from the donor's own hand.

MANCIPATE. To enslave; to bind up; to tie.

MANCIPATIO. In Roman Law. The legal form of conveyance and of fixing the relations between parties. Morey, R. L. 2. See MANUMISSION; MANCIPIUM. MANCIPIATORY WILL.

MANCIPIATORY WILL. A will by which a man's estate was conveyed to another to dispose of after his death to heirs whom the purchaser of the estate should name. Later, a person was appointed heir in the will through whom the legacies were left; and someone else, for form's sake, was employed as *familiae emptor* (purchaser of the estate). (G. 2, 103.) Because this type of will was really a conveyance of property, it was made *per aes et libram* (q. v.). The procedure took the form of a conveyance (*mancipatio*), i. e., an imaginary sale in the presence of five witnesses and a balance-holder, all Roman citizens over puberty, and of the *familiae emptor*. (J. 2, 10, 1.) At first this will took effect as a simple conveyance; it really became a will only when the estate was conveyed to a purchaser merely for the sake of form, and the heir was not disclosed until the death of the testator. Hunter, Rom. L., p. 767, 768.

A form of testamentary disposition of property.

"The testator, in the presence of five witnesses and a *libripens*, mancipates (i. e. sells) his estate (*familia pecuniaria*) to a third party, the so-called *familiae emptor*, with a view to imposing upon the latter, in solemn terms (*mancipatio*), the duty of carrying out his last wishes as contained and expressed in the *tabulae testamenti*. The object of the transaction is to make the *familiae emptor* not the material, but only the formal owner of the estate. His actual duties consist in the carrying out of the testator's intentions and the handing over of the property to the persons named in the *tabulae testamenti*, the *familiae emptor* is neither more nor less than the executor of the testator." Sohm, Rom. L. 450.

This is said by the same author to be the oldest form of the Roman contract of *mandatum*. "A juristic act validly concluded, not indeed *consensus*, but *re* (viz. by a formal conveyance of ownership), and a juristic act giving rise to a rigorously binding obligation. The *mandatum* and the conveyance of

ownership are not mutually incompatible. The *familiae emptor* is the mandatory of the testator, because he is, formally speaking, the owner of the *familia*." Sohm, Rom. L. 461.

MANCIPIUM. The power acquired over a freeman by the *mancipatio*.

To form a clear conception of the true import of the word in the Roman jurisprudence, it is necessary to advert to the four distinct powers which were exercised by the *pater familias*, viz.: the *manus*, or marital power; the *mancipium*, resulting from the *mancipatio*, or *alienatio per aes et libram*, of a freeman; the *dominica potestas*, the power of the master over his slaves, and the *patria potestas*, the paternal power. When the *pater familias* sold his son, *venum dare*, *mancipare*, the paternal power was succeeded by the *mancipium*, or the power acquired by the purchaser over the person whom he held in *mancipio*, and whose condition was assimilated to that of a slave. What is most remarkable is, that on the emancipation from the *mancipium* he fell back into the paternal power, which was not entirely exhausted until he had been sold three times by the *pater familias*. *Si pater filium ter venum dat, filius a patre liber esto*. Gaius speaks of the *mancipatio* as *imaginary quaedam venditio*, because in his times it was only resorted to for the purpose of adoption or emancipation. See 1 Ortolan, 112; Morey, Rom. L. 28, 32; Sohm, Inst. R. L. 124, 390; ADOPTION; PATER FAMILIAS.

MANCOMUNAL. In Spanish Law.

A term applied to an obligation when one person assumes the contract or debt of another. Schmidt, Civ. L. 120.

MANDAMIENTO. In Spanish Law. Commission; power of attorney. A *bona fide* contract by which one person commits his affairs to the charge of another, and the latter accepts the charge. White, New Recop. b. 2, tit. 12, c. 1.

MANDAMUS. In Practice. This is a high prerogative writ, usually issuing out of the highest court of general jurisdiction in a state, in the name of the sovereignty, directed to any natural person, corporation, or inferior court of judicature within its jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. 3 Bla. Com. 110; 4 Bacon, *Abr.* 495; per Marshall, C. J., in *Marbury v. Madison*, 1 Cra. 137, 168. See 3 Wyo. 588. It is a common-law writ with which equity has nothing to do; 76 Ga. 725.

It is an extraordinary remedy in cases where the usual and ordinary modes of proceeding are powerless to afford remedies to the parties aggrieved, and when, without its aid, there would be a failure of justice; 88 Va. 942. It confers no new authority and the party to be coerced must have the power to perform the act; 129 U. S. 493. *Mandamus* has been termed a "criminal process relative to civil rights;" 3 Brev. 264.

Its use is well defined by Lord Mansfield in *Rex v. Barker*, 3 Burr. 1265: "It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions when the law has established no specific remedy, and where, in justice and good government there ought to be one." "If there be a right, and no other specific remedy, this should not be denied." The same principles are declared by Lord Ellenborough, in *Rex v. Archbishop of Canterbury*, 8 East 219. See 6 Ad. & E. 321. The writ of *mandamus* is the supplementary remedy when the party has a clear right, and no other appropriate redress, in order to prevent a failure of justice. 12 Petersd. *Abr.* 438 (309). It is the absence of a specific legal remedy which gives the court jurisdiction; 2 Selw. N. P. *Mandamus*; 29 Pa. 131; 34 *id.* 496; 41 Me. 15; 2 Pat. & H. 385; but the party must have a perfect legal right; Beach, Pub. Corp. § 1559; 27 Mo. 225; 11 Ind. 205; 20 Ill. 525; 25 Barb. 73; 2 Dutch. 135; 3 Cal. 167; and there must be a positive ministerial duty to be

performed and no other appropriate remedy; 31 S. C. 81; 128 U. S. 246; 85 Ky. 177; 83 Neb. 641.

Under the English system this writ acquired, and may probably be still said to retain, its prerogative character; but in the United States it is becoming more and more assimilated to an ordinary remedy, to the use of which the parties are entitled as of right. It was in this sense that Taney, C. J., characterized it in modern practices as "nothing more than an action at law between the parties"; 24 How. 66; see, also, 33 Conn. 296; High, Extr. Leg. Rem. § 4. There is a tendency, however, in some states to adhere to the prerogative idea; 26 N. Y. 316; 33 Ill. 184; 48 id. 240. Though in the last named state, the prerogative idea seems to have been lost under the statutory use of the writ, while the discretionary character remains; 86 id. 283. It may be said to remain in this country an extraordinary remedy at law in the same sense that injunction is an extraordinary remedy in equity; High, Extr. Leg. Rem. § 5. The injunction is preventive and conservative, its object being to preserve matters *in statu quo*. Mandamus is remedial, tending to compel action and redress past grievances; *id.* § 6, and cases cited. Mandamus cannot be used as a preventive remedy to take the place of an injunction; 42 Md. 203.

Mandamus is a remedial process, and is not available to compel the performance of an act that will work public or private mischief, or to compel compliance with the strict letter of the law in disregard of its spirit, or in aid of a palpable fraud, or to evade the payment of a just portion of a tax by taking advantage of a confessed mistake; 137 N. Y. 201.

The remedy extends to the control of all inferior tribunals, corporations, public officers, and even private persons in some cases. But more generally, the English court of king's bench, from which our practice on the subject is derived, declined to interfere by mandamus to require a specific performance of a contract when no public right was concerned; Ang. & A. Corp. 761; 6 East 356; Bacon, Ab. Mandamus; 28 Vt. 587.

Mandamus may be granted by an appellate court to require a judge of the court to settle and allow a bill of exceptions; 18 Or. 219; 30 W. Va. 58; 128 U. S. 544. See 129 Ill. 218. It will also lie to compel an inferior court to exercise a discretion; 44 La. Ann. 1031; but not to compel the court below to decide in a particular way, or to operate as a substitute for an appeal or writ of error, even if none is given by law; 155 U. S. 396.

It is a proper remedy to compel the performance of a specific act where the act is ministerial in its character; Moraw. Priv. Corp. 15; 12 Pet. 524; 34 Pa. 293; 26 Ga. 665; 7 Ia. 186, 390; but where the act is of a discretionary nature; 6 How. 92; 12 Cush. 403; 20 Tex. 60; 10 Cal. 376; 5 Harring. 108; 12 Md. 329; 145 N. Y. 253; 4 Mich. 187; 5 Ohio St. 528; or judicial nature; 14 La. Ann. 60; 7 Cal. 130; 18 B. Monr. 423; 7 E. & B. 366; it will lie only to compel action generally; 11 Cal. 42; 30 Ala. n. s. 49; 23 Mo. 259; 96 id. 75; 31 W. Va. 781; 85 Ala. 226; 40 La. Ann. 818; 119 Ind. 444; 85 Ky. 177; 51 N. J. L. 479; 120 Pa. 518; and where the necessity of acting is a matter of discretion, it will not lie even to compel action; 6 How. 92; 5 Ia. 390. A class of cases in which this distinction is constantly drawn into question is where a mandamus is applied for to control the letting of public or municipal contracts, and it is the general rule that the remedy will not be applied to compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder; 9 Wash. 518. The provision that the contract shall be let to the lowest responsible bidder is mandatory, but the municipal board has a discretion in determining the question of responsibility, and their decision will not be reviewed on mandamus even though erroneous; 108 Pa. 559; 63 Ill. 279; 16 Nev. 217; 91 Mo. 886, *contra*,

21 Ohio 311; 4 Neb. 150; in other cases it is held that where the contract has been entered into with another and expense incurred, a mandamus will not be issued; 27 N. Y. 378 (and see 72 id. 496; 46 Barb. 254); 47 Mich. 135; 91 id. 262; others, again, hold that, the statutes being for the public benefit, the relators have not a clear legal right; 24 Wis. 683; 76 Md. 395; 45 Vt. 7; 23 Ia. 203. The writ is also refused where the matter is left entirely to the discretion of the authorities, with no provision about the lowest bidder; 141 Mass. 74; 35 Neb. 346; 78 Ia. 97; 49 Barb. 259. Where before the application the work was readvertised and the same person made a lower bid, under which he obtained the contract, a mandamus was refused; 155 U. S. 303. See 33 Am. L. Reg. 899.

Writs of mandamus have been issued from very early times to the ecclesiastical courts to compel them to absolve an excommunicated person who wished to conform to the orders of the church; 1 Palmer 50; to compel the Dean of Arches to hear an appeal; 7 E. & B. 315; but a mandamus is refused where the judge has absolute discretion, and it is said that a mandamus has never been granted to deprive one of office; Shortt, Mand. & Pro. 289; in such cases the remedy is by *quo warranto*.

This remedy will be applied to compel a corporation or public officer; 14 La. Ann. 265; 41 Me. 15; 3 Ind. 452; see 7 Gray 280; to pay money awarded against them in pursuance of a statute duty, where no other specific remedy is provided; 6 Ad. & E. 335; 34 Pa. 496; see 69 Tex. 589; 16 Or. 355; or where the money is in an officer's official custody, legally subject to the payment of such demand; 76 Cal. 269; but if debt will lie, and the party is entitled to execution, mandamus will not be allowed; Redf. Railw. § 158; 6 C. B. 70; 13 M. & W. 628; 4 B. & A. 360; 1 Q. B. 288. But mandamus will not be granted to enforce a matter of contract or right upon which an action lies in the common-law courts, as to enforce the contract of common carriers; 7 Dowl. P. C. 566; 31 Fla. 482; or where the proper remedy is in equity; 16 M. & W. 451. But where compensation is claimed for damages done partly under the powers of a statute and partly not, mandamus is the proper remedy; 2 Railw. & C. Cas. 1; Redf. Railw. § 158. Mandamus will not issue to compel the secretary of state to pay money in his hands to one party, which is claimed by another party, and the right to which is in litigation; 127 U. S. 246. Nor will the supreme court of the United States interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties; 128 U. S. 40; but it will issue where the law requires them to act, or when they refuse to perform a mere ministerial duty; 135 U. S. 200; 137 id. 636; 139 id. 306. It lies to compel the performance of a statutory duty only when it is clear and indisputable and there is no other legal remedy; 127 U. S. 246.

Mandamus is the appropriate remedy to compel corporations to produce and allow an inspection of their books and records, at the suit of a corporator, where a controversy exists in which such inspection is material to his interests; 2 Stra. 1223; 3 Term 141; 4 Maule & S. 162; 7 Houst. 338; s. c. 25 Am. L. Reg. n. s. 594.

It lies to compel the performance by a corporation of a variety of specific acts within the scope of its duties; 34 Pa. 496; 26 Ga. 665; 2 Metc. Ky. 56; 84 Ill. 303; s. c. 25 Am. Rep. 461; 39 Minn. 219; 31 Fla. 482; 142 U. S. 492.

But in order to permit the use of this remedy to compel corporate action, there must be a clear legal obligation on the part of the corporation to act in the manner suggested, and the coincidence of the other conditions required to warrant the issuing of the writ, such as the absence of any other adequate legal remedy. Accordingly a mandamus has been refused to compel street car companies to operate an abandoned portion of a line where the charter did not clearly require its operation; 90

Tex. 520; or to keep cars running during the whole year, as that would involve the performance of a long series of continuing acts involving personal service, and extending over an indefinite time; 28 Ont. 399. So a railroad company as purchaser of a branch railroad at a foreclosure sale, will not be compelled to maintain and operate it at a loss where the business can be otherwise handled; 26 S. E. Rep. (Va.) 943.

The general rule on this subject is, that, if the inferior tribunal or corporate body has a discretion, and acts and exercises it, this discretion cannot be controlled by mandamus; but if the inferior body refuse to act when the law requires it to act, and the party has no other legal remedy, and where in justice there ought to be one, a mandamus will lie to set them in motion, and to compel action, and in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction; Dill. Mun. Corp., 4th ed. § 828; 52 Ala. 87. The writ may be issued where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise; 131 U. S. 221; 147 id. 14; *id.* 486; 150 id. 150.

It is the common remedy for restoring persons to corporate offices of which they are unjustly deprived; Beach, Pub. Corp. §§ 194, 1587; 41 Kan. 122; the title to the office having been before determined by proceeding by *quo warranto*; but it will not lie to try the title to an office of which there is a *de facto* incumbent; 52 Ala. 87; 1 Burr. 402; 1 Ld. Raym. 426; 1 Salk. 314; 2 Head 650; 54 Me. 95; 17 Or. 640; see 83 Wis. 416; 49 Neb. 755; 58 N. J. L. 541; unless *quo warranto* does not lie; 3 Johns. Cas. 79; but see 20 Barb. 302; 9 Md. 83; 15 Ill. 492. And see the cases fully reviewed in Redf. Railw. § 159. Mandamus will lie to compel acceptance of municipal office by one who, possessing the requisite qualifications, has been duly appointed to the same; 145 Ill. 573. It will issue out of the supreme court to restore to his office an attorney at law illegally disbarred by the judgment of a circuit court; 30 Fla. 302.

This remedy must be sought at the earliest convenient time in those cases where important interests will be affected by the delay; 12 Q. B. 448. But it is often necessary to delay in order to determine definitely the rights and injuries of the several parties concerned, as until public works are completed; 9 Dowl. P. C. 614; 4 Q. B. 877.

It is no sufficient answer to the application that the party is also liable to indictment for the act complained of; 2 Railw. Cas. 599; 3 Q. B. 528. And where a railway company attempted to take up their rails, they were required by mandamus to restore them, notwithstanding they were also liable to indictment, that being regarded as a less efficacious remedy; 2 B. & Ald. 646. But mandamus will always be denied when there is other adequate remedy; 11 Ad. & E. 69; 1 Q. B. 288; Redf. Railw. § 159. See 97 Ala. 107; 98 Cal. 602.

It is not a proper proceeding for the correction of errors of an inferior court; 13 Pet. 279, 404; 18 Wend. 79; 18 La. Ann. 481; 7 Dowl. & R. 334; but see 140 U. S. 91; or where there is adequate remedy by appeal; 97 Mich. 620; 98 Cal. 602; 148 U. S. 107; *id.* 14; or by certiorari; 97 Mich. 637; 88 W. Va. 485. Indeed, by statute 6 & 7 Vict. ch. 67, § 2, the decisions of the English courts upon proceedings in mandamus may be revised on writ of error, and upon principle a writ of error will lie when the decision is made to turn upon a question of law and not upon discretion merely; Redf. Railw. § 159.

The writ is not demandable, as matter of right, but it is to be awarded in the discretion of the court; 1 Term 331, 396, 404, 425; 49 Barb. 259; 95 Cal. 450; Redf. Railw. § 159. But where a clear legal right to a writ is shown, the court has no discretion about granting it; 143 Ill. 434.

A petition for a mandamus to a public

officer abates by his resignation of his office; 165 U. S. 28, where it was said that this principle has for years been considered as so well settled in that court "that in some of the cases no opinion has been filed and no official report published;" 9 Wall. 298, 313; 102 U. S. 378, 408; 155 *id.* 303, 306; 164 *id.* 701. The writ does not reach the officer, but is against the officer as a person; 17 Wall. 604.

The power of granting this writ in England seems originally to have been exercised by the court of chancery, as to all the inferior courts, but not as to the king's bench; 1 Vern. 175; Ang. & A. Corp. § 697. But see 2 B. & Ald. 646; 2 M. & S. 80; 164 8 Ad. & E. 416. But for a great number of years the granting of the prerogative writ of mandamus has been confined in England to the court of king's bench.

In the United States the writ is generally issued by the highest court of judicature having jurisdiction at law; 34 Pa. 496; 20 Ill. 525; as relief by mandamus cannot be granted in equity; 127 U. S. 105.

The thirteenth section of the Judiciary Act of Sept. 24, 1789, gives the supreme court power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States. The issuing of a mandamus to courts is the exercise of an appellate jurisdiction, and, therefore, constitutionally vested in the supreme court; but a mandamus directed to a public officer belongs to original jurisdiction, and by the constitution, the exercise of original jurisdiction by the supreme court is restricted to certain specified cases, which do not comprehend a mandamus. The latter clause of the above section, authorizing this writ to be issued by the supreme court, to persons holding office under the authority of the United States, is, therefore, not warranted by the constitution, and void; 1 Cr. 175; see 5 Pet. 190; 13 *id.* 279, 404; 5 How. 103.

The supreme court of the United States has no power to control by mandamus the discretion of the circuit court in granting or refusing a supersedeas upon an appeal to the circuit court of appeals from an interlocutory order granting or continuing an injunction; 147 U. S. 525; nor can it compel the circuit court of appeals to receive and consider new proofs in an admiralty appeal in a cause within the legitimate jurisdiction of that court; 147 U. S. 486; but it will issue to compel compliance with a mandate of the supreme court of the United States, without regard to the value of the matter in dispute; 152 U. S. 512.

The circuit courts of the United States may also issue writs of mandamus; but their power in this particular is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction; 7 Cr. 504; 8 Wheat. 598; 1 Paine 453.

The mode of proceeding in obtaining the writ is: first, to demand of the party to perform the act. And it would seem that the party should be made aware of the purpose of the demand; 3 Ad. & E. 217, 477. The refusal must be of the thing demanded, and not of the right merely; 5 B. & Ad. 978. The refusal should be absolute and unqualified; but it may be by silence only. But the party should understand that he is required to perform the duty upon pain of the legal redress being resorted to without further delay; 4 Railw. Cas. 112. But any exception to the demand should be taken as a preliminary question; 10 Ad. & E. 531; Redf. Railw. § 190. A formal demand and refusal have been held not a necessary preliminary to the filing of a petition for mandamus to compel the performance of a public duty which the law requires to be done; 127 Ill. 613.

The application for a mandamus may be by motion in court, and the production of *ex parte* affidavits, in support of the facts alleged; in which case an alternative writ issues, as matter of course, generally, and the case is heard upon the excuse alleged

in the return to the alternative writ; see 2 Metc. Ky. 56. Or the party may apply for the writ by formal petition, setting forth the grounds in detail, in which case the merits of the question are determined upon the traverse of the petition, instead of the traverse of the return to the alternative writ; 9 Ohio St. 599. In the latter case a rule is granted to show cause why a mandamus shall not issue; upon the decision of this rule an alternative writ would issue at common law and upon failure to obey this or make return of an adequate legal excuse, the peremptory writ followed. This practice is entirely changed by statute, see *infra*, but the rule to show cause is in many states the usual proceeding. And in either form, if the application prevails, a peremptory mandamus issues; the only proper or admissible return to which is a certificate of compliance with its requisitions, without further excuse or delay; 1 Q. B. 616; 1 Ia. 179. See Ang. & A. Corp. § 715. The peremptory writ need not precisely follow the alternative writ in matters of detail; 39 Minn. 426. The return to an alternative writ should be made with the greatest possible certainty, as at common law the return cannot be traversed; 127 Pa. 523; 77 Cal. 34. The practice varies greatly in different jurisdictions, though resting in all cases upon the same general principles, as to all which see generally, High, Extr. Leg. Rem. ch. 8.

The English practice is, if the first writ is denied, even on the ground of defects in the affidavits, not to permit a second application to be made; 8 Ad. & E. 413; so also, if it fail for other defects of form. But a more liberal practice obtains in the American courts; Redf. Railw. § 190.

By the Common-Law Procedure Act, 17 & 18 Vict. c. 125, provision is made for statutory mandamus, incidental to an action, brief in form and enforceable by attachment, which, if awarded, will issue peremptorily in the first instance. It has been held that a plaintiff could not under this act enforce specific performance of a contract; but that the act contemplated a public duty in which the plaintiff among others was interested, and not a private obligation which the plaintiff alone could enforce; but under the judicature acts, it is allowable for the court by an interlocutory order to grant a mandamus in any cases in which it shall appear just and convenient; Mozl. & W. The prerogative writ of mandamus is still retained in the English practice; but it is obvious that the foregoing statute must have very essentially abridged its use, as well as that of decrees in chancery for specific performance. See 8 E. & B. 512; Redf. Railw. § 190, pl. 8.

Contrived questions of fact, arising in the trial of applications for mandamus in the English practice, are referred to the determination of a jury; 1 Railw. Cas. 377; 2 *id.* 714; 8 El. & B. 512; 1 East 114. By the American practice, questions of fact, in applications for mandamus, are more commonly tried by the court; 2 Metc. Ky. 56. See Angell & Ames, Corp.; High, Extra. Leg. Rem.; 16 N. J. L. J. 138.

Costs rest in the discretion of the court. In the English courts they are allowed when the application fails, but not always when it prevails; Redf. Railw. § 159. The more just rule in such cases is to allow costs to the prevailing party, unless there is some special reason for denying them; and this rule now generally prevails; 8 Ad. & E. 901, 905; 5 *id.* 804; 1 Q. B. 636, 751; 6 E. L. & Eq. 267.

MANDANS. One who gives a thing in charge to another; one who requires, requests or employs another to do some act for him.

MANDANT. The bailor in a contract of mandate.

MANDATARY, MANDATARIUS. One who undertakes to perform a mandate. Jones, Bailm. 53. He that obtains a benefice by mandamus. Cowel.

MANDATE. A direction or request.

Thus a check is a mandate by the drawer to his banker to pay the amount to the transferee or holder of the check; 1 Q. B. Div. 33; Rapalje & Lawrence.

A power of attorney to receive payment in the extinguishment of an obligation. It may be express or implied. See Howe, Stud. Civ. L. 152.

In Practice. A judicial command or precept issued by a court or magistrate, directing the proper officer to enforce a judgment, sentence, or decree.

The decision of an appellate court sent down to the court whose proceedings have been reviewed.

In some jurisdictions the court of last resort is authorized to enter final judgment upon which execution may issue without further proceedings, but neither of the federal appellate courts has such power; 1 U. S. Rev. Stat. § 701; Fost. Fed. Pr. § 495. Accordingly in these courts, and in appellate courts generally, it is the practice to send down a mandate embodying the decision. In the supreme court of the United States the mandates are sent down before the February recess, and also before the conclusion of the term; but for proper cause shown a special mandate may be ordered. A mandate may be recalled from the inferior court and set aside or corrected at the term at which it is issued; 15 Pet. 119; 111 U. S. 798; but an application to recall and correct the mandate cannot be made after the close of the term; *id.*; 107 *id.* 629.

Where there is a reversal of a judgment or decree which has been executed pending the appeal, a direction of the court below to compel restitution should be included in the mandate; 6 Cr. 329; 8 Wall. 507; even where the reversal is for want of jurisdiction; 139 U. S. 216. Restitution may be enforced by contempt proceedings; 9 Wall. 605; and it may be compelled even where a third person has received the funds or property, if he is within the jurisdiction and no superior equities in his favor have intervened; *id.*; but duties or charges paid by the party from whom restitution is required may be allowed; *id.* Restitution from the United States cannot be compelled; 10 Wheat. 431.

Interest should be included in the mandate, otherwise it cannot be awarded after the affirmance; 9 Pet. 275; but after affirmance the defendant is entitled to interest at the legal rate from the date of judgment until payment; 1 U. S. Rev. Stat. § 1010; Supr. Ct. Rule 23; Cir. Ct. App. Rule 30; 14 How. 328.

When the mandate is filed in the court below, that court again acquires the jurisdiction of the case. It has been held that in some cases a state court may act upon an affirmance without awaiting the mandate; 140 U. S. 291; but it is clearly the better practice to have the proceedings below await the mandate, which may always be specially applied for if circumstances require it; see *supra*. It was held that the statute of limitations against the right of the purchaser to sue for breach of warranty of title would run from the decision of the appellate court that his title was invalid, and not from the time of filing the mandate; 42 Fed. Rep. 757.

The court below is bound by the decree of the appellate court as set forth in the mandate; 12 Pet. 488; which must be interpreted according to its subject-matter, with due consideration to the decree below as well as that above; 15 Pet. 52; 116 U. S. 45. After the case has been sent back by a mandate it has been held too late to question the jurisdiction; 6 Cr. 267; 20 How. 541; to grant a new trial; 1 Wall. 69 (except in ejectment; 143 U. S. 99); to permit the filing of a supplemental answer; 12 Pet. 339; to grant leave to file a supplemental bill suggesting new defenses; 116 U. S. 45; to review the case below on its merits; 3 How. 611; 138 U. S. 595; 101 *id.* 555; 10 Wheat. 431. See, generally, Fost. Fed. Pr. § 495.

Royal mandates to judges for interfering in private causes constituted a branch of the royal prerogative, which was given up

by Edward I. And the 1 W. & M. st. 2, c. 2, declared that the pretended power of dispensing or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. *Whart.*

In Contracts. A bailment of property in regard to which the bailee engages to do some act without reward. *Story, Bailm. § 137.* A contract whereby one party agrees to execute gratuitously a commission received from the other. *Sohm, Rom. L. 314.*

In the early Roman law (before the doctrines of agency were developed), it was a trust or commission by which one person, called the *mandator*, requested another, the *mandatarius*, to act in his own name and as if for himself in a particular transaction (*special mandate*), or in all the affairs of the former (*general mandate*). The *mandatarius* was the only one recognized as having legal rights and responsibilities as toward third persons in the transactions involved. As between him and the *mandator*, however, the latter was entitled to all benefit, and bound to indemnify against losses, etc.; but the service was gratuitous. *Cent. Dict.*

The contract of mandate in the civil law is not limited to personal property, nor does it require a delivery of personal property when it relates to that. *Pothier, de Mand. n. 1; La. Civ. Code, 233-4.* It is, however, restricted to things of a personal nature at common law, and of these there must be a delivery, actual or constructive. *Story, Bailm. § 142; 3 Strobb. 343.*

Mandates and deposits closely resemble each other; the distinction being that in mandates the care and service are the principal, and the custody the accessory; while in deposits the custody is the principal thing, and the care and service are merely accessory. *Story, Bailm. § 140; 2 Kent 569.*

For the creation of a mandate it is necessary,—first, that there should exist something, which should be the matter of the contract; secondly, that it should be done gratuitously; and, thirdly, that the parties should voluntarily intend to enter into the contract. *Pothier, Pand. l. 17, t. 1, p. 1, § 1; Pothier, de Mandat. c. 1, § 2; Ersk. Prin. 319.*

There is no particular form or manner of entering into the contract of mandate prescribed either by the common law or by the civil law, in order to give it validity. It may be verbal or in writing; it may be express or implied; it may be in solemn form or in any other manner. *Story, Bailm. § 160.* The contract may be varied at the pleasure of the parties. It may be absolute or conditional, general or special, temporary or permanent. *Wood, Civ. Law 242; 1 Domat, b. 1, t. 15, §§ 1, 6, 7, 8; Pothier, de Mandat. c. 1, § 3.*

In Louisiana it is generally gratuitous, but not so when a contrary intention is implied from conduct of parties or nature of business; 7 La. Ann. 207; a right to compensation may be inferred from nature of services without express agreement; 5 *id.* 672.

The *mandatary*, upon undertaking his trust and receiving his article, is bound to perform it as agreed upon; 5 B. & Ald. 117; 1 Sneed 248; 6 Binn. 308; 5 Fla. 38; 41 Fed. Rep. 152; and is responsible only for gross negligence; 2 Kent 571; 4 B. & C. 345; 2 Ad. & E. 256; 16 How. 475; 3 Mas. 132; 17 Mass. 450; 2 Hawks 146; 34 Neb. 426; 154 Pa. 296; but in considering the question of negligence, regard is to be had to any implied undertaking to furnish superior skill arising from the known ability of the *mandatary*; *Story, Bailm. §§ 177, 183; 20 Mart. La. 68.* The fact that a gratuitous bailee has given bond for the faithful performance of his duties as such does not increase his liability; 154 Pa. 296. Whether a bank is liable for neglect of its agent in collecting notes, see 8 N. Y. 459; 4 Rawle 384; 2 Gall. 565; 10 Cush. 583; 12 Conn. 303; 6 H. & J. 146; 1 Pet. 25; 89 Mo. 240. He must render an account of his proceedings, and show a compliance with the condition of the bailment; *Story, Bailm. § 191.*

The *dissolution* of the contract may be by *renunciation* by the *mandatary* before commencing the execution of the undertaking; 2 M. & W. 145; 22 E. L. & E. 501; 8 B. Monr. 415; 3 Fla. 38; *Story, Bailm.*

192; by *revocation* of authority by the *mandator*; 6 Pick. 198; 5 Binn. 316; 5 Term 213; by the *death* of the *mandator*; 3 V. & B. 51; 2 Mass. 244; 8 Wheat. 174; by *death* of the *mandatary*; 2 Kent 504; 8 Taunt. 403; and by *change of state* of the parties; *Story, Ag. § 481*; and in some cases by operation of law; *Story, Ag. § 500.* The question of gross negligence is one for the jury; 2 Ad. & E. 256; 11 Wend. 25; and the plaintiff must show it; 2 Ad. & E. 80; 10 Watts 335. See 3 Johns. 170; 2 Wheat. 100; 7 B. Monr. 661; 8 Humphr. 430.

In Civil Law. The instructions which the emperor addressed to a public functionary, and which were to serve as rules for his conduct. These mandates resembled those of the proconsuls, the *mandata jurisdictionis*, and were ordinarily binding on the legates or lieutenants of the emperor of the imperial provinces, and there they had the authority of the principal edicts. *Savigny, Dr. Rom. c. 3, § 42, n. 4.*

In the Canon Law. A rescript of the pope, by which he commands some ordinary collator, or precentor, to put the person there nominated in possession of the first benefice vacant in his collation. As to their abuses, see 2 Hall. Mid. Ages 212; *Rapalje & Lawrence.*

MANDATOR. The person employing another to perform a mandate. *Story, Bailm. § 138; 1 Brown, Civ. L. 382; Halif. Anal. Civ. L. 70.*

MANDATORY. In the construction of statutes, this word is applied to such as require to be obeyed, under penalty of having proceedings under them declared void. Directory statutes must be obeyed, but, if not, do not invalidate the act. See *STATUTE, IMPERATIVE. Cf. DIRECTORY.*

MANDATORY INJUNCTION. One that compels the defendant to restore things to their former condition and virtually directs him to perform an act. *Bisph. Eq. § 400.* See *INJUNCTION*, and an extended note there cited from 20 Am. Dec. 389.

MANDATORY STATUTES. See *MANDATORY.*

MANDATUM. See *BAILMENT; MANDATE.*

MANDAVI BALLIVO. In English Practice. The return made by a sheriff when he has committed the execution of a writ of a liberty to a bailiff, who has the right to execute the writ.

MANERIUM. A manor *Wharton.*

MANHOOD. In Feudal Law. A term denoting the ceremony of doing homage by the vassal to his lord. The formula used was *devenio vester homo*, I become your man. 2 Bla. Com. 54; 1 Dev. & B. Eq. 585. See *HOMAGE.*

MANIA. In Medical Jurisprudence. The most common of all forms of insanity, consisting of one or both of the following conditions, viz.: intellectual aberration, and morbid or affective obliquity.

A chronic affection of the brain, ordinarily without fever, characterized by the perturbation and exaltation of the sensibilities, the intelligence, and will. *Esquirol.*

A condition of exaltation which affects the emotions and the intellect, and expresses itself by increased activity,—mental and physical. 3 Witht. & B. Med. Jur. 250.

A condition in which the perversion of the understanding embraces all kinds of objects and is accompanied with a general mental excitement. 2 Misc. Rep. 329.

It is in one form mere excitement, or this may have developed into the other,—frenzy. It is the reverse of melancholia, and as well developed as the depression of the latter, is the opposite feeling which characterizes the former; *id.*

An insanity in which there is general exaltation of the mental, sensory, and motor functions. 1 Clevenger, Med. Jur. of Insan. 953.

It would appear to be of easy diagnosis, but the excitement of other forms of insanity is considerably mistaken from that of simple mania. The beginning is very gradual, and weeks, months, or even years of bad health may precede an outbreak, and the mental explosion is usually unexpected, *id.*

The maniac either misapprehends the true relations between persons and things, in consequence of which he adopts notions manifestly absurd, and believes in occurrences that never did and never could take place, or his sentiments, affections, and emotions are so perverted that whatever excites their activity is viewed through a distorting medium, or, which is the most common fact, both these conditions may exist together, in which case their relative share in the disease may differ in degree that one or the other may scarcely be perceived at all. According as the intellectual or moral element prevails, the disease is called *intellectual* or *moral mania*. Whether the former is ever entirely wanting has been stoutly questioned, less from any dearth of facts than from some fancied metaphysical incongruity. The logical consequence of the doubt is that in the absence of intellectual disturbance there is really no insanity.—the moral disorders prevailing rather from unbridled passions than from any pathological condition. Against all such reasoning it will be sufficient here to oppose the very common fact that in every collection of the insane may be found many who exhibit no intellectual aberration, but in whom moral disorders of the most flagrant kind present a marked contrast to the previous character and habits of life.

Both forms of mania may be either general or partial. In the latter, the patient has adopted some notion having a very limited influence upon his mental movements, while outside of that no appearance of impairment or irregularity can be discerned. Pure monomania as this form of insanity has been often called,—that is, a mania confined to a certain point, the understanding being perfectly sound in every other respect,—is, no doubt, a veritable fact, but one of very rare occurrence. The peculiar notions of the monomaniac, resting on insane belief, are of two kinds: *delusions* and *hallucinations*, which titles see. See also *MONOMANIA*.

In general intellectual mania, excepting that form of it called *raving*, it is not to be understood that the mind is irrational on every topic, but rather that it is the sport of vague and shifting delusions, or, where these are not manifest, has lost all nice and intellectual discernment, and the ability to perform any continuous process of thought with its customary steadiness and correctness. It is usually accompanied by feelings of estrangement or indifference towards those who are otherwise its objects of affection and interest. A common feature of the disease is either more or less nervous exaltation, manifested by loquacity, turbulence, and great muscular activity, or depression, indicated by silence, gloom, painful apprehensions, and thoughts of self-destruction.

In moral or affective mania, the disorder is manifested chiefly, if not entirely, in the sentiments or propensities, which are essential parts of our mental constitution, and, of course, as liable to disease as the intellectual faculties. In modern classification, which is termed *affective insanity*, is a term in which the feelings and emotions are chiefly involved; it concerns the desires and the ethical side of human nature. 3 Witht. & B. 265. It may be partial or general. In the former, a single propensity is excited to such a degree of activity as to impel the person to its gratification by an irresistible force, while perfectly conscious of the nature of the act and deploring the necessity that controls him. Our limits allow us to do but little more than to indicate the principal of these morbid impulses:—propensity to kill, *homicidal monomania*; propensity to steal, *kleptomania*; sexual propensities of various names such as *sidiomania*, *erotomania*, *sympnomania*; propensity to burn, *pyromania*; propensity to drink, *dipsomania*; propensity to use opium, *morphomania*. In the first, the patient is urged by an inward force to take his life, without provocation, without motive. The victim is often the patient's child, or some one to whom there has been a tender attachment. In most cases there has been some derangement of health, or some deviation from the ordinary physiological condition, such as delivery, or suppressed menstruation; but occasionally no incident of this kind can be detected; the patient has been, apparently, in the ordinary condition, both bodily and mental. See *DIPSOMANIA*; *EROTIC MANIA*; *KLEPTOMANIA*; *PYROMANIA*.

In general moral mania, it is not to be supposed that the sentiments and propensities are all and equally disordered. On the contrary, the propensities may not be excessively active, though occasionally one may crave unusual indulgence. The essential features of general moral mania are that the moral relations, whereby the conduct is governed, more than by the deductions of reason, are viewed through a distorting medium. This condition is usually accompanied by a perversion of some of the sentiments that inspire hope, fear, courage, self-reliance, self-respect, modesty, veracity, domestic affection. The patient is eager and sanguine in the pursuit of whatever strikes his fancy, ready with the most plausible reasons for the success of the wildest projects, viewing every prospect through a rose-colored medium, and regardless of the little proprieties and amenities of life. Love for others is replaced by aversion or indifference; the least contradiction or check is met by anger or impatience; he is restless, insensible to fatigue, and sleeps comparatively little. In some cases, and often at different periods in the same case, the very opposite moral condition occurs. Without any cause, true or delusive, the person is completely wretched. The past affords him no pleasure, the future reveals not a single gleam of hope, and the ordinary sources of comfort and joy only serve to darken the cloud of doubt, apprehension, and despair in which he is enveloped.

Mania is usually a growth, rather than a sudden development (though sometimes the latter), and

its incipient stages are characterized by more or less of morbid depression, or, in some cases, irritability. Then follows a period of restless but undirected and unconcentrated activity. Delusions and hallucinations are common, and may extend to an entire change of personality.

The physical condition, like the mental, indicates early an appearance of vigor with excessive appetite, and the use of alcoholic stimulants, while not in itself a cause, may hasten the attack, so that in many cases which resemble alcoholic mania it is found that the mental disorder preceded the drinking. It is said that "there is always, however, finally a failure of nutrition with loss of flesh, the tongue becomes coated and the bowels are constipated. The pulse may be somewhat rapid, but frequently, even during great excitement, there is little change, it often being slow and small. Insomnia is a marked symptom, days passing without sleep despite the ceaseless activity. There is one peculiarity about this constant activity, in that there seems to be no sense of fatigue accompanying it. There is, in fact, apparently a cerebral anæsthesia. This applies also to pain perception, as exposure to cold does not seem to be recognized, and even painful operations can be carried on without apparent suffering. Acts of self-mutilation, which are especially common where sexual disturbance is associated with the mania, are often done, which are harrowing in the extreme and yet are not appreciated by the patient." 3 With. & B. Med. Jur. 261.

This form of mental disorder may be acute with frenzy and raving, in which case there is entire mental confusion and delirium; or it may be chronic in which case there is usually some more or less settled delusion with periodic excitability easily aroused and liable quickly to subside. "There is almost always associated with this condition a generally happy-go-lucky state of mind. There is in fact more or less dementia (*q. v.*), the state toward which all cases tend which do not end in recovery." *Id.* 253.

With respect to the effect of this form of mental disorder, whether general or partial, upon criminal responsibility and civil incapacity, see *INSANITY*.

MANIA A POTU. See *DELIRIUM TREMENS*; Whart. & St. Med. Jur.

MANIFEST. In Commercial Law. A written instrument containing a true account of the cargo of a ship or a commercial vessel. It must contain a list of all packages or separate items of freight with their distinguishing marks, numbers, etc. By the United States statute it must also designate the ports of lading and of destination, a description of the vessel and the designation of its owners, and must contain the names of the consignees and passengers with a list of their baggage and an account of the sea stores remaining; U. S. Rev. Stat. § 2807. The manifest should be made out, dated, and signed by the captain at places where the goods or any part of them are taken on board.

The want of a manifest where one is required and also the making a false manifest, are grave offences.

In Evidence. Clear and requiring no proof; notorious; apparent by examination; open; palpable; incontrovertible. It is synonymous with evident, visible, or plain. 71 N. Y. 486.

MANIFESTO. A solemn declaration, by the constituted authorities of a nation, which contains the reasons for its public acts towards another.

On the declaration of war, a manifesto is usually issued, in which the nation declaring the war states the reasons for so doing. Vattel, l. 3, c. 4, § 64; Wolfius § 1187. It differs from a proclamation in that it is issued to the other belligerent and to neutral nations.

MANKIND. Persons of the male sex; the human species. The statute of 25 Hen. VIII. c. 6, makes it felony to commit sodomy with mankind or beast. Females as well as males are included under the term mankind. Fortescue 91; Bac. Abr. *Sodomy*.

MANNER. Mode of performing or exercising; method; custom; habitual practice. 139 Ill. 629.

MANNER AND FORM. In Pleading. After traversing any allegation in pleading, it is usual to say, "in manner and form as he has in his declaration in that behalf alleged," which is as much as to include in the traverse not only the mere fact opposed to it, but that in the manner and form in which it is stated by the other party. These words, however, only put in issue the substantial statement of the manner of the fact traversed, and do not extend

to the time, place, or other circumstances attending it, if they were not originally material and necessary to be proved as laid. See *MODUS ET FORMA*.

MANNER OF VOTING. The phrase "manner of voting" literally interpreted, applies simply to the act of voting, but by itself, signifies nothing. 85 Ky. 112, 2 S. W. 690.

MANNING. A day's work of a man. Cowel. A summoning to court. Spelman, Gloss.

MANNIRE. To cite any person to appear in court and stand in judgment there. Du Cange.

It differs from *bannire*, for although both words signify a citation, one is by the adverse party, the other by the judge. Jacob; Du Cange.

MANNOPUS (Lat.). An ancient word, which signifies goods taken in the hands of an apprehended thief.

MANOR (French, *manoir*). A house, residence, or habitation. It includes not only a dwelling-house, but also lands. See Co. Litt. 58, 109; 2 Rolle, Abr. 121; Merlin, *Repert. Manoir*; Serg. Land Laws of Penn. 195; 11 H. L. Cas. 83.

Manor is also said to be derived originally either from Lat. *manendo*, remaining, or from Brit. *maer*, stones, being the place marked out or inclosed by stones. Webster.

In English Law. A tract of land originally granted by the king to a person of rank, part of which (*terre tenementales*) was given by the grantee or lord of the manor to his followers. The rest he retained under the name of his demesnes (*terre dominicales*). That which remained uncultivated was called the lord's waste, and served for public roads, and commons of pasture for the lord and his tenants. The whole fee was called a lordship, or barony, and the court appendant to the manor the court-baron. The tenants, in respect to their relation to this court and to each other were called *parcs curie*; in relation to the tenure of their lands, copyholders (*q. v.*), as holding by a copy of the record in the lord's court.

Originally a manor was a "highly complex and organized aggregate of corporeal and incorporeal things. It usually involved the lordship over villeins and the right to seize their chattels. It was not a bare tract of land, but a complex made up of land and of a great part of the agricultural capital that worked the land, men and beasts, ploughs and carts, forks and flails." 2 Poll. & M. 143, 148.

The franchise of a manor; *i. e.* the right to jurisdiction and rents and services of copyholders. Cowel. No new manors were created in England after the prohibition of sub-infeudation by stat. *Quia Emptores*, in 1290. 1 Washb. R. P. 90.

In American Law. A manor is a tract held of a proprietor by a fee-farm rent in money or in kind, and descending to the oldest son of the proprietor, who in New York was called a patroon. 9 Seid. 201.

MANORIAL COURTS. By the end of Edward I's reign, four main types of local courts were distinguishable, of which the manorial court was one (See *FEUDAL COURTS*). It has been said that there were two courts in a manor, a court Baron and a court Customary (4 Co. Rep. 26 b), but the distinction is not clearly drawn. From the side of jurisdiction it appears that the manor contained two kinds of jurisdiction—a jurisdiction over freeholders and a jurisdiction over copyholders. The former was a kind of "liberty," the latter was merely an incident to the property absolutely necessary to its management.

The business of the manorial court was petty but varied, more especially when, to the ordinary business of the court Baron and court Customary, there was added the business of a hundred court and a court leet. In the court Baron all kinds of personal actions (where the cause of action did not exceed 40s. in value) could be tried. 1

Holdsw. Hist. E. L. 3rd ed., 64, 180 *et seq.* See *COMMUNAL COURTS*; *FRANCHISE COURTS*; *FEUDAL COURTS*.

MANQUELLER. In Saxon Law. A murderer.

MANSE. Habitation; farm and land. Spelman, Gloss. Parsonage or vicarage house. Paroch. Antiq. 481; Jacob, Law Dict. So in Scotland. Bell, Dict.

MANSIO. The name given to an ancient measure of land. It was that quantity of land which will support a man and his family. It has also been called, *familia*, hide. What this amount of land was is a subject of controversy. It is probable that it was a fairly large tract—a tract of about 120 acres. 2 Holdsw. Hist. E. L. 3rd ed., 64.

MANSION-HOUSE. Any house of dwelling, in the law of burglary, etc. Co. 3d Inst. 64.

The term "mansion-house," in its common sense, not only includes the dwelling-house, but also all the buildings within the curtilage, as the dairy-house, the cow-house, the stable, etc.; though not under the same roof nor contiguous. Burn, Inst. *Burglary*, 1 Thomas, Co. Litt. 215, 216; 1 Hale, Pl. Cr. 558; 4 Bla. Com. 225. See 3 S. & R. 199; 4 Strobb. 372; 4 Call 409; 14 M. & W. 181; 4 C. B. 105; 1 Whart. Cr. L. § 783.

MANSLAUGHTER. In Criminal Law. The unlawful killing of another without malice either express or implied. 4 Bla. Com. 190; 1 Hale, Pl. Cr. 466.

Any unlawful and wilful killing of a human being, without malice, is manslaughter, and thus defined, it includes a negligent killing which is also wilful. 37 Fed. Rep. 875. See 2 Bish. N. Cr. L. § 737.

The distinction between manslaughter and murder consists in the following. In the former, though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter; 1 East, Pl. Cr. 218; Foster 290; 5 Cush. 304.

It also differs from murder in this, that there can be no accessories before the fact, there having been no time for premeditation; 1 Hale, Pl. Cr. 437; 1 Russ. Cr. 485; but see 1 Bish. N. Cr. L. 678.

In a recent work, cases of manslaughter are divided into three classes: (1) Where there was an intent to take life and the killing would be murder but for mitigating circumstances. (2) Where death results from unintentionally doing an unlawful act. (3) Where it results from the negligent doing or omission of an act which, though not itself wrongful, was attended by circumstances which endangered life; 1 McClain, Cr. L. § 335.

There is a not uncommon division of manslaughter into two degrees, voluntary and involuntary; and these degrees are distinctly recognized by statute in several states; in other states several distinct degrees of the crime are created by statute; in some as many as four.

Involuntary manslaughter is such as happens without the intention to inflict the injury.

Voluntary manslaughter is such as happens voluntarily or with an intention to produce the injury.

It has been said that the distinction between voluntary and involuntary manslaughter is now obsolete, and unless where the terms are used in statutes defining the crimes, they are not used in indictment, verdict, or sentence. But where the distinction is made by statute, there can be no conviction of involuntary manslaughter on an indictment for voluntary; 1 Whart. Cr. L. § 307. It would seem however that it is incorrect to characterize as obsolete what is literally recognized by statute in several jurisdictions. See *supra*. It is more accurate to say that the division is purely statutory in its origin, not entering into the common-law definitions.

Homicide may become manslaughter in consequence of provocation; mutual combat; in case of resistance to public officers, etc.; killing in the prosecution of an un-

lawful or wanton act; or killing in the prosecution of a lawful act improperly performed, or performed without lawful authority.

The provocation which reduces the killing from murder to manslaughter is an answer to the presumption of malice, which the law raises in every case of homicide: it is, therefore, no answer when express malice is proved; 1 Russ. Cr. 440; Foster 132; 1 East, Pl. Cr. 239. And to be available the provocation must have been reasonable and recent; for no words or slight provocation will be sufficient, and if the party has had time to cool, malice will be inferred; Washb. Cr. L. 81; 4 Pa. 264; 2 N. Y. 193; 25 Miss. 383; 3 Gratt. 594; 6 Blackf. 299; 8 Ired. 344; 18 Ala. N. S. 720; 15 Ga. 223; 10 Humphr. 141; 5 C. & P. 324; 6 How. St. Tr. 769; 17 id. 57; 1 Leach 151; 26 Tex. App. 221, 322; 150 U. S. 62; 114 Ill. 86; it is on the assumption that passion disturbs the sway of reason and makes one regardless of its admonition; 83 Ala. 26. Words alone, however provoking or insulting, will not reduce killing to manslaughter; 98 Mo. 150; 85 Ala. 326; 26 Tex. App. 624; 64 Cal. 369; 116 Mo. 1; 147 Ill. 310. Intent to kill cannot be an element of involuntary manslaughter; 76 Ga. 473. It does not necessarily follow that homicide was not murder because done in sudden passion; 45 La. Ann. 1036.

In case of mutual combat, it is generally manslaughter only, when one of the parties is killed; 4 D. & B. 191; 1 Jones N. C. 280; 2 C. & K. 814. When death ensues from duelling, the rule is different; and such killing is murder.

The killing of an officer by resistance to him while acting under lawful authority is murder; Whart. Cr. L. § 413; but see 57 Conn. 307; but if the officer be acting under a void or illegal authority, or out of his jurisdiction, the killing will be manslaughter, or excusable homicide, according to the circumstances of the case; Washb. Cr. L. 81; 1 Mood. Cr. Cas. 80, 132; 1 Hale, Pl. Cr. 458; 84 Ky. 103; 26 Tex. App. 1.

Killing a person while doing an act of mere wantonness is manslaughter: as, if a person throws down stones in a coal-pit, by which a man is killed, although the offender was only a trespasser; Lew. Cr. Cas. 179; MALA PROHIBITA; or where a person in another's charge, too feeble to take care of herself, dies from lack of proper food, nursing, and medical attention, the latter is guilty of manslaughter; [1893] 1 Q. B. 450.

When death ensues from the performance of a lawful act, it may, in consequence of the negligence of the offender, amount to manslaughter. For instance, if the death had been occasioned by negligent driving; 1 East, Pl. Cr. 263; 1 C. & P. 320; 6 id. 129; or by negligently running an engine and thereby causing a collision by which a passenger is killed; 118 Ind. 167. Again, when death ensues from the gross negligence of a medical or a surgical practitioner, it is manslaughter.

It is no crime for any one to administer medicine; but it is a crime to administer it so rashly and carelessly, or with such criminal inattention, as to produce death; Whart. Cr. L. § 346; and in this respect there is no difference between the regular practitioner and the quack; 1 F. & F. 519, 521; 4 C. & P. 440; 1 B. & H. Lead. Cr. Cas. 46; 6 Wash. 12. And see 6 Mass. 134; 3 C. & P. 632. ADEQUATE CAUSE; HEAT OF PASSION.

MANSTEALING. A word sometimes used synonymously with kidnapping (*q. v.*). The latter is more technical. 4 Bla. Com. 219.

MANTHEOFF. A horse-stealer.

MANTIPULATE. To pick pockets. Bailey.

MANTLE CHILDREN. See LEGITIMATION.

MAN-TRAPS. Engines to catch trespassers, now unlawful, unless set in a

dwelling-house for defence between sunset and sunrise. 24 & 25 Vict. c. 100, s. 31.

MANU BREVI. With a short hand.

Shortly; directly; by the shortest course; without circuitry. Burrill; Calv. Lex. Cf. MANU LONGA.

MANU FORTI (Lat. with strong hand). A term used in pleading in cases of forcible entry. No other words are of equal import. It implies greater force than the words *vi et armis*; 10 Ired. 39; 8 Term 382; 4 Cush. 141; Dana, Abr. c. 132, s. 6, c. 203, s. 12.

MANU LONGA. With a long hand. Indirectly; circuitously. Burrill; Calv. Lex. Cf. MANU BREVI.

MANU OPERA. See MANNOPUS.

MANUAL. That which is employed or used by the hand, of which a present profit may be made. Things in the manual occupation of the owner cannot be distrained for rent. See TOOLS.

MANUAL GIFT. A giving of movable effects accompanied by real delivery which does not require any formality. La. Civ. Code, art. 1539.

MANUALIS OBEDIENTIA. Sworn obedience or submission upon oath. Cow.

MANUCAPTIO (Lat.). In Old English Practice. A writ which lay for a man taken on suspicion of felony, and the like, who could not be admitted to bail by the sheriff, or others having power to let to mainprise. Fitzh. N. B. 249.

MANUCAPTORS. Mainperners, which see.

MANUFACTORY. A building, the main or principal design or use of which is to be a place for producing articles as products of labor. It is something more than a place where things are made. 57 Pa. 82. A steam flouring mill is a manufactory; 57 Md. 515. See FACTORY.

MANUFACTURE. To make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use; and, when used as a noun, anything made from raw materials by hand, or by machinery, or by art. 61 Hun 53.

Making fish lines, ropes, etc., from raw material is a manufacture; 36 La. Ann. 98; as is the making of cordage, rope, and twine; 42 id. 723. Cutting ice and storing it in a building is not; 135 Mass. 258.

As to its signification in patent law, see PATENT.

MANUFACTURED ARTICLES. Kindling wood produced by machinery from green slabs of wood, kiln dried and compressed into a bundle, is manufactured. 20 App. Div. 514. India rubber made into shapes suitable for use as shoes is manufactured within the meaning of the tariff act; 7 How. 795; also animal charcoal and bone black; 5 Blatch. 215; coral cut into the form of a cameo but not set; *id.* 195; reeds; 40 Fed. Rep. 570; shingles; 3 Cliff. 284; gun blocks planed on the sides; 42 Fed. Rep. 292; split timbers; 4 Wall. 408; pieces of wood cut or sawed into size or shape to be put together into boxes; 43 La. Ann. 226; and door sashes, and blinds; 41 La. Ann. 996.

Wool is not a manufactured article under the revised statutes; 20 Blatch. 267; nor are wool tops prepared for spinning and broken up into small fragments; 46 Fed. Rep. 461; nor copper plates turned up and raised at the edges by labor, to fit them for subsequent use in the manufacture of copper vessels; 5 Cra. 284; nor marble cut into blocks for transportation; Hunt, Merch. Mag. 187; nor firewood; 65 Cal. 273.

An article made by hand; an article made, either by hand or by machinery, into a new form, capable of being used, in ordinary life. 7 How. (U. S.) 794.

The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured

article, within the meaning of that term as used in the tariff laws. For example, washing and scouring wool does not make the resulting wool a manufacture of wool; cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton, etc. 121 U. S. 615. MANUFACTURING CORPORATION.

MANUFACTURER. One engaged in the business of working raw materials into wares suitable for use. 63 How. Pr. 453.

A cooper; 34 La. Ann. 596; a pork packer; 41 Ohio St. 691; a gas company; 12 Allen 75; 89 N. Y. 409; one who prepares for market and sells lumber which is the growth of his own land; 1 Low. 478; a publisher of a newspaper; 6 Bankr. Reg. 238 (*contra*, 3 McArthur. 405); a manufacturer. An ice cream confectioner is not; 82 La. Ann. 1075; nor is one engaged in cutting and making coats and trousers out of cloth which is already manufactured by another; 41 id. 894; or a dry-dock company; 92 N. Y. 487; or an aqueduct corporation; 100 Mass. 189; or a mining company; 106 id. 131.

Not, necessarily, one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. Anderson; 34 La. Ann. 597.

MANUFACTURING. "Manufacturing," as used in the Bankrupt Act of 1898, has no meaning from adjudication as used in former laws, nor has it any technical meaning. In construing the act, the intention of Congress to include corporations engaged in manufacturing will be regarded by giving the term a liberal, rather than a narrow meaning. 216 U. S. 449. See MANUFACTURING CORPORATION.

MANUFACTURING CORPORATION. A corporation engaged in the production of some article, thing or object, by skill or labor, out of raw material, or from matter which has already been subjected to artificial forces, or to which something has been added to change its natural condition. 99 N. Y. 181. The term does not include a mining corporation; 106 Mass. 135; nor one engaged in mixing teas and in roasting, mixing, and grinding coffee; 145 N. Y. 375.

Manufacturing is the process by which the application of labor and skill to materials that exist in the natural state gives to them a new quality and prepares or adapts them for new uses; this is true whether the change is produced by manual labor or by means of machinery. But these tests are not conclusive in determining the scope and meaning of the term "manufacturing corporations." It is proper to consider manufacturing as a product of capital and labor, the investment and operation of a complex system of machinery such as boilers, engines, shafting, belting, and such other things as are commonly used in what are known as manufacturing establishments. The product produced by the application of power to machinery and by means of processes wholly artificial may be said to be a manufactured product, and the corporation producing it a manufacturing corporation. 1 Thomp. Corp. 48, 49.

MANUFACTURING PRODUCT. See MANUFACTURING CORPORATION.

MANUMISSION. The act of releasing from the power of another. The act of giving liberty to a slave.

The modern acceptance of the word is the act of giving liberty to slaves. But in the Roman law it was a generic expression, equally applicable to the enfranchisement from the *manus*, the *mancipium*, the *dominica potestas*, and the *patria potestas*. *Manumittere* signifies to escape from a power,—*manus*. Originally, the master could only validly manumit his slave when he held the *dominium jure quiritium* over him: if he held him merely in *bonis*, the manumission was null, according to the civil law; but by the *jus honorarium* the slave was permitted to enjoy his liberty *de facto*, but whatever he acquired belonged to his master. The status of these quasi-slaves was fixed by the *Lex Junia Norbana* under which they became *Latini Juniani*, both which titles see. At first there were only three modes of manumission, viz.: 1. *vindicta*;

2. *census*; and, 3. *testamentum*. The *vindicta* consisted in a fictitious suit, in which the *assessor libertatis* as plaintiff alleged that the slave was free; the master not denying the claim, the *praetor* rendered a decision declaring the slave free. In this proceeding figured a rod, — *festuca vindicta*, — a sort of lance (the symbol of property), with which the *assessor libertatis* touched the slave when he claimed him as free; hence the name of the *writer constitutus*. *Census*, the second mode, was when the slave was inscribed at the instance of his master, by the censor, in the census as a Roman citizen. *Testamentum* was when the testator declared in express terms that the slave should be free, — *servus meus Cratinius liber est, et per hoc a fideicommissum, — heres meus rogo te ut Sanum vicini mei percuram, manumittas, fideicommitto heredis mei ut iste eum servum manumittat*.

Afterwards, manumission might take place in various other ways; in *sacrosanctis ecclesiis*, of which we have a form: *Ex beneficiis S. Joannem piscipum et per Albertum S. Casatum, factus est liber Lembertus, teste hac sancta ecclesia. Per epistolam*. Justices required the letter containing the manumission to be signed by five witnesses. *Inter amicos*, a declaration made by the master before his friends that he gave liberty to his slave: five witnesses were required, and an act was drawn up in which it was stated that they had heard the declaration. *Per codicillum*, by a codicil, which required to be signed by five witnesses. There were many other modes of manumission, which were enumerated in a Constitution of Justinian. C. 76, 3-12; 1 Ortolan 35 et seq.; 1 Etienne 78 et seq.; Lagrange 101 et seq.

Direct manumission may be either by deed or will, or any other act of notoriety done with the intention to manumit. A variety of these modes are described as used by ancient nations.

Indirect manumission was either by operation of law, as the removal of a slave to a non-slaveholding state *animo morandi*, or by implication of law, as where the master by his acts recognized the freedom of his slave.

Manumission being merely the withdrawal of the dominion of the master, in accordance with the principles of the common law the right to manumit existed everywhere, unless forbidden by law. No formal mode or prescribed words were necessary to effect manumission; it could be by parol; and any words were sufficient which evinced a renunciation of dominion on the part of the master; 8 Humphr. 189; 3 Halst. 275. No one but the owner could manumit; 4 J. J. Marsh. 183; 1 Pet. 588; and the effect was simply to make a freeman, not a citizen. But mere declarations of intention were insufficient unless subsequently carried into effect: Cox 259; 8 Mart. La. 149; 14 Johns. 324; 19 id. 58. Manumission could be made to take effect in future; Cox 4; 2 Root. 364. In the meantime the slaves were called *statuti liberi*.

As to the emancipation of slaves in the United States by proclamation of the president, see BONDAGE. See Cobb, Law of Slavery.

MANURE. Manure made upon a farm in the ordinary manner, from the consumption of its products, is a part of the realty; 1 Washb. R. P. 18; 68 Me. 204; s. c. 28 Am. Rep. 36, n.; 15 Wend. 169; 13 Gray 53; 11 Conn. 525; 44 N. H. 120; see 38 Fed. Rep. 911. It has been also held to be personality; 4 Dutch. 581; 2 Ired. 326; especially if it be made from hay purchased and brought upon the land by the tenant; 48 N. H. 147; and where a teamster owning a house and stable sold them with a small lot on which they stood, it was held that manure in the stable was personality; 49 N. H. 62. Manure in heaps has been held to be personality; 11 Conn. 525; and where the owner of land gathered manure into heaps and sold it, and then the land, the manure did not pass with the land; 43 Vt. 93; 110 Mass. 94. In 1 Cr. & M. 809, a custom for a tenant to receive a compensation for manure left by him on the farm was recognized. Manure dropped in the street belongs originally to the owners of the animals that dropped it, but, if abandoned by them, the first taker has a right to it; 37 Conn. 500; s. c. 9 Am. Rep. 350. See EMBLEMES.

MANUS (Lat. hand), anciently, signified the person taking an oath as a compurgator. The use of this word probably came from the party laying his *hand* on the New Testament.

Manus signifies, among the civilians, power, and is frequently used as synonymous with *potestas*. *Lec. El. Dr. Rom.* § 94. *Manus mariti*, marital power. *Manus injectio*, an executory judgment.

MANUS MARRIAGE. A form of Roman marriage in which the husband possessed over his wife the rights called "*manus*." A wife thus in her husband's *manus*, obtained the rights of a daughter. (G. I, 115.) The right over children was called "*potestas*"; *manus* lies further away from the characteristics of ownership than the *potestas*. The *manus* was incompatible

with the *potestas*: a woman that passed into the *manus* of her husband necessarily ceased to be under the *potestas* of her father. A husband, under this form of marriage, acquired all his wife's property, and was responsible for her obligations to the extent of that property. (G. 2, 98.) While she was in *manus* she could not acquire any property for herself, but only for her husband. She could, however, enjoy that modified and permissive form of ownership granted to slaves and children; namely, the *peculium*. The husband does not seem to have possessed over his wife in *manus*, the same powers of chastisement and killing that he had over slaves and children. Nor is there any trace of the actual sale of a wife except by fictitious sale, relieving the wife from the *manus* of her husband. Hunter, Rom. L., 223, 224.

MANUSCRIPT. An unpublished writing. A writing of any kind as distinguished from any thing that is printed. Cent. Dict. The term does not include pictures and paintings; 3 Cliff. 537.

In every writing the author has a property at common law, which descends to his representative, but is not liable to seizure by creditors so that they can publish it; 1 Bell, Dict. 68; 5 McLean 32. And an unauthorized publication will be restrained in equity; 4 Burr. 2320, 2408; 2 Bro. P. C. 138; 2 Edw. Ch. 329; 2 Mer. 434; 1 Ball & B. 207; 2 Stor. 100. The passage of the copyright acts has not abrogated the common-law rights of an author to his unpublished manuscript, and for a wanton infringement of his rights, exemplary damages may be given; 73 Fed. Rep. 196. Letters are embraced within this principle; for, although the receiver has a qualified property in them, the right to object to their publication remains with the writer. It is held, however, that the receiver may publish them for the purposes of justice publicly administered, or to vindicate his character from an accusation publicly made; 2 V. & B. 19; 2 Stor. 100; 3 Atk. 342; 3 Bush 480; 1 Mart. La. 297; 4 Du. N. Y. 379. The receiver may destroy or give away the letters, as soon as received; 2 Bush 480. The latter proposition has been doubted; see Drone, Copyr. 137. In the United States, the Copyright Act recognizes the right of property in "any manuscript whatever," which includes private letters; 5 McLean 32; and gives a remedy for the unauthorized publication. These rights will be considered as abandoned if the author publishes his manuscripts without securing the copyright under the acts of congress. See Curtis; Copinger; Drone, Copyright; LETTER; PRIVACY; COPYRIGHT.

MANUTENENTIA. A writ which lay against persons for the offence of maintenance. Reg. Orig. 182.

MANY. Denotes multitude, but not majority. 87 Ala. 708.

MAP. A transcript of the region which it portrays, narrowed in compass so as to facilitate an understanding of the original. 8 Minn. 103.

When a deed conveys a lot as indicated on a recorded plat, the latter may be consulted in aid of the description in the deed; 114 Mo. 13. A map in a deed should be treated as a part of the description, when evidently intended to be so treated, though it is not expressly referred to therein; 64 Conn. 78.

Where the owner of land lays it out in lots and streets, and in the map thereof filed with the public records designates certain portions as a park and afterwards conveys lots with reference to such map, it operates as a dedication of the land for a park; 23 Or. 176. The mere recording by public authority of a map of a proposed system of highways does not of itself entitle the owner of the land to damages; 167 U. S. 548; so with reference to the streets on such a map; 44 La. Ann. 931; 96 Ala. 272; 17 R. I. 799; 133 Ind. 331; 33 Fla. 470; but see 67 Hun 546. Maps and surveys are not competent evidence unless

their accuracy is shown by other evidence; 1 Black 209; as by the testimony of the surveyors who prepared them; 5 Thomp. & C. 611; but a map of public land, made by a public surveyor and duly certified and filed in a public office under a statute, is admissible for that purpose; 17 Wend. 312; and so are ancient maps to show matters of public and general right; 11 Wall. 385; but an ancient map of partition among private owners is not evidence; 2 Johns. 180.

In an action for the recovery of real estate, a map not dated or signed but shown to have been made in 1818 by a skillful surveyor long since dead, as to which other surveyors testified that they had tested it in their own work and that it was the earliest known survey of the district in question, and which was shown to have related to an actual transaction, was held admissible as an ancient map. Other maps made in 1820 and 1823 by the same surveyor and showing in detail certain of the lots in the vicinity of those in dispute were admissible as showing accuracy of the ancient map. The testimony of other surveyors as to the use of the map in their own work was admissible for the purpose of showing general accuracy of the map and deeds executed shortly after the map was made conveying the tracts described therein were admissible as ancient deeds to show that the map was made in an actual transaction; 44 N. E. Rep. (Mass.) 333.

A map or plan of land referred to in making conveyances thereof is evidence to show boundaries or location, or to explain the contract; 64 N. Y. 33; and so in dedicating land to the public; 40 Conn. 410.

Maps showing boundaries are receivable in evidence, if it appears that they were made by persons having adequate knowledge. Anderson; 1 Greenl. Ev. § 139.

MARAUDER. One who, while employed in the army as a soldier, commits a larceny or robbery in the neighborhood of the camp, or while wandering away from the army. *Merlin, Répert.* See Halleck, Int. Laws; Lieber, Guerrilla Parties.

MARC-BANCO. The name of a coin. The marc-banco of Hamburg, as money of account, at the custom-house, is deemed and taken to be of the value of thirty-five cents. Act of March 3, 1843.

MARCHERS. In Old English Law. Nobles who lived on the Marches, and had their own laws, and power over life and death, as if they were petty princes. Camden; Jacob, Law. Dict. Abolished by stat. 27 Hen. VIII. c. 26, 1 Edw. VI. c. 10, and 1 & 2 P. & M. c. 15. They were also called Lords Marchers (q. v.).

MARCHES. Limits; confines; borders. Especially used of the limits between England and Wales and between England and Scotland. Ersk. Inst. 2. 6. 4.

MARCHET. See MARCHETA

MARCHETA. Maiden rents (q. v.).

Ten shillings paid to the lord by every tenant at the marriage of his daughter. (British language called, *Guavr Merched*, i. e. a maid's fee.) Jacob.

Anciently a fee given to the lord for omitting the custom of *merchet*, (q. v.). Jacob, Maiden's Fee. See MERCHET.

MARCHIONESS. See MARQUIS.

MARE. See HORSE.

MARE CLAUSUM. The sea closed. It was formerly contended that a nation could in some cases claim jurisdiction over certain parts of the open sea even beyond the immediate vicinity of its own coast; but the contention has been abandoned. There has been an attempt to extend the principle to certain inland seas not entirely enclosed within the limits of a single state. When Turkey included the shores of the Black Sea, it was *mare clausum*. But when it lost part of its shore,

Russia and other nations became entitled to participate in the commerce of the Black Sea, a right which was recognized by treaty in 1820. The great inland lakes and their outlets fall under the same principal; 16 Halleck, Int. L., Baker's ed. 170. See 1 Kent 27; SEA.

The title of a famous work by Selden, intended as an answer to the *Mare Liberum* of Grotius. R. & L. Dict. See MARE LIBERUM.

MARE LIBERUM. The sea free. The title of a work by Grotius against the Portuguese claims to an exclusive trade to the Indies through the South Atlantic and Indian oceans. 1 Kent 27.

This work was written to show that all nations have an equal right to use the sea. R. & L. Dict. See MARE CLAUSUM.

MARESCALLUS (fr. Germ. *march*, horse, and *schalch*, master. Du Cange). A groom of the stables, who also took care of the diseases of the horse. Du Cange.

An officer of the imperial stable; *magister equorum*. Du Cange.

A military officer, whose duty it was to keep watch on the enemy, to choose a place of encampment, to arrange or *marshal* the army in order of battle, and, as master of the horse, to commence the battle. This office was second to that of *comes stabuli* or constable. Du Cange.

An officer of the court of exchequer. 51 Hen. III. 5.

An officer of a manor, who oversaw the hospitalities (*mansionarius*). Du Cange: Fleta, lib. 2, 74.

Marescallus aulae. An officer of the royal household, who had charge of the person of the monarch and the peace of the palace. Du Cange.

MARETUM (Lat.). Marshy ground overflowed by the sea or great rivers. Co. Litt. 5.

MARGIN. A sum of money, or its equivalent, placed in the hands of a stock broker, by the principal, or person on whose account the purchase is to be made, as a security to the former against losses to which he may be exposed by a subsequent depression in the market value of the stock. 49 Barb. 462.

A sale on margin is a sale on time, of stock retained as security and not delivered until final payment is made. If the stock falls in value before the time of final payment, the buyer is called upon to advance more margin.

The effect of the contract is that the broker, upon the performance of certain conditions by the customer, will buy and hold a certain number of shares, and in case any advance accrues and is realized by a sale, made under the direction or authority of the customer, he shall enjoy the benefit of it, and in case a loss ensues, the broker having performed the contract on his part, the customer shall bear it; 49 Barb. 464; 66 N. Y. 518.

The circumstances attending ordinary speculations in stocks on a margin are described by Hunt, C. J., in 41 N. Y. 235; and also more fully in Dos Passos, Stock Brokers 102.

Stock purchased on a margin instantly becomes the property of the customer, with all future dividends and earnings, and the client is entitled to the possession of it upon paying the purchase money with commissions; 41 N. Y. 235, 247, 257, 258; 53 id. 211, 216. It was settled in New York by the leading case of Markham v. Jaudam that a purchase of stock on margin by brokers to be carried for the customer in their own name and with their own funds, creates the legal relation of pledgor and pledgee, and that a sale, not judicial, or upon notice and demand for payment of advances and commissions is a wrongful conversion; 41 N. Y. 23. This doctrine was finally distinctly reaffirmed in New York; 81 N. Y. 25; and in other states; 25 Md. 242, 269; 48 Cal. 99; 5 Pa. 41; 71 id. 76; and apparently in England; 5 Bligh N. s. 163, affirming 3 Sim. 153. See Dos Passos, Stock Brokers 112,

where many other cases are cited. The pledgee is not liable for neglect to sell the stock where it depreciates in his hands or even becomes worthless, if he has not been requested to sell or refused to transfer the stock for that purpose; 87 Pa. 894; 98 Mass. 133; nor is he liable if the pledge be stolen without negligence on his part; 56 How. Pr. 68; and a stock broker is not liable where spurious securities are purchased for a customer in the regular course of business, and if he sells such and in consequence refunds the purchase money, he can recover it from his customer; 15 M. & W. 308, 486; 8 C. B. 373. It thus appears that one purchasing stock on a margin is in all essential parts the owner of the stock, entitled to the advantages and subject to the responsibilities of that relation.

The provision of the California constitution invalidating contracts for the sale of futures is held to apply to a sale of stock on margin; 89 Cal. 373. See FUTURES, TOWN RECORD.

Of Railroad. A deed made to a railroad company to land adjoining its right of way, where there is a cut, calling for the "margin of the railroad" means the top of the cut, and not the base of it. 108 S. W. 558.

MARGINAL NOTE. An abstract of a reported case; a summary of the facts, or brief statement of the principle decided which is prefixed to the report of the case.

The marginal notes which appear in the statute books have not the authority of the legislature, and cannot alter the interpretation of the text; L. R. 3 C. P. 522; 22 Ch. D. 573.

In Scotch Law. A note inserted on the margin of a deed embodying either some clause which was omitted in transcribing or some change in the agreement of the parties. Bell; Ersk. Prin. 274.

MARINARIUS (L. Lat.). An ancient word which signified a mariner or seaman. In England, *marinarius capitaneus* was the admiral or warden of the ports.

MARINE. Belonging to the sea; relating to the sea; naval.

A soldier employed, or liable to be employed, on vessels of war, under the command of an officer of marines, who acts under the direction of the commander of the ship. See MARINE CORPS.

It is also used as a general term to denote the whole naval power of a state or country.

MARINE CONTRACT. One which relates to business done or transacted upon the sea and in seaports, and over which the courts of admiralty have jurisdiction concurrent with the courts of common law. See Parsons, Marit. Law; 2 Gall. 398; MARITIME CONTRACT.

MARINE CORPS. A body of officers and soldiers under an organization separate and distinct from that of the army, and intended for service, in detached portions, on board of ships of war.

A military body primarily, belonging to the navy under the control of the secretary of the navy, but liable to be ordered to service in connection with the army. 120 U. S. 249.

MARINE COURT OF THE CITY OF NEW YORK. A local court originally established for the determination of controversies between seamen, but now a court of record, possessing general jurisdiction of controversies involving not more than \$3,000, and special jurisdiction of civil actions for injuries to person or character, without regard to the amount of damages claimed. Rap. & L. Law Dict.

The name of this court was changed to city court by Laws 1888, ch. 26. See NEW YORK.

MARINE INSURANCE. See HULL AND MACHINERY; INSURANCE.

MARINE INTEREST. A compensation paid for the use of money loaned on bottomry or respondentia. Provided the money be loaned and put at risk, there is

no fixed limit to the rate which may be lawfully charged by the lender; but courts of admiralty, in enforcing the contract, will mitigate the rate when it is extortionate and unconscionable. See BOTTOMMEY; MARITIME LOAN; RESPONDENTIA.

MARINE LEAGUE. A measure equal to the twentieth part of a degree of latitude. Boucher, Inst. n. 1845. It is generally conceded that a nation has exclusive territorial jurisdiction upon the high seas for a marine league from its own shores. 1 Kent 29. See The Franconio, 2 Ex. Div. 63; TERRITORIAL WATERS; SEA.

MARINE RISK. See INSURANCE; RISKS AND PERILS.

MARINE TORTS. See MARITIME TORTS.

MARINER. One whose occupation it is to navigate vessels upon the sea. Surgeons, engineers, clerks, stewards, cooks, porters, and chambermaids, on passenger-steamer, when necessary for the service of the ship or crew, are also deemed mariners, and permitted as such to sue in the admiralty courts for their wages. 1 Conkl. Adm. 107. See Gilp. 505; 80 N. Y. 71; 1 Hagg. Adm. 187.

The term includes masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deck hands, and waiters—women as well as men. Bened. Adm. § 278. Those employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, "no matter what be their sex, character, station, or profession;" 77 Fed. Rep. 476 (C. C. of A.). See 7 How. 80; 3 Sumn. 115; 80 N. Y. 80; SEAMEN; LIEN; SHIPPING ARTICLES.

MARISCHAL. An officer in Scotland, who, with the lord high constable, possessed a supreme itinerant jurisdiction in all crimes committed within a certain space of the court, wherever it might happen to be. Wharton.

MARITAGIO AMISSO PER DEFALTAM. An obsolete writ for the tenant in frank marriage to recover lands, etc., of which he was deforced.

MARITAGIUM (Lat.). A portion given with a daughter in marriage. See FEUDAL LAW.

MARITAGIUM HABERE. To have the free disposal of an heiress in marriage.

MARITAL. That which belongs to marriage; as marital rights, marital duties. See HUSBAND; MARRIED WOMAN.

MARITAL PORTION. The name given to that part of a deceased husband's estate to which the widow is entitled. 3 Mart. La. N. s. 1.

MARITIMA ANGLIÆ. Profits and emoluments received by the king from the sea. They were anciently collected by sheriffs but were afterwards granted to the Lord High Admiral; Par. 8 Hen. III. m. 4.

MARITIMA INCREMENTA. Lands gained from the sea. See ALLUVION.

MARITIME. Pertaining to navigation or commercial intercourse upon the seas, great lakes, and rivers.

The word *maritime* is also to have its appropriate meaning relating to the sea. The words *admiralty* and *maritime*, as they are used in the constitution and acts of congress, are by no means synonymous, although able lawyers, on the bench, as well as at the bar, seem sometimes to have so considered them. They were evidently both inserted to preclude a narrower construction which might be given to either word, had it been used alone. The English admiralty had jurisdiction of all cases arising beyond sea, although not maritime in their character. These are excluded by the use of both terms." Bened. Adm. § 40.

Maritime pertains primarily to things bordering on the sea, as distinguished from *marine*, which applies to things of or pertaining to the sea. Anderson.

MARITIME BELT. That part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. 202 U. S. 52; 139 U. S. 240; 94 U. S. 391.

MARITIME CAUSE. A cause arising from a maritime contract, whether made at sea or on land.

In all cases of contract the jurisdiction of the admiralty courts depends upon the nature or subject-matter of the contract; but in cases of maritime tort and salvage their jurisdiction depends upon the place in which the cause of action accrued; 1 Conkl. Adm. 19, 33. In general, the courts of common law have a concurrent jurisdiction with courts of admiralty in those cases which are prosecuted on the instance side of the court. But the admiralty also has jurisdiction of prize cases, and that jurisdiction is exclusive, except where affected by special statutes; 6 Wall. 759. See **PRIZE COURTS**. The jurisdiction of the district courts in civil cases of admiralty and maritime jurisdiction is exclusive of all others; nor can a state legislature confer jurisdiction upon a state court; 4 Wall. 411; 7 *id.* 624.

The admiralty jurisdiction has been held not to extend to preliminary contracts, merely leading to the execution of maritime contracts; 3 Mas. 6; 3 Sumn. 144; nor to trusts, although they may relate to maritime affairs; Daves 71; nor to enforcing a specific performance of a contract relating to maritime affairs; nor to a contract not maritime in its character, although the consideration for it may be maritime services; 4 Mas. 380; nor to questions of possession and property between owner and mortgagee; 17 How. 399; nor to contracts of affreightment from one port of the great lakes to another port in the same state; 21 How. 244. In the following cases (cited in Bened. Adm. § 214 a) actions have been sustained in admiralty: On an insurance policy; 10 Wall. 1; against an owner of cargo in general average; 12 *id.* 341; for weighing, inspecting, and measuring cargo; 2 Fed. Rep. 731; for cooping cargo; 13 *id.* 703; for compressing cargo; 26 *id.* 927; for the services of a watchman; 7 *id.* 285; a diver; 23 *id.* 429; an average adjuster; 7 *id.* 236; for the use of a dry dock; 12 *id.* 207; for removing ballast; 2 *id.* 729; for lockage in a river; 1 *id.* 218; for wharfage; 95 U. S. 75; for insurance premiums; 40 Fed. Rep. 603; for launching a vessel which had been driven ashore; 5 Hughes 125; for repairing a scow; 3 Fed. Rep. 207; on a contract to supply nets to a fishing vessel; 33 *id.* 297; for the charter of a vessel yet to be built; 44 *id.* 102; for services as watchman; 32 *id.* 300; actions to try the title to a ship; Bened. Adm. § 276; but not to enforce a merely equitable title; 135 U. S. 599.

The following cases are cited by the same author as not being within the maritime jurisdiction: For storage of sails; 2 Fed. Rep. 393 (*contra*, 2 Gall. 493); for services of a ship broker; 10 Fed. Rep. 848; for wharfage while laid up in the winter; 28 *id.* 429; for receiving and storing cargo on board a vessel during the winter; 33 *id.* 383; for obtaining a concession to dig guano; 15 *id.* 385; for lease of a "bar" on board a vessel; 2 Flipp. 427; on a contract to navigate a raft; 1 *id.* 543; a contract to store wheat for the winter; 33 Fed. Rep. 393; a contract by a master to carry cargo, sell it, and account for the proceeds; 37 *id.* 369; for services in purchasing a vessel; 39 *id.* 40.

As to passengers, it has been a question whether contracts for their transportation were within the jurisdiction; Gilp. 184; but the contrary view is now established; 4 Wall. 411.

Stevadores were formerly not considered as rendering marine services, but the contrary view appears now to obtain; Bened. Adm. § 285; 37 Fed. Rep. 209, 367; 51 *id.* 954.

As to jurisdiction over foreign ships, all persons in time of peace have the right to resort to the tribunals of the nation where they may happen to be, for the protection of their rights, unless the jurisdiction is excluded by treaty, though sometimes, as in the case of foreign seamen, they will refuse, from considerations of expediency, to exercise their jurisdiction; Bened. Adm. § 283; thus, admiralty jurisdiction does not apply to claims of bad treatment suffered by an American serving as a seaman on a Norwegian vessel; 55 Fed. Rep. 80.

As to the jurisdiction of the Lord High Admiral of England, see "A Water Court," 22 Law Mag. & Rev. 142, by Sir S. Baker; another article on "The Water Court of Saltash"; 20 Law Mag. & Rev. 195.

See **ADMIRALTY**; **WHARFAGE**; **STEVEDORES**; **PILOTS**; **MARITIME**; **MARITIME CONTRACT**; **MARITIME TORT**; **LIEN**; **BOTTOMRY**; **RESPONDENTIA**; **JETTISON**; **RANSOM BILLS**.

MARITIME CODES. See **CODE**. Much learning in relation thereto and certain lesser maritime codes not referred to under that title will be found in Bened. Adm. ch. xi.

MARITIME CONTRACT. One which relates to the business of navigation upon the sea, or to business appertaining to commerce or navigation to be transacted or done upon the sea, or in sea-ports, and over which courts of admiralty have jurisdiction concurrent with the courts of common law.

Such contracts, according to civilians and jurists, include, among others, charter-parties, bills of lading, and other contracts of affreightment, marine hypothecations, contracts for maritime service in building, repairing, supplying, and navigating ships or vessels, contracts and quasi contracts respecting averages, contributions, and jettisons. See 2 Gall. 398, in which Judge Story gave a very elaborate opinion on the subject; 2 Pars. Marit. Law 182. See 3 Mas. 27; 2 Story 176; 2 Curt. C. C. 322; 7 How. 729.

The contract for building a vessel is not a maritime contract; 20 How. 393; 7 Am. Law Reg. 5; 23 How. 129; *contra*, 21 Law Rep. 281.

The fact that contracts of affreightment are personal contracts between the shipper and ship owner does not prevent them from being maritime contracts on which a libel *in rem* against the ship may be maintained; 61 Fed. Rep. 213; 61 *id.* 860. See **MARITIME CAUSE**.

MARITIME COURT. See **ADMIRALTY**.

MARITIME INTEREST. See **MARINE INTEREST**.

MARITIME LAW. That system of law which particularly relates to the affairs and business of the sea, to ships, their crews and navigation, and to the marine conveyance of persons and property.

Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own. 21 Wall. 558.

In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the integrity of the system as a harmonious whole.

The general system of maritime law which was familiar to the lawyers and statesmen of this country when the constitution was adopted, was intended, and referred to, when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country.

The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no state law or act of congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to effect it.

The decisions of this court illustrative of these sources, and giving construction to the laws and constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

In Bened. Adm. § 214 a it is said:—The maritime law is a law common to all nations which are engaged in maritime commerce; it consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established in all the commercial countries of the world, to regulate the dealing and intercourse of merchants and mariners, in matters relating to the sea.

"This maritime law does not in the least depend upon the court in which it is to be administered, but furnishes the proper rule of decision in cases to which it applies, no matter in what court they may be brought; and it has, in fact, been administered in different countries, in different courts, each constituted in its own manner. In England, the court of admiralty and the court of chancery especially enforced it, while truth was required in pleading; but when, by the use of a fictitious venue, the facts might be laid as occurring in London, the king's bench took jurisdiction and prohibited the admiralty; and thus, in the king's bench more than in the court of admiralty, and especially under Lord Mansfield, the maritime law was built up and extended." Bened. Adm. § 42.

"The jurisdiction of the admiral, and the administration of the admiralty law proper—the local maritime law,—as it became a judicial function, has thus passed into the hands of the courts, and they now administer the admiralty law and the maritime law, both of which are sometimes called the admiralty law, sometimes the maritime law, and sometimes the admiralty and maritime law; and cases arising under them are cases of admiralty and maritime jurisdiction." Bened. Adm. § 43. See 2 Gall. 398.

The law of limited liability was enacted by congress as a part of the maritime law of the United States, and, in its operation, extends wherever public navigation extends; 130 U. S. 537; the act of congress of 1886, § 4, extending the limited liability act to vessels used on a river in inland navigation, is a constitutional and valid law; 141 U. S. 1. See **ABANDONMENT**. See **ADMIRALTY**; **MARITIME CAUSE**, and the various titles in regard to which information is sought.

MARITIME LIEN. See **LIEN**.

MARITIME LOAN. A contract or agreement by which one, who is the lender, lends to another, who is the borrower, a certain sum of money, upon condition that if the thing upon which the loan has been made should be lost by any peril of the sea, or *vis major*, the lender shall not be repaid unless what remains shall be equal to the sum borrowed; and if the thing arrive in safety, or in case it shall not have been injured but by its own defects or the fault of the master or mariners, the borrower shall be bound to return the sum borrowed, together with a certain sum agreed upon as the price of the hazard incurred. Emerigon, Mar. Loans, c. 1, s. 2. See **BOTTOMRY**; **MARINE INTEREST**; **RESPONDENTIA**.

MARITIME PROFIT. A term used by French writers to signify any profit derived from a maritime loan.

MARITIME SERVICE. A service rendered upon water in connection with some vessel, the preservation of her cargo or crew. 16 Fed. Rep. 924.

MARITIME TORT. A tort which by reason of the place where it is committed is within the jurisdiction of admiralty.

A tort committed upon water and which comes within the jurisdiction of a court of admiralty. 17 Fed. Rep. 387.

Admiralty courts have always had jurisdiction of torts committed upon the high seas, and there is also no question as to injuries upon waters of the sea where the tide ebbs and flows, but in the United States, where that is not the test, the jurisdiction would extend to any waters which for other purposes are held to be within the general admiralty jurisdiction. Civil jurisdiction of torts has been said to depend solely upon the place where the cause of action arises; 66 U. S. 574; but a doubt is suggested whether it does not also "depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction in cases of contract applies." Bened. Adm. § 308 and cases cited. This maritime jurisdiction of civil injuries has been held to extend to all cases of personal injuries committed by the master or his officers against passengers or seamen; *id.* § 309. The jurisdiction has been held not to survive the death of the person injured even if aided by a state statute enabling an administrator to sue for such injuries in ordinary cases; Sprague 184. It was held by the supreme court that no action would lie for the death of a person killed by a marine tort; 119 U. S. 199, where the decisions are collected. In that case the question whether an action *in rem* would lie was left undetermined. A personal action in such case has been maintained against the owner at common law; 77 N. Y. 546; and also in admiralty; 55 Fed. Rep. 98. Every violent dispossession of property at sea is *prima facie* a maritime tort; 1 Wheat. 238. An injury to a vessel from negligence in operating a drawbridge is a maritime tort, and a suit in admiralty will lie against the town therefor; 60 Fed. Rep. 590; 45 *id.* 260; 27 *id.* 230; 33 *id.* 202. In actions for torts arising from negligence courts of admiralty do not confine themselves within the limits of mere municipal law, but deal with the question of damage upon enlarged principles of equity and justice, to the extent of dividing the damages in cases of mutual fault; 60 Fed. Rep. 590, 578; 137 U. S. 1. See MARITIME CAUSE.

MARITUS. A husband; a married man.

MARK. A sign, traced on paper or parchment, which stands in the place of a signature; usually made by persons who cannot write. The use of the mark in ancient times was not confined to illiterate persons; among the Saxons the mark of the cross, as an attestation of the good faith of the person signing, was required to be attached to the signature of those who could write, as well as to stand in the place of the signature of those who could not write. It was the symbol of an oath. It is most often the sign of the cross, made in a little space left between the Christian name and surname; 2 Bla. Com. 305; 13 Pet. 150; 2 Ves. Sen. 455; 1 V. & B. 362. The word *his* is usually written above the mark, and the word *mark* below it; Schoul. Wills 303, 305. But it is not essential that these words shall be attached to the mark made or adopted by a person unable to write, in the execution of a deed, as it is sufficient if it appears that he in fact made the mark or adopted it; 98 N. C. 13. A mark is a signature; 12 Pet. 151; 47 N. H. 205; 93 N. C. 624; 132 Mass. 105. And it may be proved as handwriting: by one who has seen the person make his mark; 17 Ala. 706; 3 Humph. 47; 5 Johns. 144; *contra*, 17 Pa. 159. A mark is now held to be a good signature though the party was able to write; 8 Ad. & E. 94; 3 Curt. 752; 5

Johns. 144; 2 Bradf. Surr. 885; 24 Pa. 502; 19 Mo. 609; 18 Ga. 396; 16 B. Monr. 102; 1 Jarm. Wills 69, 112; 1 Will. Exec. 63. The signature of a subscribing witness to a deed may be made by a cross mark; 102 N. C. 284.

It is not necessary in the execution of a note, that the person executing, if unable to write, touch the pen while the person authorized signs his name; 35 N. E. Rep. (Ind.) 925. See SIGNATURE.

The sign, writing, or ticket put upon manufactured goods to distinguish them from others; 3 B. & C. 541; 2 V. & B. 218; also to indicate the price; and if one use the mark of another to do him damage, an action on the case will lie, or an injunction may be had from chancery; 2 Cro. 47. This mark may consist of the name of the manufacturer, printed, branded, or stamped in a mode peculiar to itself, or a seal, a letter, a cipher, a monogram, or any sign or symbol, to so distinguish it as his product; 31 Fed. Rep. 280. See TRADE-MARKS; UNION LABEL LAWS.

By the act of July 8, 1870, patentees are required to mark patented articles with the word *patented* and the day and year when the patent was granted, and in any suit for infringement by the party failing so to mark, no damages can be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article patented.

Marks and brands are admissible in evidence to prove ownership of animals, whether recorded or not, unless prohibited by statute; 26 Tex. App. 466.

MARK (spelled, also, *Marc*). A weight used in several parts of Europe, and for several commodities, especially gold and silver. When gold and silver are sold by the mark, it is divided into twenty-four carats. A money of accounts in England, and in some other countries a coin. The English mark is two-thirds of a pound sterling, or 13s. 4d.; and the Scotch mark is of equal value in Scotch money of account. Encyc. Amer.

MARK. The portion of territory occupied by the community of kindred cultivators was termed in German muniments the "mark." It signified something marked out and defined, and having settled boundaries. The mark might be located either in the forest or in the plain; and its borderland consisted either of wood or waste. It was divided into three parts,—the village, the arable lands, and the common waste lands. In the center of the mark was situated the village in which dwelt the markmen. The possession of a homestead was evidence of the fact that its possessor was a fully qualified member of the mark, and as such entitled to a full share in the enjoyment of the arable, the pasture, the meadow, and waste lands belonging to the community. In the fields under cultivation in any given year, every householder had allotted to him his equal share which he cultivated separately by his own labor, with sons and slaves. But he was required to cultivate according to fixed rules. The woods, pastures, and meadows embraced within the mark were undivided, and enjoyed in common, and, originally, without restriction. Taylor, Jurispr. 199. See MARK MOOT.

MARK MOOT. That place where all the business was transacted that arose out of the German system of common cultivation, and out of the enjoyment of common rights. The annual allotment of the arable lands, the rotation of crops, the choice of the meadow, the admission of a new member into the mark (*q. v.*), were all questions determined in the mark moot. Taylor, Jurispr. 200. See MARK.

MARKET. A public place and appointed time for buying and selling. A public place, appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold. All fairs are markets, but not *vice versa*; Bract. l. 2, c. 21; Co. Litt. 22:

Co. 2d Inst. 401; Co. 4th Inst. 272. Markets are generally regulated by local laws. A city may establish public markets and confine the sale of commodities therein, where the regulations are reasonable and in consideration of public health; 84 Ala. 17; 17 Wend. 265; 44 La. Ann. 809; 11 Ia. 407; 6 H. & S. 289. See 38 Ga. 229; and ordinances are valid, prohibiting sales in markets by non-producers without license; 11 Pick. 168; 9 Metc. 253; requiring a small fee for stalls; 10 Ohio 237; prohibiting produce wagons from standing within the limits of a market; 109 Mass. 335; or the keeping a private market within six squares of a public market (where the ordinance was authorized by statute); 41 La. Ann. 897; 139 U. S. 621; and prohibiting the sale of specified provisions except at a public market; 30 Ala. 540; 76 Tex. 559; 44 Mo. 549; 10 Wend. 100; 3 Johns. 418; 106 N. C. 604; 11 Mich. 847; 53 Ga. 613. See 24 L. R. A. 584, n.

The franchise by which a town holds a market, which can only be by royal grant or immemorial usage.

By the term market is also understood the demand there is for any particular article; as, the cotton market in Europe is dull. See 15 Viner. Abr. 41; Comyns, Dig. Market; MARKET STALLS.

See RIGGING THE MARKET.

MARKET OVERT. An open or public market; that is, a place appointed by law or custom for the sale of goods and chattels at stated times in public. "An open, public, and legally constituted market." Jervis, C. J., 9 J. Scott 601; 18 C. B. 593. As to what is a legally constituted market over, see 5 C. B. N. s. 299. In 5 B. & S. 313, the doctrine of market overt was much discussed by Cockburn, C. J., and the opinion expressed that a sale could not be considered as made in market overt, "unless the goods were exposed in the market for sale, and the whole transaction begun, continued, and completed in the open market; so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them, and prevent their being sold."

The market-place is the only market overt out of London, but in London every shop is a market overt; 5 Co. 83; F. Moore 300. Where a sale took place in a showroom above a store, access to which was only obtainable by special permission, it was not a sale in market overt; [1892] 1 Q. B. 25. In London, every day except Sunday is market-day. In the country, particular days are fixed for market-days by charter or prescription; 2 Bla. Com. 449.

All contracts for any thing vendible, made in market overt, shall be binding; and sales pass the property, though stolen, if it be an open and proper place for the kind of goods, there be an actual sale for valuable consideration, no notice of wrongful possession, no collusion, parties able to contract, a contract originally and wholly in the market overt, toll be paid, if requisite, by statute, and the contract be made between sun and sun; 5 Co. 83b. But sale in market overt does not bind the king, though it does infants, etc.; Co. 2d Inst. 713; 2 Bla. Com. 449; Comyns, Dig. Market (E); Bacon, Abr. Fairs and Markets (E); 5 B. & Ald. 624. A sale by sample is not a sale in market overt; 5 B. & S. 318; but a sale to a shop-keeper in London is; 11 Ad. & E. 326; but see 5 B. & S. 318. Under 24 & 25 Vict. c. 96, s. 100, upon the conviction of a thief, at the prosecution of a person from whom he has stolen goods, summary restitution of the stolen goods is provided for. The English Sale of Goods Act, 1893, provides that a *bona fide* buyer in market overt acquires a good title, but horses are excepted from the act.

There is no law recognizing the effect of a sale in market overt in the United States; 5 S. & R. 130; 1 Johns. 480; 52 N. H. 159; 59 Me. 111; 8 Mass. 531; 5 Ohio 203; 1 Tyl. 841; 10 Pet. 161; 2 Kent 324; 2 Tud. Lead. Cas. 784, where the subject is fully treated.

MARKET PRICE. When referring to the value of an article at the place of exportation, it means the price at which such articles are sold and purchased, clear of every charge, but such as is laid upon it at the time of sale. 2 Wash. C. C. 499.

MARKET QUOTATIONS, PROPERTY RIGHT IN. A board of trade has a property right in the quotations made upon the transactions of its exchange, as prepared by its officers and agents until their publication. 103 Fed. 902. The furnishing by a board of trade of market quotations, made upon the transactions of its exchange, to customers for the exclusive use, either by means of a ticker, or by placing them on a blackboard in the customer's office, is not such a publication as deprives the board of its right therein. 109 Fed. 705.

MARKET STALLS. The right acquired by a purchaser of a market stall is in the nature of an easement in, not a title to, a freehold in the land, and such right or easement is limited in duration to the existence of the market, and is to be understood as acquired subject to such changes and modifications in the market during its existence, as the public needs may require. The purchase confers an exclusive right to occupy the particular stalls, with their appendages, for the purposes of the market, and none other, and subject to the regulation of the market. So held in a case in 2 Md. Law Rec. 81, a case of a public market in Baltimore. In 33 Pa. 202, the court refused to enjoin the city of Philadelphia from demolishing the old market house with a view to building a new one on other property. See, also, 18 Ohio 568; 19 Am. L. Reg. N. S. 2.

MARKET VALUE. A price established by public sales, or sales in the way of ordinary business, as of merchandise. 99 Mass. 348; 69 N. Y. 448.

The market value is to be determined by the general market value of goods without regard to special advantages which the importer may enjoy; and in ascertaining that value, it is proper in some instances to consider the cost of production, including such items of expense as designs, salary of buyer, clerk hire, rent, interest, and percentage on the aggregate cost of the business in tariff law cases; 155 U. S. 240.

MARKETABLE TITLE. A title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear in such transactions, be willing and ought to accept; and which one is entitled to have. 128 N. Y. 636. A title by adverse possession for forty years is a marketable title; 138 Ind. 103. In equity a marketable title is one in which there is no doubt involved, either as law or fact; 138 Pa. 424. See **TITLE**.

MARKSMAN. A person who cannot write, and only makes his mark in executing instruments.

MARLBOROUGH, STATUTE OF. An important English statute, 52 Hen. III. (1267), relating to wrongful distress. It derived its name from the town in Wiltshire in which parliament sat when it was enacted, now known as Marlborough. See 6 Chitty, Eng. Stat.; 2 Reeve, Hist. Eng. Law 62; Crabb, Com. Law 156; 1 Soc. Eng. 410.

MARQUE AND REPRISAL. See **LETTERS OF MARQUE**.

MARQUESS. See **MARQUIS**

MARQUIS. A title of nobility. In England the rank of a marquis is below that of a duke and above an earl. It is also a title of dignity in France, Italy, and Germany.

The title dates from 1386. The wife of a marquis is formally styled marchioness, but is informally known as "Lady"; and his

sons (other than the eldest son, who takes by courtesy the next lower title—usually an earldom—of the family) are by courtesy entitled to the prefix of "lord," while his daughters are entitled in like manner to the prefix of "lady." During his life the eldest son of his eldest son bears by courtesy the title of the family next in rank after that used by the eldest son. Byrnie.

MARRIAGE. A contract made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife. For the laws of the Hebrews and Romans and the canon or ecclesiastical law of the Middle Ages on the subject of marriage, see **Fulton's Laws of Marriage**.

Marriage, in our law, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. 1 Bish. Mar. & D. § 3.

It does not mean a mere temporary agreement to dwell together for a time for the gratification of sexual desires, but it is essential that the contract be entered into with a view to its continuance through life and then be followed by celebration and cohabitation, with the apparent object of continuing such cohabitation through life; 50 N. W. Rep. (Neb.) 155.

The better opinion appears to be that marriage is something more than a mere civil contract. It has been variously said by different writers to be a status, or a relation, or an institution. This view is supported by the following: Story, Conf. Laws § 108 n.; Schoul. Husb. & W. § 12; 4 R. I. 87; 9 Ind. 37; 3 P. D. 1; s. c. 19 Am. L. Reg. N. S. 80; 4 P. D. 1; 5 id. 94; 5 Law Mag. & Rev. 4 ser. 26. But see *contra*, 23 S. E. Rep. 178. In New York it has been held to be merely a civil contract; 7 Abb. N. C. 98. Marriage is not a contract within the federal constitutional provision as to impairment of contracts; 125 U. S. 190.

All persons are able to contract marriage unless they are under the legal age, or unless there be other disability. The age of consent at common law is fourteen in males and twelve in females; Reeve, Dom. Rel. 236; 2 Kent 78; 1 N. Chimp. 254; 10 Humphr. 61; 1 Gray 119; 55 Ala. 111. This is still the rule in the older states; but in Ohio, Indiana, and other western states, the age of consent is raised to eighteen for males, and fourteen for females; Schoul. Husb. & W. § 24. When a person under the age marries, such person can, when either he or she arrives at lawful age, avoid the marriage, or such person or both may, if the other is of legal age, confirm it. It has been held that the one who is of legal age may also disaffirm the marriage; Co. Litt. 79; East, P. C. 468; but see 15 Mich. 198. The disaffirmance may be either with or without a judicial sentence; 1 Bish. Mar. & D. § 150. If either of the parties is under seven, the marriage is void; 1 Sharsw. Bla. Com. 436; 5 Ired. Eq. 487. As to the age for contracting marriage in different countries, see 2 Halleck, Int. L., Baker's ed. App.

If either party is *non compos mentis*, or *insane*, the marriage is void. See **INSANITY**.

If either party has a husband or wife living the marriage is void; 4 Johns. 53; 22 Ala. N. S. 86; 1 Salk. 120; 1 Bla. Com. 438; 45 La. Ann. 419; although the woman may have thought her first husband was dead; 124 Pa. 646. See 40 La. Ann. 10; 156 Mass. 578; **INTENTION**.

A man may contract marriage before entry of a decree declaring his former marriage to have been void; 36 Pac. Rep. (Cal.) 11. See **NULLITY OF MARRIAGE**.

Consanguinity and affinity within the rules prescribed by law in this country render a marriage void. In England they rendered the marriage liable to be annulled by the ecclesiastical courts; 10 Metc. 451;

2 Bla. Com. 434. See **CONFLICT OF LAWS**.

If either party acts under compulsion, or is under duress, the marriage is voidable; 2 Hagg. Cons. 104, 246; 75 Hun 56; 12 P. & D. 21; [1891] P. 369. Where one of the parties answers "no" to every question of the magistrate which should have been answered "yes," and thereafter refused to cohabit with the man, the marriage is not valid; 73 Mich. 133.

The parties must each be willing to marry the other. Where a woman silently withholds her consent to a formal marriage, but subsequently treats it as a good marriage, she is estopped from saying it was not real and binding on her; 69 Hun 146. Where one of the parties is mistaken in the person of the other, the requisite of consent is wanting. But a mistake in the qualities or character of the other party will not avoid the marriage; Poynt. Marr. & D. c. 9. If a man marries the woman he intends to marry, the marriage is valid, though she passes under an assumed name; 1 Bish. Mar. & D. § 204; 3 Curt. Ec. 185; see *Burke's Trials* 63.

If the apparent willingness is produced by fraud, the marriage will be valid till set aside by a court of chancery or by a decree of divorce; 5 Paige, Ch. 48. See 94 Mich. 559; 6 Misc. Rep. 355. A ceremony of marriage without license and performed by an unauthorized person, and imposed on a woman by false pretences, but believed by her to be lawful and *bona fide*, is valid for all civil purposes, unless and until avoided by the deceived person; 94 Ala. 501. Fraud is sometimes said to render a marriage void; but this is incorrect, as it is competent for the party injured to waive the tort and affirm the marriage. Impotency in one of the parties is sometimes laid down as rendering the marriage void, as being a species of fraud on the other party; but it is only a ground for annulling the contract by a court, or for a divorce. Schoul. Husb. & W. § 22.

A prohibition, imposed by the laws of a state against a subsequent marriage by a husband against whom a decree of divorce has been rendered, can have no extra-territorial effect; and therefore such person may contract a subsequent marriage in another state where the law imposes no such prohibition; 83 Ala. 528; but at his death the second wife is not entitled to letters of administration on his estate, in the state which imposed the prohibition against his re-marriage; 39 Atl. Rep. (Pa.) 16.

Dr. Wharton (Conf. Laws) gives three distinct theories as to the law which is to determine the question of matrimonial capacity.

It is determined by the law of the place of solemnization of the marriage. This view is supported by Judge Story (Conf. Laws §§ 110, 112), and Mr. Bishop (Mar. & D. § 390); 19 Am. L. Reg. N. S. 219; 76 Ga. 177; but it is objected to this theory that it is subject to exceptions which destroy its applicability to the majority of litigated cases. Thus marriages which by our law are incestuous, are not validated by being performed in another land, where they would be lawful, and so the converse is true, that the marriage, in England, of an American with his deceased wife's sister, would be recognized as valid in such of our states as hold such a marriage to be legal, nor is it believed that an American court will ever hold a marriage of American citizens, solemnized abroad, to be illegal, simply because the consent of parents was withheld or because one of the parties, though of age at home, was a minor at the place of celebration. Further, to make the *lex loci celebrationis* supreme enables parties to acquire for themselves any kind of marital capacity they want, by having the marriage solemnized in a state where this kind of marital capacity is sanctioned by law. See 87 Tenn. 244; 59 Fed. Rep. 682.

A second theory of matrimonial capacity is that it is determined by the *lex domicilii*; Wheat. Int. Law (Lawr.) 172; 4 Phill. Int. Law 234; 2 Cl. & F. 498; 9 H. L. C. 198. There are two serious objections to this

theory. First it would make the validity of the marriages in the United States of natives of other countries depend upon the question whether such persons had acquired a domicile in the United States; for if they had not, they would be governed by the laws of their foreign domicile. Few aliens, who marry in this country, could be sure they were legally married. Second, it would be necessary upon this theory to sustain the polygamous marriages of Chinese; see, as sustaining this theory, *L. R. 2 P. & M. 440*; *4 P. D. 13*; *3 P. D. 1*; *29 L. J. P. & M. 97*; *Westl. 56*; but see *125 Mass. 374*. According to Savigny, all questions of capacity are to be determined by the husband's domicile; which, as the true seat of the marriage, absorbs that of the wife. It has been conceded that the law of domicile does not extend to the direction of the ceremonial part of the marriage rite, and that the *lex domicilii* is the law of the country in which the parties are domiciled at the time of the marriage, and in which their matrimonial residence is contemplated; *Lord Campbell in 9 H. L. C. 193*.

The third theory is that matrimonial capacity is a distinctive national policy, as to which judges are obliged to enforce the rules of the state of which they are the officers. So far as concerns the United States, our national policy in this respect is to sustain the matrimonial capacity in all classes of persons arrived at puberty, and free from the impediments of prior ties. This view is approved by Dr. Wharton, *Confl. Laws* §§ 160-165. See *19 Am. L. Reg. n. s. 76, 219*; *31 Am. L. Rev. 524*.

At common law, no particular form of words or ceremony was necessary. Mutual assent to the relation of husband and wife was sufficient. Any words importing a present assent to being married to each other were sufficient evidence of the contract. If the words imported an assent to a future marriage, if followed by consummation, this established a valid marriage by the canon law, but not by the common law; *10 Cl. & F. 534*; *15 N. Y. 345*; *2 Rep. Husb. & W. 445*; *1 How. 219*; *2 N. H. 268*. But a betrothal followed by copulation does not make the common-law marriage *per verba de futuro cum copula* when the parties looked forward to a formal ceremony, and did not agree to become husband and wife without it; *12 R. I. 485*. An agreement made *per verba de presenti* between a man and a woman to become husband and wife, followed by consummation thereof, either secret or public, is a valid marriage and is not invalidated by an agreement of one of the parties not to make the marriage known until a specified time, unless with the consent of the other; *75 Cal. 1*; *17 Wash. L. Rep. 328*. The question has been raised of the validity of a marriage at sea, and it has been held in California that outside of the three-mile limit there is no law governing marriage, and that if persons go to sea to escape the conditions attached to the ceremony within a state the state cannot be expected to recognize the ceremony as valid; *55 Alb. L. J. 208*. But a formal marriage on a British man-of-war on the high seas has been held valid in England; [*1896*] *P. 116*.

At common law the consent might be given in the presence of a magistrate or of any other person as a witness, or it might be found by a court or jury from the subsequent acknowledgment of the parties, or from the proof of cohabitation, or of general reputation resulting from the conduct of the parties. In the original United States the common-law rule prevails, except where it has been changed by legislation; *6 Binn. 405*; *4 Johns. 52*. See *10 N. H. 383*; *4 Burr. 2058*; *1 How. 219, 234*; *1 Gray 119*; *2 Me. 102*.

In civil cases a marriage can generally be proved by showing that the parties have held themselves out as husband and wife, and by general reputation founded on their conduct. This is sufficient, too, for purposes of administration; *2 Redf. 456*. There is an exception, however, in the case of such civil suits as are founded on the

marriage relation, such as actions for the seduction of the wife, where general reputation and cohabitation will not be sufficient; *4 N. Y. 290*; *188 Pa. 210*; *3 Bradf. Surr. 369, 373*; *6 Conn. 446*; *29 Me. 323*; *14 N. H. 450*.

Marriage may be proved by the witnesses to its solemnization, by presumption, from a record, or from cohabitation and repute, and by declaration, or admissions of the parties to it, when against their interest or a part of the *res gestæ*, or by conduct from which such admission may be implied; *49 N. J. Eq. 520*; see *65 Vt. 482*; or by circumstantial evidence; *76 Hun 200*. Eye-witnesses and records are not essential; *103 U. S. 311*.

Documentary evidence is not the best proof of marriage; a witness who swears to having seen a marriage ceremony performed, intended to be in good faith, by a person acting as a clergyman or magistrate, testifies to a valid marriage, unless it is clearly illegal by statute; *72 Mich. 184*.

In most of the states, the degrees of relationship within which marriages may not be contracted are prescribed by statute. This limit in cases of consanguinity is generally, though not always, that of first cousins. In some of the states, a violation of the rule renders, by statute, the marriage absolutely void. In others, no provision of this kind is made. Various statutes have been passed to guard against abuse of the marriage ceremony. Such of them as require license, or the publication of bans, or the consent of parents or guardians, are regarded as directory, and, unless explicitly declaring the marriage to be void, if not complied with, do not render it void. See *4 La. 449*; *26 Mo. 260*; *2 Watts 9*; *1 How. 219*; *2 Halst. 138*; *2 N. H. 268*; *103 Mo. 188*; *43 Ala. 57*; *30 Ga. 173*; *25 N. Y. 390*. But see *2 Yerg. 589*; *9 H. L. C. 274*; *155 Mass. 425*; *29 W. Va. 732*; *30 Pac. Rep. 85*. See Nelson, Divorce.

In England Lord Hardwicke's Act, 1753, nullified all marriages (except those of Quakers and Jews) celebrated otherwise than in a church and according to the rites of the church of England, and this continued to be the law up to the passing of the Marriage Act, 1836, by which provisions were made for civil marriages at a register office, and for legalizing all marriages in duly registered dissenting places of worship, if celebrated in the presence of a civil official called a registrar of marriages. Foreign marriages are regulated in England by the act of 1892. See *LEX LOCI*, as to foreign marriages.

As to rights of married women, see HUSBAND; MARRIED WOMAN. RESTRAINT OF MARRIAGE. MIXED MARRIAGE;

MARRIAGES ACT, ROYAL. Under this act of 1772, no descendant of King George II., other than the issue of princesses married into foreign families, may contract matrimony without the previous consent of the sovereign, provided, however, that any such descendant, being over the age of twenty-five, may, upon giving twelve months' notice to the Privy Council, contract a marriage of which the king disapproves unless in the meantime both Houses of Parliament expressly declare their disapproval. *Byrne*.

MARRIAGE ARTICLES. Articles of agreement between parties contemplating marriage, in accordance with which the marriage settlement is afterwards to be drawn up; they are to be binding in case of marriage. They must be in writing, by the Statute of Frauds; *Burt. R. P. 484*; *Crabb, R. P. § 1809*; *4 Cruise, Dig. 274, 323*.

MARRIAGE BROKAGE. The act by which a person interferes, for a consideration to be received by him, between a man and a woman, for the purpose of promoting a marriage between them. The money paid for such service is also known by this name.

Such contracts are illegal at common law; *Show. P. C. 76*; *8 P. Wms. 76*; *3 Lev. 411*; and in equity they are utterly void, as

against public policy; *1 Fonbl. Eq. b. 1, c. 4, 10, note s*; *2 Sto. Eq. Jur. § 263*; *1 Ves. 508*.

It is said that such contracts were good at the civil law and that "matchmakers (*prozenetæ*) were allowed to receive a reward for their services." *Bisph. Eq. § 224, note*.

MARRIAGE LICENSE. See MARRIAGE.

MARRIAGE PORTION. That property which is given to a woman on her marriage. See DOWER.

MARRIAGE, PROMISE OF. See PROMISE OF MARRIAGE.

MARRIAGE SETTLEMENT. An agreement made by the parties in contemplation of marriage, by which the title to certain property is changed, and the property to some extent becomes inalienable. *1 Rice, Eq. 315*. See *2 Hill, Ch. 3*; *8 Leigh 29*; *1 D. & B. Eq. 389*; *Baldw. 344*; *15 Mass. 106*; *139 id. 144*; *7 Pet. 348*; *37 Ill. App. 145*; *93 Mich. 274*; *112 Mo. 442*. See *2 Washb. R. P. Appx.*; *Atherly, Marr. Settl.*

Such settlements are valid, the marriage being at law a valuable consideration; *42 S. W. Rep. (Tenn.) 213*; *20 App. Div. N. Y. 560*; and payments made in pursuance thereof cannot be set aside by creditors; *42 S. W. Rep. (Tenn.) 213*. The property covered passes, on the death of the wife, to her devisees under the settlement; *20 App. Div. N. Y. 560*; and is free from any claim by the husband to curtesy; *20 Misc. Rep. 481*. It is sufficient to change the course of inheritance and authorize each party to dispose of his or her own property by deed or devise without consent of the other; *5 Kan. App. 341*. See *42 Ia. 600*. It is not affected by a subsequent statute respecting married women; *109 Ala. 689*.

In Quebec a gift of future property between future consorts by marriage contract is illegal and void; *Rap. Jud. Quebec 11 C. S. 404*. See ANTENUPTIAL CONTRACT.

MARRIED WOMAN. A woman who has a husband.

The relation confers upon her certain rights, imposes on her certain obligations, and deprives her of certain powers and privileges.

At Common Law. A wife has a right to share the bed and board of her husband. She can call upon him to provide her with necessary food and clothing according to her position in life, and if he neglects or refuses to do it she can procure them on his account. See NECESSARIES. She is entitled, on his death, to dower in all the real estate of which he is seised at any time during coverture. See DOWER.

She is bound to follow him wherever in the country he may choose to go and establish himself, provided it is not, for other causes, unreasonable. She is under obligation to be faithful in chastity to her marriage vow; *5 Mart. La. n. s. 50*. See DIVORCE; ADULTERY.

A married woman can acquire rights of a political character: these rights stand on the general principles of the law of nations; *2 Hard. Ky. 5*; *3 Pet. 242*. See WOMAN.

When she commits a crime in the presence of her husband, unless it is of a very aggravated character, she is presumed to act by his coercion, and, unless the contrary is proved, she is irresponsible. Under other circumstances she is liable, criminally, as if she were a *feme sole*. See COERCION; DURESS; HUSBAND; WILL.

Her property rights were put by the marriage very much under the control of the husband. He could manage his own affairs in his own way, buy and sell all kinds of personal property, without her control, and he might buy any real estate he might deem proper; but, as the wife acquired a right in the latter, he could not sell it, discharged of her dower, except by her consent, expressed in the manner prescribed by the laws of the state where such lands lay. Her personal property in possession was vested in him, and he could dispose of it as if he had acquired it; this arose from the principle that they were

considered one person in law; 3 Bla. Com. 433; 83 Ala. 203; and he was entitled to all her property in action, provided he reduced it to possession during her life; 2 Bla. Com. 434. If the wife died before the claims were collected, the husband received them as her administrator, in which case, after payment of her debts, the surplus belonged to him absolutely. He was also entitled to her *chattel real*, but these vested in him not absolutely, but *sub modo*: as, in the case of a lease for years, the husband was entitled to receive the rents and profits of it, and could, if he pleased, sell, surrender, or dispose of it during the coverture, and it was liable to be taken in execution for his debts; and, if he survived her, it was to all intents and purposes his own. In case his wife survived him, it was considered as if it had never been transferred from her, and it belonged to her alone. In his wife's freehold estate he had a life estate during the joint lives of himself and wife; and when he had a child by her who could inherit, he had an estate by the curtesy. See CURTESY.

At common law a married woman could not bind herself by contract, express or implied, by parol or under seal, even for necessities, nor, though living apart from her husband, could she make a binding contract except for necessities or for the benefit of her separate estate; 9 Col. 291; and a contract made by her being invalid would be no consideration for a subsequent promise during widowhood; 49 N. J. L. 53. Her husband might be bound by her acts as his agent, duly authorized; 2 Freem. 178; 4 Man. & G. 253; but where payment to her was pleaded, her authority must be stated; 2 *id.* 173. By her own act her authority could not be enlarged; 101 U. S. 240; and she could not execute a conveyance, even in release of dower, otherwise than by joining with her husband in a deed to a third person; 4 Paige 448. No promise of a wife could at common law be enforced against her unless she had a separate estate, and then not by a personal decree but only by treating it as an appointment out of such estate; 49 N. J. L. 53; and then only for her or its benefit; 49 Ark. 220; and no implied promise could be raised against her; 58 Vt. 337. The common-law disabilities of a married woman could not be avoided by any false representations with respect to her capacity, and no estoppel would be raised thereby; 39 Pa. 299; 53 N. Y. 96; 2 Gray 161; but in the management of her separate property she would be answerable for the frauds of her agent, within the scope of his agency, though she were ignorant of it; 47 N. Y. 577. The disabilities of a married woman are her personal privilege, and must be pleaded; 7 Gray 338; 99 Mass. 199. See COVERTURE. And no one but the husband can object to a suit against him by the wife, so that a judgment against a firm of which he is a member is good if he do not himself raise the defence; 126 Pa. 470. Her common-law disability is not removed by the so-called married woman's acts which operate only to give her such capacity as is expressed in them; 22 Mo. App. 554; 4 Sawy. 604; 99 U. S. 325; 41 Miss. 125; 25 W. N. C. (Pa.) 218; 1 Biss. 64; and where such statutes authorize her to contract as though single, she is bound by estoppel arising from her misrepresentation or concealment; 77 N. C. 437; 46 Wiss. 877; or by the acts of her husband; 86 Ill. 74; 53 Miss. 844. Where such estoppel operates, it is only in respect to her personal estate; 30 Ark. 393; but the weight of authority is against sustaining estoppel against her; 2 L. R. A. 345, n., where are collected cases of common-law disabilities of a married woman and estoppel against her. The rigor of the common-law disabilities of a married woman and the merger of her individual and property rights in her husband gave rise to certain equitable remedies against her husband, intended to secure at least a portion of her property to the use of herself and her children. As to the character and extent of these rights, see WIFE'S EQUITY.

As a general rule, a contract made be-

tween parties who subsequently intermarry is, both at law and in equity, extinguished by the marriage; 1 Bla. Com. 442; but when articles are entered into or a settlement is executed whereby the wife is to have a certain provision in lieu of her fortune, the husband becomes virtually a purchaser of her fortune, and she becomes entitled to her provision, though there may be no intervention of trustees, and equity will enforce the contract; 2 Ves. Sen. 675; Husbands, on Married Women 125; MARRIAGE SETTLEMENT.

At common law a married woman was personally liable jointly with her husband for her torts unless committed under the coercion of her husband; 115 Pa. 534; 58 Vt. 337. The death of the wife terminated the liability of the husband, but if the husband died the wife might be sued alone; 115 Pa. 534.

It has been remarked by the recent historians of early English law that "the main idea which governs the law of husband and wife is not that of a 'unity of person,' but that of the guardianship, the *mund*, the profitable guardianship, which the husband has over the wife and over her property;" 1 Poll. & M. 468.

In Equity. The difficulties arising from the common-law doctrine of a married woman's incapacity, and her practical non-existence as a legal person, resulted in a qualified recognition by courts of equity of the individuality and existence of a married woman as such. This, however, was only granted in cases where she had what was termed a separate estate. This gave rise to two great doctrines of the law, the separate use and restraint on anticipation.

The latter was an invention of the court of equity and an exception to the general law of inalienability of property. It was justified as the most satisfactory method of giving property to a married woman so that it should not be practically given to her husband, to prevent which the "condition was allowed to be imposed restraining her from anticipating her income and thus fettering the free alienation of her property;" Jessel, M. R., in 11 Ch. D. 644. By the Conveyancing Act, 1881, the court was authorized, where it appeared to be for the benefit of a married woman, by judgment or order with her consent, to bind her interest in any property, notwithstanding that she was restrained from anticipation; 44 & 45 Vict. c. 41, §§ 39, 40. This was held to be not "a general power of removing the restraint upon anticipation, but only a power to make binding a particular disposition of property by a married woman if it be for her benefit;" 52 L. J. Ch. 928. See as to this doctrine, Brett, L. Cas. Mod. Eq. 104. The separate use was also originally a creation of the court of chancery, but in recent years it has been adopted in statutes with the effect of abolishing the common-law marital rights of the husband, to the same extent that they were avoided by a trust, in equity, to her sole and separate use.

The separate property of a *feme covert* as to which equity considers her as a *feme sole*, is that property alone which is settled to her sole and separate use by some will, writing, or deed of settlement with a power expressly or impliedly given her of managing it without the concurrence of her husband; 5 Day 174. This estate may be created by any form of settlement, written or oral (as to personality), by deed or will, to her directly or in trust for her; or, it may be by *antenuptial agreement* (q. v.). It may be settled by the husband; 63 Ala. 405; herself; L. R. 16 Eq. 29; or a stranger; 2 S. C. N. s. 122, 129, 133. The one essential ingredient required for its creation is a sufficient indication of an intention to bar or exclude the marital rights; 2 Bush 112; 49 Conn. 52; 24 Gratt. 250; of the husband contemplated by the settlement; 4 Myl. & C. 377; 1 Beav. 1. See Stew. H. & W. §§ 198, 199. No particular form of words is required, but any which sufficiently indicate this intention will be sufficient. For a great variety of phrases which have been judicially passed upon as sufficient or in-

sufficient, see Stew. H. & W. § 200. Where a wife purchases land in her own name and with her own money it will be presumed to be her separate property; 11 Wash. 390.

To an ordinary equitable estate of a married woman the marital rights of the husband attach; 35 Ark. 84, 85; but the effort to mitigate the severity of the common-law doctrine gave rise to the equitable creations of the *wife's equity* (q. v.) and the *equitable separate estate*; 1 Bro. C. C. 16; 27 Gratt. 491, 507; 1 L. Cas. Eq. 481; Stew. H. & W. § 197; 2 Perry, Trusts § 625.

In England a married woman's capacity to dispose of property of whatever kind settled to her separate use, by deed or will, is absolute, unless she be expressly restrained by the settlement; and, generally speaking, it is bound by her contracts, written or verbal; 3 Bro. C. C. 347; 1 *id.* 20. See, also, 13 Ves. 190; 14 *id.* 542. But it was contended by Chancellor Kent that this was not always so held, and that the English cases were too contradictory to afford a safe guide, and he held (practically the converse of the English rule) that she could exercise only such power, to be exercised in such manner as was prescribed by the instrument creating the estate; 3 Johns. Ch. 77. But this decision was reversed; 17 Johns. 548, in which the English doctrine substantially was adopted.

The course of subsequent New York decisions is neither clear nor consistent, but may, probably, on the whole, be considered as following the last cited case with a qualification that the married woman is not to be charged unless her intention to charge her separate estate is sufficiently indicated in the contract or implied from some benefit to be derived by her separate estate from the consideration. See 18 N. Y. 265; 22 *id.* 451; 58 *id.* 80; 63 *id.* 639; 64 *id.* 217; 68 *id.* 329.

Most of the states adopt, in the main, the English doctrine of power to charge the separate estate, but many jurisdictions follow what is known as the American doctrine—that a married woman, as to her separate estate, is *feme sole* in so far as the instrument has expressly conferred on her the power to act as such, and that she is confined to the particular mode of disposition prescribed in the instrument, if any, and the estate is not liable for her contracts, bonds, and notes, unless the instrument expressly declares that it shall be charged. It was first established in South Carolina and adhered to, as above stated, by Chancellor Kent. See 1 Rawle 231; 65 Pa. 430; 2 R. I. 355; 1 Swan. 489; 8 Humph. 209; 7 Ired. Eq. 311; 74 N. C. 442; *id.* 458; 26 Miss. 275; *id.* 535. See Kelly, Cont. M. W. 259, n. 5, and a critical annotation by the same author; 23 Am. L. Reg. N. s. 321; Stew. H. & W. § 203.

An instrument creating such an estate is excepted from the rule which makes void clauses in restraint of alienation, provided only that the rule against perpetuities is not violated; *id.* § 204.

Under Statutes. Superimposed upon this complex combination of common-law disability and equitable protection for separate estate, there is now, both in England and in the United States, a mass of statute law, as to most of which a classification to be relied on is impossible, and of which it has been truly said that, "To attempt a useful summary of laws so incongruous, so purely local, and so constantly changing, is useless." Schoul. H. & W. 254. For questions arising under the statutes of any state they should be resorted to directly, it being only possible here (and nothing more is intended) to give an impression of the general course of legislation which has so changed the status and rights of married women.

The course of legislation in the United States has been such as almost entirely to remove the common-law disabilities of a married woman, and to secure to her the management and control of her own property with power to contract concerning it, and also largely to increase both her individ-

his land is not bound by his covenants in the deed and is not estopped to assert a paramount lien in favor of herself; 107 Ala. 429.

Where the husband leased his wife's lands for a year with a privilege of four years more, the receipt of a share of the farm products reserved did not estop her from asserting that the lease was void, because not assented to in writing by her; 57 N. J. L. 242.

Where a married woman is unable to convey her separate estate without a deed in which her husband is joined, she cannot make a valid deed to him of such property; 85 Ala. 842. Gifts by a wife to a husband are to be closely scrutinized, but if fairly made and free from coercion and undue influence they ought to be sustained; 39 N. J. Eq. 216. The evidence must be clear and unequivocal, and the intention free from doubt; 82 Ga. 329; 124 Ind. 103. A conveyance by the husband directly to the wife creates in her an equitable estate, but is inoperative to pass a legal title; and he is left a trustee for her; 83 Ala. 408; 84 id. 193; 35 Fed. Rep. 677; 17 Or. 423. He may settle property upon his wife if it does not impair the claims of existing creditors and is not intended as a cover for future schemes of fraud; 122 U. S. 446.

An assignment by a married woman of her separate estate to pay a note in which she has been joined with her husband for his debt has been held void; 30 S. C. 159. Mortgages by a wife of her separate estate for the husband's benefit have been held null and void; 94 U. S. 767; 11 S. E. Rep. (S. C.) 351; *contra*, 3 MacArthur 118; 128 U. S. 236; 64 N. H. 585; 112 Pa. 284.

In the absence of an enabling act the contracts of a married woman are cognizable only in equity, and cannot be enforced at law, except as affected by the so-called Married Women's Acts; 95 Wis. 881. The right to contract conferred by these acts has been held to give her not a general contractual capacity, but only ability to make such contracts as have direct relation to the improvement of her separate property; 22 Mich. 255; 44 id. 80; and her property must not merely be incidentally benefited, but there must be a direct relation between it and the contract; 39 id. 671. See 35 Am. L. Reg. N. s. 727. Such is the general construction of such statutes destroying the common-law rights of the husband in his wife's property; 18 Wall. 141; 99 U. S. 325; 26 N. J. Eq. 504; 33 N. J. L. 266; 1 Marvel Del. —. Generally her contracts are binding when necessary or convenient to the use and enjoyment of her separate estate; 10 Wis. 380. A paper indorsed to enable her husband to raise money does not charge her property; 30 Ohio St. 147, where there is an exhaustive examination of the subject. For extreme cases, see 8 Kan. 525; 9 id. 80; 62 Mo. 338. See a full discussion of the effect of these statutes conferring contractual power upon a married woman; Stew. H. & W. §§ 369, 378 a.

Where a married woman performs her part of a contract, she may enforce performance against the other party, though she could not have been compelled to perform her part of the agreement; 127 Mo. 232; and if she make a contract, not enforceable against her, to purchase real estate and fail to pay for the same, it may be sold for the unpaid purchase money; 95 Tenn. 87. In some states provision is made for a conveyance of land by a married woman abandoned by her husband, under permission of court or otherwise; and under such statute it has been held that, having conveyed without compliance with the statute, she may not rescind the deed long afterwards on account of coverture without returning the consideration; 30 S. W. Rep. (Ky.) 402.

Threats of prosecution and imprisonment against her husband constitute duress sufficient to make void the deed or contract of a married woman; 18 Md. 305; 62 Ia. 42; 98 Mich. 163; 59 N. W. Rep. (Wis.) 564; 62 L. T. N. s. 376.

Generally it is held that a married woman

cannot become a partner with her husband, even under statutes which would authorize her to enter into partnership with any one else; 67 How. Pr. 292; 65 Tex. 131; 14 Abb. N. C. 341; 31 Ind. 113; 44 Ohio St. 192; 4 Wash. 263, *contra*, 3 Biss. 405; 90 Ala. 525; 122 N. Y. 308 (see as to conflicting New York cases 16 L. R. A. 526, n.); nor ordinarily with any one else; 23 Fla. 83; 41 Md. 19; if she have no separate estate; 87 Mo. 293. If, without capacity to become a partner, she does so, the property remains hers and the husband cannot assign it; 52 Miss. 239; nor can his creditors; 15 Wis. 195; 11 Paige 9. Where her partnership is a nullity the other partner may be sued alone; 20 W. Va. 571. Where her husband borrows her separate property and uses it in a firm, she is the creditor of the firm; 86 Ind. 224; 4 Del. Ch. 580; and her debt is provable in bankruptcy; 11 Paige 9. If a married woman carries on a business under the assumed name of a partnership she may be sued in that name, and cannot plead her coverture; 81 Ala. 123; nor can her co-partners deny her capacity to sue alone for a dissolution; 61 N. Y. 512. As to married women as partners, see, generally, 2 L. R. A. 343; 39 Cent. L. J. 128; 31 Am. St. Rep. 934; and as to partnerships between husband and wife, see 16 id. 526, n.; 35 Cent. L. J. 338; 24 Am. L. Reg. 659.

The capacity of a married woman to become surety or guarantor will depend upon the construction of the state statutes, and the questions most frequently arise with respect to efforts to become surety for the husband. In some states this is expressly forbidden, and the prohibition has been held to prevent her from mortgaging her real estate to one who is surety for her husband or co-surety with him; 105 Ala. 657. In other states she may bind her separate estate as surety for her husband; 40 W. Va. 194; 49 Neb. 869; and where she makes a valid contract as surety she is entitled to all the rights of a surety; 91 Va. 453.

A married woman is frequently held to have certain rights growing out of the insanity of her husband, as, to be regarded as the head of the family and to control the domicile of the husband; 54 Vt. 105; 32 Tex. 195; to receive income belonging to him; 4 Bro. C. C. 100; 2 McN. & G. 134. In such case it has also been held that the wife is entitled to act with respect to her separate property as if her husband were civilly dead; 51 Vt. 585; 37 N. H. 437. The husband's insanity does not affect her right to bar her dower by joining in a deed with her husband which by reason of his insanity is invalid; 99 Mo. 19; 84 Wis. 381; 111 Mass. 308; but in some states, as Delaware, this contingency is provided for by statute; 14 Del. Laws, ch. 78.

A married woman has been held authorized to dispose of community property to supply the necessary wants of herself and children; 32 Tex. 195; and see 63 id. 287. With respect to the property and rights of the husband the relation of the wife to it appears not to be changed by the insanity of the husband; L. R. 5 Q. B. 51; she may bind the estate of the husband for necessities; 4 E. L. & Eq. 523; 1 DeG. J. & S. 465; 3 J. J. Marsh. 658; but not for the payment of debts generally; 23 Vt. 486; 16 Pa. 215; nor can she sue for a debt due to him; 7 Dowl. P. C. 22.

A personal judgment against a married woman at common law was void; 66 Mo. 617; 18 Md. 457; 29 W. Va. 385; 80 Ky. 368; if rendered by default it is in some jurisdictions held absolutely void; 121 Pa. 243; 73 Mo. 53; 83 Ky. 305; 41 Cal. 78; 63 Miss. 921; in others merely voidable; 8 B. & C. 421; 61 Ga. 512; 43 Ohio St. 78; 42 Mich. 112; 55 Ind. 419; and she is not estopped by a failure to plead coverture; 83 Ky. 305. In the absence of fraud a consent decree is binding on a married woman; 79 Ala. 431; 126 Mo. 39; and a judgment might be obtained against her for a debt contracted *dum sola*; 2 Cow. 581; 28 Ga. 71; 4 East 521; 55 Miss. 557. Generally provision is made for such suits in the married woman's acts, and in some the husband and wife must be sued jointly, and in

others, judgment may be recovered against her separately to bind her separate estate.

In Connecticut, Illinois, Iowa, Oregon, Washington, Alabama, and New Mexico, the husband and wife are equally liable for expenses and children's education, and a married woman is liable for necessities for herself and children in Montana (see *infra*); and such a debt is enforceable against her property after execution against the husband unsatisfied in Pennsylvania and Alabama, while in Vermont, Missouri, and Arkansas a judgment for necessities against the husband may be enforced against the separate property of the wife, and for expenses incurred in the improvement of her separate property in Vermont and Missouri. Stims. Am. Stat. L. § 6410 (c).

In many states there are statutory provisions authorizing the assumption of liability by a married woman for the family expenses; and in others, such liability has been held to arise under the statutes without her express consent; thus, in Illinois, Iowa, and Oregon such expenses are made a charge upon the property of the husband and wife, or either of them, either jointly or severally. This is held to be a personal liability and not merely a property charge; 52 Ia. 725; 22 Ill. App. 557; but her property may be pursued without obtaining a personal judgment against her; 65 Ia. 180; and her liability is not dependent upon consent; 15 Ore. 574. Within these statutes family expenses include whatever is actually used in the family; 55 Ia. 702; rent of a house; 33 Ill. App. 394; medical attendance; 63 Ia. 22; whether necessary or not; 80 id. 243; the servants' wages; 11 Ill. App. 637; a piano; 41 Ia. 598; an organ; 65 id. 180; a cook stove and crockery; 13 id. 565; the husband's clothing; 23 Ill. App. 118; jewelry purchased by the husband and presented to the wife; 60 Ia. 148. The wife has been held not liable for money borrowed by the husband for household supplies; 55 Ia. 719; a reaping machine; 43 id. 536; a breaking plough; 52 id. 250; a light farm wagon occasionally used by the family to ride to church and other places; 24 Ill. App. 423; payments for the care of an insane husband; 46 Ia. 170.

Where the separate estate of the wife is made liable for necessities by statute she must be a party to the suit to enforce payment; 30 Mo. App. 464. In Alabama a constitutional provision is not violated by a statute making the separate estate of the wife liable for necessities; 55 Ala. 576; see 2 Bish. Mar. W. § 610. In suits under such statute the existence of the separate estate must be alleged; 30 Mo. App. 464; 53 Ala. 161. The separate estate of a married woman is liable for medical service to herself and children but not to children of her husband by a former marriage, though all live together; 48 Ala. 485.

A married woman and her separate property are liable for her torts in Maine, Indiana, Illinois, Iowa, Minnesota, Washington, and New Mexico, and in Connecticut if not under her husband's coercion. When so committed in Indiana they are jointly liable, and in Pennsylvania and Wyoming a judgment against the husband for the wife's tort must be first enforced against her separate property. Stims. Am. Stat. L. § 6414. See as to liability for torts, 53 Conn. 397; 74 Ia. 589; 29 S. C. 108; 42 Fed. Rep. 317; 25 Fla. 927; 103 Ind. 528; 29 Mich. 260; 61 Tex. 453; 471; 16 West. Jur. 425. Such is also the tendency with respect to fraud, in view of the statutes authorizing married women to transact business independently; 45 N. J. Eq. 330. In New York the husband must be joined in an action for the tort of the wife unless it is in relation to her separate property; 109 N. Y. 441. See 7 L. R. A. 640, n.

As to a married woman's liability connected with the use of premises owned by her there is a difference of opinion. Where the husband and wife resided on the premises she could not be convicted of keeping a gambling house; 16 S. E. Rep. (Ga.) 207; but under similar circumstances the husband was held liable for violation of

liquor laws; 124 Mass. 90; 126 *id.* 463; and for keeping a brothel; 97 *id.* 235. In New York the wife was held liable for injuries resulting from harboring a vicious dog belonging to her husband; 185 N. Y. 201, *contra*, 101 Ala. 667. In other cases they have been held jointly liable; 4 Colo. App. 92; and in Massachusetts it was held to be a question for the jury of the ownership of the animal; 152 Mass. 7. Where a married woman set fire to a house owned by her and let to a tenant, the husband was not liable; 58 How. Fr. 449; and where the husband and wife were domiciled on premises which were the separate property of the latter, he was held not to be in control of the premises so as to be responsible for injury to a stranger resulting from carelessly leaving a pit uncovered; 45 N. Y. 230. The husband was also held not liable for torts committed on his wife's premises in 118 Mass. 58, and 65 Mich. 31.

A husband is not entitled to alimony. The latter is based upon the common-law requirement, to which the husband was subject, of providing his wife with necessities, and there is no reciprocal obligation on her; 30 Kan. 132; 66 N. W. Rep. 947. In some states there are statutes providing that alimony, or an allowance out of the wife's estate, in the nature of alimony, may be granted the husband. In Kansas alimony was denied the husband because no authority could be found to authorize it; 30 Kan. 133; 68 N. W. Rep. (Neb.) 947. See on this subject, 55 Alb. L. J. 15.

The estate of a married woman is primarily liable for her funeral expenses, and where her husband pays them, he may recover them from her executor; 47 N. E. Rep. (Mass.) 407. See 146 Mass. 261.

As to the citizenship of married women, the effect of marriage upon the *status* of a woman as an alien, or her expatriation see ALIEN; CITIZEN; NATURALIZATION. See also an annotation on the subject in 23 L.R. A. 148.

As to the effect of ante-nuptial agreements, see that title. See MacQueen; Clancy; Bright; Roper; Bell; Stewart; Husband and Wife; Bish. Law M. W.; Cord, M. W.; Ewell, L. Cas. Coverture, etc.; LeBrun, Communauté Mari et Femme; Lawson, R. & R. 695-804; 8 Wait, Act. & Def. 303; RESTITUTION OF CONJUGAL RIGHTS; DIVORCE; DOWER; FEME SOLE TRADER.

MARSHAL. An officer of the United States, whose duty it is to execute the process of the courts of the United States. His duties within the district for which he is appointed are very similar to those of a sheriff. See Serg. Const. Law, ch. 25; 2 Dall. 402; Burr's Trial 365; 1 Mas. 100; 2 Gall. 101; 4 Carr. 96; 7 *id.* 276; 9 *id.* 96, 112; 6 Wheat. 194; 9 *id.* 645. He is authorized to protect a federal judge from assault and murder; 185 U. S. 1. See JUDGE.

A marshal who has process in his hands against one person and seizes the goods of another, is liable by virtue of his office and his sureties are bound; 111 U. S. 17, 181; though the authorities differ; 84 Fed. Rep. 409. He is liable in damages where he refuses to surrender property which he has taken unlawfully; 124 U. S. 181.

MARSHAL. To arrange; put in proper order; e. g., "the law will marshal words, ut res magis valeat." Hill, B., Hardr. 92.

MARSHAL, EARL. See EARL MARSHAL.

MARSHAL, KNIGHT. See KNIGHT MARSHAL.

MARSHAL OF THE QUEEN'S BENCH. An officer who had the custody of the queen's bench prison. Abolished by 5 & 6 Vict. c. 22 and an officer called keeper of the queen's prison substituted.

MARSHALLING ASSETS. An equitable principle upon which the legal rights of creditors are controlled in order to accomplish an equitable distribution of funds in accordance with the superior

equities of different parties entitled to share therein. It springs from the principle that one who is entitled to satisfaction of his demand from either of two funds shall not so exercise his election as to exclude a party who is entitled to resort to only one of the funds. For example, where one creditor has a mortgage upon two parcels of land upon one of which there is a junior incumbrance not otherwise secured, the first mortgagee may be compelled to exhaust in the first instance that parcel of land which is otherwise unencumbered in order that the security of the junior incumbrancer may not be entirely destroyed. In such case, however, the indisposition of equity to interfere with the legal rights of a creditor results in working out the equity of the junior incumbrancer through a substitution to the right of the paramount mortgagee as against the other property; Bisph. Eq. § 27, 340; 27 Am. L. Reg. N. S. 739.

Marshalling assets is a pure equity and does not rest at all upon contract, and will not be enforced to the prejudice of either the dominant creditor or third persons, or even so as to do an injustice to the debtor; 85 Tenn. 597. See 1 Johns. Ch. 409; 7 W. & S. 269; 2 Lead. Cas. Eq. 260; 51 Neb. 146; 114 Cal. 537.

The equity of marshalling seems capable of being carried into effect in one of two ways: either, first, by restraining the parties against whom it exists from using a security to the injury of another; or, secondly, by giving the party entitled to the protection of this equity the benefit of another security in lieu of the one of which he has been disappointed. In other words, the right might be enforced either by injunction against the paramount creditor, or by subrogation in favor of the junior creditor. In practice, however, the latter of these two methods is the one usually employed, and the sounder doctrine seems to be that the first of the two ought not to be resorted to except under very peculiar circumstances. But there are decisions to the contrary; 2 Lead. Cas. Eq. 280. Of course, when both funds are in court or under its immediate control, the case is different.

One whose securities have been re-hypothecated by a pledgee, together with securities belonging to the latter, has a right to compel the application of the latter securities to the payment of the debt before resort is had to those wrongfully re-hypothecated; 78 Fed. Rep. 216.

A common application of this doctrine is where mortgaged real property is subject to sale under the mortgage in the inverse order of alienation. The leading English case was *Barnes v. Raster*, 1 Y. & C. Ch. 401, and the rule in that country has been termed the rule of ratable contribution; Sto. Eq. Jur. § 1233; while the American rule was first settled by Kent, Ch., in *Clowes v. Dickinson*, 5 Johns. Ch. 235, where the doctrine of exoneration in the inverse order of conveyance was adopted. It has been noted that in this case a statement in fact *obiter* has been generally adopted and followed in the United States. See a valuable article by J. M. Gest in 27 Am. L. Reg. N. S. 739, for a critical view of the English and American authorities.

In a recent case the rule was held not to apply to a purchase merely of the equity of redemption in a portion of the mortgaged premises so as to relieve the purchaser upon taking an assignment of the mortgage from his proportion of it and entitling him to enforce the law against the remaining portion; 63 Mo. App. 67. See 20 Pa. 222; 62 Ala. 271; 2 Johns. Ch. 125; 11 Paige 30. It is said that on a sale of a part of mortgaged lands the unsold portion is primarily liable to the mortgage debt; 38 Fla. 257.

The term *marshalling liens* has been used to express the application of the particular equity just referred to, being said to mean "the ranking or ordering of several estates or parcels of land, for the satisfaction of a judgment or mortgage to which all are liable, though successively conveyed away

by the debtor." 1 Black, Judgm. § 440. It would seem, however, that the phrase is not an apt one in the application made of it, as the case put is the most ordinary one of marshalling assets, though as a matter of course there is always a marshalling of liens, in a certain sense, whenever a fund is distributed to *lieu* creditors, as, even in an ordinary case of the application of the proceeds of a sheriff's sale. This is not, however, to be confused with the great equitable doctrine under consideration.

Another phrase, sometimes used, is *marshalling securities*, which is an expression for the same practice of equity to secure a class of creditors having but one fund available from having their security exhausted by another class who have two.

This equitable doctrine cannot be invoked as against those who have superior equities, and in this light the right of a wife to her own property is superior to that of her husband's creditors; 15 Conn. 504; 11 Md. 465; 119 N. C. 450; nor is it applied in favor of a creditor of the debtor; 4 Johns. Ch. 17; 13 Ill. 41; 17 Ves. 520; unless the creditor is a mere surety; 3 Sandf. Ch. 192; 13 Ill. 41; but it does not apply where the exclusive fund is the property of the surety for the debt for which such fund is bound; 53 Ohio St. 256. The doctrine cannot be made available to create a fund, the two must exist; L. R. 3 Eq. 668; but once existing it cannot be affected by the intervention of subsequent creditors; 2 Watts 205; 4 Gratt. 407. A mortgagee having double security for his debt is not required by the existence of subsequent judgments against the mortgagor, of which he has no knowledge, to shape his action in the collection of his demand in accordance with the principle of marshalling the assets; 85 Md. 505.

The doctrine of marshalling is applied to an infinite variety of cases, and is liable to be resorted to wherever there is necessity for the distribution of two funds among creditors, some of whom have claims on both. In the settlement of decedents' estates, five classes of persons are sometimes mentioned to whom it may be applied: (1) Creditors, (2) Legatees, (3) Between creditors and legatees, (4) Between legatees and vendors, (5) Between widows and legatees.

As to its application in cases of successive purchasers, see 27 Am. L. Reg. 739; partnership; 20 *id.* 465; 21 *id.* 800; 24 Alb. L. J. 305; 34 *id.* 344, 364; devisees and legatees; 24 Ir. L. T. 239; homestead cases; 16 W. Jurist 28; 9 Ins. L. J. 677. See generally, 2 Wh. & Tud. L. Cas. Eq. 228; Bisph. Eq. §§ 341-350 and cases cited; Tied. Eq. Jur. 633. See ASSETS; LIEN.

MARSHALLING LIENS. See last title.

MARSHALLING SECURITIES.

The general rule is that, if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only, as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another, the former must seek satisfaction out of that fund which the latter cannot touch. If, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. These rules must be taken with the modifications and exceptions that in their application the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because someone else has taken imperfect security; that the rights of third parties shall not be prejudiced; and that the parties themselves are creditors of the same debtor. 66 S. W. 2. See MARSHALLING ASSETS.

MARSHALSEA. In English Law. A prison belonging to the king's bench. It has now been consolidated with others,

under the name of the queen's prison.

MARSHALSEA, COURT OF. See COURT OF THE MARSHALSEA.

MART. A place of public traffic or sale. See MARKET.

MARTIAL LAW. That military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations, in carrying on the war, and which extinguishes or suspends civil rights and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war. Prof. Joel Parker, in N. A. Rev., Oct. 1861.

Martial law is not mentioned by that name in the constitution or statutes of the United States; practically the essence of martial law is the suspension of the privilege of *habeas corpus*, and the two have been practically regarded as the same thing. See 1 Halleck, Int. L. 549; *HABEAS CORPUS*.

The instructions for the government of the United States army, 1863, define martial law as "simply military authority exercised in accordance with the laws and usages of war." It is proclaimed by the presence of a hostile army, and is the immediate and direct effect of occupation or conquest; suspending the civil and criminal law and the domestic government of the occupied place.

It supersedes all civil proceedings which conflict with it; Benet, Mil. Law; but does not necessarily supersede all such proceedings.

It extends, at least, to the camp, environs, and near field of military operations; 7 How. 83; 3 Mart. La. 530; 6 Am. Arch. 196; and see, also, 2 H. Bla. 165; 1 Term 549; 1 Knapp, P. C. 316; 13 How. 115; but does not extend to a neutral country; 1 Hill 877; 25 Wend. 493, 512, n. Nor in time of insurrection can it be applied to citizens in states in which the courts are open and their process unobstructed; 4 Wall. 2. It is founded on paramount necessity, and imposed by a military chief; 1 Kent 377, n. For any excess or abuse of the authority, the officer ordering and the person committing the act are liable as trespassers; 13 How. 115, 154; 1 Cowp. 180.

Martial law must be distinguished from military law. The latter is a rule of government for persons in military service only, but the former, when in force, is indiscriminately applied to all persons whatsoever; De Hart, Mil. Law. 17. See Benet; Hopwood, Mil. and Mart. Law; Birkheimer, Mil. L.; Hall, Int. Law; 1 Hale, Pl. Gr. 847; 1 Lieb. Civ. Lib. 180; McArthur, Courts Mart. 34; 29 L. Mag. & Rev. 24; Tytl. Courts Mart. 11, 58, 106; Hough, Mil. Courts 349; O'Brien, Mil. Law 26; 3 Webster, Works 459; Story, Const. § 1342; 8 Opin. Atty. Gen. 365; 12 Metc. 56; 3 Mart. La. 581; 7 How. 59; 15 id. 115; 10 Johns. 328; COURT MARTIAL; MILITARY LAW.

A type of military jurisdiction under the Constitution of the United States to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. Martial law is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights. 4 Wall. (U. S.) 142. See MILITARY GOVERNMENT; MILITARY JURISDICTION; MILITARY LAW; JURISDICTION UNDER.

MARYLAND. One of the thirteen original states of the Union.

The territory of Maryland was included in the grants previously made to companies formed for the settlement of Virginia. Out of these Virginia grants Maryland was granted by Charles the First, on the 20th of June, 1632, to Cecilius Calvert, Baron of Baltimore. The first settlement under the authority of Lord Baltimore was made on the 27th of March, 1634, in what is now St. Mary's county. Some settlements were previously made on Kent Island, under the authority of Virginia.

During its colonial period, Maryland was governed, with slight interruptions, by the lord proprietary, under its charter.

In Cromwell's time the government of Maryland was assumed by commissioners acting under the commonwealth of England; but in a few years Lord Baltimore was restored to his full powers, and remained undisturbed until the revolution of 1688, when the government was seized by the crown, and not restored to the proprietary till 1715. From this period there was no interruption to the proprietary rule until the revolution.

The territorial limits of Maryland were somewhat obscurely described in the charter; and long disputes arose about the boundaries, in the adjustment of which this state was reduced to her present limits.

The lines dividing Maryland from Pennsylvania and Delaware were fixed under an agreement between Thomas and Richard Penn and Lord Baltimore. See DELAWARE.

By this agreement, the rights of grantees under the respective proprietaries were saved, and provision made for confirming the titles by the government in whose jurisdiction the lands granted were situated. The boundary between Maryland and Virginia has never been finally settled. Maryland claimed to the south branch of the Potomac; but Virginia has held to the north branch, and exercised jurisdiction up to that line. The rights of the citizens of the respective states to fish and navigate the waters which divide Maryland and Virginia were fixed by compact between the two states in 1785.

The first constitution of this state was adopted on the eighth day of November, 1776.

Mash. Mash used in the manufacture of intoxicating liquor and not potable is not an intoxicating liquor. (225 Ill. App. 610.) However its possession is prohibited under section 25 of the National Prohibition Act, if designed for the manufacture of liquor intended for use in violating the Act, or if it has been so used. Thorpe, National and State Prohibition, 154.

MASOCHISM. A form of sex perversion which is the gratification of the sexual instinct by suffering pain, in contrast to *sadism* which is the gratification of sexual desire by inflicting pain. In both cases the pain may be physical resulting in the mutilation of the victim or the subject; or psychical resulting in the so-called "symbolic" sadism or masochism. Masochism in religion is shown in self-mutilation, penance, martyrdom, asceticism, and the emphasis upon meekness, resignation and self-abnegation. Bridges, Outline Abn. Psych., 73, 83. See SADISM.

MASON AND DIXON'S LINE. The boundary line between Pennsylvania on the north and Maryland on the south, celebrated before the extinction of slavery as the line of demarcation between the slave and the free states. See DELAWARE.

It was named after two Englishmen who surveyed it in 1763-67. English.

MASSACHUSETTS. One of the original thirteen states of the United States of America.

The first important settlement on the territory of Massachusetts was made by the sect of Brownists or Pilgrim Fathers at Plymouth in 1620. On March 4, 1628, Charles I. granted a charter to the Puritans under the name of "The Governor and Company of the Massachusetts Bay in New England." This charter did not include the Plymouth colony which continued till 1684, when it was adjudged forfeited. From this time till 1691, governors appointed by the king ruled the colony. In 1691, William and Mary granted a new charter, by which the colonies of Massachusetts Bay and New Plymouth, the province of Maine, and the territory called Nova Scotia, and the tract lying between Nova Scotia and Maine were incorporated into one government, by the name of the Province of Massachusetts Bay. 1 Story, Const. § 71. This charter, amended in 1726, continued until the adoption of the state constitution in 1780, which was drafted by John Adams. 4 Adams, Life and Works 213. It contained a provision for calling a convention for its revision or amendment in 1796, if two-thirds of the voters at an election held for this purpose should be in favor of it. Const. Mass. c. 6, art. x. But at that time a majority of the voters opposed any revision; Bradford's Hist. Mass. 294; and the constitution continued without amendment till 1820, when a convention was called for revising or amending it. Mass. Stat. 1820, c. 15. This convention proposed fourteen amendments, nine of which were accepted by the people.

The constitution, as originally drafted, consists of two parts, one entitled A Declaration of the Rights

of the Inhabitants of the Commonwealth of Massachusetts, and the other The Frame of Government.

The name of the state is the Commonwealth of Massachusetts.

MASSSES. Religious ceremonies or observances of the Roman Catholic Church.

The celebration of the eucharist of Lord's Supper as a sacrament instituted by Christ and as a sacrifice presenting the true body and blood of Christ under the appearance of bread and wine; the holy communion and its celebration; the name used in the Roman Catholic Church. Stand. Dict.

The "mass" is the sacrifice in the sacrament of the Eucharist, or the consecration and oblation of the Host. It is a public service, a public act of worship, by which, according to the tenets of the Roman Catholic Church, the priest who celebrates it helps the living and obtains rest for the dead. 114 Ky. 388, 70 S. W. 1074.

Under a will devising the residue of an estate for charitable purposes, masses were held to come within the religious or pious uses which are upheld as public charities. [1897] 2 I. R. 426; 184 Mass. 427; 14 Allen 553; but see 108 N. Y. 316, where a bequest to be applied for the purpose of having prayers offered in any Roman Catholic church selected by the executors was held void because there was no defined beneficiary. See, generally, 32 Alb. L. J. 367.

MASTER AND SERVANT. The relation of master and servant exists between one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or retains the power of controlling the work; 4 E. & B. 570; 24 L. J. Q. B. 138; and one who is engaged, "not merely in doing work or service for him, but who is in *his service*, usually upon or about the premises of his employer, and subject to his direction and control therein, and who is, generally, liable to be dismissed;" 59 Ala. 51; for misconduct or disobedience of orders; 50 Ill. App. 513.

Where the hiring is for a definite term of service the master is entitled to the labor of the servants during the whole term, and may recover damages against any one who entices them away or harbors them knowing them to be in his service; Sm. M. & S. 156; 6 Term 221; 13 Johns. 322; 2 E. & B. 216; 107 Mass. 555. See ENTRICE.

A master may justify an assault in defence of his servant and a servant of his master; the master because he has an interest in his servant not to be deprived of his service; the servant because it is a part of his duty, for which he receives his wages, to stand by and defend his master; 1 Bla. Com. 429; Loft 215. A master may give moderate corporal punishment to his menial servant while under age; 2 Kent 261. See ASSAULT; APPRENTICESHIP; CORRECTION.

The master may dismiss a servant before the expiration of the term for which he is hired, for immoral conduct, wilful disobedience, or habitual neglect, and the servant will not in such case be entitled to his wages; 4 C. & F. 518; 155 Pa. 67; 159 id. 579; 82 Mo. 599; 7 Fed. Rep. 642; 11 Q. B. 742; 34 La. Ann. 426; 42 Wis. 311; 63 Ga. 755; but if the dismissal be without reasonable cause, the servant may recover damages from his master therefor, to such an amount as will indemnify him for the loss of wages during the time necessarily spent in obtaining a fresh situation, and for the loss of the excess of any wages contracted for above the usual rate; 2 H. L. 607; 20 E. L. & Eq. 157; 110 N. C. 856; see 13 Lawy. Rep. Ann. 72. Any adequate cause for the dismissal of an employee known to the employer at the time thereof will justify the same, whether assigned or not, or through a different cause is assigned; 40 Ill. App. 340; or the cause may not have been known at the time of discharge; 70 Miss. 234. The statute 5 Eliz. c. 4, required a master, in certain cases, to satisfy two justices of the peace that he had reasonable and sufficient cause for putting away his

servant. It was repealed by 38 & 39 Vict. c. 86, s. 17.

Where a servant, after being discharged, sues for a breach of the contract of hiring before the termination of the period covered thereby, he can recover damages, up to, but not after, the time of the trial; 139 Ill. 67; see 81 Fed. Rep. 284; and such recovery will be a bar to any subsequent action upon the same contract; 38 Mo. 212.

When a servant becomes disabled from performing the duties of his contract, such contract is dissolved and the master may discharge him; 13 Misc. Rep. 115; 29 N. E. Rep. (Mass.) 522. An express agreement in the contract of employment that the work must be done to the satisfaction of the master, entitles him to discharge the servant for bad work at his discretion and constitutes the master the sole judge of the sufficiency or the quality of the work; 94 Mich. 496; 53 N. W. Rep. (Minn.) 1156; 14 So. Rep. (Ala.) 362; and the testimony of the master that he is dissatisfied is decisive against evidence that he should be satisfied; 29 Pac. Rep. (Col.) 219; but see 16 N. Y. Suppl. 853. The retention of the servant after his work becomes unsatisfactory is not a condonation and will not prevent a subsequent discharge for the same cause; 59 Ill. App. 226; and where such improperly performed services are accepted by the master as not in full compliance with the contract, but as the best he can get toward a performance, he may in a subsequent action by the employee for services recoup damages for breach of the contract; 21 S. W. Rep. (Ark.) 430. The question whether such services are accepted as a full compliance with the contract is for the jury; *id.*; as is the question whether the discharge of the servant is for a reasonable cause; 42 Ill. App. 230. Where the servant was discharged for conduct which did not justify his dismissal, but there was other sufficient ground therefor, not known to the master at the time, it was held that the dismissal could be justified by proof of the after-discovered fact; 39 Ch. Div. 339.

Where the facts are undisputed, the right of the master to discharge his servant is a question of law; 83 Hun 168. A contract of employment for an indefinite period may be terminated by either party at any time; 23 N. Y. Suppl. 1009; 27 *id.* 351; but one employed for a definite period cannot be discharged through a mere caprice, but only on fair and reasonable grounds; 23 *id.* 119; 143 Pa. 408; 44 Ill. App. 359. Merely because business was dull was held not to be a just cause for dismissal when the services were properly performed; 18 N. Y. Suppl. 586; nor were slight deviations from the master's instructions in immaterial matters after the master had retained his servant for a considerable length of time thereafter without complaint; 43 N. E. Rep. (Ind.) 873; nor was the destruction by fire of the master's factory; 63 L. T. 756. Where a servant was illegally discharged and voluntarily sent in a written resignation which was accepted by his employer, it was held that he could not afterwards sue on the contract of service, even though his resignation were solely because of his illegal discharge; 63 N. J. L. 607. One cannot by a decree of court be compelled to retain another in his service; 62 Ill. App. 334; and equity will not compel a master to keep a servant in his employment who for any cause is not acceptable to him, nor will it compel employees to continue in the employment of their master; 24 U. S. App. 239.

When the employment contract requires notice before leaving, under penalty of forfeiture of wages, the return of the employee on the day following does not oblige the master to restore the employment and will not enable the servant to recover the forfeited wages; 18 S. W. Rep. (Tenn.) 262; and the master has been held entitled to substantial damages for a refusal of his servants to perform their duties under a contract providing for two weeks' notice on either side; 70 L. T. R. 116. By statute in many of the states it is enacted that where the

contract of employment requires notice by the employee under penalty of forfeiture of wages, the employer shall be liable for a like amount for dismissal of the servant without the same notice, *unless in case of a general suspension of labor in his shop or factory*, and in Massachusetts by act of 1895 the latter clause has been stricken out of the law. See FORFEITURE; WAGES.

Where four partners agreed to employ the plaintiff as manager for a certain time and before the end of the period two of the partners retired and the other two were not willing to continue the employment, it was held that the dissolution of the partners amounted to a wrongful dismissal of the servant but that he was only entitled to nominal damages; [1895] 2 Q. B. 253.

In Minnesota and Wyoming a master may not require the surrender of any of the rights of citizenship of his servants, or discharge them because of their nomination for an election, or interfere in the matter of their nomination in any way; and in nearly all of the states it is a criminal offence for the master to threaten to discharge his servant, or to reduce his wages, or to promise to give him higher wages, or otherwise to attempt to influence a voter to give or withhold his vote. In Tennessee absence for voting is declared no violation of the employment contract for personal services, and every contract designed to keep employees from the polls is declared void; Stimson, Lab. L. 117 and statutes there cited.

The master is bound to provide necessities for an infant servant unable to provide for himself; 3 Campb. 650; 1 Leach 137; 1 Bla. Com. 427, n.; but not to furnish him with medical attendance and medicines during the illness; 4 C. & P. 80; 7 Vt. 76.

The master is answerable for every such wrong of the servant or agent as is committed by him in the course of the service and for the master's benefit, though no express command or privity of the master be proved; 1 L. R. 3 Ex. 359; 86 L. J. Ex. 147. Such liability springs out of the relation itself and does not depend on the stipulations of their contract. Within the scope of his authority, the servant may be said to be the medium through which the master acts; it follows, as a general rule, that for the tortious acts of the servant, the master is liable; 42 Ark. 453; 116 U. S. 624; 2 Wheat. 345; 11 Bush 465; 25 Ill. App. 521; 19 Wend. 345; 40 E. L. & Eq. 329; 26 Vt. 178; 155 Mass. 104; 75 Hun 68; 160 Pa. 300; 63 Conn. 155; 98 Mich. 1; although contrary to his express orders, if not done in wilful disobedience of those orders; 14 How. 468; 7 Cush. 385; 10 Ill. 509; 132 U. S. 518; see 65 Hun 619.

The reason for this rule has been ably expounded by Shaw, C. J., in the leading American case on this subject: "Every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he must answer for it." 4 Metc. 49; followed in 3 Macq. 316. But this case was decided on another point involving the question of the liability of a master for the negligence of a fellow servant, as to which see *infra*.

The master is not liable for acts committed out of the course of his employment; 20 Conn. 284; 17 Mass. 508; 156 *id.* 319; 69 Miss. 723; 37 W. Va. 606; 16 E. L. & Eq. 448; 63 Hun 8; nor for the wilful trespasses of his servants; 1 East 106; 24 Conn. 40; 1 Sm. Ind. 455; 2 Mich. 519; unless committed by his command or with his assent; 8 Ind. 312; 2 Stra. 885.

The master is bound to furnish suitable means and resources to accomplish the work; 73 Wis. 406; 126 Ind. 445; 79 Me. 404; 110 Mass. 240; 129 *id.* 268; 95 Pa. 211; 89 N. Y. 376; 31 Ohio St. 479; 72 N. Y. 607; 53 Tex. 206; 65 Mo. 225; 100 U. S. 213; 37 E. L. & Eq. 281; to exercise ordinary care to

provide his servants a reasonably safe place for work; 85 Fed. Rep. 353; 81 *id.* 679; 81 Kan. 586; 69 Wis. 520; 34 Minn. 321; 60 Mich. 501; 143 Mass. 197; 48 N. Y. Supr. Ct. 156; 84 Wis. 418; to use ordinary care to keep machinery in a safe condition, and he is not relieved from that obligation by delegating the management of a machine to a servant; 146 Mass. 586. But it has been held that he is only bound to furnish means and resources which to his own knowledge are not defective; 16 C. B. N. s. 669; 33 L. J. C. P. 329; and that he is not bound to furnish the newest, safest, and best appliances for the use of his employees, nor is he an insurer of their safety; he may furnish such appliances as are ordinarily sufficient for the purpose intended, and such as can, with reasonable care, be used without danger; 79 Me. 404; 50 Conn. 483; 74 Ind. 440; 84 Mich. 289; 65 Cal. 96; 132 N. Y. 278; 92 Pa. 276; 171 *id.* 581; 109 Ill. 314; 136 Mass. 1. He is not liable for hidden defects of which he had no knowledge; 4 Ill. App. 533; nor for known defects, unless they are such as, by the exercise of due care, he might have known to be dangerous; 1 *id.* 510; and the mere fact of injury received by the servant raises no presumption of negligence on the part of the master; 86 W. Va. 232; see 113 Mo. 170; 69 Miss. 848; but it has been held that an employee has a right to suppose that his master has used reasonable care in guarding against defects in appliances furnished for his use; 88 W. Va. 546; and see 128 Pa. 294, where it was held that though better machinery existed, yet, if the machine by which the servant was injured was in general use and if reasonably safe when prudently used, the master was not liable; 92 *id.* 276. In order to hold an employer liable for injuries caused by the dangerous condition of a building, the servant must allege distinctly both that the master knew of the danger and the servant was ignorant of it; 13 Q. B. D. 259; 18 *id.* 685; 56 L. J. Q. B. 340. In an action by an employee for damages resulting from the negligence of his employer in furnishing defective appliances, it is no defence to show that he might have been injured in the same manner if the appliances had been in good condition; 48 Pac. Rep. (Col.) 681. If the servant knows that he is running a risk, through defective machinery or otherwise, he cannot recover for injuries; 39 Ill. App. 642; 58 *id.* 83, 250; 59 *id.* 260; 112 U. S. 377; 71 Fed. Rep. 143; 148 N. Y. 372, reversing 20 N. Y. S. 1010, Vann, J., dissenting; 43 N. E. Rep. (Ind.) 961; 34 Atl. Rep. (Md.) 872; 46 Neb. 556; 34 S. W. (Tex.) 298; 72 Fed. Rep. 250; 165 Mass. 267, 368; 164 *id.* 282; 91 Wis. 209; 65 N. W. Rep. (Mich.) 667; 142 Ind. 596; 165 Mass. 233; 38 N. Y. Suppl. 591; 74 Fed. Rep. 186; but see 21 Can. S. C. 581; 98 Ala. 578. An employee assumes the ordinary risks of his employment; 68 N. W. Rep. (Neb.) 1058; 89 Ga. 318; and also risks arising from unsafe premises which are known to him or apparent and obvious to persons of his experience and understanding if he voluntarily enters into the employment or after he enters makes no complaint or objection; 68 N. W. Rep. (Neb.) 1053. "The adult servant is presumed to possess ordinary intelligence, judgment, and discretion to appreciate such dangers incident to his employment as are open and obvious, and knowledge of them on his part will be presumed or imputed to him as matter of law; 88 Wis. 442; and the master is not bound to warn him of such danger;" 47 N. Y. S. 521.

This presumption is strengthened when the servant is also an expert in his employment; 76 Wis. 136, where the whole subject is considered and the authorities collected. An employee who under such circumstances is injured by reason of a defect in a tube easily discoverable, is guilty of contributory negligence; 88 *id.* 442; if he have a thorough knowledge of the risk and voluntarily undertakes it; 63 L. T. 287.

Where a person without fault is placed in a situation of danger, he is not to be

held to the exercise of the same care and caution that prudent persons would exercise where no danger was present, nor is he guilty of contributory negligence because he fails to make the most judicious choice between hazards presented; the question is not what a careful person would do under ordinary circumstances, but what he might reasonably be expected to do in the presence of the peril, and is for the jury; 45 N. E. Rep. (Ohio) 559; as is the question of contributory negligence and of whether one had assumed the risk who is injured whilst obeying the order of a foreman; 12 U. S. App. 584.

The mere knowledge and assent of an immediate superior, to a violation by an employee of a known rule of a company, will not as a matter of law relieve the employee from the consequences of such violation; 19 U. S. App. 586. See 63 Fed. Rep. 231; but one obeying orders of a superior does not assume the risk of the latter's negligence; 21 S. W. Rep. (Ala.) 440. If the servant, knowing a defect existed, gave notice to his employer of it, and was promised that it would be remedied, and continued his work in reliance on this promise, he is not, in law, guilty of contributory negligence; 100 U. S. 213; 17 Col. 280; 1 U. S. App. 96; 7 id. 359; 44 Ill. App. 466. See 135 U. S. 554; 55 Ark. 433.

Fellow Servant. The relation of the fellow servant has been defined thus: "Those who engage in the same common pursuit under the same general control." Cooley, Torts 541, n. 1. All who serve the same master; work under the same control; derive authority and compensation from the same common source; are engaged in the same general business, though it may be in different grades or departments of it. 32 Ind. 411; L. R. 1 H. L. S. 326; 39 N. Y. 468; 2 Thomp. Negl. 1026. "All servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object." Beach, Contrib. Neg. 338. Those who have in view a general common object. L. R. 1 Q. B. 149, 155; 35 L. J. Q. B. 23. By the Texas act of 1893 the essential requirements are: 1, That they be engaged in the common service; 2, in the same grade of employment; 3, be working together at the same time and place; 4, be working for a common purpose. See FELLOW SERVANT.

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service; 4 Metc. 49; 3 M. & W. 1; 100 U. S. 213; 154 Pa. 130; 88 N. Y. 146; 46 N. Y. Supp. 137; 59 Fed. Rep. 626; 84 Ky. 79; 56 Ga. 645; 27 W. Va. 145; 59 Tex. 334; 68 Cal. 225; 46 N. E. Rep. (Mass.) 624; 3 Col. 499. The reasons for the rule have been thus stated: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is generally an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." 4 Metc. 49. The rule does not extend to the exemption of the servants from liability to a fellow

servant for his negligence; 23 Minn. 185; 58 Ind. 121; 130 Mass. 109; 11 Ex. 832; L. R. 3 Exch. D. 341. See 112 U. S. 377, for a review of the origin of the doctrine as to fellow servants.

If the master is negligent, the concurring negligence of a fellow servant is no defence; 40 S. W. Rep. (Tex.) 1060. Where the employer knew, or ought to have known, that a servant was incompetent, the former is liable to a fellow servant for the negligence of the incompetent servant; 181 Pa. 497.

Vice Principal. If the master entrusts the entire supervision of his business, or of a distinct department, to his employee, such an employee may be termed a general vice principal, for whose negligence the master is liable; but if he entrusts only the discharge of his absolute personal duties, such as to employ competent co-workers, to an employee, the latter may be termed a special vice principal, for whose negligence only in the discharge of these absolute personal duties the master becomes liable; 19 U. S. App. 245.

The "shift boss" in a mine whose business it is to direct miners where to work, when performing that duty, acts in the capacity of master or vice principal and if he knows of a concealed danger, such as an unexploded blast, at the place where he sets a miner to work, of the existence of which the latter is ignorant and unable with ordinary care to ascertain and does not inform him thereof, the master is liable; 95 Wis. 308.

The test in determining what is a vice principal seems to be not from the grade or rank of the service, but from the character of the act performed; 53 N. Y. 549; 110 Mass. 240; McKenney, Fellow Serv. § 23. It has been held by some courts that a servant who is a *vice principal*, or who acts in the place of the master, is not a fellow servant with those beneath him, or, in other words, that the master is responsible to inferior servants for the act of their superiors; 19 U. S. App. 245; 88 Mo. 360; 85 Tenn. 227; 84 N. C. 309; 36 Ohio St. 221; 3 id. 201; 78 Va. 745; 69 Ga. 137; 44 Ia. 134; 103 Ill. 288; 9 Bush 81; 93 Ill. 302; s. c. 34 Am. Rep. 168; 19 S. E. Rep. (Va.) 652; 59 Fed. Rep. 394; 65 Vt. 553; 6 C. C. App. 205, 636; 100 U. S. 214; 112 id. 377; 48 Fed. Rep. 62; 51 id. 182. On the other hand this broad doctrine has been denied in some jurisdictions; 98 N. Y. 511; 78 Me. 217; 96 Pa. 246; 112 id. 72; 129 Mass. 268; 48 Kan. 120; L. R. 1 Sc. App. 326; L. R. 10 Q. B. 62; 20 Md. 212; 98 Ind. 282; 42 Mich. 34; 32 Minn. 54; 51 Cal. 255. Another rule, established in some jurisdictions, is that in any extensive business, divided into distinct departments, a laborer in one department is not a fellow servant with a laborer in another and separate department; 30 Ga. 150; 9 Heisk. 37; 77 Ill. 391. And this rule has also been denied by some courts, except in cases where the master has surrendered the oversight of the department and put it in the hands of an agent; 67 Tex. 597; 129 Mass. 268; 112 Pa. 400; 65 Md. 438; 42 Mich. 34; 14 Minn. 360.

The rule as to fellow servants depends on the law of the place where the accident occurs; 79 Fed. Rep. 934; 32 id. 893; 41 id. 667; but see 51 id. 182. The decisions on the whole subject are said to be in inextricable confusion; 30 Am. L. Rev. 840.

Who are fellow servants. The following are held to be fellow servants: Baggage master and switch tender; 33 Minn. 218; boatswain and stevedore; 30 Fed. Rep. 878; brakeman and car inspector; 46 Ark. 555; brakeman and conductor taking engineer's place on a locomotive; 55 Mich. 57; laborer in a tunnel and an employee who provided him with tools; 39 N. J. L. 117; brakeman and fireman; 49 Mich. 497; director of brakeman and brakeman; 71 Mo. 164; brakeman and station agent; 119 Mass. 419; brakeman and station agent; 69 Wis. 188; fireman and switch tender; 83 N. Y. 481; brakeman and train dispatcher; 74 Ind. 77, brakeman and con-

ductor; 136 Mass. 1 (*contra*, 71 N. W. Rep. (Neb.) 776); 41 S. W. Rep. (Tex.) 70; mate and common sailor; 17 N. E. Rep. (Mass.) 517; captain and the crew; [1892] 1 Q. B. 58; snow shoveller and conductor; 54 Wis. 226; tunnel repairer and trainman; 103 Ind. 305; agent and manager of express company and an ordinary employee; 55 Wis. 453; mine boss and a driver boy; 112 Pa. 567; mine boss and miner; *id.* 72; runner of an hoisting engine and men in shaft; 14 Fed. Rep. 833; engineer and brakeman; 15 Lea 145; brakeman on a regular train and the conductor on a wild train; 167 U. S. 48; a winchman and a man working in the hold of a vessel; 79 Fed. Rep. 979; conductor and engineer of a railroad train and an employee of the same company riding on a hand car; 80 id. 260; conductor and train hand; 27 S. E. Rep. (W. Va.) 278; a section hand unloading ties from a train and a section foreman temporarily in charge of a train; 71 N. W. Rep. (Mich.) 464; gang boss on a railroad and those employed under him; 16 Sup. Ct. Rep. 843 (reversing 51 Fed. Rep. 182, Fuller, C. J., and Field and Harlan, JJ., dissenting); a motorman and a track repairer; 67 N. W. Rep. (Minn.) 1006; motor man and track foreman; 26 S. E. Rep. (N. C.) 923; an engineer and a switchman; 35 S. W. Rep. (Tex.) 564; though employed and discharged by different superiors; *id.*

Where a mining corporation is under the control of a manager, and is divided into three departments, each with a superintendent under the general manager, and in one of the departments there are several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage and discharge the men under him, is a fellow servant with them; 168 U. S. 86.

The following have been held not to be fellow servants: Wheel-inspector and baggage man and train hands; 34 Fed. Rep. 616; engineer and boiler repairer; 109 Pa. 296; brakeman and road master; 31 Kan. 197; brakeman and track repairer; 4 S. E. Rep. (Va.) 339; captain and sailor; 47 Wis. 602; pilot and servants on a vessel; 10 Q. B. 125; mate and deck hand; 18 Fed. Rep. 625; pilot and deck hand; 23 id. 413; mining captain and laborer; 50 Mich. 179; superintendent and employee; 57 Cal. 20; general manager and train dispatcher and brakeman; 23 Am. & Eng. R. R. Cas. 453; train dispatcher and conductor; 8 id. 162; a floor man in charge of work and a man working under him; 45 N. Y. Supp. 234; a conductor and train hand; 7 Ohio Dec. 206; an engineer and a porter; 35 S. W. Rep. (Ky.) 199; engineer and brakeman; 41 S. W. Rep. (Tex.) 70; the foreman of a section crew and an engineer of a train not connected with the work of the section men; 67 N. W. Rep. (Neb.) 447; the trainmen of a railroad company and the employees of another company over whose road the train is run; 32 N. Y. Supp. 627; the conductor of a train and trainmen; 112 U. S. 377; conductor and engineer; *id.*, Bradley, Matthews, Gray, and Blatchford, JJ., dissenting.

The sending of one's servant to work for another and to be under the immediate control of the latter's foreman, does not thereby make him a fellow servant of the other employees, and he can have no recovery for injuries occasioned by their negligence; 44 N. Y. Supp. 234.

See 30 Am. L. Rev. 840; 2 Harv. L. Rev. 212; 40 Am. L. Reg. N. s. 766.

The English "Employers Liability Act" of 1880 has been a model for many similar acts in America, and is as follows:

"Where, after the commencement of this act, personal injury is caused to a workman—

(1) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence; or (3) By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so con-

formed; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in his death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been in the service of the employer, or engaged in his work."

The statutes passed in many of the states are usually not so sweeping as the English Act. Such acts are now in force in Alabama, Arkansas, California, the Dakotas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Rhode Island, Texas, Wisconsin, Wyoming. There are also provisions to the same effect in the Constitutions of Mississippi and South Carolina.

The Prussian law up to June, 1881, recognized the doctrine of the non-liability of the employer, but the commercial code has made the employer liable in case of carriage by land or water. As to the liability of the master on the continent of Europe, generally, see 9 Jurid. Rev. 249.

See INSURANCE, Workmen's Industrial Insurance.

See Browne; Wood, Master and Ser.; 1 Lawson, R. & R. 231-331; Stimson, Labor Laws; Bailey, Master's Liability; Napton, Liability of Employer; Roberts & Wallace, Duty of Employer; McKinney, Fellow Servants; EMPLOYEE; LABOR UNION; LABORER; LIBERTY OF CONTRACT; TRADE SECRETS; RAILWAY RELIEF.

MASTER IN CHANCERY. An officer of a court of chancery, who acts as an assistant to the chancellor. 3 Edw. Ch. 458; 19 Ill. 131.

A master in chancery is an officer appointed by a court to assist it in various proceedings incidental to the progress of the case before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence; 104 U. S. 420.

The masters were originally clerks associated with the chancellor to discharge some of the more mechanical duties of his office. They were called *preceptores*, and gradually increased in number until there were twelve of them. They obtained the title of masters in the reign of Edw. III. Their office was mainly judicial in its character, but sometimes included ministerial offices. See Spence, Eq. Jur. 359-367; 1 Harr. Ch. 436; 1 Bail. Ch. 77; 1 Des. Ch. 587. The office was abolished in England by 15 & 16 Vict. c. 80. In the United States, officers of this name exist in many of the states, with similar powers to those exercised by the English masters, but variously modified, restricted, and enlarged by statute, and in some of the states similar officers are called commissioners and by other titles.

The master's office is a branch of the court and he has power to control the proceedings of parties before him; 3 Edw. Ch. 458.

It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers; Field, J., in 129 U. S. 524. But when the parties consent to the reference of a case to a master to hear and decide all the issues therein and such reference is entered as a rule of the court, the determinations of the master are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties of an entire case, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rule—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the rules applicable to the

administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise; *id.*

The reference of a whole case to a master has become in late years a matter of more common occurrence than formerly, though it has always been within the power of a court of chancery, with the consent of both parties, to order such a reference; 1 Sim. 184. The power is incident to all courts of superior jurisdiction; 97 U. S. 581; and is covered in most of the states by statutes; 129 U. S. 535, followed in 144 U. S. 585; 145 U. S. 132; 155 U. S. 697.

In most jurisdictions, where an action is properly in equity, the court has a right to refer it to a master, without consent of parties; 25 Ia. 280; and such was the regular practice in Pennsylvania until recent rules, made by the supreme court, required equity cases to be tried by the judges in open court on *viva voce* testimony.

The duties of the masters are, generally; *first*, to take accounts and make computations; 18 How. 295; 2 Munf. 129; 14 Vt. 501; Walk. Ch. 552; *second*, to make inquiries and report facts; 3 W. & M. 258; 3 Paige 305; 23 Conn. 529; 1 Stockt. Ch. 309; 2 Jones, Eq. 238; 5 Gray 423; 5 Cal. 90; *third*, to perform some special ministerial acts directed by the court, such as the sale of property; 11 Humphr. 278; 25 Barb. 440; settlement of deeds; see 1 Cow. 711; appointment of new trustees, and the like; 1 Barb. Ch. Pr. 468; *fourth*, to discharge such duties as are specially charged upon them by statute.

In the federal courts the judges are prohibited by statute from appointing as masters any relation within the degree of first cousin; 1 Fed. Rep. 91; or except when special reasons exist therefor, a clerk of a federal court; 20 Stat. L. ch. 415; but consent of parties is held to be sufficient special reason; 3 Cliff. 146; 1 Fed. Rep. 91; Rule 75.

Cases in which reference to the master should be ordered are: Where inquiries as to compensation or damages do not involve such complexity of facts or amounts as to require an issue; 17 Ala. 295; to ascertain what are "usual covenants" according to local usages; 17 N. J. Eq. 216; where plaintiff in a bill for specific performance, shows his right to a conveyance, but the defendant by sale or otherwise, has put it out of his power to convey; 1 Cow. 711; to settle the account in cases involving mixed questions of law and fact; 1 Hall 500; to inquire into the true value of the property at the time of sale, where an application was to reform a deed made by trustees in relation to trust property where the rights of infants were concerned; 18 How. Pr. 512; to ascertain the damages suffered by defendant by reason of an injunction, where the plaintiff failed to maintain his cause or discontinued it; 19 How. Pr. 413; to ascertain whether property given to a child on marriage was intended as an advancement in marriage, or as payment of a legacy; 2 M'Cord, Ch. 268; to ascertain the intention of the parties where the main issue was a latent ambiguity in a lease of coal lands, and a decree was reversed after but little inquiry below upon this point; 18 Gratt. 304. Where a controversy in equity turns upon facts and involves a variety of circumstances, it should be referred to a master to sift the testimony and collate and report the facts; 58 Pa. 186; and a court of chancery ought not to decide upon accounts mutually existing and controverted between the parties without reference to a master; 1 Hen. & M. 543.

A court of chancery may direct the reference of a case to the master with authority to examine the defendant on oath, and such an examination will have the effect of an answer; 3 Rand. 454.

Cases which should not be referred to a

master are: Where, on the settlement of a long account between the parties, the court has facts enough before it to strike the true balance, and both parties do not agree to or ask for reference; 8 Woodb. & M. 277; where the evidence is all written, and a decree can be rendered without difficulty; 9 Fort. 79; where it was sought to charge the heirs with a debt of their father, and it was necessary to decide whether the heirs had received assets; 18 Ark. 118; to ascertain the amount due on a promissory note; 3 Ill. 545; where the issue is distinctly raised by the pleadings and testimony taken; 1 Hoffm. Ch. 312; on a bill for a specific performance of a contract of sale where the nature of the title distinctly appears; 4 Dessaus. 536.

Orders of reference to a master should specify the principles on which the accounts are to be taken, or the inquiry proceeds, so far as the court shall have decided thereon; and the examinations before the master should be limited to such matters within the order as the principles of the decree or order shall render necessary; 2 Johns. Ch. 495. In an order of reference to a master, the defendant may be directed to produce before the master "all books, papers and writings, in his custody or power," and may be examined on oath upon such interrogatories as the master may direct, relative to the subject-matters of the reference; 2 Johns. Ch. 513. Where upon an order to deliver over books, papers, etc., the court intends to permit it to be done upon his own *ex parte* affidavit merely, he is directed, generally, "to produce and deliver the same on oath," but when the party is directed to produce and deliver them on oath "before a master" or "under the direction of a master," it is that all parties interested may examine as to the full and fair compliance with the order; 2 Paige 432. And the master should, in such a case, afford reasonable time for such examination to be made, and interrogatories to the party to be framed; *id.* Where an order of reference to make preliminary inquiries preparatory to a hearing upon the merits is not an order of course, under some rule of court, and is not assented to by all parties interested, such order can be obtained only by special application to the court upon due notice to all parties who have appeared and have an interest in the subject-matter; 6 Paige 178.

Where a case has been referred to a master, the consent of parties will not confer upon him authority to examine into a matter not charged in the bill; 2 Stor. 243; and if he report as to a matter not referred to him the report *quoad hoc* is a nullity; 5 Fla. 478.

It is his duty to report the facts, and not the mere evidence of facts, it being the province of the court to apply the law to the facts found and not to draw inferences of facts from the evidence; 26 Conn. 264. A master appointed to report the sum due on a mortgage is not authorized to decide on the title; 36 Me. 115.

A report of a master on facts submitted to him will be presumed to be true, and will not be reconsidered or set aside for an alleged mistake or abuse of authority, unless it is clearly shown and the correction is required in equity; 36 Me. 115.

It is improper for a master to perform any official act, as master, in a cause in which he is solicitor or a partner of the solicitor; Walk. Ch. Cas. 453. Where a question before the master is as to the value of certain property, he should form an independent judgment of his own, and the method of taking an average of estimates as a conclusion is tolerated only from necessity; 2 Jones, Eq. 238.

A master cannot reopen a cause for further testimony after the closing of the proofs and the submission of his draft report to the parties, without special order from the court, which will be granted only on the ground of surprise, and under the same circumstances that would induce the court to make such an order before the hearing; 7 R. I. 81. Where a master has reported back a case in which he was or-

dered to take testimony, it is *res adjudicata* and the case will not be recommitted unless specific errors can be designated; 3 Woodb. & M. 157.

After the report is prepared, it is proper for the master to hear exceptions and correct his report, or if he disallows them, to report them to the court with the evidence; 12 Ill. 277; but he need not report all the testimony where the decretal order under which he acts does not require it; 52 Me. 132, 147. As to reporting evidence, see 6 N. Y. Chy. Reprint 372.

A matter may be referred to a master and his report received and confirmed all at the same term of the court; 3 Ala. 83; but the general practice is to permit the report to lie over to the term following on motion of either party; 1 Brook. 529.

A court of equity is not bound by the report of a master, but may confirm, modify, or reject it, as the issues in the suit must be decided by the court itself; 19 U. S. App. 477; but this finding both of fact and of law will be presumed to be correct; 155 U. S. 631; and will stand unless there is some obvious error in the application of the law or serious mistake in the consideration of the evidence; 144 U. S. 585; *id.* 104; 36 W. Va. 454. See 151 U. S. 285.

In practice it is not usual for the court to reject the report of a master, with his findings upon the matter referred to him, unless exceptions are taken to them and brought to its attention, and, upon examination, the findings are found unsupported or defective in some essential particular; 128 U. S. 617.

The court will not interfere with a report of a master upon a question of fact depending upon the credibility of witnesses, unless an error is clearly made to appear; 9 N. J. Eq. 309, 659; the report has not the position of a verdict on a motion for a new trial at law, but on exceptions on a question of fact it is only necessary to review and weigh the evidence; 18 N. J. Eq. 144; and it will not be overruled because the evidence is vague and conflicting, unless the conclusion is unwarranted by the evidence; *id.* The theory that it stands as a verdict obtains only when the findings are deductions from incorporated facts; 152 Pa. 42.

As to sales by masters, see 7 N. Y. Chy. Reprint 63, note.

As to when a decree founded on a master's report will be opened, see 4 Edw. Ch. 249; 6 Allen 457; and when reviewed, 6 N. Y. Chy. Reprint 527, note.

See generally, Dan. Ch. Pr. ch. xxvi.; 1 Post. Fed. Pr. ch. xxiii.; 15 Myer's Fed. Dec. 827; Bennet, Masters; Tamlyn, Pract. & Master's Office; Garland & Ralston, Fed. Pr.

MASTER OF THE CROWN OFFICE. The queen's coroner and attorney in the criminal department of the court of queen's bench, who prosecutes at the relation of some private person or common informer, the crown being the nominal prosecutor. Stat. 6 & 7 Vict. c. 20; Whart. Dict.

MASTER OF THE FACULTIES. An officer under the archbishop, who grants licenses, dispensations, etc. See COURT OF ARCHES, FACULTIES.

MASTER OF THE HORSE. In England, this official was originally in actual charge of the royal stables. That, however, is now entrusted to a permanent official known as the Crown Equerry and Secretary to the Master of the Horse. The Master of the Horse, who is always a peer of high rank, is one of the three principal officers of the household, the first being the Lord Steward if and when that functionary exists, and the second being the Lord Chamberlain. The Master of the Horse, like the Lord Chamberlain and other chief officers of the household, goes in and out with the Ministry. His chief present function is to attend the king on state occasions. Byrne.

MASTER OF THE MINT. In English Law. An officer who superintends everything belonging to the mint.

MASTER OF THE ORDNANCE. An officer, in England, to whose care all the royal ordnance and artillery were committed.

MASTER OF THE REVELS. See REVELS.

MASTER OF THE ROLLS. In English Law. An officer of chancery, who has the keeping of the rolls and grants which pass the great seal and the records of the chancery. He formerly exercised extensive judicial functions in a court ranking next to that of the lord chancellor.

An officer with this title existed in the time of the Conqueror. He had from most ancient times an office in chancery, with distinct clerks. In early times no judicial authority was conferred by an appointment as master of the rolls. In the reign of Hen. VI. and Edw. IV. he was found sitting in a judicial capacity, and from 1623 to 1873, had the regulation of some branches of the business of the court. He was the chief of the masters in chancery; and his judicial functions, except those specially conferred by commission, appear to have properly belonged to him in this character. 1 Spence, Eq. Jur. 100, 357.

All orders and decrees made by him, except those appropriate to the great seal, were valid, unless discharged or altered by the lord chancellor; but had to be signed by him before enrolment; and he was especially directed to hear motions, pleas, demurrers, and the like. Stat. 3 Geo. II. c. 30; 3 & 4 Will. IV. c. 94; 3 Bla. Com. 442.

Under the Judicature Acts, the office of the master of the rolls has been abolished, but he is a judge of the high court, and sits as the head of one of the divisions of the court of appeal. He is no longer, of necessity, a chancery lawyer.

Provision is made for the abolition of this office when it shall become vacant, by order in council, on the recommendation of the council of judges, provided that such order in council be laid before the houses of parliament for thirty days, and during that time neither house address her majesty against it; Stat. 36 & 37 Vict. c. 60, §§ 5, 31, 32; Mozl. & W. Law Dict.

MASTER OF A SHIP. In Maritime Law. The commander or first officer of a merchant-ship; a captain.

Under the English Merchant Shipping Act, 1854, the term master includes "every person (except a pilot) having command or charge of any ship."

A distinction is noted between the two-fold duties and functions of the master, those in which as *shipmaster* he is entrusted with the management and navigation of the ship, either as the co-partner of the owners or their confidential agent; MacLachlan, Merch. Ship. 134-186; and those in which as *master mariner* he is the officer in command on board; *id.* 203, 215.

The master of an American ship must be a citizen of the United States; 1 Stat. L. 287; and a similar requirement exists in most maritime states. In some countries their qualifications in point of skill and experience must be attested by examination by proper authorities. This is provided for in England under the Merchant Shipping Act, 1894, but in the United States the civil responsibility of the owners for their acts is deemed sufficient, although a license is required for the master of a steam vessel; U. S. Rev. Stat. § 438.

A vessel sailing without a *competent* master is deemed unseaworthy, and the owners are liable for any loss of cargo which may occur, but cannot recover on a policy of insurance in case of disaster; 21 How. 7, 23; 6 Cow. 270; 12 Johns. 128, 136; 21 N. Y. 378; Desty, Sh. & Adm. § 232. One to whom the navigation, discipline, and control of a vessel is entrusted, must be considered as master, although another is registered as such; 59 Fed. Rep. 630. The owner of one half the legal title of a steamboat, who is the master in possession, and who is by written agreement entitled to such possession as master, is not liable to removal from his position as master; 135 U. S. 599.

The master is selected by the owners and is their confidential agent; 1 Wheat. 96; in case of his death or disability during the voyage, the mate succeeds; if he also dies in a foreign country, the consignee of the vessel, or the consul of the nation, may, in a case of necessity and in the ab-

sence of other authority, appoint a master; 49 Fed. Rep. 403. The master himself may, in similar circumstances of necessity and distance from the owners, appoint a substitute; 1 Pars. Mar. Law 387; 2 Sumn. 206; 13 Pet. 387. See 34 Barb. 419. During a temporary absence of the master, the mate succeeds; 2 Sumn. 588.

He must, at the commencement of the voyage, see that his ship is seaworthy and fully provided with the necessary ship's papers, and with all the necessary and customary requisites for navigation, as well as with a proper supply of provisions, stores, etc.; Bee 80; 2 Paine 291; 1 Pet. Adm. 219; Ware 454; for the voyage; 1 Pet. Adm. 407; 1 W. & M. 338. He must also make a contract with the seamen, if the voyage be a foreign one from the United States; 1 U. S. Stat. at L. 131; 2 *id.* 203. He must store safely under deck all goods shipped on board, unless by well-established custom or by express contract they are to be carried on deck; and he must stow them in the accustomed manner in order to prevent liability in case of damage. In respect to the lading or carriage of goods shipped as freight, he is required to use the greatest diligence; and his responsibility attaches from the moment of their receipt, whether on board, in his boat, or at the quay or beach; 3 Kent 206; Abb. Shipp. 423. He should acquaint himself with the laws of the country with which he is trading; 22 How. 491.

He must proceed on the voyage in which his vessel may be engaged by direction of the owners, must obey faithfully his instructions, and by all legal means promote the interest of the owners of the ship and cargo; 3 Cra. 242. On his arrival at a foreign port, he must at once deposit, with the United States consul, vice consul, or commercial agent, his ship's papers, which are returned to him when he receives his clearance; U. S. R. S. § 4309. This does not apply, however, to those vessels merely touching for advice; 9 How. 372. He must govern his crew and prevent improper exercise of authority by his subordinates; 2 Sumn. 1, 584; 14 Johns. 19. He must take all possible care of the cargo during the voyage, and, in case of stranding, shipwreck, or other disaster, must do all lawful acts which the safety of the ship and the interest of the owners of the ship and cargo require; Fland. Shipp. 190; 19 How. 150; 13 Pet. 387. It is proper, but not indispensable, in case of an accident, to note a protest thereof at the first port afterwards reached; 6 McLean 76; and to give information to the owners of the loss of the vessel as soon as he reasonably can; 4 Mas. 74. After stranding he must take all possible care of the cargo; 9 Wall. 682. In a port of refuge, he is not authorized to sell the cargo as damaged unless necessity be shown; but where it is so much injured as to endanger the ship, or will become utterly worthless, it is his duty to sell it at the place where the necessity arises; 1 Blatch. 357; 1 Story 842. When possible, he is bound to notify the owners before selling; 30 Me. 302; but he cannot sell after the completion of the voyage, when the owners of the cargo can be communicated with or readily reached; 38 Fed. Rep. 380. He may contract for definite salvage in case of emergency; 48 Fed. Rep. 925. And under certain circumstances he may even sell the vessel where she is in danger of destruction; 37 Fed. Rep. 371; but vessel and cargo can only be sold in case of urgent necessity; 13 Moo. P. C. 144; L. R. 6 C. P. 319. He should consult the owners if possible; failing that he should consult disinterested persons of skill and experience whose advice to sell would be strong evidence in justification of a sale; 6 Hall 27. While the master of a stranded vessel may, in case of urgent necessity, throw overboard or otherwise sacrifice his cargo to obtain the release of his vessel, he has no right to give it away; if he does, the donee takes no title to the property, but is liable therefor as bailee, and is bound to surrender it upon demand; 44 Fed. Rep. 431.

In time of war, he must avoid acts which will expose his vessel and cargo to seizure and confiscation, and must do all acts required for the safety of the vessel and cargo and the interests of their owners. In case of capture, he is bound to remain by the vessel until condemnation, or until recovery is hopeless; 3 Mas. 161. He must bring home from foreign ports destitute seamen; Act of Congr. Feb. 23, 1803, § 4; R. S. § 4578; and must retain from the wages of his crew hospital-money; Act of Congr. Mar. 3, 1875; R. S. § 4585. He is personally liable to seamen for their wages; 123 Mass. 125.

He is liable to the owners, and he and they to all others whose interests are affected by his acts, for want of reasonable skill, care, or prudence in the navigation or management of the vessel; 1 Wash. C. C. 142; including injuries done to the cargo by the crew; 1 Mas. 104; and this rule includes the improper discharge of a seaman; Ware 65.

His authority on shipboard is very great; Ware 506; but is of a civil character. He has a right to control and direct the efforts of the crew, and to use such force as may be necessary to enforce obedience to his lawful commands. He may even take life, if necessary, to suppress a mutiny. He may degrade officers; 1 Blatchf. & H. 195, 366; 1 Pet. Adm. 244; 4 Wash. C. C. 338; 2 C. Rob. 261. He may punish acts of insolence, disobedience, and insubordination, and such other offences, when he is required to do so for the safety and discipline of the ship. Flogging is, however, prohibited on merchant vessels; R. S. § 4611; and for any unreasonable, arbitrary, or brutal exercise of authority towards a seaman or passenger he is liable, criminally and in a civil suit; 4 U. S. Stat. L. 776, 1235. In all cases which will admit of the proper delay for inquiry, due inquiry should precede the act of punishment; 1 Hagg. 274, per Lord Stowell. He has a right to exact from his officers and crew not only a strict observance of all his lawful orders, but also a respectful demeanor towards himself; 22 Fed. Rep. 927. He may also restrain or even confine a passenger who refuses to submit to the necessary discipline of the ship; 3 Mas. 242; but, without conferring with the officers and entering the facts in the log-book, he can inflict no higher punishment on a passenger than a reprimand; 7 Pa. L. J. 77; 6 C. & P. 472; 1 Conkl. Adm. 430; 14 Johns. 119; Desty, Adm. § 129.

If the master has not funds for the necessary supplies, repairs, and uses of his ship when abroad, he may borrow money for that purpose on the credit of his owners; 3 Wash. C. C. 434; and if it cannot be procured on his and their personal credit, he may take up money on bottomry, or in extreme cases may pledge his cargo; 3 Mas. 255. His authority to act as the owner's agent is based on necessity and ceases when the latter is within reach of instructions; [1893] A. C. 38; 67 Mich. 264. He cannot bind owners to pay for repairs done at the home port without special authority; 47 Me. 254; 19 How. 22; nor when they or their agents are so near that communication can be had with them without delay; 31 Conn. 51; Abb. Shipp. 162; 3 Kent 49. The extent of his contracts must be confined to the necessities of the case; 38 Fed. Rep. 447. He has no authority to execute bottomry or any express hypothecation of the ship for differences in freights in favor of the charterer, or for his advances of charter money; 37 *id.* 436; 38 *id.* 919. See BOTTOMRY; RESPONSIBILITY.

Generally, when contracting within the ordinary scope of his powers and duties, he is personally responsible, as well as his owners, when they are personally liable. On bottomry loans, however, there is ordinarily no personal liability in this country or in England, beyond the funds which comes to the hands of the master or owners from the subject of the pledge; 6 Ben. 1; Abb. Sh. 90; Story, Ag. §§ 116, 123, 294. See 37 Fed. Rep. 436.

In most cases, too, the ship is bound for the performance of the master's contract; Ware 322; but all contracts of the master in chartering or freighting his vessel do not give such a lien; 19 How. 82.

Where the master of a ship is without fault during a period of detention resulting from seizure of the ship by legal process against the owner, he is entitled to wages on the terms of his contract, unless it stipulate to the contrary; 89 Ga. 660.

See Abbott, Shipp., 13th ed. pt. II. ch. i. —iv.; 2 Parsons, Shipp. & Adm. ch. xiv.; 3 Kent, Lect. xlv. Kay, Shipmasters & Seamen; Flanders, Shipp.; Desty, Shipp. & Adm.; Blunt; Peters, Shipmasters; 10 Journ. Jur. 106; 3 Jur. Rev. 396; FLAG, LAW OF; LIEN.

MASTER OF THE TEMPLE. The founder of the order of Knight Templars, and his successors, were called *Magni Templi Magistri*; and probably from hence he was the spiritual guide and director of the Temple.

The chief minister of the Temple Church in London is now called Master of the Temple. Jacob; Dugd. War. 706.

MASTERS AT COMMON LAW. In English Law. Officers of the superior courts of common law, whose duty is to tax costs, compute damages, take affidavits and the like. They are five in number in each court. See stat. 7 Will. IV., and 1 Vict. c. 30.

MASTERS' LIABILITY. (1) The liability of masters for injuries occurring to servants in the course of their employment, unless a servant assumes his own risk, or by his own act contributes to his injury, or unless the injury is due to the negligence of a fellow servant, in which case the fellow-servant is liable. 20 A. & E. Ency. 2nd ed., 54; vol. 12, p. 903. (2) Their liability for all injuries to third persons or to property, caused by the negligence of servants, if the act which results in the injury is done while a servant is acting within the scope of his employment in the master's service, though the act is not necessary to the performance of the servant's duties, and is not expressly authorized by the master, or known to him. See however, SERVANT'S LIABILITY. *Id.* vol. 20, p. 163. See EMPLOYERS' LIABILITY INSURANCE; ASSUMPTION OF RISK.

MATE. In Maritime Law. The officer next in rank to the master on board a merchant ship or vessel.

In such vessels there is always one mate, and sometimes a second, third, and fourth mate, according to the vessel's size and the trade in which she may be engaged. When the word mate is used without qualification, it always denotes the first mate; and the others are designated as above. On large ships the mate is frequently styled first officer, and the second and third mates, second and third officers. Parish, Sea Off. Man. 88.

The mate, as well as the inferior officers and seamen, is a mariner, and entitled to sue in admiralty for his wages; and he has a lien on the vessel for his security. Even when he acts as master in consequence of the death of the appointed master, he can sue in the admiralty for his proper wages as mate, but not for the increased compensation to which he is entitled as acting master. And he is entitled, when sick, to be cured at the expense of the ship. The mate should possess a sufficient knowledge of navigation to take command of the ship and carry on the voyage in case of the death of the master; and it may well be doubted whether a vessel be seaworthy for a long voyage at sea when only the master is competent to navigate her; Blount, Com. Dig. 32; Dana, Seaman's Friend 146; Curtis, Rights and Duties of Merchant Seamen 96, note. It is the special duty of the mate to keep the log-book. The mate takes charge of the larboard watch at sea, and in port superintends the storage and breaking out of the cargo.

The mate succeeds, of course, to the station, rights, and authorities of the captain or master on the death of the latter, and he also has command, with the authority re-

quired by the exigencies of the case, during the temporary absence of the master. See Dana, Seaman's Friend; Parish, Sea-Officer's Manual; Curtis, Rights and Duties of Merchant Seamen; Parsons, Maritime Law; Desty, Shipp. & Adm.; MASTER OF A SHIP.

MATELOTAGE. The hire of a ship or boat.

MATER FAMILIAS. In Civil Law. The mother of a family; the mistress of a family.

A chaste woman, married or single. Calvinus, Lex.

MATERIAL ALLEGATION. A "material allegation" is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient. 12 Bush. (Ky.) 600.

A "material allegation" is one necessary to support the cause of action. Civil Code of Kentucky, § 127; 130 Ky. 41, 112 S. W. 328.

MATERIAL ALTERATION. See ALTERATION.

MATERIAL MEN. Persons who furnish materials to be used in the construction or erection of ships, houses, or buildings.

By the general maritime law, material men have a lien on a foreign ship for supplies or materials furnished for such ship; which may be enforced in the admiralty; Bened. Adm. 266; 9 Wheat. 409; 19 How. 359; 55 Fed. Rep. 523; 56 *id.* 237; but no such lien exists in the case of domestic ships; 4 Wheat. 438; 20 How. 398; 21 *id.* 248; except when authorized by statute. See LIEN.

By statutory provisions, material men have a lien on ships and buildings, in some of the states. See LIEN.

The term is now much used in connection with those who furnished supplies to railroad companies, as to which see RECEIVERS.

MATERIALITY. The property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial.

MATERIALS. Matter which is intended to be used in the creation of a mechanical structure. 71 Pa. 293; 36 Wisc. 29. The physical part of that which has a physical existence.

The general property in materials furnished to a workman remains in the bailor where the contract is merely one for the employment of labor and services; otherwise where it is a sale. See BAILMENT; MANDATE; TROVER; TRESPASS.

MATERNA MATERNIS (Lat. from the mother to the mother's).

In French Law. A term denoting the descent of property of a deceased person derived from his mother to the relations on the mother's side.

MATERNAL. That which belongs to, or comes from, the mother: as, maternal authority, maternal relation, maternal estate, maternal line. See LINE.

MATERNAL PROPERTY. That which comes from the mother of the party, and other ascendants of the maternal stock. Domat, *Liv. Préf.* t. 3, s. 2., n. 12.

MATERNITY. The state or condition of a mother.

It is either legitimate or natural. The former is the condition of the mother who has given birth to legitimate children; while the latter is the condition of her who has given birth to illegitimate children. Maternity is always certain; while the paternity is only presumed.

MATERTERA. A mother's sister.

MATERTERA MAGNA. A grand-

mother's sister.

MATERTERA MAJOR. A great-grandmother's sister.

MATERTERA MAXIMA. A great-great-grandmother's sister.

MATH. A moving.

MATHEMATICAL EVIDENCE. That evidence which is established by a demonstration. It is used in contradistinction to moral evidence.

MATIMA. A godmother.

MATRICIDE. The murder of one's mother.

MATRICULA. In Civil Law. A register in which are inscribed the names of persons who become members of an association or society. Dig. 50. 3. 1. In the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy, and *matricula pauperum*; a list of the poor to be relieved: hence, to be entered in a university is to be matriculated.

MATRIMONIAL CAUSES. In the English ecclesiastical courts there are five kinds of causes which are classed under this head, viz.: causes for a malicious jactitation; suits for nullity of marriage, on account of fraud, incest, or other bar to the marriage; 2 Hagg. Cons. 423; suits for restitution of conjugal rights; suits for divorce on account of cruelty or adultery, or causes which have arisen since the marriage; suits for alimony.

Matrimonial causes were formerly a branch of the ecclesiastical jurisdiction. By the Divorce Act of 1857, they passed under the cognizance of the court for divorce and matrimonial causes created by that act. See JUDICATURE ACTS.

MATRIMONIAL CAUSES ACTS. A series of English statutes relating to divorce and matrimonial causes. See Brett, Eng. Com. 958; 4 Chitty, Stat.

MATRIMONIAL DOMICIL. See DOMICIL; ALIEN; and see also 20 Law Mag. & Rev. 330; 2 Brett, Com. 957.

MATRIMONIUM. In Civil Law. A legal marriage. A marriage celebrated in conformity with the rules of the civil law was called *justum matrimonium*; the husband *vir*, the wife *uxor*. It was exclusively confined to Roman citizens, and to those to whom the *connubium* had been conceded. It alone produced the paternal power over the children, and the marital power—*manus*—over the wife. The *farreum*, the *coemptio*, or the *usus*, was indispensable for the formation of this marriage. See PATERFAMILIAS.

MATRIMONY. Marriage; the nuptial state. See MARRIAGE.

MATRIX ECCLESIA. The mother church.

A cathedral church, in respect of the parochial churches within the same diocese, or a parochial church, in respect of the chapels depending on her. Burrill; Cowell.

MATRON. A married woman.

MATRONS, JURY OF. See JURY OF WOMEN.

MATTER. As used in law, a fact or facts constituting the whole or a part of a ground of action or defence. 18 Ind. 332. See 40 Ala. 148.

Whatever is perceptible by the senses; any material. Anderson. The subject of legal action, consideration, complaint or defence. *Id.* Some substantial or essential thing; opposed to form. *Id.*; 40 Ala. 148.

MATTER IN CONTROVERSY, OR IN DISPUTE. The subject of litigation, in the matter for which a suit is brought and upon which issue is joined. 1 Wall. 337.

To ascertain the matter in dispute we must recur to the foundation of the original controversy; the thing demanded, not the thing found; 3 Dall. 405. An appeal will not lie on a claim insufficient in amount to give jurisdiction when suit was instituted, but which has been brought within the limitation by the after-acquired interest; 2 La. Ann. 798; *id.* 911; 12 *id.* 87. See 3 Cra. 159; 1 S. & R. 269.

MATTER IN DEED. Such matter as may be proved or established by a deed or specialty. Matter of fact, in contradistinction to matter of law. Co. Litt. 320; Steph. Pl. 197.

MATTER OF FACT. In Pleading. Matter, the existence or truth of which is determined by the senses or by reasoning based upon their evidence. The decision of such matters is referred to the jury. Hob. 127; 1 Greenl. Ev. § 49.

MATTER OF FORM. That which relates merely to the form of an instrument or to its language, arrangement, or technicality, without affecting its substance.

An important distinction, in determining the sufficiency of pleadings and proceedings, is taken between matters of form and matters of substance. No definite general rule can be given for discriminating between these. The general principle is that whatever pertains to the purpose of the instrument, to the objects to be accomplished by it, or to any right involved or affected, is matter of substance; while what relates merely to the language or expression, without affecting the issue presented, the evidence requisite, the rights presented, the rights of either party, or the steps necessary to be taken in furtherance of the proceedings, is matter of form. The importance of this distinction relates chiefly to the effect attributable to errors and defects, which, in matters of form, may be amended or disregarded much more readily than when in the substance. Abbott.

MATTER IN ISSUE. That matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings. 15 N. H. 1. That ultimate fact or state of facts in dispute upon which the verdict or finding is predicated. 4 Fed. Rep. 336.

The disputed point or question. Anderson; 97 Ind. 438. A single, certain, and material point, arising out of the allegations or pleadings of the parties, and generally made by an affirmative and a negative. *Id.*; 5 Pet. (U. S.) *149. When the parties come to a point which is affirmed on one side, and denied on the other, they are said to be "at issue." All debate is then contracted into a single point, which must be determined in favor of one of the parties. *Id.*; 3 Bl. Com. 313.

MATTER OF LAW. In Pleading. Matter, the truth or falsity of which is determined by the established rules of law or by reasoning based upon them. The decision of such matters is referred to the court. Where special pleading prevails, it is a rule that matter of law must be pleaded specially. The phrase here means matter which, if established as true, goes to defeat the plaintiff's charges by the effect of some rule of law, as distinguished from that which operates as a direct negative. See 70 N. C. 167.

MATTER IN PAIS (literally, matter in the country). Matter of fact, as distinguished from matter of law or matter of record.

MATTER OF RECORD. Those facts which may be proved by the production of a record. It differs from matter in deed, which consists of facts which may be proved by specialty.

MATTER SUBSEQUENT, IMPOSSIBLE BY. See IMPOSSIBILITY.

MATTER OF SUBSISTENCE FOR MAN. All articles or things, whether animal or vegetable, living or dead, which

are used for food, and whether they are consumed in the form in which they are bought from the producer or only after undergoing a process of preparation. 19 Gratt. 813.

MATTER OF SUBSTANCE. That which goes to the merits.

See MATTER OF FORM.

MATURITY. The time when a bill or note becomes due. See DAYS OF GRACE.

MAXIM. An established principle or proposition. A principle of law universally admitted as being just and consonant with reason.

Maxims are said to have been of comparatively late origin in the Roman law. There are none in the Twelve Tables, and they appear but rarely in Gaius and the ante-Justinian fragments, or in the older English text-books and reports. The word *maximum* or *maxima* does not occur in the *Corpus Juris* in any meaning resembling that now borne by it; the nearest word in classical Roman law is *regula*; Fortescue identifies the two terms, and Du Cange defines *maxima* as *recepta sententia*, *regula vulgo nostris et Anglis maxime*. Doctor and Student defines maxims as "the foundations of the Law and the conclusions of reason, and therefore they ought not to be impugned, but always to be admitted." Coke says they are "a sure foundation or ground of art and a conclusion of reason, so sure and uncontrolled that they ought not to be questioned," and that a maxim is so called "quia maxima ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur." Co. Litt. 11a. He says in another place: "A maxim is a proposition to be of all men confessed and granted without proof, argument, or discourse." See 20 L. Quart. & Rev. 283.

Regula appears not to be quite the same thing as maxim. The Digest makes the line between *regula*, *definitio*, and *sententia* a narrow one. *Sententia* is used in several texts as equivalent to *regula*. *Definitio*, in Labeo, is really a rule of law. In Papinian it is more like *responsa prudentis*. In some editions of the *Corpus Juris*, maxims are given under the name of *Regule et Sententiae Juris*. See 20 L. Mag. & Rev. 263. Maxims in law are said to be somewhat like axioms in geometry. 1 Bla. Com. 68. They are principles and authorities, and part of the general customs or common law of the land, and are of the same strength as acts of parliament, when the judges have determined what is a maxim. This determination belongs to the court and not the jury; *Termes de la Ley* Doct. & Stud. Dial. 1, c. 8; they prove themselves; *id.* Maxims of the law are holden for law, and all other cases that may be applied to them shall be taken for granted; Co. Litt. 11, 67. See Plowd. 27 b.

The alteration of any of the maxims of the common law is dangerous; 2 Inst. 210. See the introduction by W. F. Cooper to Barton's Maxims.

Later writers place less value on maxims; thus: "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great, but a particularly small, amount of information. As often as not the exceptions and qualifications to them are more important than the so-called rules." 2 Steph. Hist. of Cr. L. 94.

"We believe that not a single law maxim can be pointed out which is not obnoxious to objection." Towns. Sl. & Lib. § 88.

"Many of the sayings that are dignified by the name of maxims are nothing but the *obiter dicta* of ancient judges who were fond of sententious phrases, and sometimes sacrificed accuracy of definition to terseness of expression; and some . . . have no definite meaning at all." E. Q. Keasbey, in 3 N. J. L. J. 160.

"Maxims are not all of equal value; some ought to be amended and others discarded altogether; they are neither definitions nor treatises; they require the test of careful analysis; they are in many instances

merely guide-posts pointing to the right road, but not the road itself." Prof. Jeremiah Smith, in 9 Harv. L. Rev. 26.

"I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them." Lord Esher, M. R., in 19 Q. B. D. 653.

Maxims have been divided, as to their origin, into three classes: Roman, Roman modified, and indigenous; 20 L. Mag. & Rev. 238.

The application of the maxim to the case before the court is generally the only difficulty. The true method of making the application is to ascertain how the maxim arose, and to consider whether the case to which it is sought to be applied is of the same character, or whether it is an exception to an apparently general rule. This requires extended discussion, which it has received (so far as the more important maxims are concerned) in the able treatise on Legal Maxims by Broom.

Non ex regula jura sumatur, sed ex jure quod est regula fiat. The law should not be taken from maxims, but maxims from the law; 9 Jurid. Rev. 307.

The earliest work on maxims appears to have been that of Bacon (1630), followed by Noy (1641), Wingate (1658), Heath (Pleading, 1694), Francis (1728), Grounds and Rudiments of Law and Equity (anonymous, 1751, of which Francis was the author), Branch (1758), Lofft (1776, in his Reports). In the present century, Broom (1845), Trayner (1872, 1883), Cotterell (1881, 1894), and Wharton's Dictionary (1848, 1892), Lawson (1883), Bell's Dictionary (Scotch, 1890), Peloubet (New York, 1880), Barton, Stimson, Morgan, Taylor, Henning, Halkerton, Jackson (Law Latin), and Hughes. See the various Law Dictionaries; also 15 West. Jur. 337; 13 Cr. L. Mag. 832; 5 L. Quart. Rev. 444.

The following list comprises, it is believed, all the legal maxims, commonly so called, together with some that are in reality nothing more than legal phrases, accompanied by a translation, and, in most cases, a reference to one or more authorities which are intended to show the origin or application of the rule. It is obvious that many of them are of slight value and that more of them are open to objections, so far as they can be considered to be statements of principles of law.

A communis observantia non est recedendum. There should be no departure from common observance (or usage). Co. Litt. 136; Wing. Max. 203; 2 Co. 74.

A digniori fide debet denominatio et resolutio. The denomination and explanation ought to be derived from the more worthy. Wing. Max. 203; Fleta, lib. 4, c. 10, § 12.

A iustitia quasi a quodam fonte omnia jura emanant. From justice, as a fountain, all rights flow. Brac. 2 b.

A impossibile nul n'est tenu. No one is bound to do what is impossible.

A non posse ad non esse sequitur argumentum necessarie negative, licet non affirmative. From impossibility to non-existence the inference follows necessarily in the negative, though not in the affirmative. Hob. 336.

A piratis aut latronibus capti liberi permanent. Those captured by pirates or robbers remain free. Dig. 40, 15, 130; Grof. lib. 3, c. 8, § 1.

A piratis et latronibus capta dominum non mutant. Things captured by pirates or robbers do not change their ownership. 1 Kent 108, 184; 2 Woodd. Lect. 268, 269.

A rescripta valet argumentum. An argument from rescripts (i. e. original writs in the register) is valid. Co. Litt. 11 a.

A summo remedio ad inferiorem actionem non habetur regressus neque auxilium. From the highest remedy to an inferior action there is no return or assistance. Fleta, lib. 6, c. 1; Brac. 104 a, 112 b; 8 Sharw. Bla. Com. 138, 194.

A verbis legis non est recedendum. From the words of the law there should be no departure. Broom, Max. 622; Wing. Max. 25; 5 Co. 119.

Ab abusu ad usum non valet consequentia. A conclusion as to the use of a thing from its abuse is invalid. Broom, Max. xvii.

Ab assuetis non fit injuria. No injury is done by things long acquiesced in. Jenk. Cent. Intro. vi.

Abbreviationum ille numerus et sensus accipendus est, ut concessio non sit inanis. Such number and sense is to be given to abbreviations that the grant may not fail. 9 Co. 43.

Absentem accipere debemus cum qui non est eo loco quo petitur. We must consider him absent who is not in that place in which he is sought. Dig. 50,

60, 199.

Absentia ejus qui reipublica causa abest, neque ei neque alius damnoosa esse debet. The absence of him who is employed in the service of the state ought not to be prejudicial to him nor to others. Dig. 50, 17, 140.

Absoluta sententia expositore non indiget. A simple proposition needs no expositor. 2 Inst. 533. See 109 Mass. 325.

Abundans cautela non nocet. Abundant caution does no harm. 11 Co. 6; Fleta, lib. 1, c. 28, § 1; 6 Wheat. 108.

Accessorium non ducit sed sequitur suum principale. The accessory does not draw, but follows, its principal. Co. Litt. 152 a, 380 a; 5 E. & B. 772; Broom, Max. 491; Lindl. Part. 1086; 21 Misc. Rep. 84. Accessorium sequitur naturam sui principalis.

An accessory follows the nature of his principal. 3 Inst. 139; 4 Bla. Com. 36; Broom, Max. 497.

Accipere quid ut iustitiam facias, non est tam accipere quam extorquere. To accept anything as a reward for doing justice, is rather extorting than accepting. Lofft 72.

Accusare nemo debet se, nisi coram Deo. No one is obliged to accuse himself, unless before God. Hardr. 139.

Accusator post rationabile tempus non est audiendus, nisi se bene de omissione excuset. An accuser is not to be heard after a reasonable time, unless he excuse himself satisfactorily for the omission. F. Moore 817; Bart. Max. 39.

Acta exteriora indicant interiora secreta. Outward acts indicate the inward intent. Broom, Max. 33 a; 5 Co. 146 b; 1 Sm. L. Cas. 261.

Acta in uno iudicio non probant in aliis nisi inter easdem personas. Things done in one action cannot be taken as evidence in another, unless it be between the same parties. Trayner, Max. 11.

Actio non datur non damificato. An action is not given to one who is not injured. Jenk. Cent. 69.

Actio non facit rem, nisi mens sit rei. An action does not make one guilty, unless the intention be bad. Lofft 37. See *Actus non, etc.*

Actio personalis moritur cum persona. A personal action dies with the person. Noy, Max. 14; Broom, Max. 90; 13 Mass. 43; 1 Pick. 73; 21 Pick. 252; Bart. Max. 30; 38 Fed. Rep. 80; 96 Ky. 700; 34 L. R. A. 786; 93 Va. 390; 25 S. E. Rep. 110; 40 W. N. C. 345; 3 Am. & Eng. Rul. Cas. n. s. 309. See *Actio PERSONALIS*.

Actio quaelibet est ius via. Every action proceeds in its own course. Jenk. Cent. 72.

Actionum genera maxime sunt servanda. The kinds of actions are especially to be preserved. Lofft 460.

Actor qui contra regulam quid adducit, non est audiendus. A pleader ought not to be heard who advances a proposition contrary to the rules of law.

Actor sequitur forum rei. The plaintiff must follow the forum of the thing in dispute. Home, Law Tr. 232; Story, Conf. L. § 325 k; 2 Kent 462.

Actore non probante, reus absolvitur. If the plaintiff does not prove his case, the defendant is absolved. Hob. 103.

Actori incumbit onus probandi. The burden of proof lies on the plaintiff. Hob. 103; 100 Mass. 490. See Dig. 22, 3, 2.

Acts indicate the intention. 8 Co. 146 b; Broom, Max. 301.

Actus curia neminem gravabit. An act of the court shall prejudice no man. Jenk. Cent. 118; Broom, Max. 123; 1 Str. 426; 1 Sm. L. C., notes to Cumber vs. Wane; 12 C. B. 415.

Actus Dei nemini facit injuriam. The act of God does wrong to no one (that is, no one is liable in damages for inevitable accidents). 2 Bla. Com. 122; Broom, Max. 230; 1 Co. 97 b; 5 id. 87 a; Co. Litt. 206 a; 4 Taunt. 309; 1 Term 33; 55 Conn. 574. See *Act of God*.

Actus inceptus cujus perfectio pendet ex voluntate partium, revocari potest, licet ex voluntate tertia persona, vel ex contingenti, revocari non potest. An act already begun, whose completion depends upon the will of the parties, may be recalled; but if it depend on consent of a third person, or on a contingency it cannot be recalled. Bacon, Max. Reg. 20. See *Story, Ag. § 24*.

Actus iudicialis coram non iudice irritus habetur; de ministerialibus autem a quocunque provenit validus esto. A judicial act before one not a judge is void; as to a ministerial act, before whomsoever it proceeds, let it be valid. Lofft 458.

Actus legis nemini est damnosus. An act of the law shall prejudice no man. 2 Inst. 287; Broom, Max. 126; 11 Johns. 380; 3 Co. 87 a; Co. Litt. 204 b; 5 Term 381, 385; 2 H. Bla. 234; 1 Prest. Abs. of Tit. 948; 6 Bacon, Abr. 659.

Actus legis nemini facit injuriam. The act of the law does no one wrong. Broom, Max. 127, 409; 2 Bla. Com. 123.

Actus legitimi non recipiunt modum. Acts required by law admit of no qualification. Hob. 153; Branch, Fr.

Actus me invito factus, non est meus actus. An act done by me against my will is not my act. Brac. 101 b.

Actus non reum facit nisi mens sit rea. An act does not make a person guilty unless his intention be guilty also. (The maxim applies only in criminal cases; in civil matters it is otherwise.) Broom, Max. 306, 367, 307, n.; 7 Term 514; 3 Bingh. n. c. 34, 468; 5 M. & G. 639; 3 Co. C. 229; 5 id. 380; 9 Cl. & F. 531; 4 N. Y. 159, 163, 193; L. R. 2 C. C. R. 160 (a very full case). It has been said that this is "the foundation of all criminal justice;" 5 Co. C. Cr. 477.

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Ad ea que frequentius accidunt jura adaptantur. The laws are adapted to those cases which occur more frequently. 2 Inst. 137; Wing. Max. 216; Dig. 1, 3, 35, 19 How. Sc. Tr. 1061; 3 B. & C. 178, 783; 2 Broom, Max. 108; 7 M. & W. 509, 600; Vaugh. 573; 6 Co. 77 a; 11 Exch. 476; 11 id. 686; 12 How. 312; 7 Allen 227; Broom, Max. 43.

Ad officium iustitiarum spectat, unicuique eorum esse placitum iustitiam exhibere. It is the duty of justices to administer justice to every one pleading before them. 2 Inst. 451.

Ad proximum antecedens fiat relatio, nisi impeditur sententia. A relative is to be referred to the next antecedent, unless the sense would be thereby impaired. Broom, Max. 680; Noy, Max. 9th ed. 4; 2 Exch. 470; 17 Q. B. 883; 2 H. & N. 625; 3 Bingh. n. c. 217; 18 How. 149.

Ad questiones facti non respondent iudices; ad questiones legis non respondent iudices. The judges do not answer to questions of fact; the jury do not answer to questions of law. Co. Litt. 205; 8 Co. 155 a; Vaugh. 149; 5 Gray 211, 219, 250; Broom, Max. 102.

Ad questiones juris respondent iudices; ad questiones facti respondent iudices. 116 Cal. 179. See *Jury*.

Ad questiones legis iudices, et non juratores, respondent. Judges, and not jurors, respond to questions of law. Mass. 273.

Ad recte docendum oportet, primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet. In order rightly to comprehend a thing, inquire first into the names, for a right knowledge of things depends upon their names. Co. Litt. 68.

Ad vim majorem vel ad casus fortuitos non tenetur quis, nisi sua culpa intervenierit. No one is held to answer for the effects of a superior force, or of accidents, unless his own fault has contributed. Fleta, lib. 2, c. 72, § 16.

Additio probandi non tenet. An addition proves inferiority. That is, if it be said that a man has a fee tail, it is less than if he has the fee. 41nst. 90; Wing. Max. 211, Max. 60; Littleton § 293; Co. Litt. 189 a.

Adjuvare quippe non, decipi, beneficio oportet. For one ought to be helped by a benefit, not destroyed by it. Dig. 13, 6, 17, 3; Broom, Max. 392.

Adiuvare est disponere, licet non, correctione, law. The disposition of the law is more impartial than that of man. 8 Co. 152 a.

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not to be judge in his own cause, because he cannot act both as judge and party. Co. Litt. 141 a; 1 Broom, Max. 117; Littleton § 213; 13 C. B. 327; 17 Fed. 1; 15 C. B. 799; 1 C. B. n. s. 220. See JUDGE; INCOMPETENCY.

Aliud est celare, aliud facere. To conceal is one thing, to be silent another. 3 Burr. 1910. See 2 Wheat. 170; 10 id. 591; 3 Bingh. 7; 4 Taunt. 831; 2 C. & P. 341; 18 Pick. 420; 25 id. 53; 12 Cush. 426; Broom, Max. 782; [1895] 3 Ch. 205.

Aliud est distinctio, aliud separatio. Distinction is one thing, separation another. Bacon's arg. Case of Postumus of Scotland, Works iv. 351.

Aliud est possidere, aliud habere in possessione. It is one thing to possess, it is another to be in possession. Hob. 163; Bract. 206.

Aliud est vendere, aliud vendenti consentire. To sell is one thing, to give consent to him who sells another. Dig. 50. 17. 160.

Allegationa contraria non est audiendus. One making contradictory allegations is not to be heard. Jenk. Cent. 16; Broom, Max. 169, 294; 4 Term 211; 8 Exch. 448, 527, 678; 3 E. & B. 363; 5 C. B. 195, 886; 10 Mass. 163; 70 Pa. 274; 4 Inst. 279; 19 R. I. 510.

Allegationum suum turpitudinem non est audiendus. One alleging his own infamy is not to be heard. 4 Inst. 279; 2 Johns. Ch. 339; 113 N. Y. 52; 13 Ch. Div. 696.

Allegari non debuit quod probatum non relevat. That ought not to be alleged which, if proved, would not be relevant. 1 Ch. Cas. 45.

Allegationo contra factum non est admittenda. An allegation contrary to a deed is not admissible. See ESTOPPEL.

Alterius circumventio alii non prebet actionem. Dig. 50. 17. 49. A deception practised upon one person does not give a cause of action to another.

Alternativa petitio non est admittenda. An alternative petition is not to be heard. 5 Co. 40, a.

Ambigua responsio contra proferentem est accipienda. An ambiguous answer is to be taken against the party who offers it. 10 Co. 59 a.

Ambiguus casibus semper presumitur pro rege. In doubtful cases the presumption is always in favor of the king.

Ambiguitas contra stipulatorem est. Doubtful words will be construed most strongly against the party using them. See INSURANCE.

Ambiguitas verborum latens verificatione suppletur. nam quod ex facto oritur ambiguitas verificatione facti tollitur. A latent ambiguity may be supplied by evidence; for an ambiguity which arises out of a fact may be removed by proof of the fact. Bacon, Max. Reg. 23; 8 Bingh. 247. See 1 Pow. Dev. 377; Bart. Max. 39; Kent 557; Broom, Max. 608; 13 Fed. 97; 1 Gray 138; 100 Mass. 60; 8 Johns. 90; 8 Halst. 71. Said to be "an unprofitable subtlety," "inadequate and unconstructive." Prof. J. B. Thayer in 6 Harv. L. Rev. 417. See LATENT AMBIGUITY.

Ambiguitas verborum patens nulla verificatione excluditur. A patent ambiguity is never to be supplied by averment. Lofft 249; Bacon, Max. 25; 21 Wend. 651; 23 id. 71; 1 Mas. 11; 1 Tex. 377. See PATENT AMBIGUITY.

Ambiguum placitum interpretari debet contra proferentem. An ambiguous plea ought to be interpreted against the party pleading it. Co. Litt. 303 b; Broom, Max. 601; Bacon, Max. Reg. 3; 2 H. Bl. 531; 2 M. & W. 444.

Ambulatorie est voluntas defuncti usque ad vitem supremum exitum. A will is ambulatory until the moment of death. Broom, Max. 508; 2 Bla. Com. 502; Co. Litt. 322 b; 3 E. & B. 572; 1 M. & 485.

Anglia jura in omni casu libertati dant favorem. The laws of England are favorable in every case to liberty. Halkers, Max. 12.

Animus ad se omne jus ducit. It is to the intention that all will appertains.

Animus hominis est anima scripti. The intention of the party is the soul of the instrument. 3 Bulst. 67; Pitman, Princ. & Str. 26.

Annus centesimio sexagesimo-quinto die dicitur, incipiente plane non exacto die, quia annus civilis non in momenta temporum sed ad dies numeratur. We call a year old on the three hundred and sixty-fifth day, when the day is fairly begun but not ended, because we calculate the civil year not by moments, but by days. Dig. 50. 16. 134; id. 132; Calvinus, Lex. See AGE.

Annus nec ambiguum iudex non separat ipse. A year is not to be separated by a judge. 3 Co. 52. See JUDGE, Eq. Jur. § 480, 517; 1 Salk. 36, 65.

Annus est mora motus quo suum planeta percolat circulum. A year is the duration of the motion by which a planet revolves through its orbit. Dig. 40. 7. 4. 5; Calvinus, Lex; Bract. 359 b.

Annus incipit a completo habet. A year begun is held to be completed. It is to be of very limited application. Trayner, Max. 45.

Apices juris non sunt jura. Legal niceties are not laws. Co. Litt. 304; 3 Scott 773; 10 Co. 126; Broom, Max. 188. See APEX JURIS.

Applicatio est vite regule. The application is the life of a rule. 1 Bulst. 79.

Aqua cedit solo. The grant of the soil carries the water. Hale, de Jur. Mar. pt. 1, c. 1.

Aqua currit et debet currere ut currere solebat. Water runs and ought to run as it was wont to run. 3 Bawle 81, 88; Bart. Max. 315; 20 Pa. 413; 3 Kent 430; Ang. Wat. Cour. 415; Gale & W. Easem. 182; 20 Nev. 269; 33 S. W. Rep. (Tenn.) 905.

Arbitrimentum arqum tribut cuique suum. A just arbitration renders to every one his own. Noy, Max. 248.

Arbitrium est iudicium. An award is a judgment. Jenk. Cent. 137; Bulst. 64.

Arbor, dum crescit; lignum, dum crescere necit. A tree while it is growing; wood when it cannot grow. Cro. Jac. 160; 12 Johns. 239, 241; 21 Wall. 64.

Argumentum a divisione est fortissimum in iure. An argument based on a subdivision of the subject is the most powerful in law. 6 Co. 60 a; Co. Litt. 213 b; 69 Vt. 292.

Argumentum a maiori ad minus negative non valet; valet e converso. An argument from the greater to the less is of no force negatively; conversely it is. Jenk. Cent. 261.

Argumentum a simili valet in lege. An argument

drawn from a similar case, or analogy, avails in law. Co. Litt. 191.

Argumentum ab auctoritate est fortissimum in lege. An argument drawn from authority is the strongest in law. Co. Litt. 225.

Argumentum ab impossibili plurimum valet in lege. An argument deduced from impossibility greatly avails in law. Co. Litt. 92.

Argumentum ab inconvenienti est validum in lege; quia lex non permittit aliud inconveniens. An argument drawn from what is inconvenient is good in law, because the law will not permit any inconvenience. Co. Litt. 66 a, 258; 7 Taunt. 527; 3 B. & C. 131; 6 Cl. & F. 671. See Broom, Max. 184; Cooley, Const. Lim. 82, 85.

Arma in omnes sumere jura sinunt. The laws permit the taking arms against the armed. 2 Inst. 574.

Assignatus utitur jure auctoris. An assignee is clothed with the rights of his principal. Halkers, Max. 14; Broom, Max. 465, 477; Wing. Max. 56; 1 Exch. 32; 18 Q. B. 578; Perkins § 100.

Auctoritates philosophorum, medicorum et poetarum sunt in causis allegando et tenendo. The opinions of philosophers, physicians, and poets are to be alleged and received in causes. Co. Litt. 284.

Averbia verborum sunt jura indigna. Catching at words is unworthy of a judge. Hch. 348.

Audi alteram partem. Hear the other side (or no man should be condemned unheard). Broom, Max. 118; 46 N. Y. 119; 1 Cush. 243; 96 Mo. 478.

Authority to execute a deed must be given by deed. Conyn. Dig. Authority (C) § 4 Term 313; 7 id. 207; 1 Holt 141; 9 Wend. 68, 75; 5 Mass. 11; 5 Binn. 613.

Baratiam committit qui propter pecuniam justitiam baratat. He is guilty of barratry who for money sells justice. Bell, Dict. (Baratry at common law has a different signification. See BARATRY.)

Bastardus non potest habere hereditatem nisi de corpore suo legitime procreatum. A bastard can have no heir unless it be one lawfully begotten of his own body. Trayner, Max. 51.

Bello parta cedit republice. Things acquired in war go to the state. O'Neil, R. & M. 56; 1 Kent 101; 5 C. Rob. 155, 183; 3 Gall. 588.

Benedicta est expositio quando res redimuntur a destructione. Blessed is the exposition when the thing is saved from destruction. 4 Co. 26 b.

Benigne faciende sunt interpretationes chartarum, ut res magis valeat quam pereat; et quolibet concessio fortissime contra donatorem interpretanda est. Liberal interpretations are to be made of deeds, so that more may stand than fall; and every grant is to be taken most strongly against the grantor. 1 Mass. 194; 1 Sandf. Ch. 258, 268; compare id. 275, 277; 78 Pa. 219.

Benigne faciende sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire. Construction should be liberal on account of the ignorance of the laity, so that the subject-matter may avail rather than perish; and words must be subject to the intention, not the intention to the words. Co. Litt. 36 a; 1 Broom, Max. 340, 365, 645; 11 Q. B. 832, 856, 883, 870; 4 H. L. Cas. 556; 3 Bla. Com. 379; 1 Bulst. 175; 1 Whart. 318.

Benignior sententia in verbis generalibus seu dubiis est preferenda. The more favorable construction is to be placed on general or doubtful expressions. 4 Co. 15; Dig. 50. 17. 192, 1; 2 Kent 357.

Benignius leges interpretanda sunt quo voluntas earum conservetur. Laws are to be more favorably interpreted, that their intent may be preserved. Dig. 1. 3. 18.

Between equal equities the law must prevail. See EQUITY. This is hardly of general application.

Bis dat qui cito dat. He pays twice who pays promptly.

Bis idem exigi bona fides non patitur, et in satisfactionibus non permittitur amplius fieri quam semel factum. Good faith does not suffer the same thing to be exacted twice; and in making satisfaction, it is not permitted that more should be done after satisfaction is once made. 9 Co. 53; Dig. 50. 17. 57.

Bona fide possessor facit fructus consumptos suos. By good faith a possessor makes the fruits consumed his own. Trayner, Max. 57.

Bona fides exigit ut quod convenit fiat. Good faith demands that what is agreed upon shall be done. Dig. 19. 2. 21; id. 19. 1. 50; id. 50. 8. 2. 13.

Bona fides non patitur ut bis idem exigatur. Good faith does not allow us to demand twice the payment of the same thing. Dig. 50. 17. 57; Broom, Max. 338, n.; 4 Johns. Ch. 143.

Bona fidei possessor in id tantum quod ad se pervenit tenetur. A bona fide possessor is bound for that only which has come to him. 2 Inst. 235; Gro. de J. B. lib. 2, c. 1; 3 et seq.

Boni judicis est ampliare jurisdictionem (or justitiam). See 1 Burr. 304. It is the part of a good judge to enlarge his jurisdiction; that is, his remedial authority. Broom, Max. 79, 80, 82; Chanc. Proc. 329; 1 Wiis. 284; 9 M. & W. 818; 1 C. B. n. s. 235; 4 Bingh. n. c. 235; 4 Scott n. c. 229; 17 Mass. 810.

Boni judicis est causas litium dirimere. It is the duty of a good judge to remove causes of litigation. 2 Inst. 306.

Boni judicis est iudicium sine dilatione mandare executioni. It is the duty of a good judge to cause execution to issue on a judgment without delay. Co. Litt. 289 b.

Boni judicis est lites dirimere, ne lis ex lite oritur, et interest republice ut sint fines litium. It is the duty of a good judge to prevent litigations, that suit may not grow out of suit, and that the welfare of a state that an end be put to litigation. 4 Co. 15 b; id. 31 a; Bart. Max. 191.

Bonus necessarius extra terminos necessitatis non est bonus. A thing good from necessity is not good beyond the limits of the necessity. Hob. 144.

Bonus iudex secundum equum et bonum iudicat, et aequitatem stricto juri praeferet. A good judge decides according to justice and right, and prefers equity to strict law. Co. Litt. 24; 4 Term 344; 2 Q. B. 337; Broom, Max. 90.

Both law and equity favor the diligent creditor. 12 Tex. Civ. App. 136.

Breve judiciale debet sequi suum originale, et accessorium suum principale. A judicial writ ought to follow its original, and an accessory its principal. Jenk. Cent. 388.

Breve judiciale non cadit pro defectu formae. A judicial writ fails not through defect of form. Jenk. Cent. 43.

By an acquittance for the last payment all other arrears are discharged. Noy 40.

Carcer ad homines custodiendos, non ad puniendos, dari debet. A prison ought to be used for the custody, not the punishment, of persons. Co. Litt. 260. See Dig. 48. 19. 8. 9.

Causa fortuitus non est sperandus, et nemo tenetur divinare. A fortuitous event is not to be foreseen, and no person is held bound to divine it. 4 Co. 66.

Causa fortuitus non est supponendus. A fortuitous event is not to be presumed. Hardr. 88, arg.

Causa ommissa et obliuioni data dispositio committitur iuris relinquuntur. A case omitted and forgotten is left to the disposal of the common law. 6 Co. 37; Broom, Max. 46; 1 Exch. 476.

Causa ommissa pro omisso habendus est. A case omitted is to be held as (intentionally) omitted. Trayner, Max. 67.

Catalia jura possessa amitti non possunt. Chattels lawfully possessed cannot be lost. Jenk. Cent. 28.

Catalia reputantur inter minora in lege. Chattels are considered in law among the minor things. Jenk. Cent. 52.

Causa causae est causa causati. The cause of a cause is the cause of the effect. Freeman 399; 12 Mod. 588.

Causa causantis causae est causati. The cause of the thing causing is the cause of the effect. 4 Campb. 384; 4 Gray 398.

Causa et origo est materia negotii. Cause and origin is the material of business. 1 Co. 99; Wing. Max. 4; Max. 31.

Causa proxima non remota spectatur. The immediate and not the remote cause is to be considered. Bacon, Max. Reg. 1; Broom, Max. 216; Story, Bailm. 515; 3 Kent 874; 2 East 348; 10 Wall. 191; 5 Dak. 444; L. R. C. P. 330; 4 Am. L. Rev. 301; 44 U. S. App. 1; 69 Fed. Rep. 559. See CAUSA PROXIMA.

Causa vaga et incerta non est causa rationabilis. A vague and uncertain cause is not a reasonable cause. 5 Co. 57.

Causae doctae, vitae, libertatis, facis sunt inter faventibus in lege. Causes of dower, life, liberty, revenue, are among the things favored in law. Co. Litt. 341.

Causae ecclesiae publicae causis aequiparantur. The cause of the church is equal to public cause. Co. Litt. 341.

Caveat emptor. Let the purchaser beware. 110 U. S. 118; 70 Fed. Rep. 146; 15 Ill. App. 885; 47 U. S. App. 734; 114 Ala. 74; 21 Misc. App. 58; id. 82. See CAVEAT EMPITOR.

Caveat emptor, qui ignorare non debuit quod jus alium emit. Let a purchaser beware; for he ought not to be ignorant of what they are when he buys the rights of another. Hch. 99; Broom, Max. 708; Co. Litt. 132 a; 3 Taunt. 493; Sugd. V. & P. 288; 1 Story, Eq. Jur. ch. 6. See CAVEAT EMPITOR.

Caveat venditor. Let the seller beware. Lofft 328; 28 Wend. 449; 2 Barb. 323; 5 N. Y. 73; 123 Pa. 7; 114 Ala. 74.

Caveat viator. Let the wayfarer beware. Broom, Max. 387, n.; 10 Exch. 774.

Cavendum est a fragmentis. Beware of fragments. Bacon, Aph. 26.

Certe debet esse intentio, et narratio et certum fundamentum, et certa causa deductur in iudicium. The intention, count, foundation and thing brought to judgment ought to be certain. Co. Litt. 303 a.

Certum est quod certum reddi potest. That is certain which can be made certain. Noy, Max. 481; Co. Litt. 45 b, 96 a, 162 a; 2 Com. 143; 2 M. & S. 50; Broom, Max. 639; 3 Term 463; 1 E. K. 385; 11 Cush. 280; 73 Cal. 54; 80 Me. 413; 36 Att. Rep. 397.

Cessante causa, cessat effectus. The cause ceasing, the effect must cease. 1 Exch. 450; Broom, Max. 450.

Cessante ratione legis cessat et ipsa lex. When the reason of the law ceases, so does the law itself. 4 Co. 38; 7 id. 69; Co. Litt. 70 b, 122 a; Broom, Max. 159; 13 East 348; 4 Bingh. n. c. 388; 12 Gray 170; 11 Pa. 273; 54 id. 201; 136 Mo. 569; 20 Nev. 299; 114 Cal. 124; 119 N. C. 779. See Dig. 35. 1. 72. 6. The doctrine is criticised by Austin, lect. 37.

Cessante statu primitivo, cessat derivativus. The primary state ceasing, the derivative ceases. 8 Co. 34; Broom, Max. 495; 4 Kent 32.

C'est le crime qui fait la honte, et non pas l'échafaud. It is the crime which causes the shame, and not the scaffold.

Cestuy que doit inherer al pere doit inherer al fils. He who would have been heir to the father of the deceased shall also be heir of the son. Fitz. Abr. Descent 3; 2 Bla. Com. 299, 320.

Chacae est ad communem legem. A chase is by common law. Reg. Br. 806.

Charta de non exit non valet. A deed of a thing not in being is not valid. Co. Litt. 36.

Chartarum super fidem, mortuis testibus, ad patriam de necessitudine recurvendum est. The witnesses being dead, the truth of deeds must, of necessity, be referred to the country. Co. Litt. 36.

Chirographum apud debitorem reputatur solum. An evidence of debt found in possession of the debtor is presumed to be paid. Halk. Max. 30. See 14 M. & W. 379.

Chirographum non extans presumitur solum. An evidence of debt not existing is presumed to have been discharged. Trayner, Max. 73.

Circuitus est evitandus. Circuity is to be avoided. Co. Litt. 384 a; Wing. Max. 179; Broom, Max. 345; 5 Co. 31 a; 15 M. & W. 208; 5 Exch. 820.

Citatio est de juri naturalis. A summons is by natural right. Cases in Banco Regis Will. III. 458.

Citationes non conceduntur priusquam exprimat super qua res fieri debet citatio. Citations should

Cum de lucro duorum queritur melior est comas possidentia. When the question of gain lies between two, the cause of the possessor is the better. Dig. 50. 17. 126.

Cum duo inter se pugnantia reperiuntur in testamento, ultimum est ratum est. When two things repugnant to each other are found in a will, the last is to be confirmed. Co. Litt. 112; Shep. Touch. 451; Broom, Max. 583; 2 Jarm. Wills, 5th Am. ed. 44; 16 Johns. 146; 1 Phil. 536.

Cum in corpore dissentitur apparet nullam esse actionem. When there is a disagreement in the substance, it appears that there is no acceptance. 12 Allen 44.

Cum in testamento ambigue aut etiam perperam scriptum, est benigne interpretari, et secundum id quod credibile est cogitatum credendum est. When an ambiguous or even an erroneous expression occurs in a will, it should be construed liberally, and in accordance with the testator's probable meaning. Dig. 34. 5. 24; Broom, Max. 568; 3 Pothier, ad Pand. 46.

Cum legitime nuptie facte sunt, patrem legitime sequuntur. Children born under a legitimate marriage follow the law of their father.

Cum par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa. Where two parties are equally in fault, the claimant always is at a disadvantage, and the party in possession has the better cause. Dig. 50. 17. 154; Broom, Max. 720.

Curia parliamenti suis propriis legibus subsistit. The court of parliament is governed by its own peculiar laws. 4 Inst. 50; Broom, Max. 85; 13 C. B. 418.

Curiosa et captiosa interpretatio in lege reprobat. A curious and captious interpretation of the law is to be rejected. 1 Bulstr. 6.

Currit tempus contra desideret et sui juris contemporet. Time runs against the slothful and those who neglect their rights. Bract. 100 b; Fleta, lib. 4, § 12.

Curia curie est lex curie. The practice of the court is the law of the court. 3 Bulstr. 53; Broom, Max. 183; 12 C. B. 414; 17 Q. B. 86; 8 Exch. 199; 9 M. & S. 25; 15 East 226; 12 M. & W. 7; 4 My. & C. 685; 8 Scott. n. 559; 88 Cal. 20.

Curia est in thesauris et in praesentia dei laici. 4 Inst. 75; 2 Eden 74; 5 Cra. 285; 1 S. & R. 106; 2 Barb. Ch. 232, 289; 3 id. 588, 577.

Custom serra prae stricta. Custom must be taken strictly. Jenk. Cent. 83.

Custos status heredis in custodia existens meliorem non deteriorare facere potest. A guardian can make the estate of an heir living under his guardianship better, not worse. 7 Co. 7.

Dans et retiens, nihil dat. One who gives and yet retains does not give effectually. Trayner, Max. 124.

Datur diogni. It is given to the more worthy. 2 Vent. 268.

De fide et officio iudicis non recipitur questio, sed de scientie vi sit error juris vi facti. The good faith and honesty of purpose of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact. Bacon, Max. Reg. 17; 5 Johns. 291; 9 id. 396; 1 N. Y. 45; Broom, Max. 97.

De iure iudicis, de facto iuratos respondent. The judges answer concerning the law, the jury concerning the facts. See Co. Litt. 236; Broom, Max. 92.

De maiori et minori non variant iura. Concerning greater and less laws do not vary. 2 Vern. 552.

De minimis non curat lex. The law does not notice (or care for) trifling matters. Broom, Max. 142; 2 Inst. 306; Hob. 8; 12 Pick. 549; 97 Mass. 83; 11 Ill. 175; 3 Hill 134; 422; 3 B. & A. 75; 17 id. 182; 27 S. E. Rep. (Va.) 826; 21 Alb. L. J. 186; 12 Car. L. J. 105, 180; 169 Ala. 157; 64 Minn. 511; 58 Cal. 563; 60 N. W. Rep. (Ala.) 689; 57 Mo. App. 142; 108 id. 544; 86 Wis. 161; 80 Fed. Rep. 896; 20 Misc. Rep. 470.

De morte hominis nulla est cunctatio longa. When the death of a human being is concerned, no day is long. Co. Litt. 134. (Why the question is concerning the life or death of a man no delay is too long to admit of inquiring into facts.)

De nomine proprio non est curandum cum in substantia non erretur; quia nomina mutabilia sunt, res autem immutabiles. As to the proper name, it is not to be regarded when one errs, not in substance; because names are changeable, but things are immutable. 6 Co. 66.

De non apparentibus et non existentibus eadem est ratio. The law is the same respecting things which do not appear and things which do not exist. 6 Ired. 61; 12 How. 253; 3 Co. 6; 6 Bingham, N. C. 463; 7 Cl. & F. 672; 5 C. B. 83; 8 id. 286; Term 404; 4 Mass. 685; 8 id. 401; Broom, Max. 163, 166.

De nullo, quod est sua natura indivisibile et divisionem non patitur, nullam partem habet vidua, sed satisfacta et ad valentiam. A widow shall have no part from the whole which in its own nature is indivisible, and is not susceptible of division; but let [the heir] satisfy her with an equivalent. Co. Litt. 32.

De similibus ad similia eadem ratione procedendum est. From similars to similars we are to be proceeded by the same rule. Branch, Princ.

De similibus idem iudicium. Concerning similars the judgment is the same. 7 Co. 18.

Debet esse finis litium. There ought to be an end of lawsuits. Jenk. Cent. 61.

Debet quis iuri subiacere ubi delinquit. Every one ought to be subject to the law of the place where he offends. 3 Co. 231; 3 Phil. Law 14, 86; Wing, Max. 113; 3 Co. 231; 8 Scott n. 567.

Debet sua cuique donus esse periculum tutissimum. Every man's house should be a perfectly safe refuge. 12 Johns. 31, 54.

Debit fundamentum fallit opus. Where there is a weak foundation, the work falls. 2 Bouv. Inst. n. 2068; Broom, Max. 180, 182.

Debita sequuntur personam debitoris. Debts follow the person of the debtor. Story, Conf. Laws § 362; 2 Kent 429; Halkers. Max. 13.

Debitor non praesumitur donare. A debtor is not presumed to make a gift. See 1 Kames, Eq. 213; Dig. 50. 16. 136; 1 P. Wms. 220; Wh. & Tud. L. Cas. Eq. 378; see PAYMENT.

Debitorum pactionibus, creditorum petitio nec tolli nec minui potest. The right of creditors to sue cannot be taken away or lessened by the contracts of their debtors. Bart. Max. 115; Pothier, Obl. 108; Broom, Max. 607.

Debitum et contractus sunt nullius loci. Debt and contract are of no particular place. 7 Co. 61; 7 M. & G. 1019, n.

Decepi non accipientibus, iura subveniunt. The laws help persons who are deceived, not those deceiving. Trayner, Max. 149.

Decipi quam fallere est tutius. It is safer to be deceived than to deceive. Loft 386.

Deficiente uno sanguine, non potest esse haeres. One being wanted, one cannot be heir. 3 Co. 41; Grounds & Rud. of Law, 77.

Delegata potestas non potest delegari. A delegated authority cannot be delegated. Broom, Max. 839; 3 Inst. 597; 5 Bingham, n. C. 310; Story, Ag. § 13; 11 How. 283; 15 Gray 408; 39 N. J. L. 18; 127 Ill. 364. See DELEGATION. This is said to be an extension of a judge judge delegatus iudicis dandi potestatem non habet, which, in that form, applied to officers whose duties were judicial, but in the English law the maxim has been applied to agency. See 20 L. M. & Rev. 529.

Delegatus non potest delegare. A delegate (or deputy) cannot appoint another. Story, Ag. § 13; Broom, Max. 840, 842; 9 Co. 77; 2 Scott n. 509; 12 M. & W. 712; 6 Exch. 156; 8 C. B. 627.

Delictus debitor est odiosus in lege. A delictor or debtor is hateful in the law. 2 Bulstr. 148.

Delinquens per se habet in se, prout debet mitius. A delinquent provoked by anger ought to be punished more mildly. 3 Inst. 65.

Derivativa potestas non potest esse major primitiva. The power which is derived cannot be greater than that from which it is derived. Wing, Max. 36; Finch, Law. b. 1, c. 3, p. 11.

Designatio iuris est exclusio alterius, et expressum facit cessare tacitum. The appointment or designation of one is the exclusion of another; and that expressed makes that which is implied to cease. Co. Litt. 134.

Deus solus heredes facere potest, non homo. God alone, and not man, can make an heir. Co. Litt. 7 b; cited 5 B. & C. 440, 454; Broom, Max. 516.

Dies dominicus non est iudicandus. Sunday is not a judicial day. Co. Litt. 135 a; 2 Saund. 291; Broom, Max. 21; Finch, Law. 7; Noy, Max. 2; Plowd. 285; 3 D. & L. 328; 13 Mass. 337; 17 Pick. 100. See SUNDAY.

Dies inceptus pro completo habetur. A day begun is held as complete. 118 Mass. 505.

Dies incertus pro conditione habetur. A day uncertain is held as a condition. Bell, Dict. Computat. of Time.

Dilaciones in lege sunt odiosae. Delays in law are odious. Branch, Princ.

Discretio est discernere per legem quid sit iustum. Discretion is to discern through law what is just. 5 Co. 99, 100; 10 id. 140; Broom, Max. 84, n.; Inst. 41; 1 W. Bl. 131; 1 Burr. 570; 3 id. 25; 3 Bulstr. 128; 6 Q. B. 700; 5 Gray 20; 18 C. 479. See DISCRETION.

Discretio est scire per legem quid sit iustum. Discretion consists in knowing what is just in law. 4 Johns. Ch. 352, 356.

Disparata non debent jungi. Dissimilar things ought not to be joined. 10 Ark. Cent. 21.

Dispensatio est vulnus, quod vulnerat jus commune. A dispensation is a wound, because it wounds a common right. Dav. 60; Branch, Princ.

Disseisina satis facit, qui uti non permittit possessorem, vel minus commode, licet omnino non expellat. He who disseises who does not permit the possessor to enjoy, or makes his enjoyment less useful, although he does not expel him altogether. Co. Litt. 331; Branch, lib. 4, tr. 2.

Dissimilium dissimilis est ratio. Of dissimilar things the rule is dissimilar. Co. Litt. 191 a.

Disstruatur et tollatur injuria. Injury is wiped out by reconciliation. Erskine, Inst. b. 4, tit. 4, § 108.

Distinguenda sunt tempora; aliud est facere, aliud perficere. Times must be distinguished; it is one thing to do a thing, another to complete it. 3 Leon. 248; Branch, Princ. See Co. Litt. 16 a; 2 Pick. 327; 14 N. Y. 380, 393.

Distinguenda sunt tempora; distingue tempora, et concordabis leges. Times are to be distinguished; distinguish time, and you will attune laws. 1 Co. 34.

Divinatio non interpretatio est, quia opinio recedit a litera. It is a guess, not interpretation, which altogether departs from the letter. Bacon, Max. Reg. 3, p. 47.

Dolus verat in generalibus. A deceiver deals in generalities. 2 Co. 94; 3 Bulstr. 226; 1077 72; 1 Rolle 137; Wing, Max. 686; Broom, Max. 250.

Dolum ex indicibus perspicui probati convenit. Fraud should be proved by clear proofs. Code 2, 21, 6; 1 Story, Contr. § 625.

Dolus auctoris non nocet successor. The fraud of a predecessor does not prejudice the successor.

Dolus circuitus non purgat. Fraud is not purged by circuitry. Bacon, Max. Reg. 1; Noy, Max. 9, 12; Broom, Max. 223; 6 E. & B. 94.

Dolus et fraus nemini patrocinetur (patrocinari debent). Deceit and fraud shall excuse or benefit no man (they themselves need to be excused). Year B. 1 Hen. VIII. 8; Story, Eq. Jur. § 590; 3 Co. 19; 2 Fonblanque, Eq. b. 2, ch. 6, § 3.

Dolus latet in generalibus. Fraud lurks in generalities. Trayner, Max. 162.

Dolus verat in generalibus. Fraud deals in generalities. Trayner, Max. 162.

Domini non potest esse in pendenti. This right of property cannot be in abeyance. Halkers. Max. 30.

Domus sua cuique est tutissimum refugium. Every man's house is his castle. 5 Co. 91, 92; 10 Ill. 229; Broom, Max. 432; 1 Hale, Pl. Cr. 481; Foster, Hon. 330; 6 Q. B. 137; 16 id. 546, 550; 19 How. St. Tr. 1030. See HABIT; SELF-DEFENSE; DEFENSE; Dig. 50. 17. 108.

Domus tutissimum cuique refugium atque receptaculum. The habitation of each one is an inviolable asylum for him. Dig. 2, 4, 18.

Domus clandestina sunt semper suspicio. Clan-

destine gifts are always suspicious. 3 Co. 61; Noy, Max. 9th ed. 132; 4 B. & C. 608; 1 M. & S. 363; Broom, Max. 280, 290.

Donari videtur quod nullo iure cogente conceditur. That is considered to be given which is granted when no law compels. Dig. 50. 17. 62.

Donatio non praesumitur. A gift is not presumed. Jenk. Cent. 109.

Donatio periculi possessione accipienda. A gift is rendered complete by the possession of the receiver. See 2 Johns. 52; 2 Leigh 837; 2 Kent 428.

Donationum alia perfecta, alia incepta et non perfecta; ut si donatio lecta fuit et concessa, ac traditio nondum fuerit subsecuta. Some gifts are perfect, others inceptant and not perfect; as if a gift were read and assented to, but delivery had not then followed. Co. Litt. 56.

Donator nunquam desinit possidere antequam donatarius incipiat possidere. He that gives never ceases to possess until he that receives begins to possess. Dyer 281; Bract. 41 b.

Dormit aliquando leges, nunquam moriuntur. The laws sometimes sleep, but never die. 2 Inst. 161.

Dos de dote peti non debet. Dower ought not to be sought from dower. 4 Co. 122; Co. Litt. 31; 4 Daise, Abr. 571; 1 Washb. R. P. 209; 13 Allen 450.

Doli lex facit; primum pudoris est, ideo parcat. The law favors dower; it is the reward of chastity, therefore let it be preserved. Co. Litt. 31; Branch, Princ.

Droit ne done plus que soit demande. The law gives no more than is demanded. 2 Inst. 286.

Droit ne pot pas morier. Right cannot die. Jenk. Cent. 100.

Duas uxores eodem tempore habere non licet. It is not lawful to have two wives at one time. Inst. 1. 10. 6; 1 Bla. Com. 436.

Duo non possunt in solidum unam rem possidere. Two cannot possess one thing each in entirety. Co. Litt. 368; 1 Preston, Abstr. 518; 9 id. 88, 286; 2 Dod. 157; 3 Carth. 70; Broom, Max. 465, n.

Duo sunt instrumenta ad omnes res aut confirmandas aut impugnandas, ratio et auctoritas. There are two instruments for confirming or impugning every thing, reason and authority. 8 Co. 16.

Duorum in solidum dominum vel possessio esse non potest. Ownership or possession in entirety cannot be in two persons of the same thing. Dig. 13. 6. 15; 1 Mackeldy, Civ. Law 245, § 286; Bract. 285.

Duplicationem possibilitatis lex non patitur. The law does not allow a duplication of possibility. 1 Rolle 321.

Ea est accipienda interpretatio, qua vitio caret. That interpretation is to be received which is free from fault. Bacon, Max. Reg. 3, b. 47.

Ea quae commendandi causa in venditionibus dicuntur, si palam appareant venditorum non obligant. Those things which, by way of commendation, are stated at sales, if they are openly apparent, do not bind the seller. Dig. 18. 48. n.; Broom, Max. 783.

Ea quae dari impossibilia sunt, vel quae in rerum natura non sunt, pro non adiecta habentur. Those things which cannot be given, or which are not in existence, are held as not expressed. Dig. 50. 17. 135.

Ea quae in euria nostra rite acta sunt, debitas executioni demandari debent. Whatever is properly done in a court should be reduced to a judgment. Co. Litt. 250 b.

Ea quae raro accidunt, non temere in agendis negotiis computantur. Those things which rarely happen are not to be taken into account in the transaction of business without sufficient reason. Dig. 50. 17. 64.

Eadem est ratio, eadem est lex. The same reason, the same law. 7 Pick. 493.

Eadem mens praesumitur regis quae est juris et quae esse debet, praesertim in dubio. The mind of the sovereign is presumed to be coincident with that of the law, and with that which ought to be, especially in ambiguous matters. Hob. 164; Broom, Max. 783.

Ecclesia ecclesiae decimasolvere non debet. It is not the duty of the church to pay tithes to the church. Cro. Eliz. 479.

Ecclesiae magis favendum est quam personae. The church is more to be favored than an individual. Godb. 172.

Effectus sequitur causam. The effect follows the cause. Wing, Max. 225.

Et incumbit probatio qui dicit, non qui negat. The burden of the proof lies upon him who affirms, not him who denies. Dig. 22. 3. 2; 1 Phil. Ev. 194; 1077 72; 1 Rolle 137; 13 C. B. 83; 2 Dan. Ch. Pr. 408.

Et nihil turpe qui admittit. Nothing is base to whom nothing is less. 4 Inst. 43.

Ejus est interpretari ejus est condere. It belongs to him to interpret who enacts. Trayner, Max. 174.

Ejus est non nolle qui potest velle. He may consent tacitly who may consent expressly. Dig. 50. 17. 3.

Ejus est periculum ejus est dominum aut commodum. He has the risk who has the right of property or advantage. Bart. Max. 38.

Ejus nulla culpa est cui parere necesse sit. No guilt attaches to him who is compelled to obey. Dig. 50. 17. 189; Broom, Max. 13, n.

Electa una via, non potest recurrere ad alteram. He who has chosen one way cannot have recourse to another. 10 Toull. n. 170.

Electio est intima [interna], libera, et spontanea separatio unius rei ab alia, sine compulsionem consistens in animo et voluntate. Election is an internal, free, and spontaneous separation of one thing from another, without compulsion, consisting in intention and will. Dyer 281.

Electio semel facta, est placitum testamentum, non potitur regressum. An election once made, and the same shown, cannot be recalled. Co. Litt. 140. See ELECTION.

Electioes fiant rite et libere sine interruptione aliqua. Election should be made in due form and freely, without any interruption. 2 Inst. 169.

Emptor emit quam minimo potest; venditor vendit quam maximo potest. The buyer buys for as little as possible; the vender sells for as much as possible. 2 Johns. Ch. 266.

En échange il convient que les estates soient égales. In an exchange it is necessary that the estates be equal. Co. Litt. 50; 3 Hill, R. P. 298.

Enumeratio infrat regulam in casibus non enumeratis. Enumeration disaffirms the rule in cases not enumerated. Bacon, Aph. 17.

Enumeratio unius est exclusio alterius. Specification of one thing is an exclusion of the rest. 4 Johns. Ch. 106, 118.

Eodem modo quo oritur, eodem modo dissolvitur. It is discharged in the same way in which it arises. Bacon, Abr. Release; Cro. Eliz. 697; 2 Wms. Saund. 48, n. 1; 1 Wend. 38; 5 Watts 155.

Eodem modo quo constituitur, eodem modo destruitur. In the same way in which anything is constituted, in that way it is destroyed. 6 Co. 83.

Equality is equity. Francis, Max. 3; 4 Bouv. Inst. n. 3725; 1 Story, Eq. Jur. § 64; 165 U. S. 394; 49 Neb. 383; 18 Misc. Rep. 668. See EQUITY.

Equity follows the law. Equity follows the law. 5 Barb. 377, 382; Cas. temp. Talb. 53; 1 St. Jo. Eq. Jur. § 64; 17 App. Div. N. Y. 182. Of this maxim it has been said: "Operative only within a very narrow range." 1 Pom. Eq. Jur. § 427. The reverse is quite as sound a maxim; 9 Harv. L. Rev. 18. "The main business of equity is avowedly to correct and supplement the law." Phelps, Jurid. Eq. § 237.

Equity follows the law. Equity follows the law. 17 Johns. 1873, provides that when law and equity conflict equity shall prevail.

Equity delights to do justice, and that not by halves. 5 Barb. 377, 380; Story, Eq. Pl. § 72.

Equity follows the law. See *Equitas sequitur legem*, supra.

Equity looks upon that as done, which ought to be done. 4 Bouv. Inst. n. 3729; 1 Fonblanque, Eq. b. 1, ch. 6, s. 9, note; 3 Wheat. 563; 23 Col. 174; 46 Pac. Rep. (Cal.) 673; 95 Wis. 456; 48 S. C. 282.

Equity suffers not a right without a remedy. 4 Bouv. Inst. n. 3725.

Equity will not require that to be done which if done would be useless. 6 Ill. App. 31.

Error fucatus-nuda veritate in multis est probabilior; et sepe numero rationibus vincit veritatem error. Error artfully colored is in many things more probable than naked truth; and frequently error conquers truth by argumentation. 2 Co. 26.

Error juris nocet. Error of law is injurious. See 1 Story, Eq. Jur. § 139, n.

Error nominis nunquam nocet, si de identitate rei constat. Mistake in the name never injures, if there is no doubt as to the identity of the thing. 1 Duer, Inst. 171.

Error qui non resistitur approbatur. An error not resisted is approved. Doct. & St. c. 70.

Error scribentis nocere non debet. An error made by a clerk ought not to injure. 1 Jenk. Cent. 524.

Errores ad sua principia referre, est refellere. To refer errors to their origin is to refute them. 3 Inst. 15.

Erbescent lex filios castigare parentes. The law blushes when children correct their parents. 8 Co. 116.

Est autem jus publicum et privatum, quod ex naturalibus preceptis aut gentium, aut civilibus esse collectum; et quod in jure scripto jus appellatur, id in lege antiqua rectum esse dicitur. Public and private law is that which is collected from natural precepts on the one hand, of nations, on the other of citizens; and that which in the civil law is called jus, in the law of England is said to be right. Co. Litt. 558.

Est boni iudicis ampliari iurisdictionem. It is the part of a good judge to extend the jurisdiction. Glib. 14.

Estoveria sunt arandi, arandi, construendi, et claudendi. Estovers are for burning, ploughing, building, and inclosing. 13 Co. 68.

Eum qui nocentem infamat, non est æquum et bonum eo eam rem condemnari; delicta enim nocentium nota sunt eorum. It is not just or good to condemn a man because he is the author of a crime; for it is fitting and expedient that the crimes of bad men should be known. Dig. 47, 10, 17; 1 Bla. Com. 125.

Eventus varios res nova semper habet. A new matter always produces various events. Co. Litt. 379.

Every man is presumed to intend the natural and probable consequences of his own voluntary acts. 1 Greenl. Evid. § 18; 9 East 277; 9 B. & C. 643; 3 Maule & S. 11; Webb, Poll. Torts 35.

Ex antecedentibus et consequentibus fit optima interpretatio. The best interpretation is made from antecedents and consequents. 2 Pars. Contr. 12, n. (r); Broom, Max. 577; 2d Inst. 317; 2 Bla. Com. 379; 1 Bulstr. 101; 15 East 641.

Ex distinetur tempore omnia presumuntur æquidistantes casu et tempore. All things are presumed to have been done in due form. Co. Litt. 6; Broom, Max. 949; 1 Greenl. Evid. § 20; Best, Ev. § 43; 84 Cal. 126.

Ex dolo malo non oritur actio. A right of action cannot arise out of fraud. Broom, Max. 37; 9 East 277; 2 Co. 301; 5 Scott, N. S. 558; 10 Mass. 276; 107 id. 440; 38 Fed. Rep. 800. See VOID; CONTRACT; VOIDABLE.

Ex facto jus oritur. The law arises out of the fact. 2 Inst. 479; 2 Bla. Com. 323; Broom, Max. 102.

Ex frequenti delicto augetur poena. Punishment increases with increase of crime. 2 Inst. 479.

Ex maleficio non oritur contractus. A contract cannot arise out of an illegal act. Broom, Max. 734; 1 Term 734; 3 id. 422; 1 H. Bla. 324; 5 E. & B. 999, 1015.

Ex malis moribus bonæ leges nate sunt. Good laws arise from evil manners. 2 Inst. 181.

Ex multis multitudinem signorum colligitur identitas vera. From the great number of signs true identity is ascertained. Bacon, Max. Reg. 25; Broom, Max. 698.

Ex nihilo nihil fit. From nothing nothing comes. 13 Wend. 178, 221; 18 id. 257, 301.

Ex nudo pacto non oritur actio. No action arises on a contract without a consideration. Noy, Max.

34; Broom, Max. 745; 3 Burr. 1670; 2 Sharsw. Bla. Com. 448; Chitty, Contr. 11th Am. ed. 24; 1 Story, Contr. § 525; 2 Johns. Ch. 266. In Paulus, Sent. II. 14, 1, it is *ex nudo pacto inter cives Romanos actio non nascitur*.

Ex pacto illicito non oritur actio. From an illicit contract no action arises. Broom, Max. 742; 7 Cl. & F. 729.

Ex procedentibus et consequentibus optima fit interpretatio. The best interpretation is made from things proceeding and following (i. e. the context). 1 Rolle 375.

Ex tota materia emergat resolutio. The construction or explanation should arise out of the whole subject-matter. Wig. Max. 286.

Ex turpi causa non oritur actio. No action arises out of an immoral consideration. Broom, Max. 730; Selw. N. P. 65; 2 Pet. 539; 118 Mass. 299; 83 Ala. 142; 98 Fed. Rep. 800; 58 N. J. L. 687.

Ex turpi contractu non oritur actio. No action arises on an immoral contract. Dig. 2, 14, 27, 4; 2 Kent 408; 1 Story, Contr. § 592; 92 N. Y. 272; 10 Ohio 120.

Exceptio ejus rei cuius petitur dissolutio nulla est. A plea of that matter the solution of which is the object of the action is of no effect. Jenk. Cent. 37.

Exceptio falsi est omnium ultima. The exception of falsehood is last of all. Trayner, Max. 198.

Exceptio firmat regulam in casibus non exceptis. An exception affirms the rule in cases not excepted. Bacon, Aph. 17.

Exceptio firmat regulam in contrarium. An exception proves an opposite rule. See *exceptio probat regulam*. Bacon, Aph. 17.

Exceptio nulla est versus actionem que exceptionem perimit. There can be no plea against an action which entirely destroys the plea. Jenk. Cent. 106.

Exceptio probat regulam de rebus non exceptis. An exception proves a rule concerning things not excepted. 11 Co. 41; 1 Pick. 371; 22 id. 112. See *exceptio firmat regulam in contrarium*.

Exceptio quæ firmat legem exponit legem. An exception which confirms the law, expounds the law. 2 Bulstr. 139.

Exceptio quoque regulam declarat. The exception also declares the rule. Bacon, Aph. 17.

Exceptio semper ultima ponenda est. An exception is always to be put last. 9 Co. 83.

Excessus in jure reprobatu communis. Excess in re qualibet jure reprobatu communis. Excess in law is reprehended. Excess in anything is reprehended by common law. 11 Co. 44.

Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus. That excuses or extenuates a wrong in capital causes which does not have effect in civil suits. Bacon, Max. Reg. 7; Broom, Max. 324.

Executio est executio juris secundum iudicium. An execution is the execution of the law according to the judgment. 3 Inst. 212.

Executio est finis legis. Execution is the end and the fruit of the law. Co. Litt. 289 b.

Executio legis non habet injuriam. An execution cannot work an injury. Co. Litt. 289 b.

Expedit republica ne sua re quis male utatur. It is for the interest of the state that a man should not use his own property improperly. Inst. 1, 8, 2; Broom, Max. 365-6; 8 Allen 829. This maxim belongs to the law of all countries: 1 Phill. Int. L. 353.

Expedit republica ut sit finis litium. It is to the advantage of the state that there should be an end of litigation. Co. Litt. 308 b; 5 Johns. Ch. 668. See *interest republica, etc.*

Experientia per varios actus legem facit. Experience by various acts makes laws. Co. Litt. 60; Branch, Princ.

Expedit, quæ ex visceribus causæ nascitur, est optima et fortissima in lege. That exposition which springs from the vitals of a cause is the fittest and most powerful in law. 10 Co. 24.

Expressa nocent, non expressa non nocent. Things expressed may be prejudicial; things not expressed are not. Calvinus, Lex; Dig. 50, 17, 1.

Expressa non proferunt quæ non expressa procedunt. Things expressed may be prejudicial which not expressed will profit. 4 Co. 78.

Expressio eorum quæ tacite insunt nihil operatur. The expression of those things which are tacitly implied operates nothing. Broom, Max. 639, 733; 2 Pars. Contr. 28; 4 Co. 78; 5 id. 11; And. Steph. Pl. 366; Hob. 170; 1 Act. 138; 11 M. & W. 569; 7 Exch. 28.

Expressio unius est exclusio alterius. The expression of one thing is the exclusion of another. Co. Litt. 210; Broom, Max. 607, 631; 3 Bingh. n. c. 86; 8 Scott, n. r. 1019; 12 M. & W. 731; 16 id. 244; 2 Curt. C. 285; 6 Mass. 54; 11 Cush. 382; 98 Mass. 20; 117 id. 448; 3 Johns. Ch. 110; 5 Watts 160; 59 Pa. 173; 84 Ala. 290; 11 Colo. 265; 36 Fed. Rep. 880; 74 id. 535; 104 U. S. 25; 4 Biss. 26.

Expressum facit cessare tacitum. That which is expressed puts an end to (renders ineffective) that which is implied. Broom, Max. 607, 631; 5 Buss. 135; 12 M. & W. 609; 2 C. & M. 429; 2 E. & B. 355; 7 Mass. 106; 9 Allen 300; 24 Me. 374; 6 N. H. 481; 7 Watts 361; 1 Doug. Mich. 330; 4 Wash. C. 185; 36 Fed. Rep. 880.

Extensio non habet terras. An alien holds no lands. Trayner, Max. 223.

Extinctio subjecti, tollit adjunctum. When the substance is gone, the adjuncts disappear. 16 Johns. 438, 492.

Extra legem positus est civilitas mortuus. One out of the pale of the law (an outlaw) is civilly dead. Co. Litt. 130. A bankrupt is, as it were, civilly dead. 101 U. S. 406.

Extra territorium jus dicenti non paratur impune. One who exercises jurisdiction out of his territory cannot be obeyed with impunity. 10 Co. 77; Dig. 2, 1, 30; Story, Const. Laws § 559; Broom, Max. 100, 101.

Extremis probatis presumuntur media. Extremes being proved intermediate things are presumed. Trayner, Max. 207.

Facta sunt potentiora verbis. Facts are more powerful than words.

Facts cannot lie. 16 How. St. Tr. 1187; 17 id. 1480; but see Best, Ev. 567.

Factum a iudice quod ad ejus officium non spectat, non ratum est. An act of a judge which does not pertain to his office is of no force. 10 Co. 76; Dig. 50, 17, 170; Broom, Max. 93, n.

Factum cuius sum, non adversario, nocere debet. A man's actions should injure himself, not his adversary. Dig. 50, 17, 133.

Factum in seculo fieri nequit. What is done cannot be undone. 1 Kames, Eq. 96, 259.

Factum negantis nulla probatio. No proof is incumbent on him who denies a fact.

Factum non dicitur quod non perseverat. That is not said to be done which does not last. 5 Co. 96; Shep. Touch. Preston ed. 301.

Factum unius alteri nocere non debet. The deed of one should not hurt another. Co. Litt. 152.

Facultas probationum non est angustanda. The right of offering proof is not to be narrowed. 4 Inst. 279.

Falsa demonstratio non nocet. A false description does not vitiate. 6 Term 670. See 2 Story 291; 1 Greenl. Ev. § 301; Broom, Max. 629 et seq.; 2 Pars. Contr. 62, n. 4; C. 322; 14 id. 122; 3 Gray 78; 9 Allen 113; 16 Ohio 62; 78 Ga. 689; 93 Va. 447.

Falsa demonstratione legatum non perimi. A legacy is not destroyed by an incorrect description. Broom, Max. 645; 3 Bradf. 144, 149. See DEMONSTRATION.

Falsa orthographia sive falsa grammatica non vitiat concessionem. False spelling or false grammar does not vitiate a grant. Bart. Max. 164; 9 Co. 48; Shep. Touch. 55.

Falsus in uno, falsus in omnibus. False in one thing, false in everything. 1 Sumn. 350; 7 Wheat. 385; 97 Mass. 403; 3 Wis. 646; 2 Jones N. C. 257; 48 Neb. 823; 183 N. Y. 10; 30 Misc. Rep. 300; 95 Wis. 195; 93 Ga. 488; 86 Wis. 402.

Fama, fides, et oculus non patiuntur ludum. Fame, plighted faith, and eyesight do not endure deceit. 3 Bulstr. 223.

Falsus iudex, qui iudicium fugit. He who flees judgment confesses his guilt: 3 Inst. 14; 5 Co. 100 b. But see Best, P. 248. See FLIGHT.

Falsus presumitur qui in proprio nomine errat. A man is presumed to be simple who makes a mistake in his own name. Code 0. 24, 14; 5 Johns. Ch. 148.

Favorabilia in lege sunt, fides, dos, vita, libertas. The treasury, dower, life, and liberty are things favored in law. Jenk. Cent. 94.

Favorabiliores rei potius quam actores habentur. Defendants are rather to be favored than plaintiffs. Dig. 50, 17, 125. See 5 Wheat. 105, 106; Broom, Max. 715.

Favorabiliores sunt executiones alias processibus quibuscunque. Executions are preferred to all other processes whatever. Co. Litt. 289 b.

Favorabiles angustias sunt ad se restringenda. Favorable incursions are to be enlarged; animosities restrained. Jenk. Cent. 180.

Felonia, ex vi termini, significat quoddam capitale crimen felleo animo perpetratum. Felony, by force of the term, signifies some capital crime perpetrated with a malignant mind. Co. Litt. 303.

Felonia implicatur in quodlibet prodicione. Felony is implied in every treason. 3 Inst. 15.

Fœdum est quod quis tenet ex quacunque causa, sive sit tenementum sive redditus. A fee is that which any one holds from whatever cause, whether tenement or rent. Co. Litt. 1.

Festinat iustitia est noverca infortunii. The hurrying of justice is the stepmother of misfortune. Hob. 97.

Fiat iustitia ruat cælum. Let justice be done, though the heaven should fall. Branch, Princ. 161.

Fiat prout fieri consuevit, nil temere novandum. Let it be done as formerly, let no innovation be made rashly. Jenk. Cent. 116; Branch, Princ.

Fictio cedit veritati, fictio juris non est ut veritas. Fiction yields to truth; where the truth appears, there can be no fiction of law. 11 Co. 51.

Fictio est contra veritatem, sed pro veritate habetur. Fiction is against the truth, but it is to be esteemed truth.

Fictio juris non est ubi veritas. Where truth is, fiction of law does not exist.

Fictio legis inique operatur alicui damnum vel injuriam. Fiction of law is wrongful if it works loss or injury to any one. 2 Co. 35; 3 id. 36; Glib. 223; Broom, Max. 129.

Fictio legis neminem lædit. A fiction of law injures no one. 2 Rolle 508; 3 Bla. Com. 43; 17 Johns. 348.

Fides servanda. Good faith must be observed. 1 Mete. Mass. 551; 3 Barb. 223; 23 id.; 521.

Fides servanda est; simplicitas juris gentium prævalet. Good faith is to be preserved; the simplicity of the law of nations should prevail. Story, Bull. 15.

Fieri non debet, sed factum valet. It ought not to be done, but if it is valid. 5 Co. 39; 1 Str. 586; 10 Johns. 34, 92; 12 id. 11, 376.

Filiatio non potest probari. Filiation cannot be proved, that is, the husband is presumed to be the father of a child born during coverture. See ACCESS; Co. Litt. 126 a. But see 7 & 8 Viet. c. 101.

Filius est nomen nature, sed hæres nomen juris. Son is a name of nature, but her name of law. 1 Sid. 193; 1 Pow. Dev. 311.

Filius in utero matris est pars viscerum matris. A son in the mother's womb is part of the mother's vitals. 7 Co. 8.

Finis finem litibus imponit. A fine puts an end to litigation. 3 Inst. 78.

Finis rei attendendus est. The end of a thing is to be attended to. 3 Inst. 51.

Finis unius diei est principium alterius. The end of one day is the beginning of another. 2 Bulstr. 305.

Firmior et potentior est operatio legis quam dispositio hominis. The operation of law is firmer and more powerful than the will of man. Co. Litt. 102. See FORTIOR, etc.

Flumina et portus publica sunt, ideoque jus piscandi omnibus commune est. Rivers and ports are public; therefore the right of fishing there is common to all. Dav. 55; Branch, Fris. 18.

Fœmine ab omnibus officiis civilibus vel publicis remota sunt. Women are excluded from all civil and public charges or offices. Dig. 50. 17. 2; 1 Exch. 685; 9 M. & W. 218.

Fœmine non sunt capaces de publicis officiis. Women are not admissible to public offices. Jenk. Cent. 237. But see 7 Mod. 263; Str. 1114; 2 Ld. Raym. 1014; 2 Term 395. See WOMEN.

Forma dat esse. Form gives being. Lord Henley, 3 Ch. 2 Eden 199.

Forma legalis forma essentialis. Legal form is essential form. 10 Co. 100; 9 C. B. 495; 3 Hopk. 319.

Forma non observata, infertur annullatio actus. When form is not observed, a nullity of the act is inferred. 12 Co. 7.

Forstellarius est pauperum depressor, et totius communitatis et patrie publicus inimicus. A forstaller is an oppressor of the poor, and a public enemy to the whole community and the country. 8 Inst. 156. See FORESTALL.

Fortior est leges quam hominis. The custody of the law is stronger than that of man. 2 Rolle 325.

Fortior et potentior est dispositio legis quam hominis. The disposition of the law is stronger and more powerful than that of man. Co. Litt. 284; Broom, Max. 664; 19 Q. B. 944; 18 Id. 87; 10 C. B. 561; 3 H. L. C. 507; 13 M. & W. 288, 306; 8 Johns. 401.

Fractionem diei non recipit lex. The law does not regard a fraction of a day. Loft 572. But see Day.

Frater fratri uterino non succedit in hereditate paterna. A brother shall not succeed to the uterine brother in the paternal inheritance. Fort. de Laud. Leg. Ang. by Amos, p. 15; 2 Sharsw. Bla. Com. This maxim is now superseded in England by 3 & 4 Wm. IV. c. 106, s. 9. Broom, Max. 530; 2 Bla. Com. 232.

Fraus est celare fraudem. It is a fraud to conceal a fraud. 1 Vern. 240.

Fraus est odiosa et non presumenda. Fraud is odious and not to be presumed. Bart. Max. 159; Cro. Car. 350.

Fraus et dolum nemini patrocinari debent. Fraud and deceit should excuse no man. Broom, Max. 97; 3 Co. 78.

Fraus et jus nunquam cohabitant. Fraud and justice never dwell together. Wing, Max. 680.

Fraus latet in generalibus. Fraud lies hid in general expressions.

Fraus meretur fraudem. Fraud deserves fraud. Plowd. 100; Branch, Princ.

Free ships make free goods. See FREE SHIPS.

Freight is the mother of wages. 2 Show. 283; 3 Kent 196; 1 Magg. 237; Smith, Merc. Law 548; 1 Hilt. 17; 5 Johns. 154; 12 Id. 324; 52 Mo. 387.

Frequentia actus multum operatur. The frequency of an act effects much. 4 Co. 76; Wing, Max. 192.

Fructus augent hereditatem. Fruits enhance an inheritance.

Fructus pendentes pars fundi videntur. Hanging fruits are part of the land. Dig. 6. 1. 4; 4 Bouv. Inst. n. 1257, et seq.

Fructus perceptos villa non esse constat. Gathered fruits are not a part of the farm. Dig. 19. 1. 1; 2 Bouv. Inst. n. 1578.

Frumenta que sata sunt solo cedere intelliguntur. Grain which is sown is understood to form a part of the soil. Inst. 2. 1. 32.

Frustra agit qui iudicium prosequi nequit cum effectu. He in vain sues, who cannot prosecute his judgment with effect. Fleta, lib. 6, c. 37, § 9.

Frustra est potentia que nunquam venit in actum. The power which never comes to be exercised is vain. 2 Co. 51.

Frustra feruntur leges nisi subditis et obedientibus. Laws are made to no purpose unless for those who are subject and obedient. 7 Co. 13.

Frustra fit per plura, quod fieri potest per pauciora. That is done vainly by many things, which might be accomplished by fewer. Jenk. Cent. 68; Wing, Max. 177.

Frustra legis auxilium quaerit qui in legem committit. Vainly does he who offends against the law seek the help of the law. 2 Hale, P. C. 386; Broom, Max. 270, 287.

Frustra petit quod statim alteri reddere cogeris. Vainly you seek that which you will immediately be compelled to give back to another. Jenk. Cent. 256; Broom, Max. 346.

Frustra petit quod mox es restitutus. Vainly you seek what you will immediately have to restore. 15 Mass. 407.

Frustra probatur quod probatum non releat. It is vain to prove that which if proved would not aid the matter in question. Broom, Max. 255; 13 Gray 511.

Furiosus nulla voluntas est. A madman has no will. Dig. 50. 17. 5; id. 1. 18. 13; 1; Broom, Max. 314.

Furiosus absentis loco est. A madman is considered as absent. Dig. 50. 17. 24. 1.

Furiosus nullum negotium contrahere (gerere) potest (quia non intelligit quod agit). A lunatic cannot make a contract. Dig. 50. 17. 5; 1 Story, Contr. § 78.

Furiosus solo furore puniatur. A madman is punished by his madness alone. Co. Litt. 247; Broom, Max. 15; 4 Bla. Com. 24, 25.

Furiosus stipulatus non potest nec aliquid negotium agere, qui non intelligit quod agit. An insane person who knows not what he does, cannot make a bargain, nor transact any business. 4 Co. 126.

Furor contrahi matrimonium non sinit, quia consensus opus est. Insanity prevents marriage from being contracted, because consent is needed. Dig. 23. 5. 16, 2; V. & B. 140; 1 Bla. Com. 439; 4 Johns. Ch. 343, 345.

Furtum non est ubi initium habet detentionis per dominium rei. It is not theft where the commencement of the detention arises through the owner of the thing. 3 Inst. 107.

Generale dictum generaliter est interpretandum. A general expression is to be construed generally. 8 Co. 116; 1 Eden 96; Bart. Max. 162.

Generale nihil certi implicat. A general expression implies nothing certain. 2 Co. 34; Wing, Max. 164.

Generale tantum valet in generalibus, quantum singulare in singulis. What is general prevails (or is worth as much) among things general as what is particular among things particular. 11 Co. 59.

Generalia præcedunt, specialia sequuntur. Things general precede, things special follow. Reg. Brev. Branch, 21.

Generalia specialibus non derogant. Things general do not derogate from things special. Jenk. Cent. 120; 16 R. I. 453; 34 L. R. A. 541; 97 Tenn. 687.

Generalia sunt præponenda singularibus. General things are to be put before particular things.

Generalia verba sunt generaliter intelligenda. General words are understood in a general sense. 8 Inst. 76; Broom, Max. 647.

Generalibus specialia derogant. Things special lessen the effect of things general. Halkers. Max. 51.

Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa. A general clause does not extend to those things which are previously provided for specially. 8 Co. 154.

Generalis regula generaliter est intelligenda. A general rule is to be understood generally. 6 Co. 65.

Glossa viperina est quæ corrodit viscera textus. That is a poisonous gloss which eats out the vitals of the text. 10 Co. 70; 9 Bulst. 79.

Grammatica falsa non vitiat chartam. False grammar does not vitiate a deed. 9 Co. 48.

Gravissus est divitum quum temporalem ledere majestatem. It is more serious to hurt divine than temporal majesty. 11 Co. 29.

Habemus optimum testem, confitemur reum. We consider as the best witness a confessing defendant. Fos. Cr. Law 167; 3 Hag. 315; 1 Phill. Ev. 397.

Harretem Deus fecit, non homo. God, and not man, makes the heir. Bract. 635; 6 Co. Litt. 7.

Hereditate suo propinquo vel extraneo periculosa sane custodia nullo committitur. To the next heir, whether a relation or a stranger, certainly a dangerous guardian, let no one be committed. Co. Litt. 330.

Hereditas est successio in universum jus quod defunctus habuerat. Inheritance is the succession to every right which was possessed by the late possessor. Co. Litt. 287.

Hereditas nulla aliud est quam successio in universum jus, quod defunctus habuerat. The right of inheritance is nothing else than the faculty of succeeding to all the rights of the deceased. Dig. 50. 17. 62.

Hereditas nunquam ascendit. The inheritance never ascends. Gualle, l. 7, c. 1; Broom, Max. 527; 2 Sharsw. Bla. Com. 312, n. 3; Greenl. Cr. R. P. 331; 1 Steph. Com. 378. Abrogated by stat. 8 & 4 Will. IV. c. 106, § 6.

Hereditum appellatione veniunt hæredes hæredum infinitum. By the title of heirs, come the heirs of heirs in infinity. Co. Litt. 9.

Heres est alter ipse, et filius est pars patriæ. An heir is another self, and a son is a part of the father.

Heres est aut jure proprietatis aut jure representationis. An heir is either by right of property or right of representation. 8 Co. 40.

Heres est eadem persona cum antecessore. The heir is the same person with the ancestor. Co. Litt. 23.

Heres est nomen collectivum. Heir is a collective name.

Heres est nomen juris, filius est nomen naturæ. Heir is a term of law; son, one of nature.

Heres est pars antecessoris. The heir is a part of the ancestor. Co. Litt. 23 b; 3 Hill N. Y. 165, 167.

Heres hæredis mei est meus hæres. The heir of my heir is my heir. Wharton, Law Dict.

Heres legitimus esse quem nuptiæ demonstrant. He is the lawful heir whom the marriage indicates. Mirror of Just. 70; Fleta, l. 6, c. 1; Dig. 2. 4. 5; Co. Litt. 7 b; Broom, Max. 515. As to the application of the principle when the marriage is subsequent to the birth of the child, see 2 Cl. & F. 571; 6 Bingh. n. c. 335; 5 Wheat. 228, 262, n.

Heres minor aut viginti annis non respondet, nisi in casu dotis. An heir under twenty-one years of age is not answerable, except in the matter of dower. F. Moore 348.

Hard cases are the quicksands of the law. 77 Fed. Rep. 703.

Hard cases make bad law.

He who comes into a court of equity must come with clean hands. 79 Fed. Rep. 854; 97 Tenn. 180; 11 Tex. Civ. App. 624.

He who has committed iniquity shall not have equity. Francis, 24 Max.

He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent. 93 Va. 415.

He who seeks equity must do equity. 109 Ala. 548; 169 Ill. 183; 67 Ill. App. 440; 11 Tex. Civ. App. 162. See EQUITY.

He who will have equity done to him must do equity to the same person. 4 Bouv. Inst. 5723.

Heirs at law shall not be disturbed by conjecture, but only by express words or necessary implication. Schoul. Wills § 479; 23 Colo. 40.

Hoc servabitur quod initio convenit. That shall be preserved which is useful in the beginning. Dig. 50. 17. 23; Bract. 73 b.

Hone ne sera puny pur euer des briefes en court le roy, soit il a droit ou a tort. A man shall not be punished for suing out writs in the king's court, whether he be right or wrong. 2 Inst. 228; but see MALICIOUS PROSECUTION.

Homini causa jus constitutum est. Law is established for the benefit of man.

Homo potest esse habilis et inhabilis diversis temporibus. A man may be capable and incapable at divers times. 5 Co. 95.

Homo vocabulum est naturæ; persona juris civilis. Man (homo) is a term of nature; person (persona), of civil law. Calvinus, Lex.

Hostes non sunt qui nobis vel quibus nos bellum decernimus; ceteri proditores vel prædones sunt. Enemies are those upon whom we declare war, or who declare it against us; all others are traitors or pirates. 7 Co. 34; Dig. 50. 16. 118; 1 Sharsw. Bla. Com. 257.

Id certum est quod certum reddi potest. That is certain which may be rendered certain. 8 Bla. Com. 143; 4 Kent 432; 24 Pick. 178; 11 Cush. 90; 9 Mass. 548; 99 Id. 280; Broom, Max. 624 et seq.; 38 S. W. Rep. (Tenn.) 588; 67 Ill. App. 381.

Id perfectum est quod ex omnibus suis partibus constat. That is perfect which is complete in all its parts. 9 Co. 9.

Id possumus quod de jure possumus. We are able to do that which we can do lawfully. Lane 118.

Id quod est magis remotum non trahit ad se quod est magis junctum, sed e contrario in omni casu. That which is more remote does not draw to itself that which is nearer, but the contrary in every case. Co. Litt. 164.

Id quod nostrum est sine facto nostro ad alium transferri non potest. What belongs to us cannot be transferred to another without our consent. Dig. 50. 17. 11.

Id solum nostrum quod debitis deductis nostrum est. That only is ours which remains to us after deduction of debts. Trayner, Max. 227.

Id tantum possumus quod de jure possumus. We can do that only which we can lawfully do. Trayner, Max. 237.

Idem agens et patiens esse non potest. To be at once the person acting and the person acted upon is impossible. Jenk. Cent. 40.

Idem est facere et non prohibere cum possit. It is the same thing to do a thing as not to prohibit it when you have your power. 3 Inst. 158.

Idem est nihil dicere et non sciens dicere. It is the same thing to say nothing and not to say enough. 2 Inst. 178.

Idem est non probari et non esse; non deficit jus et probatio. What is not proved and what does not exist are the same; it is not a defect of the law, but of proof.

Idem est scire aut scire debere aut potuisse. To be bound to know or to be able to know is the same as to know.

Idem non esse et non apparere. It is the same thing not to exist and not to appear. Broom, Max. 165; Jenk. Cent. 207.

Idem semper antecedenti proximo refertur. Idem always relates to the next antecedent. Co. Litt. 385; 7 Johns. Ch. 248.

Idem signa vera collegitur ex multitudinem signorum. True identity is collected from a number of signs. Bacon, Max. 20.

Ignorantia eorum quæ quis scire tenetur non excusat. Ignorance of those things which every one is bound to know excuses not. Hale, P. C. 42. See C. J., 10 Cl. & F. 210; Broom, Max. 267; 4 Bla. Com. 27.

Ignorantia excusatur, non juris sed facti. Ignorance of fact may excuse, but not ignorance of law. See IGNORANCE.

Ignorantia facti excusat, ignorantia juris non excusat. Ignorance of fact excuses, ignorance of law does not excuse. 1 Co. 177; Broom, Max. 253, 263; Bart. Max. 100; 2 Gray 412; 1 Foub. Eq. 119, n. See IGNORANCE.

Ignorantia iudicis est calamitas innocentis. The ignorance of the judge is the misfortune of the innocent. 2 Inst. 591.

Ignorantia juris non excusat. Ignorance of the law is no excuse. 8 Wend. 287; 15 Id. 186; 6 Paige 189; 1 Edw. Ch. 467; 7 Watts 374; 2 Alb. 9; 4 Mass. 119; 4 Id. 138; 4 Id. 618; 6 Id. 103; 37 L. Mag. 90; 73 Miss. 110; 111 Ala. 138; 74 Fed. Rep. 657. See IGNORANCE.

Ignorantia juris quod quisque scire tenetur, neminem excusat. Ignorance of law, which every one is bound to know, excuses no one. 2 Co. 8 b; 1 Plowd. 843; 9 Cl. & F. 234; Broom, Max. 253; 7 C. & P. 456; 9 Pick. 129; 16 Gray 596; 2 Kent 491. See IGNORANCE.

Ignorantia juris sui non præjudicat juri. Ignorance of one's right does not prejudice the right. Loft 535. See IGNORANCE.

Ignorantia legis neminem excusat. Ignorance of law excuses no one. See IGNORANCE; 1 Story, Eq. Jur. § 111; 7 Watts 374.

Ignorare legis est lata culpa. To be ignorant of the law is gross neglect. Bartolus on Cod. l. 14. See CULPA.

Ignorantia terminis, ignoratur et ars. Terms being unknown, the art also is unknown. Co. Litt. 2.

Ilud quod alias licitum non est, necessitas facit licitum, et necessitas inducit privilegium quod jure privat. That which is not otherwise lawful need necessity makes lawful, and necessity makes a privilege which supersedes the law. 10 Co. 61.

Ilud quod alteri unquam extinguitur, neque amplius per se vacare licet. That which is united to another is extinguished, nor can it be any more independent. Godolph. Rep. Can. 169.

Immobilia situm sequuntur. Immovables follow (the law of) their locality. 2 Kent 67.

Impertitia culpa non imputatur. Want of skill is considered a fault (i. e. a negligence), for which one who professes skill is responsible. Dig. 50. 17. 132; 2 Kent 588; 4 Ark. 528.

Impersonalitas non concludit nec ligat. Impersonality neither concludes nor binds. Co. Litt. 352.

Impossibilitas nullis obstat. Impossibility is an obligation to perform impossible things. Dig. 50. 18. 185; 1 Poth. Ob. pt. 1, c. 1, s. 4, § 3; 3 Story, Eq. Jur. 793; Broom, Max. 249.

Impotentia excusat legem. Impotency is an excuse from the law. Broom, Max. 243, 251.

Impunitas innoxium affectum tribuit delinquenti. Impunity offers a continual bait to a delinquent. 4 Co. 45.

Impunitas semper ad deteriora invitat. Impun-

ity always invites to greater crimes. 5 Co. 109.

In aequi jure melior est conditio possidentis. When the parties have equal rights, the condition of the possessor is the better. *Mitt. Eq. Pl. 215*; *Jer. Eq. Jur. 285*; *1 Macleay, Pr. 170*; *Dig. 50. 17. 128*; *Broom, Max. 718*; *Plowd. 204*.

In alta proditione nullus potest esse accessorius; sed principalis solummodo. In high treason, no one can be an accessory; all are principals. *3 Inst. 138*; see 4 Cr. 75. 146. See Accessory.

In alternativa delecti sunt debitoris. In alternatives, the debtor has the election. *1 Inst. 138*. In *ambigua voce legis ea potius accipienda est significatio, quæ vitio caret*; *præsertim cum etiam volutus legis ex hoc colligi possit.* In an ambiguous law that interpretation shall be preferred which is most consonant to equity, especially where it is in conformity with the general design of the legislature. *Dig. 1. 3. 179*; *Broom, Max. 576*; *Bacon, Max. Reg. 3*; *3 Inst. 178*.

In ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset. When there are ambiguous expressions, the intention of him who uses them is especially to be regarded. (This maxim of Roman law was confined to wills.) *Dig. 50. 17. 96*; *Broom, Max. 567*.

In ambiguo sermone non utrumque dicimus sed id duntaxat quod volumus. When the language we use is ambiguous, we do not use it in a double sense, but in the sense in which we mean it. *Dig. 50. 17. 96*; *Broom, Max. 567*.

In Anglia non est interregnum. There can be no interregnum in England. *Jenk. Cent. 203*.

In atrocioribus delictis puniuntur affectus licet non sequatur effectus. In more atrocious crimes, the intent is punished though the effect does not follow. *2 Rolle 89*. But see *ATTEMPT*.

In casu extremæ necessitatis omnia sunt communia. In cases of extreme necessity, everything is in common. *1 Hale, Pl. Cr. 54*; *Broom, Max. 2. n.* *In civilibus ministerium exousat, in criminalibus non item.* In civil cases, the master agency (or service) excuses; but not so in criminal matters. *Loft 285*; *Trayner, Max. 243*.

In commodato hæc pactio, ne dolus præstetur, rata non est. If in a contract for a loan there is inserted a clause that fraud should not be accounted of, such clause is void. *Dig. 13. 7. 17*.

In conjunctivis, non utrumque partem esse veram. In conjunctives each part must be true. *Wing. Max. 13*.

In consimili casu, consimile debet esse remedium. In similar cases, the remedy should be similar. *Hardy 65*.

In consuetudinibus non diuturnitas temporis sed soliditas rationis est consideranda. In customs, not the length of time but the strength of the reason should be considered. *Co. Litt. 141*.

In contractibus, benigna; in testamentis, benignior; in restitutionibus, benignissima interpretatio facienda est. In contracts, the interpretation or construction should be liberal; in wills, more liberal; in restitutions, most liberal. *Co. Litt. 112 a*.

In contractibus tacite insunt que sunt moris et consuetudinis. In contracts, those things which are of custom and usage are tacitly implied. *Broom, Max. 842*; *8 Bingh. m. c. 814*; *818*; *Story, Bills § 148*; *8 Kent 260*.

In contrahenda venditione, ambiguum pactum contra venditorem interpretandum est. In negotiating a sale, an ambiguous agreement is to be interpreted against the seller. *Dig. 50. 17. 172*; *18. 1. 21*.

In conventionibus contrahentium voluntatem potius quam verba spectari placuit. In agreements, the rule is to regard the intention of the contracting parties rather than their words. *Dig. 50. 16. 219*; *2 Kent 555*; *Broom, Max. 551*; *17 Johns. 150*.

In criminalibus, probationes debent esse luce clares. In criminal cases, the proofs ought to be clearer than in civil cases. *3 Inst. 210*.

In criminalibus sufficit generalis malitia intentionis cum facto parvis gradibus. In criminal cases, a general malice of intention is sufficient, with an act of corresponding degree. *Bacon, Max. Reg. 15*; *Broom, Max. 822*.

In criminalibus voluntas reputabitur pro facto. In criminal acts, the will will be taken for the deed. *3 Inst. 106*.

In disjunctivis sufficit alteram partem esse veram. In disjunctives, it is sufficient if either part be true. *Wing. Max. 13*; *Broom, Max. 562*; *Co. Litt. 225 a*; *10 Co. 50*; *Dig. 50. 17. 110*.

In dubiis benigniora præferenda sunt. In doubtful matters, the more favorable are to be preferred. *Dig. 50. 17. 56*; *2 Kent 557*.

In dubiis magis dignum est accipiendum. In doubtful cases, the more worthy is to be taken. *Bench, Pri. 18*.

In dubiis non præsumitur pro testamento. In doubtful cases, there is no presumption in favor of the will. *Cro. Car. 51*.

In dubio hæc legis constructio quam verba ostendunt. In a doubtful case, that is the construction of the law which the words indicate.

In dubio pars mitior est sequenda. In doubt, the gentler course is to be followed.

In dubio sequendum quod tutius est. In doubt, the safer course is to be adopted.

In eo quod plus est, minus inest et minus. The less is always included in the greater. *Dig. 50. 17. 110*.

In expositione instrumentorum, mala grammatica, quod feri potest, vitanda est. In the construction of instruments, bad grammar is to be avoided as much as possible. *6 Co. 99*; *2 Pars. Cent. 26*.

In facto quod bonum est et malum magis de bono quam de malo lex intendit. In a deed which may be considered good or bad, the law looks more to the good than to the bad. *Co. Litt. 78 b*.

In favorabilibus magis attenditur quod prodest quam quod nocet. In things favored, what does good is more regarded than what does harm. *Bacon, Max. Reg. 13*; *Bart. Max. 151*.

In favorem vite, libertatis, et innocentie omnia præsumuntur. In favor of life, liberty, and innocence, all things are to be presumed. *Loft 126*.

In fitione juris semper æquitas est. In legal fiction the law is always conformed with equity. *11 Co. 51*; *Broom, Max. 127*; *180*; *17 Johns. 948*; *3 Bla. Com. 48*.

In fitione juris semper subsistit æquitas. In a legal fiction equity always exists. *74 Pa. 398*; *2 Pick. 495*; *627*.

In generalibus versatur error. Error dwells in general expressions. *5 Summ. 290*; *1 Cush. 262*.

In genere quicumque aliquid dicit, sive actor sive reus, necesse est ut probet. In general, whoever alleges anything, whether plaintiff or defendant, must prove it. *Best, Ev. § 252*.

In heredes non solent transire actiones que patentes ex maleficio sunt. Penal actions arising from anything of a criminal nature do not pass to heirs. *2 Inst. 448*.

In his enim que sunt favorabilia anime, quævis sunt damnosa rebus, fiat aliquando extento statuti. In things that are favorable to the spirit, though injurious to property, an extension of the statute should sometimes be made. *10 Co. 101*.

In his que de jure communi omnibus conceduntur, consuetudo alicujus patrie vel loci non est alleganda. In those things which by common right are conceded to all, the custom of a particular country or place is not to be alleged. *11 Co. 85*.

In iudiciis minori ætati succurritur. In judicial proceedings infancy is favored. *Jenk. Cent. 46*.

In iudicio non creditur nisi iurata. In law, no one is credited unless he is sworn. *Cro. Car. 64*.

In jure non remota causa, sed proxima, spectatur. In law, the proximate and not the remote cause is to be looked to. *Bacon, Max. Reg. 1*; *Broom, Max. 216*; *228*; *888*; *n. 12*; *Mass. Reg. 1*; *Metz. 87*; *11 Allen 233*. See *3 Pars. Cent. 455*; *Bacon, Proxima*; *RE-MOTA SPECTATUR*.

In majore summa continetur minor. In the greater sum is contained the less. *5 Co. 115*.

In maleficiis voluntas spectatur, non exitus. In offences, the intention is regarded, not the event. *Dig. 48. 8. 14*; *Bacon, Max. Reg. 7*; *Broom, Max. 824*.

In maleficio rati habito mandato comparatur. In a tort, ratification is equivalent to authority. *Dig. 50. 17. 132*.

In iudiciis potentia minima licentia. In the greatest power there is the least liberty. *Hob. 139*.

In mercibus illicitis non sit commercium. There should be no commerce in illicit goods. *3 Kent 262*.

In novo casu novum remedium apponendum est. In new state of facts a new legal remedy must be found. *2 Inst. 448*.

In obscuris inspicere solere quod verisimilius est, aut quod plerumque fieri solet. Where there is obscurity, we usually regard what is probable or what is generally done. *Dig. 50. 17. 114*.

In obscuris quædam sunt sequimur. In obscure cases, we follow that which is least so. *Dig. 50. 17. 9*.

In odium spoliatoris omnia præsumuntur. All things are presumed against a wrong-doer. *Broom, Max. 939*; *1 Vern. 19*; *1 P. Wms. 731*; *1 Ch. Cas. 202*.

In omni actione iudicium distinetur, videlicet in rem et in personam, illa districtio tendens est que magis timetur et magis ligat. In every action where two distresses occur, that is in rem and in personam, that is to be chosen which is most extended, and which binds most firmly. *Bart. 372*; *Fleta, 1. 8. 14*; *14 38*.

In omni re nascitur res que ipsam rem exterminat. In every thing, the thing is born which destroys the thing itself. *2 Inst. 15*.

In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur. In every contract, whether nominate or innominate, there is implied an exchange, i. e., a consideration.

In omnibus obligationibus, in quibus dies non ponitur, præsentis die debetur. In all obligations, when no time is fixed for the performance, the thing is due immediately. *Dig. 50. 17. 114*.

In omnibus poenalis iudiciis, et ætati et imprudentie succurritur. In all trials for penal offences, allowance is made for youth and lack of discretion. *Dig. 50. 17. 108*; *Broom, Max. 814*.

In omnibus quidem magis est iudicium in jure æquitate spectanda, et in rebus in factis. In all affairs indeed, but principally in those which concern the administration of justice, equity should be regarded. *Dig. 50. 17. 90*.

In pari causa possessor potior haberi debet. When two parties have equal rights, the advantage is always in favor of the possessor. *Dig. 50. 17. 129*; *Broom, Max. 714*.

In pari delicto melior est conditio possidentis. When the parties are equally in the wrong, the condition of the possessor is better. *1 Wheat. 238*; *3 Cra. 344*; *Cowp. 341*; *Broom, Max. 825*; *4 Bouv. Inst. n. 3724*; *33 Ala. 142*.

In pari delicto potior est conditio defendentis (et possidentis). Where both parties are equally in fault, the condition of the defendant is preferable. *L. R. 7 Ch. 478*; *11 Mass. 376*; *101 Mass. 150*; *344*; *Broom, Max. 820*; *723*; *38 Fed. Rep. 191*; *15 Wash. 499*; *106 Ill. 222*.

In poenalis causis benignius interpretandum est. In penal cases, the more favorable interpretation is to be made. *Dig. 50. 17. 155*; *2*; *Plowd. 80*; *2 Hale, P. C. 865*.

In præparato ad iudicium favetur actori. In things preparatory before trial, the plaintiff is favored. *2 Inst. 57*.

In præsentia majoris potestatis, minor potestas cessat. In the presence of the superior power, the minor power ceases. *Jenk. Cent. 214*; *Hardw. 38*; *13 How. 149*; *13 Q. B. 72*; *See Broom, Max. 111*; *112*.

In pretio emptitoris et venditoris naturaliter licet contrahentibus est circumscriptio. In the price of buying and selling, it is naturally allowed to the contracting parties to overreach each other. *1 Story, Cent. 606*.

In propria causa nemo iudex. No one can be judge in his own cause. *2 Co. 13*.

In quo quis delinquit, in eo de jure est puniendus. In whatever thing one offends, in that he is rightfully to be punished. *Co. Litt. 233 b*.

In re communi neminem dominorum jure facere quicquam, invito altero, posse. One co-proprietor can exercise no authority over the common property against the will of the other. *Dig. 10. 2. 82*.

In re dubia benigniorem interpretationem sequi, non minus justus est, quam tutius. In a doubtful case, to follow the milder interpretation is not less

the more just than it is the safer course. *Dig. 50. 17. 192*; *2*; *28. 4. 8*.

In re dubia magis inficiatio quam affirmatio intelligenda. In a doubtful matter, the negative is to be understood rather than the affirmative. *Godb. 87*; *Bart. Max. 126*.

In re lupanari, testes lupanares admittuntur. In a matter concerning a brothel, prostitutes are admitted as witnesses. *6 Barb. 320*; *324*.

In re pari, potiorum eorum causam esse prohibentis constat. Where a thing is owned in common, it is agreed that the cause of him prohibiting (its use) is the stronger. *Dig. 10. 2. 82*; *3 Kent 45*; *Pothier, Traité du Con. de Soc. n. 90*; *10 Johns. 438*; *491*.

In re propria iniquum admodum est alicui licentiam tribuere sententie. It is extremely unjust that any one should be judge in his own cause.

In rebus manifestis error quæ auctoritates legum allegat; quia perspicua vera non sunt probanda. He errs who alleges the authorities of law in things manifest; because obvious truths need not be proved. *5 Co. 67*.

In rebus maxime conservanda sunt jura belli. In the state, the laws of war are to be especially observed. *2 Inst. 58*; *8 Allen 454*.

In restitutionem, non in penam, hæres succedit. The heir succeeds to the restitution, not the penalty. *2 Inst. 198*.

In restitutionibus benignissima interpretatio facienda est. The most favorable construction is to be made in restitutions. *Co. Litt. 112*.

In satisfactoribus non permittitur amplius fieri quam semel factum est. In payments, more must not be received than has been received once for all. *9 Co. 53*.

Inulationibus cum queritur quid actum sit, verba contra stipulatorem interpretanda sunt. In contracts, when the question is what was agreed upon, the terms are to be interpreted against the party offering them. *Dig. 41. 1. 38. 18*. (Chancellor remarks that the true principle appears to be "to give the contract the sense in which the person making the promise believes the other party to have accepted it, if he in fact did so understand and accept it." *2 Kent 721*.) *2 Day 281*; *1 Duer, Ins. 159*; *Broom, Max. 559*. See.

In iudicationibus id tempus spectatur quo contrahimus. In agreements, reference is had to the time at which they were made. *Dig. 50. 17. 144. 1*.

In suo quisque negotio habetior est quam in alieno. Every one is more dull in his own business than in that of another. *Co. Litt. 377*.

In testamentis plenius testatoris intentioem scrutantur. In testaments, we should seek diligently the will of the testator. (But, says Doddridge, C. J., "this is to be observed with these two limitations: 1st, his intent ought to be agreeable to the rules of the law; 2d, his intent ought to be collected out of the words of the will." *3 Bulstr. 168*.) *Broom, Max. 555*.

In testamentis plenius voluntates testantium interpretantur. In testaments, the will of the testator should be liberally construed. *Dig. 50. 17. 12*; *Quæd. ad loc. cit. 8 Pothier, Pand. 46*; *Broom, Max. 558*.

In toto et parte continetur. A part is included in the whole. *Dig. 50. 17. 13*.

In traditionibus scriptorum (chartarum) non quod dictum est, sed quod gestum (factum) est, inspicitur. In the delivery of writings (deeds), not what is said but what is done is to be considered. *9 Co. 137*; *Leake, Contr. 4*.

In veram quantitatem fidejussor teneatur, nisi pro certa quantitate accessit. Let the surety be held for the true quantity unless he agree for a certain quantity. *17 Mass. 507*.

In verbis non verba sed res et ratio querenda est. In words, not the words, but the thing and the meaning is to be inquired into. *Jenk. Cent. 132*.

In vocibus videndum non a quo sed ad quid sumatur. In discourses, it is to be considered not what, but to what, it is advanced. *Ellesmere, Postn. 62*.

Incendium ære alieno non exuit debitorum. A fire does not release a debtor from his debt. *Code 4. 2. 11*.

Incerta pro nullis habentur. Things uncertain are held for nothing. *Dav. 33*.

Incerta quantitas vitiat actum. An uncertain quantity vitiates the act. *1 Rolle 465*.

In civile est, nisi talis lege prospecta, una aliqua particularis ejus proposita, iudicare vel respondere. It is improper, unless the whole law has been examined, to give judgment or advice upon a view of a single clause of it. *Dig. 1. 8. 24*. See *Hob. 171 a*.

In civile est, nisi tota sententia inspecta, de aliqua parte iudicare. It is improper to pass an opinion on any part of a passage without examining the whole. *Hob. 171 a*.

Inclusio unius est exclusio alterius. The inclusion of one is the exclusion of another. *11 Co. 58*; *8 Mont. 312*.

Incolas domicilium facit. Residence creates domicile. *1 Johns. Cas. 383*; *396*. See *Domicile*.

Incommodum non solvit argumentum. An inconvenience does not solve an argument.

Incorporalia bello non adiunguntur. Things incorporeal are not acquired by war. *6 Maule & S. 104*.

Inde data leges ne fortior omnia possent. Laws were made lest the stronger should have unlimited power.

Indefinitum æquipollet universali. The undefined is equivalent to the whole. *1 Ventur. 393*.

Indefinitum æquipollet locum universali. The undefined supplies the place of the whole. *4 Co. 77*.

Independenter se habet asecuratio a viaggio navis. The voyage insured is an independent or distinct thing from the voyage of the ship. *8 Kent 318*, *n.*

Index animi sermo. Speech is the index of the mind. *Broom, Max. 622*.

Inesse potest donatio, modus, conditio sive causa; ut modus est; si conditio; quia causa. In a gift there may be manner, condition, and cause; as (ut), introduction, manner; if (si), a condition; because (quia), a cause. *Dyer 138*.

Infans non multum a furioso distat. An infant does not differ much from a lunatic. *Bract. 1. 8. c.*

2, § 8; Dig. 50. 17. 5. 40; 1 Story, Eq. Jur. §§ 223, 224, 242.

Injuria in jure reprobat. That which is infinite is reprehensible in law. 9 Co. 45.

Iniquissima pax est antequamdam iustissimo bello. The most unjust peace is to be preferred to the justest war. 13 Wend. 57, 806.

Iniquum est alios permittere, alios inhilare mercuriam. It is inequitable to permit some to trade and to prohibit others. 3 Inst. 181.

Iniquum est aliquem rei sui esse iudicem. It is unjust for any one to be judge in his own cause. 13 Co. 15.

Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem. It is against equity for freemen not to have the free disposal of their own property. Co. Litt. 223.

Injuria fit ei cui convicium dictum est, vel de eo factum carmen famosum. An injury is done to him of whom a reproachful thing is said, or concerning whom an infamous song is made. 9 Co. 60; Bart. Max. 179.

Injuria non excusat injuriam. A wrong does not excuse a wrong. Broom, Max. 270, 387, 396; 11 Exch. 832; 13 Q. B. 374; 2 B. & W. 78; Branch, Princ.

Injuria non presumitur. A wrong is not presumed. Co. Litt. 232.

Injuria propria non cadet beneficium facientis. No one shall profit by his own wrong.

Injuria servi domini perit. The master is liable for injury done by his servant. Loft 229.

Injustum est, nisi tota lege inspecta, de una aliqua ejus particula proposita judicare vel respondere. It is unjust to give judgment or advice concerning any particular clause of a law without having examined the whole law. 8 Co. 117 b.

Insanus est qui affectu rationis omnia cum impetu et furore facit. He is insane who, reason being thrown away, does everything with violence and rage. 4 Co. 128.

Insans est finis unius temporis et principium alterius. An instant is the end of one time and the beginning of another. Co. Litt. 185.

Intentio caeca mala. A hidden intention is bad. 2 Bulstr. 179.

Intentio inservire debet legibus, non leges intentioni. Intentions ought to be subservient to the law, not the law to intentions. Co. Litt. 314.

Intentio mea importat nomen operi meo. My intent gives a name to my act. Hob. 123.

Inter alios res gestas alii non posse prejudicium facere saepe constitutum est. It has been often settled that things which took place between other parties cannot prejudice. Code 7. 60. 1. 2.

Interdum venit ut exceptio quae prima facie justa videtur, tamen inique noceat. It sometimes happens that a plea which seems prima facie just, nevertheless is injurious and unequal. Inst. 4. 14; 4 Id. 1. 2.

Interest reipublicae ne maleficia remaneant impunita. It concerns the commonwealth that crimes do not remain unpunished. Jenk. Cent. 39, 31.

Interest reipublicae ne sua quis male utatur. It concerns the commonwealth that no one misuse his property. 6 Co. 36.

Interest reipublicae quod homines conserventur. It concerns the commonwealth that men be preserved. 12 Co. 62.

Interest reipublicae res judicatae non rescindi. It concerns the commonwealth that things adjudged be not rescinded. See RES JUDICATA.

Interest reipublicae suprema hominum testamentaria rata haberi. It concerns the commonwealth that men's last wills be sustained. Co. Litt. 236.

Interest reipublicae ut carceres sint in tuto. It concerns the commonwealth that prisons be secure. 2 Inst. 557.

Interest reipublicae ut pax in regno conservetur, et quaecunque paci adversaria sit, declinetur. It benefits the state to preserve peace in the kingdom, and prudently to decline whatever is adverse to it. 2 Inst. 158.

Interest reipublicae ut quilibet re sua bene utatur. It concerns the commonwealth that every one use his property properly. 6 Co. 36.

Interest reipublicae ut sit finis litium. It concerns the commonwealth that there be a limit to litigation. Broom, Max. 331, 343, 803 n.; Co. Litt. 303; 7 Mass. 432; 16 Gray 27; 99 Mass. 203; 88 Pa. 593; 61 N. C. 73; 59 Fed. Rep. 868; 49 La. Ann. 77.

Interpretatio concordat ut res legibus est optime interpretandi modus. To interpret according to civil laws so that they harmonize is the best mode of construction. 8 Co. 169.

Interpretatio fienda est ut res magis valeat quam pereat. Such a construction is to be made that the subject may have an effect rather than none. Broom, Max. 543; Jenk. Cent. 199; 78 Pa. 219. See CONSTRUCTION; INTERPRETATION.

Interpretatio talis in ambiguis semper fienda est ut evitentur inconveniens et absurdum. In ambiguity, that which is convenient and absurd may be avoided. 4 Inst. 323.

Interruptio multiplex non tollit prescriptionem semel obtentam. Repeated interruptions do not defeat a prescription once obtained. 2 Inst. 654.

Intestatus decessit, qui aut omnino testamentum non fecit aut non jure fecit, aut id quod fecerat ruptum irritumque factum est, aut tamen ex eo heres exstitit. He dies intestate who either has made no will at all or has not made it legally, or whose will which he had made has been annulled or become ineffectual, or to whom there is no living heir. Inst. 3. 1. 2; Dig. 28. 1. 64.

Inutilis labor, et sine fructu non est effectus legis. Useless labor and without fruit is not the effect of law. Co. Litt. 127; Wing, Max. 38.

Inveniensi libellum famosum et non corruptum puniatur. He who finds a libel and does not destroy it is punished.

Inuito beneficium non datur. No one is obliged to accept a benefit against his consent. Dig. 50. 17. 60; Broom, Max. 699 n. (But if he does not dissent he will, in many cases, be considered as assenting. See ASSENT.)

Inae leges cupiunt ut jure regantur. The laws themselves desire that they should be governed by right. Co. Litt. 174 b, quoted from Cato; 2 Co. 26 b.

Ira furor brevis est. Anger is a short insanity. 4 Inst. 386, 385.

Ita lex scripta est. The law is so written. 26 Barb. 374, 380; 18 Pa. 306. See 22 Pick. 389.

Ita semper fiat relatio ut valeat dispositio. Let the relation be so made that the disposition may stand. 6 Co. 76.

Iter est jus eundi, ambulandi hominis; non etiam jumentum agendi vel vehiculum. A way is the right of going or walking, and does not include the right of driving a beast of burden or a carriage. Co. Litt. 56 a; Inst. 2. 3. pr.; 1 Mack. Civ. Law 543, § 314.

Judex equitatem semper spectare debet. A judge ought always to regard equity. Jenk. Cent. 45.

Judex ante oculos equitatem semper habere debet. A judge ought always to have equity before his eyes. Jenk. Cent. 58.

Judex bonus nihil ex arbitrio suo faciat, nec propositione domantis voluntatis, sed juxta leges et jura pronunciet. A good judge should do nothing from his own arbitrary will, or from the dictates of his private wishes; but he should pronounce according to law and justice. 7 Co. 27 a.

Judex damnatur cum nocens absolvitur. The judge is condemned when the guilty are acquitted.

Judex debet judicare secundum allegata et probata. The judge ought to decide according to the allegations and the proofs.

Judex est lex loquens. The judge is the speaking law. 7 Co. 4 a.

Judex habere debet duos sales, solum sapientiae, ne sit insipidus, et alium conscientiae, ne sit diabolus. A judge should have two salts: The salt of wisdom, lest he be foolish; and the salt of conscience, lest he be devilish. 3 Inst. 147; Bart. Max. 189.

Judex non potest esse testis in propria causa. A judge cannot be a witness in his own cause. 4 Inst. 279. See JUDGE.

Judex non potest injuriam sibi datam punire. A judge cannot punish a wrong done to himself. 12 Co. 114.

Judex non reddit plus quam quod petens ipse requirit. The judge does not give more than the plaintiff demands. 2 Inst. 286, 285 a, 58.

Judicandum est legibus non exemplis. We are to judge by the laws, not by examples. 4 Co. 33 b; 4 Bla. Com. 405; 10 Johns. 513.

Judices non tenentur exprimere causam sententiae suae. Judges are not bound to explain the reason of their judgments. Jenk. Cent. 73.

Judici officium suum excedenti non paretur. To a judge who exceeds his office (or jurisdiction) no obedience is due. Jenk. Cent. 159.

Judici salis poena est quod Deum habet ultorem. It is punishment enough for a judge that he is responsible to God. 1 Leon. 280.

Judicia in curia regis non adhiherentur, sed stent in robore suo quousque per errorem aut attinunt adhiherentur. Judgments in the king's court are not to be annihilated, but to remain in force until annulled by error or attainder. 2 Inst. 539.

Judicia in deliberationibus jura naturae accipiunt, in accelerato processu nunquam. Judgments frequently become matured by deliberation, never by hurried process. 8 Inst. 210.

Judicia posteriora sunt in lege fortiora. The latter decisions are stronger. 6 Co. 97.

Judicia sunt tanquam fides dicta, et pro veritate accipiuntur. Judgments are, as it were, the dicta or sayings of the law, and are received as truth. 2 Inst. 537.

Judicia posterioribus fides est adhibenda. Faith or credit is to be given to the latter decisions. 13 Co. 14.

Judicis est in pronuntiando sequi regulam, exceptione non probata. The judge in his decision ought to follow the rule, when the exception is not proved.

Judicis est judicare secundum allegata et probata. A judge ought to decide according to the allegations and proofs. Dyer 12 a; Halke, Max. 73.

Judicis est jus dicere non dare. It is the duty of a judge to declare the law, not to enact it. Loft 62.

Judicis officium est opus diei in die suo perficere. It is the duty of a judge to finish the work of each day within that day. Dyer 12.

Judicis officium est ut res ita tempora rerum quare; quosito tempore tutus eris. It is the duty of a judge to inquire the times of things, as well as into things; by inquiring into the time you will be safe. Co. Litt. 17.

Judicium a non suo iudice datum nullius est momenti. A judgment given by an improper judge is of no moment. 10 Co. 76 b; 9 Q. B. 1014; 13 Id. 143; 14 M. & W. 124; 11 Cl. & F. 610; Broom, Max. 93.

Judicium est quasi juris dictum. Judgment is as it were a saying of the law. Co. Litt. 163.

Judicium non debet esse illusorium, suum effectum habere debet. A judgment ought not to be illusory, it ought to have its proper effect. 2 Inst. 341.

Judicium redditur in invitum, in presumptione legis. In presumption of law, a judgment is given against inclination. Co. Litt. 148 b, 814 b.

Judicium semper pro veritate accipitur. A judgment it always taken for truth. 2 Inst. 380; 17 Mass. 237.

Juncta juvant. Things joined have effect. 11 East 250.

Jura ecclesiastica limitata sunt infra limites separatos. Ecclesiastical laws are limited within separate bounds. 3 Bulstr. 53.

Jura eodem modo destituntur quo constituntur. Laws are abrogated or repealed by the same means by which they are made. Broom, Max. 578.

Jura naturae sunt immutabilia. The laws of nature are unchangeable. Branch, Princ.; Oliver, Forms 56.

Jura publica antefenda privata. Public rights are to be preferred to private. Co. Litt. 130.

Jura publica ex privato promiscue decidi non debent. Public rights ought not to be decided promiscuously with private. Co. Litt. 181 b.

Jura regis specialia sunt principis per generalia verba. The special rights of the king are not granted by general words. Jenk. Cent. 108.

Jura sanguinis nullo jure civili dirimi possunt. The right of blood and kindred cannot be destroyed

by any civil law. Dig. 50. 17. 9; Bacon, Max. Reg. 11; Broom, Max. 533; 14 Allen 562.

Juramentum est indivisibile, et non est attendendum in parte verum et in parte falsum. An oath is indivisible; it is not to be held partly true and partly false. 4 Inst. 374.

Jurare est Deum in testum vocare, et est actus divini cultus. To swear is to call God to witness, and is an act of religion. 3 Inst. 165. See Bart. Max. 232; 1 Benth. Ev. 570, 371, note.

Juratur creditur in iudicio. He who makes oath is to be believed in judgment. 8 Inst. 79.

Juratores debent esse vicini, sufficientes et minus suspecti. Jurors ought to be neighbors, of sufficient estate, and free from suspicion. Jenk. Cent. 141.

Juratores sunt iudices facti. Jurors are the judges of the facts. Jenk. Cent. 68.

Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletariem. According to the laws of nature, it is just that no one should be enriched with detriment and injury to another (i. e. at another's expense). Dig. 50. 17. 200.

Juri non est consensum quod aliquis accesserit in curia regis convinctur antequam aliquis de facto fuerit attinctus. It is not consonant to justice that any accessory should be convicted in the king's court before any one has been attained of the fact. 5 Inst. 183.

Juris effectus in executione consistit. The effect of a law consists in the execution. Co. Litt. 286 b.

Juris ignorantia est, cum jus nostrum ignoramus. It is ignorance of the law when we do not know our own rights. 3 Pick. 130.

Juris precepta sunt, iura, honeste vivere, alterum non ledere, suum cuique tribuere. These are the precepts of the law, to live honorably, to hurt nobody, to render to every one his due. Inst. 1. 1. 3; Sharw. Bla. Com. Intro. 40.

Juris quidem ignorantiam cuique nocere, facti verum ignorantiam non nocere. Ignorance of fact prejudices no one, ignorance of law does. Dig. 22. 6. 9.

Jurisdictione est potestas de publico introducta, eum necessitate juris dicendi. Jurisdiction is a power introduced for the public good, on account of the necessity of dispensing justice. 10 Co. 73 a.

Jurisprudentia est divina scientia, humanarum rerum notitia; justae atque injustae scientia. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust. Inst. 1. 1. 10; 2 Inst. 1. 1. 1; Bract. 3; 8 Johns. 290, 295.

Jurisprudentia legis communis Angliae est scientia socialis et copiosa. The jurisprudence of the common law of England is a science sociable and copious. 7 Co. 20 a.

Jus accrescenti inter mercatores locum non habet, pro beneficio commercii. The right of survivorship does not exist among merchants, for the benefit of commerce. Co. Litt. 182; Broom, Max. 453; Lindl. Part. 4th ed. 664.

Jus accrescenti praefertur oneribus. The right of survivorship is preferred to incumbrances. Co. Litt. 183.

Jus accrescenti praefertur ultimae voluntati. The right of survivorship is preferred to a last will. Co. Litt. 185 b.

Jus civile est quod sibi populus constituit. The civil law is what a people establishes for itself. Inst. 1. 1. 1; 1 Johns. 484, 486.

Jus descendit, et non terra. A right descends, not the land. Co. Litt. 345.

Jus dicere, et non jus dare. To declare the law, not to make it. 7 Term 666; Arg. 10 Johns. 566; 7 Exch. 543; 2 Eden 99; 4 C. B. 560, 561; Broom, Max. 140.

Jus est ars boni et aequi. Law is the science of what is good and just. Dig. 1. 1. 1. 1.

Jus est norma recti; et quicquid est contra normam recti est injuria. The law is the rule of right; and whatever is contrary to the rule of right is an injury. 3 Bulstr. 818.

Jus est frater nunguam cohabitans. Right and fraud never live together. 10 Co. 45.

Jus ex injuria non oritur. A right cannot arise from a wrong. 4 Bingh. 639; Broom, Max. 734 n.

Jus in re inherit omni usui usufructuari. A right in the thing cleaves to the person of the usufructuary.

Jus naturale est quod apud homines eandem habet potentiam. Natural right is that which has the same force among all mankind. 7 Co. 12.

Jus non habenti tute non paretur. It is safe not to obey him who has no right. Hob. 146.

Jus publicum privatorum pactis mutari non potest. A public right cannot be changed by agreement of private parties. Dig. 2. 14. 38; cited arg. in 3 C. & F. 621; 4 Id. 241; 68 Conn. 533; 37 Atl. Rep. 420.

Jus quo universitates utuntur est idem quod habet privatus. The law which governs corporations is the same as that which governs individuals. 16 Mass. 44.

Jus respicit equitatem. Law regards equity. Co. Litt. 24 b; Broom, Max. 151; 17 Q. B. 292.

Jus superveniens auctori accrescit successoris. A right growing to a possessor accrues to a successor. Halke, Max. 76.

Jus vendit quod visum approbavit. The law dispenses what law has approved. Ellesmere, Postn. 85.

Jusjurandi forma verbis debet, re convenit; hinc enim sensum habere differt, ut Deus invocetur. The form of taking an oath differs in language, agrees in meaning; for it ought to be taken in this sense, that the Deity is invoked. Grotius, b. 2. c. 13, s. 10.

Jusjurandum inter alios factum nec nocere nec prodesse debet. An oath made between third parties operates neither to hurt nor profit. 4 Inst. 279.

Justitia debet esse libera, quia nihil iniquius venali justitia; plena, quia justitia non debet claudicare; et celeris, quia dilatio est quodammodo negatio. Justice ought to be unbought, because nothing is more hateful than venal justice; full, for justice ought not to halt; and quick, for delay is a kind of denial. 2 Inst. 56.

Justitia est constantis et perpetuae voluntas jus suum cuique tribuendi. Justice is a steady and un-

ceasing disposition to render to every man his due. Inst. 11, pr.; Dig. 1, 1, 10.

Justitia est virtus excellens et Altissimi complacens. Justice is an excellent virtue and pleasing to the Most High. 4 Inst. 28.

Justitia firmat iudicium. By justice the throne is established. 8 Inst. 140.

Justitia nemini neganda est. Justice is to be denied to none. Jenk. Cent. 178.

Justitia non est neganda, non differenda. Justice is not to be denied nor delayed. Jenk. Cent. 76.

Justitia non vit patrem nec matrem, solum veritatem spectat iustitia. Justice knows neither father nor mother; justice looks to truth alone. 1 Bulstr. 190.

Iustum non est aliquem anilenatum mortuum facere bastardum, qui pro tota vita sua pro legitimo habetur. It is not just to make a bastard after his death one elder born who his life has been accounted legitimate. 8 Co. 101.

King can do no wrong. See KING CAN DO NO WRONG.

L'obligation sans cause, ou sur une fausse cause, ou sur cause illicite, ne peut avoir aucun effet. An obligation without consideration, or upon a false consideration (which fails), or upon unlawful consideration, cannot have any effect. Code 3, 3, 4; Chitty, Contr. 11th, Am. ed. 25, note.

L'ou le ley done chose, le ceo donne remedie a venir a ceo. Where the law gives a right, it gives a remedy to recover. 2 Rolle 17.

La conscience est la plus changeante des regles. Conscience is the most changeable of rules.

La ley favour la vie d'un home. The law favors a man's life. Year B. Hen. VI. 51.

La ley favour l'hereditaire d'un home. The law favors a man's inheritance. Year B. Hen. VI. 51.

La ley voit plus tost suffer un miechkeie que un inconvenience. The law will sooner suffer a mischief than an inconvenience. Littleton § 231.

Lata culpa dolo æquiperatur. Gross negligence is equal to fraud.

Law construeh every act to be lawful when it standeth indifferent whether it be lawful or not. Wing. Max. 194.

Law construeh things according to common possibility or intention. Wing. Max. 189.

Law construeh things to the best. Wing. Max. 198.

Law construeh things with equity and moderation. Wing. Max. 183; Finch, Law 74.

Law disfavoreh impossibilities. Wing. Max. 165.

Law disfavoreh improbabilities. Wing. Max. 161.

Law favoreh charity. Wing. Max. 185.

Law favoreh common right. Wing. Max. 144.

Law favoreh diligence, and therefore hateth folly and negligence. Wing. Max. 172; Finch, Law, b. 1, c. 3, n. 70.

Law favoreh honor and order. Wing. Max. 199.

Law favoreh justice and right. Wing. Max. 141.

Law favoreh life, liberty, and dowry. 4 Bacon, Works 945.

Law favoreh mutual recompense. Wing. Max. 100; Finch, Law, b. 1, c. 3, n. 42.

Law favoreh possession where the right is equal. Wing. Max. 98; Finch, Law, b. 1, c. 3, n. 36.

Law favoreh private commerce. Wing. Max. 198.

Law favoreh public quiet. Wing. Max. 200; Finch, Law, b. 1, c. 3, n. 54.

Law favoreh speeding of men's causes. Wing. Max. 176.

Law favoreh things for the commonwealth. Wing. Max. 197; Finch, Law, b. 1, c. 3, n. 33.

Law favoreh truth, faith, and certainty. Wing. Max. 164.

Law hateth delays. Wing. Max. 176; Finch, Law, b. 1, c. 3, n. 71.

Law hateth new inventions and innovations. Wing. Max. 204.

Law hateth wrong. Wing. Max. 146; Finch, Law, b. 1, c. 3, n. 62.

Law of itself prejudiceth no man. Wing. Max. 148; Finch, Law, b. 1, c. 3, n. 63.

Law respecteth matter of substance more than matter of circumstance. Wing. Max. 101; Finch, Law, b. 1, c. 3, n. 39.

Law respecteth possibility of things. Wing. Max. 140; Finch, Law, b. 1, c. 3, n. 40.

Law respecteth the bonds of nature. Wing. Max. 78; Finch, Law, b. 1, c. 3, n. 3.

Lawful things are well nized, unless a form of law oppose. Bacon, Max. Reg. 23. (The law giveth that favor to lawful acts, that although they be executed by several authorities, yet the whole act is good. Ibid.)

Le contrat fait la loi. The contract makes the law.

Le ley de Dieu et ley de terre sont tout un, et l'un et l'autre prefferre et favour le common et publique bien d'i terre. The law of God and the law of the land are all one; and both preserve and favor the common and public good of the land. Keilw. 191.

Le ley est le plus haut inheritance que le roy ad, car par le ley, il mesme et tous ses sujets sont ruez, et si le ley ne fut, nul roy ne nul inheritance serra. The law is the highest inheritance that the king possesses; for by the law both he and all his subjects are ruled, and if there were no law, there would be neither king nor inheritance.

Le salut du peuple est la supreme loi. The safety of the people is the highest law. Montes. Esp. Lois 1. xxvii. ch. 23; Broom, Max. 2, n.

Legatos violare contra jus gentium est. It is contrary to the law of nations to do violence to ambassadors. Branch, Princ.

Legatum morte testatoris tantum confirmatur, sicut donatio inter vivos traditione sola. A legacy is confirmed by the death of the testator, in the same manner as a gift from a living person is by delivery alone. 145.

Legatus regis vice fungitur a quo destinatur, et honorandus est sicut ille cuius vicem gerit. An ambassador fills the place of the king by whom he is sent, and is to be honored as he is whose place he fills. 12 Co. 17.

Legem tamen contractus dat. The contract makes the law. 22 Wend. 215, 223.

Legem terra amittentes perpetuum infamie no-

tam inde merito incurunt. Those who do not preserve the law of the land, then justly incur the ineffaceable brand of infamy. 3 Inst. 221.

Leges Anglie sunt tripartite: jus commune, consuetudines, ac decreta comitorum. The laws of England are threefold: common law, customs, and decrees of parliament.

Leges ferendi et rescindi consuetudo est periculosissima. The custom of making and unmaking laws is a most dangerous one. 4 Co. pref.

Leges humane nascuntur, vivunt, et moriuntur. Human laws are born, live, and die. 7 Co. 25; 2 A. 674; 11 Co. B. 787; 1 Bla. Com. 89.

Leges humane sunt et sunt et immutabiles; humani vero jura condito semper in infinitum decurrit, et nihil est in eo quod perpetuo stare possit. The laws of nature are most perfect and immutable; but the condition of human law is an unending succession, and there is nothing in it which can continue perpetually. Human laws are born, live, and die. 7 Co. 25.

Leges non verbis sed rebus sunt impositæ. Laws are imposed on things, not words. 10 Co. 101.

Leges posteriores priores contrarias abrogant. Subsequent laws repeal prior conflicting ones. Broom, Max. 27, 29; 2 Rolle 410; 11 Co. 628, 630; 12 Allen 434; 30 Nev. 214.

Leges sunt ligent latorem. Laws should bind the proposers of them. Fleta, b. 1, c. 17, § 11.

Leges vigilantibus, non dormientibus subveniunt. The laws aid the vigilant, not the negligent. 5 Johns. Ch. 122, 145; 16 How. Pr. 142, 144.

Legibus sumptis deservimus, lege natura utendum est. When laws imposed by the state fail, we must act by the law of nature. 2 Rolle 296.

Legis constructio non facit injuriam. The construction of laws does not make injury. Co. Litt. 183.

Leges ferendi et rescindi consuetudo periculosissima est. The custom of fixing and refixing (making and annulling) laws is most dangerous.

Legis interpretatio legis vim obtinet. The construction of law obtains the force of law. Branch, Princ.

Legis minister non tenetur, in executione officii sui, fugere aut recedere. The minister of the law is not bound, in the execution of his office, either to fly or retreat. 6 Co. 68.

Legislaturam est vox, res et non verba legum imponere. The voice of legislators is a living voice, to impose laws on things and not on words. 10 Co. 101; Bart. Max. 211.

Legitime imperanti parere necesse est. One who commands lawfully must be obeyed. Jenk. Cent. 120.

Les actions naissent de la loi, et non la loi des actions. Fictions arise from the law, and not law from fictions.

Les lois ne se chargent de punir que les actions exterieures. Laws do not undertake to punish other than outward actions. Montes. Esp. Lois, b. 12, c. 13; Broom, Max. 811.

Lex æquitate gaudet; appetit perfectum; est norma recti. The law delights in equity: it covets perfection; it is a rule of right. Jenk. Cent. 86.

Lex aliquid sequitur æquitatem. The law sometimes follows equity. 3 Wils. 119.

Lex Anglie est lex misericordie. The law of England is a law of mercy. 2 Inst. 619.

Lex Anglie non patitur absurdum. The law of England does not suffer an absurdity. 9 Co. 23.

Lex Anglie nunquam sine parlamento mutari potest. The law of England cannot be changed but by parliament. 2 Inst. 619.

Lex beneficii rei consilii remedium præstat. A beneficial law affords a remedy in a similar case. 2 Inst. 689.

Lex citius tolerare vult privatum damnum quam publicum malum. The law would rather tolerate a private loss than a public evil. Co. Litt. 152 b.

Lex contra id quod presumit probationem non recipit. The law admits no proof against that which it presumes. Lofft 573.

Lex de futuro, iudex de præterito. The law provides for the future; the judge for the past.

Lex defecere non potest in justitia exhibenda. The law ought not to fail in dispensing justice. Co. Litt. 197.

Lex dilaciones semper exhorret. The law always abhors delay. 2 Inst. 240.

Lex est æternæ. The law is from everlasting. Branch, Princ.

Lex est dictamen rationis. Law is the dictate of reason. Jenk. Cent. 117.

Lex est norma recti. Law is a rule of right.

Lex est ratio summa, et contra quæ sunt utilia et necessaria, et contraria prohibet. Law is the perfection of reason, which commands what is useful and necessary, and forbids the contrary. Co. Litt. 319 b.

Lex est sanctio sancta, jubens honesta, et prohibens contraria. Law is a sacred sanction, commanding what is right and prohibiting the contrary. 2 Inst. 687; 1 Sharw. Bla. Com. 44, n.

Lex est tutissima causa; sub clypeo legis nemo decipitur. Law is the safest helmet; under the shield of the law no one is deceived. 3 Inst. 50.

Lex fævet doti. The law favors dower. 3 & 4 Will. IV. c. 105.

Lex fingit ubi subsistit æquitas. Law creates a fiction where equity exists. Branch, Princ.

Lex intendit vicium vicini facta scire. The law presumes that one neighbor knows the actions of another. Co. Litt. 78 b.

Lex necessitate est lex temporis, i. e. instantis. The law of necessity is the law of time, that is, time present. Hob. 159.

Lex neminem cogit ad vana seu inutilia peragenda. The law forces no one to do vain or useless things. Wing. Max. 600; Broom, Max. 252; 3 Sharw. Bla. Com. 144; 2 Bingh. n. c. 121; 13 East 420; 15 Pick. 190; 7 Cush. 43, 383; 14 Gray 78; 7 Fa. 206; 3 Johns. 586. See IMPOSSIBILITY.

Lex neminem cogit ostendere quod nescire præ-

sumitur. The law forces no one to make known what he is presumed not to know. Lofft 560.

Lex nemini facit injuriam. The law does wrong to no one. Branch, Princ.; 66 Pa. 157.

Lex nemini operatur iniquum, nemini facit injuriam. The law never works an injury, or does a wrong. Jenk. Cent. 22.

Lex non facit frustra, nec aliquid frustra. The law does nothing and commands nothing in vain. Broom, Max. 262; 3 Bulstr. 279; Jenk. Cent. 17.

Lex non cogit ad impossibilia. The law requires nothing impossible. Broom, Max. 242; 3 Co. Litt. 231 b.; Hob. 90; 1 Bouv. Inst. n. 851; 17 N. H. 411; 55 Id. 911; 138 Mo. 297.

Lex non curat de minimis. The law does not regard small matters. Hob. 88.

Lex non deficit in justitia exhibenda. The law does not fail in showing justice. Jenk. Cent. 81.

Lex non ex parte definit, sed arbitrio boni viri permittit. The law does not define exactly, but trusts in the judgment of a good man. 9 Mass. 475.

Lex non favet voliti delictorum. The law favors not the wishes of the dainty. 9 Co. 68 a.; Broom, Max. 379.

Lex non intendit aliquid impossibile. The law intends not anything impossible. 12 Co. 89 a.

Lex non patitur fractiones et divisiones statutorum. The law suffers no fractions and divisions of estates. 1 Co. 87; Branch, Princ.

Lex non præscript inutilis, quia inutilis labor studii. The law commands not useless things, because useless labor is foolish. Co. Litt. 197; 5 Co. 89 a.; 112 Mass. 400.

Lex non requirit verificari quod apparet curia. The law does not require that to be proved which is apparent to the court. 9 Co. 54. See JUDICIAL NOTICE.

Lex plus laudatur quando ratione probatur. The law is the more praised when it is consonant with reason. 3 Term 146; 7 id. 252; 7 A. & E. 557; Broom, Max. 150.

Lex posterior derogat priori. A prior statute shall give place to a later. Mack. Civ. Law, 5; Broom, Max. 27, 28.

Lex prospect, non respicit. The law looks forward, not backward. Jenk. Cent. 234.

Lex punit mendaciam. The law punishes falsehood. 1 Jenk. Cent. 12.

Lex rejicit superflua, pugnantia, incongrua. The law rejects superfluous, contradictory, and incongruous things. Jenk. Cent. 133, 140, 176.

Lex reprobat moram. The law disapproves of delay.

Lex respicit æquitatem. Law regards equity. See 14 Q. B. 504, 511, 512; Broom, Max. 151.

Lex semper dat remedium. The law will always give a remedy. Bac. Abr. Actions in general (B); Branch, Princ.; Broom, Max. 192; 12 A. & E. 206; 7 Q. B. 451; 5 Rawl. 10.

Lex semper intendit quod convenit rationi. The law always intends what is agreeable to reason. Co. Litt. 78.

Lex spectat naturæ ordinem. The law regards the order of nature. Co. Litt. 197; Broom, Max. 252.

Lex succurrit ignorantia. The law succurs the ignorant. Jenk. Cent. 15.

Lex succurrit minoribus. The law assists minors. Jenk. Cent. 57.

Lex uno ore omnes alloquitur. The law speaks to all with one mouth. 2 Inst. 184.

Lex vigilans non dormientibus, subvenit. Law assists the wakeful, not the sleeping. 1 Story, Contr. § 523.

Libertas pecunia non liberat offerentem. Money being restored does not set free the party offering. Co. Litt. 207.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi quod de jure aut i prohibetur. Liberty is the natural power of doing whatever one pleases, except that which is restrained by law or force. Co. Litt. 116; Sharw. Bla. Com. Intro. 6, n.

Libertas inestimabilis res est. Liberty is an inestimable good. Dig. 50, 17, 109; Fleta, lib. 2, c. 51, § 13.

Libertas non recipit estimationem. Freedom does not admit of valuation. Bracton 14.

Libertas omnibus rebus favorabilior est. Liberty is more favored than all things. Dig. 50, 17, 122.

Libertas corporis non recipit. The body of a freeman does not admit of valuation. Dig. 9, 3, 7.

Libertum est cuique apud se explorare an expediat sibi consilium. Every one is free to ascertain for himself whether recommendation is advantageous to his interests. 4 Johns. 181, 184.

Librorum appellatione continentur omnia volumina, sive in charta, sive in membrana sint, sive in quavis alia materia. Under the name of books are contained all volumes, whether upon paper, or parchment, or any other material. Dig. 32, 52, pr. et per tot.

Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio procedens que sortiatur effectum interveniente novo actu. Although the grant of a future interest be inoperative, yet a declaration precedent may be made which may take effect, provided a new act intervene. Bacon, Max. Reg. 14; Broom, Max. 498.

Licita bene miscetur, formula nisi juris obstat. Lawful acts may well be fused into one, unless some form of law forbid. (E.g. Two having a right to convey, each a moiety, may unite and convey the whole.) Bacon, Max. 94; Crabb, R. P. 173.

Ligentia est quasi legis essentia; est vinculum fidei. Allegiance is, as it were, the essence of the law; it is the bond of faith. Co. Litt. 129.

Ligentia naturalis nullis clausuris coercetur, nullis metis refrænatur, nullis finibus premitur. Natural allegiance is not restrained by no barriers, curbed by no bounds, compressed by no limits. 7 Co. 10.

Ligna et lapides sub armorum appellatione non continentur. Sticks and stones are not contained under the name of arms. Bract. 144 b.

Linea recta est, index sui et obliqui; lex est linea recti. A right line is an index of itself and of an oblique; law is a line of right. Co. Litt. 158.

Linea recta semper præfertur transversali. The right line is always preferred to the collateral. Co.

Litt. 10; Flota, lib. 6, c. 1; 1 Steph. Com., 4th ed. 406; Broom, Max. 49.

Littere patentes regis non erant vacuae. Letters patent of the king shall not be void. 1 Bulstr. 6.

Litis nomen omnem actionem significat, sine rem, sine in personam sit. The word "lis" (i. e. a law-suit) signifies every action, whether in rem or in personam. Co. Litt. 292.

Litus est quousque mare fluctus a mari pervenit. The shore is where the highest wave from the sea has reached. Dig. 50, 16, 96; Ang. Tide-Waters 67.

Locus contractus regit actum. The place of the contract governs the act. 2 Kent 438; L. R. 11; 9 Q. B. 119; 9 U. S. 405. See Lex Loc.

Locus pro solutione redditus aut pecunie secundum conditionem dimissionis aut obligationis est stricte observandus. The place for the payment of rent or money is to be strictly observed according to the condition of the lease or obligation. 4 Co. 78.

Longa patientia trahitur ad consensum. Long suffering is construed as consent. Flota, lib. 4, c. 28, § 4.

Longa possessio est pacis fides. Long possession is the law of peace. Co. Litt. 6.

Longa possessio parit jus possidendi, et tollit actionem vero domini. Long possession produces the right of possession, and takes away from the true owner his action. Co. Litt. 110; see 115 U. S. 338; ADVERSE POSSESSION.

Longum tempus, et longus usus qui excedit memoriam hominum, sufficit pro jure. Long time and long use beyond the memory of man suffice for right. Co. Litt. 115.

Loquendum ut vulgus, sentiendum ut docti. We should speak as the common people, we should think as the learned. 7 Co. 11.

Lubricum linax non facit trahendum est in pecum. The slipperiness of the tongue (i. e. its liability to err) ought not lightly to be subjected to punishment. Cro. Car. 117.

Lucrum facere ex pupilli tutela tutor non debet. A guardian ought not to make money out of the guardianship of his ward. 1 Johns. Ch. 527.

Lunaticus, qui pavidus est lucide intervallo. He is a lunatic who enjoys lucid intervals. 1 Story, Cont. § 78.

Magis dignum trahit ad se minus dignum. The more worthy draws to itself the less worthy. Year B. 30 Hen. VI. 2, arg.

Magister rerum verus; magistra rerum experientia. Use is the master of things; experience is the mistress of things. Co. Litt. 69, 229; Wing, Max. 752.

Magna culpa dolus est. Gross negligence is equivalent to fraud. Dig. 50, 16, 226; 2 Spear 256; 1 Bouv. Inst. n. 646.

Magna negligentia culpa est, magna culpa dolus est. Gross negligence is a fault, gross fault is a fraud. Dig. 50, 16, 226. (Culpa is an intermediate degree of negligence between negligentia, or lack of energetic care, and dolus, or fraud, seeming to approach nearly to our "negligence" in meaning.) See Whart. Negl.

Mathematicum est homicidium inchoatum. Mayhem is inchoate homicide. 3 Inst. 118.

Mathematicum est inter crimina majora minimum, et inter minora maximum. Mayhem is the least of great crimes, and the greatest of small. Co. Litt. 157.

Major continet in se minus. The greater includes the less. 19 Vin. Ab. 379.

Major hereditas venit unicuique nostrum a jure et legibus quam a parentibus. A greater inheritance comes to every one of us from right and the laws than from parents. 2 Inst. 55.

Major numerus in se continet minorem. The greater number contains in itself the less. Bracton 16.

Major pena affectus quam legibus statuta est, non est infamia. One affected with a greater punishment than is provided by law is not infamous. 4 Inst. 66.

Majori summa minor testis. The greater is included in the greater sum. 2 Kent 618; Story, Ag. § 172.

Major dignum trahit ad se minus dignum. The more worthy or the greater draws to it the less worthy or the lesser. 5 Vin. Ab. 584, 586; Co. Litt. 43, 385 b; 2 Inst. 307; Finch, Law 22; Broom, Max. 176.

Major est delictum seipsum occidere quam alium. It is a greater crime to kill one's self than another. Bart. Max. 108. See Suicide.

Mala grammatica non vitia charitatis; sed in expositione instrumentorum mala grammatica quoad fieri possit evitanda est. Bad grammar does not vitiate a deed, but in the construction of instruments, bad grammar, which can be done, is to be avoided. 6 Co. 39; 9 id. 48; Vin. Ab. Grammar (A); Loft 441; Broom, Max. 686.

Maledicta expositio quo corruptum textum. It is a cursed construction which corrupts the text. 2 Co. 24; 4 id. 35; 11 id. 84; Wing, Max. 26; Broom, Max. 282.

Maleficia non debent remanere impunita, et impunitus continuum affectum tribuit delinquenti. Evil deeds ought not to remain unpunished, and impunity affords continual incitement to the delinquent. 4 Co. 45.

Maleficia proposita distinguuntur. Evil deeds are distinguished from evil purposes. Jenk. Cent. 200.

Malitia est acida, est mali animi affectus. Malice is sour, it is the quality of a bad mind. 2 Bulstr. 49.

Malitia supplet etatem. Malice supplies age. Dyer 104; 1 Bla. Com. 464; 4 id. 22, 33, 312; Broom, Max. 316. See MALICE.

Malum hominum est obviandum. The malicious plans of men must be avoided. 4 Co. 15.

Malum non habet efficientem, sed deficientem causam. Evil has not an efficient, but a deficient, cause. 3 Inst. Primum.

Malum non presumitur. Evil is not presumed. 4 Co. 72; Branch, Princ.

Malum quo communis eo pejus. The more common the evil, the worse. Branch, Princ.

Malus usus est obolendus. An evil custom ought

to be abolished. Co. Litt. 141; Broom, Max. 921; Litt. § 212; 5 Q. B. 701; 12 id. 845; 3 M. & K. 449; 71 Pa. 69.

Mandata licita strictam recipiunt interpretationem, sed illicita latam et extensam. Lawful commands receive a strict interpretation, but unlawful, a wide or broad construction. Bacon, Max. Reg. 16.

Mandataris terminis sibi positis transgredi non potest. A mandatary cannot exceed the bounds of his authority. Jenk. Cent. 58.

Mandatum nisi gratuitum nullum est. Unless a mandate is gratuitous, it is not a mandate. Dig. 17, 1, 1, 4; Inst. 3, 27; 1 Bouv. Inst. n. 1070.

Manifesta probatio non indiget. Manifest things require no proof. 7 Co. 40 b.

Mars et femina conjunctio est de jure naturae. The union of male and female is founded on the law of nature. 7 Co. 13 b.

Matrimonia debent esse libera. Marriages ought to be free. Halkers, Max. 96; 2 Kent 102.

Matrimonium subsequens tollit peccatum praecedens. A subsequent marriage cures preceding fault. Bart. Max. 218.

Matter of law ne terra mise en bouche del jurors. Matter of law shall not be put into the mouth of jurors. Jenk. Cent. 180.

Maturiora sunt vota mulierum quam virorum. The wishes of women are of quicker growth than those of men. 8 Co. 71 a; Bract. 86 b.

Maxime ita dicta quia maxime est ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur. A maxim is so called because its dignity is chiefest, and its authority the most cerule, and because universally approved by all. Co. Litt. 11.

Maxime paci sunt contraria vis et injuria. The greatest enemies to peace are force and wrong. Co. Litt. 161.

Maximus erroris populus magister. The people is the greatest master of error. Bacon, Max.

Melior est conditio possidentis. The cause of the possessor is preferable. Dig. 50, 17, 126, 2.

Melior est conditio defensoris. The cause of the defendant is the better. Broom, Max. 715, 719; Dig. 50, 17, 126, 2; Hob. 199; 1 Mass. 66; 8 id. 307; 4 Cush. 405.

Melior est conditio possidentis et rei quam actoris. Better is the condition of the possessor and that of the defendant than that of the plaintiff. Broom, Max. 714, 719; 4 Inst. 180; Vaugh. 55, 60; Hob. 103; 8 Mass. 189.

Melior est conditio possidentis, ubi neuter jus habet. Better is the condition of the possessor where neither of the two has a right. Jenk. Cent. 115.

Melior est justitia vere praeveniens quam severe punita. That justice which justly prevents a crime is better than that which severely punishes it.

Meliorum conditionem suam facere potest minor, deteriorum nequaquam. A minor can improve or make his condition better, but never worse. Co. Litt. 337 b.

Melius est in tempore occurrere quam post causam ulterius remedium quaerere. It is better to meet a thing in time, than to seek a remedy after a wrong has been inflicted. 2 Inst. 399.

Melius est jus deficiens quam jus incertum. Law that is deficient is better than law that is uncertain. Loft 395.

Melius est omnia mala pati quam malo consentire. It is better to suffer every wrong or ill, than to consent to it. 3 Inst. 23.

Melius est recurrere quam malo currere. It is better to recede than to proceed wrongly. 4 Inst. 178.

Mens testatoris in testamentis spectanda est. In wills, the intention of the testator is to be regarded. Jenk. Cent. 277.

Mentiri est contra mentem ire. To lie is to go against the mind. 3 Bulstr. 220.

Mercis appellatio ad res mobiles tantum pertinet. The term merchandise belongs to movable things only. Dig. 50, 16, 66.

Mercis appellatio homines non continet. Under the name of merchandise men are not included. Dig. 50, 16, 20.

Merito beneficium legis amittit, qui legem ipsam subvertit intendit. He justly loses the protection of the law, who attempts to infringe the law. 2 Inst. 253.

Merc est quidquid vendi potest. Merchandise is whatever can be sold. 5 Metc. 367. See MERCHANDISE.

Meum est promittere, non dimittere. It is mine to promise, not to discharge. 2 Rolle 39.

Minatur innocentibus qui parit nocentibus. He threatens the innocent who spares the guilty. 4 Co. 45.

Minima pars corporalis est major qualibet pecuniaria. The smallest bodily punishment is greater than any pecuniary one. 2 Inst. 230.

Minime mutanda sunt quae certam habuerunt interpretationem. Things which have had a certain interpretation are to be altered as little as possible. Co. Litt. 385.

Minimum est nihil proximum. The least is next to nothing. Bacon, Arg. Low's Case of Tenures.

Minor ante tempus agere non potest in casu proprietatis, nec etiam convenire. A minor before majority cannot act in a case of property, nor even agree. 2 Inst. 291.

Minor jurare non potest. A minor cannot make oath. Co. Litt. 172 b. An infant cannot be sworn on a jury. Littleton 280.

Minor minorem custodire non debet; alios enim praesumitur male regere qui seipsum regere necit. A minor ought not be guardian of a minor, for he is presumed to govern others which he does not know how to govern himself. Co. Litt. 88.

Minor non tenetur respondere durante minori aetate; nisi in causa dotis, propter favorem. A minor is not bound to answer during his minority, except as a matter of favor in a case of dower. 8 Bulstr. 143.

Minor, qui infra aetatem 12 annorum fuerit, ulagari non potest nec extra legem poni, quia aetate etatem, non est sub lege aliqua, nec in de-

cenna. A minor who is under twelve years of age cannot be outlawed, nor placed without the laws, because before such age he is not under any laws, nor in a decenary. Co. Litt. 128.

Minor 17 annis non admittitur fore executorem. A minor under seventeen years of age is not admitted to be an executor. 6 Co. 67.

Minus solvit, qui tardius solvit; nam et tempore minus solvitur. He does not pay who pays too late; for, from the delay, he is judged not to pay. Dig. 50, 16, 12, 1.

Miseria est servitus, ubi jus est vagum aut incertum. It is a miserable slavery where the law is vague or uncertain. 4 Inst. 245; 9 Johns. 427; 11 Pet. 286; Broom, Max. 150.

Mitius imperantis melius paretur. The more mildly one commands, the better is he obeyed. 3 Inst. 24.

Mobilia non habent situm. Movable things have no situs. 4 Johns. Ch. 472.

Mobilia personam sequuntur, immobilia situm. Movable things follow the person; immovable, the locality. Story, Conf. L., 3d ed. 683; 166 U. S. 185; 165 id. 194; 49 L. ed. n. 48.

Mobilia sequuntur personam. Movable things follow the person. Story, Conf. L., 3d ed. 688, 689; Broom, Max. 522; 87 Ky. 635; 16 L. R. A. 57. See TAX.

Modica circumstantia facti jus mutat. A small circumstance attending an act may change the law.

Modus de non decimando non valet. A modus (prescription) not to pay tithes is void. Loft 427; Cro. Eliz. 511; 2 Sharsw. Bla. Com. 31.

Modus et conventio vincunt legem. The form of agreement and the convention of the parties overrule the law. 15 Pick. 491; Broom, Max. 659 et seq.; 2 Co. 73; 82 N. Y. 252.

Modus legem dat donacioni. The manner gives law to a gift. Co. Litt. 19 a; Broom, Max. 459.

Moneta est justum medium et mensura rerum commutatarum, nam per medium moneta fit omnium rerum conventio, et justae estimationis. Money is the just medium and measure of all exchangeable things, for by the medium of money a convenient and just estimation of all things is made. See 1 Bouv. Inst. n. 922; Bart. Max. 222.

Monetarius jus comprehendit in regalibus quae nunquam a regio accepta ab antiquo. The right of coining is comprehended amongst those rights of royalty which are never relinquished by the kingly sceptre. Dav. 18.

Mora reprobatur in lege. Delay is disapproved of in law. Jenk. Cent. 51.

Mors dicitur ultimum supplicium. Death is denominated the extreme penalty. 3 Inst. 312.

Mors omnia solvit. Death dissolves all things.

Mortis momentum est ultimum vitae momentum. The last moment of life is the moment of death. 4 Brad. 245, 250.

Mortuus exilis non est exilus. To be dead-born is not to be born. Co. Litt. 92. See 2 Paige 35; Domat, liv. prel. t. 2, s. 1, n. 4, 6.

Mos retinendus est fidelissimae vetustatis. A custom of the truest antiquity is to be retained. 4 Co. 78.

Multa damnum famae non irrogat. A fine does not impose a loss of reputation. Code, l. 54; Calvinus, Lex.

Multa conceduntur per obliquum quae non conceduntur de directo. Many things are conceded indirectly which are not allowed directly. 6 Co. 47.

Multa fides promissa levant. Many promises lessen confidence. 11 Cush. 350.

Multa ignoramus quae nobis non latent et veterum lectio nobis fuit familiaris. We are ignorant of many things which would not be hidden from us if the reading of old authors were familiar to us. 10 Co. 73.

Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt. Many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason. Co. Litt. 70; Broom, Max. 159; 3 Co. 75. See 2 Term 146; 7 id. 252.

Multa multo exercitatione facilius quam regulis percipies. You will perceive many things much more easily by practice than by rules. 40 Inst. 50.

Multa non vetat lex, quae tamen tacite damnant. The law falls to forbid many things which yet it has silently condemned.

Multa transcutit cum universitate quae non per se transcutit. Many things pass as a whole which would not pass separately. Co. Litt. 12 a.

Multa multa, nemo omnia novit. Many men know many things, no one knows everything. 4 Inst. 348.

Multiplix et indistinctum parit confusionem; et quaestiones quo simpliciores, eo lucidiores. Multiplicity and indistinctness produce confusion; the more simple questions are, the more lucid they are. Hob. 335; Bart. Max. 70.

Multiplicata transgressione crescat poena inflicto. The infliction of punishment should be in proportion to the increase of crime. 2 Inst. 479.

Multitudinem decem faciunt. Ten make a multitude. Co. Litt. 247.

Multitudo errantium non parit errori patrocinium. The multitude of those who err is no protection for error. 11 Co. 75.

Multitudo imperitorum perdit curiam. A multitude of ignorant practitioners destroys a court. 2 Inst. 219.

Multo utilis est parva idonea effundere, quam multis inutilibus homines parant. It is much more useful to pour forth a few useful things than to oppress men with many useless things. 4 Co. 20.

Natura appetit perfectum, ita et lex. Nature aspires to perfection, and so does the law. Hob. 144.

Natura fidei fussionis sit strictissimi juris et non durat vel extendatur de re ad rem, de persona ad personam, de tempore ad tempus. The nature of the contract of suretyship is strictissimi juris, and cannot endure nor be extended from thing to thing, from person to person, or from time to time. Burge, Sur. 40.

Natura non facit saltum, ita nec lex. Nature makes no leap, nor does the law. Co. Litt. 238.

Natura non facit vacuum, nec lex supervacuum. Nature makes no vacuum, the law nothing purpose-

less. Co. Litt. 79.

Nature vii maxima; natura bis maxima. The force of nature is greatest; nature is doubly great. 2 Inst. 564.

Nature est quidlibet dissolvi eo modo quo ligatur. It is natural for a thing to be unbound in the same way in which it was bound. Jenk. Cent. 66; 4 Denio 47; Broom, Max. 877.

Nec curia deferret in iustitia exhibenda. Nor should the court be deficient in showing justice. 4 Inst. 63.

Nec tempus nec locus occurrit regi. Neither time nor place bars the king. Jenk. Cent. 190.

Nec veniam effuso sanguine casus habet. Where blood is spilled, the case is unpardonable. 3 Inst. 57.

Nec veniam, ideo numine, casus habet. Where the Divinity is insulted, the case is unpardonable. Jenk. Cent. 167.

Necessarium est quod non potest aliter se habere. That is necessary which cannot be otherwise.

Necessitas est lex temporis et loci. Necessity is the law of time and place. 8 Co. 68.

Necessitas excusat et extenuat delictum in capitalibus, quod non operatur idem in civilibus. Necessity excuses or extenuates delinquency in capital cases, but not in civil. See NECESSITY.

Necessitas facit licitum quod alias non est licitum. Necessity makes that lawful which otherwise is unlawful. 10 Co. 61.

Necessitas inducit privilegium quoad jura privata. With regard to private rights, necessity privileges. Bacon, Max. Reg. 5. Broom, Max. 11.

Necessitas non habet legem. Necessity has no law. Powd. 18. See NECESSITY, and 15 Vin. Abr. 534; 33 id. 540.

Necessitas publica major est quam privata. Public necessity is greater than private. Bacon, Max. Reg. 5; Noy, Max., 9th ed. 34; Broom, Max. 18.

Necessitas, quod cogit, defendit. Necessity defends what it compels. Hale, P. C. 54; Broom, Max. 14.

Necessitas sub lege non continetur, quia quod alias non est licitum necessitas facit licitum. Necessity is not restrained by law; since what otherwise is not lawful, necessity makes lawful. Bart. Max. 227; 2 Inst. 326; Flota, 1, 5, c. 23, § 14.

Necessitas sub lege non continetur. Necessity controls the law. Hob. 144; Cooley, Const. Lim. 747.

Necessitas creatus equity. Necessity creates equity.

Negatio conclusionis est error in lege. The denial of a conclusion is error in law. Wing, Max. 268.

Negligentia semper habet infortunium comitem. Negligence always has infortune for a companion. Co. Litt. 246; Shep. Touch. 476.

Neminem latet qui jure suo utitur. He who stands on his own rights informs no one. 41 La. Ann. 194; 48 id. 1389.

Neminem oportet esse sapientiores legibus. No man need be wiser than the laws. Co. Litt. 97.

Nemo admittendus est inhabilitare seipsum. No one is allowed to incapacitate himself. Jenk. Cent. 40. See STULTIFY, and 5 Whart. 371.

Nemo agit in seipsum. No man acts against himself. Jenk. Cent. 40. Therefore no man can be a judge in his own cause. Broom, Max. 216, n.; 4 Bingh. 151; 2 Exch. 595; 13 C. B. 253; 2 B. & Ald. 822.

Nemo alienae rei, sine satisfactione, defensor idoneus intelligitur. No man is considered a competent defender of another's property, without security. 1 Curt. 322.

Nemo alieno nomine lege agere potest. No man can sue at law in the name of another. Dig. 50. 17. 123.

Nemo aliquam partem recte intelligere potest, antequam totum iterum aliquid iterum perlegerit. No one can properly understand any part of a thing till he has read through the whole again and again. 3 Co. 59; Broom, Max. 593.

Nemo allegans suam turpitudinem audiendus est. No one alleging his own turpitude is to be heard as at witness. 4 Inst. 279; 3 Story 514, 516; 12 Pick. 567; 24 id. 146.

Nemo bis punitur pro eodem delicto. No one can be punished twice for the same offence. 2 Hawk. Pl. Cr. 377; 4 Sharsw. Bla. Com. 315.

Nemo cogitationis poenam patitur. No one suffers punishment on account of his thoughts. Trayner, Max. 362.

Nemo cogitur rem suam vendere, etiam justo pretio. No one is bound to sell his property, even for a just price. But see EMINENT DOMAIN.

Nemo contra factum suum venire potest. No man can contradict his own deed. 2 Inst. 66.

Nemo damnus facit, nisi qui id fecit quod facere jus non habet. No one is considered as doing damage, unless he who is doing what he has no right to do. Dig. 50. 17. 151.

Nemo dat quod non habet. No one can give who does not possess. Broom, Max. 499, n.; Jenk. Cent. 250; 100 Mass. 24.

Nemo de domo sua extrahi debet. A citizen cannot be taken by force from his house. Dig. 50. 17. 103. (This maxim in favor of Roman liberty is much the same as that every man's house is his castle.) Broom, Max. 432, n.

Nemo debet aliena factura locupletari. No one ought to gain by another's loss. 2 Kent 336.

Nemo debet bis puniri pro uno delicto. No one ought to be punished twice for the same offence. 4 Co. 48; 11 G. 2. 896; Broom, Max. 348.

Nemo debet bis vexari pro eadem causa. No one should be twice harassed for the same cause. 2 Johns. 24, 182; 13 id. 153; 8 Wend. 10; 3 Hill N. Y. 490; 5 id. 138; 2 Barb. 255; 6 id. 32.

Nemo debet bis vexari pro una et eadem causa. No one ought to be twice vexed for one and the same cause. 5 Pet. 61; 1 Archb. Pr. by Ch. 476; 2 Mass. 355; 17 id. 425; 79 Fed. Rep. 868; 39 Va. 595.

Nemo debet bis vexari, si constat curiae quod sit pro uno et eadem causa. No man ought to be twice punished, if it appear to the court that it is for one and the same cause. 5 Co. 61; Broom, Max. 327, 343; 5 Mass. 176; 7 id. 423; 99 id. 203.

Nemo debet esse iudex in propria causa. No one should be judge in his own cause. 12 Co. 114; Broom, Max. 116. See JUDGE; 111 N. Y. 1.

Nemo debet intromittere se rei alienae, ad se nihil pertinenti. No one should interfere in what is not his own.

way concerns him. Jenk. Cent. 18.

Nemo debet in communione invitatus teneri. No one should be retained in a partnership against his will. 2 Sandf. 568, 569; 1 Johns. 106, 114.

Nemo debet locupletari ex alterius incommodo. No one ought to be made rich out of another's loss. Jenk. Cent. 4; 10 Barb. 636, 638.

Nemo debet rem suam sine factu aut defectu suo amittere. No one should lose his property without his own act or negligence. Co. Litt. 268.

Nemo duobus utatur officio. No one should fill two offices. 4 Inst. 100.

Nemo quidem tenementum simul potest esse heres et dominus. No one can be at the same time heir and lord of the same fee. 1 Reeve, Hist. Eng. Law 106.

Nemo est heres viventis. No one is an heir to the living. Co. Litt. 22 b; 2 Bla. Com. 70, 107, 208; Vin. Abr. Abeyance; Broom, Max. 583; 7 Allen 75; 99 Mass. 458; 118 id. 345; 2 Johns. 36.

Nemo est supra leges. No one is above the law. Lofti 142.

Nemo ex alterius facto praegravari debet. No man ought to be burdened in consequence of another's act. 2 Kent 646; Pothier, Obl., Evans, ed. 138.

Nemo ex consilio obligatur. No man is bound for the advice he gives. Story, Ballm. § 155.

Nemo ex proprio dolo consequitur actionem. No one acquires a right of action from his own wrong. Broom, Max. 297; 73 Miss. 675; 43 Pac. Rep. (Cal.) 412.

Nemo ex suo delicto meliorem suam conditionem facere potest. No one can improve his condition by his own wrong. Dig. 50. 17. 154. 1. See 116 Ind. 399.

Nemo in propria causa testis esse debet. No one can be a witness in his own cause. (But to this rule there are many exceptions.) 1 Sharsw. Bla. Com. 443; 3 id. 370.

Nemo inauditus condemnari debet, si non sit contumax. No man ought to be condemned unheard, unless he be contumacious. Jenk. Cent. 18. No man shall be condemned in his rights of property, as well as in his rights of person, without his day in court. 48 S. C. 325.

Nemo ius sibi dicere potest. No one can declare the law for himself. (No one is entitled to take the law into his own hands.) Trayner, Max. 365.

Nemo militum deo implicatur secularibus negotiis. No man warring for God should be troubled by secular business. Co. Litt. 70.

Nemo nascitur artifex. No one is born an artificer. Co. Litt. 97.

Nemo patriam quam natus est exuere, nec legentia debitu ejurare possit. No man can renounce the country in which he was born, nor abjure the obligation of his allegiance. Co. Litt. 123 a; 3 Pet. 155; Broom, Max. 73. See ALLEGIANCE: EXPATRIATION; NATURALIZATION.

Nemo plus commodi heredi suo relinquit quam ipse habuit. No one leaves a greater advantage to his heir than he had himself. Dig. 50. 17. 120.

Nemo plus juris ad alienum transferre potest quam ipse habet. One cannot transfer to another a larger right than he himself has. Dig. 50. 17. 54; 2 Co. 309 b; Wing, Max. 55; Broom, Max. 467, 469; 2 Kent 324; 5 C. B. 113; 10 Pet. 161, 175.

Nemo potest contra recordum verificare per patriam. No one can verify by the country against a record. (The issue upon a record cannot be tried by a jury. 2 Inst. 380.)

Nemo potest esse dominus et heres. No one can be both owner and heir. Hale, C. L. c. 7.

Nemo potest esse simul actor et iudex. No one can be at the same time judge and suitor. Broom, Max. 117; 13 C. B. 337; 17 id. 1; 15 C. B. 796; 1 C. B. s. 333.

Nemo potest esse tenens et dominus. No man can be at the same time tenant and landlord (of the same tenement). Gilbert, Ten. 152.

Nemo potest facere per alium quod per se non potest. No one can do by another which he cannot do by himself. Jenk. Cent. 237.

Nemo potest facere per obliquum quod non potest facere per directum. No one can do that indirectly which cannot be done directly. 1 Eden 612.

Nemo potest mutare consilium suum in alterius injuriam. No one can change his purpose to the injury of another. Dig. 50. 17. 75; Broom, Max. 34; 7 Johns. 477.

Nemo potest sibi debere. No one can owe to himself. See CONFESSION OF DEBT.

Nemo potest nisi quod de jure potest. No one is able to do a thing, unless he can do it lawfully. 67 Ill. App. 80.

Nemo praesens nisi intelligat. One is not present unless he understands. See PRESENCE.

Nemo praesumitur alienam posteritatem suae praesulise. No one is presumed to have preferred another's posterity to his own. Wing, Max. 285.

Nemo praesumitur donare. No one is presumed to give. 9 Pick. 128.

Nemo praesumitur esse immemor suae aeternae salutis, et maxime in articulo mortis. No man is presumed to be forgetful of his eternal welfare, and particularly at the point of death. 6 Co. 75.

Nemo praesumitur iudicare in extremis. No one is presumed to trifle at the point of death.

Nemo praesumitur malus. No one is presumed to be bad.

Nemo prohibetur plures negotiationes sine arte exercere. No one is restrained from exercising several kinds of business or arts. 11 Co. 51.

Nemo prohibetur pluribus defensionibus uti. No one is forbidden to set up several defences. Co. Litt. 304; Wing, Max. 479.

Nemo prudens punit ut praeterita revocant, sed ut futura praeventant. No wise man punishes that things done may be revoked, but that future wrongs may be prevented. 3 Bulstr. 17.

Nemo punitur pro alieno delicto. No one is to be punished for the crime or wrong of another. Wing, Max. 338.

Nemo punitur sine injuria, facto, seu defaulto. No one is punished unless for some wrong, act, or default. 2 Inst. 287.

Nemo qui condemnari potest, absolvi non potest.

test. No one who may condemn is unable to acquit. Dig. 50. 17. 87.

Nemo sibi esse iudex vel suus iudex debet. No man ought to be his own judge, or to administer justice in cases where his relations are concerned. 12 Co. 113; Co. 3, 5, 1; Broom, Max. 116, 124.

Nemo sine actione experitur, et hoc non sine brevis sive libello conventionali. No one goes to law without an action, and no one can bring an action without a writ or bill. Bract. 112.

Nemo tenetur ad impossibile. No one is bound to an impossibility. Jenk. Cent. 7; Broom, Max. 244.

Nemo tenetur armare adversarium contra se. No one is bound to arm his adversary against himself. Wing, Max. 665.

Nemo tenetur divinare. No one is bound to foretell. 4 Co. 25; 10 id. 55 a.

Nemo tenetur edere instrumenta contra se. No man is bound to produce writings against himself. Bell, Dict.

Nemo tenetur informare qui nescit sed quisque scire quod informal. No one who is ignorant of a thing is bound to give information of it, but every one is bound to know that which he gives information of. Branch, Princ.; Lane 110.

Nemo tenetur jurare in suam turpitudinem. No one is bound to testify to his own baseness.

Nemo tenetur seipsum accusare. No one is bound to accuse himself. Wing, Max. 486; Broom, Max. 968, 970; 1 Sharsw. Bla. Com. 443; 14 M. & W. 286; 107 Mass. 181.

Nemo tenetur seipsum infortunium et pericula exponere. No one is bound to expose himself to misfortune and danger. Dig. 20. 1. 14.

Nemo tenetur seipsum prodere. No one is bound to betray himself. 10 N. Y. 10, 33; 7 How. Pr. 57, 58; Broom, Max. 968.

Nemo videtur fraudare eos qui sciunt et consentunt. No one is considered as deceiving those who know and consent. Dig. 50. 17. 116; Broom, Max. 278, n.

Nigrum nunquam excedere debet rubrum. The black should never go beyond the red (i. e. the text of a statute should never be read in a sense more comprehensive than the rubric, or title). Trayner, Max. 373.

Nihil aliud potest rex quam quod de jure potest. The king can do nothing but what he can do legally. 11 Co. 74.

Nihil consensum tam contrarium est quam via vitae metus. Nothing is so contrary to consent as force and fear. Dig. 50. 17. 116; Broom, Max. 278, n.

Nihil dat qui non habet. He gives nothing who has nothing.

Nihil de re accrescit et qui nihil in re quando jus accresceret habet. Nothing accrues to him who, when the right accrues, has nothing in the subject-matter. Co. Litt. 188.

Nihil est enim liberale quod non idem iustum. For there is nothing generous which is not at the same time just. 2 Kent 441, note a.

Nihil est magis rationi consentaneum quam eodem modo quodque rationi consentaneum est. Nothing is more consonant to reason than that everything should be dissolved in the same way in which it was made. Shep. Touch. 323.

Nihil facit error nominis cum de corpore constat. An error in the name is nothing when there is certainty as to the thing. 11 Co. 21; 2 Kent 222; Bart. Max. 265.

Nihil habet forum ex scena. The court has nothing to do with what is not before it.

Nihil in lege intolerabilius est, eandem rem diverso jure censi. Nothing in law is more intolerable than that the same case should be subject (in different courts) to different views of the law. 4 Co. 83.

Nihil infra regnum subditis magis conservat in tranquillitate et concordia quam debita legum administratio. Nothing preserves in tranquillity and concord those who are subjected to the same government better than a due administration of the laws. 2 Inst. 158.

Nihil iniquius quam equitatem nimis intendere. Nothing is more unjust than to extend equity too far. Halkers. 103.

Nihil magis iustum est quam quod necessarium est. Nothing is more just than what is necessary. Day 12.

Nihil nequam est praesumentum. Nothing wicked is to be presumed. 2 P. Wms. 588.

Nihil perfectum est dum aliquod restat agendum. Nothing is perfect while something remains to be done. 3 Co. 9.

Nihil peti potest ante id tempus quo per rerum naturam persolvi possit. Nothing can be demanded before the time when, in the nature of things, it can be paid. Dig. 50. 17. 186.

Nihil possumus contra veritatem. We can do nothing against truth. Doct. & Stu. Dial. 2, c. 6.

Nihil praescribitur nisi quod possidetur. There is no prescription for that which is not possessed. 5 B. & A. 277.

Nihil quod est contra rationem est licitum. Nothing is against reason which is lawful. Co. Litt. 97.

Nihil quod est inconveniens est licitum. Nothing inconvenient is lawful. 4 H. L. C. 145, 196; Broom, Max. 186, 366.

Nihil simul inventum est et perfectum. Nothing is invented and perfected at the same moment. Co. Litt. 330; 2 Bla. Com. 298, n.

Nihil tam conveniens est naturali aequitati quam unumquodque dissolvi eo ligamine quo ligatum est. Nothing is so consonant to natural equity as that each thing should be dissolved by the same means by which it was bound. 2 Inst. 380; Broom, Max. 877. See Shep. Touch. 323.

Nihil tam conveniens est naturali aequitati, quam voluntatem domini volentis rem suam in alium transferre, ratam haberi. Nothing is more conformable to natural equity than to ratify the will of an owner who desires to transfer his property to another. Inst. 2. 1. 40; 1 Co. 100.

Nihil tam naturale est quam eo genere quidque dissolvere, quo colligatum est. Nothing is so natural as that an obligation should be dissolved by the same principle by which it was observed in contracting it. Dig. 50. 17. 35. See 2 Inst. 359; Broom, Max. 887.

Nihil tam proprium imperio quam legibus vivere. Nothing is so becoming to authority as to live according to the laws.

according to the law. *Fleta*, l. 1, c. 17, § 11; 2 Inst. 63.

Nil agit exemplum item quod hic resoluitur. An example does no good which settles one question by another. 15 Wend. 44, 49.

Nil facit error nominis si de corpore constat. An error in the name is immaterial if the thing itself is certain. *Broom*, Max. 384; 11 C. B. 406.

Nil sine prudenti fecit ratione vetustas. Antiquity did nothing without a good reason. *Co. Litt.* 65.

Nil temere novandum. Nothing should be rashly changed. *Jenk. Cent.* 163.

Nimidia certitudo incertitudinem ipsam destruit. Too great certainty destroys certainty itself. *Loft*, 204.

Nimidia subtilitas in jure reprobat, et talis certitudo certitudinem confundit. Too great subtlety is disapproved of in law, and such certainty confounds certainty. *Broom*, Max. 167; 4 Co. 5.

Nimium alterandam veritatem amittitur. By too much alteration truth is lost. *Hob.* 344.

No man can hold the same land immediately of two several landlords. *Co. Litt.* 133.

No man is presumed to do anything against nature. 32 Vin. Abr. 154.

No man may be judged in his own cause.

No man shall set up his infamy as a defence. 2 W. Bla. 364.

No man shall take by deed but parties, unless in remainder.

No one can grant or convey what he does not own. 25 Barb. 284, 301. See 30 Wend. 267; 23 N. Y. 233; 13 id. 281; 6 Du. N. Y. 232. And see *Eeryou*.

No one will be permitted to take the benefit under a will and at the same time defeat its provisions. 25 Wash. L. Rep. 50.

Nobiles magis placentur pecunia, plebes vero in corpore. The higher classes are more punished in money, but the lower in person. 3 Inst. 280.

Nobiles sunt qui arma gentilitia antecessorum suorum proferre possunt. The gentry are those who are able to produce armorial bearings derived by descent from their own ancestors. 2 Inst. 595.

Nobilitates et benigniores presumptiones in dubiis sunt proferendae. When doubts arise, the more generous and benign presumptions are to be preferred. *Reg. Jur. Civ.*

Nomen est quasi rei notamen. A name is as it were the note of a thing. 11 Co. 20.

Nomen non sufficit si res non sit de jure aut de facto. A name does not suffice if the thing do not exist by law or by fact. 4 Co. 107.

Nomina si nescis perit cognitio rerum. If you know not the names of things, the knowledge of things themselves perishes. *Co. Litt.* 86.

Nomina sunt mutabilia, res autem immobiles. Names are mutable, but things immutable. 6 Co. 66.

Nomina sunt note rerum. Names are the marks of things. 11 Co. 20.

Nomina sunt symbola rerum. Names are the symbols of things.

Non accipit verba in demonstrationem falsam, quae competit in imitationem verum. Words ought not to be accepted to import a false description, which may have effect by way of true imitation. *Bacon*, Max. Reg. 13; 2 Pars. Con. 62; *Broom*, Max. 648; *Leake*, Con. 191; 3 B. & A. 469; 4 Exch. 604; 3 Taunt. 167.

Non alio modo puniatur aliquis, quam secundum quod se habet condemnatio. A person may not be punished differently than according to what the sentence enjoins. 3 Inst. 217.

Non aliter a significatione verborum recedi oportet quam cum manifestum est ad sensum levitatem. We must never depart from the signification of words, unless it is evident that they are not conformable to the will of the testator. *Dig.* 32. 69, pr.; *Broom*, Max. 668; 2 De G. M. & G. 313.

Non auditur perire volens. One who wishes to perish ought not to be heard. *Bentley*, 4 Exch. 383.

Non concedatur citationes priusquam exprimat super qua re fieri deest citatio. Summonses or citations should not be granted before it is expressed upon what ground a citation ought to be issued. 19 Co. 47.

Non consentit qui errat. He who errs does not consent. 1 Bouv. Inst. n. 981; *Bract*. 44.

Non dat qui non habet. He gives nothing who has nothing. *Broom*, Max. 467; 3 Cush. 369; 3 Gray. 178.

Non debeat melioris conditionis esse, quam auctor melius quo quis in me transit. I ought not to be in better condition than he to whose rights I succeed. *Dig.* 50. 17, 175, 1.

Non debeat alii nocere quod inter alios actum esset. No one ought to be injured by that which has taken place between other parties. *Dig.* 18. 2, 10.

Non debet actori licere, quod reo non permittitur. That which is not permitted to the defendant ought not to be to the plaintiff. *Dig.* 50. 17, 41.

Non debet adduci exceptio ejus rei cuius petitur dissolutio. A plea of the very matter of which the determination is sought ought not to be made. *Bacon*, Max. Reg. 3; *Broom*, Max. 166; 3 F. Wms. 317; 1 Ld. Raym. 57; 2 id. 1433.

Non debet alteri per alterum iniqua conditio inferri. A burdensome condition ought not to be brought upon one man by the act of another. *Dig.* 50. 17, 4.

Non debet, cui plus licet, quod minus est non licere. He who is permitted to do the greater may with greater reason do the less. *Dig.* 50. 17, 21; *Broom*, Max. 176.

Non debeat homines dedere causa non cognita. It is unbecoming to surrender men when no cause is shown. 4 Johns. Ch. 106, 114; 3 Wheel. Cr. Cas. 473, 482.

Non decipitur qui scit se decipi. He is not deceived who knows himself to be deceived. 5 Co. 60.

Non definitur in jure quid sit conatus. What an attempt is, is not defined in law. 6 Co. 43. See *ATTEMPT*.

Non differunt qui concordant re, tametsi non in verbis tamen. Those things which agree in substance, though not in the same words, do not differ. *Jenk. Cent.* 70.

Non dubitatur, etsi specialiter venditor evictionis

em non promiserit, re evicta, ex empto competere actionem. It is certain that although the vendor has not given a special guarantee, an action *ex empto* lies against him, if the purchaser is evicted. *Code*, § 43, 6. But see *Doct. & Stud.* b. 2, c. 47; *Broom*, Max. 768.

Non efficit affectus nisi sequatur effectus. The intention amounts to nothing unless some effect follows. 1 Rolle 226.

Non est actus vinculum inter homines quam iuramentum. There is no stronger link among men than an oath. *Jenk. Cent.* 136.

Non est certitudo de regulis juris. There is no disputing about rules of law.

Non est disputandum contra principia negantem. There is no disputing against a man denying principles. *Co. Litt.* 343.

Non est justum aliquem anteaquam post mortem facere bastardum, qui toto tempore vitae suae pro legitimo habebatur. It is not just to make an elder-born a bastard after his death, who during his lifetime was accounted legitimate. *Bart.* Max. 49; 12 Co. 44.

Non est novum ut priores leges ad posteriores trahantur. It is not a new thing that prior statutes shall give place to later ones. *Dig.* 1. 3, 26; 1. 1, 4; *Broom*, Max. 28.

Non est recedendum a communi observatione. There should be no departure from a common observation. 2 Co. 74.

Non est regula qui fallit. There is no rule but what may fail. *Diff. Ex.* 211.

Non est reus nisi mens sit rea. One is not guilty unless his intention be guilty. This maxim is much criticised. See *actus non reum facit*, etc.; *Mums* *Rea*.

Non ex opinione singularum, sed ex communi usu, nomina exaudiri debent. Names of things ought to be understood according to common usage, not according to the opinions of individuals. *Dig.* 33. 10, 7, 2.

Non exemplis sed legibus iudicandum est. Not by the facts of the case, but by the law must judgment be made. *Dig.* 7. 45. 13. (called by Albericus *Genilis lex aurea*).

Non facias malum ut inde veniat bonum. You are not to do evil that good may come of it. 11 Co. 74, n.

Non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvatur, si qua constituitur. A derogatory clause does not prevent things from being dissolved by the same power by which they were originally made. *Bacon*, Max. Reg. 19; *Broom*, Max. 37; 5 Watts 155.

Non in legendo sed in intelligendo leges consistent. The laws consist, not in being read, but in being understood. 8 Co. 167.

Non ius ex regula, sed regula ex jure. The law does not arise from the rule (or maxim), but the rule from the law. *Fleta* vi. 14; *Trayner*, Max. 384.

Non ius, sed seivitia facit stipitem. Not right, but seisin, makes a stock (from which the inheritance is derived). *Fleta*, l. 6, c. 14, 2, § 2; *Noy*, Max. 9th ed. 72, n. (b); *Broom*, Max. 525; 2 Sharsw. Bla. Com. 209; 1 Steph. Com. 365, 368, 394; 4 Kent 388; 3 Scott's N. 468.

Non licet quod dispendio licet. That which is permitted only at a loss is not permitted to be done. *Co. Litt.* 127.

Non nasci, et natum mori, paria sunt. Not to be born, and to be dead-born, are the same.

Non obligat lex nisi promulgata. A law is not obligatory unless it be promulgated.

Non observata forma, infertur annullatio actus. When the form is not observed, it is inferred that the act is annulled. 12 Co. 7.

Non officit conatus nisi sequatur effectus. An attempt does not harm unless a consequence follow. 11 Co. 98.

Non omne damnum inducit injuriam. Not every loss produces an injury (i. e. gives a right of action). See 8 Bla. Com. 219; 1 Sm. L. C. 131; 3 Bouv. Inst. n. 211.

Non omne quod licet honestum est. It is not everything which is permitted that is honorable. *Dig.* 50. 17, 144; 4 Johns. Ch. 121.

Non omnium quae a majoribus nostris constituta sunt ratio reddi potest. A reason cannot always be given for the institutions of our ancestors. 4 Co. 78; *Broom*, Max. 167; *Branch*, *Princ.*

Non possessori incumbit necessitas probandi possessiones ad se pertinere. It is not incumbent on the possessor of property to prove his right to his possessions. *Code*, § 19, 2; *Broom*, Max. 714.

Non potest adduci exceptio ejusdem rei cuius petitur dissolutio. A plea of the same matter, the determination of which is sought by the action, cannot be brought forward. *Bacon*, Max. Reg. 2. (When an action is brought to annul a proceeding in bar.) *Broom*, Max. 166; *Wing*, Max. 647; 3 F. Wms. 317.

Non potest probari quod probatum non relevat. That which cannot be proved which proved is irrelevant. See 1 Exch. 91, 102.

Non potest quis sine brevi agere. No one can sue without a writ. *Fleta*, l. 2, c. 13, § 4.

Non potest rex gratiam facere cum injuria et damno aliorum. The king cannot confer a favor which occasions injury and loss to others. 3 Inst. 236; *Broom*, Max. 63; *Vaugh*, 338; 2 E. & B. 374.

Non potest rex subditiorem intendere onerare impositionibus. The king cannot load a subject with imposition against his consent. 2 Inst. 61.

Non potest videri deesse habere, qui nunquam habuit. He cannot be considered as having ceased to have a thing, who never had it. *Dig.* 50. 17, 208.

Non praestat impedimentum quod de jure non sortitur effectum. A thing which has no effect in law is not an impediment. *Jenk. Cent.* 162; *Wing*, Max. 727.

Non quod dictum est, sed quod factum est, inspicitur. Not what is said, but what is done, is to be regarded. *Co. Litt.* 36; 6 Bing. 310; 1 Mete. 533; 11 Cush. 536.

Non refert an quis assensum suum praefert verbis, an rebus ipsis et factis. It is immaterial whether a man gives his assent by words or by acts and deeds.

10 Co. 62.

Non refert quid ex acquipollentibus fiat. It matters not which of two equivalents happens. 8 Co. 129.

Non refert quid notum sit iudici, et notum non sit in forma iudicii. It matters not what is known to the judge, if it is not known to him judicially. 3 Bulstr. 115. See *JUDICIAL NOTICE*.

Non refert verba in factis sit revocatio. It matters not whether a revocation be by words or by acts. *Cro. Car.* 49; *Branch*, *Princ.*

Non remota causa sed proxima spectatur. See *CAUSA PROXIMA*.

Non respondit minor, nisi in causa dotis, et hoc pro favore dotis. A minor shall not answer unless in a case of dower, and this in favor of dower. 4 Co. 71.

Non solent quae abundant vitare scripturas. Surplusage does not usually vitiate writings. *Dig.* 50. 17, 94; *Broom*, Max. 627, n.

Non solum quid licet, sed quid est conveniens considerandum, quia nihil quod inconveniens est licitum. Not only what is permitted, but what is convenient, is to be considered, because what is inconvenient is illegal. *Co. Litt.* 60, a.

Non sunt longa vii nihil est quod demere possit. There is no prolixity where there is nothing that can be omitted. *Vaugh*, 132.

Non temere credere, est nervus sapientiae. Not to believe rashly is the nerve of wisdom. 5 Co. 114.

Non valet confirmatio, nisi ille, qui confirmat, sit in possessione rei vel juris unde fieri debet confirmatio; et eodem modo, nisi ille cui confirmatio fit sit in possessione. Confirmation is not valid unless he who confirms is either in possession of the thing itself, or of the right of which confirmation is to be made, and, in like manner, unless he to whom confirmation is made is in possession. *Co. Litt.* 295.

Non valet donatio nisi subsecutur traditio. A gift is not valid unless accompanied by possession. *Bract*, 39 b.

Non valet exceptio ejusdem rei cuius petitur dissolutio. A plea of that of which the determination is sought is not valid. 2 Eden 134.

Non valet impedimentum quod de jure non sortitur effectum. An impediment is of no avail which by law has no effect. 4 Co. 31.

Non verba sed ipsae res, leges imponuntur. Not upon words, but upon things themselves, do we impose law. *Code*, § 43, 2.

Non videtur qui errant consentire. He who errs as if he consented is consenting. *Dig.* 50. 17, 116; *Broom*, Max. 232; 2 Kent 477; 6 Allen 543; 14 Ga. 307.

Non videtur rem amittere quibus propria non fuit. They are not considered as losing a thing whose own it was not. *Dig.* 50. 17, 85.

Non videtur consensum retinuisse si quis ex praescripto minantis aliquod immutavit. He does not appear to have retained his consent, who has changed anything at the command of a party threatening. *Bacon*, Max. Reg. 22; *Broom*, Max. 278.

Non videtur perfecte cuiusque id esse, quod ex casu auferri potest. That does not truly belong to any one which can be taken from him upon occasion. *Dig.* 50. 17, 159.

Non videtur quisquam id capere, quod ei necesse est alio restituere. One is not considered as acquiring property in a thing which he is bound to restore. *Dig.* 50. 17, 51.

Non videtur vim facere, qui jure suo utitur, et ordinaria actione experitur. He is not judged to use force who exercises his own right and proceeds by ordinary action. *Dig.* 50. 17, 155, 1.

Noscitur a sociis. It is known from its associates. The meaning of a word may be ascertained by reference to the meaning of words associated with it. *Broom*, Max. 533; 2 East 667; 6 Allen 543; 1 B. & C. 644; 18 C. B. 102, 893; 5 M. & G. 339, 367; 3 C. 497; 5 id. 380; 4 Exch. 511, 519; 5 id. 294; 11 id. 113; 3 Term 87; 12 Allen 77; 105 Mass. 433; 1 N. Y. 47, 69; 11 Barb. 43, 63; 20 id. 644; 38 Minn. 366; 166 U. S. 67; 11 App. 137.

Noscitur ex socio, qui non cognoscitur ex se. He who cannot be known from himself may be known from his associate. *F. Moore* 817; 1 Vent. 225; 3 Term 87; 9 East 267; 13 id. 531; 6 Taunt. 294; 1 B. & C. 644.

Nova dicitur a nascendo, et notitia non debet claudicare. Notice is named from knowledge; and notice ought not to halt (i. e. be imperfect). 6 Co. 29.

Nova constitutio futuris formam imponere debet, non praeteritis. A new enactment ought to impose form upon what is to come, not upon what is past. 2 Inst. 292; *Broom*, Max. 34, 37; *T. Jones* 108; 2 Show. 16; 6 M. & W. 285; 7 id. 246; 9 Mass. 122; 10 id. 439; 2 Gall. 139; 2 N. Y. 535; 7 Johns. 503.

Novatio non praesumitur. A novation is not presumed. *Halkers*, Max. 104; *Bart*, Max. 231.

Non tam utilis est quod prodest quam novitate perturbatur. Novelty benefits not so much by its utility as it disturbs by its novelty. *Jenk. Cent.* 167.

Novum iudicium non dat novum jus, sed declarat antiquum. A new judgment does not make a new law, but declares the old. 10 Co. 42.

Noxa sequitur caput. The injury (i. e. a liability to make good an injury caused by a slave) follows the head or person (i. e. attaches to his master). *Heineccius*, *Elem. Jur. Civ.* l. 4, t. 8, § 1231.

Nuda pactio obligationem non parit. A naked promise does not create an obligation. *Dig.* 2. 14. 6, 7, 4; *Code*, § 45, 2; *Broom*, Max. 746; *Brisson*, *Nudum*.

Nuda ratio et nuda pactio non ligant aliquem debitorem. Naked reason and naked promise do not bind any debtor. *Fleta*, l. 2, c. 60, § 35.

Nudum pactum est ubi nulla subest causa praeter conventionem; sed ubi subest causa, fit obligatio, et pars actionem. Nudum pactum is where there is no consideration besides the agreement; but when there is a consideration, an obligation is created and an action arises. *Dig.* 2. 14. 7, 4; *Sharsw. Bla. Com.* 415; *Broom*, Max. 745; 1 Pow. Contr. 280; 3 Burr. 1070; *Vin. Abr.* *Nudum Pactum* (A). This is explained under *CONSIDERATION*.

Nudum pactum ex quo non oritur actio. Nudum pactum is that upon which no action arises. *Code* 2. 3. 10, 5, 14, 1; *Broom*, Max. 676; *Bart*, Max. 231.

Nul ne doit s'enrichir aux dépens des autres. No

one ought to enrich himself at the expense of others. *Nul prendra advantage de son tort dememe.* No one shall take advantage of his own wrong. Broom, Max. 290.

Nulla curia que recordum non habet potest imponere finem, neque aliquem mandare carceri; quia ista spectant tantummodo ad curias de recordo. No court which has not a record can impose a fine, or commit any person to prison; because those powers belong only to courts of record. 8 Co. 60.

Nulla emptio sine pretio esse potest. There can be no sale without a price. 4 Pick. 189.

Nulla impossibilitas aut inhonestas sunt presumenda; vera autem et honesta et possibilia. No impossibilities or dishonorable things are to be presumed; but things true, honorable, and possible. Co. Litt. 73.

Nulla pactio efficit potest ne dolus praestetur. By no agreement can it be effected that there shall be no accountability for fraud. Dig. 2. 14. 27. 3; Broom, Max. 696, 118 n.; 5 M. & S. 466.

Nulla regle sans faute. There is no rule without a fault.

Nulla terre sans seigneur. No land without a lord. Guyot, Inst. Feod. c. 28.

Nulli enim res sua servit jure servitutis. No one can have a servitude over his own property. Dig. 8. 2. 28; 17 Mass. 443.

Nullus hominis auctoritas apud nos valere debet, ut meliora non sequeremur si quis attulerit. The authority of no man ought to avail with us, that we should not follow better [opinions] should any one present them. Co. Litt. 388 b.

Nullum crimen majus est inobedientia. No crime is greater than disobedience. Jenk. Cent. 77.

Nullum exemplum est idem omnibus. No example is the same for all purposes. Co. Litt. 212 a.

Nullum iniquum est presumendum in jure. Nothing unjust is to be presumed in law. 4 Co. 72.

Nullum matrimonium, ibi nulli dos. No marriage, no dowry. 4 Barb. 192.

Nullum simile est idem. Nothing which is like another is the same, i. e. no likeness is exact identity. 2 Story 512; Story, Partn. 90; Co. Litt. 3 a; 2 Bla. Com. 612; 6 Binn. 506.

Nullum simile quatuor pedibus currit. No simile runs upon four feet, or, as ordinary is expressed, "on all fours." Co. Litt. 3 a; Eunomus, Dial. 2, p. 155; 1 Story 143; 6 Binn. 506.

Nullum tempus occurrit regi. Lapse of time does not bar the right of the crown. 2 Inst. 273; 1 Sharsw. Bla. Com. 247; Broom, Max. 65; Hobs. 347; 5 Steph. Com. 504; 1 Mass. 355; 2 Brock. 389; 18 Johns. 227; 10 Barb. 139; 32 W. Va. 387; 13 Am. L. Reg. 465; 45 S. C. 312; 19 Misc. Rep. 571.

Nullum tempus occurrit reipublice. Lapse of time does not bar the commonwealth. 11 Grant. 572; 8 Tex. 410; 16 id. 305; 5 McLean 133; 19 Mo. 667.

Nullum commodum capere potest de injuria sua propria. No one shall take advantage of his own wrong. Co. Litt. 148 b; Broom, Max. 279; 4 Bingh. n. c. 395; 4 B. & A. 409; 10 M. & W. 309; 11 id. 680; 12 Gray 493; 19 Misc. Rep. 521.

Nullus debet agere de dolo, ubi alia actio subest. Where another form of action is given, no one ought to sue in the action of dolo. 7 Co. 92.

Nullus dicitur accessorius post feloniam, sed ille qui novit principale feloniam fecisse, et illum recepit et confortavit. No one is called an accessory after the fact but who knew the principal to have committed felony, and received and comforted him. 3 Inst. 138.

Nullus dicitur felo principalis nisi actor, aut qui praesens est, ubi actus autem auxiliium actorem ad feloniam faciendum. No one is called a principal felon except the party actually committing the felony, or the party present aiding and abetting in its commission. 3 Inst. 138.

Nullus idoneus testis in re sua intelligitur. No one is understood to be a competent witness in his own cause. Dig. 22. 5. 10; 1 Summ. 328.

Nullus ius suum in alius potest. No man can forfeit another's right. Fleta, l. 1. c. 28, § 11.

Nullus recedat a curia cancellaria sine remedio. No one ought to depart out of the court of chancery without a remedy. Bisp. Eq. 8; Year B. 4 Hen. VII. 4.

Nullus videtur dolo facere qui suo jure utitur. No man is to be esteemed a wrong-doer who avails himself of his legal right. Dig. 50. 17. 55; Broom, Max. 130; 14 Wend. 390, 492. See [1898] Ch. 1.

Nunquam crescit ex post facto praeteriti delicti aestimatio. The quality of a past offense is never aggravated by that which happens subsequently. Dig. 50. 17. 138. 1; Bacon, Max. Reg. 8; Broom, Max. 42.

Nunquam fictio sine lege. There is no fiction without law.

Nunquam nimis dicitur quod nunquam satis dicitur. What is never sufficiently said is never said too much. Co. Litt. 375.

Nunquam praescribitur in falso. There is never prescription in case of falsehood. Bell, Dict.

Nunquam res humana prospere succedunt ubi negliguntur divinae. Human things never prosper when divine things are neglected. Co. Litt. 95; Wing, Max. 2.

Nuptias non concubitus sed consensus facit. Not cohabitation but consent makes the marriage. Dig. 50. 17. 30; Co. Litt. 33; Broom, Max. 506, n.

Obedientia est legis essentia. Obedience is the essence of the law. 11 Co. 100.

Obtemperandum est consuetudini rationabili tanquam legi. A reasonable custom is to be obeyed like law. 4 Co. 38.

Occupantis sunt derelicta. Things abandoned become the property of the (first) occupant. 1 Pet. Adm. 53.

Odiosa et inhonesta non sunt in lege praesumenda. Odious and dishonest acts are not presumed in law. Co. Litt. 78; 6 Wend. 228; 18 N. Y. 295.

Odiosa non presumuntur. Odious things are not presumed. Burr. Sett. Cas. 190.

Officers may not examine the judicial acts of the court.

Officia judicialia non concedantur antequam vacent. Judicial offices ought not to be granted be-

fore they are vacant. 11 Co. 4.

Officia magistratuum non debent esse venalia. The offices of magistrates ought not to be sold. Co. Litt. 234.

Officium conatus si effectus sequatur. The attempt becomes of consequence, if the effect follows. Jenk. Cent. 55.

Officium nemini debet esse damnosum. An office ought to be injurious to no one. Bell, Dict.

Omissio eorum quae tacite insunt nihil operatur. The omission of those things which are silently implied is of no consequence. 2 Binn. 131.

Omne actum ab intentione agentis est judicandum. Every act is to be estimated by the intention of the doer. Branch, Princ.

Omne crimen ebrietas et incendit et detegit. Drunkenness inflames and reveals every crime. Co. Litt. 247; Broom, Max. 17; Whart. Cr. L. § 48.

Omne jus aut consensu fecit, aut necessitate constituit, aut firmitate consuetudinis. All law has been derived from consent, established by necessity, or confirmed by custom. Dig. 1. 3. 40; Broom, Max. 940, n.

Omne magis dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius. Every worthier thing draws to it the less worthy, though the latter be more ancient. Co. Litt. 853.

Omne magnum exemplum habet aliquid ex iniquo, quod publica utilitate compensatur. Every great example has some portion of evil, which is compensated by its public utility. Hob. 279.

Omne majus continet in se minus. The greater contains in itself the less. 5 Co. 115 a; Wing, Max. 206; Story, Ag. § 172; Broom, Max. 174; 15 Pick. 397; 1 Gray 836.

Omne majus dignum continet in se minus dignum. The more worthy contains in itself the less worthy. Co. Litt. 143.

Omne majus minus in se complectitur. Every greater embraces in itself the minor. Jenk. Cent. 208.

Omne principale trahit ad se accessorium. Every principal thing draws to itself the accessory. 17 Mass. 425; 1 Johns. 380.

Omne quod solo indicifacit solo edit. Every thing belongs to the sole which is built upon it. Dig. 41. 7. 10; 47. 3. 1; Inst. 2. 1. 29; Broom, Max. 401; Fleta, l. 8. c. 2, § 12.

Omne sacramentum debet esse de certa scientia. Every oath ought to be founded on certain knowledge. 4 Inst. 270.

Omne testatum morte consummatur est. Every will is consummated by death. 3 Co. 29 b; 4 id. 61 b; 2 Bla. Com. 500; Shep. Touch. 401; Broom, Max. 503.

Omnes actiones in mundo infra certa tempora habent limitationem. All actions in the world are limited within certain periods. Bract. 52.

Omnes licentiam habere his qui pro se indulta sunt, renunciare. All have liberty to renounce those things which have been established in their favor. Code 2. 3. 29; 1. 3. 51; Broom, Max. 639.

Omnes prudentes illa admittunt solent quae probantur in eis qui in se veritati sunt. All prudent men are accustomed to admit those things which are approved by those who are well versed in the art. 7 Co. 19.

Omnia delicta in aetere etiora sunt. All crimes committed openly are lighter. 8 Co. 127.

Omnia praesumuntur contra spoliatores. All things are presumed against a wrong-doer. Broom, Max. 338; 1 Greenl. Ev. § 37; 5 Allen 172; 34 L. R. A. 581; 45 Pac. Rep. 1073.

Omnia praesumuntur legitime facta donec probetur in contrarium. All things are presumed to be done legitimately until the contrary is proved. Co. Litt. 232; Broom, Max. 948; 59 Pa. 68.

Omnia praesumuntur rite et solenniter esse acta. All things are presumed to have been done rightly and regularly. Co. Litt. 282 b; Broom, Max. 105, 948; 12 C. B. 733; 3 Exch. 91; 5 id. 718.

Omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium. All things are presumed to have been done regularly and with due formality until the contrary is proved. Broom, Max. 944; 3 Bingh. 881; Campb. 44; 1 C. & M. 461; 17 C. B. 183; 5 B. & A. 505; 12 M. & W. 231; 18 Wend. 390; 59 id. 440; 85 Va. 453; 19 Md. 548; 102 N. C. 284; 124 Pa. 280.

Omnia quae jure contrahuntur, contrario jure perent. Obligations contracted under a law are destroyed by a law to the contrary. Dig. 50. 17. 100.

Omnia quae sunt auctoritas sunt ipsius viri. All things which are the wife's belong to the husband. Co. Litt. 112; 2 Kent 130, 143.

Omnia rite esse acta praesumuntur. All things are presumed to have been done in due form. Co. Litt. 6; Broom, Max. 944, n.; 11 Cush. 441; 13 Allen 397; 108 Mass. 425; 2 Ohio St. 246; 6; 589; 63 Mich. 170.

Omnis conclusio boni et veri iudicii sequitur ex bonis et veris praemissis et dictis juratorum. Every conclusion of a good and true judgment arises from good and true premises, and the verdicts of jurors. Co. Litt. 226.

Omnis consensus tollit errorem. Every consent removes error. 2 Inst. 123.

Omnia definitio in jure civili periculosa est, parum enim ut non subverti possit. Every definition in the civil law is dangerous, for there is very little that cannot be overthrown. (There is no rule in the civil law which is not liable to some exception; and the least difference in the facts of the case renders its application useless.) Dig. 50. 17. 202; 2 Woodd. Lect. 136.

Omnia exceptio est ipsa quoque regula. An exception is in law also a rule.

Omnia innoxia sunt pro innoxia legibus habetur. Every uncondemned person is held by the law as innocent.

Omnia innovatio plus novitate perturbat quam vellet prodest. Every innovation disturbs more by its novelty than it benefits by its utility. 2 Bulstr. 338; 1 Salk. 80; Broom, Max. 147; 62 Pa. 881.

Omnia interpretatio si fieri potest ita fienda est in instrumentis, ut omnes contrarietates amoveantur. The interpretation of instruments is to be made, if they will admit of it, so that all contradictions may be removed. Jenk. Cent. 96.

Omnia interpretatio vel declarat, vel extendit, vel restringit. Every interpretation either declares, extends, or restrains.

Omnia nova constitutio futuris temporibus formam imponere debet, non praeteritis. Every new statute ought to set its stamp upon the future, not the past. Bract. 238; 3 Inst. 96.

Omnia persona et homines non viciantur. Every person is a man, but not every man a person. Calvin, Lex.

Omnia privatio praesupponit habitum. Every privation presupposes former enjoyment. Co. Litt. 339.

Omnia querela et omnia actio injuriarum limitata est infra certa tempora. Every plaint and every action for injuries is limited within certain times. Co. Litt. 114.

Omnia rati habent retrotrahitur et mandato priori acquiparatur. Every subsequent ratification has a retrospective effect, and is equivalent to a prior command. Co. Litt. 307 a; Story, Ag., 4th ed. 102; Broom, Max. 757, 687; 8 Wheat. 393; 7 Exch. 726; 9 C. B. 532, 607; 5 Johns. Ch. 256; 57 Pa. 483; 111 N. Y. 393; 67 Fed. Rep. 49; 52 Me. 82; 60 Conn. 88.

Omnia regulae suas poluit exceptiones. Every rule of law is liable to its own exceptions.

Omni contributione sarcitur quod pro omnibus datum est. What is given for all shall be compensated for by the contribution of all. 4 Bingh. 121; 2 Marsh. 309.

Omni rerum usus quum usus actus, potest esse abusus, virtute solo excepta. There may be an abuse of everything of which there is a use, virtue only excepted. Dav. 79.

Once a fraud, always a fraud. 13 Vin. Abr. 539.

Once a mortgage, always a mortgage. 1 Hill. R. P. 378; Bingham, Eq. § 153; 7 Watts 375; 61 Pa. 104; 22 Ind. 82. See MORTGAGE.

Once a recompense, always a recompense. 19 Vin. Abr. 277.

Once quit and cleared, ever quit and cleared. See also Verb. Sign., iter ad fin.

One may not do that which is contrary to himself.

Opinio quae favel testamento est tenenda. That opinion is to be followed which favors the will.

Oporet quod certa res deducatur in iudicium. A thing, to be brought to judgment, must be certain or definite. Jenk. Cent. 84; Bract. 15 b.

Oporet quod certa res quoque vendatur. A thing, to be sold, must be certain or definite. Bract. 61.

Optima enim est legis interpretatio consuetudo. Usage is the best interpreter of law. 2 Inst. 18; Broom, Max. 931.

Optimus est lex, quae minimum relinquit arbitrio iudicis, optimus iudex qui minimum sibi. That is the best law which confides as little as possible to the discretion of the judge; he is the best judge who takes least upon himself. Bacon, Aph. 46; Broom, Max. 84; 70 Ga. 479.

Optimus status interpretatur est (omnibus particulis ejusdem inspecit) ipsum statutum. The best interpretation of a statute is (all the separate parts being considered) the statute itself. 8 Co. 117; Wing, Max. 239, max. 68.

Optimus esse legem, quae minimum relinquit arbitrio iudicis, id est, ut sit praevalens. That law is the best which leaves the least discretion to the judge; and this is an advantage which results from its certainty. Bacon, Aph. 8.

Optimus interpretres rerum usus. Usage is the best interpreter of things. 2 Inst. 288; Broom, Max. 917, 930.

Optimus interpretandi modus est si leges interpretare ut leges legis accordant. The best mode of interpreting laws is to make them accord. 8 Co. 169.

Optimus iudex, qui minimum sibi. He is the best judge who relies as little as possible on his own discretion. Bacon, Aph. 46; Broom, Max. 84.

Optimus legum interpretres consuetudo. Usage is the best interpreter of laws. 4 Inst. 75; 2 Pars. Com. 4th ed. 454; Broom, Max. 931.

Ordinatio placitandi iuris, servatur et ius. The order of pleading being preserved, the law is preserved. Co. Litt. 303; Broom, Max. 188.

Origine propria neminem posse voluntate sua ezimi manifestum est. It is manifest that no one by his own will can be exempted from the law (not off or charge his natural allegiance). Code 10. 34. 4. See 1 Bla. Com. c. 10; 20 Johns. 313; 3 Pet. 122, 246; Broom, Max. 77.

Origo rei inspicit debet. The origin of a thing ought to be inquired into. 1 Co. 96.

Pacta conventa quae neque contra leges, neque dolo malo inita sunt, omni modo observanda sunt. Contracts which are not illegal, and do not originate in fraud, must in all respects be observed. Code 2. 3. 2. See also Broom, Max. 930.

Pacta dant legem contractui. Agreements give the law to the contract. Halkers, Max. 118.

Pacta privata juri publico derogare non possunt. Private contracts cannot derogate from the public law. 7 Co. 23; 111 N. Y. 132.

Pacta sunt quae contra constitutiones vel contra bonos mores sunt nullam vim habere, indubitanter iuris est. It is indubitable law that contracts against the laws, or good morals, have no force. Code 2. 3. 6; Broom, Max. 695.

Pacta quae turpem causam continent non sunt observanda. Contracts founded upon an immoral consideration are not to be observed. Dig. 12. 4. 27; 4 Pet. 539; Broom, Max. 732.

Pactis privatorum juri publico non derogatur. Private contracts do not derogate from public law. Broom, Max. 935; 100 Mass. 391; 4 Cl. & F. 241; Arg. 3 id. 621.

Pacta aliquid licitum est, quod sine pacto non admittitur. By a contract something is permitted, which, without it, could not be admitted. Co. Litt. 169.

Par in parem imperium non habet. An equal has no power over an equal. Jenk. Cent. 174. Example: One of two judges of the same court cannot commit the other for contempt.

Parens est nomen generale ad omne genus cognationis. Parent is a general name for every kind of relationship. Co. Litt. 80; Littleton § 106; Mag. Cart. Joh. c. 50.

He acts prudently who obeys the commands of the law. 5 Co. 49.

Pueri sunt de sanguine parentum, sed pater et mater non sunt de sanguine puerorum. Children are of the blood of their parents, but the father and mother are not of the blood of their children. 3 Co. 40.

Lupulus pati posse non intelligitur. A pupil is not considered able to do an act which would be prejudicial to him. Dig. 50. 17. 110. 3; 2 Kent 345.

Purchaser without notice is not obliged to discover to his own hurt. See 4 Bouv. Inst. n. 4386.

Quae ab hostibus capiuntur, statim captivum sunt. Things taken from public enemies immediately become the property of the captors. Inst. 2. 1. 17; Grotius, de jur. Bell. l. 3. c. 6, § 12.

Quae ab initio inutilis fuit institutio, ex post facto convalescere non potest. An institution void in the beginning cannot acquire validity from after-mat-
ter. Dig. 50. 17. 210.

Quae ab initio non valent, ex post facto convalescere non possunt. Things invalid from the beginning cannot be made valid by subsequent act. Trayner, Max. 482.

Quae accessionum locum obtinent, extinguuntur cum principibus peremptis fuerint. When the principal is destroyed, those things which are accessory to it are also destroyed. Pothier, Obl. pt. 3. c. 6, art. 4; Dig. 33. 8. 2; Broom, Max. 496.

Quae ad unum finem locuta sunt, non debent ad alium deoritur. Words spoken to one end ought not to be perverted to another. 4 Rep. 14; 4 Co. 14.

Quae coherens persona a persona separari nequeunt. Things which belong to the person ought not to be separated from the person. Jenk. Cent. 28.

Quae communi legi derogant stricte interpretantur. Laws which derogate from the common law ought to be strictly construed. Jenk. Cent. 281.

Quae contra rationem juris introducta sunt, non debent trahi in consequentiam. Things introduced contrary to the reason of the law ought not to be drawn into precedents. 12 Co. 75.

Quae dubitationis causa tollenda inseruntur communem legem. Whatever is inserted for the purpose of removing doubt does not hurt or affect the common law. Co. Litt. 205.

Quae dubitationis tollenda causa contractibus inseruntur, ius commune non ledunt. Particular clauses inserted in agreements to avoid doubts and ambiguity do not prejudice the general law. Dig. 50. 17. 81.

Quae in curia acta sunt rite agi praesumuntur. Whatever is done in court is presumed to be rightly done. 3 Bulstr. 43.

Quae in partibus divitiis nequeunt solida a singulis praestantur. Things (i. e. services and rents) which cannot be divided into parts are rendered entire by each severally. 6 Co. 1.

Quae in testamento ita sunt scripta ut intelligi non possint, perinde sunt ac si scripta non essent. Things which are so written in a will that they cannot be understood are as if they had not been written. Dig. 50. 17. 73. 3.

Quae incontinenti vel certo sunt inesse videntur. Whatever things are done at once and certainly, appear part of the same transaction. Co. Litt. 236.

Quae inter alios acta sunt, non debent de rebus, sed de personis. Transactions between strangers may benefit, but cannot injure, persons who are not parties to them. 6 Co. 1.

Quae legi communi derogant non sunt trahenda in exemplum. Things derogatory to the common law are not to be drawn into precedent. Branch, Prince.

Quae legi communi derogant stricte interpretantur. Those things which derogate from the common law are to be construed strictly. Jenk. Cent. 29.

Quae mala sunt inchoata in principio viz bono peraguntur recte. Things which are in the commencement seldom end ill. 4 Co. 2.

Quae non fieri debent, facta valent. Things which ought not to be done are held valid when they have been done. Trayner, Max. 484.

Quae non valent singulis, juncta valent. Things which may not avail singly, when united have an effect. 3 Bulstr. 132; Broom, Max. 568.

Quae praeter consuetudinem et morem majorum sunt, neque placent, neque recta videntur. What is done contrary to the custom and usage of our ancestors, neither pleases nor appears right. 4 Co. 78.

Quae propter necessitatem recepta sunt, non debent in argumentum trahi. Things which are tolerated on account of necessity ought not to be drawn into precedent. Dig. 50. 17. 162.

Quae rerum natura prohibentur, nulla lege confirmata sunt. What is prohibited in the nature of things can be confirmed by no law. Finch, Law 74.

Quae singula non prosunt, juncta juvant. Things which taken singly are of no avail afford help when taken together. Trayner, Max. 486.

Quae sunt minoris culpe sunt majoris infamiae. Things which are of the smaller guilt are of the greater infamy. Co. Litt. 6.

Quaecunque intra rationem legis inveniuntur, intra legem ipsam esse judicantur. Whatever appears within the reason of the law, is considered within the law itself. 2 Inst. 689.

Qualibet concessio fortissime contra donatorem interpretanda est. Every grant is to be taken most strongly against the grantor. Co. Litt. 183 a; 7 Metc. 516.

Qualibet jurisdictionis cancellos suos habet. Every jurisdiction has its bounds. Jenk. Cent. 139.

Qualibet poena corporalis, quamvis minima, maior est qualibet poena pecuniaria. Every corporal punishment, although the very least, is greater than any pecuniary punishment. 3 Inst. 220.

Quarum de dubiis, legem bene dicere si vis. Inquire into doubtful points if you wish to understand the law well. Littl. § 443.

Quare de dubiis, qui per rationes perveniunt ad legitimam rationem. Inquire into doubtful points, because by reasoning we arrive at legal reason. Littl. § 377.

Quare dat sapere quae sunt legitima vere. To investigate is the way to know what things are really lawful. Littl. § 443.

Qualitas quae inesse debet, facile praesumitur. A quality which ought to form a part is easily presumed.

Quam longum debet esse rationabile tempus, non definitur in lege, sed pendet ex discretionis iusticiariorum. What is reasonable time the law does not define; it is left to the discretion of the judges. Co. Litt. 56. See 1 Co. 44.

Quam rationabiliter debet esse finis, non definitur, sed omnibus circumstantiis inspectis pendet ex iusticiariorum discretionem. What a reasonable fine ought to be is not defined, but is left to the discretion of the judges, all the circumstances being considered. 11 Co. 44.

Quamvis aliquid per se non sit malum, tamen si sit mali exemplum, non est faciendum. Although in itself a thing may not be bad, yet if it holds out a bad example it is not to be done. 2 Inst. 564.

Quamvis lex generaliter loquitur, restringenda tamen est, ut cessante ratione et ipsa cesset. Although the law speaks generally, it is to be restrained, since when the reason on which it is founded fails, it fails. 4 Inst. 380.

Quando aliquid conceditur, conceditur id sine quo illud fieri non possit. When anything is granted, that also is granted without which it cannot be effected. 9 Barb. 516; 10 id. 354.

Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud. When anything is commanded, everything by which it can be accomplished is also commanded. 5 Co. 116. See 7 Co. B. 386; 14 id. 107; 6 E. 88; 889; 19 id. 410; 2 E. & B. 301; 8 Cush. 345; Broom, Max. 465; Bish. Writ. L. § 137.

Quando aliquid per se non sit malum, tamen si sit mali exemplum, non est faciendum. When anything by itself is not evil, yet may be an example for evil, it is not to be done. 2 Inst. 564.

Quando aliquid prohibetur ex directo, prohibetur et per obliquum. When anything is prohibited directly, it is also prohibited indirectly. Co. Litt. 223.

Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud. When anything is prohibited, everything by which it is reached is prohibited. 2 Inst. 48; Broom, Max. 432, 489; Wing, Max. 618. See 7 Cl. & F. 503, 546; 4 B. & C. 187; 2 Term 251; 8 id. 401, 415; 15 M. & W. 7; 11 Wend. 820.

Quando aliquid aliquid concedit, concedere videtur et id sine quo res uti non potest. When a person grants a thing, he is supposed to grant that also without which the thing cannot be used. 3 Kent 481; 24 Pick. 104.

Quando charta continet generalem clausulam, posteaque descendit ad verba specialia quae clausulae generali sunt consentanea, interpretanda est charta secundum verba specialia. When a deed contains a general clause, and afterwards descends to special words, consistent with the general clause, the deed is to be construed according to the special words. 8 Co. 154.

Quando de una et eadem re, duo onerabiles existunt, unus, pro insufficientia alterius, de integro onerabitur. When two persons are liable concerning the same thing, if one makes default the other must bear the whole. 2 Inst. 277.

Quando dispositio refertur potest ad duas res, ita quod secundum relationem unam vitaliter et secundum alteram utilis sit, tum facienda est relatio ad utrumque ut valeat dispositio. When a disposition may be made to refer to two things, so that according to one reference it would be vitiated and by the other it would be made effectual, such a reference must be made that the disposition shall have effect. 6 Co. 76 b.

Quando diversi desiderantur actus ad aliquem statum perducendum, non respiciit actum originalem. When different acts are required to the formation of an estate, the law chiefly regards the original act. 10 Co. 49.

Quando duo jura concurrunt in una persona, aequum est ac si essent in duobus. When two rights occur in one person, it is the same as if they were in two separate persons. 4 Co. 118; Broom, Max. 531.

Quando jus domini regis et subditi concurrunt, jus regis praefertur debet. When the right of the sovereign and of the subject concur, the right of the sovereign ought to be preferred. Co. Litt. 30 b; Broom, Max. 69.

Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest. When the law gives anything, it gives the means of obtaining it. 5 Co. 47; 3 Kent 421.

Quando lex aliquid alicui concedit, omnia incidentia tacite conceduntur. When the law gives anything, it gives tacitly what is incident to it. 2 Inst. 326; Hob. 234.

Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest. When the law grants a thing to any one, it grants that also without which the thing itself cannot exist. Broom, Max. 496; 13 Barb. 153, 160.

Quando lex est specialis, ratio autem generalis, generaliter lex est interpretanda. When the law is special, but its reason is general, the law is to be understood generally. 2 Inst. 83; 10 Co. 101.

Quando licet id quod majus, videtur licere id quod minus. When the greater is allowed, the less seems to be allowed also. Shep. Touch. 420.

Quando res non valet ut ago, valet quantum valet potest. When that which I do does not have effect as I do it, let it have as much effect as it can. 1 Johns. 172; 3 Barb. Chanc. 22.

Quando res non valet ut ago, valet quantum valet potest. When the thing is of no force as I do it, it shall have as much as it can have. Cowp. 600; Broom, Max. 543; 2 Sm. L. C. 294. 6 East 105; 1 H. Bla. 614; 78 Fa. 219.

Quando verba et mens congruunt, non est inter-

pretationis locus. When the words and the mind agree, there is no place for interpretation.

Quodque verbum statum suum speciatim, ratio autem generalis, generaliter statutum est intelligendum. When the words of a statute are special, but the reason or object of it general, the statute is to be construed generally. 10 Co. 101 b.

Quodmodum ad questionem facti non respondent iudices, ita ad questionem juris non respondent juratores. In the same manner that judges do not answer to questions of fact, so jurors do not answer to questions of law. Co. Litt. 205.

Qui accusat integræ famae sit et non criminarius. Let him who accuses be of clear fame, and not criminal. 3 Inst. 26.

Qui acquirit sibi acquirit hereditibus. He who acquires for himself acquires for his heirs. Trayner, Max. 496.

Qui adimit medium dirimit finem. He who takes away the means destroys the end. Co. Litt. 161.

Qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum fecerit. He who decides anything, one party being unheard, though he should decide right, does wrong. 6 Co. 58; 4 Bla. Com. 468.

Qui alterius jure utitur, eodem jure uti debet. He who uses the right of another ought to use the same right. Pothier, Tr. De Change, pt. 1. c. 4, § 114; Broom, Max. 473.

Qui bene distinguit, bene docet. He who distinguishes well, teaches well. 2 Inst. 470.

Qui bene interrogat, bene docet. He who questions well teaches well. 2 Bulstr. 227.

Qui cadit a syllaba cadit a tota causa. He who falls in a syllable falls in his whole cause. Bract. fol. 211; Stat. Wales, 12 Edw. 1; 3 Sharsw. Bla. Com. 449.

Qui concedit aliquid, concedere videtur et id sine quo concessio est irrita, sine quo res ipsa esse non potest. He who grants anything is considered as granting that without which his grant would be idle, without which the thing itself could not exist. 11 Co. 52; Jenk. Cent. 82.

Qui affirmat nihil dat. He who confirms does not give. 2 Bouv. Inst. n. 2009.

Qui contemnit preceptum, contemnit precipientem. He who contemns the precept contemns the party giving it. 12 Co. 96.

Qui cum alio contrahit, vel est vel debet esse non ignorant conditionem contractus. He who contracts with or ought to know, the quality of the person with whom he contracts (otherwise he is not excusable). Dig. 50. 17. 19; Story, Conf. § 78.

Qui dat finem, dat media ad finem necessaria. He who gives an end gives the means to that end. 3 Mass. 129.

Qui destruit medium, destruit finem. He who destroys the means destroys the end. 11 Co. 51; Shep. Touch. 342; Co. Litt. 161 a.

Qui docti inherit alii pœre, docti inherit alii finis. He who is taught to inherit from the father ought to inherit from the son. 2 Bla. Com. 230, 247; Broom, Max. 517.

Qui evertit causam, evertit causatum futurum. He who overthrows the cause overthrows its future effects. 10 Co. 51.

Qui ex damno coitu nascuntur, inter liberos non computantur. He who are born of an illicit union should not be counted among children. Co. Litt. 8. See Bract. 6; Broom, Max. 519.

Qui facit id quod plus est, facit id quod minus est, sed non convertitur. He who does that which is more done that which is less, but not vice versa. Bracton 20 b.

Qui facit per alium facit per se. He who acts through another acts himself (i. e. the acts of an agent are the acts of the principal). Broom, Max. 518; Sharsw. Bla. Com. 449; 14 Edw. 4; 7 M. & G. 323; 16 M. & W. 36; 8 Scott n. 590; 6 Cl. & F. 600; 9 id. 850; 10 Mass. 155; 3 Gray 361; 11 Metc. 71; 123 Pa. 62; Bish. Writ. L. § 93; Webb, Poll. Torts 81. See Litt. 238 a.

Qui habet jurisdictionem absolvens, habet jurisdictionem ligandi. He who has jurisdiction to loosen has jurisdiction to bind. 12 Co. 59.

Qui hæret in litera, hæret in cortice. He who adheres to the letter adheres to the bark. Broom, Max. 685; 5 Co. Litt. 238; 5 Co. 14 b; 11 id. 34 b; 12 id. 34 b; 13 id. 34 b; 14 id. 34 b; 15 id. 34 b; 16 id. 34 b; 17 id. 34 b; 18 id. 34 b; 19 id. 34 b; 20 id. 34 b; 21 id. 34 b; 22 id. 34 b; 23 id. 34 b; 24 id. 34 b; 25 id. 34 b; 26 id. 34 b; 27 id. 34 b; 28 id. 34 b; 29 id. 34 b; 30 id. 34 b; 31 id. 34 b; 32 id. 34 b; 33 id. 34 b; 34 id. 34 b; 35 id. 34 b; 36 id. 34 b; 37 id. 34 b; 38 id. 34 b; 39 id. 34 b; 40 id. 34 b; 41 id. 34 b; 42 id. 34 b; 43 id. 34 b; 44 id. 34 b; 45 id. 34 b; 46 id. 34 b; 47 id. 34 b; 48 id. 34 b; 49 id. 34 b; 50 id. 34 b; 51 id. 34 b; 52 id. 34 b; 53 id. 34 b; 54 id. 34 b; 55 id. 34 b; 56 id. 34 b; 57 id. 34 b; 58 id. 34 b; 59 id. 34 b; 60 id. 34 b; 61 id. 34 b; 62 id. 34 b; 63 id. 34 b; 64 id. 34 b; 65 id. 34 b; 66 id. 34 b; 67 id. 34 b; 68 id. 34 b; 69 id. 34 b; 70 id. 34 b; 71 id. 34 b; 72 id. 34 b; 73 id. 34 b; 74 id. 34 b; 75 id. 34 b; 76 id. 34 b; 77 id. 34 b; 78 id. 34 b; 79 id. 34 b; 80 id. 34 b; 81 id. 34 b; 82 id. 34 b; 83 id. 34 b; 84 id. 34 b; 85 id. 34 b; 86 id. 34 b; 87 id. 34 b; 88 id. 34 b; 89 id. 34 b; 90 id. 34 b; 91 id. 34 b; 92 id. 34 b; 93 id. 34 b; 94 id. 34 b; 95 id. 34 b; 96 id. 34 b; 97 id. 34 b; 98 id. 34 b; 99 id. 34 b; 100 id. 34 b.

Qui ignorat quantum solvere debeat, non potest improbus videre. He who does not know what he ought to pay does not want probity in not paying. Dig. 50. 17. 99.

Qui ius dominiumque alterius succedit jure ejus uti debet. He who succeeds to the right or property of another ought to use his right (i. e. he holds it subject to the same rights and liabilities as attached to it in the hands of the assignor). Dig. 50. 17. 177; Broom, Max. 473, 478.

Qui in utero est, pro jam nato habetur quoties de ejus commodum quaeritur. He who is in the womb is considered as born, whenever his benefit is concerned. See 1 Bla. Com. 130.

Qui jure suo utitur, nemini facit injuriam. He who uses his legal rights inflicts no harm on one. 8 Gray 424. See Broom, Max. 371.

Qui jussu judicis aliquid fecerit non videtur dolo malo fecisse, quia parere necesse est. He who does anything by command of a judge will not be supposed to have acted from an improper motive, because it was necessary to obey. 10 Co. 76; Dig. 50. 17. 167. 1; Broom, Max. 98.

Qui male agit, odit legem. He who acts badly hates the light. 7 Co. 66.

Qui mandat ipse fecisse videtur. He who commands the thing to be done is held to have done it himself. Story, Bailm. § 147.

Qui melius probat, melius habet. He who proves most recovers most. 9 Vin. Abr. 285.

Qui nascitur sine legitimo matrimonio, matrem sequitur. He who is born out of lawful matrimony follows the condition of the mother.

Qui non cadunt in constantem virum, vani timores sunt estimandi. Those are to be esteemed vain fears which do not affect a man of a firm mind. 7 Co. 47.

Qui non habet, ille non dat. Who has not, he gives not. Shep. Touch. 243; 4 Wend. 619.

Qui non habet in ore luctu in corpore, nequid pecetur impune. He who cannot pay with his purse must suffer in his person, lest he who offends should go unpunished. 2 Inst. 173; 1 Bla. Com. 20.

Qui non habet potestatem alienandi habet necessitatem retinendi. He who has not the power of alienating is obliged to retain. Hob. 336.

Qui non improbat, approbat. He who does not disapprove, approves. 3 Inst. 27.

Qui non negat, fatetur. He who does not deny, admits. Trayner, Max. 503.

Qui non obstat quod obstat potest, facere videtur. He who does not prevent what he can, seems to commit the thing. 2 Inst. 136.

Qui non prohibet cum prohibere possit, jubet. He who does not forbid when he can forbid, commands. 1 Sharw. Bla. Com. 430.

Qui non prohibet quod prohibere potest, assentire videtur. He who does not forbid what he can forbid, seems to assent. 2 Inst. 306; 8 Exch. 304.

Qui non propulsiat injuriam quando potest, infert. He who does not repel a wrong when he can, occasions it. Jenk. Cent. 271.

Qui obstruit aditum, destruit commodum. He who obstructs an entrance destroys a convenience. Co. Litt. 101.

Qui omne dicit, nihil excludit. He who says all excludes nothing. 4 Inst. 81.

Qui parit nocentibus innocentes punit. He who spares the guilty punishes the innocent. Jenk. Cent. 126.

Qui peccat ebrius, laet sobrius. He who offends drunk must be punished when sober. Cary 133; Broom, Max. 17.

Qui per alium facit per seipsum facere videtur. He who does anything through another is considered as doing it himself. Co. Litt. 258; Broom, Max. 87.

Qui per fraudem agit, frustra agit. He who acts fraudulently acts in vain. 2 Rolle 17.

Qui potest et debet vetare, lacens jubet. He who can and ought to forbid and does not, commands. 1 Johns. Ch. 24.

Qui primum peccat ille facit rixam. He who first offends causes the strife.

Qui prior est tempore, potior est jure. He who is prior in time is stronger in right. Broom, Max. 355; Co. Litt. 14 a; 1 Story, Eq. Jur. § 64 d; Story, Bailm. § 312; 97 Mass. 108; 13 Md. 411; 3 East 103; 10 Watts 24; 24 Miss. 208; 70 Md. 448; 44 Cent. L. J. 427; Tiedm. Eq. Jur. § 22.

Qui pro me aliquid facit, mihi fecisse videtur. He who does any benefit for me (to another) is considered as doing it to me. 2 Inst. 501.

Qui providet sibi, providet heredibus. He who provides for himself provides for his heirs.

Qui rationem in omnibus querunt, rationem subvertunt. He who seeks a reason for everything subverts reason. 2 Co. 75; Broom, Max. 157.

Qui scietis solus indebitum donandi consilio id videtur fecisse, qui non scietis promittit. He who is not due, is supposed to have done it with the intention of making a gift. 17 Mass. 388.

Qui semel actionem renunciaverit, amplius repetere non potest. He who renounces his action once cannot at any more bring it. 8 Co. 59. See RETRAIT.

Qui semel natus est, semel promittit esse matris in eodem genere. He who is once born is presumed to be always so in the same degree. Cro. Car. 317; Best, Ev. 345.

Qui sentit commodum, sentire debet et onus. He who derives a benefit from a thing ought to bear the disadvantages attending it. 2 W. & M. 217; 1 Stor. 308, 571; Broom, Max. 706; 17 Pick. 530; 2 Binn. 308, 571; Short, Ry. Law 790; 49 La. Ann. 600.

Qui sentit onus, sentire debet et commodum. He who bears the burden ought also to derive the benefit. 1 Co. 99 a; Broom, Max. 712; 1 S. & R. 180; Francis, Max. 1.

Qui tacet consentire videtur. He who is silent appears to consent. Jenk. Cent. 32; Broom, Max. 138, 187; 2 Pick. 73, n.; 119 Mass. 515. See Dig. 50, 17, 142, for a different form.

Qui tacet consentire videtur ubi tractatur de ejus commodo. He who is silent is considered as assenting, when his advantage is debated. 9 Mod. 96; 35 Fla. 169.

Qui tacet non atque fatetur, sed tamen verum est eum non negare. He who is silent does not indeed confess, but yet it is true that he does not deny. Dig. 50, 17, 142.

Qui tardius solvit, minus solvit. He who pays tardily pays less than he ought. Jenk. Cent. 38.

Qui vult decipi, decipitur. Let him who wishes to be deceived, be deceived. Broom, Max. 782, n.; 1 De G. M. & G. 687, 710; Shep. Touch. 56; 43 Cal. 110.

Quicquid acquiritur servo, acquiritur domino. Whatever is acquired by the servant is acquired for the master. 15 Vin. Abr. 327.

Quicquid demonstrat re additur satis demonstrat frustra est. Whatever is added to the description of a thing already sufficiently described is of no effect. Dig. 43, 4, 1; Broom, Max. 630.

Quicquid est contra normam recte est injuria. Whatever is against the rule of right is a wrong. 3 Bulstr. 313.

Quicquid in excessu actum est, lege prohibetur. Whatever is done in excess is prohibited by law. 2 Inst. 107.

Quicquid iudicis auctoritatis subicitur, novitati non subicitur. Whatever is subject to the authority of a judge is not subject to innovation. 4 Inst. 66.

Quicquid plantatur solo, solo cedit. Whatever is affixed to the soil belongs to the soil. Off. E. 145; 8 Cush. 189. See Amb. 113; 8 East 51; Broom, Max. 401; 61 Vt. 134; 10 N. Y. L. R. 169; FIXTURES.

Quicquid recipitur, recipitur secundum modum recipientis. Whatever is received is received according to the intention of the recipient. Broom, Max. 810; Halkers, Max. 140; 2 Bingham, n. c. 451; 2 B. & C. 72; 14 Sfr. 522; 2 Cl. & F. 681; 2 Cr. & J. 678; 14 East 239, 243 c.

Quicquid solvitur, solvitur secundum modum solventis. Whatever is paid is to be applied according to the intention of the payer. Broom, Max. 810; 2 Ver. 608. See APPROPRIATION OF PAYMENTS.

Quid sit ius, et in quo consistat injuria, legis est definire. What constitutes right, and what injury,

is the business of the law to declare. Co. Litt. 158 b.

Quid turpi ex causa promissum est non valet. A promise arising out of immoral circumstances is invalid.

Quicquid enim sive dolo et culpa venditoris accidit in eo venditor securus est. For concerning anything which occurs without deceit and wrong on the part of the vendor, the vendor is secure. 4 Pick. 198.

Quicquid non movetur. Not to unsettle things which are established. 38 Barb. 9, 32.

Quilibet potest renunciare juri pro se inducto. Any one may renounce a right introduced for his own benefit. To this rule there are some exceptions. See Broom, Max. 699, 705; 3 Curt. C. C. 393; 1 Exch. 657; 31 L. J. Ch. 175; 9 Mass. 432; 3 Pick. 218; 12 Cush. 89; 5 Johns. Ch. 566.

Quisquis est qui velit juramentum haberi, continet studium, velit a quocunque doceri. Whoever wishes to be held a juror, let him continually study, and desire to be taught by everybody.

Qui ligatur, eo dissolvitur. As a thing is bound, so it is unbound. 2 Rolle 21.

Quocunque modo velit, quocunque modo possit. In any way he wishes, in any way he can. 14 Johns. 484, 492.

Quod a quoque pœna nomine exactum est id eidem restituere nemo cogitur. That which has been exacted as a penalty no one is obliged to restore. Dig. 50, 17, 142.

Quod ab initio non valet, in tractu temporis non convalescit. What is not good in the beginning cannot be rendered good by time. Meril. Rep. verb. Regle. de Droif. (This, though true in general, is not universally so.) 4 Co. 26; Broom, Max. 178; 5 Pick. 87.

Quod ad jus naturale attinet, omnes homines æquales sunt. All men are equal as far as the natural law is concerned. Dig. 50, 17, 32.

Quod edificatur in area legata credit legato. Whatever is built upon land given by will passes with the gift of the land. Amos & F. Fixtures 246; Broom, Max. 424.

Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur. What is otherwise good and just, if sought by force or fraud, becomes bad and unjust. 8 Co. 78.

Quod alias non fuit licitum, necessitas licitum facit. Necessity makes that lawful which otherwise was unlawful. Fleta, l. 5, c. 23, § 14.

Quod approbo non reprobo. What I approve I do not disapprove. Broom, Max. 712.

Quod attinet ad jus civile, servi pro nullis habentur, non tamen et jure naturali, quia, quod ad jus naturale attinet, omnes homines æquales sunt. So far as the civil law is concerned, slaves are not reckoned as persons, but not so by natural law, for so far as regards natural law all men are equal. Dig. 50, 17, 32.

Quod constat clare, non debet verificari. What is clearly apparent need not be proved. 10 Mod. 150.

Quod constat curie opere testium non indiget. What appears to the court needs not the help of witnesses. 2 Inst. 662.

Quod contra juris rationem receptum est, non est producendum ad consequentias. What has been admitted against the reason of the law, ought not to be drawn into precedents. Dig. 50, 17, 141; 19 Co. 75.

Quod contra legem fit, pro infecto habetur. What is done contrary to the law, is considered as not done. 4 Co. 31. (No one can derive any advantage from such a contract.)

Quod datum est ecclesie, datum est Deo. What is given to the church is given to God. 2 Inst. 590.

Quod demonstrandi causa additur rei satis demonstrat, frustra fit. What is added to a thing sufficiently palpable, for the purpose of demonstration, is of no effect. 118.

Quod dubitas, ne feceris. When you doubt about a thing, do not do it. 1 Hale, P. C. 310; Broom, Max. 336, n.

Quod enim semel ut bis existit, prætereunt legislatores. That which never happens but once or twice, legislators do not consider. 3 Inst. 17.

Quod est ex necessitate nunquam introducit, nisi quando necessarium. What is introduced of necessity, is never introduced except when necessary. 2 Rolle 512.

Quod est inconveniens, aut contra rationem non permittitur in lege. What is inconvenient or contrary to reason, is not allowed in law. Co. Litt. 178.

Quod est necessarium est licitum. What is necessary is lawful. Jenk. Cent. 76.

Quod fieri debet facile præsumitur. That is easily presumed which ought to be done. Halkers, Max. 153; Broom, Max. 185, 207.

Quod fieri non debet, factum valet. What ought not to be done, when done, is valid. 5 Co. 38; 12 Mod. 438; 6 M. & W. 58; 9 J. 636.

Quod in jure scripto "jus" appellatur, id in lege anglica "remun" esse dicitur. What in the civil law is called "jus," in the law of England is said to be "rectum" (right). Co. Litt. 360; Fleta, l. 6, c. 1, § 1.

Quod in minori valet, valet in majori; et quod in majori non valet, nec valet in minori. What avails in the less, will avail in the greater; and what will not avail in the greater, will not avail in the less. Co. Litt. 250.

Quod in uno similium valet, valet in altero. What avails in one of two similar things, will avail in the other. Co. Litt. 191.

Quod inconsulto fecimus, consultus revocemus. What is done without consideration or reflection, upon better consideration we should revoke or undo. Jenk. Cent. 116.

Quod initio non valet, tractu temporis non valet. A thing void in the beginning does not become valid by lapse of time. 1 S. & R. 58.

Quod initio licitum est, non potest tractu temporis convalescere. Time cannot render valid an act void in its origin. Dig. 50, 17, 29; Broom, Max. 178.

Quod ipis, qui contraxerunt, obstat, et successoribus eorum obstat. That which bars those who have contracted will bar their successors also. Dig.

50, 17, 108.

Quis alterius solvitur pro eo est quasi ipsi solvitur easet. That which is paid by the order of another is, so far as such person is concerned, as if it had been paid to himself. Dig. 50, 17, 180.

Quod meum est, sine facto sive defectu meo amitti non in alium transferri non potest. That which is mine cannot be lost or transferred to another without mine own act or default. 8 Co. 92; Broom, Max. 465; 1 Prest. Abstr. 147, 318.

Quod meum est sine me auferri non potest. What is mine cannot be taken away without my consent. Jenk. Cent. 251. But see EMINENT DOMAIN.

Quod minus est in obligationem videtur deductum. That which is the less is held to be imported into the contract (e.g. A offers to hire B's house at six hundred dollars, at the same time B offers to let it for five hundred dollars; the contract is for five hundred dollars). 1 Story, Contr. 481.

Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium. That which natural reason has established among all men, is called the law of nations. Dig. 1. 1. 9; Inst. 1. 2. 1; 1 Bla. Com. 43.

Quod necessarie intelligitur id non deest. What is necessarily understood is not wanting. 1 Bulstr. 71.

Quod necessitas cogit, defendit. What necessity forces, it justifies. Hale, P. C. 54.

Quod non apparet non est, non apparet judicialiter ante iudicium. What appears not does not exist, and nothing appears judicially before judgment. 2 Inst. 478; Broom, Max. 164; Jenk. Cent. 259; 25 Pa. 37.

Quod non capit Christus, capit fœcus. What the church does not take, the treasury takes. Year B. 19 Hen. VI. 1.

Quod non habet principium non habet finem. What has no beginning has no end. Co. Litt. 345; Broom, Max. 180.

Quod non legitur, non creditur. What is not read is not believed. 4 Co. 304.

Quod non valet in principali, in accessorio seu consequenti non valet; et quod non valet in magis propinquo, non valet in magis remoto. What is not good as to things principal, will not be good as to accessories or consequences; and what is not of force as regards things near will not be of force as to things remote. 8 Co. 78.

Quod nullius esse potest, id ut alicuius fieret obligatio valet efficere. No agreement can avail to make that the property of any one which cannot be acquired as property. Dig. 50, 17, 182.

Quod nullius est, est domini regis. That which belongs to nobody belongs to our lord the king. Fleta, l. 13; Broom, Max. 354; Bacon, Abr. Prerogative (B); 2 Bla. Com. 260.

Quod nullius est, ratione naturali occupanti conceditur. What belongs to no one, by natural reason belongs to the first occupant. 2 Inst. 2. 1. 12; 1 Bouv. Inst. n. 491; Broom, Max. 353.

Quod nullum est, nullum producit effectum. That which is null produces no effect. Trayner, Max. 519.

Quod omnes tangit, ab omnibus debet supportari. That which concerns all ought to be supported by all. 3 How. St. Tr. 818, 1087.

Quod per me non possum, nec per alium. What I cannot do in person, I cannot do through the agency of another. 4 Co. 94 b; 11 id. 87 c.

Quod per recordum probatum, non debet esse negatum. What is proved by the record, ought not to be denied.

Quod populus postremum jussit, id jus rationis est. That which the people have last enacted, let that be the established law. 1 Bla. Com. 99; 12 Allen 434.

Quod principi placuit, legis habet vigorem, et potest cum lege regia, quæ de imperio ejus lata est, populus et ei in eum omne suum imperium et potestatem conferat. The will of the emperor has the force of law; for, by the royal law which has been made concerning his authority, the people have conferred upon him all his sovereign powers. Dig. 1. 4. 1; Inst. 1. 2. 1; Fleta, l. 1. c. 17, § 7; Brac. 107; Selden, Diss. ad Flac. c. 8, § 2.

Quod prius est verius est; et quod prius est tempore potius est jure. What is first is truest; and what comes first in time is best in law. Co. Litt. 847.

Quod pro minore licitum est, et pro majore licitum est. What is lawful in the less is lawful in the greater. 8 Co. 43.

Quod pure debetur presentis die debetur. That which is due unconditionally is due now. Trayner, Max. 519.

Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire. He who suffers a damage by his own fault is not held to suffer damage. Dig. 50, 17, 203.

Quod quis sciens indebitum delit hac mente, ut postea repeteret, repeteri non potest. What one has paid knowing it not to be due, with the intention of recovering it back, he cannot recover back. Dig. 2. 6. 50.

Quod quisquis norit in hoc se exerceat. Let every one employ himself in what he knows. 11 Co. 10.

Quod remedio destitutus sit, non debet culpa abiri. What is without a remedy is by that very fact valid if there be no fault. Bacon, Max. Reg. 9; 3 Bla. Com. 20; Broom, Max. 212.

Quod semel ut bis existit prætereunt legislatores. Legislators pass over what happens (only) once or twice. Dig. 1. 3. 6; Broom, Max. 465.

Quod semel meum est amplius meum esse non potest. What is once mine cannot be mine more completely. Co. Litt. 49 b; Shep. Touch. 212; Broom, Max. 465, n.

Quod semel placuit in electione, amplius displicere non potest. That which in making his election a man has once been pleased to choose, he cannot afterwards quarrel with. Co. Litt. 146; Broom, Max. 295.

Quod solo inedificatur solo cedit. Whatever is built on the soil is an accessory of the soil. Inst. 2. 1. 28; 10 Mass. 449; 2 Bouv. Inst. n. 1571.

Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem.

That which is granted or reserved under a certain form, is not to be drawn into valuation or compensation. Bacon, Max. Reg. 4; Broom, Max. 464.

Quod subintelligitur non dicitur. What is understood is not wanting. 2 Ed. Rayn. 882.

Quod tacite intelligitur deesse non videtur. What is tacitly understood does not appear to be wanting. 4 Co. 22.

Quod omnia et inuile est, lex non requirit. The law does not require what is vain and useless. Co. Litt. 819.

Quod vero contra rationem juris receptum est, non est producendum ad consequentias. But that which has been admitted contrary to the reason of the law, ought not to be drawn into precedents. Dig. 1. 3. 14; Broom, Max. 153.

Quodcumque dicitur ad tutelam corporis sui fecerit iure iudicis videtur. Whatever one does in defence of his person, that he is considered to have done legally. 2 Inst. 590.

Quodque dissolvitur eodem modo quo ligatur. In the same manner that a thing is bound, it is unbound. 5 Rolle 93; Broom, Max. 981; 2 M. & G. 729.

Quo modo quod constituitur eodem modo dissolvitur. In whatever mode a thing is constituted, in the same manner is dissolved. Jenk. Cent. 74.

Quorum praeterea nec augeat nec minuit sententiam, sed tantum confirmat praesentia. Quorum praeterea neither increases nor diminishes the meaning, but only confirms that which went before. Plowd. 52.

Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit. Whenever there is a doubt between liberty and slavery, the decision must be in favor of liberty. Dig. 50. 17. 20.

Quotiens idem sermo duas sententias exprimit, ea potissimum accipitur, quae rei gerendae aptior est. Whenever the same words express two meanings, that is to be taken which is the better fitted for carrying out the proposed end. Dig. 50. 17. 27.

Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de quo agitur in tuto sit. Whenever in stipulations the expression is ambiguous, it is most proper to give it that interpretation by which the subject-matter may be in safety. Dig. 41. 1. 30. 16. 419.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est. When there is no ambiguity in the words, then no exposition contrary to the words is to be made. Co. Litt. 157; Broom, Max. 583; 5 Mass. 248.

Quum de iure duorum quaritur, melior est conditio possidentis. When the gain of one or two is in question, the condition of the possessor is the better. Dig. 50. 17. 128. n.

Quum in testamento ambiguitur aut etiam perperam scriptum est, benignè interpretari et secundum id quod creditur voluisse testatorem, credendum est. When in a will an ambiguous or even an erroneous expression occurs, it should be construed liberally and in accordance with what is thought the probable meaning of the testator. Dig. 34. 5. 24; Broom, Max. 551; 5 Periss. Periss.

Quum principalis causa non consistit in ea quidem quae sequitur locum habent. When the principal cause does not hold its ground, neither do the accessories find place. Dig. 50. 17. 129. 1; Broom, Max. 496; 1 Pothier, Obl. 413.

Ratihabito mandato acquiescat. Ratification is equal to a command. Dig. 46. 3. 12. 4; Broom, Max. 867; 20 Pick. 65.

Ratio est formalis causa consuetudinis. Reason is the source and cause of custom.

Ratio est iure animi, mutata legis ratione mutatur et lex. Reason is the soul of the law; the reason of the law being changed, the law is also changed. 7 Co. 7.

Ratio et auctoritas duo clarissima mundi lumina. Reason and authority are the two brightest lights in the world. Dig. 41. 1. 30. 16. 419.

Ratio in iure aequitas integra. Reason is law is perfect equity.

Ratio legis est anima legis. The reason of the law is the soul of the law. Jenk. Cent. 45.

Ratio non clauditur loco. Reason is not confined to any place.

Ratio postulat allegari deficientem legem, sed vera et legitis et non apparet. Reason may be alleged when the law is defective, but it must be true and legal reason, and not merely apparent. Co. Litt. 191.

Re, verbis, scripto, consensu, traditione, iunctura vestes sumere pacta solent. Contracts usually take their clothing from the thing itself, from words, from writings, from consent, from delivery. Plowd. 161.

Receditur a placitis juris potius quam injuriae et delicta maneant impunita. Positive rules of law will be receded from rather than crimes and wrongs should remain unpunished. Bacon, Max. Reg. 12; Broom, Max. 10. (This applies only to such maxims as are called placita juris; these will be dispensed with rather than crimes should go unpunished, quia salus populi suprema lex, because the public safety is the supreme law.)

Recorda sunt vestigia vetustatis et veritatis. Records are vestiges of antiquity and truth. 2 Rolle 296.

Recurrendum est ad extraordinarium quando non valet ordinarium. We must have recourse to what is extraordinary when what is ordinary fails.

Reddenda singula singula. Let each be put in its proper place; that is, that the words should be taken distributively. 2 Johns. Ch. 614; 3 Dist. Rep. Pa. 344; 12 Pick. 291; 18 id. 228.

Regula est juris quidem ignorantiam cuique nocere, facti vero ignorare non nocere. The rule is, that ignorance of the law does not excuse, but that ignorance of a fact may excuse a party from the legal consequences of his conduct. Dig. 22. 6. 9; Broom, Max. 233. See Irvine, Civ. Law 74.

Regula pro lege, si deficit lex. In default of the law, the maxim is the supreme law.

Regulariter non valet pactum de re mea non alienanda. Regularly a contract not to alienate my property is not binding. Co. Litt. 222.

Rei turpis nullum mandatum est. A mandate of

an illegal thing is void. Dig. 17. 1. 6. 8.

Reipublica interest volutates defunctorum effectum sortiri. It concerns the state that the wills of the dead should have their effect.

Relatio est fictio juris et intenta ad unum. Relation is a fiction of law, and intended for one thing. 3 Co. 28.

Relatio semper fiat ut valeat dispositio. Reference should always be had in such a manner that a disposition in a will may avail. 6 Co. 76.

Relatio never defeats collateral acts. 18 Vin. Abr. 282.

Relatio shall never make good a void grant or devise of the party. 18 Vin. Abr. 292.

Relative words refer to the next antecedent, unless the sense be thereby improved. Noy, Max. 4; Wing. Max. 19; Broom, Max. 600; Jenk. Cent. 180.

Relationes cognito ad uno, cognoscitur et alterum. Of things relating to each other, one being known, the other is known. Cro. Jac. 339.

Remainder can depend upon no estate but what beginneth at the same time the remainder doth.

Remainder must vest at the same instant that the particular estate determineth.

Remainder to a person not of a capacity to take at the time of appointing it, is void. Plowd. 97.

Remedies for rights are ever favorably extended. 18 Vin. Abr. 631.

Remedies ought to be reciprocal.

Remissus imperanti melius pareretur. A man commanding not too strictly is better obeyed. 3 Inst. 283.

Remoto impedimento, emergit actio. The impediment being removed, the action arises. 5 Co. 76; Wing. Max. 20.

Res must be reserved to him from whom the state of the land moveth. Co. Litt. 143.

Repellitur a sacramento infamia. An infamous person is repelled or prevented from taking an oath. Co. Litt. 133; Bract. 185.

Repellitur a sacramento cedendarum actionum. He is defeated by the plea of the cedendarum actionum assigned. 1 Johns. Ch. 400, 414.

Reprobata pecunia liberat solventem. Money refused releases the debtor. 9 Co. 70. But this must be understood with a qualification. See TEMPER.

Reputatio est opinio, non est veritas. Reputation is a common opinion where there is no certain knowledge. 4 Co. 107. But see CHARACTER.

Rerum ordo confunditur, si unicuique iurisdictioni non servatur. The order of things is confounded if every one preserves not his jurisdiction. 4 Inst. 370.

Rerum progressus ostendunt multa, quae in initio praeveri seu praevideri non possunt. In the course of events many mischiefs arise which at the beginning could not be guarded against or foreseen. 6 Co. 40.

Res suam quilibet est moderator et arbiter. Every one is the manager and disposer of his own matters. Co. Litt. 223.

Res accendit lumina rebus. One thing throws light upon others. 4 Johns. Ch. 149.

Res accessoria sequitur rem principalem. An accessory follows its principle. Broom, Max. 491. (For a definition of res accessoria, see MAX. CIV. LAW 155.)

Res denominatur a principali parte. A thing is named from its principal part. 5 Co. 47.

Res est misera ubi jus est vagum et incertum. It is a miserable state of things where the law is vague and uncertain. 2 Salk. 512.

Res generale habet specificationem, quia tam corporea, quam incorporea, cuiusque sunt generis, naturae specie, comprehendit. The word things has a general significance, because it comprehends as well corporeal as incorporeal objects, of whatever sort, nature, or species. 3 Inst. 424; 1 Bouv. Inst. n. 415.

Res inter alios acta alteri nocere non debet. Things done between strangers ought not to injure those who are not parties to it. Dig. 44. 2. 1.

Res inter alios judicata nullum alius prajudicium facit. Matters adjudged in a cause do not prejudice those who were not parties to it. Dig. 44. 2. 1.

Res iudicata facta est alibi, ex nigro album, ex curvato recto curvum. A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked. 1 Bouv. Inst. n. 840.

Res iudicata pro veritate accipitur. A thing adjudged must be taken for truth. Dig. 50. 17. 207; Co. Litt. 106; Broom, Max. 328, 333, 345; 2 Kent 120; 13 M. & W. 679; 59 Pa. 68. See RES JUDICATA.

Res nullius naturaliter fit primi occupantis. A thing which has no owner naturally belongs to the first finder. See FINDER.

Res per pecuniam aestimatur, et non pecunia per res. The value of a thing is estimated by its worth in money, and the value of money is not estimated by reference to the thing. 9 Co. 76; 1 Bouv. Inst. n. 922.

Res perit domino suo. The destruction of the thing is the loss of its owner. Harc. Cent. 88; Story, Bailm. 426; 2 Kent 591; Broom, Max. 338; 13 Allen 381; 14 id. 269. This maxim is said to be quoted chiefly in cases to which it did not apply in the Roman Law; 9 Harv. L. Rev. 106. See SALE.

Res propria est quae communis non est. A thing is private which is not common. 8 Paige 261, 270.

Res qua intra praesidia deducta nondum sunt, quamquam ab hostibus occupatae, ideo postliminii non egent, quia dominum nondum maturum ex gentium iure. Things which have not yet been intrusted by the enemy, although held by the enemy, do not need the fiction of postliminy on this account, because their ownership by the law of nations has not yet changed. Grotius, de Jur. Bell. l. 3. c. 9, § 16; l. 3. c. 6, § 8.

Res sacra non recipit estimationem. A sacred thing does not admit of valuation. Dig. 1. 8. 9. 5.

Res sua nemini servit. No one can have a servitude over his own property. Trayner, Max. 541.

Res transit cum suo onere. The thing passes with its burden. Fleta, l. 3. c. 10, § 3.

Reservatio non debet esse de proficiis ipsius quia ea conceduntur, sed de redditu novo extra proficiunt.

A reservation ought not to be of the annual increase itself, because it is granted, but of new rent apart from the annual increase. Co. Litt. 142.

Resignatio est juris proprii spontanea refutatio. Resignation is the spontaneous relinquishment of one's own right. Godb. 234.

Resoluto iure concessio, resoluitur ius concessum. The right of the grantor being extinguished, the right granted is extinguished. Mack. Civ. Law 179; Broom, Max. 467.

Respicendum est iudicanti, nequid aut durius aut remissius constituitur quam causa deprecatur; neque ius aut severitas aut clementia gloria affectanda est. It is a matter of import to one adjudicating that nothing should be either more severely or more leniently construed than the cause itself demands; for the glory neither of severity nor clemency should be affected. 3 Inst. 220.

Respondet raptor, qui ignorare non potuit quod pupillum alienum abduxit. Let the ratcher answer, for he could not be ignorant that he has taken away another's ward. Hob. 90.

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Scire debes cum quo contrahis. You ought to know with whom you deal. 11 M. & W. 405, 632; 13 id. 171.

Scire et scire debere aequiparantur in iure. To know a thing, and to be bound to know it, are regarded in law as equivalent. Trayner, Max. 351.

Scire leges, non hoc est verba eorum tenere, sed vim et potestatem. To know the laws, is not to observe their mere words, but their force and power. Dig. 1, 3, 17.

Scire proprie est rem ratione et per causam cognoscere. To know properly is to know a thing by its cause and in its reason. Co. Litt. 183.

Scire est agere. To write is to act. 2 Rolle 99; 4 Bla. Com. 80; Broom, Max. 312, 367.

Scriptae obligationes scriptis tolluntur, et nudi consensus obligatio, contrario consensu dissolvitur. Written obligations are dissolved by writing, and the obligations of a naked agreement by a naked agreement to the contrary.

Secuta est pugna civilis, sicut actores armantur actionibus, et quasi accinguntur gladiis, ita rei (e contra) mununtur exceptionibus, et defendantur quasi clipeis. A suit is a civil battle, as the plaintiff is armed with actions and as is were girl with swords, so on the other hand the defendants are fortified with pleas, and defended as it were by shields. Hon. J. Bract. 389 b.

Secuta quae scripta tollitur a scripto variari non debet. A suit which relies upon a writing ought not to vary from the writing. Jenk. Cent. 85.

Secundum naturam est, commodum cuiusque rei eum sequi, quem sequitur incommodum. It is natural that he who bears the charge of a thing should receive the profits. Dig. 50, 17, 16.

Securarius expeditur negotio commissaria pluribus, et plus videtur oculi quam oculis. Business is trusted to several speeds abed, and several eyes see more than one. Co. 48.

Semina facit sapientem. Selsin makes the stock. 2 Bla. Com. 409; Broom, Max. 538; 1 Steph. Com. 307; 4 Kent 388, 389; 13 Ga. 238.

Semel civis semper civis. Once a citizen always a citizen. Trayner, Max. 555.

Semel malus semper praesumitur esse malus in eodem genere. Whoever is once bad is presumed to be so always in the same degree. Co. 317.

Semper in dubiis benigniora praefertenda sunt. In dubious cases the more liberal constructions are always to be preferred. Dig. 50, 17, 56.

Semper in dubiis id agendum est, ut quam tutissima loco res sit bona fide contracta, nisi quam aperte contra legem scriptum est. Always in doubtful cases that is to be done by which a bona fide contract may be in the greatest safety, except when its provisions are clearly contrary to law. Dig. 34, 5, 21.

Semper in obscuris quod minimum est sequimur. In obscure cases we always follow that which is least obscure. Dig. 50, 17, 9; Broom, Max. 687, n.; 3 C. B. 962.

Semper in stipulationibus et in ceteris contractibus id sequimur quod actum est. In stipulations and other contracts we always follow that which was agreed. Dig. 50, 17, 64.

Semper ita fiat dispositio ut valeat dispositio. Let the reference always be so made that the disposition may avail. 6 Co. 76.

Semper necessitas probandi incumbit ei qui agit. The claimant is always bound to prove (the burden of proof lies on him who denies. See 10 Cl. & F. 334; 3 E. & B. 723; 1 Bish. Mar. Div. & Sep. 400.

Semper praesumitur pro legitimatione puerorum, et filiatione non potest probari. The presumption is always in favor of legitimacy, for filiation cannot be proved. Co. Litt. 196. See 5 Co. 86 b.

Semper praesumitur pro negante. The presumption is always in favor of the negator. See 10 Cl. & F. 334; 3 E. & B. 723; 1 Bish. Mar. Div. & Sep. 400.

Semper praesumitur pro sententia. Presumption is always in favor of a judgment. 3 Bulstr. 42.

Semper contra non prohibet pro se intervenire, mandare creditur. He who does not prohibit the intervention of another in his behalf is supposed to authorize it. 2 Kent 616; Dig. 14, 6, 16; 43 S. 12, 4.

Semper sexus masculinus etiam femininum continet. The male sex always includes the female. Dig. 32, 63; 3 Brev. 9.

Sententiae specialia generalibus insunt. Special clauses are always comprised in general ones. Dig. 50, 17, 147.

Senatores sunt partes corporis regis. Senators are part of the body of the king. Staunf. 72 E; 4 Inst. 53, in marg.

Sensus verborum est anima legis. The meaning of words is the spirit of the law. 5 Co. 2.

Sensus verborum est duplex, mitis et asper, et verba semper accipiuntur sensu in mitiore sensu. The meaning of words is twofold, mild and harsh; and words are to be received in their milder sense. 4 Co. 13.

Sensus verborum ex causa dicendi accipiendus est, et sermones semper accipiendi sunt secundum subjectam materiam. The sense of words is to be taken from the occasion of speaking them, and discourses are always to be interpreted according to the subject-matter. Co. 14.

Sententia a non iudice lata nemini debet nocere. A judgment pronounced by one who is not a judge should not harm any one. Fleta, 1, 6, c. 6, § 7.

Sententia contra matrimonium nunquam transit in rem iudicata. A sentence against marriage never passes in a judgment (conclusive upon the parties). 7 Co. 43.

Sententia facit ius, et legis interpretatio legis vim obtinet. The judgment makes the law, and the interpretation has the force of law.

Sententia facit ius, et res iudicata pro veritate accipitur. Judgment creates the right, and what is adjudicated is taken for truth. Ellesm. Post. 53.

Sententia interlocutoria revocari potest, definitiva non potest. An interlocutory order may be revoked, but not a final one. Bacon, Max. Reg. 20.

Sententia non fertur de rebus non liquidis. Judgment is not given upon a thing which is not clear.

Sequi debet potentia iustitiam non procedere. Power should follow justice, not precede it. 2 Inst. 451.

Sermo index animi. Speech is an index of the mind. 5 Co. 118.

Servitus est consuetudo loci ubi causa agitur. The custom of the place where the action is brought is to be observed. 3 Johns. Ch. 190, 219.

Servitus personalia sequitur personam. Personal services follow the person. 1 Inst. 374; Fleta, 1, c. 1, § 1.

Si iura decedant, vagus eris et erant omnia omnibus incerta. If you depart from the law, you will wander without a guide, and everything will be in a state of uncertainty to every one. Co. Litt. 227.

Si aliquid rei societas sit et finis negotii imposui, est finis societas. If there is a partnership in any matter, and the business is ended, the partnership ceases. 16 Johns. 438, 489.

Si aliquid ex solemnibus deficiat, cum equitas possit subueniendum est. If anything be wanting from required forms, when equity requires it will be aided. 1 Kent 157.

Si assueti mederi possis nova non sunt tentanda. If you can be relieved by accustomed remedies, new ones should not be tried. 10 Co. 142.

Si duo in testamento pugnancia reperiuntur, ultimam est ratum. If two conflicting provisions are found in a will, the last is observed. Lofti 251.

Si iudicia, cognoscere. If you judge, understand.

Si meliores sunt quos ducit amor, plures sunt quos corrigit timor. If those are better who are led by love, those are the greater number corrected by fear. Co. Litt. 332.

Si non apparet quid actum est, erit consequens ut id sequamur quod in regione qua actum est frequentatur. If it does not appear what was agreed upon, the consequence will be that we must follow that which is the usage of the place where the agreement was made. Dig. 50, 17, 34.

Si nulla sit collectio, quae ducit alio, verba intelligenda sunt ex propria, quae ducit alio, verba intelligenda sunt ex propria. If there be no inference which leads to a different result, words are to be understood according to their proper meaning, not in a grammatical, but in a popular and ordinary, sense. 2 Kent 555.

Si plures conditiones scriptae fuerint donationi conjunctim, omnibus est parendum; et ad veritatem copulative requiritur quod utraque pars sit vera, si divinum, cuiuslibet vel alteri coram salis est obtemperandum; et in divinis, sufficit alteram partem esse veram. If several conditions are conjunctively written in a gift, the whole of them must be complied with; and with respect to their truth, it is necessary that every part be true, taken jointly; if the conditions are separate, it is sufficient to comply with either one or other of them; and being disjunctive, that one or the other be true. Co. Litt. 225.

Si plures sint defessores, quotquot erunt numero, singuli in solidum tenentur. If there are more sureties than one, how many soever they shall be, they shall each be held for the whole. Inst. 3, 20, 4.

Si quis unum debet, debetur singulis non debetur, nec quod debet universis singuli debent. If anything is due to a corporation, it is not due to the individual members of it, nor do the members individually owe what the corporation owes. Dig. 3, 4, 7; 1 Bla. Com. 434; Lindl. Part 5.

Si quidem legatarius, cognomine, praenomine, agnomine legatarius testator erroris, cum de persona constat, nihilominus valet legatum. If the testator has erred in the name, cognomen, praenomen, or title of the legatee, whenever the person is rendered certain, the legacy is nevertheless valid. Inst. 2, 20, 39; Broom, Max. 645; 2 Domat b. 2, 1, s. 6, § 10, 19.

Si quis custos fraudem pupillo fecerit, a tutela remouendus est. If a guardian behave fraudulently to his ward, he shall be removed from the guardianship. Jenk. Cent. 39.

Si quis propter uxorem azorem reliquit, non videtur sine liberis decessisse. If a man dies, leaving his wife pregnant, he shall not be considered as having died childless.

Si quis unum percusserit, cum alium percute vellet, in felonia tenetur. If a man kill one, meaning to kill another, he is held guilty of felony. 3 Inst. 51.

Si suggestio non sit vera, litterae patentes vacuae sunt. If the suggestion of a patent is false, the patent itself is void. 10 Co. 113.

Si enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat. Every one ought so to improve his land as not to injure his neighbors. 3 Kent 441.

Si interpretandum est ut verba accipiantur cum effectu. Such an interpretation is to be made that the words may have an effect. 3 Inst. 80.

Si utere tuo ut alienum non laedas. So use your own as not to injure another's property. 1 Bla. Com. 306; Broom, Max. 268, 385; Webb, Foll. Torts 133; 2 Bouv. Inst. n. 2379; 9 Co. 59; 5 Exch. 797; 18 Q. B. 739; 4 A. & E. 394; El. Bl. & El. 643; 15 Johns. 218; 17 Mass. 334; 105 id. 169; 86 N. C. 401; 4 M'CORD 472; 19 Colo. 294; 49 Ark. 107; 9 N. C. 477; 10 id. 21, 122 Pa. 191; 41 La. Ann. 194; 1 L. R. A. 52; 16 id. 57; 31 id. 547. Various comments have been made on this maxim: "Mere verbiage"; El. Bl. & E. 643. "No help to decision"; L. E. 2 Q. B. 247.

Utterly useless as a legal maxim; 9 N. Y. 445. It is a mere beguiling of the question; it assumes the very point in controversy; 13 Lea 507. See 2 Aust. Jurisp. 795, 829; Expedit reprobata ne sua re quis male utatur, supra.

Sicut natura nil facit per saltum, ita nec lex. As nature does nothing by a bound or leap, so neither does the law. Co. Litt. 238.

Sigillum est impressio, quia circa sine impressione non est sigillum. A seal is a piece of wax impressed because wax will not receive an impression in a seal. 3 Inst. 109. But see SEAL.

Silence shows consent. 6 Barb. 28, 35.

Silent leges inter arma. Laws are silent amidst arms. 4 Inst.

Similitudo legalis est casuum diversorum inter se collatorum similitudo ratio; quod in uno similitudo valet, valet in altero. Dissimilitudo, dissimilis est ratio. Legal similarity is a similar reason which governs various cases when compared with each

other, for what avails in one similar case will avail in the other. Of things dissimilar, the reason is dissimilar. Co. Litt. 191; Benj. Sales 579.

Simplex commendatio non obligat. A simple recommendation does not bind. Dig. 4, 3, 37; 2 Kent 485; Broom, Max. 781; 4 Taunt. 498; 16 Q. B. 282, 283; Cro. Jac. 4; 2 Allen 214; 5 Johns. 354; 4 Barb. 95.

Simplex et pura donatio dici poterit, ubi nulla est adiecta conditio nec modus. A gift is said to be pure and simple when no condition or qualification is annexed. Bract. 1.

Simplicitas est legis amica, et nimia subtilitas in iure reprobat. Simplicity is favorable to the law, and too much subtlety is blameworthy in law. 4 Co. 8.

Sine possessione usucapio procedere non potest. There can be no prescription without possession.

Singuli in solidum tenentur. Each is bound for the whole. 6 Johns. Ch. 242, 252.

Sive tota res ematur, sive pars, habet regressum emptor in venditorem. The purchaser who has been evicted in whole or in part has an action against the vendor. Dig. 21, 2, 1; Broom, Max. 768.

Socii mei socius meus socius non est. The partner of my partner is not my partner. Dig. 50, 17, 47; Lindl. Part. 438; 13 Gray 43.

Solus ac per se senectus donationem, testamentum aut transactionem non vitiat. Old age does not alone and of itself vitiate gift, will or transaction. 5 Johns. Ch. 143, 158.

Solemnitates juris sunt observanda. The solemnities of law are to be observed. Jenk. Cent. 13.

Solo cedit quod solo implanatur. What is planted in the soil belongs to the soil. Inst. 2, 1, 32; 2 Bouv. Inst. n. 1572.

Solo cedit quod solo inaedificatur. Whatever is built on the soil belongs to the soil. Inst. 2, 1, 29. See 1 Mack. Civ. Law 328.

Solus Deus heredes facit. God alone makes the heir. Bract. 62 b; Co. Litt. 5.

Solutio pretii emptio loco habetur. The payment of the price stands in the place of a sale. Jenk. Cent. 56; 1 Pick. 70.

Solvendo esse nemo intelligitur nisi qui solidum potest solvere. No one is considered to be solvent unless he can pay all that he owes. Dig. 50, 16, 114.

Solvitur adhuc societas etiam morte socii. A partnership is moreover dissolved by the death of a partner. Inst. 3, 26, 5; Dig. 17, 2.

Solvitur eo ligamine quo ligatur. In the same manner that a thing is bound it is unloosed. 4 Johns. Ch. 588.

Spes impunitatis continuum affectum tribuit delinquendi. The hope of impunity holds out a continual temptation to crime. 3 Inst. 236.

Spoliatus debet ante omnia restitui. He who has been despoiled ought to be restored before anything else. 2 Inst. 714; 4 Sharsw. Bla. Com. 835.

Spondet peritiam artis. He promises to use the skill of his art. Pothier, Louage, n. 425; Jones, Bailm. 22, 53, 62, 97, 120; Domat, liv. 1, t. 4, s. 8, n. 1; 1 Story, Bailm. 431; 1 Bell, Com. 5th ed. 491; 1 Bouv. Inst. n. 104.

Sponte virum fugiens mulier et adultera facta, doti sua careat, nisi sponsi sponte retracta. A woman leaving her husband of her own accord, and committing adultery, should lose her dower, unless her husband takes her back of his own accord. Co. Litt. 37.

Stabit praesumptio donec probetur in contrarium. A presumption will stand good until the contrary is proved. 1 Greenl. Ev. § 33, n.; Hob. 297; 3 Bla. Com. 371; Broom, Max. 949; 15 Mass. 90; 16 id. 87; 9 S. & R. 404.

Statuta decisa, et non quia movere. To adhere to precedents, and not to unsettle things which are established. 9 Johns. 385, 428; 11 Wend. 504; 25 id. 119, 142; 4 Hill, N. Y. 271, 323; 4 id. 592, 595; 87 Pa. 286; Cooley, Const. Lim. 65; 32 U. S. App. 676; 89 Mo. 226; 73 Miss. 360; 97 Tenn. 85.

Statuta pro ratione voluntas. The will stands in place of a reason. 1 Barb. 408, 411; 16 id. 51, 525.

Stat pro ratione voluntas populi. The will of the people stands in place of a reason. 25 Barb. 344, 276.

Statuta pro publico commodo late interpretantur. Statutes made for the public good ought to be liberally construed. 4 Kent 31.

Statuta suo clauduntur territorio, nec ultra territorium disponent. Statutes are confined to their own territory, and have no extra-territorial effect. 4 Allen 324; Story, Conf. L. 24.

Statutes in derogation of common law must be strictly construed. 1 Grant, Cas. 57; Cooley, Const. Lim. 75, n.

Statutum affirmativum non derogat communi legi. An affirmative statute does not take from the common law. Jenk. Cent. 24.

Statutum generaliter est intelligendum quando verba statuti sunt specialia, ratio autem generalis. When the words of a statute are special, but the reason of it general, it is to be understood generally. 10 Co. 101.

Statutum speciale statuto speciali non derogat. One special statute does not take away from another special statute. Jenk. Cent. 199.

Sublata causa tollitur effectus. Remove the cause and the effect will cease. 2 Bla. Com. 303.

Sublata veneratione magistratuum, respublica ruat. The commonwealth perishes, if respect for magistrates be taken away. Jenk. Cent. 48.

Sublato fundamento, cadit opus. Remove the foundation, the structure falls. Jenk. Cent. 106.

Sublato principali, tollitur adjunctum. If the principal be taken away, the adjunct is also taken away. Co. Litt. 389; Broom, Max. 140, n. 70.

Succurritur minori; facilius est lapsus iuventutis. A minor is to be aided; youth is liable to error. Jenk. Cent. 47.

Summa caritas est facere iustitiam singulis et omni tempore quando necesse fuerit. The greatest charity is to do justice to every one, and at any time whenever it may be necessary. 11 Co. 70.

Summa est lex quae pro religione facit. That is the highest law which favors religion. 10 Mod. 117, 118; 2 Ch. 18.

Summa ratio est quae pro religione facit. The highest reason is that which determines in favor of

religion. Co. Litt. 341 a; Broom, Max. 19; 5 Co. 14 b; 10 id. 55 a; 2 Ch. Cas. 18.

Summam esse rationem quæ pro religione facit. That is the highest reason which determines in favor of religion. Dig. 11. 7. 43, cited in Grotius de Jur. Bello, l. 3. c. 12, a. See 10 Mod. 117, 118.

Summam ius summa injuria. The height of law is the height of wrong. Hob. 125.

Sunday is dies non juridicus. 12 Johns. 178, 180.

Superflua non nocent. Superfluities do no injury. Jenk. Cent. 184.

Suppressio veri, expressio falsi. Suppression of the truth is (equivalent to) the expression of what is false. 11 Wend. 374, 417.

Suppressio veri, suggestio falsi. Suppression of the truth is (equivalent to) the suggestion of what is false. 28 Barb. 521, 525.

Surplusagium non nocet. Surplusage does no harm. Broom, Max. 527.

Tacita quedam habentur pro expressis. Certain things though unexpressed are considered as expressed. 8 Co. 40.

Tantum interpretatio semper fenda est, ut evitetur absurdum, et incontinentia, et ne iudicium sit illusorium. Interpretation is always to be made in such a manner that what is absurd and inconvenient is to be avoided, and that the judgment be not nugatory. 1 Co. 52.

Talis non est eadem, nam nullum simile est idem. What is like is not the same, for nothing similar is the same. 4 Co. 18.

Tantum bona valent, quantum vendi possunt. Things are worth what they will sell for. 3 Inst. 305.

Tempus enim modus tollendi obligationes et actiones, quia tempus currit contra desides et iuris contempores. For time is a means of destroying obligations and actions, because time runs against the slothful and contemners of their own rights. Plea, l. 4. c. 5, § 12.

Tenor est qui legem dat feudo. It is the tenor of the feodal grant which regulates its effect and extent. Craig, Jus. Feud. 3d ed. 66. See Co. Litt. 19 a; 2 Bla. Com. 310; 2 Co. 71; Broom, Max. 459; Wright, Ten., 2d. 53, 152.

Terminus annorum certus debet esse et determinatus. A term of years ought to be certain and determinate. Co. Litt. 45.

Terminus et (ac) feodum non possunt constare simul in una eademque persona. A term and the fee cannot both be vested in one and the same person (at the same time). Plowd. 29; 3 Mass. 141.

Terra manens vacua occupanti conceditur. Land lying unoccupied is given to the occupant. 1 Sid. 347.

Terra transit cum onere. Land passes with the incumbrances. Co. Litt. 231; Broom, Max. 437, 630.

Testamenta latissimam interpretationem habere debent. Wills ought to have the broadest interpretation. Jenk. Cent. 81.

Testamentum est voluntatis nostræ iusta sententia, de eo quod quis post mortem suam fieri velit. A testament is the just expression of our will concerning that which any one wishes done after his death (or, as Blackstone translates, "the legal declaration of a man's intentions which he wills to be performed after his death"). 2 Bla. Com. 469; Dig. 38. 1. 1. § 3. 2. 1.

Testamentum omne mortis consummatur. Every will is completed by death. Co. Litt. 232.

Testatoris ultima voluntas est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his real intention. Co. Litt. 232.

Testes ponderantur, non numerantur. See the maxim Ponderantur testes.

Testibus deponentibus in pari numero dignioribus est credendum. When the number of witnesses is equal on both sides, the more worthy are to be believed. 4 Inst. 279.

Testimonia ponderanda sunt, non numeranda. Proofs are to be weighed, not numbered. Trayner, Max. 355.

Testis de visu preponderat aliis. An eye-witness outweighs others. 4 Inst. 470.

Testis nemo in sua causa esse potest. No one can be a witness in his own cause. (Otherwise in England, and in the United States.)

Testis oculatus est iuxta tenorem quam auritus decem. One eye-witness is worth ten ear-witnesses. 4 Inst. 279. See 3 Bouv. Inst. n. 3154.

Testimones ne poent testifid le negative, mes l'affirmative. Witnesses cannot testify to a negative; they must testify to an affirmative. 4 Inst. 279.

That which I may defeat by my entry I make good by my confirmation. Co. Litt. 300.

The fund which has received the benefit should make the satisfaction. 4 Bouv. Inst. n. 3730.

The law abhors a multiplicity of suits. 98 Ky. 475; 82 W. Rep. 619, 614.

The parties being in pari casu, justice is in equilibrio. 19 Misc. Rep. 511.

The repeal of the law imposing a penalty is itself a remission. 98 Ky. 468.

Things accessory are of the nature of the principal. Finch, Law, b. 1, c. 3, n. 25.

Things are construed according to that which was the cause thereof. Finch, Law, b. 1, c. 3, n. 4.

Things are dissolved as they are contracted. Finch, Law, b. 1, c. 3, n. 7.

Things grounded upon an ill and void beginning cannot have a good perfection. Finch, Law, b. 1, c. 8, n. 8.

Things in action, entry, or re-entry cannot be granted over. 19 N. Y. 100, 103.

Things incident cannot be severed. Finch, Law, b. 3, c. 1, n. 12.

Things incident pass by the grant of the principal. 25 Barb. 284, 310.

Things incident shall pass by the grant of the principal, but not the principal by the grant of the incident. Co. Litt. 152 a, 151 b; Broom, Max. 438.

Things shall not be void which may possibly be good.

Timores vani sunt estimandi qui non cadunt in constantem virum. Fears which do not affect a brave man are vain. 7 Co. 17.

Titulus est iusta causa possidendi id quod, nos-

trum est. Title is the just cause of possessing that which is ours. 8 Co. 153 (305); Co. Litt. 345 b.

Tolle voluntatem et erit omnis actus indifferens. Take away the will, and every action will be indifferent. Bract. 2.

Totum præferit unicuique parti. The whole is preferable to any single part. 8 Co. 41 a.

Tout ce que la loi ne défend pas est permis. Everything is permitted which is not forbidden by law.

Toute exception non survenelle tend à prendre la place du principe. Every exception not watched tends to assume the place of the principle.

Tractent fabrilia fabri. Let smiths perform the work of smiths. 3 Co. Epist.

Traditio loqui facit charitatem. Delivery makes the deed speak. 5 Co. 1.

Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Delivery cannot and ought not to transfer to him who receives more than was in possession of him who made the delivery. Dig. 41. 1. 20.

Transgressio multiplicata, crescit pance infictio. When transgression is multiplied, let the infliction of punishment be increased. 3 Inst. 479.

Transit in rem judicatum. It passes into a judgment. Broom, Max. 293; 11 Pet. 200; 1 Pick. 70. See, also, 12 Johns. 463; 2 Summ. 436; 6 East 251.

Transit terra cum onere. The land passes with its burden. Co. Litt. 231 a; Shep. Touch. 175; 5 B. & C. 607; 7 M. & W. 530; 3 B. & M. 587; 18 C. B. 847; 19 Pick. 453; 24 Barb. 385; Broom, Max. 495, 706. See COVENANTS.

Tres faciunt collegium. Three form a corporation. Dig. 50. 16. 85; 1 Bla. Com. 469.

Triutio ibi semper debet fieri, ubi juratores meliorem possunt habere notitiam. Trial ought always to be had where the jury can have the best knowledge. 7 Co. 1.

Trusts survive.

Trusts est res quæ non convenit cum suo toto. That part is bad which accords not with its whole. Plowd. 161.

Tuta est custodia quæ sibi creditur. That guardianship is secure which trusts to itself alone. Hob. 340.

Tutus eratur ex parte mitiori. It is safer to err on the side of mercy. 3 Inst. 280.

Tutus semper est errare in acquietando, quam in puniendo; ex parte misericordie quam ex parte justitie. It is always safer to err in acquitting than punishing; on the side of mercy than on the side of justice. Branch, Princ.; 2 Hale, P. C. 230; Broom, Max. 326; 9 Metc. 116.

Ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest. When anything is granted, that also is granted without which the thing granted cannot exist. Broom, Max. 463; 13 M. & W. 706; 41 La. Ann. 194.

Ubi aliquid impeditur propter unum, eo remoto, tollitur impedimentum. When anything is impeded by one single cause, if that be removed, the impediment is removed. 5 Co. 77 a.

Ubi esset remedium, non foretur, ubi decurrat ad extrajudicium. When a common remedy ceases to be of service, recourse must be had to an extraordinary one. 4 Co. 93.

Ubi culpa est, ibi poena subesse debet. Where a crime is committed, there the punishment should be inflicted. Jenk. Cent. 82.

Ubi damna dantur, victus victori in expensis condemnari debet. Where damages are given, the losing party should be adjudged to pay the costs of the victor. 2 Inst. 289; 3 Sharsw. Bla. Com. 399.

Ubi eadem ratio, ibi idem jus; et de similibus idem est iudicium. Where there is the same reason, there is the same law, and the same judgment should be rendered on the same state of facts. 7 Co. 18; Broom, Max. 103, n. 153, 155.

Ubi et dantis et accipientis turpitudine versatur, non posse repeti dicitur; quæ sit autem accipientis turpitudine, non videtur posse. Where there is turpitude on the part of both giver and receiver, we say it cannot be recovered back; but as often as the turpitude is on the side of the receiver (alone) it can be recovered back. 17 Mass. 568.

Ubi factum autem non foretur, nulla. Where there is no act, there can be no force. 4 Co. 43.

Ubi ius, ibi remedium. Where there is a right, there is a remedy. Broom, Max. 191, 204; 1 Term 512; Co. Litt. 197 b; 7 Gray 197; Andr. Steph. Pl. 28.

Ubi ius incertum, ibi ius nullum. Where the law is uncertain, there is no law.

Ubi lex aliquem cogit ostendere causam, necesse est quod causa sit iusta et legitima. Where the law compels a man to show cause, it is necessary that the cause be just and legal. 2 Inst. 209.

Ubi lex est specialis, et tibi ejus generalis, generaliter accipienda est. Where the law is special and the reason of it is general, it ought to be taken as being general. 2 Inst. 43.

Ubi lex non distinguit, nec nos distinguere debemus. Where the law does not distinguish, we ought not to distinguish. 7 Co. 1.

Ubi major pars est, ibi totum. Where there is the greater part, there is the whole. F. Moore 578.

Ubi matrimonium, ibi dos. Where there is marriage, there is dower. Bract. 92.

Ubi non adest norma legis, omnia quasi pro suspectis habenda sunt. When the law fails to serve as a rule, almost everything ought to be suspected. Bacon, Aph. 25.

Ubi non est condendi auctoritas, ibi non est parendi necessitas. Where there is no authority to establish, there is no necessity to obey. Dav. 69.

Ubi non est directa lex, standum est arbitrio iudicis, vel procedendum ad similia. Where there is no direct law, the judgment of the judge must be depended upon, or reference made to similar cases.

Ubi non est lex, ibi non est transgressio quod mundum. Where there is no law, there is no transgression, as it regards the world. 4 Co. 1 b.

Ubi non est manifesta injustitia, iudices habentur pro bonis viris, et iudicantur pro veritate. Where there is no manifest injustice, the judges are to be regarded as honest men, and their judgment as

truth. 1 Johns. Cas. 341, 345.

Ubi non est principalis, non potest esse accessorius. Where there is no principal, there can be no accessory. 4 Co. 43.

Ubi nulla est conjectura quæ ducat alio, verba intelligenda sunt ex proprietate non grammatica et populari ex usu. Where there is no inference which would lead in any other direction, words are to be understood according to their proper meaning, not grammatical, but according to popular usage. Grotius, de Jur. Belli, l. 2, c. 16, § 2.

Ubi nulum matrimonium, ibi nulla dos. Where there is no marriage there is no dower. Co. Litt. 32 a.

Ubi periculum, ibi et lucrum collocatur. He at whose risk a thing is, should receive the profits arising from it.

Ubi pugnantia inter se in testamento juberentur, neutrum ratum est. When two directions conflicting with each other are given in a will, neither is held valid. Dig. 50. 17. 188 pr.

Ubi quid generaliter conceditur, inest hac exceptio, si non aliquid sit contra jus fasque. Where a thing is granted in general terms, this exception is present, that there shall be nothing contrary to law and right. 10 Co. 7.

Ubi qui delinquit ibi puniuntur. Let a man be punished where he commits the offence. 6 Co. 47.

Ubi verba conjuncta non sunt, sufficit alterutrum esse factum. Where words are used disjunctively, it is sufficient that either of the things enumerated be performed. Dig. 50. 17. 110. 3.

Ubi quicquid est injuria, ibi damnum sequitur. Wherever there is a wrong, there damage follows. 10 Co. 116.

Ultima voluntas testatoris est perimplenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his true intention. Co. Litt. 322; Broom, Max. 566.

Ultimum supplicium esse mortem solam interpretamur. The extremest punishment we consider to be death alone. Dig. 48. 19, 21.

Ultra posse non potest esse vice versa. What is beyond possibility cannot exist, and the reverse (what cannot exist is not possible). Wing, Max. 100.

Unne doit prise advantage de son tort demesme. One ought not to take advantage of his own wrong. 2 And. 38, 40.

Una persona viz potest supplere vices duarum. One person can scarcely supply the place of two. 4 Co. 118.

Unus omnino testis responsio non audiatur. Let not the evidence of one witness be heard at all. Code, 4, 20, 9; 3 Bla. Com. 370.

Uniuscujusque contractus initium spectandum est, et causa. The beginning and cause of every contract must be considered. Dig. 17. 1. 8; Story, Bailm. § 56.

Universalis sunt notoria singularibus. Things universal are better known than things particular. 2 Rolle 294; 2 C. Rob. 294.

Universitas vel corporatio non dicitur aliquid facere nisi id sit collegialiter deliberatum, etiam si major pars id faciat. A university or corporation is not said to do anything unless it be deliberated upon as a body, although the majority should do it. Dav. 48.

Uno absurdo dato, infinita sequuntur. One absurdity being allowed, an infinity follow. 1 Co. 102.

Unumquodque dissolvitur eodem ligamine quo ligatur. Everything is dissolved by the same mode in which it is bound together. Broom, Max. 884; 9 Pick. 303.

Unumquodque eodem modo quo colligatum est dissolvitur. In the same manner in which anything is bound it is loosened. 2 Rolle 39; Broom, Max. 891.

Unumquodque est id quod est principalis in ipso. That which is the principal part of a thing is the thing itself.

Unumquodque ligamen dissolvitur eodem ligamine quo et ligatur. Every obligation is dissolved in the same manner in which it is contracted. 2 M. & G. 729; 12 Barb. 366, 375.

Unumquodque propter alium est sibi meti ipsi fides; et pericula vera non sunt probanda. Every principle is its own evidence, and plain truths are not to be proved. Co. Litt. 11; Branch, Princ.

Uscupio constituta est ut aliquis litium finis esset. Prescription was instituted that there might be some end to litigation. Dig. 41. 10. 5; Broom, Max. 894, n.; Wood, Civ. Law 3d ed. 123.

Usury is odious in law.

Usus est dominium fiduciarium. A use is a fiduciary ownership. Bacon, Uses.

Uti pona ad paucos, metus ad omnes perveniat. That punishment may happen to a few, the fear of it affects all. 4 Inst. 63.

Uti res magis valeat quam pereat. That the thing may rather have effect than be destroyed. 11 Allen 145; 100 Mass. 113; 106 Mass. 373; 85 Ala. 934; 97 Mo. 251; 100 N. C. 281; 10 Cal. Contr. 100.

Utile per inutile non vitiatur. What is useful is not vitiated by the useless. Broom, Max. 627-8; 7 Wheat. 221; 2 S. & R. 296; 6 Mass. 303; 12 id. 437; 7 Allen 571; 9 Ired. 254. See 18 Johns. 93, 94; 38 Fed. Rep. 25; 123 Pa. 275; Andr. Steph. Pl. 41, n.

Uxor et filius sunt nomina naturæ. Wife and son are names of nature. 4 Bacon, Works 350.

Uxor non est sui juris, sed sub potestate viri. A wife is not her own mistress, but is under the power of her husband. 3 Inst. 108.

Uxor sequitur domicilium viri. A wife follows the domicile of her husband. Trayner, Max. 606.

Vagabundum nuncupamus eum qui nullibi domicilium contrahit habitationis. We call him a vagabond who has acquired nowhere a domicile of residence. Phil. Dom. 29, note.

Vt quantum visum est potest. It shall have effect as far as it can have effect. Corp. 600; 4 Kent 493; Shep. Touch. 87.

Vana est illa potentia quæ nunquam venit in actum. Vain is that power which is never brought into action. 2 Co. 51.

Vani timores sunt estimandi, qui non cadunt in constantem virem. Vain are those fears which af-

fect not a brave man. 7 Co. 27.

Pani timoris justa excusatio non est. A frivolous fear is not a legal excuse. Dig. 50. 17. 184; 2 Inst. 498; Broom, Max. 555, n.

Velle non obsequitur imperio patri vel domini. He is not presumed to consent who obeys the orders of his father or his master. Dig. 50. 17. 4.

Vendens eandem rem duobus falsarius est. He is fraudulent who sells the same thing twice. Jenk. Cent. 107.

Venia facit incertum est delinquenti. Facility of pardon is an incentive to crime. 3 Inst. 238.

Verba accipienda sunt secundum subjectam materiam. Words are to be interpreted according to the subject-matter. 6 Co. 6, n.

Verba accipienda ut sortitanti effectum. Words are to be taken so that they may have some effect. 4 Bacon, Works 258.

Verba equivoca ac in dubio sensu posita, intelliguntur digniori et potentiiori sensu. Equivocal words and those in a doubtful sense are to be taken in their best and most effective sense. 6 Co. 20.

Verba aliquid operari debent—debent intelligi ut aliquid operentur. Words ought to have some effect—words ought to be interpreted so as to give them some effect. 8 Co. 94.

Verba aliquid operari debent, verba cum effectu sunt accipienda. Words are to be taken so as to have effect. Bacon, Max. Reg. 3, p. 47. See 1 Duer, Ins. 210, 211, 216.

Verba artis ex arte. Terms of art should be explained from the art. 2 Kent 535, n.

Verba chartarum fortius accipiuntur contra proferentem. The words of deeds are to be taken most strongly against the person offering it. Co. Litt. 38 a; Bacon, Max. Reg. 3, Noy, Max. 9th ed. p. 48; 8 B. & P. 599, 403; 1 C. & M. 657; 8 Term 605; 15 East 546; 1 Ball & B. 385; 2 Pars. Con. 22; Bacon, Max. 554. See CONSTRUCTION; POLICY.

Verba cum effectu accipienda sunt. Words are to be interpreted so as to give them effect. Bacon, Max. Reg. 3.

Verba currentis monetis tempus solutionis designant. The words "current money" refer to the time of payment. Dav. 20.

Verba debent intelligi cum effectu. Words should be understood effectively. 2 Johns. Cas. 97, 101.

Verba debent intelligi ut aliquid operentur. Words ought to be so understood that they may have some effect. 8 Co. 94.

Verba dicta de persona, intelligi debent de conditione persone. Words spoken of the person are to be understood of the condition of the person. 2 Rolle 72.

Verba generalia generaliter sunt intelligenda. General words are to be generally understood. 3 Inst. 76.

Verba generalia restringuntur ad habitatem rei vel aptitudinem persone. General words must be restricted to the nature of the subject-matter or the aptitude of the person. Bacon, Max. Reg. 10; 11 C. B. 254, 356.

Verba generalia restringuntur ad habitatem rei vel persone. General words must be confined or restrained to the nature of the subject or the aptitude of the person. Bacon, Max. Reg. 10; Broom, Max. 546.

Verba illata (relata) inesse videntur. Words referred to are to be considered as if incorporated. Broom, Max. 674, 677; 11 M. & W. 168, 188; 10 C. B. 261, 268, 266.

Verba in differenti materia per prius, non per posterius, intelligenda sunt. Words referring to a different subject are to be interpreted by what goes before, not by what follows. Calvinus, Lex.

Verba intelligenda sunt in casu possibili. Words are to be understood in reference to a possible case. Calvinus, Lex.

Verba intentionis, et non e contra, debent inseruire. Words ought to suit upon the intention, not the reverse. 8 Co. 94; 8 Allen 384; 1 Spence, Eq. Jur. 67; 2 Sharw. Bla. Com. 379.

Verba ita sunt intelligenda, ut res magis valeat quam pereat. Words are to be so understood that the subject-matter may be preserved rather than destroyed. Bacon, Max. Reg. 3; Plowd. 156; 2 Bla. Com. 380; 2 Kent 555.

Verba mere equivoca, et per communem usum loquendi in intellectu certo sumuntur, talis intellectus preferendus est. When words are merely equivocal, if by common usage of speech they acquire a certain meaning, such meaning is to be preferred. Calvinus, Lex.

Verba nihil operari melius est quam absurde. It is better that words should have no operation, than to operate absurdly. Calvinus, Lex.

Verba non tam intuentia, quam causa et natura rei, ut mens contentum, ex eis potius quam ex verbis apparent. Words are not to be looked at so much as the cause and nature of the thing, since the intention of the contracting parties may appear from those rather than from the words. Calvinus, Lex.

Verba ordinatissima quando verificari possunt in sua vera significatio, et tunc ex intellectu intellectu non debent. When the words of an ordinance can be made true in their true signification, they ought not to be warped to a foreign meaning. Calvinus, Lex.

Verba posteriora propter certitudinem addita, ad priora que certitudine indigent, sunt referenda. Subsequent words added for the purpose of certainty are to be referred to preceding words in which certainty is wanting. Wing, Max. 167; 6 Co. 236; Broom, Max. 556.

Verba pro re et subjecta materia accipi debent. Words should be received most favorably to the thing and the subject-matter. Calvinus, Lex.

Verba que aliquid operari possunt non debent esse superflua. Words which can have any effect ought not to be treated as surplusage. Calvinus, Lex.

Verba, quantumvis generalia, ad aptitudinem restringuntur, etiam si nullam aliam patere restrictionem. Words, however general, are restrained to fitness (i. e. to harmonize with the subject-matter) though they would bear no other restriction. Spiegelius.

Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur. Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them. Co. Litt. 359; Broom, Max. 673; 11 East 508; 66 Pa. 50.

Verba relata inesse videntur. Words to which reference is made seem to be incorporated. 11 Cush. 137; 121 Mass. 50.

Verba secundum materiam subjectam intelligi non est qui necit. There is no one who is ignorant that words should be understood according to the subject-matter. Calvinus, Lex.

Verba semper accipienda sunt in mitiori sensu. Words are always to be taken in their milder sense. 4 Co. 17.

Verba stricta significationis ad latam extendi possunt, si substat ratio. Words of a strict signification can be given a wide signification if reason require. Calvinus, Lex; Spiegelius.

Verba sunt indices animi. Words are indications of the intention. Latcl. 156.

Verba stantum ubi nulla ambiguitas. One must abide by the words where there is no ambiguity. Trayner, Max. 612.

Verbum imperfecti temporis rem adhuc imperfectam significat. The imperfect tense of the verb indicates an incomplete matter. 6 Wend. 103, 120.

Vere dictum est veritas; ut iudicium, quasi iuris dictum. A verdict is as it were the saying of the truth, in the same manner that a judgment is the saying of the law. Co. Litt. 236.

Veritas demonstrationis tollit errorem nominis. The truth of the description removes the error of the name. 333. See LEASERS.

Veritas habenda est in iuratore; iustitia et iudicium in iudice. Truth is the desideratum in a juror; justice and judgment, in a judge. Bract. 135 b.

Veritas nihil veretur nisi abscondi. Truth fears nothing but concealment. 9 Co. 20.

Veritas nimium alterando amittitur. By too much alteration truth is lost. Hob. 344.

Veritas nominis tollit errorem demonstrationis. The truth of the name takes away the error of description. Bacon, Max. Reg. 35; Broom, Max. 687, 641; 9 Taunt. 813; 9 Jones, 30, N. C. 72.

Veritatem qui non libere pronunciat, proditor est veritatis. He who does not speak the truth freely is a traitor to the truth. 4 Inst. Epil.

Via antiqua via est tuta. The old way is the safe way. 1 Johns. Cas. 537, 539.

Via trita est tutissima. The beaten road is the safest. 10 Co. 142; 4 Mauls & S. 168.

Via trita, via tuta. The beaten way is the safe way. 5 Pet. 223; Broom, Max. 134.

Vicarius non habet vicarium. A deputy cannot appoint a deputy. Finch, Max. 88; Broom, Max. 889; 3 Bouv. Inst. n. 1309.

Vicini viciniore praeferuntur scire. Neighbors are presumed to know things of the neighborhood. 4 Inst. 173; 78 Ga. 129.

Videtur qui surdus et mutus ne potest faire alienationem. It seems that a deaf and dumb man cannot alienate. 4 Johns. Cas. 441, 444; Bisp. Eq. 39.

Vigilantibus et non dormientibus iura subveniunt. The laws serve the vigilant, not those who sleep. 7 Allen 498; 12 id. 88; 10 Watts 24. See LACHES; Broom, Max. 63, 72, 93; 7 Ga. 618; 7 id. 53; 121 Pa. 467; 37 Ch. D. 233. See HIGH, RECEIVERS.

Vim et compellere licet, alterumque incupatula tutela, non ad emendam vindictam, sed ad propulsandam injuriam. It is lawful to repel force by force; but let it be done with the self-control of blameless defence, not to take revenge, but to repel injury. 11 N. Y. 162.

Viperine est expositio que corrodit viscera textus. That is a viperous exposition which gnaws out the bowels of the text. 11 Co. 3.

Vir et uxor consentiunt in lege una persona. Husband and wife are considered one person in law. Co. Litt. 112; 3 Jenk. Cent. 87.

Vir legibus est inimicus. Force is inimical to the laws. 3 Inst. 176.

Vitium clericis nocere non debet. Clerical errors ought not to prejudice. Jenk. Cent. 23; Dig. 34. 5. 3.

Vitium est quod fugi debet, ne, si rationem non invenias, max legem sine ratione esse clames. It is a fault which ought to be avoided, that if you cannot discover the reason, you should presently exclaim that the law is without reason. Eilem. Postn. 80.

Vix ultra lex fieri potest quam omnibus commoda sit, et si major pars propiciat, utilis est. Scarcely any law can be made which is beneficial to all; but if it benefit the majority it is useful. Plowd. 869.

Vocabula artium explicanda sunt secundum definitiones prudentium. Terms of art should be explained according to the definitions of those who are experienced in that art. Fuffordoff, de Off. Hom. l. c. 17, § 3; Gratus, de Jur. Bell. l. c. 15, § 3.

Void in part, void in toto. 15 N. Y. 9, 96.

Void things are as no things. 9 Cow. 778, 784.

Volenti non fit injuria. He who consents cannot receive an injury. Webb, Pol. Torts 185; 109 Ala. 287; 179 Pa. 689; 69 Fed. Rep. 559.

Volens sed non dixit. He willed but did not say. 4 Kent 538.

Voluntas donatoris in charta doni sui manifeste expressa observetur. The will of the donor, clearly expressed in the deed, should be observed. Co. Litt. 91 a.

Voluntas et propositum distinguunt maleficia. The will and the proposed end distinguished crimes. Bract. 2 b, 136 b.

Voluntas facit quod in testamento scriptum valeat. The will of the testator gives validity to what is written in the will. Dig. 30. 1. 12, 3.

Voluntas in delicto non exitus spectatur. In offences, the will and not the consequences are to be looked to. 2 Inst. 57.

Voluntas reputatur pro facto. The will is to be taken for the deed. 3 Inst. 60; Broom, Max. 341; 4

Mass. 439.

Voluntas testatoris ambulatoria est usque ad mortem. The will of a testator is ambulatory until his death (that is, he may change it at any time). See 1 Bouv. Inst. n. 89; 4 Co. 61.

Voluntas testatoris habet interpretationem latam et benignam. The will of the testator has a broad and liberal interpretation. Jenk. Cent. 390; Dig. 50. 17. 12.

Voluntas ultima testatoris est perimenda secundum veram intentionem suam. The last will of a testator is to be fulfilled according to his true intention. Co. Litt. 383.

Vox emissiva volat, littera scripta manet. Words spoken vanish, words written remain. Broom, Max. 686; 1 Johns. 571.

We must not suffer the rule to be frittered away by exceptions. 4 Johns. Cas. 46.

What a man cannot transfer, he cannot bind by articles.

When many join in one act, the law says it is the act of him who could best do it; and things should be done by him who has the best skill. Noy, Max.

When no time is limited, the law appoints the most convenient.

When the common law and statute law concur, the common law is to be preferred. 4 Co. 71.

When the foundation fails, all fails.

When the law gives anything, it gives a remedy for the same.

When the law presumes the affirmative, the negative is to be proved. 1 Rolle 383; 3 Bouv. Inst. n. 3063, 3090.

When two titles concur, the best is preferred. Finch, Law. b. 1, c. 4, n. 83.

Where there is equal equity, the law must prevail. Bisp. Eq. § 40; 4 Bouv. Inst. n. 8737.

Where two rights concur, the more ancient shall be preferred.

MAY. Is permitted to; has liberty to.

In interpreting statutes the word may should be construed as equivalent to shall or must in cases where the good sense of the entire enactment requires it; 22 Barb. 404; 50 Kan. 739; or where it is necessary in order to carry out the intention of the legislature; 1 Pet. 46; 4 Wall. 435; 3 Neb. 234; or where it is necessary for the preservation or enforcement of the rights and interests of the public or third persons; 18 Ind. 37; 61 Mo. 566; 48 Mo. 167; 107 Mass. 194, 197; 12 How. Pr. 224; but not for the purpose of creating or determining the character of rights; 28 Ala. 28; 39 Mo. 521.

Where there is nothing in the connection of the language or in the sense and policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary; 24 N. Y. 405; 77 Ill. 271; 27 N. J. L. 407; 8 Misc. Rep. 256; 7 id. 15; 107 Mass. 196; 30 Fed. Rep. 52. See 53 Me. 438; 48 Mo. 167; 125 Mass. 198; 52 Kan. 180; 40 La. Ann. 756; 125 Mass. 199; 46 La. 162.

In subdivision 5 of § 7 of the Food and Drugs Act of 1906 the word may is used in its ordinary and usual signification; and if an article of food may not by the addition of a small amount of poisonous substance by any possibility, injure the health of any consumer, it may not be condemned under this subdivision of the Act. 232 U. S. 399.

MAYHEM. In Criminal Law. The act of unlawfully and violently depriving another of the use of such of his members as may render him less able, in fighting, either to defend himself or annoy his adversary. 8 C. & P. 167. See 7 Mass. 247.

"Maiming is when one member of the commonwealth shall take from another member of the same, a natural member of his body, or the use and benefit thereof, and thereby disable him to serve the commonwealth by his weapons in the time of war, or by his labour in the time of peace, and also diminish the strength of his body, and weaken him thereby to get his own living, and by that means the commonwealth is in a sort deprived of the use of one of her members." Pulton, de Pace Regis, 1609, fol. 15, § 38.

One may not innocently maim himself, and where he procures another to maim him, both are guilty; Co. Litt. 127 a; 17 Wend. 351, 353. The cutting or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which abates his courage, are held to be mayhems; 7 Humphr. 161; Cl. Cr. L. 183. But cutting off the ear or nose, or the like, are not held to be mayhems at common law; 4 Bla. Com. 205; but see 9 Ala. 923. The injury must be permanent; 8 Port. 472; 80 La. Ann. II. 1329; and if inflicted on an assailant in self-defence, it is not mayhem; 4 Blackf. 546.

These and other severe personal injuries are punished by the Coventry Act, which

is common law and also has been re-enacted in most of the states; 1 Hawk. P. C., Curw. ed. 107, § 1; Ryan, Med. Jur., Phil. ed. 191; and by act of congress. See Act of April 30, 1790, s. 13; Act of March 3, 1825, s. 22; Rev. Stat. § 1342, art. 58 (when committed by a soldier in time of war, etc.); 10 Ala. n. s. 928; 5 Ga. 404; 7 Mass. 245; 1 Ired. 121; 6 S. & R. 224; 2 Va. Cass. 198; 4 Wisc. 168; 93 Cal. 564. Mayhem was not an offence at common law in Massachusetts, but only an aggravated trespass; 7 Mass. 248; but at the early common law it was a felony punishable by the loss of member for member, a punishment disused later; see *id.*; 1 McCl. Cr. L. § 432. Maim as used in the statutes is not equivalent to mayhem but to mutilate; McCl. Cr. L. § 432.

See PHYSICAL EXAMINATION.

MAYHEMAVIT. Maimed.

This is a term of art which cannot be supplied in pleading by any other word, as *mutilavit*, *francavit*, etc.; 3 Thomas Co. Litt. 548; 7 Mass. 247. In indictments for mayhem the words *feloniously* and *did maim* are requisite; Whart. Cr. Pr. § 260, n.

MAYOR (Lat. *major*; Spelman, Gloss. *Meyr*, *miret*, *maer*, one that keeps guard. Cowel; Blount; Webster). The chief governor or executive magistrate of a city.

The old word was portvegre. The word mayor first occurs in 1189, when Rich. I. substituted a mayor for the two balliffs of London. The word is common in Bracton. Bract. 87. In London, York, and Dublin, he is called lord mayor. Wharton, Lex. It is generally his duty to cause the laws of the city to be enforced, and to superintend inferior officers, such as constables, watchmen, and the like. But the power and authority which mayors possess, being given to them by local regulations, vary in different places.

MAYOR'S COURT. The name of a court usually established in cities, composed of a mayor, recorder, and aldermen, generally having jurisdiction of offences committed within the city, and of other matters specially given them by the statute.

MAOYRAZGO. In Spanish Law. A species of entail known to Spanish law. 1 New Rec. 119.

MEADOW. A tract of land lying above the shore overflowed only by spring freshets or extraordinary tides, and which yields grass good for hay. 34 Conn. 429.

A "sedge-flat" is not a meadow. Anderson. Ground somewhat watery, not ploughed, but covered with grass and flowers. R. & L. Dict.; Ency. Lond.

MEAL RENT. A rent formerly paid in meal.

MEANDER. To wind as a river or stream. Webster.

The winding or bend of a stream. Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the watercourse, and not the meander line, as actually run on the land, is the boundary; 134 U. S. 178; 140 id. 376, 406; 7 Wall. 286. See LAKE; 14 Or. 340.

MEANING. See USE OF WORD.

MEANS. See AVAILABLE MEANS.

MEANS OF SUPPORT. All those resources from which the necessities and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income. 71 Ill. 242.

MEASE. A message or dwelling-house. Whart.

Norman-French for a house. It also means a customary measure of herrings, containing in various places 500, 525, 612, or 615 fish. Byrne.

MEASON-DUE. A corruption of *Maison de Dieu*.

MEASURE. A means or standard for computing amount. A certain quantity of something, taken for a unit, and which expresses a relation with other quantities of the same thing.

The constitution of the United States gives power to congress to "fix the stand-

ard of weights and measures." Art. 1, s. 8.

The states, it seems, possess the power to legislate on this subject, or, at least, the existing standards at the adoption of the constitution remain in full force; 3 Story, Const. 21; Rawle, Const. 102; but it has been decided that this constitutional power is exclusive in congress when exercised; 7 How. 282; 29 Pa. 27.

By a resolution of congress, of the 14th of June, 1886, the secretary of the treasury is directed to cause a complete set of all weights and measures adopted as standards, and now either made or in the progress of manufacture, for the use of the several custom-houses and for other purposes, to be delivered to the governor of each state in the Union, or to such person as he may appoint, for the use of the states respectively, to the end that a uniform standard of weights and measures may be established throughout the United States. The act of March 3, 1881, requires the same to be furnished to such agricultural colleges in every state as have received grants of land from the United States. The act of July 28, 1890, authorized the use of the French metric system of weights and measures in this country, and provided that no contract or dealing, or pleading in any court, shall be deemed invalid or liable to objection, because the weights or measures expressed or referred to therein are weights or measures of the metric system; Rev. Stat. § 3569. Annexed to § 3570, g. v., is a schedule which shall be recognized in the construction of contracts, and in all legal proceedings, as establishing, in terms of the weights and measures now in use in the United States, the equivalent of the weights and measures expressed therein in terms of the metric system. See *infra*, WIZGRT.

METRIC SYSTEM. The fundamental, invariable, and standard measure, by which all weights and measures are formed, is called the *mètre*, a word derived from the Greek, which signifies measure. It is a linear measure, and is divided into 10, 11, 44-1000th lines, Paris measure, or 3 feet, 3 inches, 370-1000th, English. This unit is divided into ten parts; each tenth, into ten hundredths; each hundredth, into ten thousandths, etc. These divisions, as well as those of all other measures, are infinite. As the standard is to be invariable, something has been sought from which to make it, which is not variable or subject to any change. The fundamental base of the *mètre* is the quarter of the terrestrial meridian, or the distance from the pole to the equator, which has been divided into ten millions of equal parts, one of which is the length of the *mètre*. All the other measures are formed from the *mètre*, as follows:—

CAPACITY. The *litre*. This is the cubic *decimètre*, or the cube of one-tenth part of a *mètre*. This is divided by tenths, as the *mètre*. The measures which amount to more than a single litre are counted by tens, hundreds, thousands, etc., of litres.

WEIGHT. The *gramme*. This is the weight of a cubic *centimètre* of distilled water at the temperature of 4° above zero Centigrade.

SURFACE. The *are*, use in surveying. This is a square, the sides of which are of the length of ten *mètres*, or what is equal to one hundred square *mètres*. Its divisions are the same as in the preceding measures. One hundred *ares* make a *hectare*.

SOLIDITY. The *stère*, used in measuring firewood. It is a cubic *mètre*. Its subdivisions are similar to the preceding. For the measure of other things, the term *cube mètre*, or cubic *mètre*, is used, or the tenth, hundredth, etc., of such a cube.

MONEY. The *franc* weighs five grammes. It is made out of one-tenth the *are* and one-tenth of copper. Its tenth part is called a *decime*, and its hundredth part a *centime*.

As already stated the divisions of these measures are all uniform, namely, by tens, or decimal fractions; they may, therefore, be written as such. Instead of writing,

1 *mètre* and 1-tenth of a *mètre*, we may write, 1 m. 1.
2 *mètres* and 8-tenths,—2 m. 8.
10 *mètres* and 4-hundredths,—10 m. 04.
7 litres, 1-tenth, and 2-hundredths,—7 lit. 12, etc.

Names have been given to each of these divisions of the principal unit; but these names always indicate the value of the fraction and the unit from which it is derived. To the name of the unit have been prefixed *deci*, for tenth, *centi*, for hundredth, and *milli*, for thousandth. They are thus expressed: a *décimètre*, a *décilitre*, a *décigramme*, a *décistère*, a *déciaire*, a *centimètre*, a *centilitre*, a *centigramme*, etc. The facility with which the divisions of the unit are reduced to the same expression is very apparent; this cannot be done with any other kind of measures.

As it may sometimes be necessary to express great quantities of units, collections have been made of them, and to them have been added, tens of thousands, etc., to which prefixes derived from the Greek have been given, namely, *deca*, for tens; *hecto*, for hundreds; *kilo*, for thousands; and *myria*, for tens of thousands; they are thus expressed: a *décamètre*, a *décalitre*, etc.; a *hectomètre*, a *hectogramme*, etc.; a *kilomètre*, a *kilogramme*, etc.

The above act of congress gives the equivalents thus:—

The *Mètre* is 39.37 in.
Litre is .908 quarts, dry measure, or 1.0567 quarts, wine measure.
Are is 119.6 square yards.

Gramme is 15.432 grains avoirdupois.

The *Stère* is 35.237 cubic feet.
As to certain measures under Mexican grants, see 161 U. S. 219.

MEASURE OF DAMAGES. In Practice. A rule or method by which the damage sustained is to be estimated or

measured. Sedg. Meas. Dam. § 29.

It is the duty of the judge to explain to the jurors, as a matter of law, the footing upon which they should calculate their damages, if their verdict is for the plaintiff. This footing or scheme is called the "measure of damages;" Poll. Torts 27.

The defendant is to make compensation for all the natural and proximate consequences of his wrong, but not for secondary or remote consequences. There are cases in which this principle of compensation is departed from; as, where exemplary damages are awarded, or double or treble damages are allowed by statute. But, in general, the law seeks to give compensation.

Value is in most cases the real measure of compensation and it is a fundamental principle that market value is resorted to not as a test, but only as an aid in getting at the real value, the latter being the true measure of a recovery, whether it be property, time, labor, or service which were affected by the contract or tort which is the subject matter of the action; 1 Sedg. Meas. Dam. §§ 242, 243.

The compensation awarded may be based upon, (1) pecuniary loss, direct or indirect; (2) physical pain; (3) mental suffering; to which have been added the value of the time required for the enforcement of the plaintiff's rights and his actual expenses incurred in so doing. There may be also in the case of injuries resulting from design, malice, or fraud, the sense of wrong or injury to one's feelings which is in some cases taken into consideration as a proper subject of compensation. See Hale, Dam. 86; 1 Sedg. Meas. Dam. § 37. The injuries for which compensation may be recovered are stated generally to include all those which affect any right protected by the common law where they are the direct result of actionable wrong. They may be to property, family relations, reputation, or the person,—whether affecting the body or mind or personal freedom of action; *id.* § 39.

Pecuniary compensation includes every kind of damage which can be measured by money value; 71 Md. 135. Such loss is almost always an element to be considered and in most cases the primary one; Hale, Dam. 87. So important is the idea of compensation that it is laid down as the fundamental rule of the measure of damages that the recovery must be "by way of compensation for loss and not to punish the wrong doer;" 8 Eng. Rul. Cas. 360. The test is compensation, not restitution, and beyond this it is rarely possible to lay down any general rule; Poll. Torts 180. This idea of compensation which lies at the root of the subject, may be illustrated by cases of the most diverse character. The measure of damages for failing to fulfil a covenant which the other party performs, is what it cost to fulfil it; 123 Pa. 381; in a trespass for an injury to the realty, by the inadvertent removal of part of coal, it is its value as part of the realty, and not as a chattel after its removal; 20 So. Rep. (Ala.) 918; for illegal diversion of water by an upper riparian owner, it is the cost of enough water to take the place of that unlawfully diverted; 5 Super. Ct. Pa. 563; for a breach of contract to return borrowed stock, it is the price of the stock at the time of the refusal to return it; 184 Pa. 318. In an action of replevin for wrongful detention, the value of its use during detention may be recovered, although ordinarily the damages would be the interest on its value while detained; 38 Pac. Rep. (Kan.) 482. Where an attorney undertakes for a client a search of records for liens and overlooks a lien, his client, a mortgagee, who has thereupon loaned money on what was supposed to be a first lien upon real estate, may recover from the attorney the difference in value between a first lien and the lien which the client got; 180 Pa. 532. The amount stolen from a safe, warranted burglar proof, may be recovered in an action for breach of the warranty; 69 Ill. App. 106. Breach of contract to make a loan on a demand note secured by mortgage, to take

up an existing lien, renders the lender liable for damages caused by foreclosure of the latter, although ordinarily there is no recovery for breach of contract to make a demand loan; 20 App. Div. N. Y. 375; and where a reasonable sum was stipulated for as liquidated damages for the breach of agreement to loan money, such stipulation will be enforced; 21 *id.* 94. The compensation is not necessarily for actual loss or expense. In many cases there may be a recovery for the amount of expenditure proper to be made and charged where the service was, in fact, gratuitous, as in the case of services of physicians and nurses which cost the plaintiff nothing, and for which he is held entitled to recover upon the ground that he recovers not for their cost but for their value; 127 Ind. 1; 79 Fed. Rep. 291; *contra*, 61 N. W. Rep. (Wis.) 79, where it was held that the recovery could only be for expense incurred.

The other essential requisite is that the amount is determined, not by the actual loss, but only that which is the natural result of the act complained of, or as its consequence may be presumed to have been in contemplation of the parties. This rule was established by the leading case of *Hadley v. Baxendale*, in which the application of the principle was to a suit against a carrier; 9 Exch. 341; 5 Eng. Rul. Cas. 502; 8 *id.* 405. Remote, contingent, or speculative damages will not be allowed, but only such as naturally flow from the breach of the contract; 46 Fed. Rep. 40. The principle of *Hadley v. Baxendale*, however, is held to cover damages resulting from the failure of the plaintiff to comply with other contracts, made upon the faith of his contract with the defendant, for the breach of which he sues, where the fact of his having made such other contracts was known to the defendant; 20 Q. B. D. 86. See *CAUSA PROXIMA NON REMOTA SPECTATUR*, which is particularly to be noted in connection with claims for damages based upon physical pain and inconvenience.

As to *mental suffering*, see that title.

With regard to the measure of damages, the same principles are, to a great extent, applicable to cases of contract and tort; Poll. Torts 529; 9 F. Div. 113. Where the action is for breach of contract, the damages are limited to what may reasonably be considered to have been contemplated by the parties at the time of making it as likely to arise from a breach; 94 Wis. 44. They may include, however, gains prevented, as well as losses sustained, if certain, and reasonably to be expected; 48 Neb. 910. They are measured by the loss which results from the breach and not the sum of money or property involved in the transaction; [1897] 1 Q. B. 692. As a general rule, the contract itself furnishes the measure of damages.

In an action of tort based upon negligence in the performance of a contractual obligation without malice, the damages would be substantially the same as for breach of contract under the same circumstances; 9 App. D. C. 455.

There are *dicta* to the effect that a more liberal rule of damages should be applied in cases of tort than of contract; 42 Wis. 23; 11 Mich. 542; but they are contrary to the general current of authority which is in favor of applying the same principles to both classes of cases; 53 N. Y. 211, 216; Sedg. Meas. Dam. § 429, note a.

While the rule which affords the measure of damages is to be supplied by the court, the amount is a question for the jury, and unless the damages are so excessive as to lead to the conclusion of passion or prejudice on the part of the jury, the court cannot interfere with their verdict; 52 Fed. Rep. 87.

Damages should not exceed the amount claimed; but cases have been known in which the verdict was in excess of the amount claimed, and the court has amended the statement of claim to enable it to enter judgment on the verdict; Poll. Torts 180; but this is said to be an extreme use of the power of the court; *id.*; 43 Ch. Div.

327. Where there is uncertainty as to the measure of damages, the rule is to give the lowest sum; 63 Pa. 324.

"Estimates of value made by friendly witnesses, with no practical illustrations to support them, are too unsafe, as a rule, to be made the basis of a judicial award." 168 U. S. 134.

The measure of compensation allowed as damages has been somewhat definitely fixed, as to many classes of cases, by rules of decision, many of which are important and well established.

DEATH BY WRONGFUL ACT. The right of action in this case is entirely statutory. At common law no civil action could be maintained, but such an action was given in England in 1846 by Lord Campbell's Act, and similar statutes exist in most of the United States. For a collation of statutes see Tiff. Death Wrongf. Act c. 9.

These statutes are held constitutional even where applicable to one class of corporations; 93 Ky. 233; 32 N. H. 215. See 75 Ala. 449; 4 Col. 162; 24 Ga. 356. By some courts they are construed strictly as being remedial; in others strictly as in derogation of common law; Hale, Dam. § 133; Tiff. Death Wrongf. Act c. 2, § 32, where the cases are collected. These statutes are said to operate not by way of exception or repeal of the common law, but to create an action totally new in species, quality, principle; Blackburn, L. J., in 10 App. Cas. 59. This bears upon the measure of damages. It has been said that life is to be regarded as property to be compensated for "without regard to past earnings or capacity to earn at time of death;" 67 Pa. 300; but this case is severely criticised as unsound reasoning; 2 Sedg. Meas. Dam. § 572, where it is remarked that at common law life was not property, and no civil action lay for its loss, which "rule has only been modified by this statute, under which juries are allowed to give, in most states, damages for pecuniary injuries only." These pecuniary damages embrace: (1) Present pecuniary loss; (2) prospective pecuniary loss; (3) the interest of one who would presumably derive pecuniary benefit from the services of the deceased. Any case may involve one or all of these elements. Present pecuniary loss is based upon actual compensation for loss to the time of action, and although the action is maintainable only where it might have been brought by the deceased if he survived, the measure of damages rests upon different principles. The deceased might have recovered both for pecuniary loss and his pain and suffering, physical and mental, while his representatives recover only for the injury to his family resulting from his death; 18 Q. B. 93; 23 N. Y. 465; and not for his suffering, medical attendance, funeral expenses, loss of society of husband or wife, and the like; 2 Sedg. Meas. Dam. § 573, citing cases. See 83 Fed. Rep. 82. Prospective pecuniary loss is based on a reasonable expectation of pecuniary benefit from the life of the deceased; 3 H. & N. 211; 60 Md. 449; 66 N. C. 154; 74 Wis. 562. It is what the deceased would have probably earned during the residue of his life, taking into consideration his age, condition, ability, disposition, habits, and expenditures, without any *solutum* for distress of mind; Sharswood, J., in 57 Pa. 335, 358; 86 Tenn. 343; 29 Gratt. 431; 88 N. Y. 641; and no account can be taken of income from investments; 47 N. J. L. 28.

In the third class of cases damages are allowed to a husband for the loss of a wife's services, not her society; 11 Can. 422; to a wife for the loss of support; *id.*; for the same reason to a child during minority; 47 N. Y. 317; 38 Wis. 613; 35 Minn. 84; 129 Ill. 91; 76 Cal. 240; and on the weight of authority, for the expectation of pecuniary benefit after majority; 110 N. Y. 504; 84 Cal. 515; 32 Minn. 518; and if the statute is in favor of the estate of the deceased, the damages are not limited to the minority of a child; 73 Ind. 252; 86 Ia. 458; to a parent for the loss of a child to the extent of the pecuniary value of his services dur-

ing minority; 71 Md. 573; 97 Mo. 253; 82 W. Va. 370; to the next of kin if dependent on the deceased for support; 43 Ill. 838; but not otherwise for nominal damages; 33 Kan. 543; 7 Ohio St. 336; 71 Md. 578. Exemplary damages cannot generally be given, but in some states they are expressly authorised, either generally or under special circumstances set forth in the act. Hale, Meas. Dam. § 128.

In estimating the damages in these cases, the expectation of life may be reckoned; 91 Ala. 543; 19 Kan. 88; 85 Ia. 167. See LIFE TABLES.

As to the measure of damages in this action, generally, see 60 A. & E. Ry. Cas. 178, 219; 1 C. C. A. 33; 23 Am. L. Reg. 385, 513, 577; for the death of a child; 29 Cent. L. J. 253; value of human limbs; 27 Can. L. J. 417.

NEGOTIABLE PAPER. In suits on negotiable paper the measure of damages is its face value with interest from the breach; Sedg. Elem. Dam. 240; 6 Cow. 484; 58 Ind. 360; 9 Wis. 503. The value of a note is *prima facie* the amount secured; 120 N. Y. 134; 69 Me. 484; 23 Mo. 252; 31 Vt. 570. Formerly it was said that interest was only recoverable as damages allowable at the discretion of the jury; 2 B. & Ald. 305; 3 Campb. 296; W. N. (1887) 184. It was early settled that interest, as a matter of law, could not be given without an express or implied contract for its payment; 2 B. & C. 348. The present rule is said to be that in England it is allowed on commercial paper; 1 Sedg. Meas. Dam. § 291; and that in the United States the jury should be instructed to give it; 2 *id.* § 699; *id.* § 325; 5 Cow. 587, 610; 79 N. C. 122. Where interest is provided for in the paper the recovery is under the contract and not as damages, and there has been much conflict as to whether in case of non-payment at maturity interest thereafter is payable as interest at the contract rate or as damages at the statutory rate. The former view is supported upon the doctrine of an implied contract to pay the stipulated rate after maturity; 74 Ind. 158; 94 *id.* 178; 144 Mass. 448; 38 Ohio St. 575; 38 Mich. 662. Following the latter view—the statutory rate; 67 Me. 145; 63 Cal. 503; 42 Conn. 570; 23 Minn. 84; 8 Wend. 550; 43 N. Y. 244 (but *contra*, 4 Johns. Ch. 436; 19 Hun 87); 63 Md. 484; 5 W. & S. 51; L. R. 7 H. L. 27; 14 Ch. D. 49 (*contra*, 3 C. B. N. S. 144). See 1 Sedg. Meas. Dam. § 325 n., where the authorities are collected and the conclusion stated that the weight of authority is in favor of the latter position, which is also sustained by the supreme court as its own rule when not controlled by local law; 100 U. S. 72. See 96 *id.* 51.

If there is an intention expressed it prevails, whatever may be the form of words used; 68 Me. 80; 25 Ch. D. 338; 84 N. Y. 471; 79 Mo. 226; 10 R. I. 299; 2 Kan. 83; 18 S. C. 141; *id.* 600. Where a higher rate after maturity is expressed it is generally allowed; 91 Ill. 609; 33 Ark. 416; 66 Me. 282; L. R. 2 Eq. 221; 15 U. C. C. P. 360; but not by some courts, on the theory that it is a penalty; 11 Mo. 547; 24 Minn. 43. It is said that the question properly rests upon the doctrine of liquidated damages, but that the courts have not generally so held; 1 Sedg. Meas. Dam. § 331.

In most of the states there are statutory provisions for damages upon protested paper, ranging as to foreign bills from five to twenty per cent; and on bills payable in another state there are varying rates, some statutes making discriminations between states or groups of states, based, apparently, upon contiguity, or extent of business relations and the like. For a summary of the provisions of these statutes, see 1 Stims. Am. Stat. L. § 4753.

CARRIERS. Upon a total failure to deliver goods, the carrier is liable for the value of the goods at their place of destination, with interest from the time they should have been delivered, deducting the freight; 12 S. & R. 186; 24 N. H. 297; 1 Cal. 108; 10 La. An. 412; 9 Rich. So. C. 465; 46 N. Y. 462; 74 Ill. 249; 28 Ohio St. 358; 87 Ill. 195; 64 Mo. 47; 27 Wis. 327; 3

Mo. App. 27; 98 Mass. 550; 41 Miss. 671; 26 Ga. 122; 13 Md. 164; 42 S. W. Rep. (Tenn.) 72. Upon a failure to take the goods at all for transportation, he is liable for the difference between the value at the place of shipment and at the place of destination, less his freight; or, if another conveyance can be found, the difference between the freight agreed on with defendant and the sum (if greater) which the shipper would be compelled to pay another carrier; 1 Abb. Adm. 119; 58 Barb. 216; 56 Penn. 231; 34 Mich. 439. Upon a delay to deliver the goods, the plaintiff is entitled to an indemnity for his loss incurred by the delay, taking into account any fall in the market occurring between the time when the property should have been delivered by the carrier and the time when it actually was; 54 Ill. 58; 1 Disn. 23; 64 Ill. 143; 20 Wis. 594; 106 Mass. 468; 48 N. H. 455; 47 N. Y. 29; 14 Mich. 489; 49 Vt. 255; or, in some cases, the additional price paid for goods required by him to take the place of the delayed goods; 90 Me. 193; 147 U. S. 591; Ang. Carr. § 490 a; in case of property for exhibition at a museum, the probable net profits; 1 Tex. Civ. App. 524; or in case of stock injured, the depreciation measured by market value at the place of destination; 63 Ark. 443; 33 S. W. Rep. (Tex.) 704. The value of damaged goods may properly be determined by their sale at auction by the owner; 78 Fed. Rep. 155.

The measure of damages for a breach of a contract to transport freight by vessel, is the difference between the contract and the actual price of freight paid; 6 U. S. App. 531.

In modern times, the conditions which led to the adoption of the common law rule making a carrier an insurer having changed, it is very common to limit, by contract, the amount of the shipper's recovery. The effect of such contracts is to fix a valuation on the goods which shall be the measure of damages in case of loss, and to this the shipper is held; 112 U. S. 332; 70 N. Y. 410; 81 Pa. 315; 137 Mass. 35. Some courts, however, hold such contracts invalid; 88 Tenn. 320; this is upon the theory that it is in fact an exemption from liability for negligence which is not permitted; 17 Wall. 357. It is suggested that the true doctrine is that the carrier cannot himself limit the damages, but that a contract to do so, fairly made by both parties to it, should be sustained; 6 Mich. 242. See 9 A. & E. Ry. Cas. 334; 21 *id.* 125, 142.

LAND CONTRACTS. In actions for the breach of contracts for the sale of land where the vendor fails to convey, the English rule limits the damages to the amount advanced with interest and expenses incurred in examining the title. The rule dates back to *Y. B. 30 Edw. III. 14 b.*; but the leading case is *Flureau v. Thornhill*, 2 W. Bl. 1078. The rule was qualified by an exception, established in *Hopkins v. Gratzbrook*, when the vendor knew of the defect in title; 6 B. & C. 31; but that case was discredited as authority and the earlier rule adhered to by the house of lords; *L. R. 7 H. L. 158*, affirming *L. R. 6 Excheq. 59*, which was followed in 36 Ch. D. 619. In American law there is great lack of harmony in the decisions, and a distinction is taken in many cases growing out of the motive of the party in default. The extreme English rule has been followed in Pennsylvania, and, apparently, even where there is fraud; 80 Pa. 413; see 11 *id.* 127; 67 *id.* 126. In other states a failure to convey for want of good title does not involve liability for the value of the bargain, unless there be fraud, bad faith, or other misconduct; 2 Bibb 415; 2 Wend. 399; 57 N. Y. 153; 69 *id.* 201; 9 Lea 111; 9 Md. 250; 54 *id.* 187; 29 Kan. 508; 5 Ia. 352; 56 *id.* 139; 17 Fla. 532; see 39 Minn. 326.

Knowledge of the defendant that the title was in a third person has been considered in some cases sufficient to warrant substantial damages; 40 N. Y. 59; and where the failure to convey was the result of the refusal of the wife to sign the deed, the same rule was applied, upon the theory that the vendor knew that it was doubtful

if his wife would sign; 34 N. J. L. 358; 78 Ill. 232. In a case of contract by the defendant to sell the lands of another which he had contracted to purchase, and failed to accomplish his object because the real owner could not make title, the judgment was reversed because the judge had charged in favor of substantial damages, and Cooley, J., held, upon a review of the cases, that *Flureau v. Thornhill* must be considered as established law, but that where a party acted in bad faith or sold what he did not own, such damages should be allowed; 21 Mich. 374.

In many jurisdictions what is sometimes called the rule of the United States Supreme Court is adhered to and the purchaser is held to be entitled to the difference between the amount he has agreed to pay and the value at the time of breach. This is the opposite extreme from the English rule. 6 Wheat. 109; 113 Mass. 538; 3 R. I. 187; 37 Ia. 134; 65 Me. 87; 29 La. Ann. 286; 35 Neb. 429; 57 Fed. Rep. 973; 145 U. S. 522; 37 Ill. App. 465; 7 Utah 113.

When the purchaser refuses to perform, the measure has been held, in England, to be the difference between the price fixed in the contract and the value of the land at the time fixed for the delivery of the deed; 7 M. & W. 474. But the rule does not appear to be well settled in this country.

The English rule has been followed by some courts; 51 N. H. 167; 101 Mass. 409; 67 Pa. 126; 22 Ohio St. 172; 86 Mich. 328. In some states where a deed has been tendered and refused, it is held that the contract price may be recovered in full; 17 Barb. 260 (the question having been left undecided in 5 Cow. 506); 4 Me. 258; 11 Ia. 161; *contra*, 1 Pugs. 195; see 21 Wend. 457; 18 Vt. 27. A purchaser in possession on an instalment contract of sale on eviction was held entitled to recover instalments made and cost of improvements; 109 Ala. 261; *contra*, if buildings were erected without the vendor's request; 59 N. J. L. 160.

One who has contracted for the right to purchase public land is entitled on a breach to the difference between the contract price and the saleable value of such right, and it is the vendor's duty to re-sell the right, or, failing this, to show its market value; 145 U. S. 522; evidence of particular sales of other real estate is not admissible to establish market value; 107 Pa. 460.

EVICITION. The damages recoverable for an eviction, in an action for breach of covenants of seisin and warranty in a deed, are the consideration-money, interest thereon, and the costs, if any, of defending the eviction.

This is not in accordance with the fundamental doctrine of the law of damages, but it is the rule in most of the states, and is sometimes termed the New York rule; 3 Cai. 111; 69 N. Y. 434; 4 Dall. 441; 27 Pa. 288; 2 McCord 418 (earlier decisions were *contra*; 1 Bay 19, 92, 265); 2 Leigh 451 (also after conflicting decisions, 3 Call 320; 1 Munf. 493; 82 Va. 769; 8 Humph. 647; 2 Bibb 273; 4 Dana 253; 3 Ohio 211; 14 *id.* 118; 1 Ark. 313, 323; 43 *id.* 439; 24 Ga. 533; 41 Ill. 413; 58 Ind. 392; 122 *id.* 272; 5 Ia. 287; 44 *id.* 249; 33 Cal. 299; 39 Cal. 360; 17 N. J. L. 304; 30 N. H. 531; 65 *id.* 13; 31 Miss. 433; 23 Mo. 437; 38 Minn. 24; 100 N. C. 75; 44 Tex. 400; 36 Md. 129, 150; 15 Nev. 360; 69 Ala. 502; 33 Kan. 765; 3 Ore. 88; 26 W. Va. 447; 64 Wis. 258; 8 U. C. Q. B. 191 (but see 13 U. C. C. P. 146); 13 La. 143; but the value of improvements may be recovered; 13 La. Ann. 512; and see as to Louisiana, 131 U. S. 191; though excluded by the New York rule; 4 Johns. 1. In Mississippi a vendee who has lost land by reason of a title paramount to his remote vendor may recover the amount which such remote vendor received for the land; 68 Miss. 161.

What is known as the New England rule establishes as the measure of damages the value of the land at the time of eviction, together with the expenses of the suit, etc., and this is followed in all the New England states, Quebec, and Michi-

gan; 119 Mass. 500; 66 Me. 557; 14 Conn. 245; 12 Vt. 381; 30 *id.* 242; 61 Mich. 625; 6 Can. 425; and it is also recognized as the rule in England; 9 Q. B. D. 128.

Where a paramount title is purchased to prevent actual eviction the measure of damages is the price paid with interest; 59 Ark. 699; 61 Hun 427; 21 S. W. Rep. (Tex.) 172; and where the breach alleged was the foreclosure of a mortgage, it is the amount paid to redeem the land and expenses of defending the title; 3 N. E. Rep. (Ind.) 260; 17 S. W. Rep. (Mo.) 1014.

INCUMBRANCES. On a breach of a covenant in a deed against incumbrances, the purchaser is entitled to recover his expenses incurred in extinguishing the incumbrance, if that is practicable; 7 Johns. 358; 34 Me. 422; 4 Ind. 130; 109 Mass. 299; 7 R. I. 538; 51 Ill. 873; 41 Ia. 204; 48 N. Y. 532; 59 Mo. 488.

For a permanent incumbrance the compensation should be measured by the decreased value of the land; 20 N. Y. 191; 108 Mass. 175; 44 Conn. 312; but the amount is limited by the sum recoverable for a total loss of the land; 41 Ia. 204; 79 Ala. 346. If the incumbrance causes a total eviction the damages are the same as in other cases of eviction. See *supra*.

SALES. Where the seller of chattels fails to perform his agreement, the measure of damages is the difference between the contract price and the market value of the article at the time and place fixed for delivery; 5 N. Y. 537; 107 *id.* 674; 3 Mich. 55; 85 *id.* 478; 4 Tex. 289; 12 Ill. 184; 3 Wheat. 200; 44 Me. 255; 6 McLean 102; 41 Miss. 368; 24 Wend. 322; 3 Col. 373; 48 Pa. 407; 147 *id.* 372; 33 Vt. 92; 82 Va. 614; 75 Ia. 550; 46 Mo. App. 539; 33 Ill. App. 91; 87 Ga. 333; 98 Cal. 676; 124 U. S. 64; 8 Q. B. 604; Benj. Sales § 758.

The same rule applies as to the deficiency where there is a part-delivery only; 16 Q. B. 941; 23 How. 149; 41 N. H. 86; 51 Pa. 175; 21 Pick. 378; 12 Wis. 276; 5 Hill 472; 2 Minn. 229. Where, however, the purchaser has paid the price in advance, some of the cases, particularly in England and New York, allow the highest market price up to the time of the trial; 27 Barb. 424; 26 Pa. 143; 13 Tex. 324. Where the purchaser refuses to take and pay for the goods, the seller may sell them fairly, and charge the buyer with the difference between the contract price and the best market price obtainable within a reasonable time after the refusal; 45 Ill. 79; 5 S. & R. 19; 30 N. Y. 549; 3 Metc. Ky. 555; 9 B. Mon. 69; 83 Me. 407; 55 Ark. 401; 67 Hun 38; 5 Tex. Civ. App. 415. See 147 Pa. 184. Where the goods are delivered and received, but do not correspond in quality with a warranty given, the vendee may recover the difference between the value of the goods delivered and the value they would have had if they had corresponded with the contract; 4 Gray 457; 5 Harr. 233; 26 Ga. 704; 21 Ill. 180; 29 Md. 142; 39 Me. 287; 14 N. Y. 597; 29 Ala. 558; 20 Ill. 184; 15 U. S. App. 218. But where the article is one which cannot be bought in the market (a machine), and it was not of the warranted capacity, it appearing that the vendee had contracted to supply the products of the machine, which he was unable to do because of the breach, and the facts were known to the vendor, the measure of damages is the difference between what it would have cost to fulfil his contracts and what the vendee would have received if he had not lost them by reason of the defects in the machine; or if the work was done by others, the difference between what it would have cost him to do the work and what he paid for having it done; 3 U. S. App. 631; 49 *id.* 438.

The measure of damages for breach of a contract to deliver articles, if they have no market value or cannot be had in the market where the delivery was to be made, is the additional cost and expense of obtaining them at the nearest market, or on the most advantageous terms; 117 Ind. 594.

Many courts allow the highest intermediate value between the breach and the

end of the trial; 66 Ia. 116; 1 Nott. & McC. 334; 33 Ind. 127; but it is generally denied; 104 Mass. 259; 47 Wis. 406; 44 Md. 47; 119 Ill. 554; Hale, Dam. 186, 194, where the rule is discussed, with the authorities. This rule was originally adopted in New York as to chattel generally; 26 N. Y. 309. It was modified to exclude stock transactions on the ground that the highest intermediate value was not the natural and proximate result; 53 N. Y. 211. The rule of the last cited case is adopted by the United States supreme court; 129 U. S. 193. In Pennsylvania the rule is rejected in its general application; 5 W. & S. 106; but adopted in case of stocks; 53 Pa. 310; see 69 *id.* 403. In some cases it is left to the jury to allow any value between the highest value and that at the time of conversion; 69 Ala. 581; and in others, where the transaction is free from bad faith, value is taken at the time of conversion, with interest; 40 Miss. 352.

COLLISION. The general principle followed by the courts of admiralty in cases of collision between vessels is that the damages awarded against the offending vessel must be sufficient to restore the other to the condition she was in at the time of the collision, if restoration is practicable. Both damages to vessel and cargo are to be made good. But hypothetical and consequential damages are excluded. The loss of the use of the injured vessel while undergoing repairs is proper to be included. See 37 Fed. Rep. 148. If the injured vessel is a total loss, her market value at the time is the measure of damages. See *Olc.* 188, 246, 388, 444, 505; 13 How. 106; 17 *id.* 170; 2 Wall. Jr. 52; 6 McLean 238; 37 Fed. Rep. 270.

If the fault is equal on the part of both vessels, the loss is to be divided between them; 1 Sprague 123; 6 McLean 221; 14 Wall. 345; 21 Wall. 389; 37 Fed. Rep. 716; 60 *id.* 296; 59 *id.* 714; 122 U. S. 97.

For a total loss of cargo, its value at the place of shipment, or its cost, including expenses, charges, insurance, and interest, should be allowed; 11 U. S. App. 612; when part is recovered and sold, after expenses are incurred, the rule is to allow the difference between the market value of the goods, if uninjured, and the value in their damaged condition; *d.* The allowance of interest and costs in case of collision rests in the discretion of the lower court, and will not be disturbed on appeal; 123 U. S. 349.

CONTINUING TORTS. Ordinarily the damages which may be recovered for a tort include only compensation for the injury suffered to the time of suit, and the theory formerly aoted upon was that each continuance of a trespass or a nuisance was a fresh one for which a new action would lie; 3 Bla. Com. 220; 1 Den. 257; 21 N. J. L. 469. The only remedy applied in such cases is that exemplary damages will be given, if, after one verdict against him, any one has the hardihood to continue it; 2 Selw. N. P. 1130. In cases, however, where the injury is of a nature to be permanent, it is held that entire damages may be recovered in one action; Sedg. Meas. Dam. § 924; as where the trespass was the insertion of girders into a wall; 105 Pa. 400; or maintaining a brothel next to the plaintiff's dwelling-house; 72 Mo. 129.

The same principle is applied in actions for breach of contract by neglect of a continuing duty imposed by it. Each moment the neglect continues is a separate breach and is often considered and treated as a total breach for which the entire damage, past and prospective, may be recovered in one action, the judgment being a bar to any further suit; Hale, Dam. § 53; but not if the contract be divisible, as was held a contract to issue an annual pass renewable from year to year during the pleasure of the promisee; 51 Pac. Rep. (Kan.) 576. Whether a tort is permanent or not is a question of fact to be determined according to circumstances; Sedg. Meas. Dam. § 924; the presumption being that a wrong will not continue; 51 Ga. 378.

The question of the right to recover in

one action of damage resulting from a continuing trespass, and to be protected by the judgment from further suit, is a very important one in connection with the exercise of the right of eminent domain under those modern constitutions which secure compensation for property damaged as well as for that taken.

As to property taken or injured for public use, see, generally, **EMINENT DOMAIN**; Sedg. Meas. Dam. ch. xxxvii.; Hale, Dam. 167; Harris, Dam.; 2 Am. & Eng. Corp. Cas. 477; 5 Am. & Eng. Ry. Cas. 352, 366; 14 *id.* 207; change of grade; 4 Am. Ry. & Corp. Cas. 277; rights of landlords, tenants, and reversioners; 21 L. R. A. 212; 4 Am. Ry. & Corp. Cas. 744; benefit to of abutting property to rebut proof of damage; 129 N. Y. 576; 14 L. R. A. 844; patents, see that title.

See, generally, works on damages; **DAMAGES**; **CONSEQUENTIAL DAMAGES**; **LIQUIDATED DAMAGES**; **LATERAL SUPPORT**; **TELEGRAPH**.

Exemplary Damages. Those allowed as a punishment for torts committed with fraud, actual malice, or deliberate violence or oppression.

In nearly all of the states, in such cases, the jury are not confined to a strict compensation for the plaintiff's loss, but may, in assessing damages, allow an additional sum by way of punishment for the wrong done. This allowance is termed "smart money," or "exemplary," "vindictive," or "punitive" damages.

Some courts, however, have declined to recognize the doctrine; 4 Pick. 143; 21 *id.* 378 and see 114 Mass. 518; 7 Col. 541; 11 Neb. 261; 64 Mich. 138; 56 N. H. 456, (overruling earlier cases).

Some other courts refuse punitive damages; but allow exemplary damages as compensatory or "indeterminate damages;" 81 W. Va. 220; 1 Wyo. 277; 11 Nev. 350; 21 C. J. 96; 20 *id.* 141; 4 R. I. 371. In some of these jurisdictions they are really allowed under the guise of compensation for mental suffering and the like.

"Whenever the injury complained of is the result of the fraud, malice or wilful wanton act of the defendant, and the circumstances of the case are such as call for such damages, vindictive damages may be given. The general rule is that, when the injury has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not restricted to actual damages, but may give such damages in addition thereto as the circumstances of the case seem to warrant, to deter others from like offences." Wood's Mayne, Dam. 33; Webb, Poll. Torts 219.

"All rules of damages are referred by the law to one of two heads, either compensation or punishment. Compensation is to make the injured party whole. Exemplary damages are something beyond this, and inflicted with a view not to compensate the plaintiff, but to punish the defendant." Per Dillon, Circ. J., in summing up before the jury; 1 Dill. 71.

It has been said that the distinction between exemplary damages, and damages given as special or extraordinary compensation, is one of words merely; and the effect of allowing the former is the same as that produced upon the theory of compensation, when this is extended to cover injury beyond the pecuniary loss; Hill, Torts 440; Field, Dam. 70.

The propriety of allowing damages to be given by way of punishment under any circumstances has been strenuously denied in many of the cases, and the question has given rise to extensive discussion; but the weight of authority is decidedly that such allowance, in a suitable case, is proper. In 44 Wis. 280, the court said: "The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages which they have inherited, but they . . . do not feel at liberty to change or modify the rule at so late a day against the general current of authority elsewhere . . . if a change should now be made, it lies with the legislature, etc." See also, 7 So. L. Rev. n. s. 675; 7 Jones, L. 84; 20 Am. Law. Reg. n. s. 573; 11 Nev. 350; 6 Cent. L. J. 74.

See note to Wood's Mayne, Dam. 17; Sedg. & Field, Damages; Greenl. Evidence.

Actual malice need not be shown if the act complained of was wantonly or recklessly done; 51 Ill. 467; 66 Hun 626; 1 Misc. Rep. 148; 51 Mo. App. 320; see 161 Pa. 553; or conceived in a spirit of mischief, or in evident disregard of the rights of others, or of civil or social obligations; 28 Conn. 418; 42 Miss. 607; Wood's Mayne, Dam. 59, note. In an action for slander, however, exemplary damages cannot be recovered without proof of express malice; 48 Mo. App. 193. Where motive may be

ground of aggravation of damages, evidence on this score, as of proof of provocation, or of good faith, is admissible in mitigation of damages; Poll. Torts 184. So exemplary damages cannot be recovered where the defendant acted on advice of counsel; 33 Mich. 511; 81 Ga. 468; 73 Ala. 183; 44 Vt. 441; or in good faith; 76 Me. 216; 35 N. Y. 297; 60 Md. 358; 42 Conn. 318; or with a fixed belief that he was acting in the right; 70 Ill. 28; 35 Ia. 306; 76 Ala. 176.

The ground of the doctrine is said to be that society is protected by this species of punishment, while the party is also compensated at the same time and persons are deterred from like offences; 6 Tex. 266; 2 Hill 40.

More negligence on the part of the defendant is not enough; 35 Penn. 60; 27 Mo. 28; 5 Bush 206; but see 2 C. C. App. 354; 5 *id.* 91; 6 Misc. Rep. 162. Malicious motives alone can never constitute a cause of action but, where the allegations are sufficient to sustain the action, malice may be alleged and proved to enhance the damages; 78 Me. 445; 77 Ill. 562; 69 Mich. 380; 115 Mass. 217; 27 Fla. 157; 75 Pa. 467; 75 Ga. 193. See **MALICE**; **MOTIVE**.

Exemplary damages as a rule are recoverable only in tort, except that they are allowed for breach of promise of marriage; L. R. 1 C. P. 331; 125 N. Y. 214; 59 Mich. 33; see **PROMISE OF MARRIAGE**; and where there was a breach of a statutory bond by such tort as would warrant exemplary damages; 57 Ia. 486; 83 Ala. 235; *contra*, 20 S. C. 514; 84 Ill. 511.

Exemplary damages have been allowed, where one trespassed and cut timber from another's land; 18 Tex. 228; so where armed men broke into a store, carried off the stock, threatened the plaintiff's life, and injured his trade; 36 Mo. 226; in actions for malicious prosecution, when bad faith was shown; 39 Barb. 253; for throwing vitriol in the plaintiff's eyes; 1 Mo. App. 484; for maliciously setting fire to a person's woods, etc.; 84 Ill. 70; against an innkeeper for wrongfully turning a guest out of the inn; 23 Minn. 90; where a newspaper was informed of the falsity of a libellous article before publication; 94 Mich. 114; where a libel was recklessly or carelessly published, as well as one prompted by personal ill will; 66 Hun 626; for an assault and false imprisonment, against the liberty of a subject; 2 Wils. 205; for wilful trespass on land with intemperate behavior; 5 Taunt. 423; for seduction; 3 Wils. 18; adultery with the plaintiff's wife; 50 Pa. 359; 39 Ia. 478; 66 Ill. 206; perhaps for gross defamation; Poll. Torts 182; for negligently pulling down buildings, to an adjacent owner's injury, the defendant's conduct showing a contempt of the plaintiff's rights; 6 H. & N. 54; for injuries which are the result of negligence and accompanied with expressions of insolence; *id.* 58; where a passenger was improperly required to leave a street car in obedience to an order of a policeman called by the conductor to remove him; 166 Pa. 4; but not against a physician for malpractice unless gross negligence is proved; 13 Ia. 128; nor against a railway company, which, by reason of defective equipment, failed to return a passenger, with a return ticket, to his starting point; 115 N. C. 602, disapproving 108 *id.* 414.

Exemplary damages for personal injuries are recoverable only for negligence of a gross and flagrant character, evincing a reckless disregard of human life and safety; 30 Fla. 1.

It does not prevent a recovery, that the defendant is criminally liable for his wrongful act, and that he has been criminally punished for it; 45 Vt. 289; 64 *id.* 593; 10 Ohio St. 277; 41 Ia. 686; 151 Pa. 634; *contra*, 53 N. H. 342; 4 Cush. 273; 20 Ind. 190; 73 Ill. 69; but see 56 N. H. 456.

A master may be liable in exemplary damages for his servant's wanton act within the scope of his business; 114 Mass. 518; 37 S. C. 377. Wherever the servant would be liable in exemplary damages for an act, the master would be so liable for

the same act, if done by the servant within the scope of his employment; 57 Me. 202; 36 Miss. 660; the same rule applies to corporations and their servants; Moraw. Priv. Corp. 728; 88 Ind. 116; s. c. 10 Am. Rep. 103; 48 N. H. 305. A distinction is made in New York, that the master is liable only when he also has been guilty of misconduct, as by the improper employment or retention of the servant, or by the nature of the orders given him; 56 N. Y. 44. See 6 T. & C. 409. The master would not be liable if the servant acted from an innocent motive and in the supposed discharge of his duty; 1 Misc. Rep. 368.

Exemplary damages must be given as a part of the verdict, and not as a separate finding; 50 N. H. 456; but see 38 Wis. 194; and only in cases where there has been some actual damage; 70 Ill. 28, 496. The jury may consider the defendant's pecuniary condition; 71 Ill. 562; Bull. N. P. 27; Wood's Mayne, Dam. 64; 34 Ia. 348; 48 Mo. 153. See Hale, Dam. ch. 7; 1 Sedg. Meas. Dam. ch. 11.

Special Damages. The damages recoverable for the actual injury incurred through the peculiar circumstances of the individual case, above and beyond those presumed by law from the general nature of the wrong.

These damages must be specially averred in the declaration, or they cannot be recovered; while damages implied by law are recoverable without any such special averment. Thus, in the case of an action for libel, the law presumes an injury as necessarily involved in the loss of reputation, and will award damages therefor without any distinct averment. But if there was any peculiar loss suffered in the individual case, as the plaintiff's marriage prevented or the plaintiff's business diminished, etc., this must be especially averred; Chit. Pl. 410; 4 Den. 319; 2 Johns. 149. When they are the natural and proximate result of the act or default they are general and are legally imported, otherwise they are special and must be pleaded; Sedg. Meas. Dam. § 1262; in equity as well as at law; 69 Ala. 343. *A fortiori* where the special damage is essential to support the action; 23 Pa. 471; 12 Mass. 398; Sedg. Meas. Dam. § 1262, note b, citing many cases.

Double or Treble Damages. In some actions statutes give double or treble damages; and they have been liberally construed to mean actually treble damages. In these cases the jury find such damages as they think proper, and the court enhances them in their judgment; Brooke, Abr. Damages, pl. 70; Co. 2d Inst. 416; 1 Wils. 426; 1 Mass. 155. For example, if the jury give twenty dollars damages for a forcible entry the court will award forty dollars more, so as to make the total amount of damages sixty dollars; 4 B. & C. 154; McClel. 567. The statute must be pleaded; 79 Ky. 48. As to the rule in patent cases, see PATENT.

The construction of the words *treble damages* is different from that which has been put on the words *treble costs*; in the case of damages they are actually doubled or trebled, while double or treble costs are assessed. See 6 S. & R. 288; 1 Browne, Pa. 9; 1 Cow. 160, 175, 584; 8 id. 115.

Single damages may be recovered if the claim under the statute is not made out; 36 Mich. 246.

MECHANIC. Any skilled worker with tools; a workman who shapes and applies material in the construction of houses; one actually engaged with his own hands in constructive work. 43 La. Ann. 1180. See 11 Lea 517; 13 Pa. 525. It has been held that a painter is not a mechanic; 107 Mich. 270; and that a printer is one; 53 Ia. 474. A dentist is a mechanic in Michigan; 17 Mich. 332; but not in Mississippi; 31 Miss. 567.

MECHANICAL PURSUIT. One closely allied to or incidental to some kind of manufacturing business. 65 Minn. 263. Mining of iron is a mechanical business; *id.* A mechanic who contracts and shapes materials with his hands is engaged in such

a pursuit, in the sense of a statute exempting such from taxation; 43 La. Ann. 1180.

MECHANIC'S LIEN. See LIEN.

MEDALS. The word medals in a bequest will pass curious pieces of current coin kept by the testator with his medals. 8 Atk. 202; Wms. Ex. 1205.

MEDIA ANNATA. In Spanish Law. Profits of land received every six months. 5 Tex. 79.

MEDIA CONCLUDENDI. As a general rule, a party asserting a right by suit is barred by a judgment or decree upon the merits as to all *media concludendi* or grounds for asserting the right, known when the suit was brought. 192 U. S. 355.

A judgment is conclusive as to all the *media concludendi*. 210 U. S. 230.

MEDIATE POWERS. Those incident to primary powers, given by a principal to his agent. For example: the general authority given to collect, receive, and pay debts due by or to the principal is a primary power. In order to accomplish this, it is frequently required to settle amounts, adjust disputed claims, resist those which are unjust, and answer and defend suits; these subordinate powers are sometimes called mediate powers. Story, Ag. § 58. See 1 Campb. 43, note; 4 id. 163; 6 S. & R. 149.

MEDIATION. In International Law. States which are at war may accept an offer from a third power, or extend an offer to a third power, friendly to both, to mediate in their quarrel. But unless acceptable to both sides, any such interference amounts to intervention (*q. v.*), and possibly an act of war. Risley, Law of War 50.

It differs from intervention in being purely a friendly act. In the Middle Ages and down to the present time the Pope has been a frequent mediator. Mediation must be distinguished from *good offices*. The demand of good offices or their acceptance does not confer any right of mediation; 8 Encyc. Laws of Eng. 303.

"A mediator is a common friend who counsels both parties with a weight proportionate to their belief in his integrity and their respect for his power, but he is not an arbitrator, to whose decisions they submit their differences and whose award is binding upon them." *Id.*, quoting Sir James Mackintosh.

MEDIATORS OF QUESTIONS. Six persons authorized, under statute in the reign of Edw. III., to certify and settle, before the mayor and officers of the staple, questions arising among merchants, relating to the wool trade. Toml. Staple.

MEDICAL ATTENDANCE. See MEDICINE.

MEDICAL COLLEGE. The term "medical college" refers to those schools of learning teaching medicine in its different branches at which physicians are educated. 108 Ky. 769, 57 S. W. 501.

MEDICAL EVIDENCE. Testimony given by physicians or surgeons in their professional capacity as experts, or derived from the statements of writers of medical or surgical works.

This kind of evidence was first recognized by Charles V. of Germany, and incorporated in the "Caroline Code," framed at Ratibon in 1522, wherein it was ordained that the opinion of medical men—at first surgeons only—should be received in cases of death by violent or unnatural means, when suspicion existed of a criminal agency. The publication of this code encouraged the members of the medical profession to renewed activity, tending greatly to advance their science and the cause of justice generally. Many books soon appeared on the subject of medical jurisprudence, and the importance of medical evidence was more fully understood. Elwell, Malp. & Med. Ev. 285.

The evidence of the medical witness is strictly that of an expert; Elwell, Malp. & Med. Ev. 275; 10 How. Pr. 289; 2 Conn. 514; 1 Chandl. Ws. 178; 2 Ohio 452; 27 N. H. 157; 17 Wend. 136; 7 Cush. 219; 1 Phill. Ev. 780; 1 Whart. Ev. § 441.

In the case of Rogers, 7 Metc. 505, Shaw, C. J., presiding, the court held that the proper question to be put to the professional witness was: "If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether in his [the witness's] opinion the party was insane, and what the nature and character of that insanity; and what state did they indicate, and what he would expect would be the conduct of such a person in any supposed circumstance." Under this ruling the medical witness passes upon the condition of the person whose condition is at issue. To do it correctly he must hear all the evidence that the jury hears; he must judge as to the relevance of the evidence of others, and make an application of the facts that legally and properly bear upon the case to it, and reject all others; in short, he is judge and jury in the case. Since the trial of Rogers, a different rule has been adopted by the courts in Massachusetts. In the case of the United States v. McGuire, reported in 1 Curt., Mr. Justice Curtis instructed the jury that medical experts "were not allowed to give opinions in the case."

See Elwell, Malp. & Med. Ev. 311; Tayl. Med. Jur. 61; EXPERTS; HYPOTHETICAL QUESTION; CONFIDENTIAL COMMUNICATION; PRIVILEGED COMMUNICATION; OPINION; PHYSICIAN.

MEDICAL EXAMINER. As Agent of Insurance Company. A "medical examiner" appointed by an insurance company to make the medical examination and report is not an agent of the applicant; they are not selected or designated or in any way controlled by him, and when an insurance company appoints and selects a "medical examiner" and the examiner acting for the company makes or induces the applicant to make (when he is acting in good faith and without any intention to deceive) misleading or false answers in the medical report, the company will not be permitted to defeat a recovery upon a policy issued on the faith of these statements upon the ground that they were material and false, when they were in fact made not by the applicant but by one of its agents. 149 Ky. 87, 147 S. W. 832.

MEDICAL JURISPRUDENCE. That science which applies the principles and practice of medicine to the elucidation and settlement of doubtful questions which arise in courts of law.

These questions are properly embraced in five different classes:—

The *first* includes questions arising out of the relations of sex: as, impotence and sterility, hermaphroditism, rape, pregnancy, legitimacy, delivery.

The *second*, injuries inflicted upon the living organization: as, infanticide, wounds, poisons, persons found dead.

The *third*, those arising out of disqualifying diseases: as, the different forms of mental alienation.

The *fourth*, those arising out of deceptive practice; as, feigned diseases.

The *fifth* is made up of miscellaneous questions: as, age, identity, presumption of seniorship, life assurance, and medical evidence.

See the several titles.

MEDICINE. The practice of medicine includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the practice of surgery is limited to manual operations usually performed by surgical instruments or appliances. 24 Hun 693.

The primary meaning of the terms medical attendance or medical services is the rendering of professional medical services.

See DRUGGIST; DRUGS; PHYSICIAN.

MEDICINE. Practice of. To open an office, and announce to the public in any way, a readiness to treat the sick or afflicted shall be deemed to engage in the "practice of medicine" within the meaning of a statute. 108 Ky. 769, 57 S. W. 501. See SURGERY.

Allopathic Practice of medicine means the ordinary method commonly adopted by the great body of learned physicians, taught in their institutions, established by their highest authorities, and accepted by the larger portion of the community.

Eclectic Practice is a different system, unusual and eccentric, not countenanced by the class referred to, but characterized by

them as spurious and denounced as dangerous. Anderson; 34 Conn. 453. See CHRISTIAN SCIENCE; PATENT MEDICINE; PRACTICE MEDICINE.

MEDICO-LEGAL. Relating to the law concerning medical questions.

MEDIETAS LINGUÆ (Lat. half tongue). A term denoting that a jury is to be composed of persons one-half of whom speak the English and one-half a foreign language. See JURY.

MEDIO ACQUIETANDO. A judicial writ to distrain a lord for the acquitting of a mesne lord from a rent, which he had acknowledged in court not to belong to him. Reg. Jur. 129.

MEDITATIO FUGÆ. In Scotch Law. If a creditor apprehends that his debtor is about to fly the country, he may appear before a judge and swear that he believes his debtor to be in *meditatione fugæ*, when a warrant imprisoning him will be granted, which, however, is taken off on the debtor's finding *caution, i. e.* surety. Bell; Moz. & W.

MEDITERRANEAN PASSPORT. A passport issued by the admiralty of Great Britain under various treaties with the Barbary States in the eighteenth century. They were granted to British built ships and were respected by the Barbary pirates. See 2 Halleck, Int. L., Baker's ed. 100. They were also issued by the United States. The term is still retained in R. S. § 4191 (act of Mar. 2, 1893).

MEDLEY. An affray; a sudden or casual fighting; a hand-to-hand battle; a mêlée.

MEDSEAT. A bribe; hush money. Ano. Inst. Eug.

MEETING. A number of people having a common duty or function, who have come together for any legal purpose, or the transaction of business of a common interest; an assembly. One person does not constitute a meeting. 2 Q. B. Div. 26.

An assemblage of the creditors of an insolvent or bankrupt duly summoned in accordance with the statute under which the case is proceeding is known as a creditors' meeting, and under such statutes certain powers are usually devolved upon it by law with respect to the management of the estate and the discharge of the debtor.

In the law of corporations the term applies to every duly convened assembly either of stockholders, or of directors, managers, etc.

A distinction is made between general stated meetings of a corporation and special meetings. The former occur at stated times usually fixed by the constitution and by-laws; the latter are called for special purposes or business. Generally speaking, every member of a corporation has a right to be present at every meeting thereof, and to be notified of the meeting, in some way; 22 N. Y. 128; 2 H. L. C. 789. In the absence of a by-law or a custom to the contrary, at least one full day's notice must be given of a directors' meeting of a corporation; 173 Pa. 30. An omission to give the required notice will generally, though it be accidental, invalidate the proceedings; 7 B. & C. 695; see 55 Ark. 473; but it will not, where the action taken thereat is duly ratified at a subsequent meeting; 35 Fed. Rep. 161. When all who are entitled to be present at a meeting are present, whether notice has been given or not, and no objection is made on account of the want of formalities, there is a waiver of the want of notice; 11 Wend. 604; 7 Ind. 647; 53 Minn. 381; but if any one member is absent or refuses to give his consent, the proceedings are invalidated; 14 Gray 440. Notice should be personal; 7 Conn. 214; in writing, and signed by the proper person; 23 N. J. Eq. 216; should state the time and place of meeting, and, if a special meeting, the business to be transacted; 14 Gray 440; L. R. 2 Ch. 191. Ordinarily, notice

of stated meetings is not required; 22 N. Y. 128. A general notice, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation; 138 N. Y. 557.

All proceedings carried on by the members of a corporation, while sitting outside of the state which created it, are void; 45 Ga. 84; 38 Me. 343; 19 So. Rep. (Fla.) 172; 148 Mass. 249; 64 Md. 85; but this rule does not apply to the meetings of the directors of a corporation; Moraw. Priv. Corp. § 533; 27 Ohio St. 343; 63 Barb. 415; and a corporation created by the laws of two states may hold its meetings and transact its business in either state; 81 Ohio St. 317. See Blackwell, Meetings; 3 Weimer, Corp. Law, App., for an interesting paper on corporate meetings, by Hon. George M. Dallas; FAMILY MEETINGS; DIRECTORS; STOCKHOLDERS; INSOLVENCY; PROXY; MAJORITY; QUORUM; MINUTES.

MELANCHOLIA. In Medical Jurisprudence. A name given by the ancients to a species of partial intellectual mania, now more generally known by the name of *monomania*. It bore this name because it was supposed to be always attended by dejection of mind and gloomy ideas. See MANIA.

MELDFEOH. A recompense given to a person who made discovery of any breach of penal laws committed by another person.

MELIORATIONS. In Scotch Law. Improvements of an estate, other than mere repairs; betterments. 1 Bell, Com. 73.

MELIUS INQUIRENDUM VEL INQUIRENDUM. In Old English Practice. A writ which in certain cases issued after an imperfect inquisition returned on a *capias ultigatum* in outlawry. This *melius inquirendum* commanded the sheriff to summon another inquest in order that the value, etc., of lands, etc., might be better or more correctly ascertained.

MEMBER. A limb of the body useful in self-defence. *Membrum est pars corporis habens destinatum operationem in corpore.* Co. Litt. 126 a.

An individual who belongs to a firm, partnership, company, or corporation. A statutory provision that all the members of a company shall, in certain cases, be liable, is not confined to such as were members when the debts were contracted; 12 Metc. 3. See CORPORATION; PARTNERSHIP; JOINT STOCK COMPANY.

One who belongs to a legislative body, or other branch of the government; as, a member of the house of representatives; a member of the court.

A child living with the father does not necessarily cease to be a member of his family on reaching his majority; 79 Ill. 534.

MEMBER OF CONGRESS. A member of the senate or house of representatives of the United States.

MEMBERS. In English Law. Places where a custom-house has been kept of old time, with officers or deputies in attendance; and they are lawful places of exportation or importation. 1 Chitty, Com. Law, 726.

MEMBERS OF PARLIAMENT. See HOUSE OF COMMONS; HOUSE OF LORDS; PARLIAMENT.

MEMBRANA (Lat.). In Civil and Old English Law. Parchment; a skin of parchment. Vocab. Jur. Utr.; Du Cange. The English rolls were composed of several skins, sometimes as many as forty-seven. Hale, Hist. Comm. Law 17.

MEMOIRE. In French Law. A document in the form of a petition by which appeals to the court of cassation are initiated.

In Diplomacy. A brief statement of an undecided question. English.

MEMORANDUM (Lat. from *memorare*, to remember). An informal instrument recording some fact or agreement;

so called from its beginning, when it was made in Latin. It is sometimes commenced with this word though written in English; as, "Memorandum, that it is agreed;" or it is headed with the words, "Be it remembered that, etc." The term memorandum is also applied to the cause of an instrument.

A note to help the memory. 33 Conn. 517. A letter may be a memorandum. *Id.*

The word is also used in England to designate the objects for which a trading corporation is formed. The term prospectus is commonly used in the United States. See PROSPECTUS.

In English Practice. The commencement of a record in king's bench, now written in English, "Be it remembered," and which gives name to the whole clause.

It is only used in proceedings by bill, and not in proceedings by original, and was introduced to call attention to what was considered the bye-business of the court. 2 Tidd, Pract. 775. Memorandum is applied, also, to other forms and documents in English practice; *e. g.* *memorandum in error*, a document alleging error in fact and accompanied by an affidavit of such matter of fact. 15 & 16 Vict. c. 76, § 158. Kerr's Act. Law. Proceedings in error are now abolished in civil cases; Jud. Act, 1875. Also, a *memorandum of appearance*, etc., in the general sense of an informal instrument, recording some fact or agreement.

A *memorandum of association* is a document subscribed by seven or more persons for the purpose of forming themselves into an incorporated company, with or without limited liability. 3 Steph. Com. 20.

In Contracts. A writing required by the Statute of Frauds. See NOTE OR MEMORANDUM.

In the Law of Evidence. A witness may refresh his memory by referring to a written instrument, memorandum, or entry in a book, and may be compelled to do so, if the writing is in court; 20 Pick. 441; 11 S. C. 195; see 63 Hun 439; 31 Fla. 196; but the memorandum is not competent evidence to prove the facts stated, in itself; 96 Cal. 462; see 40 Minn. 325; nor is the memorandum admitted in evidence merely because the witness uses it to refresh his recollection; 130 U. S. 611. The writing need not be an original or made by the witness himself, provided, after inspecting it, he can speak from his own recollection, not relying wholly upon the writing; 10 N. H. 544; 14 Cent. L. J. 119; 10 N. C. 167; 39 Mich. 108; 87 Ga. 393; 33 Neb. 150; 53 Minn. 360. And a writing may be referred to by a witness, even if inadmissible as evidence itself; 8 East 273; 45 Ill. App. 368. A witness may refer to a writing which he remembers having seen before, and which he knew at that time to be correct, although he has no recollection of the facts contained therein; so, when he neither recognizes the writing nor remembers anything therein, but yet, knowing it to be genuine, his mind is so convinced, that he is enabled to swear to the fact, as where a banker's clerk is shown a bill of exchange with his own writing upon it; Whart. Ev. § 518; 1 Greenl. Ev. §§ 436-439. See 1 Houst. Cr. C. 476; 76 N. Y. 604; 18 Hun 443; 39 Mich. 405; 25 Minn. 160; 64 Vt. 511. The admission in evidence of a memorandum made by the witness is error if it does not appear that the witness could not have testified from memory; 47 Minn. 403. See 67 Hun 365.

A memorandum book, out of which some of the entries bearing on the cause of action have been torn after the action was commenced, is not admissible in evidence; 88 Va. 695. Memoranda, if admissible at all as independent evidence, cannot be admitted when it is not shown that they were made at the time of the transactions referred to, or why they were made; 151 U. S. 149.

A witness may refresh his memory by reference to a copy of a memorandum made by him, only where it is first shown that the copy is correct; 96 Ala. 363.

In Insurance. A clause in a policy

limiting the liability of the insurer.

Policies of insurance on risks of transportation by water generally contain exceptions of all liability from loss on certain articles other than total, or for contributions for general average; and for liability for particular average on certain other articles supposed to be perishable or specially liable to damage, under specified rates on each, varying from three per cent. to twenty, and for any loss whatever under three or five per cent. Some seventy or eighty articles are subject to these exceptions of particular average in the divers forms of policy in use in different places; 1 Phill. Ins. § 54, n. These exceptions were formerly introduced under a "memorandum," or "N. B.," and hence have been called "memorandum articles," and the body of exceptions the "memorandum." The list of articles and rates of exceptions vary much in different places, and from time to time at the same place; 19 N. Y. 272.

The construction of these exceptions has been a pregnant subject in jurisprudence. 1 Stark. 436; 3 Campb. 429; 4 Maule & S. 503; 5 *id.* 47; 1 Ball & B. 358; 3 B. & Ad. 200; 5 *id.* 225; 4 B. & C. 736; 7 *id.* 219; 8 Bingh. 458; 16 E. L. & Eq. 461; 1 Bingh. n. c. 526; 2 *id.* 383; 3 *id.* 266; 3 Pick. 46; 5 Mart. La. n. s. 289; 2 Sumn. 366; 16 Me. 207; 31 *id.* 455; 1 Wheat. 219; 6 Mass. 465; 15 East 559; 9 Gill & J. 337; 7 Cra. 415; 8 *id.* 84; 1 Stor. 463; Stevens. Av. p. 214; Benecke, Av. by Phill. 402; 3 Conn. 357; 19 N. Y. 272; [1893] Prob. 209; *id.* 164.

MEMORANDUM ARTICLES. A term used to designate the articles of merchandise mentioned in the memorandum clause. See **MEMORANDUM**.

MEMORANDUM CHECK. It is not unusual among merchants, when one makes a temporary loan to another, to give the lender a check on a bank, with the express or implied agreement that it shall be redeemed by the maker himself, and that it shall not be presented at the bank for payment; such understanding being denoted by the word *memorandum* upon it. If passed to a third person, it will be valid in his hands like any other check; 4 Du. N. Y. 122; 11 Paige, Ch. 612; 12 Abb. Fr. n. s. 200. Being given by the maker to the payee rather as a memorandum of indebtedness than as a payment, between these parties it is considered as a due bill, or an I. O. U. It can be sued upon as a promissory note, without presentment to the bank, whereas the holder of a regular check must first demand its payment at bank, and be refused, before he can maintain an action against the drawer; Van Schaack, Bank Checks 184.

The fact that the word "memorandum" or an abbreviation of it is written on a check makes it a memorandum check, but the bank is not bound to pay any attention to these words, and if such a check is presented for payment and the drawer has sufficient funds to meet it the bank must honor it like any ordinary check; Norton, Bills and Notes 383. If the agreement between the maker and payee is that it shall not be presented for payment, any remedy of the drawer for the breach of such agreement is solely against the payee; Morse, Banks 313. Such a check has all the features of a negotiable instrument in the hands of a *bona fide* holder for value; *id.* See **CHECK**.

MEMORANDUM CLAUSE. A clause inserted in a marine insurance policy to prevent the underwriters from being liable for injury to goods of a peculiarly perishable nature, and for minor damages. Maude & P. Shipp. 371. See **MEMORANDUM**.

MEMORANDUM IN ERROR. A document alleging error in fact, accompanied by an affidavit of such matter of fact. 15 & 16 Vict. c. 76, s. 158.

This species of memorandum was entitled in the court and in the cause, and delivered to one of the masters of the court in which the judgment had been given, accompanied

by an affidavit of the matter of fact wherein the alleged error consisted. Kerr Act. Law. But proceedings in error have been abolished in civil cases by the judicature acts, and orders under them. Abbott.

MEMORIAL. A petition or representation made by one or more individuals to a legislative or other body. When such instrument is addressed to a court, it is called a petition.

MEMORIZATION. No action will lie for pirating a play by means of *memorization* alone; 5 Term 245; see 14 Am. L. Reg. n. s. 207, where the subject is discussed in a note by Mr. J. A. Morgan.

MEMORY. Understanding; a capacity to make contracts, a will, or to commit a crime, so far as intention is necessary.

Memory is sometimes employed to express the capacity of the understanding, and sometimes its power; when we speak of a retentive memory, we use it in the former sense; when of a ready memory, in the latter. Shelford, Lun. Intr. 29, 30.

The reputation, good or bad, which a man leaves at his death.

This memory, when good, is highly prized by the relations of the deceased; and it is therefore libellous to throw a shade over the memory of the dead, when the writing has a tendency to create a breach of the peace, by inciting the friends and relations of the deceased to avenge the insult offered to the family, 4 Term 126; 5 Co. 125; Hawkins, Pl. Cr. b. 1, c. 73, s. 1. See **LIBEL**; **PRIVACY**, **RIGHT TO**.

As to witness refreshing his memory, see **MEMORANDUM**.

MEMORY, TIME OF. According to the English common law, which has been altered by 2 & 3 Will. IV. c. 71, the time of memory commenced from the reign of Richard the First, A. D. 1189. 2 Bla. Com. 31.

But proof of a regular usage for twenty years, not explained or contradicted, is evidence upon which many public and private rights are held, and sufficient for a jury in finding the existence of an immemorial custom or prescription; 2 Saund. 175 a, d; Peake, Ev. 336; 2 Price, Exch. 450; 4 *id.* 198.

MEN OF STRAW. Men who used in former days to ply about courts of law, so called from their manner of making known their occupation (*i. e.* by a straw in one of their shoes), recognized by the name of *straw-shoes*. An advocate or lawyer who wanted a convenient witness, knew by these signs where to find one, and the colloquy between the parties was brief. "Don't you remember?" said the advocate (the party looked at the fee and gave no sign; but the fee increased, and the powers of memory increased with it)—"To be sure I do." "Then come into court and swear it." And straw-shoes went into court and swore it. Athens abounded in straw-shoes. 13 L. Quart. Rev. 344.

MENACE. A threat; a declaration of an intention to cause evil to happen to another. The word menace is not restricted to threats of violence to person and property nor to threats of accusing a person of crime; it includes a threat to accuse one of immoral conduct; [1895] 1 Q. B. 706.

When menaces to do an injury to another have been made, the party making them may, in general, be held to bail to keep the peace; and when followed by any inconvenience or loss, the injured party has a civil action against the wrong-doer. Webb, Poll. Torts 210. Conyns, Dig. *Battery* (D); Viner, Abr.; Bacon, Abr. *Assault*; Co. Litt. 161 a, 162 b, 253 b; 2 Lutw. 1428. See **THREAT**.

MENTAL. Pertaining to servants or domestic service; servile. This term is applied to servants who live under their master's roof. See stat. 2 Hen. IV. c. 21; 1 Bla. Com. 425. It has been held not applicable to a housekeeper in a large hotel; 1 R. 10 C. L. 188.

MENS REA. A term meaning a guilty intent and commonly used only in connection with the maxim, *actus non facit reum, nisi mens sit rea*.

The use of the term and the maxim has been criticised. "Though the phrase is in common use, I think it most unfortunate . . . and actually misleading. . . . It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a 'mens rea' or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. 'Mens rea' means, in the case of murder, malice aforethought; in the case of theft, an intention to steal. . . . In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call dissimilar states of mind by one name. . . . To an unlegal mind, it suggests that, by the law of England, no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime." Stephen, J., in L. R. 23 Q. B. D. 196.

The maxim about "mens rea" means no more than that the definition of all, or nearly all, crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. To comprehend "mens rea" we must have a detailed examination of the definitions of particular crimes, and therefore the expression is unmeaning. 2 Steph. Hist. Cr. L. 98.

In offences against the acts relating to adulterating food, etc., the defence of *mens rea* is not good unless the acts use the word "wifely"; [1896] 1 Q. B. 65.

See 13 Cr. L. Mag. 331; 1 Bish. New Cr. L. § 287, 288, 303 a; 8 Eng. Rul. Cas. 16; **IGNORANCE**; **MOTIVE**.

MENSA (Lat.). An obsolete term, comprehending all goods and necessities for livelihoods.

MENSA ET THORO. See **DIVORCE**; **A MENSA ET THORO**.

MENSURA DOMINI REGIS. The measure of our lord the king, being the weights and measures established under King Richard I. in his parliament at Westminster, 1197. 1 Bla. Com. 275; Moz. & W.

MENTAL CONDITION. The mental condition of a person refers to his senses, his perceptions, his consciousness, his ideas. 15 Wall. (U. S.) 588. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. *Id.*

MENTAL DISEASE. Strictly speaking is always brain disease with mental symptoms. Bridges, Outline Ab. Psych. 127. See **PSYCHOSIS**; **INSANITY**; **DEMENTIA**; **AMENTIA**; **PSYCHIATRY**.

MENTAL INCAPACITY. See **DELIQUIUM**; **DELUSION**; **DEMENTIA**; **IDIOCY**; **IMBECILITY**; **INSANITY**; **MANIA**.

MENTAL RESERVATION. A silent exception to the general words of a promise or agreement not expressed, on account of a general understanding on the subject. But the word has been applied to an exception existing in the mind of the one party only, and has been degraded to signify a dishonest excuse for evading or infringing a promise. Wharton.

MENTAL SUFFERING. Where mental suffering is the natural and proximate result of a tort or of a breach of contract it is a proper subject of compensation, but standing alone it will not support an action of which actual damages is the basis; Hale, Dam. §§ 39, 40.

It was the common-law rule that mental suffering unconnected with physical injury or other element of damage to person or property, is not a cause of action for which damages may be recovered; 68 Miss. 748; L. R. 10 Q. B. 122; 9 H. L. Cas. 577; 13 App. Div. N. Y. 253; 116 Mo. 34; 61 Mo. App. 586; 48 La. Ann. 1431; 85 Ill. 331; 27 Kan. 544; 6 Nev. 224; 18 R. I. 791; 3 Dak. 315; 32 Fla. 434.

This continues to be the prevailing rule with respect to all actions upon contracts of which the consideration is something having a specific value in money. In such cases mental suffering is treated as not being within the limitations of the doctrine of proximate cause and natural consequence as settled in Hadley v. Baxendale, 9 Exchecq. 341; 6 Tex. Civ. App. 755; 2 *id.* 322; 107 N. C. 449. A line of cases *contra* is based upon a decision in 55 Tex. 808.

which has been followed in several states: 89 Ala. 510; 111 Id. 185; 96 Tenn. 695; 128 Ind. 294; 97 Tenn. 638; 77 Ia. 54; 71 Mo. 66; 11 Tex. Civ. App. 699; but the doctrine of these cases has been the subject of severe criticism. In 68 Miss. 748, Cooper, J., said:

"The rapid multiplication of cases of this character in the state of Texas, since the case of *So Relle*, indicates to some extent the field of speculative litigation opened up by that decision. . . . Kentucky, Tennessee, Indiana, and Alabama have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas, the intolerable litigation invited and appearing in Texas has not yet fairly commenced in those states. It will, however, appear in due time, and the courts will be forced to resort to limited limitations, as Texas has done, to restrict it. We prefer the safety afforded by the conservatism of the old law, as we understand it to be, and are of the opinion that no recovery for mental suffering can be had in this case."

The federal courts uniformly deny the right to recover damages in such cases: 44 Fed. Rep. 554; 54 Id. 634; 55 Id. 608; 59 Id. 433; 67 Id. 471. In the case last cited Pardee, J., after discussing the authorities, said:

"The general rule that mental anguish and sufferings, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities, by the conceded state of the general law prior to the *So Relle* case, 55 Texas, 308 (1881), and by the uniform decisions of the federal courts and decisions of the supreme courts of Nevada, Dakota, Kansas, Maine, Mississippi, Georgia, Massachusetts, and by the opinions of several text writers of unquestioned standing as expounders of the law."

In the latest federal case the mental suffering complained of was held on demurrer not to be the proximate cause of the injury, and this was said to render it unnecessary to pass upon the question whether it "is in California under any circumstances, a proper element of damages;" 73 Fed. Rep. 273.

It was early settled that substantial damages might be recovered in a class of actions of tort where the only injury suffered is mental, such as cases:—of assault without physical contact; 8 C. & P. 378; 57 Me. 202; 5 Md. 450; 45 Vt. 476; for false imprisonment, where the plaintiff has not been touched by the defendant; 6 C. & P. 774; 4 Bing. N. C. 213; 33 Ill. 473; for the mutilation of a husband's body by dissection; 47 Minn. 307; for wrongful or wanton removal of a child's body from a burial lot; 99 Mass. 281; for wrongful ejection from a train; 77 Ia. 54; for slander and libel; 17 N. Y. 54; for malicious prosecution; 49 Ind. 341; where a conductor kissed a woman passenger against her will; 36 Wis. 657. So also in cases upon contracts, of which the consideration is not pecuniary in its nature, mental suffering has been treated as a proper basis for damages. Exceptions to the general rule upon this footing are, breach of promise of marriage; 102 Mass. 395; 96 Mo. 424; 47 Cal. 194; 33 Md. 288; breach of an undertaker's contract to keep safely the body of a child; 125 Ind. 536; and so also in case of an action by a wife against a railroad company for negligence in transporting her husband's body; 32 Tex. 83; and by one arrested for failure to appear as a witness by reason of negligence of a policeman in signing in blank a warrant of arrest containing a false recital of service of subpoena on the witness; 68 Conn. 392.

Mental suffering accompanying physical pain is a subject of compensation; 4 Q. B. Div. 406; 20 How. 34; 1 Sawy. 539; 39 Fed. Rep. 315; 63 Ala. 266; 76 Ga. 311; 86 Ky. 565; 73 Ia. 241; 99 Mass. 552; 62 Barb. 364; the two cannot be dissociated; 131 U. S. 22; 92 Ala. 210. So is fright caused by apprehension of physical harm; 79 Ala. 328; or nervous shock produced by a false report of a husband's injury; [1897] 2 Q. B. 57; 73 Ia. 241; but see 47 N. E. Rep. (Mass.) 88; so loss of peace of mind and happiness; 21 Ind. 164; sense of insult or indignity, mortification or wounded pride; 5 Sawy. 107; 9 Id. 386; 48 Ark. 396; 79 Ala. 328; 79 Ga. 358; 113 Ill. 295; sense of shame and humiliation; 32 Fed. Rep. 66; 131 Mass. 674; 119 Ind. 18; 72 Mo. 407; 36

Wis. 657.

Fright alone is not, in the absence of personal injury, a ground of recovery; 147 Pa. 40; 6 Nev. 224; 60 Fed. Rep. 557; 86 Tex. 402; 31 S. W. Rep. (Tex.) 1084; though it produced a miscarriage; 47 Hun 355; 151 N. Y. 107; *contra*, 60 Miss. 906; 36 Wis. 596; 76 Tex. 210. See, as to fright, 14 L. R. A. 666, n.

A nervous shock resulting in bodily illness, and caused by another's negligence, is too remote to enter into the measure of damages; 13 App. Cas. 232; but this point is said to be generally disapproved in England; Poll. Torts 49. Even in cases where mental suffering properly enters into the computation of damages, they are not allowed for such as result from mere disappointment; 8 U. S. App. 118; or apprehension of danger to one's family; 71 Me. 237; of the result of injury to a child from negligence; 8 Tex. Civ. App. 335; 18 R. I. 79.

See, generally, Sedgw. Dam. §§ 43-52; Hale, Dam. §§ 39, 40; Webb, Poll. Torts 54-57; 8 Eng. Rul. Cas. 405-419; MEASURE OF DAMAGES.

MENU, LAWS OF. Institutes of Hindu law, dating back probably three thousand years, though the Hindus believe they were promulgated "in the beginning of time, by Menu, son, or grandson, of Brahma, the first of created beings, and not the eldest only, but the holiest of legislators."

"Such rules of the system as relate to man in his social relations will be found singularly wise and just, and not a few of them embodying the substance of important rules, which regulate the complex system of business in our day." Our knowledge of these laws is derived chiefly from the translation of Sir William Jones, and a translation by A. L. Des Longchamps, 1833. See Maine's Anc. L.; 9 Am. Law Reg. o. s. 717; CODE.

MERCANTILE AGENCY. Mercantile or commercial agencies are establishments which make a business of collecting information relating to the credit, character, responsibility, and reputation of merchants, for the purpose of furnishing the information to subscribers. 20 Am. & Eng. Ency. 2nd ed., 578; Errant, Mer. Agen. Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when, by culpable negligence, imprudence, or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor. *Id.*; 18 Can. Sup. Ct. 222. Such agencies are not such legitimate and useful instruments of commerce or commercial intercourse as to put them exclusively under the regulation of Congress, and free from state control. *Id.*; 2 S. D. 32.

See COMMERCIAL AGENCY; PRIVILEGED COMMUNICATIONS; LIBEL.

MERCANTILE LAW. That branch of law which defines and enforces the rights, duties, and liabilities arising out of mercantile transactions and relations. As to the origin of this branch of law, see LAW MERCHANT; and for its various principles, consult the articles upon the various classes of commercial property, relations, and transactions.

MERCANTILE LAW AMENDMENT ACTS. The statutes 19 & 20 Vict. cc. 60 and 97, passed mainly for the purpose of assimilating the mercantile law of England, Scotland, and Ireland.

MERCATUM (Lat.). A market. Du Cange. A contract of sale. *Id.* Supplies for an army (*commeatus*). *Id.* See Bracton 56; Fleta, l. 4, c. 23, §§ 13, 14.

MERCEN-LAGE. The law of the Mercians. One of the three principal systems of laws which prevailed in England about the beginning of the eleventh century. It was observed in many of the midland counties, and those bordering on the principality of Wales. 1 Bla. Com. 65.

MERCES (Lat.). In Civil Law. Reward of labor in money or other things. As distinguished from *pensio*, it means the rent of farms (*predia rustica*). Calvinus, Lex.

MERCHANDISE (Lat. *merx*). A term including all those things which merchants sell, either wholesale or retail; as, dry goods, hardware, groceries, drugs, etc. It is usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used, or which are used only by a slow consumption. See Pardessus, n. 8; Dig. 13, 3, 1; 19, 4, 1; 60, 16, 66; 8 Pet. 277; 6 Wend. 335.

It may be and often is used as the synonym of "goods," "wares" and "commodities." If used in an insurance policy to describe the goods of a merchant it may very properly be limited to goods intended for sale. If used for the same purpose to describe the goods of a painter, it may be held to cover property intended for use, and not for sale; 84 Me. 524.

More evidences of value, as bank-bills, are not merchandise. "The fact that a thing is sometimes bought and sold does not make it merchandise." Story, J., 2 Stor. C. C. 10, 53, 54. See 2 Mass. 467; 20 Pick. 9; 8 Metc. Mass. 367; 2 Parsons, Contr. 351, note v.

"Goods, wares, merchandise," has been held to embrace animate, as well as inanimate, property, as oxen; 20 Mich. 353; or horses; 22 Vt. 655. "Merchandise" may include a currier; Anth. N. P. 157; or shares in a joint-stock company; 60 Me. 430; 2 Mo. App. 51; or horses and trucks; 26 Fed. Rep. 768. See STACK.

The word *merchandise*, as used in the Title including § 2809 of Rev. Stats., may include goods, wares, and chattels of every description capable of being imported. It is argued that "capable of being imported" must mean capable of being imported legally as otherwise the phrase hardly would do more than exclude chattels real, and would want the poignant significance attributed to every word of legislation; and that therefore the merchandise to be included in the manifest does not embrace opium for smoking which the law has done all it can to exclude. 262 U. S. 168.

MERCHANT (Lat. *mercator, merx*). A man who traffics or carries on trade with foreign countries, or who exports and imports goods and sells them by wholesale. Webster, Dict. Lex Mercatoria 23. These are known by the name of shipping-merchants. See Comyns, Dig. Merchant (A); Dy. 279 b; Bacon, Abr. Merchant.

One whose business it is to buy and sell merchandise: this applies to all persons who habitually trade in merchandise. 1 W. & S. 469; 2 Salk. 445.

One who is engaged in the purchase and sale of goods; a trafficker; a trader. 4 Co. Ct. Rep. (Pa.) 878.

Merchants, in the statute of limitations, means not merely those trading beyond sea, as formerly held; 1 Chanc. Cas. 152; 1 W. & S. 469; but whether it includes common retail tradesmen, *quære*; 1 Mod. 238; 4 Scott N. R. 819; 2 Parsons, Contr. 369, 370. See, also, 5 Cra. 15; 6 Pet. 151; 12 Id. 300; 5 Mas. 505; 2 Duv. 107; 9 Bush 569.

The term has been held to include: an ice-dealer; 36 Mo. App. 584; a hotel-keeper; 12 Duv. 107; a banker; 84 La. Ann. 576; the keeper of a boarding stable; 17 Bankr. Rep. 73; and a saloon-keeper; *id.* 103; but not a brewer; L. R. 7 Ex. 127; a commercial traveller or drummer; 58 Miss. 478; 34 Kan. 434; the superintendent and treasurer of a steamboat corporation; 7 Fed. Rep. 583; a theatrical manager; 4 Id. 519; or a speculator in stocks; 5 Ben. 315; 8 Id. 563; L. R. 2 Ch. 466; 77 Me. 275; a farmer; 3 T. B. Monr. 330; a druggist; 9 Bush 569; or the principal of a boarding school who provides the students with clothes and books; 5 Humph. 394.

According to an old authority, there were four species of merchants: namely, merchant adventurers, merchants dormant,

merchant travellers, and merchant residents; 2 Brownl. 99. See, generally, 9 Salk. 445; Bacon, Abr.; Comyns, Dig.; 1 Bla. Com. 75, 260; 1 Pardessus, *Droit Comm.* n. 78; 2 Show. 326; Bracton 334.

See MERCHANT AND SALESMAN, ARTIFICER.

MERCHANT APPRAISERS. Merchants selected, under the revenue laws, to appraise the value of imports, where the importer is dissatisfied with the official appraisal, and there is no appraiser appointed by law. The collector appoints two respectable resident merchants; R. S. § 2809.

MERCHANT AND SALESMAN. The policy of the law is careful to distinguish between the status of a merchant and those beneath that status. A merchant is the owner of the business; a salesman or manager, a servant of it. A merchant is fixed in it and made constant to it by his financial interest; a salesman or manager is but an employee, however else he may be denominated, and may withdraw from his employment at any moment of time and become a competitor in the ranks of labor, using the word in the sense the law implies.

The Immigration Law defines the classes of aliens which shall be excluded from admission to the United States, but provides that the exclusion shall not apply to persons having the "status or occupations" of "merchants." This means, necessarily, having the "status" at the time admission is sought, not a status to come or to be established. 262 U. S. 264.

MERCHANT SHIPPING ACTS. Certain English statutes, beginning with the 16 & 17 Vict. c. 131, whereby a general superintendence of merchant shipping is vested in the board of trade. Provisions are made for the registration, etc., of merchant ships, the discipline and protection of seamen, the regulation of pilotage, etc.

MERCHANTABLE. This word in a contract means, generally, vendible in market. Merchandise is vendible because of its fitness to serve its proper purpose; 11 Ct. Cl. 680; 34 Barb. 204, 206. See, generally, 74 Me. 475; 24 Wis. 340; 2 Q. B. Div. 102; 51 Vt. 430; 37 Ohio St. 236; 102 Mass. 365.

MERCHANTMAN. A ship or vessel employed in the merchant-service.

MERCHANT VESSELS, IMMUNITIES OF. In international law, a merchant vessel in a foreign port is subject to the jurisdiction of the foreign state. In France, however, it is held that acts and offences connected solely with the discipline of the ship are not subject to the local laws; Snow, *Int. Law* 36. See VESSEL.

MERCHANTS' ACCOUNTS. Accounts between merchant and merchant, which must be current, mutual, and unsettled, consisting of debts and credits for merchandise. 6 How. (Miss.) 328; 4 Cra. C. C. 696; 6 Pet. 151.

The statutes of limitation in most of the states contain an exception in favor of such accounts, following the stat. 21 Jac. I. c. 16, § 3, which, however, was repealed in England by 19 & 20 Vict. c. 97, § 9, and has not been retained in the latest revised acts of limitation in this country. Whether the exception applied to accounts in which there had been no item for six years, has been the subject of conflicting adjudication, but was settled affirmatively in England, in *Robinson v. Alexander*, 8 Bligh N. S. 352. See 3 M. & W. 781; 20 Johns. 576; 7 Cra. 350; 61 Ala. 41; 24 Minn. 17; 30 N. J. Eq. 254; Ang. Lim. ch. xv.

MERCHET. A fine or composition paid by inferior tenants to their lord for liberty to dispose of their daughters in marriage. Cow.

The right of concubinage which certain lords had with their tenants' wives on their wedding night. Wharton.

No baron or military tenant could marry his sole daughter and heir without such leave

purchased from the king. Many of the servile tenants could neither send their sons to school nor give their daughters in marriage without express license from the superior lord. Jacob; Kennet's Gloss. in *Maritagium*. See also MARCHET.

MERCHETA. See MERCHET.

MERCIAN LAW. A system of law existing in parts of England, about the eleventh century, principally on the borders of Wales. English. See MERCEN LAGE.

MERCIMOMATUS ANGLIÆ. The impost of England upon merchandise.

MERCY (Law Fr. *merci*; Lat. *miseri-cordia*).

In Practice. The arbitrament of the king or judge in punishing offences not directly censured by law. 2 Hen. VI. c. 2; Jacob, *Law Dict.* So, to be in mercy, signifies to be liable to punishment at the discretion of the judge.

In Criminal Law. The total or partial remission of a punishment to which a convict is subject. When the whole punishment is remitted, it is called a pardon; when only a part of the punishment is remitted, it is frequently a conditional pardon; or, before sentence, it is called clemency or mercy. Rutherford, *Inst.* 224; 1 Kent 265; 3 Story, *Const.* § 1488.

As to the construction of "mercy" in the exception to the Sunday laws in favor of deeds of necessity and mercy, see 2 Pars. *Contr.* 262, notes. See IN MERCY.

MERE (Fr.). Mother. This word is frequently used, as, *in ventre sa mere*, which signifies a child unborn, or in the womb.

MERE MOTION. See EX MERO MOTU.

MERE RIGHT. A right of property without possession. 2 Bla. Com. 197.

MERE-STONE. A stone for bounding land. Yearb. P. 18 Hen. VI. 5.

MERETRICIOUS. Pertaining to unlawful sexual relations. Anderson, *L. Dict.* When persons who are under legal disabilities wed it is called a meretricious union; 1 Bla. Com. 436.

MERGER. The absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist but the greater is not increased.

The annihilation of one estate and its absorption in another by act of law.

The extinction of a security for a debt by the creditor's acquisition either of a higher security, or of the *corpus* of the property upon which his debt is a lien or charge.

Merger is distinguished from surrender and extinguishment, though in its effects not unlike both. "Strictly speaking" it has been said that it "should be confined to the sinking of one estate in another, or, at most, it should embrace, in addition, the extinction of an incorporeal hereditament through the union of its ownership with that of the land, in, over, or upon which it is exercisable." Ordinarily, however, the Roman doctrine of *confusio*, which we call extinguishment of a charge or equity, is also denominated merger, and, being governed by the same rules, it is here, and indeed generally, discussed under that title. See 3 Sharsw. & B. L. Cas. R. P. 228.

Of Estates. When a greater estate and less coincide and meet in one and the same person, without any intermediate estate, the less is immediately merged, that is, sunk or drowned, in the latter; but they must be in one and the same person, at one and the same time, in one and the same right; 2 Bla. Com., Sharsw. ed. 177, and note 16; Latch 153; Poph. 166; 6 Madd. 119; 1 Johns. Ch. 417; 3 Id. 53; 3 Mass. 172; 33 Gratt. 305; 6 Conn. 373; 11 Ind. 351; 15 Barb. 14. But see 3 Prest. *Conv.* 277. See, also, 139 Pa. 309; 5 L. R. A. 721.

The estate in which the merger takes place is not enlarged by the accession of the

preceding estate; and the greater or only subsisting estate continues, after the merger, precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished; Prest. *Conv.* 7; Wash. R. P. As a general rule, equal estates will not merge in each other.

The merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree or from the meeting of the particular estate and the immediate reversion in the same person; 4 Kent 98. See Wash. R. P. Index; 3 Prest. *Conv.*; 15 Viner, Abr. 361; 10 Vt. 293; 8 Watts 146.

A merger takes place only when the whole title, equitable as well as legal, unites in the same person; 74 Me. 362.

Merger is held to have taken place in the following cases: An antecedent life estate purchased by the owner of a consequent life estate limited on the former; 6 S. E. Rep. (S. C.) 305; life estate of the husband in the fee of the wife, both bought by the same person; 62 Conn. 143; life estate under a will, in remainder in fee, devolved upon the life-tenant by the death of her child, the tenant in remainder; 61 Conn. 344; where a tenant acquires the interest of the landlord, in which case the former cannot recover for breach of contract of the latter to repair; 105 Ala. 593; where the tenant for life acquires the fee; 6 Ohio Dec. 439; estate by the curtesy released to the owner of the fee; 179 Pa. 117. Where a lease for years and an equity of redemption come into the same hands, the legal estate may merge in the equitable, if the parties so intended; 41 S. W. Rep. (Mo.) 450; *contra*, 3 Cra. C. C. 416.

There has been held to be no merger in the following cases: where the tenant in tail acquires the reversion in fee; 2 Co. 61; 6 Conn. 373; a trust estate for life of testator's daughter, undisposed of after her death, in her fee by inheritance; 79 Hun 426; where the co-tenant for years is also the owner of the reversion, there is no merger so as to prevent a separate partition of the leasehold interest; 106 Cal. 682; where a landlord purchases improvements on property on which the lessee has forfeited his lease, it does not merge so as to entitle the holder of a mechanic's lien against the leasehold to enforce it against the fee; 10 Wash. 528; a conveyance in fee to husband and wife by entirety was held not to merge in an estate for life already vested in one of them; 4 Rich. Eq. 80; Co. Litt. 299 b; Litt. 525; *contra*, 2 Saund. 386 b. A life estate of the father by a conveyance to a trustee for ninety-nine years to secure payment of charges covenanted to be paid by the son, the succeeding tenant for life; 76 L. T. Rep. 489. Unassigned "dower" of husband in his wife's estate does not merge in the inheritance unless required for the promotion of justice; 6 Ohio Dec. 154.

Under the English judicature act of 1873, a life estate in possession conveyed to the next tenant for life in trust to pay a rent charge, and, subject thereto, to the use of the grantee in fee, does not merge the estate *per autre vie*, it being apparent that no merger was intended; [1892] 3 Ch. 110. See 30 L. R. A. 313 n.

Merger is not favored in equity and is only allowed to promote the intention of parties or for other special reason; 80 Md. 115; 140 Ind. 321; 113 Pa. 6; 118 Ill. 682; 68 Ia. 512; 4 Kent 102; Boone, *Mort.* 141-143; 2 Pom. Eq. Jur. § 788; Jones, *Mort.* 870-873; the intention actual or presumed is the criterion; 18 Ves. 390; 40 W. R. 603; if no intention is expressed, equity will examine the circumstances and presume an intention in accordance with the advantage to the acquirer of the two estates; 32 Beav. 244; 18 Ves. 390; 19 R. I. 4, 268; and wherever the legal and equitable estates are united in one owner, so long as his interest requires severance, he will be regarded as holding the titles separately; Jones, *Mort.* § 678. See 5 Ch. D. 634. And equity will not permit a merger in the case of an easement as against the interest of a third

party, with the interest of a mortgagee; 81 Md. 537.

One equity will not swallow up another, hence several equitable claims may be acquired by one person without merger, which will take place when the legal title is acquired because the reason for their existence is then terminated; 140 Ind. 321.

Merger will not be permitted, and it may be prevented, in equity, where it would operate to assist or accomplish the perpetration of a fraud; 158 Ill. 544; 2 Pom. Eq. Jur. § 794; and a merger brought about by a fraudulent deed is destroyed when the deed is set aside; 1 Wend. 478; 49 N. Y. 111; 84 Ind. 144.

In Louisiana one who has once acquired ownership of a thing by one title cannot afterwards acquire it by another title, unless it be to supply a deficiency in the first title; Civ. Code 495; and in other states there are statutes designed to prevent or modify the effects of merger upon third parties. They are collected in 1 Stims. Am. Stat. L. § 1403.

Of Liens. The merger of liens is subject to the rule of intention as well as such other general principles, already stated, as are applicable. And it is also to be noted that while separate reference is here made to some classes of liens, the same rules are in the main applicable to all, though usually, for the sake of brevity, only once mentioned. Generally where a lien holder acquires the legal title to the land subject to his lien, and there is no contrary intention expressed or implied, or other circumstance requiring it to be kept alive, the latter is merged; 119 Ill. 312; 69 Ia. 755; 110 N. Y. 33; and the merger cannot be prevented by an assignment of the incumbrance directly to the owner or for his benefit; 10 Allen 466; 13 Gray 360; 13 Cal. 526; 12 N. J. Eq. 515; 32 Md. 501.

Where a mortgagee acquires the legal title, merger will not be applied to defeat the priority of the lien; 104 Mich. 120; 141 Ind. 322. And a mortgage will be continued in favor of a mortgagee, although the parties undertook to discharge it, unless it would work injustice; 31 N. J. L. 325; 44 N. H. 619. There is a presumption that the mortgage was extinguished; 3 Johns. Ch. 393, Kent, C. Probably all that can be said is that it is not so as a matter of course; 62 Ia. 661; and that the rule of intent governs; 3 Pick. 475.

There is no merger where the mortgagee acquires an incomplete equitable title, or only to a portion of the land; 140 Ind. 321; or where he purchases the equity of redemption and by consent of the mortgagor retains the mortgage to cut out subsequent liens by foreclosure; 104 Mich. 120. A purchase by a partner of partnership land sold under a mortgage assumed by the firm operates to satisfy the mortgage; 119 Mo. 280.

A conveyance by a mortgagor to a mortgagee creates no merger as against the assignee of the mortgage; 10 Misc. Rep. 341; 152 N. Y. 159. Where municipal bonds in aid of a railway were disputed, sued upon, and a judgment entered pursuant to a written compromise, for less than the face of the bonds, the town's liability on the bonds was merged in the judgment; 69 Ala. 805.

See as to mortgages, Lawson, Rts. & Rem. §§ 3052-3; 3 Sharsw. & B. L. Cas. R. P. 245.

The question of merger is one which arises frequently, especially in England, with respect to charges. There is a presumption that when the ownership of the fee and of the charge merge, the latter is merged; 18 Ves. 390; if it is of no advantage to the owner to have it kept alive; 10 Hare 79; 29 Beav. 203; or unless he is a limited owner; 7 id. 232; if a charge is paid off by a limited owner, with no expression of intention, he retains the benefit of it against the inheritance; 5 Ch. D. 645; a tenant in tail is not excepted because it is in his power to become absolute owner; 2 S. & S. 345. It results from the rule of intention that in case of an infant tenant in tail there is no merger, as a person not *sui juris* is not presumed to intend it; 24 Beav.

457; 2 Cow. 246. See 32 Sol. Jr. 397, 418. A charge on land of a husband in favor of his wife and her heirs did not merge in the fee which she took by a devise from the husband, recognizing the charge, to her in trust for her son for life; 49 Hun 608; nor did one created by a testatrix in favor of her children on land devised to their father merge on the fee inherited by the children from the father; 19 R. I. 4.

A mechanic's lien is merged in a conveyance of the land to the lien holder; 31 S. W. Rep. (Tex.) 419; but not in a judgment for the debt; 5 Col. App. 335; 40 W. Va. 194; nor by purchase of the property under circumstances from which a contrary intention would be presumed; 160 Ill. 115. Such merger discharges a guarantor of the lien which it destroys; 97 Ia. 77; or a surety for its payment; 77 L. T. Rep. 168. A mechanic's lien assigned to one who took a mortgage on the property affected, the consideration of which was used in the purchase of the lien, did not merge, since it did not appear to be the intention of the parties or required by justice; 37 Neb. 207.

If two foreclosure decrees rendered in the same action on different obligations in favor of different persons, become the property of one person, neither will merge; 62 N. W. Rep. (Ia.) 662.

Of Contracts. Oral agreements, proposals, or negotiations by letter merge in a subsequent written contract respecting the same subject-matter; 36 U. S. App. 749; s. c. 74 Fed. Rep. 94; 38 id. 116; 97 Tenn. 469; 165 Ill. 95; 10 Wash. 339; 86 Hun 189; 93 Wis. 23; so a written option to sell land is merged in the subsequent contract of sale; 38 Pac. Rep. (Col.) 601; and the seller of chattels is not liable for any breach of warranties not contained in the written contract; 73 Fed. Rep. 904; but this rule does not apply to a collateral agreement upon which the instrument is silent, not affecting its terms; 117 Cal. 96. A bank check is a contract in the sense that it merges all previous transactions leading up to it; 47 Ia. 671; so is a note; 4 Pa. 317; a charter party; 12 N. Y. 561; a bond of one party to a joint contract debt; 7 Mo. 604.

Generally the provisions of a contract of sale are merged in a deed made in execution thereof; 80 Md. 495; but not so as to prevent the enforcement in equity of a clause in the contract not inserted in the deed; 133 Ill. 385; or where the contract is for the sale of two distinct properties and the conveyance only of one; 172 Pa. 331; 6 Ohio Dec. 273; see 74 Mich. 183; 44 id. 15; but the mere absence from the deed of a provision contained in a contract does not necessarily operate to continue the latter; 26 Can. S. C. 181. A covenant in the contract to deliver possession to the purchaser is not merged in the covenants of title of the deed; 84 Hun 430. A parol agreement between father and son that the latter shall have the property after his parents' death, in consideration of help in carrying on the farm, does not merge as to the undivided half part not conveyed by a subsequent conveyance from the father to the son of an undivided half part of the property made in contemplation of the re-marriage of the father; 69 Vt. 535.

A specialty taken for a simple contract debt merges it; 40 W. Va. 194. A new contract with respect to the subject-matter of a former one, and which appears to be supplementary, does not merge the former; 43 Neb. 584. A note is not merged in a judgment note taken as additional security; 91 Va. 446. See 7 Wait, Act. & Def. 320. As to merger of the original cause of action in a judgment recovered upon it, see JUDGMENT.

In Criminal Law. When a greater crime includes a lesser, the latter is merged in the former; 1 East, P. C. 411; 72 N. C. 447; 1 Bish. N. Cr. L. § 786; Cl. Cr. L. 35, 36; 109 Mass. 349; 7 Misc. Rep. 478. Murder, when committed by blows, necessarily includes an assault and battery; a battery, an assault; a burglary, when accompanied with a felonious taking of per-

sonal property, a larceny; in all these and similar cases, the lesser crime is merged in the greater.

Merger of crimes exists only when a misdemeanor is an ingredient of a felony; formerly there was a distinct merger and the trial must be for the felony, but this is so no longer, as a general rule; the misdemeanor and the felony must now be a constituent part of the same act in order that acquittal of the latter may be pleaded in bar of prosecution for the former; 1 Whart. Cr. L., 9th ed. §§ 270, 395; 1 Bish. N. Cr. L. §§ 804-14; the essential result is thus well expressed: "The same act cannot be punishable both as a felony and as a misdemeanor;" 1 McClain, Cr. L. § 22. In many, probably most, of the states, under an indictment for certain felonies, which include a misdemeanor, there may be conviction of the latter. "When two crimes are of equal grade there can be no technical merger;" as, in the case of a conspiracy to commit a misdemeanor, and the subsequent commission of the misdemeanor in pursuance of the conspiracy; the two crimes being of equal degree, there can be no legal merger; 4 Wend. 265; 26 N. J. L. 313; 29 id. 453; 43 Me. 218; 36 Ind. 280.

The most frequent application of the principle of merger of crimes is in the common law rule which was generally followed in this country (subject to the exception just stated) that a conspiracy to commit a felony is merged in the latter, if it be accomplished; 5 Mass. 106; 5 Am. St. Rep. 900, note; if the felony is not in fact committed, there is no merger, and there may be a conviction of the conspiracy; 28 N. Y. 177; but when the crime is a misdemeanor at common law and a felony by statute, there is still a merger; 4 Park. Cr. Cas. 206. A very late authority considers that "the weight of the more recent cases" is that the conspiracy is not merged even if the crime intended be a felony; 2 McClain, Cr. L. § 979; and this view is strongly supported; 42 Fed. Rep. 839; 64 Mich. 252; 30 Conn. 500; 86 Ia. 216; and is expressly held in England; 11 Q. B. 929; 13 Cox, C. C. 87.

It has been held that where one in an effort to commit a misdemeanor does some act which is itself a felony, he can be punished only for the latter; 2 Moo. & R. 469; 5 C. & P. 553; but in referring to a case which precisely illustrates this point, where one seeking to obtain goods by false pretences, which is a misdemeanor, commits a forgery, which is a felony, Lord Denman considered that an acquittal of the latter ought to be no bar to an indictment for the former; 11 Q. B. 946. See 6 Biss. 259.

Of Rights. Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights, or extinguishment.

When there is a confusion of rights, and the debtor and creditor become the same person, as by marriage, there can be no right to put in execution; but there is an immediate merger; 2 Ves. 264.

In Torts. Where a person in committing a felony also commits a tort against a private person, in this case the wrong is sunk in the felony, at least until after the felon's conviction.

The old rule, that a trespass is merged in a felony, has sometimes been supposed to mean that there is no redress by civil action for an injury which amounts to a felony. But it is now established that the defendant is liable to the party injured either after his conviction; Latch 144; Noy 83; W. Jones 147; 1 Hale, Pl. Cr. 546; or acquittal; 12 East 409; 2 Hayw. 108. If the civil action be commenced before, the plaintiff will be non-suited; Yelv. 90 a, n. See Ham. N. P. 63; Kel. 48; Cas. temp. Hardw. 350; Lofft 88; 3 Me. 458. Buller, J., says this doctrine is not extended beyond actions of trespass or tort; 4 Term 333. See, also, 1 H. Blackst. 583, 588, 594; 15 Mass. 78, 336; 1 Gray 88, 100.

This doctrine doubtless had its origin in the English system of relying on private

prosecutors and forfeiture of felons' goods; but it has been repudiated in this country, and the civil remedy and the criminal prosecution go side by side, and neither has any dependence upon the other; 28 Fla. 96; 19 Ohio St. 462; 1 Gray 83; 30 Miss. 492; 6 N. H. 454; 6 B. Monr. 38; 1 Tex. Civ. App. 409; 67 Hun 579. Even in England it is said that "so much doubt has been thrown upon the supposed rule in recent cases that it seems, if not altogether exploded, to be only awaiting a decisive abrogation." Poll. Torts 235.

See, generally, as to this common law doctrine in the United States; 1 Ala. 8; 35 id. 184; 15 Mass. 336; 22 Wend. 285; 1 Cox 115; 1 Miles 813; 6 Rand. 223; 1 Const. S. C. 231; 3 Root 90; 3 Hawks, N. C. 251; 16 Ga. 203; 17 Ind. 105; 19 Greenl. 392; 6 Humph. 433; 8 Tex. 6; 10 Wheat. 473, 494; 1 Hill. Torts 61.

In some states, as New York, it is provided that the right of action of any person injured by any felony shall not, in any case, be merged in such felony, or be in any manner affected thereby.

Of Corporations. Actual corporate union is usually called consolidation in America and amalgamation in England. Railroad corporations are more commonly the subject of such consolidation.

Consolidation requires legislative authority or consent; 101 U. S. 71; 30 Pa. 44; 88 Tenn. 138; 16 Ind. 46. Statutes exist in most, if not all, of the states, for this purpose. Many of them are abstracted in 1 Thomp. Corp. § 305. The state has the same power to authorize a consolidation of two existing corporations as it has to authorize individuals to incorporate; 46 Mich. 224.

A permit given in a charter of a railroad company to connect or unite with other roads, refers merely to physical connection of the tracks and does not authorize the purchase or even the lease of such roads or any union of franchises; 161 U. S. 677.

Where the charters of the constituent companies or some statute to which the charters are subject do not provide otherwise, the consent of all stockholders is required; 53 Tex. 96; 4 Biss. 78; 54 Barb. 42; a state legislature cannot ordinarily compel a stockholder to transfer his stock because the majority have voted to consolidate; 1 Wall. 25; but it has been held that the legislature may, when public necessity requires it, grant authority to consolidate existing connected railways, if it provide just compensation for dissenting stockholders; 24 N. J. Eq. 455. Where statutes existed before a consolidating company was chartered, or one is passed which is binding upon it, provisions in such statutes authorizing consolidation by the vote of a certain proportion of stockholders are binding upon a dissenting minority; such statutes commonly provide for the purchase of dissenting stock by a sale or on an appraisal. If there be no such statute or charter provision, a stockholder is not bound to consent to consolidation, nor to surrender his interest in the original corporation; 1 Thomp. Corp. § 343.

Equity will enjoin a consolidation at the suit of a dissenting stockholder, in cases where he is not bound by the action of the majority; 4 Biss. 78; 29 Vt. 45; it has been held that an injunction will be continued only till the dissenting stockholder's interest has been secured; 30 Pa. 42; 16 Ind. 46, a dictum. These two cases are criticised in 4 Biss. 78, and their doctrine disapproved in 1 Thomp. Corp. § 351. A stockholder's subscription in case of such a consolidation is held to be released; 9 Ind. 58; 4 Biss. 78.

After consolidation has been effected and a *de facto* corporation formed, only the state can attack the charter; 36 Kan. 121; especially if the new company has acted as a corporation for a considerable time; 51 Kan. 617.

The legal effect of consolidation is to extinguish the constituent companies and create a new corporation, with all the property, liabilities, and stockholders of the old companies; 41 Ark. 509; 64 Ala. 603;

16 Ind. 46; 27 S. C. 385; 128 Ill. 467; and all their franchises, ordinarily; *id.* Consolidation is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated; 109 U. S. 106; 92 U. S. 677; the respective roads and properties of two railroad companies which have been consolidated, retain their respective *status* towards the public and the state; *id.* Some cases appear to hold that the old companies continue to exist. See 123 Ill. 467; 42 Mo. 63; 151 Mass. 302 (where the statute so required). It is said in a leading case that "consolidation" has not acquired a recognized judicial construction; it may mean a union by which the old companies cease to exist, or the absorption of one by the other, the former thus securing enlarged powers. Where a statute merely authorizes consolidation upon terms to be agreed upon by the companies, the character of the consolidation is determined by the agreement; 64 Ala. 603.

Where a railroad consolidated with a smaller road, it was held that the former preserved its legal, though not its actual, identity, and that the latter and all its members passed into the former and became members thereof; 30 Pa. 45. The old companies are not of necessity dissolved; it depends upon the language of the statute; 92 U. S. 665, 676.

Technically, the consolidated company is a new corporation, but as regards the business of the old companies and their respective creditors, it is a continuation of the old companies under a new name; 39 Mo. App. 574. The new company is bound to perform the duties of the old companies; 68 Ill. 489; it usually has the powers of both of its constituents; 21 Ill. 451. "As a general rule, the new company succeeds to the rights, duties, obligations, and liabilities of each of the precedent companies, whether arising *ex contractu* or *ex delicto*. The charter powers, privileges, and immunities of the corporations pass to and become vested in the consolidated company," unless otherwise provided by law; 1 Thomp. Corp. § 365. See 61 Mo. 176.

But it has been held that the powers, etc., of the new company are no greater than those of the constituent company having the fewest privileges; 66 Me. 48; a difficult rule to apply.

The new corporation as an incident of consolidation assumes the debts and liabilities of the constituent companies, and is not an innocent purchaser for value of the property of those companies so as to protect it from liability for taxation; 35 Fla. 625.

Where two roads are consolidated, one of them having a right to exemption from taxes, and the old company being extinguished, its right of exemption does not pass to the new company; 152 U. S. 301. The legislature cannot increase the taxes of the exempt company after consolidation, but may tax that of the other precedent company; and where a taxable corporation is merged into an exempt company, the property of the former is taxable; 92 U. S. 665; 117 U. S. 139. It is held that where an exempt company and a taxable company consolidate, the property of each will continue as it was before, in relation to taxation; 99 Mo. 30; 37 N. J. L. 240; 110 N. C. 137. As to betterments on a consolidated company, one of whose constituents was not taxable, see 92 U. S. 682.

Where two companies were exempt except on net earnings above ten per cent dividends and this was based upon conditions which could only be performed by the constituent companies while operating separate lines (keeping accounts and rendering certain reports to the state), and the new company mingled the assets and ran continuous trains over its lines and could not show the net profits of each road, it was held that the new company had no right to the former exemption; 96 U. S. 508.

Consolidation does not abate a suit pending against one of the companies; 106 Mo.

594; 2 Grant (Pa.) 348; 52 Miss. 159; *contra*, 40 Kan. 192; 40 Ga. 706. The new company may be substituted under the original process without the issue of process against it; 39 Mo. App. 382.

A railroad company is not relieved from liability on the mortgage bonds of a constituent company by consolidation; 21 N. Y. S. 702. A consolidated company may use a patent under which both of the precedent companies were licensed; 1 Low. 338; and may occupy the streets of a city, if the constituent companies had the power; 53 Fed. Rep. 715. It may sue shareholders of either old company for calls; 19 C. B. 14; 18 Ohio St. 223. Non-assenting subscribers to stock are not released; 25 Kan. 261; *contra*, 10 Ind. 93. A consolidated company is entitled to a donation made by a town to one of the companies; 5 Ill. App. 579; 94 Ind. 1; but see 69 Mo. 150. The title to lands conveyed to a constituent company vests in the consolidated company; 128 Ind. 266; 67 How. Pr. 439; and its mortgage, secured upon its consolidated property is paramount to the unsecured indebtedness of the constituent companies; 15 Fed. Rep. 763.

A consolidated company is liable for the debts of the constituent companies; 29 Ind. 465; and they can be enforced only against it; 56 Tex. 609; see 106 Mo. 594; even in the absence of an express declaration to that effect; 117 Ind. 501. It is held to be liable in equity for such debts at least to the value of property received; 13 Fed. Rep. 522; and the remedy at law is said to be complete; 81 Ill. 429. It is liable on a judgment against a constituent company; 43 Ill. 199. Bonds that had no lien before consolidation do not acquire a lien by consolidation; 114 U. S. 587; but see 45 Ohio St. 592. The liability of the new company extends to damages due by a constituent company to a riparian owner; 75 Ill. 524; and damages due by a constituent company for breaking into a neighbor's mine; 47 L. J. Ch. 20; and for damages caused by its negligence; 49 Ala. 582; 41 Ark. 542; 62 Ga. 682; for the death of an employee; 17 Md. 489. A cause of action on a constituent company's debt is against the consolidated company alone; 62 N. Y. 307. The necessary facts to establish liability should be averred; 32 Mich. 251.

A railroad corporation is a corporation under the laws of its state, although consolidated with a like corporation created under the laws of another state; 94 U. S. 444; and a state can legislate for that part of a consolidated company which is within its limits, just as if no consolidation had taken place; 94 U. S. 164. A consolidated inter-state corporation has, in each state, all the powers which its constituent company had in that state, but not the powers which the constituent company of the other state had in such other state; 123 Ill. 467; it acts as a unit and may transact its corporate business in one state for both; 45 Fed. Rep. 812. So far as each state has control over the charter it grants, the corporations remain different and separate; 19 Fed. Rep. 804; it dwells in both states and is a corporate entity in each; it has a citizenship identical with each; 45 Fed. Rep. 812. A constituent company consolidated with a corporation of another state remains a citizen of its own state for the purposes of federal jurisdiction; 136 U. S. 356. A railroad extending in several states is not a citizen of each for purposes of federal jurisdiction; 167 U. S. 659.

A practical merger of corporations is sometimes effected by the purchase by one company of the shares of another. This likewise requires legislative authority. See 26 N. J. Eq. 398. Or a merger may be by the purchase of all the corporate property under a statute; 20 Ind. 457. The right to consolidate with another railroad corporation includes the right to make a fair and lawful agreement with it for the interchange of traffic and for the joint use of terminal facilities, the right to buy one-half of its stock for the shareholders of the purchaser and to guarantee the payment of its bonds; 73 Fed. Rep. 933.

As to merger by lease of railroads, see **LEASE**. Many of the cases depend largely upon the language of statutes and of the consolidating agreement, or articles of consolidation, and should be read in connection therewith.

In many states the merger of parallel and competing lines is prohibited by the constitution. The prohibition has been held not to extend to street railways; 136 Pa. 96. It includes a projected road in process of construction; 7 Atl. Rep. (Pa.) 368; and may extend to a case where the competition may arise from other lines owned or controlled by the lines proposing to consolidate; 75 Tex. 534. In Missouri the act applies only to roads within the state and to cases where the competition would have an appreciable effect on rates; 46 Fed. Rep. 88.

The constitution prohibits a scheme by which the control of the competing road is to be placed in the hands of persons named by the other road, which agreed to guarantee bonds of the competing road; 7 Atl. Rep. (Pa.) 368; and one where the existing road attempted to purchase the control of a competing road; *id.* All contracts for leasing or controlling competing roads are held to be void; 66 N. H. 100; and so is a pooling and traffic arrangement between two companies having two hundred miles of parallel tracks; 30 Fed. Rep. 2; and one where a company guarantees the bonds of a competing railroad, receiving half its stock in consideration thereof; 161 U. S. 646.

In Georgia any contract tending to defeat or lessen competition is void; 49 Fed. Rep. 412.

Two street railways are parallel when their directions are substantially the same for two and a-half miles, though their termini and general direction are wide apart; 69 Mo. 65.

Parallel lines are not necessarily competing lines as they may command the traffic of different territories; 161 U. S. 698.

Constitutional prohibitions against the merger of competing railways do not interfere with the power of congress over inter-state commerce; 161 U. S. 677, affirming 31 S. W. Rep. 476.

See, as to consolidation generally, 79 Am. Dec. 492; 3 L. R. A. 564; 13 *id.* 780; 8 Am. & Eng. R. Cas. 647; as to the effect of consolidation; 3 *id.* 572; 3 L. R. A. 435; as to how far a new corporation is created; 15 *id.* 82; as to effect on taxation; 17 Am. & Eng. R. Cas. 436; 41 *id.* 702; as to aid bonds; 5 L. R. A. 728; as to lands; 44 Am. & Eng. R. Cas. 5; as to inter-state corporations; 16 *id.* 490; 15 L. R. A. 82, 84; as to liability for rights and obligations of the constituent companies; 5 *id.* 726; 13 Am. & Eng. R. Cas. 138. See **REORGANIZATION**.

MERINO. See **WOOL**.

MERITS. The state of facts of deserving; intrinsic ground of consideration or reward. Cent. Dict. The word is used principally in matters of defence.

A defence upon the merits is one that rests upon the justice of the cause, and not upon technical grounds only; there is, therefore, a difference between a good defence, which may be technical or not, and a defence on the merits; 5 B. & Ad. 703; 1 Ashm. 4; 3 Johns. 245, 449; 2 Cow. 281.

In the New York Code of Procedure, it has been held to mean "the strict legal rights of the parties as contra-distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court." 4 How. Pr. 332. See **JURISDICTION**.

MERITORIOUS CONSIDERATION. One based upon natural love and affection. 5 Encyc. Laws of Eng. 505. One founded upon some moral obligation; a valuable consideration in the second degree. R. & L. Dict. See **CONSIDERATION**.

MERITS, AFFIDAVIT OF. An affidavit of merits represents, that upon the substantial facts of the case, justice is with

the affiant. Anderson; 18 Pa. 354. Such affidavit is required in support of certain motions of the court; e. g., in order to let in a defendant to defend after judgment signed upon a default. Abbott. In this case the affidavit of merits is an affidavit showing that he has a substantial ground of defence to the action. R. & L. Dict.

MERTON, STATUTE OF. An ancient English ordinance or statute, 20 Hen. III. (1235), which took its name from the place in the county of Surrey where parliament sat when it was enacted. Its provisions related chiefly to dower, usury, legitimacy of children, the right of freeman to make suit by attorney at the lord's or any county court, the inclosure of common lands, wardships. 2 Inst. 79; Barring. Stat. 41, 46; Hale, Hist. Com. Law 9, 10, 18.

MERX. Merchandise.

MESCROYANT. Used in our ancient books. An unbeliever.

MESE. An ancient word used to signify house, probably from the French *maison*. It is said that by this word the buildings, curtilage, orchards, and gardens will pass; Co. Litt. 56. See **MEASE**.

MESMERISM. See **HYPNOTISM**.

MESNALT or MESNALITY. A manor held under a superior lord. The estate of a mesne. T. L.; Whart. Dict.; 4 Phila. 71; 14 East 234.

MESNE. Intermediate; the middle between two extremes; that part between the commencement and the end, as it relates to time.

Hence the profits which a man receives during disseisin and recovery of lands are called *mesne profits*. Process which is issued in a suit between the original and final process is called *mesne process*.

An assignment made between the original grant and a subsequent assignment, is called a *mesne assignment*.

Mesne incumbrances are intermediate charges, or *incumbrances* which have attached to property between two given periods; as, between the purchase and the conveyance of land.

In England, the word *mesne* also applies to a dignity; those persons who hold lordships or manors of some superior who is called lord paramount, and grant the same to inferior persons, are called *mesne lords*.

MESNE LORD. See **MESNE**.

MESNE PROCESS. See **MESNE**.

See **ORIGINAL PROCESS**.

MESNE PROFITS. The value of the premises recovered in ejectment, during the time that the lessor of the plaintiff has been illegally kept out of the possession of his estate by the defendant: such are properly recovered by an action of trespass, *quare clausum fregit*, after a recovery in ejectment. 11 S. & R. 55; Bacon, Abr. Ejectment (H); 3 Bla. Com. 205.

As a general rule, the plaintiff is entitled to recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years; for in that case the defendant may plead the statute of limitations; 3 Yeates 13; Bull. N. P. 88. The value of the use of land during the time it was unlawfully detained by a lessee is the proper measure of lessor's damages; 65 Vt. 485. In an action to recover *mesne profits*, plaintiff may either prove the profits actually received, or the annual rental value of the land; 70 Md. 173. Defendant in ejectment cannot free himself from liability for *mesne profits* by permitting a third person to remain in actual possession; 68 Miss. 29. Exemplary damages are allowed in trespass for *mesne profits*, only when the defendant has acted maliciously or in bad faith; 15 R. I. 92.

The value of improvements made by the defendant may be set off against a claim for *mesne profits*; Wood. L. & T. 1390; but profits before the demise laid should be first deducted from the value of the improvements; 2 Wash. C. C. 165. See, generally,

Wash. R. P.; Bacon, Abr. Ejectment (H); 2 Phill. Ev. 208; Adams, Ej. 13.

MESNE, WRIT OF. The name of an ancient and now obsolete writ, which lies when the lord paramount distrains on the tenant paravail: the latter shall have a writ of *mesne* against the lord who is *mesne*. Fitzh. N. B. 316.

MESS BRIEF. In Danish Law. A certificate of admeasurement granted by competent authority at the home-port of a vessel. Jacobsen, Sea-Laws 50.

MESSAGE. See **TELEGRAPH**.

MESSAGE FROM THE CROWN. The method of communicating between the sovereign and the house of parliament. A written message under the royal sign manual is brought by a member of the house, being a minister of the crown, or one of the royal household. Verbal messages are also sometimes delivered; May, Parl. Pr. ch. 17.

MESSAGE, PRESIDENT'S. The annual communication of the President of the United States to congress, pursuant to art. II. sec. 3, of the constitution. It is usually delivered at the commencement of the session, and embodies the president's views and suggestions concerning the general affairs of the nation. Since Jefferson's time, at least, it has been in writing. Special messages are sent to congress from time to time as the president may deem expedient. A public document edited by James D. Richardson containing all messages and state papers of the president is now in course of publication, having reached the close of the administration of Hayes in the 7th volume.

MESSETHANE. One who said mass; a priest.

MESENGER. A person appointed to perform certain duties, generally of a ministerial character, such as carriers of messages employed by a secretary of state, or officers of a court of justice, called, in Scotland, messengers at arms. Toml.; Paterson.

The officer who takes possession of an insolvent or bankrupt estate for the judge, commissioner, or other such officer.

The messenger of the English court of chancery has the duty of attending on the great seal, either in person or by deputy, and must be ready to execute all such orders as he shall receive from the lord chancellor, lord keeper, or lords commissioners. Brown.

MESENGER SERVICE, DISTRICT. See **DISTRICT TELEGRAPH COMPANIES**.

MESSAGE. A term used in conveyancing, and nearly synonymous with dwelling-house.

A dwelling-house with the adjacent buildings and curtilage. 37 W. Va. 778.

A grant of a message with the appurtenances will not only pass a house, but all the buildings attached or belonging to it, as also its curtilage, garden, and orchard, together with the close on which the house is built; Co. Litt. 5 b; 2 Saund. 400; 4 Cruise, Dig. 321; 2 Term 502; 4 Blackf. 331. But see the cases cited in 9 B. & C. 681. This term, it is said, includes a church; 11 Co. 26; 2 Esp. 528; 1 Salk. 256; 8 B. & C. 25. And see 3 Wils. 141; 2 W. Blackst. 726; 4 M. & W. 567; 2 Bingh. N. C. 617; 1 Saund. 6; 2 Washb. R. P.

MESTIZO. The offspring of an Indian or a negro and a European or person of European stock. (Spanish America.) Webster.

METAL. The word does not include precious metals. 2 B. & Ad. 597.

"Manufactures of metals" refers to manufactured articles in which metals form a component part. White lead, nitrate of lead, oxide of zinc, and dry or orange mineral are not metals; they have no metallic qualities. 91 U. S. 576, 577.

METATUS. A dwelling; a seat; a station; quarters; the place where one lives or stays. Spelman.

METAYER SYSTEM. A system under which land was divided into small farms among families, the landlord supplying the stock, and receiving in lieu of rent a fixed proportion of the produce. 1 Mill, Pol. Econ. 296, 363.

METES AND BOUNDS. The boundary-lines of land, with their terminal points and angles. Courses and distances control, unless there is matter of more certain description, e. g. natural monuments; 42 Me. 209. A joint tenant cannot convey by Metes and bounds; 1 Hill. R. P. 582. See **BOUNDARY**.

METHOD. The mode of operating, or the means of attaining an object.

It has been questioned whether the method of making a thing can be patented. But it has been considered that a method or mode may be the subject of a patent, because when the object of two patents or effects to be produced is essentially the same, they may both be valid, if the modes of attaining the desired effect are essentially different. Dav. Pat. Cas. 290; 2 B. & Ald. 350; 2 H. Blackst. 492; 8 Term 106; 4 Burr. 2397; Perpigna, *Manuel des Inventeurs*, etc., c. 1, sect. 5, § 1, p. 22. See **PATENT**.

METHODIST EPISCOPAL CHURCH. The "Methodist Episcopal Church" of the United States, and the Methodist Episcopal Church, South, are judicially known, since 1845, to have been distinct, separate, and independent organizations. 5 Bush. (Ky.) 401.

METRE (Greek). A measure. See **MEASURE**.

METRIC SYSTEM. A system of measures for length, surface, weight, values, and capacity, founded on the *metre* as a unit. See **MEASURE**.

METROPOLITAN. One of the titles of an archbishop. In England the word is frequently used to designate statutes relating exclusively to the city of London.

METROPOLITAN BOARD OF WORKS. A board for the better sewerage, draining, lighting, etc., of the metropolis. 18 & 19 Vict. c. 120. See **LOCAL GOVERNMENT BOARD**.

The board has ceased to exist and has been superseded by the London County Council. Byrne.

METTESHEP, or METTENSCHEP. An acknowledgment paid in a certain measure of corn; or a fine or penalty imposed on tenants for default in not doing their customary service in cutting the lord's corn.

MEUBLES. In French Law. Movable. Things are meubles from either of two causes: (1) From their own nature, e. g. tables, chairs; or (2) from the determination of the law, e. g. obligations. Rap. & Law. Dict.

METUS (Lat.). A reasonable fear of an intolerable evil, as of loss of life or limb, such as may fall upon a brave man (*virum constantem*). 1 Sharsw. Bla. Com. 181; Calvinus, Lex. And this kind of fear alone will invalidate a contract as entered into through duress. Calvinus, Lex.

In a more general sense, fear.

MEXICO. A federative republic. The president is elected for four years by the people and is assisted by seven secretaries of state. The senate consists of fifty-six members, two for each state, who are elected for two years by the people. Members of the house of representatives are elected by the people.

MICHAELMAS TERM. See **TERM**.

MICHEL-GEMOT (spelled, also, *micel-gemote*, *mycel-gemot*. Sax. great meeting or assembly). One of the names of the

general council immemorially held in England. 1 Sharsw. Bla. Com. 147.

One of the great councils of king and noblemen in Saxon times.

These great councils were severally called *witena-gemotes*, afterwards *micel synoths* and *micel-gemotes*. Cowel, edit. 1727; Cunningham, Law Dict. *Micel-Gemotes*. See **WITENAGEMOT**.

The Saxon kings usually called a *synod*, or mixed council, consisting both of ecclesiastics and the nobility, three times a year, which was not properly called a *parliament* till Henry III.'s time. Cowel, ed. 1727; Cunningham, Law Dict. *Synod*, *Micel-Gemotes*.

MICHEL-SYNOTH (Sax. great council). See **MICHEL-GEMOT**.

MICHERY. Theft; cheating.

MICHIGAN. The name of one of the states of the United States of America.

It was admitted into the Union by act of congress of January 26, 1837.

The first constitution of the state was adopted June 24, 1835.

MID-CHANNEL. Such terms as "middle of the main channel" and "mid-channel," when applied to navigable streams (q. v.), usually refer to the thread of the navigable current, and, if there be several, to the thread of the one best suited and ordinarily used for navigation. 258 U. S. 593.

MIDDLE OF THE STREAM. As applied to a navigable river, is the same as the middle of the channel of such stream. 202 U. S. 50, quoting Mr. Justice Field. See **THALWEG**; **BOUNDARY**.

MIDDLE THREAD. See **AD MEDIUM FILUM**.

MIDDLEMAN. One who has been employed as an agent by a principal, and who has employed a sub-agent under him by authority of the principal, either express or implied. He is not, in general, liable for the wrongful acts of the sub-agent, the principal being alone responsible; 3 Campb. 4; 6 Term 411; 14 East 605.

A person who is employed both by the seller and purchaser of goods, or by the purchaser alone, to receive them into his possession, for the purpose of doing something in or about them: as, if goods be delivered from a ship by the seller to a wharfinger, to be by him forwarded to the purchaser, who has been appointed by the latter to receive them; or if goods be sent to a packer, for and by orders of the vendee, the packer is to be considered as a middleman.

The goods in both these cases will be considered *in transitu*, provided the purchaser has not used the wharfinger's or the packer's warehouse as his own, and have an ulterior place of delivery in view; 4 Esp. 82; 2 B. & P. 457; 3 *id.* 127, 469; 1 Campb. 232; 1 Atk. 245; 1 H. Blackst. 364; 3 East 93.

MIDSHIPMAN. A naval cadet in a ship of war whose business it is to second and transmit the orders of the superior officers and assist in the management of the ship and its armament. Webster. See **LONGEVITY PAY**.

MIDWAY. See **THALWEG**.

MIDWIFE. In Medical Jurisprudence. A woman who practises midwifery; a woman who pursues the business of an *accoucheuse*.

A midwife is required to perform the business she undertakes with proper skill; and if she be guilty of any *mala praxis* she is liable to an action or an indictment for the misdemeanor. See Viner, Abr. *Physician*; Comyns, Dig. *Physician*; 8 East 348; 2 Wils. 259; 4 C. & P. 398, 407 a; 2 Russ. Cri. 388.

MIESES. In Spanish Law. Grain crops.

MIGHT. In an instruction for personal injuries it was not error to use the word "might" instead of "would." 137 Ky. 719,

126 S. W. 370.

MIGRATION. See **IMPORT**.

MILE. A length of a thousand paces, or seventeen hundred and sixty yards, or five thousand two hundred and eighty feet. It contains eight furlongs, every furlong being forty poles, and each pole sixteen feet six inches. 2 Stark. 89.

MILEAGE. A compensation allowed by law to officers for their trouble and expenses in travelling on public business.

It usually signifies an allowance for travelling, as so much by the mile. 7 Mont. 82.

In computing mileage, the distance by the road usually travelled is that which must be allowed, whether in fact the officer travels a more or less distant way to suit his own convenience; 16 Me. 431.

An allowance to a district attorney for mileage in the R. S. § 823, is simply a reimbursement for travelling expenses; 158 U. S. 346; irrespective of the amount of his compensation under the law; *id.*; he is allowed mileage for travelling from his place of abode to the place of examination, though the latter is his official headquarters, if his abode is elsewhere; 4 U. S. App. 386; it should be computed for the most convenient and practicable route and not by the shortest; *id.*; and will not be allowed one who goes home every Saturday and returns on Monday during a continuous session of the court; 153 U. S. 88.

See **INTERSTATE COMMERCE COMMISSION**; **TICKET**.

MILES. In Civil Law. A soldier, (*Vel a "militia" aut a "multitudine," aut a numero "mille hominum."* L. 1, § 1, D., de testam. milit.) Vocab. Jur. Utr.

In Old English Law. A knight, because military service was part of the feudal tenure. Also, a tenant by military service, not a knight. 1 Bla. Com. 404; Seid. Tit. Hon. 334.

MILESTONES. Stones set up to mark the miles on a road or railway. The highway rate, etc., act, 1832, constitutes the expense incurred in maintaining replacing, or setting up milestones, a lawful charge upon the highway rate.

In England, railway companies were required by the Railways Clauses Act of 1845 to set up such posts. Likewise, the trustees of turnpike roads were required to erect milestones on roads by 3 Geo. 4, c. 27, s. 119. Byrne.

MILITARY. Anything pertaining to war or to the army.

MILITARY BOUNTY LAND. Land granted by the United States to soldiers for services rendered in the army.

Claims for bounty land can be valid only on the following conditions: (1) The soldier must have been regularly mustered into the United States service (2) That his services were paid for by the United States; (3) That he served with the armed forces of the United States, subject to the military orders of a United States officer; 5 P. D. o. s. 92.

Title to bounty land is not impaired by the promotion to a commissioned officer of a private who subsequently continued in the service to the end of the war; 1 L. B. P. 115.

Under act March 3, 1850, title to bounty land is acquired, not only by militia or volunteers serving under the general command of the United States and in time of war, but also by those rendering military service, whether in war or not, and whether under the authority of the United States, or of a state or territory, if the United States has paid for the service. Service rendered in removing the Cherokee Indians is embraced by the act and gives title; 7 Op. Atty. Gen. 606.

Under R. S. § 2424, a soldier's widow who has remarried and has a husband living has no status as a claimant for a bounty-land warrant; 4 P. D. 36.

Under act of Sept. 28, 1850, a second marriage deprives a widow of title, unless she

was a widow at the dates of the passage of the act and of filing her application; and if she be married or dead, the minor children are entitled; 2 L. B. P. 7.

Issuance of a bounty land warrant to a widow under the belief that her husband was dead, cannot be regarded as a satisfaction of his claim should it be shown that he is alive; 2 P. D. o. s. 483.

MILITARY COURTS. See COURT-MARTIAL.

MILITARY EXPEDITION. See NEUTRALITY.

MILITARY FORCES. Persons designated by the Draft Act of 1917, registered and enrolled under it and thus subject to be called into active service, were part of the military forces of the United States within the meaning of § 3 of the Espionage Act. 249 U. S. 216.

MILITARY FEUDS. The genuine or original feuds which were in the hands of military men, who performed military duty for their tenures.

MILITARY GOVERNMENT. That type of military jurisdiction under the Constitution of the United States to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents. Military government supersedes, as far as may be deemed expedient, the local law, and is exercised by the military commander under the direction of the President, with the express or implied sanction of Congress. 4 Wall. (U. S.) 141, 142. See MILITARY JURISDICTION; MILITARY LAW, JURISDICTION UNDER; MARTIAL LAW.

MILITARY JURISDICTION. There are under the constitution three kinds of military jurisdiction; one to be exercised both in peace and war; another to be exercised in time of foreign war, without the boundaries of the United States, or in time of rebellion and civil war, within the states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the president, with the express or implied sanction of congress; while the third may be denominated martial law proper, which title see; 4 Wall. 141.

MILITARY LAW. A system of regulations for the government of an army. 1 Kent 841, n.

That branch of the laws which respects military discipline and the government of persons employed in the military service. De Hart, Courts-Mart. 16.

Military law is to be distinguished from martial law. Martial law extends to all persons; military law to all military persons only, and not to those in a civil capacity. Martial law supersedes and suspends the civil law, but military law is superadded and subordinate to the civil law. Birk. Mil. G. & Mart. L. 1. See 2 Kent 10; 34 Me. 126; MARTIAL LAW; COURT-MARTIAL; MILITARY JURISDICTION.

The body of the military law of the United States is contained in the "act establishing rules and articles for the government of the armies of the United States," approved April 30, 1806, and various subsequent acts, some of the more important of which are those of May 29, 1830; August 6, 1846; July 29, 1861; August 3, 1861; August 5, 1861; December 24, 1861;

February 13, 1862; March 13, 1862; March 13, 1865; February 13, 1875. See, also, Act of February 28, 1795; 5 Wheat 1; 3 S. & R. 156, 790; the general regulations, and the orders of the president.

The act of 1806 consists of three sections, the first section containing one hundred and one articles, which describe very minutely the various military offences, the punishments which may be inflicted, the manner of summoning and the organization of courts-martial. These articles are called the articles of war. Their provisions extend to the militia mustered into the United States service, and to marines when serving with the army.

The military law of England was contained in the Mutiny Act, which has been passed annually from April 12, 1689, to 1879, when the Mutiny Act was consolidated with the articles of war, and this act was amended in 1881 by the Army Act (see MUTINY ACT), and the additional articles of war made and established by the sovereign: 2 Steph. Com. 589.

In addition, there are in both countries various usages which constitute an unwritten military law, which applies to those cases where there are no express provisions. 12 Wheat. 19; Benét, Mil. Law 3.

The sovereign, in England, has authority to ordain, by articles of war, with regard to crimes not specified by military law, every punishment not reaching to death or mutilation; the president of the United States cannot ordain any penalty for any military crime not expressly declared by act of congress.

The civil courts have no authority to review, control, or in any manner interfere with the action of the military tribunals, while regularly engaged in the exercise of their appropriate jurisdiction; 80 Fed. Rep. 176.

Consult Benét; De Hart; Cross; Samuels; Tyler, Military Law; Risley, Law of War; see MILITIA.

MILITARY LAW, JURISDICTION UNDER. That type of military jurisdiction under the Constitution of the United States to be exercised both in peace and war. It is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces. 4 Wall. (U. S.) 141, 142. See MILITARY JURISDICTION; MILITARY GOVERNMENT; MARTIAL LAW.

MILITARY OCCUPATION. This act most gives the invader certain partial and limited rights of sovereignty. Until conquest, the sovereign rights of the original owner remain intact. Conquest gives the conqueror full rights of sovereignty and, retroactively, legalizes all acts done by him during military occupation. Its only essential is actual and exclusive possession, which must be effective.

The occupant administers the government and may, strictly speaking, change the municipal law, but it is considered the duty of the occupant to make as few changes in the ordinary administration of the laws as possible, though he may proclaim martial law if necessary. He may occupy public land and buildings; he cannot alienate them so as to pass a good title, but a subsequent conquest would probably complete the title. Ships of war, warlike stores and materials, treasure and like movable property belonging to the state vest in the occupant.

State archives and historical records, charitable, etc., institutions, public buildings, museums, monuments, works of art, etc., and public buildings of lesser political subdivisions are safe from seizure; so usually are public vessels engaged in scientific discovery.

Private lands and houses are usually exempt. Private movable property is exempt, though subject to contributions and requisitions. Under the rules of the Brussels conference, the former are payments of money, to be levied only by the Commander-in-Chief. The latter consist in the supply of food or transport, or articles for

the immediate use of the troops, and may be exacted by the commander of any detached body of troops, with or without payment. This appears to be a modified species of pillage. Military necessity may require the destruction of private property, and hostile acts of communities or individuals may be punished in the same way. Property may be liable to seizure as booty on the field of battle, or when a town refuses to capitulate and is carried by assault. When military occupation ceases, the state of things which existed previously is restored under the fiction of *Postliminium* (q. v.). See Risley, Law of War 134; WAR.

See POSTLIMINIUM.

MILITARY TENURE. Tenure in chivalry or knight service. See KNIGHT'S SERVICE.

MILITARY TESTAMENT. A nuncupative will, that is, one made by word of mouth, by which a soldier may dispose of his goods, pay, and other personal chattels, without the forms and solemnities which the law requires in other cases. 1 Vict. c. 12.

MILITES. Knights, and in Scotch law freeholders.

MILITIA. A part of the military force of the nation, consisting of citizens called forth to execute the laws of the Union, suppress insurrection, and repel invasion.

The constitution of the United States provides on this subject that congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of it as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress.

In accordance with the provisions of the constitution, congress, in 1792, act of May 8, passed an act relating to the militia, which has remained, with modifications, till the present time. Under these provisions the militia can be used for the suppression of rebellion as well as of insurrection; Birk. Mil. Gov. and Mart. L. 365; R. S. § 1642; 7 Wall. 700; 45 Pa. 238. The president of the United States is to judge when the exigency has arisen which requires the militia to be called out; 12 Wheat. 19; 8 Mass. 548. He may make his request directly to the executive of the state, or by an order directed to any subordinate officer of the state militia; 3 S. & R. 169, as provided by R. S. § 1642; and see 12 Wheat. 19; 5 Phila. 259.

When the militia are called into actual service, they are subject to the same rules and articles of war as the regular troops; R. S. § 1644, but a captain of a company of the National Guard of a state cannot summarily punish by imprisonment a member of his company for refusal to obey his orders when the company is not acting as a military force, unless that authority is conferred by statute; 67 N. W. Rep. (Minn.) 989. The president may specify their term of service, not exceeding nine months; R. S. § 1648. When in actual service the militia are entitled to the same pay as the regular troops; R. S. § 1650. The militia, until mustered into the United States service, is considered as a state force; 3 S. & R. 169; 5 Wheat. 1. See 1 Kent 262; Story, Const. §§ 1194-1210. See generally 94 Ill. 123; 116 U. S. 267; MILITARY LAW; MARTIAL LAW.

MILK. In England milk means, commercially speaking, skimmed milk. 14 Q. B. Div. 193, where it was held that the sale of milk which had been deprived of sixty per cent of its butter fat was not an offence under § 6, Sale of Food and other Drugs Act, although under § 9 of the same act the sale of skimmed milk as milk is an offence; 24 Q. B. Div. 353; 59 L. J. M. C. 45.

A milk standard may be established by law; 101 N. Y. 634; 64 N. H. 404; 11 Allen 264; and a state may by statute authorize inspectors of milk to enter all carriages used for its conveyance, and wherever they have reason to believe the milk to be adulterated, to take specimens to be analyzed or tested; 132 Mass. 12; and vendors of milk must furnish samples gratuitously; 15 So. Rep. (La.) 502. If upon inspection milk is found to be adulterated, the vendor may be compelled to pour it upon the ground, or return it to the person who supplied it; 45 N. J. L. 469; 10 Hun 435. Such ordinances and statutes do not deprive persons of property without due process of law; 15 So. Rep. (La.) 502; 113 U. S. 31; 113 Mo. 395. See ADULTERATION; POLICE POWER.

MILK DEPOT. Where an ordinance provided that all persons selling milk at milk depots should pay a specified license fee, the words "milk depot" should be construed to mean any place where milk is sold whether exclusively or in connection with other lines of business. 153 Ky. 487, 156 S. W. 109.

MILL. A complicated engine or machine for grinding and reducing to fine particles grain, fruit, or other substance, or for performing other operations by means of wheels and a circular motion.

The house or building that contains the machinery for grinding, etc. Webster, Dict.

Mills are so very different and various, that it is not easy to give a definition of the term. They are used for the purpose of grinding and pulverizing grain and other matters, to extract the juices of vegetables, to make various articles of manufacture. They take their names from the uses to which they are employed; hence we have paper-mills, fulling-mills, iron-mills, oil-mills, saw-mills, etc. In another respect their kinds are various; they are either fixed to the freehold or not. Those which are a part of the freehold are either water-mills, wind-mills, steam-mills, etc.; those which are not so fixed are hand-mills, and are merely personal property. Those which are fixed, and make a part of the freehold, are buildings with machinery calculated to attain the object proposed in their erection.

It has been held that the grant of a mill and its appurtenances, even without the land, carries the whole right of water enjoyed by the grantor, as necessary to its use, and as a necessary incident; Cro. Jac. 121. And a devise of a mill carries the land used with it, and the right to use the water; Washb. Easem. 52, 1 S. & R. 169. And see 5 N. H. 107; 10 id. 63; 2 Caines, Cas. 87; 3 N. H. 190; 7 Mass. 6; 6 Me. 154, 436; 16 id. 281.

The owner of a mill, whose dam and machinery are suited to the size and capacity of the stream, has a right to the reasonable use of the water to propel his machinery; but he must detain it no longer than is necessary for its profitable enjoyment, and must return it to its natural channel, before it passes upon the land of the proprietor below; 41 Ga. 182; s. c. 5 Am. Rep. 526. See 4 Ballard, R. P. § 87, DAM.

A mill means not merely the building in which the business is carried on, but includes the site, the dam, and other things annexed to the freehold, necessary for its beneficial enjoyment; Gould, Waters § 307; 3 Mass. 280; see 6 Me. 436; and a water power also when applied to a mill becomes a part of the mill, and is to be included in the valuation; 37 Vt. 622.

Whether manufacturing machinery will pass under the grant of a mill must depend mainly on the circumstances of each case; 3 Washb. R. P. 415; 1 Brod. & B. 506; Ewell, Fict. 24. See 30 Conn. 18. As between mortgagor and mortgagee, a saw-mill and its appointments are *prima facie* part of the realty, if no intent is shown to change their character; 39 Mich. 777. When an estate for years was by a conveyance to the lessee merged in the fee, it

was held that machinery by him firmly annexed to the premises, did not, by operation of law and without intent on his part, become a part of the realty; 76 N. Y. 23. See FIXTURES.

MILL. The tenth part of a cent in value.

MILLED MONEY. This term means merely coined money; and it is not necessary that it should be marked or rolled on the edges. Running's case, Leach, Cr. Cas. 708.

MIL-REIS. The name of a coin. The mil-reis of Portugal is taken as money of account, at the custom-house, to be of the value of one hundred and twelve cents. The mil-reis of Azores is deemed of the value of eighty-three and one-third cents. The mil-reis of Madeira is deemed of the value of one hundred cents; 5 Stat. at Large, 625.

MINA. A measure of corn or grain. Cowel.

A measure of ground containing one hundred and twenty feet in length, and many in breadth. It is also taken both for a coin and a weight. Jacob; Lit. Dict.

MINAGE. A toll or duty paid for selling grain by the Mina. Cowel.

MINATOR or MINERATOR. A miner.

MIND. In its legal sense it means only the ability to will, to direct, to permit or assent. 43 N. J. L. 492.

A popular term used to mean the rational faculty, or the understanding; also, the state of the mental faculties; inclination, desire, purpose, intent; also, memory, recollection. Anderson; 15 Wall. (U. S.) 589.

MIND AND MEMORY. A testator must have a sound and disposing mind and memory. In other words, he "ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, the persons who are the object of his bounty, and the manner in which it is to be distributed between them." Washington, J., 3 Wash. C. C. 585, 586; 4 id. 262; 1 Green Ch. 82, 85; 2 id. 563, 604; 26 Wend. 255, 306, 311, 312; 8 Conn. 265; 9 id. 105. Mind and memory are convertible terms; 54 Barb. 274.

MINE RUN COAL. In mining parlance, all of the coal that comes out of the mine from the picks, embracing lump, nut and slack. 57 S. W. 12.

MINERALS (L. Lat. *minera*, a vein of metal). All fossil bodies or matters dug out of mines or quarries, whence anything may be dug; such as beds of stone which may be quarried. 14 M. & W. 859, construing 55 Geo. III. c. 18; Broom, Leg. Max. 175*.

Any natural production, formed by the action of chemical affinities, and organized when becoming solid by the powers of crystallization. Webster, Dict. But see 5 Watts 34; 1 Crabb, R. P. 95; OIL.

The term mineral has been defined as "every substance which can be got from underneath the surface of the earth, for the purpose of profit;" L. R. 7 Ch. App. 699; and in another case it is said that the word does not include anything except that which is part of the natural soil; 33 Ch. D. 566. It has been held to include coal; 73 Mo. 96; paint-stone; 2 Stockt. 136; free-stone; L. R. 1 Ch. 303; and petroleum; 88 Pa. 198. See OIL.

The words *minerals and ores* have been held to include only minerals obtained by underground working; 147 N. Y. 495.

The term *mineral lands*, as used in the statutes relating to the public domain, embraces coal lands; 118 U. S. 271; and *mineral deposits* are not only metals proper but also salt, coal, and the like. 10 N. J. Eq. 128.

Minerals severed from the earth by arti-

ficial means are personal property and dealt with by the law as such; Barr. & Ad. Mines 5; being taxable as personality; 94 U. S. 762; the subject of larceny; 85 Cal. 671; 156 Pa. 400; or recoverable in trover; 53 Pa. 261; or replevin; 63 id. 97. This is not the case, however, where the severance results from natural causes or incidentally from excavation; id.; hence a nugget of gold found upon loose rocks was held to savor of the realty and was not the subject of larceny; 64 N. C. 619. See MINES AND MINING.

MINERATOR. See MINATOR.

MINES AND MINING. A mine is an excavation in the earth for the purpose of obtaining minerals.

Mines of gold and silver belonged, at common law, to the sovereign; 1 Plowd. 310; 3 Kent 378, n.; 17 Wall. 222; and it has been said that, though the king grant lands in which mines are, and all mines in them, yet royal mines (*q. v.*) will not pass by so general a description; Plowd. 336. In New York the state's right as sovereign was asserted at an early day, and reasserted by the legislature as late as 1828; 3 Kent 378, n. In Pennsylvania the Royal Charter to Penn. reserved one-fifth of the precious metal as rent, and the patents granted by Penn. usually reserved two-fifths of the gold and silver. An act passed in 1843 declared that all patents granted by the state pass the entire estate of the commonwealth. In California, after much discussion, it seems to be finally settled that minerals belong to the owner of the soil and not to the government as an incident of sovereignty; 17 Cal. 199; 3 Wall. 304; 2 Black-17. In 17 Cal. 199, Field, C. J., upon thorough examination of the subject, rejected the doctrine of sovereign title as an assertion of personal prerogative of the British crown, neither applicable to our institutions nor a necessary incident of sovereignty in the larger sense. The prerogative title of the sovereign was in Oregon treated as conceded; 5 Ore. 104. It was held that in Maryland the mines passed by royal grant to Lord Baltimore, subject to a reservation of one-fifth of gold and silver found and that the entire title passed to the state, the interest of the proprietor by confiscation, and that of the king by conquest; 147 U. S. 282. The same prerogative right was very early asserted in New Jersey; 80 N. J. Eq. 323, note. It is said that the question is not of practical importance since the title to mineral lands generally in the United States is derived from public grants, and the right to minerals therein is regulated by law; Barr. & Ad. Mines 179. As to mineral lands and claims and their location under the United States laws, see LANDS, PUBLIC; Barr. & Ad. Mines ch. 6. See Judge Dallas's note to Bainbr. Mines 37.

Minerals in the beds of navigable waters below low water mark are owned by the state against which an appropriator without a grant is a trespasser, although he has a good title against any one else; Barr. & Ad. Mines 180. See 32 Fla. 82; 38 Pa. 380; 81 id. 156; 144 U. S. 550; 22 S. C. 50. The same rule applies to minerals found under highways; 19 Ga. 89; 23 Minn. 186; 117 Ill. 411; 5 Mas. 195. See 14 A. & E. Ry. Cas. 486.

Where lands are taken under the right of eminent domain, strictly only a right of way passes, but it is sometimes held that the appropriator may use minerals taken therefrom for making or repairing the road-bed; 5 Watts 546; at least those above grade which must be excavated; 29 Mo. 141; but the better opinion is said to be that no such right exists and that minerals remain the property of the owner of the soil; Barr. & Ad. Mines 186; 124 Ind. 329; 53 Pa. 261; 2 Metc. 482. See 24 A. & E. Ry. Cas. 142.

All mineral lands of the general government, both surveyed and unsurveyed, are free and open to exploration and occupation, subject to such regulations as may be prescribed by law, and also to local customs or rules of miners when not in conflict with the laws of the United States. R. S. § 2319.

See 94 U. S. 763; *LANDS, PUBLIC*.

It is the policy of the government to favor the development of mines of gold, silver, and other metals, and every facility is afforded for that purpose; but it exacts a faithful compliance with the conditions required; 128 U. S. 873. A mineral lode or vein whose location is perfected under the law is the property of the locators or their assigns, and not subject to disposal by the government; 127 U. S. 348.

Subject to the rights of the public, growing out of its original ownership, or as provided by law in special cases, the right to minerals belongs to the owner of the soil, and passes by a grant thereof, unless separated; 1 N. Y. 564; 82 *id.* 476; 19 Pick. 314; 53 Vt. 641; 21 W. N. C. Pa. 491; but the owner may convey his mines by a separate and distinct grant, so as to create one freehold in the soil and another in the mines; 1 Pa. 736; 7 Cush. 361; 8 *id.* 21; 5 M. & W. 50; 84 Ala. 228; 96 Ill. 279; and after such severance of the mines from the soil each is entirely independent of the other, separately inheritable, and capable of conveyance; Barr. & Ad. Mines 3.

In case of a separate ownership, the owner of the mine must support the superincumbent soil; 12 Q. B. 739; 5 M. & W. 60; 12 Exch. 259; and ancient buildings or other erections; 2 H. & N. 828. See 2 Cent. L. J. 655; 24 *id.* 270; 12 Alb. L. J. 182. But in California a miner will not be enjoined against disturbance of crops, unless the appropriation of the land was anterior to the mining location; 23 Cal. 593.

A lessee having the right to mine coal under land over which a railroad is operated, can only mine so much of the coal as can be removed without injury to the surface; 75 Ia. 78. The lessor's measure of damages where there are sinks and depressions in the surface of the land due to lessee's negligence in operating a mine, is the depreciation in the value of the land; 155 Pa. 256.

The estate in the minerals as distinguished from the soil, is created under what are known as mining leases. Where the minerals are undisturbed as a part of the soil they are said to be *in place*. The severance of the estate in the soil and in the minerals may be by conveyance, by whatever name designated, of all, or a clearly defined part, of the minerals, in which case there passes to the grantee an estate in fee in the minerals, with the privilege of using the land so far as may be necessary for the purpose stated; 7 Fed. Rep. 634. This is the effect of a conveyance even if it be called a lease or limits a term of years within which the minerals are to be taken out; Barr. & Ad. Mines 36. The effect of this is said to be the somewhat paradoxical result of the limitation of a fee-simple estate for a term of years, and the resulting difficulty is sought to be avoided by treating the limitation of the term as not upon the estate but upon the appurtenant rights, without which it would be valueless, and in case of failure to take out the mineral within the specified time it is forfeited to the grantor; 143 Pa. 293; 123 *id.* 485; 105 *id.* 469; 21 N. J. Eq. 410, affirming 19 *id.* 202. A lease for mining purposes, the rent to be a certain part of the ore mined, is forfeited by failure to work the mines for a number of years; 112 N. C. 677. Such instruments, even where the term license is employed, are held to be not a mere license, but to pass a property or to create an estate in the minerals; 93 Mich. 90; 47 Ind. 105; 150 Ill. 344; 86 Va. 315. See Barr. & Ad. Mines 36, where the cases are collected and examined. A true leasehold interest in the land may be created with an appurtenant right to take minerals, in which case the lessee is a tenant for years, and his possession and property of the soil and the minerals are the same; 5 Jones, L. 440; 120 Pa. 590; 89 *id.* 47; 52 Hun 363. Where the permission is to take all the coal and the term is indefinite, the lease expires when the latter is exhausted; 58 Ill. 210. In New York this doctrine is limited, so as to apply only where "the whole body of the

coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it can be identified as land severed, as land, from the estate of which it forms a part;" 136 N. Y. 593, where Finch, J., citing the Pennsylvania cases, says: "Every case upholding the doctrine, which I have been able to examine, has that marked characteristic." In this case which reversed 122 *id.* 505, the "lease" of all the coal contained under a described contract designated it as including all the coal that could be economically mined or taken out.

There may be a license to take all of a certain mineral in a designated tract, which is an incorporeal right, of which the distinguishing character is that it does not carry with it a possession exclusive of the owner of the soil; Barr. & Ad. Mines 53. It must be created by deed; 73 Ill. 453; and it is not revocable except after breach of covenant; 66 Mo. 430. It carries the right of property in the minerals only after they are severed; 32 N. J. Eq. 248; it is termed a license irrevocable and the word "all" describes the extent to which it may be exercised, not its exclusiveness; 2 Wall. Jr. 81.

A mere parol license is a personal privilege, unassignable, concurrent with a right of the licensor to mine, revocable at will, and vests no title to the minerals until severed; Barr. & Ad. Mines 67; 32 Fed. Rep. 177; 53 Pa. 206; 123 N. Y. 298.

Opening new mines by a tenant is waste, unless the demise includes them; Co. Litt. 53 b; 2 Bla. Com. 282; 1 Taunt. 410; but if the mines be already open, it is not waste to work them even to exhaustion; 1 Taunt. 410; 19 Pa. 324; 103 *id.* 307; 6 Munf. 134; 1 Rand. 258; 10 Pick. 460; 1 Cow. 460. See Smith, Landl. & T. 192, 193, n. In a suit for redemption of a mortgage, the mortgagee was allowed for large sums expended in working a mine which he had a right to work; 25 L. J. Ch. 121, but in another case, expenses incurred in opening a mine were disallowed; 16 Sim. 445.

In California, the occupant of public lands, who holds them for agricultural purposes merely, holds them subject to the right of any person to dig for gold; 5 Cal. 36, 97; but the miner must take them as he finds them, subject to prior rights of the same character; 5 Cal. 140, 308; 6 *id.* 148; a miner cannot take private lands; 44 Cal. 460.

An injunction lies for interference with mines; 6 Ves. 147.

Mineral deposits are usually divided into what are termed lode or vein and placer deposits. The terms *lode* and *vein* are generally used interchangeably (see *LODE*), but they are usually "found together in the statutes and both are intended to indicate the presence of metal in rock; yet a lode may, and often does, contain more than one vein; Field, J., in 128 U. S. 873.

A *placer* is a superficial deposit occupying the bed of an ancient river. Barr. & Ad. Mines 476. In federal legislation it is defined to include "all forms of deposit excepting veins and quartz or other rock in place." R. S. § 2329. These statutes divide all deposits into two classes, veins or lodes, and placers, and the former being well defined, the latter is made to include all others; Barr. & Ad. Mines 476. See *LANDS, PUBLIC*.

The *dip* of a vein is its downward course, and this the locator may follow indefinitely even though it take him beneath the ground of another and outside of his own vertical side lines; Barr. & Ad. Mines 441.

The *strike* of a vein is "its onward course, its direction or trend across and through the country." *id.*

The *apex* of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken at its edge so as to appear to be the beginning or end of a vein. 1 McCrary 480. If a vein at its highest point turns over and pursues its course downward, then such point is merely a swell in the mineral matter and

not a true apex; *id.* This is a term used in mining law in what is known as the apex rule, as to which see *LANDS, PUBLIC, sub. Mineral Lands*.

A miner whose location is on the apex of a lode may follow it to any depth, although in its downward course it may enter the adjoining land; but no location made on the middle of a lode or otherwise than at the top or apex, will enable the locator to go beyond his line; 3 Fed. Rep. 368. The apex is not necessarily a point, but often a line of great length and any portion of it, if found within the limits of a claim, is sufficient to entitle the locator to obtain title. He may follow his vein into the territory of another beyond his side lines, but not further than his own end lines, beyond which it is subject to further discovery and appropriation; 144 U. S. 19; 50 Fed. Rep. 888; but where the apex which intersects an end line passes out of the claim across one of the side lines, the owner may still follow so much of the lode on the dip as lies between the end line, through which the vein passed, and its point of divergence from the claim; 66 Fed. Rep. 212. Where two claims are so located that to follow the dip beyond the side lines would cause a conflict, that having priority of location must prevail; 54 Fed. Rep. 284. See U. S. Rev. Stat. § 2336. See as to locator's property in vein, 13 A. & E. Corp. Cas. 551, 580, 575.

A *mining claim* is a parcel of land containing precious metal in its soil or rock. A *location* is the act of appropriating such parcel, according to certain established rules. If the miner has only one location that "location" is identical with "mining claim," and the two designations may be indiscriminately used to denote the same thing. 104 U. S. 649; if he acquires an adjoining location his claim covers both; *id.* See Lindl. Mines § 327. A transfer of a mining claim must be in writing; 73 Cal. 541.

A mining claim is real estate; 1 Mont. 245; and descends to the heir; 15 Col. 143; it is property; 2 Utah 54; subject to execution; 9 Cal. 137; and taxation; 12 *id.* 56; and a lien for unpaid taxes; 94 U. S. 762. An owner out of possession may maintain an ejectment or corresponding action; 7 Cal. 817; 4 N. M. 878; 1 Mont. 475; 17 Cal. 271; 84 Fed. Rep. 515; 116 U. S. 687; *contra*, 24 Ore. 265. See as to claims, 14 Am. & Eng. Corp. Cas. 152.

There is no right of dower in an unpatented mining claim; 163 U. S. 445; but in some cases dower has been allowed in mines; 92 Mich. 186; 73 Ill. 405; 150 *id.* 560; 13 N. J. Eq. 389; 61 Ind. 473; 1 Cow. 460; 3 Pick. 17. See as to dower, 7 U. S. App. 393; s. c. 52 Fed. Rep. 859.

Of joint owners, either may mine without the consent of the others, using the common property for the purpose intended, and it is no objection that the use is consumption; 64 Cal. 134; it is not waste; but he must account to his co-owners for ore mined; 25 Conn. 137; 178 Pa. 444; and any act for the benefit of the property, as the purchase of a paramount title, inures to the benefit of all; 22 Col. 129. The interest may be the subject of partition; 23 Cal. 502; but the mere fact of joint ownership does not give an equitable right to a division; the question must be fairly considered by a chancellor upon all the circumstances; 28 Fed. Rep. 220.

Joint owners who co-operate in working, constitute a mining partnership without any specific contract or agreement; Barr. & Ad. Mines 753. There may be an ordinary commercial partnership in the working of a mine, but this will arise only from agreement. A mining partnership, properly so called, is a relation springing only by implication from actual co-operation in the work; 102 U. S. 641; 13 Bush 67; 77 Mo. 52; 30 Cal. 290; 42 *id.* 636; 149 Ill. 575. A mining partnership is not dissolved by the death of a partner, nor by the sale of his interest to a stranger; in the latter case the purchaser becomes a partner; 42 Cal. 307; 52 *id.* 540; 5 Col. 107.

Mining partnerships are in some states

effectually regulated by statute; Cal. C. C. §§ 2511-20; Mont. C. C. §§ 3350-9; Idaho, R. S. §§ 3301-9. In the latter state it has been said that a mining partnership, by virtue of the statute, "in all its essential elements is precisely like a corporation;" 33 Pac. Rep. (Ida.) 40, where the substance of the statute is given. See as to Mining partnerships; 28 Am. St. Rep. 488.

In most states where mining is an important industry, there are statutory provisions for securing the safety of those engaged in the employment. For a citation of these statutes see Barr. & Ad. Mines, 780, note 1, where it is said that a discussion of the cases arising under these statutes is impossible because they involve no general principle. Such statutes have been held constitutional; 75 Pa. 26; 4 Sup. Ct. Pa. 382. They are an exercise of the police power, as to the propriety and validity of which there can be little question. In their relation to the law of negligence these statutes enlarge and define the obligation of the mine owner, and fix absolutely his responsibility for injuries resulting from failure to comply with the act, wherever that failure is the proximate cause of the injury. But the violation of the statute does not excuse contributory negligence or authorize the employee to neglect his own safety; Barr. & Ad. Mines 785, where the cases are collected.

See Bainbridge; Blanchard & Weeks; MacSwiney; Collier; Barringer & Adams; Lindley, Mines; Morrison, Mining Rights; Wade, Am. Mining Law; Sickels, Mining Laws and Decisions; Washburn, R. P.; Tudor, L. Cas. R. P.; Copp, Am. Mining, Code; Copp, Decisions; COLLIERY; GAS; LODGE; LANDS, PUBLIC; MINERALS; OIL.

MINIMUM WAGE. The smallest amount an employer may legally offer a laborer in compensation for work done and supposed to be that which will be a living wage. Stand. Dict. Such wages have in late years been established by statute both in the United States and in England.

MINING COMPANIES. Corporations or joint stock companies formed for the purpose of carrying out a mining project. See 15 Am. & Eng. Corp. Cas. 631.

MINING PARTNERSHIP. See MINES AND MINING.

MINISTER. In Governmental Law. An officer who is placed near the sovereign, and is invested with the administration of the government. Ministers are responsible to the king or other supreme magistrate who has appointed them. 4 Conn. 134.

In Ecclesiastical Law. One ordained by some church to preach the gospel. All clergymen of every denomination and faith. 35 Neb. 375. A person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of that church is a minister of the gospel, within a statute exempting ministers from taxation. 1 Me. 102. So is a person ordained as a Congregational minister and installed as such over a town. 2 Pick. 403. See L. R. 8 Q. B. 69.

Formerly the word was applied only to deacons, but it is now the most comprehensive ecclesiastical title. In the prayer-book it means the officiating clergyman, whether bishop, priest, or deacon. 14 P. D. 148.

Ministers are authorized in the United States, generally, to solemnize marriages, and are liable to fines and penalties for marrying minors contrary to the local regulations. As to the rights of ministers or parsons, see 3 Am. Jur. 268; Shepp. Touchst. Anthon ed. 564; 2 Mass. 500; 10 id. 97; 14 id. 333; 11 Me. 487. CLERGY; BENEFIT OF CLERGY; PARSON.

In International Law. An officer appointed by the government of one nation, with the consent of two other nations who have a matter in dispute, with a view by his interference and good offices to have such matter settled.

A name given to public functionaries

who represent their country with foreign governments, including ambassadors, envoys, and residents.

A custom of recent origin has introduced a new kind of ministers, without any particular determination of character; these are simply called *ministers*, to indicate that they are invested with the general character of a sovereign's mandatories, without any particular assignment of rank or character.

The minister represents his government in a vague and indeterminate manner, which cannot be equal to the first degree; and he possesses all the rights essential to a public minister.

There are also *ministers plenipotentiary*, who, as they possess full powers, are of much greater distinction than simple ministers. These, also, are without any particular attribution of rank and character, but by custom are now placed immediately below the ambassador, or on a level with the envoy extraordinary; Vattel, liv. 4, c. 5, § 74; 1 Kent 48; Merlin, *Répert.*

Formerly no distinction was made in the different classes of public ministers, but the modern usage of Europe introduced some distinctions in this respect, which, on account of a want of precision, had become the source of controversy. To obviate these, the congress of Vienna, and that of Aix-la-Chapelle, put an end to these disputes by classing ministers as follows:—1. Ambassadors, and papal legates or nuncios. 2. Envoys, ministers, or others accredited to sovereigns (*auprès des souverains*). 3. Ministers resident, accredited to sovereigns. 4. *Chargés d'affaires*, accredited to the minister of foreign affairs. Public ministers take rank among themselves, in each class, according to the date of the official notification of the arrival at the court to which they are accredited. *Recez, du Congrès de Vienne, du 19 mars, 1815; Protocol du Congrès d'Aix-la-Chapelle, du Novembre, 1818; Wheaton, Int. Law § 211.*

Consuls and other commercial agents are not, in general, considered as public ministers. See AMBASSADOR; CONSUL; RECALL. FOREIGN MINISTER.

MINISTERIAL. That which is done under the authority of a superior; opposed to judicial; as, the sheriff is a ministerial officer bound to obey the judicial commands of the court.

A ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority without regard to or the exercise of his own judgment upon the propriety of the acts being done. 12 So. Rep. (La.) 940; 60 Conn. 448; 15 Fed. Rep. 16; 50 Tex. 501. Acts done out of court in bringing parties into court are, as a general proposition, ministerial acts; 54 Ind. 376. See 18 How. 396; 40 Wisc. 175; 49 Ala. 311.

When an officer acts in both a judicial and ministerial capacity, he may be compelled to perform ministerial acts in a particular way; but when he acts in a judicial capacity, he can only be required to proceed; the manner of doing so is left entirely to his judgment. See 10 Me. 377; Bacon, Abr. *Justices of the Peace* (E); 1 Conn. 295; 3 id. 107; 9 id. 275; 12 id. 464; **MANDAMUS**; OFFICE.

MINISTERIAL DUTY. One in respect to which nothing is left to discretion. A simple definite duty, arising under conditions admitted or proved to exist, and imposed by law, the performance of which may, in proper cases, be required of the head of a department by judicial process. 4 Wall. 498; 61 Conn. 553.

It is to be contrasted with *executive duty*. Id. Ministerial is also opposed to *judicial* or *discretionary*. Thus, a ministerial office or duty is one which merely involves the following of instructions; in other words, one which can be performed without the exercise of more than ordinary skill, prudence or discretion, e.g., the payment or receipt of money, the execution of a deed, etc. A judicial or discretionary office or duty, how-

ever, involves the exercise of judgment or discretion. Byrne.

MINISTERIAL TRUSTS (also called instrumental trusts). Those which demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; as, to convey an estate. They are a species of special trusts, distinguished from discretionary trusts, which necessarily require much exercise of the understanding. 2 Bouvier, Inst. n. 1896.

MINISTRY. The term as used in England is wider than Cabinet and includes all the holders of public office who come in and go out with the Prime Minister. In this respect it may be contrasted with the Permanent Civil Service, whose tenure is independent of public changes. The Prime Minister decides on the number of ministers to be admitted to the Cabinet. The general officers of the Royal Household, such as the Lord Steward, etc., are a part of the ministry.

MINNESOTA. One of the states of the United States of America.

It was created a territory by act of congress, March 3, 1849, and admitted into the Union as a state, May 11, 1858, under a constitution framed and adopted by a convention at St. Paul, on the 29th day of August, 1857, pursuant to an act of congress of February 28, 1857, and submitted to and ratified by the people on the 18th of October, 1857.

MINOR (Lat. less; younger). One not a major, i. e. not twenty-one. Co. 2d Inst. 291; Co. Litt. 88, 128, 172 b; 6 Co. 67; 3 Bulstr. 143; Bracton, 340 b; Fleta, l. 2, c. 60, § 26.

Of less consideration; lower. Calvinus, Lex. *Major* and *minor* belong rather to civil law. The common-law terms are adult and infant. See **LIMITATIONS**.

MINORA REGALIA. The lesser prerogatives of the crown, relating to revenue. 1 Bla. Com. 241.

They were distinguished from the *majora regalia*, the greater of the royal prerogatives. Id.

MINORIES. See **PRIVILEGED PLACES**.

MINORITY. The state or condition of a minor; infancy. See **FULL AGE**; **INFANT**.

The smaller number of votes of a deliberative assembly; opposed to majority, which see.

The minority of a committee to which a corporate power has been delegated, cannot bind the majority, or do any valid act in the absence of any special provision otherwise: 127 U. S. 579.

MINT. The place designated by law where money is coined by authority of the government.

The mint was established by the act of April 2, 1792, 1 Story U. S. Laws, 227, and located at Philadelphia. There are mints of the United States now at Philadelphia, San Francisco, New Orleans, Carson, and Denver. R. S. § 3495. A failure by the director of the mint to observe a rule prescribing that he shall, at the annual settlement, require the weighing and counting of all bullion in the mints, does not relieve a superintendent of a mint of his responsibility for bullion in his custody; 77 Fed. Rep. 944. His receipt for a certain quantity of bullion, and his admissions in reports and accounts that he holds it, are at least *prima facie* evidence that it came into his possession; *id.* He and his bondsmen are responsible for the loss of bullion which he has received, and which he cannot produce, though it has been lost or stolen without any negligence or fault on his part; *id.* When he has, on assuming office, receipted for a certain quantity of bullion, the same is thereafter in his custody, though accepted by him under lock and seal on the faith of a certificate as to its amount; *id.*

See COIN; FOREIGN COIN; MONEY; ANNUAL ASSAY; PRIVILEGED PLACES.

MINT-MARK. The masters and workers of the mint, in the indentures made

with them, agree "to make a privy mark in the money they make, of gold and silver, so that they may know which moneys were of their own making; after every trial of the pix, having proved their moneys to be lawful, they are entitled to their *quietus* under the Great Seal, and to be thereafter discharged from all suits or actions; they then change the privy mark, so that the moneys from which they are not yet discharged may be distinguished from those for which they are; they use the new mark until another trial of the pix. Wharton.

MINTAGE. That which is coined or stamped.

MINTAGE CLOSE. See PRIVILEGED PLACES.

MINUS. Less; less than.

In many phrases of the Civil Law, this word had the sense of "not." Thus, a debt was said to be *minus solutum*, though none of it had been paid. (Dig. 50. 16. 32.) Also, used in some Common Law phrases. E.g., *minus satis*; insufficient. (Cro. Jac. 552.) *Minus sufficiens in literatura*; incompetent in point of learning. (1 Bl. Com. 390.) Burrill.

MINUTE. Measures. In divisions of the circle or angular measures, a minute is equal to sixty seconds, or one-sixtieth part of a degree.

In the computation of time, a minute is equal to sixty seconds, or the sixtieth part of an hour. See MEASURE.

In Practice. A memorandum of what takes place in court, made by authority of the court. From these minutes the record is afterwards made up.

Toullier says they are so called because the writing in which they were originally was small: that the word is derived from the Latin *minuta (scriptura)*, in opposition to copies which were delivered to the parties, and which were always written in a larger hand. 8 Toullier, n. 413.

Minutes are not considered as any part of the record; 1 Ohio 268. See 23 Pick. 184. It is not the office of the clerk's minutes to indicate the legal questions raised upon a trial and determined by the court; 94 N. Y. 514; 80 Ky. 377; 34 La. Ann. 369.

OF CORPORATE MEETINGS. It is usual for boards of directors of corporations to keep a regular record in writing of their proceedings. It has been said that such a record is essential either to the proof or validity of their acts and contracts. Such may be the case if the charter makes the keeping of such a record essential to the validity of corporate acts. But in the absence of a provision directing the keeping of such records, there appears to be no reason for any distinction between recording in writing the acts of a board of agents of a corporation, and of the agents of a natural person. Provisions in charters directing that minutes be kept are merely directory; a failure to keep them does not affect the validity of corporate acts; 12 Wheat. 75; Ang. & A. Corp. 291a; Green's Brice, *Ultra Vires* 522, n. b. See 96 U. S. 271; 111 Mass. 315; 32 Vt. 633. When such records are kept, they are the best evidence of the proceedings of a meeting; but if no minutes were kept, or if, in a suit against the corporation, and upon notice, the corporation neglects or refuses to produce its books, other evidence is admissible; 1 Beach, Priv. Corp. 487; 32 Vt. 633; 111 Mass. 315; Ang. & A. Corp. 291a.

MINUTE-BOOK. A book kept by the clerk or prothonotary of a court, in which minutes of its proceedings are entered.

See RECORD BOOKS.

MINUTE TITHES. Small tithes, usually belonging to the vicar; e. g. eggs, honey, wax, etc. 3 Burn. Eccl. Law 680; 6 & 7 Will. IV. c. 71, §§ 17, 18, 27.

MIRROR DES JUSTICES. The Mirror of Justices, a legal treatise once supposed to have been written during the reign of Edward II. Andrew Horne is its

reputed author. But it has been thought that the germ of it was written before the Conquest and that Horne only made additions to it; Marv. Leg. Bibl. 396. But F. W. Maitland holds to the contrary; and also that the evidence that Horne wrote it is not conclusive. It was first published in 1642, and in 1646 it was translated into English by William Hughes. Some diversity of opinion seems to exist as to its merits. Pref. to 9 & 10 Co. Rep. As to the history of this celebrated book, see St. Armand's Hist. Essays on the Legislative Power of England 58; 2 Reeve, Hist. 358; 4 id. 116 n.

Maitland's opinion of the work may be gathered in a few words from his introduction to the reprint of it in 1893, by the Selden Society: "Is he [its author] lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer, liar? A little of all, perhaps, but the romancer seems to predominate."

MISADVENTURE. An accident by which an injury occurs to another.

When applied to homicide, misadventure is the act of a man who, in the performance of a lawful act, without any intention to do harm, and after using proper precaution to prevent danger, unfortunately kills another person. The act upon which the death ensues must be neither *malum in se* nor *malum prohibitum*. The usual examples under this head are: 1, when the death ensues from innocent recreations; 2, from moderate and lawful correction in *foro domestico*; 3, from acts lawful and indifferent in themselves, done with proper and ordinary caution; 4 Bla. Com. 182; 1 East, Pl. Cr. 221. It happens in consequence of a lawful act; involuntary manslaughter, in consequence of an unlawful act; 98 Ala. 57. See HOMICIDE; MANSLAUGHTER; CORRECTION.

MISAPPLICATION. As used in 7 Hen. IV. s. 44, the misapplication of public funds only covers cases of corrupt practices or of showing illegal favor. 80 H. L. 752.

Improper or unlawful disposition or application. Anderson. It is not sufficient to aver simply that a defendant "wilfully misapplied" trust funds; there must be averments to show how the application was made and that it was an unlawful one. 107 U. S. 669.

MISAPPROPRIATION. It is not a technical term of law, but it is sometimes applied to the misdemeanor which is committed by a banker, factor, agent, trustee, etc., who fraudulently deals with money goods, securities, etc., entrusted to him, or by a director or public officer of a corporation or company who fraudulently misapplies any of its property. Sweet, L. Dict. See EMBEZZLEMENT.

MISBEHAVIOR. Improper or unlawful conduct. See 2 Mart. La. N. s. 683.

A party guilty of misbehavior, as, for example, to threaten to do injury to another, may be bound to his good behavior, and thus restrained. As to misbehavior of juries, see NEW TRIAL.

MISBRANDED. The term *misbranded* and the phrase defining what amounts to misbranding in the Food and Drugs Act, 1906, are aimed at false statements as to identity of the article, possibly including strength, quality and purity, dealt with in § 7 of the Act, and not at statements as to curative effect. 221 U. S. 488.

MISCARRIAGE. In Medical Jurisprudence. The expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time, and before the expiration of the sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the fetus at any time before birth is termed, in law, procuring miscarriage. Chitty, Med. Jur. 410; 2 Dungl. Hum. Phys. 364. See ABORTION; FETUS.

In Practice. A term used in the Statute of Frauds to denote that species of wrongful act for the consequences of which the wrongdoer would be responsible at law in a civil action.

By the English Statute of Frauds, 29 Car. II. c. 3, § 4, it is enacted that "no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or *miscarriage* of another person, unless the agreement," etc., "shall be in writing," etc.

The wrongful riding the horse of another, without his leave or license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and, therefore, falls within the meaning of the word *miscarriage*: 2 B. & Ald. 516; Burge, Sur. 21.

MISCASTING. An error in auditing and numbering. It does not include any pretended miscasting or misvaluing. 4 Bouvier, Inst. n. 4128.

MISCEGENATION. (Lat. *miscere*, to mix, and *genere*, to beget). A mixture of races. The intermarriage of persons belonging to the white and black races. In many of the states this is prohibited by statute. The constitutionality of such statutes has been repeatedly affirmed; Cl. Cr. L. 321; 80 Mo. 175; McClain Cr. L. § 57; 3 Tex. App. 263; 58 Ala. 190; s. c. 80 Am. Rep. 131; 30 Gratt. 858; 3 Heisk. 287. It has been further held that a statute denouncing a severer penalty on persons of the two races living together in adultery, than that prescribed for a like offence between persons of the same race, is constitutional; 53 Ala. 190; s. c. 29 Am. Rep. 739; s. c. 106 U. S. 583; 2 Whart. Cr. L. § 1754. See CIVIL RIGHTS.

MISCHIEF. A term used in the law of statutory construction to designate the evil or danger intended to be cured or avoided by the statute. See MALICIOUS MISCHIEF.

MISCOGNIZANT. Ignorant, or not knowing. Stat. 32 Hen. VIII. c. 9. Little used.

MISCONDUCT. Unlawful behavior by a person intrusted in any degree with the administration of justice, by which the rights of the parties and the justice of the case may have been affected.

A verdict will be set aside when any of the jury have been guilty of such misconduct; and a court will set aside an award if it has been obtained by the misconduct of an arbitrator; 2 Atk. 501, 504; 2 Chitt. Bail. 44; 1 Salk. 71; 3 P. Wms. 362; 1 Dick. 66. See 98 Ala. 159; 36 Neb. 708.

Under a statute having reference to a divorce dissolving the marriage contract because of the misconduct of the wife, it relates to adultery; 133 N. Y. 540.

See NEW TRIAL.

MISCONTINUANCE. In Practice. A continuance of a suit by undue process. Its effect is the same as a discontinuance. 2 Hawk. Pl. Cr. 299; Jenk. Cent. Cas. 57.

MISCREANT. An apostate; an unbeliever; one who totally renounces Christianity. 4 Bla. Comm. 44.

MISDELIVERY. The delivery of property by a carrier to a person not authorized by the owner or person to whom the carrier is bound by his contract to deliver it. 133 Mass. 156.

MISDEMEANANT. A person guilty of a misdemeanor. See FIRST-CLASS MISDEMEANANT.

MISDEMEANOR. In Criminal Law. A term used to express every offence inferior to felony, punishable by indictment, or by particular prescribed proceedings. In its usual acceptation, it is applied to all those crimes and offences for which the law has not provided a particular name.

It has a common-law, a parliamentary, and a popular sense. In a parliamentary

sense, as applied to officers, it means maladministration or misconduct, not necessarily indictable. Demeanor is conduct, and misdemeanor is misconduct, in the business of one's office. It must be in matters of importance, and be of a character to show a wilful disregard of duty: 6 Amer. Law Reg. (N. S.) 649; 37 Neb. 96.

The test whether or not a certain crime is a crime at common law, is, not whether precedents for so treating it can be found in the books, but whether it injuriously affects the public policy and economy: 97 Pa. 397, followed in 146 *id.* 83, where it was held that a solicitation to commit murder meets this test.

The word is generally used in contradiction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances, but not including a multitude of offences over which magistrates have an exclusive summary jurisdiction, for a brief designation of which our legal nomenclature is at fault. Misdemeanors have sometimes been called misprisions. See 1 Bish. Cr. L. § 624. See FELONY; CRIME; MERGER.

MISDESCRIPTION. An erroneous or false description of a contract which is misleading in a material point.

MISDIRECTION. In Practice. An error made by a judge in charging the jury in a special case.

It is a rule, subject to the qualifications hereafter stated, that when the judge at the trial misdirects the jury on matters of law material to the issue, whatever may be the nature of the case, the verdict will be set aside, and a new trial granted; 6 Mod. 242; 2 Salk. 649; 2 Wils. 269; 4 Conn. 356; 59 Pa. 371; or, if such misdirection appear in the bill of exceptions, or otherwise upon the record, a judgment founded on a verdict thus obtained will be reversed. And although the charge of the court be not positively erroneous, yet, if it have a tendency to mislead the jury, and it be uncertain whether they would have found as they did if the instructions had been entirely correct, a new trial will be granted; 11 Wend. 83; 6 Cow. 682; 9 Humph. 411; 9 Conn. 107. When the issue consists of a mixed question of law and fact, and there is a conceded state of facts, the rest is a question for the court; 2 Wend. 596; and a misdirection in this respect will avoid the verdict. In England, under the Judicature Act of 1875, a new trial will not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the court, to which the application is made, some substantial wrong has been thereby occasioned; and if it appear that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only; 1 Sched. Ord. xxxix. v. 3; L. R. 10 Stat. 1875, 817.

Misdirection as to matters of fact will, in some cases, be sufficient to vitiate the proceedings. For example: misapprehension of the judge as to a material circumstance, and a direction to the jury accordingly; 1 Const. So. C. 200; or instructing them upon facts which are purely hypothetical, whereby they are misled; 8 Ga. 114; or an instruction which assumes a material fact to have been proved; 83 Ala. 445; 76 Cal. 242; 11 Colo. 80; 79 Ga. 687; 74 La. 154; 71 Md. 9; submitting as a contested point what has been admitted; 9 Conn. 216; giving to the jury a peremptory direction to find in a given way, when there are facts in the case conducive to a different conclusion; 7 J. J. Marsh. 410; 3 Wend. 102; 19 *id.* 402; 12 Mass. 22; 5 Humph. 476; 47 Ill. App. 332; or where the evidence is so conflicting or rests so largely upon inference or circumstance, that a court could not rightfully sustain a demurrer to the evidence of the opposite party; 87 Ala. 305. See 73 Ia. 576; 74 *id.* 457; 35 Fed. Rep. 116. There are, however, many cases in which the court may instruct the jury, upon the whole evidence, to find for one or

the other party; and when a verdict formed under such instruction is conformable to the law, the evidence, and the justice of the case, it is rarely disturbed; 3 Dana 564. But to warrant an unqualified direction to the jury in favor of a party, the evidence must either be undisputed or the preponderance so decided that a verdict against it would be set aside; 16 Wend. 663; 8 Misc. Rep. 512; 143 Ill. 242; 5 Wash. St. 371; 5 U. S. App. 179; and where a special verdict is directed, the court is not bound to give any instructions as to the general rules of law governing the case; 116 Ind. 278; 69 Tex. 124. When the court delivers its opinion to the jury on a matter of fact, it should be *as opinion*, and not as direction; 12 Johns. 513. But it is, in general, allowed a very liberal discretion in this regard; 1 M'Cl. & Y. 286. Where the question is one of mere fact, no expressions of the judge, however strong or erroneous will amount to a misdirection, provided the question is fairly presented to the jury and left with them for their decision; 5 Scott 28; 4 Moore & S. 295; 19 Wend. 186; 10 Pick. 252; 128 U. S. 171; 36 Fed. Rep. 166. The weight of evidence is solely for the jury; and an instruction thereupon is erroneous; 83 Ala. 40; 16 Or. 15, 173; 75 Mich. 127.

Unless the misdirection be excepted to, the party by his silence will be deemed to have waived it; 10 Mo. 515; 2 Pick. 145. But see 4 Wend. 514; 2 Barb. 420; see 8 C. C. App. 341; 97 Mich. 166; 157 Pa. 358; 144 Ill. 370.

As to its effects, the misdirection must be calculated to do injustice; for if it be entirely certain that justice has been done, and that a re-hearing would produce the same result, or if the amount in dispute be very trifling, so that the injury is scarcely appreciable, a new trial will not be granted; Thorn. Juries § 204; 2 Caines 85; 7 Me. 442; 10 Ga. 429; 3 Grah. & W. New Tr. 705; Hill. New Tr. 96. See 82 Ga. 732; New TRIAL; CHARGE.

MISE (Lat. *mittere*, through the French *mettre*, to place). **In Pleading.** The issue in a writ of right. The tenant in a writ of right is said to *join the mise on the mere right* when he pleads that his title is better than the demandant's; 2 Wms. Saund. 45, *h. i.* It was equivalent to the general issue; and everything except collateral warranty might be given in evidence under it by the tenant; 3 Wils. 420; 7 Wheat. 31; 3 Pet. 133; 7 Cow. 52; 10 Gratt. 350. The payee in aid, on coming into court, joined in the mise together with the tenant; 2 Wms. Saund. 45 *d.* It was a more common practice, however, for the demandant to traverse the tenant's plea, when the cause could be tried by a common jury instead of the grand assize.

In Practice. Expenses. It is so commonly used in the entries of judgments, in personal actions; as, when the plaintiff recovers, the judgment is *quod recuperet damna sua* (that he recover his damages), and *pro misis et custagiis* (for costs and charges) so much, etc.

MISE MONEY. Money paid by way of contract or composition to purchase any liberty, etc. Blount.

MISERABLE DEPOSITUM (Lat.). **In Civil Law.** The name of an involuntary deposit, made under pressing necessity; as, for instance, shipwreck, fire, or other inevitable calamity. Pothier, Proc. Civ. pt. 5, ch. 1, § 1; La. Code § 2935.

MISERERE. The first word and usual name of one of the penitential psalms, being that which was commonly used to be given by the ordinary to such condemned malefactors as were allowed the benefit of clergy (*q. v.*); whence it is also called the psalm of mercy. Wharton. See NECK VERSE.

MISERICORDIA (Lat.). An arbitrary or discretionary amercement.

To be in mercy is to be liable to such punishment as the judge may in his discretion inflict. According to Spelman, miseri-

cordia is so called because the party is in mercy, and to distinguish this fine from redemptions, or heavy fines. Spelman, Gloss. See Co. Litt. 126 b; Madox 14. See IN MISERICORDIA.

MISFEASANCE. The performance of an act which might lawfully be done, in an improper manner, by which another person receives an injury.

It differs from malfeasance or nonfeasance. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner, while malfeasance is doing an act which is positively unlawful or wrongful. 23 L. Mag. & Rev. 189. See, generally, 2 Viner, Abr. 35; 2 Kent 443; Doctrina Plac. 62; Story, Bailm. § 9.

It seems to be settled that there is a distinction between misfeasance and nonfeasance in the case of mandates. In cases of nonfeasance the mandatory is not generally liable, because, his undertaking being gratuitous, there is no consideration to support it; but in cases of misfeasance the common law gives a remedy for the injury done, and to the extent of that injury; 5 Term 143; 4 Johns. 81; 2 Johns. Cas. 92; 1 Esp. 74; 2 Ld. Raym. 909; 33 Conn. 109; Story, Bailm. § 165; Bouvier, Inst. Index.

MISFORTUNE. It is equivalent to some adverse event not immediately dependent on the action or will of him who suffers from it, and of so improbable a character that no prudent man would take it into his calculations in reference to the interest of himself or of others. 20 Q. B. Div. 816.

MISJOINDER. In Pleading. The improper union of parties or causes of action in one suit at law or in equity.

Of Actions. The joining several demands which the law does not permit to be joined, to enforce by one proceeding several distinct, substantive rights of recovery. Gould, Pl. c. 4, § 98; Archb. Civ. Pl. 61; Dane, Abr.

In equity, it is the joinder of different and distinct claims against one defendant; Adams, Eq. 309; 7 Sim. 241; 3 Barb. Ch. 432. The grounds of suit must be wholly distinct, and each ground must be sufficient, as stated, to sustain a bill; 5 Ired. Eq. 313. See 21 Ala. n. s. 252; 9 Ga. 278; 3 Md. Ch. Dec. 46; 22 Conn. 171.

It may arise from the joinder of plaintiffs who possess distinct claims; 2 Sim. 331; 6 Madd. 94; 8 Pet. 123; see [1893] 1 Q. B. 771; but see 6 Johns. Ch. 150; 8 Paige, Ch. 605; or the joinder of distinct claims of the plaintiff in one bill; 2 S. & S. 79; 5 Misc. Rep. 43. But it seems that where there is a common liability of the defendants and a common interest in the plaintiffs, different claims may be united in the same suit; 1 M. & C. 833; 5 How. 127, 12 Metc. 323. And see 7 Sim. 241; 3 Price 164; 2 Y. & C. 389; Story, Eq. Pl. § 536, n.; MULTIFARIOUSNESS.

At law, misjoinder vitiates the entire declaration, whether taken advantage of by general demurrer; 1 Maule & S. 355; motion in arrest of judgment, or writ of error; 2 B. & P. 424; 4 Term 347. It may be aided by verdict in some cases; 2 Lev. 110; 11 Mod. 196; 2 Maule & S. 533; 1 Chitty, Pl. 188. Where a single count of a complaint contains one cause of action in tort and another in contract, and plaintiff is allowed over objections to introduce evidence to sustain both causes, the error is not cured by plaintiff's election after the trial, to recover in contract only, when the judgment rendered does not limit plaintiff's recovery of costs to those incurred in the action in contract; 84 Wis. 209.

Of Parties. The joining, as plaintiffs or defendants, parties who have not a joint interest.

In England, under the Judicature Act, 1875, by order xvi. v. 13, no action is to be defeated by the misjoinder of the parties. Different causes of action which cannot be tried together conveniently may be ordered by the court or a judge to be tried sepa-

rately. *Mozl. & W. Dict.*

In *equity*, the joinder of improper plaintiffs is a fatal defect; 2 *Sandf. Ch.* 186; 3 *Edw. Ch.* 48; 2 *Ala. n.* 3. 406. But the court may exercise a discretion whether to dismiss the bill; 1 *Barb. Ch.* 59; 3 *Ohio St.* 129. See 5 *Fla.* 110. It may be dismissed wholly, or only as to a portion of the plaintiffs; 18 *Ohio 72*. The improper joinder of defendants is no cause of objection by a co-defendant; 2 *Barb. Ch.* 618; 6 *Ired. Eq.* 62; 7 *Ala. n.* 3. 362; 12 *Ark.* 720; 23 *Me.* 269. See 7 *Conn.* 387; 86 *Wis.* 292.

The objection must be taken *before the hearing*; 15 *How.* 546; 2 *Hill Ch.* 566; 4 *Paige Ch.* 510; not, however, if it be vital; 30 *N. H.* 433; by *demurrer*, if apparent on the face of the bill; 9 *Paige Ch.* 410; 7 *Ala. n.* 3. 362; 112 *N. C.* 578; but see 5 *Ill.* 424; by *plea and answer*; or otherwise; 13 *Pet.* 359; 1 *T. B. Monr.* 105; where the defect does not appear upon the face of the petition, objection must be raised by answer; 113 *Mo.* 623. A defendant who is improperly joined must plead or demur; 1 *Mo.* 410.

At law, see ABATEMENT; PLEADING.

An answer stating facts showing a misjoinder of plaintiffs, but not objecting to the action on that ground is not sufficient to save such an objection; 49 *Mo.* App. 273; where no objection is made in the court below to a misjoinder of parties defendant, no advantage can be taken of it on appeal; 2 *Colo.* App. 436.

MISKENNING (Fr. *mis*, wrong, and Sax. *cennan*, summon). A wrongful citation to appear in court. A variance in a plea. 1 *Mon. Angl.* 287; *Chart. Hen. II.*; *Jacob, Law Dict.*; *Du Cange*.

MISNOMER. The use of a wrong name.

In *contracts*, a mistake in the name will not avoid the contract, in general, if the party can be ascertained; 11 *Co.* 20; *Ld. Raym.* 304; *Hob.* 125. So of contracts of corporations; 2 *Beas.* 427. See NAME. If a deed, note, etc., be made to a corporation under an erroneous name, the proper course is for the corporation to sue in its proper name and allege that the defendant made the deed, etc., to the corporation by the name mentioned in the instrument; 69 *Ill.* 658. A contract entered into by a corporation under an assumed name may be enforced by either of the parties, and the identity of the company may be established by the ordinary methods of proof; 37 *W. Va.* 778.

A *misnomer* of a legatee will not, in general, avoid a legacy, when the context furnishes the means of correction; *Schoul. Wills* § 583; see 19 *Ves.* 381; 1 *Rop. Leg.* 131; LEGACY. A legacy given to a corporation, either by its corporate name, or by description, is good; in the latter case it must be so designated as to be distinguished from every other corporation; 10 *N. Y.* 84. See 45 *Me.* 552; 37 *Ala.* 478.

When a corporation is misnamed in a statute, the statute is not inoperative if there is enough to designate what corporation is meant; 10 *Co.* 44, 57 b.

Misnomer of one of the parties to a suit must be pleaded in abatement. It has been held that misnomer of one of the partners of a firm in a *scire facias* sur mortgage is unimportant, if the name of the firm is correct in the mortgage itself; 64 *Penn.* 63. A slight variation in a corporate name will be disregarded unless the misnomer be taken advantage of by a plea in abatement; 30 *Ill.* 151; 19 *Mich.* 196. If a corporation, sued by an erroneous name, appears by that name without objection, the error is cured; *Taney* 418. See 56 *Ark.* 499. But a writ of mandamus issued against a corporation under an erroneous name is void; 2 *Ld. Raym.* 1288; and an error in the corporate name in an execution is fatal; 58 *Ga.* 280. The same is true when there is an error in the corporate name in a judgment; 1 *Ld. Raym.* 117; but see 11 *Mass.* 188.

The names of third persons must be correctly laid; for the error will not be helped

by pleading the general issue; but, if a sufficient description be given, it has been held, in a civil case, that the misnomer was immaterial. Example: in an action for medicines alleged to have been furnished to defendant's wife, Mary, and his wife was named Elizabeth, the misnomer was held to be immaterial, the word wife being the material word; 2 *Marsh.* 159. See 10 *U. S. App.* 267. In indictments, the names of third persons must be correctly given; *Rosc. Cr. Ev.* 78. If a person is well known by the name in the indictment, the indictment is good; 7 *Am. L. Reg. N. S.* 445; the middle name of a defendant, if stated in an indictment, either in full or by the initial letter, must be correctly stated; 1 *Am. L. Reg.* 380. That a party is known by one name as well as another, is a good replication to a plea of misnomer; 43 *Ill. App.* 609. Accuracy is especially required in stating the correct name of a corporation in all criminal proceedings in which it may be concerned; 1 *Leach* 253; but see 35 *Cal.* 110. See *Archbold*; *Chitty, Pleading*; ABATEMENT; CONTRACT; PARTIES; LEGACY; NAME.

MISPLEADING. Pleading incorrectly, or omitting anything in pleading which is essential to the support or defence of an action, is so called.

Pleading not guilty to an action of debt is an example of the first; setting out a defective title is an example of the second. See 3 *Salk.* 365.

MISPRISON. In Criminal Law. A term used to signify every considerable misdemeanor which has not a certain name given to it by law. *Co. 3d Inst.* 36.

The concealment of a crime.

Negative *misprison* consists in the concealment of something which ought to be revealed.

Misprison of felony is the like concealment of felony, without giving any degree of maintenance to the felon; Act of Congress of April 30, 1790, s. 6, R. S. § 5390; for if any aid be given him, the party becomes an accessory after the fact.

Misprison of treason is the concealment of treason by being merely passive. Act of Congress of April 30, 1790, R. S. § 5333; 1 *East, Pl. Cr.* 139. If any assistance be given to the traitor, it makes the party a principal, as there are no accessories in treason.

Positive *misprison* consists in the commission of something which ought not to be done. 4 *Bla. Com. c.* 9.

It is the duty of every good citizen, knowing of a treason or felony having been committed, to inform a magistrate. Silently to observe the commission of a felony, without using any endeavors to apprehend the offender, is a misprison. 1 *Russ. Cr.* 43; 1 *Bish. Cr. L.* § 720; *Hawk. Pl. Cr. c.* 59; s. 6; 4 *Bla. Com.* 119.

Misprisons which are merely positive are denominated contempts or high misdemeanors; as, for example, dissuading a witness from giving evidence. 4 *Bla. Com.* 126.

MISREADING. When a deed is read falsely to an illiterate or blind man who is a party to it, such false reading amounts to a fraud, because the contract never had the assent of both parties; 5 *Co.* 19; 6 *East* 309; *Dane, Abr. c.* 86, a. 3, § 7; 2 *Johns.* 404; 12 *id.* 469; 3 *Cow.* 537. See 14 *Pa.* 496; 82 *id.* 203; 62 *Wis.* 480; 55 *Mich.* 592.

MISRECITAL. The incorrect recital of a matter of fact, either in an agreement or a plea: under the latter term is here understood the declaration and all the subsequent pleadings. See RECITAL.

MISREPRESENTATION. The statement made by a party to a contract that a thing relating to it is in fact in a particular way, when he knows it is not so.

The misrepresentation must be both false and fraudulent in order to make the party making it responsible to the other for damages; 8 *Conn.* 413; 10 *Mass.* 197; 1 *Const. So. C.* 328, 475; *Metc. Yelv.* 21 a, n. 1; *Peake, Cas.* 115; 3 *Campb.* 154; *Marshall,*

Ins. b. 1, c. 10, s. 1. And see 5 *Maule & S.* 380; 12 *East* 638; 3 *B. & P.* 370; 45 *Ill. App.* 244. Misrepresentation as to a material part of the consideration will avoid an executory contract; 1 *Phil. Ins.* §§ 630, 675; 83 *Va.* 397; 147 *Mass.* 403; 124 *Pa.* 450; 97 *Mich.* 5.

A misrepresentation, to constitute *fraud*, must be contrary to fact; the party making it must know it to be so; 2 *Kent* 471; 1 *Story, Eq. Jur.* § 142; 4 *Price* 135; 3 *Conn.* 597; 22 *Me.* 511; 7 *Gratt.* 64, 239; 6 *Ga.* 458; 5 *Johns. Ch.* 182; 6 *Paige, Ch.* 197; 1 *Stor.* 172; 1 *W. & M.* 342; 85 *Tenn.* 139; 76 *La.* 11; 5 *Ind. App.* 474; 51 *Kan.* 144; 63 *Vt.* 463; excluding cases of mere mistake; 5 *Q. B.* 804; 9 *id.* 197; 10 *M. & W.* 147; 14 *id.* 651; 7 *Cra.* 69; 13 *How.* 211; 8 *Johns.* 209; 7 *Wend.* 10; 1 *Metc. Mass.* 1; 27 *Me.* 35; 7 *Vt.* 67, 79; 6 *N. H.* 99; and including cases where he falsely asserts a personal knowledge; 18 *Pick.* 96; 1 *Metc. Mass.* 193; 6 *id.* 245; 27 *Me.* 309; 16 *Wend.* 646; 16 *Ala.* 785; 1 *Bibb* 244; 4 *B. Monr.* 601; 3 *Cra.* 281; and one which gave rise to the contracting of the other party; 14 *N. H.* 331; 1 *W. & M.* 90, 342; 2 *id.* 298; 2 *Strobb.* Eq. 14; 2 *Bibb* 474; 8 *B. Monr.* 23; 4 *How.* *Miss.* 435; 6 *id.* 311; 25 *Miss.* 167; 3 *Cra.* 283; 3 *Yerg.* 178; 19 *Ga.* 448; 5 *Blackf.* 13. See 12 *Me.* 263; 13 *Pet.* 26; 23 *Wend.* 260; 7 *Barb.* 65; *Poll. Cont.* 542.

A contract is bad where a party is induced to enter into it by the innocent misstatement of facts by another; 51 *La.* 364; 39 *Ohio* 491; 89 *Ind.* 38; 2 *Kent* 471; but the misrepresentation must be the proximate and immediate cause of the transaction; 11 *Col.* 15; and part of the same transaction; 83 *Va.* 504; and the party seeking relief must have relied upon it; 86 *Wis.* 427. In an action for misrepresentation of facts, it is not always necessary to prove that it was made with a fraudulent intent and with guilty knowledge; 80 *Wis.* 540; but an innocent misrepresentation cannot be proved under a plea of fraud; 21 *Can. S. C. R.* 359.

To be material, the misrepresentation must be in respect to an ascertainable fact, as distinguished from a mere matter of opinion, judgment, probability, or expectation; if it is vague and indefinite in its nature and terms, or is merely a loose, conjectural, or exaggerated statement, it is not a material misrepresentation; 73 *Tex.* 465; 17 *Ore.* 347; 149 *Mass.* 188.

A representation concerning a man's private rights, though it may involve matters of law, is as a whole deemed to be a statement of fact; 13 *Q. B. D.* 363; as is a representation that one has extraordinary and supernatural power in curing disease; 36 *Atl. Rep. (Md.)* 1027. See also 15 *W. N. C. Pa.* 282. And representations from one bank to another that a business corporation is prosperous, well organized, doing a large business, and is a valued customer, and that an investigation has been made of its business and responsibility by a bank officer, are also representations of fact and not of opinion; 59 *Fed. Rep.* § 38. "A suppression of the truth may amount to a suggestion of falsehood;" 128 *U. S.* 388; 51 *Kan.* 355; and a false pretence need not be in regard to a fact which does in reality exist, but may be that a fact exists when it does not; 14 *Crim. L. Mag.* 1.

Mere honest expression of opinion will not, as a rule, be regarded as fraud, either as a basis for an action of deceit, or as ground for setting aside a contract, although the opinion may prove to be erroneous; 141 *N. Y.* 596; 29 *N. J.* Eq. 257; 73 *Tex.* 465; 92 *Va.* 71; 84 *Ill. App.* 666; 125 *U. S.* 247; *L. R.* 13 *Q. B. D.* 562. And this rule applies ordinarily to statements of the value of property to be bought or sold; 124 *Pa.* 450; 90 *N. Y.* 272; 86 *Mo.* 293; 106 *Cal.* 623; but it cannot be laid down as a matter of law that value is never a material fact; 11 *Mich.* 68; as where the defendant was employed to value real estate for an intended mortgage, and gave a valuation which was in fact no valuation at all, it was held that the defendant owed a duty to the plaintiff which he had failed to discharge, and had made reckless statements

on which plaintiff had acted, and therefore defendant was liable to plaintiff for the loss he had sustained; 39 Ch. D. 39.

So the mere puffing of articles to be sold is held not to amount to such a misrepresentation as will amount to fraud; 73 Ill. 104; but this rule applies only when the purchaser has a full and fair opportunity to inspect the article and judge for himself, and not to things which are not the subject of any visible test or examination; 44 Ark. 216; and a vendor may be held guilty of deceit by reason of material untrue representations in respect to his own business or property, the truth of which representation he is bound and must be presumed to know; 150 U. S. 673. A person who makes representations of material facts, assuming or intending to convey the impression that he has adequate knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is liable if he knew that they were false; *id.*

Statements as to future events are mere matters of opinion; 17 Abb. N. C. 1; 59 Mo. App. 130; and however contrary to good faith and sound morals, they cannot form the basis of an action at law or in equity; 1 Ark. 31; but see 87 Cal. 557, where although the question was not raised as to whether misrepresentations of prospects of property sold would entitle one to an action, yet as the measure of damages for such representations was decided, the court seem to have admitted that liability would arise therefrom.

One who makes a false statement which he believes to be true, incurs no liability; if the belief is honest, it makes no difference what their grounds are; Poll. Torts 273; *contra*, 41 S. W. Rep. (Ark.) 819; but the grounds of a belief are a "most important test of its reality;" 14 App. Cas. 375. If untrue statements are founded upon a belief destitute of all reasonable grounds, or which the least inquiry would immediately correct, such circumstances would be evidence, but only evidence, that the statement was not really believed to be true; and any liability therefor would be based, not upon the party having stated as true what he had not reasonable grounds to believe to be true, but as having stated as true what he did not believe to be true; L. R. 1 Sc. App. 162, followed in 14 App. Cas. 337, a decision deemed by a learned writer to be unfortunate; Poll. Torts 275; and see 5 L. Quart. Rev. 410; 6 *id.* 73.

It is not necessary that the misrepresentation should have been made directly to the plaintiff; Poll. Torts 282; 2 M. & W. 519; they may be published generally with the intention that they may be acted upon by any who choose; 3 B. & Ad. 114; as a time-table of a railway company announcing a train, which is not, in fact, running; 5 E. & B. 860; or a prospectus; L. R. 6 H. L. 377.

Where one states that he knows a thing to exist, when he does not know it to exist, he is guilty of fraud; this rule applies to facts susceptible of actual knowledge, and not matters of opinion, etc.; one who does not know a fact to exist must ordinarily be deemed to know that he does not know; 147 Mass. 403. "If persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue"; L. R. 4 H. L. 79; this ignorance is conscious ignorance; 14 App. Cas. 371. Where one has honestly made a representation and discovers that it is false before it is acted upon, he is deemed, if he has the means of communicating the truth and does not do so, to be making a false representation with knowledge of its untruth; see 1 D. G. M. & G. 660.

There may be a false pretence by conduct, as where one not a member of the university put on a cap and gown at Oxford and thereupon obtained goods on credit; 7 C. & P. 784; so where one having no money goes into a restaurant and orders a good dinner and cannot pay for it, it was held to be incurring a liability by fraud;

42 Sol. Journ. 78.

An action to recover for false representations made by the seller of personal property does not survive as against his estate, under a statute providing that actions "of trespass and trespass on the case for damages done to . . . personal estate shall survive"; 35 Atl. Rep. (Vt.) 488.

In the absence of any bad faith, a principal is not affected by a representation made by his agent, which the former knew to be untrue, as he would be by a fraudulent representation made either by himself or his agent; 2 Kent 621, n.; 1 H. L. C. 615; 6 M. & W. 358; *contra*, 21 Vt. 129; 8 *id.* 96; 3 Q. B. 58. See Poll. Torts 384; Benj. Sales § 445; Broom, Leg. Max. 707. Where a purchaser has been induced to buy through the fraud of an agent, the vendor being innocent, he may rescind the contract or maintain an action of deceit against the agent personally, but against the principal he can maintain no action unless there was a warranty; Benj. Sales § 467, notes. See 3 Am. L. Rev. 430; Bigel. L. C. Torts 21; 16 Gray 436.

If a principal knows the representation of his agent to be false and authorizes him to make it, the former is liable; if the agent makes the representation without specific authority, but not believing it to be true, the principal is liable (6 M. & W. 373); as to whether, in such case if the agent does believe the representations to be true, the principal is liable, is doubtful in England; Poll. Torts 291. See AGENTS; See, generally, DECEIT; FRAUD.

MISSAE PRESBYTER. A Priest in Orders. Blount.

MISSILIA. In Roman Law. Gifts which the officers were in the habit of throwing among the people. Inst. 2, 1, 45.

MISSING SHIP. A ship which has been at sea and unheard from for so long a time as to give rise to the presumption that she has perished with all on board.

There is no precise time fixed as to when the presumption is to arise; and this must depend upon the circumstances of each case; 2 Stra. 1199; Park. Ins. 63; Marsh. Ins. 488; 2 Johns. 150; 1 Caines 525; Holt 242.

MISSING WORD COMPETITIONS. See LOTTERY.

MISSIO. In Roman Law. Letting go or sending away.

MISSIO IN BONA. Execution against the property of a debtor by which a creditor was empowered to take possession of the entire estate of the debtor. Sohm, Rom. L. 211.

MISSIO JUDICUM IN CONSILIUM. A sending out of the jury to make up their sentence. Burrill; Halifax, Anal. 3, 13, 31.

MISSIO IN POSSESSIONEM. A writ by which a creditor obtained actual control, or mere detention of a thing as security for his claim, without any right of sale or action. Sohm, Rom. L. 275.

MISSISSIPPI. The name of one of the states of the United States.

The territory of Mississippi, embracing the present states of Alabama and Mississippi, was authorized to be organized by act of congress, of April 9, 1778, and organized on 22d January, 1779. Georgia, from which the territory was formed, ceded it to the United States on April 24, 1802.

The western part of the Mississippi territory was authorized to form a state government to be known as the state of Mississippi, by act of congress passed March 1, 1817, and the state was admitted into the Union December 10, 1817.

The first constitution of the state was adopted at Washington, August 15, 1817. The second at Jackson, October 28, 1833. This was amended in August, 1865, so as to strike out the word "white," and to abolish and to eliminate everything connected with the institution of slavery. The third, at Jackson, on May 15, 1868, ratified by the people on December 1, 1869, and went into operation in 1870, on the re-admission of the state into the Union under the Reconstruction Acts of congress.

MISSIVES. In Scotch Law. Writings passed between parties as evidence of a transaction. Bell. Dict.

MISSOURI. The name of one of the states of the United States of America.

It was formed out of part of the territory ceded to the United States by the French Republic by treaty of April 30, 1803, and admitted into the Union by a resolution of congress approved March 2, 1821.

To this resolution there was a condition, which, having been performed, the admission of Missouri as a state was completed by the president's proclamation, dated August 10, 1821.

The convention which formed the constitution of this state met at St. Louis on Monday, June 19, 1820, and continued by adjournment till July 19, 1820, when the constitution was adopted, establishing "an independent republic, by the name of the 'State of Missouri.'"

MISSITICUS. A messenger.

MISSURA. The ceremonies used in a Roman Catholic church to recommend and dismiss a dying person.

MISTAKE. Some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. Story, Eq. Jur. § 110; 48 Wis. 118.

That result of ignorance of law or fact which has misled a person to commit that which, if he had not been in error, he would not have done. Jeremy, Eq. Jur. 853.

A mistake exists when a person, under some erroneous conviction of law or fact does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. Bishop, Eq. § 185. The essential element of mistake is a mental condition or conception or deviation of the understanding either in a passive or active state; when passive, it may consist of unconsciousness, ignorance, or forgetfulness, and when active, it may be a belief. The first condition must always concern a fact material to the transaction, while in the second, the belief may be that a matter or thing exists at the present time which really does not exist, or that it existed at some past time when it did not really exist. All particular errors which fall under either condition are mistakes of fact which are a ground of equitable relief. These mistakes may arise from ignorance; 19 Barb. 222; in forgetfulness of a fact past; 7 Johns. 442; of a fact present; 33 Pa. 491; in unconsciousness; 29 Vt. 238; 4 Bosw. 320; in belief of a thing which does not exist; 25 N. Y. 289; 19 *id.* 502; of things which have not existed; 8 N. Y. 335. See 6 L. R. A. 835.

As a general rule, both at law and in equity, mistakes of law do not furnish an excuse for wrongful acts or a ground of relief from the consequences of acts done in consequence of such a mistake; 94 N. C. 490; 107 Ind. 69; 9 M. & W. 54; 5 Hare 91; 9 How. 55; 7 Paige 99*, 137; 2 Johns. Ch. 60. See 2 M'Cord, Ch. 455; 6 H. & J. 500; 25 Vt. 603; 13 Ark. 129; 6 Ohio 169; 11 *id.* 480; 21 Ga. 118; Beal. Ch. 165; 62 Mich. 473; 159 Pa. 531; 43 Ill. App. 387; 108 Ind. 61; 88 Mo. 621. But if a contracting party knows that the other party is proceeding upon a mistake in law, there might arise a consideration of fraud in his taking advantage of the other's mistake; 70 Pa. 425; 51 Ala. 154; 23 Ill. 579; 102 *id.* 208; 67 Me. 217; 82 N. C. 40; 36 N. J. Eq. 111. When both parties are under a common mistake of law as to the application of their contract, it can be applied only according to their intention and not otherwise; Leake, Contr. 347; 46 L. J. Q. B. 213. And, if parties contract under a common misapprehension as to their relative and respective rights, the contract may be liable to be set aside as inapplicable to the state of rights really existing; L. R. 2 H. L. 170; see 79 Hun 44; 48 Wis. 443; 36 N. J. L. 432. In this connection the word *jus in the maxim ignorantia juris haud excusat*, denotes general law and not private rights; *ibid.*; Add. Contr. 119. An agreement made for the purpose of settling rights, with full knowledge of the doubts arising upon them, will be enforced, and parties will not be allowed to state that they were under a misapprehension as to the law; 1 S. & S. 555; 51 Ala. 160; 3 Lead. Cas. Eq. 411; 7 W. & S. 253. This is particularly the case in relation to family settlements; 3 Swanst. 462; 64 Pa.

25. Inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby; 138 U. S. 514.

The power of courts of equity to afford relief from the consequences of the mistakes of parties to written instruments is not strictly limited to mistakes of fact, but extends also to mistakes of law; 37 Minn. 80; 85 Wis. 240; see 141 U. S. 260; it will correct an instrument where it is clearly and fully inconsistent with a prior agreement and with the purpose for which it was designated, or if it fails to express the intention of the parties; 99 N. C. 30. See **IGNORANCE**.

An act done or a contract made under a mutual mistake or ignorance of a material fact is voidable and relievable in equity; Poll. Contr. 442; Story, Eq. Jur. § 140; 142 U. S. 417. The rule applies to cases where there has been a studied suppression of facts by one side, and to cases of mutual ignorance or mistake; 26 Beav. 454; 12 Sim. 465; 9 Ves. 275; 2 Barb. 475; 11 Pet. 71; 8 B. Monr. 580; 4 Mas. 414; 5 R. L. 130; 85 Ky. 322; 150 Pa. 36; 5 Wash. St. 736; 78 Hun 462; 160 Mass. 438; 64 Conn. 28. See 128 U. S. 315; 132 *id.* 271; 31 Fla. 73; 148 Ill. 383. But the fact must be material to the contract, *i. e.* essential to its character, and an efficient cause of its concoction; 11 Gratt. 468; 2 Barb. 37; 2 Sandf. Ch. 298; 13 Pa. 371. See 28 N. J. Eq. 306; 75 N. Y. 55; 97 U. S. 55. And as a ground for reforming an instrument the mistake must be mutual; 71 Tex. 99; 49 Mo. App. 255; 66 Hun 635; 68 *id.* 299; 131 Mass. 316; 109 Ind. 354; 71 Iowa 446. But equity will not afford relief in cases of mutual mistake of legal rights where it is impossible to restore both parties to the *status quo*; 173 Pa. 154. A mistake will not be relieved against if it was the result of the party's negligence; 5 Oreg. 169; 12 Cl. & F. 248; 1 W. & M. 138; 5 R. L. 130; 122 Ill. 536; 103 Pa. 594; 70 Ga. 794. See 16 Oreg. 412. If the mistake, as to the expression of an agreement, is only on one side, there will be no relief. But if such a mistake on the part of one party be known to the other at the time, the contract can be avoided at common law, if not reduced to writing; L. R. 6 Q. B. 597. In equity, a mistake of one party known to the other may not only preclude the latter from obtaining specific performance, but may also be a ground for setting aside the contract altogether; Leake, Contr. 318; 30 Beav. 445. When a written contract contains a mistake common to both parties in expressing its terms, equity will give relief by restraining proceedings at law, or by rectifying the writing or setting it aside; Leake, Contr. 319. An act done intentionally and with knowledge, cannot be treated as a mistake; 22 Ct. Cls. 165.

Where an attorney acting under general instructions of his client to compromise a litigation consents to a compromise under a misapprehension, neither the client nor the counsel are bound thereby and the court will set it aside on application; [1895] 2 Ch. 638.

When a mistake in the expression of a written contract is so obvious, without extrinsic evidence, as to leave no doubt of the intention of the parties, the writing may be so construed as to correct the mistake; 5 H. L. C. 40; L. R. 9 Eq. 507. See 50 Ohio St. 394.

An award may be set aside for a mistake of law or fact by the arbitrators apparent on the face of the award; 2 B. & P. 371; 1 Hall. 487; 1 Sneed 321. See 6 Metc. 136; 17 Dow. 344; 6 Pick. 148; 2 Gall. 61; 4 N. H. 357; 3 Vt. 308; 15 Ill. 461; 2 B. & Ald. 691.

The word which the parties intended to use in an instrument may be substituted for one which was actually used by a clerical error, in equity; Adams, Eq. 169; 13 Gray, 373; 6 Ired. Eq. 462; 17 Ala. N. S. 562; 58 Fed. Rep. 918. Equity will not correct a mistake in a voluntary deed by inserting the word "heirs" omitted by inadvertence of the draughtsman; but otherwise, when the deed is supported by a valuable or meritorious consideration; 98

N. C. 426.

As to the rule for the correction of mistakes in wills, see Story, Eq. Jur. § 179; 2 Ves. 216; 3 *id.* 321; 1 Bro. Ch. 85; 3 *id.* 446; 1 Keen 692; 2 K. & J. 740; 1 Jones, Eq. 110; 22 Mo. 518; 2 Stockt. Ch. 582; [1893] Prob. 1; 45 Wis. 357; 56 Ia. 676.

A mistake sometimes prevents a forfeiture, in cases of violation of revenue laws; Paine 129; Gilp. 235; 4 Call 158; breach of embargo acts; 3 Day 296; Paine 16; 7 Cra. 22; 3 Wheat. 59; 11 How. 47; 1 Bish. Cr. Law, § 697; 1 Mass. 347. See Kerr, Fr. & Mist.; Bispham, Equity; Leake, Contr.; 3 Lead. Cas. Eq. 411. See **ERROR**.

MISTERY. A trade or calling. Cowell.

MISTRIAL. A trial which is erroneous on account of some defect in the persons trying, as if the jury come from the wrong county, or because there was no issue formed, as if no plea be entered, or some other defect of jurisdiction. 3 Cro. 284; 2 Maule & S. 270.

Where a jury is discharged without a verdict, the proceeding is properly known as a mistrial; 22 Fed. Rep. 427.

Consent of parties cannot help such a trial, when past; Hob. 5.

It is error to go to trial without a plea or an issue, in the absence of counsel and without his consent, although an affidavit of defence be filed in the case, containing the substance of a plea, and the court has ordered the case on the list for trial; 3 Pa. 501.

On an indictment for perjury, an infant under the age of twenty-one years, and not otherwise qualified, not having, in fact, been summoned, personated his father as a juror. Here was a mistrial, because the verdict in the case was the verdict of but eleven jurors. "To support a judgment," observed Justice Holroyd, "it must be founded on a verdict delivered by twelve competent jurors. This man was incompetent, and therefore there has been a mistrial." 7 D. & R. 684. See 4 B. & Ald 430; 18 N. Y. 128; **NEW TRIAL**.

MISUSER. An unlawful use of a right.

In cases of public offices and franchises, a misuser is sufficient to cause the right to be forfeited. 2 Bla. Com. 153; 5 Pick. 163.

MITIGATION. Reduction; diminution; lessening of the amount of a penalty or punishment.

Circumstances which do not amount to a justification or excuse of the act committed may yet be properly considered in mitigation of the punishment; as, for example, the fact that one who stole a loaf of bread was starving.

In actions for the recovery of damages, matters may often be given in evidence in mitigation of damages which are no answer to the action itself. See **DAMAGES**; **CHARACTER**.

MITIOR SENSUS. See **IN MITIORI SENSU**.

MITRE COURT. See **PRIVILEGED PLACES**.

MITTENDO MANUSCRIPTUM PEDIS FINIS. An abolished judicial writ, addressed to the treasurer and chamberlain of the exchequer to search for and transmit the foot of the fine acknowledged before justices in eyre into the common pleas. Reg. Orig. 14.

MITTER (L. Fr.). To put, to send, or to pass; as, *mitter avant*, to present to a court; *mitter l'estate*, to pass the estate; *mitter le droit*, to pass a right. 2 Bla. Com. 324; Bacon, Abr. *Release* (C); Co. Litt. 193, 273 b. *Mitter a large*, to put or set at large.

MITTIMUS. In Old English Law. A writ enclosing a record sent to be tried in a county palatine: it derives its name from the Latin word *mittimus*, "we send." It is the jury process of these counties, and commands the proper officer of the county palatine to command the sheriff to summon the jury for the trial of the cause, and to return the record, etc. 1 Mart. La. 278; 2 *id.* 88.

In Criminal Practice. A precept in writing, under the hand and seal of a justice of the peace, or other competent officer, directed to the jailer or keeper of a prison, commanding him to receive and safely keep a person charged with an offence therein named, until he shall be delivered by due course of law. Co. Litt. 590.

MIXED ACTION. See **ACTION**.

MIXED CONTRACT. See **CONTRACT**.

MIXED GOVERNMENT. A government established with some of the powers of a monarchical, aristocratical, and democratical government. See **GOVERNMENT**; **MONARCHY**.

MIXED JURY. A jury composed partly of white men and partly of negroes. See **CIVIL RIGHTS**.

One consisting partly of citizens and partly of aliens. See **MEDIETATE LINGUÆ**; **JURY**.

MIXED LARCENY. Compound larceny, which see.

MIXED MARRIAGE. A marriage between persons of different nationalities or of different races. See **CIVIL RIGHTS**.

MIXED POLICY. See **POLICY**.

MIXED PRESUMPTION. See **PRESUMPTION**.

MIXED PROPERTY. That kind of property which is not altogether real nor personal, but a compound of both. Heirlooms, tombstones, monuments in a church, and title-deeds to an estate, are of this nature. 2 Bla. Com. 428; 3 B. & Ad. 174; 4 Bingh. 106. See **CONFUSION OF GOODS**.

MIXED QUESTION. A question involving matters of law and of fact, or one arising from the conflict of foreign and domestic laws. See **CONFLICT OF LAWS**; **LEX LOCI**; **JURY**.

MIXED TITHES. In Ecclesiastical Law. "Those which arise not immediately from the ground, but from those things which are nourished by the ground;" *e. g.*, colts, chickens, calves, milk, eggs, etc. 3 Burn, Eccl. Law 380; 2 Bla. Com. 24.

MIXED TRIBUNALS. A name given to an international jurisdiction introduced into Egypt in 1878, after negotiations with the various Christian Powers of Europe. This tribunal made the administration of civil justice quite independent of the government of Egypt. They have jurisdiction over cases between persons of different nationalities, whether native or European, but criminal charges against natives are heard in the native criminal courts and those against Europeans in the proper consular courts. There are three mixed courts of First Instance and a Court of Appeal, whose decisions are final, and which sits at Alexandria. The two divisions of the Appeal Court are each composed of five European and three native judges; the Courts of First Instance are each composed of five judges, three European and two native. The judges are subjects of various European states, and of the United States and Brazil. They are appointed by their respective governments; Milner, England in Egypt. Changes in the organization are now being considered by a commission.

These courts were instituted for a period of five years only, and have been renewed at various times. The current period expires in February, 1899. See 8 Encyc. Laws of Eng. 445.

MIXTION. The putting of different goods or chattels together in such a manner that they can no longer be separated; as, putting the wines of two different persons into the same barrel, the grain of several persons into the same bag, and the like.

The intermixture may be occasioned by the wilful act of the party, or owner of one of the articles, by the wilful act of a

stranger, by the negligence of the owner or a stranger, or by accident. See *CONFUSION OF GOODS*.

MOB (Lat. *mobilis*, movable). A tumultuous rout or rabble; a crowd excited to some violent or unlawful act. The word in legal use is practically synonymous with riot, but the latter is the more correct term.

At common law a municipal corporation is not liable for damage to property by a mob; *Beach, Pub. Corp.* § 748; 80 Pa. 397; s. c. 35 Am. Rep. 670; 46 Ala. 118; 25 Md. 107; nor for the failure of its officers to repress a mob; 53 Ala. 527; s. c. 25 Am. Rep. 656; 18 Blatch. 289. The legislature may, however, give a right of action against the corporation for damages caused by a mob, and provide the measure of damages; 9 Kan. 350; 24 Hun 562; 47 Cal. 531; 65 Me. 426. Such a right of action has been provided by statute in Pennsylvania against the county in which the damage was caused.

As all the parties in any way concerned with an unlawful killing by a mob are liable *in solido*, it is proper to join, as a party defendant with the individuals who participated in the killing, the city in which the act was committed, on the ground of its negligence in not preventing the killing; 50 Fed. Rep. 170; and independently of any misconduct on the part of the city or county to which the loss is attributed, a state may constitutionally compel such county or city to indemnify against losses of property from mobs and riots within their limits; 81 Fed. Rep. 317. See *LYNCH LAW*; *RIOT*.

MOBBING AND RIOTING. In *Scotch Law*. A general term, including all those convocations of the lieges for violent and unlawful purposes, which are attended with injury to the persons or property of the lieges, or terror and alarm to the neighborhood in which it takes place. The two phrases are usually placed together; but, nevertheless, they have distinct meanings, and are sometimes used separately in legal language,—the word mobbing being peculiarly applicable to the unlawful assemblage and violence of a number of persons, and that of rioting to the outrageous behavior of a single individual. *Alison, Cr. Law* 509.

MOBILIA. See *MOVABLES*.

MOCK. To deride, to laugh at, to ridicule, to treat with scorn and contempt. 34 Conn. 279.

MODE. The manner in which a thing is done; as the mode of proceeding, the mode of process. *Anderson's L. Dict.*
See, generally, 9 Pet. 360; 10 Wheat. 51; 48 Wis. 385.

MODEL. A machine made on a small scale to show the manner in which it is to be worked or employed.

A copy or imitation of the thing intended to be represented. 25 N. J. L. 602. See *PATENT*.

MODERAMEN INCULPATÆ TUTELÆ. In *Roman Law*. The regulation of justifiable defence. The term expresses that degree of force which a person might lawfully use in defence of his person or property, even though it should occasion the death of the aggressor. *Bell, Dict.*

MODERATA MISERICORDIA. A writ founded on *Magna Charta*, which lies for him who is amerced in a court, not of record, for any transgression beyond the quality or quantity of the offence; it is addressed to the lord of the court, or his bailiff, commanding him to take a moderate amercedment of the parties. *New Nat. Brev.* 167; *Fitzh. Nat. Brev.* 76.

MODERATE CASTIGAVIT. In *Pleading*. The name of a plea in trespass by which the defendant justifies an assault and battery, because he moderately corrected the plaintiff, whom he had a right to correct. 2 Chitty, Pl. 576; 2 B. & P. 224. See *CORRECTION*; *ASSAULT*; 15 Mass. 347; 2 Phill. Ev. 147; *Bacon, Abr. Assault* (C).

This plea ought to disclose, in general terms, the cause which rendered the correction expedient; 8 Salk. 47.

MODERATE SPEED. The moderate speed of a steam vessel is such as will permit the steamer reasonably and effectually to avoid a collision by slackening speed, or by stopping and reversing within the distance at which an approaching vessel can be seen. 35 Fed. Rep. 609; 39 *id.* 430. Five knots is a moderate speed for a sailing vessel; 46 L. T. N. S. 840.

What is a "moderate speed" for a vessel depends not upon the speed of the vessel herself, but upon the position she is in, whether in a crowded channel or on the open sea. *Anderson*.

MODERATOR. A person appointed to preside at a popular meeting; sometimes he is called a chairman. The presiding officer of town meetings in New England is so called.

MODIATIO. A certain duty paid for every tierce of wine. *Mon. Angl. t. ii.* 144.

"MODIFY, SUSPEND, CANCEL, OR REQUISITION." The power "to modify, suspend, cancel, or requisition," any contract, etc., extends to the cancellation of the Government's own contracts. 261 U. S. 515.

MODIUS. A measure, usually a bushel.

MODUS ET FORMA (Lat. in manner and form). In *Pleading*. Technical words used to put in issue such concomitants of the principal matters as time, place, etc., where these circumstances were material. Their use when these circumstances were immaterial was purely formal. The words were translated literally, when pleadings began to be made in English, by "in manner and form." See *Lawes, Pl.* 120; *Gould, Pl. c. 6*, § 22; *Steph. Pl.* 213; *Dane, Abr. Index*; *Viner, Abr. Modo et Forma*.

MODUS. In *Civil Law*. Manner; means; way. *Ainsworth, Lat. Dict.* A rhythmic song. *Du Cange*.

In *Old Conveyancing*. *Manner: e. g.*, the manner in which an estate should be held, etc. A qualification, whether in restriction or enlargement of the terms of the instrument; especially with relation to the kind of grant called "*donatio*,"—the making those *quasi* heirs who were not in fact heirs according to the ordinary form of such conveyances. And this *modus* or qualification of the ordinary form became so common as to give rise to the maxim "*modus et conventio vincunt legem*." *Co. Litt.* 19 a; *Bracton*, 17 b; 1 *Reeve, Hist. Eng. Law* 293. A consideration. *Bracton*, 17, 18.

In *Ecclesiastical Law*. A peculiar manner of tithing, growing out of custom. See *MODUS DECIMANDI*.

MODUS DECIMANDI. In *Ecclesiastical Law*. A peculiar manner of tithing, arising from immemorial usage, and differing from the payment of one-tenth of the annual increase.

To be a good *modus*, the custom must be—*first*, certain and invariable; *second*, beneficial to the person; *third*, a custom to pay something different from the thing compounded for; *fourth*, of the same species; *fifth*, the thing substituted must be in its nature as durable as the tithes themselves; *sixth*, it must not be too large: that would be a *rank modus*. 2 Bla. Com. 30. See 2 & 3 Will. IV. c. 100; 13 M. & W. 622.

MODUS DE NON DECIMANDO. In *Ecclesiastical Law*. A custom or prescription not to pay tithes, which is not good, except in case of abbey-lands. 2 Sharsw. Bla. Com. 31, n.

MODUS LEVANDI FINES. See *FINE*.

MOERDA. The secret killing of another; murder. 4 Bla. Com. 194.

MOHAMMEDAN LAW. A system of native law prevailing among the Mohammedans in India, and administered there by the British government. See *HINDU LAW*.

MOHATRA. In *French Law*. The name of a fraudulent contract made to cover a usurious loan of money.

It takes place when an individual sells merchandise on credit at a high price and afterward buys it back at a much less price for cash. 16 *Toullier*, n. 44; 1 *Bouvier, Inst.* n. 1118.

MOIETY. The half of anything; as, if a testator bequeath one moiety of his estate to A, and the other to B, each shall take an equal part. Joint tenants are said to hold by moieties. *Littleton* 125; 3 C. B. 274, 283.

MOLESTATION. In *Scotch Law*. The name of an action competent to the proprietor of a landed estate against those who disturb his possession. It is chiefly used in questions of commonfy, or of converted marches. *Erskine, Inst.* 4. 1. 48. See, generally, 12 Q. B. D. 539; 14 *id.* 792.

MOLTURA. Toll paid for grinding at a mill; multure. Not used.

MOLLITER MANUS IMPOSUIT (Lat.). He laid his hands on gently.

In *Pleading*. A plea in justification of a trespass to the person. It is a good plea when supported by the evidence; 12 *Viner, Abr.* 182; *Hamm. N. P.* 149; where an amount of violence proportioned to the circumstances; 20 *Johns.* 427; 4 *Den.* 443; 2 *Strobb.* 232; 17 *Ohio* 454; has been done to the person of another in defence of property; 3 *Cush.* 154; 3 *Ohio St.* 159; 9 *Barb.* 652; 23 *Pa.* 424; see 19 *N. H.* 562; 25 *Ala.* n. s. 41; 4 *Cush.* 597; or the prevention of crime: 2 *Chitty, Pl.* 574; *Bac. Abr. Assault and Battery* (C. 8).

MOLMUTIAN LAWS. The laws of Dunvallo Molmutius, sixteenth king of the Britons, who began his reign about 400 B. C. These laws were famous in the land till the conquest; *Towl.*; *Moz.* & *W.*

MONARCHY. That government which is ruled, really or theoretically, by one man, who is wholly set apart from all other members of the state.

According to the etymology of the word, monarchy is that government in which one person rules supreme—alone. In modern times the terms autocracy, autocrat, have come into use to indicate that monarchy of which the ruler desires to be exclusively considered the source of all power and authority. The Russian emperor styles himself Autocrat of all the Russias. Autocrat is the same with despot; but the latter term has fallen somewhat into disrepute. Monarchy is contradistinguished from republic. Although the etymology of the term monarchy is simple and clear, it is by no means easy to give a definition either of monarchy or of republic. The constitution of the United States guarantees a republican government to every state. What is a republic? In this case the meaning of the term must be gathered from the republics which existed at the time of the formation of our government, and which were habitually called republics. Lieber, in a paper on the question, "Shall Utah be admitted into the Union?" (*Putnam's Magazine*), declared that the Mormons did not form a republic.

The fact that one man stands at the head of a government does not make it a monarchy. We have a president at the head. Nor is it necessary that the one person have an unlimited amount of power, to make a government a monarchy. The power of the king of England is limited by law and theory, and reduced to a small amount in reality; yet England is called a monarchy. Nor does hereditaryness furnish us with a distinction. The pope is elected by the cardinals, yet the States of the Church were a monarchy; and the stadtholder of several states of the Netherlands was hereditary, yet the states were republics. We cannot find any better definition of monarchy than

this: a monarchy is that government which is ruled (really or theoretically) by one man, who is wholly set apart from all other members of the state (called his subjects); while we call republic that government in which not only there exists an organism by which the opinion of the people, or of a portion of the people (as in aristocracies), passes over into public will, that is, law, but in which also the supreme power, or the executive power, returns, either periodically or at stated times (where the chief magistracy is for life), to the people, or a portion of the people, to be given anew to another person; or else, that government in which the hereditary portion (if there be any) is not the chief and leading portion of the government, as was the case in the Netherlands.

Monarchy is the prevailing type of government. Whether it will remain so with our Caucasian race is a question not to be discussed in a law dictionary. The two types of monarchy as it exists in Europe are the limited or constitutional monarchy, developed in England, and centralized monarchy—to which was added the modern French type, which consisted in the adoption of Rousseau's idea of sovereignty, and applying it to a transfer of all the sovereign power of the people to one Caesar, who thus became an unqualified and unmitigated autocrat or despot. It was a relapse into coarse absolutism.

Paley has endeavored to point out the advantages and disadvantages of the different classes of government—not successfully, we think. The great advantages of the monarchical element in a free government are: first, that there remains a stable and firm point in the unavoidable party struggle; and secondly, that supreme power, and it may be said the whole government, being represented by or symbolized in one living person authority, respect, and, with regard to public money, even public morality, stand a better chance to be preserved.

The great disadvantages of a monarchy are that the personal interests or inclinations of the monarch or his house (of the dynasty) are substituted for the public interest; that to the chance of birth is left what with rational beings certainly ought to be the result of reason and wisdom; and that loyalty to the ruler comes easily to be substituted for real patriotism, and frequently passes over into undignified and pernicious man-worship. Monarchy is assuredly the best government for many nations at the present period, and the only government under which in this period they can obtain security and liberty; yet, unless we believe in a pre-existing divine right of the monarch, monarchy can never be anything but a substitute—acceptable, wise, even desirable, as the case may be—for something more dignified, which, unfortunately, the passions or derelictions of men prevent. The advantages and disadvantages of republics may be said to be the reverse of what has been stated regarding monarchy. A frequent mistake in modern times is this: that a state simply for the time without a king—a kingless government—is called a republic. But a monarchy does not change into a republic simply by expelling the king or the dynasty; as was seen in France in 1848. Few governments are less acceptable than an elective monarchy; for it has the disadvantages of the monarchy without its advantages, and the disadvantages of a republic without its advantages. See GOVERNMENT; ABSOLUTISM.

MONASTERIUM. A monastery; a church. Spel. Gloss.

MONASTICON. A book giving an account of monasteries, convents, and religious houses.

MONETAGIUM. An ancient tribute paid by tenants to their lord every third year, in consideration of the lord's not changing the money he had coined.

Mintage, or the right of coining money. Cowel.

MONETARY UNION. See LATIN MONETARY UNION.

MONEY. Gold and silver coins. The common medium of exchange in a civilized nation.

There is some difference of opinion as to the etymology of the word money; and writers do not agree as to its precise meaning. Some writers define it to be the common medium of exchange among civilized nations; but in the United States constitution there is a provision which has been supposed to make it synonymous with coins: "The congress shall have power to coin money." Art. 1, sect. 8. Again: "No state shall coin money, or make anything but gold and silver a legal tender in payment of debt." Art. 1, sect. 10. Hence the money of the United States consists of gold and silver coins. And so well has the congress of the United States maintained this point, that the copper coins heretofore struck, and the nickel cent of recent issues, although authorized to "pass current," are not money in an exact sense, because they are not made a legal tender beyond twenty-five cents. The question has been made whether a paper currency can be constitutionally authorized by congress and constituted a legal tender in the payment of private debts. Such a power has been exercised and adjudged valid by the highest tribunal of several of the states, as well as by congress in the legal-tender acts of 1862 and 1863. See LEGAL TENDER; 1 Am. L. Reg. n. s. 558; 11 *id.* 618; 12 *id.* 601; 47 Wisc. 651.

For many purposes, bank-notes; 1 Y. & J. 380; 3 Mass. 405; 4 Pick. 74; 2 N. H. 383; 20 Wisc. 217; 47 *id.* 557; 7 Cow. 662; Brayt. 24; 71 Ala. 554; 34 Mich. 490; treasury notes and national bank notes; 66 Miss. 298; greenbacks; 27 Fla. 196; a check; 4 Bingh. 179; negotiable notes; 3 Mass. 405; securities; 41 Ill. App. 579; and bonds; 19 C. C. R. 516; will be considered as money. But, ordinarily, standing alone, it means only that which passes current as money, including bank deposits; but in a bequest of money it has been held to include personal property; 65 Hun 159; see 92 N. Y. 234; 34 Ohio St. 352. But a charge that the defendant set up and kept a faro bank, at which money was bet, etc., is not sustained by proof that bank-notes were bet, etc.; 2 Dana 298; see 2 H. & G. 407; or where there is an indictment for the larceny of lawful money of the United States, evidence of the larceny of national bank notes, does not warrant a conviction; 60 Ind. 193. To support a count for money had and received, the receipt by the defendant of bank-notes, promissory notes; 9 Pick. 93; 14 Me. 285; 7 Johns. 132; credit in account in the books of a third person; 3 Campb. 199; or any chattel, is sufficient; 4 Pick. 71; 17 Mass. 560; and will be treated as money. See 7 Wend. 311; 7 S. & R. 246; 3 B. & P. 559; 1 Y. & J. 380; 30 Tex. App. 475; 5 Lea 96. The mutilation of coins is forbidden by law. U. S. R. S. 2 Supp. 579. See LATIN UNION; GOLD; SILVER; COIN. FOREIGN MONEY.

MONEY OF ADIERO. In French Law. Earnest money. See EARNEST.

MONEY BILLS. Bills or projects of laws providing for raising revenue, and for making grants or appropriations of the public money.

A bill for granting supplies to the crown. Such bills commence in the House of Commons and are rarely attempted to be materially altered in the Lords; May, Parl. L. ch. 22.

The first clause of the seventh section of the constitution of the United States declares, "All bills for raising revenues shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills." See Story, Const. §§ 874-877; 58 Ala. 546; 126 Mass. 601; Cooley, Const. Lim., 4th ed. 160.

What bills are properly "bills for raising revenue," in the sense of the constitution, has been matter of some discussion. Tuck. Bla. Com. App. 261; Story, Const. § 880. In practice, the power has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which

may incidentally create revenue; Story, Const. § 880; 2 Elliott, Deb. 263.

And a privilege conferred by a state constitution, to originate "money bills," has been held to be limited to such as transfer money from the people to the state, and not to include such as appropriate money from the state treasury; 126 Mass. 557. See REVENUE.

MONEY BROKER. A money changer; one who lends to or raises money for others.

MONEY CLAIMS. In English Practice. Under the Judicature Act of 1875, claims for the price of goods sold, for money lent, for arrears of rent, etc., and other claims where money is directly payable on a contract express or implied, as opposed to the cases where money is claimed by way of damages for some independent wrong, whether by breach of contract or otherwise. These "money claims" correspond very nearly to the "money counts" hitherto in use. Moz. & W. 410.

MONEY COUNTS. In Pleading. The common counts in an action of assumpsit.

They are so called because they are founded on express or implied promises to pay money in consideration of a precedent debt. They are of four descriptions; the *indebitatus assumpsit*; the *quantum meruit*; the *quantum valebat*; and the account stated. See these titles.

Although the plaintiff cannot resort to an implied promise when there is a general contract, yet he may, in many cases, recover on the common counts notwithstanding there was a special agreement, provided it has been executed; 12 East 1; 7 Cra. 299; 5 Mass. 391; 7 Johns. 132; 10 *id.* 136. It is, therefore, advisable to insert the money counts in an action of assumpsit, when suing on a special contract; 1 Chitty, Pl. 333.

MONEY DEMAND. A claim for a fixed amount of money, contrasting with damages.

Money demand on contract includes the right of action upon an undertaking in the nature of a replevin bail, to return a chattel in controversy, if such return should be adjudged, pay costs, etc. Abbott; 8 Ind. 339. It includes an action for a breach of the obligations contained in articles of apprenticeship. *Id.*; 5 Ind. 538.

See ACTION FOR MONEY; CURRENT MONEY.

MONETARIUM. See MONIERS.

MONEY HAD AND RECEIVED. In Pleading. The technical designation of a form of declaration in assumpsit, wherein the plaintiff declares that the defendant had and received certain money, etc.

An action of assumpsit will lie to recover money to which the plaintiff is entitled, and which in justice and equity, when no rule of policy or strict law prevents it, the defendant ought to refund to the plaintiff, and which he cannot with a good conscience retain, on a count for money had and received; 6 S. & R. 369; 3 J. J. Marsh. 175; 1 Harr. N. J. 447; 1 Harr. & G. 258; 7 Mass. 288; 6 Wend. 290; Add. Contr., 9th ed. 429; see 120 N. Y. 536; 109 *id.* 363; 68 Hun 627; 45 Ill. App. 276.

When the money has been received by the defendant in consequence of some tortious act to the plaintiff's property, as when he cut down the plaintiff's timber and sold it, the plaintiff may waive the tort and sue in assumpsit for money had and received; 1 Dall. 122; 1 Blackf. 181; 4 Pick. 452; 1 J. J. Marsh. 543; 3 Watts 277; 4 Call 451.

In general, the action for money had and received lies only where money has been received by the defendant; 14 S. & R. 179; 1 Pick. 204; 1 J. J. Marsh. 544; 11 Johns. 464; 77 N. Y. 400. But bank-notes or any other property received as money will be considered for this purpose as money; 3 Mass. 405; 17 *id.* 560; Brayt. 24; 7 Cow. 622; 4 Pick. 74. See 9 S. & R. 11. Money paid under an illegal contract which has been partially carried into effect cannot be recovered

back; L. R. 24 Q. B. Div. 742.

No privity of contract between the parties is required in order to support this action, except that which results from the fact of one man's having the money of another which he cannot conscientiously retain; 17 Mass. 593, 579. See 2 Dall. 54; 5 Conn. 71; 127 Mass. 23. See QUASI CONTRACTS.

MONEY IN HAND. There is no real difference between "money in hand" and "ready money." 12 L. J. Ch. 387.

Money which is subject to one's control. English.

MONEY JUDGMENT. One which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred.

MONEY LAND. A phrase sometimes applied to money held upon trust to be laid out in the purchase of land. See CONVERSION.

MONEY LENDERS ACTS. English Acts of 1900 and 1911, the former providing that every money lender must be registered and carry on business in one name only and only at his registered address or addresses; that he cannot send circulars to infants (*q. v.*); and that the courts may reopen transactions between him and his clients. The act of 1911 protects *bona fide* holders without notice of securities taken by money lenders. Byrne.

MONEY LENT. In Pleading. The technical name of a declaration in an action of assumpsit for that the defendant promised to pay the plaintiff for money lent.

To recover, the plaintiff must prove that the defendant received his money, but it is not indispensable that it should be originally lent. If, for example, money has been advanced upon a special contract, which has been abandoned and rescinded, and which cannot be enforced, the law raises an implied promise from the person who holds the money to pay it back as money lent; 7 Bingh. 266; 8 M. & W. 434; 9 *id.* 29. See 1 N. Chipm. 214; 3 J. J. Marsh. 377.

MONEY-ORDER. The act of June 8, 1872, c. 335, provided for the establishment of a uniform money-order system, at all suitable post-offices, which shall be called "money-order" offices. The applicant, upon depositing a sum, at one post-office, receives a certificate for that amount, which he mails to the payee, who can then obtain the money at the office designated in the order, upon presenting the latter and mentioning the name of his correspondent. The system is now established with several foreign countries, as well as at home, and is found very convenient for the transmission of small sums; R. S. §§ 4027-4048. Suppl. to R. S. p. 156. Under the law of March 3, 1883, it was provided that money-orders should not be issued for a larger sum than a hundred dollars; 1 Supp. R. S. p. 406; 2 *id.* 166.

MONEY PAID. In Pleading. The technical name of a declaration in assumpsit, in which the plaintiff declares for money paid for the use of the defendant.

When one advances money for the benefit of another with his consent, or at his express request, although he be not benefited by the transaction, the creditor may recover the money in an action of assumpsit declaring for money paid for the defendant; 5 S. & R. 9. But one cannot by a voluntary payment of another's debt make himself creditor of that other; 1 Const. S. C. 472; 1 Gill & J. 497; 3 Johns. 434; 14 *id.* 87; 2 Root 84; 2 Stew. Ala. 500; 4 N. H. 138; 1 South. 150; 121 Pa. 641. In order to enable one who has paid money to the use of another, to maintain an action for money paid, two things are essential: a legal liability on the part of the defendant to pay the original demand, and his antecedent request, or subsequent promise to pay; 86 Ala. 203.

Assumpsit for money paid will not lie where property, not money, has been given or received; 7 S. & R. 246; 14 *id.* 179; 7

J. J. Marsh. 18. But see 7 Cow. 662. Nor will an action lie to recover back money paid voluntarily with a full knowledge of the facts and circumstances; 12 Colo. 208; 69 Tex. 267.

But where money has been paid to the defendant either for a just, legal, or equitable claim, although it could not have been enforced at law, it cannot be recovered as money paid. See MONEY HAD AND RECEIVED.

The form of declaring is for "money paid by the plaintiff for the use of the defendant and at his request"; 1 M. & W. 511.

MONEYED CAPITAL. In a statute with reference to taxation of national bank stock, it is held to mean money employed in a business whose object is to make profit by investing in securities by way of loan, discount or otherwise, which from time to time are reduced again to money and reinvested. 59 Fed. Rep. 952.

Words include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are again reduced to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. *Id.*, citing 121 U. S. 138.

The term has a more limited meaning than the term personal property, and applies to such capital as is readily solvable in money; 28 Fed. Rep. 777. In the provision of Rev. Stats., § 5219 respecting state taxation of shares of national banks, that it "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," the words "moneyed capital in the hands of individual citizens" include bonds, notes and other evidences of indebtedness in the hands of individuals, which are shown to come materially into competition with the national banks in the loan market. 256 U. S. 336.

Distinguished from Personal Property. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. There may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. *Id.*, citing 105 U. S. 324.

MONEYED CORPORATION. A corporation having the power to make loans upon pledges or deposits, or authorized by law to make insurance. 2 N. Y. Rev. Stat., 7th ed. 1871; 3 N. Y. 479; 48 Barb. 464; 6 Paige 497.

MONIERS. Ministers of the mint; also bankers. Cowel.

MONITION. In Practice. A process in the nature of a summons, which is used in the civil law, and in those courts which derive their practice from the civil law. In the English ecclesiastical courts it is used as a *warning* to a defendant not to repeat an offence of which he had been convicted. See Bened. Adm.; 76 Mo. 470.

A general *monition* is a citation or summons to all persons interested, or, as is commonly said, to the whole world, to appear and show cause why the libel filed in the case should not be sustained, and the prayer of relief granted. This is adopted in prize cases, admiralty suits for forfeitures, and other suits *in rem*, when no particular individuals are summoned to an-

swer. In such cases the taking possession of the property libelled, and this general citation or monition served according to law, are considered constructive notice to the world of the pendency of the suit; and the judgment rendered thereupon is conclusive upon the title of the property which may be affected. In form, the monition is substantially a warrant of the court, in an admiralty cause, directed to the marshal or his deputy, commanding him, in the name of the president of the United States, to give public notice, by advertisements in such newspapers as the court may select, and by notifications to be posted in public places, that a libel has been filed in a certain admiralty cause pending, and of the time and place appointed for the trial. A brief statement of the allegations in the libel is usually contained in the monition. The monition is served in the manner directed in the warrant.

A *mixed monition* is one which contains directions for a general monition to all persons interested, and a special summons to particular persons named in the warrant. This is served by newspaper advertisements, by notifications posted in public places, and by delivery of a copy attested by the officer to each person specially named, or by leaving it at his usual place of residence.

A *special monition* is a similar warrant, directed to the marshal or his deputy, requiring him to give special notice to certain persons, named in the warrant, of the pendency of the suit, the grounds of it, and the time and place of trial. It is served by delivery of a copy of the warrant, attested by the officer, to each one of the adverse parties, or by leaving the same at his usual place of residence; but the service should be personal, if possible. Clerke, Prax. tit. 21; Dunlap, Adm. Pr. 135. See Conkl. Adm.; Pars. Marit. Law.

MONITORY LETTER. In Ecclesiastical Law. The process of an official, a bishop, or other prelate having jurisdiction, issued to compel, by ecclesiastical censures, those who know of a crime, or other matter which requires to be explained, to come and reveal it. Merlin, Répert.

MONOCRACY. A government by one person only.

MONOCRAT. A monarch who governs alone; an absolute governor.

MONOGAMY. The state of having only one husband or one wife at a time.

A marriage contracted between one man and one woman, in exclusion of all the rest of mankind. The term is used in opposition to bigamy and polygamy. Wolff, *Dr. de la Nat.* § 857.

MONOGRAM. A character or cipher composed of one or more letters interwoven, being an abbreviation of a name.

A signature made by a monogram would perhaps be binding provided it could be proved to have been made and intended as a signature; 1 Denio 471.

There seems to be no reason why such a signature should not be as binding as one which is altogether illegible.

MONOMANIA. In Medical Jurisprudence. Insanity only upon a particular subject, and with a single delusion of the mind.

A perversion of the understanding in regard to a single object, or a small number of objects, with the predominance of mental excitement. 2 Misc. Rep. 333.

See DELUSION; INSANITY; MANIA; and other titles there referred to.

MONOPLEGIA. See PARALYSIS.

MONOPOLIUM. The sole power, right, or privilege of sale; monopoly; a monopoly. Calvin.

MONOPOLY. In Commercial Law. The abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise, to the detriment of

the public.

Any combination among merchants to raise the price of merchandise to the injury of the public.

An institution or allowance by a grant from the sovereign power of a state, by commission, letters-patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given. *Bacon, Abr.; Co. 3d Inst.* 181. Whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade; 111 U. S. 754; 11 So. Rep. (La.) 239; 58 Fed. Rep. 452. Monopolies were, by stat. 21 Jac. I. c. 3, declared illegal and void, subject to certain specified exceptions, such as patents in favor of the authors of new inventions; 4 Bla. Com. 159; 2 Steph. Com. 25. See *passim* *For. Cas.* and *Op.* 421; *Curtis, Robinson, Merwin, Walker*; *Patents*.

A patent for a useful invention, under the United States laws, is not, in the old sense of the common law, a monopoly.

The constitutions of Maryland, North Carolina, and Tennessee declare that "monopolies are contrary to the genius of a free government, and ought not to be allowed."

The act of congress (26 St. L. 209) declaring illegal "every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations," applies to combinations of laborers as well as of capitalists; 54 Fed. Rep. 994. To constitute the offence of monopolizing or attempting to monopolize under the above act of July 2, 1890, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein; 52 Fed. Rep. 104.

See COPYRIGHT; PATENT; TRUST; RESTRAINT OF TRADE; HOLDING CORPORATION

MONROE DOCTRINE. A rule or principle of conduct by which any attempt on the part of any European power to extend its system of government to any part of the Western Hemisphere will be regarded as an act of unfriendliness to the United States.

The doctrine originated in 1823 when the European powers seemed inclined to assist Spain to regain the colonies she had lost in America, and was first stated by President Monroe in his message of December 2d of that year as follows:

"We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States."

Monroe, it seems, had no thought of the important effect his words would have. He was expressing, however, not his own personal opinion, but a principle which the logic of events and the thought of others had been long evolving. See *President Gilman's Life of Monroe*. The doctrine is now regarded as the settled policy of the United States. It has been evoked on several occasions, notably by President Lincoln in the civil war when the Emperor of France attempted to establish Maximilian in Mexico, and by President Cleveland in the boundary dispute between Venezuela and Great Britain. See *The Nicaragua Question*, by Prof. L. M. Keasbey; Redd-

away, *The Monroe Doctrine*. See *Whart. Dig. Int. L.*

MONSTER. An animal which has a conformation contrary to the order of nature. 2 *Dungl. Hum. Phys.* 432.

It is said that a monster, although born of a woman in lawful wedlock, cannot inherit. Those who have, however, the essential parts of the human form, and have merely some defect of conformation, are capable of inheriting, if otherwise qualified; 2 *Bla. Com.* 246; 1 *Beck, Med. Jur.* 366; *Co. Litt.* 7, 8; *Dig.* 1. 5. 14; 1 *Swift, Syst.* 331; *Fred. Code*, pt. 1, b. 1, t. 4, § 4.

No living human birth, however much it may differ from human shape, can be lawfully destroyed. *Trail, Med. Jur.* 47. See *Briand, Méd. Lég.* pt. 1, c. 6, art. 2, § 3; 1 *Foderé, Méd. Lég.* § 402.

MONSTRANS DE DROIT (Fr. showing of right). A common-law process by which restitution of personal or real property is obtained from the crown by a subject. *Chitty, Prerog. of Cr.* 345; 3 *Bla. Com.* 256. By this process, when the facts of the title of the crown are already on record, the facts on which the plaintiff relies, not inconsistent with such record, are shown, and judgment of the court prayed thereon. The judgment, if against the crown, is that of *ouster le main*, which vests possession in the subject without execution. *Bac. Abr. Prerogative (E)*; 1 *And.* 181; 5 *Leigh* 512; 12 *Gratt.* 564.

Monstrans de droit was preferred either on the common-law side of the court of chancery, or in the exchequer, and will not come before the corresponding divisions in the high court of justice. (*Jud. Act*, 1873, s. 34.)

MONSTRANS DE FAIT (Fr. showing of a deed). A profert. *Bac. Abr. Pleas*.

MONSTRAVERUNT, WRIT OF. In English Law. A writ which lies for the tenants of an ancient demesne who hold by free charter, and not for those tenants who hold by copy of court-roll, or by the rod, according to the custom of the manor. *Fitzh. N. B.* 81.

MONTANA. One of the states of the United States.

Congress, by an act approved May 26, 1864 (R. S. § 1903), created the territory and defined its boundaries, providing also that the United States might divide the territory or change its boundaries in such manner as may be deemed expedient; and further, that the rights of person and property pertaining to the Indians in the territory shall not without their consent be included within the territorial limits of jurisdiction.

By act of congress approved March 1, 1872, a tract of land in the territories of Montana and Wyoming, lying near the headwaters of the Yellowstone River, is reserved and withdrawn from settlement under the laws of the United States and dedicated and set apart as a public park for the benefit and enjoyment of the people. R. S. § 2474; and by act of April 15, 1874, a tract of land at the northern boundary is set apart as a reservation for the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may, from time to time, see fit to locate therein. 16 *Stat.* at L. 28.

The act providing for the admission of Montana into the Union as one of the states was passed February 22, 1889, and the proclamation announcing its admission was on November 8, 1889.

The constitution was adopted August 17, 1889, and ratified by the people October 1, 1889.

Montes Pietatis, Monts de Piété. Institutions established by public authority for lending money upon pledge of goods.

In these establishments a fund is provided, with suitable warehouses and all necessary accommodations. They are managed by directors. When the money for which goods are pledged is not returned in proper time, the goods are sold to reimburse the institutions. They are found principally on the continent of Europe. With us, private persons, called pawnbrokers, perform this office. See *Bell, Inst.* 5. 2. 2. A late statute in New York authorizes public pawnshops like those on the continent of Europe.

MONTENEGRO. A principality of Europe. The government is absolute and

is vested in a prince. It has a state council of eight members, half of them nominated by the prince and half elected. There are district courts in the chief towns. The supreme court has jurisdiction, appellate and concurrent, over the principality. There is a final appeal to the prince.

MONTH. A space of time variously computed, as the term is applied to astronomical, civil or solar, or lunar months.

The astronomical month contains one-twelfth part of the time employed by the sun in going through the zodiac. In law, when a month simply is mentioned, it is never understood to mean an astronomical month.

The civil or solar month is that which agrees with the Gregorian calendar; and these months are known by the names of January, February, March, etc. They are composed of unequal portions of time. There are seven of thirty-one days each, four of thirty, and one which is sometimes composed of twenty-eight days, and in leap-years, of twenty-nine.

The lunar month consists of twenty-eight days.

The Roman names of the months, as settled by Augustus, have been used in all Christian countries except Holland, where a set of characteristic names prevail, the remains of the ancient Gaulish title, which were also used by our Anglo-Saxon ancestors. The French convention, in October, 1793, adopted a set of names similar to that of Holland.

By the law of England, a month means ordinarily, in common contracts, as in leases, a lunar month. A contract, therefore, made for a lease of land for twelve months would mean a lease for forty-eight weeks only; 2 *Bla. Com.* 141; 6 *Co.* 62; 1 *Maule & S.* 111. A distinction has been made between "twelve months" and a "twelve-month;" the latter has been held to mean a year; 6 *Co.* 61. In a contract for the hire of furniture at a weekly rental for so many months, "months" was held to mean lunar month; 45 *L. T. Rep.* N. s. 343.

But in mercantile contracts a month simply signifies a calendar month; 2 *Wall.* 190; 3 *Dall.* 402; 3 *Cra. C. C.* 218; 19 *Pick.* 532; 28 *N. Y.* 444; a promissory note to pay money in twelve months would, therefore, mean a promise to pay in one year, or twelve calendar months; 3 *B. & B.* 187; 1 *M. & S.* 111; 2 *C. & K.* 9; *Story, Bills*, §§ 143, 330; 19 *Pick.* 332; 6 *W. & S.* 179; 1 *Johns. Cas.* 99; 1 *Q. B.* 250; *Benj. Sales* § 684.

In general, when a statute speaks of a month, without adding "calendar," or other words showing a clear intention, it shall be intended a lunar month; *Com. Dig. Anno (B)*; 15 *Johns.* 358; *Dud. Cas.* 107. See 2 *Cow.* 518, 605. But it is now otherwise in England by 13 *Vic. c.* 21, § 4. And by the Judicature Act of 1875, Ord. lviii. r. 1, it is provided that month shall mean calendar month when not otherwise expressed. In all legal proceedings, as in commitments, pleadings, etc., a month means four weeks; 3 *Burr.* 1455; 1 *W. Bla.* 540; *Dougl.* 446, 463; 12 *Pa. Co. Ct. R.* 543; 3 *Johns. Ch.* 74.

In Pennsylvania, Massachusetts, Nebraska, Florida, and Maryland, and perhaps some other states, a month mentioned generally in a statute has been construed to mean a calendar month; 2 *Dall.* 302; 4 *id.* 143; 4 *Mass.* 461; 4 *Bibb* 105; 34 *Neb.* 376; 27 *Fla.* 215; 74 *Md.* 86; 139 *U. S.* 137. In England in the ecclesiastical law, months are computed by the calendar; 3 *Burr.* 1455; 1 *M. & S.* 111; thirty days is not a month; 72 *N. C.* 146.

In New York, it is enacted that whenever the term "month" or "months" is or shall be used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar, and not a lunar, month, unless otherwise expressed. *Rev. Stat.* pt. 2, c. 19, tit. 1, § 4; 28 *N. Y.* 444. But this has been modified as to computation of inter-

est, so that a month shall be considered the twelfth part of a year, and as consisting of thirty days, and interest for any number of days less than a month shall be estimated by the proportion which such number of days bears to thirty; R. S. pt. 3, p. 2254, § 9.

See, generally, 2 A. K. Marsh. 245; 3 Johns. Ch. 74; 4 Dall. 143; 4 Mass. 461; 31 Cal. 173; 2 Harr. Del. 548; 72 N. C. 146; 29 N. H. 385; 12 Lawy. Rep. Ann. 770.

MONUMENT. A thing intended to transmit to posterity the memory of some one. A tomb where a dead body has been deposited.

In this sense it differs from a cenotaph, which is an empty tomb. Dig. 11. 7. 2. 9; 11. 7. 2. 4. Coke says that the erecting of monuments in church, chancel, common chapel, or churchyard in convenient manner is lawful; for it is the last work of charity that can be done for the deceased, who whilst he lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection.

The defacing of monuments is punishable by the common law; Year B. 9 Edw. IV. c. 14; and trespass may be maintained; 10 F. Moore 494; 1 Cons. S. C. 172; L. R. 3 A. & E. 113; 3 Bingh. 186. An heir may bring an action against one that injures the monument of his ancestor; Co. 3d Inst. 202; Gibb. 483. A gift for the perpetual repair of a tomb, if in a church, will be sustained; [1891] 3 Ch. 252; but see L. R. 4 Eq. 521; CHARITABLE USES. Although the fee of church or churchyard be in another, yet he cannot deface monuments; Co. 3d Inst. 202. The fabric of a church is not to be injured or deformed by the caprice of individuals; 1 Cons. S. C. 145; and a monument may be taken down if placed inconveniently; 1 Lee, Eccl. 640. A monument containing an improper inscription can be removed; 1 Curt. Eccl. 880.

As to inscriptions on monuments and their value as evidence, see INSCRIPTION.

MONUMENTS. Permanent landmarks established for the purpose of indicating boundaries.

Monuments may be either natural or artificial objects: as, rivers, known streams, springs, or marked trees; 6 Wheat. 582; 6 Pet. 498; 1 Pet. C. C. 64; 3 Ohio 284; 5 N. H. 524; 3 Dev. 75; 125 Ind. 226. Even posts set up at the corners; 5 Ohio 534; and a clearing; 7 Cow. 723; are considered as monuments. But see 3 Dev. 75.

When monuments are established, they must govern, although neither courses nor distances nor computed contents correspond; 1 Cow. 605; 3 Pick. 401; 2 Harr. & J. 260; 5 id. 163, 255; 5 Ohio 534; 4 Hen. & M. 125; 1 Call 429; 11 Me. 825; 1 Hayw. 22; 3 Murph. 88; 4 T. B. Monr. 32; 5 J. J. Marsh. 578; 6 Wheat. 582; 4 Wash. C. C. 15; 72 Me. 90; 33 Fla. 261; 147 Ill. 76; 117 Mo. 438; 92 Cal. 623; 49 Minn. 268; 106 Mo. 281; 48 N. J. Eq. 170; 1 Washb. R. P. 406.

A monument established by the government surveyors as the true corner of sections will control courses and distances; 91 Mich. 29; 145 Ill. 98. See 79 Cal. 540; BOUNDARY.

In Mexican grants, while monuments control courses and distances, and courses and distances control quantity, where there is uncertainty in specific description, the quantity named may be of decisive weight and necessarily is so if the intention to convey only so much and no more is plain; 161 U. S. 208; 171 id. 220.

See METES AND BOUNDS.

MOOE. An officer in the Isle of Man similar to the English bailiff.

MOOKTAR. In Hindu Law. An agent or attorney.

MOONSHINE WHISKY. Moonshine whisky of sufficient strength to be intoxicating is "privately manufactured distilled liquor." Thorpe, National and State Prohibition, 156; 184 Wis. 664.

MOORAGE. A sum due for fastening ships to a tree or post at the shore or to a wharf. 3 Bland 373.

MOORING. In Maritime Law. The securing of a vessel by a hawser or chain, or otherwise, to the shore, or to the bottom by a cable and anchor. The being "moored in safety," under a policy of insurance, is being moored in port, or at the usual place for landing and taking in cargo free from any immediate impending peril insured against; 1 Phil. Ins. 968; 3 Johns. 88; 2

Stra. 1243; 5 Mart. La. 637; 6 Mass. 313; Code de Comm. 152.

MOOT (from Saxon *gemot*, meeting together. Anc. Laws and Inst. of England). See FOLC GEMOTE; WITENAGEMOTE.

In English Law. A term used in the inns of court, signifying the exercise of arguing imaginary cases, which young barristers and students used to perform at certain times, the better to be enabled by this practice to defend their clients' cases. Orig. Jur. 212. *Mooting* was formerly the chief exercise of the students in the inns of court.

To plead a mock case. (Also spelled *meet*, from Sax. *moetan*, to meet; the sense of debate being from meeting, encountering. Webster, Dict.) A moot question is one which has not been decided.

MOOT COURT. A court where moot questions are argued. Webster, Dict.

In law schools this is one of the methods of instruction; an undecided point of law is argued by students appointed as counsel on either side of the cause, one or more of the professors sitting judicially in presence of the school. The argument is usually conducted as in cases reserved for hearing before the full bench.

MOOT HILL. Hill of meeting (*gemot*), on which the Britons used to hold their courts, the judge sitting on the eminence, the parties, etc., on an elevated platform below. Encyc. Lond.

MORA. A moor, barren or unprofitable ground; marsh; a heath; a watery bog or moor. Co. Litt. 5; Fleta, l. 2, c. 71. See IN MORA.

MORAL ACTIONS. Actions only in which men have knowledge to guide them and a will to choose for themselves. Ruth. Inst. Nat. L. lib. 1, c. 1.

MORAL CERTAINTY. That degree of certainty which will justify a jury in grounding on it their verdict.

It is only probability; but it is called certainty, because every sane man assents to it necessarily from a habit produced by the necessity of acting. Beccaria on Crimes and Punishments, c. 14. Nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us. Puffendorf, Law of Nature, b. 1, c. 2, § 11. A reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. A certainty beyond a reasonable doubt. Shaw, C. J., Commonwealth v. Webster. Bemis' Rep. of the trial, 469; 113 Mass. 1. Such a certainty "as convinces beyond all reasonable doubt." Parke, B., Best, Presumpt. 257, note; 6 Rich. Eq. 217.

MORAL CONSIDERATION. See CONSIDERATION; MORAL OBLIGATION.

MORAL INSANITY. In Medical Jurisprudence. A morbid perversion of the moral feelings, affections, inclinations, temper, habits, and moral disposition, without any notable lesion of the intellect or knowing and reasoning faculties, and particularly without any maniacal hallucination. Prichard, art. *Insanity*, in Cyclopaedia of Practical Medicine.

A disorder which affects the feelings and affections, or what are termed the moral powers in contradistinction to those of the understanding or intellect. 3 Witth. & B. 269.

For a discussion on this subject and its legal relations, see INSANITY; MANIA.

MORAL OBLIGATION. A duty which one owes, and which he ought to perform, but which he is not legally bound to fulfil.

These obligations are of two kinds: 1st, those founded on a natural right: as, the obligation to be charitable, which can never be enforced by law. 2d, those which are supported by a good or valuable antecedent consideration: as, where a man owes a debt barred by the act of limitations, or contracted during infancy; this cannot be recovered by law, though it subsists in morality and conscience. A doctrine prevailed for some time in the courts of England and this country that an express promise made in discharge of an antecedent moral obligation created a valid

contract, and the contract was then said to be supported by the previous moral obligation; Cowp. 290; 5 Taunt. 36; 4 Wash. C. C. 148; 12 S. & R. 177. This opinion appears to have been entertained by Lord Mansfield; 5 Taunt. 36. In a note to Wrennall v. Adney, 3 B. & P. 249, this idea was controverted, and in Eastwood v. Kenyon, 11 Ad. & E. 438 (6 Eng. Rul. Cas. 41), the notion of the validity of a moral consideration was finally overruled. The rule existed, if it does not still exist, in Pennsylvania, as late as 24 Pa. 267, and see 140 id. 63; Hollingsworth, Contr.

Promises by an infant, after coming of age, to pay a debt incurred during infancy, of a bankrupt to pay a debt discharged in bankruptcy, and of a debtor to pay a debt barred by the statute of limitations, are sometimes considered as instances of contracts supported by moral considerations. But the promise of the infant is rather a ratification of a contract which was voidable, but not void. The promise of the bankrupt operates as a waiver of the defence given to the bankrupt by statute, the certificate of discharge not having extinguished the debt, but merely having protected the defendant from an action on it, by means of the statutory bar. In both of these cases the action is founded upon the original debt. The case of a promise to pay a debt barred by the statute of limitations is said to stand upon anomalous grounds. The true explanation of the doctrine seems to be that it was an ingenious device for evading the statute adopted at a time when the courts regarded it with disfavor. Here too the action is upon the old debt, and not upon the new promise; 3 Metc. Mass. 439. The subject is learnedly treated by Mr. Langdell (Contr. § 71). Some cases have held a feme bound by a promise after coverture to pay a debt contracted during coverture; 24 Pa. 371; see Ewell, L. C. Cov. 332.

Under the English Bankruptcy Act of 1869, debts discharged cannot be revived by a promise made after adjudication; and under the Infants' Relief Act of 1874, any promise made after full age to pay a debt contracted during infancy is void.

The discharge of a merely moral obligation of another will not create a debt, unless made in pursuance of an express request or actual agreement to that effect; Leake, Contr. 86.

MORAL TURPITUDE. See TURPITUDE.

MORALLY IMPOSSIBLE. See ABSURDITY.

MORATORIUM. An emergency act of legislation authorizing a debtor or bank to suspend payments for a given period. Stand. Dict.

MORATUR or DEMORATUR IN LEGE. He demurs in law. He rests on the pleadings of the case, and abides the judgment of the court.

MORE OR LESS. Words, in a conveyance of lands or contract to convey lands, importing that the quantity is uncertain and not warranted, and that no right of either party under the contract shall be affected by a deficiency or excess in the quantity. 17 Ves. 394; Powell, Pow. 397. So in contracts of sale generally. 2 B. & Ad. 106. These words added to a specification of quantity in a conveyance show it to be a mere estimate, and by necessary inference subordinates the quantity to fixed calls or monuments; 82 Wis. 206.

In case of an executory contract, equity will enforce specific performance without changing the price, if the excess or deficiency is very small; 17 Ves. 394; 24 Miss. 597; 13 Tex. 223; but not if the excess or deficiency is great, even though the price reserved be per acre. In 2 B. & Ad. 106, it was held that an excess of fifty quarters over three hundred quarters of grain was not covered by the words "three hundred more or less," if it was not shown that so large an excess was in contemplation; 1 Esp. 229. See 85 Me. 362; 27 Atl. Rep.

(N. J.) 140. But a deed adding the words more or less to a description of the property is not a sufficient fulfillment of a contract to convey the described property, when more or less was not in such original contract, if there is an actual deficiency. But after such a conveyance is made and a note given for the purchase-money, the note cannot be defended against on the ground of deficiency; 2 Pa. 533; 9 S. & R. 80; 10 Johns. 297; 4 Mass. 414. These words more or less have been held to cover a deficiency of 10 acres where the deed called for 96 acres; 7 N. Y. 210; a deficiency of 54 acres in a deed calling for 451 acres; 54 Ind. 368; 50 feet from 220, where the true dimension was on record, in a purchase in gross; 99 Mass. 231.

In case of an executed contract, equity will not disturb it, unless there be a great deficiency; 2 Russ. 570; 1 Pet. C. C. 49; or excess; 8 Paige, Ch. 312; 2 Johns. 37; Ow. 133; 1 V. & B. 375; see 106 Ind. 185; or actual misrepresentation without fraud, and there be a material excess or deficiency; 14 N. Y. 143; see 91 Ga. 600; 26 Gratt. 721; 11 Q. B. Div. 255.

Eighty-five feet, more or less, means eighty-five feet, unless the deed or situation of the land in some way controls it; 20 Pick. 62.

The words more or less will not cover a distinct lot; 24 Mo. 574. See CONSTRUCTION; or ABOUT.

The purchaser is not precluded by a recital of "more or less" in the deed from showing by parol evidence, under an allegation of fraud or mistake, an agreement contemporaneous with the execution of the deed, making the transaction a sale by the acre; 1 Tex. Civ. App. 600.

MOREOVER. See ALSO.

MORGANATIC MARRIAGE. A lawful and inseparable conjunction of a single man of noble and illustrious birth with a single woman of an inferior or plebeian station, upon this condition, that neither the wife nor children should partake of the title, arms, or dignity of the husband, nor succeed to his inheritance, but should have a certain allowance assigned to them by the morganatic contract.

This relation was frequently contracted during the Middle Ages; the marriage ceremony was regularly performed, the union was for life and indissoluble, and the children were considered legitimate, though they could not inherit. Fred. Code, b. 2, art. 3; Poth. Du Mar. 1, c. 2, § 3; Shelf. Marr. & D. 10; Pruss. Code, art. 835.

MORGUE. A place where the bodies of persons found dead are kept for a limited time to the end that their friends may identify and claim them. R. & L. Dict.

Its usual and commonly accepted meaning is a place or dead-house, where the bodies of persons found dead are exposed for identification or that they may be claimed by their friends. 75 Ohio St. 278.

In an act which provides that: it shall be unlawful for any person or persons, company, association or firm to establish a morgue on any street or part of a street upon which are dwelling houses, unless the owner or occupants of such dwelling houses within 200 yards of said proposed morgue give their written consent thereto, does not prohibit the location of an undertaking establishment on a residence street, nor make it unlawful to receive, care for and keep temporarily in an undertaking establishment thus located, in a private room thereof and unexposed to public view, the bodies of known and identified dead which are from time to time taken to such undertaking establishment at the instance and request of relatives or friends of the deceased that funeral services over the body may be held and conducted at that place.

MORMONISM. The system of doctrines, practices (especially polygamy), ceremonies, and church government maintained by the Mormons. Cent. Dict. See MARRIAGE.

A social and religious system prevailing in Utah, whereby plurality of wives is not only permitted, but enjoined. These marriages are not recognized by English law. Nor are they legal according to the law of the United States, persons entering into them being indictable, even under the laws of Utah, for bigamy. R. & L. Dict.

MORNING GIFT. In primitive Anglo-Saxon times, a gift given by the bridegroom to the bride the day after the marriage. In a later form of marriage, the conception of the *weotuma* (q. v.) was merged with the morning gift. 2 Holdsw. Hist. E. L. 3rd ed., 88, 89.

MORPHINE. The word "morphine" has as well defined a meaning as the word "whiskey" and is well known to the generality of the people to be a derivative of opium, possessing great narcotic power and deadly effect as a poison. 160 Ky. 32, 169 S. W. 514.

MORPHINOMANIA, or MORPHINISM. A morbid uncontrollable craving for morphine; the morphine habit. There are four periods in the career of a morphinomanic: (1) the period of initiation, or of acute intoxication; (2) the period of hesitation, and attempt to discontinue the habit; (3) morphinomania proper, which brings with it permanent symptoms and abstinence symptoms, the former symptoms including hyperesthesia and paresthesia, impairment of attention, amnesia, insomnia, tremor, muscular weakness, etc., the latter symptoms including at first anxiety and paresthesias, followed by delirium tremens, clouding of consciousness, hallucinations, delusions, etc. (4) cachexia: previous symptoms exaggerated, considerable dementia, and final death. Bridges, Outline Abn. Psych. 167.

MORT D'ANCESTOR. An ancient and now almost obsolete remedy in English law. An assize of *mort d'ancestor* was a writ which was sued out where, after the decease of a man's ancestor, a stranger abated, and entered into the estate. Co. Litt. 159. The remedy in such case is now to bring ejectment.

MORTALITY, BILL OF. See BILL OF MORTALITY.

MORTALITY TABLES. See LIFE TABLES.

MORTGAGE. Scientific legal writers reckon among proprietary rights "*jura in re aliena*," i. e. rights of dominion over tangible things of which the fundamental property right is in another. Of such rights the most important is Pledge, which, in this sense, covers those legal relations in which a right *in rem* is conferred by a debtor upon a creditor as security for a right *in personam*, i. e. for the debt or other personal obligation of the debtor; Holland, Jurispr. ch. xi. Practically we distinguish these securities as *Mortgage*, when the debtor transfers the title to the *res* to his creditor, retaining the possession of it, and *Pledge*, when he retains the title but transfers the possession. See PLEDGE.

Mortgage is the translation of *vadium mortuum*—dead pledge, so named because the land was turned over to the mortgagee or lender of the money, who received the profits or revenues of it without applying them in satisfaction of his debt, and the land thus became dead to the mortgagor or borrower who derived no benefit from it. This was regarded as in the nature of usury on the part of the lender and was looked upon with disfavor, in modern phrase as contrary to public policy. In contrast to this was *vadium vivum*, or live pledge, under which the borrower continued in possession of his property, receiving the profits or revenues of it. Another explanation of the words is that in the *vadium mortuum* the pledge was *dead* to the borrower if he failed to redeem, but in the other was *alive* to him until the lender secured possession of it on default; 1 Coote, Mortg., 4th ed. 5; Co. Litt. 205. (In the case of Welsh mortgages, now disused, the

mortgagee entered into possession, taking the rents and profits, but applying them on account of the debt.) In attempting to avoid the difficulty lenders devised the plan of taking from the borrower a conveyance of the property to become absolute upon the failure of the borrower to redeem. Later, the plan was adopted of taking an absolute conveyance, with an agreement on the part of the lender to re-convey on payment of the debt, the transaction being in form an absolute sale of land with an option to buy it back by payment of the loan at a fixed time. Another form was to convey the land to a trustee who was to hold to the creditor's use, and on default was to sell it for the payment of the debt. All these devices were intended to protect the lender by enabling him to secure the land on his debtor's default. All of them were modified or softened by the courts refusing to allow the forfeiture or to treat the transaction as other than a method of pledging the land as security for the debt, the debtor retaining what came to be known as the equity of redemption, and being protected against the strict enforcement of his contract; H. W. Chaplin, in 4 Harv. L. Rev. 1. See EQUITY OF REDEMPTION.

In modern times although the old forms are still followed, it is everywhere recognized that the real owner of the land is the mortgagor, and the mortgage is a mere security for the debt or obligation, giving the mortgagee a chattel interest which passes to his personal representatives and not to his heirs. Some of the states have abrogated the old rule and declared by statute that the effect of a mortgage shall be merely to give a lien and not to pass an estate to the mortgagee. But in England and in most of the states the old rule remains nominally in force, and in courts of law the mortgage is recognized as conveying an estate, while equity treats it as merely conferring a lien. Originally this was burdensome, since there was an actual distinction between the rules applied in the different jurisdictions, and redress had to be sought in equity against the severities of the law, but the principle adopted in Pennsylvania in the eighteenth century, of administering equity through common law forms has been gradually making its way until it reached its most signal triumph in the adoption of the Judicature Act of 1873 in England providing that where "there is any conflict between the rules of equity and the rules of common law, the rules of equity shall prevail." To day it may be safely said that the equitable doctrine has completely supplanted the legal, but as the form of the transaction is still the same, some confusion exists, and doubtless always will exist, in the definitions given of mortgage. Some of these are as follows:—

The conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it. 4 Kent 136.

An estate created by a conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance. 2 Washb. R. P., 5th ed. *475.

A conditional conveyance of land designed as a security for the payment of money, the fulfillment of some contract, or the performance of some act, and to be void upon such payment, fulfillment or performance. 44 Me. 299.

A contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. 2 S. Dak. 346. It is a mere security for a debt or obligation; 60 Conn. 24; 53 *id.* 175; 15 Wall. 322.

"A concise definition of mortgage which should embrace both its equitable and its legal character is virtually impossible. . . . These attempted definitions are all erroneous upon any theory of the instrument; they do not go beyond the literal import of the language in which a mortgage is

usually expressed, and they utterly ignore all the equitable elements which are as much and as truly constituent parts of the mortgage as the legal elements. Any true definition based upon the original common law and equitable system must embody and express all the double features of the mortgage—that it is both a lien in equity and a conveyance at law." *Pomeroy, Eq. Jur.* § 1191.

Both real and personal property may be mortgaged, and in substantially the same manner, except that a mortgage being in its nature a transfer of title, the law respecting the necessity of possession in case of personal property and the nature of the instruments of transfer, require the transfer to be made differently in the two cases.

All kinds of property, real or personal, which are capable of an absolute sale, may be the subject of a mortgage; rights in remainder and reversion, franchises, and choses in action, may, therefore, be mortgaged. But a mere possibility or expectancy, as that of an heir, cannot; 2 Story, *Eq. Jur.* § 1012; 4 Kent 144; 32 Barb. 328; 13 Cal. 536; 45 Ill. 264; 12 N. J. Eq. 174; 108 Mass. 347; 68 Ill. 98 (see EXPECTANCY). Where real estate is mortgaged, all accretions thereto, subsequent to the mortgage, will be bound by it; 32 N. H. 434; 51 Cal. 630; 52 Ala. 123; 19 Wall. 544; 24 Mich. 416; 64 Pa. 366; and if specifically stated to bind after-acquired property, it will have that effect; 51 Barb. 45; 50 Me. 453; 14 Gray 566; 11 Wall. 481; 19 Md. 473; 29 Conn. 382. A mortgage in terms covering after-acquired property creates a charge on property to which the mortgagor subsequently acquires either the legal or equitable title; 75 Md. 445. See *infra*. A mortgage of property to be acquired in futuro is constructively fraudulent as to the creditors of the mortgagor other than the mortgagee; 85 Ky. 591.

A mortgage to secure future advances is valid as between the parties; 31 Vt. 123; 23 How. 14; but if a second mortgage be executed of which the holder of the first mortgage have notice before he makes advances the latter will not be protected; 36 Pa. 170; 9 H. L. C. 514; but see, *contra*, 16 Vt. 300; but he will be where the first mortgagee binds himself to make the advances, though they be made after the execution of the subsequent mortgage; 13 Mich. 360; 31 Conn. 74; and in either case it is said the first mortgagee will be protected if the advances be made without notice of the subsequent mortgage; *id.*; the record of the second mortgage is constructive notice; 13 Mich. 360. See, generally, 3 Va. L. Reg. 834.

As to the form, a mortgage must be in writing, when it is intended to convey the legal title; 1 Pa. 240. It is either in one single deed which contains the whole contract,—which is the usual form,—or it is two separate instruments, the one containing an absolute conveyance and the other a defeasance; 2 Johns. Ch. 139; 12 Mass. 456; 1 N. H. 39; 5 McLean 281; 55 Pa. 311; 21 Minn. 520; 53 Me. 463; 13 Wis. 264; 38 Mo. 349; 65 N. C. 520; 18 Ia. 376; 17 Ohio 356; and generally, whenever it is proved that a conveyance was made for purpose of security, equity treats it as a mortgage, and attaches thereto its incidents; 9 Wheat. 489; 2 Des. Eq. 564; 38 N. H. 22; 25 Vt. 273; 1 Md. Ch. Dec. 536; 1 Murph. 116; 3 J. J. Marsh. 353; 5 Ill. 156; 4 Ind. 101; 2 Pick. 211; 20 Ohio 464; 36 Me. 115; 1 Cal. 203; 1 Wis. 627; 9 S. & R. 434; 100 N. C. 316; 24 Neb. 692; 1 Tex. Civ. App. 391; 71 Hun 349. Whether the intention that it was a security for money appears from the same instrument or from any other, it is always considered, in equity, a mortgage; 86 Ky. 679; 39 Minn. 137; 62 Mich. 414; 96 Tex. 420; 24 Neb. 79; 129 Ill. 72; 76 Ia. 96; 35 Tenn. 363; 75 Cal. 271; 45 N. J. Eq. 208. The true test in determining whether an instrument purporting to convey title in payment of a debt be a mortgage or not, is, was the old debt at that time cancelled and absolutely paid; 71 Tex. 418. In law, the defeasance must be of as high a nature as the conveyance to be defeated; 1 N. H. 39;

2 Johns. Ch. 191; 7 Watts 361; 13 Mass. 433; 53 Me. 963; 14 Pet. 201.

The rule as to the admission of parol evidence to establish the character of a conveyance as a mortgage varies in the different states. It is safe to state that where the equitable principle admitting parol evidence to vary a writing on the ground of fraud, accident, or mistake can be invoked, it would universally be applied. In some states the rule is still more liberal, and the evidence is admitted more upon the principle of making the intention of the parties govern the transaction. If excluded in any state it would probably be for statutory reasons: Thus in *New Hampshire* no deed shall be defeated, nor any estate encumbered, unless by condition inserted in the conveyance; 57 N. H. 117. In *Georgia* a deed absolute in form and supported by possession shall not be shown by parol evidence to be a mortgage, unless fraud be the issue; 83 Ga. 303; 88 *id.* 191. In *Pennsylvania* no defeasance shall have the effect of reducing a deed absolute to a mortgage unless the defeasance is contemporaneous with the deed and is in writing, signed, sealed, acknowledged, and delivered, and is recorded within sixty days. See 118 Pa. 30; 31 Am. L. Reg. 378. In *Colorado*, on the other hand, it is provided that parol evidence may be admitted to convert a deed into a mortgage; 12 Col. 491. Where a conveyance is in form absolute, in order to change its character to that of a mortgage, the proof must clearly and satisfactorily show such intent; and evidence which leaves the mind in serious doubt is not sufficient; 126 Ill. 301; 35 Fed. Rep. 445; 83 Ala. 396; 75 Ia. 89; 7 Mont. 585; 20 Can. S. C. R. 543; 98 Cal. 281; 1 App. D. C. 133. See *DEFEASANCE*.

The mortgagor has, technically speaking, in law, a mere tenancy, subject to the right of the mortgagee to enter immediately, unless restrained by his agreement to the contrary; 34 Me. 187; 9 S. & R. 302; 1 Pick. 87; 19 Johns. 325; 2 Conn. 1; 4 Ired. 122; 5 Bingh. 421. In equity, the mortgagee is held a mere security for the debt, and only a chattel interest; and until a decree of foreclosure the mortgagor is regarded as the real owner; 2 J. & W. 190; 4 Johns. 41; 11 *id.* 534; 4 Conn. 235; 1 Rawle 329; 45 Pa. 463; 5 Harr. & J. 312; 3 Pick. 484; 7 Johns. 273. Both in law and equity a mortgage is held to be only a chattel interest; 12 Ia. 539. It has been held frequently that the legal fee is in the mortgagee until default, and an absolute fee afterwards; 3 Gray 517; 22 Conn. 587; 13 Ohio St. 419; but it may be considered as the general rule, in modern practice, that the mortgagor, before entry, is the legal owner as to third persons and his conveyance is a transfer of the fee, if the mortgage is afterwards paid; 36 N. H. 141; 15 Pick. 82.

The mortgagee, at law, is the owner of the land, subject, however, to a defeat of title by performance of the condition, with a right to enter at any time; 21 N. H. 460; 9 Conn. 216; 19 Me. 53; 2 Den. 170. He is, however, accountable for the profits before foreclosure, if in possession; 31 Me. 104; 5 Paige, Ch. 1; 24 Conn. 1; 1 Halst. Ch. 346; 2 Cal. 387; 6 Fla. 1; 148 Mass. 300; 49 Ark. 508; 42 Ill. App. 202; 48 N. J. Eq. 399; 1 Washb. R. P. § 577. The different states fluctuate somewhat between the rules of equity and those of law, or, rather, have engrafted the equitable rules upon the legal to an unequal extent; 31 Pa. 295; 10 Ga. 65; 27 Barb. 503; 3 Mich. 581; 4 Ia. 571; 4 M'Cor'd 338; 9 Cal. 123, 365; 1 Washb. R. P. § 517; Jones, Mort. § 17.

Case lies by a mortgagor for injuries done the mortgaged premises by a mortgagee not in possession; 64 N. H. 591. A mortgagee cannot maintain trover for fixtures severed from the mortgaged premises prior to the foreclosure; 66 Hun 635; but he may maintain a bill to prevent injury to the mortgaged property; 53 Fed. Rep. 515; 84 *id.* 369.

Mortgages are to be distinguished from sales with a contract for repurchase. The distinction is important; 2 Call 423; 7 Watts 401; but turns rather upon the evi-

dence in each case than upon any general rule of distinction; 6 Blackf. 113; 12 How. 139; 5 Ala. n. s. 698; 3 Tex. 119; 2 J. J. Marsh. 113; 4 Ind. 101; 3 Tex. 119; 37 Me. 543; 7 Ired. Eq. 13, 167; 2 Sch. & L. 393; 30 Md. 495; 33 Cal. 326; 19 Ia. 385; 80 Ill. 188; 41 Cal. 22; 35 Vt. 125; 70 Pa. 434; 21 Minn. 449; 8 Nev. 147; 49 Ga. 133; 62 Mo. 202; 73 Ill. 156; 50 N. Y. 441; 109 Mass. 130; 51 Miss. 329; 129 U. S. 58; 149 *id.* 17; 86 Ala. 333; 72 Mich. 645; 7 Mont. 585; 5 C. C. App. 394; 59 Conn. 170.

A mortgage differs from a pledge: the general property passes by a mortgage, whilst by a pledge only the possession or, at most, a special property, passes. Possession is inseparable from the nature of a pledge, but is not necessary to a mortgage; 3 Mo. 516; 5 Johns. 258; 2 Pick. 610; 2 N. H. 13; 5 Vt. 532; 26 Me. 499.

Assignment of mortgages must be made in accordance with the requirements of the statute of frauds; 15 Mass. 233; 6 Gray 153; 32 Me. 197; 7 Blackf. 210; 5 Den. 187; 3 Ohio St. 471; 5 Halst. Ch. 156; 21 Ala. n. s. 497; 51 Me. 121; 23 Tex. 464; 31 Pa. 142; 21 Wis. 476; 71 N. C. 492; 56 N. H. 105.

A parol assignment of a mortgage note is an equitable transfer of the mortgage; 85 Ala. 80; and the transfer of the debt carries with it the security, without assignment or delivery thereof; 82 Va. 190; 113 N. C. 532. One to whom an overdue note and mortgage are assigned, takes them subject to all equities existing in favor of the mortgagor or of any other person; 134 N. Y. 514.

Assumption of mortgage by grantee. The question whether the acceptance by a grantee of a deed subject to a specified mortgage as part of the consideration, in the absence of an express promise to pay it, implies such a promise on his part, has been the subject of conflicting decisions. But the more generally accepted view is, that the clause "under and subject" in a deed or conveyance, is a covenant of indemnity only as between grantor and grantee for the protection of the former; 88 Pa. 450; 173 *id.* 275 (but see 171 *id.* 328); 154 Ill. 627; 48 Ill. App. 505; 48 N. Y. 556; 4 N. J. Eq. 454; 124 Mass. 254; 49 Conn. 191; 46 Pac. Rep. (Kas.) 58. A different view has been held in New York, based in the later cases on the doctrine that when one makes a promise for the benefit of a third person, the latter may maintain an action upon it; 24 N. Y. 178; 48 *id.* 253; 71 *id.* 26. But this doctrine is for the most part confined to New York; see 26 Am. Rep. 660, n.; 115 U. S. 505; 143 *id.* 187; 14 Wash. 507; 1 Jones, Mort. § 758. In Pennsylvania, by statute, a grantee does not assume a liability for an incumbrance, unless by agreement in writing, and the words "under and subject" in his deed do not impose such liability.

As to the rights of a mortgagee holding more than one mortgage of the same mortgagor, see *TACKLING*.

Where it is sought to give the lien of a junior mortgage precedence over the lien of a senior one, the claim must be based either on an agreement to that effect, or on the superior equity of the junior mortgage; 22 Neb. 708. See *MARSHALLING*. An agreement between mortgagor and mortgagee extending the time of payment of the mortgage debt, and providing for the compounding of interest, cannot be enforced to the prejudice of junior lienholders whose liens were created prior to such agreement; 84 Ky. 411. The vested priority of a mortgage is beyond the power of the mortgagor or the legislature thereafter to disturb; 134 U. S. 296. Failure to show that a mortgage was recorded before a judgment, is fatal to the mortgagee's claim of priority; 79 Ga. 111. The redelivery of a mortgage which has been paid, upon an agreement that it shall secure another debt, does not create a lien; 86 Ky. 311. A mortgage cannot be continued in effect so as to cover a new indebtedness by an oral agreement; 30 Pa. 378; 29 Kan. 124; but where money has been paid thereunder, the party making payments will be pro-

tested as against the mortgagor, or his vendee with knowledge of the facts; 10 Allen 74; L. R. 12 Eq. 516.

The remedies upon a mortgage by the mortgagee on default of payment are various. In cases of real estate he may (1) bring ejectment on his legal title; (2) file a bill and obtain a decree of foreclosure, or a sale of the property mortgaged; 4 Kent *180; (3) exercise a power of sale, if such power be in the mortgage; (4) take possession of the land, if he can do so peaceably, his title becoming sure, and the equity of redemption being barred after the lapse of twenty years or a period equal to the lapse of time necessary to bar a writ of entry, or in some states for a less period provided by law; (5) by proceeding in accordance with statutory enactments which vary in the different states. The general rule is that the mortgagor may pursue all his remedies at the same time; 4 Kent *183.

In cases of chattel mortgages, the mortgagee's remedy is either (1) to bring a bill in equity, obtain a decree of foreclosure, and a sale; (2) if he have the thing mortgaged in his possession, to sell it after giving to the mortgagor notice of such sale, and also of the amount of the debt due.

A remedy by foreclosure is barred where the obligation secured by the mortgage is barred; 23 Tex. 561; 41 Ill. 516; *contra*, 35 Vt. 104; 26 Miss. 599.

In some cases a reconveyance by the mortgagee is necessary when the mortgagee has been paid after default; L. R. 5 Ch. 237; 10 Wall. 536; in other cases no reconveyance is necessary; 12 B. Monr. 497.

A lender after default discharges the mortgage lien; 54 N. Y. 599; 13 Mich. 306; *contra*, 34 N. J. L. 505; 9 Allen 522.

It is held in England that a mortgagee's purchase at a foreclosure sale, under a power of sale, by having another buy for him, does not pass a title free from the interest of the mortgagor unless the right to purchase is conferred by the mortgage; [1894] A. C. 150; 106 Ala. 417; if the power is conferred by the mortgage, the mortgagee may buy at his own sale; 161 Mass. 335; 100 N. C. 520; 137 Ill. 591. A mere power to sell has been held to confer on the mortgagee the right to purchase; 96 Ga. 246. But in *scire facias* proceedings in Pennsylvania the mortgagee may buy at his own sale; and it is everywhere a familiar practice in the foreclosure of corporate mortgages for the bondholders to unite to buy in the property.

A strict foreclosure is the barring of the equity of redemption of the mortgagor, after default in payment, when such default continues after due notice to redeem; 4 Kent *180. It was by bill in equity, by which the lands became the absolute property of the mortgagee. This is a common English practice and obtains also in certain New England states, with a liberal period, by statute or by practice in equity, for redemption; 4 Kent *181. But it is common to decree a sale of the mortgaged premises and apply the proceeds to the payment of the incumbrances in their order of priority. A more common practice, both in England and here, is for the mortgagee, or a trustee appointed for the purpose, to sell the land under a power of sale inserted in the mortgage. This takes the place of a foreclosure. It is the usual practice in the foreclosure of corporation mortgages, except that the sale by the trustee named in the mortgage is usually made in the course of legal proceedings and under a decree of the court, the fund being distributed to the lienholders according to their respective priorities, and the surplus, if any, paid over to the mortgagor.

A mortgagee may proceed to judgment on his bond secured by the mortgage; and such judgment has a lien as of the date of the mortgage; the purchaser at a sale under the judgment holds the land discharged of the lien of the mortgage; 6 Whart. 210.

The general rule is that the mortgagee may pursue all his rights at the same time; 4 Kent *183; but it is said that there are difficulties attending the sale of the equity of redemption by execution at law, and it

has been forbidden by statute in New York; and is disapproved in Massachusetts, North Carolina, and Kentucky; 4 Kent *184.

The satisfaction of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident, or mistake; and if he does this, his rights will not be affected by the improper cancellation of it; 32 W. Va. 244.

The object of recording a mortgage is to give notice to third persons; as between the parties thereto, a mortgage is just as effectual for all purposes without recording as with; 181 U. S. 258.

The receipt of insurance money by a mortgagee in whose behalf the premises were insured, does not constitute a payment of the mortgage, where such is not the intent of the parties, and the money is delivered to the mortgagor for rebuilding; 64 Vt. 387.

An honest mortgage is not affected by its proximity to an assignment for creditors; 62 Mich. 420; nor is it affected by the fact that it was given for a larger sum than is actually due, or in some particulars misdescribes the note in fact secured; 33 Minn. 443; and because it was given for a larger amount than the actual indebtedness, is not conclusive evidence of fraud; 23 Neb. 89.

An *equitable mortgage* is one in which the mortgagor does not actually convey the property, but does some act, by which he manifests his determination to bind the same as a security. See *EQUITABLE MORTGAGE*.

A *chattel mortgage* is a transfer of personal property as security for the obligation of the mortgagor. In form it is usually a bill of sale with a clause of defeasance. In some states its form is prescribed by statute; in the greater number, however, this is not the case, and any form may be adopted. A mortgage is to be distinguished from a pledge, the former being a transfer of title, the latter a transfer of possession (see *PLEDGE*); also from a conditional sale, the test being that if after the transfer the mere relation of debtor and creditor exists the transaction is a mortgage, if not, a conditional sale. The courts lean toward construing the transaction as a mortgage.

The subject-matter of the transaction being a chattel, the law is in some respects simpler than the law as to mortgages of realty which is complicated by rules of conveyancing. The courts seek, in dealing with chattel mortgages, as in the case of other contracts, to arrive at the intention of the parties, and form is generally of little importance. But on the other hand the subject is complicated by the transitory nature of the subject-matter and the devices resorted to to secure the mortgagee and at the same time protect from fraud the creditors of the mortgagor, in other words by the recording acts. These are the very life of the chattel mortgage, and without them it cannot exist. For example, it was held in Pennsylvania (where chattel mortgages formerly did not exist at all, and are now recognized only to a limited extent) that while such a mortgage between citizens of Maryland would be recognized and enforced, when the question arose between the mortgagee and a citizen of Pennsylvania who had in good faith purchased the mortgaged chattel from the mortgagor, the mortgage could not be regarded because in the absence of statutory provisions the common law rule prevails in Pennsylvania that a sale of personal property unaccompanied by delivery of possession is void as against the intervening rights of creditors and purchasers; 9 Phila. 615; 4 D. R. (Pa.) 270.

The problem is how to restrict a transaction by which the mortgagor, though retaining possession of his goods, gives a valid lien upon them as security for a debt, so that innocent parties shall not be injured by giving credit to the mortgagor on the strength of the apparent ownership of the goods. Manifestly the only way to secure this end is by requiring the transaction to be made a matter of record.

Accordingly, the statutes provide for recording the instrument, usually in the county or town in which the mortgagor resides, or, if he is a non-resident, in the county or town in which the chattels are situated. Commonly this is sufficient record while the mortgaged property remains within the state, but some of the acts require re-recording if the property be removed to another county. In some acts it is provided that the wife of the mortgagor must join. In many states are found provisions to punish any removal or disposition of the property by the mortgagor in prejudice of the rights of the mortgagee. See *LEX REI SITE*; *CONFLICT OF LAWS*.

The property must be described with such accuracy as the nature of it will admit, and the description should be sufficient to enable third parties to identify the property. As a general rule it may be said that any personal property may be mortgaged, but this with the reservation that in a number of states the right is restricted to classes of articles, more or less numerous. Naturally, a common stock of such a mortgage is a shopkeeper's stock of goods employed by him in regular course of business. As to this, every variety of rule from the absolute prohibition of such mortgages to their freest use will be found. In some cases they bind the stock at the time the mortgage is created, in others they bind the stock at the time of foreclosure, in others they bind what is left of the original stock, but not the accessions; in others they bind the accessions, provided no other specific lien has attached before the mortgagee secures possession of them.

Where animals are mortgaged, the natural increase will be covered by the mortgage, in the absence of a statutory provision to the contrary. A mortgage on an article in process of manufacture will cover it when completed if still capable of identification. Growing crops are frequently the subject of mortgage, and the mortgage is valid at any stage of their development, and even in anticipation of their planting. See *LIENS*. As to a mortgage in its terms covering after acquired property see *supra*, and also corporation mortgages *infra*.

CORPORATION MORTGAGES OR DEEDS OF TRUST. The power to give a mortgage is said to be inherent, unless prohibited by statute, in all corporations except railway companies. In the case of the latter, the power does not exist unless conferred by charter or statute; Cook, Stock and Stockh. § 780. In practice, however, this power is usually—perhaps universally—possessed by railroad companies; Short, Rwy. Bonds, ch. viii.; 31 U. S. App. 486. See, generally, 7 Rul. Cas. 673.

A corporate mortgage should be executed with the same formalities as a deed. As it is incident to the general business of a corporation, unless restrained by statutory or charter provision, the directors can authorize a mortgage, though it is customary, and perhaps better practice, that authority should be given by the stockholders. In form it may correspond to the mortgage of an individual and be made directly to the holder of the bond which it secures; but as it is usually given to secure an issue of a number of bonds, it is ordinarily in form a deed of trust conveying the mortgaged property to a trustee for the bondholders, and this trustee is usually a corporation.

Corporate mortgages usually contain covenants or provisions which are wanting in a mortgage given by an individual. Provisions commonly found in such mortgages are (1) that until default the mortgagor may remain in possession of the property mortgaged; (2) an express covenant that the mortgagor will pay the principal and interest of the bonds secured, when due; (3) that the mortgagor shall have power to sell, free from lien of the mortgage, worn out or damaged material (usually accompanied by some provision for replacing the same); (4) provisions as to the payment of taxes and assessments upon the mortgaged property (which are usually assumed by the mortgagor) and providing against the suffering of liens to be established against it;

(5) provisions as to the maturing of the principal of the mortgage debt in case of default in the covenants for payment of interest, or other covenants, by the mortgagor; (6) exemption of the trustee from liability except for gross negligence; (7) provision for the substitution of a trustee in case the trustee named should decline to act, or, usually, in case a substitution be desired by a majority or some larger number of the bondholders; (8) any other provisions, not illegal, which may be desired, such as provisions for the conversion of bonds into stock, provisions in regard to maintaining a sinking fund, etc. It is customary for the trustee to accept the trust expressly, or to become a party to the deed, and also to certify upon each bond that it is one of the issue secured under the mortgage. Where such certificate is forged the bond is void, though in the hands of an innocent purchaser for value; 83 N. Y. 223. But signature by vice-president is good though the bond calls for signature of the president; 161 Pa. 391. A trustee's certificate is a warranty of the facts recited therein (as that the bond is secured by a first mortgage duly recorded) on which the trustee is liable; 76 Fed. Rep. 919; 79 id. 948; 175 Pa. 318.

The mortgage should be recorded in each county in which real estate covered by it is situated, and if it covers also personal property the provisions of the law in regard to chattel mortgages should ordinarily be complied with and the mortgage recorded as a chattel mortgage, at any rate in the county in which the principal office of the mortgagor is situated. These matters are frequently governed by statutes. See RECORDING.

A railroad mortgage is made with reference to the law of the state in which the subject-matter of the contract is, and in which the contract is made; and the law enters into and becomes a part of the contract as if it were there in express terms; 25 U. S. App. 415.

In the absence of a provision to the contrary, all bonds secured by a mortgage have an equal lien irrespective of the time at which they were negotiated; 55 Ohio St. 23; 123 Pa. 565; 44 N. E. Rep. (Ohio) 596. First mortgage bonds are prior to second mortgage bonds, even if subsequently negotiated; 8 Fed. Rep. 118. The invalidity of some of the bonds does not invalidate the mortgage; 118 U. S. 161.

The negotiable character of the bonds extends also to the mortgage securing them, against which the mortgagor cannot defend on grounds which it cannot set up against *bona fide* holders of bonds; 16 Wall. 271, 452; 136 U. S. 268; 64 Me. 37; 122 Mass. 67; 39 Wis. 146; the rule in Ohio and Illinois is said to be different; 14 Ohio St. 396; 93 Ill. 433; see 79 Ala. 587. In case of default, an individual bondholder may sue the corporation, but after securing judgment cannot have execution on property covered by the mortgage, which is security for all the bondholders alike. As to the effect of recitals in bonds as notice, see RECITALS.

In the surrender of corporate bonds and the substitution of new bonds, the latter will retain the security of the mortgage, unless an extinguishment was intended; 96 N. C. 298; see, also, 98 Ala. 92; 76 Fed. Rep. 43 (where under a reorganization plan the old bonds were deposited and were to be held by a trustee as additional security for the old bonds); but not where the mortgage was satisfied of record; 96 N. C. 298. A mere change in the form of the mortgage debt, such as substituting new bonds for the old, will not affect the lien; novation, especially when against the interest of the bondholders, must be clearly proved; 76 Fed. Rep. 38; and the funding of overdue interest and the issue of new evidence of indebtedness in place of the overdue coupons will not constitute a novation unless there be clear proof of an intention to waive the lien; 3 Hughes 320; 33 Gratt. 586.

A corporate mortgage may cover property acquired by the corporation after the mortgage is given. This has been

sustained upon the theory that though ineffective as a conveyance, the mortgage operates as an executory agreement attaching to the property when acquired; 63 Fed. Rep. 891. This rule, though contrary to the common law, has been established from necessity in the case of railroads, public policy requiring that a railroad be preserved intact as *quasi-public* property. The rule will be applied only where the mortgage expressly covers the subsequently acquired property. A railroad mortgage covers the road, although the route differs from that originally laid out. It covers, also, a right of way acquired subsequently to the mortgage, though here the mortgage would be strictly construed, and while held to apply to property used for railroad purposes, it would be held not to apply if not so used; 122 U. S. 82. It covers terminal facilities upon a line of railroad constructed or to be constructed between the named termini, together with all stations, etc.; 138 U. S. 414. See TERMINAL FACILITIES. It applies not only to legal titles but also to equitable rights and interests subsequently acquired either by or for the company; 149 U. S. 327; 130 id. 413; 164 id. 1; it embraces the lease of a belt line around a city acquired after the execution of the mortgage; 22 U. S. App. 54. It does not cover uncalled capital; [1897] 1 Ch. 406. Where the property acquired is at the time subject to existing liens, these liens are prior in right to the lien of the mortgage; 12 Wall. 362; 81 Fed. Rep. 772. See FUTURE ACQUIRED PROPERTY. And if property was fraudulently acquired, the vendor may rescind as against the mortgagee.

Another rule resting upon the *quasi-public* character of a railroad is that which prohibits creditors from levying an attachment or execution upon the railroad, or parts of it, even subject to the mortgage. To permit such action would be to permit the disintegration of the railroad and the destruction of the power to discharge the public obligation of the corporation.

Foreclosure. The mortgage or deed of trust contains provisions for enforcing the rights of bondholders in case of default of the mortgagor. It usually provides for (1) Entry by the trustee. This is seldom now resorted to, since by operating the property, the trustee becomes liable as the mortgagor would have been, and as default implies that the property has been operated at a loss, the trustee will seldom consent to exercise this right, and never unless sufficiently indemnified by the bondholders. (2) Trustee's sale of the property after prescribed advertisement, which is seldom resorted to. (3) The usual method of procedure is by a bill of foreclosure, usually accompanied by a prayer for a receiver (see *supra*; RECEIVERS) and for the establishing of liens or claims against the property. No provision in the mortgage can exclude the right of a trustee to apply to a court of equity for foreclosure. The provision usually found that a majority of the bondholders may by an instrument in writing waive the right to declare that a default has occurred will be sustained by the court, though such provision is not favored, as being inimical to the rights of a minority. Provisions unreasonably limiting the right to foreclose are void. When a provision required the request of one-fourth of the bondholders to compel the trustee to begin foreclosure, the fact that three-fourths of the bonds were held by a company operating the mortgagor company was held to justify action by a single bondholder; 73 Fed. Rep. 320. In case the trustee refuses to act, a bondholder may bring suit for foreclosure on behalf of himself and such others as may join; 74 Fed. Rep. 67; 77 id. 525; in such case the refusal of the trustee must be set out and the trustee should be made a party defendant; 79 Fed. Rep. 25; 80 id. 569. If a single bondholder has the right to institute proceedings he is bound to act for all standing in a similar position; 143 U. S. 42. See PARTIES.

Railroad foreclosure suits are begun generally in the federal courts, thus secur-

ing the appointment of the same receiver or receivers for the entire property, and avoiding, to a certain extent, possible prejudice in a state court. For the latter reason, perhaps, the same jurisdiction is sought in many cases of corporations other than railroads. The jurisdiction of the federal courts in such cases depends on the citizenship of the parties. Federal courts sitting in equity cannot be ousted of jurisdiction to enforce a right of an equitable nature by a state statute which prescribes an action at law to enforce such right; 149 U. S. 574. See JURISDICTION.

Where a federal court has jurisdiction and possession of the property of a railroad company, it acquires jurisdiction of a subsequent suit to foreclose a mortgage on the same property, irrespective of the citizenship of the parties thereto; 137 U. S. 171; 52 Fed. Rep. 671.

Demand for payment is not necessary before proceeding for foreclosure, though a corporation could of course show that payment would have been made if demanded; 95 U. S. 10.

The court having acquired jurisdiction takes control of the entire property of the corporation through its receiver, and usually in the case of a railroad, though exceptionally in the case of other corporations, operates the property through such receiver. See RECEIVERS.

After the receiver takes possession, supplies, even though not covered by the mortgage, cannot be taken in execution by creditors. Prior to such taking possession, such assets are ordinarily subject to execution, or can be reached by attachment or bill in equity. Income, such as earnings, or interest or accounts collected subsequently to the appointment of the receiver, are taken by him and administered for the benefit of all the creditors. See RECEIVERS; OPERATING EXPENSES.

Provision is then made for ascertaining the liens, or claims, against the property and determining the liabilities of the corporation and their several priorities. This is preliminary to a sale of the property, in order that parties interested may know what the incumbrances upon, or claims against, the property are, and may bid intelligently, or make provision to redeem the property without a sale; 63 Fed. Rep. 891. See Foreclosure decree in 88 id. 843.

Decrees for the sale of mortgaged property usually provide that a part of the bid may be paid in bonds of the issue secured.

On the foreclosure sale of the property of a corporation, bonds should not be received in payment of a bid except for such proportion of the bid as the purchaser, on a distribution of the purchase money, is entitled to receive on account of his bonds, and the right to bid in bonds should be extended to all bondholders on the same terms; 73 Fed. Rep. 956.

The receivership usually terminates in a sale under order of court, either for the purpose of carrying out a plan of reorganization (see REORGANIZATION), or for the purpose of realizing upon the property of the corporation. For the form of a bill of foreclosure and decree, see 3 Hughes 320.

A purchaser of real estate at a foreclosure sale is punishable as for contempt in refusing to obey an order of the court requiring him to complete the sale; see 47 N. Y. Supp. 835, reversing *id.* 693. Inability to pay the price will not relieve the party; 47 N. Y. Suppl. 835; *contra*, 92 N. C. 304.

It is to be observed that in a foreclosure it is by no means certain that the lien of the mortgage will be determined to be the first lien upon the corporate property. In many cases it develops that claims subsequent to the mortgage in time are held to be prior liens, and while for many purposes the filing of a bill or appointment of a receiver fixes the liabilities, it may be that claims arising even subsequent to the receivership will be held to precede the claim of the mortgage bondholders.

The first payment out of the fund realized from the property is for the expenses of the litigation, always provided for from a fund under the control of a court. In-

cluded under this head are receivers' certificates, since these were issued by order of the court. See OPERATING EXPENSES; RECEIVERS.

Taxes are prior in lien to all other liens except judicial costs; 3 Woods 484; 110 N. Y. 250; 41 N. J. L. 235.

In many states liens are given by statutes to certain favored creditors, who thus acquire priority over mortgage bonds prior to the inception of their claims. The ordinary mechanic's lien statute does not apply to railroads unless expressly declared to do so. The contractor who constructs a railroad has no lien thereon as a matter of right. The fact that he has possession does not give him a lien; 1 Wall. 254; 11 id. 459. The courts construe such statutes strictly. Thus, a statute giving a lien for materials, supplies, and labor does not give a lien for money loaned to pay for them; 39 Fed. Rep. 436. And a lien for materials will be allowed only for such materials as pass into the permanent structure, and not for trucks, scales, etc.; 27 Fed. Rep. 178. A contractor's lien for work done will be limited to the embankments and structures actually made by him, as distinguished from the land and right of way; 83 Fed. Rep. 336. It has been held that a statute giving a lien to persons furnishing supplies necessary to the operation of a manufacturing company prior to the lien of an earlier mortgage is not unconstitutional as special or class legislation; 90 Va. 126. Such "supplies" are only such things as contribute directly to carrying on the work in which the company is engaged and not, *e. g.*, goods supplied to a "company store" maintained by a furnace company; 81 Fed. Rep. 451. But, while the courts construe such statutes strictly in determining the kind of claims to be admitted under their provisions, they construe them liberally as remedial statutes in determining the formalities to be observed under their provisions; 35 Fed. Rep. 442.

A very common statutory lien of this class is the lien for labor, usually limited as to the duration of the labor for which a lien can be filed, and also as to the class of employees entitled to take advantage of the provisions of such a statute; 85 Fed. Rep. 436; 81 id. 453.

The "six months' rule," or as it is usually called, from the case in which it was adopted by the Supreme Court of the United States (99 U. S. 235), the rule in *Fosdick v. Schall*, allows parties who have furnished labor or supplies within six months antecedent to the receivership priority, at least so far as income received during the receivership is concerned, over mortgage bondholders. It has been held that the rule applies only to railroads; 128 U. S. 416; not to manufacturing corporations; 35 Fed. Rep. 436; 43 id. 372; nor to steamship lines; 50 id. 312; nor to a hotel company; 106 N. Y. 423. But see, *contra*, an Alabama case discussing the authorities and extending the rule to private corporations generally; 29 L. R. A. 623. See RECEIVERS.

Mortgage or Lien. Where preferred stock is issued under a stipulation in the certificate that "no mortgage or lien of any nature" shall be placed upon the property of the company without the unanimous consent of the preferred stockholder, the words "mortgage or lien of any nature" do not include claims of general creditors. 148 Ky. 379, 146 S. W. 752.

As to the right of a mortgagee to possession, see 5 Harv. L. Rev. 245.

See ROLLING STOCK; RECITALS; TRUSTEE; TRUST DEED; MERGER; LEASE; MAJORITY.

Consult Kent; Washburn; Williams, Real Property; Story; Pomeroy, Equity; Jones, Mortgages and also Chattel Mortgages; Cook, Stock and Stockholders; Short, Railway Bonds; Thompson, Corporations.

Mortgages in the civil law are of two kinds, conventional and legal. A conventional mortgage results from the direct act or covenant of the parties. A legal mortgage arises by mere act of law.

A mortgage may be acquired in three

ways.

First, with the consent of the debtor, by his agreement.

Second, without the owner's consent, by the quality and bare effect of the engagement, the nature of which is such that the law has annexed to it the security of a mortgage.

Third, where a mortgage is acquired by the authority of justice: as where a creditor who had no mortgage obtains a decree of condemnation in his favor.

When the creditor is put into possession of the thing, movable or immovable, he has a right to keep it until he is paid what is owing him; and the debtor cannot turn the creditor out of possession, nor make use of his own thing without the consent of the creditor.

Effect of a mortgage. **First**, the creditor has a right to sell the thing pledged, whether the creditor has it in his possession or not. Under the French law, it was a right to have it sold. Cushing's Domat, p. 647.

Second, a right on the part of the creditor to follow the property, into whosever hands it has come, whether movable or immovable.

Third, a preference of the first creditor to whom the property is mortgaged, and a right on his part to follow the property into the hands of the other creditors.

Fourth, the mortgage is a security for all the consequences of the original debt, as damages, interest, expenses in preserving, etc.

With respect to mortgages under the modern civil law of France and Louisiana, the distinction between movables and immovables is important. Such a thing as a chattel mortgage is not recognized under either system. "But some things movable in their nature become immovable by destination under certain circumstances," as: animals intended for and used in the cultivation of a plantation and placed on it by the owner for that purpose; though the animal cannot be mortgaged by itself, a mortgage of a plantation will cover the animals so attached to it; Howe, Stud. Civ. L. 76; 14 La. Ann. 15. See LIEN; PACT DENON ALIENANDO.

See, generally, Domat, part i. lib. iii. tit. i.; Guyot, Rep. Univ. tit. *Privilegium*; Cushing's Domat. LEGAL MORTGAGE.

MORTGAGE AND CONDITION SALE. Distinguished. Where the debt forming the consideration of a conveyance still subsists, or the money is advanced by way of loan, with a personal liability on the part of the borrower to repay it, and by the terms of the agreement the land is to be reconveyed on payment of the money, it will be regarded as a "mortgage"; but where the relation of debtor and creditor is extinguished, or never existed, the agreement will be considered as merely a "conditional sale." 8 Bush. (Ky.) 695.

MORTGAGEE. He to whom a mortgage is made. See MORTGAGE.

MORTGAGOR. He who makes a mortgage. See MORTGAGE.

MORTIFICATION. In Scotch Law. A term nearly synonymous with mortmain.

MORTMAIN. A term applied to denote the possession of lands or tenements by any corporation, sole or aggregate, ecclesiastical or temporal. These purchases having been chiefly made by religious houses, in consequence of which lands became perpetually inherent in one dead hand, this has occasioned the general appellation of mortmain to be applied to such alienations. 2 Bla. Com. 268; Co. Litt. 2 b; Erskine, Inst. 2. 4. 10; Barrington, Stat. 27, 97. See Story, Eq. Jur., 13th ed. § 1137 n. (4); Shelf. Mortm. In England the common-law right of every corporation to take and hold lands and tenements has been restrained by the statutes of mortmain, which subject the power to acquire lands to the discretion of the crown or parliament as to the grant of a license;

8 H. L. C. 713; 15 How. 367, 404. These statutes have not been re-enacted or considered in force in this country except in Pennsylvania, where they are judicially recognized to the extent of prohibiting the dedication of property to superstitious uses, and grants to a corporation without a statutory license; 7 S. & R. 313; though the title is good till office found, and may be conveyed subject to the right of the state to defeat it; id. See 101 U. S. 353. The commonwealth only can object; 7 Pa. 238.

Ordinarily, a corporation may take and hold such land as may be within the purposes of the charter, whether it acquires it by deed or devise; Clark, Corp. 129. Statutes sometimes restrict the amount that can be taken. Where a limit of value is specified it is ascertained as of the taking; 4 Sandf. Ch. 633.

In the United States the term mortmain acts is applied to statutes which exist in some states restricting the right of religious corporations to hold land and the power to make conveyances, devises, or bequests to religious societies or charitable uses. Such statutes are aimed at the same mischief which gave rise to the English statutes of mortmain, and either avoid the deed or will, *quoad hoc*, altogether, or when without valuable consideration, or when the real estate is above a specified valuation, or if made within a specified time before the death of the grantor or testator. See Stims. Am. Stat. L. §§ 403, 1446, 2618.

In England, by the Mortmain Act of 1736, 9 Geo. II. c. 36, the power of devising land by will to charitable purposes was absolutely destroyed; 6 Ch. D. 214. This act and various amending acts were repealed by the act of 1883, but practically the then existing law was re-enacted; Whitehead, Church Law 174.

The act of 1886 is in effect a codification of the law on the subject; 5 L. Quart. Rev. 387. It is in four distinct parts: I. Assurances in mortmain are void as to the land liable to forfeiture, if made otherwise than under authority of a statute or of a license from the queen, who is empowered to grant it. II. Assurances for charitable uses are treated substantially on the basis of the statute 9 Geo. II., and charitable objects are enumerated in the language of the statute 48 Eliz. c. 4; they must take effect immediately, without the power of revocation, reservation, etc., except as to a nominal rent; mines and minerals, or easements, building contract, or the like; or, in case of *bona fide* sale, of a rent charge or annual payment to the vendor; they can never be made by will, but only by deed made with prescribed formalities. III. Exemptions are made of specified quantities of land for parks, museums, and schoolhouses, which may be made by will; also land for the two universities and other named colleges is excepted from the provisions in the second part of the act. IV. Scotland and Ireland are excluded, and existing charters, etc., are saved.

By the Mortmain and Charitable Use Act of 1891, land may be assured by will to or for the benefit of any charitable use, but such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator unless the time is extended by the high court, or a judge at chambers, or the charity commissioners, who have power to sanction the retention or acquisition of such land where it is required for actual occupation for purposes of charity. Land under the mortmain acts, 1883 and 1891, is defined to include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not any money, secured on land or any personal estate arising from or connected with land; 54 & 55 Vict. c. 73, § 3.

Statutes of mortmain are local in their application and do not affect wills of persons domiciled in British colonies. A bequest by a testator, domiciled in a colony, of money, to his trustees for the purchase of land in England for a charitable object, is valid; 7 H. L. Cas. 124.

See Whitehead, Church Law 174; Tysen, Char. Beq. 561; 1 Brett, Com. ch. xix.; CHARITABLE USE.

MORTUARY. In Ecclesiastical Law. A burial-place. A kind of ecclesiastical heriot, being a customary gift of the second best living animal belonging to the deceased, claimed by and due to the minister in many parishes, on the death of his parishioners, whether buried in the churchyard or not. These mortuaries, like lay heriots, were originally voluntary bequests to the church in lieu of tithes or ecclesiastical dues neglected in lifetime. See SOUL SCOT. They were reduced to a certain amount by 21 Hen. VIII. c. 6.

They were sometimes payable to the lord; Paroch. Antiq. 470. The mortuary seems to have been carried to church with the corpse, and was therefore sometimes called corpse-present. 2 Burn, Eccl. Law 563. Anciently, a parishioner could not make a valid will without an assignment of a sufficient mortuary or gift to the church. 2 Bla. Com. 427.

MORTUARY CEREMONIES. Ceremonies at the interment of the dead, the performance of which being enjoined and prescribed by religious societies, fraternal and other organizations, are of infinite variety as to form, and lack the essential element of uniformity to make them binding and obligatory as customs, even if their compulsory observance was not constitutionally objectionable. 149 Ky 498, 149 S. W. 871.

MORTUARY TABLES. See LIFE TABLES.

MORTUUM VADIUM. A mortgage.

MORTUUS (Lat.). Dead. Ainsworth, Lex. So in Sheriff's return *mortuus est*, he is dead. O. Bridgm. 460; Brooke, Abr. *Retourne de Brie*, pl. 125; 19 Viner, Abr. *Return*, lib. 2, pl. 12.

MORTUUS CIVILITER. See CIVILITER MORTUUS; DEATH, CIVIL.

MOST FAVORED NATION TREATMENT. Because of the complex nature of commercial relations at the present day, changes of policy in government, etc., the treaty in detail (*q. v.*) would be impracticable between states, inasmuch as they would be subject to constant amendment. In order, therefore, for states to preserve their rights and to prevent any future discriminations unfavorable to them and to their commerce, they have adopted two methods to supplant the treaty in detail. They are: (1) National Treatment, (2) Most favored nation treatment, or (3) a combination of both.

As a general rule, **national treatment** secures to the foreign merchant who enjoys its benefits the same rights and privileges as a native subject or citizen in all that concerns his residence, property, commercial transactions and the importation and sale of his goods, and it obtains for the foreign state the same treatment of its merchant vessels as is secured to native vessels.

Most favored nation treatment, on the other hand, leaves each party free to make what internal regulations it pleases, and to give what preference it finds expedient to native merchants, vessels and productions.

Its object is to prevent any unfair discrimination against the merchants, vessels and productions of the contracting party in favor of those of another state, and, owing to its greater scope, the privileges secured by it may be superior to those secured by national treatment. Imports being in their essence foreign, it is impossible that they receive national treatment. The rate of duty on them must be fixed either by a treaty wholly, or in part, in detail, by a supplementary convention confined to duties on imports and exports, or by the legislature of the state; and the favored nation clause is usually resorted to by foreign states to secure a uniformity of charges and to prevent unfair discriminations.

The article enjoins the spirit of fair and equal legislation and is designed as a stipulation that no unfriendly regulations shall be resorted to by one party against the other, nor any preference given in the future with an intent to injure or prejudice either party. Its object is two fold,—to supply omissions by covering the whole field of commerce and navigation, or other matters of which it treats, and to insure fair and equal treatment in these respects during the life of the convention.

The ordinary forms of the clause as it appears in modern treaties are as follows: (a) **The simply reciprocal form.** "The high contracting parties agree, that, in all that concerns commerce and navigation,

any privilege, favor, or immunity which either contracting party has already granted, or may hereafter grant to any other state, shall become common to the other party."

(b) **The qualified reciprocal form**, so called because of the qualifying clause appended owing to the many discussions concerning the interpretation of "favor." (c) **The imperative and unconditional form.** (d) **The unilateral form** appearing in treaties between Christian or civilized, and semi-civilized states, whereby the civilized power reserves to itself alone favored nation treatment, usually imperative and unconditional. (e) **The specialized or contracted form** which applies to but one subject of commerce, as for instance, "imports." Herod, Favored Nation Treatment, 2-6.

MOTEER. A customary service or payment at the moot or court of the lord from which some were exempted by charter or privilege. Cowel.

MOTHER. A woman who has borne a child.

It is generally the duty of a mother to support her child when she is left a widow, until he becomes of age or is able to maintain himself; 8 Watts 366; 16 Mass. 135; 3 N. H. 29; 52 N. J. Ch. 92; and even after he becomes of age, if he be chargeable to the public, she may, perhaps in all the states, be compelled, when she has sufficient means, to support him. But when the child has property sufficient for his support, she is not, even during his minority, obliged to maintain him; 1 Bro. Ch. 387; 2 Mass. 415; *id.* 97; but will be entitled to an allowance out of the income of his estate, and, if need be, out of the principal, for his maintenance; 2 Fla. 36; 2 Atk. 447; 5 Ves. 194; 3 Dutch. 388. During the life of the father she is not bound to support her child, though she have property settled to her separate use and the father be destitute; 4 Cl. & F. 323; 11 Bligh, n. s. 62.

When the father dies without leaving a testamentary guardian at common law, the mother is entitled to be the guardian of the person and estate of the infant until he arrives at fourteen years, when he is able to choose a guardian; Littleton § 123; 3 Co. 38; Co. Litt. 84 b; 2 Atk. 14; Comyns, Dig. *Feme*; 7 Ves. 348. See 10 Mass. 135, 140; Harp. 9; 1 Root 487; 22 Barb. 178; 2 Green, Ch. 221; 3 Dev. & B. 325; 9 Ala. 197; 29 W. Va. 751. The right of the widowed mother to the earnings and services of her minor child does not appear to have been precisely determined; but it is by no means so absolute as that of the father; 81 Me. 240; 15 N. H. 486; 4 Binn. 487; 3 Hill N. Y. 400; 14 Ala. 123; 15 Mass. 272.

In Pennsylvania, when the father dies without leaving a testamentary guardian, the orphans' court will appoint a guardian until the infant shall attain his fourteenth year. During the joint lives of the parents, the father has the only control and custody of the children, except when in special cases, as when they are of tender years, or when the habits of the father render him an unsuitable guardian, the mother is allowed to have possession of them; 6 Rich. Eq. 344; 2 S. & R. 174; 13 Johns. 418; 2 Phill. 786; 2 Coll. 661.

The right of the father or mother to the custody of their minor child is not an absolute right to be accorded them under all circumstances, for it may be denied to either of them if it appears to the court that the parent, otherwise entitled to this right, is unfit for the trust; 29 W. Va. 751; 82 Va. 433.

A child will not be taken from the custody of its father and given to its mother when it does not appear that his welfare required the change; 4 Misc. Rep. 235.

The mother of a bastard child, as natural guardian, has a right to the custody and control of such child, even as against the putative father, and is bound to maintain it; 12 Mass. 387, 433; 2 Johns. 375; 6 S. & R. 255; but after her death the court will, in its discretion, deliver such child to the father in opposition to the claims of the maternal grandfather; 1 Ashm. 55; Stra. 1162.

As a general rule the mother of an illegitimate cannot recover damages for his death, under a statute giving a right of action to the relatives or representatives of one killed through the negligence of another; 2 Ont. 658; 46 Fed. Rep. 269. See, *contra*, 25 S. W. Rep. (Mo.) 179. See BASTARD.

MOTHER-IN-LAW. The mother of one's wife or of one's husband.

MOTION. In Practice. An application to a court by one of the parties in a cause, or his counsel, in order to obtain some rule or order of court which he thinks becomes necessary in the progress of the cause, or to get relieved in a summary manner from some matter which would work injustice.

It is said to be a written application for an order; 83 La. 471, but it is frequently made verbally.

Where the object of the motion may be granted merely on request, without a hearing, it is a motion of *course*; those requiring a hearing are *special*; such as may be heard on the application of one party alone, *ex parte*; those requiring notice to the other party, *on notice*.

When the motion is made on some matter of fact, it must be supported by an affidavit that such facts are true; and for this purpose the party's affidavit will be received, though it cannot be read on the hearing; 1 Binn. 145. See 3 Bla. Com. 305; 15 Viner, Abr. 495; Graham, Pr. 542; Smith, Ch. Pr. Index; Mitchell, Motions and Rules.

Under the English Bankruptcy Rules of 1870, all applications to a court having jurisdiction in bankruptcy, in the exercise of its primary jurisdiction, must in general be made by motion. Any application made to a divisional court of the high court of justice, or to a judge in an action, under the rules appended to the Judicature Act, 1875, must be made by motion. Moz. & W.

MOTION FOR DECREE. This has hitherto been (since its introduction by stat. 15 & 16 Vict. c. 86) for the plaintiff in an English chancery suit to obtain the decree to which he claims to be entitled. It must be distinguished from interlocutory motions. See Hunt, Eq. Pl. i. ch. 4; Moz. & W.

MOTION FOR JUDGMENT. In English Practice. A proceeding whereby a party to an action moves for the judgment of the court in his favor, which he may adopt under various circumstances enumerated under the Judicature Act, 1875.

MOTIVE. The inducement, cause, or reason why a thing is done.

It is an inducement, or that which leads or tempts the mind to indulge the criminal act; it is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act which has been clearly proved, but from the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt; 49 N. Y. 143. It is not indispensable to conviction for murder that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury; 151 U. S. 396.

An act legal in itself, which violates no right, is not actionable on account of the motive which actuated it; 34 Conn. 529; 28 Vt. 49; [1896] 1 Ch. 274; [1898] A. C. 1. See the learned paper on the doctrine of the last cited case, *Allen v. Flood*, by L. C. Krauthoff, in Rep. Am. Bar Assoc. 1898.

See MALICE; LIBEL; LUCRI CAUSA; CAUSE; CONSIDERATION; MISTAKE; WITNESS.

MOTOR CYCLE. Motor cycles are motor vehicles within the Act No. 196, Pub. Acts 1905 (Mich.). The distinction between bicycles and motor cycles is that one is propelled by muscular and the other by mechanical power. 156 Mich. 174. See MOTOR VEHICLE.

MOTOR VEHICLES. As used in

Act. No. 196, Pub. Acts 1905 (Mich.) § 1 means all vehicles propelled by power, other than muscular power, except traction engines and such motor vehicles as run only upon rails or tracks. 156 Mich. 174.

MOURNING. The apparel worn at funerals, and for a time afterwards, in order to manifest grief for the death of some one, and to honor his memory.

The expenses paid for such apparel.

It has been held, in England, that a demand for mourning furnished to the widow and family of the testator is not a funeral expense; 2 C. & P. 207. See 14 Ves. 346; 1 V. & B. 364. See 2 Bell, Com. 156.

MOVABLES. Such subjects of property as attend a man's person wherever he goes, in contradistinction to things immovable.

Things movable by their nature are such as may be carried from one place to another, whether they move themselves, as cattle, or cannot be removed without an extraneous power, as inanimate things. So in the civil law *mobilia*; but this term did not properly include living movables, which were termed *moventia*. Calvinus, Lex. But these words *mobilia* and *moventia* are also used synonymously, and in the general sense of "movables." *Ibid.* Movables are further distinguished into such as are in possession, or which are in the power of the owner, as a horse in actual use, a piece of furniture in a man's own house; and such as are in the possession of another, and can only be recovered by action, which are therefore said to be in action, as a debt. But it has been held that movable property, in a legacy, strictly includes only such as is corporeal and tangible; not, therefore, rights in action, as judgment or bond debts; 19 Conn. 238, 245; 2 Dall. 142; 1 Wm. Jones 225. But see 17 Pick. 404. See **PERSONAL PROPERTY**; **POW. MORTG. INDEX**; 2 Bla. Com. 384; 2 Steph. Com., 11th ed. 26; 1 P. Wms. 267.

In a will, "movables" is used in its largest sense, but will not pass growing crops, nor building materials on ground; nor, as stated above, rights in action; 2 Wms. Exec. 1014; 3 A. K. Marsh. 123; 2 Dall. 142. See **MORTGAGE**.

In Scotch Law. Every right which a man can hold which is not heritable; opposed to heritage. Bell, Dict.

MOVE. To apply to the court to take action in any matter. See **MOTION**. To propose a resolution, or recommend action in a deliberative body.

MUIRBURN. In Scotch Law. To set fire to a muir or moor. The time in which muirburn may be practised is regulated by statute. See 1 Bro. C. C. 78.

MULAGE. A term used by miners meaning that the crime of buggery had been committed by a miner with a mule. To charge one with "mulage" is libelous. 162 Ky. 69, 172 S. W. 993.

MULATTO. A person born of one white and one black parent. 7 Mass. 88; 1 Bailey 270; 2 id. 558; 18 Ala. 276.

Properly a mulatto is a person one of whose parents is wholly black and the other wholly white; but the word does not always, though perhaps it does generally, require so exactly even a mixture of blood, nor is its signification alike in all the states. 1 Bish. Mar. & D. § 308.

MULCT. A fine imposed on the conviction of an offence.

An imposition laid on ships or goods by a company of trade for the maintenance of consuls and the like. It is obsolete in the latter sense, and but seldom used in the former.

MULE. A mule is not a mare, horse, or gelding. 4 D. R. Pa. 172.

A hybrid between the ass and the horse. Stand Dict. A mule may be considered as a horse within a statute giving a remedy for injuries to "horses and cattle" by a railroad company. Anderson; 50 Ill. 186. See

EXPERIENCED MULE.

MULIER. Anciently *mulier* was taken for a wife, as it is commonly used for a woman, and sometimes for a widow; but it has been held that a virgin is included under the name *mulier*. Co. Litt. 170, 253; 2 Bla. Com. 248.

The term is used always in contradistinction to a bastard, *mulier* being always legitimate. Co. Litt. 243, and seems to be a word corrupted from *mulior*, or the French *meilleur*, signifying lawful issue born in wedlock. But by Glanville, lawful issue are said to be *mulier*, not from *mulior*, but because begotten *e muliere*, and not *ex concubina*, for he calls such issue *filios mulieratos*, opposing them to bastards. Glanville, lib. 7, c. 1. If the said lands "should, according to the queen's laws, descend to the right heir, then in right it ought to descend to him, as next heir being *mulieris* borne, and the other not so borne." Holinshed. Chron. of Ireland, an. 1538.

MULIER PUISNE. See **BASTARD** **EIGNE**; **EIGNE**.

MULTA. A fine imposed *ex arbitrio* by magistrates on the *praesides provinciarum*. Inst. 4. 1.

A fine given to the king that the bishop might have the power to make his will and to have the probate of other men's, and the granting administrations. Toml. Law Dict.

MULTIFARIOUSNESS. In Equity Pleading. The demand in one bill of several matters of a distinct and independent nature against several defendants. Cooper, Eq. Pl. 182; 18 Ves. 80; 2 Mas. 201; 4 Cow. 682; 2 Gray 467. See Dan. Ch. Pr. 2093. See **PATENT**.

The uniting in one bill against a single defendant several matters perfectly distinct and unconnected. More commonly called misjoinder of claims. See **MISJOINDER**.

Multifariousness of the first kind is where the plaintiff joins several distinct claims against the same defendant and prays relief in respect to all; and of the second kind is where a plaintiff having a valid claim against one defendant joins another person as defendant in the same suit with a large part of which he is not connected.

The objection is discouraged where it might defeat the ends of justice; 12 Ga. 61; but joinder will be allowed unless it is apparent that the defence will be seriously embarrassed by confusing different issues and proofs in the same litigation; 4 Blatchf. 376. See 61 Ga. 520. A bill is multifarious where there is a misjoinder of distinct and independent causes of action. See 17 Ala. 119. Thus, unconnected demands against different estates cannot be united in the same bill, though the defendant is executor in both; 6 Dana 186; nor will a bill lie against two different partnerships, though one defendant is a partner in both; 10 Md. 364; nor a bill combining individual claims with claims in a representative capacity; 3 Story 25; but a bill may be brought by several persons claiming under a common title but in different shares; 18 How. 253; and where there is a joinder of a legal and an equitable claim and a prayer for relief as to both, the bill is not multifarious; 18 Ala. 439. To justify dismissal on this ground, it must appear that the interests are so diverse that they cannot be properly included in one decree; 21 Ala. 813.

A bill framed with a double aspect is not multifarious; 1 S. & M. 221, 208.

There is no general rule by which to determine whether a bill is multifarious because it joins another person as defendant in a suit with a large part of which he is unconnected; it must be left to the discretion of the court; 3 How. 333; 18 id. 259; the courts do not disregard previous decisions, but have a due regard to general convenience and the advancement of justice; 3 Md. Ch. 47.

Defendants should not be put to the unnecessary trouble and expense of answering litigated matters in a bill in which they are not interested; 3 Barb. Ch. 432; but where the interests of different parties are so complicated in different transactions that entire justice could not be conveniently done without uniting the whole, the bill is not multifarious; 3 How. 411; 59 N. H.

507. The objection is confined to cases where the cause of each defendant is entirely different in subject-matter from that of his co-defendants, but it does not apply to a case where a general right is claimed by the plaintiff, though the defendants may have separate and distinct rights; 95 N. C. 303; 69 Mo. 436. To render a bill multifarious it must contain not only separate and distinct matters, but such that each entitles the complainant to separate equitable relief; Adams, Eq. 310.

The objection should be raised by demurrer; 9 Gill & Johns. 280; filing an answer and taking the testimony on the merits waives the objection, and it cannot be made on appeal after a decree *pro confesso*; id.; 100 Ill. 237; or after a final decree on the merits of one part of the bill; 18 Ala. 787. In 57 Pa. 247, it was held that it was too late to object at the hearing. But in such case it has also been held that its allowance rests in the discretion of the court; 17 Ala. 425. It may be taken by plea, answer, or demurrer, but not at the hearing; but the court may raise it at any time; 3 How. 332.

One defendant cannot demur on the ground of the joinder of another defendant who does not object. See 38 N. J. Eq. 88, n.

A demurrer goes to the whole suit, and, if sustained, the bill should be dismissed; 3 Md. Ch. 46; 16 Ala. 87. See **MISJOINDER**.

MULTIPLE POINDING. In Scotch Law. Double distress; a name given to an action, corresponding to proceedings by way of interpleader, which may be brought by a person in possession of goods claimed by different persons pretending a right thereto, calling the claimants and all others to settle their claims, so that the party who sues may be liable only "in once and single payment." Bell, Dict.; 2 Bell, Com. 299; Stair, Inst. 3. 1. 39.

MULTIPLICITY. That quality of a pleading which involves a variety of matters or particulars; undue variety.

MULTIPLICITY OF ACTIONS, OR SUITS. Numerous and unnecessary attempts to litigate the same right. For such cases equity provides a proceeding called a bill of peace, *q. v.*, and a court of common law may grant a rule for the consolidation of different actions; L. R. 2 Ch. 8; Story, Eq. Pl. 234; Bisph. Eq. 415.

MULTITUDE. The meaning of this word is not very certain. By some it is said that to make a multitude there must be ten persons at least, while others contend that the law has not fixed any number. Co. Litt. 257. That two cannot constitute a multitude, see 104 Mass. 595.

MULTURA. See **MULTA**.

MULTURE. In Scotch Law. The quantity of grain or meal payable to the proprietor of a mill, or to the multureur, his tacksman, for manufacturing the corns. Erskine, Inst. 2. 9. 19; Ersk. Prin. 210.

MUMMIFICATION. In medical jurisprudence, the complete drying up of the body as the result of burial in a dry, hot soil, or the exposure of the body to a dry, cold atmosphere.

MUND See **WEOTUMA**.

MUNERA. The name given to grants made in the early feudal ages, which were merely tenancies at will or during the pleasure of the grantor. Dalrymple, Feud. 198, 199; Wright, Ten. 19.

MUNICEPS (Lat. from *munus*, office, and *capere*, to take). In Roman Law. Eligible to office.

A freeman born in a municipality or town other than Rome, who had come to Rome, and though a Roman citizen, yet was looked down upon as a provincial, and not allowed to hold the higher offices (*dignitates*).

The inhabitants of a municipality entitled to hold municipal offices. Voc. Jur. Utr.; Calvinus, Lex.

MUNICIPAL. Strictly, this word applies only to what belongs to a city. It is used in this sense in the terms *municipal court*, *municipal ordinance*, *municipal officer*.

It has two meanings: (1) relating to cities, towns, and villages; (2) relating to the state or nation; 3 Wyo. 597. See 43 Ala. 598.

Among the Romans, cities were called *municipia*; these cities voluntarily joined the Roman republic in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were thence called *municipal magistrates*. With us this word has a more extensive meaning: for example, we call *municipal law* not the law of a city only, but the law of the state. 1 Bla. Com. 41. Municipal is used in contradistinction to international: thus, we say, an offence against the law of nations is an international offence, but one committed against a particular state or separate community is a municipal offence. See *Municipium*.

MUNICIPAL BONDS. Evidences of indebtedness issued by a municipality.

In the ordinary commercial sense, they are negotiable bonds. 85 Tex. 520.

This class of securities is issued for sale in the market, with the object of raising money, under the express authority of the legislature. As to the power of municipal corporations to issue and sell bonds and borrow money, see *MUNICIPAL CORPORATIONS*. Notwithstanding they are under seal, they are clothed with all the attributes of negotiable or commercial paper, pass by delivery or indorsement, and are not subject to prior equities (where the power to issue them exists) in the hands of holders for value, who took before maturity and without notice. Payment of interest on such bonds for a number of years will estop the corporation from setting up a mere irregularity in their issue, as against *bona fide* holders for value; 80 Fed. Rep. 672. The coupons usually attached to such bonds are likewise negotiable, and may be detached and held separately from the bond, and may be sued on by the holder in his own name without his being the owner of the bonds to which they were originally attached; 1 Dill. Mun. Corp. § 496; 3 Wall. 327; 1 Dill. 338; whether he has given consideration for them or not; 80 Fed. Rep. 672.

Coupons when severed from the bonds cease to be incidents of the bonds, and become independent claims, and do not lose their validity, if for any cause the bonds are cancelled or paid before maturity; 20 Wall. 583. See as to coupons as distinct and separate instruments, 6 L. R. A. 562, n.; *COUPONS*.

The fact that such bonds are payable out of a special fund, known as a "sinking fund," does not prevent the holder from suing at law to enforce collection; 75 Fed. Rep. 967.

A very important principle with respect to municipal bonds was settled by the leading case of *Gelpcke v. Dubuque*, 1 Wall. 175, in which it was held that bonds which were valid under the decisions of the state court of Iowa at the time they were issued, will be sustained by the federal court, although the state court had subsequently overruled its earlier decisions and held that they were issued without authority. See 3 *id.* 294; 7 *id.* 181. See also an article sustaining this doctrine in 4 Harv. L. Rev. 311, by Prof. J. B. Thayer, in a preliminary note to which are cited a number of adverse criticisms of it.

Purchasers of the bonds of a municipality issued to aid the building of a railway, which recite a compliance with the law authorizing their issue, are not required to ascertain conditions imposed by the proposition voted on, which do not appear in the bonds; 82 Fed. Rep. 873; they have a right to assume that the conditions have been complied with; 73 *id.* 966.

See 5 Am. & Eng. R. R. Cas. 241; 36 Cent. L. J. 133; and as to power to subscribe; 12 Am. & Eng. R. R. Cas. 689; 15 *id.* 621, 655; ratification; 12 Am. & Eng. R. R. Cas. 651; effect of recitals; 12 *id.* 524; 15 *id.* 584, 675; 2 Am. & Eng. Corp. Cas. 291, 320; 35 Corp. L. T. 438, 460. See also an extended discussion of cases on municipal bonds in aid of railroads, in the supreme court of the

United States; 17 Am. L. Reg. N. s. 309, 609.

See, generally, as to municipal bonds for public purposes, Coler; Burhans. Mun. Bonds; Burroughs, Pub. Sec. in America; Dillon, Mun. Corp.; Jones, Railroad Securities, ch. 7; Report Mo. Bar Ass'n, 1891, 221; 1 L. R. A. 787, note; 15 Am. & Eng. Corp. Cas. 356; 86 Fed. Rep. 594, 263; as to election for issue; 40 *id.* 543; negotiability; 5 *id.* 593; over issue; 40 *id.* 535; limit of indebtedness; *id.* 584; 26 *id.* 473; fraudulent circulation; 2 *id.* 263; estoppel to deny validity; 2 Am. Ry. Corp. Cas. 525; power to issue; 5 L. R. A. 726; *bona fide* holder; 23 Am. L. Reg. N. s. 310; 29 *id.* N. s. 330; mandamus, to enforce subscription; 12 Am. & Eng. Ry. Cas. 609; to enforce payment; 15 *id.* 629.

MUNICIPAL CORPORATION. A public corporation, created by government for political purposes, and having subordinate and local powers of legislation: *e. g.* a county, town, city, etc. 2 Kent 275; Ang. & A. Corp. 9, 29; Baldw. 222. An incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government. Glover, Mun. Corp. 1.

Municipal corporations are political subdivisions of the State, created by it and at all times wholly under its legislative control; their charters, and the laws conferring powers on them, do not constitute contracts with the State within the contract clause of the Federal Constitution; nor are a municipality and its citizens or taxpayers deprived of its or their property without due process of law, nor is such property taken without compensation by reason of any legislative action of the State in regard to the property held by such municipality for governmental purposes, or as to the territorial area of such municipality, or the consolidation thereof with another city, or the repeal or alteration of its charter. 207 U. S. 161.

In the United States, until recently, municipal corporations have been created singly, each with its special or separate charter passed by the legislature of the state. These charters define the territorial boundaries; provide for a governing body, usually styled the town or city council, with representatives to be chosen from different wards of the city or town; fix the qualifications of voters; specify the mode of holding elections; provide for the election of a mayor; and contain a minute and detailed enumeration of the powers of the city council; 1 Dill. Mun. Corp., 4th ed. § 39.

A state is the proper party to impeach the validity of a municipal charter, and its corporate existence cannot be collaterally attacked; 167 U. S. 646. There must be both population and territory; 75 Ill. 156; 29 Mich. 451; and there cannot be two municipal corporations, at the same time, over the same territory; 25 Fla. 371.

There are territorial subdivisions, not incorporated, but which are like municipal corporations, instrumentalities of local government for certain definite purposes. Such are in some states, the counties, or towns, or school districts where they are not incorporated. They are termed *quasi-corporations*, which title see. They are not included in the phrase "counties or municipal corporations" in a statute; 44 Wis. 489.

The term municipal corporation has been held to include the District of Columbia; 129 U. S. 141; a city; 250 Ohio St. 143; a village; 27 Neb. 770.

Where a municipal charter is repealed, and the same, or substantially the same, inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is the successor of the old one and entitled to its property and subject to its liabilities; 167 U. S. 646.

Public duties are required of such corporations as counties and districts as a part of the machinery of the state government, and in order that they may properly perform these duties they are invested with certain corporate powers, but their functions are wholly of a public nature, and

they are at all times subject to the will of the legislature, unless restrained by the constitution; 30 W. Va. 424.

In England, the municipal corporation acts, 5 & 6 Will. IV. ch. 76, abolish all special charters, with enumerated exceptions, and enact general provisions for the incorporation, regulation, and government of municipal corporations. These acts have been followed in many of the United States. The usual scheme is to grade corporations into classes, according to their size, as into cities of the first class, second class, etc., and towns or villages, and to bestow on each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform; 1 Dill. Mun. Corp. § 41, n.

The scope of legislative authority over municipal corporations is limited only by the terms of the state and federal constitutions, and the necessary implications derived therefrom; 24 Mich. 44; s. c. 9 Am. Rep. 103; 142 U. S. 366. Those matters which are of concern to the state at large, although exercised within defined limits, such as the administration of justice, the preservation of the public peace, and the like, are held to be under legislative control; while the enforcement of municipal by-laws proper, the establishment of gas works, of water works, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large; 69 Ill. 326; 62 Mo. 370; 51 Cal. 15; 28 Mich. 228; s. c. 15 Am. Rep. 202; 97 U. S. 284; 61 Fed. Rep. 782. See 160 Pa. 511.

As ordinarily constituted, municipal corporations have a dual character, the one governmental, legislative, or public; the other, proprietary or private. In their public capacity a responsibility exists in the performance of acts for the public benefit, and in this respect they are merely a part of the machinery of government of the sovereignty creating them, and the authority of the state is supreme. But in their proprietary or private character their powers are supposed to be conferred not from considerations of state, but for the private advantage of the particular corporation as a distinct legal personality.

"The functions of such municipalities are obviously two-fold: (1) political, discretionary, and legislative, being such public franchises as are conferred upon them for the government of their inhabitants and the ordering of their public affairs, and to be exercised solely for the public good, rather than their special advantage; (2) those ministerial specified duties which are assumed in consideration of the privileges conferred by their charter." 17 Gratt. 375. And it was said by Folger, J., in 69 N. Y. 180, "There are two kinds of duties imposed upon a municipal corporation. One is of that kind which arises from the grant of a special power in the exercise of which the municipality is as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is sovereign. The former power is private and is used for private purposes; the latter is public and is used for public purposes; the former is not held by the municipality as one of the political divisions of the state, the latter is." "The distinction is quite clear and well settled and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company." 8 Hill 531.

As to powers of the non-public nature and as to property acquired thereunder, and contracts made with reference thereto, they are to be considered as *quoad hoc* private corporations; 1 Dill. Mun. Corp. § 66; 102 Mass. 489; 122 *id.* 359; s. c. 23 Am. Rep. 332. And in like manner, as such corporations they are liable for the misuser or nonuser of their powers of this nature. A city is liable for wrongfully permitting the accumulation of sewage in a cellar, thereby causing the death of a person who lived in the house over such cellar; 21 App. Div. N. Y. 811. But counties, though by modern legislation frequently constituted municipal corporations, are permitted greater immunity from liability for negligence than cities. On this principle in a

recent case it was held that the act of 1892, declaring a county to be a municipal corporation, did not change the common-law rule as to its non-liability in such cases, and, consequently, it was not liable for personal injuries sustained by an individual by reason of a defective bridge which it was bound to maintain; 154 N. Y. 675. If a municipal corporation becomes indebted, the rights of creditors cannot be impaired by any subsequent legislative enactment; 4 Wall. 535; 19 Wis. 468; 100 U. S. 374; but authority to a city to borrow money, and to tax all the property therein to pay the debt thus incurred, does not necessarily deprive the state of the power to modify taxation, if the rights of creditors be not thereby impaired; 37 Ohio St. 426; s. c. 22 Am. Rep. 321. So, also, as trustee for the general public, the legislature has control over the public property and the subordinate rights of municipal corporations. It can authorize a railroad company to occupy the streets of a city without its consent and without payment; 81 N. Y. 164; 13 La. Ann. 326. It can direct a municipal corporation to build a bridge over a navigable watercourse within its limits, or appoint agents of its own to build it, and empower them to create a loan for the purpose, payable by the corporation; 58 Pa. 320; 17 Wall. 322; 104 Mass. 296; 47 Md. 145. The legislature may compel a city to pay its bonds, by taxation, but not to pay an obligation for which no consideration had been received; 95 U. S. 644. In the absence of constitutional restraint, it may extend the boundaries of an existing municipal corporation without the consent, or even against the remonstrance, of the majority or of all of the inhabitants of the existing corporation; 73 Tex. 538. And in general the legislature may, by subsequent legislation, validate acts of a municipal corporation otherwise invalid; 97 U. S. 687; Cooley, Const. Lim. 371; 101 U. S. 196. The legislature may also interfere with the administration of public charitable trusts by municipal corporations; 64 Pa. 169; but not with those of a private character where a contract has been constituted; 11 Me. 118; 4 Wheat. 518; 59 N. H. 575. A contract made by a city with a water works company, so far as the city's rights are concerned, is subject to the will of the legislature, and a statute may authorize a change therein; 142 U. S. 79; and property acquired by it for the purpose of furnishing water is not held by it as a private corporation so as to prevent the legislature from modifying the management of it; 7 Houst. 44.

See as to special legislation, as applied to corporate powers of municipal corporations, 35 Cent. L. J. 266; as to the power of the legislature over the streets of municipalities, 26 Am. L. Rev. 520; as to municipal power of taxation, 35 Cent. L. J. 227.

"A municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable." 70 N. C. 14; 93 Ill. 236; 3 Wall. 320; 1 Dill. Mun. Corp., 4th ed. § 89; 22 Am. Rep. 261; 134 U. S. 198; 145 id. 135; 78 Ga. 683; 130 Ind. 149. No powers can be implied except such as are essential to the purposes of the corporations as created; they can bind the people and property only to the extent of their powers; 108 U. S. 110; 13 Ore. 17. Where discretionary powers are granted, the corporation thereby acquires a control and discretion as absolute as that originally possessed by the legislature; 5 Cow. 541; 7 Mart. (La.) n. s. 5; 78 Ill. 550; 37 N. J. L. 146; a grant of express power carries with it the right to determine the mode of its execution; 101 N. Y. 132; 58 Wis. 403; and its discretion in that respect should not be interfered with by courts except where it is clearly abused; 47 Mich. 115. Acts in excess of the express or implied powers are

void; 114 Ill. 659. See as to municipal powers, express and implied, 1 L. R. A. 169; 2 id. 54.

A strict, rather than a liberal, construction of the powers of a municipal corporation is adopted; 43 Ia. 524; s. c. 22 Am. Rep. 261; 23 How. 435; 31 Mo. App. 287; and only such can be implied as are essential to the corporate objects and purposes; 108 U. S. 110; 79 Ia. 587; 13 Ore. 17. But, bearing this in mind, it is also true that a municipal corporation may do many acts not expressly authorized by its charter, and it has been said that "it is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age;" 160 Pa. 511. This fairly expresses the elasticity which characterizes the decisions with respect to their implied powers. The functions of such corporations are so well understood that there is usually little difficulty in deciding whether a particular power is essential to its purpose or necessarily implied. These powers have been recognized:—To grade and pave streets; 84 Pa. 487; to establish and maintain a sewerage system; 2 Grant 291; 21 Ohio St. 499; provide for a water supply and an electric light plant; 91 Wis. 131; erect public buildings; 3 Allen 9; prevent damage by fire; 7 Cow. 349; 28 Mo. 488; and to that end appropriate money to fire companies; 27 Vt. 70; 26 Ga. 678; to make pleasure drives around public squares; 171 Pa. 542; regulate poles and electric wires; 148 Pa. 117; even to the extent of requiring them to be placed underground; 6 Am. Elec. Cas. 64 (it is settled that this power may be exercised by the legislature in the exercise of the sovereign power of the state; 145 U. S. 175; 107 N. Y. 593; 125 id. 641; 38 Fed. Rep. 552); so it may make police regulations; 61 Ga. 572; 5 Wash. 303; 93 Mich. 135; offer a reward for the detection of criminals; 7 Gray 374; 92 U. S. 73; *contra*, 57 Me. 174; appropriate public money for a police pension fund; 182 Pa. 373; or, where it will promote the interests of the inhabitants generally, for a survey for a ship canal; 183 Pa. 202; issue bonds in aid of a railway; see BONDS; and it was held that the city of Philadelphia had power to send the Liberty bell, owned by it absolutely, to the Atlanta Exposition; 4 D. R. Pa. 523.

Power in municipal corporations is denied:—To provide for fireworks on the fourth of July; 116 N. C. 296; or to prohibit screens in bar rooms; 135 Ind. 466; or issue commercial paper; 47 Ill. App. 254; 121 U. S. 165. See 110 id. 192. The municipal authorities may provide not only for the immediate, but also for the prospective, needs of the city, and may make temporary appropriation, as by lease for private use of such public property as is not presently needed; 37 Wis. 400; 25 Fed. Rep. 202; 131 Mass. 25.

A subject of the utmost importance is the power of a municipal corporation with respect to nuisances. Without legislative authority it cannot authorize a common nuisance; 9 Houst. 396; nor by ordinance prohibit, as one, the fencing by a railroad of its right of way; 30 Ore. 478; but in the exercise of a granted power to suppress nuisances it may invoke the aid of a court of equity; 66 N. W. Rep. (S. Dak.) 815. In the Oregon case just cited, the subject was examined and the conclusion reached that even authority by charter to declare what shall constitute a nuisance does not authorize a city by ordinance to declare a particular use of property a nuisance, unless such use is such by common law or statute.

See 36 L. R. A. 593; 39 id. 520, 609, 649; for full annotations covering the entire ground of municipal power in regard to nuisances. See NUISANCE.

The power to borrow money and issue bonds therefor is not included among the implied powers of a municipal corporation, but when a debt has been lawfully incurred, it is not prohibited from issuing bonds for its payment; 84 Pa. 487; 51 Fed. Rep. 165; but see 19 Wall. 468; 5 Dill. 165.

They possess the incidental or implied power to borrow money and issue bonds

therefor in order to carry out their express powers, or any affecting their legitimate objects; 7 Ohio 31; 11 Wis. 470.

The power to borrow money or to create a debt should not be implied against the spirit and policy clearly manifested by contemporaneous legislation as well as by the organic law in force when the legislation giving such power was enacted; 67 Tex. 519. It can only be implied from a special duty imposed, for the discharge of which it is necessary; the power to raise money does not include the power to borrow; 119 N. Y. 289.

It was generally held that where express power is given to borrow money it includes the power to issue negotiable bonds or other securities to the lender; 1 Wall. 272; 48 Ill. 423; 15 Ind. 395; 3 Wall. 654; 34 Pa. 496. But, in cases very much discussed, it has been held by the United States supreme court that the power conferred upon a municipal corporation to borrow money or to incur indebtedness merely authorized it to issue the usual evidences of indebtedness but not "to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences;" *Merrill v. Monticello*, 138 U. S. 673. This case, it was claimed, was plainly at variance with *Rogers v. Burlington*, 3 Wall. 654, and *Mitchell v. Burlington*, 4 Wall. 270; though it did not in terms overrule them. But that they were considered overruled by the later cases was expressly stated in 144 U. S. 173, which was re-argued, before eight judges, by reason of the death of Bradley, J., pending its decision, and from the final decision in which Harlan, Brewer, and Brown, JJ., dissented. The decision was squarely to the effect that the power to borrow money did not authorize the issue of negotiable bonds, and that "even a *bona fide* holder of them cannot have a right to recover upon them or their coupons." See a critical review of these cases, 5 Harv. L. Rev. 157; 6 id. 53; BONDS: MUNICIPAL BONDS.

Where a statute confers power to borrow money and fixes the limit of the amount which can be borrowed, a municipality cannot exceed that amount under power conferred by a general provision to borrow money for any purpose within its discretion; 107 U. S. 68.

By constitutional provision in several of the states the legislature is required to restrict municipal corporations in their power to borrow money, contract debts, or pledge their credit. These provisions vary, but are most commonly in the nature of a restriction of possible indebtedness to a certain percentage of the assessed value of property; see 176 Pa. 80; and for a note collecting authorities on the municipal power to borrow money, see 7 L. R. A. 759. Constitutional limitations on state indebtedness apply to the state alone and not to her political or municipal subdivisions; 13 Cal. 175; 19 Ill. 406; 2 Ohio 607. As to both constitutional and statutory limitations, see 23 L. R. A. 402.

There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit; 6 Ohio Dec. 1; and a statute authorizing the union of public and private capital or credit in any enterprise whatever is unconstitutional; 23 Ohio St. 78; 37 id. 97; but a joinder of a city with a county in purchasing a building for a city hall has been upheld; 2 Cal. 289; where it was held that they could take as tenants in common.

Such corporations have not the power of taxation, unless such is conferred by the legislature, and when it is so conferred the statute must be strictly construed; 82 Va. 324; 83 Ala. 608; 99 N. C. 210. A grant of the power of taxation by the legislature to a municipal corporation is subject to revocation, modification, and control by the legislature of the state; 180 U. S. 180.

While the power to make laws cannot be delegated, the creation of municipalities exercising local self-government cannot be held to trench upon that rule; 129 U. S. 141. See LEGISLATIVE POWER. So from

necessity, these corporations exercise a large measure of police power (q. v.). A city council may by ordinance authorize police officers to arrest without warrant persons engaged in a breach of the peace, and an officer who, from the outside of a house, hears a disturbance or disorderly conduct within it, may, acting in good faith under such authority, enter the house and arrest the person guilty thereof as being the inmate of a disorderly house; 95 Wis. 492.

The delegation of power to municipal councils to determine between alternative methods for payment of assessments for municipal improvements is authorized by a constitutional provision directing the legislature to provide for municipal corporations; 44 Pac. Rep. (Cal.) 915.

Delegations of power to municipal corporations have been held valid to provide for the increase of justices in proportion to population, and authorizing the appointment of the additional justices by county commissioners; 45 Pac. Rep. (Col.) 357; allowing existing municipal corporations to elect to continue under their old charter or adopt the general incorporation law; 72 Miss. 950; authorizing a township committee to determine what territory shall be included in a proposed city; 33 Atl. Rep. (N. J.) 858; authorizing cities of a given class to make laws for their local self-government, subject to the general laws of the state; 11 Wash. 435; 18 id. 17.

The delegation, by the state to a city, of authority to act for it in granting franchises to build and operate street railways, does not include the power to institute and maintain actions for their forfeiture for misuse or abuse, and such forfeiture must be decreed in an action in the name of the state; 95 Wis. 39.

The delegated power of legislation involved in the authority of municipal corporations to enact ordinances springs naturally from the nature and functions of these corporations as an instrumentality of local government. Such ordinances, by the legislative body of the municipality, are the usual means of expressing the corporate will and enacting municipal laws and regulations. Such regulations may be by resolution as well as by ordinance where the charter is silent on the subject; 148 U. S. 591; 50 Wis. 204; 70 Ia. 105; 130 Ind. 149; 35 Pa. 231; 54 N. J. L. 325; if, however, the charter requires action by ordinance, a resolution is ineffective; 55 N. J. L. 285; 54 id. 474; 32 Kan. 456; and where an ordinance is required in a particular form it cannot be repealed by resolution; 89 Tex. 79; so even if an ordinance has been passed, where a resolution would have been sufficient, the latter is not sufficient to repeal it; 88 Ia. 558. Where the charter authorized action by ordinance, a resolution is sufficient if adopted and approved by the mayor with such formalities as an ordinance would require; 49 Mo. App. 612; and where an ordinance requires the approval of the mayor, a resolution not presented to him is unavailing; 113 Mo. 395. See ORDINANCE.

The principles upon which rests the right to enact penal ordinances is thus stated: (1) Unless forbidden by the constitution, the legislature can clothe municipal government with power to prohibit and punish any act made penal by the state laws, when done within the municipal limits. (2) Such an ordinance is not invalid, merely because it prescribes the same penalties as the state law for the commission or omission of the same act. (3) It is no valid objection to such an ordinance, that the offender may be tried and punished for the same act under both the ordinance and the state law. (4) A conviction or acquittal by the municipal courts, under such an ordinance, is no bar to a prosecution under the state law. (5) Such an ordinance is not invalid, merely because the trial thereunder is without a jury. (6) Nor is it invalid, because it excepts from its operation certain business pursuits that are not excepted from the operation of the state law on the same subject; 34 Fla. 440. To the same effect is

id. 504. See 1 Am. L. Reg. & Rev. N. S. 669, 699.

Ordinances must not only not conflict with constitutional or general statute law, but they must be reasonable. It is, however, said that what may be reasonable under ordinary circumstances, as a prohibition against driving on the street at a greater speed than six miles an hour, would be unreasonable and void as applied to the members of a salvage corps or fire patrol responding to an alarm; 64 Minn. 287. An ordinance providing that "no person shall on any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language," was held unreasonable and therefore invalid; [1896] 1 Q. B. 290. It is suggested that the real ground of objection in this case was that the words "or on land adjacent thereto," were too wide, and that the other objection alone ought to be untenable because the use of profane or obscene language necessarily implies annoyance; 35 Am. L. Reg. N. S. 327. But an ordinance which conforms to a definite statutory grant of power cannot be set aside as unreasonable; 38 Atl. Rep. (N. J.) 857. A statutory power to make ordinances regulating trade does not warrant one making it unlawful to carry on a lawful trade in a lawful manner; [1896] A. C. 88.

Municipal ordinances must be specific and definite, and they will not be construed as forbidding an act by implication; 7 Mart. 496; and, like a statute, they may be valid in some of their provisions and invalid as to others; 34 Ala. 17; 98 id. 134; but where the invalid provisions are inseparably connected with the valid ones, the ordinance is void; 54 N. J. L. 75; 49 Ill. App. 60. When a city council is vested with full power over a subject, and the mode of exercising it is not limited by the charter, it may exercise it in any manner most convenient; 16 Ore. 334. A city ordinance in conflict with the general policy and laws of the state is void; 45 La. Ann. 34. See ORDINANCE.

With respect to the liabilities of municipal corporations it may be said generally that as parties to a contract where they act *qua* private corporations, they are liable on their contract, and contracting parties are liable to them in the same manner as private persons and corporations are. A city can bind parties by such contracts only as it is authorized by its charter to make; 116 N. Y. 167. Those who contract with them are protected where their contracts are made according to law; 71 Mich. 227; 11 Colo. 483; and those who deal with them must exercise reasonable diligence to ascertain whether there be legally provided the funds from which the obligation to be created may be met; and the public is not estopped from setting up the illegality of the obligation by the fact that the other party has acted in reliance upon its validity; 50 N. J. L. 665.

Contracts may be entered into by the officers of a corporation, binding upon it, without the use of the corporate seal; 12 Mich. 138. Without express legislative authority, a municipality cannot act as surety or guarantee; 19 Ia. 199. Where the statute provides that no city officer should be interested in a municipal contract, and that any such contract contrary to that provision should be void, a contract with a school director for street work was held void; 98 Cal. 427; and the same is true if the interest of the officer is indirect merely, as the member of a contracting firm or corporation; 28 Atl. Rep. (N. J.) 578; such contract may be ratified by subsequent municipal action after the officer has ceased to be such, for it is a new contract; 132 Ind. 553. Even if there be no penal statute prohibiting the execution of such contract, it is void on grounds of public policy, but so long as it is executory it is voidable merely, and if entered into in good faith for a proper purpose and the city has received the benefit, there may be a recovery on a *quantum meruit*; 1 Kan. App. 35. For cases on the general subject

of the liability of municipal corporations on contracts, see 6 L. R. A. 318, note.

The liability of private corporations for the misfeasance, or negligent nonfeasance, of its officers, is affected primarily by the distinction between their public functions as an instrumentality of government, and their private relations as a corporation transacting ordinary business. See *supra*. Within the sphere of the former they are entitled to exemption from liability, inasmuch as the corporation is a part of the government, and to that extent its officers are public officers, and as such, entitled to the protection of this principle; but within the sphere of the latter, they drop the badges of their governmental offices and stand forth as the delegates of a private corporation in the exercise of private franchises, and it is amenable as such to the fundamental doctrine of liability for the acts of a servant; 17 Gratt. 375. Although the difference between the two kinds of powers is plain and marked, yet, as they approximate each other, it is sometimes difficult to ascertain the exact line of distinction. All that can be done with safety is to determine, as each case arises, under which class it falls; 5 N. Y. 369.

Where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence; Dill. Mun. Corp. § 965; but where such corporations are not in the exercise of their purely governmental functions, but are exercising, as corporations, private franchises, powers, and privileges which belong to them for their ordinary corporate benefit, or dealing with property held by them for their corporate advantage, gain, or emolument, though enuring ultimately to the benefit of the general public, then they become liable for the negligent exercise of such powers precisely as though they were individuals; 122 Mass. 344; 36 N. H. 284; 17 How. 161; Dill. Mun. Corp. § 966.

The obligation and duty of a municipal corporation in the construction of public work is only the exercise of reasonable care; it does not insure against damage; 120 N. Y. 164. The inquiry must be whether the department or officer whose action or non-action is complained of is part of the machinery for carrying on the municipal government, and whether it was then engaged in discharging a duty resting upon it; 116 N. Y. 558. To constitute negligence in such actions, there must be a duty imperfectly discharged; 81 N. Y. 21; 8 C. B. N. S. 568; and if the duty is owed to the public, there is no action by an individual to whom the duty was not specially owed; 34 Md. 265; 8 Cow. 153; 44 N. H. 246; 43 Conn. 562. As illustrating the effect of their two-fold character, municipal corporations have been held liable for injuries resulting from negligence in the management of a public building rented out for profit; 102 Mass. 499; otherwise, if let gratuitously; 128 id. 561. So they are liable for torts of their agents amounting to the negligent breach of municipal duty; 22 Pa. 54. Upon this theory rests the exception to the general rule of exemption from liability for negligence in performance of a public duty, recognized in many states, as to defective highways; 24 Ala. 112; see 5 L. R. A. 143, 253; 10 id. 734; as is also in many jurisdictions the liability for defective drains and sewers; 78 Cal. 588; 1 L. R. A. 296; 7 id. 156; but it was held that there was no liability for damage by fire resulting from failure to keep fire plugs, etc., in order; 78 Ga. 241; 35 S. W. Rep. (Tex.) 341; or from not preventing the erection of a wooden building within the fire limits; 72 Mich. 278.

There is no liability for omission to exercise discretionary powers; 107 Ill. 324; 56 Vt. 228; there must be a corporate du-

imposed; 76 N. Y. 506; 79 Ind. 491; L. R. 2 Q. B. 534; as, for example, a city is not liable for failure of its police to prevent crime which is a public duty, as distinguished from a strictly corporate duty; 1 Marvel, Del. 5. But if the corporation receives a benefit, it may be liable; 128 Mass. 324. It is then the general rule that they are not liable for misfeasance or nonfeasance of their agents. The cases on this point are very numerous.

The municipality has been held not liable for injuries resulting from negligence of a physician in charge of a pest-house; 65 Me. 402; see 1 L. R. A. 844; or for tortious acts of agents in their nature unlawful; 90 Mo. 877; 79 Me. 343; as a constable making an unlawful sale; 100 N. Y. 577; for negligence of an officer in whose selection there was no negligence; 84 Ala. 469; or of officers selected under a statute independently of municipal control; 71 Ill. 357; 17 Gratt. 382; see 1 L. R. A. 844; for negligence of police; 113 Pa. 269; unless there is statutory liability, express or implied; 89 Mo. 208; or of firemen; 84 Minn. 402; or of a civil engineer in establishing a grade for the benefit of an individual for whom he was bound to do it on payment of a fee; 69 Ia. 541; for damages resulting from the firing of a cannon under a license from the mayor authorized by ordinance; 148 Mass. 578; for the publication of defamatory matter contained in an official report of an investigating committee duly selected; 150 Mass. 434; for the wrongful act of its officers in closing an exhibition with intent to injure the owner thereof; 6 C. C. App. 627; see 76 Hun 390; for failure of its officers to provide by special tax a fund to pay street grade warrants; 16 Wash. 698. See 3 L. R. A. 257, note; MANDAMUS; QUASI CORPORATIONS.

Municipal corporations may be dissolved in England; (1) by act of parliament; Co. Litt. 176, n.; (2) by the loss of an integral part; 9 Gill & J. 365; (3) by a surrender of their franchises; 6 Term 277; (4) by forfeiture of their charter; 6 Beav. 220; 76 Ill. 419.

In the United States these modes of dissolution are not applicable, there can be no dissolution except by an act of the legislature which created the corporation. See 113 Ill. 491; 72 Tex. 182; 102 U. S. 472; 116 id. 289; 93 id. 258.

The change of name does not dissolve a municipal corporation; 7 Wall. 1; 93 U. S. 266; but the power of so changing exists only in the legislature.

Nor does the failure of the inhabitants of a municipality to elect officers operate as a dissolution of it; 71 Tex. 65; 72 id. 182; nor is a municipal charter forfeited by mere non-user for any period of time; 98 Ala. 358.

Upon the division of a municipal corporation into two separate towns, each is entitled to hold in severalty the public property within its limits; 2 Wend. 159. See 40 Minn. 18.

In actions generally, the original minutes or records of a corporation are competent evidence of its acts and proceedings; 6 Wend. 651. It is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances which have, when authorized, the force, in favor of the municipality and against the persons bound thereby, of laws passed by the legislature of the state; 44 Ia. 508; s. c. 24 Am. Rep. 756; but ordinances cannot enlarge or change the charter by enlarging, diminishing, or varying its powers; 22 How. 422; 12 Wall 349. See DELEGATION; POLICE POWER.

Relation to State. In every essential, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, may be destroyed, or their powers may be restricted, enlarged or withdrawn at the will of the Legislature, subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. 191 U. S. 220, 221, citing 3 Wall. 663; 17 Nall. 328-329 et al.

MUNICIPAL COURTS. At common law, municipal corporations frequently enjoyed the franchise of holding a court, and the franchise being a public right, could not be lost by non-user. A. & E. Encyc. L. See Dillon, Mun. Corp., 3d ed. § 424; 4 D. P. C. 682.

In the United States, in many of the larger cities, there are courts so designated, with statutory jurisdiction in criminal or civil cases, or both, usually limited not only in amount, but by the requirement that suits can only be instituted against residents, and crimes prosecuted which are committed within the city.

MUNICIPAL INDEBTEDNESS.

Whenever any city, town, county, taxing district or other municipality is authorized to contract an "indebtedness," it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest on said indebtedness, and to create a sinking fund for the payment of the principal thereof, within not more than forty years from the time of contracting the same. 158 Ky. 610, 166 S. W. 195.

An indebtedness created by the issuing of bonds for a street improvement as authorized by statute is not a "municipal indebtedness" within the meaning of the Kentucky Constitution limiting "municipal indebtedness." 129 Ky. 532, 112 S. W. 666.

MUNICIPAL LAW. In contradistinction to international law, the system of law proper to any single nation or state. It is the rule or law by which a particular district, community, or nation is governed. 1 Bla. Com 44.

Municipal law contrasts with international law, in that it is a system of law proper to a single nation, state, or community. In any one state the municipal law of another state is foreign law. See FOREIGN LAW. A conflict of laws arises where a case arising in one state involves foreign persons or interests, and the foreign and the domestic laws do not agree as to the proper rule to be applied. See CONFLICT OF LAWS.

The various provinces of municipal law are characterized according to the subjects with which they respectively treat: as, *criminal or penal law, civil law, military law*, and the like. *Constitutional law, commercial law, parliamentary law*, and the like, are departments of the general province of civil law, as distinguished from criminal and military law.

MUNICIPAL ORDINANCE. A statute or regulation enacted or adopted by a municipal corporation for the proper conduct of its affairs or the government of its inhabitants. See MUNICIPAL CORPORATION; ORDINANCE.

A local law prescribing a general and permanent rule. (114 Ind. 332.) It is a local law enacted by public officers under legislative authority, and binds all within the municipality, strangers as well as residents, and with or without their consent. 1 Thomp. Corp. 2nd ed., 1193. Cf. BY-LAW.

A local law or rule prescribed by a municipal government for application within its jurisdiction. (145 Ga. 843.) It generally imports a command or prohibition applicable to all the inhabitants or certain classes in the given community. It is usually designed to compel or prevent action of some sort on the part of some one. (219 N. Y. 216.) Although an ordinance is not a law in every sense in which the term law is used in constitutions and statutes, it is nevertheless a local law of the municipality (162 Ky. 738), emanating from its legislative authority, and operative within its restricted sphere as effectively as a general law of the sovereignty.

Ordinance as a term of municipal law is the equivalent of legislative action, and hence, its employment in a constitution, statute or charter carries with it by natural, if not necessary implication, the usual incidents of such action. It means something more than a verbal motion subsequently reduced to writing. To create an ordinance, therefore, legislative formality is indispensable. 7 McQuillan, Mun. Corp. 6838-41. Cf. RESOLUTION. [A resolution deals with matters of a special or temporary character

an ordinance prescribes some permanent rule of government (19 Ga. App. 559), and is distinctively a legislative act.] Id., 6841. See BY-LAW.

MUNICIPAL PURPOSE. The erection of a school building is a "municipal purpose" for which the city is authorized to issue bonds. 134 Ky. 435, 120 S. W. 367.

MUNICIPAL SECURITIES. The evidences of indebtedness issued by cities, towns, counties, townships, school districts, and other such territorial divisions of the state. There are two general classes: (1) municipal warrants, orders, or certificates; (2) municipal negotiable bonds. A. & E. Encyc. See MUNICIPAL CORPORATION.

MUNICIPALITY. The body of officers taken collectively, belonging to a city, who are appointed to manage its affairs and defend its interests.

MUNICIPIUM. In Roman Law. A free town which retained its original right of self-government, but whose inhabitants also acquired certain rights of Roman citizenship. Morey, Rom. L. 51. See MUNICIPAL.

A municipal town. Down to the reduction of Latium, these towns enjoyed, under a treaty of equal alliance, the private rights of Roman citizenship at Rome; the citizens of such towns might exercise these rights, and were liable to the corresponding obligations. After the subjugation of Latium, the foreign policy of the municipal towns (*municipia*) was merged in the supremacy of Rome, and the citizens either possessed the private citizenship alone, or, being enrolled in a Roman tribe, were able to exercise the full citizenship at Rome. In both cases the municipal towns were self-governed, and their imperial obligations were fixed by the terms of their treaties of alliance. Hunter, Rom. L. 32.

MUNIMENTS. The instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, by which he is enabled to defend the title of his estate. *Termes de la Ley*: Co. 3d Inst. 170. Cathedrals, collegiate churches, etc., sometimes have a muniment house, where the seal, evidences, charter, etc., of such cathedral are kept. Cowel.

MUNUS. A gift; an office; a benefice, or feud. A gladiatorial show or spectacle. Calvinus, Lex.; Du Cange.

MURAGE. A toll formerly levied in England for repairing or building public walls.

MURAL MONUMENTS. Monuments made in walls.

Owing to the difficulty or impossibility of removing them, secondary evidence may be given of inscriptions on walls, fixed tables, gravestones, and the like. 2 Stark. 274.

MURDER. In Criminal Law. The wilful killing of any subject whatever, with malice aforethought, whether the person slain shall be an Englishman or a foreigner. Hawk. Pl. C. b. 1, c. 13, s. 3. Russell says, the killing of any person under the king's peace, with malice prepense or aforethought, either express, or implied by law. 1 Russ. Cr. 421; 5 Cush. 304; Archb. Cr. Pr. & Pl. 727 note; Whart. Cr. L. 808. When a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied. Co. 3d Inst. 47.

The latter definition, which has been adopted by Blackstone, 4 Com. 195; 2 Chitty, Cr. Law, 224, and others, has been severely criticised. What, it has been asked, are sound mind and discretion? What has soundness of memory to do with the act? Is it ever so imperfect, how does it effect the guilt? If discretion is necessary, can the crime ever be committed? For is it not the highest indiscretion in a man to take the life of another, and thereby expose his own? If the person killed be an idiot or a newborn infant, is he a reasonable creature? Who is in the king's peace? What is malice aforethought? Can there be malice aforethought? Livingston, Pen. Law, 188. It is, however, apparent that some of the criticisms are merely verbal, and others are answered by the construction given in the various cases to the requirements of the definition. See, especially, 5 Cush. 304.

According to Coke's definition, there must be, *first*, sound mind and memory in the agent. By this is understood there must be a will and legal discretion. *Second*, an actual killing; but it is not necessary that it should be caused by direct violence; it is sufficient if the acts done apparently endanger life, and eventually prove fatal; Hawk. Pl. Cr. b. 1, c. 31, s. 4; 1 Hale, Pl. Cr. 431; 1 Ashm. 289; 9 C. & P. 356. *Third*, the party killed must have been a reasonable being, alive in the king's peace. To constitute a birth, so as to make the killing of a child murder, the whole body must be detached from that of the mother; but if it has come fully forth, but is still connected by the umbilical cord, such killing will be murder; 2 Bouvier, Inst. n. 1722, note. Feticide would not be such a killing; he must have been *in rerum natura*. *Fourth*, malice, either express or implied. It is this circumstance which distinguishes murder from every description of homicide. 88 Ala. 26. See MALICE.

Murder may be committed as the result of some illegal act, whether the design to take life is actually present or not; 30 S. C. 74. Wilful omission of duty resulting in death is murder, where the exposure or neglect clearly shows danger to life; 8 Mont. 95. It being contrary to the law of the land to commit suicide, if two persons meet together and agree so to do, and one of them dies, the other is guilty of murder; 10 Crim. L. Mag. 862. One who fires with deliberate purpose of killing A., and kills B., is as guilty as if he had killed A.; 160 Pa. 451; 9 Me. 163; 1 Houst. Cr. Cas. 563; but see 100 Mich. 518; obstructing a railroad track, by which a human being is killed, is murder in the first degree; 59 Ala. 98.

In some of the states, by legislative enactments, murder has been divided into degrees. In Pennsylvania, by the act of April 22, 1794, "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find the person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly." Many decisions have been made under this act, to which the reader is referred. See Whart. Cr. Law.

Similar enactments have been made in many other states; 3 Yerg. 283; 6 Rand. 721; 23 Ind. 231; 49 N. H. 399; Wright 20; 8 Mont. 110; 97 Mo. 31; 73 Ia. 32; 25 Tex. App. 631; 32 Fla. 462; 77 Va. 284; 101 Mass. 1.

The power of a state to punish crimes is limited to such as are committed within its territory, and consequently it cannot provide for the punishment, as crimes, of acts committed beyond the state boundary; 2 Park. Cr. Rep. 590; 36 Miss. 593; Cooley, Const. Lim. [128]; but if the ultimate and injurious result of an unlawful act committed outside of a state is effected within it, the perpetrator may be punished by it as an offender; *id.*; and it was held constitutional to punish in Michigan a homicide committed by a mortal blow in Canada waters from which death resulted in the state; 8 Mich. 320. See Cooley, Const. Lim. [128]. See also 16 Wis. 393; 35 U. C. 603. A murder committed on a United States battleship lying within territory ceded to the United States by New York, is triable in the United States court for the Southern District of New York; 64 Fed. Rep. 622. See JURISDICTION.

A question much discussed is whether a person who commits murder may take property by will or descent from his victim.

It has been held that a child who murdered a parent was not thereby debarred of his heirship; 170 Pa. 203; 6 Ohio C. C. 357; so of a father who murdered his daughter; 41 Neb. 631, reversing 31 *id.* 61; a woman who murdered her husband; [1892] 1 Q. B. 147; and one who was an accessory to her husband's murder was held entitled to dower; 100 N. C. 240. In one case the contrary view was taken, and it was held that the devise was not rendered void, but equity might interfere to deprive the devisee of the fruits of his crime, but that his petition to compel payment of his distributive share would not be heard until after his trial on the indictment; 115 N. Y. 506. Neither the beneficiary in a life insurance policy, who has feloniously killed the assured, nor his assignee can recover on it; 117 U. S. 591. This was also held in [1892] 1 Q. B. 147, *supra*, where, although the wife could not take the money as a beneficiary, it passed to her as the legal representative of the assured as part of his estate.

See address of Judge Leslie W. Russell before the New York State Bar Association, Jan., 1898, reviewing these cases; 18 N. Y. L. J. 1390.

See, generally, Bishop, Gabbett, Russell, Wharton, Cri. Law; Roscoe, Cri. Ev.; Archb. Cri. Pra.; Hawkins, Hale, Pleas of the Crown.

In Pleading. In an indictment for murder, it must be charged that the prisoner "did kill and murder" the deceased; and unless the word murder be introduced into the charge, the indictment will be taken to charge manslaughter only; Bish. Cr. Prac. § 548; Post. Cr. Law 424; Yelv. 205; 1 Chitty, Cr. Law *243, and the authorities and cases there cited.

MURDRUM. In Old English Law. During the times of the Danes, and afterwards till the reign of Edward III., murder was the killing of a man in a secret manner; and in that it differed from simple homicide.

When a man was thus killed, and he was unknown, by the laws of Canute he was presumed to be a Dane, and the vill was compelled to pay forty marks for his death. After the conquest, a similar law was made in favor of Frenchmen, which was abolished by 3 Edw. III.

The fine formerly imposed in England upon a person who had committed homicide *per infortunium* or *se defendendo*. Prin. Pen. Law 219, note.

See HEAT OF PASSION.

MURORUM OPERATIO. The service of work and labor done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle. Cowel.

MURTHRUM. In Old Scotch Law. Murder.

MUSICAL COMPOSITION. The acts of congress of February 3, 1831, and July 8, 1870, authorize the granting of a copyright for a musical composition. A question was formerly agitated whether a composition published on a single sheet of paper was to be considered a book; and it was decided in the affirmative; 2 Campb. 28, n.; 11 East 244. Not only an original composition, but any substantially new arrangement or adaptation of an old piece of music, is a proper subject of copyright; Taney, Dec. 72; L. R. 2 C. P. 340; S. C. 3 *id.* 223; 2 Blatchf. 39; 7 C. B. 4; Drone, Copyright 175. See COPYRIGHT.

MUSTER. To collect together and exhibit soldiers and their arms. To employ recruits, and put their names down in a book to enroll them. In the latter sense the term implies that the persons mustered are not already in the service; 8 Allen 480. The same term is applied to a list of soldiers in the service of a government. Articles of War, R. S. § 1342.

MUSTER-ROLL. A written document containing the names, ages, quality, place of residence, and, above all, place of birth, of every person of the ship's company. It is of great use in ascertaining the ship's neutrality. Marsh. Ins. p. 407; Jacobsen, Sea Laws 161; 2 Wash. C. C. 201.

MUSTIZO. A name given to the issue of an Indian and a negro. Dudl. S. C. 174.

MUTATION. In French Law. This term is synonymous with change, and is particularly applied to designate the change which takes place in the property of a thing in its transmission from one person to another. Permutation therefore happens when the owner of the thing sells, exchanges, or gives it. It is nearly synonymous with transfer. Merlin, *Repert.*

MUTATION OF LIBEL. In Practice. An amendment allowed to a libel, by which there is an alteration of the substance of the libel, as by propounding a new cause of action, or asking one thing instead of another. Law, Eccl. Law 165-167; 1 Paine 435; 1 Gall. 123; 1 Wheat. 261.

MUTATIS MUTANDIS (Lat.). The necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like.

MUTE (*mutus*). When a prisoner upon his arraignment totally refuses to answer, insists upon mere frivolous pretences, or refuses to put himself upon the country, after pleading not guilty, he is said to stand mute.

In the case of the United States v. Hare *et al.*, Circuit Court, Maryland Dist., May sessions, 1818, the prisoner standing mute was considered as if he had pleaded not guilty. See 19 Blatch. 251; 13 Fed. Rep. 27; 48 Ark. 39. In consequence an act of congress of March 8, 1825, provided that if any person, in case of an offence not capital, shall stand mute, the trial shall proceed as upon a plea of not guilty. A similar provision is to be found in the laws of many states, and, in England, the same practice is adopted by the court.

In former times, in England, the terrible punishment or sentence of *penance* or *peine* (probably a corrupted abbreviation of *prison*) *fort et dure* was inflicted where a prisoner would not plead, and stood obstinately mute. See PEINE FORTE ET DURE. Prisoners sometimes suffered death in this way to save their property from forfeiture. In treason, petit felony, and misdemeanors, however, wilfully standing mute was equivalent to a conviction, and the same punishment might be imposed. Giles Corey, accused of witchcraft, was perhaps the only person pressed to death in America for refusing to plead. 3 Bancroft's Hist. U. S. 93. See DEAF AND DUMB.

MUTILATION. In Criminal Law. The depriving a man of the use of any of those limbs which may be useful to him in fight, the loss of which amounts to *mayhem*. 1 Bla. Com. 130. See MAYHEM.

MUTINY. In Criminal Law. The unlawful resistance of a superior officer, or the raising of commotions and disturbances on board of a ship against the authority of its commander, or in the army in opposition to the authority of the officers; a sedition; a revolt. See Whart. Cr. L. § 1876.

By the act for establishing rules and articles for the government of the armies of the United States, it is enacted as follows: Article 22. Any officer or soldier, who begins, excites, or causes, or joins in, any mutiny or sedition in any troop or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as a court-martial shall direct. Article 23. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavors to suppress the same, or having knowledge of any intended mutiny, does not without delay give information thereof to his commanding officer, shall be punished by death, or suffer such other punishment as a court-martial may direct.

And by the act for the better government of the navy of the United States, it is enacted as follows: Article 4. Any person in the naval service who makes, or attempts to make, any mutinous assembly, or being witness to or present at any mutiny, does not do his utmost to suppress it, or knowing of any mutinous assembly, or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer, shall suffer death or such other punishment as a court-martial may adjudge. And any person as aforesaid who utters any seditious or mutinous words, or joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer, or treats his su-

perior officer with contempt, or is disrespectful to him, while in the execution of his office, may be punished by such punishment as a court-martial may adjudge. R. S. § 1634.

Mutiny, revolt, and the endeavor to make a revolt or mutiny, on board merchant vessels, are made criminal, and a punishment provided for them; R. S. § 4596; 2 Curt. C. C. 225; 1 Woodb. & M. 306; 2 Sumn. C. C. 582.

MUTINY ACT. In English Law. A statute, annually passed, to punish mutiny and desertion, and for the better payment of the army and their quarters. It was first passed 12th of April, 1689. The passage of this bill was the only provision for the payment of the army. 1 Sharsw. Bla. Com. 416, 417, n. In 1879, the army discipline act, 42 and 43 Vict., s. c. 33, consolidated the provisions of the mutiny act with the articles of war.

MUTUAL. Proceeding from both sides; reciprocal; interchanged.

MUTUAL ACCOUNTS. Such as contain mutual credits between the parties; or an existing credit on one side which constitutes a ground for credit on the other, or where there is an understanding that mutual debts shall be a set-off *pro tanto*, between the parties. 27 Ark. 343. Such accounts, of however long standing, are not barred by the statute of limitations, if there be any items within the prescribed limit; 6 Term 189; Ang. Lim. 138. See **MERCHANTS' ACCOUNTS; LIMITATIONS.**

MUTUAL BENEFIT ASSOCIATIONS. See **BENEFICIAL SOCIETIES; INSURANCE. ASSESSMENT INSURANCE.**

MUTUAL CONSENT. Mutual consent is of the essence of every contract, and therefore it must always exist, in legal contemplation, at the moment when the contract is made. See Add. Contr. 13. It never, however, is the subject of direct allegation or proof, partly because it is generally incapable of direct proof, and partly because every contract is made by acts performed. Proof of the necessary acts carries with it presumptive proof of mutual consent. Thus, if two separate agreements be drawn up, signed and sealed, each of them purporting to be a contract

between A. and B., and the parties, intending to deliver one of the instruments, deliver the other by mistake, there is no contract made; Langd. Contr. 198. Where the plaintiff's acceptance of the defendant's offer inadvertently made a slight change in a date, there was no contract, because there had not been mutual consent; 4 Bing. 653. Mutual consent must extend to the consideration as well as to the promise; Langd. Contr. 82.

MUTUAL CREDITS. Credits given by two persons mutually, *i. e.* each giving credit to the other. It is a more extensive phrase than mutual debts. Thus, the sum credited by one may be due at once, that by the other payable *in futuro*; yet the credits are mutual, though the transaction would not come within the meaning of mutual debts; 7 Term 378. And it is not necessary that there should be intent to trust each other; thus, where an acceptance of A. came into the hands of B, who bought goods of A, not knowing the acceptance to be in B's hands, it was held a mutual credit; 3 Term 507, n.; 3 Ves. 65; 8 Taunt. 156, 499; 2 Sm. Lead. Cas. 179; 26 Barb. 310; 4 Gray 284; 9 N. J. Eq. 44; 7 D. & E. 378. See 85 N. Y. 590; 9 N. J. Eq. 49.

MUTUAL INSURANCE. That form of insurance in which each person insured becomes a member of the company, and the members reciprocally engage to indemnify each other against losses, any loss being met by an assessment laid upon all the members. See **INSURANCE.**

MUTUAL INSURANCE COMPANY.

Stock Insurance Companies. Such companies differ essentially from stock insurance companies. The former need many by-laws and conditions that are not required in stock companies, and each person who insures therein becomes a member of the association. A mutual company is also defined as one wherein the members constitute both insurer and insured, where the members all contribute by a system of assessments, to the creation of a fund from which all losses and liabilities are paid, and

wherein the profits are divided among themselves in proportion to their interests. (171 Ind. 296.) 1 Joyce 831, 2nd ed.

MUTUAL PROMISES. Promises simultaneously made by two parties to each other, each promise being the consideration of the other. Ans. Contr. 72; 1 Pars. Contr. 464; Hob. 88; 14 M. & W. 855; Add. Contr. 13. If one of the promises be voidable, it will yet be good consideration, but not if void; Story, Contr. § 81; 2 Steph. Com. 114.

MUTUALITY. Reciprocity; an acting in return. Webster, Dict.; Add. Contr. 622; 9th ed. 13, 14; 26 Md. 37. See 83 Ky. 371.

MUTUARY. A person who borrows personal chattels to be consumed by him and returned to the lender in kind; the person who receives the benefit arising from the contract of mutuum. Story, Bailm. § 47.

MUTUATUS. A loan of money. See Gilbert, Com. Pleas 5.

A borrowing. Burrill; 2 Arch. Pr. 25. From Latin, *mutuari*, to borrow. *Id.*

MUTUUM. A loan of personal chattels to be consumed by the borrower and to be returned to the lender in kind and quantity; as, a loan of corn, wine, or money which is to be used or consumed, and is to be replaced by other corn, wine, or money. Story, Bailm. § 228; Edw. Bailm. § 120; Add. Contr. 724. See **LOAN FOR USE.**

MYSTERY (said to be derived from the French *mestier*, now written *metier*, a trade). A trade, art, or occupation. Co. 2d Inst. 668.

Masters frequently bind themselves in the indentures with their apprentices to teach them their art, trade, and *mystery*. See Hawk. Pl. Cr. c. 23, s. 11.

MYSTIC TESTAMENT. A will placed in a sealed envelope. La. Civ. Code, art. 1567; 5 Mart. La. 182; Schoul. Wills. § 9; 5 La. 396.

N.

N. E. I. See *NON EST INVENTUS*; *FOUND*.

NAAM. See *NAMUM*.

NABOB. Originally the governor of a province under the Mogul government of Hindostan, whence it became a mere title of any man of high rank, upon whom it was conferred without any office being attached. *Wils. Gloss*; *Whart.*

NAIF. See *NEIF*.

NAIL. A measure of length, equal to wo inches and a quarter. See *MEASURE*.

NAIL COUSINS. See *SIB-SHIP*.

NAKED. This word is used in a metaphorical sense to denote that a thing is not complete, and for want of some quality it is either without power or it possesses a limited power. A naked contract is one made without consideration, and for that reason it is void. See *CONSIDERATION*. A naked authority is one given without any right in the agent, and wholly for the benefit of the principal. 2 *Bouvier, Inst. n. 1302*. See *NUDUM FACTUM*.

NAKED TRUST. A dry or passive trust; one which requires no action on the part of the trustee, beyond turning over money or property to the *cestui que trust*. See *TRUST*.

NAKED TRUSTEE. See *TRUSTEE*.

NAM. Distress; seizure. *Anc. Inst. Eng.* See *NAMUM*.

NAMATION. The act of distraining or taking a distress. *Cowel*. See *NAMUM*.

NAME. One or more words used to distinguish a particular individual: as *Socrates*, *Benjamin Franklin*.

Names are *Christian*, as *Benjamin*, or *surnames*, as *Franklin*. One *Christian name* only is recognized in law; 1 *Ld. Raym.* 583; *Bacon, Abr. Misnomer* (A); 7 *Colt.* 69; 5 *Johns.* 84; though two or more names usually kept separate, as *John* and *Peter*, may undoubtedly be compounded, so as to form in contemplation of law but one; 5 *Term* 195. An initial is no part of a name. See *INITIAL*. Nor is the title junior (*q. v.*); nor the prefix *Mrs.*; 13 *Vroom* 69; 33 *Ill. App.* 109. But it has been held that where *Lewis R. instead of Lewis S.* was inserted in a writ of *sci. fa.* to revive a judgment, the writ was not notice to purchaser for value in a chain of title, in which *Lewis S.* was the actual name; 1 *Sup. Ct. Pa.* 198. See 140 *Pa.* 335.

The name of a corporation is said to be "the very being of the constitution;" *Bac. Abr. Corp. (C)*; 30 *Ala.* 664; and in general a corporation must contract and sue and be sued in its corporate name; 8 *Johns.* 295; 19 *id.* 300; 4 *Rand.* 359.

In the name of a corporation, which frequently consists of several descriptive words, the transposition, omission, or alteration of some of them may make no essential difference in the sense; 10 *N. H.* 124; 1 *B. & Ald.* 699; 10 *Mass.* 360; see 87 *Ga.* 734; if there is no possibility of mistaking the identity of the corporation; 12 *La.* 444. See 20 *Me.* 41; 2 *Va. Cas.* 362; 16 *Mass.* 141; 12 *S. & R.* 389.

A corporation, like an individual, may take a name by reputation; 2 *N. H.* 310; 10 *Mass.* 360; or may acquire it by usage; it is not indispensable that the name should be given by the charter; 30 *Ala.* 664; see 2 *McLean* 195; and after its name has been changed, it may continue under the old name and thus, by usage, regain the latter and sue thereunder; 24 *N. J. Eq.* 90. But

it is held that a change of corporate name requires statutory authority, whether done directly or by user, though it may acquire a name by user when not given at incorporation; 132 *Ill.* 32; such change does not in any way affect its identity or rights; and an action against it by its former name cannot be defeated by showing the change, if the membership remains the same; 83 *Va.* 768. When a corporation is sued, a mistake in the name, in words and syllables, but not in substance, will not be regarded, unless pleaded in abatement; but if the mistake be in substance, the suit cannot be regarded as against the corporation; 1 *B. & P.* 39. Where the name in a contract in suit differed from the name in the declaration, but the identity was apparent, the variance was held not to constitute a defence; 31 *Me.* 290. There is said to be a distinction between a misnomer which incorrectly names, but correctly describes, a corporation and the statement in the pleading of an entirely different party; the former is curable by amendment, the latter is not; 30 *Ala.* 650. A grant to a corporation by the wrong name is good if the corporation really intended be apparent; 2 *Kent* 292; 1 *Dill. Mun. Corp.* § 179; so of a contract; 6 *S. & R.* 12; and of a gift by will; 11 *Eng. L. & Eq.* 191. If a corporation conveys by the wrong name it cannot defeat its grant, if it has received the consideration; 132 *Ill.* 32.

As to the protection of a corporation in the use of its corporate name, see *Moraw. Priv. Corp.* § 355; *TRADE-MARK*.

See *GOOD-WILL*; *PARTNERSHIP*; *PARTNERS*; *MISNOMER*.

The real name of a party to be arrested must be inserted in the warrant, if known; 8 *East* 828; 6 *Cow.* 456; 9 *Wend.* 320; if unknown, some description must be given; 1 *Chitty, Cr. Law* 39; with the reason for the omission; 1 *Mood. & M.* 281.

Proof may be given that the maker of an instrument habitually applied a nickname or peculiar designation used therein to a particular person or thing; 26 *Ohio St.* 604. As to mistakes in devises, see *LEGACY*. As to the use of names having the same sound, see *IDEM SONANS*; 1 *Over.* 434. As to the effect of using a name having the same derivation, see 2 *Rolle, Abr.* 135; 1 *Wash. C. C.* 285. At common law one could change his name; 10 *Fed. Rep.* 894; 123 *Mass.* 415; 3 *B. & Ald.* 544; and a person not having a fraudulent or criminal purpose in so doing may enter into a contract by any name he may choose to assume; 74 *N. W. Rep. (Minn.)* 147; 38 *Minn.* 361; 42 *N. Y. Super. Ct.* 567; 31 *N. C.* 184; 31 *Mo.* 188. Under this rule, legal proceedings against a married woman under an assumed name have been held good after judgment; 19 *Kan.* 522; and obligations incurred by or with third parties under her maiden name are mutually binding; 73 *Wis.* 646; 96 *Cal.* 609; see *Schoul. Dom. Rel.* 40; although until a decree in divorce giving a married woman leave to resume her maiden name goes into effect, or widowhood is succeeded by a new marriage, she keeps her former husband's surname; 2 *P. D.* 263.

A person, not having a fraudulent or criminal purpose in doing so, may enter into a contract by any name he may choose to assume; it is only a question of identity; 74 *N. W. Rep. (Minn.)* 147; 41 *N. Y. Super.* 567. A grant of land under an assumed name will pass title; and evidence is admissible to prove identity; 38 *Minn.* 361.

When a person uses a name in making a contract under seal, he will not be per-

mitted to say that it is not his name; as, if he sign and seal a bond "A and B" (being his own and his partner's name), and he had no authority from his partner to make such a deed, he cannot deny that his name is A and B; 1 *T. Raym.* 2; 1 *Salk.* 214. And if a man describes himself in the body of a deed by the name of James, and signs it John, he cannot, on being sued by the latter name, plead that his name is James; 3 *Taunt.* 505; *Cro. Eliz.* 897, n. a. See 3 *P. & D.* 271; 11 *Ad. & E.* 594; 19 *Abb. N. C.* 123. A man may sue by the name by which he has been known from childhood, instead of by that given him by his parents; 31 *Wkly. Law Bul.* 102.

The right to the exclusive use of a name in connection with a trade or business is familiar to the law; and any person using that name, after a relative right of this description has been acquired by another, is considered guilty of a fraud, or at least an invasion of another's rights, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who has never been called by that name is a grievance to the family for which the law affords no redress; *L. R.* 2 *P. C.* 441. See 11 *Beav.* 112; *L. R.* 2 *Ch.* 307. A name may be a trade-mark; *L. R.* 10 *Ch. D.* 436; 1 *Eq.* 518; 13 *Beav.* 209; 13 *Am. Rep.* 111. A person cannot, however, have an exclusive right of trade-mark in a name as against all others bearing the same name, and honestly using the name in competition, unless the defendant uses the same brand or stamp in connection with the name; 123 *Mass.* 139; 96 *U. S.* 245; 50 *Barb.* 236. Nor in the name of the city in which a thing is made; 44 *Fed. Rep.* 277. But such exclusive right to a name may be acquired as against a corporation called by the same name. See 11 *Cent. L. J.* 3; *Poll. Torts* 152; *ELECTION*; *TRADE-MARK*.

NAMED. Mentioned *nominatim*, if not by all their names, by some at least, either *Christian* or *surnames*. 22 *L. J. Ch.* 393. It is sometimes used, but only in a secondary sense, as meaning mentioned or referred to. 34 *S. J.* 129.

NAMELY. A difference, in grammatical sense, in strictness exists between the words *namely* and *including*. *Namely* imports interpretation, *i. e.* indicates what is included in the previous term; but *including* imports addition, *i. e.* indicates something not included. 2 *Jarm. Wills* 222.

NAMUM. An old word which signifies the taking or distraining another person's movable goods. 2 *Inst.* 140; 8 *Bla. Com.* 149. A distress. *Dalrymple, Feud. Pr.* 113.

NAMUM VETITUM. The unjust taking of another person's cattle and driving them to an unlawful place, under pretence of damage having been done by them, in which case the owner may demand satisfaction for the injury. *Cowel*.

NANTISSEMENT. In *French Law*. The contract of pledge; if of a movable, it is called *gago*, and if of an immovable, *antichrèse*; *Brown, Dict.*

NARR. (an abbreviation of the word *narratio*). A declaration in a cause.

NARRATIO. A common-law name for the plaintiff's count or declaration as being a narrative of facts on which he relies.

NARRATIVE CLAUSE. In Scotch Law. The first clause in an original charter which follows immediately after the name and designation of the grantor. Ersk. Prin. 129.

NARRATOR. A pleader who draws narrs. *Serviens narrator*, a serjeant-at-law. Fleta, 1. 2, c. 37. Obsolete.

NARROW SEAS. In English Law. Those seas which adjoin the coast of England. Bacon, *Abr. Prerogative* (B 8).

NASCITURUS. Not yet born. This term is applied in marriage settlements to the unborn children of a particular marriage, *natus* (born) being used to designate those already born.

NATALE. The state or condition of a man acquired by birth.

NATIO. A native place. Cowel.

NATION. An independent body politic. A society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.

But every combination of men who govern themselves independently of all others will not be considered a nation; a body of pirates, for example, who govern themselves, is not a nation. To constitute a nation, another ingredient is required. The body thus formed must respect other nations in general, and each of its members in particular. Such a society has its affairs and interests; it deliberates and takes resolutions in common,—thus becoming a moral person, who possesses an understanding and will and is susceptible of obligations and rights. Vattel, *Prelim.* § 1, 2; 5 Pet. 52.

It belongs to the government to declare whether they will consider a colony which has thrown off the yoke of the mother-country as an independent state; and until the government have decided on the question, courts of justice are bound to consider the ancient state of things as remaining unchanged; 1 Johns. Ch. 543; 13 Johns. 141, 561. See 5 Pet. 1; 1 Kent 22.

In American constitutional law the word *state* is applied to the several members of the American Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the federal government; Cooley, *Const. Lim.* See 7 Wall. 720. See FIVE CIVILIZED NATIONS.

NATIONAL. Belonging to, affecting, or pertaining to, a particular nation: as, national domicil, the national government. Often opposed to State, and nearly synonymous with Federal: as, in national bank (q. v.), or national banking association. Anderson.

NATIONAL BANKS. Banks created and governed under the provisions of the "National Bank Act."

They are private corporations organized under a general law of congress, by individual stockholders, with their own capital, for private gain, and managed by officers, agents, and employes of their own selection. They constitute no part of any branch of the government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute, is of a general nature arising from their business relations to the people through individual citizens, and not as direct representatives of the state as a body politic in exercising its legal and constitutional functions; 12 Ct. Cl. 281; but they are instruments designed to aid the government in an important branch of the public service; 91 U. S. 29. See 164 U. S. 347. Congress in the exercise of an undisputed constitutional power to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain the circulation of any notes not issued under its authority; 8 Wall. 548.

Any number of persons, not less than five, may organize a national bank. They must sign, acknowledge before a court of record or notary public, and transmit to the comptroller of the currency, an organization certificate, containing the name of the bank, its place of business, the

amount of capital stock and the number of shares into which it is to be divided, the names and residences of the shareholders, and the number of shares held by them, and that the applicants desire to avail themselves of the act of congress. The comptroller decides whether the bank is lawfully entitled to begin business; see 19 Mich. 196; if he so finds, his certificate of this fact must be published in a newspaper of the place where the bank is to do business for sixty days.

One hundred thousand dollars is the minimum capital allowed, except in places not exceeding 6,000 inhabitants, when, by consent of the comptroller, the capital may be \$50,000; where the population exceeds 50,000 the capital must be at least \$200,000. The term capital does not refer to borrowed money, but to the property or moneys of the bank permanently invested in its business; 21 Wall. 284. The capital stock is divided into shares of \$100 each, which are personal property. At least fifty per cent. thereof must be paid in before organization, and the rest in monthly instalments of ten per cent. each. The stock of stockholders not paying these instalments may be sold, on notice; stockholders are individually responsible, in addition to what they have invested in their shares, for all contracts, debts, and engagements of the bank, to the extent of their stock at its par value. This liability is several and not joint; 8 Wall. 505. The estate of a deceased owner of bank stock is liable to an assessment levied against his executor in consequence of the failure of the bank after his death; 60 Fed. Rep. 326; 121 U. S. 27.

Upon its organization a national bank has the usual corporate powers, also the right of succession for twenty years, and the power to exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, etc.; by receiving deposits, by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

They have not the same rights in all the states. For all practical purposes they exercise their functions only within the limits of the state in which they are located and they have no authority to carry on business outside those limits; 2 McCrary 95; 6 Hun 71.

The powers of national banks are to be measured by the act creating them; 13 Wall. 589; 72 Pa. 456; 62 Mo. 329; 139 U. S. 67; the words of the act above quoted, "by discounting and negotiating promissory notes, etc.," are not to be read as limiting the mode of exercising the "incidental powers" necessary to carry on the business of banking, but as descriptive of the kind of business which is authorized; 22 Ohio St. 516. A national bank may buy negotiable notes and bills of exchange; 33 Minn. 40; 23 S. C. 339; 20 Kan. 440. This power, it has been held, simply implies an authority to realize upon such commercial paper as the bank may receive in the lawful conduct of its business, by negotiating, selling, and transferring it by means of a re-discount obtained or otherwise. It gives no implied authority to speculate or traffic in paper of this character or in financial securities of any description; 24 Minn. 140; 52 Md. 78. In the last case, by a divided court, the opinion was qualified by the remark that a national bank might invest its surplus capital in notes. The purchasing and discounting of paper has been held to be only a mode of loaning money; 26 Ohio 141; but it cannot discount a conditional note; 27 Alb. L. J. 447. It may collect notes; 9 Pac. Rep. (Utah) 709; deal in national bonds; 31 La. 69; 69 N. Y. 382; and own coupons on state bonds; 16 Blatch. 53; and it may deal in stocks; 12 Hun 97; but the tendency of the decisions is *contra*; 89 Pa. 324; 72 *id.* 456; 92 U. S.

122; 42 Md. 581; 3 S. W. Rep. (Ky.) 124. It may lend on collateral security, including United States bonds; 44 Md. 47; or the stock of another national bank; 99 U. S. 628; or a warehouse receipt for merchandise; 40 Ohio 176; or a locomotive; 8 Biss. 158; 1 Hughes 101; but it may not lend its credit; 3 *id.* 467; 55 Fed. Rep. 465. It may borrow money on its own notes, and pledge its assets for its repayment; 41 Bank. Mag. 131. It may, in a fair and *bona fide* compromise of a contested claim against it, growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of a demand, so as to obtain by the arrangement a transfer of stocks, if done in the belief that by turning the stocks into money under more favorable circumstances a loss which would otherwise accrue from the transaction might be averted or diminished; 92 U. S. 122, affirming 39 Md. 600.

It has authority to receive special deposits and is responsible for their loss if occasioned by gross negligence; 100 U. S. 699, affirming 79 Pa. 106; 26 Ia. 562; 99 Mass. 605; 58 Ga. 369; 33 Ohio 105; 80 N. Y. 82, affirming 17 Hun 419; 29 Fed. Rep. 498. See *contra*, 47 Vt. 546; 50 *id.* 388.

It may take legal proceedings to recover stolen property for itself or for depositors, and will be held responsible for lack of diligence, skill, and care in performing such an undertaking; 119 U. S. 361, affirming 15 Fed. Rep. 428.

A national bank has no power to indorse a note for compensation; 27 Hun 109; but, should it do so, only the government may object; *id.*, citing 82 N. Y. 291; 96 U. S. 640; 84 N. Y. 190; 103 U. S. 99; but it may guarantee a note; 101 U. S. 183. It may not receive deposits when insolvent; 99 N. Y. 131. It cannot be garnished for a deposit of a trust estate or pay out funds of a bankrupt except upon a warrant of an assignee in bankruptcy of the district or by the register in bankruptcy of the district; 6 Thomp. & C. 346.

National banks may purchase, hold, and convey real estate for the following purposes, and for no others: 1. Such as shall be necessary for its immediate accommodation in the transaction of its business. 2. Such as shall be mortgaged to it in good faith by way of security, for debts previously contracted. 3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. 4. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it; title 1 the latter case to be held for no longer than five years.

It is now settled that a bank may lawfully take a mortgage to secure future indebtedness; 98 N. Y. 269; 31 Gratt. 228; 71 Mo. 228; 94 Pa. 64; 78 Ind. 19; 85 N. C. 240; 94 Ill. 349. Such a loan of money on real estate security by a national bank is valid between the parties; 98 U. S. 821, reversing 62 Mo. 329; *contra*, 72 Pa. 456; 87 Ill. 151; and that it had so loaned money in violation of the prohibition of the national banking law does not give the debtor a right to object; the United States alone can complain; 45 La. Ann. 75; 103 U. S. 99; 112 *id.* 439. It may take a purchase-money mortgage on real estate sold by it; 29 La. Ann. 355; and it may purchase real estate at a judgment sale; 70 Ind. 106; 112 U. S. 405; 120 Mass. 153; 88 Ill. 352; and a prior mortgage if needful to protect the interest of the bank; 90 Ind. 332. A converted bank may take real estate belonging to it whilst it was a state bank; 9 Neb. 316; it may accept personal property in payment upon the sale of real estate belonging to it; 73 Ia. 145; and the assignment of a mortgage on land to secure a loan made at the time of the assignment; 7 Wash. 261.

A transfer of stock in a national bank which is insolvent at the time, made with an intent to avoid liability, where the transferee has reason to believe that the bank is insolvent, will not relieve the

transferor from the residuary liability to pay the debt of the bank, and such a transfer may be treated by the receiver as inoperative without regard to the financial condition of the transferee; but if the bank is solvent at the time of the transfer the motive with which it is made is immaterial; 160 U. S. 1.

When not defined by a board of directors the duties of the president and cashier are only such as may be incident to their offices respectively in their very nature, in the absence of anything to the contrary in the act of incorporation; 23 Gratt. 88. Neither of these officers, nor both acting together, can give up a debt or liability to the bank, nor make any admissions which would release the maker of a note due to the bank from his legal responsibility; *id.*; 6 Pet. 51; 8 *id.* 12; 50 How. Pr. 447. The president has no power to sell or surrender securities and receive others of an inferior value; 83 Mich. 520. Ordinarily his authority is very limited; he may bring actions at law and employ counsel for the purpose of protecting the rights of the bank, but he is not its executive officer nor has he charge of its money operations. He has no more power of management nor disposal of the property of the corporation than any other member of the board of directors unless further powers are conferred upon him by the charter of the bank or by the action of the managing board; 21 Neb. 280. He may not make an agreement binding on the bank and embodying a transaction not within the usual course of business of the bank; 89 Pa. 324; but see 7 Neb. 201; 9 Biss. 253.

A bank is liable upon notes, executed by it through its cashier, for loans made by another bank in an amount not so great as to create suspicion, where the actual management of the bank was left entirely to such cashier, and the negotiation and all the correspondence were such as might lead the officers of the lending bank to believe that he was acting on authority and in good faith and honest intention, though the money was used by him for his own individual purposes, and the signature of the president was forged; 80 Fed. Rep. 389; but where the affairs of a national bank were managed entirely by the cashier, who was universally believed to be honest and capable, but whose dishonesty and reckless management resulted in wrecking the bank, the president and directors, most of whom were farmers knowing little of banking, were not guilty of negligence so as to be liable for losses to creditors because they failed to examine the books, the statements being prepared and furnished them by the cashier, and reporting the bank to be in a prosperous condition, and there being no grounds of suspicion known to them; 82 Fed. Rep. 181, following 141 U. S. 132.

The circuit courts of the United States have jurisdiction of all suits by or against national banks established in the district for which the court is held; R. S. § 629; see 3 Dill. 298; irrespective of the amount in controversy or the citizenship of the parties; Fed. Cas. No. 9670. A national bank may bring suit in the circuit court out of its district, against a citizen of the district where the court sits; 3 Blatch. 137; 9 Nev. 134. A national bank may waive its right to be sued in its own district; 2 Conn. 298; and state courts have jurisdiction of suits brought by national banks; 49 Vt. 1; 93 U. S. 130; but this must be a state court of its locality; 14 Wall. 383; 101 Mass. 240.

Mortgages held by national banks are not subject to taxation by a state; 21 Nev. 404; nor can the stock in a national bank be taxed in any state other than that in which the bank is located; 55 N. J. L. 110.

A national bank may go into liquidation and be closed by a vote of the shareholders of two-thirds of its stock; R. S. § 5220; although it be contrary to the wishes and against the interests of the owners of the minority of the stock; 51 Kan. 254. In case of a failure to pay its circulating notes, the comptroller may appoint a receiver to wind up national banks; R. S. §

5234.

State banks may be changed into national banks; the change when made is a transit, and not a creation; see 40 Mo. 140; and does not affect its identity or its right to sue upon obligations or liabilities incurred to it by its former name; 143 U. S. 293. See DEPOSIT; INTEREST; PROXY; RESERVE; BANK.

NATIONAL CHURCH. A church established by law in a country or nation. 25 Gratt. 965.

Usually refers to the Protestant Church of England, of which the sovereign is the head and supreme governor. R. & L. Dict.; 26 Hen. VIII. c. 1.

NATIONAL CURRENCY. Notes issued by national banks and by the government. See CURRENT MONEY; MONEY; LEGAL TENDER.

Not the United States notes or greenbacks. These are a national currency in their nature, more properly than the banking association notes; but "national currency" is generally used to signify the notes authorized by the acts to provide a national currency, and issued on the immediate responsibility of the associations; while greenbacks or treasury notes is the more common designation of the notes issued immediately by the government. In other words, national, as usually applied in America during recent years to currency, distinguishes the currency of banks authorized by the nation from that authorized by state laws, not that issued by the nation from that issued by corporations. Abbott.

NATIONAL DEBT. A sum owing by the government to individuals who have advanced money to it for public purposes, either in anticipation of the produce of the particular branches of the revenue, or on credit of the general power which the government possesses of levying the amount necessary to pay interest for the money borrowed or to repay the principal. See FUNDING SYSTEM.

In England. This national debt is in part funded, and in part unfunded; the former being that which is secured to the national creditor upon the public funds; the latter, that which is not so provided for. The unfunded debt is comparatively but of small amount, and is generally secured by exchequer bills and bonds. Abbott; 2 Steph. Com. 574.

NATIONAL DOMAIN. See LANDS, PUBLIC.

NATIONAL DOMICIL. See DOMICIL.

NATIONAL ENSIGN. The National flag. See FLAG.

NATIONAL GOVERNMENT. A government of the people of a single state or nation, united as a community by what is termed the social compact, and possessing complete and perfect supremacy over persons and things so far as they can be made the lawful objects of civil government. A federal government is distinguished from a national government by its being the government of a community of independent and sovereign states united by compact. 6 Ohio St. 393.

NATIONAL GUARD. A name given to the organized militia in some parts of the United States.

NATIONAL LAW. See INTERNATIONAL PRIVATE LAW.

NATIONAL PROHIBITION ACT. An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries. 41 Stat. 305 (Comp. St. Ann. Supp. 1923, § 10138½, *et seq.*).

The Eighteenth Amendment, which em-

bodies the National Prohibition Act, became a part of the Constitution on January 16, 1919, when its ratification in the state legislatures was consummated; not on January 29, 1919, when the ratification was proclaimed by the Secretary of State. 256 U. S. 376. As this Amendment, by its own terms, was to go into effect one year after being ratified, it was in force on January 16, 1920. *Id.*

NATIONAL TREATMENT. See MOST FAVORED NATION TREATMENT.

NATIONALITY. Character, status, or condition with reference to the rights and duties of a person as a member of some one state or nation rather than another.

Nationality may be determined from origin, naturalization, domicile, residence, trade, or other circumstances; 1 Halleck, Int. L. 403.

The term is in frequent use with regard to ships. Nationality determined by one's birthplace or parentage is called *nationality of origin*; that which results from naturalization, is by *acquisition*. A woman, upon marriage acquires the nationality of her husband; Morse on Citizenship 142. In feudal times, nationality was determined exclusively by the place of birth, *jure soli*; but under the laws of Athens and Rome the child followed that of the parents, *jure sanguinis*. "Of these two tests, the place of birth and the nationality of the father, neither is at present adopted without qualification by British, French, or American law. The laws of these countries exhibit, in fact, different combinations of the two, Great Britain and the United States laying chief stress on the place of birth, while in France the father's nationality determines, though not absolutely and in all cases, that of the child; and this latter theory has found acceptance among other European nations," as Belgium, Bavaria, Prussia, and Spain. Morse, Citizenship 10.

Subject to the act of 1870, English jurists almost unanimously deny the right of expatriation to the extent of a change of primitive allegiance, without the consent of the liege lord. By the laws of France, a Frenchman loses his native character by naturalization in a foreign country, by accepting office under a foreign government without the permission of his own, or by so establishing himself abroad as to show an intention of never returning. In Austria national character is lost by authorized emigration from the empire without the intention of returning, and it is equally lost if effected without permission. In Germany, it is lost by unauthorized emigration except in the case of a German naturalized in the United States. Spain and the Spanish American Republics provide for the loss of Spanish nationality upon the acquisition of a new national character; 1 Halleck, Int. L. 403. The native, national character lost or suspended by a foreign domicile, easily reverts; *id.* 429.

A general rule is recommended by Westlake: "Legitimate children, wherever born, are regularly members of the state of which their parents form part the moment of their birth; but they may choose as their nationality the place of their birth." See 2 Kent 49; Cock. Nat.; Whart. Conf. Laws; Westlake, Priv. Int. Law. See, generally, ALLEGIANCE; CITIZEN; DENIZEN; DOMICIL; EXPATRIATION; NATURALIZATION. *JUS SOLI*; *JUS SANGUINIS*.

NATIONS, LAW OF. See INTERNATIONAL LAW.

NATIVE, NATIVE CITIZEN. A natural-born subject. 1 Bla. Com. 366. Those born in a country, of parents who are citizens. Morse, Citizenship 12. See CITIZEN. There is no distinction between *native born* as used in the French Extradition treaty and *natural born* as used in the extradition act; 37 W. R. 269.

NATIVO HABENDO. A writ which lay for a lord when his vassal had run away from him. *Termes de la Ley*.

It was directed to the sheriff, and commanded him to apprehend the villain, and to restore him, together with his goods, to the lord. But if a villain had tarried in a town or ancient demesne lands for the period of a year and a day, without having been claimed by his lord, then the lord could not seize him in either of such places. Abbott; *Termes de la Ley*.

NATIVUS. See **NELF**.

NATURA BREVIVM. A book compiled in the reign of Edward III giving the original writs then in use, succeeded, in the reign of Henry VIII, by the *New Natura Brevium*, which was compiled by Anthony Fitzherbert. The earlier book thereafter was known as the *Old Natura Brevium*. Byrne.

NATURAL AFFECTION. The affection which one naturally feels towards those who are nearly allied to him. It sometimes supplies the place of a valuable consideration in contracts; and natural affection is a good consideration in a deed. 2 Steph. Com., 11th ed. 68. See **BARGAIN AND SALE**; **COVENANT TO STAND SEIZED**; **CONSIDERATION**.

NATURAL ALLEGIANCE. See **ALLEGIANCE**.

NATURAL-BORN. See **NATURALIZATION**.

NATURAL-BORN SUBJECT. See **NATURALIZATION**.

NATURAL CHILDREN. Bastards; children born out of lawful wedlock. But in a statute declaring that adopted children shall have all the rights of "natural" children, the word "natural" was used in the sense of legitimate; 9 Am. L. Reg. 747.

In Civil Law. Children by procreation, as distinguished from children by adoption.

In Louisiana. Illegitimate children who have been adopted by the father. La. Civ. Code, art. 220.

NATURAL DAY. That space of time included between the rising and the setting of the sun. See **DAY**.

NATURAL DEATH. See **DEATH**.

NATURAL EQUITY. That which is founded in natural justice, in honesty and right, and which arises *ex æquo et bono*.

It corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range that human tribunals have never attempted to enforce it. Every code of laws has left many matters of natural justice or equity wholly unprovided for, from the difficulty of framing general rules to meet them, from the almost impossibility of enforcing them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, or kindness. 4 Bouvier, Inst. n. 3720. See **EQUITY**.

NATURAL FOOL. An idiot; one born without the reasoning powers or a capacity to acquire them.

NATURAL FRUITS. The natural production of trees, bushes, and other plants, for the use of men and animals, and for the reproduction of such trees, bushes, or plants.

This expression is used in contradistinction to artificial or figurative fruits: for example, apples, peaches, and pears, are natural fruits; interest is the fruit of money, and this is artificial.

NATURAL GAS. See **GAS**.

NATURAL HEIRS. As used in a will and by way of executory devise, they are considered as of the same legal import as "heirs of the body." 19 Conn. 112.

NATURAL INFANCY. A period of non-responsible life, which ends with the seventh year. Whart. Dict.

NATURAL LAW. See **LAW OF NATURE**.

NATURAL LIBERTY. See **LIBERTY**.

NATURAL LIFE. The period between birth and natural death. The use of the word natural before life in a sentence of solitary confinement in a state prison for life, is a surplusage and does not affect the sentence; 89 Mich. 70. See **DEATH**.

NATURAL MERINO. See **WOOL**.

NATURAL OBLIGATION. One which in honor and conscience binds the person who has contracted it, but which cannot be enforced in a court of justice. Pothier, nn. 173, 191. See **OBLIGATION**; **MORAL OBLIGATION**.

NATURAL PERSONS. See **PERSON**.

NATURAL PRESUMPTIONS. In Evidence. Presumptions of fact; those which depend upon their own form and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience.

NATURAL AND REASONABLE WEAR AND TEAR. Wear and tear by use. Damage by operation of nature, as by freshets, is not included therein. 20 N. J. L. 544.

NATURAL RIGHTS. In Real Property Law. Such rights and privileges which pass with the property in the land as incidents to the land itself. They are such rights as the owner of property may enjoy in connection with his own property, as distinguished from easements (*q. v.*) which are supposed to be acquired by grant or prescription. 6 App. Cas. 740; 1 Thomp. Real Prop. 363. They are not created separately as a distinct subject of property, but are merely incidents of the right of ownership. 112 Fed. 98; *id.* For example, the right to have one's land supported by adjacent and subjacent land; the right to have the air in the vicinity of one's land reasonably free from disagreeable odors and noises, etc. 100 N. Y. 471; *id.*

NATURAL WATERCOURSE. A natural stream flowing in a defined bed or channel, with banks and sides, and having permanent sources of supply. 86 N. Y. 140; 53 N. W. Rep. (Ia.) 78. See **WATERCOURSE**.

NATURAL WOOL. See **WOOL**.

NATURALEZA. In Spanish Law. The state of a natural-born subject. White, New Recop. b. 1, t. 5, c. 2.

NATURALIZATION. The act by which an alien is made a citizen of the United States of America.

The act of adopting a foreigner and clothing him with all the privileges of a native-born citizen. 9 Wheat. 827; 9 Op. Atty-Gen. 359.

A nation, or the sovereign who represents it, may grant to a stranger the quality of a citizen, by admitting him into the body of the political society. This is called naturalization. Vattel, Laws of Nat., bk. 1, ch. xix, §§ 212-214.

It is believed that every state in Christendom accords to foreigners, with more or less restrictions, the right of naturalization, and that each has some positive law or mode of its own for naturalizing the native-born subjects of other states, without reference to the consent of the latter for the release of the transfer of the allegiance of such subjects. See Morse, Citizenship 66.

The fourteenth amendment to the federal constitution provides that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the states where they reside."

It affirms the ancient rule of citizenship by birth, within the territory, in the allegiance, and under the protection of the country, including all children here born of resident aliens, with the exception of the

children of foreign sovereigns or their ministers, or born on a foreign public ship, or of enemies, within and during a hostile occupation of part of our territory, and children of members of the Indian tribes owing direct allegiance to their several tribes. It includes a child, born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, but have a permanent residence and domicile in the United States, and not employed in any diplomatic capacity; 169 U. S. 649, a learned opinion by Gray, J., Fuller, C. J., and Harlan, J., dissenting.

At common law a natural-born subject included every child born in England of alien parents except the child of an ambassador or diplomatic agent or of an alien enemy in hostile occupation of the place where the child was born; 169 U. S. 649. It made no difference whether the parents were permanently or only temporarily residing in England; Cockb. Nat. 7.

The term natural-born citizen used in the federal constitution is not therein defined. Its meaning must be gathered from the common law. An alien enemy cannot be naturalized; R. S. § 2171.

An applicant for naturalization must have been a resident of the United States for five years next preceding his admission to citizenship, but uninterrupted habitation is not required; R. S. § 2165. Naturalization, of itself, conveys no right of suffrage; Pars. Rights, Amer. Citizen 190; though by it a foreigner becomes, to all intents and purposes, a citizen of the United States, with no disability except that he cannot become president or vice-president. It does not operate as a bar against prosecution in one's native country for prior offences; 2 Whart. Dig. Int. L. § 180. The provision of the constitution applies to persons of foreign birth only; 19 How. 419; but not to Mongolians, or American Indians; 5 Sawy. 55; 7 Op. Atty-Gen. 746; and not, formerly, to a freeman of color, born in the United States; 26 Ind. 299. Indians may be naturalized by act of congress; 19 How. 393. Entire communities have been naturalized by a single act of national sovereignty; 86 Cal. 658; 143 U. S. 135. The act of July 14, 1870, extended the naturalization laws to persons of African descent. Under R. S. § 1994, providing that "any woman who is now or hereafter may be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen," applies to women of African blood; 86 Fed. Rep. 951.

An alien over twenty-one years who has enlisted in the United States army may, without previous declaration of intention, be naturalized on one year's residence, good moral character and honorable discharge; Act of July 17, 1862, § 21. An alien seaman may become a citizen by declaring his intention and serving three years on a merchant vessel of the United States; R. S. § 2174.

Minor children, though born out of the United States, if living within the United States at the time of the naturalization of the parents, become citizens by virtue of the naturalization of the parents; 97 Mo. 311; but not so if they came after the father had been naturalized; 135 Ill. 591. As to whether a child of a naturalized British subject is himself a British subject, see 5 L. Quart. Rev. 438.

A married woman may be naturalized; 1 Cra. C. C. 372; even without the concurrence of her husband; 16 Wend. 617; and an alien woman becomes a citizen when her husband is naturalized, even if she is not of age at the time; 44 N. Y. Sup. Ct. 635; and though she may have lived in a foreign country for years and has never come to the United States until after his death; 14 Op. Atty-Gen. 402.

The federal constitution, art. 1, § 8, vests in congress the power to establish a uniform rule of naturalization. "It follows from the very nature of the power that to be useful it must be exclusive, for a concurrent power in the states would bring back all the evils and embarrassments

which the constitution was designed to remedy, and accordingly, though there was a momentary hesitation when the constitution first went into operation as to whether the power might not still be exercised by the states subject only to the control of congress so far as the legislation of the latter extended as the supreme law, yet the power is now firmly established to be exclusive; 2 Story, Const. § 1104; 7 How. 556; 19 id. 393; 5 Cal. 300; 56 Fed. Rep. 576; and no state can pass a law which contravenes the acts of congress on the subject; 2 Rand. 276. A state may confer such rights of citizenship as it pleases so far as relates to itself only; 19 How. 393; 16 Wis. 443; but this is not to be confounded with the right of citizenship of the United States; 19 How. 393; 143 U. S. 160; and no state can make a citizen of the United States; 4 Dill. 425.

By act of April 14, 1803, congress has conferred power to naturalize upon state courts having common-law jurisdiction and a seal and clerk; 18 B. Monr. 693; 83 Me. 489; and it may invest state courts with jurisdiction to naturalize; 33 N. H. 89; but it is held that it cannot impose the duty of naturalization upon state courts; 3 D. R. (Pa.) 728; nor require them to act upon applications for naturalization; 32 Atl. Rep. (N. J.) 743. See 37 Neb. 299. In 10 Ark. 621, the court say, "Whether the state courts are bound to exercise concurrent jurisdiction permitted to be retained by them even when enjoined upon them by act of congress, is not altogether well settled. Some strong intimations to the contrary have been given by the judges of the supreme court of the United States, and in some instances the courts of the particular states have refused to exercise this jurisdiction." No state can confer jurisdiction on any court, which does not come within the terms of the act of congress; 50 N. H. 245.

Courts of record, in naturalizing foreigners, act judicially, ascertaining the facts and applying the law to them; 4 Pet. 407; the certificate of naturalization issued by a court of competent jurisdiction is conclusive proof of the citizenship of the person named therein; 147 Ill. 514; though not the only proof. The judgment of the court, like every judgment, has been decided to be complete evidence of its own validity; *id.*

When no record can be produced showing the naturalization of a foreigner, naturalization may be inferred from the fact that for a long time he voted, held office, and exercised all the rights and privileges of a citizen; 143 U. S. 185. The subject is fully discussed in Morse, Citizenship. See Miller, Const. 285, 302; 4 Am. Lawy. 348; 30 L. R. A. 761; CHINESE; CITIZEN; ALLEGIANCE; EXPATRIATION.

NATURALIZED CITIZEN. One who, being born an alien, has lawfully become a citizen of the United States under the constitution and laws.

In foreign countries he has a right to be treated as such, and will be so considered, even in the country of his birth, at least for most purposes; 1 B. & P. 430. See CITIZEN; DOMICIL; INHABITANT; NATURALIZATION.

NATURALLY. According to the usual course of things. 71 Cal. 164.

NAUCLERUS (Lat.). The master or owner of a vessel. Vicat, Voc. Jur.; Calvinus, Lex.

NAUFRAGE. In French Maritime Law. When, by the violent agitation of the waves, the impetuosity of the winds, the storm, or the lightning, a vessel is swallowed up, or so shattered that there remain only the pieces, the accident is called *nauffrage*.

It differs from *echouement*, which is when the vessel remains whole, but is grounded; or from *bris*, which is when it strikes against a rock or a coast; or from *sombre*, which is the sinking of the vessel in the sea when it is swallowed up, and which may be caused by any accident whatever. Pardessus, n. 643. See WARE.

NAUGHT. Bad; defective.

NAULAGE. See NAULUM.

NAULUM (Lat.). Freight or passage money. 1 Pars. Mar. Law 124, n.; Bened. Adm. § 288; Dig. l. 6, § 1, *qui potiores in pignore*.

NAUTA (Lat.). One who charts (*exerect*) a ship. L. 1, § 1, ff. *nauta, caupo*; Calvinus, Lex. Any one who is on board a vessel for the purpose of navigating her. 3 Sumn. 213; Vicat, Voc. Jur.; 2 Emerigon 448; Pothier, Pand. lib. 4, tit. 9, n. 2; lib. 47, tit. 5, nn. 1, 2, 3, 8, 10. A carrier by water. 2 Ld. Raym. 917.

NAUTICA, PECUNIA. Loans to a ship owner, to be repaid only in case of the successful termination of a voyage. Of such a nature are the contracts known as *traiectitia*, *prêt à la grosse*, *bottomry*, and *respondentia*. They have always been allowed to be effected, by way of compensation for the risk run by the lender, at an extraordinary rate of interest, — *nauticum foenus*. Holland, Jurispr. 12th ed., 303.

NAUTICAL ASSESSORS. Experienced shipmasters or other persons having special knowledge of navigation and nautical affairs, who are called to the assistance of a court of admiralty in difficult cases involving questions of negligence, and who sit with the judge during the argument and give their advice upon questions of seamanship or the weight of testimony. 19 Fed. Rep. 559.

NAUTICUM FOENUS. See NAUTICA PECUNIA.

NAVAGIUM. A duty on certain tenants to carry their lord's goods in a ship. 1 Mon. Ang. 922.

NAVAL CADET. Formerly, a pupil of the United States Naval Academy, Annapolis, — now termed 'midshipman,' Stand. Dict. By settled usage which has the force of law, naval cadets are appointed by certificates under the hand and seal of the secretary of war. They are inferior officers who, for purposes of instruction, may be required to serve as officers, non-commissioned officers, or privates. Anderson.

NAVAL COURTS. Courts held abroad in certain cases to inquire into complaints by the master or seamen of a British ship, or as to the wreck or abandonment of such ship.

A Naval Court consists of three, four, or five members, being officers in her majesty's navy, consular officers, masters of British merchant ships or British merchants. It has power to supersede the master of the ship with reference to which the inquiry is held, to discharge any of the seamen, to decide questions as to wages, send home offenders for trial, or try certain offenses in a summary manner. R. & L. Dict.; Mer. Sh. Act, 1855, § 28.

NAVAL COURTS MARTIAL. See COURT MARTIAL.

NAVAL LAW. A system of regulations for the government of the navy. 1 Kent 377, n. Consult act of April 3, 1800; act of December 21, 1861; act of July 17, 1862; Homans, Nav. Laws; De Hart, Courts-Martial.

NAVAL OFFICER. An officer of the customs of the United States. His office relates to the estimating duties, countersigning permits, clearances, etc., certifying the collectors' returns, and similar duties.

NAVAL PRIZE ACT. The act of 27 & 28 Vict. c. 25, which regulates questions of prize. See PRIZE.

NAVARCHUS, NAVICULARIUS (Lat.). In Civil Law. The master of an armed ship. *Navicularius* also denotes the master of a ship (*patronus*) generally. Cic. Ver. 4, 55; also, a carrier by water (*exer-*

citor navis). Calvinus, Lex.

NAVIGABLE WATERS. Those waters which afford a channel for useful commerce. 20 Wall. 430. See Patterson, Fed. Rest. 45.

The test by which the character of a stream as public or private is determined, is its navigability in fact; 122 Pa. 191; 100 N. C. 477.

In its technical sense, the term navigable, at common law, is only applied to the sea, to arms of the sea, and to rivers which flow and reflow with the tide, — in other words, to tide-waters, the bed or soil of which is the property of the crown. All other waters are, in this sense of the word, unnavigable, and are, *prima facie*, strictly private property; but in England even such waters, if navigable in the popular sense of the term, are, either of common right or by dedication, subject to the use of the public as navigable highways, the fee or soil remaining in the riparian proprietors; Davies 149; 5 Taunt. 705; 20 C. B. N. s. 1; 1 Pick. 180; 5 id. 199.

In the United States, this technical use of the term has been adopted in many of the states, in so far as it is employed to designate and define the waters, the bed or soil of which belongs to the state; 4 N. Y. 472; 4 Pick. 268; 2 Conn. 481; 3 Me. 269; 16 Ohio 540; 1 Halst. 31; 4 Wis. 486; 2 Swan 9. See 3 Abb. N. C. 88; 122 Pa. 191. But in Pennsylvania; 2 Binn. 475; 14 S. & R. 71; in North Carolina; 3 Ired. 277; 2 Dev. 30; in Iowa; 3 Ia. 1; 4 id. 199; and in Alabama; 11 Ala. 436; the technical use of the term has been entirely discarded, and the large fresh-water rivers of those states have been decided to be navigable, not only as being subject to public use as navigable highways, but also as having their bed or soil in the state.

The rule of the common law, by which the ebb and flow of the tide has been made the criterion of navigability, has never been adopted in any of the United States, or, if adopted, it has been in a form modified and improved to fit the condition of the country and the wants of its inhabitants. According to the rule administered in the courts of this country, all rivers which are found "of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market;" 8 Barb. 239; or which are capable of use "for the floating of vessels, boats, rafts, or logs"; 31 Me. 9 (but see 6 Cal. 443; 17 Or. 165); 50 Fed. Rep. 429; 58 N. W. Rep. (Wis.) 257; are subject to the free and unobstructed navigation of the public, independent of usage or of legislation; 5 Wend. 358; 42 Me. 552; 18 Barb. 277; 5 Ind. 8; 2 Swan 9; 29 Miss. 21; 6 Cal. 180; 2 Stockt. 211. See 51 Me. 256; 3 Ore. 445; 42 Wis. 202; 111 N. C. 661; 107 U. S. 682. Water navigable for pleasure boating must be regarded as navigable; 108 Mass. 456.

The navigable waters of the United States are such as are navigable in fact; 16 U. S. App. 152; and which by themselves, or in connection with other waters, form a continuous channel for commerce with foreign countries or among the states; 109 U. S. 385; 11 Wall. 411.

A river may be navigable below the ebb and flow of the tide in the sense of the common law, and, in fact, navigable above; and the question of boundary in respect to lands adjoining it will be determined by one principle above, and by another below tide-water; 12 N. J. Eq. 1. It is not necessary that the stream should be navigable all the year round; 31 Mich. 336; 25 Fla. 1. See 86 Ala. 88. There can be no prescriptive right to maintain or continue an obstruction to the navigation of a public stream; 86 Ala. 88.

In 108 Mass. 447, Gray, J., says: "The term 'navigable waters,' as commonly used in the law, has three distinct meanings; first, as synonymous with 'tide-waters,' being waters whether fresh or salt where ever the ebb and flow of the sea is felt; or second, as limited to tide-waters which are capable of being navigated for some use-

ful purpose; or third, as including all waters, whether within or beyond the ebb and flow of the tide which can be used for navigation." See 19 Am. L. Reg. N. S. 147; Ang. Waterc. § 542; 19 Abb. N. C. 159. In North Carolina the test of navigability is not whether the stream is subject to the ebb and flow of the tide, but whether it is navigable for sea-going vessels; 114 N. C. 787; while in South Carolina the test is its navigable capacity, without regard to the character of the craft; 19 S. E. Rep. (S. C.) 963.

In New York, it seems that courts are bound to take judicial notice of what streams are, and what are not, highways, at common law; 8 Barb. 239; but it has been held that what is a navigable stream is a mixed question of law and fact; if a stream is not navigable the legislature cannot declare it to be so, because the legislature cannot appropriate it to public use without provision for compensation; 35 N. Y. 454. See **WATERS; WATERCOURSE; RIVERS; LAKE; RIPARIAN PROPRIETORS; TIDE-WATER.**

A navigable river in this country is one which is used, or is susceptible of being used in its ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. It does not depend upon the mode by which trade is conducted upon it, whether by steamers, sailing vessels or flat boats, nor upon the difficulties attending navigation, but upon the fact whether the river in its natural state is such that it affords a channel for useful commerce. 260 U. S. 86.

What are navigable streams within the meaning of the local rules of property is for the determination of the States; and where a State by statute enumerates the navigable streams within its borders those not enumerated are non-navigable in law. 228 U. S. 244.

Navigability, in the sense of the law, is not destroyed by artificial obstructions subject to abatement by public authority; nor because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water. *Id.*, 118, 122. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. *Id.*, 122, 123, quoting 10 Wall. 563.

NAVIGATING. A vessel which, though touching bottom, forces her way by her own screw through the soft mud is navigating. 59 Fed. Rep. 365.

NAVIGATION. See **Fog.**

NAVIGATION ACT. The stat. 12 Car. II. c. 78. It was repealed by 6 Geo. IV. cc. 109, 110, 114. See 16 & 17 Vict. c. 107; 17 & 18 Vict. cc. 5 and 120; 3 Steph. Com. 145.

NAVIGATION, RULES OF. Rules and regulations which govern the motions of ships or vessels when approaching each other under such circumstances that a collision may possibly ensue.

These rules are firmly maintained in the United States courts. A federal question is presented by a ruling of a state court which substantially ignores the obligatory force of rules of navigation; 150 U. S. 674.

The rules of navigation which prevailed under the general maritime law, in the absence of statutory enactments, will be considered, although, as hereinafter stated, they have lately been superseded by express enactment in most of the commercial countries of the world.

These rules were derived mainly from the decisions of the high court of admiralty in England, and of the superior courts of the United States, and they are based upon the rules promulgated by the corporation of the Trinity House on the 30th of October, 1840, and which may be found in full in 1 W. Rob. 488. Though now codified, see *infra*, they are here continued as in the former

edition as a matter of historical interest.

For sailing-vessels about to meet. 1. Those having the wind fair shall give way to those on a wind [or close-hauled].

2. When both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand.

3. When both vessels have the wind large or abeam, and meet, they shall pass each other in the same way, on the larboard hand; to effect which two last-mentioned objects the helm must be put to port.

For a sailing- and a steam vessel about to meet. 1. Steam-vessels are to be considered in the light of vessels navigating with a fair wind, and should give way to sailing-vessels on a wind on either tack.

2. A steam-vessel and a sailing-vessel going large, when about to meet, should each port her helm and pass on the larboard side of the other; 1 W. Rob. 478; 2 *id.* 515.

But in the United States courts it has been almost uniformly held, and the rule is now firmly established, that when a sailing-vessel and a steamer are about to meet, the sailing-vessel must, under ordinary circumstances, and whether going large, or before the wind, or close-hauled by the wind, keep her course, and the steamer must take all the measures necessary to avoid a collision; 10 How. 557; 17 *id.* 152, 178; 18 *id.* 581; 3 Blatch. 92; Desty, Adm. § 357; 48 Fed. Rep. 760; 54 *id.* 411; 37 *id.* 330; 144 U. S. 371.

For steam-vessels about to meet. 1. When steam-vessels on different courses are about to meet under such circumstances as to involve the risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of the other.

2. A steam-vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand.

The following abstract of authorities may also be referred to as furnishing rules of decision (in addition to the general rules of navigation) in the particular cases alluded to; and they will be found generally applicable in cases of collision arising under the new regulations, as well as in cases arising under the general maritime law.

When a steamer or other vessel is about to pass another vessel proceeding in the same general direction, she must allow the foremost boat to keep her way and course, and must take the necessary measures to avoid a collision; 23 How. 448; Abb. Adm. Pr. 108; Olc. 505; 1 Blatch. 363.

A vessel under sail or steam is bound to keep clear of a vessel stationary or at anchor, provided the latter is in a proper place, and exhibits a proper light,—the presumption in such cases being that the vessel in motion is at fault; 1 How. 89; 19 *id.* 103; 3 Kent 231; Daveis 359; 1 Swab. 88; 3 W. Rob. 49.

A vessel entering a harbor is bound to keep the most vigilant watch to avoid a collision; 18 How. 584; Daveis 359; see 51 Fed. Rep. 766; and in the night-time she ought generally to have her whole crew on deck; Daveis 359. And see 3 Kent 231; 1 Dods. 467.

By the general maritime law, vessels upon the high seas were not ordinarily required constantly to exhibit a light; 2 W. Rob. 4; 3 *id.* 49; 2 Wall. Jr. 268; but the subject is now regulated by statute in the various maritime countries.

Regulations made by various governments are binding upon all vessels within the jurisdiction of that government; Story, Conf. Laws, ch. 14; 1 Swab. 38, 63, 96; 1 How. 28; 14 Pet. 99; but it is beyond power of the legislature to make rules applicable to foreign vessels when beyond their jurisdiction; that is, more than a marine league from their shores; 1 Swab. 96. And see 18 How. 223; 21 *id.* 184. It has, accordingly, been held that an English rule is not applicable in a case of collision on the high seas between a British and a foreign vessel, and that the latter could not set up in its defence a violation of the English statute by the British vessel; 1 Swab. 63, 96; and it was declared that in such a case the gen-

eral maritime law must be the rule of the court. See 92 U. S. 31.

The British Government, by an Order in Council, in 1863, promulgated certain regulations for preventing collisions at sea. An Order in Council, in 1879, promulgated new regulations, to take effect on September 1, 1880. These were adopted in pursuance of the recommendation of representatives of different nations, and are stated in the last-mentioned Order to have been very generally adopted by commercial nations. They were adapted to the United States with regard to vessels on the high seas and in coast waters, in 1864 (R. S. § 4233). A revised code was adopted by England in 1884, and then was adopted by the United States with reference to vessels on the high seas in 1885. In 1890 by international agreement congress adopted a complete system of rules of the road governing vessels both on the ocean and on our own inland waters. These rules consist of: 1. The International Rules agreed upon by all nations, which went into effect July 1, 1897; 1 R. S. Sup. 781. 2. Rules for the navigation of rivers, harbors, and inland waters of the United States, navigable by sea-going vessels, which went into effect October 7, 1897; 2 R. S. Sup. 620. 3. Rules to regulate the navigation on the Great Lakes and their connecting and tributary waters as far east as Montreal, which went into effect March 1, 1895; 2 R. S. Sup. 320. 4. Rules for the navigation of the Red River of the North and rivers entering into the Gulf of Mexico and its tributaries, which are the same as were formerly in use, and are to be found in R. S. § 4233 and its amendments, and rules made pursuant to R. S. § 4412 by the Board of Supervising Inspectors of steam-vessels. Copies of all these rules are furnished on application by the Commissioner of Navigation. These various codes of rules are too long to be set forth here.

It is evident that these rules and regulations were intended to supersede all other rules of navigation, and every other system of vessels' lights, wherever they may be adopted. They establish a well-devised and complete system of vessels' lights, and furnish plain and simple rules of navigation applicable to all the ordinary cases of vessels approaching each other under such circumstances as to involve the risk of collision,—leaving extraordinary cases, such as the meeting of vessels in extremely narrow or other very difficult channels (in respect to which no safe general rule can be devised), to the practical good sense and professional skill of those in charge of such vessels. Under all ordinary circumstances a vessel discharges her full duty to another vessel by a faithful and literal observance of the international rules; 158 U. S. 187. Where there were no positive rules of navigation on a foreign river, but there was a certain practice, it was held that a vessel which disregarded the practice was responsible for a collision occurring thereby; L. R. 15 P. D. 194. A departure from the rules, to be justifiable, must be necessary in order to avoid immediate danger. But that necessity must not have been caused by the negligence or fault of the party disobeying the rule; and courts of admiralty lean against the exceptions; 18 How. 581, 583; 1 W. Rob. 157, 478. And see 2 Curt. C. C. 141, 363; 18 How. 581; 150 U. S. 674; 123 *id.* 349. It is no excuse that a vessel, in departing from the navigation rules, when rounding the Battery at New York, to say that vessels often agree with each other to do so, when it appears that the vessel in question took upon herself the responsibility of departing from the rules for her own convenience; 14 U. S. App. 684.

The maritime law, however, requires that in collision cases every violation of a rule of navigation, and every other act or omission alleged to be a fault, shall be considered in connection with all the attending circumstances; and when by inevitable accident, or the fault of one of two colliding vessels, a vessel free from fault is suddenly brought into such circumstances of

imminent danger as probably to render the deliberate or proper exercise of the judgment and skill of an experienced seaman impossible, an error of judgment, or other mistake, is not regarded as a legal fault; 3 Blatch. 92; 12 How. 461; 14 Wall. 199; 19 id. 54; 54 Fed. Rep. 411; 128 U. S. 349; 144 id. 87.

The proper and continual exhibition of the bright and colored lights which these rules and regulations prescribe, and their careful observance by the officer of the deck and the lookout of every vessel, constitute the very foundation of the system of navigation established by such rules and regulations. The exhibition of such lights, and the strict compliance with the rules in respect to stationing and keeping a competent and careful person in the proper place and exclusively devoted to the discharge of the duties of a lookout, are of the utmost importance.

The stringent requirements of our maritime courts in respect to lookouts may be learned by consulting the following authorities: 10 How. 535; 12 id. 448; 18 id. 108, 228; 21 id. 548, 570; 23 id. 448; 3 Blatch. 92; 5 C. C. App. 390; 53 Fed. Rep. 609; 60 id. 1022. This rule admits of no exception on account of size, in favor of any craft capable of committing injuries; 56 Fed. Rep. 271. A sailing-vessel is entitled to assume that a steam-vessel, approaching her, is being navigated with a proper lookout and with reasonable attention to the obligations laid upon her; 1 U. S. App. 11. The absence of a lookout is not material where the presence of one would not have availed to prevent a collision; 144 U. S. 371.

The neglect to carry or display the lights prescribed by these rules and regulations will always be held, *prima facie*, a fault, in a collision case; 5 How. 441, 465; 21 id. 548, 556; 3 W. Rob. 191; Swab. 120, 245, 253, 519; 1 Lush. 382; 2 Wall. 538. And, upon the same principles, the neglect, in a fog, to use the prescribed fog-signals will also be considered, *prima facie*, a fault; Desty, Adm. § 360. See Fog.

It will be observed that the duty of slackening speed, in all cases when risk of collision is involved, is absolutely and imperatively imposed upon every steam-vessel, by these regulations, and that they require that every steam-vessel shall stop and reverse her engine when necessary to avoid a collision.

The duty of slackening speed in order to avoid a collision had been frequently declared by the maritime courts before the adoption of these regulations; 3 Hagg. Adm. 414; 3 Blatch. 92; Swab. 138; 2 W. Rob. 1; 3 id. 95, 270, 377; 10 How. 557; 12 id. 443; 18 id. 108; but there was no inflexible rule requiring a steamer to slacken speed in all cases when there was risk of collision; and the neglect to do it was held to be a fault only in those cases where its necessity was shown by the proofs. This left the question open to be determined by the courts in each particular case, and perhaps upon vague and unreliable estimates of time and distance and bearings, or upon conflicting and unsatisfactory testimony; but the legislature, in view of the great power and speed of the steamers now in general use, and the very disastrous consequences of a collision of such vessels when running at their ordinary speed, has wisely made the duty imperative; 5 Blatch. 256; 10 How. 586; 91 U. S. 200; 7 U. S. App. 20. See COLLISION; MARITIME LAW.

NAVIRE. In French Law. A ship. Emerig. *Traité des Assur.* c. 6, § 1.

NAVY. The whole shipping, taken collectively, belonging to the government of an independent nation, and appropriated for the purposes of naval warfare. It does not include ships belonging to private individuals nor (in the United States, at least) revenue vessels or transports in the service of the war department.

Under the constitution, congress has power to provide and maintain a navy. This power authorizes the government to buy and build vessels of war, to establish a naval academy, and to provide for the

punishment of desertion and other crimes, and to make all needful rules for the government of the navy. See 3 Wheat. 337; 20 How. 65; 3 Wheat. 370.

NAVY BILLS. Bills drawn by the officers of the British navy for their pay, etc.

A bill of exchange drawn by the paymaster of a United States vessel, while abroad, to procure money for the expenses of his ship or fleet.

NAVY DEPARTMENT. See DEPARTMENT.

NAVY LIST. An official account of the officers of the British navy, with a list of the ships, published quarterly.

NAVY PERSONNEL ACT. An act of March 3, 1899, 30 Stat. 1004, equalizing the pay of army and navy officers. The act declared that "after June 30, 1899, commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for officers of corresponding rank in the army." By a former act, the relative rank of army and navy officers was fixed. It was, however, a source of dissatisfaction to navy officers that some of them did not receive the same pay as corresponding officers of the army, although others received a larger pay. To remove this dissatisfaction Congress passed the Naval Personnel Act, assimilating the pay of navy officers to army officers of corresponding rank, with a proviso, however, "that no provision of this act shall operate to reduce the present pay of any commissioned officer now in the navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law." The effect of this legislation was to raise the pay of certain navy officers to that received by army officers of corresponding rank, and to leave undisturbed the present pay of certain other navy officers, who were already receiving higher pay than army officers of the same rank. The intention of Congress was evidently to put officers of the army and navy on the same footing with respect to their general pay, and to make the act prospective in its application to future legislation, so that if Congress should thereafter raise the general pay of army officers as fixed by Revised Statutes, section 1261, a like increase should apply to navy officers. 195 U. S. 418, 420, 421. See RANK.

NAVY REGISTER. An official list published semi-annually of the officers of the United States navy, their stations, rates of pay, etc., with a list of the ships.

NAVY REGULATIONS. Regulations established by the Secretary of the Navy with the approval of the President. (12 Stat. 565; Rev. Stat., § 1547). Such regulations have the force of law. 100 U. S. 22; 4 Hos. (U. S.) 80.

NE ADMITTAS (Lat.). The name of a writ now practically obsolete, so called from the first words of the Latin form, by which the bishop is forbidden to admit to a benefice the other party's clerk during the pendency of a *quære impedit*. Fitzh. N. B. 37; Reg. Orig. 31; 3 Bla. Com. 248; 1 Burn. Eccl. Law 31.

NE BAILA PAS (he did not deliver). In Pleading. A plea in detinue, by which the defendant denies the delivery to him of the thing sued for.

NE DISTURBA PAS. In Pleading. The general issue in *quære impedit*. Hob. 162. See Rast. Entr. 517; Winch, Entr. 703. Andr. Steph. Pl. 230.

NE DONA PAS, NON DEDIT. In Pleading. The general issue in formation. It is in the following formula: "And the said C D, by J K, his attorney, comes and defends the right, when, etc., and says that the said E F did not give the said manor, with the appurtenances, or any

part thereof, to the said G B, and the heirs of his body issuing, in manner and form as the said A B hath in his count above alleged. And of this the said C D puts himself upon the country." 10 Wentw. Pl. 182; Andr. Steph. Pl. 230.

NE EXEAT REPUBLICA, NE EXEAT REGNO (Lat.). In Practice. The name of a writ originally employed in England as a high prerogative process, for political purposes; Story, Eq. Jur. § 1487; 50 N. H. 358; but now applied in civil matters only, issued by a court of chancery, directed to the sheriff, reciting that the defendant in the case is indebted to the complainant, and that he designs going quickly into parts without the state, to the damage of the complainant, and then commanding him to cause the defendant to give bail in a certain sum that he will not leave the state without leave of the court, and for want of such bail that he, the sheriff, do commit the defendant to prison.

This writ is a part of the English chancery practice and is usually a part of that practice in states where it is in force. It may be issued by the United States District Courts; 48 Fed. Rep. 492.

This writ has been expressly abolished in very many of the states. Yet its place has been filled by other methods of procedure, similar in effect. The constitutions of Vermont, Pennsylvania, Kentucky, Mississippi, and Louisiana prohibit any restraint upon emigration. In Arkansas the writ is abolished, and in the code of New York a system of arrest and bail is substituted. In Ohio and California it is abolished; 27 Ohio 464; 49 Cal. 465. In those jurisdictions where *ne exeat* is still recognized, the circumstances under which the writ will be granted, and the requisites to its issuance, are largely regulated by statute; but certain general principles govern in nearly every case. These will be found set forth in Rhodes v. Cousins, 6 Rand. 191. See 14 Amer. Dec. 550, n.

This writ is issued to prevent debtors from escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to hold to bail, or to compel a party to give security to abide the decree to be made in his case; Bisp. Eq. § 38; 2 Kent 32; 1 Clark 551; Beames, *Ne Exeat*; 13 Viner, Abr. 537; 1 Suppl. to Ves. Jr. 38, 352, 467; 1 Bla. Com. 138; Madd. Ch. Pr.; 1 Smith, Ch. Pr. 576; 19 V. & B. 312; 6 Johns. Ch. 138; 27 Ohio 466; 46 Vt. 708; 1 Del. Ch. 32; id. 295; 6 Phila. 143.

Arrest under this writ is not in violation of a constitutional provision that a person shall not be imprisoned for debt, unless in cases of tort, or where there is a strong presumption of fraud; 16 Colo. 75.

The writ may be issued against foreigners subject to the jurisdiction of the court, citizens of the same state, or of another state, when it appears by a positive affidavit that the defendant is about to leave the state, or has threatened to do so, and that the debt would be lost or endangered by his departure; 3 Johns. Ch. 75, 412; 7 id. 192; 1 Hopk. Ch. 499. On the same principle which has been adopted in the courts of law that a defendant could not be held to bail twice for the same cause of action, it has been decided that a writ of *ne exeat* was not properly issued against a defendant who had been held to bail in an action at law; 8 Ves. 594.

This writ can be issued only for equitable demands; 4 Des. Eq. 108; 6 Johns. Ch. 138; 1 Hopk. Ch. 499; and not where the plaintiff by process of law may hold the defendant to bail; 3 Bro. C. C. 218; 8 Ves. Jr. 593; 36 Ga. 578; 18 N. J. Eq. 249; 28 Wisc. 245; and where there is an adequate remedy at law, the writ will be dissolved; 30 Ga. 965. It may be allowed in a case to prevent the failure of justice; 2 Johns. Ch. 191. When the demand is strictly legal, it cannot be issued, because the court has no jurisdiction. When the court has concurrent jurisdiction with the courts of common law, the writ may, in such case, issue, unless the party has been already arrested at law; 2 Johns. Ch. 170. In all cases when a writ of *ne exeat* is claimed, the plaintiff's equity must appear on the face of the bill; 8 Johns. Ch. 414.

The writ may be provided for in the final decree and will continue in force until dissolved by the court or until the decree is satisfied; 48 Fed. Rep. 492. It is not super-

seded by a subsequent bond for the performance of final decree; 36 Atl. Rep. (N. J.) 951. It may be granted on motion founded on affidavit, but where the facts charged in the bill are such as to entitle the complainant to the writ, it is sufficient to refer to them as showing the ground of the complainant's demand without restating them in the affidavit; 1 Del. Ch. 32.

The amount of bail is assessed by the court itself; and a sum is usually directed sufficient to cover the existing debt and a reasonable amount of future interest, having regard to the probable duration of the suit; 1 Hopk. Ch. 501.

The defendant arrested upon a writ of *ne exeat* may obtain a discharge of the writ upon giving bond, with surety, to answer and be amenable to the process of the court; 141 U. S. 260.

NE INJUSTE VEXES (Lat.). In Old English Law. The name of a writ which issued to relieve a tenant upon whom his lord had distrained for more services than he was bound to perform.

It was a prohibition to the lord, not unjustly to distrain or vex his tenant. Fitzh. N. B. Having been long obsolete, it was abolished in 1835.

NE LUMINIBUS OFFICIATUR (Lat.). In Civil Law. The name of a servitude which restrains the owner of a house from making such erections as obstruct the light of the adjoining house. Dig. 8. 4. 15. 17; *SERVITUDE*.

NE RECIPIATUR (Lat.). That it be not received. A caveat or words of caution given to a law officer, by a party in a cause, not to receive the next proceedings of his opponent. 1 Sell. Pr. 8.

NE RELESSA PAS (Law Fr.). The name of a replication to a plea of release, by which the plaintiff insists he did not release. 2 Buistr. 55.

NE UNQUES ACCOUPLE (Law Fr.). In Pleading. A plea by which the party denies that he ever was lawfully married to the person to whom it refers. See the form, 2 Wils. 118; 10 Wentw. Pl. 158; 2 H. Bla. 145; 3 Chitty, Pl. 599.

NE UNQUES EXECUTOR. In Pleading. A plea by which the party who uses it denies that the plaintiff is an executor, as he claims to be; or that the defendant is executor, as the plaintiff in his declaration charges him to be. 1 Chitty, Pl. 454; 1 Saund. 274, n. 3; Comyns, Dig. *Pleader* (2 D 2); 2 Chitty, Pl. 498.

NE UNQUES SEISIE QUE DOWER. In Pleading. A plea by which a defendant denies the right of a widow who sues for and demands her dower in lands, etc., late of her husband, because the husband was not on the day of her marriage with him, or at any time afterwards, seised of such estate, so that she could be endowed of the same. See 2 Saund. 329; 10 Wentw. Pl. 159; 3 Chitty, Pl. 598, and the authorities there cited.

NE UNQUES SON RECEIVER. In Pleading. The name of a plea in an action of account-render, by which the defendant affirms that he never was receiver of the plaintiff. 12 Viner, Abr. 183.

NE VARIETUR (Lat. that it be not changed). A form sometimes written by notaries public upon bills or notes, for the purpose of identifying them. This does not destroy their negotiability. 8 Wheat. 338.

NEAP TIDES. Those tides which happen between the full and change of the moon, twice in every twenty-four hours. 18 Cal. 21.

Tides in which the rise and fall is least, occurring after the first and third quarters of the moon. English. Cf. *SPRING TIDES*.

NEAR. Close or at no great distance. 109 N. C. 358. Near is a relative term, and its precise meaning depends upon circumstances; 44 Mo. 197; 5 Allen 221; 39

N. J. Eq. 435; 108 U. S. 211; 31 Fed. Rep. 872.

Two and one half miles was held to be near; 44 Mo. 197. See *AT OR NEAR*.

NEAREST. Not necessarily nearest by geographical measurement, but by convenience of access, having regard to the usual travelled route. 54 Tex. 307. See *MILEAGE*.

NEAT, NET. The exact weight of an article, without the bag, box, keg, or other thing in which it may be enveloped.

NEAT CATTLE. Oxen or heifers. Whart. Dict. "Beeves" may include neat stock, but all neat stock are not beeves; 36 Tex. 324; 82 *id.* 479. The term neat cattle includes a cow. 17 S. W. Rep. (Mo.) 745.

NEAT LAND. Land let out to the yeomanry. S. W. Cowel.

NEATNESS. In Pleading. The statement in apt and appropriate words of all the necessary facts and no more. Lawes, Plead. 62.

NEBRASKA. One of the states of the American Union, being the thirty-seventh admitted to the Union.

Its territory formed a part of the province of Louisiana as ceded by France, and was afterwards included in the district and the territory of Louisiana as organized in 1804 and 1805, respectively, and in as organized in 1820, to which the name of the last-named territory was changed in 1812. The territory of Nebraska, extending beyond the limits of the present state westward to the summit of the Rocky Mountains, and northward to the British possessions, was organized by the act of May 30, 1854. An enabling act for the formation of a state government was passed April 19, 1864; a state constitution was adopted June 21, 1866; on the 9th of February, 1867, an act was passed for the admission of the state into the Union, on condition that civil rights and the elective franchise should be secured to all races, excepting Indians not taxed; and on the first of March, 1867, a proclamation by the president announced the acceptance of this condition, whereupon by the terms of the act the admission of the state became complete.

NECATINE. The act of killing.

NECESSARIES. Such things as are proper and requisite for the sustenance of man, including food, clothing, medicine, and habitation. 47 Minn. 250.

The term necessities is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties; Add. Contr. 382; 7 S. & R. 247. Ornaments and superfluities of dress, such as are usually suitable to the party's rank and situation in life; 1 Campb. 120; 7 C. & P. 52; 8 Term 578; 47 Minn. 250; some degree of education; 4 M. & W. 727; 16 Vt. 683; lodging and house-rent; 1 B. & P. 340; see 12 Metc. 559; 1 M. & W. 67; 5 Q. B. 606; board bill; 83 Me. 305; pew rent; 40 Conn. 75; horses, saddles, bridles, liquors, pistols, but powder, whips, and fiddles have been held not to be necessities; 1 Bibb 519; 2 N. & M'C. 524. Nor is an infant liable on a contract for the erection of a dwelling-house; 78 Hun 603. But a racing bicycle is a necessary for an apprentice earning 21s. a week and living with his parents; 78 L. T. 296.

The rule for determining what are necessities is that whether articles of a certain kind or certain subjects of expenditure are or are not such necessities as an infant may contract for, is a matter of law, and for instruction by the court; but the question whether any particular things come under these classes, and the question, also, as to quantity, are generally matters for the jury to determine; 10 Vt. 225; 12 Metc. 559; 11 N. H. 51; 1 Bibb 519; 2 Humphr. 27; 3 Day 37; 6 M. & W. 42; 6 C. & P. 690; Ans. Contr. 118; Poll. Contr. 67.

Infants, when not maintained by parent or guardian, may contract for necessities; 4 M. & W. 727; 16 Mass. 28; 10 Mo. 451; 9 Johns. 141; 25 Atl. Rep. (R. I.), 345. But when living with and supported by their parents they are not liable for necessities; 4 Wend. 403; 61 Ill. 177; 48 Mo. App. 59; Ewell, Lead. Cas. 55. Nor can an infant pledge his father's credit, as a wife can her husband's, for abandonment of duty; 17

Vt. 348; 6 M. & W. 483; Schoul. Dom. Rel. 328. Infants are not liable at law for borrowed money, though expended for necessities; 10 Mod. 67; 1 Bibb 519; 7 W. & S. 83, 88; 10 Vt. 225. See 1 P. Wms. 558; 7 N. H. 368; 2 Hill S. C. 400; 32 N. H. 345. Otherwise in equity; 1 P. Wms. 558; 2 Duval 149; 7 W. & S. 88. But they are liable for money advanced at their request to a third party to pay for necessities; 1 Den. 460; 10 Cush. 436; 7 N. H. 368; 2 Hill S. C. 400; 83 Me. 305. An infant is not liable upon a bill of exchange at the suit of an indorsee of the bill, although it was accepted for the price of necessities; [1891] 1 Q. B. 413. Services rendered by an attorney to an infant in examining the public records and advising him as to his rights to certain property are not necessities; 48 Neb. 391. Necessaries for the infant's wife and children are necessities for himself; Stra. 168; Com. Dig. *Infant* (B 5); 1 Bibb 519; 2 N. & M'C. 523; 9 Johns. 144; 16 Mass. 31; 14 B. Monr. 232. As to a note or acceptance by an infant for necessities, see 35 Cent. Law J. 203. See *INFANT*.

When a wife is living with her husband, it is presumed that she has his assent to pledge his credit for necessities. See 35 Me. 332; 83 *id.* 132; 79 Wis. 147; 64 Hun 634. But this presumption may be rebutted by showing a prohibition on his part or that he has already supplied her with necessities. The fact of cohabitation is not conclusive of the husband's assent; 2 Ld. Raym. 1006; 34 N. H. 420; 39 N. Y. 351; Schoul. Dom. Rel. 80; 29 Am. L. Reg. 324. But if the husband altogether neglects to supply the wife, she may pledge his credit notwithstanding he has forbidden tradesmen to trust her; the law here raising a presumption of agency to enforce the marital obligation and protect the wife; 41 Barb. 558; 15 Conn. 535; Schoul. Dom. Rel. 77; 2 Misc. Rep. 49. A wife is ordinarily authorized to purchase clothing on the husband's credit only in case of necessity, and where the wife has habitually clothed herself out of her separate income which is adequate for that purpose, the husband is not liable for clothing ordered by her; 47 N. E. Rep. 408; 114 Mass. 424; 183 *id.* 513. See 67 Me. 238. The husband is also liable when away from his wife without her fault or by his own misconduct; 24 Ala. 337; 8 Ia. 51; 8 Gray 172; 2 Kent 146; 43 Ill. App. 39; 160 Mass. 149. In order to charge a husband with necessities sold to his wife, it must affirmatively appear that the goods were sold on the husband's credit; 7 Misc. Rep. 118. But otherwise where it is the wife's fault; 10 Ill. 569; 29 N. H. 63; 40 Vt. 68; 19 Wisc. 268. But if the wife elopes, though it be not with an adulterer, he is not chargeable even for necessities; the very fact of the elopement and separation is sufficient to put persons on inquiry, and whoever gives credit to the wife afterwards gives it at his peril; 1 Stra. 647; 11 Johns. 281; 3 Pick. 289; 2 Halst. 146; 2 Kent 123; Bacon, Abr. *Baron and Feme* (H); 1 Hare & W. Sel. Dec. 104, 106; 6 C. B. N. S. 519; 19 Wisc. 268. See *MARRIED WOMAN*. Insane persons are liable for necessities; Pars. Contr. 420, note 3; 5 B. & C. 170; 10 Allen 59; 56 Me. 308. See, generally, Schoul. Dom. Rel.; Ewell, Lead. Cas. on *Coverture*, etc.; 29 Am. L. Reg. 324; 32 Mich. 204; 12 Lawy. Rep. Ann. 859; *MARRIED WOMAN*.

NECESSARY. Reasonably convenient. 19 So. Rep. 202.

This word has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose, 43 Ill. 307. It frequently imports no more than that one thing is convenient, or useful, or essential to another; 4 Wheat. 414.

The word admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. 4 Wheat. (U. S.) * 413, 414.

To employ the means necessary to an end,

is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. *Id.*

What is "necessary to the beneficial enjoyment of an estate" cannot reasonably be held to be limited to absolute physical necessity, but to what is reasonably necessary. *Anderson*; 8 Allen 6. Necessary help for the warden of a prison includes the services of a physician. *Id.*; 13 Nev. 420. Necessary household furniture includes more articles than such as are absolutely indispensable,—articles which, to the common understanding, are required for comfort and convenience. But "necessary" is not to have the liberal sense given it in the rule as to "necessaries," *q. v.* *Id.*; 43 Conn. 529. Necessary implication, in construing a will, means so strong a probability of intention that an intention contrary to that imputed cannot be supposed. *Id.*; 1 Ves. & B. *466. Referring to taking private property for public uses, necessary means expedient. *Id.*; 7 Cow. 606. Necessary repairs to a vessel means such as are reasonably proper under the circumstances; not merely such as are indispensable for the safety of the ship or the accomplishment of the voyage. *Id.*; 3 Sumn. 237.

As used in a code exempting the wages of a laboring man when necessary for the support of his family in whole or in part, it does not mean that his wages must be absolutely indispensable to the bare subsistence of the family and that the family could not live without them, but is used in a broader and less rigid sense looking rather to the comfort and well being of the family, and contemplates the furnishing to it whatever is necessary to its comfort and well-being as distinguished from luxuries. 29 Pac. Rep. (Mont.) 337.

Witness fees are not necessary disbursements where witnesses were not called at the trial, unless the party shows why he did not call them; 28 N. Y. Supp. 663.

Necessary material for the construction of a railroad includes the railroad as a completed structure, station buildings, depots, machine shops, side tracks, turn outs, and water tanks. 150 U. S. 1.

Necessary help. A physician may be appointed by a warden of a state prison under authority to appoint all necessary help. 13 Nev. 419.

Necessary implication. In construing a will, not a natural necessity, but so strong a probability that a contrary construction cannot be supported. 1 V. & B. 466.

NECESSARY APPARATUS. All such articles as are usually employed in the business referred to. 7 J. J. Mar (Ky.) 113.

NECESSARY BALLAST. The ballast reasonably necessary to complete the road for the purpose for which it was built. 139 Ky. 358, 104 S. W. 370.

NECESSARY DOMICIL. That kind of domicile which exists by operation of law, as distinguished from voluntary domicile or domicile of choice.

NECESSARY EXPENSE. The acquisition of a place or home for a building and loan association for the conduct of its business is a "necessary expense," within a statute, making provision for the allowance of necessary and proper expenses from moneys accumulated. 129 Ky. 755, 112 S. W. 864.

NECESSARY SUPPLIES. The transportation of children to and from school in wagons held not to be "necessary supplies" within a clause relating to additional tax of subdistricts for educational purposes. 146 Ky. 460, 142 S. W. 1041.

NECESSITOUS CIRCUMSTANCES. In the civil code of Louisiana the words are used relative to the fortune of the deceased and to the condition in which the claimant lived during the marriage. 43 La. Ann. 1140.

NECESSITY. That which makes the

contrary of a thing impossible.

Necessity is of three sorts: of conservation of life; see DURESS; of obedience, as the obligation of civil subjection, and, in some cases, the coercion of a wife by her husband; and necessity of the act of God, or of a stranger. *Jacob*; *Moz.* & *W.*

Whatever is done through necessity is done without any intention; and as the act is done without will (*q. v.*) and is compulsory, the agent is not legally responsible; *Whart. Cr. L.* § 95; *Bacon, Max. Reg.* 5. Hence the maxim, Necessity has no law; indeed, necessity is itself a law which cannot be avoided nor infringed. *Clef des Lois Rom.*; *Dig.* 10. 8. 10. 1; *Comyns, Dig. Pleader* (3 M 20, 3 M 30). As to the circumstances which constitute necessity, see 1 Russ. Cr. 16, 20; 2 Stark. Ev. 713; 31 Ind. 189; 4 Cush. 243; 55 Ga. 126.

NECK. In Mining. An entry driven narrow, or just wide enough to allow a car track into the room from which this "neck" is the outlet for the coal, as mined, to the cross entry. 160 Ky. 669, 170 S. W. 14.

NECK-VERSE. The Latin sentence *Miserere mei, Deus*, Ps. li. 1, because the reading of it was made a test for those who claimed benefit of clergy (*q. v.*).

If a monk had been taken
For stealing of bacon.
For foraging, murder, or rape;
If he could but rehearse
(Well promptly) his neck-verse,
He never could fall to escape.
Brit. Apollo 1710; *Whart. Dict.*

NEEDLESSLY. In a statute with reference to the needless killing or bad treatment of animals, it denotes an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction. 29 N. E. Rep. (Ill.) 933; 37 Ark. 460; 4 Mo. App. 215.

NEFAS. That which is against right or divine law; a wicked thing or act. *Calv. Lex.*

NEGATIVE. Negative propositions are usually much more difficult of proof than affirmative, and in cases where they are involved, it is often a nice question upon which side lies the burden of proof. The general rule has been thus stated: Whoever asserts a right dependent for its existence upon a negative, must establish the truth of the negative, except where the matter is peculiarly within the knowledge of the adverse party. Otherwise rights of which a negative forms an essential element may be enforced without proof; 72 Ind. 113; S. C. 37 Am. Rep. 141; 78 N. Y. 480. Thus inactions for malicious prosecution, the plaintiff must prove that there was no probable cause; 67 Ind. 375; 2 Greenl. Ev. § 454. The rule applies whenever the claim is founded in a breach of duty in not repairing highways, and in cases of mutual negligence; 78 N. Y. 480; *Shearm. & Red. Neg.* 312. So one must prove the allegation that a negotiable promissory note was not taken in payment of a debt; 68 Ind. 254. So the onus is on a plaintiff who assigns as a breach by tenant that he did not repair; 9 C. & P. 754; 6 H. L. C. 672; 12 Mod. 526. In all actions for breach of warranty of the soundness of a personal chattel, the plaintiff must prove the negative. "It may be stated as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof which he must satisfactorily sustain." 1 *Whart. Ev.* § 357; see 14 M. & W. 95; 5 Cra. C. C. 298; 119 Mass. 469; 47 Pa. 476; 62 N. Y. 448; 33 Miss. 292; 39 Wis. 520; 69 Ill. 423; 52 Mo. 390; 123 U. S. 317; article in 25 Alb. L. Jour. 124; *BURDEN OF PROOF*; *Tayl. Ev.* § 365.

NEGATIVE AVERMENT. In Pleading. An averment in some of the pleadings in a case in which a negative is asserted.

NEGATIVE CONDITION. One where the thing which is the subject of it must not happen. 1 *Bouvier, Inst. n.* 751. See *POSITIVE CONDITION*.

NEGATIVE COVENANT. See COVENANT.

NEGATIVE EASEMENT. See EASEMENT.

NEGATIVE PREGNANT. In Pleading. Such a form of negative expression as may imply or carry within it an affirmative. 134 Ind. 46.

Thus, where a defendant pleaded a license from the plaintiff's daughter, and the plaintiff rejoined that he did not enter by her license, the rejoinder was objected to successfully as a negative pregnant; *Cro. Jac.* 87. The fault here lies in the ambiguity of the rejoinder, since it does not appear whether the plaintiff denies that the license was given or that the defendant entered by the license; *Steph. Pl.* 381.

This ambiguity constitutes the fault; *Hob.* 295; which, however, does not appear to be of much account in modern pleading; *Conn. Dig. Pleader* (R 6); *Gould, Pl. c.* 6, § 36.

A special denial in the words of the allegation denied is a mere negative pregnant and a motion to make more definite and certain will lie; 60 Hun 532. A mere denial in the language of the complaint, that a partial payment was made on a specified day, is an admission that the payment was made on some other day; 81 Wis. 581.

NEGATIVE STATUTE. One which is enacted in negative terms, and which so controls the common law that it has no force in opposition to the statute. *Bac. Abr. Statutes* (G); *Brook, Abr. Parliament*, pl. 72; *Bish. Writ. L.* § 153.

NEGGILDARE. To claim kindred. *Jac. L. Dict.*

NEGLECT. To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act. 54 N. Y. 262. See *NEGLECTANCE*. *GROSS NEGLECT*. UNAVOIDABLE DELAY WILFUL NEGLECT.

NEGLECTED CHILD. See DEPENDENT CHILD.

NEGLECT. The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. 11 Ex. 784. See *Webb, Poll. Torts* 537; 4 Ind. App. 515. The standard is not that of a particular man, but of the average prudent man; 3 Bing. N. C. 463.

The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. *Cooley, Torts* 630; 91 Cal. 296.

The absence of care according to circumstances. See 78 Pa. 219; 46 Tex. 356; 9 W. Va. 252.

Such an omission by a reasonable person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter. 25 Fla. 1.

The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. 95 U. S. 441. See 82 Wis. 408.

Negligence, in its civil relation, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. *Whart. Negl.* § 3. It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the

conduct of the prudent or careful or diligent man. Bigelow, Torts 261; 73 Tex. 592; 85 Ky. 423; 129 Ill. 335; 85 Tenn. 465. See 116 Mo. 450.

It is synonymous with, or about equivalent to, common prudence. 79 Ga. 44.

The opposite of care and prudence, the omission to use the means reasonably necessary to avoid injury to others. 39 Ill. 353. Opposed to diligence or carefulness. 95 Cal. 279.

The result of a failure to perform a duty. 109 Mo. 187; 83 Neb. 802. It implies a duty as well as its breach, and the fact can never be found in the absence of a duty; 55 Ark. 428.

When a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for tort. Hence it is at the election of the party injured to sue either on the contract or on the tort; Whart. Negl. § 435; 4 Gray 485; 24 Conn. 392; but there must be privity of contract between the parties, therefore an attorney who made a mistake in drawing a will is not liable to a person who, by the mistake, is deprived of a gift intended for him by the testator; 110 Cal. 339.

It is said that liability for negligence depends on the probability of the consequences, i. e. its capability of being foreseen by a reasonable man; Poll. Torts 37.

A person is expected to anticipate and guard against all reasonable consequences, but not against that which no reasonable man would expect to occur. See 5 Ex. 248. Some cases have gone to the extent of maintaining an action in tort even where no attempt has been made to perform a contract; 13 Ired. 39; 11 Cl. & F. 1.

It is said not to be essential to constitute negligence that the damage caused might reasonably have been expected from the negligent act; Whart. Negl. § 16. Thus Gray, C. J., says, in 107 Mass. 494: "A man who negligently sets fire on his own land and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner in which it was communicated." And in L. R. 6 C. P. 14, where a railway company left a pile of rubbish in hot weather by the side of their track, and the pile was ignited by sparks from an engine, and the fire crossed a field and burned the plaintiff's cottage, Channell, B., said: "When there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, . . . but when it has been once determined that there has been evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

Where a person unlawfully injures another, he is liable in damages, without regard to the intention with which the act was done; 32 N. J. L. 554; 44 N. H. 211; and good faith does not excuse negligence; 32 Vt. 632; 3 Sneed 677. As to the right of action for negligence resulting in the death of the injured person, see *ACTIO PERSONALIS MORITUR CUM PERSONA*.

The damage caused must arise from inadvertence. If it be intentional, a suit for negligence will not lie; the remedy is in trespass and not case.

One negligent person cannot escape liability for his negligence because the negligence of another concurred in producing the injury; 119 Ind. 583.

Proof of negligence. The first requisite for the plaintiff is to show the existence of the duty which he alleges has not been performed, and then he must show a failure to observe this duty; that is, he must establish negligence on the defendant's part. This is an affirmative fact, the presumption always being, until the contrary appears, that every man will perform his duty; Cooley, Torts 659. It is not suffi-

cient for the plaintiff to prove a state of facts consistent with the accident having been caused either by the negligence of the defendant or by that of the person injured. He must prove that it was caused by the defendant; 12 App. Cas. 41. In many cases evidence of the injury done makes out a *prima facie* case of negligence on the defendant's part; for instance, when a bailee returns in an injured condition an article loaned to him, or when a passenger on a railway train is injured without fault on his part.

As a general rule this liability cannot be avoided by stipulation; thus, a common carrier will not be permitted to contract for immunity from the results of its own negligence or that of its agents; 4 Ohio St. 362; 114 Pa. 523; 111 N. C. 482; 94 Ind. 281; 34 Ga. 315; 90 Tenn. 17; 2 Hill N. Y. 623; 101 Mo. 631; 44 Ill. 239; 14 Bush 590; 89 Ala. 294; 3 Col. 280; 41 Conn. 338; 4 Sandf. 136; 102 Mass. 552; 26 Gratt. 328; 3 Kan. 205; 69 Miss. 191; 9 Ir. R. C. L. 20; 75 Tex. 300; 4 Ben. 271; this may be considered as the rule generally followed in this country, in which the leading case is *Railroad Co. v. Lockwood*, 17 Wall. 357, where the authorities are collected by Bradley, J. In England, however, the courts seem to find no conclusive objection to sustaining such contracts when specially made; L. R. 10 Q. B. 212; 5 East 438; 23 U. C. Q. B. 600; and in New York, though the contracts are upheld, it is only when expressed in clear and specific language and not by mere general words in the usual printed bills of lading or receipts; 1 Jones & S. 423; 19 *id.* 196, following 56 N. Y. 168; 71 *id.* 180. So the liability may be limited in consideration of a reduced rate of transportation; 86 Va. 481; L. R. 8 H. L. 703; L. R. 10 Q. B. D. 250; 18 C. B. 805; 29 L. J. Ex. 441; or by special contract, for all negligence except gross; 43 Ill. App. 322. Such a contract, made in New York, was enforced in an action in Pennsylvania according to the law of New York; 128 Pa. 217. See 35 A. & E. R. Cas. 672; *COMMON CARRIERS; FLAG*.

By an act of February 13, 1893 (*Harter Act*), common carriers by land or sea cannot exempt themselves from responsibility for loss or damage arising from the negligence of their own servants, and any stipulation for such exemption is contrary to public policy and void. The *Harter Act* (*q. v.*) provides that if the owner of a vessel transporting merchandise to or from any port in the United States shall exercise due diligence to make the said vessel in all respects seaworthy, when properly manned, etc., neither the vessel, or her owner or charterer, shall be liable for errors in navigation or in the management of the vessel. In England, except so far as controlled by the railway and canal traffic act of 1854, carriers can exempt themselves from responsibility for loss occasioned by the negligence of servants; 42 Ch. D. 321; 168 U. S. 116.

Taking precaution after an accident against the future is not to be construed as an admission of responsibility for the past; 20 U. S. App. 326; so a subsequent alteration or repair of the machine which caused an injury is not evidence of negligence in its original construction; 144 U. S. 202.

There is a rule exempting public charitable corporations from liability for negligence, but the Young Men's Christian Association is not within the rule; 165 Mass. 280.

Law or fact. It is generally said that the question of negligence is a mixed question of law and fact, to be decided by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed, and the evidence is conflicting; Whart. Negl. § 420; 134 Ind. 269; see 17 R. I. 658; 36 W. Va. 329. In the great majority of cases the question is left to the jury to determine whether the defendant's conduct was reasonable under the circumstances. When a well-recognized legal duty rested upon the plaintiff, it is usual for the court to define this duty to the jury, and leave to

it the question as to whether the plaintiff fulfilled this duty. More recently the courts have drawn a distinction between what is evidence of negligence for the jury and what is negligence *per se*, and therefore a question of law for the court, and the tendency has been rather to increase the number of cases in which the question of negligence is passed upon by the court. In Pennsylvania, when the standard of duty is defined by law, and is the same under all circumstances, and when there has been such an obvious disregard of duty and safety as amounts to misconduct, the courts have withdrawn the case from the consideration of the jury. It is said to be clear, by most of the authorities, that when the facts are found, and it is perfectly manifest that a prudent man would or would not do as the defendant has done, the court may rule accordingly, or rather may direct the jury to find accordingly. The same is also true when the law has prescribed the nature of the duty, and also when there exists a well-known practice in the community, of a proper character. In other cases, the inference concerning negligence is left to the jury; Bigelow, Torts 263; 35 W. Va. 389. See Bigelow, L. C. Torts 589. When the evidence is conflicting, the court should instruct the jury that there would or would not be negligence, accordingly as they might find the facts; 110 N. C. 58.

"When the circumstances of a case are such that the standard of duty is fixed, when the measure of duty is defined by law and is the same under all circumstances, its omission is negligence and may be so declared by the court. But it is said that when the negligence is clearly defined and palpable, such that no verdict of a jury could make it otherwise, or when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law." 2 Thomp. Negl. 1236.

"As a general rule, a question whether a party has been guilty of negligence or not, is one of fact, not of law. Where, however, the plaintiff brings action for a negligent injury, and the action of the two parties must have concurred to produce it, it devolves upon him to show that he was not himself guilty of negligence; and if he gives no evidence to establish that fact, the court may properly instruct the jury that they should return a verdict for defendant. Where, however, the question of negligence depends upon a disputed state of facts, or when the facts, though not disputed, are such that different minds might honestly draw different conclusions from them, the court cannot give such positive instructions, but must leave the jury to draw their own conclusions upon the facts, and upon the question of negligence depending upon them. To warrant the court in any case in instructing the jury that the plaintiff was guilty of negligence, the case must be a very clear one against him, and one which would warrant no other inference." Per Cooley, C. J., in 17 Mich. 99.

It is true, in many cases, that when the facts are undisputed, the effect of them is for the judgment of the court. That is true in that class of cases when the existence of such facts comes in question, rather than when deductions or inferences are to be made from the facts (and see 25 Kan. 391). In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used; another man, equally sensible, equally impartial, would infer that proper care had been used. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and of little education, men of learning and men whose learning consists in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer: these sit together,

consult, apply their separate experiences of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the final effort of the law to obtain; 17 Wall. 663. Although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given or whether they established negligence; 73 Ind. 261; 34 N. E. Rep. (Ind.) 618; 48 Neb. 538.

The terms "ordinary care," "reasonable prudence," and such like terms have a relative significance, and cannot be arbitrarily defined; and, when the facts are such that reasonable men differ as to whether there was negligence, the determination of the matter is for the jury; 144 U. S. 406; as it is in all cases where the inference from the facts is not so plain as to make it a legal conclusion that there was negligence; 163 *id.* 93; and it is only where they would draw the same conclusion that it is a question of law for the court; *id.* 353; 23 U. S. App. 1; 65 Fed. Rep. 181; and a decision of the trial judge on the question is subject to review; *id.*

Whether a railroad company should erect guards at its car windows is a question for the jury; 13 U. S. App. 655; so also where a workman, returning from his work on the train and being ordered by the conductor to jump off at a station when the train was moving about four miles an hour and where the platform was about a foot lower than the car step, jumped and was seriously injured, the question of contributory negligence was for the jury; 163 U. S. 93.

It is said that a presumption of negligence arises from the occurrence of an accident in the course of a business, which may, according to expert testimony, be safely carried on if conducted with due care; 107 Cal. 549.

See 13 Am. L. Reg. N. S. 284, where the subject is fully treated and the earlier decisions collected by states.

In the absence of a contract between the parties, the burden of proof of negligence is on the plaintiff, and if the "evidence is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury;" 11 C. B. N. S. 538; but the rule of the burden of proof is modified when there is a relation of contract between the parties; Poll. Torts 416; as in cases of common-carriers, or where the thing which was the cause of the mischief was "under the management of the defendant or his servants, and the accident was such as in the ordinary course of things does not happen, if those who have the management use proper care;" 3 H. & C. 596.

In actions for negligence the English rule is said to be that the "judge has to say whether any facts have been established from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, negligence ought to be inferred;" 3 App. Cas. 197; or better, whether, as reasonable men, they do infer it; Poll. Torts 420.

Contributory negligence. If the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, there can be no recovery; Beach, Contrib. Neg. 14. The distinction, however, must be drawn between condition and causes, between *causa causans* and *causa sine qua non*. The question must always be considered whether the act of the plaintiff had a natural tendency to expose him directly to the danger which resulted in the injury complained of. If it had not, the plaintiff's negligence is not considered in law as contributing to the injury. Thus, when the defendant was driving carelessly along the highway, and ran into and injured the plaintiff's donkey, which was straying improperly on the highway with his forefeet fettered, it was held that the plaintiff's negligence had not contributed to the accident; 10 M. & W. 546. It has also been held that if the plaintiff could by the exercise of reasonable care, at or just before the happening of the injury to him, have

avoided the same, he cannot recover; 5 C. B. N. S. 573; 75 Mich. 557; 126 Ill. 381. One who sees or could have seen if he had looked, and has the faculties to understand the dangers to which he is exposed, is charged with a knowledge of them; and his failure to act on the knowledge as a prudent and cautious man would act under like circumstances, is negligence which, notwithstanding the negligence of the defendant, will defeat a recovery; 73 Cal. 137. And when it appears that the plaintiff, by the defendant's misconduct, became frightened, and in endeavoring to escape the consequence of the defendant's misconduct, rushed into danger and was injured, the plaintiff's conduct does not contribute to the injury; 56 N. Y. 585. If, through the defendant's negligence, the injured person is placed in a position of peril and confronted with sudden danger, the law does not require him to exercise the same degree of care and caution that it does of a person who has ample opportunities for the full exercise of his judgment; 143 Ill. 409; 155 Pa. 279. See 153 U. S. 262. It is a general principle that one who invites another upon his premises is bound to exercise more than ordinary care towards him. If the person giving the invitation is alone benefited he is responsible for even the slightest negligence. So a storekeeper, who either expressly or impliedly invites the public to enter his place of business for the purpose of trading must exercise a high degree of care to keep his premises in a safe condition, and where such person is accidentally injured the shopkeeper is liable in the absence of negligence on the part of the person injured; 80 Cal. 574; 26 Neb. 118; 82 Mich. 1; 27 Ill. App. 391; 82 Ia. 652; 48 N. Y. 1046; 84 Ala. 186; 134 Pa. 203; so letter-carriers have an implied invitation to enter certain buildings for the purpose of placing mail in boxes; 152 Mass. 513; 52 N. Y. 601; and an employee and contractor for the construction of a building is not a trespasser and may maintain an action for injuries; 58 Hun 610; 12 N. Y. 482. See Webb, Elevators. A person invited to come upon a ship for the purpose of business is entitled to be protected by the exercise of such care and prudence as would render the premises reasonably safe; 8 U. S. App. 129; and one who, while riding in a private carriage of another at his invitation, is injured by the negligence of a third party, may recover against the latter, notwithstanding the negligence of the driver of the carriage may have contributed to the injury; 4 U. S. App. 542. But the owner of land and of buildings is not liable to one who is on his premises as a mere licensee. As one who enters on premises by permission only, without any inducement being held out to him by the occupant, cannot recover for injuries caused by obstructions or pitfalls; 143 Ill. 182; unless it was unlawful to erect the machine or contrivance, or the injury was wilful and wanton; the wilfulness will be presumed from gross negligence; 70 Tex. 400; 23 N. Y. 548; where an elevator is out of order or is intended for freight only and not for passengers, and notice of such fact is duly posted, one who has a reasonable opportunity for seeing and reading such posted notice assumes the risk of venturing on or near such elevator; 137 Ind. 15; 58 Hun 60; 148 Mass. 95; 156 *id.* 511. There is an ambiguity in the use of the word license in decisions relating to negligence. It is sometimes used for sufferance of a trespass; L. R. 1 C. P. 274; sometimes equivalent to invitation; 4 C. B. N. S. 563, 567. See, also, 2 C. P. D. 810. When the defendant might, by proper care, have avoided the consequences of the plaintiff's negligence, the plaintiff may still recover; 85 N. C. 512; 144 U. S. 408; 139 *id.* 551. See 70 Tex. 602. Contributory negligence has been held to be no defence where defendant's negligence was reckless or wanton; 39 Kan. 531. See 111 N. C. 80.

Contributory negligence is a good defence to an action for damages for a personal injury; and it is immaterial to what extent it is proven, provided it contributed

to the injury; 8 Houst. 185; 29 W. Va. 98; in order to bar a recovery, the contributory negligence must have been a proximate cause of the injury; 97 N. C. 11; 100 *id.* 280; 84 Va. 498; 17 Nev. 245.

In some cases it has been held that the plaintiff must show affirmatively that he was in the exercise of due care, when the injury happened; 88 Ill. 354; 19 Conn. 566; 78 N. Y. 490; 101 Mass. 455; 3 Misc. Rep. 324; 43 Ill. App. 534; 84 Me. 334; 24 U. S. App. 326. This is frequently termed the Illinois rule. Probably the proof need not be direct, but may be inferred from the circumstances of the case; 104 Mass. 187; 2 Thomp. Negl. 1178, n. In other states, contributory negligence is a matter of defence, the burden of proving which is on the defendant; 66 Pa. 30; 85 *id.* 275; 22 Minn. 152; 65 Mo. 84; 35 Ohio St. 627; 3 Mo. App. 565; 50 Cal. 70; 11 W. Va. 14; 43 Wis. 513; 95 Ala. 397; 88 Ga. 599; 6 U. S. App. 381; 147 U. S. 571; 151 *id.* 73; 157 Pa. 593; 28 Am. Rep. 558, where the cases are discussed. But even in these courts, if the plaintiff's own showing disclose contributory negligence, he cannot recover. The rule that a plaintiff cannot recover, if himself guilty of contributory negligence, applies where the party inflicting the injury is not guilty of negligence indulged in after the position of the injured party was discovered, or, by the exercise then of reasonable care, could have been discovered; 23 U. S. App. 443.

The fact that the plaintiff lived in his home near a powder magazine, with knowledge of the danger, does not constitute contributory negligence; 12 U. S. App. 665.

The burden of showing contributory negligence is on the defendant; 24 U. S. App. 176; 147 U. S. 571. It has been said that the true rule is that the onus of proving contributory negligence rests in the first instance on the defendant, although the plaintiff may disclose upon his own case such evidence of it as to relieve the defendant of that primary obligation and shift on to the plaintiff the onus of displacing the effect of his own evidence; 12 Q. B. D. 71.

If the plaintiff, by ordinary care, could have avoided the effect of the negligence of the defendant, he is guilty of contributory negligence, no matter how careless the defendant may have been at the last or any preceding stage; Tuff v. Warman, 2 C. B. N. S. 740. "The true ground of contributory negligence being a bar is that it is the proximate cause (or 'decisive' cause) of the mischief; and negligence on the plaintiff's part, which is only part of the inducing cause (i. e. a 'condition,' not a 'cause'; Whart. Negligence) will not disable him"; Poll. Torts 434; and it "would seem that a person who has by his own act or default deprived himself of ordinary ability to avoid the consequences of another's negligence, can be in no better position than if, having such ability, he had failed to avoid them; unless, indeed, the other has notice of his inability in time to use care appropriate to the emergency; in which case the failure to use that care is the decisive negligence." Poll. Torts 434.

No one is bound to anticipate that others will be guilty of negligence. See L. R. 5 H. L. 45.

Where one is in danger through fault of another and chooses between two methods of escape, he is not negligent if he chooses that which, otherwise, would not be prudent; 12 Q. B. 459. See, further, 15 Wall. 401; 41 Wis. 105; 44 N. Y. 465; 28 Am. Rep. 563, n.; 20 Alb. L. J. 304, 359.

The question of contributory negligence is one of fact for the jury, under proper instructions, and is not one of law for the court; 9 Utah 141; 144 U. S. 408; 71 Hun 526; 44 Ill. App. 418; 6 Ind. App. 390. Where the evidence of contributory negligence is not of such a conclusive character as would warrant the court in setting aside a verdict, the question should be left to the jury; 147 U. S. 571.

Comparative negligence. In Illinois a rule of comparative negligence has been laid down. If, on comparing the negli-

gence of the plaintiff with that of the defendant, or the negligence of the person injured with that of the person inflicting the injury, the former is found to have been slight and the latter gross, the plaintiff may recover. See 20 Ill. 478; 53 *id.* 405; 95 *id.* 25. In 36 Ill. 409, it was said: "The rule of this court is that negligence is relative, and that the plaintiff, although guilty of negligence which may have contributed to the injury, may hold the defendant liable if he has been guilty of a higher degree of negligence, amounting to wilful injury. The fact that the plaintiff is guilty of slight negligence does not absolve the defendant from the use of care and the use of reasonable efforts to avoid the injury." It has also been held that the negligence of the plaintiff must be but slight, and that of the defendant gross in comparison; and both of these terms, "gross" and "slight," or their equivalents, should be used in every instruction to a jury on the subject. "Want of ordinary care is not equivalent to gross negligence;" 8 Bradw. 133; a mere preponderance of negligence against the defendant will not make him liable; 96 Ill. 42. The doctrine of comparative negligence has no application unless the person injured observed ordinary care for his safety with reference to the particular circumstances involved; 44 Ill. App. 56.

This doctrine has been adopted to a certain extent in Kansas; 14 Kan. 37; and perhaps in Georgia. See 30 Fla. 1; 35 W. Va. 389; 87 Mich. 400.

In admiralty, where both ships are in fault, the damages are equally divided; Marsden, Coll. ch. 6; this rule is preserved by the Judicature Act in the Admiralty Division. See 2 L. Quart. R. 357; 13 *id.* 17; COLLISION; Report, Int. Law Assn. 1895.

Imputed negligence. In cases of actions brought by infants of tender years for damages caused by the defendant's negligence, it has sometimes been held that the negligence of the parent or guardian of the infant, in permitting it to become exposed to danger, is to be imputed to the infant so as to bar its right of action. This rule was laid down in *Hartfield v. Roper*, 21 Wend. 615. The doctrine has been much discussed, and this case has been followed, sometimes with modification. See 104 Mass. 53; 88 Ill. 441; 28 Ind. 287; 2 Neb. 319; 52 Cal. 602; 83 Ala. 371; 78 Hun 248; but in other states, especially Pennsylvania (37 Pa. 187; 81 *id.* 19), its doctrine has been denied; 22 Vt. 213; 59 Tex. 64; 78 Ia. 598; 64 Mich. 514; 16 Neb. 139; 36 Mo. 489; 23 Vroom 446; 142 Mass. 301. The weight of authority is against the New York rule; 30 Ohio St. 451; 19 S. E. Rep. (N. C.) 730; 26 S. W. Rep. (Tex.) 446. But see L. R. 1 Ex. 239. See, as to injuries to infants, 31 Am. Rep. 206; 14 Cent. L. J. 282. See 15 N. J. L. J. 262.

A child of such tender years as to be incapable of exercising any judgment or discretion is not chargeable with contributory negligence; but where he has attained such an age as to be capable of exercising judgment and discretion, he is held to such a degree of care as might be reasonably expected of one of his age and mental capacity; 39 Minn. 164; 46 Ohio St. 283; 70 Tex. 530; 83 Ala. 371; 81 Ga. 397; 39 Kan. 531; 129 Ill. 91.

At what age an infant's responsibility for negligence is presumed to begin is a question of law for the court; 20 N. Y. S. 262.

The negligence of a gripman on a cable car in running across the crossing of another road undergoing repairs, at an excessive rate of speed, is imputable to the conductor of such car in control of such gripman, and will prevent him recovering for injuries sustained by reason of such negligence; 53 Mo. App. 276.

A vessel colliding with an obstruction to navigation cannot be charged with the negligence of a tug acting as an independent contractor in towing her, and wholly controlling her movements; 63 Fed. Rep. 626.

In England, where a passenger has been injured by concurrent negligence of his own carrier and a third party, it was formerly held that the carrier's negligence was imputed to the passenger and barred his recovery; *Thorogood v. Bryan*, 8 C. B. 115. But the doctrine has been overruled in 13 App. Cas. 1. It was rejected in 47 N. J. L. 161; 19 N. Y. 841; 36 Ohio St. 86; 105 Ill. 364; and, after a review of the authorities, in 116 U. S. 366. It was followed in 39 Ia. 523; 105 Mass. 77; 43 Wis. 513.

The negligence of a husband cannot be imputed to his wife, who was riding with him over a defective highway, unless it be shown that he was at that time under her control and direction; 48 Pac. Rep. (Kan.) 134. Such is the weight of the authorities; 36 Fed. Rep. 164; 111 N. Y. 199. There are cases to the contrary; 50 Conn. 379; 46 Ill. 403; 60 Ia. 429; 62 Tex. 344. See ORDINARY NEGLIGENCE; WANTON NEGLIGENCE. LAST CLEAR CHANCE.

NEGLIGENT ESCAPE. The omission on the part of a gaoler to take such care of a prisoner as he is bound to take, when in consequence thereof the prisoner departs from his confinement without the knowledge or consent of the gaoler, and eludes pursuit.

For a negligent escape, the sheriff or keeper of the prison is liable to punishment, in a criminal case; and in a civil case he is liable to an action for damages at the suit of the plaintiff. In both cases the prisoner may be retaken; 3 Bla. Com. 415. See ESCAPE.

NEGLIGENTLY. The failure to use the highest degree of care. 149 Ky. 346, 149 S. W. 835.

NEGOTIABLE. In Mercantile Law. A term applied to a contract, the right of action on which is capable of being transferred by indorsement (of which delivery is an essential part), in case the undertaking is to A or his order, A or his agent, and the like, or by delivery alone, in case the undertaking is to A or bearer,—the assignee in either case having a right to sue in his own name.

That which is capable of being transferred, by assignment, indorsement, or by delivery. 148 Pa. 583.

At common law, *choses in action* were not assignable; but exceptions to this rule have grown up by mercantile usage as to some classes of simple contracts, and others have been introduced by statute, so that now bills of exchange, promissory notes, and bank-notes, to order or bearer, are universally negotiable; and notes not to order or bearer have become *quasi* negotiable; that is, an indorsement will give a right of action in the name of the assignor; and in some states, by statute, bonds and other specialties are assignable by indorsement.

NEGOTIABLE INSTRUMENTS. Besides notes, bills, and checks, the following have been held to be negotiable instruments: *exchequer bills*; 4 B. & Ald. 1; 12 Cl. & F. 787, 805; state and municipal bonds; 3 B. & C. 45; 96 U. S. 51; 3 Wall. 327; 113 U. S. 135; corporate bonds; L. R. 3 Ch. App. 758, 154; L. R. 11 Eq. 478; 21 How. 575; [1892] 3 Ch. 527; coupon bonds of an individual; 6 Ben. 175; coupon bonds of a corporation; 9 Wall. 477; 14 *id.* 282; 20 *id.* 583; 66 N. Y. 14; 44 Pa. 63 (the question has been whether such coupons are negotiable apart from the bonds to which they were formerly attached, and the decisions establish their negotiability; 102 Mass. 503); government scrip; L. R. 10 Ex. 337; U. S. treasury notes; 21 Wall. 138; 57 N. Y. 573; post-office orders; 65 Law Times 52; certificates of deposit; 13 How. 218; Pars. Bills 1, 2, 26; 34 Neb. 71; 40 *id.* 484. The following have been held not to be negotiable: lottery tickets; 8 Q. B. 134; dividend warrants; 9 Q. B. 396; iron scrip notes; 3 Macq. 1; debentures, on which authorities differ; L. R. 8 Q. B. 374; pass-book of savings bank; 60 Conn. 300;

a treasury warrant not presented for three years, the amount having been covered back into the treasury; 27 Ct. Cls. 177.

In some of the states statutes have been enacted in regard to the nature and operation of bills of lading and warehouse receipts, but the statutes and interpretations of them lack uniformity. Warehouse receipts, bills of lading; 14 M. & W. 403; 44 Md. 11; 115 Mass. 224; 12 Barb. 310; 101 U. S. 559; letters of credit; 2 How. 249; 40 Tex. 306; 10 Pet. 482; 22 Pick. 228; 1 Macq. H. L. C. 513; certificates of stock; 28 N. Y. 600, 604; 86 Pa. 80; 74 N. Y. 226 (but see 53 N. W. Rep. (Ia.) 291); county warrants are negotiable, transferable, or assignable; but not in the sense of the law merchant; 103 U. S. 74.

The weight of authority is in favor of the negotiability of instruments payable to bearer; 14 Conn. 362; [1891] 1 Ch. 270.

An instrument in the form of a promissory note drawn by a corporation, and bearing its seal, is not a promissory note negotiable by the law merchant; per Blatchford, J., in 8 Fed. Rep. 534.

Any addition to the form of a note which destroys its essential quality of a promise to pay, "simple, certain, unconditional, not subject to any contingency," will destroy its negotiable character; 84 Pa. 409. Thus, the addition of the words, "given as collateral security with agreement;" 127 Mass. 293; "a warrant to confess judgment;" 77 Pa. 131; "in facilities;" 14 Mass. 322; "foreign bills;" 4 *id.* 245; "and it is the understanding it will be renewed at maturity;" 126 Pa. 195; "return notice ticket with this order;" and "deposit book must be at bank before money can be paid;" 139 Pa. 53; "with exchange" in varying forms with respect to place; 28 Fed. Rep. 865; 88 *id.* 283; 23 U. C. C. P. 503; 4 N. Dak. 30; 15 Ind. App. 563; *contra*, 39 Mich. 137; 55 N. W. Rep. (Minn.) 988; 3 N. M. 45; 4 Biss. 473; with counsel fees, expenses of collection, or other words to the same effect; 84 N. C. 27; 63 Mo. 35; 14 Fed. Rep. 705; 37 *id.* 708; 60 Wis. 206; *contra*, 32 Ia. 184; 31 Fed. Rep. 649; 16 *id.* 89; 2 *id.* 44; 18 Kan. 432.

A note containing a tax clause is not negotiable; 35 L. R. A. 537; 110 N. Y. 469; nor is one given for rent and subject to set-off for repairs; 40 S. W. Rep. (Tex.) 1010.

Contracts are not necessarily negotiable because by their terms they inure to the benefit of the bearer. Hence, a receipt acknowledging that a person has received from another named so many shares of stock in a specified corporation, entitling the bearer to so many dollars in certain bonds to be issued, is not free in the hands of a transferee from equities which would have affected it in the hands of the original recipient; 7 Wall. 392.

Indorsements of payment on the back of a promissory note before delivery do not destroy negotiability; 132 Pa. 24.

The rule in Illinois that a negotiable note, secured by a mortgage, transferred to a *bona fide* holder before maturity, is held subject to all equities between the original parties, is not binding on the federal courts, which hold in such cases that in a suit in equity brought to foreclose the mortgage, no other defences are allowed against it than would be allowed in an action at law to recover on the notes; 31 Fed. Rep. 858. Coupons attached to a railroad bond and payable to bearer, when detached and negotiated, are no longer incidents of the bond, but independent negotiable instruments; 34 Fla. 424. See COUPONS.

"By the decisive weight of authority in this country where negotiable paper has been put in circulation, and there is no infirmity or defence between the antecedent parties thereto, a purchaser of such securities is entitled to recover thereon, as against the maker, the whole amount, irrespective of what he may have paid therefor." 149 U. S. 327. See 107 Mass. 552; 25 Wis. 544; 33 Ia. 140.

A negotiable instrument act, codifying the law on the subject, went into effect in New York, October 1, 1897. It has also been enacted by Connecticut, Colorado,

Maryland, Massachusetts, Virginia, and Florida. One of the most important changes is in the rule of *Coddington v. Bay*, 5 Johns. Ch. 54, and provides that an antecedent indebtedness is a valuable consideration.

As to the early history of negotiable instruments, see 9 Law Quart. Rev. 70.

See, generally, *Dos Passos*, *Stock Brokers*; 7 Harv. L. Rev. 1; *Daniel*, *Negotiable Instruments*; *PROMISSORY NOTES*; *BILLS OF EXCHANGE*; *BOND*; *COUPONS*.

A form of property. Not mere evidence of the interest which they represent, or of debt. (*q. v.*) 250 U. S. 381, citing 177 Mass. 337. See *FOREIGN MONEY*.

NEGOTIATE. The power to negotiate a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorser or holder. 42 Md. 581. See 69 N. Y. 386; 30 Minn. 408. A note transferred by delivery is negotiated; 49 Mo. App. 153. A national bank, under the power to negotiate evidences of debt, may exchange government bonds for registered bonds; 69 N. Y. 383.

To negotiate is a general word coming to us from the Latin and signifies to carry on negotiations concerning, and so to conduct business, to conclude a contract or to transfer or arrange. 70 S. W. 186.

NEGOTIATION. The deliberation which takes place between the parties touching a proposed agreement.

That which transpires in the negotiation makes no part of the agreement, unless introduced into it. It is a general rule that no evidence can be given to add to, diminish, contradict, or alter a written instrument; *Leake*, *Contr.* 26; 1 Dall. 426; 3 S. & R. 609. But this rule has been much modified, and parol evidence is now held admissible to contradict, vary, or even avoid a written instrument where it would not have been executed but for the oral stipulation, except in the case of negotiable paper; 90 Pa. 82. See *EVIDENCE*.

As to negotiations preceding a contract, see *MERGER*.

In Mercantile Law. The act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person.

The transfer of a bill or note in the form and manner prescribed by the law merchant, with the incidents and privileges annexed thereby, *i. e.* :—

The transferee can sue all parties to the instrument in his own name;

The consideration for the transfer is *prima facie* presumed;

The transféror can under certain conditions give a good title, although he has none himself;

The transferee can further negotiate the bill with the like privileges and incidents.

There are two modes of negotiation, *viz.* : by delivery and by indorsements. The former applies to bills, etc., payable to bearer; the latter to those payable to order. See *Chalm. Dig. of Bills*, etc. § 106; 1 Pars. *Notes & B.* 14; *Bytes*, *Bills* 169.

Until an accommodation bill or note has been negotiated, there is no contract which can be enforced on the note; the contract, either express or implied, that the party accommodated will indemnify the other, is, till then, conditional; 2 M. & G. 911. See *CONTRACT*; *MERGER*.

NEGOTIUM GESTOR (Lat.). In Civil Law. One who spontaneously, and without authority, undertakes to act for another, during his absence, in his affairs.

In cases of this sort, as he acts wholly without authority, there can, strictly speaking, be no contract; but the civil law raises a *quasi* mandate by implication for the benefit of the owner, in many such cases; *Mackelday*, *Civ. Law*, § 460; 2 Kent 616, n.; *Story*, *Bailm.* §§ 82, 189.

NEGRO. A black man descended from the black race of Southern Africa; it has been held not to include a mulatto; 18 Ala. 726. See *MIXED JURY*; *CIVIL RIGHTS*;

RAILROAD; MISCEGENATION, COLORED PEOPLE.

NEIF, NAIF, NATIVUS. In Old English Law. A woman who was born a villain, or a bond-woman.

NEIGHBOR. One who lives in close proximity to another. The expression *neighbour* was discussed in 1 A. C. 22, where the following condition was embodied in a deed of grant: "That he (the grantee) shall have only four days at a time during the seasons the use of the water (meaning a stream called the Congo River) in succession with his neighbours, who now or hereafter may be dependant upon the stream for the use of their respective lands; *De Villiers*, C. J., held that the servitude must be construed strictly, and that the word *neighbour*, in that case must be confined to the proprietor of the next adjoining farm. 1 A. C., 22 (*So. Africa*.)

NEIGHBORHOOD. A surrounding or adjoining district. It depends upon no arbitrary rule of distance or topography. The neighborhood of a person will cover a larger space in a sparsely settled country than in a city; 116 Mo. 162. See 22 Ill. App. 179; 63 N. H. 246.

It is not synonymous with territory or district, but is a collective noun, with the suggestion of proximity, and refers to the units which make up its whole, as well as to the region which comprehends those units. A district or locality, especially when considered with relation to its inhabitants or their interests. 32 Pac. Rep. (Cal.) 803.

NEM. CON. See *NEMINE CONTRADICENTE*.

NEM. DISS. See *NEMINE DISSENTIENTE*; *NEMINE CONTRADICENTE*.

NEMINE CONTRADICENTE (usually abbreviated *nem. con.*). Words used to signify the unanimous consent of the house to which they are applied. In England, they are used in the house of commons; in the house of lords, the words used to convey the same idea are *nemine dissentiente*.

NEMINE DISSENTIENTE. No one dissenting; abbreviated *nem. diss.* *Stand. Dict.* See *NEMINE CONTRADICENTE*.

NEPHEW. The son of a brother or sister. *Ambl.* 514; 1 Jac. 207.

The Latin *nepos*, from which *nephew* is derived, was used in the civil law for nephew, but more properly for grandson; and we accordingly find *neveu*, the original form of nephew, in the sense of grandson. *Britton*, c. 119.

According to the civil law, a nephew is in the third degree of consanguinity; according to the common law, in the second; the latter is the rule of common law; 2 Bla. Com. 206. But in this country the rule of the civil law is adopted; 2 Hilt. R. P. 194.

Nephews and nieces may be shown by circumstances to include grand-nephews and grand-nieces, and even a great-grand-niece; 3 Barb. Ch. 466; 131 N. Y. 456; but in a bequest, would not include, without special mention, nephews and nieces by marriage; 42 Pa. 25. See *LEGACY*.

NEPOS (Lat.). A grandson. See *NEPHEW*.

NEPTIS (Lat.). Granddaughter; sometimes great-granddaughter. *Calv. Lex.*; *Vicat*, *Voc. Jur.*; Code 33. See *LEGACY*.

NERVOUSNESS. See *ILLNESS*.

An instruction allowing recovery for "mental pain or nervous or physical suffering" is erroneous in the use of the word "nervous." 156 Ky. 823, 162 S. W. 110.

NET. Clear of all charges and deductions; that which remains after the deduction of all charges or outlay, as net profit. 22 Wall. 148.

NET BALANCE. In commercial usage it means the balance of the proceeds after deducting the expenses incident to the sale. 71 Pa. 74.

NET EARNINGS. The excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. 99 U. S. 420. See 27 Fed. Rep. 1; 10 Blatchf. 271; 22 Wall. 148; 110 U. S. 205; 25 S. W. Rep. (Ky.) 494. See *EARNINGS*.

NET PROFITS. This term does not mean what is made over the losses, expenses, and interest on the amount invested; it includes simply the gain that accrues on the investment, after deducting the losses and expenses of the business. 50 Ga. 350. See 40 N. J. Eq. 114. See *PROFITS*.

The words "net profits" define themselves. They mean what shall remain, as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution. *Anderson*; 40 N. J. Eq. 121. In the law of partnerships, "profits" are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. "Losses" are the excess of advances over returns; the excess of the cost of obtaining over what is obtained. "Profits" and "net profits" are, for all legal purposes, synonymous expressions; but the returns themselves are often called "gross profits"; hence it becomes necessary to call profits "net profits," to avoid confusion. *Id.*; *Lindley*, *Partn.* 15. See *INCOME*.

NET VALUE. The "net value" of a policy is the "reserve" or that part of the annual premiums paid by the insured, which, according to the American experience table of mortality, must be set apart to meet or mature the company's obligations to the insured, under the policy. 151 Ky. 609, 152 S. W. 780.

NETHER HOUSE OF PARLIAMENT. The house of commons so called in the time of Henry VIII.

NEUTRAL. In International Law. On neither side; taking neither side; belonging to neither side; indifferent between contending parties. See *NEUTRALITY*.

NEUTRAL PROPERTY. Property which belongs to neutral owners, and is used, treated, and accompanied by proper insignia as such.

Where the insured party has property and commercial establishments and depositories in different countries, if the property and concern of any one are in, or belong to, a belligerent country, they will have the national character of such country though the national character of the owner may be that of a neutral; 1 Phil. Ins. § 164; 5 W. Rob. 302; 1 Wheat. 159; 16 Johns. 128. The declaration of war by a nation subsequently to the time in reference to which the policy takes effect will, however, only affect ownership thereafter acquired or acts thereafter done; 6 Cra. 274; 4 Mas. 256; 1 Johns. 192; 14 id. 308; 1 C. Rob. 107, 336; 6 id. 364; 3 Wheat. 245; 3 Gall. 274; 12 Mass. 246.

The description of the subject in a policy of insurance as neutral or belonging to neutrals, is, as in other cases, a warranty that the property is what it is described to be, and it must, accordingly, in order to comply with the warranty, not only belong to neutral owners at the time of making the insurance, but must continue to be so owned during the period for which it is insured, and must, so far as it depends upon the assured, be accompanied by the usual insignia, as such, and in all respects represented, managed, and used as such; 1 Johns. 192; 1 Wash. C. C. 219; 6 Cra. 274; 4 Mas. 256; 1 C. Rob. 26, 336; 2 id. 133, 218.

NEUTRAL SPIRITS. See *WHISKEY*.

NEUTRALITY. The state of a nation which takes no part between two or more other nations at war with each other.

"Strictly speaking, [neutrality] consists in abstinence from any participation in a public, private, or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed, is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency; and, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention." 166 U. S. 52.

"The relation of neutrality will be found to consist in two principal circumstances: Entire abstinence from any participation in the war, and impartiality of conduct towards both belligerents." 3 Phill. Int. L. 225. They remain the common friends of the belligerents, favoring the arms of neither to the detriment of the other; 2 Halleck, Int. L., Baker's ed. 141.

A recent writer (Risley, Law of War) has classified the rights and duties of neutrals thus:—

A neutral state must *abstain* from the following acts:—

Furnishing either belligerent with troops, arms, warlike materials, ships of war, or money. Allowing passage of forces of either belligerent across its territory. Deciding in its courts upon the validity of captures made by either belligerent. Acquiring, during the war, any conquest made by either belligerent.

It must *restrain* the conduct of its subjects in the following respects:—

Pecuniary gifts or gratuitous loans to either belligerent. Enlistment within its jurisdiction in the forces of either belligerent.

It must *prevent* the following by all persons within its jurisdiction:—

The issue of commissions by persons acting for either belligerent within the jurisdiction. The fitting out of hostile expeditions on behalf of either belligerent. The use of its ports by the ships of either belligerent as a base of operations and supplies.

It must *suffer* certain interferences with the trade of its subjects by permitting both belligerents to exercise the following rights: To prevent carriage of contraband and breach of blockade; to capture enemy ships carrying neutral goods; and to exercise the right of search.

It has been said that there should be, on the part of a neutral state, not an impartiality of action, but of non-action; Masse, *Droit Com.* 199.

Where a neutral has bound itself, by previous treaty, to one belligerent, assistance under such treaty does not necessarily forfeit its neutral character; 2 Halleck, Int. L., Baker's ed. 142.

The recognition of the belligerency of insurgents relieves the parent state from all responsibility for damages for any irregularities committed against neutrals by the other belligerent, which claims could be enforced against the parent nation if the injuries were committed by insurgents.

Maritime warfare, with its incidents of blockade and the right of search, imposes heavy burdens and restrictions upon all commercial nations; in the view of international law it is the right of sovereigns alone; 25 Fed. Rep. 408.

The public ships of a neutral are inviolable; and so are its private ships, subject, however, to laws relating to a breach of blockade, contraband, and search. Neutral territory, including the sea for a distance of three miles from low-water mark, is inviolable. If a ship is captured in neutral waters, in violation of neutrality, the neutral power is bound to enforce its restoration or compensate the injured belligerent; and, in general, a neutral is bound to prevent and punish a violation of its rights as a neutral by either belligerent; Halleck,

Int. L., Baker's ed. 143.

Where a United States war vessel captured a Confederate steamer in a neutral port of Brazil and brought it to a United States port, and it was there sunk by a collision, and the United States disavowed the action of its ship in making the capture, it was held that as the capture was unlawful, or had been disavowed by the government, it was as if it had never been made; 101 U. S. 37. A neutral may demand the return of a captured vessel and further redress. But where a neutral ship chooses to resist capture in neutral waters, its capture is not an offence against the neutral; Cobb, Int. L. Cas. 230.

Where neutral immunity is violated by illegal outfit and equipment, the offence is deposited after the termination of the voyage; 6 Wheat. 348. A neutral ship should, ordinarily, submit to capture and seek its remedies in the courts for damage; 1 Rob. 374.

It has been suggested that a belligerent who has begun an attack on another belligerent outside of neutral territory or water may continue the contest within the neutral waters and complete the capture; 5 C. Rob. 365; but on the other hand it is said that the inviolability of neutral territory should allow of no exceptions, and that property captured under such circumstances must be restored, though it actually belonged to the enemy; 5 C. Rob. 15; 3 Phill. Int. L. 386.

It belongs exclusively to the neutral government to raise the question of a capture made within neutral territory; 6 Wall. 266; the owner of the captured ship must assert his claim through his government; 1 Kent 121; an enemy cannot do so; 5 Wall. 517; but whenever a capture is made by a belligerent in violation of neutral rights, if the prize come voluntarily within the jurisdiction of the neutral, it should be restored to its original owner; 3 Phill. Int. L. 582; 5 Wheat. 385.

A public vessel of a belligerent may enter a neutral port to make such repairs or to take in such coal and provisions as may be necessary; but the ordinary rule is that it must not remain more than twenty-four hours, except in case of necessity.

A belligerent vessel may bring a prize into a neutral port and sell it there, with the consent of the neutral; 5 Mas. 77; and a neutral may permit a prize to be brought into its ports for repairs; 1 Op. A. G. 608; but neutrals may prohibit this and have often, by proclamation, done so; 2 Halleck, Int. L., Baker's ed. 148.

Where a neutral allows the right of passage through its territory to one belligerent, it must accord it to both; 3 Phill. Int. L. 138; 1 Kent *120; 21 Rev. de Dr. Int. 117. The troops of a belligerent cannot cross neutral territory, nor can even the wounded be taken across neutral territory, without the express permission of the neutral, which, in the case of the Franco-Prussian War of 1870, was refused by Belgium; nor can a neutral allow its ports and waters to be used as a base of operations or supplies, or as a point from which to watch the other belligerent. Rules are generally laid down by neutrals in each war to regulate these questions.

The subjects of neutral states are entitled to carry on, upon their own account, a trade with a belligerent; this doctrine is well settled; 3 Phill. Int. L. 300. But it was considered unlawful, under the common law, for an English subject to raise a loan to support the subjects of a foreign state at war with a government in alliance with his own; 3 Phill. Int. L. 247; yet it now appears to be the opinion that, although the neutral state cannot loan money, yet the individual citizens of a neutral state may, and such loans are not considered a violation of neutrality any more than the sales of arms and ammunition; Snow, Lect. Int. Law 119. But such loans to an insurgent state or colony have been considered unlawful; Risley, Law of War; 9 Moore, P. C. 586.

A neutral will not permit a belligerent's ship to coal in its ports except in case of

necessity, and then only to the extent necessary to carry them to their nearest home port; and a belligerent vessel cannot take on coal again at any port of such neutral within three months.

It was formerly held that citizens of a neutral state may send armed vessels as well as munitions of war to a belligerent port for sale; 7 Wheat. 283; though they would be subject, of course, to capture as contraband. But this doctrine has been modified as between the United States and Great Britain by the treaty relating to the Alabama claims, by which those nations agreed that "A neutral state is bound: 1. To use due diligence to prevent the fitting out, arming, or equipping, etc., within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace, and also to use due diligence to prevent the departure from its jurisdiction of any vessel, etc., such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use." 2. "Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men." It is said that there is a growing consensus of nations in favor of some rule resembling these; Risley, Law of War 204.

A belligerent may capture certain articles as contraband of war when carried in neutral ships and having a hostile destination. This includes munitions of war. Other articles are of doubtful use, *ancipitis usus*, and may be contraband or not according to circumstances. There is no settled definition of contraband, nor any practice in regard to its exact limits. Provisions, money, or coal destined for the use of a belligerent army or fleet have been included within the term. Coal is declared contraband in the proclamation of President McKinley, April 26, 1898, and by the British government on the breaking out of the Hispano-American war. Where things are of doubtful use, that is, occasional contraband, they are not usually confiscated, but are bought by the captor at a fair price. This is called *Pre-emption* (*q. v.*), and usually applies to cargoes of provisions. See CONTRABAND; 1 Kent 138.

The question whether a belligerent may take the goods of its enemy, not contraband, which are being carried in a neutral ship, has been much discussed, and also whether innocent goods of a neutral can be transported in a belligerent's vessel without being confiscated when the vessel is captured. Formerly it was held that a belligerent might take enemy's goods from neutral custody, on the high seas. But the Declaration of Paris changed the rule of the nations, except the United States, Spain, and Venezuela, and a neutral flag now covers enemy's goods with the exception of contraband of war. This is a general rule of international law, although some treaties made by the United States have laid down a different rule; Snow, Int. Law 164; it was applied by the United States during the war of the Rebellion; 1 Kent 128; and adopted by it in the Hispano-American war of 1898.

By the Declaration of Paris (*q. v.*) the following principles were adopted:—The neutral flag covers enemy's goods, except contraband of war. Neutral goods, except contraband of war, are not liable to capture under an enemy's flag.

Neutral goods on an armed belligerent cruiser are not subject to capture, though there was resistance to capture by the vessel, provided the neutral owner did not aid in the armament or the resistance, notwithstanding he had chartered the whole vessel and was on board at the capture; 9 Cra. 388; 8 Wheat. 409; *contra*, 1 Dods. 448. If the neutral vessel is in the direct employ of the enemy, both ships and goods are liable to capture; 24 Fed. Rep. 35; and so are neutral goods on a neutral vessel, if the latter be under the enemy's protection;

27 Ct. Cls. 99.

It is lawful for a neutral ship to carry contraband goods, but the right is always exercised subject to capture. Ordinarily the neutral ship is not subject to confiscation and will be released in the prize court, unless she belongs to the owner of the contraband, or her owner is privy to the carriage of the contraband goods, or uses false papers; *Risley, Law of War* 232; 1 Kent 143.

When two states are at war, it has become the practice of modern times for other states to issue a proclamation of neutrality to protect their commercial interests and territory.

The subjects of a neutral power residing in a belligerent territory are not entitled to any special protection for their property or to exemption from military contributions to which they may be liable in common with the inhabitants of the place in which they reside or in which their property may be situated; 2 Halleck, *Int. L.*, Baker's ed. 144.

By Convention of the Great Powers, 1867 and 1888, the Suez Canal is neutralized, and is to remain open in war or peace, to vessels of commerce and war of all nations. See *id.* 149. In 1815, the Rhine was neutralized, as between the States of the Rhine, to a certain extent. In 1829, entrance into the Black Sea was admitted to belong to Russia and to powers at amity with Russia. By the treaty of Paris the Black Sea was neutralized, but this was largely abrogated in 1871. By the Clayton-Bulwer treaty, 1850, Great Britain and the United States agreed that any canal built between the Atlantic and Pacific oceans should be forever neutral.

The neutrality acts of the United States, which regulate the conduct of its citizens and of aliens while within its jurisdiction, constitute Title LXVII. of the Revised Statutes. Their origin and scope are as follows:—President Washington, in his annual message to Congress, December 3, 1793, said: "The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military services, offensive or defensive, is deemed unlawful." The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of international law, was passed in accordance with this recommendation. The acts of 1817 and 1818 were successively passed and carried forward into R. S. Title LXVII., which forbids citizens from accepting a commission from a foreign prince against a foreign prince with whom we are at peace; enlisting or hiring or retaining another to enlist, or going away to enlist in the army or navy of such foreign prince; fitting out or arming a vessel in the service of a foreign prince to commit hostilities against a foreign prince, etc. (the vessel to be forfeited—one half to the informer); increasing the force of any vessel of war of such foreign prince by adding any equipment solely applicable to war; preparing any military expedition in the United States to be carried on thence against any foreign prince with whom we are at peace.

Sec. 5238 provides that the president may employ the land and naval forces of the United States and militia in compelling any foreign vessel to depart the United States in all cases in which by the laws of nations or the treaties of the United States she ought not to remain therein. Sec. 5239 provides that the owners or consignees of every armed vessel sailing out of our ports belonging wholly or in part to citizens thereof shall before clearing give bond in double the value of the vessel and cargo, conditioned that she shall not commit any hostilities against any foreign prince, etc., with whom we are at peace. Sec. 5290 provides that the United States shall detain any vessel manifestly built for warlike purposes and about to depart the United States, the cargo of which consists principally of munitions of war, when the number of men on board or other circumstances

render it probable that it is intended to commit hostilities against any such foreign prince, etc., until the decision of the president is had thereon or the owner gives bond and securities as required in cases under § 5289. Sec. 5291 provides that this title shall not extend to subjects of any foreign prince, etc., transiently within the United States, who enlist on a vessel of war or privateer which at the time of its arrival here was equipped as such, or who employ other citizens of the same foreign prince, etc., to enlist on board such vessel of war, etc., if the United States shall then be at peace with such foreign prince, etc. Offences under these sections are made high misdemeanors.

The act does not prohibit armed vessels belonging to citizens from sailing out of our ports, but only requires their owners to give security; 6 Pet. 445.

The word "people," as used in § 5288, covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized; 166 U. S. 1.

Where a vessel is chartered by a foreign government to carry a cargo of arms to that government, she is not liable to seizure; 37 Fed. Rep. 799. It is not the intent of § 5286 to interfere with the commercial activities of citizens of the United States, but to prevent complications between this government and foreign powers, and fitting out military expeditions against friendly nations; 84 *id.* 609, per Bradford, J.

The offence covered by the act consists of an act done in the United States, with the intent to commit an offence against the act; the intent is a necessary ingredient; 38 Fed. Rep. 431; and it must be formed and exist within the United States; 24 *id.* 33. The offence is complete when the expedition is organized; 53 *id.* 536; and although it is formed and detached in separate parts; 18 *id.* 529.

No particular number of men is necessary to constitute a military expedition under the act; its character may be determined by the designation of the officers, the organization of the men in regiments or companies, and the purchase of military stores; 53 *id.* 536. Where insurgents carrying on war against a foreign country sent a vessel to procure arms in the United States, the purchase of such arms and placing them on board the vessel was held not within § 5286, though they were intended to be used by the insurgents in carrying on war against a foreign country, if they are not designed to constitute any part of the furnishings of the vessel herself; 48 *id.* 99. Placing munitions of war on a vessel, with intent to carry them to insurgents in a foreign country, but without intent that they shall constitute any part of the furnishings of the vessel, is not within the act; 49 *id.* 646. One who provides the means for transporting a military expedition on any part of its journey, with knowledge of its ultimate destination and unlawful character, commits an offence under § 5286; 84 *id.* 799. Sec. 5283 is not applicable to such a case; 13 Op. Att. Gen. 177.

A proceeding under § 5283 is a simple suit in admiralty, where the decree is that the libel be dismissed, or the vessel condemned; and no decree of restitution is necessary; 38 Fed. Rep. 431.

The British Foreign Enlistment Act of 1819 forbade British subjects to enlist or to induce others to enlist, or to leave or to induce others to leave the queen's dominions in order to enlist; and forbade ship-owners to take aboard their ships persons illegally enlisted. It is a substantial copy of the American act of 1818; 166 U. S. 60. In 1870 a new British act was passed.

See BELLIGERENCY; CAPTURE; CONTRABAND; FREE SHIPS; INSURGENCY; INTERNATIONAL LAW; INTERVENTION; PRE-EMPTION; PRIZE; RANSOM BILLS; RECAPTURE; SEARCH; SHIPS OF WAR; WAR.

NEVADA. One of the states of the United States of America.

It was admitted into the Union, Oct. 31, 1864. Its boundaries were defined by an enabling act, approved March 21, 1864, as amended by the act of

May 5, 1866.

NEVER INDEBTED. A plea to an action of *indebitatus assumpsit*, by which the defendant asserts that he is not indebted to the plaintiff. 6 C. & P. 545; 1 M. & W. 542; 1 Q. B. 77. The plea of never indebted has, in England, been substituted for *nil debet*, in certain actions specified in schedule B (36) of the Common Law Procedure Act of 1852; and the effect of the plea never indebted is to deny those facts from which the liability of the defendant is alleged. In actions on negotiable bills or notes, never indebted is inadmissible; Reg. Gen. Hil. T. 1833, §§ 6, 7; 3 Chitty, Stat. 560. By the judicature act, 1875, Ord. xix. r. 20, a defendant is no longer allowed to deny generally the facts alleged by the plaintiff; Whart. Lex. A defendant cannot, under the plea of "never indebted," contend that, though a contract was made in fact, it was void in point of law, for the facts from which its invalidity is inferred must form the subject of a special plea; Moz. & W.

NEVERTHELESS. Equivalent to notwithstanding. 112 Ky. 486, 66 S. W. 32.

NEW. This term in its ordinary acceptation, when applied to the same subject or object, is the opposite of old. 14 Pet. 364.

A distinction must be observed between a new article of commerce and a new article which, as such, is patentable. Any change in form from a previous condition may render the article new in commerce. But to render the article new in the sense of the patent law, it must be more or less efficacious, or possess new properties by a combination with other ingredients; not from a mere change of form produced by a mechanical division. It is only where one of these results follows that the product of the compound can be treated as the result of invention or discovery, and be regarded as a new and useful article. 97 U. S. 6. See PATENT.

Business. When an existing business is enlarged, transferred to a new plant, and put in the name of a corporation, it is not a new business in the city, within the meaning of an ordinance exempting from taxation for five years new manufacturing establishments to induce their location in the city. 151 Ky. 753, 152 S. W. 980.

NEW AND USEFUL INVENTION. A phrase used in the act of congress relating to patents for inventions. See PATENT.

NEW ASSIGNMENT. A re-statement of the cause of action by the plaintiff, with more particularity and certainty, but consistently with the general statement in the declaration. Steph. Pl. 241; 20 Johns. 43.

Its purpose is to avoid the effect of an evasive plea which apparently answers the declaration, though it does not really apply to the matter which the plaintiff had in view; 1 Wms. Saund. 299 b. Thus, if a defendant has committed two assaults on the plaintiff, one of which is justifiable and the other not, as the declaration may not distinguish one from the other, the defendant may justify, and the plaintiff not being able either to traverse, demur, or confess and avoid, must make a new assignment.

There may be several new assignments in the course of the same action; 1 Chitty, Pl. 614. A plaintiff may reply to a part of the plea and also make a new assignment. A new assignment is said to be in the nature of a new declaration; 1 Saund. 299 c; but is more properly considered as a repetition of the declaration; 1 Chit. Pl. 602; differing only in this, that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is, consequently, to be framed with as much certainty or specification of circumstances as the declaration itself. In some cases, indeed, it should be even more particular; Gould, Pl. 339 n.; Bac. Abr. *Trespass* (14, 2); 1 Chit. Pl. 610.

See 3 Bla. Com. 311; Archb. Civ. Pl. 286. In England, under the Judicature Act, 1875, Ord. xix. r. 14, no new assignment is necessary or is to be used; but everything which has heretofore been alleged by way of new assignment is to be introduced by way of amendment of the statement of claim; Whart. Dict.

NEW CODE. A Code which came into operation under Justinian December 29, 534. This was a second edition of the Code, the first edition having been published April 7, 529. The object of the second edition was to incorporate under the proper heads the Fifty Decisions, and a large number of constitutions subsequent to the first edition, and "suppressing without scruple whatever appears to be superfluous, abrogated provisions, repetitions, and contradictions." This new edition of the Code was called, *codex repetitae praelectionis*. Hunter, Rom. L. 92. See OLD CODE.

NEW FOR OLD. A term used in marine insurance in cases of adjustment of a loss when it has been but partial. In making such adjustment, the rule is to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for repairs, and to allow the deduction of one-third *new for old* upon the balance. See 1 Cow. 265; 4 Ohio 284; 7 Pick. 259. The deduction, in the United States, is usually one-third, and is made from the cost of labor and material, and in practice also from the incidental expenses of repairs, as towage, etc.; but see, as to this last, 3 Sumn. 45; 9 Wall. 203. The deduction is without regard to the age of the vessel; 11 Johns. 315. A writer criticises the rule of thirds, and suggests that the increase of iron hulls will change the rule of law; Gourlie, Gen. Av. In Liverpool, no deduction is made on iron vessels for the first eighteen months.

NEW FOREST. The royal forest in Hampshire, founded by William the Conqueror. See FOREST LAW.

It contains about 92,000 acres, of which about 63,000 acres are strictly speaking forest; 2,000 belong to the Crown, and 27,000 acres belong to private persons. Some parts of the 27,000 acres are subject to certain forest rights of the Crown. Byrne.

NEWFOUNDLAND FISHERY DISPUTE. See HAGUE CONFERENCE.

NEW HAMPSHIRE. The name of one of the original thirteen United States of America.

It was subject to Massachusetts from 1641 to 1680. It was governed as a province, under royal commissions, by a governor and council appointed by the king, and a house of assembly elected by the people, until the revolution.

In January, 1776, a temporary constitution was adopted, which continued till 1784. The constitution adopted in 1784 was amended by a convention of delegates held at Concord, approved by the people in their town-meetings, and established by the convention in February, 1792. This constitution was amended in 1850, by abolishing the property qualifications for certain offices, and amended again in 1877, changing it in eleven particulars, the principal of which were the abolition of the religious test, and adoption of biennial elections, increasing the number of senators, and changing the election from March to November.

NEW INDUSTRY. See LABOR.

NEW INN. An inn of chancery. See INNS OF COURT.

NEW JERSEY. The name of one of the original thirteen states of the United States of America.

The territory of which the state is composed was included within the patent granted by Charles II. to his brother James, duke of York, bearing date on the 12th of March, 1663-4. This grant comprised all the lands lying between the western side of Connecticut river and the east side of Delaware bay, and conferred powers of government over the granted territory. At this time the province was in the possession and under the government of Holland. Before the close of the year the inhabitants of the province submitted to the government of England, on the 23d and 24th of June, 1664. The duke of York, by deed of lease and release, conveyed to John Lord Berkeley and Sir George Carteret, their heirs and assigns forever, "all that tract of land adjacent to New England and lying and being to the westward of Long Island and Manhatas Is-

land, and bounded on the east part by the main sea, and part by Hudson river, and hatl upon the west Delaware bay or river, and extendeth southward to the main ocean as far as Cape May at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is in 41 degrees and 40 minutes of latitude, and crosseth over thence in a straight line to Hudson's river in forty-one degrees of latitude; which said tract of land is hereafter to be called Nova Caesaria, or New Jersey."

This grant first defined the boundaries and gave the name of the province. It conferred upon the grantees, with the territory, powers of government in as full and ample manner as they were conferred by the crown upon the duke of York. Lord Berkeley and Sir George Carteret, being by virtue of this conveyance the sole proprietors of New Jersey, on the 10th of February, 1664-5, signed a constitution which they published under the title of "The concessions and agreement of the lords proprietors of the province of Nova Caesaria, or New Jersey, to and with all and every of the adventurers, and all such as shall settle or plant there." The document, under the title of "The Concessions," was regarded as the first constitution of New Jersey, and continued in force until the division of the province in 1676. The instrument was considered as irrevocable, and therefore of higher authority than the acts of assembly, which were subject to alteration and repeal. War having been declared by England against Holland in 1673, the Dutch were again in possession of the country, and the inhabitants submitted to their authority.

By the treaty of peace between England and Holland on the 9th of February, 1674, the country was restored to the possession of the English. On the conclusion of peace, in order to remove all grounds of objection to his title on account of the recapture of the country by the Dutch, the duke of York obtained from the crown a new patent, similar to the first, and dated on the 28th of June, 1674. On the 20th of July in the same year, the duke of York made a second grant of a portion of the province to Sir George Carteret individually. The partition which this patent was intended to secure, in addition to the confirmation of Carteret's grant, was accomplished by deed of partition executed July 1, 1676, between Carteret and the trustees of Byllinge. In 1702, the proprietors of the two provinces, called respectively East New Jersey and West New Jersey, surrendered their powers of government to Queen Anne, still retaining their title to the land. The two divisions constituted thenceforth but one colony. The colony was governed by a governor and council appointed by the crown, and an assembly of the representatives of the people chosen by the freeholders. This form of government continued till the American revolution.

The first constitution of the state of New Jersey was adopted by the provisions of the act passed on the second day of July, 1776. This body was composed of representatives from all the counties of the state, who were elected on the fourth Monday of May, and convened at Burlington on the tenth day of June, 1776. It was finally adopted on the second day of July, but was never submitted to a popular vote. This constitution continued in force until the first day of September, 1844, when it was superseded by the existing constitution. The new constitution was adopted May 14, 1844, by a convention composed of delegates elected by the people in pursuance of an act passed by the legislature. The constitution thus framed, having been submitted to and adopted by the people at an election held on the thirteenth day of August, took effect and went into operation, pursuant to one of its provisions, on the twenty-second of September, 1844. This constitution was amended at a special election held September 7, 1875.

NEW MATTER. In Pleading. Matter not previously alleged. Statements of fact not previously alleged by either party to the pleadings. Where special pleading prevails, such matter must be pleaded in avoidance, and it must, in general, be followed by a verification; Gould, Pl. c. 3, § 195; 1 Chitty, Pl. 538; Steph. Pl. 251; Comyns, Dig. Pleader (E 32); 1 Wms. Saund. 103, n. 1; Ventri. 121. See PLEA.

In equity, new matter, discovered by either plaintiff or defendant, may be introduced by cross or supplemental bill before a decree has been pronounced, but not by amendment after an answer has been filed; 1 Paige, Ch. 200; Harr. Ch. 438.

NEW MEXICO. The name of one of the United States of America.

By act of congress, approved September 9, 1850, the territory of New Mexico was constituted and described. A proviso was annexed that the United States might divide the territory into two or more, and that when admitted as a state the said territory, or any portion of the same, should be received into the Union with or without slavery, as their constitution might prescribe at the time of admission.

Colorado was partly formed from New Mexico in 1861, and in 1868 the entire territory of Arizona, which reduced New Mexico to its present boundaries. By the organic act, the powers of the territory are lodged in three branches,—the legislative, executive, and judicial. The operation of this act was suspended until the Texan boundary was agreed upon, when it went into force by proclamation of the president, December 13, 1850.

NEW PROMISE. A contract made after the original promise has, for some cause, been rendered invalid, by which the

promisor agrees to fulfil such original promise. Within the meaning of the statute of frauds the renewal of a promise to pay is a new promise; 24 Atl. Rep. (R. I.) 576. See LIMITATIONS.

NEW TRIAL. In Practice. A re-examination of an issue in fact before a court and a jury, which has been tried at least once before the same court; Hill. N. Tr. 1. A rehearing of the legal rights of the parties, upon disputed facts, before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose; 4 Chitty, Gen. Pr. 30; Grah. & W. N. Tr. 32. It is either upon the same, or different, or additional evidence, before a new jury, and probably, but not necessarily, before a different judge. It is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee; 99 Cal. 265.

The origin of the practice of granting new trials is of extremely ancient date, and, consequently, involved in some obscurity. Blackstone gives the most connected and satisfactory account of it of any writer; 3 Com. 387.

Courts have, in general, a discretionary power to grant or refuse new trials, according to the exigency of each particular case, upon principles of substantial justice; 1 Burr. 390. That the trial judge is not satisfied with a verdict is not binding on the court in banc, but deserves serious consideration; L. J. 55 Q. B. 403. This discretion is generally not reviewable on error; 10 Vt. 520; 14 N. H. 441; 20 Pick. 285; 10 Ga. 93; 132 U. S. 108. It should be exercised with great caution where a new trial is asked only because the verdict is against the weight of the evidence; 31 W. Va. 428.

Where one party moves for a new trial and the opposing party consents thereto, the court is not compelled to grant the same; 44 Kan. 144; 45 Ill. App. 426. An order granting a new trial operates to set aside the judgment; 76 Cal. 90.

The usual grounds for a new trial may be enumerated as follows:

The *not giving the defendant sufficient notice* of the time and place of trial, unless waived by an appearance and making a defence, will be a ground for setting aside the verdict; 3 Price 72; 1 Wend. 22. But the defendant's ignorance must not have been owing to his own negligence, and the insufficiency of the notice must have been reasonably calculated to mislead him; 2 Bibb 177; 3 B. & F. 1; 13 Tex. 516; 32 Conn. 402; 36 N. H. 74.

Pleadings. Failure of the complaint to state a cause of action is available on motion for a new trial; 46 Pac. Rep. (Ariz.) 74; so of one which shows the cause of action alleged to be barred; 26 S. E. Rep. (W. Va.) 431.

Misconduct of parties, counsel, or witnesses. The use of crutches by plaintiff in going to and from the witness stand, when just before and after the trial he walked readily without them, is ground for a new trial; 42 N. Y. S. 941; but plaintiff's hysteria while on the witness stand is not; 45 N. E. Rep. (Ill.) 290; nor is a controversy, between court and counsel, during the trial, not prejudicial to the defeated party; 37 S. W. Rep. (Mo.) 115; nor improper remarks made by counsel in his argument; 27 U. S. App. 663.

Mistakes or omissions of officers in summoning and drawing jurors, when the irregularity deprives the party complaining of a substantial right, will entitle him to a new trial; 2 Halst. 244; 16 Ark. 37; 12 Pick. 496. Likewise, where the officer summoning the jury is nearly related to one of the parties; 10 S. & R. 334; 1 South. 364; 20 Tex. 254; 1 Dev. & B. 196; or is interested in the event; 5 Johns. 138; unless the objection to the officer was waived by the party; 3 Me. 215; 21 Pick. 457; or the authority of the officer be so circumscribed as to put it out of his power to select an improper jury; 7 Ala. 253; 7 Cow. 720. A

verdict will be set aside for the following causes: The unauthorized interference of a party, or his attorney, or the court, in selecting or returning jurors, unless the interference can be satisfactorily explained; 8 Humphr. 412; that a juror not regularly summoned and returned personated another; 77 Ga. 108; 7 Dowl. & R. 684; but not if the juror personated another through mistake, was qualified in other respects, and no injustice has been done; 12 East 229; 12 Ohio Cir. Ct. 367. That a juror sat on the trial after being challenged and stood aside, unless the party complaining knew of it, and did not object; 3 Yeates 318; that a juror, was discharged without any sufficient reason, after being sworn; 1 Ohio St. 66; but not if the juror was discharged by mistake and with the knowledge and acquiescence of the party; 9 Metc. Mass 572; 5 Ired. 58; that the jury were not sworn, or that the oath was not administered in the form prescribed by law; 1 How. 497; 2 Me. 270.

The *disqualification of jurors*, if it has not been waived, will be ground for a new trial; but a principal cause of challenge to a juror, not discovered during the trial, will not require a new trial in a criminal case, unless injustice resulted to the prisoner from the fact that such juror served; 36 W. Va. 729; that a juror was also a member of the grand jury finding the bill will not sustain a motion in arrest of judgment, where no objection was made to the juror on the trial; 30 S. C. 105; 41 La. Ann. 688; 4 Utah 42. The want of a necessary property qualification is ground for a new trial; 4 Term 473; 15 Vt. 61; irregularity in selection, which results in injury to the defeated party; 59 Mo. 417; but after a plea of not guilty and conviction, defendant may not object to the venire or to jurors summoned under it; 9 Humphr. 626; or to a juror whose name was not in the box, on the list, or on the books of the tax receiver; 63 Ga. 791; but not if it appears that injustice was not done; 31 W. Va. 459; and there was a fair trial, and the verdict was fully warranted by the evidence; 63 Fed. Rep. 565. Relationship to one of the parties; 32 Me. 310; or to one of the counsel; 81 Me. 155; 17 S. E. Rep. (Ga.) 631; or business relations with the counsel; 42 N. Y. S. 569; is ground; but knowledge of such relation must not have been obtained before trial, else the disqualification is waived; 84 Me. 304; unless the relationship be so remote as to render it highly improbable that it could have had any influence; 12 Vt. 661. So is interest in the event; 2 Johns. 194; 21 N. H. 438; concealment of his interest by juror; 111 Ind. 59; bias or prejudice; 3 Dall. 515; where a juror was deputy prosecuting attorney; 100 Ind. 357; conscientious scruples against finding a verdict of guilty; 13 N. H. 536; 16 Ohio 364; 13 Wend. 351; an opinion held by juror which would have excluded him if discovered before he was sworn; 36 W. Va. 729; and mental or bodily disease unfitting jurors for the intelligent performance of their duties; 6 Humphr. 59; 8 Ill. 398; alienage; 6 Johns. 332; 2 Ill. 476; 60 Vt. 449 (but not criminality of juror); 10 Oreg. 145; 15 Colo. 270; but see 8 Ill. 202; 4 Dall. 853). The want of purely statutory qualifications, such as citizenship, age, property, etc., which are not essential to an intelligent and impartial discharge of duty by a juror, are not treated with the same strictness as bias and like causes; 22 Fed. Rep. 234. See 2 N. H. 349.

When *indirect measures have been resorted to, to prejudice the jury*, or tricks practised or disingenuous attempts made to suppress or stifle evidence or thwart the proceedings, or to obtain an unconscionable advantage, they will be defeated by granting a new trial. For example: where papers material on the point in issue, not previously submitted, are surreptitiously handed to the jury; Cas. temp. Hardw. 116; 2 Yeates 273; or where the party, or some one in his behalf, directly approaches the jury on the subject of the trial; 7 S. & R. 458; 13 Mass. 218; or where one or a

member of the jury slept in the same room with them, and had a conversation with one or two of them, in which he made statements reflecting on the character of the party against whom the verdict was rendered; 78 Ia. 207. But if the other party is aware of such attempts, and neglects to correct them when in his power, he will be deemed to have waived all objection; 11 Mod. 118. If the interference with the jury comes from a stranger, be without fault in the jury, and without the knowledge of the parties, and no injury has thereby ensued, the verdict will not be disturbed; 5 Mo. 525; 3 Bibb 8; 11 Humphr. 169, 491. But see 9 Miss. 187; 16 id. 465; 20 id. 398. Where the jury, after retiring to deliberate, examined witnesses in the case, a new trial was granted; Cro. Eliz. 189; 2 Bay 94; 1 Brev. 16; so, also, when one of their number communicates to his fellows private information possessed by him, which influences the finding; 1 Swan 61; 2 Yeates 166; 4 Yerg. 111; 36 Neb. 708; or the judge addresses a note to them, or privately visits them, after they have retired to deliberate; 1 Pick. 337; 10 Johns. 238; or a juror takes a private view; 157 Mass. 579; 57 Fed. Rep. 898; 32 Minn. 329.

Misconduct of the jury will sometimes avoid the verdict; as, for example, jurors betting as to the result; 4 Yerg. 111; sleeping during the trial; 8 Ill. 868; see 131 Pa. 172; unauthorized separation; 1 Va. Cas. 271; 11 Humphr. 502; 3 Harr. N. J. 468; but see 101 N. C. 761; 7 Mont. 489; 147 Ill. 385; taking refreshment at the charge of the prevailing party; 4 Wash. C. C. 32; 23 Neb. 171; see 49 Kan. 643; drinking spirituous liquor; 4 Cow. 17, 26; 4 Harr. 367; 78 Cal. 317; if any mental incapacity results therefrom; 8 Mont. 57; but see 40 La. Ann. 739; 8 Mont. 57; 7 id. 489; 100 N. C. 528; talking to strangers on the subject of the trial; 3 Day 223; 9 Humphr. 646; but not general conversation; 36 W. Va. 729; determining the verdict by a resort to chance; 15 Johns. 87; 8 Blackf. 32; 49 Cal. 275; 21 Ia. 379; 4 Wis. 67; 1 Minn. 156; 45 N. H. 408; by returning as the verdict the quotient obtained by dividing by twelve the total of the sums named by the jurors; 15 Johns. 87; 85 Tenn. 240; 35 Fed. Rep. 649; 11 L. R. A. 706. But every irregularity which would subject jurors to censure will not overturn the verdict, unless there be some reason to suspect that it may have had an influence on the final result. See 26 Tex. App. 260; 40 Kan. 258; 40 La. Ann. 751. In general, if it does not appear that the misconduct was occasioned by the prevailing party or any one in his behalf, does not indicate any improper bias, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict will not be disturbed. For gross misconduct of the jury a new trial may be granted on grounds of public policy; Hilly. New T. 198. Where the jury after returning an informal verdict were discharged, and within thirty seconds recalled and the verdict corrected, the separation will not vitiate the verdict; 26 Tex. App. 689. When the jury were kept out eighty-four hours it was held that their agreement was coerced and a new trial ordered; 156 N. Y. 268; s. c. 19 N. Y. L. J. 967.

Error of the judge will be ground for a new trial; such as, admitting illegal evidence which has been objected to,—unless the illegal evidence was wholly immaterial, or it is certain that no injustice has been done; 77 Ga. 692; and where the illegal testimony was admitted in gross violation of the well-settled principles which govern proof, it has been deemed *per se* ground for a new trial, notwithstanding the jury were directed to disregard it; 13 Johns. 350; but see 6 N. H. 333; improperly rejecting evidence tending in any degree to aid the jury in determining a material fact; 3 J. J. Marsh. 229; the admission of incompetent evidence, although of slight importance, if the party has suffered or might have suffered prejudice by its admission; 101 N. C. 134; 78 Ga. 480; 80 id. 549; 81

id. 93; (but the objection that the jury were not allowed to take to their room letters introduced in evidence cannot first be raised on a motion for a new trial; 70 N. W. Rep. (Ia.) 769; nor the admission of improper evidence not objected to at the trial; 37 S. W. Rep. (Mo.) 115;) withdrawing testimony once legally before the jury, —unless the excluded testimony could not be used on a second trial; 4 Humphr. 22; denying to a party the right to be heard through counsel; 2 Bibb 76; 3 A. K. Marsh. 465; erroneously refusing to grant a nonsuit; 19 Johns. 154; improperly restricting the examination or cross-examination of witnesses, or allowing too great latitude in that respect, under circumstances which constitute a clear case of abuse; 6 Barb. 333; refusing to permit a witness to refer to documents to refresh his memory, where, by the denial the complaining party has sustained injury; 3 Litt. 338; improperly refusing an adjournment, whereby injustice has been done; 2 South. 518; 9 Ga. 121; improperly denying the right to open and close at the trial; 76 Ga. 79; refusing to give such instructions to the jury as properly arise in the case, where it is manifest that the jury erred through want of instruction; 4 Ohio 389; 9 Mo. 305; giving to the jury binding instructions, when there are circumstances in the case which ought to have been submitted to them,—unless the verdict is in strict accordance with the weight of evidence; 19 Wenu. 402; 5 Humphr. 476; giving an erroneous exposition of the law on a point material to the issue,—unless it is certain that no injustice has been done, or the amount in dispute is very trifling, so that the injury is scarcely appreciable; 4 Conn. 356; 5 Sandf. 180; 3 Johns. 239; misleading the jury by a charge which is not explicit, or which is absurd and impossible, or contradictory, or argumentative and evasive; 9 Humphr. Tenn. 411; 11 Wend. 63; 6 Cow. 682; erroneous instruction as to the proof that is requisite; 3 Bibb 481; 21 Me. 20; misapprehension of the judge as to a material fact, and a direction to the jury accordingly, whereby they are misled; 1 Mills 200; see MISDIRECTION; instructing the jury as to the law upon facts which are purely hypothetical,—but not if the charge was correct in point of law, and the result does not show that the jury were misled by the generality of the charge; 8 Ga. 114; 2 Ala. N. S. 694; submitting as a contested point what has been admitted; 9 Conn. 216; erroneously leaving to the jury the determination of a question that should have been decided by the court, whereby they have mistaken the law; charging as to the consequences of the verdict; 1 Pick. 106; 2 Graham & W. New T. 595. Neither the rejection nor admission of immaterial evidence is cause for a new trial; 77 Ga. 692.

Surprise, as a ground for setting aside the verdict, is cautiously allowed. When it is occasioned by the act of the adverse party, or by circumstances out of the knowledge and beyond the control of the party injured by it, this has sometimes been held to constitute grounds for relief; but not when he might have been fully informed by the exercise of ordinary diligence; 6 Halst. 242; 12 Colo. 195; although even when the complainant is not entirely free from fault, the court, in cases where great wrong would otherwise be done, will, for the sake of promoting justice, grant a new trial. Among the cases of surprise may be enumerated the following: the unexpectedly being summoned and detained as a witness or juror in another court, or sudden and serious illness, which prevents the party from attending at the trial; 3 T. B. Monr. 113; 4 Litt. 1; 1 Halst. 344; that the cause was brought on prematurely, in the absence of the party; 6 Dana 89; erroneous ruling of the court as to the right to begin, which has worked manifest injustice; 4 Pick. 156; but see 8 Conn. 254, 296; perturbation of counsel, arising from sudden and dangerous sickness occurring in his family and coming to his knowledge during the trial; 14 Pick.

494; where some unforeseen accident has prevented the attendance of a material witness: 6 Mod. 22; 1 Harp. 267; that testimony beyond the reach of the party injured, and completely under the control of the opposite party, was not produced at the trial; 7 Yerg. 502; 7 Wend. 62; that competent testimony was unexpectedly ruled out on the trial; 9 Dana 26; 2 Vt. 573; 2 J. J. Marsh. 515; where a party's own witnesses, through forgetfulness, mistake, contumacy, or perjury, testify differently than anticipated, or where evidence is unexpectedly sprung upon a party by his opponent; 8 Ga. 136; 18 Miss. 326; see 69 Tex. 437; the withdrawal of a material witness before testifying, attended with suspicions of collusion; 25 Wend. 663; that a material witness was suddenly deprived of the power of testifying by a paralytic stroke, or other affection, or that the testimony of the witness was incoherent on account of his being disconcerted at the trial; 1 Root 175; where it is discovered after the trial that a material witness who testified is interested in the event, or where it is probable that the verdict was obtained by false testimony, which the party injured could not until after the trial contradict or expose; 2 C. B. 342; 1 Me. 322. But a new trial cannot be obtained on the ground of surprise caused by evidence which was clearly within the issues presented by the pleadings; 1 Tex. Civ. App. 343. There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from accident or surprise; 96 Cal. 38. Accident or surprise which ordinary prudence could not have guarded against, does not include ignorance, mistake, nor misapprehension of an attorney, not occasioned by the adverse party, nor mismanagement of the defence by the attorney, through design, ignorance, or neglect; 52 Kan. 743; 107 Mo. 500.

New trials on account of after-discovered testimony are granted but rarely, and with great caution. The court, in order to set aside the verdict on this ground, must be satisfied that the evidence has come to the applicant's knowledge since the trial; 3 Stor. 1; 21 N. H. 166; see 76 Ga. 602; that it is not owing to the want of diligence that it did not come sooner; 6 Johns. Ch. 479; 80 Fed. Rep. 85; 91 Ga. 171; 90 Cal. 607; see 132 Mass. 341; 49 How. Pr. 53; 19 S. W. Rep. (Mo.) 1107; 73 Hun 195; 1 Blackf. 367; 49 Ill. App. 224; that it is so material that it will probably produce a different result; 1 Dudd. 85; 43 Ill. App. 417; see 76 Ga. 585; 41 Kan. 345; 29 W. Va. 410; 88 Tenn. 450; and that it is not cumulative; Woodb. & M. 348; as mere cumulative evidence is insufficient to warrant a new trial; 78 Cal. 41; 76 Ga. 602; 129 Ill. 101; 120 Ind. 136; 39 Minn. 190; 69 Tex. 679; 83 Va. 581; but the rule does not apply where it is cumulative evidence to prove an *alibi*; 3 Wash. 206. Nor must the sole object of the newly-discovered evidence be to impeach witnesses examined on the former trial; 7 Barb. 271; 8 Gratt. 637; 79 Ga. 633; 116 Ind. 84; 39 Kan. 320; 102 N. C. 347; 85 Va. 205; 43 Ill. App. 161; 41 La. Ann. 787. The moving party must state what the evidence is, and what diligence he has used in the preparation of his case; and his application must be accompanied by affidavits of the newly-discovered witness, unless some cause be shown why they cannot be produced; 5 Halst. 250; 1 Tyl. Vt. 441; 22 Me. 246. Evidence which could have been procured before the trial by the exercise of reasonable diligence is not sufficient; 76 Ga. 618; 73 Ia. 698; 41 Kan. 485; 62 Mich. 186; 69 Tex. 437; 82 Va. 827.

When a continuance on account of absent testimony is refused, and it subsequently appears that such evidence is necessary and material to the defendant, he should be awarded a new trial; 25 Tex. App. 27, 247; 26 *id.* 668.

Excessive damages may be good cause for granting a new trial; first, where the measure of damages is governed by fixed rules and principles, as in actions on

contracts, or for torts to property, the value of which may be ascertained by evidence; second, in suits for personal injuries, where, although there is no fixed criterion for assessing the damages, yet it is clear that the jury acted from passion, partiality, or corruption; 10 Ga. 37.

A new trial should be granted for an error of law, where the general merits of the case, as one for a recovery at all, are doubtful, and where the damages are apparently excessive; 80 Ga. 602. In actions for personal torts, a new trial will not, in general, be granted on account of the smallness of the damages, unless the verdict is the result of contrivance by the defendant, or surprise on the plaintiff, or of partiality or misconduct of the jury, or unless the finding is entirely disproportionate to the injury. See 49 L. J. Q. B. 283, where a verdict of £7,000 in favor of a physician for damages, caused by defendant's negligence, was set aside on the ground of the damages being insufficient.

A state statute forbidding new trials on account of inadequate damages, if binding on the federal courts, would be in violation of the constitutional right of a trial by jury; 80 Fed. Rep. 72. Where the verdict is for an amount exceeding the damages laid in the writ, it will be set aside unless the plaintiff will release the excess; 7 Wend. 330. See JURY; DAMAGES.

It is within the discretion of the trial court, after a verdict awarding excessive damages, to make an order denying a motion for a new trial on the condition that the plaintiff will remit a certain part of the verdict; 98 Cal. 13; 130 U. S. 69; see 48 Mo. App. 79; 70 Ga. 119; 91 *id.* 818. It is error to set aside a verdict as excessive unless the amount is such as to show misconduct and impropriety on the part of the jury; 74 Hun 284. Where the question of damages is peculiarly for the jury, if the court grant a new trial, it should be granted absolutely and not on condition of a refusal to file a remittitur; 26 L. R. A. 653.

When the verdict is clearly against the law, it will be set aside, notwithstanding the jury had power to decide both the law and the fact, or the issue was one exclusively of fact and there have been concurrent verdicts by two successive juries; 1 Dudd. 213; 4 Ga. 198; see 79 Ga. 770; if, however, substantial justice has been done, a new trial will not be granted though the law arising on the evidence would have justified a different result; 1 Burr. 54; 4 Term 468.

Courts are at all times reluctant to grant a new trial on the ground that the verdict is against the evidence; and where the jury have passed upon a mere question of fact, they will only do so when the verdict is palpably against the evidence; injustice must have been done by the verdict, and there must be a probability that justice will be done on a retrial; 21 Conn. 245; 5 Ohio 509; 3 Strobb. 353. A statute forbidding courts to set aside a third verdict in the same action, does not apply to a case where there is no evidence, and thus construed, is constitutional; 89 Tenn. 311. See 134 U. S. 614; 36 Neb. 642. Where the verdict is founded on circumstantial evidence, the court will rarely, if ever, interfere with it; 16 Mass. 345; 11 Ill. 36. On the other hand, when the issue approximates to a purely legal question, courts are somewhat more liberal in granting new trials; 2 McMull. 44. The verdict will be set aside where the witnesses upon whose testimony it was obtained have since the trial been convicted of perjury; 3 Dougl. 24; so where the testimony on which the verdict is founded derives its credit from circumstances, and those circumstances are afterwards clearly falsified by affidavit; 1 B. & P. 437; 3 Grah. & W. N. Tr. 1203.

The verdict may be void for *obscurity or uncertainty*; 1 S. & R. 367; and where special findings are contradictory on essential questions, a new trial should be granted; 111 N. C. 661. It will be set aside where it is not responsive to the issue, or does not comprehend all of the issues, unless the finding of one or more of the issues

will be decisive of the cause; 2 Ala. N. S. 359; 11 Pick. 45; or where it is contrary to the instructions, whether the latter are right or wrong; 74 Ia. 330; or where the verdict shows that it includes items not shown by the evidence to be due; 45 Ill. App. 328. So, where the findings on the issues are contradictory, thus rendering the general verdict inconsistent and unintelligible; 97 N. C. 66. That it was not recorded in open court, or was received in the absence of the plaintiff, or was altered after it was recorded and the jury dismissed, will be ground for a new trial; 1 Ill. 109; 1 Wend. 86; 16 S. & R. 414. If rendered on Sunday, it will, in general, be void; but there are many instances in which verdicts have been sustained though rendered on that day; 1 South. 156; 15 Johns. 119; 3 Watts 56; 13 Ohio 490.

In the United States courts no exception lies to the overruling of a motion for a new trial; 7 U. S. App. 359; 85 Fed. Rep. 957; or where a new trial on the ground of after-discovered evidence is refused; 24 U. S. App. 601.

The Pennsylvania act of 1891 provides that "the supreme court shall have power in all cases to affirm, reverse, amend, or modify a judgment, decree, etc., and to enter such judgment or decree as it may deem proper, without returning the record to the court below, and may order a verdict and judgment to be set aside and a new trial had." In 178 Pa. 481, it was said by the court that this was "a new power, a wide departure from the policy of centuries in regard to appellate courts and clearly exceptional in character;" but the act was held to be constitutional, and the court ordered the verdict set aside.

An act of Montana authorizing its supreme court to grant a new trial for excessive damages, was upheld in 131 U. S. 29, where it was held that the court below could order a new trial, or, with the plaintiff's consent, reduce the verdict, but could not enter judgment itself for a lesser sum than the verdict.

Courts of equity have always proceeded with great caution in awarding new trials at law. At the present day they are but seldom applied to for this purpose, as courts of law are liberal in exercising the same jurisdiction, and it has been held to be unconscionable and vexatious to bring into courts of equity a discussion which might have been had at law; 1 Sch. & L. 301. But, in general, when it would have been proper for a court of law to have granted a new trial if the application had been made while that court had the power, it is equally proper for a court of equity to do so if the application be made on grounds arising after the court of law can no longer act; 1 A. K. Marsh. 287. A court of equity will not grant a new trial at law to enable a party to impeach a witness, or because the verdict is against evidence; 1 Johns. Ch. 432; or when the new trial can be obtained by application to a law court; 52 N. J. Eq. 387. It will only interpose in cases of newly-discovered evidence, surprise, fraud, or the like, where the party is deprived of the means of defence by circumstances beyond his control; 1 Litt. 140; 2 Bibb 241; 2 Hawks 605; Will. Eq. Jur. 357.

A court of equity will often grant a second, and sometimes a third, fourth, and even fifth trial of a feigned issue, in cases where a court of law would not disturb a first verdict; 1 Edw. Ch. 96. This arises from the consideration that the responsibility of the decision rests upon the judge in equity; 3 Grah. & W. N. Tr. 1570.

New trials may be granted in criminal as well as in civil cases, at the solicitation of the defendant, when he is convicted even of the highest offences. But a person once lawfully convicted on a sufficient indictment can never after, against his consent, be a second time put in peril for the same offence, unless the former conviction was instituted by the fraudulent procurement of the defendant with a view to shield himself from adequate punishment; 2 Grah. & W. N. Tr. 61. Where the accused has been acquitted, and his acquittal has not been

procured by his own fraud or evil practice, the law, mingling justice with mercy in *favorem vite et libertatis*, does not permit a new trial; 16 Conn. 54. In civil actions for the recovery of penalties, and in some cases where the form of proceeding is criminal, if the object be only to establish a civil right, as in cases of *quo warranto* and the like, new trials may be granted even after acquittal. But, in such cases, when the verdict is for the defendant, it will not, in general, be disturbed unless some rule of law be violated in the admission or rejection of evidence or in the charge of the court to the jury; 4 Term 753; 2 Cow. 811; 2 Graham & W. New Tr. 61. See Graham & Waterman; Hilliard, New Trials; JURY; MISDIRECTION; CHARGE; MISTRIAL.

NEW WORKS. By a new work is understood every sort of edifice or other work which is newly commenced on any ground whatever. Where the ancient form of work is changed, either by an addition being made to it or by some part of the ancient work being taken away, it is styled also a new work. La. Civ. Code, Art. 856.

NEW YORK. The name of one of the original states of the United States of America.

In its colonial condition this state was governed from the period of the revolution of 1686 by governors appointed by the crown, assisted by a council, which received its appointments also from the parental government, and by the representatives of the people. 1 Story, Const. b. 1, ch. 10.

There have been four constitutions adopted by the state since its colonial period: one in 1777, which remained in force until January 1, 1883, was the second went into operation. This second constitution remained until January 1, 1847, when a constitution, adopted by a convention of the people at Albany, went into force. This constitution was amended in certain particulars, and remained in force until January 1, 1865, when the present constitution was adopted by a convention at Albany and went into effect on January 1, 1865, except article six, relating to the courts, which became operative January 1, 1866.

NEWLY DISCOVERED EVIDENCE. In Practice. Proof of some new and material fact in the case, which has been ascertained since the verdict. See NEW TRIAL.

NEWS. Information respecting current events. The history of the day. It is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*. 248 U. S. 234. There is a distinction between the substance of the information (news element), and the particular form or collocation of words in which the writer has communicated it (literary element). *Id.*

To the newspaper owners, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. *Id.* 236. See also PLAGIARISM OF NEWS.

NEWSPAPERS. Papers for conveying news, printed and distributed periodically.

A paper issued every day of the week except one is a daily newspaper; 45 Cal. 30.

A paper devoted principally to legal intelligence is a newspaper in which notices required by statute may be published; 75 Ill. 51; but see 25 Minn. 147.

Publication of notice from June 26 to July 26, both dates inclusive, is a sufficient compliance with an ordinance directing publication for thirty days, although the paper in which the publication is made is not issued on Sundays or on the 4th of July; 60 Fed. Rep. 961. See 7 Exch. 113; 4 Op. Atty. Gen. 11; LIBEL; LIBERTY OF THE PRESS.

NEXI. In Roman Law. Persons bound (*nexi*); that is, insolvents, who might be held in bondage by their creditors until their debts were discharged. Heinemann, Antiq. Rom. ad Inst. lib. 3, tit. 330; Calvinus; Mackeldey, Civ. Law § 486 a.

NEXT. Nearest or highest, not in the sense of propinquity alone, as, for example, three persons on three chairs, one in the midst, those on each side of the middle one are equally near, each "next" to the middle one; but it signifies also order, or succession, or relation as well as propinquity. 27 L. J. Ch. 654. See generally 3 Q. B. 738; 4 Johns. Ch. 26; 3 Cal. (N. Y.) 89.

NEXT FRIEND. One who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not *sui juris*. Where a person of unsound mind, not found so by inquisition, conveys his land by deed to another, the proper mode of proceeding in equity to have such deed cancelled, annulled, and made void is not by information exhibited by the attorney-general on the relation of others, but by a bill in the name of the incompetent person by a responsible next friend; 5 Del. Ch. 328, where the practice in such cases was elaborately discussed, both in argument and by Saubury, Ch., who permitted an information in the name of the attorney-general to be amended into a bill by next friend, and whose decision was affirmed on appeal, where the only question was the propriety of the amendment. It has been held in other states that such suit may be brought by next friend in behalf of a person not adjudged insane and having no guardian appointed; 11 Tex. Civ. App. 677; 72 Miss. 838; but in Ohio it was held that such action must be by guardian, not next friend; 41 N. E. Rep. 239; and in Iowa that it could not be done independently of statute; 96 Ia. 560. In such cases the court may supersede a next friend by a guardian *ad litem*, and in its discretion stay proceedings instituted by the former; 64 Fed. Rep. 831. See 2 Bish. Mar. Div. & Sep. 513, 514; PROchein AMI.

Where an infant is so young as to be incapable of making a selection of a person to represent him, the court will permit any person to institute suit in his behalf, exercising, however, discretion to prevent any abuse of that right; 134 U. S. 650.

NEXT OF KIN. This term is used to signify the relations of a party who has died intestate.

In general, no one comes within this term who is not included in the provisions of the statutes of distribution; 3 Atk. 422, 761; 1 Ves. Sen. 84; 28 How. Pr. 417. The phrase means relation by blood; 73 N. Y. 312. It has been held, on the other hand, that next of kin in a will means "nearest of kin"; 10 Cl. & F. 215; 63 N. C. 242; 47 Ill. App. 232. A wife cannot, in general, claim as next of kin of her husband, nor a husband as next of kin of his wife; 113 Mass. 430; 113 Id. 431; 4 Ired. Eq. 66; 14 Ves. 372; 44 Ill. 446; 106 Pa. 176. But see 34 Barb. 410; 28 Ohio 192; 84 Iowa 655. But when there are circumstances in a will which induce a belief of an intention to include them under this term, they will be so considered, though in the ordinary sense of the word they are not; Hovenden, Fr. 288, 289; 1 My. & K. 82; the same rule holds as to the interpretation of statutes; 7 Ohio Cir. Ct. Rep. 185; 51 N. W. Rep. (Ia.) 145; 25 Alb. L. J. 496. This phrase as used in the act of March 3, 1891 (French Spoliation claims), means next of kin living at the date of the act, to be determined according to the statutes of distribution of the respective states of the domicile of the original sufferers; 162 U. S. 439; 160 Pa. 391, reversing 150 Pa. 85; 20 D. C. 261; 49 Leg. Int. 147, a Maryland case.

In the construction of wills and settlements, a considerable conflict of opinions, the established rule of interpretation in England is that next of kin when found in ulterior limitations must be understood to mean nearest of kin without regard to the statute of distribution; 2 Jarm. Wills 108; 162 U. S. 464. This rule was followed in 144 Mass. 135; 63 N. C. 242, but it was not approved in 95 N. Y. 17; 57 N. H. 226.

Speaking generally, under our dual system of government who are next of kin is deter-

mined by the legislation of the various States to whose authority that subject is normally committed. It would seem to be clear that the absence of a definition in the Act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. But it is urged that as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common law significance and therefore as excluding all persons not included in the term under the common law, meaning of course the law of England as it existed at the time of the separation from the mother country. 240 U. S. 493.

See LEGACY; DESCENT AND DISTRIBUTION; KIN; KINDRED, RELATIONS.

NEXUM (Lat.). In Roman Law. The transfer of the ownership of a thing, or the transfer of a thing to a creditor as a security.

In one sense *nexum* includes *mancipium*; in another sense, *mancipium* and *nexum* are opposed, in the same way as sale and mortgage or pledge are opposed. The formal part of both transactions consisted in a transfer *per as et libram*. The person who became *nexus* by the effect of a *nexum* placed himself in a servile condition, not becoming a slave, his *ingenitas* being only in suspense, and was said *nexum intrare*. The phrases *nexi datio*, *nexi liberatio*, respectively expressed the contracting and the release from the obligation.

The Roman law as to the payment of borrowed money was very strict. A curious passage of Gellius (xx. 1) gives us the ancient mode of legal procedure in the case of debt, as fixed by the Twelve Tables. If the debtor admitted the debt, or had been condemned in the amount of the debt by a *judez*, he had thirty days allowed him for payment. At the expiration of this time he was liable to the *manus infectio*, and ultimately to be assigned over to the creditor (*addictus*) by the sentence of the *praetor*. The creditor was required to keep him for sixty days in chains, during which time he publicly exposed the debtor, on three *nundinae*, and proclaimed the amount of his debt. If no person released the prisoner by paying the debt, the creditor might sell him as a slave or put him to death. If there were several creditors, the latter of the law allowed them to cut the debtor in pieces and take their share of his body in proportion to their debt. Gellius says that there was no instance of a creditor ever having adopted this extreme mode of satisfying his debt. But the creditor might compel the debtor, who was *addictus*, as slave, and compel him to work out his debt; and the treatment was often very severe. In this passage Gellius does not speak of *nexi*, but only of *addicti*, which is sometimes alleged as evidence of the identity of *nexus* and *addictus*, but it proves no such identity. If a *nexus* is what he is here supposed to be, the laws of the Twelve Tables could not apply; for when a man became *nexus* with respect to one creditor, he could not become *nexus* to another; and if he became *nexus* to several at once, in this case the creditors must abide by their contract in taking a joint security. This law of the Twelve Tables only applied in the case of a debtor being assigned over by a judicial sentence to several creditors, and it provided for a settlement of their conflicting claims. The precise condition of a *nexus* has, however, been a subject of much discussion among scholars. See Smith, Dict. Rom. & Gr. Antiq.; MANCIPIUM.

NICARAGUA. A republic of Central America. The president is elected for four years. The Senate of eighteen members is elected for six years and the House of Representatives of twenty-one members is elected for four years.

By a treaty of January 15, 1898, it was provided that Honduras, Nicaragua, Costa Rica, Guatemala, and San Salvador should constitute one republic in respect of their relations with foreign countries, to be called the Greater Republic of Central America. The treaty was to be ratified by the several republics. It has been ratified by Honduras, Nicaragua, and San Salvador, which are now known as states of the Greater Republic.

NICHILLS or Nihilis. Debts due to the exchequer which the sheriff could not levy, and as to which he returned *nil*. These sums were transcribed once a year by the clerk of the nichills, and sent to the treasurer's remembrancer's office, whence process was issued to recover the "nichill" debts. Both of these offices were abolished in 1833; Manning's Exch. Pr. 321; Moz. & W.

NICKNAME. A short name; one *nicked* or cut off for the sake of brevity, without conveying any idea of opprobrium and frequently evincing the strongest affection or the most perfect familiarity. Busb. Eq. 74.

When a nickname is used, evidence will be received as to the true name. Such a name is but an alias for the true name. Anderson; 55 Vt. 313.

NIDERLING. A vile, base person or sluggish; chicken-hearted. Spelm. Sometimes Nidering and Nithing. Toml. Dic.

NIECE. The daughter of a brother or sister. Ambl. 514; 1 Jac. 207. See NEPHEW; LEGACY.

NIEFE. See NEIF.

NIENT COMPRISE (Law Fr. not included). An exception taken to a petition because the thing desired is not contained in that deed or proceeding whereon the petition is founded. Toml. Law Dict.

NIENT CULPABLE (Law Fr. not guilty). The name of a plea used to deny any charge of a criminal nature, or in an action for a tort.

NIENT DEDIRE (Law Fr. to say nothing). Words used to signify that judgment be rendered against a party because he does not deny the cause of action: *i. e.* by default.

When a fair and impartial trial cannot be had in the county where the venue is laid, the practice in the English courts is, on an affidavit of the circumstances, to change it, in transitory actions; or, in local actions, they will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in another county. 1 Tidd, Pr. 655.

NIENT LE FAIT (Law Fr.). In Pleading. The same as *non est factum*, a plea by which the defendant asserts that the deed declared upon is not his deed.

NIENT SEIST. In Old Pleading. Not seised. The general plea in a writ of annuity. Crabb, Eng. L. 424.

NIGHT. That space of time during which the sun is below the horizon of the earth, except that short space which precedes its rising and follows its setting, during which by its light the countenance of a man may be discerned. It is night when there is daylight, *crepusculum* or *diluculum*, enough left or begun to discern a man's face withal. 1 Hale, Pl. Cr. 550; 4 Bla. Com. 224; Bac. Abr. Burglary (D); 2 Russ. Cr. 32. See 47 Conn. 182; 78 Ill. 295.

The common-law rule has been modified by statute in some of the states, and by the stat. 9 Geo. IV. c. 69, the night, for purposes of poaching, was held to begin one hour after sunset, and end one hour before sunrise. By the stat. 24 & 25 Vict. c. 96, the night, during which a burglary may be committed, is deemed to commence at 9 P. M., and end at 6 A. M.; 4 Steph. Com. 105. But see 88 Wis. 163, where it was held that such an instruction is erroneous, as it is day when there is daylight enough by which to discern a person's face.

In the time of the English Saxons and even till Henry I., time was computed by nights: as fortnight for two weeks.

NIGHT WALKERS. Persons who sleep by day and walk by night; 5 Edw. III. c. 14; that is, persons of suspicious appearance and demeanor, who walk by night. In many of the states there are statutes against it; 1 Bish. Cr. L. § 501, n. See 45 N. H. 543.

Watchmen may undoubtedly arrest them; and it is said that private persons may also do so; 2 Hawk. Pl. Cr. 120. But see 3 Taunt. 14; Hamm. N. P. 135.

NIHIL CAPIAT PER BREVE (Lat. that he take nothing by his writ). In Practice. The form of judgment against the plaintiff in an action, either in bar or in abatement. When the plaintiff has commenced his proceedings by bill, the judgment is *nilhil capiat per billam*. Co. Litt. 363.

NIHIL DICIT (Lat. he says nothing). The name of the judgment rendered against a defendant who fails to put in a plea or answer to the plaintiff's declaration by the

day assigned. In such a case, judgment is given against the defendant of course, as he says nothing why it should not. See 15 Viner, Abr. 556; Dane, Abr. Index.

NIHIL EST (Lat. there is nothing). A form of return made by a sheriff where he has been unable to serve the writ. "Although *non est inventus* is the more frequent return in such case, yet it is by no means so full an answer to the command of the writ as is the return of *nilhil*. That amounts to an averment that the defendant has nothing in the bailiwick; no dwelling-house, no family, no residence; and no personal presence to enable the officer to make the service required by the act of assembly. It is, therefore, a full answer to the exigency of the writ." 33 Pa. 139.

NIHIL HABET (Lat. he has nothing). The name of a return made by a sheriff, marshal, or other proper officer, to a *scire facias* or other writ, when he has not been able to serve it on the defendant. 5 Whart. 367.

Two returns of *nilhil* in proceedings *in rem* are, in general, equivalent to a service; Yelv. 112; 1 Cow. 70; 1 Law Rep. N. C. 491; 4 Blackf. 188; 5 S. & R. 211; 24 Pa. 491; 71 *id.* 81.

NIHILS. See NICHILIS.

NIL DEBET (Lat. he owes nothing). In Pleading. The general issue in debt on simple contract. Gould, Pl. 284. It is in the following form: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." When, in debt on specialty, the deed is the only inducement to the action, the general issue is *nil debet*. Steph. Pl. 174, n.; 8 Johns. 83. In English practice, by rule 11, Trinity Term, 1853, the plea of *nil debet* was abolished; 2 Chitty, Pl. 275.

NIL HABUIT IN TENEMENTIS. (Lat.). In Pleading. A plea by which the defendant, who is sued by his landlord in debt for rent upon a lease, but by deed indented, denies his landlord's title to the premises, alleging that he has no interest in the tenements. 2 Lilly, Abr. 214; 12 Viner, Abr. 184.

NINETEENTH AMENDMENT. See CONSTITUTION OF THE UNITED STATES.

NISI PRIUS (Lat. unless before). In Practice. For the purpose of holding trials by jury. Important words in the writ (*venire*) directing the sheriff to summon jurors for the trial of causes depending in the superior courts of law in England, which have come to be adopted, both in England and the United States, to denote those courts or terms of court held for the trial of civil causes with the presence and aid of a jury.

The origin of the use of the term is to be traced to a period anterior to the institution of the commission of *nisi prius* in its more modern form. By the Magna Charta it was provided that the common pleas should be held in one place, and should not follow the person of the king; and by another clause, that assizes of novel disseisin and of mort d'ancestor, which were the two commonest forms of actions to recover land, should be held in the various counties before the justices in eyre. A practice obtained very early, therefore, in the trial of trifling causes, to continue the cause in the superior court from term to term, provided the justices in eyre did not sooner (*nisi prius iusticiarii*) come into the county where the cause of action arose, in which case they had jurisdiction when they so came. Bracton, 1. 3, c. 1, § 11. By the statute of *nisi prius*, 13 Edw. I. c. 30, enforced by 14 Edw. III. c. 16, justices of assize were empowered to try common issues in trespass and other suits, and return them, when tried, to the superior court, where judgment was given. The clause was then left out of the continuance and inserted in the venire, thus: "*Præcipimus tibi quod venire facias coram iusticiariis nostris apud Westm. in Octavis Sancti Michaelis, nisi talis et talis, tali die et loco, ad partes illas venerint, duodecim.*" etc. (we command you that you cause to come before our justices at Westminster, on the octaves of Saint Michael, unless such and such a one, on such a day and place, shall come to those parts, twelve, etc.). Under the provisions of 49 Edw. III. c. 11, the clause is omitted from the venire, and the jury is respited in the

court above, while the sheriff summons them to appear before the justices, upon a *habeas corpora juratorum*, or, in the king's bench, a *distingas*. See Sell. Pr. Intro. lxxv.; 1 Spence, Eq. Jur. 116; 3 Shars. Bla. Com. 332-354; 1 Reeve, Hist. Eng. Law 245, 282.

See, also, ASSIZE; COURT OF ASSIZE AND NISI PRIUS; JURY.

NISI PRIUS ROLL. In Practice. The transcript of a case made from the record of the superior court in which the action is commenced, for use in the nisi prius court.

It includes a history of all the proceedings in the case, including the declaration, plea, replication, rejoinder, issue, etc. It must be presented in proper manner to the nisi prius court. When a verdict has been obtained and entered on this record, it becomes the *postea*, and is returned to the superior court.

Under the Judicature Act of 1875, 1st Sched. Ord. xxxvi. r. 17, the party entering the action for trial is to deliver to the officer a copy of the pleadings for the use of the judge. Moz. & W.

NITHING. See NIDERLING.

NO AWARD. The name of a plea in an action on an award. 2 Ala. 520; 1 N. Chipm. 131; 3 Johns. 367.

NO BILL. Words frequently indorsed on a bill of indictment by the grand jury when they have not sufficient cause for finding a true bill. They are equivalent to *Not found*, or *Ignoramus*. 2 N. & M'C. 558.

NOBILE OFFICIUM. In Scotch Law. An equitable power of the court of sessions, by which it is able, to a certain extent, to give relief when none is possible at law. Stair, Inst. b. iv. tit. 3, § 1; Erskine, Inst. 1. 3. 22; Bell, Dict.

NOBILITY. An order of men, in several countries, to whom special privileges are granted. The constitution of the United States provides, Art. 1, § 10, that "no state shall grant any title of nobility," and § 9, that "no title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of congress, accept of any title of any kind whatever, from any king, prince, or foreign state." It is singular that there should not have been a general prohibition against any citizen whatever, whether in private or public life, accepting any foreign title of nobility. An amendment for this purpose has been recommended by congress, but it has not been ratified by a sufficient number of states to make it a part of the constitution, probably from a growing sense that it is unnecessary; Rawle, Const. 120; Story, Const. §§ 1350-52; Fed. No. 84.

NOCHELL. See NOTCHELL.

NOCTANTER (By night). An abolished writ which issued out of chancery and returned to the queen's bench for the prostration of inclosures, etc. It was repealed by 7 & 8 Geo. IV. c. 27.

NOCTES DE FIRMA. In Domesday book understood of entertainment of meat and drink for so many nights. Toml. Law Dict. See NIGHT.

NOCUMENTUM (Lat. harm, nuisance). In Old English Law. A thing done whereby another man is annoyed in his free lands or tenements. Also, the assize or writ lying for the same. Fitzh. N. B. 183; Old N. B. 108, 109. Manw. For. Laws, c. 17, divides *nocumentum* into *generale*, *commune*, *speciale*. Reg. Orig. 197, 199; Coke, Will Case. *Nocumentum* was also divided into *damnosum*, for which no action lay, it being done by an irresponsible agent, and *injuriousum et damnosum*, for which there were several remedies. Bracton 221; Fleta, lib. 4, c. 26, § 2.

NOISE. See NUISANCE; INJUNCTION.

NOL. PROS. See NOLLE PROSEQUI.

NOLENS VOLENS (Lat.). Whether

willing or unwilling.

NOLISSEMENT. In French Law. Affreightment. Ord. Mar. liv. 3, t. 1.

NOLLE (Lat.). To be unwilling; to will not to do a thing; to refuse to do a thing. See **NOLLE PROSEQUI**.

NOLLE PROSEQUI. In Practice. An entry made on the record, by which the prosecutor or plaintiff declares that he will proceed no further. See Tr. & H. Pr. 566.

A *nolle prosequi* may be entered either in a criminal or a civil case. In criminal cases, before a jury is impanelled to try an indictment, and also after conviction, the attorney-general has power to enter a *nolle prosequi* without the consent of the defendant; but after a jury is impanelled a *nolle prosequi* cannot be entered without the consent of the defendant; 17 Pick. 395; 12 Vt. 93; 3 Hawks 613; 7 Humphr. 152; 1 Bail. 151; 9 Ga. 306. See 102 Mass. 487; 49 N. H. 155. It is for the prosecuting officer to enter a *nol. pros.* in his discretion; 3 Hawks 613; but in some states leave must be obtained of the court; 1 Hill N. Y. 377; 1 Va. Cas. 139; 12 Vt. 93; 7 Smith, Pa. Laws 227.

It may be entered as to one of several defendants; 11 East 307.

The effect of a *nolle prosequi*, when obtained, is to put the defendant without day; but it does not operate as an acquittal; for he may be afterwards reindicted, and, it is said, even upon the same indictment fresh process may be awarded; 6 Mod. 261; Com. Dig. Indictment (K); 2 Mass. 172; 4 Cush. 235; 13 Ired. 256. See 3 Cox, C. C. 93; 7 Humphr. 159; 57 Ga. 478; 61 Mo. 173.

A *nolle prosequi* as to some of the counts in an indictment works no acquittal, but leaves the prosecution just as though such counts had never been inserted in the indictment; 152 U. S. 539.

In civil cases, a *nolle prosequi* is considered not to be of the nature of a *retrahit* or release, as was formerly supposed, but an agreement only not to proceed either against some of the defendants, or as to part of the suit. See 1 Wms. Saund. 207, note 2, and the authorities there cited; 1 Chitty, Pl. 546. A *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff; 3 Term 511; 1 Wils. 98.

In civil cases, a *nolle prosequi* may be entered as to one of several counts; 7 Wend. 301; or to one of several defendants; 1 Pet. 80; as in the case of a joint contract, where one of two defendants pleads infancy, the plaintiff may enter a *nolle prosequi* as to him and proceed against the other; 1 Pick. 500. See, generally, 1 Pet. 74; 2 Rawle 334; 1 Bibb 337; 3 Cow. 335, 374; 5 Gill & J. 489; 5 Wend. 224; 3 Watts 490.

NOLO CONTENDERE. I do not desire to contend. The name of a plea in an indictment or criminal case, upon which the person accused may be sentenced. English.

NOMEN (Lat.). In Civil Law. A name of a person or thing. In a stricter sense, the name which declared the *gens* or family: as, Porcius, Cornelius; the *cognomen* being the name which marked the individual: as Cato, Marcus; *agnomen* a name added to the cognomen for the purpose of description. The name of the person himself: e. g. *nomen curiis addere*. The name denoting the condition of a person or class: e. g. *nomen liberorum*, condition of children. Cause or reason (*pro causa aut ratione*): e. g. *nominis culpe*, by reason of fault. A mark or sign of anything, corporeal or incorporeal. *Nomen supremum*, i. e. God. Debt or obligation of debt. A debtor. See Calvinus, Lex.

In Old English Law. A name. The Christian name, e. g. John, as distinguished

from the family name; it is also called *pre-nomen*. Flota, lib. 4, c. 10, §§ 7, 9; Law Fr. & Lat. Dict.

In Scotch Law. *Nomen debiti*. Right to payment of a debt.

NOMEN COLLECTIVUM (Lat.). A word in the singular number which is to be understood in the plural in certain cases.

Misdemeanor, for example, is a word of this kind, and when in the singular may be taken as *nomen collectivum* and including several offences. 2 B. & Ad. 75. *Heir*, in the singular, sometimes includes all the heirs. *Felony* is not such a term.

NOMEN GENERALISSIMUM (Lat.). A most universal or comprehensive term: e. g. land. 2 Bla. Com. 19; 3 id. 172; Tayl. Law Gloss. So goods. 2 Will. Ex. 1014.

NOMINAL DAMAGES. In Practice. A trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.

Those awarded where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show; 5 Wash. 807.

Wherever any act injures another's right, and would be evidence in future in favor of a wrong-doer, an action may be sustained for an invasion of the right without proof of any specific injury; 1 Wms. Saund. 346 a; 28 N. H. 438; 13 Conn. 269; and wherever the breach of an agreement or the invasion of a right is established, the law infers some damage, and if none is shown will award a trifling sum: as, a penny, one cent, six and a quarter cents, etc.; 14 Ill. 301; 4 Denio 554; Sedgw. Dam. 47; Field, Damages § 860.

Thus, such damages may be awarded in actions for flowing lands; 2 Stor. 661; 1 Rawle 27; 12 Me. 183; 28 N. H. 438; injuries to commons; 2 East 154; violation of trade-marks; 4 B. & Ad. 410; and see 7 Cush. 322; 2 R. I. 566; infringement of patents; 1 Gall. 429, 483; 49 Fed. Rep. 747; diversion of water-courses; 5 B. & Ad. 1; 17 Conn. 288; 2 Ill. 544; 6 Ind. 39; 32 N. H. 90; but see 21 Ala. n. s. 309; 6 Ohio St. 187; trespass to lands; 24 Wend. 188; 2 Tex. 206; see 4 Jones, N. C. 139; neglect of official duties, in some cases; 5 Metc. Mass. 517; 1 Denio 548; 27 Vt. 563; 12 N. H. 341; breach of contracts; 2 Hill N. Y. 644; 6 Md. 274; 129 N. Y. 148; 61 Conn. 56; 62 Fed. Rep. 136; 42 Mo. App. 659; when substantial damages have not been sustained; 44 Ill. App. 358; and many other cases where the effect of the suit will be to determine a right; 12 Ad. & E. 488; 13 Conn. 361; 20 Mo. 603; 28 Me. 505; 19 Miss. 98; 2 La. Ann. 907; 39 Ga. 815; 51 Mo. App. 601; 8 Wash. 307; 45 La. Ann. 1401. And see, in explanation and limitation; 10 B. & C. 145; 1 Q. B. 636; 22 Vt. 251; 1 Dutch. 255; 14 B. Monr. 830; 5 Ind. 250; 6 Rich. 75.

The title or right is as firmly established as though the damages were substantial; Sedgw. Dam. 47. As to its effect upon costs, see *id.* 55; 2 Metc. Mass. 96.

NOMINAL PARTNER. One who allows his name to appear as a member of a firm, wherein he has no real interest. See PARTNER.

NOMINAL PLAINTIFF. One who is named as the plaintiff in an action, but who has no interest in it, having assigned the cause or right of action to another, for whose use it is brought.

In general, he cannot interfere with the rights of his assignee, nor will he be permitted to discontinue the action, or to meddle with it; 1 Wheat. 233; 7 Cra. 152; 1 Johns. Cas. 411; 1 Johns. 592, n.; Bisp. Eq. § 172; Greenl. Ev. § 173.

NOMINATE. See APPOINT.

NOMINATE CONTRACT. A contract distinguished by a particular name, the use of which name determines the

rights of all the parties to the contract: as, purchase and sale, hiring, partnership, loan for use, deposit and the like. The law thus supersedes the necessity for special stipulations, and creates an obligation in the one party to perform, and a right in the other to demand, whatever is necessary to the explication of that contract. In Roman law there were twelve nominate contracts, with a particular action for each. Bell, Dict. *Nominate and Innominate*; Mackeldey, Civ. Law §§ 393, 408; Dig. 2. 14. 7. 1.

NOMINATION (from Lat. *nominare*, to name). An appointment: as, I nominate A B executor of this my last will.

A proposal or naming. The word *nominate* is used in this sense in the constitution of the United States, art. 2, s. 2, § 2: the president "shall nominate, and by and with the consent of the senate shall appoint, ambassadors," etc.

In an agreement for reference, a provision that each party shall nominate a referee means not only naming him, but also the communication of the nomination to the other party. 17 L. J. Q. B. 2; 11 Q. B. 7.

As to nominations under modern ballot laws, see ELECTION.

NOMINE POENÆ (Lat. in the nature of a penalty). In Civil Law. A condition annexed to heirship by the will of the deceased person. Domat, Civ. Law; Hallifax, Anal.

At Common Law. A penalty fixed by covenant in a lease for non-performance of its conditions. 2 Lilly, Abr. 221.

It is usually a gross sum of money, though it may be anything else, appointed to be paid by the tenant to the reversioner, if the duties are in arrear, in addition to the duties themselves. Hamm. N. P. 411.

To entitle himself to the *nomine poenæ*, the landlord must make a demand of the rent on the very day, as in the case of a re-entry; 1 Saund. 287 b, note; 7 Co. 28 b; Co. Litt. 202 a; 7 Term 117. A distress cannot be taken for a *nomine poenæ* unless a special power to distrain be annexed to it by deed; 3 Bouvier, Inst. n. 2451. See Bac. Abr. Rent (K 4); Woodf. Landl. & T. 253; Dane, Abr. Index.

NOMINEE. One who has been named or proposed for an office.

NOMOCANON. A body of canon law with the addition of imperial laws bearing upon ecclesiastical matters; also a collection of the canons of the ancient church and fathers without regard to the imperial constitutions.

The first nomocanon was made by Johannes Scholasticus in 554. Photius, patriarch of Constantinople, in 883, compiled another nomocanon, or collation of the civil laws with the canons; this is the most celebrated. Balsamon wrote a commentary upon it in 1180. R. & L. Diet.; Ency. Lond.

NON (Lat.). Not. The common particle of negation.

NON-ABILITY. Inability; an exception against a person. Fitz. Nat. Brev. 35, 65.

NON ACCEPTAVIT (Lat. he did not accept). In Pleading. The name of a plea to an action of *assumpsit* brought against the drawee of a bill of exchange upon a supposed acceptance by him. See 4 M. & G. 561.

NON-ACCESS. The non-existence of sexual intercourse between husband and wife is generally expressed by the words non-access of the husband to the wife; which expressions, in a case of bastardy, are understood to mean the same thing. 2 Stark, Ev. 218, n. See ACCESS.

NON-AGE. By this term is understood that period of life from birth till the arrival at twenty-one years. In another sense it means under the proper age to be of ability to do a particular thing: as, when non-age is applied to one under the age of fourteen, who is unable to marry. See AGE.

NON-APPARENT OR NON-CONTINUOUS EASEMENTS. Discontinuous easements. Such that have no means specially constructed or appropriated to their enjoyment, and that are enjoyed at intervals, leaving between these intervals no visible sign of their existence; such as a right of way, or right of drawing a seine upon the shore.

One to the enjoyment of which the act of the party is essential, and of this class is a right of way. (L. R. 1 Q. B. 156.) The continuous and non-continuous easement may both be granted and annexed to the same estate, and upon the unity of title they would both cease to exist as easements. Upon the severance of the estate the continuous would revert and pass by the conveyance, but the non-continuous would not revert or pass but by a new creation. This distinction, and this result, is recognized by all the authorities on the subject. (9 R. I. 564.) A non-continuous easement is one whose enjoyment depends upon an actual interference of man at each time of its enjoyment; as the personal action of walking or driving over a way. (4 B. & S. 258.) 1 Thomp. Real Property 468, 469. See CONTINUOUS EASEMENT; EASEMENT.

NON ASSUMPSIT (Lat. he did not undertake). In Pleading. The general issue in an action of assumpsit. Andr. Steph. Pl. 231.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise, in manner and form as the said A B hath above complained. And of this he puts himself upon the country."

Under this plea almost every matter may be given in evidence, on the ground, it is said, that as the action is founded on the contract, and the injury is the non-performance of it, evidence which disaffirms the obligation of the contract, at the time when the action was commenced, goes to the gist of the action. Salk. 279; 2 Stra. 738; 1 B. & P. 481. See 12 Vin. Abr. 189; Com. Dig. Pleader (2 G 1).

NON ASSUMPSIT INFRA SEX ANNOS (Lat. he has not undertaken within six years). In Pleading. The plea by which, when pleadings were in Latin, the defendant alleged that the obligation was not undertaken and the right of action had not accrued within six years, the period of limitation of the right to bring suit. See LIMITATION. It is still in use.

NON BIS IN IDEM. In Civil Law. A phrase which signifies that *no one shall be twice tried for the same offence*; that is, that when a party accused has been once tried by a tribunal in the last resort, and either convicted or acquitted, he shall not again be tried. Code 9. 2. 9. 11; Merlin, Répér. See JEOPARDY.

NON CEPIT MODO ET FORMA (Lat. he did not take in manner and form). In Pleading. The plea which raises the general issue in an action of replevin; or rather which involves the principal part of the declaration, for, properly speaking, there is no general issue in replevin; Morris, Repl. 142.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not take the said cattle (or, goods and chattels, according to the subject of the action) in the said declaration mentioned, or any of them, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

It denies the taking the things and having them in the place specified in the declaration, both of which are material in this action. Steph. Pl., Andr. ed. 239, n.; 1 Chitty, Pl. 490.

NON-CLAIM. An omission or neglect by one entitled to make a demand within the time limited by law: as, when a con-

tinual claim ought to be made, a neglect to make such claim within a year and a day.

NON-COMMISSIONED OFFICER. A subordinate officer who holds his rank not by commission from the executive authority of a state or nation, but by appointment by a superior officer.

NON COMPOS MENTIS (Lat. not of sound mind, memory, or understanding). A generic term, including all the species of madness, whether it arise from idiocy, sickness, lunacy, or drunkenness. Co. Litt. 247; 4 Co. 124; 4 Comyns, Dig. 613; 5 id. 186; Shelf. Lun. 1. See INSANITY, and titles there referred to.

NON CONCESSIT (Lat. he did not grant). In English Law. The name of a plea by which the defendant denies that the crown granted to the plaintiff by letters-patent the rights which he claims as a concession from the king: as, for example, when a plaintiff sues another for the infringement of his patent right, the defendant may deny that the crown has granted him such a right. It does not deny the grant of a patent, but of the patent as described in the plaintiff's declaration; 3 Burr. 1544; 6 Co. 15 b. Also a plea resorted to by a stranger to a deed, because estoppels do not hold with respect to strangers. It brought into issue the title of the grantor as well as the operation of the deed; Whart. Dict.

NON-CONFORMISTS. In English Law. A name given to certain dissenters from the rites and ceremonies of the church of England.

NON CONSTAT (Lat. it does not appear. It is not certain). Words frequently used, particularly in argument, to express dissatisfaction with the conclusions of the other party: as, it was moved in arrest of judgment that the declaration was not good, because *non constat* whether A B was seventeen years of age when the action was commenced. Swinb. pt. 4, § 22, p. 331.

NON CULPABILIS (Lat.). In Pleading. Not guilty. It is usually abbreviated *non cul.*; 16 Vin. Abr. 1.

NON DAMNIFICATUS (Lat. not injured). In Pleading. A plea in the nature of a plea of performance to an action of debt on a bond of indemnity, by which the defendant asserts that the plaintiff has received no damage. 1 B. & P. 640, n. a; 1 Saund. 116, n. 1; 2 id. 81; 14 Johns. 177; 10 Wheat. 396, 405; 3 Halst. 1.

NON DECIMANDO. See DE NON DECIMANDO.

NON DEDIT. In Pleading. The general issue in formedon. See NE DONA PAS.

NON DELIVERY. Neglect, failure, or refusal to deliver goods on the part of a carrier, vendor, etc. See COMMON CARRIER.

NON DEMISIT (Lat. he did not demise). In Pleading. A plea proper to be pleaded to an action of debt for rent, when the plaintiff declares on a parol lease. Gilb. Debt 436; Bull. N. P. 177; 1 Chitty, Pl. 477. A plea in bar, in replevin, to an avowry for arrears of rent, that the avowant did not demise. Morris, Repl. 179. It cannot be pleaded when the demise is stated to have been by indenture; 12 Vin. Abr. 178; Com. Dig. Pleader (2 W 48).

NON DETINET (Lat. he does not detain). In Pleading. The general issue in an action of detinue. Its form is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not detain the said goods and chattels (or 'deeds and writings,' according to the subject of the action) in the said declaration specified; or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." Andr. Steph. Pl. 231.

It puts in issue the detainer only: a justi-

fication must be pleaded specially; 8 Dowl. Pract. Cas. 347. It is a proper plea to an action of debt on a simple contract in the case of executors and administrators. 6 East 549; Bac. Abr. Pleas (1); 1 Chitty, Pl. 476. See DETINET.

NON EST FACTUM (Lat. is not his deed). In Pleading. A plea to an action of debt on a bond or other specialty.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that the said supposed writing obligatory (or 'indenture,' or 'articles of agreement,' according to the subject of the action) is not his deed. And of this he puts himself upon the country." 6 Rand. 86; 1 Litt. 158.

It is a proper plea when the deed is the foundation of the action; 1 Wms. Saund. 38, note 3; 2 id. 187 a, note 2; 2 Ld. Raym. 1500; 11 Johns. 476; and cannot be proved as declared on; 4 East 585; on account of non-execution; 6 Term 317; or variance in the body of the instrument; 1 Campb. 70; 4 Maule & S. 470; 2 D. & R. 662. Under this plea the plaintiff may show that the deed was void *ab initio*; 2 Campb. 272; 12 Johns. 337; 10 S. & R. 25; see 2 Salk. 275; 6 Cra. 219; or became so after making and before suit; 5 Co. 119 b; 11 id. 27. See 1 Chitty, Pl. 417, n.

In covenant, the defendant may, under this plea, avail himself of a mis-statement or omission of a qualifying covenant; 2 Stra. 1146; 9 East 183; 1 Campb. 70; or omission of a condition precedent; 11 East 639; 7 D. & R. 249. See Jud. Act, 1875, Ord. xix. rr. 20, 23.

NON EST INVENTUS (Lat. he is not found). In Practice. The sheriff's return to a writ requiring him to arrest the person of the defendant, which signifies that he is *not to be found* within his jurisdiction. The return is usually abbreviated *N. E. I.* Chitty, Pr. The English form "not found" is also commonly used. See FOUND.

NON-FEASANCE. The non-performance of some act which ought to be performed.

When a legislative act requires a person to do a thing, its non-feasance will subject the party to punishment: as, if a statute require the supervisors of the highways to repair such highways, the neglect to repair them may be punished. See 1 Russ. Cr. 48; MANDATUM.

NON FECIT (Lat. he did not make it). The name of a plea, for example, in an action of assumpsit on a promissory note. 3 M. & G. 446. Rarely used.

NON FECIT VASTUM CONTRA PROHIBITIONEM (Lat. he did not commit waste against the prohibition). In Pleading. The name of a plea to an action founded on a writ of estrepement, that the defendant did not commit waste contrary to the prohibition. 2 Bla. Com. 226, 227.

NON IMPEDIVIT (Lat. he did not impede). In Pleading. The plea of the general issue in *quare impedit*. 3 Bla. Com. 305; 3 Woodd. Lect. 36. In law French, *ne disturba pas*.

NON IMPLACITANDO ALIQUEM DE LIBERO TENEMENTO SINE BREVI. A writ to prohibit bailiffs, etc., from levying a distress upon any man without the king's writ touching his freehold. Cowel.

NON INFREGIT CONVENTIONEM (Lat. he has not broken the covenant). In Pleading. A plea in an action of covenant. This plea is not a general issue: it merely denies that the defendant has broken the covenants on which he is sued. It being in the negative, it cannot be used where the breach is also in the negative. Bacon, Abr. Covenant (1); 3 Lev. 19; 2 Taunt. 278; 1 Aik. 150; 4 Dall. 436; 7 Cow. 71.

NON-INTERCOURSE. The refusal of one state or nation to have commercial

intercourse with another. See EMBARGO.

NON-INTERCOURSE ACT. An act passed by congress in February, 1809, forbidding intercourse with certain nations. It remained in force till March 15, 1809, so far as related to all countries but France and Great Britain, and as to them, after the end of the next session of congress. On June 12, 1798, intercourse with France and her dependencies was forbidden by an act of congress. See EMBARGO; WAR.

NON INTROMITTENDO QUANDO BREVE DE PRÆCIPUI IN CAPITULO SUBDOLE IMPETRATUR. A writ which used to be directed to the justices of the bench or in eyre, commanding them not to give one who had (under cover of entitling the king to land, etc., as holding of him in *capite*) deceitfully obtained the writ, the benefit of the same, but to put him to his writ of right if he thought fit to use it. Cowel.

NON-ISSUABLE PLEAS. Those upon which an issue would not determine the action upon the merits, as a plea in abatement.

NON-JOINDER. In Pleading. The omission of one or more persons who should have been made parties to a suit at law or in equity, as plaintiffs or defendants.

In Equity. It must be taken advantage of before the final hearing; 1 Ala. N. S. 580; 24 Conn. 586; 1 Des. 315; 1 Stockt. Ch. 401; 10 Paige, Ch. 445; 2 McLean, 376; 47 Fed. Rep. 583; except in very strong cases; 1 Pet. 299; as, where a party indispensable to rendering a decree appears to the court to be omitted; 14 Vt. 178; 19 Ala. N. S. 213; 5 Ill. 424; 24 Me. 119. See 64 N. H. 2. The objection may be taken by demurrer, if the defect appear on the face of the bill; 5 Ill. 424; 1 Des. 315; 8 Ga. 506; 4 Rand. 451; or by plea, if it do not appear; 9 Mo. 605. The objection may be avoided by waiver of rights as to the party omitted; 4 Wisc. 54; or a supplemental bill filed, in some cases; 4 Johns. Ch. 605. It will not cause dismissal of the bill in the first instance; 3 Cra. 189; 6 Conn. 421; 17 Ala. 270; 1 T. B. Monr. 189; 1 Dev. Eq. 354; 1 Hill S. C. 53; but will, if it continues after objection made; 17 Ala. 270; 5 Mas. 561; without prejudice; 5 Mas. 561; 1 J. J. Marsh. 76; 4 B. Monr. 594; 7 Paige, Ch. 451. The cause is ordered to stand over in the first instance; 20 Me. 59; 9 Cow. 320; 2 Edw. Ch. 242. See JOINDER; PARTIES; MISJOINDER.

In Law. See ABATEMENT; PARTIES.

In England, the Judicature Act of 1873, Ord. xvi., has made very full provisions as to the joinder of parties, and the consequences of misjoinder and non-joinder. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative.

NON JURIDICUS. See DIES NON.

NON JURORS. In English Law. Persons who refuse to take the oaths, required by law, to support the government. See 1 Dall. 170.

NON LIQUET (Lat. it is not clear). In Civil Law. Words by which the judges (*judices*), in a Roman trial, were accustomed to free themselves from the necessity of deciding a cause when the rights of the parties were doubtful. On the tablets which were given to the judges wherewith to indicate their judgment, was written N. L.

NON MERCHANDIZANDO VIC-TUALIA. An ancient writ directed to justices of assize commanding them to inquire whether the officers of certain towns sold victuals in gross or by retail during the exercise of their office, contrary to a statute then in force, and to punish them accordingly. Cowel; Reg. Orig. 184.

NON MOLESTANDO. A writ which lay for him who was molested, contrary to the king's protection granted him. Cowel.

NON OBSTANTE. In English Law. These words, which literally signify notwithstanding, were used to express the act

of the English king by which he dispensed with the law, that is, authorized its violation.

He would by his license or dispensation make an offence punishable which was *malum in se*; but in certain matters which were *malum prohibitum* he could, to certain persons and on special occasions, grant a *non obstante*. Vaugh. 380; Lev. 217; Sid. 6, 7; 12 Co. 18; Bacon, Abr. *Prærogative* (D 7); 2 Reeve, Eng. C. L. 8, p. 83. But the doctrine of *non obstante*, which set the prerogative above the laws, was demolished by the bill of rights at the revolution; 1 W. & M. Stat. 2, c. 2; 1 Bla. Com. 342; 1 Steph. Com., 11th ed. 441.

NON OBSTANTE VEREDICTO. Notwithstanding the verdict. See JUDGMENT.

Judgment *non obstante veredicto*, strictly and technically, is a judgment given for the plaintiff, on his motion, where the defendant had a verdict, but it appears from the record that, either from some matter growing out of the pleading, or because the fact found by the jury is immaterial, the defendant is not, in law, entitled to the judgment. In such cases where the common-law practice prevails, a writ of inquiry is awarded to assess the damages; 2 Tidd, Pr. 920. "The right method . . . is not to state the entry of judgment upon the verdict by rule, but to enter the verdict upon record, and then the judgment for the plaintiff *non obstante veredicto*." *Id.* For a statement of the nature and effect of such a judgment at common law, see JUDGMENT, sub-title *Classification*, 1, (3). As appears from the definition there given, this was a judgment for the plaintiff, and in many of the states, it has been uniformly held that judgment *non obstante veredicto* can only be given for a plaintiff; the remedy for a defendant is to have the judgment arrested; 2 Ohio St. 287; 2 Hill 86; 6 Rich. 208. A motion by a defendant for a judgment *non obstante veredicto* is never allowable; 10 Ia. 402; 15 N. H. 546; 4 Wend. 486; 59 Wis. 6; 65 Vt. 281; 17 R. I. 208, 544; Steph. Pl. [98]; 1 Freeman, Judg. § 7; 1 Black, Judg. § 16; unless the well-settled common-law rule has been relaxed by statute or decisions; 58 Fed. Rep. 144; 19 U. S. App. 24.

A motion for such judgment must be founded on the record alone; 8 Vt. 309; 83 *id.* 92; 2 Wend. 624; it cannot be rendered after a judgment upon a verdict has been entered; 14 Miss. 218; 12 S. W. Rep. (Ky.) 628. It is allowed where a verdict has been found for the defendant on an insufficient plea in avoidance; 1 G. Green 134; 5 Pick. 187; that is, where the plea confesses the action and entirely fails to avoid it; 14 Ind. 115; 7 Blackf. 384; or if found true, is neither bar nor answer; 14 Ohio 204; or if an immaterial issue tendered by the plaintiff was found for the defendant and a replender was unnecessary to effect justice; 7 Mo. 479; or if on motion for a new trial it is clear that in no event could damages be recovered on the cause of action; 5 R. I. 419.

It has been said that in Pennsylvania, where a point of law is reserved at the trial, the jury is instructed to find for the plaintiff, whereupon the defendant moves for judgment on the point reserved *non obstante veredicto*. See 2 Brewster, Prac. 1219. And, in some other states, the technical common-law rule that this form of judgment should not be given for the defendant, has not been observed; though it would seem that this change of practice is due, in some degree, to the confusion of this subject with judgment on special verdicts and points reserved, and to the fact that judgments are frequently entered under the name *non obstante veredicto*, which properly and technically would not be such if the common-law distinctions were carefully observed. Such judgment for defendant has been entered in an action for damages where a plea of contributory negligence was not controverted; 35 S. W. Rep. (Ky.) 924; or where plaintiff's evidence is a mere *scintilla*; 155 Pa.

156; or where special findings in plaintiff's favor were set aside as against undisputed evidence, and defendant moved for judgment on the remaining findings and undisputed evidence; 91 Wis. 447. But such motion by defendant will not be granted where the defence is a general denial; 115 N. C. 402; or where the pleadings and evidence raise questions of fact proper for a jury; 67 N. W. Rep. (Wis.) 780; or where the evidence supports a verdict for plaintiff, but the undisputed facts show the transaction to be within the statute of frauds; 25 S. W. Rep. (Tex.) 736. A reservation of "the question whether there is any evidence in this case, to be submitted to the jury, on which plaintiff is entitled to recover," does not present a "point reserved" to authorize judgment for defendant *non obstante veredicto*; 170 Pa. 346; 164 *id.* 73; nor can such judgment be rendered for plaintiff where verdict is for defendant, subject to the question reserved, whether, notwithstanding the findings, plaintiff was not entitled to recover; 151 *id.* 415.

A motion for such judgment is properly denied, after verdict upon an issue distinctly raised by the answer and submitted to the jury without objection; 112 N. C. 402; or where the evidence is sufficient to support the verdict; 15 Ind. App. 188; or where there is a general finding for the party against whom the motion is made; 33 N. E. Rep. (Ind.) 1060; or where, after reserving a point on certain facts, other evidence is submitted to the jury, and it is uncertain on which evidence the jury found; 110 Pa. 1.

It is not sufficient that the verdict was contrary to the weight of the evidence; 42 Neb. 712; and the judgment can be entered only when the moving party is entitled to it upon the pleadings of the party who had the verdict; 43 Neb. 132.

In Ohio, judgment against a general verdict cannot be entered unless all the facts necessary to support such judgment are expressly found; 66 Fed. Rep. 471. In Indiana, a judgment *non obstante* will not be granted unless there is an irreconcilable conflict between the general verdict and the answer to the interrogatories; 5 Ind. App. 204; 6 *id.* 52, 340, 646; 132 Ind. 278. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly; 61 Kan. 781. In Oregon, there is a statutory provision authorizing judgment for the other party where the verdict does not correspond with pleadings, and it is held that that right is not impaired by failing to move for judgment before verdict; 21 Ore. 495. In Minnesota, such judgment can be given only to a party who, after the testimony, moved to direct a verdict in his favor; 64 Minn. 136.

In many states there are statutes on the subject which must be considered in connection with the decisions.

NON OMITTAS (Lat. more fully, *non omittas propter libertatem*, do not omit on account of the liberty or franchise).

In Practice. A writ which lies when the sheriff returns on a writ to him directed, that he hath sent to the bailiff of such a franchise, which hath return of writs, and he hath not served the writ; then the plaintiff shall have this writ directed to the sheriff, that he omit not on account of any franchise, but himself enter into the franchise and execute the king's writ.

This clause is now usually inserted in all processes addressed to sheriffs. Wharton, Lex., 9th ed.; 2 Will. IV. c. 39; 3 Chitty, Stat. 494; 3 Chittv. Pr. 190, 310.

NON-PLEVIN. In Old English Law. A neglect to replevin land taken into the hands of the king upon default, within fifteen days, by which seisin was lost, as by default. Heugh. de Magn. Ch. c. 8. By 9 Edw. III. c. 2, no man shall lose his land by *non-plevin*.

NON PONENDIS IN ASSISSIS ET JURATIS. A writ which lay for persons

who are summoned to attend the assizes or to sit on a jury and wish to be freed and discharged from the same. Reg. Orig. 100.

NON PROCEDENDO AD ASSISAM REGE INCONSULTO. A writ to put a stop to the trial of a cause appertaining unto one who is in the king's service, etc., until the king's pleasure respecting the same be known. Cowel.

NON PROS. An abbreviation of *non prosequitur*, he does not pursue. Where the plaintiff, at any stage of the proceedings, fails to prosecute his action, or any part of it, in due time, the defendant enters *non prosequitur*, and signs final judgment, and obtains costs against the plaintiff, who is said to be *non pros'd.* 2 Archb. Pr., Chitty ed. 1409; 3 Bla. Com. 296; 3 Chitty, Pr. 10; Caines, Pr. 102. The name *non pros.* is applied to the judgment so rendered against the plaintiff; 1 Sell. Pr.; Steph. Pl. 185.

In modern English practice under the Jud. Act, 1875, a plaintiff, failing to deliver a statement of his claim in due time, may have his action dismissed for want of prosecution. And the same course may be taken with a plaintiff who fails to comply with an order to answer interrogatories; besides that the party so making default renders himself liable to "attachment." If the plaintiff fail in due time to give "notice of trial," the defendant may do so for him; Moz. & W.

NON-RESIDENCE. In Ecclesiastical Law. The absence of spiritual persons from their benefices.

NON-RESIDENT. Not residing in the jurisdiction. Service of process on non-resident defendants is void, excepting cases which proceed *in rem*, such as proceedings in admiralty or by foreign attachment, and the like, or where the property in litigation is within the jurisdiction of the court.

One does not necessarily become a non-resident by absconding or absenting himself from his place of abode; 52 Mo. App. 291; nor does a mere casual or temporary absence on business or pleasure render one a non-resident, even if he may not have a house of usual abode in the state; 4 Barb. 504; 15 Abb. Pr. 221; if there be no intent to change his residence; 54 N. W. Rep. (Ia.) 225; 59 N. W. Rep. (Minn.) 199. But where a man has a settled abode, for the time being, in another state for the purpose of business or pleasure, he is a non-resident; 82 Cal. 631; and it has been held that one who departs from the state with his family and remains absent for about a year is a non-resident, though he has not acquired a residence elsewhere, and though he intended to return in a few months; 69 Hun 308. See HOME; DOMICIL; RESIDENCE; PROCESS; SERVICE.

NON RESIDENTIA PRO CLERICUS REGIS. A writ addressed to a bishop charging him not to molest a clerk employed in the king's service, by reason of his non-residence. Cowel; Reg. Orig. 58.

NON SCRIPTUM. See *JUS SCRIPTUM*.

NON SOLVENDO PECUNIAM AD QUAM CLERICUS MULCTATUR PRO NON RESIDENTIA. A writ prohibiting an ordinary from taking a pecuniary mulct imposed upon a clerk of the king's for non-residence. Cowel.

NON SUBMISSIT (Lat.). The name of a plea to an action of debt on a bond to perform an award, by which the defendant pleads that he did not submit. Bacon, Abr. Arbitration, etc. (G).

NON SUM INFORMATUS (Lat.). In Pleading. I am not informed. See JUDGMENT.

NON TENENT INSIMUL (Lat. they do not hold together). In Pleading. A plea to an action in partition, by which the defendant denies that he holds the property which is the subject of the suit,

together with the complainant or plaintiff.

NON TENUIT (Lat. he did not hold). In Pleading. The name of a plea in bar in replevin, when the defendant has avowed for rent-arrear, by which the plaintiff avows that he did not hold in manner and form as the avowry alleges. Rosc. Real Act. 628.

NON-TENURE. In Pleading. A plea in a real action, by which the defendant asserted that he did not hold the land, or at least some part of it, as mentioned in the plaintiff's declaration; 1 Mod. 250; in which case the writ abates as to the part with reference to which the plea is sustained. 8 Cra. 242. It may be pleaded with or without a disclaimer. It was a dilatory plea, though not strictly in abatement; 2 Saund. 44, n. 4; Dy. 210; Booth, Real Act. 179; 3 Mass. 312; 11 id. 216; but might be pleaded as to part along with a plea in bar as to the rest; 1 Lutw. 716; Rast. Ent. 231 a, b; and was subsequently considered as a plea in bar; 14 Mass. 239; 1 Me. 54; 2 N. H. 10; Bac. Abr. Pleas (I 9).

NON-TERM. The vacation between two terms of a court.

NON-TERRITORIAL PROPERTY. See *TERRITORIAL PROPERTY*.

NON-TRADING PARTNERSHIP. A partnership organized for the purpose of carrying on the business of sawing lumber pickets and lath is non-trading in character; 145 U. S. 512, reversing 30 Fed. Rep. 413. See *PARTNERSHIP*.

A non-commercial firm, the members of which can not be held, as matter of law, and by reason of the nature of the partnership business, to have authority to execute negotiable instruments in the name of the firm. 145 U. S. 517.

The distinction between trading and non-trading partnerships is fully indicated, in a general way, by the names alone. The former is commercial, the object of which is buying and selling. The latter embraces those partnerships which are not embraced under the former. To this extent the distinction is simple; but when applied to individual cases it is often exceedingly hard to classify the relation. As a rule, the question is immaterial as to which class the partnership belongs; but one exception often makes it very important, this exception being, that in a trading partnership there is a presumption of mutual and general agency, while the rule does not apply in non-trading partnerships. "In a commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within the scope of its business; and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions. But when we pass to non-trading partnerships the doctrine of general agency does not apply, and there is no presumption of authority to support the act of one partner. Hence, in order to subject the firm upon a bill or note executed by the partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had been invested by his copartners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it." (53 Conn. 53.) 1 Rowley, Partnership, 150-152.

NON-USER. The neglect to make use of a thing.

A right which may be acquired by use may be lost by non-user; and an absolute discontinuance of the use for twenty years affords presumption of the extinguishment of the right in favor of some other adverse right; 5 Whart. 584; 23 Pick. 141; but non-user of the franchise of a corporation is held insufficient to constitute a dissolution of the same without a judicial adjudication thereof; 34 S. W. Rep. (Tenn.) 209. See *DISSOLUTION; FORFEITURE*. A right of way,

whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is an intentional abandonment of the former way; 121 Mass. 8. See *ABANDONMENT; EASEMENT*.

Every public officer is required to use his office for the public good: a non-user of a public office is, therefore, a sufficient cause of forfeiture; 2 Bla. Com. 153; 9 Co. 50. Non-user for a great length of time will have the effect of repealing an old law. But it must be a very strong case which will have that effect; 13 S. & R. 452.

NONENUMERATED DAY. See

NONENUMERATED MOTIONS.

NONENUMERATED MOTIONS.

In New York, motions are divided into two classes, enumerated and nonenumerated. In 1 Cai. (N. Y.) 22 it was held that on a non-enumerated motion for irregularity, the merits could not be entered into. The court said: "The application must be for irregularity only, to bring it on as a nonenumerated motion. If merits are united, it becomes enumerated." 21 A. & E. Encyc., 2nd ed., 545. A motion to set aside a verdict for irregular conduct by the jury has been held to be a nonenumerated motion. *Id.*, 2 Cai. (N. Y.) 381. A motion for a peremptory mandamus, on the coming in of a return to an alternative mandamus, is a nonenumerated motion, if the relator has not formally demurred. *Id.*, 6 Wend. (N. Y.) 559.

Notice of a nonenumerated motion, may be for an enumerated day, if accompanied with an excuse for not being given the first day. 2 Cai. (N. Y.) 259.

NONSENSE. That which in a written agreement or will is unintelligible.

It is a rule of law that an instrument shall be so construed that the whole, if possible, shall stand. When a matter is written grammatically right, but it is unintelligible and the whole makes nonsense, some words cannot be rejected to make sense of the rest; 1 Salk. 324; but when matter is nonsense by being contrary and repugnant to some precedent sensible matter, such repugnant matter is rejected; 14 Viner, Abr. 142; 15 id. 560. The maxim of the civil law on this subject agrees with this rule: *Quæ in testamento ita sunt scripta, ut intelligi non possent; perinde sunt ac si scripta non essent.* Dig. 50. 17. 73. 3. See *AMBIGUITY; CONSTRUCTION; INTERPRETATION*.

In pleading, when matter is nonsense by being contradictory and repugnant to something precedent, the precedent matter, which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected: as in ejectment where the declaration is of a demise on the second day of January, and that the defendant *postea scilicet*, on the first of January, ejected him, here the *scilicet* may be rejected as being expressly contrary to the *postea* and the precedent matter; 5 East 255; 1 Salk. 324.

NONSUIT. The name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue.

A *voluntary* nonsuit is an abandonment of his cause by plaintiff, who allows a judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict. 1 Dutch. 556. See 77 Me. 344.

An *involuntary* nonsuit takes place when the plaintiff, on being called, when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury could find a verdict. 13 Johns. 334. See 73 Mich. 258.

At common law the plaintiff cannot be nonsuited against his will; for a party cannot be compelled to make default.

An involuntary nonsuit is not ordered against a plaintiff who has given evidence of his claim, in the federal courts; 103 U.

S. 264; 1 Pet. 469; 1 McCrary 436; 7 U. S. App. 359; nor in many of the state courts; 9 Ind. 551; 6 Ark. 44; 14 *id.* 706; 57 *id.* 468; 2 Dougl. (Mich.) 125; 13 Mo. 312; 19 *id.* 101; 2 Or. 57; 4 Yerg. 528; 4 Vt. 363; 1 Wash. Va. 87, 219; 23 Md. 312; 12 Sm. & M. 550; but in other states if the evidence is insufficient to support the action a nonsuit may be granted; 40 Pa. 364; 155 Mass. 96; 36 Minn. 122; 15 R. I. 213; 30 N. J. L. 460; 15 Nev. 59; 13 Neb. 37; 45 Ia. 661; 13 Johns. 334; 24 N. Y. 430; 3 McCord 131; 42 Me. 259; 26 N. H. 351; 4 Ohio St. 628; 12 Or. 329; 17 Ill. 494; 126 *id.* 466; 1 Cal. 103; 103 *id.* 153; 16 Ga. 154.

In Pennsylvania, by statute, the plaintiff may be nonsuited compulsorily. This may be done in two cases: (1) under the act of March 11, 1836, when the defendant has offered no evidence, and the plaintiff's evidence is not sufficient in law to maintain his action; (2) under the act of April 14, 1846, confined to Philadelphia, when the cause is reached and the plaintiff or his counsel does not appear, or, if he appears, does not proceed to trial, and does not assign and prove a sufficient legal cause for continuance.

The granting of a nonsuit for want of sufficient evidence to warrant a verdict for the plaintiff is no infringement of the right of trial by jury; 164 U. S. 301.

The defendant cannot assign as error the denial of his motion for a nonsuit if thereafter he proceeds to examine witnesses and try the cause on the merits; 90 Fed. Rep. 638.

A nonsuit is no bar to another action for the same cause; Freeman, Judgt. § 261; 5 Allen 153; 9 N. J. L. 38; 77 Hun 80.

A judge has no power to nonsuit a plaintiff on the opening statement of his counsel without his consent; [1893] 1 Q. B. 122; nor is a nonsuit warranted unless it appears that plaintiff is not entitled to recover after giving him the most favorable view that a jury would be warranted in taking of the evidence; 137 N. Y. 389; 156 Pa. 34; but where the evidence is sufficient to sustain a verdict for plaintiff the court should not grant a nonsuit; 69 Hun 373.

A nonsuit may be asked for at any time before verdict; 38 S. C. 507; 103 Cal. 251; see 31 Fla. 56; and, if it is proper, to grant it prematurely is harmless error; 102 Cal. 450. Defendant waives his motion for a nonsuit and cannot base any claim of error upon it, where, after it is overruled, he proceeds with his defence and introduces testimony; 149 U. S. 17; 153 *id.* 216; 123 *id.* 710; 124 *id.* 405. Exception cannot be taken to the court's refusal to enter a compulsory nonsuit; 161 Pa. 87.

After the trial is begun, plaintiff's right to take a nonsuit is not absolute, but lies in the discretion of the court, and will be denied when plaintiff gets all his own evidence in and is not surprised by defendant's evidence; 59 Fed. Rep. 670.

After a voluntary nonsuit taken by the plaintiff, the court cannot reinstate the case without defendant's consent; 36 Pittsb. L. J. Pa. 356.

The formality of calling the plaintiff when he is to suffer a nonsuit is obsolete in most of the states.

NOON. In Insurance Policy. Twelve o'clock, standard time. 120 Ky. 752, 87 S. W. 1155.

NORMALLY. According to an established norm, rule, or principle; conformed to a type, standard, or regular form. Webster.

NORMAN FRENCH. See LANGUAGE.

NORROY. See HERALD.

NORTH. In a description in a deed, unless qualified or controlled by other words, it means due north. Northerly in a grant, where there is no object to direct its inclination to the east or west, must be construed to mean north. 1 Johns. 156; 96 Col. 505. See 115 Mass. 578.

NORTH CAROLINA. The name of one of the original states of the United

States of America.

The territory which now forms this state was included in the grant made in 1663 by Charles II. to Lord Clarendon and others, of a much more extensive country. The boundaries were enlarged by a new charter granted by the same prince to the same proprietaries in the year 1665. By this charter the proprietaries were authorized to make laws, with the assent of the freemen of the provinces or their delegates, and they were invested with various other powers. Being dissatisfied with the form of government, the proprietaries procured the celebrated John Locke to draw up a plan of government for the colony, which was adopted, and proved to be impracticable; it was highly exceptionable on account of its disregard of the principles of religious toleration and national liberty, which are now universally admitted. After a few years of unsuccessful operation it was abandoned. The colony had been settled at two points, one called the Northern and the other the Southern settlement, which were governed by separate legislatures. In 1729 the proprietaries surrendered their charter, when it became a royal province, and was governed by a commission and a form of government in substance similar to that established in other royal provinces. In 1732 the territory was divided, and the divisions assumed the names of North Carolina and South Carolina.

A constitution of North Carolina was adopted December 18, 1776. To this constitution amendments were made in 1785, 1788, 1795, 1801, 1805, 1816, 1820, 1822, 1824, 1826, 1828, 1830, 1832, 1834, 1836, 1838, 1840, 1842, 1844, 1846, 1848, 1850, 1852, 1854, 1856, 1858, 1860, 1862, 1864, 1866, 1868, 1870, 1872, 1874, 1876, 1878, 1880, 1882, 1884, 1886, 1888, 1890, 1892, 1894, 1896, 1898, 1900, 1902, 1904, 1906, 1908, 1910, 1912, 1914, 1916, 1918, 1920, 1922, 1924, 1926, 1928, 1930, 1932, 1934, 1936, 1938, 1940, 1942, 1944, 1946, 1948, 1950, 1952, 1954, 1956, 1958, 1960, 1962, 1964, 1966, 1968, 1970, 1972, 1974, 1976, 1978, 1980, 1982, 1984, 1986, 1988, 1990, 1992, 1994, 1996, 1998, 2000, 2002, 2004, 2006, 2008, 2010, 2012, 2014, 2016, 2018, 2020.

NORTH DAKOTA. One of the states of the United States.

By the act of congress of February 22, 1889 (1 Supp. Rev. Stat. 645), the area comprising the territory of Dakota was divided on the line of the seventh standard parallel produced due west to the western boundary of said territory, and that portion north of said parallel forms the state of North Dakota. The proclamation announcing the admission of this state into the Union was made by the President on November 2, 1889.

NORTHAMPTON, ASSIZE OF. This Assize enacts among other things that every robber on being taken is to be delivered to the custody of the sheriff, and in his absence to be taken to the nearest *castellanus* to be kept by him till he is delivered to the custody of the sheriff.

The Assize also provides (Art. 2) that no one is to be allowed to entertain any guest in his house, either in a town or in the country (*neque in burgo neque in villa*), for more than a night unless the guest has some reasonable excuse which the host is to show to his neighbors, and when the guest leaves, he must do so in the presence of neighbors and by day. Stephen, *cr. Proc.* in 2 Essays in Anglo-Amer. L. H. 445.

NORTHAMPTON, STATUTE OF. The statute 2 Edw. 3, containing 17 chapters, most of which are now repealed. It was enacted at Northampton in 1328. Byrne.

NORTHAMPTON TABLES. Life tables prepared by a Dr. Price from bills of mortality (*q. v.*) kept in the parish of All Saints in the north of England, between 1735 and 1780: Anderson. See LIFE TABLES; CARLISLE TABLES; WIGGLESWORTH'S TABLES.

NOSCITUR A SOCIIS (It is known by its associates). The maxim *noscitur a sociis* is used only to solve ambiguity. *Noscitur a sociis* is a well established and useful rule of construction where words are of obscure or doubtful meaning; and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words. 148 U. S. 503, 519; 75 Minn. 163. That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place except in the domain of ambiguity. 175 U. S. 414, 421; 222 U. S. 513, 518-519. Verbs in an enumeration whose meaning, when they are separately applied to their common object, is plain, should be interpreted distributively. 261 U. S. 515, 520.

NOSOCOMI. In Civil Law. Persons who have the management and care of hospitals for paupers. *Clef Lois Rom. mot Administrateurs.*

NOT DOUBTING. In Will. The words "not doubting," as used in a will, are considered sufficient to raise a trust where the subject and object are sufficiently certain. 78 Ky. 128.

NOT FOUND. Words indorsed on a bill of indictment by a grand jury, when they have not sufficient evidence to find a true bill. See IGNORAMUS FOUND.

NOT GUILTY. In Pleading. The general issue in several sorts of actions.

In *trespass*, its form is as follows: "And the said C D, by E F, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in the manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

Under this issue the defendant may give in evidence any matter which directly controverts the truth of any allegation, which the plaintiff on such general issue will be bound to prove; 1 E. & P. 218; and no person is bound to justify who is not *primâ facie* a trespasser; 2 B. & P. 359; 2 Saund. 284 d. For example, the plea of not guilty is proper in trespass to persons, if the defendant have committed no assault, battery, or imprisonment, etc.; and in trespass to personal property, if the plaintiff had no property in the goods, or the defendant were not guilty of taking them, etc.; and in trespass to real property, this plea not only puts in issue the fact of trespass, etc., but also the title, which, whether freehold or possessory in the defendant or a person under whom he claims, may be given in evidence under it, which matters show *primâ facie* that the right of possession, which is necessary in trespass, is not in the plaintiff, but in the defendant or the person under whom he justifies; 7 Term 354; 8 *id.* 403; Willes 222; Steph. *Pl. 178; 1 Chitty, Pl. 491, 492.

In *trespass on the case in general* the formula is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

This, it will be observed, is a mere traverse, or denial, of the facts alleged in the declaration, and therefore, on principle, should be applied only to cases in which the defence rests on such a denial. But here a relaxation has taken place; for, under this plea, a defendant is permitted not only to contest the truth of the declaration, but, with some exceptions, to prove any matter of defence that tends to show that the plaintiff has no cause of action, though such matters be in confession and avoidance of the declaration; as, for example, a release given, or satisfaction made; Steph. Pl. 182, 183; 1 Chitty, Pl. 486; McKelv. Pl. 31.

In *trover*. It is not usual in this action to plead any other plea, except the statute of limitations; and a release, and the bankruptcy of the plaintiff, may be given in evidence under the general issue; 7 Term 391.

In *debt* on a judgment suggesting a *devastavit*, an executor may plead not guilty; 1 Term 482.

In *criminal cases*, when the defendant wishes to put himself on his trial, he pleads not guilty. This plea makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment, information, or complaint. On the other hand, the defendant may give in evidence under this plea not only everything which negatives the allegations in the indictment, but also all matter of excuse and justification.

In English practice, under the Jud. Act, 1875, it is not sufficient for a defendant to deny generally the facts alleged by the plaintiff's statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth. But

this does not affect defendant's right to plead "not guilty by statute," which is a plea of the general issue by a defendant in a civil action, when he intends to give special matter in evidence by virtue of some act or acts of parliament; in which case he must add the reference to such act or acts, and state whether they are public or otherwise. But if a defendant so plead, he will not be allowed to plead any other defence without the leave of the court or judge. Jud. Act, 1875, 1st Sched. Ord. xix. r. 16. Moz. & W.

NOT IN HIS SELF-DEFENSE.

The words "not in his self-defence" should be taken as qualifying everything that follows them, including the words "carelessly and wantonly," and "careless or wantonly." 47 S. W. 770.

NOT LESS THAN. See AT LEAST.

NOT POSSESSED. In Pleading. A plea sometimes used in actions of trover, when the defendant was not possessed of the goods at the commencement of the action. 3 M. & G. 101, 103. See McKelv. Pl. 34. This plea would probably be held "evasive" within the meaning of Ord. xix. r. 22, Jud. Act, 1875. Moz. & W.

NOT PROVEN. In Scotch Criminal Law. It is a peculiarity of the Scotch jury system in criminal trials that it admits a verdict of not proven, corresponding to the *non liquet* of the Roman law. The legal effect of this is equivalent to not guilty; for a prisoner in whose case it is pronounced cannot be tried again. According to the homely but expressive maxim of the law, no man can be made to thole an assize twice. But, although the verdict of not proven is so far tantamount to an acquittal that the party cannot be tried a second time, it falls very far short of it with regard to the effect upon his reputation. He goes away from the bar of the court with an indelible stigma upon his name. There stands recorded against him the opinion of a jury that the evidence respecting his guilt was so strong that they did not dare to pronounce a verdict of acquittal. When Sir Nicholas Throckmorton was tried and acquitted by an English jury in 1554, he said, "It is better to be tried than to live suspected." But in Scotland a man may be not only tried, but acquitted, and yet live suspected, owing to the sinister influence of a verdict of not proven. Forsyth, Hist. Trial by Jury 384.

NOTARIUS. In Civil Law. One who took notes or draughts in shorthand of what was said by another, or of proceedings in the senate or in a court. One who draughted written instruments, wills, conveyances, etc. Vicat, Voc. Jur.; Calvinus, Lex.

In English Law. A notary. Law Fr. & Lat. Dict.; Cowel.

NOTARY, NOTARY PUBLIC. An officer appointed by the executive or other appointing power, under the laws of different states.

Notaries are of ancient origin; they existed in Rome during the republic, and were called *tabelliones forenses*, or *personae publicae*. Their employment consisted in the drawing up of legal documents. They exist in all the countries of Europe, and as early as A. D. 808 were appointed by the Frankish kings and the popes. Notaries in England are appointed by the archbishop of Canterbury. 25 Hen. VIII. c. 21, § 4. They are officers of the civil and canon law; Brooke, Office & Pr. of a Notary 9. In most of the states, notaries are appointed by the governor alone, in others by the governor, by and with the advice of his council, in others by and with the advice and consent of the senate; in the District of Columbia they are appointed by the President of the United States. As a general rule, throughout the United States, the official acts of a notary public must be authenticated by seal as well as signature; 10 Iowa 305; 49 Ala. 242; 12 Ill. 162.

Their duties differ somewhat in the different states, and are prescribed by statute. They are generally as follows: to

protest bills of exchange and draw up acts of honor; to authenticate and certify copies of documents; to receive the affidavits of mariners and draw up protest relating to the same; to attest and take acknowledgments of deeds and other instruments, and to administer oaths. Ordinarily notaries have no jurisdiction outside the county or district for which they are appointed; but in several states they may act throughout the state.

By act of congress, Sept. 16, 1850, notaries are authorized to administer oaths and take acknowledgments in all cases where under the laws of the United States justices of the peace were formerly authorized to act.

By act of Aug. 15, 1876, c. 304, notaries are authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, and to take acknowledgments and affidavits with the same effect as commissioners of the United States circuit courts may do. R. S. § 1778. They may protest national bank circulating notes; R. S. § 5226; take acknowledgment of assignment of claims upon the United States; *id.* § 3477; and administer oaths of allegiance to persons prosecuting such claims; *id.* § 3479. By act of June 22, 1874, c. 390, notaries may take proof of debts against the estate of a bankrupt. By act of Feb. 26, 1881, c. 82, reports of national banks may be sworn to before notaries, but such notary must not be an officer of the bank; R. S. § 5211. By act of Aug. 18, 1856, c. 127, every secretary of legation and consular officer may, within the limits of his legation, perform any notarial act; R. S. § 1750. A statute which authorizes a notary public to commit for contempt a witness who has been duly subpoenaed to testify before him and who refuses to be sworn or give his deposition, is unconstitutional; 48 Pac. Rep. (Kan.) 574.

The acts of notaries are respected by the custom of merchants and the law of nations. Their protest of a bill is received as evidence in the courts of all civilized countries. Except in cases of protest of bills, the signature of a notary to an instrument going to a foreign country ought to be authenticated by the consul or representative of that country.

The notaries of England have always considered themselves authorized to administer oaths; and the act of 5 & 6 Will. IV. has placed it beyond dispute. In this country they do not exercise the power unless authorized by statute, except in cases where the oath is to be used out of the state or in the courts of the United States.

Upon the general principle they cannot act in cases in which they are interested; 95 Am. Dec. 378, note; 37 Ga. 374; but where a notary public was intermediary between a borrower and lender on mortgage and took the acknowledgment of the mortgage, his act was held valid, there being nothing on the face of the papers to indicate to third parties that there was any incapacity to act; 84 Fed. Rep. 515; and the mere fact that he is an officer of a corporation does not make its acknowledgment before him invalid; 37 L. R. A. 484.

The books or registers of a deceased notary are admissible to prove his official acts as to presentment, demand, and notice of non-payment of negotiable paper; 8 Wheat. 326; 1 Gray 175; and so are entries of a notary's clerk; 51 N. Y. 84. When produced, the handwriting of the deceased person must be proved; 18 Wall. 516.

Where an action is brought against a notary for a false certificate of acknowledgment, the presumption is that the defendant, acting in his judicial capacity, did so on reasonable information, and discharged his full duty. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty; 97 Pa. 228; Proff. Notaries, 2d ed. §§ 48, 175; Notary's Manual. It has been held an actionable libel for a notary falsely and maliciously to protest for non-payment the acceptance of a person, and then send the draft with such protest to the source from whence it came; 88 Ga. 308.

One who has lost his chattel mortgage lien by the negligence of the notary in making a defective acknowledgment, can recover no damages from such notary, where the property covered by the mortgage is absolutely worthless; 75 Cal. 182.

NOTATION. The act of making a memorandum of some special circumstance on a probate or letters of administration.

NOTCHELL. "Crying the wife's Notchell" seems to have been a means of preventing her running up debts against her husband. See 20 Law Mag. & Rev. 280.

NOTE. "Note" means negotiable promissory note. Miller's Ky. Negotiable Insts. Law, § 190. See ACTION ON AN INSTRUMENT TRANSFERABLE BY DELIVERY.

NOTE A BILL. When a foreign note has been dishonored it is usual for a notary public to present it again on the same day. If it is not then paid he makes a minute consisting of his initials, the day, month and year, and reason, if assigned, of non-payment, which proceeding is termed "noting the bill."

NOTE OF ALLOWANCE. A note delivered by a master to a party to a cause, who alleged that there was error in law in the record and proceedings, allowing him to bring error.

NOTE OF A FINE. The fourth step of the proceedings in acknowledging a fine, which is only an abstract of the writ of covenant and the concord, naming the parties, the parcel of land, and the agreement, and enrolled of record in the proper office. 2 Sharsw. Bla. Com. 351, App. n. iv. § 3; 1 Steph. Com., 11th ed. 542.

NOTE OF HAND. A popular name for a promissory note.

NOTE OR MEMORANDUM. An informal note or abstract of a transaction required by the statute of frauds.

The form of it is immaterial; but it must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without reference to parol evidence to show intent of parties; Browne, Stat. of Fr. 353, 386; 43 Me. 158; 4 R. I. 14; 14 N. Y. 584; 31 Miss. 17; 11 Cush. 127; 9 Rich. 215; 28 Mo. 423; 17 Ill. 354; 3 La. 430. In some states, and in England, the consideration need not be stated in the note or memorandum; 4 B. & Ald. 595; 5 Cra. 142; 17 Mass. 123; 6 Conn. 81.

A memorandum of the terms of an agreement was signed by plaintiff but not by defendant; the latter subsequently wrote to plaintiff referring to "our agreement for the hire of your carriage," and "my monthly payment." There was no other arrangement between the parties, to which these expressions could refer. Held, that the letter and the document containing the terms of the arrangement together constituted a note and memorandum signed by defendant, within the fourth section of the statute of frauds; 45 L. T. Rep. n. s. 348; s. c. 25 Alb. L. J. 70. See 99 U. S. 100; 139 *id.* 210; 149 *id.* 481; 32 N. J. Eq. 838; 66 Ind. 474.

See Browne; Reed, Stat. of Frauds; MEMORANDUM.

NOTE OF PROTEST. A note or minute of the protest, made by the notary, at time of protest, on the bill, to be completed or filled out at his leisure. Byles, Bills, 15th ed. 214.

NOTES. See JUDGE'S NOTES.

NOTICE. The information given of some act done, or the interpellation by which some act is required to be done. Knowledge.

A statutory notice is not binding unless given as the law directs or allows; 100 N. C. 235; 45 Ill. App. 572.

Actual notice exists when knowledge is actually brought home to the party to be affected by it. This statement is criticised,

as being too narrow, in *Wade*, Notice 4. This writer divides actual knowledge into two classes, express and implied; the former includes all knowledge of a degree above that which depends upon collateral inference, or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them, choosing to remain ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest; *Wade*, Notice 5. In 42 Conn. 146, there is a division into "particular or explicit" and "general or implied" notice. Information which a prudent man believes to be true, and which if followed by inquiry must lead to knowledge, is equivalent to knowledge; 6 Or. 407.

Any fact which is sufficient to put a purchaser of land on inquiry, is adequate notice; 88 Va. 397; 84 *id.* 348; and of everything to which such inquiry may lead; 151 U. S. 607.

Constructive notice exists when the party, by any circumstance whatever, is put upon inquiry (which is the same as *implied notice*, *supra*), or when certain acts have been done which the party interested is presumed to have knowledge of on grounds of public policy; 2 Mas. 581; 14 Pick. 224; 4 N. H. 397; 14 S. & R. 333. The recording a deed; 23 Mo. 287; 25 Barb. 685; 28 Miss. 354; 4 Kent 132, n.; an advertisement in a newspaper, when authorized by statute as a part of the process, *public acts of government*, and *his pendens* (but see *LIS PENDENS*), furnish constructive notice. Judge Story defines the term as "knowledge" imputed by the court on presumption, too strong to be rebutted, that the information must have been communicated; *Story*, Eq. Jur. § 399; and see 2 Anstr. 432. "Constructive notice is a legal inference of notice, of so high a nature, as to be conclusive, unless disproved, and is in most cases insusceptible of explanation or rebuttal by evidence that the purchaser had no actual notice, and believed the vendor's title to be good;" 2 Lead. Cas. Eq. 77. Constructive notice is sometimes called notice in law; 1 Johns. Ch. 261. The constructive notice given by the record of a deed is sometimes called record notice. Where an instrument affecting the title to real estate is properly recorded, the record thereof is notice to subsequent purchasers, etc., from the same grantor; *Wade*, Notice, 2d ed. § 97; 38 Tex. 530; 30 Ark. 407; 28 N. J. Eq. 49.

The possession of land is notice to all the world of the possessor's rights thereunder; 24 Neb. 692; 74 Ia. 294; 125 Pa. 470; 29 S. C. 147; 142 U. S. 417.

Notice to an agent in the same transaction is, in general, notice to the principal; 25 Conn. 444; 10 Rich. 293; 3 Pa. 67; 39 N. Y. 70; 11 Colo. 223. See 25 Am. L. Reg. 1; 40 Minn. 390; 23 Neb. 334. A principal imposing confidence in an agent, and therefore neglecting some source of knowledge which he might have sought, is not chargeable with what he might have found out upon inquiry aroused by suspicion; 130 U. S. 505. Notice to the trustees is notice to the beneficiaries in a deed of trust; 133 U. S. 670; 32 W. Va. 244.

A principal is not bound by his agent's knowledge where it is not the duty of the agent to communicate it; 75 Ia. 689.

The giving notice in certain cases is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus, in the familiar instance of bills of exchange and promissory notes, the implied contract of an indorser is that he will pay the bill or note, provided it be not paid, on presentment at maturity, by the acceptor or maker (being the party *primarily* liable), and provided that he (the indorser) has due notice of the dishonor, and without which he is discharged from all liability; consequently, it is essential for the holder to be prepared to prove affirmatively that such notice was given, or some facts dis-

pensing with such notice; 1 Chitty, Pr. 496; 1 Pars. Notes & B. 516.

Whenever the defendant's liability to perform an act depends on another occurrence which is *best known to the plaintiff*, and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. So, in cases of insurances on ships, a notice of abandonment is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures.

Notice may be written or oral, in many cases, at the option of the party required to give it; but written notice is generally preferable, both as avoiding doubt and ambiguity in its terms, and as admitting more easy and exact proof of delivery; 2 Dan. Neg. Inst. 972. See KNOWLEDGE, ACTUAL KNOWLEDGE; IMMEDIATE, Notice, LEGAL NOTICE.

NOTICE TO ADMIT. In the practice of the English high court either party may call upon the other to admit a document, and on refusal or neglect to admit he must bear the costs of proving the document, unless the judge certifies that the refusal was reasonable. Rules of Court XXXII; Whart.

NOTICE, AVERMENT OF. In Pleading. The statement in a pleading that notice has been given.

When the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof: as, when the defendant promised to give the plaintiff as much for a commodity as another person had given or should give for the like.

But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred; 1 Saund. 117, n. 2; 2 *id.* 62 a. n. 4; Freem. 285. Therefore, if the defendant contracted to do a thing on the performance of an act by a stranger, notice need not be averred; for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice of it at his peril; Com. Dig. Pleader (C 65). See Com. Dig. Pleader (C 73, 74, 75); Viner, Abr. Notice; Hardr. 42; 5 Term 621.

The omission of an averment of notice, when necessary, will be fatal on demurrer or judgment by default; Cro. Jac. 432; but may be aided by verdict; 1 Stra. 214; 1 Saund. 228 a; unless in an action against the drawer of a bill, when the omission of the averment of notice of non-payment by the acceptor is fatal, even after verdict; Dougl. 679.

NOTICE TO THE CITY. Knowledge of a policeman of the dangerous condition of a street was "notice to the city." 149 Ky. 537, 14 S. W. 932.

NOTICE OF DISHONOR. A notice given to a drawer or indorser of a bill, or an indorser of a negotiable note, by a subsequent party, that it had been dishonored either by non-acceptance in the case of a bill, or by non-payment in the case of an accepted bill or a note.

The notice must contain a description of the bill or note; Byles, Bills 220; 5 Cush. 546; 14 Conn. 362; 1 Fla. 301; 1 Wisc. 264; sufficient to leave no doubt in the mind of the indorser, as a reasonable man, what note was intended; 3 Metc. Mass. 495; 7 Ala. n. s. 205; 12 N. Y. 551; 26 Me. 45; 11 Wheat. 431; 56 N. J. L. 11. As to what is a misdescription, see 7 Exch. 578; 9 Q. B. 609; 9 Pet. 33; 11 Wheat. 431; 17 How. 606; 7 N. Y. 19; 2 Mich. 238; 12 Mass. 6; 14 Pa. 483; 2 Ohio St. 345.

It must also contain a clear statement of the dishonor of the bill; 1 Bingh. n. c. 194; 2 Cl. & F. 93; 2 M. & W. 799; 3 Metc. Mass. 495; 18 Conn. 361; and something more than the mere fact of non-acceptance or non-payment must be stated; 10 Ad. & E. 125; 2 Q. B. 388; 11 Wheat. 431; 3 Metc.

Mass. 595; 5 Barb. 190; 1 Spears 244; 2 Ohio St. 345; 3 Md. 262, 251; 2 Hawks 560; 5 How. Mass. 552; except in some cases; 5 Cush. 546; 1 Md. 59, 504; see as to effect of the use of the word *protested*, 11 Wheat. 431; 7 Ala. n. s. 205; 2 Dougl. Mich. 379; 9 Rob. La. 161; 14 Conn. 362; 5 Cush. 546; 1 Wisc. 264; 4 N. J. 71. See some cases where the notice was held sufficient; 2 M. & W. 109, 799; 6 *id.* 400; 7 *id.* 515; 14 *id.* 7, 44; 6 Ad. & E. 499; 10 *id.* 131; 2 Q. B. 421; 1 E. & B. 801; 5 C. B. 687; 1 H. & W. 3; and others where it was held insufficient; 2 Exch. 719; 1 E. & B. 801; 4 B. & C. 339; 10 Ad. & E. 125; 7 Bingh. 530; 3 Bingh. n. c. 688; 8 C. & P. 355; 2 Q. B. 388; 1 M. & G. 76; 53 Minn. 386; 91 Tenn. 301; 63 Hun 625.

As to whether there must be a statement that the party to whom the notice is sent is looked to for payment, see 11 M. & W. 372; 7 C. B. 400; 4 D. & L. 744.

The notice is generally in writing, but may be oral; 16 Barb. 146; 3 Metc. Mass. 495; 8 Mo. 336; 7 C. B. 400; 8 C. & P. 355. It need not be personally served, but may be sent by mail; 7 East 385; 6 Wheat. 102; 1 Pick. 401; 28 Vt. 316; 15 Md. 285; 5 Pa. 178; 1 Conn. 329; 2 R. I. 467; 23 Mo. 213; 13 N. Y. 549; otherwise, perhaps, if the parties live in the same town; see 5 Metc. Mass. 352; 10 Johns. 490; 3 McLean 96; 28 N. H. 302; 15 Me. 141; 15 Md. 285; 3 Rob. La. 261; 6 Blackf. 312; 3 Harr. Del. 419; 8 Ohio 507; 85 Va. 95; or left in the care of a suitable person, representing the party to be notified; 15 Me. 207; 2 Johns. 274; 20 Miss. 332; 16 Pick. 392; 14 La. 494; 19 Ill. 598; Holt 476; 98 Ala. 550; see 84 Va. 41.

It should be sent to the place where it will most probably find the party to be notified most promptly; 6 Metc. 1, 7; 1 Pet. 578; whether the place of business; 1 Pet. 578; 3 McLean 96; 5 Metc. 212, 352; 11 Johns. 231; 15 Me. 139; 5 Pa. 178; 3 Harr. Del. 419; 6 Blackf. 312; 1 La. Ann. 95; 1 Maule & S. 545; or place of residence; 4 Wash. C. C. 464; 28 Vt. 316; 1 Conn. 329. The word residence in the law of negotiable instruments may be satisfied by a temporary, partial, or even constructive residence; 148 Mass. 181. When sent by mail, it should be to the post-office to which the party usually resorts; 2 Pet. 543; 4 Wend. 328; 5 Pa. 160; 3 McLean 91; 15 La. 38; 4 Humphr. 88; 3 Ga. 436; 11 Md. 436; 3 Ohio 307; 8 Mo. 443; 6 Metc. 106; 6 H. & J. 172; 8 Misc. Rep. 503; see 159 Mass. 404. If properly addressed and mailed it will charge the indorser, whether he has received it or not; 8 Misc. Rep. 516.

Every person who, by and immediately upon the dishonor of the note or bill, and only upon such dishonor, becomes liable to an action either on the paper or on the consideration for which the paper was given, is entitled to immediate notice; 1 Pars. Notes & B. 499. The holder need give notice only to the parties and to the indorser whom he intends to hold liable; 25 Barb. 138; 19 Me. 62; 11 La. Ann. 137; 1 Ohio St. 206; 49 Ohio St. 351; 5 Miss. 272; 17 Ala. 258; 15 M. & W. 231; 61 Mich. 402. A second indorser duly notified cannot defend on the ground that the first was not so notified; 20 D. C. 26.

Notice may be given by any party to a note or bill not primarily liable thereon as regards third parties, and not discharged from liability on it at the time notice is given; 8 Mo. 336; 16 S. & R. 157; 3 Dana 126; 5 Miss. 272; 17 Ala. 258; 25 Barb. 138; 15 Md. 150; 15 La. 321; 14 Mass. 116; 5 Maule & S. 68; 15 M. & W. 231. The late English doctrine that any party to a note or bill may give the notice by which an antecedent party may be held liable to subsequent parties, is now quite firmly established; *Wade*, Notice § 709. Such notice may be by the holder's agent; 4 How. 336; 11 Rob. La. 454; 21 Tex. 690; 8 Mo. 704; 7 Ala. n. s. 205; 15 M. & W. 231; and in the agent's name; 99 Cal. 143; may be by an indorsee for collection; 3 N. Y. 245; a notary; 2 How. 66; 28 Mo. 339; the administrator or executor of a deceased person; *Story*, Pr. Notes § 804; the holder of

the paper as collateral security; 14 C. B. n. s. 728. It has been held that notice by a stranger, pretending to be the holder, may be ratified by the real holder; 2 C. & K. 1016. Mere knowledge on the part of an indorser of a note, learned from the maker that it had been dishonored, is not a notice, since notice must come from a party who is entitled to look to the indorser for payment; 53 Minn. 386.

The notice must be forwarded as early as the day after the dishonor, by a mail which does not start at an unreasonably early hour; 9 N. H. 558; 24 Me. 458; 2 R. I. 437; 24 Pa. 148; 4 N. J. L. 71; 1 Ohio St. 206; 9 Miss. 261, 644; 13 Ark. 645; 7 Gill & J. 78; 4 Wash. C. C. 464; 2 Stor. 416; 4 Bingh. 715; Big. Notes & B. 298; see 155 Pa. 327.

An indorser is entitled to notice of demand and non-payment of a note, notwithstanding that he has collateral security; 15 R. I. 44; 4 W. & S. 328.

Notice of dishonor may be excused: where it is prevented by inevitable accident, or overwhelming calamity; by the prevalence of a malignant disease which suspends the operations of trade; by war, blockade, invasion, or occupation by the enemy; by the interdiction of commerce between the countries from which or to which the notice is to be sent; by the impracticability of giving notice, by reason of the party entitled thereto having absconded or having no fixed place of residence, or his place of business or residence being unknown, and incapable of being ascertained upon reasonable inquiries. These are the excuses of a general nature given by Story, on Pr. Notes and on Bills. Special excuses are: That the note was for the accommodation of the indorser only; an original agreement on the part of the indorser, made with the maker or other party at all events to pay the note at maturity; the receiving security or indemnity from the maker, or other party for whose benefit the note is made, by the indorser, or money to take it up with; receiving the note as collateral security for another debt where the debtor is no party to the note, or if a party has not indorsed it; an original agreement by the indorser to dispense with notice; an order or direction from the maker to the maker not to pay the note at maturity. See Story, Pr. Notes §§ 293, 357.

Consult Bayley; Byles; Chitty; Story, on Bills of Exchange; Story, Promissory Notes; Parsons, Notes and Bills; Daniel, Negotiable Instruments; Wade, Notice.

NOTICE OF EXECUTION. Under an exemption act which requires an execution, the debtor desiring to avail himself of its benefits should make a schedule of all his personal property within ten days after notice of execution. The sheriff should, whenever practical, give personal notice, and an ambiguously worded notice by mail from which the debtor may infer that personal demand will be made on him at some time in the future, is insufficient; 46 Ill. App. 150.

NOTICE OF INQUIRY. The plaintiff must give a written notice of executing a writ of inquiry to the defendant or his solicitor; 2 Chit. Arch. Prac.; Wharton.

NOTICE OF JUDGMENT. In several of the states it is provided by statute that a written notice shall be served by the party entering the judgment upon his adversary or his attorney, stating the time when the judgment is entered.

In England, in the Chancery Division, when an action is instituted for the administration of the estate of a deceased person, or for the execution of the trusts of an instrument, by or against one member of a class of persons, it is not necessary to join the other members of the class as plaintiffs or defendants in the action. (Ord. 16, rr. 33-38.) Whenever, in any action for the administration of the estate of a deceased person, or for the execution of the trusts of any instru-

ment, or for the partition or sale of any hereditaments, a judgment or order has been pronounced or made which affects persons not parties to the action, then the court or a judge may order such persons to be served with notice of the judgment or order; this gives them the right with one month of service to apply to have the order varied or discharged; and it makes them parties. Byrne; Judicature Act, 1873, s. 100.

NOTICE OF LIS PENDENS. A notice filed for the purpose of warning all persons that the title to certain property is in litigation. See LIS PENDENS.

NOTICE OF MOTION. A notice in writing, entitled in a cause, stating that, on a certain day designated, a motion will be made to the court for the purpose stated. Burrill.

NOTICE TO PLEAD. Written notice to defendant, requiring him to plead within a certain time. It must always be given before plaintiff can sign judgment for want of a plea. 1 Chitty, Archb. Pr. 221. Notice to plead, indorsed on the declaration or delivered separately, is sufficient without demanding plea or rule to plead, in England, by statute.

NOTICE TO PRODUCE PAPERS. In Practice. When it is intended to give secondary evidence of a written instrument or paper which is in the possession of the opposite party, it is, in general, requisite to give him notice to produce the same on the trial of the cause, before such secondary evidence can be admitted. See 50 Kan. 436.

To this general rule there are some exceptions: *first*, in cases where, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in the case of trover for a bond. 14 East 274; 4 Taunt. 865; 6 S. & R. 154; 4 Wend. 626; 1 Campb. 143; 48 Me. 218; 30 Barb. 398; 58 N. H. 68; *second*, where the party in possession has obtained the instrument by fraud; 4 Esp. 256. See 1 Phill. Ev. 425; 1 Stark. Ev. 362; Rosc. Ev., 16th ed., 8.

In general, a notice to produce papers ought to be given in writing, and state the title of the cause in which it is proposed to use the papers or instruments required; 2 Stark. 19. It seems, however, that the notice may be by parol; 1 Campb. 440. It must describe with sufficient certainty the papers or instruments called for, and must not be too general and by that means be uncertain; Ry. & M. 341; M'Cl. & Y. 159.

The notice may be given to the party himself, or to his attorney; 2 Term 203, n.; 3 id. 306; Ry. & M. 327.

The notice must be served a reasonable time before trial, so as to afford an opportunity to the party to search for and produce the instrument or paper in question; 1 Stark. 283; 92 Mich. 542; 66 Ia. 292.

When a notice to produce an instrument or paper in the cause has been proved, and it is also proved that such paper or instrument was, at the time of the notice, in the hands of the party or his privy, and upon request in court he refuses or neglects to produce it, the party having given such notice and made such proof will be entitled to give secondary evidence thereof. See 66 Hun 626; 155 Mass. 233.

Where a party is notified to produce certain writings, and the same are shown not to be within the state, copies may be introduced; 99 Ala. 331; 82 Tex. 368.

NOTICE OF PROTEST. A notice given by a notary to the drawer or indorser of a bill, or the indorser of a note, that the bill or note has been protested for non-acceptance or non-payment. The essential requisites of the notice are, a true description of the note; an assertion that it has been duly presented at maturity, and dishonored; and that the holder looks to the person to whom notice is given, for indemnity. See NOTICE OF DISHONOR.

NOTICE TO QUIT. A request from a landlord to his tenant to quit the prem-

ises leased, and to give possession of the same to him, the landlord, at a time therein mentioned. 3 Wend. 337, 357; 7 Halst. 99.

The form of the notice. The notice or demand of possession should contain a request from the landlord to the tenant or person in possession to quit the premises which he holds from the landlord (which premises ought to be particularly described, as being situate in the street and city or place, or township and county), and to deliver them to him on or before a day certain,—generally, when the lease is for a year, the same day of the year on which the lease commences. But where there is some doubt as to the time when the lease is to expire, it is proper to add, "or at the expiration of the current year of your tenancy." 2 Esp. 589. It should be dated, signed by the landlord himself, or by some person in his name, who has been authorized by him, and directed to the tenant. The notice must include all the premises under the same demise; for the landlord cannot determine the tenancy as to part of the premises demised and continue it as to the residue. For the purpose of bringing an ejectment, it is not necessary that the notice should be in writing, except when required to be so under an express agreement between the parties; Com. Dig. *Estate by Grant* (G 11, n. p.); 2 Campb. 96. But it is the general and safest practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes and renders the evidence certain. Care should be taken that the words of a notice be clear and decisive, without ambiguity or giving an alternative to the tenant; for if it be really ambiguous or optional, it will be invalid; Ad. Ej. 204.

As to the person by whom the notice is to be given. It must be given by the person interested in the premises, or his agent properly appointed; Ad. Ej. 120. See 3 C. B. 215. As the tenant is to act upon the notice at the time it is given to him, it is necessary that it should be such as he may act upon with security, and should, therefore, be binding upon all the parties concerned at the time it is given. Where, therefore, several persons are jointly interested in the premises, they need not all join in the notice; but, if any of them be not a party at the time, no subsequent ratification by him will be sufficient by relation to render the notice valid. But see 2 Phill. Ev. 184; 1 B. & Ad. 135; 7 M. & W. 139. But if the notice be given by an agent, it is sufficient if his authority is afterwards recognized; 3 B. & Ald. 689. But see 10 B. & C. 621.

As to the person to whom the notice should be given. When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. It should invariably be given to the tenant of the party serving the notice, notwithstanding a part may have been underlet or the whole of the premises may have been assigned; Ad. Ej. 119; 5 B. & P. 330; 14 East 234; 6 B. & C. 41; unless, perhaps, the lessor has recognized the sub-tenant as his tenant; 10 Johns. 270. When the premises are in possession of two or more as joint tenants or tenants in common, the notice should be to all. A notice addressed to all and served upon one only will, however, be a good notice; Ad. Ej. 123. The delivery of a notice to quit to the wife of a tenant, she being in possession of the premises, is a good service upon the husband; 30 Ill. App. 300.

As to the mode of serving the notice. The person about serving the notice should make two copies of it, both signed by the proper person, then procure one or more respectable persons for witnesses, to whom he should show the copies, who, upon comparing them and finding them alike, are to go with the person who is to serve the notice. The person serving the notice then, in their presence, should deliver one of these copies to the tenant personally, or to one of his family, at his usual place of abode, although the same be not upon the

demised premises; 2 Phill. Ev. 185; or serve it upon the person in possession; and where the tenant is not in possession, a copy may be served on him, if he can be found, and another on the person in possession. The witnesses should then, for the sake of security, sign their names on the back of the copy of the notice retained, or otherwise mark it so as to identify it; and they should also state the manner in which the notice was served. In the case of a joint demise to two defendants, of whom one alone resided upon the premises, proof of the service of the notice upon him has been held to be sufficient ground for the jury to presume that the notice so served upon the premises has reached the other who resided in another place; 7 East 553; 5 Esp. 196. In ejectment the defence of adverse possession is inconsistent with a tenancy, and exempts the plaintiff from the necessity of proving a notice to quit; 92 Mich. 136; 126 Ill. 228; 75 Cal. 342.

At what time it must be served. At common law it must be given six calendar months before the expiration of the lease; 1 Term 159; 8 Cow. 13; 1 Vt. 311; 5 Yerg. 431; 4 Ired. 291; 17 Mass. 287; see 8 S. & R. 458; 2 Rich. 346; and three months is the common time under statutory regulations; and where the letting is for a shorter period the length of notice is regulated by the time of letting; 6 Bing. 362; 5 Cush. 563; 23 Wend. 616. Where a tenant under a lease for a term assents to the termination of his lease and continues to hold from day to day under a new arrangement, he is not entitled to a month's notice to quit; 94 Mich. 474; a tenant or sub-tenant holding over is not entitled to notice to quit; 31 Ill. App. 592. Difficulties sometimes arise as to the period of the commencement of the tenancy; and when a regular notice to quit on any particular day is given, and the time when the term began is unknown, the effect of such notice, as to its being evidence or not of the commencement of the tenancy, will depend upon the particular circumstances of its delivery; if the tenant, having been applied to by his landlord respecting the time of the commencement of the tenancy, has informed him it began on a certain day, and in consequence of such information a notice to quit on that day is given at a subsequent period, the tenant is concluded by his act, and will not be permitted to prove that in point of fact the tenancy has a different commencement; nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into error; Ad. Ej. 141; 2 Esp. 635; 2 Phill. Ev. 186. In like manner, if the tenant at the time of delivery of the notice assent to the terms of it, it will waive any irregularity as to the period of its expiration; but such assent must be strictly proved; 4 Term 361; 2 Phill. Ev. 183. When the landlord is ignorant of the time when the term commenced, a notice to quit may be given not specifying any particular day, but ordering the tenant in general terms to quit and deliver up the possession of the premises at the end of the current year of his tenancy thereof, which shall expire next after the end of three months from the date of the notice. See 2 Esp. 559. Where a notice to quit is necessary, the day named therein must be the day of, or corresponding to the day of, the conclusion of the tenancy; 55 N. J. L. 217.

What will amount to a waiver of the notice. The acceptance of rent accruing subsequently to the expiration of the notice is the most usual means by which a waiver of it may be produced; but the acceptance of such rent is open to explanation; and it is the province of the jury to decide with what views and under what circumstances the rent is paid and received; Ad. Ej. 139; 2 Camp. 387. If the money be taken with an express declaration that the notice is not thereby intended to be waived, or accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy,

no waiver will be produced by the acceptance; the rent must be paid and received *as rent*, or the notice will remain in force; Cowp. 248. The notice may also be waived by other acts of the landlord; but they are generally open to explanation, and the particular act will or will not be a waiver of the notice, according to the circumstances which attend it; 2 East 236; 1 Term 53. It has been held that a notice to quit at the end of a certain year is not waived by the landlord's permitting the tenant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease,—that is, to clear and fence the land and pay the taxes; 1 Binn. 333. In cases, however, where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover in an action for use and occupation, the notice of course will be waived; Ad. Ej. 144; 1 H. Bla. 311; 19 Wend. 391. See 13 C. B. 178.

A tenant becomes a trespasser at the expiration of the time specified in a due notice to quit; and the landlord has a right during the tenant's absence to re-enter and take possession, and eject the tenant's goods and to keep the possession so obtained; 16 R. I. 524. A tenant at will, after a notice to quit, has a reasonable time in which to vacate the premises; 60 Vt. 886.

See LANDLORD AND TENANT; LEASE.

NOTICE OF TRIAL. The plaintiff may give notice of trial at any time after the issues of fact are ready for trial; and if not given within a certain time the defendant may give notice of same or move to dismiss the action for want of prosecution.

NOTING. A term denoting the act of a notary in minuting on a bill of exchange, after it has been presented for acceptance or payment, the initials of his name, the date of the day, month, and year when such presentment was made, and the reason, if any has been assigned, for non-acceptance or non-payment, together with his charge. The noting is not indispensable, it being only a part of the protest; it will not supply the protest; 4 Term 175.

NOTIO. The power of hearing and trying a matter of fact. Calv. Lex.

(Lat. from *noscere*, to know.) The power or authority of a *judez*; the power of hearing causes and of pronouncing sentence, without any degree of jurisdiction. *Id.*

In a more general sense, *notio* included both *cognitio* (cognizance), and *jurisdictio* (jurisdiction). *Id.*; Dig. 20. 16. 99, pr.

NOTORIOUS. As used in defining adverse possession, it means that the character of the holding must possess such elements of notoriety that the owner may be presumed to have notice of it and of its extent. 33 Fla. 261. See 94 Mo. 187.

Manifest to all persons; generally known; open; as, a notorious act of ownership, etc. Known to discredit or disadvantage; of bad or questionable repute. Anderson. In the law of evidence, matters deemed notorious do not require to be proved. There does not seem to be any recognized rule as to what matters are deemed notorious; cases have occurred in which the state of society or public feeling has been treated as notorious, e.g., during times of sedition. R. & L. Dict.; Best Ev. 354. See TRUE, PUBLIC, AND NOTORIOUS.

NOTORIOUSLY. Well and generally understood. 46 Fed. Rep. 724.

NOTOUR. In Scotch Law. Open; notorious. A notour bankrupt is a debtor who, being under diligence by horning and caption of his creditor, retires to sanctuary, or absconds, or defends by force, and is afterwards found insolvent by court of sessions. Bell, Dict.

NOVA CUSTOMA. An imposition

or duty. See ANTIQUA CUSTOMA.

NOVA CUSTOMA, STATUTUM DE. See CARTA MERCATORIA.

NOVA STATUTA. New statutes. A term including all statutes passed in the reign of Edw. III. and subsequently. See VETERA STATUTA.

NOVÆ NARRATIONES. New counts or talys. A book of such pleadings as were then in use, published in the reign of Edw. III. 3 Bla. Com. 297; 3 Reeve, Hist. Eng. Law 439.

NOVATION (from Lat. *novare*, *novus*, new). The substitution of a new obligation for an old one, which is thereby extinguished.

A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor. 1 Pars. Cont. 217; 136 N. Y. 152; 137 Id. 542.

It is a mode of extinguishing one obligation by another—the substitution, not of a new paper or note, but of a new obligation in lieu of an old one—the effect of which is to pay, dissolve, or otherwise discharge it. 85 Ala. 401.

In Civil Law. There are three kinds of novation.

First, where the debtor and creditor remain the same, but a *new debt* takes the place of the old one. Here, either the subject-matter of the debt may be changed, or the conditions of time, place, etc., of payment.

Second, where the debt remains the same, but a *new debtor* is substituted for the old. This novation may be made without the intervention or privity of the old debtor (in this case the new agreement is called *expromissio*, and the new debtor *expromissor*), or by the debtor's transmission of his debt to another, who accepts the obligation and is himself accepted by the creditor. This transaction is called *delegatio*. Domat lays down the essential distinction between a delegation and any other novation, thus: that the former demands the consent of all three parties, but the latter that only of the two parties to the new debt. See DELEGATION.

Third, where the debt remains the same, but a *new creditor* is substituted for the old. This also is called *delegatio*, for the reason adduced above, to wit: that all three parties must assent to the new bargain. It differs from the *cessio nominis* of the civil law by completely cancelling the old debt, while the *cessio nominis* leaves the creditor a claim for any balance due after assignment.

In every novation the old debt is wholly extinguished by the new. To effect such a transformation, several things are requisite.

First, there must be an *anterior obligation* of some sort, to serve as a basis for the new contract. If the old debt be void, as being, e.g., *contra bonos mores*, then the new debt is likewise void; because the consideration for the pretended novation is null. But if the old contract is only voidable, in some cases the new one may be good, operating as a ratification of the old. Moreover, if the old debt be conditional, the new is also conditional unless made otherwise by special agreement,—which agreement is rarely omitted.

Second, the parties innovating must consent thereto. In the modern civil law, every novation is voluntary. Anciently, a novation not having this voluntary element was in use. And not only consent is exacted, but a *capacity* to consent. But capacity to make or receive an absolute payment does not of itself authorize an agreement to innovate.

Third, there must be an *express intention* to innovate,—the *animus novandi*. A novation is never presumed. If an intent to destroy the old debt be not proved, two obligations now bind the debtor,—the old and the new. Conversely, if the new contract be invalid, without fraud in the

transaction, the creditor has now lost all remedy. The anterior obligation is destroyed without being replaced by a new one.

An important rule of novation is that the extinction of the debt destroys also all rights and liens appertaining thereto. Hence, if any hypothecations be attached to the ancient agreement, they are cancelled by the new one, unless express words retain them. The second contract is simple and independent, and upon its terms is the action *ex stipulatu* to be brought. Hence, too, the new parties cannot avail themselves of defences, claims, and set-offs which would have prevailed between the old parties.

Obviously, a single creditor may make a novation with two or more debtors who are each liable *in solido*. In this case any one debtor may make the contract to innovate; and if such a contract be completed, all his fellow-debtors are discharged with him from the prior obligation. Therefore Pothier says that, under the rule that novation cancels all obligations subsidiary to the main one, *sureties* are freed by a novation contracted by their principal. The creditor must specially stipulate that co-debtors and guarantors shall consent to be bound by the novation, if he wish to hold them liable. If they do not consent to such novation, the parties all remain, as before, bound under the old debt. So in Louisiana the debt due to a community creditor is not necessarily novated by his taking the individual note of the surviving spouse, with mortgages to secure its payment; 11 La. Ann. 687.

It follows that the new debtor, in a delegation, can claim nothing under the old contract, since he has consented to the destruction of that contract. For the same reason, a creditor cannot proceed against the discharged debtor. And this is true though the new debtor should become insolvent while the old remains solvent. And even though at the time of the novation the new debtor was insolvent, still the creditor has lost his remedy against the old debtor. But the rule, no doubt, applies only to a *bona fide* delegation. And a suit brought by the creditor against a delegated debtor is not evidence of intention to discharge the original debtor; 11 La. Ann. 93.

In a case of *mistake*, the rule is this: If the new debtor agree to be substituted for the old, under the belief that he himself owes so much to the discharged debtor, although he do not in fact owe the amount, yet he is bound to the creditor on the novation; because the latter has been induced to discharge the old debtor by the contract of the new, and will receive only his due in holding the new debtor bound. But where the supposed creditor had really no claim upon the original debtor, the substitute contracts no obligation with him; and even though he intended to be bound, yet he may plead the fact of no former debt against any demand of the creditor, as soon as this fact is made known to him.

A novation may be made dependent on a condition. In that case the parties remain bound, as before, until the condition is fulfilled. The new debtor is not freed from a conditional novation as to the creditor until the condition happens; and he is not liable in an action to the old debtor until it is performed.

Any obligation which can be destroyed at all may be destroyed by novation. Thus, legacies, judgments, etc., with mortgages, guarantees, and similar accessories, are as much the subjects of novation as simple contract debts. But a covenant by the obligee of a bond not to sue the obligor within a certain time is not an example of the civil-law novation. The agreement was not a release, not a substituted contract, but a covenant merely, for the breach of which the obligee has his action; 19 Johns. 129.

At Common Law. The common-law doctrine of novation mainly agrees with that of the civil law, but in some parts differs from it.

The term novation is rarely employed. The usual common-law equivalent is assignment, and sometimes merger. Still, this form of contract found its way into common-law treatises as early as Fleta's day, by whom it was called *innovatio*. Item, *per innovationem, ut si transfusa sit obligatio de una persona in aliam, que in se suscepit obligationem*. Fleta, lib. 2, c. 90, § 12. The same words here quoted are also in Bracton, lib. 3, c. 2, § 13, but we have *novationem* for *innovationem*. In England, recently, the term novation has been revived in some cases.

A case of novation is put in Tatlock v. Harris, 3 Term 180. "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100; B's debt is extinguished, and C may recover that sum against A."

The subject of novation has been much before the courts in reference to the transfers of the business of life assurance companies. In order to constitute a novation the old obligation must be discharged; and it has often been the interest of claimants on the transferor company, where the transferee company has become insolvent, to contend that there is no "novation," but that the old obligation is still in force. In England the questions which have arisen on this matter are for the most part set at rest by the stat. 35 & 36 Vict. c. 41, s. 7, providing that no policy-holder shall be deemed to have abandoned any claim against the original company, and to have accepted in lieu thereof the liability of the new company, unless such abandonment and acceptance shall have been signified by some writing signed by him, or by his agent lawfully authorized. Moz. & W.

There must always be a debt once existing and now cancelled, to serve as a *consideration* for the new liability. The action in all cases is brought on the new agreement. But in order to give a right of action there must be an extinguishment of the original debt; 4 B. & C. 163; 1 M. & W. 124; 14 Ill. 34; 4 La. Ann. 281; 15 N. H. 129; 110 Mass. 52; 53 Vt. 345; 78 Ia. 718; 46 Ark. 163. See 93 Mich. 342.

Where there is a substitution of a new contract for an old one, the new contract must be a valid one upon which the creditor can have his remedy; 57 Wis. 584; and the previous obligation of which novation is sought must be a valid one; 59 Ind. 509; 64 id. 413.

No mere agreement for the transformation of one contract into another is of effect until actually carried into execution and the consent of the parties thereto obtained. A good novation is an accord executed; 5 B. & Ad. 925; 3 N. & M'C. 171; 1 La. 410; 24 Conn. 621; otherwise, if there be no satisfaction; 2 Scott N. R. 988. The discharge of the old debt must be contemporaneous with, and result from the consummation of, an arrangement with the new debtor; 39 Minn. 407.

But where an agreement is entered into by deed, that deed gives in itself a substantial cause of action; and the giving such deed may be a sufficient accord and satisfaction for a simple contract debt; Co. Litt. 212 b; 1 Burr. 9; 2 Rich. 608; 3 W. & S. 276; 1 Hill N. Y. 567.

In the civil law *delegatio*, no new creditor could be substituted without the debtor's consent. This rule is observed in the common law. Hence, without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity of contract between them. To establish such privity there must be a new promise founded on sufficient consideration; 3 Mer. 652; 5 Wheat. 277; 12 Ga. 406; 5 Ad. & E. 115; 7 Harr. & J. 213, 219; 21 Me. 494; 39 Minn. 407; 123 Mass. 28; 74 Wis. 456; 14 La. Ann. 54.

But in equity a creditor may assign his claim fully to another without any intervention of the debtor; and the assignee is not even compelled to sue in his assignor's name; 14 Conn. 141; 8 Swanst. 392; 4 Rand. 392; Mart. & Y. 378.

The extinction of the prior debt is consideration enough to support a novation. If A holds B's note, payable to A, and assigns this for value to C, B is by such transfer released from his promise to A, and this is sufficient consideration to sustain his promise to C; 1 Pars. Contr. ch. 13; 2 Barb. 349; Ans. Contr. 220; 37 Ohio 279; 95 Ind. 452; 53 Vt. 30. And a consideration need not be expressed in the contract of novation; though one must be proved in order to defend in a suit brought by creditors of the assignor.

When assent or consideration is wanting, the novation operates only as a species of collateral security. The transferee cannot sue in his own name, and will be subject to all the equitable defences which the debtor had against the original creditor. This assent on the debtor's part is said to be essential, for the reason that he may have an account with his assignor, and he shall not be barred of his right to a set-off. Still, if anything like an assent on the part of a holder of money can be inferred, he will be considered as the debtor; 4 Esp. 208; 6 Tex. 163; if the debtor's assent be not secured, the order of transfer may be revoked before it is acted on.

In a delegation, if the old debtor agree to provide a substitute, he must put his creditor into such a position that the latter can claim full satisfaction from the delegated debtor, or otherwise the original liability remains, and there is no novation; 19 Mo. 322, 637. See 3 B. & Ald. 64; 2 M. & W. 484; 6 Cra. 253; 12 Johns. 409; 21 Wend. 450; 1 Misc. Rep. 176; 57 Wis. 534.

One who has contracted to pay the debts of another, and has been notified by a creditor that he accepts the arrangement, cannot be released from liability to such creditor by rescinding the contract without his consent; 25 Ill. App. 130.

The existing Louisiana law is based upon the doctrines of the Civil Code considered above. It is held in numerous cases that "novation is not to be presumed," hence the receipt of a bill or note is not necessarily a novation, or extinguishment of the debt for which it is given. An express declaration to that effect is required in most of our states, or else acts tantamount to a declaration. An intention to discharge the old debt must be shown in all cases; and this intention is sufficient to work a novation; 4 La. Ann. 329, 543; 6 id. 669; 9 id. 228, 497; 12 id. 299. "The delegation by which the debtor gives to the creditor another debtor, who obliged himself towards such creditor, does not operate as a novation unless the creditor has expressly declared his intention to discharge the debtor who made the delegation." 13 La. Ann. 238.

One of the most common of modern novations is the surrender and destruction of an old promissory note or bill of exchange, and the receipt of a new one in payment thereof. The rules of novation apply as completely to debts evidenced by mercantile paper as to all other obligations; Story, Bills § 441; Pothier, *de Change*, n. 189; Thoms. Bills, ch. 1, § 3. Hence, everywhere, if the parties intend that a promissory note or bill shall be absolute payment, it will be so considered; Ans. Contr. 278, n.; 10 Ad. & E. 593; 4 Mas. 396; 1 Rich. 37, 112; 9 Johns. 310; 13 Vt. 452. In some states, the receipt of a negotiable promissory note is *prima facie* payment of the debt upon which it is given, and no action lies upon the account unless the presumption is controverted; 12 Mass. 237; 113 id. 194; 132 id. 538; 8 Me. 298; 79 Me. 62; 29 Vt. 32; 59 id. 154; 68 Ind. 254; 111 id. 137; 7 Or. 39. "If a creditor gives a receipt for a draft in payment of his account, the debt is novated;" 2 La. 109. But see the cases cited *supra* for the full Louisiana law. In most states, however, the rule is, as in England, that, whether the debt be pre-existing or arise at the time of giving the note, the receipt of a promissory note is *prima facie* a conditional payment only, and works no novation.

It is payment only on fulfillment of the condition, i. e. when the note is paid; 5 Beav. 415; 6 Cra. 264; 2 Johns. Cas. 488; 27 N. H. 253; 11 Gill & J. 416; 4 R. I. 383; 8 Cal. 501; 2 Rich. 244; 15 S. & R. 162.

If a vendor transfer his vendee's note, he can only sue on the original contract when he gets back the note, and has it in his power to return it to his vendee; 1 Pet. C. C. 262; 4 Rich. 59.

Where the holder of a note agrees to accept another as debtor in place of the maker, there is a complete novation of the debt, and the indorsers are discharged; 22 Can. S. C. R. 479.

A novation is not a promise to pay the debt of another, within the statute of frauds, and need not be in writing; 18 So. Rep. (Tex.) 646. See 2 Misc. Rep. 301; 45 Ill. App. 648; 54 Mo. App. 221; 160 Mass. 235; 39 Atl. Rep. (Me.) 551.

See Dixon, Substituted Liabilities; 6 Harv. Law Rev. 184; DISCHARGE; PAYMENT; MORTGAGE; MERGER.

NOVEL ASSIGNMENT. See NEW ASSIGNMENT.

NOVEL DISSEISIN. The name of an old remedy which was given for a new or recent disseisin.

When a tenant in fee-simple, fee-tail, or for term of life, was put out and disseised of his lands or tenements, rents, and the like, he might sue out a writ of assize or novel disseisin; and if, upon trial, he could prove his title and his actual seisin, and the disseisin by the present tenant, he was entitled to have judgment to recover his seisin and damages for the injury sustained; 3 Bla. Com. 187. This remedy is obsolete.

NOVELLÆ LEONIS. The ordinances of the Emperor Leo, which were made from the year 887 till the year 893, are so called. These novels changed many rules of the Justinian law. This collection contains one hundred and thirteen novels, written originally in Greek, and afterwards, in 1560, translated into Latin by Agilæus.

NOVELS, NOVELLÆ CONSTITUTIONES. In Civil Law. The name given to the constitutions or laws of Justinian and his immediate successors, which were promulgated soon after the Code of Justinian.

It appears to have been the intention of Justinian, after the completion of the second and revised edition of the Code, to supply what had not been foreseen in the preceding laws, together with any necessary amendments or alterations, not by revising the Code, but by supplementary laws. Such laws he promulgated from time to time; but no official compilation of them is known to have been made until after his death, when his laws, 189 in number, with those of the reigns of Justin II. and Tiberias, nine in number, were collected, together with some local edicts, under this name. They belong to various times between 525 and 565.

Although the Novels of Justinian are the best known, and when the word Novels only is mentioned those of Justinian are always intended, he was not the first who used that name. Some of the acts of Theodosius, Valentinian, Leo, Severus, Authenarius, and others, were also called Novels. But the Novels of the emperors who preceded Justinian had not the force of law after the legislation of that emperor. Those Novels are not, however, entirely useless; because, the Code of Justinian having been compiled to a considerable extent from the Theodosian Code and the earlier Novels, the latter frequently remove doubts which arise on the construction of the Code.

The original language of the Novels was for the most part Greek; but they are represented in the Corpus Juris Civilis by a Latin translation of 134 of them. These form the fourth part of the Corpus Juris Civilis. They are directed either to some officer, or an archbishop or bishop, or to some private individual of Constantinople; but they all had the force and authority of law.

The 134th Novel is the foundation and groundwork of the English Statute of Distribution of Intestates' Effects, which has been copied in many states of the Union. See 1 P. Wms. 27; Prec. in Chanc. 598; CIVIL CODE; CODE.

NOVELTY. In Patent Law. See PATENT.

NOVIGILD. A pecuniary satisfaction for an injury, amounting to nine times the value of the thing for which it was paid. Spelman.

NOVUS HOMO (Lat. a new man). This term is applied to a man who has been

pardoned of a crime, by which he is restored to society and is rehabilitated.

NOW. At this time, or at the present moment; or at a time contemporaneous with something done. 15 Ore. 426. At the present time. 26 Ct. Cl. 15. In a will the word now is construed to mean at the death of the testator; 53 L. J. Ch. 1163 (reversed on other grounds, 30 Ch. D. 50); except where persons or classes must be ascertained or a description of property fixed; 30 L. J. Ex. 290; 6 H. & N. 583, where the word now is held to refer to the date of the will.

NOW RESIDES. The expression "now resides" conveys the idea of a fixed and permanent residence quite as certainly as the expression "usually resides." 78 Ky. 468.

NOXA (Lat.). In Civil Law. Damage resulting from an offence committed by an irresponsible agent. The offence itself. The punishment for the offence. The slave or animal who did the offence, and who is delivered up to the person aggrieved (*datur noxae*) unless the owner choose to pay the damage. The right of action is against whoever becomes the possessor of the slave or animal (*noxa caput sequitur*). D. de furt. L. 41; Vicat, Voc. Jur.; Calv. Lex.

NOXAE DEDITIO. Surrender of a wrongdoer. In Roman law, used in connection with the surrender of a slave by a master for the former's misdeeds, in lieu of paying the damages assessed. Hunter, Rom. Law, 166; See NOXA.

NOXAL ACTION. See NOXA.

NOXIOUS. Hurtful; offensive. Within the meaning of a statute prohibiting noxious or offensive trade or manufactures, brick-making is not included. 32 L. J. M. C. 135; 13 C. B. n. s. 479.

A thing is noxious if capable of doing harm. And if noxious as administered, although innoxious if differently administered; 49 L. J. M. C. 44; 5 Q. B. Div. 307; 13 Cox 547; 12 id. 463.

NUBILIS (Lat.). In Civil Law. One who is of a proper age to be married. Dig. 32, 51.

NUDE. Naked. Figuratively, this word is now applied to various subjects.

A nude contract, *nudum pactum*, is one without a consideration. Nude matter is a bare allegation of a thing done, without any evidence of it.

NUDUM PACTUM. A species of contract in the civil law. See CONSIDERATION. It is now commonly used to express a contract made without a consideration.

NUISANCE. Anything that unlawfully worketh hurt, inconvenience, or damage. 3 Bla. Com. 5, 216. See Cooley, Torts 670.

That class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or to the right of another, or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Wood, Nuisance.

A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. It produces damage to but one or a few persons, and cannot be said to be public; 36 N. Y. 297; 35 N. H. 357; 5 R. I. 185; Ad. Eq. 210; 3 Bla. Com. 215; Webb, Poll. Torts 484.

A public or common nuisance is such an inconvenience or troublesome offence as annoys the whole community in general and not merely some particular person. It produces no special injury to one more than another of the people; 1 Hawk. Pl. Cr. 197; 4 Bla. Com. 166.

A mixed nuisance is one which, while

producing injury to the public at large, does some special damage to some individual or class of individuals; Wood, Nuisance 85.

It is difficult to say what degree of annoyance constitutes a nuisance. If a thing is calculated to interfere with the comfortable enjoyment of a man's house, it is a nuisance; 3 Jur. n. s. 571. In relation to offensive trades, it seems that when such a trade renders the enjoyment of life and property uncomfortable it is a nuisance; 1 Burr. 833; 18 Allen 95; 116 E. C. L. 608; 45 Cal. 55; 85 Ia. 221; 84 Tex. 230; 15 N. Y. Supp. 701; for the neighborhood have a right to pure and fresh air; 2 C. & P. 485; 23 N. J. Eq. 26; 58 Pa. 275; 4 B. & S. 608. Every citizen holds his property subject to the implied obligation that he will use it in such way as not to prevent others from enjoying the use of their property; 97 N. C. 477.

A thing may be a nuisance in one place which is not so in another; therefore the situation or locality of the nuisance must be considered. A tallow-chandler, for example, setting up his business among other tallow-chandlers, and increasing the noxious smells of the neighborhood, is not guilty of setting up a nuisance unless the annoyance is much increased by the new manufactory; Peake 91. Such an establishment might be a nuisance in a thickly populated town of merchants and mechanics where no such business was carried on; 3 Grant 302. The same doctrine obtains as regards other trades or employments. Persons living in populous manufacturing towns must expect more noise, smoke, and disturbance than those living elsewhere, and the circumstances of every case must govern; 21 Conn. 213; 58 Pa. 275; 54 Me. 272; 15 Ohio Cir. Ct. Rep. 228. A private hospital in a fashionable square in Dublin is an offensive trade; [1896] 1 I. R. 76. A private lunatic asylum is not an offensive trade; 2 A. & E. 161.

Coal burning was at one time decided to be a nuisance, and on petition Edw. II. issued a proclamation against the using it in London; Chamb. Encyc. tit. Coal, cited in 8 Ont. Q. B. Div. 538, where it was held that a barbed wire fence is not a nuisance. A city ordinance declaring a public laundry to be a nuisance if carried on in a city except in designated parts of it, is unconstitutional as contravening the fourteenth amendment of the United States constitution; 82 Fed. Rep. 823. Carrying on an offensive trade for several years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of and travellers upon which it is a nuisance. Formerly the contrary doctrine obtained, on the ground that the complainants were in fault in coming to a nuisance. This doctrine is now very properly exploded, as it is manifest that an observance of it would interfere greatly with the growth of towns and cities; 6 Gray 473; 7 Blackf. 534; 3 C. & P. 483; 23 Wend. 446; 3 Phila. 10; 5 Scott 500; 3 Barb. 167; 52 N. J. Eq. 675; 82 Mich. 471; 11 H. L. Cas. 642; 18 N. J. Eq. 397; 38 id. 58; 62 Ia. 540; 18 Fed. Rep. 753. The trade may be offensive for noise; 51 N. Y. 300; 10 L. T. (N. S.) 241; 2 Bing. 34; L. R. 4 Ch. App. 388; 2 Sim. N. S. 133; L. R. 8 Ch. App. 487; 23 Vt. 321; 6 Cush. 80; 14 Mo. App. 590; see 146 Mass. 349; 133 id. 289; or smell; 2 C. & P. 435; 13 Metc. Mass. 365; 1 Den. 524; 34 Tex. 230; 100 Mass. 597; 33 Conn. 121; 43 N. H. 415; 74 Ia. 169; or for other reasons; 1 Johns. 78; 1 Swan 213; 3 Jur. n. s. 570; 73 Pa. 84; L. R. 5 Eq. Ca. 166; 52 N. H. 282; 51 N. J. L. 42; 25 Fla. 851.

To constitute a public nuisance, there must be such a number of persons annoyed that the offence can no longer be considered a private nuisance; 1 Burr. 337; 2 Chitty, Cr. L. 607; 8 Ind. 494; 1 Wheat. 469; 37 Barb. 301. Where pugilistic entertainments were given at a club and crowds collected outside, and men whistled for cabs during late hours, it was

held a nuisance which would be enjoined; 63 L. T. 65.

Public nuisances arise in consequence of following particular trades, by which the air is rendered offensive and noxious; Cro. Car. 510; Hawk. Pl. Cr. b. 1, c. 75, § 10; 2 Ld. Raym. 1163; 1 Burr. 333; 1 Stra. 686; 4 B. & S. 608; 23 Vt. 92; 52 N. J. Eq. 675; also where rendered offensive from stagnant ponds; 134 N. Y. 414; 71 Hun 149; from acts of public indecency, as bathing in a public river in sight of the neighboring houses; 2 Campb. 89; 29 Ind. 517; 18 Vt. 574; 5 Barb. 203; 20 Ala. 65; 5 Rand. 627; or for acts tending to a breach of the public peace, as for drawing a number of persons into a field for the purpose of pigeon-shooting, to the disturbance of the neighborhood; 3 B. & Ald. 184; or for rude and riotous sports or pastimes; 5 Hill 121; 8 Cow. 169; 1 S. & R. 40; 6 C. & P. 324; or keeping a disorderly house; 13 Gray 26; 5 Cranch 304; 8 Blackf. 208; 1 Salk. 282; 30 N. J. Eq. 103; or a gaming house; Hawk. Pl. Cr. b. 1, c. 75, § 6; or a bawdy-house; 9 Conn. 350; 13 Gray 26; 26 N. Y. 190; 54 Barb. 299; 128 N. Y. 341; 85 Me. 288; or a merry-go-round; 21 S. E. Rep. (W. Va.) 906; or a dangerous animal, known to be such, and suffering him to go at large, as a large bulldog accustomed to bite people; 28 Wisc. 430; 40 Vt. 347; or exposing a person having a contagious disease, as the smallpox, in public; 4 M. & S. 73, 472; and the like. The bringing a horse infected with the glanders into a public place, to the danger of infecting the citizens, is a misdemeanor at common law; 2 H. & N. 299; 16 Conn. 272; 41 Barb. 339. The selling of tainted and unwholesome food is likewise indictable; 4 Bla. Com. 162; 3 Hawks 376; 3 M. & S. 11. The leaving unburied the corpse of a person for whom the defendant was bound to provide Christian burial, as a wife or child, is an indictable nuisance, if he is shown to have been of ability to provide such burial; 2 Den. Cr. Cas. 325. So of storing combustible articles in undue quantities or in improper places; 56 Barb. 72; 3 East 192; 57 Pa. 274; 2 Hen. & M. 345; or the placing of a powder magazine in dangerous proximity to a city; 34 Ill. App. 364; or the erection and maintenance of purstures; Story, Eq. § 921; 9 Wend. 571; 28 N. Y. 396; 55 Barb. 404; 10 Pet. 623; 23 Vt. 92; 2 Wall. 403; 10 id. 557; or the keeping of a coal-shed by a railroad in a thickly settled part of a city; 134 Ill. 281; or maintaining a powder magazine within the city limits, against an ordinance; 12 U. S. App. 665.

Private nuisances may be to corporeal inheritances; as, for example, if a man should build his house so as to throw the rain-water which fell on it on my land; Fitzherbert, Nat. Brev. 184; 39 Barb. 400; 5 Rep. 101; have a tree projecting over the land of another; Poll. Torts 62; keep hogs or other animals so as to incommode his neighbor and render the air unwholesome; 9 Co. 58; 139 Mass. 198; or to incorporeal hereditaments; as, for example, obstructing a right of way by ploughing it up or laying logs across it, and the like; Fitzherbert, Nat. Brev. 183; 2 Rolle, Abr. 140; 80 Ga. 650; or obstructing a spring; 1 Campb. 463; 6 East 208; or "shooting" a gas well; 131 Ind. 408; or making musical and other sounds, for the purpose of vexing and annoying the next door neighbor; [1893] 1 Ch. 316; interfering with a franchise, as a ferry or railroad, by a similar erection unlawfully made; or with a navigable stream by a railroad bridge erected without authority; 28 Ga. 398; 122 Mass. 1. Any annoyance arising from odors, smoke, unhealthy exhalations, noise, interference with water power, etc., etc., whereby a man is prevented from fully enjoying his own property, may be ranked as a private nuisance. See 131 Ind. 375; 153 Pa. 366; 50 Kan. 478; 67 Hun 401; [1893] 2 Ch. 447; polluting a stream by discharge of drainage; 35 Atl. Rep. (Conn.) 499; 39 N. E. Rep. (Md.) 909; lowering the grade of a highway; 17 U. C. Q. B. 165; building a railway across it un-

lawfully; 4 Gray 22; failing to keep a street railway in repair; 87 Tenn. 746. So making noises in the street and thereby occasioning damage to citizens; 6 Cush. 80; and making a great outcry and clamor in the streets, by which people are drawn together and the highway obstructed; 74 Phila. 365; 101 Mass. 29; and even though the noise disturbed but a single person; 113 Mass. 8; and a continuous and daily beating of drums on the street; 105 Cal. 558; if it be so troublesome as to annoy the whole community; 73 N. C. 27. See several full notes on nuisances in 59 L. R. A.; and see MUNICIPAL CORPORATIONS; ORDINANCE.

A person is not liable in damages for a nuisance erected on land by his grantor until after a request to abate; 43 Ill. App. 421; but see 57 Fed. Rep. 901.

The remedies are by an action for the damage done, by the owner, in the case of a private nuisance; 3 Bla. Com. 220; or by any party suffering special damage, in the case of a public nuisance; 4 Wend. 9; 3 Vt. 529; 1 Pa. 309; Vaugh. 341; 3 M. & S. 472; 2 Bingh. 283; 28 Vt. 142; 36 Cal. 193; 2 R. I. 493; 74 Cal. 463; 76 Ga. 804; 51 N. J. L. 26; 74 Ia. 127; 34 Atl. Rep. (Pa.) 974; by abatement by the owner, when the nuisance is private; 2 Rolle, Abr. 555; 3 Dowl. & R. 556; 37 Pa. 503; 8 Dana 158; and in some cases when it is public; Add. Torts 71. But in neither case must there be any riot, and very pressing exigency is requisite to justify summary action of this character, particularly in the case of a public nuisance; 14 Wend. 397; 11 Ark. 252; 16 Q. B. 546; by injunction, which is the most usual and efficacious remedy; see INJUNCTION; or by indictment for a public nuisance; 2 Bish. Cr. L. § 856; Whart. Cr. L. § 1410, etc.; 57 Vt. 144; 91 Tenn. 445. A private individual cannot abate a nuisance in a public highway, unless it does him special injury, and then only so far as is necessary to the exercise of his right of passing along the highway; 26 U. S. App. 486; 9 Co. 55; 2 Salk. 458; 3 Bla. Com. 5.

Every continuance of a nuisance or recurrence of the injury is an additional nuisance forming in itself the subject-matter of a new action; 38 Minn. 179.

See Wood, Nuisance, as to municipal authority to abate a nuisance; 9 L. R. A. 711, n.

According to the principles of equity as recognized in the courts of the United States, a state can obtain relief by a suit in equity to restrain a public nuisance; 144 U. S. 550.

NUL AGARD (L. Fr. no award). In Pleading. A plea to an action on an arbitration bond, when the defendant avers that there was no legal award made. 3 Burr. 1730; 2 Stra. 923.

NUL DISSEISIN. In Pleading. No disseisin. A plea in a real action, by which the defendant denies that there was any disseisin. It is a species of the general issue.

NUL TIEL RECORD (Fr. no such record). In Pleading. A plea which is proper when it is proposed to rely upon facts which disprove the existence of the record on which the plaintiff founds his action. Andr. Steph. Pl. 234.

Any matters may be introduced under it which tend to destroy the validity of the record as a record, provided they do not contradict the recitals of the record itself; 10 Ohio 100. It is frequently used to enable the defendant to deny the jurisdiction of the court from which the alleged record emanates; 2 McLean 129; 22 Wend. 293.

It is said to be the proper plea to an action on a foreign judgment, especially if of a sister state, in the United States; 2 Leigh 72; 17 Vt. 302; 6 Pick. 232; 11 Miss. 210; 1 Pa. 499; 2 South. 778; 2 Breese 2; though it is held that *nil debet* is sufficient; 33 Me. 268; 3 J. J. Marsh. 600; especially if the judgment be that of a justice of the peace; 3 Harr. N. J. 498. It has been held that *nil tiel record* is an inappropriate

plea to suits upon foreign judgments, since such judgments do not create a merger, and are only *prima facie* evidence of an indebtedness; 88 Me. 406.

See CONFLICT OF LAWS.

NUL TORT (L. Fr. no wrong). In Pleading. A plea to a real action, by which the defendant denies that he committed any wrong. It is a species of general issue.

NUL WASTE. In Pleading. The general issue in an action of waste. Co. 3d Inst. 700 a, 708 a. The plea of *nul waste* admits nothing, but puts the whole declaration in issue; and in support of this plea the defendant may give in evidence anything which proves that the act charged is no waste, as that it happened by tempest, lightning, and the like; Co. Litt. 283 a; 3 Wms. Saund. 238, n. 5.

NULL. Properly, that which does not exist; that which is not in the nature of things. In a figurative sense it signifies that which has no more effect than if it did not exist. 8 Toulmier, n. 320.

NULL AND VOID. The words "null" and "void" mean the same thing. 5 Ky. L. R. 812.

NULLA BONA (L. Lat. no goods). The return made to a writ of *fiat facias* by the sheriff, when he has not found any goods of the defendant on which he could levy.

NULLITY. An act or proceeding which has absolutely no legal effect whatever. See Chitty, Contr., 12th ed. 671.

NULLITY OF MARRIAGE. The requisites of a valid and binding marriage have been considered in the article on that subject. If any of these requisites are wanting in a given case, the marriage is either absolutely void, or voidable at the election of one or both of the parties. The more usual imperfections which thus render a marriage void or voidable are: 1. Unsoundness of mind in either of the parties. 2. Want of age, i. e. fourteen in males and twelve in females. 3. Fraud or error; but these must relate to the essentials of the relation, as personal identity, and not merely to the accidentals, as character, condition, or fortune. 4. Duress. 5. Physical impotence, which must exist at the time of the marriage and be incurable. 6. Consanguinity or affinity within the prohibited degrees. 7. A prior subsisting marriage of either of the parties. The fifth and sixth are termed canonical, the remainder, civil, impediments.

The distinction between the two is important,—the latter rendering the marriage absolutely void, while the former only renders it voidable. In the one case, it is not necessary (though it is certainly advisable) to bring a suit to have nullity of the marriage ascertained and declared; it may be treated by the parties as no marriage, and will be so regarded in all judicial proceedings. In the other case, the marriage will be treated as valid and binding until its nullity is ascertained and declared by a competent court in a suit instituted for that purpose; and this must be done during the lifetime of both parties; if it is deferred until the death of either, the marriage will always remain good. But the effect of such sentence of nullity, when obtained, is to render the marriage null and void from the beginning, as in the case of civil impediments.

For the origin and history of this distinction between void and voidable marriages, see 1 Bish. Mar. Div. & Sep. § 252.

A suit for nullity is usually prosecuted in the same court, and is governed by substantially the same principles, as a suit for divorce; 2 Bish. Mar. Div. & Sep. § 39.

In its consequences, a sentence of nullity differs materially from a divorce. The latter assumes the original validity of the marriage, and its operation is entirely prospective. The former renders the marriage void from the beginning, and nullifies

all its legal results. The parties are to be regarded legally as if no marriage had ever taken place: they are single persons, if before they were single; their issue are illegitimate; and their rights of property as between themselves are to be viewed as having never been operated upon by the marriage. Thus, the man loses all right to the property, whether real or personal, which belongs to the woman; and the woman loses her right to dower; 2 Bish. Mar. Div. & Sep. §§ 907, 1597.

Neither is the woman, upon a sentence of nullity, entitled to permanent alimony; though the better opinion is that she is entitled to alimony *pendente lite*; 2 Bish. Mar. Div. & Sep. §§ 907, 1597. See ALIMONY; MARRIAGE; DIVORCE.

NULLIUS IN BONIS (Lat.). Among the property of no person; not a subject of private property.

NULLIUS FILIUS (Lat.). The son of no one; a bastard.

A bastard is considered *nullius filius* as far as regards his right to inherit. But the rule of *nullius filius* does not apply in other respects, and has been changed by statute in most states so as to make him the child of his mother, in respect of inheritance.

The mother of a bastard, during its age of nurture, is entitled to the custody of her child, and is bound to maintain it; 6 S. & R. 255; 2 Johns. 375; 2 Mass. 109; 4 B. & P. 148. But see 5 East 224, n.

The putative father, too, is entitled to the custody of the child as against all but the mother; 1 Ashm. 55. And it seems that the putative father may maintain an action, as if his child were legitimate, for marrying him without his consent, contrary to law; Add. Pa. 212. See BASTARD; CHILD; FATHER; MOTHER; PUTATIVE FATHER.

NULLIUS JURIS (Lat.). Of no legal force.

NULLUM ARBITRIUM (Lat.). In Pleading. The name of a plea to an action on an arbitration bond for not fulfilling the award, by which the defendant asserts that there is *no award*.

NULLUM FECERUNT ARBITRIUM (Lat.). In Pleading. The name of a plea to an action of debt upon an obligation for the performance of an award, by which the defendant denies that he submitted to arbitration, etc. Bac. Abr. *Arbitr.*, etc. (G).

NULLUM TEMPUS ACT. The statute 3 Geo. III. c. 16. See 32 Geo. III. c. 58, and 7 Will. c. 3. It was so called because the right of the crown to sue, etc., was limited by it to sixty years, in contradiction to the maxim, *Nullum tempus occurrit regi*. 3 Chitty, Stat. 63.

NUMBER. A collection of units. In pleading, numbers must be stated truly when alleged in the recital of a record, written instrument, or express contract; Lawes, Pl. 48; 4 Term 314; Cro. Car. 262; Dougl. 669; 2 W. Bla. 1104. But in other cases it is not, in general, requisite that they should be truly stated; because they are not required to be strictly proved. If, for example, in an action of trespass the plaintiff proves the wrongful taking away of any part of the goods duly described in his declaration, he is entitled to recover *pro tanto*; Bac. Abr. *Trespass* (I 2); Lawes, Pl. 48.

And sometimes, when the subject to be described is supposed to comprehend a multiplicity of particulars, a general description is sufficient. A declaration in trover alleging the conversion of "a library of books," without stating their number, titles, or quality, was held to be sufficiently certain; 3 Bulstr. 31; Carth. 110; Bac. Abr. *Trover* (F 1); and in an action for the loss of goods by burning the plaintiff's house, the articles may be described by the simple

denomination of "goods" or "divers goods"; 1 Kebl. 835; Plowd. 85, 118, 128; Cro. Eliz. 837; 1 H. Bla. 284. The singular number may be included within the plural; 83 Ind. 238; 71 Ala. 157; 29 Kan. 734; 77 Mo. 246; Bish. Stat. Crimes § 213.

NUMERATA PECUNIA (Lat.). In Civil Law. Money counted or paid; money given in payment by count. See PECUNIA NUMERATA and PECUNIA NON-NUMERATA. L. 3, 10, C. *de non numerat. pecun.*

NUNC PRO TUNC (Lat. now for then). A phrase used to express that a thing is done at one time which ought to have been performed at another.

A *nunc pro tunc* entry is an entry made now, of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake. 31 N. E. Rep. (Ind.) 670.

Leave of court must be obtained to act in legal proceedings *nunc pro tunc*; and this is granted to answer the purposes of justice, but never to do injustice. A judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court; 3 C. B. 970. See 1 V. & B. 312; 1 Moll. 462; 18 Price 604; 52 Kan. 562. Entering a decree *nunc pro tunc*, and thereby restricting the time for appeal, is not prejudicial error, where the defeated party succeeds in perfecting his appeal; 144 Ill. 248, 651.

A plea *puis darrein* continuance may be entered *nunc pro tunc* after an intervening continuation, in some cases; 11 N. H. 299; and lost pleadings may be replaced by new pleadings made *nunc pro tunc*; 1 Mo. 327. See 159 U. S. 687.

Nunc Pro Tunc Order. The rule is well settled that the court cannot alter, correct, or amend its records at a subsequent term by the recollection of the judge, or the representation of others to him. There must be at least a minute, or a memorandum on the court record evidencing the order or judgment then rendered to justify the court, at a subsequent term, entering a "nunc pro tunc order." 157 Ky. 767, 164 S. W. 72.

NUNCIATIO. In Civil Law. A formal proclamation or protest. It may be by acts (*realis*) or by words. Mackeldey, Civ. Law § 287. Thus, *nunciatio novi operis* was an injunction which one man could place on the erection of a new building, etc., near him, until the case was tried by the prætor. *Id.*; Calv. Lex. An information against a criminal. Calv. Lex.

NUNCIO. The name given to the pope's ambassador. Nuncios are ordinary or extraordinary; the former are sent upon usual missions, the latter upon special occasions. See FOREIGN MINISTER.

NUNCIUS. In International Law.

A messenger; a minister; the pope's legate, commonly called a *nuncio*. See LEGATE.

NUNCUPATIVE WILL. An oral will, declared by a testator in *extremis*, or under circumstances considered equivalent thereto, before witnesses, and afterwards reduced to writing. Beach, Wills 5; 4 Kent 576; 2 Bla. Com. 500; 1 Jarm. Wills, 6th Am. ed. *78; Schoul. Wills § 360.

When a man lieth languishing for fear of sudden death, dareth not stay the writing of his testament, and therefore he prayeth his curate and others to bear witness of his last will, and declareth by word what his last will is. Perk. Conv. § 476; Bac. Abr. 305; 24 Atl. Rep. 370.

In early times this kind of will was very common, and before the statute of frauds, by which it was virtually abolished, save in the case of soldiers and sailors, was of equal efficacy, except for lands, tenements, and hereditaments, with a written testa-

ment. Such wills are subject to manifest abuses, and by stat. 1 Vict. c. 26, §§ 9, 11 (preceded by 1 Will. IV. c. 20), the privilege is confined to soldiers in actual service, and sailors at sea, and extends only to personal estate. Similar provisions have been enacted in Massachusetts, Minnesota, New York, Rhode Island, Virginia, West Virginia, and Montana. In Georgia, the statute embraces both real and personal property. In California and the Dakotas, the decedent must have been in actual military service, or at sea, and in immediate fear of death. In the other states, nuncupative wills by persons in *extremis* are still recognized, subject to restrictions as to amount of property bequeathed, similar to those of the English statute of frauds.

The following principles, among others, are well established: Statutes relating to nuncupative wills are strictly construed; 2 Phillim. 194; 78 Ill. 287; 47 Pa. 31; 33 Miss. 629. The testator must be in *extremis*, overtaken by violent sickness, in contemplation of death, and without time to make a written will; 1 Addams 389; 20 Johns. 502; 6 W. & S. 184; 10 Gratt. 548; 84 Ga. 619; but see 2 Ala. n. s. 242; 82 Ill. 50; the deceased must have clearly intimated by word or sign to those present that he intended to make the will; 9 B. Monr. 553; 27 Ill. 247; 26 N. H. 372; 14 La. Ann. 729; 36 Md. 630; 2 Greenl. 298; 63 Ill. 455; 78 *id.* 287; 46 Ia. 694; 63 N. C. 637; testamentary capacity must be most clearly proved; 12 Gill & J. 192; 78 Ill. 287. In "actual military service," is held to mean during warfare, and while on an expedition; 3 Curt. 531; 53 Me. 561; but this rule has been somewhat freely treated; 89 Vt. 498; 1 Abb. Pr. U. S. 112. See 53 Me. 561. Sailors must be *servant on shipboard*; 2 Curt. 339; 2 R. I. 133. The term mariner applies to every one in the naval or mercantile service; 4 Bradf. 154. See note to Sykes v. Sykes, 20 Am. Dec. 44; 24 Atl. Rep. 370. See MILITARY TESTAMENT.

NUNDINÆ (Law Lat.). In Civil and Old English Law. Fair or fairs. Dion. Halicarnass. lib. 2, p. 95; Law Fr. & Lat. Dict. Hence *Nundination*, traffic at fairs.

NUNQUAM INDEBITATUS (Lat. never indebted). In Pleading. A plea to an action of indebitatus assumpsit, by which the defendant asserts that he is not indebted to the plaintiff. McKelv. Pl. 31; 6 C. & P. 545; 1 M. & W. 542; 1 Q. B. 77.

In England, this plea has been substituted for *nil debet*, *q. v.*, as the general issue in debt on a simple contract.

NUNTIUS, NUNCIUS. In Old English Practice. One who made excuse for absence of one summoned. An apparitor, beadle, or sergeant. Cowel. A messenger or legate; *e. g.* pope's nuncio. Jacob, L. Dict. *Essonator* was sometimes wrongly used for *nuntius* in the first sense. Bracton, fol. 345, § 2.

NUPER OBIT (Lat. he or she lately died). In Practice. The name of a writ which in the English law lay for a sister coheirress dispossessed by her coparcener of lands and tenements whereof their father, brother, or any common ancestor died seized of an estate in fee-simple. Fitzh. N. B. 197. Abolished in 1833.

NUPTIÆ (Lat.). Marriage; nuptials; the union of man and woman.

NURTURE. The act of taking care of children and educating them. See CHILD.

NURUS (Lat.). A daughter-in-law. Dig. 50. 16. 50.

NYMPHOMANIA. A morbid and insane sexual desire in women. Stand. Dict. A term used to designate *hyperæsthesia sexualis* or eroticism in women. Bridges, Abn. Psy. 82.

"Nymphomania" is recognized as irresponsible insanity. 6 Bush (Ky.) 276.

O. K. Abbr. (U. S.) I. All correct. (Possibly humorous spelling, oll korrekt.) II. vt. To pass; certify; indorse; as, to O. K. a bill. Stand. Dict.

"O. K." may operate as a consent. 114 Ky. 332, 70 S. W. 852.

O. NI. Formerly it was the custom for the Exchequer, as soon as the sheriff entered into and made up his account for issues, amerciaments, etc., to mark upon each head "O. Ni."; this denoted "*oneratur, nisi habeat sufficientem exonerationem*," and presently he became the king's debtor, and a debt was set upon his head; whereupon the parties *paravalle* became debtors to the sheriff, and were discharged against the king. Wharton; 4 Inst. 116.

OATH. An outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God. Tyler, Oaths 15.

The term has been variously defined: as, "a solemn invocation of the vengeance of the Deity upon the witness if he do not declare the whole truth, so far as he knows it;" 1 Stark. Ev. 22; or, "a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth;" 2 Leach 482; or, as "a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith, or, in other words, to punish his perjury if he shall be guilty of it;" 10 Toullier, n. 343-348; Puffendorff, b. 4, c. 2, § 4. The essential idea of an oath would seem to be, however, that of a recognition of God's authority by the party taking it, and an undertaking to accomplish the transaction to which it refers as required by his laws.

In its broadest sense, the term is used to include all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly. In a more restricted sense, it excludes all those forms of attestation or promise which are not accompanied by an imprecation.

Assertory oaths are those required by law other than in judicial proceedings and upon induction to office: such, for example, as custom-house oaths.

Extra-judicial oaths are those taken without authority of law. Though binding *in foro conscientie*, they do not; when false, render the party liable to punishment for perjury.

Judicial oaths are those administered in judicial proceedings.

Promissory or official oaths are oaths taken, by authority of law, by which the party declares that he will fulfil certain duties therein mentioned: as, the oath which an alien takes, on becoming naturalized, that he will support the constitution of the United States: the oath which a judge takes that he will perform the duties of his office. The breach of this does not involve the party in the legal crime or punishment of perjury; 3 Zabz. 49. Where an appointee neglects to take an oath of office when required by statute to do so, he cannot be considered qualified, nor justify his doings as an officer; 2 N. H. 202; s. C. 9 Am. Dec. 50.

Qualified oaths are circumstantial oaths. Rap. & L. Dict.

The form of administering the oath may be varied to conform to the religious belief of the individual, so as to make it binding upon his conscience; 4 Bla. Com. 43; 1

Whart. Ev. §§ 386-8; 16 Pick. 154; 2 Gall. 346; 3 Park. Cr. 590; 2 Hawks 458; 7 Ill. 540; Ry. & M. 77. The most common form is upon the gospel, by taking the book in the hand: the words commonly used are, "You do swear that," etc., "so help you God," and then kissing the book; 9 C. & P. 137. The oath was in common use long prior to the Christian era; Willes 545, 1744; the oath and Christianity became associated during the reign of Henry VIII. in England; 3 Robertson's Charles V. 257. The origin of this oath may be traced to the Roman law; Nov. 8, tit. 3; Nov. 74, cap. 5; Nov. 124, cap. 1. In ancient times a Bible containing the Gospels was placed upon a stand in view of the prisoner. The jurors placed their hands upon the book, and then the accused had a full view of "the peer" who was to try him. This was called the "corporal oath" because the hand of the person sworn touched the book. Probably, out of reverence, the book may have been kissed sometimes, as a Catholic priest now kisses it in a Mass; but it is doubtful if kissing the book was ever essential to the validity of the "corporal oath"; 22 Law Mag. & Rev. 59.

The terms "corporal oath" and "solemn oath" are synonymous, and an oath taken with the uplifted hand is properly described by either term in an indictment for perjury; 1 Ind. 184. In New England, New York, and in Scotland the gospels are not generally used, but the party taking the oath holds up his right hand and repeats the words here given; 1 Leach 412, 498.

Kissing the book has been abolished by statute (1895) in Pennsylvania.

Where a justice asks affiant if he swears to the affidavit, and he replies that he does, the oath is sufficient though he does not hold up his hands and swear; 65 Miss. 454.

Another form is by the witness or party promising holding up his right hand while the officer repeats to him, "You do swear by Almighty God, the searcher of hearts, that," etc., "and this as you shall answer to God at the great day."

In another form of attestation, commonly called an affirmation (q. v.), the officer repeats, "You do solemnly, sincerely, and truly declare and affirm that;" which is the form prescribed in England by 8 Geo. I. ch. 6.

A general oath that the evidence "shall be the truth, the whole truth, and nothing but the truth," etc., is all that is necessary for a witness who testifies to the signing of an instrument in his presence, and translates the language of such instrument for the benefit of the jury; 13 Or. 563.

A Jew is sworn on the Pentateuch, or Old Testament, with his head covered; Stra. 821, 1113; a Mohammedan, on the Koran; 1 Leach 54; a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest; Wils. 549; 1 Atk. 21; a Chinaman, by breaking a china saucer; 1 C. & M. 248. See 25 Alb. L. J. 301; 92 Mo. 395.

After a witness has taken the oath according to the custom and religion of his country, it is not error to require him to take the statutory oath; 47 Pac. Rep. 961.

The requirement of an "oath" as used in any act or resolution of congress shall be deemed complied with by making affirmation in the judicial form; U. S. R. S. § 1.

The form and time of administering oaths, as well as the person authorized to administer, are usually fixed by statute.

See Gilp. 439; 4 Wash. C. C. 555; 2 Blackf. 35; 2 McLean 135; 9 Pet. 238; 1 Va. Cas. 181; 8 Rich. So. C. 456; 1 Swan 157; 5 Mo. 21; 48 Cal. 197; 41 Conn. 206. The administering of unlawful oaths is an offence against the government; Whart. Lex.

The subject of oaths has undergone much revision of late years by parliament. By the Promissory Oaths Act (31 & 32 Vict. c. 72) a number of unnecessary oaths have been abolished, and declarations substituted. The act of 1885 provides that in case of rape of a child under thirteen, the victim or a witness, if too young to be sworn, may give evidence not under oath. See also Promissory Oaths Act, 1871.

In Arkansas, California, Florida, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, New York, Ohio, Oregon, and Wisconsin there are constitutional provisions intended to exclude any religious test for the competency of witnesses.

The Bible is not an indispensable requisite in the administration of an oath; 4 Seld. 67. See VOLUNTARY OATH.

OATH AGAINST BRIBERY. One which could have been administered to a voter at an election for members of parliament. Abolished in 1854. Whart. Lex.

OATH OF CALUMNY. In Civil Law. An oath which a plaintiff was obliged to take that he was not actuated by a spirit of chicanery in commencing his action, but that he had *bona fide* a good cause of action. Pothier, Pand. lib. 5, tit. 16, 17, s. 124. This oath is somewhat similar to our affidavit of a cause of action. See Dunl. Adm. Pr. 289, 290; JURAMENTUM CALUMNIE.

OATH DECISORY. In Civil Law. An oath which one of the parties defers or refers back to the other for the decision of the cause.

It may be deferred in any kind of civil contest whatever, in questions of possession or of claim, in personal actions, and in real. The plaintiff may defer the oath to the defendant whenever he conceives he has not sufficient proof of the fact which is the foundation of his claim; and in like manner the defendant may defer it to the plaintiff when he has not sufficient proof of his defence. The person to whom the oath is deferred ought either to take it or refer it back; and if he will not do either, the cause should be decided against him. Pothier, Obl. pt. 4, c. 3, s. 4.

The decisory oath has been practically adopted in the district court of the United States for the district of Massachusetts; and admiralty causes have been determined in that court by the oath decisory. But the cases in which this oath has been adopted have been where the tender has been accepted; and no case is known to have occurred there in which the oath has been refused and tendered back to the adversary Dunl. Adm. Pr. 290.

It was familiar to the Roman tribunals, and could be administered by the court to either party for the satisfaction of his conscience, when in doubt. 3 Greenl. Ev., Lewis ed. § 412.

OATH IN LITEM. An oath which in the civil law was deferred to the complainant as to the value of the thing in dispute, on failure of other proof, particularly when there was a fraud on the part of the defendant and he suppressed proof in his possession. See Greenl. Ev. § 348; 1 Eq.

Cas. Abr. 229; 1 Me. 27; 1 Yeates 34.

In general, the oath of the party cannot, by the common law, be received to establish his claim, but is admitted in two classes of cases: *first*, where it has been already proved that the party against whom it is offered has been guilty of some fraud or other tortious or unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages. See 1 Pet. 591; 9 Wheat. 486; 5 Pick. 436; 16 Johns. 198; 17 Ohio 156; 3 N. H. 135: as, for example, where a trunk of goods was delivered to a shipmaster at one port to be carried to another, and on the passage he broke the trunk open and rifled it of its contents, in an action by the owners of the goods against the shipmaster, the facts above mentioned having been proved *abunde*, the plaintiff was held a competent witness to testify as to the contents of the trunk; 1 Me. 27; 11 *id.* 412. And see 10 Watts 335; 1 Greenl. Ev. § 348; 12 Metc. 44; 12 Mass. 360. *Second*, the oath *in litem* is also admitted on the ground of public policy where it is deemed essential to the purposes of justice; 1 Pet. 596; 6 Mood. 137; 2 Stra. 1186. But this oath is admitted only on the ground of necessity. An example may be mentioned of a case where a statute can receive no execution unless the party interested be admitted as a witness; 16 Pet. 203. Parties in interest are now everywhere, and in most cases, permitted to testify.

OATH EX OFFICIO. The oath by which a clergyman charged with a criminal offence was formerly allowed to swear himself to be innocent; also the oath by which the compurgators swore that they believed in his innocence. 3 Bla. Com. 101, 447; Moz. & W. See OFFICIO, EX, OATH OF.

OATH PURGATORY. An oath by which one destroys the presumptions which were against him, for he is then said to purge himself, when he removes the suspicions which were against him: as, when a man is in contempt for not attending court as a witness, he may purge himself of the contempt, by swearing to a fact which is an ample excuse. See PURGATION.

OATH SUPPLEMENTARY. In Civil and Ecclesiastical Law. An oath required by the judge from either party in a cause, upon half-proof already made, which being joined to half-proof, supplies the evidence required to enable the judge to pass upon the subject. See 3 Bla. Com. 270.

OB CONTINENTIAM DELICTI (Lat.). On account of the contaminating character of the offense.

OB CONTINGENTIAM (Lat.). In case of contingency.

OB TURPEM CAUSAM (Lat.). For an immoral consideration.

OBDIENICE. The performance of a command.

Officers who obey the command of their superiors, having jurisdiction of the subject-matter, are not responsible for their acts. A sheriff may, therefore, justify a trespass under an execution, when the court has jurisdiction, although irregularly issued; 3 Chitty, Pr. 75; Hamm. N. P. 48.

A child, an apprentice, a pupil, a mariner, and a soldier owe respectively obedience to the lawful commands of the parent, the master, the teacher, the captain of the ship, and the military officer having command; and in case of disobedience submission may be enforced by correction. See ASSAULT; CORRECTION.

OBDIENT. Submissive to authority; yielding compliance with commands, orders, or injunctions; performing what is required, or abstaining from what is forbid. 1 Duv. (Ky.) 17.

OBDIENTARIUS. A monastic officer. Du Cange. See 1 Poll. & Maitl. 417.

OBDIENTIAL OBLIGATION. See OBLIGATION.

OBIT. That particular solemnity or office for the dead which the Roman Catholic church appoints to be read or performed over the body of a deceased member of that communion before interment; also, the office which upon the anniversary of his death was frequently used as a commemoration or observance of the day. Dy. 313.

OBIIT SINE PROLE (Lat.). (He) died without issue.

OBITER (Lat.). By the way; in passing. "This point was not the principal question in the case, but the law concerning it is delivered obiter only, and in the course of argument." 2 Bl. Com. 238.

OBITER DICTUM. See DICTUM.

OBJECT. That which is perceived, known, thought of, or signified; that toward which a cognitive act is directed. Cent. Dict. The term includes whatever may be presented to the mind as well as to the senses; whatever also is acted upon or operated upon affirmatively or intentionally influenced by anything done, moved, or applied thereto; 8 Blatchf. 257; it may be used as having the sense of effect; 3 Wash. Ter. 131; and for all practical purposes the words subject and object are synonymous; *id.* But the subject of action cannot be the object of action; the latter is the remedy demanded, the relief prayed for, and is no part of the subject of action or the causes of action; 18 Kan. 406.

OBJECTION. Where evidence is objected to at the trial, the nature of the objections must be distinctly stated, whether an exception be entered on the record or not, and, on either moving for a new trial on account of its improper admission, or on arguing the exception, the counsel will not be permitted to rely on any other objections than those taken at *nisi prius*; 3 Tayl. Ev., Chamb. ed. § 1881 *d*; objections must state the specific ground; 40 Cal. 390; 99 Ind. 588; 35 Mo. 226; and counsel cannot change his ground on the argument in the appellate court; 70 N. Y. 34; general objections, such as irrelevant, incompetent, and the like, are said to be too general in their terms; 91 Mo. 138; 50 N. H. 121; evidence to which such objections are made will be held in the appellate court to have been properly admitted, if admissible for any purpose; 46 Cal. 397; one who has not objected to evidence when introduced is not entitled to have the court instruct the jury to disregard it; 85 Mo. 106; nor will an objection be heard if made for the first time on the motion for a new trial; 40 Ind. 516; or in the appellate court; 105 U. S. 4.

When testimony was received without objection, the court should not sign a bill of exceptions; if it does, it will be disregarded above; 38 Pa. 56.

Ordinarily, where an objection has been made and overruled, it is not necessary to repeat it to each succeeding question open to the same objection; Thomp. Trials § 705.

Objecting to a judge's instruction is said to be regarded as having the same force as excepting; 98 Mo. 640. See BILL OF EXCEPTIONS.

Where objections have been twice presented and regularly allowed, it is not necessary that they should be renewed at the termination of the testimony of a witness; 168 U. S. 532.

OBJECTS OF A POWER. The persons who are intended to be benefited by the distribution of property settled subject to a power.

OBJURGATRICES. Scolds or unquiet women punished with the cuckoo stool. (g. v.).

OBLATA. See OBLATE ROLL.

OBLATE ROLL. An exchequer-roll containing particulars of *oblata*, i. e., old debts; fines; amercements, or gifts to the crown. Stand. Dict.

OBLATI ACTIO (Lat.). An action given to a party against another who had offered to him a stolen thing, which was found in his possession.

OBLATIO (Lat.). In Civil Law. A tender of money in payment of debt made by debtor to creditor. L. 9, C. *de solut.* Whatever is offered to the church by the pious. Calv. Lex.; Vicat, Voc. Jur.

OBLATION. In Ecclesiastical Law. Offerings; obventions. See OBVENTIONS.

OBLIGATIO. In Roman Law. A legal bond which obliges us to the performance of something in accordance with the law of the land. Ortolan, Inst. 2, § 1179.

It corresponded nearly to our word contract. Justinian says, "*Obligatio est juris vinculum quo necessitate adstringimur aliquid solvendo rei, secundum nostrae civitatis iura.*" Pr. J. 3, 13.

The Romans considered that obligations derived their validity solely from positive law. At first the only ones recognized were those established in special cases in accordance with the forms prescribed by the strict *jus civile*. In the course of time, however, the praetorian jurisdiction, in mitigation of the primitive rigor of the law, introduced new modes of contracting obligations and provided the means of enforcing them: hence the twofold division made by Justinian of *obligationes civiles* and *obligationes praetoriae*. Inst. 1. 3, 13. But there was a third class, the *obligationes naturales*, which derived their validity from the law of nature and nations, or the natural reason of mankind. These had not the binding force of the other classes, not being capable of enforcement by action, and are, therefore, not noticed by Justinian in his classification; but they had, nevertheless, a certain efficacy even in the civil law: for instance, though a debt founded upon a natural obligation could not be recovered by an action, yet if it was voluntarily paid by the debtor he could not recover it back, as he might do in the case of money paid by mistake, etc., where no natural obligation existed. L. 38, pr. D. 12, 6. And see Ortolan 2, § 1180.

The second classification of obligations made by Justinian has regard to the way in which they arise. They were, in this aspect, either *ex contractu* or *quasi ex contractu*, or *ex maleficio* or *quasi ex maleficio*; Inst. 2, 3, 13. These will be discussed separately.

Obligations ex contractu, those founded upon an express contract, are again subdivided into four classes, with reference to the mode in which they are contracted. The contract might be entered into *re*, *verbis*, *litteris*, or *consensu*.

A contract was entered into *re* by the actual transfer of a thing from one party to the other. Though in such cases the understanding of the parties as to the object of the transfer, and the conditions accompanying it, formed an essential part of the contract, yet it was only by the actual delivery of the thing that the contract was generated. The only contracts which could be entered into in this way were those known to our law as bailments,—a term derived from the French word *bailleur*, to deliver, and evidently pointing to the same characteristic feature in the translation which the Romans indicated by the word *re*. These were the *mutuum*, or loan of a thing to be consumed in the using and to be returned in kind, the *commodatum*, or gratuitous loan of a thing to be used and returned, the *depositum*, or delivery of a thing to be kept in safety for the benefit of the depositor, and the *pignus*, or delivery of a thing in pledge to a creditor, as security for his debt. See MUTUUM; COMMODATUM; DEPOSITUM; PIGNUS; Ortolan, Inst. § 1208; Mackeldey, Röm. Recht § 396. Besides the above named *contractus reales*, a large class of contracts which had no special names, and were thence called *contractus innominati*, were included under this head, from the fact that they, like the former,

gave rise to the *actio præscriptis verbis*. Some of these were the contracts of exchange, of mutual compromise, of doubtful or contested claims (somewhat resembling our accord and satisfaction), of factorship, etc. See Mackelvey § 409.

Contracts were entered into *verbis*, by a formal interrogation by one party and response by the other. The interrogation was called *stipulatio*, and the party making it, *reus stipulandi*. The response was called *promissio*, and the respondent, *reus promittendi*. The contract itself, consisting of the interrogation and response, was often called *stipulatio*. In the time of the earlier jurists, the stipulation could only be entered into by the use of certain formula words by the parties: as, for instance, *Spondes? do you promise? Spondeo, I promise; Dabis? will you give? Dabo, I will give; Facies? will you do this? Faciam, I will do it, etc.*, etc. But by a constitution of the emperor Leo, A. D. 469, the obligation to use these particular words was done away, and any words which expressed the meaning of the parties were allowed to create a valid stipulation, and any language understood by the parties might be used with as much effect as Latin. Such contracts were called *verbis*, because their validity depended entirely upon the use of the words. The mere agreement of the parties without using the question and response could not beget a stipulation; and, on the other hand, if the question and response had been used, the obligation was created although there might be an absence of consent. In this latter case, however, equitable relief would be granted by the prætor; Ortolan, Inst. § 1250. Stipulations, and, indeed, all other forms of contracts, might be made either *pure*, i. e. absolutely, or *in diem*, i. e. to take effect at a future day, or *sub conditione*, i. e. conditionally. But some kinds of conditions, such as those physically impossible, were inadmissible, and invalidated the contract; while others, such as those which were absurd, were themselves invalidated, and the contract was considered as having been made absolutely. Mackelvey § 415-421; Ortolan, Inst. § 1235; Inst. § 13.

Contracts entered into *litteris* were obsolete in the reign of Justinian. In the earlier days of Roman jurisprudence, every citizen kept a private account-book. If a creditor, at the request of his debtor, entered in such book his charge against his debtor, such entry, in pursuance of the request, constituted not merely evidence of a contract, but the contract itself. This was the contract formed *litteris*, in writing. The debtor, on his part, might also make a corresponding entry of the transaction in his own book. This was, in fact, expected of him, and was generally done; but it seems not to have been necessary to the validity of the contract. The entry was made in the form of a fictitious payment; it was allowable only in pecuniary transactions; it must be simple and unconditional, and could not be made to take effect at a future day. The charge might be made against the original debtor, *a re in personam*, or against a third person who agreed to take his place, *a persona in personam*. This species of literal contract was called *nomina, nomina transcriptitia* or *acceptilatio et expensilatio*. Ortolan, Inst. § 1414. This species of contract seems never to have been of great importance; they had disappeared entirely before the time of Justinian; Hadley, Rom. Law 216.

There were two other literal contracts known to the early jurisprudence, called *syngrapha* and *chirographia*; but these even in the times of Gaius had become so nearly obsolete that very little is known about them. All these, it must be borne in mind, were contracts themselves, not merely evidences of a contract; and this distinguishes them from the instruments of writing in use during the latter ages of the civil law. Ortolan, Inst. § 1414; Mackelvey § 422.

Contracts were made *consensu*, by the mere agreement of the contracting parties.

Although such agreement might be proved by a written instrument, as well as in other ways, yet the writing was only evidence of the contract, not the contract itself. This species of consensual contracts are *emptio et venditio*, or sale, *locatio et conductio*, or hiring, *emphyteusis*, or conveyance of land reserving a rent, *societas*, or partnership, and *mandatum*, or agency. See these words; HIRE.

Obligaciones quasi ex contractu. In the Roman law, persons who had not in fact entered into a contract were sometimes treated as if they had done so. Their legal position in such cases had considerable resemblance to that of the parties to a contract, and is called an *obligatio quasi ex contractu*. Such an obligation was engendered in the cases of *negotiorum gestio*, or unauthorized agency, of *communio incidens*, a sort of tenancy in common not originating in a contract, of *solutio indebiti*, or the payment of money to one not entitled to it, of the *tutela* and *cura*, resembling the relation of guardian and ward, of the *additio hereditatis* and *agnitio bonorum possessionis*, or the acceptance of an heirship, and many others. Some include in this class the *constitutio dotis*, settlement of a dower. Ortolan, Inst. § 1522; Mackelvey § 457.

Obligaciones ex maleficio or *ex delicto*. The terms *maleficium*, *delictum*, embraced most of the injuries which the common law denominates torts, as well as others which are now considered crimes. This class includes *furtum*, theft, *rapina*, robbery, *damnum*, or injury to property, whether direct or consequential, and *injuria*, or injury to the person or reputation. The definitions here given of *damnum* and *injuria* are not strictly accurate, but will serve to convey an idea of the distinction between them. All such acts, from the instant of their commission, rendered the perpetrator liable for damages to the party injured, and were, therefore, considered to originate an *obligatio*. Inst. 4. 1; Ortolan, Inst. § 1715.

Obligaciones quasi ex delicto. This class embraces all torts not coming under the denomination of *delicta* and not having a special form of action provided for them by law. They differed widely in character, and at common law would in some cases give rise to an action on the case, in others to an action on an implied contract. Ortolan, Inst. § 1781.

Obligaciones ex variis causarum figuris. Although Justinian confined the divisions of obligations to the four classes which have been enumerated, there are many species of obligations which cannot properly be reduced within any of these classes. Some authorities have, consequently, established a fifth class, to receive the odds and ends which belonged nowhere else, and have given to this class the above designation, borrowed from Gaius, l. 1, pr. § 1, D. 44. 7. See Mackelvey § 474. See, generally, Hadley, Rom. Law 209, etc.

OBLIGATION (from Lat. *obligo*, *ligo*, to bind). A duty.

A tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made. Inst. 3. 14.

A bond containing a penalty, with a condition annexed, for the payment of money, performance of covenants, or the like, and which differs from a bill, which is generally without a penalty or condition, though it may be obligatory. Co. Litt. 172.

A deed whereby a man binds himself under a penalty to do a thing. Com. Dig. *Obligation* (A); 2 S. & R. 502; 6 Vt. 40; 1 Blackf. 241; Harp. 434; Baldw. 129. The word has a very broad and comprehensive legal signification and embraces all instruments of writing, however informal, whereby one party contracts with another for the payment of money or the delivery of specific articles. 103 N. C. 344; 6 Minn. 353; 23 Fed. Rep. 585.

An *absolute obligation* is one which gives no alternative to the obligor, but requires fulfilment according to the engagement.

An *accessory obligation* is one which is

dependent on the principal obligation; for example, if I sell you a house and lot of ground, the principal obligation on my part is to make you a title for it; the accessory obligation is to deliver you all the title-papers which I have relating to it, to take care of the estate till it is delivered to you, and the like.

An *alternative obligation* is where a person engages to do or to give several things in such a manner that the payment of one will acquit him of all.

Thus, if A agrees to give B, upon a sufficient consideration, a horse, or one hundred dollars, it is an *alternative obligation*. Pothier, Obl. pt. 2, c. 3, art. 6, no. 245.

In order to constitute an alternative obligation it is necessary that two or more things should be promised disjunctively; where they are promised conjunctively, there are as many obligations as the things which are enumerated; but where they are in the alternative, though they are all due, there is but one obligation, which may be discharged by the payment of any of them.

The choice of performing one of the obligations belongs to the obligor, unless it is expressly agreed that it shall belong to the creditor; Dougl. 14; 1 Ld. Raym. 279; 4 Mart. L. A. n. s. 187. If one of the acts is prevented by the obligee or the act of God, the obligor is discharged from both. See 2 Evans, Pothier, Obl. 53; Viner, Abr. *Condition* (S b); *CONJUNCTIVE*; *DISJUNCTIVE*; *ELECTION*.

A *civil obligation* is one which has a binding operation in law, and which gives to the obligee the right of enforcing it in a court of justice; in other words, it is an engagement binding on the obligor. 4 Wheat. 197; 12 id. 318, 337.

Civil obligations are divided into express and implied, pure and conditional, primitive and secondary, principal and accessory, absolute and alternative, determinate and indeterminate, divisible and indivisible, single and penal, and joint and several. They are also purely personal, purely real, or mixed.

A *conditional obligation* is one the execution of which is suspended by a condition which has not been accomplished, and subject to which it has been contracted.

A *determinate obligation* is one which has for its object a certain thing: as, an obligation to deliver a certain horse named Bucephalus. In this case the obligation can only be discharged by delivering the identical horse.

A *divisible obligation* is one which, being a unit, may nevertheless be lawfully divided, with or without the consent of the parties.

It is clear that it may be divided by consent, as those who made it may modify or change it as they please. But some obligations may be divided without the consent of the obligor: as where a tenant is bound to pay two hundred dollars a year rent to his landlord, the obligation is entire; yet, if his landlord dies and leaves two sons, each will be entitled to one hundred dollars; or if the landlord sells one undivided half of the estate yielding the rent, the purchaser will be entitled to receive one hundred dollars and the seller the other hundred. See *APPORTIONMENT*.

Express or *conventional obligations* are those by which the obligor binds himself in express terms to perform his obligation.

Imperfect obligations are those which are not binding on us as between man and man, and for the non-performance of which we are accountable to God only: such as charity or gratitude. In this sense an obligation is a mere duty. Pothier, Obl. art. præl. n. 1.

An *implied obligation* is one which arises by operation of law: as, for example, if I send you daily a loaf of bread, without any express authority, and you make use of it in your family, the law raises an obligation on your part to pay me the value of the bread.

An *indeterminate obligation* is one where the obligor binds himself to deliver one of a certain species: as, to deliver a horse, where the delivery of any horse will dis-

charge the obligation.

An *indivisible* obligation is one which is not susceptible of division: as, for example, if I promise to pay you one hundred dollars, you cannot assign one-half of this to another, so as to give him a right of action against me for his share. See *DIVISIBLE*.

A *joint* obligation is one by which several obligors promise to the obligee to perform the obligation. When the obligation is only joint, and the obligors do not promise separately to fulfil their engagement, they must be all sued, if living, to compel the performance; or, if any be dead, the survivors must all be sued. See *PARTIES*.

A *natural or moral* obligation is one which cannot be enforced by action, but which is binding on the party who makes it in conscience and according to natural justice.

As, for instance, when the action is barred by the act of limitation, a natural obligation still subsists, although the civil obligation is extinguished; 5 Binn. 578. Although natural obligations cannot be enforced by action, they have the following effect: *first*, no suit will lie to recover back what has been paid or given in compliance with a natural obligation; 1 Term 285; 1 Dall. 184; *second*, a natural obligation has been held to be a sufficient consideration for a new contract; 2 Binn. 591; 5 *id.* 33; Yelv. 41 a, n. 1; Cowp. 290; 2 Bla. Com. 445; 3 Bos. & P. 249, n.; 2 East 506; 3 Taunt. 311; 5 *id.* 36; 3 Pick. 207; Chitty, Contr., 12th ed. 38; Hare, Contr. 264; Poll. Contr. 168; but see *MORAL OBLIGATION; CONSIDERATION*.

Obediential obligations. Such obligations are incumbent on parties in consequence of the situation or relationship in which they are placed. Ersk. Prin. 60.

A *penal* obligation is one to which is attached a penal clause, which is to be enforced if the principal obligation be not performed. See *LIQUIDATED DAMAGES*.

A *perfect* obligation is one which gives a right to another to require us to give him something or not to do something. These obligations are either natural or moral, or they are civil.

A *personal* obligation is one by which the obligor binds himself to perform an act, without directly binding his property for its performance.

It also denotes an obligation in which the obligor binds himself only, not including his heirs or representatives.

A *primitive* obligation, which in one sense may also be called a principal obligation, is one which is contracted with a design that it should itself be the first fulfilled.

A *principal* obligation is one which is the most important object of the engagement of the contracting parties.

A *pure* or simple obligation is one which is not suspended by any condition, either because it has been contracted without condition, or, having been contracted with one, it has been fulfilled.

A *real* obligation is one by which real estate, and not the person, is liable to the obligee for the performance.

A familiar example will explain this. When an estate owes an easement as a right of way, it is the thing, and not the owner, who owes the easement. Another instance occurs when a person buys an estate which has been mortgaged, subject to the mortgage: he is not liable for the debt, though the estate is. In these cases the owner has an interest only because he is seized of the servient estate or the mortgaged premises, and he may discharge himself by abandoning or parting with the property. The obligation is both personal and real when the obligor has bound himself and pledged his estate for the fulfilment of the obligations.

A *secondary* obligation is one which is contracted and is to be performed in case the *primitive* cannot be. For example, if I sell you my house, I bind myself to give a title: but I find I cannot, as the title is in another: then my *secondary* obligation

is to pay you damages for my non-performance of my obligation.

A *several* obligation is one by which one individual, or, if there be more, several individuals, bind themselves separately to perform the engagement. In this case each obligor may be sued separately; and if one or more be dead, their respective executors may be sued. See *PARTIES*.

A *single* obligation is one without any penalty: as where I simply promise to pay you one hundred dollars. This is called a single bill, when it is under seal.

Contractual. That form of obligation which is created by an agreement as results in contract between two parties. It is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group. Elliot, Contracts, p. 6, citing Anson Cont. 5, § 3. Not a mere general obligation consisting of a right incident to ownership or a merely public or official right, nor an indefinite one binding a party to the entire community or relating to indefinite acts or forbearances. It is a control exercisable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value. *Id.*; Anson Cont. 7.

A relation that exists between two persons of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing. *Id.*; Pol. Cont. 3 (new ed. 1885.)

Quasi-Contractual. That form of obligation which does not depend upon the consent of the obligor and which is frequently imposed upon him in defiance of his will. It binds him to affirmative action in the form of making restitution and of restoring an unjust enrichment which the obligor has received to the party who is lawfully entitled thereto. 1 Page, Contracts, 2nd ed., p. 42.

Of Tort. That form of obligation which is entered into by reason of the obligor's wrongful act or default in violating a duty which is imposed upon him by law without regard to his assent, the violation of which duty inflicts an injury upon the obligee. 1 Page, Contracts, 2nd ed., p. 42. See *CONJUNCTIVE OBLIGATION; HERITABLE OBLIGATION; IRRECUSABLE; JOINT; JOINT AND SEVERAL OBLIGATION; MANCOMMUNAL*.

OBLIGATION OF CONTRACTS.

A state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage; 163 U. S. 118. The subject is treated under *IMPAIRING THE OBLIGATIONS OF CONTRACTS*.

OBLIGATORY PACT. In Civil Law. An informal obligatory declaration of consensus, which the Roman law refused to acknowledge. Sohm, Rom. L. 321.

OBLIGATORY RIGHTS. In the Civil Law. One class of private rights between debtors and creditors.

OBLIGEE. The persons in favor of whom some obligation is contracted, whether such obligation be to pay money or to do or not to do something. La. Code, art. 3522, no. 11.

Obligees are either several or joint. An obligee is several when the obligation is made to him alone; obligees are joint when the obligation is made to two or more; and in that event each is not a creditor for his separate share, unless the nature of the subject or the particularity of the expression in the instrument lead to a different conclusion. 2 Pothier, Obl., Evans ed. 56; Hob. 173; Cro. Jac. 251. The words obligee and payee have been held to have a technical and definite meaning under an act relative to promissory notes, bonds, etc., and apply only to notes, bonds, or bills whether given for the payment of money

or for the performance of covenants and conditions, and not to mortgages; 2 Ill. 142.

OBLIGOR. The person who has engaged to perform some obligation. La. Code, art. 3522, no. 12. One who makes a bond.

Obligors are joint and several. They are joint when they agree to pay the obligation jointly; and then the survivors only are liable upon it at law, but in equity the assets of a deceased joint obligor may be reached; 1 Bro. Ch. 29; 2 Ves. 101, 371. They are several when one or more bind themselves and each of them separately to perform the obligation. In order to become an obligor, the party must actually, either himself or by his attorney, enter into the obligation and execute it as his own. If a man sign and seal a bond as his own and deliver it, he will be bound by it although his name be not mentioned in the bond; 4 Ala. 474; 4 Hayw. 239; 4 M'Cord 203; 7 Cow. 484; 5 Mass. 538; 2 Dana 463; 4 Dev. 272. When the obligor signs between the penal part and the condition, still the latter will be a part of the instrument; 7 Wend. 345; 3 Hen. & M. 144.

The execution of a bond by the obligor, in blank, with verbal authority to fill it up, does not bind the obligor, though it is afterwards filled up, unless the bond is redelivered or acknowledged or adopted; 1 Yerg. 60, 149; 1 Hill N. Y. 287; 2 N. & M'C. 125; 2 Brock. 64; 1 Ohio 368; 2 Dev. 369; 6 Gill & J. 250. But see, *contra*, 17 S. & R. 438; and see 6 *id.* 306; Wright Ohio 742; BLANK.

All obligors in a joint bond are presumed to be principals, except such as have the word "security" opposite their names; 82 Va. 751.

OBLITERATION. In the absence of statutory provisions to the contrary, the obliteration of part of a will, leaving it otherwise complete, with the intention by the testator to annul only what was cancelled, leaves the residue valid; 123 Mass. 102; 19 Alb. L. J. 328; 39 L. T. (N. S.) 581; 22 N. J. Eq. 463. But under the Wills Act in England; 1 Vict. c. 26; any obliterations or other alterations must be duly attested as is required for the execution of a will, except that such attestation may be limited to the alterations; 1 Wms. Exec. 144. A line drawn through the writing is, doubtless, an obliteration, though it may leave it as legible as it was before; 58 Pa. 244. For a review of the cases see note to 35 Am. Rep. 35; WILLS.

OBES. Works or trades which men carry on in houses or in covered places. White, New Recop. b. 1, t. 5, c. 8, § 6.

OBLOQUY. Censure; reproach. 70 Cal. 275.

OBREPTION. Acquisition of escheats, etc., from a sovereign, by making false representations. Bell, Dic. *Subreption*; Calv. Lex.

OBROGATION. The annulling a law, in whole or in part, by passing a law contrary to it. The alteration of a law. Calv. Lex.

OBSCENE. Ordinarily, something which is offensive to chastity; something that is foul and filthy, and for that reason is offensive to a pure-minded person. 38 Fed. Rep. 732. That which is offensive to chastity and modesty. 45 Fed. Rep. 414; 50 *id.* 918. See *OBSCENITY*.

Applied to language spoken, written, or printed, and to pictorial productions. Anderson; 12 Fed. Rep. 673. Obscene, lewd, or lascivious publications of an indecent character, are neither mailable nor importable. *Id.* The test is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall. A book need not have words which are in themselves obscene, in order to be obscene. Regard is had to the idea conveyed by the words used, in any substantial part of the publication. *Id.*; 16 Blatch. 336.

OBSCENITY. In Criminal Law. Such indecency as is calculated to promote the violation of the law and the general corruption of morals. It is that form of indecency which is calculated to promote the general corruption of morals. 51 Fed. Rep. 41. In all cases an indictment for obscenity must aver exposure and offence to the community generally; mere private indecency is not indictable at common law; 2 Whart. Cr. L. § 1431.

The exhibition of an obscene picture is an indictable offence at common law, although not charged to have been exhibited in public, if it be averred that the picture was exhibited to sundry persons for money; Arch. Cr. Pr. 1034; 2 S. & R. 91. The stat. 20 and 21 Vict. c. 88, gives summary powers for the searching of houses in which obscene books, etc., are suspected to be kept, and for the seizure and destruction of such books. By various acts of congress, the importation and circulation, through the mails or otherwise, of obscene literature or articles of any kind is rendered punishable with fine or imprisonment; R. S. §§ 2491, 3893, 5389. See 8 Phila. 453; 126 Mass. 46; 92 Ill. 182; 51 Fed. Rep. 41. R. S. § 3893, as amended by act of congress (19 Stat. L. p. 90), prohibiting the mailing of obscene papers, is not in contravention of the first amendment to the constitution providing that the freedom of the press shall not be abridged; 96 U. S. 727; 143 *id.* 110; 50 Fed. Rep. 921. An obscene book or paper within the act relating to non-mailable matter means one which contains immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those in whose hands the publication might fall, and whose minds are open to such immoral influences; 38 Fed. Rep. 732. Mailing a private sealed letter containing obscene matter is an offence within the statute; 163 U. S. 420; 50 Fed. Rep. 410. The character of a publication as to whether obscene or otherwise is not to be determined by the motives of the author or sender in making or sending it; 38 Fed. Rep. 500. An indictment for selling an obscene book need not set out the obscene matter nor even describe the same in general terms, if it identifies the book and states that the contents are too indecent to be placed upon the record; 43 N. Y. Supp. 1046.

The fact that a woman, in whose presence obscene language is used, is herself in the habit of using such language, can in no case constitute a justification, but may mitigate the offence; 86 Ala. 601.

Legislative provisions forbidding the keeping, exhibition, or sale of indecent books or pictures, and authorizing their destruction if seized, are within the police powers of the states and are constitutional; Cooley, Const. Lim. 749.

OBSERVE. In Civil Law. To perform that which has been prescribed by some law or usage. Dig. 1. 3. 32.

OBSELETE. A term applied to laws which have lost their efficacy without being repealed.

A positive statute, unrepealed, can never be repealed by non-user alone; 4 Yeates 181, 215; 1 P. A. Bro. App. 28; 13 S. & R. 447. The disuse of a law is at most only presumptive evidence that society has consented to such a repeal; however this presumption may operate on an unwritten law, it cannot, in general, act upon one which remains as a legislative act on the statute-book; because no presumption can set aside a certainty. A written law may indeed become obsolete when the object to which it was intended to apply, or the occasion for which it was enacted, no longer exists; 1 P. A. Bro. App. 28. "It must be a very strong case," says Chief Justice Tilghman, "to justify the court in deciding that an act standing on the statute-book, unrepealed, is obsolete and invalid. I will not say that such case may not exist,—where there has been a non-user for a great number of years,—where, from a change of times and manners, an ancient sleeping statute would do great mischief if suddenly

brought into action,—where a long practice inconsistent with it has prevailed, and especially where from other and later statutes it might be inferred that in the apprehension of the legislature the old one was not in force." 13 S. & R. 452; Rutherford, Inst. b. 2, c. 6, s. 19; Merlin, *Répert*, *Dessuetude*.

OBSTANTE. Withstanding; hindering. See NON OBSTANTE.

OBSTA PRINCIPIIIS. Withstand beginnings. It is the duty of the court to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiiis*. 116 U. S. 635.

Oppose (adverse) beginnings. Taylor, L. Gloss. Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure. This can be obviated only by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. 116 U. S. 635.

OBSTRUCT AND HINDER. The words "obstruct and hinder" import resistance and obstruction of rights. 92 Ky. 624. See DEFEAT OR OBSTRUCT.

OBSTRUCTING MAIL. See POSTAL SERVICE.

OBSTRUCTING PROCESS. In Criminal Law. The act by which one or more persons attempt to prevent, or do prevent, the execution of lawful process.

The officer must be prevented by actual violence, or by threatened violence accompanied by the exercise of force, or by those having capacity to employ it, by which the officer is prevented from executing his writ. The officer is not required to expose his person by a personal conflict with the offender; 2 Wash. C. C. 169. See 3 *id.* 335; 12 Ala. n. s. 199; 37 Wis. 196; 17 Tex. App. 232; Whart. Cr. L. § 652.

This is an offence against public justice of a very high and presumptuous nature; and more particularly so where the obstruction is of an arrest upon criminal process. A person opposing an arrest upon criminal process becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason; 4 Bla. Com. 128; 1 Russ. Cr. 360. See 2 Gall. 15; 2 Chitty, Cr. L. 145; 3 Vt. 110; 25 *id.* 415; 2 Strobh. 73; 15 Mo. 486; 4 Am. L. J. 489; 10 Ky. L. Rep. 289; 148 U. S. 197.

The fact that a person whom a mayor attempts to arrest does not know that he is authorized by the charter of the city to make arrests, does not change his responsibility for acts committed in resisting arrest; 36 S. C. 493; but where a person, who is not vested by law with authority to make an arrest, attempts to do so, he acts as a private citizen, and one who opposes him therein is not guilty of opposing an officer; 48 Fed. Rep. 554.

OBSTRUCTING PUBLIC WORSHIP. See DISTURBANCE OF PUBLIC WORSHIP.

OBSTRUCTING RAILWAYS. Acts constituting the obstruction of railroad tracks a crime exist in many states, e. g. Alabama, California, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New York, and Tennessee, and in England. The motive with which it is done is not material; 73 Ala. 473; it need not appear that an obstruction maliciously placed on the track did actually hinder the trains; 38 Ia. 257. It is the intent of the act and not the natural consequences which makes a crime; 25 Alb. L. J. 419. A driver of a vehicle who refuses to turn off a street railway track, when notified, may be guilty of obstructing a railway track; 14 Gray 69. In Texas it must be shown that the obstruction was such as would endanger human life; 7 Tex. App. 462. If a person's wagon accidentally becomes caught in a crossing, he is not liable on an indictment for obstructing the track, though he was negligent;

3 L. T. 665.

Permitting cars to remain for an unnecessarily long time on a highway is a nuisance; 95 N. C. 602; whether it be in bad faith or not; 120 Ind. 298.

The "obstruction" by a railroad company of an easement across its tracks by permitting cars to stand thereon for an unreasonable length of time is not an obstruction amounting to a nuisance which may be abated by the owner of the passway. 161 Ky. 464, 170 S. W. 1194. See NUISANCE; RAILROAD.

OBSTRUCTING A STREET. To block up; to hinder or impede. To omit, after notice, to remove an obstruction, is to willfully obstruct a highway; 12 Q. B. D. 121; as is the leaving on the side of a highway anything calculated to frighten horses; 12 *id.* 110. A certain use of the streets by carriages, either in front of private residences, hotels, clubs, theatres, churches, and similar buildings, is a legitimate use of the street as such, and when they are occupied temporarily and reasonably by a licensed coachman or by a private carriage, the practice does not amount to a nuisance; N. Y. Sup. Ct. (1896).

To render passage difficult or impossible. Anderson. The primary purpose of streets is use by public for travel and transportation, and the rule is that any obstruction or encroachment which interferes with such use is a public nuisance. But there are exceptions to the rule, born of necessity and justified by public convenience. Whether an obstruction is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto. *Id.*; 107 N. Y. 365. See STREET; NUISANCE; HIGHWAY.

OBVENTIO (Lat. *obvenire*, to fall in). In Civil Law. Rent or profit accruing from a thing, or from industry. It is generally used in the plural.

In Old English Law. The revenue of spiritual living, so called. Cowel. Also, in the plural, offerings. Co. 2d Inst. 661.

OBVIOUS. Apparent; evident; manifest. An obvious imitation of a patent does not mean obvious to an uneducated or unskilled eye, but obvious to a judge or jury, sitting as experts; 15 Ch. D. 181; 50 L. T. 420. See 15 Ct. Sess. Cas., 4th ser. 660.

The word may receive different interpretations when applied to degree of certainty; e. g., highest attainable certainty, absolute certainty, or reasonable certainty. 12 Conn. * 229.

OCCASIO. A tribute imposed by the lord on his vassals or tenants.

Molestation; trouble; hindrance; vexation by suit. Burrill; Spel.

OCCUPANCY. The taking possession of those things corporeal which are without an owner, with an intention of appropriating them to one's own use.

Pothier defines it to be the title by which one acquires property in a thing which belongs to nobody, by taking possession of it with design of acquiring it. *Tr. du Dr. de Propriété*, n. 30. The Civil Code of Louisiana, art. 3375, nearly following Pothier, defines occupancy to be "a mode of acquiring property by which a thing which belongs to nobody becomes the property of the person who took possession of it with an intention of acquiring a right of ownership in it." The basis of its origin seems to be not an instinctive bias towards the institution of property, but a presumption, arising out of the long continuation of that institution, that everything should have an owner. Maine, Anc. L. 249. Occupancy is sometimes used in the sense of occupation or holding possession; indeed it has come to be very generally so used in this country in homestead laws, public-land laws, and the like; 21 Ill. 178; 25 Barb. 54; Act of Cong. May 29, 1890 (4 Stat. at L. 429); 36 Wisc. 73; see 47 Minn. 13; 12 Q. B. Div. 356; 2 *id.* 583; but this does not appear to be a common legal use of the term, as recognized by English authorities.

To constitute occupancy, there must be a taking of a thing corporeal, belonging to nobody, with an intention of becoming the owner of it; Co. Litt. 416.

A right by occupancy attaches in the finder of lost goods unreclaimed by the

owner; in the captor of beasts *ferae naturae*, so long as he retains possession; 2 Bla. Com. 403; the owner of lands by accession, and the owner of goods acquired by confusion.

It was formerly considered, also, that the captor of goods contraband of war acquired a right by occupancy; but this is now held otherwise, such goods being now held to be primarily vested in the sovereign, and as belonging to individual captors only, to the extent and under such regulations as positive laws may prescribe; 2 Kent 200. See *BRIZE*.

OCCUPANT. One who has the actual use or possession of a thing. See 13 Nev. 65.

When the occupiers of a house are entitled to a privilege in consequence of such occupation, as to pass along a way, to enjoy a pew, and the like, a person who occupies a part of such house, however small, is entitled to some right, and cannot be deprived of it; 2 B. & Ald. 164; 1 Chitty, Pr. 209; 4 Comyns, Dig. 64; 5 *id.* 199. See 30 Ia. 242; 3 Q. B. 449.

OCCUPATIO (Lat. from *occupare*, to occupy). A taking possession of a thing which before belonged to nobody, (*quod ante nullius est*); as of wild beasts and other wild animals, property and persons captured in war, gems and other things found upon the sea-shore, etc. Burrill; Inst. 2. 1. 12, 17, 18.

OCCUPATION. Use or tenure; as, the house is in the occupation of A. B. A trade, business, or mystery; as, the occupation of a printer. See 99 Ill. 506.

A putting out of a man's freehold in time of war. Co. Litt. s. 412. See *MILITARY OCCUPATION*.

In International Law. The act by a state of taking possession of unoccupied territory (*q. v.*) under circumstances which indicate an intention to continue in possession, thus acquiring title to the property. Discovery gives merely inchoate title unless followed up by occupation. The possession must be either by persons acting under the authority of the state or if by unauthorized persons their act must be ratified by the state upon whose behalf they acted. Maxey, Int. Law 138, 139. See *TERRITORIAL PROPERTY*.

OCCUPAVIT (Lat.). In Old Practice. The name of a writ which lies to recover the possession of lands when they have been taken from the possession of the owner by occupation (*q. v.*).

OCCUPIER. One who is in the enjoyment of a thing.

A tenant, though absent, is, generally speaking, the occupier of premises; 1 B. & C. 178; but not a servant or other person who may be there *virtute officii*; 26 L. J. C. P. 12; 47 L. J. Ex. 112; L. R. 1 Q. B. 72.

OCCUPY. To hold in possession; to hold or keep for use; as, to occupy an apartment. 107 U. S. 343. In legal acceptance, actual use, possession, and cultivation. 11 Johns. 202; 37 N. J. Eq. 486.

A statute exempting from taxation the property of an institution so long as it is "occupied" by the institution for the purposes of its organization, does not exempt such portions of the property as may be rented out, although the rents may be applied to such purposes. 90 Ky. 409, 14 S. W. 408.

Occupied as a Family Residence. Where a policy of fire insurance describes the house insured as "occupied as a family residence," and by a subsequent clause provides that the policy shall become void if the house shall be or become vacant or unoccupied, the words "occupied as a family residence" must be regarded as but a representation as to the then use of the house, and the subsequent words as but an undertaking by the insured that the house shall not be without an occupant during time covered by the policy. 83 Ky. 468.

OCCUR. To happen. 91 Ill. 95.

"After a loss shall occur," in a policy of insurance, refers to the time when liability becomes fixed, by proofs of loss, etc.,—when the insurer may lawfully be compelled to pay the amount of the loss. Anderson; 77 N. Y. 243.

OCHLOCRACY. A government where the authority is in the hands of the multitude; the abuse of a democracy. Vaumène, *Dict. du Langage Politique*. Mob rule. See *GOVERNMENT*.

OCTAVE (Law Lat. *utras*). In Old English Practice. The eighth day inclusive after a feast. 3 Bla. Com. 277.

OCTO TALES (Lat. eight such). If, when a trial at bar is called on, the number of jurors in attendance is too small, the trial must be adjourned, and a *decem* or *octo tales* awarded, according to the number deficient; as, at common law, namely, a writ to the sheriff to summon eight more such men as were originally summoned. 3 Bla. Com. 364.

OCTROI. In Old French Law. Originally, a duty, which, by the permission of the *seigneur*, any city was accustomed to collect on liquors and some other goods, brought within its precincts, for the consumption of the inhabitants. Afterwards appropriated to the use of the king. Burrill; Steph. Lect. 361.

ODHAL RIGHT. An allodial right.

ODIO ET ATIA. See *DE ODIO ET ATIA*.

OF. The word has been held equivalent to after; 5 Term 283; 10 L. J. Q. B. 10; at; 3 Taunt. 147; belonging to; 2 B. & S. 703; 38 Ohio St. 506; manufactured by; 2 Bing. N. C. 668; by; 107 Mass. 355; residing at; 3 Wend. 320; 8 A. & E. 232.

In the expression "bounded north of the heirs of A," held to mean by. Anderson; 107 Mass. 361. The infirmity "of" a county is equivalent to "the property of" or "belonging to" the county. *Id.*; 33 Ohio St. 506. Entered "of record" means upon a record or records. *Id.* "Of force" means of binding force, obligatory although possibly not enforced. *Id.*; 1 Faine 336.

OF COUNSEL. A phrase commonly applied in practice to the counsel employed by a party in a cause.

OF COURSE. That which may be done in the course of legal proceedings without making any application to the court; that which is granted by the court, without further inquiry, upon its being asked; as, a rule to plead is a matter of course.

OFFENCE. In Criminal Law. The doing that which a penal law forbids to be done, or omitting to do what it commands. In this sense, it is nearly synonymous with crime. In a more confined sense, it may be considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty; 1 Chitty, Pr. 14.

OFFENDING PARTY. Where a policy provides that insured shall not recover if he is killed in a quarrel in which he is the "offending party," insured is the "offending party" if he brings on a difficulty that ends in his death by assaulting the person who kills him unless he has reason to believe he was acting in self-defense. 156 Ky. 271, 160 S. W. 1043.

OFFENSE. See *QUASI-CRIMES*.

OFFER. A proposal to do a thing. An offer, as an element of a contract, is a proposal to make a contract. It must be made by the person who is to make the promise, and it must be made to the person to whom the promise is made. It may be made either by words or by signs, either orally or in writing, and either personally or by a messenger; but in whatever way

it is made, it is not in law an offer until it comes to the knowledge of the person to whom it is made; Langd. Contr. § 151; 6 H. L. Cas. 112. While an offer remains in force, it confers upon the offeree the power to convert it into a promise by accepting it. The offeror may state how long it shall remain in force; and it will then remain in force during the time so stated, unless sooner revoked; 3 Cush. 224. In the absence of any specification by the offeror, an offer will remain in force a reasonable time unless sooner revoked; Leake, Contr. 38; 119 U. S. 151. As to what will be a reasonable time, no uniform positive rule can be laid down. When an offer is made personally, it will *prima facie* continue until the interview or negotiation terminates, and longer; 6 Wend. 103. In commercial transactions, when an offer is made by mail, the general rule is that the offeror is entitled to an answer by return mail; but this will not apply in all cases, *e. g.* when there are several mails each day. In transactions which are not commercial, much less promptitude in answering is required; Langd. Contr. § 152.

Where the offer contemplates a unilateral contract, the length of time that the offer will continue in force depends upon different considerations. The question is no longer one of accepting the offer orally or by letter, but of performing the consideration. The duration of such an offer, therefore, in the absence of any express limitation, will be measured by the length of time which may be reasonably required for the performance of the consideration. When performance of the consideration has been begun in good faith, it seems that the offer will continue, in the absence of actual revocation, until the performance is either completed or abandoned, especially when the performance of the consideration is constantly within the knowledge of the offeror; Langd. Contr. § 155. An offer which contains no stipulation as to how long it shall continue is revocable at any moment. A stipulation that an offer shall remain open for a specified time must be supported by a sufficient consideration, or be contained in an instrument under seal, in order to be binding; Langd. Contr. § 178; 3 Term 653. When thus made binding, the offer is not irrevocable, but the only effect is to give the offeror a claim for damages if the stipulation be broken by revoking the offer. When an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding; an offer which in its terms limits the time of acceptance is withdrawn by the expiration of the time; 144 U. S. 394.

As an offer can only be made by communication from the offeror to the offeree, so it can only be revoked in the same manner. But the death or insanity of the offeror during the pendency of the offer, revokes it; Langd. Contr. § 180.

An offer can only be accepted in the terms in which it is made; an acceptance, therefore, which modifies the offer in any particular, goes for nothing; L. R. 7 Ch. App. 587; 119 U. S. 151. The other party having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it; 4 Wheat. 235; 14 Pet. 77; 101 U. S. 50; 119 *id.* 151.

A mere proposal to sell may be revoked at any time before acceptance; 45 La. Ann. 214. Where an offer of sale of land stands for twenty years, and until after the death of the party to whom it is made, without compliance with its terms, the widow and sole devisee of such party cannot accept the proposition, and offer to perform it, and thereby make a contract binding on the proposer; 51 Fed. Rep. 860.

A man may change his mind at any time, if it is not to the injury of another; he may, therefore, revoke or recall his offers at any time before they have been accepted; and, in order to deprive him of this right, the offer must have been accepted on the terms in which it was made; 10 Ves. 436; 2 C. & P. 553. See *ANS. CONTR.* 31.

Any qualification of, or departure from,

those terms invalidates the offer, unless the same be agreed to by the party who made it; 4 Wheat. 225; 3 Johns. 534; 7 *id.* 470; 6 Wend. 103; Poll. Contr. 38; *i. e.* there is no contract entered into.

When the offer has been made, the party is presumed to be willing to enter into the contract for the time limited, and, if the time be not fixed by the offer, then until it be expressly revoked or rendered nugatory by a contrary presumption; 6 Wend. 103. See 8 S. & R. 243; 1 Pick. 278; 10 *id.* 326; 12 Johns. 190; 9 Port. Ala. 605; 33 Neb. 460; 35 W. Va. 463; 1 Bell, Com. 326; Pothier, Vente, n. 32. And see **ASSENT**; **BID**; **LETTER**.

An offer must be communicated, but in many classes of contracts it need not be made to an ascertained person: as, auction sales; an offer of a reward (whether the service must have been rendered after knowledge of the offer of a reward is unsettled; see Ans. Contr. *24); an advertisement in railroad time-tables; letters of credit; offers to receive subscriptions for stocks or bonds. An offer of a stock of goods for sale on bids is not such an offer that a person who makes the highest bid is entitled to them (L. R. 5 C. P. 561). An offer may be determined:—by lapse of a specified time; by lapse of a reasonable time for accepting; by failure to comply with the terms of the offer as to the mode of acceptance; by the death of either party before acceptance; by revocation before acceptance; Hollingsworth, Contr. 11.

OFFERINGS. See **OBVENTIO**.

OFFICE. A right to exercise a public function or employment, and to take the fees and emoluments belonging to it. Sheif. Mortm. 797; Cruise, Dig. Index; 3 S. & R. 149. An office is a public charge or employment; 2 Brock. 102, per Marshall, C. J. An office may exist without an incumbent; 28 Cal. 382.

Judicial offices are those which relate to the administration of justice, and which should be exercised by persons of sufficient skill and experience in the duties which appertain to them.

Military offices are such as are held by soldiers and sailors for military purposes.

Ministerial offices are those which give the officer no discretion as to the matter to be done, and require him to obey the mandates of a superior. 7 Mass. 280. See 5 Wend. 170; 10 *id.* 514; 8 Vt. 512; 1 Ill. 280; 12 Ind. 569. It is a general rule that a judicial office cannot be exercised by deputy, while a ministerial may.

Political offices are such as are not connected immediately with the administration of justice or the execution of the mandates of a superior officer: the offices of the president of the United States, of the heads of departments, of the members of the legislature, are of this number.

In the United States, all offices, according to the above definition, are public; but in another sense employments of a private nature are also called offices: for example, the office of president of a bank, the office of director of a corporation. For the incompatibility of office, see **INCOMPATIBILITY**; **OFFICER**.

See, generally, 3 Kent 362; **MANDAMUS**; **QUO WARRANTO**.

For word "office" as used of a place for transacting public business, see 6 Cush. 181. See, as to tenure of office, R. S. §§ 1767-1775. See **RANK**; **FOREIGN OFFICE**; **LUCRATIVE OFFICE**.

OFFICE-BOOK. A book kept in a public office, not appertaining to a court, authorized by the law of any state.

An *exemplification* of any such office-book, when authenticated under the act of congress of 27th March, 1804, is to have such faith and credit given to it in every court and office within the United States as such exemplification has by law or usage in the courts or offices of the state from whence the same has been taken. See **FOREIGN LAWS**; **FOREIGN JUDGMENT**.

OFFICE-COPY. A transcript of a record or proceeding filed in an office established by law, certified under the seal of the proper officer.

A copy made by an officer of the court, bound by law to make it, is equivalent to an exemplification, though it is sometimes called an "office copy"; Steph. Dig. Ev. Art. 77. Copies of public records, whether judicial or otherwise, made by a public officer authorized by law to make them, are often termed "office copies," *e. g.* copies of recorded deeds; 74 Me. 127.

A copy made by an officer of the court, who is authorized to make it by a rule of court, but not required by law to make it, is equivalent to an exemplification in the same cause and court, but in other causes or courts is not admissible unless it can be proved as an examined copy; Steph. Dig. Ev. Art. 78. These are called "office copies"; 6 Barb. 130. Office copies are said to be secondary evidence; Steph. Dig. Ev.

OFFICE FOUND. In English Law. When an inquisition is made to the king's use of anything, by virtue of office of him who inquires, and the inquisition is found, it is said to be office found. See 100 U. S. 212, 484; **INQUEST OF OFFICE**.

OFFICE GRANT. See **GRANT**.

OFFICE OF A JUDGE. In English Law. A criminal suit in an ecclesiastical court, not being directed to the reparation of a private injury, is regarded as a proceeding emanating from the office of the judge, and may be instituted by the mere motion of the judge. But in practice these suits are instituted by private individuals, with the permission of the judge or his surrogate; and the private prosecutor in any such case is, accordingly, said to promote the office of the judge. Coote's Eccl. Practice; Moz. & W.

OFFICER. One who is lawfully invested with an office.

An office is a public charge or employment; and one who performs the duties of an office is an officer. Marshall, C. J., in 2 Brock. 102.

Executive officers are those whose duties are mainly to cause the laws to be executed.

Legislative officers are those whose duties relate mainly to the enactment of laws, such as members of congress and of the several state legislatures. These officers are confined in their duties by the constitution generally to make laws, though sometimes, in cases of impeachment, one of the houses of the legislature exercises judicial functions somewhat similar to those of a grand jury, by presenting to the other articles of impeachment, and the other house acts as a court in trying such impeachment.

Judicial officers are those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with violations of the law.

Ministerial officers are those whose duty it is to execute the mandates, lawfully issued, of their superiors.

Military officers are those who have command in the army. Non-commissioned officers are not officers in the sense in which that word is generally used; 16 Ct. Cls. 214.

Naval officers are those who are in command in the navy.

Officers are also divided into public officers and those who are not public. Some officers may bear both characters: for example, a clergyman is a public officer when he acts in the performance of such a public duty as the marriage of two individuals; 4 Conn. 209; and he is merely a private person when he acts in his more ordinary calling of teaching his congregation. See 4 Conn. 134; 18 Me. 155.

Officers are required to exercise the functions which belong to their respective offices. The neglect to do so may in some cases, subject the offender to an indictment; 1 Yeates 519; and in others he will be liable to the party injured; 1

Yeates 506.

Public office in the constitution means a permanent public trust or employment, not merely transient, occasional, or incidental; 71 N. Y. 238. The term embraces the ideas of tenure, duration, emoluments, and duties; 6 Wall. 385; but it has been held that duration and salary are not of the essence of public office, and that the duty of acting for and on behalf of the state constitutes an office; 68 N. C. 497; even though it expires as soon as a single act is done; 66 N. C. 59. The true test is that it is a parcel of the administration of government; 86 N. C. 241; though it is a clerkship in a department and the duties are confined within narrow limits; 8 Cal. 39; the term includes all persons in any public station or employment conferred by government; *id.* 39. It is said to depend upon the greater importance and dignity of the position; the requirement of an oath and perhaps of a bond, and usually upon the tenure; 40 Mich. 673. Officers of the United States are those nominated by the president and confirmed by the senate or those who are appointed under an act of congress, by the president alone, a court of law, or a head of a department; 99 U. S. 509; see 124 U. S. 303. The notification of the secretary of the navy is a valid appointment as a passed assistant surgeon; 95 U. S. 762. It is generally true that a relation arising out of a contract and dependent for its duration and extent upon the terms thereof is never considered an office; 36 Miss. 273; 2 Brock. 102. Not every employment under the government is an office; 2 Brock. 96. The distinction between officer and placeman is that the former must take an oath of office, the latter not; 63 N. C. 199.

Who are officers. The following have been held to be officers: All persons entrusted with the receipt of public money; 74 Pa. 124; the receiver of a national bank; 2 Ben. 303; clerks in an executive department of the federal government; 10 Ct. Cl. 426; a collector of city taxes, within the bankruptcy act of 1841; 7 Metc. 152; a representative in a state legislature; 2 N. H. 246 (see *infra*); members of the boards of public safety and public works; secretaries of such boards; assistant bailiff of the police court; and the stenographer of the said court, within the meaning of a constitutional provision that the salaries of public officers shall be neither increased nor diminished during their term of office; 36 S. W. Rep. (Kan.) 944; a notary public, within the meaning of a constitutional provision that any public officer who shall travel on a free pass shall forfeit his office; 32 N. Y. Supp. 109, affirmed in 145 N. Y. 424; a representative in congress; 77 N. Y. 503; a selectman; 53 N. H. 610; the president of a city council; 45 Ohio St. 196; a city superintendent of streets; 106 Mo. 489; an assistant of the board of aldermen; 3 Hun 680; a deputy county clerk; 39 N. J. Eq. 126; a county solicitor duly elected; 128 Pa. 48; a notary public; 15 Ala. 72; a passed assistant surgeon in the navy; 95 U. S. 760; a cadet engineer, a graduate of the naval academy; 116 U. S. 483; a clerk appointed by an assistant treasurer; 6 Wall. 385; a postmaster; 22 Cal. 336; judges and members of a state senate and house and state directors in corporations; 66 N. C. 59; justices of the peace; 73 Cal. 487; attendants of courts; 83 N. Y. 372; a marshal of the United States; 4 Woods 592; a deputy marshal; 17 Fed. Rep. 150; a sheriff; 63 N. C. 199; 33 Conn. 109; a deputy state treasurer; 41 Ia. 593; an additional paymaster in the army; 6 Wall. 244; trustees of the state university and directors of a state institution for the deaf and dumb, penitentiary, etc.; 68 N. C. 457; the superintendent of a county penitentiary; 11 How. Pr. 240; the medical superintendent of a hospital for the insane; 29 Ohio St. 347; trustees of a state library; 30 Cal. 160; a deputy constable; 90 Mo. 369. As to a policeman, see 45 Conn. 191; 30 Hun 396; 113 Pa. 395; a fire marshal; 49 N. Y. S. 1096. See 63 N. C. 9, where a long list of public officers is given.

It has been said that members of the bar are "public officers and ministers of justice," Barn. Ch. 478; see also 22 N. Y. 67 (which gives a very learned argument by Prof. Dwight); 2 Cow. 13; *contra*, 20 Johns. 492; 7 Porter (Ala.) 298; 24 Cal. 241. An attorney-at-law is not, indeed, in the strictest sense a public officer, but he comes very near it; 131 Mass. 376, citing 6 Md. 18; 7 Wall. 384.

The following have been held *not* to be officers:—A special deputy sheriff; 41 Ala. 399; a civil surgeon appointed by the commissioner of pensions to examine applicants for pensions; 99 U. S. 508; a lamp inspector; 180 N. Y. 894; a paymaster's clerk in the navy; 124 U. S. 308; a United States agent of fortifications; 2 Brock. 102; the keeper of a county jail; 39 Fed. Rep. 599; the chief clerk in a city assessor's office; 40 Mich. 678; a mail carrier; 17 Gratt. 243 (*contra*, 13 Ohio 523); an agent appointed by a state to receive an extradited person; 111 U. S. 624; patrolmen on the police force of a city; 80 Hun 396 (*semble*); firemen of cities and villages; 32 N. Y. 377; 57 Ohio St. 15; a pilot; 66 Ga. 503; a night watchman of a post-office building; 89 N. C. 133; members of the legislature; 63 N. C. 199. Nine-tenths of the employees of the United States government are said *not* to be officers; 98 U. S. 509. County commissioners are not officers for the purpose of impeachment; 167 Mass. 559.

See on this subject, 17 L. R. A. 248.

Public officers are public agents or trustees and have no proprietary interest or property in their office beyond the lawful term and salary (if any) prescribed. Their official rights and duties may be changed at the discretion of the legislature during their term of office; R. M. Charl't. 397; but it has been held that a clerk's office, to be held during good behavior, and many other public offices are, under certain limitations, the subject of property; 4 Dev. (N. C.) 18; the emoluments are private property; *id.*

The profits of a public office cannot be assigned for the benefit of creditors; 8 Cl. & F. 295.

The buying and selling of offices was forbidden by 5 & 6 Edw. VI. c. 15, under which it has been held that an officer having a certain salary or certain annual profits may make a deputation of it, reserving a sum not exceeding the amount of his profits, or the deputy may lawfully agree to pay so much out of the uncertain fees of an office; but if the office have uncertain fees or profits, an agreement by the deputy to pay a fixed sum annually is a sale within the statute; and so is an agreement to give the deputy all the profits; 3 Kent 456; see 9 Wend. 175.

An agreement by an applicant for an office to divide the fees with another applicant if the latter withdraw his application for it, is void; 4 Comst. 449; so is a contract for the sale of an office; 51 Mich. 524; whether made by the appointing power or the incumbent; 18 Ind. 390. An agreement for compensation for procuring the appointment or resignation of a public officer is void; 20 S. E. Rep. (N. C.) 733. So is the sale by the owners of a vessel of the position of master; 2 B. & C. 861; and the promises of a stockholder that he will secure to the buyer of his stock the office of treasurer; 120 Mass. 501.

The tenure of office is never more permanent than during good behavior; 3 Kent 454; if not protected by the constitution, it may be changed by the legislature; 165 Pa. 284; but its term cannot be extended when fixed by the constitution; 44 Ohio St. 589. In England, servants of the crown, civil as well as military, except in special cases otherwise provided by law, hold their office only during the pleasure of the crown; [1896] 1 Q. B. 116, 121.

When an officer is protected in his office from removal, except for cause to be ascertained and adjudged upon a hearing of a judicial nature, his removal without such hearing is contrary to law, although at such hearing as was held he made no

objection; 18 N. Y. L. J. 1241 (Ct. of App. N. Y.).

The right to appoint to a public office, when no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or hearing; 66 N. W. Rep. (N. D.) 234.

The suspension of an officer by the governor does not deny him the equal protection of the laws because the governor refuses to produce to him the evidence against him, or to confront him with his accusers. He is not entitled to a jury trial; 169 U. S. 586.

An officer cannot be removed from office during his second term for a violation of duty committed during his first term; 40 Pac. Rep. (Cal.) 435.

The power to remove a corporate officer for reasonable and just cause is one of the common-law incidents of all corporations; Dill. Mun. Corp. § 179; 89 N. C. 187; but not for pre-existing cause affecting his capacity to hold the office; *id.*

The act of a *de facto* officer is binding on the public; 159 U. S. 596. Persons coming into a public office to transact business, who find a person in charge of it, are not bound to ascertain his authority so to act. To them he is an officer *de facto*, and so far as they are concerned, *de jure*; 164 U. S. 657; though there was no power to appoint him; 37 Atl. Rep. (N. J.) 732. A municipal corporation who has paid a salary to a *de facto* officer who has performed the duties of an office while the right to it was in litigation, cannot be held liable therefor again to one who may thereafter establish his title to the office; 68 N. W. Rep. (S. D.) 308; the remedy is against the *de facto* officer; *id.*; 20 Kan. 298. See 68 N. Y. 279; but see 12 Heisk. 499; 53 Ill. 428; 28 Cal. 21. It is no defence to a prosecution for bribery that the act under which the officer was bribed was unconstitutional; 42 N. E. Rep. (Ohio) 999. See *DE FACTO*.

Where the settlement of a question involves the exercise of discretion and judgment, the duty is not ministerial and is beyond the review of the judicial department; 37 U. S. App. 71.

A town collector is responsible as a debtor and not merely as a bailee; 1 Den. 233. It is the policy of public laws to hold all receivers of public money to a very strict accountability; 15 Wall. 346. The obligation to keep safely the public money was said to be absolute, without any condition express or implied; 3 How. 587; but this was considered in 15 Wall. 347, as being too generally expressed, the court intimating there that loss of funds under special circumstances, as by an earthquake, would probably exonerate the official. In the same case it was said that it appears from all the cases (except that in 1 Den. 233) that the official bond of an officer is regarded as laying the foundation of a more stringent responsibility; but the court held that the forcible seizure by the rebel authorities in 1861 of public moneys in the hands of a loyal government agent, against his will and without fault on his part, was a discharge from his obligation in reference to such moneys, three judges dissented.

The responsibility of a public officer is determined, not by the law of bailment, but by the condition of his bond; 3 Pa. 372.

—Where public money is lost by the failure of a bank; 34 S. W. Rep. (Tenn.) 427; (*contra*, 151 N. Y. 135); or a city treasurer is robbed; 113 Cal. 205; (*contra*, 44 Minn. 427); the official being free from fault is not liable; but in 44 Pac. Rep. (Wash.) 125, an officer was held liable for the safety of public moneys, lost in an insolvent bank, even though he was not negligent; and in New York the liability is very strictly maintained; 151 N. Y. 135. The weight of authority seems to be in favor of a strict accountability; 48 Neb. 1; 14 Wash. 117.

Where a subordinate officer takes the place of his superior in the case of death or disability, he is entitled to the same salary; 45 Pac. Rep. (Nev.) 243.

There is no federal statute expressly bearing upon removals from office, except § 13 of the act of January 16, 1893—the Civil Service Act, relating to removal, etc., by reason of giving or refusing political contributions. The civil service rules of the executive are but regulations imposed by him upon his own actions or those of heads of departments, and do not confer upon an employe any property right in his office; 84 Fed. Rep. 551. Equity has no jurisdiction over the appointment and removal of public officers, whether the power is vested in executive or administrative boards or officers, or in a judicial tribunal; jurisdiction belongs exclusively to courts of law; 171 U. S. 866.

Equity has no jurisdiction over the appointment or removal of public officers; the jurisdiction belongs exclusively to courts of law; 124 U. S. 300; 54 Ala. 320; 151 Ill. 41; 119 Ind. 481. But equity will prevent a breach of trust affecting public franchises, or some illegal act, under color or claim of right, affecting injuriously the property rights of individuals, and falling under one of the acknowledged heads of equity jurisprudence; 55 N. Y. 390; 84 Fed. Rep. 554; and it is said that equity will protect the position of officers *de facto* against the interference of adverse claimants; High, Inj. § 1315; as by enjoining the dispossession of an officer, by force and unlawfully, and compelling the defendant to resort to a remedy at law; 84 Fed. Rep. 555.

The president may remove a district attorney within four years of his appointment; 167 U. S. 324; where the history of the question is reviewed. By the repeal (act of 1887) of the Tenure of Office Act, congress intended to concede to the president the power of removal, if it ever took it from him; *id.*

In the absence of constitutional or statutory regulation, the power of appointment carries with it, as an incident, the power of removal; 13 Pet. 320; 167 U. S. 324; 84 Fed. Rep. 552.

The Civil Service Act of 1891 is constitutional; 83 Fed. Rep. 578.

Department regulations cannot enlarge or restrict the liability of an officer on his bond; 81 Fed. Rep. 684.

The postmaster-general, when in the discharge of his duties, is not liable for damages on account of official communications made by him within those duties, by reason of any personal motive that might be alleged to have prompted his action; 161 U. S. 483.

The United States is not liable for the non-feasance or misfeasance or neglect of its officers; 141 U. S. 573.

A person holding two different federal offices cannot draw pay for both for the same period; 10 Ct. Cl. 426.

Congress cannot exercise the power of appointment to office; 147 U. S. 282. It may vest in the president the power to appoint a vice-consul; 169 U. S. 331.

The act, however tortious, of an executive officer of a court, done under color of its process, is to be regarded as a proceeding of the court, with which courts of concurrent jurisdiction will not interfere; 16 U. S. App. 325.

An act directing the employment of veterans in the labor service of the commonwealth, etc., in preference to other persons, if such veterans are qualified for the work, is constitutional; 166 Mass. 589, three judges dissenting.

One who accepts an office incompatible with one already held, *ipso facto* vacates the first office; 69 N. W. Rep. 82; 76 Hun 146. Where the mayor of Detroit was elected governor of Michigan, it was held that he thereby vacated the former office; 70 N. W. Rep. 450. In Louisiana a constitutional officer may also hold a municipal office; 25 La. Ann. 138. See *OFFICE*.

A woman is eligible to the office of court clerk where there is no provision expressly requiring such clerk to be a man, though the word "he" is used in the constitution of the state in declaring who is eligible to office; 39 S. W. Rep. (Mo.) 270.

The officers of a corporation are not, as regards their criminal liability, a single person in respect to corporate acts, and therefore they may be guilty of conspiracy; 44 N. Y. Supp. 836. A college professor is not an officer but an employee; 21 Pa. 525.

The word "vacant" has no technical nor peculiar meaning; it means empty, unoccupied; as applied to an office—without an incumbent. An existing office without an incumbent is vacant, whether it be an old or a new one; 7 Ind. 320. Where a new office has been created and has not been filled, a vacancy exists; 5 Nev. 111; 7 Ind. 326; but see 51 Miss. 28. Where a newly appointed officer fails to qualify as required by law, there is usually not a vacancy, if, by law, the last incumbent holds over; 44 Ohio St. 589; but it has been held that in such case there is a vacancy; 34 La. Ann. 273; and so where the last incumbent has no authority to hold over; 1 *id.* N. S. 753.

Statutory provisions requiring a bond and oath of office are usually only directory; it will suffice if the oath be taken and the bond given before a vacancy has been declared; 33 Ala. 674; 95 Ill. 249, 593; but see 52 N. Y. 374; 77 Va. 265; 14 Fla. 277. See 16 L. R. A. 140.

At common law, the refusal of a public officer to accept office was indictable; 4 Term 778; such is still the rule; 145 Ill. 573. Mandamus will lie to compel a person to enter upon the discharge of the duties of an office; 103 U. S. 471; 145 Ill. 573.

A public officer may resign, but not till he has qualified; 25 Cal. 94. A resignation, in the absence of any statute, should be tendered to the officer or body authorized to act in filling the vacancy; 103 U. S. 471. The resignation of a public officer is not complete till acceptance; 103 U. S. 471; 87 Va. 689; 31 N. J. L. 107; *contra*, 49 Ala. 403; 3 Nev. 566; 12 Ia. 405; 77 N. Y. 378.

An unaccepted offer to resign may be withdrawn; 10 Ind. 62; 32 Kan. 191; and even without the consent of the person accepting; 10 Ind. 62; but not after acceptance; 45 Ind. 105; 14 Q. B. Div. 908; 49 Ala. 402. See 36 Am. St. Rep. 523; 25 L. R. A. 613.

Term of office means "a fixed and definite period of time"; 30 Am. & E. Corp. Cas. 351. When no time is mentioned in the law from which the term of office begins, it runs from the date of election; 7 Ohio 7.

Officers who are compelled to rely upon and act through subordinate officers and employers are not ordinarily responsible to the government for their misfeasance or non-feasance; 52 N. Y. Supp. 197.

As to officers of corporations, see Wood, Ry.; Thomp. Corp. As to officers of a corporation as parties in patent cases, see INFRINGEMENT. As to service on corporation officers, see FOREIGN CORPORATIONS.

See MANDAMUS; QUO WARRANTO. See 72 Am. Dec. 179; Mechem, Publ. Off.; SERVICE; TENURE OF OFFICE; OFFICE; LONGEVITY PAY; LOAN; NATIONAL BANKS, and the titles of various public and corporation officials.

The trustees of the city schools are "officers of the State," since the city schools, including high schools, are a part of the State's common school system. 134 Ky. 494, 121 S. W. 411. See EMPLOYEE; PUBLIC OFFICER; RULE OF COURSE.

OFFICER DE FACTO. One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law; 6 East 368. See OFFICER.

One who discharges the duties of an office under color of title. One who, having been elected to an office, assumes to exercise its duties without having attempted to qualify, is without color of title and not such an officer. Anderson; 83 Ky. 147. Not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. 99 U. S. 24.

OFFICIAL. In Old Civil Law. The person who was the minister of, or attendant upon, a magistrate.

In Canon Law. The person to whom the bishop generally commits the charge of his spiritual jurisdiction bears this name. Wood, Inst. 30, 505; Merlin, *Répert.*

OFFICIAL CAPACITY. The words "in his official capacity" mean, when an officer, assuming to act as an officer and not as an individual, undertakes as an officer and not as an individual, to do something within the scope of his official powers. 164 Ky. 80, 174 S. W. 801.

OFFICIAL REFEREES. See REFEREES, OFFICIAL.

OFFICIAL SOLICITOR TO THE COURT OF CHANCERY. An officer in England whose function is to protect the suitors' fund, and to administer under the direction of the court, so much of it as comes under the spending power of the court.

He was transferred to the High Court by the Judicature Act, 1873. In view of the fact that the Court of Chancery is gone, he is now known as the Official Solicitor of the Supreme Court. When so directed, he acts for persons suing or being sued in *forma pauperis*; he acts generally as solicitor in cases in which the Chancery Division requires his services as solicitor; he visits persons in custody for contempt, etc. Byrne.

OFFICIAL TRUSTEES OF CHARITIES. Charity commissioners in England, created by 16 & 17 Vict. c. 137, and amended by 18 & 19 Vict. c. 24.

Of Charity Lands. The secretary of the Charity Commissioners in England. He is a corporation sole for the purpose of taking and holding real property and leaseholds upon trust for an endowed charity in cases where it appears to the court desirable to vest in him. He is a bare trustee, the possession and management of the land remaining in the persons acting in the administration of the charity.

Of Charitable Funds. Persons in whom the money, stocks or investments of any endowed charity may be vested (either voluntarily or by order of the court) for the purpose of security or convenient administration. They are appointed by the Charity Commissioners, with the approval of the Treasury, and form a corporation. Byrne.

OFFICIAL USE. An active use before the statute of uses, which imposed some duty on the legal owner or feoffee to uses, as a conveyance to A with directions for him to sell the estate and distribute the proceeds amongst B, C, and D. To enable A to perform this duty he had the legal possession of the estate to be sold. Wharton.

OFFICIARIIS NON FACIENDIS VEL AMOVENDIS. A writ addressed to the magistrates of a corporation, requiring them not to make such a man an officer, or to put one out of the office he has, until inquiry is made of his manners, etc. Reg. Orig. 126.

OFFICINA JUSTITIE. The workshop or office of justice. In English Law. The chancery was formerly so called, because all writs issued from it, under the great seal, returnable into the courts of common law. See CHANCERY.

OFFICIO, EX, OATH OF. An oath whereby a person might be obliged to make any presentment of any crime or offence, or to confess or accuse himself of any criminal matter whereby he might be liable to any censure, penalty, or punishment. 3 Bla. Com. 447.

This oath was made use of in the spiritual courts as well as in criminal cases of ecclesiastical cognizance, as in matters of civil right. When the high commission court, (which made a most extravagant and illegal use of the oath) was abolished by statute, this

oath *ex officio* was abolished with it. R. & L. Dict.; Brown; 3 Bl. Com. 447.

OFFICIOUS WILL. A testament by which a testator leaves his property to his family. Sand. Just. Inst. 207.

OFFSET. See SET-OFF.

OFFSPRING. The word offspring in its proper and natural sense extends to any degree of lineal descendants and has the same meaning as *issue*. 32 L. J. Ch. 373.

OHIO. One of the states of the American Union.

Massachusetts, Connecticut and Virginia claimed, under their respective charters, the territory lying northwest of the river Ohio. At the solicitation of the continental congress, these claims were, soon after the close of the war of independence, ceded to the United States. Virginia, however, reserved the ownership of the soil of the million seven hundred thousand acres between the Scioto and the Little Miami rivers, for military bounties to the soldiers of her line who had served in the revolutionary war; and Connecticut reserved three million six hundred and sixty-six thousand acres in northern Ohio, now usually called the "Western Reserve." The history of these reservations, and of the several "purchases" under which land-titles have been acquired in various parts of the state, will be found in Alabachi's Annals of the West, in the Preliminary Sketch of the History of Ohio, in the first volume of Chase's Statutes of Ohio, and in Swan's Land Laws of Ohio. The conflicting titles of the states having been extinguished, congress, on July 13, 1837, passed the celebrated ordinance for the government of the territory northwest of the river Ohio. 1 Curw. Rev. Stat. of Ohio 86. It provided for the equal distribution of the estates of intestates among their children, gave the widow dower as at common law, regulated the execution of wills and deeds, secured perfect religious toleration, the right of trial by jury, judicial proceedings according to the course of the common law, the benefits of the writ of *habeas corpus*, security against cruel and unusual punishments, the right of reasonable bail, the inviolability of contracts and of private property, and declared that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."

These provisions have been, in substance, incorporated into the constitution and laws of Ohio, as well as of the other states which have since been formed within "the territory." The ordinance has been held to be a mere temporary statute, which was abrogated by the adoption of the constitution of the United States. 1 McLean 386; 3 U. S. 226; 3 How. 212, 589; 10 *id.* 82, 232. See ORDINANCE OF 1787.

On the 30th of October, 1802, congress passed an act making provision for the formation of a state constitution, under which, in 1803, Ohio was admitted into the Union, under the name of "the State of Ohio." The constitution was never submitted to a vote of the people, but is held to be the organic law of Ohio until September 1, 1851, when it was abrogated by the adoption of the present constitution.

The bill of rights which forms a part of this constitution contains the provisions common to such instruments in the constitutions of the different states. Such are the prohibitions against any laws impairing the right of peaceably assembling to consult for the common good, to bear arms, to have a trial by jury, to worship according to the dictates of one's own conscience, to have the benefit of the writ of *habeas corpus*, to be allowed reasonable bail, to be exempt from excessive fines and cruel and unusual punishment, not to be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, to have a copy of the indictment, the aid of counsel, compulsory process for witnesses, a speedy and public trial, to be privileged from testifying against one's self, or from being twice put in jeopardy for the same offence. Provision is also made against the existence of slavery, against transporting offenders out of the state, against imprisonment for debt unless in cases of fraud, against granting hereditary honors, against quartering soldiers in private houses, for the security of persons from unreasonable arrest or searches, and for the freedom of speech and the press.

OIL. Petroleum or rock oil is a mineral substance obtained from the earth by process of mining, and the land from which it is obtained is called mining land; 40 N. E. Rep. (Ohio) 399; 110 Pa. 513. It is a part of the realty; *id.*; 88 Pa. 198. But it is held that a reservation of "all timber suitable for sawing, also all minerals," will not include petroleum, the ordinary meaning of the word mineral overcoming the technical meaning; 101 Pa. 36.

A property owner has a right to drill for oil through a stratum of coal belonging to another; 152 Pa. 286. A contract giving the right to explore for oil, and if any be found, to sink wells, is a license only; 65 Pa. 164. A lease of land with the right to bore for oil is a lease and not a sale of the oil; 129 Pa. 94.

Oil produced from wells on lands leased for oil purposes during the owner's life is

income; 188 Pa. 606. Where a life tenant united with a remainder-man in a leasing new oil territory, the court appointed a trustee to hold and invest the royalties and pay the income to the life tenant, and at her death, the principal to the remainder-man; 174 Pa. 425. A life tenant cannot lease new oil territory, never operated before her title accrued; 179 Pa. 371.

When oil reaches a well and is produced at the surface, it becomes personal property; 49 N. E. Rep. (Ohio) 399. As to whether one holding oil on storage who converts it to his use is guilty of larceny as bailee, see 82 Pa. 472.

See **Bryan, Petroleum and Natural Gas**; as to oil leases, see 31 L. R. A. 678; as to liability for rent on oil leases, see 38 L. R. A. 847; as to assignment of an oil lease, see 34 L. R. A. 62. See **NATURAL GAS; EMINENT DOMAIN; PIPE LINES; MINES AND MINING; WASTE.**

OKLAHOMA. The name of one of the states of the United States of America.

OLD BAILY SESSIONS. From time immemorial these sessions had exercised criminal jurisdiction over approximately the same area as that now within the jurisdiction of the Central Criminal Court of England, which was substituted for it by the Central Criminal Court Act, 1834. *Byrne.* See **CENTRAL CRIMINAL COURT.**

OLD CODE. A code which came into operation under Justinian on April 7, 529, and came into force six weeks later. Justinian, on February 13 of the preceding year, had appointed a commission of ten jurists and others to consolidate into a single code the Gregorian, Hermogenian, and Theodosian codes, and the novels of the emperors subsequent to A.D. 438. They were instructed, "suppressing preambles, repetitions, contradictory and disused clauses, to collect and classify the laws under proper titles, adding, cutting down, modifying, compressing, if need be, several constitutions into a single enactment, so as to render the sense more clear, and yet preserve in each title the chronological order, so that this order may be noted by position in the code as well as by date." The work was divided into twelve books. Hunter, *Rom. L.* 90. See **NEW CODE.**

OLD-LINE MUTUAL COMPANY. See **INSURANCE, Assessment Insurance.**

OLD-LINE POLICIES. See **INSURANCE, Assessment Insurance.**

OLD NATURA BREVIVM. The title of an English book, so called to distinguish it from Fitzherbert's work entitled *Natura Brevium*. It contains the writs most in use in the reign of Edward III., together with a short comment on the application and properties of each of them.

OLD STYLE. The mode of reckoning time in England until the year 1752, when the New Style, at present in use, and which had prevailed in the Roman Catholic countries of the continent since 1582, was introduced. According to the O. S., the year commenced on the 25th of March and every fourth year was a leap-year, instead of, as now, but 97 leap years in 400 years; *Moz. & W.*

OLD TENURES. The title of a small tract, which, as its title denotes, contains an account of the various tenures by which land was holden in the reign of Edward III. This tract was published in 1719, with notes and additions, with the eleventh edition of the *First Institutes*, and reprinted in 8vo in 1764, by Sergeant Hawkins, in a selection of Coke's *Law Tracts*.

OLEOMARGARINE. Artificial butter made out of animal fat, milk, and other substances; imitation butter. *Anderson's L. Dict.*

Oleomargarine is a recognized article of food and commerce, and being thus a lawful article of commerce it cannot be

wholly excluded from importation into a state from another state where it was manufactured, though the former state may so regulate the introduction as to insure purity, without having the power totally to exclude it; 171 U. S. 1.

The New Hampshire Act prohibiting the sale of oleomargarine unless it is of a pink color is invalid as being, in necessary effect, prohibitory. The act is not an inspection law, it provides for no inspection, and apparently none was intended. It is an absolute prohibition of the sale of an article of commerce; 171 U. S. 30.

The Massachusetts Act of March 10th, 1891, "to prevent deception in the manufacture and sale of imitation butter," in its application to the sales of oleomargarine artificially colored and brought into Massachusetts, is in conflict with the commerce clause of the federal constitution; 155 U. S. 461.

The legislature of a state has the power to determine, as a matter of state policy, whether to permit the manufacture and sale of oleomargarine within the state or entirely to forbid the same, so long as the legislation is confined to the manufacture and sale within the state; 127 U. S. 678, explained in 171 U. S. 16.

Under its taxing power and in connection with the internal revenue system, congress has passed a law defining butter and oleomargarine and imposing a tax upon and regulating the sale, etc., of oleomargarine. See 144 U. S. 677.

In many of the states the manufacture and sale of this substance are prohibited by statute, unless made in a specified form and in such manner as will inform the buyer as to its real character.

In England, all packages must be marked, as must each parcel exposed for sale. See [1895] 2 Q. B. 657.

See **ORIGINAL PACKAGE.**

OLERON, LAWS OF. See **CODE.**

OLIGARCHY (Gr. *ὀλιγος* and *ἀρχή*. The government of a few). A name given to designate the power which a few citizens of a state have usurped, which ought by the constitution to reside in the people. Among the Romans, the government degenerated several times into an oligarchy,—for example, under the decemvirs, when they became the only magistrates in the commonwealth. See **GOVERNMENT.**

OLOGRAPH. A term which signifies that an instrument is wholly written by the party. See *La. Civ. Code*, art. 1581; *Code Civ.* 970; 5 *Toullier*, n. 357; 1 *Stu. Low. C.* 327. See **TESTAMENT; WILL; Beach, Wills** 16.

OMISSION. The neglect to perform what the law requires.

When a public law enjoins on certain officers duties to be performed by them for the public, and they omit to perform them, they may be indicted: for example, supervisors of the highways are required to repair the public roads; the neglect to do so will render them liable to be indicted.

When a nuisance arises in consequence of an omission, it cannot be abated, if it be a private nuisance, without giving notice, when such notice can be given. See **COMMISSION; NUISANCE.**

OMITTED PROPERTY. Property which is not assessed at all; but property which by mistake has been apportioned to the wrong subdivision or municipality may not be treated as "omitted property" by the county or subdivision where it should have been assessed. 154 Ky. 673; 159 S. W. 538.

OMNIA PERFORMAVIT (Lat. he has done all). In **Pleading.** A good plea in bar where all the covenants are in the affirmative. 1 *Me.* 189.

OMNIBUS. For all; containing two or more independent matters. Applied to a count in a declaration, and to a bill of legislation, and perhaps to a clause in a will, which comprises more than one general

subject. 64 Pa. 428; 14 Md. 193. See **IN OMNIBUS.**

OMNIUM (Lat.). In **Mercantile Law.** A term used to express the aggregate value of the different stock in which a loan is usually funded. 2 *Esp.* 361; 7 *Term* 630.

ON. As denoting contiguity or neighborhood, it may denote near to as well as at; 45 *Mo.* 349; and has been held to be interchangeable with upon. 19 *Wall.* 264; 85 *Va.* 128. It is not equivalent to immediately on; 12 *Kan.* 25.

Upon; at; near to. *Anderson.* A deed described land as "on a railroad." Held, that "on," as denoting contiguity or neighborhood, may mean as well "near to" as "at." *Id.*; 45 *Mo.* 351. A vessel may be in distress "on the shore" without being actually in contact with the shore. *Id.*; 46, L. T. 907. "On a decree" being made means after the decree is made—contemporaneously or immediately after. *Id.*; 3 *P.* D. 50.

ON OR ABOUT. A phrase used in reciting the date of an instrument referred to.

ON ACCOUNT OF WHOM IT MAY CONCERN, FOR WHOM IT MAY CONCERN. A clause in policies of insurance, under which all are insured who have an insurable interest at the time of effecting the insurance and who were then contemplated by the party effecting the insurance. 3 *Pars. Marit. Law* 30.

ON ALL FOURS. A phrase used to express the idea that a case at bar is in all points similar to another. The one is said to be on all fours with the other when the facts are similar and the same questions of law are involved. See **IN OMNIBUS.**

ON OR BEFORE. The words "on or before" inserted in a stipulation to do an act, or pay money, entitles the party stipulating, to perform at any time before the day, and upon performance or tender and refusal, he is immediately vested with all the rights which would have attached, if performed on the day. 6 *J. J. Marshall (Ky.)* 156.

ON BEHALF. Where security is to be given on behalf of a person it cannot be given by the person himself. L. R. 4 C. P. 235.

ON BOARD. A devise of goods on board a ship may pass goods on board at the date of the will, but afterwards removed. 1 *Ves. Sen.* 271.

ON CALL. There is no legal difference between an obligation payable "on demand" and one payable "on call." 22 *Gratt.* 609.

ON CONDITION. "On condition" was interpreted as meaning a covenant or agreement. 211 U. S. 582.

ON DEMAND. A promissory note payable on demand is a present debt and is payable without demand. 39 *Me.* 494. It is payable the instant the note is signed; no demand is necessary prior to bringing an action; 2 *M. & W.* 461; 29 *L. J. Ex.* 377; 34 *Ch. D.* 566.

ON DUTY. As used in the Sixteen Hour Law of 1907 means "to be actually engaged in work or to be charged with present responsibility for such should the occasion for it arise." 197 *Fed.* 629. See **SIXTEEN HOUR LAW.**

For one to be "on duty" means that he must be in a position and in condition to see and hear that he exercise the same degree of care and diligence that an ordinarily prudent person would exercise. 163 *Ky.* 146; 173 *S. W.* 373.

ON STAND. A term used in the law of landlord and tenant. A tenant of a farm who cannot carry away manure but has the right to sell it to his successor, is said to have the right of *on stand* on the farm for it till he can sell it; he may maintain trespass for the taking of it by the

incoming tenant before it is sold. See 16 East 116.

ONE MAN COMPANY. See PROMOTERS.

ONERANDO PRO RATA PORTIONIS. A writ that lay for a joint tenant, or tenant in common, who was distrained for more rent than his proportion of the land came to. Reg. Orig. 182.

[By charging according to the proportion (or quantity).] Reg.

ONERARI NON (Lat. ought not to be burdened). In Pleading. The name of a plea by which the defendant says that he ought not to be charged. It is used in an action of debt; 1 Saund. 290, n. a.

ONERATIO. A lading; a cargo.

ONERIS FERENDI (Lat. of bearing a burden). In Civil Law. The name of a servitude by which the wall or pillar of one house is bound to sustain the weight of the buildings of the neighbor.

The owner of the servient building is bound to repair and keep it sufficiently strong for the weight it has to bear. Dig. 8. 2. 23.

ONEROUS CAUSE. In Civil Law. A valuable consideration.

ONEROUS CONTRACT. In Civil Law. One made for a consideration given or promised, however small. La. Civ. Code, art. 1767.

ONEROUS DEED. In Scotch Law. A deed given for valuable consideration. Bell, Dict.; CONSIDERATION.

ONEROUS GIFT. The gift of a thing subject to certain charges imposed by the giver on the donee. Pothier, Obl.

ONEROUS TITLE. Under the Spanish and Mexican law that which was created by a valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions or payment of charges to which the property was subject. See 13 Cal. 458; 8 La. 433; 20 id. 242.

ONOMASTIC. A term applied to a signature which is in a different handwriting from the body of the instrument. 2 Benth. Jud. Ev. 460.

ONUS EPISCOPALE. Ancient customary payments from the clergy to their diocesan bishop, of synods, pentacostals, etc.

ONUS IMPORTANDI. The charge of importing merchandise, mentioned in 12 Car. II. c. 28.

ONUS PROBANDI (Lat.). In Evidence. The burden of proof.

It is a general rule that the party who alleges the affirmative of any proposition shall prove it. It is also a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact: for example, when to a plea of infancy the plaintiff replies a promise after the defendant had attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to show that he was not of age at the time; 1 Term 648. But where the negative involves a criminal omission by the party, and, consequently, where the law, by virtue of the general principle, presumes his innocence, the affirmative of the fact is also presumed. See 11 Johns. 513; 19 id. 345; 9 Mart. La. 48; 3 Mart. La. n. 8. 576. The burden of proof of the want of mental capacity of a person at the time of his marriage is on those asserting it, in the absence of proof of a confirmed condition of lunacy or idiocy prior to such marriage; 159 Pa. 634.

In general, wherever the law presumes the affirmative, it lies on the party who denies the fact to prove the negative; as when the law raises a presumption as to the continuance of life, the legitimacy of children born in wedlock, or the satisfaction of a debt. See, generally, 1 Phil. Ev.

156; 1 Stark. Ev. 376; Rosc. Civ. Ev., 16th ed. 94; Rosc. Cr. Ev., 8th ed. 17; Bull. N. P. 298; 2 Gall. 485; 1 M'Cord 573; 1 Houst. 44; 12 Viner, Abr. 201; Tayl. Ev. 343; 1 Greenl. Ev. 79; Whart. Ev. 353. As to shifting of burden of proof, see, generally, 44 La. Ann. 1043; 44 Mo. App. 141; 90 Tenn. 638.

The party on whom the *onus probandi* lies is entitled to begin, notwithstanding the technical form of the proceedings; 1 Stark. Ev. 584. See BURDEN OF PROOF; OPENING AND CLOSING; NEGATIVE.

OOPHORECTOMY. Ovariectomy. The removal of one or both of the ovaries. Webster.

OPEN. To begin. He begins or opens who has the affirmative of an issue. 1 Greenl. Ev. § 74.

To open a case is to make a statement of the pleadings in a case, which is called the opening. This should be concise, very distinct, and perspicuous. Its use is to enable the judge and jury to direct their attention to the real merits of the case and the points in issue; 1 Stark. 439; 2 id. 317.

To vacate; to relieve a party who has an equitable right to such relief against a proceeding which is to him a formal or legal bar; to allow a re-discussion on the merits.

For example, to open a rule of court. 2 Chitty, Bail 265; 5 Taunt. 628; 1 Mann. & G. 555; 7 Ad. & E. 519. To open a judgment or default; 4 R. I. 324; 1 Wisc. 631. See OPENING A JUDGMENT. To open an account; to make a judicial announcement, that a party, *e. g.* an executor, shall not be absolutely bound by the account he has rendered, but may show that it contains errors to his prejudice. To open a marriage settlement or an estate-tail; *i. e.* to allow a new settlement of the estate. To open biddings; *i. e.* to allow a re-sale. See OPENING BIDDINGS. To open a contract; 44 Me. 206; a highway; 37 N. J. L. 14.

OPEN ACCOUNT. A running or unsettled account; not completely settled, but subject to future adjustment. 1 Ala. 62; 6 id. 438; 21 La. Ann. 406; 1 Ga. 275; 18 Oregon 414.

OPEN FOR BUSINESS. A store is open for business when, according to custom, the door is locked after dark, but customers can get in by knocking. 15 S. W. Rep. (Ark.) 1034. See INSURANCE.

OPEN COMMISSION. A commission without written interrogatories issued out of any one of certain courts of record, an issue of fact having been joined in that court, to take the testimony of witnesses, not within the state, but within the United States and Canada; N. Y. Code Civ. Proc. § 893, 894, 897. The application for an open commission will be denied where there is reason to believe that a commission with interrogatories will develop all the facts bearing upon the case. 17 Weekly Dig. (N. Y.) 17.

OPEN COURT. A court formally opened and engaged in the transaction of all judicial functions. 45 Ia. 501.

A court to which all persons have free access as spectators while they conduct themselves in an orderly manner.

The term is used in the first sense as distinguishing a court from a judge sitting in chambers or informally for the transaction of such matters as may be thus transacted. See CHAMBERS; COURT.

In the second sense, all courts in the United States are open; but in England, formerly, while the parties and probably their witnesses were admitted freely in the courts, all other persons were required to pay in order to obtain admittance. Stat. 13 Edw. I. c. 42, 44; Barr on the Stat. 126, 127. See Prin. of Pen. Law 165.

In a trial for criminal assault, the court, in the interest of public morality and to prevent undue publicity, ordered the exclusion of all persons not connected by ties of friendship or blood with the accused or complaining witnesses. Newspaper report-

ers were also permitted to remain. It was held that the constitutional requirements of a public trial must be interpreted in the broadest sense, and that any restriction of the public's right to be present rendered the trial illegal; Mich. Sup. Ct. 1897, 55 Alb. L. J. 429.

In most of the states the constitution provides that persons accused shall have a speedy public trial; Stimson, Am. Stat. L. § 131. This has been construed to mean that "the doors of the court-room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects . . . with due regard to the size of the court-room and the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial;" 103 Cal. 242; in this case a conviction of assault with intent to commit rape was reversed because against defendant's objection all persons were excluded except the officers of the court and the defendant; *id.* See 65 Cal. 223. In a trial of a civil case of trespass for adultery the judgment was reversed because all but parties and witnesses were excluded; 86 Me. 80.

Judge Cooley says that the requirement of a public trial is for the benefit of the accused, but it is fairly met if a reasonable number are admitted; Const. Lim. 812.

In California the court may direct the trial of issues of fact in private; Cal. Code, C. P. § 125; but this act does not authorize the court to forbid the publication of the testimony, and when such an order was made judgment of guilty of contempt against a newspaper publisher was reversed; 99 Cal. 526. On a trial for assault with intent to kill, the court-room was cleared and all persons excluded except officers of the court, press reporters, and friends of defendant; the order was made on behalf of defendant, who was liable to be excited by a crowd, as well as to preserve order, and it was held that her right to a public trial was not violated; 14 Pac. Rep. (Cal.) 849.

See 15 Am. L. Rev. 427; 89 Mich. 276; s. c. 28 Am. St. R. 294, where the subject is fully discussed. See IN CAMERA.

OPEN A CREDIT. To accept or pay the draft of a correspondent who has not furnished funds. Pardessus, n. 296.

OPEN ENTRY. See ENTRY.

OPEN INSOLVENCY. The condition of a person having no property, within the reach of the law, applicable to the payment of any debt. 8 Blackf. 305.

OPEN LAW. The waging of law. Magna Charta, c. 21.

OPEN POLICY. An open policy is one in which the amount of the interest of the insured is not fixed by the policy, and is to be ascertained in case of loss. See POLICY. See RUNNING POLICY.

OPENING. In American Practice. The beginning. The commencement. The first address of the counsel.

The opening is made immediately upon the impanelling of the jury: it embraces the reading of such of the pleadings as may be necessary, and a brief outline of the case as the party expects to prove it, where there is a trial, or of the argument, where it is addressed to the court.

OPENING BIDDINGS. Ordering a re-sale. When estates are sold under decree of equity to the highest bidder, the court will, on notice of an offer of a sufficient advance on the price obtained, *open the biddings*, *i. e.* order a re-sale. But this will not generally be done after the confirmation of the certificate of the highest bidder. So, by analogy, a re-sale has been ordered of an estate sold under bankruptcy. Sugd. Vend. 90; 22 Barb. 167; 8 Md. 322; 13 Gratt. 639; 4 Wisc. 242; 31 Miss. 514.

In England, by stat. 30 & 31 Vict. c. 48, s. 7, the opening of biddings is now allowed

only in cases of fraud or misconduct in the sale; *Wms. R. P.* The courts of this country also will not generally open the biddings merely to obtain a higher price, but require irregularity, fraud, or gross inadequacy of price to be shown.

OPENING AND CLOSING. After the evidence is all in, the plaintiff has the privilege of the opening and closing or summing up speeches to the jury; in the closing address he should confine himself to a reply to defendant's speech. It seems doubtful whether it is within the discretion of the court to interfere with this established mode of procedure; at least it should only be done with great caution; 36 Mich. 254; 32 Ohio 224; 8 Daly 61; 16 West. Jur. 18; 56 N. Y. 402; 87 Ky. 410. But in some courts it is the practice for the defendant's counsel to open to the jury, followed by the plaintiff's counsel. See *Best's Right to Begin and Reply*; *TRIAL*.

In English Practice. The address made immediately after the evidence is closed. Such address usually states—*first*, the full extent of the plaintiff's claims, and the circumstances under which they are made, to show that they are just and reasonable; *second*, at least an outline of the evidence by which those claims are to be established; *third*, the legal grounds and authorities in favor of the claim or of the proposed evidence; *fourth*, an anticipation of the expected defence, and statement of the grounds on which it is futile, either in law or justice, and the reasons why it ought to fail. "But the court will sometimes restrict counsel from an anticipation of the defence; 3 Chitty, Pr. 881.

OPENING A COMMISSION. See *COURTS OF ASSIZE AND NISI PRIUS*.

OPENING A JUDGMENT. In Practice. An act of the court by which a judgment is so far annulled that it cannot be executed, although it still retains some qualities of a judgment: as, for example, its binding operation or lien upon the real estate of the defendant.

The opening of the judgment takes place when some person having an interest makes affidavit to facts which, if true, would render the execution of such judgment inequitable. The judgment is opened so as to be in effect an award of a collateral issue to try the facts alleged in the affidavit; 6 W. & S. 493.

The rule to open judgment and let defendant into a defence is peculiar to Pennsylvania practice, and is a clear example of the system of administering equity under common-law forms. By practice it is confined to judgments by default and those entered on warrants of attorney to confess, etc. It was, however, devised in the absence of a court of chancery, as a substitute for a bill in equity, to enjoin proceedings at law; *Mitchell's Motions and Rules*; 49 Pa. 365; 8 Phila. 553; 2 Watts 379; 6 W. N. C. 484.

OPENING OF A POLICY OF INSURANCE. The question has been made whether, and in what cases, if any, the valuation in a valued policy shall be opened. The valuation, being a part of the agreement of the parties, is not to be set aside as between them in any case. The question is, how shall it be treated where only a part of the subject insured and valued is put at a risk, and also in the settlement of a particular average? and the answer is the same in both cases: viz., when the proportion or rate per centum put at risk or lost is ascertained, the agreed valuation of the whole is to be applied to the part put at risk or the proportion lost, *pro rata*. 2 Phill. Ins. 1203.

OPENING A RULE. The act of restoring or recalling a rule which has been made absolute to its conditional state, as a rule nisi, so as to re-admit of cause being shown against the rule. *Brown*.

Thus, when a rule to show cause has been made absolute under a mistaken impression that no counsel had been instructed to show

cause against it, it is usual for the party at whose instance the rule was obtained to consent to have the rule opened, by which all the proceedings subsequent to the day when cause ought to have been shown against it are in effect nullified and the rule is then argued in the ordinary way. *R. & L. Dict.*; *Brown*.

Opening a rule is where the court allows the propriety of a rule to be again open for argument after it has been made absolute. Where a rule has issued improvidently through a mistake of the officer of the court, or in a case in which the court had no jurisdiction to grant it, the court will allow it to be opened for the purpose of correcting the mistake or discharging the rule; but this will not in general be done on any other ground. *Abbott*; *Lush Pr.* (Steph.) 662.

OPERA. See *COPYRIGHT*.

OPERARI. Such tenants under feudal tenures, as held some portion of land by the duty of performing bodily labor and servile works for their lord.

OPERATING EXPENSES. They are, broadly speaking, those which it is reasonably necessary to incur for the purpose of keeping up a railroad (to which the term is commonly applied) as a going concern, or, as it is sometimes expressed, those which conduce to the conservation of the property. *Short, Railw. Bonds* § 653.

The term, when used in a reorganization plan, does not include money spent on steel rail betterments, or on steamers owned by the company to make them more efficient, or on the purchase of freight engines and coal cars; 34 Fed. Rep. 582. Under a Massachusetts statute, it was held that damage to property at a railroad crossing must be considered as operating expenses; 124 Mass. 154. See 188 Mass. 122; 124 Mass. 527. Judgments against a receiver for damages to persons by negligence are a part of the operating expenses; 73 Fed. Rep. 112. All outlays made by a receiver in the ordinary course, with a view to advance and promote the business of the road and render it profitable and successful, are fairly within the receiver's discretion; this will include not only keeping the road and rolling stock in repair, but also providing such additional accommodations, stock, and instrumentalities as the necessities of the business may require; 1 Woods 331. The court will authorize the purchase of new rails; 62 Fed. Rep. 771; and the payment of reasonable office rent; 1 Woods 331; and the payment of interest on money which a receiver has been obliged to borrow; *id.*; and of traffic balances on connecting roads; 64 Ala. 603; and rebates on freight; 1 Woods 331.

Damages paid to the owners of goods lost in transportation and for injury to property during a receivership will be allowed in the receiver's account of earnings; 93 U. S. 352; such claims stand upon the same footing as the other expenses of administration; *Short, Railw. Bonds* § 669; 62 Miss. 271; 80 N. Y. 458.

Earnings diverted to the payment of interest on receiver's certificates made payable out of the *corpus*, or to the costs or allowances in the foreclosure suit or any other matter not properly operating expenses, must be returned to the current earnings fund; 25 Fed. Rep. 232. See *MORTGAGE*; *REORGANIZATION*.

OPERATION OF LAW. The obligation of law; 1 Cra. C. C. 19; its practical working and effect. 5 Ia. 496. A term applied to indicate the manner in which a party acquires rights without any act of his own: as, the right to an estate of one who dies intestate is cast upon the heir at law, by operation of law; when a lessee for life enfeoffs him in reversion, or when the lessee and lessor join in a feoffment, or when a lessee for life or years accepts a new lease or demise from the lessor, there is a surrender of the first lease by operation of law; 5 B. & C. 269; 9 *id.* 298; 2 B. & Ad. 119; 5 Taunt. 518. See *DESCENT*; *PURCHASE*.

OPERATIVE. A workman; one em-

ployed to perform labor for another. See 1 Pa. L. J. 368; 3 C. Rob. 237; 2 Cra. 240, 270. See *FACTORY ACTS*; *MASTER AND SERVANT*.

OPERATIVE PART. That part of a conveyance, lease, mortgage or other instrument, which carries out its main object.

Thus, in a conveyance or lease, the operative part consists of the operative words of conveyance or demise and the parcels. Sometimes everything which follows the recitals is called the operative part, for the term has no fixed meaning. (1 *Dauids. Conv.* 44.) In a mortgage, the operative part consists of (1) the covenant for payment of the mortgage debt; (2) the conveyance of the mortgaged property; and (3) the proviso for reconveyance. *R. & L. Dict.*; 2 *Id.* 508 *et seq.*

OPERATIVE WORDS. In a deed, or lease, the words which effect the transaction of which the instrument is the evidence; the terms generally used in a lease are "demise and lease," but any words clearly indicating an intention of making a present demise will suffice; *Fawcett, L. & T. 74*; *Wms. R. P.* 196; *Bacon, Abr. (K)* 161; see *Martindale, Conv.* 273.

OPERATOR, OF ELEVATOR. See *ELEVATOR*.

OPHTHALMOPLÉGIA. See *PARALYSIS*.

OPINION. In Evidence. An inference or conclusion drawn by a witness as distinguished from facts known to him as facts.

It is the province of the jury to draw inferences and conclusions; and if witnesses were in general allowed to testify what they judge as well as what they know, the verdict would sometimes prove not the decision of the jury, but that of the witnesses. Hence the rule that, in general, the witness cannot be asked his opinion upon a particular question; *Tayl. Ev.* 1206; 29 N. H. 94; 16 Ill. 513; 18 Ga. 194, 573; 7 Wend. 560; 2 N. Y. 514; 17 *id.* 340. But while it is incompetent for a witness to state his opinion upon a question of law, where the intent with which an act done by him is drawn in question he may testify as to such intent; 12 Repr. 664.

Some confusion in the application of this rule arises from the delicacy of the line which divides that which is to be regarded as matter of observation from that which is matter of judgment founded upon observation. Thus, it is held that an unprofessional witness may testify to the fact that a person whom he saw was intoxicated, whether he is able to state all the constituent facts which amount to drunkenness or not; 14 N. Y. 562; 26 Ala. n. s. 26; 53 Minn. 532; he may also testify as to the apparent condition of a party as to sobriety, shortly before the commission of an offence; 73 Cal. 7. He is also competent to testify whether a person with whom he is familiarly associated is in good or bad health and hearing, is lame or has the natural use of his limbs, and also whether on certain occasions he was unconscious; 143 Ill. 480; also whether a certain person has African blood in his veins; 113 N. C. 9. But, on the other hand, insanity or mental incapacity cannot, in general, be proved by the mere assertion of an unprofessional witness; 17 N. Y. 340; 7 Barb. 314; 13 Tex. 568. And see 25 Ala. n. s. 21; 117 Ind. 277; but the opinion of non-expert witnesses may be given as to mental capacity where the facts upon which the opinions are based are disclosed; 116 Ind. 278; 126 Ill. 507; 100 N. C. 457; 77 Ga. 724; 7 Mont. 489; 64 N. H. 573; 84 Va. 87; 30 Fla. 170; 36 W. Va. 757.

So handwriting may be proved by being recognized by a witness who has seen other writings of the party in the usual course of business, or who has seen him write; *Steph. Ev.* § 51; *Peake, N. P.* 21; 2 *Johns. Cas.* 211; 19 *Johns.* 134; 84 Ala. 63. See 85 Va. 146. But, on the other hand, the au-

thorship of an anonymous article in a newspaper cannot be proved by one professing to have a knowledge of the author's style; How. App. Cas. 187.

From necessity, an exception to the rule of excluding opinions is made in questions involving matters of science, art, or trade, where skill and knowledge possessed by a witness, peculiar to the subject, give a value to his opinion above that of any inference which the jury could draw from facts which he might state; 1 Denio 281; 3 Ill. 297; 3 N. H. 480; 2 Story 421. Such a witness is termed an expert; and he may give his opinion in evidence; Whart. Ev.

440. Experts alone can give an opinion based on facts shown by others, assuming them to be true; 100 N. C. 457.

The following reference to some of the matters in which the opinions of expert witnesses have been held admissible will illustrate this principle. The unwritten or common law of foreign countries may be proved by the opinion of witnesses possessing professional knowledge; 1 Cra. 12, 38; 6 Pet. 763; 2 Wash. C. C. 1, 175; 2 Wend. 411; 3 Pick. 293; 4 Conn. 517; 4 Bibb 73; 2 Marsh. 609; 5 Harr. & J. 186; 1 Johns. 385; 14 Mass. 455; 6 Conn. 508; 1 Vt. 336; 15 S. & R. 87; 1 La. 153; 6 Cra. 274; the degree of hazard of property insured against fire; 17 Barb. 111; 4 Zab. 843; whether a picture is a good likeness or not; 39 Ala. 193; handwriting; 35 Me. 78; 2 R. I. 819; 25 N. H. 87; 1 Jones N. C. 94, 150; 13 B. Monr. 258; mechanical operations, the proper way of conducting a particular manufacture, and the effect of a certain method; 8 N. Y. 322; negligence of a navigator, and its effect in producing a collision; 24 Ala. n. s. 21; sanity; 41 Ala. 700; 12 N. Y. 358; impotency; 3 Phill. Eccl. 14; value of chattels; 22 Ala. n. s. 870; 11 Cush. 257; 22 Barb. 652; value of land; 11 Cush. 201; 9 N. Y. 188; compare 4 Ohio St. 553; value of services; 15 Barb. 550; speed of a railway train; 59 N. Y. 631; benefit to real property by laying out a street adjacent thereto; 2 Gray 107; survey marks identified as being those made by United States surveyors; 24 Ala. n. s. 390; as to the location of surveys; 121 Pa. 182; 71 Mich. 520; seaworthiness; 10 Bingh. 57; and see 9 Cush. 226; whether a person appeared sick or well; 53 N. Y. 603; of the effect of a personal injury; 116 Ind. 446; 56 Fed. Rep. 184; whether fright would produce heart trouble; 128 Ill. 163; whether a child would have been born alive if he had received medical assistance in time; 71 Tex. 507; as to the distance at which it is safe to stop before going upon a crossing; 116 Ind. 60. So an engineer may be called to say what, in his opinion, is the cause of a harbor having been blocked up; 3 Dougl. 158; 1 Phil. Ev. 276; 4 Term 498. Opinion evidence as to the age of a person, from his appearance, is not admissible; 6 Conn. 9; but see 25 Tex. App. 448; 98 Mo. 640; 48 Mo. App. 39; nor is it in cases involving adultery, on the question of guilt or guilty intent; see 18 Ala. 738; nor can an opinion be given as to the meaning of an instrument where the words or phrases are not technical; 79 Ga. 105; 8 Misc. Rep. 253.

It is to be observed, however, that the principle of admitting such opinions is taken with the qualifications necessary to make, as far as possible, the judgment of the jury, and not that of the witness, the final means of determining the issue. Thus opinions of experts are not admissible upon the question of damages; 23 Wend. 425; 60 Vt. 343; 84 Ala. 102; nor whether damages were occasioned by negligence; 76 Ga. 532; 2 Tex. Civ. App. 210; 91 *id.* 422; 77 Hun 360; and experts are always confined to opinions within the scope of their professions, and are not allowed to give opinions on things of which the jury can as well judge; 4 Wend. 320; 14 Me. 398; 3 Dana 382; 1 Pa. 161; 2 Halst. 244; 7 Vt. 161; 6 Rand. 704; 9 Conn. 102; 3 N. H. 349; 5 Harr. & J. 438. A distinction is also to be observed between a feeble im-

pression and a mere opinion or belief; 3 Ohio St. 406; 19 Wend. 477. See Mr. Lawson's article, in 25 Alb. L. J. 367. The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen; 100 N. C. 310. See 87 W. Va. 524. The opinions of a witness are not admissible as to one's agency; 51 Minn. 141.

Upon an issue, in a suit upon a life policy, as to the insanity of the insured at the time he took his own life, the opinion of a non-professional witness as to his mental condition, in connection with a statement of the facts and circumstances, within his personal knowledge, upon which that opinion is based, is competent evidence; 111 U. S. 613.

Opinion evidence is not admissible as to whether the mode of coupling cars was careless and not the best way of performing the act; 39 Fed. Rep. 487. There are cases where the opinion of witnesses may be asked as to distance and other circumstances, but such questions are not permissible when it is practicable to draw out with exactness the data upon which a judgment must be founded; 109 Mass. 499. It must be left somewhat to the trial court; 58 Fed. Rep. 948. Whether a particular position on a wharf is a safe place for a wharfinger to stand while a steamboat is approaching is not matter for expert testimony; 139 U. S. 551.

In Practice. The statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case. The judgment itself is sometimes called an opinion; and sometimes the opinion is spoken of as the judgment of the court.

A declaration, usually in writing, made by a counsel to the client of what the law is, according to his judgment, on a statement of facts admitted to him.

An opinion is in both the above cases a decision of what principles of law are to be applied in the particular case, with the difference that judicial opinions pronounced by the court are law and of authority, while the opinions of counsel, however eminent, are merely advice to his client or argument to the court.

Where there are several judges, and they do not all agree in the disposition of the cause, the opinion of the majority is termed the opinion of the court. The opinion of the minority is termed the dissenting opinion. The opinions of the courts, collected and provided with such preliminary statements of facts and of the arguments of counsel as may be necessary in each case to an understanding of the decision, make up the books of reports.

Opinions are said to be judicial or extra-judicial. A judicial opinion is one which is given on a question which is actually involved in the matter brought before the judge for his decision; an extra-judicial opinion is one which, although given by a judge in deciding a case, is not necessary to the judgment; Vaugh. 382; 1 Hale, Hist. 141; and, whether given in or out of court, is no more than the *prolatum* of him who gives it, and has no legal efficacy; 4 Pa. 28. Where a point is essential to the decision rendered, it will be presumed that it was duly considered, and that all that could be urged for or against it was presented to the court. But if it appears from the report of the case that such point was not taken or inquired into at all, there is no ground for this presumption, and the authority of the case is proportionably weakened; 8 Abb. P. 316.

Where two or more points are discussed in the opinions delivered on the decision of a cause, and the determination of either point in the manner indicated in such opinions would authorize the judgment pronounced by the court, the judges concurring in the judgment must be presumed to have concurred in such opinions upon all the points so discussed, unless some dissent is expressed or the circumstances necessarily lead to a different conclusion; 6 N. Y. 9. Where a judgment is reversed upon a part only of the grounds on which

it went, it is still deemed an authority as to the other grounds not questioned. See 5 Johns. 125.

The opinion of the court assigning reasons for its conclusions cannot be treated as a special finding; 139 U. S. 222.

Counsel should, in giving an opinion, as far as practicable, give, *first*, a direct and positive opinion, meeting the point and effect of the question, and, if the question proposed is properly divisible into several, treating it accordingly. *Second*, his reasons, succinctly stated, in support of such opinion. *Third*, a reference to the statutes or decisions on the subject. *Fourth*, when the facts are susceptible of a material difference in statement, a suggestion of the probability of such variation. When an opinion is sought as a guide in respect to maintaining an action or defence, some other matters should be noticed—as, *Fifth*, any necessary precautionary suggestions in reference to the possibility of a fatal defect in the evidence, arising from the nature of the case. Thus, where some important fact is stated as resting principally on the statement of the party interested, if by the law of the place such party is incompetent to testify respecting it, a suggestion ought to be made to inquire how that fact is to be proved. *Sixth*, a suggestion of the proper mode of proceeding, or the process or pleadings to be adopted.

In English and American law, the opinions of counsel, however eminent, are not entitled to any weight with the court, as evidence of the law. While the court will deem it their duty to receive such opinions as arguments, and as such entitled to whatever weight they may have, they will not yield to them any authority; 4 Pa. 28, per Gibson, C. J. In many cases, where a client acts in good faith under the advice of counsel, he may on that ground be protected from a liability which the law might otherwise have imposed upon him.

Expressions of opinion which are not statements of fact do not constitute fraud; 125 U. S. 247.

The attorney-general of the United States gives to the president his opinion and advice upon questions of law whenever required; and upon the request of the head of any of the executive departments of the government, he is required to give his opinion on questions of law arising in the administration of the department; R. S. §§ 354, 356. See JUDGE; EXPERT; OPINION OF JUDGES; PRECEDENT; LEGISLATIVE POWER.

OPINION OF JUDGES. Occasionally English judges have given opinions on legal matters to the crown, but the last instance appears to be in 1760. See 126 Mass. 562. The practice still obtains in the house of lords. See McNaghten's Case, 10 C. & F. 200. The federal judiciary can be called upon only to decide controversies brought before them in legal form. In Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota, the constitution requires the supreme court to give opinions, at the request of the governor or legislature, or sometimes both. In Vermont the same practice obtains by statute, and in Nebraska without either constitutional or statutory sanction; 6 A. & E. Encyc. 1068. In Idaho, the constitution requires the supreme court judges to report annually to the governor as to defects and omissions in existing laws.

It has been held that the courts are the judges of whether the questions presented to them for their opinion fall within the scope of the law, and, generally, whether the exigency requires them to act. The court usually require that the questions shall be matters of public law and not those involving merely private rights; see Thayer on Advisory Opinions; Story, Const.; 6 A. & E. Encyc. 1065, where much law on the subject is collected. See LEGISLATIVE POWER.

OPIUM. A medicinal drug which has no claim to rank as a necessary of life. Its use has been mainly in medicine, as an

anodyne; and is classed in science among the active poisons. In the East it has been used for centuries, by smoking and mastication, to produce a kind of intoxication. It is said to be a vice less easy of detection than alcohol intoxication, which it is said to replace where law and custom have made the latter disreputable. Its evil effects are most manifest upon the nervous and digestive systems, and its final results resemble delirium tremens. 137 Mo. 147-8, quoting 28 Fed. Rep. 308.

In English Law: The Dangerous Drugs Act, 1920, regulates the importation, exportation, manufacture, sale and use of "opium and other dangerous drugs." For the purposes of the act opium is divided into (1) "raw opium," which includes powdered or granulated opium but not "medicinal opium"; (2) "prepared opium," which means opium prepared for smoking and includes dross and any other residues remaining after opium has been smoked; and (3) "medicinal opium," which means raw opium artificially dried. Part I. prohibits the importation of raw opium except under license and at approved ports, and gives power to regulate the possession, etc., of such opium. Part II. absolutely prohibits the importation or exportation of prepared opium, and provides penalties for possessing or smoking it, and for the possession of opium-smoking utensils, and for keeping or using premises for opium smoking. Part III. prohibits the importation or exportation without license of "medicinal opium," morphine, cocaine, eponine, diamorphine (heroin) and new drugs which may be specified in an Order in Council, and of their respective salts, and of anything containing not less than .005 of morphine or .001 of cocaine, eponine or diamorphine; and it regulates the manufacture and sale of such drugs.

The act gives the police power to arrest without warrant, even upon suspicion, persons whose names and addresses cannot be ascertained or who are likely to abscond. Byrne.

Death by. "Death by opium" means not the accidental or involuntary, but the rational and voluntary use of opium. 6 Bush (Ky.) 271.

OPPOSITE. Over against, standing in front or facing. 58 Me. 360. See 15 Atl. Rep. (Pa.) 706; 23 L. J. Ch. 45.

An old word for opponent. R. & L. Dict.

OPPOSITION. In Practice. The act of a creditor who declares his dissent to a debtor's being discharged under the insolvent laws. 14 Bankr. Reg. 449.

OPPRESSION. An act of cruelty, severity, unlawful exaction, domination, or excessive use of authority. 14 Fed. Rep. 597.

To make an act oppressive on the part of an officer under Rev. Stat., § 3169, it must be done wilfully, "under color of law," and "without legal authority." *Id.*

OPPRESSOR. One who having public authority uses it unlawfully to tyrannize over another: as, if he keep him in prison until he shall do something which he is not lawfully bound to do. To charge a magistrate with being an oppressor is actionable; 1 Stark. Sl. 185.

OPPROBRIUM. In Civil Law. Ignominy; shame; infamy.

OPTION. Choice; election. See those titles.

In Contracts. A contract by which A, in consideration of the payment of a certain sum to B, acquires the privilege of buying from or selling to B, specified securities or property at a fixed price within a certain time. 71 N. Y. 420; 88 *id.* 93.

Where notes are given to cover losses on deals in options in grain, a part of which is to be delivered, the illegality of a part taints the whole, the consideration being entire; 40 Ill. App. 155. See 40 *id.* 307; 49 Ohio St. 240; 75 Hun 174; [1892] 2 Q.

B. 484; 54 Mo. App. 606. The sale of commodities to be delivered at a future day is not *per se* unlawful where the parties intend in good faith to comply with the terms of the contract; 47 Minn. 238; 64 Hun 636; 37 Neb. 766. See WAGER; CONTRACTS.

These options are of three kinds, viz.: "calls," "puts," and "straddles," or "spread eagles." A call gives A the option of calling or buying from B or not certain securities. A put gives A the option of selling or delivering to B or not. A straddle is a combination of a put and a call, and secures to A the right to buy or sell to, B or not. Where neither party, at the time of making the contract, intends to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract is void either by virtue of statute or as contrary to public policy; 11 C. B. 538. In each transaction the law looks primarily at the intention of the parties; and the form of the transaction is not conclusive; 11 Hun 471; 71 N. Y. 420; 5 M. & W. 466; 89 Pa. 250; 10 W. N. C. 112. Option contracts are not *prima facie* gambling contracts; 11 Hun 471; 71 N. Y. 420. But see 78 Ill. 43; 88 *id.* 33. See in general Dos Passos, Stock-Brokers.

OPTIONAL WRIT. An original writ in the alternative, commanding either to do a thing or show cause why it has not been done. 3 Bla. Com. 274; Finch, Law 257.

OPUS LOCATUM (Lat.). In Civil Law. A work (*i. e.* the result of work) let to another to be used. A work (*i. e.* something to be completed by work) hired to be done by another. Vicat, Voc. Jur. *Opus, Locare*; L. 51, § 1, D. *Locat.*; L. 1, § 1, D. *ad leg. Rhod.*

OPUS MAGNIFICIUM or MANIFICIUM (from Lat. *opus*, work, *manus*, hand). Manual labor. Fleta, l. 2, c. 48, § 3.

OR. A disjunctive particle.

As a particle, or is often construed *and*, and *and* construed *or*, to further the intent of the parties, in legacies, devises, deeds, bonds, and writings; 3 Gill 492; 7 *id.* 197; 1 Call. 212; 2 Rop. Leg. 1400, 1405; 3 Greenl. Ev. §§ 18, 25; 1 Jarm. Wills, c. 17, 427, 2d ed.; 1 Wills. Exrs. 932; 5 Co. 112 a; Cro. Jac. 322; 4 Zab. 686; 3 Term 470; 27 N. J. Eq. 305; 98 U. S. 143; 30 Ohio St. 407; 33 Minn. 419; but its more natural meaning, when used as a connective, is to mark an alternative and present a choice, implying an election to do one of two things; 60 Conn. 32. It sometimes has the same effect as the word "nor"; 64 Hun 635; 65 *id.* 145.

As a disjunctive particle "or" to be read "and" when such change will give effect to the evident intention of law makers, testators, or contracting parties. Anderson. In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe "or" as meaning "and," and again "and" as meaning "or." 3 Wall. (U. S.) 447. But, "or" is never construed to mean "and," when the evident intent of the parties would be thereby defeated. 98 U. S. 142.

The ending -or, in assignor, consignor, covenantor, devisor, donor, etc., designates the actor or doer; while -ee, designates the recipient—the person toward whom the action is directed, for whom the thing is done, as in assignee, consignee, devisee, etc. Originally, a Latin suffix. *Id.*

Where an indictment is in the alternative, as forged or caused to be forged, it is bad for uncertainty; 2 Stra. 900; 1 Y. & J. 22. But a description of a horse as of a brown or bay color, in an indictment for larceny of such horse, is good; 13 Vt. 687; and so an indictment describing a nuisance as in the highway or road; 1 Dall. 150. See 28 Vt. 533; 24 Conn. 286; 13 Ark. 397. So, "break or enter," in a statute defining burglary, means "break and enter"; 82 Pa. 306, 326; 105 Mass. 135.

When the word *or* in a statute is used in

the sense of *to wit*, that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment which adopts the words of the statute is well framed. Thus, it was held that an indictment was sufficient which alleged that the defendant had in his custody and possession ten counterfeit bank-bills or promissory notes, payable to the bearer thereof, and purporting to be signed in behalf of the president and directors of the Union Bank, knowing them to be counterfeit, and with intent to utter and pass them, and thereby to injure and defraud the said president and directors; it being manifest from the statute on which the indictment was framed, that promissory note was used merely as explanatory of bank-bill, and meant the same thing; 8 Mass. 59; 2 Gray 502.

In general, see Cro. Eliz. 832; 2 Sandf. 369; 1 Jones N. C. 309; 3 Term 470; 1 Bingh. 500; 2 Dr. & War. 471; Whart. Cr. Pl. & Pr., 9th ed. §§ 161, 251.

OR OTHERWISE. Authority is given by Missouri Rev. Stat. 1909, § 11417, to the Circuit Court to enforce "by mandamus or otherwise" an order to the county court to have the tax assessed, etc. But the words "or otherwise" do not authorize the Circuit Court to collect the tax, but only allow the resort to other means beside mandamus to compel the county court to do so. 236 U. S. 57.

ORACULUM (Lat.). In Civil Law. The name of a kind of decision given by the Roman emperors.

ORAL. Spoken, in contradistinction to written; as, oral evidence, which is evidence delivered verbally by a witness. Steph. Ev. 135. Formerly pleadings were put in *viva voce*, or orally; Kerr's Act. Law. When a pleading sets up a contract, and does not allege that it was in writing, it will be taken to have been oral; 84 Ind. 583.

ORAL EVIDENCE. See TESTIMONY.

ORAL PLEADING. Pleading by word of mouth, in the actual presence of the court.

ORANDO PRO REGE ET REGNO. An ancient writ which issued, while there was no regular collect for a sitting parliament, to pray for the peace and good government of the realm.

Before the Reformation it was customary for a new parliament to petition the king to require the clergy to offer up prayers for the kingdom and for a good understanding between the king and the parliament; and thereupon the writ *de orando pro rege et regno* (to pray for the king and the kingdom) was issued to the clergy. Byrne.

ORATOR. In Chancery Practice. The party who files a bill. *Oratrix*, is used of a female plaintiff. These words are disused in England, the customary phrases now being plaintiff and petitioner. Brown.

In Roman Law. An advocate. Code l. 3. 33. 1.

ORCINUS LIBERTUS. In Roman Law. A freedman who obtained his liberty by the direct operation of the will or testament of his deceased master was so called, being the freedman of the deceased (*orcinus*), not of the *haeres*.

ORDAIN. To make an ordinance, to enact a law.

The preamble to the constitution of the United States declares that the people "do ordain and establish this constitution for the United States of America." The third article of the same constitution declares that "the judicial power shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." See 1 Wheat. 304, 324; 4 *id.* 316, 402.

To confer on a person the holy orders of priest or deacon. 4 Conn. 134.

ORDAINERS. One who ordains. A

person given power by Henry II., of England, to prescribe ordinances. English.

ORDEAL. An ancient superstitious mode of trial.

When in a criminal case the accused was arraigned, he might select the mode of trial either by God and his country, that is, by jury, or by God only, that is, by ordeal.

The trial by ordeal was either by fire or by water. Those who were tried by the former passed barefooted and blindfolded over nine hot glowing ploughshares, or were to carry burning irons in their hands, and accordingly as they escaped or not they were acquitted or condemned. The water ordeal was performed either in hot or cold water. In cold water, the parties suspected were adjudged innocent if their bodies were not borne up by the water contrary to the course of nature; and if after putting their bare arms or legs into scalding water they came out unhurt, they were taken to be innocent of the crime.

It was supposed that God would, by the mere contrivance of man, exercise his power in favor of the innocent. 4 Bla. Com. 342; 2 Am. Jur. 280. See 110 U.S. 529. For a detailed account of the trial by ordeal, see Herbert, *Antiq. of the Inns of Court* 146.

ORDEFFE or ORDELFE. A liberty whereby a man claims the ore found in his own land; also, the ore lying under land. Cowell.

ORDELFE. See **ORDEFFE**.

ORDELS. The right of administering oaths and adjudging trials by ordeal within a precinct or liberty. Cowell.

ORDENAMIENTO. In Spanish Law. An order from the sovereign and differing from a *cedula* in form and in the mode of its promulgation. Schin. Civ. L. Intro. 93, n.

ORDER. Command; direction.

An informal bill of exchange or letter of request requiring the party to whom it is addressed to deliver property of the person making the order to some one therein described.

A designation of the person to whom a bill of exchange or negotiable promissory note is to be paid. See 14 Conn. 445; 48 N. H. 45; 89 N. Y. 98. This order, in the case of negotiable paper, is usually by indorsement, and may be either express, as, "Pay to C D," or implied merely, as by writing A B [the payee's name].

See **INDORSEMENT**; **STORE ORDERS**.

In French Law. The act by which the rank of preferences of claim, among creditors who have liens over the price which arises out of the sale of an immovable subject, is ascertained. Dalloz, Dict.

In the Practice of Courts. An order is any direction of a court or judge made or entered in writing, and not included in a judgment. N. Y. Code of Proc. § 400; 51 Ia. 137. But a decree is often called an order. See **DECREE**. For distinction between order and requisition, see 19 Johns. 7.

In Governmental Law. By this expression is understood the several bodies which compose the state. In ancient Rome, for example, there were three distinct orders: namely, that of the senators, that of the patricians, and that of the plebeians.

In the United States there are no orders of men; all men are equal in the eye of the law. See **RANK**, **FRAUD ORDER**; **INTERIM ORDER**.

Punishing for Contempt. An order punishing for contempt made in the progress of a case, when not in the nature of an order in a criminal proceeding is an interlocutory order and to be reviewed only upon appeal from a final decree in the case. 204 U.S. 599.

See **AGREED ORDER**; **FINAL ORDER**; **FINAL ORDER OR JUDGMENT**.

ORDER IN COUNCIL. An order by the sovereign with the advice of the privy council. See **PRIVY COUNCIL**.

Also an order of a Colonial Viceroy with the advice of the Privy or Executive Council of the British Colony or Possession to which the order relates.

Some Orders in Council come within the class of Statutory Orders, that is to say, of orders made under statutory authority. Jenks, *Hist. E. L.* 187. The issue of Orders in Council is expressly authorized by various modern statutes, the effect of this authorization being to give the government a power to legislate, subject in many cases to the right of parliament to nullify the Order in Council by an address disapproving thereof.

Other Orders in Council are made by virtue of the royal prerogative. Thus the Civil Service of the United Kingdom is regulated by Orders in Council made under the prerogative. Byrnie.

ORDER OF DISCHARGE. In England, an order made under the Bankruptcy Act of 1869, by a court of bankruptcy, the effect of which is to discharge a bankrupt from all debts, claims, or demands provable under the bankruptcy. Robson, *Bkcy.*; Whart. Lex.

ORDER OF FILIATION. The name of a judgment rendered by two justices, having jurisdiction in such case, in which a man therein named is adjudged to be the putative father of a bastard child, and it is further adjudged that he pay a certain sum for its support.

The order must bear upon its face—first, that it was made upon the complaint of the township, parish, or other place where the child was born and is chargeable; second, that it was made by justices of the peace having jurisdiction; 1 Salk. 122, pl. 6; 2 Ld. Raym. 1197; third, the birthplace of the child; fourth, the examination of the putative father and of the mother, but it is said the presence of the putative father is not requisite if he has been summoned; Cald. 308; fifth, the judgment that the defendant is the putative father of the child; Sid. 363; Style 154; Dougl. 662; sixth, that he shall maintain the child as long as he shall be chargeable to the township, parish, or other place, which must be named; 1 Salk. 121, pl. 2; but the order may be that the father shall pay a certain sum weekly as long as the child is chargeable to the public; Ventr. 210; seventh, it must be dated, signed, and sealed by the justices. Such order cannot be vacated by two other justices; 15 Johns. 208. See 4 Cow. 253; 2 Blackf. 42.

ORDER NISI. A conditional order, which is to be confirmed unless something be done, which has been required, by a time specified. Eden, *Inj.* 122.

ORDER OF REVIVOR. In English Practice. An order as of course for the continuance of an abated suit. It superseded the bill of revivor. See 15 & 16 Vict. c. 86, s. 53. Whart. Lex.

ORDERS. Rules made by a court or other competent jurisdiction. The formula is generally in these words: *It is ordered*, etc.

The instructions given by the owner to the captain or commander of a ship, which he is to follow in the course of the voyage.

ORDERS OF THE DAY. Matters which the house of commons may have agreed beforehand to consider on any particular day, are called the "orders of the day," as opposed to original motions. May's Parl. Prac. Orders of the day are also known to the parliamentary practice of this country; Cush. Pr. Leg. Assemblies 1512.

ORDINANCE. A law; a statute; a decree.

Municipal ordinances are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the corporation. The term *ordinance* is now the usual denomination of such acts, although in England and in some states, the technically more correct term *by-law* is in common and approved use. The main feature of such enactments is that they are

local, as distinguished from the general applicability of the state laws; hence, the word *law*, with the prefix *by*, should in strictness be preferred to the word *ordinance*; Horr. & Bemis, *Mun. Pol. Ord.* 1. See 117 Ind. 221; *By-Laws*.

They are not, in a constitutional sense, public laws, but mere local rules or by-laws, police or domestic regulations, devoid in many respects of the characteristics of public or general laws; 17 Colo. 302.

This word is more usually applied to the laws of a corporation than to the acts of the legislature. The following account of the difference between a statute and an ordinance is from Bacon's *Abridgment, Statute* (A). "Where the proceeding consisted only of a petition from parliament and an answer from the king, these were entered on the *parliament roll*; and if the matter was of a public nature, the whole was then styled an *ordinance*: if, however, the petition and answer were not only of a public but a novel nature, they were then formed into an *act* by the king, with the aid of his council and judges, and entered on the *statute roll*." See Co. Litt. 159 b, Butler's note; 3 Reeve, *Hist. Eng. Law* 146.

According to Lord Coke, the difference between a statute and an ordinance is that the latter has not had the assent of the king, lords, and commons, but is made merely by two of these powers. Co. 4th Inst. 25. See Barrington, *Stat.* 41, note (x).

A resolution of a council is but another name for an ordinance, and if it is a legislative act it is immaterial whether it is called a resolution or an ordinance, so long as the requirements essential to the validity of an ordinance be observed; 99 Pa. 330; but if the action is merely declaratory of the will of the corporation, it is proper to act by resolution, which is more in the nature of a ministerial act; 19 U. S. App. 622.

A municipal ordinance not passed under legislative authority, is not a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts; 146 U. S. 258.

Equity will not restrain a city council from passing an ordinance allowing a gas company to lay pipes in its streets, although it has granted the exclusive privilege to do so to another company; 87 Ala. 245. See 92 Ky. 95. An illegal ordinance may be enjoined before passage; 92 Ky. 95; or the enforcement of an invalid ordinance; 132 Ind. 575; but not an ordinance restraining a certain act, unless it be a nuisance *per se*; 7 Mont. 173.

While it is not *per se* negligence for a railroad company to run its cars at a higher rate of speed than the limit specified in a city ordinance, yet the fact that it did so in the particular case may be taken into consideration by the jury, with other evidence, in ascertaining whether or not the defendant was negligent; 165 Pa. 118. In 34 Minn. 29, it was held that running a railroad train at a speed exceeding the limit fixed by ordinance was evidence of negligence which should go to the jury. That it is negligence *per se* is held in 96 Mo. 509; 84 Ala. 141; 178 Ill. 197. (Also where the rate of speed is fixed by statute; 34 Ia. 276.) An ordinance as to the right of way between two street cars is not conclusive of the question of negligence; it is merely evidence of negligence on the part of the driver of a car whose duty under it was to give way; 173 Pa. 602.

An ordinance requiring an opening in a street to be guarded is admissible in evidence in an action against a city for injuries sustained by falling into such opening; 150 Pa. 611.

An ordinance which has the effect of denying to the owner of property the right to conduct a lawful business thereon is invalid, unless the business is of such a noxious or offensive character that the health, safety, or comfort of the community require its exclusion from the neighborhood; 98 Cal. 73; this does not extend to an asylum for the treatment of mild forms of insanity; *id.*; or to a laundry; 82 Fed. Rep. 623.

The burden of proving the unreasonableness of an ordinance is upon him who denies its validity; 53 N. J. L. 132; 19 L. R. A. 632.

A copy of an ordinance having the seal of the city attached is admissible in evidence without further proof; 118 Mo. 895.

See **MUNICIPAL CORPORATIONS**; **NUISANCE**; **POLICE POWERS**. See **MUNICIPAL ORDINANCE**. By-Law.

ORDINANCE OF 1647. A law passed by the Colony of Massachusetts, still in force, in a modified form, whereby the state owns the great ponds within its confines, which are held in trust for public uses. 147 Mass. 548. See **LAKE**.

ORDINANCE OF 1648. A law of England relating to admiralty jurisdiction. See **Bened. Adm.** § 99. It expired in 1660.

ORDINANCE OF 1681. An ordinance of France relating to maritime affairs. See **Bened. Adm.** § 173.

ORDINANCE OF 1787. A statute for the government of the Northwest Territory. See **OHIO**.

It has no force in Illinois except as incorporated in its statutes; 168 Ill. 179.

ORDINANCES OF EDWARD I. Two laws and ordinances published by Edward I. in the second year of his reign, at Hastings, relating to admiralty jurisdiction. These are said to have been the foundation of a consistent usage for a long time. See **Bened. Adm.** § 55.

ORDINARY. In **Ecclesiastical Law**. An officer who has original jurisdiction in his own right, and not by deputization.

In England, the ordinary is an officer who has immediate jurisdiction in ecclesiastical causes. Co. Litt. 344. A bishop is an ordinary, and archbishops are the ordinaries of the whole province. Also an archdeacon; and an officer of the royal household.

In the United States, the ordinary possesses, in those states where such officer exists, powers identical with those usually vested in the courts of probate. In South Carolina, the ordinary was a judicial officer; 1 Const. S. C. 267; 2 *id.* 384; but the office no longer exists in South Carolina, where they have now a probate court. Georgia retains courts of ordinary. See **COURTS OF ORDINARY**.

ORDINARY CALLING. Those things which are repeated daily or weekly in the course of trade or business are parts of the ordinary calling of a man exercising such trade or business. 5 Ga. App. 618.

A business in which one is at least partly engaged, a business which occupies a portion of one's time as a calling. *Id.*; 617.

ORDINARY CARE. That degree of care which men of ordinary prudence exercise in taking care of their own persons or property. Story, Bailm. 11; 95 Cal. 279; 143 Ill. 127; 108 Mo. 387; 8 S. Dak. 98; 49 Kan. 260. It can only be determined by the circumstances of each particular case whether ordinary care was used. This degree of care is said to be required of bailees for the mutual benefit of bailor and bailee; 8 Metc. 91; 16 Ark. 308; 23 Conn. 437; 443; 40 Me. 64; 26 Ala. N. S. 203; 36 E. L. & E. 506. See 4 Misc. Rep. 104; 156 Pa. 358; **BAILEE**; **NEGLIGENCE**; **CARE**.

ORDINARY NEGLIGENCE. The want of such care and diligence as reasonably prudent men, generally, in regard to the subject-matter of inquiry, would use to prevent or avoid an injury. 49 Kan. 460. See **GROSS NEGLIGENCE**.

ORDINARY ROOF. See **Roof, Ordinary Roof**.

ORDINARY SKILL. Such skill as a person conversant with the matter undertaken might be reasonably supposed to have. 11 M. & W. 113; 20 Mart. La. 68, 75; 8

B. Monr. 515; 18 Johns. 211; 7 C. & P. 289; 16 S. & R. 388; 15 Mass. 316; 108 N. C. 187. See **Cooley, Torts** 777; **NEGLIGENCE**.

One who undertakes to act in a professional or other clearly defined capacity is bound to exercise the skill appropriate to such capacity; Webb, Poll. Torts 26; though the undertaking be gratuitous; 20 Pa. 136; 31 N. H. 119.

ORDINATION. The act of conferring the orders of the church upon an individual. See **ORDAIN**.

ORDINATIONE CONTRA SERVIENTES. A writ that lay against a servant for leaving his master contrary to the ordinance of 23 & 24 Edw. III.

ORDINIS BENEFICIUM. See **BENEFICIUM ORDINIS**.

ORDINUM FUGITIVI. Those of the religious who deserted their houses, and, throwing off the habits, renounced their particular order in contempt of their oath and other obligations. Par. Antiq. 388.

ORDNANCE DEBENTURES. Bills which were issued by the Board of Ordnance on the treasurer of that office for the payment of stores, etc.

ORDNANCE OFFICE, or BOARD OF ORDNANCE. An office which was kept within the Tower of London, and which superintended and disposed of all the arms, instruments, and utensils of war, both by sea and land, in all the magazines, garrisons, and forts of Great Britain. It is divided into two distinct branches, the civil and the military. 4 & 5 Wm. IV. c. 24. But by 18 & 19 Vict. c. 117, the powers, duties, etc., of the board were transferred to the secretary of state for war. Wharton.

ORDO JUDICIORUM. The order of judgment; the rule by which the due course of hearing each cause was prescribed. 4 Reeve Hist. Eng. L. 17.

ORDONNANCE DE LA MARINE. See **CODE**.

ORE LEAVE. A right to dig and take ore from land. 84 Pa. 340.

ORE TENUS (Lat.). Verbally; orally. Formerly the pleadings of the parties were *ore tenus*; and the practice is said to have been retained till the reign of Edward III. 8 Reeve Hist. Eng. Law 95; Steph. Pl., Andr. ed. § 59. And see Bracton 372 b.

In chancery practice, a defendant may demur at the bar *ore tenus*; 3 P. Wms. 370; if he has not sustained the demurrer on the record; 1 Swanst. 288; Mitf. Pl., Tyler's ed. 310; 6 Ves. 779; 8 *id.* 405; 17 *id.* 215.

OREGON. One of the Pacific coast states of the American Union, and the thirty-third state admitted therein.

The territory called Oregon from the early name of its principal river—now called the Columbia—originally included all the country on the Pacific coast west of the Rocky mountains, and north of the 42d and south of the 49th parallel of north latitude. From 1818 to 1846, this country was subject to the joint occupancy of the subjects and citizens of Great Britain and the United States, under a disputed claim of title, which was settled by the treaty of June 15, of the latter year, in favor of the United States.

As early as 1841 the American and British occupants west of the Cascade mountains commenced to organize a government for their protection. These efforts resulted in the establishment of the "Provisional Government of Oregon" by a popular vote on July 5, 1845, consisting of an executive, legislative (one house), and judicial department, the officers of which were chosen and supported by the voluntary action of the citizens and subjects of both nations. On March 3, 1849, this government was superseded by the territorial government provided by congress in the act of August 14, 1848. On September 27, 1850, congress passed the "donation act," giving the settlers the land held by them under the provisional government—640 acres to a married man and his wife, and 320 to a single man.

In 1857 a state constitution was formed and ratified by the people, under which a portion of the territory was admitted into the Union on February 14, 1859, on an equal footing with the other states.

ORFGILD (Sax. *orf*, cattle, *gild*, payment. Also called *cheapgild*). A payment

for cattle, or the restoring them. Cowell.

A restitution made by the hundred or county of any wrong done by one that was in pledge. Lambard, Archaion 125, 126.

A penalty for taking away cattle. Blount.

ORGANIC LAW. The fundamental law or constitution of a state or nation. See **LAW**.

ORIGINAL. An authentic instrument which is to serve as a model or example to be copied or imitated.

Originals are single or duplicate: single when there is but one; duplicate, when there are two. In the case of printed documents, all the impressions are *originals*, or in the nature of *duplicate originals*, and any copy will be primary evidence; 2 Stark. 130. But see 14 S. & R. 200. See **TELEGRAPH**; **PHOTOGRAPH**; **PRESS COPY**.

When an original document is not evidence at common law, and a copy of such original is made evidence by an act of the legislature, the original is not therefore made admissible evidence by implication; 2 Campb. 121, n.

Not deriving authority from any other source; as, original jurisdiction, original writ, original bill, and the like.

ORIGINAL BILL. In Chancery Practice. A bill relating to a matter not before brought before the court by the same parties, standing in the same interests. Mitf. Eq. Pl. 33.

Proceedings in a court of chancery are either commenced by way of information, when the matter concerns the state or those under its protection, or by original petition or bill when the matter does not concern the state or those under its protection. The original bill states simply the cause of complaint, and asks for relief. It is composed of nine parts; Story, Eq. Pl. 7; and is the foundation of all subsequent proceedings before the court. See 1 Dan. Ch. Pr., 6th Am. ed. *314; **BILL**.

ORIGINAL CHARTER. In Scotch Law. That one by which the first grant of land is made. Bell, Dict.

ORIGINAL CONSTRUCTION. This term, as distinguished from repairs, has a technical meaning in relation to railroads, and is that construction of bridges, etc., that is necessary to be done before the railroad can be opened, not such structures as are intended to replace worn-out counterparts. 86 Fed. Rep. 73.

Where a portion of an old turnpike road became a public way of a city by reason of the extension of its limits, so as to include the same, the regrading and paving thereof was an "original construction" within the meaning of a statute. 99 Ky. 232, 35 S. W. 645.

A street is not "originally constructed" until it is improved at the cost of the adjoining property owners. 159 Ky. 138, 166 S. W. 811.

Where a fill to protect a city from overflow and the improvement thereof with macadam were paid for out of the proceeds of a bond issue, without cost to the abutting property owners, a subsequent improvement by granite pavement, was held an "original construction" within the meaning of a statute. 159 Ky. 138, 166 S. W. 811.

ORIGINAL CONVEYANCES (sometimes called *primary conveyances*). Those conveyances by means whereof the benefit or estate is created or first arises: viz. feoffment, gift, grant, lease, exchange, partition. 2 Bla. Com. 309; 1 Steph. Com., 11th ed. 464.

ORIGINAL AND DERIVATIVE ESTATES. An original estate is the first of several estates, bearing to each other the relation of a particular estate and a reversion. It is contrasted with a derivative estate, which is a particular interest carved out of an another estate of larger extent. 1 Pres. Est. *123.

ORIGINAL ENTRY. The first entry

made by a merchant, tradesman, or other person in his account-books, charging another with merchandise, materials, work, or labor, or cash, on a contract made between them.

Such an entry, to be admissible as evidence, must be made in a proper book. In general, the books in which the first entries are made, belonging to a merchant, tradesman, or mechanic, in which are charged goods sold and delivered or work and labor done, are received in evidence. There are many books which are not evidence, a few of which will be here enumerated. A book made up by transcribing entries made on a slate by a journeyman, the transcript being made on the same evening, or sometimes not until nearly two weeks after the work was done, was considered as not being a book of original entries; 1 Rawle 435; 4 *id.* 408; 2 Watts 451; 6 Whart. 189. A book purporting to be a book of original entries, containing an entry of the sale of goods when they were ordered, but before delivery, is not a book of original entries; 4 Rawle 404; 3 Dev. 449. And unconnected scraps of paper, containing, as alleged, original entries of sales by an agent, on account of his principal, and appearing on their face to be irregularly kept, are not to be considered as a book of original entries; 13 S. & R. 126; *contra*, 4 Harring. 532. See 2 Whart. 33; 4 McCord 76; 20 Wend. 72; 1 Yeates 198. A notched stick kept as a tally was admitted to prove items of different amount indicated by different cuts and notches; 2 Harring. 288.

The entry must be made in the course of business, and with the intention of making a charge for goods sold or work done; it ought not to be made after the lapse of one day; Tayl. Ev. 620; 1 N. & McC. 180; 4 S. & R. 5. Memoranda of sales found in an account-book are competent, when made contemporaneously with orders, by a witness knowing them to state correctly the facts; 35 Fed. Rep. 314.

The entry must be made in an intelligible manner and not in figures or hieroglyphics which are understood by the seller only; 4 Rawle 404. A charge made in the gross as "190 days work;" 1 N. & McC. 180; or "for medicine and attendance," or "thirteen dollars for medicine and attendance on one of the General's daughters in curing the whooping-cough;" 2 Const. So. C. 476, were rejected. An entry of goods without carrying out any prices proves, at most, only a sale; and the jury cannot, without other evidence, fix any price; 1 South. 370. The charges should be specific, and denote the particular work or service charged as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and attach the price and value to each item; 2 Const. So. C. 745; 1 N. & McC. 180.

The entry must, of course, have been made by a person having authority to make it; 4 Rawle 404; and with a view to charge the party; 8 Watts 545.

The proof of the entry must be made by the person who made it. If made by the seller, he is competent to prove it from the necessity of the case, although he has an interest in the matter in dispute; 5 Conn. 496; 12 Johns. 461; 1 Dall. 239. When made by a clerk, it must be proved by him. But in either case, when the person who made the entry is out of the reach of the process of the court, as in the case of death, or absence from the state, the handwriting may be proved by a person acquainted with the handwriting of the person who made the entry; 2 W. & S. 137; if he is absent, proof must first be made that he cannot be found; 57 Ark. 402. But the plaintiff was not competent to prove the handwriting of a deceased clerk who made the entries; 1 Bro. App. liii. A book containing entries in defendant's handwriting of payments by him to payee in her lifetime, on the note in action, is not admissible as evidence in defendant's favor; 84 Va. 341.

The books and original entries, when proved by the supplementary oath of the

party, are *prima facie* evidence of the sale and delivery of goods, or of work and labor done; 1 Yeates 347; 8 Vt. 463; 1 McCord 481; 2 Root 59. See 30 Fla. 419; 97 Ala. 619. But they are not evidence of money lent or cash paid; 1 Day 104; Kirb. 289; or of the time a vessel lay at the plaintiff's wharf; 1 Browne 287; or of the delivery of goods to be sold on commission; 2 Whart. 53. See, generally, Greenl. Ev. § 118.

These entries are sometimes evidence in suits between third parties; 8 Wheat. 326; 3 Campb. 305, 377; 2 P. & D. 573; 15 Mass. 380; 20 Johns. 168; 15 Conn. 206; 7 S. & R. 116; 2 Hart. & J. 77; 2 Rand. 87; 1 Y. & C. 53; and also in favor of the party himself; 2 Mart. La. n. s. 508; 2 Mass. 217; 1 Dall. 239; 2 Bay 173, 362; 5 Vt. 313; 108 Mo. 277. See 26 Tex. App. 404; 68 Hun 190; 160 Mass. 328.

ORIGINAL IMPOSSIBILITY.

See IMPOSSIBILITY.

ORIGINAL IMPROVEMENT. The word "original" when used in connection with an improvement, referred to an improvement when first made. 128 Ky. 555, 108 S. W. 878.

ORIGINAL JURISDICTION.

ORIGINAL PACKAGE. The casing in which imported merchandise is kept and handled in course of transportation, whether hogheads, bales, bottles, or boxes. Such as are used in *bona fide* transactions carried on between the manufacturer and wholesale dealers residing in different states. 179 U. S. 359.

The doctrine upon the subject of original packages was contained in the decision of the court in 12 Wheat. (U. S.) 419, in which Mr. Chief Justice Marshall observed: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while retaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." *Id.*, 351. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. The doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state. *Id.*, 359, 360.

The term "original package" is not defined by any statute, and is simply a convenient form of expression adopted by Chief Justice Marshall to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. Whatever the form or size employed there must be a recognition of the fact that the transaction is a *bona fide* one, and the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the state. 196 U. S. 270.

The term "original package" as used in a state statute does not necessarily have the same meaning as when used in some of the decisions of this court. 222 U. S. 415. See also PACKAGE.

The package delivered by the importer to the carrier at the initial point of shipment in the exact condition in which it was shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package, but if a number are fastened together and marked, or are together in a box, etc., such box, etc., constitutes the original package; 81 Fed. Rep. 997.

An original package is a bundle put up for transportation and usually consists of a

number of things bound together and convenient for handling; 15 So. Rep. (La.) 10. An original package, trade in which is protected by the federal constitution, is such form and size of package as is used by purchasers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of commerce; 156 Pa. 201.

The power to regulate or forbid the sale of a commodity after it has been brought into a state does not carry with it the right and power to prevent its introduction by transportation from another state; 125 U. S. 465. This was followed by Leisy v. Hardin, 135 U. S. 100, where it was held (three judges dissenting), that a state statute prohibiting the sale of intoxicating liquors, except for medicinal, etc., purposes, and under a license, is, as applied to a sale by an importer and in the original packages or kegs unbroken and unopened, of such liquor brought from another state, unconstitutional and void as repugnant to the commerce clause of the constitution. See 4 Harv. L. Rev. 221, for a criticism of this case. The rule established in Leisy v. Hardin, does not justify the contention that a state is powerless to prevent the sale of foods made in or brought from another state, if their sale may cheat the people into buying something they do not intend to buy, and which is wholly different from what its condition and appearance import; 155 U. S. 461, upholding the Massachusetts Oleomargarine Act.

The act of congress of August 8, 1890 (Wilson Act), provided that upon the arrival in any state of liquors they should be subject to the laws of the state the same as if produced there, and should not be exempt therefrom whether in original packages or not. This was held constitutional in 140 U. S. 545. It does not confer upon any state the power of prohibiting the importation of articles by any one except certain officers appointed by the state. The South Carolina Dispensary Act of 1895 is therefore contrary to the commerce clause, and so far as it is so is invalid; 165 U. S. 68.

A consignment of liquor has arrived in the state, within the meaning of the Wilson Bill, as soon as it crosses the state boundary, although the contract of carriage is not then completed; 24 L. R. A. 245.

A state may regulate or prohibit the sale of liquor even in the original package; 18 Sup. Ct. Rep. 674; but it cannot impose a penalty on a carrier for transporting such goods within the state and before their delivery; *id.* 664.

Opening a barrel of intoxicating liquor to obtain a small quantity for testing does not destroy the nature of the original package; 27 L. R. A. (1a.) 219.

The peddling of separate articles after a package has been broken is subject to regulation by the state police power; 166 Pa. 89.

An act prohibiting the manufacture and sale of cigarettes interferes with interstate commerce as applied to sales in small boxes containing ten each imported in that form from other states; 76 Fed. Rep. 156; 82 *id.* 615.

A sale of ten-pound packages of oleomargarine, manufactured and packed in one state and imported into another, is a valid sale, though made to a person who was himself a consumer. The importer has not only a right to sell personally but to employ an agent to sell for him. The right of the importer to sell does not depend upon whether the original package was suitable for retail trade or not, but is the same even if the consumers are wholesale dealers, provided he sells in original packages. The Pennsylvania act of May 21st, 1885, forbidding the manufacture of any imitation of butter or cheese, and providing that no one should sell or have such imitation in his possession with intent to sell as an article of food, is invalid to the extent that it prohibits the introduction of oleomargarine into another state and its sale in the original packages; 171 U. S. 1, two judges dissenting, reversing 170 Pa. 284. Whether

the right to sell extended beyond the first sale by the importer was not decided. The right to import a lawful article of commerce from one state to another continues until a sale in the original package; 171 U. S. 23; when the package is broken it becomes a part of the general mass of property; 124 Mo. 486.

Retail trade as well as wholesale is included in the idea of commerce; 81 Fed. Rep. 1000.

The form or size of the package the importer determines for himself; 25 Pac. Rep. (Kan.) 235; however small it may be, if it is an original package, it is protected; 42 Fed. Rep. 545.

Bottles, if sealed without the state, are the original packages and not the boxes or barrels in which they come; 138 Pa. 642; 82 Ia. 401; 86 *id.* 639; but where bottles were shipped separately in tissue paper, each labelled original package, and packed in an open box with hay, it was held that the boxes were the original packages; 91 Ala. 2. See 47 N. W. Rep. (S. D.) 411; 60 N. W. Rep. (Neb.) 463; 53 *id.* (Ia.) 330; 43 Fed. Rep. 372.

Where cigarettes are put up in small boxes, ten to a box, and these boxes are placed in larger boxes for shipping, the small boxes constitute original packages; but when they reach their place of destination for sale they become a part of the mass of property of the state; 81 Fed. Rep. 997; 82 *id.* 422.

Merely labelling each bottle "original package" does not make it one; 91 Ala. 2. See 34 Am. L. Reg. 784; 29 *id.* 721; COMMERCE; LIQUOR LAWS; OLEOMARGARINE.

ORIGINAL PROCESS. Process to compel an appearance by the defendant.

The means of compelling the defendant to appear is sometimes called "original process," being founded upon the original writ, and also to distinguish it from "mesne (intermediate) process," which issues, pending the suit, upon some collateral interlocutory matter, as, to summon juries, witnesses, and the like. Anderson.

ORIGINAL WRIT. In English Practice. A mandatory letter issued in the king's name, sealed with his great seal, and directed to the sheriff of the county wherein the injury was committed or supposed to have been done, requiring him to command the wrongdoer, or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him. This writ is deemed necessary to give the courts of law jurisdiction. Andr. Steph. Pl. 62; Gould, Pl. 14.

This writ is now disused, the writ of summons being the process prescribed by the Uniformity of Process Act for commencing personal actions; and under the Judicature Act, 1873, all suits, even in the court of chancery, are to be commenced by such writs of summons; Brown. But before this, in modern English practice, the original writ was often dispensed with, by recourse to a fiction and a proceeding by bill substituted. In this country, our courts derive their jurisdiction from the constitution, and require no original writ to confer it. Improperly speaking, the first writ which is issued in a case is sometimes called an original writ; but it is not so in the English sense of the word. See 3 Bla. Com. 273; Walker, Am. Law, *passim*.

ORIGINALIA (Lat.). In English Law. The transcripts and other documents sent to the office of the treasurer-remembrancer in exchequer are called by this name to distinguish them from *records*, which contain the judgments of the barons. The treasurer-remembrancer's office was abolished in 1833.

ORIGINALITY. In Patent Law. The finding out, the contriving, the creating of something which did not exist and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind. 4 Fish. Pat. Cas. 16.

ORNAMENT. An embellishment. In questions arising as to which of two things is to be considered as principal or accessory, it is the rule that an ornament shall be considered as accessory.

ORPHAN. A minor or infant who has lost both of his or her parents. Sometimes the term is applied to a person who has lost only one of his or her parents. 2 S. & S. 93; Aso & M. Inst. b. 1, t. 2. c. 1; 40 Wisc. 276. See 14 Hazzard, Penn. Reg. 188, 189, for a correspondence between Joseph Hopkinson and ex-president J. Q. Adams as to the meaning of the word *orphan*; see, also, Hob. 247; 147 Mass. 300.

ORPHANAGE. In English Law. The share reserved to an orphan by the custom of London. See LEGITIME; DEAD'S PART.

ORPHANS' COURT. In American Law. Courts of more or less extended jurisdiction, relating to probate, estates of decedents, etc., in Delaware, Maryland, New Jersey, and Pennsylvania. See the titles of the respective states.

ORPHANOTROPHI. In Civil Law. Persons who have the charge of administering the affairs of houses destined for the use of orphans. *Clef des Lois Rom. Administrateurs*.

ORREUM. See HORREUM.

OSCULI, JUS (IUS). According to the old phraseology there could be no intermarriage within the circle of the *iūs osculī* ("the right of kiss").

A patrician citizen, if his marriage was to be reckoned lawful, had to wed either a fellow-patrician or a woman who was a member of an allied community. In either case it was essential that she should not be of kin to him within the 7th degree. Muirhead, Rom. L. 26.

OSTENSIBLE PARTNER. One whose name appears in a firm as a partner, and who is really such. Pars. Part. 27. See PARTNERS.

OSTEOPATHY. A method of treating diseases by kneading or manipulation of the body, and does not teach surgery, bacteriology, *materia medica*, or therapeutics. 103 Ky. 769, 57 S. W. 504.

OSWALD'S LAW. The law by which was effected the ejection of married priests, and the introduction of monks into churches. Named from Oswald, Bishop of Worcester, about 964. Whart. Lex.

OTHER CASUALTY. In a lease providing that rent shall cease if the premises become untenable by fire or other casualty, it refers to some fortuitous interruption of the use. 6 U. S. App. 42.

OTHER WRONGS. See ALIA ENORMIA.

OTHERWISE. See OR OTHERWISE.

OTHESWORTHE (Sax. *eothe*, oath). Worthy to make oath. Bract. 185, 192.

OUGHT. The word is generally directory, but may be taken as mandatory if the context requires it. Bract. fol. 185, 292 b.

OUNCE. The name of a weight. See WEIGHTS.

OUST. To put out; to turn out or eject. 3 Bl. Com. 201, 202.

OUSTER (L. Fr. *oultre*, *oultre*; Lat. *ultra*, beyond). Out; beyond; besides; farther; also; over and more. *Le ouster*, the uppermost. Over: *respondet ouster*, let him answer over. Britton, c. 29. *Ouster le mer*, over the sea. Jacob, L. Dict. *Ouster eit*, he went away. 6 Co. 41 b; 9 *id.* 120.

To put out; to oust. *Il oust*, he put out or ousted. *Oustes*, ousted. 6 Co. 41 b.

In Torts. The actual turning out or keeping excluded the party entitled to possession of any real property corporeal.

It is the wrongful dispossession or exclusion from real property of a party entitled to the possession thereof; ouster of one cotenant by another is produced by the same acts as any other ouster; 91 Cal. 170.

An ouster can properly be only from real property corporeal, and cannot be committed of anything movable; 1 C. & P. 123; 1 Chitty, Pr. 148; nor is a mere temporary trespass considered as an ouster. Any continuing act of exclusion from the enjoyment constitutes an ouster, even by one tenant in common of his co-tenant; Co. Litt. 199 b, 200 a. See 3 Bla. Com. 167; Webb, Poll. Torts 447; 1 Chitty, Pr. 374, where the remedies for an ouster are pointed out. See 33 Cent. L. J. 297. A demand of possession by a tenant in common from his co-tenant, and refusal by the latter, constitutes an ouster from the joint possession; 107 Mo. 520. In an action of *quo warranto*, the judgment rendered, if against an officer or individuals, is called *judgment of ouster*; if against a corporation by its corporate name, it is *ouster and seizure*. See JUDGMENT; RESPONDEAT OUSTER; Rosc. Real Actions 502, 552, 574, 582; 1 Chitty, R. P. § 2454 a; 1 Woodd. Lect. 501; Washb. R. P.

OUSTER LE MAIN (L. Fr. to take out of the hand). In Old English Law. A delivery of lands out of the hands of the lord after the tenant came of age. If the lord refused to deliver such lands, the tenant was entitled to a writ to recover the same from the lord: this recovery out of the hands of the lord was called *ouster le main*. Abolished by 12 Car. II. c. 24. Also, a livery of land out of the king's hands by judgment given in favor of the petitioner in a *monstrans de droit*; 3 Steph. Com. 657.

OUSTRE LE MER. Beyond the sea. A cause of excuse, if a person, being summoned, did not appear in court. Cowell.

OUT OF COURT. A plaintiff in an action at common law must have declared within one year after the service of the summons, otherwise he was *out of court* unless the court had, by special order, enlarged the time for declaring. See Jud. Act, 1875, Ord. xxi. r. 1. Whart. Lex.

Also used as a colloquial phrase applied to a litigant party when his case breaks down, equivalent to saying, "he has not a leg to stand on;" Moz. & W.

OUT OF THE STATE. Beyond sea, which title see.

OUT OF TIME. In Marine Insurance. Missing. Generally speaking, a ship may be said to be missing or out of time when she has not been heard of after the longest ordinary time in which the voyage is safely performed. 1 Arn. Ins., 6th ed. 536; 2 Duer, Ins. 469, n.

OUTBORH. See INBORH.

OUTBUILDING. Something used in connection with a main building. 140 Mass. 287. While a stable may be a necessary outbuilding, yet when erected for use in connection with a tent placed temporarily on land, it is not so, within a restriction against the erection of a building other than dwellings of a specified value with necessary outbuildings; 159 Mass. 6. See OUTHOUSES.

OUTCAST. The word "outcast" implies being a degraded and disgraced character. 158 Ky. 40, 164 S. W. 370.

OUTER BAR. See UTTER BARRISTER.

OUTER HOUSE. A department of the court of session in Scotland, consisting of five lords ordinary, sitting each separately, to decide causes in the first instance. Paterson; Moz. & W.

OUTFANGTHEF. A liberty in the ancient common law, whereby a lord was enabled to call any man dwelling in his manor and taken for felony in another place out of his fee to judgment in his own court. Du Cange. See INFANGTHEF.

OUTFIT. An allowance made by the

government of the United States to an ambassador, a minister plenipotentiary, or *chargé d'affaires*, on going from the United States to any foreign country.

The outfit can in no case exceed one year's full salary. No outfit is allowed to a consul. See **MINISTER**.

As to the meaning of "outfit" in the whaling business, see 9 Metc. 354.

OUTHOUSES. Buildings adjoining or belonging to dwelling-houses.

Buildings subservient to, yet distinct from, the principal mansion-house, located either within or without the curtilage. 4 Conn. 446; 4 Gill & J. 402; 2 Cr. & D. 479.

It is not easy to say what comes within and what is excluded from the meaning of outhouse. It has been decided that a *schoolroom*, separated from the dwelling-house by a narrow passage about a yard wide, the roof of which was partly upheld by that of the dwelling-house (the two buildings, together with some other, and the court which inclosed them, being rented by the same person), was properly described as an outhouse; Russ. & R. Cr. Cas. 295. See, for other cases, Co. 3d Inst. 67; 1 Leach 49; 2 East Pl. Cr. 1020; 5 C. & P. 555; 8 B. & C. 461; 1 Mood. Cr. Cas. 323, 336; 4 Conn. 446; 11 Ala. N. S. 594; 20 id. 30; 87 Ky. 454; 25 S. W. Rep. (Ky.) 1062.

OUTLAND. Land lying beyond the desmesnes and granted out to tenants at the will of the lord, like copyholds. Spelman.

OUTLAW. In English Law. One who is put out of the protection or aid of the law. 23 Viner, Abr. 316; 1 Phill. Ev. Index; Bacon Abr. *Outlawry*; 2 Sell. Fr. 277; Doctr. Plac. 331; 3 Bla. Com. 283, 284.

As used in the Alabama act of December 28, 1868, § 1, declaring counties liable for persons killed by an "outlaw," it is not used in the strict common-law sense of the term, but merely refers in a loose sense to the disorderly persons then roving through the state, committing acts of violence; 46 Ala. 118, 137. See 37 Me. 389.

When used with reference to a claim, as, a debt due on a promissory note, "outlawed" means barred by the statute of limitations; 37 Me. 392.

OUTLAWRY. In English Law. The act of being put out of the protection of the law, by process regularly sued out against a person who is in contempt in refusing to become amenable to the court having jurisdiction. The proceedings themselves are also called the outlawry.

At four successive county courts held month by month, a proclamation was made calling on the person "to come in to the king's peace," and at the fifth court he would be declared an outlaw. If, after this, he were caught he would be condemned to death without investigation. To slay him wherever he was found was not only the right but the duty of every true man, and, even in the middle of the thirteenth century this was still the customary law of the Welsh marches; 1 Social England 296.

Outlawry may take place in criminal or in civil cases; 3 Bla. Com. 283; Co. Litt. 128.

In the United States, outlawry in civil cases is unknown, and if there are any cases of outlawry in criminal cases they are very rare; Dane, Abr. ch. 193 a, 34.

See Bac. Abr. *Abatement* (B), *Outlawry*; Gilbert, Hist. 196, 197; 2 Va. Cas. 244; 2 Dall. 92; 37 Me. 389.

OUTPARTERS. Stealers of cattle. Cowell.

OUTPENY. See **INFENY** AND **OUTPENY**.

OUTPUTTERS. Such as set watches for the robbing any manor house. Cowell.

OUTRAGE. A grave injury; a serious wrong. This is a generic word which is applied to everything which is injurious in a great degree to the honor or rights of

another. 44 Ia. 314.

OUTRE MEER. See **OUSTER LE MER**.

OUTRIDERS. In English Practice. Bailiffs employed by the sheriffs and their deputies to ride to the farthest places of their counties or hundreds, to summon such as they thought good to attend their county or hundred court.

OUTROPER. A person to whom the business of selling by auction was confined by statute. 2 H. Bla. 557.

OUTSTANDING. Unpaid; uncollected; remaining undischarged.

OUTSTANDING CROP. One not harvested or gathered. It is outstanding from the day it commences to grow until gathered and taken away. 53 Ala. 474.

OUTSTANDING DEBT. Due but not paid; overdue; uncollected, as an outstanding draft, bond, premium, or other demand or indebtedness.

OUTSTANDING STOCK. See **STOCK**.

OUTSTANDING TERM. A term in gross at law, which, in equity, may be made attendant upon the inheritance, either by express declaration or by implication.

OUTSUCKEN MILTURES. Quantities of corn paid by persons voluntarily grinding corn at any mill to which they are not thirled or bound by tenure.

OUVERTURE DES SUCCESSIONS. In French Law. The right of succession which arises to one upon the death, whether natural or civil, of another. Brown.

OVERCYTED; OVERCHYSED. Proved guilty or convicted. Blount.

OVERDRAFT. See **OVERDRAW**.

OVERDRAW. To draw bills or checks upon an individual, bank, or other corporation, for a greater amount of funds than the party who draws is entitled to.

When a person has overdrawn his account without any intention to do so, and afterwards gives a check on a bank, the holder is required to present it, and on refusal of payment to give notice to the maker, in order to hold him bound for it; but when the maker has overdrawn the bank knowingly, having no funds there between the time the check is given and its presentment, the notice is not requisite; 2 N. & M.C. 433; 16 Me. 36. A bank may properly refuse to pay a check which will overdraw the depositor's account, though on the bank books his balance seems to be larger than the amount of the check, because a check of his, paid by the bank two days before, had not yet been charged to such depositor; 138 Ill. 596. The president of a bank who directs the payment of checks of a customer who has no money in the bank, drawn in payment of property purchased by the customer, has no such interest in the property as will support an action by him for its conversion; 43 Mo. App. 566.

An overdraft on a bank is in the nature of a loan; it is considered a fraud on the part of the depositor; 52 Pa. 206. See 10 Wall. 647. *Indebitatus assumptit* will lie against the depositor to recover the overdraft; 9 Pa. 475; 46 Ill. App. 461. See, generally, 24 N. J. L. 484.

A cashier who knowingly permits an overdraft is guilty of a breach of trust, and liable to an action to make good the amount, even though the directors had been wont to countenance him in a custom of allowing good depositors to overdraw; Morse, Bank., 3d ed. § 357.

If an overdraft on a national bank is properly made and allowed, or even if improperly allowed, the entry of the transaction on the books of the bank just as it occurred is not a false entry, under R. S.

§ 5209; 82 Fed. Rep. 904. The mere payment of a check which creates an overdraft is not a fraudulent misapplication of the funds; *id.*; and where a national bank officer arranges with a depositor in good faith to give him credit beyond his deposit and makes proper entries of his overdrafts, it is not a false entry under R. S. § 5209; 165 U. S. 323. But where the president of a bank, not acting in good faith, permitted overdrafts which he did not believe and had no reasonable ground to believe would be repaid, and it appeared that he intended by the transaction to injure and defraud the bank, the act becomes a crime; 162 U. S. 664.

OVERDUE. A bill, note, bond, or other contract for the payment of money at a particular day, when not paid upon the day, is overdue.

The indorsement of a note or bill overdue is equivalent to drawing a new bill payable at sight; 2 Conn. 419; 18 Pick. 260; 9 Ala. N. S. 153.

A note when passed or assigned after it is overdue, is subject to all the equities between the original contracting parties; 6 Conn. 5; 10 id. 30, 55; 18 N. J. L. 222; Byles, Bills 190.

Overdue Check. A check drawn on Saturday and negotiated on the following Monday is not "overdue." 151 Ky. 142, 151 S. W. 372.

OVER-INSURANCE. See **DOUBLE INSURANCE**.

OVERHAUL. To inquire into. The merits of a judgment can never be overhauled by an original suit. 2 H. Bla. 414.

OVERISSUE. Bonds. Where there is an agreement that a railroad company shall issue only a fixed number of bonds per mile, bonds issued in excess of the limit will be postponed in lien and payment to those within the limit; 134 U. S. 159; and one who buys bonds within the limit upon the faith of this agreement is fully entitled to the benefit of it; *id.*; where bonds are issued, secured by a mortgage which recites the amount of the bonds and that part of them were to be used to take up bonds of a prior issue, the lien of the mortgage will be confined to an amount of bonds which, added to the specified incumbrances, shall not exceed the limit fixed; 8 Fed. Rep. 118, where the question was raised by subsequent bondholders.

Where an issue of railroad bonds was limited in amount, and the governor of a state indorsed on them a recital that they were issued in pursuance of law, it was held that a *bona fide* purchaser was not bound to look beyond his certificate and that the bonds so certified in excess of the authorized issue were entitled to share *pro rata* with the other bonds; 2 Woods 523. Bonds are numbered for mere convenience, and holders of those of a higher number stand on the same footing, in a distribution of a fund, as those of lower numbers; *id.*

Where a mortgage was given to secure a specified issue of bonds and by mistake a larger number were issued and the excess came into the hands of a *bona fide* holder, there being nothing to put him on inquiry, the company was held estopped to set up that they were not secured by the mortgage, and it was held that the excess bonds had a prior lien as against income bonds not secured by a recorded mortgage, but not against a subsequent recorded mortgage; 1 Duv. 112. Where a statute limited the issue of bonds to the amount of the capital stock actually paid in, it was held that bonds issued in excess of this amount were illegal, and that a second mortgage bondholder could take advantage of their illegality, though the company itself did not seek to repudiate them; 10 Allen 448; but see 69 N. W. Rep. (Ia.) 541, where bonds issued in excess were held to be valid to the extent of the consideration received for them. Where a railroad company was authorized to issue bonds to a certain amount in relation to the amount of the capital stock, and a mortgage was executed

for a larger amount than was authorized, it was held that between *bona fide* holders of the mortgage bonds and the company, the bonds were entitled to the lien of the mortgage, and that subsequent creditors with notice of the bonds occupied no better position than the company; 188 Pa. 494. A constitutional provision forbidding the fictitious increase of corporate indebtedness will not be enforced where mortgage bonds are sold at par to innocent purchasers, for construction and equipment; *id.*

Stock. Any issue of stock of a corporation in excess of that authorized by statute or charter is void; 34 N. Y. 30; even in the hands of a *bona fide* purchaser; 99 Pa. 344, 513. A *bona fide* holder of overissued stock, purporting to be signed by an authorized corporate officer, and actually issued by the corporation, may sue the corporation in tort and recover damages; 34 N. Y. 30 (the leading case); 99 Pa. 513; Pars. Sel. Cas. 180, 216; the doctrine of estoppel applying; 18 Atl. Rep. (Pa.) 383; and the same rule applies where the overissued stock is held as collateral for notes; 99 Pa. 513; not so, as to a purchaser not in good faith for full value; 134 N. Y. 83; although the signature of one corporate officer had been forged by another; 83 N. E. Rep. (N. Y.) 378.

If statutory or charter provisions authorize an increase of the capital stock, but the formalities prescribed for making the increase are not complied with, it is termed an irregular issue, and is voidable; 105 U. S. 143.

The authorized corporate officers and the corporation are jointly and severally liable to immediate or subsequent purchasers (buying upon the faith of certificates) of an overissue or irregular issue of stock, who have sustained damage thereby; 36 N. Y. 200.

Equity will enjoin the transfer of spurious stock, the payment of dividends thereon, or the voting thereof by the pretended owners; 78 N. Y. 159. Such stock is a cloud upon the title of the genuine stock, which a court of equity will remove at the suit of the corporation or the stockholders; 98 U. S. 193; and the holder thereof who knew it to be overissued, at the time of the subscription, can defeat an action at law on his subscription therefor; 105 U. S. 143; or an action upon a promissory note given therefor; 50 Ia. 404.

See Cook, St. & Stockh.; MORTGAGE; BOND; STOCK.

OVERPLUS. What is left beyond a certain amount; the residue; the remainder of a thing. The same as surplus.

The overplus may be certain or uncertain. It is certain, for example, when an estate is worth three thousand dollars, and the owner asserts it to be so in his will, and devises of the proceeds one thousand dollars to A, one thousand dollars to B, and the overplus to C, and in consequence of the deterioration of the estate, or from some other cause, it sells for less than three thousand dollars, each of the legatees, A, B, and C, shall take one-third. The overplus is uncertain where, for example, a testator does not know the value of his estate and gives various legacies, and the overplus to another legatee; the latter will be entitled only to what may be left; 18 Ves. 466. See RESIDUE; SURPLUS.

OVERRATE. In its strictest signification, a rating by way of excess and not one which ought not to have been made at all. 2 Ex. 352.

OVERREACHING CLAUSE. In a resettlement, a clause which saves the powers of sale and leasing annexed to the estate for life created by the original settlement, when it is desired to give the tenant for life the same estate and powers under the resettlement.

The clause is so called because it provides that the resettlement shall be overreached by the exercise of the old powers. If the resettlement were executed without a provision to this effect, the powers annexed to the estate for life created by the original settlement would be gone after the resettlement;

but this is not now a matter of much importance in England because the powers given to a tenant for life by the English Settled Land Acts, 1882 to 1890, remain notwithstanding the resettlement; and the clause is therefore frequently omitted, although it is, on the whole, better to insert it. Byrne.

OVERRULE. To annul; to make void. This word is frequently used to signify that a case has been decided directly opposite to a former case; when this takes place, the first-decided case is said to be overruled as a precedent, and cannot any longer be considered as of binding authority.

It also signifies that a majority of the judges of a court having decided against the opinion of the minority, in which case the latter are said to be overruled.

See PRECEDENTS.

OVERSAMMESSA. A forfeiture for contempt or neglect in not pursuing a malefactor. 3 Inst. 116.

OVERSEERS OF HIGHWAYS. Officers having supervision of highways in some of the states. See COMMISSIONERS OF HIGHWAYS.

OVERSEERS OF THE POOR. Persons appointed or elected to take care of the poor with moneys furnished to them by the public authority.

The duties of these officers are regulated by local statutes. In general, the overseers are bound to perform those duties, and the neglect of them will subject them to an indictment. See 1 Bla. Com. 360; 16 Viner, Abr. 150; 1 Mass. 459; 3 *id.* 436; 2 N. J. L. 6, 136; 77 N. C. 494; Com. Dig. *Justice of the Peace* (B. 63).

OVERSMAN. In Scotch Law. A person commonly named in a submission, to whom power is given to determine in case the arbiters cannot agree in the sentence. Sometimes the nomination of the oversman is left to the arbiters. In either case the oversman has no power to decide unless the arbiters differ in opinion; Erskine, Inst. 4. 3. 16. The office of an oversman very much resembles that of an umpire.

OVERT. Open.

An overt act in treason is proof of the intention of the traitor, because it opens his designs: without an overt act, treason cannot be committed; 2 Chitty, Cr. Law 40. An overt act, then, is one which manifests the intention of the traitor to commit treason; Archb. Cr. Pl. 379; 4 Bla. Com. 79; Co. 3d Inst. 12; 1 Dall. 33; 2 *id.* 346; 4 Cra. 75; 3 Wash. C. C. 234. In order to sustain a conviction for treason under the United States constitution, there must be the testimony of two witnesses to the same overt act or a confession in open court. A conspirator can be tried in any place where his co-conspirators perform an overt act; Rev. Stat. § 440. The phrase is used in relation to the Fugitive Slave Act in 5 How. 215.

In conspiracy, no overt act is needed to complete the offence; 11 Cl. & F. 155; 48 Md. 381; 49 Ind. 186. See 7 Biss. 175.

The mere contemplation or intention to commit a crime, although a sin in the sight of Heaven, is not an act amenable to human laws. The mere speculative wantonness of a licentious imagination, however dangerous or even sanguinary in its object, can in no case amount to a crime. But the moment that any overt act is manifest, the offender becomes amenable to the laws. See Cro. Car. 577; ATTEMPT; CONSPIRACY; SOLICITATION.

OWELTY. The difference which is paid or secured by one coparcener or cotenant to another for the purpose of equalizing a partition. 1 Story, Eq. Jur. § 612. Littleton § 251; Co. Litt. 169 a; 1 Watts 265; 16 Viner, Abr. 223, pl. 3. See 158 Pa. 396; 113 *id.* 578.

A charge on land for owelty of partition follows the land into the hands of a purchaser from the person to whom it was al-

lotted; and the statute of limitation does not run against it, as the possession is not adverse; 106 N. C. 444.

OWING. Something unpaid. A debt, for example, is owing while it is unpaid, and whether it be due or not. See 40 La. Ann. 871.

In affidavits to hold to bail it is usual to state that the debt on which the action is founded is due, owing, and unpaid; 1 Pa. L. J. 210.

OWLER. In English Law. One guilty of the offence of owling (*q. v.*).

OWLING. In English Law. The offence of transporting wool or sheep out of the kingdom.

The name is said to owe its origin to the fact that this offence was carried on in the night, when the owl was abroad.

OWNER. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right. See 18 S. W. Rep. (Tex.) 578; 21 Or. 339.

Although there can be but one absolute owner of a thing, there may be a qualified ownership of the same thing by many. Thus, a bailor has the general ownership of the thing bailed, the bailee the special ownership. See 2 Cra. C. C. 83. The right of the absolute owner is more extended than that of him who has only a qualified ownership: as, for example, the use of the thing. Thus, the absolute owner of an estate, that is, an owner in fee, may cut the wood, demolish the buildings, build new ones, and dig wherever he may deem proper for minerals, stone, plaster, and similar things, which would be considered waste and would not be allowed in a qualified owner of the estate, as a lessee or a tenant for life. The word owner, when used alone, imports an absolute owner; but it has been held in Ohio that the word owner, in the mechanic's lien law of that state, includes the owner of the leasehold as well as of the reversion, on the ground that any other construction would be subversive of the policy and intent of the statute. 2 Ohio 123.

The owner continues to have the same right although he perform no acts of ownership or be disabled from performing them, and although another perform such acts without the knowledge or against the will of the owner. But the owner may lose his right in a thing if he permit it to remain in the possession of a third person for a sufficient time to enable the latter to acquire a title to it by prescription or under the statute of limitations. See La. Civ. Code, b. 2, tit. 2, c. 1; *Encyclopédie d'Alembert, Propriétaire*.

When there are several joint owners of a thing,—as, for example, of a ship,—the majority of them have the right to make contracts in respect of such thing in the usual course of business or repair, and the like, and the minority will be bound by such contracts; Holt 586; 5 Whart. 366; 105 Pa. 222. See PART-OWNER. LIMITED OWNER.

OWNER'S RISK. There is no exact meaning of "owner's risk." (1906) T. S. 973 (So. Afr.)

The Supreme Court of the Cape Colony expressed in one case (*Naylor vs. Munnick* 3 Searle, 187) an opinion that a carrier who conveys goods at owner's risk is not excused in case of gross negligence or malfeasance. *Id.*, 973. There has been a judicial expression of opinion that owner's risk does not include freedom from liability arising from gross negligence or from malfeasance. . . . If, however, the carrier employs suitable servants, and by some error of judgment on their part, but through no malfeasance or gross negligence, an accident occurs by which the goods are damaged, then the carrier will not be liable if he takes the goods at "owner's risk" and at lower rate. *Id.*, 974.

OWNERSHIP. The right by which a thing belongs to some one in particular, to the exclusion of all others. 1 A. Civ. Code. art. 490. See CO-OWNERSHIP; UNCONDITIONED OWNERSHIP.

OXGANG (fr. Sax. *gang*, going, and ox; Law Lat. *bovata*). In Old English Law. So much land as an ox could till. In the north of England a division of a carucate. According to some, fifteen acres. Co. Litt. 89 a; Crompton, Jurisd. 220. According to Balfour, the Scotch *oxengang*, or *oxgate*, contained twelve acres; but this does not correspond with ancient charters. See Bell, Dict. *Ploughgate*. Skene says thirteen acres. Cowell. See 1 Poll. & Maitl. 347.

OYER (Lat. *audire*; through L. French *oyer*, to hear).

In Pleading. A prayer or petition to the court that the party may hear read to him the deed, etc., stated in the pleadings of the opposite party, and which deed is by intendment of law in court when it is pleaded with a *profert*. The same end is now generally attained by giving a copy of the deed of which oyer is asked, or, in other instances, by setting forth the instrument in full in the plaintiff's statement of his case. Oyer as it existed at common law seems to be abolished in England; 1 B. & P. 646; 3 *id.* 398; 25 E. L. & E. 304. Oyer may be demanded of any specialty or other written instrument, as, bonds of all sorts, deeds-poll, indentures, letters testamentary and of administration, and the like, which the adverse party is obliged to plead with a *profert in curia*; Gould, Pl. 408. But pleading with a *profert* unnecessarily does not give a right to demand

oyer; 1 Salk. 497; and it may not be had except when *profert* is made; Hempst. 265. Denial of oyer when it should be granted is ground for error; Andr. Steph. Pl. 59; 1 Blackf. 126. In such cases the party making the claim should move the court to have it entered on record, which is in the nature of a plea, and the plaintiff may counterplead the right of oyer, or strike out the rest of the pleading following the oyer, and demur; 1 Saund. 9 b, n. 1; Bac. Abr. *Pleas* 1; upon which the judgment of the court is either that the defendant have oyer, or that he answer without it; *id.*; 2 Lev. 142; 6 Mod. 28. See *PROFERT IN CURIA*.

After craving oyer, the defendant may set forth the deed or a part thereof, or not, at his election; 1 Chitty, Pl. 372; and may afterwards plead *non est factum*, or any other plea, without stating the oyer; 2 Stra. 1241; 1 Wils. 97; and may demur if a material variance appear between the oyer and declaration; 2 Saund. 386, n.

See, generally, Com. Dig. *Pleader* (P), *Abatement* (I 22); 3 Bouvier, Inst. n. 2890.

OYER AND TERMINER. See ASIZE; COURT OF OYER AND TERMINER.

OYEZ (Fr. *hear ye*). The introduction to any proclamation or advertisement by public crier. Used also by court officers in opening court. It is wrongly and usually pronounced oh yes. 4 Bla. Com. 340, n.

OYSTER. The right to take shell fish below high water mark from natural beds in tide waters is common to all citizens of the state, except as restrained by positive law or grants from the state; 50 N. J. L. 409; 32 Atl. Rep. (R. I.) 166; 33 *id.* (Conn.) 1006. "A natural oyster-bed" is one not planted by man. 104 N. C. 764. There

is a right of property in artificial oyster beds planted in public or navigable waters, in spots designated by stakes or otherwise; 27 N. J. L. 117; 22 Hun 53; the owner must clearly mark out and define his beds; 11 Barb. 248; this right is in the nature of a license from the state, which the state may revoke; 14 Wend. 41; 65 Md. 586.

The state, subject to the paramount right of navigation, is the owner of the oyster-beds in its waters and can prohibit their taking by any but its own citizens, and prescribe the times, instruments, and conditions of taking them; 86 Fed. Rep. 652; 94 U. S. 391; 76 Va. 989.

One who plants oysters on a natural bed cannot recover against one who removes them with the natural growth; 66 Conn. 285.

One who plants a bed of oysters in a bay on an arm of the sea, designating the bed, does not interfere with the common right of fishing, and may maintain trespass for an invasion of his property; 91 N. Y. 98; 7 Q. B. D. 106. Oysters deposited artificially may obstruct navigation and be a nuisance; 7 Q. B. 339.

A riparian owner has not the right to bed oysters along his entire water front; 65 Md. 586.

In Maryland by statute any citizen of any county bordering on the waters of the state may appropriate any area not exceeding an acre for bedding oysters.

An act (Maryland) exacting a license fee of three dollars per ton on oyster boats is not a tonnage tax, but a lawful compensation to the state for the privilege of taking oysters; 36 Fed. Rep. 651.

Statutes in several states, especially Delaware, Maryland, and Virginia, regulate the matter.

PAAAGE. A toll for passage through another's land.

PACARE. To pay.

PACE. A measure of length, containing two feet and a half. The geometrical pace is five feet long. The common pace is the length of a step; the geometrical is the length of two steps, or the whole space passed over by the same foot from one step to another.

PACIFIC BLOCKADE. A means of coercion short of war, usually adopted by the joint action of several nations. An instance of it occurred when Great Britain and Germany united to prevent the slave traffic and stop the importation of arms on the east coast of Africa; Snow, Int. Law 79. In 1827 Greece was blockaded by France, Russia, and Great Britain; in 1850 the Greek ports were blockaded by Great Britain, and again in 1855 by the combined fleets of the five Great Powers.

In the blockade of Mexico by France in 1838, neutral vessels as well as Mexican were both seized and condemned. In other cases both classes of ships were seized, but were restored without compensation at the termination of conflict. In the blockades of Greece in 1850 and 1856, only Greek vessels were sequestered.

Different nations have given to the term a different scope. For instance, France has claimed the right under it to intercept not only the ships of the state against which the remedy is applied, but the ships of other nations as well. England, upon the other hand, has usually applied it only to the ships of the country whose coast is blockaded.

The line of demarcation between blockade and war is a shadowy one. It might not be inaccurate to define a pacific blockade as a form of restraint used against a weak power which if used against a strong power would be war. This much is clear, that any form of restraint of which force is the essence may at any moment be considered as an act of war. Maxey, Int. Law, 364, 365.

In 1887 the Institute of International Law unanimously declared in favor of the legality of pacific blockade, subject to these conditions:—“(1) That the neutral flag can enter freely; (2) that there must, of course, be formal notice and a sufficient force; and (3) that ships of the blockaded country may be sequestered, but should be restored with their cargoes at the end of the blockade, but without compensation.” See 31 L. Mag. & Rev. 285; BLOCKADE.

PACIFICATION (Lat. *par*, peace, *facere*, to make). The act of making peace between two countries which have been at war; the restoration of public tranquillity.

PACK. To deceive by false appearances; to counterfeit; to delude.

PACK OF WOOL. A horse load consisting of seventeen stone and two pounds. Cowell.

PACKAGE. A bundle put up for transportation or commercial handling. A parcel is a small package; 1 Hugh. 529; 44 Ala. 468, where a bale of cotton was held not a package; *contra*, 2 Daly 434. See L. R. 9 Ex. 87. Certain duties charged in the port of London on the goods imported and exported by aliens. Now abolished. Whart. Lex. See ORIGINAL PACKAGE.

“Package” or its equivalent, as used in the Food and Drugs Act, refers to the immediate container of the article which is intended for consumption by the public.

To limit the requirements of the act to the outside box which is not seen by the purchasing public would render nugatory one of the principal provisions of the act. 228 U. S. 115.

PACKED PARCELS. The name for a consignment of goods consisting of one large parcel made up of several small ones, collected from different persons by the immediate consignor, who united them into one for his own profit, at the expense of the carrier. Whart.

PACKER. A person employed by merchants to receive and (in some instances) to select goods from manufacturers, dyers, calenders, etc., and pack the same for exportation. Arch. Bankr., 11th ed. 87.

PACKING A JURY. Improperly and corruptly selecting a jury to be sworn and impanelled for the trial of a cause. 12 Conn. 289.

PACT. In Civil Law. An agreement made by two or more persons on the same subject, in order to form some engagement, or to dissolve or modify one already made: *Conventio est duorum in idem placitum consensus de re solvenda, id est facienda vel prestanda*. Dig. 2, 14; *Clef des Lois Rom.*; Ayliffe, Pand. 558; Merlin, Rép. Pacte.

PACT DE NON ALIENANDO. A clause inserted in mortgages in Louisiana which secures to the mortgage creditor the right to foreclose his mortgage by executory process, directed solely against the mortgagor, and gives him the right to seize and sell the mortgaged property, regardless of any subsequent alienations. 35 La. Ann. 585; 36 *id.* 645; 124 U. S. 355. This rule applies to an alienation by condemnation in proceedings for confiscation, and as against the heirs-at-law of the person whose property is confiscated; 113 U. S. 293. If a mortgage debtor in Louisiana, in a suit to foreclose a mortgage containing this clause, waives the benefit of prescription, those who take through him are estopped from pressing it, as effectually as he is estopped; 124 U. S. 351.

PACTIONS. In International Law. Contracts between nations which are to be performed by a single act, and of which execution is at an end at once. 1 Bouvier, Inst. n. 100.

PACTUM. (Lat. from *pangere*, to strike). A pact. An agreement or convention without specific name, and without consideration, which, however, might, in its nature, produce a civil obligation. Burrill; Heinecc. Elem. Jur. Civ. 3. 14. 775. A pact was distinguished from a contract (*contractus*) which had a specific name or present consideration, and carried with it a civil obligation, both being species of *conventio*, (convention), which was the general term. *Id.*; 773. An action lay upon a contract, but not on a pact. *Id.*

PACTUM CONSTITUTÆ PECUNIÆ (Lat.). In Civil Law. An agreement by which a person appointed to his creditor a certain day, or a certain time, at which he promised to pay; or it may be defined simply an agreement by which a person promises a creditor to pay him.

When a person by this pact promises his own creditor to pay him, there arises a new obligation, which does not destroy the former by which he was already bound, but which is accessory to it; and by this multiplicity of obligations the right of the

creditor is strengthened. Pothier, Obl. pt. 2, c. 6, s. 9.

There is a striking conformity between the *pactum constitutæ pecuniæ*, as above defined, and our *indebitatus assumpsit*. The *pactum constitutæ pecuniæ* was a promise to pay a subsisting debt, whether natural or civil, made in such a manner as not to extinguish the preceding debt, and introduced by the pretor to obviate some formal difficulties. The action of *indebitatus assumpsit* was brought upon a promise for the payment of a debt; it is not subject to the wager of law and other technical difficulties of the regular action of debt; but by such promise the right to the action of debt was not extinguished nor varied; 4 Co. 91, 95. See 1 H. Bla. 550, 551; Brooke, Abr. *Action sur le Case* (pl. 7, 69, 72); 4 B. & B. 295; 1 Chitty, Pl. 89.

PACTUM DE NON ALIENANDO. A stipulation in a mortgage by which the mortgagor agrees not to alienate or encumber the mortgaged premises to the prejudice of the mortgage. 113 U. S. 299. The effect of this stipulation is well settled in Louisiana. In 2 Martin, N. S. 32, the effect was decided to be, that “the mortgagee is not bound to pursue a third possessor, but may have the hypothecated property seized *in via executina* as if no change had taken place in its possessors, because any alienation or transfer made in violation of the pact *de non alienando* is *ipso jure* void as it relates to the creditor, and that this effect of the pact is not annulled by the provisions of the Civil Code in relation to mortgages, and the rules laid down for pursuing the action of mortgage.”

Id. Where a mortgage contains the pact *de non alienando* the mortgagee may enforce his mortgage by proceeding against the mortgagor alone, notwithstanding the alienation of the property, and all those claiming under the mortgagor, whether directly or remotely, will be bound, although not made parties. *Id.*, p. 300.

PACTUM DE NON PETENDO (Lat.). In Civil Law. An agreement made between a creditor and his debtor that the former will not demand from the latter the debt due. By this agreement the debtor is freed from his obligation. This is not unlike the *covenant not to sue*, of the common law. Wolff, *Dr. de la Nat.* § 755; Leake, Contr., 3d ed. 798.

PACTUM DE QUOTA LITIS (Lat.). In Civil Law. An agreement by which a creditor of a sum difficult to recover promises a portion—for example, one-third—to the person who will undertake to recover it. In general attorneys should abstain from making such a contract; yet it is not unlawful at common law. See CHAMPERTY.

PAID UP LIFE POLICY. A “paid up life policy” is the equivalent of the insurer's bond to pay a sum definite at a time certain or upon the happening of an inevitable contingency. It can not be said that such an obligation is without specific money value. It may be stated generally that any tangible, definable interest in property having a value, and not exempt by law, is subject to the owner's debts. 111 Ky 64, 63 S. W. 12.

PAIN FORTE ET DURE. See PEINE FORTE ET DURE.

PAINS AND PENALTIES. See BILL OF PAINS AND PENALTIES.

PAINTING. A likeness, image, or scene depicted with paints. Cent. Dict. The term does not necessarily mean anything upon which painting has been done by a workman, but rather something of value as a painting and something on which

skill has been bestowed in producing it; 3 Exch. Div. 531. Whether certain articles fall within the description of paintings as used in a statute is a question of fact for a jury; *id.*

Paintings on porcelain, the value of which depends on the skill of the artist, are dutiable as porcelain and not as china porcelain and parian ware gilded, decorated, or ornamented in any manner; 103 U. S. 677. As to copyright in paintings, see COPYRIGHT.

PAIRING-OFF. A system in vogue both in parliament and in legislative bodies in this country, whereby a member agrees with a member on the opposite side, that they shall both be absent from voting during a given time, or upon a particular question. It is said to have originated in the house of commons in Cromwell's time. See May, Parl. Prac.

PAIS, PAYS. A French word, signifying country. In law, matter in *pais* is matter of fact, in opposition to matter of record; a trial *per pais* is a trial by the country,—that is, by a jury. See IN PAIS.

PALACE CAR. See SLEEPING CAR.

PALACE COURT. In English Law. A court which had jurisdiction of all personal actions arising between any parties within twelve miles of Whitehall, not including the city of London.

It was erected in the time of Charles I., and was held by the steward of the household, the knight-marshal and steward of the court, or his deputy. It had its sessions once a week, in the borough of Southwark. It was abolished by 12 & 13 Vict. c. 101, § 13. See COURT OF MARSHALSEA.

PALAGIUM. A duty to lords of manors for exporting and importing vessels of wine at any of their ports. Jacob.

PALATINE. Possessing royal privileges. See COUNTY PALATINE; COURTS OF COUNTY PALATINE.

PALFRIDUS (L. Lat.). A palfrey; a horse to travel on. Fitzherbert, Nat. Brev. 23.

PALLIO COOPERIE. (To cover with a cloak.) An ancient custom, where the parents of children born out of wedlock afterwards intermarried, of the parents and children standing together under a cloth extended, while the marriage was solemnized, the act being in the nature of adoption. Toml. See LEGITIMATION.

PALMER'S ACT. Statutes 19 & 20 Vict. c. 16, which enable a person accused of crime committed out of the jurisdiction of the central criminal court to be tried in that court.

PALMISTRY. The art or practice of telling fortunes by a feigned interpretation of the lines and marks on the hand. The word is used by good writers in the sense of a trick with the hand. 2 Exch. Div. 268.

PALPABLY DANGEROUS. A set screw, that is suffered to remain uncovered and unguarded, is "palpably dangerous." 145 Ky. 1, 139 S. W. 1059.

PAMPHLET. A small book usually printed in octavo form and stitched.

Pamphlet laws. The name given in some states to the publication of the acts of the legislature. In Pennsylvania and Delaware they are originally published from session to session, unbound, with continuous paging, and indexed and bound after a number of sessions.

PAMPHLET LAWS. In the United States, the acts of each session of Congress are published under the title "Statutes of the United States," but since they are issued in paper covers, and are later superseded by bound volumes under another title, they are usually referred to as "Pamphlet Laws." These Pamphlet Laws of the United States Congress for each session are now issued in two parts. The first

part contains public acts and joint resolutions arranged in chronological order. Part two contains private acts, concurrent resolutions, treaties, proclamations and amendments to the United States Constitution. At the beginning of the two parts are chronological lists, and at the end alphabetical indices. These Pamphlet Laws are merely advance issues of volumes which contain all of the laws, resolutions, etc., of a Congress, the latter when published being called "Statutes at Large." Hicks, Mater. & Meth. Leg. Res., p. 61, 62.

PANDECTS. In Civil Law. The name of an abridgment or compilation of the civil law, made by Tribonian and others, by order of the emperor Justinian, and to which he gave the force of law, A. D. 529.

It is also known by the name of the Digest, because in his compilation the writings of the jurists were reduced to order and condensed *quasi digesta*. The emperor, in 529, published an ordinance entitled *De Conceptione Digestorum*, which was addressed to Tribonian, and by which he was required to select some of the most distinguished lawyers to assist him in composing a collection of the best decisions of the ancient lawyers, and bundle them in fifty books, without confusion or contradiction. The instructions of the emperor were to select what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and by the necessary changes, to produce a complete body of law. This work was a companion to the Code of Justinian, and was to be governed in its arrangement of topics by the method of the Code. Justinian allowed the commissioners, who were sixteen in number, ten years to compile it; but the work was completed in three years, and promulgated in 529. A list of the writers from whose works the collection was made, and an account of the method pursued by the commissioners, will be found in Smith's Dict. of Gr. & Rom. Antiq. About a third of the collection is taken from Ulpian; Julius Paulus, a contemporary of Ulpian, stands next; these two contributed one-half of the Digest. Papinian comes next. The Digest, although compiled in Constantinople, was originally written in Latin, and afterwards translated into Greek.

The Digest is divided in two different ways: the first into fifty books, each book in several titles, and each title into several extracts or *leges*, and at the head of each series of extracts is the name of the lawyer from whose work they were taken. The fifty books are allotted in seven parts.

The division into *digestum vetus* (book first to and including the second of book twenty-fourth), *digestum infortiatum* (title third of book twenty-fourth, to and including book thirty-eighth), and *digestum novum* (from book thirty-ninth to the end), has reference to the order in which these three parts appeared. As to the methods of citing them, see CITATIONS or ABBREVIATIONS.

The Pandects—as well indeed as all Justinian's laws, except some fragments of the Code and Novels—were lost to all Europe for a considerable period. During the pillage of Amalfi, in the war between the two soi-disant popes Innocent II. and Anaclet II., a Bologna, Italy, monk discovered an old manuscript, which attracted his attention by its envelope of many colors. It was carried to the Emperor Clothaire, and proved to be the Pandects of Justinian. The work was arranged in its present order by Warner, a German, whose Latin name is Irnerius, who was appointed by that emperor Professor of Roman Law at Bologna. *Hist. des Arts et des Lettres*, t. 1, p. 124. The style of the work is very grave and pure, and contrasts in this respect with that of the Code, which is very far from classical. On the other hand, the learning of the Digest stands rather in the discussing of subtle questions of law, and enumerations of the variety of opinions of ancient lawyers thereupon, than in practical matters of daily use, of which the Code so simply and directly treats. See Ridley, View, pt. i. ch. 1, 2.

While the Pandects form much the largest fraction of the *Corpus Juris* their relative value and importance are far more than proportional to their extent. They are, in fact, the soul of the *Corpus Juris*. Hadley, Rom. L. II. See FIFTY DECISIONS, THE.

PANEL (diminutive from either *pane*, apart, or *page*, *pagella*. Cowell). In Practice. A schedule or roll, containing the names of jurors summoned by virtue of a writ of *venire facias*, and annexed to the writ. It is returned into court whence the *venire* issued. Co. Litt. 153 b; 3 Bla. Com. 353; 40 Cal. 586. See 89 Ill. 575. The word may be used to designate either the whole number of jurors summoned or those selected by the clerk by lot according to the connection in which it is used. 76 Ia. 141.

In Scotch Law. The prisoner at the bar, or person who takes his trial before the court of justiciary for some crime. So called from the time of his appearance. Bell, Dict. Spelled, also, *pannel*. See REGULAR PANEL.

PANEL OF ARBITRATORS. See HAGUE CONFERENCE.

PANTOMIME. A dramatic perform-

ance in which gestures take the place of words. 3 C. B. 871.

PAPACY. See PAPIST.

PAPAL SUPREMACY, DOCTRINE OF. That supremacy which the pope claimed in the Holy Roman Empire, not only over the emperor but over all other Christian princes. The theory was that all Christian princes stood to the Roman pontiff as great vassals to a supreme lord or suzerain, and as such supreme lord the pope claimed the right to enforce the duties due to him from his feudal subordinates through an ascending scale of penalties culminating in the absolution of the subject from the bonds of allegiance, and in the deposition of the sovereign himself. Taylor, Jurispr., 323, 608.

PAPER. A manufactured substance composed of fibres (whether vegetable or animal) adhering together in forms consisting of sheets of various sizes and of different thicknesses, used for writing or printing or other purposes to which flexible sheets are applicable. 4 H. & N. 470. Books are not paper within the meaning of the tariff act; 104 U. S. 785.

In a statute against sending obscene papers, includes letters. Anderson; 103 Ind. 419. In the sense of a printed sheet or sheets containing the current news, see NEWSPAPER. A commercial, business, or negotiable instrument. *Id.* A list of the business to be transacted exhibited in each court in England, to enable the parties to know when their presence will be required. R. & L. Dict.

PAPER BLOCKADE. An ineffective blockade. See BLOCKADE.

PAPER-BOOK. In Practice. A book or paper containing an abstract of all the facts and pleadings necessary to the full understanding of a case.

The issues in actions, etc., upon special pleadings, made up by the clerk of the papers, who is an officer for that purpose. Upon an issue in law, it is termed the demurrer-book. The clerks of the papers of the court of K. B., in all copies of pleas and paper-books by them made up, shall subscribe to such paper-books the names of the counsel who have signed such pleas, as well on behalf of the plaintiff as defendant; and in all paper-books delivered to the judges of the court, the names of the counsel who did sign those pleas are to be subscribed to the books by the clerks or attorneys who deliver the same. Jac. L. Dict.; 2 Hill, Abr. 268.

The courts of error, and other courts, on arguments, require that the judges shall each be furnished with such a paper-book; Tr. & H. Pr. 867. In Pennsylvania the printed copy of the record, the argument, etc., used in the supreme and superior courts is so called.

In the court of king's bench, in England, the transcript containing the whole of the proceedings filed or delivered between the parties, when the issue joined is an issue in fact, is called the *paper-book*. Steph. Pl. 95; 3 Bla. Com. 317; 3 Chitt. Pr. 521; 2 Stra. 1131, 1266; 2 Wils. 243.

In modern English practice under the Jud. Act of 1875, printed copies of every special case must now be delivered by the plaintiff (Ord. xxxiv. r. 3). And any party who enters an action for trial must deliver to the officer of the court a copy of the whole of the pleadings in the action for the use of the judge at the trial. Ord. xxxvi. r. 17.

PAPER CREDIT. Credit given on the security of any written obligation purporting to represent property.

PAPER-DAYS. In English Law. Days on which special arguments are to take place. Tuesdays and Fridays in term-time are paper-days appointed by the court. Lee, Dict. of Pr.; Archb. Pr. 101.

PAPER MILL. See PAPER OFFICE.

PAPER MONEY. The engagements to pay money which are issued by governments and banks, and which pass as money. *Pardessus, Droit. Com. n. 9.* Bank-notes are generally considered as cash, and will answer all the purposes of currency; but paper money is not a legal tender if objected to. But see **LEGAL TENDER**.

See **NATIONAL BANKS; MONEY; GOLD.**

PAPER OFFICE; PAPER MILL. In 1578 Queen Elizabeth established "the Office of Her Majesty's Papers and Records for Business of State and Council," and appointed a keeper of the papers. This office—popularly known as the Paper Office—existed until 1854 at a number of different addresses in and about Whitehall. Upon the death in 1854 of the then keeper of the State papers, the Paper Office became merged in the Public Record Office.

In the old Court of King's Bench there was an office known as the Paper Office or Paper Mill. In it were kept the records of the Court pending their removal to the Treasury of the Exchequer, in which latter office all records of the Courts were finally deposited. *Byrne.* See **RECORD OFFICE**.

PAPER TITLE. A title to land evidenced by one or more conveyances, the term generally implying that such title, while it has color or plausibility, is without substantial validity. *Black, L. Dict.*

PAPERS. The term does not mean newspapers or perhaps even include them within the meaning of a statute, the object of which is to prevent a jury from receiving any evidence, papers, or documents not authorized by the court. *42 Pac. Rep. (Mont.) 216.* In a will, "all my books and papers" include a promissory note; *49 N. H. 107.*

The constitution of the United States provides that the rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. See **SEARCH WARRANT; VALUABLE PAPERS**.

PAPIST. A term applied by Protestants to Roman Catholics.

By the act of 10 Geo. IV. c. 7, known as the Catholic Emancipation Act, Roman Catholics were restored in general to the full enjoyment of all civil rights, except that of holding ecclesiastical offices and certain high appointments in the state. Before that act their condition had been much ameliorated by various statutes, beginning with 18 Geo. III. c. 60. As to the right of holding property for religious purposes, the 2 & 3 Wm. IV. c. 115, placed them on a level with Protestant dissenters, and the 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 49, repealed all enactments oppressive to Roman Catholics. See *Whart. Lex.*

See 2 *Phill. Int. L.* for a history of the political status of the Papacy.

PAR. Equal. It is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; above par, or below par, when they sell for more or less; *57 Ga. 324; 8 Paige 527; 23 Pa. 479.*

PAR DELICTUM. Equal guilt. See **IN PARI DELICTO; PARI DELICTO**.

PAR OF EXCHANGE. The par of the currencies of any two countries means the equivalence of a certain amount of the currency of the one in the currency of the other, supposing the currency of both to be of the precise weight and purity fixed by their respective mints. *26 Wend. 224.* The exchange between the two countries is said to be at par when bills are negotiated on this footing. *Bowen, Pol. Econ. 321.* See 11 *East 267.*

PAR ONERI. Equal to the burden or charge, or to the detriment or damage.

PAR VALUE. A current phrase having no other meaning than the value of the pound sterling formerly fixed by law for the purposes of revenue. *10 Allen 44.* It is commonly used to indicate the face value of bonds or stock.

A phrase which implies a dollar in money for every dollar in security. *Anderson; 26 Wend. 234.*

PARAGE. Equality of blood, name, or dignity, but more especially of land in the partition of an inheritance between co-heirs. *Co. Litt. 166 b.* See **TENURE**.

In **Feudal Law**. Where heirs took of the same stock and by same title, but, from right of primogeniture, or some other cause, the shares were unequal, the younger was said to hold of the elder, *Jure et titulo paragi*, by right and title of parage, being equal in everything but the quantity, and owing no homage or fealty. *Calv. Lex. See 3 Poll. & Matil. 361, 374, 289.*

PARAGIUM (from the Latin adjective *par*, equal; made a substantive by the addition of *agium*; 1 *Thomas Co. Litt. 681*). Equality.

In **Ecclesiastical Law**. The portion which a woman gets on her marriage. *Ayl. Par. 336.*

PARAGRAPH. A distinct part of a discourse or writing relating to a particular point.

An entire or integral statement of a cause of action equivalent to a count at common law. *63 Fed. Rep. 488.* Where a complaint contains several causes of action, each must be distinctly paraphrased and numbered; *19 U. S. App. 157.*

PARALLEL. Extending in the same direction, and in all parts equidistant; having the same direction or tendency. *14 S. E. Rep. (Va.) 803.* See 144 *Mass. 254.*

In the specification of a patent the word was construed in its popular sense of going side by side and not in its purely mathematical sense; *2 App. Cas. 423; and so in 32 Cal. 231; 2 Cal. Cas. 363; 5 Johns. 489; 3 Me. 1031,* where it was held that parallel lines were not necessarily straight lines. As to parallel and competing railroads, see **MERGER**.

Parallel Line. Two "parallel lines" of railroad are lines running in one general direction, traversing the same section of country and running within a few miles of each other. Two lines are parallel when they run between the same two points or localities. *144 Ky. 330, 138 S. W. 291.*

PARALYSIS. Loss or material diminution of the power of contractility in the voluntary or involuntary muscles, and sometimes of the power of perceiving sensations, in one or more parts of the body; palsy. *Stand. Dict.*

There are two types of paralysis; organic paralysis resulting from a neural lesion, and functional paralysis due, not to a physiological lesion of the nervous system, but to dissociation. The latter type is often wrongly attributed to malingering. It is a common symptom of hysteria. There are three kinds of organic paralysis depending upon the locus of the neural lesion: upper motor neurone, lower motor neurone, and peripheral paralyses.

Monoplegia; paralysis of a single limb or other muscle group.

Paraplegia; paralysis of the lower extremities.

Hemiplegia; paralysis of one side.

Diplegia; paralysis of both sides.

Ophthalmoplegia; paralysis of eye muscles internal or external. *Bridges, Outline Ab. Psych. 89.* See **APOPLEXY; ILLNESS; PARESIS**.

PARAMOUNT (*par*, by, *mounter*, to ascend). Above; upwards. *Kelh. Norm. Dict. Paramount especiel*, above specified. *Plowd. 209 a.*

That which is superior: usually applied to the highest lord of the fee of lands, tenements, or hereditaments. *Fitzh. N. B. 135.* Where A lets land to B, and he underlets them to C, in this case A is the paramount and B is the mesne landlord. See 2 *Bla. Com. 90; 1 Thomas, Co. Litt. 484, n. 79, 485, n. 81; MESNE*.

PARANOIA. A form of insanity which comes under the class of degenerative diseases. The main fundamental characteristic of this disease is a delusion which has become a part of the belief of the individual, and which he believes himself able to explain and defend. *3 Withth. & Beck.*

Med. Jur. 288.

A chronic progressive psychosis which occurs mostly in adult life, and develops on the basis of certain character anomalies. In this type of psychosis, delusions are well systematized, usually taking the form of false interpretation of facts, and might very well be true. They are persecutory and expansive. The delusional system appears so logical that others may be persuaded of its truth. There are numerous forms of paranoia resulting from the general trend of the delusion. For example, the delirium of revindication (*Litigious paranoia*) is the form in which the patient is continually seeking legal redress for supposed wrongs; inventive paranoia, in which the patient besieges patent offices with his many usually useless devices; religious paranoia, in which the patient develops some original but usually fantastic religious system, etc. The courts have the first type of paranoia to contend with most frequently, i. e., *Litigious paranoia*. *Bridges, Outline of Ab. Psych. 136, 137.*

It is sometimes characterized as logical perversion, and is said to have "misplaced the antiquated term monomania, which not only implied that the delusion was restricted to one subject, but was otherwise insufficient and misleading;" *2 Clevenger, Med. Jur. 860.* The memory, emotions, judgment, and conceptions are in most cases unimpaired, though each of these mental divisions may be involved; *id.* The intellect is rarely much involved. In all other relations the individual may be able to carry on his business in life. There is little doubt but that they are thoroughly responsible for their own actions. But if the act be the result of their delusion it is not so much a question of their ability to control their actions, as that they do not attempt to do so. *3 Withth. & Beck. 289.*

PARAPHERNA (Lat.). In Civil Law. Goods brought by wife to husband over and above her dower (*dos*). *Voc. Jur. Utr.; Fleta, lib. 5, c. 23, § 6; Mack. C. L. § 529.*

PARAPHERNALIA. Apparel and ornaments of a wife, suitable to her rank and degree. *2 Bla. Com. 435.*

Those goods which a wife could bequeath by her testament. *2 Poll. & Matil. 427.*

These are subject to the control of the husband during his lifetime; *3 Atk. 394; but go to the wife upon his death, in preference to all other representatives; Cro. Car. 343; and cannot be devised away by the husband; Noy, Max.* They are liable to be sold to pay debts on a failure of assets; *1 P. Wms. 780.* See, also, *2 Atk. 642; 11 Vin. Abr. 176.* The judge of probate may, in the practice of most states, make an allowance to the widow of a deceased person which more than takes the place of the paraphernalia.

While a married woman may acquire title to articles of apparel by gift from her husband, yet her mere use and enjoyment of such articles purchased by her husband does not give title thereto as her separate property; *12 S. C. 180; s. c. 32 Am. Rep. 508.* See, also, *35 Ohio St. 514.* The wearing apparel purchased by a married woman after her marriage, with her husband's money, or upon his credit, belongs to him as against her creditors; *87 Mich. 62.* In New York, by statute, a married woman may sue in her own name for injury to her paraphernalia; *43 N. Y. 212; s. c. 8 Am. Rep. 543; but in the absence of proof of a gift to her, the husband can sue; 74 N. Y. 116; s. c. 30 Am. Rep. 271.*

In some states, the paraphernalia of a wife is protected by statute (in Georgia by name, and in Rhode Island and Colorado by description). The articles covered by one or more of the statutes are: wearing apparel of the wife and such ornaments, jewelry, silver, table ware, plate, and such articles of property as have been given to her for her own use and comfort. In Louisiana the property not declared to be brought in marriage by the wife, or given

to her in consideration of the marriage, is paraphernalia, and she has a right to administer it without the assistance of her husband; but as to any which is administered by her husband without her opposition, he is accountable for it. See **MARRIED WOMAN**.

PARAPHERNAUX BIENS. In French Law. All the property of the wife which is not subject to the *régime dotal*. Brown.

The wife has the entire administration of this property; but she may allow the husband to enjoy it, and in that case he is not liable to account. R. & L. Dict.; Brown.

PARAPLEGIA. See **PARALYSIS**.

PARASYNEXIS. In Civil Law. A conventicle or unlawful meeting. Whart.

PARATITULA (Lat.). In Civil Law. An abbreviated explanation of some titles or books of the Code or Digest.

PARATUM HABEO (Lat. I have ready). In Practice. A return made by the sheriff to a *capias ad respondendum*, which signified that he had the defendant ready to bring into court. This was a fiction, where the defendant was at large. Afterwards he was required, by statute, to take bail from the defendant, and he returned *cepi corpus* and bail-bond. But still he might be ruled to bring in the body; 7 Pa. 535.

PARAVAIL. Tenant paravail is the lowest tenant of the fee, or he who is the immediate tenant to one who holds of another. He is called tenant paravail because it is presumed he has the avails or profits of the land. Fitzh. N. B. 135; Co. 2d Inst. 296.

PARCEL. A part of the estate. 38 Ia. 141; 1 Comyns, Dig. *Abatement* (H 51), *Grant* (E 10). Under a statute providing for an assessment of unplatted lands, synonymous with lot. 38 N.E. Rep. (Ind.) 468. To parcel is to divide an estate. Bac. Abr. *Conditions* (O).

A small bundle or package.

The word "parcel" is not a sufficient description of the property alleged in an indictment to have been stolen. The prisoner was indicted for stealing "one parcel, of the value of one shilling, of the goods," etc. The parcel in question was taken from the hold of a vessel, out of a box broken open by the prisoner. Held an insufficient description; 7 Cox, C. C. 13. See **PACKAGE**.

PARCEL MAKERS. Two officers in the exchequer who formerly made the parcels of the escheator's accounts, wherein they charged them for everything they had levied for the sovereign's use within the time of their being in office, and delivered the same to the auditors to make up their accounts therewith. Whart. Law Lex.

PARCEL POST. Domestic. Fourth-class matter embraces that known as domestic parcel-post mail exceeding 8 ounces in weight and includes merchandise, farm and factory products, seeds, cuttings, bulbs, roots, scions, and plants, books (including catalogues), circulars and other printed matter, and all other mailable matter not embraced in the first and second classes. U. S. Off. Postal Guide, 1924, p. 11. See **MAIL MATTER, DOMESTIC**; **MAILABLE, UNMAILABLE**.

International (Foreign). International parcel-post service is maintained by direct or indirect service; that is, parcels are either dispatched from the United States by steamships landing parcel-post mails at a port in the country of destination or are dispatched from the United States to some intermediate country for onward dispatch in the parcel-post mails of that intermediate country to the place of destination. *Id.*; 198 *et seq.*

PARCELS, BILL OF. See **BILL OF PARCELS**.

PARCENARY. The state or condition

of holding title to lands jointly by parceners, before the common inheritance has been divided.

PARCENERS. The daughters of a man or woman seized of lands and tenements in fee-simple or fee-tail, on whom, after the death of such ancestor, such lands and tenements descend, and they enter. See **ESTATE IN COPARCENARY**.

PARCHMENT. Sheepskins dressed for writing, so called from *Pergamus*, Asia Minor, where they were invented. Used for deeds, and was used for writs of summons in England previous to the Judicature Act, 1875. Whart. Lex.

PARCO FRACTO (Lat.). In English Law. The name of a writ against one who violently breaks a pound and takes from thence beasts which, for some trespass done, or some other just cause, were lawfully impounded.

PARDON. An act of grace, usually proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime he has committed. 7 Pet. 160; 19 N. Y. S. 508.

Every pardon granted to the guilty is in derogation of the law; if the pardon be equitable, the law is bad; for where legislation and the administration of the law are perfect, pardons must be a violation of the law. But, as human actions are necessarily imperfect, the pardoning power must be vested somewhere, in order to prevent injustice when it is ascertained that an error has been committed.

An absolute pardon is one which frees the criminal without any condition whatever.

A conditional pardon is one to which a condition is annexed, performance of which is necessary to the validity of the pardon. 1 Bail. 283; 10 Ark. 284; 1 McCord 176; 1 Park. Cr. Cas. 47. See 27 N. J. L. 637.

A general pardon is one which extends to all offenders of the same kind. It may be express, as when a general declaration is made that all offenders of a certain class shall be pardoned, or implied, as in case of the repeal of a penal statute. 2 Over. 423.

The pardoning power is lodged in the executive of the United States and of the various states, and extends to all offences except in cases of impeachment. In some states a concurrence of one of the legislative bodies is required; in other states, boards of pardon have been provided, whose recommendation of a pardon to the executive is a prerequisite to the exercise of the power. See the titles of the several states. The constitutional power of pardon vested in the executive is not subject to legislative control, either to limit the effect of a pardon, or to exclude from its operation any class of offenders; 4 Wall. 333; 169 Pa. 316. In Pennsylvania, the act of March 31, 1860, provides that when any person convicted of a felony, etc., has endured his punishment, it shall have the same effect as a pardon, and he becomes a competent witness; this is a legislative pardon and has the same effect as an executive pardon; 53 Fed. Rep. 352. The pardoning power is by no means confined to the executive; it was possessed by parliament (4 Bla. Com. 401; 7 Pet. 162); and from the very nature of government, in Pennsylvania it is vested in the legislative branch by the inherent supreme law-making power, and in the executive by constitutional provision; 53 Fed. Rep. 352.

The power of pardon conferred by the constitution upon the president is unlimited, except in cases of impeachment. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. A pardon reaches the punishment prescribed for an offence, and the guilt of the offender. If granted before conviction, it prevents any of the penalties and disabilities con-

sequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights. It gives him a new credit and capacity. It blots out his guilt and makes him, in the eye of the law, as innocent as if he had never committed the offence. There is only this limitation to its operation; it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment; 4 Wall. 333. See 93 Ky. 156; 26 N. J. L. 326; 27 *id.* 637. It may be granted after conviction and before sentence while exceptions are pending; 109 Mass. 323, where there is an extended discussion of the pardoning power by Gray, J.

The granting of a full and unconditional pardon by the president to a person convicted of a felony restores his competency as a witness, and this result is not affected by a recital in a pardon that it was granted for the reason, among others, that his testimony was desired by the government in a cause then pending in a federal court; 142 U. S. 450; and a pardon granted after the person has served his term of imprisonment has the same effect; 30 S. W. Rep. (Ky.) 98.

There are several ways (as given by Judge Cooley) in which the pardoning power of the president may be exercised: 1. A pardon may be given to a person under conviction by name, and this will take effect from its delivery, unless otherwise provided therein. 2. It may be given to one or more persons named, or to a class of persons, before conviction, and even before prosecution begun. Such a pardon is rather in the nature of an amnesty. 3. It may be given by proclamation, forgiving all persons who may have been guilty of the specified offence, or offences; 4 Wall. 330, 380; 13 *id.* 128; and in this case the pardon takes effect from the time the proclamation is signed; 17 Wall. 191. See *infra*. 4. It may in any of these ways be made a pardon on conditions to be first performed, in which case it has effect only on performance; or on conditions to be thereafter performed, in which case a breach of the condition will place the offender in the position occupied by him before the pardon was issued; 7 Pet. 150; 2 Caines 57; 1 McCord 176; 64 Cal. 29.

In Michigan it has been held that a pardoned convict charged with having violated the conditions of his release must be arrested and tried in the same manner as other offenders against the law; 62 Mich. 496; but in South Carolina a convict who has broken the conditions of his pardon may be remanded to the penitentiary to serve out the remainder of his sentence, though the time in which he was to serve has expired; 32 S. C. 14. A power to grant pardons on condition that the person pardoned shall leave the state and not return to it, is not in conflict with a constitutional provision which provides that no one shall be exiled from the state; 33 S. W. Rep. (Ark.) 106.

It is to be exercised in the discretion of the power with whom it is lodged.

As to promises of pardon to accomplices, see 1 Chitty, Cr. L. 83; 1 Leach 115.

In order to render a pardon valid, it must express with accuracy the crime intended to be forgiven; 4 Bla. Com. 400; 3 Wash. C. C. 335; 7 Ind. 359; 1 Jones N. C. 1.

The effect of a pardon is to protect the criminal from punishment for the offence pardoned; 6 Wall. 766; 13 *id.* 147; 91 U. S. 474; but for no other; 10 Ala. 475; 1 Bay 34. It seems that the pardon of an assault and battery, which afterwards becomes murder by the death of the person beaten, would not operate as a pardon of the murder; 12 Pick. 496. See Plowd. 401; 1 Hill N. Y. 426. In general, the effect of a full pardon is to restore the convict to all his rights; 169 Pa. 319; even though granted after he has served out his sentence, it restores his competency to testify; 23 U. S. App. 344; 142 U. S. 450; but to this there are some exceptions. First, it does not restore civil capacity; 2 Leigh

724. See 1 Strobh. 150; 2 Wheel. Cr. Cas. 451; 33 N. H. 388. *Second*, it does not affect a *status* of other persons which has been altered or a right which has accrued in consequence of the commission of the crime or its punishment; 10 Johns. 232; 2 Bay 565; 5 Gilm. 214; or third persons who, by the prosecution of judicial proceedings, may have acquired rights to a share in penalties or to property forfeited and actually sold; 4 Wash. C. C. 64; 9 Fed. Rep. 645; but see 4 Biss. 336; 6 Wall. 766 (as to forfeiture to U. S.).

In England a pardon removes not only the punishment but the legal disabilities consequent on the crime, wherever the latter are the consequence of the judgment, but where it is declared by act of parliament to be a part of the punishment, as in case of perjury under the 5 Eliz. c. 9, pardon will not make the person competent; 2 Russ. Cr. 976, followed in 1 Park. Cr. Rep. 241; 24 Ill. 298. See 11 Am. Jur. 356. But this distinction does not obtain here; 169 Pa. 316; 4 Wall. 383. It has been held in Ohio that a prisoner could not be tried on the charge of being a habitual criminal after having been pardoned by the governor for the previous offence; 56 Alb. L. J. 5.

When the pardon is general, either by an act of amnesty, or by the repeal of a penal law, it is not necessary to plead it; because the court is bound, *ex officio*, to take notice of it; Baldw. 91; 145 U. S. 546. A criminal cannot even waive such pardon, because by his admittance no one can give the court power to punish him when it judicially appears there is no law to do it. But when the pardon is special, to avail the criminal it must judicially appear that it has been accepted; and for this reason it must be specially pleaded; 4 Bla. Com. 401; 7 Pet. 150, 163; and if he has obtained a pardon before arraignment, and, instead of pleading it in bar, he pleads the general issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment; 1 Rolle 297. See 1 Dy. 34 a; T. Raym. 18; 3 Metc. Mass. 453.

The power to pardon extends to punishments for contempt; 7 Blatch. 23.

All contracts made for the buying or procuring a pardon for a convict are void; and such contracts will be declared null by a court of equity, on the ground that they are opposed to public policy; 4 Bouvier, Inst. 3857.

A mayor of a city may be vested with power to pardon one convicted of the violation of an ordinance. See 46 Fed. Rep. 52. See AMNESTY.

PARDONERS. Persons who carried about the pope's indulgences and sold them. Whart. Law Lex.

PARENS PATRIÆ (Lat.). Father of his country. In England, the king; 3 Bla. Com. 427; 2 Steph. Com. 538; in the United States the state, as sovereign, has power of guardianship over persons under disabilities. See 17 How. 393.

PARENTAGE. Kindred in the direct ascending line. See 2 Bouv. Inst. n. 1955. For a discussion of the subject in connection with citizenship, see 2 Kent 49; Morse, Citizenship; CITIZEN; NATURALIZATION.

PARENTAL RIGHTS. See COMPULSORY SCHOOL ATTENDANCE ACTS.

PARENTELA. The sum of those persons who trace descent from one ancestor. 2 Poll. & Maitl. 294. See LINE.

This, or the fuller form *de parentela se tollere*, signified a renunciation of kindred and of all rights of inheritance from them, effected in court before twelve men, who made oath that they believed it to be done for good cause. Byrne; Leg. Hen. 1, c. 88.

PARENTS. The lawful father and mother of the party spoken of. 1 Murph. N. C. 336; 11 S. & R. 98.

The term parent differs from that of ancestor, the latter embracing not only the father and mother, but every person in an

ascending line. It differs also from predecessor, which is applied to corporators. 7 Ves. Ch. 522; 1 Murph. N. C. 336; 6 Binn. 255. See FATHER; MOTHER.

By the civil law, grandfathers and grandmothers, and other ascendants, were, in certain cases, considered parents. *Dict. de Jur. Parents.* See 1 Ashm. 55; 2 Kent 159; 5 East 223.

PARES (Lat.). A man's equals; his peers. 3 Bla. Com. 349.

PARES CURLE (Lat.). In Feudal Law. Those vassals who were bound to attend the lord's court. Erskine, Inst. b. 2, tit. 3, s. 17; 1 Washb. R. P., 5th ed. 1. See MAGNA CHARTA.

PAREISIS. Paresis is another name for *dementia paralytica*, or general paralysis of the insane. It is a chronic psychosis of middle age characterized by progressive mental deterioration leading to absolute dementia, and by physical symptoms leading to paralysis and death usually within three years. Rapid progressive intellectual enfeeblement is a fundamental symptom. There are several predisposing causes of paresis, such as hereditary taints, and social factors. The exciting causes are emotional stress, cranial traumatism, excessive alcoholism and syphilis, which is probably the essential cause, *sine qua non*. Bridges, Outline Ab. Psych. 151-155. See PARALYSIS.

PARI DELICTO (Lat.). In a similar offence or crime; equal in guilt or in legal fault.

A person who is *in pari delicto* with another differs from a *particeps criminis* in this, that the former term always includes the latter, but the latter does not always include the former. 8 East 381.

Ordinarily where two persons are *in pari delicto* the law will not relieve them; see CONTRIBUTION. But this doctrine does not apply where a president of a national bank has borrowed an amount exceeding twenty per cent. of its capital stock and suit is brought to recover the amount; 49 N. Y. Supp. 270.

The rule that both parties to an *ultra vires* contract are *in pari delicto*, and therefore a court of equity will not interpose to restore to one of them rights which it has thus parted with, is inapplicable to a municipal corporation whose trustees attempt to make an invalid grant; 56 Fed. Rep. 867.

PARI MATERIA (Lat.). Of the same matter; on the same subject; as laws *pari materia* must be construed with reference to each other. Bacon, Abr. *Statute* (I) 8.

PARI PASSU (Lat.). By the same gradation. Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other.

PARI PASSU BONDS. A name given in Scotland to certain bonds secured upon lands which share an equal benefit of the security. Where several securities are created over the same lands by separate bonds and dispositions in security, they would ordinarily have priority according to the date of registration of the sasine or bond, as the case may be. If it is intended to have them rank as *pari passu*, it is usual to insert a clause in each bond declaring that they shall be so ranked without regard to their priority of registration. 9 Jurid. Rev. 74.

PARIS, DECLARATION OF. See DECLARATION OF PARIS; BLOCKADE; NEUTRALITY.

PARIS MUTUAL. See FRENCH POOL.

PARISH. A district of country, of different extents. As used in the revised statutes, the word is synonymous with county; 28 Fed. Rep. 840; as also in the state of Louisiana.

In Ecclesiastical Law. The territory committed to the charge of a parson, or

vicar, or other minister. Ayl. Par. 404; 2 Bla. Com. 112; Hoffm. Ecol. Law.

Although, in the absence of a state church in this country, the status of parishes is comparatively unimportant, yet in the Protestant Episcopal Church, at least, their boundaries and the rights of the clergy therein are quite clearly defined by canon. In the leading case of *Stubbs and Boggess v. Tyng*, decided in New York, in March, 1898, the defendant was found guilty of violating a canon of the church, in having officiated, without the permission of plaintiffs within the corporate bounds of the city of New Brunswick, N. J., which then constituted the plaintiffs' parochial cure. Baum 108. As to their origin, see 2 Hallam, Mid. Ages, c. 7, p. 144. See, also, 1 Poll. & Maitl. 548, 602.

In New England. Divisions of a town, originally territorial, but which now constitute *quasi*-corporations, consisting of those connected with a certain church. See 2 Mass. 501; 16 id. 457, 489; 1 Pick. 91. Synonymous with church and used in the same sense as society. 16 Conn. 299.

PARISH APPRENTICES. The children of parents unable to maintain them, who are apprenticed by the overseers of the poor of their parish, to such persons as may be willing to receive them. 2 Steph. Com. 230.

PARISH CLERK. In English Law. An officer, in former times often in holy orders, and appointed to officiate at the altar; now his duty consists chiefly in making responses in church to the minister. By common law he has a freehold in his office, but it seems now to be falling into desuetude. 2 Steph. Com. 11th ed. 713; Moz. & W.

PARISH CONSTABLE. See CONSTABLE.

PARISH COURT. In Louisiana the local courts in each parish, corresponding generally to county and probate courts, and, in some respects, justices' courts, in other states were formerly so called.

PARISH OFFICERS. Churchwardens, overseers, and constables.

PARISH PRIEST. The parson; a minister who holds a parish as a benefice.

If the predial tithes are appropriated, he is called "rector"; if impropriated "vicar." R. & L. Diet.

PARISHIONERS. Members of a parish. In England, for many purposes they form a body politic. See PARISH.

PARITOR. A beadle; a summoner to the courts of civil law.

PARIUM JUDICIUM (Lat. the decision of equals). The right of trial by one's peers; *i. e.* by jury in the case of a commoner, by the house of peers in the case of a peer.

PARK (L. Lat. *parcus*). An inclosure. 2 Bla. Com. 38. A pound. Reg. Orig. 166; Cowell. An inclosed chase extending only over a man's own grounds. 13 Car. II. c. 10; Manw. For. Laws; Crompton, Jur. fol. 148; 2 Bla. Com. 38.

A pleasure-ground in or near a city, set apart for the recreation of the public; a piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament. 36 N. Y. 120. A place for the resort of the public for recreation, air, and light; a place open for everyone. 40 N. J. L. 613. See 98 Cal. 43.

Public parks may be dedicated to the public like highways; 143 Mass. 521; 23 Ore. 176; and at common law, upon such dedication, the fee remains in the owners; 154 Mass. 823. Non-user by the public, however long continued, will not affect the public right or revert the title in the donor; 81 Wis. 313. The title is usually vested in municipalities by the legislature; 106 N. Y. 496; 27 Mich. 262; 148 Mass. 580; and held by them in trust for the use of the public. The municipality cannot lease them; 60 Ga. 221; nor can the legislature; 7 Ohio 218; but see 3 West. L. Bul. 551, where a right of way was granted through a public park in consideration of an agreed rental.

A public park may be crossed by a street

railway where such use will not materially interfere with its enjoyment by the public; 76 Cal. 176; and compensation may not be demanded for the taking; 44 N. E. Rep. (Mass.) 446; but it is also held that parks dedicated to the public use are not subject to a right of way for a street railway, and that neither the municipality nor the legislature can divert them for that purpose; 67 Ill. 540; Booth, St. Ry. L. § 11.

A park or public square may be enclosed, notwithstanding it has remained open many years; 58 Tex. 183; 2 Ohio St. 107; *contra*, 3 Pa. 206, where it was held that a public square was as much a highway as though it were a street, and that neither the county nor the public could block it up, to the prejudice of the public or an individual. See, also, 3 Ore. 226; 85 Mo. 674.

A city is not bound to keep parks in safe condition; 148 Mass. 580; 128 id. 584; and is not liable for injuries caused by a horse frightened by the firing of a cannon therein; 148 Mass. 580; but it must contribute to an assessment for the improvement of streets by which a park is bounded in common with private owners benefited thereby; 42 Ill. 192.

As to the right of the municipality to make regulations for the preservation of order in a park or public square, see POLICE POWER; LIBERTY OF SPEECH.

See, generally, DEDICATION; EMINENT DOMAIN; RAILROAD; PUBLIC PARK.

PARLE HILL (also called Parling Hill). A hill where courts were held in olden times. Cowell. See MALBERGE.

PARLIAMENT' (said to be derived from *parler la ment*, to speak the mind, or *parum lamentum*).

In English Law. The legislative branch of the government of Great Britain, consisting of the house of lords and the house of commons.

The parliament is usually considered to consist of the kings, lords, and commons. See 1 Bla. Com. 147ⁿ; 157ⁿ; Chitty's note; 2 Steph. Com., 11th ed. § 41. In 1 Wood. Lect. 30, the lords temporal, the lords spiritual, and the commons are called the three estates of the realm; yet the king is called a part of the parliament, in right of his prerogative of veto and the necessity of his approval to the passage of a bill. That the connection between the king and the lords temporal, the lords spiritual, and the commons, who when assembled in parliament form the three estates of the realm, is the same as that which subsists between the king and those estates—the people at large—out of parliament, the king not being in either case a member, branch, or co-estate, but standing solely in the relation of sovereign or head. See Coote's Record 710; Rot. Parl. vol. iii. 623 & n.; 2 M. & G. 457, n.

The House of Lords was the supreme court of judicature in the kingdom. It had no original jurisdiction (except to a certain extent before the reign of Charles II.), but was the court of appeal in the last resort, with a few exceptions and under some limitations as to the right, from the inferior courts upon appeal, or writ of error for mistakes of law. Appeals lay to this tribunal from Scotch and Irish courts, in some cases. See stat. 4 Geo. IV. c. 85, as to Scotch, and stat. 39 & 40 Geo. III. c. 67, art. 8, as to Irish, appeals.

This body, when sitting as a court of law, was presided over by the lord chancellor, whose attendance alone was in any respect compulsory, and was composed of as many of its members who had filled judicial stations as chose to attend. Three laymen also attended in rotation, but did not vote upon judicial matters; 11 Cl. & F. 491. In the absence of the chancellor, deputy speakers, who were members of the profession but not of the house, have been appointed; 3 Bla. Com. 56.

By statute 39 & 40 Vict. ch. 59, an appeal, by petition, lies to the House of Lords from the Court of Appeal in England and from Scotch and Irish courts from which an appeal or writ of error formerly lay to the House of Lords. The appeal is heard by the Lord Chancellor, two Lords of Appeal in Ordinary (whose appointment is provided for by the act), and such peers as are holders of or have held certain high judicial offices. The House of Lords sits also to try impeachments.

Records of writs summoning knights, burgesses, and citizens to parliament are first found towards the end of the reign of Henry III., such writs having issued in the thirty-eighth and forty-ninth years of his reign. 4 Bla. Com. 425; Fyenne, 4th Inst. 2. The earliest parliamentary roll is said to be 1290. 1 Poll. & Maitl. 178. In the reign of Edward III. it assumed its present form. Since the reign of Edward III. the history of England shows an almost constant increase in the power of parliament. Anne was the last sovereign who exercised the royal prerogative of *veto*; and, as this prerogative no longer practically exists, the authority of parliament is absolutely unrestrained. The parliament can only meet when convened by the sovereign, except on the demise of the sovereign with no par-

liament in being, in which case the last parliament is to assemble; 6 Anne, c. 7. The sovereign has also power to prorogue and dissolve the parliament. The origin of the English parliament seems traceable to the *witena-genote* of the Saxon kings. Encyc. Brit. A recent writer traces the origin back to the local institutions of the Germanic tribes, but considers that the final stages of its growth are to be sought in the period between the accession of Henry II. and the close of the reign of Edward I.; 1 Social Eng. 396. See May, Law, Priv. and Proc. of Parliament; St. Armand, Legislative Power; Bagehot, English Constitution; Pike, History of the House of Lords; HIGH COURT OF PARLIAMENT; FOLIO-GENOTE; WITENA-GENOTE; LEGISLATIVE POWER; PEERS; HOUSE OF LORDS.

PARLIAMENT. See CONVENTION PARLIAMENT.

PARLIAMENTARY ACT. The act of 1911 which provided that an act can be passed by the sovereign and the Commons without the concurrence of the Lords, in the circumstances set forth in the act. Byrne. Before 1911 acts of Parliament were invariably made by the sovereign with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled. *Id.*

PARLIAMENTARY AGENTS. Persons professionally employed in the promotion of or opposition to private bills, and otherwise in relation to private business in parliament. Whart. Law Lex. Business in relation to private bills must be transacted through them, and counsel may be instructed by them. 2 Brett, Com. 775.

PARLIAMENTARY COMMITTEE. A committee of members of the house of peers, or of the house of commons, appointed by either house for the purpose of making inquiries, by the examination of witnesses or otherwise, into matters which could not be conveniently inquired into by the whole house. Whart. Law Lex.

PARLIAMENTARY COMMITTEES. These consist of (1) committees of the whole House, (2) standing or sessional committees, (3) select committees, (4) joint committees.

A committee of the whole House, whether in the Lords or the Commons, is really the House of Lords or the House of Commons, as the case may be, presided over by a chairman instead of by the Lord Chancellor or the Speaker. In the House of Commons, there are the Committee of Supply and the Committee of Ways and Means. These committees do not legislate. They merely pass resolutions on financial matters. But a resolution of the Committee of Ways and Means which varies or renews taxation has, under the Provisional Collection of Taxes Act, 1913, statutory effect for a limited period. That act was passed because it was decided—as indeed was obvious—that the practice which had grown up of acting on resolutions of the Committee of Ways and Means before they had been embodied in an Act of Parliament was wholly illegal.

The standing or sessional committees and the select committees consist in each House of a certain number of members who perform various functions in connection with bills.

Joint committees consist of equal numbers of members of each House. Since 1864 they have frequently been constituted; but between 1695 and 1864 there had been no such committee. Byrne.

PARLIAMENTARY COUNSEL TO THE TREASURY. An office established in 1869, which was to be responsible for the preparation of all government bills, and which should be subordinate to the Treasury and thus brought into immediate relation, not only with the Chancellor of the Exchequer, but with the First Lord of the Treasury, who was usually Prime Minister.

The Parliamentary Counsel was to settle all such departmental bills, and draw all such other governmental bills (except Scotch and Irish bills) as he might be required by the Treasury to settle and draw. The instructions for the preparation of every bill were to be in writing and sent to the heads

of the departments to the Parliamentary Counsel through the Treasury, to which latter department he was to be considered responsible. On the requisition of the Treasury he was to advise on all cases arising on bills or acts drawn by him, and to report in special cases referred to him by the Treasury on bills brought in by private members. It was not to be part of his duty to write memoranda or schemes for bills, or to attend parliamentary committees, unless under instructions from the Treasury.

The staff of the Parliamentary Counsel's office still remains practically the same as when first established in 1869. The permanent staff consists of the Parliamentary Counsel and the Assistant Parliamentary Counsel, with three shorthand writers, an office-keeper, and an office boy, and these together run what may be called the legislative workshop. Ilbert, Legis. Meth. & Forms 84-86.

PARLIAMENTARY LAW. That body of the recognized usages of parliamentary and legislative assemblies by which their procedure is regulated, which takes its name from the British parliament and on the practice of which it is mainly founded, with such changes and modifications in American deliberative bodies as have been necessary to adapt it to the usages of that country. See MEETINGS; QUORUM.

PARLIAMENTUM DIABOLICUM. A parliament held at Coventry, 38 Henry VI., wherein Edward, Earl of March (afterwards Edward IV.), and many of the chief nobility were attainted, was so called; but the acts then passed were annulled by the succeeding parliament. Jacob.

PARLIAMENTUM INDOCTUM (Lat. unlearned parliament). A name applied to a parliament assembled at Coventry, under a law that no lawyer should be a member of it. 6 Hen. IV.; 1 Bla. Com. 177; Walsingham 412, n. 30; Rot. Parl. 6 Hen. IV.

PARLIAMENTUM INSANUM. A parliament assembled at Oxford, 41 Hen. III., so styled from the madness of its proceedings, and because the lords came to it with armed men. Jacob. See MAD PARLIAMENT.

PARLOR CAR. See SLEEPING CAR

PAROCHE. A parish.

PAROCHIAL BOARD. In Scotch Law. A body of men in a parish who manage the relief of the poor. Ersk. Prin. 612.

PAROL (more properly, *parole*. A French word, which means, literally, word, or speech). A term used to distinguish contracts which are made verbally, or in writing not under seal, which are called parol contracts, from those which are under seal, which bear the name of deeds or specialties. 1 Chitty, Contr., 12th ed. 7; 7 Term 350; 3 Johns. Cas. 60; 1 Chitty, Pl. 88. When a contract is made under seal, and afterwards it is modified verbally, it becomes wholly a parol contract; 2 Watts 451; 9 Pick. 298. See CONTRACT.

Pleadings are frequently denominated the *perol*. In some instances the term parol is used to denote the entire pleadings in a cause; as, when in an action brought against an infant heir, on an obligation of his ancestors, he prays that the parol may demur, *i. e.* that the pleadings may be stayed till he shall attain full age; 3 Bla. Com. 300; 4 East 485; 1 Hoffm. 178. See a form of a plea in abatement, praying that the parol may demur, in 1 Wentw. Pl. 43, and 2 Chitty, Pl. 520. But a devisee cannot pray the parol to demur; 4 East 485.

PAROL DEMURRER. See PAROL.

PAROLEVIDENCE. Evidence verbally delivered by a witness. See 56 Am. St. Rep. 659; 6 Harv. L. Rev. 417; Browne, Parol Evidence; EVIDENCE; RECEIPT; CONTRACT.

PAROL LEASE. An agreement made orally between parties, by which one of them leases to the other a certain estate. See **LEASE**.

PAROL PROMISE. A simple contract; a verbal promise.

PAROLE. In International Law. The agreement of persons who have been taken prisoner by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war. Vattel, liv. 8, c. 8, § 151.

It is a sacred obligation to the fulfilment of which the national faith is pledged. 5 Phila. 299; Fed. Cas. No. 16777.

A parole can be given only by a commissioned officer for himself or the troops under him. And an inferior officer, if his superior is within reach, cannot give his parole without the consent of the latter. If the prisoner's government refuse to confirm his parole, he is bound in honor to return into captivity. A captor is not bound to offer, nor a prisoner to accept, parole; it is voluntary on both sides. Giving a parole precludes only active service in the field. It is ended by the prisoner's exchange or by peace. A prisoner who violates his parole and is again captured may be shot as a bandit; Risley, Law of War 181.

In Criminal Law. In some states acts have been passed providing for the release on parole of prisoners committed to prison upon conviction of crime. Such acts were passed in 1897 in Connecticut, Illinois, Idaho, Indiana, Minnesota, and Missouri. See **PRISONER**.

PARQUET. In French Law. The magistrates who are charged with the conduct of proceedings in criminal cases and misdemeanors.

PARRICIDE (from Lat. *pater*, father, *caedere* to slay). In the Civil Law. One who murders his father. One who murders his mother, his brother, his sister, or his children. Merlin. *Rep. Parricide*; Dig. 48. 9. 1, 3, 4.

This offence is defined almost in the same words in the penal code of China. Penal Laws of China, b. 1, a. 2, § 4.

The criminal was punished by being scourged, and afterwards sewed in a sort of sack with a dog, a cock, a viper, and an ape, and then thrown into the sea or into a river; or, if there were no water, he was thrown in this manner to wild beasts. Dig. 48. 9. 3; Code 9. 17. 1. 1, 4, 18. 6; Brown, Civ. Law 423.

By the laws of France, parricide is the crime of him who murders his father, or mother, whether they be the legitimate, natural, or adopted parents of the individual, or the murder of any other legitimate ascendant. Code Penal, art. 297. This crime was then punished by the criminal's being taken to the place of execution without any other garment than his shirt, barefooted, and with his head covered with a black veil. He was then exposed on the scaffold, while an officer of the court read his sentence to the spectators; his right hand was then cut off, and he was immediately put to death. *Id.* art. 18.

The common law does not define this crime, and makes no difference between its punishment and the punishment of murder; 1 Hale, Pl. Cr. 380; Prin. Penal Law, c. 18, § 6, p. 243; Daloz, Dict. Homicide, § 8.

PARS ENTIA (Lat.). In Old English Law. The share of the eldest daughter where lands were parted between daughters by lot, she having her first choice after the division of the inheritance. Co. Litt. 166 b; Glanv. lib. 7, c. 3; Fleta, lib. 5, c. 10, § In *divisionem*.

PARS RATIONABILIS (Lat. reasonable part). That part of a man's goods which the law gave to his wife and children. 2 Bla. Com. 492; Magn. Chart.; 9 Hen. III. c. 18; 2 Steph. Com., 11th ed. 194. See **DEAD MAN'S PART**.

PARSON. In Ecclesiastical Law. One that hath full possession of all the rights of a parochial church.

So called because the church, which is an invisible body, is represented by his person. In England he is himself a body corporate, in order to protect and defend the church (which he personates) by a perpetual succession; Co. Litt. 300. He is sometimes called the rector (*q. v.*), or governor, of the church; but the appellation of parson, however it may be depreciated by familiar, clownish, and indiscriminate use, is the most legal, most beneficial, and most honorable title that a parish priest can enjoy;

because "such a one," Sir Edward Coke observes, "and he only, is said *vicem seu personam Ecclesie gerere*"; 1 Bla. Com. 384.

The parson has, during life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues, unless these are appropriated, *i. e.* given away, to some spiritual corporation, sole or aggregate, which the law esteems as capable of providing for the service of the church as any single private clergyman; *id.* 1 Hagg. Cons. 162; 3 Steph. Com., 11th ed. 5.

The ecclesiastical or spiritual rector of a rectory. 1 Woodd. Lect. 311; Fleta, lib. 7, c. 18; Co. Litt. 300. Also, any clergyman having a spiritual preferment. Co. Litt. 17. Holy orders, presentation, institution, and induction are necessary for a parson; and a parson may cease to be such by death, resignation, cession, or deprivation, which last may be for simony, non-conformity to canons, adultery, etc.; Co. Litt. 120; 4 Co. 75, 76.

PARSON IMPERSONEE (Lat.). A person, or parson, may be termed *impersonata*, or impersonee, only in regard to the possession he hath of the rectory by the act of another. Co. Litt. 300. One that is inducted and in possession of a benefice; *e. g.* a dean and chapter. Dy. 40, 221. He that is in possession of a church, be it presentative or appropriate, and with whom the church is full,—*persona* in this case meaning the patron who gives the title, and *persona impersonata* the parson to whom the benefice is given in the patron's right. Reg. Jud. 24; 1 Barb. 330; 1 Busb. Eq. 55.

PARSONAGE. The house set apart for the minister's residence. A portion of lands and tithes established by law for the maintenance of a minister. Toml.

PART. A share; a purpart. This word is also used in contradistinction to counterpart; covenants were formerly made in a script and rescript, or *part* and *counterpart*.

PART AND PERTINENT. In Scotch Law. A term in a conveyance including lands or servitudes held for forty years as part of, or pertinent to, lands conveyed, natural fruits before they are separated, woods and parks, etc.; but not steelbow stock, unless the lands have been sold on a rental. Bell, Dict.; Erskine, Inst. 2. 5. 3, et seq.

PART-OWNERS. Those who own a thing together, or in common.

In Maritime Law. A term applied to two or more persons who own a vessel together, and not as partners.

In general, when a majority of the part-owners are desirous of employing such a ship upon a particular voyage or adventure they have a right to do so upon giving security in the admiralty by stipulation to the minority, if required to bring her back and restore the ship, or in case of her loss, to pay them the value of their respective shares; Abb. Ship., 13th ed. 84; 3 Kent 151; Story, Partnership § 489; 11 Pet. 175. When the majority do not choose to employ the ship, the minority have the same right, upon giving similar security; 11 Pet. 175; 1 Hagg. Adm. 306; Jacobsen, Sea-Laws 442.

Where part-owners are equally divided as to the employment upon any particular voyage, the courts of admiralty have manifested a disposition to support the right of the court to order a sale of the ship; Story, Partn. § 439; Bee 2; Gilp. 10; 18 Am. Jur. 486. See **VESSEL**.

Owners of a part; those who have an interest in a chattel in common with another, or with others.

PARTES FINIS NIL HABUERUNT (Lat. the parties to the fine had nothing; *i. e.* nothing which they could convey). In Old English Pleading. The plea to a fine levied by a stranger, which only bound parties and privies. 2 Bla. Com. *356; Hob. 334; 1 P. Wms. 520; 1 Woodd. Lect. 315.

PARTIAL LOSS. See **LOSS**.

PARTIAL RESTRAINT OF TRADE. See **RESTRAINT OF TRADE**; **RESTRAINT**.

PARTIBLE LANDS. Lands which might be divided; lands held in gavelkind. See 2 Poll. & Matl. 268, 271; **GAVELKIND**.

PARTICEPS. Literally, a part-taker; a partaker or sharer; one jointly interested with another; an associate or accomplice.

PARTICEPS CRIMINIS. A partner in crime.

PARTICIPATE. To take equal shares and proportions; to share or divide. 6 Ch. 696. *Participate in an estate.* To take as tenants in common. 28 Beav. 266.

PARTICULAR AVERAGE. Every kind of expense or damage, short of total loss, which regards a particular concern, and which is to be wholly borne by the proprietor of that concern or interest alone. See 3 Bosw. N. Y. 385; 14 Allen 320; 2 Phill. Ins. § 354; 1 Pars. Marit. Law 284; Gourlie, Gen. Average; **AVERAGE**.

PARTICULAR AVERMENT. See **AVERMENT**.

PARTICULAR CHALLENGE. See **CHALLENGE**.

PARTICULAR CUSTOM. A custom which only affects the inhabitants of some particular district.

To be good, a particular custom must have been used so long that the memory of man runneth not to the contrary; must have been continued; must have been peaceable; must be reasonable; must be certain; must be consistent with itself; must be consistent with other customs. 1 Bla. Com. 74, 79.

PARTICULAR ESTATE. An estate which is carved out of a larger, and which precedes a remainder, as, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail: this precedent estate is called the particular estate, and the tenant of such estate is called the particular tenant. 2 Bla. Com. 165; 4 Kent 226; 16 Vin. Abr. 216; 4 Com. Dig. 32; 5 id. 346; Will. Real P. 281. See **REMAINDER**.

PARTICULAR LIEN. The right which a person has to retain property in respect of money or labor expended on such particular property. See **LIEN**.

PARTICULAR MALICE. Ill will; grudge; a desire to be revenged on a particular person. 11 Ind. 261. See **MALICE**.

Personal Malice. Spite against some particular individual. It is one of the two varieties of malice in fact, the other being what Blackstone terms "universal" malice, or malice against the world generally, without reference to individuals; as, where a person discharges a gun into a multitude, or starts out to kill and does kill the first man he meets. Anderson; 4 Bl. Com. 200.

PARTICULAR SERVICES. In this phrase is included the professional services of an expert; 59 Ind. 183; but not of a witness; 14 Ore. 20.

PARTICULAR STATEMENT. In Pennsylvania Pleading and Practice. A statement particularly specifying the date of a promise, book-account, note, bond (penal or single), bill, or all of them, on which an action is founded and the amount believed by the plaintiff to be due from the defendant. 6 S. & R. 21. It is founded on the provisions of a statute passed March 21, 1806. See 4 Sm. Pa. Laws 328. It is an unmethodical declaration, not restricted to any particular form; 2 S. & R. 537; 3 id. 405; 8 id. 816.

PARTICULAR TENANT. See **PARTICULAR ESTATE**.

PARTICULARS. See **BILL OF PARTICULARS**.

PARTIDAS. See **LAS PARTIDAS**.

PARTIES (Lat. *pars*, a part). Those who take part in the performance of an act, as, making a contract, carrying on an ac-

tion. Parties in law may be said to be those united in interest in the performance of an act; it may then be composed of one or more persons. The term includes every party to an act. It is also used to denote all the individual, separate persons engaged in the act,—in which sense, however, a corporation may be a party.

In Contracts. Those persons who engage themselves to do or not to do the matters and things contained in an agreement.

In general, all persons may be parties to contracts. But no person can contract with himself in a different capacity, as there must be an agreement of minds; 2 Bro. C. C. 400; 13 S. & R. 210; 2 Johns. Ch. 252; 4 How. 503; 63 Vt. 231. See 5 Misc. Rep. 309.

Aliens were under greater disabilities at common law with reference to real than to personal property; 7 Co. 25 a; 6 Pet. 102; 11 Paige, Ch. 292; 1 Cush. 531. The disability is now removed, in a greater or less degree, by statutes in the various states, and alien friends stand on a very different footing from alien enemies; 2 Sandf. Ch. 586; 2 Woodb. & M. 1; 2 How. 65. See ALIEN; WAR.

Bankrupts and insolvents are disabled to contract, by various statutes, in England, as well as by insolvent laws in the states of the United States.

Duress renders a contract voidable at the option of him on whom it was practised. See DURESS.

Infants are generally incapable of contracting before the age of twenty-one years. This provision is intended for their benefit; and therefore most of their contracts are voidable, and not void. It is the infant's privilege at majority to elect whether to avoid or ratify the contract he has made during minority; 39 Kan. 495. Though the infant is not bound, the adult with whom he may contract is. The infant may always sue, but cannot be sued; Stra. 937. The infant cannot avoid his contract for necessities; 11 N. H. 51; 12 Metc. 559; 6 M. & W. 42; 65 Hun 57. See [1891] 1 Q. B. 413. If he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he has received; the privilege of infancy is to be used as a shield, not as a sword; 7 Mont. 171; 1 App. D. C. 359. See INFANT; NECESSARIES.

Married women, at common law, were almost entirely disabled to contract, their personal existence being almost entirely merged in that of their husbands; 2 J. J. Marsh. 82; 23 Me. 305; 5 Exch. 388; so that contracts made by them before marriage could be taken advantage of and enforced by their husbands, but not by themselves; 13 Mass. 384; 17 Me. 29; 2 Dev. 360; 9 Cow. 230; 14 Conn. 99; 6 T. B. Monr. 257. The contract of a *feme covert* was, then, generally void, unless she was the agent of her husband, in which case it was the husband's contract, and not hers; 6 Mod. 171; 6 N. H. 124; 16 Vt. 390; 5 Binn. 285; 15 Conn. 347. See MARRIED WOMAN.

Non compos mentis. At common law, formerly, in this class were included *lunatics, insane persons, and idiots*. It is understood now to include *drunkards*; 4 Conn. 203; 2 N. H. 435; 15 Johns. 503; 11 Pick. 304; 1 Rice 56; 3 Blackf. 51; 13 M. & W. 623; 56 Minn. 216. See 89 Va. 56; 63 Hun 629. **Spendthrifts** under guardianship are not competent to make a valid contract for the payment of money; 13 Pick. 206. **Seamen** "are the wards of the admiralty, and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies; wards with their guardians, and *cestuis que trust* with their trustees." 2 Mas. 541. See 3 Kent 193; 2 Dods. 504.

As to the character in which parties contract. They may act independently or severally, jointly, or jointly and severally. The decision of the question of the kind of liability incurred depends on the terms of the contract, if they are express, or, if not express, upon the intention of the parties

as gathered from the circumstances of the case. Whenever, however, the obligation is undertaken by two or more, or a right given to two or more, it is a general presumption of law that it is a joint obligation or right; words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance in order to produce a several responsibility or a several right; 13 M. & W. 499; 6 Wend. 629; 7 Mass. 58; 1 B. & C. 407; 12 Gill & J. 265; 37 W. Va. 334. See 53 N. J. L. 638. It may be doubted, however, whether anything less than express words can raise at once a joint and several liability. No joint liability exists upon separate individual contracts, though for the same subject-matter; 43 Ill. App. 378. Parties may act as the representatives of others, as *agents, factors, or brokers, attorneys, executors, or administrators, and guardians*. See these titles; JOINT PROMISE. They may also act in a collective capacity, as *corporations, joint-stock companies, or as partnerships*. See these titles.

New parties may be made to contracts already in existence, by *novation, assignment, and indorsement*, which titles see.

To Suits in Equity. The person who seeks a remedy in chancery by suit, commonly called the plaintiff, or complainant, and the person against whom the remedy is sought, usually denominated the defendant, or respondent, are the parties to a suit in equity.

In equity all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all; 133 U. S. 233, 579; it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matter in the suit, and it is connected with the others; 128 U. S. 403. In the absence of parties, and without their having an opportunity to be heard, a court is without jurisdiction to make an adjudication affecting them; 164 U. S. 471.

Active parties are those who are so involved in the subject-matter in controversy that no decree can be made without their being in court. **Passive parties** are those whose interests are involved in granting complete relief to those who ask it. 1 Wash. C. C. 517. See 3 Ala. 361.

PLAINTIFFS. In general, all persons, whether natural or artificial, may sue in equity; and an equitable title only is sufficient; 10 Ill. 332. Incapacities which prevent suit are *absolute*, which disable during their continuance, or *partial* which disable the party to sue alone.

Persons representing antagonistic interests cannot be joined as complainants; 14 So. Rep. (Ala.) 765.

Alien enemies are under an absolute incapacity to sue. Alien friends may sue; Mitf. Eq. Pl. 129; if the subject-matter be not such as to disable them; Co. Litt. 129 b; not against a sovereign; 1 Sim. 94; 8 Wheat. 464; 4 Johns. Ch. 370; Ad. Eq. 314. In such case he must have been first recognized by the executive of the forum; Story, Eq. Pl. § 55; 3 Wheat. 324.

In such case the sovereign submits to the jurisdiction, as to the subject-matter, and must answer on oath; Mitf. Eq. Pl. 30; Ad. Eq. 313; 6 Beav. 1. See SOVEREIGN.

Attorney-general. Government (in England, the *crown*) may sue both in its own behalf, for its own political rights and interests, and in behalf of the rights and interests of those partaking of its prerogatives or claiming its peculiar protection; Mitf. Eq. Pl. 421; Coop. Eq. Pl. 21, 101; usually by the agency of the attorney-general or solicitor-general; Mitf. Eq. Pl. 7; Ad. Eq. 312. See INJUNCTION; QUO WARRANTO; MANDAMUS; TRUSTS.

Corporations, like natural persons, may sue; Moraw. Pr. Corp. § 357; Grant, Corp. 198; for foreign; id. 200; but in such case the incorporation must be set forth; 1 Cr. M. & R. 206; 4 Johns. Ch. 327; as it must if they are domestic and created

by a private act; 3 Conn. 199; 15 Viner, Abr. 198. All the members of a voluntary association must be joined; 15 Ill. 251; unless too numerous; 2 Pet. 566; 3 Barb. Ch. 362. See JURISDICTION; EXPRESS COMPANIES.

As to the right of a stockholder to sue, see 104 U. S. 460; 106 id. 537; 18 How. 331.

Idiots and lunatics may sue by their committees; Mitf. Eq. Pl. 29. As to when a mere petition is sufficient, see 7 Johns. Ch. 24; 2 Ired. Eq. 294. See NEXT FRIEND.

Infants may sue; Mitf. Eq. Pl. 25; and, if they be on the wrong side of the suit, may be transferred at any time, on suggestion; 3 Edw. Ch. 32. The bill must be filed by the next friend (*q. v.*); Coop. Eq. Pl. 27; 2 Ala. 406; who must not have an adverse interest; 2 Ired. Eq. 478; and who may be compelled to give bail; 1 Paige, Ch. 178. If the infant have a guardian, the court may decide in whose name the suit shall continue; 12 Ill. 424.

A married woman, at common law, was under partial incapacity to sue; 7 Vt. 369. Otherwise, when in such condition as to be considered in law a *feme sole*; 2 Hayw. 406. She could sue on a separate claim by aid of a next friend of her own choice; Story, Eq. Pl. § 61; 1 Freem. 215; but see 2 Paige, Ch. 454; and the defendant might insist that she should sue in this manner; 2 Paige, Ch. 255; 4 Rand. 397.

Though at common law an action could not be maintained by a partnership against another partnership having a common member with the former, upon an agreement made between the two firms, equity will take jurisdiction, and afford an adequate remedy; 50 Minn. 171.

Societies. A certain number of persons belonging to a voluntary society may sue on behalf of themselves and their associates for purposes common to them all; 2 Pet. 366; such as bondholders and stockholders.

The objection for want of proper parties may be taken advantage of either by demurrer, plea, answer, or at the hearing; 24 U. S. App. 601.

Where a defendant insists upon the joinder of a certain party, as a necessary party, there is, upon joining such party, no ground for demurrer for improperly uniting causes of action; 18 N. Y. L. J. 1797, Supreme Ct. of N. Y., App. Div.

DEFENDANTS. Generally, all who are able to sue may be sued in equity. To constitute a person defendant, process must be prayed against him; 2 Bland, Ch. 106; 4 Ired. Eq. 175; 5 Ga. 251; 1 A. K. Marsh. 594. Those who are under incapacity may be made defendants, but must appear in a peculiar manner. One, or more, interested with the plaintiff, who refuse to join may be made defendants; 2 Bland, Ch. 264; 3 Des. 31; 10 Ill. 594; 15 id. 251; 156 Mass. 203. A court of equity even after a final hearing on the merits, and on appeal to the court of last resort, will compel the joinder of necessary parties defendant; 89 Mo. 284. One cannot be made a defendant on his own application, against the objection of the complainant; 15 So. Rep. (Miss.) 33; 2 Tenn. Ch. 140. See INTERVENTION.

Corporations must be sued by their corporate names, unless authorized to come into court in the name of some other person, as president, etc.; Story, Eq. Pl. § 70. Governments cannot, generally, be sued in their own courts; Story, Eq. Pl. § 69; yet the attorney-general may be made a party to protect its rights when involved; 1 Barb. Ch. 157; and the rule does not prevent suits against officers in their official capacity; 1 Dougl. Mich. 225. The directors of a corporation may be included as parties defendant in a bill against a corporation for infringement of a trade-mark; 53 Fed. Rep. 124; or of a patent; 45 id. 432; or where discovery is sought from the officers; 43 id. 349; but not on a bill for an accounting in which no discovery is sought against the officers; 44 id. 219. See INFRINGEMENT; PATENT.

Foreclosure. For the mere purpose of extinguishing an equity of redemption, the mortgage is strictly the only necessary

party; 23 Fed. Rep. 513; but if it be intended to divest other liens, other parties must be brought in; *id.*

In a suit to foreclose a junior mortgage, a prior mortgagee need not be joined; 112 U. S. 8; and more particularly if the prior mortgage is not yet due; 94 U. S. 734; but it is otherwise where the bill prays a receiver for the property covered by such prior mortgage; 106 U. S. 286; or where the junior mortgagee seeks a sale of the property free of incumbrance; 94 U. S. 734; or where there is a doubt as to the amount of the debt due under the prior incumbrance; 43 Hun 521; 94 U. S. 784. Senior mortgagees cannot become parties to an action to foreclose a junior mortgage; 9 Abb. N. C. 256. But where joined he may enforce his lien by a cross-bill; 30 Fed. Rep. 805. Even junior incumbrancers are not indispensable parties, but if not joined, their rights will not be affected; 62 Ill. App. 418; 23 Fed. Rep. 849.

A receiver is a proper, though not a necessary party to foreclosure proceedings begun after his appointment; 105 N. Y. 340; 38 N. J. Eq. 234; he may be permitted to intervene; 4 N. J. Eq. 377.

Bondholders cannot bring proceedings to foreclose a mortgage without showing that they have requested their trustee to proceed and he has refused; 79 Fed. Rep. 25.

Mortgage bondholders may proceed for the protection of their interests where the trustee has refused to sue; 130 Mass. 303; 35 Fed. Rep. 3; 106 U. S. 47; or has acquired interests adverse to those of the bondholders; 52 Fed. Rep. 826; and, in such case, one or more bondholders may sue for themselves and other like bondholders; 59 Fed. Rep. 957; such others may come in at any stage; 2 Woods 447.

A mortgage trustee is the only necessary party to a bill to foreclose the mortgage; he represents the bondholders; see 93 U. S. 156; 4 Dill. 533; 117 U. S. 434; and he is the proper person to bring foreclosure proceedings; 122 U. S. 1; 15 Fed. Rep. 52. A non-resident mortgage trustee may be brought in as defendant by publication in the federal courts; 13 Fed. Rep. 857. In a railroad foreclosure brought by a non-resident bondholder, the fact that the trustee is a resident of the same state as the plaintiff does not affect the jurisdiction of a federal court; 27 Fed. Rep. 1.

A trustee may intervene in a bondholder's suit to foreclose and carry on the suit in his own name; 3 Ill. 487. A buyer at a foreclosure sale makes himself a party to the record; 136 U. S. 89. See INTERVENTION; MORTGAGE.

Corporations are indispensable parties to a bill which affects corporate rights or liabilities; 148 U. S. 804; 110 Mass. 115.

Idiot and lunatics may be defendants and defend by committees, usually appointed guardians *ad litem* as of course; Mitf. Eq. Pl. 103; Story, Eq. Pl. § 70; 6 Paige, Ch. 237.

A guardian *de facto* may not have a bill against a lunatic for a balance due him, but must proceed by petition; 2 D. & B. Eq. 385; 2 Johns. Ch. 242; 2 Paige, Ch. 422.

Infants defend by guardians appointed by the court; Mitf. Eq. Pl. 103; 8 Pet. 128; 12 Mass. 16. On becoming of age, an infant is allowed, as of course, to put in a new plea, or to demur, on showing that it is necessary to protect his rights; 6 Paige, Ch. 353.

Married women might be made defendants, and might answer as if *femes sole*, if the husband was plaintiff, an exile, or an alien enemy, has abjured the realm or been transported under criminal sentence; Mitf. Eq. Pl. 104.

She should be made defendant where her husband sought to recover an estate held in trust for her separate use; 9 Paige, Ch. 225; and, generally, where the interests of her husband conflicted with hers in the suit, and he was a plaintiff; 3 Barb. Ch. 397. See MARRIED WOMEN.

See, generally, as to who may be defendants, JOINDER OF PARTIES.

A failure to join the husband of a married woman in an equitable action against her, is cured by his death pending suit; 84 Ala. 332.

Where proceedings are against an association having numerous members, all need not be made parties defendant; they are good as to all the members named; 11 C. C. R. 525; Story, Eq. Pl. § 94.

In 175 Pa. 13, the same trust company as trustee for two different estates was both plaintiff and defendant in a cause. The court in its opinion adverted to the fact without comment.

AT LAW. IN ACTIONS EX CONTRACTU.

There are two necessary parties to an action, viz. the person who seeks to establish a right in himself, commonly called the plaintiff, and the person upon whom he seeks to impose a corresponding duty or liability, commonly called the defendant. In attachment proceedings there is still a third party, commonly called the garnishee.

PLAINTIFFS. In general, all persons who have a just cause of action may sue, unless some disability be shown; Dicey, Part. 1. An action on a contract, of whatever description, must be brought in the name of the party in whom the legal interest is vested; 3 B. & P. 147; 5 S. & R. 27; 10 Mass. 230, 287; 1 Pet. C. C. 109; 2 Root 119; 21 Wend. 110. See 51 N. H. 71.

On simple contracts, by the party from whom (in part, at least) the consideration moved; 1 Stra. 592; 2 W. & S. 237; although the promise was made to another, if for his benefit; 3 Pick. 38; 10 Wend. 87, 156; 5 Dana 45; and not by a stranger to the consideration, even though the contract be for his sole benefit; Browne, Act. 101. On contracts under seal, by parties to the instrument only; 10 Wend. 87; Co. Litt. 231.

Agents contracting in their own name, without disclosing their principals, may, in general, sue in their own names; 3 B. & Ald. 290; 5 M. & W. 650; 5 Pa. 41; or the principals may sue; 6 Cow. 181; 3 Hill N. Y. 72; 2 Ashm. 485; Broom, Part. 44. See, generally, Ans. Contr. 352.

So they may sue on contracts made for an unknown principal; 3 E. L. & E. 391; and also when acting under a *del credere* commission; 4 Maule & S. 566; 10 Barb. 202; but not an ordinary merchandise broker. An auctioneer may sue for the price of goods sold; 1 H. Bl. 81; 16 Johns. 1; but a mere attorney having no beneficial interest may not sue in his own name; 10 Johns. 383.

Alien enemies, unless resident under a license, or contracting under specific license, cannot sue, nor can suit be brought for their benefit; 1 Campb. 482; 1 Kent 67; 11 Johns. 418. License is presumed if they are not ordered away; 10 Johns. 69; 6 Binn. 241. See, also, Co. Litt. 129 b; 15 East 260; 1 Kent 68.

Alien friends may bring actions concerning personal property; Bac. Abr. *Aliens*; for libel published here; 8 Scott 182; and now, in regard to real estate generally, by statute; 12 Wend. 342; see 15 Tex. 495; and, by common law, till office found, against an intruder; 1 Johns. Cas. 399. But see 5 Cal. 373. See WAR. As a general rule, an alien may maintain a personal action in the federal courts; 3 Story 458; 4 McLean 516.

Assignees of choses in action cannot, at common law, maintain actions in their own names; Broom, Part. 10; 42 Me. 221. Promissory notes, bills of exchange, bailbonds, and replevin bonds, etc., are exceptions to this rule; Hamm, Part. 108. Assignees of a note and mortgage can maintain an action thereon, whether they paid any consideration for the assignment, or not; 74 Wis. 289.

An assignee of real estate may have an action in his own name for breaches of a covenant running with the land, occurring after assignment; 14 Johns. 89; and he need not be named in an express covenant of this character; Broom, Part. 8.

An assignee in insolvency or bankruptcy should sue in his own name on a contract made before the act of bankruptcy or the

assignment in insolvency; 1 Chitty, Pl. 14; Com. Dig. *Abatement* (E 17); 5 S. & R. 394. See 3 Term 779. Otherwise of a suit by a foreign assignee; 11 Johns. 488. The discharge of the insolvent pending suit does not abate it; 11 Johns. 488. But see 1 Johns. 118.

An assignee who is to execute trusts may sue in his own name; 4 Abb. 106. *Cestui que trustent* cannot sue at law; 3 Bouvier, Inst. 135.

Civil death occurring in case of an outlaw, an attainted felon, or one sentenced to imprisonment for life, incapacitates the person for suing as plaintiff during the continuance of the condition; Broom, Part. 85. Sentence as above, during suit, abates it; 1 Du. N. Y. 664; but the right to sue is suspended only; Broom, Part. 85.

Corporations may sue in their true corporate name, on contracts made in their behalf by officers or agents; 2 Blatchf. 343; 6 Cal. 258; 5 Vt. 500; 20 Me. 45; 3 N. J. 321; 9 Ind. 359; Dicey, Part. 276; 39 W. Va. 294; as a bank, on a note given to a cashier; 5 Mo. 26; 4 How. Pr. 63; 21 Pick. 486. A suit against a director for his secret profits on a sale to the company is properly brought by the company and not by its stockholders; 64 Conn. 401.

The name must be that at the time of suit; 3 Ind. 285; 4 Rand. 359; with an averment of the change, if any, since the making of the contract; 6 Ala. 327, 494; even though a wrong name were used in making the contract; 6 S. & R. 16; 10 Mass. 360; 5 Ark. 234; 10 N. H. 123; 5 Halst. 323. See NAME.

If the corporation be a foreign one, proof of its existence must be given; 1 C. & P. 569; 13 Pet. 519; 2 Gall. 105; 5 Wend. 478; 10 Macs. 91; 2 Tex. 531; 1 T. B. Monr. 170; 2 Rand. 465; 2 Green N. J. 439; 1 Mo. 184. See 144 U. S. 451.

Executors and administrators, in whom is vested the legal interest, are to sue on all personal contracts; 5 Term 393; Will. Exec. Index; see 15 S. & R. 183; or covenants affecting the realty but not running with the land; 2 H. Bl. 310; and on such covenants running with the land, for breach during the decedent's lifetime occasioning special damage; 2 Johns. Cas. 17. They must sue, as such, on causes accruing prior to the death of the decedent; 1 Saund. 112; Com. Dig. *Pleader* (2 D 1); 2 Swan 170; and as such, or in their own names, at their election, for those accruing subsequently; 16 Ark. 36; 3 Dougl. 36; Will. Exec. 1590; and upon contracts made by them in their official capacity; 30 Ala. 482; 32 Miss. 319; 15 Tex. 44; in their own names only, in some states; 4 Jones 159.

On the death of an executor, his executor, or administrator, if he die intestate, is the legal representative of the original decedent; 7 M. & W. 306; 2 Swan 127; 2 Bla. Com. 506; unless altered by statute.

Foreign governments, whether monarchical or republican; 5 Du. 634; if recognized by the executive of the forum; 3 Wheat. 324; Story, Eq. Pl. § 55; see 4 Cra. 272; 2 Wash. C. C. 45; 9 Ves. 347; 11 id. 253; may sue; 26 Wend. 212.

Husband must sue alone for wages accruing to the wife, for the profits of business carried on by her, or money lent by her during coverture; 2 W. Bl. 1239; 4 E. D. Sm. 384; and see 1 Salk. 114; 1 Maule & S. 180; 4 Term 516; for slanderous words spoken of the wife which are actionable only by reason of special damage; 2 Du. 633; on a fresh promise, for which the consideration was in part some matter moving from him renewing a contract made with the wife, *dum sola*; 1 Maule & S. 180; and see 2 Pa. 827; for a legacy accruing to the wife during coverture; 22 Pick. 490; and as administrator of the wife to recover chattels real and personal not previously reduced into possession; Broom, Part. 74. See MARRIED WOMAN.

He may sue alone for property that belonged to the wife before coverture; 1 Murph. 41; 5 T. B. Monr. 264; on a joint bond given for a debt due to the wife *dum sola*; 1 Maule & S. 180; 1 Chitty, Pl. 20;

on a covenant running to both; Cro. Jac. 899; 1 B. & C. 443; to reduce choses in action into possession; 2 Maule & S. 396, n. (b); 2 Ad. & E. 30; for damages to his wife's separate real estate; 71 Tex. 264; and, after her death, for anything he became entitled to during coverture; Co. Litt. 351 a, n. 1. And see 4 B. & C. 529.

Infants may sue only by guardian or *prochein ami*; 13 M. & W. 640; 11 How. Pr. 188; 13 id. 413; 13 B. Monr. 193. In a suit by an infant against his guardian, the infant and not his next friend must be made the plaintiff; 157 U. S. 195. Infants who, by their next friend, have procured a judgment from a court with jurisdiction, for the sale of their lands, are bound thereby; 102 N. C. 112.

Joint tenants. See JOINDER.

Lunatic, or non compos mentis, may maintain an action, which should be in his own name; Broom, Part. 84; Hob. 215; 8 Barb. 532. His wife may appear, if he have no committee; 7 Dowl. 22. An idiot may, by a next friend, who petitions for that purpose; 2 Chitty, Archb. Pr. 909.

Married women cannot, in general, sue alone at common law; Broom, Part. 74; but a married woman may sue alone where her husband is civilly dead; see 4 Term 361; Cro. Eliz. 519; 2 B. & P. 165; or, in England, where he is an alien out of the country, on her separate contracts; 1 B. & P. 357; 2 id. 226; 3 Campb. 123; while he is in such condition; Broom, Part. § 114.

So she may sue alone after a sentence of nullity or divorce *a vinculo*; 9 B. & C. 698; but not after a divorce *a mensa et thoro*, or voluntary separation merely; 3 B. & C. 297.

She may, where he is legally presumed to be dead; 5 B. & Ad. 94; 2 M. & W. 894; or where he has been absent from the country for a very long time; 12 Mo. 30; 23 E. L. & E. 127. See 11 East 301; 2 B. & P. 226.

When the wife survives the husband, she may sue on all contracts entered into by others with her before coverture, and she may recover all arrears of rent of her real estate which became due during the coverture, on their joint demise; 8 Taunt. 181; 1 Rolle, Abr. 350 d. She is also entitled to all her real property, and her chattels real and choses in action not reduced into possession by the husband; Broom, Part. 76.

Partners. One partner cannot, in general, sue another for goods sold; 9 B. & C. 356; for work done; 7 B. & C. 419; for money had and received in connection with a partnership transaction; 6 B. & C. 194; or for contribution towards a payment made under compulsion of law; 5 B. & Ad. 936; 1 M. & W. 504. See id. 168; 2 Term 476. But one may sue the other for a final balance struck; Broom, Part. 57; 5 M. & W. 21; 2 Cr. & M. 361; see JOINDER; and they may sue the administrator of a deceased partner; 4 Wisc. 102. One making a contract for himself and his partner cannot sue therein in his own name alone; 72 Wis. 120. An action on an account due a firm is properly brought in the names of its members, though the firm has been dissolved; 160 Mass. 559. The fact that after suit brought by partners, one of them sells his interest in the firm to the others, does not necessitate a change of parties; 6 Tex. Civ. App. 254.

Partners cannot sue or be sued in their copartnership name, but the individual names of the members must be stated; 5 So. Rep. (Miss.) 112. A dormant partner is not a necessary party plaintiff in an action brought by the firm; 3 Tex. Civ. App. 1.

Survivors. The survivor or survivors of two or more jointly interested in a contract not running with the land must sue as such; Broom, Part. 21; Archb. Pl. 54; 1 East 497; 1 Dall. 65, 248; 3 Johns. Cas. 374; 7 Ala. 89.

The survivor of a partnership must sue alone as such; 9 B. & C. 538; 4 B. & Ald. 374; 2 Maule & S. 225. See 119 Ind. 313.

The survivor of several parties to a simple contract should describe himself as such; 3 Conn. 208.

Tenants in common may sue each other singly for actual ouster; Woodf. Landl. & T. 789. See JOINDER; Webb's Poll. Torts 447.

Trustees must sue, and not the *cestuis que trustent*; 1 Lev. 235; 15 Mass. 286; 12 Pick. 554; 4 Dana 474. See JOINDER.

DEFENDANTS. All persons having a direct and immediate legal interest in the subject-matter of the suit are to be made parties. The proper defendants to a suit on a specialty are pointed out by the instrument.

In case of simple contracts, the person made liable expressly by its terms; 3 Bingh. N. C. 732; or by implication of law, is to be made defendant; 2 Bla. Com. 443. See 6 Mass. 253; 1 Chitty, Pl. 24. Where there are several persons parties, if the liability be joint, all must be joined as defendants, either on specialties; 1 Wms. Saund. 154; or simple contracts; Chitty, Contr. 99. If it be joint and several, all may be joined; 1 Wms. Saund. 154, n. 4; or each sued separately; 1 Wms. Saund. 191, c.; Com. Dig. Obligations (G); 3 Term 782; 1 Ad. & E. 207; if it be several, each must be sued separately; 1 East 236. The presumption is, in such case, that a written agreement is joint; 2 Campb. 640; 3 id. 49, 51, n.; otherwise of verbal contracts; 1 Ad. & E. 691; 3 B. & Ald. 89.

Alien enemies may be sued; Broom, Part. 18; 1 W. Bla. 30; Cro. Eliz. 516; 4 Bingh. 421; Com. Dig. Abatement (E 3); see 18 Wall. 99; 65 Ill. 288; 30 Md. 512; and, of course, alien friends.

Assignees of a mere personal contract cannot, in general, be sued; of covenants running with the realty may be, for breach after assignment; 3 Saund. 304, n. 12; Woodf. Landl. & T., 1st Am. ed. 260; 7 Term 312; 1 Dall. 210; but not after an assignment by him; Bac. Abr. Covenant (E 4). Assignees of bankrupts cannot be sued as such at law; Cowp. 134; Chitty, Pl. 11, n. (f).

Bankrupts after discharge cannot be sued. An insolvent after discharge may be sued on his contracts, but his person is not liable to arrest in a suit on a debt which was due at the date of his discharge; Dougl. 93; 8 East 311; 1 Saund. 241, n. 5.

See CONFLICT OF LAWS; BANKRUPTCY; INSOLVENCY.

Corporations must be sued by their true names; Moraw. Pr. Corp. § 355; 7 Mass. 441; 2 Cow. 778; 15 Ill. 185; 4 Rand. 359; 2 Blatchf. 343. See NAME. Assumpsits lies against a corporation aggregate on an express or implied promise, in the same manner as against an individual; 3 Halst. 182; 3 S. & R. 117; 12 Johns. 251; 7 Cra. 297; 2 Bay 109; 10 Mass. 397; 9 Pet. 541; 2 Conn. 260; 5 Q. B. 547.

Executors and administrators of a deceased contractor or the survivor of several joint contractors may be sued; Hamm. Part. 156; but not if any of the original contractors survive; 6 S. & R. 272; 2 Wheat. 844.

The liability does not commence till probate of the will; 2 Sneed 53. The executor or administrator *de bonis non* of a deceased person is the proper defendant; Broom, Part. 197.

The liability is limited by the amount of assets, and does not arise on subsequent breach of a covenant which could be performed only by the covenantor; Broom, Part. 118. They, or real representatives, may be parties, at the election of the plaintiff, where both are equally liable; 1 Lev. 189, 303.

The personal representative must be made a party before debts can be decreed against a decedent's estate; 32 W. Va. 14; 71 Tex. 103.

Foreign governments cannot be sued to enforce a remedy, but may be made defendants to give an opportunity to appear; 14 How. Pr. 617. A foreign sovereign cannot be sued for any act done by him in the character of a sovereign prince; 2 H. L. C. 1; 17 Q. B. 171; it would appear most probably that he can in no case be made defendant in an action; Dicey, Part. *5; but see 10 Q. B. 656. See JURISDICTION.

Heirs may be liable to suit under the ancestor's covenant, if expressly named, to the extent of the assets received; Broom, Part. 118; Platt, Cov. 449.

Husband may be sued alone at common law for breach of joint covenant of himself and wife; 15 Johns. 483; 17 How. 609; and must be on a mere personal contract of the wife made during coverture; Com. Dig. Pleader (2 A 2); 8 Term 545; 2 B. & P. 105; 16 Johns. 281; even if made to procure necessities when living apart; 6 W. & S. 346; may be on a new promise for which the consideration is a debt due by the wife before marriage; 7 Term 348; but such promise must be express; Broom, Part. 174; and have some additional consideration, as forbearance, etc.; 1 Show. 183; 11 Ad. & E. 438, 451; on lease to both made during coverture; Com. Dig. Baron & F. (2 B); on lease to wife *dum sola*, for rent accruing during coverture, or to wife as executrix; Broom, Part. 178; Com. Dig. Baron & F. (T); 1 Rolle, Abr. 149; not on wife's contracts *dum sola* after her death; 3 Mod. 186; 3 P. Wms. 410; except as administrator; 7 Term 350; Cro. Jac. 257; 1 Campb. 189, n.

He is liable, after the death of the wife, in cases where he might have been sued alone during her lifetime. See MARRIED WOMEN.

Idiots, lunatics, and non compos mentis, generally, may be sued on contracts for necessities; 2 M. & W. 2.

Infants may be sued on their contracts for necessities; 10 M. & W. 195; Macph. Inf. 447. Ratification in due form; 11 Ad. & E. 934; after arriving at full age, renders them liable to action on contracts made before.

Partner is not liable to action by his co-partners. A sole ostensible partner, the others being dormant, may be sued alone by one contracting with him; Broom, Part. 172.

A partnership cannot be sued as such, but the names of its members must be set out; 17 Or. 256. Garnishment to secure a claim against a partnership cannot be maintained against a partner individually; 19 Colo. 206.

Survivor of two or more joint contractors must be sued alone; 1 Saund. 291, n. 2; 2 Burr. 1196. A sole surviving partner may be sued alone; Chitty, Pl. 152; 1 B. & Ald. 29.

IN ACTIONS EX DELICTO. PLAINTIFFS. The plaintiff must have a legal right in the property affected, whether real; 2 Term 684; Broom, Part. 202; Co. Litt. 240 b; 2 Bla. Com. 185; or personal; 11 Cush. 55; though a mere possession is sufficient for trespass, and trespass *quare clausum*; Cro. Jac. 122; 4 B. & C. 591; 1 Ad. & E. 44; and the possession may be constructive in case of trespass for injury to personal property; 6 Q. B. 606; 5 B. & Ald. 603; 1 Hill N. Y. 311. The property of the plaintiff may be absolute; 5 Bingh. 305; 1 C. B. 672; or special. See 7 Term 9; 4 B. & C. 941.

Agents who have a qualified property in goods may maintain an action of tort in their own names for injury to the goods.

A principal may sue in the name of his agent for a false representation to the agent; 12 Wend. 176.

Assignees of property may sue in their own names for tortious injuries committed after the assignment; 3 Maule & S. 7; 1 Ad. & E. 580; although it has never been in their possession; 9 Wend. 80; 8 B. & C. 270; Wms. Saund. 252 a, n. (7). Otherwise of the assignee of a mere right of action; 12 N. Y. 322; 18 Barb. 500; 7 How. 492. See 15 N. Y. 432. Assignees in insolvency may sue for torts to the property; 8 S. & R. 124; but not to the person of the assignee; W. Jones 215.

Executors and administrators cannot, in general, sue in actions *ex delicto*, as such actions are said to die with the plaintiff; Broom, Part. 212; 13 N. Y. 322. See ACTIO PERSONALIS. They may sue in their own names for torts subsequent to the death of the deceased; 11 Rich. 363.

Heirs and devisees have no claim for torts committed during the lifetime of the an-

cestor or deviser; 2 Inst. 305.

Husband must, at common law, sue alone for all injuries to his own property and person; 3 Bla. Com. 143; Cro. Jac. 473; 1 Lev. 3; including personality of the wife which becomes his upon marriage; 6 Call 55; 13 N. H. 283; Cro. Eliz. 133; 6 Ad. & E. 359; 27 Vt. 17; Hempst. 64; and including the continuance of injuries to such property commenced before marriage; 1 Salk. 141; 6 Call 55; in replevin for timber cut on land belonging to both; 8 Watts 412; for personal injuries to the wife for the damages which he sustains; 3 Bla. Com. 140; Chitty, Pl. 718, n.; 4 B. & Ald. 523; 4 La. 420; as in battery; 8 Mod. 342; 2 Brev. 170; 11 So. Rep. (La.) 541; slander, where words are not actionable *per se*; 4 B. & Ad. 514; 22 Barb. 396; or for special damages; 4 B. & Ad. 514; 112 N. C. 293.

He may sue alone, also, for injuries to personality commenced before marriage and consummated afterwards; 2 B. & P. 407; and the right survives to him after death of the wife in all cases where he can sue alone; 1 Chitty, Pl. 75; Viner, Abr. *Baron & F.* (G); for cutting trees on land held by both in right of the wife; 16 Pick. 235; 1 Rep. Husb. & W. 215; and generally, for injury to real estate of the wife during coverture; 18 Pick. 110; 20 Conn. 296; 3 Wils. 414; although her interests be reversionary only; 5 M. & W. 142; he may also sue alone for damages for the negligent failure of a telegraph company to transmit and deliver a message to his wife; 70 Tex. 689.

Infants may sue by guardian for torts; Broom, Part. 238.

Lessors and reversioners, generally, may have an action for injury to their reversions; Broom, Part. 214. Damage necessarily to the reversion must be alleged and shown; 1 Maule & S. 234; 11 Ad. & E. 40; 10 B. & C. 145.

Lessees and tenants, generally, may sue for injuries to their possession; 4 Burr. 2141; Woodf. Landl. & T. 661.

Married woman must sue alone for injury to her separate property; 29 Barb. 512; see 129 Ind. 472; she may bring an action of detinue to recover her separate personal property and join her husband as co-plaintiff; 37 W. Va. 377.

The restrictions on her power to sue are the same as in actions *ex contractu*; Broom, Part. 233. Actions in which she might or must have joined her husband survive to her; Rolle, Abr. 349 (A). A married woman though living with her husband may maintain an action for slander in her own name, and without joining him; 89 Ga. 829.

The dissolution of marriage by divorce does not enable the wife to sue her husband for a tort committed on her during coverture; 46 Ill. App. 106. She may maintain in her own name an action for the alienation of her husband's affections; 29 N. E. Rep. (Ill.) 389; 32 id. 932. See 31 Cent. L. J. 29.

Master has an action in tort for enticing away an apprentice; 3 Bla. Com. 342; 3 Maule & S. 191; and, upon the same principle, a parent for a child; 1 Halst. 322; 4 B. & C. 660; 4 Litt. 25; and for personal injury to his servant, for loss of time, expenses, etc.; 3 Bla. Com. 342; Sm. M. & S. 171.

For seduction or debauchery, a master; Broom, Part. 227; 4 Cow. 422; and if any service be shown, a parent; 2 M. & W. 542; 6 id. 56; has his action.

Survivor, whether sole or several, must sue for a tortious injury, the rule being that the remedy, and not the right, survives; Broom, Part. 212; 1 Show. 188; 2 Maule & S. 225.

Tenants in common must sue strangers separately in distress and avowry for rent; 15 Johns. 479.

A tenant in common may sue his co-tenant, where there has been actual ouster, in ejectment; Littleton § 322; 1 Campb. 173; 11 East 49; or trespass *quare clausum*; 7 Pa. 397; and trespass for mesne profits after recovery; 3 Wils. Ch. 118. Where there is a total destruction or conversion of the property, one tenant in common may sue his co-tenant in trespass; Co. Litt. 290

a, b; Cro. Eliz. 157; 8 B. & C. 257; or in trover; 1 Term 658; 2 Ga. 73; 2 Johns. 468; 6 Ired. 388. For a misfeasance, waste, or case in the nature of waste, may be brought.

DEFENDANTS. He who commits the tortious act or asserts the adverse title is to be made defendant: as the wrongful occupant of land, in ejectment; 1 B. & P. 573; the party converting, in trover; Broom, Part. 246; making fraudulent representations; 3 Term 56; 3 M. & W. 582. The act may, however, have been done by the defendant's agent; 2 M. & W. 650; his mischievous animal; 12 Q. B. 29; or by the plaintiff himself if acting with due care and suffering from the defendant's negligence; 1 Q. B. 29; 10 Ill. 425.

Agents and principals; Story, Ag. § 625; Paley, Ag. 394; are both liable for tortious act or negligence of the agent under the direction; 1 Sharsw. Bla. Com. 431, n.; or in the regular course of employment, of the principal; 10 Ill. 425; 1 Metc. Mass. 550. See 2 Den. 115. As to the agent of a corporation acting erroneously without malice, see 1 East 555.

Subsequent ratification is equivalent to prior authority; Broom, Part. 259.

Agents are liable to their principals for conversion; 14 Johns. 128; 8 Pa. 443.

Assignees are liable only for torts committed by them: as, where one takes property from another who has possession unlawfully; Bac. Abr. *Actions* (B); or continues a nuisance; 2 Salk. 460; 1 B. & P. 409.

Bankrupts; 3 B. & Ald. 408; 2 Den. 73; and **insolvents**; Broom, Part. 284; 2 B. & Ald. 407; 9 Johns. 161; are liable even after a discharge, for torts committed previously.

Corporations are liable for torts committed by their agents; Moraw. Pr. Corp. § 725; 2 Wend. 452; 17 Mass. 503; 4 S. & R. 16; 2 Ark. 255; 4 Ohio 500; 4 Wash. C. 106; 5 Ind. 252; but not, it seems, at common law, in replevin; Kyd, Corp. 205; or trespass *quare clausum*; 9 Ohio 81. In an action against a corporation for a tort, the corporation and its servant by whose act the injury was done may be joined as defendants; 98 N. C. 34.

Death of a tort-feasor, at common law, takes away all cause of action for torts disconnected with contract; 5 Term 651; 1 Saund. 291 e. But actions against the personal representatives are provided for by statute in most of the states, and in England by stat. 3 & 4 Will. IV. c. 42, § 2.

Executors and administrators, at common law, are liable for the continuance of torts first committed by the deceased; W. Jones 173; 5 Dana 34; see 28 Ala. n. s. 360; but such continuance must be laid to be, as it really is, the act of the executor; 1 Cowp. 373; Will. Exec., 7th Am. ed. *1602; 13 Pa. 54; 1 Harring. Mich. 7.

Husband must be sued alone for his torts, and in detinue for goods delivered to himself and wife; 2 Bulstr. 308; 1 Leon. 312.

He may be sued alone for a conversion by the wife during coverture; 2 Rep. Husb. & W. 127. In an action for a wife's personal tort the husband is properly joined as defendant; 61 Hun 164; 44 Mo. App. 583.

Idiots and lunatics are liable, civilly, for torts committed; Bac. Abr. *Trespass* (G); Webb, Poll. Torts 59, n.; though they may be incapable of design; Broom, Part. 261. But if the lunatic is under control of an officer, proceedings must be in that court, or it will constitute a contempt; 3 Paige 199.

Infants may be sued in actions *ex delicto*, whether founded on positive wrongs or constructive torts; Broom, Part. 280; Co. Litt. 180 b, n. 4; as, in detinue for goods delivered for a specific purpose; 4 B. & P. 140; for tortiously converting or fraudulently obtaining goods; 3 Pick. 492; 5 Hill N. Y. 391; 4 M'Cord 387; for uttering slander; 8 Term 337; but only if the act be wholly tortious and disconnected from contract; 8 Term 35; 6 Watts 1; 6 Cra. 226.

Lessor and lessee are respectively liable for their part of the tort in case of a wrong commenced by one and continued by the

other; as, for example, a nuisance; 2 Salk. 460; Broom, Part. 253; Woodf. Landl. & T. 671.

Master is liable for a negligent tortious act or default of his servant while acting within the scope of his employment; 6 Cow. 189; 2 Gray 181; 23 N. H. 157; 16 Me. 241; 5 Rich. 44; 18 Mo. 362; 75 Hun 63; 160 Pa. 300; 37 W. Va. 606; for the direct effect of such negligence; 17 Mass. 132; but not to one servant for the neglect of another engaged in the same general business; 36 Eng. L. & Eq. 486; 3 Cush. 270; 15 Barb. 574; 6 Ind. 205; 22 Ala. n. s. 294; 23 Me. 269; 4 Sneed 36; 161 Pa. 270; 160 Mass. 45; 98 Mich. 135; 7 Wash. 178; 154 U. S. 349; if the servant injured be not unnecessarily exposed; 28 Vt. 59; 6 Cal. 209; 4 Sneed 36.

And the servant is also liable; 1 Sharsw. Bla. Com. 431, n. For wilful acts; 9 C. & P. 607; 3 Barb. 42; for those not committed while in the master's service; 26 Pa. 482; or not within the scope of his employment, he alone is liable.

Partners may be sued separately for acts of the firm, its agents or servants; 4 Gill 406; 1 C. & M. 93; 17 Mass. 182; 11 Wend. 571.

In an action to recover damages for a tort committed by a corporation prior to the appointment of a receiver, the latter is not a proper party; 83 Fed. Rep. 93. See INTERVENTION; MORTGAGE; UNITED STATES COURTS; REMOVAL; JOINDER; MISJOINDER; MISNOMER; NAME; RECEIVER; PATENT.

PARTITION. The division which is made between several persons of lands, tenements, or hereditaments, or of goods and chattels which belong to them as co-proprietors. The term is more technically applied to the division of real estate made between co-parceners, tenants in common, or joint tenants.

Voluntary partition is that made by the owners by mutual consent. It is effected by mutual conveyances or releases to each person of the share which he is to hold, executed by the other owners. Cruise, Dig. tit. 32, c. 6, § 14.

Compulsory partition is that which takes place without regard to the wishes of one or more of the owners.

At common law the right of compulsory partition existed only in cases of co-parcenary; Litt. § 264. By statutes of 31 Henry VIII. c. 1, and 32 id. c. 2, the right was extended to joint tenants and tenants in common. These statutes have been generally re-enacted or adopted in the United States, and usually with increased facilities for partition; 4 Kent 362; Co. Litt. 175 a; 2 Bla. Com. 185; 16 Vin. Abr. 217. Partition at common law is effected by a judgment of the court and delivering up possession in pursuance of it, which concludes all the parties to it. In England the writ of partition has been abolished by stat. 3 & 4 Wm. IV. c. 27, § 36.

Courts of equity also exercise jurisdiction in cases of partition where no adequate remedy could be had at law, as where the titles to the estates in question are such as are cognizable only in equity or where it is necessary to award owelty of partition. This jurisdiction was first settled in Elizabeth's time, and has increased largely on account of the peculiar advantages of the chancery proceeding; 1 Spence, Eq. 654. Nor have the increased facilities grafted by statute upon the common-law proceedings ousted the jurisdiction; 1 Story, Eq. § 646.

Partition in equity is effected by first ascertaining the rights of the several parties interested; and then issuing a commission to make the partition required; and finally on return of the commissioners and confirmation thereof, by decreeing mutual conveyances between the parties; Mitf. Eq. Pl. 120; 2 Sc. & L. 371. Where the titles of the parties are legal titles, the decree in the partition has been held to vest the titles in the purparts without conveyances.

A suit in the nature of partition cannot be maintained where there has been an ouster of the complainants by the de-

defendant tenant in common, by acts so overt and notorious as to imply notice to his co-tenants; 37 Fed. Rep. 273; 80 Ala. 70. An adverse holding by any one of the parties for a period of time, however short, before the institution of proceedings in partition, is effectual to defeat the proceedings; 126 Pa. 297.

A voluntary partition of land by persons under legal disabilities is binding when fairly and equally made and free from fraud; 49 N. E. Rep. (Ind.) 373.

Where there is a parol partition, a party acquiescing in it and accepting exclusive possession under it is estopped from asserting title or right to possession in violation of its terms; 45 Fed. Rep. 742.

PARTNERS. Members of a partnership.

General partners are those whose liability for partnership debts is unlimited.

Ostensible partners are those whose names appear to the world as partners, and who in reality are such.

Nominal partners are those who are held out as partners but who have no interest in the firm or business. They may be liable as partners by reason of their own acts, without being actually partners.

Secret partners are partners whose connection with the firm is not publicly made known.

Silent partners are those who, though having a share in the firm profits, have no voice in the firm business.

Dormant partners are those whose names and transactions as partners are professedly concealed from the world. They combine the characters of both secret and silent partners.

A dormant partner is one whose name is not mentioned in the title of the firm, or embraced in some general term, as company, son, etc.; 4 Phill. 1. It is not necessary that his membership be universally unknown; it is enough if he is not an ostensible partner; 2 Fed. Rep. 640.

Special partners are those whose liabilities are limited by statute to the amount of their respective contributions. Ordinarily a special partner is associated with at least one general partner by whom the business is managed, but in the "partnerships limited" organized under recent statutes, all the parties have a limited liability.

WHO MAY BE. *General rule.* Persons who have the legal capacity to make other contracts may enter into that of partnership; Lind. Part. *77; 1 Col. Part. § 11; Pars. Part. § 14.

Aliens. An alien friend may be a partner; Lind. Part. *78; Co. Litt. 129 b. An alien enemy cannot enter into any commercial contract; 1 Kent *66; 16 Johns. 438; 7 Pet. 536; 9 Bush 15; 11 Exch. 135; and the breaking out of a war between two countries in which partners reside dissolves the partnership; 91 U. S. 70. See WAR.

Clergymen were disqualified to enter into a partnership in England by 57 Geo. III.

Corporations. There is no general principle of law which prevents a corporation from being a partner with another corporation, or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its charter; Lind. Part., 2d Am. ed. *78; 46 Conn. 136; Grant, Corp. 5; 5 Gray 58; they are said to be *prima facie* ineligible as partners; George, Partn. 15; 121 N. Y. 582; 68 Pa. 173; 86 Tenn. 598; Beach, Corp. § 842. The purchase of an interest in a firm by a corporation does not make it a partner; 62 Mo. App. 390; but see 46 Conn. 136, where the charter authorized the corporation to enter into a partnership. See also 7 Wend. 412, where it was held that two corporations cannot form a partnership. A corporation which shares profits may be held to make good losses; 14 Barb. 479. While a contract of partnership between a corporation and an individual is *ultra vires* as to this corporation, yet if the corporation

has received the benefit of the contract, it must account to the other party for what is due him under the contract; 182 Pa. 206.

Firms. Two firms may be partners in one joint firm; 1 Abb. Pr. 243; 1 Fed. Rep. 800. Where a partnership and an individual form a second partnership, all the members of the first partnership are members of the new firm; 114 Ill. 574.

Felons. Felons probably are not disqualified, in the absence of any statutory restriction, to enter into a contract of partnership in this country; George, Partn. 11.

Infants. An infant may contract the relation of partner, as he may make any trading contract which is likely to prove for his advantage; 17 Gratt. 503; 5 B. & Ald. 147. Such a contract made by a person during infancy is voidable and may be affirmed or disaffirmed by him at majority; Story, Part. § 7; 42 Mich. 184; but whether he may disaffirm before majority is doubtful; 31 Mich. 182; Lind. Part., 2d Am. ed. *74, n.; though it is said that he may; Pars. (Jas.) Partn. § 136. He may reclaim his contribution before majority; 83 N. Y. 245. Unless he gives notice of disaffirmance, or in some manner repudiates the contract within a reasonable time after becoming of age, he will be presumed to have ratified it; Story, Part. § 7; 9 Vt. 368; but it is held that there must be positive acts of ratification after majority; neglect to disaffirm is not ratification; 3 Cush. 372; see 8 Exch. 181; 8 N. Y. 228; and his liability then relates back to firm contracts made during his minority; 33 S. C. 285; 21 Mich. 304. The person with whom the minor contracts will be bound; 2 M. and S. 205; 1 Watts 412; 3 Green N. J. 343. In England and in Maine ratification, after majority, must be in writing.

Lunatics. A lunatic is probably not absolutely incapable of being a partner; Lind. Part. *84; since the insanity of a partner does not *per se* dissolve the firm, but simply amounts to a sufficient cause for a court of equity to decree a dissolution; 1 Cox, Ch. 107; 2 Myl. & K. 125; 15 Johns. 57; contra, 6 Humphr. 85. Whether a contract by a lunatic to become a partner can in all cases be avoided by him, is, perhaps, unsettled; Story, Part. § 7, n. 1.

Married women. Married women, at common law, are incapable of becoming partners, since they are generally unable to contract or engage in trade; 30 Md. 402; Story, Part. § 10; 3 De G., M. & G. 18; see 36 S. C. 424; and cannot be made partners by estoppel; 27 S. C. 525; 31 Ind. 113. But where a married woman is authorized by custom, statute, or otherwise to trade as a *feme sole*, she may probably be a partner; 52 Miss. 402; 43 Ark. 212; 57 Ia. 361; contra, 91 Ind. 384; Story, Part. § 10; Pars. Part. § 19. The mere consent of her husband to her trading as a *feme sole* does not necessarily permit her to become a partner; Story, Part. § 13. In some states she may be a partner as to her separate estate; 74 Pa. 448; 94 Mich. 230; contra, 20 W. Va. 571. A married woman, by acting as partner and continuing the business after her husband's death, creates a partnership from the beginning; 10 Paige 82.

Except as above stated, a married woman cannot become a partner without statutory authority; 23 Fla. 33; 27 S. C. 525; 20 W. Va. 571; in any case, however, the capital she puts in is liable for the firm debts; 66 Mo. 617. It has been held that where the wife cannot be a partner, the husband will be considered as such; 65 Tex. 131.

Under modern married women statutes, a wife is not, according to most of the cases, permitted to enter into partnership with her husband; 140 Mass. 521; 4 Wash. St. 263; 16 L. R. A. (Ark.) 526; 73 Mich. 146; contra, 122 N. Y. 308. See 3 Biss. 405.

Number of persons. Generally speaking, the common law imposes no restriction as to the number of persons who may carry on trade as partners; 1 Col. Part. § 10; 27 Ind. 399; unless by statute, as in England, where the limit is twenty. But a partner-

ship cannot consist of but one person; 46 Mich. 449.

As to who are partners, see PARTNERSHIP.

POWERS OF PARTNERS. *General rule.* It has been customary to derive the authority of a partner from an assumed relation of mutual agency between the members of the firm, and it is true that the firm is responsible for whatever is done by any of the partners while acting for it within the limits of the authority conferred by the nature of the business carried on; 8 H. L. Cas. 268; Lind. Part., 2d Am. ed. *124; 36 Pa. 498; 58 Mo. 532; 45 Miss. 499; 59 Ala. 386. The principle of agency applies to copartners; but it is only when one is acting as their agent that he binds them; 18 N. Y. L. J. 1315. It is perhaps more accurate to trace a partner's power to his standing as a co-principal, and to consider his agency an incident of this relation; 5 Ch. Div. 458; L. R. 7 Ex. 218. The relation is a peculiar sort of agency, where the partner is agent for the firm and not merely for the other partners; 5 Ch. Div. 458. Whatever the source of a partner's power, it is, as a rule, limited to acts incident to carrying on, in the usual way, the particular business in which the firm is engaged, and each partner has the power to manage the ordinary business of the firm, and, consequently, to bind his co-partners, whether they be ostensible, dormant, actual, or nominal; 2 B. & Ald. 673; 1 Cr. & J. 316; by whatever he may do, in the course of such management, as entirely as to bind himself. But the acts of a partner wholly unconnected with the business of the partnership do not bind the firm; 2 B. & Ald. 678; 8 Me. 320; 15 Pick. 290; 3 Johns. Ch. 23; nor will an act beyond the scope of the partnership; 79 Ga. 268.

The partner's authority is incident to, and co-extensive with, the business; Pars. (Jas.) Partn. § 133. A partner's authority to act cannot be restricted by notice from another partner to a third party; 5 Den. 541; 41 N. Y. 376. An insolvent partner has the same authority, even after dissolution; 1 Duer 662. Partners may, by agreement, restrict the authority of a partner, as between themselves, but not as to third parties, without notice; Pars. (Jas.) Part. § 134.

One of two partners in the practice of the law has no authority to accept for the firm an agency for the mere sale of real estate; 152 U. S. 673.

Accounts. One partner can bind his firm by rendering an account relating to a partnership transaction; 8 Cl. & F. 121; 47 Mo. 346; Lind. Part., 2d Am. ed. *28.

Actions. One partner can bring an action on firm account in his own and his co-partners' names without their consent, but they are entitled to indemnity if he sues against their will; Lind. Part., 2d Am. ed. *271; 2 Cr. & M. 318; 67 Mo. 568. This power of a partner survives the dissolution of the firm; 1 E. D. Sm. 423. One partner cannot, as a rule, sue in his own name for a firm debt; the suit must be in the names of all; Penn. N. J. 711.

Admissions. After the relation of partnership has been established, a partner may bind his co-partner by an admission; Pars. (Jas.) Partn. § 121; 143 Mass. 473; 65 Wis. 247; but the existence of the partnership must be shown by other evidence; 102 N. Y. 336. See *infra*.

Appearance. In an action against partners, one may enter or authorize an appearance for the rest; 7 Term 207; 17 Vt. 531; 1 Binn. 214; 6 Johns. 296; 32 N. Y. Supp. 840; 4 Kan. 240; contra, L. R. 8 Q. B. 398; 3 Ohio 519; see Pars. (Jas.) Partn. § 119; 10 App. Cas. 690; but not after dissolution of the firm; 2 McCord 311. Nor can one partner bind his co-partners personally and individually by entering an appearance for them when they are not within the jurisdiction, nor served with process; 9 Cush. 390; 11 How. 165. A partner cannot authorize an appearance for a co-partner, not subject to the jurisdiction of the court, or if the firm has been dissolved; 91 U. S. 160; but a solicitor instructed by a managing

partner may enter an appearance for all partners; [1896] 1 Q. B. 386.

Arbitration. As a general rule, one partner cannot bind the firm by submitting any of its affairs to arbitration, whether by deed or parol; 3 Kent 49; 3 C. & B. 742; 35 Mich. 5; 2 So. Rep. (Ala.) 268; 40 Vt. 460; 19 Johns. 187; 1 Pet. 221. The reason given being that such a power is unnecessary for carrying on the business in the ordinary way; Lind. Part., 2d Am. ed. *129, *272. But the acting partner may be bound; 19 Johns. 137; 5 G. & J. 413. And the general rule is perhaps somewhat relaxed; Pars. Partn. § 121. It is held that one partner may bind the firm by submission to arbitration, by an agreement not under seal; 89 Pa. 453; 3 T. B. Monr. 435; 25 Ill. 48; but apparently only so as to bind firm assets; 12 S. & R. 243; 89 Pa. 453.

Assignments. The right of a partner to dispose of the property of the firm extends to the assignment of at least a portion of it as security for antecedent debts, as well as for debts thereafter to be contracted; Story, Part. § 101; 5 Cra. 289; 58 Mo. 532; 17 Vt. 394. Although the authorities differ, the better opinion seems to be that one partner cannot, without the knowledge or consent of his co-partners, assign all the property of the firm to a trustee for the benefit of creditors; 13 Minn. 43; 34 Mo. 329; 50 Ala. 251; 29 Ohio St. 441; 32 Wis. 444; 17 Vt. 390; 69 Miss. 17; 2 Tex. App. 226; 134 U. S. 206; unless the co-partner is absent, or is incapable of giving his assent or dissent; 90 Va. 200; 27 Minn. 255; but not against the assent, or without the consent, of the co-partner, if the latter is present and capable of acting; 176 Pa. 52. A surviving partner has power to make an assignment for the benefit of the firm's creditors; 76 Md. 531.

Bills of exchange and promissory notes. A partner may draw, accept, and indorse bills and notes in the name and for the use of the firm, for purposes within the scope of its business; 7 Term 210; 20 Miss. 226; 119 Mass. 215; 73 Ill. 234. A restriction of this power by agreement between the partners does not affect third persons unless they have notice; 27 La. Ann. 352; 44 Miss. 283. This power cannot be exercised after dissolution of the firm; 42 Mich. 110; 51 Cal. 531; but its exercise may bind the firm if such dissolution be without proper notice; 130 Mass. 591; or when the other party subsequently assents thereto; 98 Ga. 468.

The doctrine is generally limited to partnerships in trade and commerce, and does not apply to other partnerships, unless it is the common usage of such business so to bind the firm, or it is necessary for the due transaction thereof; 145 U. S. 512. Non-trading partners, such as farmers; 57 Ill. 531; lawyers; 37 Wis. 285; physicians; 1 Humph. 23; cannot usually bind the firm by such instruments. Parties dealing with non-trading partnerships are put on inquiry; 10 Heisk. 629; 33 La. Ann. 196; the doctrine of general agency does not apply; 53 Conn. 53.

A bill or note made by one partner in the name of the firm is *prima facie* for partnership purposes; 31 Mich. 373; 34 Pa. 344; 16 Wend. 504; 44 Miss. 283.

A partner has no implied authority to indorse a note made payable to a co-partner, although for firm account; 64 Ga. 221; nor to bind the firm as a party to a note for the accommodation of or as surety for another; 19 Johns. 154; 5 Conn. 574; 21 Miss. 122; 31 Me. 452; 49 Minn. 557; 1 App. D. C. 171; unless by special authority implied from the nature of the business or previous course of dealing; 3 Kent 46; 3 Humph. 597; 4 Hill N. Y. 261; and the burden is on the holder of the instrument to show such authority; 19 Johns. 154; 86 Mich. 632; 69 Miss. 17. Direct proof is not necessary; the authority or ratification may be inferred from circumstances; 2 Cush. 309; 22 Me. 188; 14 Wend. 133; 10 Vt. 268. Indorsement of a note for a third person by a partner in the firm name without the knowledge of the other member of

the firm and having no connection with its business, does not bind the firm; 129 U. S. 372.

Borrowing money. One partner may borrow money on the credit of the firm, when it is necessary for the transaction of the business in the ordinary way; 115 Mass. 388; 62 Pa. 393; 75 Ill. 629; 61 Ala. 143; but the amount must be within the usual business of the firm; Pars. (Jas.) Partn. § 125; but a partner in a cash business, as a firm of solicitors, cannot borrow; 37 Wis. 285; or physicians; Humph. 23. It is said that a partner cannot borrow to increase the firm's capital; 2 Hare 218. A contract to borrow money in violation of a partnership agreement is not valid, though made in furtherance of the interests of the firm; 13 So. Rep. (Miss.) 282.

Checks. One partner has the implied power to bind the firm by firm checks drawn on its bankers; 3 C. B. N. S. 442. See 159 Pa. 287. Such checks must not be post-dated; L. R. 6 Q. B. 209.

Compromise. A partner may compromise with debtors or creditors of the firm; Story, Part. § 115; 30 Conn. 1; 7 Gill 49.

Confession of judgment. One partner cannot, by confessing a voluntary judgment against the firm, bind his co-partners; 172 Pa. 70; see 51 Mo. App. 470; 43 id. 121. But a judgment so confessed will bind the partner who confessed it; 91 U. S. 160; 3 C. B. 742; 154 Pa. 152; 13 Ia. 496; 32 Vt. 709; 30 La. Ann. 692; but see 22 How. 209; and will bind the firm assets; see 8 Kulp Pa. 264; 32 La. Ann. 607, where it was held that a "commercial partner" has a right to confess judgment on behalf of the firm. Only the other partner can object to it; 42 Ill. App. 291. Where a judgment note has been signed in the firm name only, the plaintiff may name the individual members, and judgment may be entered in this form; 172 Pa. 70.

Contracts. A partner has the power to bind the firm by simple contracts within the scope of the partnership business; 15 Mass. 75; 5 Pet. 529; and make a contract which will bind them as partners and also as individuals; 78 Ga. 797; but not a contract to convey firm real estate; 5 Hill N. Y. 107.

Debts. One partner may receive debts due the firm, and payment to him by the debtor extinguishes the claim; 12 Mod. 446; 1 Wash. Va. 77; 2 Blackf. 371; 14 La. Ann. 681; 4 Binn. 375; even after dissolution; 15 Ves. 198; although the debtor knew there was an agreement that one party alone was to collect and pay the debts; 44 Ill. App. 500. A partner may also bind the firm by assenting to the transfer of a debt due to it, as the transfer of the firm's account from one banker to another; 2 H. & N. 326. A partner cannot employ partnership funds to pay his own pre-existing debt, without the consent of his co-partners; 18 Conn. 294; 12 Pet. 221; 31 Ala. 532; 28 Ohio St. 55; 94 Pa. 31; 87 Ga. 651; 121 U. S. 310. But in 57 Fed. Rep. 257, it was held that one of two co-partners could pledge the partnership property to secure his private debts, to the extent of his interest therein.

Deeds. One partner has no implied authority to bind his co-partners by a deed, even for a debt or obligation contracted in the ordinary course of commercial dealings within the scope of the partnership business; 3 Kent 47; 11 Ohio St. 223; 26 Vt. 154. Such an instrument binds the maker only; 62 Pa. 393; 7 Ohio St. 463. But such a deed may be ratified; 12 Ill. App. 517; and this consent or adoption may be by parol; 26 Vt. 154; 11 Pick. 400. It binds the firm if they were present at the execution; 3 Ves. 578. The fact that the partnership articles are under seal does not give such authority; 7 Term 297; unless they contain a particular power to that effect; *id.* One partner may convey by deed property of the firm which he might have conveyed without deed. The seal in such a case would be surplusage; 2 Ohio St. 478; 5 Hill N. Y. 107; 7 Metc. 244; he may assign a mortgage in payment of a firm debt, or release a mort-

gage; 4 Gill & J. 310; 4 Mas. 206. See *infra* under Release. One partner may acknowledge a deed for the firm; 70 Mo. 206.

Distress. Where a lease has been granted by the firm, any partner may distrain or appoint a bailiff to do so; 4 Bing. 562, and cases there cited.

Firm property. Each partner has the power to dispose of the entire right of his co-partners in the partnership effects, for the purposes of the partnership business and in the name of the firm; Story, Part. § 9. This power is held not to extend to real estate, which a single partner cannot transfer without special authority; Story, Part. § 101; 1 Brock. 456; 3 McLean 27. Since the power to transfer the firm property must be exercised for the ordinary purposes of the partnership business, it is held that a partner's employment of firm capital in a new partnership, which he forms for his firm with third persons charges him for a conversion of the fund to his own use; 25 Ohio St. 180.

Guarantees. A partner derives no authority from the mere relation of partnership to bind the firm as guarantor of the debt of another; 4 Exch. 623; 31 Me. 454; 21 Miss. 122; 85 Pa. 517. If the contract of guaranty is strictly within the scope of the firm business, one partner may bind the firm by it; 41 La. 518; or if guaranty is usual in that kind of business or is such as the firm has frequently recognized; Pars. Partn. § 144; and where a partner sold notes and applied the proceeds to firm use; 24 Barb. 549.

Insurance. One partner may effect an insurance of the partnership goods; 1 M. & G. 130; 54 Mich. 531; 141 Mass. 298. The assignment of a partner's interest in the firm stock without the insurer's consent, does not violate a policy of insurance upon it; 27 Ohio St. 1.

Leases. The rule is that a partner has no power to contract on behalf of the firm for a lease of a building for partnership purposes; 22 Beav. 606. But it is held that a partner may bind the firm for the rent of premises necessary for partnership purposes, and so used; 47 Conn. 26; 21 La. Ann. 21; 51 Wis. 547; but see 22 Beav. 606. A partner can give a valid notice to quit; 1 B. & Ad. 135.

Statute of limitations. Before dissolution an acknowledgment by one partner of a debt barred by the statute will bind the firm; Pars. Part. § 127; as to whether it will do so, if made after dissolution, the authorities are conflicting; the better view appears to be that it will not; *id.*; 15 Fed. Rep. 888; 76 Ala. 501; 5 Neb. 368; some cases distinguish between acknowledgments made before and after the statutory period has run; if made after, it does not bind; 43 Md. 70; if made before, it does; 36 Conn. 270; 45 Mo. 365. Some cases hold that it binds though made after dissolution and after the statutory period has run; 50 Vt. 421; 6 Call. 51. If made after dissolution by a liquidating partner, it is binding; 8 W. & S. 345; but not otherwise; 101 Pa. 233. In England and in many states statutes have rendered the acknowledgment of one partner insufficient to toll the statute.

Majority, power of. The weight of authority seems to be in favor of the power of a majority of the firm, acting in good faith, to bind the minority in the ordinary transactions of the partnership business; 3 Kent 45; 33 Beav. 595; 4 Johns. Ch. 473; 46 Pa. 434; 27 Ala. 245; 49 Ga. 417. But see 6 Ves. 773; 1 Yo. & Jer. 227; 57 Pa. 365. It is said that, in the absence of an express stipulation, a majority may decide as to the disposal of the partnership property; 3 Chitty, Com. L. 234; but the power of the majority must be confined to the ordinary business of the partnership; 14 Beav. 367; 2 De G. M. & G. 49; it does not extend to the right to change any of the provisions therein; 4 Johns. Ch. 573; 32 N. H. 9; nor to engage the partnership in transactions for which it was never intended; 3 Maule & S. 483; and all must be consulted; 2 Ia. 504. Where a majority is authorized to act, it must be fairly constituted and must

proceed with the most entire good faith; 10 Hare 493; 5 De G. & S. 310. A majority cannot change the place of business after a lease has expired; 8 Ch. Div. 129. The American cases are said to have enlarged the power of the majority; Pars. Partn. § 147; but the question is not clearly settled; *id.*

Mortgages. A partner has no implied power to make a mortgage of partnership real estate; Lind. Partn., 2d Am. ed. *139; 2 Humph. 534. See 37 Neb. 666. But one partner may execute a valid chattel mortgage of firm property, without the consent of his co-partners; 47 Wis. 261; 18 Minn. 232; 16 Or. 153; 30 W. Va. 586; 96 Mich. 233; 130 Ind. 63; 83 Ia. 449. A deed of trust of partnership property to secure certain creditors to the exclusion of others will bind the partnership, though executed by only two out of three partners; 136 U. S. 223. Two or three members of a firm have authority to mortgage partnership stock for the security of the debts of the firm; 73 Ia. 399. A mortgage by one partner of the whole stock in trade to secure a firm debt has been held valid; 1 Metc. 515.

Pledges of firm property. A partner may pledge its personal property to raise money for the firm; 3 Kent 46; 10 Hare 453; 7 M. & G. 607; 3 Bradw. 261. It is thought that a partner's equitable mortgage of firm real estate, by depositing deeds of partnership property as a pledge, would be valid; Lind. Partn., 2d Am. ed. *140.

Purchases. A partner may bind the firm by purchasing on credit such goods as are necessary for carrying on the business in the usual way; 1 Camp. 185; 5 W. U. S. 564; 19 Ga. 520; 76 N. C. 139; even land; 14 Nev. 265; but see 13 Bush 67.

Ratification. If a contract on behalf of the co-partnership, executed under seal by one partner, be, after its execution, ratified by the other partners, it becomes the deed of the firm as fully as if executed under seal by all the partners; even if the contract did not pertain to the ordinary business of the firm; 45 Minn. 11; see 70 Tex. 517.

Receipts. The power of a partner to receipt for the firm is incident to his power to receive money for it; see *Debts*; Story, Partn. § 115.

Relative extent of each partner's power. In all ordinary matters relating to the co-partnership, the powers of the partners are co-extensive, and neither has a right to exclude another from an equal share in the management of the concern or from the possession of the partnership effects; 2 Paige, Ch. 310; 2 J. & W. 558.

Release. The rule that one partner cannot bind his co-partners by deed does not extend to releases; 75 Ill. 583; 2 Co. 68; 3 Johns. 68; 4 Gill & J. 310; 3 Kent 48; but see 40 Ia. 76. As a release by one partner is a release by all; 21 Ill. 604; 37 Vt. 573; so a release to one partner is a release to all; 5 Gill & J. 314; 23 Pick. 444.

Sales. A partner has power to sell any of the partnership goods; Cowp. 445; 3 Kent 44; or its negotiable notes; 102 U. S. 564; even the entire stock, if the sale be free from fraud on the part of the purchaser; and such sale dissolves the firm, although the term for which it was formed has not expired; 24 Pick. 89; 5 Watts 22; 59 Ala. 338; see, *contra*, 8 Bosw. 495; and this rule is doubted; George, Partn. 234; the implied power of a partner to sell applies only to property which is held for the purposes of sale; 37 Pa. 217; 12 Misc. Rep. 620; a partner has no power to sell all the partnership property without his co-partners' assent. A partner cannot transfer the whole of the partnership assets to a third person who is not a creditor; 32 N. Y. S. App. 423. A partner has power to sell after dissolution; 4 De G. M. & G. 542; and may then sell partnership realty to pay debts; 104 U. S. 18. A sale by one partner of his share of the stock dissolves the firm and gives the purchaser the right to an account; 50 Cal. 615. A *bona fide* sale of all the partnership effects by one partner to another is valid, although the firm and both partners are at the time insolvent; 9

Cush. 553; 21 Conn. 130; 21 N. H. 462.

Servants. One partner has the implied power to hire servants for partnership purposes; 9 M. & W. 79; 74 Pa. 166; and probably to discharge them, though not against the will of his co-partner; Lind. Partn., 2d Am. ed. *147.

Specialties. As a rule, the relation of partnership gives a partner no authority to bind his co-partners by specialty; Story, Partn. § 117; and see *Deeds and Mortgages*, *supra*. The reason is that a seal belongs to the common law and partnership to the law merchant; Pars. Partn. § 123. But it has been held that a partner may bind his firm by an executed contract under seal, because the firm is really bound by the act, and the seal is merely evidence; 38 Pa. 231; and, as stated above, a partner may bind his firm by a release under seal. If the seal was not necessary, it will be regarded as surplusage; as in an assignment for creditors; 5 Cra. 289; a mortgage of firm chattels; 7 Metc. 244; an assignment of a chose in action due the firm; 5 Hill 163. The general rule is now of less importance than formerly; Pars. Partn. § 123. A lender may disregard a specialty executed by one partner, for a loan, and recover from the firm in assumpsit; 98 Ill. 27.

Warranties. It is laid down as a general rule that a power to sell does not carry with it the implied authority to bind the firm by a warranty; Pars. Partn. 4th ed. § 144. See 48 Ill. App. 213. But if the partner has power to sell, his warranty would probably bind the firm; Pars. Partn. § 144; 24 Barb. 549.

LIABILITIES. General Rule. If an act is done by one partner on behalf of the firm, and it can be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *prima facie* be liable, although in point of fact the act was not authorized by the other partners; but if the act cannot be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *prima facie* not be liable; 10 B. & C. 128; 14 M. & W. 11. As to reason for such liability, see *Powers, supra*.

Admissions. It is laid down as a general rule that partners are bound by the admissions, representations, and acknowledgments of one of their number, concerning partnership transactions; Story, Partn. § 107; 1 Harr. N. J. 41. A better rule seems to be that the admissions of one partner with reference to a partnership transaction are evidence against the firm; 2 C. & P. 232; but not necessarily conclusive evidence; 2 K. & J. 491; 5 Stew. N. J. 828. It is held that the admission of one partner in legal proceedings is the admission of all; 1 Maule & S. 259; 40 Md. 499; 68 Ind. 110; 47 Mo. 346; 4 Conn. 326; 15 Mass. 44; 2 Wash. C. C. 388. See *supra*.

Agreements inter se. No arrangement between the partners themselves can limit or prevent their ordinary responsibilities to third persons, unless the latter assent to such arrangement; 2 B. & Ald. 670; 3 Kent 41; 5 Pet. 129; 3 B. & C. 427. But where the creditor has express notice of a private arrangement between the partners, by which either the power of one to bind the firm or his liability on partnership contracts is qualified or defeated, such creditor will be bound by the arrangement; 4 Ired. 129; 38 N. H. 287; 6 Pick. 372; 4 Johns. 251; 5 Conn. 597; 5 Bro. P. C. 489.

Attachment. A partner's interest in a firm is liable to attachment by his creditors; 7 C. B. 229; 2 Johns. Ch. 548; 8 N. H. 252; but one partner cannot maintain an attachment against the firm of which he is a member; 98 Ala. 526.

Contracts. See *Powers, supra*.

Contribution. A partner's contribution to the capital of his firm is a partnership debt for the repayment of which each partner is liable on an accounting and after payment of debts; 119 Mass. 38. Failure of a partner to pay his contribution in full does not entitle his co-partner to exclude him from the business without a dissolution; 3 C. E. Green 385.

Debts. Each partner is liable to pay the whole partnership debts. In what proportion the partners shall contribute is a matter merely among themselves; 5 Burr. 2613. Universally, whatever agreement may exist among the partners themselves, stipulating for a restricted responsibility, and however limited may be the extent of his own separate beneficial interest in, and however numerous the members of, the partnership, each individual member is liable for the joint debt; 5 Burr. 2611; 1 V. & B. 157; 2 Des. 148; 6 S. & R. 333; 34 Ohio St. 187. See 45 N. J. Eq. 738. In Louisiana, ordinary partners are not bound *in solido* for the debts of the partnership; La. Civ. Code, art. 28; though commercial partners who deal in personal property are bound *in solido*; a partner is bound for his share of the partnership debts, calculating such share in proportion to the number of partners, without attention to the proportion of the stock or profits each is entitled to; *id.* art. 2873. In equity, partnership debts are regarded as both joint and several; 45 N. J. Eq. 738.

An incoming partner is not liable for the debts of the firm incurred before he became a member, unless he assumes them by agreement; 58 Pa. 179; 27 La. Ann. 352; 73 Ill. 381; 6 Wash. 514; 53 Kan. 251; 49 Ark. 457; 77 Cal. 440. But a retiring partner remains liable for the outstanding debts of the firm; 4 Russ. 430.

Dormant partners. Dormant partners are, when discovered, equally liable with those who are held out to the world as partners, upon contracts made during the time they participate in the profits of the business; 1 Cr. & J. 316; 5 Mas. 176; 9 Pick. 272; 5 Pet. 529; 2 Harr. & G. 159; 5 Watts 454; 1 Dougl. 371; 21 Miss. 656; 25 Ill. 359; 46 La. Ann. 894. This liability is said to be founded on their participation in the profits; 5 Pet. 574; 10 Vt. 170; 16 Johns. 40; 1 H. Bla. 31. Another reason given for holding them liable is that they might otherwise receive usurious interest without any risk; 4 B. & Ald. 663; 10 Johns. 226. But inasmuch as a dormant partner differs from an ostensible partner only in being unknown as such, the liability of each must be owing to the same cause, viz.: that they are principals in the business, the dormant partner being undisclosed; L. R. 7 Ex. 218. Sharing profits is simply evidence of this relation; 5 Ch. Div. 458; and the usurious interest theory is so palpably illogical that it has never been accepted to any extent; 2 W. Bla. 997.

Dower. It has been held that a partner's widow is entitled to dower in firm lands subject to the equities of the parties; 3 Stew. N. J. 415. Firm debts are a lien on partnership lands paramount to a widow's right of dower; 8 Ohio St. 328; 86 Ill. 286; where partnership land is sold to pay debts, the widow of a partner has no dower; 65 Mo. 138; but *contra*, 20 S. C. 550; 7 How. (Miss.) 437. See 34 Fed. Rep. 375. Where the firm debts are all paid the dower survives; 68 Ala. 210.

Firm funds. A partner who withdraws firm funds from the business, thereby diminishing the stock, and applies them to his own use, is liable to the others for the injury; 1 J. J. Marsh. 507; 3 Stor. 101; and funds so used by a partner may be followed into his investments; 1 Stew. N. J. 595.

Fraud. One partner will be bound by the fraud of his co-partner in contracts relating to the affairs of the partnership, made with innocent third persons; 6 Cow. 497; 2 Cl. & F. 250; 7 T. B. Monr. 617; 15 Mass. 75, 331; 56 Ind. 406; 73 Ill. 381. This doctrine proceeds upon the ground that where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or the occasion of the confidence and credit reposed in such third person; 1 Metc. 562, 563. The liability, therefore, does not arise when there is collusion between the fraudulent partner and the party with whom he deals; 1 East 48; or the latter has reason to suppose that the partner is acting on his own account; 2 C. B. 821; 10 B. & C. 298. See *infra*.

Not only gross frauds, but intrigues for private benefit, are clearly offences against the partnership at large, and, as such, are relievable in a court of equity; 3 Kent 51, 52; 1 Sim. 52, 89.

A fraud committed by a partner (in a law firm) while acting on his own separate account is not imputable to the firm, although, had he not been a member of the firm, he would not have been in a position to commit the fraud; 18 N. Y. L. J. (Dec. 17, 1897).

Insolvency. It has been held that the discharge of the partners in insolvency, as individuals, does not relieve them from liability for the firm debts; 56 Cal. 631.

Judgments. The rule is that a judgment obtained against one partner on a firm liability is a bar to an action against his co-partners on the same obligation; Lind. Part., 2d Am. ed. *255, *703; 3 De G. & J. 33; 4 McLean 51; 11 Gill & J. 11; see *contra*, 14 Bush 777; except when they are abroad and cannot be sued with effect; Lind. Part., 2d Am. ed. *255; 42 Ohio St. 11; 71 Ga. 466; 4 De G. & S. 199; and this is so even if the other partners were not known to him. But in Pennsylvania and other states this rule is changed by statute. Where one partner is sued and judgment is given for him, the creditor may still have recourse to the others; 2 H. & C. 717.

Mismanagement. As a rule, a partner is not liable to the firm for the mismanagement of its business; Penn. N. J. 717; 1 Gray 376. See 41 Pa. 505; see *infra*, **Torts**. Because it is unreasonable to hold a partner, who acts fairly and for the best interests of the firm according to his judgment, liable for a loss thus unwittingly occasioned; 3 Wash. C. C. 224.

Notice. A retiring ostensible partner remains liable to persons who have had dealings with the firm and who have no notice of his retirement; 51 Ala. 126; 57 Ind. 284; 83 Pa. 148. Actual notice is not necessary to escape liability to new customers; Wace, Notice 226; Pars. Part. § 317; even though the business is continued in the same firm name; 36 Ohio St. 135. As a general rule, notice to one partner of any matters relating to the business of the firm is notice to all; 40 Mich. 546; 40 N. H. 267; 6 La. Ann. 684; 20 Johns. 176; 79 Pa. 251; even if two firms have a common partner; 3 Pa. 399.

Surviving partner. The surviving partner stands chargeable with the partnership debts, and takes the partnership property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money and the debts paid; 3 Kent 37; 5 Metc. 576; 10 Gill & J. 404; 30 Me. 386; 3 Paige, Ch. 527; 13 Miss. 44; 18 Conn. 294. See 1 Exch. 164. The debts of the partnership must be collected in his name; 6 Cow. 441; Story, Part. § 348; 3 Kent 37; 4 Metc. 540. He has full power to control and dispose of the firm assets for the purpose of winding up its affairs and may secure a firm creditor by the execution of a mortgage, which is not invalid by reason of the fact that it also secures money borrowed by him after the death of his partner, if used for the partnership debts; 46 Pac. Rep. (Colo.) 932. He has power to make an assignment for the benefit of firm creditors with preferences; 118 U. S. 3.

Torts. The firm is not liable for the torts of a partner committed outside of the usual course of the business, unless they are assented to or adopted by its members; 42 N. H. 25; 87 Ill. 508; 2 Ia. 580; 4 Blatch. 129; 32 Miss. 17; otherwise, in regard to torts committed in conducting the affairs of the partnership or those assented to by the firm; Lind. Part., 2d Am. ed. *198, *702; as for the negligent driving of a coach by a member of a firm of coach proprietors; 4 B. & C. 223; or for the negligence of a servant employed by the firm while transacting its business; 14 Gray 191; or for the conversion of property by a partner, to be appropriated to the use of the firm; 87 Ill. 508; or for obtaining goods by false pretences and fraudulently disposing of them; 67 N. W. Rep.

(Mich.) 116. Demand of, and a refusal by, one partner to deliver up property is evidence of a conversion by the firm; 24 Wend. 169; 4 Rawle 120. A partnership may be liable for the publication of a libel; 83 Ala. 404. See 73 Mich. 203. If the firm is liable for the tort of a partner, each partner is liable *in solido*; Pars. Part. § 100; and all or one or more may be sued; 142 Ill. 9.

It has been held that the fraud of one partner does not charge the firm; 6 Mass. 245; without participation by the firm; 5 Greenl. 295 (but see as to these cases 1 Metc. 564); and that it is not liable for malicious prosecution instituted by one partner for the larceny of firm property, unless the others participated in the prosecution; 101 Ala. 165.

RIGHTS AND DUTIES. General rules. Good faith, reasonable diligence and skill, and the exercise of a sound judgment and discretion, lie at the very foundation of the relation of partnership. In this respect the same general rules apply to partners which are applicable to the other fiduciary relations; Story, Part. § 169; 14 Beav. 250; 1 Johns. Ch. 470; 53 Mo. 122; 81 Ill. 221; 80 Pa. 234. It becomes, therefore, the implied duty of each partner to devote himself to the interests of the business, and to exercise due diligence and skill for the promotion of the common benefit of the partnership. No partner has, ordinarily, a right to engage in any business or speculation which must necessarily deprive the partnership of a portion of his skill, industry, or capital; 3 Kent 51; 1 Johns. Ch. 305; 1 S. & S. 133; nor to place himself in a position which gives him a bias against the discharge of his duty; Story, Part. § 175; 1 S. & S. 124; 11 S. & R. 41, 48; 3 Kent 61; see 129 U. S. 512; nor to make use of the partnership property for his own private benefit; 6 Madd. 367; 4 Beav. 534; 1 Sim. 52; 3 Stew. N. J. 254; nor to make a personal profit out of any transaction connected with firm interests; 61 N. Y. 123. He cannot make a profit out of any transaction between himself and the firm; 18 Beav. 75; L. R. 18 Eq. 524; a partner cannot engage in any other business in which he competes with his firm; 1 S. & S. 124. But a partner may traffic outside of the scope of the firm's business for his own benefit and advantage; 150 U. S. 524.

Account in equity. Every partner has a right to an account from his co-partner, which may be enforced in equity, whereby a partner is enabled to secure the application of partnership assets to firm debts and the distribution of the surplus among the members of the firm; 8 Beav. 106; 24 Conn. 279. A silent partner may have a bill for an account; 98 Mass. 118. It has been held that a partner's bill for an account will be barred by the statute of limitations; 3 C. E. Green 457. See 66 Hun 469. But not for secret profits made by one partner in transacting firm business; 3 Stew. N. J. 254. A partner cannot maintain account against a co-partner for the profits of an illegal traffic; 120 Mass. 285.

Accounts to be kept. In order to give the partners information that the business is being carried on for their mutual advantage, it is the duty of each to keep an accurate account ready for inspection; 2 J. & W. 556; Story, Part. § 181; and see 104 Mass. 436; 16 Fla. 99; 3 Y. & C. 655; 20 Beav. 219.

Actions. As a general rule an action at law does not lie by one partner against his co-partners for money paid or liabilities incurred on account of the partnership, because without an account it is impossible to tell whether a partner is a debtor or creditor of the firm; 33 Mo. 557; 54 Barb. 353. See, *contra*, Gow, Part. c. 2, § 3. There are, however, many circumstances under which partners may sue each other; see Story, Part. § 219, note (2).

Articles of co-partnership. Partners may enter into any agreements between themselves, which are not void as against statutory provisions or general principles of law, even though they do conflict with the ordinary rules of the law of partnership,

and such engagements will be enforced between the parties; Pars. Part., 4th ed. § 160; 28 E. L. & Eq. 7.

One partner may obtain an injunction to restrain his co-partner from violating his rights under the contract of partnership, even when the dissolution of the partnership is not asked; 12 U. S. App. 193. But it is held that equity will not interfere with the suit of a partner to prevent a dissolution made in contravention of the partnership articles, or to compel specific performance of them, the contract being of an essentially personal character; 4 Del. Ch. 337; 118 Mass. 279; 168 U. S. 336.

But the partnership articles do not affect third persons, unless they have notice of them; 2 B. & Ald. 697; 8 M. & W. 703; 1 Dall. 269; 14 Ohio St. 592; 16 Wend. 505.

Claims against the firm. A partner may be a firm creditor and is entitled to payment of his claim before judgment creditors of the individual partners; 5 C. E. Green 288.

Compensation. As it is the duty of partners to devote themselves to the interests of the business, it follows that they are not entitled to any special compensation for so doing, although the services performed by them are very unequal in amount and value, unless there is an express stipulation for remuneration; 7 Paige, Ch. 488; 4 Gill 838; 2 D. & B. Eq. 123; 44 Ia. 428; 69 Pa. 30; 11 So. Rep. (Ala.) 754; 89 Mich. 233; 99 U. S. 355; nor for services performed prior to the partnership, although they enure to its benefit; 124 Mass. 305. A surviving partner has been held entitled to compensation for continuing the business, in order to save the good-will; 26 Ohio St. 190. A surviving partner is ordinarily entitled to compensation after dissolution; 25 Beav. 382; but it is held that a liquidating partner is not entitled to compensation for winding up the concern; 82 Hun 488; 89 Pa. 139; 99 U. S. 355; 124 Mass. 305; so of a surviving or liquidating partner; 31 N. Y. Supp. 614; but he is entitled to be paid his expenses; 2 Super. Ct. Pa. 306. But where it was agreed that a partner should not give personal services, he may recover for services rendered the firm at their request; 11 Ill. 392. See *Liquidating partner, infra*.

Contribution. Since partners are co-principals and all liable for the firm debts, any partner who pays its liabilities is, in the absence of agreement to the contrary, entitled to contribution from his co-partners; Lind. Part., 2d Am. ed. *367; 6 De G. M. & G. 572; 3 Ill. 464; 13 Pa. 351.

Dissolution. A member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any time; Pars. Part. § 306; Lind. Part. *220; 51 Ind. 478; 76 N. Y. 373; 168 U. S. 336; 4 Col. 567. It will then continue only for purposes of winding up; 17 Ves. 298; 5 Leigh 583; 55 N. J. L. 427. But a court of equity would perhaps interfere to prevent irreparable injury by an untimely dissolution; 1 Swanst. 512. Where there is an agreement to continue the business for a certain time, one partner has no right to have a dissolution except for special cause; 50 Barb. 169; 9 Utah 236. But it is held that a partner can dissolve a partnership formed for a definite period, before the end of that period, but that he is liable in damages for the value of the profits which the other partner would otherwise have received; 10 N. Y. 439; 168 U. S. 337. In general, any circumstance which renders the continuance of the partnership, or the attainment of the end for which it was created, practically impossible, would seem sufficient to warrant a dissolution; Lind. Part., 2d Am. ed. *576; 22 Beav. 471. A sale by one partner of his interest in the firm's property to the others has been held not necessarily to work a dissolution of the firm; 93 Mich. 569; but see 28 Fla. 680; **PARTNERSHIP**.

Exemption. The right of partners to statutory exemption out of firm property is a disputed point, and depends somewhat on the statutes of the several states. It has been held that they are not so entitled; 77 Cal. 403; 7 Neb. 134; 61 Wis. 335; 26

Ohio St. 317; 44 Pa. 442; *contra*, 57 Ga. 229; 44 Mich. 86; 37 N. Y. 350. See *Thomps. Hom. & Ex.* § 197.

Firm name, use of. It has been held that one partner has no right to use the firm name after dissolution: 7 South. 749; 7 Abb. Pr. 202; 7 Phila. 257; the reason given being that such a continued use of the firm name would impair the value of the goodwill (*q. v.*), and might also subject the retired partners to additional liabilities; *Lind. Part.*, 2d Am. ed. *444; 43 Ch. D. 208 (C. A.). For cases *contra* see 3 Swanst. 490; 7 Sim. 421; 28 Beav. 536; 34 *id.* 566; 121 N. Y. 484; 4 Denio 559. It is said to be the better opinion that the firm name is an asset of the firm; *Pars. Partn.* § 182, n. Where there is a sale of the business to a partner, the latter does not, without express agreement, acquire a right to the firm name; 43 Ch. D. 208 (C. A.); 88 Mich. 473; but see 10 Ch. D. 436 (C. A.); 37 Conn. 278; even so as to advertise himself as "successor," *id.*; but he may advertise that he is "late of" the former firm; *id.* A continuing partner who has acquired the right to a retiring partner's name, cannot transfer it to a corporation; *Bagby, etc., Co. v. Rivers, Ct. of App. Md.*, 57 Alb. L. J. 261.

Firm property. Each partner has a claim, not to any specific share or interest in the property *in specie*, as a tenant in common has, but to the proportion of the residue which shall be found to be due to him upon the final settlements of their accounts, after the conversion of the assets and the liquidation of all claims upon the partnership; and therefore each partner has a right to have the same applied to the payment of all such claims, before any one of the partners, or his personal representatives, or his individual creditors, can claim any right or title thereto; *Story, Part.* § 97; 4 Ves. 396; 6 *id.* 119; 17 *id.* 193.

Each partner has also a specific lien on the present and future property of the partnership, the stock brought in, and everything coming in during the continuance and after the determination of the partnership, not only for the payment of debts due to third persons, but also for the amount of his own share of the partnership stock, and for all moneys advanced by him beyond that amount, as also for moneys withdrawn by his co-partners beyond the amount of his share; 3 Kent 65; 8 Dana 278; 10 Gill & J. 253; 20 Vt. 479; 9 Cush. 553; 25 Beav. 280; 52 N. J. Eq. 628. This lien attaches to real estate held for partnership purposes, as well as to the personal estate; 5 Metc. Mass. 562, 577; and is co-extensive with the transactions on joint account; 1 Dana 58; 11 Ala. n. s. 412.

Upon a settlement of a partnership by an account, the assets are divided among the partners in proportion to their contributions; and each partner is liable for a deficit in proportion to his share of the profits; 120 Mass. 324.

Fraud. A partner has an equity to rescind the partnership and be indemnified for his co-partner's fraud in inducing him to enter the business; 126 Mass. 304; 3 De G. & J. 304; 1 Giff. 355. Where the partnership suffers from the fraud or wanton misconduct of any partner in transacting firm business, he will be responsible to his co-partners for it; *Story, Part.* § 169. See *supra*.

Interest. As a general rule partners are not entitled to interest on their respective contributions to capital unless by special agreement, or unless it has been the custom of the firm to have such interest charged in its accounts; 3 De G. J. & S. 1; 6 Beav. 493; 89 Pa. 139; 119 Mass. 38; 20 Ala. 747; 92 Ill. 92. See 52 Minn. 342; 56 Mich. 276. But a partner is entitled to interest on advances made by him to the firm; 6 Mad. 145; 129 Mass. 517; 35 Atl. Rep. (Md.) 60; 14 N. J. Eq. 44; 17 Vt. 242; 79 N. Y. 366; and no express agreement is necessary; 1 McCart. Ch. 44. See, however, 8 Dana 214; 24 Conn. 185. But it is held that interest will not be allowed on advances and profits not drawn out; 25 N. E. Rep. (Mass.) 728. Where profits are left in

the business, a partner is not entitled to interest thereon; L. R. 5 Ch. 519; 89 Pa. 139; 53 Mich. 421; a partner who has not paid in his contribution to capital will be charged with interest; 42 Kan. 247; 109 Ill. 94; a partner will not be charged with interest on overdrafts; 72 Ga. 154. A partner has been held entitled to interest on a sum contributed to capital in excess of the agreed share; 17 Ala. 32.

Liquidating partner. It is the duty of those upon whom, by appointment or otherwise, it devolves, after the dissolution of a firm, to wind up the affairs of the partnership, to act for the best advantage of the concern, to make no inconsistent use of the property, and to seek no private advantage in the composition of debts or in any other transaction in the performance of this business; 1 Swanst. 507; 2 *id.* 627; 11 Ill. 392; 54 Kan. 793. Nor, in this case, can any partner claim any commission for getting in the debts, or, in any other particular, reward or compensation for his trouble; *id.*; 14 Misc. Rep. 18; 99 U. S. 355; 1 Knapp, P. C. 312; 3 Kent 64, note; *Story, Part.* § 331; 17 Pick. 519; 4 Gratt. 138; but in 16 Vt. 613, a partner who performed services in settling up the affairs of a firm after dissolution was allowed compensation for them, and where one partner contributed all the capital and exercised complete management of the business, he was allowed compensation; 35 S. W. Rep. (Ky.) 921; and where there is a great difference between the services of the partners, there may be compensation; 19 Pa. 516; see 124 Mass. 305; it is held that no compensation will be allowed for an excess of services without a special agreement; 57 Ill. App. 20. But it is held that a partner will be allowed compensation for extra and outside services in winding up; 118 Mass. 236. See *Compensation, supra*.

Litigation. A partner may recover the costs of carrying on litigation for the firm—but not compensation for conducting it, unless by express agreement; 2 Stew. N. J. 504.

Profits and losses, how distributed. As between the partners, they may by agreement stipulate for equal or unequal shares in the profit and loss of the partnership; 132 U. S. 539; *Story, Part.* § 23; but in the absence of any express agreement or stipulation between them, and of all controlling evidence and circumstances, the presumption has been held to be that they are interested in equal shares; 183 Pa. 186; 6 Wend. 263; 9 Ala. n. s. 372; 2 Murph. 70; 5 Dana 211; 1 Ired. Eq. 332; 1 J. J. Marsh. 506; 20 Beav. 98; 54 Fed. Rep. 237; 132 U. S. 539; 70 Md. 523. And the circumstance that each partner has brought an unequal amount of capital into the common stock, or that one or more have brought in the whole capital and the others have only brought industry, skill, and experience, would not seem to furnish any substantial ground of difference as to the distribution; *Story, Part.* § 24; 3 Kent 28, 29; 21 Me. 117.

It has sometimes been asserted, however, that it is a matter of fact, to be settled according to all the circumstances, what would be a reasonable apportionment, uncontrolled by any natural presumption of equality in the distribution; *Story, Part.* § 24; 2 Camp. 45. The opinion in England seems divided; but in America the authorities seem decidedly to favor the doctrine of a presumed equality of interest. See American cases cited above; *Story, Part.* § 24. "The better view is that although all or a large part of the capital is furnished by one partner, the entire loss is to be borne by all. Hence, after payment of the debts, the contributions of partners to capital are all to be repaid before there can be any division of profits (L. R. 7 Eq. 538; 119 Mass. 38; 113 N. Y. 39). And if the assets are not sufficient, after paying the debts, to repay the capital, the deficit must be shared by all the partners; and the partner who has contributed more than his share of capital is therefore entitled to contribution from the rest (37 Fed. Rep. 294; 124 Pa. 498)." *Pars. Part.*, Beale's ed. § 173.

Receiver, appointment of. To authorize a partner to demand the appointment of a receiver of a subsisting partnership, he must show such a case of gross abuse and misconduct on the part of his co-partner, that a dissolution ought to be decreed and the business wound up; *Story, Part.* §§ 228, 231; 2 Mar. 405; 8 C. E. Green 208, 388. Where it appears that the surviving members of a firm are conducting the business for the purpose of enlarging and continuing it, and not to close it up, a receiver may be appointed for that purpose, on application of the legal representatives of the deceased member; 20 N. Y. S. 65. After dissolution a court of equity will appoint a receiver almost as a matter of course; *Lind. Part.* *1008; 1 Ch. Div. 600; 65 N. C. 162; 2 C. E. Green 343; 20 Md. 30. But see 18 Ves. 281; and [1892] Ch. 633, where it was held that the mere fact of dissolution of a partnership does not give one partner an absolute right, as against his co-partners, to have a receiver appointed of the partnership business.

Set-off. It may be stated as a general rule in law and equity that there can be no set-off of joint debts against separate debts unless under a special agreement; *Story, Part.* § 396. Thus, a debt due by one of the members of the firm cannot be set off against a debt due the firm; 2 C. B. 821; 16 R. I. 288; 2 Bay 146; 4 Wend. 583; 88 Ala. 356; unless the partners assent; 89 Pa. 392. Nor can a debt owing to a partner be set off against a debt due by the firm; 119 Ill. 407; 6 C. & P. 60; *Lind. Part.*, 2d Am. ed. *269; 1 South. 220; but see 67 Miss. 60. But otherwise where the partnership's debt is reduced to judgment; *Pars., Part.*, Beale's ed. § 262; 69 Wis. 410.

Torts. If the partnership suffers loss from the gross negligence, unskillfulness, fraud, or other wanton misconduct of a partner in the partnership business, or from a known deviation from the partnership articles, he must bear the loss; 6 W. & S. 529; 1 Sim. 89; *Pothier, Part. n.* 133; 3 Kent 52, note; *Story, Part.* § 173. But not if it be the result of an honest mistake in judgment, not caused by gross negligence or ignorance; 1 McCart. 44; 76 Ia. 288. See SPECIAL PARTNER.

PARTNERSHIP. A relation founded upon a contract between two or more persons to do business as individuals on joint, undivided account.

A contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent 23; 94 Ala. 116.

This definition was criticised by Jessel, M. R., in 5 Ch. D. 472, on the ground that there may be partners who do not contribute any property, labor, or skill, as where a share is given to the widow of a former partner. Pollock (*Partnership* 3) considers it the most businesslike and substantially accurate definition, and one which might be excepted, with more or less verbal condensation and amendment.

A voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or any or all of them, in some lawful commerce or business, under an understanding, express, or implied from the nature of the enterprise, that there shall be a communion of profit and loss between them, will constitute a partnership. *Colly. Part.* § 2; 10 Me. 489; 3 Harr. N. J. 485; 5 Ark. 278.

A legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them. *Parsons, Part.*, Beale's ed. § 1. See 5 Ch. D. 458.

The relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them. *Colly. Part.*, 5th ed. 4.

Sir F. Pollock says: "The nearest approach to a definition which has been given by judicial authority in England is the statement that 'to constitute a partnership

the parties must have agreed to carry on business and to share profits in some way in common;" but he adds that this principle "excludes several kinds of transactions which, at first sight, have some appearance of partnership." Poll. Part. 4.

A contract of partnership is one by which two or more persons agree to carry on a business for their own benefit, each contributing property or services and having a community of interest in the profits. It is, in effect, a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his co-partner. Gray, J., in 168 U. S. 334.

An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature in every definition of the term. Ewell's Lind. Part., 2d Am. ed. *2, where many definitions are collected.

The relation which subsists between persons carrying on a business in common with a view of profit. English Partnership Act, 1890.

It has been said that "the various definitions have been approximate rather than exhaustive;" 145 U. S. 611.

Partnership, though often called a contract, is in truth the result of a contract; the relation which subsists between persons who have so agreed that the profits of a business inure to them as co-owners. George, Part. 30.

That a partnership is an entity, distinct from the partners, is the view of the business world everywhere. And such is the state of the law where the civil law is in force. In our law, the partnership has not been clearly recognized as an entity. In an action at law, at least, the partners alone are recognized as parties in interest, yet even at law certain doctrines are explained only by recognizing the firm as an entity. The courts of equity show more recognition of the true character of a partnership; but even in equity this has not been made clear until recently. There is now, however, a strong disposition on the part of the courts to recognize the mercantile doctrine. Pars. Part., Beale's ed. 2.

"The firm is the contracting party, not the individuals composing the firm; the credit is given to the firm; the partnership, the ideal person, formed by the union of interest, is the legal debtor. A partnership is considered in law as an artificial person, or being, distinct from the individuals composing it." 2 Green, L. 410.

"Everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land, as it is now. But when you get that idea clearly, you will see at once what sort of agency it is. It is the one person acting on behalf of the firm." 5 Ch. D. 476, per Jessel, M. R.

"When one joins a partnership, he makes himself a part of an entity already existing, which has acquired certain property and business, and in acquiring it has incurred certain indebtedness. The firm owns the property, holds the business, and owes the debts." 17 Kan. 340, per Brewer, J.

A partnership is a distinct entity, having its own property, debts, and credits; for the purpose for which it was created, it is a person, and as such is recognized by the law. 22 Neb. 744. See 82 Ga. 129.

"The partnership for most legal purposes is a distinct entity." 39 Mich. 784, per Cooley, J.

"A partnership, or joint stock company, is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation. . . . The obligation and the liability, *inter partes*, are the same in the

one case as the other. The only practical difference is a technical one, having reference to the *forum* and form of remedy." 50 Vt. 676.

There are statutes in some states providing that a partnership may sue and be sued by its name.

The relation between the partners and the firm is that of agent to principal; and the firm property, the legal title to which is held by the partners, is in trust for the firm. Each partner, in doing an act which is within the scope of his agency, is acting therefor for the firm, and not for himself nor for his co-partners. Pars. Part., Beale's ed. 4.

The law of partnership, as administered in England and in the United States, rests on foundations derived from three sources,—the common law, the law merchant, and the Roman law; Colly. Part. § 1.

Partnership in the Roman law (*societas*) included every associated interest in property which resulted from contract; e. g. where two bought a farm together. Every other associated interest was styled *communitas*, e. g. where a legacy was left to two; Pothier, *Droit Franc.* III. 444; Ewell's Lind. Part. *58, note 2; 11 La. Ann. 277.

Partnership at the common law is an active notion. The relation implies a business and a turning of capital. It is to be contrasted with ownership, which is, whatever the tenancy, a *passive* notion; 1 Johns. 106; 54 Cal. 429. But there may be at the common law a joint purchase and an individual liability for the whole price without a partnership. In a purchase expressly by two the contract is *prima facie* joint with a consequent liability of each for the whole price. But this inference may be contradicted by circumstances known to the seller which indicate a division of title; 1 Wms. Saund. 291 c; 4 Cow. 163, 282; 27 Ia. 131; 9 Johns. 475; 15 Me. 17.

Partnership, in the Roman law, was in buying or selling. True partnership, at common law, is only in buying and selling. This peculiarity of the common law is due to the commercial origin of the relation and of the rules by which the relation is governed. The Roman *societas* was an outgrowth of the ancient tribal constitution. The common-law partnership is an expedient of trade; 15 Wend. 187; 42 Ala. 179; 41 Me. 9; 1 Pa. 140; Camp. 793; 1 Johns. 106. Buying to sell again fixes the transaction as a joint one. The transaction is joint because the sale excludes the idea of division of title in the purchase. The property dealt in becomes the instrument of both parties in obtaining a totally distinct subject of distribution, i. e. the profit; 14 Wend. 187; 3 Kent *25. There must be an agreement, not a mere intention, to sell jointly; 47 N. Y. 199.

In a partnership, the members do business in their unqualified capacity as men, without special privilege or exemption; they are treated in law as a number of individuals, occupying no different relation to the rest of the world than if each were acting singly; 7 Ves. 773. On the other hand, a corporation, though in fact but an association of individuals with special privileges and exemptions, is in contemplation of law a fictitious person distinct from the members who compose it; Ewell's Lind. Part. *4. Every unincorporated association for purposes of gain is a partnership; unless it can claim corporate privilege on the ground of a *de facto* standing; 27 Ind. 399; 66 N. Y. 425; 7 Pa. 165; 65 Ill. 532. A club or association not for gain is not a partnership: it is not a commercial relation; 6 Mo. App. 465; 22 Ohio St. 159; 97 Pa. 498; 2 M. & W. 172. In this country there is a far wider extent in the variety of purposes for which partnerships are established than anywhere else; Pars. Part. § 37; including farming, manufacturing, mining, lumbering, the business of lawyers, physicians, etc.; *id.*

Whether a partnership exists or not in a particular case is not a mere question of fact, but one mixed of law and fact; 111 U. S. 520. It is, nevertheless, generally to

be decided by a jury. See 3 Harr. N. J. 353; 1 N. & M.C. 20; 1 Cal. 184; 2 Fla. 541; 8 C. B. n. s. 562, 563; 42 Ala. 179; 61 Mich. 216. If the facts are admitted or the evidence consists of a written instrument, it is for the court to say whether a partnership exists; 58 Conn. 413; 13 R. I. 27.

Elements of partnership. The elements of partnership are the contribution and a sharing in the profits. These two elements must be combined. Without contribution the alleged partner cannot be said to do business; unless he shares the profits, the business is not carried on for his account. Contribution without a share in the profits is a simple gift to the firm, by which firm creditors are enriched, not damaged. Sharing profits without contribution is a gift by the firm to the beneficiary, with which creditors may of course interfere by seizing the property and closing out the concern. In neither case does the alleged partner enter into business relations with the customers and creditors of the firm; 8 H. L. Cas. 286; 5 Ch. Div. 458; 8 Hun 189; L. R. 7 Exch. 218.

Contribution need not be made to the firm stock; any co-operation in the business will be enough; 4 East 144; 16 Johns. 84; Story, Partn. §§ 27, 40. A contribution must be kept in the concern, and take the risk of the business; a loan, on the other hand, is made upon the personal credit of the partners merely, and may be used by them as they please; it is to be repaid at all events. Because of this difference, sharing profits in lieu of interest upon a loan does not create a partnership. The English statute to this effect has been decided to be merely declaratory; 5 Ch. Div. 458; 7 Ch. Div. 511; 62 N. Y. 508; 6 Pick. 372. Mere loaning of money to a partnership for a definite period, the creditor to receive interest in proportion to the profits, does not make the lender liable as a partner; 145 U. S. 611. It is not necessary, however, that each partner should bring into the concern both labor and property; Parsons, Partn. Beale's ed. § 63. The contribution of money or property by an incoming partner is not essential to the creation of a partnership; it is competent for the prior partners, in consideration of the new partner undertaking the entire charge and control of the business of the company, to give him an interest as partner in the property which is to constitute, at the outset, the whole capital of the partnership; 132 U. S. 539.

It was formerly held that sharing profits constituted the parties partners, though no such relation was intended between them; 2 W. Bla. 998; 2 H. Bla. 235; 1 Story 371; 58 N. Y. 272; but not sharing gross profits; 1 Camp. 329. Again, it is called *prima facie* evidence of partnership, but a contribution will have the same effect. Each is an element in a relation not complete without both.

It has been held that a partnership subsists between merchants who divide the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other; 4 B. & Ald. 663. See 95 Ky. 397. So between persons who agree to share the profits of a single adventure; 9 C. B. 431; 1 Rose 297; and between persons one of whom is in the position of a servant to the others, but is paid a share of the profits instead of a salary; 1 Deac. 341; 1 Rose 92; (*contra*, 182 Pa. 824); and between persons one of whom is paid an annuity out of the profits made by the others; 17 Ves. 412; 8 Bingham 469; or an annuity in lieu of any share in those profits; 2 W. Bla. 999. So between the vendor and purchaser of a business, if the former guarantee a clear profit of so much a year, and was to have all profits beyond the amount guaranteed; 3 C. B. 641. The character in which a portion of the profits was received did not affect the result; see 1 Maule & S. 412; 21 Beav. 164. Persons who share profits were *quasi*-partners, although their community of interest was confined to the profits; 2 B. & C. 401. But it is held that a contract for the sale

of goods, which provides that they shall be charged for at reasonable prices, and that the purchaser shall have a credit of one-half the profits, does not establish a partnership between the seller and purchaser; 16 Colo. 447.

An agreement to share losses is not essential; that follows as an incident to the relation. Indeed all liability *inter se* may be provided against by contract and a partnership may nevertheless subsist; 3 M. & W. 357; 3 C. B. 32, 39; Ewell's Lind. Part. *22; 7 Ala. 761; 5 La. An. 44. Partnership is a question of intention, and the intention which makes a partnership is ordinarily to contribute to the business and share the profits. In this way, the parties become co-principals in a business carried on for their account. The question of intention is to be decided by a consideration of the whole agreement into which the parties have entered, and ought not to be made to turn upon a consideration of only a part of its provisions; 15 M. & W. 292; 3 Kent 27; Ewell's Lind. Part. *10.

An agreement to share profits, nothing being said about the losses, amounts *prima facie* to an agreement to share losses also; so that an agreement to share profits is *prima facie* an agreement for a partnership; and, accordingly, it is held that, unless an agreement to the contrary is shown, persons engaged in any business or adventure, and sharing the profits derived from it, are partners as regards that business or adventure. It is strong presumptive evidence of partnership; 37 Conn. 250. Still, it cannot be said that persons who share profits are necessarily partners in the proper sense of the word; Ewell's Lind. Part. *7, *12; 23 Ohio St. 319; 54 Mo. 325; 5 Gray 59, 60; 12 Conn. 69; 12 N. H. 185; 15 Me. 294; 8 H. L. Cas. 268; see 18 Johns. 34; 18 Wend. 175; 6 Conn. 347; 132 U. S. 539; unless the business is carried on by them personally or by their agents; 8 H. L. Cas. 268. Although a presumption of partnership would seem to arise in such a case; Colly. Part. § 85; 101 Cal. 500; 127 Pa. 442; still, the particular circumstances of the case may be such as to repel this presumption. It may appear that the share of the profits taken was merely a compensation to one party for labor and service, or for furnishing the raw materials, or a mill privilege, or a factory, or the like, from which the other is to earn profits; 5 Gray 60; 3 Kent 33; 6 Halst. 181; 2 McCord 421; but see 38 N. H. 289. Originally it was immaterial whether the profits were shared as gross or net; but the later cases have established a distinction. A division of gross returns is thought to be identical with a purchase for the purpose of division; the price represents the thing. There is no unity of interest; 1 Camp. 329; 3 Kent *25; 4 Maule & S. 240; 5 N. Y. 186. But the distinction is not absolutely decisive on the question of partnership. See 1 Camp. 330; 6 Vt. 119; 6 Pick. 335; 4 Me. 264; 12 Conn. 69; 38 N. H. 287, 304; 4 B. & Ald. 663. The officers and crews of whaling and other fishing vessels, who are to receive certain proportions of the produce of the voyage in lieu of wages; 4 Esp. 182; 17 Mass. 206; 2 Y. & C. 61; captains of merchant-ships who, instead of wages, receive shares in the profits of the adventure; 4 Maule & S. 240; or who take vessels under an agreement to pay certain charges and receive a share of the earnings; 16 Mass. 336; 7 Me. 261; persons making shipments on half-profits; 14 Pick. 195; have generally been held not to be partners with the owners, and the like. Running a steamboat on shares does not make the owners partners in respect of the vessel; 35 Fed. Rep. 785; so of an agreement between two parties to farm on shares; 42 Ga. 226; 67 Mo. 170; 30 Atl. Rep. (Md.) 637; and a purchase of land on joint account for the purpose of sale and profit; 142 U. S. 632; and a hotel lease where the rental depends in part on the profit of the hotel; 28 N. Y. Supp. 134; or running a saw mill where one erects it and another furnishes logs and they divide profits; 58 Ala. 618. But a part-

nership can be created in a single business transaction, as upon the sale of horses, sharing the profits and loss; 2 Super. Ct. Pa. 104; or in the purchase and sale of lands; 149 U. S. 248. A seaman who is to receive pay in proportion to the amount of fish caught, is not a partner; 68 Me. 241. Sharing profits in lieu of wages is not a partnership. There is no true contribution; 182 Pa. 624; 69 Ill. 237; 118 Mass. 443; 34 Md. 49; 29 N. J. L. 270; 14 Cal. 73; 43 Mo. 538; 44 Ga. 228; 15 So. Rep. (Ala.) 444; 41 Kan. 503; 112 N. Y. 419. Where a person enters into a contract with another by which the latter is to receive a certain salary and a percentage of the profits, while the former is to own the entire capital, no partnership exists; 104 Mo. 425; nor where one receives a share of the profits by way of compensation; 76 N. Y. 55; 4 Nev. 420. A factor, simple or *del credere*, may receive a portion of the profits in lieu of commissions, without becoming a partner; 62 Pa. 374; 24 L. J. Ch. 58. A mere participation in profits and losses of a business does not necessarily constitute a partnership; 89 Mo. 192.

Where a business is assigned to trustees who are to manage it and pay creditors out of the profits, the creditors are not partners; the distribution of so-called profit is really the payment of a debt; 8 H. L. C. 268; but creditors who set up their insolvent debtor in business and share the profits with him, forbearing meanwhile to press their claims, have been held to be partners; 8 Hun 189.

The case of Cox v. Hickman, 8 H. L. C. 268, which held that persons who share profits do not thereby incur the liability of partners, is said to have put an end to two doctrines formerly held to be fundamental: that persons may be held to the liability of partners who are not partners in fact, merely because some other relation exists between them; and that profit-sharing is conclusive of the existence of a partnership; Pars. Part. § 43. The true question of partnership is said in L. R. 1 C. P. 86, to be as stated by Lord Cranworth in 8 H. L. C. 268: "Whether the trade is carried on, on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business."

The doctrine of Cox v. Hickman has been generally followed in this country; 145 U. S. 611; George, Partn. 43, where cases in nearly all the states are collected; but in Pennsylvania the rule in Waugh v. Carver, 2 H. Bl. 235, *supra*, has been held to be firmly established, though overruled in England; 62 Pa. 374. There is a distinction in Pennsylvania between participation in profits as such and a compensation or consideration merely measured by a proportion of profits; while this distinction is of a very refined and shadowy character, it is said to be too late to question the rule or the exception; 62 Pa. 374; 176 Pa. 361. In New York, Cox v. Hickman was considered, but not followed, in 58 N. Y. 272; and in 115 N. Y. 625, the rule in Waugh v. Carver was held to be still in force in that state. The rule was fully discussed in 53 N. H. 276 and 45 Mich. 188. The result of the English doctrine is said to be that there can be no partnership between parties unless by contract among themselves, but parties may be charged as partners by way of estoppel. It is the present law of England that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*; 1 Lind. Part. *42; L. R. 1 C. P. 86.

Mutual agency as a final test of partnership has been approved in some cases; 53 N. H. 276; 64 L. J. Q. B. 170; and rejected in others; 5 Ch. Div. 458; 145 U. S. 611.

The ultimate test is said to be the co-ownership of the profits, which the owner

receives as owner and not by way of compensation for something, such as services, etc.; George, Partn. 50. To constitute partnership each person must have an interest in the profits as a principal in the joint business; 54 Mo. 325.

A distinction is made between a share in the profits and a commission equal to a certain per cent. on the profits. In the latter case there is no partnership, because no sharing in the profits as such. The rule is based upon authority, but is acknowledged to have no foundation in common sense. It is said to be an attempt to escape from the rigidity of the proposition that a share in the profits must in all cases make a man a partner; L. R. 4 P. C. App. 419; 62 Pa. 374; 18 Ves. 300; 12 Conn. 69; 6 Metc. 82.

In other cases, it is held that in order to render a man liable as partner he must have a specific interest in the profits as a *principal trader*; 1 Den. 337; 15 Conn. 73; 10 Metc. 303; 28 Ohio St. 319. But in reference to these positions the questions arise: When may a party be said to have a specific interest in the profits, *as profits*? when, as a principal trader?—questions in themselves very nice, and difficult to determine. See 6 Metc. 82; 12 Conn. 77.

Sometimes the partnership relation has been made dependent on the power to control the business. In strictness the only control necessary is the power to control the application of the contribution. A partner may have no power, as between him and his partners, to manage the business; 4 Sandf. 311.

Again, partnership has been said to require that a partner have an initiative in the conduct of the business; but the proposition seems to lose sight of dormant partners; L. R. 4 P. C. 419.

Again, partnership has been made to depend on what is termed the legal title to the business: A was held not a partner, though he shared in the profits of a business created solely by his contribution but assigned to B for A's protection; L. R. 1 C. P. 86. There are other cases in which considerable stress is laid on the right to an account of profits, as furnishing a rule of liability; 3 Kent 25; 18 Wend. 184; 3 C. B. n. s. 544, 561. But, although it is true that every partner must have a right to an account, it seems not to be equally true that every party who has a right to an account is a partner; 5 Gray 58.

Partnership has sometimes been styled a branch of the law and relation of principal and agent. But mutual agency is not the basis, it is the incident of partnership. Partners are co-principals, and the right and power of representation springs from this circumstance. A dormant partner is not at all the agent of the firm; L. R. 7 Ex. 237. The principal distinction between a partnership and a mere agency is that a partner has a community of interest with the other partners in the business and responsibilities of the partnership,—sometimes both in the stock and profits, and sometimes only in the profits,—whereas an agent, as such, has no interest in either; 4 B. & C. 67. The authority of a partner is very much more extensive than that of a mere agent; 10 N. H. 16. See PARTNERS. The reference to agency as a test of partnership is unfortunate and inconclusive, inasmuch as agency results from partnership, rather than partnership from agency; 145 U. S. 611.

The formation of a contract of partnership does not require any particular formality. It is, in general, sufficient that it is formed by the voluntary consent of the parties, whether that be express or implied, whether it be by written articles, tacit approbation, or by parol contract, or even by mere acts; 3 Kent 27; Daves 320; 4 Conn. 568; Pars. Part. § 627. As a general rule a writing is unnecessary; 2 Barb. Ch. 336; Ewell's Lind. Part. *80. Under the statute of frauds, where there is an agreement that a partnership shall commence at some time more than a year from the making of the agreement, a writing is necessary; 5 B. & C. 108. As to partner-

ship in lands, see *infra*.

Where there is no written agreement, the evidence generally relied upon to prove a partnership is the conduct of the parties, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the others, dealt with other persons. This can be shown by the books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes by which facts can be established. As to the presumption arising from the joint retainer of solicitors, see 20 Beav. 98; 7 Hare 159. For cases in which partnership has been inferred from various circumstances, see 4 Russ. 247; 2 Camp. 45. Though formed by deed, partnership may be dissolved by parol; *Ewell's* Lind. Part. *572. See ARTICLES OF PARTNERSHIP.

A contract for the creation of a partnership is enforceable at law; 3 Super. Ct. Pa. 527. The practical construction of partnership articles given for several years by the partners to its language will usually be accepted by the courts as conclusive; 152 Mass. 316.

Kinds. The Roman law recognized five sorts of partnership. First: *societas universorum bonorum*, a community of goods; probably a survival of the old tribal relation. Second: *societas universorum quæ ex questu veniunt*, or partnership in everything which comes from gain,—the usual form; Pothier, Part. nn. 29, 43. Such contracts are said to be within the scope of the common law; but they are of very rare existence; Story, Part. § 72; 5 Mass. 188. Third: *societas vectigalium*, a partnership in the collection of taxes. It was not dissolved by the death of a member; and if it was so agreed in the beginning, the heir immediately succeeded to the place of the ancestor. Fourth: *societas negotiationis aliquid*, *i. e.* in a given business venture. Fifth: *societas certarum rerum vel unius rei*, *i. e.* in the acquisition or sale of one or more specific things; Pothier, Part. *24.

In the French law there are four principal classes of partnership; First: *en nom collectif*, the ordinary general partnership. Second: *en commandite*, an association corresponding to our limited partnership, composed of general and special partners in which the liability of the latter is limited to the fund invested by them. Third: *anonyme*, a joint stock company with limited liability. Fourth: *en participation*, simply a partnership with a dormant partner; Merlin, *Répert. de Jur. tit. Société*; Mackenzie, *Rom. Law* 217; Pothier, Part. *39. See Goiraud, *Code, etc.*

In the common law all partnership is for gain. General partnership is for a general line of business; 3 Kent *25; Cowp. 814. But where the parties are engaged in one branch of trade or business only, they would be usually spoken of as engaged in a general partnership; Story, Part. § 74. **Special or particular** partnership is one confined to a particular transaction. The extent or scope of the agreement is different in the two cases, but the character of the relation is the same. A partnership may exist in a single transaction as well as in a series; *Daveis* 323; 2 Ga. 18; 3 C. B. 641; 49 Pa. 88. Special or limited partnership differs from the ordinary relation. It is composed of general partners to whom all the ordinary rules of partnership apply, and of limited partners with circumscribed power and liability limited to the amount of their contribution. The privilege is imparted by charter in England. In America it exists by statute; and unless the provisions of the act are strictly complied with, the association will be treated as a general partnership; 3 Kent *35; 62 N. Y. 513; 91 Ill. 96; 127 Pa. 161, 255; 151 Id. 79; 35 Ill. App. 336. The special exemption of a limited partner will be recognized in other jurisdictions than the one in which the association is formed, though the firm has made the contract in the foreign jurisdiction; 69 N. Y. 24.

Another sort of association is styled *limited partnership* (*q. v.*). It is of recent, statutory origin and strongly resem-

bles a corporation. The members incur no liability beyond the amount of their subscription; unless they violate in some manner the requirements of the statute under which they organize. It is a general requirement, that the word "limited" be in all cases added to the firm name. Limited partnerships in Pennsylvania, which can be sued in the partnership name, are nevertheless not corporations entitled to sue as artificial citizens of the states, within the constitution and laws of the United States; 38 Fed. Rep. 574.

There is still another class of partnerships, called *joint-stock companies* (*q. v.*).

Sub-partnerships. The *delectus persone*, *q. v.*, which is inherent in the nature of partnership (excepting mining partnerships; see 103 U. S. 641; 28 Cal. 569; and joint-stock companies, and certain partnership associations in Massachusetts; see 137 Mass. 510; 47 N. E. Rep. (Mass.) 502) precludes the introduction of a stranger into the firm without the concurrence of all the partners; 7 Pick. 235; 11 Me. 488; 1 Hill, N. Y. 234; 8 W. & S. 68; 16 Ohio 166; 2 Rose 254; Pars. Part. § 106. Yet no partner is precluded from entering into a sub-partnership with a stranger: *nam socii mei socius meus socius non est*. In such case the stranger may share the profits of the particular partner with whom he contracts; and although it has been decided that it is not true as a general proposition that such stranger will not be liable for the debts of the general partnership; 13 Gray 468; still, it is quite evident that a mere participation in profits renders one responsible only for the debts and liabilities of those with whom he participates; and, inasmuch as such stranger shares the profits only of and with one of the partners, he can be held only as the partner of that partner; he cannot be held as a partner in the general partnership, because he does not share or participate with the other persons who compose it. See 2 Rose 255; 3 Kent 52; 1 B. & P. 546; 19 Ind. 113; 3 Ired. Eq. 226; 114 Ill. 574. Besides, a sub-partner does not receive a certain share of the whole profits of the firm, but only a part of a share thereof; and he does not receive this part of a share, nor is he entitled to interfere with it at all, to say whether it shall be more or less in amount, until it has actually been set out and the time has come for a division between himself and the partner with whom he contracted. He does not draw out of the general concern any of its profits; he only draws from the profits of one who has previously drawn them from the general partnership. See 6 Madd. 5; 4 Russ. 285. If this stranger has caused damage to the partnership by his default, the party who has taken him into the partnership will be liable to the other partners the same as if he had done the damage himself; Pothier, Part. n. 93.

Any number of partners less than the whole may form an independent co-partnership, which, though not strictly a sub-partnership, is entitled to a separate standing in equity. In case of insolvency the subordinate co-partnership is treated as a distinct concern, and the assets are marshalled accordingly. Consequently, although the creditors of the smaller firm are strictly separate creditors when compared with the creditors of the larger firm; yet debts owing by one firm to the other are collected on insolvency for the benefit of the creditors of the creditor firm; 1 B. & P. 539; 1 Cox 140. See 176 Pa. 354. Indeed, one partner may have this independent standing if the trade is distinct; Lind. Part. 2d Am. ed. *725. But the debts must arise in the ordinary course of trade; Lind. Part. 2d Am. ed. *527.

Quasi-partnership. This is simply the case of a man who without being actually a partner, holds himself out or suffers himself to be held out as such; he is estopped to deny his liability as a partner; Pars. Part. § 93; 27 N. H. 252; 2 Campb. 802; 2 McLean 347; 17 Vt. 449; 6 Ad. & E. 469; 122 U. S. 538. This rule of law rests, not upon the ground of the real transaction

between the partners, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without others they would not have been willing to lend anything; 8 Kent 32; 6 S. & R. 259, 333; 16 Johns. 40; 2 Des. 148; 2 N. & M'C. 427; 39 Minn. 404; 70 Md. 205.

The term "holding one's self out as partner" imports, at least, the voluntary act of the party holding himself out; 8 Conn. 324; 2 Camp. 617; but no particular mode of holding himself out is requisite to charge a party. It occurs most frequently where a partner retires from a firm and his retirement is not made known. It may be express and either by direct assertion or by authority to a partner to use the party's name. It may result from negligence, as a failure to forbid the use of one's name by the firm; 2 Zab. 372; 61 N. Y. 456; 41 Pa. 30; 64 Ind. 545; 53 Ga. 98; 30 Md. 1; 32 Ark. 733. It must appear that the "holding out" was done by him or by his consent; 51 N. J. L. 103.

Holding out is a question of fact; 10 Ind. 475; 47 Mo. App. 31; 70 Md. 205. The usual evidence to charge a party in such cases is that he has suffered the use of his name over the shop-door, etc., or that he has done other acts, or suffered his agents to do acts; 37 N. H. 9; no matter of what kind, sufficient to induce others to believe him to be a partner; 8 McLean 364, 549; 3 Camp. 310; 20 N. H. 453; 39 Me. 157; 55 Ga. 116; 139 Mass. 275; 43 La. Ann. 258. A person is not relieved from liability though he was induced by the fraud of others to hold himself out as a partner with them. See 5 Bingh. 521; 1 Rose 69. The holding out must have been before the contract with the third person was entered into, and must have been the inducement to it; 7 B. & C. 409; 8 Ala. 560; 67 Ill. 161; 37 Me. 252; 30 Atl. Rep. (N. H.) 351. A third party will be held liable as a partner only to one who knew of the holding out at the time he acted and who acted in reliance upon it; 1 B. & Ald. 11; 111 U. S. 529; 83 Ala. 322; 130 Mass. 476; 81 N. Y. 550. The cases *contra* in 61 N. Y. 456 and 2 H. Bla. 242, cannot be considered as good law; Pars. Part. Beale's ed. § 93. If the plaintiff knew at the time he made the contract that the party he seeks to charge was not a partner, he cannot hold him as such; 50 Fed. Rep. 684; or if the plaintiff had notice of any kind; 85 Ala. 19; 1 Camp. 404; and a representation made after the contract was entered into will not charge the defendant; 1 C. M. & R. 415. The doctrine is based upon estoppel. But it has been held that even where there was no evidence that the plaintiff was misled, the reputed partner will be held liable; 26 Kan. 221.

A person who is not actually a partner cannot, by reason of having held himself out to the world as a partner, be held liable on a contract made by the partnership with one who had no knowledge that he was so held out; 111 U. S. 529.

Where the new firm had the same name as the old, one who sold goods to the former may recover of the members of the old firm, though notice of dissolution was published in a newspaper, and though the old firm, owed him nothing at the dissolution, and though he did not know the names of the members of the old firm; 143 Mass. 479.

A person does not become liable as partner because he represents that he is willing or intends to become one; 9 B. & C. 632; 15 M. & W. 517.

Where persons hold themselves out as a corporation, without having even a *de facto* corporate existence, persons dealing with them, if not estopped to deny their corporate existence, may hold them liable as partners; Clark, *Corp.* 108; 76 Mich. 579; 108 Pa. 569; 64 Fed. Rep. 90. Other cases hold that the remedy is against the agent who professed to act for a non-existent corporation; 1 Thomp. Corp. § 418; 7 Cush. 188. Where there is a *de facto* corporation, the members cannot be held as partners;

91 Ala. 224; 80 Tex. 344; 48 N. J. L. 599; 69 Ga. 159. If the organization is defective and the parties act in good faith, they are not liable as partners; 22 Fed. Rep. 197; 80 Tex. 344; 48 N. J. L. 599; *contra*, 72 Mo. 446; 29 Mich. 369; 56 Ia. 104; 43 N. H. 636. Text writers differ widely. That stockholders in a defective or illegal corporation are liable as partners, see Cook, *Stockh.* §233; Beach, *Priv. Corp.* §162; Spell, *Priv. Corp.* §838; *contra*, whether the corporation is *de facto* or not; Moraw, *Priv. Corp.* §748; *Taylor*, *Priv. Corp.* §148; Bates, *Partn.* §4. Incorporators who transact business upon the strength of an organization which is materially defective, are individually liable, as partners, to those with whom they have dealt. Failure to record the charter as required by law, renders the incorporators personally liable to persons who deal with them without knowledge of the attempted incorporation or without knowledge of facts which ought to put them on inquiry; 159 Pa. 303.

Where persons enter into articles of association for banking purposes, and go through the usual steps for forming a corporation, such as subscribing for shares, etc., but without a charter, they are liable as partners; 60 Ill. 454. Where persons associate together to form a corporation, but none is formed, by reason of a failure to comply with the statute, they become a *quasi*-partnership; 85 Ill. 164; but not as against a creditor who is also a stockholder; 161 Ill. 417; or is a director; 48 N. E. Rep. (Ill.) 399; or when it appears that third parties dealt with the concern as a corporation; 38 Mich. 779.

If the charter is obtained by fraud, the members will be held liable as partners; 45 Pa. 410; or if it be obtained for gambling purposes; 85 Tenn. 572. Where parties go to another state to get a charter to carry on business in their own state, with powers which they could not obtain at home, they will be held liable as partners, the transaction being substantially forbidden by statute; 12 L. R. A. (Tex. App.) 366; 148 Mass. 249; *contra*, 128 N. Y. 205. It is held that when parties incorporate in one state to do business in another, they are partners; 12 N. J. Eq. 31; *contra*, 34 N. Y. 207; 35 Ohio St. 158; Cook, *St. & Stockh.* §237; 35 Kan. 242. The intent to form a corporation will not prevent parties being held as partners; 79 Mo. 401.

After dissolution of a corporation, stockholders are not liable as partners for corporate debts; 66 N. Y. 424; unless they agree to continue the business as partners; 45 N. Y. 410.

The fact that a special partner fails to comply with the stipulated requirements, does not change his special partnership into a general one, but simply makes him liable to creditors as a general partner; 131 U. S. 66.

The Domain. A partnership is primarily a commercial relation. The notion has, however, been gradually extended to include other associations than those for trade merely: *e. g.* partnerships between two attorneys at law; 6 Pa. 360; 8 Wend. 665; 13 Ark. 173. It is said by Collyer that "perhaps it may be laid down generally that a partnership may exist in any business or transaction which is not a mere personal office, and for the performance of which payment may be enforced." Colly. Part. 5th ed. §56.

The early law did not recognize partnerships for trading in land, because the land was all held by the barons who did not engage in trade. But in modern times, and especially in America, where the social conditions are different, land is largely held by speculators whose operations as partners the law must recognize; 21 Me. 421, 422; 7 Pa. 165; 10 Cush. 458; 4 Conn. 568; 4 Ohio St. 1; 54 N. Y. 1. In transferring title to and from the firm the ordinary rules of conveyancing must be observed. When the title is in all the partners, all must join in the deed; if in the name of one, he alone need execute; Story, Part. §92, note; 15 Johns. 159; 15 Gratt. 11; 16 B. Monr. 631; 2 Nev. 234.

Building operations are now upon the same footing as land speculations; 4 Cow. 282. But the tradition has been too strong to be impaired as yet in landlord and tenant cases. Farming on shares is not partnership. The owner of land may either receive a share in the produce as rent, or give such a portion to a laborer in lieu of wages; Lind. Part. Am. ed. *651; 58 Ind. 379. But there may be a partnership in the development of land owned by one; 59 Ala. 587. See *supra*, as to mining partnerships; also MINES AND MINING.

Firm Property. Partners have, presumptively, the same interest in the stock that they have in the profits; 16 Hun 163. Their shares are presumed to be equal both in capital and profits; Ewell's Lind. Part. *318; 23 Cal. 427; 16 Hun 163; 23 Cal. 427. Where no definite arrangement is made between partners as to a division of profits, the presumption of law is that they are to be equally divided; 182 Pa. 186. But a joint stock is not essential to a partnership. The partner without capital is then interested, not in the fund, but in the adventure; 2 Bingh. 170; 7 Hun 425; Ewell's Lind. Part. *13.

Sometimes a partnership exists between parties merely as the managers and disposers of the goods of others; 4 B. & Ald. 663; 15 Johns. 409, 422. So, it seems, two persons may be owners in common of property, and also partners in the working and management of it for their common benefit; 2 C. B. n. s. 357, 363; 16 M. & W. 503.

Whether a partnership includes the capital stock, or is limited to the profit and loss, must be determined from the agreement and intention of the parties; 21 Me. 120. See 5 Taunt. 74; 4 B. & C. 867; Story, Part. §26.

A partner may contribute only the use of his capital, retaining full control of the principal; and he may charge interest for the use whether profits are earned or not; Ewell's Lind. Part. *328. If, however, the firm funds are expended in repairing and improving the property thus placed at their disposal, it becomes partnership stock; Ewell's Lind. Part. *330; 49 Me. 252; 23 N. J. Eq. 247; 72 Pa. 142.

The partnership property consists of the original stock and the additions made to it in the course of trade. All real estate purchased for the partnership, paid for out of the funds thereof, and devoted to partnership uses and trusts, whether the legal title is in one or all of the partners, is treated in equity in the same manner as other partnership property until the partnership account is settled and the partnership debts are paid; Story, Part. §98; 5 Ves. 189; 10 Cush. 458; 4 Metc. Mass. 527; 3 Kent 37; 27 N. H. 37; Ewell's Lind. Part. *324. See 111 N. Y. 423. Leases or real estate taken by one partner for partnership purposes, mines, and trade-marks are held to be partnership property; 17 Ves. 298; 1 Taunt. 250; Story, Part. §98. See 83 Ia. 571. The good-will of a business is an asset of the firm. It does not always have a salable value, however; Ewell's Lind. Part. *327, *443; 9 Neb. 258; 4 Sandf. Ch. 405; 1 Hoff. Ch. 68; 5 Ves. 539. But Chancellor Kent says, "The good-will of a trade is not partnership stock;" 3 Kent 64. The good-will of a professional partnership belongs, in the absence of express stipulations, exclusively to the survivors; 3 Madd. 64; a surviving partner has the right to carry on the business under the firm name; 7 Sim. 421; 4 Den. 559; *contra*, 7 Abb. Pr. 202. The firm name is a part of the good-will; 8 Daly 1. Upon dissolution, it passes with the assets and good-will to one who buys the business and continues it; 7 Abb. N. C. 292; L. R. 10 Ch. Div. 436. On dissolution and a division of firm assets, each partner may use the firm name in a similar business; 34 Beav. 566; 47 How. Pr. 532 (but see 53 Hun 501); see 79 N. Y. 490; but he must not do it in such a way as to mislead the public; L. R. 9 Ch. Div. 196; 22 Ohio St. 370. The name of a withdrawing partner cannot be used by the remaining partners without an agreement; L. R. 43 Ch. Div. 208; nor can a partner who buys the firm

stock in trade, but not the good-will, keep the name of the retiring partner in the firm name; 26 L. J. N. s. 391. There are statutes which partially govern the subject in New York and Massachusetts. See 15 L. R. A. 462; GOOD-WILL.

A ship, as well as any other chattel, may be held in strict partnership; 3 Kent 154; 12 Mass. 54; 15 Me. 427. But ships are generally owned by parties as tenants in common; and they are not in consequence of such ownership to be considered as partners; 6 Me. 77; 24 Pick. 19; 14 Conn. 404; 14 Pa. 34, 38; 47 N. Y. 462. The same is true of any other species of property in which the parties have only a community of interest; Ewell's Lind. Part. 51; 8 Exch. 825; 21 Beav. 536. As against an assignment of partnership property for the benefit of creditors, property in the possession of and used by the firm, cannot be claimed to have been the individual property of a member of the firm, by one to whom such member subsequently assigned it; 70 Hun 593.

Partners hold land by a peculiar title. In one respect it most resembles an ancient joint tenancy. Neither partner can convey title to a moiety of the goods; his assignee takes subject to the right of the other partner to have firm debts paid out of that fund; he therefore can assign only a moiety of what is left after firm debts paid. Upon this principle depends also the special right of survivorship for the purposes of liquidation. With these qualifications the partner's title at law differs but slightly from a tenancy in common; Story, Part. §§90, 97; 9 Me. 28; 5 Johns. Ch. 417. See 85 Tex. 22. They hold the land in common and must grant it as other tenants in common; 11 Gray 179. The legal title to the land, with all the characteristics of realty, attaches to it until applied to partnership purposes; 76 Ala. 501; equity interferes for partnership purposes only; 13 Allen 352. Co-partners may withdraw realty from the partnership for the purpose of holding it in severalty; and in this event they become simply co-tenants in such land; 7 Mont. 206.

A partner has the same title to the stationary capital of the firm that he has to its product in his hands for sale, but his power over it is less extensive. He cannot sell the permanent capital stock. The power of a partner to sell results not from the title, but from the general partnership relation; 37 Pa. 217.

It has been held that in order to make the land really firm assets the title should be in the partners as a firm, otherwise, the partners would be mere tenants in common, and the land, as to purchasers and creditors, would be the individual estate of the partners, regardless of the funds by which it was purchased and the uses to which it was put; 81 Pa. 377; but as to the partners and their representatives, the land would belong to the firm, in such case; 5 Metc. 582; 89 Pa. 203 (even if the title is in one partner's name; 31 N. Y. Supp. 78, 543). The rule is applied to cases of equitable, as well as legal, estates; 70 Pa. 79. In other cases it has been held that where land has been bought with firm money and is used for firm purposes, or been dedicated to the firm, it must be regarded as partnership property without considering the record title; 64 N. Y. 479; 55 Ill. 416; 14 Fla. 565; 17 Cal. 262. It has been thought necessary to resort to an equitable conversion of firm land into personality in order to subject it to the rules governing partnership property; 7 J. Baxt. 212; 15 Gratt. 11; 74 Pa. 391; 135 U. S. 621. But this fiction seems unnecessary. See 25 Ala. 625; 3 Stew. N. J. 415; 11 Barb. 43.

Partnership lands are liable for firm debts prior to the claim of the widow or heirs of a deceased partner; 118 U. S. 97. After liquidation, the lands or their surplus proceeds pass as real estate; 3 Stew. N. J. 415; 7 J. Baxt. 212; 11 Barb. 43; 74 Pa. 391; upon a dissolution the equitable title to land passes to the surviving partner; 34 Fed. Rep. 375; 86 Wis. 552; 109 N. Y. 338.

If one partner buys land with firm money

and takes title in his own name, a resulting trust arises to the firm; 39 Pa. 535; 135 U. S. 621; 81 Me. 207; 73 Cal. 394; 85 Ky. 539. No length of possession by one partner of real estate paid for with partnership funds and conveyed to him, bars the other partners; 135 U. S. 621. A deed made to a partnership as grantee in the firm name, vests in the individual partners the power to convey; 8 C. C. App. 600; 15 Oreg. 476; but it has been held that such a conveyance vests title only in the partner whose name appears in the firm name; 22 Mo. 378. See 36 Ark. 476. In Pennsylvania, so far as third parties without notice are concerned, the title of the firm must appear of record; 128 Pa. 153. As to partnership realty, see 28 L. R. A. 86, 129, 161; 27 *id.* 449.

Profits made by a member of a firm through individual outside transactions do not belong to the firm, though he employs therein the skill and information acquired by him as a member thereof; 150 U. S. 524. Nor do they when made with the consent of the firm which receives a commission on them; 30 N. Y. Supp. 321; but if a partner avails himself of information obtained by him in the firm business, and uses it for any purposes within the scope of the firm business, or in competition with the firm in its business, he is liable to account to it for the profits made by him; [1891] 2 Ch. 244.

Marshalling Assets. A firm is not a corporation, and hence firm creditors are in theory separate creditors as well. But in administering insolvent estates equity has established the "rule of convenience" that firm and separate creditors shall have priority upon, and be confined to, the firm and separate funds respectively; 116 Ind. 317; 84 Ky. 85; 31 W. Va. 688; 22 Neb. 526; 98 N. C. 1; 133 U. S. 670. A surplus of a separate fund is divided among firm creditors *pro rata*; and a surplus of a firm fund is divided among the separate creditors of the various partners in proportion to the shares of the partners therein; Pars. Part. § 382; 67 Ind. 485; 50 Miss. 300; 44 Pa. 503; 13 N. J. Eq. 126; 41 N. H. 12; 35 Vt. 44; 94 Ill. 271; 28 Ga. 371; 29 Ala. 172. If there is no firm fund and no solvent partner, the firm creditors come in on an equal footing with separate creditors against the separate estates of partners *par passu* with individual creditors; 39 Fed. Rep. 203; 78 Mo. 491; 58 Wis. 499; *contra*, 46 N. H. 188; 100 Ind. 593; 9 Cush. 553. A very slight firm fund over and above costs will suffice to exclude firm creditors from the separate estate; five shillings has been said to be enough; 7 Am. L. Reg. 499; and five pounds is enough, and so is a joint estate of less than two pounds; 2 Rose 54; one dollar and a quarter was considered too little; Pars. Part. 4th ed. § 384. A solvent partner, if living, is equivalent to a firm fund; 8 Conn. 584; Lind. Part. *731.

But though there is no separate estate, separate creditors cannot come against the joint estate until the firm debts are paid, after which they may resort to the partners' interest in any surplus remaining; Pars. Part. § 382; 3 B. & P. 288, 289; 12 Ohio 647; 43 N. H. 144.

As a general rule partnership creditors, after they have exhausted firm assets, cannot share equally with individual creditors in the individual assets; 89 Ala. 503; 133 U. S. 670; 103 Mo. 78; some cases hold that they can; 33 La. Ann. 1279; 21 Conn. 41; 86 Va. 478. In Kentucky they share the separate assets equally with the separate creditors after the latter have received the same dividend from the separate estate that the firm creditors have received from the firm estate; 79 Ky. 133. It has been said not to be settled that, at law, the partnership creditors may not look to the several funds at once, in common with several creditors, but that the law is now tending towards the adoption of the rule to that effect which prevails in equity; Pars. Part. § 383.

If two firms having one or more common members, are both bankrupt, there can be no proof by one against the other; Pars.

Part. § 381. Various explanations have been offered for this rule. Sometimes it is called a "rule of convenience"; sometimes a fundamental principle of equity; Ewell's Lind. Part. *692; 22 Pick. 450; 5 Johns. Ch. 60; Story, Part. § 377; 44 Pa. 503. Sometimes it is said to depend on the principle of destination; the partners by gathering together a firm fund have dedicated it to the firm creditors. Upon this theory, the partnership stock becomes a trust fund. The firm creditors occupy a commanding position and restrain even the partners in dealing with the property; 3 Biss. 122; 41 Barb. 307; 52 N. Y. 146. Usually it is declared to be the outgrowth of the partner's equity, *i. e.* his right to have firm funds applied first to the payment of firm debts; 7 Md. 393; 32 Gratt. 431; 4 Bush 25; 4 R. I. 173; 7 B. Monr. 210. Consequently, where the partner gives up this right, the firm creditor loses his priority; 3 Ired. L. 213; 59 Tenn. 167; 2 Disn. 286; 1 Woods 127; 32 Gratt. 481. The rule does not apply where a partnership creditor has acquired a lien by contract; 84 Ky. 85. If insolvent partners divide the firm fund among their separate creditors in proportion to the interest of each in the partnership, firm creditors cannot object; 39 Pa. 369; 77 N. Y. 195.

As a general rule, insolvency fixes the position of the different funds. A debt to a partner by the firm cannot be collected for the benefit of separate creditors; a debt of a partner to the firm cannot be collected for the benefit of firm creditors; because a man cannot prove against his own creditors; 4 H. & McH. 167. What one partner owes his co-partner independently of the firm can be collected from the separate estate of the debtor for the benefit of the separate estate of the creditor; but this will not be allowed unless the situation is such that the firm creditors can derive no benefit even indirectly from the enforcement of the claim, *i. e.* there must be no surplus to go to them; 4 De G. J. & S. 551; *contra*, where both partners owe the firm one-half of the excess of one debt over the other, it is payable to the firm creditors out of the estate of the greater debtor; 55 Pa. 252. Partners, before insolvency, may, by an executed agreement, change firm into separate property. Firm creditors have no lien to prevent the alteration; *e. g.* where one partner sells out to the others, the fund becomes primarily liable for the claims of the creditors of the new firm; 20 N. J. Eq. 13; 6 Bosw. 533; 19 Ga. 190; 9 Cush. 553; 35 Ia. 323; 21 Pa. 77; 6 Ves. 119.

Equity will not interfere to embarrass a vested legal right. Therefore if a firm creditor levies on a separate estate, he has priority over the subsequent execution of a separate creditor; 24 Ga. 625; 22 Pick. 450; 9 N. J. Eq. 353; 17 N. Y. 300. A separate creditor can sell nothing but his debtor's interest. An execution against the firm, though subsequent, has priority, because it attaches this paramount right of the co-partner. But a firm creditor, without a legal lien, has no standing; 22 Cal. 194; 17 N. J. Eq. 259; 5 Johns. Ch. 417; 9 Me. 28. But where there is an execution against each partner and a subsequent execution against the firm, and the sheriff seizes and sells firm goods under the three, the proceeds are given first to the joint creditor, and the remainder to the separate creditors in proportion to each partner's interest; 29 Pa. 90. So in the case of judgments against real estate. A judgment on a separate claim has no lien on the firm real estate, but only on the partner's interest. But a firm judgment is a lien on a partner's separate real estate, and takes priority over a subsequent separate judgment; Ewell's Lind. Part. *299; 17 N. Y. 300; 46 Ia. 461. Partnership creditors who have a levy on partnership goods are entitled to be paid before a creditor of one of the partners, who had a prior attachment on the individual interest of one partner; 97 Mo. 145.

When an assignment for creditors has been made by a firm, and also by the part-

ners individually, the holder of a note executed by the firm and by the individual members is entitled to have the estates of the partnership and of each partner kept separate, and to receive a dividend from each, though the note was given for a firm liability; 67 N. W. Rep. (Ia.) 239.

Duration. *Prima facie* every partnership is determinable at will. But it may be entered into for a definite term by agreement express or implied; Ewell's Lind. Part. *121, 413.

A partnership at will is presumed to continue so long as the parties are in life and of capacity to continue it; 1 Greenl. Ev. § 42; 9 Humphr. 750. See PARTNERS. A partnership for a term is presumed to continue during the term, provided the parties are in life and of legal capacity to continue it. See 7 Mo. 29. If a partnership be continued by express or tacit consent after the expiration of the prescribed period, it will be presumed to continue upon the old terms, but as a partnership at will; 17 S. & R. 165. But in no case will the law presume a partnership to exist beyond the life of the parties; 1 Wils. Ch. 181. When a partnership has been entered into for a definite term, it is nevertheless dissolved by death within the term; Story, Part. § 195. The *delectus personae* is so essentially necessary to the constitution of a partnership that even the executors or other representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners; 7 Pick. 237, 238; 3 Kent 55; 42 Ill. 342; 46 Mo. 197. The civilians carried this doctrine so far as not to permit it to be stipulated that the heirs or executors of partners should themselves be partners; Domat, lib. 1, tit. 8, s. 2; Pothier, Part. n. 145; though Pothier thinks it binding.

At common law, the representatives of a deceased partner may be made partners in his stead either by original agreement or by testamentary direction; Ewell's Lind. Part. *590; 47 Tex. 481. Clauses providing for the admission into the firm of a deceased partner's representatives will, in general, be construed as giving them an option to become partners, and not as constituting them partners absolutely; 7 Jarm. Conv. 120; 1 McCl. & Y. 569; 2 Russ. 62. The executor of a deceased partner is not compelled in such case to become a partner, so as to charge the estate with debts incurred after the partner's death; 168 Pa. 331. In any event it must be a new partnership; Pars. Part. 4th ed. § 343; 5 Allen 290; 32 Barb. 425; 79 Ala. 540; 31 Minn. 136; *contra*, 48 Conn. 136; 66 Mo. 468; 81 Me. 207; 51 Tex. 578; and such is said to be the tendency of modern decisions; Pars. Part. Beale's ed. § 343, n.

Only the fund already invested or directed to be invested by the testator is subject to the claims of new creditors; 15 Gratt. 11; 10 Ves. 110; 47 Tex. 481; 135 N. Y. 430; any direction, in order to charge the general assets, must be clear and unambiguous; 2 How. 577; 48 Pa. 275.

The rule in England is clear that when an executor undertakes to participate in the business, whether in consequence of a testamentary direction or otherwise, he becomes personally liable to creditors as a partner, in addition to the liability of the estate. The common-law relation of partnership will not admit of a qualified liability; Ewell's Lind. Part. *593, *604; 11 Moo. P. C. 198. See 113 N. Y. 586; 59 Miss. 305. But simply taking the profits will not charge the executor; L. R. 7 Ex. 218. In America, some authorities have declared that the executor is not personally liable when the testator has directed him to continue the business, but only when he does so of his own motion; 4 Ala. 588; 33 Md. 382; 39 How. Pr. 82; 48 Pa. 275; *contra*, for personal liability of executor; 8 Conn. 584. A simple direction to allow a fund to remain in a partnership may be construed as a loan to the survivors; 9 Hare 141. An executor is not liable personally if he merely leaves the estate of his testator in the business and takes no part in it; 60 Miss. 367; 48 N. J. L. 120.

Dissolution. A partnership may be dissolved: 1. *By the act of the parties:* as by their mutual consent; Pars. Part. § 284; 98 Ill. 109; 3 Kent 54; and where no specified period is limited for the continuance of the partnership, either party may dissolve it at any time; 4 Russ. 260; 131 Mass. 312; 76 N. Y. 373; 168 U. S. 334; 3 Kent 53; Story, Part. §§ 84, 272. Whether a partnership for a certain time can be dissolved by one partner at his mere will before the term has expired, seems not to be absolutely and definitively settled; Story, Part. § 275. In favor of the right of one partner in such cases, see 3 Kent 55; 17 Johns. 325; 3 Bland, Ch. 674; 55 Mich. 256, per Cooley, J.; 58 Pa. 155; 168 U. S. 337. Against it, see Story, Part. § 275; 5 Ark. 281; 4 Wash. C. C. 234; Pothier, Part. 152; Ewell's Lind. Part. *571, note; 20 N. J. Eq. 172; 9 Utah 286.

A partner exercising such right would be liable for his breach of the partnership articles; 55 Mich. 256; 168 U. S. 337, 256. As against third persons, a partner may certainly withdraw from a partnership at his pleasure; 3 C. B. n. s. 561. Partners may terminate the partnership at any time by mutual agreement; 126 Ill. 166; and this may be inferred from an abandonment of the undertaking; 109 Ill. 94; 54 Cal. 463; but see 16 Pick. 412. The incorporation of the partners for a similar business may perhaps work a dissolution as by consent. See Pars. Part. § 285. Dissolution need not be under seal, even though the partnership articles were under seal; Pars. Part. § 284. See PARTNERS.

A partner, who, within the time stipulated in the articles of partnership for its continuance, undertakes to dissolve the partnership and takes exclusive possession of its property and business, is liable to account to his co-partner for profits according to the partnership agreement; 168 U. S. 338.

2. *By the act of God:* as, by the death of one of the partners; and this operates from the time of the death; 3 Mer. 610; 6 Cow. 441; 6 Conn. 184; 2 How. 560; 7 Ala. n. s. 19; 7 Pet. 594; 17 Pick. 519; 5 Gill 1; 40 Mich. 343. As to the effect of a provision in the partnership articles to the contrary, see *supra*.

A partnership dissolved by the death of one of the partners is dissolved as to the whole firm; 7 Pet. 586, 594; 31 Minn. 186; and the reason given for this rule is applicable not only to dissolution by death, but to every species of dissolution; Story, Part. § 317.

3. *By the act of law:* as by the bankruptcy of one of the partners; Cowp. 448; 6 Ves. 136; 5 Maule & S. 340; 45 Miss. 703; 59 Ala. 597; or by the bankruptcy of the firm; *id.*; such dissolution takes place when bankruptcy is legally declared, and then relates back to the act of bankruptcy; 11 Ves. 78.

4. *By a valid assignment* of all the partnership effects for the benefit of creditors, either under insolvent acts; Colly. Part. 6th ed. § 102; or otherwise; 41 Me. 373; but this is only *prima facie* evidence of dissolution which other circumstances may rebut; 1 Dall. 380; by a sale of the partnership effects under a separate execution against one partner; 2 V. & B. 300; 3 Kent 59. It is said that this does not constitute a dissolution but inevitably leads to it; 24 Pick. 89; 53 Tex. 540. The mere insolvency of one or all of the members of a partnership, without a suspension or judicial process, etc., does not of itself operate a dissolution; 24 Pick. 89.

5. *By the civil death* of one of the partners; Pothier, Part. n. 147. But the absconding of a party from the state does not of itself operate a dissolution; 24 Pick. 89. See Story, Part. § 298.

6. *By the breaking out of war* between two states in which the partners are domiciled and carrying on trade; 16 Johns. 498; 3 Bland, Ch. 674; 50 N. Y. 166; 91 U. S. 7. See WAR.

7. *By the marriage of a feme sole partner;* 4 Russ. 260; 3 Kent 55. This would now, in view of the recent married women acts,

depend upon the laws of the state; 61 Tex. 437. The marriage of a male and female partner would work a dissolution; 52 Mich. 3.

8. *By the extinction of the subject-matter* of the joint business or undertaking; 16 Johns. 401; and by the completion of the business or adventure for which the partnership was formed; Story, Part. § 280.

9. *By the termination of the period* for which a partnership for a certain time was formed; Colly. Part. § 105.

10. *By the assignment of the whole of one partner's interest* either to his co-partner or to a stranger; 4 B. & Ad. 175; 17 Johns. 535; 1 Freeman, Ch. 231; 3 W. & S. 262; 45 Ill. App. 469; 28 Fla. 690; where it does not appear that the assignee acts in the concern after the assignment; 17 Johns. 525; 8 Wend. 442; 5 Dana 213; 1 Whart. 381; 2 Dev. Eq. 481. But in England this can occur only in partnerships at will. See, 135 U. S. 632. It has been held that a sale by one partner of his interest in the firm's property to the other does not necessarily work a dissolution of the firm; 93 Mich. 569. In partnerships for a term, assignment is a ground for dissolution by remaining co-partners, but probably not by the transferee. In America, the transferee always has a right to an account; Ewell's Lind. Part. *363; 60 Ala. 226; 50 Cal. 615. But see 14 Pick. 322, where it was held that such an assignment would not *ipso facto* work a dissolution. See 55 N. J. L. 427. "If a member of an ordinary partnership assigns where the partnership is at will, the assignment dissolves it, and if the partnership is not at will, the assignment may be treated by the other members of the concern as a cause of dissolution. The assignee of one partner cannot be made a member of the partnership against the will of the other partners, but the absolute right to have the affairs of the firm at once wound up, when the specified duration of the partnership has not yet expired, may be subject to modification according to circumstances." 135 U. S. 632.

11. *By the award of arbitrators* appointed under a clause in the partnership articles to that effect. See 1 W. Bla. 475; 4 B. & Ad. 172; 5 Wend. 268.

The addition of a member to a firm creates a new firm and operates as a dissolution of the old one, even though the business be continued under the old firm name, and so does the retirement of a member; 96 Mo. 591.

A partnership for a term may be dissolved before the expiration of the term, by the decree of a court of equity founded on the wilful fraud or other gross misconduct of one of the partners; Pars. Part. § 270, § 357; 4 Beav. 502; 2 V. & B. 299; 5 Ark. 270; 145 U. S. 578; so on his gross carelessness and waste in the administration of the partnership, and his exclusion of the other partners from their just share of the management; 1 J. & W. 592; 5 Ark. 278; 79 Mich. 290; or persistent violation of partnership articles; 41 Fed. Rep. 841; or the loss of health by a partner; Pars. Part. § 360; or the pecuniary inability of a partner to fulfil his engagement with the others; *id.*; so on the existence of violent and lasting dissension between the partners; 1 Ia. 537; where these are of such a character as to prevent the business from being conducted upon the stipulated terms; 3 Kent 60, 61; and to destroy the mutual confidence of the partners in each other; 21 Beav. 482; 20 N. J. Eq. 172. Equity will not act on slight grounds; 58 Pa. 168. A partner cannot, by misconducting himself and rendering it impossible for his co-partners to act in harmony with him, obtain a dissolution on the ground of the impossibility so created by himself; 21 Beav. 493; 3 Hare 387; 84 Ill. 121. A partnership may be dissolved by decree when its business is in a hopeless state, its continuance impracticable, and its property liable to be wasted and lost; 3 Kent 60; 16 Johns. 491; 3 K. & J. 78; 18 Sim. 495; 8 Oreg. 84; 41 Fed. Rep. 841; or where there was fraud in inducing a part-

ner to enter into the partnership; *id.*

The confirmed *lunacy* of an active partner is sufficient to induce a court of equity to decree a dissolution, not only for the purpose of protecting the lunatic, but also to relieve his co-partners from the difficult position in which the lunacy places them. See 1 Cox, Ch. 107; 1 Swanst. 514; 2 My. & K. 125; 6 Beav. 324; 2 Kay & J. 441; 3 Y. & C. 184; 128 Ill. 256. The same may be said of every other inveterate infirmity, which has seized upon one of the partners and rendered him incompetent to act where his personal labor and skill were contracted for; 3 Kent 62. But lunacy does not itself dissolve the firm, nor do other infirmities; 3 Kent 58; Story, Part. § 295; this is said to be supported by the current of authorities; Pars. Part. § 362. It is, however, contended by Mr. Justice Story and by Parker, C. J., that a clear case of insanity ought to effect that result; Story, Part. § 295; 10 N. H. 101. An inquisition of lunacy found against a member dissolves the firm; 6 Humph. 85. The court does not decree a dissolution on the ground of lunacy except upon clear evidence that the malady exists and is incurable; 3 Y. & C. 184; 2 K. & J. 441. A temporary illness is not sufficient; 2 Ves. Sen. 34; 1 Cox 107. A dissolution by the court on the ground of insanity dates from the decree and not from a prior day; 1 Phill. 172; 1 K. & J. 765.

Actual notice of dissolution must be brought home to persons who have been in the habit of dealing with the firm; but as to all persons who have had no previous dealings with the firm, notice fairly given in the public newspapers is deemed sufficient; Colly. Part. 6th ed. 163, n. See 159 Pa. 165; 99 Ala. 47; 148 Mass. 498. This notice is necessary to terminate the agency of each partner, and, consequently, his powers and liabilities as a member; 68 N. Y. 314; 25 Gratt. 321; 47 Wisc. 261; 67 Ill. 106; 83 Pa. 148; 7 Price 193; 1 Camp. 402. If there is no notice of the dissolution and the retiring partner permits the use of his name, he is liable for the acts of the continuing partner; 48 Mo. App. 518. It is said that notice of dissolution need not be given to one who has sold goods to the firm for cash; 17 Kan. 287; 12 N. Y. 283; or to one who, without the knowledge of the firm, has discounted its commercial paper; 20 N. Y. 241.

It is not necessary to give notice of the retirement of a dormant partner from the firm, if the fact of his being a partner be unknown to all the creditors of the firm; if it be known to some, notice to those must be given, but that will be sufficient; 1 Metc. Mass. 19; 1 B. & Ad. 11; 5 B. Monr. 170; 36 Pa. 325; 37 Ill. 76. See 35 Ala. 242; 87 Ill. 281; 3 N. Y. 168; 87 Ky. 525. But where there were an active and two dormant partners, and the firm retained a solicitor in pending litigation, and the dormant partners retired, the solicitor never having known that they were partners and having no notice of dissolution, the dormant partners were held liable for the solicitor's costs incurred after dissolution; [1897] 2 Q. B. 397.

Notice of the dissolution is not necessary, in case of the death of one of the partners, to free the estate of the deceased partner from further liability; 3 Kent 63; 3 Mer. 614; 17 Pick. 519; 25 Gratt. 321; nor is notice, in fact, necessary in any case where the dissolution takes place by operation of law; 3 Kent 63, 67; 15 Johns. 57; Cowp. 445; 9 Exch. 145. Bankruptcy of a member, after dissolution, is notice of dissolution; 146 Mass. 413.

One partner may obtain an injunction to restrain his co-partner from violating his rights under the partnership articles, even when the dissolution of the partnership articles is not asked; 54 Fed. Rep. 439.

If a retiring partner leaves a firm and the remaining partners agree to pay the debts and indemnify the outgoing partner, the creditors who know these facts and raise no objections are bound to treat the outgoing partner merely as surety for the debts; [1894] A. C. 586.

Effect of dissolution. The effect of dissolution, as between the partners, is to terminate all transactions between them as partners, except for the purpose of taking a general account and winding up the concern; 1 Pa. 274; 8 Kent 62. As to third persons, the effect of a dissolution, with notice as stated *supra*, is to absolve the partners from all liability for future transactions, but not for past transactions of the firm; 53 Miss. 280; 51 Cal. 530; 61 Ind. 225; 57 Ill. 215; 2 Cush. 175; 3 M'Cord 378; 4 Munf. 215; 5 Mas. 56; Harp. 470; 4 Johns. 224; 41 Me. 376.

It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business; 11 Ves. 5; 16 id. 57; 2 Russ. 242; Ewell's Lind. Part. *217. See 55 N. J. L. 427. The power of the partners subsists for many purposes after dissolution: among these are—*first*, the completion of all the unfinished engagements of the partnership; *second*, the conversion of all the property, means, and assets of the partnership existing at the time of the dissolution, for the benefit of those who were partners, according to their respective shares; *third*, the application of the partnership funds to the payment of the partnership debts; Story, Part. § 326; 3 Kent 57; 17 Pick. 519. See 135 U. S. 621. But although, for the purposes of winding up the concern and fulfilling engagements that could not be fulfilled during its existence, the power of the partners certainly subsists even after dissolution, yet, legally and strictly speaking, it subsists for those purposes only; 5 M. & G. 504; 4 M. & W. 461; 10 Hare 453; 61 N. Y. 222; 49 Ia. 177; 45 Pa. 49. The surviving members of a co-partnership have the legal title to the firm property, and the right to dispose of its assets, only for the purpose of closing the business, not to continue it; 66 Hun 628.

Whether a dissolution of a partnership is *per se* a breach of a contract by the firm to employ a person in their service is questionable; 3 H. & N. 931. A contract of employment for a year by a firm terminates on the dissolution of the firm during the year by the death of a partner; 4 Misc. Rep. 99.

See CLUB; NON-TRADING PARTNERSHIP; SECRET PARTNERSHIP; TRADING PARTNERSHIP.

PARTNERSHIP PROPERTY. Apart from statute, the legal title to land cannot be vested in a partnership as such, it not being recognized as a person at law, and consequently, though the property is intended to belong to the firm, the legal title must be vested in some individual or individuals; and so far as the rights of the members of the firm; as such, or of the firm creditors, are concerned, it is immaterial whether the legal title is in one or more of the partners, or in a stranger. (Parsons, Partnership, § 265). In whomsoever the legal title may be, such person or persons are regarded in equity as holding it in trust for firm purposes, that is, for the payment of the firm debts and the adjustment of equities between the partners. 1 Tiffany, Real Prop. 2nd Ed., 660; 135 U. S. 621. See CO-OWNERSHIP; JOINT TENANCY; TENANCY IN COMMON, etc.

PARTURITION. The act of giving birth to a child. See BIRTH.

PARTUS (Lat.). The child just before it is born, or immediately after its birth. Offspring. See MAXIMS, *Partus sequitur*, etc.

PARTY. See PARTIES.

PARTY AGGRIEVED. The phrase is not technical. They are ordinary English words and are to be construed in the ordinary meaning put upon them. 7 Q. B. D. 470.

One whose interest is adversely affected by a judgment. English.

PARTY TO BE CHARGED. A phrase used in the seventeenth section of

the Statute of Frauds, under which, in the case of certain sales, a note or memorandum of the contract must be in writing, "signed by the parties to be charged by such contract." In the fourth section the language is "by the party to be charged." It is held to be sufficient if the signature is only by the party against whom the contract is sought to be enforced; 4 Gray 31; 90 Cal. 307; 42 N. Y. 493; and if a written offer be made though accepted by parol; L. R. 1 Exch. 342; *contra*, 58 Mich. 574. The signature may be by mark, or by initials, or printed, if the printed name be shown to have been adopted; Tiff. Sales 75. If the name be shown to have been signed to the writing to authenticate it, it is immaterial in what part of the writing it is placed; L. R. 2 H. L. 127. An agent may be authorized to sign by parol and a subsequent ratification proved; 24 W. Va. 643; 114 Ind. 311. An auctioneer at a public sale may sign for either party; 7 East 558; 35 N. J. L. 338; and so, ordinarily may a broker; 16 Gray 436; and his memorandum need not be signed. Within the meaning of a statute of frauds, the words "the party to be charged" mean the vendor, in a sale of land; and unless the vendor sign, he may not maintain an action upon the writing, even though the vendee has signed it. 157 Ky. 607, 163 S. W. 741.

See FRAUDS, STATUTE OF; NOTE OR MEMORANDUM.

PARTY IN INTEREST. One scheduled by a bankrupt as a creditor is *prima facie* a "party in interest" and entitled to oppose the granting of a discharge although he has not proved his claim. 206 Fed. 266.

PARTY-JURY. A jury *de medietate lingue*. See JURY.

PARTY OR PARTIES. The words "party" or "parties" are commonly employed interchangeably in deeds, regardless of whether their antecedents are singular or plural. 129 Ky. 132, 110 S. W. 412.

PARTY-WALL. A wall erected on the line between two adjoining pieces of land belonging to different persons, for the use of both properties. 2 Washb. R. P. 385.

A structure for the common benefit and convenience of both the tenements which it separates. 118 Ill. 17.

The phrase ordinarily means a wall of which the two adjoining owners are tenants in common. Emden, Building Leases 285. But it does not as a matter of law necessarily imply a solid structure; 129 N. Y. 51.

It is a wall built by one owner partly on the land of another for the common benefit of both. The adjoining owners are not joint tenants or tenants in common of the party wall. Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and buildings of such other; 57 Miss. 746; 32 Pac. Rep. (Or.) 681.

"The words *party wall* appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, which is the most common and the primary meaning of the term. In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners. Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the building acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of

the other moiety." 14 Ch. Div. 102.

A brick wall which is used in common, as the wall of two adjacent properties in a city, is a party-wall, if erected partly on the soil of each, and so used for many years without question or complaint by either; 43 La. Ann. 1157.

Party-walls are generally regulated by statute. The principles of these acts generally are that the wall shall be built equally on the lands of the adjoining owners, at their joint expense, but when only one owner wishes to use such wall, it is built at his expense, and when the other wishes to make use of it he pays one-half of its value. Each owner has a right to place his joists in it and use it for the support of his roof. See 4 Sandf. 480; 24 Mo. 69; 12 La. An. 785. When the party-wall has been built, and the adjoining owner is desirous of having a deeper foundation, he has a right to undermine such wall, using due care and diligence to prevent any injury to his neighbor; and, having done so, he is not answerable for any consequential damages which may ensue; 17 Johns. 92; 12 Mass. 220; 2 N. H. 534. See 1 Dall. 346; 5 S. & R. 1. An adjoining owner of a party wall has a right to increase its height, but in doing so is liable for any injury to the adjoining building, even though the addition is being built by a contractor and the damages result from a windstorm which causes the wall to fall; 50 N. Y. 639; 68 Hun 293. See 14 Daly 450.

When such a wall exists between two buildings, belonging to different persons, and one of them takes it down with his buildings, he is required to erect another in its place in a reasonable time and with the least inconvenience; the other owner must contribute to the expense, if the wall required repairs, but such expense will be limited to the costs of the old wall; 3 Kent 436; 6 Den. 717. See 41 La. Ann. 194. When the wall is taken down, it must be done with care; but it is not the duty of the person taking it down to shore up or prop the house of his neighbor to prevent it from falling. If, however, the work be done with negligence, by which injury accrues to the neighboring house, an action will lie; 1 M. & M. 362; 15 N. Y. 601. If one tenant in common of a party-wall excludes the other from the use of it by placing obstacles in it, the only remedy is to remove the obstacles; 14 Ch. Div. 192.

Where the owner of two contiguous lots erects a brick message, with a division wall, and sells to different purchasers, the wall is not a party-wall; 2 Miles 247; *contra*, 6 Duer 17. The right to use a party-wall is not lost by lapse of time, even seventy-five years; 1 Phila. 366. It can be acquired by prescription after a sufficient period; 80 N. Y. 614. A party-wall must be built without openings; 61 Pa. 118; 51 Tex. 490; s. c. 32 Am. Rep. 627; 6 Mackey 580; 71 Hun 295; 159 Mass. 427. A party-wall can only be built for mutual support; painting a sign on it is unlawful; 2 W. N. C. Pa. 333. The principle of party-walls is based upon mutual benefit, and does not extend to the interior of lots where the adjoining owner cannot be expected to build; 2 Pears. 324. Where one built a party-wall, which was defective and fell over, injuring the adjoining premises, he was held liable to the owner of the premises; 125 Mass. 233; s. c. 28 Am. Rep. 224. Where a building having a party-wall is destroyed by fire, leaving the wall standing, the easement in the wall ceases; 57 Miss. 746; and so where the wall becomes unfit either from age or accident; 24 Or. 16.

An agreement between adjoining owners in relation to a party-wall erected on the division lines of their lots is binding on the parties and those who purchase subject to such agreement, and creates cross easements upon the lots; 33 Neb. 437; 135 N. Y. 312; but see 9 S. W. Rep. (Tex.) 205. It creates a covenant running with the land; 88 Mo. 524; s. c. 1 L. R. A. 3. But an agreement to pay half the cost is merely a personal covenant; 115 Ill. 199.

By statute in Iowa, Mississippi, Pennsylvania, and South Carolina, and in the

District of Columbia, one adjacent owner may build over his neighbor's line, without compensating him, except that the latter may, when he pleases, use the wall so built, upon paying for it. The cases should be read with a view to the statutes. The regulation of party walls is a very ancient form of exercise of the police power, and came to Pennsylvania from the customs of London, like so many other parts of our early law. Those interested will find the subject discussed in a note in 7 Amer. L. Reg. n. s. 10. But such regulation, as it exists in Pennsylvania and some other states, is an interference with the rights and enjoyment of property, sustainable only on the police power, and therefore to be governed and measured by the strict extent of the statutory grant; 146 Pa. 636. The provincial act of 1693 in Massachusetts, similar to the Pennsylvania act, was held void as contrary to the bill of rights; 139 Mass. 29, a case cited by counsel, but not followed, in 16 W. N. C. Pa. 83. But it has also been said that there can be no available objection to the principle upon which the law of party-walls is based. It has constituted a part of the law of France for ages. The principle is no invasion of the absolute right of property. Per Lowrie, J., in 23 Pa. 36.

See LATERAL SUPPORT.

PARVA SERJEANTIA. Petty serjeanty. See SERJEANTY.

PARVISE. A legal disputation or moot among students at law. English.

PARVUM CAPE. See PETIT CAPE.

PASS. A certificate given to a slave, by his master or mistress, in which it is stated that he is permitted to leave his home with their authority. The paper on which such certificate is written.

In Practice. To be given or entered: as, let the judgment pass for the plaintiff.

To become transferred: thus, the title to goods passes by the sale whenever the parties have agreed upon the sale and the price, and nothing remains to be done to complete the agreement; 1 Bouvier, Inst. n. 939.

To decide upon. When a jury decide upon the rights of the parties, which are in issue, they are said to pass upon them.

The constitution of various states forbid the issue of free passes on railroads, except in certain cases, as does the Interstate Commerce Act. See INTERSTATE COMMERCE COMMISSION.

PASS AND REPASS. The phrase has been held to mean going and returning over the road once only. 34 J. P. 823.

PASS-BOOK. In Mercantile Law. A book used by merchants with their customers, in which an entry of goods sold and delivered to a customer is made.

It is kept by the buyer, and sent to the merchant whenever he wishes to purchase any article. It ought to be a counterpart of the merchant's books, as far as regards the customer's account.

The term pass-book is given to a small book made up from time to time from the banker's ledger and forwarded to the customer: this is not considered as a statement of account between the parties: yet when the customer neglects for a long time to make any objection to the correctness of the entries, he will be bound by them; 2 Atk. 252; 2 D. & C. 534; 2 M. & W. 2.

A depositor in a bank, who sends his pass-book to be written up and receives it back with entries of credits and debits and his paid checks as vouchers for the latter, is bound to examine with due diligence the pass-book and vouchers, and to report to the bank without any unreasonable delay any errors which may be discovered in them; and if he fails to do so and the bank is thereby misled to its prejudice, he cannot afterwards discredit the balance as shown by the pass-book. If a depositor delegates the examination to a clerk without proper supervision he will not be

protected from loss if it turns out that without his knowledge the clerk had committed forgery in raising the amounts of some of the checks, and thereby misled the bank to its prejudice, in spite of due care on the part of its officers; 117 U. S. 96.

PASSAGE. Properly a way over water. Where a seaman shipped for a voyage to foreign parts, and at the termination of the voyage was provided with a passage to a port within the United Kingdom, but not the one from which he originally shipped, he was held to have been provided with a passage home, within the meaning of the Merchant Shipping Act; [1897] 1 Q. B. 712.

In Legal Use. Passage is spoken, chiefly, of laws; and is nearly equivalent to enactment. Spoken of a law, "prior to the passage" means prior to the going into effect. Abbott; 1 Iowa, 435. The time of a passage of a statute is when the act has gone through all the constitutional forms, including the approval of the governor. *Id.*; 33 Pa. St. 202. "Forty days from its passage," referring to a statute, means forty days from the signature by the governor, or passage over his veto, or expiration of time for its return, if neither signed nor vetoed. *Id.*; 3 Heisk. 442.

The easement of passing over a piece of private water, analogous to a right of way over land. R. & L. Dict. Yelv. 163. Also, a voyage upon a ship or other vessel navigating the sea, or some large lake or river. *Id.* See FINAL PASSAGE.

PASSAGE COURT. An ancient court of record in Liverpool, once called the "mayor's court of *pays sage*," but now usually called the "court of the passage of the borough of Liverpool." M. & W.

Up to 1835 it was also called the Borough Court of Liverpool. It was formerly held before the mayor and bailiffs of the borough; but the Court of Passage Act, 1834 provided that the court should not sit without a legal assessor, and that the attendance of the mayor and bailiffs was unnecessary; and now, under the act of 1893, the assessor is the presiding judge, and has the powers of a judge of the High Court sitting at *Nisi Prius* or in chambers. He must be a barrister of not less than seven years' standing.

The court has jurisdiction in personal actions to any amount where any defendant resides or carries on business within the jurisdiction or, by leave of the court, when any part of the cause of action arose therein; but no action under £20 can be commenced in the court if the County Court has jurisdiction. The High Court has power to order certain actions of contract to be tried in the Passage Court, and may in certain cases remit to it actions of tort. The court has jurisdiction in Admiralty similar to and co-extensive with that of the County Court of Lancaster at Liverpool.

This court is a remarkable instance of the adaptation to the needs of a great modern city of a court with an antiquated procedure which in remote times had served the needs of a village such as Liverpool was. Byrne.

PASSAGE-MONEY. The sum claimable for the conveyance of a person, with or without luggage, on the water.

The difference between *freight* and *passage-money* is this, that the former is claimable for the carriage of goods, and the latter for the carriage of the person. The same rules which govern the claim for freight affect that for passage-money; 3 Chitty, Com. Law 424; 1 Pet. Adm. 126; 3 Johns. 335. See COMMON CARRIERS OF PASSENGERS.

PASSAGIO. An ancient writ addressed to the keepers of the ports to permit a man who had the king's leave to pass over sea. Reg. Orig. 193.

PASSAGIUM REGIS. A voyage or expedition to the Holy Land made by the kings of England in person. Cowell.

PASSATOR. He who has the interest or command of the passage of a river; or

a lord to whom a duty is paid for passage. Wharton.

PASSENGER. One who has taken a place in a public conveyance, by virtue of a contract, for the purpose of being transported from one place to another, on the payment of fare or its equivalent. 132 Pa. 1. See 96 *id.* 267.

The purchase of a ticket and the entry by a person on the premises or accommodations of the carrier creates the relation of passenger and carrier with all its rights, duties, and obligations; 104 Ill. 296; 9 Am. & Eng. R. R. Cas. 264; 37 Ia. 264; so does entry on the premises with the intention of buying a ticket; 40 Barb. 546; 89 Pa. 639.

A carrier is not liable to one who rides by stealth; 83 Ill. 427; or who is a trespasser; 91 Mo. 332; although invited to ride by an employee of the carrier; 78 Tex. 174. Express messengers and mail clerks are passengers; 15 N. Y. 444; 96 Pa. 256; but not a voluntary assistant to an express messenger or mail clerk; 12 Am. Rep. 475; or a newsboy permitted to ride free; 69 Pa. 210; 60 Mo. 413; or an employee of the carrier who rides free between his home and place of employment; 30 Kan. 689.

One who travels free; 14 How. 468; on an annual pass; 17 So. Rep. (La.) 503; or on a drover's pass; 51 Pa. 316; is entitled to the same care as the holder of a regular ticket; even if he expressly assumes the risk of accident; 176 Pa. 45; but an employee travelling on a free pass containing a stipulation that the company will not be liable cannot recover for injuries; 84 N. J. L. 513.

A passenger voluntarily riding in a baggage car, or other dangerous place, even by permission of the conductor, cannot recover for injuries; 14 Allen 429; 92 Pa. 21; 55 Tex. 88; but it has been held that the permission of the conductor justifies such conduct in the passenger; 20 Minn. 125; 1 Duer 571; so of permitting a passenger to ride on a freight train; 115 Ind. 435.

A passenger is bound by the reasonable rules of a carrier; 55 Ill. 185; 11 Fed. Rep. 688; 41 Am. Dec. 472; which do not violate the obligation of the contract; 142 Mass. 40; 26 Am. & Eng. R. R. Cas. 54. Whether such rule is reasonable is a question for the court; 18 Am. & Eng. R. R. Cas. 356; 92 Mo. 359; 43 Ill. 420; 14 Lea 128; 20 N. Y. 127; but it has been held to be one for the jury; 4 Fed. Rep. 37; 41 Am. Dec. 472. A passenger who places his arm outside the car window and is injured cannot recover; 36 L. R. A. (Ky.) 123; see 56 Alb. L. J. 250; but it is not contributory negligence for a passenger on a crowded train to ride on the platform; Ky. L. Rep., July 15, 1897.

Provisions have been made by the United States laws for the health and safety of passengers by sea. See acts March 2, 1847; Jan. 31, 1848; May 17, 1848; 11 Stat. 127, 149, 210.

Seamen have no right, even in cases of extreme peril, to sacrifice the lives of passengers, for the sake of preserving their own; Fed. Cas. 15, 383.

See NEGLIGENCE; BAGGAGE; TICKET; COMMON CARRIERS OF PASSENGERS; SLEEPING CAR; RAILROAD.

PASSENGER SHIP. "Every description of sea-going vessel carrying one or more passenger or passengers on any voyage from any place in Her Majesty's Dominions to any place whatever." 52 & 53 Vict. c. 29.

This means for the purposes of the English Merchant Shipping Acts, every ship propelled by mechanical power carrying passengers to, from or between any places in the United Kingdom except steam ferries working in chains. Byrne.

PASSENGER TRAIN. "A train advertised to take passengers generally,—people travelling from place to place,—upon the terms and in the manner *ordina-*

rily applicable to such passengers." 54 L. J. Q. B. 535.

PASSIAGIARIUS. A ferryman. Jacob.

PASSIM. In various places. Used with regard to an author, book, statute, etc., in such a reference as "see the Trade Marks Act, 1905, *passim*."

PASSION. "Passion" is the state of mind when it is powerfully acted upon and influenced by something external to itself; the state of any particular faculty, which, under such conditions, becomes extremely sensitive or uncontrollably excited. 111 S. W. 681. See *HEAT OF PASSION*.

PASSIVE. See *DEBT*; *TRUST*.

PASSIVE TRUST. See *NAKED TRUST*; *TRUST*.

PASTIME. A bet on an election, cannot, with strict propriety of language, be dominated, a bet on any game, sport, or "pastime" whatever. 2 Dana (Ky.) 347.

PASSPORT (*Fr. passer*, to pass, *port*, harbor or gate). In *Maritime Law*. A paper containing a permission from a neutral state to the captain or master of a ship or vessel to proceed on the voyage proposed. It usually contains his name and residence, the name, property, description, tonnage, and destination of the ship, the nature and quantity of the cargo, the place from whence it comes, and its destination, with such other matters as the practice of the place requires.

It is also called a *sea-brief*, or *sea-letter* (*q.v.*). But Marshall distinguishes sea-letter from passport, which latter, he says, is pretended to protect the ship, while the former relates to the cargo, destination, etc. See Jacobs, *Sea-Laws* 66, note.

This document is indispensably necessary in time of war for the safety of every neutral vessel; Marsh. Ins. 317, 406 b.

A Mediterranean pass (*q.v.*), or protection against the Barbary powers.

A document granted in time of war to protect persons or property from the general operation of hostilities. Wheat. Int. Law, 3d Eng. ed. § 408; 1 Kent 161; 6 Wheat. 3.

In most countries of continental Europe passports are given to travellers. These are intended to protect them on their journey from all molestation while they are obedient to the laws. The secretary of state may issue, or cause to be issued in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the president may prescribe, passports, but only to citizens of the United States; R. S. §§ 4075-4076. See *SAFE CONDUCT*.

PASTURES. Lands upon which beasts feed themselves. By a grant of pastures the land itself passes. 1 Thomas, Co. Litt. 202.

PATENT. A grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals. Phillips, Pat. 1.

As the term was originally used in England, it signified certain written instruments emanating from the king and sealed with the great seal. These instruments conferred grants of lands, honors, or franchises; they were called letters patent, from being delivered open, and by way of contradistinction from instruments like the French *lettres de cachet*, which went out sealed.

In the United States, the word patent is sometimes understood to mean the title-deed by which a government, either state or federal, conveys its lands. But in its more usual acceptation it is understood as referring to those instruments by which the United States secures to inventors for a limited time the exclusive right to their own inventions.

The granting of exclusive privileges by

means of letters patent was a power which for a long time was greatly abused by the sovereigns of England. The sole right of dealing in certain commodities was in that manner conferred upon particular individuals, either as a matter of royal favor or as a means of replenishing the royal treasury. These exclusive privileges, which were termed monopolies, became extremely odious, and, at an early date, met with the most determined resistance. One of the provisions of Magna Charta was intended to prevent the granting of monopolies of this character; and subsequent prohibitions and restrictions were enacted by parliament even under the most energetic and absolute of their monarchs. See Hallam, *Const. Hist.* 158, 205.

Still, the unregulated and despotic power of the crown, which reached its height in Elizabeth's reign, proved, in many instances, superior to the law, until the reign of James I., 1623, when an act was passed, known as the Statute of Monopolies, 21 Jac. 1, ch. 3, which entirely prohibited all grants of that nature, and abolished existing monopolies. But the king was permitted to secure by letters patent to the inventor of any new manufacture, the sole right to make and vend the same for a term not exceeding fourteen years. Since that time the power of the monarch has been so far controlled by the law that the prohibition contained in the Statute of Monopolies has been fully observed, and under that statute has grown up the present system of British patent law, from which ours has to a great extent being derived. See Rob. Pat. §§ 1-8. See 12 Law Quart. Rev. 141, as to the earliest grants of privileges in England and the early history of patent law.

The constitution of the United States confers upon congress the power to pass laws "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;" U. S. Const. art. i. s. 6, cl. 8. This right can, accordingly, be conferred only upon the *authors* and *inventors* themselves; but it rests with congress to determine the length of time during which it shall continue. Congress at an early day availed itself of the power. The first act passed was that which established the patent office, on the 10th of April, 1790. There were several supplements and modifications to this law, namely, the acts passed February 7, 1793. June 7, 1794, April 17, 1800, July 3, 1832, July 13, 1832. These were all repealed, by an act passed July 4, 1836, and a new system was established. Subsequently other changes were made by the acts of March 3, 1837, March 3, 1839, August 29, 1842, May 27, 1848, March 3, 1849, February 18, 1861, March 2, 1861, July 16, 1862, March 3, 1863, June 25, 1864, and March 3, 1865. The act of July 8, 1870, repealed all existing acts. See acts of March 3, 1883 (patents to United States officers); Feb'y 4, 1887 (pirating patented designs); Feb'y 9, 1893 (act establishing court of appeals in D. C.); March 3, 1897 (various amendments); March 3, 1897 (jurisdiction over infringers).

Letters patent for inventions are granted for a term of seventeen years.

The present law does not furnish any guarantee of the validity of the title conferred upon the patentee. The patent is, nevertheless, *prima facie* evidence of its own validity; 1 Stor. 336; 14 Pet. 458; 2 Blatchf. 229; as also for a defendant as tending to show non-infringement, in some cases. See 15 How. 252.

The exclusive right of the patentee did not exist at common law; it is created by acts of congress; and no rights can be acquired unless authorized by the statute and in the manner it prescribes; 10 How. 494; 19 *id.* 195; 137 U. S. 41. The power granted by the patent is domestic in its character, and confined within the limits of the United States; consequently it does not extend to a foreign vessel lawfully entering one of our ports, where the patented improvement was placed upon her in a foreign port and authorized by the laws of the

country to which she belongs; 19 How. 183.

Of the subject-matter of a patent. The act of July 8, 1870, sec. 24, provides for the granting of a patent to the first inventor or discoverer of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned. By act of March 3, 1897 (to go into effect January 1, 1898), amending this section, the patenting or publication of an invention in a foreign country, if more than two years before the application in this country bars a patent. There are four classes of inventions which may be the subjects of patents: *first*, an art; *second*, a machine; *third*, a manufacture; and, *fourth*, a composition of matter. In Great Britain, as we have seen, letters patent granting exclusive privileges can be issued only to the inventors of a "new manufacture." But the courts in defining the meaning of the term, have construed the word "manufacture" to be coextensive in signification with the whole of the four classes of inventions thus recognized by our law. An art or process, a machine, and a composition of matter are all regarded there as manufactures. The field of invention in Great Britain is, therefore, coincident with that provided by our law, and the legal subject-matter of patents is the same in each country; 2 B. & Ald. 349; 2 M. & W. 544. But, inasmuch as we have three other classes of inventions, the term "manufacture" has a more limited signification here than it receives in Great Britain. See *infra*.

A *process* is an art or method by which any particular result is produced. Where a result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, vulcanizing india-rubber, smelting ores, etc., are usually carried on by processes, as distinguished from machines. But the term process is often employed more vaguely in a secondary sense in which it cannot be the subject of a patent. Thus, we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine, and does not constitute a patentable subject-matter, because there cannot be a valid patent for the function or abstract effect of a machine, but only for the machine which produces it. 15 How. 267.

"A *process* is a mode of treatment of certain materials to produce a given result. It is an act, or series of acts, performed upon the subject-matter, to be transferred and reduced to a different state or thing. . . . In the language of the patent law, it is an 'art.' The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be entirely new, and produce an altogether new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." 94 U. S. 788. The term *process* is not used in the patent statutes, but it has been uniformly held that there may be a patent for a process; 103 U. S. 727. A process may be new though the apparatus is old; 122 U. S. 413; 21 Fed. Rep. 811. The process

by which an article is produced and the product are two different inventions; 7 Fed. Rep. 213. The new combination of old processes constitutes a new process; 13 Fed. Rep. 173; 7 E. & B. 725.

Letters patent for a process irrespective of the particular mode or form of apparatus for carrying it into effect are granted under the laws of the United States. Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he discovers; 103 U. S. 727.

Processes of manufacture which involve chemical or other similarly elementary action are patentable, though mechanism may be necessary in carrying out the process, while those which consist solely in the operation of a machine are not, and where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon the mechanism, does not impair his right to the patent for the process. A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, that is to say, for the function of a machine; 158 U. S. 68.

To procure a patent for a process the inventor must describe his invention with sufficient clearness to enable those skilled in the matter to understand what the process is, and must point out some practicable way of putting it into operation; but he need not bring the art to the highest degree of perfection; 126 U. S. 1. It must first be reduced to practice; Rob. Pat. §. 171; 30 Fed. Rep. 63.

Where a patent clearly shows and describes the functions of a certain process, no other person can afterwards patent that process; 21 Fed. Rep. 590. Where the process is described with the method of operation of a machine, the machine alone is patentable; 32 Fed. Rep. 221; the product, unless itself new, is not patentable; *id.*

A machine is any contrivance which is used to regulate or modify the relations between force, motion, and weight.

"The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result;" 15 How. 267; but when the effect is produced by chemical action, or by the application of some element or power of nature, or of one substance to another, such methods or operations are called processes; 4 Fish. Pat. Cas. 175.

A machine is an instrument composed of one or more of the mechanical powers, and capable, when set in motion, of producing, by its own operation, certain predetermined physical effects. Rob. Pat. §. 173. A machine differs from an art in that the act or series of acts which constitute the art become, in the machine, inseparably connected with a specific physical feature. The art is the primary conception, the machine the secondary. A machine differs from all other mechanical instruments in that its rule of action resides within itself. The structural law of a machine is its own enduring and essential characteristic. Rob. Pat. §. 175; 1 Fish. 44. See 23 O. G. 1827.

What are sometimes called the simple machines are six in number: the lever, the pulley, the wheel and axle, the wedge, the screw, and the inclined plane. These are sometimes known as the mechanical powers, though neither these nor any other machinery can ever constitute or create power; they can only control, direct, and render it useful.

Machines, as generally seen and understood, are compounded of these simple machines in some of their shapes and modification. Such a combination as, when in operation, will produce some specific final result, is regarded as an entire machine.

It is so treated in the patent law; for although a new machine, or a new improvement of a machine, is an invention, and although only one invention can be included in a single patent, still several different contrivances, each of which is in one sense a machine, may all be separately claimed in a single patent, provided they all contribute to improve or to constitute one machine, and are intended to produce a single ultimate result; and a new combination of machines is patentable whether the machines themselves be new or old; 3 Wash. C. C. 69; 1 Sto. 273, 568; 3 Wheat. 454; 2 Fish. Pat. Cas. 600.

Inventions pertaining to machines may be divided into four classes: 1. Where the invention embraces the entire machine; 2. Where it embraces one or more of the elements of the machine only, as the coupler of a plough; 3. Where the invention embraces both a new element and a new combination of elements previously used and well known; 4. Where all the elements of the machine are old and the invention consists in a new combination. Almost all of the modern machines are of the fourth class; 3 Cliff. 639.

The combination of two existing machines is patentable; 18 Pa. 465.

It has been said that a machine becomes entitled to protection by a patent only when embodied in an operative instrument. The expression of the idea in language, drawings, or a model, does not fulfil the legal requirements. It must be constructed of sufficient size, etc., to accomplish its purpose; Rob. Pat. §. 180. But this is probably not a correct statement.

A *manufacture* is a term which is used to denote whatever is made directly by the hand of man, or indirectly through the instrumentality of any machinery which is controlled by human power. A commodity may be regarded as being in itself a manufacture, or as being produced by manufacture.

The term is used in its widest sense in the patent law of Great Britain. See *supra*. It has been defined there to be "anything made by the hand of man." 3 Term 99.

A manufacture is an instrument created by the exercise of mechanical forces and designed for the production of mechanical effects, but not capable, when set in motion, of attaining, by its own operation, to any predetermined results. It receives its rule of action from the external source which furnishes its motive power. A manufacture requires the constant guidance and control of some separate intelligent agent; a machine operates under the direction of that intelligence with which it was endowed by its inventor when he imposed on it its structural law. The parts of a machine, considered separately from the machine itself, all kinds of tools and fabrics, and every other vendible substance, which is neither a complete machine nor produced by the mere union of ingredients, is included under the title "manufacture"; Rob. Pat. §. 182. An article of ornament may be a manufacture; 20 Blatch. 413; and a bond and coupon register in the form of a book; 9 Fed. Rep. 333; and a wooden pavement; 2 Webst. 126. The parts of a machine are not patentable upon the ground that it makes a known article more perfectly than it has been made before; 11 Blatch. 215. A manufacture, if new in itself, may be patentable whether the process or apparatus by which it is produced be new or not; 6 Holmes 208. A manufacture may be an invention distinct from the mode of producing it; 21 Blatch. 226. Making an article by a new process or apparatus is not making a new manufacture; 8 Fed. Rep. 710; a new process producing a new manufacture may involve two separate inventive acts; 7 Fed. Rep. 213. A new form of an old article may be a new manufacture; 25 O. G. 601; but to perceive a hitherto unknown quality in an existing substance is not the invention of a new substance; 32 Fed. Rep. 81. Although a new process for producing an article is patentable, the

product itself cannot be patented, if it is old; 111 U. S. 293.

Invention, what constitutes. The general rule is that, wherever invention has been exercised, there will be found the subject-matter of a patent; 1 McAll. 48; 5 Blatch. 46.

An invention differs from a discovery, inasmuch as this latter term is used to signify the finding out of something that existed before. Thus, we speak of the discovery of the properties of steam, or of electricity; but the first contrivance of any machinery by which those discoveries were applied to practical use was an *invention*: the former always existed, though not before known; the latter did not previously exist.

Although the word "discovery" is used in our statute as entitling the discoverer to a patent, still, every discovery is not a patentable invention. The discoverer of a mere philosophical principle, or abstract theory, or elementary truth of science, cannot obtain a patent for the same, unless he applies it to some directly useful purpose. The patent can only be for such a principle, theory, or truth reduced to practice and embodied in a particular structure or combination of parts; 1 Sto. 285; 1 Mas. 187; 140 U. S. 481; nor can there be a patent for a function or for an effect only, but for an effect produced in a given manner or by given means; 1 Holmes 20; 2 Fish. 229; or by a particular operation; 1 Mas. 476; 1 Sto. 270; 1 Pet. C. C. 394; 15 How. 62; 4 Fish. 468; but a patent covers the means employed to effect results; 151 U. S. 186. While the end or purpose sought to be accomplished by the device is not the subject of a patent, the device or mechanical means by which the desired result is to be secured, is; 150 U. S. 221. An idea is not patentable; a patent is valid only for the practical application of an idea; 3 Blatch. 535; 20 Wall. 498. A principle denotes the physical force employed by an invention. It is some natural power or energy which operates with uniformity under given circumstances, and may thus be contemplated as obedient to law. It is a necessary factor in every means which produce physical effects, whether such means be natural or artificial; Rob. Pat. §. 135.

To be entitled to a patent, a person must have invented and discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof; and it is not enough that a thing is new, in the sense that in the shape or form in which it is produced, it has not been known, and that it is useful, but it must amount to an invention or discovery; 133 U. S. 349; 132 *id.* 693.

An invention, to be patentable, must not only be *new*, but must also be *useful*. But by this it is not meant that it must be more useful than anything of the kind previously known, but that it is capable of use for a beneficial purpose. The word "useful" is also to be understood in contradistinction to "pernicious" or "frivolous." A contrivance directly and mainly calculated to aid the counterfeiter, the pickpocket, or the assassin, or which would in any way be directly calculated to be injurious to the morals, the health, or the good order of society, would not be patentable. Neither would a new contrivance which was of too trivial a character to be worthy of serious consideration; 1 Paine 203; 1 Blatch. 372, 488; 13 N. H. 311; 5 Fish. 396; 1 Biss. 362; 3 Fish. 218, 536.

The patent itself is *prima facie* evidence of utility; 9 Blatch. 77; s. c. 5 Fish. 48; 1 Bond 212; and its use by the defendant and others is evidence of utility; 1 Holmes 340.

In the trial of an action for infringement, evidence of the comparative utility of the plaintiff's machine and the defendant's is inadmissible, except for the purpose of showing a substantial difference between the two machines; 1 Stor. 336.

A mere application of an old device or process to the manufacture of an article is held to constitute only a "double use," and not to be patentable. There must be some

new process or machinery used to produce the effect; 2 Sto. 190, 408; 2 Curt. 340; 12 Blatch. 101; 91 U. S. 37, 150. See 134 U. S. 388; 135 *id.* 227; 138 *id.* 124; 147 *id.* 623; 148 *id.* 547. A combination of old elements does not constitute a patentable invention, where they are all found, some in one and some in another of earlier devices for the same purpose, in which each element performs the same function that it has in the new combination; 137 U. S. 423; 150 *id.* 221; 133 *id.* 349.

A mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent; 152 U. S. 100; 148 *id.* 547; 144 *id.* 11; 138 *id.* 124; 137 *id.* 423; 133 *id.* 349; and something more is required to support one than a slight advance over what has preceded it, or mere superiority in workmanship or finish; 140 U. S. 55.

Inventive skill has been defined as "that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision; it differs from a "suggestion of that common experience which arose spontaneously and by a necessity of human reasoning in the minds of those who had become acquainted with the circumstances with which they had to deal." 113 U. S. 72.

"Not every improvement is invention; but to entitle a thing to protection it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates." 22 Fed. Rep. 841.

"An invention, in the sense of the patent law, means the finding out—the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind." 4 Fish. 12.

"It was never the object of those [patent] laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures." 107 U. S. 200, Bradley, J.

"The law gives no monopoly to industry, to wise judgment, or to mere mechanical skill in the use of known means, nor to the product of either if it be not new. . . . It is invention of what is new, and not comparative superiority or greater excellence in what was before known, which the law protects as exclusive property, and it is that alone which is secured by patent." 1 O. G. 331.

"Originality is the test of invention. If that is successfully exercised, its product is protected; and it is immaterial whether it is displayed in a greater or less degree, or whether the new idea revealed itself to the inventor by a sudden flash of thought or dawned on his mind after groping his way through many and dubious experiments." 6 Blatch. 195.

Whenever a change or device is new, and accomplishes beneficial results, courts look with favor upon it. The law, in such cases, has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device. A lucky casual thought, involving a comparatively trifling change, often produces decided and useful results, and, though the result of a small amount of inventive skill, the law extends to it the same protection as if it were the product of a lifetime of profound thought and most ingenious experiment; 3 Fish. 141. The patentee must be an inventor and he must have made a discovery. It is not enough that a thing shall be new and that it shall be useful, but it must amount to an invention or discovery; 114 U. S. 11.

The unsuccessful effort of others in the same art, to accomplish the same result,

indicates that the means by which the patentee has produced it are the result of inventive skill; 28 Fed. Rep. 195; 29 *id.* 248. In *The Barbed Wire Patent*, 143 U. S. 275, it appeared that the sales of the earlier article had been but tentative and slight, and those of the patented article enormous. In sustaining the patent in suit, Brown, J., said: "Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. . . . It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result, never attained before, it is evidence of invention."

The degree of invention is not prescribed by the statute; 69 Fed. Rep. 958; nor is it material; 4 Fed. Rep. 900; each case must stand on its own facts, but if the patented structure is at the head of the evolution in its particular art and is a marked improvement on what preceded it, the court should surely be predisposed in its favor; 70 Fed. Rep. 1006. Courts give a liberal construction to the law, so as to protect every contrivance which can be called new, and which proves at all useful. The inventor, therefore, has the benefit of the doubt. But it is obvious that there is a limit beyond which mere changes cannot and ought not to receive this protection; 3 Fish. 265.

Where the question of patentable novelty in a device was by no means free from doubt, the court, in view of the extensive use to which the patent had been put by manufacturers of wagons, resolved the doubt in favor of the patentee and sustained the patent; 145 U. S. 156. While the utility of a contrivance, as shown by the general public demand for it when made known, is not conclusive evidence of novelty and invention, it is nevertheless highly persuasive in that direction, and in the absence of pretty conclusive evidence to the contrary, will generally exercise controlling influence; 27 Fed. Rep. 560; see 4 *id.* 900; 36 *id.* 183; in case of doubt it will turn the scale; 148 U. S. 556; it is better evidence of invention than the opinion of an expert or the intuition of a judge; 34 Fed. Rep. 336; but not where public acceptance is the plain result of successful business methods in creating a market for the article. And not when the popularity is not due to any patentable feature. The fact that a patented device went into immediate use, and supplanted all others, cannot be attributed to artful advertising, in the case of an article such as an electric heater for railway cars, which is sold, not to the public, but to mechanics of skill in their art; 82 Fed. Rep. 993. But extensive use has been said to be an unsafe criterion of patentability; 141 U. S. 419. When, in a class of machines widely used, it appears that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when a patent has been granted to the successful inventor, the courts should not be ready to adopt a narrow or astute construction, fatal to the grant; 151 U. S. 139.

Simplicity in the device is itself a merit; 2 Webst. Pat. Cas. 113. Mere suggestions from others do not negative the existence of patentable invention, unless they cover the entire invention; 5 Ct. of Cl. 1. The suggestion by others of a part of a device does not show the absence of inventive skill as to the whole; 11 Fed. Rep. 505. Where inventive skill was necessary in addition to suggestions of others, the inventor is entitled to a patent; 15 Blatch. 160; 1 Sto. 336; 15 How. 62. To suggest that a certain result may be obtained, but without indicating how, is not an invention; 7 Biss. 490. Mere experiment is not invention; 1 Fish. 17.

The simplicity of a device and its apparent obviousness after the event, ought not to detract from its meritousness. That it had never been suggested or thought of before, and effectually supplied

the one thing necessary to bring success, when before there had been nothing but failure, is sufficient within the meaning of the patent law; 61 Fed. Rep. 102. "The apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject; but the decisive answer is that with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to any one before. The practised eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to every one." 155 U. S. 597.

A "double use" may involve invention if the second use is an art remote from the former use; otherwise, if the new use is such that it would occur to a person of ordinary mechanical skill; much depends upon the nature of the changes required to adapt the device to its new use; *id.*

Study, effort, and experiment are not alone enough to constitute inventive skill; 27 Fed. Rep. 219. Nor is the exercise of good judgment; 109 U. S. 633. Nor the exercise of the reasoning process; 23 Fed. Rep. 443. Inventive skill requires thought, while mechanical skill does not; 24 Blatch. 163. Small discoveries may involve inventive skill; 27 Fed. Rep. 656.

The exercise of mechanical skill must be considered as it existed at the date of the invention; 31 Fed. Rep. 224.

It is said by an able writer: These two requirements of novelty and utility are clearly susceptible of proof by evidence; and it is deducible from the earlier decisions and those which have followed in the same line, that a change which involves those requirements is an invention within the meaning of the patent law with certain well defined exceptions. The exceptions are that a change, even when new and useful, does not amount to invention when it is a mere change of form, or in size, or degree, or in proportions, or of material, or of location, or of arrangement. A mere application of an old thing to a new purpose or a double use of an old thing is an exception. Also a mere application of an old thing to perform its usual functions with its usual mode of operation, or movement. A mere substitution of one old device for another, or a duplication of old devices, or a change of direction of movement of a moving device, or discovery of a new property of matter are exceptions. But there are changes in each of the above respects which are not mere changes, but are substantial, and amount to invention when the changes are new and useful; Renwick, Pat. Inv. 4.

The doctrine of *equivalents* is treated under novelty as a part of Patentable Invention; Rob. Pat. § 245. It is there said that *equivalent* "signifies the interchangeability of agencies which are known in the arts to be capable of serving the same purpose as integral parts of some particular invention. It must be capable of performing the same office in the invention as the act or substance whose place it supplies; it must relate to the form of embodiment alone and not affect in any degree the idea of means; and it must have been known in the arts at the date of the patent, as endowed with this capability, or have subsequently become so known without the further exercise of inventive skill." *Id.* § 246. See 27 Fed. Rep. 691; 15 Wall. 187; 3 Bann. & Ard. 598.

A mechanical equivalent exists where one device may be adopted instead of another by a person skilled in the art, from his knowledge of the art; 1 Fish. 351. Equivalents have been said to be "obvious and customary" interchanges; 1 Fish. 64. It is a question of fact depending on the opinion of experts and on an inspection of the machine; 2 Fish. 31. It is a question of use, not of name; 5 Fish. 1. Equivalents may differ in shape; 11 Fed. Rep. 148; a substitute in a combination does not cease to be an equivalent because, in addition, it does something more and better; 3 B. & Ard. 161. Only those things can be considered equivalents for the elements of a

manufacture which perform the same function in substantially the same way; 102 U. S. 232. Where no inventive skill is shown in the substitute, it is an equivalent; 103 U. S. 797; 96 *id.* 549.

Successive patents. "No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ. The second patent, in such case, although containing a claim broader and more generic in its character than the specific claims contained in the prior patent, is also void. But where the second patent covers matters described in the prior patent, essentially distinct and separable, and distinct from the invention covered thereby, and claims made thereunder, its validity may be sustained." 151 U. S. 186. See also 69 Fed. Rep. 257; 83 *id.* 1014.

An **improvement** is an addition to or alteration in some existing means, which increases its efficiency without destroying its identity. It includes two necessary ideas: the idea of a complete and practical operative art or instrument and the idea of some change in such art or instrument not affecting its essential character but enabling it to produce its appropriate results in a more perfect or economical manner; Rob. Pat. § 210.

No patent can be granted in the United States for the mere importation of an invention brought from abroad; although it is otherwise in England. The constitution, as we have seen, only authorizes congress to grant these exclusive privileges to the inventors themselves. The mere fact of an inventor having obtained a patent for a device in a foreign country will not prevent his obtaining a patent for the same thing here, provided he applies for a patent here within seven months from the date of the foreign patent (Act of March 3, 1897). When the foreign patent issues before the United States patent issues, the latter expires at the same time as the former, or, if there be more than one, with the former patent having the shortest term; but in no case will the term exceed seventeen years; 157 U. S. 1.

Of caveats. See CAVEAT.

The caveator can prevent the grant of any interfering patent, on any application filed within one year from the day when the caveat was lodged in the patent office, without his being notified of the application and having an opportunity of contesting the priority of invention of the applicant, by means of an "interference," which will be treated of hereafter. In this way an inventor can obtain a year to perfect his invention, without the risk of having the patent to which he believes he is entitled granted to another in the mean time.

Upon application within one year by any other person for a patent covering the same invention, it is the duty of the commissioner of patents to give notice of such application to the person filing the caveat, who shall within three months file his description, etc. The caveat is filed in the secret archives of the office. See 1 Bond 212; 4 Blatch. 362. A caveat is evidence of the date of the invention, but it does not necessarily show that the invention was then completed. It is not assignable. The caveator is not concluded by his description of the invention, but may proceed with his experiments; Rob. Pat. § 438 *et seq.*

Of the application for a patent. When the invention is complete, and the inventor desires to apply for a patent, he causes a specification to be prepared, setting forth in clear and intelligible terms the exact nature of his invention, describing its different parts and the principle and mode in which they operate, and stating precisely what he claims as new, in contradistinction from those parts and combinations which were previously in use. This should be accompanied by a petition to the commissioner of patents, stating the general nature of his invention and the object of his application. One copy of drawings should be attached

to the specification, where the nature of the case admits of drawings; and, where the invention is for a composition of matter, specimens of the ingredients and of the composition of matter should be furnished. The specification as well as the drawings, must be signed by the applicant and attested by two witnesses; the drawings may be signed by an attorney in fact; and appended to the specification must be an affidavit of the applicant (or in case of his death, of his personal representatives), stating that he verily believes himself to be the original and first inventor of that for which he asks a patent, and that he does not know and does not believe that the same was ever before known or used, and, also, of what country he is a citizen. It may be sworn to before any person in the United States authorized to administer oaths, and, in foreign countries, before certain officials designated in the act. The whole is then filed in the patent office.

A substituted specification covering a different invention fixes the date of the application; 27 Fed. Rep. 450.

Of the examination. As has been already observed, the act provides for an examination whenever an application is completed in the prescribed manner. And if on such examination it appears that the claim of the applicant is invalid and would not be sustained by the courts, the application is rejected.

As a general rule, an invention is considered patentable whenever the applicant is shown to be the original and first inventor; and his own affidavit appended to the application is sufficient to raise a presumption that he is the first inventor, until the contrary is shown. But if it is ascertained by the office that the same thing had been invented by any other person in this country, or that it had been patented or described in any printed publication in this or any foreign country, prior to its invention by the applicant, a patent will be denied him. But a mere prior invention of the same thing in a foreign country, if not patented or described in some printed publication, will not affect his right to a patent here. Under the act of March 3, 1897 (taking effect Jan. 1, 1898), the patenting or publication of an invention in any foreign country, for more than two years before the application in this country, or its patenting in a foreign country by the applicant for more than seven months before his application, bars a patent here.

The rule that the applicant is entitled to a patent whenever he is shown to be the original and first inventor is subject to one important exception. If he has, either actually or constructively, abandoned his invention to the public, he can never afterwards recall it and resume his right of ownership.

Abandonment may be by conduct from which an intention to abandon will be inferred, or by public use or sale. In the former class, it may be *before* the application; *by* the application; or *after* application. Abandonment before application may be shown by any conduct from which can be inferred an intention to give the invention to the public; as, by throwing it aside and not using it; disclaiming any right in it, or giving it expressly to the public; and by public use of the device for even less than two years, taken in connection with circumstances tending to show that the inventor did not intend to secure a monopoly; Rob. Pat. § 349. It is a question of intention; 2 Blatch. 240; and of fact; 10 *id.* 140.

An applicant, either by express words in his specification, or by a failure to claim all of his invention or by unreasonable delay in applying for a revision, may abandon the whole or a part of his invention; and after application he can abandon his invention by withdrawing his application.

Public use or sale of the invention for more than two years before the application works an abandonment; 123 U. S. 267; 26 Fed. Rep. 262; this is a conclusive pre-

sumption; 9 Blatch. 185; and a single use is enough; 104 U. S. 333. But this rule does not apply to a strictly experimental use; 22 Fed. Rep. 780; 19 Fed. Rep. 735; 12 *id.* 721; no matter how long it had continued; 97 U. S. 126. A mere temporary use by a few persons as an act of kindness, for a limited period, or a use where the party using it is bound to secrecy, or is actually under the control of the inventor, or a use by the inventor in private is not within the rule; 1 Sto. 273. See 1 Fish. 1. Such public use, with or without the consent of the subsequent patentee, renders the patent invalid; 123 U. S. 267.

The sale which works an abandonment in this connection must be a sale in the usual course of business; 2 Fed. Rep. 78; and of the completed invention; *id.*; and merely placing the device on sale is not sufficient; 14 Fed. Rep. 919. A sale on trial, to test the invention, is not an abandonment, even though warranted; 11 Fed. Rep. 859.

Use by the inventor for the purpose of testing the machine, in order to devise means for perfecting its operation, is admissible where, as incident to such use, the product of its operation is disposed of by sale; such use does not change its character; but where the use is mainly for the purposes of trade and profit and the experiment is merely incidental to that, the principle, and not the incident, must give character to the use. The thing implied as excepted out of the prohibition may be characterized as substantially the purpose of experiment; 123 U. S. 249.

Where an invention was complete and capable of producing the result sought to be accomplished, and the construction and mode of operation and use of the mechanism were necessarily known to the workmen who put it into safes, which were the articles in question, where it was hidden from view after the safes were completed and no attempt was made to expose the mechanism and thus prove whether or not it was efficient, it was held that it was not an experimental use; 107 U. S. 90. If an inventor, after having made his device, gives or sells it to another to be used by the donee or vendee without limitation or restriction or injunction of secrecy, and it is so used, such use is public even though confined to one person; 104 U. S. 333. Where the inventor of a connecting tie for rails used the device in constructing a cable road and reserved no future control over it, and had no expectation of making any material changes in it, and never examined it to see whether it was defective or could be improved, it was held that it was a public use so as to defeat the patent; 146 U. S. 210. But where the inventor of a wooden pavement himself constructed an experimental pavement which was used for six years before the patent was applied for, and it appeared that he built it at his own expense and went to see the effect of traffic upon it and its durability, and examined it almost daily, it was held that this was an experimental use; 97 U. S. 126. Where the invention is a machine, such as a grist mill, its experimental use does not cease to be so because its products have been sold. But if the inventor allows his machine to be used by other persons generally, with or without compensation, or if it by his consent put on sale for such use, then it will be in public use and on public sale, within the act; 146 U. S. 223. Where there is no evidence of use or sale of the invention, which was a method of driven wells, by the applicant before his application, or by others with his consent, except putting down a single well, it was held that the use was merely experimental; 122 U. S. 71.

The abandonment extends only to the exact invention publicly used or sold; 2 Fed. Rep. 78.

An inventor whose application for a patent has been rejected by the patent office and withdrawn by him, and who, without substantial reason or excuse, omits for eight years to reinstate or renew it, during which time many patents embody-

ing the substance of the invention are granted to other persons, must be held to have abandoned the invention; 118 U. S. 22.

A delay of 13 years in the patent office, was held, under the circumstances, not to invalidate a patent; 167 U. S. 225.

By the act of March 3, 1897, it is provided that the failure to apply for a patent in this country for more than seven months after the inventor's application in a foreign country, bars the patent. And, by the same act, a failure to complete an application and prepare it for examination within one year after its filing, and a failure to prosecute the same within one year after action in the office, of which notice shall have been given, works an abandonment, unless the commissioner be satisfied that the delay was unavoidable; but these provisions do not apply to patents granted or applications filed prior to January 1, 1898.

If the application or any claim is rejected, the specification or the claim may be amended and a second examination requested. If again rejected, an appeal may be taken to the examiners-in-chief. If rejected by them, an appeal lies to the commissioner; and if rejected by him, an appeal may be taken to the court of appeals of the District of Columbia, upon notice to the commissioner, and filing the reasons of appeal in writing. If all this proves ineffectual, the applicant may still file a bill in equity in the circuit court to compel the allowance of his patent.

All the proceedings before the patent office connected with the application for a patent are *ex parte*, and are kept secret, except in cases of conflicting claims, which will be referred to below.

Of the date of the patent. The patent usually takes date on the day it issues; every patent shall bear date as of a day not later than six months from its allowance and notice to the applicant.

The date of the application and not the date of the patent, controls in determining the legal effect to be given to two patents issued at different dates to the same inventor, and the order in which they are to be considered; 143 U. S. 275.

The conception of an invention consists in the complete performance of the mental part of the inventive act. While this in theory necessarily precedes the physical reduction to practice, it in fact also embraces whatever of thought and skill the inventor may have exercised in bringing the invention to that point where reduction to practice can begin; Rob. Pat. § 376; and the date of the conception is the date when the idea of means, including all the essential attributes of the invention, becomes so clearly defined in the mind of the inventor as to be capable of exterior expression; Rob. Pat. § 80. The true date of invention is at the point where the work of the inventor ceases and the work of the mechanic begins; 18 O. G. 520.

Whoever first perfects a machine and makes it capable of useful operation is entitled to a patent; an imperfect and incomplete invention resting in theory or intellectual motion and uncertain experiments, not actually reduced to practice and embodied in some machine, etc., is not patentable; 2 Cliff. 224.

The one who first conceives the invention, and is diligent to reduce it to practice is entitled to a patent in preference to one who conceives it subsequently, although the latter may have been the first to render the invention available for public use; Rob. Pat. § 383. See 1 Sto. 590.

Of interferences. When an application is filed which interferes with another pending application or with an unexpired patent, an investigation is ordered for the purpose of determining who was the prior inventor, and a patent is directed to be issued or not accordingly. When the controversy is between two applications a patent will be finally granted to him who is shown to be the first inventor, and will be denied to the other applicant so far as the point thus controverted is concerned. But if the interference is between an application and

an actual patent, as there is no power in the patent office to cancel the existing patent, all that can be done is to grant or withhold from the applicant the patent he asks. If the patent is granted to him there will be two patents for the same thing. The two parties will stand upon a footing of equality, and must settle their rights by a resort to the courts.

The parties to an interference are required to put their claims into proper shape, and the question of the patentability of the device for which the application is filed is then determined by the examiner. The issues are then defined by the examiner and the parties notified. Each party is then required to file a concise written statement under oath of the date of the conception of his invention, its reduction to practice, etc. If a party to an interference fail to file such a statement, he cannot show an earlier date for his invention than the date of his application. The averments of fact in the preliminary statement are conclusive upon the party who files it. If, in an interference between two applications, the date fixed in the preliminary statement is not earlier than the date of filing the previous application, the priority is awarded to the earliest application. Testimony is taken in contested cases and the question of priority passed upon. An appeal lies to the Examiners-in-Chief and from them to the Commissioner. Priority of inventive act consists in the prior conception of the idea of means and the prior embodiment of this idea in some practically operative art or instrument, or reasonable diligence in perfecting such embodiment, and must be established by a clear preponderance of evidence; Rob. Pat. § 600. Conception of the invention may be shown by verbal descriptions, sketches, models, etc., but these have little weight in proving a reduction to practice. The testimony cannot carry the date of conception back of the statement filed. An applicant can terminate interference proceedings by disclaiming the matter in contest, whereupon judgment goes against him on the interference. A judgment in an interference has been held to be binding only on the parties to the record, and only in respect of further proceedings on the same question in the patent office, and not on the courts on the question of novelty or priority; 1 Bann. & A. 394; though the courts will consider it on a motion for a preliminary injunction against the defeated party; 24 Fed. Rep. 275; but the supreme court has recently held that where the question decided in the patent office is one between contesting parties as to priority of invention, the decision there must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony, which in character and amount carries thorough conviction; 153 U. S. 125. The opinion of the patent office on claims or earlier patents do not affect the applicant, except so far as they lead him to abandon or modify some of his claims; 84 Fed. Rep. 659.

The question of interference is determined by the claims and not by the general appearance and functions of the machine shown, but not claimed; 56 Fed. Rep. 714.

An appeal lies from the Commissioner of Patents in an interference case to the court of appeals of the District of Columbia; Act of Feb. 9, 1893.

Whenever there are interfering patents, any person interested in any one of such patents may have relief against the interfering patent by suit in equity against its owners; the court may thereupon adjudge either patent void in whole or in part, etc., but such judgment shall affect none but parties to the suit and those deriving title under them subsequently to the judgment.

Of the specification. The specification is required to describe the invention in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it relates, to make, construct, or use it. In the trial of an action

for infringement, it is a question of fact for the jury whether this requirement has been complied with. See 2 Brock. 293; 1 Mas. 182; 2 Sto. 432; 1 W. & M. 53. At the same time, the interpretation of the specification, and the ascertainment of the subject-matter of the invention from the language of the specification and claims and from the drawings are a matter of law exclusively for the court; 5 How. 1; 3 McLean 250, 432; 2 Fish. 62; 4 Blatch. 61; 1 Fish. 44, 289, 351. The specification will be liberally construed by the court, in order to sustain the invention; 1 Sumn. 482; 1 Sto. 270; 5 Fish. 153; 2 Bond 189; 15 How. 341; 4 Blatch. 238; 1 Wall. 491; but it must, nevertheless, identify with reasonable clearness and accuracy the invention claimed, and describe the manner of its construction and use so that the public from the specification alone may be enabled to practise it; and if the court cannot satisfactorily ascertain the meaning of the patent from its face, it will be void for ambiguity; 2 Blatch. 1; 2 Brock. 303; 1 Sumn. 482; 1 Mas. 182, 447. It will be construed in view of the state of the art; 2 Fish. 477; 14 Blatch. 79; 1 Biss. 87; 124 U. S. 1; 133 id. 349. A specification in letters patent is sufficiently clear and descriptive, when expressed in terms intelligible to a person skilled in the art to which it relates; 152 id. 561.

It is required to distinguish between what is new and what is old, and not mix them together without disclosing distinctly that for which the patent is granted; 1 Sto. 273, 475; 1 Sumn. 482; 3 Wheat. 534. If the invention consists of an improvement, the patent should be confined thereto, and should clearly distinguish the improvement from the prior device, so as to show that the former only is claimed; 1 Gall. 438, 478; 1 Mas. 447; 3 McLean 250. Ambiguous terms should be avoided; nothing material to the use of the invention should be omitted; and the necessity of trials and experiments should not be thrown upon the public.

Of the claim. The claim is the statutory requirement prescribed for the purpose of making a patentee define what the invention is. It is to be read in the light of the description contained in the specification, and its literal terms may be enlarged or narrowed accordingly, but not to an extent inconsistent with their meaning; 38 U. S. App. 55. If an invention is not covered by the claim, it will not be protected by the patent; 148 U. S. 54. A mere reference in a claim to a letter on the drawing does not in itself limit the claim to the precise geometrical shape shown in the drawing; 20 U. S. App. 14.

The claim is the measure of a patentee's right to relief; and where the specification may be referred to, to limit the claim, it can never be made available to expand it; 141 U. S. 419.

The inventor need not describe all the functions to be performed by his machine if they are evident in its practical operation; 37 U. S. App. 239.

The terms of the claims are carefully scrutinized in the patent office. It defines and determines what the applicant is entitled to. The scope of the patent should be limited to the invention covered by the claim; although the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specification; 104 U. S. 112. The whole patent, including specifications and drawings, is to be taken into consideration, though the court looks to them only for the purpose of placing a proper construction upon the claims; 2 Fish. 10. The scope of the patent is given by the claims; 117 U. S. 555; though it be less than the real invention; 9 Blatch. 77; parts which may be indispensable to the invention are not covered by the patent unless mentioned in the claims; 1 Fed. Rep. 732; and where a feature is inserted in the claims which is not essential, its materiality cannot be afterwards denied; 13 Fed. Rep. 86. The patentee, in a suit brought on his patent, is bound by his claims; 95 U. S. 274;

9 Blatch. 363; the court will not enlarge the claims by the specification; 117 U. S. 554. Words in a claim such as "substantially as described" refer back to the descriptive parts of the specification and are implied in a claim whether inserted or not; 19 Wall. 287; they relate only to the material features of the invention; 9 Blatch. 77. See 86 Fed. Rep. 315. "Substantially as set forth" are technical words and are equivalent to saying "by the means described in the text of the inventor's application for letters patent as illustrated by the drawings, diagrams, and model which accompany the application;" 25 U.S. App. 475.

A patentee cannot hold under his patent anything excluded therefrom by him or with his acquiescence during the stages of his application therefor; 28 U. S. App. 525.

Where one originates a generic invention and also several specific inventions and presents the same for patent contemporaneously, he cannot enlarge each invention by use of general terms so as to obtain overlapping patents; 1 U. S. App. 320. An inventor is required to explain the principle of his machine and the best mode of applying the principle, so as to distinguish it from other inventions; but he is not necessarily limited to the one mode shown. A pioneer inventor is entitled to a generic claim, which will include every species within the genus, and may also insert in the same application specific claims for one or more of the species; 80 Fed. Rep. 121.

A claim must be interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the patent office or disclosed by prior devices; 150 U. S. 221.

A claim for a function is bad; 4 Fed. Rep. 635; though it will, if possible, be construed as a claim for means of performing the function; 28 Fed. Rep. 850; thus a claim for doing an act is treated as a claim for the means of doing it; 94 U. S. 288.

While the law does not limit the number of claims, their multiplication is disapproved; 21 Fed. Rep. 316.

A drawing must be filed whenever the nature of the invention permits; 16 O. G. 809; a model is not required until called for by the patent office.

Of re-issues. It often happens that errors, defects, and mistakes occur in the specification of a patent, by which it is rendered wholly or partially inoperative, or perhaps invalid. Sec. 53 of the act of 1870 provides that when such errors or defects are the result of inadvertence, accident, or mistake, without any fraudulent or deceptive intention, the patent may be surrendered by the patentee, his executors, administrators, or assigns, and a new patent issued in proper shape to secure the real invention intended to have been patented originally. Rob. Pat. § 658. The identity between the invention described in the re-issue and that in the original patent is a question of fact for the jury; 4 How. 380; 27 Pa. 517; 1 Wall. 531. A patentee cannot secure in a re-issue claims covering what has been previously rejected upon his original application; 150 U. S. 38.

A re-issued patent has the same effect and operation in law, on the trial of all actions for causes subsequently arising, as though the patent had been originally issued in such corrected form. From this it appears that after a re-issue no action can be brought for a past infringement of the patent. But, as the bare use of a patented machine is (if unauthorized) an infringement of the rights of the patentee, a machine constructed and lawfully used prior to the re-issue may be an infringement of the patent if used afterwards. The re-issued patent will expire when the original patent would have expired.

All matters of fact relating to a re-issue are finally settled by the decision of the commissioner, granting the re-issue; but it may be shown that the commissioner has exceeded his authority in granting a re-issue for an invention different from the one embraced in the original patent; 11

Wall. 516; 9 *id.* 796; 8 Blatch. 513. See 123 U. S. 87. Where a re-issue is sought on the ground of inadvertent errors, rendering the patent inoperative, the decision of the commissioner upon the questions of fact relating to inoperativeness and inadvertence will not be re-examined by the courts; 82 Fed. Rep. 916.

Where the only mistake suggested is that the claim is not so broad as it might have been, the mistake was apparent on the first inspection of the patent, and any correction desired should have been applied for immediately; the right to a correction may be lost by unreasonable delay. The claim of a specific device, and the omission to claim other devices apparent on the face of the patent, are in law a dedication to the public of that which was not claimed, and the legal effect of the patent cannot be revoked unless the patentee surrenders it and proves that the specification was so framed by real inadvertence, accident, or mistake, and this should be done with due diligence and before adverse rights have accrued. It was not the special purpose of the legislation to authorize re-issues with broader claims, though such a re-issue may be made when it clearly appears that there has been a *bona fide* mistake, such as chancery in cases within its ordinary jurisdiction would correct. The specifications cannot be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the invention as intended to be originally claimed; 129 U. S. 294; 119 *id.* 664. The re-issue is an amendment and cannot be allowed unless the imperfections in the original patent arose without fraud, and from inadvertence, accident, or mistake; 137 U. S. 258. The re-issued patent is not a new patent; and an existing contract concerning the patent before its surrender applies equally to it after the surrender and re-issue; 11 Cush. 569.

A re-issue can cover only what an examination of the original shows the original was intended to embrace; 127 U. S. 563; 123 *id.* 87; and not that which the original did not describe or claim; 40 Fed. Rep. 667. It can enlarge a claim by omitting an element previously claimed as essential; 124 U. S. 347. Claims cannot be enlarged so as to cover matter already in public use after unreasonable delay; 127 U. S. 563. If not for the same invention, the re-issue is void; 145 U. S. 226.

A claim restricted by the patent office in the first re-issue cannot be enlarged by subsequent re-issues; 125 U. S. 427. A re-issue which brings in a claim originally rejected by the patent office with the acquiescence of the applicant, is void; 35 Fed. Rep. 329; but a re-issue may correct errors occasioned by the mistaken ideas raised in the patent office; 33 Fed. Rep. 502. Both the specification and the claims may be corrected by a re-issue; 16 Fed. Rep. 240.

Laches in applying for a re-issue is fatal to the re-issue and may be taken advantage of by a demurrer; 39 Fed. Rep. 273; 33 *id.* 840. What is reasonable delay is a question for the court and the decision of the patent office on that point is not conclusive; 125 U. S. 217. The plaintiff must explain the delay in applying for a re-issue; 125 U. S. 217. The inadvertence must be in reference to the application and not to the invention. See a review of the cases in 123 U. S. 89. A delay of three years is held to invalidate a re-issue; 76 Fed. Rep. 816; but where a patent, dated in 1882, was held void in 1894 and a re-issue was granted five months later, it was held valid; 86 Fed. Rep. 124; where, on an application for a re-issue, the primary examiner rejects certain claims, and the applicant abandons his application, the claims disallowed are not invalidated; 169 U. S. 606.

No action lies on the original patent after its surrender for re-issue; 35 Fed. Rep. 883. A patentee, imposing words of limitation upon himself in his claim in taking out a re-issue, is bound thereby in subsequent suits on the re-issued patent; 123 U. S. 589.

A patent cannot be re-issued to enlarge

a claim unless there has been a clear mistake in the wording of the claim, and an application is made within a reasonably short period after the original patent was granted; 123 U. S. 87; 125 *id.* 217; 148 *id.* 270.

The application for a re-issue must be sworn to by the inventor, if living, and not by the assignee, if any.

A re-issue of a patent for an invention, after the expiration of foreign patents for the same invention is invalid; 135 U. S. 176.

Until an amended patent issues, the original stands as if the re-issue had never been applied for; 171 U. S.—Not reported.

Of patents for designs. The act of 1870 permits any person to obtain a patent for a design, which shall continue in force for three and a-half, seven, or fourteen years, at the option of the applicant, upon the payment of a fee of ten, fifteen, or thirty dollars, according to the duration of the patent obtained. These patents are granted wherever the applicant, by his own industry, genius, efforts, and expense, has invented or produced any new and original design for a manufacture, alto-relievo, or bas-relief, or any new and original design for the printing of woollen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture, or any new and original shape or configuration of any article of manufacture, not known or used by others before his invention or production thereof, or patented or described in any printed publication.

A design is an instrument created by the imposition upon a physical substance of some peculiar shape or ornamentation which produces a particular impression upon the human eye, and through the eye, upon the mind. Its creation involves a change in the substance itself and not merely in the mode of presenting it for sale; and affects, not its abstract qualities, nor those on which its practical utility depends, but those only which determine its appearance to the sight; Rob. Pat. § 200. The acts of congress were plainly intended to give encouragement to the decorative arts; they contemplate not so much utility as appearance; 14 Wall. 511. A design is patentable though not more beautiful than former ones; 105 U. S. 94. Design patents require as high a degree or exercise of the inventive or originaive faculty as utility patents; 18 Fed. Rep. 321. Where scroll-work is used there must be something peculiar to sustain a patent; 84 Fed. Rep. 182.

A design patent cannot be enlarged in its scope from the specifications; 84 Fed. Rep. 170.

The general method of making the application is the same as has been hereinbefore described, and the patent issues in a similar form.

The use of a design or colorable imitation thereof on any article of manufacture or the sale of any article to which the same shall have been applied, knowing that it has been so applied, renders the party liable to pay \$250 or the profits in excess of that amount, and this may be recovered at law or in equity.

Of disclaimers. R. S. § 4922 provides that the plaintiff in a suit for infringement may disclaim so much of his patent as is in excess of his real invention and thus recover damages for the injury he has really sustained. Sec. 4917 provides for the filing in the patent office of a disclaimer of either a separate claim or some distinct and separate matter which can be excised without mutilating or changing what is left. These two sections are part of one law having one general purpose and both relate to a case in which a patentee, through inadvertence, accident, or mistake, and without any fraudulent intention, has included in his claim and in his patent, inventions to which he is not entitled, and

which are clearly distinguishable from those to which he is entitled. The purpose of § 4917 is to authorize him to file a disclaimer to the part to which he is not entitled and of § 4922 is to legalize the suit on the patent mentioned in the section, and to the extent to which the patentee can rightfully claim the patented invention; 123 U. S. 532.

Delay in a disclaimer under § 4917 goes only to the question of costs; 145 U. S. 29.

No person can avail himself of the benefits of this provision who has unreasonably neglected or delayed to enter his disclaimer. The act of 1870 follows substantially the act of 1837 in this respect.

A disclaimer by one owner will not affect the interest of any other owner.

A disclaimer cannot be used to change the character of the invention; 123 U. S. 532; 130 *id.* 56.

After an action in equity for the infringement of letters patent has been heard and decided upon its merits, the plaintiff cannot file a disclaimer in court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court upon such terms as it thinks fit to impose; 132 U. S. 103.

Of the extension of a patent. See EXTENSION OF PATENTS.

Of the repeal of letters patent. The United States may sue in equity for the repeal of a patent obtained by fraud; 128 U. S. 315; and a bill in equity to repeal two patents for the same subject-matter and to the same party is not multifarious; 128 U. S. 315.

R. S. § 4918 provides that any person interested in one or more interfering patents may bring his bill in equity against the owner of the adverse patent, upon which the court may declare either of the patents void in whole or part, or inoperative, or invalid in any particular part of the United States. The judgment rendered affects only the parties or those taking under them.

Suits may be maintained by the government in its own courts to set aside one of its own patents, not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are merely to enforce the rights of an individual. In a suit between individuals to set aside an instrument for a fraud, the testimony must be clear, unequivocal, and convincing and more than a bare preponderance of evidence is required. This is much more so when the government attempts to set aside its solemn patent. In establishing the patent office, congress created a tribunal to pass upon all questions of novelty and utility, giving it exclusive jurisdiction in the first instance, with provisions for review. Its determination of facts should therefore be held conclusive upon the government subject to the same limitations as apply in suits between individuals; 167 U. S. 224.

Of the assignment of patents. Every patent or an interest therein is assignable in law, by an instrument in writing; such assignments, etc., are void as against any purchaser or mortgagee for a valuable consideration, without notice, unless recorded in the patent office within three months. But an unrecorded assignment is valid as against a subsequent party who has had actual notice; Holmes 152; 2 Stos. 609.

The right may be successively assigned without limit; 9 Fed. Rep. 390. Any person may take under an assignment, a married woman, an infant, etc.; 17 Fed. Rep. 841. An invention may be assigned before it is perfected; 26 Fed. Rep. 249; 92 U. S. 724; but an agreement for the future assignment of a patent not yet granted is not a recordable instrument; 32 Fed. Rep. 783.

A deed conveying "all the inventor's property and estate whatsoever" carries rights in unpatented inventions; 10 Wall. 367.

An assignment is the transfer of the entire interest in a patented invention or of an undivided portion of such entire interest as to every section of the United States; Rob. Pat. § 762; it differs from grant in relation to the territorial area to which they relate. A grant is the transfer of the exclusive right in a specific part of the United States. It is an exclusive sectional right. A license is a transfer of a less or different interest than either the interest in a whole patent or an undivided part of such whole interest or an exclusive sectional interest; 4 Blatch. 206. See 8 Fed. Rep. 143; 21 Wall. 205. Any transfer of an interest in a patented invention, which cannot operate as an assignment or grant, is a license; Rob. Pat. § 806. See 4 Blatch. 206. A license is distinguished from an assignment and a grant in that the latter transfers the monopoly as well as the invention, while a license transfers only the invention and does not affect the monopoly otherwise than by estopping the licensor from exercising his prohibitory powers in derogation of the privileges conferred by him upon the licensee; Rob. Pat. § 806. See 5 Fish. 411; 138 U. S. 252; 144 *id.* 248. A license is said to be merely the right not to be sued; 7 Hun 146. It need not be recorded; 2 Stos. 69. It may be by parol; 153 U. S. 332. The right of a patent owner to license the use of his patent is not a creature of statute, but of the common law; 29 Fed. Rep. 17.

No particular form is required for an assignment; 32 Fed. Rep. 790; to comply with the act it must be in writing; 104 U. S. 521; Holmes 152; 5 Fish. 528. It may be made either before or after the patent issues; 94 U. S. 225.

A grant of the exclusive right to make, use, and sell a patented article throughout the United States for the full term of the patent, is an assignment; 41 Fed. Rep. 793; where the intention of a writing is to transfer all rights under the patent, it is an assignment; 32 Fed. Rep. 790.

One owning a patent with several claims cannot assign a single claim so as to pass the legal title; such a transfer is a mere license; 144 U. S. 288. A joint owner may give a license; 61 Fed. Rep. 401.

A licensee cannot dispute the validity of the patent; 41 Fed. Rep. 48; but where a license does not recite the validity of the patent, a licensee who abandons the patent may set up the defence of invalidity in an action for royalties alleged to be payable by him after his repudiation; 55 Fed. Rep. 645; and a licensee is not estopped to question the validity of a patent in vindication of acts done after his license expired; 37 Fed. Rep. 686. A patentee cannot question the validity of his own patent as against his assignee; 31 Fed. Rep. 918; 60 *id.* 385.

An oral agreement for the sale and assignment of the right to obtain a patent, is not within the statute of frauds, nor within R. S. § 4898, requiring assignments of patents to be in writing, and may be specifically enforced in equity, upon sufficient proof thereof; 149 U. S. 315.

The right to damages for past infringements does not pass by a mere assignment; 13 Fed. Rep. 638; 30 *id.* 241, 444; but see 30 *id.* 250; 32 *id.* 629, 790; 34 *id.* 327.

Acts in pais will sometimes justify the presumption of a license; 1 How. 202; 17 Pet. 228; 3 Stos. 402. As to a verbal license, see 1 Bond 194; s. c. 1 Fish. 380. A license to use an invention implied from circumstances is not transferable; 119 U. S. 226; and a licensee cannot divide the territory in which he is licensed among third parties although the license is to him and his assigns; 53 Fed. Rep. 945. A verbal assignment of an interest in a patent has no force against a subsequent assignee under a written transfer, without notice; 153 U. S. 332; but it has been held that a license to use a patent, not exclusive of others, need not be recorded and may be by parol; and a subsequent assignee of the patent takes title subject to such license, of which he must inform himself as best he may; but the verbal license will be strictly construed,

and must show the consideration and alleged payment of royalties; 58 Fed. Rep. 1006.

An assignment may be made prior to the granting of a patent. And when duly made and recorded, the patent may be issued to the assignee. This, however, only applies to cases of assignments proper, as contradistinguished from grants or licenses. The application must, however, in such cases be made and the specification sworn to by the inventor. See 5 McLean 131; 4 Wash. C. C. 71; 1 Blatch. 506. The assignment transfers the right to the assignee, although the patent should be afterwards issued to the assignor; 10 How. 477. The assignee of the entire right in a patent has the exclusive right to sue either at law or in equity for its subsequent infringement; 138 U. S. 252; and may sue in his own name, and so may the assignee of the entire interest for some particular territory; 2 Blatch. 20; but see 14 Fed. Rep. 297.

A license to use includes the right to make for use; 43 Fed. Rep. 847.

The title to a patent passes to the assignee in bankruptcy of the patentee, subject to the assignee's election not to accept it if in his opinion it is worthless or would prove to be burdensome and unprofitable; and he is entitled to a reasonable time to elect whether he will accept it or not; 145 U. S. 29. Upon the death of the owner of a patent, intestate, it passes to his administrator; 19 Fed. Rep. 918; who can sue thereon in another state without taking out ancillary letters of administration therein; 1 Dill. 104. See LETTERS TESTAMENTARY.

It has been held that any breach of the condition of a license by the licensee works a forfeiture; 1 Blatch. 165.

Licenses containing express stipulations for their forfeiture are not *ipso facto* forfeited upon condition broken, but remain inoperative and pleadable until rescinded by a court of equity; Rob. Pat. § 822; 3 Fed. Rep. 223. The question of forfeiture depends upon the ordinary principles of equity; therefore a court will not rescind a license for non-payment of money at the time fixed therein, if payment has been subsequently tendered or justice can be done by a judgment for the amount already due; Rob. Pat. § 822; 5 Bann. & A. 572. A refusal to pay royalties coupled with an abandonment of the license and a defence on other grounds, are sufficient for annulment; 1 Fish. 390. If the contract contain no power of revocation, the licensor can only proceed at law for any breach; 41 Fed. Rep. 475; 32 *id.* 544; 28 *id.* 814.

Where an assignment, grant, or conveyance of a patent has been acknowledged before a notary public or United States commissioner, or any secretary of legation or consular officer authorized to administer oaths under R. S. § 1750, the certificate of such acknowledgment under the hand and seal of such officer is *prima facie* evidence of the execution of the instrument; Act of March 3, 1897.

A certified copy of an assignment of a patent has been held sufficient, *prima facie*, to show title in the assignee; 5th Fed. Rep. 149; but see 26 *id.* 763; 60 *id.* 1016.

Of joint inventors. The patent must in all cases issue to the inventor, if alive and if he has not assigned his interest. And if the invention is made jointly by two inventors, the patent must issue to them both. This is equally the case where one makes a portion of the invention at one time and another at another time.

It is not necessary that exactly the same idea should have occurred to each at the same time. If an idea is suggested to one and he even goes so far as to construct a machine embodying this invention, but it is not a completed working machine and another person takes hold of it and by their joint labor a perfect machine is made, a joint patent may be properly issued to them. But if each person invented a distinct part of a machine, each should obtain a patent for his invention; 11 Fed. Rep. 505.

A joint patent is invalid as to a feature previously invented by one of the patentees, which is not a necessary part of the device jointly invented; 58 Fed. Rep. 803.

Of executors and administrators. Where an inventor dies before obtaining a patent, his executor or administrator may apply for and obtain such patent, holding it in trust for the heirs at law or devisees, accordingly as the inventor died intestate or testate. Nothing is said as to its being appropriated to the payment of debts; but, having once gone into the hands of the executors or administrators, it would perhaps become assets, and be used like other personal property: In England, a patent will pass as assets to assignees in bankruptcy; 3 B. & P. 565.

The right to make a surrender and receive a re-issue of a patent also vests by law in the executor or administrator. The law further provides that the executor or administrator may make the oath necessary to obtain the patent,—differing in this respect from the case of an assignment, where, although the patent issues to the assignee, the inventor must make the oath.

The liability of a patent to be levied upon for debt. The better opinion is that letters patent cannot be levied upon and sold by a common-law execution. The grant of privilege to the patentee would, from its incorporeal nature, seem to be incapable of manual seizure and of sale. Even if such a sale were made, there does not appear to be any provision in the acts of congress which contemplates the recording of a sheriff's deed; and without a valid record, the patentee might nevertheless make a subsequent transfer to a bona fide purchaser without notice, which would be valid.

But this peculiar species of property may be subjected to the payment of debts through the instrumentality of a bill in equity. The chancellor can act upon the person. He can direct the patent to be sold, and by attachment can compel the patentee to execute a conveyance to the purchaser; 105 U. S. 126; see where it was further held that the court might compel the holder of the patent to assign it, or appoint a trustee for that purpose. The right of a patentee will pass to his assignees in bankruptcy; 3 B. & P. 777; 145 U. S. 29; but not to a trustee in insolvency, in Massachusetts; 1 Holmes 152. The legal title to a patent does not pass to a receiver of an insolvent owner; but the receiver may maintain a bill to compel the owner to transfer it to him; 45 Fed. Rep. 479.

How far a patent is retroactive. By the earlier law on this subject in the United States, a patent, when granted, operated retroactively; so that a machine covered by the terms of the patent, though constructed with the inventor's knowledge, or consent, or purchased from him, previously to the date of that instrument, could not be used after the issuing of the patent without subjecting the party so using it to an action for infringement. The use of the machine previously to the date of the patent has been held not an infringement; 128 U. S. 605. See, also, 163 U. S. 49.

The 37th section of the act of 1870, following substantially the act of 1837, provides "that every person who may have purchased of the inventor, or with his knowledge and consent may have constructed any newly-invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or sold or used one so constructed, shall have the right to use, and vend to others, to be used, the specific thing so made or purchased, without liability therefor."

At present, therefore, property rightfully acquired in a specific machine, etc., cannot be affected by a patent subsequently obtained by the patentee. It has been held, however, that, under the general grant contained in the constitution, congress has power to pass a special act which shall operate retrospectively so as to give a patent for an invention already in public

use; 3 Wheat. 454; 3 Stor. 164; 3 Sumn. 385.

On the question of anticipation by a prior device, the patentee's invention will be considered as relating back to the original conception; 4 Wash. C. C. 68, 703.

Marking patented articles. Sec. 38 of the act of 1870 declares that in all cases where an article is made or vendible by any person under the protection of letters patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word "patented," together with the day and year the patent was granted, or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label containing a like notice; on failure of which, in any suit for the infringement of letters patent by the party failing so to mark, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice, to make, use, or vend the article patented. The burden of proof is on the plaintiff, in a suit for infringement, to allege and prove actual or constructive notice of the patent; 155 U. S. 584; 132 *id.* 244.

Penalties provided in certain cases. The act of 1870 provides a penalty of not less than \$100 and costs for every person who shall mark, etc., any article for which he has not obtained a patent, with the name or imitation of the name of any person who has a patent thereupon, without his consent, etc., or who shall so mark the word "patent" or any word of similar import with intent to counterfeit the mark or device of the patentee, without consent; or who shall in any manner mark upon an unpatented article the word "patent," etc., for the purpose of deceiving the people. This penalty may be recovered in the district court where the offence was committed; one half goes to the person who sues for the penalty and the other to the United States.

A similar statute—that of 5 & 6 Will. IV. c. 83—exists in England, for observations upon which see Hindm. Pat. 366. It has been decided under that statute that where there has been an unauthorized use of the word "patent," it must be proved that the word was used with a view of imitating or counterfeiting the stamp of the patentee, and that it is no defence that the patented article imitated was not a new manufacture, the grant of the patent being conclusive on the defendant; 3 H. & N. 802. See 1 Fish. 647; 3 Fish. 72, 374; 5 *id.* 384; 5 Blatch. 494; 6 *id.* 33.

Defences. In any action for infringement the defendant may plead the general issue and having given thirty days notice previous to trial, may prove: 1. That for the purpose of deceiving the public the specification contained less than the whole truth relative to the invention or more than necessary to produce the desired effect; 2. That the patentee had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; 3. That it had been patented or described in some printed publication prior to his supposed invention thereof [or more than two years prior to the application]; 4. That the patentee was not the original and first inventor of any material and substantial part of the thing patented; 5. That it had been in public use or on sale in this country more than two years before the application or had been abandoned to the public. R. S. § 4920, as amended.

The portions above in [] were inserted in § 4920 by the act of March 3, 1897, and do not apply to patents previously granted.

Special notice must be given at law or must be set up in the answer in equity; notice of previous invention, knowledge, or use must state the names of the patentees and when granted and the names and residences of the persons alleged to have

invented or to have had a prior knowledge of the thing patented and where and by whom it had been used.

Numerous other defences can be set up at law or in equity, such as the want of invention, novelty, or utility; absence of title in the plaintiff; non-infringement; estoppel; title in the defendant; a release, etc. See Rob. Pat. All of these, and also the above statutory defences, can be proved at law under a general issue plea; those not statutory do not require notice of special matter, unless under special practice in the particular court. The statute of limitations must be pleaded specially.

Prior use must be proved beyond reasonable doubt; 36 Fed. Rep. 183; it must antedate the patentee's invention and not merely his application; 80 Fed. Rep. 121.

A prior use of a device, in order to defeat a patent, must be something which was identical with the patented invention; 4 Blatch. 807. It is not enough to show older devices having part of the elements in one machine, part in a second, and part in a third, and then say that the patented device is anticipated; 17 Fed. Rep. 520. A prior use of all the elements of a device does not anticipate their combination; 4 Cliff. 424; a prior invention must have been complete and operative; 14 Fed. Rep. 457. A mere written description or drawing does not constitute a prior use; 9 Fed. Rep. 293; nor does the construction of a model; 16 Blatch. 76. But there may be circumstances under which a complete model will suffice; 19 Blatch. 473; 18 Wall. 120. A patent, though a mere paper one, may constitute anticipation if it discloses the principle of a subsequent invention; 82 Fed. Rep. 228.

If the prior use was embryotic or inchoate it is not enough. If the device was a machine, it must have been clothed in a substantial form, sufficient to demonstrate at once its practical efficacy and utility; 18 Wall. 120.

Trade magazines, copyrighted, and found in public and scientific libraries are "publications"; 87 Fed. Rep. 470.

Abandoned experiments do not constitute a prior use; 23 Fed. Rep. 327; 23 Wall. 181; 26 Fed. Rep. 329. But throwing aside an invention does not necessarily show that it was an unsuccessful experiment; 20 Fed. Rep. 826. It has been said that where an invention once in use has become a lost art, one who has reinvented it may obtain a patent therefor; Webst. Pat. 720.

Evidence as to the state of the art before the date of the conception of the invention is always admissible to show what was then known, to distinguish the new features from the old and to enable the court to perceive the precise limits of the inventive act; Rob. Pat. § 1020. No previous notice of this evidence is necessary; 91 U. S. 337.

If letters patent be manifestly invalid upon their face, the question of their validity may be raised on demurrer; 158 U. S. 299; 83 Fed. Rep. 170; but only in an unusual case; 84 *id.* 189.

The doctrine of laches has been said to apply to a case where a patentee has slept on his rights for sixteen years while infringement was open and notorious; 82 Fed. Rep. 96; but on the other hand it is held that mere delay will not bar a right unless it act as an estoppel; 69 *id.* 838.

The failure of a patentee for some years to manufacture his device does not defeat his right to his patented invention; 59 Fed. Rep. 613.

Utility is said to be absence of frivolity and mischievousness, and utility for some beneficial purpose; Rob. Pat. § 339; and the degree of utility is not material; 19 Fed. Rep. 323. But there is no utility if the invention can be used only to commit a fraud with; 19 Wall. 433; or for some immoral purpose; 1 Mas. 183; or can be used only for gambling purposes in saloons; 82 Fed. Rep. 448; or if the invention is dangerous in its use; 19 Wall. 287.

Of infringements. The criterion of infringement is substantial identity of con-

struction or operation. Mere changes of form, proportion, or position, or substitution of mechanical equivalents, will still be infringements, unless they involve a substantial difference of construction, operation, or effect; 3 McLean 250, 432; 1 Wash. C. C. 103; 15 How. 62; 1 Curt. 279; 1 McAll. 48. As a general rule, whenever the defendant has incorporated in his structure the substance of what the plaintiff has invented and properly claimed, he is responsible to the latter; 1 Wall. 531.

Where the patent is for a new combination of machines to produce certain effects, it is no infringement to use any of the machines separately, if the whole combination is not used; 1 Mas. 447; 2 *id.* 112; 1 Pet. C. C. 322; 1 Sto. 568; 16 Pet. 336; 3 McLean 427; 14 How. 219; 1 Black 427; 1 Wall. 78. But it is an infringement to use one of several improvements claimed, or to use a substantial part of the invention, although with some modification or even improvement of form or apparatus; 2 Mas. 113; 1 Sto. 273. Where the patent describes and claims a machine, it cannot be construed to be for a process or function, so as to make all other machines infringements which perform the same function; and no infringement will in such case take place where the practical manner of giving effect to the principle is by a different mechanical structure and mechanical action; 15 How. 352. If the patentee is the inventor of a device, he may treat as infringers all who make a similar device operating on the same principle and performing the same functions by analogous means or equivalent combinations, although the infringing machine may be an improvement of the original and patentable as such. But if the invention claimed is itself but an improvement on a known machine, by a mere change of form or combination of parts, it will not be an infringement to improve the original machine by the use of a different form or combination of parts performing the same functions. The doctrine of equivalents does not in such case apply, unless the subsequent improvements are mere colorable invasions of the first; 20 How. 405. A pioneer in the art of making a practical device, who has invented a principle which has gone into almost universal use in this country, is entitled to a liberal construction of his claim; and another device containing all the elements of his combination should be held an infringement, though there are superficial dissimilarities in their construction; 145 U. S. 29. A pioneer means one covering a function never before performed; a wholly novel device marking a distinct step in the progress of the art; 18 Sup. Ct. Rep. 707. The new application of a patented device to another use, which does not involve the exercise of the inventive faculty, is an infringement as much as though the new machine were an exact copy of the old; 139 U. S. 601. The mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee is not a defence to a charge of infringement; 147 U. S. 623.

A sale of the thing patented to an agent of the patentee, employed by him to make the purchase on account of the patentee, is not *per se* an infringement, although, accompanied by other circumstances, it may be evidence of infringement; 1 Curt. 260.

The making of a patented machine for philosophical experiment only, and not for use or sale, has been held to be no infringement; 1 Gall. 429, 485; but a use with a view to an experiment to test its value is an infringement; 4 Wash. 580. The sale of the articles produced by a patented machine or process is not an infringement; 3 McLean 295; 4 How. 709; 94 U. S. 568; nor is the *bona fide* purchase of patented articles from an infringing manufacturer; 10 Wheat. 359; nor a sale of materials by a sheriff; 1 Gall. 485; 1 Robb 47. Selling the parts of a patented machine may be an infringement; 1 Holmes 88. As to infringement by a railroad corporation,

where its road was worked and its stock owned by a connecting road, see 17 How. 30. Ignorance by the infringer of the existence of the patent infringed is no defence, but may mitigate damages; 11 How. 587. See INFRINGEMENT.

The purchaser of a car load of beds covered by a patent from the owner of the territorial rights of Michigan, for the express purpose of selling them in Massachusetts, had the right to sell them anywhere within the United States, even within the territory already assigned to another person; 157 U. S. 659 (Brown J., dissenting); 149 *id.* 355; but one cannot buy a patented article in a foreign country from a person authorized to sell it there and then sell it in the United States; 84 Fed. Rep. 192.

The owners of letters patent cannot sue the United States in the court of claims for infringement of his patent; 155 U. S. 163.

The United States has no right to use a patented invention without a license from the patentee or making compensation to him. No suit can be maintained, or injunction granted, against the United States, unless expressly permitted by act of congress. Officers or agents of the United States, although acting under order of the United States, are personally liable to be sued for their own infringement of a patent. Upon a suit in equity by the patentee of an improvement in caisson gates against officers of the United States, using in their official capacity a caisson gate made and used by the United States, in infringement of his patent, the plaintiff is not entitled to an injunction. Nor can he recover profits, if the only profit proved is a saving to the United States in the cost of the gate; 161 U. S. 10.

Of damages for infringement. Damages may be recovered in any circuit court of the United States, in the name of the party interested either as patentee, assignee, or grantee, and in case of a verdict for the plaintiff the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with costs. A court of equity may award damages for infringement and increase the same in a similar manner. R. S. § 4921, as amended March 3, 1897, provides that upon a decree in equity for infringement the complainant shall be entitled to recover, in addition to profits, the damages he has sustained, which shall be assessed by the court, and the court has the same power to increase the damages as is given to the court to increase the damages found by verdict, even though the infringer made no profit; 97 U. S. 348. See 13 Am. L. Rev. 1. At law a plaintiff is entitled to recover what he has lost although it exceed defendant's profits; in equity only the profits the defendant has actually made; 151 U. S. 139; 155 *id.* 565; 161 *id.* 10.

The actual damage is all that can be allowed by a jury, as contradistinguished from exemplary, vindictive, or punitive damages. The amount of defendant's profits from the unlawful user is, in general, the measure of the plaintiff's damages; and this may be determined by the plaintiff's price for a license; 11 How. 607; 16 *id.* 480; 20 *id.* 198; 1 Blatch. 244, 405; 2 *id.* 132, 194, 229, 476; but no interest is allowed on the profits until their amount is judicially ascertained; 125 U. S. 136. The rule of damages is different where a patent is only for an improvement on a machine and where it is for an entire machine; 16 How. 480. If there be a mere making and no user proved, the damages should be nominal; 1 Gall. 476; and where there is in the evidence no basis for a computation of the damages, only nominal damages can be given; 131 U. S. 159. Where a royalty was proved on a device covering two claims and one only was sustained, only nominal damages were allowed; 4 Fed. Rep. 415; but it has been held that in an action at law, if there is no established royalty, the jury may consider what would be a reasonable royalty;

and, in so doing, may consider the utility and advantage of the invention, and take into account defendant's profits; 81 Fed. Rep. 1012.

In equity, a plaintiff, though he has an established license fee, is not limited to the amount thereof as damages; but may instead of damages recover the profits the defendants have made; 125 U. S. 136.

The plaintiff may recover in equity as profits the advantages which the defendants have gained by using the invention, and a definite saving shown to have been made in the cost of manufacture; 125 U. S. 136. The expense of using the new process is to be ascertained from the manner in which the defendants have used it and not in the manner in which they might have used it; *id.*

A plaintiff cannot recover a defendant's entire profits unless the whole market value of defendant's article is shown to be due to the invention; 24 Blatch. 275. But if the entire saleability of the article is the result of the introduction of the patented feature, the plaintiff is entitled to all the profits made; 39 Fed. Rep. 466; 130 U. S. 456. Where the invention apparently gave the device its value, the defendant must show the extent to which his own improvements were the cause of the profits which he had made; 39 Fed. Rep. 468. The profits are what the defendant made or saved; 36 Fed. Rep. 378. Nominal damages only are allowed where it is not shown what definite profits were due to the invention; 24 Blatch. 396, 463; 39 Fed. Rep. 613; or where plaintiff shows no established license fee, no market price, and no other use of the invention than by the defendant; 81 Fed. Rep. 863.

Where the owner of a patent has a fixed license fee, this is the measure of damages for an invention; 2 Fed. Rep. 677; 27 Fed. Rep. 691; this must be the license fee existing at the date of infringement; 25 Fed. Rep. 274; one established afterwards may be considered, though it is not conclusive; 26 Fed. Rep. 274; it is immaterial whether in such case the use of the invention has been profitable to the defendant. A single instance is not sufficient to establish a license fee; 85 Fed. Rep. 597; but two instances may be; 37 Fed. Rep. 654; it is not enough to show foreign license fees; 14 Blatch. 265. And a license fee must be shown by actual payment and not merely by promises to pay; 28 Fed. Rep. 360; nor by amount paid in settlement of a claim; 43 Fed. Rep. 478.

In the absence of an established license fee, damages must be shown by general evidence; 8 Wall. 315; and there is a difference between infringement by sale and those by use. The measure of recovery in a suit in equity for infringement of patent is the gains and profits made by the infringer and such further damage as the proof shows that the complainant sustained in addition; but in an action at law the damages are measured only by the extent of the plaintiff's loss, as proved by the evidence, and when the evidence discloses the existence of no license fee, no impairment of the plaintiff's market, no damages of any kind, only nominal damages can be recovered; 155 U. S. 565.

Where the defendant's acts compelled the plaintiff to reduce his price, such loss is an item of damage; 43 Fed. Rep. 72.

It is said that any attempt to classify the reported cases on damages would be futile; Rob. Pat. § 1061.

The statute of limitation is six years prior to the filing of the bill of complaint or the issuing of a writ at law; Act of March 3, 1897 (in effect January 1, 1898).

It is the province of the court to define the patented invention, as indicated by the language of the claims; and of the jury to determine whether, as so defined, it covers the defendant's article; 155 U. S. 565.

If one is employed to devise or perfect an instrument or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. What he accomplishes becomes the property of the em-

player. He has sold it in advance to him. So when one is in the employ of another in a certain line of work and devises an improved instrument for that work and uses the property of his employer and the services of other employees to develop and put in practical form his invention, a jury or court is warranted in finding that the benefits resulting from his use of the property and the assistance of the co-employees of his employer have given to such employer an irrevocable license to use the invention; 180 U. S. 342; 150 *id.* 430; 1 How. 303; 160 U. S. 426. But a railroad company is not entitled to the use of an invention of its master mechanic, when none of the company's material or labor entered into the perfecting of the invention or was devoted to its construction until after the patent had issued; 93 N. E. Rep. (Ind.) 323.

Patents can be granted to United States officers, except those in the patent office, without any fee, when the invention is used or to be used in the public service, but the patentee must file a stipulation, which must be inserted in the patent, that the invention may be used by the government and its officers in public work or by any other person in the United States; Act of March 3, 1883.

In patent cases, costs will not be awarded to complainant, where some of the claims sued on are withdrawn at the argument, and others are adjudged not infringed, although the decree is in favor as to others still; 71 Fed. Rep. 886.

Jurisdiction of cases under the patent laws. The act of 1870, § 55, gives original jurisdiction to circuit courts of the United States and to the supreme court of the District of Columbia, or of any territory, in all cases arising under the laws of the United States granting exclusive privileges to inventors. This act was amended by giving this jurisdiction to the court of appeals of the District of Columbia and abolishing that of the supreme court of the District. This jurisdiction extends both to law and equity, and is irrespective of the citizenship of the parties or the amount in controversy. The jurisdiction of the federal courts is exclusive of that of the state courts; 3 N. Y. 9; 40 Me. 430. But this is to be understood of cases arising directly under the acts of congress, and not of those where the patent comes collaterally in question: as, for instance, where it is the subject-matter of a contract or the consideration of a promissory note; 3 McLean 525; 1 W. & M. 34; 16 Conn. 409. Hence a bill to enforce the specific performance of a contract for the sale of a patent-right is not such a case arising under the patent laws as gives jurisdiction to the federal courts; 10 How. 477; 140 U. S. 344. A contract relating to a patent does not necessarily involve a federal question; 125 U. S. 46, 54; 140 *id.* 344. For the requirements of a bill on a patent, see 121 U. S. 484. If a bill is filed so near the expiration of a patent that, under the rules, there could be no injunction, it will be dismissed; but if one could be obtained, though only three days before the expiration, the court may retain jurisdiction and proceed, with or without an injunction; 119 U. S. 322.

The expiration of a patent pending a suit for infringement does not defeat the jurisdiction of a court of equity, although it is a reason for denying an injunction which was the basis of equity jurisdiction; 123 U. S. 71; 119 *id.* 322. A bill is not maintainable when filed only a few days before the patent expired; 84 Fed. Rep. 344.

Patent-right, note given for a. In many of the states, laws have been passed making void all notes given in consideration of a patent-right unless the words "given for a patent-right" are prominently written on the face of the note. These laws have been decided to be unconstitutional in 87 Mich. 309; 70 Ill. 109; 23 Minn. 24; 25 Fed. Rep. 394; 2 Biss. 811; 2 Flipp. 38; 14 Neb. 134; *contra*, 109 N. Y. 127; 108 Ind. 365. The property in inventions exists by virtue of the laws of congress, and no state has a

right to interfere with its enjoyment or annex conditions to the grant; 2 Biss. 314; 4 Bush 311. In Pennsylvania, however, a distinction has been made, the statute of April 12, 1872, requiring the insertion of the words "given for a patent-right," merely having the effect of making the note or instrument in the hands of a purchaser subject to the same defence as if in the hands of the original owner or holder. By necessary implication, notes without such words inserted in them remain on the same footing as before the act, and innocent holders, who take such notes without notice, take them clear of all equities existing between the original parties. And in several cases these acts have been sustained as constitutional; 36 Ohio St. 370; 116 Ind. 118, 503; 109 N. Y. 127; 93 Pa. 373.

As between the original parties to a note given for a patent-right, it is well settled that it is a good defence to show that the alleged patent was void, and therefore there was no consideration; 18 Pa. 465. All who take with notice of the consideration, take subject to same defence; *id.*; 93 Pa. 373. Sharswood, J., held that there was nothing in this view which interfered with any just right of the holder of a valid patent under the acts of congress, nor in permitting the maker to show, against a holder with such notice, that the note was obtained by fraudulent misrepresentation; 86 Pa. 173. An innocent purchaser of a note is not affected by the act; 93 Pa. 373; 118 Ind. 586; 83 Tenn. 705. If the patent is void; 124 Mass. 523; or the patented article is useless; 42 Nev. 97; 40 Ind. 1; the note is void.

To secure the insertion of the words, some acts make it a misdemeanor punishable by fine or imprisonment, or both, for any person "knowing the consideration of a note" to be the sale of a patent-right, to sell or transfer it without the words "given for a patent-right" inserted, as provided by the act; 26 Am. Rep. 514; 23 Minn. 24; 53 Ind. 454; 64 *id.* 270.

On the expiration of patents on the "Singer" sewing-machine, under which name it came to indicate a type of machine made by that company, the right to make the patented article and use the generic name passed to the public, but one using the name in selling such type of machines may be compelled to indicate that the articles made by him are his product and not the product of the owners of the extinct patent; 163 U. S. 169.

See CAVEAT; EXPERT; EXTENSION OF PATENTS; INFRINGEMENT; LIBEL. NEW. VEND AND VENDING.

PATENT AMBIGUITY. An ambiguity which appears upon the face of an instrument.

An uncertainty or question between two meanings of language which arises on bare inspection of the words themselves. Abbott. See AMBIGUITY. It is a settled rule that extrinsic evidence is not admissible to explain such an ambiguity. The general rule on the subject is thus stated in 2 Eng. Rul. Cas. 707: "Where a legal relation is sought to be established by means of a written instrument, if an uncertainty of intention appear by the expression of the instrument itself, the true intention cannot be ascertained by the aid of extrinsic evidence. For, as said by Lord Bacon (Maxims, Reg. 23), 'ambiguitas patens cannot be helped by averment.'" 5 Bing. N. C. 426; s. c. 8 L. J. C. P. 227. LATENT AMBIGUITY.

PATENT MEDICINE. The word "patent" as used in connection with medicines does not mean that the article is patented but that it is proprietary; and there is no fraud on the public in using the word in that sense, although the article has been patented. 221 U. S. 263.

PATENT OFFICE. The office through which applications for letters patent for inventions, etc., are made, and from which those letters patent emanate. Some provision for the purpose of issuing

patents is, of course, found in every country where the system of granting patents for inventions prevails; but nowhere else is there an establishment which is organized in all respects on the same scale as the United States Patent Office.

By the act of 1790, the duty of transacting this business was devolved upon the secretary of state, the secretary of war, and the attorney-general. In the provision for a board for this purpose found in the act of 1793 the secretary of war is omitted. From that time during a period of more than forty years all the business connected with the granting of patents was transacted by a clerk in the office of the secretary of state, the duties of the secretary in this respect being little more than nominal, and the attorney-general acting only as a legal adviser.

The act of July 14, 1836, reorganized the office and gave it a new and higher position. A commissioner of patents was constituted. Provision was made for a library, which has since become one of the finest of the kind in the country.

The act of 1870 provides for the appointment by the President of one commissioner, one assistant commissioner and three examiners-in-chief. Other officers are appointed by the secretary of the interior, in whose department the patent office is, upon the nomination of the commissioner.

The patent office is an office of record, in which assignments of patents are recordable, and the record is notice to all the world of the facts to be found on record. Under section 4 of the act of 1793, an assignment was not valid unless recorded in the office of the secretary of state; 4 Blackf. 183. See PATENT.

PATENT OFFICE, EXAMINERS

IN. Officials in the United States Patent Office, whose duty it is to determine whether the subject-matter of applications for letters patent is such as to entitle the applicant to the grant of such letters. See PATENT OFFICE.

PATENT RIGHT. See PATENT.

PATENT ROLLS. Registers in which are recorded all letters patent granted since 1516. 2 Sharsw. Bla. Com. 346; Whart. L. Lex.

PATENT WRIT. A writ not closed or sealed up. Jacob, Law Dict.; Co. Litt. 289; 7 Co. 20.

PATENTEE. He to whom a patent has been granted. The term is usually applied to one who has obtained letters patent for an invention. See PATENT.

PATENTES BREVIA. Open, or patent writs. Taylor. See PATENT WRIT; APERTA BREVIA.

PATER (Lat.). Father. The term is frequently used in genealogical tables.

PATER-FAMILIAS (Lat.). In Civil Law. One who was *sui juris*, and not subject to the paternal power.

In order to give a correct idea of what was understood in the Roman law by this term, it is proper to refer briefly to the artificial organization of the Roman family—the greatest moral phenomenon in the history of the human race. The comprehensive term *familia* embraced both persons and property: money, lands, houses, slaves, children, all constituted part of this artificial family, this juridical entity, this legal patrimony, the title to which was exclusively vested in the chief or *pater-familias*, who alone was *capax domini*, and who belonged to himself, *sui juris*.

The word *pater-familias* is by no means equivalent to the modern expression father of a family, but means proprietor in the strongest sense of that term; it is he *qui in domo dominium habet*, in whom were centred all property, all power, all authority: he was, in a word, the lord and master, whose authority was unlimited. No one but he who was *sui juris*, who was *pater-familias*, was capable of exercising any right of property, or wielding any superiority or power over anything; for nothing could belong to him who was himself *alieni juris*. Hence the children of the *filius familias*, as well as those of slaves, belonged to the *pater-familias*. In the same manner, everything that was acquired by the sons or slaves formed a part of the *familia*, and consequently, belonged to the chief. This absolute property and power of the *pater-familias*, only ceased with his life, unless he voluntarily parted with them by a sale; for the

alienation by sale is invariably the symbol resorted to for the purpose of dissolving the stern dominion of the *pater-familias* over those belonging to the *familia*. Thus, both emancipation and adoption are the results of imaginary sales, — *per imaginarias venditiones*. As the daughter remained in the family of her father, grandfather, or great-grandfather, as the case might be, notwithstanding her marriage, it followed as a necessary consequence that the child never belonged to the same family as its mother: there is no civil relationship between them; they are natural relations, — *cognati*, — but they are not legally related to each other, — *agnati*; — and therefore the child never inherits from its mother, nor the mother from her child. There is, however, a means by which the wife might enter into the family and subject herself to the power of her husband, in *manu mariti*, and thereby establish a legal relationship between herself and her husband. This There is no civil relationship between them; they are natural relations, — *cognati*, — but they are not legally related to each other, — *agnati*; — and therefore the child never inherits from its mother, nor the mother from her child. There is, however, a means by which the wife might enter into the family and subject herself to the power of her husband, in *manu mariti*, and thereby establish a legal relationship between herself and her husband. This There is no civil relationship between them; they are natural relations, — *cognati*, — but they are not legally related to each other, — *agnati*; — and therefore the child never inherits from its mother, nor the mother from her child. There is, however, a means by which the wife might enter into the family and subject herself to the power of her husband, in *manu mariti*, and thereby establish a legal relationship between herself and her husband. This

There is some similarity between the *agnatio*, or civil relationship, of the Romans, and the transmission of the paternal power, under the modern law, to all his descendants in the male line. The Roman law says of the children, *patris, non matris, familiam sequuntur*: we say, *patris, non matris, nomen sequuntur*. All the members of the family who, with us, bear the same name, were under that law *agnati*, or constituted the *agnatio*, or civil family. Those children only belonged to the family, and were subject to the paternal power, who had been conceived in *iustus nuptiis*, or been adopted. *Nuptie*, or *matrimonium*, was a marriage celebrated in conformity with the peculiar rules of the civil law. There was a second kind of marriage, called *concubinatus*, — a valid union and a real marriage, — which has been often improperly confounded, even by high authority, with concubinage. This confusion of ideas is attributable to a superficial examination of the subject; for the illicit intercourse between a man and a woman which we call concubinage was stigmatized by the opprobrious term *stuprum* by the Romans, and is spoken of in the strongest terms of reprobation. The *concubinatus* was the natural marriage, and the only one which those who did not enjoy the *ius connubii* were permitted to contract. The Roman law recognized two species of marriage, the one civil, and the other natural, in the same manner as there were two kinds of relationship, the *agnatio* and *cognatio*. The *iustus nuptius* or *iustum matrimonium*, or civil marriage, could only be contracted by a Roman citizen, that is, to whom the *ius connubii* had been conceded: this kind of marriage alone produced the paternal power, the right of inheritance, etc.

But the rapid rise and extraordinary greatness of the city attracted immense crowds of strangers, who, not possessing the *ius connubii*, could form no other union than that of the *concubinatus*, which, though authorized by law, did not give rise to those legal effects which flowed from the *iustus nuptius*. By adoption, the person adopted was transferred from one family to another; he passed from the paternal power of one *pater-familias* to that of another: consequently, the person who was adopted could be adopted in the strict sense of that word. But there was another species of adoption, called *adrogatio*, by which a person *sui juris* entered into another family, and subjected himself to the paternal power of his chief. The effect of the *adrogatio* was not confined to the person *adrogatus* alone, but extended over his family and property 1 Marcade 75.

This extraordinary organization of the Roman family, and the unlimited powers and authority vested in the *pater-familias*, continued until the reign of Justinian, who by his 18th Novel, enacted on the 9th of August, 544, abolished the distinction between the *agnatio* and *cognatio*, and established the order of inheritance which, with some modifications, continues to exist at the present day in all countries whose jurisprudence is based on the civil law. See Maine, Anc. L. Ch. 5; GENÉ; PATRIA POTESTAS.

PATERNA PATERNIS (Lat. the father's to the father's). In French Law. An expression used to signify that, in a succession, the property coming from the father of the deceased descends to his paternal relations.

PATERNAL. That which belongs to the father or comes from him: as paternal power, paternal relation, paternal estate, paternal line. See LINE.

PATERNAL POWER. The authority lawfully exercised by parents over their children. See FATHER.

PATERNAL PROPERTY. That

which descends or comes from the father and other ascendants or collaterals of the paternal stock. Domat, Liv. Prel. tit. 3, s. 2, n. 11.

PATERNITY. The state or condition of a father.

The husband is *prima facie* presumed to be the father of his wife's children born during coverture or within a competent time afterwards: *pateris est quem nuptie demonstrant*; 7 Mart. La. n. s. 553. So if the child is *en ventre sa mere* at time of marriage; Co. Litt. 123; 8 East 192. In civil law the presumption holds in case of a child born before marriage as well as after; 1 Bla. Com. 446, 454; Fleta, lib. 1, c. 6. In cases of marriage of a widow within ten months after decease of husband, the paternity is to be decided by circumstances; Hargrave, note to Co. Litt. § 188. Marriage within ten months after decease of husband was forbidden by Roman, Danish, and Saxon law, and English law before the Conquest; 1 Beck, Med. Jur. 481; Brooke, Abr. *Bastardy*, pl. 18; Palm. 10; 1 Bla. Com. 456.

The presumption of paternity may always be rebutted by showing circumstances which render it impossible that the husband can be the father; 6 Binn. 233; 8 East 193; Stra. 51, 940; 2 Myl. & K. 349; 3 Paige, Ch. 139; 1 S. & S. 150; T. & R. 138.

The declarations of one or both of the spouses, however, cannot affect the condition of a child born during the marriage; 7 Mart. La. n. s. 553; 3 Paige, Ch. 139. See ACCESS; BASTARD; BASTARDY; LEGITIMACY; PREGNANCY.

PATHOLOGY. In Medical Jurisprudence. The science or doctrine of diseases. In cases of homicides, abortions, and the like, it is of great consequence to the legal practitioner to be acquainted in some degree with pathology. 2 Chitty, Pr. 42, n.

PATIBULUM. A gallows or gibbet. Fleta, l. 2, c. 3, § 9.

PATRIA (Lat.). The country; the men of the neighborhood competent to serve on a jury; a jury. This word is nearly synonymous with *pais*, which see.

PATRIA POTESTAS (Lat.). In Civil Law. The paternal power; the authority which the law vests in the father over the persons and property of his legitimate children.

One of the effects of marriage is the paternal authority over the children born in wedlock. In the early period of Roman history, the paternal authority was unlimited: the father had the absolute control over his children, and might even, as the domestic magistrate of his family, condemn them to death. They could acquire nothing except for the benefit of the *pater-familias*; and they were even liable to be sold and reduced to slavery by the author of their existence. But in the progress of civilization this stern rule was gradually relaxed.

There are several instances given in which the emperors interfered to moderate the severity of fathers, and the power to kill the child was restricted and finally abolished during the empire. The father could originally abandon his male child to relieve himself of responsibility for it, but this was forbidden by the institutes. Inst. 4, § 7. Over the property of the child the rights of the father were as absolute as over that of the slave; but this power was also moderated under the emperors until in the time of Justinian it was practically destroyed. The power of the *pater familias* extended to all descendants in the male line, and it was not lost even over those who held the highest offices in the state or became victorious generals.

The children of a daughter were not subject to the paternal authority of her own father but entered into the family of her husband. The paternal power was never exercised by a woman, even if she were herself *sui juris*. It is for this reason, Ulpian observes, that the family of which a woman, *sui juris*, was the head, *mater familias*, commenced and ended with her: *mulier autem familie sue et caput et finis est*. 1 Ortolan 191.

See PATER FAMILIAS.

The modern civil law has hardly preserved any features of the old Roman jurisprudence concerning the paternal power. The Louisiana code provides that a child owes honor, respect, and obedience to the parents, but even the power of correction ceases with the age of puberty, and boys at fourteen and girls at twelve years of age may leave the paternal roof in opposition to the will of their parents. By modern law the paternal authority is vested in both parents, but usually exercised by the father alone. During the marriage the power over those who to the property of the minor children, subject to the obligation of support and education, paying taxes, repairs, etc.

The paternal power ceases with the death of one spouse and is succeeded by the other, which, however, usually devolves upon the surviving parent, who can also at death appoint a testamentary tutor.

PATRICIDE. One guilty of killing his father. See PARRICIDE.

PATRIMONIAL. A thing which comes from the father, and, by extension, from the mother or other ancestor.

PATRIMONIUM. In Civil Law. That which is capable of being inherited.

Things capable of being possessed by a single person exclusively of all others are, in the Roman or civil law, said to be in *patrimonio*; when incapable of being so possessed, they are *extra patrimonium*.

Most things may be inherited; but there are some which are said to be *extra patrimonium*, or which are not in commerce. These are such things as, common, as the light of heaven, the air, the sea, and the like; things public, as rivers, harbors, roads, creeks, ports, arms of the sea, the sea-shore, highways, bridges, and the like; things which belong to cities and municipal corporations, as public squares, streets, market-houses, and the like. See 1 Bouvier, Inst. n. 421.

PATRIMONY. Any kind of property. Such estate as has descended in the same family; estates which have descended or been devised in a direct line from the father, and, by extension, from the mother or other ancestor. It has been held that the word is not necessarily restricted to property inherited directly from the father. 5 Ir. Ch. Rep. 525.

PATRINUS (Lat.). A godfather.

PATRON. In Ecclesiastical Law. He who has the disposition and gift of an ecclesiastical benefice.

In Roman Law. The former master of a freedman. Dig. 2, 4, 8, 1.

PATRONAGE. The right of appointing to office; as, the patronage of the President of the United States, if abused, may endanger the liberties of the people.

In Ecclesiastical Law. The right of presentation to a church or ecclesiastical benefice. 2 Bla. Com. 21.

PATRONIZE. To act as patron towards. The occupants of a house cannot be said to patronize it; 9 Bradw. 344. See 48 N. Y. 472.

PATRONUS (Lat.). In Roman Law. A modification of the Latin word *pater*, father. A denomination applied by Romulus to the first senators of Rome, and which they always afterwards bore.

Romulus at first appointed a hundred of them. Seven years afterward, in consequence of the association of Tatius to the Romans, a hundred more were appointed, chosen from the Sabines. Tarquinius Priscus increased the number to three hundred. Those appointed by Romulus and Tatius were called *patres majorum gentium*, and the others were called *patres minorum gentium*. These and their descendants constituted the nobility of Rome. The rest of the people were called plebeians, every one of whom was obliged to choose one of these fathers as his patron. The relation thus constituted involved important consequences. The plebeian, who was called *cliens* (a client), was obliged to furnish the means of maintenance to his chosen patron, to furnish a portion for his patron's daughters, to ransom him and his sons if captured by an enemy, and pay all sums recovered against him by judgment of the courts. The patron, on the other hand, was obliged to watch over the interests of his client, whether present or absent, to protect his person and property, and especially to defend him in all actions brought against him for any cause. Neither could accuse, or bear testimony against the other, or give contrary votes, etc. The contract was of a sacred nature; the violation of it was a sort of treason, and punishable as such. According to Cicero (De Repub. li. 9), this relation formed an integral part of the governmental system. *Et habuit plebem in clientelas principum descriptum*, which he affirms was eminently useful. Blackstone traces the system of vassalage to this ancient relation of patron and client. It was, in fact, of the same nature as the feudal institutions of the middle ages, designed to maintain order in a rude state by a combination of the opposing interests of the aristocracy and of the common people, upon the principle of reciprocal bonds for mutual interests. Ultimately, by force of radical changes in the institution, the word *patronus* came to signify nothing more than an advocate.

PATROON. In New York. The lord of a manor. See MANOR.

PATRUELIS (Lat.). In Civil Law. A cousin-german by the father's side; the son or daughter of a father's brother. Dig. 88, 10, 1.

PATRUUS (Lat.). In Civil Law. An uncle by the father's side; a father's brother. Dig. 38. 10. 10. *Patruus magnus* is a grandfather's brother, grand-uncle. *Patruus major* is a great-grandfather's brother. *Patruus maximus* is a great-grandfather's father's brother.

PAUPER (Lat. poor). One so poor that he must be supported at the public expense.

A laboring man, who has always been able to make a living, and who, until his last sickness, has never had occasion to ask or receive charity, is not a pauper, although without money or property with which to pay the expense of that sickness; 21 Nev. 415. See 16 Viner, Abr. 259; Botts' Poor-Laws; Woodf. Landl. & T. 201.

Before a person can be admitted to sue or defend as a pauper, proof must be given that he is not worth £25, his wearing apparel and the subject-matter of the cause or matter, only excepted. He is exempt from court fees. Counsel may be assigned to him, and no fees can be taken from him. Brett, Comm. 681. See POOR; IRREMOVABILITY.

PAUPERIES (Lat.). In Civil Law. Poverty. In a technical sense, *Dammum absque injuria*; i. e. a damage done without wrong on the part of the doer: e. g. damage done by an irrational being, as an animal. L. 1, § 3, D. *si quod paup. fec.*; Calvinus, Lex.

PAVE. To cover with stone, brick, concrete, or any other substantial matter, making a smooth and level surface. 60 N. Y. 22.

To lay or cover with stone, brick, or other material, so as to make a firm, level, or convenient surface for horses, carriages, or persons on foot to travel on. It means as well to cover with asphalt or concrete, as to lay or cover with stone; 110 Mo. 502.

The laying of a cross walk comes within the general designation of paving; 62 N. Y. 224; paving includes flagging, as well as other modes of making a smooth surface for streets and sidewalks; 76 N. Y. 181; 66 Hun 179. A footway made up with gravel, but not paved with stone or flags is a pavement; 15 Q. B. D. 552; 54 L. J. M. C. 147. To pave a street has been held not to include curbing and sidewalks; 9 Wash. 272.

Power to pave a street may include, as not unusual, macadamizing and making gutters; *Id.*, 31 Iowa 36. Also, raising and lowering parts of the street. *Id.*; 20 How. 147. But an order to grade a street does not authorize macadamizing it. *Id.*; 33 Minn. 164.

PAVIAGE. A contribution or tax for paving streets or highways.

PAWN. A pledge. A pledge includes, in Louisiana, a *pawn* and an *antichresis*; but sometimes pawn is used as the general word, including pledge and antichresis. La. Civ. Code, art. 8101; Hennen, Dig. Pledge. See PLEDGE.

PAWNBROKER. One whose business it is to lend money, usually in small sums, upon pawn or pledge. An ordinance requiring pawnbrokers to keep a book in which shall be entered a description of all property left in pawn, with the name and description of the pledgor and to submit such book to the inspection of the mayor or any police officer on demand, is a valid police regulation; 31 S. W. Rep. (Mo.) 101; 111 Ill. 291. And one forbidding them to purchase certain specified articles is not unreasonable as imposing upon pawnbrokers a penalty for doing that which is lawful for other persons to do, as a city may not only regulate their business, but suppress and prohibit it; 30 Ill. App. 203.

An ordinance requiring pawnbrokers to take out a license is not authorized by a statute empowering city councils to make by-laws and ordinances not inconsistent with the laws of the state and necessary to carry out the object of the corporation;

127 Ind. 109. See 78 Ga. 773; 24 S. E. Rep. (N. C.) 526; LICENSE; ORDINANCE; POLICE POWER.

PAWNEE. He who receives a pawn or pledge. See PLEDGE.

PAWNOR. One who, being liable to an engagement, gives to the person to whom he is liable a thing to be held as a security for the payment of his debt or the fulfilment of his liability. 2 Kent 577. See PLEDGE.

PAX REGIS (Lat.). That peace or security for life and goods which the king promises to all persons under his protection. Bract. lib. 3, c. 11. See PEACE.

In ancient times there were certain limits which were known by this name. The *pax regis*, or verge of the court, as it was afterwards called, extended from the palace-gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barleycorns; Crabb, C. L. 41; or from the four sides of the king's residence, four miles, three furlongs, nine acres in breadth, nine feet, nine barleycorns, etc.; LL. Edw. Conf. c. 12, et LL. Hen. I.

PAY. To discharge a debt, to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged. 36 N. Y. 527. See 1 Cush. 76.

To pay, as usually understood, means to deliver money, this is, however, not necessarily involved. The word does, however, imply a delivery of value, and that it is the value called for by the engagement to be discharged. For, when that engagement calls for something else than a simple delivery of value, performance is the proper term; and when something else than what it calls for is delivered and accepted, this is a compromise, or a discharge, but "pay" does not apply. Abbott.

To pay is to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged. *Id.*; 36 N. Y. 522. The word implies an indebtedness. *Id.*; 15 Barb. 274. The word does not necessarily import a discharge of the obligation by money. To pay is to discharge an obligation by a performance according to its terms or requirements: if the obligation be for money, the payment is made in money; if for merchandise or labor, a delivery of the merchandise or a performance of the labor is payment; or if for the erection of a building, performance according to the terms of the contract is payment. The assent of insurers to an indorsement upon a policy of the words, "pay the loss to T," does not impair their right, if the policy so allows, to discharge their obligation by replacing the property insured, instead of paying its value. *Id.*; 1 Cush. 73.

As Used in a Will. The words "to pay" have been construed to be effective words to give an immediate interest in the estate. 110 Ky. 889, 62 S. W. 1036.

See ALL BACK PAY AND EMOLUMENTS.

PAY. A fixed and definite amount given by law to persons in military service in consideration of and as compensation for their personal services. 13 Ct. Cl. 496. See LONGEVITY PAY.

Payable in trade. Payable in such article as the promisor deals in. 114 Mass. 34.

Payable as convenient. A phrase which can be construed only as an extension of credit. 120 Mass. 171.

PAYABLE. Dischargeable by delivery of an equivalent in value, usually in money; also, due in present time; matured. Anderson.

PAYEE. The person in whose favor a bill of exchange is made payable. See BILLS OF EXCHANGE.

PAYMENT. The fulfilment of a promise, or the performance of an agreement. The discharge in money of a sum due.

It implies the existence of a debt, of a party to whom it is owed, and of a satisfaction of the debt to that party; 53 Conn. 175.

The word payment is not a technical term: it has been imported into legal proceedings from the ex-

change, and not from law treatises. When payment is pleaded as a defence, the defendant must prove the payment of money, or something accepted in its stead, made to the plaintiff or to some person authorized in his behalf to receive it; 2 Greenl. Ev. 558.

Payment, in its most general acceptance, is the accomplishment of every obligation, whether it consists in giving or in doing: *solutio est prestatio ejus quod in obligatione est*.

It follows, therefore, that every act which, while it extinguishes the obligation, has also for its object the release of the debtor and his exemption from liability, is not payment. Payment is doing precisely what the payer has agreed to do. *Solvere dicitur cum qui fecit quod facere promissit*.

However, practically, the name of payment is often given to methods of release which are not accompanied by the performance of the thing promised. *Restringimus solutiones ad compensationem, ad novationem, ad delegationem, et ad numerationem*.

In a more restricted sense, payment is the discharge in money of a sum due. *Numeratio est solutio solutio*. 5 Mass. *Droit commercial* 229. That a payment may extinguish a debt, it must be made by a person who has a right to make it, to a person who is entitled to receive it, in something proper to be received both as to kind and quality, and at the appointed place and time.

In the civil law, it is said, where payment is something to be done, it must be done by the debtor himself. If I hire a mechanic to build a steam-engine for me, he cannot against my will substitute in his stead another workman. Where it is something to be given, the general rule is that it can be paid by any one, whether a co-obligor, or surety, or even a third person who has no interest; except that in this last case subrogation will prevent the extinction of the debt as to the debtor, unless the payer at the time of payment act in the name of the debtor, or in his own name to release the debtor. See SUBROGATION.

What constitutes payment. According to Comyns, payment by merchants must be made in money or by bill; Com. Dig. Merchant (F).

It is now the law that payment must be made in money, unless the obligation is, by the terms of the instrument creating it, to be discharged by other means. In the United States, congress has, by the constitution, power to decide what shall be a legal tender; that is, in what form the creditor may demand his payment or must receive it if offered; and congress has determined this by statutes. The same power is exercised by the government of all civilized countries. As to the medium of payment in the United States, see LEGAL TENDER.

In England, Bank of England notes are legal tender. But the creditors may waive this right, and anything which he has accepted as satisfaction for the debt will be considered as payment. What the parties agree shall constitute payment, the law will adjudge to be payment; 115 Ind. 525.

A debt contracted in a foreign country is payable in the currency of that country, and therefore, where the creditor sues in the United States, he is entitled to recover such sum in the money of the United States as equals the debt in the foreign country where it was payable; 34 Pac. Rep. (Cal.) 73. Where rent is payable in coin, its value is to be estimated at the market price of the coin at the time and place of payment; 153 Ill. 207. See GOLD.

Upon a plea of payment, the defendant may prove a discharge in bank-notes, negotiable notes of individuals, or a debt already due from the payee, delivered and accepted or discounted as payment; Phil. Ev. Cowen & H. ed. n. 387. Bank-notes, in conformity to usage and common understanding, are regarded as cash; 1 Burr. 452; 9 Johns. 120; 6 Md. 37; unless objected to; 1 Metc. Mass. 356; 8 Ohio 169; 10 Me. 475; 2 Cr. & J. 16, n.; 5 Yerg. 199; 3 Humphr. 162; 6 Ala. n. s. 226. Treasury notes are not cash; 3 Conn. 534. Giving a check is not considered as payment; the holder may treat it as a nullity if he derives no benefit from it, provided he has not been guilty of negligence so as to cause injury to the drawer; 2 B. & F. 518; 4 Ad. & E. 952; 4 Johns. 296; 30 N. H. 256; 78 Cal. 15. See 17 R. I. 746; 8 Misc. Rep. 535; 4 Tex. Civ. App. 535; 39 Minn. 340; 101 N. C. 589; 59 Mo. App. 610. But see 14 How. 240. Giving a check is a conditional payment, and the debt is discharged only when the check is paid, unless it was agreed that the check should be received in satisfaction of the debt; 76 Hun 194.

Payment in forged bills is generally a

nullity, both in England and this country; 10 Wheat. 333; 2 Johns. 455; 6 Hill, N. Y. 340; 7 Leigh 617; 3 Hawks 568; 4 Gill & J. 463; 11 Ill. 137; 3 Pa. 330; 5 Conn. 71. So also of counterfeit coin; but an agreement to sell goods and accept specific money is good, and payment in these coins is valid even though they be counterfeit; 1 Term 225; 14 S. & R. 51. The forged notes must be returned in a reasonable time, to throw the loss upon the debtor; 7 Leigh 617; 11 Ill. 137. Payment to a bank in its own notes which are received and afterwards discovered to be forged is a good payment; 2 Parsons, Contr. *822, n. A forged check received as cash and passed to the credit of the customer is good payment; 4 Dall. 234; 10 Vt. 141. Payment in bills of an insolvent bank, where both parties were innocent, has been held no payment; 7 Term 64; 13 Wend. 101; 11 Vt. 576; 9 N. H. 365; 22 Me. 85. On the other hand, it has been held good payment in 1 W. & S. 92; 6 Mass. 185; 12 Ala. 290; 8 Yerg. 175. See 121 U. S. 27. The point is still unsettled, and it is said to be a question of intention rather than of law; Story, Pr. Notes 125*, 477*, 641. The payment of bonds, secured by a mortgage, made in Confederate money during the Civil War is held to have been received in good faith, and if accepted and acquiesced in for a long time, a court of equity will not interfere; 145 U. S. 214.

If a bill of exchange or promissory note be given to a creditor and accepted as payment, it shall be a good payment; Benj. Sales 726; Com. Dig. *Merchant* (F); 30 N. H. 540; 27 Ala. n. s. 254; 16 Ill. 161; 2 Du. 133; 14 Ark. 267; 4 Rich. 609; 34 Me. 324. But regularly a bill of exchange or note given to a creditor shall not be a discharge of the debt till payment of the bill, unless so accepted; 1 Salk. 124.

If the debtor gives his own promissory note, it is held in England and the United States generally not to be payment, unless it be shown that it was so intended; 10 Pet. 567; 4 Mas. 336; 27 N. H. 244; 15 Johns. 247; 9 Conn. 23; 26 E. L. & E. 56.

And if payment be made in the note of a factor or agent employed to purchase goods, or intrusted with the money to be paid for them, if the note be received as payment it will be good in favor of the principal; 1 B. & Ald. 14; 7 B. & C. 17; but not if received conditionally; and this is a question of fact for the jury; 6 Cow. 181; 10 Wend. 271.

It is said that an agreement to receive the debtor's own note in payment must be expressed; 1 Cow. 359; 1 Wash. C. C. 328; 47 Minn. 207; 7 Ind. App. 1; and when so expressed it extinguishes the debt; 5 Wend. 85; 49 Ark. 509; 77 Ga. 463; but if such be not the express agreement of the parties, it only operates to extend the period of the payment of the debt; 131 U. S. 287. Whether there was such an agreement is a question for the jury; 9 Johns. 310; 181 U. S. 287. Acceptance of an indorsed note of a debtor in payment for goods sold, merges and extinguishes the original debt; 6 Miso. Rep. 77. See 115 Ind. 512. But the giving of a void note for an indebtedness does not pay it; 29 Atl. Rep. (N. H.) 406.

A bill of exchange drawn on a third person and accepted discharges the debt as to the drawer; 10 Mod. 37; and in an action to recover the price of goods, in England, payment by a bill not dishonored has been held a good defence; 4 Esp. Cas. 46; 1 M. & M. 28; 4 Bingh. 454; 5 Maule & S. 62.

Retaining a draft on a third party an unreasonable length of time will operate as payment if loss be occasioned thereby; 13 S. & R. 318; 2 Wash. C. C. 191; Ans. Contr. 359. The receipt of a draft, in the absence of an express agreement, does not constitute a payment of the debt for which the draft is drawn; 92 Ga. 511. See 62 Hun 376.

In the sale of a chattel, if the note of a third person be accepted for the price, it is good payment; 3 Cow. 272; 1 D. & B. 291. Not so, however, if the note be the

promise of one of the partners in payment of a partnership debt; 4 Dev. 91, 460.

In Maine and Massachusetts, the presumption where a negotiable note is taken, whether it be the debtor's promise or that of a third person, is that it is intended as payment; 6 Mass. 143; 8 Me. 298; 37 *id.* 419. The fact that a note was usurious and void was allowed to overcome this presumption; 11 Mass. 361. Generally, the question will depend upon the fact whether the payment was to have been made in notes or the receiving them was a mere accommodation to the purchaser; 17 Mass. 1. And the presumption never attaches where non-negotiable notes are given; 15 Me. 340.

Payment may be made through the intervention of a third party who acts as the agent of both parties: as, for example, a stakeholder. If the money be deposited with him to abide the event of a legal wager, neither party can claim it until the wager is determined, and then he is bound to pay it to the winner; 4 Campb. 37. If the wager is illegal, the depositor may reclaim the money at any time before it is paid over; 8 B. & C. 221; 29 E. L. & E. 424. And at any time after notice given in such case he may hold the stakeholder responsible, even though he may have paid it over; see 2 Pars. Contr. 138.

An auctioneer is often a stakeholder, as in case of money deposited to be made over to the vendor if a good title is made out. In such case the purchaser cannot reclaim except on default in receiving a clear title. But if the contract has been rescinded by the parties there need be no notice to the stakeholder in case of a failure to perform the condition; 2 M. & W. 244; 1 M. & R. 614.

A payment of a debt by a stranger without the debtor's request, if accepted as such by the creditor, discharges the debt so far as the creditor is concerned, and also as to the debtor, if he ratify it; 38 W. Va. 390.

A transfer of funds, called by the civil-law phrase a payment by delegation, is payment only when completely effected; 2 Pars. Contr. 137; and an actual transfer of claim or credit assented to by all the parties is a good payment; 2 *id.*; 5 B. & Ald. 228; 7 N. H. 345, 397; 17 Mass. 400. This seems to be very similar to payment by drawing and acceptance of a bill of exchange.

Where a purchaser contracts to pay a certain amount in printing, the seller cannot enforce the collection of such amount in cash, as a profit presumably attaches to the printing; 7 Wash. 316; unless, of course, the party declines to pay in printing.

Foreclosure of a mortgage given to secure a debt operates as payment made when the foreclosure is complete; but if the property mortgaged does not produce a sum equal in value to the amount of the debt then due, it is payment *pro tanto* only; 2 Greenl. Ev. § 324; 3 Mass. 562; 2 Gall. 152; 3 Mass. 474; 10 Pick. 396; 11 Wend. 106. A transfer of a worthless mortgage in payment of a debt, does not discharge the debt where neither party at the time of the transfer knew that the mortgage was worthless; 75 Hun 445. A *legacy* also is payment, if the intention of the testator that it should be so considered can be shown, and if the debt was liquidated at the death of the testator; 1 Esp. 187; 12 Mass. 391; 5 Cow. 368; 61 Vt. 110. See LEGACY.

When money is sent by letter, even though the money is lost, it is good payment, and the debtor is discharged, if he was expressly authorized or directed by the creditor so to send it, or if such authority can be presumed from the course of trade; Benj. Sales 727; 11 M. & W. 233; and in the case of an insurance premium, such premium is paid when the letter containing it is deposited in the postoffice, addressed to the company; 77 Hun 556. But, even if the authority be given or inferred, at least ordinary diligence must be used by the debtor to have the money safely conveyed. See 3 Mass. 249; Ry. & M. 149; 1 Exch. 477.

Payment must be of the whole sum; and even where a receipt in full has been given for a payment of part of an ascertained sum, it has been held not to be an extinction of the debt; 5 Co. 117; 2 B. & C. 477; 3 N. H. 518; 11 Vt. 60; 37 Me. 361; 10 Ad. & E. 121; 4 Gill & J. 305; 9 Johns. 333; 11 How. 100.

But payment of part may be left to the jury as evidence that the whole has been paid; 5 Cra. 11; 3 N. H. 518; and payment of a part at a different time; 2 Metc. Mass. 283; or place; 3 Hawks 580; or in any way more beneficial to the creditor than that prescribed by the contract, is good; 15 M. & W. 23. Giving a chattel, though of less value than the debt, is a discharge; Dr. 75 a; 2 Litt. 49; 3 Barb. Ch. 621; or rendering certain services, with the consent of the creditor; 5 Day 359; or assigning certain property; 5 Johns. 386; 13 Mass. 424. So if a stranger pay a part, or give his note for a part, and this is accepted, it is a good payment of the debt; 4 B. & C. 500; 13 Ala. n. s. 353; 14 Wend. 116; 2 Metc. Mass. 283; 53 Minn. 88. And where a creditor by process of law compels the payment of a part of his claim, by a suit for that part only, this is generally a discharge of the whole; 11 S. & R. 78; 16 Johns. 121. See ACCORD.

The payment must have been accepted knowingly. Many instances are given in the older writers to illustrate acceptance; thus if the money is counted out, and the payee takes a part and puts it in a bag, this is a good payment, and if any be lost it is the payee's loss; 5 Mod. 398. Where A paid B £100 in redemption of a mortgage, and B bade C put it in his closet, and C did so, and A demanded his papers, which B refused to deliver, and A demanded back his money, and B directed C to give it to him, and C did, it was held to be a payment of the mortgage; Viner, *Abr. Payment* (E). When interest coupons on railroad bonds have been presented and paid at the usual place of payment, with money furnished by a third party, a private arrangement between such third party and the mortgagor that the transaction shall constitute a purchase of the coupons and not payment, will not be enforced against the bondholders; 138 Pa. 494. One who lends money to a company to take up its coupons, is not entitled to be paid out of funds in the hands of the receiver; 12 Bush 673.

Generally, there can be but little doubt as to acceptance or non-acceptance, and the question is one of fact for the jury to determine under the circumstances of each particular case. Of course where notes or bank-bills are given in payment of a debt, the evidence that they were so given is to be the same as evidence of any other fact relating to payment.

Evidence of payment. Evidence that any thing has been done and accepted as payment is evidence of payment.

A receipt is *prima facie* evidence of payment; but a receipt acknowledging the payment of ten dollars and acquitting and releasing from all obligations would be a receipt for ten dollars only; 5 B. & Ald. 696; 18 Pick. 325; 1 Edw. Ch. 341. And a receipt is only *prima facie* evidence of payment; 2 Taunt. 241; 7 Cow. 384; 4 Ohio 346; 18 Colo. 538. For cases explaining this rule, see, also, 2 Mas. 141; 11 Mass. 27; 9 Johns. 310; 4 H. & M'H. 219; 96 Ala. 496; 46 Ill. App. 121. And it may be shown that the particular sum stated in the receipt was not paid, and, also, that no payment has been made; 2 Term 366; 26 N. H. 12; 9 Conn. 401; 10 Humphr. 188; 13 Pa. 46. As against strangers thereto, a receipt is incompetent evidence of the payment thereby acknowledged; 41 Neb. 95. See RECEIPT.

Payment may be presumed by the jury in the absence of direct evidence; thus, possession by the debtor of a security after the day of payment, which security is usually given up upon payment of the debt, is *prima facie* evidence of payment by the debtor; 1 Stark. 374; 9 S. & R. 385; 83 Tex. 385; 36 Neb. 741. See 37 Ill. App. 564.

If an acceptor produce a bill of exchange, this is said to afford in England no presumption of payment unless it is shown to have been in circulation after he accepted it; 2 Campb. 439. See, also, 14 M. & W. 379. But in the United States such possession is *prima facie* evidence of payment; 7 S. & R. 116; 4 Johns. 296; 2 Pick. 204. Payment is conclusively presumed from lapse of time. After twenty years' non-demand, unexplained, the court will presume a payment without the aid of a jury; 1 Campb. 27; 14 S. & R. 15; 6 Cow. 401; 2 Cra. 180; 112 Mo. 300; 152 Pa. 102; 65 Fed. Rep. 910. Facts which destroy the reason of this rule may rebut the presumption; 1 Pick. 60; 2 La. 481; 84 Me. 107; 23 Or. 313. See 34 S. C. 289; 50 Ark. 485; 78 Hun 177. And a jury may infer payment from a shorter lapse of time, especially if there be attendant circumstances favoring the presumption; 7 S. & R. 410. As to presumptions against the existence of the debt, see 5 Barb. 63. The statute of limitations does not apply to an action by a legatee to collect a legacy which is a charge on land, and no presumption of payment arises from the lapse of twenty years; 82 Wis. 393. Where an indebtedness is shown, it is presumed to remain unpaid until the contrary is shown; 56 Mo. App. 535.

In a suit to enforce a vendor's lien the acknowledgment of payment contained in the deed is only *prima facie* evidence of payment; 150 Ill. 212.

A presumption may rise from the course of dealing between the parties, or the regular course of trade; Tayl. Ev. 194. Thus, after two years it was presumed that a workman had been paid, as it was shown that the employer paid his workmen every Saturday night, and this man had been seen waiting among others; 1 Esp. 296. See, also, 3 Camp. 10.

A receipt for the last year's or quarter's rent is *prima facie* evidence of the payment of all the rents previously due; 2 Pick. 204. If the last instalment on a bond is paid in due form, it is evidence that the others have been paid; if paid in a different form, that the parties are acting under a new agreement.

Where receipts had been regularly given for the same amount, but for a sum smaller than was due by the agreement, it was held evidence of full payment; 4 Mart. La. 698.

Who may make payment. Payment may be made by the primary debtor, and by other persons from whom the creditor has a right to demand it.

An agent may make payment for his principal. An attorney may discharge the debt against his client; 5 Bingh. 506. One of any number of joint and several obligors, or one of several joint obligors, may discharge the debt; Viner, Abr. *Payment* (B). Payment may be made by a third person, a stranger to the contract.

It may be stated, generally, that any act done by any person in discharge of the debt, if accepted by the creditor, will operate as payment. In the civil law there are many exceptions to this rule, introduced by the operation of the principle of subrogation. Most of these have no application in the common law, but have been adopted, in some instances, as a part of the law merchant. See SUBROGATION; CONTRIBUTION.

To whom payment may be made. Payment is to be made to the creditor. But it may be made to an authorized agent. And if made in the ordinary course of business, without notice requiring the payment to be made to himself, it is binding upon the principal; 6 M. & G. 166; 4 B. & Ald. 395; 41 La. Ann. 1. Payment to a third person by appointment of the principal will be substantially payment to the principal; 1 Phill. Ev. 200. Payment to an agent who made the contract with the payee (without prohibition) is payment to the principal; 16 Johns. 86; 2 Gall. 565; 10 B. & C. 755. But payment may be made to the principal after authority given to an agent to receive; 6 Maule & S. 156. Payments made

to an agent after the death of the principal do not discharge the debtor's obligation, even if made in ignorance of the principal's death; 150 U. S. 520. Payment to a broker or factor who sells for a principal not named is good; 11 East 36. Payment to an agent, when he is known to be such, will be good, if made upon the terms authorized; 11 East 36; if there be no notice not to pay to him; 3 B. & P. 485; 15 East 65; and even after notice, if the factor had a lien on the money when paid; 5 B. & Ald. 27. If the broker sells goods as his own, payment is good though the mode varies from that agreed on; 1 Maule & S. 147; 2 C. & P. 49. Bankers are not agents of the owner to receive payment of the notes by reason simply of the fact that the notes were made payable at their bank; and moneys left with them to be used as payment are not thereby the moneys of the owner of the notes; 134 U. S. 68.

Payment to an attorney is as effectual as payment to the principal himself; 2 Pars. Contr. 727; 102 Mich. 483. So, also, to a solicitor in chancery after a decree; 2 Ch. Cas. 38. The attorney of record may give a receipt and discharge the judgment; 1 Call 147; 1 Coxe 214; 1 Pick. 347; 10 Johns. 220; 2 Bibb 382; if made within one year; 1 Me. 257. Not so of an agent appointed by the attorney to collect the debt; 2 Dougl. 623. Payment by an officer to an attorney whose power has been revoked before the officer received the execution did not discharge the officer; 13 Mass. 465. See, also, 1 Des. Ch. 461. Payment to one of two co-partners discharges the debt; 8 Wend. 542; 2 Blackf. 371; 1 Ill. 107; 6 Maule & S. 156; 1 Wash. C. C. 77; even after dissolution; 4 C. & P. 108. And see 7 N. H. 568. So payment to one of two joint creditors is good, though they are not partners; 4 J. J. Marsh. 367. But payment by a banker to one of several joint depositors without the assent of the others was held a void payment; 1 M. & R. 145; 4 E. L. & E. 342.

Payment to the wife of the creditor is not a discharge of the debt, unless she is expressly or impliedly his agent; 2 Scott N. R. 373; 2 Freem. 178; 22 Me. 335; as to payment to the husband, see 66 Hun 633. One who purchases the property of a married woman through the agency of her husband, must pay for it precisely as if he had purchased through an agent who sustained no such relation; 116 Ind. 164. An auctioneer employed to sell real estate has no authority to receive the purchase-money by virtue of that appointment merely; 1 M. & R. 326. Usually, the terms of sale authorize him to receive the purchase-money; 5 M. & W. 645. Payment was made to a person sitting in the creditor's counting-room and apparently doing his business, and it was held good; 1 M. & M. 200; 5 Taunt. 307; but payment to an apprentice so situated was held not to be good; 2 Cr. & M. 304. Payment to a person other than the legal owner of the claim must be shown to have been made to one entitled to receive the money; 114 N. Y. 431. Generally, payment to the agent must be made in money, to bind the principal; 10 B. & C. 760; 61 Vt. 534; 40 Kan. 395. Power to receive money does not authorize an agent to commute; 1 Wash. C. C. 454; 1 Pick. 347; nor to submit to arbitration; 5 How. 891. See, also, Story, Ag. § 99.

An agent authorized to receive money cannot bind his principal by receiving goods; 4 C. & P. 501; or a note; 5 M. & W. 645; but a subsequent ratification would remedy any such departure from authority; and it is said that slight acts of acquiescence will be deemed ratification. Payment to one of several joint creditors of his part will not alter the nature of the debt so as to enable the others to sue separately; 4 Tyrwh. 488. Payment to one of several executors has been held sufficient; 3 Atk. 695. Payment to a trustee generally concludes the *cestui que trust* in law; 5 B. & Ad. 96. Payment of a debt to a marshal or sheriff having custody of the person of the debtor does not satisfy the plaintiff; 4 B. & C. 32. Interest may be

paid to a scrivener holding the mortgage deed or bond, and also the principal, if he deliver up the bond; otherwise of a mortgage-deed as to the principal, for there must be a re-conveyance; 1 Salk. 157. It would seem, then, that in those states where no re-conveyance is needed, a payment of the principal to a person holding the security would be good, at least *prima facie*.

Subsequent ratification of the agent's acts is equivalent to precedent authority to receive money; Pothier, Obl. n. 528.

When to be made. Payment must be made at the exact time agreed upon. This rule is held very strictly in law; but in equity payment will be allowed at a time subsequent, generally when damages can be estimated and allowed by way of interest; 8 East 208; 3 Pick. 414; 5 id. 106, 187. Where payment is to be made at a future day, of course nothing can be demanded till the time of payment, and, if there be a condition precedent to the liability, not until the condition has been performed. And where goods had been sold "at six or nine months' credit," the debtor was allowed the option; 5 Taunt. 338.

Where no time of payment is specified, the money is to be paid immediately on demand; 1 Pet. 455; 4 Rand. 346. When payment is to be made at a certain time, it may be made at a different time if the plaintiff will accept; Viner, Abr. *Payment* (H); and it seems that the debtor cannot compel the creditor to receive payment before the debt is due. The time of payment of a pecuniary obligation is a material provision in the contract, and a creditor cannot be compelled by statute to accept payment in advance; 111 N. Y. 1.

Where to be made. Payment must be made at the place agreed upon, unless both the parties consent to a change. If no place of payment is mentioned, the payer must seek out the payee; 2 Pars. Part. 751; Moore, P. C. 274; Shepp. Touchst. 378; 2 M. & W. 223; 20 E. L. & E. 498. Refusal to receive payment offered at a place other than the stipulated place of payment, except upon certain conditions, is an implied waiver of the right to have the payment made in the place agreed on; 37 Fed. Rep. 286. Where there is a covenant for the payment of rent, the tenant must seek the landlord; 3 Exch. 689. A lessor must demand the rent upon the land on the day when it becomes due at a convenient time before sunset, in order to re-enter for breach of condition upon non-payment; 47 Conn. 366; 63 Ind. 415. It has been held that a licensor of a patent must apply to the licensee for an account and payment; 6 Fed. Rep. 493.

So, too, the creditor is entitled to call for payment of the whole of his claim at one time, unless the parties have stipulated for payment otherwise.

Questions often arise in regard to the payment of debts and legacies by executors and administrators. These questions are generally settled by statute regulations.

As a general rule, debts are to be paid first, then specific legacies. The personal property is made liable for the testator's debts, and, after that is exhausted, the real estate, under restrictions varying in the different states.

See DESCENT AND DISTRIBUTION; EXECUTOR; ADMINISTRATOR; LEGACY.

In the payment of mortgages, if the mortgage was made by the deceased, the personal estate is liable to discharge the mortgage debts; 2 Cruise, Dig. 147. But where the deceased acquired the land subject to the mortgage, the mortgaged estate must pay the debt; 3 Johns. Ch. 252; 2 Bro. C. C. 57; 24 Pa. 203. See MORTGAGE.

Effect of Payment. The effect of payment is—first, to discharge the obligation; and it may happen that one payment will discharge several obligations by means of a transfer of the evidence of obligations; Pothier, Obl. 554, n. Payment by one who is primarily liable to one entitled to collect the debt is an extinguishment of the debt and all liability thereunder, and however held, transferred, or assigned, it is ever af-

terwards a mere nullity; 84 Va. 806. *Second*, payment does not prevent a recovery back when made under mistake of fact. The general rule is that a mistake or ignorance of law furnishes no ground to reclaim money paid voluntarily under a claim of right; 2 Kent 491; 2 Greenl. Ev. § 123; 44 Mo. App. 249; 27 Ct. Cls. 547; 29 *id.* 115; 99 Cal. 607. But acts done under a mistake or ignorance of an essential fact are voidable and relievable both in law and equity; Poll. Cont. 439; 84 Fla. 471. Laws of a foreign country are matters of fact; Story, Const. 5th ed. § 1304; 9 Pick. 112; and the several United States are foreign to each other in this respect. See **CONFLICT OF LAWS; FOREIGN LAWS**. In Kentucky and Connecticut there is a power of recovery equally in cases of mistake of law and of fact; 19 Conn. 548; 3 B. Monr. 510. In Ohio it may be remedied in equity; 11 Ohio 228. In New York a distinction is taken between ignorance of the law and mistakes of law, giving relief in the latter case; 18 Wend. 422; 2 Barb. Ch. 508. In England, money paid under a mistake of law cannot be recovered back; 4 Ad. & E. 858. The payment of a note for the purchase price of land, after the discovery of a mistake in computing the price, is no bar to an action to recover an overpayment resulting from such mistake; 158 Mass. 352. See **IGNORANCE; MISTAKE**. A payment under protest is nevertheless voluntary, unless there was duress or coercion; 3 N. Dak. 180; 186 N. Y. 363. *Third*, part payment of a note will have the effect of waiver of notice of protest. *Fourth*, payment of part of the debt will bar the application of the Statute of Limitations as to the residue; 22 N. H. 219; 6 Md. 201; 8 Mass. 134; 28 E. L. & E. 454; even though made in goods and chattels; 4 Ad. & E. 71. But it must be shown conclusively that the payment was made as part of a larger debt; 6 M. & W. 824; 20 Miss. 663; 9 Ark. 455; 11 Barb. 554; 24 Vt. 216. See, also, 3 Pars. Contr. 8th ed., 74; **EARNEST; PROTEST; PAYMENT UNDER**.

The Burden of Proof, on a plea of payment, is on the party pleading it; 7 Miss. Rep. 668; 91 Ga. 791; 33 Neb. 319; 1 Mo. App. Rep. 295. As to *appropriation of payments*, see that title. One English and one American case reported since its publication may be here cited as stating the general principles. When a debtor pays money on account and makes no appropriation, the creditor has the right to make it and may exercise it up to the last moment by action or otherwise; [1897] A. C. 286, reversing the court of appeal. The right of appropriation of payments belongs exclusively to the debtor and creditor and no third party can demand a change in appropriations assented to by them; 10 U. S. App. 415. See **NOVATION**.

In Contemplation of Insolvency. A payment by an insolvent debtor in the usual course of his business to maintain his credit, preserve his estate, and carry on his business, without any intent to prefer one creditor to another, is not a "payment in contemplation of insolvency," and with a design to prefer a creditor within Kentucky Statutes, § 1910. 139 Ky. 284, 129 S. W. 828.

See **VOLUNTARY PAYMENT**.

In Pleading. The name of a plea by which the defendant alleges that he has paid the debt claimed in the declaration; this plea must conclude to the country. See *Chitty, Plead.* In Pennsylvania a plea of payment, with leave, etc., is in common use; under it a defendant may give in evidence anything tending to show that, of right, the plaintiff cannot recover.

PAYMENT INTO COURT. In *Practice*. Depositing a sum of money with the proper officer of the court by the defendant in a suit, for the benefit of the plaintiff and in answer to his claim.

It may be made in some states under statutory provisions; 18 Ala. 298; 7 Ill. 671; 1 Barb. 21; 5 Harring. 17; 24 Ga. 211; 16 Tex. 461; 11 Ind. 532; and see 3 E. L. & E. 185; and in most by a rule of court

made for the purpose; 2 Bail. 28; 7 Ired. 100; 1 Swan 92; in which case notice of an intention to apply must, in general, have been previously given.

The effect is to divest the defendant of all right to withdraw the money; 1 Wend. 191; 3 Watts 248; except by leave of court; 1 Cox 298; and to admit conclusively every fact which the plaintiff would be obliged to prove in order to recover it; 1 B. & C. 8; 6 M. & W. 9; 1 Dougl. Mich. 330; 24 Vt. 140; 66 Pa. 27; as, that the amount tendered is due; 1 Campb. 558; 5 Mass. 365; 2 Wend. 431; for the cause laid in the declaration; 5 Bingh. 28, 32; 2 B. & P. 550; 5 Pick. 285; to the plaintiff in the character in which he sues; 2 Campb. 441; the jurisdiction of the court; 5 Esp. 19; that the contract was made; 8 Campb. 52; and broken as alleged; 1 B. & C. 9; but only in reference to the amount paid in; 7 Johns. 315; 8 E. L. & E. 548; and nothing beyond such facts; 1 Greenl. Ev. § 206.

Generally, it relieves the defendant from the payment of further costs unless judgment is recovered for a sum larger than that paid in; 1 Wash. 10; 3 Wend. 326; 2 Miles 65; 2 Rich. 64; 24 Vt. 140; 32 Fed. Rep. 316. As to the capacity in which the officer receiving the money acts, see 1 Cox 298; 2 Bail. 28; 17 Ala. 293.

Payment of money into court, when the declaration is on a special contract, is an acknowledgment of the right of action to the amount of the sum brought in, and no more; 1 Tidd's Pr. 624. It does not waive the benefit of a defence, though that be to the whole claim; 66 Pa. 27; 100 U. S. 673. But no defence can deprive the plaintiff of the right to the money in court. See **TENDER**.

PAYMENT OF MONEY. Delivery by the debtor to the creditor of the amount due. 7 Wall. (U. S.) 250.

PAYS. Country. Trial per pays, trial by jury (the country). See **IN PAIS; PAIS**.

PEACE. The concord or final agreement in a fine of land. 18 Edw. I. *modus levandi finis*.

The tranquillity enjoyed by a political society, internally by the good order which reigns among its members, and externally by the good understanding it has with all other nations. Applied to the internal regulations of a nation, peace imports, in a technical sense, not merely a state of repose and security as opposed to one of violence or warfare, but likewise a state of public order and decorum; Hamm. N. P. 139; 12 Mod. 566; 86 Mich. 175.

The term peace in English and American law is used in a general way to express that condition which is violated by the commission of crime. In modern times it is expressed in England by the phrase *king's peace*, and in this country *peace of the state or commonwealth*. But originally the phrase *king's peace* had no such broad meaning, but was used only in connection with crimes committed against persons, or in places, or at times and seasons, which were under the special protection of the king. See **PAX REGIA**. "Breach of the king's peace was an act of personal disobedience, and a much graver matter than an ordinary breach of public order; it made the wrong-doer the king's enemy. The notion of the king's peace appears to have had two distinct origins. These were, first, the special sanctity of the king's house, which may be regarded as differing only in degree from that which Germanic usage attached everywhere to the home-stead of a free man; and, secondly, the special protection of the king's attendants and servants, and other persons whom he thought fit to place on the same footing. . . . The rapid extension of the king's peace till it becomes, after the Norman Conquest, the normal and general safeguard of public order, seems peculiarly English. On the continent the king appears to have been recognized as protector of the general peace, besides having power to grant special protection or peace of a higher order, from a much earlier time." 1 Poll. & Maitl. 22.

There was the peace of the church, both that of the parish and the minister; so there was the peace of the sheriff, and of each lord, and indeed of every household, for the breach of which atonement could be exacted. In writing of the criminal law of England in the twelfth century it is said, "The time has not yet come when the king's peace will be eternal and cover the whole land. Still we have here an elastic notion; if the king can bestow his peace on a privileged person by a writ of protection, can he not put all men under his peace by proclamation." See 2 Poll. & Maitl. 451-2. The phrase peace of the king was in that period used to express the idea that the crime which was alleged to be in breach of the "peace of God and of our lord the

king," was one of those reserved as specially punishable in behalf of the king himself. These crimes were the original pleas of the crown but the king's peace by an easy process extended itself "until it had become an all-embracing atmosphere;" *id.* 462. That general peace which is now denominated the peace of the king or of the state, as the case may be, was in the early days protected only by the hundred court and the ealdorman. It is possible that mediæval usage which applied to an inferior court the phrase the peace of the lord who held it, dates from the earliest period of the administration of justice. There is said to be some evidence that in the tenth century the phrase *peace of the witan*, was used, but no authority for the use of the term *folk-peace*; 1 Poll. & Maitl. 22. See also Pollock, The King's Peace, Oxford Lectures; Inderwick, The King's Peace.

The Lord Chancellor and the judges of the Queen's Bench Division of the High Court are conservators of the peace at common law; they have all the common-law powers for the preservation of the peace which are possessed by other conservators, such as sheriffs and justices of the peace; they may command all men, whether private citizens, soldiers, or constables, to assist in the suppression of unlawful assemblies, and may arrest peace-breakers, by command, on view of the breach, or by their warrants.

See, generally, Bacon, *Abr. Prerogative* (D 4); Hale, *Hist. Comm. Pleas* 160; 3 Taunt. 141; 1 B. & Ald. 237; Peake 89; 1 Esp. 294; Harrison, *Dig. Officer* (V 4); 2 Benth. Ev. 819, note; 10 Ore. 139. **GOOD BEHAVIOR; SURETY OF THE PEACE; ARTICLES OF THE PEACE; BREACH OF THE PEACE; CONSERVATOR OF THE PEACE; TREATY OF PEACE.**

PEACE, ARMED. The state of a country whose military force is kept on a war basis during peace. English.

PEACE OF GOD. The words, "in the peace of God and the said commonwealth, then and there being," as used in indictments for homicide and in the definition of murder, mean merely that it is not murder to kill an alien enemy in time of war, provided such killing occur in the actual exercise of war; Whart. Cr. Law § 310; 18 Minn. 341.

PEACE OF GOD AND THE CHURCH. The freedom from suits at law between the terms. Spelman, *Gloss.*; Jacob, *Law Dict.* See **PEACE**.

PEACE, IN TIME OF. Not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. 255 U. S. 9, 10; 102 U. S. 438.

PEACEABLE ASSEMBLY. See **ASSEMBLY; LIBERTY OF SPEECH**.

PECK. A measure of capacity, equal to two gallons. See **MEASURE**.

PECULATION. The unlawful appropriation by a depository of public funds, of the property of the government intrusted to his care, to his own use or that of others. Domat, *Suppl. au Droit Public*, l. 3, tit. 5. See **EMBEZZLEMENT**.

PECULIARS. In *Ecclesiastical Law*. A parish in England which has jurisdiction of ecclesiastical matters within itself and independent of the ordinary.

They may be either—
Royal, which includes the sovereign's free chapels;

Of the archbishops, excluding the jurisdiction of the bishops and archdeacons;

Of the bishops, excluding the jurisdiction of the bishop of the diocese in which they are situated;

Of the bishops in their own diocese, excluding archdeaconal jurisdiction;

Of deans, deans and chapters, prebendaries, and the like, excluding the bishop's jurisdiction in consequence of ancient compositions.

See 1 Phill. Eccl. 202, n. 245; Skinn. 589; 3 Bla. Com. 65; **COURT OF PECULIARS**.

PECULIUM (Lat.). In *Civil Law*. Private property.

The most ancient kind of *peculium* was the *peculium profectitium* of the Roman law, which signified that portion of the property acquired by a son or slave which the father or master allowed him, to be managed as he saw fit. In modern civil law there are other kinds of *peculium*, viz.: *peculium castrense*, which includes all movables given to a son by relatives and friends on his going on a campaign, all the presents of comrades, and his military pay and the things bought with it; *peculium quasi-castrense*, which includes all acquired by

a son by performing the duties of a public or spiritual office or of an advocate, and also gifts from the reigning prince; *peculium adventitium*, which includes the property of a son's mother and relatives on that side of the house, and all which comes to him on a second marriage of his parents, and, in general, all his acquisitions which do not come from his father's property and do not come under *castrens* or *quasi-castrens* *peculium*.

The *peculium profectitium* remains the property of the father. The *peculium castrens* and *quasi-castrens* are entirely the property of the son. The *peculium adventitium* belongs to the son; but he cannot alien it nor dispose of it by will; nor can the father, unless under peculiar circumstances, alien it without consent of the son. Mackeldey, Civ. Law, § 887; Inst. 2. 9. 1; Dig. 15. 1. 5. 8; Pothier, ad Pand. lib. 50, tit. 17, c. 2, art. 8.

A master is not entitled to the extraordinary earnings of his apprentices who do not interfere with his services so as to affect the master's profits. An apprentice was therefore decreed to be entitled to salvage, in opposition to his master's claim for it. 2 Cra. 270. See MANUS MARRIAGE.

PECUNIA (Lat.). In Civil Law. Property, real or personal, corporeal or incorporeal. Things in general (*omnes res*).

The law of the Twelve Tables said, *uti quisque pater, familia legasset super pecunia tutelae rei sue ita jus esto*: in whatever manner a father of a family may have disposed of his property or of the tutelage of his things, let this disposition be law. 1 *Lecons Elem.* du Dr. Civ. Rom. 288. But Paulus, in l. 3, D. de verb. signifi., gives it a narrower sense than *res*, which he says means what is not included within patrimony, *pecunia* what is. Vicat, Voc. Jur. In a still narrower sense, it means those things only which have measure, weight, and number, and most usually strictly money. *Id.* The general sense of property occurs, also, in the old English law. *Leg. Edw. Confess.* 10.

Pecunia were the first riches of the ancients; and it is from *pecus* that the words *pecunia*, *peculium*, *pecuniatus*, are derived. In old English law *pecunia* often retains the force of *pecus*. So often in *Domesday*: *pastura ibidem pecunie villas*, i. e. pasture for cattle of the village. So *vinea pecunie*, livestock. *Leg. Edw. Confess.* c. 10; Emsendat. Willielmi Primi ad Leges Edw. Confess.; Cowell.

PECUNIA NUMERATA (Lat.). Money given in payment of a debt.

Properly used of the creditor, who is properly said to *number*, i. e. count out, the money to the debtor which he must pay, and improperly of the debtor, who is said to *number* or *count* out the money to the creditor, i. e. to pay it. Vicat, Voc. Jur.; Calvinus, Lex.

PECUNIA NON-NUMERATA (Lat.). Money not paid or numbered.

The *exceptio non-numerate pecunie* (plea of money not paid) is allowed to the principal or surety by the creditor. Calvinus, Lex.

PECUNIA TRAJECTITIA (Lat.). A loan of money which, either itself or in the shape of goods bought with it, is to be carried over the sea, the lender to take the risk from the commencement of the voyage till arrival at the port of destination, and on that account to have higher interest; which interest is not essential to the contract, but, if reserved, is called *fœnus nauticum*. Mackeldey, Civ. Law § 398b. The term *fœnus nauticum* is sometimes applied to the transaction as well as the interest, making it coextensive with *pecunia trajectitia*.

PECUNIARY. That which relates to money. A *pecuniary provision* does not apply to a provision in an agreement for alimony specifically dividing personal property of the parties; 61 Me. 395. The exemption from registration of annuities without regard to *pecuniary consideration* was held to include the case of a grantee's giving up his business to the grantor; 4 Term 790; 5 *id.* 639. Bank notes; 3 *id.* 554; 1 B. & P. 208; checks; 8 Term 328; and a verbal promise to pay a debt in full; 6 Gray 327; are pecuniary considerations. But the assignment of a leasehold interest is not; 2 B. & B. 702; or a transfer of stock; 3 B. & A. 602; or a surrender of a life interest in a sum of money and of a contingent interest in the corpus; 2 El. & Bl. 374; 2 B. & C. 875.

PECUNIARY CAUSES. Causes in ecclesiastical courts where satisfaction is sought for withholding ecclesiastical dues or the doing or neglecting some act connected with the church. 3 Bla. Com. 88. As to what causes are ecclesiastical, see 2 Burn, Eccl. Law 89.

PECUNIARY LEGACY. See LEGACY.

PECUNIARY LOSS. A loss of money, or of something by which money or something of money value may be acquired. 33 Barb. 33.

PECUNIARY PROFIT. An academy is not a corporation for pecuniary profit. 116 Ill. 376.

PEDAGIUM (Lat. pes, foot). Money paid for passing by foot or horse through any forest or country. Cassan de Coutum. Burgund. p. 118; Rot. Vasc. 22 Edw. III. m. 34.

PEDAULUS (Lat. pes, foot). In Civil Law. A judge who sat at the foot of the tribunal, i. e. on the lowest seats, ready to try matters of little moment at command of the prætor. Calvinus, Lex.; Vicat, Voc. Jur.

PEDDLER. Persons who travel about the country with merchandise for the purpose of selling it.

An itinerant trader, who carries goods about in order to sell them, and who actually sells them, to purchasers, in contradistinction to a trader who has goods for sale, and sells them, at a fixed place of business. A petty chapman, or other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise, carrying to sell or expose to sale, any goods, wares, or merchandise. 107 Ind. 502; 12 Cush. 493; 63 Hun 123. Any person carrying a wagon, cart, or buggy for the purpose of exhibiting or delivering any wares or merchandise. N. C. Act 1895, c. 116.

An itinerant individual, ordinarily without local habitation or place of business, who travels about the country carrying commodities for sale. 75 Ia. 74.

The distinctive feature has been held not to consist in the mode of transportation, though one of the statutory modes is essential to constitute a peddler, but in the fact that the peddler goes from house to house or place to place carrying his merchandise with him and concurrently sells and delivers it; 87 Ala. 144; 140 N. Y. 187. One who, having a place of business in another town, goes about delivering goods at the houses of his customers, in pursuance of orders previously taken, and takes orders for future delivery, is not a peddler; 140 N. Y. 187; 140 Pa. 158; 113 N. C. 681; but one who manufactures and deals in proprietary medicines who, although having a permanent manufactory and residence, yet attends county fairs and publicly recommends his medicines as a cure for certain ailments, is held a peddler; 85 Ia. 21.

The driver of a delivery wagon who takes orders for goods and subsequently delivers them is not a peddler; 55 N. J. L. 522; nor is one who merely delivers goods previously sold by another; 88 Ia. 191; or a canvasser; 135 Ill. 36; or one who exhibits samples of cloth and takes orders for clothing to be made therefrom; 28 Wkly. L. Bul. 107.

But one who goes from house to house with merchandise, selling the same on the instalment plan is held a peddler; 64 N. W. Rep. (Mich.) 333; 41 N. E. Rep. (Ind.) 315.

A state may impose a tax upon itinerant peddlers and require them to take out a license to practice their trade; 156 U. S. 296; but it may not discriminate between its own citizens and non-residents; 12 Wall. 418; 103 U. S. 344; 64 N. H. 48; 84 Ga. 754; nor charge a higher price to the latter for a license than it imposes on the former; 64 N. H. 508. See COMMERCE; LICENSE.

An oil company, which fills tanks of regular customers every week under a standing order, is not a "peddler." 129 Ky. 744, 112 S. W. 902.

A traveling agent who takes orders and transmits them to be accepted or rejected by his principal and who delivers nothing

is not a "peddler." 150 Ky. 634, 150 S. W. 814.

All itinerant persons vending lightning rods, goods, wares, merchandise, clocks, watches, jewelry, gold, silver or plated ware, spectacles, drugs, nostrums, perfumery, and any other thing not hereinafter specially exempt, shall be deemed "peddlers." Kentucky Statutes, § 4216. See PEDDLER'S NOTES. COMMERCIAL TRAVELER.

PEDDLER'S NOTES. "Peddler's notes" includes notes given for the exclusive right to sell a certain article in a certain county, or territory. 104 S. W. 287.

A traveling agent, taking orders for goods, and taking notes for the things sold, is not a peddler, nor are the notes so taken "peddler's notes." 150 Ky. 634, 150 S. W. 814.

PEDIGREE. A succession of degrees from the origin: it is the state of the family as far as regards the relationship of the different members, their births, marriages, and deaths. This term is applied to persons or families who trace their origin or descent.

On account of the difficulty of proving in the ordinary manner, by living witnesses, facts which occurred in remote times, *hearsay evidence* has been admitted to prove a pedigree: As declarations of deceased persons who were related by blood or marriage may be given in evidence in matters of pedigree; 117 U. S. 397. See Rawle, Covenants § 17 N. 1; Warv. Abs. of Title 33, 318. See DECLARATION; HEARSAY.

PEDIS POSITIO (Lat.) A planting or placing of the foot. A term used to denote an actual corporal possession. *Possessio est quasi pedis positio*: possession is as it were a planting of the foot. 3 Co. 42; 8 Johns. per Kent, C. J.; 5 Pa. 303; 2 N. & McC. 343. See PEDIS POSSESSIO.

PEDIS POSSESSIO (Lat.). A foot-hold; an actual possession. To constitute adverse possession, there must be *pedis possessio*, or a substantial inclosure. 2 N. & M'C. 343.

PEERESS. The wife or the unmarried widow of a peer or a woman upon whom a peerage has been conferred, or a woman holding a peerage descendible to the heirs general of the original grantee. A peeress in her own right cannot sit in the House of Lords; but she is entitled to be tried by that House if charged with treason or felony. Byrne.

PEERS (Lat. pares). The vassals of a lord; the freeholders of a neighborhood, before whom livery of seisin was to be made, and before whom, as the jury of the county, trials were had. 2 Bla. Com. 316. These vassals were called *pares curiæ*, which title see. 1 Washb. R. P. 5th ed. *23.

Trial by a man's peers or equals is one of the rights reserved by Magna Charta. 4 Bla. Com. 349.

The nobility of England, though of different ranks, viz., dukes, marquesses, earls, viscounts, and barons, are equal in their privileges of sitting and voting in the house of lords; hence they are called peers of the realm.

They are created by writ summoning them to attend the house of lords by the title intended to be given, or by letters patent directly conferring the dignity. The former is the more ancient way; but the grant by patent is more certain. See Sullivan, Lect. 19 a; 1 Wood. Lect. 37.

Peers are tried by other peers in cases of treason, felony, and misprison of the same. In cases of treason, felony, and breach of the peace, they have no privilege from arrest; 1 Sharsw. Bla. Com. 401*, n. 11.

Bishops who sit in parliament are peers; but the word spiritual is generally added; e. g. "lords temporal and spiritual." 1 Sharsw. Bla. Com. 401*, n. 12.

The titles of all temporal peers are now hereditary; May, Law of Parl. 14; except certain peers holding judicial office, whose peerage is a life peerage only.

Scotch and Irish peers are not entitled to sit in the lords, but sixteen representa-

tive Scotch peers are elected to each parliament, and twenty-eight Irish peers are elected to sit in the lords for life.

A peerage is not transferable, except with consent of parliament; *id.* Succession to the title is destroyed by attainder; see 1 Bla. Com. 412*. When an English peer has been adjudicated a bankrupt, he cannot sit in the house of lords; he loses no other privilege thereby. When the bankruptcy is determined he may resume his seat. If he obtains his discharge with a certificate that bankruptcy was the result of misfortune, the disqualification may be removed. But in the case of Scotch or Irish representative peers in the house of lords, the bankruptcy not determined within a year vacates their seat.

A member of the House of Commons, when he becomes a member of the English peerage, ceases thereby to have a right to sit in the Commons.

As to the trial of peers; see tit. Lord High Steward, in 8 Encyc. Laws of Eng.

PEINE FORTE ET DURE (L. Fr.). In English Law. A punishment formerly inflicted in England on a person who, being arraigned of felony, refused to plead and put himself on his trial, and stubbornly stood mute.

A jury was empanelled to try whether he stood "mute of malice," or "mute by the visitation of God," and if the latter the trial proceeded; but if the former the prisoner was solemnly warned by the judges of the terrible consequences described by Lord Coke, in the trial of Sir Richard Weston in 1615 for the murder of Sir Thomas Overbury, by the words—*overe, frigore, et fame*. Time was given for reflection and often the unfortunate was subjected to entreaties of friends and others, but if he remained obdurate he was adjudged to suffer *peine forte et dure*. The judgment was that he return from whence he came, to a low dungeon into which no light could enter; he was to be laid down, naked, on his back, on the ground, his feet and head and loins covered, his arms and legs drawn apart by cords tied to posts, a sharp stone under his back, and as much weight of iron or stone as he could bear, or more than he could bear, placed on his chest. He was to have the next day three morsels of barley bread, without drink; the next, three draughts, as much each time as he could drink, of the nearest stagnant water to the prison, without bread; and such was to be his diet on alternate days, till he died. This punishment was vulgarly called *pressing to death*; 2 Reeve, Hist. Eng. Law 134; 4 Bla. Com. 324; Cowell; Britton c. 4. fol. 11*. This punishment as above described dates back to a period between 31 Edw. III. and 8 Hen. IV.; 4 Bla. Com. 324; Year B. 8 Hen. IV. 1. It did not at first include the *pressing*. Originally when asked how he would be tried the accused must choose between a trial "by God" (by ordeal) and "by my country" (by jury). After the former method of trial was abolished about 1215 the other method remained a privilege to be claimed and in those days the idea did not occur to any one of trying a prisoner by jury without his consent. By standing mute a prisoner put the court in difficulty, and at first he was put to death for not consenting to be tried "according to the law and custom of the realm." This was thought too severe and in the Parliament of Westminster under Edward I. there was provided for notorious felons confinement in *prison forte et dure*; which included all possible harsh features except death. Then to conquer obduracy starvation was resorted to; but this being too slow, under Henry IV. the *peine* was substituted for the *prison*. It continued until 1772 although occasionally something stronger than exhortation was resorted to, as tying up by the thumbs in the presence of the court, at the Old Bailey in 1734. It only ended when standing mute, by statute, in England, became equivalent to a confession or ver-

dict of guilty; 12 Geo. III. c. 20; but in 1827 it was enacted by 7 and 8 Geo. IV., c. 28 "that in such cases a plea of not guilty should be entered for the accused."

The obvious effect of standing mute was to avoid the forfeiture of goods consequent upon conviction of felony and the results of corruption of blood, by an attainder, in case of capital felony. Often, indeed usually, in treason cases certainly, conviction was sure and the fortitude required to endure this death by torture would save his children or other heirs from disinheritance. Great numbers did in fact undergo the punishment which was recorded by the clerk's entry or record, "*mortuus en pen' fort' et dur'*." The number in rural Middlesex alone in 1609-1618 was thirty-two, of whom three were women, and peers were not protected from it by their privilege. A case is recorded in the last year of George I. and one at least in the reign of George II.

The only instance in which this punishment has ever been inflicted in this country is that of Giles Cory, of Salem, who refused to plead when arraigned for witchcraft; Washb. Jud. Hist. 142; 1 Chandl. Cr. Tr. 122.

PELLS, CLERK OF THE; CLERICUS PELLIS. An officer of the Exchequer whose duty it was to enter all moneys received from the tellers in a parchment roll called the *Pellis receptorum*, and to enter all payments in another roll called the *Pellis exitum*. Long after the days of parchment rolls the Clerk of the Pells continued to be an officer of the Exchequer. His office was abolished only in 1834. Byrne.

PENAL. Enacting punishment. Imposing a punishment or penalty.

PENAL ACTION. An action for recovery of statute penalty. 3 Steph. Com. 535. See Hawk. Pl. Cr. *Informatio*. It is distinguished from a popular or *qui tam* action, in which the action is brought by the informer, to whom part of the penalty goes. A penal action or information is brought by an officer, and the penalty goes to the king; 1 Chitty, Gen. Pr. 25; 2 Archb. Pr. 188.

PENAL BILL. The old name for a bond with condition by which a person is bound to pay a certain sum of money or do a certain act, or, in default thereof, pay a certain sum of money by way of penalty. Jacob, Law Dict. *Bill*.

PENAL CLAUSE. That particular clause or subdivision of a statute which fixes the penalty for a violation of previous provisions. See STATUTE; PENAL STATUTES.

A secondary obligation entered into for the purpose of enforcing the performance of a primary obligation. La. Civ. Code, art. 2117.

PENAL LAWS. See PENAL STATUTES.

PENAL SERVITUDE. A punishment which consists in keeping an offender in confinement and compelling him to labor.

The only distinction between penal servitude and "imprisonment with hard labor" seems to be that the latter is carried out within the walls of a goal, and cannot be inflicted for more than a comparatively short term of years, while penal servitude is carried out in any place appointed for the purpose by the proper authority, and may be for life, or any period not less than five years. R. & L. Dict.

PENAL STATUTES. Those which inflict a penalty for the violation of some of their provisions. Strictly and properly, they are those laws imposing punishment for an offence committed against the state, which the executive has power to pardon, and the expression does not include statutes which give a private action against a wrong-doer. 146 U. S. 657.

It is a rule of law that such statutes must

be construed strictly; 1 Bla. Com. 88; Cro. Jac. 415; 1 Com. Dig. 444; 5 *id.* 860; 1 Kent 467; Whart. Cr. L. 28. They cannot, therefore, be extended by their spirit or equity to other offences than those clearly described and provided for; 1 Paine 32; 6 Cra. 171. But they are not to be so strictly construed as to defeat the obvious intention of the legislature; 134 U. S. 624. See 120 *id.* 678; CONSTRUCTION; INTERPRETATION.

PENALTY. A clause in an agreement, by which the obligor agrees to pay a certain sum of money if he shall fail to fulfil the contract contained in another clause of the same agreement.

A penal obligation differs from an alternative obligation, for the latter is but one in its essence; while a penalty always includes two distinct engagements, and when the first is fulfilled the second is void. When a breach has taken place, the obligor has his option to require the fulfilment of the first obligation, or the payment of the penalty, in those cases which cannot be relieved in equity, when the penalty is considered as liquidated damages. Dalloz, Dict. *Obligation avec Clause penale*.

A distinction is made in courts of equity between penalties and forfeitures. In cases of forfeiture for the breach of any covenant other than a covenant to pay rent, relief will not be granted in equity, unless upon the ground of accident, fraud, mistake, or surprise, when the breach is capable of compensation; Eden, Inj. 22; 3 Ves. 692; 16 *id.* 403; 18 *id.* 58.

For the distinction between a penalty and liquidated damages, see LIQUIDATED DAMAGES.

The penalty remains unaffected, although the condition may have been partially performed; as, in a case where the penalty was one thousand dollars, and the condition was to pay an annuity of one hundred dollars, which had been paid for ten years, the penalty was still valid; 5 Vt. 355.

The punishment inflicted by a law for its violation. The term is mostly applied to a pecuniary punishment; see 6 Pet. 404; 7 Wheat. 13; 1 Wash. C. C. 1; 1 Paine 661; 1 Gall. 26; 1 Mas. 243; 7 Johns. 72; 1 Pick. 451; 1 Saund. 58, n.; 16 Vin. Abr. 301; 62 Hun 407; 23 Fed. Rep. 74; 124 U. S. 571; although not restricted to it; 16 Ind. App. 357.

The words penal and penalty in their strict and primary sense, denote a punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offence against its laws; 146 U. S. 657.

The term "penalty" involves the idea of punishment for infraction of the law and includes any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered; while in a civil suit the amount of recovery for such damages is determined by the extent of the injury received and the elements constituting it. 233 U. S. 319.

PENANCE. In Ecclesiastical Law. An ecclesiastical punishment inflicted by an ecclesiastical court for some spiritual offence. Ayliffe, Parerg. 420.

PENCIL. An instrument made of plum-bago, red chalk, or other suitable substance, for writing without ink.

It has been held that a will written with a pencil is valid; 1 Phill. Ecol. 1; 2 *id.* 173; Beach, Wills § 28. See WILL.

PENDENTE LITE (Lat.). Pending the continuance of an action; while litigation continues.

An administrator is appointed *pendente lite*, when a will is contested. See ADMINISTRATOR; LIS PENDENS.

PENDENTES (Lat.). In Civil Law. The fruits of the earth not yet separated from the ground; the fruits hanging by the roots. Erskine, Inst. b. 2, tit. 2, s. 4.

PENDING. See LIS PENDENS.

PENDING SUIT. See **AUTER ACTION PENDANT**; **UNITED STATES COURTS**.

PENES (Lat.). In the possession; in one's possession or power; under one's control.

PENETRATION. See **RAPE**.

PENITENTIALS. Books formerly used by Roman Catholic priests hearing confessions containing rules for the imposition of penances. Webster.

PENITENTIARY. A prison for the punishment of convicts.

A prison or place of punishment. The place of punishment in which convicts, sentenced to confinement and hard labor, are confined by the authority of the law. 2 Kan. 174; 48 Kan. 723.

There are two systems of penitentiaries in the United States, each of which is claimed to be the best by its partisans,—the Pennsylvania system and the New York system. By the former, convicts are lodged in separate, well-lighted, and well-ventilated cells, where they are required to work during stated hours. During the whole time of their confinement they are never permitted to see or speak with each other. Their usual employments are shoe-making, weaving, winding yarn, picking wool, and such like business. The only punishments to which convicts are subject are the privation of food for short periods, and confinement *without labor* in dark but well-aired cells: this discipline has been found sufficient to keep perfect order; the whip and all other corporal punishments are prohibited. The advantages of the plan are numerous. Men cannot long remain in solitude without labor; convicts, when deprived of it, ask it as a favor, and, in order to retain it, use, generally, their best exertions to do their work well; being entirely secluded, they are of course unknown to their fellow-prisoners, and can form no combination to escape while in prison, or associations to prey upon society when they are out; being treated with kindness, and afforded books for their instruction and amusement, they become satisfied that society does not make war upon them, and more disposed to return to it, which they are not prevented from doing by the exposure of their fellow-prisoners when in a strange place; the labor of the convicts tends greatly to defray the expenses of the prison. The disadvantages which were anticipated have been found to be groundless. Among these were that the prisoners would be unhealthy; experience has proved the contrary: that they would become insane; this has also been found to be otherwise: that solitude is incompatible with the performance of business: that obedience to the discipline of the prison could not be enforced. These, and all other objections to this system, are by its friends believed to be without force.

The New York system, adopted at Auburn, which was probably copied from the penitentiary at Ghent, in the Netherlands, called *La Maison de Force*, is founded on the system of isolation and separation, as well as that of Pennsylvania, but with this difference, that in the former the prisoners are confined to their separate cells during the night only; during the working-hours in the daytime they labor together in workshops appropriated to their use. They eat their meals together, but in such a manner as not to be able to speak with each other. Silence is also imposed upon them at their labor. They perform the labor of carpenters, blacksmiths, weavers, shoemakers, tailors, coopers, gardeners, woodworkers, etc. The discipline of the prison is enforced by stripes inflicted by the assistant keepers, on the backs of the prisoners; though this punishment is rarely exercised. The advantages of this plan are that the convicts are in solitary confinement during the night: that their labor, by being joint, is more productive; that, inasmuch as a clergyman is employed to preach to the prisoners, the system affords an opportunity

for mental and moral improvements. Among the objections made to it are that the prisoners have opportunities of communicating with each other and of forming plans of escape, and, when they are out of prison, of associating together in consequence of their previous acquaintance, to the detriment of those who wish to return to virtue, and to the danger of the public; that the discipline is degrading, and that it engenders bitter resentment in the mind of the convict.

PENNED AND CORRALLED. Confined in a small enclosure or narrow space, either by means of an artificial structure or through some other agency without such structure. 105 Cal. 636.

PENNSYLVANIA. One of the thirteen original states of the United States of America.

It received its name from a royal charter granted March 4, 1681, by Charles II. to William Penn. By that charter, Penn was constituted the proprietary and governor of the province, and vested with power to enact laws, with the consent of the freemen, to execute the laws, to appoint judges and other officers, incorporate towns, establish ports, levy customs, import and export goods, sell lands creating a tenure, levy troops, make war, and exercise other attributes of sovereign power. Appeals in judicial matters lay to the crown, and all laws could be annulled by the Crown within five years after their passage.

The first frame of government was adopted and promulgated on April 25, 1682. The government was to be by the governor and freemen in a provincial council and general assembly. Both of the latter were chosen annually by the people. All laws were to originate with the council. A governor, judges, and other officers were to be appointed, during good behavior, by the governor from a double list presented by the council or assembly.

On April 2, 1683, a new frame was adopted, reducing the numbers both of the council and assembly. In 1689 the proprietary was deprived of his government and the province placed under the government of New York. But in 1694 Penn was duly reinstated.

A new frame of government adopted on October 26, 1696, made some material alterations in the existing order of things. The power of originating laws was thereby first conferred on the assembly.

The charter of privileges granted by the proprietary and accepted by the assembly on October 28, 1701, confirming the foregoing provisions and making numerous others, continued the supreme law of the province during the residue of the proprietary government.

In 1776, after the declaration of American independence, a constitution was formed adapted to the altered circumstances of the country, which continued in force until 1790, when a new one was substituted. This was amended in 1837 by the introduction of some very radical changes. Other amendments were made in 1850, in 1857, and in 1864. In 1874 a new constitution was adopted.

PENNY. The name of an English coin, of the value of one-twelfth part of a shilling.

The weight of a penny is approximately, 1-3 oz. avoird.; of a half penny, 1-5 oz.; of a farthing, 1-10 oz. A half penny is one inch in diameter. Whitaker's *Alm.*

While the United States were colonies, each adopted a monetary system composed of pounds, shillings, and pence. The penny varied in value in the different colonies.

PENNY WEIGHT. A troy weight of twenty-four grains, or one-twentieth part of an ounce. See **WEIGHTS**.

PENSION. A stated and certain allowance granted by the government to an individual, or those who represent him, for valuable services performed by him for the country.

The act of August 26, 1776, of the old congress promised pensions to soldiers and seamen who might be disabled in the war; and the act of May 15, 1778, promised half pay for seven years after the end of the war to all commissioned officers who should serve until the end of the war. The earliest act of the United States congress was that of September 29, 1789, which directed that pensions that had been paid by the states should be paid by the United States. The act of July 4, 1838, was the foundation of pensions to widows and orphans. In 1866 and 1868 "old war" pensioners were put upon the same footing with widows and orphans of the War of the Rebellion. Originally the secretary of war was directed to make out the list of pensioners. The law of May 15, 1828, was executed at the treasury department, but by resolution of June 28, 1832, all duties devolved on that department were transferred to the war department. On March 2, 1833, an inde-

pendent pension bureau was established in the war department. For a time navy pension laws were executed in the navy department, but on March 4, 1840, this was transferred to the pension bureau. The act of March 3, 1849, created the interior department and transferred the pension business to that department, where it has since been.

Pensions have been divided into "invalid pension," "gratuitous or service pensions" and "land bounties."

"No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which congress has the right to give, distribute, or recall at its discretion." 107 U. S. 68. But by an act of December 21, 1893, payment of a pension cannot be withheld or suspended without notice to the grantee of not less than thirty days.

Invalid pensions were granted to volunteers and the militia in suppressing Indian depredations in Florida; and pensions were granted to the widows and children under sixteen years of age of those engaged in various Indian wars since 1790 who remained in the service at the date of their death, or who had received an honorable discharge and died, or should thereafter die of injuries received or disease contracted in the service. In 1892, service pensions were granted to survivors who had served for thirty days in certain Indian wars from 1832 to 1842, and were honorably discharged and to those personally named in any resolution of congress though they may have served less than thirty days, and to their surviving widows, if not remarried. This act does not apply to persons who are not citizens of the United States.

Invalid pensions were granted to regulars and volunteers, disabled by injury received or disease contracted in the Mexican war if they received an honorable discharge; R. S. § 4730; and in case of their death, to their widows, or if the latter die or remarry, to the children under sixteen. By act of January 29, 1887, service pensions were granted to survivors of the Mexican war who served sixty days or were actually engaged in a battle or were personally named in any resolution of congress for specific service in the war.

By R. S. § 4728, invalid navy pensions are granted to any person in the navy or marine service disabled in the service prior to March 4, 1861; and in case of death from injury received or disease contracted in the service, a pension is granted to the widow, and, in case of her death or remarriage, to the children under sixteen years; R. S. §§ 4728, 4729. By R. S. § 4741, officers and men on revenue cutters co-operating with the navy are placed on the navy pension list. Special acts provide for a navy pension fund and a privateer pension fund and the pensioners thereon.

No person can draw a pension as an invalid and the pay of his rank for any period, unless his disability caused his employment in a lower grade or in the civil branch of the service; R. S. § 4724; and no person can draw two pensions; R. S. § 4715. No pension shall be paid to any person or to the widow or children or heirs of any deceased person who voluntarily engaged in or aided or abetted the rebellion; R. S. § 4716; unless such person afterwards voluntarily enlisted in the army or navy and incurred disability therein; act of March 3, 1877, amended August 1, 1892.

Pensions are not liable to attachment in any way; R. S. § 4747.

If any one entitled under R. S. § 4693, *supra*, has died since March 4, 1861, or dies after this act, by reason of any wound, etc., which under said section would have entitled him to an invalid pension, had he been disabled, his widow, or if none, or in case of her death without the payment to her of any part of the pension mentioned in the act, his child or children under sixteen years, shall receive the same pension as the husband or father would have been entitled to, to continue from the death of the husband or father, to continue to the widow during widowhood and to the chil-

dren until they attain sixteen years (longer if permanently helpless); in case of the widow's marriage the children draw the pension from her marriage, etc., R. S. § 4702, as amended August 7, 1882. Pensions of widows are increased by two dollars a month for each child under sixteen years; R. S. § 4703.

By act of March 19, 1886, widows' pensions are raised to twelve dollars a month (with allowance of two dollars a month for each child under sixteen years); but the act applies only to widows married prior to that date, and those who may marry prior to and during the husband's service.

If a widow entitled to a pension abandon a child under sixteen or is an unsuitable person, by reason of immoral conduct, to have the custody of it, no pension is allowed the widow till the child attains sixteen years, but the child shall be pensioned as if no widow had survived, the pension being payable to the guardian; R. S. § 4706. Children born before marriage, if acknowledged by the father before or after marriage, are deemed legitimate; R. S. § 4704. On remarriage of a widow entitled to a pension, her pension ceases; R. S. § 4708; and no pension shall be granted to a widow for the same period that her husband received one; R. S. § 4735.

Dependent relations of one entitled under R. S. § 4793, *supra*, in case of his death since March 4, 1861, or after the act, leaving neither widow nor legitimate children, are entitled to the same pension as such person would have been entitled to, in the following order of precedence:—the mother; the father; orphan brothers and sisters under sixteen (jointly); R. S. § 4707. See act of March 19, 1886. They take in substance, successively; but are entitled only so long as the pension shall be necessary as a means of adequate subsistence; R. S. § 4707; and the rate is raised to twelve dollars a month; act of March 19, 1886. The marriage of a dependent mother or sister terminates the pension.

Arrears of pensions granted in consequence of death which originated from a cause occurring in the service since March 4, 1861, or in consequence of wounds or injuries received or disease contracted since that date, commence on the death or discharge of the person, if the disability occurred prior to discharge; if after discharge, then from disability, or from the termination of the right of the person having the prior right to such pension; provided the application was filed prior to July 1, 1880, otherwise the pension begins at the filing of the application; but this limitation does not apply to widows, insane persons, or children under sixteen; acts of January 25, 1879; March 3, 1879; June 7, 1888. Where death or disability occurred prior to March 4, 1861, and an application was not filed in three years from discharge or death or from the termination of a previously granted pension, the pension commences from the date of filing the application; but no claim allowed prior to June 6, 1886, is affected by this section; R. S. § 4713. In pensions payable to dependent parents, it is enough to show that the parents have no means of support except their own manual labor or the contributions of others, not legally bound to support them; the pension continues only so long as the dependence; act June 27, 1890.

All persons who served ninety days or more in the rebellion, and were honorably discharged, and are or may be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitates them from support by manual labor, shall receive not more than twelve nor less than six dollars a month, proportioned to the degree of inability, beginning with the date of filing the application after June 27, 1890; and the widow, if without means of support other than her daily labor, or the children under sixteen are placed on the pension list from the date of the application, on proof of the husband's death, but without proving his death to have been the result of army service.

An offence against the act of June 27, 1890, is committed when a sum greater than ten dollars has been taken, regardless of the fact whether the pension has or has not been received, and it is not necessary to aver a demand for the return of the money wrongfully taken; 157 U. S. 160. Where one fraudulently obtained pension money from a client he is not guilty of wrongfully withholding money from the pensioner under R. S. § 4786; it applies to money before it reaches the hands of the pensioner; 160 U. S. 187. See MILITARY BOUNTY LANDS.

A reasonable appropriation of municipal funds for a police pension is for a strictly municipal use and is valid; 182 Pa. 373.

PENSIONARY PARLIAMENT. See LONG PARLIAMENT.

PENSIONER. One who is supported by an allowance at the will of another. It is more usually applied to him who receives an annuity or pension from the government.

PENT ROAD. A road shut up or closed at its terminal points. 40 Vt. 41.

PEON. A peon is one who is compelled to work for his creditor until his debt is paid. 219 U. S. 242.

PEONAGE. A status or condition of compulsory service, based upon the indebtedness of the peon (*q. v.*) to the master. The basal fact is indebtedness. 197 U. S. 215. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. *Id.*

A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. *Id.*; 215, 216.

A term descriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt. 219 U. S. 242. See INVOLUNTARY SERVITUDE.

PEONIA. In Spanish Law. A portion of land which was formerly given to a simple soldier on the conquest of a country. It is now a quantity of land of different size in different provinces. In the Spanish possessions in America it measured fifty feet front and one hundred feet deep. 2 White, N. Rec. 49; 12 Pet. 444, notes.

PEOPLE. A state: as, the people of the state of New York. A nation in its collective and political capacity. 4 Term 783. See 6 Pet. 467.

When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. Thus, the people elect delegates to a constitutional convention; the people choose the officers under the constitution, and so on. For these and similar purposes, the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and, as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people. But in all the enumerations and guaranties of rights the whole

people are intended, because the rights of all are equal, and are meant to be equally protected; Cooley, Const. 2d ed. 40, 267; Cooley, Const. L. 278.

In a policy of insurance, "detainments of all kings, princes, and people," the word does not include insurance against any promiscuous or lawless rabble which may be guilty of attacking or detaining a ship; 2 Marsh. Ins. 508. See INSURGENTS; NATION.

The term *people of the United States* is synonymous with *citizens*; both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives.

Sovereign people. Every citizen is one of this people, and a constituent member of the sovereignty; 19 How. 393; 143 U. S. 135; it includes registered voters as well as tax payers. 19 R. I. 610.

PER. By. When a writ of entry is sued out against the alienee, or descendant of the original disseisor, it is then said to be brought in the *per*, because the writ states that the tenant had not the entry but by the original wrong-doer. 3 Bla. Com. 181. See ENTRY, WRIT OF; POST.

PER AES ET LIBRAM (Lat. *æs*, brass, *libra*, scale). In Civil Law. A sale was said to be made *per æs et libram* when one called *libripens* held a scale (*libra*), which the one buying struck with a brazen coin (*æs*), and said, "I say, by the right of a Roman, this thing is mine," and gave the coin to the vendor, in presence of at least three witnesses. This kind of sale was used in the emancipation of a son or slave, and in making a will. Calvinus. Lex. *Mancipatio*. See MANCIPATORY WILL.

PER AGREEMENT. The addition of these words in a bill of particulars for services does not preclude from recovering the value of the services specified, although no agreement for the payment of a specified sum is proven. 45 N. Y. 810.

PER ALLUVIONEM (Lat.). In Civil Law. By alluvion, or the gradual and imperceptible increase arising from deposit by water. Vocab. Jur. Utr. *Alluvio*; Ang. & A. Watere. 53.

PER ANNULUM ET BACULUM (Lat.). In Ecclesiastical Law. The symbolical investiture of an ecclesiastical dignity was *per annulum et baculum*, *i. e.* by the ring and staff. 1 Bla. Com. 378; 1 Burn, Eccl. Law 209.

PER ANNUM. Strictly speaking, by the year or through the year. 50 Kan. 440.

PER AUTRE VIE. See ESTATE PER AUTRE VIE.

PER AVERSIONEM (Lat.). In Civil Law. By turning away. Applied to a sale not by measure or weight, but for a single price for the whole in gross; *e. g.* a sale of all the wine of a vineyard for a certain price. Vocab. Jur. Utr. *Aversio*. Some derive the meaning of the phrase from a *turning away* of the risk of a deficiency in the quantity from the seller to the buyer; others, from *turning away* the head, *i. e.* negligence in the sale; others think *aversio* is for *adversio*. Calvinus, Lex.; 2 Kent 640; 4 *id.* 517.

PER CAPITA (Lat. by the head or polls). When descendants take as individuals, and not by right of representation (*per stirpes*), they are said to take *per capita*. For example, if a legacy be given to the issue of A B, and A B at the time of his death shall have two children and two grandchildren, his estate shall be divided into four parts, and the children and grandchildren shall each have one of them. 3 Ves. 257; 2 Bla. Com. 218; 6 Cush. 158; 2 Jarm. Wills 6th Am. ed. 945; 3 Beav. 451; 4 *id.* 239. See EQUALLY DIVIDED.

PER CORPOS (Lat.). By the body.

PER AND CUI. When a writ of

entry is brought against a second alienor or descendant from the disseisor, it is said to be in the *per* and *cui*, because the form of the writ is that the tenant had not entry but *by* and *under* a prior alienor, to whom the intruder himself demised it. 3 Bla. Com. 181. See ENTRY, WRIT OF.

PER CURIAM (Lat. by the court). A phrase which occurs constantly in the reports. It distinguishes the opinion or decision of the court from that of a single judge. Abb. Law Dict. 353. It designates, in Pennsylvania, opinions written by the chief justice of the supreme court.

PER DEFALTAM (L. Lat.). By default.

PER FORMAM DONI (Lat. by the form of the gift). According to the line of descent prescribed in the conveyance of the ancestor or donor of estate-tail. 2 Bla. Com. 113; 3 Harr. & J. 323; 1 Washb. R. P. 74, 81.

PER FRAUDEM (Lat.). A replication to a plea where something has been pleaded which would be a discharge if it had been honestly pleaded that such a thing has been obtained by fraud; for example, where, on debt on a statute, the defendant pleads a prior action depending, if such action has been commenced by fraud, the plaintiff may reply *per fraudem*. 2 Chitty, Pl. *675.

PER INCURIAM. Through want of care; through inadvertence. 35 E. L. & Eq. 302.

An order of the court which clearly is the result of some oversight is said to have been made *per incuriam*. Byrne. 35 E. L. & Eq. 302.

PER INDUSTRIAM. See INDUSTRIAL, PER.

PER INDUSTRIAM HOMINIS (Lat.). By human industry. A term applied to the reclaiming or taming of wild animals by art, industry and education. 2 Bl. Com. 391.

PER INFORTUNUM (Lat. by misadventure). In Criminal Law. Homicide *per infortunium*, or by misadventure, is said to take place when a man in doing a lawful act, without any intent to hurt, unfortunately kills another. Hawk. Pl. Cr. b. 1, c. 11; Fost. Cr. Law 253; Co. 3d Inst. 56.

PER LEGALE JUDICIUM PARIUM SUORUM (L. Lat.). By the lawful judgment of his peers.

PER LEGEM TERRÆ. By the law of the land.

PER MINAS (Lat. by threats). When a man is compelled to enter into a contract by threats or menaces, either for fear of loss of life or mayhem, he may avoid it afterwards. 1 Bla. Com. 181; Bac. Abr. Duress, Murder (A). See DURESS.

PER MY ET PER TOUT (Law Fr. by the moiety, or half, and by the whole). The mode in which joint tenants hold the joint estate, the effect of which, technically considered, is that for purposes of tenure and survivorship each is the holder of the whole, but for purposes of alienation each has only his own share, which is presumed in law to be equal. 1 Washb. R. P. 406; 2 Bla. Com. 182; Chal. R. P. 335.

PER NORMAN LEGIS COMMUNIS (Lat.). By the rule of the common law.

PER PAIS TRIAL. Trial by the country, *i. e.* by jury.

PER PLEGIUM (L. Lat.). By pledge or surety; on bail.

PER PROC. By procurator; by letter of attorney. It does not necessarily mean that the act is done under procurator. 27 L. J. Ex. 463; 3 H. & W. 554. A signature of a promissory note or bill of exchange

by procurator operates as notice that the agent has but limited authority to sign, and the principle is only bound by such signature if the agent was acting within the actual limits of his authority. 12 C. B. N. s. 373.

PER PROCURATIONEM. See PER PROC.

PER QUOD (L. Lat.). In pleading. By which; whereby. Words introducing a consequence of law from matters of fact before stated.

PER QUOD CONSORTIUM AMISIT (Lat. by which he lost her company). If a man's wife is so badly beaten or ill used that thereby he loses her company and assistance for any time, he has a separate remedy by an action of trespass (in the nature of an action on the case) *per quod consortium amisit*, in which he shall recover satisfaction in damages. 3 Bla. Com. 140; Cro. Jac. 501.

PER QUOD SERVITIUM AMISIT (Lat. by which he lost her or his service). Where a servant has been so beaten or injured that his or her services are lost to the master, the master has an action of trespass *vi et armis, per quod servitium amisit*, in which he must allege and prove the special damage he has sustained. 3 Bla. Com. 142. This action is commonly brought by the father for the seduction of his daughter, in which case very slight evidence of the relation of master and servant is necessary; but still some loss of service, or some expense, must be shown; 5 East 45; 5 B. & P. 466; 5 Price 641; 11 Ga. 603; 15 Barb. 279; 8 N. Y. 191; 14 id. 413; 20 Pa. 354; 5 Md. 211; 1 Wisc. 209; 3 Sneed 29. See SEDUCTION.

PER SALTUM. By sudden movement, passing over certain proceedings. 8 East 511.

PER SAMPLE. By sample. A purchase so made is a collateral engagement that the goods shall be of a particular quality. 4 B. & Ald. 387.

PER SE. Taken alone; in itself; by itself.

Thus, in slander certain words are said to be actionable *per se, i. e.* no special damage need be proved in order to recover for the speaking them. R. & L. Dict.

PER STIRPES (Lat. stirps, trunk or root of a tree or race). By or according to stock or root; by right of representation. 6 Cush. 153; 2 Bla. Com. 217; 2 Steph. 253; 2 Woodd. Lect. 114; 2 Kent 425.

When descendants take by representation of their parent, they are said to take *per stirpes*; that is, children take among them the share which their parent would have taken, if living. See DESCENT AND DISTRIBUTION; EQUALLY DIVIDED.

PER TOTAM CURIAM (L. Lat.). By the whole court.

PER TOUT ET NON PER MY (Law Fr. by the whole and not by the moiety). Where an estate in fee is given to a man and his wife, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*. 2 Bla. Com. 182. The late married woman's acts have been held to abolish estates by entirety; 76 Ill. 57; 56 N. H. 105; 76 N. Y. 262; *contra*, 57 Ind. 412; s. c. 26 Am. Rep. 64; 25 Mich. 350; 56 Pa. 106. See 20 Alb. L. J. 346; ENTIRETY.

PER UNIVERSITATEM (Lat. by the whole). Used of the acquisition of any property as a whole, in opposition to an acquisition by parts; *e. g.* the acquisition of an inheritance, or of the separate property of the son (*peculium*), etc. Calvinus, Lex. Universitas.

PER VERBA DE FUTURO (L. Lat.). By words of the future (tense). A phrase applied to contracts of marriage. 1 Bl. Com. 439; 2 Kent's Com. 87.

PER VERBA DE PRESENTI (L. Lat.). By words of the present (tense);

as, "I marry you;" "you and I are man and wife." A phrase applied to contracts of marriage. 1 Bl. Com. 439.

PER VIVAM VOCEM (L. Lat.). By the living voice; the same with *viva voce*.

PER YEAR. Equivalent to the word "annually." 30 N. Y. 213.

PERAMBULATION. Traveling around or throughout; walking about boundaries, to inspect and settle them.

Perambulation of the forest was the surveying or walking about the forest, and the utmost limits of it, by justices or other officers thereto assigned, to set down and preserve the metes and bounds thereof. Perambulation of parishes was to be made by the minister, church-wardens, and parishioners, by going round the same once a year, in or about Ascension week; and the parishioners may justify going over any man's land in their perambulation, according to usage. There was also a perambulation of manors; also, a commission was grantable to other persons to make perambulation of towns, counties, etc., and to certify the same in the chancery or the common pleas, etc. Also, the district within which an officer is authorized to make a periodical tour of inspection is said to be called sometimes a perambulation. Abbott.

PERAMBULATIONE FACIENDA, WRIT DE. In English Law. The name of a writ which is sued by consent of both parties when they are in doubt as to the bounds of their respective estates; it is directed to the sheriff to make perambulation, and to set the bounds and limits between them in certainty. Fitzh. N. B. 309.

"The writ *de perambulatione facienda* is not known to have been adopted in practice in the United States, but in several of the states remedies somewhat similar in principle have been provided by statutes." Greenl. Ev. § 146.

PERCEPTION (From *per* and *capere*). The taking possession of. For example, a lessee or tenant before perception of the crops, *i. e.* before harvesting them, has a right to offset any loss which may happen to them, against the rent; but after the perception they are entirely at his risk. Mackelvey, Civil Law § 378. Used of money, it means the counting out and payment of a debt. Also used for food due to soldiers. Vicat, Voc. Jur.

PERCH. The length of sixteen feet and a half; a pole or rod of that length. Forty perches in length and four in breadth make an acre of land.

PERCOLATING WATERS. See WATERS.

PERCOLATION. See SUBTERRANEAN WATERS.

PERDONATIO UTLAGARIÆ (Lat.). In English Law. A pardon for a man who, for contempt in not yielding obedience to the process of the king's courts, is outlawed, and afterwards, of his own accord, surrenders.

PERDUELLIO (Lat.). In Civil Law. At first, an honorable enmity to the republic; afterwards, a traitorous enmity of a citizen; consisting in being of a hostile disposition towards the republic, *e. g.* treason aiming at the supreme power, violating the privileges of a Roman citizen by beating him, etc., attempting anything against the person of the emperor, and, in general, any open hostility to the republic. Sometimes used for the enemy or traitor himself. *Perduellio* was distinguished from *crimen imminutæ majestatis*, as being an attempt against the whole republic, punishable in *comitia centuriata*, by crucifixion and by infamy after death. Calvinus, Lex.; Vicat, Voc. Jur.

PEREGRINI (Lat.). In Civil Law. Under the denomination of *peregrini* were comprehended all who did not enjoy any

capacity of the law, namely, slaves, alien enemies, and such foreigners as belonged to nations with which the Romans had not established relations. Savigny, Dr. Rom. § 66.

PEREMPT. To waive or bar an appeal by one's own act so as partially to comply with or acquiesce in a sentence of a court. Phill. Ecol. L. 1275; Rog. Ecol. L. 47.

PEREMPTORIUS (Lat. from *perimere*, to destroy). In Civil Law. That which takes away or destroys forever: hence, *exceptio peremptoria*, a plea which is a perpetual bar. See **PEREMPTORY**. Bract. lib. 4, c. 20; Fleta, lib. 6, c. 36, § 8; Calvinus, Lex.

PEREMPTORY. Absolute; positive. A final determination to act, without hope of renewing or altering. Joined to a substantive, this word is frequently used in law; as, peremptory action; Fitzh. N. B. 35, 38, 104, 108; peremptory nonsuit; *id.* 5, 11; peremptory exception; Bract. lib. 4, c. 20; peremptory undertaking; 3 Chitty, Pr. 112, 793; peremptory challenge of jurors; Inst. 4. 18, 9; Code 7. 50, 2; 8. 36, 8; Dig. 5. 1. 70, 73.

PEREMPTORY CHALLENGE. See **CHALLENGE**.

PEREMPTORY DAY. A day assigned for a hearing without further postponement. Anderson. A precise time when certain business by rule of court ought to be spoken to; but if it cannot be spoken to then, the court, at the prayer of the party concerned, will give a further day without prejudice to him. R. & L. Dict.

PEREMPTORY DEFENCE. A defence which insists that the plaintiff never had the right to institute the suit, or that, if he had, the original right is extinguished or determined. 4 Bouvier, Inst. n. 4206.

PEREMPTORY EXCEPTION. Any defence which denies entirely the ground of action. 1 White, Rec. 283. So of a demurrer; 1 Tex. 364.

PEREMPTORY MANDAMUS. A mandamus requiring a thing to be done absolutely. It is usually granted after failure to show satisfactory cause on an alternative mandamus. No other return will be permitted but absolute obedience; 3 Bla. Com. *110; Tapp. Mand. 400. See **MANDAMUS**.

PEREMPTORY PAPER. A court paper containing a list of all motions.

A list of the causes which are enlarged at the request of the parties, or which stand over from press of business in court. In the courts of common pleas and exchequer, when a rule moved for in one term was drawn up to show cause in the next term, or was enlarged till the following term, it was the custom to place it in a paper called the peremptory paper. Certain days were allotted in these courts for taking the peremptory paper, usually the first five or six days in each term. Regularly, it was necessary for the party who desired to support or to show cause against the rule, to do so by counsel on the very day allotted to the rule in the peremptory paper; and, if he neglected to do so, the court would not, in favor of a mere technical objection, afterwards permit the rule to be opened and discussed. Abbott; 3 Chitty Gen. Pract. 477.

PEREMPTORY PLEA. A plea which goes to destroy the right of action itself; a plea in bar or to the action. 3 Steph. Com. 11th ed. 541; 3 Woodd. Lect. 57; 2 Saund. Pl. & Ev. 645.

PEREMPTORY RULE. An order which is to be observed promptly and fully, without argument *contra*. Anderson.

In former English practice, when a plaintiff in an action was not ready to declare within the time limited, and the defendant wished to compel him to do so, defendant

might procure what was termed a peremptory rule to declare, which was in the nature of an order from the court, compelling the plaintiff to declare, under pain of judgment of *non pros*, being signed against him. By the common-law procedure act, a notice to declare was substituted for this rule of court. Abbott.

PERFECT. Complete. The word implies either physical, moral, or mechanical perfection. 17 C. B. n. s. 601. A guaranty that goods are perfect is construed to mean that they are perfect for the use intended; 41 Wis. 860.

The term is applied to obligations in order to distinguish those which may be enforced by law, which are called *perfect*, 37 Ga. 128, from those which cannot be so enforced, which are said to be *imperfect*.

A *perfect title* is one which is good both at law and in equity. 21 Conn. 449.

PERFECT TAXING SYSTEM. See **TAXING SYSTEM, PERFECT**.

PERFIDY. The act of one who has engaged his faith to do a thing, and does not do it, but does the contrary. Wolff § 390.

PERFORMANCE. The act of doing something. It is synonymous with fulfilling. 81 Ind. 97.

The thing done; as, Paul is exonerated from the obligation of his contract by its performance.

When a contract has been made by parol, which under the statute of frauds could not be enforced, because it was not in writing, and the party seeking to avoid it has received the whole or a part performance of such agreement, he cannot afterwards avoid it; 1 Johns. Ch. 273; L. R. 1 Ch. 35; 40 U. S. App. 579; and such part performance will enable the other party to prove it *alunde*; 1 Pet. C. C. 380; 1 Rand. 165; 1 Blackf. 58; 2 Day 255; 1 Des. 350; 1 Binn. 218; 3 Paige, Ch. 545.

The statute of frauds does not apply to a contract which has been fully performed by one party and partially, at least, by the other; 35 Atl. Rep. (R. L.) 579. An agreement for constructing a party wall is so performed as to take it out of the statute when built by one owner and used by the other; 7 Ohio Dec. 426. Part performance of a verbal contract for the sale of land is not sufficient to avoid the statute; 73 Miss. 665; though in some cases it is; 89 Me. 506; as where the land was selected and a conveyance made; 15 Ind. App. 432; and where there has been an entry into possession under a parol promise and a deed has been tendered, it is sufficient part performance to sustain an action for the purchase money, though it would not have been for compelling specific performance; 48 Neb. 659.

The question what is sufficient delivery to operate as part performance to avoid the statute is one of frequent occurrence, and must usually be determined upon the circumstances of each case and is not a subject upon which it is easy to generalize. For cases in which the question has arisen see 59 Minn. 295; 64 Vt. 147; 114 N. C. 530; 84 Md. 426; 38 Neb. 339; 15 Ind. App. 34; 10 Utah 31.

The question of performance becomes important where it is necessary to determine whether the non-performance of one party according to the exact terms of the contract will prevent a recovery upon it, or in case that is not permitted, upon a *quantum meruit*. As to the effect of a contract for services, where the employee is discharged for good cause before the termination of his contract, the authorities conflict. See 24 L. R. A. 231, where the authorities are collected. See also **MASTER AND SERVANT**. Where there is a contract for permanent employment, a substantial performance by the employer would have the effect of releasing him from liability upon his contract to an employee who refused to comply with the terms of the contract; 42 Neb. 531.

The non-performance of a building con-

tract is not excused by inevitable accident; 88 Mo. 285; 25 Conn. 530; 2 Wall. 1; 25 N. Y. 272; nor by the acceptance of the buildings when not finished in due time; 23 How. 220; but it may be by acts of the other party which delay completion, even if acquired in by the contractor; 11 *id.* 461; 102 N. Y. 205. The prevention of performance by the destruction of a building before completion, if the contract is entire, will prevent recovery for any part; L. R. 2 C. P. 651; but where there is a provision for payment from time to time, it is otherwise; 4 M. & W. 699. There may be waiver of strict performance as to time; 102 N. Y. 228; and a recovery for work actually done; 91 U. S. 640; a vendor who has waived performance at the time specified cannot rescind without reasonable notice to the vendee; 8 Paige 423; 36 Minn. 317; 4 Mich. 573. Nothing can be recovered for part performance of a contract unless full performance was waived or prevented; 26 N. Y. 217; 39 Wis. 553; 67 Me. 449; but see 81 N. Y. 341. See 2 Benj. Sales § 1032. It is said that substantial performance of a building contract is all that is required; 88 N. Y. 648; but one who invokes that doctrine must himself have faithfully endeavored to perform; 123 Pa. 119. See 5 L. R. A. 270; 9 *id.* 52.

Whether a contract is entire or severable with respect to its performance depends generally upon the consideration, and not the subject matter; 110 Pa. 236; if the latter is apportioned, either expressly or impliedly, the contract is severable; 77 *id.* 228; so also where it provides for the performance of different things at different times; 143 Mass. 11; or where the price is apportioned to different items to be separately performed; 11 N. Y. 35; 5 B. & Ald. 942. See 1 L. R. A. 826.

Where no time is fixed for performance, a reasonable time will be presumed to have been intended; 45 Ill. App. 624; 79 Mich. 47; 10 Vt. 274; 4 Q. B. D. 133; 39 N. Y. 481; 27 Fla. 482; 11 L. R. A. 526. What is a reasonable time will depend upon the circumstances of the case; 24 Me. 131; L. R. 1 C. P. 885; 30 Vt. 633; 14 W. Va. 1; and is a question for the jury; 18 N. Y. L. J. 1899. Where no time has been fixed, or where performance at an appointed time has been waived, either party may limit a reasonable period within which it must be performed, giving notice thereof to the other party; Hoffm. Ch. 125; 16 Beav. 59, 239; L. R. 10 Eq. 281.

A contract for the delivery of a number of personal chattels of the same kind is severable in its nature, and if a part is accepted and appropriated to the use of the vendee, he must pay the stipulated price for such part, less damages sustained by reason of the failure to make complete delivery; 86 Fed. Rep. 225.

Where the contract is silent as to the mode of performance, it should be according to the usage of the place where it is made; 11 Ex. 645; but it must be substantial and *bona fide*, conforming to the true intent and meaning, and not merely the letter of the agreement; 4 *id.* 128. Conditions precedent must be performed; 3 Addison, Contr. 8th ed. [1189]. See **CONDITION**.

The question of performance also becomes important with respect to the effect of non-performance as a rescission, so as to give a right of action to the other party. The refusal or inability of one party to a contract to perform his part of it, discharges the other, who is ready and willing to perform his part, from further responsibility, and entitles him to sue at once for a breach. If before the time of the performance, one party announces to the other that he does not intend to perform his promise, the latter may treat the contract as broken and bring suit at once; 158 Pa. 107.

The leading case for this rule is *Hochster v. De La Tour*, 22 L. J. Q. B. 455, which was followed in *Frost v. Knight*, L. R. 7 Ex. 111; but in *Johnston v. Milling*, 16 Q. B. D. 460, it was doubted whether the doctrine extended to a contract containing

various stipulations, where the whole cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations. The rule has generally been followed in England and in this country; 11 C. B. n. s. 152; 13 *id.* 825; 102 N. Y. 10; 108 Ill. 170; 36 Md. 567; *contra*, 114 Mass. 530.

The principle has been applied to sustain an action for breach of promise of marriage where the defendant, before the time fixed for fulfilling his promise, has married another person; L. R. 7 Ex. 111; 32 Ia. 409; 42 N. Y. 246.

The refusal of performance must be treated as a breach; the plaintiff cannot maintain his action if he persists in seeking performance; 6 El. & Bl. 953; 2 C. B. n. s. 568.

The refusal to perform must be distinct, unequivocal, and absolute; 15 Wall. 36; and acted on by the other party; Benj. Sales § 568. In 117 U. S. 502, the court considered the cases, but declined to decide whether or not the rule should be maintained as applicable to the class of cases to which the one then before it belonged; and said it has been called in England a "novel doctrine" and has never been applied in that court.

The cases in 8 C. C. A. 14 (59 Fed. Rep. 87) and 19 C. C. A. 599 (73 Fed. Rep. 603) followed *Hochster v. De la Tour*. In 84 Fed. Rep. 569, Dallas, J., was of opinion that the question was an open one, so far as the supreme court was concerned, and followed the ruling of Judge Lowell in 11 Fed. Rep. 372, supported by the two federal cases last above mentioned. He considered that Judge Lowell had answered the argument of the court in 114 Mass. 530, and concurred with him in thinking that the cases which follow the English rule are "founded in good sense, and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic."

Wallace, C. J., in 85 Fed. Rep. 853, considered that *Dingley v. Oler*, 117 U. S. 490, was a *dictum*, and that there was an overwhelming preponderance of adjudication in favor of the doctrine of *Hochster v. De la Tour*. He cited also 137 N. Y. 471; 60 Minn. 284; 41 W. Va. 717. See 6 Eng. Rul. Cas. 576; ELECTION OF RIGHTS OR REMEDIES.

See, generally, Add. Contr.; 2 Sto. Contr.; 2 Pars. Contr.; 7 Wait, Act. & Def. Ch. 53.

PERFORMED. To carry through, execute, accomplish, to make complete, to perfect (Webster). 150 Ky. 250, 150 S. W. 367.

PERIL. The risk, contingency, or cause of loss insured against, in a policy of insurance. See RISK; INSURANCE.

PERIL OF DEATH. A term used to denote that condition of apprehension of death in which it is necessary that the donor should be, in order to make a valid gift *causa mortis*.

In the cases on this subject there is found a great lack of precision of definition. The result of a critical examination of the authorities is thus stated by Bates, Ch., in *Robson v. Robson's Adm.*, 3 Del. Ch. 51, 63: "I have labored to obtain from the authorities a clear view of what is implied in these terms, peril of death, in other words, what is that precise condition of disability in consideration of which it is that the law gives effect to a gift *causa mortis*. Thus much is certain, that the gift, to be valid, in the first instance must be made under apprehension of death, as likely to result from some present peril, usually that of sickness. It is further certain that to render the gift finally effectual death must in fact ensue from the sickness or other peril under which it was made. But on another question I am unable to derive from the text books and decisions any settled conclusion: That question is, whether the apprehension of death must be an apprehension of death as present imminent, the donor being, as it is

said, *in extremis*; or, whether it is sufficient for the validity of the gift if death be contemplated as the probable result of the sickness, a result likely or even certain to occur but after an indefinite interval, it may be of weeks or months; as in the case of chronic diseases generally." After adverting to the difference of view to be found in the leading English cases, the chancellor continues: "The question is uncontrolled by any decisions known to me in our own courts; and as between the English cases I confess a strong preference for the narrower construction of these terms 'peril of death,' the one which seems to have been at first held. It is consistent with the original object of admitting these gifts into the English law; it guards the policy of the statute of wills; and prevents frauds and uncertainties of title." This view of the proper construction of the phrase "peril of death," was founded upon the theory that gifts *causa mortis* were testamentary in their nature. But Gibson, C. J., in *Nicholas v. Adams*, 2 Whart. 17, held to the contrary, "that these gifts are not testamentary, but, as he describes them, are gifts executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship or deliverance from the peril." By way of comment on the last cited case it has been suggested that, "that able judge (and this is said with great deference) seems to have been misled by a consideration of gifts *causa mortis* under the civil law. Under that law these gifts formed quite an expanded system. They embraced all cases of gifts made in consideration of mortality, whether made in present danger or not." 3 Del. Ch. 66. See also *Prec. in Ch.* 289; 2 Ves. Sr. 437; 1 Bligh 533; DONATIO CAUSA MORTIS.

PERILS OF THE SEA. All marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel. 74 Fed. Rep. 413.

A phrase contained in bills of lading, and a class of dangers to goods carried, the effects of which the carriers do not undertake to insure against in virtue of their general undertaking.

Bills of lading generally contain an exception that the carrier shall not be liable for "perils of the sea." What is the precise import of this phrase is not, perhaps, very exactly settled. In a strict sense, the words perils of the sea denote the natural accidents peculiar to the sea; but in more than one instance they have been held to extend to events not attributable to natural causes.

Perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. It is a loss happening in spite of all human effort and sagacity; 2 Kent 597, approved in 166 U. S. 386. It is said to have a broader signification than the act of God and includes calamities not caused by violence or a convulsion of nature, such as lightning, flood, or tempest; 20 U. S. App. 503, on appeal in 166 U. S. 386, where Fuller, C. J., said that this might be the case, but did not decide the exact point.

The damage must be due to an accident, of a kind peculiar to the sea, directly and exclusively, without any negligence on the part of the ship-owner or his servants, and must not be due to unseaworthiness of the ship when she started on the voyage; *Pollock, Bill of Lading Excep.* 40. "There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure;" 12 App. Cas. 509.

Perils of the sea include a capture by pirates; 9 Allan 310; loss by fire; 26 Conn. 138; 10 N. Y. 431; hidden obstructions in a river, recently brought there by the current; 53 Barb. 439; but see 6 Gratt. 199; loss due to motion of the sea; 41 Fed. Rep. 63; but not by the natural and inev-

itable action of winds and waves; 12 App. Cas. 509; by a tidal wave and flood of unusual violence; 41 Fed. Rep. 106. Also the following, if the immediate damage is caused by salt water; rolling and pitching of the ship in rough weather; 32 L. T. 847; running ashore in a fog; L. R. 9 Ex. 339; foundering in a collision; 12 App. Cas. 509; rats eating a hole in a ship and letting water in; 12 App. Cas. 527; the destruction of goods at sea by rats has been held a peril of the sea, the carrier not being in default; 1 Binn. 592.

It includes striking on a sunken rock not on the chart, or a rock from which the light has been removed, or an iceberg, or a vessel without lights; 12 App. 514; or a sword fish making a hole in the ship; *id.* 525.

Where the vessel's main shaft was broken by a cause coming within perils of the sea and by the necessary delays for repairs the cargo was destroyed, and the plaintiff lost the entire freight, it was held that this was a claim consequent on the disabling of the vessel by peril of the sea; 75 L. T. Rep. 155. Where a cargo was damaged by sea water, which, during the voyage, was caused by the giving way of a bolt used to fasten a stanchion, and it appeared that the ship had encountered very heavy weather, but the evidence showed that the stanchion had withstood with much heavier cargo on a former voyage, and there was no fault in the original construction shown, it was held that the loss came within the exemption clause; 14 U. S. App. 626.

The stranding of a steamer by reason of the negligence of a local pilot, by which the anchor dragged and a portion of her cargo was damaged, is a sea peril and the steamer is not responsible for the negligence of the pilot; 38 U. S. App. 50.

It does not include: Restraint of princes and rulers; 100 Mass. 301; 10 Q. B. 517; 22 How. 502; loss by rats; 5 Blatch. 335; 17 Q. B. Div. 670; destruction by vermin in certain seas, where such injury is to be expected; 2 Mass. 429; 12 App. Cas. 524; by worms; 48 Fed. Rep. 463; confiscation of cargo as contraband by a foreign court; 10 Q. B. 517; damage caused by an accident to machinery that would equally have occurred on land under similar condition; 12 App. Cas. 592; retardation of the voyage by which meats are spoiled; L. R. 4 C. P. 206; encountering heavy seas; 42 Fed. Rep. 861.

Where a cargo was damaged by water which reached it through a pipe which had been gnawed by rats, it was held that the ship was responsible for the whole damage to the cargo, less such portion as could be shown affirmatively to have been done by sea peril; 38 U. S. App. 1.

Where the loss might not have occurred but for the unseaworthiness of the ship or the negligence or breach of contract of the owner or master, it would seem that the owner is not exonerated by the fact that the proximate cause of the loss was a peril of the sea; 9 Wall. 684; 14 C. B. n. s. 59.

The mere fact of a collision at sea is not proof that it occurred in such a way as to be a peril of the sea; 11 P. D. 170. The burden of proof is on the shipowner; 56 Fed. Rep. 243; 1 U. S. App. 251; if goods are lost, the presumption is that it was the fault of the carrier; 41 Fed. Rep. 62.

The exception in a charter-party as to dangers of the seas and navigation, is not applicable to the perils which arise from a breach of the ship-owner's obligation; 11 U. S. App. 648. Where the ship-owner, *prima facie*, appears to have been negligent, it is not enough for him to prove that his ship was seaworthy at the commencement of the voyage; 78 Fed. Rep. 155.

The mere fact that goods are damaged by sea water entering the ship does not create a presumption of damage by peril of the sea even when aided by the presumption of seaworthiness, for the water may still have got in through negligence; 75 Fed. Rep. 74. But where sea perils have been encountered adequate to cause

damage to a seaworthy ship and there is general proof of seaworthiness, the damage is presumptively due to such perils; 79 Fed. Rep. 371.

See ACT OF GOD; FORTUITOUS EVENT; PILOT; RESTRAINT OF RULERS; SEAWORTHY.

PERINDE VALERE. A writ of dispensation granted by the pope to a clerk admitted to a benefice, although incapable. Gibs. 87; 3 Burn, Eccl. L. 111.

PERIOD. A stated and recurring interval of time, a round or series of years, by which time is measured. 67 N. Y. 538.

When used to designate an act to be done or to be begun, though its completion may take an uncertain time, as for instance, the act of exportation, it must mean the day on which the exportation commences. 20 How. 579. See **TIME**.

Any portion of complete time. Anderson. The word has its etymological meaning, but it also has a distinctive signification according to the subject with which it may be used in connection. It may mean any portion of complete time, from a thousand years, or less, to the period of a day.

PERIODICAL. See **PERIODICAL PUBLICATION**.

PERIODICAL PAYMENTS. Payments occurring periodically, that is, at fixed times from some antecedent obligation and not at variable periods at the discretion of individuals. 42 L. J. Ch. 337.

PERIODICAL PUBLICATIONS. A periodical is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, etc., the publication could not be considered as a periodical as there is no connection between the subjects and no literary continuity. 194 U. S. 97.

A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding, (although this is by no means essential), but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character. The fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. *Id.*; 97, 98.

The noun *periodical*, according to the nice shade of meaning given to it by popular speech, conveys at least a suggestion if not a promise of matter on a variety of topics, and certainly implies that no single number is contemplated as forming a book by itself. 226 U. S. 59.

Generally a printed publication is a book when its contents are complete in themselves, deal with a single subject, betray no need of continuation, and, perhaps, have an appreciable size. *Id.*

PERIODICAL WORK. Within the copyright act, 5 & 6 Vict., one that comes out from time to time and is miscellaneous in its articles; 16 L. J. Ch. 142; but a newspaper has been held not a periodical within that act; 39 L. J. Ch. 182; L. R. 9 Eq. 324; *contra*, 50 L. J. Ch. 621; 17 Ch. D. 708.

PERIPHRAISIS. Circumlocution; the use of other words to express the sense of one.

Some words are so technical in their meaning that in charging offences in indictments they must be used or the indictment will not be sustained; for example, an indictment for treason must contain the word *traitorously*; an indictment for burglary, *burglariously*; and *feloniously* must be introduced into every indictment for felony; 1 Chitty, Cr. Law 242; Co. 3d Inst. 15; 2 Hale, Pl. Cr. 172; 4 Bla. Com. 307; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 6); Cro. Car. c. 37.

PERISH. To come to an end; to cease to be; to die.

What has never existed cannot be said to have perished.

When two or more persons die by the same accident, as a shipwreck, no presumption arises that one perished before the other.

PERISHABLE. Subject to speedy decay. 31 Conn. 498.

PERISHABLE GOODS. Goods which are lessened in value and become worse by being kept.

Losses due to the natural decay, deterioration, and waste of perishable goods in the hands of a carrier are excusable. Reference must always be had, however, to the nature and inherent qualities of the articles in question, their unavoidable exposure at the time and place, and under the general circumstances, while in the charge of a carrier of ordinary prudence, and their condition when entrusted to him; Schoul. Bail. 397; 31 Am. Rep. 567.

In admiralty practice, property in its nature perishable, or liable to deterioration, injury, or decay, may be sold pending suit and the proceeds brought into court to abide the event of the suit; or the court may order it appraised and deliver it to the claimant, upon his paying into court such sum of money, or giving such bond as the court may direct; Bened. Adm. § 444; Adm. Rule 10; 1 Gall. 148, 476.

There is a similar practice in equity and in most of the states such property when taken in execution or under attachment, on petition may be ordered sold, pending suit; in which case the proceeds of sale are held in place of the property. See **COMMON CARRIERS**.

In order to authorize the court to order property levied upon under a warrant of attachment, to be sold as being perishable, it must appear that such property is inherently liable to deterioration and decay and it is not sufficient to show that it will depreciate in value because of changes in fashion; 25 Hun 367. Fattened cattle are perishable property; 3 Munf. 288; also potatoes; 16 Me. 208; skins and furs; 7 Cow. 202; kid gloves; 25 Hun 367; but not merchantable corn; 64 Ill. 67. The doctrine applies to real estate in litigation and liable to deteriorate; 26 N. J. Eq. 269.

PERJURY. In Criminal Law. The wilful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. 2 Whart. C. L. § 1244.

The wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry. 2 Bish. N. Cr. Law § 1015.

It consists in swearing wilfully and corruptly to some matter which is untrue. 63 Vt. 201.

The intention must be wilful. The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made; for if it has arisen in consequence of inadvertency, surprise, or mistake of the import of the question, there was no corrupt motive;

Hawk. Pl. Cr. b. 1, c. 69, s. 2; Cro. Eliz. 492; 4 McLean 113; 3 Dev. 114; 7 C. & P. 17; 11 Q. B. 1028; 1 Rob. Va. 729; 3 Ala. n. s. 602; 74 Cal. 306. But one who swears wilfully and deliberately to a matter which he really believes, and which is false, and which he had no probable cause for believing, is guilty of perjury; 6 Binn. 249. See Baldw. 370; 1 Bail. 50; 4 McLean 118. And so is one who swears falsely, though he testifies against his will; 96 Ky. 526. Where a bankrupt, having submitted the facts fairly to his counsel, swore to a schedule wrongly made out or his advice, it was not perjury; 3 McLean 578.

The oath must be false. The party must believe that what he is swearing to is fictitious; and if, intending to deceive, he asserts that which may happen to be done without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him; Co. 3d Inst. 166; Hawk. Pl. Cr. b. 1, c. 69, s. 6; 1 Bish. N. Cr. L. § 437. See 4 Mo. 47; 4 Zab. 455; 9 Barb. 567; 1 C. & K. 519; 15 S. W. Rep. (Tex.) 118. As, if a man swears that C.D. revoked his will in his presence; if he really had revoked it, but it was unknown to the witness that he had done so, it is perjury; Heffl. 97. Knowledge by a witness that his testimony is false, is tested, like intention generally, by sound mind and discretion, and by all the circumstances; soundness of mind, where nothing to the contrary appears, being assumed; 93 Ga. 531.

The party must be lawfully sworn. The person by whom the oath is administered must have competent authority to receive it; an oath, therefore, taken before a private person, or before an officer having no jurisdiction, will not amount to perjury, "For where the court hath no authority to hold plea of the cause, but it is *coram non iudice*, there perjury cannot be committed;" 1 Ind. 232; 1 Johns. 498; 3 M'Cord 308; 3 C. & P. 419; 4 Hawks 132; 1 N. & M'C. 546; 2 Hayw. 56; 8 Pick. 453; 12 Q. B. 1026; 2 Russ. Cr. 520; Co. 3d Inst. 166; 40 La. Ann. 460; 181 U. S. 50; 20 D. C. 424. See 79 Ga. 162; 24 Tex. App. 715; 36 Tex. Cr. Rep. 483; 107 N. C. 832; 87 Tenn. 693; 9 Mackey 424. Where a defect in the proceedings is waived, perjury may be committed; 135 Ill. 416. A false affidavit will be perjury where the officer who administered the oath was a minor, in the absence of a statutory disqualification of minors from holding office; 35 Tex. Cr. Rep. 243.

The proceedings must be judicial; 5 Mo. 21; 1 Bail. 595; 11 Metc. 406; 5 Humphr. 85; 1 Johns. 49; Wright, Ohio 173; R. & R. 459. Proceedings before those who are in any way intrusted with the administration of justice, in respect of any matter regularly before them, are considered as judicial for this purpose; 2 Russ. Cr. 518; Hawk. Pl. Cr. b. 1, c. 69, s. 3. See 9 Pet. 238; 11 Conn. 408; 4 M'Cord 165. Perjury cannot be committed where the matter is not regularly before the court; 4 Hawks 132; 2 Hayw. 56; 8 Pick. 453; 1 N. & M'C. 546; 9 Mo. 824; 18 Barb. 407; 26 Me. 33; 7 Blackf. 25; 5 B. & Ald. 634. An oath not administered pursuant to, or required or authorized by, any law, cannot be made the basis of a charge of perjury; 41 Minn. 59.

The assertion must be absolute. If a man, however, swears that he believes that to be true which he knows to be false, it will be perjury; 10 Q. B. 670; 2 W. Bla. 881; 1 Leach 232; 6 Binn. 249. It is immaterial whether the testimony is given in answer to a question or voluntarily; 3 Zab. 49; 12 Metc. 225. Perjury cannot be assigned upon the valuation, under oath, of a jewel or other thing the value of which consists in estimation; Sid. 146; 1 Kebl. 510. But in some cases a false statement of opinion may become perjury; 10 Q. B. 670; 15 Ill. 357; 3 Ala. n. s. 602; 8 Strobb. 147; 1 Leach. C. C. 325; 9 S. W. Rep. (Ky.) 161.

The oath must be material to the question depending; 1 Term 68; 12 Mass. 274; 8 Murph. 123; 4 Mo. 47; 2 Ill. 60; 9 Miss. 149; 6 Pa. 170; 2 Cuah. 212; 40 Kan. 681; 98 N. C. 759; 64 Cal. 106. See 23 Neb. 496;

111 Mo. 464; 14 Fed. Rep. 447. Where the facts sworn to are wholly foreign from the purpose and altogether immaterial to the matter in question, the oath does not amount to perjury; 2 Russ. Cr. 521; Co. 3d Inst. 107; 8 Ves. 35; Bac. Abr. *Perjury* (A); 2 N. & M.C. 18; 2 Mo. 158; 95 Cal. 657. But all false statements wilfully and corruptly made by a witness as to matters which affect his credit are material; [1895] 1 Q. B. 797; and so is every question in cross-examination which goes to the credit of a witness, as, whether he has been before convicted of felony; 3 C. & K. 26; 1 C. & M. 655. And see 10 Mod. 195; 8 Rich. 456; 9 Mo. 824; 12 Metc. 225; 28 Tex. Ap. 301. False evidence, whereby, on the trial of a cause, the judge is induced to admit other material evidence, even though the latter evidence is afterwards withdrawn by counsel, or though it was not legally receivable, is indictable as perjury; 2 Den. C. C. 302; 3 C. & K. 302.

It is perjury where the witness swears falsely in giving evidence legally inadmissible, but which becomes material by being introduced in evidence; 5 Okl. 173.

The materiality of the false oath is for the court and not for the jury; 54 Fed. Rep. 488; 97 Cal. 224; 1 Okl. 336.

A defendant in a criminal prosecution, who testifies in his own behalf and of his own accord, is guilty of perjury if he testifies falsely. He is to be treated the same as any other witness; 115 N. C. 712; 33 Tex. Cr. Rep. 814; id. 67; 57 Kan. 431.

Where one person arranges with another to commit perjury, both are *in pari delicto*; 135 U. S. 483. An attempt to induce a person to commit perjury on the contemplated trial of an indictment not yet returned, has been held not to be subornation of perjury; 137 Mo. 269.

Punishment of perjury is provided for by statutes in all the states, and also by the United States when it is committed in any proceeding by or under federal laws; U. S. R. S. §§ 5392-5396. For a form of indictment approved as correct in every substantial part, see 159 U. S. 682.

The power of punishing witnesses for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had; 134 U. S. 372. In general, it may be observed that a perjury is committed as well by making a false affirmation as a false oath. See OATH.

R. S. § 5392, provides that every person taking an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, etc., by him subscribed is true, who wilfully, and contrary to such oath, states or subscribes any material matter which he does not believe to be true, is guilty of perjury, punishable by a fine of not more than \$2,000 and imprisonment at hard labor for not more than five years, and is rendered incapable of testifying in any court of the United States until the judgment against him is reversed.

It is unnecessary in an indictment for perjury under R. S. § 5396 to set out the affidavit at length; 50 Fed. Rep. 915.

PERMANENT. This word does not always embrace the idea of absolute perpetuity; 8 Barb. 185; or forever or lasting forever, or existing forever; 136 U. S. 393; 2 N. J. Eq. 155; but where the citizens of a locality are induced to give large sums of money for the establishment of an educational institution, it means that the place agreed on shall be the site of the institution so long as it shall endure; 8 Barb. 186.

PERMANENT ABODE. A domicile, a home, which a party is at liberty to leave, as interest or whim may dictate, but without any present intention of changing it. 78 Ill. 181. See NON-RESIDENT; DOMICIL; HOME; ABODE.

PERMANENT EMPLOYMENT. Employment for an indefinite time which

may be severed by either party. 81 Cal. 596; 12 Bush 541; 4 C. B. 479.

PERMANENT INABILITY TO LABOR. "Permanent inability to labor" is not the precise equivalent of "permanent reduction in his power to earn money." 121 Ky. 203, 89 S. W. 132.

PERMANENT STRUCTURE. When a structure is of a durable character, evidently intended to last indefinitely, it may be regarded as a "permanent structure." 136 Ky. 323, 124 S. W. 337.

PERMANENT TRESPASS. A trespass consisting of trespasses of one and the same kind, committed on several days, which are, in their nature, capable of renewal or continuation, and are actually renewed or continued from day to day, so that the particular injury done on each particular day cannot be distinguished from what was done on another day. In declaring for such trespasses, they may be laid with a *continuando*; 3 Bla. Com. 212; Bac. Abr. *Trespass* (B 2, i 2); 1 Saund. 24, n. 1; Poll. Torts 482. See CONTINUANDO; TRESPASS.

PERMISSION. A license to do a thing; an authority to do an act which without such authority would have been unlawful. A permission differs from a law: it is a check upon the operations of the law.

A negation of law, arising either from the law's silence, or its express declaration. Ruth. Nat. L. b. 1, c. 1.

Express permissions derogate from something which before was forbidden, and may operate in favor of one or more persons, or for the performance of one or more acts, or for a longer or shorter time.

Implied permissions are those which arise from the fact that the law has not forbidden the act to be done.

PERMISSIVE. Allowed; that which may be done: as, permissive waste, which is the permitting real estate to go to waste. When a tenant is bound to repair, he is punishable for permissive waste. See WASTE.

PERMISSIVE LETTERS. In a note by the secretary of the navy, October 1, 1861, this term was used as indicating an authority something less than a grant of letters of marque. See 2 Hall. Int. L. Baker's ed. 120.

PERMISSIVE WASTE. That kind of waste which is a matter of omission only; as by suffering a house to fall for want of necessary repairs. 2 Bl. Com. 281.

PERMIT. A license or warrant to do something not forbidden by law: as to land goods imported into the United States, after the duties have been paid or secured to be paid. Act of Congr. March 2, 1790, s. 49, cl. 2. See form of such a permit, Gordon Dig. App. II. 46.

It denotes a decided assent; 105 Ill. 558. It may mean suffer; 7 Ch. Div. 145; although it is more positive than allow or suffer; 105 Ill. 558. It implies consent given or leave granted; 4 Bosw. 391. It has been defined to mean allow by not prohibiting. 9 Allen 266. Every definition of suffer or permit includes knowledge of what is to be done under the sufferance or permission and intention that what is done was what was to be done; 17 Blatch. 325.

PERMUTATION. In Civil Law. Exchange; barter.

This contract is formed by the consent of the parties; but delivery is indispensable, for without it it is a mere agreement. Dig. 31. 77. 4; Code 4. 64. 3.

Permutation differs from sale in this, that in the former a delivery of the articles sold must be made, while in the latter it is unnecessary. It agrees with the contract of sale, however, in the following particulars: that he to whom the delivery is made acquires the right or faculty of prescribing; Dig. 41. 3. 4. 17; that the contracting parties are bound to guarantee to each other the title of the things deliv-

ered; Code 4. 64. 1; and that they are bound to take back the things delivered when they have latent defects which they have concealed; Dig. 21. 1. 68. See Aso & M. Inst. b. 2, t. 16, c. 1; MUTATION; TRANSFER.

PERMUTATIONE. A writ to an ordinary commanding him to admit a clerk to a benefice upon exchange made with another. Cow.; Moz. & W.

PERNANCY (from Fr. *prendre*, to take). A taking or receiving.

PERNOR OF PROFITS. He who receives the profits of lands, etc. *A cestui qui use*, who is legally entitled and actually does receive the profits, is the pernor of profits. *Termes de la Ley*.

PERPARS. A part of the inheritance. Flota.

PERPETRATOR. Within the meaning of a statute giving an action against the perpetrator of an act, where a servant of a railroad company is killed through the negligence of a fellow-servant, the company itself may be regarded as the perpetrator. 83 Ia. 47.

PERPETUAL. That which is to last without limitation as to time: as, a perpetual statute, which is one without limit as to time, although not expressed to be so.

PERPETUAL CURACY. The office of a curate in a parish where there is no spiritual rector or vicar, but where the curate is appointed to officiate by the impropriator. 2 Burn. Eccl. Law 55.

The church of which the curate is perpetual. 2 Ves. Sen. 425. See 2 Steph. Com. 11th ed. 695; 2 Burn. Eccl. Law 55; 9 Ad. & E. 556. As to whether such curate may be removed, see 2 Burn. Eccl. Law 55.

PERPETUAL EDICT. In Roman Law. An edict issued by the praetor on taking office. It was intended to be valid for the whole term of his year of office. Sohm, Rom. L. 51.

PERPETUAL INJUNCTION. Opposed to an injunction *ad interim*; an injunction which finally disposes of the suit, and is indefinite in point of time. See INJUNCTION.

PERPETUAL SUCCESSION. The continuous existence which enables a corporation to manage its affairs and hold property without the necessity of conveyances for the purpose of transmitting it. By reason of this quality, this ideal and artificial person remains, in its legal entity and personality, the same, though frequent changes may be made of its members; and although all of its members may be changed, and new ones substituted for the old, it still legally remains the same. Field, Corp. § 50; 5 Mo. App. 340.

PERPETUATING TESTIMONY. The act by which testimony is reduced to writing as prescribed by law, so that the same shall be read in evidence in some suit or legal proceedings to be thereafter instituted.

The origin of this practice may be traced to the canon law, cap. 5, *X ut lite non contestata*, etc. Bockmer, n. 4; 8 Toullier, n. 22. Statutes exist in most of the states for this purpose. Equity also furnishes means, to a limited extent, for the same purpose.

PERPETUITY. Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation. Randall, Perp. 48.

Such a limitation of property as renders it inalienable beyond the period allowed by law. Gilbert, Uses, Sugd. ed. 260, n.

"A future limitation, whether executory or by way of remainder, and of real or personal property, which is not to vest till after the expiration of or which will not

necessarily vest within, the period prescribed by law for the creation of future estates, and which is not destructible by the person for the time being entitled to the property subject to the future limitation, except with the concurrence of the person interested in the contingent event." Lewis, *Perpetuities* ch.12. This was said by Gibson, C. J., to be the nearest approach to a perfect definition of a perpetuity; 10 Pa. 334.

It is suggested that some confusion has arisen in connection with the law of perpetuities because of a certain ambiguity in the legal definition of the term itself. "The original meaning of a perpetuity is an inalienable, indestructible interest. The second artificial meaning is, an interest which will not vest to a remote period. This latter is the meaning which is attached to the term when the rule against perpetuities is spoken of;" Gray, *Perp.* § 140. The author last cited considers it a matter of regret that the rule should not have been known as the rule against remoteness, rather than the rule as against perpetuities.

The comment was made upon this statement that notwithstanding the declaration quoted from this author, "yet in all his illustrations he shows that interests which were destructible were not perpetuities"; 121 Pa. 205; where it is held that indestructibility of the estate of the person, for the time being entitled to the property, is essential to constitute a perpetuity.

The following is suggested as the true form of the rule: "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest;" Gray, *Perp.* 201. A later work adheres more closely to the familiar phraseology (a course which has great advantages in the discussion of common-law rules of decision), in defining it as a rule which "forbids the postponement of the vesting of real or personal property for an estate in fee-simple, in tail or absolute interest, during a longer period than lives in being and twenty-one years after, an extension being allowed for gestation if gestation exists;" Brett, *L. Cas. Mod. Eq.* 47. See, also, 7 Cra. 456; 113 U. S. 340; L. R. 44 Ch. D. 85. The rule against perpetuities as distinguished from that against making estates indefinitely inalienable, concerns itself only with the vesting or assignment of estates and not with their termination; 90 Me. 318; and when properly so limited, it is applicable to a gift in trust for charity: *id.* An interesting case in Colorado holds that notwithstanding statutory adoption, in that state, of the common law prior to 4 James I., English decisions after that year are to be regarded as authority in determining what the common law as to perpetuities was at that time; 23 Colo. 40; s. c. 35 L. R. A. 41.

The rule against perpetuities is one of decision only, and in England is affected only by statute under what is known as the *Thelluson* Act, the passage of which was occasioned by litigation arising under the will of Peter Thelluson who died in 1797. See *Thelluson v. Woodford*, 4 Ves. Jr. 237; 11 Ves. 112. For the text of the act see Gray, *Perp.* Appx. B. note; and for the history of the litigation which led to it, see *Hargrave, Thelluson Case* ch. 1.

The act was directed against trusts for accumulation. Such a trust which violates the rule against perpetuities is wholly void, but one which is good within the rule might violate the *Thelluson* Act and be void for the excess; Gray, *Perp.* § 637. The act prohibits accumulations other than during four distinct periods, the language being: "For any longer term than the life or lives of any such grantor or grantors, settlor or settlers; or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living, or *en ventre sa mere* at the time of the death of such grantor, devisor, or testator; or

during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated." And only one of these periods can be taken; 16 Sim. 391; 25 Ch. D. 729. In Pennsylvania there is a statute of the same kind, Act 1853, Apr. 18, § 9, the text of which will be found in Gray, *Perp.* Appx. B. In Alabama accumulations are prohibited for more than ten years, or to the termination of minority in case of a minor in being at the date of conveyance or death of the testator.

The legislation in the United States on the subject of perpetuities has been classified as of three kinds: 1. A general provision that perpetuities shall not be allowed. 2. A short and simple statute declaring or modifying the law. 3. An elaborate scheme to be substituted for the common law.

The first class consists mainly of constitutional provisions in Arkansas, North Carolina, Tennessee, Texas, and Vermont. A similar provision existed formerly in Florida, being omitted in the last constitution. The second class includes Georgia, Iowa, and Kentucky, with statutes properly declaratory of the common law; and Alabama, Connecticut, Indiana, Mississippi, Ohio, Pennsylvania, where the common-law rule is somewhat modified. The third class embraces the states which have followed, in the main, the New York statute, providing against, (1) remoteness of interests in land; (2) accumulation of land and profits therefrom; (3) the same as to personal property. Michigan and Minnesota have followed the first and second parts of the New York system, and Indiana substantially the whole of it. The prohibition of this legislation is against a restraint upon the power of alienation for more than two lives in being at the creation of the estate.

But in Indiana, California, and Dakota, where the New York system to a large extent was followed, the restraint was not confined to two existing lives. In Wisconsin, where the New York statute was first followed exactly, in 1887, the period was extended to two lives in being and twenty-one years thereafter. See Gray, *Perp.* Appx. B. & C.; 1 Stims. Am. Stat. L. § 1440. The rule affects both legal and equitable interests and real and personal estate; it is not of feudal origin, but the outgrowth of necessities of modern times; and while strictly applied, regard is had rather to substance than form; Gray, *Perp.* §§ 202, 203.

Under the common-law rule there is no limit to the number of lives that can be taken; 11 Ves. 146.

In the application of the rule, a child *en ventre sa mere* is to be considered as born when necessary for its own benefit; 2 H. Bla. 399; but not for that of third persons; 2 De G. J. & S. 665. The principle controlling the allowance of the period of gestation under the rule is, that life begins from conception and it is sufficient if the person entitled to a future interest at majority is begotten though not born within a life in being at its creation; Gray, *Perp.* § 220. This principle has been extended to allow two periods of gestation; 7 Term 100; and it has been a subject of discussion whether three might be allowed; 3 Yo. & Coll. 328; Lewis, *Perp.* 726; Gray, *Perp.* § 222. The time runs only from testator's death; *id.* § 231; Lewis, *Perp.* Suppl. 27. Where a future interest is void as against the rule, prior limitations will be treated precisely as if the void limitation had been omitted; 3 Gray 142; 4 Ves. Jr. 427; 83 Wis. 617. See an extended note classifying and analyzing the cases, 20 L. R. A. 509. Subsequent limitations following an interest too remote were held, by Sugden, L. C., to fail. The authorities relied upon for this view are, his argument as counsel in *Beard v. Westcott*, 5 B. & Ald. 801; and his decision as chancellor in *Monypenny v. Dering*, 2 De G. M. & G.

145. In *Beard v. Westcott*, the limitation was held good in the common pleas; 5 Taunt. 393; and bad in the king's bench; 5 B. & Ald. 801. The latter view is seriously controverted as not supported by the authorities cited in Sugden's argument; Gray, *Perp.* §§ 251-257; Lewis, *Perp.* 421, 661.

A vested interest is not subject to the rule, and therefore it does not affect reversions and vested remainders and analogous equitable interests and interests in personality; Gray, *Perp.* § 205. Whether contingent remainders are so has been the subject of much discussion involving the mooted question of limiting a possibility upon a possibility. That they are within the rule is contended by many authorities; Gray, *Perp.* §§ 284-298, where it is earnestly contended that contingent remainders and all future interests should fall within the rule, which conclusion is also supported by Lewis, *Perp.* c. 16, Suppl. 97. See, also, 20 Ch. D. 562; 1 Jarm. Wills 255, 260; 2 *id.* 945; Theobald, Wills 424; 46 N. H. 230; 60 L. T. 247; 69 *id.* 360; 1 Hayes, *Conv.* 494; *contra*, Wms. R. P. 6th Am. ed. 274; Challis, R. P. 90, 159; 8 Jurist, pt. 2, p. 20, 283; 4 D. & W. 1; s. c. 2 H. L. Cas. 186. See L. R. 43 Ch. D. 246.

The rule applies to personal property; Lewis, *Perp.* 613; Gray, *Perp.* § 315; and equitable interests are affected by analogy to legal estates; those vested are subject, and those not vested are not subject to the rule; *id.* §§ 322, 323. The rule against perpetuities does not affect contracts unless they are such as create rights of property; *id.* § 329; L. R. 43 Ch. D. 265. The rule is not applicable to a resulting trust which arises on the failure of an estate granted for a particular use which has ceased; 165 U. S. 342; nor to a power to sell, upon the expiration of an estate tail, and divide the proceeds among persons then ascertainable; 166 U. S. 83.

The statutes against perpetuities were directed at private trusts and accumulations and not at public, charitable, or eleemosynary trusts or uses; 107 U. S. 174; 95 *id.* 303; 3 Pet. 99; 15 How. 367; 6 Paige 639. The rule cannot be invoked to defeat a charitable use; 68 Fed. Rep. 796; but a gift for the encouragement of yacht-racing is not such a use and may therefore be void as a perpetuity; [1895] 2 Ch. 657.

If a gift by will to a class is void as to one of the class because against the rule as to perpetuities, it is void as to all; 124 Pa. 10.

Mr. Justice Powell, in *Scattergood v. Edge*, 12 Mod. 278, distinguished perpetuities into two sorts, absolute and qualified; meaning thereby, as it is apprehended, a distinction between a plain, direct, and palpable perpetuity, and the case where an estate is limited on a contingency, which might happen within a reasonable compass of time, but where the estate, nevertheless, from the nature of the limitation, might be kept out of commerce longer than was thought agreeable to the policy of the common law. But this distinction would not now lead to a better understanding or explanation of the subject, for whether an estate be so limited that it cannot take effect until a period too much protracted, or whether on a contingency which may happen within a moderate compass of time, it equally falls within the line of perpetuity, and the limitation is therefore void; for it is not sufficient that an estate *may* vest within the time allowed, but the rule requires that it *must*; Randall, *Perp.* 49; 48 Conn. 293; 7 Sim. 173; 10 Allen 1; Schoul. Wills § 21; 124 Pa. 10. See Cruise, *Dig.* tit. 32, c. 23; 1 Belt, Suppl. to Ves. Jr. 406; 2 Ves. 357; 3 Saund. 988; Com. Dig. *Chancery* (4 G 1); 3 Ch. Cas. 1; 85 Tenn. 646.

Under statutes of the New York class, a devise which suspends the power of alienation for a specific time, not measured by two lives, but by a term of years, is void; 5 App. Div. 318; 74 Hun 297. That a contingency may arise which will make the estate alienable is immaterial, but the validity of the provision must be determined independently of any possible agree-

ment of parties; 157 Mass. 362; but a power is not rendered void because by its terms an appointment might possibly be made which would not take effect within the required period; 136 Pa. 354.

PERQUISITES. In its most extensive sense, perquisites signifies anything gotten by industry or purchased with money, different from that which descends from a father or ancestor. Bract. 1. 2, c. 30, n. 3; 1. 4, c. 22. In a more limited sense, it means something gained by a place or office beyond the regular salary or fee.

PERSON. A man considered according to the rank he holds in society, with all the right to which the place he holds entitles him, and the duties which it imposes. 1 Bouv. Inst. n. 137; 134 N. Y. 506.

The term is, however, more extensive than *man*. It may include artificial beings, as corporations; 2 Ill. 178; 1 Bla. Com. 123; 4 Bingham. 669; 1 Mod. 164; 23 N. Y. 242; 48 Ga. 321; *quasi*-corporations; Sedgw. Stat. & Const. L. 372; L. R. 5 App. Cas. 857; territorial corporations; 53 Conn. 507; and foreign corporations; 80 N. Y. 259; under statutes, forbidding the taking of property without due process of law and giving to all persons the equal protection of the laws; 169 U. S. 466, citing 118 *id.* 394; 142 *id.* 386; 165 *id.* 150; concerning claims arising from Indian depredations; 164 U. S. 686; relating to taxation and the revenue laws; 1 Bush 250; 80 N. Y. 264; to attachments; 20 Conn. 416; usurious contracts; 7 How. (Miss.) 508; 13 Conn. 249; applying to limitation of actions; 20 N. Y. 210; 4 Kan. 453; and concerning the admissibility as a witness of a party in his own behalf when the opposite party is a living person; 22 N. Y. 552; 81 Barb. 267. A corporation is also a person under a penal statute; 11 Wheat. 392. See *RAILROAD*.

It has been held that when the word person is used in a legislative act, *natural* persons will be intended unless something appear in the context to show that it applies to artificial persons; 2 Ill. 178; 112 Pa. 337; but as a rule corporations will be considered persons within the statutes unless the intention of the legislature is manifestly to exclude them; 5 Rand. (Va.) 132.

A county is a person in a legal sense; 53 N. W. Rep. (Neb.) 711; but a sovereignty is not; 53 N. Y. 535; 44 Fed. Rep. 17; 94 U. S. 315; but *contra* within the meaning of a statute, providing a penalty for the fraudulent alteration of a public record with intent that any "person" be defrauded; 24 Tex. 61; and within the meaning of a covenant for quiet and peaceful possession against all and every person or persons; 19 Mont. 268. An Indian is a person; 5 Dill. 459; 2 Sawy. 264; and a slave was so considered, in so far as to be capable of committing a riot in conjunction with white men; 1 Bay 358. The estate of a decedent is a person; 107 Ind. 54; and where the statute makes the owner of a dog liable for injuries to any person, it includes the property of such person; 11 Gray 29; but where the statute provided damages for the bite of a dog which had previously bitten a person, it was held insufficient to show that the dog had previously bitten a goat; [1896] 2 Q. B. 109; a dog will not be included in the word in an act which authorizes a person to kill dogs running at large; 34 Mich. 283.

It includes women; 136 Mass. 580; 50 Conn. 131; 16 Col. 441; 25 Ohio St. 21; 76 Mich. 1; 74 Ga. 795; but see 39 Wis. 232; 55 Ill. 535, where the statute was in reference to admission to the bar, and it was held that, while the term was broad enough to include them, such a construction could not be presumed to be the legislative intent.

Where the statute prohibited any person from pursuing his usual vocation on the Lord's Day, it was held to apply to a judge holding court; 49 Ga. 436.

A child *en ventre sa mere* is not a person;

138 Mass. 14; but an infant is so considered; 131 *id.* 441.

In the United States Bankruptcy Act of 1898, it is provided that the word "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and, when used with reference to the commission of acts which are therein forbidden, shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or their

The word "persons" in an indemnity policy comprehends servants, and employees, and "third persons." 124 Ky. 152, 74 S. W. 216.

Having Custody or Control. A third person permitted by the officers of election to inspect a ballot, or who by force took a ballot within his control, "is a person having custody or control" of a ballot, within meaning of Statutes, § 1476, making it a felony for any person intrusted with the custody or control of a ballot to mutilate or place distinguishing marks thereon. 137 Ky. 465, 125 S. W. 1083.

With a Family. A married woman who for a number of years has supported her husband and children is a "person with a family." 101 Ky. 731, 42 S. W. 404.

See *EXTRADITION*; *WHITE PERSON*.

Of Unsound Mind. The words "person of unsound mind" include persons who are destitute of mind. Section 732, Subsection 40, Civil Code of Kentucky. See *ALL, Persons Interested*.

PERSONA (Lat.) In Civil Law. Character, in virtue of which certain rights belong to a man and certain duties are imposed upon him. Thus, one man may unite many characters (*personae*); as, for example, the characters of father and son, of master and servant; Mackeldey, Civ. Law § 117.

In its original signification, a mask; afterwards, a man in reference to his condition or character (*status*). Vicat, Voc. Jur. It is used metaphorically of things, among which are counted slaves. It is often opposed to *res*: as, *actio in personam* and *actio in rem*.

Power and right belonging to a person in a certain character (*pro jure et potestate personae competente*). Vicat, Voc. Jur. Its use is not confined to the living, but is extended to the dead and to angels. *Id.* A statue in a fountain whence water gushes.

PERSONA GRATA. In International Law. A diplomatic representative who is personally acceptable to the sovereign or government to which he is accredited. Opposed to '*persona non grata*', one who is not thus acceptable. Stand. Dict.

PERSONA NON GRATA. See *PERSONA GRATA*.

PERSONA STANDI IN JUDICIO (L. Lat.). Capacity of standing in court or in judgment; capacity to be a party to an action; capacity or ability to sue.

PERSONAL. Belonging to the person. See *THINGS PERSONAL*.

PERSONAL ACTION. In Practice. In the Civil Law. An action in which one person (the *actor*) sues another (the *reus*) in respect of some obligation which he is under to the actor either *ex contractu* or *ex delicto*. It will be seen that this includes all actions against a person, without reference to the nature of the property involved. In a limited sense of the word action in the civil law, it includes only personal action, all others being called *petitions*. See *REAL ACTION*.

In the Common Law. An action brought for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property. Such arise either upon contracts as, account, assumpsit, covenant, debt, and de-

tinue (see these words), or for wrongs, injuries, or torts, as trespass, trespass on the case, replevin, trover (see these words). Other divisions of personal actions are made in the various states; in Vermont and Connecticut an action is in use called the action of book debt. See *PERSONAL PROPERTY*.

PERSONAL ASSETS. See *ASSETS*.

PERSONAL CHATTELS. See *CHATTELS*.

PERSONAL CONTRACT. A contract as to personal property. A covenant (or contract) personal relates only to matters personal as distinguished from real, and is binding on the covenantor (contractor) during his life, and on his personal representatives after his decease, in respect of assets. 3 Co. 22 a.

PERSONAL COVENANT. A covenant which binds only the covenantor and his personal representatives in respect to assets, and can be taken advantage of only by the covenantee.

A covenant which must be performed by the covenantor in person. Fitzh. N. B. 340.

All covenants are either personal or real; but some confusion exists in regard to the division between them. Thus, a covenant may be personal as regards the covenantor, and real as regards the covenantee; and different definitions have been given, according to whether the rights and liabilities of the covenantor or the covenantee have been in consideration. It is apprehended, however, that the prevalent modern usage is to hold a covenant real, if it is real,—that is, runs with the land so as to apply to an assignee, either as regards the covenantor or the covenantee. See Platt, Cov. 61; 4 Bla. Com. 304; 3 N. J. 260; 7 Gray 83. See *COVENANT*.

PERSONAL EFFECTS. In a will, the words are held not to include personal property in the testator's house, such as furniture and pictures. 173 Pa. 368. See *WILL*.

PERSONAL ESTATE. The term is sometimes used as synonymous with personal property, but its use should not lead to the supposition that there can be any such thing as an estate in personality, properly so called. Will. Pers. Prop. 8.

But Dicey (Conf. Laws, Moore's ed. 311) considers *personal estate* and *personal property* synonymous. They are so used in Acts of Parliament. See *REAL ESTATE*.

PERSONAL FREIGHT. The "personal freight" of parties means freight owned by them individually. 137 Ky. 216, 125 S. W. 302.

PERSONAL GOODS. That property which passes by hand and property which marriage passed from the wife to the husband. Co. Litt. 185 b. See *PERSONAL PROPERTY*.

PERSONAL INJURY. Bodily injury. 45 Pac. Rep. (Wash.) 303.

PERSONAL LIABILITY. The statutory liability of stockholders of corporations by which they are held individually liable for the debts of the corporation. See *STOCKHOLDERS*; *JOINT STOCK COMPANY*.

PERSONAL LIBERTY. Freedom from physical and personal restraint; the right to the pursuit of happiness; freedom to go where one chooses and to pursue such lawful occupations as may seem suitable.

In its broad sense personal liberty would include freedom from unlawful arrest and restraint, from unlawful seizures and searches, from assault and battery, from libel and slander, from general warrants of arrest, from unfair monopolies in trade, and from quartering soldiers in time of peace; and it would include also the right of trial by jury, liberty of conscience,

freedom of the press, the right to travel and emigrate, to bear arms and to petition the government for redress of grievances. But in its stricter sense it includes only freedom to move about as one pleases and to pursue any lawful calling. 94 U. S. 142; 4 Am. St. Rep. 468; 16 Wall. 106; 111 U. S. 757; 99 N. Y. 377; 60 Am. Rep. 636. See CONSTITUTIONAL; POLICE POWER; ASSAULT; CORRECTION; IMPRISONMENT; HABEAS CORPUS; EXPATRIATION; PHYSICAL EXAMINATION; SEARCH; PRELIMINARY EXAMINATIONS; LIBERTY OF CONTRACT; LIBERTY.

PERSONAL MALICE. See PARTICULAR MALICE.

PERSONAL PROPERTY. Theright or interest which a man has in things personal.

The right or interest less than a freehold which a man has in realty, or any right or interest which he has in things movable.

Personal property is to be distinguished from things personal. There may be, for example, a personal estate in realty, as chattels real; but the only property which a man can have in things personal must be a personal property. The essential idea of personal property is that of property in a thing movable or separable from the realty, or of perishability or possibility of brief duration of interest as compared with the owner's life, in a thing real, without any action on the part of the owner. See 2 Bla. Com. 14 and notes, 384 and notes.

It includes money, chattels, things in action and evidence of debt; 62 Hun 298; 2 S. Dak. 226; 129 Md. 595; and the right which a vendor has to enforce a contract for the sale of real property; 183 N. Y. 383. It does not include dogs untaxed; 79 Ind. 9.

A crop growing in the ground is personal property so far as not to be considered an interest in land, under the statute of frauds; 12 Me. 337; 5 B. & C. 829; 9 id. 561; 10 Ad. & E. 753; 117 Ind. 56, 58.

It is a general principle of American law that stock in corporations is to be considered as personal property; Walker, Am. Law, 9th ed. Sec. 3; 4 Dane, Abr. 670; 1 Hill, R. P. 18; 76 Cal. 536; though it was held that such stock was real estate; 2 Conn. 567; but the rule was then changed by the legislature.

Title to personal property is acquired—*first*, by original acquisition by occupancy; as, by capture in war, by finding a lost thing; *second*, by original acquisition by accession; *third*, by original acquisition by intellectual labor: as, copyrights and patents for inventions; *fourth*, by transfer, which is by act of law, by forfeiture, by judgment, by insolvency, by intestacy; *fifth*, by transfer by act of the party, by gift, by sale. See Graves, Title to Pers. Prop; PEW; PROPERTY; REAL PROPERTY; POSSESSION.

Possession of personal property is *prima facie* title thereto; 76 Ga. 299. See 113 N. Y. 52. See MONEYED CAPITAL; PERSONALTY.

PERSONAL REPRESENTATIVES. The executors or administrators of the person deceased. 6 Mod. 155; 5 Ves. 402; 1 Madd. 108; 118 Mass. 198. The personal representative of a lessee for years is his assignee. 1 Ld. Raym. 553; 12 Eng. Rul. Cas. 59.

In wills, these words are sometimes construed to mean *next of kin*; 3 Bro. C. C. 2:4; 2 Jarm. Wills 112; 1 Beav. 46; 1 R. & M. 587; that is, those who would take the personal estate under the statute of distributions. They have been held to mean *descendants*; 19 Beav. 448. See LEGAL PERSONAL REPRESENTATIVES.

PERSONAL SECURITY. The legal and uninterrupted enjoyment by a man of his life, his body, his health, and his reputation. 1 Bouvier, Inst. n. 202.

PERSONAL SERVICE. The delivery of a writ to the person therein named in person. Leaving a copy at his place of abode is not personal service; 12 Wis.

336.

PERSONAL STATUTE. A law whose principal, direct, and immediate object is to regulate the condition of persons.

The term is not properly in use in the common law, although Lord Mansfield, in 2 W. Bla. 154, applied it to those legislative acts which respect personal transitory contracts, but it is occasionally used in the sense given to it in civil law and which is adopted as its definition. It is a law, ordinance, regulation, or custom, the disposition of which affects the person and clothes him with a capacity or incapacity which he does not change with his abode. See 2 Kent 613.

PERSONALTY. That which is movable; that which is the subject of personal property and not of a real property.

PERSONALITY. A term used to designate that quality of a law which concerns the condition, state, or capacity of persons.

An *action in personality* is one brought against the right person, or the person against whom it lies. Fitzh. N. B. 92.

The *personality of laws* is a phrase used by foreign jurists to designate all laws concerning the condition, state, or capacity of persons, as distinguished from the reality of laws, which means all laws concerning property or things. To express the idea that the operation of a law is universal it is termed a *personal statute*, and, on the other hand, to express the idea that its operation is confined to the country of its origin it is designated a *real statute*. Sto. Conf. L. § 16.

Livermore used the words *personality and reality*, and Henry the words *personality and reality*; Story preferred the former, as less likely to lead to mistakes, as, in our law, *personality and reality* are used exclusively to designate personal and real property. *Id.*

PERSONATE. In Criminal Law. To assume the character of another without lawful authority, and, in such character, do something to his prejudice, or to the prejudice of another, without his will or consent.

The bare fact of personating another for the purpose of fraud is no more than a cheat or misdemeanor at common law, and punishable as such; 2 East, Pl. Cr. 1010; 2 Russ. Cr. 479.

By statute punishment is inflicted in the United States courts for false personation of any person under the naturalization laws, and of any person holding a claim or debt against the government; R. S. §§ 5424, 5436. See, generally, 2 Johns. Cas. 238; 16 Vin. Abr. 336; Comyns, Dig. *Action on the Case for a Deceit* (A 3).

PERSUADE, PERSUADING. To persuade is to induce to act. Persuading is inducing others to act. Inst. 4. 6. 23; Dig. 11. 3. 1. 5.

In the act of the legislature which declared that "if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, etc., by *persuading* others to enlist for that purpose, etc., he shall be adjudged guilty of high treason," the word *persuading* thus used means to succeed; and there must be an actual enlistment of the person persuaded in order to bring the defendant within the intention of the clause; 1 Dall. 39; 4 C. & P. 369; 9 id. 79. The attempt to persuade a servant to steal his master's goods, or other person to undertake a larceny or other crime, is an indictable misdemeanor, although the person approached declines the persuasion; 1 Bish. Cr. L. § 767.

If one counsels another to suicide, and it is done in his presence, the adviser is as guilty as the principal. Accordingly, where two persons, agreeing to commit suicide together, employ means which take effect on one only, the survivor is a principal in the murder of the other; 8 C. & P. 418; 1 Bish. Cr. L. § 652; Whart. Cr.

L. § 448.

PERSUASION. The act of influencing by expostulation or request. While the persuasion is confined within those limits which leave the mind free, it may be used to induce another to make his will, or even to make it in his own favor. But if such persuasion should so far operate on the mind of the testator that he would be deprived of a perfectly free will, it would vitiate the instrument; 3 S. & R. 269; 5 id. 207; 13 id. 323.

PERTINENT. (from Lat. *pertineo*, belong to). That which tends to prove or disprove the allegations of the parties. Wiles 319. Matters which have no such tendency are called impertinent; 8 Toullier, n. 22.

PERTINENCES. In Scotch Law. Appurtenances. Ersk. Inst. 2. 6. 6.

PERTURBATION. This is a technical word which signifies disturbance or infringement of a right. It is usually applied to the disturbance of pews or seats in a church. In the ecclesiastical courts, actions for these disturbances are technically called "suits for perturbation of seat." 1 Phill. Eccl. 323. See PEW.

PERVERSE VERDICT. A verdict rendered by a jury which choose not to take the law from the judge, but will act on their own erroneous view of the law. In such cases, however honest the intentions of the jury may be, their verdict is perverse. A. & E. Encyc.; 14 Eng. L. & Eq. 532.

PERVISE, PARVISE. The palace yard at Westminster.

A place where counsel used to advise with their clients.

An afternoon exercise or moot for the instruction of students. Cowell; Blount.

PESAGE. In England, a toll charged for weighing avoirdupois goods other than wool. 2 Chitty, Com. Law 16.

PESO. A Spanish dollar; also, an Argentine, Chilian, Colombian, etc., coin, equal to from seventy-five cents to a dollar; also, a pound weight. Webster.

PESQUIDOR. In Spanish Law. A coroner. White, New Recop. b. 1, tit. 1, § 3.

PETENS. A demandant; the plaintiff in a real action. Bract. fol. 102, 106 b.

PETER-PENCE. An ancient levy or tax of a penny on each house throughout England paid to the pope. It was called *Peter-pence* because collected on the day of St. Peter, *ad vincula*; by the Saxons it was called *Rome-feoh*, *Rome-scot*, and *Rome-penny*, because collected and sent to Rome; and lastly, it was called *hearth money*, because every dwelling-house was liable to it, and every religious house, the abbey of St. Albans alone excepted.

It was not intended as a tribute to the pope, but chiefly for the support of the English school or college at Rome; the popes, however, shared it with the college, and at length found means to appropriate it to themselves.

PETIT (sometimes corrupted into *petty*). A French word signifying little, small. It is frequently used: as, *petit larceny*, *petit jury*, *petit treason* (q. v.).

PETIT ASSIZE. A jury to decide on questions of possession. Britton c. 42; Glanv. lib. 2, c. 6, 7. Used in contradistinction to the *grand assize*, which was a jury to decide on questions of property. See GRAND ASSIZE.

PETIT CAPE. See CAPE; GRAND CAPE.

PETIT JURY or **PETTY JURY.** The "little" jury, so called to distinguish it from the "grand" (or "large") jury. Brett, Comm. 1162, n.

PETIT LARCENY. See LARCENY.

PETIT SERJEANTY. See SERJEANTY.

PETIT TREASON. In English Law. The killing of a master by his servant, a husband by his wife, a superior by a secular or religious man. In the United States, this is like any other murder. See HIGH TREASON; TREASON.

PETITIO. A count or declaration. Glanv.

PETITION. An instrument of writing or printing, containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented, for the redress of some wrong or the grant of some favor which the latter has the right to give.

By the constitution of the United States, the right "to petition the government for a redress of grievances" is secured to the people. Amend. art. 1.

Petitions are frequently presented to the courts in order to bring some matters before them. It is a general rule in such cases that an affidavit should be made that the facts therein contained are true as far as known to the petitioner, and that those facts which he states as knowing from others he believes to be true. The sufficiency of a petition must be determined by its face, and can neither be aided nor destroyed by the accompanying exhibits, the exhibits being no part of it; 46 Mo. App. 236. See CROSS-PETITION; PLAINTIFF.

PETITION DE DROIT (L. Fr.). In English practice. A petition of right; a form of proceeding to obtain restitution from the crown of either real or personal property. See PETITION OF RIGHT.

PETITION OF RIGHT. In English Law. A proceeding in chancery by which a subject may recover property in the possession of the king.

This is in the nature of an action against a subject, in which the petitioner sets out his right to that which is demanded by him, and prays the king to do him right and justice; and, upon a due and lawful trial of the right, to make him restitution. It is called a petition of right because the king is bound of right to answer it and let the matter therein contained be determined in a legal way, in like manner as causes between subject and subject. The petition is presented to the king, who subscribes it with these words, *soit droit fait al partie*, and thereupon it is delivered to the chancellor to be executed according to law. Co. 4th Inst. 419, 422 b; Mitf. Eq. Pl. 30, 31; Cooper, Eq. Pl. 22, 23.

The modern practice is regulated by statute 23 and 24 Vict. c. 34, which provides that the petition shall be left with the home secretary for Her Majesty's consideration, who, if she shall think fit, may grant her fiat that right be done, whereupon the fiat having been served on the solicitor of the treasury, an answer, plea, or demurrer shall be made in behalf of the crown, and the subsequent pleadings be assimilated as far as practicable to the course of an ordinary action; Mozl. & W.

The stat. 3 Car. I. was a parliamentary declaration of the liberties of the people. 1 Bla. Com. 128.

PETITORY. That which demands or petitions; that which has the quality of a prayer or petition; a right to demand.

A petitory suit or action is understood to be one in which the mere title to property is to be enforced by means of a demand, petition, or other legal proceeding, as distinguished from a suit where only the right of possession and not the mere right of property is in controversy. 1 Kent 371; 7 How. 846; 10 id. 257. Admiralty suits touching property in ships are either *petitory*, in which the mere title to the property is litigated, or *possessory*, to restore the possession to the party entitled thereto.

The American courts of admiralty exercise unquestioned jurisdiction in petitory as well as possessory actions; 23 Fed. Rep. 403, 406; 26 id. 708; 46 id. 204; but admiralty will not enforce a merely equitable title; 135 U. S. 599. In England the courts of law, some time after the restoration in

1660, claimed exclusive cognizance of mere questions of title, until the statute of 3 & 4 Vict. c. 65. By that statute the court of admiralty was authorized to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry in any cause of possession, salvage, damage, wages, or bottomry, instituted in such court after the passing of that act; Ware 232; 18 How. 267; 2 Curt. C. C. 426.

In Scotch Law. Actions in which damages are sought.

This class embraces such actions as assumption, debt, covenant, and detinue, at common law. See PATTERSON, Comp. 1053, n.

PETROLEUM. See OIL.

PETTIFOGGER. One who pretends to be a lawyer, but possesses neither knowledge of the law nor conscience.

An unprincipled practitioner of law, whose business is confined to petty cases.

PETTY AVERAGE (called, also, customary average). Several petty charges which are borne partly by the ship and partly by the cargo, such as the expense of tonnage, beaconage, etc. Abb. Sh. 13th ed. 658; 2 Pars. Mar. Law 312; 1 Bell, Com. 567; 2 Magens 277. See AVERAGE.

PETTY BAG OFFICE. In English Law. An office in the court of chancery, appropriated for suits against attorneys and officers of the court, and for process and proceedings by extent on statutes, recognizances *ad quod damnum*, and the like. *Termes de la Ley*.

PETTY CONSTABLE. The ordinary constable, as distinguished from the high constable of the hundred. 1 Bla. Com. 355; Bac. Law Tr. 181, *Office of Constable*; Willc. Cons. c. 1, § 1. See CONSTABLE.

PETTY SESSIONS. See SESSION.

PEW. A seat in a church, separate from all others, with a convenient place to stand therein.

It is an incorporeal interest in the real property. The pewholder does not own the soil; 32 Barb. 234. And although a man has the exclusive right to it, yet it seems he cannot maintain trespass against a person entering it; 1 Term 430; but case is the proper remedy; 3 B. & Ald. 361; 8 B. & C. 204. See 47 Vt. 262. In 3 Paige, Ch. 296, it was held that the owner of a pew can, if disturbed in its use, maintain trespass, case, or ejectment, according to the circumstances.

The right to pews is limited and usufructuary, and does not interfere with the right of the parish or congregation to pull down and rebuild the church; 4 Ohio 541; Mitch. R. E. & Conv. 60; 5 Cow. 496; 109 Mass. 21; 6 S. & R. 503; 9 Wheat. 445; 9 Cra. 52; 6 Johns. 41; 6 Term 396; 3 How. 74; indemnifying those whose pews are destroyed; 17 Mass. 435. See 2 Bla. Com. 429; 1 Pow. Mortg. 17; 19 Am. L. Reg. n. s. 1; 9 Am. Dec. 161; 24 id. 230. The pewholder's right is only to occupy his pew during public worship; 47 Vt. 262.

His right is subject to the paramount rights of the parish; 59 Me. 250; but it is held that a rule of the Roman Catholic Church forbidding a layman to control his pew will not be regarded by the courts, unless it was part of the contract; 33 Vt. 602 (criticized in 15 Am. L. Reg. 280).

When pews are removed from a church merely as a matter of expediency, the owners are entitled to payment; 160 Mass. 118. See PERTURBATION.

A pew may be used only for divine service and for meetings of the congregation held for temporal purposes. The pew-owner must preserve order, while enjoying his pew; 34 N. Y. 149. The owner of a pew does not own the soil under it, nor the space above it; 17 Mass. 435.

Where not otherwise provided by statute the interest is considered as real estate, subject to the incidents of that kind of property; 1 Washb. R. P. 9; 33 Vt. 602;

34 Barb. 104 (see also 2 Edw. Ch. 608); 14 Conn. 279; 23 La. Ann. 9; 21 N. J. L. 325. In Massachusetts and New Hampshire pews are personal property by statute. In Pennsylvania they are held personal property as to devolution, although, strictly speaking, an interest in real estate; 24 Pa. 251. See, generally, 45 N. J. L. 320; 27 Wkly. L. Bul. 25; Best, Pres. 111; Crabb, R. P. § 481; Baum, Church Law.

PHARMACY. See DRUGGIST.

PHAROS. A watch-tower, at sea mark, which cannot be erected without lawful warrant and authority. 8 Inst. 204.

PHOTOGRAPH. The mechanical process of photography is judicially recognized as a means of producing true likenesses which are admissible in evidence in the trial of civil and criminal cases. The difference between the images produced upon a photographic plate and upon the human eye does not render a photograph inadmissible in evidence, but bears only upon the effect of such evidence; 1 Greenl. Ev. 92; 2 Rice, Ev. 1169; Tayl. Ev. 1613; 75 Fed. Rep. 373; 52 Mich. 214. A photograph of the subject-matter in controversy is admissible in evidence, when proved to have been fairly taken; 83 N. Y. 464; 31 Wis. 512; 163 Mass. 90; 69 Ga. 42; 47 Am. Rep. 748; 90 Ala. 25; 41 U. S. App. 498; 76 Pa. 340; 81 Cal. 408; 67 Ia. 146; 50 N. H. 159. While the reported cases do not always show that the photograph offered in evidence was first authenticated, yet there is no case which holds that such proof is unnecessary. The following cases show that such proof was assumed to be necessary or was given; 57 Conn. 9; 30 Fla. 256; 52 Ia. 210; 160 Mass. 288; 95 Mich. 586; 54 Minn. 379; 134 Mo. 85; 67 Am. Rep. 766; 125 N. Y. 136; 46 S. C. 55; 77 Tex. 438; 91 Ala. 112; 128 Ind. 97; 31 Wis. 512. It has been said that photographs are merely secondary evidence; 107 Ill. 113; 2 Woods 680; and where the jury has viewed the premises in question a photograph of them is generally inadmissible; 7 D. R. Pa. 321; 118 Mass. 420; 31 Wis. 512; but where the photographs themselves are the subject of the controversy, or the original subject of the photograph cannot for any reason be produced, it is otherwise; 89 Ala. 193; 49 Ill. App. 398; 5 Wash. 479; 52 Mich. 214; 26 Am. Rep. 319; 2 Woods 680; 32 S. W. Rep. (Tex.) 240; 36 Neb. 361; 31 Wis. 512; 46 Hun 32; 81 Cal. 408; 6 L. R. A. 594; 6 Blatch. 137. The discretion of the court in the admission of photographs does not differ from the exercise of that power with reference to other kinds of evidence; 30 Fla. 256; 162 Mass. 414; 26 L. R. A. 430; 106 N. Y. 598; 37 Am. Rep. 538.

Photographs are admissible to show the physical condition, characteristics, and identity of persons and property, in civil and criminal cases; 65 Mich. 806; 88 Tex. 642; 139 N. Y. 73; 38 Am. Rep. 464; 160 Mass. 403; 89 Ala. 134; 42 Minn. 350; 59 Fed. Rep. 684; 85 Ga. 751; 156 Pa. 147; 4 Fost. & F. 103; 162 U. S. 613; 58 Ind. 530; 36 Neb. 361; 64 N. W. Rep. (Ia.) 420; 17 R. I. 763; 108 Cal. 597; also of places; 3 Fost. & F. 73; 36 Neb. 361; 31 Wis. 512; 76 Cal. 597; 95 Mich. 586; 57 Conn. 9; 15 S. W. Rep. (Tex.) 714; 140 Ill. 474; 89 Ga. 92; 126 Mo. 597; 46 S. C. 55; 123 Ind. 527; 162 Mass. 90; 125 N. Y. 136; 30 Fla. 256; 76 Fed. Rep. 373; 55 Miss. 533; 41 U. S. App. 498; 91 Ala. 112; to show the condition of a highway; 62 Hun 137; and a change of grade in a street; 31 Wis. 512; to show resemblance of parent and child; 56 Kan. 43; 81 Cal. 408; 6 L. R. A. 594; 160 Mass. 288; and the physical condition of a plaintiff who was too ill to be present at a trial; 54 Minn. 379; also the appearance of a person at some time in the past; 17 R. I. 763; 159 Mass. 375; to show the identity of a person who passed under different names; 59 Fed. Rep. 684; of documents in general; 134 Mo. 85; 77 Tex. 488; 52 Mich. 214; 60 Barb. 580; 107 Ill. 113; 6 Blatch. 137; 23 Abb. n. c. 83; and public records that cannot be brought into

court, but the handwriting must be proved; 2 Woods 680; for comparison of handwriting; 5 Wash. 479; 57 Mich. 69; 10 Abb. Pr. n. s. 300; 39 Md. 36; 75 Tex. 176; 23 How. 515; 16 Gray 161; 77 Ann. Dec. 405; 59 Vt. 688; 124 Ind. 495; to show certain premises where inspection is impossible; 36 Neb. 361; and eye-witnesses may verify their accuracy; 75 Hun 255; to show things in general; 49 Ill. App. 398; 62 Mo. App. 634; 56 Md. 84; 11 Blatch. 552.

It is doubtful if they ought to be admitted to show the health, strength, or agility of a person; 160 Mass. 403.

Upon a criminal trial, photographic likenesses taken after death, of persons whom it is material to identify, may be exhibited to witnesses acquainted with such persons in life as aids in the identification; 45 N. Y. 315. Where a mutilated body was found, the witness was allowed to testify that the face resembled a photograph of a person alleged to be the one found, though he had not known the man before death; 76 Pa. 340. The healthy condition of the deceased may be proved by a colored photograph taken a short time before death; 1 W. N. C. Pa. 369; and in an indictment for bigamy a photograph of the first husband may be shown to a witness to the first marriage to prove his identity with the person mentioned in the marriage certificate; 4 F. & F. 103.

See an extended note on the use of photographs as evidence, where the cases are collected and classified; 35 L. R. A. 802.

A photograph made by the cathode or X-ray process will be admitted as secondary evidence; its competency depends upon the science, skill, experience, and intelligence of the person who took the picture and testified with regard to it. Lacking these important qualifications, it should not be admitted, and it is to be weighed like other competent evidence. In an action for personal injuries it was held competent to submit to the jury an X-ray photograph taken by a surgeon, showing the overlapping bones of one of the plaintiff's legs, where it was broken at the time of the accident, and where the surgeon was familiar with the process by which the impression was secured, as well as with fractures, and the surgeon testified that the photograph accurately represented the condition of the leg at the point of the fracture, and that by the aid of the X-rays he was enabled to see the fracture and overlapping bones as if they were uncovered to the sight; 41 S. W. Rep. (Tenn.) 445. So in an action for negligence by which the plaintiff's foot was injured, an X-ray photograph was admitted to prove the condition of the injured foot; Hawkins, J., in 22 Law Mag. & Rev. 62.

In a criminal case in New York the prosecution claimed that a bullet struck the victim in the jaw, and split, one piece being deflected into the jaw and the other piece into the back of his head. The defence claimed that the piece lodged in the back of the victim's head was not a fragment but a bullet. To prove this, the defence introduced an X-ray photograph of the head and neck showing the lodgment of the bullet, and the testimony of the physician who took the photograph; 56 Alb. L. J. 309; 15 Med. Leg. J. 246. This question was also recently presented to the District Court of Colorado, wherein Le-fevre, J., said:

"During the last decade, at least, no science has made such mighty strides forward as surgery. It is eminently a scientific profession, alike interesting to the learned and the unlearned. It makes use of all science and learning. It has been of inestimable value to mankind. It must not be said of the law that it is wedded to precedent; that it will not lend a helping hand. Rather let the courts throw open the door to all well considered scientific discoveries. Modern science has made it possible to look beneath the tissues of the human body and has aided surgery in telling of the hidden mysteries. We believe it to be our duty in this case to be the first,

if you please, to so consider it, in admitting in evidence a process known and acknowledged as a determinate science." 29 Chi. Leg. News 145.

It is a breach of contract and violation of confidence for a photographer to make unauthorized copies of his customer's photograph. A private individual may enjoin the publication of his photograph, but a public character may not, in the absence of a breach of contract or violation of confidence in procuring the likeness from which the publication is made. A statesman, author, artist, or inventor who seeks public recognition, may be said to have surrendered this right to the public; 64 Fed. Rep. 280; 40 Ch. D. 345. See *PRIVACY*; *INJUNCTION*.

One who reproduces a copyrighted photograph cannot escape liability as an infringer by merely showing that the copy which he reproduced did not bear the notice of copyright when he purchased it, but he must also show that it bore no notice when it left the custody of the owner of the copyright; 54 Fed. Rep. 890; s. c. 4 C. C. A. 548. Violation of the right in a copyrighted photograph is subject by statute to a penalty. See 77 Fed. Rep. 966.

See *COPYRIGHT*.

PHOTOGRAPHER. An artist who takes impressions or likenesses of things and persons on prepared plates or surfaces. 11 Lea 517.

PHRENASTHENIA. A morbid condition, also known as the insanity of the degenerates, used to indicate the general mental infirmity of degenerates, or individuals with vices of organization who are insane, but whose insanity presents special characteristics growing out of mental infirmity. It is usually hereditary and congenital. The insanity is a secondary phenomenon, vice of organization being the primary one; 2 Clevenger, Med. Jur. 856.

PHYSICAL EXAMINATION. The question as to whether, and under what circumstances, courts will permit the physical examination of litigants and of persons accused of crime, and also of property in litigation, has been much mooted. A physical examination of a woman under the writ of *de ventre inspiciendo* was known to the common law under special circumstances. See *JURY* of *WOMEN*. This early practice has been urged as a precedent for permitting a physical examination in certain civil and criminal cases.

In *Union Pacific R. Co. v. Bottsford*, 141 U. S. 250, the question was the right of a court of the United States to order a surgical examination of the plaintiff, in an action of tort. Mr. Justice Gray referred to the common-law writ of *de ventre inspiciendo* in capital cases, and also in civil cases involving the rightful succession to property of a decedent against fraudulent claims of bastards, and said that the learning and research of counsel for the plaintiff in error (John F. Dillon) had "failed to produce an instance of its even having been considered in any part of the United States as suited to the habits and conditions of the people." He added that "so far as the books within our reach show, no order to inspect the body in a personal action appears to have been made or even moved for, in any of the English courts of common law, at any period of their history." The ruling of the court below, refusing such an examination, was sustained. See, also, 129 Ind. 401; 129 N. Y. 50; 60 Fed. Rep. 278; 25 C. C. A. 418; 102 Ill. 272.

It appears however that such an order was moved for and made by a judge at chambers, not purporting to be by consent, though in fact unopposed, and of which Cockburn, C. J., said, "the order for such examination was clearly *ultra vires*;" 46 L. J. 696.

"The right to one's person may be said to be a right of complete immunity,—to be let alone." Cooley, Torts 29.

But while it has been held that the defendant has no absolute right to have a personal physical examination of the plain-

tiff made, in an action for personal injuries, yet in the discretion of the court such examination may be made, if essential for the ascertainment of truth or to subserve the ends of justice; 3 Am. St. Rep. 549; 95 Mo. 169; 49 Leg. Int. (Pa.) 434; 13 Med. Leg. J. 23; 72 Tex. 95; 90 Ala. 71; 2 Dist. R. (Pa.) 825; 34 L. R. A. 207; 96 Mich. 625; 39 W. Va. 86; 82 Ga. 719; 61 Wis. 536; 46 Ark. 275; 29 Kan. 466.

In 1865, in New York, it was said that in an action for personal injuries the defendant could examine the actual physical condition of the plaintiff before trial, and if the plaintiff refused, the defendant might prove the refusal at the trial; 64 Barb. 299. In 1868, in an action in the same state against a physician for personal injuries resulting from malpractice, it was said that no case involving the right to a physical examination was to be found on the books; but the court permitted the examination, citing as authority proceedings in divorce for impotency, mayhem, and the writ *de ventre inspiciendo*; 52 How. Pr. 334. The supreme court of that state, in an action against a carrier for injury to a passenger, overruled this view of the law, holding that in such divorce cases a physical examination was necessary to arrive at the truth, and that the other proceedings were obsolete; 29 Hun 154; 129 N. Y. 50. In a note by the reporter in 52 How. Pr. 334, it is said that there were few cases decisive of the right of physical examination, and he cites: *Andrew's Trials* 41; 45 How. 216; 1 Brews. (Pa.) 561; 71 N. C. 85; 5 Jones (N. C.) 259.

A plaintiff, in an action for personal injuries alleged to have caused the secretion of albumen and sugar, may be required to produce in court, for analysis, specimens of his urine, accompanied by an affidavit that it was voided by him; the privacy of his person not being thereby invaded; 46 N. E. Rep. (Ind.) 678; 36 L. R. A. 681.

It is within the discretion of the court to refuse to require the plaintiff to submit to a physical examination which necessitates the administration of anaesthetics; 65 N. W. Rep. (Mich.) 616.

In some courts plaintiffs are allowed to exhibit to the jury their injuries, and to perform physical acts showing the nature and extent of their injuries; 47 Ia. 375; 33 Minn. 130; but other courts hold this to be improper, because such evidence cannot be preserved in a bill of exceptions for use in an appellate court; 19 Cent. L. J. 144.

In a trial of an action of trespass for assault and battery, it is not error to permit the jury to examine with their fingers scars on the plaintiff's head caused by a blow from defendant's pistol; 35 S. W. Rep. (Tex.) 539.

A court of equity will not, in a patent case, even if it had the power, require the respondent, claiming under an alleged anticipating patent, to perform experiments in the presence of plaintiff's witnesses, except where so extraordinary a course is necessary; 83 Fed. Rep. 490.

In an action for breach of warranty on a sale of a horse, the court has no power to order that the defendant have the privilege of sending a veterinary surgeon into the plaintiff's stable to examine the horse; 63 N. W. Rep. (Mich.) 993; 95 Mich. 266.

In a suit for divorce on the ground of impotence a court has power to compel the parties to submit to a surgical examination when facts essential to a correct decision may thereby be ascertained; 5 Paige 554; 89 Ala. 291; 33 L. J. Mat. 13; in divorce proceeding because of malformation of the wife the court made an order for her inspection, but did not require the husband to submit to inspection; 16 Week Rep. 943.

The measurement in the presence of the jury of a woman's foot and her leg six inches above the ankle, in a suit for injuries to the foot and ankle, must be permitted by the court when there is a direct conflict as to such measurement by the medical men called by the respective parties,—at least if

the witness herself does not object; 99 Ia. 698; s. c. 34 L. R. A. 208.

The better practice seems to be to apply to the party to be examined, before trial, for permission to make the examination, and upon his refusal, to present a motion for leave, by affidavit, showing the refusal, and also the probability that the examination will result in some material disclosure. The party applying for the order for examination should also offer to pay the expense of such examination; 82 Ga. 719. In practice, some courts order a private physical examination of a party to be made by a physician, who may then testify in regard thereto at the trial of the cause.

A physical examination, if made, must be made by physicians agreed upon by the parties or selected by the court, care being taken to prevent danger to life, pains of body, or any indignity to the person; 47 Ia. 875; 33 Minn. 137; 37 Ohio St. 104.

Where an order for physical examination is made, the court will enforce it by refusing to try the cause until it is complied with; 7 Co. Ct. Rep. (Pa.) 565; by dismissing the action, or refusing to allow the plaintiff to give evidence to establish his injury; 37 Ohio St. 104; or by striking out and withdrawing from the consideration of the jury the allegations relative to his inquiry, or punishing him for contempt; 47 Ia. 875; 33 Minn. 130. A refusal to submit to a physical examination, if the court permit him to prosecute his claim will be very strong evidence against the person refusing; 35 Mo. App. 97; and may be considered by the jury as reflecting on his good faith; 141 U. S. 250.

Upon an appeal of mayhem where the issue joined is whether it is mayhem or no mayhem, it will be decided by the court upon inspection with the assistance of surgeons, if desired; 3 Bla. Com. 332.

The Stat. 31 & 32 Vict. c. 119, § 26, expressly authorizes any judge of a court in which an action is pending to recover compensation for a railway accident or any person having power to fix such compensation, to order an examination of the person injured by a duly qualified medical practitioner named in the order, and not being a witness on either side, the costs to be at the discretion of the judge or court making the order. When an examination has been procured by a railway company under this statute the report is privileged and the plaintiff is not entitled to an order for its production; 43 L. J. Rep. Exch. 150.

The act of 1894 in New York provides that, in all actions for personal injuries, the court may, before trial, order the plaintiff to submit to a physical examination "by one or more physicians or surgeons" under such restrictions as the order may impose; the order must require the person to appear before the judge or a referee, for the purpose of taking the examination, "at a time and place named therein. A woman is entitled to have the examination made by 'surgeons of her own sex.'"

In criminal proceedings there is no power to undress and medically examine the person of a prisoner, without his consent, although such examination might further the ends of justice; 18 Cox, C. C. 625. It is error for a court to require a person on trial for murder to exhibit his leg at the place where it was amputated, although a certain material fact may be established thereby; 3 Cr. Law Mag. (Ga.) 393; 71 N. C. 85. Where a prisoner refused to make a print of his foot in a pan of soft earth in order that the witnesses for the prosecution might testify as to similarity of such tracks with those found at the scene of the crime, the court said it was optional with the accused, who refused, and upon conviction a new trial was granted; 5 Baxt. 619; *contra*, 7 Tex. Civ. App. 245. A woman indicted for the murder of her illegitimate child refused to allow physicians selected by the coroner to examine whether she had recently been delivered of a child, and upon being threatened, yielded. The court ruled out the testimony of the physicians, saying that such proceedings vio-

lated the spirit of the constitution which declares that no person shall, in any criminal case, be compelled to be a witness against himself; 45 How. Pr. 216.

On the other hand, it has been held not to be error to compel the defendant to exhibit tattoo marks on his body, to the existence of which a witness had testified; 14 Nev. 79; 33 Am. Rep. (S. C.) 530; or to compel the accused to make his footprints in an ash heap, and to allow the prosecution to show that they corresponded with those found at the scene of the crime; 7 Tex. Civ. App. 245; or for an officer to compel the accused to put his foot in print found at the place where the crime was committed and at the trial testify to the result of the comparison; 74 N. C. 646; 67 Ga. 76; 26 N. E. (Ind.) 138.

See JURY OF WOMEN; PRIVACY; VIEW.

PHYSICAL FACT. A fact, the existence of which is perceptible by the senses.

"A fact considered to have its seat in some inanimate being, or, by virtue, not of the qualities by which it is constituted animate, but of those which it has in common with the class of inanimate beings." 1 Benth. Jud. Ev. 45.

PHYSICALLY IMPOSSIBLE. See IMPOSSIBILITY.

PHYSICIAN. A person, who has received the degree of doctor of medicine from an incorporated institution.

One lawfully engaged in the practice of medicine.

As used in a policy of life insurance, the term "family physician" has been held to mean the physician who usually attends, and is consulted by, the members of a family, in the capacity of a physician, whether or not he usually attended on or was consulted by the insured himself; 17 Minn. 497; s. c. 10 Am. Rep. 166. See 58 Mo. 421.

Although the physician is civilly and criminally responsible for his conduct while discharging the duties of his profession, he is in no sense a warrantor or insurer of a favorable result, without an express contract to that effect; Elwell, Malp. 20; 7 C. & P. 81.

Every person who offers his services to the public generally, impliedly contracts with the employer that he is in possession of the necessary ordinary skill and experience which are possessed by those who practise or profess to understand the art or science, and which are generally regarded by those most conversant with the profession as necessary to qualify one to engage in such business successfully. This ordinary skill may differ according to locality and the means of information; Elw. Malp. 22, 201; Story, Bailm. 433; 3 C. & P. 629; 34 Ia. 286; s. c. 11 Am. Rep. 141, n.; 82 Ill. 379; s. c. 25 Am. Rep. 328; 70 Md. 163; 36 Neb. 794; 27 Abb. N. C. 45; 108 N. C. 187. If the treatment of the patient has been honest and intelligent only ordinary care and skill is required of defendant and errors of judgment will be overlooked; 60 Barb. 485; 75 N. Y. 21. Experimenting with a patient outside of the rules of practice renders the practitioner liable in damages; 4 Ill. 209. Any one who treats patients as a clairvoyant must be held to the same degree of care as a regular practitioner; 59 Me. 181; 72 Wis. 391.

The physician's responsibility is the same when he is negligent as when he lacks ordinary skill, although the measure of indemnity and punishment may be different; Elw. Malp. 27; 3 Maule & S. 14, 15; 5 id. 198; 1 Lew. C. C. 169; Broom, Leg. Max. 168, 169; 4 Denio 464; 19 Wend. 345; 62 How. 621. See 69 Hun 826; 84 Me. 497. Where a physician is charged with manslaughter, resulting from a surgical operation performed by him, it is error to charge that if deceased consented to the performance of the operation, defendant must be acquitted; 8 Wash. 12.

One who holds himself out as a healer of diseases, and accepts employment as such,

must be held to the duty of reasonable skill in the exercise of his vocation; failing in this he must be held liable for any damages proximately caused by unskilful treatment of his patient; 72 Wis. 591. Gross negligence may constitute criminal liability; 138 Mass. 165; 38 Ark. 605; and an unlicensed practitioner may be guilty of manslaughter; 1 Witth. & Beck. Med. Jur. 79. See 4 F. & F. 519; 29 Ohio St. 577.

Bad or unskilful practice in a physician or other professional person, whereby the health of the patient is injured, is usually called Malpractice (*Mala praxis*).

Wilful malpractice takes place when the physician purposely administers medicines or performs an operation which he knows and expects will result in damage or death to the individual under his care; as in the case of criminal abortion; Elw. Malp. 243; 2 Barb. 216.

Negligent malpractice comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the situation of the patient requires; as if a physician should administer medicines while in a state of intoxication, from which injury would arise to his patient.

Ignorant malpractice is the administration of medicines calculated to do injury, which do harm, which a well-educated and scientific medical man would know were not proper in the case; Elw. Malp. 198; 7 B. & C. 493; 6 Mass. 134; 5 C. & P. 333; 1 Mood. & R. 405; 5 Cox, C. C. 587; Whart. & St. Med. Jur. 755.

This offence is a misdemeanor (whether it be occasioned by curiosity and experiment or neglect), because it breaks the trust which the patient has put in the physician, and tends directly to his destruction. See 3 Chitty, Cr. Law 863; 4 Wentw. Pl. 360; 2 Russ. Cr. 277; 6 Mass. 134; 138 id. 165; 38 Ark. 605; 10 Cox, C. C. 525; 8 Mo. 561; 3 C. & P. 629; 4 id. 423.

Besides the public remedy for malpractice, in many cases the party injured may bring a civil action; 9 Conn. 209; 3 Watts 355; 7 N. Y. 397; 39 Vt. 447.

Civil cases of malpractice are of very frequent occurrence on those occasions where surgical operations are rendered necessary, or supposed to be so, by disease or injury, and are so performed as either to shorten a limb or render it stiff, or otherwise prevent the free, natural use of it, by which the party ever after suffers damage. This may embrace almost every kind of surgical operation; but nine-tenths of all such cases arise from amputations, fractures, or dislocations; Elw. Malp. 55.

To the performance of all surgical operations the surgeon is bound to bring at least ordinary skill and knowledge. He must apply without mistake what is settled in his profession. He must possess and practically exercise that degree and amount of knowledge and science which the leading authorities have pronounced as the result of their researches and experience up to the time, or within a reasonable time, before the issue or question to be determined is made; Elwell, Malp. 55; 6 Am. L. Reg. N. S. 774; 36 Neb. 764.

A physician in the treatment of a patient is bound only to use the reasonable degree of skill and care which is ordinarily possessed and exercised; 27 Abb. N. C. 45; the law imposes on a surgeon the duty of being reasonably skilled in his profession, and the exercise of care and prudence in the application of that skill, and if he be wanting in either, to the injury of his patient, he is liable for damages; 62 Hun 621; although there may be no contractual relation between the patient and the physician; 130 N. Y. 35. If one physician, being unable to attend, sends another in his stead, the former is not liable to one who is injured by the unskilfulness of the latter, since the latter, being engaged in a distinct and independent occupation of his own, is not the servant or agent of the former; 33 Atl. Rep. (N. J.) 388. See, also, 8 East 347; 2 Wils. 259; 1 H. Bla. 61; Wright, Ohio 466; 22 Pa. 261; 27 N. H. 460; 13 B. Monr. 219; 27 Abb. N. C. 45; 62 Hun 621.

In the Roman civil law and at common law until 1422 the practice of medicine and surgery was free to all. A statute in that year confined it to those who had studied the subject in a university and who were bachelors of science. In the United States statutes regulating the right to practice are constitutional; 129 U. S. 114; 10 N. W. Rep. 323; 11 Colo. 109; 52 Hun 65.

In England, at common law, a physician could not maintain an action for his fees for anything done as physician either while attending to or prescribing for a patient; but a distinction was taken when he acted as a surgeon or in any other capacity than that of physician, and in such cases an action for fees would be sustained; 1 C. & M. 227, 370; 3 Q. B. 928. But now by the act of 21 & 22 Vict. c. 90, a physician who is registered under the act may bring an action for his fees, if not precluded by any by-law of the college of physicians; 2 H. & C. 92. It has not been denied in this country; 26 Wend. 451.

In this country, the various states have statutory enactments regulating the collection of fees and the practice of medicine; they will be found in Witth. & Beck. Med. Jur.; an unlicensed physician can not maintain an action for medical attendance and medicines; 4 Den. 60; 91 Tenn. 16; 21 Ala. n. s. 680; *contra*, 1 Metc. 154.

In a suit for medical services the plaintiff is presumed to have been licensed; 24 Wend. 15. See, also, 24 Ill. App. 42. Sec. 153 of ch. 661 of the laws of New York (1895), as amended by ch. 396, laws of 1895, providing that no person shall practice medicine who has ever been convicted of felony, applies to persons who had been convicted of felony before the passage of the act. As to such persons the statute is *not ex post facto*; 55 Alb. L. J. 218. Such an act does not conflict with the federal constitution; 170 U. S. 189.

The business of massage does not violate a statute forbidding the practice of medicine without a license; 24 Hun 32; but prescribing patent medicine does; 15 Wend. 395; 4 Ohio 295. The law does not recognize any difference between schools of medicine; 4 E. D. Sm. 1. See 42 N. Y. 161. Contracts for contingent compensation are valid; 71 N. Y. 443; 19 Vt. 54. Where a physician called in a stranger, an unmarried man in a confinement case, it was held that this was a breach of duty, for which both were liable to the patient; 46 Mich. 160.

Where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks the plaintiff performed an operation, soon after which she died, it was held, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if, in his judgment, it was necessary or expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant; 19 Pick. 333.

If physicians attending a woman deem it necessary for the preservation and prolongation of her life, to perform an operation they are justified in doing so if she consents, whether her husband consents or not; 70 Md. 162.

Where one who has received personal injury through the negligence of another uses reasonable and ordinary care in the selection of a physician, the damages awarded him will not be reduced because more skillful medical aid was not secured; 32 Ia. 324; s. c. 7 Am. Rep. 200. In assumption by a physician for his services, the defendant cannot prove the professional reputation of the plaintiff; 3 Hawks 105. Physicians can recover for the services of

their students in attendance upon their patients; 4 Wend. 200. Partners in the practice of medicine are within the law merchant, which includes the *jus accrescendi* between traders; 9 Cow. 631. An agreement between physicians whereby, for a money consideration, one promises to use his influence with his patrons to obtain their patronage for the other, is lawful and not contrary to public policy; 89 Conn. 336; s. c. 12 Am. Rep. 390. If a physician carries contagious disease into a family, on a suit for services this may be shown to reduce his claim; 13 B. Monr. 465. A physician who has been guilty of negligence in the treatment of his patient, resulting in damages to the latter, does not necessarily lose his right to recover any compensation whatever for his services; but the amount of his recovery, if any, depends in the amount of damages suffered because of negligence; 66 N. W. Rep. 898.

A law providing that no person shall be licensed to practise medicine except after examinations by the state board, is not in conflict with the fourteenth amendment of the United States constitution; 4 Wash. St. 424; nor is a statute making it a misdemeanor punishable by fine or imprisonment to practise medicine without a certificate from the state board of health that the practitioner is a graduate of a reputable medical college, unconstitutional, as depriving him of life, liberty, or property without due process of law; 129 U. S. 114. See CONFIDENTIAL COMMUNICATIONS; EXPERT; OPINION; EVIDENCE.

PIA FRAUS. A pious fraud; a fraud considered morally justifiable on account of the ends sought to be promoted.

PIACLE. An enormous crime. Obsolete.

PICARON. A robber; a plunderer.

PICKERY. In Scotch Law. Stealing of trifles, punishable arbitrarily. Bell, Dict.; Tait, Inst. Theft.

PICKETING. Picketing by members of a trade union or strikers, consists in posting members at all the approaches to the works struck against for the purpose of reporting the workman going to or coming from the works; and to use such influence as may be in their power to prevent the workman from accepting work there. Dav. Friend. Soc. 212. See LABOR UNION; STRIKE; BOYCOTT.

PICKPOCKET. A thief; one who in a crowd or in other places steals from the pockets or person of another without putting him in fear. This is generally punished as simple larceny.

PICTURE. A frame is part of a picture as used in a carrier's act. L. R. 5 Ex. 90; 39 L. J. Ex. 55; 37 L. J. C. P. 83. See PAINTING; COPYRIGHT; PHOTOGRAPH; FIXTURES.

"Pictures" include all of the paintings, drawings, and sketches on the walls of one's residence or office building. 132 Ky. 589, 116 S. W. 769.

PIE-POUDRE, PIE POWDER. See COURT OF PIE POWDER.

PIER. A wharf. A structure erected for ferry purposes which was simply a ferry rack and bridge was held not a pier. 5 Robt. N. Y. 285. See DOCK; HARBOR; PORT.

PIERAGE. The duty for maintaining piers and harbor.

PIGEON-HOLE TABLE. A "pigeon-hole table" is a table not so wide as a pool table, and longer, but with four legs, and with rubber cushions on the sides and ends, and covered with cloth, and instead of having pockets at each corner and on the sides have a number of holes in the table at one end and certain pegs at or near these holes. The game is played with balls and a cue, and instead of the balls being numbered, as in the other game, the holes or pockets into which the balls roll through the holes are numbered. 158 Ky. 445, 165 S. W. 423.

PIGNORATIO (Lat. from *pignorare*, to pledge). In Civil Law. The obligation of a pledge. L. 9 D. de pignor. Sealing up (*obsignatio*). A shutting up of an animal caught in one's field and keeping it till the expenses and damage have been paid by its master. New Decis. 1. 34. 13.

PIGNORATIVE CONTRACT. In Civil Law. A contract by which the owner of an estate engages it to another for a sum of money and grants to him and his successors the right to enjoy it until he shall be reimbursed, voluntarily, that sum of money. Pothier, Obl.

PIGNORIS CAPTIO (Lat.). In Roman Law. The name given to one of the *legis actiones* of the Roman law. It consisted chiefly in the taking of a pledge, and was, in fact, a mode of execution. It was confined to special cases determined by positive law or by custom, such as taxes duties, rents, etc., and is comparable in some respects to distresses at common law. The proceeding took place in the presence of a praetor.

PIGNUS (Lat.). In Civil Law. Pledge, or pawn. The contract of pledge. The right in the thing pledged.

"It is derived," says Gaius, "from *pugnus*, the fist, because what is delivered in pledge is delivered in hand." Dig. 50. 16. 238. 2. This is one of several instances of the failure of the Roman jurists when they attempted etymological explanations of words. The elements of *pignus* (*pig*) are contained in the word *pan(g)-o* and its cognate forms. See Smith, Dict. Gr. & Rom. Antiq.

Though pledge is distinguished from mortgage (*hypotheca*), as being something delivered in hand, while mortgage is good without possession, yet a pledge (*pignus*) may also be good without possession. Domat, Civ. Law b. iii. tit. 1, § 5; Calvinus, Lex. *Pignus* is properly applied to movables, *hypotheca* to immovables; but the distinction is not always preserved. *Id.*

PILA. That side of money which was called *pile*, because it was the side on which there was an impression of a church built on piles. Fleta, lib. 1, c. 39.

PILFER. To steal. To charge another with pilfering is to charge him with stealing and is slander; 4 Blackf. 499.

PILFERER. One who steals petty things.

PILLAGE. The taking by violence of private property by a victorious army from the citizens or subjects of the enemy. This in modern times is seldom allowed, and then only when authorized by the commanding or chief officer at the place where the pillage is committed. The property thus violently taken belongs, in general, to the common soldiers. It is expressly forbidden under the rules of the Brussels Conference, 1874, which however have never been adopted by the European nations. See Dalloz, Dict. *Proprété*, art. 3, § 5; Wolff § 1201; BOOTY; PRIZE; WAR.

PILLORY. A wooden machine, in which the neck of the culprit is inserted. This punishment has in most of the states been superseded by the adoption of the penitentiary system. See 1 Chitty, Cr. L. 797. The punishment of standing in the pillory, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 27, 1839, s. 5. See Barrington, Stat. 43.

PILOT. An officer serving on board of a ship during the course of a voyage, and having charge of the helm and of the ship's route. An officer authorized by law who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into port.

Pilots of the second description are estab-

lished by legislative enactments at the principal seaports in this country, and have rights, and are bound to perform duties, agreeably to the provisions of the several laws establishing them.

Pilots have been established in all maritime countries. After due trial and experience of their qualifications, they are licensed to offer themselves as guides in difficult navigation; and they are usually, on the other hand, bound to obey the call of a ship-master to exercise their functions; Abb. Sh. 13th ed. 190; 1 Johns. 305; 4 Dall. 205; 5 B. & P. 82; 5 Rob. Adm. 308; 6 id. 316; Laws of Oleron, art. 23; Molloy, b. 2, c. 9, ss. 3, 7; Wesk. Ins. 395; Act of Congr. of August 7, 1789, s. 4; Pardessus, n. 637.

The master of a vessel may decline the services of a pilot, but in that event he must pay the legal fees; 1 Cliff. 492. A pilot who first offers his services, if rejected, is entitled to his fee; 2 Am. Law Rev. 453; Desty. Shipp. § 349; 102 U. S. 592.

The pilot is to conduct the navigation, regulate the course of the ship and the management of the sails; 7 Moore, P. C. 171, 134. He is not liable for damages to the vessel unless caused by his failure to use ordinary diligence, i. e., the degree of skill commonly possessed by others in the same employment; 57 Fed. Rep. 227. A river pilot is bound to be familiar with the channel of the river, and with the various obstructions to navigation, and is liable for damages occasioned by the want of such knowledge, but not for damages occasioned by an error of judgment on his part; 48 Fed. Rep. 690. Shipowners are responsible to third parties for obedience to the pilot; his orders ordinarily, are to be implicitly obeyed; but the shipowner is not responsible for the acts of the pilot where pilotage is compulsory; 7 Moore, P. C. 171; 7 P. Div. 134; 63 Fed. Rep. 845; 73 L. T. 49; 2 W. Rob. 10; in such case the ship has been held liable; 7 Wall. 53. But the owner remains liable for the ship's management in all things that do not relate to mere navigation; 158 U. S. 186. The compulsory pilotage law applies within the three mile limit; 70 Fed. Rep. 331. See TERRITORIAL WATERS. Where a steamer in need of a pilot disregarded the speaking pilot and it appeared that the speaking pilot was within the three mile limit, the pilot was held entitled to recover his fee; 28 U. S. App. 593. See SEAWORTHINESS; PERILS OF THE SEA.

By acts of Aug. 7, 1789, March 2, 1837, each state has authority over pilotage on its navigable waters, though not exclusive; 9 Fed. Rep. 164. A Delaware pilot may recover for services upon the Delaware River and to Philadelphia, although a Pennsylvania act prohibits any one acting assuch without a Pennsylvania license; 12 Fed. Rep. 346. The state of Delaware cannot exclude pilots of other states, on the Delaware River; 14 Fed. Rep. 972. A state law may permit or direct a pilot to tender his services beyond the three mile limit.

The usual signal by which a pilot tenders his services is the Union Jack set at the main truck, by day, and "flare-ups" by night; 19 Fed. Rep. 207.

PILOTAGE. The compensation given to a pilot for conducting a vessel in or out of port. Pothier, *Des Avaries*, n. 147.

Pilotage is a lien on the ship, when the contract has been made by the master or quasi-master of the ship or some other person lawfully authorized to make it; 1 Mas. 508; see 32 Fed. Rep. 486; 24 id. 397; and the admiralty court has jurisdiction when services have been performed at sea; 10 Wheat. 428; 6 Pet. 682; Bened. Adm. § 289; 10 Fed. Rep. 135. And see 1 Pet. Adm. Dec. 227; 42 Fed. Rep. 793. The statutes of the several states regulating the subject of pilotage are, in view of the numerous acts of congress recognizing and adopting them, to be regarded as constitutionally made, until congress by its own acts supersedes them; 12 How. 317; 13 Wall. 236.

PIMP. One who provides for others the means of gratifying lust; a procurer; a panderer. The word pimp is not a technical one, nor has it acquired any peculiar or appropriate meaning in the law; and is therefore to be construed and understood according to the common and approved usage of the language; 75 Mich. 127, where the court disapproved the action of the judge at nisi prius who defined the term to mean a man who has intercourse with a loose woman, who usually is taking care of him,—supporting him.

The Indiana statutes provide: "Whoever, being a male person, frequents houses of ill-fame or of assignation, or associates with females known or reputed as prostitutes, or frequents gambling-houses with prostitutes, or is engaged in or about a house of prostitution, is a pimp." R. S. (1881) § 2002. See 103 Ind. 156, which was an indictment for being a pimp under that statute.

PIMP-TENURE. A very singular and odious kind of tenure mentioned by old writers, "*Wilhelmus Hoppeshort tenet dimidium virgatum terræ, per servitium custodiendi sex damisillas, scil. meretrices, ad usum domini regis.*" 12 Edw. 1.

PIN-MONEY. Money allowed by a man to his wife to spend for her own personal comforts.

It has been conjectured that the term *pin-money* has been applied to signify the provision for a married woman because anciently there was a tax laid for providing the English queen with pins; Barrington, Stat. 181.

When pin-money is given to but not spent by the wife, on the husband's death it belongs to his estate; 4 Viner, Abr. 133, *Baron & Feme* (E a. 8); 2 Eq. Cas. Abr. 156; 2 P. Will. 341; 1 Ves. 190, 267; 1 Madd. 489.

In England it was once adjudged that a promise to a wife, by the purchaser, that if she would not hinder the bargain for the sale of the husband's lands he would give her ten pounds, was valid, and might be enforced by an action of assumpsit instituted by husband and wife; Rolle, Abr. 21.

In the French law, the term *epingles*, pins, is used to designate the present which is sometimes given by the purchaser of an immovable to the wife or daughters of the seller to induce them to consent to the sale. This present is not considered as a part of the consideration, but a purely voluntary gift. *Dict. de Jur. Epingles.*

PINT. A liquid measure, containing half a quart or the eighth part of a gallon.

PIOUS USES. See CHARITABLE USES.

PIPE ROLL. In English Law. The name of a roll in the exchequer, otherwise called the *Great Roll*. A measure, containing two hogsheads; one hundred and twenty-six gallons is also called a pipe.

PIPE LINES. A connected series of pipes for the transportation of oil, gas, or water.

A line of pipes running upon or in the earth carrying with it the right to the use of the soil in which it is placed. 95 Cal. 92.

The right to construct a pipe line is a public use, as is also that of laying pipes for a proper purpose in the streets of a city. See EMINENT DOMAIN.

A pipe line company for conveying oil is a common carrier bound to receive and transport for all persons alike, all goods entrusted to its care, and is not in any sense, or at any time, an agent for the person committing oil to its care; 172 Pa. 580.

A pipe line for the transportation of oil is not rendered a nuisance by the mere fact that its presence enhances the rates of insurance in the neighborhood; 20 Atl. Rep. (N. J.) 683.

A pipe line is held to create an additional servitude on a country highway but not on city or borough streets; 111 Pa. 35; 160 id. 872. It may remove its pipes and abandon its easement; 184 id. 28.

See Bryan, Nat. Gas; GAS; OIL.

PIRACY. In Criminal Law. A robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility. 3 Wheat. 610; 5 id. 153, 163; 3 Wash. C. C. 209. This is the definition of this offence by the law of nations; 1 Kent 183.

"Depredation upon the high seas, without authority from any sovereign." It is not necessary that the motive be plunder, or that the depredations be directed against the vessels of all nations indiscriminately. As in robbery upon land, it is only necessary that the spoliation or intended spoliation be felonious, that is, with intent to injure, and without legal authority or lawful excuse; 25 Fed. Rep. 408.

All nations and individuals are warranted in seizing pirates. It has been held by many authorities that insurgents who have not been accorded belligerent rights are pirates, although it may be their intention to prey upon no ships except those of their mother country whom they are resisting. The American colonists in the American Revolution were declared to be pirates by Great Britain, and so were the cruisers of the confederate government by the federal government during the American Civil War; Snow, Lect. Int. Law 52.

Piracy has two aspects: As a violation of the common right of nations, punishable under the common law of nations by the seizure and condemnation of the vessel only, in prize courts. Its liability to punishment criminally by the municipal law of the place where the offenders are tried; Whart. Cr. L. § 2830; 2 Phil. Int. Law 414. Acts hostile in their nature, done for plunder, hatred, revenge, or mischief, or in the wanton exercise of power, are piratical; 2 How. 210, where the subject is elaborately discussed.

Property found on board a pirate ship goes to the Crown, of strict right; but the claim of the original owner is admitted, on application; 1 Hagg. Adm. 142. Vessels recaptured from pirates, after whatever length of time, are always restored to the owner on payment of salvage; 4 C. Rob. 3.

Congress may define and punish piracies and felonies on the high seas, and offences against the law of nations; Const. U. S. art. 1, s. 7, n. 10; 3 Wheat. 336; 5 id. 76, 153, 164. The following laws have been passed:

Every person who on the high seas commits the crime of piracy as defined by the Law of Nations, and is afterwards brought into or found in the United States, shall suffer death; § 5368. Every seaman who lays violent hands upon his commander, thereby to hinder and prevent his fighting in the defence of his vessel or the goods entrusted to him, is a pirate and shall suffer death; § 5369. Robbery on the high seas or in any open roadstead, haven, or harbor where the sea ebbs and flows, committed upon any vessel or ship's company or its lading, is piracy punishable by death; § 5370. Robbery on shore committed by the crew of a piratical vessel is piracy punishable by death. Every person who commits upon the high seas or in any river, harbor, basin, or bay, out of the jurisdiction of any particular state, murder or robbery or any crime which by the laws of a country would be punishable by death, by the laws of the United States, is a pirate, punishable by death. Every citizen who aids in murder or robbery or act of hostility against the United States or any citizen thereof on the high seas under color of any commission from any foreign prince or state or on pretence of authority from any person, is a pirate punishable by death. Every subject of a foreign state found upon the sea making war upon the United States or cruising against its vessels or citizens contrary to the provisions of any treaty between the United States and the state of which he is a subject, when by such treaty such acts are declared to be piracy, is guilty of piracy, and shall suffer death; § 5374. Every person who knowingly aids, or another to commit murder, robbery, or other piracy upon the seas is an accessory before the fact, punishable by death; § 5323. Every person who knowingly receives any vessel or other property feloniously taken by any robber or pirate, against the laws of the United States, and any person who, knowing that said pirate has committed any act of piracy or robbery on the land or sea, receives or conceals him, is accessory after the fact; § 5324. Secs. 5375, 5376 refer to confining and detaining negroes on board vessels and landing or seizing negroes on foreign shores, and constitute piracy punishable by death.

See RECAPTURE.

In Torts. By piracy is understood the

plagiarism of a book, engraving, or other work for which a copyright has been taken out; infringement of copyright may be by unfair quotation; by piratical copying; by piratical use other than copying.

Where the violation of the copyright consists of excerpts from plaintiff's book, the court is bound to consider the quantity and quality of the matter appropriated and the extent to which the plaintiff is injured by it and the damage to the defendant by an injunction. It seems that the complainant is not always bound to prove pecuniary damage to entitle him to an injunction. Where the parts of the complainant's book are scattered through the defendant's book and cannot be separated, the whole will be enjoined; 33 Fed. Rep. 494. See *Drone*, Copyr. 494.

Piratical copying was held to be established in the case of a society directory by proof that out of 2800 names, 39 common errors were found to exist; 30 Fed. Rep. 772; and by proof that out of 60,000 names there were 67 common errors; 66 Fed. Rep. 977. Two common errors in maps were held sufficient to establish the fact that one map had been copied from the other; 18 Fed. Rep. 539; in a mercantile agency book, the existence of 15 common errors was held sufficient to establish the use of the complainant's book by the defendant; 84 Hun 12. It is not necessary to point out many common errors to establish a presumption of piracy; 66 Hun 38. The court does not feel bound to go through the whole of the defendant's book to ascertain the extent of the piracy; 19 L. J. N. S. Ch. 90. In 2 Beav. 6, the court enjoined the defendant who had pirated parts of a topographical dictionary, without waiting until the whole of the pirated parts could be ascertained, and held that if the parts which had been copied could not be separated from those which were original without destroying the use and value of the original matter, the defendant must suffer the consequences.

The majority of copyright infringements that occur, which have been called "literary larceny" lie intermediately between open piracy and fair use; *Chamier*, Copyr. 108.

In 30 Fed. Rep. 772, it was intimated that the injunction would be modified at the final hearing, if the proofs of the defendant tended to segregate any part of the material which had been made subject to the injunction.

The rule is well settled that although the entire copyrighted work is not copied in the infringement, but only portions, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendant will be given to the plaintiff; 144 U. S. 488, following 128 *id.* 617. See 2 Russ. 385; 97 U. S. 126.

It is the unfair appropriation of the compiler's labor in the case of the syllabus of a legal opinion that constitutes infringement. Identity of language will often prove that the offence was committed, but it is not the sole proof. If the subsequent digester has made an unfair use of any part of a syllabus of his predecessor, the burden is on him to show that there were parts of it that he did not use. Where the defendant's editor, in compiling a digest of reports, digested some 13,300 cases from the complainant's pamphlet reports and a partial comparison of the copyrighted syllabi with the digest showed internal evidence of piracy in some 400 instances, it was held that this indicated a general, systematic, and unfair use of the copyrighted work, coupled with an attempt to disguise such use, and made out a *prima facie* case, which was not rebutted by the simple denial of the defendant's editors that they had made use of the complainant's syllabi. It was held that the whole work, so far as taken from the complainant's pamphlet reports, should be enjoined, with liberty to defendant to show by further proofs what paragraphs were digested by non-offending editors and to

move to have them excluded from the injunction; 79 Fed. Rep. 756. See *COPYRIGHT*; *MEMORIZATION*.

PIRATE. A sea-robber, who, to enrich himself, by subtlety or open force, setteth upon merchants and others trading by sea, despoiling them of their loading, and sometimes bereaving them of life and sinking their ships. *Ridley*, View pt. 2, c. 1, s. 3. One guilty of the crime of piracy. *Merlin*, *Répert.* See, for the etymology of this word, *Bac. Abr. Piracy*. See *PIRACY*.

PIRATICALLY. In Pleading. This is a technical word, essential to charge the crime of piracy in an indictment, which cannot be supplied by another word or any circumlocution. *Hawk*, Pl. Cr. b. 1, c. 37, s. 15; *Co. 3d Inst.* 112; 1 *Chitty*, Cr. L. *244.

PISCARY. The right of fishing in the waters of another. *Bac. Abr.*; 5 *Com. Dig.* 366. See *FISHERY*.

PISTAREEN. A small Spanish coin. It is not made current by the laws of the United States. 10 *Pet.* 618.

PIT. A hole dug in the earth, which was filled with water, and in which women thieves were drowned, instead of being hung. The punishment of the pit was formerly common in Scotland.

PIT AND GALLOWS (Law Lat. *fossa et furca*). In *Scotch Law*. A privilege of inflicting capital punishment for theft, given by king Malcolm, by which a woman could be drowned in a pit (*fossa*) or a man hanged on a gallows (*furca*). *Bell, Dict.*; *Stair, Inst.* 277 § 62.

PLACE. The word is associated with objects which are, in their nature, fixed and territorial. 3 *Wheat.* 336. See *VENUE*.

It is applied to any locality, limited by boundaries however large or however small. It may be used to designate a country, state, county, town, or a very small portion of a town. The extent of the locality designated by it must, generally, be determined by the connection in which it is used; 46 *Vt.* 432.

Any piece of ground appropriated by its owner or occupier for the time being is a place within the English betting houses act; 51 *L. J. M. C.* 56; but the ground must be so appropriated and must be an ascertained place; 14 *Q. B. D.* 588. The habitual standing or using a table in Hyde Park does not make it a place for betting; 19 *C. B. N. S.* 765; as habitual user is not of the essence of place; 10 *Q. B.* 102; but a piece of ground bounded on one side by a boarding and on two other sides by staves which support the boarding is a place under 16 & 17 *Vic. c.* 119, relating to betting; [1896] 1 *Q. B.* 295. See [1897] 1 *Q. B.* 579.

A private residence may become a public place when it is used for the purpose of public amusement, recreation, business, or religious worship; 45 *S. W. Rep.* (Tex.) 702.

PLACE OF ABODE. See *ABODE*.

PLACE OF AMUSEMENT. A hall containing a stage whereon a nightly programme of music, vocal and instrumental, is rendered is a place of amusement; 4 *D. R. Pa.* 37; and a dance hall is a public amusement. 40 *N. E. Rep.* (Mass.) 1043.

PLACE OF BUSINESS. The place where a man usually transacts his affairs or business.

When a man keeps a store, shop, counting-room, or office, independently and distinctly from all other persons, that is deemed his place of business; and when he usually transacts his business at the counting-house, office, and the like, occupied and used by another, that will also be considered his place of business, if he has no independent place of his own. But when he has no particular right to use a place for such private purpose, as in an insurance-office, an exchange-room, a banking-room, a postoffice, and the like, where persons generally resort, these will not be consid-

ered as the party's place of business, although he may occasionally or transiently transact business there; 1 *Pet.* 582; 2 *id.* 121; 10 *Johns.* 501; 11 *id.* 231; 16 *Pick.* 392; *Byles*, Bills 296.

It is a general rule that a notice of the non-acceptance or non-payment of a bill, or of the non-payment of a note, may be sent either to the domicile or place of business of the person to be affected by such notice; and the fact that one is in one town and the other in the other will make no difference, and the holder has his election to send to either. A notice to partners may be left at the place of business of the firm or of any one of the partners; *Story*, Fr. Notes § 312; *Dan. Neg. Instr.* 4th ed. § 1016. See *Notice*.

PLACE OF CONTRACT. See *LEX LOCI*.

PLACE OF DELIVERY. The place where goods sold are to be delivered. If no place is specified in the contract they must, generally, be delivered at the place where they are at the time of the sale. 100 *U. S.* 134.

PLACER. See *MINES AND MINING*.

PLACER CLAIM. As used in *Rev. Stat.* § 2333 means, ground within defined boundaries which contains mineral in its earth, sand or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. 128 *U. S.* 679. Cf. *LODE*.

PLACITA COMMUNIA (Lat.). Common pleas. All civil actions between subject and subject. 3 *Bla. Com.* 38, *40; *Cowell, Plea.* See *PLACITUM*.

PLACITA CORONÆ (Lat.). Pleas of the crown. All trials for crimes and misdemeanors, wherein the king is plaintiff, on behalf of the people. 3 *Bla. Com.* 40*; *Cowell, Plea.*

PLACITA JURIS (Lat.). Arbitrary rules of law. *Bac. Law Tr.* 73; *Bac. Max.* Reg. 12.

PLACITUM (Lat. from *placere*). In *Civil Law*. Any agreement or bargain. A law; a constitution or rescript of the emperor; the decision of a judge or award of arbitrators. *Vicat, Voc. Jur.*; *Calvinus, Lex*; *Dupin, Notions sur le Droit*.

In *Old English Law* (Ger. *plats*, Lat. *platea*, *i. e.* fields or streets). An assembly of all degrees of men, where the king presided and they consulted about the great affairs of the kingdom: first held, as the name would show, in the fields or street. *Cowell*.

So on the continent. *Hinc. de Ordine Palatii*, c. 29; *Bertinian, Annals of France* in the year 767; *Const. Car. Mag.* cap. ix.; *Hinc. Epist.* 197, 227; *Laws of the Longobards, passim*.

A lord's court. *Cowell*.

An ordinary court. *Placita* is the style of the English courts at the beginning of the record at *nisi prius*; in this sense, *placita* are divided into pleas of the crown and common pleas, which see. *Cowell*.

A trial or suit in court. *Cowell*; *Jacobs*. A fine. *Black Book of Exchequer*, lib. 2, tit. 13; 1 *Hen. I. cc.* 12, 13.

A plea. This word is *nomen generalissimum*, and refers to all the pleas in the case. 1 *Saund.* 388, n. 6; *Skin.* 554; *Carth.* 334; *Yelv.* 65. By *placitum* is also understood the subdivisions in abridgments and other works, where the point decided in a case is set down separately, and, generally, numbered. In citing, it is abbreviated as follows; *Viner, Abr. Abatement* pl. 3.

Placitum nominatum is the day appointed for a criminal to appear and plead.

Placitum fractum. A day past or lost to the defendant. 1 *Hen. I. c.* 59.

PLAGIARISM. The act of appropriating the ideas and language of another and passing them for one's own.

When this amounts to piracy, the party

who has been guilty of it will be enjoined when the original author has a copyright. See COPYRIGHT; PIRACY; QUOTATION; Pardessus, *Dr. Com.* n. 169.

PLAGIARISM, OF NEWS. There are two kinds of use that may be made by one news agency of news taken from the bulletins and newspapers of the other. (1) The bodily appropriation of a statement of fact or a news article, with or without re-writing, but without independent investigation or other expense; (2) the taking of the news of a rival agency as a "tip" to be investigated, and if verified by independent investigation the news thus gathered is sold. 243 U. S. 243.

PLAGIARIUS (Lat.). In Civil Law. He who fraudulently concealed a freeman or slave who belonged to another.

The offence itself was called *plagium*. It differed from larceny or theft in that, larceny always implies that the guilty party intended to make a profit, whereas the *plagiarius* did not intend to make any profit. Dig. 48. 15. 6; Code 9. 20. 9. 15.

PLAGIUM (Lat.). Man-stealing; kidnapping. This offence is the *crimen plagii* of the Romans. Alison, *Cr. L.* 280.

PLAIN STATEMENT. One that can be readily understood not merely by lawyers but by all who are sufficiently acquainted with the language in which it is written. 5 Sandf. 564. See 79 N. C. 574.

PLAIN TYPE. Large or ordinary sized type, not that of very small size. 57 Mo. 255.

PLAINT. In English Law. The exhibiting of any action, real or personal, in writing. The party making his plaint is called the plaintiff.

PLAINTIFF (Fr. *pleyntife*). He who complains. He who, in a personal action, seeks a remedy for an injury to his rights. 3 Bla. Com. 25; Hamm. Part. 1; Chitty, Pl. 1 Com. Dig. 36, 205, 308.

The legal plaintiff is he in whom the legal title or cause of action is vested.

The equitable plaintiff is he who, not having the legal title, yet is in equity entitled to the thing sued for. For example: when a suit is brought by B. for the use of A., B. the legal, and A. the equitable, plaintiff. This is the usual manner of bringing suits when the cause of action is not assignable at law but is so in equity.

The word plaintiff occurring alone means the plaintiff on record, not the real or equitable plaintiff. After once naming the plaintiff in pleading, he may be simply called the plaintiff. 1 Chitty, Pl. 266; 9 Paige, Ch. 226; 5 Hill, N. Y. 523, 548; 7 Term 50.

The word "plaintiff" embraces a defendant who demands a set-off or counter-claim; the word "defendant" embraces a plaintiff against whom such demand is made; and the word "petition" embraces an answer or reply in which such demand is made, and also embraces cross-petitions. Section 732, Sub-section 36, Civil Code of Kentucky. See CONDEMNATION PROCEEDINGS; CORPORATION PROCEEDINGS.

PLAINTIFF IN ERROR. A party who sues out a writ of error; and this, whether in the court below he was plaintiff or defendant.

PLAN. The delineation or design of a city, a house or houses, a garden, a vessel, etc., traced on paper or other substance, representing the position and the relative proportions of the different parts.

A plan referred to in a deed describing land as bounded by a way laid down upon a plan may be used as evidence in fixing the locality of such way; 16 Gray 374; and if a plan is referred to in the deed for description, and in it are laid down courses, distances, and other particulars, it is the same as if they were recited in the deed itself; 3 Washb. R. P. 430.

When houses are built by one person agreeably to a plan, and one of them, with

windows and doors in it, is sold to a person, the owner of the others cannot shut up those windows, nor has his grantee any greater right; 1 Price 27; 2 Ry. & M. 24; 2 Sand. 114, n. 4; 1 Mood. & M. 396. See 12 Mass. 159; Hamm. N. P. 202; Com. Dig. *Action on the Case for a Nuisance (A).* ANCIENT LIGHTS; PLAT; MAP; WINDOWS.

PLANT. The fixtures and tools necessary to carry on any trade or mechanical business. 77 Ga. 752. The term does not cover property forming part of a separate business; 77 Fed. Rep. 938. As used in the business of a wharfinger, a horse was held part of the plant; 19 Q. B. D. 647; and a legacy of plant and good will was held to pass the house of business held by lease; 8 W. R. 410.

PLANTATIONS. Colonies; dependencies. 1 Bla. Com. 107.

In England, this word, as it is used in stat. 13 Car. II. c. 18, is never applied to any of the British dominions in Europe, but only to the colonies in the West Indies and America; 1 Marsh. Ins. 69.

In its ordinary use it is nearly synonymous with farm, and includes all the land forming the parcel or parcels under culture as one farm, or even what is worked by one set of hands. 38 Cal. 291; 10 Ired. 131. It has been held that in order to constitute a plantation, the estate should be under the control of one proprietor. 79 Ga. 721. The devise of a plantation passes the stock, implements, utensils, etc., on it; 1 Sim. 435; but plantation stock does not include cotton seed; 4 Jones, Eq. 203.

PLASTERING. Plastering a building includes lathing. 16 Ill. 502; 49 N. Y. 464.

PLAT. A map of a piece of land, on which are marked the courses and distances of the different lines, and the quantity of land it contains.

Such a plat may be given in evidence in ascertaining the position of the land and what is included, and may serve to settle the figure of a survey and correct mistakes; 5 T. B. Monr. 160. See 17 Mass. 211; 5 Me. 219; 7 id. 61; 4 Wheat. 444; 14 Mass. 149.

PLATE. Vessels and utensils of gold and silver. By the act 29 Geo. 2. c. 14, a tax was laid on all persons possessed of plate; but that act was repealed by the 17 Geo. 3. c. 39. Tomlin.

PLEA. In Equity. A special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, or delayed, or barred. Mitf. Eq. Pl. Jer. ed. 219; Coop. Eq. Pl. 223; Story, Eq. Pl. § 649.

The modes of making defence to a bill in equity are said to be by *demurrer*, which demands of the court whether from the matter apparent from the bill the defendant shall answer at all; by *plea*, which resting on the foundation of a new matter offered, demands whether the defendant shall answer further; by *answer*, which responds generally to the charges of the bill; by *disclaimer*, which denies any interest in the matters in question; Mitf. Eq. Pl. Jer. ed. 13; 2 Stor. 59; Story, Eq. Pl. § 487. Pleas are said to be *pure* which rely upon foreign matter to discharge or stay the suit, and *anomalous* or *negative* which consist mainly of denials of the substantial matters set forth in the bill; Story, Eq. Pl. § 631, 667; 2 Dan. Ch. Pr. 97, 110; Beames, Eq. Pl. 123; Adams, Eq. 236.

Pleas to the jurisdiction assert that the court before which the cause is brought is not the proper court to take cognizance of the matter.

Pleas to the person may be to the person of the plaintiff or defendant. Those of the former class are mainly *outlawry*, *excommunication*, *popish recusant convict*, which are never pleaded in America and very rarely now in England; *attainder*, which is now seldom pleaded; 2 Atk. 399; *alienage*, which is not a disability unless the matter respect lands, when the alien may not hold them, or he be an alien enemy not under license; 2 V. & B. 323; *infancy*,

coverture, and *idiccy*, which are pleadable as at law (see ABATEMENT); *bankruptcy* and *insolvency*, in which case all the facts necessary to establish the plaintiff as a legally declared bankrupt must be set forth; 3 Mer. 667; though not necessarily as of the defendant's own knowledge; Youngs 331; 4 Beav. 554; 1 Y. & C. 59; *want of character in which he sues*, as that he is not an administrator; 2 Dick. 510; 1 Cox, Ch. 198; is not heir; 2 V. & B. 159; 2 Bro. C. C. 143; 3 id. 489; is not a creditor; 2 S. & S. 274; is not a partner; 6 Madd. 61; as he pretends to be; that the plaintiff named is a fictitious person, or was dead at the commencement of the suit; Story, Eq. Pl. § 727. Those to the person of the defendant may show that the defendant is not the person he is alleged to be, or does not sustain the character given by the bill; 6 Madd. 61; Cas. temp. Finch 334; or that he is bankrupt, to require the assignees to be joined; Story, Eq. Pl. § 732. These pleas to the person are pleas in abatement, or, at least, in the nature of pleas in abatement.

Pleas to the bill or the frame of the bill object to the suit as framed, or contend that it is unnecessary. These may be—the *pendency of another suit*, which is analogous to the same plea at law and is governed in most respects by the same principles; Story, Eq. Pl. § 736; 2 My. & C. 603; 1 Phill. 82; 1 S. & S. 491; Mitf. Eq. Pl. Jer. ed. 248; see *AUTER ACTION PENDANT*; the other suit must be in equity, and not at law; Beames, Eq. Pl. 146; *want of proper parties*, which goes to both discovery and relief, where both are prayed for; Story, Eq. Pl. § 745; see 3 Yo. & C. 447; but not to a bill of discovery merely; 2 Paige, Ch. 280; 3 Cra. 220; a *multiplicity of suits*; 1 P. Wms. 428; 2 Mas. 190; *multifariousness*, which should be taken by way of demurrer, when the joining or confession of the distinct matters appears from the face of the bill, as it usually does; Story, Eq. Pl. § 271. A plea to the jurisdiction which sets up matters affecting the validity of the service, matters showing want of proper citizenship, and also the pendency of a prior suit, is bad for duplicity; 58 Fed. Rep. 717.

Pleas in bar rely upon a *bar created by statute*; as, the Statute of Limitations; 1 S. & S. 4; 3 Sumn. 152; 10 Ves. 466; which is a good plea in equity as well as at law, and with similar exceptions; Cooper, Eq. Pl. 253; see *LIMITATION, STATUTE OF*; the Statute of Frauds, where its provisions apply; 1 Johns. Ch. 425; 4 Ves. 24, 720; 2 Bro. C. C. 559; or some other public or private statute; 2 Story, Eq. Jur. § 768; *matter of record or as of record in some court*, as a common recovery; 1 P. Wms. 754; 1 Vern. 18; a judgment at law; 1 Keen 456; 2 My. & C. Ch. 602; Story, Eq. Pl. § 781, n.; the sentence or judgment of a foreign court or a court not of record; 12 Cl. & F. 368; 14 Sim. 265; especially where its jurisdiction is of a peculiar or exclusive nature; 12 Ves. 307; 2 How. 619; with limitation in case of fraud; 1 Ves. 284; Story, Eq. Pl. § 788; or a decree of the same or another court of equity; Cas. Talb. 217; 7 Johns. Ch. 1; 2 S. & S. 464; 2 Y. & C. 43; *matters purely in pais*, in which case the pleas may go to discovery, relief, or either, both, or a part of either, of which the principal (though not the only) pleas are: account, stated or settled; 7 Paige, Ch. 573; 1 My. & K. 281; accord and satisfaction; 1 Hare 564; award; 2 V. & B. 764; purchase for valuable consideration; 2 Sumn. 507; 2 Yo. & C. 457; release; 3 P. Wms. 315; lapse of time analogous to the Statute of Limitations; 1 Yo. & C. 432, 458; 2 J. & W. 1; 1 Hare 594; 1 Johns. Ch. 46; 10 Wheat. 152; 1 Sch. & L. 721; 3 Paige, Ch. 273; 7 id. 62; title in the defendant; Story, Eq. Pl. § 812.

The same pleas may be made to bills seeking discovery as to those seeking relief; but matter which constitutes a good plea to a bill for relief does not necessarily to a bill for discovery merely. See Story, Eq. Pl. § 816; Mitf. Eq. Pl. Jer. ed. 281. The same kind of pleas may be made to bills not original as to original bills, in many cases,

according to their respective natures. Peculiar defences to each may, however, be sometimes urged by plea; Story, Eq. Pl. § 826; Mitf. Eq. Pl. Jer. ed. 288.

Effect of a plea. A plea may extend to the whole or a part, and if to a part only must express which part, and an answer over-rules a plea if the two conflict; 3 Yo. & C. 693; 3 Cra. 220. The plea may be accompanied by an answer fortifying it with a protest against waiver of the plea thereby; Story, Eq. Pl. § 695. A plea or argument may be allowed, in which case it is a full bar to so much of the bill as it covers, if true; Mitford, Eq. Pl. Jer. ed. 301; or the benefit of it may be saved to the hearing, which decides it valid so far as then appears, but allows matter to be disclosed in evidence to invalidate it, or it may be ordered to stand for an answer, which decides that it may be a part of a defence; 4 Paige, Ch. 124; but is not a full defence, that the matter has been improperly offered as a plea, or it is not sufficiently fortified by answer, so that the truth is apparent; 3 Paige, Ch. 459.

While a defendant cannot plead merely the facts averred in the bill of complaint, but must present his objection to their sufficiency by demurrer, yet he may present a good plea by averring along with the facts contained in the bill, other and additional facts, provided that both together establish a defence to the bill; 50 Fed. Rep. 151.

A plea which avoids the discovery prayed for is no evidence for defendant, even when under oath and denying a material averment in the bill; 120 U. S. 303.

At Law. The defendant's answer by matter of fact to the plaintiff's declaration, as distinguished from a demurrer, which is an answer by matter of law.

It includes as well the denial of the truth of the allegations on which the plaintiff relies, as the statement of facts on which the defendant relies. In an ancient use it denoted action, and is still used sometimes in that sense; as, "summoned to answer in a plea of trespass;" Steph. Pl. 38; Warren, Law Stud. 272; Oliver, Prec. 97. In a popular, and not legal, sense, the word is used to denote a forensic argument. It was strictly applicable in a kindred sense when the pleadings were conducted orally by the counsel. Steph. Pl. App. n. 1.

Pleas are either *dilatory*, which tend to defeat the particular action to which they apply on account of its being brought before the wrong court, by or against the wrong person, or in an improper form; or *peremptory*, which impugn the right of action altogether, which answer the plaintiff's allegations of right conclusively. Pleas are also said to be to the jurisdiction of the court, in suspension of the action, in abatement of the writ, in bar of the action. The first three classes are dilatory, the last peremptory. Steph. Pl. And. ed. 136; 1 Chitty, Pl. 425; Lawes, Pl. 36.

Pleas are of various kinds. **In abatement.** See ABATEMENT. **In avoidance**, called also, **confession and avoidance**, which admits, in words, or in effect, the truth of the matters contained in the declaration, and alleges some new matter to avoid the effect of it and show that the plaintiff is, notwithstanding, not entitled to his action. 1 Chitty, Pl. 540; Lawes, Pl. 122. Every allegation made in the pleadings subsequent to the declaration which does not go in denial of what is before alleged on the other side is an allegation of new matter. See Gould, Pl. § 195; CONFESSION AND AVOIDANCE.

Pleas in bar deny that the plaintiff has any cause of action. 1 Chitty, Pl. 407; Co. Litt. 303 b. They either conclude the plaintiff by matter of estoppel, show that he never had any cause of action, or, admitting that he had, insist that it is determined by some subsequent matter. Steph. Pl. And. ed. 448; Britt. 92 § 190. They either deny all or some essential part of the averments in the declaration, in which case they are said to traverse it, or, admitting them to be true, allege new facts which obviate and repel their legal effect,

in which case they are said to confess and avoid; Steph. Pl. And. ed. 146. The term is often used in a restricted sense to denote what are with propriety called special pleas in bar. These pleas are of two kinds; the general issue, and special pleas in bar. The general issue denies or takes issue upon all the material allegations of the declaration, thus compelling the plaintiff to prove all of them that are essential to support his action. There is, however, a plea to the action which is not strictly either a general issue or a special plea in bar, and which is called a *special issue*, which denies only some particular part of the declaration which goes to the gist of the action. It thus, on the one hand, denies less than does the general issue, and, on the other hand, is distinguished from a "special plea in bar" in this,—that the latter universally advances *new matter*, upon which the defendant relies for his defence, which a special issue never does; it simply *denies*. Lawes, Pl. 110, 145; Co. Litt. 126 a; Gould, Pl. 5th ed. ch. ii. § 38, ch. vi. § 8. The matter which ought to be so pleaded is now very generally given in evidence under the general issue. 1 Chitty, Pl. 415. A plea which merely amounts to the general issue, though not such in form, is bad; 84 Md. 414.

Special pleas in bar admit the facts alleged in the declaration, but avoid the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue. *Ld. Raym.* 88. They are very various, according to the circumstances of the defendant's case: as, in personal action the defendant may plead any special matter in denial, avoidance, discharge, excuse, or justification of the matter alleged in the declaration, which destroys or bars the plaintiff's action; or he may plead any matter which estops or precludes him from averring or insisting on any matter relied upon by the plaintiff in his declaration. The latter sort of pleas are called pleas in *estoppel*. In real action, the tenant may plead any matter which destroys and bars the demandant's title; as, a *general release*; Steph. Pl. 115.

The general qualities of a plea in bar are—*first*, that it be adapted to the nature and form of the action, and also conformable to the count. Co. Litt. 303 a; 235 b; Bac. Abr. Pleas (1); Rolle 216. *Second*, that it answers all it assumes to answer, and no more. Co. Litt. 303 a; Com. Dig. Pleader (E 1, 36); 1 Saund. 28; 2 B. & P. 427. *Third*, in the case of a special plea, that it confess and admit the fact. 3 Term 298; 1 Saund. 28, 14; 10 Johns. 289. *Fourth*, that it be single. Co. Litt. 307; Bac. Abr. Pleas (K 1, 2); 2 Saund. 49, 50. *Fifth*, that it be certain. Com. Dig. Pleader (E 5-11, C 41). See CERTAINTY; PLEADING. *Sixth*, it must be direct, positive, and not argumentative. See 6 Cra. 126; 9 Johns. 513. *Seventh*, it must be capable of trial. *Eighth*, it must be true and capable of proof.

The parts of a plea are—*first*, the title of the court. *Second*, the title of the term. *Third*, the names of the parties in the margin. These, however, do not constitute any substantial part of the plea. The surnames only are usually inserted, and that of the defendant precedes the plaintiff's; as, "Roe v. Doe." *Fourth*, the commencement, which includes the statement of the name of the defendant, the appearance, the defence, see DEFENCE, the *actio non*, see ACTIO NON. *Fifth*, the body, which may contain the inducement, the protestation, see PROTESTATION, ground of defence, *quæ est eadem*, the traverse. *Sixth*, the conclusion.

Dilatory pleas go to destroy the particular action, but do not affect the right of action in the plaintiff, and hence delay the decision of the cause upon its merits. Gould, Pl. ch. ii. § 33. This class includes pleas to the jurisdiction, to the disability of the parties, and all pleas in abatement. All dilatory pleas must be pleaded with the greatest certainty, must contain a distinct, clear, and positive averment of all material facts, and must in general, enable

the plaintiff to correct the deficiency or error pleaded to; And. Steph. Pl. 136. See ABATEMENT; JURISDICTION.

Pleas in discharge admit the demand of the plaintiff, and show that it has been discharged by some matter of fact. Such are pleas of judgment, release, and the like.

Pleas in excuse admit the demand or complaint stated in the declaration, but excuse the non-compliance with the plaintiff's claim, or the commission of the act of which he complains, on account of the defendant's having done all his power to satisfy the former, or not having been the culpable author of the latter. A plea of tender is an example of the former, and a plea of *son assault demesne* an instance of the latter.

Foreign pleas go to the jurisdiction; and their effect is to remove the action, from the county in which the venue is originally laid. Carth. 402. Previous to the statute of Anne, an affidavit was required. 5 Mod. 335; Carth. 402; 1 Saund. Pl. 98, n. 1; Viner, Abr. Foreign Pleas; 1 Chitty, Pl. 382; Bacon, Abr. Abatement (R).

Pleas of justification assert that the defendant has purposely done the act of which the plaintiff complains, and in the exercise of his legal rights. 8 Term 78; 3 Wils. 71. No person is bound to justify who is not *prima facie* a wrong-doer: 1 Leon. 301; 2 id. 83; Cowp. 478; 4 Pick. 126; 13 Johns. 443, 579; 1 Chitty, Pl. 436.

Pleas puis darrein continuance introduce new matter of defence, which has arisen or come to the plaintiff's knowledge since the last continuance. In most of the states, the actual continuance of a cause from one term to another, or from one particular day in term to another day in the same term, is practically done away with, and the prescribed times for pleading are fixed without any reference to terms of court. Still, this right of a defendant to change his plea so as to avail himself of facts arising during the course of the litigation remains unimpaired; and though there be no continuance, the plea is still called a *plea puis darrein continuance*,—meaning, now, a plea upon facts arising since the last stage of suit. They are either in bar or in abatement. Matter which arises after purchase or issue of the writ, and before issue joined, is properly pleaded in bar of the further maintenance of the suit; 4 East 502; 5 Pet. 224; 4 Me. 532; 12 Gill & J. 358; see 7 Mass. 325; while matter subsequent to issue joined must be pleaded *puis darrein continuance*; 30 Ala. n. s. 253; Hempst. 16; 40 Me. 582; 7 Gill 415; 10 Ohio 300. Their object is to present matter which has arisen since issue joined, and which the defendant cannot introduce under his pleadings as they exist, for the rights of the parties were at common law to be tried as they existed at the time of bringing the suit, and matters subsequently arising come in as they were by exception and favor. See 7 Johns. 194.

Among other matters, it may be pleaded that the plaintiff has become an alien enemy; 3 Camp. 152; that an award has been made after issue joined; 2 Esp. 504; 29 Ala. n. s. 619; that there has been accord and satisfaction; 5 Johns. 392; 19 Wend. 98; 5 Pet. 231; that the plaintiff has become bankrupt; 1 Dougl. Mich. 267; 15 East 622; that the defendant has obtained a bankrupt-certificate, even though obtained before issue joined; 9 East 83; see 2 H. Bla. 553; 3 B. & C. 23; 3 Den. 269; that a feme plaintiff has taken a husband; Bull. N. P. 310; 1 Blackf. 288; that judgment has been obtained for the same cause of action; 9 Johns. 221; 5 Dowl. & R. 175; that payment has been made; 61 Ind. 453; that letters testamentary or of administration have been granted; 1 Saund. 265, n. 2; or revoked; Com. Dig. Abatement (1 4); that the plaintiff has released the defendant; 4 Cal. 331; 3 Sneed 52; 17 Mo. 267. See 33 N. H. 179. But the defendant in ejectment cannot plead release from the lessor of the plaintiff; 4 Maule & S. 300; and the release will be avoided in case of fraud; 4 B. & Ad. 419; 4 J. B. Moo.

P. C. 193; 23 N. H. 535. In ejectment a right to the land obtained by defendant since the commencement of the action, must be set up by a plea *puis darrein continuance*; 99 Mich. 333.

As a general rule, such matters must be pleaded at the first continuance after they happen or come to the plaintiff's knowledge; 11 Johns. 424; 1 S. & R. 146; though a discharge in insolvency or bankruptcy of the defendant; 2 Johns. 294; 9 *id.* 235, 392; and coverture of the plaintiff existing at the purchase of the suit, are exceptions; Bull. N. P. 310; in the discretion of the court; 10 Johns. 161; 4 S. & R. 239; 5 Dowl. & R. 521; 2 Mo. 100. *Great certainty* is required in pleas of this description; Freeman. 112; Cro. Jac. 261; 2 Wils. 130; 2 Watts 451. They must state the day of the last continuance, and of the happening of the new matter; Bull. N. P. 309; And. St. ph. Pl. 356, n; 7 Ill. 252; 75 Me. 551; cannot be awarded after assizes are over; 2 M'C. & Y. 350; must be verified on oath before they are allowed; 1 Stra. 493; 1 Const. S. C. 455; and must then be received; 3 Term 554; 1 Marsh. 70, 280; 15 N. H. 410. They stand as a substitute for former pleas; Hob. 81; Hempst. 16; 4 Wisc. 159; 1 Strobb. 17; 73 Me. 465; 14 Wend. 161; and demurrers; 32 E. L. & E. 280; may be pleaded after a plea in bar; 1 Wheat. 215; Freeman. 252; and if decided against the defendant, the plaintiff has judgment in chief; 1 Wheat. 215; Al. 67; Freeman. 252.

Sham pleas are those which are known to the pleader to be false, and are entered for the purpose of delay. There are certain pleas of this kind which, in consequence of their having been long and frequently used in practice, have obtained toleration from the courts, and, though discouraged, are tacitly allowed; as, for example, the common plea of *judgment recovered*, that is, that judgment has been already recovered by the plaintiff for the same cause of action; Steph. Pl. 444, 445. See 14 Barb. 393; 2 Den. 195. The later practice of courts in regard to sham pleas is to strike them out on motion, and give final judgment for the plaintiff, or impose terms (in the discretion of the court) on the defendant, as a condition of his being let in to plead anew. The motion is made on the plea itself, or on affidavits in connection with the plea.

Pleas in suspension of the action show some ground for not proceeding in the suit at the present period, and pray that the pleading may be stayed until that ground be removed. The number of these pleas is small. Among them is that which is founded on the nonage of the parties, and termed *parol demurrer*. Steph. Pl. And. ed. 138.

A plea which avers a legal conclusion is bad, as "that a dam is no higher than the statute authorized;" 13 Wall. 175.

In ecclesiastical courts, a plea is called an allegation. See ALLEGATION.

PLEAD, TO. To answer the indictment or, in a civil action, the declaration of the plaintiff, in a formal manner. To enter the defendant's defence upon record. In a popular use, to make a forensic argument. The word is not so used by the profession. Steph. Pl. App. n. 1; Story, Eq. Pl. § 4, n.

PLEADER. A person professionally employed to manage another's cause for him, particularly to plead orally, or argue for him in court.

PLEADING. The written allegation of what is affirmed on the one side, or denied on the other, disclosing to the court or jury having to try the cause, the real matter in dispute between the parties. 1 Minn. 17.

In Chancery Practice. It consists in making the formal written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it, of which, when contested in matters of fact, they propose to offer proofs, and in

matters of law to offer arguments to the court. Story, Eq. Pl. § 4. The substantial object of pleading is the same, but the forms and rules of pleading are very different, at law and in equity.

In Civil Practice. The stating in a logical and legal form the facts which constitute the plaintiff's cause of action or the defendant's ground of defence: it is the formal mode of alleging that on the record which constitutes the support or the defence of the party in evidence. 3 Dougl. 278; Com. Dig. *Pleader* (A); Bac. Abr. *Pleas and Pleading*. Pleading is used to denote the act of making the pleadings.

The object of pleading is to secure a clear and distinct statement of the claims of each party, so that the controverted points may be exactly known, examined, and decided, and the appropriate remedy or punishment administered. See Cowp. 682; Dougl. 159. The object is to develop the real issue; 28 Pa. 522. A pleading must proceed upon some single definite theory, and it must be good upon the theory on which it proceeds; 118 Ind. 87. Good pleading consists in good matter pleaded in good form, in apt time, and due order. Co. Litt. 303. *Good matter* includes all facts and circumstances necessary to constitute the cause of complaint or ground of defence, and no more. It does not include arguments or matters of law. But some matters of fact need not be stated, though it be necessary to establish them as facts. Such are, among others, *facts of which the courts take notice* by virtue of their office: as, the time of accession of the sovereign; 2 Ld. Raym. 794; time and place of holding parliament; 1 Saund. 181; public statutes and the facts they ascertain; 1 Term 45; including ecclesiastical, civil, and marine laws; Ld. Raym. 333; but not private; 2 Dougl. 97; or foreign laws; 2 Carth. 273; 4 R. I. 523; common-law rights, duties, and general customs; Ld. Raym. 1542; Co. Litt. 175; Cro. Car. 561; the almanac, days of the week, public holidays, etc.; Salk. 269; 6 Mod. 81; 4 Dowl. 43; 4 Fla. 158; political divisions; Co. 2d Inst. 557; 4 B. & Ald. 242; 6 Ill. 73; the meaning of English words and terms of art in ordinary acceptance; 1 Rolle, Abr. 86, 525; their own course of proceedings; 2 Lev. 176; 10 Pick. 470; and that of courts of general jurisdiction; 1 Saund. 73; 5 McLean 167; 10 Pick. 470; 1 Greenl. Ev. § 4; see JUDICIAL NOTICE; *facts which the law presumes*: as, the innocence of a party, illegality of an act, etc.; 4 Maule & S. 105; 1 B. & Ald. 463; 6 Johns. 105; 72 Tex. 272; 6 Conn. 130; 2 Tex. Civ. App. 76; *matters which the other party should plead*, as being more within his knowledge; 1 Sharsw. Bla. Com. 293, n.; 2 H. Bl. 530; 2 Johns. 415; 9 Cal. 286; 1 Sandf. 89; *mere matters of evidence of facts*; 9 Co. 96; 25 Barb. 457; 7 Tex. 603; 6 Blackf. 173; 1 N. Chipm. 293; see 25 Fla. 1; *unnecessary matter*: as, a second breach of condition, where one is sufficient; 2 Johns. 443; 1 Saund. 58, n. 1; 33 Miss. 474; 4 Ind. 409; 23 N. H. 415; 12 Barb. 27; 2 Green, N. J. 577; see *DUP LICITY*; or intent to defraud, when the facts alleged constitute fraud; 16 Tex. 335; see 3 Maule & S. 182; *irrelevant matter*; 1 Chitty, Pl. 209. Such matter may be rejected without damage to the plea, if wholly foreign to the case, or repugnant; 7 Johns. 462; 3 Day 472; 2 Mass. 283; 8 S. & R. 124; 16 Tex. 656; 7 Cal. 349; 23 Conn. 134; 1 Du. 242; 6 Ark. 468; 8 Ala. n. S. 320; but in many cases the matter must be proved as stated, if stated; 7 Johns. 321; 3 Day 283. The matter must be true and susceptible of proof; but legal fictions may be stated as facts; 2 Burr. 667; 4 B. & P. 140. Facts necessarily implied from direct averments will be treated as having been pleaded; 48 Mo. App. 319; 44 Ill. App. 22; and facts and not conclusions should be pleaded; 44 Ill. App. 203. See 96 Ala. 454; 52 Fed. Rep. 898.

The form of statement should be according to the established forms; Co. Litt. 303; 6 East 351; 8 Co. 43 b. This is to be considered as, in general, merely a rule of caution, though it is said the courts disap-

prove a departure from the well-established forms of pleading; 1 Chitty, Pl. 212. In most of the states of the United States, and in England since 1852, many radical changes have been introduced into the law of pleading; still, it is apprehended that a reasonable regard to the old forms will be profitable, although the names of things may be changed. See 3 Sharsw. Bla. Com. 301, n.; 3 Cal. 196; 28 Miss. 766; 14 B. Monr. 83. In general, it may be said that the facts should be stated logically, in their natural order, with certainty, that is, clearly and distinctly, so that the party who is to answer, the court, and the jury may readily understand what is meant; 2 B. & P. 267; Co. Litt. 303; 33 Miss. 669; Hempst. 238; with precision; 13 Johns. 437; 19 Ark. 695; 5 Du. 689; and with brevity; 36 N. H. 458; 1 Chitty, Pl. 212. The facts stated must not be insensible or repugnant; 7 Co. 25; 25 Conn. 431; 5 Blackf. 339; 18 Colo. 16; nor ambiguous or doubtful in meaning; 5 Maule & S. 88; 86 Wis. 64; nor argumentative; Co. Litt. 303; 5 Blackf. 557; nor by way of recital; 2 Bulstr. 214; Ld. Raym. 1413; and should be stated according to their legal effect and operation; Steph. Pl. And. ed. 366; 16 Mass. 443.

The time within which pleas must be filed is a matter of local regulation, depending upon the court in which the action is brought. *The order* of pleading different matters is of importance as affecting the defendant, who may oppose the plaintiff's suit in various ways. The order is as follows:—

First, to the jurisdiction of the court.

Second, to the disability, etc., of the person: *first*, of the plaintiff; *second*, of the defendant.

Third, to the count or declaration.

Fourth, to the writ: *first*, to the form of the writ,—*first*, matter apparent on the face of it, *secondly*, matters dehors; *second*, to the action of the writ.

Fifth, to the action itself in bar.

This is said to be the natural order of pleading, because each subsequent plea admits that there is no foundation for the former; 13 La. An. 147; 41 Me. 102; 7 Gray 38; 5 R. I. 235; 2 Bosw. 267; 1 Grant, Pa. 359; 4 Jones, N. C. 241; 20 Miss. 656. See 16 Tex. 114; 4 Ia. 158. An exception exists where matter is pleaded *puis darrein continuance*; see PLEA; and where the subject-matter is one over which the court has no jurisdiction, a failure to plead to the puis cannot confer jurisdiction; 10 S. & R. 229; 17 Tex. 62.

The science of pleading, as it existed at common law, has been much modified by statutory changes; but, under whatever names it is done,—whether under rules of court, or of the legislative power, by the parties, the court, or the jury,—it is evident that, in the nature of things, the end of pleading must be attained, namely, the production of one or more points of issue, where a single fact is affirmed by one party and denied by the other. By pleading at the common law, this was done by the parties; in the civil law, by the court.

In England, pleadings in actions are now governed by the provisions of the Judicature Act, ord. xix., which made a number of changes in the old common-law methods. See Wharton, Dict.; JUDICATURE ACTS.

Up to judgment pleadings are construed most strongly against the pleader, and unknown, unrecited facts are not assumed in his favor; 45 La. Ann. 935. See 45 Mo. App. 519; 84 Ky. 380; 17 Or. 308; 79 Ga. 315.

In Criminal Practice the rules of pleading are the same as in civil practice. There is, however, less liberty of amendment of the indictment. The order of the defendant's pleading is as follows:—*first*, to the jurisdiction; *second*, in abatement; *third*, special pleas in bar: as, *autrefois acquit*, *autrefois attain*, *autrefois convict*, *pardon*; *fourth*, the general issue.

PLEADING, SPECIAL. By special pleading is meant the allegation of special

or new matter, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Pl. c. 1, s. 18. See SPECIAL PLEADING.

PLEADINGS. In Chancery Practice. The written allegations of the respective parties in the suit. The pleadings in equity are less formal than those at common law.

The parts of the pleadings are—the *bill*, which contains the plaintiff's statement of his case, or *information*, where the suit is brought by a public officer in behalf of the sovereign; the *demurrer*, by which the defendant demands judgment of the court, whether he shall be compelled to answer the bill or not; the *plea*, whereby he shows some cause why the suit should be dismissed or barred; the *answer*, which, controverting the case stated by the bill, confesses and avoids it; or traverses and denies the material allegations in the bill, or, admitting the case made by the bill, submits to the judgment of the court upon it, or relies upon a new case or upon new matter stated in the answer, or upon both; *disclaimer*, which seeks at once a termination of the suit by the defendants, disclaiming all right and interest in the matter sought by the bill; Story, Eq. Pl. § 546; Mitf. Eq. Pl. by Fer. 13, 106; Cooper, Eq. Pl. 108; 2 Sto. 59.

In Civil Practice. The statements of the parties, in legal and proper manner, of the causes of action and grounds of defence. The result of pleading. They were formerly made by the parties or their counsel, orally, in open court, under the control of the judge. They were then called the *parole*; 3 Bla. Com. 293; 2 Reeves, Hist. Eng. Law 267.

The parts of the pleadings may be arranged under two heads: the regular, which occur in the ordinary course of a suit; and the irregular or collateral, which are occasioned by errors in the pleadings on the other side.

The regular parts are—the *declaration* or count; the *plea*, which is either to the jurisdiction of the court, or suspending the action, as in the case of a *parol demurrer*, or in abatement, or in bar of the action, or in replevin, an avowry or cognizance; the *replication*, and, in case of an evasive plea, a *new assignment*, or, in replevin, the *plea in bar* to the avowry or cognizance; the *rejoinder*, or, in replevin, the replication to the plea in bar; the *sur-rejoinder*, being in replevin the rejoinder; the *rebutter*; the *sur-rebutter*; Viner, Abr. Pleas and Pleading (C); Bac. Abr. Pleas and Pleadings (A); *pleas puis darrein continuance*, when the matter of defence arises pending the suit.

The irregular or collateral parts of pleading are stated to be—*demurrers* above mentioned; *demurrers to evidence* given at trials; *bills of exceptions*; *pleas in scire facias*; and *pleas in error*. Viner, Abr. Pleas and Pleadings (C).

In Admiralty, the proceedings might go on, by turns, as long as the mode of pleadings require it. The successive pleadings, after the replication, were called duplication, triplication, and quadruplication, and so on; but they are now obsolete; Bened. Adm. § 482.

In Criminal Practice, the pleadings are—*first*, the *indictment*; *second*, the *plea*; and the other pleadings as in civil practice.

PLEAS. See NON-ISSUABLE PLEAS.

PLEAS OF THE CROWN. In English Law. A phrase now employed to signify criminal causes in which the king is a party. Formerly it signified royal causes for offences of a greater magnitude than mere misdemeanors. Pleas of the crown, were so called because the sovereign is supposed by law to be the person injured by every wrong, done to the community. Blackstone vol. 4, p. 2.

These were left to be tried in the courts of the barons; whereas the greater offences, or royal causes, were to be tried in

the king's courts, under the appellation of pleas of the crown. 1 Robertson, Hist. Charles V. 48.

PLEAS ROLL. In English Practice. A record which contains the declaration, plea, replication, rejoinder, and other pleadings, and the issue. Eunom. Dial. 2, § 29, p. 111.

PLEBEIAN. One who is classed among the common people, as distinguished from the nobles.

PLEBISCITUM (Lat.). In Roman Law. A law established by the people (*plebs*), on the proposal of a popular magistrate, as a tribune. Vicat. Voc. Jur.; Calvinus, Lex.; Mackeldey, Civ. Law §§ 27, 37. The term is used in France to express a popular vote (*plébiscite*).

PLEDGE. A bailment of personal property as security for some debt or engagement.

The word is also applied to the *res* or personal property forming the subject-matter of the bailment. *Pawn* was synonymous with *pledge* at common law, but modern usage tends to restrict these words to the bailment of tangible chattels for money advanced, and has introduced the term *collateral security*, or simply *collateral*, to designate the subject-matter of a pledge given as security for an engagement other than a simple borrowing of money, and particularly when the subject-matter consists of incorporeal chattels such as stocks, bonds, or choses in action.

A pledge or pawn (Lat. *pignus*), according to Story, is a bailment of personal property as security for some debt or engagement; Story, Bailm. § 286; which see for the less comprehensive definitions of Sir Wm. Jones, Lord Holt, Pothier, etc. Domat broadly defines it as an appropriation of the thing given for the security of an engagement. But the term is commonly used as Sir Wm. Jones defines it: to wit, as a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged. Jones, Bailm. 117; 2 Ld. Raym. 909; Pothier, *De Naut.* art. prelim. 1; Code Civ. 2071; Domat b. 3, tit. 1, § 1; La. Civ. Code 3100; 6 Ired. 309. The pledgee secures his debt by the bailment, and the pledgor obtains credit or other advantage. See 1 Pars. Contr. 591.

In Louisiana there are two kinds of pledges: the pawn and the antichresis. The former relates to movable securities, and the latter to immovables. If a creditor have not a right to enter on the land and reap the fruits, the security is not an antichresis; 3 La. 157. A pledge of negotiable paper is not valid against third parties without transfer from debtor to creditor; 2 La. 387; 9 U. S. 467, 496.

Pledge is distinguished from mortgage because the essential feature of pledge is transfer of possession, while the essential feature of mortgage is transfer of title; 96 U. S. 467 (see MORTGAGE). The same distinction exists at the civil law between *pignus* and *hypotheca*; Story, Bailm. § 286. In modern transactions title is often transferred under a pledge, but this arises from the nature of the collateral security, and is not a necessity of the relation. In a mortgage, at common law, the property on non-payment of the debt passes wholly to the mortgagee. In a pledge, the property is sold, and only so much of the proceeds as will pay his debt passes to the pledgee. A mortgage is a conditional conveyance of property, which becomes absolute unless redeemed at a specified time. A pledge is not strictly a conveyance at all, nor need any day of redemption be appointed for it. A mortgagee can sell and deliver the thing mortgaged, subject only to the right of redemption. A pledgee cannot sell and deliver the thing pledged until the debt is due and payment denied (though he can assign his contract, and with it the collateral security, or pledge).

Whether a particular contract be held a pledge or a mortgage is often a question of importance, and the courts hold it to be whichever seems best to effectuate the in-

tention of the parties without regard to the language employed; 9 Wend. 80; 47 Minn. 437; 8 So. Dak. 570; leaning, however, to pledge rather than mortgage as ordinarily more favorable to the debtor; 3 Tex. 119; 2 Cow. 324.

Subject of pledge. Any personal property capable of delivery or transfer may be pledged, except for the peculiar rules of maritime law which are applicable to shipping, and except, also, that on the ground of public policy the common law (apart from statutory prohibitions which are frequent) does not permit the pay and emoluments of officers and soldiers to be pledged; 1 H. Bla. 627; 4 Term 248. Hence, probably, a fishing bounty could not be pledged, nor any form of government pension or bounty given for the personal benefit of the donee.

Not only goods and chattels and money, but also negotiable paper, may be put in pledge; 3 Pa. 381; 25 Minn. 202; 82 Ill. 584; 22 Gratt. 262. So may choses in action, patent rights, coupon bonds, and manuscripts of various sorts; 2 Taunt. 268; 15 Mass. 380, 534; 2 Blackf. 198; 7 Me. 28; 4 Den. 227; 2 N. Y. 443; 1 Stockt. 667. So may bonds secured by a mortgage on personal property and corporate franchises; 50 N. H. 57; and coupon bonds; 104 U. S. 505; 9 N. J. Eq. 667; and chattel mortgages of every description; and policies of life insurance; 4 Colo. 138; 13 Fed. Rep. 803. Even a lease may be taken in pledge; 8 Cal. 145; L. R. 10 Eq. 92; for leases are but chattels real; or a mortgage of real estate, which, before foreclosure, is now to be ranked with personal property; 9 Bosw. 322. Incorporeal things could be pledged immediately probably, under the civil law, and so in the Scotch law, or, at all events, by assignment; 1 Domat b. 3, tit. 1, § 1; Pothier, *de Naut.* n. 6; 2 Bell, Com. 23. In the civil law, property of which the pledgor had neither present possession nor title could be pledged,—though this was rather a contract for pledge, called a *hypothecation*. The pledge became complete when the property was acquired by the pledgor. The same rule holds in our law, where a hypothecary contract gives a lien which attaches when the property is vested; 1 Hare 549; 13 Pick. 175; 54 N. Y. 18; 21 Me. 86; 16 Conn. 276; 60 id. 463; Daves 199. And it has been held that a pledge may be made to secure an obligation not yet risen into existence; 12 La. An. 529. In an agreement to pledge a vessel not then completed, the intent of the parties governs in determining when the property passes; 8 Pick. 236; 24 E. L. & E. 220.

Buying and selling through a broker on deposit of a "margin" with him is held in New York to create the relation of pledgor and pledgee; so that, on the pledgor's failure to keep his "margin" good, the pledgee or broker cannot sell the stock, except upon the pledge formalities, for repayment of his advances and commissions; 41 N. Y. 235; and the rule has been adopted in other states; 119 Ill. 554; 63 Conn. 198.

Delivery of possession is essential to a pledge. Unless the pledgee take and retain possession there is no pledge; 96 U. S. 467; 133 id. 243; 37 Me. 543; 167 Mass. 322; 86 Md. 392; 30 W. Va. 586; 48 La. Ann. 488. If possession be given to a third person for the pledgee such person must know of the trust and accept the obligation it imposes; 46 La. Ann. 1036. But a constructive delivery is all that is required; that is, such delivery as the nature or situation of the goods admits. Hence goods in transit or in store will pass by transfer of the bill of lading or warehouse receipt; 8 How. U. S. 384; 86 Ky. 176; 132 N. Y. 41; 133 Mass. 154; 13 Wash. 645; 29 S. E. Rep. (Ga.) 752; 44 S. W. Rep. (Tex.) 572. A change of the location of bulky articles is not in all cases necessary, but it is sufficient if the best means available to give notice of the change of possession are made use of; 147 Pa. 49; such as posting signs on, or marking, the goods; 17 Nev. 401; or appointing an agent to take charge, which agent may be an employee of the pledgor; 13 Pick. 76; 24

Minn. 423. Delivery of a larger quantity than the amount pledged with the right in pledgee to select the pledge, is good; 14 Pick. 497; 2 Gray 195; 2 N. Y. 258; and so where the pledgee is put and kept in possession of a quantity in excess of the pledged amount, allowing the pledgor to add to, or subtract from, the mass, but maintaining the quantity of the pledge, the pledge is good; 81 Fed. Rep. 439. But there cannot be a valid pledge of a portion of a mass, there being no segregation, and the pledgor retaining the whole; 15 Pa. 618; 63 Me. 459. When goods are in the hands of an agent of the pledgor an order on him to hold for the use of the pledgee, accepted by him, constitutes a delivery; 42 W. Va. 156.

In the case of commercial paper, stocks, bonds, and securities, which together constitute by far the most important division of pledges, or collateral securities, and of choses in action, delivery of possession is essential, but to make the delivery effective assignment is necessary, and assignment is transfer of title. As both title and possession are transferred, the distinction between mortgage and pledge ceases to be of much practical importance—the title to the collateral depends not on the principal obligation, but on the mode of transfer; 65 Fed. Rep. (C. C. A.) 643. But there is a distinction between the position of the pledgee in relation to the pledgor and in relation to third persons. His position cannot be described as simply that of a trustee, because he holds the collateral primarily for his own benefit, which affects his relation to the pledgee; 174 Pa. 529. So far as the pledgor is concerned the question of the title of the pledgee is determined by the intention of the parties; as to third parties he is practically owner. Thus a pledgee of stock may transfer it to his own name; 82 Tex. 368; though this is not necessary; 43 S. W. Rep. (Tex.) 896; and so far as the corporation is concerned he is the owner of it; 149 Pa. 363. The legal title to a pledged note or chose in action is in him; 36 Fla. 619; 96 Ga. 445; 39 So. West. Rep. (Tex.) 1002. He occupies the position of a *bona fide* holder for value, except when the pledge is for an existing debt; 112 Ala. 228; and though an assignee of a pledgee have notice of equities, he is not bound by them if his assignor, the pledgee, had not; 75 Fed. Rep. (C. C. A.) 433. His title to an accommodation note is good, notwithstanding equities between maker and payee; 15 S. E. Rep. (So. Car.) 490; and he has the rights of a *bona fide* holder against the corporation, when the collateral is a certificate of stock which proves to have been fraudulently issued; 137 N. Y. 231. See *Stock*.

He is bound by anything which should amount to notice that the pledgor is without authority to pledge; 181 N. Y. 595; 185 Pa. 476; 5 Wash. 792; 99 Ala. 130; 52 Fed. Rep. 513; 20 Can. S. C. R. 481. But in dealing with one in possession of the securities and having the apparent right to dispose of them he will be protected, though the pledge be a fraud on the real owner; 113 Ala. 372. Of course if the true owner has been deprived of possession by what amounts to embezzlement he can recover from the pledgee; 168 Mass. 578. And a pledgee from one who has no authority either to sell or pledge acquires no lien on the property as against the true owner; 28 So. East. Rep. (W. Va.) 740. As holder of a note to which there is a valid defence against the payee he is protected, but only to the extent of his interest, i. e. to the amount which he has advanced; 88 Tex. 653. See 41 Neb. 754.

Factors and Agents. A factor cannot, at common law, pledge his principal's goods; and the principal may recover them from the pledgee's hands; 6 Maule & S. 1; 2 Br. & B. 639; 4 B. & C. 5; [1893] 1 Q. B. 62; 1 M'Cord 1; 6 Metc. 68; 20 Johns. 421; 4 Hen. & M. 432; 18 Mo. 147, 191; 11 How. 209, 226; 52 Fed. Rep. 513; and this is so whether entrusted with the goods themselves or with the symbol of them, as a bill of lading; 120 U. S. 20. But the Factors' Acts in England, to remedy the intolerable

condition which would exist if an unknown owner were permitted to repudiate transactions of a factor have enacted that a pledge by a factor having a power of sale shall be valid. Similar acts have been passed in many of the States. See *AGENTS; FACTOR; FACTORS' ACTS*.

Co-Pledgees. A pledgee may hold a pledge for another pledgee also, and it will be a good pledge to both; 43 La. Ann. 1049. If the pledge be not large enough for both debts after sale, and no other arrangement be made, the prior pledgee will have the whole of his debt paid before any part of the proceeds is applied to the subsequent pledge. If there is no priority of time, they will divide ratably. But an agreement between the parties will always determine the right of two or more pledgees; 12 Mass. 321. Where possession is given to one of three pledgees, to hold for all three the other two have a constructive possession, which is equally good, for the purpose of sharing, with an actual possession. Hence the mere manual possession of one pledge will not give a right to discharge the whole debt of the holder and a part only of that of his co-pledgees. So, by the rule of constructive possession, if the holder should lose the pledge by his own negligence, he would be liable to his co-bailees out of actual possession, as well as to his bailor.

Substituted collateral is held on the same terms as that originally pledged, the surrender of that given up being sufficient consideration for the new deposit; 143 Ill. 598; 132 Mo. 492; 67 Fed. Rep. (C. C. A.) 469. Collateral deposited on a demand by the pledgee for additional "margin" would probably be held to be security given for an existing debt. The point does not appear to have been decided. When the pledgee changes the form of the collateral he continues to hold under the terms of the pledge, e. g. where he forecloses a mortgage and buys in the land; 87 Ga. 339. See 114 Cal. 126; 124 Mass. 242; 86 N. Y. 176; 159 Ill. 416.

Other debts. A pledge cannot, in general, be held for any other debt than that which it was given to secure, except on the special agreement and consent of the parties; 6 Ves. 236; 83 Tex. 545; 153 N. Y. 490; 154 Mass. 359; 33 Atl. Rep. (R. I.) 370. (The civil and Scotch law are otherwise; 2 Bell, Com. 22.) Unless the intention is clear to the contrary it will be held that this special agreement applies only to subsequent debts; 77 Ind. 423; 52 N. J. Eq. 188; and the court was equally divided where a custom of brokers was set up to justify the application to existing debts; 94 Va. 686. Where a judgment has been paid the parties may lawfully agree that it shall remain as collateral for a new loan made, or to be made; 161 Pa. 469. After his debt is paid the pledgee may continue to hold the pledge as security for another creditor; 47 La. Ann. 800.

The renewal of the note or obligation of pledge does not affect the pledgee's rights in regard to the collaterals, it is a mere prolongation of the original contract; 10 U. S. App. 415; *Colebrooke, Collat. Secur.* § 14.

Assignment by the pledgee is valid, in the absence of an agreement to the contrary, and carries with it all the collaterals pledged as security. The pledgor is not injured thereby, his right to redeem remaining unimpaired; 99 Mich. 121; 43 Neb. 489; 19 Colo. 149. The pledgor may sell or transfer his right to a third party, who may bring trover against the pledgee if the latter, after tender of the amount of the debt, refuse to deliver the pledge; 9 Cow. 52; 13 M. & W. 430; L. R. 1 Q. B. 585; 73 Pa. 153; 73 Ill. 449.

Conversion. If the pledgee assign the debt without the collateral he loses his lien on the latter, and the pledgor can recover it. If he assign the collateral, except by exercising whatever right of sale he has under the pledge, he is liable to the pledgor, who has an immediate right of action, without tendering the amount due, for the conversion, though the defendant can off-

set the debt due him; 69 Hun 311. If he hold negotiable paper he has no right to sell it, but should wait until its maturity and then collect it; 25 Minn. 202; 82 Ill. 584; 22 Grat. 262; 16 N. Y. 392; but a court may under certain circumstances order a judicial sale of it; 57 Minn. 341. See 164 Pa. 95; 89 Wis. 444; 55 N. J. L. 296; 79 Md. 41. Treating the pledge as his own property in disregard of his obligation to the pledgor is, of course, a conversion; 41 N. Y. Sup. 451.

Shares of stock have no individuality, no earmarks. The certificates are merely evidence of ownership, muniments of title, like title deeds. Therefore a pledgee of stocks need not preserve a careful separation of certificates connected with each transaction, but complies with his obligation by holding at all times a sufficient number of shares to answer the pledge when called on; 11 Fed. Rep. 115; 82 Tex. 368. The right to re-pledge for his own debt was not enjoyed by a common-law pledgee, but where a custom of brokers justifies re-pledging securities of customers it is not unlawful; 63 Conn. 198; [1893] 2 Ch. Div. 120. No usage will justify such re-pledging of the collateral as to put it out of the power of the pledgee to return it on payment of his debt; that would be to destroy the contract; 78 Md. 475. If a broker re-hypothecate for a larger amount than the pledgor's debt to him, for his own benefit, he is guilty of conversion; 17 App. Div. (N. Y.) 329. See, as to pledgees of shares, 12 L. R. A. 781.

Re-delivery to pledgee. Possession is of the very essence of the pledge, and if possession be re-delivered by the pledgee, or with his consent, without more, the pledge is extinguished. The exceptions to the rule are where the pledgor holds as the pledgee's agent, or where the pledge is re-delivered for a temporary purpose only, e. g. for sale, or for collection or suit by the pledgor; 96 U. S. 478; 127 *id.* 532; [1895] App. Cas. 56; 47 La. Ann. 742; 42 So. West. Rep. (Tenn.) 698; 60 Mo. App. 83; 53 Minn. 327. Such possession by the pledgor will not defeat the pledge.

Property. The pledgee has at common law a special property in the pledge, and is entitled to the exclusive possession of it during the time and for the objects for which it is pledged. If a wrong-doer take the pledge from him, he is not thereby ousted from his right. His special property is enough for him to support replevin or trover against the wrong-doer. He has, moreover, a right of action, because he is responsible to his pledgor for proper custody of the bailment. The pledgor, also, may have his action against the wrong-doer resting it on the ground of his general property. A judgment for either pledgor or pledgee is a bar against a similar action by the other; 2 Bla. Com. 395; 1 B. & Ald. 59; 5 Binn. 457. See 15 Conn. 302; 9 Gill 7; 13 Me. 436; 13 Vt. 504.

The pledgee may bring replevin or trover against the pledgor if the latter remove the pledge before paying the debt and thus injure the pledgee's rights, on the ground that the owner has parted with his absolute right of disposing of the chattel until he has redeemed it from its state of pledge; 2 Taunt. 268; 1 Sandf. 203; 22 N. H. 196; 11 N. Y. 150; 2 M'Cord 126. He recovers only the value of his special property as against the pledgor, or one who derives title from him; 4 Barb. 491; 13 Ill. 465; but the value of the whole property as against a stranger, and the balance beyond the special property, he holds for the owner; 15 Conn. 302. So if the owner brings the action and recovers the whole damages, including those for deprivation of possession, it must be with the consent of the pledgee.

A creditor of the pledgor can only take his interest, and must pay the debt before securing the pledge. It is now settled that the pledgor's general property in the pledge may be sold on execution, and the purchaser or assignee of the pledgor succeeds to the pledgor's rights and may himself redeem. At common law, a

pledge could not be taken in execution; 1 Ves. 278; 3 Watts 258; 17 Pick. 85; 1 Gray 254; 27 Md. 354; 21 N. H. 73. On an extent the king takes a pawn on paying the pawnee's debt; 2 Chit. Prerog. 285.

Where securities have been pledged by assignment and delivery it would seem that the property vests in the pledgee, who in suit upon them can recover their full value; 73 N. W. Rep. (Wis.) 872. It has been held, however, that the pledgor does not entirely lose his right to protect his interests and can proceed against the maker of notes transferred by him as collateral; 47 La. Ann. 1230; and that when the pledgee refuses to proceed for collection he can proceed in equity against the pledgee and the maker; 21 So. Rep. (Miss.) 970. A bill which discloses that complainant has pledged the stock for which he sues is not demurrable on the ground that it fails to show payment in full of the debt for which the stock was pledged, because a pledgor always has an interest sufficient to enable him to maintain a suit; 77 Fed. Rep. 779. Where a pledgee of securities has wrongfully re-hypothecated them, and the owner secures them by paying the debt for which they were re-hypothecated, a judgment recovered by the pledgor against the original pledgee for the conversion does not vest the title to the securities in the pledgee; 78 Fed. Rep. 216.

Ordinary care. The pledgee is bound to take ordinary care of the pledge, and is liable only for neglect of such care, the bailment being for the mutual benefit of the parties; 41 Minn. 46; 119 N. Y. 263; 99 Cal. 234. Where he is to do work upon the pledge and incur expenditure he must use reasonable diligence to secure the best net results, and account, showing that expenses for which allowance is claimed were reasonable and necessary; 55 Minn. 14; where he is to sell, paying himself out of the proceeds, he will be liable for carelessness in properly keeping the pledge, and for failing to sell until the market has fallen; 53 Pac. Rep. (Wash.) 229. If the pledge is lost, and the pledgee has not failed to exercise ordinary care, he may still recover his debt. Such losses often result from casualty, superior force, or intrinsic defect against which a man of ordinary prudence would not have effectually guarded himself. If a pledgor find it necessary to employ an agent, and exercise ordinary care in the selection, he will not be liable for the latter's neglect or misconduct; 1 La. An. 344; 10 B. Monr. 239; 4 Ind. 425; 8 N. H. 66; 6 Cal. 643; 68 N. W. Rep. (So. Dak.) 735. Loss or depreciation in value of the thing pledged, through negligence of the pledgee, does not operate to extinguish *pro tanto* the debt secured; 41 Minn. 46; but the pledgee is liable to the pledgor for the depreciation in value of the property pledged after a tender of the amount due and a refusal of the pledgee to deliver; 74 Cal. 250.

Loss by theft is *prima facie* evidence of a want of ordinary care, and the bailee must rebut the presumption. The facts in each case regulate the liability. Theft is only evidence, in short, and not absolute presumption, of negligence. Perhaps the only safe rule is that, where the pledgee pleads loss by theft as ground for not performing his duty, to excuse himself he must show that the theft could not have been prevented by ordinary care on his part. If the bailor should assert in his declaration that the pledge was lost by the bailee's fault, he would be compelled to prove the charge as laid.

The holder of collateral security, by accepting it, binds himself to use reasonable diligence in protecting it; 71 Fed. Rep. (C. C. A.) 113. Thus, by negligently releasing the indorser he becomes chargeable with the amount of a note; 50 Fed. Rep. 798; if he refuse to sue on a note the pledgor may file a bill to have the note collected and credited on the debt; 21 So. Rep. (Miss.) 970; by failure to use due diligence to collect accounts assigned he becomes responsible for the resulting losses; 87 So. Car. 200; he must account

for the real value of an insurance policy surrendered to the company for its cash value without notice to the pledgor; 37 Atl. Rep. (R. I.) 8. But as assignee of a policy of life insurance he is not obliged to pay premiums unless he has engaged to do so; 72 Hun 194; though authorized to sell collateral in the event of its depreciation he is not bound to do so, nor liable if he fails; 15 App. Div. (N. Y.) 103; by taking notes secured on property he incurs no obligation to sue for the property, and if he does so, at the request of the pledgor, he incurs no obligation to take charge of it, and advance expenses upon it; 97 Tenn. 308; when only required to collect a sufficient sum on a note to pay the debt, and then to turn it over to the pledgor, after collecting such sum, he is not liable for failure to take prompt steps to collect the residue at maturity; 44 So. West. Rep. (Tenn.) 304. But he is responsible as bailee after, as well as before, the maturity of the debt; 49 Neb. 280.

Pledgee's expenses. Whatever reasonable expense is necessarily incurred by the pledgee in keeping and caring for the property pledged, and protecting it against liens and taxes and assessments, and asserting title to it, or rendering it available, is a fair charge against the property pledged; 147 Ill. 570; 173 Pa. 633; 116 Cal. 9; 67 Fed. Rep. (C. C. A.) 837. For any unusual care he may get compensation from the pledgor, if it were not contemplated by the parties or is implied in the nature of the bailment; Ld. Raym. 909; 2 Salk. 522; 1 Pars. Contr. 593.

Use. The reasonable use of a pledge is allowed to a pledgee, according to Lord Holt, Sir Wm. Jones, and Story, provided it be of no injury or peril to the bailment. The reason given by Story is precise, namely, that where use of the pledge is beneficial to it, or cannot depreciate it, the consent of the pledgor to such use may be fairly presumed; but not otherwise. Still, the word *peril* is somewhat broad. If the pawn be in its nature a charge upon the pawnee,—as a horse or a cow,—he may use it, moderately, by way of recompense. The pawnee is answerable in damages for an injury happening while he is using the pawn. Still, though he use it tortiously, he is only answerable by action. His pledgee's lien is not thereby forfeited; 4 Watts 414. A pledgee can exercise a horse, but not loan it for hire. The rule is, that if he derive any profits from the pledge they must be applied to the debt; 2 Murph. 111. A sewing machine that is pledged cannot be used; 72 Ill. 353.

Redemption. The pledgor may redeem at any time until his right to do so has been foreclosed by judicial decree, or by sale after notice. He has his whole lifetime in which to redeem, and the right survives to his representatives; 3 Mo. 816; 1 Cal. 290. Failure to pay the debt at maturity works no forfeiture; 10 Utah 3. If the pledgee fail to deliver on tender the pledgor may maintain trover, or if special ground be shown may proceed in equity; 113 Ala. 372.

Remedies of pledgee. The contract of pledge is *security* for some debt or engagement, that is to say it is a secondary or subordinate contract, and the pledgee may enforce the primary contract, or may proceed upon any one of several collateral securities, or may proceed upon all together, unless restricted by his engagement with the pledgor, though he can have but one satisfaction of the debt. It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor; 92 U. S. 613; 184 Pa. 318; 164 Mass. 318; 27 Abb. N. C. 278; 56 Ark. 105; 76 Fed. Rep. 86; 85 id. (C. C. A.) 536. Even where the pledgee wrongfully claims that he is the owner of the goods, the pledgor cannot recover them without a tender of the debt; 67 L. T. 642; and the levy of an attachment by the pledgee on the pledge in the hands of the pledge-holder is not a waiver of the pledge; 59 Fed. Rep. 249; 34 So. West. Rep. (Ky.) 232. But one

personal obligation cannot constitute collateral security for another obligation of the same debtor, hence if he hold bonds of a corporation as collateral for its note he cannot, if the pledgor become insolvent, claim both on the notes and the bonds; 3 Wyo. 803; 67 Conn. 324.

Formerly on default the pledgee had no power to realize upon his pledge, in the absence of agreement, except by securing a judicial decree; Glanv. lib. x. c. 6; 5 Bligh N. s. 136; 2 Johns. Ch. 100; 8 Ill. 423; 3 Tex. 119; 22 Pick. 40; 2 N. Y. 443. While this might in some cases still be necessary (see 57 Minn. 341), it is now generally conceded that on default the pledgee may sell after demand for payment and reasonable notice to pledgor. The pledge must be sold at public auction, and if it be divisible, only enough must be sold to pay the debt.

Generally an agreement is entered into when the pledge is made which provides what remedies the pledgee shall have in case of default, and the agreement of the parties will be sustained if not fraudulent or contrary to public policy; 8 Cal. 151; 52 Kan. 195; 49 Neb. 280. Thus the pledgor may waive notice; 133 N. Y. 660; or authorize the pledgee to sell at public or private sale without advertisement or notice, at his discretion; 84 Fed. Rep. 557; but the sale must be in good faith; 80 id. 665. The fact that the price realized was small will not affect the purchaser's title; 56 id. 164. But a merely colorable and pretended sale of the pledged property by the pledgee does not affect the rights of the pledgor as against one not standing in the position of a *bona fide* purchaser; 41 Minn. 146. The pledgee may in anticipation of default make a valid contract to sell the collateral when the default occurs; 162 Mass. 527. But a stipulation for a forfeiture to pledgee in case of default is void; 84 Hun 496; and a court of equity will scrutinize carefully an agreement for transfer of ownership, and set it aside if it appear to have been obtained under a harsh contract, brought about by the position of advantage occupied by the pledgee; 79 Fed. Rep. 522.

In the absence of an agreement permitting it, the pledgee cannot buy the pledge; 84 Me. 72; 127 U. S. 532; see 81 Fed. Rep. 450; though his purchase is voidable merely, at the election of the pledgor, and not void; 54 Fed. Rep. 759; 85 id. (C. C. A.) 539. But on procuring a decree of foreclosure in a proceeding in equity to which he has made the pledgor a party, he can sell, and buy in, taking an indefeasible title; 145 Ill. 163.

When corporate bonds, pledged to secure claims against the company, are sold at public auction and bought in by the pledgee the latter is entitled to be paid the full value of the bonds, and not merely the amount for which they were pledged; 86 Fed. Rep. 975.

Consult Wigmore, The Pledge Idea, 10 Harv. L. Rev. 1, 339; Jones, Pledges; Colebrooke, Collateral Securities; Story, Bailments; Schouler, Bailments. See MORTGAGE; SALE; CHATTEL MORTGAGE; HYPOTHECATION; LIEN.

PLEDGEE. One to whom a thing is pledged.

PLEDGES. In Pleading. Those persons who became sureties for the plaintiff's prosecution of the suit. Their names were anciently appended at the foot of the declaration. In time it became purely a formal matter, because the plaintiff was no longer liable to be amerced for a false claim, and the fictitious persons John Doe and Richard Roe became the universal pledges, or they might be omitted altogether; 1 Tidd, Pr. 455; Archb. Civ. Pl. 171; or inserted at any time before judgment; 4 Johns. 90; they are now omitted.

PLEDGOR. The party who makes a pledge.

PLEGII DE RETORNO HABENDO. Pledges to return the subject of distress, should the right be determined against the party bringing the action of

replevin. 3 Steph. Com. 422, n.

PLEGIS ACQUIETANDIS, WRIT DE. The name of an ancient writ in the English law, which lies where a man becomes pledge or surety for another to pay a certain sum of money at a certain day; after the day, if the debtor does not pay the debt, and the surety be compelled to pay, he shall have this writ to compel the debtor to pay the same. Fitzh. N. B. 321.

PLENA FORISFACTURA. See FORISFACTURA.

PLENA PROBATIO. In Civil Law. A term used to signify full proof, in contradistinction to *semi-plena probatio*, which is not merely a suspicion, but such evidence as produces a reasonable belief though not complete evidence. Tait, Ev. 273; Code 4. 19. 5. etc.; 1 Greenl. Ev. § 119.

PLENARTY. In Ecclesiastical Law. Signifies that a benefice is full. See AVOIDANCE.

PLENARY. Full; complete. In the courts of admiralty, and in the English ecclesiastical courts, causes or suits in respect of the different course of proceedings in each are termed plenary or summary. Plenary, or full and formal, suits are those in which the proceedings must be full and formal; the term summary is applied to those causes where the proceedings are more succinct and less formal. 2 Chitty, Pr. 481.

PLENE ADMINISTRATIVIT (Lat. he has fully administered). In Pleading. A plea in bar entered by an executor or administrator, by which he affirms that he had not in his possession at the time of the commencement of the suit, nor has had any time since, any goods of the deceased to be administered; when the plaintiff replies that the defendant had goods, etc., in his possession at that time, and the parties join issue, the burden of the proof will be on the plaintiff. See 15 Johns. 323; 1 B. & Ald. 254; 11 Viner, Abr. 349; 12 id. 185; 3 Saund. (a) 815, n. 1; 6 Com. Dig. 311.

PLENE ADMINISTRATIVIT PRÆTER (Lat. he has fully administered except). In Pleading. A plea by which a defendant executor or administrator admits that there is a residue remaining in his hands unadministered.

PLENE COMPUTAVIT (Lat. he has fully accounted). In Pleading. A plea in an action of account render, by which the defendant avers that he has fully accounted. Bac. Abr. *Account* (E). This plea does not admit the liability of the defendant to account. 15 S. & R. 153.

PLENIPOTENTIARY. Possessing full powers: as, a minister plenipotentiary is one authorized fully to settle the matters connected with his mission, subject, however, to the ratification of the government by which he is authorized. See MINISTER.

PLENUM DOMINIUM (Lat.). The unlimited right which the owner has to use his property as he deems proper, without accountability to any one.

PLEVIN. A warrant, or assurance.

PLIGHT. An old English word, used sometimes for the estate with the habit and quality of the land. Co. Litt. 221. It extends to a rent-charge and to a possibility of dower. *Id.*: 1 Rolle, Abr. 447; Littl. § 289.

PLOUGH ALMS. The ancient payment of a penny to the church from every plough land. 1 Mon. Aug. 256.

PLOUGH-BOTE. An allowance made to a rural tenant of wood sufficient for ploughs, harrows, carts, and other instruments of husbandry.

PLOUGH-LAND. In Old English Law. An uncertain quantity of land. According to some opinions, it contains one hundred and twenty acres. Co. Litt. 69 a.

PLOUGH SILVER. Money formerly paid by some tenants in lieu of service to plough the lord's land.

PLOW ALMS. See PLOUGH ALMS.

PLUNDER. The capture of personal property on land by a public enemy, with a view of making it his own. The property so captured is called plunder. See, for a full discussion of the subject, 8 Fed. Rep. 246; 16 Pick. 9; CAPTURE; BOOTY; PRIZE.

PLUNDERAGE. In Maritime Law. The embezzlement of goods on board of a ship.

The rule of the maritime law in such cases is that the whole crew shall be responsible for the property thus embezzled, because there must be some negligence in finding out the depredator; Abb. Ship. 457; 3 Johns. 17; 1 Pet. Adm. 200, 239; 4 B. & P. 347.

PLURIES (Lat. many times). A writ issued subsequently to a first and second (alias) of the same kind, which have proved ineffectual. The name is given to it from the word *pluries* in the Latin form of the writ: "We command you, as we have often (*pluries*) commanded you before," which distinguishes it from those which have gone before. *Pluries* is variously translated, in the modern forms of writs, by "formerly," "more than once," "often." The next writ to the *pluries* is called the second *pluries*; and so on. 3 Sharsw. Bla. Com. 283; App. 15; Nat. Brev. 38.

PLURIS PETITIO. In Scotch Law. A demand of more than is due. Bell, Dict.

PLY. A hackney carriage plies for hire if it solicits passengers in a railway station. L. R. 6 Q. B. 351.

POACHING. Unlawfully entering land in night-time, armed, with intent to destroy game. 1 Russ. Crimes 469; 3 Steph. Comm. 11th ed. 20. This offence is punished in England by imprisonment for any period not exceeding three months with hard labor, and at the expiration of such period the party convicted is to be bound over by sureties for good behavior for one year, or in default thereof to be imprisoned for a further period of six months, or until such sureties be found. For a second offence, the offender is liable to an imprisonment of six months and then to be bound in sureties for two years. And for a third, he is guilty of a misdemeanor and liable to penal servitude or imprisonment at hard labor for not more than two years. By 25 & 26 Vict. c. 114, power is given to any constable in the highway to search any person he may have good cause to suspect of coming from any land where he shall have been unlawfully in search of game and to seize such game and to apply to some justice for a summons citing the offender to appear before two justices, by whom the party may, on conviction, be fined. See GAME LAWS.

POCKET JUDGMENT. A statute-merchant which was enforceable at any time after non-payment on the day assigned, without further proceedings.

POCKET SHERIFF. In English Law. A sheriff appointed by sole authority of the crown, not being one of the three nominated by the judges in the exchequer. 1 Sharsw. Bla. Com. 342.

POENA. Punishment. R. & L. Dict.

POENA CORPORALIS. Corporal punishment.

POENA PILLORALIS. Punishment of the pillory. Fleta, lib. 1, ch. 38, § 11.

POET LAUREATE. See LAUREATE.

POINDING. In Scotch Law. That diligence (process) affecting movable subjects by which their property is carried directly to the creditor. Poinding is real or personal. Erskine, Inst. 3. 6. 11.

POINDING, PERSONAL. Poinding of the goods belonging to the debtor, and of those goods only.

It may have for its warrant either letters of horning, containing a clause for poinding, and then it is executed by messengers: or precepts of poinding, granted by sheriffs, commissaries, etc., which are executed by their proper officers. Erskine, Inst. 3. 6. 11. This process is somewhat similar to distress.

POINDING, REAL. POINDING OF THE GROUND. Though it be properly a diligence, this is generally considered by lawyers as a species of real action, and is so called to distinguish it from personal poinding, which is founded merely on an obligation to pay.

Every *debitum fundi*, whether legal or conventional, is a foundation for this action. It is, therefore, competent to all creditors in debts which make a real burden on lands. As it proceeds on a real right, it may be directed against all goods that can be found on the lands burdened; but goods brought upon the ground by strangers are not subject to this diligence. Even the goods of a tenant cannot be poinded for more than his term's rent. Erskine, Inst. 4. 1. 3.

POINT. In Practice. A proposition or question arising in a case.

It is the duty of a judge to charge the jury on every point of law properly arising out of the issue which is propounded to him by counsel. But where the conclusion of a point does not necessarily flow from the premise contained in the first part of it, it is not error for the court to refuse to affirm it; 182 Pa. 427.

POINT RESERVED. A point or question of law, which the court, not being fully satisfied how to decide, in the trial of a cause, rules in favor of the plaintiff, but subject to revision on a motion for a new trial. If, after argument, it be found to have been ruled correctly, the verdict is supported; if otherwise, it is set aside. Tr. & H. Pr. § 708. It must be a pure question of law; the facts on which it is based must appear on the record, distinctly stated; and it must be a point which is decisive of the case. The verdict must be in favor of the plaintiff, and the defendant then moves for a new trial and judgment *non obstante verdicto*. See NON OBSTANTE VEREDICTO.

POINTS. Marks in writing and in print, to denote the stops that ought to be made in reading, and to point out the sense.

Points are not usually put in legislative acts or in deeds; Eunom. Dial. 2, § 33, p. 239; yet in construing such acts or instruments, the courts must read them with such stops as will give effect to the whole; 4 Term 65.

The points are—the comma, the semicolon, the colon, the full point, the point of interrogation, and the point of exclamation. Barrington, Stat. 294, n. See PUNCTUATION.

Statements of fact and of the law applicable thereto submitted to a trial judge with a request that he so charge the jury. See BRIEF; PAPER BOOK; CHARGE; INSTRUCTION.

POISON. In Medical Jurisprudence. A substance of definite chemical composition, which, when taken into the living organism, is capable of causing impairment or cessation of function. Blyth, Poisons.

The history of poisoning, and many remarkable early instances of a wide-spread use of poisons, are recorded in works on medical jurisprudence. See these, and also, especially, Taylor, Poisons; Archb. Cr. Pract. Waterman's ed. 940; Whart. & Stillé, Med. Jur.; 1 Beekman, Hist. Jur. 74. The classification proposed by Mr. Taylor (Med. Jur. § 71, 74, 78) is as follows:—

IRRITANTS. { MINERAL { Non-METALLIC { Acids, Alkalies and their Salts. Metalloids. METALLIC { Arsenic).
 VEGETABLE—Crotalus Oil.
 ANIMAL (Cantharides).
 CEREBRAL (Morphia).
 NARCOTICS. SPINAL (Strychnia).
 CEREBRO-SPINAL (Conia, Aconitina).
 GASEOUS. (Carbon Monoxide, Chlorine).

Irritant poisons, when taken in ordinary doses, occasion speedily violent vomiting and purging, preceded, accompanied, or followed by intense pain in the abdomen, commencing in the region of the stomach. The corrosive poisons, as distinguished from those in a more limited sense termed irritant, generally produce their results more speedily, and give chemical indications; but every corrosive poison acts as an irritant in the sense here adopted.

Narcotic poisons act chiefly on the brain or spinal marrow. Either immediately or some time after the poison has been swallowed, the patient suffers from headache, giddiness, paralysis, stupor, delirium, insensibility, and, in some instances, convulsions.

The effects of one class are, however, sometimes produced by the other,—more commonly as secondary, but sometimes even as primary symptoms.

The evidence of poisoning as derived from symptoms is to be looked for chiefly in the suddenness of their occurrence; this is perhaps the most reliable of all evidence derived from symptoms in cases of criminal poisoning; see Taylor, Pois. 107; Christison, Pois. 42; though none of this class of evidence can be considered as furnishing anything better than a high degree of probability: *the regularity of their increase*; this feature is not universal, and exists in many diseases; *uniformity in their nature*; this is true in the case of comparatively few poisons; *the symptoms begin soon after a meal*; but sleep, the manner of administration, or certain diseases, may affect this rule in the case of some poisons; *when several partake at the same time of the same poisoned food, all suffer from similar symptoms*; 2 Park. C. C. 285; Taylor, Pois. 118; *the symptoms first appearing while the body is in a state of perfect health*; Archb. Cr. Pl. Waterman ed. 948.

Appearances which present themselves on post-mortem examinations are of importance in regard to some classes of irritant poisons; see The Hersey Case, Mass. 1861; Palmer's Case, Taylor, Poisons 697; 17 Am. L. Reg. N. S. 145; but many poisons leave no traces which can be so discovered.

Chemical analysis often results in important evidence, by discovering the presence of poison, which must then be accounted for; but a failure to detect it by no means proves that it has not been given. Christison, Poisons 61, 62.

The evidence derived from circumstances differs in nothing in principle from that in case of commission of other crimes.

Homicide by poisoning is generally either accidental, so as not to amount to murder, or deliberate; yet it has been held that there may be a verdict of murder in the second degree under an indictment for poisoning; 19 Conn. 388. The doctrine of principal and accessory is also modified to some extent in its application to cases of poisoning; 2 Mood. Cr. Cas. 120; 9 C. & P. 354; 9 Co. 81. To constitute an administering of poison, it is not necessary that there should be a delivery by hand; 4 C. & P. 356; 1 Bish. Cr. L. § 651.

Intent to kill need not be specifically alleged in an indictment for murder by poison; 1 East, Pl. Cr. 346; 3 Cox. C. C. 300; 8 C. & P. 418; 2 Allen 178. Where a wholesale dealer supplied a poisonous drug in place of a harmless drug ordered, he was held liable in damages to the customer who bought it from the retailer and suffered injury from taking it; 6 N. Y. 397.

Many of the states have statutes inflicting severe penalties upon the administering of poisons with a malicious intent. See Archb. Cr. Pr. Waterman's ed. 942; 86 Va.

223.

Practicing physicians, who are graduates of a medical college, are competent to testify as experts on the subject of arsenical poisoning, although it is not shown that they have had actual experience in poison cases; 143 Ill. 571.

Consult Christison, Taylor, Blyth, Poisons; Beck, Taylor, Wharton & Stillé, Withth. & Beck, Clevenger; Med. Jur.; Archbold, Crim. Fract. Waterman's ed.; Russell, Crimes; Wharton, Homicide. See DRUGGIST. As to gas poison, see 15 Med. Leg. J. 276.

POLE. A measure of length, equal to five yards and a half. See MEASURE.

POLES. The extended use of poles on highways in connection with electric railways, telegraph, and telephone companies, has raised many interesting questions in connection with the right to erect and maintain them and the relation thereto of abutting owners and municipal corporations. The erection of such poles in a street or on the sidewalk is an obstruction of the highway, and like all other obstructions, is only justified when done under authority of law; 31 Hun 596; Keasbey, Electric Wires. Where authorized, they must be erected in such manner as to cause the least interference with public travel and this condition is implied even if it were not expressed in the authority given; *id.*; in a proper case it is left to the jury to determine the question of damage; 15 N. J. L. J. 50; 38 Fed. Rep. 320; see 77 Wis. 589; but the rule of reasonable care does not require the company to provide against all contingencies of accident or inconvenience; 36 Fed. Rep. 164. It has been justly said that the question of damage arising from the obstruction of a highway by poles, depends largely on the extent of the right of the public which is under the control of the legislature, and subject to the exercise of its discretion in legalizing new uses of the highway; Keasbey, Electric Wires 157.

The question most discussed with respect to poles, has been whether their erection is a legitimate use of the street, and whether it imposes a new servitude on the land of the abutting owner. A recent writer holds the view that the substitution of electricity for horse power is not a change of use; Keasbey, Electric Wires 106; but a different view was taken by the New Jersey supreme court; 15 N. J. L. J. 39, 45.

Poles have been permitted to stand as being a proper use of the street; 3 Ohio C. C. 425; 22 Wkly. L. Bul. 67; 16 R. I. 668; 85 Mich. 634; 47 *id.* 393; 47 N. J. Eq. 280; 59 N. J. L. 101; 139 Pa. 419; 84 Mich. 634.

The conclusion reached from a detailed examination of the cases by Mr. Keasbey in his work on the subject, is that whilst an electric railway may have some additional elements of damage and obstruction, possibly the solution of the difficulty is to be found in the suggestion of Campbell, C. J., in the case last cited, that compensation should be recoverable for damage actually sustained. In that case poles and wires prevented the extinguishment of a fire, but it was held that the company owning them was not liable to one who had erected buildings alongside of them and permitted a tenant to use one of the wires and had never made any objection to them. The poles are held to be an additional servitude on country roads; 86 Va. 696; 71 Hun 533; 107 Ill. 507; and on a street where the fee was in the abutting owner and there were direct and immediate injuries suffered; 74 Md. 36. In Minnesota the court was evenly divided on the subject; 37 Minn. 347; and in Massachusetts even the owner of the fee was held entitled to no compensation; 136 Mass. 75.

Where the right to erect poles is recognized, the courts will regulate strictly the manner in which the privilege is used. An injunction has been granted against the erection of broken or unsightly poles; 12 Mo. App. 494; so the poles must be set with as little damage as possible and the cutting off trees to clear the way for them will be

a ground for recovering damages; 24 L. R. A. 724; 16 Lea 456; 39 La. Ann. 996. See HIGHWAYS; ELECTRIC LIGHT; WIRES; RAILROADS; LICENSE; TELEGRAPH.

POLICE. That species of superintendence by magistrates which has principally for its object the maintenance of public tranquillity among the citizens. The officers who are appointed for this purpose are also called the police. See 2 Cent. L. J. 353.

The word *police* has three significations. The first relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc. The second has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered over to the justice of the country. The third comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.

Police has also been divided into *administrative police*, which has for its object to maintain constantly public order in every part of the general administration; and *judiciary police*, which is intended principally to prevent crimes by punishing the criminals. Its object is to punish crimes which the administrative police has not been able to prevent.

See PENSION.

POLICE JURY. In Louisiana. A name given to certain officers who collectively exercise jurisdiction in certain cases of police: as, levying taxes, regulating roads, etc.

POLICE POWER. The powers of government inherent in every sovereignty. 5 How. 533.

The power vested in the legislature to make such laws as they shall judge to be for the good of the commonwealth and its subjects. 7 Cush. 814. It is much easier to realize the instances and sources of this power than to mark its boundaries or prescribe limits to its exercise; *id.*

The power to govern men and things, extending to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. 27 Vt. 149.

The authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest. 109 N. C. 279; 117 N. Y. 14.

The police power of a State embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public health, morals or safety; it is not confined to the suppression of what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the State, 204 U. S. 311.

The exercise of this power has been left with the individual states; 11 Bush 311; 123 U. S. 623; and embraces the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offences against itself, but also to establish for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent the conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with the right enjoyment of rights by others; Cooley, Const. Lim. 572.

Most of the law on this subject has been the growth of the nineteenth century and the latter half of it. The earliest instances of the exercise of this power were found when houses were destroyed to prevent the spread of fire. The right to take a man's property in such cases was called the law of overruling necessity. There are also some very early instances of sanitary legislation. An act of parliament in 1388 imposed a penalty for throwing animal filth or refuse into rivers, and one of 1489 prohibited the slaughtering of cattle in the

cities. Laws regulating wharfingers, millers, common carriers, innkeepers, chimney sweeps, auctioneers, ferry-keepers and drovers have been common for many centuries before the term was used.

Among former exercises of the police power which have become obsolete, may be mentioned laws restraining extravagance in dress, punishing heresy, interfering with the worship of particular churches or sects, and restraining speculation, or combinations to control a product and by withholding it, increase the price thereof; Tiedm. Pol. Pow. § 96 a; although in some of the states there are statutory provisions forbidding the cornering of grain, they are repetitions of old laws as to forestalling and engrossing; *id.*

This right must be clearly distinguished from the administration of criminal law and from police regulations and police authority, nor should it be confused with eminent domain, as has sometimes been done, or with the power of taxation. It is distinct from both of these. It is more despotic and broader in its action than the right of eminent domain, caring for the public health and morals of the community, restraining individuals from interfering with them, and when it is found necessary to take private property under the police power, no compensation need be given the owner unless expressly provided by statute; 7 Cush. 84; 11 Metc. 55; 81 Pa. 80; 101 U. S. 814; 69 Ga. 320; 78 Mo. 107; 17 Fed. Rep. 109; 50 Tex. 612. It is the application of the personal right or principle of self-preservation of the body politic; 18 N. Y. 578; to its exercises there are no limits except the restrictions contained in the written constitution; 1 Thayer, Const. L. 720.

The confusion of police power with the power of taxation usually arises in cases where the police power has affixed a penalty for a certain act, or required licenses for certain occupations to be taken out and the sum paid therefor. But this is in no sense taxation, but an attempt to levy a tax which might be open to the constitutional objection to lack of equality. Its admitted right to regulate includes the implied power to license or tax; 12 Wheat. 419; 5 Wall. 493; 92 U. S. 214; 109 *id.* 3; 113 *id.* 27; 140 *id.* 545. See LICENSE.

Each law relating to the police power involves the questions: First, is there a threatened danger? Second, does the regulation involve a constitutional right? Third, is the regulation reasonable? 66 N. W. Rep. (Mich.) 382. See 144 N. Y. 529; 145 *id.* 32.

The rights insured to private corporations by their charters and the manner of their exercises are subject to such new regulations as from time to time may be made by the state, but these regulations must not conflict with the charter, nor take from the corporation any of its essential rights and privileges; Cooley, Const. Lim. 718; 61 Mo. 24; 18 Conn. 53; 35 Wis. 425; 161 U. S. 695. A municipal corporation may regulate the speed of railroad trains within its limits; 67 Ill. 113; 79 Pa. 33 (but only in the streets and public grounds of the municipality; 29 N. J. L. 170); require the railroad to fence its tracks; 27 Vt. 156; regulate the grade of the railroad and prescribe how the railroads may cross each other and apportion expenses of making necessary crossings between the corporations owning the roads; 77 Pa. 173; 4 Allen 198; it may require the railroad company to abolish a grade crossing at its own expense; 151 U. S. 556; to repair and maintain a safe viaduct over a street in a populous city; C. B. & Q. R. Co. v. Nebraska, S. C. of U. S., not yet reported; regulate such crossings in a populous city; 170 *id.* 58; limit the charges by the railroad company; 118 *id.* 307; prevent extortion on their part by unreasonable charges, favoritism, or discrimination; 123 *id.* 174; forbid consolidation of competing lines; 161 *id.* 697; make the company liable for fires; 17 Sup. Ct. Rep. 248; require salaries and expenses of a state commission to be borne by the rail-

road corporations within the state; 142 U. S. 386; require locomotive engineers to be licensed after examination as to competency; 124 *id.* 265; and the examination of railroad employees for color blindness; 128 *id.* 96; regulate the speed of trains at highway and other crossings; 72 Ill. 235; require the bell to be rung or the whistle blown before crossing highways at grade, and flagmen to be stationed at dangerous crossings; 67 Ill. 37; impose a penalty on conductors for failing to cause their trains to stop five minutes at every station; 4 Tex. App. 545; require them to stop at county seats; 17 Sup. Ct. Rep. 627; direct the printing upon railroad tickets of any condition limiting the liability of a railroad company in type of a specified size, and provide for the redemption by the company of tickets sold but not used; 63 Ind. 552.

It may regulate insurance businesses and forbid unjust and oppressive conditions; 164 Pa. 306; and require returns from insurance companies; 153 U. S. 446; direct companies operating electric conductors to file maps and plans; 145 U. S. 175; forbid the running of freight trains on Sunday; 163 *id.* 299; require prompt delivery of telegraph messages; 183 U. S. 650. It may regulate the use of public highways and their alterations; Cooley, Const. Lim. 725; require the owners of urban property to construct and keep in repair sidewalks in front of it; 8 Mich. 309; 19 Ohio 418; 4 R. I. 290, 445; 36 Barb. 226; 16 Pick. 504; regulate bicycle riding on highways; 97 N. C. 477; control and regulate the use of navigable waters (subject to the commerce powers of congress); Cooley, Const. Lim. 729; prescribe the maximum charges of a business affected by the public interest; 69 Ill. 80; 94 U. S. 113; 153 U. S. 391; 143 *id.* 517; 118 Ind. 194, where a telephone company was held to be a business affected with a public interest; 164 U. S. 579; 154 *id.* 23. It may regulate plumbing; 51 N. E. Rep. (Ohio) 136.

In the exercise of its police power, a state may not invade the domain of the national government; 9 Wheat. 1; 7 How. 572; and the states may pass no laws conflicting with existing regulations by the federal government on the subjects entrusted to it; 95 U. S. 485; 133 *id.* 78; 135 *id.* 100. The power of congress to regulate commerce was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country; 161 U. S. 701; but since the range of a state's power comes very near to the field committed by the constitution to congress, it is the duty of courts to guard against any needless intrusion; 95 U. S. 465. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any power which the constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal constitution; Cooley, Const. Lim. 715. See 16 Wall. 36; 7 How. 233.

State quarantine laws, prohibiting the entry of persons or cargoes which might bring contagious diseases, are constitutional; and the national government also has jurisdiction in quarantine to prohibit improper immigrants and injurious traffic between the states; 118 U. S. 464; 107 U. S. 687; 141 U. S. 47. Cattle infected with pleuro-pneumonia, dangerous persons, Chinese, coolies, contract laborers, and rags may be kept out of the country; 118 U. S. 465; 130 *id.* 581; 140 *id.* 424; 149 *id.* 698; 169 *id.* 613; peach trees may be destroyed, when affected with peach yellows; 56 Conn. 216; adulteration of food prohibited; 64 N. H. 549; 63 Md. 592; 56 Minn. 69; and the manufacture of oleomargarine; 146 Pa. 265, where it was held that the legislature might prohibit, if it saw fit, the manufacture of a wholesome article of food; but see 99 N. Y. 377, where the decision is criticised, and in 40 L. R. A. (Tex.) 201, it is held that the state cannot constitute it a crime to mix wholesome and nutritious

articles of food. See OLEOMARGARINE.

The legislature may require all oleomargarine to be stamped as such; 63 Ind. 592; or to be colored pink; 84 Fed. Rep. 186; or prohibit artificially coloring it; 155 U. S. 461; prescribe the price at which bread should be sold; 8 Ala. 140; suppress gambling and opium dens, and lotteries; 101 U. S. 814; and carrying on of offensive manufactures; 47 Barb. 64; regulate laundries; 113 U. S. 703; 81 Fed. Rep. 690; 118 U. S. 856; pawn-brokers, hawkers, and peddlers; 133 Pa. 69; and require a license fee, where no discrimination is made between residents or products of the state and those of another state; 156 U. S. 296; enact laws for the preservation of game and fish; 152 U. S. 133; to prevent the waste of natural gas; 87 L. R. A. 294; the sale or manufacture of intoxicating liquors; 123 U. S. 623; 80 Fed. Rep. 735; forbid the sending of threatening letters by a debtor to a creditor; 135 Mo. 450; close cemeteries within the built-up parts of a city; 5 Cow. 538; 88 Pa. 42; and forbid the pollution of streams; 44 N. J. L. 88; the keeping of gunpowder in cities or villages; 1 Gray 27; the erection of wooden buildings in populous cities; 11 Mich. 425; 7 Cow. 352; or the keeping of swine therein; 97 Mass. 221; or of a slaughter house; 109 *id.* 315; 111 U. S. 746; 39 La. Ann. 247; or a bone boiling factory; 67 Hun 52; or any other business injurious to the public; 35 Wis. 298; the sale of indecent books; 8 Gray 448; 38 N. H. 426; 152 U. S. 133; 135 *id.* 100; restrain the employment of children at a theatrical exhibition; 54 N. Y. 559; or prohibit their employment altogether when below a specified age. Similarly there seems to be no doubt that the hours of labor of women and children and the wages to be paid them may be controlled through the police power; 94 U. S. 113; 5 Hill, N. Y. 121; 48 Am. Dec. 609, 337; 70 N. Y. 569; 36 Barb. 392; 110 N. Y. 418; 105 Ind. 250; 66 Md. 399; 38 Wis. 428; 160 Mass. 86. Laborers wages may be controlled; 5 Ark. 416; 50 Fed. Rep. 628, 681; and the issuance to them, in payment, of scrip or store orders prohibited; 48 Pac. Rep. (Colo.) 512.

The confinement of the insane and their control in asylums, is an exercise of the police power; 40 Mich. 90; and skilled trades and learned professions often come under its control, as where examinations are provided for those who wish to practise law, medicine, or pharmacy. Physicians, dentists, and midwives may be compelled to take out licenses and report births and deaths; 46 Am. Rep. 63; 113 Ind. 514; 129 U. S. 114. Every city has also numerous regulations about the sale of medicines and poisons, ventilation and drainage, etc.

The following are not within police power:—Laws levying taxes upon alien passengers from foreign ports, for the use of hospitals; 7 How. 233. Requiring a bond to be given for alien passengers from foreign ports to indemnify the state against expense for the support of the person named therein; 92 U. S. 259. Prohibiting the driving of foreign cattle into a state within certain dates; 95 U. S. 465. Requiring an inspection before slaughtering of cattle, etc., so far as they apply to foreign meats; 136 U. S. 313. (This offends against inter-state commerce.) Requiring a license under onerous conditions from the agents of foreign express companies; 141 U. S. 47.

"Whether the prohibited act or omission shall be made a criminal offence, punishable under the general laws, or subject to punishment under municipal by-laws, or, on the other hand, the party be deprived of all remedy for any right which, but for the regulation, he might have had against other persons, are questions which the legislature must decide." Cooley, Const. Lim. 745.

The determination by the legislature as to what is a proper exercise of its police power is subject to the supervision of the courts; 123 U. S. 623; 152 U. S. 137.

See Tiedeman, Prentice; Police Powers; Cooley, Const. Lim.; Thayer, Const.

L.; 6 So. L. Rev. N. s. 59; 15 Cr. L. Mag. 9, 200; 5 Detroit Leg. N. 28; and see also the various titles to which the power has been applied. See LIBERTY OF CONTRACT; PRIVILEGES AND IMMUNITIES.

POLICIES OF INSURANCE, COURT OF. See COURT OF POLICIES OF INSURANCE.

POLICY. In Insurance. The instrument whereby insurance is made by an underwriter in favor of an assured, expressed, implied, or intended, against some risk, peril, or contingency, in reference to some subject.

The written or printed form to which the contract has been reduced, and which evidences the agreement or contract between the parties. It may be either a specialty or simple contract. 1 Joyce, Ins. § 145.

It must show expressly, or by implication, in whose favor it is made. It may be upon a valuable property, interest, or contingency, or be a gaming or wagering policy on a subject in which the assured has no interest, or against risks in respect to which the assured has no interest except what arises from the contract itself.

A blanket policy is an insurance for a gross sum covering several kinds of property in one or more localities and not apportioned among them. Stand. Dict.

Blanket and floating policies are sometimes issued to factors or to warehousemen, intended only to cover margins uninsured by other policies, or to cover nothing more than the limited interest which the factor or warehouseman may have in the property which he has in charge. 93 U. S. 541.

An **interest policy** is one where the insured has a real, substantial, assignable interest in the thing insured. 37 Wis. 539.

An **open policy** is one on which the value is not fixed, but is left to be definitely determined in case of loss. 1 Phill. Ins. §§ 4, 6, 7; 101 N. Y. 458; 4 Dal. 430. By an "open policy" is also sometimes meant, in the United States, one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time; 12 La. An. 259; 19 N. Y. 305; 6 Gray 214; it may also mean one kept open for new subscriptions, or one on cargo kept open for new subjects of insurance; 1 Joyce, Ins. § 156.

A **valued policy** is one where a value has been set on the ships or goods insured, and this value inserted in the policy in the nature of liquidated damages. In such a policy the value of the subject is expressly agreed; 33 Md. 109; 3 Rich. S. C. 331; or is, as between the parties, the amount insured. Under an open policy in case of loss, the insured must prove the true value of the property, while under a valued policy, the sum agreed upon is conclusive, except in case of fraud; 3 Camp. 319; 15 Mass. 341; 48 Pa. 372; May, Ins. § 30.

A **mixed policy** is one which is open as to certain property and valued as to other property. 2 Conn. 368.

A **wager policy** is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. These policies are strongly reprobated; 3 Kent 225; Beach, Ins. § 142.

A **floating policy** is one which applies to goods of a class or kind, which, from its fluctuating, changing nature, differs as to specific articles. 32 N. Y. 405.

In the absence of any insurable interest of the beneficiary, the law will presume that a policy was taken out for the purpose of a wager, or speculation; 122 Pa. 324.

The insured must be held to a knowledge of the conditions of his policy, and the fact that he had never seen it does not help him any more than the fact that he had not read it, where there is no adequate reason shown why he could not have seen it had he so desired, and the company had not kept it from him through any fault or

fraud; 71 Mich. 414; 60 Tex. 353.

Records and documents expressly referred to in the policy are, in effect, for the purpose of the reference, a part of the contract; 23 Conn. 285; 37 Mo. 187; 23 Pa. 50; 23 E. L. & E. 514; 33 N. H. 203; 10 Cush. 337; 70 N. Y. 72; 16 Or. 288; 84 Ky. 653; 183 Ind. 876; 58 Ark. 277; May, Ins. § 158.

All prior negotiations are presumed to be merged in the written contract, and the policy itself, in the absence of fraud, duress, or mistake, must be looked to to ascertain the intent of the parties; 13 Mass. 96. Where the form of the policy is not prescribed by statute, it should contain, either by itself, or by reference to other papers, the exact agreement between the parties, set forth therein in clear, precise, and unambiguous terms, and should embody all the requirements of a valid insurance contract. Where the terms are plain and unambiguous, parol evidence is inadmissible to vary or control them; 42 Mo. 38; 116 N. Y. 317; but if it is ambiguous, extrinsic evidence is admissible, not to contradict or change the contract, but to develop and explain its true meaning; 40 Mo. 33. Conversations had between the parties at the time have been held admissible; 1 Sto. 574; and when parties have, by certain acts of their own, placed a construction on doubtful terms of the contract, this construction will be adopted by the court against them.

The language of the policy must be construed with reference to the subject-matter and the nature of the property to which it is applied, and with a view to the objects and intentions of the parties, as the same may be gathered from the whole instrument; 2 Gill & J. 136; 30 N. Y. 136; 33 Minn. 501; and the whole policy with all its parts should be construed together as one entire contract; 16 Ore. 283. A special clause in a policy which creates an exception to a general clause governs the latter; 27 Mo. 152. When susceptible of more than one interpretation, the contract should be construed in favor of the assured; 116 N. Y. 54; 105 Ind. 212; 111 U. S. 335; 133 Ill. 556. The written part of the policy controls that part which is printed; 4 East 136; 32 Fed. Rep. 47; 84 id. 501; 38 Me. 404; 31 N. Y. 389. A special indorsement exempting from liability for partial loss will control; 97 N. Y. 333. See LEX LOCI.

A policy may take effect on actual or constructive delivery; 1 Phill. Ins. ch. xi. sect. i; 25 Ind. 537; 27 Pa. 268; 42 Me. 259; 25 Conn. 207; 5 Gray 52; and may be retrospective, provided there is no concealment or misrepresentation by either party; Hill, Ins. § 925; 2 Dutch. 268; s. c. 3 id. 645.

Every policy, whether marine, against fire, or on life, specifies or imports parties, and specifies the subject or interest intended to be insured, the premium or other consideration, the amount insured, the risks and perils for which indemnity is stipulated, and the period of the risk or the terminus *a quo* and *ad quem*. The subject-matter is usually more minutely described in a separate paper—called an *application*; Beach, Ins. § 352. See APPLICATION. May, Ins. § 29.

The duration of the risk, under a marine insurance, or one on inland navigation, is either from one geographical terminus to another, called a "*Voyage Policy*," or from a specified time, called a "*Time Policy*;" that of a fire policy is for a specified time; one on life is either for life or a term of years, months, etc. It is a leading principle, as to the construction of a policy of insurance, that its distinguishing character as a contract of indemnity is to be favored; which is in conformity with the common maxim, *ut res valeat magis quam pereat*; 8 N. Y. 351; 18 id. 385; 8 Cush. 593; 17 Pa. 253; 29 E. L. & E. 111, 215; 2 Du. 419, 554; 5 id. 517, 594; 16 Mo. 98; 22 Conn. 285; 13 B. Monr. 311; 11 Ind. 171; 28 N. H. 294; 2 Curt. C. C. 322, 610; 37 Me. 137; 4 Zab. 447; 18 Ill. 553; 4 R. I.

159. See May, Ins. § 7; 94 U. S. 457. Any reasonable doubt as to the meaning of an insurance policy must be resolved in favor of the insured; 38 Minn. 501; 84 Va. 72; 145 Pa. 346; 3 Ind. App. 361; 151 U. S. 452.

In marine insurance the contract has necessarily more implied reference to customs and usages than most other contracts; or, in other words, a larger proportion of the stipulations are not specifically expressed in the instrument; 1 Phill. Ins. § 119; whence it has been thought to be an imperfect, obscure, confused instrument; 5 Cra. 342; 1 Burr. 347. But the difficulty in giving it a practical construction seems to arise more from the complication of the circumstances necessarily involved than from any remediable defects in its provisions and phraseology. New provisions are, however, needed, from time to time, to adapt the contract to new circumstances. A mistake in filling up a policy may be corrected by order of a court of equity; Beach, Ins. § 509; 5 B. & P. 322; 1 Wash. C. C. 415; 2 Cra. 441; 2 Johns. 330; 1 Ark. 545; 2 Curt. C. C. 277. If by accident, inadvertence, or mistake, the terms of the contract are not fully set forth in a policy, it may be reformed so as to express the real agreement; 136 U. S. 267. A marine policy is assignable without the consent of the insurers; May, Ins. § 377; while a fire policy is not; 16 Wend. 385; 2 Pet. 25; 4 Bro. P. C. 481; 18 La. 319; 9 L. T. N. s. 688. An outstanding and valid life policy is held to be assignable without the insurer's consent, provided the sale is *bona fide* and not a device to evade the law; 13 N. Y. 31; 29 Ind. 236; 98 Mass. 381; 26 Pa. 189; 26 Atl. Rep. (Md.) 959. But see, *contra*, 41 Ind. 116. See, generally, 9 L. R. A. 600; Joyce, Insurance. A pre-existing debt is a sufficient consideration for an assignment of insurance policies after loss of the property insured; 40 Ill. 102. When a policy of insurance expressly stipulates that no assignment shall be valid without the consent of the company, an assignment without such consent is without effect; 45 La. Ann. 736; 161 Mass. 320; and it is avoided by an assignment for the benefit of creditors; 64 N. H. 257; but if made subsequently to the loss, it is valid regardless of the conditions; 32 W. Va. 283; 35 Neb. 214.

For the rules of construction of a policy of credit insurance, see 73 Fed. Rep. 95.

See ABANDONMENT; AVERAGE; INSURABLE INTEREST; INSURANCE; SALVAGE; LOSS; TOTAL LOSS; VOLUNTARY EXPOSURE; RESERVE; PREMIUM.

A standard form of policy is provided by statute in Massachusetts, Maine, Michigan, Minnesota, Missouri, New Hampshire, New York, New Jersey, North Dakota, North Carolina, Wisconsin, Pennsylvania, South Dakota, Connecticut, and Rhode Island. A statute providing for a standard policy without fixing its terms or conditions and leaving them to be fixed by the insurance commissioner is unconstitutional as a delegation of legislative power; it seems that the legislature could prescribe a form; 166 Pa. 72, reversing 3 D. R. 788; 65 N. W. Rep. (Wis.) 738.

A method of gambling by betting as to what numbers will be drawn in a lottery. 60 Conn. 87.

See ENDOWMENT INSURANCE; PUBLIC POLICY; RUNNING POLICY; TIME POLICY; UNVALUED POLICY; VALUED POLICY.

POLICY, PUBLIC. See PUBLIC POLICY; RESTRAINT OF TRADE.

POLITICAL. Pertaining to policy, or the administration of the government. Political rights are those which may be exercised in the formation and administration of the government: they are distinguished from civil rights, which are the rights which a man enjoys as regards other individuals, and not in relation to the government. A political corporation is one which has principally for its object the administration of the government, or to which the powers of government, or a part of such powers, have been delegated. See 37 La.

544; 90 Ill. 563.

POLITICAL OFFENDER. A political offender if accused of what is *prima facie* an extraditable crime cannot be legally surrendered, if the offence is of a political character, that is if it is incidental to, and forms part of, a political disturbance; [1891] 1 Q. B. 149; [1896] 1 Q. B. 108.

POLITICAL PARTIES. See ELECTION; NOMINATION.

Within the meaning of a Primary Act, is an affiliation or organization of electors representing a political policy and having a constituted authority for its government and regulation, and which, at the last preceding election at which presidential electors were voted for, cast at least twenty per cent. of the total vote cast at said election in this State. 163 Ky. 655, 174 S. W. 753.

Voluntary associations for political purposes. They are governed by their own usages, and establish their own rules. Members of such parties may form them, reorganize them, and dissolve them at their will. The voters constituting such party are, indeed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom and liberty of the voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, rules, or doctrines of a political party, or to determine between conflicting claimants' rights growing out of its government. 109 Ky. 283, 58 S. W. 779.

POLITICAL QUESTION. One which concerns the law-making power as distinguished from the judiciary. English.

POLITICS. Everything that concerns the government of the country. 2 Ves. Sr. 156.

POLL. A head. Hence poll-tax is the name of a tax imposed upon the people at so much a head.

To *poll* a jury is to require that each juror shall himself declare what is his verdict. This may be done, at the instance of either party, at any time before the verdict is recorded, according to the practice in some states. See 18 Johns. 188; 9 Ill. 336. In some states it lies in the discretion of the judge; 1 McCord 24, 525; 22 Ga. 431. A defendant has a right to a poll of the jury to ascertain whether each member concurs in the verdict, but the exact words used by the juror in answering are immaterial, if they indicate clearly the assent of the individual mind to the verdict; 153 Pa. 535. Where a court directs a verdict, a party is not entitled to have the jury polled; 87 Mich. 13.

In Conveyancing. A deed-poll, or single deed, is one made by a single party, whose edges are *polled*, or shaved even, in distinction from an *indenture*, whose sides are indented, and which is executed by more than one party. 2 Bla. Com. 296. See DEED POLL.

POLL-TAX. A capitation tax; a tax assessed on every head, i. e. on every male of a certain age, etc., according to statute. Webster. Dict.; Whart. Dict. See TAXATION.

POLLICITATION. In Civil Law. An offer not yet accepted by the person to whom it is made. Langd. Contr. § 1.

It differs from a contract, inasmuch as the latter includes a concurrence of intention in two parties, one of whom promises something to the other, who accepts, on his part, such promise. Grotius 1.2, c. 2; Pothier, Obl. pt. 1, c. 1, s. 1, art. 1, § 2.

POLLS. The place where electors cast in their votes.

POLLUTION OF WATERS. A riparian proprietor is required to refrain from erecting upon the banks of a water course any works which will pollute the

water and thereby create a nuisance; 9 Co. 59; 5 B. & Ald. 1; 4 Mas. 397; 5 C. E. Greene 416; 4 Cush. 345; [1897] Ch. D. 96. See 13 Q. B. 426.

It is the right of the owner of land through which a stream flows, to have the natural flow free from pollution, as also from diversion or obstruction; and for an interference with this right an action will lie; 10 R. I. 106; 14 N. J. Eq. 335. An injury to the purity of the water which affects the riparian owner is considered an injury of the same character as an obstruction or diversion of the water; 122 Mass. 583. So one who pollutes his neighbor's spring is liable therefor; 99 Mass. 582; 89 Ky. 468; 29 Ch. D. 115; and one who deposits filth or noxious matter on his own premises from which it percolates through the soil; 162 Pa. 493; 67 Cal. 412; 29 Ch. D. 115; 92 Ill. 19; 108 Mass. 261; 43 N. J. Eq. 128.

Sources of the pollution of water for which it has been held that an action would lie, are: fouling by the discharge into it of muriatic acid; 7 H. & P. 160; sulphuric acid; 5 Ch. D. 769; vitriol, having a corrosive effect on boilers; 13 Allen 16; dye wares or dye liquors, madder, indigo, potash, etc.; 16 Jur. N. S. 75; heated water, which affects a stream injuriously; 3 Exch. 748; 3 B. & Ad. 304; 2 K. & J. 264; blood from a slaughter-house; 20 N. J. Eq. 296, 415; 57 Md. 1; setting up hogpens, or lime-pits; 46 Wis. 391; Y. B. Hen. II. b. 6; 11 Mo. 517; the erection of a cess-pool, placing near the water oil or manure; 12 S. W. Rep. (Ky.) 937; placing the carcass of a dead animal in the water; 25 Kan. 608.

It is not always actionable to discharge into a stream waste or impure matter, but it is a question for the jury whether such use of it is, under the circumstances, reasonable, and as a general rule the same consideration would control as in case of obstructions of the water generally. It is necessary to take into consideration the character of the stream, its natural uses and the importance of the use proposed to be made of it by the party complained of and the extent and character of the injury to the other party. See Ang. Waterc. § 140 d. A riparian proprietor cannot use the water in such manner as to pollute the atmosphere, and it is no defence to an action for so doing that the injury was public in its character as affecting an entire community and that it was a subject of criminal indictment; 4 Ohio 833; and if such a condition of things cannot be remedied by action, equity will interfere to abate the nuisance; 21 N. J. Eq. 576; in all these cases where the injury is continuous and irreparable so that an action for damages is not an adequate remedy, an injunction will be granted. See INJUNCTION. For a collection of cases in which injunctions have been granted, see Amer. & Eng. Dec. in Eq. 648, 653.

The weight of authority is in favor of the doctrine that an action by the lower riparian owner will lie for the pollution of the stream by a discharge into it of refuse water from a mine, and that such action may be enjoined; [1893] App. Cas. 691; 54 N. J. Eq. 65, where it was expressly held that it was no defence, that the pollution was a natural and necessary result of mining operations prosecuted in the ordinary way. In this case the defendant was not a riparian owner. The decree was affirmed by the court of appeals in which Garrison, J., thus stated the conclusion: "A non-riparian mine-owner may not artificially cause the injurious discoloration of a natural water course, if, by the use of practicable means within his knowledge and under his control, he may carry on his mining operations without injury to the right of others,—a paraphrase of the maxim, "*Sic utere tuo ut alienum non ledas*."

In the English case cited, the general principle as laid down by the House of Lords in a much considered case was thus expressed: "Every riparian proprietor is entitled to have the natural water of the

stream transmitted to him, without sensible alteration in its character or quality. Any invasion of this right, causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the court."

The contrary doctrine was held in Pennsylvania in the case of Penn. Coal Co. v. Sanderson; 113 Pa. 126; a decision which was criticised and expressly disapproved in both the above cases. The Pennsylvania case had been twice decided otherwise; 86 Pa. 401; 94 *id.* 302; and these decisions were overruled in the third case by a bare majority of the court, Mercer, C. J., Gordon, and Trunkay, JJ., dissenting. Referring to this, Lord Shand, in the English case last cited, says: "This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight." One other case seems in a measure to follow the Pennsylvania case; Barnard v. Shirley, 135 Ind. 537, where it was held that one who sinks an artesian well on his own land, and uses the water to bathe the patients in a sanitarium erected by him on said premises, is not liable to injunction and damages for allowing the water, after such use, to flow into a stream which crosses the land of an adjoining owner, and is the only natural and available outlet." Of this case it is remarked: "There were, however, many features to distinguish this from the Sanderson case, so that the adoption of the language of the latter was unnecessary. In the first place, the pollution was slight; in the second, before the water reached the plaintiff's premises, it was further defiled by passing through a city; either of which would tend to defeat the claim, apart from all other considerations;" 3 Eng. & Am. Dec. in Eq. 652, by Henry Budd.

The same writer draws attention to the fact that "even in Pennsylvania, the doctrine of the Sanderson case is carefully limited to the natural drainage of the mine water; and any other means of getting rid of it will be enjoined;" *id.*, citing 7 Kulp 493. See, also, 8 Atl. Rep. 620.

The right of the lower riparian proprietor to have the use of the stream unimpaired, must be adjusted with due regard to the rights possessed by the upper riparian owner to use the stream for the proper purposes, such as casting sewage or waste therein; 74 N. Y. 341; 108 Mass. 208; 44 N. H. 580; and the necessary result of the legitimate use of a stream for irrigation, manufacturing, and domestic purposes, will have a tendency, with the natural increase of population, to render the stream more impure; see 110 Mass. 321; 113 Pa. 126; and the courts will not interfere by injunction with extensive manufacturing enterprises until satisfied from all the circumstances that there is no adequate remedy at law, and that the failure to interfere will result in irreparable injury; 54 Pa. 164; 57 *id.* 105. The pollution, by a properly constructed city sewer, of a stream which is the natural drainage of the land on which the city is built, gives no right of action to a lower riparian owner whose mill property, constructed and operated before the building of the city, is injured thereby; 18 Ind. App. 482. A plaintiff was held entitled to recover damages where sewers constructed by a city, polluted a stream and the foul water found its way to the two springs of the plaintiff, and he was unable to obtain pure water by digging wells, the whole underground supply being polluted; 162 Pa. 493. As a general thing the circumstances of each case must be considered by the court and the conflicting interests, carefully and judiciously weighed, and no general rule can be framed which will afford a rule to be applied by the courts in all cases as matter of law. The right to deposit in the stream must be settled as a question of reasonable use in the same way that courts deal with questions of diversion or obstruction; 30 Minn. 249; as to many uses of the water, either by common consent or other obvious

considerations, settled rules have been established; Redfield, C. J., in 28 Vt. 459; many of these cases may be found collected in Gould, Waters § 230. See LAND.

Where a municipal corporation was authorized by statute to construct sewers and discharge sewerage into the tide water it was held liable for damages, caused by the sewerage destroying the plaintiff's oysters, although the damage involved no physical taking of property; 22 App. Div. N. Y. 406.

One who had permission to use the water of a canal was held entitled to recover damages from a third person, who fouled the water so that the plaintiff's boilers were injured, the action of the defendant having been without any authority; 2 H. & N. 476; in a case in the Exchequer Chamber, although the judgment was reversed on other grounds, there was no dissent from the doctrine of the court below, "that he had no right to cause dirty water to flow on his neighbors' land without some special right to do so," but it was left doubtful whether the mere permission of the riparian owner to take the water out of the stream was sufficient to authorize the action against the wrong-doer either for diverting or fouling; 3 H. & N. 675.

The pollution of streams has been the subject of extended legislation in England, which is embodied in the Rivers Pollution Prevention Act, 1876, which is of general application, and also various acts of local application, all of which, with notes and decisions are collected in Haworth on Rivers Pollution.

POLYANDRY. The state of a woman who has several husbands.

Polyandry is legalized only in Thibet. It is inconsistent with the law of nature. See LAW OF NATURE.

POLYGAMIST. A man or woman who, having contracted a polygamous marriage, and become the husband or wife, at one time, of two or more wives or husbands, maintains that relation and status. 114 U. S. 16; Act of Mar. 22, 1882. See BIGAMIST; POLYGAMY.

POLYGAMY. The act or state of a person who, knowing that he has two or more wives, or that she has two or more husbands, marries another.

It differs from bigamy. Com. Dig. *Justices* (S 5); Co. 3d Inst. 88.

But bigamy is now commonly used even where polygamy would be strictly correct; 1 Russ. Cr. 186, n. On the other hand, polygamy is used where bigamy would be strictly correct; Mass. Gen. Stat. 1860, p. 817.

Every person having a husband or wife living, who marries another, whether married or single, in a territory or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term of not more than five years; R. S. § 5352; 103 U. S. 304.

An act of congress of March 3, 1887, was passed for the express purpose of the suppression of polygamy in Utah Territory. It expressly annuls the act of territorial legislation which contravenes its purposes and provided for winding up the corporation in the territory, known as the Church of Jesus Christ of the Latter Day Saints, and required the attorney-general to take proceedings for that purpose. The act contains elaborate provisions for adjusting property interests involved in this change, and providing severe penalties for violation of its provisions; U. S. R. S. 1 Supp. 568. This act was held constitutional; 136 U. S. 1; where it was also held that the pretence of religious belief cannot deprive congress of the power to prohibit polygamy and all other open offences against the enlightened sentiment of mankind. See BIGAMY; RELIGION.

POLYGARCHY. A term used to express a government which is shared by several persons.

POND. A body of stagnant water; a

pool. See Call. Sew. 103.

Any one has a right to erect a fish-pond; the fish in it are considered as real estate, and pass to the heir, and not to the executor; Ow. 20. Where land bounding on a lake or pond is conveyed, the grant extends only to the water's edge if it is a natural pond (some cases say to low-water mark; 13 Pick. 261); but to the middle of the stream if it is artificial; Ang. Wat. Cours. § 41. See 3 Washb. R. P. 5th ed. * 633.

By the common law, fresh water lakes and ponds, except the great navigable lakes, belong to the owners of the soil adjacent, who own the soil *usque ad flum aquæ*; 140 U. S. 871. See 133 Mass. 364. See LAKES. WATERS.

PONE. (Lat. *ponere*, to put). In English Practice. An original writ issuing out of chancery, for the purpose of removing a plaintiff from an inferior court into the superior courts at Westminster. The word signifies "put"; put by gages, etc. The writ is called from the words it contained when in Latin, *Pone per vadum et salvos plegios*, etc.; put by gage and safe pledges, etc. See Fitzh. N. B. 69, 70 a; Digby, Hist. R. P. 71.

The writ of *certiorari* is now used in its place.

PONENDIS IN ASSISIS. An old writ directing a sheriff to empanel a jury for an assize or real action. Moz. & W. Law Dict.; Whart. Law Lex.

PONENDUM IN BALLIUM. A writ commanding that a prisoner be bailed in cases bailable. Whart. Law Lex.; Moz. & W. Law Dict.

PONENDUM SIGILLUM. A writ requiring justices to put their seals to a bill of exceptions, according to Stat. West. 2, 13 Ed. I. c. 31. Whart. Law Lex.; Moz. & W. Law Dict.

PONERE (Lat.). To put. The word is used in the old law in various connections, in all of which it can be translated by the English verb "put." See Glanv. lib. 2, c. 8.

PONIT SE (Lat. puts himself). In English Criminal Practice. When the defendant pleads "not guilty," his plea is recorded by the officer of the court, either by writing the words "*po se*," an abbreviation of the words *ponit se super patriam* (puts himself upon his country), or, as at the central criminal court, *non cul.* 3 Den. C. C. 392. See ARRAIGNMENT.

PONTAGE. A contribution towards the maintenance, rebuilding, or repairs of a bridge. The toll taken for this purpose also bears this name. Obsolete. Fleta, lib. 4, c. 1, § 16.

PONTIBUS REPARANDIS. An old writ directed to the sheriff commanding him to charge one or more to repair a bridge. Cow.; Reg. Orig. fol. 153.

POOL. A small lake of standing water. By the grant of a pool, it is said, both the land and water will pass; Co. Litt. 5. Undoubtedly the right to fish, and probably the right to use hydraulic works, will be acquired by such grant; 2 N. H. 259; Co. Litt. 5; Bac. Abr. *Grants* (H 8); Com. Dig. *Grant* (E 5); 5 Cow. 216; Cro. Jac. 150; 1 Lev. 44; Vaugh. 103. See LAKE.

A combination of stakes, the money derived from which goes to the winner. 146 Mass. 203. See GAMING; HORSE RACE.

A commercial term used to indicate a contract between two competing railroad companies, whereby they agree to divide all their earnings over and above the amounts required for the payment of operating expenses.

They have been held to be illegal; 6 So. Rep. (La.) 888; 61 N. H. 161; 55 id. 581; 28 N. E. Rep. (Ind.) 159. See 1 J. & H. 252; 2 id. 69; 8 Ry. & Corp. L. J. 144.

As a business term the word "pool," as used in the phrase "real estate pool," means no more than that certain individuals are engaged in dealing in real estate

as a commodity of traffic, 103 U. S. 195. See RESTRAINT OF TRADE, FRENCH POOL.

POOLING AGREEMENT. See RESTRAINT OF TRADE.

POOR. Destitute; helpless and in extreme want; 52 N. W. Rep. (Wis.) 444; so completely destitute of property as to require assistance from the public. 14 Kan. 421. A trust for the benefit of the poor does not generally include those receiving parochial relief; 8 Biss. 395; 1 Jarm. 209; but a trust for the benefit of poor boys was held not confined to those who required parish relief; 31 L. J. Ch. 810. See CHARITABLE USES; LEGACY.

POOR DEBTORS. By the constitution of the several states and territories, or by the laws which exist for the relief of poor debtors, it is provided in general terms that there shall be no imprisonment for debt. But this is usually qualified by provisions for the arrest of debtors in certain enumerated cases of fraud. The statutes in the different states are very similar, and as a rule, require the creditor to make affidavit that the debtor is about to remove some of his property out of the jurisdiction of the court with intent to defraud his creditors, or that, for the same reason, he is about to dispose of or has disposed of his property, or that he is fraudulently concealing it; or that the debt, concerning which suit is brought, was fraudulently contracted. Such in general is the law in most of the states and territories.

A classification of the states shows that there are constitutional provisions that there shall be no imprisonment for debt in Indiana, Minnesota, Kansas, Maryland, North Carolina, Missouri, Texas, Oregon, Nevada, South Carolina, Georgia, Alabama, Mississippi, and Florida; that there shall be none in any civil action on mesne or final process in Ohio, Iowa, Nebraska, Tennessee, Arkansas, California, Oregon, and Arizona; or in any action or judgment founded on contract in New Jersey, Michigan, and Wisconsin. In Vermont, Rhode Island, Pennsylvania, Illinois, Kentucky, and Colorado, the provision is that no person shall be imprisoned for debt in any civil action when he has delivered up his property for the benefit of creditors in the manner prescribed by law; 1 Stims. Am. Stat. L. § 80.

Subject to these constitutional provisions the subject is regulated in most states by general statutes which should be consulted with respect to any particular case.

It may be stated generally that the object of such statutes is to induce the defendant to pay the debt, give security, or take advantage of the insolvent laws or of some enactments made especially for the relief of poor debtors. It follows therefore that in most of the states a person under arrest for debt may obtain his release in any of these ways. A poor debtor is of course usually compelled to resort to one of the two last mentioned, and although the proceedings differ in the different states, yet as a rule he is released upon delivering his property to a trustee, or taking oath that he has not more than ten or twenty dollars above the amount exempted by statute in the particular state in which he is confined.

In a few states the rule that there shall be no imprisonment for an ordinary contract debt is strictly adhered to. In Tennessee a debtor may be imprisoned in criminal actions, and in Missouri for the non-payment of fines or penalties imposed by law. So he may be imprisoned for fraud in civil or criminal actions in Vermont, Rhode Island, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Iowa, Minnesota, Kansas, Nebraska, North Carolina, Kentucky, Arkansas, California, Oregon, Nevada, Colorado, South Carolina, Florida, and Arizona. In Georgia and Louisiana the legislature has power to provide for the punishment of fraud, and for reaching property of the debtor concealed from his creditors. Debtors may be imprisoned in Oregon if absconding; in Nevada, in cases of libel or slander; in Colorado and California, in actions of tort, and in the latter state also

for malicious mischief; in Michigan and Arizona for breach of trust or moneys collected by public officers, or in any professional employment; 1 Stims. Am. Stat. L. § 80.

Women are not subject to arrest as debtors in North Carolina, Rhode Island, South Carolina, Vermont, Pennsylvania, New Jersey, New Hampshire, District of Columbia. See INSOLVENCY; INSOLVENT.

POOR LAW BOARD. A government board appointed by statute 10 & 11 Vict. c. 109, to take the place of poor law commissioners, who had general management of the poor and the funds for their relief. The poor law board is now superseded by the local government board, established under 34 & 35 Vict. c. 70; 3 Steph. Com. 49; Moz & W.

POOR RATE. A rate levied by church authorities for the relief of the poor.

POPE. The bishop of Rome and head of the Roman Catholic church. He is elected by certain officers called cardinals, and remains in power during life. In the 9th Collation of the Authentics it is declared the bishop of Rome hath the first place of sitting in all assemblies, and the bishop of Constantinople the second. Ridley, Civ. & Eccl. L. pt. 1, c. 3, § 10.

"It does not appear necessary that a Pope be selected either from the ranks of the Cardinals or that he be in Orders." 1 Halleck, Int. L., Baker's ed. 104.

The Catholic powers concede the precedence to the Pope as the visible head of the church; but Russia and Turkey and the Protestant states of Europe consider him only as the bishop of Rome, and a sovereign prince, although since September 20, 1870, he has been dispossessed of substantially all his territory. By the Italian decree of May 13, 1871, he is guaranteed his sovereign rights and other immunities by Italy, but he has refused to accept this decree. He maintains diplomatic relations with France and some other Catholic states; *id.* 118. See PAPACY.

POPULAR ACTION. An action given by statute, to any one who will sue for the penalty. A *qui tam* action. Dig. 47. 23. 1.

POPULAR SENSE. The sense in which a subject is understood by those conversant therewith. 1 Ex. D. 248.

POPULAR USE. The occasional and precarious enjoyment of property by the members of society in their individual capacity, without the power to enforce such enjoyment according to law. 18 Cal. 238.

POPULARITY CONTEST. A scheme commonly called a "popularity contest" whereby it was announced that persons paying for subscriptions to the newspaper, or for advertising therein, were to be given a certain number of votes for each dollar so paid, and the holder of such votes had the privilege of naming a candidate, and of casting these votes for such candidate, or for one already named; and the candidate obtaining the largest number of votes was to receive a prize, is not a lottery. 159 Ky. 83, 166 S. W. 794.

POPULISCIUM (Lat.). An act of the commons; same as *plebiscitum*. Ainsworth, Dict.

A law passed by the whole people assembled in *comitia centuriata*, and at the proposal of one of the senate, instead of a tribune, as was the case with a *plebiscitum*. Tayl. Civ. Law 178; Mackelley, Civ. Law § 26.

PORCH. A portico; a shelter in front of a door. 148 Mass. 584.

PORT. A place to which the officers of the customs are appropriated, and which includes the privileges and guidance of all members and creeks which are allotted to them. 1 Chitty, Com. Law 726; Postlewaith, Com. Dict. According to Dalloz, a port is a place within land, protected against the waves and winds and affording

to vessels a place of safety. By the Roman law a port is defined to be *locus conclusus quo importantur merces et unde exportantur*. Dig. 50. 16. 59. See 7 Mart. La. N. s. 81. In the revenue laws it is synonymous with district, when the limits of the port and district are the same; 3 Mass. 153. As used in the R. S. § 4347 it means any place from which merchandise may be shipped.

A port differs from a haven, and includes something more. First, it is a place at which vessels may arrive and discharge or take in their cargoes. Second, it comprehends a ville, city, or borough, called in Latin *caput corpus*, for the reception of mariners and merchants, for securing the goods and bringing them to market, and for virtualising the ships. Third, it is impressed with its legal character by the civil authority. Hale, *de Portibus Mar.* c. 2; 1 Hargr. Tracts 46, 73; Bac. Abr. *Prerogative* (D 5); Com. Dig. *Navigation* (E); Co. 4th inst. 148; Callis, Sew. 56; 2 Chitty, Com. L. 2; Dig. 50. 16. 59; 43. 12. 1. 13; 47. 10. 15. 7; 39. 4. 15.

The exact meaning of the term was much considered by Lord Esher, M. R., in 15 Q. B. D. 580. He held that it was not usually the legal port as defined by acts of Parliament, but, "a place of safety for the ship and goods, whilst the goods are being loaded and unloaded"; that there never would be a port in the ordinary business sense of the word, unless there was some element of safety in it for the ship and goods, and that nothing was more certain to be such a port than a natural port; that a natural port was "a place in which the conformation of the land with regard to the sea is such that, if you get your ship within certain limits, she is in a place of safety for loading and unloading"; that any place at which the loading and unloading took place might safely be inferred to be within "the port," as understood by the parties; that beyond the place of loading and unloading, the port would extend to any further space over which the court authorities were in the habit of exercising "port discipline."

In L. R. 4 Ex. 238, 245, Byles, J., said: "The passage from Lord Hale, *de Portibus Maris* (ch. 2, p. 46), shows that the limits of a port may depend on the existence of wharves, quays, buildings, and other conveniences. It may accordingly, from time to time, vary and increase with the increase of population and of buildings. Lord Hale further says: 'The port of London anciently extended to Greenwich in the time of Edward I. and Gravesend is a member of it. The extent of a port therefore after a lapse of years may become a question of fact.'"

In the same case below the meaning of "port" generally was considered by Martin, B.; L. R. 8 Ex. 330, 345. See HOME PORT.

PORT OF DELIVERY. This is sometimes used to distinguish the port of unloading or destination, from any port at which the vessel touches for other purposes. 2 Mas. 319.

PORT OF DEPARTURE. As used in the United States statutes requiring a ship to procure a bill of health from the consular officer at the place of departure, it is not the last port at which the ship stops while bound for the United States, but the port from which she cleared. 61 Fed. Rep. 986.

PORT OF DESTINATION. As used in a time policy, the phrase has been held to mean any foreign port to which the vessel may be destined during the voyage, as well as her home port, and to include any usual stopping place for lading or unloading cargoes. 12 Gray 501.

PORT OF DISCHARGE. The place where the substantial part of the cargo is discharged has been held to be such, although done with the intent to complete the discharge at another basin. 104 Mass. 510. Some cargo must be discharged to

make the port of destination the port of discharge; 5 Mas. 414. See, further, 2 Cliff. 4; 1 Sprague 485; 18 Law Rep. 94.

PORT RISK. A risk upon a vessel whilst she is lying in port and before she has taken her departure on another voyage. 71 N. Y. 459.

PORT SANITARY AUTHORITY. See SANITARY AUTHORITIES.

PORT TOLL. The toll paid for bringing goods into a port.

PORTATICA (L. Lat.) In English Law. The generic name for port duties charged to ships. Hargr. Law Tracts 64.

PORTENTA IN LEGE (Lat.). Monstrosities in law; unheard of positions.

PORTER. The name of an ancient English officer who bore or carried a rod before the justices. The door-keeper of the English parliament also bears this name.

One who is employed as a common carrier to carry goods from one place to another in the same town is also called a porter. Such person is, in general, answerable as a common carrier. Story, Bailm. § 496.

See INTOXICATING LIQUOR.

PORTGREVE (from Sax. *gerefa*, reeve or bailiff, and port). A chief magistrate in certain maritime towns. The chief magistrate of London was anciently so called, as appears from a charter of king William I. Instead of this portgreve of London, the succeeding king appointed two bailiffs, and afterwards a mayor. Camden, Hist. 325.

PORTION. That part of a parent's estate, or the estate of one standing *in loco parentis*, which is given to a child. 1 Vern. 204. See 8 Com. Dig. 539; 16 Viner, Abr. 432; 1 Belt, Suppl. Ves. 34, 58, 303; 2 id. 46; 108 Pa. 187; 54 Ala. 240.

The part, share, or division, made for a child by the parent. 183 Ill. 541.

PORTION DISPONIBLE. In French Law. The part of a person's estate which he may bequeath to others than his natural heirs. A parent having one legitimate child may dispose of one-half only of his property; leaving two, one-third only; and leaving three or more, one-fourth only; and it matters not whether the disposition is *inter vivos*, or by will. See LEGITIME.

PORTIONIBUS. Is properly employed to mean a portion of the tithes of one parish claimed by the rector of another parish. 4 Cl. & F. 1.

PORTORIA (Lat.). In Civil Law. Duties paid in ports on merchandise. Code 4. 61. 3. Taxes levied in old times at city gates. Tolls for passing over bridges. Vicat, Voc. Jur.; Spelman, Gloss.

PORTRAIT. A picture of a person painted from life or from reasonable materials, if there are such, from which a likeness can be framed; or a picture painted after a man's death and meant to represent him. If there is nothing affording the materials for the portrait, it is completely an ideal one and cannot properly be called a portrait; Lord Lyndhurst, in 14 L. J. Ch. 73.

PORTSALES. Auctions were anciently so called, because they took place in ports.

PORTSOKA, or PORTSOKEN. Any place within the jurisdiction of a city. Cowell.

POSITIONS. When the pleadings were completed, each of the parties, if he wished to examine his adversary, prepared a detailed statement in writing of the facts in support of his own pleadings, so far as he supposed them to be within the knowledge of his adversary. This statement was divided into paragraphs, which were numbered, and each paragraph was called a position

(*positio*), and hence the document as a whole was called positions. It was brought into court and submitted to the judge, and then used by him as the basis of his examination. He framed oral questions upon them, and required the examinee to answer as to every point stated in the positions, but did not require him to go any further, or into any more detail than the positions did. The positions were answered separately, as if they had been a series of interrogatories. The answers were reduced to writing, and when completed, sworn to, and filed, a copy was furnished to the party who had exhibited the positions; and who was thus enabled to learn how much of his case he must prove by witnesses, for he had no occasion to examine witnesses as to anything admitted by his adversary, such admissions being conclusive. Langdell, *Pleadings in Ecclesiastical Courts*, § 15.

POSITIVE. Express; absolute; not doubtful. This word is frequently used in composition.

POSITIVE CONDITION. One in which the thing which is the subject of it *must* happen: as, if I marry. It is opposed to a negative condition, which is where the thing which is the subject of it *must not* happen: as, if I do not marry.

POSITIVE EVIDENCE. That which, if believed, establishes the truth or falsehood of a fact in issue, and does not arise from any presumption. It is distinguished from circumstantial evidence. 8 Bouvier, Inst. n. 3057. See VIOLENT PRESUMPTION.

POSITIVE FRAUD. See FRAUD.

POSITIVE LAW. Law actually ordained or established, under human sanctions, as distinguished from the law of nature or natural law, which comprises those considerations of justice, right, and universal expediency that are announced by the voice of reason or of revelation. Municipal law is chiefly, if not essentially, positive; while the law of nations has been deemed by many of the earlier writers as merely an application of the law of nature. That part of the law of nations which rests on positive law may be considered in a threefold point of view:—1. *The universal voluntary law*, or those rules which become law by the uniform practice of nations in general, and by the manifest utility of the rules themselves; 2. *The customary law*, or that which, from motives of convenience, has, by tacit but implied agreement, prevailed, not necessarily among all nations, nor with so permanent a utility as to become a portion of the *universal voluntary law*, but enough to have acquired a *prescriptive* obligation among certain states so situated as to be mutually benefited by it. 1 Taunt. 241; 3. *The conventional law*, or that which is agreed between particular states by *express treaty*, a law binding on the parties among whom such treaties are in force. 1 Chitty, Com. Law 28. See LAW.

POSITIVI JURIS (L. Lat.). Of positive law. See POSITIVE LAW.

POSSE. This word is used substantively to signify a possibility. For example, such a thing is *in posse*, that is, such a thing may possibly be. When the thing is in being, the phrase to express it is, *in esse*.

POSSE COMITATUS (Lat.). The power of the county.

The sheriff, or other peace officer, has authority by the common law, while acting under the authority of the writ of the United States, commonwealth, or people, as the case may be, and for the purpose of preserving the public peace, to call to his aid the *posse comitatus*; 1 Bla. Com. 348.

But with respect to writs which issue in the first instance to arrest in civil suits, or on mesne process, the sheriff is not bound to take the *posse comitatus* to assist him in the execution of them; though he may, if he pleases, on anticipated, or actual resistance to the execution of the process; Co.

2d Inst. 193; Co. 3d Inst. 161; 10 Johns. 85; 2 Jones N. C. 339.

Although the sheriff is not bound upon a *capias ad respondendum* to take the *posse comitatus*, it has been held to be his duty to do so if he has any reason to anticipate resistance; nor can it be said to be a hardship on the sheriff that he should be bound to provide against resistance; 12 Jurist 1053; Winst. 144. And likewise with reference to a *capias ad satisfaciendum*; 20 Ga. 598; and he cannot, in an action for escape, plead that the prisoner was rescued; *id*.

Having the authority to call in the assistance of all citizens, he may equally require that of any individual; but to this general rule there are some exceptions; persons of infirm health, or who lack understanding, minors under the age of fifteen years, women, and perhaps some others, it seems, cannot be required to assist the sheriff, and are, therefore, not considered as a part of the power of the county; Viner, *Abr. Sheriff* (B).

A refusal on the part of an individual lawfully called upon to assist the officer in putting down a riot is indictable; 1 Carr. & M. 314. In this case will be found the form of an indictment for this offence.

Although the sheriff is acting without authority, yet it would seem that any person who obeys his command, unless aware of that fact, will be protected; 84 Vt. 69.

An individual not called upon by the sheriff to lend his aid does so at his peril; 5 Tex. App. 60. In a case where the defendant assisted a sheriff's officers in executing a writ of replevin without their solicitation, the court held him justified in so doing; 2 Mod. 244; see 78 Me. 373; 19 Am. Dec. 123; Bac. *Abr. Sheriff* (N); Hamm. N. P. 68; 5 Whart. 437. See SHERIFF; PEACE.

POSSESS. A warehouse cannot be said to "possess" liquor, within the meaning of § 25 of the National Prohibition Act, which holds such liquor in storage for its lawful owner solely and in good faith for the purpose of preserving and protecting it until it shall be consumed by the owner and his family or *bona fide* guests. 254 U. S. 91.

POSSESSED. This word is applied to the right and enjoyment of a termor, or a person having a term, who is said to be possessed, and not seised. Bac. Tr. 335; Poph. 76; Dy. 389. It is sometimes synonymous with "seised"; 89 Ga. 632.

"Possessed" is a variable term in the law, and has different meanings as it is used in different circumstances. It sometimes implies a temporary interest in lands; as we say a man is possessed, in contradistinction to being seised. It sometimes implies the corporal having; as we say a man is seised and possessed. But it sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his; 44 Mich. 603.

POSSESSIO (Lat.). In Civil Law. The detention of a thing: divided into—*first*, natural, or the naked detention of a thing, without intention to acquire ownership; *second*, civil, or the detention of a thing to which one has a right, or with intention of acquiring ownership. Hein. *Elem. Jur. Civ.* § 1288; Mackeldey, *Civ. Law* § 210.

In Old English Law. Possession; seisin. Law Fr. & Lat. Dict.; 2 Bla. Com. 237; Bracton, lib. 2, c. 17; Cowell, *Possession*. But *seisina* cannot be of an estate less than freehold; *possession* can. New England Sheriff 141; 1 Metc. Mass. 450; 6 id. 439.

POSSESSIO FRATRIS (Lat. the brother's possession). A technical phrase applied in the English law relating to descents, to denote the possession by one in such privity with a person as to be considered the person's own possession.

By the common law, the ancestor from whom the inheritance was taken by descent must have had actual seisin of the lands, either by his own entry, or by the posses-

sion of his own or his ancestor's lessee for years, or by being in the receipt of rent from the lessee of the freehold. But there are qualifications as to this rule, one of which arises from the doctrine of *possession fratris*. The possession of a tenant for years, guardian, or brother is equivalent to that of the party himself, and is termed in law *possession fratris*; Littl. sect. 8; Co. Litt. 15 a; 3 Wills. 616; 7 Term 888.

In Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, and probably in other states, the real and personal estates of intestates are distributed among the heirs without any reference or regard to the actual seisin of the ancestor; Reeve, Desc. 377; 4 Mass. 467; 3 Day 106; 2 Pet. 59. In Maryland, New Hampshire, North Carolina, and Vermont, the doctrine of *possession fratris*, it seems, still exists; 2 Pet. 625; Reeve, Desc. 377; 4 Kent 884.

POSSESSION. The detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or exercises it in his name.

By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded. Thus, the seaman possesses his ship, but not the water in which it moves, although he makes each subserve his purpose.

It expresses the closest relation that can exist between a corporeal thing and the person who possesses it, implying an actual, physical contact, as by sitting or standing upon a thing; 109 N. C. 57.

Actual possession exists where the thing is in the immediate occupancy of the party. 3 Dev. 34.

Constructive possession is that which exists in contemplation of law, without actual personal occupation. 11 Vt. 129. And see 1 McLean 214, 265; 2 Bla. Com. 116.

In order to complete a possession, two things are required: that there be an occupancy, *apprehension*, or taking; that the taking be with an intent to possess (*animus possidendi*); hence persons who have no legal wills, as children and idiots, cannot possess or acquire possession; Pothier; Etienne. See 1 Mer. 358; Abb. Sh. 9. But an infant of sufficient understanding may lawfully acquire the possession of a thing; Mitch. R. E. 259.

Proof of the possession of property is commonly said to be *prima facie* evidence of title to it; and this is so with respect to land, in which case it has been held that proof of possession is sufficient evidence of title to maintain an action against a powder company for damages caused by an explosion; 58 Fed. Rep. 152. This particular phrase that possession is *prima facie* evidence of title has been very much criticised by Sir Frederick Pollock, who says that "it would be less intelligible at first sight, but not less correct to say that in the developed system of common-law pleading and procedure as it existed down to the middle of this century, proof of title was evidence only of a right to possess." Poll. Torts 317. Under the common-law forms of action, possession was of the utmost importance and was rather to be considered than ownership. "An owner in possession was protected against disturbance, but the rights of an owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes the true owner of goods is the person, and the only person, entitled to immediate possession." Poll. Torts 316.

Commenting on the suggestion sometimes made that there is no doctrine of possession in our law, the same author says: "The reason of this appearance, an appearance capable of deceiving even learned persons, is that possession has all but swallowed up ownership; and the rights of a possessor, the one entitled to possess, have all but monopolized the very name of property." *Id.* 317.

"Legal possession does not necessarily coincide either with actual physical con-

trol . . . or with the right to possess (constantly called property in our books), and it need not have a rightful origin." *Id.* 818. "The common law, when it must choose between denying legal possession to the persons apparently in possession and attributing it to a wrongdoer, generally prefers the latter course. In Roman law there is no such general tendency, though the results are often similar." *Id.* 819.

Judge Holmes considers possession a conception only less important than contract, and he contends that the English system is far more civilized than the Roman. He seeks to answer the question which presents so much difficulty to German philosophers: "Why is possession protected by the law when the possessor is not also an owner?" His reply is that "possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will; he has extended his personality into or over that object." Holmes, *Com. Law* 207. "Rights of ownership are substantially the same as those incident to possession. . . . The owner is allowed to exclude all and is accountable to no one; the possessor is allowed to exclude all but one and is accountable to no one but him." *Id.* 246. See Holmes, *Common Law*, Lect. 6; Pollock, *Torts*, 5th ed. ch. 9; F. W. Maitland in *1 Law Quart. Rev.* 324; 2 *id.* 481.

A very high degree of legal protection is accorded to one lawfully in possession and, whether its origin is rightful or not, a stranger cannot be heard in opposition to it. The true owner may be heard, but an intruder never. It is said, however, that the bald proposition that possession is a good title against a wrongdoer is inaccurate, if stated entirely without a qualification, and that the true limits of the bare possessor's right to recover damages for interference with his possession are: 1. If the defendant cannot show who the true owner is, the bare possessor may recover the same measure of damages as if he were the true owner, though he may be liable over to the latter. 2. Where the true owner is shown, the bare possessor cannot recover the value of the goods taken or the diminution in their value, or for injury, unless he is liable. 3. Whether the true owner be shown or not, the possessor may recover damages for the taking or trespass, nominal or substantial, as the taking is or is not attended with aggravation. 7 *Law Quart. Rev.* 242.

Possession in the Roman law is the subject of an extended discussion by a writer in 3 *Law Quart. Rev.* 32, who takes issue with Judge Holmes' treatment of that subject, as to which he says, that although the differences between the two systems are very striking, Judge Holmes treats the civilians with scant respect, although "the knowledge he shows of their rights proves that he has himself by no means neglected them and we shall not be far wrong in following his practice rather than his precept."

Failure to take possession is sometimes considered a badge of fraud, in the transfer of personal property. See *SALE; MORTGAGE*. Possession of real property will be presumed to accompany ownership until the contrary is proved; and constructive possession consequent upon legal ownership is sufficient as against mere trespassers; 120 U. S. 605. Long continued possession and use of real property creates a presumption of lawful origin; and this presumption need not rest upon belief that a conveyance was in point of fact executed; 120 U. S. 534.

See *ADVERSE POSSESSION; LIMITATIONS*.

In Louisiana. Civil possession exists when a person ceases to reside in a house or on the land which he occupied, or to detain the movable which he possessed, but without intending to abandon the possession. It is the detention of a thing by virtue of a just title and under the conviction of possessing as owner. *La. Civ. Code*, art. 3392, 3394.

Natural possession is that by which a man detains a thing corporeal; as, by occupying a house, cultivating ground, or re-

taining a movable in his possession. Natural possession is also defined to be the corporeal detention of a thing which we possess as belonging to us, without any title to that possession, or with a title which is void. *La. Civ. Code*, art. 3391, 3393.

Possession applied properly only to corporeal things, movables and immovables. The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a *quasi*-possession, and is exercised by a species of possession of which these rights are susceptible. *Id.* art. 3395.

Possession may be enjoyed by the proprietor of the thing or by another for him; thus, the proprietor of a house possesses it by his tenant or farmer.

To acquire possession of a property, two things are requisite: the intention of possessing as owner; the corporeal possession of the thing. *Id.* art. 3399.

Possession is lost with or without the consent of the possessor. It is lost *with* his consent—when he transfers this possession to another with the intention to divest himself of it; when he does some act which manifests his intention of abandoning possession; as, when a man throws into the street furniture or clothes of which he no longer chooses to make use. *Id.* art. 3411. A possessor of an estate loses the possession *against* his consent—when another expels him from it, whether by force in driving him away, or by usurping possession during his absence, and preventing him from re-entering; when the possessor of an estate allows it to be usurped and held for a year, without during that time having done any act of possession or interfered with the usurper's possession. *Id.* art. 3412.

In Criminal Law. In some states it is made a criminal offence to have possession of burglars' tools with intent to use them for the purpose for which they were intended. Under such statutes it was held (1) that it is sufficient to allege in the information possession with the intent to break open places of deposit in general and take property, without specifying any particular place or property. (2) That where the defendant was found with the tools concealed about his person while stealing a ride on a railway and he testified that he found the tools, it was proper to refuse to take the case from the jury. (3) Where the only evidence produced by the state was the concealment of the tools on the person, and there was no evidence that the defendant had been convicted of theft, the application to him in argument by the prosecuting attorney of the term thief, followed by a ruling by the court that the assertion was warranted by the evidence, was ground for reversal; 91 *Wis.* 552.

See *RECENT POSSESSION OF STOLEN PROPERTY*.

In International Law. As indicating political control, a possession means the same as a colony. It was so used in the treaty of 1897, between the United States and Great Britain, which failed to receive the approval of the senate.

Of Land. What will constitute possession of land depends largely upon its character, condition and the use to which it is adapted. It is not necessary to constitute actual possession that there should be an enclosure or any physical or visible occupancy of every part of the land. As said by the Supreme Court of Iowa. 25 *Iowa*, 177, 181.

"Possession of land is the holding of and exclusive exercise of dominion over it. It is evident that this is not, and cannot be, uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner can not occupy literally the whole tract,—he cannot have an actual *pedis possessio* of all, nor hold it in the grasp of his hands. But this can not always be done, yet he may hold the possession in fact of uninclosed land, by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable, and acquire the profits

it yields in its present condition,—such acts, being continued and uninterrupted, will amount to actual possession, and, if under color of title, or claim of right, will be adverse." 260 U. S. 433.

See *ACTUAL POSSESSION; CONSTRUCTIVE POSSESSION*.

The word "possession" is more or less ambiguous, and is interchangeably used to describe both actual and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins. Custody may be in the servant and possession in the master; or title and right of control may be in one and the property within the protection of the house of another. (7 *Cush.* 487, 489.) So that, as pointed out by Pollock and Wright in their work on the subject, controversies arising out of mixed possession have inevitably led to many subtle refinements in order to determine the rights of conflicting claimants, or to lay the proper charge of ownership in prosecution for larceny of goods belonging to one in the custody of another or found by the defendant. 232 U. S. 67.

POSSESSION MONEY. An allowance to one put in possession of goods taken under writ of *feri facias*. Holthouse, *Dict.*

POSSESSION, WRIT OF. See *HABERE FACIAS POSSESSIONEM*.

POSSESSOR. He who holds, detains, or enjoys a thing, either by himself or his agent, which he claims as his own.

In general, the possessor of personal chattels is presumed to be the owner; and in case of real estate he has a right to receive the profits until a title adverse to his possession has been established, leaving him subject to an action for the mesne profits. See *BONA FIDE POSSESSOR*.

POSSESSORY. Relating to possession; founded on possession; contemplating or claiming possession.

POSSESSORY ACTION. In *Old English Law*. A real action, in which the plaintiff, called the demandant, sought to recover the possession of land, tenements, and hereditaments. On account of the great nicety required in its management, and the introduction of more expeditious methods of trying titles by other actions, it has been laid aside. *Finch*, *Laws* 257.

In admiralty law the term is still in use. See *PETITIONS*.

In Louisiana. An action by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted. 2 *La.* 227, 254.

In Scotch Law. An action by which the possession of heritable or movable property may be recovered and tried. An action of molestation is one of them. *Paterson*, *Comp.* § 1058, n.

POSSESSORY JUDGMENT. In *Scotch Law*. A judgment which entitles a person who has uninterruptedly been in possession for seven years, to continue in possession until the question of right be decided in due course of law. *Bell*, *Dict.*

POSSIBILITY. An uncertain thing which may happen. Lilly, *Reg.* A contingent interest in real or personal estate. 1 *Madd.* 549.

Possibilities are near, as when an estate is limited to one after the death of another; or remote, as that one man shall be married to a woman, and then that she shall die and he be married to another. 1 *Fonbl.* Eq. n. e.; Viner, *Abr.*; 2 *Co.* 51 a.

Possibilities are also divided into—a possibility coupled with an interest. This may, of course, be sold, assigned, transmitted, or devised. Such a possibility occurs in executory devises, and in contingent, springing, or executory uses. See 89 *N. C.* 81.

A bare possibility, or hope of succession. This is the case of an heir apparent during the life of his ancestor. It is evident that he has no right which he can assign, devise, or even release. See *Chal. R. P. 66*.

A possibility or mere contingent interest, as, a devise to Paul if he survive Peter. *Dane, Abr. c. 1, a. 5, § 2*, and the cases there cited. See *PERPETUITY IMPOSIBILITY*.

POSSIBLE. Liable to happen or come to pass, capable of existing or of being conceived or thought of; capable of being done; not contrary to the nature of things. 38 Kan. 383. It is sometimes equivalent to practicable or reasonable; 44 Wis. 208. An undertaking to supply an article as soon as possible is construed to mean with all reasonable promptitude, regard being had to the manufacturer's means of business, and his orders already in hand; 26 L. J. C. P. 78; 4 Q. B. D. 670.

POST (Lat.). After. When two or more alienations or descents have taken place between an original intruder and the tenant or defendant in a writ of entry, the writ is said to be in the *post*, because it states that the tenant had not entry unless after the ouster of the original intruder. 3 Bla. Com. 182. Persons claiming under the *propositus* by feoffment or inheritance were said to be "in the *per*," while those claiming in any other manner, *e. g.* the limitation of a use, as tenant in dower, etc., were said to be "in the *post*." Except in case of the heir, the distinction is that persons in the *per* take by the act of the party at common law unassisted by statute, while persons in the *post* take by operation of law without any act of the party or by his act aided by statute; 4 L. Quart. Rev. 362. See *ENTRY, WRIT OF*.

A military establishment where a body of troops is permanently fixed. 19 Wal. 268; a military post is synonymous with military station. 94 U. S. 219.

POST CONQUESTUM. After the conquest. Words inserted in the king's title by King Edward I., and constantly used in the time of Edward III. *Toml.*

POST-DATE. To date an instrument a time after that on which it is made. See *DATE*.

POST DIEM (Lat.). After the day; as, a plea of payment *post diem*, after the day when the money became due. *Com. Dig. Pleader (2 W 29)*.

POST DISSEISIN. In English Law. The name of a writ which lies for him who, having recovered lands and tenements by force of a novel disseisin, is again disseised by a former disseisor. *Jacob, Law Dict.*

POST ENTRY. In Maritime Law. An entry made by a merchant upon the importation of goods, after the goods have been weighed, measured, or gauged, to make up the deficiency of the original or prime entry. The custom of making such entries has arisen from the fact that a merchant in making the entry at the time of importation is not or may not be able to calculate exactly the duties which he is liable to pay: he therefore makes an approximately correct entry, which he subsequently corrects by the *post entry*. See *Chitty, Com. L. 746*.

POST FACTO. See *EX POST FACTO*.

POST-FACTUM or POSTFACTUM (Lat.). An after-act; an act done afterwards; a post-act.

POST FINE. A duty formerly paid to the king for a fine acknowledged in his court.

POST LITEM MOTAM (Lat.). After the commencement of the suit.

Declarations or acts of the parties made *post litem motam* are presumed to be made with reference to the suit then pending, and, for this reason, are not evidence in favor of the persons making them; while those made before an action has been commenced, in some cases, as when a pedigree

is to be proved, may be considered as evidence; 4 Camp. 401.

POST-MARK. A stamp or mark put on letters in the postoffice.

Post-marks are evidence of a letter's having passed through the postoffice; 2 Camp. 620; 2 B. & P. 316; 15 East 416; 1 Maule & S. 201; 15 Conn. 206. But they are not evidence *per se* without proof; 1 Campb. 215; *id.* 178; 16 M. & W. 124; 3 Stark. 64; R. & R. C. C. 264. The opinion of a person in the habit of receiving letters is, it seems, evidence of the genuineness of a post-mark; 5 Bing. 299. Cited in *Stark. Ev., Sharsw. ed. 174*, note e. See *LETTER*; *POSTAL SERVICE*.

POST MORTEM (Lat.). After death: as, an examination *post mortem* is an examination made of a dead body to ascertain the cause of death; an inquisition *post mortem* is one made by the coroner.

It is the duty of the coroner, after death by violence, to cause a *post mortem* examination to be made by a competent medical authority. A physician thus employed may, at common law, maintain an action against the county for trouble and labor expended in such examination; *Gibson, C. J.*, in 4 Pa. 269.

A father may maintain an action against one to whom he has entrusted his child for treatment, for an autopsy performed upon it after death; 47 N. E. Rep. 401, where it was held that as the natural guardian of the child, the father had the right to the possession of the dead body. Being entitled to such possession for the purpose of burial, his right against one who unlawfully interferes with it and mutilates it is as great as if that one had unlawfully removed the body from the lot in which it was buried. See 55 Alb. L. J. 434. A widow may recover damages in a similar case for the unlawful dissection of the body of her dead husband; 47 Minn. 307. The right of a person entitled to the possession of a body is thus defined by Patterson, J.: "The right is to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative;" 1 App. Div. N. Y. 551; other authorities to the same general effect are 125 Ind. 536; 81 Md. 358; 19 Am. Law Rev. 251; 10 Alb. L. J. 71; 4 Am. L. T. 127; 3 Chic. Leg. N. 378; *Perley, Mortuary Law 26*. See *DEAD BODY*.

POST-NATUS (Lat.). Literally, after born; it is used by the old law writers to designate the second son. See *PUISNE*; *POST-NATI*.

POST NOTES. A species of bank-notes payable at a distant period, and not on demand. 2 W. & S. 463. A kind of bank-notes intended to be transmitted at a distance by post. See 24 Me. 36.

POST-NUPTIAL. Something which takes place after marriage: as, a post-nuptial settlement, which is a conveyance made generally by the husband for the benefit of the wife.

A post-nuptial settlement is either with or without consideration. The former is valid even against creditors, when in other respects it is untainted with fraud; 4 Mas. 443; 2 Bail. 477. The latter, when made without consideration, if *bona fide*, and the husband be not involved at the time, and it be not disproportionate to his means, taking his debts and situation into consideration, is valid; 4 Mas. 443. See 4 Dall. 304; *SETTLEMENT*; *VOLUNTARY CONVEYANCE*.

POST-OBIT (Lat.). An agreement by which the obligor borrows a certain sum of money and promises to pay a larger sum, exceeding the lawful rate of interest, upon the death of a person from whom he has some expectation, if the obligor be then living. 7 Mass. 119; 6 Madd. 111; 5 Ves. 57; 19 *id.* 628. See *CATCHING BARGAIN*;

EXPECTANCY; *MACEDONIAN DECREE*.

POSTOFFICE. A government office for the receipt and delivery of the mail.

All the streets of the city are post roads, because they are letter carrier routes, as are all public roads and highways while kept up and maintained as such; 1 Suppl. 423; and all railroads; 148 U. S. 92; 160 *id.* 1, 40; 88 Fed. Rep. 552; all the waters, canals, and plank roads of the United States during the time the mail is carried thereon; R. S. § 3964. See also 3 How. 151; 13 Ct. Cl. 199.

The power to establish postoffices does not enable the postmaster-general to bind the government by leasing a postoffice for twenty years when there is no appropriation therefor; 155 U. S. 489.

The top of a letter-box is not an authorized depository for mail matter; 17 Op. A. G. 524.

A repair shop though designated as a station is not a branch postoffice or station; 30 Ct. Cl. 59.

Where goods are sent by mail the postoffice is the agent of the buyer and not the seller; [1898] A. C. 200; and when they are delivered by the seller to the postoffice the title vests in the buyer; *id.* 204.

No person shall furnish any private conveyance for letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods over any post route or between places between which the mail is carried. See 16 Fed. Rep. 609.

POST ROADS. See *POSTOFFICE*.

POSTAGE. The money charged by law for carrying and delivering mail matter.

The rates of postage between places in the United States are fixed by law; the rates of postage upon foreign letters are fixed by arrangements entered into by the postmaster-general, in pursuance of authority vested in him by congress for that purpose.

POSTAGE-STAMPS. The act of congress approved March 3, 1847, section 11, and the act of congress of March 3, 1841, sections 3, 4, provide that, to facilitate the transportation of letters in the mail, the postmaster-general be authorized to prepare postage-stamps, which when attached to any letter or packet shall be evidence of the payment of the postage chargeable on such letter. The same sections declare that any person who shall falsely or fraudulently make, utter, or forge any post-stamp, with the intent to defraud the postoffice department, shall be deemed guilty of felony, and be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment. And if any person shall use or attempt to use, in prepayment of postage, any postage-stamp which shall have been used before for like purposes, such person shall be subject to a penalty of fifty dollars for every such offence; to be recovered in the name of the United States, in any court of competent jurisdiction. See, also, Act of Mar. 3, 1851, 9 Stat. at L. 589; Act of Aug. 31, 1852, 10 Stat. at L. 141; 1 Supp. R. S. p. 249, § 28. It is made penal to sell stamps or stamped envelopes for a larger sum than that indicated on the stamp or than is charged by the department; Act of Mar. 3, 1855, 10 Stat. at L. 642. See R. S. § 5463. Postmasters and other postal employees are forbidden to dispose of postage-stamps, stamped envelopes, or postal cards except for cash, or sell or dispose of them for any larger or less sum than the values indicated on their faces; 1 Supp. R. S. p. 187.

POSTAL SAVINGS-BANK. A savings-bank in connection with a postoffice. The idea was evolved in England in 1861, was adopted by Australia in 1863, Canada in 1868, and the United States June 25, 1910.

In the United States, the funds deposited bear 2 per cent. interest, depositors must be 10 years of age or over, and not more than \$100 in any one month or \$500 in all may be deposited by any one person.

A married woman may open an account in her own name and her deposits will be free from control by her husband.

In Great Britain and Ireland, accounts may be opened by any one over 7 years old, \$250 a year is the largest sum that may be deposited, and no total deposit may exceed \$1,000; deposits in the name of a married woman are deemed to be her separate property; interest is paid at the rate of 2½ per cent. Deposits and interest are guaranteed by the Federal Treasury and the Exchequer of the United Kingdom, respectively. *Stand. Dict.*

POSTAL SAVINGS DEPOSITOR. See **POSTAL SAVINGS-BANK.**

POSTAL SERVICE. That relating to the mails, their transmission and delivery.

The act of July 26, 1892, provides that after a general advertisement for the transportation of the mails, the postmaster-general may secure any mail service that may become necessary, and the contract shall be made with the lowest bidder. Where a contract is awarded to the lowest bidder, it can be changed only in the manner provided in §§ 3957-3959; 31 Ct. Cl. 332. The contract should be in the name of the United States; 18 Op. Atty. Gen. 112; and the bid must have with it an acceptable bond; 17 *id.* 294. Under § 3962 the postmaster-general may by order make a mail service subject to fines and deductions; 24 Ct. Cl. 61, 350; 26 *id.* 344.

A contractor for mail messenger service is not required to haul mail bags for repairs to and from a subsequently established repair shop; 30 Ct. Cl. 59.

The compensation of mail contractors is fixed by contract and by law of congress. The postmaster-general may make deduction for failure to perform services, and may also deduct the price of the trip in all cases where the trip is not performed; 24 Ct. Cl. 61; 26 *id.* 344. Compensation for additional services in carrying the mail is not to be in excess of the exact proportion which the original compensation bears to the original services; 131 U. S. 31, 35. The original letting, and not any subsequent increase of service or pay, is made the standard of limitation under § 3960; 17 Op. Atty. Gen. 166. If an allowance is made under false representations or by mistake, the money paid can be recovered; 132 U. S. 271, 644; 135 *id.* 550; and money received under an expedited schedule as payment for additional horses and men and never used, though allowed in the order of expedition, was held bound to be subject to being refunded to the United States; 132 U. S. 271. The clause providing that the compensation should not be in excess of the exact proportion does not prevent its being less; 19 Op. Atty. Gen. 147.

Most of the criminal legislation of congress rests upon no express grant of power, but upon the power to make all laws necessary and proper for carrying into execution the powers conferred; *Ordron. Const. Leg.* 559. The power to establish postoffices and post roads includes the power to punish offences committed against its administration, by whatever name it may be known; 13 *Blatch.* 335; 3 *Cra.* 212; 7 *Wall.* 492; and to forbid the use of the mails to carry matter which disseminates crime and immorality; 143 U. S. 110.

Opening a letter which had been in the postoffice, before delivery to the person to whom it was directed, with the intent to pry into his correspondence, is an offence against the postal laws, even though the letter was not sealed at the time; 2 *Curt.* 265; and though it come from a criminal and is supposed to contain improper information; 1 *Biss.* 227; 162 U. S. 430; but in order to constitute an offence against the postal laws the letter must have been in the custody of the postmaster or his agents; 20 *Fed. Rep.* 625.

Obstructing mails. The United States may enjoin obstructions to highways used in interstate commerce and in transporting the mails; 158 U. S. 564. This applies to obstructions upon railroads and electric

railways, and includes employees who suddenly desert their work; *id.*; 55 *Fed. Rep.* 380; 44 *id.* 592. See **LABOR UNION.**

Arresting a letter carrier on an indictment for murder is not obstructing the mail; 7 *Wall.* 493. A state statute which necessarily interferes with speedy and uninterrupted carriage of the United States mails cannot be considered as a reasonable police regulation; 163 U. S. 642. The committing an unprovoked assault upon a postmaster, the necessary result whereof was an obstruction and retarding of the passage of the mail, is an offence, unless the act was independent and disconnected from the postoffice and matters pertaining thereto; 14 *Fed. Rep.* 127.

A person having a lien against horses for their keeping cannot enforce the same in such a manner as to stop the United States mail in a stage coach drawn by such horses; 3 *Hughes* 545. But no offence is committed by enforcing it unless the mail is *in transitu* and unless the horses or vehicle taken are actually being used in carrying mail; *id.* It has been held that it is an offence under the statute to stop a mail train although one had obtained a judgment and writ of execution from a state court against the railway company; 3 *Fed. Rep.* 478. It is not an offence under the statute to restrain the driver of a mail coach from driving through a crowded city at such a rate as seriously to endanger the lives of the citizens; 9 *Pet.* 390. Restricting the speed of trains to six miles an hour by city ordinance does not obstruct the mails; 5 *Op. Atty. Gen.* 554.

Larceny and robbery. Embezzlement or destruction of mail matter by an employee in any department of the postal service is an offence against the postal laws. This statute has been held to create two distinct offences; viz.: (1) the embezzlement of a letter carried in the United States mail, and (2) the stealing of its contents; and one may be punished separately for each offence; 37 *Fed. Rep.* 200; 34 *id.* 316; and see 134 U. S. 624. Under the statute no one can be convicted who is not an employee of the postoffice department; 1 *McLean* 499; 2 *id.* 14. One who steals from the mail, whether an employee or not, commits an offence against the postal laws; 35 *Fed. Rep.* 59; and in taking or abstracting articles or receiving them when so taken, with the object of opening, secreting, destroying, embezzling, or stealing the same constitutes the offence; 37 *Fed. Rep.* 108.

As to the use of decoy letters, see that title.

As to using the mails for improper or non-mailable matter, see **LABEL; LIBERTY OF THE PRESS; LOTTERY; OBSCENITY.**

See **SAVINGS BANKS.**

POSTAL UNION. A treaty made at Berne in October, 1874, for the regulation of rates of postage and other matters connected with the postoffice between England and various other countries. See 38 & 39 *Vict. c.* 22; 1 *Hall. Int. L.* 286. Several international conferences have since been held on the subject.

POSTEA (Lat. afterwards). In Practice. The indorsement, on the *nisi prius* record, purporting to be the return of the judge before whom a cause is tried, of what has been done in respect of such record.

It states the day of trial, before what judge, by name, the cause is tried, and also who is or was an associate of such judge; it also states the appearance of the parties by their respective attorneys, or their defaults, and the summoning and choice of the jury, whether those who were originally summoned, or those who were tales, or taken from the standers-by; it then states the finding of the jury upon oath, and, according to the description of the action, and the assessment of the damages, with the occasion thereof, together with the costs.

These are the usual matters of fact contained in the *postea*; but it varies with the description of the action. See *Lee*,

Dict. Postea; 2 *Lilly, Abr.* 337; 16 *Viner, Abr.* 465; *Bacon, Law Tr.* 127.

When the trial is decisive, and neither the law nor the facts can afterwards be controverted, the *postea* is delivered by the proper officer to the attorney of the successful party, to sign his judgment; but it not unfrequently happens that after a verdict has been given there is just cause to question its validity: in such case the *postea* remains in the custody of the court. *Eunomus, Dial.* 2, § 33, p. 116.

POSTERIORES (Lat.). This term was used by the Romans to denote the descendants in a direct line beyond the sixth degree. It is still used in making genealogical tables.

POSTERIORITY. Being or coming after. It is a word of comparison, the correlative of which is *priority*: as, when a man holds lands from two landlords, he holds from his ancient landlord by priority, and from the other by posteriority. *Co. 2d Inst.* 892.

These terms, priority and posteriority, are also used in cases of liens: the first are prior liens, and are to be paid in the first place; the last are posterior liens, and are not entitled to payment until the former have been satisfied.

POSTERITY. All the descendants of a person in a direct line to the remotest generation. 8 *Bush* 527.

POSTHUMOUS CHILD. One born after the death of its father; or, when the Cæsarean operation is performed, after that of the mother. The doctrine is universally adopted throughout the United States, that posthumous children inherit in the same manner as if born during the father's life; and this relates back to the conception of the child, if it is born alive; 3 *Washb. R. P.* *412; 4 *Paige* 52; 30 *Pa.* 178; *Mitch. R. E.* 231. The court will allow a longer time than nine months for the birth of the child, when the opinion of physicians, or circumstances warrant it; 2 *Greenl. Cruise, R. P.* 140.

When a father makes a will without providing for a posthumous child, the will is generally considered as revoked, *pro tanto*; 3 *Washb. R. P.* 699, 412; 4 *Kent* 412, 521, n., 525; 28 *Am. Rep.* 496; 160 *Pa.* 433.

In most of the states there are statutes providing that in case of future estates or remainders limited to heirs, issue, or children of any person, posthumous children take as if living at the death of the parent without the limitation of an estate to support contingent remainders; and most of such statutes also provide that the future estate limited to take effect on the death of a person without heirs, etc., is defeated by the birth of a posthumous child. In a few states the time within which such child must be born is limited to ten months after the death of the father. See 31 *Fla.* 139; **LEGACY; DESCENT AND DISTRIBUTION; EN VENTRE SA MERE.**

POSTLIMINIUM (Lat. from post, after, and limen, threshold). A fiction of the civil law, by which persons or things taken by the enemy were restored to their former state on coming again under the power of the nation to which they formerly belonged. *Calvinus, Lex.*; 1 *Kent* 108. It is also recognized by the law of nations. But movables are not entitled to the benefit of this rule, by strict law of nations, unless promptly recaptured. If recaptured after twenty-four hours they vest in the recaptor, subject, amongst most nations, to revert in the owner, upon payment of military salvage; *Kusley, Law of War* 143.

The rule does not affect property which is brought into a neutral territory; 1 *Kent* 108. It is so called from the return of the person or thing over the threshold or boundary of the country from which it was taken.

When an enemy's military occupation comes to an end, the legal state of things

previously existing is deemed to have been in continuous existence during the occupation. Postliminium applies to territory, to private immovable property, and to every kind of property that may not lawfully be seized. But property, public or private, that has been lawfully taken by an enemy, such as booty or treasure, is not subject to the fiction. Acts done once and for all, within an invader's competence to perform, hold good. There is no postliminium as regards lawful prize, though it is said there may be by recapture; which, if it occur before capture is complete, may have effects like those of postliminium, though the latter fiction does not include any idea of salvage; Risle, Law of War 143.

The *jus postliminii* in international law is derived from a similar term in the Roman law by which persons and property captured by an enemy and then recaptured are restored to their original owner. The term now applies almost exclusively to property both real and personal which when recaptured does not belong to the recaptor but to the original owner. Snow, Int. Law 116.

POSTLIMINY. See POSTLIMINIUM.

POSTMAN. A senior barrister in the court of exchequer, who has precedence in motions; so called from place where he sits. 2 Bla. Com. 28; Wharton, Dict. A letter-carrier. Webster, Dict.

POSTMASTER. An officer who keeps a postoffice, attending to the receipt, forwarding, and delivery of letters and other matter passing through the mail.

Postmasters must reside within the delivery district for which they are appointed. For those offices where the salary or compensation is less than a thousand dollars a year, the postmaster-general appoints; where it is more, the president. Postmasters are divided into four classes, exclusive of the postmaster at New York, according to the amount of salary; those of the first class receiving three thousand or more, those of the fourth less than one thousand; 1 Supp. R. S. p. 110; *id.* 417. They must give bond to the United States of America; see 19 How. 73; Gilp. 54; which remains in force, for suit upon violation, during the term; 1 W. & M. 150; for three, formerly two, years after the expiration of the term of office; R. S. § 3838; 7 How. 681. See R. S. § 3836.

Where an office is designated as a money-order office, the bond of the postmaster shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business; R. S. § 3834.

The presumption that public officers do their duty applies to the duty of postmasters to report a contractor's delinquencies; 132 U. S. 644.

Every postmaster is required to keep an office in the place for which he may be appointed; and it is his duty to receive and forward by mail, without delay, all letters, papers, and packets as directed, to receive the mails, and deliver, at all reasonable hours, all letters, papers, and packets to the persons entitled thereto.

Every person who, without authority from the postmaster-general, sets up any office bearing the title of postoffice is liable to a penalty of \$500 for each offence; R. S. § 3829.

A postmaster is liable for all losses occasioned by his own default in office; 3 Wils. 443; Cowp. 754; 5 Burr. 2709; Edw. Bailm. 433; 1 Bell. Com. 468; 2 Kent 474; Story, Bailm. § 463; see 97 Ala. 710; but in order to make him liable for negligence, it must appear that the loss or injury sustained was in consequence of such negligence; 7 Cra. 242; 6 Barb. 232. He is bound only to the exercise of due diligence in the care of matter deposited in the post-office; 15 Wall. 337. See 1 Ld. Raym. 646, where the question is elaborately discussed.

A postmaster is liable for the acts of his clerks or servants who were not regularly

appointed and sworn as his assistants; 23 Vt. 663; 106 Mass. 446. In Pennsylvania it has been decided that he is not responsible for their secret delinquencies; though, perhaps, he is answerable for want of attention to the official conduct of his subordinates; 8 Watts 453; but see 97 Ala. 710. An attempt to induce a postmaster to sell stamps on credit is in violation of a statute providing against the attempt to influence any officer of the United States to a violation of his lawful duties; 136 U. S. 257.

POSTMASTER-GENERAL. The chief officer of the postoffice department of the executive branch of the government of the United States.

His duties, in brief, are, among other things, to establish postoffices and appoint postmasters (see POSTMASTER) at convenient places upon the post-roads established by law; to give instructions for conducting the business of the department; to provide for the carriage of the mails; to obtain from the postmasters balances due, with accounts and vouchers of expenses; to pay the expenses of the department; see 15 Pet. 377; to prosecute offences, and, generally, to superintend the business of the department in all the duties assigned to it. He is assisted by four assistants and a large corps of clerks,—the four assistants being appointed by the president. He must make ten several reports annually to congress, relating chiefly to the financial management of the department, with estimates of the expenses of the department for the ensuing year. R. S. § 413. He is a member of the cabinet. See R. S. §§ 388-414; DEPARTMENT; OFFICER.

POSTNATI (Lat.). Those born after. Applied to American and British subjects born after the separation of England and the United States; also to the subjects of Scotland born after the union of England and Scotland. Those born after an event, as opposed to *antenati*, those born before. 2 Kent 56; 2 Pick. 395; 5 Day 169*. See ANTENATI.

POSTPONE. To put off; to delay; to continue or adjourn, as to postpone a hearing.

POSTULATIO (Lat.). In Roman Law. The name of the first act in a criminal proceeding.

A person who wished to accuse another of a crime appeared before the prætor and requested his authority for that purpose, designating the person intended. This act was called *postulatio*. The postulant (*calumnium jurabat*) made oath that he was not influenced by a spirit of calumny, but acted in good faith with a view to the public interest. The prætor received this declaration, at first made verbally, but afterwards in writing, and called a libel. The *postulatio* was posted up in the forum, to give public notice of the names of the accuser and the accused. A second accuser sometimes appeared and went through the same formalities.

Other persons were allowed to appear and join the postulant or principal accuser. These were said *postulare subscriptionem*, and were denominated *subscriptores*. Cic. in Cæcil. Divin. 15. But commonly such persons acted concurrently with the postulant, and inscribed their names at the time he first appeared. Only one accuser, however, was allowed to act; and if the first inscribed did not desist in favor of the second, the right was determined, after discussion, by judges appointed for the purpose. Cic. in Verr. 1. 8. The preliminary proceeding was called *divinatio*, and is well explained in the oration of Cicero entitled *Divinatio*. See Aulus Gellius, Att. Noct. lib. ii. cap. 4.

The accuser having been determined in this manner, he appeared before the prætor, and formally charged the accused by name, specifying the crime. This was called *nominis et criminis delatio*. The magistrate reduced it to writing, which was called *inscriptio*, and the accuser and his adjuncts, if any, signed it, *subscribent*. This proceeding corresponds to the indictment of the common law.

If the accused appeared, the accuser formally charged him with the crime. If the accused confessed it, or stood mute, he was adjudged to pay the penalty. If he denied it, the *inscriptio* contained his answer, and he was then in *reus* (indicted, as we should say), and was called *reus*, and a day was fixed, ordinarily after an interval of at least ten days, according to the nature of the case, for the appearance of the parties. In the case of Verres, Cicero obtained one hundred and ten days to prepare his proofs; although he accomplished it in fifty days, and renounced, as he might do, the advantage of the remainder of the time allowed him.

At the day appointed for the trial, the accuser and his adjuncts or colleagues, the accused, and the judges, were summoned by the herald of the prætor. If the accuser did not appear, the case

was erased from the roll. If the accused made default, he was condemned. If both parties appeared, a jury was drawn by the prætor or *judex questiois*. The jury was called *jurati homines* and the drawing of them *sortitio*, and they were, taken from a general list made out for the year. Either party had a right to object to a certain extent to the persons drawn; and then there was a second drawing called *subsortitio*, to complete the number.

In some tribunals *questiones* (the jury) were *editi* (produced) in equal number by the accuser and the accused, and sometimes by the accuser alone, and were objected to or challenged in different ways, according to the nature of the case. The number of the jury also varied according to the tribunal (*questio*): they were sworn before the trial began. Hence they were called *jurati*.

The accusers, and often the *subscriptores*, were heard, and afterwards the accused, either by himself or by his advocates, of whom he commonly had several.

After the pleadings were concluded, the prætor or the *judex questiois* distributed tablets to the jury, upon which each wrote, secretly, either the letter A. (*absolvo*), or the letter C. (*condemno*), or N. L. (*non liquet*). These tablets were deposited in an urn. The prætor ascertained and counted the tablets. If the majority were for acquitting the accused, the magistrate declared it by the words *fecisse non videtur*, and by the words *fecisse videtur* if the majority were for a conviction. If the tablets marked N. L. were so many as to prevent an absolute majority for a conviction or acquittal, the cause was put off for more ample information, *ampliatio*, which the prætor declared by the word *ampliatus*. Such, in brief, was the course of proceedings before the *questiones perpetuæ*.

The forms observed in the *comitia centuriata* and *comitia tributa* were nearly the same, except the composition of the tribunal and the mode of declaring the vote.

POSTULATIO ACTIONIS (Lat.). In Civil Law. Demand of an action (*actio*) from the prætor, which some explain to be a demand of a *formula*, or form of the suit; others, a demand of leave to bring the cause before the judge. Taylor, Civ. Law 80; Calvinus, Lex. *Actio*.

POT-DE-VIN. In French Law. A sum of money frequently paid at the moment of entering into a contract, beyond the price agreed upon.

It differs from *arrha* in that it is not part of the price of the thing sold, and that the person who has received it cannot by returning double the amount, or the other party by losing what he has paid, rescind the contract; 18 Toullier, n. 52.

POTENTATE. One who has a great power over an extended country; a sovereign.

By the naturalization laws of the United States, an alien is required, before he can be naturalized, to renounce all allegiance and fidelity to any foreign prince, potentate, state, or sovereign whatever.

POTENTIALLY. In possibility, not in act, not positively; in efficacy, not in actuality. 19 Neb. 556.

POTESTAS (Lat.). In Civil Law. Power; authority; domination; empire. *Imperium*, or the jurisdiction of magistrates. The power of the father over his children, *patria potestas*. The authority of masters over their slaves, which makes it nearly synonymous with *dominium*. See Inst. 1. 9. 12; Dig. 2. 1. 13. 1; 14. 1; 14. 4. 1.

POUND. A place, enclosed by public authority, for the temporary detention of stray animals. 4 Pick. 258; 9 *id.* 14.

Animals may not be impounded unless they are suffered by the owner to run at large within the strict construction of the statute; 1 Aik. 316; if the impounding is illegal, they can be recovered by the owner; 28 Me. 481; 21 N. H. 448; 23 Vt. 674. If it is legal, the owner must pay the costs imposed; 20 Ill. 363; and the pound-keeper need not deliver over the animals until all legal charges are paid; 5 Cush. 263; 39 Vt. 34; the impounder has the right to use the same force to maintain his possession as a sheriff has to protect his possession under legal process; 36 Vt. 625.

Where the proper officer finds cattle running at large in public streets, he may pursue them upon private property; 63 Me. 84; but when a man finds strange cattle in his field, he is not bound to impound or retain them for the owner, but may drive them off into the highway; 18

Pick. 227; if, however, he impounds, he must feed and water them properly, according to the usage of the country and good husbandry; 13 *id.* 384; he must proceed strictly according to the statute, or he will be a trespasser; 16 Pa. 22; notice must be given before the impounded animal can be sold; 126 Mass 364; and such notice must state the legal charges; 16 *Meto.* 198. Laws authorizing the impounding and sale of stock without notice or judicial investigation are held to be unconstitutional as authorizing a sale of private property without due process of law; 35 N. Y. 302; 98 N. C. 44; 64 Miss. 283; but it has been held that such laws are valid under the police power; 58 Wis. 144. See *ANIMAL; ESTRAY; RUNNING AT LARGE.*

Money. The sum of twenty shillings. Previous to the establishment of the federal currency, the different states made use of the pound in computing money; it was of different value in the several states.

Pound Sterling is a denomination of money of Great Britain. It is of the value of a sovereign (*q. v.*). In calculating the rates of duties, the pound sterling shall be considered and taken as of the value of four dollars and eighty-six cents and six and one-half mills; R. S. § 3565.

The pound sterling of Ireland is to be computed, in calculating said duties, at four dollars and ten cents; *id.*

Weights. There are two kinds of weights, namely, the troy and the avoirdupois. The pound avoirdupois is greater than the troy pound in the proportion of seven thousand to five thousand seven hundred and sixty. The troy pound contains twelve ounces, that of avoirdupois sixteen ounces.

POUND-BREACH. The offence of breaking a pound in order to take out the cattle impounded. 3 Bla. Com. 146. The writ *de parco fracto*, or pound-breach, lies for recovering damages for this offence; also case. *Id.* It is also indictable.

POUND-KEEPER. An officer charged with the care of a pound, and of animals confined there.

POUNDAGE. In Practice. The amount allowed to the sheriff, or other officer, for commissions on the money made by virtue of an execution. This allowance varies in different states and to different officers.

POURFAIRE PROCLAIMER. An ancient writ addressed to the mayor or bailiff of a city or town, requiring him to make proclamation concerning nuisances, etc. Fitz. Nat. B. 176.

POURPARLER. In French Law. The conversations and negotiations which have taken place between the parties in order to make an agreement. These form no part of the agreement. Pardessus, *Dr. Com.* 142.

POURSUIVANT. A follower; a pursuer. In the ancient English law, it signified an officer who attended upon the king in his wars, at the council-table, exchequer, in his court, etc., to be sent as a messenger. A *poursuivant* was, therefore, a messenger of the king.

POVERTY AFFIDAVIT. An affidavit furnished by a party to a suit that he is not able to furnish security for costs. 36 Kan. 263. In the United States courts, an affidavit of poverty for the purpose of avoiding the giving of a cost bond, may be filed after the granting, on notice to plaintiff, of an order for such bond; 82 Fed. Rep. 865.

POWDER. Technically, "powder" may be a mass of fine particles of any substance, yet, when used in connection with an allegation of shooting and the use of leaden balls, any person, would know that gunpowder was meant. 66 S. W. 995.

POWER. The right, ability, or faculty of doing something.

The distinction between "power" and "right," whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right; 143 Pa. 64.

Technically, an authority by which one person enables another to do some act for him. 2 Lilly, Abr. 339.

Derivative Powers are those which are received from another. This division includes all the powers technically so called. They are of the following classes:—

Coupled with an interest, being a right or authority to do some act, together with an interest in the subject on which the power is to be exercised, Marshall, C. J., 8 Wheat. 203; and the interest coupled with a power in order to make it irrevocable, must be an interest in the thing itself; 125 U. S. 342.

A power of this class survives the person creating it, and, in case of an excess in execution, renders the act valid so far as the authority extends, leaving it void as to the remainder only. It includes powers of sale conferred on a mortgagee.

Naked, being a right of authority disconnected from any interest of the donee in the subject-matter. 3 Hill, N. Y. 365. In the case of a naked power not coupled with an interest the law requires that every prerequisite to the exercise of that power should precede it; 4 Wheat. 77; 134 U. S. 256. A naked power given to several persons cannot be executed by the survivors; 16 Beav. 233.

Implied Power. The true test of "implied power" is, whether a preferred means is adapted to the end of an express power, and is also unprohibited, or, in other words, is congenial with the spirit and purpose of a constitution. 2 Duv. (Ky.) 21.

Inherent Powers. Those which are enjoyed by the possessors of natural right, without having been received from another. Such are the powers of a people to establish a form of government, of a father to control his children. Some of these are regulated and restricted in their exercise by law, but are not technically considered in the law as powers.

Special Power. "Special power" to dispose of by will, within the meaning of a statute, is a power which is specifically expressed, or as clearly and unequivocally manifested, of disposing by will of some particular estate. 9 Bush (Ky.) 397.

Powers under the Statute of Uses. An authority enabling a person, through the medium of the statute of uses, to dispose of an interest in real property, vested either in himself or another person.

Methods of causing a use, with its accompanying estate, to spring up at the will of a given person. Will. R. P., 16th ed. 333; 2 Washb. R. P. 300.

The right to designate the person who is to take a use. Co. Litt. 271 b, Butler's note, 231, § 3, pl. 4.

A right to limit a use. 4 Kent 334. An authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

They are distinguished as—

Appendant. Those which the donee is authorized to exercise out of the estate limited to him, and which depend for their validity upon the estate which is in him. 2 Washb. R. P. 304. A life-estate limited to a man, with a power to grant leases in possession, is an example. Hardr. 416; 1 Cal. Cas. 15; Sugd. Pow. 107; Burton, R. P. § 179.

Of appointment. Those which are to create new estates. Distinguished from powers of revocation.

Collateral. Those in which the donee has no estate in the land. 2 Washb. R. P. 305.

General. Those by which the donee is at liberty to appoint to whom he pleases.

In gross. Those which give a donee, who has an estate in the land, authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. 2 Cow. 236; Tu-

dor, Lead. Cas. 293; Watk. Conv. 260.

Of revocation. Those which are to divest or abridge an existing estate. Distinguished from those of appointment; but the distinction is of doubtful exactness, as every new appointment must divest or revoke a former use. Sanders, Uses 154.

As to the effect of the insertion of a power of revocation, either single or in connection with one of appointment, see Styles 389; 2 Washb. R. P. 307.

Special. Those in which the donee is restricted to an appointment to or among particular objects only. 2 Washb. R. P. 307.

The person bestowing a power is called the *donor*; the person on whom it is bestowed is called the *donee*.

The person who receives the estate by appointment is called the appointee; the donee of the power is sometimes called the appointor.

The creation of a power may be by *deed or will*; 2 Washb. R. P. 314; Mitch. R. E. 506; by *grant to a grantee, or reservation to the grantor*; 4 Kent 319; and the reservation need not be in the same instrument, if made at the same time; 1 Sugd. Pow. 153; by *any form of words* indicating an intention; 2 Washb. R. P. 315. The doubt whether a power is created or an estate conveyed can, in general, exist only in cases of wills; 2 Washb. R. P. 316; and in any case is determined by the intention of the grantor or deviser, as expressed in or to be gathered from the whole will or deed; 10 Pet. 532; 8 How. 10; 3 Cow. 651; 6 Watts 87; 4 Bibb 307. It must be limited to be executed, and must be executed within the period fixed by the rules against perpetuities; 5 Bro. P. C. 592; 2 Ves. 368; 13 Sim. 393.

The interest of the donee is not an estate; Watk. Conv. 271; 2 Prest. Abstr. 275; but is sufficient to enable the donee to act, if the intention of the donor be clear, without words of inheritance; 3 Ves. 467; 1 P. Wms. 171; 7 Johns. Ch. 34; see Co. Litt. 271 b, Butler's note 231; and may coexist with the absolute fee in the donee; 10 Ves. 255; 4 Greenl. Cruise, Dig. 241, n. As a general rule a power to sell does not include a power to mortgage; 3 Hill N. Y. 361; 66 Tex. 31; 89 Va. 873; but where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, then it may be proper under the circumstances to raise the money by mortgage, and the court will support it as a conditional sale; 1 De G. M. & G. 645; 3 Jur. N. S. 1143; Sugd. Powers 425; and sale generally means a cash sale; 4 Kent 331; 3 Hill N. Y. 373. See *infra*.

As to exercising the power. If it be simply one in which no person is interested but the donee, it is a matter of election on his part whether to exercise it or not; 1 Sugd. Pow. 158; see *infra*; but if coupled with a trust in which other persons are interested, equity will compel an execution; Story, Eq. Jur. § 1062; 2 Mas. 244, 251.

A power to appoint by will, conferred on a life tenant, does not empower him to devise the land for the payment of his own debts; 69 Md. 390. But a power conferred by will to invest or use includes the power to sell; 115 N. C. 40.

The execution must be in the manner prescribed, by the proper person, see *APPOINTMENT*, and cannot be by an assignee; 2 Washb. R. P. 321; unless authorized by the limitation; 4 Cruise, Dig. 211; or unless an interest be coupled with the power; 2 Cow. 236; 8 Wheat. 203; nor by a successor, as on the death of an executor; 13 *Meto.* 220. As to whether a sale by a donee who has also an estate in the land is held to be an execution of the power, see 2 Washb. R. P. 325; Tudor, Lead. Cas. 306; 5 B. & C. 720; 6 Co. 18; 16 Pa. 25.

A power to sell gives authority to sell for cash only, and does not uphold a mere exchange; 140 U. S. 253; 22 How. 75; 82 Ia. 91; Perry, Trusts § 760; or mortgage; 15 Minn. 212; 6 Cush. 117; 66 Tex. 31; *contra*, 151 Pa. 322; 163 *id.* 626; and see 153 Mass. 137.

Where three executors, given power to

sell real estate, have accepted the trust, one alone cannot execute the power; 73 Tex. 293; and in a devise to two sisters to sell if they desired, the power can only be exercised by their joint deed and is lost by the death of either of them; 56 Conn. 816. A power given by will cannot be delegated, but an appointment under it need not allude to the power; 88 Va. 588.

Where an exact execution is impossible under authority of court, it may be executed as near as may be (*cy-près*) to carrying out the donor's intention; 2 Term 241; 4 Ves. 681; 5 Sim. 632; 3 Wash. C. C. 12.

It must be made at a proper time, and, where several powers are given over different parts of the same estate, in proper succession; 1 Co. 174; 1 W. Bla. 281.

Equity will compel the donee to execute a power where it is coupled with a trust in which other persons are interested; Story, Eq. Jur. § 1062; and to correct a formal defect in the manner of execution; 2 P. Wms. 489, 622; 2 Mas. 251; 3 Edw. Ch. 175.

Three classes of cases have been held sufficient demonstrations of an intended exercise of a power: 1. Where there has been some reference in the will, or other instrument, to the power; 2. or a reference to the property, which is the subject on which it is to be executed; 3. or when the provisions in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual or a mere nullity, in other words it would have no operation, except as an execution of the power; 134 U. S. 590. See 98 *id.* 326; 109 *id.* 366; 33 N. Y. 392; 92 Ill. 538.

The suspension or destruction of a power may sometimes happen by a release by the donee, by an alienation of his estate, by his death, and by other circumstances.

An appendant power may be suspended by a conveyance of his interest by the donee; 4 Cruise, Dig. 221; Cro. Car. 472; 4 Bingh. N. C. 734; 2 Cow. 237; and may be extinguished by such conveyance; 2 B. & Ald. 93; 10 Ves. 246; or by a release; 1 Russ. & M. 431, 436, n.; 1 Co. 102 b; 2 Washb. R. P. 308.

Illusory powers. It was held at common law that when a power is given to appoint among certain persons, it is a sufficient and legal exercise of the power if a large part of property is appointed to some of the beneficiaries and very little to the others. Thus a power to appoint a thousand dollars between A. and B. would be satisfied if nine hundred and ninety-nine were given to A. and only one dollar to B. The courts of equity interfered in such case and compelled a substantial distribution to prevent the appointment becoming illusory or a fraud on the power. But by 1 Wm. IV. c. 36, the common-law rule was restored; 44 Pa. 527; 66 Pa. 248.

A power in gross may be released to one having the freehold in possession, reversion, or remainder, and not by any other act of the donee; Tud. Lead Cas. 294; Burt. R. P. § 176; Chance, Pow. § 3172; Hardr. 416; 1 P. Wms. 777; an infant may execute a power in gross; 7 Ch. D. 728.

A collateral power cannot be suspended or destroyed by act of the donee; F. Moo. 605; 5 Mod. 457; such a power may be executed by an infant; 4 Kent 342. And see 1 Russ. & M. 431; 13 Metc. 220.

Impossibility of immediate vesting in interest or possession does not suspend or extinguish a power; 2 Bingh. 144. A power of sale in a mortgage for condition broken is not revoked by the mortgagor's death; 143 Mass. 49; 4 S. D. 604. In general, a power of sale is exhausted by a single exercise of power; 30 Fed. Rep. 532.

A power may be executed by a married woman; 4 Kent 342; but she will not be compelled to exercise a power of appointment of which she is donee for the benefit of her creditors; 17 Q. B. D. 521.

For the distinction between *political* and *judicial* power, see 78 Ill. 261; 75 *id.* 152; 29 Mich. 451; 43 Ia. 452; 114 Mass. 247; s. c. 19 Am. Rep. 341; 10 Bush 72; Cooley, Const. Lim. 122.

See BALANCE OF POWER; BENEFICIAL

POWER; CONCURRENT POWER; POLICE POWER; CONSTITUTIONAL LAW.

POWER OF ATTORNEY. An instrument authorizing a person to act as the agent or attorney of the person granting it. It is often called *letter of attorney*.

A general power authorizes the agent to act generally in behalf of the principal.

A special power is one limited to particular acts.

It may be by parol or under seal. 1 Pars. Contr. 94. The attorney cannot, in general, execute a sealed instrument so as to bind his principal, unless the power be under seal; 2 B. & P. 338; 5 B. & C. 355; 2 Me. 358. See 7 M. & W. 322, 331; 7 Cra. 299; 4 Wash. C. C. 471; 19 Johns. 60; 2 Pick. 345.

Powers of attorney are strictly construed; 6 Cush. 117; 5 Wheat. 326; 8 M. & W. 806; 5 Bingh. 442. General terms used with reference to a particular subject-matter are presumed to be used in subordination to that matter; 7 B. & C. 278; 5 Den. 49; 7 Gray 287. See, as to a power to collect a debt; 1 Blackf. 252; to settle a claim; 5 M. & W. 645; 3 Blackf. 291; to make an adjustment of all claims; 8 Wend. 494; 7 Watts 716; 14 Cal. 399; 7 Ala. N. S. 800; to accept bills; 7 B. & C. 278.

Where a power of attorney is executed in a foreign country in the language of that country, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, lawyers of the country, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be acted upon in other countries, the extent of the authority in any country in which the authority is acted upon must be determined by the law of that country; [1891] 1 Q. B. 79.

Third parties dealing with an agent on the basis of a written letter of attorney are not prejudiced by any private instructions from the principal to the agent, unless such instructions are in some way referred to in the letter; 15 Johns. 44; 3 Term 757; 81 N. C. 5; 27 Gratt. 119. Where an agent is acting under such a written letter, it is the duty of third persons to examine the instrument; Story, Ag. § 72. A failure to do this precludes a recovery unless the claim is based on fraud; 1 Pet. 264; Whart. Ag. § 227; 22 N. H. 360; 72 Pa. 351; 53 Md. 28. When a power of attorney is to a partnership as such, a deed executed in the partnership name by one of the partners is good; 81 Tex. 505.

A power of attorney to convey lands is immediately revoked by the death of the principal, and deeds subsequently made by the attorney are void; 50 Fed. Rep. 712; and upon the death of some of the donors of a power of attorney, it is revoked as to them if not as to all; 119 U. S. 156.

See AGENCY; PRINCIPAL.

PRACTICABLE, PRACTICABLY. Practicable is that which may be done, practiced, or accomplished, that which is performable, feasible, possible; and the adverb practically means in a practical manner. 43 Ill. 165.

Reasonably practicable, when used in directing the observance of a set of affirmative and negative rules, will usually apply to the negative; 16 Q. B. D. 340.

Where a statute provides that persons having in charge animals affected with a contagious disease shall notify the police of the fact with all practicable speed, it was held to be necessary that the person shall have knowledge of the animal's being diseased before it becomes neglect to give notice; L. R. 8 C. P. 322.

PRACTICAL IMPOSSIBILITY. See IMPOSSIBILITY.

PRACTICAL LOCATION. Means the same as actual location. 47 Barb. 287.

PRACTICE. The form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their

various stages, according to the principles of law and the rules laid down by the respective courts. In its ordinary meaning it is to be distinguished from the pleadings. The term applies to a distinct part of the proceedings of the court. 10 Jur. N. S. 457. In a popular sense, the business which an attorney or counsellor does; as, A B has a good practice.

The books on practice are very numerous; among the most popular are those of Tidd, Chitty, Archbold, Sellon, Graham, Dunlap, Caines, Troubat & Haly, Blake, Impey, Daniell, Benedict, Colby, Curtis, Hall, Law, Day, Abbott.

A settled, uniform, and long-continued practice, without objection, is evidence of what the law is; and such practice is based on principles which are founded in justice and convenience; 2 Russ. 19, 570; 2 Jac. 232; 5 Term 380; 1 Y. & J. 167, 168; 2 C. & M. 55; Ram, Judgm. c. 7.

With respect to criminal practice, it has been forcibly remarked by a learned judge that even where the course of practice in criminal law has been unfavorable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of parliament. Per Maule, J., Scott, N. C. 599, 600.

PRACTICE COURT. In English Law. A court attached to the court of king's bench, which heard and determined common matters of business and ordinary motions for writs of mandamus, prohibition, etc.

It was usually called the bail court. It was held by one of the puisne justices of the king's bench.

PRACTICE OF MEDICINE. See MEDICINE, PRACTICE OF.

PRACTICES. A succession of acts of a similar kind or in a like employment. Webster. See CORRUPT PRACTICES; ILLEGAL PRACTICES.

PRACTICING. A retired lawyer who tries a case for a neighbor gratuitously, is not a practicing lawyer subject to a penalty for practicing without having paid the license tax. "The term practicing implies something more than a single act or effort." 1 So. Rep. (Miss.) 161; 98 N. C. 644.

PRACTITIONER. He who is engaged in the exercise or employment of any art or profession.

PRÆCEPTORS (Lat.). Heretofore masters in chancery were so called, as having the direction of making out remedial writs. Fleta 76; 2 Reeve, Hist. Eng. Law 251. A species of benefice, so called from being possessed by the principal templars (*præceptores templi*), whom the chief master by his authority created. 2 Mon. Ang. 543.

PRÆCIPUE, PRECIPUE (Lat.). A slip of paper upon which the particulars of a writ are written. It is lodged in the office out of which the required writ is to issue. Wharton, Dict. A written order to the clerk of a court to issue a writ.

PRÆCIPUE IN CAPITALE. A writ out of chancery for a tenant holding of the crown in *capite*, viz., in chief. Magna Char. c. 24.

PRÆCIPUE QUOD REDDAT (Lat.). Command him to return. An original writ, of which *præcipe* is the first word, commanding the person to whom it is directed to do a thing or to show cause why he has not done it. 3 Bla. Com. 274; Old, N. B. 13. It is as well applied to a writ of right as to other writs of entry and possession.

PRÆCIPUE QUOD TENEAT CONVENTIONEM. The writ which commenced the action of covenant in fines, which are abolished by 3 & 4 Wm. IV. c. 74.

PRÆCIPITUM. The punishment of

casting headlong from some high place.

PRÆCIPUT CONVENTIONNEL. In French Law. Under the régime en communauté, when that is of the conventional kind, if the survivor of husband and wife is entitled to take any portion of the common property by a paramount title and before partition thereof, this right is called by the somewhat barbarous title of the conventional *præciput*, from *præ*, before, and *capere*, to take. Brown.

PRÆDIA (Lat.). In Civil Law. Lands.

Prædia urbana, those lands which have buildings upon them and are in the city.

Prædia rustica, those lands which are without buildings or in the country. Voc. Jur. Uta.

Prædia stipendiaria, provincial lands belonging to the people.

Prædia tributaria, provincial lands belonging to the emperor.

Prædia volantia, certain things movable which were ranked among immovable things. 2 Bla. Com. 428.

It indicates a more extensive domain than *fundus*. Calvinus, Lex.

PRÆDIA BELLI (Lat.). Booty. Property seized in war. See *BOOTY*.

PRÆDIAL. That which arises immediately from the ground: as, grain of all sorts, hay, wood, fruits, herbs, and the like.

PRÆDIUM DOMINANS (Lat.) the ruling estate). In Civil Law. The name given to an estate to which a servitude is due; it is called the ruling estate.

PRÆDIUM RUSTICUM (Lat.) a country estate). In Civil Law. By this is understood all heritages which are not destined for the use of man's habitation; such, for example, as lands, meadows, orchards, gardens, woods, even though they should be within the boundaries of a city.

PRÆDIUM SERVIENS (Lat.). In Civil Law. The name of an estate which suffers or yields a service to another estate.

PRÆDIUM URBANUM (Lat.). In Civil Law. By this term is understood buildings and edifices intended for the habitation and use of man, whether they be built in cities or whether they be constructed in the country.

PRÆFECTI APOSTOLICI. Officers of the same character as the Vicarius Apostolicus (q. v.), but without the power of exercising episcopal functions. 2 Phill. Int. L. 529.

PRÆFECTUS URBI. An officer who had the superintendence of the city and its police with jurisdiction extending one hundred miles from the city and power to decide both civil and criminal cases. Whart.

PRÆFECTUS VIGILUM (Lat.). In Roman Law. The chief officer of the night-watch. His jurisdiction extended to certain offences affecting the public peace, and even to larcenies. But he could inflict only slight punishments.

PRÆMUNIRE (Lat.). In order to prevent the pope from assuming the supremacy in granting ecclesiastical livings, a number of statutes were passed in England, during the reigns of Edward I. and his successors, punishing certain acts of submission to the papal authority therein mentioned. In the writ for the execution of these statutes, the words *præmunire facias* (cause to be forewarned), being used to command a citation of the party, gave not only to the writ, but to the offence itself of maintaining the papal power, the name of *præmunire*. Co. Litt. 129; Jacob, Law Dict.

The penalties of *præmunire* were subsequently applied to other offences of various kinds, as the molestation of possessors of abbey lands, the assertion that the houses of parliament have a legislative authority without the sovereign or the sending sub-

jects of the realm into parts beyond the seas. Whart. Law Dict.

PRÆNOMEN. In Civil Law. See *COGNOMEN*.

PRAESTIMONIA. See *PRESTIMONY*.

PRAESTITA ROLLS. "Rolls" in the Record Office of England containing lists of payments made by the Exchequer to royal officials between 1199 and 1603. Byrne.

PRESUMPTIO HOMINIS. A presumption based upon what is probable in human experience, whereby, from a given fact or state of facts, another fact or state of facts may be naturally inferred. Morey, Rom. L. 411.

PRESUMPTIO JURIS (Lat.). In Roman Law. A deduction from the existence of one fact as to the existence of another, which admits of proof to the contrary. A rebuttable presumption. An intendment of law which holds good until it is weakened by proof or a stronger presumption. Best, Pres. 29.

PRESUMPTIO JURIS ET DE JURE (Lat.). In Roman Law. A deduction drawn, by reason of some rule of law, from the existence of one fact as to the existence of another, so conclusively that no proof can be admitted to the contrary. A conclusive presumption.

PRÆTOR. In Roman Law. A municipal officer of Rome, so called because (*præiret populo*) he went before or took precedence of the people.

The consuls were at first called *prætors*. Liv. Hist. iii. 55. The word *prætor* means literally a general and is a title of honor accorded to the consuls in the first centuries of the republic. The *prætor* was really a third consul who was specially entrusted, not with the military command, but with the administration of justice. This is the reason why, in point of rank (and in the number of his lictors), he was inferior to the consul, though, on principle, his power was consular; Sohm, Inst. Rom. L. 48, n. 1. He was a sort of minister of justice, invested with certain legislative powers, especially in regard to interpretation of the laws during his magistracy. The edict issued by the *prætor* on his taking office was called the *edictum perpetuum*. It was said that these edicts were of great authority. They were called the *ius honorarium* "because those who bear honors in the state, that is the magistrate, have given it their sanction; Inst. 1. 2. 7; Howe, Stud. Civ. L. 10; the fact that the circumstances and habits of thought, untrammelled as they were under this system, led to the exercise by the *prætor* of equitable functions and extension of the narrow limits of the old civil law, was a potent factor in the judge-made law which replaced the ancient technical and rigid system by one more flexible. The *lex Cornelia* (B. C. 67) forbade a *prætor* to depart during his term from the edict promulgated by him at its beginning. The edicts of preceding *prætors* were collected and condensed by Salvius Julianus, who had filled the office during the time of Hadrian, this was a final *edictum perpetuum*, and it was known distinctively by that title. It is doubtful whether after that annual edicts were issued; Sand. Inst. Just. II.; Sohm, Rom. L. § 14; Mack, Rom. L. § 47.

The authority of the *prætor* extended over all jurisdictions, and was summarily expressed by the words *do dico, addico*, i. e. *do* I give the action, *dico* I declare the law, *addico* I promulgate the edict. *Addico* I invest the judge with the right of judging. There were certain cases which he was bound to decide himself, assigned by a council chosen by himself, perhaps the *decemviri*. But the greater part of causes brought before him he sent either to a judge, an arbitrator, or to *recuperatores*, or to the *centumviri*, as before stated. The *prætor* had no power to legislate, but he might grant or refuse an action; Sohm, Inst. L. 42. Under the empire, the powers of the *prætor* passed by degrees to the *prefect of the prætorium* or the *prefect of the city*; so that this magistrate, who at first ranked with the consuls, at last dwindled into a director or manager of the public spectacles or games.

The *prætor urbanus* was a special officer appointed to administer justice in the city; afterwards (about 242 B. C.) the increase of business made it necessary to appoint a second *prætor*, who was called a *prætor peregrinus* to whom were assigned all cases in which either or both of the parties were foreigners. *Prætores tutelares* were special magistrates nominated in Rome and vested with the power of appointing *tutors* which right

had previously been exercised by the *prætor urbanus*.

A *prætor fidei commissarius* was a magistrate specially appointed to have jurisdiction of *fidei commissaria*.

The *prætor fiscalis* has special jurisdiction of cases affecting the public treasury.

PRAGMATIC SANCTION. In French Law. An expression used to designate those ordinances which concern the most important object of the civil or ecclesiastical administration. Merlin *Répert.*; 1 Fournel, *Hist. des Avocats* 24, 38.

In Civil Law. The answer given by the emperors on questions of law, when consulted by a corporation or the citizens of a province or of a municipality, was called a pragmatic sanction. *Leçons El. du Dr. Civ. Rom.* § 53. This differed from a rescript.

PRAIRIE. An extensive tract of land destitute of trees, covered with coarse grass, and usually characterized by a deep, fertile soil; a meadow or tract of grassland; especially a so called "natural meadow." 51 Kan. 23.

PRATIQUE or PRATIC. A license for the master of a ship to traffic in the ports of Italy upon a certificate that the place whence he came is not annoyed with any infectious disease. R. & L. Dict.; Encyc. Lond.

PRAY IN AID. In old English practice. To call upon for assistance. In real actions, the tenant might pray in aid, or call for assistance of another, to help him to plead, because of the feebleness or imbecility of his own estate. 3 Bl. Com. 300.

PRAYER. In Equity Practice. The request in a bill that the court will grant the aid which the petitioner desires. That part of the bill which asks for relief. The word denotes, strictly, the request, but is very commonly applied to that part of the bill which contains the request.

OF PROCESS. That part of the bill which asks that the defendant may be compelled to appear and answer the bill, and abide the determination of the court upon the subject.

It must contain the names of all the parties; 1 P. Wms. 593; 2 Dick. Ch. 707; 2 Johns. Ch. 245; Coop. Eq. Pl. 16; Bishp. Eq. § 9; see 55 Fed. Rep. 835; although they are out of the jurisdiction; 1 Beav. 106; Mitf. Eq. Pl. 164. The ordinary process asked for is a writ of subpoena; Story, Eq. Pl. § 44; and in case a distringas against a corporation; Coop. Eq. Pl. 16; or an injunction; 2 S. & S. 219; 1 Sim. 50; is sought for, it should be included in the prayer.

FOR RELIEF, is general, which asks for such relief as the court may grant; or special, which states the particular form of relief desired. A special prayer is generally inserted, followed by a general prayer, 4 Madd. 408; 16 Pet. 195; 23 Vt. 247; 6 Gill 105; 25 Me. 153; 10 Rich. Eq. 53; 7 Ind. 661; 15 Ark. 555; a general prayer if omitted, may be added by amendment or amended bill; 88 W. Va. 583. Unless the general prayer is added, if the defendant fails in his special prayer he will not be entitled to any relief; 1 Ves. 426; 12 *id.* 62; 2 R. I. 129; 15 Ala. 9; except in case of charities and bills in behalf of infants; 1 Atk. 6, 355; 18 Ves. 326; 1 Russ. 235; 2 Paige, Ch. 396.

A general prayer is sufficient for most purposes; and the special relief desired may be prayed for at the bar; 4 Madd. 408; 1 Edw. 28; Story, Eq. Pl. § 41; 81 N. H. 193; 2 Paine 11; 9 How. 890; 9 Mo. 201; 9 Gill & J. 80; 19 Ark. 62; 18 Ala. 371; 23 Vt. 247; but where a special order and provisional process are required, founded on peculiar circumstances, a special prayer therefor is generally inserted; 6 Madd. 218; 3 Ind. 419. A prayer for general relief is sufficient to support any decree warranted by the allegations of the bill; 148 Ill. 622; but under such a prayer a party cannot recover a claim distinct from that demanded by the bill; 29 W. Va. 1.

Such relief, and such only, will be

granted, either under a special prayer, whether at bar; 2 Ves. 299; 4 Paige, Ch. 229; 25 Me. 153; 30 Ala. n. s. 416; or in the bill; 16 Tex. 399; 18 Ga. 492; 21 Pa. 181; or under a general prayer, as the case as stated will justify; 7 Ired. Eq. 80; 4 Sneed 633; 18 Ill. 142; 5 Wisc. 117, 424; 24 Mo. 31; 7 Ala. n. s. 193; 13 Ark. 183; 8 Barb. Ch. 613; 3 Gratt. 518; 9 How. 390; and a bill framed apparently for one purpose will not be allowed to accomplish another, to the injury of the defendant; 16 Tex. 399; 21 Pa. 181; 6 Wend. 63.

And, generally, the decree must conform to the allegations and proof; 7 Wheat. 522; 19 Johns. 496; 2 Harr. Ch. 401; 1 Ired. Eq. 83; 6 Ala. n. s. 518; 4 Bibb 376; 13 Conn. 146. See 75 Tex. 287. But a special prayer may be disregarded, if the allegations warrant relief under the general prayer; 15 Ark. 555; 4 Tex. 20; 2 Cal. 239; 22 Ala. n. s. 646; 8 Humphr. 230; 1 Blackf. 305; the relief granted must be consistent with the special prayer; 27 Ala. 507; 21 Pa. 181; 1 Jones, Eq. 100; 14 Ga. 52; 1 Edw. Ch. 654; 9 Gill & J. 80; 4 Des. Eq. 530; 9 Yerg. 301; 1 Johns. Ch. 111.

PREAMBLE. An introduction prefixed to a statute, reciting the intention of the legislature in framing it, or the evils which led to its enactment. It is no part of the law; 26 Pa. 287. It is no more than a recital of some inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the statute. Resort cannot be had to the preamble of a statute to ascertain the intention of an act unless there is an ambiguity in the enacting part. Effect should be given to a preamble to the extent that it shows what the legislature intended, and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case that meaning should be preferred to one which shows an intention of the legislature which would not answer the purposes of the preamble or would go beyond them. To that extent only is the preamble material; 8 App. Cas. 388. The clear language of an act cannot be cut down by a reference to the preamble; 29 Ch. D. 950. It may explain what is of doubtful meaning, but will not limit what is clear; 15 R. I. 299; 19 Fed. Rep. 304.

A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute; Co. 4th Inst. 330; 6 Pet. 301. In modern legislative practice, preambles are much less used than formerly, and in some of the United States are rarely inserted in statutes. In the interpretation of a statute, though resort may be had to the preamble, it cannot limit or control the express provisions of the statute; Dwaris, Stat. 504; Wilberf. Stat. Law 277. Nor can it by implication enlarge what is expressly fixed; 1 Story, Const. b. 3, c. 6; 8 McCord 298; 15 Johns. 89; Busb. 131; Davis 38.

A preamble reciting the existence of public outrages, provision against which is made in the body of the act, is evidence of the facts it recites. See 4 Maule & S. 532; 2 Russ. Cr. 720.

The facts recited in a preamble of a private statute are not evidence, as between the person for whose benefit the act passed and a third person; 3 Litt. 472; 7 Hill 80; but the statement of legislative reasons in the preamble will not affect the validity of an act; 42 Conn. 583.

See STATUTE; CONSTRUCTION.

A recital inserted in a contract for the purpose of declaring the intention of the parties.

PRE-AUDIENCE. The right of being heard before another. A privilege belonging to the English bar, the members of which are entitled to be heard in their order, according to rank, beginning with the Queen's attorney general, and ending with barristers at large. 3 Bl. Com. 28, note.

PREBEND. In Ecclesiastical Law. The stipend granted to an ecclesiastic, in consideration of officiating in the church. It is in this distinguished from a canonicate, which is a mere title and may exist without stipend. The prebend may be a simple stipend, or a stipend with a dignity attached to it, in which case it has some jurisdiction belonging to it. 2 Burn, Eccl. Law 88; Stra. 1032; 1 Term 401; 2 id. 630; 1 Wils. 206; Dy. 273 a; 7 B. & C. 113; 8 Bingh. 490; 5 Taunt. 2; Jacob, L. Dict.

PRECARIE. Day works which the tenants of certain manors were bound to give their lords in harvest time. Cowel.

PRECARIOUS. The affairs of an executor are precarious only when conducted with such recklessness as in the opinion of prudent and discreet men endangers their security. 60 Barb. 56.

PRECARIOUS RIGHT. The right which the owner of a thing transfers to another, to enjoy the same until it shall please the owner to revoke it.

If there is a time fixed during which the right may be used, it is then vested for that time, and cannot be revoked until after its expiration, Wolff, Inst. § 333.

PRECARIUM (Lat.). The name of a contract among civilians, by which the owner of a thing, at the request of another person, gives him a thing to use as long as the owner shall please. Pothier, n. 87. See Yelv. 173; Cro. Jac. 235; 9 Cow. 687; Rolle 128; Bac. Abr. *Bailment* (C); Ersk. Inst. 3. 1. 9; Story, Bailm. §§ 127, 253 b.

A tenancy at will is a right of this kind.

PRECATORY WORDS. Expressions in a will praying or requesting that a thing shall be done. A trust created by such words, which are more like words of entreaty and permission, than of command or certainty.

Examples of such words, which the courts have held sufficient to constitute a trust, are "wish and request," "have fullest confidence," "heartily beseech," and the like; Rap. and Lawr. L. Dict.

Although recommendatory words used by a testator, of themselves, seem to leave the devisee to act as he may deem proper, giving him a discretion, as when a testator gives an estate to a devisee, and adds that he hopes, recommends, has a confidence, wish, or desire that the devisee shall do certain things for the benefit of another person, yet courts of equity have formerly construed such precatory expressions as creating a trust; 8 Ves. Ch. 380; 18 id. 41; Bac. Abr. *Legacies* (B); 98 Mass. 274; 35 Vt. 173; 4 Am. L. Rev. 617; 113 Mo. 112. See, *contra*, 20 Pa. 268; 1 McCart. 397; 2 Story, Eq. Jur. § 1069; 49 N. J. Eq. 570; 139 Mass. 117; Bisph. Eq. 73.

But this construction will not prevail when either the objects to be benefited are imperfectly described, or the amount of property to which the trust should attach is not sufficiently defined; 1 Bro. C. C. 142; 1 Sim. 542, 556.

While the expression of confidence, if the context shows that a trust is intended, may create a trust, yet, if upon the whole will the confidence is merely that the legatee will do what is right in disposing of the property, a trust is not imposed; 4 Kent 305; [1895] 2 Ch. 370; 140 N. Y. 122; 152 Pa. 108; 159 Mass. 229. As to when the words confidence, etc., create a trust, see note to Lloyd & G. 154; see also 2 Pa. 129. The words in the fullest confidence were held to create a trust; 1 Turn. & R. 143.

The current of decision in England with regard to precatory words is said to be now changed. A trust will not be created where the testator shows an intention to leave property absolutely; 27 Ch. Div. 394. See 70 Pa. 153; 19 Conn. 351. The leaning of the courts is against the implication of a trust; 1 Jarm. Wills 365. It is a question of what was the intention, not of what particular word was used; [1895] 2 Ch. 370. But it was held that a testamen-

tary gift with added words of entreaty or recommendation, or expressing a hope or confidence will constitute a trust; 100 Mass. 340; 34 Ala. 349. See the cases in 1 Jarm. Wills 365, on this subject.

"The true rule, upon principle, and according to the weight of more recent authorities, is said to be that the whole will must be examined to determine whether the words used were to impose an obligation or to give the devisee full discretion." 4 Kent 305, note b, citing 8 Ch. D. 540; 109 U. S. 725; 126 Mass. 213; 79 Ky. 378. See 140 N. Y. 122.

Vagueness in the object tends to show that no trust was intended. See L. R. 8 Eq. 673. It has been held that precatory words are *prima facie* imperative, and create a trust; 83 Md. 200; 71 id. 108; 127 U. S. 300.

Precatory words do not always create a trust. The question in every case is one of intention. Expressions *per se* sufficient to create a trust may be deprived of that effect by a context especially declaring or by implication showing no trust was intended. The question in all cases is, was the direction imperative? The real question to be determined when such words are used is whether the confidence, hope, or wish expressed is meant to govern the donee, or whether it was a mere indication of that which the testator thinks would be a reasonable or suitable use of the property conveyed, leaving the matter ultimately to the decision of the donee; 1 Jarm. Wills 406, n.

The meaning of the word "precatory," according to its ordinary use, does not embrace a command—it means beseeching, suppliant, prayerful. 79 Ky. 381.

PRECEDENCE. The right of being first placed in a certain order,—the first rank being supposed the most honorable.

In this country no precedence is given by law to men.

Nations, in their intercourse with each other, do not admit any precedence: hence, in their treaties, it is the usage for the powers to alternate, both in the preamble and in the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Sometimes signatures are made in alphabetical order of the states which are parties to the act, the French alphabet being adopted for that purpose. 2 Hall. Int. L. 122.

In some cases of officers, when one must of necessity act as the chief, the oldest in commission will have precedence: as, when the president of a court is not present, the associate who has the oldest commission will have a precedence; or if their commissions bear the same date, then the oldest man.

In the army and navy there is a regular order of precedence. See RANK.

For rules of precedence in England, see Whart. Law Dict.

PRECEDENTS. In Practice. Legal acts or instruments which are deemed worthy to serve as rules or models for subsequent cases.

The word is similarly applied in respect to political and legislative action. In the former use, precedent is the word to designate an adjudged case which is actually followed or sanctioned by a court in subsequent cases. An adjudged case may be of any degree of weight, from that of absolute conclusiveness down to the faintest presumption; and one which is in fact disregarded is said never to have become a precedent. In determining whether an adjudication is to be followed as a precedent, the following considerations are adverted to. First, the justice of the principle which it declares, and the reasonableness of its application. Hob. 270. If a precedent is to be followed because it is a precedent, even when decided against an established rule of law, there can be no possible correction of abuses, because the fact of their existence would render them above the law. It is always safe to rely upon principles. See 16 Viner, Abr. 499;

2 J. & W. 318; 3 Ves. 527; 2 P. Wms. 258; 2 Bro. C. C. 86; 1 Tex. 11; 2 Evans, Poth. 377, where the author argues against the policy of making precedents binding when contrary to reason. "The reason and spirit of cases make law: not the letter of particular precedents." 3 Burr. 1364, per Lord Mansfield. See, also, 1 Kent 475; Liverm. Syst. 104; Gresl. Eq. Ev. 300; 16 Johns. 403; 20 id. 722; Cro. Jac. 527; 33 Hen. VII. 41; Jones, Bailm. 46; 1 Hill, N. Y. 438; 9 Barb. 544; 50 N. Y. 451; Wells, Res. Adj. & Dec.

According to Lord Talbot, it is "much better to stick to the known general rules than to follow any one particular precedent which may be founded on reasons unknown to us." *Cas. t. Talb.* 26. Blackstone, 1 Com. 70, says that a former decision is, in general, to be followed, unless "manifestly absurd or unjust;" and in the latter case it is declared, when overruled, that the former decision was *bad law*, but that it was *not law*. If an adjudication is questioned in these respects, the degree of consideration and deliberation upon which it was made; 4 Co. 94; the rank of the court, as of inferior or superior jurisdiction, which established it, and the length of time during which it has been acted on as a rule of property, are to be considered. The length of time which a decision has stood unquestioned is an important element; since where a rule declared to be law, even by an inferior tribunal, has been habitually adopted and acted upon by the community, and becomes thus imbedded in the actual affairs of men, it is frequently better to enforce it as it is, instead of allowing it to be re-examined and unsettled. It is said that in order to give precedents binding effect there must be a current of decision; Cro. Car. 528; Cro. Jac. 386; 9 Co. 163; 10 Wisc. 370; and even then, injustice in the rule often prevails over the antiquity and frequency of its adoption, and induces the court to overrule it. But this is to be very cautiously done where it is a rule of property, or wherever a departure from it would unjustly affect vested rights; 8 Cal. 188; 47 Ind. 286; 30 Miss. 258; 23 Wend. 340.

"The only use of authorities, or decided cases, is the establishment of some principle which the judge can follow out in deciding the case before him. . . . Where a case has decided a principle, although I myself do not concur in it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of respectable age and has been used by lawyers as settling the law, leaving to the appellate court to say that a case is wrongly decided, if the appellate court should so think." 13 Ch. D. 712, per Jessel, M. R.

"Without minutely examining all the cases, or saying whether I do or do not agree with them, it is sufficient for me to abide by the principle established by them; the principle is the thing which we are to extract from cases, and to apply it in the decision of other cases." 7 Term 148, per Lord Kenyon, C. J.

"Now, I have often said, and I repeat it, that the only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided; but it is not sufficient that the case should have been decided on a principle, if that principle is not itself a right principle, or one not applicable to the case." 13 Ch. D. 785, per Jessel, M. R.

"If one authority were produced to me, and my own opinion were the other way, I would not follow that authority; but if the authorities are numerous, I admit that I must be bound." L. R. 19 Eq. 460, per Jessel, M. R.

"Courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of parliament itself, in matters affecting rights of property, may

fairly be treated as having passed into the category of established and recognized law." 15 Ch. D. 336, per Thesiger, L. J.

"Where an old case is contrary to the principles of the general law, the court of appeal ought not to shrink from overruling it even after a considerable lapse of time. But when an old decided case has made the law on a particular subject, the court of appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it;" 9 Q. B. D. 352, per Jessel, M. R., cited by Lord Esher, M. R., in 23 Q. B. D. 619. See also 12 Q. B. D. 318.

"Where there is a decision which has stood for more than two hundred years in respect of a subject-matter constantly arising in practice, the court does not overrule it unless absolutely obliged to do so. . . . Even if the court did not agree with the decision, it would not overrule it." [1895] 2 Q. B. 665. Where a dictum of law has been accepted, and is likely to have affected divers contracts and dealings between man and man, and if not followed, many transactions done on the faith of it would be disturbed, the court will follow the dictum; 26 Ch. D. 821. But where a decision had not stood wholly unquestioned the court need not feel bound to follow it merely because it has stood for twelve years without being authoritatively overruled; 27 Ch. D. 154.

"Where the decision is really one as to the jurisdiction of another court there is no reason why, at any distance of time, a superior court may not overrule it." 13 Q. B. D. 591, per Brett, M. R.

"Speaking for myself, I do not pay much attention to the *dicta* of modern judges, as I consider it my duty to decide for myself. This, of course, does not apply to decisions of modern judges, nor to old recognized *dicta* by eminent judges." 23 Ch. D. 49, per Jessel, M. R. See, also, 23 Ch. D. 127; [1891] 3 Ch. 376.

Decisions on the constructions of instruments, if the words are identical, are not strictly binding, much less so if the words are only similar; L. R. 10 Ch. 397; 22 Ch. D. 488; and this is true even of the decisions of the appeal court; 23 Ch. D. 111.

In 25 Q. B. D. 57, Lord Esher drew a distinction between "fundamental propositions of law," which could be changed only by parliament, and "the evidence of the existence of such a proposition," which was within the disposition of the court.

There is no common law or statutory rule to oblige a court to bow to its own decision; it does so again on the grounds of judicial comity. But when a court is equally divided, this comity does not exist, for there is no authority of the court as such, and those who follow must choose one of two adverse decisions. When the court is equally divided, if the case comes before it again, it will exercise an independent opinion and abide by one of the two views. The case may be different as regards the house of lords, for it is the ultimate court of appeal, for if it is otherwise there exists an uncertainty as to the law; 9 P. D. 98.

In 44 L. T. 440, Jessel, M. R., stated that he had frequently differed from the courts of co-ordinate jurisdiction and the same was said by Brett, L. J., in 10 Q. B. D. 328, in reference to a decision in the Exchequer Chamber, where the judges were equally divided, and it was said by Brett, M. R., in 13 Q. B. D. 355, that a court of law is not justified in overruling the decisions of another court of co-ordinate jurisdiction, citing Jessel, M. R., in 13 Ch. D. 130.

"For us to reverse the judgment of a lord chancellor would require a tremendous case—a case of a clear error." 12 Ch. D. 47, per James, L. J. While the decisions of the lord chancellor, at all events sitting alone, are not absolutely binding, yet the greatest weight ought to be given to them, and unless manifestly wrong, they ought not to be overruled; 12 Ch. D. 54, per Thesiger, L. J. The old lord chancellors overruled one another, and sometimes they overruled their own decisions without the

slightest trouble; 21 Ch. D. 346, Jessel, M. R.

It is said that the house of lords has the same power that every other tribunal has in subsequently applying the law laid down by it to other cases; 5 H. L. Cas. 63. The observations made by the members beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in so far as they may be considered agreeable to sound reason and to prior authorities. But the house of lords, as a tribunal, is bound by its own precedents which it will not overrule, and the doctrine on which the judgment of the house is founded must be universally taken for law, and can only be altered by act of parliament; 3 H. L. Cas. 391; 8 id. 391; 9 id. 338; L. R. 8 C. P. 313. This doctrine has just been again laid down, after argument, in 78 L. T. Rep. 361. If two cases in the house of lords are not to be reconciled, the more recent ought to prevail; 5 App. Cas. 798; 7 id. 294, 302.

The judicial committee of the privy council is not bound by its own precedents, see 4 Moore, P. C. 63; but where a decision of the privy council has been reported to the queen, and been sanctioned and embodied in an order in council, it becomes the decree or order of the final court of appeal, and every subordinate tribunal to whom the order is addressed should carry it into execution; 6 App. Cas. 483.

The supreme court of the United States has overruled its own precedents in some instances, notably on the question of the extent of admiralty jurisdiction and in the legal tender cases.

It has been said that a judgment made by an equally divided court has no weight as a precedent; 5 Wend. 372; 25 id. 256; and does not even settle the question of law; 5 id. 372; but a judgment affirmed by a divided court in the house of lords is a binding precedent; 9 H. L. Cas. 338. The subject of precedents both in English law and in other systems is treated by Prof. John C. Gray in 9 Harv. L. Rev. 327.

Instances of a lower court disregarding the decision of a higher court will be found in L. R. 2 Eq. 335, where a case formerly decided by Lord Westbury was disregarded because he had decided it in ignorance of a statute, and in L. R. 3 Ch. 420, where the lord chancellor made a ruling as to the abatement of legacies, which was nothing more than a blunder, and was subsequently disregarded by the vice-chancellors. See 9 Harv. Law Rev. 327.

See STARE DECISIS.

Mr. Powell (Appellate Proceedings) develops at some length the thought that two of the most important ideas and principles in judicial proceedings are essentially of modern origin. These are the force and effect of precedent, and the aid afforded by appellate proceedings in the correction of errors and the perfecting of the law. Neither of these ideas were known to the ancients, or recognized in the civil law, and they were almost entirely disregarded in the courts of continental Europe until the present day. We are indebted for their development to England. Both of the subjects—the citation of a former case as evidence of the law, upon the trial of a subsequent case, and the supervision by the superior courts of the correctness of the proceedings and decisions of the inferior courts began to make their appearance about the time of Edward I.

The argument until quite recently so much used by jurists of continental Europe and civilians, is thus summarized and answered: "They say that judicial decisions are either conformable to law or not; if the former, they are mere applications of a pre-existing rule to individual cases falling within it, and do not therefore create new laws; if the latter, they are not binding, but are themselves against law. This is more ingenious than fair or truthful; for such decisions are not made and called into requisition where a pre-existing rule existed, but in those doubtful and evenly balanced questions between two or

more opinions, and further light and aid are called for, where all pre-existing rules have failed, satisfactorily, to give that aid. The assumption of the dilemma is contrary to experience and reason; for it is the frequent experience of the jurist to find cases where pre-existing rules entirely fail him; and reason also teaches that it must be so, since it is found that all human productions are imperfect. The using of such former judicial decisions as aids in forming a judgment and decision, is no more than what was done under the civil law, in calling in aid the opinion and writings of distinguished *juris consulti*. But the usefulness and justice of thus using previous judicial decisions is now generally admitted and followed." The earliest use of judicial proceedings as precedents is said, on the authority of Guterbock on Bracton and his Relation to the Roman Law, to have been by Bracton about the time of Edward I.

The considerations bearing upon the weight of authority given to judicial decisions are said by the author quoted to be:

1. The decisions of the appellate courts are of absolute authority in the subordinate courts, no matter how much the latter may differ in their conclusions "unless in any case it was considered (which is hardly supposable) to be contrary to the constitution or common sense."

2. Decisions of the same court, or co-ordinate ones, are authorities, but subject to be reviewed, dissented from, or overruled with reference to the time when they were made, and the extent to which they have been acted upon.

3. The decision of any court or the opinion of any jurist, is an authority, to be more or less relied upon as it accords with settled principles of law, and as it is justified by reason. The opinions of jurists, though they may be received, are not to be accorded the weight of judicial decisions.

These principles, it is contended, though very important, are only made effective by a judicious system of appellate jurisdiction, sifting out errors and irregularities, and bringing the decisions into harmony with the law and rendering it one consistent whole; Powell, App. Proc. 4.

The real object and function of appellate tribunals is, in this last sentence, very well expressed. It has been the subject of much discussion in connection with regulating the right of appeal by the amount in controversy. Such limitations are sometimes thought to cause inequality in the administration of justice, between, as it is said, the rich and the poor. It may, however, be said that the primary purpose of an appellate tribunal is to settle and unify the law as administered by the various subordinate courts under the general supervisory jurisdiction of the appellate court. In theory, an appeal to a higher court cannot be considered as a right of any litigant; the rights of a litigant are fully protected by giving him a day in court for the trial of his cause in the court below, with the opportunity, by motion for a new trial, to secure the correction of any error of law or manifest injustice in the verdict.

Of the place filled by case law in the jurisprudence of England and America, it has been said: "The resource of English lawyers, when called on to fill the gap which was elsewhere supplied by the Roman law, was custom. Of this custom the judges were themselves, in the last resort, the repository. Thus it comes to pass that English case law does for us what the Roman law does for the rest of western Europe." Markby, Elem. of Law § 90. The difference between the common law of England and the continental law is thus characterized by the same author: "Where the principles of the Roman law are adopted, the advance must always be made on certain lines. An English or American judge can go wherever his good sense leads him. The result has been that whilst the law of continental Europe is formally correct, it is not always easily adapted to the changing wants of those amongst whom it is administered. On the other hand, the

English law, whilst it is cumbrous, ill-arranged, and barren of principles, whilst it is obscure and frequently in conflict with itself, is yet a system under which justice can be done; anyhow it stands alone in the history of the world." *Id.* § 92. Freeman says: "The life and soul of English law has ever been precedent," and to this he ascribes, not only the growth of the common law but that of the unwritten constitution of England. Freeman, Eng. Const. ch. ii. iii.

In a lucid discussion of the value of judicial decisions as an essential part of the English and American systems, Judge Dillon says: "Judicial precedent is not simply part of the law in a general sense... but it is a part of our law in a sense, and with effects, which are distinctively and most strikingly peculiar. The doctrine, as established, is shortly this: that a decision by a court of competent jurisdiction of a point of law lying squarely in the pathway of judicial judgment that the case could not be adjudged without deciding it, is not only binding upon the parties to the cause in judgment, but the point, so decided, becomes, until it is reversed or overruled, evidence of what the law is in like cases, which the courts are bound to follow, not only in cases precisely like the one which was first determined, but also in those which, however different in their origin or special circumstances, stand, or are considered to stand, upon the same principles." Laws and Jurisp. 231. Passing over the question whether a judicial decision is law or only evidence of it, the same writer notes the difference between the authoritative effect of a judicial decision in our system, and the entire want of it in continental Europe, the result being that under the former system "a point solemnly decided has the force and effect of law, binding the judges in all other cases that clearly fall within its principle, which the judges are therefore bound to follow and apply, unless, to use Blackstone's well-known and much criticised qualification, the precedent is 'flatly absurd or unjust';" *id.*

Allusion is very properly made to a point of great importance in estimating the value of judicial decisions, which is frequently overlooked, that is, the contribution made by the arguments of counsel. The writer quoted says: "Indirectly, the reports embody also the results of the researches, studies, experience, and ability of the bar during the same period, since of these the judges have had the advantage in the argument of the causes so decided. Indeed the doctrine of judicial precedent implies that the point of the decision whereof such force is attributed should have been argued by opposing counsel." *Id.* 233. So important is this consideration that it might almost be suggested as a wise rule to apply to the use of judicial decisions as precedents, that no case should be held to acquire binding force as law unless the point on which it was decided had been argued by counsel.

The fortuitous and irregular growth of case law is the necessary result of the rule of its existence, that no point can become the subject of a judicial decision until it actually arises for judgment. So that it is left, as has been observed, to "the casual exigencies of litigation to determine what parts of it shall be filled up and what left incomplete," with the result that "all kinds of curious little questions receive elaborate answers, while great ones remain in a provoking state of uncertainty." Pollock, Essays on Jurisprudence and Ethics, ch. iii.

Concerning the true office and use of adjudged cases, the views of Mr. Justice Miller are expressed in a letter which is published in a note to lecture IX. of Judge Dillon's work already referred to. After adverting to the difficulty experienced by a judge in the use of judicial decisions, he groups the cases into three classes: 1. Those which must be decided by principles not disputed, in which citations are of little value, because the duty of the judge is confined to the application of principles in a particular case. 2. Those which construe the constitutions and statutes, as to which

the decisions of the highest court of the government which adopted them, are generally conclusive. 3. Those depending upon general principles of law or equity which must be determined, if there is a conflict of decision, by the weight of authority, and in which the citation of adjudged cases is most useful.

Allusion is also made to the fact that the opinions of certain judges, even when dissenting or *obiter*, carry special weight apart from the courts in which they were delivered.

Another very able writer considers that the development of the law, by this system, results, to some extent, in a paradox both in form and substance. "In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents," but they "survive in the long run after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from a merely logical point of view." On the other hand, he considers that the growth of the law, in substance, is legislation in the sense that "the secret root from which it draws all the juices of life" is really to be found in the consideration of what is "expedient for the community concerned" on "more or less definitely understood views of public policy," not less so because the "unconscious result of instinctive preferences and inarticulate convictions." When the law is administered with ability and experience, even if ancient rules are maintained, they will be fitted with new reasons, so that both form and substance are changed by the transplanting. Holmes, Com. L. 35.

Few modern writers agree with the older theory formulated by Blackstone, that the courts are "not delegated to pronounce a new law, but to maintain and expound the old one;" 1 Bla. Com. 69; but see Lieber, *Hermeneutics* Ham. ed. 312. The tendency is strongly to accept the view that it is a "childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody; existing from eternity and merely declared from time to time by the judges;" 2 Aust. Lect. Jurisp. 655. The same view is elaborated by Sir Henry Maine who makes judicial decision the beginning of all law, and contends that the distinction between case law and code law is only one of form, and that both are, properly speaking, written, not unwritten, law. *Anc. Law* ch. 1.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised to make up for the negligence or incapacity of the avowed legislature. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Aust. Lect. Jurisp. 224.

It must be accepted as a fact that courts have always exercised the power of making rules for new cases or modifying existing laws in accordance with current ideas of equity or changed conditions, and that they justify themselves under cover of exercising the judicial function of determining whether a binding custom exists or applying general laws to particular cases. Holland, *Jur.* 56.

But it has also been said that the application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases and to deny that the principles (of which these cases are ordinarily said to be evidence) existed at all. 4 Harv. L. Rev. 213.

As to what are considered precedents in prize courts, see that title.

See, generally, Cooley, *Const. Lim.* 47-54; Ram, *Leg. Judgm.* Ch. 3, 4, 5; Broom, *Leg. Max.* 154; 12 Ohio St. 11; 5 Harv. L.

Rev. 172; JUDGE-MADE LAW; STARE DECISIS; DICTUM; JUDICIAL POWER; RES JUDICATA; LAW; Wambaugh, Case Law.

Written forms of procedure which have been sanctioned by the courts or by long professional usage, and are commonly to be followed, are designated precedents. Steph. Pl. 392. And this term, when used as the title of a law-book, usually denotes a collection of such forms.

PRECEDING AND FOLLOWING. The words "preceding" and "following," when used by way of reference to any section of the Kentucky Statutes, construed to mean the section next preceding or next following that in which such reference is made, unless when some other is expressly designated. Section 462, Kentucky Statutes.

PRECEPARIUM. The continuance of a suit by consent of both parties. Cowell.

PRECES PRIMARIE, OR PRIME. A right of the crown to name to the first prebend that becomes vacant after the accession of the sovereign, in every church of the kingdom. This right was exercised by the crown of England in the reign of Edward I. 2 Steph. Com. 670, n.

PRECEPT (Lat. *precipio*, to command). A writ directed to the sheriff, or other officer, commanding him to do something.

PRECINCT. The district for which a high or petty constable is appointed is, in England, called a precinct. Wilcox, Const. xii. See 124 Mass. 172.

Precinct is used, in certain legislation in Wyoming, relatively to assessing taxes on railroad property, as a general word and not a technical one, and indicates any district marked out and defined. It further signifies a district inferior to a county and superior to a township. 116 U. S. 524.

In Pennsylvania and other states it is used to indicate a subdivision of a city for election purposes.

PRECIPUT. In French Law. An object which is ascertained by law or the agreement of the parties, and which is first to be taken out of property held in common by one having a right, before a partition takes place.

The preciput is an advantage or a principal part to which some one is entitled *precipium jus*, which is the origin of the word preciput. Dalloz, Dict.; Pothier, Obl. By preciput is also understood the right to sue out the preciput.

PRECISE. When the terms "clear, precise, explicit, unequivocal, and indubitable," are used by the courts to define the requisite proof of a fact, it is meant that the witnesses shall be credible, that the facts are distinctly remembered by them, that details are narrated exactly, and that their statements are true. 89 Pa. 314.

PRECLUDI NON (Lat.). In Pleading. A technical allegation contained in a replication which denies or confesses and avoids the plea.

It is usually in the following form: "And the said A B, as to the plea of the said C D, by him secondly above pleaded, says that he, the said A B, by reason of anything by the said C D in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said C D, because he says that," etc. 2 Wils. 42; 1 Chitty, Pl. 573; Steph. Pl. 398.

PRECOGNITION. In Scotch Law. The examination of witnesses who were present at the commission of a criminal act, upon the special circumstances attending it, in order to know whether there is ground for a trial, and to serve for direction to the prosecutor. But the persons examined may insist on having their declaration cancelled before they give testimony at the trial. Erskine, Inst. 4. 4. n. 49.

PRECONTRACT. An engagement entered into by a person which renders

him unable to enter into another; as, a promise or covenant of marriage to be had afterwards. When made *per verba de presenti*, it is in fact a marriage, and in that case the party making it cannot marry another person. Bish. Mar. & D. § 53; 1 Bish. Mar. Div. & Sep. § 280, 1891. See PROMISE OF MARRIAGE.

PREDECESSOR. One who has preceded another.

This term is applied in particular to corporations who are now no longer such, and whose rights have been vested in their successor; the word ancestor is more usually applicable to common persons. The predecessor in a corporation stands in the same relation to the successor that the ancestor does to the heir.

One who has filled an office or station before the present incumbent.

PREDESTINATION. See ABSOLUTE PREDESTINATION.

PREDICATE. To affirm logically.

PREDOMINANT. Something greater or superior in power and influence to others with which it is connected or compared. 22 Pick. 53.

PRE-EMPTION. In International Law. The right of pre-emption is the right of a nation to detain the merchandise of strangers passing through her territories or seas, in order to afford to her subjects the preference of purchase. 1 Chitty, Com. Law 103; 2 Bla. Com. 287.

According to general modern usage the doctrine of pre-emption rests upon the distinction between articles which are contraband (*q. v.*) *universally*, and those which are contraband only under the particular circumstances of the case. The carrying of the former class alone is punishable, and entails the penalty of confiscation, either of ship or cargo or both. The latter class are subject to the milder belligerent right of *pre-emption*, which is regarded as a fair compromise between the right of the belligerent to seize, and the claim of the neutral to export his *native commodities*, though immediately subservient to the purpose of hostility; 3 Phill. Int. L. 450; 1 C. Rob. 241. The right of pre-emption is said to be rather a waiver of a greater right than a right itself; an indulgence to the neutral rather than a right of the belligerent; Ward, Contraband 196.

This right is sometimes regulated by treaty. In the treaty made between the United States and Great Britain, November 10, 1794, ratified in 1795, it was provided, after mentioning that the usual munitions of war, and also naval materials, should be confiscated as contraband, that, "whereas the difficulty of agreeing on precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles so being contraband according to the existing laws of nations shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mercantile profit thereon, together with the freight, and also the damages incident to such detention." According to the practice of the British prize court, a profit of ten per cent. has been usually allowed to the proprietor of the goods seized, for the purposes of pre-emption; 3 Phill. Int. L. 451.

See NEUTRALITY.

PRE-EMPTION RIGHT. The right given to settlers upon the public lands of the United States to purchase them at a limited price in preference to others.

It gave a right to the actual settler who was a citizen of the United States, or who had filed a declaration of intention to be-

come such, and had entered and occupied without title, to obtain a title to a quarter-section at the minimum price fixed by law, upon entry in the proper office and payment, to the exclusion of all other persons. It is an equitable title; 15 Miss. 780; 9 Mo. 683; 15 Pet. 407; and does not become a title at law to the land till entry and payment; 2 Sandf. Ch. 78; 11 Ill. 529; 15 id. 131. It may be transferred by deed; 9 Ill. 454; 15 id. 131; and descends to the heirs of an intestate; 2 Pet. 201; 12 Ala. N. S. 822.

No person is entitled to more than one pre-emption right to public land; and where a party has filed a declaration, he cannot file another for another tract, or for an addition to the first tract; 189 U. S. 642.

A person cannot acquire by his occupation only of unsurveyed lands of the United States, a right of pre-emption to them under the laws of the United States; 130 U. S. 232. The word heirs as used in R. S. § 269, which provides for the issuance of a patent to the heirs of a deceased pre-emptor, includes illegitimate children, when such can inherit it from their father in the state where he was domiciled and the land located; 162 U. S. 65.

By act of March 3, 1891, the pre-emption laws were repealed, saving the rights of claims already initiated; 1 R. S. Sup. 942; and *bona fide* pre-emption claimants were permitted to transfer any part of their land for church, cemetery, and school purposes and for the right of way of railroads, canals and irrigation and drainage works. See LANDS, PUBLIC.

PRE-EXISTING. "Pre-existing" debt includes all debts previously contracted whether they have become payable or not; 136 Mass. 340.

PREFECT. In French Law. A chief officer invested with the superintendence of the administration of the laws in each department. Merlin, *Répert.*

PREFER. To bring any matter before a court; as,—A. preferred a charge of assault against B.

To apply or move; thus,—"to prefer for costs." Abb. Law Dict.

PREFERENCE. The paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claim, to the exclusion of the rest. The right which a creditor has acquired over others to be paid first out of the assets of his debtor; as, when a creditor has obtained a judgment against his debtor which binds the latter's land, he has a preference.

A failing creditor, if an individual or partnership, may prefer any one creditor to the exclusion of others; 6 Cow. 285; 12 Pet. 178; 38 Pa. 446; 7 Hun 146; 15 Mo. 378; 48 Ala. 877. See 144 Mass. 192; 48 Ala. 376; 76 Va. 276; 13 R. I. 463.

At common law, unless prohibited by statute, a corporation whether insolvent or not, had a right to pay a creditor, whether a director, officer, stockholder or outsider; 94 N. Y. 168; 2 Moraw. Corp. § 802; 18 N. Y. L. J. 1601; so had an individual a right to prefer any creditor; 94 N. Y. 168. As to preference by failing corporations, there are now two doctrines; one that the assets are a trust fund for the benefit of all creditors *pro rata* and no preference can be given to any creditor; 45 Fed. Rep. 7; 130 Ill. 162; 64 Wis. 639; 46 Ohio St. 86, 493; 5 L. R. A. 378; 3 N. Y. 479; 39 Mo. App. 131; 96 Ala. 439; 76 Mich. 634. The other that a corporation has the same power in dealing with the assets and preferring creditors as an individual has under similar circumstances; 70 Ia. 697; 16 N. J. Eq. 229; 41 id. 635; 45 Fed. Rep. 149; 30 W. Va. 93, 123; 78 Va. 737; 14 Mich. 477; 25 Fed. Rep. 577; 35 id. 438; 5 W. & S. 223; 25 Mo. App. 190; 79 Ga. 135; 13 Ark. 563; 46 Am. Dec. 743; 78 Fed. Rep. 71; 150 U. S. 371; 184 Pa. 1; 18 N. Y. L. J. 1601. In the absence of statutory prohibition it has been held a corporation may convey its property to the creditor upon

condition that he pay himself and return the surplus; 5 W. S. 223, 247; 6 Conn. 233; Am. Dec. 561.

It has been held that a failing corporation may prefer its own stockholders; 106 Ill. 439; 17 B. Mon. 412; 66 Am. Dec. 165; 20 Vt. 425; but not its own directors; 149 Pa. 149; 39 N. Y. 202; 36 Md. 60; 61 N. H. 632; 93 Ala. 437, 439; 23 Mo. App. 132; 44 Fed. Rep. 231; 45 id. 7; 130 Ill. 163; 64 Wis. 639; 25 Fed. Rep. 577; but see, *contra*, 70 Ia. 697; 72 id. 666; 78 Va. 737; 1 Spears, Eq. 545; 93 Mo. 79. After suspension and insolvency no preference will be allowed; 43 N. H. 263; 16 R. I. 597; 5 L. R. A. 361. The directors may advance money to a corporation in difficulties and secure themselves by mortgage of its property; 91 U. S. 597; 138 Ill. 655. If the preferred creditor be one of its officers, he must show that the preference was fair and conscionable and not collusive for the mere purpose of preference; 184 Pa. 1. The liquidation in good faith of debts due to directors with the hope of continuing business, is not invalid; 164 Mass. 437; 59 N. Y. 5. Judge Thompson takes very strong ground against the right of a corporation to prefer any creditor, but especially an officer, or stockholder; Thompson, Corp. § 6492; 32 Am. L. Rev. 138. The opposite ground is taken on principle in 2 No. W. L. Rev. by Prof. Harriman. In New York, by statute, a failing corporation cannot transfer any of its property to an officer, director or stockholder. This does not apply to a non-stock, mutual insurance company; 18 N. Y. L. J. 1601.

Preferences in assignment are allowed: *Arizona*, to creditors who will accept their share and release; *Arkansas*, generally, but not by corporations; *Georgia*, by individuals and firms, not by corporations; *Massachusetts*, if assented to by creditors in excess of the amount assigned and not valid against insolvent assignee; *Mississippi* and *N. Carolina*, generally; *Virginia*, certain preferences allowed, but not by limited partnerships; *Montana*, good, if absolute; *New York*, as to one-third of the estate, less claims preferred by law; but none by corporations or limited partnerships; *Utah*, none, if conditioned on release. In the other states and the territories, preferences appear to be invalid. In some states assignments which attempt to create a preference are void and the assignment is for the equal benefit of all creditors. See 4 Am. Lawy. 344. Preferences are usually invalidated by bankrupt acts.

PREFERENCE SHARES. Shares of a corporation or a joint-stock company entitling their holders to a preferential dividend and sometimes to priority on the division of the assets. See STOCK.

PREFERENTIAL DEBTS. Preferential debts, in bankruptcy, are those prior to all others; as, wages of a clerk, servant, or workman, rates due and taxes. Brett, Comm. 890.

PREFERRED. This word is relative; it refers to something else, and it means that the thing to which it is attached, whatever that may be, has some advantage over another thing of the same character, which, but for this advantage, would be like the others. 16 S. C. 530.

PREFERRED CLAIMS. See MORTGAGE; RECEIVER.

PREFERRED CREDITOR. A creditor whom the debtor has directed shall be paid before other creditors. See PREFERENCE.

PREFERRED DEBTS. See PREFERENTIAL DEBTS.

PREFERRED SHARES. See PREFERENCE SHARES.

PREFERRED STOCK. See STOCK.

PREFET, or PREFECT. A chief official invested, in France, with the superintendence of the administration of the laws in each department. R. & L. Dict.; Merl.

Répert.

PREGNANCY. In Medical Jurisprudence. The condition of a woman who has within her the product of a conception which has occurred within a year. Billings, Nat. Med. Dictionary.

Extra uterine or ectopic pregnancy is the development of the ovum outside of the uterine cavity, as in the Fallopian tubes or ovary. Extra uterine pregnancy commonly terminates by rupture of the sac, profuse internal hemorrhage, and death if not relieved promptly by a surgical operation. Rupture usually takes place between the second and sixth month of pregnancy.

The signs of pregnancy. These acquire a great importance from their connection with the subject of concealed, and also of pretended, pregnancy. The first may occur in order to avoid disgrace, and to accomplish in a secret manner the destruction of offspring. The second may be attempted to gratify the wishes of a husband or relations, to deprive the legal successor of his just claims, to gratify avarice by extorting money, and to avoid or delay execution.

These signs and indications are both subjective and objective. The chief subjective signs are: (1) *cessation of menstruation*, which rarely may not occur, and on the other hand may occur in other conditions; (2) *nausea and vomiting* which usually develop about the 6th week; (3) *nervous disorders*, including changes in disposition; (4) pain or discomfort in the breasts; (5) *quickening* or sensations due to the movements of the fetus within the uterus. These sensations are first noticed about the end of the fourth month. The movements begin much earlier but are not felt until the uterus has developed sufficiently to come in contact with the abdominal walls.

The chief objective symptoms are: (1) changes in the facial expression with dark rings about the eyes and often spots of figmentation resembling large freckles; (2) enlargement of the breast, the nipple becoming prominent, and in brunettes surrounded by an aureola of figmentation; (3) enlargement of the abdomen, usually not evident before the third or fourth month. The prominence is pear-shaped with the small end downward; (4) Foetal movements which can be felt through the abdominal walls as early as the end of the fifth month; (5) the *uterine souffle* or sound heard with the ear upon the abdomen and caused by the blood current in the dilated uterine arteries. This sound may be heard as early as the end of the fourth month; (6) the most important of all the signs consists of the sounds of the foetal heart. These sounds can be heard about the beginning of the fifth month, and are of course a positive sign of pregnancy. The sounds have been aptly compared to the ticking of a watch heard through a pillow; (7) softening of the cervix or neck of the uterus; (8) Ballotement, the impulse or wave excited by suddenly lifting the uterus with a hand in the vagina, the other hand being placed firmly upon the abdomen.

The duration of pregnancy is normally about nine calendar or ten lunar months, or about 275 days from the cessation of the last menstrual period. The possibility of prolonged pregnancy has long been a fruitful subject of discussion but "by a study of the analogy of other functions of the body, by observations in the lower animals, and by accurate reliable data, from women in particular, we are forced to the conclusion that pregnancy may be and often is prolonged. . . . Gestation may be lengthened, parturition may be delayed from a few days to several months." American Text-Book of Obstetrics, Saunders, 1896.

The laws relating to pregnancy concern the circumstances under and the manner in which the fact is ascertained. There are two cases where the fact whether a woman is or has been pregnant is important to ascertain. The one is when it is supposed she pretends pregnancy, and the other when she is charged with concealing it.

Pretended pregnancy may arise from two causes: the one when a widow feigns herself with child in order to produce a supposititious heir to the estate. The presumptive heir may in such case have a writ *de ventre inspiciendo*, by which the sheriff is commanded to have such made, and the fact determined whether pregnancy exists or not, by twelve matrons, in the presence of twelve knights. If the result determine the fact of pregnancy, then she is to be kept under proper guard until she is delivered. If the pregnancy be negatived, the presumptive heir is admitted to the inheritance; 1 Bla. Com. 456; Cro. Eliz. 566; 4 Bro. C. C. 90; 2 P. Wms. 591; Cox, C. C. 297. A practice quite similar prevailed in the civil law.

The second cause of pretended pregnancy occurs when a woman is under sentence of death for the commission of a crime. At common law, in case this plea be made before execution, the court must direct a jury of twelve matrons, or discreet women, to ascertain the fact, and if they bring in their verdict *quick with child* (for barely *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed, generally till the next session of the court, and so from session to session, till either she is delivered or proves by the course of nature not to have been with child at all; 4 Bla. Com. 394; 1 Bay 497.

In Scotland, all that is necessary to be proved, to have execution delayed, is the fact of pregnancy, no difference being made whether she be quick with child or not. This is also the provision of the French penal code upon this subject. In this country, there is little doubt that clear proof that the woman was pregnant, though not quick with child, would at common law be sufficient to obtain a respite of execution until after delivery. The difficulty lies in making the proof sufficiently clear, the signs and indications being all somewhat uncertain, some of them wanting, all liable to variation, and conviction of the fact only fastening upon the mind when a number of them, inexplicable upon any other hypothesis, concur in that one result.

It has been held that pregnancy at the time of marriage by another than the husband is sufficient ground for divorce, provided the pregnancy was unknown to the husband and there was no reasonable ground of suspicion by him; 99 Pa. 196; 79 Mich. 591. This can hardly be laid down as an absolute rule; 1 Bish. Mar. Div. & Sep. § 483. And in a later case it was held that false representations of pregnancy made by a woman to induce a man, with whom she has had illicit intercourse, to marry her are not such fraud as will entitle him to a divorce if he does so, at least if they were not believed by him; 24 Atl. Rep. (Pa.) 128. See 20 Ore. 579.

Pregnancy is seldom concealed except for the criminal purpose of destroying the life of the fetus in utero, or of the child immediately upon its birth. Infant life is easily extinguished; while proof of the unnatural crime is hard to be furnished. This has led to the passage of laws, both in England and in this country, calculated to facilitate the proof and also to punish the very act of concealment of pregnancy and death of the child when, if born alive, it would have been illegitimate. In England, the very stringent act of 21 Jac. I. c. 27, required that any mother of such child who had endeavored to conceal its birth should prove by at least one witness that the child was actually born dead; and for want of such proof it arrived at the forced conclusion that the mother had murdered it. This cruel law was essentially modified in 1803, by the passage of an act declaring that women indicted for the murder of bastard children should be tried by the same rules of evidence and presumption as obtain in other trials of murder.

The early legislation of Pennsylvania was characterized by the same severity. The act of May 31, 1781, made the concealment of the death of a bastard child conclusive evidence to convict the mother of murder. This was repealed by the act of

5th April, 1790, s. 6, which declared that the constrained presumption that the child whose death is concealed was therefore murdered by the mother shall not be sufficient to convict the party indicted, without probable presumptive proof is given that the child was born alive. The law was further modified by the act of 22d April, 1794, s. 18, which declares that the concealment of the death of any such child shall not be conclusive evidence to convict the party indicted for the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury that she did wilfully and maliciously destroy and take away the life of such a child. The act also punishes the concealment of the death of a bastard child by fine and imprisonment. The act of 31 March, 1880, P. & L. Dig. 1118, now governs in Pennsylvania. It makes the concealment of the death of an illegitimate child a substantive offence punishable by fine and imprisonment, and leaves the question of the murder of the child by its mother, subject to the mode of trial and punishment as ordinary cases of murder. Counts for murder and concealing the death of the child may, however, be united in the same indictment. The states of New York, Massachusetts, Vermont, Connecticut, New Jersey, New Hampshire, Georgia, Illinois, and Michigan, all have enactments on this subject,—the punishment prescribed being, generally, fine and imprisonment. For duration of pregnancy, see GESTATION.

See PHYSICAL EXAMINATION; JURY OF WOMEN; EN VENTRE SA MERE; ILLNESS.

PREGNANT. See AFFIRMATIVE PREGNANT; NEGATIVE PREGNANT.

PREJUDICE (Lat. *præ*, before, *judicare*, to judge).

A forejudgement. A leaning toward one side of a cause for some reason other than its justice. See 12 Ga. 448.

PRELATE. The name of an ecclesiastical officer. There are two orders of prelates: the first is composed of bishops, and the second, of abbots, generals of orders, deans, etc.

PRELEVEMENT. In French Law. The portion which a partner is entitled to take out of the assets of a firm before any division shall be made of the remainder of the assets between the partners.

The partner who is entitled to a prelevement is not a creditor of the partnership; on the contrary, he is a part-owner; for, if the assets should be deficient, a creditor has the preference over the partner; on the other hand, should the assets yield any profit, the partner is entitled to his portion of it, whereas the creditor is entitled to no part of it, but he has a right to charge interest when he is in other respects entitled to it.

PRELIMINARY. Something which precedes: as, *preliminaries of peace*, which are the first sketch of a treaty, and contain the principal articles on which both parties are desirous of concluding, and which are to serve as the basis of the treaty.

PRELIMINARY ACT. In English Law. A document stating the time and place of a collision between vessels, the names of the vessels, and other particulars required to be filed by each solicitor in actions for damage by such collisions. Whart. Law. Dict.

PRELIMINARY EXAMINATION. The hearing given to a person accused of crime, by a magistrate or judge, exercising the functions of a committing magistrate, to ascertain whether there is evidence to warrant and require the commitment and holding to bail of the person accused. See Bish. New Cr. L. § 32, 225-239 a.

Coroners generally have the powers of a committing magistrate as also have the mayors of cities in many of the states; *id.* 229 b.

In case, as it often happens, there is question as to what precise crime should be charged against the prisoner or whether more than one crime is involved in the facts shown, the commitment should be so framed as to cover them all, leaving to the prosecuting officer and the grand jury the opportunity for election; but if the commitment does not cover all charges it does not discharge the prisoner from liability for the rest; *id.* § 33. The discharge of a prisoner on a preliminary examination will not operate as a bar to further proceedings; 47 N. J. L. 251; 16 Tex. App. 321; 10 Neb. 78.

It is said that a person charged with crime, unless a fugitive from justice, is entitled to a preliminary examination; 44 Neb. 417; but it was also held that such examination is not necessary as a basis for finding an indictment; 3 Pac. Rep. (Ida.) 272; and that in proper cases the court may direct the prosecuting attorney to submit indictments without such examination; 2 Dist. Rep. Pa. 743. A complaint made on such examination may be dismissed and a new charge prosecuted before another magistrate; 7 Wash. 506; but after holding the accused to bail the magistrate cannot discharge him without notice to the prosecutor; 160 Pa. 119. The denial of the right to be taken before a magistrate of the county in which one is arrested, to give bail does not vitiate a subsequent trial and conviction; 79 Hun 410.

Where the evidence seems to warrant the commitment of the accused person, or time is required for the introduction of other evidence or for further investigation, the person may be committed or held to bail for further hearing. The examination may be postponed on account of the physical inability to attend of important witnesses for the state; 47 La. Ann. 1677.

Generally the offence charged is stated in the complaint and warrant and a preliminary examination is waived; and a plea that there was no such examination will not be entertained after information filed; 54 Kan. 206. An objection that there was no preliminary examination must be raised before trial by plea in abatement or motion to quash; 44 Neb. 417.

A person arrested and taken before a magistrate for preliminary examination may waive it even where the state constitution secures the right to such examination; 115 Cal. 57; 47 Pac. Rep. (Idaho) 945. See, also, 46 Neb. 631. See, also, as to waiver of such examinations, 83 Wis. 486; 103 Mich. 473; 25 Fla. 675; 45 Hun 34.

It is the duty of the committing magistrate to secure the attendance of witnesses for the prosecution who are examined by him, for which purpose he may require them to give bail for their appearance before the grand jury or in the criminal court, with or without surety which is usually in his discretion; 1 Bish. N. Cr. L. 34. Where the preliminary examination is provided for by law, the testimony of the witnesses taken thereat may be afterwards shown in contradiction; 85 Cal. 421; 17 Vt. 658; 34 La. Ann. 1037; 40 Ark. 454; see 2 Swan 237; 32 Ia. 36. And the witnesses are liable to the penalties of perjury for false swearing if so authorized, otherwise not; 40 La. Ann. 460; 26 Me. 69; 2 McClain, Cr. Law § 858.

The filing of an information after the preliminary examination, but before a return of it made by the examining magistrate, is a mere irregularity and does not vitiate the proceedings; 115 Cal. 57. In Colorado, by statute, an information may be filed without a preliminary examination, upon the affidavit of any person who has knowledge of the commission of the offence and is a competent witness; 23 Col. 1, 9.

Where a complaint charged perjury on a certain date, and examination was waived, and the information subsequently filed charged the commission of the crime on another date, a plea in abatement on the ground that there was no examination on the offence charged in the information, was sustained; 91 Wis. 245.

A statutory requirement that the magistrate shall, on preliminary examination, examine the witnesses to support the accusation, does not require that all of the witnesses known to the state shall be examined, but merely sufficient to justify the magistrate in binding over the accused for trial; 65 N. W. Rep. (Wis.) 848.

United States commissioners holding preliminary examinations have no judicial power, but only authority to determine whether there is probable cause to believe that the offence was committed; 70 Fed. Rep. 972; and a district judge holding a preliminary examination has only, *quoad hoc*, the powers of a commissioner; *id.*

Where an examining magistrate certified that he found probable cause to believe that an offence had been committed and had taken bail, it was sufficient to sustain an information without a positive certificate by the magistrate that an offence had been committed; 102 Mich. 519.

In England, when an accused person has been arrested, either without warrant or by a justice's warrant, if he is charged with an offence for which he may be tried before a jury, the justice holds a preliminary inquiry to decide whether he ought or ought not to be sent for trial. The admission of the public during these inquiries is a matter of discretion with the justice. The witnesses for the prosecution are examined under oath and may be cross-examined by the defendant or his counsel or solicitor. The evidence is taken down in writing and after the prosecution is closed, it is read in the hearing of the defendant and he is asked whether he has anything to say in answer to the charge, being first told that he is not required to speak but that whatever he does say will be taken down in writing and may be given in evidence against him on the trial. The defendant is then allowed to call witnesses to prove his innocence. He may examine these himself or by his counsel or solicitor, and they may be cross-examined by the prosecutor. The defendant may not be questioned nor may he give evidence on his own behalf, except in certain special cases. If he choose to give evidence on oath he is liable to be cross-examined by the prosecutor.

If a *prima facie* case is not made out the defendant is discharged. If the justices are of opinion that a case has been made out they send him to trial. Hearings may be adjourned upon reasonable grounds to a stated time and place, in which case the accused is either removed under custody or discharged on his own recognizance, with or without sureties, to appear at the adjourned hearing. The limit of time must not exceed eight days. If the accused be held for trial, the prosecutor and the witnesses are bound by recognizance to appear and give evidence at the trial. The accused will not be released on bail when the charge is treason. In cases of felony and a large number of misdemeanors, the justice has a discretion in the matter. In case of misdemeanors not specially provided for, they have no power to refuse bail. Haycraft, Exec. Pow. in Rel. to Crime.

As to present French system, See JUGE D'INSTRUCTION.
See PRISONER.

PRELIMINARY PROOF. In Insurance. Marine policies in the United States generally have a provision that a loss shall be payable in a certain time, usually sixty days, "after proof," meaning "preliminary proof," which is not particularly specified. Fire policies usually specify the preliminary proof. Life policies, like marine, usually make the loss payable sixty or ninety days after notice and proof; 31 Me. 325; 6 Gray 396; 6 Harr. & J. 408; 3 Gill 276; 2 Wash. Va. 61; 23 Wend. 43; 1 La. 216; 11 Miss. 278; Stew. Low. C. 354; 14 Mo. 220; 10 Pet. 507; 6 Ill. 434; 5 Sneed 139; 2 Ohio 452; 6 Ind. 137; 30 Vt. 659; Beach, Ins. 1216. See PROOFS OF LOSS.

PREMEDITATEDLY. Thought of

beforehand, for any length of time, however short, 106 Mo. 198. "Deliberately" logically contains in it all that is meant by "premeditatedly," and more. But "premeditatedly" is also contained in the phrase "malice aforethought." 108 Mo. 205; 118 id. 96.

PREMEDITATION. A design formed to commit a crime or to do some other thing before it is done. 8 Wash. St. 99.

Intent before the act, but not necessarily existing any extended time before. 28 Fla. 318.

Premeditation differs essentially from *will*, which constitutes the crime; because it supposes, besides an *actual will*, a *deliberation*, and a *continued persistence* which indicate more perversity. The preparation of arms or other instruments required for the execution of the crime are indications of premeditation, but are not absolute proof of it; as these preparations may have been intended for other purposes, and then suddenly changed to the performance of the criminal act. Murder by poisoning must of necessity be done with premeditation. See **MALICE**.

PREMIER. The principal minister of state; the prime minister. See **CABINET**.

PREMISES (Lat. *præ*, before, *mittere*, to put, to send).

That which is put before. The introduction. Statements previously made. See 1 East 456.

In Conveyancing. That part of a deed which precedes the *habendum*, in which are set forth the names of the parties with their titles and additions, and in which are recited such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the contract then entered into is founded; and it is here, also, the consideration on which it is made is set down and the certainty of the thing granted. 2 Bla. Com. 298; 8 Mass. 174; 6 Conn. 289; 13 N. J. Eq. 331; 15 id. 418.

In Equity Pleading. The stating part of a bill. It contains a narrative of the facts and circumstances of the plaintiff's case, and the wrongs of which he complains, and the names of the persons by whom done and against whom he seeks redress. Cooper, Eq. Pl. 9; Bart. Suit in Eq. 28; Mitf. Eq. Pl. 43; Story, Eq. Pl. § 27.

Every material fact to which the plaintiff intends to offer evidence must be stated in the premises; otherwise, he will not be permitted to offer or require evidence of such fact; 1 Bro. C. C. 94; 3 P. Wms. 276; 11 Ves. 240; 2 Hare 264; 6 Johns. 565; 9 Ga. 148.

In Estates. Lands and tenements. 1 East 453; 3 Maule & S. 169; 21 Ohio St. 188.

PREMIUM. In Insurance. The consideration for a contract of insurance.

A policy of insurance always expresses the consideration called the *premium*, which is a certain amount or a certain rate upon the value at risk, paid wholly in cash, or partly so and partly by promissory note or otherwise. 2 Pars. Marit. Law 182. By the charters of mutual fire insurance companies, the insured building is usually subject to a lien for the premium; 19 Miss. 53; 21 How. 35. The premium may be payable by service rendered; 5 Ind. 96.

In life insurance, the premium is usually payable periodically; 18 Barb. 541; and the continuance of the risk is usually made to depend upon the due payment of a periodical premium; 2 Dutch. 268. But if the practice of the company and its course of dealings with the insured, and others known to him, have been such as to induce a belief that so much of the contract as provides for a forfeiture upon non-payment at a fixed time will not be insisted on, the company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief; May, Ins. § 361; 95 U. S. 380; 85 Ala. 348. The ac-

ceptance by a manager and agent of a life insurance company of a promissory note from the insured for the amount of the advance premium, and a delivery of the policy upon receipt of the note, constitute a waiver of the cash premium provided for in the application and policy which binds the company, although the policy also provides that the first premium shall be paid at the home office of the company on the delivery of the policy, and that no agent has power in any way to waive the terms of the contract; 18 N. Y. L. J. 1785. An action lies to recover a premium paid on a policy of life insurance where the company, upon the discovery of certain false statements inserted therein by the company's agents, cancelled the policy, but the cost of the insurance enjoyed by the insured during the life of the policy must first be deducted; 38 Atl. Rep. (N. H.) 500. But this is doubted in 46 Am. L. Reg. 40, because the insured should be entitled to recover the entire premium, he never having had any insurance under the void policy. See 117 U. S. 519. So far as the agreed risk is not run in amount or time under a marine policy, the whole or a proportional stipulated or customary part of the premium is either not payable, or, if paid, is to be returned unless otherwise agreed; 2 Pars. Mart. Law 185; 16 Barb. 280; 7 Gray 246. Where an insurance company authorizes the insured to send a premium by mail, such premium is paid when the letter containing it is deposited in the post office addressed to the company; 77 Hun 556. See **INSURANCE**, *Endowment Insurance*.

PREMIUM NOTE. In Insurance. A note given in place of payment of the whole or a part of the premium.

The premium, or a part of it, is not unfrequently paid wholly or in part by a promissory note, with a stipulation in the policy that the unpaid amount shall be set off and deducted in settling for a loss; 1 Phill. Ins. § 51. It is also usually collaterally secured by a stipulation in the policy for the forfeiture of the policy by non-payment of the premium note, or any amount due thereon by assessment or otherwise; 12 N. Y. 477; 2 Ind. 65; 3 Gray 215; 19 Miss. 135; 35 N. H. 328; 29 Vt. 23; 32 Pa. 75; 34 Me. 451; Beach, Ins. 520.

PREMIUM PUDICITÆ (Lat. the price of chastity.) The consideration of a contract by which a man promises to pay to a woman with whom he has illicit intercourse a certain sum of money.

When the contract is made as the payment of *past* cohabitation, as between the parties, it is good, and will be enforced, if under seal, but such consideration will not support a parol promise; 3 Q. B. 483; Poll. Contr. 288; 1 Story, Contr. § 670. It cannot be paid on a deficiency of assets, until all creditors are paid, though it has a preference over the heir, next of kin, or devisee. If the contract be for future cohabitation, it is void; 1 Story, Eq. Jur. 13th ed. § 296; 5 Ves. 286; 3 E. & B. 642; 2 P. Wms. 432; 1 W. Bla. 517; 1 Ball & B. 360; Roberts, Fraud. Conv. 428; Cas. Talb. 153, and the cases there cited; 6 Ohio 21; 5 Cow. 253; Harp. 201; 3 T. B. Monr. 35; 11 Mass. 368; 2 N. & M'C. 251. See **CONSIDERATION**.

PRENDER, PRENDRE (L. Fr.). To take. This word is used to signify the right of taking a thing before it is offered; hence the phrase of law, it lies in render, but not in prender. See **A PRENDRE**; **PROFITS A PRENDRE**; Gale & W. Easem; Washb. Easem.

PRENOMEN (Lat.). The first or Christian name of a person. Benjamin is the prenomem of Benjamin Franklin. See Cas. Hardw. 286; 1 Tayl. 148.

PREPENSE. Aforethought. See 2 Chitty, Cr. Law 1784.

PREPONDERANCE. See **FAIR PREPONDERANCE**.

PREPONDERENCE OF EVIDENCE. Greater weight of evidence,

or evidence which is more credible and convincing to the mind. 80 Wis. 193. See 37 Ark. 588.

PREROGATIVE. In Civil Law. The privilege, pre-eminence, or advantage which one person has over another; thus, a person vested with an office is entitled to all the rights, privileges, *prerogatives*, etc., which belong to it.

In English Law. The royal prerogative is an arbitrary power vested in the executive to do good and not evil. Rutherford, Inst. 279; Co. Litt. 90; Chitty, Prerog. Bac. Abr. The word simply means a power or will which is discretionary, and above and uncontrolled by any other will. It is frequently used to express the uncontrolled will of a sovereign power in the state and is applied not only to the king but also to the legislative and judicial branches of the government.

It is sometimes applied by law writers to the thing over which the power or will is exercised, as fiscal prerogatives, meaning king's revenues; 1 Halleck, Int. L. 147.

PREROGATIVE COURT. In English Law. An ecclesiastical court held in each of the two provinces of York and Canterbury before a judge appointed by the archbishop of the province.

Formerly in this court testaments were proved, and administrations granted where a decedent left chattels to the value of five pounds (*bona notabilia*) in two distinct dioceses or jurisdictions within the province, and all causes relating to the wills, administrations, or legacies of such persons were originally cognizable. This jurisdiction was transferred to the court of probate by 20 & 21 Vict. c. 77, § 4, and 21 & 22 Vict. c. 95, and now, by the Judicature Acts, it is included in the supreme court of judicature.

An appeal lay formerly from this court to the king in chancery, by stat. 25 Hen. VIII. c. 19, afterwards to the privy council, by stat. 2 & 3 Will. IV. c. 92; 2 Steph. Com. 11th ed. 206; 3 Bla. Com. 65.

In American Law. A court having a jurisdiction of probate matters, in the state of New Jersey.

PREROGATIVE WRITS. Processes issued by an exercise of the extraordinary power of the crown on proper cause shown. They are the writs of *procedendo*, *mandamus*, prohibition, *quo warranto*, *habeas corpus*; 3 Stephens, Com. 11th ed. 626. They differ from other writs in that they are never issued except in the exercise of the judicial discretion, and are directed generally not to the sheriff, but to the parties sought to be affected themselves; 3 Bla. Com. 132.

PRESBYTERY. See **JUDICATORIES**.

PRESCRIBABLE. To which a right may be acquired by prescription.

PRESCRIBE. To claim, or allege a title to a thing, on the ground of long or immemorial usage.

PRESCRIPTION. A mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment.

A prescribing for title; the claim of title to a thing by virtue of immemorial use and enjoyment; the right or title acquired by possession had during the time and in the manner fixed by law; a mode of acquiring real property, when a man can show no other title to what he claimed than that he and those under whom he claimed had immemorially used to enjoy it; 26 W. Va. 427.

The distinction between a *prescription* and a *custom* is that a custom is a local usage and not annexed to a person; a prescription is a personal usage confined to the claimant and his ancestors or grantors. The theory of prescription was that the right claimed must have been enjoyed beyond the period of the memory of man, which for a long time, in England, went back to the time of Richard I. To avoid the necessity of proof of such long duration, a custom arose of allowing a presumption of a grant on proof of usage for a long term of years.

The length of time necessary to raise a strict prescription was limited by statute 32 Hen. VIII. at sixty years; 8 Pick. 308; 7 Wheat. 59; 4 Mas. 402; 2 Greenl. Ev. § 539. See 29 Vt. 43; 24 Ala. n. s. 130; 29 Pa. 22; 4 Del. Ch. 648.

Grants of incorporeal hereditaments are presumed upon proof of enjoyment of the requisite character for a period of years equal to that fixed by statute as the period of limitation in respect of real actions; 3 Kent 443; 12 Wend. 330; 27 Vt. 265; 2 Bail. 101; 4 Md. Ch. Dec. 386; 13 N. H. 360; 4 Day 244; 10 S. & R. 68; 9 Pick. 251. See 3 Mo. 120; 1 B. & P. 400; 5 B. & Ald. 232; 7 Mackey 1; 84 Ky. 430; 82 Ga. 770; 66 Hun 633; but a grant cannot be presumed where it would have been unlawful; 112 N. Y. 142.

Prescription properly applies only to incorporeal hereditaments; 3 Barb. 105; Finch, Law 132; such as easements of water, light and air, way, etc.; 4 Mas. 397; 20 Pa. 331; 1 Gale & D. 205, 210, n.; Tudor, Leg. Cas. 114; see 140 Ill. 581; 4 Misc. Rep. 48; 44 La. Ann. 492; 156 Mass. 89; a class of franchises; Co. Litt. 114; 10 Mass. 70; 10 S. & R. Pa. 401. See FERRY; Herbert. Prescription.

A person cannot acquire a prescriptive right of way over his own lands, or the lands of another which he occupies as tenant; 116 Mo. 379. The fact that certain persons have a right of way by grant does not prevent other persons from acquiring a prescriptive right to use the way; 156 Mass. 449.

It has been held that corporations may exist by prescription; 2 Kent *277; 12 Mass. 400. It is necessary in such case to presuppose a grant by charter or act of parliament, which has been lost; 35 Barb. 319.

In Louisiana, a manner of acquiring property or discharging debts by the effect of time. Rev. Code of La. Art. 3457. See 40 La. Ann. 761.

See as to rights by prescription to use lands of another, 10 Lawy. Rep. Ann. 484.

In France thirty years has been substituted for immemorial prescription, and in Prussia periods of from thirty to fifty years.

In International Law. The doctrine of Immemorial Prescription is indispensable in public law; 1 Phill. Int. L. § 255. The general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. All nations are bound by this consent, since all are parties to it; none can safely disregard it without impugning its own title to its possessions; 1 Wheat. Int. L. 207. The period of time cannot be fixed in public law as it can in private law; it must depend upon varying and variable circumstances; 1 Phill. Int. L. § 260.

Burke speaks of the "solid rock of prescription—the soundest, the most general, the most recognized title between man and man that is known in municipal, as in public jurisprudence." Vol. ix. p. 449.

Time of. A length or period of time sufficient to establish the right of prescription, or title by prescription. See TERRITORIAL PROPERTY.

PRESENCE. The being in a particular place.

In many contracts and judicial proceedings it is necessary that the parties should be present in order to render them valid; for example, a party to a deed, when it is executed by himself, must personally acknowledge it, when such acknowledgment is required by law, to give it its full force and effect, and his presence is indispensable, unless, indeed, another person represent him as his attorney, having authority from him for that purpose.

Actual presence is being bodily in the precise spot indicated.

Constructive presence is being so near to or in such relation with the parties actually in a designated place as to be considered in law as being in the place.

Attempting to deter a witness from testifying, while he is in the witness-room or hallway of the court-room, by offering him money, is a misdemeanor in the presence of the court, and punishable without indictment, as contempt; 181 U. S. 267.

It is a rule in the civil law that he who is incapable of giving his consent to an act is not to be considered present although he be actually in the place. A lunatic, or a man sleeping, would not, therefore, be considered present; Dig. 41. 2. 1. 3. And so if insensible; 4 Bro. P. C. 71; 3 Russ. 441; or if the act were done secretly so that he knew nothing of it; 1 P. Wms. 740.

The English statute of frauds, § 5, directs that all devises and bequests of any lands or tenements shall be attested or subscribed in the presence of the devisor. Under this statute it has been decided that an actual presence is not indispensable, but that where there was a constructive presence it was sufficient; as, where the testatrix executed the will in her carriage standing in the street before the office of her solicitor, the witness retiring into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in a situation to see the witness sign the will, through the window of the office; Bro. C. C. 98. See 2 Curt. Eccl. 320, 331; 2 Salk. 688; 3 Russ. 441; 1 Maule & S. 294; 2 C. & P. 491; 135 Mass. 241; 81 Va. 410.

In Criminal Law. In trials for cases in which corporal punishment is assigned, the defendant's appearance must ordinarily be in person, and must so appear on record. There can be no judgment of conviction taken by default; 6 Pa. 387; Whart. Cr. Pl. & Pr. § 540. The prisoner's actual presence is not requisite at the making and arguing of motions of all kinds, though in motions for arrest of judgment and in error, the old practice was to require it; 88 Ill. 284; Bish. New Cr. Pro. 265; 63 Mo. 159. This is not now usually required in proceedings in error; 1 Park. C. C. 360. In felonies presence at the verdict is essential, and this right cannot be waived; 18 Pa. 103; 63 id. 386; but where a prisoner was voluntarily absent during the taking of a portion of the testimony in an adjoining room, he was considered as constructively present; 25 Alb. L. J. 303. See 88 Pa. 189. In trials for misdemeanors these rules do not apply; 9 Dana 304; 7 Cow. 525; Whart. Cr. Pl. & Pr. § 550.

PRESENT. A gift, or more properly, the thing given. It is provided by the constitution of the United States, art. 1, s. 9, n. 7, that "no person holding any office of profit or trust under them [the United States] shall, without the consent of congress, accept of any present, emolument, or office, or title, of any kind whatever, from any king, prince, or foreign state."

PRESENT USE. One which has an immediate existence and is at once operated upon by the statute of uses.

PRESENTATION. In Ecclesiastical Law. The act of a patron offering his clerk to the bishop of the diocese to be instituted in a church or benefice.

PRESENTATION OFFICE. The office of the lord chancellor's official, the secretary of presentations.

PRESENTEE. In Ecclesiastical Law. A clerk who has been presented by his patron to a bishop in order to be instituted in a church.

PRESENTLY. When a person is bound to do or perform a thing for another, "presently," all that can be required is, that the business shall be commenced and prosecuted with such despatch, as diligent persons would make use of, who have fully resolved and determined to do and perform the same thing for themselves, not permitting any other employment to interfere with, or retard the performance. 5 J. & Mar. (Ky.) 299.

PRESENTMENT. In Criminal Practice. The written notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the

suit of the government. 4 Bla. Com. 301.

Upon such presentment, when proper, the officer employed to prosecute afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill. In an extended sense, presentments include not only what are properly so called, but also inquiries of office and indictments found by a grand jury. 2 Hawk. Pl. Cr. c. 25, s. 1.

The difference between a presentment and an indictment is this: that the former is found by a grand jury authorized to inquire of offences generally, whereas the latter is an accusation found by a jury specially returned to inquire concerning the particular offence. 2 Hawk. Pl. Cr. c. 25, s. 6. See, generally, Com. Dig. Indictment (B); Bac. Abr. Indictment (A); 1 Chitty, Cr. Law 163; 7 East 387; 1 Meigs 112; 11 Humphr. 12.

The writing which contains the accusation so presented by a grand jury. 1 Brock. 156.

In Contracts. The production of a bill of exchange or promissory note to the party on whom the former is drawn, for his acceptance, or to the person bound to pay either, for payment.

The holder of a bill is bound, in order to hold the parties to it responsible to him, to present it in due time for acceptance, and to give notice, if it be dishonored, to all the parties he intends to hold liable; 2 Pet. 170; 12 Pick. 399; 7 Gray 217; 20 Wend. 321; 12 Vt. 401; 13 La. 357; 7 B. Monr. 17; 8 Mo. 268; 7 Blackf. 367; 1 M'Cord 322; 7 Leigh 179. See 20 D. C. 26; 1 App. D. C. 171. And when a bill or note becomes payable, it must be presented for payment.

In general, the presentment for payment should be made to the maker of a note, or the drawee of a bill, for acceptance, or to the acceptor for payment; 2 Esp. 509; but a presentment made at a particular place, when payable there, is, in general, sufficient; 8 N. Y. 266. A personal demand on the drawee or acceptor is not necessary; a demand at his usual place of residence; 1 M. & G. 83; 3 B. Monr. 461; 17 Ohio 78; of his wife, or other agent, is sufficient; Byles, Bills 283; 17 Ala. n. s. 42; 1 Const. 367; 2 Esp. 509; Holt 313; or place of business, of the acceptor; 3 Kent 64, 65; 4 Mo. 52; 11 Gratt. 260; 2 Camp. 596. See 158 Mass. 90. When, on presentment of a bill of exchange at the acceptor's usual place of business, within proper hours, a notary finds the doors closed, he is justified, nothing further appearing, in protesting the bill for non-payment, without inquiry for the acceptor at his residence, and without making further effort to find him; 86 Tenn. 201. The term residence is not used in a strict sense, so necessarily implying a permanent, exclusive, or actual abode in a place, but it may be satisfied by a temporary, partial, or even constructive residence; 148 Mass. 181. See RESIDENCE.

The presentment for acceptance must be made in reasonable time; and what this reasonable time is depends upon the circumstances of each case; 9 Moore, P. C. 66; 2 H. Bla. 503; 4 Mass. 336; 1 M'Cord 322; 7 Gray 217; 7 Cow. 205; 9 Mart. La. 336; 7 Blackf. 367. See 65 Miss. 242. The presentment of a note or bill for payment ought to be made on the day it becomes due; 4 Term 148; 8 Mass. 453; 3 N. H. 14; 13 La. 336; 22 Conn. 213; 20 Mo. 109; 7 Gill & J. 78; 8 Ia. 394; 10 Ohio 496; and notice of non-payment given, otherwise the holder will lose the security of the drawer and indorsers of a bill and indorsers of a promissory note; 1 Wheat. 171; 1 Harr. Del. 10; 5 Leigh, 522; 5 Blackf. 215; 2 Jones, N. C. 23; 13 Pick. 465; 19 Johns. 391; 8 Vt. 191; 1 Ala. n. s. 375; 8 Mo. 336; and if the money be lodged there for its payment, the holder would probably have no recourse against the maker or acceptor if he did not present them on the day and the money should be lost; 5 B. & Ald. 244; 27 Me. 149. The facts being undisputed, the question of reasonable time for presentment of a draft is one of law; 51 Mo. App. 245.

The excuses for not making a presentment are general, and applicable to all persons who are indorsers; or they are special, and applicable to the particular indorser only.

Among the former are—inevitable acci-

dent or overwhelming calamity; Story, Bills § 308; 8 Wend. 489; 2 Ind. 224. *The prevalence of a malignant disease, by which the ordinary operations of business are suspended*; 2 Johns. Cas. 1; 3 Maule & S. 267. *The breaking out of war between the country of the maker and that of the holder*; 1 Paine 156. *The occupation of the country where the note is payable, or where the parties live, by a public enemy, which suspends commercial operations and intercourse*; 8 Cra. 155; 15 Johns. 57; 7 Pet. 536; 2 Brock 20. *The obstruction of the ordinary negotiations of trade by vis major. Positive interdictions and public regulations of the state which suspend commerce and intercourse. The utter impracticability of finding the maker or ascertaining his place of residence*; Story, Pr. Notes §§ 205, 236, 238, 241, 264; 4 S. & R. 480; 14 La. An. 484; 3 McCord 494; 1 Dev. 247; 2 Cai. 121.

Among the latter, or special excuses for not making a presentment, may be enumerated the following. *The receiving the note by the holder from the payee, or other antecedent party, too late to make a due presentment*; this will be an excuse as to such party; 16 East 248; 7 Mass. 488; Story, Pr. Notes §§ 201, 265; 11 Wheat. 431; Byles, Bills 206. *The note being an accommodation note of the maker for the benefit of the indorser*; Story, Bills § 370. See 2 Brock, 20; 7 Harr. & J. 381; 7 Mass. 452; 1 Wash. C. C. 461; 1 Havw. 271; 4 Mas. 413; 1 Cai. 157; 1 Stew. Ala. 175. *A special agreement by which the indorser waives the presentment*; 8 Me. 218; 11 Wheat. 629; Story, Bills § 371. *The receiving security or money by an endorser to secure himself from loss, or to pay the note at maturity. In this case, when the indemnity or money is a full security for the amount of the note or bill, no presentment is requisite*; Story, Bills § 374; Story, Pr. Notes § 281; 4 Watts 328; 9 Gill & J. 47; 7 Wend. 165; 2 Me. 207; 5 Mass. 170; 5 Conn. 175. *The receiving the note by the holder from the indorser as a collateral security for another debt*; Story, Pr. Notes § 284; Story, Bills § 372; 2 How. 427, 457.

Where a negotiable note is by its terms payable at a particular bank, proof of presentment at that bank for payment, at its maturity, is indispensable to a recovery in an action thereon against an endorser; 29 W. Va. 528.

A want of presentment may be waived by the party to be affected, after full knowledge of the fact; 8 S. & R. 498. See 6 Wend. 658; 3 Bibb 102; 5 Johns. 385; 4 Mass. 847; 8 Cush. 157; Bac. Abr. *Merchant, etc.* (M); 47 Mo. App. 151; 114 Mo. 276. See, generally, 1 Harv. & W. Sel. Dec. 214, 224; Story, Pr. Notes; Byles, Bills; Parsons, Bills; Dan. Neg. Instr.; 12 L. R. A. 727.

PRESENTS. This word signifies the writing then actually made and spoken of; as, *these presents*; know all men by *these presents*; to all to whom *these presents* shall come.

PRESERVATION. Keeping safe from harm; avoiding injury. This term always presupposes a real or existing danger.

A jettison, which is always for the preservation of the remainder of the cargo, must therefore be made only when there is a real danger existing. See **AVERAGE**; **JETTISON**.

In certain cases the court may make orders for the preservation of the subject-matter of litigation. An order has been made for the sale of a horse which was consuming its value in food while an action on a warranty was pending; 3 C. P. D. 816; Brett, Comm. 762. See **PERISHABLE GOODS**.

PRESIDENT. An officer of a company who is to direct the manner in which business is to be transacted. From the decision of the president there is an appeal to the body over which he presides.

PRESIDENT OF A BANK. This of-

ficer, under the banking system in the United States, is ordinarily a member of the board of directors of the bank, and is chosen by them. It is his duty to preside at all meetings of the board of directors; to exercise a constant, immediate, and personal supervision over the daily affairs of the bank; and to institute and carry on legal proceedings to collect demands or claims due the institution; Morse, Banks 144, citing 2 Meta. (Ky.) 240; 5 How. 88; Bolles, Bank Off. 1-70; 28 Vt. 24. Mortgages to secure subscriptions to stock are often put in his name; 1 Sandf. Ch. 179; but he has no more control over the property of the bank than any other director; 7 Ala. 281; 1 Seld. 320. He has no authority to release the claims of the bank without the authorization of the board of directors; 7 R. I. 224; 115 Mass. 547; and an agreement made by him, after the bank has gone into liquidation, to continue its guarantee upon certain notes, is not binding upon the stockholders; 133 U. S. 67. See **NATIONAL BANKS**; **OFFICER**. See, generally, Ball, Nat. Banks 58.

PRESIDENT OF THE COUNCIL.

An officer of state who is a member of the cabinet. He attends on the sovereign, proposes business at the council table, and reports to the sovereign the transactions there. 1 Bla. Com. 230.

PRESIDENT JUDGE.

A title sometimes given to the presiding judge. It was formerly used in England and is now used in the courts of common pleas in Pennsylvania. The lord chief justice is now permanent president of the high court in England. The title president is said to have a high Norman flavor. Inderwick, King's Peace 225.

PRESIDENT JUSTICE. Same as chief justice (*q. v.*). Anderson.

PRESIDENT OF THE UNITED STATES OF AMERICA.

The title of the chief executive officer of the United States.

The constitution directs that the executive power shall be vested in a president of the United States of America. Art. 2, s. 1.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years and been fourteen years resident within the United States. Art. 2, s. 1, par. 5.

He is chosen by presidential electors (*q. v.*). See 1 Kent 276; Story, Const. 5th ed. § 1453. The votes of the electors are transmitted to the vice-president and by him opened in the presence of both houses of congress and counted by tellers previously selected by the two houses separately. If there is no election, a president is chosen by the house of representatives, the members voting by states, from the candidates not exceeding three, having the highest number of electoral votes.

In case of a vacancy the vice-president succeeds, and if there be none then the members of the cabinet succeed in a prescribed order. See **CABINET**.

The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them. Art. 2, s. 1, par. 7. The act of March 3d, 1873, c. 226, fixed the salary of the president at fifty thousand dollars.

In addition to certain specified powers, the president is vested by the constitution with the executive power of the federal government and the duty of seeing that the laws are faithfully executed. As to his powers, generally, and the historical development of the executive office, see **EXECUTIVE POWER**.

The president and all civil officers of the United States shall be removed from office

on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Art 2, sec. 4.

PRESIDENTIAL ELECTORS. Persons chosen in the different states whose sole duty it is to elect a president and vice-president of the United States. Each state appoints a number of electors equal to the whole number of senators and representatives to which the state is entitled in congress, and it is within the power of the state legislature to direct how such electors shall be appointed. (Const. art. ii. sect. 1). The electors have frequently been appointed by the state legislatures directly, and they have been elected separately by congressional districts; but the more usual method of appointment is by general ballot, so that each voter in a state votes for the whole number of electors to which his state is entitled.

The appointment and mode of appointment of electors belong exclusively to the states, under the constitution; 146 U. S. 1.

The constitution provides, Amend. art. 12, that "the electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate." See **PRESIDENT OF THE UNITED STATES**; **ELECTORAL COLLEGE**.

PRESS. By a figure this word signifies the art of printing.

All men have a right to print and publish whatever they may deem proper, unless by doing so they infringe the rights of another, as in the case of copyrights (*q. v.*), when they may be enjoined. For any injury they may commit against the public or individuals they may be punished, either by indictment or by a civil action at the suit of the party injured, when the injury has been committed against a private individual. See U. S. Const. Amendm. art. 1; **LIBERTY OF THE PRESS**; **LIBEL**.

PRESS COPIES. The identity of the handwriting as shown on the impression is not destroyed, nor rendered unrecognizable by persons acquainted with its characteristics. A person having accurate knowledge can testify to the genuineness with as much accuracy as if the original sheets were before him. Such copies are the same as other writings partially obliterated by damp and exposure, which are admissible as evidence, if duly identified by testimony. They are not however satisfactory as standards of comparison of handwriting. Enough originality is left to be identified by a witness when its own originality is in question; 7 Allen 561; 1 Cush. 217; to prove the contents of a lost letter, or where a party refused to give up the original; 6 S. & R. 420; 19 La. An. 91; 37 Conn. 555. The necessity of producing the original, or laying the foundation in the usual way for secondary evidence, is not obviated by the fact that a party keeps letter press copies; 44 N. Y. 171; so in 85 Md. 123. A copy, sworn to be correctly made from a press copy of a letter, is admissible as secondary evidence, to prove its contents, without producing the press copy; 102 Mass. 362. Press copies are admissible against a party when they appear to be in his handwriting and the originals cannot be produced; 7 Allen 561. Strictly speaking, a letter-press copy is secondary to the document from which it is taken, and cannot be treated as an original; 8 Camp. 228; 4 McLean 378; 35 Md. 123; 19 La. An. 91; 31 Fed. Rep. 813. See, generally, 57 Ga. 50; 73 Ill. 161; 18 Kan. 546.

PREST. A duty in money that was to

be paid by the sheriff on his account in the exchequer, or for money left or remaining in his hands. Cowell.

PRESTATION. A right by which neutral vessels may be appropriated by way of hire by a belligerent on payment of freight beforehand. In 1870 the Prussian troops sank six British vessels to obstruct navigation in the river Seine. The act was defended by Prussia on the ground of military necessity; indemnification was subsequently made; 1 Halleck, Int. L. 485.

PRESTIMONY, OR PRÆSTIMONIA. In the Canon Law. A fund or revenue appropriated by the founder for the subsistence of a priest, without being erected into any title or benefice, chapel, prebend, or priory. It is not subject to the ordinary; but of it the patron, and those who have a right from him, are the collators. Whart. Law Lex.

PRESUME. To believe or accept upon probable evidence. It is not so strong a word as infer; 46 Conn. 385. See **INFERENCE**; **PRESUMPTION**.

PRESUMPTION. An inference affirmative or disaffirmative of the truth or falsehood of any proposition or fact drawn by a process of probable reasoning in the absence of actual certainty of its truth or falsehood, or until such certainty can be ascertained. Best, Presump. 4.

An inference affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established. Best, Presump. 12.

A rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved. Steph. Ev. 4; 136 N. Y. 120.

Conclusive presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. Best, Presump. 20. They are called, also, *absolute* and *irrebuttable* presumptions.

Disputable presumptions are inferences of law which hold good until they are invalidated by proof or a stronger presumption. Best, Presump. 29; 2 H. & M.H. 77; 4 Johns. Ch. 287.

Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases. 3 B. & Ad. 890; 3 Hawks 122; 1 Wash. C. C. 372.

Presumptions of law are rules which, in certain cases, either forbid or dispense with any ulterior inquiry. 1 Greenl. Ev. § 14. Inferences or positions established, for the most part, by the common, but occasionally by the statute, law, which are obligatory alike on judges and juries. Best, Presump. 17. They are either conclusive or disputable.

Mixed presumptions hold an intermediate place and consist of presumptive inferences which, from their strength, importance, or frequent occurrence, attract the observation of the law, and, from being constantly recommended by judges and acted on by juries, become as familiar to the courts as presumptions of law, and occupy as important a place in the administration of justice. They have been termed *quasi* legal presumptions; and are divided into three classes: 1st, Where the inference is one which common-sense would have made for itself; 2d, Where an artificial weight is attached to the evidentiary facts, beyond their mere natural tendency to produce belief; and 3d, Where from motives of legal policy, juries are recommended to draw inferences which are purely artificial. Chamb. Best, Ev. § 324.

The distinctions between presumptions of law and presumptions of fact are—first, that in regard to presumptions of law a certain inference must be made whenever

the facts appear which furnish the basis of the inference; while in case of other presumptions a discretion more or less extensive is vested in the tribunal as to drawing the inference. See 9 B. & C. 643. Second, in case of presumptions of law, the court may draw the inference whenever the requisite facts are developed in pleading; Steph. Pl. 382; while other presumptions can be made only by the intervention of a jury. Presumptions of law are reduced to fixed rules, and form a part of the system of jurisprudence to which they belong; presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind. See 2 Stark. Ev. 684; 35 Pa. 440.

It has been said that a more useful and accurate division of presumptions of fact is obtained by treating them with reference to their effect upon the burden of proof and designating them in this aspect as *slight* and *strong*; Chamb. Best, Ev. § 319. Slight presumptions, though sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either constitute proof or shift the burden of proof; *id.* Strong presumptions shift the burden of proof even though the evidence to rebut them involved the proof of a negative; *id.* § 321. These are of great weight and in the absence of other evidence are decisive in civil cases; *id.* § 322. It has been suggested as the characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that when the former are disregarded by a jury, a new trial is granted as matter of right, but that the disregard of any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court; Chamb. Best, Ev. § 327; 1 Term 167; 44 Ala. 159; 31 Ga. 331.

The lack of precision which attaches to the use of the word presumption springs naturally from the variety of the uses to which the word is applied. Of these Prof. J. B. Thayer in his pamphlet on the Presumption of Innocence enumerates seven: (1) The presumption of facts properly defined, where a fact or set of facts furnishes evidence or inference of another. (2) The presumption of law properly defined, as, where a fact or set of facts is considered sufficient evidence of another in the absence to the contrary. (3) Where a fact or set of facts makes out a case which shall stand until overturned by a specific quantity of evidence; (a) sufficient to satisfy a jury; (b) a preponderance; (c) evidence beyond a reasonable doubt. (4) Where the term is used to imply that a certain fact is the legal equivalent of another fact; e. g. the presumption of malice. (5) Where the contrary of the so-called presumption is not to be taken as true without evidence, the effect being to regulate the burden of proof. (6) Where neither a fact nor the contrary of it is to be assumed as true without evidence, the presumption being of the truth of what is termed a neutral fact, or in other words, that there is no presumption; as in case of shipwreck where there is no presumption of survivorship. 8 H. L. Cas. 183. (7) Where the word is used as a rhetorical term to express a legal doctrine as the presumption of innocence. See, for a discussion of this classification and a collection of cases relating thereto, Chamb. Best, Ev. 306.

In giving effect to presumptions of fact, it is said that the presumption stands until proof is given of the contrary; 1 Cr. M. & R. 895; 2 H. & M.H. 77; 2 Dall. 22; 4 Johns. Ch. 287. See **BURDEN OF PROOF**; **ONUS PROBANDI**. This contrary proof may be a conflicting presumption; and Mr. Best lays down the following rules for application in such cases: first, special presumptions take the place of general ones; see 8 B. & C. 737; 9 *id.* 643; 5 Taunt. 326; 1 Marsh. 68; second, presumptions derived from the ordinary course of nature are stronger than casual presumptions; 4 B. & C. 71; Co. Litt. 373 a; third, presumptions are favored which tend to give validity to acts; 1 Mann.

& R. 668; 3 Camp. 432; 7 B. & C. 578; 2 Wheat. 70; 1 South. 148; 7 T. B. Monr. 344; 2 Gill & J. 114; 10 Pick. 359; 1 Rawle 386; 72 Mich. 446; 38 Minn. 143; and see **MAXIMS, Omnia presumuntur, etc.**; fourth, the presumptions of innocence is favored in law; 4 C. & P. 116; Russ. & R. 61; 10 M. & W. 15.

Among conclusive presumptions may be reckoned *estoppels* by deed, see **ESTOPPELS**; *solemn admissions*, of parties, and *unsolemn admissions* which have been acted on; 1 Camp. 139; 1 Taunt. 398; 15 Mass. 82; see **ADMISSIONS**; 1 Greenl. Ev. § 205; that a *sheriff's return* is correct as to facts stated therein as between the parties; 15 Mass. 82; that an *infant under the age of seven years* is incapable of committing a felony; 4 Bla. Com. 23; see 84 Ky. 457; that a *boy under fourteen* is incapable of committing a rape; 7 C. & P. 582; *contra*, 5 Lea 352; 84 Ky. 457; that children born in wedlock are presumed to be legitimate; 2 Allen 458; 75 Ill. 315; 2 Bush 621; 75 Cal. 379; at least where the husband might have had access and though the infidelity of the wife be proved; 3 C. & P. 215; 5 Cl. & F. 163; and positive proof of non-access is required to rebut the presumption; 58 Vt. 49; 85 Va. 245; and it cannot be proved by the wife; 60 Wis. 583; that *despatches of an enemy* carried in a neutral vessel between two hostile ports are hostile; 6 C. Rob. 440; that *all persons subject to any law* which has been duly promulgated, or which derives its validity from general or immemorial custom, are acquainted with its provisions; 4 Bla. Com. 27; 1 Co. 177; 2 *id.* 3 b; 6 *id.* 54 a. See, also, **LIMITATION**; **PRESCRIPTION**.

A person not heard from for seven years by those who would probably have heard from him if alive is presumed to be dead; 1 Greenl. Ev. § 41; Chamb. Best, Ev. 304, note citing cases; 180 Pa. 644; and though the time at which death is presumed to have taken place is a subject of controversy, the better opinion is that there is no presumption as to that; Chamb. Best, Ev. 305; 2 Brett. Com. 941; 2 M. & W. 894; and the onus is on the person whose case requires proof of death at a particular period; 75 Ala. 27; 72 Wis. 170; 13 Ired. Law 333; 8 U. C. Q. B. 291; though in some cases it has been held that death will be presumed at the end of seven years; 11 N. H. 197; 15 N. J. Eq. 119; 4 Bradf. Sur. N. Y. 117; 4 U. C. Q. B. 510. In most states this subject is regulated by statute but it is held that the statutory presumption of death from absence or concealment for seven years, without having been heard from, does not apply to children of tender age, incapable of absencing or concealing themselves of their own volition, and whose movements are governed by others; 73 Miss. 417. In order to establish a presumption of death the place to look for the person is his last known place of residence, and not the place from which he has removed; 183 Pa. 155. See, as to presumption of death, 8 Eng. Rul. Cas. 512-553.

Among rebuttable presumptions may be reckoned the presumptions that a *man is innocent* of the commission of a crime; Steph. Ev. 97; 2 Lew. Cr. Cas. 227; see 3 Gray 465; 4 B. & C. 247; 2 B. & Ald. 385; 23 Neb. 33; 44 N. J. Eq. 329; that the *possessor of property* is its owner; 1 Stry. 505; 9 Cush. 150; 21 Barb. 333; 35 Me. 139, 150; 113 N. Y. 284; 4 Harring. 327; that buildings belong to the owner of the land on which they stand; 150 U. S. 483; that possession of real property accompanies ownership; 120 U. S. 805; that *possession of the fruits of crime* is guilty possession; 2 C. & P. 359; 1 Den. Cr. Cas. 596; 7 Vt. 122; 9 Conn. 527; 19 Me. 398; 111 N. Y. 539; 25 Tex. App. 751; that *things usually done in the course of trade* have been done; 8 C. B. 827; 7 Q. B. 846; 7 Wend. 198; 9 S. & R. 385; 9 N. H. 519; 10 Mass. 205; 7 Gill 34; 45 Me. 516, 550; 15 Conn. 206; and in the usual and ordinary way; 96 Mo. 591; that *solemn instruments are duly executed*; 1 Rob. Eccl. 10; 9 C. & P. 570; 15 Me. 470; 1 Metc. 349; 15 Conn. 206; that a *person, relation, or state of things* once shown to

exist continues to exist, as, *life*; 2 Rolle 431; 1 Pet. 452; 3 McLean 390; see 2 Camp. 113; 14 Sim. 28, 277; 19 Pick. 112; 1 Ga. 538; 11 N. H. 191; 36 Me. 176; 13 Ired. 333; 1 Penn. N. J. 167; 18 Am. L. Reg. N. S. 639; 23 Alb. L. J. 39; 14 Cent. L. J. 96; 126 Pa. 297; 69 Tex. 19; see **DEATH**; a *partnership*; 1 Stark. 405; see *insanity*; 3 Bro. C. C. 448; 3 Metc. Mass. 164; 89 N. H. 163; 4 Wash. C. C. 232; 5 Johns. 144; 1 Pet. C. C. 163; 2 Va. Cas. 132; 24 Alb. L. J. 304; 100 N. C. 457; that *official acts have been properly performed*; 1 J. J. Marsh. 447; 14 Johns. 182; 19 id. 345; 8 N. H. 310; 3 Gill & J. 359; 12 Wheat. 70; 7 Conn. 350; 35 Fed. Rep. 131; 120 U. S. 605; but see 84 Wis. 135; that *statutes of other states are the same as those of the state in which the court is sitting*; 40 La. Ann. 766; 125 Pa. 204; 144 id. 205; 65 Tenn. 616; 35 Neb. 375; 76 Hun 200; 93 Cal. 172; but see 50 Ark. 237; that a *mature male has normal powers of virility*; 81 Ga. 141; that a *child was born in lawful wedlock*; 127 Ill. 554; that a *person has testamentary capacity*; 45 N. J. Eq. 703; that he is *sane*; 127 Ill. 523; 26 Neb. 655; *identity of person is presumed from identity of name*; 75 Cal. 98, 240; 83 Ala. 523; *homicide committed by means of a deadly weapon, creates a presumption of malice*; 83 Ala. 33; 100 N. C. 512; that a *vote is legal*; 40 Kan. 270; 97 Mo. 311; 98 N. C. 591; that a letter duly directed and mailed, was received by the person to whom it was directed, in the regular course of mail; 63 Hun 624; 147 Ill. 176; 141 U. S. 25.

A favorite maxim is that *ignorantio legis neminem excusat*, or that every one is conclusively presumed to know the law. There is no such presumption in fact; 2 C. B. 720; L. R. 3 Q. B. 629. The fact is simply that it is a rule of public policy that ignorance of the law shall not be set up as a defence against legal liability; 11 Blatch. 200; 37 Miss. 379; 7 Pick. 279. In many cases a commonly accepted misconception of the law has been held sufficient excuse; 80 Pa. 430; 2 Black 372; 21 Wall. 178; 91 U. S. 45; 36 N. J. L. 125; 43 Ala. 197.

Another very much misused maxim is that one is presumed to intend the natural consequence of his act. This has been characterized as "merely a fantastic transference into the law of evidence of the phraseology of positive law;" Chamb. Best, Ev. 310; 10 Cush. 373; 7 Md. 108. So far as it is a rule of law it means simply that mere carelessness is not a ground of defence against legal liability; 72 N. Y. 90; 80 Ill. 28; 23 Vt. 151; 8 Cal. 113; 100 Mass. 505.

There is a presumption of jurisdiction which attaches to the record of the judgment or the decree of a court of general jurisdiction in another state, and where the record discloses nothing in regard to the service of process or notice and no evidence is given on the subject, jurisdiction over the person will be presumed; 134 N. Y. 333, affirming 12 App. Div. N. Y. 278.

Consult Greenleaf, Starkie, Phillips, Wharton, Greenleaf, on Evidence; Best, Matthews, on Presumptive Evidence; Russell on Crimes. See **VIOLENT PRESUMPTION**.

PRESUMPTIVE EVIDENCE. See **EVIDENCE**. PROBABLE EVIDENCE; VIOLENT PRESUMPTION.

PRESUMPTIVE HEIR. See **HEIR PRESUMPTIVE**.

PRESUMPTIVE TITLE. See **TITLE**.

PRÊT À LA GROSSE. See **NAUTICA PECUNIA**.

PRÊT À USAGE. (Fr. loan for use). A phrase used in the French law instead of *commodatum*.

PRETENDED TITLE STATUTE. The statute 32 Hen. VIII. c. 9, § 2. It enacts that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land,

or of the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor.

PRETENSED. Pretended; claimed.

PRETENSION, or PRETENSION. In the French law, a claim made to a thing which the claimant believes himself entitled to demand, but which is not admitted or adjudged to be his. R. & L. Dict.

The words *right, actions, and pretensions* are usually joined; not that they are synonymous, for *right* is something positive and certain, *action* is what is demanded, while *pretension* is sometimes not even accompanied by a demand.

PRETERITION (Lat. *preter* and *eo*, to go by). In **Civil Law**. The omission by a testator of some one of his heirs who is entitled to a legitime (q. v.) in the succession.

Among the Romans, the preterition of children when made by the mother was presumed to have been made with design; the preterition of sons by any other testator, was considered as a wrong, and avoided the will, except the will of a soldier in service, which was not subject to so much form.

PRETEXT (Lat. *prætextum*, woven before). The reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation, or which, if true, are not the true reasons for such act. Vattel, liv. 3, c. 3, § 32.

Ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretence. 27 Neb. 604.

PRETIUM AFFECTIONIS (Lat.). An imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it. Bell, Dict.

When an injury has been done to an article, it has been questioned whether in estimating the damage there is any just ground, in any case, for admitting the *pretium affectionis*. It seems that when the injury has been done accidentally by culpable negligence, such an estimation of damages would be unjust, but when the mischief has been intentional it ought to be so admitted. Kames, Eq. 74, 75.

PRETIUM PERICULI. The price of the risk, e. g. the premium paid on a policy of insurance; also the interest paid on money advanced on bottomry or respondentia.

PRETORIUM. A court house or hall of justice. 3 How. St. Tr. 425.

PREUVE (Fr.). Proof, evidence, trial, ordeal. Wes. Fr. Eng. Dict.

PREVAILING PARTY. To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it. 60 Me. 286. See 53 Mo. 330.

PREVARICATION. In **Civil Law**. The acting with unfaithfulness and want of probity. The term is applied principally to the act of concealing a crime. Dig. 47. 15. 6.

PREVENT. To hinder; to obstruct; to intercept. 20 Ark. 185. It is held not to mean to obstruct by physical force; 17 Q. B. 145.

PREVENTION (Lat. *prevenire*, to come before). In **Civil Law**. The right of a judge to take cognizance of an action over which he has concurrent jurisdiction with another judge.

In Pennsylvania it has been ruled that a justice of the peace cannot take cognizance of a cause which has been previously decided by another justice. 2 Dall. 77, 114.

PREVIOUS QUESTION. In parliamentary practice, the question whether a vote shall be taken on the main issue, or not, brought forward before the main or

real question is put by the speaker and for the purpose of avoiding, if the vote is in the negative, the putting of this question. The motion is in the form "that the question be now put," and the mover and secondor vote against it.

In the house of representatives of the United States and in many state legislatures the object of moving the previous question is to cut off debate and secure immediately a vote on the question under consideration.

PREVIOUSLY. An adverb of time, used in comparing an act or state named, with another act or state, subsequent in order of time, for the purpose of asserting the priority of the first. 40 Ia. 94.

PRICE. The consideration in money given for the purchase of a thing.

It is not synonymous with value; 51 Kan. 408.

There are three requisites to the quality of a price in order to make a sale.

It must be *serious* and such as may be demanded; if, therefore, a person were to sell me an article, and by the agreement, reduced to writing, he were to release me from the payment, the transaction would no longer be a sale, but a gift. Pothier, *Vente*, n. 18.

It must be *certain and determinate*; but what may be rendered certain is considered as certain; if, therefore, I sell a thing at a price to be fixed by a third person, this is sufficiently certain, provided the third person make a valuation and fix the price; Pothier, *Vente*, n. 23; 2 Sumn. 539; 4 Pick. 179; 13 Me. 400; 2 Ired. 36; 3 Pa. 50; 2 Kent 477. When the parties have not expressed any price in their contract, the presumption of law is that the thing is sold for the price it generally brings at the time and place where the agreement was made; 3 T. B. Monr. 133; 6 H. & J. 273; Coxe 261; 10 Bingh. 376; 11 U. C. Q. B. 545.

The third quality of a price is that it consists in money, to be paid down, or at a future time; for if it be of anything else it will no longer be a price, nor the contract a sale, but exchange or barter; Pothier, *Vente*, n. 30; 16 Toullier, n. 147; 12 N. H. 390; 10 Vt. 457; see, 54 N. Y. 173, where it was held that price in an act meant *value or compensation*.

The true price of a thing is that for which things of a like nature and quality are usually sold in the place where situated, if real property; in the place where exposed to sale, if personal; Pothier, *Vente*, n. 243. The first price or cost of a thing does not always afford a sure criterion of its value. It may have been bought very dear or very cheap; Ayl. Parerg. 447; Merlin, *Répert*; 4 Pick. 179; 16 id. 227.

In a declaration in trover it is usual, when the chattel found is a living one, to lay it as of such a price; when dead, of such a value; 8 Wentw. Pl. 372, n.; 2 Lilly, Abr. 629.

Lord Tenterden's act has substituted *value for price* in the English statute of frauds; 25 L. J. C. P. 257. See Campb. Sales 162; **COST**.

See **CONTRACT PRICE**; **FACTORY PRICE**; **UPSET PRICE**.

PRICE CURRENT. A list or enumeration of various articles of merchandise, with their prices, the duties (if any), payable thereon, when imported or exported, with the drawbacks occasionally allowed upon their exportation. Wharton.

PRICES ON EXCHANGE. See **QUOTATIONS OF PRICES ON AN EXCHANGE**.

PRIDE GAVEL. A rent or tribute. Tayl. Gavell. 112.

PRIEST. An officer in the second order of ministry in the church.

PRIMA FACIE (Lat.). At first view or appearance of the business; as the holder of a bill of exchange, indorsed in blank, is *prima facie* its owner.

Prima facie evidence of fact is in law sufficient to establish the fact, unless re-

butted; 6 Pet. 632, 632; 14 *id.* 334. See, generally, 7 J. J. Marsh. 425; 3 N. H. 484; 7 Ala. 267; 5 Rand. 701; 1 Pick. 332; 1 South. 77; 1 Yeates 347; 2 N. & M.C. 320; 1 Mo. 334; 11 Conn. 95; 2 Root 286; 16 Johns. 68, 136; 1 Bail. 174; 2 A. K. Marsh. 244; 97 U. S. 3. For example, when buildings are fired by sparks emitted from a locomotive engine passing along the road, it has been held to be *prima facie* evidence of negligence on the part of those who have the charge of it; 3 C. B. 229; and proof of the mailing of a letter is *prima facie* evidence of its receipt by the person to whom it is addressed; 147 Ill. 176; 27 S. W. Rep. (Mo.) 436; 63 Hun 624.

PRIMA FACIE EVIDENCE. Evidence which, unexplained and uncontradicted, appears to be sufficient to establish the fact, or which would warrant a finding of the fact or matter, to support or prove which it is introduced. It is evidence which suffices to establish the fact unless rebutted or until overcome by other evidence. It is not conclusive, but may be contradicted or controlled. Eliot, Evidence § 17, 15.

Prima facie evidence is sufficient to outweigh the presumption of innocence, and, if not met by opposing evidence, to support a verdict. 219 U. S. 219, quoting 6 Pet. 632.

PRIMA TONSURA (Lat.). A grant of a right to have the first crop of grass. 1 Chitty, Pr. 181.

PRIMAE IMPRESSIONIS. First impression. A case which presents to a court of law for its decision a question of law which is new, and for which there is consequently no precedent, is said to be a case of first impression. R. & L. Diet. SEE IMPRESSION.

PRIMAGE. In Mercantile Law. A duty payable to the master and mariners of a ship or vessel,—to the master for the use of his cables and ropes to discharge the goods of the merchant, to the mariners for lading and unlading in any port or haven. Abb. Sh. 270.

A small payment to the master for his care and trouble which he is to receive for his own use, unless he has otherwise agreed with the owner. Abb. Sh. 13th ed. 531; it is of a very ancient date and subject to authority and regulations. "In the 'Guidon,' it is called *la contribution des chausses ou pol de vin du maître*." It is sometimes called the master's hat-money; *id.*

It is no longer a gratuity to the master, unless especially stipulated; but it belongs to the owners or freighters, and is nothing but an increase of the freight rate; 14 Fed. Rep. 421.

PRIMARIES. Methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. In no sense elections for office. 256 U. S. 250.

PRIMARY. That which is first or principal; as, *primary evidence*, that evidence which is to be admitted in the first instance, as distinguished from secondary evidence, which is allowed only when primary evidence cannot be had.

PRIMARY BOYCOTT. See BOYCOTT.

PRIMARY CONVEYANCES. Those common law conveyances, by means of which an estate is created or first arises. 2 Bl. Com. 309.

PRIMARY ELECTION. A popular election held by members of a particular political party, for the purpose of choosing delegates to a convention empowered to nominate candidates for that party to be voted for at an approaching election. 125 Ind. 210. In many states they are regulated by law and frauds are punishable as in a general election.

PRIMARY EVIDENCE. The best evidence of which the case in its nature is susceptible. 3 Bouvier, Inst. n. 3053. See Steph. 67; EVIDENCE

PRIMARY OBLIGATION. An obligation which is the principal object of the contract: for example, the primary obligation of the seller is to deliver the thing sold, and to transfer the title to it. It is distinguished from the accessory or secondary obligation to pay damages for not doing so. 1 Bouvier, Inst. n. 702.

PRIMARY POWERS. The principal authority given by a principal to his agent; it differs from *mediale powers*. Story, Ag. § 58.

PRIMATE. In Ecclesiastical Law. An archbishop who has jurisdiction over one or several other metropolitans.

PRIME. In a contract for delivery of "prime barley" prime will be understood according to its use among merchants. 14 Mo. 9.

Prime cost, the true price paid for goods upon a *bona fide* purchase. 2 Mas. 53.

PRIME MINISTER. See CABINET; PREMIER.

PRIME SERJEANT. The Queen's first serjeant at law.

PRIMER ELECTION. A term used to signify first choice.

In England, when coparcenary lands are divided, unless it is otherwise agreed, the eldest sister has the first choice of the parts: this part is called the *entia pars*. Sometimes the oldest sister makes the partition; and in that case, to prevent partiality, she takes the last choice. Hob. 107; Litt. §§ 243; 245; Bac. Abr. Coparceners (U).

PRIMER FINE. The fine due the crown by ancient prerogative on suing out the writ of *præcipe*. 1 Steph. Com. 560.

PRIMER SEISIN. In English Law. The right which the king had, when any of his tenants died seized of a knight's fee, to receive of the heir, provided he were of full age, one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion, expectant on an estate for life. 2 Bla. Com. 66. See FEUDAL LAW.

PRIMICERIUS. The first of any degree of men. 1 Mon. Ang. 838.

PRIMO BENEFICIO. A writ directing a grant of the first benefice in the sovereign's gift. Cowell.

PRIMOGENITURE. The state of being first born; the eldest.

At common law, in cases of the descent of land, primogeniture gave a title to the oldest son in preference to the other children. This distinction has been abolished in the United States. Formerly in Pennsylvania, in cases of intestacy, the oldest son took a double portion of the real estate; 1 Binn. 91, where it was held that a trust estate (the legal title) descends as at common law; and this case was followed in Delaware; 4 Houst. 648.

The law of primogeniture has not been altered in England; see however the radical act of 1897, cited in LAND TRANSFER.

PRIMOGENITUS (Lat.). The first-born. 1 Ves. 290. And see 3 Maule & S. 25; 8 Taunt. 468; 3 Vern. 660.

PRIMUM DECRETUM (Lat.). In the courts of admiralty, this name is given to a provisional decree. Bacon, Abr. *The Court of Admiralty* (E).

PRINCE. In a general sense, a sovereign; the ruler of a nation or state. The son of a king or emperor, or the issue of a royal family; as, princes of the blood. The chief of any body of men.

PRINCE OF WALES. A title given to the eldest son of the British sovereign or to the heir apparent to the crown.

PRINCES OF THE BLOOD. The younger sons of the British sovereign and male members of other branches of the royal family not in the direct line of succession.

PRINCES AND RULERS. See RESTRAINT OF PRINCES AND RULERS.

PRINCESS ROYAL. The title borne by the eldest daughter of the sovereign, if and when it is conferred on her by the sovereign. No grant by letters patent is necessary. The question as to what happens when the title is borne by the eldest daughter of a subsequent sovereign has never arisen until now. The title had not up to the end of 1921 been conferred on the eldest daughter of his present Majesty. It would seem that the title cannot well be held simultaneously by two ladies. Byrne.

PRINCIPAL. Leading; chief; more important.

This word has several meanings. It is used in opposition to *accessory*, to show the degree of crime committed by two persons. Thus, we say, the principal is more guilty than the accessory after the fact.

In estates, principal is used as opposed to *incident* or *accessory*: as in the following rule: "The incident shall pass by the grant of the principal; but not the principal by the grant of the incident: *accessorium non ducit sed sequitur suum principale*." Co. Litt. 152 a.

It is used in opposition to *agent*, and in this sense it signifies that the principal is the prime mover.

It is used in opposition to *interest*: as, the principal being secured, the interest will follow.

The corpus or capital of the estate in contradistinction to the income.

Money bearing interest; a capital sum lent on interest.

It is used also in opposition to *surety*; thus, we say, the principal is answerable before the surety.

Principal is used also to denote the more important: as, the principal person.

In the English law, the chief person in some of the inns of chancery is called principal of the house. Principal is also used to designate the best of many things: as, the principal bed, the principal table, and the like.

In Contracts. One who, being competent *sui juris* to do any act for his own benefit or on his own account, confides it to another person to do for him. 1 Domat b. 1, tit. 15, Introd.; Story, Ag. § 3.

Every one of full age, and not otherwise disabled, is capable of being a principal; for it is a rule that whenever a person has power, as owner, or in his own right, to do a thing, he may do it by another; Com. Dig. *Attorney* (C 1); Heineccius, ad Pand. p. 1 l. 3, tit. 1, § 424; 9 Co. 75 b; Story, Ag. § 6. Infants are generally incapable of appointing an agent; but under special circumstances they may make such appointments. For instance, an infant may authorize another to do any act which is beneficial to him, but not to do an act which is to his prejudice; 2 Kent 233; 9 Co. 75; 3 Burr. 1804; 6 Cow. 393; 10 Ohio 37; 10 Pet. 58, 69; 14 Mass. 463. A married woman could not, in general, appoint an agent or attorney; and when it was requisite that one should be appointed, the husband usually appointed for both. She might, perhaps, dispose of or incur her separate property, through an agent or attorney; Cro. Car. 165; 2 Bulstr. 13; but this seemed to be doubted; Cro. Jac. 617; 1 Brownl. 134; Ad. Ej. 174. Idiots, lunatics, and other persons *sui juris* are wholly incapable of appointing an agent; Story, Ag. § 6.

The general principle which governs the liability of a principal is that the responsibility is measured by the character and extent of the authority given; see AGENCY; AGENT; for example, authority to an agent to vote at a corporate meeting upon the stock of his principal does not empower the former to act for the latter in connection with other stockholders, who were also creditors of the corporation, in taking measures for cancelling a mortgage of the corporation under which the claims of the

principal and those stockholders against the corporation were secured; 112 Ala. 228. The powers of the agent must be measured and determined by the application to each particular case of ordinary business principles, and sound judgment to be exercised by the agent in executing his authority, and by the court which is to deal with the case in considering the question of the responsibility of the principal. Where a discretion has been conferred upon the agent the principal must abide the result of its exercise and will be held liable to third persons where it has been honestly exercised. So where an agent has power to borrow money on exceptional terms in cases of emergency, a lender is not bound to inquire whether in the particular case the emergency has or has not arisen; 15 L. R. App. 357. And where the agent was entrusted with securities and instructed by the principal to raise a certain sum upon them, but borrowed a larger sum and fraudulently appropriated the difference, the principal could not redeem the securities without paying the lender in full where he had acted *bona fide* and in ignorance of the limitation, although he had no knowledge of the agent's authority to borrow and made no inquiry, and the agent practised fraud and forgery to obtain the loan; [1895] App. Cas. 173, affirming [1895] 3 Ch. 130.

The principal is entitled to the service of the agent with respect to the matter in hand as though the agent were attending to his own business; and the latter will be considered, to that extent, as merging his own individuality and will be held to act entirely for the benefit of the principal. He cannot make a profit out of the business which he transacts for the principal derived from any knowledge acquired by him in the course of it, except consistently with the engagements between the principal and agent. So where an agent, acting in a confidential capacity, obtained information of a defect in his principal's title and put in an outstanding claim through a third party, it was held that he could not profit by his purchase but held the title for his principal; 12 U. S. App. 606. On the other hand, a principal cannot retain the fruit of his agent's acts and yet disclaim his authority in order to escape the corresponding obligation. Where a corporation obtained from the plaintiff the right to construct a road in front of his property and constructed it, it could not refuse to recognize its agent's authority to bind it to pay the sum he agreed to pay; 47 N. Y. Supp. 327. It is said in this case that agency cannot be proved by the uncorroborated testimony of the agent, nor can any implication of consent to the work done arise, in the absence of proof of knowledge that it was being done.

The rights to which principals are entitled arise from obligations due to them by their agents or by third persons.

The rights of principals in relation to their agents are—*first*, to call them to an account at all times in relation to the business of the agency; 2 Bouvier, Inst. 28. *Second*, when the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence or omissions in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full indemnity; Story, Ag. § 217 c; 12 Pick. 328; 6 Hare 366; 7 Beav. 176. But the loss of damage must be actual, and not merely probable or possible; Story, Ag. § 222; Paley, Ag. 7, 8, 74, 75. But see *id.* 74, note 2. *Third*, where both the principal and agent may maintain a suit against a third person for any matter relating to the agency, the principal has a right to supersede the agent, by suing in his own name; and he may by his own intervention intercept, suspend, or extinguish the right of the agent under the contract; Story, Ag. § 408; 4 Camp. 194; 3 Hill, N. Y. 72, 73; 6 S. & R. 27; 2 Wash. C. C. 223; 1 Maule & S. 576. See 57 Fed. Rep. 463. But, as we shall presently see, an exception

to this rule arises in favor of the agent, to the extent of any lien, or other interest, or superior right, he may have in the property; Story, Ag. §§ 393; 397, 407, 424. The principal has a right to determine or revoke the authority given to his agent, at his own mere pleasure, where not otherwise agreed between them; 141 U. S. 637.

Agents are not entitled to use the materials gained or collected by them in the cause of their employment to the detriment of their principal; [1893] 1 Ch. 218.

In general, the principal, as against third persons, has a right to all the advantages and benefits of the acts and contracts of his agent, and is entitled to the same remedies against such third persons, in respect to such acts and contracts, as if they were made or done with him personally; Story, Ag. §§ 418, 420; Paley, Ag. 323; 8 La. 296; 2 Stark. 443. See 103 Cal. 43. But to this rule there are the following exceptions. *First*, when the instrument is under seal, and it has been exclusively made between the agent and the third person, as, for example, a charter-party or bottomry bond made by the master of a ship in the course of his employment, in this case the principal cannot sue or be sued on it; Story, Ag. § 422; Abb. Sh. pt. 3, ch. 1. § 2; 4 Wend. 285; 1 Paine 251; 3 Wash. C. C. 560. *Second*, when an exclusive credit is given to and by the agent, and therefore the principal cannot be considered in any manner a party to the contract, although he may have authorized it and be entitled to all the benefits arising from it. The case of a foreign factor buying or selling goods is an example of this kind; he is treated, as between himself and the other party, as the sole contractor, and the real principal cannot sue or be sued on the contract. This, it has been well observed, is a general rule of commercial law, founded upon the known usage of trade; and it is strictly adhered to, for the safety and convenience of foreign commerce; Story, Ag. § 425; 9 B. & C. 87; 4 Taunt. 574. *Third*, when the agent has a lien or claim upon the property bought or sold, or upon its proceeds, which is equal to or exceeds the amount of its value, the principal cannot sue without the consent of the agent; Story, Ag. §§ 403, 407, 424.

But contracts are not unfrequently made without mentioning the name of the principal. In such case he may avail himself of the agreement; for the contract will be treated as that of the principal as well as of the agent. If, however, the person with whom the contract was made, *bona fide* dealt with the agent as owner, he will be entitled to set off any claim he may have against the agent, in answer to the demand of the principal; and the principal's right to enforce contracts entered into by his agent is affected by every species of fraud, misrepresentation, or concealment of the agent which would defeat it if proceeding from himself; Story, Ag. §§ 420, 440; 2 Kent 633; Paley, Ag. 324; 8 B. & P. 490; 24 Wend. 458.

Where the principal gives notice to the debtor not to pay money to the agent, unless the agent has a superior right, from a lien or otherwise, the amount of any payment afterwards made to the agent may be recovered by the principal from the debtor; Story, Ag. § 429; 4 Camp. 60; 6 Cow. 181, 186. Money paid by an agent may also be recovered by the principal under any of the following circumstances: *first*, where the consideration fails; *second*, where money is paid by an agent through mistake; *third*, where money is illegally extorted from an agent in the course of his employment; *fourth*, where the money of the principal has been fraudulently applied by the agent to an illegal and prohibited purpose; Paley, Ag. 335. When goods are intrusted to an agent for a specific purpose, a delivery by him for a different purpose, or in a manner not authorized by the commission, passes no property in them, and they may, therefore, be reclaimed by the owner; Paley, Ag. 340; 3 Pick. 495. Third persons are also liable to

the principal for any tort or injury done to his property or rights in the course of the agency. If both the agent and third person have been parties to the tort or injury, they are jointly as well as severally liable to the principal, and he may maintain an action against both or either of them. Story, Ag. § 436; 3 Maule & S. 562.

The liabilities of the principal are either to his agent or to third persons. The liabilities of the principal to his agent are—to reimburse him all his advances, expenses, and disbursements lawfully incurred about the agency, and also to pay him interest upon such advances and disbursements whenever interest may fairly be presumed to have been stipulated for or to be due to the agent; Story, Ag. § 335; Story, Bailm. 196, 197; Paley, Ag. 107, 108; *second*, to pay him his commissions as agreed upon, or according to the usage of trade, except in cases of gratuitous agency; Story, Ag. § 324; Paley, Ag. 100; *third*, to indemnify the agent when, without his own default, he has sustained damages in following the directions of his principal: for example, when the agent has innocently sold the goods of a third person, under the direction or authority of his principal, and a third person recovers damages against the agent, the latter will be entitled to reimbursement from the principal; Story, Ag. § 339; 9 Metc. Mass. 212.

The principal is bound to fulfil all the engagements made by the agent for or in the name of the principal, which come within the scope of his usual employment, although the agent in the particular instance has in fact exceeded or violated his private instructions; Story, Ag. 443; 4 Watts 232; 21 Vt. 129; 26 Me. 84; 1 Wash. C. C. 174; 114 N. Y. 415; 98 Mo. 478. See [1893] 1 Q. B. 346. And where an exclusive credit is not given to the agent, the principal is liable to third persons upon contracts made by his agent within the scope of his authority, although the agent contracts in his own name and does not disclose his agency; Story, Ag. § 446. But if the principal and agent are both known, and exclusive credit be given to the latter, the principal will not be liable though the agent should subsequently become insolvent; Story, Ag. § 447. When goods are sold to a person who in fact is the agent of another, but the seller has no knowledge of the agency, the latter may elect to make the principal his debtor on discovering him; 48 Conn. 314; 50 Ark. 433. The same principle applies where the seller is informed at the time of the sale that the buyer is an agent, but is not informed who the principal is; 9 B. & C. 78; 2 Metc. 319. Where money is paid by a third person to the agent, by mistake or upon a consideration that has failed, the principal will be liable to repay it although he may never have received it from his agent; Story, Ag. § 451; Paley, Ag. 293; 2 Esp. 509.

An interesting collection of cases illustrating the doctrine of the liability of the principal for the act of the agent is the subject of an annotation in 35 Am. L. Reg. N. s. 590, as to the authority of officers of corporations to employ physicians and nurses in cases of accident to employees or others. It has been held that the superintendent or general manager of a railroad company has the authority to employ a physician in such cases; 126 Ind. 99; 28 Mich. 289; 24 Kan. 328; L. R. 2 Ex. 228. Such employment was sustained in the case of any superior officer, where no higher one was present; as, a division superintendent; 52 Kan. 433; a conductor; 121 Ind. 353; 22 Fla. 356; a master mechanic; 19 Kan. 256; a yard master; 28 Mich. 289; and a station agent; 3 Ex. 268. In any case the company will be bound if the employment be ratified by the superintendent; 98 Ind. 391; 19 Kan. 256. There is no inherent power in the general manager, but the question of his delegated authority is for the jury; 45 Mo. App. 282; 42 Conn. 556; 7 Ind. App. 676; and so the authority of a superintendent and general manager of an electric light company, who

was also a director, to bind the corporation by employing a nurse, was held a question for the jury; 67 N. W. Rep. (Mich.) 544.

The death of the principal usually revokes the authority to act for him or for his estate; 150 U. S. 520; 75 Cal. 349. Where an agent by the sudden death of his principal without known heirs is left in sole charge of his principal's estate, he is entitled to compensation for services in connection with the estate until the persons entitled to the property are found and their rights established in the orphans' court; 180 Pa. 192. See AGENCY.

There is a general presumption that an agent is presumed to have disclosed to his principal all facts which come to his knowledge in the course of the agency, and this presumption remains in force so long as the agent acts within the scope of his employment in good faith for the interest of the principal; but if he forms the purpose of dealing with the principal's property for his own benefit or that of some one else opposed in interest, his subsequent action based upon such purpose is considered to be in fraud of the rights of the principal, and the presumption no longer prevails; 18 N. Y. L. J. 1121.

The principal is not, in general, liable to a criminal prosecution for the acts or misdeeds of his agent, unless he has authorized or co-operated in such acts or misdeeds; Story, Ag. § 452; Paley, Ag. 303; 1 Mood. & M. 433. He is, however, civilly liable to third persons for the misfeasance, negligence, or omission of duty of his agent in the course of the agency, although he did not authorize or know of such misconduct, or even although he forbade it; Story, Ag. § 452; Paley, Ag. 294; 26 Vt. 112, 123; 6 Gill & J. 291; 20 Barb. 507; 7 Cush. 385; 83 Ala. 333; 51 Fed. Rep. 160; 33 Fla. 696; 5 Tex. Civ. App. 476; see 78 Ga. 323; and he is liable for the injuries and wrongs of sub-agents who are retained by his direction, either express or implied; Story, Ag. § 454; Paley, Ag. 296; 1 B. & P. 409. But the responsibility of the principal for the negligence or unlawful acts of his agent is limited to cases properly within the scope of the agency. Nor is he liable for the *wilful* acts of his agent whereby damage is occasioned to another, unless he originally commanded or subsequently assented to the act; Paley, Ag. 298, 299; Story, Ag. § 456; 9 Wend. 288; 23 Pick. 25; 20 Conn. 234. See 11 Colo. 233. Strict compliance with the instructions of a principal by the agent is a condition of exemption of the agent from liability; 137 U. S. 473.

A principal who accepts the benefits of a contract made on his behalf by his authorized agents is responsible for the fraudulent representation of the agent, although made without authority; 85 Tenn. 139; 2 C. C. App. 535; and a person who has adopted a sale made by his agent, and receives the benefit of it, takes the sale with all the burdens created by false representations of the agent; 78 Cal. 490; 40 Minn. 476; 52 Kan. 245; 65 Hun 182; see 160 Mass. 177; and a principal must adopt the acts of his agents as a whole; 24 Neb. 653; 150 U. S. 128; 15 So. Rep. (La.) 116. A ratification by a principal of an unauthorized contract made by his agent, relates back to the beginning of the transaction; 57 Fed. Rep. 973; and a principal having the right to disaffirm acts of an agent must do it promptly, and if not done within a reasonable time ratification will be presumed; 120 U. S. 256. There can be no ratification by a principal of the acts of his agent, where he has no knowledge of such acts; 71 Md. 200; 76 Ia. 129.

In Criminal Law. The actor in the commission of a crime.

All who are present, either actually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are principals in the crime; 45 Fed. Rep. 851. See 25 Tex. App. 538; 21 id. 107.

Principals are of two kinds, namely,

principals in the first degree, and principals in the second degree.

A *principal in the first degree* is one who is the actual perpetrator of the act. 1 Hale, Pl. Cr. 233, 615; 15 Ga. 346. But to constitute him such it is not necessary that he should be actually present when the offence is consummated; 3 Denio 190; 21 Tex. App. 107. For if one lay poison purposely for another, who takes it and is killed, the offender, though absent when it was taken, is a principal in the first degree; Clark, Cr. L. 83; 1 Hawk. Pl. Cr. c. 31, § 7; 4 Bla. Com. 34; 1 Chitty, Cr. L. 257. And the offence may be committed in his absence, through the medium of an innocent agent; as, if a person incites a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, to the commission of crime, the inciter, though absent when the act was committed, is *ex necessitate* liable for the act of his agent and a principal in the first degree; 1 Hale, Pl. Cr. 514; 2 Leach 978. But if the instrument be aware of the consequences of his act, he is a principal in the first degree; the employer, in such case, if present when the fact is committed, is a principal in the second degree, and, if absent, an accessory before the fact; Russ. & R. 163; 1 C. & K. 559; 1 Archb. Cr. L. 58.

Principals in the second degree are those who are present aiding and abetting the commission of the act. 2 Va. Cas. 356. They are generally termed aiders and abettors, and sometimes, improperly, accomplices; for the latter term includes all the *particeps criminis*, whether principals in the first or second degree or mere accessories. A person to be a principal in the second degree need not be actually present, an ear or eye-witness of the transaction. The presence may be constructive. He is, in construction of law, present aiding and abetting if, with the intention of giving assistance, he be near enough to afford it should the occasion arise. If, for instance, he be outside the house watching to prevent surprise or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make a principal in the second degree; Clark, Cr. L. 85; 1 Russ. Cr. L. 27; 1 Hale 555; Wright, Ohio 75; 9 Pick. 496; 9 C. & P. 437; 15 Ill. 511. There must, however, be a participation in the act; for although a person be present when a felony is committed, yet if he does not consent to the felonious purpose or contribute to its execution, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony or apprehend the felon; 1 Russ. Cr. 27; 1 Hale, Pl. Cr. 439; 9 Ired. 440; 3 Wash. C. C. 223; 1 Wisc. 159.

The law recognizes no difference between the offence of principals in the first and principals in the second degree. And so immaterial is the distinction considered in practice that, if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offence, although his was not the hand which actually did it, will support the indictment; and if he be indicted as principal in the second degree, proof that he was not only present, but committed the offence with his own hand, will support the indictment. So, when an offence is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning of the statute as much as the parties who actually commit the offence; 1 Archb. Cr. L. 66. See 89 Mo. 312.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, provided the offence permits of a participation, or specially, as aiders and abettors; Archb. Cr. Pl. 7; 11 Cush. 422; 1 C. & M. 187. But where by particular

statutes the punishment is different, then principals in the second degree must be indicted specially as aiders and abettors; Archb. Cr. Pl. 7. If indicted as aiders and abettors, an indictment charging that A gave the mortal blow, and that B, C, and D were present aiding and abetting, will be sustained by evidence that B gave the blow, and that A, C, and D were present aiding and abetting; and even if it appears that the act was committed by a person not named in the indictment, the aiders and abettors may, nevertheless, be convicted; Dougl. 207; 1 East, Pl. Cr. 350. And the same though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting; 1 Den. Cr. Cas. 52; 2 C. & K. 382.

PRINCIPAL AND AGENT. A person who authorizes another to act on his behalf is called the "principal," and the person so authorized is called the "agent." The law of principal and agent deals both with the rights and duties of the principal and agent *inter se*, and with those of each of them toward third persons. As to the law of principal and agent generally, see Sm. Merc. L. 109 *et seq.* R. & L. Dict. See PRINCIPAL.

PRINCIPAL CHALLENGE. See CHALLENGE.

PRINCIPAL CONTRACT. One entered into by both parties on their own account or in the several qualities they assume.

PRINCIPAL OBLIGATION. That obligation which arises from the principal object of the engagement which has been contracted between the parties. It differs from an accessory obligation. For example, in the sale of a horse, the principal obligation of the seller is to deliver the horse; the obligation to take care of him till delivered is an accessory engagement. Pothier, Obl. n. 182. By principal obligation is also understood the engagement of one who becomes bound for himself, and not for the benefit of another. Pothier, Obl. n. 186.

PRINCIPAL PLACE OF BUSINESS. The term "principal place of business," as used in a statute, requiring corporations to place their names on their principal place of business, does not apply to a local office of a telephone company, having its main offices at other places. 108 S. W. 262. Highest in rank, authority, character, importance, or degree; most considerable or important, chief, main. An incorporated company may have one or more "principal places of business" depending entirely upon the method of conducting its business. 110 Ky. 823, 62 S. W. 897.

PRINCIPAL STREET. A "principal street" is a principal thoroughfare dedicated to the use of the public. 161 Ky. 846, 171 S. W. 396.

PRINCIPLES. By this term is understood truths or propositions so clear that they cannot be proved nor contradicted unless by propositions which are still clearer.

That which constitutes the essence of a body or its constituent parts. 8 Term 107. See 5 McLean 63; PATENT.

They are of two kinds: one when the principle is universal, and these are known as axioms or maxims; as, *no one can transmit rights which he has not; the accessory follows the principal, etc.* The other class are simply called first principles. These principles have known marks by which they may always be recognized. These are—*first*, that they are so clear that they cannot be proved by anterior and more manifest truths; *second*, that they are almost universally received; *third*, that they are so strongly impressed on our minds that we conform ourselves to them whatever may be our avowed opinions.

First principles have their source in the sentiment of our own existence, and that

which is in the nature of things. A principle of law is a rule or axiom which is founded in the nature of the subject, and it exists before it is expressed in the form of a rule. Domat, *Lois Civiles*, liv. prélim. t. 1, s. 2; Toullier, tit. prélim. n. 17. The right to defend one's self continues as long as an unjust attack, was a principle before it was ever decided by a court: so that a court does not establish but recognizes principles of law.

PRINCIPLES OF CONSTITUTIONAL LAW. See CONSTITUTIONAL LAW.

PRINT. The word includes most of the forms of figures or characters or representations, colored or uncolored, that may be impressed on a yielding surface. 97 U. S. 367; 20 Blatchf. 464; 38 Fed. Rep. 829.

PRINTED FORMS. A court in construing a contract will look at what was originally the printed form and at what was introduced in writing to alter that printed form; 2 C. & M. 539. Words written in a printed form, such as an insurance policy, will in case of doubt have a greater effect than the printed words; 22 Q. B. D. 501.

PRINTER. Of Newspaper. The "printer" is the person whose mechanical skill has, (by means of the type and printing press, etc.), stamped upon the paper the words, sentences and ideas of the author. 6 J. J. Mar. (Ky.) 18.

PRINTING. The art of impressing letters; the art of making books or papers by impressing legible characters.

In patent cases in the circuit court, the taxable costs do not include expenditures for printing, charts, models, exhibits, printed records, briefs, copies of testimony, and the like; 83 Fed. Rep. 183; but the practice varies in different circuits.

See LIBEL; LIBERTY OF THE PRESS; PRESS.

PRIORITY. Precedence; going before.

He who has the precedency in time has the advantage in right, is the maxim of the law; not that time, considered barely in itself, can make any such difference, but because, the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards; 1 Fonbl. Eq. 320.

In the payment of debts, the United States is entitled to priority when the debtor is insolvent or dies and leaves an insolvent estate. The priority was declared to extend to cases in which the insolvent debtor had made a voluntary assignment of all his property, or in which his effects had been attached as an absconding or absent debtor, on which an act of legal bankruptcy had been committed; 1 Kent 243.

Among common creditors, he who has the oldest lien has the preference,—it being a maxim both of law and equity, *qui prior est tempore potior est jure*; 2 Johns. Ch. 608. See INSOLVENCY.

But in respect to privileged debts, arising *ex contractu*, existing against a ship or vessel under the general admiralty law, the order of priority is most generally that of the inverse order of their creation,—thus reversing the order of priority generally adopted in the courts of common law. The ground of this inversion of the rule is that the services performed at the latest hour are more efficacious in bringing the vessel and her freightage to their final destination. Each foregoing incumbrance is, therefore, actually benefited by means of the succeeding incumbrance; 16 Bost. Law Rep. 1, 204; 17 id. 421. See MARITIME LIENS; ASSETS; LIEN.

PRISAGE. An ancient duty or right of the crown of one-tenth of the amount of wine-carried by the ships of merchants, aliens, or denizens. 3 Bulstr. 1.

PRISEL EN AUTER LIEU. A taking in another place. A plea in abatement to a writ of replevin.

PRISON. A public building for confining persons, either to insure their production, in court, as accused persons and witnesses, or to punish them as criminals.

The root is French, as is shown by the Norman prisons, prisoners; Kelham, Norm. Fr. Dict.; and Fr. prisons, prisons. Britton, c. 11, *de Prisonis*. Originally it was distinguished from gaol, which was a place for confinement, not for punishment. See Jacob, Dict. Gaol. But at present there is no such distinction.

The United States has no prisons. The joint resolution of September 3, 1789, recommended to the states to authorize state prisons to receive United States prisoners, the latter paying the states for the service. In the absence of a state prison, the marshal, under the jurisdiction of the district judge, may procure a suitable place. See R. S. § 5537, 5539; 9 Cra. 76; PENITENTIARY; GAOL; PRISONER; DETAINER.

PRISON BREAKING. The act by which a prisoner, by force and violence, escapes from a place where he is lawfully in custody. This is an offence at common law. This offence is to be distinguished from rescue (*q. v.*), which is a deliverance of a prisoner from lawful custody by a third person. 2 Bish. Cr. L. § 1065.

To constitute this offence there must be—a lawful commitment of the prisoner on criminal process; Co. 2d Inst. 589; 1 Carr. & M. 295; 2 Ashm. 61; 1 Ld. Raym. 424; see 43 N. J. L. 555; an actual breach with force and violence of the prison, by the prisoner himself, or by others with his privity and procurement; Russ. & K. 458; 1 Russ. Cr. 380; *the prisoner must escape*; 2 Hawk. Pl. Cr. c. 18, s. 12. See 1 Hale, Pl. Cr. 607; 4 Bla. Com. 130; Co. 2d Inst. 500; 1 Gabb. Cr. Law 305; Alison, Scotch Law 555; Dalloz, Dict. *Effraction*; 3 Johns. 449; 5 Metc. Mass. 559. See BREACH OF PRISON; ESCAPE.

PRISON LABOR. In most of the states prisoners convicted of crime are sentenced to hard labor, and in the constitution of the United States and of several of the states, the right to require the services of prisoners is secured by the exception of cases of punishment for crime from the provisions which abolish involuntary servitude.

In some states convict labor is farmed out to contractors, who thereby acquire a right in the prison and its inmates where the former is leased. The state, in order to resume its possession, must compensate the lessee as in other cases of taking private property; 16 Cal. 11. The right of the lessee, however, is subject to the pardoning power; 15 id. 429; and to the legislative power to modify and control the punishment; id.; 55 Mo. 101. A contract by the warden of a penitentiary for the hire of convicts is substantially a contract by the state, and a bill for the specific performance of it will not lie; 70 Ala. 493; 7 Paige 301.

In some states the sale or lease of convict labor is forbidden by constitution or statute. See 1 Stims. Am. Stat. L. § 141, where these provisions are collected. In North Carolina it is unlawful, unless authorized by the court before which the prisoner has been tried, and it has been held that this authority cannot be given at a term other than that at which the prisoner was convicted; 100 N. C. 414.

Where the statute provides as to how the letting of contracts shall be done, the directions as to advertising, etc., are mandatory and not directory; 1 Mich. 438.

As the result of labor agitation there have been attempts by legislation to forbid or regulate strictly the sale of convict-made goods. The Ohio act of May 19, 1894, forbidding any person to sell without license convict-made goods, was held unconstitutional. The court said: "It is not competent for a state legislature to declare that convict-made goods are not articles of traffic and commerce, and then to act upon such declaration, and discriminate against such goods, or exclude them from the state by unfriendly legislation. Whatever congress, either by silence or statute, recognizes as

articles of traffic and commerce, must be so received and treated by the several states. There is no act of congress declaring that convict-made goods are not fit for traffic or commerce, and it therefore follows that such goods are the subject of commerce, and when transported from one state to another for sale or exchange, become articles of interstate commerce, and entitled to be protected as such; and any discrimination against such goods in the state where offered for sale is unconstitutional. . . . The act in question is not a police regulation, but an attempt to prevent, or at least to discourage, the importation of convict-made goods from other states, and thereby protect our citizens, laborers, and market against such goods. But if we are in a condition to require such protection, the appeal for relief must be made to congress, which body alone has the power to legally grant such relief." 56 Ohio St. 417.

In Massachusetts a law limiting the production of goods in prison work-shops went into effect on Jan. 1, 1898. It provides that not over thirty per cent. of the number of the inmates of any penal institution in the state having more than one hundred inmates, shall be employed in any one industry, except in the industry of cane-sewing and in the manufacture of umbrellas. See PRISONER; HARD LABOR.

In England, by 60 & 61 Vict. c. 63, the importation of foreign prison-made goods is absolutely prohibited.

PRISON-MADE GOODS. See PRISON LABOR.

PRISONER. One held in confinement against his will.

Lawful prisoners are either prisoners charged with crimes or for a civil liability. Those charged with crimes are either persons accused and not tried; and these are considered innocent, and are therefore entitled to be treated with as little severity as possible, consistently with the certain detention of their persons; they are entitled to their discharge on bail, except in capital cases; or those who have been convicted of crime, whose imprisonment, and the mode of treatment they experience, is intended as a punishment: these are to be treated agreeably to the requisitions of the law, and, in the United States, always with humanity. See PENITENTIARY. Prisoners in civil cases are persons arrested on original or mesne process, and these may generally be discharged on bail; and prisoners in execution, who cannot be discharged except under the insolvent laws.

Persons unlawfully confined are those who are not detained by virtue of some lawful, judicial, legislative, or other proceeding. They are entitled to their immediate discharge on *habeas corpus*. For the effect of a contract entered into by a prisoner, see 1 Salk. 402, n.; 6 Toullier 82.

Throughout the United States there have grown up abuses in the treatment of prisoners, particularly by the detective force of larger cities, which amount in those cases to a practical denial of the plainest constitutional guaranties of liberty of person and property and of freedom from unreasonable searches. Among these abuses have been the illegal searches of the person of prisoners arrested on bare suspicion, who are often the victims of the mere whim of the arresting officer. The growth of these abuses is promoted by the fact that the large majority of prisoners in whose cases they occur are, through ignorance or poverty, unable to assert their rights.

In a recent case in Illinois the principles governing this subject were thus stated: "An officer may take from a prisoner any articles of property which it is presumable may furnish evidence against him, but money should not be taken unless it is in some way connected with the charge or proof against him, as he is thereby deprived of the means of making his defence. The arresting officer if he finds on the prisoner's body, or otherwise in his possession, either goods or money which he reasonably be-

lieves to be connected with the supposed crime as its fruits, or as supplying proofs relating to the transaction, may take and hold them to be disposed of as the court directs." It was there held that whether money found on a prisoner and taken from him by the officer is the fruits of the crime, is a question for the jury; 69 Ill. App. 668. By statute in Iowa an officer making an arrest, or a jailer upon committing a person to jail, may search him and take from him all offensive weapons and property which might be used in effecting an escape, but he has no right to take from him watches and money in no way connected with crime; 65 Ia. 666, where it was said: "Where a party submits to a search of his person by an officer, it cannot be said that the search was with his consent, because he makes no physical resistance: when the search is completed and the fruits thereof are retained by the officer, it would require a strong showing to hold that this was with the consent of the prisoner."

Where money had been taken from a prisoner and an effort was made to reach it by garnishment against the officer, it was held that it was illegally taken, not being connected with the offence charged or necessary as evidence of the crime; but an application for a mandamus to compel the restoration of the money by the officer was denied because the propriety of its restoration was the subject of litigation under the attachment; 92 Ala. 102; s. c. 13 L. R. A. 120.

Pieces of silver intended for the manufacture of counterfeit coin were held to have been properly taken by the sheriff from the person who was carrying them to the place of manufacture, and it was held that the owner could not sustain trover therefor against the sheriff; 21 Vt. 9, where it was held by Redfield, J., that the base metal was properly detained both as evidence and because from its character it was, "so to speak, outlawed, and common plunder." In New Hampshire it was held that "if a prisoner has about his person money, or other articles of value, by means of which, if left in his possession, he might obtain tools or implements, or assistance, or weapons, with which to effect his escape, the officer arresting him may seize and hold such property for a time, without being liable for a conversion of the property, if he acts in good faith and for the purposes aforesaid. It is a question of fact in such cases for the jury, whether the officer taking such property from his prisoner, acted in good faith and for a proper purpose, or in bad faith, with an improper and unlawful purpose." 47 N. H. 482.

It has been held that United States officials have no right to confiscate money found on federal prisoners, and when it has been done and the money paid into the treasury, it may be recovered back by suit against the United States under the act of March 3, 1887, 1 Supp. 559; 77 Fed. Rep. 821.

In England it has been held that an officer who arrests a prisoner has no right to take from him money which he has about him unless it is in some way connected with the offence with which he is charged, as he thereby deprives him of the means of making his defence; 7 C. & P. 138, 488, 515; and it was also so held with respect to a watch and other articles taken by a police officer at the time of arrest; *id.* 447. In this case the indictment was for rape, and it was said by Patteson, J.: "Certainly the property must be given up; it has nothing whatever to do with the charge. It ought not to have been taken." And Gurney, B., said: "It should not have been taken; it must be delivered up to the prisoner himself." See SEARCH.

Handcuffing an accused person arrested on suspicion, not yet put upon his trial, was characterized at the hearing of a prisoner before a Manchester magistrate in England as degrading and improper, and in the unreported case of *Norman v. Smith* at the Manchester Assizes, in 1880, a plaintiff was awarded £15 damage for being wrongfully handcuffed; 29 Chi. Leg. News 88. It was

laid down as early as 1825 that handcuffing could only be justified in cases when it was necessary to prevent the prisoner from escaping when he has attempted to escape; 4 B. & C. 596. Recently Lord Russell, C. J., remarked that "handcuffing was only justifiable where reasonable necessity existed, and if it were resorted to in the absence of such necessity, the person so treated might bring an action to recover damages for such a grievous indignity." 59 J. P. 393. In commenting on these cases it is said that handcuffs may be justified when the prisoner is of notoriously bad character, violent or dangerous, or threatens or assaults the constable, or the offence is of a grave nature, or when there is an attempt to escape. In the absence of such grounds or in case of trivial offences he should not be. Nor should women or aged prisoners; 29 Chi. Leg. News 88. See FETTERS.

A party waives his constitutional right "to be confronted with the witness against him," by admitting that witnesses, if present, would testify to certain facts stated in the affidavit of the district attorney for a continuance, and thereby preventing a postponement of the trial; 2 Mont. 239; or by wrongfully keeping away the witnesses; 7 Am. L. Reg. 9.

Bertillon System. The increase of habitual criminals in modern times has given additional interest to the various expedients for their identification, and records of various kinds are kept of all persons confined as prisoners for criminal offences. The simplest and most natural expedient of photographing all such persons gives rise to the "rogues' gallery," which is now, in most cities, a prominent institution in connection with the criminal administration. But an improved method which is considered the most effectual, is what is known as the Bertillon system of anthropometrical measurements. This system rests upon three distinct bases which it is said by M. Bertillon, Chief of the Central Bureau of Identification of France since 1882, have been shown by ten years' experience to be unimpeachable. (1) The almost absolute immutability of the human frame after the twentieth year of age; the growth thereafter, being only of the thigh bone, is so little that it is easy to make allowance for it. (2) The diversity of dimension of the human skeleton of different subjects is so great that it is difficult, if not impossible, to find two individuals whose bony structure is even sufficiently alike to make confusion between them possible. (3) The facility and comparative precision with which certain dimensions of the skeleton may be measured in the living subject by calipers of simple construction. The measurements which, as the result of minute criticism, have been preferred, are as follows: (1) Height (man standing); (2) reach (finger tip to finger tip); (3) trunk (man sitting); (4) length; (5) width; (6) length of right ear; (7) width of right ear; (8) length of left foot; (9) length of left middle finger; (10) length of left little finger; (11) length of left forearm.

Measurements are classified and grouped and preserved in an elaborate card index. The French statistics indicate that practically the result of this system is certainly in the recognition of a criminal by measurements. It has been adopted by statute in the states of Massachusetts, and New York, and permitted by statute in Pennsylvania, and adopted by prison regulations in Illinois, Ohio, and some United States military posts. There is a bureau of identification on this system in Chicago to which resort is had by the police of any cities, and the use of the system is rapidly extending in the United States. See the work of M. Bertillon on his System of Identification, 1895-6, vol. 2, ch. 28, where the system is fully described and the statutes on the subjects are collected.

See PRISON; PRISON LABOR; PRISON-MADE GOODS; FETTERS; SEARCH; ESCAPE; PRELIMINARY EXAMINATION; PENITEN-

TIARY.

The subject of granting a parole to convicts, independently of the exercise of the power of pardon, is the subject of an able report made to the American Bar Association, 1898, by Hon. J. Franklin Fort of Newark, N. J.

Acts have been passed in Alabama, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Utah, and Wisconsin. Iowa, Vermont, Virginia, and West Virginia have a system of conditional pardon which has a very similar operation. Maryland has a statute which permits the trial court to parole any person convicted of a crime not capital, by which he is not sentenced, but is subject to recall for sentence at any time. Nearly all of these acts have been passed within the last five years. None of them extend to any person convicted of murder in the first or second degree, and most of them are limited to persons serving a term for a first offence. In some states there is a further limitation to persons between the ages of 16 and 25 or 30 at the time of their conviction. The committee report that the most carefully considered statute is that of Indiana passed in 1897.

The same committee reports on indeterminate sentences, which it defines as "sentences imposed by the court without fixing a definite period of limitation or term of imprisonment, but which simply directs that the convict be imprisoned or placed in the custody of the prison authorities to be held for not less than the minimum nor longer than the maximum fixed by law for the offence for which the prisoner stands convicted." New York, Massachusetts, Pennsylvania, Minnesota, Illinois, Ohio, and Indiana have passed such acts which have worked well in practice. They are mostly confined to prisoners who are first offenders and are between the ages of 16 and 30 years. The committee reported that it was not willing to give this system its unconditional approval, though it might prove successful in connection with the parole system provided the judge who sentenced the prisoner should fix a maximum term. Indeterminate sentences as defined by the committee have been sustained as constitutional in 43 Ohio 629; 148 Ill. 413; 167 *id.* 447; 49 N. E. Rep. (Ind.) 894; 167 Mass. 144. They have been held unconstitutional in 88 Mich. 249.

The committee report that after careful investigation and correspondence with the executives of various states the system of paroling convicts has been beneficial.

In England, by statute, a convict undergoing a term of servitude may be set at large by a license granted by the home secretary, who may revoke the license at any time. It is subject to the conditions indorsed upon it, which generally are that the holder shall produce it when called upon to do so by a magistrate or police officer, shall abstain from any violation of the law, shall not habitually associate with notoriously bad characters, and shall not lead an idle and vicious life without visible means of obtaining an honest livelihood. The holder is obliged to report his place of residence to the general officer of the district where he resides and report himself there once a month. When he removes from one district to another, he must notify his removal to the general officer of the old district and report his address to the general officer of the new district. If a licensed convict is indicted and convicted of any offence his license is forfeited thereby. When forfeited the convict is liable to undergo a term of penal servitude equal to the unexpired portion of his original term. See TICKET-OF-LEAVE; SENTENCE.

PRISONER OF WAR. One who has been captured while fighting under the banner of some state. He is a prisoner although never confined in a prison.

In modern times, prisoners are treated with more humanity than formerly: the individual captor has now no personal

right to his prisoner. Prisoners are under the superintendence of the government, and they are now frequently exchanged. See 1 Kent 14.

The Brussels Conference, 1874, laid down rules which are generally accepted. Lawful combatants become prisoners of war when captured: and so may such non-combatants as guides, messengers, newspaper correspondents, balloonists, telegraphers, and contractors who are with their army and so clearly associated with it as to be rendering it direct service; Risley, *Law of War* 129. Important public officials may be captured in any place where acts of war are lawful. Sailors may become prisoners of war, but surgeons and chaplains are considered as exempt; *id.*

It is a general rule that a prisoner is out of the protection of the laws of the state so far that he can have no civil remedy under them, and he can, therefore, maintain no action. But his person is protected against all unlawful acts. See *Abatement* (B 3), *Aliens* (D). See *PAROLE*.

PRIVACY. The right of privacy has been defined as the right of an individual to withhold himself and his property from public scrutiny, if he so chooses. The doctrine is of recent growth, and is as yet insufficiently defined. It is said to be incapable of exact definition, and to exist only so far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain, or malice. Such remedy has been invoked to prevent the publication of oral lectures delivered by a professor; 12 App. Cas. 326; 3 L. J. Ch. 200; or copies of private drawings and etchings; 1 MacN. & G. 25; or a letter in the possession of a person by whom it was received, without the writer's consent, where the publication is not necessary for the vindication of the receiver or the public interests; 2 Ves. & B. 19; 2 Atk. 342; Amb. 737; 2 Swanst. 402; 4 Duer 379; 2 Bush 480; a telegram of a private nature; 50 How. Pr. 194; a scientific, artistic, or literary composition kept for the private use of the composer; 4 Burr. 2303, 2330, 2408; 2 Eden 329; 2 Meriv. 435; 8 Pet. 591; a portrait in a newspaper; 6 Misc. Rep. 290; or a photograph by the photographer; 40 Ch. Div. 345; 64 Fed. Rep. 280. But such publication of a photograph or portrait will not be prevented where the person is a "public character," such as a foremost inventor of world-wide reputation; 64 Fed. Rep. 280, reversing 57 *id.* 434, on this point. The case on appeal held that the publication of such a photograph will not be restrained. The doctrine prevailed one time that an injunction against the publication of letters could only be granted where they were of the nature of a literary composition; 3 Edw. Ch. 515; 3 Barb. Ch. 320; but this doctrine no longer prevails; 4 Duer 379. In many cases the unauthorized use of one's name, where it will tend to cause irreparable damage, will be enjoined, as a recommendation of a medicinal preparation by a physician; 27 Abb. N. C. 402; see 11 Beav. 561; a use of a person's name as director of a corporation; 10 Beav. 561; or a publisher's statement that one is a member of a bankrupt firm; 7 L. R. Eq. 488; a false statement of a dispute pending a suit in relation thereto; 52 L. J. Ch. 134; 8 W. R. 734.

The property of an author or composer of any work, whether of literature, art, or science, in such work, unpublished and kept for his private use or pleasure, cannot be questioned; 1 MacN. & G. 42.

Every clerk employed in a merchant's counting house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk; 2 Hare 893; 1 MacN. & G. 45.

The court will interfere by injunction to prevent a party's availing himself in any manner of a title arising out of the violation of right or any breach of confidence;

1 MacN. & G. 25.

A photographer who had taken a negative likeness of A, for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such purposes, and also that such sale or exhibition was a breach of confidence. The right to enjoin the copying of a photograph does not depend on the existence of a property right; the court of chancery has always had original jurisdiction to prevent what it considered and treated as a wrong, whether arising from the violation of a right or from breach of contract or confidence; 40 Ch. Div. 354, following 1 MacN. & G. 25.

Where a party was employed to make a certain number of copies of a picture, his employment carried with it the necessary implication that he would not make more copies for himself or sell the additional copies in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, which clearly entitles the employer to an injunction whether there is a copyright on the picture or not; 19 L. R. Q. B. Div. 639.

Where the defendant was intrusted by the plaintiff with the secret of making a kind of medicine which the plaintiff called a patent medicine, though he had no patent, it was held that there was such a relation between the plaintiff and the defendant and such a breach of contract or breach of faith on the part of the defendant as would entitle the plaintiff to an injunction restraining the use of the secret by the defendant; 9 Hare 241 (approved in 19 L. R. Q. B. Div. 639). In 19 Hare 241, the court said that different grounds have been assigned for the exercise of the jurisdiction; in some cases it has been referred to property, in others to contract, and in others again it has been treated as founded upon trust or confidence, but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it.

In *Prince Albert v. Strange*, De G. & S. 652, and, on appeal, 1 MacN. & G. 23, it was held that the reproduction of etchings belonging to the plaintiff and Queen Victoria, and made for their own pleasure, would be restrained, and the defendants would also be restrained from publishing a description of them, whether more or less limited or summary, and whether in the form of a catalogue or otherwise.

An author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary compositions, has a common and exclusive copyright therein unless he has unequivocally dedicated them to the public or some private person, but no person has the right to publish them without his consent unless such publication be required to establish a personal right or claim or to vindicate character. The government has perhaps a right to publish official letters addressed to it by public officers; but no private person has such a right without the sanction of the government; 2 Story 100.

If the recipient of a letter attempt to publish such letter on occasions not justifiable, equity will prevent the publication as a breach of private rights. . . . The general property, and the general rights incident to property, belong to the writer, whether the letter is a literary composition, or a familiar letter, or contains details of business. Third persons standing in no privity with either party are not entitled to publish letters to subvert their own private purposes of interest or curiosity or passion; 2 Story 111. The writer of letters, though written without any purpose of profit or any idea of literary property, possesses such a right of property in them that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication; 2 Swanst. 418, Romilly, *arguendo*; but see High, Inj. § 1012, *contra*.

This subject of the right to privacy was much discussed in the case *Schuyler v. Curtis*, in which an injunction was sought to prevent certain persons from making a

statue of a deceased woman and exhibiting it at the Columbian Exposition, the avowed object being to honor her as a philanthropist and reformer. A decree for an injunction entered by the supreme court of New York was affirmed by the general term, but was reversed by the court of appeals; 147 N. Y. 434, reversing 70 Hun 595; s. c. 2 Am. & Eng. Dec. Eq. 462, and 24 N.Y. Supp. 512 [1893]. In this case the question whether the action contemplated was a violation of the right of privacy was discussed, and the conclusion reached by a majority of the court that "the individual right of privacy which any person has during his life dies with the person, and any right of privacy which survives is a right pertaining to the living only," and that "any privilege of surviving relatives of a deceased person to protect his memory exists for the benefit of the living to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased." It was held that "persons attempting to raise a statue or bust of a woman who is no longer living, if their motive is to do honor to her, and if the work is to be done in an appropriate manner, cannot be restrained by her surviving relatives from carrying out such a purpose, merely because they had not the honor of her personal acquaintance or friendship while she was living, or, at the most, had merely been associated with her philanthropic enterprises. The mere fact that a person's feelings may be injured by the erection of a statue to a deceased relative was decided not to be a ground for an injunction against its erection, unless there is reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice, nor of pure fancy, nor the result of a supersensitive and morbid mental organization dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy."

The opposite view was presented by Gray, J., who dissented:

"Upon the findings in this case, I think we are bound to say that the purpose of the defendants was to commit an act which was an unauthorized invasion of the plaintiff's right to the preservation of the name and memory of Mrs. Schuyler intact from public comment and criticism. As the representative of all her immediate living relatives, it was competent for him to maintain action to preserve them from becoming public property, as would be the case if a statue were erected by strangers for public exhibition under such classification, with respect to the characteristic virtues of the deceased, as they judged befitting. I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person."

In 1893 it was held in a New York case that an injunction will lie to restrain the publication of the plaintiff's picture in a newspaper, with an invitation to the readers of the newspaper to vote upon the question of the popularity of the plaintiff as compared with that of another person whose picture was also published; 26 N. Y. Supp. 908.

In an article in 4 Harv. Law Rev. 193, by Samuel D. Warren and Louis Brandeis, the following are suggested as the limitations to the right to privacy:—

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.
2. The right to privacy does not prohibit the publication of any matter, if in itself not private, when the publication is made under circumstances which would render it a privileged publication according to the law of slander and libel.
3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.
4. The right to privacy ceases upon the publication of facts by the individual, or with his consent.
5. The truth of the matter published

does not afford a defence.

6. The absence of "malice" in the publisher does not afford a defence.

See No. Amer. Rev. July, 1896; 30 Am. Law Rev. 582; 2 A. & E. Dec. Eq. 462, with note by Ardenas Stewart; INJUNCTION; LETTER; MANUSCRIPT; PHOTOGRAPH; PHYSICAL EXAMINATION; TRADE SECRETS.

PRIVATE. Affecting or belonging to individuals, as distinct from the public generally. Not clothed with office.

PRIVATE ACT. See **STATUTE**; **GENERAL LAW**; **PUBLIC ACTS**.

PRIVATE BILL. In legislative parlance, is a project of a private act; the draught, as presented in the legislature, of a measure which, when passed, will affect individuals only. The expression is in general use only as respects bills in legislation; there is no distinction of public and private bills of exchange, bills in equity, etc. Abbott.

PRIVATE BILL OFFICE. An office of the British parliament where the business of securing private acts of parliament is conducted.

PRIVATE CARRIER. One who agrees in some special case with some private individual to carry for hire, as distinguished from a common carrier who holds himself out to all persons who choose to employ him as ready to carry for hire. Story, Cont. 752 a; 37 N. Y. 342. See **CARRIER**.

PRIVATE CHARITY. See **PUBLIC CHARITY**.

PRIVATE CORPORATION. See **CORPORATION**.

PRIVATE DWELLING-HOUSE. A covenant which requires a house to be used as a private dwelling-house only, is broken by its being used as a school or dancing academy; 25 L. J. Q. B. 264; or as an institution for educating the daughters of missionaries; 47 L. J. Ch. 230; or as a club; *id.* or as a hotel or lodging-house; 53 *id.* 632; but not by a public auction of the furniture of the house; 24 W. R. 485.

PRIVATE INTERNATIONAL LAW. A name used by some writers to indicate that branch of the law which is now commonly called conflict of laws.

Mr. Dicey, in 6 Law Quart. Rev., says: This department of law has been called by various names, none of which are free from objection. The defect in the use of the term "conflict of laws" is that the supposed "conflict" is fictitious, and the expression has the further radical effect of concealing from view the circumstance that the question by the law of what country a given transaction shall be governed is often a matter too plain to admit of doubt. The term has been defended on account of its applicability, not to any conflict between the laws themselves, but to a question in the mind of the judge as to which of two systems of law should govern a given case. This, however, gives a new and forced sense to a received expression.

The term private international law is convenient and manageable. It brings into light the great and increasing harmony between the rules as to the application of foreign laws which prevail in all civilized countries, but the term is at bottom incorrect. The words private international law should mean a private species of the body of rules which prevails between one nation and another, but nothing of this sort is, however, intended, and the unfortunate employment of the phrase has led to endless misconception of the true nature of this department of legal science. Further, it confounds two classes of rules which are generically different from each other. The principles of international law, properly so called, are international because they prevail among nations, but they are not in the proper sense laws. On the other hand, the principles of private international law

are laws in the strictest sense of that term, but they are not international, for they are laws which determine the private rights of one individual as against another, and these individuals may or may not belong to one and the same nation. The expression International Private Law is no doubt a slight improvement, but the name has the insuperable fault of giving to the adjective, international, a meaning different from the sense in which it is generally and correctly employed.

The same learned author further approaches the subject from the standpoint adopted by English judges when it is their duty to deliver a judgment on any question which may raise a so-called conflict of laws. If the case falls within the terms of any English statute there is no further room for discussion. If it does not fall within a statute, the next inquiry for the judge is whether it is covered by any English precedent which has the authority of law, and if it does, discussion is again closed. If, lastly, it falls neither within the terms of a statute nor under any principle established by authority, English judges look for guidance to foreign decisions, to the opinions of jurists, or to arguments drawn from general principles. See **INTERNATIONAL LAW**; **CONFLICT OF LAWS**; **INTERNATIONAL PRIVATE LAW**.

PRIVATE LAND CLAIMS. The United States obtained from the Republic of Mexico by the treaty of Guadalupe Hidalgo, on the 2d of February, 1848, and by the treaty of Masilla, known as the Gadsden purchase, dated December 30, 1853, all the property included in what is now the states of California, Colorado, Utah, Wyoming, and Nebraska, and the territories of new Mexico and Arizona; and by these treaties the United States agreed to protect and recognize the rights of property of every kind belonging to Mexicans that was situated in the ceded territory. Under the stipulations contained in the treaty of Guadalupe Hidalgo, congress, on March 3, 1851, passed a law to determine the validity of private land grants in the state of California; and on March 3, 1891 (26 Stat. L. 854), it passed a law for the settlement of title to private land grants under both treaties, entitled "An act to establish a court of private land claims and to provide for the settlement of private land claims in certain states and territories." By this act all persons claiming rights protected by the treaties, whether their title was complete and perfect or incomplete and inchoate, are given the right to present their claims and have the validity thereof ascertained and determined by the court.

These private land claims originated from grants and cessions made by Spain to various settlers, emigrants, and citizens up to the treaty of Cordoba, August 24, 1821 (which was the initiation of the severance of Mexico from Spain, and which culminated, after many desultory revolutions, in the complete independence of Mexico, by the adoption of the new constitution on October 23, 1835), and from various sales and grants, made by the Mexican government, both under the monarchy and under the republic, from 1835 down to the treaty of Guadalupe Hidalgo on February 2, 1848.

These various sales and grants of public lands may be conveniently divided into the first and second epoch of the Central System of Government, beginning on Oct. 3, 1835, when all legislatures were abolished and departmental councils (*juntas*) were established, and (December 29, 1836) when the new constitution was adopted, which divided the national territory into departments, provided for the appointment of governors and the election of departmental councils and defined their powers, and running down to August 4, 1846, when the constitution of 1824 was re-established. It was at this time (August 18, 1846) that General Kearney entered Santa Fe and took possession of New Mexico in the

name of the United States. This period marks the end of the first epoch of the central system of government.

From that time, March 17, 1853, there was a succession of revolutions and counter-revolutions, culminating in the election of Santa Anna as president of the republic, from which time dates the beginning of the second epoch of the central system of government. Many of these claims are conflicting in their nature; many of them which were granted by one government were declared null upon the inauguration of another, and as each revolution succeeded the other, attempts were made to undo everything that had been done during the lease of power by the other forces, so that the titles to the lands of that portion of the United States obtained through the treaty of Guadalupe Hidalgo and the Gadsden purchase, having for their foundation the grants made by Spain and the various succeeding governments of Mexico, were in an almost hopeless state of confusion and uncertainty, rendering the passage of the act of March 3, 1891, establishing the court of private land claims, for the purpose of passing upon these titles, at once a necessity and a boon.

For a history and compilation of the various Spanish and Mexican land laws, see Reynolds on Spanish and Mexican land laws, *passim*. This work, compiled by the United States attorney for the court of private land claims, contains, in addition to the court of private land claims act and the rules of practice in that court, an historical sketch of new Spain and New Mexico and old Mexico under its Spanish dominion and subsequently, together with a translation of all of the Spanish and Mexican land laws, and to any one interested in these matters it will be found to be an invaluable aid.

Court of Private Land Claims. By the act of March 3, 1891 (26 Stat. L. 854), congress created a court of private land claims. The court is composed of a chief justice and four associate justices, appointed by the president of the United States. The United States are represented by a United States attorney appointed by the president to protect the interests of the government in litigation before that court. The jurisdiction and method of procedure is specifically pointed out in section 9 of the act. The jurisdiction embraces all claims for lands within the limits of the territory derived by the United States from the republic of Mexico, and now embraced within the territories of New Mexico, Arizona, or Utah, or within the states of Nevada, Colorado, or Wyoming, claimed by virtue of any Spanish or Mexican grant, concession, warrant, or survey, which the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States, which at the date of the passage of the said act had not been confirmed by act of congress or otherwise finally decided upon lawful authority and are not already complete and perfect. The action is begun by filing a petition, whereupon procedure is had in accordance with the act and in accordance with the rules of practice laid down by the court. If a title shall be found to be perfect and be confirmed, the confirmation shall be for so much land only as is found to be held by a perfect title, excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. No confirmation of claims or title shall have any effect other or further than as a release of all claims of title by the United States; and no private right of any person as between himself and other claimants or persons in respect of any such lands, shall be in any wise affected thereby. It is also provided that the head of the Department of Justice may, through the United States

attorney for the court or private land claims, file in the court a petition against the holder or possessor of any claim or land within these states or territories who shall not have voluntarily come in under the provisions of this act for the purpose of settling the title to the claim held by him. It is provided, also, that any party against whom the court shall in any case decide, may appeal to the supreme court of the United States, and that the United States may appeal in case of the confirmation of any title, such appeals to be taken within six months after the rendition of the decision. Upon any such appeal, the supreme court is required to try the case *de novo*. Whenever a decision of confirmation shall have become final, the clerk of the court is required to certify that fact to the commissioner of the general land office, together with a copy thereof, and the commissioner is required thereupon, without delay, to cause the tract so confirmed to be surveyed at the cost of the United States, and when this shall have been done, he is required to give notice thereof, by publication in Spanish and in English, in newspapers published in the capital of the territory or state. Such survey shall be open to public inspection for ninety days, and if, at the expiration of that period, no objection shall have been filed, shall be approved and forwarded to the general land office. If objection be made, the survey is to be forwarded, together with such objections and the proofs thereof and report thereon. The commissioner of the general land office is required to transmit the survey to the court of final decision, by which, if found to be correct, it shall be approved, and if found incorrect, shall be corrected. When any survey is finally approved by the court, it is required to be returned to the commissioner of the general land office, who is required to issue a patent to the proper party; the neglect to file a petition in this case for the period of two years is a bar to the claim, except in cases of minors, married women, or persons *non compos mentis*, in which case the court is required to appoint a guardian *ad litem* for such persons. It is provided that no claim shall be allowed unless it appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from some of the states of the republic of Mexico having lawful authority to make grants of lands, and one that, if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and such that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect. No claim can be allowed that will interfere with or overthrow any just and unextinguished Indian title or right. No confirmation confers title to mines or minerals, unless the grantee has become otherwise entitled thereto in law or in equity, but all such mines and minerals remain the property of the United States. No claim hitherto decided by congress shall be confirmed. Private rights of persons, as between each other, are not concluded by a decree under this act, but only the rights as between the United States and claimants, and that only for the purpose of releasing to the claimant such right or title to the land as the United States may have acquired from the treaties. No confirmation can be made for more than eleven square leagues to the original grantee.

There are other minor and unimportant exceptions and reservations, for which see the act itself.

By the original act this court was to cease to exist on December 31, 1895, but its life was subsequently extended to December 31, 1897, and again to March 4, 1899 (Sup. Rev. Stats. vol. 2, pp. 417 and 556). See UNITED STATES COURTS.

PRIVATE NUISANCE. Anything

done to the hurt and annoyance of the lands, tenements, or hereditaments of another. 3 Bla. Com. 215; 181 N. Y. 211. See NUISANCE.

PRIVATE PROPERTY. As used in a constitution, the term applies to such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels; 29 Miss. 32.

PRIVATE SCHOOLS. See PUBLIC SCHOOLS.

PRIVATE STATUTES. See PUBLIC ACTS.

PRIVATE TRUSTEE. See PUBLIC TRUSTEE.

PRIVATE WAY. An incorporeal hereditament of a real nature, entirely different to a common highway. The right of going over another man's ground. 98 Pa. 5. See WAY.

PRIVATE WRONGS (otherwise termed Civil injuries). The violation of public or private rights, when considered in reference to the injury sustained by the individual, and consequently as subjects for civil redress or compensation.

PRIVATEER. A vessel owned by one or more private individuals, armed and equipped at his or their expense, for the purpose of carrying on a maritime war, by the authority of one of the belligerent parties.

A privateer is a private vessel commissioned by the state by the issue of a letter of marque to its owner to carry on all hostilities by sea, presumably according to the laws of war. She continues under the control of her private owner, and her crew are under the same discipline as the crew of a merchant ship. Formerly a state issued letters of marque to its own subjects, and to those of neutral states as well, but a privateersman who accepted letters of marque from both belligerents was regarded as a pirate.

For the purpose of encouraging the owners of private armed vessels, they are usually allowed to appropriate to themselves the property they capture, or, at least, a large proportion of it; 1 Kent 96. See 2 Dall. 36; 1 Wheat. 46; 2 Gall. 19, 56, 526; 1 Mass. 365; 3 Wash. C. C. 209.

By the Declaration of Paris (*q. v.*) privateering was abolished, but the United States, Spain, Mexico, and Venezuela did not accede to this declaration.

The creation of a volunteer navy by a belligerent was not prohibited by the Declaration of Paris. A volunteer cruiser is a vessel loaned by her private owner to the state. Her officers are commissioned and her crew are subject to the discipline of a ship of war; she only resembles a privateer in that her prizes belong to her owner. In 1870, when Prussia proposed the creation of a volunteer navy, the French government protested, but the English government held that such a navy was to be distinguished from privateers, and that their employment was not evasion of the Declaration of Paris; but from this opinion Phillimore decidedly dissented; Risley, Law of War 112.

A merchant vessel without any commission may become a lawful combatant in self-defence, and if she captures her assailant, the latter may be condemned as lawful prize.

During the civil war in America, congress authorized the president to issue letters of marque, but he did not do so. The confederates offered their letters of marque to foreigners, but they were not accepted. The confederate vessels were commissioned as of its regular navy. Boyd's Wheat. Int. Law.

The president's proclamation at the outbreak of the Spanish-American war, 1898, declared that privateering would not be resorted to by the United States.

It has been thought that the constitutional provision empowering congress to issue letters of marque deprives it of the power to join in a permanent treaty abolishing privateering. See 28 Am. L. Rev. 615; 24 *id.* 902; 19 Law Mag. & Rev. 35.

PRIVATION. A taking away or withholding. Co. Litt. 239.

PRIVEMENT ENCEINTE (L. Fr.). A term used to signify that a woman is pregnant, but not *quick with child*. See Wood, Inst. 662; ENCEINTE; FETUS; PREGNANCY.

PRIVIES. Persons who are partakers or have an interest in any action or thing, or any relation to another. Wood, Inst. b. 2, c. 3, p. 255; Co. Litt. 271 a.

There are several kinds of privies: namely, privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as the relation between the donor and donee, lessor and lessee; privies in respect to contracts; and privies on account of estate and contract together. Prest. Conv. 327. Privies have also been divided into privies in fact and privies in law. 8 Co. 42 b. See Viner, Abr. Privity; 5 Com. Dig. 347; Hamm. Part. 131; Woodf. Landl. & T. 279; 1 Dane, Abr. c. 1, art. 6. The latter are created by the law casting land upon a person, as in escheat; 1 Greenl. Ev. § 189.

No one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. Freem. Judg. § 162; 83 Fed. Rep. 515.

PRIVIGNUS (Lat.). In Civil Law. Son of a husband or wife by a former marriage: a stepson. Calvinus, Lex.; Vicat, Voc. Jur.

PRIVILEGE. Exemption from such burdens as others are subjected to. 24 N. J. L. 557. See 67 Tex. 542; 123 Mass. 519.

In Civil Law. A right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors. Dalloz, Dict. Privilege; Domat, Lois Civ. liv. 2, t. 1, s. 4, n. 1; 43 La. Ann. 1078, 1194.

Privilege is "a real right in a thing (*jus in re*) springing from the nature of a debt which has been contracted with reference to that thing, and securing the debt by a preference on the proceeds of the thing when it is sold under legal process." Howe, Stud. Civ. L. 86.

"A mortgage under the civil law is to all intents and purposes what it is in equity in the English law or the law of Connecticut, a security for a debt given by the agreement of the debtor. But a debtor cannot, by his mere agreement, *proprio vigore*, confer a privilege.

"If he contracts a debt, which by its nature has a privilege under the law, then the privilege exists, as a method of securing the debt. It inures in the thing with reference to which the debt has been contracted, follows it into the hands of third persons (in the absence of some law of recodification providing to the contrary), and as a rule would prime a mortgage of the same property." Howe, Stud. Civ. L. 87.

"The one is legal; the other conventional. This former is sometimes called by the civilians a privileged hypothecation; the latter a mere hypothecation." Howe, Stud. Civ. L. 88.

The civil law privilege became, by adoption of the admiralty courts, the admiralty lien; Howe, Stud. Civ. L. 89; 19 How. 82, 90; 148 U. S. 1.

Creditors of the same rank of privileges are paid in concurrence, that is, on an equal footing. Privileges may exist either in movables or immovables, or in both at once. They are general or special, on certain movables. The debts which are privileged on all the movables in general are the following, which are paid in this order. Funeral charges. Law charges, which are such as are occasioned by the

prosecution of a suit before the courts. But this name applies more particularly to costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege. Charges, of whatever nature, occasioned by the *last sickness*, concurrently among those to whom they are due. See *LAST SICKNESS*. The *wages of servants* for the year past, and so much as is due for the current year. *Supplies of provisions* made to the debtor or his family during the last six months by retail dealers, such as bakers, butchers, grocers, and during the last year by keepers of boarding-houses and taverns. The *salaries of clerks, secretaries*, and other persons of that kind. *Dotal rights* due to wives by their husbands.

The debts which are privileged on *particular movables* are—the debt of a workman or artisan, for the price of his labor, on the movable which he has repaired or made, if the thing continues still in his possession; that debt on the pledge which is in the creditor's possession; the carrier's charges and accessory expenses on the thing carried; the price due on movable effects, if they are yet in the possession of the purchaser; and the like. See *LIEN*.

As to privileges on movables, see a good summary in 1 Stims. Am. Stat. L. § 4662, and compare with the texts.

Creditors who have a privilege on movables in Louisiana are (1) vendors for purchase money, (2) architects, mechanics, contractors, etc., for construction, rebuilding and repair of houses, etc., (3) material men, (4) those who have worked by the job in the manner required by law or police regulation on levees, bridges, ditches, and roads of a proprietor; Code §§ 3249–51.

In regard to privilege, Domat says, "We do not reckon in the number of privileges the preference which the creditor has on the moveables that have been given him in a pawn, and which are in his custody. The privilege of a creditor is the distinguishing right which the nature of his credit gives him, and which makes him to be preferred before other creditors, even those who are prior in time, and who have mortgages." Domat, pt. 1, lib. iii. tit. i. sec. v.

These privileges were of two kinds: one gave a preference on all the goods, without any particular assignment on any one thing; the other secures to the creditors their security on certain things, and not on the other goods.

Among creditors who are privileged, there is no priority of time, but each one is in the order of his privilege, and all creditors who have a privilege of the same kind take proportionately, although their debts be of different dates. And all privileges have equally a preference over those of an inferior class, and over debts which do not have this favored character, whether subsequent or antecedent in point of time.

The vendor of immovable property, for which payment has not been made, is preferred before creditors of the purchaser, and all other persons, as to the thing sold. By the Roman law, this principle applies equally to movables and immovables; and the seller may seize upon the property in the hands of his vendee, or wherever he can find it.

So, too, a person who has lent money to repair a thing, or to make improvements, has this privilege. And this, though he lends to workmen or architects, etc., if it be done with the knowledge of the owner.

Carriers have a privilege not only for the price of carriage, but for money paid on account of the goods.

Landlords have a privilege for the rents due from their tenants even on furniture of the under-tenants, if there be a sublease. But not if payment has been made to the tenant by an immediate lessor; although a payment made by the sub-tenant to the landlord would be good as against the tenant.

The privilege was lost by a novation, or by anything in the original contract which showed that the vendor had taken some other security inconsistent with the privilege. See Domat, pt. i. lib. iii. tit. i. sec. v.

See Daloz, Dict. *Privilege*; *LIEN*; *LAST SICKNESS*; *PREFERENCE*.

In Maritime Law. An allowance to the master of a ship of the general nature of prize, being compensation, or rather a gratuity, customary in certain trades, and which the law assumes to be a fair and equitable allowance, because the contract on both sides is made under the knowledge of such usage by the parties.

PRIVILEGE FROM ARREST. Privilege from arrest on civil process.

It is either permanent, as in case of ambassadors, public ministers, and their servants, the royal family and servants, peers and peeresses, etc., or temporary, as in case of members of both houses of congress, and of the state legislature, who are privileged *eundo, manendo, et redeundo*; 1 Kent 243; Cooley, Const. Lim. 163; 8 R. I. 43; see 2 Stra. 985; practising barristers, while actually engaged in the business of the court; 2 Dowl. 51; 1 H. Bla. 636; 1 M. & W. 488; 6 Ad. & E. 623; a clergyman in England whilst going to church, performing services, and returning; 7 Bingh. 320; witnesses and parties to a suit and bail, *eundo, manendo, et redeundo*; 5 B. & Ad. 1078; 6 Dowl. 632; 1 Maule & S. 638; 1 M. & W. 488; 6 Ad. & E. 623; 17 R. I. 715; 136 N. Y. 585; and other persons who are privileged by law. See *ARREST*. Privilege (from arrest) does not extend to defendants in criminal cases; 6 Dist. Rep. Pa. 595.

In case of the arrest of a legislator contrary to law, the house of which he is a member may give summary relief, by ordering his discharge, and if this be not complied with, by punishing the persons concerned in such arrest, as for contempt of its authority. If the houses neglect to interfere, the court from which the process issued should set it aside, on the fact being shown to it; and any court or officer having authority to issue writs of *habeas corpus* may inquire into the case and release the party; Cooley, Const. Lim. 163; Cush. Parl. Pract. § 546. "When attachment is mere process, privilege exists; when it is punitive or disciplinary, privilege does not exist." Brett, Comm. 748. See 1 H. L. Cas.

By the constitutions of some of the states, the privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process; e.g. Michigan, Kansas, Nebraska, California, Wisconsin, Indiana, Oregon, and others.

See *EXTRITERRITORIALITY*; Piggott, Consular Jurisdiction.

PRIVILEGE TAX. See *PROPERTY TAX*, etc.

PRIVILEGE, WRIT OF. A process to enforce or maintain a privilege. Cowell.

PRIVILEGED COMMUNICATIONS. Communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contain criminary matter which without this privilege would be slanderous and actionable.

Duty, in this canon, cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation; 5 E. & B. 347. The proper meaning of a privileged communication, said Baron Parke, is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the

communication was made; 2 Cr. M. & R. 578. So, also, in 16 N. Y. 373. See 73 Mich. 445; 40 Minn. 475; 83 Va. 106; 8 How. 287; [1891] App. Cas. 78; 85 Wis. 451.

The law recognizes two classes of cases in which the occasion either supplies an absolute defence, or a defence subject to the condition that the party acted *bona fide* without malice. The distinction turns entirely on the question of malice. The communications last mentioned lose their privilege on proof of express malice; 12 Fed. Rep. 526. The former depend in no respect for their protection upon the *bona fides* of the defendant. The occasion is an absolute privilege, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion; Heard, Lib. & S. § 89. See Webb, Poll. Torts 335; Odg. Sl. & L. 184; 109 N. C. 270.

As to communications which are thus absolutely privileged, no person is liable, either civilly or criminally, in respect of anything published by him as a member of a legislative body, in the course of his legislative duty, or in respect of anything published by him in the course of his duty in any judicial proceeding. This privilege extends not only to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, but also to proceedings in legislative bodies, and to all who, in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice, or in legislation. A fair report of any judicial proceeding or inquiry is also privileged; Heard, Lib. & S. §§ 90, 103, 110; Odg. Lib. & S. *185; but to be privileged it must be an accurate and impartial account of what actually occurred; 50 Ohio St. 71. A report to a newspaper of judicial proceedings if made by an outsider is actionable if made from motives of personal hostility; 5 Ex. Div. 53. See 46 Ill. App. 813; 45 La. Ann. 1184; [1893] 1 Q. B. 65.

The *bona fide* statements of one church member on the trial of another, before a church tribunal, are privileged; 88 Ga. 620. They have a qualified privilege; Poll. Torts 253.

Freedom of speech in parliament is protected by the Bill of Rights; 1 W. & M. Sess. 2, c. 2. An action will not lie against a judge for words spoken in his judicial capacity in a court of justice; L. R. 3 Ex. 220.

Unfounded insinuations made by counsel against the prosecutor are privileged; 11 Q. B. Div. 588; so are volunteered statements of a witness involving a criminal charge against a person not connected with the case under inquiry. Military courts stand in the same way; L. R. 7 H. L. 744; communications relating to affairs of state and passing between officials are absolutely privileged; Poll. Torts 253; [1895] 1 Q. B. 888; as to whether military and naval reports, not made in the cause of some judicial inquiry, are absolutely privileged, or have only a qualified privilege, see L. R. 5 Q. B. 94. Fair reports of judicial and parliamentary inquiries are said to have an absolute privilege; Poll. Torts 253.

A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered, when the party to whom it is made has an interest in it and such party stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.

"A communication which would otherwise be privileged, if made with malice in fact or through hatred, ill-will, and a malicious design to injure, is not a privileged communication, but the burden of proof is on the plaintiffs to show malice in fact." 12 Fed. Rep. 526; 111 Pa. 404. A member of a legislative body cannot take advantage of his position to utter private slanders against others; 184 Pa. 108.

Information furnished by a charity organization society at the request of a person not a member, but who was interested, is a privileged communication; 13 Cent.

L. J. 432. So are communications to a near relative respecting the character of a person with whom the relative is negotiating for a marriage; 8 C. & P. 88 (but not by a stranger; 5 Allen 170); so where one communicated to an employer, his suspicions of dishonest conduct in a servant towards himself; 8 C. B. N. s. 597.

A publication by a newspaper of an article without inquiry is not privileged because received from a regular correspondent; 68 Hun 474. Communications between an applicant for a patent and the patent office touching an unissued patent are not privileged; 44 Fed. Rep. 294. As to statements made to commercial agencies, see that title. Whenever it is right in the interest of society for one person to communicate to another what he believes or has heard concerning any person's conduct or character is a privileged occasion; Poll. Torts 256; L. R. 5 Q. B. 11. Thus a solicitor to his client about the soundness of a security, or a father to his daughter about her suitor; Poll. Torts 256; a creditor of a firm in liquidation to another of its creditors as to a member of the debtor firm; L. R. 4 Ex. 232; communications addressed to a person in public position relating to the redress of grievances; 5 E. & B. 344. Where the defendant dismissed the plaintiff from its service on account of gross neglect of duty, a statement by the defendant to its servants of the reason for plaintiff's dismissal is a privileged communication. The occasion being privileged, the communication is so, unless the plaintiff can show that it was malicious; [1891] 2 Q. B. 189.

In making privileged communications of a confidential kind, the failure to use the ordinary means of insuring privacy will destroy the privilege; L. R. 9 C. P. 393.

If the occasion be privileged the plaintiff must prove malice, that is dishonest or reckless ill-will. To constitute malice there must be something more than the absence of reasonable ground for belief; Poll. Torts 262. See 8 Harv. L. Rev. 9; CONFIDENTIAL COMMUNICATIONS; LIBEL; MALICE; JUSTIFICATION; SLANDER.

In America, as in England, the defence of privilege is confined to comment and criticism of the acts of public men, as they actually happened, and does not extend to false assertions of fact; 55 Fed. Rep. 456. See 152 Pa. 406; 13 Lawy. Rep. Ann. 97.

PRIVILEGED COPYHOLDS. Those copyholds which are held according to the custom of the manor and not according to the will of the lord. They include ancient demesne and customary freehold. See CUSTOMARY COPYHOLD; 2 Woodd. Lect. 33; Lee, Abs. 63; 1 Crabb, R. P. 709, 919; 2 Bla. Com. 100.

PRIVILEGED DEBTS. Those which an executor or administrator, assignee in bankruptcy, etc., may pay in preference to others, such as funeral expenses, servants' wages, and doctors' bills during last sickness, etc. See PRIVILEGE; ADMINISTRATOR.

PRIVILEGED DEED. In Scotch Law. An instrument, for example, a testament, in the execution of which certain statutory formalities usually required are dispensed with, either from necessity or expediency. Erskine, Inst. 3. 2. 22; Bell, Dict.

PRIVILEGED PLACES. Places—all in or near the city of London—in which a pretended right of sanctuary existed. They were Whitefriars, the Savoy, Salisbury Court, Ram Alley, Mitre Court, Fuller's Rents, Mintage Close, the Minories, the Mint, and Clink or Deadman's Place. This pretended right was taken away by the statute 8 & 9 Will. 3. c. 26, which provided for the execution of process within these places and for the punishment of anyone resisting. A subsequent statute dealt further with the Mint. Byrne.

PRIVILEGED VILLENAGE. Villenage socage. 1 Steph. Com. 188, 223. See SOCAGE.

PRIVILEGES AND IMMUNITIES.

The words privileges and immunities are used in the XIV amendment of the constitution, and in other parts of that document, and were also used in the articles of confederation. They are such privileges as are fundamental, which belong to the citizens of all free governments and which have at all times been enjoyed by citizens of the United States; 16 Wall. 76; 123 U. S. 150; 144 U. S. 361.

These have been enumerated as some of the principal privileges: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; 16 Wall. 76; 123 U. S. 156; 144 id. 361; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise (but he is entitled to no greater privileges and immunities than are possessed by the citizens of the latter state; 135 U. S. 492), to claim the benefit of the writ of *habeas corpus*, to institute and maintain actions of every kind in the courts of the state, to take, hold, and dispose of property, and an exemption from higher federal taxes or impositions than are paid by the citizens of other states, etc.; 4 Wash. C. C. 371. Other judges have preferred to leave the meaning of the phrase to be determined as each case arises; 94 U. S. 391. See Cooley, Const. 24.

The constitution also declares that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States;" but this amendment does not control the power of the state over its own citizens; 31 Atl. Rep. (Md.) 322.

A citizen of the United States has been said to have a right as such to participate in foreign and inter-state commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, to pass from state to state and into foreign countries; he may petition the federal authorities, visit the seat of government without being subjected to the payment of a tax for the privilege (6 Wall. 35), be the purchaser of public lands on the same terms as others; 112 U. S. 87; 144 id. 263; participate in the government if he comes within the conditions of suffrage, be protected from violence while exercising his right of suffrage; 144 U. S. 268; demand the protection of the government on the high seas or in foreign countries; Cooley, Const. 489, 246; see 16 Wall. 36; take out patents and copyrights, buy, sell, or devise United States securities, and take the benefit of the national bankrupt laws; Black, Const. L. 531. A state may not impose a tax upon travellers passing by public conveyance out of the state; 6 Wall. 35; nor impose conditions upon the rights of citizens of other states to sue its citizens in the federal courts; 20 Wall. 445; see 37 Ia. 145; nor deny to colored citizens the privilege of serving on the jury, because of their color; 100 U. S. 303, 313, 339; or to citizens who have become such by naturalization; 5 Leigh 743.

The right to free education is not a privilege and immunity; 80 Chi. Leg. N. 138; or the right of suffrage; 21 Wall. 162; 48 Hun 198; or the right to practise law in the courts of the state; 16 Wall. 130; or to have a controversy in the state court prosecuted or determined by one form of action rather than by another; 160 U. S. 389; nor does an act forbidding the practice of medicine until after examination by a state board; 4 Wash. St. 424.

Among statutes which have been held not to abridge the privileges or immunities of citizens are: Requiring that every child attending school shall be vaccinated; 65 Conn. 183; that policies of insurance shall not be issued without securing a charter of incorporation; 164 Pa. 306; that contractors shall accept no more than

eight hours' work in twenty-four except in cases of necessity; 77 Hun 120; that every person before registration for election must be able to read and write; 34 N. E. Rep. (Mass.) 521; that one who sells patents shall file an authenticated copy of the letters patent and an affidavit that such letters are genuine; 51 Fed. Rep. 774 (distinguishing 25 id. 894); that women shall not be employed in saloons, theatres, etc., where liquor is sold; 83 Fed. Rep. 157; that minors shall not remain therein; 73 N. W. Rep. (Mich.) 111; prohibiting plumbers from exercising their calling without a certificate from a board of examiners; 81 Hun 434; requiring that the seller of fertilizers shall take out a license; 43 Fed. Rep. 609; that those carrying on the banking business shall comply with the provisions of an act relating thereto; 51 N. W. Rep. (S. D.) 558; regulating the right to practise medicine; 10 Col. 383; 88 Ala. 122; 112 Ind. 462; dentistry; 52 Ark. 223; 44 Kan. 565 (but such regulation cannot discriminate against citizens of other states; 65 N. H. 103); suppressing a nuisance; 82 Fed. Rep. 623; regulating or prohibiting the sale of liquor within a state. See LIQUOR LAWS.

Refusal to any person of the accommodations of any public conveyance or place of amusement; 109 U. S. 8; refusing to allow colored children to attend the public schools; 103 Mo. 546 (but see 7 Nev. 342); excluding persons of color not taxed, in an enumeration of inhabitants for the purpose of reorganizing a senatorial district; 19 N. Y. S. 978; the establishment of separate schools for white and colored children; 107 N. C. 609; or prohibiting the carrying of dangerous weapons; 35 W. Va. 367; 153 U. S. 535; do not abridge the privileges or immunities of citizens; nor does a statute prohibiting the intermarriage of white and colored persons; 36 Ind. 389; 63 N. C. 547.

See Black, Const. L.; Cooley, Const. Lim.; 14 L. R. A. 579; CIVIL RIGHTS; DUE PROCESS OF LAW; PROTECTION OF THE LAW; LIBERTY OF CONTRACT; SCHOOLS.

PRIVILEGIUM (priva lex, i. e. de uno homine). In Civil Law. A private law inflicting a punishment or conferring a reward. Calvinus, Lex.; Cicero, de Lege 3. 19; pro Domo 17; Vicat, Voc. Jur. Every peculiar right by which one creditor or class of creditors is preferred to another in personal actions. Vicat, Voc. Jur. Every privilege granted by law in derogation of common right. Mackelday § 188. A claim or lien on a thing, which once attaching, continues till waiver or satisfaction, and which exists apart from possession. So at the present day in maritime law; e. g. the lien of seamen on ship for wages. 2 Pars. Marit. Law 561. See PRIVILEGE.

PRIVILEGIUM CLERICALE (Lat.) Benefit of clergy, which see.

PRIVILEGIUM, PROPTER, PROPERTY. A qualified property in animals *feræ naturæ*, i. e. a privilege of hunting, taking, and killing them, in exclusion of others. 2 Bla. Com. 394.

PRIVITY. The mutual or successive relationship to the same rights of property. 1 Greenl. Ev. § 189; 6 How. 60; 1 U. S. App. 101; 2 Colo. App. 571.

PRIVITY OF CONTRACT. The relationship which subsists between two contracting parties.

From the nature of the covenant entered into by him, a lessee has both privity of contract and of estate; and though by an assignment of his lease he may destroy his privity of estate, still the privity of contract remains, and he is liable on his covenant notwithstanding the assignment; Dougl. 458, 764; Viner, Abr.; 6 How. 60.

PRIVITY OF ESTATE. Identity of title to an estate.

The relation which subsists between a landlord and his tenant.

It is a general rule that a termor cannot

transfer the tenancy or privity of estate between himself and his landlord without the latter's consent: an assignee who comes in only in privity of estate is liable only while he continues to be legal assignee; that is, while in possession under the assignment; *Bac. Abr. Covenant* (14); *Woodf. Landl. & T.* 261; *Viner, Abr.*; *Washb. R. P.*

PRIVITY OF POSSESSION. To establish this, the later occupant must enter under the prior one, and must obtain his possession either by purchase or deed. When the possession is actual, it may commence in parol without deed or writing; and it may be transferred or pass from one occupant to another by parol bargain, and sale, accompanied by delivery. All the law requires is continuity of possession, where it is actual; 2 *Sawy.* 545; 22 *Or.* 77.

PRIVY. One who is a partaker or has any part or interest in any action, matter, or thing.

PRIVY COUNCIL. The chief council of the sovereign, called, by pre-eminence, "the Council," composed of those whom the king appoints. 1 *Bla. Com.* 229.

The statute of Charles II. in 1679 limited the number to thirty,—fifteen of the chief officers of the state *ex virtute officii*, the other fifteen at the king's pleasure; the number is now indefinite. A committee of the privy council was a court of ultimate appeal in admiralty and ecclesiastical cases and cases of lunacy; 3 *P. Wms.* 108; and from all dominions of the crown except Great Britain and Ireland; *H. Wood. Lect.* 157 b. The court of appeal now has its jurisdiction in lunacy and admiralty. See **JUDICIAL COMMITTEE.**

PRIVY PURSE. The income set apart for the sovereign's personal use.

PRIVY SEAL. In *English Law.* A seal which the king uses to such grants or things as pass the great seal. *Co. 2d Inst.* 554.

PRIVY SIGNET. The seal which is first used in making grants, etc., of the crown. It is always in custody of the secretary of state. 2 *Bla. Com.* 347; 1 *Woodf. Lect.* 250; 1 *Steph. Comm.*, 11th ed. 593.

PRIVY TOKEN. By stat. 33 Henry VIII. c. 1, punishment is provided against those evil-disposed persons who devised how they might unlawfully get into their possession goods, chattels, and jewels of other persons by "privy tokens and counterfeit letters in other men's names," unto divers persons their friends and acquaintances, by color whereof they have unlawfully obtained the same. A false privy token within the statute has generally been taken to denote some seal, visible mark, or thing, as a key, a ring, etc. 13 *Viner, Abr.* 460. When one makes use of a false token, he is indictable for the cheat, though the act is not larceny; 1 *Bish. Cr. L.* § 585. But when the consent obtained covers no more than the possession, and the goods are converted to his own use, the offence becomes larceny; 1 *Leach* 420; *East, Pl. Cr.* 691. See **FALSE TOKEN.**

PRIVY VERDICT. One which is delivered privily to a judge out of court.

PRIZE. In *Maritime Law.* The apprehension and detention at sea of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo. 1 *C. Rob.* 228. See *Bened. Adm.* § 509.

The vessel or goods thus taken. Goods taken on land from a public enemy are called booty; and the distinction between a prize and booty consists in this, that the former is taken at sea and the latter on land.

A lawful prize includes enemy's property captured on the high seas or in territorial waters belonging either to the cap-

tor or to the enemy, and property of neutrals captured and confiscated for breach of blockade or as contraband of war; *Risley, Law of War* 144.

In order to vest the title of the prize in the captors, it must ordinarily be brought with due care into some convenient port for adjudication by a competent court. But circumstances may render such a step improper; and of these the captor must be the judge. In making up his decision, good faith and reasonable discretion are required; 18 *How.* 110; 1 *Kent* 101. The condemnation must be pronounced by a prize court of the government of the captor sitting in the country of the captor or his ally; 7 *Wheat.* 283; the prize court of an ally cannot condemn.

Strictly speaking, as between the belligerent parties the title passes, and is vested when the capture is complete; and that was formerly held to be complete and perfect when the battle was over, or the flag hauled down, and the *spes recuperandi* was gone. Later, twenty-four hours' possession was required, and in still later times it was considered that the captured vessel must be brought *infra præsidia* (g. v.) to a place of safety. But by the modern usage of nations this is not sufficient to change the property. A judicial tribunal must pass upon the case; and the property is not charged in favor of a neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation; 1 *Kent* 102; 1 *C. Rob.* 135; but this rule is not inflexible.

A neutral ship in the employment of a belligerent is, as well as the enemy's cargo, subject to capture; 24 *Fed. Rep.* 83. Where a vessel is captured by the army it is not subject to condemnation as prize; 108 *U. S.* 92.

Formerly prizes could be brought into a neutral port and kept there until condemned by a prize court sitting in the belligerent's territory; but it is probable that, at present, this right would be limited to cases arising out of stress of weather, lack of supplies, etc., and only for such length of time as necessity requires; *Risley, Law of War* 176.

All captures are made for the government; 10 *Wheat.* 306; and the title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the result of local law or regulation; 101 *U. S.* 42; 2 *Russ. & M.* 56. The question of prize or no prize in England is triable only in a court of admiralty under a commission from the crown, with an appeal to the crown in council, for the crown reserves the right to decide such questions by its own authority and does not commit its determination to any municipal court.

Under the prize laws of the United States a ship includes a torpedo steam launch; 113 *U. S.* 747.

Where there is a probable cause to believe that a vessel is liable to capture, it is proper to take her and subject her to the examination and adjudication of a prize court; 4 *Dall.* 34. Circumstances creating a reasonable suspicion of conduct warranting her capture are sufficient; 1 *Mas.* 24.

A captured vessel is usually put in charge of a prize master, whose duty is, immediately on his arrival in port, to institute proceedings for condemnation. He is a bailee for the captors, and may become liable for negligence resulting in loss to them, for demurrage, etc.; 2 *Halleck, Int. L., Baker's ed.* 391. A captor should bring his prize, as speedily as may be consistent with his other duties, within the jurisdiction of a competent prize court, though under imperious circumstances, he may take it to a foreign port or even sell it. The proceeds of a sale must be subject to the order of a prize court.

The Navy Department rules of August, 1876, and the act of June 30, 1864, prescribe rules for the captors of prizes.

A captor's right of prize may be forfeited in various ways, as by delay in seek-

ing a prize court; cruel treatment of the captured crew, embezzlement, etc.

See **PRIZE COURT**; **NEUTRALITY**; **RECAPTURE**; **CAPTURE**; **INFRA PRÆSIDIA**; **PRE-EMPTION.**

In Contracts. A reward which is offered to one of several persons who shall accomplish a certain condition; as, if an editor should offer a silver cup to the individual who shall write the best essay in favor of peace. In this case there is a contract subsisting between the editor and each person who may write such essay that he will pay the prize to the writer of the best essay; *Wolff, Dr. de la Nat.* § 675.

PRIZE COURT. In *English Law.* That branch of admiralty which adjudicates upon cases of maritime captures made in time of war. A special commission issues in England, in time of war, to the judge of the admiralty court, to enable him to hold such court. See **ADMIRALTY.**

Some question has been raised whether the prize court is or is not a separate court from the admiralty court. Inasmuch as the commission is always issued to the judge of that court, and the forms of proceeding are substantially those of admiralty, while the law applicable is derived from the same sources, the fact that the commission of prize is only issued occasionally would hardly seem to render the distinction a valid one. But Lord Mansfield said that the whole system of procedure, litigation, and jurisprudence is different; *Dougl.* 613. See **JUDICATURE ACTS.**

In the United States, the admiralty courts discharge the duties both of a prize and an instance court (g. v.). The district courts are prize courts; 3 *Dall.* 6. The president cannot confer jurisdiction to act as a prize court; 13 *How.* 498. The circuit and district courts and the supreme court are now courts of admiralty for the condemnation of prizes, the original jurisdiction being in the district court. Appeals may be taken directly from it to the supreme court if the amount in controversy exceeds two thousand dollars, or if there is a certificate of the district judge that the question involved is one of general importance; but by the act of March 3, 1891, this limitation is probably removed.

On the breaking out of hostilities the district court appoints commissioners to examine witnesses, etc., under the direction of the court; *R. S.* § 4621. For the practice see *Bened. Adm.* §§ 509-512; 1 *Wheat.* 494; 2 *id.* 429; and as to the English practice, 2 *Halleck, Int. L., Baker's ed.* 421. Questions of booty may be referred to the admiralty by the crown; *Knapp, P. C.* 360.

If there is probable cause for the seizure of a vessel that is not a good prize, the captors may have their costs though the vessel is not condemned; 12 *Ct. Cls.* 408; they are not liable in damages; 2 *Gall.* 240, 325; but if a captor unreasonably delays bringing suit for condemnation, he is liable for demurrage if the court decrees a restoration; 108 *U. S.* 92, where the United States was held liable for demurrage from the time when surrender might have been made, at the rate fixed by the charter party. A captor does not lose his right by delay in sending home a prize for adjudication, if he thinks it necessary and uses discretion and good faith; 18 *How.* 110. It is the usual practice of the prize court to give freight to the neutral carrier of enemy's goods that are seized; 3 *Phill. Int. L.* 373. The burden of proof that the prize is neutral rests upon the claimant; and if he fails to show it, condemnation ensues; 2 *C. Rob.* 77; he must clear himself of suspicion; 22 *Ct. Cls.* 408.

A prize court of the captors cannot sit in neutral territory, though it may in conquered territory, and in that of a co-belligerent; 2 *Halleck, Int. L., Baker's ed.* 401.

The decision of a prize court is conclusive against the subject of the state and as to the property in the subject-matter against all parties; but unlawful condemnation may subject the state of the captors to de-

mands for indemnity by a foreign state; *id.* 407. But courts of other nations may examine as to the jurisdiction of a prize court, and if a condemnation therein was not according to the rules of international law, may treat it as a nullity; *id.* 411. Condemnations of prize courts are final in actions between individuals, and as to the vessel condemned, giving purchasers a good title against all the world, but do not bind foreign nations, if wrongfully decreed; 22 Ct. Cls. 1.

There is a clearly marked distinction between proceedings for prize and forfeiture. "The libel for prize is founded upon the law of nations, and depends for proof upon the facts of her acts upon the high seas. The libel for forfeiture is for the violation of a municipal statute, and depends upon a set of facts and circumstances entirely different from that of piratical aggression. The offences charged are separate and distinct, and the cause of action is in no wise the same." 28 Fed. Rep. 150. In the case of *The Itata*, it was said that "when a ship is libelled for prize, and the facts fail to sustain the libel, but make out a strong *prima facie* case of a statutory forfeiture, it would be the duty of the court to remand the case for a new libel; but under no circumstances could a ship be libelled for one offence, and have a decree entered against it for another distinct and separate offence." 56 *id.* 505, 515.

The duties of prize courts are thus described by Lord Stowell:—

"In forming my judgment, I trust that it has not for a moment escaped my anxious recollection what it is that the duty of my station calls for from me; namely, not to deliver occasional and shifting opinions to serve present purposes of particular national interests, but to administer, with indifference, that justice which the Law of Nations holds out, without distinction, to independent States, some happening to be neutral, and some belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question, if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." 1 C. Rob. 350.

In another case, he says:

"It is to be recollected that this is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the Law of Nations simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable reluctance." 6 *id.* 349.

PRIZE-FIGHT. A public prize-fight is an indictable offence. No concurrence of wills can justify a public tumult and alarm; therefore, persons who voluntarily engage in a prize-fight and their abettors are all guilty of assault; 4 C. & P. 537; Poll. Tort 186, n.; 1 Cox, C. C. 177; 2 Bish. C. L. § 35. Prize-fights are unlawful, and all persons guilty of aiding and abetting a prize-fight are guilty of an assault; 8 Q. B. Div. 534. See, also, 108 Mass. 302; 67 Miss. 350.

To constitute prize-fighting there must be an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded, and there must be an intent to inflict some degree of bodily harm on the contestant; 96 Mich. 576.

Prize-fighting is unlawful; 1 Bish. Cr. Law § 535; C. & M. 314; fighting with the fists is an assault and battery, though the parties agree thus to fight and have no ill-

will toward each other; Washb. Manual of Crim. Law; it is a breach of the peace; Poll. Tort 139; 9 C. & P. 214.

If two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no danger or ill-will; 119 Mass. 350, disagreeing with 1 Hill S. C. 10; it is no bar to an action for assault that the parties fought with each other by mutual consent, but such consent may be shown in mitigation of the damages; 33 Ind. 531; one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply; 3 Jones N. C. 131; mere voluntary presence at a fight does not, as a matter of law, necessarily render persons so present guilty of an assault, as aiding and abetting in such fight; 8 Q. B. Div. 534 (4 C. & P. 537, distinguished); *semble*, mere presence of a person at a prize-fight affords some evidence for the consideration of a jury of an aiding and abetting in such fight; 8 Q. B. Div. 534.

To constitute a prize-fight it is not essential that the fight should be with the naked fist or hand, but the fact that a contest was had with gloved hands, as also the kind, size, weight, and other characteristics of the gloves so used, may be looked to in connection with the other evidence in the case in determining whether a contest was a prize-fight, or merely a sparring or boxing exhibition without prize or reward to the victor; 4 Ohio N. P. 81.

Prize-fighting was not a distinct offence at common law and participants were indictable and punishable for assault, riot, or affray; 8 Q. B. Div. 534; 3 C. & M. 314; 2 C. & P. 234; 67 Miss. 350.

A spectator at a sparring match is not *particeps criminis*; there is nothing unlawful in sparring, unless the men fight until they are so weak that a dangerous fall is likely to be the result of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter; 10 Cox, C. C. 371.

In Arkansas a court of equity has power to issue an injunction to restrain a prize-fight advertised to take place within its jurisdictional limits; 35 Am. Law Reg. & Rev. 100; 28 L. R. A. 727; in Indiana an injunction was granted at the suit of the state, upon the ground that a corporation was misusing its franchise and maintaining its property as a nuisance, although the act complained of was a crime; 143 Ind. 98.

Consent to engage in a boxing match is not a defence to an indictment for a breach of the peace. It is for the jury to determine from the nature of the contest whether it was a breach of the peace, under proper instructions as to what constitutes such a breach.

Evidence is not admissible to prove that such matches are common and harmless amusements, practised in the colleges of this country, nor was there error in refusing to allow the jury to examine the boxing gloves used by the respondent; 56 Vt. 445.

It is not necessary that an indictment aver that the fight took place in public; nor that it contain averments which negative the existence of matters mentioned in the proviso of § 8890 of the revised statutes; 49 Ohio St. 117.

An agreement to engage in a prize-fight is a conspiracy to commit a crime; and the declarations of either party with reference to the common object, or in furtherance of the criminal design, while engaged in its prosecution, are competent evidence against the other, though the agreement was made through backers or other representatives of the principals and the latter were unknown to each other. Letters written by one of the principals, while in training for the fight, describing what the fight is to be, stating when and where it is to occur, and requesting the presence of his friends and others thereat, are in furtherance of the unlawful enterprise, and admissible in evidence against the other; 49

Ohio St. 117.

Whether a pugilistic encounter is a fight or boxing exhibition, is not a question upon which expert testimony is admissible on the trial of an indictment for engaging in a prize-fight. The question must be decided by the jury upon the evidence of what actually took place, under proper instructions from the court, and not upon the opinions of professional pugilists, and others experienced in such combats, or the rules adopted by associations for conducting such contests; 49 Ohio St. 117.

Statutes prohibiting prize-fights have been passed in nearly all the states. That of Nevada (1897) alone need be set forth. Any male person over twenty-one years may procure a license for an exhibition in a public place for any contest or exhibition with gloves between man and man for a wager or reward, and the weight of the gloves used shall not be less than four ounces. The sheriff of any county in which such exhibition is to be held, shall issue a license therefor on payment to him of one thousand dollars. The licensee shall, ten hours before any proposed contest, file with the county clerk where such contest is to be held, a certificate in writing executed by two regular practising physicians of the state showing that the contestants are in sound physical health and condition. The exhibition shall be within an enclosure sufficient to exclude the view of the public not in attendance thereat; no intoxicating liquors of any kind shall be sold or given away at or during the contest upon the grounds or within the enclosure. A charge may be made for admission. Any persons who shall participate in, conduct, or manage any glove contest contrary to the provisions of this act shall be guilty of a misdemeanor.

What constitutes prize-fighting is a question of law; but it is a term in common use, and the very employment of the word indicates what is meant; 96 Mich. 576.

By statute it is even made criminal for inhabitants of a state by previous agreement to leave the state and engage in a fight outside of its limits; 108 Mass. 302.

See McClain, Cr. Law §§ 196, 249, 1013; 1 Bish. Cr. Law §§ 632-633; 6 L. Quart. Rev. 110.

PRIZE PACKAGES. See SALES; LOTTERY.

PRO BONO PUBLICO. For the public good.

PRO CONFESSO (Lat. as confessed).

In Equity Practice. A decree taken where the defendant has either never appeared in the suit, or, after having appeared, has neglected to answer. 1 Dan. Ch. Pr. 479; Ad. Eq., 8th ed. *328, 330, 374; 1 Sm. Ch. Pr. 254.

PRO CONSILIO. For counsel given. An annuity *pro consilio* amounts to a condition, but in a feoffment or lease for life, etc., it is the consideration, and does not amount to a condition; for the state of the land by the feoffment is executed, and the grant of the annuity is executory. Plowd. 412.

PRO CONVICTO (L. Lat.). As convicted.

PRO DEFECTU EXITUS. For, or in case of, default of issue. 2 Salk. 620.

PRO DIGNITATE REGALI. In consideration of the royal dignity. 1 Bla. Com. 223.

PRO EO QUOD (Lat.). In Pleading. For in that. This is a phrase of affirmation, and is sufficiently direct and positive for introducing a material averment. 1 Saund. Pl. n. 4; 2 Chit. Pl. 369-393; Gould, Pl. c. 3, § 84.

PRO FALSO CLAMORE SUO. A nominal averment of a plaintiff for his false claim, which used to be inserted in a judgment for the defendant.

PRO FORMA. As a matter of form. 2 Kent 245.

PRO HAC VICE (Lat.). For this occasion.

casion.

PRO INDIVISO (Lat.). For an undivided part. The possession or occupation of lands or tenements belonging to two or more persons, and where, consequently, neither knows his several portion till divided. Bract. l. 5.

PRO INTERESSE SUO (Lat.). According to his interest.

PRO LÆSIONE FIDEI. For breach of faith. 3 Bla. Com. 52.

PRO LEGATO. As a legacy.

PRO MAJORI CAUTELA. From greater caution.

PRO NON SCRIPTO (Lat.). As not written; as though it had not been written; as never written.

PRO PARTIBUS LIBERANDIS. An ancient writ for partition of lands between co-heirs. Reg. Orig. 316.

PRO QUERENTE (Lat.). For the plaintiff; usually abbreviated *pro quer.*

PRO RATA (Lat.). According to the rate, proportion, or allowance. A creditor of an insolvent estate is to be paid *pro rata* with creditors of the same class.

According to a certain rule or proportion. 19 Am. L. Reg. N. S. 355, n. (U. S. D. C. Cal.). It is presumed to be used in that sense in a will; *id.*

PRO RE NATA (Lat.). For the occasion as it may arise.

PRO SALUTE ANIMÆ. For the good of his soul.

PRO TANTO (Lat.). For so much. See 17 S. & R. 400.

PRO TEMPORE. For the time being; temporary.

PRO TOTO (Lat.). For the whole.

PROAMITA (Lat.). A grandfather's sister; a great aunt. Ainsworth, Dict.

PROAVIA (Lat.). A great-grandmother. Ainsworth, Dict.

PROAVUNCULUS (Lat.). A great-grandmother's brother. Ainsworth, Dict.

PROAVUS (Lat.). Great-grandfather. This term is employed in making genealogical tables.

PROBABILITY. Likelihood; consonance to reason; for example, there is a strong probability that a man of good moral character, and who has heretofore been remarkable for truth, will, when examined as a witness under oath, tell the truth; and, on the contrary, that a man who has been guilty of perjury will not, under the same circumstances, tell the truth: the former will, therefore, be entitled to credit, while the latter will not.

PROBABLE. Having the appearance of truth; appearing to be founded in reason.

PROBABLE CAUSE. A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offence with which he is charged. 53 N. Y. 17; 109 Mo. 281; 63 Hun 626; *id.* 254; 1 Colo. App. 297.

Want of probable cause is one of the elements required to support an action for malicious prosecution, which title see for a discussion of the subject.

In extradition cases, probable cause is made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it; 161 U. S. 502. See EXTRADITION.

In cases of municipal seizure for the breach of revenue, navigation and other laws, if the property seized is not condemned, the party seizing is exempted from liability for such seizure if the court before which the cause is tried grants a certificate that there was *probable cause*

for the seizure. If the seizure was without probable cause, the party injured has his remedy at common law. See 7 Cra. 329; 2 Wheat. 118; 9 *id.* 382; 16 Pet. 342; 3 How. 197; 4 *id.* 251; 18 *id.* 498.

PROBABLE EVIDENCE. Presumptive evidence is so called, from its foundation in probability.

PROBABLE REASONING. Reasoning founded on the probability of the fact or proposition sought to be proved or shown.

PROBATE. Originally, relating to proof; afterwards, relating to the proof of wills. In American law, now a general name or term used to include all matters of which probate courts have jurisdiction. 47 Minn. 575.

PROBATE CODE. The body or system of law relating to the estates of deceased persons, and of persons under guardianship. 47 Minn. 575.

PROBATE IN COMMON FORM. See SOLEMN FORM.

PROBATE COURT. See COURT OF PROBATE.

PROBATE COURTS. See COURTS OF PROBATE.

PROBATE DUTY. A tax laid by the government on the gross value of the personal property of the deceased testator.

This is a stamp duty payable (except where it is merged in estate duty) with certain unimportant exceptions, on all the personal property over the value of £100 in England of anyone in respect of whom a grant of probate or letters of administration should be obtained. Such personal property includes property appointed by will under a general power. It is not payable in respect of deaths since 1st August, 1894, upon any estate for which estate duty (*q. v.*) is payable; but it is still payable upon the personal estates in England of persons domiciled abroad, inasmuch as no estate duty is payable thereon, and it therefore is not entirely superseded by estate duty. Like estate duty, it is payable on the total value of the property which is subject to it; but, unlike estate duty, it applies only to personality. Byrne. See DEATH DUTIES.

PROBATE IN SOLEMN FORM. See SOLEMN FORM.

PROBATE OF A WILL. The proof before an officer authorized by law that an instrument offered to be proved or registered is the last will and testament of the deceased person whose testamentary act it is alleged to be.

Jurisdiction. In England, the ecclesiastical courts were the only tribunals in which, except by special prescription, the validity of wills of personal estate could be established or disputed. Hence in all courts, the seal of the ecclesiastical court is conclusive evidence of the factum of a will of personality; from which it follows that an executor cannot assert or rely on his authority in any other court, without showing that he has previously established it in the spiritual court,—the usual proof of which is the production of a copy of the will by which he is appointed, certified under the seal of the ordinary. This is usually called the probate. The probate of a will is conclusive as to personality; but not as to realty, which can only be settled by an issue out of chancery or a trial at law; 4 Kent 510.

The ecclesiastical courts had no jurisdiction of devises of lands; and in a trial at common law or in equity the probate of a will is not admissible as evidence, but the original will must be produced, and proved the same as any other disputed instrument. This rule has been modified by statute in some of the United States. In New York, the record, when the will is proved by the subscribing witnesses, is *prima facie* evidence, and provision is made for perpetuating the evidence. See 12 Johns. 192; 14 *id.* 407. In Massachusetts, North Carolina, and Michigan the probate

is conclusive of its validity, and a will cannot be used in evidence till proved; 12 Allen 1; 1 Gall. 623; 2 Mich. Comp. Laws (1871) 1875; Battle, Rev. 849. In Pennsylvania, the probate was held not conclusive as to lands, and, although not allowed by the register's court, it might be read in evidence; 5 Rawle 80; but see 119 Pa. 138; but it becomes conclusive as to realty, unless withdrawn in five years from probate those interested shall contest its validity. In South Carolina the will must be proved *de novo* in the court of common pleas, though allowed in the ordinary; 1 N. & M'C. 326. In New Jersey, probate is necessary, but it is not conclusive; 1 Penn. N. J. 49; except in actions not commenced within seven years from the probate; N. J. Rev. Stat. 1250. See LETTERS TESTAMENTARY.

The effect of the probate in this country, and the rules in regard to jurisdiction, are generally the same as in England; but, as no ecclesiastical courts exist in the United States, probate is granted by some judicial officer, who performs the part of the ordinary in England, but generally with more ample powers in relation to the administration of the estate. See SURROGATE; LETTERS TESTAMENTARY.

The proof of the will is a judicial proceeding, and the probate a judicial act. The party propounding the instrument is termed the proponent, and the party disputing, the contestant. In England, proof *ex parte* was called probate in common form, and proof on notice to the next of kin, proof in solemn form. In the United States, generally speaking, proofs are not taken until citation or notice has been issued by the judge to all the parties interested to attend. On the return of the citation, the witnesses are examined, and the trial proceeds before the court. If the judge, when both parties have been heard, decides in favor of the will, he admits it to probate; if against the will he rejects it. In Pennsylvania no citation is required.

More than one instrument may be proved; and where the contents of two or more instruments are not wholly inconsistent with each other, they may all be admitted as together constituting the last will and testament of the deceased; Will. Exec. *138.

On the probate the alleged will may be contested on any ground tending to impeach its validity; as, that it was not executed in due form of law and according to the requisite statutory solemnities; that it was forged, or was revoked, or was procured by force, fraud, misrepresentation, or undue influence over a weak mind, or that the testator was incompetent by reason of idiocy or lunacy.

PROBATIO (Lat. from *probare*, to prove). Proof *Probatio viva*; living proof; proof by witnesses *viva voce*. Burrill; Bract. fol. 400.

PROBATION. The evidence which proves a thing. It is either by record, writing, the party's own oath, or the testimony of witnesses. Proof. It also signifies the time of a novitiate; a trial. Nov. 5.

PROBATION SYSTEM. A method of allowing a person convicted of a minor offense to go at large under suspension of sentence, but usually under the supervision of a probation officer. Stand. Dict.

In England, under the Probation of Offenders Act, 1907, where a person is charged before a magistrate with a summary offense which is proved, or where a person is convicted on indictment, the magistrate may, instead of convicting, dismiss the charge or discharge the offender on recognisances (with or without sureties) for good behavior and to come up for judgment within three years, and the court before which the prisoner is convicted on indictment may discharge him on the like recognisances; but one of these courses is permissible only where it is considered desirable, in view of the character, antecedents, age, health, or mental condition of the accused, or the trivial nature of the offense, or extenuating circumstances. The court may also order payment by the accused of the compensation to the extent of £10, or

any higher amount fixed by statute, and the costs of the proceedings. The recognisance may contain various conditions aimed at securing the good conduct of the offender. There may be appointed probation officers, for adult offenders, and also "children's probation officers," who keep in touch with offenders on probation. Where an offender fails to observe the conditions of his recognisance he may be brought up and sentenced for the original offense. Byrnes.

PROBATIVE FACT. A fact which actually has the effect of proving a fact sought.

PROBATOR. In Old English Law. Strictly, an accomplice in felony who to save himself confessed the fact, and charged or accused any other as principal or accessory, against whom he was bound to make good his charge. It also signified an approver, or one who undertakes to prove a crime charged upon another. Jacob, Law Dict.

PROBATORY TERM. In the British courts of admiralty, after the issue is formed between the parties, a time for taking the testimony is assigned. This is called a probatory term.

This term is common to both parties, and either party may examine his witnesses. When good cause is shown, the term will be enlarged. 2 Brown, Civ. Law 418; Dunlop, Adm. Pr. 217.

PROBI ET LEGALES HOMINES (Lat.). Good and lawful men; persons competent in point of law to serve on juries. Cro. Eliz. 654, 751; Cro. Jac. 635; Mart. & Y. 147; Hard. 63; Bac. Abr. Juries (A).

PROCEDENDO (Lat.). In Practice. A writ which issues where an action is removed from an inferior to a superior jurisdiction by *habeas corpus*, *certiorari*, or writ of privilege, and it does not appear to such superior court that the suggestion upon which the cause has been removed is sufficiently proved; in which case the superior court by this writ, remits the cause to the court from whence it came, commanding the inferior court to *proceed* to the final hearing and determination of the same. See 2 W. Bla. 1060; 6 Term 365; 52 Conn. 166.

A prerogative writ which issues (1) when the judge of an inferior court delays the parties to a proceeding before him, by not giving judgment for one side or the other, when he ought to do so; or (2) when a cause has been removed from an inferior court to a superior court improperly or on insufficient grounds, and the superior court thinks fit to remit or remove it back to the inferior court. In the former class of cases, the writ of *mandamus* (*q. v.*) is more frequently used. Byrnes.

PROCEDURE. The methods of conducting litigation and judicial proceedings.

It might be termed, by way of illustration, the mechanism of the law, as distinguished from jurisprudence, which is the science of the law.

The term is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice. And practice in this sense means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in; and evidence as a part of procedure signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted. Bish. Cr. Proc. § 2; 107 U. S. 231. See 5 Ind. App. 95.

The term is, with respect to its present use, rather a modern one. Recently the supreme court of the United States commented on the fact that it was unable to find anywhere a satisfactory definition of it. Apart from observations of the most general character the subject is one which

does not admit of distinct or detailed treatment under this title. It includes all the practical titles of the law to which reference should be had, with respect to any particular matter, as they are separately treated in this work.

Probably the most salient fact with respect to legal procedure in civil cases is the modern tendency in England and the United States to obliterate technical distinctions between law and equity and to authorize the enforcement of equitable remedies, as well in courts of law as of chancery. But with respect to this tendency it has been very justly said that:

"Although, under modern systems, courts of law may enforce equitable rights, the proof must agree with the pleadings, and the relief granted must be within the prayer for relief and the grounds relied on." 70 Fed. Rep. 949.

Another feature of modern thought on the subject of procedure is the controversy between the advocates of common-law practice and that under codes, which will be found discussed at length under the titles CODE and COMMON LAW, respectively. See also Clarke, The Science of Law and Law-Making.

In England the last quarter of the century has witnessed the most radical change in procedure as the result of the Judicature Acts, which title see. Under the changes thus introduced, where one formerly, in seeking relief from judicial tribunals, was obliged to use different forms of procedure in different courts, these acts, and the rules made pursuant to them, "have to a very large extent introduced uniformity in this respect into the practice of the different divisions of the court." 1 Brett, Com. 336.

In criminal procedure there is a strong tendency indicated towards simplification and expedition. The most notable tendency of a general character is that towards the abolition or modification of the grand jury system, as to which see that title. Very recently vital and comprehensive changes have been made in the criminal procedure of France relating to the preliminary examination of accused persons. See JUGE D'INSTRUCTION.

A new criminal code, notable both as to the changes introduced and the care with which it was prepared, went into effect in Italy in 1890, a careful analysis of which will be found in 35 Am. L. Reg. N. S. 696. In Great Britain the criminal procedure of Scotland is very different from that of England notwithstanding the union, and a carefully detailed account of it may be found in 35 Am. L. Reg. N. S. 619.

In a case defining the functions and authority of a prosecuting attorney and his right to enter a *nolle prosequi* after conviction, the supreme court of Louisiana, in a very able opinion, directed attention to some differences between the criminal procedure of that state and that of England and the states which follow English precedence. The great power given to the prosecuting officer under the common law is greatly diminished in that state, and the court concludes its examination of the subject by the statement that:

"First. The inauguration or preliminary stage, when the prosecuting officer has absolute control of his indictments.

"Second. The trial of the cause, and its incidents, during which the court has control and the power of the prosecuting officer is suspended.

"Third. The period between the verdict of the jury and the sentence of the court, when the pardoning power comes into operation." 48 La. Ann. 109, 144.

See POSTULATIO.

PROCEDURE ACTS. Three acts of parliament passed in 1852, 1854, and 1860, for the amendment of procedure at common law. Moz. & W. They have been largely superseded by the Judicature Acts of 1873 and 1875. See JUDICATURE ACTS.

PROCEEDING. In its general acceptance, the form in which actions are to be brought and defended, the manner of

intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing. It includes certified copies of pleadings on which the case was tried. 63 N. W. Rep. (Neb.) 1084.

Ordinary proceedings intend the regular and usual mode of carrying on a suit by due course at common law.

Summary proceedings are those where the matter in dispute is decided without the intervention of a jury; these must be authorized by the legislature, except, perhaps, in cases of contempt, for such proceedings are unknown to the common law.

In 81 Fed. Rep. 880 the question was suggested whether proceedings before pension commissioners are judicial proceedings within the meaning of R. S. § 860, which provides that evidence obtained from a party or witness shall not be used against him in any criminal proceeding. The court passed the question without deciding it, though apparently inclined to the affirmative.

In Louisiana there is a third kind of proceeding, known by the name of executory process (*q. v.*).

In New York the code of practice divides remedies into actions and special proceedings. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Every other remedy is a special proceeding.

The examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso to the general appropriation act of 1903, that no person shall be prosecuted on account of anything which he may testify in any proceeding under the Anti-trust Law. The word should receive as wide a construction as is necessary to protect the witness in his disclosures. 201 U. S. 43.

See COLLATERAL PROCEEDING.

PROCEEDS. Money or articles of value arising or obtained from the sale of property. Goods purchased with money arising from the sale of other goods, or obtained on their credit, are *proceeds* of such goods. 2 Pars. Marit. L. 201; Bened. Adm. 290. See 61 Hun 872. The sum, amount, or value of goods sold, or converted into money. Whart. Dict. Proceeds does not mean necessarily money; 101 U. S. 380.

PROCERES (Lat.). The name by which the chief magistrates in cities were formerly known. St. Armand, Hist. Eq. 88.

PROCES-VERBAL. In French Law. A true relation in writing in due form of law, of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion. It is a species of inquisition of office.

The *procès-verbal* should be dated, contain the name, qualities, and residence of the public functionary who makes it, the cause of complaint, the facts tending to prove the existence of the crime, that which serves to substantiate the charge, point out its nature, the time, the place, the circumstances, state the proofs and presumptions, describe the place,—in a word, everything calculated to ascertain the truth. It must be signed by the officer. Dalloz, Dict. See JUGE D'INSTRUCTION.

PROCESS. In Practice. The means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal, cases.

The method taken by law to compel a compliance with the original writ or commands of the court.

A writ, warrant, subpoena, or other formal writing issued by authority of law; also the means of accomplishing an end, including judicial proceedings; 84 La. 567; the means or method pointed out by a statute, or used to acquire jurisdiction of the

defendants, whether by writ or notice. 109 Mo. 588.

In civil cases, in all real actions and for injuries not committed against the peace, the first step was a summons, which was served in personal actions by two persons called summoners, in real actions by erecting a white stick or wand on the defendant's grounds. If this summons was disregarded, the next step was an attachment of the goods of the defendant, and in case of trespasses the attachment issued at once without a summons. If the attachment failed, a distringas issued, which was continued till he appeared. Here process ended in injuries not committed with force. In case of such injuries, an arrest of the person was provided for. See ARREST. In modern practice some of these steps are omitted; but the practice of the different states is too various to admit of tracing here the differences which have resulted from retaining different steps of the process.

In the English law, process in civil cases is called *original process*, when it is founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues pending the suit, upon some collateral interlocutory matter, as, to summon juries, witnesses, and the like; *mesne process* is also sometimes put in contradistinction to *final process*, or process of execution; and then it signifies all process which intervenes between the beginning and end of a suit. 3 Bla. Com. 279. See REGULAR PROCESS; OBSTRUCTING PROCESS.

No court can, at common law, exercise jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears; 149 U. S. 194. See JURISDICTION.

As to the grant of letters patent for a process, see PATENT. See ORIGINAL PROCESS, JUDICIAL PROCESS.

PROCESS OF INTERPLEADER. See INTERPLEADER.

PROCESS OF LAW. See DUE PROCESS OF LAW.

PROCESSION. A peaceable procession in the streets of a town, if lawful, and the streets are not obstructed more than is ordinarily the case under such circumstances, is not an indictable offence on the part of those composing it. 72 N. C. 25.

The peaceable procession in the streets of a religious body, known as the Salvation Army, has been held lawful, although the members were aware of the lawless intention of their opponents to make it the occasion of a riot; 26 Sol. Journ. 505. See 26 Alb. L. J. 22.

PROCESSIONING. A term used to denote the manner of ascertaining the boundaries of land, as provided for by the laws of that state. 1 Tenn. Comp. Stat. § 2920. The term is also used in North Carolina and Georgia. 3 Murph. 504; 3 Dev. 268; 79 Ga. 406.

PROCESSUM CONTINUANDO. A writ for the continuation of process after the death of the chief justice or other justices in the commission of *oyer* and *terminer*. Reg. Orig. 128.

PROCHEIN (L. Fr.). Next. A term somewhat used in modern law, and more frequently in the old law; as, *prochein ami*, *prochein cousin*. Co. Litt. 10.

PROCHEIN AMI (L. Fr.; spelled also, *prochein amy* and *prochain amy*). Next friend (q. v.).

PROCLAMATION. The act of causing some state matters to be published or made generally known. A written or printed document in which are contained such matters, issued by proper authority; as, the president's proclamation, the governor's, the mayor's proclamation. Also used to express the public nomination made of any one to a high office; as, such a prince was *proclaimed* emperor.

The president's proclamation may give force to a law, when authorized by con-

gress; as, if congress were to pass an act, which should take effect upon the happening of a contingent event, which was to be declared by the president by proclamation to have happened, in this case the proclamation would give the act the force of law, which till then it wanted. How far a proclamation is evidence of facts, see Bac. Abr. Evidence (F); Bull. N. P. 226; 13 Mod. 216; 8 How. St. Tr. 212; 4 Maule & S. 546; 2 Camp. 44; Dane, Abr. ch. 96, a. 2, 3, 4; 6 Ill. 577; Brooke, Abr. The public proclamation of pardon and amnesty has the force of public law, of which courts and officers will take notice though not specially pleaded; 145 U. S. 546. Courts take judicial notice of official proclamations and messages of the governor of the state; 110 Mo. 286.

On the breaking out of war it is usual for a nation to issue a proclamation announcing the existence of hostilities. See MANIFESTO; WAR.

In Practice. The declaration made by the crier, by authority of the court, that something is about to be done.

It usually commences with the French word *Oyez, do you hear*, in order to attract attention; it is particularly used on the opening of the court, and at its adjournment; it is also frequently employed to discharge persons who have been accused of crimes or misdemeanors.

PROCLAMATION OF EMANCIPATION. See BONDAGE.

PROCLAMATION OF EXIGENTS. In Old English Practice. On awarding an *exigent*, in order to outlawry, a writ of proclamation issued to the sheriff of the county where the party dwelt, to make three proclamations for the defendant to yield himself or be outlawed.

PROCLAMATION OF A FINE. The proclamation of a fine was a notice, openly and solemnly given at all the assizes held in the county where the lands lay. It was made within one year after engrossing the fine; and anciently consisted in the fine as expressed being openly read in court sixteen times,—four times in the term in which it was made, and four times in each of the three succeeding terms. This, however, was afterwards reduced to one reading in each term. These proclamations were upon transcripts of the fine, sent by the justices of the common pleas to the justices of assize and the justices of the peace. Abb. Law Dict. See 2 Bla. Com. 352.

PROCLAMATION OF REBELLION. In Old English Practice. When a party neglected to appear upon a *subpoena*, or an attachment in chancery, a writ bearing this name issued; and, if he did not surrender himself by the day assigned, he was reputed and declared a rebel.

PROCLAMATOR. An officer of the English court of common pleas.

PROCREATION. The generation of children: it is an act authorized by the law of nature. One of the principal ends of marriage is the procreation of children. Inst. tit. 2, in pr.

PROCTOR. One appointed to manage the affairs of another or represent him in judgment. The authority was in writing under the hand of the principal and was called a proxy.

One who is employed to manage for another proceedings in admiralty and ecclesiastical causes.

A proctor, strictly speaking, conducts the proceeding out of court, as an English solicitor does in common-law courts; while the advocate conducts those in court. But in this country the distinction is not observed. A proctor is properly appointed in writing, but not necessarily so. Until final decree, he has entire control of the cause; but after decree he has no power except to enforce it. See Bened. Adm. § 334; W. Rob. 835. The fees of proctors are fixed by R. S. §§ 823-829; but fees not

in the statute may be allowed in special cases; 7 Fed. Rep. 246; 25 id. 672.

In England under the judicature acts proctors may practise in all divisions of the supreme court of judicature.

One of the representatives of the clergy in the convocations of the two provinces of Canterbury and York in the church of England.

An official in a university whose function it is to see that good order is kept.

See QUEEN'S PROCTOR.

PROCURATION. In Civil Law. The act by which one person gives power to another to act in his place, as he could do himself. A letter of attorney.

An *express* procurator is one made by the express consent of the parties. An *implied* or *tacit* procurator takes place when an individual sues another managing his affairs and does not interfere to prevent it. Dig. 17. 1. 6. 2; 50. 17. 60; Code 7. 32. 2.

Procurations are also divided into those which contain absolute power, or a general authority, and those which give only a limited power. Dig. 3. 3. 58; 17. 1. 60. 4.

Procurations are ended in three ways: first, by the revocation of the authority; second, by the death of one of the parties; third, by the renunciation of the mandatory, when it is made in proper time and place and it can be done without injury to the person who gave it. Inst. 3. 27; Dig. 17. 1. Code 4. 35. See AUTHORITY; LETTER OF ATTORNEY; MANDATE; PER PROC.

PROCURATIONS. In Ecclesiastical Law. Certain sums of money which parish priests pay yearly to the bishops or archdeacons, *ratione visitationis*. Dig. 3. 39. 25; Ayliffe, Parerg. 429; 17 Viner, Abr. 544.

PROCURATOR. In Civil Law. A proctor; a person who acts for another by virtue of a procurator. *Procurator est, qui aliena negotia mandata Domini administrat*. Dig. 3. 3. 1. See ATTORNEY; AUTHORITY; FOREIGN MINISTER.

PROCURATOR FISCAL. In Scotch Law. A public prosecutor. Bell, Dict.

PROCURATOR LITIS (Lat.). In Civil Law. One who by command of another institutes and carries on for him a suit. Vicat, Voc. Jur. *Procurator* is properly used of the attorney of actor (the plaintiff), *defensor* of the attorney of reus (the defendant). It is distinguished from *advocatus*, who was one who undertook the defence of persons, not things, and who was generally the patron of the person whose defence he prepared, the person himself speaking it. It is also distinguished from *cognitor* who conducted the cause in the presence of his principal, and generally in cases of citizenship; whereas the procurator conducted the cause in the absence of his principal. Calvinus, Lex.

PROCURATOR IN REM SUAM. In Scotch Law. A term which imports that one is acting as attorney as to his own property. When an assignment of a thing is made, as a debt, and a procurator or power of attorney is given to the assignee to receive the same, he is in such case procurator *in rem suam*. 3 Stair, Inst. 1. 2. 3. etc.; Erskine, Inst. 3. 5. 2; Bell, Dict.

PROCURATORIUM (Lat.). The proxy or instrument by which a proctor is constituted and appointed.

PROCURATORY OF RESIGNATION. A proceeding by which the vassal authorized the return of the fee to his superior. Bell, Dict.

PROCURE. To contrive, effect, or bring about; to cause. 23 Neb. 45.

There is a clear legal distinction between procuring an act to be done and suffering it to be done. 2 Ben. 196.

PROCEURER DE LA REPUBLIQUE. The name of an officer charged with the prosecution of crimes under the

French procedure, corresponding to the prosecuting attorney in the United States. See JUGE D'INSTRUCTION.

PROCURING CAUSE OF THE SALE. Where the owner of property puts it in the hands of a real estate agent for sale and the agent finds a purchaser, but the contemplated purchaser and the owner cannot agree on terms, and the owner, with a view of avoiding the agent's commission, withdraws the property from the hands of the agent without his consent and breaks off the negotiations with the purchaser, but thereafter sells the property to the purchaser brought to his attention by the agent, or to a third person who he knows is acting for him, the agent should be treated as the "procuring cause of the sale" and entitled to his commission. 161 Ky. 517, 171 S. W. 153.

PRODES HOMMES. See PRUD'HOMMES.

PRODIGAL. In Civil Law. A person who, though of full age, is incapable of managing his affairs, and of the obligations which attend them, in consequence of his bad conduct, and for whom a curator is therefore appointed.

PRODIGUS. In the Roman law, a spendthrift whose extravagance was such as to render him incapable of managing his own affairs, and to require the appointment of a guardian of his estate for his protection. R. & L. Dict.

PRODITORIE (Law Lat.). Treasonably. This is a technical word formerly used in indictments for treason, when they were written in Latin. Tomlins.

PRODUCE. The product of natural growth, labor, or capital. The produce of a farm has been held not to include beef raised and killed thereon; 6 W. & S. 269; and yearly produce of a farm is held to be confined to crops gathered annually; 19 Conn. 513.

PRODUCE BROKER. A person occupied in buying and selling agricultural or farm products. 1 Abb. 470. See BROKER; COMMISSION MERCHANT; FACTOR.

PRODUCENT. In Ecclesiastical Law. He who produces a witness to be examined.

PRODUCING BOOKS. See CORPORATION.

PRODUCTION. That which is produced or made product; fruit of labor; as the productions of the earth, comprehending all vegetables and fruits; the productions of intellect, or genius, as poems and prose compositions; the productions of art, as manufactures of every kind. 27 Ark. 567.

PRODUCTION OF DOCUMENTS. Where there is an issue either direct or collateral on the forgery of papers, courts of equity or law will compel their production for inspection in advance of trial. A party to an action at law may, before trial, maintain a bill for discovery of letters relied on by the other party to the suit and alleged to have been written by the plaintiff in the bill, but which the plaintiff alleges are forgeries. The production of private writings in which another person has an interest may be had by a bill of discovery in proper cases, or in trials at law by an order for inspection, a notice to produce or a writ of subpoena duces tecum.

The order for inspection, though now provided for by statute in most states, was within the practice of the English common-law courts at an early date. It is resorted to where documents in the possession of the other party are required for use in preparing the pleadings either by the plaintiff; 4 Bing. 539; 1 Taunt. 386; 8 Dowl. 118; 89 Hun 613; or the defendant; 2 Cr. & M. 456; 6 B. & S. 888; 1 App. Div. N. Y. 136; but an order requiring a prospective defendant to produce books at an examination by plaintiff to enable the latter to prepare his complaint is erroneous;

81 Hun 496. Where there was but one copy of an agreement between two persons, he who retained it would be compelled to produce it for the inspection of the other who might also take a copy of it, as, in the case of a partnership agreement; 1 Brod. & B. 318; or a lease; 4 Taunt. 666; or plans constituting part of an agreement sued on; 70 Fed. Rep. 337.

The practice was originally confined to cases in which there was but one copy, but it was speedily extended to any case in which the parties seeking an inspection have an interest in the document; 8 C. B. N. s. 617; nor was it necessary that it should be a single paper, but it extended to correspondence, as, a letter accepting an oral offer; *id.* An order for inspection might also be obtained by a defendant who suggested the alteration or forgery of the document which formed the cause of action; 2 Man. & G. 758. In such a case it was usual and proper for the application to be founded on an affidavit attacking the genuineness of the paper; 3 Cow. 17.

The right of inspection is confined to documents supporting the case of the party applying for it and does not extend to those which support the case of his opponent; 1 Myl. & K. 88; 4 Ves. 66; 8 Eng. Rul. Cas. 712, and notes; nor can the right be used for the purpose of finding out the case of the other party; 6 C. B. N. s. 679; [1897] 2 Q. B. 62; or where the books applied for contain entries of a confidential, privileged nature, not relative to the action, and the legitimate information from them can be obtained at the trial, and they are in possession of the plaintiff and can be produced under subpoena; 20 App. Div. N. Y. 330; and in a libel suit an order will not be made for the production of the original manuscript where the publication is admitted; [1897] 2 Q. B. 189; [1895] 2 Q. B. 148. If, however, the party is entitled to the production of the document as being applicable to his case, his right is unaffected by the circumstance that it discloses the case of his opponent; *id.*; or that it is evidence for the other party's case also; 180 Pa. 14.

The right of common-law courts to order an inspection was established in England by stat. 14 & 15 Vict. c. 99, § 6, which authorized the exercise of the power where an action was pending, and documents were in the control of the other party, of which by a bill of discovery the inspection could be secured. In the United States prior to the statutes of the same character which were passed in most states, the courts were indisposed to assume the power; 6 Co. v. 62; and resort was more frequently had to a bill of discovery, the use of which is now usually unnecessary except in special cases. There is no federal statute definitely applying to the subject, though Rev. Stat. §§ 724, 858, 914, provide for the production of documents at the trial and in those courts therefore to secure an inspection before the trial a bill of discovery must still be resorted to. At least it would appear that the weight of the earlier authorities confines production under the section cited to the trial; 23 Fed. Rep. 82; 32 id. 743; *contra*, 9 id. 577; 67 id. 18. See, also, 1 Post. Fed. Pr. § 267.

As to notice to produce and subpoena duces tecum, see those titles.

Public documents are subject to the general rule that their inspection will not be ordered where it would be detrimental to the public interest; 3 Tayl. Ev., 9th ed. § 1483; 1 Greenl. Ev. §§ 251, 476. As to the right of inspection of public records generally, see RECORDS.

It has been held that corporation books are not open to the inspection of strangers; 8 Term 590; 8 B. & C. 375; 44 Barb. 64; or in a litigation to which the corporation is not a party; 35 Fed. Rep. 15; *contra*, 15 id. 716; but its members or stockholders or officers always have the right of inspection and production in their interest; 3 Pick. 108; 70 N. Y. 220; 103 Pa. 111; 40 N. J. Eq. 392; 28 La. Ann. 204; 63 Vt. 519.

An objection to the production of documents on the ground that they may tend

to criminate the party ordered to produce them must be taken only to the production of the documents alleged to have that effect and not to the order; [1897] 2 Q. B. 124. A person who has obtained an order for inspection of books cannot have irrelevant parts kept concealed during the whole litigation or unsealed and resealed on oath from time to time as the books are required in business, so as to cause interruption of it; it is sufficient if irrelevant entries are covered, during the actual inspection, with the affidavit of the person producing them that nothing material has been covered; [1897] 1 Ch. 761.

The provisions for production and inspection of documents in the New Jersey common-law practice act are held to apply to the court of chancery; 38 Atl. Rep. (N. J.) 864. An order for production will be refused where the party applying refuses to state how the papers in question are material; 25 S. E. Rep. (Ga.) 31.

Too great generality in the application for production of books is cured by particularizing books in the order; 12 Misc. Rep. 3.

See NOTICE TO PRODUCE PAPERS; SUBPOENA DUCES TECUM; PROFERT IN CURIA.

PRODUCTION OF SUIT (*productio sectæ*). The concluding clause of all declarations is, "and thereupon he brings his suit." In old pleading, this referred to the production by the plaintiff of his *secta* or suit, *i. e.* persons prepared to confirm what he had stated in the declaration. The phrase has remained; but the practice from which it arose is obsolete; 3 Bla. Com. 295; Steph. Pl., Andr. ed. § 220.

PROFANE. That which has not been consecrated. By a profane place is understood one which is neither sacred, nor sanctified, nor religious. Dig. 11. 7. 2. 4.

PROFANELY. In a profane manner. In an indictment, under the act of assembly of Pennsylvania, against profanity, it is requisite that the words should be laid to have been spoken profanely. 11 S. & R. 394. See BLASPHEMY.

PROFANENESS, PROFANITY. In Criminal Law. A disrespect to the name of God or His divine providence. This is variously punished by statute in the several states. See Cooley, Const. Lim., 2d ed. 580. See BLASPHEMY.

PROFECTITUS (Lat.). In Civil Law. That which descends to us from our ascendants. Dig. 23. 3. 5.

PROFER. An offer or proffer.

PROFERT IN CURIA (Lat. he produces in court: sometimes written *profert in curiam*, with the same meaning). In Pleading. A declaration on the record that a party produces the deed under which he makes title in court. In ancient practice, the deed itself was actually produced; in modern times, the allegation only is made in the declaration, and the deed is then constructively in possession of the court; 3 Salk. 119; 6 M. & G. 277; 11 Md. 322; 67 Fed. Rep. 597.

Profert is, in general, necessary when either party pleads a deed and claims rights under it, whether plaintiff; 2 Dutch. 293; or defendant; 17 Ark. 279; to enable the court to inspect and construe the instrument pleaded, and to entitle the adverse party to oyer thereof; 10 Co. 92 b; 1 Chitty, Pl. 414; 1 Archb. Pr. 164; Andr. Steph. Pl. 160; and is not necessary when the party pleads it without making title under it; Gould, Pl. c. 7, p. 2, § 47. But a party who is actually or presumptively unable to produce a deed may plead it without profert, as in suit by a stranger; Com. Dig. Pleader, O 8; Cro. Jac. 217; Cro. Car. 441; or one claiming title by operation of law; Co. Litt. 225; Bac. Abr. Pleas (I 12); 5 Co. 75; or where the deed is in the possession of the adverse party or is lost. In all these cases the special facts must be shown, to excuse the want of profert. See Gould, Pl. c. 8, p. 2;

Lawes, Pl. 96; 1 Saund 9 a. Profert and oyer are abolished in England by the Common Law Procedure Act, 15 & 16 Vict. c. 76; and a provision exists, 14 & 15 Vict. c. 90, for allowing inspection of all documents in the possession or under the control of the party against whom the inspection is asked. See 25 E. L. & E. 304. In many of the states of the United States profert has been abolished, and in some instances the instrument must be set forth in the pleading of the party relying upon it. The operation of profert and oyer, where allowed, is to make the deed a part of the pleadings of the party producing it; 11 Md. 322; 3 Cra. 234. See 7 Cra. 176; PRODUCTION OF DOCUMENTS.

PROFESSION. A public declaration respecting something. Code 10. 41. 6. A state, art, or mystery; as, the legal profession. Dig. 1. 13. 6. 4; Domat, *Dr. Pub.* 1. 1, t. 9, s. 1, n. 7.

In Ecclesiastical Law. The act of entering into a religious order. See 17 Viner, Abr. 545.

The term professions in a statute laying a tax includes lawyers; 59 Ga. 187. See 41 Mich. 155; 19 id. 217.

PROFESSIONAL ETHICS. See ETHICS, LEGAL.

PROFIT A PRENDRE. The right to take soil, gravel, minerals, and the like from the land of another. An interest in the estate. 49 Fed. Rep. 549; Washb. Easem. 11. This right may be the subject of a separate grant; 85 Me. 448. It is an interest in the estate; 22 Wend. 425; 70 N. Y. 419.

Profit à prendre is a peculiar species of easements. It is "the right to take something which is the produce of the land." It is in its nature an incorporeal right incapable of livery, though it is imposed upon corporeal or tangible property. It may be appurtenant to a dominant tenement, in the nature of an easement, or it may be a right in gross. It may be held apart from the possession of land, and differs therein from an easement, which requires a dominant tenement for its existence. When attached to other land it is in the nature of an easement; when not so attached it cannot properly be said to be an easement, but is an interest or estate in the land itself. Jones, Easements § 49.

The right can be acquired only by grant or prescription. Such a right in the soil of another cannot be claimed by custom. Thus a claim by the inhabitants of a township upon the land of another to take sand, etc., from the seashore, is without foundation; 15 C. B. N. s. 240; 17 N. H. 524.

The privilege of watering cattle at a pond or brook or of taking the water for domestic purposes is an easement and not a *profit à prendre*; 5 Ad. & El. 758; the right to take seaweed from the shores is a right to a profit in the soil; 48 Me. 100; and so is the right to take coal or any mineral from the land of another; 53 Pa. 206; and so is a right to use lands of another to cut grass, for pasturage, for hunting, or fishing; Jones, Easements 57; so is the right to take and kill game on land or water; 9 Q. B. D. 315.

The right to *profit à prendre* acquired by grant or prescription as appurtenant to certain lands cannot be used as a right in gross by one not holding any connection with the land; 12 C. B. N. s. See EASEMENTS: A PRENDRE.

PROFITS. The advance in the price of goods sold beyond the cost of purchase. See 84 N. Y. 23.

The gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.

An excess of the value of returns over the value of advances.

The excess of receipts over expenditures; that is, net earnings. 15 Minn. 519.

The receipts of a business, deducting

current expenses; it is equivalent to net receipts. 94 U. S. 500; 5 Super. Ct. Pa. 276.

This is a word of very extended signification. In commerce, it means the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor, it is well understood to imply the net return to the capital of stock employed, after deducting all the expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself for superintending the employment of his capital or stock. Adam Smith, *Wealth of Nat.-b. i. c. 6*, and McCulloch's Notes; Mill, *Polit. Econ. c. 15*. After indemnifying the capitalist for his outlay, there commonly remains a surplus, which is his profit, the net income from his capital. 1 Mill, *Polit. Econ. c. 15*. The word profit is generally used by writers on political economy to denote the difference between the value of advances and the value of returns made by their employment.

The profit of the farmer and the manufacturer is the gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed,—whether land, buildings, machinery, instruments, or money. The rents and profits of an estate, the income or the net income of it, are all equivalent expressions. The income or the net income of an estate means only the profit it will yield after deducting the charges of management; 5 Me. 202; 35 id. 420.

Under the term profit is comprehended the produce of the soil, whether it arise above or below the surface; as, herbage, wood, turf, coals, minerals, stones; 23 S. E. Rep. (W. Va.) 666; also fish in a pond or running water. Profits are divided into *profits à prendre*, or those taken and enjoyed by the mere act of the proprietor himself, and *profits à vendre*, namely, such as are received at the hands of and rendered by another. Hamm. N. P. 172.

Profits are divided by writers on political economy into gross and net,—gross profits being the whole difference between the value of advances and the value of returns made by their employment, and net profits being so much of that difference as is attributable solely to the capital employed. The remainder of the difference, or, in other words, the gross profits minus the net profits, has no particular name; but it represents the profits attributable to industry, skill, and enterprise. See Malthus, *Political Econ.*; McCulloch, *Political Econ.* 563. But the word profit is generally used in a less extensive signification, and presupposes an excess of the value of returns over the value of advances.

It was said by Jessel, M. R., that "there is no such thing as gross profits." See 10 App. Cas. 446. Where a life insurance company issued "participating policies" for an increased premium, agreeing at the end of every five years to give two-thirds of the "gross profits" of such policies to the policy holders, it was held that this two-thirds constituted "annual profits or gains" of the company and were assessable to income tax; 10 App. Cas. 438, per Lords Blackburn and Fitzgerald, Lord Bramwell dissenting. The case seems to disregard the nature of the return of that portion of the premium charged in advance and subsequently ascertained to have been excessive, which the companies curiously call "dividends." See DIVIDENDS; NET PROFITS; OPERATING EXPENSES.

Using profit in this more limited and popular sense, persons who share profits do not necessarily share losses; for they may stipulate for a division of gain, if any, and yet some one or more of them may, by agreement, be entitled to be indemnified against losses by the others; so that whilst all share profits, some only bear losses. Persons who share gross returns share profits in the sense of gain; but they do not by sharing the returns share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits if there

are any, it is so only incidentally, and because such profits are included in what is divided: it is not a division of profits as such; and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or loss, or neither; 1 Lindl. Part. 8, 17. These considerations have led to the distinction between agreements to share profits and agreements to share gross returns, and to the doctrine that, whilst an agreement to share profits creates a partnership, an agreement to share gross returns does not. See PARTNERS; PARTNERSHIP.

Commissions may be considered as profits, for some purposes. A participation in commissions has been held such a participation in profits as to constitute the participants partners; 2 H. Bla. 235; 4 B. & Ald. 663. So, commissions received from the sales of a pirated map are profits which must be accounted for by the commission merchant on a bill by the proprietor of the copyright; 2 Curt. C. C. 608. As between partners, all gains which equitably belong to the firm, but which are clandestinely received by one partner, are accounted profits of the firm; Story, Part. § 174; 2 Curt. C. C. 608.

Depreciation of buildings in which a business is carried on, though they were erected by expenditure of the capital invested, is not ordinarily or necessarily considered in estimating the profits; 94 U. S. 500.

In computing the profits to which a party is entitled, interest on fines, debts, and taxes should be charged off and also a proper sum for depreciation of plant; 24 N. Y. Supp. 547.

A direction or power given in a will to raise money out of the rents and profits of an estate for the payment of debts and legacies, or to raise a portion within a definite period, within which it could not be raised out of the annual rents and profits, authorizes a sale; 2 Ch. Cas. 205; 1 Vern. 104; 2 id. 26, 310, 420, 424; 1 Ves. Sen. 491. And judges in later times, looking to the inconvenience of raising a large sum of money in this manner, have inclined much to treat a trust to apply the rents and profits in raising a portion, even at an indefinite period, as authorizing a sale or mortgage; 2 Jarm. Wills, 282; 1 Ves. 234; 1 Ves. Sen. 42. But, as a general rule, the question whether the money is to be raised by a sale or mortgage or out of the annual rents and profits will depend upon the nature of the purpose for which the money is to be raised, and the general tenor of the will; 2 Jarm. Wills 383; 3 Bro. P. C. 66; 3 Yo. & J. 360; 1 Atk. 550; 1 Russ. & M. 590; 2 P. Wms. 63. The circumstances that have chiefly influenced the decisions are—the appointment of a time within which the charge cannot be raised by annual profits; the situation of the estate, where a sale or mortgage would be very prejudicial, as in the case of a reversion, especially if it would occasion any danger that the charge would not be answered in its full extent; the nature of the charge, as where it is for debts or portions, and, in the latter instance, the age or death of the child; 2 Ves. 480, n. 1; 2 Vern. 26, 73, 420; 2 P. Wms. 13, 650; 1 Atk. 506, 550; 2 id. 358. But in no case where there are subsequent restraining words has the word profit been extended; Prec. Ch. 586, note, and the cases cited there; 1 Atk. 506; 2 id. 105.

A devise of the rents and profits of land is equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interest therein; 1 Ves. Sen. 171; 2 B. & Ald. 42; 9 Mass. 372; 1 Cush. 93; 1 Spenc. 142; 17 Wend. 393; 85 Me. 414; 1 Bro. C. C. 310. A direction by the testator that a certain person shall receive for his support the net profits of the land is a devise of the land itself, for such period of time as the profits were devised; 35 Me. 419.

An assignment of the profits of an estate amounts to an equitable lien, and would entitle the assignee in equity to insist upon a mortgage. Thus, if a tenant for life of the real estate should, by covenant, agree to set apart and pay the whole or a portion

of the annual profits of that estate to trustees for certain objects, it would create a lien in the nature of a trust on those profits against him and all persons claiming as volunteers or with notice under him; 2 Cox, Ch. 253; s. c. 1 Ves. 477; 3 Bro. C. C. 531, 538.

Profits expected to arise from merchandise employed in maritime commerce are a proper subject of insurance in England and in the United States; 3 Kent 271; 16 Pick. 399; 1 Sumn. 451. So in Italy; Targa, cap. xliii. no. 5; Portugal; Santerna, part iii. no. 40; and the Hanse Towns; 2 Magnus 213; Beneck, Ass. chap. 1, sect. 10, vol. 1, p. 170. But in France; Code de Comm. art. 347; Holland; Rynkershoek, Quæst. Priv. Jur. lib. iv. c. 5; and in Spain, except to certain distant parts; Ordinanze de Bilbao, ch. xxii. art. 7, 8, 11; it is illegal to insure expected profits. Such insurance is required by the course and interest of trade, and has been found to be greatly conducive to its prosperity; 3 Kent 271; 2 East 544; 1 Arn. Ins., 8th ed. 37, 205. Sometimes the profits are included in a valuation of the goods from which they are expected to arise; sometimes they are insured as profits; 1 Johns. 433; 3 Pet. 222; 1 Sumn. 45; 6 E. & B. 312. They must be insured as profits; May, Ins. § 79. They may be insured equally by valued and by open policies; 1 Arn. Ins. 205; 3 Camp. 287. But it is more judicious to make the valuation; 1 Johns. 433; 3 Kent 273. The insured must have a real interest in the goods from which the profits are expected; 3 Kent 271; but he need not have the absolute property in them; 16 Pick. 397, 400. See May, Ins. § 79; INSURANCE.

A trustee, executor, or guardian, or other person standing in a like relation to another, may be made to account for and pay all the profits made by him in any of the concerns of his trust, as by embarking the trust funds in trade; 1 Story, Eq. Jur. 465; 2 Myl. & K. 66, 672, note; Lindl. Part., Am. ed. 523; 1 Ves. 32, 41; 11 id. 61; 2 V. & B. 315; 1 J. & W. 122, 131; 2 Will. Exec. 139, n.; 1 S. & R. 245; 1 Maule & S. 412; 2 Bro. C. C. 400; 10 Pick. 77; Lind. Part.

The expected profits of a special contract may be reckoned as a part of the damages for a failure to fulfil it, where it appears that such profits would have accrued from the contract itself as the direct and immediate consequence of its fulfilment; 13 How. 307, 344; 7 Cush. 516, 522; 8 Exch. 401; 16 N. Y. 489; Mayne, Dam. 15; 2 C. B. n. s. 592; 90 Ga. 416; 9 Utah 175; 66 Hun 631; 83 Wis. 309; 92 Mich. 606; 88 id. 390. But where the profits are such only as were expected to result from other independent bargains actually entered into on the faith of such special contract, or for the purposes of fulfilling it, or are contingent upon future bargains or speculations or states of the market, they are too remote and uncertain to be relied upon as a proper basis of damages; 13 How. 307, 344; 38 Me. 361; 7 Cush. 516, 522; 7 Hill 61; 13 C. B. 353. See, also, 21 Pick. 378, 381; 1 Pet. C. C. 85, 94; 3 Wash. C. C. 184; 1 Pet. 172; 11 S. & R. 445; 48 Ill. App. 26. Profits may be recovered as damages for the breach of a contract, where they are not uncertain or remote, or where, from the terms of the contract itself or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time the contract was made; 139 U. S. 199; 153 id. 540. See MEASURE OF DAMAGES; PATENT.

A purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; 2 Sugd. Vend. ch. 16, sect. 1, art. 1; 6 Dana 298; 3 Gill 82. See 12 M. & W. 761.

Under what circumstances a participation or sharing in profits will make one a partner in a trade or adventure, see PARTNERS; PARTNERSHIP.

PROGRESSION (Lat. *progressio*; from *pro* and *gredior*, to go forward).

That state of a business which is neither the commencement nor the end. Some act done after the matter has commenced and before it is completed. Plowd. 343. See CONSUMMATION; INCEPTION.

PROHIBITIO DE VASTO DIRECTA PARTI. A judicial writ which was formerly addressed to a tenant, prohibiting him from waste pending suit. Reg. Jud. 21.

PROHIBITION (Lat. *prohibitio*; from *pro* and *habeo*, to hold back). Forbidden to do; inhibition; interdiction. 74 Md. 545.

In Practice. The name of a writ issued by a superior court, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. 3 Bla. Com. 112; Com. Dig.; Bac. Abr.; Viner, Abr.; 2 Sell. Pr. 308; Ayliffe, Parerg. 484; 2 H. Bla. 533; 4 Wash. 655; 142 U. S. 479; 147 id. 14.

The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed; Bull. N. P. 219; or when by the exercise of its jurisdiction, the inferior court would defeat a legal right; 2 Chitty, Pr. 355; or to prevent a judge from granting a new trial after expiration of the trial term; 118 Mo. 42.

A writ of prohibition is a civil remedy given in a civil action, even when instituted to arrest a criminal prosecution; 129 U. S. 104; and only lies in case of the unlawful exercise of judicial functions; 31 W. Va. 617; 2 Hill 367; 41 Mo. 44; 33 Wis. 93; 36 Barb. 341.

The writ of prohibition issues only in cases of extreme necessity, and before it can be granted, it must appear that the party aggrieved has applied in vain for redress; and it is never allowed except in cases of usurpation or abuse of power, and not then unless other existing remedies are inadequate to afford relief, or no other remedy exists; 30 W. Va. 532; 40 La. Ann. 837. When a writ of error or appeal furnishes a complete and effective remedy, a writ of prohibition will not be issued; 98 Mo. 252; 40 La. Ann. 837; 46 id. 29; 78 Ga. 693; 84 Va. 696. Prohibition will not issue after judgment and sentence unless want of jurisdiction appears on the face of the proceedings, but before judgment the supreme court can examine not simply the process and pleadings of record, but also the facts and evidence upon which action was taken; 143 U. S. 472, 513, 515.

A writ of prohibition will not be issued to restrain a district court from taking jurisdiction of a petition of the owner of a barge for the benefit of the limited liability act; 146 U. S. 357.

When a party aggrieved by a judgment has an appeal to the supreme court which becomes inefficacious through his neglect, a writ of prohibition will not issue to prevent the enforcement of the judgment; 143 U. S. 472, 513.

"Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings." See 155 U. S. 402, followed in 166 U. S. 110.

The supreme court of Mississippi has re-visory jurisdiction only and cannot grant a writ of prohibition to circuit courts; 47

Miss. 200, 668.

The term *prohibition* is also applied to the interdiction of making and of selling or giving away, intoxicating liquors, either absolutely or for other than medicinal, scientific, and religious (sacramental) purposes. Anderson's L. Dict. See LIQUOR LAWS. NATIONAL PROHIBITION ACT.

PROHIBITION COMMISSIONER AND DIRECTORS.

The regulations of the National Prohibition Act provide for and designate a general agent of the Commissioner of Internal Revenue, called a prohibition commissioner, who is authorized, among other things, to issue and sign permits to sell liquor at retail prices for medicinal purposes through licensed pharmacists, and also a local agent, in each State or district, called a prohibition director, who is authorized, among other things to issue and sign permits to purchase liquor to be used and sold under the permits last mentioned.

The act and the regulations make it plain that the prohibition commissioner and the prohibition directors are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his directions. 265 U. S. 391.

PROHIBITIVE IMPEDIMENTS.

Those impediments to a marriage which are only followed by a punishment but do not render the marriage null. Bowyer, Mod. Civ. Law 44.

PROJET. In International Law. The draft of a proposed treaty or convention.

PROLES (Lat.). Progeny; such issue as proceeds from a lawful marriage; and, in its enlarged sense, it signifies any children.

PROLETARIUS. In Civil Law. One who had no property to be taxed, and paid a tax only on account of his children (*proles*); a person of mean or common extraction. The word has become, in French, *prolétaire* signifying one of the common people; and in English proletarian.

PROLICIDE (Lat. *proles*, offspring, *cædere*, to kill). In Medical Jurisprudence. A word used to designate the destruction of the human offspring. Jurists divide the subject into *fœticide*, or the destruction of the *fœtus in utero*, and *infanticide*, or the destruction of the new-born infant. Ryan, Med. Jur. 137.

PROLIXITY. The unnecessary and superfluous statement of facts in pleading or in evidence. This will be rejected as impertinent. 7 Price 278, n.

PROLOCUTOR (Lat. *pro* and *loquor*, to speak before). In Ecclesiastical Law. The president or chairman of a convocation.

The speaker of the house of lords is called the prolocutor. The office belongs to the lord chancellor by prescription; 3 Steph. Com. 347.

PROLONGATION. Time added to the duration of something.

When the time is lengthened during which a party is to perform a contract, the sureties of such a party are, in general, discharged, unless the sureties consent to such prolongation. See GIVING TIME.

In the civil law the prolongation of time to the principal did not discharge the surety; Dig. 2. 14. 37; 12. 1. 40.

PROLYTÆ (Lat.). In Roman Law. The term used to denominate students of law during the fifth and last year of their studies. They were left during this year very much to their own direction, and took the name *prolytæ, omnino soluti*. They studied chiefly the Code and the imperial constitutions. See Dig. Pref. Prim. Const. 2; Calvinus, Lex.

PROMATERTERA (Lat.). Great maternal aunt; the sister of one's grand-mother. Inst. 3. 6. 3; Dig. 38. 10. 10. 14.

PROMISE (Lat. *promitto*, to put forward). An engagement by which the promisor contracts with another to perform or do something to the advantage of the latter.

Within the statute of frauds a promise to pay the debt of another is an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made, continues liable. 60 Conn. 71.

When an oral promise is made, all that is said at the time in relation to it must be considered; if, therefore, a man promises to pay all he owes, accompanied by a denial that he owes anything, no action will lie to enforce such a promise; 15 Wend. 187.

Strictly speaking a promise is not a representation; the failure to make it good may give a cause of action, but it is not a false representation, which will authorize the rescission of a contract; 96 Ala. 564.

And when the promise is conditional, the condition must be performed before it becomes of binding force; 7 Johns. 36. See **CONDITION**; **CONTRACTS**; 5 East 17; 2 Leon. 224; 4 B. & Ald. 595.

The words "I promise" in a note signed by several, will apply to and bind each of them. 6 Dana (Ky.) 341.

PROMISE OF MARRIAGE. A contract mutually entered into by a man and a woman that they will marry each other. Every marriage is necessarily preceded by an express or implied contract of this description, as a wedding cannot be agreed upon and celebrated at one and the same instant; Addison, Contr. 1196.

When a man and a woman agree to marry and subsequently either one refuses, the other may bring suit for damages, such suits being called breach of promise suits. It is no defence to an action for breach of promise that the defendant was married if the plaintiff did not have knowledge of such fact; 60 N. Y. Sup. Ct. 222; 133 N. Y. 633. If a man refuse to marry a woman she need not make a demand before bringing action; 77 Wisc. 663. Before the Reformation no action for breach of promise could be maintained, for marriage was a matter of spiritual jurisdiction. It was not till the middle of the seventeenth century that marriage was recognized by our law as a temporal benefit, and a breach of promise as cognizable by the temporal courts; 20 Q. B. D. 494, 504, 505.

A promise of marriage is not to be likened to an actual marriage. The latter, as has been seen in the article on marriage, is not a contract, but a legal relation; while the former is an executory contract in the strict sense of the term, and governed in general by the ordinary law of contracts, though it has certain peculiarities of its own. As in other contracts, the parties must be *sui juris*. If, therefore, the man or the woman be an infant, or labor under any other legal disability, he or she will not be bound by a promise of marriage; but if one of the parties be an infant and the other be an adult, the promise will be binding upon the latter; Stra. 937; 5 Cow. 475; 7 id. 22; 5 Sneed 659; 1 D. Chippm. 252; 42 Ill. App. 511. A promise made during infancy may be ratified after the infant attains majority. A late English statute requires a new and distinct contract, after majority, in order to bind the infant on his promise to marry after he comes of age; but a new contract may be inferred from continued acceptance of the engagement; L. R. 5 C. P. 410; and see 4 C. P. Div. 485. Neither does it follow, as we shall see presently, that a promise of marriage is not binding because the parties to the promise cannot form a valid marriage; they may be competent to contract, though not competent to marry.

There must be a legal and valid consideration; but as there are always mutual promises, they are a sufficient consideration for each other. There must be a meeting of the minds of the parties, *i. e.* a request or proposition on the one side, and an assent on the other. If the communications

between the parties are verbal, the only questions which usually arise relate to evidence and proof. The very words or time or manner of the promise need not be proved, but it may be inferred from the conduct of the parties, and from the circumstances which usually attend an engagement to marry: as, visiting, the understanding of friends and relations, preparations for marriage, and the reception of the man by the woman's family as a suitor; 3 Salk. 16; 15 Mass. 1; 2 D. & C. 282; Leake, Contr. 210; 13 Pa. 331; 1 Ohio St. 26; 2 C. & P. 553; 6 Cow. 254; 26 Conn. 398; 4 Zab. 291; 65 Vt. 273. But as to the evidence of a contract to marry, more direct proof is now commonly required than formerly, since modern statutes permit parties themselves to take the stand; Schoul. Husb. & W. § 43. Therefore a promise cannot be inferred from devoted attention, frequent visits, and apparently exclusive attention; 53 N. Y. 267; nor from mere presents or letters not to the point; see 2 Brewst. 487; [1891] 2 Q. B. 534; nor from the plaintiff's wedding preparations, unknown to the defendant; 48 Ind. 562; 63 Ill. 41; nor from the woman's unexplained possession of an engagement ring; 2 Brewst. 487. See, generally, 53 N. Y. 267.

A later New York case holds that under the law allowing parties to an action to testify, a promise of marriage cannot be inferred from the mere proof of circumstances such as usually attend an engagement to marry. In the absence of fraud, there must be proof of an actual contract; a meeting of minds of the two parties. Courtship alone or mere intention to marry is not enough. Thorough acquaintance with character, habits, and disposition is essential in order to enter into such a contract intelligently, and an opportunity must be allowed to form the acquaintance which is required, without raising the inference of a contract; 151 N. Y. 598. Mere courtship is not an agreement to marry; 14 Am. R. 111; 63 Am. Dec. 529; 63 Ill. 41.

When the parties are at a distance from each other, and the offer is made by letter, it will be presumed to continue for a reasonable time for the consideration of the party addressed; and if accepted within a reasonable time, and before it is expressly revoked, the contract is then complete; 1 Pars. Contr. 84. No particular form of word is necessary; 53 N. Y. 267.

A promise of marriage is not within the third clause of the fourth section of the statute of frauds, relating to agreements made upon consideration of marriage; but if not to be performed within a year, it has been held to be within the fifth clause, and must, therefore, be in writing in order to be binding; 1 Ld. Raym. 387; 58 Ind. 29; 2 N. H. 515. But the later cases are inclined to construe the statute so as not to affect promises to marry; 56 Me. 187; 20 Conn. 493; Schoul. Husb. & W. § 44; the marriage may be performed within a year, and that is enough. See 85 Ill. 232.

If no time be fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period, considering the circumstances of the age, pecuniary means, etc., of the contracting parties, and either party may call upon the other to fulfil the engagement, and in case of default may bring an action for damages. If both lie by for an unreasonable period, and do not treat the contract as continuing, it will be deemed to be abandoned by mutual consent. If the parties are somewhat advanced in years, and the marriage is appointed to take place at a remote period of time, the contract would be voidable at the option of either party, as in restraint of marriage; Addison, Contr. 678. The fact that the plaintiff consented to a two years' postponement of the wedding-day does not relieve defendant from his promise; 71 Hun 137.

Upon a refusal to marry, an action lies at once, although the time set for the marriage has not come; Leake, Contr. 752; 42 N. Y. 246; 60 N. Y. Super. Ct. 222; so if a party puts it out of his power to perform his promise of marriage; 27 Mich. 217; 15

M. & W. 189. An action lies when one party has given notice that he will not fulfil his promise, although the time for fulfilment has not arrived; L. R. 8 C. P. 167. See **PERFORMANCE**. A refusal to fulfil the contract may be as well manifested by acts as by words. After the lapse of a reasonable time, if one party, without excuse, neglects or refuses to fulfil his promise, the other may consider this a breach and sue; 42 Mich. 346. It is sufficient if plaintiff shows that defendant has violated his promise by refusing to marry her, without averring or proving an offer on her part to marry defendant; 25 Atl. Rep. (R. I.) 346. See 71 Wis. 663.

It has been said that the action has curious points of affinity with actions of tort, one of which is a very large discretion given to the jury as to damages; Poll. Torts 184; and damages are often given which are, in fact, exemplary; L. R. 1 C. P. 331. The amount awarded is usually estimated according to plaintiff's loss of reputation, wealth, social position, and prospects in life, as well as the endurance of mortification, pain, or disgrace; 12 Ohio St. 313; 53 Wis. 462; 8 Barb. 323; 58 Mo. 600; 52 Mich. 336.

The defences which may be made to an action for a breach of promise of marriage are, of course, various; but it is only necessary to notice in this place such as are in some degree peculiar. Thus, if either party has been convicted of an infamous crime, or has sustained a bad reputation generally, and the other was ignorant of it at the time of the engagement, or if the woman has committed fornication, and this was unknown at the time to the man who promised to marry her, or if the woman prove unchaste subsequently; 77 Pa. 504; 51 Ill. 288; or if the woman is deeply involved in debt at the time of the engagement, and the fact is kept secret from her intended husband; Add. Contr. 680; but see 1 E. B. & E. 7, 96; or if false representations are made by the woman; or by her friends in collusion with her, as to her circumstances and situation in life and the amount of her fortune and marriage portion, either of these will constitute a good defence; 1 C. & P. 350, 529; 3 Esp. 236; 44 Me. 164; 1 C. & K. 463; 5 Bingh. N. C. 54; 5 La. Ann. 316; 18 Ill. 44. But it has been held not to be a defence that the plaintiff at the time of the engagement was under an engagement to marry another person, unless the prior engagement was fraudulently concealed; 1 E. B. & E. 796. But see 2 Pars. Contr. 550. And the defendant's pre-engagement would be no defence; Schoul. Husb. & W. § 48. It is not justification of a breach of promise to marry a woman, to show that she has been heard to use obscene language; 8 Can. L. J. 426; and where marriage between cousins is not forbidden by statute, such relationship will not mitigate or excuse a breach of promise to marry; 78 Wis. 72. A bare offer of marriage is not a defence to a prosecution for seduction; it must be accepted; 50 Pac. Rep. (Ore.) 800; but the contrary was held in 27 S. W. Rep. (Ky.) 815, which is said to be the only case sustaining that view; 57 Alb. L. J. 51. The general rule is undoubtedly that nothing short of actual marriage is a bar; 79 Ia. 703; 82 id. 393; 118 Mo. 181; 97 Cal. 448.

If after the engagement either party is guilty of gross misconduct, inconsistent with the character which he or she was fairly presumed to possess, the other party will be released; 4 Esp. 256; so if either party is guilty of acts of unchastity after the making of the promise, the other party will be absolved; 51 Ill. 288; 77 Pa. 504; but mutual improprieties and lewdness between the parties will not be allowed to bar the action or to go in mitigation or aggravation of damages; 3 Pittsb. 84; or excuse the performance of the contract; 107 Mo. 471. If the engagement is made without any agreement respecting the woman's property, and she afterwards disposes of any considerable portion of it without her intended husband's knowledge and consent, or if she insists upon having her

property settled to her own separate use, it is said that this will justify him in breaking off the engagement: *Add. Contr.* 1201. So, if the situation and position of either of the parties as regards his or her fitness for the marriage relation is materially and permanently altered for the worse (whether with or without the fault of such party) after the engagement, this will release the other party. Thus, if one of the parties is attacked by blindness, or by an incurable disease, or any malady calculated permanently to impair and weaken the constitution, this will dispense with the performance of the contract on the part of the other party; *Add. Contr.* 1190; *Pothier, Tr. du Mar. no. 1, 60, 61, 63.* (In 1 *Abb. App. Dec.* 282, it was held that evidence that the plaintiff drank intoxicating liquors to excess was not admissible as a defence.) Whether it will also constitute a defence for the party afflicted, is a question of much difficulty. In 1 *E. B. & E.* 746, 765, where it appeared that the defendant since the engagement had become afflicted with consumption, whereby he was rendered incapable of marriage without great danger of his life, it was held, by six judges against five, that this constituted no defence; though it seemed to be agreed that it would have been a good defence for the other party.

The common opinion that an agreement to marry between persons incapable of forming a valid marriage is necessarily void, is erroneous. If the disability pertains only to one of the parties, and the other party was ignorant of it at the time of the engagement, it will constitute no defence for the former. Thus, if a man who already has a wife living makes a promise of marriage to another woman who is ignorant of the former marriage, he will be liable in damages for a breach of his promise, although a performance is impossible; *Leake, Contr.* 597; 2 *C. & P.* 553; 7 *C. B.* 999; 5 *Exch.* 775; 29 *Barb.* 23; 106 *Mass.* 339; 60 *Hun* 578. Otherwise, if the woman knew at the time the engagement to marry was entered into that the man was married; 39 *N. J. L.* 133; 63 *Ill.* 99. Knowledge that the man was married, obtained by the woman subsequently to the engagement to marry, is not a defence, but may go in mitigation of damages; 1 *Heisk.* 368.

In an action for breach of promise of marriage, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by improper motives; 1 *C. B. N. s.* 660; 1 *Y. & J.* 477; 26 *Conn.* 398. And if the defendant has undertaken to rest his defence, in whole or in part, on the general bad character or the criminal conduct of the plaintiff, and fails altogether in the proof, the jury may take this into consideration as enhancing the damages; 6 *Cow.* 254; 27 *Mo.* 600. Where such an action is brought by a woman, she may prove, in aggravation of damages, that the defendant, under color of a promise of marriage, has seduced her; 106 *id.* 395; *s. c.* 8 *Am. Rep.* 338, *n.*; 42 *Mich.* 346; *s. c.* 36 *Am. Rep.* 442; 37 *Wisc.* 46; 33 *Md.* 288; *s. c.* 3 *Am. Rep.* 174; *L. R. 1. C. P.* 331; 8 *Barb.* 323; 2 *Ind.* 402; 3 *Mass.* 73; 75 *Tex.* 852. But see, *contra*, 2 *Pa.* 80, commented on in 11 *id.* 316; 1 *R. I.* 493. And misconduct, showing that the plaintiff would be an unfit companion in married life, may be given in evidence in mitigation of damages; 1 *Abb. App. Dec.* 282. The defendant may show that his failure to marry the plaintiff proceeded from opposition by his mother to the marriage; 24 *N. Y.* 252; or that he was afflicted with an incurable disease at the time of his breach of the promise to marry, in mitigation of damages; 51 *Ill.* 288; 129 *Ind.* 430. Evidence that the general character of the plaintiff for chastity previously to the engagement was bad, is admissible in mitigation of damages; 71 *Pa.* 240; 4 *Mo. App.* 94; 2 *Bradw.* 236; so is indelicate conduct (not criminal) of plaintiff before the promise

was made; 7 *Wend.* 142. Evidence of the defendant's financial standing is admissible; 42 *Mich.* 346; *s. c.* 36 *Am. Rep.* 442; so of his social position; *Schoul. Husb. & W.* § 49.

See 21 *Alb. L. J.* 327; *Schoul. Husb. & W.* § 40; 5 *So. L. Rev. N. s.* 57; *Maccola, Breach of Promise*; *Bishop, M. & D. chap. xi.*

PROMISEE. A person to whom a promise has been made.

In general, a promisee can maintain an action on a promise made to him; but when the consideration moves not from the promisee, but some other person, the latter, and not the promisee, has a cause of action, because he is the person for whose use the contract was made; *Latch* 272; *Cro. Jac.* 77; 1 *T. Raym.* 271, 368; 4 *B. & Ad.* 435; 1 *N. & M.* 308; *Cowp.* 437; *Dougl.* 142. But see *Carth.* 5; 2 *Ventr.* 307; 9 *M. & W.* 92, 96.

PROMISES. When a defendant has been arrested, he is frequently induced to make confession in consequence of promises made to him that if he will tell the truth he will be either discharged or favored; in such a case, evidence of the confession cannot be received, because, being obtained by the flattery of hope, it comes in so questionable a shape, when it is to be considered evidence of guilt, that no credit ought to be given to it; 1 *Mass.* 144; 1 *Leach* 299. This is the principle; but what amounts to a promise is not so easily defined. See *CONFESSION*; *CONCURRENT PROMISES*; *DEPENDENT PROMISES*; *INDEPENDENT PROMISES*.

PROMISOR. One who makes a promise.

The promisor is bound to fulfil his promise, unless when it is contrary to law, as a promise to steal or to commit an assault and battery; when the fulfilment is prevented by the act of God, as where one has agreed to teach another drawing and he loses his sight, so that he cannot teach it; when the promisee prevents the promisor from doing what he agreed to do; when the promisor has been discharged from his promise by the promisee; when the promise has been made without a sufficient consideration; and perhaps in some other cases.

PROMISSORY NOTE. A written promise to pay a certain sum of money, at a future time, unconditionally. 7 *W. & S.* 264; 2 *Humphr.* 143; 10 *Wend.* 675; 1 *Ala.* 233; 7 *Mo.* 42; 2 *Cow.* 536; 6 *N. H.* 364; 7 *Vern.* 22; 112 *Mo.* 251; the form of a promissory note is unessential, provided it contain the essential ingredients thereof. See 50 *Pac. Rep.* (Mont.) 713.

An unconditional written promise, signed by the maker, to pay absolutely and at all events, a sum certain in money, either to the bearer or to a person therein designated or his order. *Benj. Chalm. Bills* § 271.

A promissory note differs from a mere acknowledgment of a debt without any promise to pay, as when the debtor gives his creditor an I O U. See 2 *Yerg.* 50; 15 *M. & W.* 23. But see 2 *Humphr.* 143; 6 *Ala. N. s.* 373. In its form it usually contains a promise to pay, at a time therein expressed, a sum of money to a certain person therein named or to his order, for value received. It is dated and signed by the maker. It is never under seal; 9 *Hun* 931; even when made by a corporation; 15 *Wend.* 265; 3 *Houst.* 288; 8 *Fed. Rep.* 403. But in *L. R. 3 Ch. Ap.* 758, it was held that a "debenture" under a corporate seal was provable against the company by the indorsee, free from equities between the payee and the corporation, and, *semble*, that it was a promissory note. In 15 *R. I.* 121, it was held that a paper seal of a corporation on an instrument in the form of a promissory note should be regarded as "mere excess." No particular form of words is necessary; but there must be an intention to make a note; see 15 *M. & W.* 23; *Benj. Chalm. Bills*, etc. 274; and it should amount in legal effect to an absolute

promise to pay money; 75 *Cal.* 268.

He who makes this promise is called the *maker*, and he to whom it is made is the *payee*; 3 *Kent* 46. A writing in the form of a note payable to the maker's order, becomes a note by indorsement; 22 *Pa.* 89. A note payable to the maker's order, and indorsed by him in blank, is, in legal effect, a note payable to bearer and is transferable by delivery; 6 *C. C. App.* 423.

Although a promissory note in its original shape bears no resemblance to a bill of exchange, yet when indorsed it is exactly similar to one; for then it is an order by the indorser of the note upon the maker to pay the indorsee. The indorser is as it were the drawer; the maker, the acceptor; and the indorsee, the payee; 4 *Burr.* 669; 4 *Term* 143; 3 *Burr.* 1224.

Most of the rules applicable to bills of exchange equally affect promissory notes. No particular form is requisite to these instruments: a promise to deliver the money, or to be accountable for it, or that the payee shall have it, is sufficient; *Chitty, Bills* 53.

There are two principal qualities essential to the validity of a note: *first*, that it be payable at all events, not dependent on any contingency; 20 *Pick.* 132; nor payable out of any particular fund; 3 *J. J. Marsh.* 170, 542; 5 *Ark.* 441; 2 *Blackf.* 48; 1 *Bibb* 503; 9 *Miss.* 393; 3 *Pick.* 541; 4 *Hawks* 102; 5 *How.* 382. *Second*, it is required that it be for the payment of money only; 10 *S. R.* 94; 47 *Wisc.* 551; 27 *Mich.* 191; 35 *Me.* 364; 11 *Vt.* 268 (though statutes in some states have made notes payable in merchandise negotiable); that is, in whatever is legal tender at the place of payment; 2 *Ames, Bills* 828; and not in bank-notes; though it has been held differently in the state of New York; 9 *Johns.* 120; 19 *id.* 144. The rule on this subject is said to be more strict in England than here, but to have been relaxed there in 2 *Q. B. Div.* 194. It is said that the tendency here is to use the term money in a very wide sense; *Benj. Chalm. Bills*, 2d *Am. ed.* 10.

A promissory note payable to order or bearer passes by indorsement, and although a chose in action, the holder may bring suit on it in his own name. Although a simple contract, a sufficient consideration is implied from the nature of the instrument. See 5 *Com. Dig.* 133, *n.* 151, 472; 4 *B. & C.* 235; 1 *C. & M.* 16. It has been urged that, upon principle, negotiable instruments are contracts binding by their own force, and therefore not requiring any consideration; *Langd. Contr.* § 49. When the back of a note is covered by various indorsements, an assignment of the note, written on a piece of paper pasted to the note, will pass the legal title. See *INDORSEMENT*.

A negotiable instrument payable to bearer is one which, by custom of trade, passes from hand to hand by delivery, and the holder of which for the time being, if he is a *bona fide* holder for value without notice, has a good title, notwithstanding any defect in title in the person from whom he took it; [1891] 1 *Ch.* 270.

As to whether a stipulation in an instrument, otherwise in the form of a promissory note, for the payment of an attorney's fee for the collection of the note in case of dishonor renders the instrument non-negotiable, see *BILLS OF EXCHANGE*.

A promissory note on the face of which, across one end, is written an agreement that the note will be renewed at maturity, is not negotiable; 126 *Pa.* 194; nor is one indorsed "without recourse"; 59 *Fed Rep.* 853.

A promissory note does not discharge the debt for which it is given unless such be the agreement of the parties; it only operates to extend the period for the payment of the debt; 131 *U. S.* 287. The holder of a note which is destroyed may recover on the note without giving a bond of indemnity; 47 *Pac. Rep.* (Col.) 1037. See, also, 9 *Wheat.* 558; 16 *N. Y.* 582; 21 *Grat.* 556; *contra*, 4 *Cal.* 37; 2 *Dev. & B.* Eq. 122; 1 *Humph.* 145. See 7 *B. & C.* 90.

As to promises to pay a debt in specific

articles, see 21 Am. Dec. 422.

See BILL OF EXCHANGE; INDORSEMENT; NOTICE; PAYMENT; Dan. Neg. Instr.; Ames, Bills & Notes; Byles, Bills.

PROMITTOR. In Roman law, he who made the promise in the contract of *stipulatio*. Hunter's Rom. L. (2nd ed.) 460. See STIPULATIO; STIPULATOR; ADSTIPULATOR.

PROMOTERS. Those who, in popular and penal actions, prosecute offenders in their own name and the king's.

Persons or corporations at whose instance private bills are introduced into and passed through parliament. Especially those who press forward bills for the taking of land for railways and other public purposes, who are then called promoters of the undertaking.

Persons who assist in organizing joint stock companies or corporations. Mozl. & W.

It has been said to be a term usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is generally brought into existence; 28 W. R. 351. One who does an act with reference to the formation of a company or in aid of its organization, is, as regards that act, a promoter of the company. Lloyd, Corp. Liab. for Acts of Prom. 17. It applies to any person who takes an active part in inducing the formation of a company, whether he afterwards becomes connected with the company or not; 97 Cal. 610. See 89 Va. 455.

Promoters stand in a relation of trust and confidence to the intended company, and are bound to exercise *uberrima fides*; Lloyd Corp. Liab. 18; 64 Pa. 43; L. R. 6 Ch. Div. 372; their acts are carefully scrutinized; L. R. 3 App. Cas. 1218; they are precluded from making a secret advantage over the other stockholders; 64 Pa. 43.

The relation of promoters to the company has been considered as similar to that of a trustee to a beneficiary; 25 N. E. Rep. (N. Y.) 505; 6 Ch. Div. 371; or of an agent to a principal; *id.*; or as analogous to that of partners; 64 Pa. 43.

As between themselves, the relation has been said to be that of partners; 86 Mo. 382; 2 Rawle 359; *contra*, 84 Minn. 355; or to be rather that of agency; 53 Mo. 815; promoters may, in fact, be partners. It has also been held that their relation towards each other is that of principal and agent; each is liable for such contracts as he authorizes; 64 N. W. Rep. (Minn.) 826.

As to the liability of a corporation in regard to any contract made by its promoters on its behalf (supposing the contract to be one which the corporation, after its organization, could legally have made), these rules have been laid down by a writer in 16 Am. L. Rev. 281.

I. As long as the contract remains executory on both sides, the party who contracted with the promoter cannot enforce the contract against the corporation, unless the corporation has ratified the same; and the corporation cannot enforce the contract against the other contracting party without carrying out all the engagements entered into with the other contracting party at the time of making the contract.

II. When a contract made by a promoter on behalf of a future corporation has been ratified and performed by the latter, it may force the party who contracted with the promoter to perform on his side.

III. When the contract has been executed by the other contracting party, the corporation should be held to perform on its side, if (1) it has ratified the contract, or (2) voluntarily accepted the benefit arising from the performance of the contract in such a manner as to estop the corporation from denying that it has ratified the contract. But on the other hand if the benefit from the contract came to the corporation without any voluntary action on its part, or on the part of those whose acts in regard to the subject-matter of the contract

are to be regarded as the acts of the corporation, then there is no principle in law or in equity on which it can be compelled to carry out engagements entered into without its authority, and which it has never even impliedly ratified.

A promoter though he purport to act on behalf of a projected corporation cannot bind it by acts performed before it came into existence; 86 Tex. 350; also 44 Ark. 383; 63 Mo. App. 477; 29 Pac. Rep. (Utah) 878; 19 N. Y. Supp. 592; 134 N. Y. 197; 39 Pac. Rep. (Colo.) 584; 43 *id.* (Oreg.) 719. It has been said in one case, 143 N. Y. 430, that this rule does not apply to a private corporation; 9 N. Y. Supp. 184. The rule does not apply when there was a *de facto* corporation in existence when the acts were performed; 93 Ill. 153; or when the charter provides that the company shall be liable; 129 Mo. 106; 103 N. Y. 58. "Except as a fiction, therefore, this doctrine that a company can be bound before it is formed, and enters upon its corporate life '*cum onere*,' must be regarded as unfounded in principle. . . . It is discredited in England and has not been followed (as far as can be ascertained) since the decision in 2 Macq. H. of L. 393. The American authorities repudiate it." Lloyd, Corp. Liab. for Acts of Prom. 42, citing 5 H. L. 605. The fact that all the stockholders were promoters and entered into the contract, does not make it binding upon the company when formed; 33 N. W. Rep. (Minn.) 327; 37 Ark. 164; but see 2 Nev. 257. A corporation cannot, by ratification, become liable on a contract made by its promoters before it came into existence; L. R. 3 C. P. 175; L. R. 9 C. P. 503; 86 Tex. 350; *contra*, 59 Conn. 272; 21 Neb. 621; 129 Mo. 106; 50 N. W. Rep. (Wis.) 776; such ratification, if binding, would date back to the original agreement; 59 Conn. 272. It has been held that the company may "adopt" the original contract and thus become liable under it; 86 Tex. 350; 103 N. Y. 58; 141 Mass. 145; but see 150 Mass. 248; 72 Ill. 531. But adoption is, in effect, the making of a new contract on the same terms as the old; L. R. 83 Ch. Div. 16; 51 N. W. Rep. (Minn.) 216. It has been held that estoppel will constitute a ground of liability; 40 Md. 395; 86 Tex. 350.

Where a promoter has contracted for something to be performed after incorporation, the company, if it accept performance, with knowledge of the facts, is liable; 141 Mass. 145; L. R. 33 Ch. Div. 156; 143 N. Y. 430. Where the performance is partly before and partly after incorporation, the company may, by acceptance, render itself liable; 51 N. W. Rep. (Minn.) 216; but see 86 Tex. 350, where services were rendered, under different contracts, before and after incorporation, and a recovery was allowed for the latter and not for the former.

A vote of the directors (under a clause in the articles of association) that the promoter's preliminary expenses be paid, was held not a ground of recovery; L. R. 9 C. P. 503; but see 59 Conn. 272; and a vote of the directors that "the agreement of purchase be ratified" was held not to bind the corporation; L. R. 16 Ch. Div. 125.

A recovery for work done before incorporation, at the request of a promoter, has been allowed on the ground of a *quasi-contractual* obligation; 13 N. Y. Supp. 533; but see 27 Conn. 170; 65 Ill. 328; L. R. 9 C. P. 503; 86 Tex. 350. See Keener, Quasi-Contracts.

Ratification may be express, or may be implied from the voluntary acceptance of the benefit of the contract, whereby an estoppel is worked. See 12 N. H. 205; 15 Barb. 323. See, also, 7 Ch. Div. 338; L. R. 2 C. P. 174. A corporation cannot enforce a subscription to shares made before its formation on the faith of certain promises of its promoters, without fulfilling the promises; 10 N. Y. 550.

Promoters are personally liable on contracts made by them for the intended company when the latter proves abortive; L. R. 2 C. P. 174; and also for subscriptions

paid in to an abortive company, and that without any deduction for expenses incurred; Beach, Priv. Corp. 159; 3 B. & C. 814.

A promoter is not liable *ex contractu* to a person who has been induced by his fraud to take shares in a company, but he may be liable *ex delicto*; 2 E. & B. 476. Promoters are liable in damages to subscribers whose subscriptions are obtained by fraud; 42 Vt. 389; 66 N. Y. 558; a bill in equity lies to recover back money which a person has been induced, through fraud, to invest in a bubble; 2 P. Wms. 153. As against a person acting as promoter, the corporation is entitled to the full benefit of all acts done and contracts made by him while acting in that capacity; and the promoter, as between himself and the corporation, is entitled to no secret profits; he may not purchase property for the corporation, and then sell the same to the corporation at an advance; 61 Pa. 202; 5 Ch. Div. 73, 395; 6 *id.* 371. Where one has already purchased a certain property at a good bargain, it is no fraud to organize a company and sell the property to it at an advance; Thomp. Liab. of Off. 232. See 1 Ch. Div. 182; 4 Hun 192. But if at the time of making the sale he occupies towards the corporation a position of trust, as promoter or otherwise, it would seem that he should not be allowed to sell at an exorbitant price; 16 Am. L. Rev. 289; but see 64 Penn. 43; and he should faithfully state to the company all material facts relating to the property which would influence it in deciding as to the purchase; Thomp. Liab. of Off. 219; L. R. 5 Eq. 464. See 2 Lind. Part. 580.

The writer quoted (Lloyd, Corp. Liab. for Acts of Prom.) states four propositions as the result of the cases as to the relation between the corporation and its promoters: 1. Where a promoter buys property intending to sell it to the company (already in process of formation) he cannot make a profit on the transaction without the fullest disclosure; L. R. 11 Ch. Div. 918. 2. Where one owns property he is at liberty to form a company and sell it at any price and without disclosing his profit, providing he make no fraudulent misrepresentations; 64 Pa. 43. 3. Where one buys property and soon after begins to promote a company, and declares that he bought the property for the company, and effects a sale to the company, he is liable for any profit made, on the ground that he has alleged that he acted as an agent in the matter; 61 Pa. 202. 4. If the promoter receive a gift or commission from the vendors of the property for arranging a sale to the company, he must account therefor; L. R. 11 Ch. Div. 918.

Where a promoter acts as the agent of the company, if he is under no special duty to purchase the land in question for the corporation, he may sell his own land to it, or buy any other land, and sell at a profit, provided he do so fairly, but it must appear that the company had an independent board of directors, who could exercise their own discretion in the purchase of the property; 3 App. Cas. 1218; 23 Can. Sup. Ct. 644; 53 N. J. Eq. 219; he must disclose his interest in the property; 3 App. Cas. 1218; 101 Cal. 94; he must state truly all the material facts; 3 App. Cas. 1218; 101 Cal. 90; 74 Wis. 307. A promoter who acts as a mere agent for the purchase of the property cannot retain a secret profit out of the transaction; 11 Ch. D. 918; 4 C. P. D. 396; 30 Fed. Rep. 538; 122 N. Y. 349; but a profit made with the knowledge and assent of all the members of the corporation may be retained; 14 Ch. D. 390. But where a promoter deals with the corporation at arm's length, he may make such profit as he can; 2 Hare 461.

The remedy for the corporation is either to rescind the contract, if no equities intervene to prevent, or to call upon the promoter to account for his unlawful profit; 4 Russ. 562; 54 N. Y. 408.

When a solvent trader converts his business into a limited liability company, complying with all the statutory requirements, the court will not go behind the transac-

tion and decide that the company is not validly constituted on account of the non-fulfilment of conditions which are not found in the company's acts; [1897] A. C. 22. This case sustains the validity of what are known in England as "one man companies."

The use of the English Company Acts to enable two partners to carry on business with limited liabilities is an abuse of those acts; but the company so created is an effectual company, and the parties cannot be sued as partners, though, possibly, if they and the company were both before the court, the creditors might be entitled to an indemnity from them personally; 74 L. T. 149.

The subject is fully treated by Judge Thompson in his work above cited. See, also, *Alger, Promoters*; 16 Am. L. Rev. 291; 3 Am. & Eng. Dec. in Eq. 489; Keener, *Quasi-Contracts*; *PROSPECTUS*.

PROMOTION STOCK. See STOCK.

PROMPT. Quick, sudden, or precipitate. One who is ready is said to be prepared at the moment; one who is prompt is said to be prepared beforehand. 105 N. Y. 412.

PROMULGATION. The order given to cause a law to be executed, and to make it public; it differs from publication. 1 Bla. Com. 45; Stat. 6 Hen. VI. c. 4.

With regard to trade, unless previous notice can be brought home to the party charged with violating their provisions, laws are to be considered as beginning to operate in the respective collection districts only from the time they are received from the proper department by the collector. Paine 23, 32.

The promulgation of laws is an executive function. The mode may be prescribed by the legislature. It is the extrinsic act which gives a law, perfect in itself, executory force. Unless the law prescribes that it shall be executory from its passage, or from a certain date, it is presumed to be executory only from its passage; 17 La. Ann. 390. Formerly promulgation meant introducing a law to the senate; Aust. Jur. Lect. 28. See *STATUTE*.

PROMUTUUM (Lat.). In Civil Law. A quasi-contract, by which he who receives a certain sum of money, or a certain quantity of fungible things, which have been paid to him through mistake, contracts towards the payer the obligation of returning him as much. Pothier, *de l'Usure*, pt. 3, s. 1; a. 1.

This contract is called *promutuum*, because it has much resemblance to that of *mutuum*. This resemblance consists in this: *first*, that in both a sum of money or some fungible things are required; *second*, that in both there must be a transfer of the property in the thing; *third*, that in both there must be returned the same amount or quantity of the thing received. But, though there is this general resemblance between the two, the *mutuum* differs essentially from the *pro-mutuum*. The former is the actual contract of the parties, made expressly, but the latter is a *quasi-contract*, which is the effect of an error or mistake. 1 Bouvier, Inst. n. 1125.

PRONEPOS (Lat.). Great-grandson.

PRONEPTIS (Lat.). A niece's daughter. A great-granddaughter. Ainsworth, Dict.

PRONOUN. The use of "he" in an instrument, in referring to a person whose Christian name is designated by an initial, is not conclusive that the person is a male. Parol evidence is admissible to show that the person intended is a female. Anderson; 71 Cal. 38.

PRONURUS (Lat.). The wife of a great-grandson.

PROOF. In Practice. The conviction or persuasion of the mind of a judge or jury, by the exhibition of evidence, of

the reality of a fact alleged. Thus, to prove is to determine or persuade that a thing does or does not exist; 8 Toullier, n. 2; Ayliffe, Parerg. 442; 2 Phil. Ev. 44, n. a; Steph. Ev. 62; 1 Greenl. Ev. § 1; 31 Cal. 203; 36 Ia. 106. Proof is the perfection of evidence; for without evidence there is no proof, although there may be evidence which does not amount to proof; for example, if a man is found murdered at a spot where another has been seen walking but a short time before, this fact will be evidence to show that the latter was the murderer, but, standing alone, will be very far from proof of it.

Ayliffe defines *judicial proof* to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner by fit and proper arguments, and likewise by all other legal methods: first, by proper arguments, such as conjectures, presumptions, indicia, and other adimicular ways and means; secondly, by legal methods, or methods according to law, such as witnesses, public instruments, and the like. Ayliffe, Parerg. 442; Aso & M. Inst. b. 3, t. 7. See *LITERAL PROOF*.

PROOF OF DEATH. See DEATH.

PROOF OF LOSS. See LOSS.

PROOF OF SPIRITS. Testing the strength of alcoholic spirits, also the degree of strength; as high proof, first proof, second, third, and fourth proofs. In the internal revenue law it is used in the sense of degree of strength. 6 U. S. App. 53.

PROP. In Mining. "Props" are upright posts wedged between the roof and the floor to support the roof. 160 Ky. 671, 170 S. W. 14.

Caps. "Caps" or "props" are used for propping up, bracing and supporting the roof of a mine, to prevent slate from falling. 157 Ky. 763, 164 S. W. 304. See *SAFE PLACE DOCTRINE*.

PROPER. That which is essential, suitable, adapted, and correct.

Congress is authorized, by art. 1, s. 8, of the constitution of the United States, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution of the United States, in any department or officer thereof."

Proper District. Under Judicial Code, § 28, 29, permitting removal of causes to the District Court "for the proper district," the proper district is that one which includes the county or place where the suit in the state court is pending at the time of the removal. 260 U. S. 262.

Proper Persons. The term "proper persons" as applied to persons entitled to be carried as passengers, means persons whose status or condition apparently entitled them to be carried as such. 144 Ky. 652, 139 S. W. 855.

PROPER LAW OF CONTRACT. See LEX LOCI.

PROPERTY. The right and interest which a man has in lands and chattels to the exclusion of others. 6 Binn. 98; 4 Pet. 511; 17 Johns. 283; 11 East 290, 518; 14 id. 370.

The sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe. 2 Bla. Com. 2. The right to possess, use, enjoy, and dispose of a thing. 56 N. Y. 263; which is in itself valuable; 4 McLean 603. The right or interest which one has in lands or chattels. 6 Binn. 94; 4 Pet. 511. The free use and enjoyment by a person of all his acquisitions, without any control or diminution, save only by the law of the land. 2 Ark. 291; 61 Hun 571. The right of a person over a thing (*in rem*) indefinite in point of user. Austin's Lectures.

That which is peculiar or proper to any

person; that which belongs exclusively to one; the first meaning of the word from which it is derived—*proprius*—is one's own. Droue, Copyr. 6.

A vested right of action is property in the same sense that tangible things are property; 108 U. S. 132. It is a thing owned, that to which a person has or may have a legal title; 43 N. Y. 889. See 50 Ala. 509; 20 Cal. 387; 59 Ill. 142; 9 Ind. 203; 13 B. Mon. 293; 11 East 290.

In the treaty by which Louisiana was acquired, property comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract, executory as well as executed; 113 U. S. 179.

The term "property" embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments; 46 N. Y. Super. Ct. 138; it includes money as well as other assets; 12 Colo. 152; a chose in action; 49 Ohio St. 60; a mining claim; 143 U. S. 431; a debt; 55 Ill. App. 563; a ferry franchise; 1 Black 603; 110 Mo. 557; 9 C. C. App. 174; the reciprocal rights of the wife to the society, protection, and support of her husband, and his right to her society and services in his household may be regarded as the property of the respective parties; 39 Hun 40; 89 Mich. 123. A liquor license is not property; 13 S. E. Rep. (Ga.) 197. See *LIQUOR LAWS*.

Includes bonds, mortgages, and certificates of stock, which are more than mere evidences of the interest which they represent, or of debt. The debt is inseparable from the paper which declares and constitutes it. 250 U. S. 381.

All things are not the subject of property; the sea, the air, and the like cannot be appropriated; every one may enjoy them, but he has no exclusive right in them. When things are fully our own, or when all others are excluded from meddling with them or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases: so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherford, Inst. 20; Domat, liv. prel. tit. 3; Pothier, *des Choses*; 18 Vinet, Abr. 63; Com. Dig. *Biens*. See, also, 3 B. & C. 281; 9 id. 396; 3 Dowl. & R. 394; 1 C. & M. 39; 4 Call 473; 18 Ves. 193; 6 Bingham 630.

See 90 N. Y. 122; 130 id. 360, where easements of light and air and ingress and egress to buildings were held to be property.

The ownership of property implies its use in the prosecution of any legitimate business which is not a nuisance in itself; 82 Fed. Rep. 623.

Property is said to be real and personal property. See those titles.

Dacey (Conf. Laws, Moore's ed. 72) treats of property as consisting of movables and immovables, but says that this "does not square with the distinction known to English lawyers between *things real*, or real property, and *things personal*, or personal property." Movables are equivalent to personal property with the omission of chattels real; immovables are equivalent to realty, with the addition of chattels real or leaseholds. Law is concerned, not with things but with rights over, or in reference to property.

It is also said to be, when it relates to goods and chattels, *absolute* or *qualified*. Absolute property is that which is our own without any qualification whatever: as, when a man is the owner of a watch, a book, or other inanimate thing, or of a horse, a sheep, or other animal which never had its natural liberty in a wild state.

Qualified property consists in the right which men have over wild animals which they have reduced to their own possession,

and which are kept subject to their power; as, a deer, a buffalo, and the like, which are his own while he has possession of them, but as soon as his possession is lost his property is gone, unless the animals *go animo revertendi*; 2 Bla. Com. 396; 3 Binn. 546; but a whale, harpooned, but not connected with a boat by line, is vested in the crew that harpooned it, and not in one which afterwards followed and captured it; 8 Fed. Rep. 159; when killed and marked, it belongs to the person who killed it; 1 Sprague 315.

But property in personal goods may be absolute or qualified without any relation to the nature of the subject-matter, but simply because more persons than one have an interest in it, or because the right of property is separated from the possession. A bailee of goods, though not the owner, has a qualified property in them; while the owner has the absolute property. See BAILEE; BAILMENT.

Personal property is further divided into property in possession, and property or choses in action. See CHOSE IN ACTION.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like.

In a strict legal sense, land is not property, but the subject of property. The term property, although in common parlance applied to a tract of land or a chattel, in its legal signification means only the right of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy, and dispose of a thing. 13 N. Y. 378; 1 Bla. Com. 186; 2 Austin, Jurispr. 817. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference takes, *pro tanto*, the owner's property. The right of using a thing indefinitely is an essential quality of absolute property, without which absolute property can have no legal existence. Use is the real side of property. This right of user necessarily includes the right and power of excluding others from the land; 103 Mass. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's property. If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right, takes property, although the owner may still have left to him valuable rights in the article of a more limited and circumscribed nature; 51 N. H. 512.

Property is lost by the act of man by—*first, alienation*; but in order to do this the owner must have a legal capacity to make a contract; *second*, by the voluntary abandonment of the thing; but unless the abandonment be purely voluntary the title to the property is not lost; as, if things be thrown into the sea to save the ship, the right is not lost; Pothier, n. 270; 3 Toullier, n. 345. But even a voluntary abandonment does not deprive the former owner from taking possession of the thing abandoned at any time before another takes possession of it.

It is lost by *operation of law*—*first*, by the forced sale, under a lawful process, of the property of a debtor to satisfy a judgment, sentence, or decree rendered against him, to compel him to fulfil his obligations; *second*, by confiscation, or sentence of a criminal court; *third*, by prescription; *fourth*, by civil death; *fifth*, by capture by a public enemy. It is lost by the act of God, as in the case of the death of slaves or animals, or in the total destruction of a thing: for example, if a house be swallowed up by an opening in the earth during an earthquake.

It is proper to observe that, in some cases, the moment that the owner loses his possession he also loses his property or right in the thing; animals *feræ naturæ*, as mentioned above, belong to the owner

only while he retains the possession of them. But, in general, the loss of possession does not impair the right of property, for the owner may recover it within a certain time allowed by law. Bouvier, Inst.

As to the *situs* of property, it has been said:—"Lands, and generally, though not invariably, goods, must be held situate at the place where they, at a given moment, actually lie; debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists, resides; or, in other words, debts or choses in action are generally to be looked upon as situate where they are properly recoverable or can be enforced." Dicey, Conf. Laws, Moore's ed. 318.

A British ship belonging to a deceased person, and registered at any port of the United Kingdom, is to be held, for some purposes at any rate, to be situate at that port. Goods on the high seas, which are capable of being dealt with in England by means of bills of lading in that country, are held situate in England, and goods which at the death of the deceased owner are *in transitu* to that country, and arrive there after his death, are apparently to be held situate in England at his death. Money in a bank in Canada belonging to one who dies in England is considered as virtually *in transitu*. Bonds or other securities forming part of the property of a deceased person, if they are in fact in England and are marketable securities there, saleable and transferable there by delivery only, without its being necessary to do any act out of England to make the transfer valid, are situate in England, though the debts or money are owing from foreigners. Such bonds, differ essentially from foreign loans, which cannot be fully transferred without doing some act in a foreign country. A debt due on a deed situate in England from a debtor resident abroad, and a debt due on a deed situate abroad from a debtor resident in England, are situate in England. A judgment debt is assets where the judgment is recorded; 4 M. & W. 171. A share in a partnership business is situate where the business is carried on, but it has been said to be only a claim, and therefore situate wherever it can be enforced. See 15 App. Cas. 482. Most of the cases arise upon the liability of a decedent's property to the payment of probate duties, but sometimes on the question of jurisdiction; Dicey, Conf. Laws, Moore's ed. 318.

A license to use a patent in New South Wales could not be said to be locally situate anywhere. However, for the purposes of probate duty, property is capable of being localized, yet, for any other purposes, incorporeal rights could not be said to have any local situation. [1896] 2 Q. B. 178. See 22 Law Mag. & Rev. 116.

The locality of a mortgage debt is that of the debt and does not depend on that of the mortgaged property. See Dicey, Conf. Laws 319.

"The general rule of law is well settled that for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because . . . the bill or note is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable." 109 U. S. 654, citing 102 Mass. 186; 10 Ohio St. 136; 4 M. & W. 171. See 143 Ill. 25; 74 Me. 85.

A claim against the United States is not a local asset in the District of Columbia; 27 Ct. Cl. 529. A bond does not come within the rule as to simple contract debts, but is assets for the purpose of administration in the place in which it is found; 73 N. Y. 292. A life insurance policy is assets, for the purpose of founding an administration, in a state into which it is brought after the death of the insured; 111 U. S. 138. An insurance policy, issued and payable in New York, on the life of a

person domiciled in Virginia, was held to have passed to his administrator in Virginia, although it was deposited with a person in Mississippi, who, as administrator there, sought to collect it; 71 Miss. 590. See note to Dicey, Conf. Laws 331.

As between the states of the United States, a ship at sea is presumed to be situate in the state in which it is registered; 16 Wall. 610.

See TAXATION, as to the *situs* of property for the purposes of taxation; and Waples, Debt. & Cred., where the subject of the location of property is treated.

See COMMUNITY PROPERTY; PARTNERSHIP PROPERTY; TENANCY IN COMMON; JOINT TENANCY; CO-OWNERSHIP; PRIVATE PROPERTY; TERRITORIAL PROPERTY; SEPARATE PROPERTY.

Taking Feloniously. See ROBBERY. See ABUTTING PROPERTY; JOINT PROPERTY.

PROPERTY INSURANCE. See INSURANCE.

PROPERTY RIGHT. To a Dead Body. There is not a "property right to a dead body" in a commercial sense, but there is a right to bury it which the courts of law will recognize and protect. This right embraces the right to select the place of burial and to change it at pleasure. This right, in the absence of testamentary disposition of the body, belongs to the next of kin. 149 Ky. 501, 149 S. W. 871.

PROPERTY RIGHT IN MARKET QUOTATIONS. See MARKET QUOTATIONS, PROPERTY RIGHT IN.

PROPERTY TAX OR PRIVILEGE TAX. A tax on a franchise of a gas company was a "property tax" on the intangible property, and not a "privilege tax" for engaging a business in which natural persons could not engage. 135 Ky. 324, 122 S. W. 164.

PROPINQUITY (Lat.). Kindred; parentage. See AFFINITY; CONSANGUINITY; NEXT OF KIN.

PROPIOR SOBRINA, PROPIOR SOBRINO (Lat.). The son or daughter of a great-uncle or great-aunt on the father's or mother's side. Calvinus, Lex.

PROPIOS, PROPRIOS. In Spanish Law. Certain portions of ground laid off and reserved when a town was founded in Spanish America, as the inalienable property of the town, for the purpose of erecting public buildings, markets, etc., or to be used in any other way, under the direction of the municipality, for the advancement of the revenues or the prosperity of the place. 12 Pet. 442.

PROPONENT. In Ecclesiastical Law. One who propounds a thing; as, "the party proponent doth allege and propound." 6 Eccl. 356, n. Often used of one who offers a will for probate.

PROPORTUM. Intent or meaning. Cowel.

PROPOSAL. An offer. A formal offer to perform some undertaking, stating the time and manner of performance and price demanded, or one or more of these particulars, either directly or by implied or direct reference to some announcement requesting such an offer. See 35 Ala. n. s. 33. A proposal of this character is not to be considered as subject to different rules from any other offer. Pierce, Am. Railw. Law 364; Poll. Contr. 13. See OFFER.

PROPOSITUS (Lat.). The person proposed. In making genealogical tables, the person whose relations it is desired to find out is called the *propositus*.

PROFOUND. To offer; to propose; as, the *onus probandi* in every case lies upon the party who propounds a will. 1 Curt. Eccl. 637; 6 Eccl. 417.

PROPRES. In French Law. The term *propres* or *biens propres* is used to

denote that property which has come to an individual from his relations, either in a direct line, ascending or descending, or from a collateral line, whether the same have come by operation of law or by devise. *Propres* is used in opposition to *acquêts*. Pothier, *Des Propres*; 2 Burge, *Conf. of Law* 61.

PROPRIA PERSONA (Lat. in his own person). It is a rule in pleading that pleas to the jurisdiction of the court must be plead in *propria persona*, because if pleaded by attorney they admit the jurisdiction, as an attorney is an officer of the court, and he is presumed to plead after having obtained leave, which admits the jurisdiction. Lawes, Pl. 91.

An appearance may be in *propria persona*, and need not be by attorney.

PROPRIETARY. In its strict sense, this word signifies one who is master of his actions, and who has the free disposition of his property. During the colonial government of Pennsylvania, William Penn was called the proprietor.

Belonging to ownership; as proprietary rights. 117 U. S. 487.

PROPRIETATE PROBANDA. See *DE PROPRIETATE PROBANDA*.

PROPRIETOR. The owner.

One who has the legal right or exclusive title to anything. In many instances it is synonymous with owner. 83 Tex. 218. A receiver is not a proprietor; 32 S. W. Rep. (Tex.) 77.

PROPRIO VIGORE (Lat.). By its own force and vigor: an expression frequently used in construction. A phrase is said to have a certain meaning *proprio vigore*.

PROPTER (Lat.). On account of; for.

PROPTER AFFECTUM (Lat.). For or on account of some affection or prejudice. See *CHALLENGE*.

PROPTER DEFECTUM (Lat.). On account of or for some defect. See *CHALLENGE*.

PROPTER DEFECTUM SANGUINIS. On account of failure or deficiency of blood. 2 Bl. Com. 245.

PROPTER DELICTUM (Lat.). For or on account of crime. See *CHALLENGE*.

PROPTER HONORIS RESPECTUM. On account of respect or honor of rank. See *CHALLENGE*.

PROPTER IMPOTENTIAM. See *IMPOTENTIAM PROPTER*.

PROPTER MAJOREM SECURITATEM. For greater security.

PROPTER SAEVITIAM AUT ADULTERIUM. On account of cruelty or adultery. 2 Kent's Com. 125.

PROROGATED JURISDICTION. In Scotch Law. That jurisdiction which, by the consent of the parties, is conferred upon a judge who, without such consent, would be incompetent. Erskine, Inst. 1. 2. 15.

At common law, when a party is entitled to some privilege or exemption from jurisdiction he may waive it, and then the jurisdiction is complete; but the consent cannot give jurisdiction.

PROROGATION. Putting off to another time. It is generally applied to the English parliament, and means the continuance of it from one time to another; it differs from adjournment, which is a continuance of it from one day to another in the same session. 1 Bla. Com. 186.

In Civil Law. The giving time to do a thing beyond the term prefixed. Dig. 2. 14. 27. 1. See *PROLONGATION*.

PROSCRIBED (Lat. *proscribo*, to write before). In Civil Law. Among the Romans, a man was said to be proscribed when a reward was offered for his

head; but the term was more usually applied to those who were sentenced to some punishment which carried with it the consequences of civil death. Code 9. 49.

PROSECUTE. To proceed against a person judicially; to proceed against a person criminally.

PROSECUTION (Lat. *prosequor*, to follow after). In Criminal Law. The means adopted to bring a supposed offender to justice and punishment by due course of law. See 34 La. Ann. 1198.

Prosecutions are carried on in the name of the government, and have for their principal object the security and happiness of the people in general. Hawk. Pl. Cr. b. 2, c. 25, s. 3; Bac. Abr. *Indictment* (A 3).

In England, the modes most usually employed to carry them on are—by indictment; 1 Chitty, Cr. L. 132; presentment of a grand jury; *id.* 183; coroner's inquest; *id.* 184; and by an information. In this country, the modes are—by indictment, by presentment, by information, and by complaint, which see. See *POSTULATIO*; *MALICIOUS PROSECUTION*.

To Recover a Penalty. A prosecution for contempt of court is a "prosecution to recover a penalty" within the meaning of a statute, and is barred by limitation one year after the right to the penalty accrued. 141 Ky. 461, 133 S. W. 206. See *CRIMINAL PROSECUTIONS*.

PROSECUTOR. In Practice. He who prosecutes another for a crime in the name of the government.

The public prosecutor is an officer appointed by the government to prosecute all offences: he is the attorney-general or his deputy.

A private prosecutor is one who prefers an accusation against a party whom he suspects to be guilty.

Every man may become a prosecutor; but no man is bound, except in some few of the more enormous offences, as treason, to be one; but if the prosecutor should compound a felony he will be guilty of a crime. The prosecutor has an inducement to prosecute, because he cannot, in many cases, have any civil remedy until he has done his duty to society by an endeavor to bring the offender to justice. If a prosecutor act from proper motives, he will not be responsible to the party in damages though he was mistaken in his suspicions; but if, from a motive of revenge, he institute a criminal prosecution without any reasonable foundation, he may be punished by being mulcted in damages, in an action for a malicious prosecution (*q. v.*).

In Pennsylvania, a defendant is not bound to plead to an indictment, where there is a private prosecutor, until his name shall have been indorsed on the indictment as such, and on acquittal of the defendant, in all cases except where the charge is for a felony, the jury may direct that he shall pay the costs. See 1 Chitty, Cr. Law 110; 2 Va. Cas. 3, 20; 1 Dall. 5; 2 Bibb 210; 6 Call 245; Bish. Cr. Pro. 691; DISTRICT ATTORNEY OF THE UNITED STATES; *INFORMER*.

PROSECUTOR OF THE PLEAS. The title of the prosecuting officer in each county in New Jersey and one or two other states.

The term is used in the same sense as district attorney in other states.

PROSOCER (Lat.). A father-in-law's father; grandfather of wife. Vicat, Voc. Jur.

PROSOCERUS (Lat.). A wife's grandmother.

PROSPECTIVE (Lat. *prospicio*, to look forward). That which is applicable to the future: it is used in opposition to retrospective. To be just, a law ought always to be prospective. 1 Bouvier, Inst. n. 116. See *RETROSPECTIVE*.

PROSPECTUS. A prospectus of an intended company ought not to omit actual and material facts, or to conceal facts ma-

terial to be known, the misrepresentation or concealment of which may improperly influence the mind of the reader; for if he is thereby deceived into becoming an allottee of shares and suffers loss he may proceed against those who have misled him. The proper purpose of a prospectus of an intended company is held to be only to invite persons to become original shareholders or allottees of shares in the company. When it has performed this office, it is exhausted; *Peek v. Gurney*, L. R. 6 H. L. 377; but a purchaser of shares from an original allottee may maintain an action for misrepresentations contained in a prospectus, if he can show that it was intended by those issuing it to be, and was, communicated to him prior to his purchase of shares; [1896] 1 Q. B. 372; such an intention may be inferred if the prospectus was circulated after all its shares had been allotted, particularly if they were taken up by the promoters themselves. See [1892] 3 Ch. 566; 17 Ch. D. 467.

The doctrine of *Peek v. Gurney* is considered by Judge Thompson (Corp. § 1471) as "desitute of any foundation in reason and opposed to the common opinions of justice and business morality." It is not followed in this country, where it is held that it is sufficient if the prospectus was issued to influence the public, and the plaintiff saw it and was induced thereby to purchase shares; *id.*

A prospectus set forth that a tramway company had the right to use steam power as well as horses; the directors believed the statement to be true, but it was not; it was held that the officers of the company were not liable for deceit: *Derry v. Peek*, L. R. 14 App. Cas. 337. This decision was followed in England by an act of 1890 which provided that when a prospectus contains any untrue statement the directors of the company issuing it shall be liable in damages to any person taking shares, etc., for any loss he may sustain; see *Beach, Priv. Corp.* § 271.

If a director of a company knowingly issues or sanctions the circulation of a false prospectus, containing untrue statements of material facts tending to deceive the community, and to induce the public to buy the stock in the market, he is responsible to those who are injured thereby; 62 N. Y. 319.

A letter intended to be used to promote the sale of bonds of a trust company is a representation to all persons to whom it is shown; 159 Mass. 437.

A prospectus is admissible in evidence in an action at law by a company against its promoters for secret profits; 61 Pa. 203. See *Thomp. Liab. of Off.* 309.

A statement in a prospectus of the purpose for which money is wanted, is a material statement of fact, and if untrue may be ground for an action of deceit; 29 Ch. Div. 459.

A prospectus of a new company, so far as it alleges facts concerning the position and prospects of the undertaking, is a representation to all persons who may apply for shares therein, but not to subsequent transferees of shares; L. R. 6 H. L. 377; but it may be as to the latter, if actively used to induce the purchase of shares; [1896] 1 Q. B. 372; *Poll. Torts* 284. The material question as to a prospectus is, "Was there or was there not misrepresentation in point of fact?" *id.*

See 7 Eng. Rul. Cas. 561; *Alger, Promoters; DECEIT; MISREPRESENTATION; PROMOTERS*.

PROSTITUTION. The common lewdness of a woman for gain. The act of permitting a common and indiscriminate sexual intercourse for gain. 12 Metc. 97.

The act or practice of prostituting or offering the body to an indiscriminate intercourse with men; common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire. 108 Mo. 575. See 54 Me. 24; 98 Ala. 61.

By the word in its most general sense is understood the act of setting one's self

to sale, or of devoting to infamous purposes what is in one's power; as, the prostitution of talents or abilities; the prostitution of the press, etc. 8 Barb. 610.

In all well-regulated communities this has been considered a heinous offence, for which the woman may be punished; and the keeper of a house of prostitution may be indicted for keeping a common nuisance.

A landlord cannot recover for the use and occupation of a house let for the purpose of prostitution; 1 Esp. Cas. 13; 1 B. & P. 840, n. It is not a crime to let rooms to prostitutes for quiet and decent occupation, nor to permit a house to be visited by disreputable people, if they visit it for innocent and proper purposes; 15 R. L. 24.

In a figurative sense, it signifies the bad use which a corrupt judge makes of the law, by making it subservient to his interest: as, the prostitution of the law, the prostitution of justice.

PROTECTION. In Mercantile Law. The name of a document generally given by notaries public to sailors and other persons going abroad, in which is certified that the bearer therein named is a citizen of the United States.

In Governmental Law. That benefit or safety which the government affords to the citizens.

In English Law. A privilege granted by the king to a party to an action, by which he is protected from a judgment which would otherwise be rendered against him. Of these protections there are several kinds. Fitzh. N. B. 65.

PROTECTION OF THE LAWS.

The fourteenth amendment of the constitution of the United States, among other provisions respecting the life, liberty, and property of citizens, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This provision has been subjected to much judicial construction. The protection extends to "acts of the state whether through its legislative, its executive, or its judicial authorities;" 154 U. S. 45; 100 *id.* 313, 339; 103 *id.* 370. In a late case the court said: "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition, and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'" Harlan, J., in 166 U. S. 226. See 162 *id.* 565; 118 *id.* 356. That amendment conferred no new and additional rights, but only extended the protection of the federal constitution over rights of life, liberty, and property that previously existed under all state constitutions. Prior to the passage of this amendment "the laws of all the states in terms gave equal protection to all white persons. This amendment, however, is general, and forbids the denial to any class of persons the equal protection of the laws by any state; and there is no doubt that class legislation is forbidden;" 14 Utah 71. "What must constitute a denial of the equal protection of the law will depend, in this view, in a large measure, upon what rights of the law have been conferred, or protection extended, under the constitution and laws of the particular state in which the question arises. As the constitution and laws of the states vary, the proposition that each case must, to an extent, depend upon its own facts, is especially applicable to this class of cases. When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens, and subject that class to oppressive discrimina-

tion, especially in respect to those rights so important as to be protected by constitutional guaranty. That the prohibitions of that amendment are now regarded as protecting the citizen against a denial of the equal protection of the law, and against taking property without due process of law, under the power of taxation, is a proposition clearly deducible from the many causes in which that question has been considered;" 86 Fed. Rep. 168, 185. The state statute providing that in case of a loss under a life insurance policy, the insurer shall be liable to pay, in addition to the amount thereof, 12 per cent. with attorney's fees for the collection of the same, is in violation of the fourteenth amendment of the constitution of the United States, which secures the equal protection of the laws, inasmuch as it is a discrimination against such companies; 41 S. W. Rep. (Tex.) 680.

By equal protection is meant equal security to every one in his private rights—in his rights to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances; 18 Fed. Rep. 893. See PRIVILEGES AND IMMUNITIES; CIVIL RIGHTS; DUE PROCESS OF LAW.

PROTECTION ORDERS. Orders granted by the court upon the application of a wife living apart from her husband to protect her property. Brett, Com. 988.

PROTECTION, WRIT OF. A writ which, from a very early period, issued out of the Chancery to men absent overseas on the king's service. It made them free of all suits except some few such as the Assize of Novel Disseisin, the Assize of Darrein Presentment, Attaints, etc. It could not, as a rule, be pleaded to any suit instituted before it was issued, nor to a charge of felony. The last instance of its issue was about 1690. The writ of protection was also issued to crown debtors in order to prevent private creditors from getting priority of the crown. Byrne.

PROTECTOR OF SETTLEMENT.

The protector of a settlement is a person without whose consent a tenant in tail cannot bar the entail except as against his own issue, nor a tenant in base fee enlarge his estate into a fee-simple. R. & L. Dict.

PROTECTORATE. Treaties of protection are treaties in the nature of unequal alliance, from which they are chiefly distinguished by keeping a garrison within the protected state; Twiss, Rights of Nations § 247. The rights of sovereignty must be exercised *de facto* as well as *de jure*. See Halleck, Int. L. 69; 1 Kent, Gould's ed. *23.

The term protectorate is one of which the meaning is somewhat divided; or rather, perhaps, it may be said with more correctness to have different meanings under different circumstances. As exercised, however, by a European power over a smaller civilized state, it differs from the relation which links an Eastern protected state with a European country; a German protectorate inclines to the assumption of more full control than a British.

Formerly protected nations were said to retain their independence and internal sovereignty, placing their foreign relations under a stronger country. It is believed that all the states represented at the Berlin Conference in 1885, except Great Britain, maintained that a Protectorate includes the right of administering justice over the subjects of a protected state. See Hall, For. Jur. of the British Crown.

PROTEST. In Contracts. A notarial act, made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange by a notary public in which it is declared that all parties to such instruments will be held

responsible to the holder for all damages, exchanges, re-exchange, etc.

A formal notarial certificate attesting the dishonor of a bill of exchange or promissory note. Benj. Chalm. Bills, etc., art. 176.

There are two kinds of protest, namely, protest for non-acceptance, and protest for non-payment. There is also a species of protest common in England, which is called protest for better security. Protest for non-acceptance or non-payment, when duly made and accompanied by notice to all the parties to the bill or note, has the effect of making all of them responsible to the holder for the amount of the bill or note, together with damages, etc.; 3 Kent 63; Byles, Bills 273, 394; Chitty, Bills 278; Com. Dig. Merchant (F 8, 9, 10); Bac. Abr. Merchant, etc. (M 7). Protest for better security may be made when the acceptor of a bill fails, becomes insolvent, or in any other way gives the holder just reason to suppose it will not be paid. It seems to be of doubtful utility, except that it gives the drawer of a bill on a foreign country an opportunity of availing himself of any attachment law then in force; 1 Ld. Raym. 745.

The protest is a formal paper signed and sealed by a notary wherein he certifies that on the day of its date he presented the original bill attached thereunto, or a copy (a description of the bill is enough; 17 How. 606), to the acceptor, or the original note to the maker thereof, and demanded payment, or acceptance, which was refused, for reasons given in the protest, and that thereupon he protests against the drawer and indorsers thereof for exchange, re-exchange, damages, costs, and interest. See Benj. Chalm. Bills, art. 176; 2 Ames, Bills & N. 863. It is usual, also, for the notary to serve notices of the protest on all the parties to the bill. The notice contains a description of the bill, including its date and amount, the fact of demand and refusal, and that the holder looks to the person notified for payment. Protest of foreign bills is proof of demand and refusal to pay or accept; 2 H. & J. 399; 8 Wheat. 333; 2 Pet. 179, 688. Protest is said to be part of the constitution of a foreign bill; and the form is governed by the *lex loci contractus*; 2 Hill N. Y. 227; 11 La. 14; 2 Pet. 179, 180; Story, Bills 176 (by the place where the protest is made; Benj. Chalm. Bills, art. 180). A protest must be made by a notary public or other person authorized to act as such; Benj. Chalm. Bills, art. 177; but it has been held that the duties of a notary cannot be performed by a clerk or deputy; 102 Mass. 141. Inland bills and promissory notes need not be protested; 6 How. 23; see 1 App. D. C. 171; but the term protest, as applied to inland bills of exchange, includes only the steps necessary to charge the drawer and indorser; 36 Neb. 744. See 3 Misc. Rep. 516. Protest is unnecessary to fix the liability of an indorser on a non-negotiable instrument; 70 Tex. 568. See ACCEPTANCE; BILLS OF EXCHANGE; NOTICE OF DISHONOR.

In Legislation. A declaration made by one or more members of a legislative body that they do not agree with some act or resolution of the body: it is usual to add the reasons which the protestants have for such a dissent.

In Maritime Law. A writing, attested by a justice of the peace, a notary public, or a consul, made and verified by the master of a vessel, stating the severity of a voyage by which a ship has suffered, and showing that it was not owing to the neglect or misconduct of the master. See Beach, Ins. § 1821; 1 Wash. C. C. 145, 238, 403, n.; 1 Pet. C. C. 119; 1 Dall. 6, 10, 317; 2 *id.* 195; 3 W. & S. 144.

The protest is not, in general, evidence for the master of the vessel or his owners in the English or American courts; yet it is often proper evidence against them; Abb. Sh., 13th ed. 457.

In Public Land Affairs. Any complaint or objection, whether by a public

agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry. 244 U. S. 178. Cf. **CONTEST**.

PROTEST, PAYMENT UNDER.

A person who without the compulsion of legal process, or duress of goods or of the person, yields to the assertion of an invalid or unjust claim by paying it, cannot by mere protest, either in writing or oral, change its character from a voluntary to an involuntary payment. The payment overcomes and nullifies the protest; 4 Wait, Act. & Def. 493. Where an illegal tax is paid under protest to one having authority to enforce its collection, it is an involuntary payment and may be recovered back; 29 Ia. 310; 21 Mich. 483; but see 34 Id. 170; s. c. 22 Am. Rep. 512.

A mere apprehension of legal proceedings to collect a tax is not sufficient to make the payment compulsory; there must be an immediate power or authority to institute them; 46 Md. 552.

An action will not lie to recover money voluntarily paid to redeem land sold upon a void tax judgment when the party making the payment has at the time full knowledge of the character of the sale and all the facts affecting its validity; 26 Minn. 543.

The payment of illegal fees cannot generally be considered as voluntary, so as to preclude the plaintiff from recovering them back; 2 B. & C. 729; 2 B. & A. 562. Where money is paid under an illegal demand, *colore officii*, the payment can never be voluntary; 3 Exch. 635.

Where a railway company exacted from a carrier more than they charged to other carriers in breach of the acts of parliament, it was held that sums thus exacted could be recovered back; 7 M. & G. 253. Where a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, he is entitled to recover back the excess; L. R. 4 H. L. C. 249.

The object of the protest is to take from the payment its voluntary character; it serves as evidence that the payment was not voluntary, and in order to be efficacious there must be actual coercion, duress, or fraud, presently existing, or the payment will be voluntary in spite of the protest; 59 N. Y. 603; 115 Mass. 367. Whether actual protest, in case of the payment of money illegally demanded by a public officer is a condition precedent to a recovery by the party paying the money is not clearly settled; 4 Wait, Act. & Def. 495. Where the person demanding the money has notice of the illegality of the demand, a protest is not necessary, but otherwise it is necessary; 49 Cal. 624.

On *certiorari* the supreme court held that when duties are paid in order to get possession of the goods, a protest made within ten days after the ascertainment and liquidation of the duties is sufficient; 164 U. S. 54, where the statutes on the subject are collated and examined and the decision of the circuit court of appeals was affirmed; Fuller, C. J., and Field, Harlan, and Brewer, JJ., dissenting.

PROTESTANDO. See **PROTESTATION**.

PROTESTANT. It includes all those who believe in the Christian religion and do not acknowledge the supremacy of the pope. 52 Conn. 418; 53 Id. 493. See 53 N. H. 57.

PROTESTATION. In Pleading. The indirect affirmation or denial, by means of the word protesting (in the Latin form of pleadings, *protestando*), of the truth of some matter which cannot with propriety or safety be positively affirmed, denied, or entirely passed over. See 3 Bla. Com. 311. The exclusion of a conclusion. Co. Litt. 124.

Its object was to secure to the party making it the benefit of a positive affirmation or denial in case of success in the action,

so far as to prevent the conclusion that the fact was admitted to be true as stated by the opposite party, and at the same time to avoid the objection of duplicity to which a direct affirmation or denial would expose the pleading; 19 Johns. 96; 2 Saund. 103; Com. Dig. *Pleader* (N). Matter which is the ground of the suit upon which issue could be taken could not be protested; Plowd. 276; 2 Johns. 227. But see 2 Wms. Saund. 103, n. Protestations are no longer allowed; 8 Bla. Com. 312; and were generally an unnecessary form; 3 Lev. 125.

The common form of making protestations was as follows: "because protesting that," etc., excluding such matters of the adversary's pleading as are intended to be excluded in the protestando, if it be matter of fact; or, if it be against the legal sufficiency of his pleading, "because protesting that the plea by him above pleaded in bar" (or by way of reply, or rejoinder, etc., as the case might be) "is wholly insufficient in law." See, generally, 1 Chitty, Pl. 534; Com. Dig. *Pleader* (N); Steph. Pl. 235.

In Practice. An asseveration made by taking God to witness. A protestation is a form of asseveration which approaches very nearly to an oath. Wolffius, Inst. § 375.

PROTHONOTARY. The title given to an officer who officiates as principal clerk of some courts. Viner, Abr.

In ecclesiastical law, the name of prothonotary is given to an officer of the court of Rome. He is so called because he is the first notary,—the Greek word *πρωτο* signifying *primus*, or first. These notaries have pre-eminence over the other notaries, and are put in the rank of prelates. There are twelve of them. Dalloz, *Dict. de Jur.*

PROTOCOL. A record or register. Among the Romans, *protocollum* was a writing at the head of the first page of the paper used by the notaries or tabellions. Nov. 44.

In France the minutes of notarial acts were formerly transcribed on registers, which were called protocols. Toullier, *Dr. Civ. Fr.* liv. 3, t. 3, c. 6, s. 1, n. 413.

By the German law it signifies the minutes of any transaction. Encyc. Amer. In the latter sense the word has of late been received into international law. *Id.*

In International Law it is a diplomatic expression which signifies the register on which the deliberations of a conference, etc., are inscribed, whence the word comes to signify the deliberations themselves. 1 Halleck, Int. L. 298, note.

It is used to indicate a preliminary treaty, as the instrument of August 12, 1898, entered into between the United States and Spain.

PROTOCOLO. In Spanish Law. The original draft of an instrument which remains in the possession of the notary. White, New Recop. 1, 3, t. 7, c. 5, § 2.

PROTUTOR (Lat). In Civil Law. He who, not being the tutor of a pupil or minor, has administered his property or affairs as if he had been, whether he thought himself legally invested with the authority of a tutor or not.

He who marries a woman who is tutrix becomes, by the marriage, a protutor. The protutor is equally responsible with the tutor.

PROUT PATET PER RECORDUM (Lat.). As appears by the record. This phrase is frequently used in pleading; as, for example, in debt on a judgment or other matter of record, unless when it is stated as an inducement, it is requisite, after showing the matter of record, to refer to it by the *prout patet per recordum*. 1 Chitty, Pl. *356; 10 Me. 127.

PROVE. To establish by evidence; to make out a case or claim by evidence.

PROVER. In Old English Law. One who undertakes to prove a crime against another. 28 Edw. I.; 5 Hen. IV. One who, being indicted and arraigned for treason or felony, confesses before plea pleaded, and accuses his accomplices to ob-

tain pardon; state's evidence. 4 Bla. Com. 330*. To prove. Law Fr. & Lat. Dict.; Britton, c. 22.

PROVIDED. The word always expresses a condition, unless it appears from the context to be the intent of the parties that it shall constitute a covenant; 16 Conn. 419; but it has been held that, though it is apt to create a condition, it does not necessarily do so; it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only serves to qualify or restrain the generality of a former clause; 8 Allen 596. The word is often used as a conjunction to an independent paragraph; 128 U. S. 174.

Provided always may constitute a condition, limitation, or covenant, according to circumstances; 20 Ind. 403.

See **PROVISO**, **AS PROVIDED**

PROVIDED ALWAYS. See **PROVIDED**.

PROVIDENT SOCIETIES. See **INDUSTRIAL AND PROVIDENT SOCIETIES**.

PROVINCE. Sometimes this signifies the district into which a country has been divided; as, the province of Canterbury, in England; the province of Languedoc, in France. Sometimes it means a dependency or colony; as, the province of New Brunswick. It is sometimes used figuratively to signify power or authority; as, it is the province of the court to judge of the law, that of the jury to decide on the facts.

PROVINCIAL CONSTITUTIONS. The decrees of provincial synods held under divines archbishops of Canterbury.

PROVINCIALE OF LINDWOOD. A treatise on Church law by William Lyndwode who lived during reign of Edward IV. English.

PROVING THE TENOR. In Scotch Law. An action for reviving a writing which has been destroyed or is missing. Ersk. Prin. 496.

PROVISION. In Common Law. The property which a drawer of a bill of exchange places in the hands of a drawee; as, for example, by remittances, or when the drawee is indebted to the drawer when the bill becomes due, provision is said to have been made. Acceptance always presumes a provision. See *Code de Comm.* art. 115-117.

In French Law. An allowance granted by a judge to a party for his support,—which is to be paid before there is a definite judgment. In a civil case, for example, it is an allowance made to a wife who is separated from her husband, Dalloz, *Dict.*

In the law of *proemunire* a provision was a nomination by the pope to an English benefice before it became void, though the term was afterwards indiscriminately applied to any right of patronage exerted or claimed by the pope. The statute 35 Edw. 1, was the first statute against provisions. Persons who attempted to take the benefit of provisions were called provisors. Byrne.

PROVISIONAL INJUNCTION. Sometimes, though not correctly, used for interlocutory injunction.

PROVISIONAL REMEDY. One provided for present need, or for the occasion, that is, one adapted to meet a particular exigency. 54 How. Fr. 100.

PROVISIONAL SEIZURE. In Louisiana. A term which signifies nearly the same as attachment of property.

It is regulated by the Code of Practice as follows, namely:—

The plaintiff may, in certain cases, hereafter provided, obtain the provisional seizure of the property which he holds in pledge, or on which he has a privilege (q. v.), in order to secure a payment of his claim. La. Code, art. 284.

Provisional seizure may be ordered in the

following cases: *first*, in executory proceedings, when the plaintiff sues on a title importing confession of judgment; *second*, when a lessor prays for the seizure of furniture or property used in the house, or attached to the real estate which he has leased; *third*, when a seaman, or other person, employed on board of a ship or water craft, navigating within the state, or person having furnished materials for or made repairs to such ship or water craft, prays that the same may be seized, and prevented from departing, until he has been paid the amount of his claim; *fourth*, when the proceedings are *in rem*, that is to say, against the thing itself which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent. La. Code, art. 285. See 6 Mart. La. n. s. 168; 7 id. 153; 8 id. 320; 1 Mart. La. 168; 12 id. 32.

PROVISIONS. Food for man; victuals.

Corn on the ear in the shuck is provisions within the meaning of a constitutional provision with reference to exemptions; 88 Ga. 352; 23 Ark. 103; but the word does not include a milch cow; 50 Ga. 733; nor cotton; 79 Ga. 173. It has been held to mean only articles of food; 20 Wend. 177. The sale of unwholesome provisions is a misdemeanor; 2 East, Pl. Cr. 823; 3 Maule & S. 10; 4 id. 214; 4 Camp. 10. And the rule is that the seller impliedly warrants that they are wholesome; 3 Bla. Com. 166. See ADULTERATION; FOOD; GROCERIES; SALE; WARRANTY.

PROVISO. The name of a clause inserted in an act of the legislature, a deed, a written agreement, or other instrument, which generally contains a condition that a certain thing shall or shall not be done, in order that an agreement contained in another clause shall take effect.

A limitation or exception to a grant made, or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. 10 Pet. 471; 98 Cal. 433.

The general purpose of a proviso is to except the clause covered by it from the provisions of a statute or to qualify the operation of the statute; 128 U. S. 174. See 93 id. 88. It always implies a condition, unless subsequent words change it to a covenant; 12 Conn. 419; but when a proviso contains the mutual words of the parties to a deed, it amounts to a covenant; 2 Co. 72; Cro. Eliz. 242; Moore 707.

A proviso differs from an exception; 1 B. & Ald. 99. An exception *exempts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*. An exception takes out of an engagement or enactment something that would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse; 8 Am. Jur. 242; Plowd. 361; 1 Saund. 234a, note; Lilly. Reg., and the cases there cited. The natural presumption from a proviso is, that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso; 5 Q. B. D. 173. See, generally, Am. Jur. no. 16, art. 1; Bac. Abr. Conditions (A); Com. Dig. Conditions (A1), (A 2); Dwarria, Stat. 660; PROVIDED.

The proper use of provisos in drafting acts is explained by Coode on Legislative Construction, printed as an appendix to Purdon's Pennsylvania Digest. He considers that the abuse of the proviso is universal, and doubts if it need ever be employed in drafting acts. The early, and, as he thinks, the correct use, is by way of taking special cases out of general enactments and *providing for them*. The courts have generally assumed that such was the proper mode of using a proviso. It is incorrectly used to introduce mere exceptions to the operation of the enactment where no special provision is made for the exception; these are better expressed as exceptions. If a general provision is

merely to be negatived in some particular, the negative should be expressed in immediate contact with the general words. Sometimes a proviso introduces several stages of consecutive operation, which would be better expressed by "and." It is impossible to deduce any general rule from the doctrines laid down by the courts in the multitude of adjudicated cases.

Trial by proviso. A trial at the instance of a defendant in a case in which the plaintiff, after issue joined, does not proceed to trial when by the practice of the court he ought to have done so.

While the primary purpose of a proviso is to qualify only the provision of the statute to which it is appended, a presumption of such purpose will not prevail against a demonstrative test that the legislative intent was that the proviso was of general application. 204 U. S. 143.

PROVISOR. He that hath the care of providing things necessary; but more especially one who sued to the court of Rome for a provision. Jacob; 25 Edw. III. One nominated by the pope to a benefice before it became void, in prejudice of the right of the true patron. 4 Bla. Com. 111*.

PROVISORS. See PROVISION.

PROVISORS, STATUTE OF. The statute 25 Edw. 3, st. 4, was more particularly known as the Statute of Provisors, but it was only one of a series directed against provision. Byrne. See PROVISION ¶ 2.

PROVOCATION (Lat. *provoco*, to call out). The act of inciting another to do something.

Provocation simply, unaccompanied by a crime or misdemeanor, does not justify the person provoked to commit an assault and battery. In cases of homicide it may reduce the offence from murder to manslaughter; but not if the provocation is by mere words, however exasperating; 164 U. S. 492. But when the provocation is given for the purpose of justifying or excusing an intended murder, and the party provoked is killed, it is no justification; Whart. Cr. L. 457; 2 Gilb. Ev. by Lofft 753. See 81 Va. 298.

The unjust provocation by a wife of her husband, in consequence of which she suffers from his ill usage, will bar her divorce on the ground of the husband's cruelty; her remedy in such cases is to change her manners; 2 Lee 173; 1 Hagg. Cons. 155. See CRUELTY; 1 Russ. Cr. 434, 486; 1 East, Pl. Cr. 232-241. ADEQUATE PROVOCATION; CONSIDERABLE PROVOCATION.

PROVOKE. To excite; to stimulate; to arouse. 34 Conn. 279. See PROVOCATION.

PROVOST. A title given to the chief of some corporations or societies. The chief officer of certain colleges, *e. g.* the University of Pennsylvania.

The chief dignitary of a cathedral or collegiate church. In France, this title was formerly given to some presiding judges. The word is derived from the Latin *præpositus*.

PROVOST MARSHAL. An officer appointed by some general officer commanding a body or force of troops, for police duty, or for the general maintenance of order and the repression of all offences in connection with military occupation. He or his assistants may, at any time, arrest and detain for trial, persons subject to military law committing offences, and may carry into execution any punishments to be inflicted in pursuance of a court martial.

PROXENETÆ (Lat.). In Civil Law. Among the Romans these were persons whose functions somewhat resembled those of the brokers of modern commercial nations. Dig. 50. 14. 3; Domat, l. 1, t. 17, § 1, art. 1.

PROXIMATE. In its legal sense, closeness of causal connection. 55 N. J. L. 205.

Proximate—Approximate—Distinction. The word "proximate" when used in speaking of the results of an injury means direct or immediate, but the word "approximate" conveys a very different meaning. 161 Ky. 47, 170 S. W. 499.

PROXIMATE CAUSE. That which, in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. The proximate cause is that which is most proximate in the order of responsible causation; 37 W. Va. 180; 80 Pac. Rep. (N. M.) 918. That which stands next in causation to the effect, not necessarily in time or space but in causal relation; 143 Ill. 242. See 93 U. S. 180; CAUSA PROXIMA NON REMOTA SPECTATUR; NEGLIGENCE.

PROXIMITY (Lat.). Kindred between two persons. Dig. 38. 16. 8. See VICINITY.

PROXY (contracted from procuracy, procurator). A person appointed in the place of another, to represent him.

The instrument by which a person is appointed so to act.

The right of voting at an election of an incorporated company by proxy is not a general right, and the party claiming it must show a special authority for that purpose; Ang. & A. Corp. § 128; 76 Pa. 42; and although not defined on the face of the proxy, it will be held to be for the election then in contemplation, and for no other; 5 R. R. & Corp. L. J. 255. At common law it was allowable only by the peers of England, and that is said to be in virtue of a special permission of the king; 1 Paige 590; but that practice has been discontinued; Bagehot, Eng. Const. 175.

Where there was no clause in the act of incorporation empowering the members to vote by proxy, but a by-law provided that the shareholders may so vote, it was held, in view of this by-law, that a vote given by proxy should have been received; 5 Day 329. The court did not say how they would have decided had there been no such by-law, but drew a clear distinction between public and moneyed corporations. A by-law prohibiting voting by proxy has been held unreasonable and invalid; 38 Pac. Rep. (Cal.) 452. In 2 Green N. J. 222, it was held that it required legislative sanction before any corporation could make a by-law authorizing members to vote by proxy. So, also, in 3 Grant, Cas. 209. See 2 Kent 294; Beach, Pub. Corp. 391; 6 Wend. 509. Stockholders of national banks may vote by proxy, but no officer, clerk, teller, or bookkeeper of a bank may act as proxy; R. S. § 5144; many of the states have passed statutes regulating the right to vote by proxy. Where it is provided in the charter of a corporation that votes may be given by proxy, and an appointment is made without limitation, a vote by the proxy binds the stockholder, whether exercised in his interest or not, to the same extent as if the vote had been cast in person; 98 Ala. 92.

A power of attorney, irrevocable for ten years, executed by joint owners of stock, is not against public policy, nor within an act providing that every proxy shall be revocable at the pleasure of the person issuing it; 36 N. Y. S. 627; and a by-law providing that no proxy should be voted by any one not a stockholder of the corporation is invalid under an act providing generally that stockholders may be represented by proxies; 104 Cal. 649.

A stockholder who holds a proxy from another stockholder, and votes at a corporate meeting by a show of hands, counts as one person, without regard to the number of proxies he has; [1897] 1 Ch. 1; 52 L. T. N. s. 846; 101 L. T. J. 327; *contra*, per Kekewich, J., 22 Law Mag. & Rev. 46; but if proxies are held by non-members, every such has one vote (*semble*); [1897] 1 Ch. 1. In England it is said that proxyholders cannot demand a poll; 3 Q. B. D. 442. See VOTING TRUST; MEETING.

In Ecclesiastical Law. A judicial

proctor, or one who is appointed to manage another man's law concerns is called a proxy. Ayliffe, Parerg.

An annual payment made by the parochial clergy to the bishop, etc., on visitations. Tomlins, Law Dict.

In Rhode Island and Connecticut the name of an election or day of voting for officers of government. Webst. Dict.

PRUDENCE. That degree of care required by the exigencies or circumstances under which it is to be exercised. 8 S; Dak. 93. See NEGLIGENCE.

PRUDHOMMES, PRODES HOMMES. Discreet men. A term applied to jurors. Burrill; Britt. c. 58. *Prud omes*; great men. *Id.*; Kelham. *Prudum*; an honest man. *Id.* The two last forms are obvious corruptions.

PRUDOMES. See PRUDHOMMES.

PRUDUM. See PRUDHOMMES.

PRYK. A kind of service of tenure. It signified an old-fashioned spur with one point only, which the tenant, holding land by this tenure, was to find for the king. Blount.

PSEUDOGRAPH. False writing.

PSYCHIATRY. The science of mental diseases (*q. v.*). It includes symptomatology, etiology, pathological anatomy, and therapy of mental diseases, and care of the insane. Bridges, Outline Abn. Psych. 127. See PSYCHOSIS; DEMENTIA; AMENTIA; INSANITY.

PSYCHOLOGICAL FACT. In the law of evidence. A fact which can only be perceived mentally; such as the motive by which a person is actuated.

PSYCHOSIS. An active pathological process with pronounced mental symptoms. Bridges, Outline Ab. Psych. 127. See MENTAL DISEASE.

PURBETTY. In Civil Law. The age in boys of fourteen, and in girls of twelve years. Ayliffe, Pand. 63; Toullier, Dr. Civ. Fr. tom. 5, p. 100; Inst. 1. 22; Dig. 1. 7. 40. 1; Code 5. 60. 3; 1 Bla. Com. 436.

PUBLIC. The whole body politic, or all the citizens of the state. The inhabitants of a particular place.

This term is sometimes joined to other terms, to designate those things which have a relation to the public: as, a public officer, a public road, a public passage, a public house.

A distinction has been made between the terms *public* and *general*: they are sometimes used as synonymous. The former term is applied strictly to that which concerns all the citizens and every member of the state; while the latter includes a lesser, though still a large, portion of the community. Greenl. Ev. § 128.

When the public interest and its rights conflict with those of an individual, the latter must yield. Co. Litt. 181. See EMINENT DOMAIN, TRUE, PUBLIC, AND NOTORIOUS.

PUBLIC ACT. An act which concerns the whole community and of which courts of law are bound to take judicial notice. A land patent granted by a sister state is a public act. 4 Hen. & M. 146.

See JUDICIAL NOTICE. As to giving full faith and credit to the public acts of a state, see FOREIGN JUDGMENTS.

PUBLIC ADMINISTRATOR. A public officer who administers property, usually when there are no relatives. English.

PUBLIC AMUSEMENT. See PLACE OF AMUSEMENT; THEATRE.

PUBLIC BID. See BIDDER.

PUBLIC BRIDGE. See BRIDGE.

PUBLIC BUILDING. One of which the possession and use, as well as the property in it, are in the public. 34 N. J. L. 383.

PUBLIC CARRIER. See COMMON CARRIER.

PUBLIC CHAPELS. Chapels of ease. See CHAPEL.

PUBLIC CHARACTER. An individual who asks for and desires public recognition. A statesman, author, artist, or inventor who does so may be said to have surrendered his right of protection against the publication of his portrait; 64 Fed. Rep. 290. See INJUNCTION; PRIVACY; LIBEL.

PUBLIC CHARITY. A charity which is so general and indefinite in its objects as to be of common and public benefit. 11 Allen 456. It would be almost impossible to say what charities are public and what private in their nature; 2 Atk. 87. A devise to the poor of a parish is a public charity; *id.* An incorporated library association, the object of which is the diffusion of public knowledge and the acquirement of the arts and sciences, and the revenues and income of which are devoted exclusively to such objects and purposes, is an institution of purely public charity under a statute exempting such institutions from taxation; 36 Ohio St. 53; as is an orphan asylum which restricts its inmates to children of a specified religion; 90 Pa. 21. See CHARITABLE USE.

Charity, in its broadest sense, should abound in every institution; tempering even the rigor of the law, and meliorating the harsh conditions of life. It is announced by Divine authority and regarded by the common consent of all enlightened people as being the chief of human virtues.

"Public charities" are public blessings, and the Commonwealth is interested in giving force and effect to them. When property is employed in its unselfish exercise on behalf of the public, where it eases the burdens of society, and in a measure thereby discharges a duty which the public, on its conscience, owes to unfortunate humanity, and is unrestricted save by the limitation of ability, the charity may be said to be a purely public one. 116 Ky. 711, 76 S. W. 523.

A testamentary trust to establish a Masonic Orphans' Asylum to support and educate orphan children under seventeen years of age is a "public charity" within a statute. 134 Ky. 311, 120 S. W. 283.

PUBLIC CORPORATION. See CORPORATION; QUASI-PUBLIC CORPORATIONS.

PUBLIC CROSSING. A way that has been established as a public road in the manner provided by law, or that has been dedicated to the public use. 96 Ky. 197, 27 S. W. 999; 104 Ky. 35, 46 S. W. 207.

PUBLIC DEBT. That which is due or owing by the government.

The constitution of the United States provides, art. 6, § 1, that "all debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation." The fourteenth amendment provides that "the validity of the public debt of the United States authorized by law, including debts incurred for the payment of pensions and bounties for the services in suppressing insurrection or rebellion, shall not be questioned." See FUNDING SYSTEM.

PUBLIC DOCUMENTS. The publications printed by order of congress or either house thereof. 1 Dak. Ter. 328. In an action involving a title to swamp lands the official correspondence and reports of public officers of the United States relating to swamp lands and published by the authority of the legislature are public documents which the court may consult even if not made formal proof in the case; 39 Fed. Rep. 66.

PUBLIC DOMAIN. See STATE LANDS.

PUBLIC DUES. Taxes levied by a county court to pay a subscription of the county in aid of a railroad are "public dues" of the county. 10 Bush (Ky.) 132.

PUBLIC ENEMY. This word, used in the singular number, designates a na-

tion at war with the United States, and includes every member of such nation. Vattel 3, c. 5, § 70.

To make a public enemy, the government of the foreign country must be at war with the United States; for a mob, how numerous soever it may be, or robbers, whoever they may be, are never considered as a public enemy; 2 Marsh. Ins. 508; 3 Esp. 181, 182; 74 Me. 418.

A common carrier is exempt from responsibility whenever a loss has been occasioned to the goods in his charge by the act of a public enemy; but the burden of proof lies on him to show that the loss was so occasioned; 3 Munf. 239; 4 Binn. 127; Edw. Bailm. 547-548; 2 Bail. 157. See COMMON CARRIER.

In the late rebellion, the federal troops were a public enemy, against whose acts a common carrier within the confederate lines did not insure. 1 Heisk. 256.

PUBLIC FUND. See FUNDING SYSTEM.

PUBLIC GRANT. See FRANCHISE; CORPORATION; LANDS, PUBLIC.

PUBLIC HEALTH. See ADULTERATION; POLICE POWER; HEALTH; QUARANTINE.

PUBLIC HIGHWAY. One under the control of and kept by the public, established by regular proceedings for the purpose, or generally used by the public for twenty years, or dedicated by the owner of the soil and accepted by the proper authorities and for the maintenance of which they are responsible. 119 N. C. 968. It includes roads, streets, alleys, and lanes, laid out or erected as such by the public, or dedicated or abandoned to the public by the owner; 93 Cal. 128. A railroad is a public highway; 112 Mo. 109; but not a road on paper; 183 Pa. 681, reversing 2 Super. Ct. Pa. 265; nor, it is said, is a turnpike; 10 Ired. 222. See HIGHWAY.

PUBLIC HOSPITAL. To constitute a public hospital, four elements or conditions must be present: the purpose must be charitable; the benefits gratuitously furnished; the beneficiaries unrestricted and indefinite within the extent of the charity, and the institution itself must be of governmental foundation and under governmental control. 15 A. & E. Encyc. 758; 160 Pa. St. 578; 107 U. S. 167; 4 Wheat. (U. S.) 673.

PUBLIC HOUSE. A house kept for the entertainment of all who come lawfully and pay regularly. 3 Brewst. 844. It does not include a boarding-house; *id.*; but under a statute, a store-house in the country is included in this term; 29 Ala. 40; and a barber shop; 30 *id.* 550; and a broker's office; 31 *id.* 371. A room to which persons generally are permitted to resort, to play cards, though not every one has access to it, is a public gambling-house. See many cases collected in 22 Alb. L. J. 24, and Abb. Dic.

In England it applied to a licensed place where liquor is sold. The keeper of a public house is bound to serve any person who presents ready money; 2 Q. B. Div. 136.

PUBLIC IMPROVEMENT. See PUBLIC UTILITY.

PUBLIC INTEREST. If by public permission one is making use of public property and he chances to be the only one with whom the public can deal with respect to the use of that property, his business is affected with a public interest which requires him to deal with the public on reasonable terms; Cooley, Const. Lim. 746.

Business affected with a public interest. 1. Where the business is one, the following of which is not of right but is permitted by the state as a privilege or franchise. 2. Where the state on public grounds renders to the business a special assistance by taxation or otherwise. 3. Where for the accommodation of a business special use is al-

lowed to be made of public property or of a public easement. 4. Where special privileges are granted in consideration of some special return to be made to the public; *id.*

As to the publication of matter of public interest, see **LABEL**; **PRIVILEGED COMMUNICATION**.

PUBLIC INTERNATIONAL LAW. See **INTERNATIONAL PRIVATE LAW**.

PUBLIC LANDS. Such lands as are subject to sale or other disposition by the United States, under general laws; 92 U. S. 761; 145 *id.* 535. See **LANDS, PUBLIC**; 10 Nev. 260. **STATE LANDS**.

Term does not include lands to which rights have attached and become vested through full compliance with an applicable land law. 255 U. S. 237, 238, citing 92 U. S. 763; 185 U. S. 391, *et al.*

While the phrase "public lands" is a term ordinarily used to designate lands subject to sale under general laws, it is sometimes used in a larger sense, and as used in § 2 of the act of July, 1862, it includes lands within Indian reservations. Congress so intended and such has been the construction placed on the words by the Interior Department. 225 U. S. 583.

PUBLIC LAWS. See **PUBLIC ACTS**.

PUBLIC MEETING. See **ASSEMBLY**; **UNLAWFUL ASSEMBLY**.

PUBLIC MONEY. As used in the U. S. statutes, the money of the federal government received from the public revenues, or intrusted to its fiscal officers, wherever it may be. It does not include money in the hands of the marshals and other officers of the courts, held to await the judgment of the court. 12 Ct. Cl. 281.

PUBLIC OFFICE. Where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. 29 N. E. Rep. (Ohio) 593. See **OFFICER**.

PUBLIC OFFICER. One who renders a public service; a service in which the general public is interested. A municipal fireman is a "public officer" within the meaning of the term of its broader sense. 145 Ky. 242, 140 S. W. 197.

Persons employed in a city hall in managing and conducting the affairs of the municipality are "public officers." 135 Ky. 571, 122 S. W. 860.

PUBLIC PARK. As **Public Property**. A "public park," maintained at public expense, is not for profit, but for the public good. It is open to the rich and poor alike, whether they live in or outside the city. The municipal authorities are charged with the duty of maintaining the public health, and in the judgment of scientific men, it is essential to the public health that cities have and maintain parks, where the people can breathe wholesome air. People of this enlightened age justify the levying of taxes to maintain them. They are just as much "public property," used for public purposes, as are the streets, and trees planted therein, and it would be just as proper and reasonable to tax the one as the other. The public have access to and enjoy both. In our opinion, the public park is public property, used for public purposes, and necessary to the proper government of a city. 105 Ky. 344, 49 S. W. 320.

PUBLIC PASSAGE. A right to pass over a body of water. This term is synonymous with public highway, with this difference: by the latter is understood a right to pass over the land of another; by the former is meant the right of going over the water which is on another's land. Carth. 193; Hamm. N. P. 195. See **PASSAGE**.

PUBLIC PEACE. "That invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted." Redfield, J., in 11 Vt. 236. See 6 Daly 280. See **PEACE**.

PUBLIC PLACE. Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Steph. Cr. L. 115. Under a statute against gaming, a steamboat carrying passengers and freight is a public place; 13 Ala. 602; so is an infirmary; 19 *id.* 551; so is a shoemaker's shop into which many went, but a few were excluded during the gaming; 17 *id.* 369; but a secluded place on a mountain, some distance from a roadway and in a dense thicket, is not; 26 S. W. Rep. (Tex.) 394. Under statutes against indecent exposure, a public omnibus is a public place; 3 C. & K. 360; so is a urinal in a public park; L. R. 1 C. C. 282; and a part of the sea beach, visible from inhabited houses; 2 Campb. 89. See many cases cited in 22 Alb. L. J. 24, and Abb. Dict. See **PUBLIC HOUSE**; **PLACE**.

PUBLIC POLICY. That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. 4 H. L. Cas. 1; Greenh. Pub. Pol. 2. It has been designated by Burroughs, J., as "an unruly horse pursuing us, and when once you get astride of it you never know where it will carry you." 2 Bingh. 229.

"Public policy is a variable quantity; it must and does vary with the habits, capacities, and opportunities of the public," 36 Ch. Div. 359.

Public policy is manifested by public acts, legislative and judicial, and not by private opinion, however eminent; 42 Fed. Rep. 470. See **POLICE POWER**; **STATUTE**; **CONSTITUTIONAL**.

As to public policy in the law of contracts, see **VOID CONTRACTS**.

The "public policy" of a State is necessarily confined to the regulation of its own affairs and transactions occurring within its sovereignty. No State can be said to have a "public policy" as to the administration of justice, or as to the service of quasi public agencies, or as to contracts made with respect thereto, transpiring wholly abroad. The "public policy" of a State can no more have extra territorial effect than can a statute of the State. 118 Ky. 247, 80 S. W. 778.

PUBLIC PURPOSE. As employed to denote the objects for which taxes may be levied, it has no relation to the urgency of the public need or to the extent of the public benefit which is to follow. It is on the other hand merely a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which by the like usage are left to private inclination, interest, or liberality. 20 Mich. 453. The power of a municipal corporation to borrow money for a public purpose gives it authority to borrow money and issue bonds to aid a railroad company in making its road as a way of public travel and transportation; 3 Wall. 654, affirmed in 4 *id.* 270.

The words "for public purposes" means the same as the words "for governmental purposes;" and property so used by a city for public governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens, individually, or collectively, was held to be subject to taxation. 107 Ky. 684, 39 S. W. 336.

The sprinkling of city streets, being necessary to preserve the public health and comfort, is a "public purpose." 116 Ky. 885, 76 S. W. 1091.

The words "used for public purposes" mean the same as the words "used for governmental purposes." 82 S. W. 1009.

The wharf property of the city of Louisville is public property used for "public purposes." 133 Ky. 845, 119 S. W. 163.

PUBLIC RECORD OFFICE. See

RECORD OFFICE.

PUBLIC RECORDS. Under a statute "public records" include official papers, proceedings and records of the officers and general councils of the city, which the law requires them to keep. An ordinance of the city enacted pursuant to the statute governing it is a "public record." 155 Ky. 710, 160 S. W. 267.

PUBLIC SALE. See **SALE**; **AUCTION**.

PUBLIC SCHOOLS. Common schools. 103 Mass. 97. See **SCHOOLS**.

PUBLIC SEMINARY. The testator, by designating a general object of charity, a "public seminary," must be understood as intending either a seminary or the seminary of his county, or any which his executors, or court of equity, in the exercise of a sound judicial discretion, should select. 8 Dana (Ky.) 38.

PUBLIC SERVICE. The "public service" that may entitle certain individuals, including private corporations, to privileges and immunities not enjoyed by the public generally, is a public service that carries with it some measure of public control and authority, must precede or accompany the grant of the privilege and be so much a part of it that the privilege cannot be exercised without incurring the responsibility and liability that attaches to the performance of public duties. 151 Ky. 644, 152 S. W. 799.

PUBLIC SERVICE CORPORATIONS. Another name for quasi-public corporations (*q. v.*). See **QUASI-PUBLIC CORPORATIONS**.

PUBLIC SHIP. See **SHIPS OF WAR**.

PUBLIC SQUARE. In its popular import, the phrase refers almost exclusively to ground occupied by a courthouse and owned by a county. 8 Ind. 378; but it may be used as synonymous with park; 33 N. J. L. 13. See **PARK**.

As to the right of a municipality to prohibit lecturing, preaching, etc., in public squares, see **LIBERTY OF SPEECH**; **POLICE POWER**; **PROCESSION**.

PUBLIC STATUTES. See **PUBLIC ACTS**; **STATUTE**.

PUBLIC TRIAL. The constitutional right to a "public trial" does not mean that all of the public who desire to be present shall have opportunity to do so. The court may limit the admissions to the court room to persons holding tickets of admission. 143 Ky. 588, 137 S. W. 205.

PUBLIC, TRUE, AND NOTORIOUS. The old form by which charges in the allegations in the ecclesiastical courts were described at the end of each particular.

PUBLIC TRUST. See **TRUST**.

PUBLIC TRUSTEE. This English official, who has practically replaced the Judicial Trustee, is appointed by the lord chancellor under the Public Trustee Act, 1906. The public trustee, under that act and the rules made pursuant thereto, may act as trustee of English wills or settlements (with certain exceptions) precisely as a private trustee may do; but he makes a small charge for acting, whereas a private trustee makes none. The great advantage of the public trustee is that there can be no defalcations and that, as he is a corporation sole, the trouble of replacing trustees who have died never occurs. The main disadvantages would appear to be that he can scarcely administer a discretionary trust as advantageously as a private trustee, and that, when a *cestui que trust* comes of age and becomes absolutely entitled to large trust funds, he can scarcely advise a self-protective settlement with the same authority as a family solicitor of good standing. These disadvantages can, however, be got over by appointing another trustee to act jointly with the public trustee. Byrne.

PUBLIC USE. Under **Eminent Domain**. Implies the use of many, or by the public. It may be limited to the inhabitants of a small or restricted locality, but must be in common, and not for a particular individual. Lewis, Em. Dom. c. 7; 180 N. Y. 249; 63 Cal. 182; 66 Hun 619. It arises when the sovereign power is essential to an enterprise, and is for that reason therein exercised; 50 Fed. Rep. 312. See **EMINENT DOMAIN**; **PUBLIC UTILITY**.

PUBLIC UTILITY. A distinction is made between a public improvement and a public utility, and by some a public utility is distinguished from a public use, and it is said: 'Utility is somewhat more abstract and philosophical than usefulness or use, and it is often employed to denote adaptation to produce a valuable result, while usefulness denotes the actual production of such result.' 29 Am. & Eng. Encyc. 560; 161 Mo. 371, quoting Stand. Dict. Public utility held to be synonymous with public use in 7 W. Va. 195. *Id.*

PUBLIC WAYS. Held to mean all public streets, alleys, side-walks, roads, lanes, avenues, highways and thoroughfares. 51 S. W. 157.

PUBLIC WORSHIP. The term may mean the worship of God conducted and observed under public authority; or it may mean worship in an open or public place, without privacy or concealment; or it may mean the performance of religious exercises, under a provision for an equal right in the whole public to participate in its benefits; or it may be used in contradistinction to worship in the family or the closet. In this country, what is commonly called "public worship" is commonly conducted by voluntary societies, constituted according to their own notions of ecclesiastical authority and ritual propriety, opening their places of worship, and admitting to their religious services such persons, and upon such terms and subject to such regulations, as they may choose to designate and establish. A church absolutely belonging to the public, and in which all persons without restriction have equal rights, such as the public enjoy in highways or public landings, is certainly a very rare institution. Abbott; 14 Gray 586.

PUBLIC WRONGS. Violation of public rights and duties which affect the whole community, considered as a community; crimes and misdemeanors. 3 Bl. Com. 2.

PUBLICAN. In Civil Law. A farmer of the public revenue; one who held a lease of some property from the public treasury. Dig. 39. 4. 1. 1; 39. 4. 12. 3; 39. 4. 13.

PUBLICATION. The act by which a thing is made public.

It differs from promulgation, which see; and see, also, Toulhier, *Dr. Civ. Fr. titre Préliminaire*, n. 59, for the difference in the meaning of these two words.

Publication has different meanings. When applied to a law it signifies the rendering public the existence of the law; when it relates to the opening of the depositions taken in a case in chancery, it means that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by consent of parties, or by the rules or orders of the court, to show the depositions openly, and to give out copies of them; *Pract. Reg.* 297; Blake, Ch. Pr. 143. And when spoken of a will it signifies that the testator has done some act from which it can be concluded that he intended the instrument to operate as his will; 3 Atk. 161; 4 Me. 220; 3 Rawle 15; Com. Dig. *Estates by Devise* (E 2). See Com. Dig. *Chancery* (Q). As to the publication of an award, see 6 N. H. 36.

Some of the state constitutions provide that general laws shall not take effect till published. The mode of publication is for the legislature to determine. A general law printed in a volume of private laws was held to have been published; 9 Wisc. 264;

but an unauthorized publication is no publication; 10 Wisc. 186. In Pennsylvania, where the constitution did not require publication, it was held to be necessary before an act could be operative; but nevertheless that publication in the legislative journals was sufficient, and that neglect to publish an act in the pamphlet laws did not invalidate the act; 81 Pa. 432. An inaccuracy in the publication of a statute which does not change its substance or legal effect, will not invalidate the publication; 14 Wisc. 212; a joint resolution of a general nature must be published; 4 Kan. 261. See Cooley, *Const. Lim.*, 2d. ed. 189-191.

See **LIBEL**, as to the publication of a libel. **PERIODICAL PUBLICATION**.

PUBLICI JURIS. Of public right.

PUBLICIANA (Lat.). In Civil Law. The name of an action introduced by the prætor Publicius, the object of which was to recover a thing which had been lost. Inst. 4. 6. 4; Dig. 6. 2. 1. 16 at 17. Its effects were similar to those of our action of trover.

PUBLICITY. The doing of a thing in the view of all persons who chose to be present.

The law requires that courts should be open to the public; there can therefore be no secret tribunal, except the grand jury (*q. v.*); and all judgments are required to be given in public. See **OPEN COURT**.

Publicity must be given to the acts of the legislature before they can be in force; but in general their being recorded in a certain public office is evidence of their publicity.

PUBLISH. Primarily it means to make known. 54 N. J. L. 111.

PUBLISHER. One who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.

The publisher of a libel is responsible as if he were the author of it, and it is immaterial whether he has any knowledge of its contents or not; 9 Co. 59; Odger, L. & Sl. 125, 168, 432; Hawk. Pl. Cr. c. 73, § 10; 4 Mas. 115; and it is no justification to him that the name of the author accompanies the libel; 10 Johns. 447; 2 Mood. & R. 312.

When the publication is made by writing or printing, if the matter be libellous, the publisher may be indicted for a misdemeanor, provided it was made by his direction or consent; but if he was the owner of a newspaper merely, and the publication was made by his servants or agents, without any consent or knowledge on his part, he will not be liable to a criminal prosecution. But see 107 Mass. 199. In either case he will be liable to an action for damages sustained by the party aggrieved; 7 Johns. 260; 60 Ill. 51; 33 Mich. 10.

In order to render the publisher amenable to the law, the publication must be maliciously made; but malice will be presumed if the matter be libellous. This presumption, however, will be rebutted if the publication be made for some lawful purpose, as, drawing up a bill of indictment, in which the libellous words are embodied for the purpose of prosecuting the libeller; or if it evidently appear that the publisher did not, at the time of publication, know that the matter was libellous; as, when a person reads a libel aloud in the presence of others, without beforehand knowing it to be such; 9 Co. 59. See **LIBEL**; **LIBELLER**; **PUBLICATION**; *Odg. Lib. & S.*

PUDICITY. Chastity; the abstaining from all unlawful carnal commerce or connection. A married woman or a widow may defend her pudicity as a maid may her virginity. See **CHASTITY**; **RAPE**.

PUDZELD. In Old English Law. To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 a. The same as *Woodgeld*.

PUEBLO. In its original signification, it means people or population, but is used

in the sense of the English word "town." It has the indefiniteness of that term, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement, or village, as well as to a regularly organized municipality. 100 U. S. 251.

PUER (Lat. a boy; a child). In its enlarged sense this word signifies a child of either sex; though in its restrained meaning it is applied to a boy only.

A case once arose which turned upon this question, whether a daughter could take lands under the description of *puer*; and it was decided by two judges against one that she was entitled; Dy. 337 b. In another case, it was ruled the other way; Hob. 33.

PUERILITY. In Civil Law. A condition which commenced at the age of seven years, the end of the age of infancy, and lasted till the age of puberty,—that is, in females till the accomplishment of twelve years, and in males till the age of fourteen years fully accomplished. Ayliffe, Pand. 68.

The ancient Roman lawyers divided puerility into *proximus infantie*, as it approached infancy, and *proximus puertati*, as it became nearer to puberty. 6 Toulhier, n. 100.

PUERITIA (Lat.). In Civil Law. Age from seven to fourteen. 4 Bla. Com. 22; Wharton, Dict. The age from birth to fourteen years in the male, or twelve in the female. Calvinus, Lex. The age from birth to seventeen. Vicat, Voc. Jur.

PUFFER. A person employed by the owner of property which is sold at auction to bid it up, who does so accordingly, for the purpose of raising the price upon *bona fide* bidders.

This is a fraud, which, at the option of the purchaser, invalidates the sale. 3 Madd. 112; 2 Kent 423; 3 Ves. 628; 2 Bro. C. C. 326; 11 S. & R. 89; 2 Hayw. 328; 4 H. & McH. 282; 2 Dev. 126. See **AUCTION**; **BIDDER**; **BY BIDDER**.

PUISDAIRBYN CONTINUANCE (L. Fr. since last continuance). In Pleading. A plea which is put in after issue joined, for the purpose of introducing new matter, or matter which has come to the knowledge of the party pleading it subsequently to such joinder. See **CONTINUANCE**; **PLEA**.

PUISNE (L. Fr.). Younger; junior. Associate. *Puisne* judge, an associate judge; not the chief justice.

PULLMAN CAR. See **SLEEPING CAR**.

PUNCTUALITY. As a general rule, a railroad company is liable to damage accruing to a passenger for a negligent failure on its part to run its trains according to the company's time tables; but there must be proof of negligence. Neither time table nor advertisement is a warrant of punctuality. Whart. Negl. § 662.

The publication of the time table cannot amount to less than this, viz.: a representation that it is ordinarily practicable for the company, by the use of due care and skill, to run according to the table, and an engagement on their part that they will do all that can be done, by the use of due care and skill, to accomplish that result; 52 N. H. 596. See also 5 E. & B. 860. The company is undoubtedly liable for any want of punctuality which they could have avoided by the use of due care and skill; nor can they excuse a want of conformity to the time table for any cause, the existence of which was known to them, or ought to have been known to them, at the time of publishing the table; 52 N. H. 596. See 8 E. L. & Eq. 363; 14 Allen 433; 36 Miss. 660; L. R. 2 C. P. 359. In *Ang. Carriers* 527 a, it is said that time tables are in the nature of a special contract, so that any deviation from them renders the company liable. But it does not appear that the cases go so far.

PUNCTUATION. The division of a

written or printed instrument by means of points, such as the comma, semicolon, and the like.

Courts of law in construing statutes and deeds must read them with such punctuation as will give effect to the whole; 4 Term 65.

In construing deeds, it is said that no regard is to be had to punctuation, and although stops are sometimes used, they are not to be regarded in the construction of the instrument; 3 Washb. R. P. 397. See 21 W. Va. 707. Punctuation is not allowed to throw light on printed statutes in England; 24 Beav. 380.

In an act of parliament there are no such things as brackets, any more than there are such things as stops; 24 Q. B. D. 478.

Punctuation may be considered in determining the meaning of a contract, when it is doubtful; 138 U. S. 1.

Where a comma after a word in a statute, if any force were attached to it, would give the section containing it broader scope than it would otherwise have, it was held that that circumstance should not have a controlling influence. Punctuation is no part of the statute; 105 U. S. 77; in construing statutes, courts will disregard punctuation; or, if need be, repunctuate, to render the true meaning of the statute; 16 Ohio St. 432, approved in 105 U. S. 77; also 65 Pa. 311; 9 Gray 385.

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first ascertain the meaning from the four corners of the instrument; 11 Pet. 64.

Lord St. Leonards said: "In wills and deeds you do not ordinarily find any stops; but the court reads them as if they were properly punctuated;" 2 Dr. & War. 98.

Judges in the later cases have been influenced in construing wills by the punctuation of the original document; 2 M. & G. 679; 26 Beav. 81; 1 Phila. 528; 17 Beav. 589; 24 L. J. Ch. 523; but see 1 Mer. 651, where Sir William Grant refused to resort to punctuation as an aid to construction. See, also, 25 Barb. 405; 16 Can. L. J. 183.

PUNCTURED WOUND. In medical jurisprudence. A wound made with an object having a sharp cutting point; a stab.

PUNISHABLE. Liable to punishment. 118 Mass. 36. See 107 *id.* 225; 49 Conn. 232; 135 U. S. 266.

PUNISHMENT. In Criminal Law. Some pain or penalty warranted by law, inflicted on a person for the commission of a crime or misdemeanor, or for the omission of the performance of an act required by law, by the judgment and command of some lawful court.

The penalty for the transgression of the law. Whart.; 8 N. Y. Crim. R. 355.

"The infliction of pain in vengeance of crime." Dr. Johnson.

The right of society to punish is derived, by Beccaria, Mably, and some others, from a supposed agreement which the persons who composed the primitive societies entered into, in order to keep order, and, indeed, the very existence of the state. According to others, it is the interest and duty of man to live in society; to defend his right, society may exert this principle, in order to support itself; and this it may do whenever the acts punishable would endanger the safety of the whole. And Bentham is of opinion that the foundation of this right is laid in public utility or necessity. Delinquents are public enemies, and they must be disarmed and prevented from doing evil, or society would be destroyed. But, if the social compact has ever existed, says Livingston, its end must have been the preservation of the natural rights of the members; and therefore the effects of this fiction are the same with those of the theory which takes abstract justice as the foundation of the right to punish; for this justice, if well considered,

is that which assures to each member of the state the free exercise of his rights. And if it should be found that utility, the last source from which the right to punish is derived, is so intimately united to justice that it is inseparable from it in the practice of law, it will follow that every system founded on one of these principles must be supported by the other.

The proper end of human punishment is not the satisfaction of justice, but the prevention of crime; Paley.

The end of punishment, therefore, is neither to torment sensible beings nor undo a crime already committed, nor yet recall the past, nor reverse the crime. It is to punish the criminal for doing some injury to society; to repair the wrong done to society or to a private individual, and to amend his life for the future, and by his example to prevent others from committing like offences. The chief end of punishment is by punishing the crime and preventing the doing of it again; and that by means of fines, imprisonment, hard labor, moral and physical treatment, and new habits formed. The infliction of pain for its own sake is now condemned by all enlightened governments, statesmen, and philanthropists; 16 L. Mag. & Rev. 99.

The main objects of penal justice is laid down by Bentham: example, reformation, incapacitation, satisfaction for the person injured, economy to the public. He further says that all our forms of punishment should be put to these five tests and should be subjected most especially to all except the last.

To attain their social end, punishments should be *exemplary*, or capable of intimidating those who might be tempted to imitate the guilty; *reformatory*, or such as should improve the condition of the convicts; *personal*, or such as are at least calculated to wound the feelings or affect the rights of the relations of the guilty; *divisible*, or capable of being graduated and proportioned to the offence and the circumstances of each case; *reparable*, on account of the fallibility of human justice.

Punishments are either corporal or not corporal. The former are—death, which is usually denominated capital punishment; imprisonment, which is either with or without labor, see **PENITENTIARY**; whipping, in some states; and banishment.

The punishments which are not corporal are—fines, forfeitures; suspension or deprivation of some political or civil right; deprivation of office, and being rendered incapable to hold office; compulsion to remove nuisances.

The object of punishment is to reform the offender, to deter him and others from committing like offences, and to protect society. See 4 Bla. Com. 7; Whart. Cr. L. 3, 4, 7; Rutherford, Inst. b. 1, c. 13. A state may provide for a severer punishment for a second than for a first offence, provided it is dealt out to all alike; 159 U. S. 673.

The constitution of the United States, Amendments, art. 8, forbids the infliction of cruel and unusual punishments. This is intended only for congress and the federal courts; 12 S. & R. 220; 3 Cow. 686; and does not apply to the states; 144 U. S. 323 (Field, Harlan, and Brewer, J.J., dissenting). Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the federal constitution; 136 U. S. 436.

A state statute which provides for the punishment of death by electricity, and which is held by the state courts not to inflict a cruel and unusual punishment, does not abridge the privileges or immunities of a convict under the federal constitution; 142 U. S. 155.

What punishment is suited to a specified offence must in general be determined by the legislature, and the case must be very extraordinary in which its judgment could be brought in question. A punishment may possibly be unlawful because it is so manifestly out of all proportion to the offence as to shock the moral sense with its

barbarity, or because it is a punishment long disused for its cruelty until it has become unusual; Cooley, Const., 2d ed. 401-403. So, for example, is the punishment of depriving a native of China of his hair; 18 Am. L. Reg. 676. Whipping, as a punishment for stealing mules, is not contrary to this provision; 1 New Mex. 415. In New York, where a general law created a crime and fixed the maximum of its punishment, a special statute operating only in localities, or upon particular individuals, whereby, for no perceptible reason, the same identical crime, which consists in the violation of a statute applicable to the whole state, can therein or in those persons be punished with double the severity that it can be elsewhere in the same state, is within the prohibition of section five of article one of the constitution of the state as to "cruel and unusual punishments"; 61 How. Pr. 294; 35 L. R. A. 562. See **INFAMY**; **INFAMOUS CRIME**; **JEOPARDY**; **CAPITAL PUNISHMENT**; **PRISONER**; **SENTENCE**; **PARDON**; **ELECTROCUTION**; **HANGING**; **CRUEL AND UNUSUAL PUNISHMENT**; **ACCUMULATIVE SENTENCES**; **INFAMOUS PUNISHMENT**.

PUNITIVE. "Punitive, vindictive and exemplary damages" are, in legal contemplation, synonymous terms. 2 Met. (Ky.) 147.

PUNITIVE DAMAGES. See **MEASURE OF DAMAGES**.

PUPIL. In Civil Law. One who is in his or her minority. See Dig. 1. 7; 26. 7. 1. 2; 50. 16. 239; Code 6. 30. 18. One who is in ward or guardianship. See **SCHOOLS**; **ASSAULT**; **BATTERY**; **CORRECTION**.

PUPILLARIS SUBSTITUTIO (Lat.). In Civil Law. The nomination of another besides his son as pupil to succeed, if the son should not be able or inclined to accept the inheritance, or should die before he came of age to make a testament.

If the child survived the age of puberty, though he made no testament, the substitute had no right of succession. See Bell, Dict. *Substitution*; Dig. 28. 6.

PUPILLARITY. In Civil Law. That age of a person's life which included infancy and puerility.

PUR. A corruption of the French word *par*, by or for. It is frequently used in old French law phrases; as *pur autre vie*. It is also used in the composition of words: as, *purparty*, *purlicue*, *purview*.

PUR AUTRE VIE (old French, *for another's life*). See **ESTATE PUR AUTRE VIE**.

PURCHASE. A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. 2 Washb. R. Prop. 5th ed. *401; 15 Barb. 508; 9 Cow. 437. A title by purchase is one that is vested in a person by his own act or agreement; 2 Bla. Comm. 241. A title by devise is a title by purchase; 134 Ind. 78.

There are six ways of acquiring a title by purchase, namely, by deed; by devise; by execution; by prescription; by possession or occupancy; by escheat. In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money or some other valuable consideration; Cruise, Dig. tit. 30, §§ 1-4; 1 Dall. 20. See 96 Ill. 535. In common parlance, purchase signifies the buying of real estate and of goods and chattels.

The word 'purchase' implies purchase in fee. 1 Dallas (U. S.) 21.

PURCHASE-MONEY. The consideration which is agreed to be paid by the purchaser of a thing in money. See 15 Barb. 568. As to vendor's lien, see **LIEN**. See **APPLICATION OF PURCHASE-MONEY**.

PURCHASER. A buyer; a vendee. A mortgagee or a conditional vendee is not a purchaser; 46 Neb. 830.

Ex Vi Termini. A purchaser *ex vi termini*, is one who has acquired the title, and the term cannot in legal propriety be applied to one who claims under an unexecuted contract to convey. 2 Bibb. (Ky.) 418.

See **SALE; PARTIES; BONA FIDE PURCHASER; PURCHASER FOR VALUE AND WITHOUT NOTICE. CONTRACTS.**

PURCHASER FOR VALUE AND WITHOUT NOTICE. A *bona fide* purchaser. A purchaser of land who takes a conveyance purporting to pass the entire title, legal and equitable, gives therefore a valuable consideration, and has neither actual nor constructive notice of any equitable rights of other persons in conflict with the title that his deed purports to convey. 23 Am. & Eng. Encyc. 2d ed., 476; 49 Ark. 214 *et al.* See **BONA FIDE PURCHASER.**

PURE DEBT. In Scotch Law. A debt actually due, in contradistinction to one which is to become due at a future day certain, which is called a future debt, and one due provisionally, in a certain event, which is called a contingent debt. 1 Bell, Comm. 315.

PURE OBLIGATION. One which is not suspended by any condition, whether it has been contracted without any condition, or, when thus contracted, the condition has been performed. Pothier, *Obl.* n. 176.

PURE PLEA. In Equity Pleading. One which relies wholly on some matter *dehors* the bill, as, for example, a plea of a release on a settled account.

Pleas not pure are so called in contradistinction to pure pleas; they are sometimes also denominated negative pleas. 4 Bouvier, Inst. n. 4275.

PURGATION (Lat. *purgo*, from *purum* and *ago*, to make clean). The clearing one's self of an offence charged, by denying the guilt on oath or affirmation.

Canonical purgation was the act of justifying one's self, when accused of some offence, in the presence of a number of persons worthy of credit, generally twelve, who would swear they believe the accused. See **PURGATORY; WAGER OF LAW.**

Vulgar purgations consisted in superstitious trials by hot and cold water, by fire, by hot irons, by batel, by corned, etc. See **OATH PURGATORY.**

PURGED OF PARTIAL COUNSEL. In Scotland every witness, before making oath or affirmation, is *purged of partial counsel*, i. e. cleared by examination on oath of having instigated the plea of having been present with the party for whom he testifies at consultations of lawyers, where it might be shown what was necessary to be proved, or of having acted as his agent in any of the proceedings. So, in a criminal case, he who is agent of prosecutor or who tampers with the panel cannot be heard to testify, because of *partial counsel*. Stair, Inst. p. 768, § 9; Bell, Dict. *Partial Counsel*.

PURGING A TORT. Is like the ratification of a wrongful act by a person who has power of himself to lawfully do the act. But, unlike ratification, the purging of the tort may take place even after commencement of the action. 1 Brod. & B. 282.

PURLIEU. In English Law. A space of land near a forest, known by certain boundaries, which was formerly part of a forest, but which has been separated from it.

The history of purlieus is this. Henry II., on taking possession of the throne, manifested so great a taste for forests that he enlarged the old ones wherever he could, and by this means enclosed many estates which had no outlet to the public roads; forests increased in this way until the reign of king John, when the public reclamations were so great that much of this land was disforested, — that is, no longer had the

privileges of the forests—and the land thus separated bore the name of purlieu. See **FOREST LAWS.**

PURPART. A share of an estate allotted by partition to a coparcener. Anderson. See **PURPARTY.**

PURPARTY. That part of an estate which, having been held in common by parceners, is by partition allotted to any of them. To make purparty is to divide and sever the lands which fall to parceners. Old. N. B. 11.

PURPORT. In Pleading. The substance of a writing as it appears on the face of it to the eye that reads it. It differs from tenor. 2 Russ. Cr. 365; 1 East 179.

PURPOSE. See **PUBLIC PURPOSE.**

PURPOSELY. Intentionally; designedly. 23 Ind. 231.

PURPRESTURE. An enclosure by a private individual of a part of a common or public domain.

An inclosure by a private person of a part of that which belongs to, and ought to be open and free to the enjoyment of the public at large. 34 Mich. 472; 89 *id.* 94. See 76 Cal. 156.

According to Lord Coke, purpresture is a close or enclosure, that is, when one encroaches or makes several to himself that which ought to be in common to many; as, if an individual were to build between high and low water mark on the side of a public river. In England this is a nuisance, and in cases of this kind an injunction will be granted, on *ex parte* affidavits, to restrain such a purpresture and nuisance; 2 Bouvier, Inst. n. 2382; 4 *id.* n. 3798; Co. 2d Inst. 28. And see Skene, *Purpresture*; Glanville, lib. 9, ch. 11, p. 239, note; Spelman, Gloss. *Purpresture*; Hale, *de Port. Mar.*; Hargrave, *Law Tracts* 84; 2 Anstr. 606; Bisph. Eq. 443; Callis, Sew. 174.

PURSER. The person appointed by the master of a ship or vessel, whose duty it is to take care of the ship's books, in which everything on board is inserted, as well the names of mariners as the articles of merchandise shipped. Roccus, Ins. note. By statute pursers in the navy are now called paymasters. R. S. § 1383.

PURSUE. To execute or carry out. Co. Litt. 52 a.

PURSUER. The name by which the complainant or plaintiff is known in the ecclesiastical courts. 3 Eccl. 350.

PURVIEW. That part of an act of the legislature which begins with the words, "Be it enacted," etc., and ends before the repealing clause. Cooke 330; 3 Bibb 181. According to Cowel, this word also signifies a conditional gift or grant. It is said to be derived from the French *pourvoir*, provided. It always implies a condition.

PUT. In Pleading. To select; to demand; as, "the said C D puts himself upon the country;" that is, he selects the trial by jury as the mode of settling the matter in dispute, and does not rely upon an issue in law. Gould, Pl. c. 6, part 1, § 19.

PUTOFF. To postpone. In a bargain for the sale of goods, it may mean to postpone its completion or to procure a resale of the goods to a third person. 11 Ex. 302.

PUTATIVE. Reputed to be that which is not. The word is frequently used: as, putative father, putative marriage, putative wife, and the like. And Toullier, tome 7, n. 29, uses the words putative owner, *proprietaire putatif*. Lord Kames uses the same expression. Princ. of Eq. 391.

PUTATIVE FATHER. The reputed father.

This term is usually applied to the father of a bastard child.

The putative father is bound to support his children; and is entitled to the guardianship and care of them in preference to all persons but the mother. 1 Ashm. 55.

And see 5 Esp. 181; 1 B. & Ald. 491; Bott, Poor Law 499; 1 C. & P. 268; 3 *id.* 86; 1 Ball & B. 1.

PUTATIVE MARRIAGE. A marriage which is forbidden but which has been contracted in good faith and ignorance of the impediment on the part of at least one of the contracting parties.

Three circumstances must concur to constitute this species of marriage. *There must be bona fides.* One of the parties at least must have been ignorant of the impediment, not only at the time of the marriage, but must also have continued ignorant of it during his or her life, because if he became aware of it he was bound to separate himself from his wife. *The marriage must be duly solemnized.* The marriage must have been considered lawful in the estimation of the parties or of that party who alleges the *bona fides*.

A marriage in which these three circumstances concur, although null and void, will have the effect of entitling the wife, if she be in good faith, to enforce the rights of property which would have been competent to her if the marriage had been valid, and of rendering the children of such marriage legitimate.

This species of marriage was not recognized by the civil law: it was introduced by the canon law. It is unknown to the law of the United States, and in England and Ireland. In France it has been adopted by the Code Civil, art. 201, 202. In Scotland the question has not been settled. Burge, Confl. Laws 151, 152.

PUTS AND CALLS. As used in a board of brokers. A "put" is defined in the evidence to be a privilege of delivering or not delivering the grain, and a "call" is a privilege of calling or not calling for the grain. 79 Ill. 353. See **OPTION.**

PUTTING IN FEAR. These words are used in the definition of a robbery from the person: the offence must have been committed by *putting in fear* the person robbed. Co. 3d Inst. 68; 4 Bla. Com. 248.

This is the circumstance which distinguishes robbery from all other larcenies. But what force must be used or what kind of fears excited are questions very proper for discussion. The goods must be taken *against the will of the possessor*.

There must either be a putting in fear or actual violence, though both need not be positively shown, for the former will be inferred from the latter, and the latter is sufficiently implied in the former. For example, when a man is suddenly knocked down, and robbed while he is senseless, there is no fear, yet in consequence of the violence, it is presumed; 2 East, Pl. Cr. 711; 4 Binn. 379; 3 Wash. C. C. 209.

In an indictment for robbery, at common law, it is not necessary to allege a putting in fear in addition to the allegation of force and violence; 7 Mass. 242; 8 Cush. 217.

PYROMANIA. An irresistible propensity to burn.

Pyromania always occurs in young subjects, and is supposed to be connected with disordered menstruation, or that physiological evolution which attends the transition from youth to manhood. See **MANIA.**

PYX, TRIAL OF THE. A trial in England which is held every year for the purpose of ascertaining whether the coins have been made in accordance with the Coinage Act 1870. The trial takes place before the King's Remembrancer and a jury of six members of the Goldsmiths' Company, summoned by the officials of that company, who are known as the Prime Warden and the Wardens; there is a weighing, melting and assaying of the coins in order to ascertain whether they are of proper weight and fineness, and the verdict of the jury, which must be signed by each of them, contains various averments as to these matters. Byrne.

Q. C. An abbreviation of "queen's counsel" (q. v.). Anderson.

QUACK. One who, without sufficient knowledge, study, or previous preparation, undertakes to practise medicine or surgery, under the pretence that he possesses secrets in those arts.

To call a regular physician a quack is actionable. A quack is criminally answerable for his unskilful practice, and also civilly to his patient in certain cases. See **MALPRACTICE**; **PHYSICIAN**.

QUACUNCQUE VIA DATA (Lat.). Whichever way given; in whichever view of the case.

QUADRAGESIMS. The third part of the year-books of Edward III. R. & L. Dict.; 3 Reeves Hist. Eng. Law c. xvi. 148.

QUADRANS (Lat.). In Civil Law. The fourth part of the whole. Hence the heir *ex quadrante*; that is to say, of the fourth part of the whole.

QUADRANTATA TERRAE (Lat.). The fourth part of an acre.

QUADRIENNIUM UTILE (Lat.). In Scotch Law. The four years of a minor between his age of twenty-one and twenty-five years are so called. During this period he is permitted to impeach contracts made against his interest previously to his arriving at the age of twenty-one years. 1 Bell, Com. 135.

QUADRIPARTITE (Lat.). Having four parts, or divided into four parts; as, this indenture quadripartite, made between A B, of the one part, C D, of the second part, E F, of the third part, and G H, of the fourth part.

QUADRIPARTITUS. A translation of the old dooms into Latin made about the year 1118. The first part contains the old English laws, the second some important state papers. The third and fourth parts, dealing respectively with legal procedure and theft, are not extant. Byrne; Liebermann, *Quadrupartitus*; Halle, 1892.

QUADROON. A person who is descended from a white person and another person who has an equal mixture of the European and African blood. 2 Bail. 558. See **MULATTO**.

QUADRUPLOTORES. Informers among the Romans, who, if their information were followed by conviction, had the fourth part of the confiscated goods for their trouble.

QUADRUPLICATION. In Pleading. A pleading in admiralty, third in order after a replication; now obsolete. Formerly this word was used instead of surrebutter. 1 Brown, Civ. Law. 469, n.

QUÆ EST EADEM (Lat. which is the same). In Pleading. A clause containing a statement that the trespass, or other fact mentioned in the plea, is the same as that laid in the declaration, where from the circumstances there is an apparent difference between the two. 1 Chitty, Pl. *582; Gould, Pl. c. 3, § 79, 80; 29 Vt. 455.

The form is as follows: "which are the same assaulting, beating, and ill-treating, the said John, in the said declaration mentioned, and whereof the said John hath above thereof complained against the said James." See 1 Maund. 14, 208, n. 2; 2 id. 5 a., n. 3; Arch. Civ. Pl. 217; Com. Dig. Pleader (E 31); Cro. Jac. 372.

QUÆ PLURA. A writ which lay

where an inquisition had been taken by an escheator of lands, etc. of which a man, died seised, and all the land was supposed not to be found by the office or inquisition; it was to inquire of "what more" lands or tenements the party dies seised. Reg. Orig. 298.

QUÆRE (Lat.). Query: noun and verb. A word frequently used to denote that an inquiry ought to be made of a doubtful thing. 2 Lilly, Abr. 406. Commonly used in the syllabi of the reports, to mark points of law considered doubtful.

QUAERENS NIHIL CAPIAT PER BILLAM (L. Lat.). The plaintiff shall take nothing by his bill.

QUERENS NON INVENT PLEGIUM (Lat.). In Practice. The plaintiff has not found pledge. The return made by the sheriff to a writ directed to him with this clause, namely, *si A fecerit B securum de clamore suo prosequendo*, when the plaintiff has neglected to find sufficient security. Fitz. N. B. 38.

QUESTIO (Lat.). In Roman Law. A sort of commission (*ad quaerendum*) to inquire into some criminal matter given to a magistrate or citizen, who was called *quesitor* or *quaestor*, who made report thereon to the senate or the people, as the one or the other appointed him. In progress of time he was empowered (with the assistance of a counsel) to adjudge the case; and the tribunal thus constituted was called *questio*.

This special tribunal continued in use until the end of the Roman republic, although it was resorted to, during the last times of the republic, only in extraordinary cases.

The manner in which they were constituted was this. If the matter to be inquired of was within the jurisdiction of the comitia, the senate, or the demand of the consul, or of a tribune, or of one of its members, declared by a decree that there was cause to prosecute a citizen. Then the consul *ex auctoritate senatus* asked the people in comitia (*rogatus rogatio*) to enact this decree into a law. The comitia adopted it, either simply or with amendment, or they rejected it.

The increase of population and of crimes rendered this method, which was tardy at best, onerous, and even impracticable. In the year a. v. c. 604, or 149 a. c., under the consulship of Censorinus and Manilius, the tribune Calpurnius Piso procured the passage of a law establishing a *questio perpetua*, to take cognizance of the crime of extortion committed by Roman magistrates against strangers *de pecuniis repetundis*. Cicero, Brut. 27; de Off. II. § 1; in Ver. IV. 23.

Many such tribunals were afterwards established, such as *Questiones de maiestate*, *de ambitu*, *de peculatu*, *de vi*, *de sodalitatibus*, etc. Each was composed of a certain number of judges taken from the senators, and presided over by a prætor, although he might delegate his authority to a public officer, who was called *judez questorius*. These tribunals continued a year only; for the meaning of the word *perpetuus* is *non interruptus*, not interrupted during the term of its appointed duration.

The establishment of these *questiones* deprived the comitia of their criminal jurisdiction, except for the crime of treason; they were, in fact, the depositories of the judicial power during the sixth and seventh centuries of the Roman republic, the last of which was remarkable for civil dissensions and replete with great public transactions. Without some knowledge of the constitution of the *Questio perpetua*, it is impossible to understand the forensic speeches of Cicero, or even the political history of that age. But when Julius Cæsar, as dictator, sat for the trial of Ligarius, the ancient constitution of the republic was, in fact, destroyed, and the criminal tribunals, which had existed in more or less vigor and purity until then, existed no longer but in name. Under Augustus, the concentration of the triple power of the consuls, præ-consuls, and tribunes in his person transferred to him, as of course, all judicial powers and authorities.

QUÆSTOR (Lat.). The name of a magistrate of ancient Rome.

QUALE JUS. A judicial writ, which lay where a man of religion had judgment to recover land before execution was made

of the judgment.

QUALIFICATION. The endowment or acquirement which renders eligible to place or position. 52 Miss. 672; 64 Mo. 89. It relates to the fitness or capacity of a party for a particular pursuit or profession; 4 Wall. 319. It has been held not only to imply the presence of every requisite demanded, but the absence of every disqualification imposed. 17 B. Monr. 786.

QUALIFIED ACCEPTANCE. See **CONDITIONAL ACCEPTANCE**.

QUALIFIED ELECTOR. A person who is legally qualified to vote. 28 Wisc. 358.

QUALIFIED FEE. One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and his heirs on the part of his father affords an example of this species of estate. Littleton § 254; 2 Bla. Com. 109; Chall. R. P. 50. See **BASE FEE**.

QUALIFIED INDORSEMENT. A transfer of a bill of exchange or promissory note to an indorsee, without any liability to the indorser: the words usually employed for this purpose are *sans recours*, without recours. 1 Bouv. Inst. n. 1138.

QUALIFIED OATH. See **OATH**.

QUALIFIED OWNER. See **OWNER**; **PROPERTY**; **QUALIFIED PROPERTY**.

QUALIFIED PROPERTY. Property not in its nature permanent, but which may sometimes subsist and at other times not subsist. A defeasible and precarious ownership, which lasts as long as the thing is in actual use and occupation; e. g. first, property in animals *feræ nature*, or in light, or air, where the qualified property arises from the nature of the thing; second, property in a thing held by any one as a bailee, where the qualified property arises not from the nature of the thing, but from the peculiar circumstances under which it is held; 2 Bla. Com. 391, 395*; 2 Kent 347; 2 Woodd. Lect. 385.

Any ownership not absolute.

QUALIFIED VOTER. A person qualified to vote generally. 9 Colo. 629; or, it may mean a person qualified and actually voting. 111 U. S. 565.

Under a statute requiring officers in certain cities to be "qualified voters," one's eligibility is not affected by his failure to register. 132 Ky. 201, 116 S. W. 779.

QUALIFY. To become qualified or fit for any office or employment. To take the necessary steps to prepare one's self for an appointment; as, to take an oath to discharge the duties of an office, to give the bond required of an executor, etc.

It is held synonymous with probate in a statute authorizing probate judges to qualify wills by receiving the evidence of witnesses, etc. 23 Pac. Rep. (N. M.) 288.

QUALITY. Of Persons. The state of condition of a person.

Two contrary qualities cannot be in the same person at the same time. Dig. 41. 10. 4. Every one is presumed to know the quality of the person with whom he is contracting. In the United States the people are all upon an equality in their civil rights.

In Pleading. That which distinguishes one thing from another of the same kind.

It is, in general, necessary, when the declaration alleges an injury to the goods and

chattels, or any contract relating to them, that the quality should be stated; and it is also essential, in an action for the recovery of real estate, that its quality should be shown: as, whether it consists of houses, lands, or other hereditaments, whether the lands are meadow, pasture, or arable, etc. The same rule requires that in an action for an injury to real property, the quality should be shown; Steph. Pl. 214, 215. See, as to the various qualities, Ayliffe, Pand. [60].

It is often allowable to omit from the indictment, and it is seldom necessary to prove with precision, allegations of quality, or, in other words, those allegations which describe the mode in which certain acts have been done. Thus, if the charge is of a felonious assault with a staff, and the proof is of such an assault with a stone, or if a wound, alleged to have been given with a sword, is proved to have been inflicted by an axe, or if a pistol is stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive material, the charge is substantially proved, and no variance occurs: 1 East, Pl. C. 341; 5 C. & P. 128; 9 id. 525, 548.

QUAMDIU SE BENE GESSERIT (Lat. as long as he shall behave himself well). A clause inserted in commissions, when such instruments were written in Latin, to signify the tenure by which the officer held his office.

QUANDO ACCIDERINT (Lat. when they fall in).

In Practice. When a defendant, executor, or administrator pleads *plene administravit*, the plaintiff may pray to have judgment of assets *quando acciderint*; Bull. N. P. 169; Bac. Abr. *Executor* (M). A similar judgment may be taken at the plaintiff's election, in an action against an heir, on a plea of *riens perdescent*, instead of taking issue on the plea. In either of these cases if assets afterwards come to the hands of the executor or heir a *scire facias* must be sued out before execution can issue, or there may be an action of debt, suggesting a *devastavit*; 2 Bouv. Inst. 3708. It is also sometimes termed a judgment of assets *in futuro*.

By taking a judgment in this form the plaintiff admits that the defendant has fully administered to that time; 1 Pet. C. C. 442, n.; and therefore the plaintiff will not be allowed to give evidence of effects come to defendant's hands before the judgment. For this reason the *scire facias* on a judgment of assets *quando acciderint* must only pray execution of such assets as have come to the defendant's hands since the former judgment, and if it pray judgment of assets generally, it cannot be supported. See 2 Bouv. Inst. 3708; 1 Viner, Abr. 379; Com. Dig. *Pleader* (2 D 9).

QUANTI MINORIS (Lat.). The name of a particular action in Louisiana. An action *quanti minoris* is one brought for the reduction of the price of a thing sold, in consequence of defects in the thing which is the object of the sale.

Such action must be commenced within twelve months from the date of the sale, or from the time within which the defect became known to the purchaser; 3 Mart. La. N. S. 287; 11 Mart. La. 11.

QUANTITY. In Pleading. That which is susceptible of measure.

It is a general rule that, when the declaration alleges an injury to goods and chattels, or any contract relating to them, their quantity should be stated; Gould, Pl. § 35. And in actions for the recovery of real estate the quantity of the land should be specified; Bracton 431 a; 11 Co. 25 b, 55 a; Doctr. Plac. 85, 86; 1 East 441; 13 id. 102; Steph. Pl., Andr. ed. § 163.

QUANTITY OF ESTATE. Its time of continuance, or degree of interest, as in fee, during life, or for years. See *ESTATE*.

QUANTUM DAMNIFICATUS (Lat.). In Equity Practice. An issue directed by a court of equity to be tried in

a court of law, to ascertain by a trial before a jury the amount of damages suffered by the non-performance of some collateral undertaking which a penalty has been given to secure. When such damages have thus been ascertained, the court will grant relief upon their payment. 4 Bouvier, Inst. n. 3913.

QUANTUM MERUIT (Lat.). In Pleading. As much as he has deserved.

When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumption on a *quantum meruit*. 2 Bla. Com. 162, 163; 1 Viner, Abr. 346. See 43 Mo. App. 653.

When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied assumption; 14 Johns. 326; 18 id. 169; 10 S. & R. 236; Ans. Contr. 278-279; 51 Fed. Rep. 725. But see 7 Cra. 299; Stark. 277; Holt, N. P. 236; 10 Johns. 36; 12 id. 374; 13 id. 56, 94, 359; 14 id. 326; 5 M. & W. 114; 4 C. & P. 93; 4 Scott N. S. 374; 4 Taunt. 475; 1 Ad. & E. 333; 126 Ind. 461. See *COMMON COUNTS*.

QUANTUM VALEBAT. (Lat. as much as it was worth). In Pleading. When goods are sold without specifying any price, the law implies a promise from the buyer to the seller that he will pay him for them as much as they were worth.

The plaintiff may, in such case, suggest in his declaration that the defendant promised to pay him as much as the said goods were worth, and then aver that they were worth so much, which the defendant has refused to pay. See the authorities cited under the article *QUANTUM MERUIT*.

QUARANTINE. In Maritime Law. The space of forty days, or less, during which the crew of a ship or vessel coming from a port or place infected or supposed to be infected with disease are required to remain on board after their arrival, before they can be permitted to land. It was probably established by the Venetians in 1484. Baker, Quar. 3. In England it is governed by 6 George IV. c. 78, and the Public Health Act of 1875. Ships of war are bound, equally with merchant ships, to respect municipal quarantine regulations.

By act of congress of April 29, 1878, ch. 66, vessels from foreign ports where contagious and other diseases exist, are forbidden to enter the United States, excepting subject to certain regulations prescribed.

The object of the quarantine is to ascertain whether the crew are infected or not. To break the quarantine without legal authority is a misdemeanor; 1 Russ. Cr. 138.

Quarantine regulations made by the states are sustainable as the exercise of the police power; Cooley, Const. Lim. 729; 95 U. S. 465; 118 id. 455; 57 Fed. Rep. 276. See 25 Am. L. Rev. 45, where the subject is discussed at large. The detention and disinfection of immigrants by order of a state board of health, with the purpose of preventing infectious disease, is not a regulation of foreign commerce by a state, within the meaning of the constitution; 57 Fed. Rep. 276; 12 Wheat. 419.

In cases of insurance of ships, the insurer is responsible when the insurance extends to her being moored in port twenty-four hours in safety, if before the twenty-four hours are expired she is ordered to perform quarantine, and any accident contemplated by the policy occur; 1 Marsh. Ins. 264. Where a ship was prevented from complying with her charter party by quarantine regulations, it was held that this was "restraint of princes or rulers and people";

3 U. S. App. 147. See *CHARTER PARTY*.

See Baker, Quarantine; 47 Am. St. Rep. 540; *POLICE POWER*.

In Real Property. The space of forty days during which a widow has a right to remain in her late husband's principal mansion immediately after his death. The right of the widow is also called her *quarantine*.

In some of the states provision has been made by statute securing to the widow this right for a greater or less space of time. See 4 Kent 62; Digb. Hist. R. P. 110; Walk. Am. Law, 9th ed. § 106, 281; 3 Washb. R. P., 5th ed. *272. Quarantine is a personal right, forfeited, by implication of a law, by second marriage; Co. Litt. 32. See Bacon, Abr. *Dower* (B); Co. Litt. 32 b, 34 b; Co. 2d Inst. 16, 17.

QUARANTINE LAWS. Laws the object and the end of which is to provide for the safety of its citizens by preventing, as far as human means can prevent it, the introduction among them of contagious and infectious diseases. 7 How. (U. S.) 301.

QUARE (Lat.). In Pleading. Wherefore.

This word is used sometimes in the writ in certain actions, but is inadmissible in a material averment in the pleadings, for it is merely interrogatory; and, therefore, when a declaration began with complaining of the defendant, "wherefore with force, etc., he broke and entered" the plaintiff's close, it was considered ill; Bacon, Abr. *Pleas* (B, 5, 4); Gould, Pl. c. 3, § 34.

QUARE CLAUSUM FREGIT. See *TRESPASS*; *TRESPASS QUARE CLAUSUM FREGIT*.

QUARE EJECIT INFRA TERMINUM. See *EJECTMENT*.

QUARE IMPEDIT (Lat. why he hinders). In English Law. A real possessory action which can be brought only in the court of common pleas, and lies to recover a presentation when the patron's right is disturbed, or to try a disputed title to an advowson. See *DISTURBANCE*; *Mireh. Advow. 265*; 2 Saund. 336 a.

In 1335 the king brought a *Quare impedit* against the bishop of Norwich for the deanery of Lynn. The king stated in his count that John, late bishop of Norwich, had conferred the deanery on one Master Roger of Snittisham, who was already parson of the church of Cressingham, and who continued to hold both benefices for more than a month after his installation in the deanery, *per quod per constitutionem de pluralitate predictus decanatus vacavit ipso iure* and remained vacant till the temporalities of the bishoprics of Norwich came into the hand of Edw. II upon the death of bishop John. Maitl. Canon Law 67.

QUARE INCUMBRAVIT. Why he incumbered. A writ which lay against a bishop, who, within six months after the vacation of a benefice, conferred it on his clerk; whilst two others were contending at law for the right of presentation, calling upon him to show cause why he had incumbered the church. Reg. Orig. 32.

QUARE OBSTRUXIT (Lat. why he obstructs). The name of a writ formerly used in favor of one who, having a right to pass through his neighbor's grounds, was prevented enjoying such right, because the owner of the grounds had obstructed the way.

QUARREL. A dispute; a difference. In law, particularly in releases, which are taken most strongly against the releasor, when a man releases all quarrel he is said to release all actions, real and personal. 8 Co. 153.

QUARRY. A place whence stones are dug for the purpose of being employed in building, making roads, and the like. In mining law it is said to be an open excavation where the works are visible at the surface. It is said to be derived from *quadrarius*, a stone-cutter or squarer. Bainbr.

MINES 2.

When a farm is let with an open quarry, the tenant may, when not restrained by his contract, take out the stone; but he has no right to open new quarries. See MINES; WASTE.

QUART. A liquid measure, containing one-fourth part of a gallon.

QUARTER. A measure of length, equal to four inches. See MEASURE.

In the Law of War. By the end of the seventeenth century quarter became a recognized usage of war. It is forfeited only under exceptional circumstances. 1. In case of absolute and overwhelming necessity, as where a small force is incumbered with a large number of prisoners in a savage and hostile country, and may be justified in killing them for their own self-preservation. 2. Where belligerents violate the laws of war they may be refused quarter. 3. By way of retaliation against an enemy who has denied quarter without a cause. Risley, *The Law of War*.

QUARTER DAYS. The four days of the year on which rent payable quarterly becomes due.

QUARTER DOLLAR. A silver coin of the United States, of the value of twenty-five cents.

Previous to the act of Feb. 21, 1853, c. 79, 10 U. S. Stat. at Large 160, the weight of the quarter-dollar was one hundred and three and one-eighth grains; but coins struck after the passage of that act were of the weight of ninety-six grains. The fineness was not altered by the act cited: of one thousand parts, nine hundred are pure silver and one hundred alloy. By the act of 12th of Feb. 1873, the weight of the quarter-dollar is fixed at one-half that of the half-dollar (twelve and one-half grams); R. S. § 3573; and by act of July 22, 1876, it was made legal tender in all sums public and private not exceeding ten dollars; 1 Supplement R. S. p. 488.

See HALF-DOLLAR; ANNUAL ASSAY; LEGAL TENDER.

QUARTER-EAGLE. A gold coin of the United States, of the value of two and a half dollars. See MONEY; COIN.

QUARTER-SALES. In New York a certain fraction of the purchase-money is often conditioned to be paid back on alienation of the estate; and this fine on alienation is expressed as a tenth-sale, a quarter-sale, etc. 7 Cow. 285; 7 Hill 253; 7 N. Y. 490.

QUARTER SEAL. In Scotch Law. The seal kept by the director of the chancery in Scotland is so called. It is in the shape and impression of the fourth part of the great seal Bell, Dict.

QUARTER SESSIONS. A court bearing this name, mostly invested with the trial of criminals. It takes its name from sitting quarterly, or once in three months. See COURT OF QUARTER SESSIONS. The English courts of quarter sessions were erected during the reign of Edward III. See stat. 36 Edw. III.; Crabb, Eng. Law 278.

QUARTER-YEAR. In the computation of time, a quarter-year consists of ninety-one days. Co. Litt. 135 b; 2 Rolle, Abr. 521, l. 40.

QUARTERING. A barbarous punishment formerly inflicted on criminals by tearing them to pieces by means of four horses, one attached to each limb.

QUARTERING OF SOLDIERS. Furnishing soldiers with board or lodging or both. The constitution of the United States, Amend. art. 3, provides that "no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." See Cooley, Const. Lim., 6th ed. 373; Rawle, Const. 126.

QUARTEROON. One who has had

one of his grandparents of the black or African race.

QUARTO DIE POST (Lat. fourth day after). Appearance-day, which is the fourth day inclusive from the return of the writ; and if the person summoned appears on that day, it is sufficient. On this day, also, the court begins to sit for despatch of business. These three days were originally given as an indulgence. 3 Sharsw. Bla. Com. 278*; Tidd, New Pr. 134. But this practice is now altered. 15 & 16 Vict. c. 76. It still obtains in Pennsylvania.

QUASH. In Practice. To overthrow or annul.

When proceedings are clearly irregular and void, the courts will quash them, both in civil and criminal cases; for example, when the array is clearly irregular, as, if the jurors have been selected by persons not authorized by law, it will be quashed. 3 Bouvier, Inst. n. 3342.

In criminal cases, when an indictment is so defective that no judgment can be given upon it, should the defendant be convicted, the court, upon application, will, in general, quash it: as, if it have no jurisdiction of the offence charged, or when the matter charged is not indictable; 1 Burr. 516, 543; And. 226; 49 Fed. Rep. 914. It is in the discretion of the court to quash an indictment or to leave the defendant to a motion in arrest of judgment; 1 Cush. 189; 97 N. C. 401; 100 id. 543. When the application to quash is made on the part of the defendant, in English practice, the court generally refuses to quash the indictment when it appears some enormous crime has been committed; Comyns, Dig. *Indictment* (H); Wils. 325; 3 Term 621; 5 Mod. 13; 6 id. 42; 8 Burr. 1841; Bacon, Abr. *Indictment* (K).

When the application is made on the part of the prosecution, the indictment will be quashed whenever it is defective so that the defendant cannot be convicted, and the prosecution appears to be *bona fide*. If the prosecution be instituted by the attorney-general, he may, in some states, enter a *nolle prosequi*, which has the same effect; 1 Dougl. 239, 240. The application should be made before plea pleaded; Leach 11; 4 How. State Tr. 232; 1 Hale 35; Post. 231; 85 Pac. Rep. (Idaho) 710; and before the defendant's recognizance has been forfeited; 1 Salk. 380. See CASSETUR BREVE.

QUASI (Lat. as if, almost). A term used to mark a resemblance, and which supposes a difference between two objects. Dig. 11. 7. 1. 8. 1. See 60 Ill. 402. It is exclusively a term of classification. Prefixed to a term of Roman law, it implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It negatives the idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other; Maine, Anc. Law 332. Civilians use the expressions *quasi-contractus*, *quasi-delictum*, *quasi-possessio*, *quasi-traditio*, etc.

QUASI-AFFINITY. In Civil Law. The affinity which exists between two persons, one of whom has been betrothed to the kindred of the other, but who have never been married. See AFFINITY.

QUASI-CONTRACTUS (Lat.). In Civil Law. An obligation similar in character to that of a contract, but which arises not from an agreement of parties but from some relation between them, or from a voluntary act of one of them.

An obligation springing from voluntary and lawful acts of parties in the absence of any agreement. Howe, Stud. Civ. L. 171.

An obligation which grows out of certain relations between persons whereby they become bound to each other by duties similar to those arising from a contract. Morey, Rom. L. 371.

Quasi-contracts were a well-defined class under the civil law. By the civil code of Louisiana they are defined to be "the law-

ful and purely voluntary acts of a man, from which there results any obligation whatever to a third person and sometimes a reciprocal obligation between parties. In *quasi*-contract the obligation arises not from consent, as in the case of contracts, but from the law or natural equity. The term was not found in the common law, but it has been taken by writers of the common law from the Roman law and may be considered now as quite domesticated even to the extent of being used as the title of a very valuable common-law text book; Keener, *Quasi-Contract*. The subject will be found treated in a sub-title of *CONTRACT*, *supra*. See also *CONTRACTUAL OBLIGATION*.

It need only be added here that *quasi*-contracts were in the Roman law of almost infinite variety but were divided into five classes:—1. *Negotiorum gestio*, the management of the affairs of another, without authority. 2. *Tutela administratio*, the administration of a tutorship. 3. *Rei communis administratio*, or *communio bonorum*, the management of common property. 4. *Hereditatis aditio*, the entering upon an inheritance. 5. *Indebiti Solutio*, payment by mistake of money not due. They all have certain general features, as that from their nature each has an affinity with some contract; and persons under disabilities may be affected by them though incapable of contracting. A common error which needs to be avoided is the confusion of *quasi*-contracts with implied contracts. The latter are real contracts, differing from express contracts in the nature of the proof by which they are established, but in *quasi*-contracts the essential part of the contract, the agreement or convention, is wanting; Maine, Anc. L. 332. See, generally, Inst. 8. 28; Dig. 3. 5; Ayl. Pand. b. 4, tit. 81; 1 Bro. Civ. L. 386; Ersk. Inst. 3. 3. 16; Pard. n. 192; Poth. Obl. n. 118; Merl. Rép. h. t.; Keener, *Quasi-Contract*; Howe, Stud. Civ. L. Lect. x.; Morey, Rom. Law 371; Schom, Inst. Rom. L. 315-21.

QUASI-CONTRACTS. See UNJUST ENRICHMENT.

QUASI-CONTRACTUAL OBLIGATION. See OBLIGATION.

QUASI-CORPORATIONS. A term applied to those bodies or municipal societies which, though not vested with the general powers of corporations, are yet recognized, by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained by suits at law. They may be considered *quasi*-corporations, with limited powers, co-extensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to those metaphysical persons by the common law. See 13 Mass. 192; L. R. 1 H. L. 293; Boone, Corp. § 10.

Among *quasi*-corporations may be ranked counties, and also towns, townships, parishes, hundreds, and other political divisions of counties, which are established without an express charter of incorporation; commissioners of a county, most of the commissions instituted for public use, supervisors of highways, overseers, or guardians or the poor, loan officers of a county, trustees of a school fund, trustees of the poor, school districts, trustees of schools, judges of a court authorized to take bonds to themselves in their official capacity, and the like, who are invested with corporate powers *sub modo* and for a few specified purposes only. The governor of a state has been held a *quasi*-corporation sole; 8 Humph. 176; so has a trustee of a friendly society in whom, by statute, property is vested, and by and against whom suits may be brought; see 1 B. & Ald. 157; so of a levee district organized by statute to reclaim land from overflow; 51 Cal. 406; and fire departments having by statute certain powers and duties which necessarily invest them with a limited capacity to sue and be sued; 1 Sweeney 224. It may be laid down as a general rule

that where a body is created by statute possessing powers and duties which involve incidentally a qualified capacity to sue and be sued, such body is to be considered a *quasi*-corporation; *id.*; 51 Cal. 406. See, generally, *Ang. & A. Corp.* § 24; 13 Am. Dec. 524; *Beach, Pub. Corp.* § 71, n. 1003; but not such a body as the general assembly of the Presbyterian church, which has not the capacity to sue and be sued; 4 Whart. 531; *Ang. & A. Corp.* § 24. See CORPORATION; MUNICIPAL CORPORATION.

QUASI-CRIMES. Offences for which some person other than the actual perpetrator is responsible, the perpetrator being presumed to act by command of the responsible party.

Injuries which have been unintentionally caused. See MASTER AND SERVANT.

All offences not crimes or misdemeanors, but which are in the nature of crimes; a class of offences against the public which have not been declared crimes, but wrongs against the general or local public which it is proper should be repressed or punished by forfeitures and penalties. 68 Ill. 375. See 29 Minn. 182.

QUASI-DELICT. In Civil Law. An act whereby a person, without malice, but by fault, negligence, or imprudence not legally excusable, causes injury to another.

A *quasi*-delict may be public or private; the neglect of the affairs of a community, when it is our duty to attend to them, may be a crime; the neglect of a private matter, under similar circumstances, may be the ground of a civil action. *Bowyer, Mod. Civ. Law*, c. 43, p. 265.

QUASI-DEPOSIT. A kind of involuntary bailment, which takes place where a person acquires possession of property lawfully, by finding. *Story, Bailm.* § 85.

See DEPOSIT.

QUASI-DERELICT. The condition of a vessel which is not abandoned, but those on board of which are physically incapable of doing anything for their safety. 1 Newb. Adm. 452.

QUASI-ENTAIL. An estate *pur autre vie*, to a man and the heirs of his body.

The interest so granted is not properly an estate tail, but so far in the nature of one that it will go to the heir of the body as special occupant during the life of the *cestui que vie* in the same manner as an estate of inheritance would descend, if limited to the grantee and the heirs of his body.

QUASI-FEE. An estate gained by wrong.

QUASI-OFFENCES. See QUASI-CRIMES.

QUASI-PARTNERS. Partners of lands, goods, or chattels, who are not actual partners, are sometimes so called. *Pothier, de Société* App. n. 184. See PART-OWNERS.

QUASI-PERSONALITY. Things immovable in point of law; though fixed to things real either actually or fictitiously.

QUASI-POSTHUMOUS CHILD. In Civil Law. One who, born during the life of his grandfather or other male ascendant, was not his heir at the time he made his testament, but who by the death of his father became his heir in his lifetime. *Inst.* 2. 13. 2; *Dig.* 28. 3. 13.

QUASI-PUBLIC CORPORATION.

Quasi-public corporations are also styled public-service corporations. It is legally and technically a private corporation. The qualification of public is given because of its character or because its purpose is the accomplishment of some public enterprise in which the public interests are directly involved or public use and convenience are contemplated. "A quasi-public corporation is one constituted of private persons to engage in a business, public in its nature, and where it must serve all who apply. It is therefore granted the power to acquire, under the exercise of the power of eminent domain, lands, rights of way, and other property essential to the performance of its public duties." 3 Purdy's Beach Priv.

Corp., § 1032. Another law writer has given this definition: "Some private corporations are organized for a purpose which is of a public nature, or rather for a purpose which renders them particularly beneficial, if not necessary, to the public; they are for this reason called quasi-public corporations; and, because of their quasi-public nature, they are sometimes given rights and privileges that are not accorded to other corporations—as the right of eminent domain. 63 Me. 269, *et al.* 1 Thomp. Corp. 2nd ed., 32.

See CORPORATION.

QUASI-PURCHASE. This term is used in the civil law to denote that a thing is to be considered as purchased from the presumed consent of the owner of a thing; as, if a man should consume a cheese, which is in his possession and belonging to another, with an intent to pay the price of it to the owner, the consent of the latter will be presumed, as the cheese would have been spoiled by keeping it longer. *Wolff, Dr. de la Nat.* § 691.

QUASI-REALTY. Things which are fixed in contemplation of law to realty, but movable in themselves, as heirlooms (or limbs of the inheritance), title deeds, court rolls, etc. *Whart. Law Lex.*

QUASI-TRADITIO (Lat.). In Civil Law. A term used to designate that a person is in the use of the property of another, which the latter suffers and does not oppose. *Lec. Elem.* § 396. It also signifies the act by which the right of property is ceded in a thing to a person who is in possession of it; as, if I loan a boat to Paul, and deliver it to him, and afterwards I sell him the boat, it is not requisite that he should deliver the boat to me to be again delivered to him: there is a *quasi*-tradition or delivery.

QUATUORVIRI (Lat. four men). In Roman Law. Magistrates who had the care and inspection of roads. *Dig.* 1. 2. 3. 30.

QUAY. A wharf at which to load or land goods. (Sometimes spelled *key*.)

In its enlarged sense the word *quay* means the whole space between the first row of houses of a city, and the sea or river; 5 La. 152, 215. So much of the quay as is requisite for the public use of loading and unloading vessels is public property, and cannot be appropriated to private use, but the rest may be private property.

A public quay in a city, dedicated to public use, does not cease to be *locus publicus* and become private property because it is leased by the public authorities for a purpose subservient to the public use; 140 U. S. 654. See KEY OR QUAY.

QUE DONERA? (L. Fr.). To whom will he give? To whom is the gift to be made?

QUE EST MESME (L. Fr.). Which is the same. See QUE EST EADEM.

QUE ESTATE (*quem statum*, or *which estate*). A plea by which a man prescribes in himself those whose estate he holds. 2 Bla. Com. 270; 18 Viner, Abr. 133-140; Co. Litt. 121 a.

QUEAN. A worthless woman; a strumpet. The meaning of this word, which is now seldom used, is said not to be well ascertained. 2 Rolle, Abr. 296; Bacon, Abr. Slander (U 8).

QUEEN. A woman who is sovereign of a kingdom. The wife of a king.

This may be either:—a Queen Regnant (as in the case of Queen Victoria), who is for every purpose the same as the King; a Queen Consort (or wife of a reigning King), who has no political power whatever; and a Queen Dowager (or widow of a deceased King), who likewise has no political position.

A Queen Consort was anciently entitled to Queen Gold. Her person and her chastity are specially protected by the Treason Act. 1351. She is not subject to, in the words of Coke, "any toll fine or americiament."

She is entitled to appoint her own attorney-general and solicitor-general: but this privilege has not been exercised since the death of Queen Victoria resulted in there being again a Queen Consort.

A Queen Dowager retains her rank in the event of her re-marriage. It is said that she retains most of the privileges of a Queen Consort. *Byrne*.

QUEEN ANNE'S BOUNTY. By stat. 2 Anne, c. 11, all the revenue of first-fruits and tenths was vested in trustees forever, to form a perpetual fund for the augmentation of poor livings. 1 Bla. Com. 286; 2 Burn, Eccl. Law 200-268.

QUEEN CONSORT. The wife of a reigning king. 1 Bla. Com. 218. She is looked upon by the law as a *feme sole*, as to her power of contracting, suing, etc. *Id.*

QUEEN DOWAGER. The widow of a king. She has most of the privileges belonging to a queen consort. 1 Bla. Com. 229.

QUEEN-GOLD. A royal revenue belonging to every queen consort during her marriage with the king, and due from every person who has made a voluntary fine or offer to the king of ten marks or upwards, in consideration of any grant or privilege conferred by the crown. It is due of record on the recording of the fine. It was last exacted in the reign of Charles I. It is now quite obsolete. 1 Bla. Com. 220-222; *Fortescue, de Laud.* 398.

QUEEN REGNANT. She who holds the crown in her own right. She has the same duties and prerogatives, etc., as a king. Stat. 1 Car. I. st. 3, c. 1; 1 Bla. Com. 218; 1 Woodd. Lect. 94.

QUEEN'S ADVOCATE. See ADVOCATE.

QUEEN'S BENCH. See BANCUS REGINAE.

QUEEN'S COUNSEL. Barristers appointed as counsel to the crown on the nomination of the lord chancellor, taking precedence over ordinary barristers, and having the privilege of wearing a silk gown as their professional robe. See [1898] App. Cas. 252.

The two principal of these counsel are called the attorney and solicitor general; and none of these counsel can plead publicly in court for a prisoner or a defendant in a criminal prosecution, without a license obtained for that purpose from the crown. *Abbott; Brown*.

Queen's counsel is a name given to barristers and sergeants appointed by letters-patent to be her majesty's counsel learned in the law. Their selection and removal rests in practice with the lord chancellor. *Id.*; 3 Steph. Com. 273. A queen's counsel has various privileges. He is generally made a bencher of his inn. He may not, except by license from the crown, take a brief against the crown in any civil or criminal case; but such license will generally be given on payment of the usual fee. A queen's counsel, in taking that rank renounces the preparation of written pleadings, and other chamber practice. *Id.*; M. & W.

QUEEN'S ENEMIES. A phrase used in bills of lading importing a limitation upon the liability of the ship owner under the contract therein contained.

It includes the enemies of the sovereign of the carrier; 34 L. J. C. P. 14. It does not include the acts of an armed band of depredators; 1 Term 27; or a seizure of goods by a foreign revenue official for a breach of revenue laws; 10 Q. B. 517. It is less extensive in its scope than Restraint of Rulers and Princes (*q. v.*). See PUBLIC ENEMY.

QUEEN'S PROCTOR. A proctor or solicitor representing the crown in the former practice of the courts of probate and divorce. *Moz. & W. Law Dict.*

His function, in a proper case, is to intervene in order to prevent a decree nisi from

being made absolute; and he may do this either *quod* Queen's (or King's) Proctor on the ground of collusion or *quod* member of the public if the decree was obtained as the result of the suppression of material facts. Byrne.

QUERELA (Lat.). An action preferred in any court of justice. The plaintiff was called *querens*, or complainant, and his brief, complaint, or declaration was called *querela*. Jacob, Law Dict.

QUERELA CORAM REGE ET CONCILIO DISCUTIENDA ET TERMINANDA. A writ by which one was called to justify a complaint of a trespass made to the king himself, before the king and his council. Reg. Orig. 124.

QUERELA INOFFICIOSI TESTAMENTI (Lat. complaint of an undutiful or unkind will). In Civil Law. A species of action allowed to a child who had been unjustly disinherited, to set aside the will, founded on the presumption of law, in such cases, that the parent was not in his right mind. Calvinus, Lex.; 2 Kent 327; Bell, Dict.

QUERENS (Lat.). A plaintiff; the plaintiff or complaining party.

QUESTION. Something in controversy or which may be the subject of controversy. 39 Mich. 45.

A means sometimes employed, in some countries, by torture, to compel supposed great criminals to disclose their accomplices or to acknowledge their crimes.

This torture is called *question* because, as the unfortunate person accused is made to suffer pain, he is asked *questions* as to his supposed crime or accomplices. This is unknown in the United States. See Pothier, *Procédure Criminelle*, sect. 5, art. 2, § 3.

In Evidence. An interrogation put to a witness, requesting him to declare the truth of certain facts as far as he knows them.

Questions are either *general* or *leading*. By a *general* question is meant such a one as requires the witness to state all he knows, without any suggestion being made to him: as, *Who gave the blow?*

A *leading* question is one which leads the mind of the witness to the answer, or suggests it to him: as, *Did A B give the blow?*

The Romans called a question by which the fact or supposed fact which the interrogator expected or wished to find asserted in and by the answer was made known to the proposed respondent, a *suggestive* interrogation: as, *Is not your name A B?* See LEADING QUESTION.

In Practice. A point on which the parties are not agreed, and which is submitted to the decision of a judge and jury.

When the doubt or difference arises as to what the law is on a certain state of facts, this is said to be a *legal question*; and when the party demurs, this is to be decided by the court; when it arises as to the truth or falsehood of facts, this is a *question of fact*, and is to be decided by the jury. See JURY.

Proof beyond reasonable question is held synonymous with proof beyond reasonable doubt; 103 N. C. 1.

See HYPOTHETICAL QUESTION; CERTIFIED QUESTION.

QUESTORES CLASSICI (Lat.). In Roman Law. Officers entrusted with the care of the public money.

Their duties consisted in making the necessary payments from the *erarium*, and receiving the public revenues. Of both they had to keep correct accounts in their *tabule publicæ*. Demands which any one might have on the *erarium*, and outstanding debts were likewise registered by them. Fines to be paid to the public treasury were registered and exacted by them. They were likewise to provide proper accommodations for foreign ambassadors and such person as were connected with the republic by ties of public hospitality. Lastly, they were charged with the care of the burials and monuments of distinguished

men, the expenses for which had been decreed by the senate to be paid by the treasury. Their number at first was confined to two; but this was afterwards increased as the empire became extended. There were questors of cities and of provinces, and questors of the army; the latter were in fact paymasters.

QUESTORES PARRICIDII (Lat.). In Roman Law. Public accusers, two in number, who conducted the accusation of persons guilty of murder or any other capital offence, and carried the sentence into execution. They ceased to be appointed at an early period. Smith, Dict. Gr. & Rom. Antiq.

QUESTUS EST NOBIS. A writ of nuisance, which, by 15 Edw. I., lay against him to whom a house or other thing that caused a nuisance descended or was alienated; whereas, before that statute the action lay only against him who first levied or caused the nuisance to the damage of his neighbor. Cowel.

QUI IMPROVIDE. A *supersedeas* granted where a writ was erroneously sued out or miswadded.

QUI SUNT EJUSDEM POTES-TATIS. One having the same power with another. Burrill. See COLLEGA.

QUI TAM (Lat. who as well). An action under a statute which imposes a penalty for the doing or not doing an act, and gives that penalty in part to whomsoever will sue for the same, and the other part to the commonwealth, or some charitable, literary, or other institution, and makes it recoverable by action. The plaintiff describes himself as suing *as well* for the commonwealth, for example, as for himself. Espinasse, Pen. Act 5, 6; 1 Viner, Abr. 197; 1 Salk. 129, n.; Bac. Abr.

QUIA (Lat.). In Pleading. Because. This word is considered a term of affirmation. It is sufficiently direct and positive for introducing a material averment. 1 Saund. 117, n. 4; Com. Dig. Pleader (C77).

QUIA DATUM EST NOBIS INTELLIGI (L. Lat.). Because it is given to us to understand.

QUIA DOMINUS REMISIT CURIAM (L. Lat.). In old practice. Because the lord hath remised or remitted his court.

QUIA EMPTORES (Lat.). A name sometimes given to the English Statute of Westminster 3, 18 Edw. I. c. 1, which prohibited sub-infeudation; so called from its initial words. 2 Bla. Com. 91. See MANOR; SUB-INFEUDATION; TENURE.

QUIA ERRONICE EMANAVIT (L. Lat.). Because it issued erroneously, or through mistake.

QUIA TIMET (Lat. because he fears). A term applied to preventive or anticipatory remedies. According to Lord Coke, "there be six writs of law that may be maintained *quia timet*, before any molestation, distress, or impleading: as, *First*, a man may have his writ or mesne before he be distrained. *Second*, a *warrantia chartæ*, before he be impleaded. *Third*, a *monstraverunt*, before any distress or vexation. *Fourth*, an *audita querela*, before any execution sued. *Fifth*, a *curia claudenda*, before any default of enclosure. *Sixth*, a *ne iniuste vexes*, before any distress or molestation. And these are called *brevia anticipantia*, writs of prevention." Co. Litt. 100. And see 7 Bro. P. C. 125.

These writs are generally obsolete. In chancery, when it is contemplated to prevent an expected injury, a bill *quia timet* is filed. See BILL QUIA TIMET.

QUIBBLE. A slight difficulty raised without necessity or propriety; a cavil.

No justly eminent member of the bar will resort to a quibble in his argument. It is contrary to his oath, which is to be

true to the court as well as to the client; and bad policy, because by resorting to it he will lose his character as a man of probity.

QUICK ASSETS. "Quick Assets" are defined as: (1) Cash and cash items; (2) Unpledged good accounts receivable, and short time bills and notes and acceptances having not more than six months to run, received in the ordinary course of business for goods sold; (3) Merchandise or products manufactured or in process of manufacture, production or preparation, and raw materials, and (4) Such other items as are generally regarded as working capital or quick assets, by corporations or associations conducting a business similar to that of the Trustees or Controlled Companies, including therein stocks or securities which have a determined, available and realizable market value. Sears' Trust Estates as Business Companies, 672.

QUICK DESPATCH. A steamer chartered to be discharged with customary "quick despatch" arrived in port, March 8th, was ordered to berth March 10th, and began to discharge March 11th at one o'clock, and completed March 20th at noon; discharged by "sticks" instead of platform scales, and from but one hatch, while there were four to be discharged from. It was held that this was not "customary quick despatch"; 28 U. S. App. 383. See DEMURRAGE; LAY DAYS.

QUICK WITH CHILD. See QUICKENING.

QUICKENING. In Medical Jurisprudence. The sensation a mother has of the motion of the child she has conceived.

The period when quickening is first experienced varies from the tenth to the twenty-fifth, but is usually about the sixteenth week from conception; Denman, Midw. 129.

It was formerly supposed that either the child was not alive until the time of quickening, or that it had acquired some new kind of existence that it did not possess before: hence the presumption of law that dates the life of the child from that time.

The child is, in truth, alive from the first moment of conception, and, according to its age and state of development, has different modes of manifesting its life, and, during a portion of the period of gestation, by its motion. By the growth of the embryo, the womb is enlarged until it becomes of too great a size to be contained in the pelvis, it then rises to the abdomen, when the motion of the foetus is for the first time felt.

Quickening as indicating a distinct point in the existence of the foetus has no foundation in physiology; for it arises merely from the relation which the organs of gestation bear to the parts that surround them; it may take place early or late, according to the condition of these different parts, but not from any inherent vitality for the first time manifested by the foetus.

As life, by law, is said to commence when a woman first becomes quick with child, so procuring an abortion after that period is a misdemeanor. Before this time, formerly the law did not interfere to prevent a pregnant woman convicted of a capital offence from being executed; 2 Hale, Pl. Cr. 413. If, however, the humanity of the law of the present day would not allow a woman to be executed who is, as Blackstone terms it, *privèment enceinte*, Com. 129, *i. e.* pregnant, although not quick, it would be but carrying out the same desire to interfere with long-established rules, to hold that the penalty for procuring abortion should also extend to the whole period of pregnancy.

"Quick with child is having conceived; 49 N. Y. 86; with quick child is where the child has quickened." 8 C. & P. 265; approved in 1 Leg. Gaz. Rep. (Pa.) 183; 2 Whar. & St. Med. Jur., 4th ed. III. § 7. See 26 Am. Dec. 60, n.; 2 Zabz. 52.

QUID JURIS CLIMAT. A judicial writ issued out of the record of a fine which

lay for the grantee of a reversion or remainder, when the particular tenant would not attain. Cowel.

QUID PRO QUO (Lat. what for what). A term denoting the consideration of a contract. See Co. Litt. 47 b; 7 M. & G. 998.

QUIDAM (Lat. some one; somebody). In French Law. A term used to express an unknown person, or one who cannot be named.

A *quidam* is usually described by the features of his face, the color of his hair, his height, his clothing, and the like, in any process which may be issued against him. Merlin, *Répert.*

QUIET ENJOYMENT. The name of a covenant in a lease, by which the lessor agrees that the lessee shall peaceably enjoy the premises leased. This covenant goes to the possession, and not to the title; 3 Johns. 471; 5 id. 120; 2 Dev. 388; 3 id. 200. A covenant for quiet enjoyment does not extend as far as a covenant of warranty; 1 Aik. 233.

The covenant for quiet enjoyment is broken only by an entry, or lawful expulsion from, or some actual disturbance in, the possession; 3 Johns. 471; 8 id. 198; 15 id. 483; 7 Wend. 281; 2 Hill N. Y. 105; Ham. Cov. 85; 9 Metc. 63; 4 Whart. 86; 4 Cow. 340. But the tortious entry of the covenantor, without title, is a breach of the covenant for quiet enjoyment; 7 Johns. 376. The covenant for quiet possession in a deed merges all previous representatives as to the possession, and limits the liability growing out of them; 130 U. S. 643.

See COVENANT FOR QUIET ENJOYMENT.

QUIET TITLE. See BILL TO QUIET POSSESSION AND TITLE.

QUIETUS (Lat. freed or acquitted). In English Law. A discharge; an acquittance.

An instrument by the clerk of the pipe and auditors in the exchequer, as proof of their acquittance or discharge of accountants. Cowel.

Discharge of a judge or attorney-general. 3 Mod. *99.

In American Law. The discharge of an executor by the probate court. 4 Mas. 131.

QUINTO EXACTUS (Lat.). In Old English Law. The fifth call or last requisition of a defendant sued to outlawry.

QUIRITARIAN OWNERSHIP. In old Roman law, strict legal or technical ownership as distinguished from mere equitable or bonitarian ownership (q. v.); known as *dominium ex jure quiritium*. Hunter's Rom. L. (2nd ed.) 118, 262-5.

QUIT-CLAIM. In Conveyancing. A form of deed of the nature of a release containing words of grant as well as release. 3 Washb. R. P., 5th ed. 606.

The term is in constant and general use in American law to denote a deed substantially the same as a release in English law. It presupposes a previous or precedent conveyance or a subsisting estate and possession; Thornt. Conv. 44. It is a conveyance at common law, but differs from a release in that it is regarded as an original conveyance in American law, at least in some states; 6 Pick. 499; 3 Conn. 398; 9 Ohio 96; 5 Ill. 117; Me. Rev. Stat. c. 73, § 14; Miss. Code 1857, p. 309, art. 17. The operative words are remise, release, and forever quit-claim; Thornt. Conv. 44. Covenants of warranty against incumbrances by the grantor are usually added. See a full article in 12 Cent. L. J. 127; 34 id. 174.

The rule that a purchaser by a quit-claim deed is not to be regarded as a *bona fide* purchaser without notice of a prior incumbrance; 85 Ala. 80; 89 Tex. 214; has no application where the registry laws require the recording of such an incumbrance in order to make it a lien on lands in the hands of a subsequent purchaser; 47 Fed. Rep. 420. One accepting a quit-claim deed from his grantor is bound, at his peril, to ascertain what equities, if any, exist against his title; 35 Neb. 361; but the receipt of

the quit-claim deed does not of itself prevent the grantee from showing that he is a *bona fide* purchaser; 148 U. S. 21, 31, 49; and the grantee under such deed may be a *bona fide* purchaser under the recording acts; 146 Ind. 77.

A quit-claim deed conveys only the interest of the grantor at the time of the conveyance; 39 Neb. 741; but such a deed is as effectual to divest and transfer a complete title as any other form of conveyance; 148 U. S. 21. Such a deed from a judgment debtor of land, sold under execution, passes merely the right of redemption and does not relieve the land of dower of the debtor's wife, though she did not reside in the state when the deed was executed; 19 Mont. 23. A title acquired subsequently to the execution of a quit-claim, with special warranty simply, does not enure to the grantee, and a subsequent purchaser from the grantor is not affected by the recording of the deed executed before the grantor acquired the title; 90 Me. 457.

Under a Massachusetts statute, a quit-claim deed takes precedence over a prior deed, recorded subsequently to the quit-claim, where the grantee in the latter is without notice of the other; 167 Mass. 443. A quit-claim deed, duly recorded, is held to be within the protection of a statute providing that deeds shall take effect only on delivery for record; 49 Neb. 187, where will be found much learning on the subject of these deeds.

QUIT-RENT. A rent paid by the tenant of the freehold, by which he goes quit and free,—that is, discharged from any other rent. 2 Bla. Com. 42.

In England, quit-rents were rents reserved to the king or a proprietor, on an absolute grant of waste land, for which a price in gross was at first paid, and a mere nominal rent reserved as a feudal acknowledgment of tenure. Inasmuch as no rent of this description can exist in the United States, when a quit-rent is spoken of some other interest must be intended. 5 Call 384. A perpetual rent reserved on a conveyance in fee-simple is sometimes known by the name of quit-rent in Massachusetts. See GROUND-RENT; RENT.

QUO ANIMO (Lat. with what intention). The intent; the mind with which a thing has been done: as, the *quo animo* with which the words were spoken may be shown by the proof of conversations of the defendant relating to the original defamation. 19 Wend. 296.

QUO JURE, WRIT OF. In English Law. The name of writ commanding the defendant to show *by what right* he demands common of pasture in the land of the complainant who claims to have a fee in the same. Fitzh. N. B. 299.

QUO MINUS (Lat.). The name of a writ. In England, when the king's debtor is sued in the court of the exchequer, he may sue out a writ of *quo minus*, in which he suggests that he is the king's debtor, and that the defendant has done him the injury or damage complained of, *quo minus sufficiens existit*, by which he is less able to pay the king's debt. This was originally requisite in order to give jurisdiction to the court of exchequer; but now this suggestion is a mere form. 3 Bla. Com. 46.

QUO WARRANTO (Lat. by what authority). In Practice. The name of a writ (and also of the whole pleading) by which the government commences an action to recover an office or franchise from the person or corporation in possession of it.

The writ commands the sheriff to summon the defendant to appear before the court to which it is returnable, to show (*quo warranto*) *by what authority* he claims the office or franchise. It is a writ of right, a civil remedy to try the mere right to the franchise or office, where the person in possession never had a right to it or has forfeited it by neglect or abuse; 3 Bla. Com. 262, 263.

The action of *quo warranto* was pre-

scribed by the Statute of Gloucester, 6 Edw. I., and is a limitation upon the royal prerogative. Before this statute, the king, by virtue of his prerogative, sent commissions over the kingdom to inquire into the right to all franchises, *quo jure quove nomine illi retinent*, etc.; and, as they were grants from the crown, if those in possession of them could not show a charter, the franchises were seized into the king's hands without any judicial proceeding. Like all other original civil writs, the writ of *quo warranto* issued out of chancery, and was returnable alternatively before the king's bench or justices in eyre; Co. 2d Inst. 277, 494; 2 Term 549.

The writ of *quo warranto* has given place to an information in the nature of *quo warranto*. This, though in form a criminal; see 14 Fla. 256; is in substance a civil, proceeding, to try the mere right to the franchise or office; 3 Bla. Com. 263; 1 S. & R. 382; Ang. & A. Corp. 489; 2 Kent 312; 3 Term 199; 23 Wend. 537, 591; but see 13 Ill. 66. Leave to file an information in the nature of *quo warranto* rests in the sound discretion of the court, and, without strong grounds for questioning defendant's title to the office, the court will refuse to grant it; 6 Houst. 487. A constitutional provision that the right of trial by jury shall remain inviolate, does not guarantee the right of trial by jury in *quo warranto* proceedings; 16 Wash. St. 382.

If the proceedings refer to the usurpation of the franchises of a municipal corporation, the right to file the information is in the state, at the discretion of the attorney-general; Beach, Pub. Corp. § 1613; 14 Fla. 256; see 59 Miss. 453; 126 Mass. 300; 81 N. C. 298; 49 N. J. L. 515; not of citizens; id.; see 20 Pa. 518; 51 N. J. L. 180. Individuals cannot take proceedings to dissolve a corporation; 16 S. & R. 144; but in regard to the election of a corporate officer the writ may issue at the suit of the at,orney-general or of any person interested—1 Zab. 9; 20 Pa. 415; but a private citizen must have some interest; 50 Mo. 97. See 80 Ill. 496; 46 Conn. 479. In Pennsylvania it was held that a stockholder, whose votes were wrongly rejected at a corporate election, was the proper party to institute proceedings of *quo warranto* against the officers who claimed to have been elected, though the petitioner was at the same time elected to an office and his title was in dispute; 168 Pa. 582. The attorney-general may act without leave of court; 83 Pa. 105; 38 N. J. L. 282; 12 Fla. 190; but a private relator may not; 15 S. & R. 127; s. c. 16 Am. Dec. 531; and the court will use its discretion in granting the writ; 70 Ill. 25; 2 Johns. 184. Leave is granted on a petition or motion with affidavits, upon which a rule to show cause is granted; 70 Ill. 25. The writ lies against the corporate body, if it is to restrain a usurpation; 50 Mo. 56; or enforce a forfeiture; 57 N. H. 498; but if it is to inquire whether a corporation has been legally organized, the writ lies against the individuals; 15 Wend. 113; s. c. 30 Am. Dec. 34. Whether a corporation *de facto* is also one *de jure* can be determined only in *quo warranto*; 125 Ill. 664.

In New York a statutory action in the nature of a *quo warranto* has been substituted. Code Civ. Proc. § 1883. This is a civil writ of legal, not equitable, cognizance; 52 N. Y. 576. So in other states it is subject to the rules strictly applicable to civil proceedings; 50 Ala. 568; 44 Mo. 134; Boone, Corp. § 161. The terms "*quo warranto*" and "information in the nature of a *quo warranto*" are synonymous; 34 Wisc. 197; *contra*, 25 Mo. 555; 26 Ark. 281.

Although *quo warranto* proceedings will lie against a municipal corporation in this country, yet they are seldom employed. See a case in 32 Vt. 50; and see 66 Mo. 328; 30 Ala. 66. They will lie against members of a city council; 70 Pa. 465; 80 N. Y. 117; 23 Neb. 365; *contra*, 47 Cal. 624; 20 Kans. 692; a county treasurer; 15 Ill. 517; district school trustees; 84 Ill. 162; a sheriff; 5 Mich. 146; 38 Pa. 105; a lieutenant-governor; 12 Fla. 265; a governor; 4 Wisc.

567; a judge of probate; 77 N. C. 18; a mayor; 53 N. Y. 525; an elector of president of the United States, proceedings being taken in the name of the United States; 8 S. C. 400; a major-general of militia; 5 R. I. 1; so of other militia officers; 26 Pa. 81; 2 Green, Law 84; but see 1 Rich. 43; superintendent of the poor; 73 Mich. 234; but not against a policeman; 84 Mich. 223. There must first be a user of the office; 83 Ill. 128; 5 T. R. 85; but taking the oath; *id.*; or exercising its functions without taking the oath; 52 Miss. 665; is enough.

Quo warranto lies against a corporation to determine whether there has been a misuser or a nonuser of corporate franchises, or whether the corporation has usurped franchises never granted to it; but does not lie to test the legality of any act of the corporation; 87 Mo. App. 496.

Quo warranto is the only direct and adequate remedy for trying title to public office; 58 N. J. L. 340. The review of an election to public office by *certiorari* may determine collateral questions respecting validity of laws or ordinances, but can have no effect as a bar in a subsequent information in the nature of a *quo warranto*; *id.* 325.

The validity of proceedings for the election of a minor officer such as janitor of a court-house, may be reviewed on *certiorari*; *id.* 319.

An incumbent cannot proceed in *quo warranto* against one not in possession of the office, he must await the attack of his adversary; *id.* 325.

Pleadings in quo warranto are anomalous. In ordinary legal proceedings, the plaintiff, whether he be the state or a person, is bound to show a case against the defendant. But in an information of *quo warranto*, as well as in the writ for which it is substituted, the order is reversed. The state is not bound to show anything, but the defendant is bound to show that he has a right to the franchise or office in question; and if he fail to show authority, judgment must be given against him; 4 Burr. 2146, 2127; Ang. & A. Corp. 636. To the writ of *quo warranto* the defendant simply pleaded his charter, which was a full answer to the writ; just as before the statute of Edward I. the production of the charter to the king's commissioners was full authority for the possession of the franchise or office. But to an information of *quo warranto* the plea of the defendant consists of his charter, with an *absque hoc* denying that he usurped the franchise, and concludes with a verification. The plea is in form a special traverse, but in substance it is not such. The information was originally a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise; therefore the information charged usurpation, and the defendant was compelled to deny the usurpation, as well as to show his charter, which he did in the form of an *absque hoc* to his plea. But when the proceeding ceased to be criminal, and, like the writ of *quo warranto*, was applied to the mere purpose of trying the civil right to the franchise, the *absque hoc* denying the usurpation became immaterial, though it is still retained in the forms; 2 Jacob, Law Dict. 874; 4 Cow. 106, note. In Coke's Entries 351, there is a plea to an information of *quo warranto* without the *absque hoc*. The *absque hoc*, being immaterial, should not be answered by the replication, as it must always be in a special traverse; but the charter, in the first part of the plea, though occupying the place of an inducement, must be denied by the replication, its existence and character being the sole question in controversy upon which the legality of the acts of the corporation turns; Gilb. Ev. 6, 145; 10 Mod. 111, 296.

Until the statute 32 Geo. III. c. 68, the defendant could not plead double in an information of *quo warranto* to forfeit an office or franchise; 1 P. Wms. 220; 4 Burr. 2146, n.; 1 Chitty, Pl. 479; 5 Bac. Abr. 449; 4 Cow. 118; 2 Dutch. 215.

In information of *quo warranto* there are two forms of judgment. When it is

against an officer or against individuals, the judgment is *oustur*; but when it is against a corporation by its corporate name, the judgment was *oustur* and *seizure*. In the first case, there being no franchise forfeited, there is none to seize; in the last case, there is; consequently the franchise is seized; 2 Kent 312, and note; 2 Term 521, 550. Now judgment is *oustur* and dissolution; 15 Wend. 113; s. c. 30 Am. Dec. 34; but there may be a judgment of ouster of a particular franchise, and not of the whole charter; 15 Wend. 113. See, as to the judgment, 32 Vt. 50; 4 Cow. 120. By such judgment of ouster and seizure the franchises are not destroyed, but exist in the hands of the state; but the corporation was destroyed, and ceased to be the owner or possessor of lands or goods, or rights or credits. The lands reverted to the grantor and his heirs, and the goods escheated to the state. But, later, it has been held that the judgment must be confined to seizure of the franchises; if it be extended to seizure of the property, so far it is erroneous; 1 Blackf. 267.

Quo warranto lies against a corporation to determine its right to exercise its franchises, but not to divest it of the ownership of property, unless acquired by a usurpation of the proprietary rights of the state; 33 N. E. Rep. (Ohio) 1051. See SCIRE FACIAS; 30 Barb. 588.

The principle of forfeiture is that the franchise is a trust; and all the terms of the charter are conditions of the trust; and if any one of the conditions of the trust be violated, it will work a forfeiture of the charter. And the corporate powers must be construed strictly, and must be exercised in the manner and in the forms and by the agents prescribed in the charter; 2 Kent 298, 299; 1 Bla. Com. 485; 13 Viner, Abr. 511; 13 Pet. 587; 5 Wend. 211; 2 Term 546; 4 Gill & J. 121.

Cases of forfeiture may be divided into two great classes. *Cases of perversion*: as, where a corporation does an act inconsistent with the nature, and destructive of the ends and purposes, of the grant. In such cases, unless the perversion is such as to amount to an *injury to the public* who are interested in the franchise; 34 Pa. 283; it will not work a forfeiture. *Cases of usurpation*: as, where a corporation exercises a power which it has no right to exercise. In such cases the cause of forfeiture is not determined by any question of *injury to the public*, but the abuse which will work a forfeiture need not be of any particular measure or extent; 3 Term 216, 249; 23 Wend. 242; 34 Miss. 638; 21 Ill. 65. See 30 Ala. n. s. 66. In case of usurpation of an office or franchise by an individual, it must be of a public nature to be reached by this writ; 21 Ill. 65; 28 Vt. 594, 714; 9 Cush. 596.

In England corporations are the creatures of the crown, and on dissolution their franchises revert to the crown; and they may be re-granted by the crown either to the old, or to the new, or to the old and new, corporators; and such grant restores the old rights, even to sue on a bond given to the old corporation, and the corporation is restored to the full enjoyment of its ancient liberties; and if it were a corporation by prescription it would still be so; 2 Term 524, 543; 3 *id.* 241. In the United States, corporations are the creatures of the legislature, and on dissolution their franchises revert to the state; and the legislature can exercise the same powers by legislation over the franchises, and with the same effects, as the crown can in England; Ang. & A. Corp. 652 (subject, however, at the present time, to constitutional provision that corporations must be created by general acts; see GENERAL LAWS; STATUTES).

By the statute of Anne, c. 20, an information in the nature of *quo warranto* may by leave of court be applied to disputes between party and party about the right to a corporate office or franchise; 4 Zab. 529; 1 Dutch. 354; 32 Pa. 478; 33

Miss. 508; 7 Cal. 393, 432. See 75 Mich. 503. And the person at whose instance the proceeding is instituted is called the *relator*; 3 Bla. Com. 204. The court will not give leave to private informers to use the king's name and suit to call in question the validity of a franchise, when such persons apply under very unfavorable circumstances; 4 Burr. 2123. As to where the burden falls of showing the lawful or unlawful character of a franchise or right, see 28 Pa. 333; 5 Mich. 146; 100 Cal. 87. Where a proceeding to oust the incumbent of an office is prosecuted in the name of the party asserting title to such office, the burden of proof is on plaintiff; 93 Ky. 600; 58 N. W. Rep. (Mich.) 383. The information, it is said, may be filed after the expiration of the term of office; 2 Jones No. C. 124; but see High, Extr. Leg. Rem. § 633; Beach, Pub. Corp. § 85, n.

See High, Extr. Leg. Rem.; 30 Am. Dec. 33 and full note; Boone, Corp.; Ang. & A. Corp.

QUOAD (Lat.). As to; as far as concerns.

QUOAD HOC (Lat. as to this; with respect to this). A term frequently used to signify, as to the thing named, the law is so and so.

QUOAD SACRA (Lat.). As to sacred things; for religious purposes.

QUOD BILLA CASSETUR. See BILLA CASSETUR; CASSETUR BREVES.

QUOD CLERICI BENEFICIATI DE CANCELLARIA. A writ to exempt a clerk of the chancery from the contribution towards the proctors of the clergy in parliament, etc. Orig. Orig. 261.

QUOD COMPUTET (Lat. that he account). The name of an interlocutory judgment in an action of account-render; also the name of a decree in the case of creditors' bills against executors or administrators. Such a decree directs the master to take the accounts between the deceased and all his creditors, to cause the creditors, upon due and public notice, to come before him to prove their debts, at a certain place and within a limited period, and also directs the master to take an account of all personal estate of the deceased in the hands of the executor or administrator; Story, Eq. Jur., 13th ed. § 548. See JUDGMENT; ACCOUNT; CAPIAS AD COMPUTANDUM.

QUOD CUM (Lat.). In Pleading. For that whereas. A form of introducing matter of inducement in those actions in which introductory matter is allowed to explain the nature of the claim: as, assumption and case. Hardr. 1; 2 Show. 180.

This form is not allowable to introduce the matter which constitutes the gravamen of the charge, as such matter must be stated by positive averment, while *quod cum* introduces the matter which depends upon it by way of recital merely. Hence in those actions, as trespass *vi et armis*, in which the complaint is stated without matter of inducement, *quod cum* cannot be properly used; 2 Bulstr. 214. But its improper use is cured by verdict; 1 P. A. Browne 68; Comyns, Dig. Pleader (C 86).

QUOD CURIA CONCESSIT (L. Lat.). Which the court granted.

QUOD EI DEFORCEAT (Lat.). In English Law. The name of a writ given by stat. Westm. 2, 13 Edw. I. c. 4, to the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, who are barred of the right of possession by a recovery had against them through their default or non-appearance in a possessory action; by which the right was restored to him who had been thus unwarily defeated by his own default. 3 Bla. Com. 193.

QUOD PERMITTAT (Lat.). In English Law. That he permit. The name of a writ which lies for the heir of

him who is disseised of his common of pasture against the heir of the disseisor, he being dead. *Termes de la Ley*.

QUOD PERMITTAT PROSTER-NERE (Lat. that he give leave to demolish). In English Law. The name of a writ which commands the defendant to permit the plaintiff to abate the nuisance of which complaint is made, or otherwise to appear in court and to show cause why he will not. On proof of the facts, the plaintiff is entitled to have judgment to abate the nuisance and to recover damages. This proceeding, on account of its tediousness and expense, has given way to a special action on the case.

QUOD PERSONA NEC PREBENDARI. A writ which lay for spiritual persons, distrained in their spiritual possessions, for payment of a fifteenth with the rest of the parish. *Fitz. Nat. Brev.* 175.

QUOD PROSTRAVIT (Lat.). The name of a judgment upon an indictment for a nuisance, that the defendant abate such nuisance.

QUOD RECUPERET. See JUDGMENT QUOD RECUPERET.

QUOD SI CONTINGAT (L. Lat.). That if it happen. Words by which a condition might formerly be created in a deed.

QUORUM. Used substantively, quorum signifies the number of persons belonging to a legislative assembly, a corporation, society, or other body, required to transact business. A quorum is such a number of the officers or members of any body as is competent by law or constitution to transact business. 18 Col. 18. There is a difference between an act done by a definite number of persons, and one performed by an indefinite number; in the first case a majority is required to constitute a quorum, unless the law expressly directs that another number may make one; in the latter case any number who may be present may act, the majority of those present having, as in other cases, the right to act; 7 Cow. 402; 9 B. & C. 856; 34 Vt. 316; Beach, Pub. Corp. 485; 27 Miss. 517. It has been said that there are two rules as to quorum in legislative bodies: one, where the quorum is fixed by the power creating the body, in which case a majority of the specified quorum may transact business; the other, where the quorum is not fixed by such power, in which case the general rule is that a quorum is a majority of all the members; 108 N. C. 678; Cush. Elect. § 247.

In England where the articles of a company provide that the business of a corporation shall be conducted by not less than a specified number of directors, the words are mandatory, and at least the specified number must join in the performance of any act; 16 Ch. D. 681.

In a private corporation a majority of the directors must be present to constitute a quorum, unless the charter, a valid by-law, or a usage provides a different number; 3 Thomps. Corp. § 3913; 23 N. H. 555; but when a quorum is present a majority may act; 92 Mo. 79. It is settled that those stockholders who attend a duly called stockholders' meeting may transact the business of that meeting although a majority in interest or number are not present; 1 Cook, St. & Stockh. § 607. Where a meeting is composed of an indefinite number of persons like stockholders, that is the rule; but where a definite number is involved, as directors, a majority must be present; 87 Pa. 42; 10 W. N. C. 85; 5 Blatch. 585.

Where articles of association did not prescribe the number of directors necessary for a quorum, it was held that the number who usually transacted the business constituted a quorum; L. R. 4 Eq. 233. A single shareholder was held not to constitute a meeting; 2 Q. B. Div. 26; at least two persons are necessary to make a corporate meeting; 46 L. J. 104. Where one stockholder, holding also proxies of the three remaining stockholders, held a meeting and voted and elected officers, the meeting was held invalid; W. N. [1877] 223. When an authority is confided to several persons for a private purpose, all must join in the act, unless otherwise authorized; 6 Johns. 38; 17 Abb. Pr. 201; otherwise if the trust is a continuous public duty; 17 Abb. Pr. 201. See AUTHORITY; MAJORITY; PLURALITY; MEETINGS; Cook, Stockholders. A majority of a board of directors is a quorum, and a majority of such quorum can act; 19 N. J. Eq. 402; so of a board of selectmen of a town; Maine Laws (1880) 225.

The rule of the lower house of congress, that the names of the members present who do not vote shall be noted and counted in determining the presence of a quorum to transact business, is a constitutional mode of ascertaining the presence of a quorum; 144 U. S. 1. In such case no quorum is present until such a number convene.

QUORUM, JUSTICES OF THE. Some justices were so-called because in certain cases it was necessary for one to have another with him before he could act. English.

QUOT. In Scotch Law. The twentieth part of the movables, computed without computation of debts, was so called.

Formerly the bishop was entitled, in all confirmations, to the quot of the testament. *Erskine, Inst.* 3. 9. 11.

QUOTA. That part which each one is to bear of some expense: as, his quota of this debt; that is, his proportion of such debt.

QUOTATION. In Practice. The allegation of some authority or case, or passage of some law, in support of a position which it is desired to establish.

The transcript of a part of a book or writing from a book or paper into another.

If the quotation is fair, and not so extensive as to extract the whole value or the most valuable part of an author, it will not be a violation of the copyright. It is mostly difficult to define what is a fair quotation. When the quotation is unfair, an injunction will lie to restrain the publication. See 17 Ves. 424; 1 Bell, Com. 121.

"That part of a work of one author found in another," observed Lord Ellenborough, "is not of itself piracy, or sufficient to support an action; a man may adopt part of the work of another; he may so make use of another's labors for the promotion of science and the benefit of the public." 1 Camp. 94. See Curtis, Copyr. 242; 3 Myl. & C. 737; 17 Ves. 422; 2 Stor. 100; 2 Beav. 6; ABRIDGMENT; COPYRIGHT; PIRACY.

QUOTATIONS OF PRICES ON AN EXCHANGE. Quotations of prices on an exchange, collected by the exchange, are property and entitled to the protection of the law, and the exchange has the right to keep them to itself or have them distributed under conditions established by it. 205 U. S. 322.

QUOTUPLEX (Lat.). Of how many kinds: of how many fold.

QUOUSQUE. A Latin adverb, which signifies how long, how far, until.

In old conveyances it is used as a word of limitation; 10 Co. 41.

In practice, it is the name of an execution which is to have force until the defendant shall do a certain thing. Of this kind is the *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken into execution, and he is imprisoned until he shall satisfy the execution; 3 Bouvier, Inst. n. 3371.

QUOVIS MODO (Lat.). In whatever manner.

R. An abbreviation of *Rex* or *Regina*.

RACE. A main division of the human species, the members of which have several characteristics in common, and containing a number of groups variously composed by different ethnologists, such groups being again variously divided and subdivided; as, the Caucasian race; the Mongol race. Stand. Dict.

RACHATER (L. Fr.). To redeem; to repurchase (or buy back).

RACHETUM (Fr. *racheter*, to redeem). In Scotch Law. Ransom; corresponding to Saxon *veregild*, a pecuniary composition for an offence. Skene; Jacob, Law Dict.

RACING. The offering of prizes or purses of a definite sum by a racing association, to be awarded to the successful horses in a race, and to be paid out of the general funds of the association, made up in part of entrance fees paid by the owners of the competing horses, is not a violation of the constitutional provision against gambling. 6 Park. Cr. Rep. 256. See HORSE RACE.

RACK. An engine with which to torture a supposed criminal, in order to extort a confession of his supposed crime and the names of his supposed accomplices.

RACK RENT. In English Law. The full extended value of land left by lease, payable by a tenant for life or years. Wood, Inst. 192.

RADIUS. A straight line drawn from the centre of a circle to any point of the circumference. Its length is half the diameter of that circle, or is the space between the centre and the circumference. 40 La. Ann. 174.

An act prohibiting private markets within a radius of six squares of any public market was held to meet six squares measured on city streets; 41 La. Ann. 46.

A contract not to practise dentistry within a radius of ten miles was held a valid contract not to practise within ten miles of the centre point of the village; 47 Conn. 175.

RADOUR. In French Law. A term including the repairs made to a ship, and a fresh supply of furniture and victuals, munitions, and other provisions required for the voyage. Pardessus, n. 602.

RAFFLE. A kind of lottery. A raffle may be described as a species of "adventure or hazard," but has been held not to be a lottery. 2 Mills (S. C.) 128. See LOTTERY.

RAFT. See LOGS.

RAGMAN'S-ROLL, or RAGMUND'S-ROLL. A roll, called from one Ragimund, or Ragimont, a legate in Scotland, who, summoning all the benefited clergymen in that kingdom, caused them on oath to give in the true value of their benefices, according to which they were afterwards taxed by the court of Rome. Whart. Law Lex.

RAILROAD. A road graded and having rails of iron or other material for the wheels of railroad cars to run upon.

In their modern form, railroads are usually owned by corporations; 2 Col. 673; 18 Pa. 187. But a private individual may construct and work a railroad if he can obtain a right of way by purchase; 70 Pa.

210; L. R. 4 H. L. 171; 30 Vt. 182.

Railroads were once regarded as public highways upon which private individuals might place their cars, to be drawn by the company; 12 Gray 180; 63 Pa. 18. A land grant conditioned that the road should be a public highway for the government, free of toll, applied only to the tracks; 93 U. S. 442.

Railroad and railway are ordinarily interchangeable terms; 135 Pa. 96; 30 Minn. 523; 88 Fed. Rep. 598; where a summons was against a railroad company and a judgment was entered against a railway, it was held immaterial; 89 Ind. 88; so in 83 Ala. 518. But in 60 Mo. 384, railway was held to mean the rails when laid, and railroad the highway in which the railway is laid.

A railroad and a street railway are distinct and different things; 2 Duv. 175. Whether "railroad" in a statute includes street railways depends upon the general intent of the act and the circumstances. Thus an act forbidding the obstruction of a railroad track applies to both; 74 Ga. 78; so does an act giving powers to railroad companies to enter into operating contracts; 24 Ill. 52; and an act authorizing the lease of one railroad to another; 89 Pa. 210; and an act giving a right of action against any railroad for death by negligence; 10 Bush 231; and an act relating to crossing the tracks of a railroad; 22 So. Rep. (Ala.) 279; but a constitutional clause forbidding the merger of competing railroads was held not to apply to street railways; 136 Pa. 96; and so of an act giving a mechanic's lien upon a "railroad or other structure;" 2 Wash. St. 115 (*contra*, 3 Mo. App. 559); and an early act (1857) giving a penal action against railroad companies for demanding fares in excess of the amount allowed by law; 4 Abb. Pr. n. s. 357; and an act giving a laborer's lien upon a railroad or other structure and the land upon which it is erected; 25 Pac. Rep. (Wash.) 1084. A passenger railway in Fairmount Park, Philadelphia, where there are no streets, but only country roads, is not a street passenger railway within the constitution of the state which requires local consent for building such; 175 Pa. 33.

A railroad company is a quasi-public corporation and owes certain duties to the public; 27 U. S. App. 1. In 128 U. S. 182, it was said that a railroad company is a private corporation though its uses are public. In 169 U. S. 466, it was said that a railroad is a public highway and is created for public purposes.

The charter of a public railroad requires the grant of the supreme legislative authority of the state; 3 Engl. Railw. Cas. 65; 2 Railw. Cas. 177; 3 N. Y. 430. It is usually conferred upon a private corporation, but sometimes upon a public one, where the stock is owned and the company controlled by the state; Redf. Railw. 17; 1 Ohio St. 657; 21 Conn. 304; 10 Leigh 454; 4 Wheat. 668; 8 Watts 316. It is sometimes by special act, but now, more commonly, under general laws. A railroad may be chartered by act of congress; 1 Dill. 314. If created by two states, it is a corporation of each state; 31 Ohio St. 317. See MERGER. Such charter, when conferred upon a private company or a natural person, as may be, is, in the absence of constitutional or statutory provisions to the contrary, irrevocable, and only subject to general legislative control, the same as other persons natural or artificial; 4 Wheat. 668; 2 Kent 275; 27 Vt. 140. See IMPAIRING THE OBLIGATION OF CONTRACTS.

But a company must be held to have accepted its rights, etc., subject to the condition that the legislature may protect the people against the exaction of unreasonable charges for the services rendered by it, subject to the constitutional guarantee for the protection of its property; 169 U. S. 466.

An act requiring that all regular passenger trains shall stop at all railroad stations and county seats is unconstitutional when its effect is to compel a fast interstate mail train to turn aside from its direct route to a county seat three and a half miles away, the company having provided ample accommodations for travel from such county seat; 163 U. S. 143; otherwise, if applicable only to trains running within a state; 166 U. S. 427. An act requiring railroad companies where there is a telegraph office to note on a blackboard in each station whether trains are late, etc., and if so, how late, is constitutional; 41 N. E. Rep. (Ind.) 937. See PUNCTUALITY.

A state statute which requires railroad companies to provide separate accommodations for white and colored persons and makes a passenger who insists upon occupying a coach other than the one set apart for his race, liable to a penalty, does not violate either the thirteenth or the fourteenth amendment; 163 U. S. 537, Harlan, J., dissenting.

Their charters are now usually subject to legislative control, either by virtue of a right reserved in the charter or in general laws subject to which they are organized. In either case legislation is binding upon the company. But where there is a right to repeal the charter for cause, it cannot be done without inquiry; 1 Abb. (U. S.) 9. A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, etc., subject to the condition that the legislature may protect the people against the exaction of unreasonable charges for the services rendered by it, subject to the constitutional guarantee for the protection of its property; 169 U. S. 466.

But a municipal ordinance which requires a street railway to sell six tickets for twenty-five cents is invalid; 57 Alb. L. J. 390; U. S. C. C. (Wisc.). The power of a municipality to reduce street railway fares is subject to limitations: (1) that there is reasonable need on the part of the public of lower rates; (2) that the rates fixed by the ordinance are not unreasonable in view of all the conditions; 87 Fed. Rep. 577. See an important case in 83 Fed. Rep. 529, as to the constitutionality of an act regulating fares, and a case *contra*, on the same act, in 51 N. W. Rep. (Ind.) 80.

The right of way is generally obtained by the exercise of the right of eminent domain. This can only be done in strict conformity to the charter or grant; 4 Engl. Railw. Cas. 235, 513, 524; 6 Gill 363. In this country, in many cases, the provisions of the charter enable companies to obtain land by purchase; 25 Vt. 49. The company may enter upon lands for the purpose of making preliminary surveys, by legislative permission, without becoming trespassers, and without compensation; 34 Me. 247; 9 Barb. 449; Wright Ohio 132; but compensation must be made or secured before the permanent occupation of the lands. See 6 Biss. 168; 27 Ind. 260. A company may not take land for speculation, or to prevent competition; 43 N. Y. 137. It may make any use of the land ac-

quired for the right of way, which contributes to the safe and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands; 95 Ala. 631. See EMINENT DOMAIN. Railroad corporations possess the powers conferred upon them by charter and such as are fairly incidental thereto; and they cannot, except with the consent of the state, disengage themselves from the discharge of their functions, duties, and obligations. The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public, or contracts beyond the scope of its powers, cannot be rendered enforceable by the doctrine of estoppel; but where the subject-matter is not foreign to the purposes of its creation, a contract embracing whatever may be fairly regarded as incidental to the things authorized, ought not, unless expressly prohibited, to be held to be *ultra vires*; 163 U. S. 364.

The construction and operation by a railroad of a part of its road proves an acceptance of its charter where no particular mode of acceptance is designated; 106 Mo. 557. See 83 Me. 440.

The company may lay their road across a highway, but not without making compensation to the owner of the fee for the additional servitude thus imposed upon the land; 26 N. Y. 526; 75 Ill. 74; 41 Cal. 256; 1 Exch. 723; 21 Mo. 580; 27 Pa. 339; 9 Cush. 1.

Steam railroads on highways impose an additional burden thereby and cannot be built without compensation to abutting land-owners; 49 Ind. 178; 19 N. J. Eq. 386; 124 Pa. 544; *contra*, 16 R. I. 663; 35 Minn. 113; 85 Ky. 640. In the absence of constitutional provisions, the legislature may authorize the use of streets by a steam or street railroad without municipal consent; 66 Mo. 228; 6 Whart. 25; 45 Ga. 602.

If it is required by statute to be raised out of a cut in a street and placed on a viaduct, the company is liable for additional damages; N. Y. L. J., Nov. 19, 1897 (S. C. of N. Y.).

The legislature may authorize a railroad to be constructed *under*, as well as *upon*, highways; and when so constructed, the rights of the land-owners are determined upon the same principles as if they were built upon the surface; Peirce, Railr. 248; 42 Md. 117. It may also authorize elevated railroads, or railroads built upon structures raised above the highway; Peirce, Railr. 248. See 70 N. Y. 337, 361; 6 Blatch. 487; 82 N. Y. 95. But a company incorporated as a street passenger railroad cannot build an elevated railroad over and along the streets of Philadelphia; 161 Pa. 409.

The construction of the road must be within the prescribed limits of the charter. The right of deviation secured by the charter or general laws is lost when the road is once located; 1 Myl. & K. 154; 2 Ohio St. 285; 31 N. J. L. 205. The location can then be changed only by act of legislature; 85 Barb. 373; 42 Miss. 555; 31 N. J. L. 205. Distance, having reference either to the length of the line or to deviation, is to be measured in a straight line through a horizontal plane; 9 Q. B. 76; 27 Vt. 766. But charters must be taken to allow such discretion in the location of the route as is incident to an ordinary practical survey thereof, with reference to the nature of the country; 6 Minn. 150. A right to build to a city named imports a right to extend *within* the city limits; 45 Tex. 88. Where a location of a terminus was fixed at or near P. it was held that a point a mile and a half from P. was a compliance with the charter; 64 Pa. 137. A deviation from the line specified in the charter will not be permitted; 27 Pa. 339; but slight deviations may be allowed; Wood, Ry. 1104. A charter power to change the location of the line in case of any obstacle to the one first selected, will authorize a relocation before, but not after, the line has been constructed; 15 Ohio St. 21. Ordinarily the courts will not interfere with the selection of a route; 13 Barb. 646.

A railroad company constructing its line is bound to do so in a careful manner; and if it is so constructed it is not liable to adjacent property owners; but if it appears that it exceeded its authority, or exercised it negligently, it will become liable; 85 Ill. 370; 149 Mass. 335; 29 Ia. 153. So if the injury amounts to taking property, as by the destruction of an easement.

A company cannot build only part of its charter line; 126 N. Y. 29. It cannot abandon a part; 63 Tex. 529.

Liability for the acts of contractors, sub-contractors, and agents. The company are not in any case liable for the act of a contractor or sub-contractor, or their agents, if it be not in doing precisely what is contemplated in the contract; 6 M. & W. 499; 12 Ad. & E. 737; 24 Barb. 355; 3 Gray 349; Redf. Railw. § 168.

Railroad companies are liable for the acts of their agents within the range of their employment; and for all acts of their agents within the most extensive range of their charter-powers; 14 How. 433; 27 Vt. 110; 7 Cush. 385; but not for the wilful acts of their agents, out of the range of their employment, unless directed by the company or subsequently adopted by them; 2 Harr. N. J. 514; 1 Fla. 136.

Railroad companies are liable for any injury accruing to the person or property of another through any want of reasonable care and prudence on the part of their employes. See MASTER AND SERVANT.

A railroad company operating its road through the streets of a populous city is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings; 40 La. Ann. 810; 70 Tex. 126; 84 Va. 63; 85 Ky. 224.

It is the duty of the company to use on its cars, etc., all the modern improvements in machinery commonly used; 65 Barb. 92; 76 N. C. 454; 83 Ala. 518; 76 Ia. 387.

Express business. Railroad companies are not required to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried; or to do more as express carriers than to provide the public at large with reasonable express accommodation. They need not furnish all express companies equal facilities on their passenger trains; 117 U. S. 1; Miller and Field, J.J., dissenting; 70 Cal. 169; 57 Fed. Rep. 673; 43 N. J. Eq. 77. But it has been held that they may be compelled to admit the agents of express companies on their trains, with their safes; 6 L. R. A. (N. C.) 271. And an early case held that a contract giving exclusive privileges to one express company is void; 2 Phila. 107; and in Maine a statute provides for equal facilities to all; 81 Me. 92. It has been held that a railroad company cannot assume the exclusive right of carrying on the express business over its own lines; 4 Fed. Rep. 431; but this was decided prior to the case in 117 U. S. 1, *supra*. See EXPRESS COMPANIES; FACILITIES.

The exclusive grants to railroad companies are to be strictly construed in favor of the corporation, and liberally expounded in favor of public rights and interests; 11 Pet. 420; 13 How. 71; 1 La. Ann. 253.

The power to build a railroad includes the power to build switches; 56 Pa. 325; but all customers have not an equal right to have switches built for them. 31 U. S. App. 252.

An act providing that a carrier accepting goods for transportation over connecting lines assumes an obligation for their safe carriage to the point of destination, etc., is not a regulation of interstate commerce, but establishes a rule of evidence and does not conflict with the United States constitution touching interstate commerce; 169 U. S. 311. But a carrier is not liable beyond its own lines, unless its liability be established by clear evidence; 155 U. S. 333. See COMMON CARRIERS.

A railroad corporation is a person within the fourteenth amendment declaring that no state shall deprive any person of prop-

erty without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; 169 U. S. 460. See PERSON.

Railroad grants of lands by congress are granted *in presenti*, and take effect upon the section of the land when the road is definitely located, by relation, as of the date of the grant; 137 U. S. 528. See 133 id. 496. When different grants cover the same premises, the earlier takes the title; 130 U. S. 1; 146 id. 570; 152 id. 284. Title does not pass until the act is complied with. 15 U. S. App. 339. See LAND GRANTS.

A company is not liable for injuries to a person who goes into its yard, merely because such yard is a dangerous place, but it must be shown to be unnecessarily dangerous and that the injury resulted from the negligence of the company; 48 Pac. Rep. (Kan.) 16.

A hotel-keeper who sends his servant to the station to accompany guests, etc., has no right to use the station except with the leave of the railway company; 56 Alb. L. J. 130.

Where a number of passengers who have right to take a certain train is in excess of its capacity, the company must exercise the same care and forethought in providing additional cars as it is bound to exercise in relation to its other passengers; 43 N. W. Rep. (Ill.) 698.

It is the duty of a railroad company to heat its cars in cold weather; 31 S. W. Rep. (Tex.) 677.

When a person (in this case a physician) is, while driving along a public highway, detained for twenty minutes at a grade crossing by the negligent delay of the employes of the railroad company in opening the gates, the company is liable in damages for delay; [1895] 2 Ir. R. 255.

When no legislative prohibition is shown, a railroad company may lease and maintain a summer hotel at its seaside terminus; 160 U. S. 514.

Mandamus will lie to compel a railroad company to operate its road; 28 Hun 453; 91 U. S. 343 (though the business be unprofitable; 7 Neb. 357; but not where it carries traffic on another line owned by it; 103 N. Y. 95); also to build a bridge; 70 N. Y. 569. The remedy for abandonment of a railroad may also be by indictment or by proceedings to forfeit the charter; 24 N. Y. 261.

An agreement whereby a railroad company has the right to run its trains into the depot of another railroad company is not a lease; 143 U. S. 596. See a contract for trackage in 45 Fed. Rep. 304.

Neither a railroad, nor any part of its property, is subject to levy under execution, unless by statute. See 114 U. S. 340; 65 Pa. 278; 117 Ind. 501. See LEASE.

STREET RAILWAYS. As to the difference between street and steam railways, see *supra*.

When a railway is laid in a street, to facilitate its use by the public, it is a street railway; 87 Mich. 371; so, if confined within the limits of a city and to be used exclusively under the streets; 107 N. Y. 53. A distinctive feature is that it is entirely for the carriage of passengers; Booth, Rys. § 1. It makes no difference whether it be on, above, or below the surface; *id.*; see *supra*; or what kind of motor power it uses; 41 Fed. Rep. 556. The difference between street railroads and steam railroads lies in their use and not in their motive power; 88 Fed. Rep. 538.

Street railroads belong to the surface of an open highway. They must conform to the grade of the highway. They must carry passengers only, under Pennsylvania acts; 161 Pa. 393. A street railway has been said to be one which is used expressly for the transportation of passengers, and which stops its cars at frequent intervals to take on passengers. 47 N. J. Eq. 380; 24 Atl. Rep. (Pa.) 179.

The general (steam) railroad act of Pennsylvania does not authorize the incorporation of elevated street passenger railroads in the streets of a city, and they cannot be incorporated under the general act provid-

ing for the incorporation of street passenger railways; 161 Pa. 396.

The right to permit their construction or refuse consent, is often vested in the local authorities. See Booth, Rys. § 28, as to the legislation of various states. Whether they have implied, in the absence of express authority, is said not to be settled; *id.* § 15. A city cannot, without legislative authority, grant the right to build a street railway; 73 La. 513; 3 Duer 119; 24 Ill. 52; 66 Mo. 238; 9 Bush 127. See 10 Wall. 38. But the power to open and improve streets has been held to confer such authority; 85 Mo. 263; so of a power to regulate and improve streets and regulate vehicles thereon; 14 La. Ann. 842. It is also held that it cannot grant an exclusive right without legislative authority; 24 Fed. Rep. 305; 11 So. Rep. (La.) 77; which must be express: Booth, Rys. § 17. The power to grant easements in city streets, in perpetuity and in monopoly, can only be conferred by express words, or, if inferred from other powers, must be indispensable to their exercise; 171 U. S. (not reported).

Where the authority is express, it cannot be delegated; 34 Ohio St. 194.

A city cannot grant to individuals the exclusive right to lay tracks; 61 Ia. 11; 36 N. J. L. 79; 38 N. Y. 201; *contra*, 26 Pac. Rep. (Utah) 336. See Booth, Rys. § 2.

Ordinarily, and apart from constitutional or statutory provisions, a second company may be authorized to lay additional tracks; 45 Cal. 365; 23 Atl. Rep. (Md.) 463.

It is held that the local authorities, when their consent to building a street railway is required by law, may impose any conditions they choose; 37 Mich. 558; 169 Pa. 181; but it has been also held that if the conditions imposed by the local authorities relate to matters over which the legislature has entire control, the acts of the legislature cannot be affected by the local authorities; 105 N. Y. 97. The legislature may impose conditions other than, and in addition to, those prescribed by the constitution, and the local authorities may prescribe conditions additional to both the constitutional and statutory provisions on the subject; 103 N. Y. 343. See 118 *id.* 113. Where a municipality has the right to control the use of its streets, its action is not subject to judicial control; 17 N. J. Eq. 88; 40 La. Ann. 446; Booth, Rys. § 40.

Where local authorities have granted a right to construct a street railway, they cannot, without the consent of the company and in the absence of a reserved right so to do, impose additional obligations; 84 Mich. 257; as, the use of iron poles instead of wooden poles; *id.*; or requiring the railway company to pave and keep in repair a portion of the street outside of the tracks; 26 N. E. Rep. (W. Va.) 188.

The consent of the local authorities once given and accepted and acted upon, cannot be revoked; 109 N. C. 688; 45 Tex. 88; see 23 Chi. L. News 147; but where a right to revoke has been reserved, it may be exercised by the local authorities; 111 Mass. 232.

The use of its tracks by a railway company may be temporarily interrupted by municipal authorities, when necessary for the purpose of repairs on the streets; 48 Md. 168; 11 Phila. 353; 103 Mass. 262.

Where a route has been established under the direction of the local authorities, the company cannot change the location so fixed without a new consent for that purpose; 53 Hun 131. The local authorities may permit the tracks to be relied on another part of the street; 23 La. Ann. 535; and may compel a change where it has reserved the right so to do; 10 Phila. 70. A railway company may adopt any gauge for its track which it sees fit and afterwards change the same, in the absence of anything to the contrary; 131 Pa. 1; and it may ordinarily adopt any kind of rails and change the same from time to time; 10 Atl. Rep. (N. J.) 263; but the rails used must be such as not to interfere with the use of the street by the public; 133 Pa. 505.

A city cannot grant the use of its streets to so many companies as to impair its pub-

lic use; 48 Mich. 433. It cannot, ordinarily, grant the right to build in a city park; 26 La. Ann. 478; 67 Ill. 540; but see 76 Cal. 156; 175 Pa. 33; PARK. See 20 Hun 201.

The legislature, unless forbidden by the constitution, may grant a right to lay a street railway in a street; 10 Wall. 38; 24 N. J. Eq. 158.

Many cases hold that a street railway is not a new servitude on the street, for which the owners of abutting lands are entitled to compensation; 24 N. J. Eq. 158; 58 Md. 603; 94 U. S. 324; 88 Mich. 66; 78 Md. 261; 55 N. J. L. 605; 27 Wis. 194; 82 Conn. 579; 125 Mass. 515; 2 Dill. Mun. Corp. 725; and their consent to the construction of such railways is not necessary; but see an able dissenting opinion, 85 Mich. 634. It has been held that the abutting owner may recover where the tracks were laid next the curb; 14 Ohio St. 523.

It is held that this is so even if steam motors are used in propelling the cars; 79 Me. 363; 35 Minn. 112; 47 N. J. Eq. 380; or electricity; 85 Mich. 634; 75 Md. 222; 47 N. J. Eq. 380; 16 R. I. 668. But as to whether the use of steam on street railways imposes an additional servitude, the weight of judicial opinion is said to be very nearly evenly balanced; Booth, Rys. § 86.

The substitution of cable propulsion for horse power imposes no new servitude on the street; 19 N. E. Rep. (Ga.) 831; 121 N. Y. 536; 32 Fed. Rep. 270.

In New York it is held that street railways impose an additional burden on the streets; 39 N. Y. 404; 121 *id.* 505; unless the fee of the soil of the street is vested in the city; 27 N. Y. 108; but even then the abutting owner has a right of action if access to his property is cut off; 123 *id.* 157.

An elevated railroad is an additional burden on the highway; 23 Atl. Rep. (Md.) 463; 90 N. Y. 123; 129 N. Y. 252. Their structures are incompatible with the free and unobstructed use of the street and abutting property owners are entitled to an injunction unless their rights have been properly acquired by the company and they have received compensation therefor. See 90 N. Y. 123; 128 *id.* 157; 125 *id.* 164; 130 *id.* 14; 121 *id.* 505; 123 *id.* 157. Though not owning the soil of the street, they have easements of light, air, and access therein; 130 N. Y. 14; 90 *id.* 122.

Non-abutting property owners are not entitled to damages by reason of the use of a street by an elevated railway; 16 Daly 145; 18 N. Y. Supp. 238.

An elevated railway in New York which has not acquired the right from abutting proprietors is a continuous trespass upon their property which gives rise to a separate cause of action at law for damages. See 123 N. Y. 426; 120 *id.* 119. Equity will prevent the continuance of trespass by including as damages injuries permanently resulting from the interference of easement with light, air, and access. An abutting owner has a right of action for the pollution of air by smoke.

Constructing an elevated railroad on pillars in a public street is held, in 36 L. R. A. (Ill.) 97, not to constitute a new servitude or an unlawful use of the street. In Pennsylvania a street railway on a country road in a township is an additional burden on the highway and cannot be constructed without the consent of abutting property owners, though it is otherwise as to the streets of a city or borough; 167 Pa. 162.

An electric street railway between cities and villages for the transportation of passengers, merchandise, and baggage imposes an additional servitude on the highway; 70 N. W. Rep. (Wis.) 678.

It is said that equity will not relieve an abutting property owner but will leave him to his remedy at law; 147 U. S. 248. But the rule appears to be otherwise in Pennsylvania. See 167 Pa. 162.

Ordinarily street railways have no right of eminent domain.

In 152 Pa. 163, the court seemed to consider that the right to build a passenger railway carries with it, at least in the absence of specific denial, the right from time to time, to operate it by new methods,

but the point was not decided. An ordinance permitting the building of a horse-car railway covers an electric railway; 185 N. Y. 393.

The erection of trolley poles in the middle of the street does not entitle the abutting owners to compensation; 47 N. J. Eq. 380. Where electric railways are authorized the authority extends to the necessary and proper apparatus for operating them; 139 Pa. 419; including poles and wires; 47 N. J. Eq. 380. But where this right encroaches on property rights of an abutting owner it should be so exercised by the company as to minimize the inconveniences and danger to such rights; 51 N. J. Eq. 213.

Poles must be so placed as not to interfere with the rights of ingress and egress to abutting property; 85 Mich. 634; stringing a wire along the street twenty feet above the surface is no interference with the right to light and air; 51 N. J. Eq. 213. See POLES; WIRES.

If a street railway is constructed and operated without lawful authority, it is a nuisance; 137 Pa. 535; 133 *id.* 505; 2 Colo. 673; 87 Mich. 361; and a railroad company cannot grant to an individual a right to operate a railroad for his private purposes over a part of its line which it does not use; 102 N. Y. 441.

Where the use of a street is unlawful, an injunction will lie at the suit of an abutting owner; 19 Ohio St. 78; *contra*, 16 R. I. 533; 100 Mo. 508; 112 Ill. 611; or at the suit of a duly authorized public officer; 50 Ga. 451; 27 N. Y. 611; 102 *id.* 441; a company so operating a steam road may be indicted for a nuisance; 14 Gray 93; 101 Pa. 92; and, by analogy, a street railway; Booth, Rys. § 4.

A municipality can maintain proceedings in the nature of *quo warranto* to oust a street railway company of its franchises for non-user; 140 Mo. 539.

Ordinarily, a franchise to build a street railway is not exclusive; 48 Mich. 433; 41 La. Ann. 561; 73 Ia. 513.

A right or permit from a municipality to construct a street railway on a given street, is not a part of the company's franchise, but is property, and is an incorporeal right; 87 Ill. 317.

Street railway companies are subject to regulation by statutes and by ordinances under the police power; Booth, Rys. § 221; such as ordinances regulating the speed of cars; 84 Mo. 119; 129 Mass. 310; requiring cars to stop at designated places; 42 Ark. 321; requiring the watering of tracks; 77 Ga. 731; forbidding the use of sand upon tracks; 47 Hun 221.

Where a railway company has not built all the line specified in its charter and has abandoned a part of what it had built its charter is subject to forfeiture; 126 N. Y. 29; 63 Tex. 529.

A street railway company owns the structure laid by it in the highway, and has a superior right to the space covered by its track; Peirce, Rair. 252. See 14 Gray 69; 76 N. Y. 530; 34 Ia. 527. The public, on foot or in carriages, may cross its tracks, and travel on the spaces covered by it, and even incidentally drive ordinary carriages on the rails. But a person driving a carriage on the track should leave it without retarding the cars; 76 N. Y. 530; 69 Ill. 388. See 9 Misc. Rep. 270. It is also held that an electric street railway company has a common right in the highway with other travellers, not a superior right, and they must be so managed as not unnecessarily to interfere with the like rights of others; 37 Atl. Rep. (Conn.) 379. But its rails cannot be used by other competing common carriers driving railway or other carriages, without special legislative authority; 72 N. Y. 330; 4 Stew. N. J. 525; 81 Ill. 523.

A company may remove snow from its track to another part of the street, but in so doing, it must avoid unnecessary injury to the owners of property; 50 Md. 73. See Peirce, Rair. 252.

When an electric street railway car is stopping at a crossing, it should not run its

car in an opposite direction on the other track without warning pedestrians; 84 Atl. Rep. N. J. 1094; 97 Cal. 553; *contra*, 16 N. Y. Supp. 350; but one who crosses a street behind a moving car at a place which is not a regular crossing, is bound to look for cars on the other track; 145 N. Y. 196; though it is held that a passenger alighting from a car has a right to presume that the other track will be kept clear; 127 Ill. 1; 36 N. Y. Supp. 105; but it is also held that it is a question of ordinary care; 126 Pa. 559. See 39 N. Y. Supp. 440. Where a passenger alights from a car on a double track trolley line, it is the duty of the company to regulate the speed of its cars and to give such warning of their approach as will reasonably protect the passenger from injury; 43 N. E. Rep. (Ohio) 207.

A street car has recently been held by the house of lords to be a *coach* within the meaning of an act relating to tolls on a particular bridge.

See various related titles treating subjects connected with railroads; LATERAL RAILROADS; STATION; FIRST-CLASS; ROADBED.

Invitation to Alight from Train. The announcement of a station and the opening of the vestibule doors is not an "invitation" to passengers "to alight" until after the train stops. 163 Ky. 459, 173 S. W. 1113.

RAILROAD-AID BONDS. See BOND.

RAILROAD BRIDGE. The qualified phrase, "railroad bridge," means a viaduct constructed for the exclusive use of railroad transportation. 2 Duv. (Ky.) 178.

RAILROAD COMMISSIONERS. officers appointed in various states for the supervision of the construction and operation of railroads.

A suit against railroad commissioners to restrain the enforcement of rates, as unjust, is not a suit against the state; 154 U. S. 362, 418, 420.

RAILROAD COMPANY. As used in a state police statute is inclusive of natural persons operating a railroad. 234 U. S. 280.

RAILROAD PROPERTY. The property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail. It includes the road bed, right of way, tracks, bridges, stations, rolling stock, and such like property. Lands owned and held for sale, or other disposition for profit, and in no way connected with the use or operation of the railroad, are not railroad property in the sense mentioned, but are property of the company independently of its functions and duties as a common carrier. 47 Fed. Rep. 681.

"Railroad property" held to include a bridge owned by the railroad company. 139 Ky. 386, 109 S. W. 303.

RAILROAD RELIEF FUNDS. A term applied to funds raised by periodical contributions of corporations' employees, or by them jointly with the corporation, and usually managed jointly, for the purpose of providing relief to the employees in case of injury, and the payment of money to their families in case of death, in the service. They are usually managed jointly by the corporation and representatives of the members, the business facilities being furnished by the corporation, which usually guarantees the funds and undertakes to make good deficiencies. Their management usually constitutes a department of the corporation business. They have been instituted in England and in some of the largest railroad systems in the United States. Compulsory contribution to funds for charitable, financial, etc., purposes, is forbidden in some states. In Massachusetts, acts provide for such societies for employees of railroad, street railroad, and steamboat companies.

Members are usually required to contract that the acceptance of relief benefits from the fund in case of injury or death shall

operate as a release to the company of all rights of action for damages for injury or death made by, or on behalf of, the member or his legal representatives.

Such contracts are sustained as defences to actions for personal injuries; 169 Ill. 313; 64 Ill. App. 444; 44 Neb. 44; 70 N. W. Rep. (Ia.) 630; 81 id. 971; 71 Fed. Rep. 136, 139, 931; 10 Ind. App. 47; 37 N. E. Rep. (Ind.) 423; 75 Md. 162; 81 id. 412; 63 Mich. 690; 41 Fed. Rep. 125; 36 id. 655; 9 Q. B. Div. 357; L. R. 3 Q. B. 555.

A contract by which, if the member or his representatives accept benefits, he or they thereby release all rights of action against the company, for damages for injury, etc., is valid; and when the injured party after the right of action has arisen accepts the benefits, he is merely settling for the past; 163 Pa. 133. See 164 id. 329.

But it was held that where, under such a contract, the widow of a member accepted a benefit upon her husband's death, and personally released the fund and the company, the contract of the husband did not waive a right of action, and that neither the contract nor the widow's receipt of the benefit discharged her right of action; 58 N. W. Rep. (Neb.) 1120. In 65 Fed. Rep. 308, the court, on a demurrer to such a defence, upheld the demurrer and held the contract and release void, and expressed its surprise at finding that several courts of unquestionable dignity and authority had sustained such defences. This case was affirmed on appeal, though not quite on such broad ground as was taken below; 76 Fed. Rep. 439.

A rule of a railway relief department which provides that all claims of beneficiaries shall be submitted to the superintendent, with the right of appeal to an advisory committee whose decision shall be final, does not bar the holder of a claim which has been rejected by such committee from the right of action in the courts; 46 N. E. Rep. (Ohio) 577.

An Ohio act which provides that no railroad company shall require any stipulation with any person in or about to enter its employ, whereby such person agrees to waive any right of action against the company for personal injuries, and that all such agreements shall be void, is in violation of the fourteenth amendment to the federal constitution as taking away liberty of contract; 71 Fed. Rep. 931.

See an address by Josiah Calef Bartlett of Chicago.

RAILROAD STATION. See STATION.

RAILWAY. Held that the term "railroad," as used in a statute under condemnation proceedings, has same meaning as "railway." 128 Ky. 768, 109 S. W. 361.

RAILWAY AND CANAL COMMISSION. See COURT OF RAILWAY AND CANAL COMMISSION.

RAILWAY COMMISSIONERS. A body of three commissioners appointed under the English regulation of railways act, 1873, principally to enforce the provisions of the railway and canal traffic act, 1854, by compelling railway and canal companies to give reasonable facilities for traffic, to abstain from giving unreasonable preference to any company or person, and to forward through traffic at through rates.

They also had the supervision of working agreements between companies. The statutory authority for the existence of the commission expired on 31st December, 1882, as from which date the Railway and Canal Commission was in operation and replaced it. Byrne.

RAIN-WATER. The water which naturally falls from the clouds.

No one has a right to build his house so as to cause the rain-water to fall over his neighbor's land; 1 Rolle, Abr. 107; 1 Stra. 643; Fortesc. 212; Bacon, Abr. *Action on the Case* (F); 5 Co. 101; unless he has acquired a right by a grant or prescription.

When the land remains in a state of na-

ture, said a learned writer, and by the natural descent the rain-water would descend from the superior estate over the lower, the latter is necessarily subject to receive such water; 1 *Lois des Bâtimens* 15, 16. See 2 Rolle 140.

RAINY DAY. The phrase *rainy day* has no definite and certain meaning. It may be used and understood in many senses. In common parlance, it varies in signification from the day with light, passing April showers to the steady and strong down-pour of an Oregon December. Worcester defines *rainy* as follows: 'Abounding in rain; showery; wet;' and Webster's definition is the same. But the definition, while it fixes some limit to the signification of the term, as that a rainy day is a wet one, and therefore not a dry one, does not free the matter from the uncertainty which is inherent in the expression. 23 Am. & Eng. Encyc. 2nd ed., 842, n. 7; 5 Sawy. (U. S.) 434.

RAISE. To create. A use may be raised; i. e. a use may be created. 1 Spence, Eq. Jur. 449.

When a child has reached the age of twenty-one years, he is *raised*; 59 Ind. 598.

RAISE REVENUE. Is to collect revenue, not necessarily to increase the amount; 58 Ala. 546. Authority to raise money for prosecuting and defending suits only authorizes raising money by taxation and not by borrowing; 119 N. Y. 280 a.

RAM ALLEY. See PRIVILEGED PLACES.

RANDOM. See AT RANDOM.

RANGE. A word used in the land-laws of the United States to designate the order of the location of public lands. In patents from the United States to individuals for public lands, they are described as being within a certain range.

RANGER. A sworn officer of the forest to inquire of trespasses, and to drive the beasts of the forest out of the deforested ground into the forest. Jacob, Law Dict.

RANK. The order or place in which certain officers are placed in the army and navy, in relation to others.

It is a maxim that officers of an inferior rank are bound to obey all the lawful commands of their superiors, and are justified for such obedience.

Army and Navy. In 1868, a retiring board found a colonel incapacitated from the result of wounds received in battle while commanding a division with the brevet rank of major-general. He was thereupon retired by the president, under the act of July 18, 1866, with the full rank of major-general. Subsequently his retired rank was changed by the provisions of the act of March 3, 1875, to that of brigadier-general. It was held that he was not appointed to the office of major-general; that he still retained on the retired list the office of colonel; that the rank conferred upon him by act of congress was in no sense a constitutional appointment to a new office; and that the same power that gave him his rank could take it away. Rank is often used to express something different from office. It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position in reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments. This is the case with the staff officers of the army. 15 Ct. Cl. 159. See R. S. §§ 1122, 1128, 1131, 1168, for instances.

The distinction between rank and office is more clearly apparent with reference to staff officers than to officers of the line, because in the latter case the words used to designate the rank and the office are usually the same, while in the former case they are always different.

In some cases, officers of the line have a rank assigned to them different from the

title of their office. See R. S. §§ 1096, 1097. Selections under these sections are usually made from among officers whose rank is raised to a higher degree by the service assigned to them, but the new rank does not confer a new office.

In the army, all officers, except chaplains, are paid according to their rank; in the navy, the pay of staff officers does not depend upon their rank; and there rank only determines matter of precedence, etc., among officers.

Grade is a step or degree in either office or rank. See 15 Ct. Cl. 151, per Richardson, J.

Officers in the regular army, active or retired, who served in the volunteer forces in the civil war may receive a brevet equal to their highest rank held in the said forces; act of Feb. 16, 1897.

Relative Rank of Army and Navy Officers. Rear admirals rank with major generals; commodores with brigadier generals; captains with colonels; commanders with lieutenant colonels; lieutenant commanders with majors; lieutenants with captains, etc. Such relative rank of army and navy officers was fixed by the act of July 16, 1862, Rev. Stat. § 1466. 195 U. S. 420.

RANKING. In Scotch Law. Determining the order in which the debts of a bankrupt ought to be paid.

RANSOM. A redemption for money or other consideration of that which is taken in war. 8 Term 277.

The custom of ransom of prisoners of war, which superseded slavery, has given place to the exchange of prisoners; Risley, Law of War 127. See PRISONERS OF WAR; RANSOM BILL.

In Old English Law. A sum of money paid for the pardoning of some great offence, or to redeem the person from captivity or imprisonment, or property from seizure; a fine, particularly an excessive or severe one. The distinction made between ransom and amercement is said to be that a ransom is the redemption of a corporal punishment; while an amercement is a fine by way of penalty for an offence committed. Abbott; Cowel.

In International Law. The redemption, also the sum or other consideration, agreed to be paid for the redemption of captured property, or the liberty of a captive. A ransom, strictly speaking, is not a recapture of the captured property; it is rather a purchase of the right of the captors at the time, be it what it may; or, more properly, it is a relinquishment of all the interest and benefit which the captors might acquire or consummate in the property, by a regular adjudication of a prize tribunal, whether it be an interest in rem, a lien, or a mere title to expenses. In this respect, there seems to be no difference between the case of a ransom of an enemy or a neutral. *Id.*; 2 Gall. 325.

RANSOM BILL. A contract for payment of ransom of a captured vessel, with stipulations of safe conduct if she pursue a certain course and arrive at a certain time. If found out of time or course, the safe conduct is void; Wheaton, Int. Law 107. The payment cannot be enforced in England, during the war, by an action on the contract, but can in this country; 1 Kent 104, 105; 4 Wash. C. C. 141; 2 Gall. 325.

By the general maritime law ransoms are allowed and the master of a ship may bind the whole cargo as well as the ship, by his contract for ransom; 3 C. Rob. 240. They were formerly prohibited in England, but now the queen in council may make rules for prohibiting or allowing them, under the act of 1864.

Ransoms have never been prohibited by the United States; 15 Johns. 6; nor by the other nations, except England; 1 Kent 112.

A belligerent may deliver up neutral property on ransoms as well as enemy's property; per Story, J., in 2 Gall. 337, where the subject of ransom is discussed.

A ransom strictly speaking is not a re-

purchase of the captured property, it is rather a repurchase of the actual right of the captors at the time, be it what it may, or, more properly, it is a relinquishment of all the interest or benefit which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal. There seems to be no legal difference between the case of a ransom of the property of an enemy and of a neutral, for if the property be neutral and yet there be probable cause of capture, or if the delinquency be such that the penalty of confiscation might be justly applied, there can be no intrinsic difficulty in supporting a contract by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid or agreed to be paid by the captured; 3 Phil. Int. L. 645.

In the absence of stipulation, if the ransom vessel be lost, the contract is still binding; but usually there is a clause excepting loss on the high seas, but not by stranding; 2 Halleck, Int. L., Baker's ed. 331.

RAPE (Lat. *rapere*, to snatch, to seize with violence). In Criminal Law. The carnal knowledge of a woman by a man forcibly and unlawfully against her will. Russ. Cr. L. 904.

The statute of Westminster 2, c. 34, defines the crime to be where "a man do ravish a woman, married, maid, or other, where she did not consent neither before nor after." And this statute definition has been adopted in several very recent cases. Addenda to 1 Den. Cr. Cas.; 1 Bell, Cr. Cas. 63, 71.

Much difficulty has arisen in defining the meaning of *carnal knowledge*, and different opinions have been entertained,—some judges having supposed that penetration alone is sufficient, while others deemed emission an essential ingredient in the crime; Hawk. Pl. Cr. b. 1, c. 41, s. 3; 12 Co. 37; 1 Hale, Pl. Cr. 638; 2 Chitty, Cr. Law 810. *Penetration* is the act of inserting the penis into the female organs of generation. 9 C. & P. 118. See 5 C. & P. 321; 9 *id.* 31. It was once held that in order to commit the crime of rape it is requisite that the penetration should be such as to rupture the hymen; 5 C. & P. 321. But this case has since been expressly overruled; 2 Mood. Cr. Cas. 90; 9 C. & P. 752; Whart. Cr. L. 554. In the United States in modern times the better opinion seems to be that both penetration and emission are not necessary; 1 East, Pl. Cr. 439; Add. Pa. 143; 3 Greenl. Ev. § 410; 2 Bish. N. Cr. Law § 1131; 111 Ind. 279; 14 Neb. 205; 1 Houst. Cr. Cas. 393; 25 Fla. 702; *contra*, 14 Ohio 223; but later cases in that state intimated that if the question were new, the decision would be the other way; 22 Ohio St. 102, 541. See 65 N. C. 466. Slight penetration has been held to be sufficient; 76 Ga. 623. By statute in England carnal knowledge is completely proved by proof of penetration; 9 Geo. IV. c. 31, § 18. Statutes to the same effect have been passed in some of the United States; but these statutes have been thought to be merely declaratory of the common law; 3 Greenl. Ev. § 210. See, on this subject, 1 Hale, Pl. Cr. 623; 1 East, Pl. Cr. 437; 1 Chitty, Med. Jur. 386; 1 Russ. Cr. Law 860. It is to be remarked, also, that very slight evidence may be sufficient to induce a jury to believe there was emission; Add. Pa. 143; 2 Const. 351; 1 Beck, Med. Jur. 140; 4 Chitty, Bla. Com. 213, note 8. See [1891] 2 Q. B. 149. In Scotland, emission is not requisite; 1 Swint. 93. See EMISSION.

By the term *man* in this definition is meant a male of the human species, of the age of fourteen years and upwards; for an infant under fourteen years is supposed by law incapable of committing this offence; Whart. Cr. L. 551; 1 Hale, Pl. Cr. 631; 8 C. & P. 738; Tayl. Ev. 127; 29 Fla. 565. But this presumption has been held by some authorities not to be conclusive, but capable of removal by proof; 5 Lea 352. But not only can an infant under fourteen years, if of sufficient mischievous discretion, but even a woman may be guilty as principal in the second degree; 83 N. C. 605.

And the husband of a woman may be a principal in the second degree of a rape committed upon his wife; as, where he held her while his servant committed the rape; 1 Hargr. St. Tr. 388. See 62 Mich. 280; 2 Bish. N. Cr. L. § 1135.

Drunkenness is no excuse for rape; nor can it excuse or mitigate an assault with intent to commit a rape; 98 Mo. 431.

The knowledge of the woman's person must be *forcibly and against her will*; and if her consent has not been voluntarily and freely given (when she has the power to consent), the offence will be complete, nor will any subsequent acquiescence on her part do away the guilt of the ravisher. A consent obtained from a woman by actual violence, by duress or threats of murder, or by the administration of stupefying drugs, is not such a consent as will shield the offender or turn his crime into adultery or fornication; and if the connection took place when she was in a state of insensibility from liquor, having been made drunk by the prisoner, though the liquor was given only for the purpose of exciting her, it is a rape; 1 Den. Cr. Cas. 89; 1 C. & K. 746; 13 Cox, C. C. 311. Having carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, does not amount to a rape; 8 C. & P. 267, 286. But it is otherwise by act of 1855. No doubt the party would be liable in such a case for an assault.

The injured party cannot condone the crime of rape by excusing or forgiving the guilty party; 147 Mass. 423.

It has been decided that if a physician professing to take steps to cure a woman of disease, induces her to submit to sexual intercourse with him, under the impression that it is a necessary portion of her medical treatment, this does not amount to rape. To constitute rape there must be an actual resistance of the will on the part of the woman; 19 L. J. M. C. 174; 1 Den. C. C. 530; 12 Am. Rep. 283, n.; s. c. 25 Mich. 358; and it has been held that this must be shown beyond a reasonable doubt; 123 Ind. 185. If it appear that the intercourse was effected without her consent, the crime of rape is proved, although no positive resistance by her is shown; 85 Va. 638. Some authorities have held that the woman's resistance is not sufficient to render the crime rape, if finally she consent through fear, duress, or fraud. It must appear that she showed the utmost reluctance and resistance; 50 Wisc. 418; s. c. 36 Am. Rep. 856; 59 N. Y. 374. But this is not the general rule, the better opinion being that a consent obtained by fear of personal violence is no consent—and though a man puts no hand on a woman, yet if, by the array of physical force, he so overpowers her mind that she dares not resist, he is guilty of rape; 2 Bish. Cr. L. § 1125; 36 Am. Rep. 860, n.; s. c. 50 Wisc. 518. The offence of rape is complete where prosecutrix is rendered unconscious in consequence of the assault and violence; 39 Minn. 277. It has been said that consent during any part of the act will prevent its being rape; 73 Ia. 332; 36 Mich. 203; 50 Wisc. 518; but Mr. Bishop takes the very sensible view that after the offence has been completed by penetration no subsequent consent is of any avail to relieve the man from the charge of rape; 2 Bish. N. Cr. L. § 1122. A written statement by the prosecutrix on a trial for rape cannot be used to contradict her where she admits making it, but testifies that she did so under compulsion and that it is false; 136 Mo. 74.

The matrimonial consent of the wife cannot be retracted; and, therefore, her husband cannot be guilty of a rape on her, as his act is not *unlawful*. But, as already observed, he may be guilty as principal in the second degree.

As a child under ten years of age is incapable in law to give her consent, it follows that the offence may be committed on such a child whether she consent or not. See stat. 18 Eliz. c. 7, s. 4.

There is a recent trend in legislation in this country in the direction of raising the age of consent. This has resulted from a

very active agitation on the subject largely promoted by the societies for the prevention of cruelty to children and persons who devote themselves especially to the promotion of social purity. In most of the states there are statutes, some of which are extremely drastic. By recent legislation the age of consent is made in Virginia, Wisconsin, and Indiana, fourteen years; in Iowa, Texas, and Delaware, fifteen years; Connecticut, Louisiana, Massachusetts, Michigan, Oregon, and South Dakota, sixteen years; and in Arizona, Colorado, Idaho, Missouri, Nebraska, New York, Utah, and Wyoming, it is eighteen years. In England, thirteen years, but it is a misdemeanor if between thirteen and sixteen. Ignorance of the woman's age is no defence; 117 Cal. 583; nor is the fact that she was large for her age and physically strong; 73 N. W. Rep. (la.) 844.

It has been questioned whether rape was a felony at common law, or was made one by a statute in the reign of Edward I. The benefit of clergy was first taken away by a statute of Elizabeth. By a statute of Victoria, the offence is no longer punishable with death, but, at most, with transportation for life; previously to that statute, the capital punishment was almost invariably enforced.

See, as to the possibility of committing a rape, and as to the signs which indicate it, 1 Beck. Med. Jur. c. 12; Merlin, *Répert. Viol.*; Biessy, *Manuel Médico-Légal*, etc., 149; Parent-Duchatellat, *De la Prostitution*, etc., c. 3, § 5; 9 C. & P. 752; 2 Pick. 380; 12 S. & R. 69; 7 Conn. 64. See, generally, 2 Bish. N. Cr. L. ch. xxxvi; McClain, Cr. L. 2 Witth. & Beck. 415-477; 32 Cent. Law J. 102; 80 Am. Dec. 361.

In English Law. A division of a county similar to a hundred, but oftentimes containing in it more hundreds than one.

RAPE OF THE FOREST. Trespass committed in a forest by violence. Cowell.

RAPINE. In Criminal Law. The felonious taking of another man's personal property, openly and by violence, against his will. The civilians define rapine to be the taking with violence the movable property of another, with the fraudulent intent to appropriate it to one's own use. *Leg. El. Dr. Rom.* § 1071.

RAPPORT A SUCCESSION (Fr.; similar to *hotchpot*). In Louisiana. The reunion to the mass of the succession of the things given by the deceased ancestor to his heir; in order that the whole may be divided among the co-heirs.

The obligation to make the rapport has a triple foundation. *First*, it is to be presumed that the deceased intended, in making an advancement, to give only a portion of the inheritance. *Second*, it establishes the equality of a division, at least, with regard to the children of the same parent, who all have an equal right to the succession. *Third*, it preserves in families that harmony which is always disturbed by unjust favors to one who has only an equal right. Dalloz, *Dict.* See **ADVANCEMENT**; **COLLATION**; **HOTCHPOT**.

RASCAL. An opprobrious term, applied to persons of bad character. The law does not presume that a damage has arisen because the defendant has been called a rascal, and therefore no general damages can be recovered for it; if the party has received special damages in consequence of being so called, he can recover a recompense to indemnify him for his loss.

RASURE. The scratching or scraping a writing, so as to prevent some part of it from being read. The word writing here is intended to include printing.

RATABLE ESTATE. Within the meaning of a tax law, taxable estate. 55 Vt. 545.

RATABLE PROPERTY. Property in its quality and nature capable of being rated, i. e. appraised, assessed. 10 B. & S. 323; 16 R. 1. 240.

RATAM REM HABERE (Lat.). In the civil law. To hold a thing ratified; to ratify or confirm it.

RATE. A public valuation or assessment of every man's estate; or the ascertaining how much tax every one shall pay. See *Pow. Mortg.*; 1 *Hopk. Ch.* 37. See **THROUGH ROUTE**.

RATE-BREAKING POINTS. See **THROUGH ROUTE**.

RATE OF EXCHANGE. In Commercial Law. The price at which a bill drawn in one country upon another may be sold in the former.

RATES. The power of the legislature to regulate rates or charges of corporation is treated under **IMPAIRING THE OBLIGATION OF CONTRACTS**. The case of *Smyth v. Ames*, 169 U. S. 466, has since decided: While rates for the transportation of persons and property within a state are primarily for the determination of the state, the question whether they are made so unreasonably low as to deprive the carrier of its property without just compensation cannot be so determined by the legislature of the state that the matter cannot become the subject of judicial inquiry. The reasonableness of rates prescribed by a state must be determined without reference to the interstate business done by the company. A railroad is a public highway and is therefore subject to governmental control. It may not fix its rates with a view solely to its own interests, but the rights of the public will be ignored if rates are imposed without reference to the fair value of the property, and, in order simply that the company may meet operating expenses, pay its interest and declare a dividend: but where a company has bonded its property in excess of its fair value or if its capitalization is largely fictitious, it may not impose on the public the burden of such increased rates as may be required to realize profits thereon, and the apparent value of the property as represented by its securities is not alone to be considered on the question of reasonable rates. It must be held to have accepted its rights and franchises subject to the condition that the government may protect the people against unreasonable charges.

The basis of all calculations as to the reasonableness of rates must be the fair value of the property used by it, and this includes the original cost of construction, probable earning capacity of the property under particular rights prescribed by the statute, and the sum required to meet operating expenses. All these items are to be given such weight as may be just and right in each case. The company is entitled to ask a fair return upon the value of its property and the public is entitled to demand that no more be exacted than the services rendered are reasonably worth. Neither market nor par value of stock is a criterion of value, but the owner is entitled to any appreciation above the original cost; 82 Fed. Rep. 850.

Stockholders are not the only persons to be considered: if the establishment of new lines of transportation should cause a diminution in the tolls collected, that, in itself, is not a sufficient reason why the corporation maintaining the road should be allowed to maintain rates that would be unjust to those who use its property. It is not necessary that all corporations exacting tolls should be placed upon the same footing as regards rates; 164 U. S. 578.

The doctrine of state control over rates has been applied as follows:—To *Bridges*; 8 Fed. Rep. 190. See 154 U. S. 204. *Ferries*; 24 N. J. L. 718, where the charter subjected the ferry company to such regulations as might be fixed by law. *Boom Companies*; 150 Pa. 475; 50 Fed. Rep. 902. See 44 Mich. 403. *Gas Companies*; 5 Ohio C. C. 559 (natural gas); 34 Ohio St. 572. See 27 Am. L. Reg. 286. *Mills for Grinding*; 86 Me. 102; 40 W. Va. 480. *Railroads*; 94 U. S. 155, 180; 143 U. S. 339; 82 Ia. 312;

22 Neb. 313; 15 Colo. 601; 64 Fed. Rep. 165 (where the company was incorporated by an act of congress). *Railways, Street*; 36 Neb. 307 (by ordinance); 111 N. Y. 182. *Stock Yards*. See 82 Fed. Rep. 850. *Telegraphs*; 116 N. C. 211. *Telephones*; 105 Ind. 250; 118 Ind. 194, 593. See 96 Mo. 623. *Water*; 110 U. S. 347 (a California case under the constitution). *Warehouses*; for grain, etc., requiring them to keep insured for the benefit of its owner of grain stores; 153 U. S. 391. This power cannot be delegated to private persons or corporations; 160 Mass. 62; 100 Mich. 350. An act fixing minimum rates for railroad freight and passenger fares does not apply to the transportation of messengers and freight of express companies; 6 Fed. Rep. 426. An act requiring a railroad company to sell one thousand mile books for twenty dollars and to accept for fare such books issued by other companies, was held unconstitutional, because it attempted to compel one company to carry passengers on the credit of another company; 160 Mass. 62.

An act of Illinois making it a penal offence for a railroad company within that state to charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, is unconstitutional. A state statute intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property or telegraph messages from one state to another is not within that class of legislation which the states may enact in the absence of legislation by congress, and such statutes are void even as to that part of such transmission as may be within the state; 118 U. S. 557.

The authority of a city under a street railway charter to fix the rates of fare thereon is exhausted by fixing such rates in an ordinance granting it the use of the streets; 83 Fed. Rep. 39. See **RAILROAD**.

A statute fixing the rate of compensation to be paid for labor or service performed on public works is not unconstitutional; 142 N. Y. 101; nor is an act of congress making it a misdemeanor for a pension agent to charge more than ten dollars on a pension claim; 157 U. S. 160.

The interstate commerce commission (*q. v.*) cannot fix rates; 168 U. S. 144.

As to discrimination in rates, see **DISCRIMINATION**; **INTERSTATE COMMERCE COMMISSION**; **FACILITIES**; **INTERSTATE COMMERCE ACT**.

See 33 L. R. A. 177, a full note on rates; 79 Fed. Rep. 665; *Butterworth, Max. Rates*, as to the English practices; **RAILROADS**.

RATIFICATION. An agreement to adopt an act performed by another for us.

Express ratifications are those made in express and direct terms of assent. *Implied* ratifications are such as the law presumes from the acts of the principal; as, if Peter buy goods for James, and the latter, knowing the fact, receive them and apply them to his own use.

Ratification of a contract implies an existing person on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. 48 Minn. 319.

By ratifying a contract a man adopts the agency altogether, as well what is detrimental as what is for his benefit; 2 *Stra.* 859; 6 *East* 164; 16 *Mart. La.* 105; 1 *Ves.* 509; *Story*, Ag. § 250; 9 *B. & C.* 59; 24 *Neb.* 653; 34 *Id.* 110; 31 *U. S.* App. 340. See 150 U. S. 128.

A ratification, to be efficacious, must be made by a party who had power to do the act in the first place, and it must be made with knowledge of the material facts; 152 U. S. 346.

Where there has been actual and positive fraud, or the adverse party has acted *malà fide*, there can be no such thing as a confirmation; 8 *W. & S.* 36. The ratification of the signing of a bond by an obligor

whose signature has been forged, does not render him liable thereon, there being no new consideration; 67 Pa. 391; s. c. 5 Am. Rep. 445, n.; 33 Ohio St. 405; s. c. 31 Am. Rep. 546, n. But if a contract be merely against conscience, then if a party, being fully informed of all the circumstances of it and objections to it, voluntarily confirms it, his ratification will stand; 67 Pa. 217; 62 Ill. 483; s. c. 14 Am. Rep. 106. When a claim is founded upon an act done without the claimant's knowledge and authority, by a person claiming to act as his agent, the bringing of an action by him based upon that act is a ratification of it; 155 U. S. 13. A forged note cannot be ratified; L. R. 6 Ex. 49; 92 Pa. 447; but see 4 Allen 447.

A party from whom a contract has been wrong by duress must disclaim it on the recovery of freedom, subsequent recognition is the equivalent of ratification; 23 Misc. Rep. 173.

Ratification will, in general, relieve the agent from all responsibility on the contract, when he would otherwise have been liable; 2 Br. & B. 452. See 16 Mass. 461; 8 Wend. 494. See *ASSENT*; Ayliffe, Pand. *386; 18 Viner, Abr. 156; Story, Ag. 239. See, generally, 25 Am. Law Rev. 14; *AGENCY*.

A principal having the right to disaffirm acts of an agent must do it promptly, and if not done within a reasonable time ratification will be presumed; 120 U. S. 256. The principle of ratification by laches or delay is applicable to a municipal corporation, such as a county; 139 U. S. 684.

An infant is not, in general, liable on his contracts; but if, after coming of age, he ratify the contract by an actual or express declaration, he will be bound to perform it, as if it had been made after he attained full age. The ratification must be voluntary, deliberate, and intelligent, and the party must know that without it he would not be bound; 3 Pa. 428; see 12 Conn. 551; 10 Mass. 137; 4 Wend. 403; and now in England must be in writing. But a confirmation or ratification of a contract may be implied from acts of the infant after he becomes of age, as, by enjoying or claiming a benefit under a contract he might have wholly rescinded; 1 Pick. 221; and an infant partner will be liable for the contracts of the firm, or at least such as were known to him, if he, after becoming of age, confirm the contract of partnership by transacting business of the firm, receiving profits, and the like; 2 Hill S. C. 479; 1 J. B. Moore 289; 33 S. C. 285.

Where an infant, during his minority, has made a deed or mortgage, his mere failure to disaffirm the conveyance on coming of age, without some positive and clear act of affirmation, will not amount to a ratification; 86 Ala. 442; 86 Ky. 572. See *INFANT*.

A board of directors may ratify and authorize the execution of a promissory note by the secretary of the corporation for money borrowed; 12 U. S. App. 699.

When a contract is not *ultra vires* a corporation may ratify it though made without proper authority by its agents; 6 U. S. App. 26.

RATIFICATION OF TREATIES. See TREATY.

RATHABITION. Confirmation; approbation of a contract; ratification.

RATIO (Lat.). A reason; a cause; a reckoning of an account.

RATIO LEGIS (Lat.). The reason or occasion of a law; the occasion of making a law.

RATIONABILI PARTE BONORUM. See *DE RATIONABILI PARTE BONORUM*.

RATIONABILIBUS DIVISIS, WRIT DE. See *DE RATIONABILIBUS DIVISIS*.

RATIONAL DOUBT. The "rational doubt" which should result in acquittal, is a doubt as to all or any one of the

constituent elements essential to legal responsibility or punishable guilt; and, unless they all concur, acquittal is the legal consequence. 1 Duval (Ky.) 223.

RATIONE TENURÆ. By reason of tenure.

BATTENING. The offence on the part of members of a trades union, of causing the tools, clothes, or other property of a workman to be taken away or hidden, in order to compel him to join the union or cease working. 38 & 39 Vict. c. 83.

RAVINE. A long, deep, and narrow hollow, worn by a stream or torrent of water; a long, deep, and narrow hollow or pass through the mountains. 36 Ia. 60.

RAVISHED. In Pleading. A technical word necessary in an indictment for rape.

No other word or circumlocution will answer. The defendant should be charged with having "feloniously ravished" the prosecutrix, or woman, mentioned in the indictment; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 6); Hawk. Pl. Cr. 2, c. 25, s. 26; Cro. Car. 37; Co. Litt. 184, n. p; Co. 2d Inst. 180; 1 East, Pl. Cr. 447. The words "feloniously did ravish and carnally know" imply that the act was done forcibly and against the will of the woman; 12 S. & R. 70. See 3 Chitty, Cr. L. 812.

RAVISHMENT. In Criminal Law. An unlawful taking of a woman, or of an heir in ward. Rape, which see.

RAVISHMENT OF WARD. In English Law. The marriage of an infant ward without the consent of the guardian. It is punishable by statute Westminster 2, c. 35.

READING. The act of pronouncing aloud, or of acquiring by actual inspection, a knowledge of the contents of a writing or of a printed document.

In order to enable a party to a contract, or a devisor, to know what a paper contains, it must be read, either by the party himself or by some other persons to him. When a person signs or executes a paper, it will be presumed that it has been read to him; 14 Pa. 496; 32 id. 203; see 83 Ala. 496; 117 U. S. 532; but this presumption may be rebutted.

In the case of a blind testator, if it can be proved that the will was not read to him, it cannot be sustained; 3 Wash. C. C. 580. But when the testator was blind and there are any circumstances giving reasonable ground for suspicion of fraud or imposition, the burden is on those who support the will to show that it was read to him; 1 Houst. 44.

Where one who cannot read or write is disqualified for jury service, the words mean that he must be able to do so in the English language, and that he is able to read and write in German will not remove the objection; 12 Tex. App. 167.

READY. Prepared. The words, "I will be ready to," are held to imply a covenant. 1 Rolle, Abr. 519, pl. 8.

READY MONEY. A bequest of ready money includes cash at the banker's, whether balance on current account, or a deposit, or withdrawable after notice; 12 L. J. Ch. 385; 27 id. 797; but not unrecieved dividends on stock; 18 L. J. Ch. 401; nor money in the hands of a sales-master; 9 Ir. Eq. Rep. 398; but it has been held that a debt would pass under a bequest of ready money. 23 L. J. Ch. 496.

READY AND WILLING. Implies capacity to act as well as disposition. 11 L. J. Ex. 322. See 5 Bing. N. C. 399.

REAL. At Common Law. A term which is applied to land in its most enlarged signification. *Real security*, therefore, means the security of mortgages or other incumbrances affecting lands. 2 Atk. 806; s. c. 2 Ves. Sen. 547.

In Civil Law. That which relates to a

thing, whether it be movable or immovable, lands or goods; thus, a real injury is one which is done to a thing, as a trespass to property, whether it be real or personal in the common-law sense. A real statute is one which relates to a thing, in contradistinction to such as relate to a person.

REAL ACTION. In Practice. In THE CIVIL LAW. One by which a person seeks to recover his property which is in the possession of another. Dig. 50. 16. 16. It is to be brought against the person who has possession.

AT THE COMMON LAW. One brought for the specific recovery of lands, tenements, or hereditaments. Stephen, Pl. 3.

They are *droitural* when they are based upon the right of property, and *possessory* when based upon the right of possession. They are either writs of right; writs of entry upon disseisin (which lie in the per, the per et cui, or the post), intrusion, or alienation; writs ancestral possessory, as mort d'ancestor, aiel, besaiei, cossinage, or nuper obiti. Comyns, Dig. *Actions* (D 2).

These actions were always local, and were to be brought in the country where the land lay; Bracton 189, 414. They are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process,—a much more expeditious method of trying titles being since introduced by other actions, personal and mixed. See Stearns; Booth, Real Act.; Bac. Abr. *Actions*; Com. Dig. *Actions*; 3 Bla. Com. 118; *ACTION*.

REAL ASSETS. See *ASSETS*.

REAL BURDEN. In Scotch Law. Where a right to land is expressly granted under the burden of a specific sum, which is declared a burden on the lands themselves, or where the right is declared null if the sum be not paid, and where the amount of the sum and the name of the creditor in it can be discovered from the records, the burden is said to be real. Bell, Dict.

REAL CHATELS. See *CHATTEL*.

REAL CONTRACT. At Common Law. A contract respecting real property. 3 Rep. 22 a.

In Civil Law. Those contracts which require the interposition of a thing (*res*) as the subject of them. See *CONTRACT*.

REAL COVENANT. A covenant whereby a man binds himself to pass a real thing, as lands or tenements; as, a covenant to levy a fine, etc. Shepp. Touchst. 161; Fitzh. N. B. 145; Co. Litt. 384 b.

A covenant, the obligation of which is so connected with the realty that he who has the latter is either entitled to the benefit of or liable to perform the other. 2 Bla. Com. 304, Coleridge's note; Stearns, Real Act. 134; 4 Kent 472.

A covenant by which the covenantor binds his heirs. 2 Bla. Com. 304.

Those by which a single covenantor undertakes the performance of the covenant. It frequently happens that each one of several covenantors binds himself to perform singly the whole undertaking. The words commonly used for this purpose are "severally," "each of us." Still more commonly the undertaking is both joint and several.

It is the nature of the interest, and not the form of the covenant, which determines its character in this respect; 16 How. 580; 1 Gray 376.

Very considerable confusion exists among the authorities in the use of the term real covenants. The definition of Blackstone which determines the character of covenants from the insertion or non-insertion of the word "heir" by the covenantor, is pretty generally rejected. Of the other definitions, that which makes a real covenant an obligation to pass realty is the most ancient. The second definition is that now ordinarily understood when the term "real covenant" is employed.

The benefit of such covenants will always run with the land and can be enforced by any vendee, no matter how remote. The burden, however, will not run with the land so as to be capable of enforcement unless there be privity either of contract or estate between the plaintiff and the defendant; *Spencer's Case*, 1 Sm. L. C. 115. These covenants are of various kinds. Some are used in lieu of the ancient warranty. Of these the most common are covenants of warranty, both general and special, covenants of seisin, that the vendor has a good right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance. *Wms. R. P.* 447. In regard to all these, it may be said that in England the right of action passes to and vests in the party in whose time the substantial breach occurs, and who ultimately sustains injury; *Rawle*, *Cov.* 324. In the United States, however, the covenants for seisin, for right to convey, and against incumbrances are usually construed to be broken as soon as made and cannot enure to the advantage of subsequent grantees. Covenants of warranty and for quiet enjoyment are, however, prospective, and no breach occurs until eviction, actual or constructive; *id.* 313. See COVENANT, and the various titles thereunder.

Other real covenants now in use are as follows: either to preserve the inheritance, as to keep in repair; 9 B. & C. 505; 17 Wend. 148; 1 Dall. 210; 6 Yerg. 512; 6 Vt. 276; 88 E. L. & E. 462; to keep buildings insured, and reinstate them if burned; 5 B. & Ald. 1; 6 Gill & J. 372; to continue the relation of landlord and tenant, as to pay rent; 1 Dougl. 183; 2 Rawle 159; 1 Wash. C. C. 375; to do suit to the lessor's mill; 5 Co. 18; 1 B. & C. 410; to grind the tenant's corn; 2 Yeates 74; for the renewal of leases; *Moore* 159; or to protect the tenant in his enjoyment of the premises, as to warrant and defend, never to claim or assert title; 7 Me. 97; 3 Metc. 121; to release suit and service; *Co. Litt.* 384 b; to produce title-deeds in defence of the grantee's title; *Dig. tit. xxxii. c. 27*; § 99; 1 S. & S. 449; to supply water to the premises; 4 B. & Ald. 286; to draw water off from a mill-pond; 19 Pick. 449; not to establish another mill on the same stream; 17 Wend. 136; not to erect buildings on adjacent land; 4 Paige, Ch. 510; to use the land in a specified manner; 13 Sim. 228; generally to create or preserve easements for the benefit of the land granted; 4 E. D. Sm. 122; 1 Bradf. 40. See 2 Greenl. Ev. § 240; 2 Washb. R. P. 648; *Spencer's Case*, 1 Sm. L. C. 115.

REAL EFFECTS. Real property. 1 *Cowp.* 307. See EFFECTS; REAL PROPERTY.

REAL ESTATE. Landed property. See LAND; REAL PROPERTY.

Under a statute requiring the court ordering a sale of trust lands, and retaining control of the fund realized by the sale, until the same is invested in "real estate" includes "real estate" outside the State. 134 Ky. 148, 119 S. W. 756.

"Real estate" means interest in land other than a chattel interest. 116 S. W. 244.

The words "real estate and land" in a statute mean lands, tenements, and hereditaments, and all right thereto and interests therein other than a chattel interest. 14 Bush (Ky.), 1, 79 Ky. 252.

The words "real estate" or "land" shall be construed to mean lands, tenements and hereditaments and all rights thereto and interests therein, other than a chattel interest; and the words "personal estate" shall include chattels, real and other estate, such as, upon the death of the owner intestate, would devolve upon his personal representative. Section 458, Kentucky Statutes.

REAL ESTATE BROKER. One who engages in the purchase and sale of real estate as a business, and holds himself out to the public in that character and capacity. 26 Pa. 138.

REAL EVIDENCE. Evidence of

which any object belonging to the class of things is the source, persons also being included in respect of such properties as belong to them in common with things. This sort of evidence may be either immediate, where the thing comes under the cognizance of our senses; or reported, where its existence is related to us by others. *Chamb. Best*, Ey. 16.

It is sometimes direct, e.g. when the offense is committed in *fori conspectu*; but it is most usually circumstantial or indirect. A corner's inquest must be held *super visum corpora*; and in all charges of murder, the *corpus delicti* is proved by production of the dead body—two illustrations of direct real evidence of the fact of a crime having been committed. But who the criminal was, is dependent upon (in general) circumstantial evidence, the inferences from which are usually not necessary, but probable only, and the degree of probability may vary in ever so many degrees, one physical coincidence being sometimes sufficient in itself. But more often circumstantial real evidence is open to innumerable informative hypotheses, that may either weaken it or explain it altogether away. *R. & L. Dict.*; *Best Ev.*, 5th ed., 277-295.

REAL INJURY. An injury arising from an unlawful act, as distinguished from a verbal injury which was done by words.

REAL LAW. At Common Law. A popular term used to denote such parts of the system of common law as concern or relate to real property.

In Civil Law. A law which relates to specific property, whether movable or immovable.

If real law in any given case relate to immovable property, it is limited in its operation to the territory within which that property is situate, real estate being, both by the common and continental laws, subject exclusively to the laws of the government within whose territory it is situate; *Story*, *Conf. L.* 426. See LEX REI SITE.

REAL PARTY IN INTEREST. A shipper, having assigned his rights to another, is not the "real party in interest," and cannot prosecute an appeal in his name alone from a judgment dismissing the petition, where he sued for the benefit of the assignee, alleging that the assignee was entitled to any judgment that was rendered in the action, and the assignee did not appeal. *Civil Code of Kentucky* § 18, 19, 21; 146 Ky. 514, 142 S. W. 1037.

REAL PROPERTY. Land, and generally whatever is erected or growing upon or affixed to land. 9 Day 874; 87 Minn. 4; also rights issuing out of, annexed to, and exercisable within or about the same. Annexations made by a stranger to the soil of another without his consent become the property of the owner of the soil; *Britton*, bk. 2, ch. 2, sec. 6, p. 856; 2 Kent 334; 15 Ill. 397; 16 Mass. 449; 105 *id.* 414; 82 Fed. Rep. 857. When annexations are made by the owner of the soil with the materials of another, so long as the identity of the original materials can be proved, the right of the original owner is not lost; 25 Vt. 620; 57 N. H. 514. Such property has the quality of passing on the death of the owner to the heir and not the executor. It may either be corporeal or incorporeal. See WILL. Real P. 12.

In respect to property, real and personal correspond very nearly with immovables and movables of the civil law. By the latter "*biens*" is a general term for property; and these are classified into movable and immovable, and the latter are subdivided into corporeal and incorporeal. *Guyot*, *Répert. Biens*.

By immovables the civil law intended property which could not be removed at all, or not without destroying the same, together with such movables as are fixed to the freehold, or have been so fixed and are intended to be again united with it, although at the time severed therefrom. *Taylor*, *Civ. L.* 475.

Real property includes also some things not strictly land or rights exercised or engaged in reference thereto—such as offices and dignities, which are so classed because in ancient times such titles were annexed to the ownership of various lands; *Wms. R. P.* 8. Corodies and annuities are also sometimes classed as real property. Shares of stock in railway and canal companies are in England real property unless made personal by act of parliament. In the United States the better opinion is that they are personal independent of statutory enactment; *Ang. & A. Corp.* § 557; 2 Kent 840, n. Some interests in lands are regarded as personal property, and are governed by the rules relating thereto—such as terms of years of lands. Such interests are known as chattels real; 2 Bla. Com. 386.

Though the term real, as applied to property, in distinction from personal, is now so familiar, it is one of a somewhat recent introduction. While the feudal law prevailed, the terms in use in its stead were lands, tenements, or hereditaments. These acquired the epithet of real from the nature of the remedy applied by law for the recovery of them, as distinguished from that provided in case of injuries, contracts broken, and the like. In the one case the claimant or demandant recovered the real thing sued for,—the land itself,—while, ordinarily, in the other he could only recover recompense in the form of pecuniary damages.

The term, it is said, as a means of designation, did not come into general use until after the feudal system had lost its hold, nor till even as late as the commencement of the seventeenth century. One of the earliest cases in which the courts applied the distinctive terms of real and personal to estates, without any words of explanation, is said to have been that of *Wind v. Jekyl*, 1 P. Wms. 575; *Wms. R. P.* 66.

Corporeal hereditaments comprise land and whatever is erected or growing upon or affixed thereto, including whatever is beneath or above the surface, "*usque ad orcum*" as well as "*usque ad celum*;" 2 Bla. Com. 17-19; *Co. Litt.* 4 a. Houses, trees, growing crops, and other articles fixed to the soil, though usually classed as realty, may under certain circumstances and for certain purposes acquire the character of personality. Thus if one erect a building on the land of another with the latter's consent, it is the personal estate of the builder and may be levied on by his creditors as such; 6 N. H. 555; 6 Me. 452; 8 Pick. 402; 55 Minn. 211; 39 *id.* 479; see 159 U. S. 483; but if he fail to remove it within a reasonable time after being ejected from the land, it becomes a part of the realty; 57 Minn. 104. If it is sold to the owner of the soil, it becomes real property; 80 Me. 542. So if a nurseryman plant trees upon land leased for the purpose of growing them for the market, the trees are deemed personality; 1 Met. 27; 4 Taunt. 316. So where the owner of land sells growing trees (not in a nursery to be cut by the vendee), they will be deemed to pass as personality where the contract gives no right to the vendee to allow them to remain upon the land; 4 Metc. Mass. 580; 9 B. & C. 561. But where there is an understanding, express or implied, that the trees may remain upon the land and be cut at the pleasure of the vendee, then the property in the trees is deemed real; 4 Mass. 266; 7 N. H. 523. So crops, while growing, planted by the owner of the land, are a part of the real estate; but if sold by him when fit for harvesting, they become personality; 5 B. & C. 829; and a sale of such crops, though not fit for harvest, has been held good as personality; 4 M. & W. 343; 2 Dana 203; 2 Rawle 161. See 39 Ill. App. 404. A rose-bush in a yard will pass by a deed of the realty; 19 N. Y. S. 381. See EMBLEMENTS; MINES AND MINING.

There are a large number of articles known as fixtures, which, though originally wholly movable and personal in their nature, have acquired, by having been affixed to real estate or applied to use in

connection with it, the character of realty. Such articles pass from the vendor to the vendee of the land as realty; 2 Kent 345; 2 Sm. L. C. 228; 20 Wend. 636; even though they may be at the time temporarily disconnected. See **FIXTURES**.

The intention of the parties immediately concerned, who have agreed that property annexed to the soil shall retain its character as personality, will prevail except as against innocent purchasers without notice, unless the property be of such a nature that it necessarily becomes incorporated into and a part of the realty by the act and manner of annexation; 117 Ind. 176.

Manure made upon a farm in the usual manner for consumption of its products would be a part of the real estate; while if made from products purchased and brought on to the land by the tenant, as in case of a livery-stable, it would be personal; 21 Pick. 387; 3 N. H. 503; 6 Me. 222; 2 N. Chipm. 115; 11 Conn. 525; 15 Wend. 169; 30 N. H. 558. See **MANURE**; **FIXTURES**.

Equity will, in many instances, for the sake of enforcing and preserving the rights of parties interested, regard realty as converted into personality and personality as converted into realty, although no such change may actually have taken place. So where realty is devised by a testator to his executors with imperative directions to sell, the devolution of the property, even before actual conversion, will be controlled by the rules relating to personality; 1 Bro. C. C. 497; 3 Wheat. 563; 72 Pa. 417. So where money is directed to be laid out in lands, it will be deemed realty for purposes of descent even before the purchase; 1 Bro. C. C. 503. But such direction must be imperative, otherwise no such result ensues; 3 Atk. 255; L. R. 7 Eq. 226; 10 Pa. 131. So realty owned by a partnership will be deemed personality for the purposes of the partnership; 3 Kent 39; 81 Pa. 377; 1 Black 346; 7 Conn. 11. And the moment a corporation has exercised its right to condemn land, conversion takes place, in Pennsylvania. See **PARTNERSHIP**; **CONVERSION**; **INCORPORAL HEREDITAMENTS**; **LAND TRANSFER**; **REGISTRATION**.

REAL REPRESENTATIVE. The words "real representative" mean the heir or devisee of real property of a deceased person. Section 732, Subsection 18, Civil Code of Kentucky.

REAL RIGHT. In Scotch Law. That which entitles him who is vested with it to possess the subject as his own, and, if in the possession of another, to demand from him its actual possession.

It is distinguished from a personal right, which is that of action against a debtor, but without any right in the subject which the debtor is obliged to transfer to him. Real rights affect the subject itself; personal are founded in obligation. Erskine, Prin. 479.

By analogy, the right which a claimant in an action of replevin seeks to enforce at common law would be a real one, while the compensation which the plaintiff seeks in an action of assumpsit or trover, being a pecuniary one, would be personal.

REAL SERVITUDE. In Scotch Law. A burden imposed upon one tenement in favor of another tenement. Ersk. Prin. 206.

REAL STATUTES. Statutes which have property for their principal object, and do not speak of persons, except in relation to property. Sto. Conf. L. § 13.

REAL THINGS. Things substantial and immovable, and the rights and profits annexed to or issuing out of them. 1 Steph. Com. 167.

REALM. A kingdom; a country. 1 Taunt. 270; 4 Camp. 289; Rose 387.

REALTY. A term sometimes used as a collective noun for real property or estate—more generally to imply that that of which it is spoken is of the nature or character of real property or estate. See **REAL PROPERTY THINGS REAL**.

REAR. The word has been held not necessarily to mean directly behind. 109 Mass. 82.

REASON. That power by which we distinguish truth from falsehood and right from wrong, and by which we are enabled to combine means for the attainment of particular ends. Encyclopédie; Shelf. Lun. Introd. xxvi. *Ratio in jure æquitas integra*.

A man deprived of reason is not, in many cases, criminally responsible for his acts, nor can he enter into any contract.

Reason is called the *soul of the law*; for when the reason ceases the law itself ceases. Co. Litt. 97, 188; 1 Bla. Com. 70; 7 Toul-lier, n. 566; MAXIMS, *Cessante ratione, etc.*

REASONABLE. Conformable or agreeable to reason; just; rational.

An award must be reasonable; for if it be of things nugatory in themselves, and offering no advantage to either of the parties, it cannot be enforced; 3 Bouvier, Inst. n. 2096. See **AWARD**.

REASONABLE ACT. This term signifies such an act as the law requires. When an act is unnecessary, a party will not be required to perform it as a reasonable act; 9 Price 43; Yelv. 44; Platt, Cov. 342, 157.

REASONABLE CARE. That care and foresight which men of ordinary prudence are accustomed to employ. 6 Duer 646. It is synonymous with ordinary care; 3 S. Dak. 93; see 42 Mo. 95; or due care; 10 Allen 532. See **CARE**; **DUE CARE**; **NEG- LIGENCE**; **ORDINARY CARE**.

Care exercised in proportion to the danger of doing harm to others. Anderson; 54 Conn. 172. A relative term, with no fixed meaning. The caution which persons of ordinary prudence would exercise in any given case is "reasonable care" in law. That care which under some circumstances would be reasonable care might under other circumstances be gross negligence. *Id.*; 34 Wis. 318.

REASONABLE DOUBT. See **DOUBT**.

A doubt based on reason, and which is reasonable in view of all the evidence. If, after an impartial comparison and consideration of all the evidence a juror can candidly say that he is not satisfied of the defendant's guilt, he has a reasonable doubt. But if, after impartial comparison and consideration of all the evidence the juror can truthfully say he has an "abiding conviction" (*q. v.*) of the defendant's guilt, such as he would be willing to act upon in the more weighty and important matters relating to his own affairs, he has no reasonable doubt. 120 U. S. 439.

REASONABLE EXPECTATION. Within the meaning of the English bankruptcy act of 1863, one who begins business without capital and with a mortgage on all his assets, is held to have contracted his debts without reasonable or probable ground of expectation of being able to pay. 14 Q. B. D. 600.

REASONABLE FACILITIES. See **FACILITIES**.

REASONABLE FEE. A "reasonable attorney's fee" is such attorney's fee as the law allows to be charged. 93 Ky. 626, 20 S. W. 1041.

REASONABLE GROUNDS. The words "reasonable grounds," when used with reference to belief of a thing, are such grounds as would induce a person of ordinary prudence under the circumstances to believe it. 107 S. W. 214.

REASONABLE PART. The shares to which the wife and children of a deceased person were entitled, were called their "reasonable parts"; and the writ *de rationabili parte bonorum* was given to recover them. R. & L. Dict.; Brown.

REASONABLE PORTION. A power to charge an estate with reasonable portions or fortunes for younger children and for their maintenance and education is

sufficiently certain to be capable of execution, and the word reasonable there is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. Beatty 818.

REASONABLE AND PROBABLE CAUSE. In Malicious Prosecution. A reasonable amount of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused is guilty; but mere suspicion alone is not sufficient. 32 Neb. 444. See **MALICIOUS PROSECUTION**.

REASONABLE QUESTION. See **QUESTION**.

REASONABLE RATES. See **INTER- STATE COMMERCE COMMISSION**; **RATES**; **IN- TERSTATE COMMERCE ACT**.

REASONABLE REWARD. Under a contract to pass boats through a canal for a "reasonable reward," a "reasonable reward" is *prima facie*, the legal tolls. It could not be a greater or less sum than the tolls which they had a right to charge. 8 Dana (Ky.) 161-162.

REASONABLE SKILL. Such skill as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment. 6 Metc. 26.

REASONABLE TIME. The English law, which in this respect has been adopted by us, frequently requires things to be done within a reasonable time; but what a reasonable time is, it does not define: *quam longum debet esse rationabile tempus non definitur in lege, sed pendet ex discretione judiciorum*; Co. Litt. 50.

The question of reasonable time is left to be fixed by circumstances and the usages of business. A bill of exchange must be presented within a reasonable time; Chitty, Bills 197-202. An abandonment must be made within a reasonable time after advice received of the loss; Marsh. Ins. 589.

The commercial code of France fixes a time in both these cases, which varies in proportion to the distance. See *Code de Com.* l. 1, t. 8, s. 1, § 10, art. 160; *id.* l. 5, t. 10, s. 3, art. 373. See **NOTICE OF DIS- HONOR**; **PROTEST**.

Where the facts are admitted or clearly proved, what is a reasonable time is a question of law for the court depending upon all the circumstances of the case; 6 Sup. Ct. Rep. 1023.

It has been held that where the question of reasonable time is one affected by many different circumstances with respect to which no definite rule of law has been laid down, it is a question for the jury. It is a question for the court when by a series of decisions on the same data it has been rendered certain; 22 U. S. App. 164. See **ARGUMENT**.

REASONABLY. The adverb "reasonably" is a qualifying word. It is defined as meaning moderately or tolerably, and that is its commonly understood meaning. 117 Ky. 144, 77 S. W. 712.

REASONABLY REGARDED. The words "reasonably regarded" held equivalent to "considered." 154 Ky. 408, 157 S. W. 1133.

REASONABLY SAFE. A car stall in which a horse is transported by a carrier is "reasonably safe" when it is such as a person of ordinary care would provide. 131 Ky. 257, 117 S. W. 270.

REASSURANCE. When an insurer is desirous of lessening his liability, he may procure some other insurer to insure him from loss for the insurance he has made: this is called reinsurance.

RE-ATTACHMENT. A second attachment of him who has formerly attached and dismissed the court without day, by the not coming of the justices, or some such casualty. Reg. Orig. 35.

REBATE. In Mercantile Law. Dis- count; the abatement of interest in conse-

quence of prompt payment. An allowance by way of discount or drawback.

The allowance of rebates is a common method by which common carriers discriminate between shippers; the practice is unlawful; and a contract to procure rebates from railroad companies for a shipper is void as being in violation of the provisions of the interstate commerce law; 6 Misc. Rep. 570.

There is nothing in the interstate commerce law which, by reason of the allowance of rebates, if actually made, would invalidate a contract of affreightment, or exempt a railroad company from liability on its bills of lading; 151 U. S. 368; in cases where the facts are controverted or doubtful, it is for the jury to determine the facts, and the court to apply the law in determining the question; Wells, Law & Fact 185.

REBEL. A citizen or subject who unjustly and unlawfully takes up arms against the constituted authorities of the nation, to deprive them of the supreme power, either by resisting their lawful and constitutional orders in some particular matter or to impose on them conditions. Vattel, *Droit des Gens*, liv. 3, § 328. In another sense, it signifies a refusal to obey a superior or the commands of a court.

REBELLION. In Criminal Law. The taking up arms traitorously against the government. The forcible opposition and resistance to the laws and process lawfully issued.

Insurrection, sedition, rebellion, revolt, and mutiny express action directed against government or authority, while riot has this implication only incidentally, if at all. They express actual and open resistance to authority. Except sedition, which may be secret or open, and often is only of a nature to lead to overt acts. An insurrection goes beyond sedition, in that it is an actual arising against the government. Rebellion goes beyond insurrection in aim, being an attempt actually to overthrow the government, while an insurrection seeks only some change of minor importance. A rebellion is generally on a larger scale than an insurrection. A revolt has generally the same aim as a rebellion, but it is on a smaller scale. A revolt may be against military government, but is generally like insurrection, sedition, and rebellion against civil government. A mutiny is organized resistance to law in an army or navy, and sometimes a similar act by an individual. The success of a rebellion often dignifies it with the name of a revolution. Cent. Dict.

If the rebellion amount to treason, it is punished by the laws of the United States with death. U. S. Rev. Stat. § 5382. If it be a mere resistance of process, it is generally punished by fines and imprisonment. *Id.* § 5336. See Dalloz, Dict.; Code Penal 20).

When a rebellion has broken out in any state, the rebel cruisers may be treated as pirates by the established government, if the rebel government has not been recognized as belligerent by the parent state or by foreign nations; but the right ceases to exist on the recognition of the rebels as belligerents; 2 Black 278; 11 Wall. 268; Boyd's Wheat. Int. Law 169.

REBELLION, COMMISSION OF. In Old English Practice. A writ issuing out of chancery to compel the defendant to appear.

REBOUTER. To repel or bar. The action of the heir by the warranty of his ancestor is called to rebut or repel.

REBUS SIC STANTIBUS. At this point of affairs. R. & L. Dict.

REBUT. To contradict; to do away.

REBUTTABLE PRESUMPTION. See PRESUMPTION.

REBUTTAL. See REBUTTING EVIDENCE.

REBUTTER. In Pleading. The

name of the defendant's answer to the plaintiff's surrejoinder. It is governed by the same rules as the rejoinder. Comyns, Dig. Pleadings (K). See PLEADINGS; And. Steph. 51.

REBUTTING EVIDENCE. That evidence which is given by a party in the cause to explain, repel, counteract, or disprove facts given in evidence on the other side. The term rebutting evidence is more particularly applied to that evidence given by the plaintiff to explain or repel the evidence given by the defendant.

It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side; 2 M'Cord 161; and the proof of circumstances may be offered to rebut the most positive testimony; 1 Pet. C. C. 235. It is within the discretion of the court to allow evidence in rebuttal which should have been offered in chief; 36 N. E. Rep. (Ill.) 1019.

But there are several rules which exclude all rebutting evidence. A party cannot impeach his own witness, though he may disprove, by other witnesses, matters to which he has testified; 3 Litt. 465; nor can he rebut or contradict what a witness has sworn to which is immaterial to the issue; 16 Pick. 158; 2 Bail. 118.

Parties and privies are estopped from contradicting a written instrument by parol proof; but this rule does not apply to strangers; 10 Johns. 229. But the parties may prove that before breach the agreement was abandoned, or annulled by a subsequent agreement not in writing; 4 N. H. 196. And when the writing was made by another, as where the log-book stated a desertion, the party affected by it may prove that the entry was false or made by mistake; 4 Mas. 541. It is within the discretion of a trial court to permit witnesses to be called in rebuttal whose testimony is in support of that given in chief; 4 U. S. App. 563.

RECALL. In International Law. To deprive a minister of his functions; to supersede him.

Where a mission to a foreign country is terminated by a formal letter of recall, the minister usually delivers a copy thereof to the minister or secretary of foreign affairs, obtains an audience of the sovereign or chief executive, and delivers or exhibits the original of his recall. If he is recalled at the request of the government to which he is accredited, he would neither ask nor receive an audience of leave. If recalled on account of a misunderstanding between the two governments, it must depend upon circumstances whether a formal letter of recall is to be sent to him or whether he may quit the residence without waiting for it; also as to whether he shall demand or the sovereign shall grant him an audience of leave; 1 Hall. Int. L. 365. See LETTER OF RECALL; MINISTER.

RECALL A JUDGMENT. To reverse a judgment on a matter of fact.

RECAPTURE. The act of a person who has been deprived of the custody of another, to which he is legally entitled, by which he regains the peaceable custody of such person; or of the owner of personal or real property who has been deprived of his possession, by which he retakes possession peaceably.

In each of these cases the law allows the recapture of the person or of the property, provided he can do so without occasioning a breach of the peace or an injury to a third person who has not been a party to the wrong. Co. 3d Inst. 184; 2 Rolle, Abr. 565; 3 Bla. Com. 5.

The right of recapture of a person is confined to a husband, in retaking his wife; a parent, his child, of whom he has the custody; a master, his apprentice; and, according to Blackstone, a master, his servant,—but this must be limited to a servant who assents to the recapture: in these cases, the party injured may peaceably enter the house of the wrong-doer,

without a demand being first made, the outer door being open, and take and carry away the person wrongfully detained. He may also enter peaceably into the house of a person harboring, who was not concerned in the original abduction; 8 Bingh. 186.

The same principles extend to the right of recapture of personal property. The true owner of goods wrongfully taken may retake them if he can, even from a third party, using (it is said) whatever force is reasonably necessary; Poll. Torts 361; and may enter, for that purpose, on the first taker's land, but not on a third person's land, unless, it is said, the original taking was felonious, or, perhaps, after the goods have been claimed and the occupier of the land has refused to deliver them up; Poll. Torts 361.

In the recapture of real estate, the owner may, in the absence of the occupier, break open the outer door of a house and take possession; but if in regaining his possession the party be guilty of a forcible entry and breach of the peace, he may be indicted; but the wrong-doer, or person who had no right to the possession, cannot sustain any action for such forcible regaining possession merely; 1 Chitty, Pr. 646. See Cooley; Pollock, Torts.

RECAPTURE. The recovery from the enemy, by a force friendly to the former owner, of a prize by him captured.

It seems incumbent on fellow-citizens, and it is of course equally the duty of allies, to rescue each other from the enemy when there is a reasonable prospect of success; 3 C. Rob. 224.

By the act of March 3, 1800, in case of recapture of vessels or goods belonging to persons resident within, or under the protection of, the United States, the same, not having been condemned as prize by competent authority before the recapture, shall be restored to the owner upon payment of salvage of one-eighth of the value, if recaptured by a public ship, and one-sixth if recaptured by a private ship; and if the recaptured vessel shall appear to have been set forth and armed as a vessel of war before its capture, or afterwards and before recapture, then the salvage shall be one moiety of the value. If the recaptured vessel belong to the government and be *unarmed*, the salvage is one-sixth, if recaptured by a private ship, and one-twelfth if recaptured by a public ship; if *armed*, the salvage is one moiety, if recaptured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel; as to private ships, the rate of salvage is the same on the cargo whether the vessel be armed or unarmed. See 9 Cra. 244. The valuation of the property is to be made at the place of restitution, not of recapture; Edw. Adm. 210.

Salvage is not generally allowed on the recapture of neutral property, unless there be danger of condemnation, or such unjustifiable conduct on the part of the government of the captors as to bring the property into jeopardy; 6 C. Rob. 410; 1 Cra. 102. To entitle a party to salvage there must have been actual or constructive capture; but it is sufficient if the property was completely under the dominion of the enemy; 3 C. Rob. 305; it is a recapture if the prize was actually rescued from the grasp of the hostile captor; *id.*; 3 Phill. Int. L. 638. Where the enemy has captured a ship and then abandoned her and she is recaptured, she is to be restored on payment of salvage, but the rate of salvage is discretionary; 6 C. Rob. 278; but if the abandonment be caused by terror of a hostile fleet, it is a recapture; *id.*

Where a prize is abandoned and brought into court by neutral salvors, a neutral court has jurisdiction to decree salvage, but cannot restore the property to the original owner; neutral nations ought not to inquire into the validity of a capture as between belligerents; 3 Dall. 188.

Recapture can be made by a non-commissioned vessel; 3 C. Rob. 229.

In Great Britain prize statutes were

formerly passed at the beginning of every war. The Naval Prize Act, 1864, provides that, as between subjects, the right to recover possession is preserved forever, except where the vessel, after capture, has been fitted out by the enemy for war. The right is subject, when the recapture is by a public ship, to the payment of one-eighth salvage or when the recapture is made under circumstances of special difficulty or danger, more than one-eighth, but not exceeding one-fourth. The French rule is to restore a vessel recaptured by a public vessel on the payment of one-thirtieth of the value, if recaptured within twenty-four hours; if after that the time, the salvage is one-tenth.

If a belligerent captures neutral property, and it is recaptured by the other belligerent, the latter usually restores it without the payment of salvage.

If the prize has been duly condemned and sold to a neutral purchaser by the captors, that title prevails against the original owners and the recaptors, both under the English and American rule. But such condemnation must be in a competent prize court of the belligerents and not one held in neutral territory; 1 C. Rob. 135.

A recaptured vessel may be permitted, under the English act of 1864, to continue her voyage, or be brought in at once for adjudication; in the former case the recaptor does not lose his right to salvage. If she does not return to a port of the kingdom within six months, the recaptor may proceed in the admiralty, for his salvage.

See INFRA PRÆSIDIA; NEUTRALITY; POST-LIMINIUM; PRIZE.

RECEIPT (Lat. *receptum*, received; through Fr. *receit*). A written acknowledgment of payment of money or delivery of chattels.

It is executed by the person to whom the delivery or payment is made, and may be used as evidence against him, on the general principle which allows the admission or declaration of a party to be given in evidence against himself. As an instrument of evidence, the receipt of one person is, in general, inoperative against another, although often useful as a voucher in the private settlement of accounts; and the statutes of some states make receipts for small payments made by executors, etc., evidence of the payment on a settlement of their accounts. And receipts of public officers are sometimes admissible *per se*; 1 Ill. 45. It is essential to a receipt that it acknowledge the payment or delivery referred to; Russ. & R. 227; 7 C. & P. 549. And under the stamp laws a *delivery* or *payment* must be stated; 1 Camp. 499. Also the receipt must, from the nature of the case, be in writing, and must be delivered to the debtor; for a memorandum of payment made by the creditor in his own books is no receipt; 2 B. & Ald. 501, n.; 1 Spear 53. See 37 Mo. 432.

Receipts, effect of. The mere acknowledgment of payment made is not treated in law as binding or conclusive in any high degree. So far as a simple acknowledgment of payment or delivery is concerned, it is presumptive evidence only; Whart. Ev. 1064, 1130, 1365; 1 Pet. C. 183; 1 Rich. 35; 1 Harr. 5; 16 Wend. 460; 16 Me. 475; 5 Ark. 61; 11 Mass. 27, 363; 3 McLean 265; 6 B. Monr. 199; 1 Perr. & D. 437; 8 Gill 179; 3 Jones N. C. 501; 18 Colo. 538; 43 Ill. App. 615; 115 U. S. 183; 46 Hun. 270; 111 Pa. 562; and is, in general, open to explanation; Tay. Ev. 654, 736, 965; 2 Johns. 378; Add. Contr. 142; 8 Ala. n. s. 59; 4 Vt. 308; 3 McLean 387; 4 Barb. 265; 5 J. J. Marsh. 79; 5 Mich. 171; 32 S. C. 595; 35 Kan. 464; 125 U. S. 90; 68 Ia. 557; being an exception to the general rule that parol evidence cannot be admitted to contradict or vary a written instrument; 5 Johns. 68; 2 Metc. Mass. 283. Thus, a party may always show, in explanation of a receipt limited to such acknowledgment, the actual circumstances under which it was made; 8 Johns. 389; e. g. that it was obtained by fraud; Wright Ohio 764; 4 H.

& M'H. 219; or given under a mistake; 6 Barb. 58; 3 Dana 427; or that, in point of fact, no money was actually paid as stated in it; 2 Strobh. 390; 3 N. Y. 168; 10 Vt. 96; 34 Mo. App. 189; 83 Ill. 134. But see 1 J. J. Marsh. 538; or that the medium of remittance on which the receipt was based has failed; 51 Neb. 5; or where it is given by a contractor under an assurance that it is only a receipt for moneys then paid, and would not preclude him from making a claim for extra work; 18 App. Div. N. Y. 514. A receipt in full for part of an undisputed claim does not prevent recovery of the balance, though given with knowledge and there was no error or fraud; 19 Misc. Rep. 357. A receipt is an admission only; Greenl. Ev. 1, 212; 3 B. & Ad. 318; 112 Mo. 661; it is but *prima facie* evidence against the creditor; 13 U. S. App. 597; and may be explained, unless executed with the formalities of a deed; Leake, Contr. 901; in law as well as equity; L. R. 6 Ch. 534. As against a stranger thereto, it is incompetent evidence of the payment thereby acknowledged; 50 N. W. Rep. (Neb.) 703. Mere negligence in signing a receipt without reading it will not conclude the signer or preclude explanation of its contents, particularly if the signing were induced by fraud or misrepresentation; 57 Kan. 195.

Receipts "in full." When, however, we find a receipt acknowledging payment "in full" of a specified debt, or "in full of all accounts" or of "all demands," the instrument is of a much higher and more conclusive character. It does not, indeed, like a release, operate upon the demand itself, extinguishing it by any force or virtue in the receipt, but it is evidence of a compromise and mutual settlement of the rights of the parties. The law infers from such acknowledgment an adjustment of the amount due, after consideration of the claims of each party, and a payment of the specified sum as a final satisfaction; 10 Vt. 491; 2 Dev. 247; Wright Ohio 764; 21 N. H. 85; 120 N. Y. 190. This compromise thus shown by the receipt will often operate to extinguish a demand, although the creditor may be able to show he did not receive all that he justly ought. Papers showing a receipt of money in full satisfaction of a decree appealed from, cannot be varied or contradicted by parol evidence; 120 U. S. 198. See ACCORD.

If the rights of a party are doubtful, are honestly contested, and time is given to allow him to satisfy himself, a receipt in full, though given for less than his just rights, will not be set aside. Thus, in general, a receipt in full is conclusive when given with a knowledge of the circumstances, and when the party giving it cannot complain of any misapprehension as to the compromise he was making, or of any fraud; 5 Vt. 520; 1 Camp. 392; 2 Strobh. 203; and unless given in ignorance of its purport, or under circumstances constituting duress, it is an acquittance in bar of any further demand; 151 U. S. 483.

But receipts of this character are not wholly exempt from explanation; fraud or misrepresentation may be proved, and so may such mistake as enters into and vitiates the compromise of the demand admitted; Brayt. 75; 1 Camp. 394; Coxé N. J. 48; 2 Brev. 223; 4 H. & M'H. 219; 4 Barb. 265; 2 Harring. 392; 2 C. & P. 44. See 73 Mich. 138; 141 U. S. 584. The evidence in explanation must be clear and full, and addressed to the point that there was not in fact an intended and valid compromise of the demand. For if the compromise was not binding, the receipt in full will not aid it. The receipt only operates as evidence of a compromise which extinguished the claim; 26 Me. 88; 4 Denio 168; 2 McCord 320; 4 Wash. C. C. 562.

A receipt for a specified amount of money and designated notes executed by a defendant to the plaintiff's intestate may be used as evidence that it was a deposit with the latter and not a payment to him where there is other evidence to the same effect; 114 Cal. 612.

Though a receipt in full is presumed to

be in full settlement the presumption is not conclusive; 32 S. W. Rep. (Ky.) 623; and where it is given for work and labor, a receipt in full for the bill rendered is not conclusive evidence of a final settlement unless it purports to be so; 91 Hun 639. Where the question is raised whether the purchase price of an article has been paid notwithstanding a receipt, and there is evidence to the contrary, the question is for the jury; 2 App. Div. N. Y. 93; and a jury is not precluded from finding that a receipt in full was not intended to be such by the fact that he who signed it gave no explanation for doing so; 87 Me. 429.

Receipts in deeds. The effect to be given to a receipt for the consideration-money, so frequently inserted in a deed of real property, has been the subject of numerous and conflicting adjudications. The general principle settled by weight of authority is that for the purpose of sustaining the conveyance as against the vendor and his privies the receipt is conclusive; they are estopped to deny that a consideration was paid sufficient to sustain the conveyance; 1 Binn. 503; 26 Mo. 56; 4 Hill N. Y. 643. But in a subsequent action for the purchase-money or upon any collateral demand, e. g. in an action to recover a debt which was in fact paid by the conveyance, or in an action for damages for breach of a covenant in the deed, and the like, the grantor may show that the consideration was not in fact paid—that an additional consideration to that mentioned was agreed for, etc.; 16 Wend. 460; 10 Vt. 96; 4 N. H. 229, 397; 1 McCord 514; 7 Pick. 533; 1 Rand. 219; 4 Dev. 355; 6 Me. 364; 5 B. & Ald. 603; 5 Ala. 224; 2 Harring. Del. 354; 13 Miss. 238; 5 Conn. 113; 1 Harr. & G. 139; 2 Humphr. 534; 1 J. J. Marsh. 337; 3 Ind. 212; 15 Ill. 230; 1 Stockt. Ch. 492. See 80 Mo. App. 253. But there are many contrary cases. See 1 Me. 2; 7 Johns. 341; 3 McCord 533; 1 Harr. & J. 332; 1 Hawks 64; 4 Hen. & M. 113; 2 Ohio 182; 1 B. & C. 704. And when the deed is attacked for fraud, or is impeached by creditors as voluntary and therefore void, or when the object is to show the conveyance illegal, the receipt may be explained or contradicted; 8 Zab. 463; 8 Md. Ch. Dec. 461; 21 Pa. 480; 20 Pick. 247; 13 N. H. 248. See ASSUMPSIT; DEED; RECITAL.

With this exception of receipts inserted in a sealed instrument having some other purpose to which the receipt is collateral, a receipt under seal works an absolute estoppel, on the same principles and to the same general extent as other specialties; Ware 496; 4 Hawks 22. Thus, where an assignment of seamen's wages bore a sealed receipt for the consideration money, even though the attesting witness testified that no money was paid at the execution of the papers, and defendant offered no evidence of any payment ever having been made, and refused to produce his account with the plaintiff (the assignor), on the trial, it was held that the receipt was conclusive; 2 Taunt. 141. See SEAL; SPECIALTY.

Receipt embodying contract. A receipt may embody a contract; and in this case it is not open to the explanation or contradiction permitted in the case of a simple receipt; 4 Gray 180; 44 Minn. 471. An agreement in a receipt is as conclusive as any other paper executed between the parties; 125 U. S. 90. The fact that it embodies an agreement brings it within the rule that all matters resting in parol are merged in the writing. See EVIDENCE. Thus, a receipt which contains a clause amounting to an agreement as to the application to be made of the money paid—as when it is advanced on account of future transactions—is not open to parol evidence inconsistent with it; 5 Ind. 109; 14 Wend. 116; 12 Pick. 40, 562. A bill of parcels with prices affixed, rendered by a seller of goods to a purchaser, with a receipt of payment executed at the foot, was held in one case to amount to a contract of sale of the goods, and therefore not open to parol explanation; while in another case a similar bill was held merely a receipt, the bill at the head being deemed only a memorandum to

show to what the receipt applied; 3 Cra. 311; 1 Bibb 271. A bill of lading, which usually contains words of receipt stating the character, quantity, and condition of the goods as delivered to the carrier, is the subject of a somewhat peculiar rule. It is held that so far as the receipt is concerned it may be explained by parol; 6 Mass. 422; 7 *id.* 297; 3 N. Y. 321; 10 *id.* 529; 1 Abb. Adm. 209, 397; 89 Ill. App. 17. But see 1 Bail. 174.

A receipt for rent given to a tenant after notice to quit where the person signing it is not shown to have been authorized by the landlord to receive the rent, is not admissible in an action by the latter to recover possession; 19 Misc. Rep. 56; and in such action receipts given by the same landlord to another tenant are not admissible to show the character of the tenancy by a difference in the form of receipts, the receipt being in the one case for one month only and in the other not specifying the time, and the effort being to establish a monthly tenancy; *id.*

But as respects the agreement to carry and deliver, the bill is a contract, to be construed, like all other contracts, according to the legal import of its terms, and cannot be varied by parol; 3 Sandf. 7. In this connection may also be mentioned the receipt customarily given in the New England states, more particularly for goods on which an attachment has been levied. The officer taking the goods often, instead of retaining them in his own manual control, delivers them to some third person, termed the "receiptor," who gives his receipt for them, undertaking to redeliver upon demand. This receipt has in some respects a peculiar force. The receiptor having acknowledged that the goods have been attached cannot afterwards object that no attachment was actually made, or that it was insufficient or illegal; 11 Mass. 219, 317; 24 Pick. 196. Nor can he deny that the property was that of the debtor, except in mitigation of damages or after redelivery; 12 Pick. 562; 15 *id.* 40. And in the absence of fraud, the value of the chattels stated in the receipt is conclusive upon the receiptor; 12 Pick. 362.

Where the payment is made in some particular currency or medium, as doubtful bank bills, a promissory note of another person, etc., clauses are often inserted in the receipts specifying the condition in which such mode of payment is accepted. In most states negotiable paper given in payment is presumed to have been accepted on the condition that it shall not work a discharge of the demand unless the paper shall ultimately produce satisfaction; and if an intent to accept it absolutely does not affirmatively appear, the creditor is entitled, in case the paper turned out to him is dishonored, to return it and claim to be paid anew. See PAYMENT. If the receipt is silent on that subject, it is open to explanation, and the creditor may rebut it by proof that the payment admitted was in fact made by a note, bill, check, bank-notes afterwards ascertained to be counterfeited, or notes of a bank in fact insolvent though not known to be so to the parties, etc.; 1 Wash. C. C. 338; 1 W. & S. 521; 2 Johns. Cas. 438; 13 Wend. 101; 3 McLean 285; 5 J. J. Marsh. 78. But see 3 Caines, Cas. 14; 1 Munf. 460; 1 Metc. Mass. 156. But if the agreement of the parties is specified in the receipt, the clause which contains it will bind the parties, as being in the nature of a contract; 5 Vt. 555; 1 Rich. 111; 16 Johns. 277; 23 Wend. 345; 2 Gill & J. 493; 3 B. Monr. 353. A receipt for a note taken in payment of an account will not, in general, constitute a defence to an action on the account, unless it appears by proof that the creditor agreed to receive the note as payment and take the risk of its being paid; 10 Md. 27.

Receipts, uses of. A receipt is often useful as evidence of facts collateral to those stated in it. It proves the payment; and whatever inference may be legally drawn from the fact of the payment described will be supported by the receipt. Thus, receipts for rent for a given term have

been held *prima facie* evidence of the payment of all rent previously accrued; 15 Johns. 479; 1 Pick. 332. And they have been admitted on trial of a writ of right, as showing acts of ownership on the part of him who gave them; 7 C. B. 21. A receipt given by A to B for the price of a horse, afterwards levied on as property of A, but claimed by B, has been admitted as evidence of ownership against the attaching creditor; 2 Harr. N. J. 78. A receipt "in full of all accounts," the amount being less than that called for by the accounts of the party giving it, was held in his favor evidence of a mutual settlement of accounts on both sides, and of payment of the balance ascertained to be due after setting off one account against the other; 9 Wend. 332. A receipt given by an attorney for securities he was to collect and account for has been held presumptive evidence of the genuineness and justness of the securities; 14 Ala. 500. And a general receipt by an attorney for an evidence of debt then due, is presumed to have been received by him as attorney, for collection; and he must show the contrary to avoid an action for neglect in not collecting; 3 Johns. 185.

A receipt signed in the name of a certain person by another person, constitutes no evidence of the receipt of the money by the latter; 74 Mich. 220.

Receipts, larceny and forgery of. A receipt may be the subject of larceny; 2 Abb. Pr. 211; or of forgery; Russ. & R. 227; 7 C. & P. 459. Punched railroad tickets shown to be receipts to the conductor and vouchers to him for the amount of fare between stations, are receipts within a statute making it larceny to steal any receipt; 95 Ia. 341.

And it is a sufficient "uttering" of a forged receipt to place it in the hands of a person for inspection with intent fraudulently to induce him to make an advance on the faith that the payment mentioned in the spurious receipt has been made; 14 E. L. & Eq. 536. See FORGERY:IN FULL.

RECEIPTOR. In Practice. A name given to the person who, on a trustee process being issued and goods attached, becomes surety to the sheriff to have them forthcoming on demand, or in time to respond to the judgment, when the execution shall be issued; upon which the goods are bailed to him. Story, Bailm. § 124. The term is used in New York and New Hampshire; 11 N. H. 557; and Maine; 14 Me. 414. See ATTACHMENT; RECEIPT.

As to whether a receiptor is estopped to show property in himself, see 31 Am. Dec. 62; s. c. 14 Me. 414; 25 Am. Dec. 426, n.; 116 Mass. 454; 28 Am. Dec. 695; 24 Am. Dec. 103. He may defend by showing that the property has been taken from him; 11 N. H. 570.

RECEIVABLE. In a legacy, payable; vested. 29 L. J. Ch. 822; L. R. 6 Eq. 59.

RECEIVER. One who receives money to the use of another to render an account. Story, Eq. Jur. § 446. Receivers were at common law liable to the action of account-renderer for failure in the latter portion of their duties.

In Equity. A person appointed by a court possessing chancery jurisdiction, to receive the rents and profits of land, or the profits or produce of other property in dispute.

A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things, which it does not seem reasonable to the court that either party should do; or where a party is incompetent to do so, as in the case of an infant. The remedy of the appointment of a receiver is one of the very oldest in the court of chancery, and is founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction; Bisph. Eq. 606.

He is a ministerial officer of the court. 2 S. & S. 93; 1 Cox, Ch. 422; 9 Ves. 335;

11 Ga. 413; 2 Tex. Civ. App. 88; with no powers but those conferred by his order of appointment and the practice of the court; 6 Barb. 539; 2 Paige, Ch. 453; which do not extend beyond the jurisdiction of the court which appoints him; 17 How. 332 (but see *infra*); appointed on behalf of all parties who may establish rights in the cause; 8 U. S. App. 597, 610; he stands in the shoes of the company; 59 Fed. Rep. 523; 3 Atk. 564; 2 Md. Ch. Dec. 278; 4 Madd. 80; 4 Sandf. Ch. 417; and after his appointment neither the owner nor any other party can exercise any acts of ownership over the property; 2 S. & S. 96. Neither party is responsible for his acts; 2 Wall. 519. His custody is that of the court, and leaves the right of the parties concerned to be controlled by the ultimate decree of the court; 10 Bank. Reg. 517.

The appointment of a receiver does not change the title or right of possession of the property, but puts it into his custody for the benefit of the party ultimately entitled; 136 U. S. 223; nor does it work a dissolution of the corporation, but only suspends the function of its officers as far as provided in the decree; 11 Colo. 464; 115 Ind. 466.

A court will protect its receiver in the possession and use of franchises and property committed to him; 53 Fed. Rep. 837.

The rule that property in the hands of a receiver is in *custodia legis*, and that interference with such possession without leave of the court is a contempt, is as applicable in the seizure thereof to enforce payment of taxes due the state as in any other case; 149 U. S. 164; *id.* 191.

A receiver is an officer of the court which appointed him, and a judgment in another court in a suit affecting the receiver's right of possession, begun without the permission of the court appointing him, is void; 22 U. S. App. 313. A receiver is not the agent of the corporation nor a substitute for the board of directors. He is but the hand of the court appointing him. His acts are not the acts of the corporation, and his servants are not the servants of the corporation; 31 U. S. App. 644. A decree appointing a receiver is an act of such notoriety that all persons have constructive notice thereof; 31 U. S. App. 644. A receivership is not personal, but continuous, and claims arising against different successive receivers stand on the same footing; 84 Fed. Rep. 67; 62 *id.* 771; he is analogous to a corporation sole; *id.*

A receiver is appointed only in those cases where in the exercise of a sound discretion it appears necessary that some indifferent person should have charge of the property; 1 Johns. Ch. 56; 25 Ala. n. s. 81; only during the pendency of a suit; 1 Atk. 578; 2 Du. 632; except in extreme cases; 2 Atk. 315; 2 Dick. Ch. 580; as when a fund in litigation is in peril; 2 Blatch. 78; and *ex parte*; 14 Beav. 423; 8 Paige, Ch. 373; or before answer; 13 Ves. 266; 4 Price 346; 4 Paige, Ch. 574; 2 Swanst. 146; in special cases only; and, generally, not till all the parties are before the court; 2 Russ. Ch. 145; 1 Hog. Ir. 93. Ordinarily a receiver will not be appointed on an *ex parte* application; 59 Ia. 307. The action of the court in the appointment of a receiver is not reviewable on appeal; 1 Bond. 422; 1 Biss. 198. But by act of Feb. 9, 1893, an appeal from such an order in the supreme court of the District of Columbia may be taken to the court of appeals; R. S. 2 Supp. 79.

The appointment of a receiver is authorized when the party seeking the appointment shows *prima facie* a title reasonably free from doubt, or a lien upon the subject-matter of controversy to which he has a right to resort for the satisfaction of his claim, and that it is in danger of loss from waste, misconduct, or insolvency if the defendant is permitted to retain the possession; 86 Ala. 370; 41 Kan. 475; 97 N. C. 367.

One will not be appointed, except under special circumstances making a strong case, where a party is already in possession of the property under a legal title; 19 Ves.

59; 1 Ambl. 311; 2 Y. & C. 351; as a trustee; 2 Bro. C. C. 158; 1 V. & B. 183; 1 My. & C. 163; 16 Ga. 406; 2 J. & W. 294; an executor; 13 Ves. 266; tenant in common; 3 Dick. Ch. 800; 4 Bro. C. C. 414; 2 S. & S. 142; a mortgagee; 4 Abb. Pr. 235; 13 Ves. 377; 1 J. & W. 176, 627; 1 Hog. Ir. 179; or a mortgagor when the debt is not wholly due; 5 Paige, Ch. 38; a director of a corporation in a suit by a stockholder; 2 Halst. Ch. 374; *where the property is or should be already in the possession of some court*, as during the contestation of a will in the proper court; 2 Atk. 378; 6 Ves. 172; 2 V. & B. 85, 95; 7 Sim. 512; 1 My. & C. 97; but see 3 Md. Ch. Dec. 278; when admiralty is the proper forum; 5 Barb. 209; or where there is already a receiver; 1 Hog. Ir. 199; 10 Paige, Ch. 43; 1 Ired. Eq. 210; 11 *id.* 607; nor, on somewhat similar grounds, where salaries of public officers are in question; 2 Sim. 560; 10 Beav. 602; 2 Paige, Ch. 333; or where a public office is in litigation; 9 Paige, Ch. 507; *where the equitable title of the party asking a receiver is incomplete as made out*, as where he has delayed asking for one; 1 Hog. Ir. 118; 1 Donn. Min. Cas. 71; or *where the necessity is not very apparent*, as on account merely of the poverty of an executor; 12 Ves. 4; 1 Madd. 142; 18 Beav. 161; see 4 Price 346; pending the removal of a trustee; 16 Ga. 406; where a trustee mixes trust-money with his own; 1 Hopk. Ch. 429.

A person holding an unliquidated claim against a corporation is not entitled to the appointment of a receiver, which would be a denial of trial by jury; 148 U.S. 604; 150 *id.* 385; mere insolvency of a corporation does not authorize the appointment of a receiver at the suit of general creditors, but one will be appointed where it is no longer able to proceed with its business; 64 Fed. Rep. 928.

A receiver will not be appointed without the consent of the corporation on the application of a mere contract creditor, and especially where he cannot claim a definite sum as due; 82 Fed. Rep. 775.

Where the only indebtedness of an insolvent corporation is to the party bringing the creditor's bill, a receiver is unnecessary; 8 U. S. App. 340.

Where the business of a corporation is being mismanaged, a receiver will be appointed at the suit of a stockholder; 103 Ill. 472.

Where a partnership has been dissolved, a receiver will usually be appointed if the property is unsafe in the hands of the partners; 135 N. Y. 688; 104 Ind. 53. On a bill for dissolution on account of improper conduct of partners, a receiver is almost a matter of course; but where a partnership has expired by limitation and there is no special ground for a receiver one will not ordinarily be appointed; 104 Ind. 53. A receiver will not be appointed to continue the business, except temporarily; 6 Fla. 164.

A receiver will be appointed if there is fraud or mismanagement on the part of one partner; or a disagreement between them; or an appropriation of firm property to individual use; or one partner is excluded from the management; or where a liquidating partner is insolvent; Smith, Rec. § 191.

Receivers will be appointed to take charge of trust property when it is in danger, and such appointment is necessary for its preservation; 66 Ga. 66; as where the trustee is not responsible; 92 N. C. 519; or neglects his duties; 4 D. & W. 117; or uses the trust funds on his own account; 91 N. C. 220; or refuses to collect a debt belonging to the estate; L. R. 8 Ch. App. 597; or has failed to obey an order to pay over money of the trust; 54 L. J. Ch. 1130; but ordinarily the remedy will be by the removal of the trustee. The jurisdiction to appoint a receiver exists, but will usually be exercised only in very special cases.

Where a sole trustee is insolvent, a receiver will be appointed; L. R. 1 Ch. App. 325; or where the trustee is poor and of

bad habits; 12 Sim. 363.

Equity will appoint a receiver as between co-tenants of real estate in cases of necessity; 17 N. J. Eq. 151; though the cases are rare; as in case of partition suits; 56 Cal. 32; and where one tenant excludes the other from possession; or is insolvent and refuses to account; or refuses to execute the necessary leases or interferes with the collection of rent; Smith, Rec. § 317.

It is said that equity will more willingly appoint a receiver of a mining property, than of ordinary property; 22 Cow. 194.

A receiver will be appointed for good cause in a suit for specific performance; 142 Ind. 324; 91 Hun 304; but see 4 Lea 507. Under special and urgent circumstances, a receiver may be appointed as between lessor and lessee; 57 Pa. 83.

In 2 Daly 423, the income of property of the defendant in divorce proceedings was placed in the hands of a receiver to provide for the wants of his family during the divorce litigation and after its termination; so in case of a decree for alimony; 28 Wis. 367.

A receiver will be appointed to take charge of the estate of a decedent, but "a strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act"; 1 Woods 262, affirmed in 91 U.S. 254. Pending probate proceedings the property will in some cases be protected by the appointment of a receiver; 3 Md. Ch. 279. In 60 Pa. 172, where a will had been admitted to probate and an appeal was pending on an issue to try the validity of the will, a bill for the appointment of a receiver was refused.

A receiver may be appointed in lieu of an executor or administrator, where there has been waste or misappropriation; or such a result is probable; or the executor is insolvent and this is coupled with misapplication; 57 N. C. 390; but not for poverty alone; *id.*; or where an executor is dead or refuses to act; or where the executor is a non-resident; Smith, Rec. § 301.

A receiver will be appointed as between the vendee and vendor of realty where there is a contract of sale under which possession has been delivered and there is a default in payments, the vendee not being responsible; Smith, Rec. § 315.

The comptroller of the currency has power to appoint a receiver of a national bank, to take possession of its assets, collect its debts, and enforce the personal liability of the stockholders. In cases not within the national bank act, equity has jurisdiction to appoint receivers as in case of other corporations.

A receiver of a national bank is an officer and agent of the United States within R. S. § 880, requiring the district attorney to conduct all suits relating to national banks in which the United States or any of its officers or agents are parties; 150 U. S. 342. The closing of a national bank and the appointment of a receiver transfers the assets of the bank to him; 146 U. S. 499; he has a reasonable time to elect whether he will take property leased with an option to purchase or return it; 142 U. S. 313.

Generally any stranger to the suit may be appointed receiver. The court will not appoint attorneys and solicitors in the cause; 1 Hog. Ir. 322; masters in chancery; 6 Ves. 427; an officer of the corporation; 28 N. J. Eq. 166; 1 Paige, Ch. 517; though it is sometimes done especially in the case of large railroad systems. There is no general rule about appointing officers of the company as receivers; generally the courts refuse to do so; 65 Fed. Rep. 557. Counsel for an adverse party cannot act as receiver's counsel, and if he do he will not be paid out of the funds; 44 N. E. Rep. (Ill.) 871; a public officer charged with the duty of winding up an insolvent corporation may be appointed; 3 Fed. Rep. 465; so also a mortgagee; 2 Term 238; 9 Ves. 271; a trustee; 3 Ves. 516; 8 *id.* 72; but not ordinarily a party in the cause; 63 Ill. 408.

A receiver may be appointed without notice to the adverse party, though generally this should not be done; 41 Kan. 475. It will be done only where the defendant cannot be found or where there is danger of loss or irreparable injury; Smith, Rec. § 5. The appointment and retention of a receiver cannot be collaterally attacked; 52 Kan. 109.

A receiver has no power without the previous direction of the court to incur any expenses, except those absolutely necessary for the preservation and use of the property; 93 U. S. 352.

He is responsible for good faith and reasonable diligence. When the property is lost or injured by any negligence or dishonest execution of the trust, he is liable in damages; but he is not as of course responsible because there has been an embezzlement or theft. He is bound to such ordinary diligence as belongs to a prudent and honest discharge of his duties, and such as is required of all persons who receive compensation for their services; Story, Bailm. §§ 620, 621; see 80 N. Y. 458; but he is not the agent of an insolvent railroad company, and hence the company is not liable for damages occasioned by his negligence in operating the road; 53 N. Y. 61; nor is he personally liable; 63 N. Y. 281; but he is liable as receiver for loss as a carrier of goods; 99 Mass. 395. It is held that where an injury results from the fault or misconduct of a receiver appointed by a court of equity, the court may in its discretion either take cognizance of the question of the receiver's liability, and determine it, or permit the aggrieved party to sue at law; 11 C. E. Green 474; 4 Hun 373; 12 Am. Law Rev. 660.

In a railroad receivership the court will not order the receiver to pay the rental of a leased portion of the road, when he has not received therefrom sufficient to pay such rental, over and above operating expenses, and when the trustee of the leased property has asked the court for its surrender, but has permitted it to remain in the receiver's hands and has not taken possession of it under an order granted by the court; 145 U. S. 82.

Receivers are not assignees and are not bound to adopt a lease. But have an option to do so or not; 58 Fed. Rep. 280; 60 *id.* 906. A receiver is not compelled to adopt the contracts or leases of the railroad company, but is entitled to a reasonable time to elect, and a court will not order him to pay rental when the income is not sufficient to pay running expenses; 150 U. S. 287, 310. A receiver of an insolvent corporation, who takes possession of a leasehold estate held by the corporation, does not thereby become an assignee of the term, nor liable on the covenants of the lease, but is liable only for a reasonable rent while in possession; 40 N. E. Rep. (Mass.) 857; and in some cases for the rental specified in the lease; 163 Ill. 126. See LEASE.

A receiver is entitled to a reasonable time in which to elect whether or not to retain rolling stock formerly obtained by the company on periodical payments. If he retains it, he must pay the contract price; if he retains it for a time and then releases it, he must pay a fair price for its use, which is usually based on the mileage of the cars and is not the stipulated "rental" under the contract; 42 Fed. Rep. 6.

The receiver of a railroad is not liable for his refusal to carry the plaintiff on a ticket issued by the company before his appointment. The plaintiff has only the right to come in as a general creditor for the price of the ticket; 48 Pac. Rep. (Wash.) 53.

Freight money paid to a company before the appointment of a receiver does not entitle the company to sue the receiver for refusal to carry the goods; 51 Fed. Rep. 15.

Damages accruing during the time a railroad is in the hands of a receiver are part of the operating expenses, payable out of the income, if there is any; if not, out of the corpus of the property; 86 Fed. Rep. 1; 31 U. S. App. 644.

An act in South Carolina by which a

judgment for personal injuries recovered in an action commenced twelve months from the time the injury was sustained, takes precedence of any mortgage deed or trust given to secure the payment of bonds, is an amendment of the charters of all railroad corporations theretofore created in that state, and any existing mortgagee must be taken to have given his assent to this provision.

Equity may order a receiver to buy rolling stock when necessary for the continued operation of the road and charge the price as a first lien on the property; 117 U. S. 434; 97 *id.* 146.

Separate receivers will not be appointed in two suits against the same railroad company. The existing receivership should be extended; 65 Fed. Rep. 351.

A receiver appointed in a federal court is required to manage the property in accordance with the laws of the state wherein it is situated; 2 Supp. R. S. 613.

Where a receiver has been discharged and a railroad turned over to the company, it was held that the company was liable to an action by one who had suffered personal injury by the negligence of the employees while the road was in the hands of the receiver; 23 U. S. App. 143.

A mortgagee plaintiff at whose instance a receiver has been appointed for a railway cannot be compelled, if expenses of operation and management exceed the value of the property, to make good a deficit, unless the order of appointment was made on that condition, and he is not liable to the employees of the receiver for their wages; 47 Pac. Rep. (Ore.) 706.

Equity in appointing a receiver for a corporate property may, in its discretion, require mortgage bondholders to do equity by providing for the payment of claims for labor and supplies as a condition of the appointment; 99 U. S. 235. Orders appointing a receiver usually direct the payment of such preferred claims of this class as the master shall find to be equitably entitled; 23 Fed. Rep. 471; and it is the better practice to make the order then; 41 Fed. Rep. 551; they will be paid even if not provided for in the original decree; 103 U. S. 286; the order can be made afterwards; 41 Fed. Rep. 551. It has been held that there can be no preference as to the *corpus* of the property where payment was not provided for in the original record; 61 Fed. Rep. 150; nor any preference whatever; 69 Fed. Rep. 235; but it is also held that where the earnings have been diverted to the payment of interest or permanent improvements, preferred debts will be charged on the *corpus* if the current income is not sufficient to pay them; 107 U. S. 59; 111 *id.* 776; 125 *id.* 268; and sometimes even without showing a diversion of earnings; 106 U. S. 286.

Where a receiver is in under foreclosure proceedings of a general mortgage on a system of railroads, preferred debts will be charged on the earnings of the entire system; 30 Fed. Rep. 332.

As to the classes of preferred debts, they are said to be those "which, when incurred, operated in a direct way to the advantage of the bondholder;" 33 Fed. Rep. 12; or which were "made to preserve the estate;" 83 Tenn. 138; or were payments "necessary in the ordinary administration of the affairs of the corporation;" 23 Fed. Rep. 521; or were reasonably "necessary to incur in order to keep the road in operation;" Short, Ry. Bonds § 624.

They include: Debts for freight and ticket balances; 106 U. S. 280; wages; 99 *id.* 235; 106 *id.* 286; wages and salaries of employees of every grade; 33 Fed. Rep. 778; counsel; 8 Fed. Rep. 579; 23 *id.* 521 (but not one employed for a special purpose; 138 U. S. 501; nor an attorney's fee for services rendered a year and a half before the receivership; 51 Fed. Rep. 58; but the annual salary of a regular counsel for a short time before receivership will be preferred; 23 Fed. Rep. 521; not a secretary of the company; 69 Fed. Rep. 295; nor a claim for legal services in advising

parties who lent money to keep the road in operation; 138 U. S. 501; supplies and material for equipping, operating, and repairing the road; 99 U. S. 252; 69 Fed. Rep. 23; but not when furnished on credit payable at some definite period, in the future; 58 Fed. Rep. 473; 46 *id.* 101. The vendor of rolling stock under a car trust is not preferred as to the balance of payments due him; 99 U. S. 258. The rental of cars used by the receiver is held to be chargeable to the proceeds of the sale of the property as one of the expenses of the administration; 96 Ga. 630; as is also the unpaid rental during their use by the company before the receiver was appointed, and compensation for the ordinary wear and tear and the expense of returning the cars to the owner; *id.*; *contra*, as to rentals accruing before the receivership; 136 U. S. 89; 117 *id.* 479.

Rentals on a leased line will not be preferred; 58 Fed. Rep. 268; debts contracted for original construction will not be preferred; 134 U. S. 296; nor the price of a locomotive bought six months before the receivership; 44 Minn. 115; nor will claims for damages for breach of contract; 32 Fed. Rep. 566; nor those caused by the operation of the road before the appointment of the receiver; 14 *id.* 141; 28 *id.* 871; but see 20 *id.* 260, a case said to be of doubtful authority; Short, Ry. Bonds § 626.

A bondholder who pays taxes will be subrogated to the lien of the state; 100 Ill. 511.

The ordinary period within which such claims are allowed is six months; 6 Biss. 535; but claims have been awarded a preference after eight months; 3 Hughes 320; eleven months; 111 U. S. 776; nearly two years; 41 Fed. Rep. 551; two years; 83 *id.* 605; three years; 99 U. S. 389. There is no fixed time within which a loan priority can be given; it is a question of reasonable time; 70 Fed. Rep. 741.

Preferred debts do not come in before mortgage debts because they have a lien; 75 Va. 701.

The doctrine of Fosdick v. Schall, 99 U. S. 252 (first suggested by Judge Dillon), is that the income of a railroad company, out of which a mortgage is to be paid, is the net income obtained by deducting from gross earnings what is required for operating expenses, proper equipment, and useful improvements. Every mortgagee impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income. Also, that when there is a diversion of income from the payment of current debts to pay fixed charges, thus increasing the security of the latter, this must be returned to the current debt fund before the mortgagee is paid. This was followed in 111 U. S. 781, where it was held that a supply claim incurred prior to the receivership was a charge on the income coming into the receiver's hands, as well as that received before his appointment. Such a claim is payable out of the receiver's surplus earnings, whether or not, during the company's operation of the road, there was a diversion of income, either in paying interest or in betterments; and even where the company has misappropriated such income to purposes not beneficial to the mortgagee; 170 U. S. 355. See 106 *id.* 286.

The dominant feature of the doctrine, as applied in 111 U. S. 776, is said to be that where expenditures were made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness would be paid out of current earnings, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of a receiver; 170 U. S. 355. This equity arises upon the tacit or express understanding that the current earnings would be appropriated for the payment of the debt. Even though the mortgage provides for a sequestration of income for the benefit of the bondholders,

that income, until strict foreclosure or a sale of the road, is charged with the prior equity of unpaid supply claims; *id.* Equity will confine itself within very restricted limits in the application of this doctrine; 136 U. S. 89; 149 U. S. 95; in both of which cases it was not, under special circumstances, applied to car trust rentals prior to the suit for foreclosure. To the same effect, 48 Am. & E. R. Cas. (Tex.) 656.

A receiver of a railroad on coming into possession of earnings should pay out of the same all debts for supplies contracted within a reasonable time before the receivership, before making any expenditure for betterments or interest on mortgages; 76 Fed. Rep. 502.

The court may authorize receivers, in their discretion, to pay the current payrolls and supply accounts incurred in the operation of the road within four months before their appointment; 75 Fed. Rep. 54. Current operating expenses for a limited time before the appointment of a receiver under a foreclosure bill may be charged on the income earned during the receivership or upon the *corpus* of the property, in preference to the liens of the mortgage; 74 Fed. Rep. 335. A receiver of a railroad is properly authorized to pay all balances due to other carriers and connecting lines, and should be allowed to pay, from the proceeds of the sale of receiver's certificates, charges for freight on cars, coal, oil, etc., consigned to the insolvent company and due before the appointment of a temporary receiver; 8 U. S. App. 547.

Mileage due under a contract for the use of Pullman cars is not distinguishable from car rentals, and cannot be made a preferred claim on the appointment of a receiver; 84 Fed. Rep. 18; 149 U. S. 95.

A cable for a cable railway, if necessary, is entitled to a preference, though no diversion of income is shown; and the lapse of two years will not bar the claim; 83 Fed. Rep. 365.

The payment of unpaid debts for operating expenses accrued within ninety days, and of ticket and freight balances due, are necessary for the preservation of the mortgaged property, in order to keep it a going concern; 117 U. S. 456.

The doctrine has in some courts been extended with great freedom, and the granting of preferences and the issue of receiver's certificates carried to such an extent as to give rise in the public mind to an erroneous view of the powers of courts of equity in this regard. In 80 Fed. Rep. 624, the circuit court of appeals remarks that "the liberality with which this equity was extended by some of the circuit courts in favor of general creditors, induced the supreme court in *Kneeland v. Trust Co.*, 136 U. S. 89, to call attention to the necessity of preserving the general priority of contract liens over all but a limited class of claims. Through Mr. Justice Brewer, the court said: 'The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquire power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. . . . It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable power, has unlimited discretion in this matter of the displacement of vested liens.'" While the court appointing an ancillary receiver will protect local creditors having prior rights or liens, it will recognize no distinction between foreign and domestic creditors whose claims stand on equal footing, and it rests in the court's discretion whether

it will distribute the assets or transmit them to a primary receiver; 88 Fed. Rep. 130.

The rule has been held to apply only to railroads; 128 U. S. 416; not to manufacturing corporations; 35 Fed. Rep. 436; 42 id. 373; nor to street railways; 84 Fed. Rep. 257; nor to steamship lines; 50 Fed. Rep. 312; nor to a hotel company; 106 N. Y. 423; it is held applicable to street railways; 8 Utah 15; 87 Fed. Rep. 269. In a recent Alabama case it has been held applicable to all public corporations; 39 L. R. A. 623.

See MORTGAGE.

Suits. A receiver must ordinarily obtain leave of the appointing court before instituting a suit; but not where he sues for debt due him in his official capacity; L. R. 12 Eq. 614; or sues in the appointing court with its sanction; Smith, Rec. § 69; 86 Mo. 505.

It was formerly held that a receiver had no standing in a foreign court; Smith, Rec. § 73; but it is said to be now "well established that a receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction to which he is entitled," but not against the creditors of a non-resident debtor who are seeking to subject property to the payment of their debts; 123 Ind. 477; and this is a matter of comity; 33 N. J. Eq. 155.

Late cases hold that a receiver appointed in one state can sue in another by comity, in respect of property rights in the latter state, provided the domestic creditors are protected; 123 N. Y. 37; 55 How. Pr. 52; 18 N. Y. L. J. 1059 (App. Div.).

It is held that an Illinois receiver appointed at the suit of a non-resident creditor may hold the assets against an Illinois creditor; 39 N. E. Rep. (Ill.) 1091. It is the safer course in important cases to secure an ancillary receivership in the foreign state, and such is a common practice.

In 161 Mass. 224, it was held that the ancillary receiver should remit the fund to the home receiver for distribution, if it should appear that Massachusetts claimants would there be placed on an equality with home claimants. This case is said to have gone to the limits of comity; Smith, Rec. § 73. Where a receiver takes property to a foreign state his possession will be protected; 75 Pa. 112; 108 Mo. 317; *contra*, 81 Cal. 551.

One who has a legal cause of action sounding merely in tort against a receiver appointed by a court of chancery has a right to pursue his redress by an action at law. Such action cannot be brought without the chancellor's permission, but this cannot be refused, unless the claim preferred be manifestly unfounded; 16 Wall. 218. See 25 Alb. L. J. 46.

A receiver cannot be sued without the consent of the appointing court; 2 Idaho 590; 149 U. S. 473; 134 Ind. 672; but there are exceptions to this rule: By act of congress, March 3d, 1839, every receiver appointed by a federal court may be sued without leave of court, but subject to the general equity jurisdiction of the court which appointed him. This act extends to any court of competent jurisdiction, state or federal, and not merely to the appointing court; 141 U. S. 327; 73 Tex. 47. It applies to actions for personal injuries to passengers; 121 Mo. 1; suits on patents may be brought without leave; 66 Fed. Rep. 788. Receivers operating a railroad in another state are liable to action there; 99 Mass. 395; property in another state, in the hands of a receiver, may be garnished there; 5 Colo. 14; where a receiver has taken possession of property not specified in the decree appointing him; 111 Mass. 508.

It is held that suing without leave is mere contempt of court and does not affect the jurisdiction of the court in which the suit is brought; 5 Colo. 14; and that the proceedings are regular till the appointing court interferes; 60 N. Y. 88; other cases hold that there is no jurisdiction till leave is granted; 104 U. S. 126; 96 Ind. 69; 14

How. 52. Leave to sue rests in the discretion of the appointing court; 68 Wis. 44; ordinarily leave will be granted to sue only in the appointing court; 21 Fed. Rep. 354.

Under the strict common law, a receiver must sue in the name of the corporation or firm of which he is receiver; 115 U. S. 490; but in states having codes of procedure he may sue in his own name, as having the beneficial interest; 5 Thomps. Corp. § 6979.

Suit should be brought against the company, but service made on the receiver; 141 U. S. 327. The receiver brings suit in the company's name but for his own use; 44 Pa. 294; but he sues in his own name on his own contracts; 75 Pa. 112; an attachment execution should be served on him; 167 Pa. 589.

The receiver of a corporation appointed by a court of equity cannot sue in his own name to recover property of the corporation which has never been in his possession nor been assigned to him, where authority to bring such suit has not been conferred on him by statute or by decree of court; 157 Mass. 77. Actions against the receiver are, in law, actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal; and judgments against him as receiver are payable only out of the funds in his hands; 141 U. S. 327. The corporation is not liable for the receiver's contracts; 58 Ill. 61.

The court can, by summary proceedings, compel payment by a purchaser from a receiver of the price of goods sold and delivered; 36 Atl. Rep. (N. J. Ch.) 937.

Where a circuit court has appointed a receiver of a steamer and all other property of a railroad company, and the steamer came into collision with another vessel and was libelled in admiralty, it was held that the circuit court did not err in declining to issue an injunction against the admiralty proceedings; 21 U. S. App. 460.

Where property is in the hands of a receiver, an independent suit cannot be brought to foreclose a mortgage on it, even in the same court; 86 Fed. Rep. 390.

Judgment against a corporation obtained between the entry of an order appointing a receiver therefor and the approval of his bond creates no lien on the property; 80 Fed. Rep. 441.

Where a receiver has been guilty of a public nuisance, the court will enjoin him therefrom; 22 U. S. App. 154.

A purchaser of a claim against a railroad company which is in the hands of a receiver is not estopped to attack the validity of an order appointing the receiver made before he became a party to the action; 47 Pac. Rep. (Cal.) 872.

It is not inconsistent with the relations between a receiver and the court appointing him that he should appeal from an order of such court granting an injunction against him; 23 U. S. App. 154.

The appointment of a receiver of a corporation fixes the status and priorities of its creditors; 184 Pa. 1.

A circuit court of the United States has no power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court; 157 U. S. 169.

A receiver appointed for one corporation cannot act for another; 24 U. S. App. 341.

An order fixing the compensation of a receiver, and taxed as such in the costs, is a final judgment upon a collateral matter arising out of the action and appealable by any party interested in the fund; 47 Pac. Rep. (Cal.) 872. As to a receiver's compensation, see 32 A. & E. Corp. Cas. 532.

The appointment of a receiver does not abate personal actions against the debtor, and the receiver has no status in court thereunder until he is made a party thereto on his own application. The plaintiff may proceed to final judgment without him; 87 Fed. Rep. 843.

In Smith, Receiverships, will be found

references to state legislation relating to the appointment of receivers.

See Smith, Receiverships; High; Gluck & Becker, Receivers; ROLLING STOCK; MORTGAGE; LEASE; MERGER; RECEIVERS' CERTIFICATES; REORGANIZATION.

RECEIVER GENERAL OF THE DUCHY OF LANCASTER. An officer of the Duchy court, who collects all the revenues, fines, forfeitures, and assessments within the duchy.

RECEIVER GENERAL OF THE PUBLIC REVENUE. An officer appointed in every county in England to receive the taxes granted by parliament, and remit the money to the treasury.

RECEIVER OF STOLEN GOODS. In Criminal Law. By statutory provision, the receiver of stolen goods, knowing them to have been stolen, may be punished as the principal, in perhaps all the United States.

To make this offence complete, the goods received must have been stolen, they must have been received by the defendant, and the receiver must know that they had been stolen.

A boy stole a chattel from his master, and after it had been taken from him in his master's presence, it was, with the master's consent, restored to him again, in order that he might sell it to the defendant, to whom he had been in the habit of selling similar stolen articles. He accordingly sold it to the defendant, who, being indicted for feloniously receiving it of an evil-disposed person, knowing it to be stolen, was convicted, and, notwithstanding objection made, sentenced; Car. & M. 217. But this case has since been held not to be law, and a defendant not to be liable to conviction under such circumstances, inasmuch as at the time of the receipt the goods were not *stolen goods*; Dears. 468.

The goods stolen must have been received by the defendant. *Prima facie*, if stolen goods are found in a man's house, he, not being the thief, is a receiver; 1 Den. Cr. Cas. 601. And though there is proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remains in the thief, a conviction for receiving cannot be sustained; 2 id. 37. So a principal in the first degree, *particeps criminis*, cannot at the same time be treated as a receiver; 2 id. 459. Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing; Bell, Cr. Cas. 20. See 48 Ohio St. 220. But a person having a *joint* possession with the thief may be convicted as a receiver; Dears. 494. The actual manual possession or touch of the goods by the defendant, however, is not necessary to the completion of the offence of receiving; it is sufficient if they are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if he ordered it; *id.* 494. Husband and wife were indicted jointly for receiving. The jury found both guilty, and found, also, that the wife received the goods without the control or knowledge of the husband, and apart from him, and that "he afterwards adopted his wife's receipt." It was held that this finding did not warrant the conviction of the husband; Dears. & B. 329.

The offence of receiving stolen property involves a criminal intent as a material element, such as an intent to aid the thief, of obtaining a reward for restoring it to the owner, or in some way to derive profit from the act; 27 Tex. App. 193. See 58 Ark. 513.

It is almost always difficult to prove guilty knowledge; and that must, in general, be collected from circumstances. If such circumstances are proved which to a person of common understanding and prudence, and situated as the prisoner was, must have satisfied him that they were

stolen, this is sufficient. For example, the receipt of watches, jewelry, large quantities of money, bundles of clothes of various kinds, or personal property of any sort, to a considerable value, from boys or persons destitute of property and without any lawful means of acquiring them, and specially if bought at untimely hours, the mind can arrive at no other conclusion than that they were stolen. This is further confirmed if they have been bought at an under-value, concealed, the marks defaced, and falsehood resorted to in accounting for the possession of them; *Alison, Cr. Law 330*; *2 Russ. Cr. 253*; *1 Fost. & F. 51*; *Whart. Cr. L. 983, 980*. See *135 Ill. 243*.

Evidence that other stolen goods were found in defendant's possession is admissible to show guilty knowledge; *38 S. C. 330*.

In order to sustain a prosecution for receiving stolen property, it is necessary to prove that defendant knew it was stolen, but such knowledge need not be personal or actual; *50 Mo. App. 186*.

At common law, receiving stolen goods, knowing them to have been stolen, is a misdemeanor; *3 Russ. Cr. 253*. But in Massachusetts it has been held to partake so far of the nature of felony that if a constable has reasonable grounds to suspect one of the crime of receiving or aiding in the concealment of stolen goods, knowing them to be stolen, he may without warrant arrest the supposed offender; *5 Cush. 281*. See *[1892] 2 Q. B. 597*; **RECENT POSSESSION**, etc.

RECEIVERS' CERTIFICATES.

Acknowledgments of indebtedness issued by a receiver under the order of the court by which he was appointed, either directly in discharge of obligations incurred in the management of the property, or for borrowing money for the maintenance and operation of the property, and redeemable out of its proceeds. They may be made a lien on the property when that is necessary for its proper management and operation in the interest of all who may be concerned in it, as directed in the order under which they are issued, and are usually made a first charge on the fund in the receiver's hands, after payment of the operating expenses.

In the case of property such as a railroad, which is of a character to give the public a right to its continued operation and use, the court in a proper case may impose the expenses and obligations of operation upon the property regardless of the question of who may be the ultimate owner of the property; *115 Cal. 285*. A court of equity has power to appoint a receiver for a railroad and to authorize the issue of certificates for raising money necessary for the management and preservation of the road, and make the debt thereby created a first lien; *97 U. S. 146*; *117 id. 434*. But a court of equity cannot order the issue of certificates, to be a paramount lien, by the receiver of an insolvent private corporation, where the business is affected with no public interest, unless such issue is essential to preserve the property or franchises; *63 Fed. Rep. 623*; as against lienors who have not assented to their issue; *78 id. 62*.

In the case of a mining company the court cannot, against the objection of even a small minority of the mortgage bondholders, authorize the issue of certificates to be a first lien, to enable a continuance of the operation of the mines; *50 Fed. Rep. 481*; nor can such certificates be issued for payment of taxes in the case of the foreclosure of the second mortgage of a private corporation, to be a paramount lien, against the consent of the first mortgagee; *70 Fed. Rep. 2*; or in the like case for carrying out contracts for improvements made with purchasers of the company's land; *id.*; *S. C. 36 U. S. App. 61*. In the case of a railroad such certificates cannot be issued and given a first lien, on an application *ex parte* without notice to lienholders, the proceeds to be used for the maintenance of the road; *45 S. C. 464*.

Where a mine and railroad were operated

in connection with each other by the same company, certificates were issued as a charge upon both properties; *86 Va. 754*.

If the order authorizing certificates for borrowing money to carry on the business does not limit their payment to any particular fund, the right of *bona fide* holders for value to resort to the general assets as against general creditors will not be qualified by a *quasi*-limitation apparent on the face of the certificates; *22 W. N. C. Pa. 31*; *S. C. 12 Atl. Rep. (Pa.) 271*.

When the receiver is appointed on petition of a stockholder, and earnings have been used to pay interest on the bonds, there is no equity which requires payment of past due claims for labor and materials by the issue of receivers' certificates therefor, payable out of the *corpus* of the property; there is an equity to pay out of net earnings for labor necessary to keep the property in actual operation, but such earnings cannot be anticipated by the issue of receivers' certificates unless by agreement of parties; *59 Fed. Rep. 25*; nor can such certificates be issued against the opposition of first mortgage bondholders for new equipment and construction of a narrow gauge road of which new owners would manifestly change the gauge to the standard, so that the proposed improvements would be useless; *id.* Except under extraordinary circumstances, a court ought not to order the issue of receivers' certificates, with a prior lien, to complete an unfinished railroad; *100 U. S. 605*. Such an order was made in *2 Dill. 448*, where it was necessary to complete the road in order to secure a land grant; and in *2 Woods 506*, to preserve a railroad and complete some inconsiderable portion of it.

Certificates issued, under an order made without notice to creditors, for debts prior to the receivership, give the holders no preference over other creditors; *64 Fed. Rep. 25*. They cannot be issued, with priority over existing mortgages, for wages accrued before the appointment of the receiver or for deficiency of supplies; *1 Wall. 254*; *94 id. 731*; *97 id. 146*; *107 id. 592*; *96 N. Y. 49*; *95 Ill. 134*. Certificates issued, not to preserve the property, but to pay unsecured claims, cannot be given priority over an antecedent mortgage; *81 Mo. 559*; when in excess of the amount authorized by the court they cannot be enforced against the property unless the proceeds were used for its benefit; *77 Hun 144*. They cannot be issued to pay interest on bonds; *70 Fed. Rep. 418*.

Allowances to receivers and their counsel as compensation for services are taxable as costs, and have priority over receivers' certificates; *70 Fed. Rep. 643*; and certificates issued under an order not giving them priority over other claims, are not entitled to preference over debts of the receiver contracted in carrying on the business; *27 Pittsb. L. J. Pa. N. S. 396*; and persons taking such certificates in exchange for certificates before issued under an order giving them a preference, are not entitled to priority even under the first order; *id.*

The holder of certificates is put upon inquiry as to the whole course of the proceedings of a litigation in which they were issued, and is charged with notice thereof; *53 Fed. Rep. 6*; and when the order for the issue was *ex parte*, and the proceeds were improperly applied, a holder who made no demand for three years and until the foreclosure sale was confirmed and a decree of distribution entered, was guilty of gross laches and estopped by the decree from asserting his claim; *id.* Where defendants held receivers' certificates for a right of way and agreed that they should be postponed to other certificates to be issued to plaintiffs, but on a sale defendants were paid for the right of way and plaintiffs' certificates were not paid in full, the latter were entitled to recover from the defendants the amount so paid them; *137 Ind. 159*.

Holders of certificates cannot enjoin a sale under a decree in favor of an intervening mechanics' lien creditor whose claim was prosecuted before the certificates were authorized; *63 Fed. Rep. 680*.

It has been held that a chancellor cannot authorize a receiver to borrow money by selling interest-bearing receivers' certificates of indebtedness at less than their face value; *53 Ala. 237*; but see *2 Woods 506*.

They are not negotiable, and in fact lack almost every characteristic of negotiable paper; *Gluck & Beck. Rec. § 95*.

Purchasers of certificates are not bound to see to the application of the purchase money; *id.*; *117 U. S. 434*. See **RECEIVERS**; **ROLLING STOCK**; **MORTGAGE**.

RECEIVING. Taking or having. *23 Atl. Rep. (Neb.) 735*.

RECENT POSSESSION OF STOLEN PROPERTY. In Criminal Law. Possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession; and if unexplained, either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is usually regarded by the jury as conclusive. *1 Tayl. Ev. § 122*. See *1 Greenl. Ev. § 34*; *103 U. S. 615*.

It is manifest that the force of this rule of presumption depends upon the *recency* of the possession as related to the crime, and upon the *exclusiveness* of such possession.

If the interval of time between the loss and the finding be considerable, the presumption, as it affects the party in possession of the stolen property, is much weakened, and the more especially so if the goods are of such a nature as, in the ordinary course of things, frequently to change hands. From the nature of the case, it is not possible to fix any precise period within which the effect of this rule of presumption can be limited; it must depend not only upon the mere lapse of time, but upon the nature of the property and the concomitant circumstances of each particular case. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after they had been stolen, it was held that the prisoner should explain how he came by the property; *7 C. & P. 551*. But where the only evidence against a prisoner was that certain tools had been traced to his possession three months after their loss, an acquittal was decided; *3 C. & P. 600*. And so, on an indictment for horse-stealing, where it appeared that the horse was not discovered in the custody of the accused until after six months from the date of the robbery; *3 C. & K. 318*; and where goods lost sixteen months before were found in the prisoner's house, and no other evidence was adduced against him, he was not called upon for his defence; *2 C. & P. 459*.

It is obviously essential to the just application of this rule of presumption that the house or other place in which the stolen property is found, be in the exclusive possession of the prisoner. Where they are found in the apartments of a lodger, for instance, the presumption may be stronger or weaker according as the evidence does or does not show an exclusive possession. Indeed, the finding of stolen property in the house of the accused, provided there were other inmates capable of committing the larceny, will of itself be insufficient to prove his possession, however recently the theft may have been effected, though, if coupled with proof of other suspicious circumstances, it may warrant the prisoner's conviction even though the property is not found in his house until after his apprehension; *3 Dowl. & R. 572*; *2 Stark. 139*. The force of this presumption is greatly increased if the fruits of a series of thefts be found in the prisoner's possession, or if the property stolen consist of a multiplicity of miscellaneous articles, or be of an uncommon kind, or, from its value or other circumstances, be unsuited to the station of the party.

Such possession of stolen goods may be indicative of any more aggravated crime which has been connected with theft. Upon an indictment for arson, proof that

property which was in the house at the time it was burnt was soon afterwards found in the possession of the prisoner was held to raise a probable presumption that he was present and concerned in the offence; 3 East, Pl. Cr. 1035. A like inference has been raised in the case of murder accompanied by robbery; *Wills*, Circ. Ev. 72, 241; in the cases of burglary and shopbreaking; 4 B. & Ald. 122; 9 C. & P. 364; 1 Mass. 106; and in the case of the possession of a quantity of counterfeit money; *Russ. & R.* 308; *Dearsl.* 552; but the recent possession of stolen property by one charged with receiving it, knowing it to be stolen, raises no presumption that he knew that it had been stolen; 89 Mo. 595.

Upon the principle of this presumption, a sudden and otherwise inexplicable transition from a state of indigence, and a consequent change of habits, is sometimes a circumstance extremely unfavorable to the supposition of innocence; 11 Metc. 534. See 1 Gray 101.

But this rule of presumption must be applied with caution and discrimination; for the bare possession of stolen property, though recently stolen, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt; 2 Hale, Pl. Cr. 289, where it is said: "If a horse be stolen from A, and the same day B be found upon him, it is a strong presumption that B stole him; yet," adds that excellent lawyer, "I do remember before a learned and very wary judge, in such an instance, B was condemned and executed at Oxford assizes, and yet, within two assizes after, C being apprehended for another robbery, and convicted, upon his judgment and execution confessed he was the man that stole the horse, and, being closely pursued, desired B a stranger, to walk his horse for him while he turned aside upon a necessary occasion, and escaped; and B was apprehended with the horse, and died innocently."

The rule is occasionally attended with uncertainty in its application, from the difficulty attendant upon the positive identification of articles of property alleged to have been stolen; and it clearly ought never to be applied where there is reasonable ground to conclude that the witnesses may be mistaken, or where, from any other cause, identity is not satisfactorily established. But the rule is nevertheless properly applied in peculiar circumstances, where, though positive identification is impossible, the possession of the property cannot but be considered of a guilty character: as in the case of persons employed in carrying sugar and other articles from ships and wharves. Cases have frequently occurred of convictions of larceny, in such circumstances, upon evidence that the parties were detected with property of the same kind upon them recently after coming from such places, although the identity of the property as belonging to any particular person could not otherwise be proved.

It is seldom, however, that juries are required to determine upon the effect of evidence of the mere recent possession of stolen property: from the very nature of the case, the fact is generally accompanied by other corroborative or explanatory circumstances of presumption. If the party have secreted the property; if he deny it in his possession, and such denial is discovered to be false; if he cannot show how he became possessed of it; if he give false, incredible, or inconsistent accounts of the manner in which he acquired it, as that he had found it, or that it had been given or sold to him by a stranger or left at his house; if he has disposed of or attempted to dispose of it at an unreasonably low price; if he has absconded or endeavored to escape from justice; if other stolen property, or picklock keys, or other instruments of crime, be found in his possession; if he were seen near the spot at or about the time when the act was committed, or if any article belonging to him be found at the place or in the locality where the theft was committed, at or

about the time of the commission of the offence; if the impression of his shoes or other articles of apparel correspond with marks left by the thieves; if he has attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or the officers of justice; these and all like circumstances are justly considered as throwing light upon and explaining the fact of possession; and render it morally certain that such possession can be referable only to a criminal origin, and cannot otherwise be rationally accounted for; 1 Benn. & H. Lead. Cr. Cas. 371, where this subject is fully considered.

RECEPTUS (Lat.). In Civil Law. The name sometimes given to an arbitrator, because he had been received or chosen to settle the differences between the parties. Dig. 4, 8; Code 2, 56.

RECESSES. The time in which the court is not actually engaged in business. 69 Cal. 55.

RECESSION. A re-grant; the act of returning the title of a country to a government which formerly held it, by one which has it at the time; as, the recession of Louisiana, which took place by the treaty between France and Spain, of October 1, 1800. See 2 White, N. Rec. 516.

RECIDIVE. In French Law. The state of an individual who commits a crime or misdemeanor, after having once been condemned for a crime or misdemeanor; a relapse.

Many statutes provide that for a second offence punishment shall be increased: in those cases the indictment should set forth the crime or misdemeanor as a second offence.

The second offence must have been committed after the conviction for the first; a defendant could not be convicted of a second offence, as such, until after he had suffered a punishment for the first; *Daloz*, Dict.

RECIDIVIST. A habitual criminal. One who makes a trade of crime. Reformation in such cases is rare. Such criminals generally either succumb to tuberculosis or heart disease in prison or end in an asylum. Sometimes attacks of acute mania or melancholia have a good influence upon such persons, but generally after an attack of acute insanity they are found to be still subject to their criminal tendencies. McDonald, *Criminology*, ch. viii. As to cases of innate tendency to particular crimes or special propensities, see *id.* pt. ii. ch. i.-ii.

RECIPROCAL CONTRACT. In Civil Law. One by which the parties enter into mutual engagements.

They are divided into perfect and imperfect. When they are perfectly reciprocal, the obligation of each of the parties is equally a principal part of the contract, such as sale, partnership, etc. Contracts imperfectly reciprocal are those in which the obligation of one of the parties only is a principal obligation of the contract: as, mandate, deposit, loan for use, and the like. In all reciprocal contracts the consent of the parties must be expressed. Pothier, *Obl.* n. 9; La. Civ. Code, art. 1758, 1759. See **CONTRACT**; **MUTUAL CONSENT**.

RECIPROCITY. Mutuality; state, quality, or character of that which is reciprocal.

The states of the Union are bound to many acts of reciprocity. The constitution requires that they shall deliver to each other fugitives from justice; that the records of one state, properly authenticated, shall have full credit in the other states; that the citizens of one state shall be citizens of any state into which they may remove. In some of the states, as in Pennsylvania, the rules with regard to the effect of a discharge under the insolvent laws of another state are reciprocated; the discharges of those courts which respect the discharges of the courts of Pennsylvania are respected in that state.

Between nations. Mutual concessions made by nations in favor of the importation of the products and manufactures of each other.

The president of the United States has

been authorized by various tariff acts to enter into reciprocal agreements with foreign countries, concerning the mutual importation of manufactures and products, and to suspend certain provisions of the tariff laws, accordingly. By act of July 24, 1897, he may enter into such agreements with the governments of countries exporting certain specified products, and by proclamation reduce the tariff rates thereon during such agreement, to a lower schedule than specified in the act. He may, also, within two years of the passage of the act, with the consent of the senate, enter into treaties with foreign governments for a specified period of not exceeding five years, which will provide for a reduction of not over twenty per cent. on the tariff rates imposed by the act upon certain articles and for the addition of any such articles to the free list.

RECITAL. The repetition of some former writing, or the statement of something which has been done. It is useful to explain matters of fact which are necessary to make the transaction intelligible. 2 Bla. Com. 298; Big. Estop. 365.

IN CONTRACTS. The party who executes a deed is bound by the recitals of essential facts contained therein; Com. Dig. *Estopel* (A 2); 2 Co. 33; 8 Mod. 311. The amount of consideration received is held an essential fact under this rule, in England; 2 Taunt. 141; 5 B. & Ald. 606; 1 B. & C. 704; 2 B. & Ad. 544; otherwise in the United States; 5 Cush. 431; 6 Me. 364; 10 Vt. 96; 4 N. H. 229, 397; 8 Conn. 304; 14 Johns. 210; 7 S. & R. 311; 1 Harr. & G. 139; 1 M'Cord 514; 15 Ala. 496; 10 Yerg. 160; 7 Monr. 291. But see 1 Hawks 64; 11 La. 416; 2 Ohio 350; 3 Mas. 347.

IN DEEDS. The recitals in a deed of conveyance bind parties and privies thereto, whether in blood, estate, or law; Whart. Ev. 1039; 1 Greenl. Ev. § 23; Tayl. Ev. 119; and see 3 Ad. & E. 265; 4 Pet. 1. See **ESTOPPEL**. Recitals in a deed bind parties and claimants under them, but not strangers claiming by an adverse title, or those who claim by title anterior or paramount to the deed; 124 U. S. 261. Recitals of preliminary proceedings in tax deeds are not evidence of the facts recited; 61 Vt. 530; 101 N. C. 35; 69 Tex. 103.

Recitals are deemed to be made upon suggestion of the grantee; 4 Pet. 87; and are part of the title; 4 Binn. 231; they are evidence against the grantee; 58 Pa. 304; and parol evidence is not admissible to contradict them.

If the recitals of a patent nullify its granting clause, the grant falls; 104 U. S. 644. See 39 Fed. Rep. 70. If the operative parts of a deed are ambiguous, the recitals may be referred to as a key to the intention of the parties; 5 Russ. 344; but not if the operative parts are clear; 19 L. J. Q. B. 462; and the same rule applies to statutes; 4 Ch. D. 592. If they are at variance, the operative parts must be effective and the recitals ineffective, but the latter may explain ambiguities; L. R. 1 Eq. 183; in such case, in a conveyance, if the recital is clear as to what is meant and the operative parts go beyond the recitals, the conveyance must be restricted; L. R. 1 Eq. 361; 29 Ch. D. 514. See, also, 17 Q. B. D. 286. A misrecital in a deed may influence its construction; *Elphins*, *Interpr. of Deeds* 139.

The recital of the payment of the consideration money is evidence of payment against subsequent purchasers from the same grantor; 54 Pa. 19; but not against third parties, when it is necessary for the party claiming under the deed to show full payment before receiving notice of an adverse equity; 28 Pa. 425. A deed of defeasance which professes to recite the principal debt must do so truly; *Cruise*, Dig. tit. 32, c. 7, § 23. See 3 Pa. 425; 3 Ch. Cas. 101; Co. Litt. 352; Com. Dig. *Fail* (E 1).

IN STATUTES. A mere recital in an act, whether of fact or of law, is not conclusive, unless it is clear that the legislature intended that the recital should be accepted as a fact in the case; 150 U. S. 483.

IN BONDS. The recitals in corporate bonds may constitute notice to holders of facts which will affect their rights. See 99 U. S. 434; 175 Pa. 318. One who buys bonds which recite that they are for the principal and interest of other bonds, is chargeable with notice that the former indebtedness was overdue; 154 Ill. 301. It has been held by the supreme court of the United States that recitals in county bonds prescribed by statute and subject to the determination of county officers, have been complied with; 170 U. S. 593. In that case, the court said:—"By a long series of decisions such recitals are held conclusive, in favor of a *bona fide* holder of bonds, that precedent conditions, prescribed by statute and subject to the determination of those county officers, have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will in favor of a *bona fide* holder, be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to these in the bonds before us." The court applied the doctrine of the conclusive effect of such recitals not only to matters transpiring before the placing of the bonds in the hands of the trustee, such as the election, etc., but also to conditions which it was urged were to be performed subsequently to the execution, such as that the bonds should not be binding until the railway should have been so completed through the county, that a train of cars had passed over it. See, also, 92 U. S. 484; 97 id. 96; 102 id. 278; 110 id. 608; 133 id. 523; 156 id. 692; 158 id. 312; **BONDS; MUNICIPAL BONDS.**

IN JUDICIAL RECORDS. A recital in the record of a court imports absolute verity, and all parties thereto are estopped from denying its truth; 15 So. Rep. [Ala.] 450; and the recitals of the record of a trial court are conclusive on the parties as to the term at which a decree was rendered; and if the record is incorrect, the remedy is by a proper proceeding in the trial court to secure a correction; 35 Neb. 822.

IN PLEADING. *In Equity.* The decree formerly contained a recital of the pleadings. This usage is now mostly abolished, though it obtains largely in New Jersey.

At Law. Recitals of deeds or specialties bind the parties to prove them as recited: Com. Dig. *Pleader* (2 W. 18); 4 East 585; 3 Den. 356; 9 Pa. 407; Hempst. 294; 13 Md. 117; see 6 Gratt. 130; and a variance in an essential matter will be fatal; 18 Conn. 395; even though the variance be trivial; Hempst. 294; 1 Chitty, Fl. 424. The rule applies to all written instruments; 7 Pa. 401; 11 Ala. n. s. 539; 1 Ind. 209; 32 Me. 283; 6 Cush. 508; 24 N. J. L. 218; 16 Ill. 495; 36 N. H. 252; not, it seems, where it is merely brought forward as evidence, and is not made the ground of action in any way; 11 Ill. 40. See 31 Me. 290.

Recitals of public statutes need not be made in an indictment or information; Dy. 155 a, 346 b; Cro. 187; 1 Wms. Saund. 135; nor in a civil action; 6 Ala. n. s. 289; 16 Me. 69; 3 N. Y. 188; but, if made, a variance in a material point will be fatal; 4 Co. Abr.; Cro. Car. 135; 5 Blackf. 548; Bac. Abr. *Indictment* ix.

Recitals of private statutes must be made; 10 Wend. 75; 1 Mo. 593; and the statutes proved by an exemplified copy unless admitted by the opposite party; Steph. Pl. 347; 10 Mass. 91; but not if a clause be inserted that it shall be taken notice of as a public act; 1 Cr. M. & R. 44, 47; 5 Blackf. 170; *contra*, 1 Mood & M. 421. Pleading a statute is merely stating the facts which bring a case within it, without making any mention, or taking any notice of the statute itself; 6 Ired. 352; 7 Blackf. 359. Counting upon a statute consists in making express refer-

ence to it, as by the words "against the form of the statute [or "by force of the statute"] in such case made and provided." Reciting a statute is quoting or stating its contents; Steph. Pl. 347; Gould, Pl. 46.

Recital of a record on which the action is based must be correct, and a variance in a material point will be fatal; 9 Mo. 742; 2 Paine 209; 29 Ala. n. s. 112; 80 Miss. 126; 17 Ark. 371; 19 Ill. 637; otherwise where it is offered in evidence merely; 12 Ark. 760, 766, 768.

RECITE. In a statute requiring that a sheriff's deed recite the execution, names of the parties, etc., it was held that the word *recite* does not mean to copy or repeat *verbatim*, but only to state the substance of the execution. 12 Kan. 283; 8 Ohio 128; 10 id. 433.

To state in a written instrument facts connected with its inception, or reasons for its being made. Abbott. See **RECITAL.**

In pleading, reciting a statute is quoting or stating its contents. Anderson; Gould, Pl., 4th ed., 46, n.

RECKLESS. Heedless, careless, rash, indifferent to consequences. 95 Ala. 412. It implies heedlessness and indifference. 139 Ill. 536.

RECKLESSNESS. An indifference whether wrong is done or not. An indifference to the rights of others. Recklessness and wantonness are stronger terms than mere or ordinary negligence. 39 Kan. 531.

RECLAIM. To demand again; to insist upon a right; as, when a defendant for a consideration received from the plaintiff has covenanted to do an act, and fails to do it, the plaintiff may bring covenant for the breach, or assumpsit to *reclaim* the consideration. 1 Caines 47.

RECLAIMING BILL. In Scotch Law. A petition for review of an interlocutor, pronounced in a sheriff's or other inferior court. It recites *verbatim* the interlocutor, and, after a written argument, ends with a prayer for the recall or alteration of the interlocutor, in whole or in part. Bell, Dict. *Reclaiming Petition*; Shaw, Dig. 394.

RECLAMER (L. Fr.). To reclaim; to make a claim; to challenge.

RECOGNITION. An acknowledgment that something which has been done by one man in the name of another was done by authority of the latter. See **AGENCY**; **RATIFICATION**.

(1) The old form of real action, called an assize (*q. v.*). (2) The trial or hearing of an assize. Hence the jury summoned upon an assize were called *recognitors*.

In International Law.

As a general rule international law is not concerned with internal changes within a sovereign state. The government may change from a democracy to a republic or monarchy without any change in the identity of the state in the family of nations. But the ruler of an independent state may call upon other states and nations to recognize a new title he has assumed or new territory which he has acquired by conquest and wishes to have recognized as part of his domain, and often part of a nation separates itself from the rest by revolution and claims to be recognized as a new member of the family of nations. In the latter case the new state is never recognized until the mother country has ceased military operations against it and its government has the appearance of stability; Snow, Lect. Int. L. 23. The recognition of the independence of a revolted state is lawful only when its independence has been *de facto* established. See 1 Kent 25. As to recognition of belligerency, see **NEUTRALITY**; **BELLIGERENCY**; **INSURGENCY**.

United States Recognition of Foreign Powers. The recognition by the United States of a status of belligerency, or the recognition of the sovereignty

and independence of a foreign government are political acts, not subject to judicial review and are performed by the President.

It is to be presumed, however, that when the recognition of a status of belligerency or of the independence of a revolutionary government is likely to institute a *casus belli* with some other foreign power, the President will be guided in a large measure by the wishes of the legislative branch. Upon the other hand, it is the proper province of the Executive to refuse to be guided by a resolution on the part of the legislature if, in his judgment, to do so would be unwise. The legislature may express its wishes or opinions, but may not command. Willoughby, *Constit. Law* 461.

RECOGNITION OF BELLIGERENCY. See **BELLIGERENCY**.

RECOGNITORS. In English Law. The name by which the jurors impaneled on an assize were known. 17 S. & R. 174.

RECOGNIZANCE. An obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified. 2 Bla. Com. 341. See 49 Fed. Rep. 776; Troub. & H. Pr. 2028.

The liability of bail above in civil cases, and of the bail in all cases in criminal matters, must be evidenced by a recognizance, as the sheriff has no power to discharge upon a bail-bond being given to him in these cases. See 4 Bla. Com. 297.

The object of a recognizance is to secure the presence of the defendant to perform or suffer the judgment of the court. In some of the United States, however, this distinction is not observed, but bail in the form of a bail-bond is filed with the officer, which is at once bail below and above, being conditioned that the party shall appear and answer to the plaintiff in the suit, and abide the judgment of the court.

In civil cases they are entered into by bail, conditioned that they will pay the debt, interest, and costs recovered by the plaintiff under certain contingencies, and for other purposes under statutes.

In criminal cases they are either that the party shall appear before the proper court to answer to such charges as are or shall be made against him, that he shall keep the peace or be of good behavior. The presence of witnesses may also be secured in the same manner; 6 Hill 506.

Who may take. In civil cases recognizances are generally taken by the court; 15 Vt. 9; 7 Blackf. 221; or by some judge of the court in chambers, though other magistrates may be authorized therefor by statute, and are in many of the states; 6 Whart. 359; 4 Humphr. 213. See 2 Dev. 555; 3 Gratt. 82.

In criminal cases the judges of the various courts of criminal jurisdiction and justices of the peace may take recognizances; 6 Ohio 251; 19 Pick. 127; 14 Conn. 206; 6 Blackf. 284, 315; 18 Miss. 626; 26 Ala. n. s. 81; 8 Mich. 42; see 2 Curt. C. C. 41; 44 La. Ann. 905; the sheriff, in some cases; 5 Ark. 265; 11 Ala. 676; but in case of capital crimes the power is restricted usually to the court of supreme jurisdiction. See **BAIL**.

In cases where a magistrate has the power to take recognizances it is his duty to do so, exercising a judicial discretion, however; 7 Blackf. 611. In form it is a short memorandum on the record, made by the court, judge, or magistrate having authority, which need not be signed by the party to be bound; 5 S. & R. 147; 9 Mass. 520; 4 Vt. 488; 1 Dana 523; 6 Ala. 465; 2 Wash. C. C. 422; 6 Yerg. 354. It is to be returned to the court having jurisdiction of the offence charged, in all cases; 7 Leigh 371; 9 Conn. 350; 4 Wend. 887; 14 Vt. 64. See 27 Me. 179.

Discharge and excuse under. A surrender of the defendant at any time anterior to a fixed period after the sheriff's return of *non est* to a *ca. sa.*, or taking the defendant on a *ca. sa.*; 1 Hawks 51; 6 Johns. 97; discharges the bail (see **FIXING BAIL**); Arch. Cr. P. by Pom. 184; as does the death

of the defendant before the return of *non est*; Bish. Cr. Proc. 264; 1 N. & M.C. 251; 3 Conn. 84; see 14 Daly 333; or a loss of custody and control by act of government or of law without fault of the bail prior to being fixed; 3 Dev. 137; 18 Johns. 335; 5 Metc. Mass. 380; 2 Ga. 33; 14 Gratt. 698; see 8 Mass. 264; 5 Sneed 623; 2 Wash. C. C. 464; including imprisonment for life or for a long term of years in another state; 18 Johns. 35; 6 Cow. 599; but not voluntary enlistment; 11 Mass. 146, 284; or long delay in proceeding against bail; 2 Mass. 485; 1 Root 428; see 4 Johns. 478; or a discharge of the principal under the bankrupt or insolvent laws of the state; 2 Bail. 492; 1 Harr. & J. 101, 156; 21 Wend. 670; 1 Mass. 292; 1 Harr. Del. 367, 466; 1 McLean 226; 1 Gill 259; and see, also, 2 Pa. 492; and, of course, performance of the conditions of the recognizance by the defendant, discharges the bail. And see BAIL-BOND; FIXING BAIL.

The formal mode of noting a discharge is by entering an exoneration; 5 Binn. 332; 1 Johns. Cas. 329; 2 id. 101, 220; 7 Conn. 439; 1 Gill 526; 2 Ga. 331. A culprit giving a recognizance to appear to an indictment, and not to depart from the court without leave, is not discharged from his obligation, nor is his surety thereon, by the quashing of the indictment; 54 N. J. L. 393.

The remedy upon a recognizance is by means of a *scire facias* against the bail; 1 H. & G. Md. 154; 1 Ala. 84; 7 T. B. Monr. 130; 4 Bibb Ky. 181; 7 Leigh 371; 4 Ia. 289; 3 Blackf. 344; 6 Halst. 124; 19 Pick. 127; 2 Harr. N. J. 446; or by suit, in some cases; 13 Wend. 33; 5 Ark. 691; 14 Conn. 329. A surety on a recognizance may defend by showing the invalidity of the indictment against his principal; 78 Ga. 188; *contra*, 25 Tex. App. 331.

Without notice to the principal, a recognizance cannot be legally amended against objection of the sureties; 28 Tex. App. 28.

It is indispensable to a legal default and declaration of forfeiture of a recognizance, that the principal in the recognizance should have been regularly called, and, upon such call, failed to appear; 24 Ill. App. 72. See SURETYSHIP; SUBROGATION.

RECOGNIZE. To try; to examine in order to determine the truth of a matter. 3 Sharsw. Bla. Com. App. No. III. § 4; Bracton 179.

To enter into a recognizance.

RECOGNIZEE. He for whose use a recognizance has been taken.

RECOGNIZOR. He who enters into a recognizance.

RECOLEMENT. In French Law. The reading and re-examination by a witness of a deposition, and his persistence in the same, or his making such alteration as his better recollection may enable him to do after having read his deposition. Without such re-examination the deposition is void. Pothier, *Procéd. Cr.* s. 4, art. 4.

RECOLLECTION. Discovery—*Distinction.* "Recollection" is not "discovery." The former deals with the known; the latter with the unknown. A want of recollection of a fact which, by due attention, might have been remembered, cannot be a reasonable ground for granting a new trial; for want of "recollection" may always be pretended, and may be hard to disprove. 49 S. W. 340.

RECOMMEND. As Used in Will. The word "recommend" as used in a will is considered sufficient to raise a trust where the subject and object are sufficiently certain. 78 Ky. 128.

RECOMMENDATION. The giving to a person a favorable character of another.

When the party giving the character has acted in good faith, he is not responsible for the injury which a third person, to whom such recommendation was given, may have sustained in consequence of it,

although he was mistaken.

But when the recommendation is knowingly untrue, and an injury is sustained, the party recommending is civilly responsible for damages; 3 Term 51; 7 Cra. 69; 7 Wend. 1; 14 id. 126; 6 Pa. 310; whether it was done merely for the purpose of benefiting the party recommended or the party who gives the recommendation. See PRIVILEGED COMMUNICATIONS.

And in case the party recommended was a debtor to the one recommending, and it was agreed, prior to the transaction, that the former should, out of the property to be obtained by the recommendation, be paid, or in case of any other species of collusion to cheat the person to whom the credit is given, they may both be criminally prosecuted for the conspiracy. See CHARACTER; Fell, Guar. c. 8; 6 Johns. 181; 13 id. 224; 1 Day 22; 5 Mart. La. N. s. 443.

RECOMMENDATION, LETTER OF. See CLEARANCE CARD.

RECOMPENSATION. In Scotch Law. An allegation by the plaintiff of compensation on his part made in answer to a compensation or set-off pleaded by the defendant in answer to the plaintiff's demand.

RECOMPENSE. A reward for services; remuneration for goods or other property.

In maritime law there is a distinction between *recompense* and *restitution*. When goods have been lost by jettison, if at any subsequent period of the voyage the remainder of the cargo be lost, the owner of the goods lost by jettison cannot claim restitution from the owners of the other goods; but in the case of expenses incurred with a view to the general benefit, it is clear that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port, or the ship-owner himself.

RECOMPENSE OF RECOVERY IN VALUE. A phrase applied to the matter recovered in a common recovery, after the vouchee has disappeared and judgment is given for the demandant. 2 Bouvier, Inst. n. 2093.

RECONCILE. While etymologically not synonymous with "harmonize," reconcile is so nearly equivalent as not to mislead a jury instructed as to the reconciliation of conflicting testimony. 3 S. Dak. 134.

RECONCILIATION. The act of bringing persons to agree together, who before had had some difference.

A renewal of cohabitation between husband and wife is proof of reconciliation; and such reconciliation destroys the effect of a deed of separation; 4 Eccl. 238. See Bish. Mar. & D. § 1707.

RECONDUCTION. In Civil Law. A renewing of a former lease; relocation. Dig. 19. 2. 13. 11; Code, Nap. art. 1737-1740.

RECONSTRUCTION. This term has been widely used to describe the measures adopted by congress, at the close of the civil war in the United States, to regulate the admission of the representatives from the Southern states, the re-establishment of the federal authority within their borders, and the changes in their internal government, in order to adapt them to the condition of affairs brought about by the war. See 1 Am. L. Rev. 238.

RECONSTRUCTION OF COMPANY. In England, a company which is being wound up voluntarily may be reconstructed under s. 192 of the Companies (Consolidation) Act, 1908, by a transfer of its undertaking to another company. A company which is being wound up either voluntarily or by the court may be reconstructed by arrangement with its creditors under s. 120 of the same act. Byrne.

RECONVENTION. In Civil Law. An action brought by a party who is de-

fendant against the plaintiff before the same judge. 4 Mart. La. N. s. 439. To entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be nevertheless necessarily connected with it and incidental to the same. La. Code of Pr. art. 375; 11 La. 309; 7 Mart. La. N. s. 282. The reconvention of the civil law was a species of cross-bill. Story, Eq. Pl. § 402. See RECOURPENT.

RECOPILACION. The laws enacted in Spain for the government of the Indies, and promulgated at different periods, were compiled by order of Philip IV in 1661, in the "Recopilacion" of the Laws of the Indies, of which a subsequent edition was published. This is the only authentic collection of the ordinances and decrees governing Spanish-America prior to the year 1860. 210 U. S. 315; 9 Alcubilla 936.

RECORD. A written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done. 6 Call 78; 1 Dana 595.

Records may be either of legislative or judicial acts. Memorials of other acts are sometimes made by statutory provisions.

Legislative acts. The federal and state constitutions, acts of congress and of the several legislatures are the highest kind of records. The printed journals of congress have been so considered. See Dougl. 508; Cowp. 17. And public documents transmitted to congress by the president are at least records so far that copies of them printed by the public printer are evidence; 7 Johns. 88.

A record in *judicial proceedings* is a precise statement of the suit from its commencement to its termination, including the conclusion of law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of facts; or in the language of Lord Coke, "records are memorials or remembrances, in rolls of parchment, of the proceedings and acts of a court of justice, which hath power to hold plea according to the course of the common law." See 13 Conn. 216.

The proceedings of the courts of common law are records. But every minute made by a clerk of a court for his own future guidance in making up his record is not a record; 4 Wash. C. C. 638. See 10 Pa. 157; 2 Pick. 448; 4 N. H. 450; 5 Ohio St. 545; 8 Wend. 237; 2 Vt. 573; 5 Day 363; 8 T. B. Monr. 63; 146 Ill. 189; 57 Me. 107; 115 Mass. 201.

Proceedings in courts of chancery are said not to be, strictly speaking, records; but they are so considered; Gresh. Ev. 101. And see 8 Mart. La. N. s. 303; 1 Rawle 331; 8 Yerg. 142; 1 Pet. C. C. 332.

It is within the power of any court of general jurisdiction to restore its lost records or to expunge false or fraudulent interpolations therein; 61 Ill. App. 454; 69 Mo. App. 504; 49 La. Ann. 1012; or where the record is silent, or, where it suggests as a fact something contrary to the fact, to correct the record by an order *nunc pro tunc*; 70 Ga. 155. See 134 U. S. 136. The power of a court to amend its own records is limited to the correction of actual mistakes and omissions; 65 Hun 619. A court may always, after the expiration of the term, amend the record *nunc pro tunc* to conform to the facts, where there are sufficient data; 8 N. Mex. 446. If there has been a failure to file a record within the time required, a subsequent filing cures this defect; provided no motion to docket and dismiss has been made; 24 U. S. App. 527.

In criminal proceedings all parts of the record must be interpreted together, and a deficiency in one part may be supplied by what appears elsewhere therein; 154 U. S. 134.

Altering records of a court is a crime punishable at common law; 2 East, P. C. 865, 866. See 38 Mich. 218; 30 Me. 484. See 1 Bish. Cr. L. § 468 (6).

A form of entry signed by the judge, and

intended to be entered in the journal of the court, is not a public record, the mutilation or changing of which is prohibited by Cr. Code § 1858; 43 Pac. Rep. (Ore.) 717.

An attorney may be disbarred for alteration of the record by falsifying the stenographer's transcript of the evidence to deceive an appellate court; 129 Mo. 291; and the proceedings for that purpose may be properly instituted in the appellate court on relation of the attorney-general; *id.*; but it was held that the senior counsel who was not connected with the mutilation of the record, would not be disbarred for arguing the appeal from the record as filed; *id.* 231.

The fact of an instrument being recorded is held to operate as a constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property; 1 Johns. Ch. 394. And even if not recorded, if it has been filed for record and its existence is necessarily implied from the existence of another instrument already of record, purchasers will be deemed to have had notice of its existence; 14 Cent. L. J. 374.

But all conveyances and deeds which may be *de facto* recorded are not to be considered as giving notice: in order to have this effect, the instruments must be such as are authorized to be recorded, and the registry must have been made in compliance with the law, otherwise the registry is to be treated as a mere nullity, and it will not affect a subsequent purchaser or incumbrancer unless he has actual notice; 2 Sch. & L. 68; 4 Wheat. 466; 1 Johns. Ch. 300; 1 Story, Eq. Jur. § 403; 5 Me. 272; but where a statute makes it discretionary to record an instrument, the effect of recording is in no wise lessened, but is deemed a constructive notice the same as if the recording had been required; 77 Pa. 373. The record of a deed is not constructive notice of its contents when it is not entitled to be recorded under the recording acts; 7 C. C. App. 293. Where a proper book is kept for the purpose of showing when an instrument is left for record, delay or negligence in entering it in other books will not affect it as a lien upon the property; 82 Pa. 116. See, as to recording acts, 3 Law Mag. & Rev., 4th ser. 412; Judge Cooley's Paper in 4th Rep. Am. Bar Assn. (1881); Lecture of W. H. Rawle before the Law Dept. Univ. of Pa., 1881; as to mortgages, see MORTGAGE; as to courts of record see that title; as to falsification of a record see FORGERY.

As to giving full faith and credit to judicial proceedings, under the United States constitution, see FOREIGN JUDGMENT. The constitutional provision applies in terms to public acts, records, and judicial proceedings, and it is held that the term records in the Judiciary Act of May 26, 1790, which provides how they shall be proved and admitted in evidence, includes all acts, legislative, executive, judicial, and ministerial, composing the public records of the state; 20 How. 250; 16 Tex. 509.

Questions as to what is or is not a part of the record have arisen, principally on writ of error or appeal, as to what parts of the record and proceedings of the court below are to be considered as parts of the record before the appellate court. In many of these cases matters which were actually a part of the record below are only such in the court above when made so by being embodied in the bill of exceptions. Among the matters and things which have been held not to be a part of the record, but to be considered with reference to the foregoing qualification, are: Trial list; 1 Pa. 129; bond for costs; 5 Ark. 264; 8 Mich. 81; writing sued on; 7 Humphr. 255; 2 Ark. 109 (unless made so by oyer or otherwise; 4 Ark. 202); an affidavit made to supply a part of the record which has been lost; 4 Ill. 119, 259; papers presented to a court and acted upon merely as matters of evidence; 16 Me. 81; the registry of a mechanic's lien; 1 W. & S. 240; the statement of demand, in the court for the trial of small causes; 3 Green N. J. 224; a warrant of attorney to confess judgment

and an affidavit showing the death of one of the signers of it; 12 Ill. 379; instructions to the jury; 1 La. 226; 11 *id.* 454 (*contra*, where they were signed by the judge and filed; 16 Ind. 416); letters copied into the transcripts as exhibits; 28 Ala. 416; papers filed after an appeal prayed, taken, and signed by the judge; 1 Ark. 557; a plea stricken from the files; 5 *id.* 166, 233; 29 Ind. 120; minutes of the court taken at the trial; 23 Cal. 103; or clerk's minutes; 33 *id.* 171; a bill of particulars; 24 Ill. 262; a summons or other writ; 1 Morr. 439 (otherwise where there was no appearance; 19 Ind. 273).

The following have been held to be parts of the record: A stipulation as to sale of mortgaged premises and solicitor's fee; 15 Wis. 211; depositions in a probate court; 38 Miss. 476; affidavits filed in opposition to an application for an injunction; 23 Cal. 362; motions, notices, and rulings of court; 4 Greene (La.) 123; a finding of the court; 20 Wis. 350; 21 Mo. 157; 11 Ind. 314; a submission and award filed; 27 Ill. 374; a bill of exceptions settled on an appeal from an order; 20 Wis. 518; an instrument of which oyer is craved; 5 Ark. 116. The opinion of the trial court as to the facts was held a part of the record; 96 Ia. 501; but in Pennsylvania it is said to be not a good principle so to treat the opinion; 183 Pa. 153.

Under recording acts. Statutes of the several states have required enrolment of certain deeds, mortgages, and other instruments, and declared that the copies thus made should have the effect of records. An instrument lodged for record is considered as recorded from that time, whether it was actually copied in the book or not, or in the proper book or not; 172 Pa. 234.

Inspection of Records. At common law, there was no general right of inspection, but the right depended entirely upon the question whether the party seeking to exercise it had an interest. If he had, he was entitled to exercise the right upon the payment of the usual fees; 7 Mod. 127; 1 Stra. 304; 2 *id.* 260, 384, 1005; but a mere stranger who had no such interest had no right of inspection at common law; 8 Term 390; and the custodian might permit or refuse the inspection at his discretion without any control by a court; 6 Ad. & El. 84; 9 Cent. L. J. 425. At a comparatively early period, this distinction between those who had and those who had not an interest became obliterated; 1 Wils. 297; 47 Barb. 329. The effect of modern recording acts making the public records notice, has aided to accomplish this result, and, indeed, makes the right of inspection and of enforcing the privilege an essential one; 4 D. & R. 820; 61 Ala. 310; 71 *id.* 299; 45 Ill. 224; 66 Me. 305; 90 Mich. 643. It does not extend in England to merely quasi-public records, such as court rolls of a manor; Bunb. 269; or to records of a justice of the peace; 66 Vt. 485; or to a marriage license docket; 4 D. R. (Pa.) 284; *contra, id.* 162.

The right of inspection will not exist as to the record of private suits, at least before trial, where it is sought only to gratify malice or curiosity, or to make profit by disclosing private affairs and making public scandalous matters; 72 Mich. 560; 85 *id.* 1; nor does it extend to records required by law to be kept secret, as, the proceedings of a county electrical board; 25 S. E. Rep. (Va.) 552. The right of inspection is secured by statute in most of the states, and is not dependent on interest, though in some cases it is denied if detrimental to public policy or is sought by a citizen of another state; 51 Mich. 145; 61 Ala. 310. In case of refusal, the right may be enforced; 44 Fed. Rep. 786; 39 N. J. L. 287; 37 W. Va. 266; even though the rules of the office require the records to be kept secret. The right when denied is enforced by mandamus; 53 N. J. Eq. 158, reversing 49 *id.* 474; 71 Ala. 299; 60 Mich. 643; 66 Me. 305. Injunction is usually held not to be a proper remedy; 73 Md. 289; 51 Ga. 391; 51 Mich. 145; 27 Ill. App. 36; 53 N. J. Eq. 158. The right of inspection is very

much drawn into question in cases where the right is sought to be exercised by abstract and title insurance companies. Objections to the use of public offices by the agents of such companies are made upon the ground of interference with the legitimate fees of the public officers, with the business of the office, and of possible injuries to the records. The right has been sustained in 44 Fed. Rep. 786; 17 Colo. 248; 17 *id.* 546; 38 Hun 429; 99 N. Y. 620; 12 W. N. C. (Pa.) 291; and, after some fluctuation, in 53 N. J. Eq. 158; 78 Mich. 383; 102 *id.* 55; 17 Colo. 248; 76 Ala. 49; 82 Ala. 527; 7 Colo. 200; 51 Ga. 391; 73 Md. 289 (the statute having been passed as a result of a previous decision otherwise).

Where the right is permitted, the custodian may make reasonable rules; 99 N. Y. 620; 96 Mich. 600; 17 Colo. 546; and charge reasonable fees; 102 Mich. 55. The right to inspect has been held to include the right to copy; 69 Wis. 538; 87 Minn. 372; *contra*, 89 Kan. 301; 82 Ala. 527.

See, generally, 29 Am. Law Reg. N. S. 60; 10 L. R. A. 312; 27 *id.* 82; 37 Cent. L. J. 395; PATENT.

As to parish and church registers and records, see REGISTER, PUBLIC RECORD.

RECORD BOOKS. The docket book or the minute book of the county court are not "record books." 140 Ky. 747, 131 S. W. 998.

RECORD, CONTRACT OF. See CONTRACT.

RECORD, CONVEYANCES BY. Extraordinary assurances, as private acts of parliament and royal grants.

RECORD OF NISI PRIUS. In English Law. A transcript from the issue-roll: it contains a copy of the pleadings and issue. Steph. Pl. 105.

RECORD OFFICE. This English office was established by the Public Record Office Act, 1838, which placed it under the superintendence of the Master of the Rolls, and provided for the appointment of a Deputy Keeper of the Records, who is, for practical purposes, the head of the office. The office, the full title of which is the Public Record Office, has been accommodated since 1900 in a building in Chancery Lane popularly known as the Rolls Office. Byrne. See PAPER OFFICE.

RECORDARE. A writ to bring up judgments of justices of the peace. 3 Jones N. C. 491.

RECORDARI FACIAS LOQUE-LAM. In English Practice. A writ commanding the sheriff that he cause the plaint to be recorded which is in his county, without writ, between the parties there named, of the cattle, goods, and chattels of the complainant taken and unjustly distrained as it is said, and that he have the said record before the court on a day therein named, and that he prefix the same day to the parties, that then they may be there ready to proceed in the same plaint. 2 Sell. Pl. 166. Now obsolete.

RECORDATION. The act of recording; also, a record. Stand. Dict.

RECORDATUR (Lat.). An order or allowance that the verdict returned on the nisi prius roll be recorded. Bacon, Abr. Arbitration, etc. (D).

RECORDER. A judicial officer of some cities, possessing generally the powers and authority of a judge. 3 Yeates 300; 4 Dall. 299. See 1 Const. S. C. 45.

Anciently, recorder signified to recite or testify on recollection, as occasion might require, what had previously passed in court; and this was the duty of the judges, thence called *recordeurs*. Steph. Pl. note 11.

An officer appointed to make record or enrolment of deeds and other legal instruments authorized by law to be recorded.

RECORDER OF LONDON. One of the justices of oyer and terminer, and a

justice of the peace of the *quorum* for putting the laws in execution for the preservation of the peace and government of the city. Whart. Law Lex.

An officer appointed by the corporation, but he cannot perform any judicial functions unless the crown also appoints. He is not disqualified by office from being a member of the House of Commons; but it may be taken as having been now settled that he should not seek election or re-election as member of that House, although he may retain his seat until the general election next following his appointment to the office, if he happens to have been a member at the time of his appointment. The salary is, at present, £4,000 a year. Byrne.

RECORDING ACTS. Statutes which regulate the official recording of conveyances, mortgages, bills of sale, hypothecations, assignments for the benefit of creditors, articles of agreement, and other instruments, for the purpose of informing the public, creditors and purchasers, of transactions affecting the ownership of property and the pecuniary responsibility of individual persons. See RECORD.

RECORDS, EARLY ENGLISH. For discussion, see 2 Selected Essays in Anglo-American Legal History, 169, *et seq.*

RECORDUM. A record; a judicial record. It is used in the phrase *procurator per recordum*, which is a formula employed, in pleading, for reference to a record, signifying as it appears from the record. 1 Chit. Pl. 355; 10 Me. 127.

RECOUPMENT (Fr. *recouper*, to cut again). The act of abating or recouping a part of a claim upon which one is sued by reason of a legal or equitable right resulting from a counter-claim arising out of the same transaction. The right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract. 4 Wend. 488; 22 *id.* 153; 10 Barb. 55; 13 N. Y. 151; 3 Ind. 72, 265; 9 *id.* 470; 7 Ala. n. s. 753; 27 *id.* 574; 12 Ark. 699; 17 *id.* 270; 6 B. Monr. 528; 15 *id.* 454; 3 Mich. 281; 39 Me. 382; 16 Ill. 495; 11 Mo. 415; 25 *id.* 430; 83 Ga. 212.

Recoupment is the right to set off unliquidated damages, while the right of set-off, as distinguished from recoupment, comprehends only liquidated demands, or those capable of being ascertained by calculation; 32 N. J. Eq. 225. Both these terms have a technical meaning and both are included in the same general term, counter-claim, which see.

This is not a new title in the law, the term occurring from the 14th to the 16th centuries, although it seems of late years to have assumed a new signification, and the present doctrine is said to be still in its infancy; 7 Am. L. Rev. 389. Originally it implied a mere deduction from the claim of the plaintiff, on account of payment in whole or in part, or a former recovery, or some analogous fact; 2 Co. 65; 4 *id.* 94; 5 *id.* 2, 31; 11 *id.* 51, 52. See note to *Idly v. Grew*, 6 Nev. & M. 407; *Viner, Abr. Discount*, pl. 3, 4, 9, 10; 28 Vt. 413. This meaning has been retained in many modern cases, but under the name of deduction or reduction of damages; 11 East 289; 1 Maule & S. 318, 322; 2 M. & G. 241; 7 M. & W. 314; 12 *id.* 772; 20 Conn. 204; 21 Wend. 610; 3 Dana 499; 14 Pick. 356. The word recoupment has also been applied to cases very similar to the above; 4 Den. 227; 20 Wend. 267. See 7 Am. L. Rev. 239, where recoupment is fully treated.

Recoupment as now understood seems to correspond with the *Reconvention* of the civil law, sometimes termed *demanda incidentis* by the French writers, in which the *reus*, or defendant, was permitted to exhibit his claim against the plaintiff for allowance, provided it rose out of, or was incidental to, the plaintiff's cause of action. *Euvres de Pothier*, vol. 9, p. 30; 1 White, New Rec. 293; *Voet, tit. de Judicis*, n. 78; La. Code Pr. art. 375; 4 Mart. n. s. 439; 5 *id.* 671; 12 La. Ann. 114, 170; 6 Tex. 406.

In England, as well as in some of the United States, the principles of recoupment as defined above have been recognized only in a restricted form. Under the name of reduction of damages, the defendant is allowed to show all such violations of his contract by the plaintiff as go to render the consideration less valuable, but he is

compelled to resort to an independent action for any immediate or consequential damages affecting him in other respects; 8 M. & W. 858; 3 Campb. 450; 1 C. & P. 384; 6 Barb. 387; 6 B. Monr. 528; 12 Conn. 129; 11 Johns. 547; 12 Pick. 330; 8 Humphr. 678; 9 How. 231. See 84 Ala. 496; 65 Miss. 315. But these restrictions are all gradually disappearing, and the law is assuming the form expressed in the cases cited under the definition of modern recoupment, the main reason upon which the doctrine now rests being the avoidance of circuity of action.

In Pennsylvania a defendant may avail himself, by way of recoupment or equitable defence, of a breach of warranty or of a fraudulent representation, and show that the goods sold were worth less than they would have been if they were such as they were warranted or represented to be; 120 U. S. 648.

There are some limitations and qualifications to the law of recoupment, as thus established. Thus, it has been held that the defendant is not entitled to any judgment for the excess his damages in recoupment may have over the plaintiff's claim, nor shall he be allowed to bring an independent action for that excess; 6 N. H. 431; 14 Ill. 424; 3 Mich. 281; 12 Ala. n. s. 643; 3 Hill N. Y. 171; 17 Ark. 270. See 83 Ala. 333. If recoupment is put upon the ground of a cross-action and not a mere defence for the reduction of damages, there is no reason why he should not have judgment to the extent of his injury. Such seems to be the practice in Louisiana, under the name of *reconvention*; 12 La. Ann. 170; and such will probably be the practice under those systems of pleading which authorize the court, in any action which requires it, to grant the defendant affirmative relief; 2 E. D. Sm. 317. See, also, 3 W. & S. 472; 17 S. & R. 385; 12 How. Pr. 310.

The damages recouped must be for a breach of the same contract upon which suit is brought; 3 Hill N. Y. 171; 4 Sandf. 147; 10 Ind. 329; 74 Mich. 424. See 77 Mo. 345; 95 Ill. 476; 54 Miss. 503. For example, when chattels have been sold with an express or implied warranty, and there were latent defects unknown to the purchaser, he may retain the goods without notifying the vendor, and either sue for his damages or recoup the same in an action against him for the price; 67 Wis. 129; 13 Ohio C. C. 99; even if the sale were on approval, but the contract did not limit the purchaser to the return of the property, if unsatisfactory; 56 Conn. 489; or one who has pledged stocks as collateral to a note, if sued on the note, may recoup the damages resulting from wrongful appropriation of the stocks by the pledgee; 36 U. S. App. 248; s. c. 71 Fed. Rep. 102. The surety on a note, in an action by the payee, may set up, by way of recoupment, the breach of warranty of the property sold to the maker for which the note was given; 15 App. Div. N. Y. 498; but if a surety is sued alone, he cannot recoup for a warranty in favor of his principal, without the consent of the latter; 40 S. W. Rep. (Tenn.) 482. It may be for a tort; but it seems that the tort must be a violation of the contract, and it is to be measured by the extent of this violation, and no allowance taken of malice; 10 Barb. 55; 17 Ill. 38; 4 S. & R. 249. The language of some cases would seem to imply that recoupment may be had for damages connected with the subject-matter or transaction upon which the suit is brought, but which do not constitute a violation of any obligation imposed by the contract, or of any duty imposed by the law in the making or performance of the contract; 14 Ill. 424; 17 *id.* 38. But these cases will be found to be decided with reference to statutes of counter-claim. And even in the construction of such statutes it has been doubted whether it is not better to confine the damages to violations of the contract; 8 Ind. 399; 2 Sandf. 120.

It is well established, in the absence of statutory provisions, that it is optional with the defendant whether he shall plead his cross-claim by way of recoupment, or

resort to an independent action; 14 Johns. 379; 13 Wend. 277; 12 Ala. n. s. 643; 3 Ind. 59; 21 Mo. 415. Nor does the fact of a suit pending for the same damages estop him from pleading them in recoupment, although he may be compelled to choose upon which action he shall proceed; 3 E. D. Sm. 135; 5 Watts 116. Payment after action brought, although never pleadable in answer to the action, was usually admitted in reduction of damages; 4 N. H. 557; 6 Ind. 26; 2 Bingh. n. c. 88; 7 C. & P. 1; 1 M. & W. 463. But the defendant can never recoup for damages accruing since action brought; 20 E. L. & E. 277; 4 Barb. 256; 2 Binn. 287.

The right of recoupment will usually be allowed to sureties and indorsers in cases where it would be permitted for the benefit of the principal debtor, as, for example, a successful recoupment by the maker of a note will enure to the benefit of the indorser when sued with the maker; 21 Misc. 86.

It has been maintained by some courts that the law of recoupment is not applicable to real estate. Accordingly, they have denied the defendant the right, when sued for the purchase-money, to recoup for a partial failure of title; 11 Johns. 50; 2 Wheat. 13; 12 Ark. 709; 17 *id.* 254. But most of these cases will be found denying him that right only before eviction. A confusion has been introduced by regarding failure of title and failure of consideration as convertible terms. The consideration of a deed without covenants is the mere delivery of the instrument; Rawle, Cov. 588. A failure of title in such case is not a failure of consideration, and it therefore affords no ground for recoupment. The consideration of a deed with covenants does not fail till the covenantee has suffered damages on the covenants, which in most cases does not happen till eviction, either actual or constructive. After this has happened, his right to recoup is now pretty generally admitted. This is nothing more than allowing him to recoup as soon as he can sue upon the covenants; 21 Wend. 131; 13 N. Y. 151; 3 Pick. 459; 14 *id.* 293; 6 Gratt. 305; Dart, Vend. 381; Rawle, Cov. 583.

It has been more generally admitted that where there is a failure of the consideration as to the quantity or quality of the land, the purchaser may recoup upon his covenants; 12 Ark. 699; 17 *id.* 254; 2 Kent 470; 13 Mo. 368; 20 *id.* 443; 71 Wis. 54.

Under the common-law system of pleading, the evidence of a recoupment, if going to a total failure of consideration, might be given under the general issue without notice, but if it went only to a partial failure, notice was required to prevent surprise; 6 Barb. 386; 2 N. Y. 157; 6 N. H. 497; 3 Ind. 265. This is the only way it could be admitted, for it could not be pleaded, a partial defence constituting neither a plea in bar nor in abatement. Under a notice it was admitted to aid in sustaining the general denial.

But under the new systems of practice there being no general issue to which the notice was subsidiary, the defendant is required to plead his defence whether it is in answer of the whole demand or only in reduction of damages; 6 How. Pr. 433; 11 N. Y. 352; 12 Wend. 246; 18 Mo. 368.

The effect to be given to the law of recoupment will depend, in many of the states, upon the statutes of counter-claim and offset in force. In Missouri, for instance, it is provided that if any two or more persons are mutually indebted in any manner whatever, and one of them commence an action against the other, one debt may be set against the other, although such debts are of a different nature; 1 R. S. § 3867. The term *counter-claim* under this statute is held to include both set-off and recoupment; 49 Mo. 570; the distinction between the two terms being important only from the fact that the former must arise from contract, and can only be used in an action founded on contract; while the latter may spring from a wrong, provided it arose out of the trans-

action set forth in the petition, or was connected with the subject of the action; *id.* In the case of actions arising out of contracts it has been held that nothing would be allowed by way of recoupment unless it worked a violation of some obligation imposed by the contract, or some duty imposed by the law in the making or performance of it; 2 Sandf. 120; 8 Ind. 399.

See, generally, Waterman, Set-off. Recoupment and Counter-claim: 27 Myers, Fed. Dec. 894; 10 L. R. A. 379, note; 7 Am. L. Rev. 389; 9 Am. L. Rev. 380; 8 Am. St. Rep. 63.

RECOURSE. To recur. As to indorsement without recourse, see **INDORSEMENT**.

RECOVER. To obtain by course of law; to obtain by means of an action; or by the judgment rendered in an action; to succeed in an action.

RECOVERED. See **JUDGMENT RECOVERED**.

RECOVERER. The demandant in a common recovery, after judgment has been given in his favor, assumes the name of recoverer.

RECOVERY. The restoration of a former right, by the solemn judgment of a court of justice. 3 Murph. 169. See 28 L. J. C. P. 312; 8 Q. B. D. 470.

In its general use, recovery signifies a collection of a debt by process and course of law. 76 Cal. 269.

The phrase *right of recovery* is used to express the possession of a right of action under the existing facts.

A common recovery is a judgment obtained in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit. Bacon, Tracts 148.

A true recovery, usually known by the name of recovery simply, is the procuring a former right by the judgment of a court of competent jurisdiction: as, for example, when judgment is given in favor of the plaintiff when he seeks to recover a thing or a right.

Common recoveries are considered as mere forms of conveyance or common assurances: although a common recovery is a fictitious suit, yet the same mode of proceeding must be pursued, and all the forms strictly adhered to, which are necessary to be observed in an adversary suit. The first thing, therefore, necessary to be done in suffering a common recovery is that the person who is to be the demandant, and to whom the lands are to be adjudged, should sue out a writ or *praecipe* against the tenant of the freehold; whence such tenant is usually called the tenant to the *praecipe*. In obedience to this writ the tenant appears in court, either in person or by his attorney; but, instead of defending the title to the land himself, he calls on some other person, who upon the original purchase is supposed to have warranted the title, and prays that the person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those he shall lose by the defect of his warranty. This is called the voucher, *vocatio*, or calling to warranty. The person thus called to warrant, who is usually called the voucher, appears in court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The defendant then desires leave of the court to impart or confer with the voucher in private, which is granted of course. Soon after the defendant returns into court, but the voucher disappears or makes default, in consequence of which it is presumed by the court that he has no title to the lands demanded in the writ, and therefore cannot defend them; whereupon judgment is given for the demandant, and the defendant is to recover the lands in question against the tenant, and for the tenant to recover against the voucher lands of equal value in recompense for those so warranted by him, and now lost by his default. This is called the recompense of recovery in value; but as it is customary for the creditor of the voucher, who is usually called the common voucher, the tenant can only have a nominal and not a real recompense for the land thus recovered against him by the demandant. A writ of *habere facias* is then sued out directed to the sheriff of the county in which the lands thus recovered are situated; and on the execution and return of the writ the recovery is completed. The recovery here described is with single voucher; but a recovery may be, and is frequently, suffered with double, treble, or further voucher, as the exigency of the case may require, in which case there are several judgments against the several vouchers.

Common recoveries were invented by the ecclesiastics in order to evade the statute of mortmain, by which they were prohibited from purchasing, or receiving under the pretence of a free gift,

any land or tenements whatever. They have been used in some states for the purpose of breaking the entail of estates. See, generally, Cruise, Digest, tit. 36; 2 Wms. Saund. 48, n. 7; 4 Kent 687; Pigot, Comm. Rec. passim. See Chall. Real P. 279; Big. Estop. 418.

All the learning in relation to common recoveries is nearly obsolete, as they are out of use. Rey, a French writer, in his work *Des Institutions Judiciaires de l'Angleterre*, tom. ii. p. 221, points out what appears to him the absurdity of a common recovery. As to common recoveries, see 3 S. & R. 485; 9 id. 330; 1 Yeates 244; 4 id. 413; 1 Whart. 130, 151; 2 Rawle 168; 6 Pa. 45; 2 Haist. 47; 5 Mass. 483; 6 id. 338; 8 id. 34; 3 Harr. & J. 232.

See **POSTLIMINIUM**.

RECREANT. A coward; a poltroon. 3 Bla. Com. 840.

RECRIMINATION. In Criminal Law. An accusation made by a person accused against his accuser, either of having committed the same offence or another.

In general, recrimination does not excuse the person accused nor diminish his punishment, because the guilt of another can never excuse him. But in applications for divorce on the ground of adultery, if the party defendant can prove that the plaintiff or complainant has been guilty of the same offence, the divorce will not be granted; 2 Bish. Mar. & D. 340; 1 Hagg. Cons. 144; 4 Eccl. 360. The laws of Pennsylvania contain a provision to the same effect. See 1 Hagg. Eccl. 790; 8 id. 77; 1 Hagg. Cons. 147; Dig. 24. 3. 39; 48. 3. 13. 5; 1 Add. Eccl. 411; 2 Colo. App. 3; COMPENSATION; CONDONATION; DIVORCE.

RECRUITING. In the Espionage Act, § 3: The gaining of fresh supplies of men for the military forces, by draft as well as otherwise. 249 U. S. 53.

RECTIFIER. As used in the internal revenue laws, this term is not confined to a person who runs spirits through charcoal; but is applied to any one who rectifies or purifies spirits in any manner whatever, or who makes a mixture of spirits with anything else, and sells it under any name. 3 Ben. 73; 3 C. 2 Am. L. T. Rep. 23.

RECTOR. In Ecclesiastical Law. One who rules or governs: a name given to certain officers of the Roman church. Dict. Canonique.

In English Law. He that hath full possession of a parochial church. A rector (or parson) has for the most part the whole right to all the ecclesiastical dues in his parish; where, as in theory of law, a vicar has an appropriator over him, entitled to the best part of the profits, to whom the vicar is, as it were, perpetual curate, with a standing salary. Cowell; 1 Bla. Com. 384; 2 Steph. Com. 677. See **PARISH PRIEST**.

RECTORY. In English Law. Corporate real property, consisting of a church, glebe-lands, and tithes. 1 Chitty, Pr. 163.

RECTUM (Lat.). Right. *Breve de recto*, writ of right. In Old English Law. Right; law. A term peculiar to the law of England. What in the written (civil) law is called *jus*, in the law of England is said to be *rectum*. Burrill; Fleta, 6. 1. 1.

A right claimed by a party; a right to land claimed by the writ called a writ of right, (*breve de recto*). *Id.*

Also, an accusation or charge of crime; suspicion of crime. *Id.*; Spelman. In the Register, *rectum* occurs as a form of this word, closely resembling the French *rette*, from which it is undoubtedly derived. *Id.*; Reg. Orig. 77 b.

RECTUS (Lat.). Right; upright; straight; straightforward; direct. See **RECTUM**.

RECTUS IN CURIA (Lat. right in court). The condition of one who stands at the bar, against whom no one objects any offence or prefers any charge.

When a person outlawed has reversed his outlawry, so that he can have the benefit of the law, he is said to be *rectus in curia*. Jacob, Law Dict.

RECUPERATORES (Lat.). In Roman Law. A species of judges originally

established, it is supposed, to decide controversies between Roman citizens and strangers concerning the right to the possession of property requiring speedy remedy, but gradually extended to questions which might be brought before ordinary judges.

After the enlargement of their powers, the difference between them and judges, it is supposed, was simply this:—if the prætor named three judges, he called them *recuperatores*; if one, he called him *judez*. But opinions on this subject are very various. Colman, *De Romano judicio recuperatorio*. Cicero's oration *pro Cæcili*, 1, 3, was addressed to *recuperatores*.

The result of the latest investigation of this subject is that, while ordinary cases were referred to the college of *centumviri*, in cases where the prætor wished to obtain a speedy decision he had power to appoint an extraordinary college of three or five *recuperatores* whose instructions required them to find a verdict within a designated time. Such a course was often required in cases involving personal liberty, and the result was that the jurisdiction of the *centumviri* over all such actions became displaced by the court of *recuperatores*. The latter were also appointed in cases to which aliens were parties. Like the *judices* the *recuperatores* were private persons; Solim, *Inst. Rom. L. 150, n. 3*.

RECUSABLE. See **IRRECUSABLE**; **CONTRACTUAL OBLIGATION**.

RECUSANTS. In English Law. Persons who wilfully absent themselves from their parish church, and on whom penalties were imposed by various statutes passed during the reigns of Elizabeth and James I. Whart. Dict.

Those persons who separate from the church established by law. *Termes de la Ley*.

RECUSATIO TESTIS (Lat.). Rejection of a witness, on the grounds of incompetency.

RECUSATION. In Civil Law. A plea or exception by which the defendant requires that the judge having jurisdiction of the cause should abstain from deciding, upon the ground of interest, or for a legal objection to his prejudice.

A recusation is not a plea to the jurisdiction of the court, but simply to the person of the judge. It may, however, extend to all the judges, as when the party has a suit against the whole court. Pothier, *Proced. Civ. 1ère part. ch. 2, s. 5*. It is a personal challenge of the judge for cause. See 2 La. 390; 6 id. 134.

The challenge of jurors. La. Code Pract. art. 499, 500. An act, of what nature soever it may be, by which a strange heir, by deeds or words, declares he will not be heir. Dig. 29. 2. 95. See, generally, 1 Hopk. Ch. 1; 5 Mart. La. 292.

RED BOOK OF THE EXCHEQUER. An ancient record, wherein are registered the holders of lands *per baroniam* in the time of Henry III., the number of hides of land in certain counties before the conquest, and the ceremonies on the coronation of Eleanor, wife of Henry III., compiled by Alexander de Swenford, archdeacon of Salop and treasurer of St. Paul's, who died in 1246. 31 Hen. III.; Jacob, Law Dict.; Cowell.

RED TAPE. In a derivative sense, order carried to fastidious excess; system run out into trivial extremes. 55 Ga. 434.

REDDENDO SINGULA SINGULIS (Lat.). Referring particular things to particular persons. For example: when two descriptions of property are given together in one mass, both the next of kin and the heir cannot take, unless in cases where a construction can be made *reddendo singula singulis*, that the next of kin shall take the personal estate, and the heir-at-law the real estate. 14 Ves. 490. See 11 East 513, n.; Bac. Abr. *Conditions* (L).

REDDENDUM (Lat.). That clause in a deed by which the grantor reserves something new to himself out of that which he granted before. It usually follows the *tenendum*, and is generally in these words, "yielding and paying." In every good *reddendum* or reservation these things must concur: namely, it must be in apt words; it must be of some other thing issuing or coming out of the thing granted, and not

a part of the thing itself nor of something issuing out of another thing; it must be of a thing on which the grantor may resort to distrain; it must be made to one of the grantors, and not to a stranger to the deed. See 3 Bla. Com. 299; Co. Litt. 47; Shepp. Touchst. 80; Cruise, Dig. tit. 32, c. 24, s. 1; Dane, Abr. Index.

REDDIT SE (Lat. he has rendered himself). In English Practice. An indorsement made on the bail-piece when a certificate has been made by the proper officer that the defendant is in custody. Com. Dig. Bail (Q 4).

REDDITION. A surrendering or restoring; also, a judicial acknowledgment that the thing in demand belongs to the demandant, and not to the person surrendering. Cowell.

REDEEM. To purchase back; to regain, as mortgaged property by paying what is due; to receive back by paying the obligation. 47 Ohio St. 156. See 47 N. J. Eq. 170.

REDEMPTION (Lat. re, back, emptio, a purchase).

A purchase back by the seller from the buyer. It is applied to denote the performance of the conditions upon performance of which a conditional sale is to become ineffective as a transfer of title, or, more strictly, a right to demand a reconveyance becomes vested in the seller. In the case of mortgages, this right is a legal right until a breach of conditions, when it becomes an equitable right, and is called the equity of redemption. See MORTGAGE; EQUITY OF REDEMPTION.

REDEMPTIONES (Lat.). Heavy fines. Distinguished from Misericordia, which see.

REDHIBITION. In Civil Law. The avoidance of a sale on account of some vice or defect in the thing sold, which renders its use impossible or so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice. La. Civ. Code, art. 2496.

This is essentially a civil-law right. The effect of the rule expressed by the maxim *caveat emptor* is to prevent any such right at common law, except in cases of express warranty. 2 Kent 374; Sugd. Vend. 222.

REDHIBITORY ACTION. In Civil Law. An action instituted to avoid a sale on account of some vice or defect in the thing sold which renders its use impossible or so inconvenient and imperfect that it must be supposed the buyer would not have purchased it had he known of the vice. La. Civ. Code 2496.

REDHIBITORY DEFECT (OR VICE). A defect in an article sold, for which the seller may be compelled to take it back; a defect against which the seller is bound to warrant.

REDISSEISOR. See DISSEISIN.

REDITUS ALBI (Lat.). A rent payable in money; sometimes called white rent, or blanche farm. See ALBA FIRMA.

REDITUS NIGRI (Lat.). A rent payable in grain, work, and the like; it was also called black mail. This name was given to it to distinguish it from *reditus albi*, which was payable in money.

REDITUS QUIETI. Quit rents. 1 Steph. Com. 676.

REDMANS, or RADMANS. Men who, by the tenure or custom of their lands, were to ride with or for the lord of the manor, about his business. Domesd.

REDOBATORES (L. Lat.). Those that buy stolen cloth and turn it into some other color or fashion, that it may not be recognized. Redubbers, *q. v.* Barrington, Stat., 2d ed. 87, n.; Co. 3d Inst. 134; Britton, c. 29.

REDOUND. "Redound" signifies to conduce, in the consequence, to contribute, to result. 3 Met. (Ky.) 526.

REDRAFT. In Commercial Law. A bill of exchange drawn at the place where another bill was made payable and where it was protested, upon the place where the first bill was drawn, or, when there is no regular commercial intercourse rendering that practicable, then in the next best or most direct practicable course. 1 Bell, Com. 406. See RE-EXCHANGE.

REDRESS. The act of receiving satisfaction for an injury sustained. For the mode of obtaining redress, see REMEDIES; 1 Chitty, Pr. Anal. Table.

REDUBBERS. In Criminal Law. Those who bought stolen cloth and dyed it of another color to prevent its being identified, were anciently so called. Co. 3d Inst. 134. See REDOBATORES.

REDUCTION. In Scotch Law. An action for the purpose of setting aside or rendering null and void some deed, will, right, etc. Bell, Dict.

REDUNDANCY. Matter introduced in an answer or pleading which is foreign to the bill or article.

The respondent is not to insert in his answer any matter foreign to the articles he is called upon to answer, although such matter may be admissible in a plea; but he may, in his answer, plead matter by way of explanation pertinent to the articles, even if such matter shall be solely in his own knowledge, and to such extent incapable of proof; or he may state matter which can be substantiated by witnesses; but in this latter instance, if such matter be introduced into the answer, and not afterwards put in the plea, or proved, the court will give no weight or credence to such part of the answer. Per Lushington, 3 Curt. Eccl. 543.

A material distinction is to be observed between redundancy in the allegation and redundancy in the proof. In the former case, a variance between the allegation and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate because more is proved than is alleged, unless the matter superfluously proved goes to contradict some essential part of the allegation; 1 Greenl. Ev. § 67; 1 Stark. Ev. 401.

RE-ENTRY. The act of resuming the possession of lands or tenements in pursuance of a right which the party exercising it reserved to himself when he quit his former possession.

Conveyances in fee reserving a ground-rent, and leases for a term of years, usually contain a clause authorizing the proprietor to re-enter in case of the non-payment of rent, or of the breach of some covenant in the lease, which forfeits the estate. Without such reservation he would have no right to re-enter for the mere breach of a covenant, although he may do so upon the breach of a condition which, by its terms, is to defeat the estate granted; 2 Bingh. 13; 1 M. & Ry. 694; Tayl. Landl. & T. § 290; Woodf. Landl. & T. 310.

When a landlord is about to enforce his right to re-enter for the non-payment of rent, he must make a specific demand of payment, and be refused, before the forfeiture is complete, unless such demand has been dispensed with by an express agreement of the parties; 18 Johns. 451; 6 S. & R. 151; 6 Halst. 270; 7 Term 117; 5 Co. 41. In the latter case, a mere failure to pay, without any demand, constitutes a sufficient breach, upon which an entry may at any time subsequently be made; 2 N. Y. 147; 2 N. H. 164; 2 Dougl. 477; 2 B. & C. 490. The demand may be in the form of a notice to quit; 35 Neb. 766.

The requisites of a demand upon which to predicate a forfeiture for the non-payment of rent, at common law, are very strict. It must be for the payment of the precise sum due upon the day when, by the

terms of the lease, it becomes payable; if any days of grace are allowed for payment, then upon the last day of grace; Co. Litt. 203; 7 Term 117; 2 N. Y. 147; see 55 N. J. L. 217; at a convenient time before sunset, while there is light enough to see to count the money; 17 Johns. 66; 1 Saund. 287; if the place appointed for payment, or if no particular place has been specified in the lease, then at the most public place on the land, which, if there be a dwelling-house, is the front door; 4 Wend. 318; 18 Johns. 450; 1 How. 211; Co. Litt. 202 a; notwithstanding there be no person on the land to pay it; Bac. Abr. Rent (1); and if the re-entry clause is coupled with the condition that no sufficient distress be found upon the premises, the landlord must search the premises to see that no such distress can be found; 15 East 286; 6 S. & R. 151; 8 Watts 51.

A re-entry, at common law, for condition forfeited in a lease, is void unless the evidence shows that the common-law forms have been complied with. A mere taking possession of the premises, when unoccupied, is not sufficient; 15 Wall. 475.

But the statutes of most of the states, following 4 Geo. II. c. 28, now dispense with the formalities of a common-law demand, by providing that an action of ejectment may be brought as substitute for such a demand in all cases where no sufficient distress can be found upon the premises. And this latter restriction disappears entirely from the statutes of such of the states as have abolished distress for rent.

The clause of re-entry for non-payment of rent operates only as a security for rent; for at any time before judgment is entered in the action to recover possession the tenant may either tender to the landlord, or bring into the court where the action is pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the landlord, and in such case all further proceedings will cease. And in some states, even after the landlord has recovered possession, the tenant may in certain cases be reinstated upon the terms of the original lease, by paying up all arrearages and costs; Tayl. Landl. & T. 302. See, generally, Wms. R. P. 285.

The acceptance by a landlord, after his right of possession is fixed, of property from the tenant in payment of rent that had accrued, is no waiver of his right to enter; 44 Ill. App. 61; but the acceptance of rent accruing after breach of a condition in a lease, with full knowledge of the breach, is a waiver of the right to declare a forfeiture and re-enter; 12 So. Rep. (Ala.) 61. See 6 Misc. Rep. 408.

But the courts will not relieve against a forfeiture which has been wilfully incurred by a tenant who assigns his lease, or neglects to repair or to insure, contrary to his express agreement, or if he exercises a forbidden trade, or cultivates the land in a manner prohibited by the lease; for in all such cases the landlord, if he has reserved a right to re-enter, may at once resume his former possession and avoid the lease; 2 Price 206, n.; 2 Mer. 459; 9 C. & P. 703; 1 Dall. 210; 9 Mod. 112; 3 V. & B. 29; 12 Ves. 291.

Where the landlord is justified in re-entering and taking possession of the premises, the lessee can recover no damages for the loss of the portion of the term, or for injury to the business, but may recover for property destroyed or any unnecessary damage thereto; 72 Wis. 559.

RE-EXAMINATION. A second examination of a thing. A witness may be re-examined, in a trial at law, in the discretion of the court; and this is seldom refused. In equity, it is a general rule that there can be no re-examination of a witness after he has once signed his name to the deposition and turned his back upon the commissioner or examiner. The reason of this is that he may be tampered with, or induced to retract or qualify what he has sworn to; 1 Mer. 130.

RE-EXCHANGE. The expense in-

curring by a bill being dishonored in a foreign country where it is made payable and returned to that country in which it was made or indorsed and there taken up. 11 East 265; 2 Campb. 65. 1 Pars. Notes & B. 648. See Danl. Neg. Inst. 1445.

The loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed.

It is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the then rate of exchange at the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor. The holder may draw a sight bill for such sum on either the drawer or one of the indorsers. Such bill is a "redraft"; Benj. Chalm. Bills, art. 231. See L. R. 3 App. Cas. 146; Byles, Bills 444.

The drawer of a bill is liable for the whole amount of re-exchange occasioned by the circuitous mode of returning the bill through the various countries in which it has been negotiated, as much as for that occasioned by a direct return; 11 East 265; 3 B. & P. 335. And see 10 La. 562; 24 Mo. 65; 8 Watts 545; 10 Metc. 375; 7 Cra. 500; 4 Wash. C. C. 310; 2 How. 711, 764; 9 Exch. 25; 6 Moo. P. C. 314.

In some states legislative enactments have been made which regulate damages on re-exchange. These damages are different in the several states; and this want of uniformity, if it does not create injustice, must be admitted to be a serious evil. See 23 Pa. 137; 4 Johns. 119; 4 Cal. 395; 3 Ind. 53; 8 Ohio 292; MEASURE OF DAMAGES.

RE-EXTENT. A second extent on lands or tenements, on complaint that the former was partially made, etc. Cowell.

REEF. A large vein of auriferous quartz;—so called in Australia. Hence, any body of rock yielding valuable ore. Webster.

REEVE. An ancient English officer of justice, inferior in rank to an alderman.

He was a ministerial officer appointed to execute process, keep the king's peace, and put the laws in execution. He witnessed all contracts and bargains, brought offenders to justice and delivered them to punishment, took bail for such as were to appear at the county court, and presided at the court or folcmote. He was also called *gerefa*.

There were several kinds of reeves: as, the *shire-gerefa*, shire-reeve or sheriff; the *heh-gerefa*, or high-sheriff; *tithing-reeve*, burghor or borough-reeve.

REFALO. A word composed of the three syllables *re. fa. lo.*, for *recordari facias loquelam*. 2 Sell. Pr. 160; 8 Dowl. 514.

REFARE. To bereave, take away, or rob. Cowell.

REFECTION (Lat. *re*, again, *facio*, to make). In Civil Law. Reparation; re-establishment of a building. Dig. 19. 1. 6. 1.

REFEREE. A person to whom has been referred a matter in dispute, in order that he may settle it. His judgment is called an award. See ARBITRATOR; REFERENCE.

In England. Official referees are paid and permanent officers of the court. Byrne.

REFEREES, COURT OF. In the passage of private bills through the house of commons, the practice was adopted in 1864 of the appointment of referees on such bills, consisting of the chairman of ways and means and not less than three other persons to be appointed by the speaker. The referees were formed into one or more courts, three at least being required to constitute each court, a member in every case being chairman, but receiving no salary. The referees inquired into the proposed works, etc., and reported to the house. The committees of the house on any bill might also refer any question to

the referees for their decision. It was also ordered in 1864 that the referees should decide on all petitions as to the right of the petitioner to be heard, i. e. his *locus standi*. A court of referees was specially constituted for the adjudication of this right, called *locus standi*. A series of reports of the court of referees on private bills in parliament, called *Locus Standi* reports, has been published since 1867.

Also, in England, the National Insurance Act of 1911 provides for the appointment of "courts of referees" in connection with that act, and enacts that each such court shall consist of one or more members chosen to represent employers, an equal number chosen to represent workmen, and a chairman appointed by the Board of Trade. Byrne.

REFERENCE. In Contracts. An agreement to submit to certain arbitrators matters in dispute between two or more parties, for their decision and judgment.

In Mercantile Law. A direction or request by a party who asks a credit to the person from whom he expects it, to call on some other person named, in order to ascertain the character or mercantile standing of the former. See PRIVILEGED COMMUNICATIONS.

In Practice. The act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court.

That part of an instrument of writing where it points to another for the matters therein contained. For the effect of such reference, see 1 Pick. 27; 15 id. 66; 17 Mass. 443; 7 Halst. 25; 14 Wend. 619; 10 Conn. 422; 3 Me. 393; 4 id. 14, 471. The thing referred to is also called a reference.

REFERENDARIUS (Lat.). An officer by whom the order of causes was laid before the Roman emperor, the desires of petitioners made known, and answers referred to them. Vicat, Voc. Jur.; Calvinus, Lex.

A king's chancellor at the time of the conquest. 1 Social England 186. See CANCELLARIUS.

REFERENDUM (Lat.). In International Law. A note addressed by an ambassador to his government, submitting to its consideration propositions made to him touching an object over which he has no sufficient power and is without instructions. When such a proposition is made to an ambassador, he accepts it *ad referendum*; that is, under the condition that it shall be acted upon by his government, to which it is referred.

In Municipal Law. The submission of a proposed law to the voting citizens of a country for their ratification or rejection. A mode of appealing from an elected body to the whole body of voters.

The laws are first passed upon by the legislature and then referred to the people for their final ratification.

This method of government is supposed to have originated in Switzerland; but it has in effect been employed in the United States since the revolution, in country, city, township, and school district governments, especially in New England. It has also, during the same time, been the practice in the United States for new state constitutions to be submitted to popular vote after they have been prepared by a convention of delegates elected by the people.

The referendum has been introduced in some local communities in Belgium, and is advocated by some of the minor political parties in the United States and in England. The system of submitting liquor laws to the decision of the people concerned, which has long been practised in the United States, is steadily extending and is usually held to be constitutional by the courts; 42 Conn. 364; 54 Ga. 317; 8 La. Ann. 341; 103 Mass. 27; 4 Cal. 385; 73 Pa. 491; 7 Cra. 382.

A correlative of the referendum is known as the *initiative*, which is an authority given to the people to propose legislation.

An act has recently been passed in Nebraska which enables the voters of cities and towns to adopt the referendum and also the initiative under the following principles: Fifteen per cent. of the voters may propose ordinances by petition, and twenty per cent. of the voters may compel the city council and mayor to submit proposed ordinances to a popular vote. As for ordinances passed by the city council, of its own initiative, they are not to go into effect for thirty days, and if, meantime, five per cent. of the voters petition for the submission of any ordinance so passed to the people, the same must be so submitted and must receive the approval of a majority of the voters before going into effect. A petition from ten per cent. of the voters obliges the city government to submit the proposed ordinance at a special election held within twenty days. Only ordinances relating to the immediate preservation of the public peace and health, and items of appropriations for current expenditures, are excepted from the provisions of the referendum law. 56 Alb. L. J. 33.

See Oberholtzer, The Referendum in America: LOCAL OPTION; DELEGATION; LEGISLATIVE POWER.

REFORM. To reorganize; to rearrange. Thus, the jury "shall be reformed by putting to and taking out of the persons so impanelled." Stat. 3 Hen. VIII. c. 12; Bacon, Abr. Juries (A).

To reform an instrument in equity is to make a decree that a deed or other agreement shall be made or construed as it was originally intended by the parties, when an error or mistake as to a fact has been committed. A contract has been reformed although the party applying to the court was in the legal profession and he himself drew the contract, it appearing clear that it was framed so as to admit of a construction inconsistent with the true agreement of the parties: 1 S. & S. 210; 3 Russ. 424. But a contract will not be reformed in consequence of an error of law; see 1 Story, Eq. Jur. 109; 1 Russ. & M. 418; 1 Chitty, Fr. 124; 159 Pa. 531; nor unless the mistake is mutual; 49 Mo. App. 255; see 142 U. S. 417; and only as between the original parties, or those claiming under them in priority, including purchasers with notice; 81 Me. 525. Equity will not reform instruments which express an intention of the parties at the time they are made, based on the knowledge then possessed by them, though their intention would have been different if they had been better informed; 69 Miss. 891.

A person who seeks to rectify a deed on the ground of mistake must establish in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all the parties down to the time of its execution; and also must be able to show exactly and precisely the form to which the deed ought to be brought: 4 De G. & J. 265; 68 Hun 299; 16 Or. 412; 142 U. S. 417. See 50 Ark. 179; 31 Fla. 73; 78 Hun 462. Before commencing an action to reform a deed, demand must be made on the grantee; 133 Ind. 19; 77 id. 74. Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation; Ad. Eq. 171; 14 N. H. 175. But if there is mistake on one side and fraud on the other, there is a case for reformation; 44 N. Y. 325; Bisph. Eq. § 469; 142 U. S. 417.

A lease will not be reformed in equity, so as to make it conform to another lease, where both leases have the same legal effect, as judicially construed; 159 Pa. 350.

Where a deed does not express the intention of the parties at the time of its execution, equity will afford relief and decree a reformation; 39 U. S. App. 162.

A clerical mistake by one party at the time of executing the contract, unknown to the other, for which the latter is not responsible, will be sufficient ground for such relief and decree; 80 Fed. Rep. 46.

Where a policy of insurance was issued

to a receiver of property, there being a contest as to the title to the property held by the receiver, the real owner, having established his title, may have the policy reformed, or, if the intent of the parties appears on its face, no reformation is necessary in order to enable the real owner to maintain an action on it; 7 U. S. App. 325.

The correction of a written instrument for fraud or mistake in its execution requires clear, unequivocal, and convincing evidence; 144 U. S. 154.

Reformation will not be decreed against *bona fide* purchasers for value; 15 U. S. App. 79.

Where a bid for certain public work contained an error in the amount for which it was offered to do the work, and the bidder sought to rescind his offer, it was held that equity would not reform a written contract unless a mistake is proved to be the mistake of both parties, but may rescind and cancel a contract upon the ground of a mistake of one party as to facts material to the contract; 83 Fed. Rep. 255.

See MISTAKE.

REFORM ACT. A name given to the Stat. 2 Wm. IV. ch. 45, passed to amend the representation of the people in England and Wales. This statute introduced extended amendments into the system of electing members of the House of Commons. Abbott.

REFORMATORY. An institution or place in which efforts are made, either to cultivate the intellect or instruct the conscience or improve the conduct where the inmates voluntarily submit themselves to its instruction or discipline or are forcibly detained therein. 49 Conn. 34. See PRISONER.

The most famous reformatory is at Elmira, New York, under the control, for years, of Z. R. Brockway. Its annual reports contain much valuable matter on the subject of criminology.

REFRESHING THE MEMORY. To revive the knowledge of a subject by having a reference to something connected with it.

In the ascertainment of facts of which judges are bound to take judicial notice, as in the decision of matters of law which it is their office to know, they may refresh their memory and inform their conscience from such sources as they deem most trustworthy; 137 U. S. 216; Gresley, Eq. Ev. pt. 3, c. 1; 17 How. 557; 91 U. S. 37; 61 Me. 178.

As to witnesses, see MEMORANDUM.

REFUND. To pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid.

On a deficiency of assets, executors and administrators *cum testamento annexo* are entitled to have refunded to them legacies which they may have paid, or so much as may be necessary to pay the debts of the testator; and in order to insure this they are generally authorized to require a refunding bond. See Bac. Abr. Legacies (H).

REFUNDING BOND. See REFUND.

REFUSAL. The act of declining to receive or to do something.

A grantee may refuse a title, see ASSENT; one appointed executor may refuse to act as such. In some cases, a neglect to perform a duty which the party is required by law or his agreement to do will amount to a refusal.

The word is often used to indicate an option; as, the refusal of a house. See OFFER; CONTRACT.

REFUSE. To deny a request or demand. 113 Ind. 206. See RAIL.

REFUSE MATTER. That which is in fact noisome and has been refused or rejected by the owner as worthless. 68 Conn. 101.

REGALIA. A privilege, prerogative, or right of property pertaining to a sovereign. The regalia includes the power of

judicature of life and death, of war and peace, of masterless goods as estrays; of assessments, and of minting money.

In England the term was sometimes applied to things, as the crown and sceptre, etc., and sometimes to the dignity, power, and pecuniary rights of the king. The term differs from sovereignty as being applicable to both things and to rights to things, and also as not being inherent in or inseparable from the sovereign power, for regalia may be alienated, either with or without the consent of parliament. 1 Hall. Int. Law 150.

Some writers divide the royal prerogative into *majora* and *minora regalia*, the former including the regal dignity and power, the latter the revenue or fiscal prerogatives of the crown. R. & L. Dict.

Upon the breaking up of the Roman Empire, the princes and cities which declared themselves independent appropriated to themselves those parts in which nature, most rich and liberal, yields extraordinary products. These portions or reserved rights were called *regalia*. 17

Also, emblems of royalty, indicia of sovereignty. Abbott.

REGARD, COURT OF. See COURT OF REGARD.

REGARD OF THE FOREST. The oversight or inspection of the forest or the office and province of the regarider, who is to go through the whole forest, and every bailiwick in it, before the holding of the sessions of the forest, or justice-seat, to see and inquire after trespassers, and for the survey of dogs. R. & L. Dict.: Manw.

REGARDANT (French, *regardant*, seeing or vigilant). A villain regardant was one who had the charge to do all base services within the manor, and to see the same freed of annoyances. Co. Litt. 120; 2 Bla. Com. 93.

REGARDED. See REASONABLY REGARDED.

REGE INCONSULTO. A writ issued from the sovereign to the judges not to proceed in a cause which may prejudice the crown, until advised. Jenk. Cent. 97.

REGENCY. The authority of the person in monarchical countries invested with the right of governing the state, in the name of the monarch, during his minority, absence, sickness, or other inability.

REGENT. A ruler; a governor. The term is usually applied to one who governs a regency, or rules in the place of another.

In the canon law, it signifies a master or professor of a college. *Dict. du Dr. Can.*

It sometimes means simply a ruler, director, or superintendent; as in New York, where the board who have the superintendence of all the colleges, academies, and schools are called the regents of the University of the state of New York.

REGIAM MAJESTATEM (Lat.). An ancient book purporting to contain the law of Scotland, and said to have been compiled by king David, who reigned 1124-1153. It is not part of the law of Scotland, though it was ordered to be revised with other ancient laws of Scotland by parliaments of 1405 and 1407. Stair, Inst. 12, 508. So Craig, Inst. 1. 8. 11; Scott, Border Antiquary, prose works 7, 30; but Erskine, Inst. b. 1, tit. 1, § 13, and Ross 60, maintain its authenticity. It is cited in some modern Scotch cases. 2 Swint. 409; 3 Bell, Hou. L. It is, according to Dr. Robertson, a servile copy of Glanville. Robertson, Hist. Charles V. 282.

REGICIDE (Lat. *rex*, king, *cædere*, to kill, slay). The killing of a king, and, by extension, of a queen. *Théorie des Lois Criminelles*, vol. 1, p. 300.

REGIDOR. In Spanish Law. One of a body, never exceeding twelve, who formed a part of the *ayuntamiento*, or municipal council, in every capital of a jurisdiction in the colonies of the Indies.

The office of a regidor was held for life; that is to say, during the pleasure of the supreme authority. In most places the office was purchased; in some cities, however, they were elected by persons of the district, called *capitulares*. 13 Pet. 442, note.

REGIME DOTAL. See DOTAL PROPERTY.

REGIMIENTO. In Spanish Law. The body of regidores, who never exceeded twelve, forming a part of the municipal council, or *ayuntamiento*, in every capital of a jurisdiction. 12 Pet. 442, note.

REGINA. The queen. English.

REGIO ASSENSU. A writ whereby the sovereign gives his assent to the election of a bishop. Reg. Orig. 294.

REGISTER. A book containing a record of facts as they occur, kept by public authority; a register of births, marriages, and burials.

In England, where there is a state church, which has authority to legislate with respect to parish records, parish records are by law invested with the characteristics of public records; 1 Salk. 281; Stark. Ev., 4th ed. 299. But in the United States where there is no religion established by law, church registers, in the absence of statutory provisions, are not regarded as public records; 10 Allen 161; 16 Mo. 24; 47 id. 521; 12 How. 472.

Entries in the baptismal register of a church, made by a clergyman in the regular discharge of his duties, are admissible in evidence after his death, though there is no law requiring such records to be kept. Ordinarily such entries are admissible only for the purpose of proving the fact and date of baptism, and not of other matters therein stated, such as the date of the birth of the child; 52 Md. 708; 92 Mass. 161; 3 Wall. 175.

These registers, when admissible, are not, in general, evidence of any fact not required to be recorded in them; 37 Kan. 298; 47 Mo. 521; 51 Hun 639; 61 Mich. 471; 8 Me. 75; 3 Wall. 175. They have sometimes been admitted in evidence as being made by a third person in the discharge of an official duty; 92 Mass. 161; 115 Mass. 167; 52 Md. 708; 3 Wall. 75. See DECLARATIONS.

Statutes have been enacted in several states which give to such records, in a measure, their common-law importance. See 5 Pet. 475; 74 Wis. 849; 37 Kan. 298; 47 Md. 521; 133 Mass. 242.

In Pennsylvania, the registry of births, etc., made by any religious society in the state is evidence, by act of assembly, but it must be proved as at common law; 6 Binn. 416. A copy of the register of births and deaths of the Society of Friends in England, proved before the lord mayor of London by an *ex parte* affidavit, was allowed to be given in evidence to prove the death of a person; 1 Dall. 2; and a copy of a parish register in Barbadoes, certified to be a true copy by the rector, proved by the oath of a witness, taken before the deputy secretary of the island and notary public, under his hand and seal, was held admissible to prove pedigree, the handwriting and office of the secretary being proved; 10 S. & R. 383. In North Carolina, a parish register of births, marriages, and deaths, kept pursuant to the statute of that state, is evidence of pedigree; 2 Murph. 47. In Connecticut, a parish register has been received in evidence; 2 Root 99. See 15 Johns. 226; 1 Phill. Ev. 305; 1 Curt. 755; 6 Eccl. 452.

The certificate of registry granted to the person or persons entitled thereto, by the collector of the district, comprehending the port to which any ship or vessel shall belong; more properly, the registry itself. For the form, requisites, etc., of certificate of registry, see Acts of Cong. Dec. 31, 1792, 1 Stat. at L. 287, § 9; May 6, 1864, 13 Stat. at L. 69, § 4; Desty, Com. & Nav. § 4155; 3 Kent 141. See 1 Cra. 158; 9 Pet. 682; 19 How. 76; 3 Wheat. 601; 1 Newb.

309; 1 Wash. C. C. 125; 1 Mas. 306; 1 Blatch. & H. 52.

REGISTER, REGISTRAR. An officer authorized by law to keep a record called a register or registry: as, the register for the probate of wills.

REGISTER GENERAL. An officer appointed by the sovereign of England to whom, subject to such regulations as shall be made by a principal secretary of state, the general superintendence of the whole system of registration of births, deaths, and marriages is entrusted. 3 Steph. Com. 234. See REGISTRAR GENERAL.

REGISTER OF PROBATE. In the United States, a public officer in some States who records all wills admitted to probate. Stand. Dict. See REGISTER OF WILLS.

REGISTER OF SHIPS. A register kept by the collectors of customs, in which the names, ownership, and other facts relative to the merchant vessels are required by law to be entered. The register is evidence of the nationality and privileges of an American ship. Rap. & L. Law Dict.

The certificate of such registration, given by the collector to the owner or master of the ship, is also called the "ship's register." *Id.*

The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. It is to be distinguished from the purpose of an enrolment which is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license. 3 Wall. (U. S.) 571.

A certificate of a vessel's registry and proof that she carried the flag of the United States establish a *prima facie* case of proper registry under the laws of the United States, and of the nationality of the vessel and its owners; 154 U. S. 134.

REGISTER OF WILLS. A register of Probate (*q. v.*). English.

REGISTER OF WRITS. A book preserved in the English court of chancery, in which were entered, from time to time, all forms of writs once issued. Stat. Westm. 2, c. 25.

It is spoken of as one of the most ancient books of the common law. Co. Litt. 159; Co. 4th Inst. 150; 8 Co. Pref.; 3 Shars. Bla. Com. 183^d. It was first printed and published in the reign of Hen. VIII. This book is still an authority, as containing, in general, an accurate transcript of the forms of all writs as then framed, and as they ought still to be framed in modern practice.

But many of the writs now in use are not contained in it. And a variation from the register is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness. Steph. Pl. 7, 8.

REGISTERED BOND. One whose negotiability is temporarily withdrawn by a writing thereon that it belongs to a specific person, and by a registry to that effect at a specified office. Cook, St. & Stockh. § 15.

REGISTERED LETTER. A letter is not registered so as to complete service of notice by registered letter until it is numbered as required by the postal laws, although the postmaster has received it properly addressed and given a receipt therefor. 34 L. R. A. (Ia.) 466. A registered letter must be delivered by the carrier to the person to whom it is addressed; 4 *id.* (Neb.) 457.

REGISTER'S COURT. In American Law. A court in the state of Pennsylvania which had jurisdiction in matters of probate.

REGISTRAR. An officer whose business is to write and keep a register.

REGISTRAR GENERAL. In England, the officer at the head of the system under which all births, deaths and marriages in the country are registered. His office was established by the Births and Deaths Registration Act, 1836, s. 2. Byrne.

REGISTRARIUS (Lat.). An ancient name given to a notary. In England this name is confined to designate the officer of some court the records or archives of which are in his custody.

REGISTRATION. The word "registration," used in the U. S. Rev. Stat. § 2011, has a general, not a technical, meaning, and indicates any list or schedule containing a list of voters, the being upon which constitutes a prerequisite to vote, unless there is a system of registration described by act of congress, and applied by the act as the only registration of voters under the law. The Delaware assessment lists, made primarily by the assessors of the different hundreds, and completed by the levy courts of the different counties, are such lists, though they contain not only a list of voters, but of other persons besides. The registration of voters intended by the act of congress need not be conclusive evidence that the person registered is qualified to vote; 1 Fed. Rep. 1. This decision was prior to the existence in Delaware of a registration act *eo nomine*.

In the United States circuit court for South Carolina it was held that the registration laws of that state were null and void as being an unreasonable restriction of the right of suffrage, evidently intended to exclude ignorant persons, especially of the African race, and a violation both of the constitution of the state and of the fourteenth and fifteenth amendments to the constitution of the United States; 67 Fed. Rep. 818. In that case it appeared that in 1882 an act was passed providing that in that year a registration of voters should be made and the books closed to be opened thereafter once a month after the general election in each year until the first of July preceding the general election in November following; but that after the closing of the books each year persons coming of age before election might be registered. Voters receive certificates of registration which must be produced in order to vote and were transferred under different conditions upon removal into another county.

The registration of voters under the Delaware act was held to be so far judicial and not ministerial that a mandamus was refused to restore to the voting list the name of a person stricken off by the board of registration; 1 Marvel 450.

A land registration act went into effect in Massachusetts October 1, 1898. It provides for a court of registration consisting of two judges sitting in Boston, with a right to adjourn to such other place as convenience may require. Examiners of title may be appointed by the judge of registration in each county. Only estates in fee simple can be registered. The act provides for the form of application and the form of notice to be given to the occupants of the land and to adjoining owners, which may be given by mail and by publication. The decree of the court confirming title and ordering registration binds the land and quiets the title thereto. It cannot be opened except within one year in case the registration is obtained by fraud, and not for that reason if an innocent purchaser for value has acquired an interest. The decree is registered in the county. A certificate of registration constitutes the owner's evidence of title. After registration the owner may convey it, etc., as at present, but no voluntary instrument of transfer except a will and a lease for not over seven years binds the land, but operates only as a contract between the parties and as authority for registration. Upon re-registration this certificate is surrendered and a new one issued. The act was drawn by Alfred Hemenway, under an appointment by act of 1897.

See LAND TRANSFER; TORRENS SYSTEM.

REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS. In most states acts have been passed requiring physicians, clergymen, etc., to register all such events with the proper county officer. The validity of these laws has been sustained under the police power; 14 N. W. Rep. (Ia.) 202. See REGISTER.

REGISTRATION CERTIFICATE. The "registration certificate" was issued as a means of identifying the voter. His possession of the certificate, though conclusive as to the fact that the person named therein has been registered, will not be conclusive of his right to vote, for, if unknown to the election officers, they may require other proof of his identity. In other words, the "registration certificate" does not mean "vote bearer," unless "bearer" be known to the election officers to be the person named therein. 118 Ky. 690, 82 S. W. 282.

REGISTRATION OF COMPANIES. See REGISTRATION.

REGISTRATION OF DOCUMENTS. See REGISTRATION.

REGISTRATION OF MATTERS OF FACT. See REGISTRATION.

REGISTRUM BREVIUM (Lat.). The name of an ancient book which was a collection of writs. See REGISTER OF WRITS.

REGISTRY. A book, authorized by law, in which writings are registered or recorded.

REGNAL YEARS. The years in which a sovereign has reigned.

The following table of the reigns of English and British kings and queens is added, to assist the student in many points of chronology:—

	Accession.
Egbert	827
Ethelwulf	839
Ethelbald	858
Ethelbert	858
Ethelred	866
Alfred	871
Edward the Elder	901
Athelstan	925
Edmund	940
Edred	946
Edwy	955
Edgar	958
Edward the Martyr	975
Ethelred II.	979
Edmund Ironside	1016
Canute	1017
Harold I.	1035
Hardicanute	1040
Edward Confessor	1042
Harold II.	1066
William I.	1066
William II.	1087
Henry I.	1100
Stephen	1135
Henry II.	1154
Richard I.	1189
John	1199
Henry III.	1216
Edward I.	1272
Edward II.	1307
Edward III.	1326
Richard II.	1377
Henry IV.	1399
Henry V.	1413
Henry VI.	1422
Edward IV.	1461
Edward V.	1483
Richard III.	1483
Henry VII.	1485
Henry VIII.	1509
Edward VI.	1547
Mary *.	1553
Elizabeth.	1558
James I.	1603
Charles I.	1625
Commonwealth	1649

* References in legal works to reign of Mary couple the name of Philip, her husband, with her.

	Accession.
Charles II.	1649
James II.	1685
William and Mary	1689
William III.	1685
Anne	1702
George I.	1714
George II.	1727
George III.	1760
George IV.	1820
William IV.	1830
Victoria	1837
Edward VII.	1901
George V.	1910

+The Restoration of Charles II. did not take place till 1660, but the regnal year of his reign is always computed from the death of Charles I., disregarding the Commonwealth.

REGNANT. One having authority as a king; one in the exercise of royal authority.

REGRATING. In Criminal Law. Every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise, is so denominated. Co. 3d Inst. 196; 1 Russell, Cr. 169. Whart. Cr. Law 1849. See RESTRAINT OF TRADE.

REGULA. See MAXIMS.

REGULAR CLERGY. Monks who lived according to the rules of their respective houses or societies, in contradistinction to the parochial clergy, who did their duties "in *seculo*," and hence were called secular clergy. 1 Sharsw. Bla. Com. 387, n.

REGULAR PANEL. The expression "regular panel" means the number of persons who are to constitute the regular attendance of the court during the term as regular jurors; that is, as the "standing jury." 106 Ky. 906, 51 S. W. 788.

REGULAR PROCESS. Regular process is that which has been lawfully issued by a court or magistrate having competent jurisdiction.

When the process is *regular*, and the defendant has been damnedified, as in the case of a malicious arrest, his remedy is by an action on the case, and not trespass; when it is *irregular* the remedy is by action of trespass.

If the process be *wholly* illegal or *misapplied* as to the person intended to be arrested, without regard to any question of fact, or whether innocent or guilty, or the existence of any debt, then the party imprisoned may legally resist the arrest and imprisonment, and may escape, be rescued, or even break prison; but if the process and imprisonment were in form legal, each of these acts would be punishable, however innocent the defendant might be, for he ought to submit to legal process and obtain his release by due course of law; 1 Chitty, Pr. 637; 5 East 804, 308; 2 Wils. 47; 1 East, Pl. Cr. 310. See ESCAPE; ARREST; ASSAULT; FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

REGULATE. To adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws. 16 Neb. 638.

REGULATION. See INTERNATIONAL REGULATION.

REGULATION OF COMMERCE. It is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. 114 U. S. 203. As used in the constitution, transportation being essential to commerce, every obstacle to it, or burden laid upon it, by legislative authority, is regulation; 95 U. S. 470;

109 N. C. 279. See COMMERCE; REGULATE; COMMERCE WITH FOREIGN NATIONS;

REGULATIONS. In an act of Congress, *regulations* of a department means general rules relating to the subject upon which the department acts, made by the head thereof under some act giving the regulations the force of law. Anderson; 3 Ct. Cl. 42. See NAVY REGULATIONS.

REHABERE FACIAS SEISINAM (Lat. do you cause to regain seisin). When a sheriff in the "*habere facias seisinam*" had delivered seisin of more than he ought, this judicial writ lay to make him restore seisin of the excess. Reg. Jud. 13, 51, 54.

REHABILITATION. The act by which a man is restored to his former ability, of which he had been deprived by a conviction, sentence, or judgment of a competent tribunal.

REHEARING. A second consideration which the court gave to a cause on a second argument.

A rehearing takes place principally when the court has doubts on the subject to be decided; but it cannot be granted by the supreme court after the cause has been remitted to the court below to carry into effect the decree of the supreme court; 7 Wheat. 58.

Where any judge, who concurred in the decision, thinks proper to have a rehearing, the motion for one will be considered, otherwise it will be denied as of course; 16 U. S. App. 718.

Where the grounds for a rehearing were not brought to the attention of the court at the argument or by brief, permission to reargue will be granted only in extreme cases; 21 U. S. App. 426; and not where the questions have already been fully considered; 27 U. S. App. 290; and not when the ground was not overlooked at the former trial; 34 U. S. App. 45. That a judgment of affirmance was by an equal decision of the judges merely, affords no ground for granting a rehearing; 25 Wend. 256. See PRECEDENT.

The practice in the federal courts is to file a petition for a rehearing which, with the argument in its support, is submitted, without oral argument, for the consideration of the court, which decides whether to have the case reargued or not.

In the federal courts a petition for rehearing must be signed by counsel, and the accompanying affidavits should, by distinct and positive allegation, be made a part of the petition. Neither the petition nor affidavits should be verified before a notary public who is also counsel for petitioner; 85 Fed. Rep. 481.

When a motion for a new trial of an action at law and a petition for rehearing have been denied, equity will not entertain a bill to set the judgment aside on the same grounds alleged in the motion and petition; *id.* 508.

The refusal of the circuit court to grant a rehearing is not the subject of review; 118 U. S. 697.

Courts, especially in cases of general interest, order a reargument where they are in doubt or where the case was not argued before a full bench. In 71 Pa. 81, eminent counsel not connected with the cause petitioned the court for a reargument on the ground that the judgment was not well considered and that it would unsettle titles to real estate. A reargument was ordered and the former decision was reversed. See REOPENING CASE.

REHYPOTHECATION. See PLEDGE.

REI INTERVENTUS (Lat.). When a party is imperfectly bound in an obligation, he may, in general, annul such imperfect obligation; but when he has permitted the opposite party to act as if his obligation or agreement were complete, such things have *intervened* as to deprive him of the right to rescind such obligation: these circumstances are the *rei inter-*

ventus; 1 Bell, Com., 5th ed. 328, 329; Burton, Man. 128.

REIMBURSE. To pay back. 83 Pa. 264.

REINSCRIPTION. The law of Louisiana requires a mortgage to be periodically reinscribed in order to preserve its priority. When ten years have elapsed from the date of inscription without reinscription the mortgage is without effect as to all persons whatsoever who are not parties to it; 29 La. Ann. 315. A failure to reinscribe a mortgage within the statutory limits is not remedied or supplied by the pendency of a suit to foreclose it; 30 La. Ann. 1. See 103 U. S. 281; 34 La. Ann. 797; 149 U. S. 505, MORTGAGE.

REINSTATE. To restore to a state from which one has been removed. 86 Ky. 190.

REINSTATEMENT. This term in the law of insurance implies placing the insured in the same condition that he occupied and sustained towards the insurer next before the forfeiture was incurred, and does not imply reinsurance or the making of a new contract or policy of insurance. 110 N. C. 93.

REINSURANCE. Insurance effected by an underwriter upon a subject against certain risks, with another underwriter, on the same subject, against all or a part of the same risks, not exceeding the same amount. In the original insurance, he is the insurer; in the second, the assured. His object in reinsurance is to protect himself against the risks which he has assumed. There is no privity of contract between the original assured and the reinsurer, and the reinsurer is under no liability to such original assured; 3 Kent 227; 1 Phill. Ins. § 78 a, 404; 20 Barb. 468; 23 Pa. 250; 9 Ind. 443; 13 La. Ann. 246. See Beach, Ins. 1283; Pars. Mari. Ins. 301.

In the absence of any usage to the contrary, and of any specific stipulation in the policy, the original insurer may protect himself by reinsurance to the whole extent of his liability; 140 U. S. 565.

REINVESTMENT. Under Civil Code of Kentucky, § 491, "reinvestment" means, real property may be sold for reinvestment of proceeds in other real property. 142 Ky. 499, 134 S. W. 832.

REISSUABLE NOTES. Bank-notes which, after having been once paid, may again be put into circulation.

They cannot properly be called valuable securities while in the hands of the maker, but in an indictment may properly be called goods and chattels; Ry. & M. 218. See 5 Mas. 537; 2 Russ. Cr. 147. And such notes would fall within the description of *promissory* notes; 2 Leach 1090, 1093.

REISSUE; REISSUED PATENT. See PATENT.

REJECT. To throw away; to discard; to refuse to receive; to refuse to grant; as to reject a prayer or request. 94 Ky. 302, 22 S. W. 313.

REJOINDER. In Pleading. The defendant's answer to the plaintiff's replication. Andr. Steph. Pl. 151.

It must conform to the plea; 16 Mass. 1; 2 Mod. 343; be triable, certain, direct, and positive, and not by way of recital, or argumentative; 1 H. & M.H. 159; must answer every material averment of the declaration; 23 N. H. 193. It must not be double; 6 Blackf. 421; 3 McLean 163; and there may not be several rejoinders to the same replication; 1 How. Miss. 139; 1 Wms. Saund. 337, n.; nor repugnant or insensible. See Co. Litt. 394; Archb. Civ. Pl. 278; Comyns, Dig. Pleader (H).

REJOINING GRATIS. Rejoining within four days from the delivery of the replication, without a notice to rejoin or demand of rejoinder. 1 Archb. Pr. 280, 317; 10 M. & W. 12. But judgment cannot be signed without demanding; 3 Dowl.

537.

RELATION (Lat. *re. back, fero. to* bear). In **Civil Law**. The report which the judges made of the proceedings in certain suits to the prince were so called.

These relations took place when the judge had no law to direct him, or when the laws were susceptible of difficulties: it was then referred to the prince, who was the author of the law, to give the interpretation. They were made in writing, and contained the pleadings of the parties and all the proceedings, together with the judge's opinion, and prayed the emperor to order what should be done. This ordinance of the prince thus required was called a rescript. Their use was abolished by Justinian, Nov. 125.

In Contracts. When an act is done at one time, and it operates upon the thing as if done at another time, it is said to do so by relation; as, if a man deliver a deed as an escrow, to be delivered, by the party holding it, to the grantor, on the performance of some act, the delivery to the latter will have relation back to the first delivery. *Termes de la Ley*. Again, if a partner be adjudged a bankrupt, the partnership is dissolved, and such dissolution relates back to the time when the commission issued; 3 Kent 33. See Litt. 462; 2 Johns. 510; 15 *id.* 309; 2 Harr. & J. 151; **Fiction**.

RELATION, DOCTRINE OF. See **DOCTRINE OF RELATION**.

RELATIONS. A term which, in its widest sense, includes all the kindred of the person spoken of. It has long been settled that in the construction of wills it includes those persons who are entitled as next of kin under the statute of distribution; 2 Jarm. Wills 661; 54 Me. 291; L. R. 20 Eq. 410; [1894] 3 Ch. 565; 132 N. Y. 338; in the interpretation of a statute, the term was held not to include a stepson; 108 Mass. 382; or a wife; 101 *id.* 36; 10 Wash. 533; or a brother-in-law; 162 Mass. 448.

A legacy to "relations" generally, or to "relations by blood or marriage," without enumerating any of them, will, therefore, entitle to a share such of the testator's relatives as would be entitled under the statute of distributions in the event of intestacy; 1 Madd. 45; 1 Bro. C. C. 33. The same rule extends to devises of real estate; 1 Taunt. 263. See **LEGACY**; **KINDRED**.

Relations to either of the parties, even beyond the ninth degree, have been holden incapable to serve on juries; 3 Chitty, Pr. 795, note c. As to the disqualification of a judge by reason of relationship, see **JUDGE**. Relationship or affinity is no objection to a witness, unless in the case of husband and wife. See **WITNESS**.

Next of Kin. The "relations" or "next of kin" of the deceased are those persons who take the personal estate of the deceased under the statutes of distribution. 161 Ky. 19, 170 S. W. 213.

RELATIVE. See **RELATIONS**.

RELATIVE FACT. A fact having relation to another fact; a minor fact; a circumstance. Burrit, Circ. Ev. 121. See **RELEVANCY**.

RELATIVE IMPOSSIBILITY. See **IMPOSSIBILITY**.

RELATIVE POWERS. Those which relate to land; so called to distinguish them from those which are collateral to it.

These powers are *appendant*: as, where a tenant for life has a power of making leases in possession. They are *in gross* when a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate, but notwithstanding, is annexed in privity to it, and takes effect in the appointee out of an interest appointed in the appointer. 2 Bouvier, Inst. n. 1980.

RELATIVE RIGHTS. Those to which a person is entitled in consequence of his relation with others; such as the rights of a husband in relation to his wife; of a father as to his children; of a master as to his servant; of a guardian as to his ward.

In general, the superior may maintain an

action for an injury committed against his relative rights. See 2 Bouvier, Inst. nn. 2377-2396; 3 *id.* n. 3401; 4 *id.* nn. 3615-3318; **ACTION**.

RELATOR. A rehearser or teller. One who, by leave of court, brings an information in the nature of a *quo warranto*.

At common law, strictly speaking, no such person as a relator to an information is known, he being a creature of the statute of Anne, c. 20. In this country, even where no statute similar to that of Anne prevails, informations are allowed to be filed by private persons desirous to try their rights, in the name of the attorney-general, and these are commonly called relators; though no judgment for costs can be rendered for or against them; 5 Mass. 231; 3 S. & R. 52; 15 *id.* 127; Ang. Corp. 470. In chancery, the relator is responsible for costs; 4 Bouvier, Inst. n. 4022.

RELAXATION, LETTERS OF. Letters which a debtor might procure and which had the effect to restore him to his former state. Ersk. Prin. 156.

RELEASE. The giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced.

Releases may either give up, discharge, or abandon a right of action, or convey a man's interest or right to another who has possession of it or some estate in the same. Shepp. Touchst. 320; Littleton 444; Bac. Abr.; Viner, Abr.; Rolle, Abr. In the former class a mere right is surrendered; in the other not only a right is given up, but an interest in the estate is conveyed and becomes vested in the releasee.

An *express* release is one directly made in terms by deed or other suitable means. An *implied* release is one which arises from acts of the creditor or owner, without any express agreement. See Pothier, Obl. nn. 603, 609.

A release *by operation of law* is one which, though not expressly made, the law presumes in consequence of some act of the releasor; for instance, when one of several joint obligors is expressly released, the others are also released by operation of law; 3 Salk. 298; Hob. 10, 66; 4 Mod. 380; 7 Johns. 207.

Releases of claims which constitute a cause of action acquit the releasee, and remove incompetency as a witness resulting from interest.

Littleton says a release of all *demands* is the best and strongest release; sect. 508. Lord Coke, on the contrary, says *claims* is a stronger word; Co. Litt. 291 b.

In general, the words of a release will be restrained by the particular occasion of giving it; 1 Lev. 235; T. Raym. 399. It cannot apply to circumstances of which the party had no knowledge at the time he executed it; and if it be so general as to include matters never contemplated, the party will be entitled to relief; 6 H. & N. 347.

The general words in a release are limited always to the things which were in the contemplation of the parties when the release was given; L. R. 4 H. L. 623.

The word release in an assignment for the benefit of creditors, requiring creditors accepting its terms to execute releases of their claims, was held to include any instrument sufficient to secure the absolute discharge of the debtor as to creditors accepting the terms of the assignment; 17 S. E. Rep. (S. C.) 56. See **PREFERENCE**.

The reader is referred to the following cases where a construction has been given to the expressions mentioned. A release of "all actions, suits, and demands;" 3 Mod. 277; "all actions, debts, duties, and demands;" *id.* 1, 64; 8 Co. 150 b; 2 Saund. 6 a; "all demands;" 5 Co. 70 b; 1 Lev. 99; Salk. 578; 2 Rolle 20; 2 Conn. 120; "all actions, quarrels, trespasses;" Dy. 2171, pl. 2; Cro. Jac. 487; "all errors, and all actions, suits, and writs of error whatsoever;" T. Raym. 399; "all suits;" 8 Co. 150; "of covenants;" 5 Co. 70 b.

Where a creditor promised to sign a release of his claim, but afterwards refuses to execute it, the debtor is not released from liability; 153 Pa. 281.

A parol agreement to release a party from liability on a note, unsupported by any consideration, cannot be enforced; 96 Ala. 454. The voluntary payment by a third person of the amount then due on a contract is a sufficient consideration to support a release of the contract; 120 U. S. 256. A release of plaintiff's cause of action, under seal and for a money consideration, is a bar to an action, though fraud in obtaining it be alleged, unless it be shown that the consideration was tendered back before the action was commenced, or that defendant was *non compos mentis* when he executed the release, and his mental unsoundness prevented him from understanding the transaction; 53 Fed. Rep. 569. Where it is claimed that a release is not effective because of the mental condition of the person who signed it, it raises a question of fact for the jury, as where in an action against a railroad company for injury by reason of negligence, a written release of damages was set up in bar of the action, it was held to be for the jury to say whether he executed it under the influence of great suffering through his injury and in a state approaching unconsciousness caused thereby and by the use of morphine; 158 U. S. 326.

Where one has a right of action against two or more, and covenants with one of them not to sue him, it does not operate as a release of the others, though an express release to him would have that effect; 6 Taunt. 289; L. R. 8 Ex. 81; 4 Ch. App. 208.

A release by a witness where he has an interest in the matter which is the subject of the suit, or release by the party on whose side he is interested, renders him competent; 1 Phill. Ev. 102, and the cases cited in n. a. See Chitty, Bail. 329; 1 Dowl. & R. 361.

The release of one of the joint makers of a note constitutes a release of the other also; 37 W. Va. 15; 17 Mass. 581; but a covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability; [1892] 2 Q. B. 511.

In Estates. The conveyance of a man's interest or right which he hath unto a thing to another that hath the possession thereof or some estate therein. Shepp. Touchst. 320. The relinquishment of some right or benefit to a person who has already some interest in the tenement, and such interest as qualifies him for receiving or availing himself of the right or benefit so relinquished. Burton, R. P. 15*.

The words generally used in such conveyance are "remised, released, and forever quit-claimed." Littleton § 445.

Releases of land are, in respect of their operation, divided into five sorts: releases that enure by way of passing the estate, or *mitter l'estate (q. v.)*, e. g. a release by joint-tenant to co-joint-tenant, which conveyance will pass a fee without words of limitation. Releases that enure by way of passing the right, or *mitter le droit*, e. g. by disseisee to disseisor. Releases that enure by enlargement of the estate. A release to the tenant in possession, by him who hath the reversion or inheritance, is said to *enlarge* his estate and to be equal to an entry and feoffment and to amount to a grant and attornment. The law requires privity of estate, that the releasor have a right, and the releasee such a possession as will make him capable of taking an estate; Bac. Abr. *Release* (C) 4.

Releases that enure by way of extinguishment; e. g. a lord releasing his seigniorial rights to his tenant.

Releases that enure by way of feoffment and entry; e. g. if there are two disseisors, a release to one will give him a sole estate, as if the disseisee had regained seisin by entry and enfeoffed him. 2 Sharsw. Bla. Com. 325*. See 4 Cruise, Dig. 71; Gibb. Ten. 82; Co. Litt. 264; 3 Brock. 185; 2 Sumn. 487; 8 Pick. 143; 5 Harr. & J. 158; 2 N. H. 402; 10 Johns. 456.

The technicalities of English law as to releases are not generally applicable in the United States. The corresponding conveyance is a quit-claim deed. 21 Ala. N. S. 125.

RELEASE BY WAY OF PASSING AN ESTATE. As where one of two co-parceners releases all her right to the other, this passes the fee simple of the whole. 2 Bl. Com. 324, 325. See RELEASE—IN ESTATE.

RELEASE DEED. A discharge or conveyance of a man's right in lands to another, who has in them some former estate in possession. 19 Conn. *113. See RELEASE.

RELEASEE. A person to whom a release is made.

RELEASOR. He who makes a release.

RELEGATIO (Lat.). A kind of banishment known to the civil law, which did not take away the rights of citizenship, which *deportatio* did.

Some say that *relegatio* was temporary, *deportatio* perpetual; that *relegatio* did not take away the property of the exile, and that *deportatio* did; but these distinctions do not seem always to exist. There was one sort of *relegatio* for slaves, viz. *in agros*; another for freemen, viz. *in provincias*. *Relegatio* only exiled from certain limits; *deportatio* confined to a particular place (*locus penae*). Calvinus, Lex.

RELEGATION. The temporary banishment or exile by special act of parliament. Co. Litt. 133 a.

RELEVANCY. Applicability to the issue joined. That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue between the parties to a suit. See 1 Greenl. Ev. § 49. Two facts are said to be relevant to each other when so related "that according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other." Steph. Dig. Ev. art. 1. This is relevancy in a logical sense. Legal relevancy requires a higher standard of evidentiary force. It includes logical relevancy and demands a close connection between the fact to be proved and the fact offered to prove it. The fact, however, that it is logically relevant does not insure admissibility; it must also be legally relevant; 93 U. S. 281; it is, however, the tendency of modern jurisprudence to admit most evidence logically relevant. Chamb. Best. Ev. 251, n.

RELICTA VERIFICATIONE (Lat. his pleading being abandoned).

In Pleading. A confession of judgment made after plea pleaded: viz. a *cognovit actionem* accompanied by a withdrawal of the plea.

RELICION (Lat. *relinquo*, to leave behind). An increase of the land by the retreat or recession of the sea or a river.

Where the sea cut off the sea front of the main land between certain points and afterwards a beach was reformed outside the main land, and divided from it by a bay of navigable water, it was held that the title to the new formation was in the owners of the part cut off. 61 How. Pr. 197.

See AVULSION; ALLUVION; LAKE; RIVER; WATERS.

RELIEF. A sum payable by a new tenant, the duty being incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate which was lapsed or fallen in by the death of the last tenant. At one time the amount was arbitrary: but afterwards the relief of a knight's fee became fixed at one hundred shillings. 2 Bla. Com. 65.

In Practice. Satisfaction for a past injury, or the prevention of a threatened injury, or the enforcement or protection of a right.

A plaintiff usually claims not only a

particular kind of relief, or *specific relief*, but also *general relief* by asking for such further or other relief as the nature of the case may require, and he may ask for *alternative relief*, that is, he may mention two kinds of relief, and ask for one of them. R. & L. Dict.

RELIEF ASSOCIATION. See RAILROAD RELIEF.

RELIEF, PRAYER FOR. See PRAYER.

RELIGION (Lat. *re*, back, *ligo*, to bind). Real piety in practice, consisting in the performance of all known duties to God and our fellow-men. It has been held to include the principle of gratitude to an active power who can confer blessings. 38 L. J. M. C. 5.

The constitution of the United States provides that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." See Story, Const. 1870; Miller, Const. 645. Congress cannot pass a law for the government of a territory which prohibits the free exercise of religion; 98 U. S. 162; religion is not defined in the constitution, its meaning there must be ascertained elsewhere. Jefferson was the leader of the movement for placing this clause in the constitution; *id.* See 13 Hening's Stat. 84; 1 Jeff. Works 45, 79; 2 *id.* 335; 8 *id.* 113. This provision and that relating to religious tests (*q. v.*) are limitations upon the power of congress only; Cooley, Const. 205; perhaps the fourteenth amendment may give additional securities if needful; *id.* By establishment of religion is meant the setting up of a state church, or at least the conferring upon one church of special favors which are denied to others; 1 Tuck. Bla. Com. App. 296; 2 *id.* App. n. G. The Christian religion is, of course, recognized by the government, yet not so as to draw invidious distinctions between different religious beliefs, etc.; Cooley, Const. 206. With the exception of these provisions, the preservation of religious liberty is left to the states. The various state guarantees have been summed up by Judge Cooley, who says that under American constitutions the following things are unlawful: 1. Any law respecting the establishment of religion. 2. Compulsory support by taxation or otherwise of religious instruction. 3. Compulsory attendance upon religious worship. 4. Restraints upon the free exercise of religion according to the dictates of conscience. 5. Restraints upon the expression of religious belief. Const. Lim. 575.

The constitutions of most of the states forbid any religious test for holding office; but those of Arkansas, Mississippi, North Carolina, South Carolina, and Texas provide that any one who denies the existence of God is ineligible to office. In Maryland, Kentucky, and Tennessee, by constitution, clergymen are ineligible to civil office. The constitution of New Hampshire permits the legislature to authorize the towns to make adequate provision for the support and maintenance of public Protestant teachers of religion.

A person's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land (polygamy); 98 U. S. 145. By the constitution "congress is deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order;" *id.* 164. Where the parents of a sick child omitted to call in medical attendance because of their religious belief that what they did would be effective, they were held not guilty of manslaughter; 10 Cox, Cr. Cas. 531; otherwise, if they had actively starved it to death under like religious belief; *id.* See 98 U. S. 167.

Where congress appropriated money for a building to be erected on the grounds of a hospital in the District of Columbia, at the discretion of the commissioners, they

were restrained from placing it on the grounds of a Roman Catholic institution; 26 Wash. Law Rev. 84; s. c. 11 Harv. Law Rev. 542.

See Cooley, Const. Lim. ch. 13; 32 Am. L. Rev. 541; 29 Am. L. Reg. n. s. 273, 321; Spear, Religion and the State; 5 *Revue Leg.* 569; 4 Alb. L. J. 221; 10 *id.* 17.

As to reading the Bible in schools, see SCHOOLS.

See CHARITIES; CHARITABLE USES; POLYGAMY; RELIGIOUS TEST; RELIGIOUS EDUCATION; CHRISTIANITY.

RELIGIOUS BOOKS. Those which tend to promote the religion taught by the Christian dispensation, unless by associated words the meaning is so limited to show that some other form of worship is referred to. 72 Me. 500.

RELIGIOUS CORPORATION. See RELIGIOUS SOCIETY.

RELIGIOUS EDUCATION. Questions respecting the religious education of children arise not infrequently by reason of applications to the courts for either restraining or mandatory process intended to control the religious education of children where differences exist between the parents or where the relations of a deceased parent seek to control the direction given to the mind of the child.

Where the husband was a Roman Catholic and the wife a Protestant, and by an antenuptial agreement the children were to be brought up as Roman Catholics, but they had been educated as Protestants, and it appeared that the father gave way to drink and two girls of fifteen and eleven were before the court on the application of the father, who had reformed, to restore them to his charge and educate them at a Papist school, it was held that the children should remain at the Protestant school where they then were; [96] 1 Ch. 740.

Courts or those who have the guardianship of a child after the father's death should have a sacred regard to the religion of the father and, unless under very special circumstances, should see that the child is brought up in his religious faith; L. R. 6 Ch. 539.

Where both father and mother were Roman Catholics and, after the death of the father, a posthumous child was born, and five years after the father's death, the mother became a Protestant and, until the child was about nine years of age, educated it in that faith, the court refused to order the child to be brought up in the father's belief; 8 D. M. & G. 760.

Where no abandonment by the father is shown, the mere fact that a child will be better off or more contented under other people's care will not justify his instruction in a creed other than the father's; but when abandonment is proved, the question turns upon the welfare of the child; L. R. 8 Ch. 822. See 24 Ch. Div. 317. The pecuniary welfare of the child will be weighed together with its moral welfare, but the danger of making the former all important must be guarded against; 4 My. & Cr. 688.

The practice of the courts of having interviews with the children is discouraged as tending to encourage controversial opinions in their tender minds, and because the child is often so nervous that the court can form no useful opinion in that way; [93] 1 Ch. 143. See FATHER; INFANT.

As to reading the Bible in schools, see SCHOOLS.

RELIGIOUS IMPOSTORS. Those who falsely pretend an extraordinary commission from heaven, or terrify and abuse the people with false denunciations of judgment; punishable with fine, imprisonment, and infamous corporal punishment. 4 Br. & H. Com. 71.

RELIGIOUS MEN. Such as entered into some monastery or convent. In old English deeds, the vendee was often restrained from aliening to "Jews or religious men," lest the lands should fall into mortmain. Religious men were civilly

dead. Blount.

RELIGIOUS SECT. See SECTARIAN.

RELIGIOUS SOCIETY. A body of persons associated together for the purpose of maintaining religious worship. In this country they are not ecclesiastical corporations in the English sense, but ordinary private, civil corporations, and as such subject to the ordinary civil jurisdiction; 13 Wall. 679; 33 N. Y. 161; 18 Vt. 511.

The religious corporation and the church are distinct bodies, independent of each other, though one may exist within the other. When a church and society are united, the society commonly owns the property and makes the pecuniary contract with the clergyman, but in many instances a society exists without a church and a church without a society; 16 Gray 329; 9 Cush. 196. Membership in the church is not ordinarily a prerequisite to membership in the corporation, and the excommunication of a member who was trustee of a religious society did not disqualify him from holding that office; 15 Wall. 131. This distinction between the church and the society has been stated by Judge Cooley, who said that the statute under consideration contemplated a church connected with the corporation, though that may not be essential. The church is not incorporated and does not control the property or the membership of the society, while the corporation has nothing to do with the church except to provide for its temporal wants; 51 Mich. 137. The unincorporated ecclesiastical body has power to control and discipline its membership, but the religious corporation has no power to try or disfranchise a corporator for moral delinquency, and in case of an attempt to do so, he has his remedy at law; 53 N. Y. 103.

Their powers, like those of other corporations, are construed with reference to the object of their corporate existence and extend so far, and so far only, as necessary to effectuate them. It has been held that a church corporation the object of whose incorporation was "the more efficient worship of God, the preservation and perpetuation of said church, and the better control and regulation of the property thereof," had no power to charter a steamboat, manage a public excursion, and sell tickets therefor, in order to raise money to pay debts of the church; 63 Ga. 186. In this case the steamboat company had refused to proceed because of an attempt to overload the boat, and it was held that no action would lie against it for breach of contract.

Where there is a dispute over the rights of contending factions of an unincorporated church to the use of the church property, an injunction will lie at the suit of the faction entitled to the property to restrain trespasses thereon by the other faction; 34 S. W. Rep. (Mo.) 875.

Even where the corporation is defective, yet where land has been acquired for the use of a religious society, equity will enforce that use no matter where the legal title is vested or though it be in an individual. So the corporation itself will be compelled by the courts to administer the property upon the trusts attached to it in the grant or donation. "The corporation or society are trustees and can no more divert the property from the use to which it was originally dedicated than any other trustee. If they should undertake to divert the funds, equity will raise some other trustee to administer them and apply them according to the intention of the original donors or subscribers." Sharswood, J., in 67 Pa. 138.

The effect of church divisions upon such trusts is discussed by Mr. Justice Miller in the leading case of *Watson v. Jones*, 13 Wall. 679. He classifies the cases under three heads. 1. Where the property is devoted to some specific form of religious doctrine. 2. Where it is held by a congregation strictly independent of ecclesias-

tical associations. 3. Where it is merely a subordinate member of some general church organization. Trusts of the first class are enforced in some states, but mainly in jurisdictions which sustain charitable uses. And in such case the limitation must be express and not ambiguous. *Kynett, Rel. Corp.* 96. Such conveyance might be sustained in New York where the trust is put in the form of a condition which can only be enforced by the grantor; *id.* See 21 N. Y. 267. Such trusts have been held invalid in several states; 31 Minn. 173; 41 Mich. 730; 64 Md. 333; *contra*, 2 W. Va. 310; 9 Kan. 592.

In the second class of cases referred to in *Watson v. Jones*, it was there said that the ordinary rules governing voluntary associations must be applied, and in case of schism, the right to the property must be determined by the principles regulating the government of the association. This view is said to have been uniformly adopted; *Kynett, Rel. Corp.* 100, and cases cited in note.

As to the third class of societies, the denominational relations are considered by the court, and it is quite settled that if the doctrines of the denomination are abandoned by the majority, they forfeit the right to retain and use the property; *id.* 100-104, where the cases are collected.

In questions relating to church property, the decision of ecclesiastical tribunals, while accorded great weight, are not binding upon the civil courts, but they will be respected by the latter in all matters of purely ecclesiastical concern, such as the decision of questions of faith within the association, and the government of its individual members; *id.* 105.

Where land was bought and the title was taken by a bishop, and money was raised by the members of his church to purchase land and build a temple, and the land was dedicated by religious services by the head of the order, and when the bishop left the state he executed a declaration of trust in favor of the church, it was held that the grant was impressed with a trust in favor of the church; 60 Fed. Rep. 937.

In some states, as Illinois, Maryland, and Massachusetts, statutes provide that the appropriate Roman Catholic archbishop shall be and may become a corporation sole.

An allegation that by the regulations of the Catholic Church the bishop of the diocese holds all its property in his own name as trustee, for its benefit, and that each priest assigned to duty is entitled to hold the bishop individually liable for his salary, is not sufficient to sustain an action for salary brought by a priest against his bishop. A trust created by the rules of a church which is not shown to be capable of making contracts, accepting benefits, and compelling performance, is not recognized by law. The courts will not take judicial notice of the nature and powers of a church, so far as its civil rights and duties are concerned, in the absence of averment or proof upon the subject. Where such a question has been submitted to an ecclesiastical tribunal in the church, its decision, adverse to the claim, is a bar to an action therefor; 18 N. Y. L. J. 1613 (C. of App. N. Y., March 1, 1898).

A bishop is not liable to a priest for his salary; both are fellow-servants of the same church; 46 Mich. 457. Those who deal with an unincorporated church must trust the performance of civil obligations to the honor and good faith of its members; 41 Mich. 737.

The decision of an ecclesiastical tribunal is conclusive as to matters of discipline; and as to property rights it is said that the courts will treat the determination of the highest tribunal in the church as controlling; 13 Wall. 679; 54 N. Y. 551.

A priest necessarily subjects his conduct, in that capacity, to the laws and customs of his church; and in that respect, when his case has been heard according to the prescribed forms, the decision of the tribunals of the church will be respected by

the courts; 149 N. Y. 401, 414; 98 Pa. 213; 58 Ill. 509.

In religious bodies all matters of faith and internal government will be left to the decision of the bodies themselves; 104 Pa. 493; 42 Minn. 503; 5 Del. Ch. 573; 156 Pa. 119; 146 Ill. 428. But where these decisions violate the law of the land, or their own law; 89 Pa. 477; courts will examine them; 36 Neb. 564; after the ecclesiastical remedies have been exhausted; 58 N. W. Rep. (Mich.) 834.

If property rights are involved, courts will assume jurisdiction; 162 Pa. 280; 33 N. J. L. 162; L. R. 1 Sc. & Div. App. 568; and the office of priest; 90 Pa. 477; or vestryman; 68 Cal. 248; involves a property right.

RELIGIOUS TEST. The constitution of the United States declares that "no religious test shall ever be required as a qualification to any office or public trust under the United States." This clause was introduced for the double purpose of satisfying the scruples of many persons who feel an invincible repugnance to any religious test or affirmation, and to cut off forever every pretence of any alliance between church and state in the national government. Story, Const. § 1841. See RELIGION.

RELIGIOUS USE. See CHARITABLE USES.

RELINQUISHMENT. In Practice. A forsaking, abandoning, or giving over a right; for example, a plaintiff may relinquish a bad count in a declaration, and proceed on a good; a man may relinquish a part of his claim in order to give a court jurisdiction.

RELIQUA. The remainder or debt left upon balancing an account.

RELOCATIO (Lat.). In Civil Law. A renewal of a lease on its determination on like terms as before. It may be either express or tacit; the latter is when the tenant holds over with the knowledge and without objection of the landlord. MacKelvey, Civ. Law § 379.

REMAINDER. The remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument and limited to arise immediately on the determination of that estate and not in abridgment of it. 4 Kent 197. See Will. Real P. 282; Chall. Real P. 69.

A contingent remainder is one which is limited to an uncertain or dubious person, or which is to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate.

A vested remainder is one by which a present interest passes to the party, though perhaps to be enjoyed in future, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent.

There are four classes of contingent remainders. 1. Where the remainder depends on a contingent determination of the preceding estate, and it remains uncertain whether the use or estate limited in future will ever vest. 2. Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate and must precede the remainder. 3. Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. 4. Where the person to whom the remainder is limited is not ascertained or not in being. 4 Kent 207, quoting Fearn, Cont. Rem.

They are divided by Blackstone into two kinds. 1. Remainders limited to take effect to a dubious and uncertain person, or 2. Upon a dubious or uncertain event; and by Lord Ch. J. Willes into, 1. Where the person to whom the remainder was limited is not *in esse*. 2. Where the court

commencement of the remainder depended on some matter collateral to the determination of the particular estate; Willes 327; 4 Kent 207, and note, where the classification of Blackstone is approved.

There are exceptions to the third and fourth classes of contingent remainders, as enumerated by Fearn, as, a limitation for a long term of years with remainder over gives a vested remainder; and where one takes an estate of freehold and an immediate remainder is limited thereon in the same instrument to his heirs in fee or in tail, the remainder is immediately executed in possession and he becomes seized in fee or in tail. 4 Kent 209. See SHELLEY'S CASE, RULE IN.

The rule that where there is a possibility upon a possibility, the remainder is void; 2 Co. 51; is said to be obsolete; 4 Kent 206, n.; 2 H. L. Cas. 186.

See CONTINGENT REMAINDER; CROSS-REMAINDER; EXECUTORY DEVISE; LIMITATION; REVERSION.

REMAINDER-MAN. One who is entitled to the remainder of the estate after a particular estate carved out of it has expired. Will Real P. 290.

REMAINS UNPAID. The words "remains unpaid" when used in a contractor's bond apply only to claims where payment has been demanded and either refused or neglected for an unreasonable length of time. 162 Ky. 632, 172 S. W. 1072.

REMAND. When a prisoner is brought before a judge on a *habeas corpus*, for the purpose of obtaining his liberty, the judge hears the case, and either discharges him or not: when there is cause for his detention, he remands him.

REMANDING A CAUSE. The sending it back to the same court out of which it came, for the purpose of having some action on it there. March 100.

REMANENT PRO DEFECTU EMPTORUM (Lat. *remanet*, they remain, *pro defectu*, through lack, *emptorum*, of buyers). The return made by the sheriff to a writ of execution when he has not been able to sell the property seized, that the same remains unsold for want of buyers; in that case the plaintiff is entitled to a *venditioni exponas*. Com. Dig. Execution (C 8).

REMANET (Lat.). In Practice. The causes which are entered for trial, and which cannot be tried during the term, are *remanets*. 1 Sell. Pr. 434; 1 Phillpotts, Ev. 4.

REMEDIAL. That which affords a remedy: as, a remedial statute, or one which is made to supply some defects or abridge some superfluities of the common law. 1 Bla. Com. 86. The term remedial statute is also applied to those acts which give a new remedy. Esp. Pen. Act. 1. See Wilberf. Stat. L. 231.

REMEDY. The means employed to enforce a right or redress an injury.

Remedies for non-fulfilment of contracts are generally by action; see ACTION; ASSUMPSIT; COVENANT; DEBT; DETINUE; or in equity, in some cases, by bill for specific performance. Remedies for the redress of injuries are either public, by indictment, when the injury to the individual or to his property affects the public, or private, when the tort is only injurious to the individual. See INDICTMENT; FELONY; MERGER; TORTS; CIVIL REMEDY.

Remedies are *preventive* which seek compensation, or which have for their object punishment. The *preventive*, or *re-mov-ing*, or *abating* remedies may be by acts of the party aggrieved or by the intervention of legal proceedings: as in the case of injuries to the person or to personal or real property, defence, resistance, recaption, abatement of nuisance, and *surety of the peace*, or *injunction* in equity, and perhaps some others. Remedies for compensation may be either by the acts of

the party aggrieved, or summarily before justices, or by arbitration, or action, or suit at law or in equity. Remedies which have for their object punishments or compensation and punishments are either *summary proceedings* before magistrates, or *indictment*, etc.

Remedies are *specific* or *cumulative*: the former are those which can alone be applied to restore a right or punish a crime: for example, where a statute makes unlawful what was lawful before, and gives a particular remedy, that is specific, and must be pursued, and no other; Cro. Jac. 644; 1 Salk. 45; 2 Burr. 803. But when an offence was antecedently punishable by a common-law proceeding, as by indictment, and a statute prescribes a particular remedy, there such particular remedy is cumulative, and proceedings may be had at common law or under the statute; 1 Saund. 134, n. 4.

In a very large number of cases there are concurrent remedies the resort to one of which does not bar the other. This is particularly true where there is a legal and an equitable remedy with respect to the same subject-matter. For example, a bill in equity against the holder of a note to recover possession of it, and against makers for the balance due on it, may be maintained, pending an action at law against the holders and makers to recover from the latter the balance due; and where the action at law failed on the ground that the plaintiffs were not in possession, the judgment did not bar the proceeding in equity; 161 Mass. 46.

The maxim *ubi jus ibi remedium* has been considered so valuable that it gave occasion to the first invention of that form of action called an action on the case; 1 Sm. Lead. Cas. 473. The novelty of the particular complaint alleged in an action on the case is no objection, provided there appears to have been an injury to the plaintiff cognizable by law; 2 Wils. 146; 3 Term 63; Wiles 577; 2 M. & W. 519.

There is an important distinction to be considered in connection with the construction and effect of statutes, between those which create rights, and those which afford remedies. This distinction has an important effect upon the legislative power, with respect to many subjects constantly involved in the question whether an act is obnoxious to the provision of the federal constitution against impairing the obligation of contracts, under which title the subject is discussed and to which reference should be made. The distinction is also important in many questions merely of state legislation. "The remedies which one legislature may have prescribed for the redress of private wrongs, a subsequent legislature can change or modify at pleasure, and make the new remedy applicable to pending controversies, provided a substantial or adequate remedy is left, and provided, further, that the legislature is not prohibited from making the new remedy applicable to pending suits by some provision of the organic law. . . . It is true that the courts have, on some occasions, refused to apply statutes which dealt with the remedy for the redress of private grievances to existing controversies, and have held them solely applicable to actions thereafter brought. But it will be found, we think, on an examination of most of this class of cases, that the refusal to apply to existing suits statutes which were plainly applicable thereto, and which merely changed or modified the course of procedure, was based either on the ground that, if so applied, they would operate unfairly, and cause loss or inconvenience to the parties, or on the ground that the right involved had become so far established by acts done and performed in reliance on the prior law, and its continuance in force, that it would savor of injustice to take away such right by making the new law applicable to the pending controversy;" 83 Fed. Rep. 643, where it was held that a statute giving two new trials as of right in ejectment suits conferred not a vested right protected by constitutional guaran-

ties, but a mere privilege pertaining to the remedy, which may be legally taken away by the legislature, as to pending suits, except in cases wherein a verdict is standing which a party is entitled to have set aside when the act takes effect. See, also, 4 Colo. 162; 4 Ore. 119; 23 Wend. 482; 68 Tex. 37; RETROSPECTIVE; EX POST FACTO LAW.

REMEDY. See PROVISIONAL REMEDY.

REMEMBRANCER, KING'S. One of the three officers anciently in the English Exchequer. The King's Remembrancer performed duties connected with recoveries of penalties and debts due to the crown; he kept in his office the documents relating to the passing of lands to and from the crown; and he had functions in connection with English Bills. The Queen's Remembrancer Act, 1859 provided that he should cease to exist as a separate officer, and that he should be a Master of the Court of Exchequer. Under the Judicature Act, 1873, he was attached to the Supreme Court, and under the Judicature Act, 1879 he was transferred to the Central Office and made a Master of the Supreme Court. His duties as King's Remembrancer now consist mainly of certain functions connected with the selection of sheriffs and swearing in of the Lord Mayor of London, the trial of the Pyx and acknowledgments of homage for crown lands. Byrne.

REMISE, RELEASE, AND QUIT-CLAIM. The ordinary effective words in a release. These words are, in this country, sufficient to pass the estate in a primary conveyance; 7 Conn. 250; 24 N. H. 460; 21 Ala. N. S. 125; 7 N. Y. 422. Remise is a French word synonymous with release. See QUIT-CLAIM.

REMISSION (Lat. *re*, back, *mitto*, to send).

In Civil Law. A release of a debt. It is *conventional* when it is expressly granted to the debtor by a creditor having a capacity to alienate; or tacit, when the creditor voluntarily surrenders to his debtor the original title, under private signature constituting the obligation. La. Civ. Code, art. 2195.

Forgiveness or pardon of an offence. It has the effect of putting back the offender into the same situation he was before the commission of the offence. Remission is generally granted in cases where the offence was involuntary or committed in self-defence. Pothier, Fr. Civ. sect. 7, art. 2, § 2.

At Common Law. The act by which a forfeiture or penalty is forgiven. 10 Wheat. 246.

REMIT. To annul a fine or forfeiture. This is generally done by the courts where they have a discretion by law: as, for example, when a juror is fined for non-attendance in court, after being duly summoned, and, on appearing, he produces evidence to the courts that he was sick and unable to attend, the fine will be remitted by the court.

In Commercial Law. To send money, bills, or something which will answer the purpose of money. To send back, as to remit a check. 66 Hun 543.

REMITTANCE. In Commercial Law. Money sent by one merchant to another, either in specie, bill of exchange, draft, or otherwise.

REMITTEE. A person to whom a remittance is made. Story, Bailm. § 75.

REMITTER. To be placed back in possession.

When one having a right to lands is out of possession, and afterwards the freehold is cast upon him by some defective title, and he enters by virtue of that title, the law *remits* him to his ancient and more certain right, and, by an equitable fiction, supposes him to have gained possession under

it; 3 Bla. Com. 190; Com. Dig. *Remitter*.

REMITTIT DAMNA (Lat. he releases damages). An entry on the record by which the plaintiff declares that he remits the damages or a part of the damages which have been awarded him by the jury.

In some cases a misjoinder of action may be cured by the entry of a *remittit damna*; Chitty, Pl. 207.

REMITTITUR DAMNUM. The act of the plaintiff upon the record, whereby he abates the excess of damages found by the jury beyond the sum laid in the declaration. See 1 Saund. 285, n. 6; 4 Conn. 109. It cannot be filed by one of several plaintiffs, and where the widow of one killed by the negligence of a railroad company brought an action for damages on behalf of herself and her children and the parents of the deceased, a *remittitur* filed by the widow, reducing the judgment on behalf of each claimant, was held to be invalid and a new trial was ordered; 163 U. S. 369.

REMITTITUR OF RECORD. After a record has been removed to the supreme court and a judgment has been rendered, it is to be remitted or sent back to the court below, for the purpose of re-trying the cause, when the judgment has been reversed, or of issuing an execution when it has been affirmed. The act of so returning the record, and the writ issued for that purpose, bear the name of *remittitur*.

REMITTOR. A person who makes a remittance to another.

REMONSTRANCE. A petition to a court or deliberative or legislative body, in which those who have signed it request that something which is in contemplation to perform shall not be done.

REMOTE. At a distance; afar off. See CAUSA PROXIMA; MEASURE OF DAMAGES.

REMOVAL OF CAUSES. Under what are known as the removal acts, provision is made by federal statutes for the removal of causes in the state courts to the federal courts in certain cases.

The legislation on the subject begins with the Judiciary Act of 1789, which provided for the removal of suits commenced in the state courts against aliens, or citizens of other states, where the matter in dispute exceeded \$500; 1 Stat. L. 73. This act continued in force, being substantially included in the revised statutes (§ 639), until 1875, when the jurisdiction was greatly enlarged; 18 Stat. L. 470; 3 Woods 397. The same section also provided for the removal of suits between citizens of one state claiming lands under grants of different states; 1 Stat. L. 73; and this act was also substantially included in the revised statutes (§ 647), and also in the act of 1887, with changes as to the jurisdictional limit, the party who might petition for removal, and the state from which the grant must be derived.

The act of 1833, occasioned by the nullification laws in South Carolina, provided for the removal of proceedings against federal revenue officers; 4 Stat. L. 633. This act was included in the revised statutes (§ 643), and with some extension of its scope is still in force, not having been repealed expressly or by implication by the act of 1875; 105 U. S. 636; and being excepted from repeal by the act of 1887; 25 Stat. L. 433. The act of 1863 related in terms to certain cases arising out of the civil war and has no subsequent force or effect. Several acts were passed during the reconstruction period, which were consolidated in the revised statutes, §§ 641, 642, relating to the removal of causes in which there was a denial of civil rights either by the action or non-action of the judicial tribunals of the state. This act is expressly saved from repeal by the act of 1887. The act of 1886 was one relating to procedure merely, and authorized the removal of a separable part of a cause by one non-resident defendant joined with a resident; 14 Stat. L. 306. This was substantially covered by Rev. St. § 639, but

was repealed by the act of 1875 and not revived by that of 1887. The act of 1876 (14 Stat. L. 558), subsequently included in Rev. St. § 639, authorized the removal of causes upon an affidavit of prejudice or local influence. This was not repealed by the act of 1875 (113 U. S. 73), but was repealed and supplied by that of 1887; 142 *id.* 459. See *infra*. The act of 1868 authorized the removal of suits against federal corporations other than banks; 15 Stat. L. 227; Rev. St. § 640; but this was repealed by the act of 1887. The act of 1872 authorized the removal of personal actions brought by an alien against civil officers of the United States; 17 Stat. L. 44; Rev. St. § 644. Subject to the change in the jurisdictional amount, this act is not expressly, and probably not impliedly, repealed by the act of 1887.

The general act of 1875 was one largely extending the federal jurisdiction and the right of removal; 18 Stat. L. 470; and the result of it was such an overcrowding of the dockets of the federal courts as to induce the passage of the very restrictive act of 1887, which is now in force. The act of 1887 is generally considered to have been framed for the purpose of reorganizing the circuit courts of the United States and its operation is practically to repeal prior legislation on the subject, except some special acts of limited scope, and to substitute this act for pre-existing legislation as to the federal law on the subject of the removal of causes. The act of 1887 was supplemented by the act of August 13, 1888; 25 Stat. L. 433, which was passed for the purpose of correcting many errors and ambiguities in the act of 1887. As thus amended, the act gives to the circuit courts of the United States original concurrent jurisdiction of all civil suits where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. In certain classes of cases there is a right to remove independently of amount; such as criminal cases and those civil actions touching matters not capable of a reduction to a pecuniary basis.

In determining whether an amount in dispute exceeds \$2,000, the plaintiff's demand, unless colorable, must furnish the rule, but where the law does give the rule, the legal cause of action, and not the plaintiff's demand, must be regarded; 85 Fed. Rep. 4. See JURISDICTION.

Where the main controversy is removed the ancillary proceedings go with it, without respect to the amount involved; 79 Fed. Rep. 637; 137 U. S. 366.

The act of 1887 authorizes the removal from the state courts of the following classes of suits:

1. Suits at law or in equity arising under the constitution or laws or treaties of the United States.

2. Any other suits of which the circuit courts of the United States have jurisdiction under the act.

3. Any suits in which there is a controversy wholly between citizens of different states, and which can be fully determined as between them.

4. Any suit pending in a state court in which the defendant, being a citizen of another state, shall make it appear to the circuit court that from prejudice or local influence he will not be able to obtain justice in the state court.

In all these cases the jurisdictional limit of \$2,000 is applicable. It was at first doubted whether this was so in cases removed on the ground of prejudice or local influence, and there were decisions to the effect that the limitation of amount did not apply in those cases; 32 Fed. Rep. 673; 38 Fed. Rep. 529; 41 Fed. Rep. 449; but it was finally settled by the supreme court that the limitation applies in this as in other cases; 137 U. S. 451. See 22 U. S. App. 707; 42 Fed. Rep. 420.

The proceeding for removal is by petition filed in the state court, upon which an order is made, if the case is within the act, directing the removal, upon the filing of a bond, with surety, for entering a copy of the record in the circuit court, where the

case proceeds as if originally commenced therein; if improperly removed it may be remanded to the state court and there proceeded with. The proceedings under the act of 1887 are generally of the same character as those under the preceding acts, and, as a rule, the decisions under the latter are applicable, with the exception, of course, of cases relating to the construction of acts repealed and not supplied by subsequent legislation.

The removal acts are not penal and therefore not subject to any rule of strict construction; they are not in derogation of any right to a trial in a state court, as there is no such right; the rule of construction is that applied to other statutes giving jurisdiction; 8 Fed. Rep. 650; but the act of 1887 is to be construed with reference to its evident restrictive intent, and more strongly against one seeking to avoid its requirements; 32 *id.* 497. The right to remove is no more a vested right than the right to trial in the state court, and may therefore be taken away at will by congress; *id.* 708.

The cognizance over cases removed to the federal court has been referred to the appellate jurisdiction; on the ground that the suit is not instituted in that court by original process; 1 Wheat. 304; but this jurisdiction has been more accurately characterized as "original jurisdiction acquired indirectly by a removal from the state court;" 5 Blatchf. 336; 6 *id.* 362. The validity of the legislation on this subject has been repeatedly affirmed; 92 U. S. 10; 100 *id.* 257, 303; 77 N. C. 530; 28 Ohio St. 208. And it has been further decided that when the terms upon which the right is given have been complied with, the right of removal cannot be defeated by state legislation; 20 Wall. 445. It has been said that a state has the right to impose conditions, not in conflict with the constitution or the laws of the United States, on the transaction of business within its territory by a foreign corporation, or having given a license, to revoke it with or without cause; and that it may therefore require foreign corporations to forego their right of removal, or cease to do business within the state; 94 U. S. 535; 40 Wis. 220.

But in 121 U. S. 186, it was said that the point decided in 94 *id.* 435, was expressly limited to the principle that an injunction would not be granted to restrain the action of state officers in such case; and it is settled that any legislation by the states intended to defeat the right of removal or to require from foreign corporations a stipulation in advance that they will not exercise it, is unconstitutional and void; *id.*; 146 *id.* 202; 97 Ky. 238; 32 Ohio St. 468; or by a state law providing a special remedy in its own courts; 3 Wall. Jr. 252; nor can the right of removal be defeated by agreement of parties; 6 Pet. 41; 10 Wall. 415; Fed. Cas. No. 12, 90; 6 Gray 192; 56 Me. 521. See JURISDICTION.

Formerly the right of removal was given to either party without regard to the position occupied as plaintiff or defendant; 100 U. S. 457; but under the act of 1887 this right is in most cases given to the defendant only, the exception being where citizens of the same state claim land under grants from different states and the defendant must be a non-resident; 148 U. S. 663; but a case is not removable from the state court on the ground of citizenship, unless both at the commencement of the action, and also when the removal is asked, the defendants are citizens of a state other than the one of which the plaintiff is a citizen; 130 U. S. 230; 144 *id.* 568; 132 *id.* 267. Some question has arisen as to which party is to be considered the plaintiff in proceedings for the exercise of the right of eminent domain, and if, by local practice, the landowner is the plaintiff, he cannot remove; 50 Fed. Rep. 637; 54 *id.* 545.

Where several are sued as partners and only one has been served, he is not precluded from removal by the non-joinder of the others in the removal proceedings; 84 *id.* 413. Where one may sue either one

of two parties and he chooses to sue both, he may do so, though his motive in joining them is to prevent a removal to a federal court; 83 Fed. Rep. 876.

A suit between a state and citizens of another state cannot be removed on the ground of citizenship; 117 U. S. 430; 155 *id.* 432; 65 N. C. 714; 9 Ohio C. C. 21; 85 Fed. Rep. 870. Corporations existing by virtue of acts of congress may remove to the federal courts actions brought against them in the state courts, on the ground that they are "suits arising under the laws of the United States;" 76 Fed. Rep. 468.

The diversity of citizenship at the commencement of the action must appear from the petition; 130 U. S. 230; 187 U. S. 61.

Application for removal must be before the plea is due; and this means at or before the time when the defendant is required by the laws of the state to answer or plead to the merits; 83 Fed. Rep. 15; and the time is not extended by delay in taking judgment or default for want of plea; 133 U. S. 298; nor can it be by stipulation of the parties or by the discretionary action of the judge in a particular case; 80 Fed. Rep. 945.

All the facts essential to federal jurisdiction must appear on the record; 22 U. S. App. 707. They must appear from the plaintiff's statement where that is the ground of removal, and cannot be supplied by statement in the petition for removal or subsequent pleadings; 155 U. S. 432, 438; 162 *id.* 490.

If a cause removed is not remanded when it might be, and proceeds without objection to judgment, the latter remains in force until vacated; 123 U. S. 552. One who petitions for or consents to removal cannot afterwards object to it as not asked for in time; 156 U. S. 335. If a cause is removed and the circuit court decides it has no jurisdiction, it *remands* and does not *dismiss*; 149 U. S. 452.

Where the state court denies the motion for removal but the record is nevertheless filed in the circuit court, which proceeds to a hearing and then remands, the order refusing removal works no prejudice, and the error, if any, is immaterial; 160 U. S. 556.

Actual removal subjects the defendants to the jurisdiction of the federal court and is a waiver of privileges claimed by pleas in abatement, but the mere filing a petition in the state court is not a waiver of exception to its jurisdiction; 13 U. S. App. 252.

An order of the circuit court remanding a case to a state court is not reviewable by the supreme court by any direct proceeding; 140 U. S. 117; 169 U. S. 92; 160 *id.* 556. The act of 1887 takes away the power of the supreme court to relieve by mandamus when a case removed is improperly remanded; 137 U. S. 451; and when the state court asserts jurisdiction after a proper application for removal, the question is not waived by the party entitled to the removal by reason of his appearing and contesting the matter in dispute; 19 Wall. 214; 100 U. S. 457; 106 *id.* 118; 112 *id.* 12. He may take an appeal, should the decision be against him, to the highest court of the state, save the question of removal on the record, and failing there, to the supreme court of the United States; 118 U. S. 49; 104 *id.* 5. In the event of his obtaining a decision in favor of removal there, the judgment of the state court will be reversed and an order made to transfer the case to the circuit court for trial on the merits; 92 J. S. 10. If a cause be improperly removed and the circuit court entertains jurisdiction improperly, its judgment will be reversed by the supreme court with directions to the circuit court to remand the same to the state court; 20 Wall. 117.

The denial by a state court of an application to amend a petition for removal is not a denial of a right secured by the constitution of the United States; 157 U. S. 370.

When a suit over which a state court has full jurisdiction in equity is removed to a circuit court of the United States on the ground of diverse citizenship, and it ap-

pears that the courts of the United States have no jurisdiction in equity over such a controversy, the cause should be remanded to the state court, instead of dismissing it for want of jurisdiction; 149 U. S. 451.

A bill in equity to reach partnership property and set aside judgments confessed by fraud, presented a single controversy as to all defendants and could not be removed by one for diversity of citizenship; 132 U. S. 571; so also of a bill to prevent the payment of county bonds alleged to be invalid where some bondholders were citizens of the same state with the plaintiffs and others who sought to remove of a different state; 188 U. S. 571; so of a bill to recover possession of town bonds where the bailee is a necessary party and a citizen of the same state; 151 U. S. 56. One of two corporations sued jointly in a state court for tort, though pleading severally, cannot remove the case on the ground of a separable controversy; 133 U. S. 599; so of a complaint against a corporation and its agents individually for damages for polluting a stream, and seeking a remedy against them jointly, though they answer separately with separate defences; 118 U. S. 264. To remove upon the ground of separable controversy, the case must be capable of separation into two or more independent suits, one of which is wholly between citizens of different states in the sense that it may be fully determined as between them without the presence of the other parties to the record; 19 U. S. App. 646; 140 U. S. 406; see 151 *id.* 308; but separate defences do not create separate controversies within the meaning of the removal act; 132 U. S. 571; 118 *id.* 596; and a defendant cannot make an action several which plaintiff elects to make joint; 118 U. S. 596; 144 *id.* 527.

The right of removal under R. S. § 641, *supra*, is authorized only upon petition setting forth infractions of the 14th amendment to the constitution previous to the trial and final hearing of the cause, and has no applicability to those occurring after the trial or final hearing has commenced. This section was drawn only with reference to state action, and has no reference to individual violations of rights; 100 U. S. 313. The right of removal under section 641 of the revised statutes exists only in the special cases mentioned in it, and in the absence of the denial or inability to enforce in the judicial tribunals of the state the equal civil rights of citizens, does not embrace cases in which a right is denied by judicial action during trial, or in the sentence or mode of its execution; 162 U. S. 555, where it was held, following 103 *id.* 370, that a removal was not authorized by the exclusion of negroes *because of their race* from service on grand juries.

A suit cannot be removed on the ground of prejudice or local influence, unless all the opposing parties are citizens of the state in which suit was brought, which state must also be other than that of which the petitioners are citizens; 118 U. S. 54; 119 *id.* 536; or under the act of 1887, where there is no separable controversy, and in such case the petition and affidavit must show facts, not mere conclusions; 19 U. S. App. 300. If the petition is filed by the final hearing it is in time; 129 U. S. 688. The motion cannot be made *ex parte*; 59 Fed. Rep. 209; 112 N. C. 396. The application is too late after a third trial in the state court; 143 U. S. 459; it may be at any time before the first trial; 59 Fed. Rep. 990; 54 *id.* 7. The matter in dispute in a case removed for prejudice, etc., must exceed \$3,000; 137 U. S. 451; 29 U. S. App. 707; 30 Neb. 161; though it was at first a matter of some controversy whether the jurisdictional limit of amount applied to these cases, and there were decisions that it did not; 32 Fed. Rep. 673; 38 *id.* 529; 41 *id.* 449. In such case the defendant should obtain an order from the federal court for the removal, file that order in the state court, and take from it a transcript which should be filed in the federal court; 143 U. S. 255. All issues of fact upon petition for removal for prejudice or

local influence must be tried in the circuit court; 123 U. S. 513.

In cases under Rev. St. § 643, the jurisdiction of the state court is taken away only after the petition for removal is filed in the circuit court and a writ of *certiorari* or of *habeas corpus cum causa* issued and served; 148 U. S. 107.

A motion under a state statute as to corporations, for executions against a stockholder, cannot be removed; 5 Dill. 223. Nor can an appeal under a state law from assessment of taxes; 135 U. S. 467; or a writ of *habeas corpus* (under act of 1875); 115 U. S. 487.

Proceedings in a probate court to determine whether the property of a deceased person is separate or community property, cannot be removed to a federal court, though the opposing parties are citizens of different states. The federal courts will not interfere with the custody of the estate of a deceased person by the state probate court in which proceedings are pending for administration; 80 Fed. Rep. 949. A proceeding by mandamus to compel the register of the transfer of stock may be removed; *id.* 489; but not one on a plea which raises the issue of title to an office; 29 La. Ann. 399; nor an action in the nature of *quo warranto* to determine the title to office of presidential electors; 8 S. C. 382. Suits by attachment may be removed; 5 Blatchf. 107; 2 Curt. C. C. 212; ejectment suits; 3 Wall. Jr. 258, 263; a bill in equity to reform an insurance policy; 6 Blatchf. 208; a suit to annul a will; 92 U. S. 10; a railway foreclosure suit; 6 Biss. 529. A condemnation proceeding; 124 U. S. 197; suit against a marshal for trespass for goods taken on attachment; 139 U. S. 628; where the controversy involved the authority of the land department to grant a patent; 140 U. S. 406. An action of tort against several defendants for a conspiracy cannot be removed by a part of them; 40 Ala. 639. Where the suit is in its nature an equitable proceeding, it must proceed as such in the federal court, and in accordance with the rules governing equity cases in such court without regard to the system in the state court; 13 How. 268; 23 *id.* 484. Where the suit unites legal and equitable questions of relief or defence, a repleader is necessary after removal; 1 Dill. 290; 8 Blatchf. 299; 15 *id.* 432; 15 Wall. 573. The circuit court may issue a *certiorari* to bring in the record from the state courts. This was provided by the act of 1875 (18 Stat. L. 470) and not repealed by the act of 1887; but a *certiorari* is not an essential part of the proceeding and need only be resorted to if necessary to procure the record; 6 Biss. 529. So the circuit court may join further proceedings in the state court; 17 Blatchf. 333; 56 Fed. Rep. 329; 22 Wall. 250, where it was held that the prohibition against injunctions by federal courts touching proceedings in the state courts has no application to such cases.

See Dillon, Removal of Causes (Black's ed.); UNITED STATES COURTS.

REMOVAL FROM OFFICE. A deprivation of office by the act of a competent officer or of the legislature. It may be express, that is, by a notification that the officer has been removed, or implied, by the appointment of another person to the same office; Wall. Jr. 118. See 13 Pet. 130; 1 Cra. 137. See OFFICER.

REMOVE. To move away from the position occupied; to displace. 86 Ky. 190. To change place in any manner; to go from one place to another. 12 Conn. 186.

Remove at Pleasure. The words "remove at pleasure" have a well defined legal meaning. The right to remove at pleasure is an entirely different thing from the right to remove for cause. To hold that the statute only authorized the council to remove for cause would be to deny the words used by the Legislature their ordinary meaning. 118 Ky 108, 80 S. W. 514.

REMOVER. In Practice. A trans-

fer of a suit or cause out of one court into another, which is effected by writ of error, *certiorari*, and the like. 11 Co. 41.

REMUNERATION. Reward; recompense; salary. Dig. 17. 1. 7. See 1 Q. B. Div. 663.

RENDER. To yield; to return; to give again; it is the reverse of *prender*. See 77 Ia. 387.

A judgment is "rendered" when the court makes an order therefor; 12 Mont. 11.

RENDEZVOUS. A place appointed for meeting. Especially used of places appointed for the meeting of ships and their convoy, and for the meeting of soldiers.

RENDITION. See FUGITIVE FROM JUSTICE; EXTRADITION.

RENEGADE. One who has changed his profession of faith or opinion. Whart.

RENEW. To make again; as, to renew a treaty or a covenant. 124 Mass. 151.

To renew a charter is to give new existence to a charter which has been forfeited or has lost validity by lapse of time. Anderson; 21 Pa. 201.

RENEWAL. A change of something old for something new; as, the renewal of a note; the renewal of a lease. See NOVATION; 1 Bouvier, Inst. n. 800.

RENOUCE. To give up a right; for example, an executor may renounce the right of administering the estate of the testator; a widow, the right to administer for her intestate husband's estate.

RENOUNCING PROBATE. Giving up the right to be executor of a will, where-in he has been appointed to that office, by refusing to take out probate of such will. 1 Will. Exec. 230, 231. It is usually done by writing filed in the probate office.

RENOVANT. Renewing. Cowel.

RENT (Lat. *reditus*, a return). A return or compensation for the possession of some corporeal inheritance. A certain profit, either in money, provisions, or labor, issuing out of lands and tenements, in return for their use.

The compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof. Jacks. & Gross, Landl. & T. § 38; Woodf. Landl. & T. 375.

The word "rents" in the bond of an administrator is intended to apply to and embrace only such "rents" as at the death of an intestate passed to his personal representative and not to his heirs. 12 Bush (Ky.) 215.

It has been held that a rent may issue out of lands and tenements corporeal, and also, out of them and their furniture, in this case a dairy farm with its stock and utensils; 31 Pa. 20; 99 *id.* 52. See, as to furnished lodgings, 5 B. & P. 224; 5 Co. 16 b.

Some of its common-law properties are that it must be a profit to the proprietor, certain in its character, or capable of being reduced to a certainty, issuing yearly, that is, periodically, out of the thing granted, and not be part of the land or thing itself; Co. Litt. 47; 2 Bla. Com. 41.

At common law there were three species of rent: rent *service*, where the tenant held his land by fealty, homage, or other corporal service and a certain rent to which the right of distress was necessarily incident; 3 Kent *461; 9 Watts 258; rent *charge*, which was a reservation of rent, with a clause authorizing its collection by distress; and rent *seck*, where there was no such clause, but the rent could only be collected by an ordinary action at law as by a writ of annuity or writ of assize. These distinctions, however, for all practical purposes, have become obsolete, in consequence of various statutes both in England and in this country, allowing every kind of rent to be distrained for without distinction. See Tayl. Landl. & T. § 370; FEUDAL LAW.

The payment of rent is incident to every tenancy where the relation of landlord and

tenant subsists, except as to mere tenancies at will or by sufferance, where this relation cannot be said to exist. And no tenant can resist a demand for rent unless he shows that he has been evicted or become otherwise entitled to quit the premises, and has actually done so, before the rent in question became due. By the strictness of the common law, when a tenant has once made an agreement to pay rent, nothing will excuse him from continuing to pay, although the premises should be reduced to a ruinous condition by some unavoidable accident of fire, flood, or tempest; 6 Mass. 63; 4 Harr. & J. 564; 72 Pa. 285; 39 Cal. 151; 3 Johns. 44; 1 Term 310; 9 Price 294; 85 Ala. 99; 37 Ill. App. 542. See 72 Mich. 433.

But this severity of the ancient law has been somewhat abated in this country, and in this respect conforms to the more reasonable provisions of the Code Napoléon, art. 1722, which declares that if the thing hired is destroyed by fortuitous events, during the continuance of the lease, the contract of hiring is rescinded, but if it be only destroyed in part, the lessee may, according to circumstances, demand either a diminution of the rent or a rescission of the contract itself. The same provision is to be found substantially in the Code of Louisiana, art. 2667, and in the act of the legislature of New York of 1860, c. 345, § 1. A somewhat similar provision is found in the laws of Minnesota; Laws 1883, c. 100; 47 Minn. 291. In South Carolina and Pennsylvania it was decided that a tenant who had been dispossessed by a public enemy ought not to pay rent for the time the possession was withheld from him; and in Maryland it has been held that where a hurricane rendered a house untenable it was a good defence to an action for rent. But these cases are evidently exceptions to the general rule of law above stated; 1 Bay 499; 5 Watts 517; 1 M'Cord 447. A tenant is not compelled to keep and pay rent for a house which, from defects in its construction, becomes untenable and unfit for habitation; 73 Mich. 577. Where land has been swept away or gained upon by the sea, the lessee is no longer liable for rent; Bac. Abr. 63; Rolle, Abr. 236.

The right of the lessor to terminate a lease for non-payment of rent will not give the lessee any right to avoid the lease or his liability for agreed rent; 150 U. S. 665.

The quiet enjoyment of the premises, unmolested by the landlord, is an implied condition to the payment of rent. If, therefore, he ousts the tenant from any considerable portion of the premises, or erects a nuisance of any description upon or so near to them as to oblige the tenant to remove, or if the possession of the land should be recovered by a third person, by a title superior to that of the landlord, the dispossession in either case amounts to an eviction, and discharges the obligation to pay rent; 2 Ired. 350; 3 Harr. N. J. 364; 4 Leigh 484; 4 N. Y. 217; 1 M. & W. 747; 91 Pa. 322; 103 Mass. 201; 54 N. H. 426; 49 Vt. 109; 31 Ala. 412; 44 Mo. App. 279; 1 App. D. C. 447. By retaining possession of premises in spite of such acts of his landlord as would otherwise amount to an eviction, a tenant waives his right to withhold the rent; 112 Mass. 8; 20 N. Y. 32. The entry of a landlord upon demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent, and not to his entire exclusion; 151 Pa. 101.

A tenant's liability for rent is not affected by condemnation of part of the leased premises; 136 Ill. 37; 144 *id.* 537; but where the estate of both landlord and tenant in the entire premises is extinguished by condemnation, the obligation to pay rent ceases; 144 Ill. 537.

As rent issues out of the land, it is said to be incident to the reversion, and the right to demand it necessarily attaches itself to the ownership, and follows a transfer of the premises, and the several parts thereof, without the consent of the occupant. Every occupant is chargeable with rent by virtue of his occupation, whether

he be the tenant or an assignee of the tenant. The original tenant cannot avoid his liability by transferring his lease to another, but his assignee is only liable so long as he remains in possession, and may discharge himself by the simple act of assigning over to some one else; 14 Wend. (8); 1 N. & M'C. 104; 12 Pick. 460; 4 Leigh 61; 2 Ohio 221; 1 Wash. C. C. 375; 1 Rawle 153; 3 B. & Ald. 393; 11 Ad. & E. 408; Cro. Eliz. 256; Co. Litt. 46 b. When rent will be apportioned, see APPORTIONMENT; LANDLORD AND TENANT.

The day of payment depends, in the first instance, upon the contract; if this is silent in that respect, rent is payable quarterly or half-yearly, according to the custom of the country; but if there be no usage governing the case, it is not due until the end of the term. Formerly it was payable before sunset of the day whereon it was to be paid, on the reasonable ground that sufficient light should remain to enable the parties to count the money; but now it is not considered due until midnight or the last minute of the natural day on which it is made payable; 36 Pa. 272. This rule, however, may be varied by the custom of different places; Co. Litt. 202 a; 15 Pick. 147; 5 S. & R. 432. Under a lease requiring rent to be paid annually on a certain day for a year in advance, a tenant continuing in possession three months after that day is liable for the year's rent; 17 Atl. Rep. (Vt.) 719. See FORFEITURE; RE-ENTRY; PAYMENT.

Interest accrues on rent from the time it is due, but cannot be included in a distress; 17 S. & R. 390.

When rent is payable in money, it must strictly be paid in legal-tender money; with respect to foreign coin, the lessor may decline to receive it except by its true weight and value. Bank-notes constitute part of the currency of the country, and ordinarily pass as money, and are a good tender, unless specially objected to by the creditor at the time of the offer; 10 Wheat. 347. Payment may be made in commodities, when so reserved. If the contract specifies a place of payment, a tender of rent, whether in money or in kind, must be made at that place; but, if no place is specified, a tender of either on the land will be sufficient to prevent a forfeiture; 16 Term 222; 10 N. Y. 80; 4 Taunt. 555.

Under an income-tax statute, rent is to be treated as identical with land; 158 U. S. 601. An assignment of rent must be in writing under the statute of frauds; 23 N. Y. 521.

See DISTRESS; RE-ENTRY; GROUND-RENT; REFLEVIN; PAYMENT TONNAGE-RENT.

RENT OF ASSISE. See RENTS OF ASSISE.

RENT CHARGE. A rent reserved with a power of enforcing its payment by distress. See RENT.

RENT INSURANCE. See INSURANCE.

RENT ROLL. A list of rents payable to a particular person or public body. See RENT.

RENT SECK. A rent collectable only by action at law in case of non-payment. See RENT.

RENT SERVICE. A rent embracing some corporal service attendant upon the tenure of the land. Distress was necessarily incident to such a rent. See RENT; GROUND-RENT; FEUDAL SYSTEM.

RENTAL. A roll or list of the rents of an estate, containing the description of the lands let, the names of the tenants, and other particulars connected with such estate. This is the same as *rent roll*, from which it is said to be corrupted. It is commonly used as synonymous with rent.

RENTAL ROLLS. Tiend bolts, due the parson as tithes. Ersk. Prin. 2. 10. 6.

RENTE. In French Law. A word

nearly synonymous with our word annuity. *Rentes*: Public funds.

RENTE FONCIERE. In French Law. A rent which issues out of land; and it is of its essence that it be perpetual, for if it be made but for a limited time it is a lease. It may, however, be extinguished. La. Civ. Code, art. 2750, 2759; Pothier. See GROUND-RENT.

RENTE VIAGERE. In French Law. An annuity for life. La. Civ. Code, art. 2761; Pothier, *Rente*, n. 215.

RENTS OF ASSIZE. The certain and determined rents of the freeholders and ancient copyholders of manors. Brown.

RENTS, ISSUES, AND PROFITS. The profits arising from property generally. This phrase in the Vermont statute has been held not to cover "yearly profits." 26 Vt. 741.

RENUNCIATION. The act of giving up a right.

It is a rule of law that any one may renounce a right which the law has established in his favor. To this maxim there are many limitations. A party may always renounce an acquired right; as, for example, to take lands by descent; but one cannot always give up a future right before it has accrued, nor the benefit conferred by law, although such advantage may be introduced only for the benefit of individuals.

For example, the power of making a will, the right of annulling a future contract on the ground of fraud, and the right of pleading the act of limitations cannot be renounced. The first, because the party must be left free to make a will or not; and the latter two, because the right has not yet accrued.

This term is usually employed to signify the abdication or giving up of one's country at the time of choosing another. The act of congress requires from a foreigner who applies to become naturalized a renunciation of all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof such alien may at the time be a citizen or subject. See Morse, *Citizenship*; CITIZEN; EXPATRIATION; NATURALIZATION.

RENVOI. The power which every state has to expel strangers from its territory. This is one of the complementary elements of the protection to society which is the end and purpose of the right to inflict punishment. Bouvé, *Exclusion and Expulsion of Aliens in the United States*, p. 4. See DEPORTATION; EXPULSION.

REOPENING A CASE. A court of equity, in the exercise of a sound discretion, has full power to reopen a case, and allow the correction of mistakes in testimony. To reopen a case is to permit the introduction of new evidence and, practically, try it anew; to rehear a case is to hear it again upon the same proofs and allegations. Such applications are not favored, however, and, when granted, must be based upon strong circumstances to justify a deviation from the general rule; 93 Pa. 214; Adams, *Eq.* 372; 8 Phila. 380; 41 Fed. Rep. 425; 3 *id.* 95. An application to reopen a case and take further proofs has been granted on condition that the moving party pay his opponent's counsel fee for the previous argument, where the new testimony appeared to be newly discovered, material, and not cumulative, and there was no great laches; 44 Fed. Rep. 283. But an application to reopen and admit a newly discovered defence, after final hearing, will only be granted when it appears that such defence, if made at the final hearing, would have been effectual; 7 *id.* 920.

Reopening patent cases is to be discouraged when the grounds offered therefor pertain to matters of evidence which could as well have been produced at the hearing; 20 *id.* 111; 31 *id.* 918. See REHEARING; NEW TRIAL; BILL OF REVIEW.

REORGANIZATION. A term in common use to denote the carrying out, by proper agreements and legal proceedings, of a business plan or scheme for winding up the affairs of, or foreclosing a mortgage or mortgages upon the property of, insolvent corporations, more frequently railroad companies. It is usually by the judicial sale of the corporate property and franchises, and the formation, by the purchasers of a new corporation, in which the property and franchises are thereupon vested, and the stock and bonds of which are divided among such of the parties interested in the old company as are parties to the reorganization plan.

In most of the states, statutes have been passed to regulate the purchase of corporate properties and franchises at judicial sales. A list of them is given in Short, *Ry. Bonds* 842. They usually provide that the purchasers shall be, or become, or may organize a new corporation in taking over the assets and franchises purchased, and have and enjoy the corporate rights and franchises of the former company.

Usually some of the security holders name a committee who formulate a plan of reorganization providing for the deposit of securities with the committee as agents or trustees for the owners; for the purchase of the property at the sale; and the organization of a new company upon the basis of a specified scheme of distribution of the new securities among those who assent to the plan. The securities are generally deposited with the committee with very full powers of control, under the plan, and usually with a certain power of modification of the plan, under specified circumstances. When the new company has been formed, the new securities are issued to the assenting parties in accordance with the terms of the plan.

Where a reorganization is the only feasible method of protecting the relative rights of all parties interested in a large enterprise, and it can be done only by co-operation, courts of equity, in the absence of fraud or oppression, are disposed to aid rather than to thwart such schemes of reorganization; 56 Fed. Rep. 7. Such arrangements are to be promoted, because they are necessary to prevent great sacrifice and loss; 28 *id.* 340; 22 *id.* 183.

The creditors of a mortgagor railroad company may fairly combine to purchase the property at a mortgage sale, and other creditors are not, by such combination, deprived of the right to bid at such sale; 2 *id.* 302. Courts will endeavor to carry into effect a fair plan of reorganization and will overlook merely technical defects in it; 11 Ch. D. 603. Such an agreement is not a fraud on non-assenting creditors and does not entitle them to claim their debts against the new company; 101 Pa. 576.

Where a railroad company has issued several series of mortgage bonds, some covering all the property and some only a part, and become insolvent, and the principal of some of the mortgages was due and the company had a large floating debt, it was held that a decree foreclosing all the mortgages, entered by consent of the bondholders, would not be set aside on the petition of some of the stockholders on the ground that some of the mortgages were not yet due, as it was in the interest of the company to effect a reorganization which would secure and extend its bonded debt and reduce the rate of interest thereon and provide the necessary means to satisfy the floating debt; 45 Fed. Rep. 438.

Reorganization agreements must be carried out according to their terms. If they are not, the subscribers to them are not bound; 40 Vt. 399; and the assenting security holders must also comply strictly with the agreement to which they have assented; Short, *Ry. Bonds* 857.

Where there was a compromise in which stockholders of a company were given the right to subscribe for stock in the reorganized company, upon terms specified in a circular addressed to the old stockholders, it was held, on proceedings by a stockholder who averred, want of notice of the

circular, that he had no right of action against the company, because the agreement was not made by the company or on its behalf, and that he could not complain of the terms of the agreement, as he was not a party to it; 81 N. Y. 462. A reorganization committee is not a trustee for non-assenting bondholders; 73 Fed. Rep. 49.

Creditors who do not assent to a reorganization agreement are entitled to enforce payment of the purchase price paid at a foreclosure sale by the reorganization committee, for the purpose of discharging their claims. Creditors coming in under the plan thereby release their rights against the old company; 80 Fed. Rep. 569.

Where a reorganization agreement provided that if stockholders neglected to pay the assessments within the period limited, the privilege of receiving the shares allotted to them should be ratably distributed among those who did pay their assessments, it was held that as soon as the default occurred on the part of a non-assenting stockholder, his interest became a vested right in the assenting stockholders under the plan. Likewise that an assenting bondholder who fails to deliver his bonds to the trustee under the agreement is debarred from any benefit therein; 44 Barb. 75.

In an action against a reorganized railroad company for failure to deliver its stock in amount equal to the bonds and coupons of the old company held by the plaintiff, it was held that, as the plaintiff had not exercised his option to come into the plan prior to the execution of the deed of the property to the new company, he was not entitled to the stock, and his only right was to take his share of the proceeds of the sale; 133 Pa. 579. The right to participate ceases when the property has passed to the new corporation; the rights of the security holders thereby become fixed, and a majority of certificate holders cannot then modify them; 14 N. Y. Supp. 558.

Where a statute required the consent of bondholders for foreclosure proceedings of a railroad property and such consent was given, it was held that outstanding bondholders would be regarded as consenting by reason of their silence during a protracted litigation; 122 U. S. 1.

A majority of bondholders cannot compel a minority, however small, to enter into a joint agreement with them; 109 U. S. 535; but it is said by an able writer that the relations of corporate bondholders are peculiar, and that the courts, in foreclosure proceedings, have sometimes considered them as analogous to those which exist among stockholders; Short, *Ry. Bonds* § 27; and that this is especially true in carrying out reorganization schemes; *id.* See 100 U. S. 605. An act for the reorganization of an embarrassed corporation which provides that all mortgage bondholders who do not, within a given time, expressly dissent from the plan of reorganization, shall be deemed to have assented to it, is valid; 109 U. S. 401; and so is an act which provides that a majority of the bondholders, with equal opportunities to all, may reorganize a new corporation; 53 Conn. 333. The theory is that railroad property is pledged to public use and that this consideration is superior to the property rights of corporators, stockholders, and bondholders. See 109 U. S. 535. Acts relating to reorganization are for the good of all, and are a species of bankruptcy acts; unless forbidden, as in the United States, there is no good reason why they should not be passed in respect of existing obligations; *id.*

Where a corporation mortgage vests certain powers of control in a majority of the bondholders, as to sanction a modification of a deed of trust; 55 L. T. N. S. 347; 74 Fed. Rep. 110; [1898] 1 Ch. 477, 484; to direct the trustee to purchase the mortgaged property at a foreclosure sale and to reorganize a new company; 99 U. S. 384; or to control the mortgagee trustee in beginning or discontinuing foreclosure pro-

ceedings; 184 U. S. 500; the courts will carry into effect the action of such majority.

In 18 Fed. Rep. 242, Treat, J., criticised the decree of foreclosure then before the court, for the omission of what he considered the usual clause in foreclosure decrees, viz., one permitting the minority bondholders to come in, after purchase, within a limited time, on equal terms with purchasing bondholders.

A sale under foreclosure of an insolvent railroad company under an agreement by which the bondholders, according to their priorities, got more or less of their debt (100 to 30 per cent.), and the stockholders of the company the residue of the proceeds (16 per cent. of the par of their stock), was held fraudulent as against general creditors, although the road was mortgaged far above its value; 7 Wall. 392. But where the plan gives stockholders an interest but does not include general creditors, it is not invalid unless the scheme is to give the stockholders that which should go to creditors; 85 Fed. Rep. 838.

The holders of preferred stock may not use it to make up the amount of their bid on foreclosure sale of the property; 88 Fed. Rep. 930.

Where the local managers and officers of an insolvent railroad company, holding a small portion of its bonds, of which a much greater portion was held by non-residents, got an order of sale and proceeded in a hasty and rather secret way to sell and buy it in at the lowest value for themselves, the proceedings were held invalid as against the bondholders, generally, and the stockholders; 21 Wall. 616.

In England, if some of the majority of bondholders are not acting in good faith, a reorganization agreement will not be sanctioned; 44 Ch. Div. 403. Secured creditors of a railroad company, after bringing the property within the jurisdiction of the court, will not be permitted, by any private arrangement with the company or otherwise, so to dispose of the property as seriously and unnecessarily to prejudice the unsecured creditors. They may not, for their own benefit or for the common interest of themselves and the debtor, place the surplus which may exist after the satisfaction of their own claims beyond the reach of the latter; 21 Fed. Rep. 264.

On proceedings by an unsecured creditor praying that the stock of a reorganized company, set aside in the reorganization agreement for the stockholders of the old company, should be sold and the proceeds paid to the holders of the floating debt, it appearing that the plan showed a due regard for the interests of all classes of creditors and stockholders, and that the bill did not show any injustice intended or done to the complainant, the bill was dismissed; 9 Fed. Rep. 738.

Bondholders who decline, on request, to assent, and take no steps to protect themselves, have no standing in equity to set aside a foreclosure sale, if the transaction was fair; 3 Fed. Rep. 177. And a bill praying that a reorganization of a railroad company be set aside and a new plan formulated, and for a receiver, was dismissed, it appearing that the plaintiff had her representative on the new board and had attempted to buy more of the new issue of bonds, although it was alleged that the new company was illegally organized, which fact was, however, known to the plaintiff; 15 Fed. Rep. 691.

Where a reorganization of an English mining company, whose property was all in the United States, was carried on in England by the voluntary act of the English stockholders and not by the British courts, and was found to have been in flagrant violation and disregard of the rights of the American stockholders, it was held that no principle of international comity required that it should be sustained; 55 Fed. Rep. 7.

In 112 U. S. 609, it was held that a mortgage on a charter of a corporation made in the exercise of a power given by a statute, confers no right upon purchasers at a fore-

closure sale to exist as the same corporation; if it confers any right of corporate existence upon them, it is only a right to reorganize as a corporation, subject to the laws existing at the time of the reorganization. The court said: "The real transaction, in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the incorporators, and a grant de novo of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived by a mere figure of speech. The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made. The statute authorizing the transfer and declaring its effect is the grant of a new charter couched in a few words, and to take effect upon condition of the surrender or abandonment of the old charter, and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment."

In Pennsylvania, under the act of April, 1861, the sale of a railroad does not extinguish the corporation, but creates the purchaser a body corporate, with all the rights, etc., of the old corporation. Irregularities in the organization are not necessarily fatal to the being of the new corporation, and will, at the most, enable the commonwealth to retake the franchise. It cannot be said that the franchises do not exist; 52 Pa. 506.

Where foreclosure was brought on a railroad mortgage containing the usual clause that the trustee on request of a majority of the bondholders should bid at the sale, and reorganize on their account, it was held that the agreement enured equally for the benefit of the bondholders, and that each held his interest subject to the controlling power given to the majority; that, upon proper request from the bondholders, the court might direct the trustee to bid at the sale the amount of the principal and interest due on the first mortgage bonds and to proceed to execute the trust; 99 U. S. 334.

The pendency of a reorganization plan for the preservation of an entire railroad system may sometimes be reason for refusing temporarily an application on the part of the trustees of a divisional mortgage to be put in possession of the property covered by the mortgage to them; Short, Ry. Bonds 854.

In reorganization proceedings it is not necessary that notice of the terms of the plan nor of the legal proceedings be given to the stockholders in order to bar their rights if they do not assent; 96 N. Y. 49.

Where a Canadian act provides for the reorganization of a Canadian railroad company, and the settlement is accepted by a large majority of the shareholders and goes into effect, United States bondholders are bound by it, if they could participate on the same terms as Canadian bondholders; 109 U. S. 527.

Where the stockholders of an insolvent company formed a new company, under the laws of another state, which took a lease of the property of the old company and paid off its debts, and then in its turn became insolvent, it was held to be, as to third persons, substantially the same company and the property remained charged with a mechanic's lien for labor and materials furnished to the new company; 75 Fed. Rep. 368.

See MERGER; MORTGAGE; NEWSPAPER; RAILROAD; RECEIVER; LEASE.

Modern systems of railroad reorganization are severely criticised by Moorfield Storey in Am. Bar Asso. Rep. 1896.

Reorganization agreements frequently contain provisions conferring a control by means of a voting trust, which see.

REPAIRS. That work which is done to property to keep it in good order.

Repair is held to mean to restore to a sound state after decay, injury, dilapidation, or partial injury; 85 Mo. 263; to be synonymous with "make and keep up"; 23 Ind. 281; and sometimes to mean replace; 2 N. Y. 93.

Tenantable repairs. Decorative repair is not included. But papering always, and painting, unless intended for the protection of the property, are decorative repairs. The obligation does not extend to repairing or restoring what is worn out by age, but voluntary waste is a breach of the obligation. 36 W. R. 54; 59 L. J. Q. B. 129.

What a party is bound to do, when the law imposes upon him the duty to make necessary repairs, does not appear to be very accurately defined. Natural and unavoidable decay in the buildings must always be allowed for, when there is no express covenant to the contrary; and it seems the lessee will satisfy the obligation the law imposes on him by delivering the premises at the expiration of his tenancy in a habitable state. Questions in relation to repairs most frequently arise between the landlord and tenant.

In determining whether there has been a breach of a covenant to repair, regard must be had to the age and character of the premises at the date of the demise; and if the premises through their own inherent defects fall in the course of the tenancy into a particular condition, the result of their being in that condition are not breaches of a covenant to repair, however wide that covenant may be; [1893] 2 Q. B. 212.

When there is no express agreement between the parties the tenant is always required to do the necessary repairs; Woodf. Landl. & T. 244; 6 Cow. 475. He is, therefore, bound to put in windows or doors that have been broken by him, so as to prevent any decay of the premises; but he is not required to put a new roof on an old worn-out house; 2 Esp. 590. The landlord is under no implied obligation to make ordinary repairs; 161 Pa. 87.

An express covenant on the part of the lessee to keep a house in repair, and leave it in as good a plight as it was when the lease was made, does not bind him to repair the ordinary and natural decay; Woodf. Landl. & T. 256. See 7 Gray 550. And it has been held that such a covenant does not bind him to rebuild a house which had been destroyed by a public enemy; 1 Dall. 210; but where in a lease there is an express and unconditional agreement to repair and keep in repair, the tenant is bound to do so, though the premises be destroyed by fire or accident; 91 Pa. 88; 2 Wall. 1; 49 Barb. 554.

Repair means to restore to its former condition, not to change either the form or material of a building; 63 Pa. 162. When a landlord covenants to repair, he is bound only to restore to a sound state either what has become decayed or dilapidated, or better, what has been partially destroyed; his covenant does not extend to improvements, nor to new buildings erected by the tenant; 4 Pa. 364. See 1 Dy. 33 a.

In order to entitle a tenant to recover from his landlord for repairs made by the tenant upon the premises, he must show a contract with the landlord, express or implied, to pay for them; 38 Neb. 157.

As to the time when the repairs are to be made, it would seem reasonable that when the lessor is bound to make them he should have the right to enter and make them, when a delay until after the expiration of the lease would be injurious to the estate; but when no such damage exists, the landlord should have no right to enter without the consent of the tenant. See 18 Toullier, n. 297. A general covenant by a lessor to repair is construed to mean within a reasonable time after notice; 76 Cal. 173. When a house has been destroyed by accidental fire, neither the tenant nor the landlord is bound to rebuild, unless obliged by some agreement so to do; 4 Paige, Ch. 355; 1 Term 708. See LANDLORD AND TENANT; RENT; 4 Camp. 275; Co. Litt. 27 a; 3 Johns. 44; 6 Mass. 63; Platt. Co. 266; 1 Saund. 322, n. 1, 323, n. 7; 2 id. 158 b, n. 7 & 10.

REPARATION. The redress of an injury; amends for a tort inflicted. See

REPARATIONE

REMEDY.

REPARATIONE FACIENDA, WRIT DE (Lat.). The name of an ancient writ which lies by one or more joint tenants against the other joint tenants, or by a person owning a house or building against the owner of the adjoining building, to compel the reparation of such joint property. *Fitzherbert, Nat. Brev.* 295.

REPATRIATION. The regaining nationality after expatriation.

REPAY. Repay does not necessarily mean to pay money. It has also the meaning of return, restore, etc.; 19 Kan. 390.

REPEAL. The abrogation or destruction of a law by a legislative act.

A repeal is *express*, as, when it is literally declared by a subsequent law, or *implied*, when the new law contains provisions contrary to or irreconcilable with those of the former law.

The power to revoke or annul a statute or ordinance is equivalent to the power to repeal it; and in either case the power is legislative and not judicial in its character; 30 W. Va. 479.

A statute is not to be deemed repealed merely by the enactment of another statute on the same subject. There must be a positive repugnancy between the provisions of the new law and the old, to work a repeal by implication; and even then the old law is repealed only to the extent of such repugnancy; 16 Pet. 342; 51 N. J. Eq. 332; 137 U. S. 693. This rule is supported in a vast variety of cases.

A law may be repealed by implication, by an affirmative as well as by a negative statute, if the substance is inconsistent with the old statute; 1 Ohio 10; 2 Bibb 96; Harp. 101; 4 Wash. C. C. 691; and a repeal by implication has been effected even where two inconsistent enactments have been passed in the same session; 2 B. & Ald. 818; or where two parts of the same act have proved repugnant to each other; 4 C. P. Div. 29; but this will be presumed only in extreme cases; 13 C. B. 461. A repeal by implication is not favored, the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts; 1 Black 470; 137 U. S. 632; 146 Ill. 268; 57 Mich. 407; 73 Cal. 360; 78 Ia. 88; 50 Ark. 132; 9 Q. B. D. 58; [1892] 1 Q. B. 654; see 76 Ga. 181; 100 N. C. 474; and a general law is not to be held as repealing a prior special law unless it clearly manifests such intention; 98 Mo. 426; 85 Ky. 265; 45 La. Ann. 237; 146 Ill. 268; 12 U. S. App. 574. General legislation must give way to special legislation on the same subject; *id.* 267. But where the constitution directs the legislature to pass general legislation, and a law is passed, which is complete and does evidently intend to provide a uniform system, no words of repeal are necessary; 176 Pa. 67.

The later of two clearly inconsistent and repugnant acts must prevail; 104 N. Y. 218; 28 Neb. 618; and is an implied repeal of the earlier; 29 Ch. D. 15; but not unless their provisions are clearly inconsistent; 12 U. S. App. 574; and where they can be read together without repugnancy, both should stand; 50 L. J. M. C. 6; 157 U. S. 46; and the burden is on the one who asserts that there is an implied repeal; 29 Ch. D. 15.

An earlier statute is repealed by a subsequent one only in those particulars wherein it is clearly inconsistent and irreconcilable with the later enactment. The leaning of all courts is against repealing the positive provisions of former statutes by construction, unless there be such a manifest and total repugnance between the two enactments that they cannot both stand. It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject; there must be a conflict between different acts on the same specific subject; 177 Pa. 112. Where the repealing act is

unconstitutional and void, it will not work a repeal; 26 Ala. 165; 3 Gray 476; 14 Mich. 276; 1 Wash. 382; *contra*, 11 Ind. 489.

Special legislation is not necessarily repealed by subsequent general legislation without words of repeal; 91 N. Y. 231; 152 Pa. 244; 146 Ill. 268; L. R. 10 A. C. 68. To have that effect there must be express reference or necessary implication; 2 J. & H. 53; 10 App. Cas. 68. Where a statute amends a former statute "so as to read as follows" and restates it at length the prior act is not repealed and re-enacted but is continued; 143 Mass. 418; inconsistent provisions in the former, omitted in the later, act are repealed; 136 N. Y. 347.

Where there is a general revision of statutes, clearly intended to be complete, it repeals prior legislation, though not repugnant and though the revision contains no words of repeal; 82 Ky. 256; 12 Mass. 537; 545; 9 Pick. 97; 42 Me. 53; 121 N. Y. 234; 37 N. H. 295; 30 Vt. 344; 8 Tex. 62; 14 Ill. 334; 6 B. Monr. 146; but only where the intent to repeal plainly appears; 62 Vt. 442. See 9 Ind. 337; 10 *id.* 566.

There can be no repeal by non-user; 2 Term 274. It was otherwise in the civil law, and it is said to be otherwise in Scotland; 1 Kent 466.

A statute purporting to cover an entire subject repeals all former statutes on the same subject, either with or without a repealing clause and notwithstanding it may omit material provisions of the earlier statutes; 86 Tenn. 523; 85 *id.* 495; 86 Ky. 170; 73 Ia. 619; 20 Oreg. 345.

A statute will not repeal a prior statute merely because it repeals some of its provisions and omits others, or adds new provisions; the later act operates as a repeal only when it plainly appears that it was intended as a substitute for the first act; 127 U. S. 406; and a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and prescribes the only rules in respect to that subject that are to govern; 134 U. S. 206.

Where a new statute expressly repeals the former statute, and the new and the repeal of the old are to take effect at the same time, a provision in the old statute which is embodied in the new is deemed to have continued in force without suspension; 3 Wisc. 667; 15 Ill. 595. But it has been held that where the new law does not go into effect until a time subsequent to that at which the repeal takes effect, such a provision is to be deemed repealed meantime; 12 La. Ann. 593. But see 1 Pick. 33.

As to what force should be given to portions of a statute excepted from repeal, see Endlich, *Interpr. Stat.*; 3 Wall. 495; 109 U. S. 556.

A difference in the punctuation of similar statutes does not in all cases warrant a different construction, particularly when the printer is responsible for it, and not the legislature; 39 Pac. Rep. (Idaho) 548. See 34 Cent. L. J. 253.

Where an amendment changes the phraseology of a former act, it will be presumed that it was the intention to make a corresponding change in its meaning; 50 Fed. Rep. 749. Where a section of a statute is amended and afterwards such section "as amended" is repealed, the original section, and not the amendment merely, is repealed; 80 Ia. 661. The amendment of a statute does not repeal it so that a subsequent statute, which professes to amend the original act, is invalid; 45 Neb. 724. See 1 Am. L. Reg. N. s. 566.

It is a general rule that when a penal statute punishes an offence by a certain penalty, and a new statute is passed imposing a greater or a lesser penalty for the same offence, the former statute is repealed by implication; 5 Pick. 163; 3 Halst. 48; 3 A. K. Marsh. 70; see 1 Binn. 601; Bacon, *Abr. Statute* (D); but subsequent statutes which add accumulative penalties do not repeal former statutes; 1 Cowp. 297; 6 Mod. 141.

At common law the repeal of a repeal-

ing act revived the former act; 6 Co. 199; 1 Gray 163; 7 W. & S. 233; 2 Blackf. 33; 54 N. J. L. J. 175; and it has been held in the supreme court to have this effect, unless the language of the repealing statute or some general statute provides otherwise; 120 U. S. 52; but this rule is now altered in England by an act passed in 1890 and amended in 1899, and in many states this rule has been changed, as in Ohio and Louisiana; La. Civ. Code, art. 23. And in some states, as Tennessee and Georgia, the substance of an act repealed or revived must be stated in the caption or otherwise, and in others, as Connecticut and Arkansas, a repealing or amending act must recite the law so amended sufficiently to show the effect of the amendment or repeal. For a summary of statutes on the subject of repeals, see Stimson, *Am. Stat. L.* §§ 1042-3.

It has been held that when the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand and have effect, notwithstanding the invalidity of the act; 11 Ind. 489. But other cases hold that such repealing clause is to be understood as designed to repeal all conflicting provisions, in order that those of the new statute can have effect, and that if the statute is invalid, nothing can conflict with it, and therefore nothing is repealed; 6 Wis. 605; 35 Barb. 264; Cooley, *Const. Lim.* 186.

A repealed statute is as if it had never existed, except as to transactions which are past and closed before the repeal; 4 De G. & J. 557; but the repeal leaves all the civil rights of the parties acquired under the law unaffected; 3 La. 337; 2 South. 689; Breese 29; 2 Stew. Ala. 160; 2 Wall. 450. An action for penalties cannot be sustained when the statute inflicting them has been repealed before judgment; 13 How. 429; nor an action for the recovery of money paid in violation of law, under similar circumstances; 5 Blatch. 229.

When a penal statute is repealed or so modified as to exempt a class from its operation, violations committed before the repeal are also exempted, unless specifically reserved, or unless there has been some private right vested by it; 2 Dana 330; 4 Yeates 393; 5 Rand. 657; 1 Wash. C. C. 84; 2 Va. Cas. 382.

See, generally, Dwaris; Wilberforce; Endlich, *Statutes*; PATENT; REPUGNANCY; CONSTRUCTION; OBSOLETE; INTERPRETATION; STATUTE; REVISED STATUTES.

REPERTORY. In French Law. A word used to denote the inventory or minutes which notaries are required to make of all contracts which take place before them. Dalloz, *Dict.*

REPETITION. In Civil Law. The act by which a person demands and seeks to recover what he has paid by mistake or delivered on a condition which has not been performed. Dig. 12. 4. 5.

The name of an action which lies to recover the payment which has been made by mistake when nothing was due.

Repetition is never admitted in relation to natural obligations which have been voluntarily acquitted, if the debtor had capacity to give his consent. 6 Toullier 356.

In order to entitle the payer to recover back money paid by mistake, it must have been paid by him to a person to whom he did not owe it, for otherwise he cannot recover it back,—the creditor having, in such case, the just right to retain the money. *Repetitio nulla est ab eo qui suum recepit.*

How far money paid under a mistake of law is liable to repetition has been discussed by civilians; and opinions on this subject are divided. 2 Pothier, *Obl.*, Evans ed. 369, 408-437; 1 Story, *Eq. Pl.* § 111, note 2.

In Scotch Law. The act of reading over a witness's deposition, in order that he may adhere to it or correct it, at his choice. The same as *recolement* (*q. v.*) in the French law. 2 Benth. *Ev.* 339.

REPLEADER. In Pleading. Making a new series of pleadings.

Judgment of replenders differs from a judgment *non obstante veredicto* in this: that it is allowed by the court to do justice between the parties where the defect is in the form or manner of stating the right, and the issue joined is on an immaterial point, so that it cannot tell for whom to give judgment; 3 Pick. 124; 19 *id.* 419; while judgment *non obstante* is given only where it is clearly apparent to the court that the party who has succeeded has, upon his own showing, no merits, and cannot have by any manner of statement; 1 Chitty, Pl. 569. See 19 Ark. 194.

It may be ordered by the court for the purpose of obtaining a better issue, if it will effect substantial justice where issue has been reached on an immaterial point; 3 B. & P. 353; 2 Johns. 388; 3 Hen. & M. 118, 161; Gould, Pl. 473; as a plea of payment on a given day to an action on a bond conditioned to pay on or before that day; 2 Stra. 934. It is not to be allowed till after trial for a defect which is aided by verdict; 3 Saund. 319 b; Bac. Abr. *Pleas*. If granted or denied where it should not be, it is error; 2 Salk. 579. See 9 Ala. N. S. 193.

The judgment is general, and the parties must begin at the first fault which occasioned the immaterial issue; 1 Ld. Raym. 169; entirely anew, if the declaration is imperfect; 1 Chitty, Pl. 563; that the action must be dismissed in such case; 1 Wash. Va. 135; with the replication, if that be faulty and the bar be good; 3 Keb. 664; 1 Wash. Va. 155. No costs are allowed to either side; 6 Term 131; 2 B. & P. 376.

It cannot be awarded after a default at *nisi prius*; 1 Chitty, Pl. 568; nor where the court can give judgment on the whole record; Willes 532; nor after demurrer; 2 Mass. 81; unless, perhaps, where the bar and replication are bad; Cro. Eliz. 313; 7 Mo. 303; nor after writ of error, without the consent of the parties; 3 Salk. 306; nor at any time in favor of the person who made the first fault; 1 Ld. Raym. 170; 1 Hempst. 268; 1 Humphr. 85; 6 Blackf. 375; see 3 Hen. & M. 388; nor after judgment; 1 Tyl. Vt. 146. The same end is secured in many of the states by statutes allowing amendments. See, generally, Tidd, Pr. 813, 814; Com. Dig. *Pleader* (R 18); Bac. Abr. *Pleas* (M).

REPLEGIARE (Lat.). To replevy: to redeem a thing detained or taken by another, by putting in legal sureties.

REPLEGIARE DE AVERIIS (Lat.). A writ brought by one whose cattle are impounded or distrained, upon security given to the sheriff to pursue or answer the action at law. 7 Hen. VIII. c. 4; Fitzh. N. B. 63; New Book of Entries, *Replevin*; Dy. 173; Reg. Orig. 81.

REPLEGIARE FACIAS (Lat.). A writ of replevin, which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in regard to the matter in his own county court. It was abolished by statute of Marlbridge (q. v.), which provided a shorter process. 3 Sharsw. Bla. Com. 147*; Andr. Steph. Pl. 92.

REPLEVIN. In Practice. A form of action which lies to regain the possession of personal chattels which have been taken from the plaintiff unlawfully.

The action originally lay for the purpose of recovering chattels taken as a distress, but has acquired a much more extended use. In England and most of the states of the United States it extends to all cases of illegal taking, and in some of the states it may be brought wherever a person wishes to recover specific goods to which he alleges title. See *infra*.

A general use of this remedy seems to date from the latter part of the 13th century, referring to the fact that at that period the remedy known as *vetitum narium* (q. v.) was falling into desuetude.

It is said that at that time, "under the name of *Replegiare*, or *Replevin*, an action was being developed which was proving itself to be convenient action for the settlement of disputes between landlord and tenant; but it seems to have owed its vigor, its rapidity, and therefore its convenience, to the supposition that a serious offence had been committed against the king." 2 Poll. & Maitl. 576.

By virtue of the writ, the sheriff proceeds at once to take possession of the property therein described and transfer it to the plaintiff, upon his giving pledges which are satisfactory to the sheriff to prove his title, or return the chattels taken if he fail so to do. It is said to have laid formerly in the *detinuit*, which is the only form now found at common law, and also in the *detinet*, where the defendant retained possession, and the sheriff proceeded to take possession and deliver the property to the plaintiff after the trial and proof of title; Bull. N. P. 52; Chitty, Pl. 145; 3 Bla. Com. 146; *DETINET*; *DETINUIT*.

It differs from *detinue* in this: that it requires an unlawful taking as the foundation of the action; and from all other personal actions in that it is brought to recover the possession of the specific property claimed to have been unlawfully taken.

The action lies to recover personal property; 19 Pa. 71; including parish records; 11 Pick. 492; trees after they had been cut down; 2 Barb. 613; 9 Mo. 259; 13 Ill. 192; records of a corporation; 5 Ind. 165; articles which can be specifically distinguished from all other chattels of the same kind by indicia or ear-marks; 18 Ill. 286; including money tied up in a bag and taken in that state; 2 Mod. 61; a promissory note; 155 Mass. 339; trees cut into boards; 30 Me. 370; 13 Ill. 192; a house which is being moved from the land on which it was built; 84 Me. 133; see 81 Wis. 341; 93 Mich. 49; but does not lie for injuries to things annexed to the realty; 4 Term 504; 2 M'Cord 329; 17 Johns. 116; 10 B. Monr. 72; nor to recover such things, if dissevered and removed as part of the same act; 3 S. & R. 509; 6 Me. 427; 8 Cow. 220; nor for writings concerning the realty; 1 Brownl. 168.

Replevin lies in Massachusetts wherever *detinue* does, e. g. for deeds which attend the inheritance; Holmes, Com. L. 352.

A general property with the right to immediate possession gives the plaintiff sufficient title to maintain it; 3 Wend. 230; 15 Pick. 63; 9 Gill & J. 220; 2 Ark. 315; 4 Blackf. 304; 8 Dana 238; 27 Miss. 193; 2 Swan 358; 60 Vt. 624; as do a special property and actual possession; 2 Watts 110; 2 Ark. 315; 4 Blackf. 304; 10 Mo. 277; 9 Humphr. 739; 2 Ohio St. 82; and the bare possession of property, though wrongfully obtained, is sufficient title to maintain it against a mere stranger; 51 Minn. 294.

A joint owner of personal property can maintain replevin in his own name to recover it, against one whose right is not superior to his; 60 Vt. 718.

It will not lie for the defendant in another action to recover goods belonging to him and taken on attachment; 5 Co. 99; 20 Johns. 470; 2 N. H. 412; 2 B. Monr. 18; 3 Md. 54; nor, generally, for goods properly in the custody of the law; 2 N. & M'C. 453; 3 Md. 54; 7 Watts 173; 4 Ark. 525; 8 Ired. 887; 16 How. 622; 3 Mich. 163; Hempst. 10; 2 Wisc. 92; 1 Sneed 390; 73 Hun 633; but this rule does not prevent a third person, whose goods have been improperly attached in such suit, from bringing this action; 4 Pick. 167; 14 Johns. 84; 6 Halst. 370; 2 Blackf. 172; 7 Ohio 133; 19 Me. 255; 9 Gill & J. 220; 24 Vt. 371.

As to the rights of co-tenants to bring this action as against each other, see 1 Harr. & G. 803; 13 Conn. 331; 15 Pick. 71; 36 Neb. 631; as against strangers, see 4 Mas. 515; 13 Wend. 131; 15 Me. 245; 2 N. J. L. 553; 37 N. H. 320; 6 Ind. 414.

The action lies, in England, and most of the United States, wherever there has been an illegal taking; 18 E. L. & E. 290; 7 Johns. 140; 5 Mass. 283; 3 S. & R. 562;

1 Mas. 319; 11 Mo. 38; 3 Blackf. 415; 1 Const. 401; 3 N. H. 35; 6 Halst. 370; 1 Ill. 130; 1 Mo. 345; 6 T. B. Monr. 421; 6 Ark. 18; 4 Harr. Del. 327; and in some states wherever a person claims title to specific chattels in another's possessions; 2 Harr. & J. 429; 4 Me. 306; 1 Pa. 238; 4 Harr. N. J. 160; 4 Mo. 93; 8 Blackf. 244; Hempst. 10; 4 R. I. 539; 121 Mass. 107; 54 Me. 447; 48 Miss. 357; while in others it is restricted to a few cases of illegal seizure; 9 Conn. 140; 3 Rand. 446; 16 Miss. 279; 4 Mich. 295. The object of the action is to recover possession; and it will not lie where the property has been restored. And when brought in the *detinet* the destruction of the articles by the defendant is no answer to the action; 3 Bla. Com. 147.

The declaration must describe the place of taking. Great accuracy was formerly required in this respect; 2 Wms. Saund. 74 b; 10 Johns. 53; but now a statement of the county in which it occurred is said to be sufficient; 1 P. A. Bro. 60.

The chattels must be accurately described in the writ; 6 Halst. 179; 1 Harr. & G. 252; 4 Blackf. 70; 1 Mich. 92.

The plea of *non cepit* puts in issue the taking, and not the plaintiff's title; 6 Ired. 38; 25 Me. 464; 3 N. Y. 506; 2 Fla. 42; 13 Ill. 378; and the pleas, not guilty; 9 Mo. 256; *cepit in alio loco*, and property in another, are also of frequent occurrence.

An avowry, cognizance, or justification is often used in defence. See those titles.

The judgment, when the action is in the *detinuit*, if for the plaintiff, confirms his title, and is also for damages assessed by the jury for the injurious taking and detention; 1 W. & S. 513; 20 Wend. 172; 15 Me. 20; 1 Ark. 557; 5 Ired. 192. In actions of replevin the measure of damages is the real value of the chattel at the time the tortious possession of the defendant began, with damages for its unlawful detention; 54 N. J. L. 597.

The defendant in replevin is not concluded by the value of the property named in the bond of the writ, when he brings an action on the bond, and is not estopped from showing such value to be greater than there stated; 125 U. S. 426.

See JUDGMENT; Morris, Repl.; 6 E. & B. 842; 2 Poll. & Maitl. 3.

REPLEVY. To re-deliver goods which have been distrained to the original possessor of them, on his giving pledges in an action of replevin. It signifies also the bailing or liberating a man from prison, on his finding bail to answer. See *REPLEVIN*.

REPLIANT. One who makes a replication.

REPLICATION (Lat. *replicare*, to fold back).

The plaintiff's answer to the defendant's plea or answer.

In Equity. The plaintiff's avoidance or denial of the answer or defence. Story, Eq. Pl. § 877.

A general replication is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. Cooper, Eq. Pl. 329, 330. Such a replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill; 168 U. S. 1.

A special replication was one which introduced new matter to avoid the defendant's answer. It might be followed by rejoinder, surrejoinder, and rebutter. Special replications have been superseded by the practice of amending bills; 1 How. Intr. 55; 17 Pet. App. 68. A replication must be made use of where the plaintiff intends to introduce evidence, and a subpoena to the defendant to rejoin must be added, unless he will appear gratis; Story, Eq. Pl. § 879.

A replication may be filed *nunc pro tunc* after witnesses have been examined under leave of court; Story, Eq. Pl. § 881; Mitf. Eq. Pl. by Jeremy 323. If a replication is

taken to a plea and issue be found thereon, the bill will not be dismissed, provided the facts contained in the plea are proved; 24 U. S. App. 542.

In the federal courts, after an answer is filed on any rule day, complainant has until the second rule day thereafter to file a general replication; 85 Fed. Rep. 508 (in the 8th Circuit).

In Admiralty. No replication to the answer to a libel is now allowed; the libellant, under Adm. Rule 51, is considered as denying new facts set up in the answer.

At Law. The plaintiff's reply to the defendant's plea. It contains a statement of matter, consistent with the declaration, which avoids the effect of the defendant's plea or constitutes a joinder in issue thereon. See Andr. Staph. Pl. 151.

It is, in general, governed by the plea, whether dilatory or in bar, and most frequently denies it. When the plea concludes to the country, the plaintiff must generally reply by a similiter. See SIMILITER; Hempst. 67. When it concludes with a verification, the plaintiff may either conclude the defendant by matter of estoppel, deny the truth of the plea in whole or in part, confess and avoid the plea, or new assign the cause of action in case of an evasive plea. Its character varies with the form of action and the facts of the case. See 1 Chitty, Pl. 519.

As to the form of the replication:

The title contains the name of the court, and the term of which it is pleaded, and in the margin the names of the plaintiff and defendant. 2 Chitty, Pl. 641.

The commencement is that part which immediately follows the title, and contains a general denial of the effect of the defendant's plea. When the plea is to the jurisdiction, it contains a statement that the writ ought not to be quashed, or that the court ought not to be ousted of their jurisdiction. Rastell, Entr. 101. When misnomer is pleaded, no such allegation is required; 1 B. & P. 61.

When matter in estoppel is replied, it is, in general, in the words "and the said plaintiff saith that the said defendant."

When the replication denies or confesses and avoids the plea, it contains a *precludi non*, which see.

The body should contain—

Matter of estoppel, which should be set forth in the replication if it does not appear from the previous pleadings; as, if the matter has been tried upon a particular issue in trespass and found by the jury; 3 East 346; 4 Mass. 443; 4 Dana 73; *denial of the truth of the plea*, either of the whole plea, which may be by a denial of the fact or facts constituting a single point in express words; 12 Barb. 573; 36 N. H. 232; 28 Vt. 279; 1 Humphr. 524; or by the general replication and *injuria*, etc., according to the form of action; 8 Co. 67; 1 B. & P. 79; 13 Ill. 80; 19 Vt. 329; or of a part of the plea, which may be of any material fact; 20 Johns. 406; 13 T. B. Monr. 288; and of such only; 20 N. H. 323; 37 E. L. & E. 479; 9 Gill 310; 3 Pet. 31; or of matter of right resulting from facts; 1 Saund. 23 a, n. 5; 10 Ark. 147; see 2 La. 120; and see TRAVERSE; a *confession and avoidance*; 23 N. H. 535; 2 Denio 97; 10 Mass. 226; see CONFESSION AND AVOIDANCE; a *new assignment*, which see.

The conclusion should be to the country when the replication denies the whole of the defendant's plea containing matter of fact; 2 McLean 92; 7 Pick. 117; 1 Johns. 516; as well where the plea is to the jurisdiction; 1 Chitty, Pl. 385; as in bar; 1 Chitty, Pl. 554; but with a verification when new matter is introduced; 1 Saund. 103, n.; 17 Pick. 87; 1 Brev. 11; 11 Johns. 56. See 5 Ind. 264. The conclusions in particular cases are stated in 1 Chitty, Pl. 615; Com. Dig. Plead. (F 5). See 1 Saund. 103, n.; 1 Johns. 516; Archb. Civ. Pl. 258; 19 Viner, Abr. 29; Bac. Abr. Trespass (I 4).

As to the qualities of a replication. It must be responsive to the defendant's plea; 17 Ark. 365; 4 McLean 521; answering all

which it professes to answer; 12 Ark. 188; 8 Ala. n. s. 875; and if bad in part, is bad altogether; 1 Saund. 388; 7 Cra. 156; 32 Ala. n. s. 506; *directly*; 10 East 205; see 7 Blackf. 481; without departing from the allegations of the declaration in any material matter; 2 Watts 306; 4 Munf. 205; 23 N. H. 303; 5 Blackf. 306; 1 Ill. 26; see DEPARTURE; with *certainly*; 6 Fla. 25; see CERTAINTY; and without *duplicitly*; 4 Ill. 423; Davis 236; 14 N. H. 373; 26 Vt. 397; 4 Wend. 211; see DUPLICITY. Although the replication is a departure from the complaint, yet the defendant cannot avail himself of such a defect in a court of error, where he did not raise the question by demurrer or by motion, but went to trial upon the issues as made up; 148 U. S. 345.

An objection that replications were not filed to the defendant's pleas when the trial commenced, nor before judgment with leave of court, comes too late if made after entry of judgment; 144 U. S. 454.

REPLY. In England in public prosecutions for felony or misdemeanor, instituted by the Crown, the law officers have a general right of reply, whether the defendant has introduced evidence or not; but prosecuting counsel in ordinary cases have not this right. See 6 Law Mag. & Rev., 4 Ser. 102. See OPENING AND CLOSING; RIGHT TO BEGIN; BURDEN OF PROOF.

REPORT OF COMMITTEE. That communication which the chairman makes to the house upon the close of the investigation in which the committee has been engaged.

REPORT OFFICE. Formerly a department of the English court of chancery. Whart.

REPORTING, COUNCIL OF LAW. In 1865 the Council of Law Reporting commenced a series of reports covering all the superior courts of England which took over the regular reporters. But this series is not official, as is sometimes thought. "All reports made by gentlemen of the Bar and published on their responsibility are equally regular. There is no superiority in the reports of the Council of Law Reporting. Counsel are as much entitled to use the one as the others." (per Lord Esher, M. R., 3 T. L. R. 641). Byrne.

REPORTS. A printed or written collection of accounts or relations of cases judicially argued and determined.

The value and force of *adjudicated precedents*, which is, to a greater or less degree, acknowledged in the jurisprudence of all civilized countries, is elsewhere discussed under the titles herein, *judge-made law*, *precedent*, and *stare decisis*. The greater weight given to precedent, however, in England and America, makes the subject of law reporting one of the utmost interest and importance. The multiplication of reports has given rise to much discussion on the subject.

In an able report to the American Bar Association, 1893, presented by Edward Q. Keasbey, it was suggested that the evils of excessive reports would be lessened if the court could be induced to write shorter opinions, especially when passing upon well-settled principles of law, and if the dissenting opinions were brief. The committee thought that dissenting opinions should be published. Only the important cases should be reported, omitting those which decide only questions of fact, or reaffirm settled principles of law, the selection to be made by the reporter. In preparing the syllabus all *dicta* should be omitted, and also propositions of law made by the court which were only *arguendo*. The reporter should state the facts even though they are stated by the court; an abstract of the arguments should be printed only in novel and important cases; Rep. Am. Bar Ass'n, 1893.

Prior to the year 1800, there were only one or two American Reports. In England, however, there were very many, but before the period of official reporting, and

particularly among the early reports, there is a great difference in the value of the reports published by volunteer reporters. While some of them are of the highest authority, both in England and America, others are of little or, in many cases, of no authority whatever, and it is of the highest importance that a lawyer in citing them should know the character of the volume cited.

They are often mere *note-books* of lawyers or of students, or copies hastily and very inaccurately made from genuine manuscripts. In some instances one part of the book is *good*, when another is perfectly worthless. This is especially true of the early Chancery Reports, which were generally printed as booksellers' "jobs."

The failure to give due attention to the character of the old reports has led to grave judicial errors. Mr. Wallace, in "The Reporters," calls attention to the fact that the opinion of Chief Justice Marshall, which "had the effect of almost totally subverting in two states of our Union the entire law of charitable uses," relied upon the authority, which, twenty-five years afterwards, under the critical examination of Mr. Binney, was shown to be no authority, and the opinion passed upon it was overruled. The necessity of attention to the apparent value of the old reports is enhanced by the fact that even in books of the worst authority, there are occasional cases well reported, and different parts of the same book are of very different value. The most thorough and satisfactory source of information on this subject is "The Reporters," the author of which made the most exhaustive investigations in London, and his work received the highest commendation from English judges; 5 C. B. n. s. 854, where the book was characterized "as highly valuable and interesting," and one to which "they could not refrain from referring" on a question involving the reputation of one of the early English reporters.

Although want of space requires the omission in this revision of the detailed list of reports, a few of the comments upon the older reporters are given here in view of the fact that some of the sources from which they were drawn are out of print.

For a history of the "Law Reports" in England, with much information on reporting, see Daniel, History of the Origin of the Law Reports, 1884.

See 1 Abbott's National Digest x, for much information as to the Federal Reports, other than those in supreme court. All of the federal cases (except in the Supreme Court) have been reprinted in a very valuable series, in thirty volumes, under the name of "Federal Cases."

See, generally, 1 Kent, 14th ed. 471; 9 L. Quart. Rev. 179; 1 *id.* 137; Wambaugh, Study of Cases, *passim*; 2 Jurid. Soc. Papers 745, "The Expediency of Digesting the Precedents of the Common Law, and Regulating the Publication of Reports."

For a list of reports, see Soule, Lawyers' Reference Manual, which gives the chronology of all reports.

Among the English reporters the following possess little authority: Noy, Godbolt, Owen, Popham, Winch, March, Hutton, Ley, Lane, Hetley, Carter, J. Bridgman, Keble, Siderfin, Latch, several volumes of the "Modern" Reports, 3d Salkeld, Gilbert's Cases in Law and Equity, the 1st and 2d parts of "Reports in Chancery," Chancery Cases, Reports *temp.* Finch, "Gilbert's Reports," 8th Taunton, Peake's Nisi Prius Reports.

Prof. Wambaugh (Study of Cases) speaks of the "many cases excellently reported by Dyer, Plowden, Coke, Croke, Yelverton, Hobart, and Saunders." The first reporter to make orderly and condensed reports in full harmony with modern ideas was Sir James Burrow (1756-1772, K. B.); *id.*

Aleyn (John). K. B., 1646-48, 1 vol. These are reports of cases in the time of the civil wars of Charles I., and do not possess much authority, though contain-

- ing reports of Rolle's decisions.
- Ambler (Charles).** Cases in the High Court of Ch. 1737-83. Second edition by J. E. Blunt. 2 vols. As originally published of very little authority, but much improved by Mr. Blunt, whose edition was published in 1838.
- Barnardiston (Thomas).** High Ct. of Ch., 1740-41. 1 vol. Lord Mansfield (2 Burr. 1142) forbade the citing of this book as it would be only misleading the students to put them upon reading it. He said it was marvellous, however, to those who knew the sergeant, and his manner of taking notes, that he should so often stumble upon what was right; but that there was not one case in his book which was so throughout. Lord Eldon, however, in 1 Bligh, N. R. 538, says, "in that book there are reports of very great authority."
- Barnardiston (Thomas).** K. B., 1726-34. 2 vols. A book which for many years was very little esteemed, the author having been reputed a careless fellow who let the wags scribble what they liked in his note-book while he was asleep. However, where his accuracy has been tested, as it has been of later times, it has come out pretty fairly; and now both the K. B. and Ch. reports of Barnardiston are reasonably respected. See Wallace, Report. 423.
- Bendloe (Guilme).** All the Courts, 1531-1623. 1 vol. Properly cited as New Benloe, but sometimes as old Benloe.
- Benloe (Guilme) & Dalison (Guilme).** C. P. Benloe contains cases from 1532 to 1579, and Dalison from 1546 to 1574. 1 vol. of each, bound together. There is very great confusion in the citations of the reports of Benloe and Dalison. Some cases of Benloe's are given at the end of Keilway's Reports and of Ashe's Tables. It is supposed that the title New Benloe was given to the volume here given as Bendloes to distinguish it from the cases in Keilway and Ashe. The volume given as Benloe & Dalison consists in reality of two separate series of reports, pagged independently, although bound together, and the modes of reference are very various, being sometimes to Dalison when Benloe is intended, and *vice versa*. A full account is given in Wallace's Report. 80-85, 93, of these reports, and of the various mistakes made in citation.
- Blackstone (William).** K. B., C. P., and Exch. Chamber, 1746-79. 2 vols. Lord Mansfield said (Dougl. 92, n.): "We must not always rely on the words of reports, though under great names. Mr. Justice Blackstone's reports are not very accurate," but of late they have been well edited, and are more esteemed.
- Bosanquet (J. B.) & Puller (C.).** New Reports, C. P., Exch. Chamb., and House of Lords, 1804-07. 8 vols. The volumes of Bosanquet & Puller are generally cited from 1 to 5 in American books. In English books the latter series is frequently cited as New Reports.
- Brooke (Robert).** New Cases. Called also Petit Brooke, Little Brooke and Bellewe's Cases, *temp.* Henry VIII. A selection of cases in the K. B., C. P., and Exch., 1515-58. These cases were selected out of Brooke's Abridgment by Richard Bellewe.
- Burrow (James).** K. B., 1756-71. 5 vols. A full, excellent, and accurate reporter, who holds in a legal point of view the same relation to Lord Mansfield that in a literary and historical one Boswell does to Dr. Johnson.
- Carthew (Thomas).** King's Bench, 3 Jac. II.-12 Will. III. 1 vol. Lord Thurlow said, "Carthew and his book were equally bad authority," but Lord Kenyon, in 2 Term 776, says that Carthew is in general a good reporter. See also Willes 182.
- Cary (George).** Ch., 1557-1604. 1 vol. Frequently mere transcripts from the Registrar's books.
- Cases in B. R. temp. Holt.** Cases and Resolutions in the Court of K. B., 1714-29. 1 vol. This must not be mistaken for "Reports temp. Holt," for which see "Holt."
- Cases in Chancery.** Two parts in 1 vol.; with this is usually bound "Select Cases in the High Ct. of Ch.," which contains the cases of the Duke of Norfolk and of the Earls of Bath & Montagu; it is cited as 1st, 2d, & 3d "Chancery Cases."
- Cases tempore Hardwicke.** K. B. at Westminster during the time of Hardwicke, usually cited as Hardwicke's Cases, which see; see also Ridgway.
- Cases tempore Talbot.** K. B., C. P., and Ch., 1734-38. 1 vol. By Alex. Forrester to page 217, and from there to the end, by Hawkins. A book of highly respectable authority, though not a monument worthy of Lord Talbot's transcendent virtue. Wallace, Report. 506.
- Cases tempore William III.** King's Bench, 1690-1702. 1 vol. See Modern, vol. 12. Buller said in Dougl. 88, "12th Modern is not a book of any authority."
- Choyce Chancery Cases, 1557-1606.** 1 vol. A very good little book, so far as it goes. See Wallace, Report. 470, where curious extracts are given from the volume. Reprinted, 1870.
- Coke (Edward).** King's Bench, Common Pleas, Exchequer; and Chancery, 1572-1618. 13 parts or volumes. Lord Coke's reports are very voluminous. They have been severely criticised by Sir Edward Sugden, Lord Redesdale, and others, and Coke charged with "telling untruths" in them; but all the charges made against him have been examined by Mr. Wallace (Reporters, p. 165), and Lord Coke's integrity vindicated from the imputations of his countrymen.
- Comerbach (Roger).** K. B., 1685-99. It is said by Lord Thurlow (1 Bro. C. C. 97) to be bad authority, though a few cases are better reported than in any other place. Its chief use is for comparison with other reports of the same cases. Wallace, Report. 396.
- Cox (Edward W.).** Criminal Cas. in all the Cts. in England and Ireland, 1843-81. 14 vols. These reports, which are edited by Mr. Cox, are prepared by a large number of reporters.
- Croke (Sir George).** Ch., K. B., and C. P., 1582-1641. 4 vols. The reports in Croke are generally short, and, as the books consist of four closely-printed volumes, the cases are, of course, very numerous. Occasionally cases are misreported; but taken as a whole, Croke has enjoyed from early times a high reputation, and even now is constantly cited. Wallace, Report. 198. The Chancery cases in the time of Elizabeth are Sir Harbottle Grimston's. The reports are commonly cited by the name of the author and the reigning sovereign: vol. 1 as Croke Car., vols. 2 & 3 Croke Eliz., and vol. 4 Croke Jac.
- Davies, or Davis, or Davy (Sir John).** K. B., C. P., and Exch. in Ireland, 1604-12. 1 vol. Davies, who was chief-justice of Ireland, and died on the night of the day on which he had been appointed chief-justice of England, was a man of great genius and accomplishments. For an account of these reports, see Wallace, Report. 229.
- Dickens (John).** High Ct. of Ch., 1559-1798. 2 vols. Mr. Dickens was a very attentive and diligent register; but his notes, being rather loose, are not to be considered as of very high authority. Lord Redesdale, 1 Sch. & L. 240. See, also, Sugd. Vend. 146. A few cases, where the opinions are printed from manuscripts prepared for publication, are valuable. Wallace, Report. 476.
- Dyer (Sir James).** K. B. and C. P. Exch. and Ch., 1513-82. 3 vols. Short notes, never intended by Dyer to have been published; always regarded, however, as among the best of the old reports. Wallace, Report. 126.
- Ellis (Thomas F.) & Blackburn (Colm).** Q. B., 1852-58. 8 vols. Among modern reports few are more valued for the success with which extraneous matter is stripped off and nothing but the essence of the case presented to the reader. 9 Lond. Law Mag. 389.
- Equity Cases Abridged.** Cases in the High Court of Ch., 1667-1744. 3 vols. This work is a digest, rather than reports, and is frequently cited. The first volume, which is attributed to Pooley, is of excellent authority; the second, much less so.
- Fortesque (John).** Select cases in all the courts of Westminster Hall, *tempore* Will. III., Anne, Geo. I., and Geo. II.; also the Opinion of all the Judges of England relative to the Grandest Prerogatives of the royal family, and some observations relating to the Prerogative of a Queen-Consort. 1 vol.
- Freeman (Richard).** K. B. and C. P., 1670-1704. 1 vol. Freeman's note-book having been stolen by a student, and these reports published surreptitiously, they were for a long time but little esteemed. Of late, however, they have been re-edited, and enjoy a higher reputation than they formerly did. Lord Mansfield said, in Cowp. 16, "Some of the cases in Freeman are very well reported." Wallace, Report. 390.
- Gilbert (J.).** Cases in Law and Eq., 1718-15. 1 vol. A posthumous work, containing one or two cases well reported, but generally consisting of loose notes very badly edited. Wallace, Report. 251. Commonly cited as Gilbert's Cases.
- Hardwicke's Cases.** Court of King's Bench at Westminster, 7th to 10th Geo. II., during which time Hardwicke presided in that court, to which are added some cases decided by Lee and two Equity cases by Hardwicke.
- Hetley (Sir Thomas).** C. P., 1627-31. 1 vol. Not marked by any peculiar skill, accuracy, or information. Dougl. ix. Not valued. 2 Jurid. Soc. Papers 577.
- Hobart (Sir Henry).** C. P. and Ch., 1-23 Jac. I. Hobart was a great judge; and these reports, which are by himself, have always been esteemed. Wallace (Report. p. 163) cites from Judge Jenkins a splendid tribute to his character.
- Holt.** Reports *tempore* Holt. K. B., C. P., Exch., and Ch., 1688-1710. 1 vol., by Giles Jacob. (Taken from a MS. of Thomas Farresley.) In *Rex v. Bishop of London*, Lee, C. J., said this was a book of no authority.
- Howell (Thomas B.) & (Thomas J.).** State Trials and Proceedings for High Treason and other Crimes and Misdemeanors, 1163-1820. 33 vols., and Index. Vol. 1-21, 1163-1783. T. B. Howell. 22-33, 1783-1820. T. J. Howell. This is an immense collection of cases, brought together by hunting through every collection in England, and, therefore, having very different degrees of merit. For a full account of its character and value, see Wallace's Report. 64.
- Hutton (Sir Richard).** C. P., 1612-38. 1 vol. This book, says Mr. Wallace, seems to belong to that class of literary productions which do not obtain notoriety enough to be abused. Wallace, Report. 246.
- Jenkins (David).** Exchequer, 1220-1623. 1 vol. Eight centuries, or eight hundred cases. See an interesting account of Jenkins, who was a Welsh judge, by Mr. D'Israeli, given in Wallace's Report. 71. The reports of Jenkins were prepared in prison, where Jenkins was put for his loyalty to Charles I. and kept for fifteen years. The book is of excellent authority.
- Jones (Sir William).** K. B. and C. P., House of Lords, and Exch. Chamb., 1620-41. It is a book of good authority. It is sometimes cited as 1st Jones, to distinguish it from Sir Thomas Jones, which

is then correspondingly cited as 2d Jones. Keble (Joseph). K. B., 12-20 Car. II. 3 vols., an inaccurate reporter, yet a tolerable historian of the law; 3 Wils. 330. Not a satisfactory reporter, but a pretty good register, and more esteemed of late, perhaps, than formerly. Wallace, Report. 315.

Keilwey (Robert). K. B. and C. P. It also contains some cases *incerti temporis*, and some *temp.* Edw. III. The volume, having been edited by John Croke, is sometimes cited as Croke's Reports. See Wallace, Report. 119.

Leonard (William). K. B., C. P., and Exch., 1540-1615. A very good and much-esteemed reporter; one of the best, indeed, of the old books. See Wallace, Report. 142, citing Sugden, Lord Nottingham, and Sir George Treby.

Ley (Sir James). King's Bench, C. P., Ex., and Court of Wards, and Star Chamber, 1608-29. 1 vol. The book is seldom cited. Wallace, Report. 241. It is sometimes cited as Leigh; *id.* 244.

Lofft (Capel). K. B., C. P., and Ch., 1772-74. 1 vol. Not a very highly esteemed reporter, but the only volume giving an account of the great case of the negro Somerset.

Meeson (R.) & Welsby (W. N.). Exch. and Exch. Chamb., 1836-47. 16 vols. Among the most useful and best reported of the modern English reports.

Modern Cases in Law and Equity. See Modern Reports, parts 8 & 9; in 1 Burr. 386, it is observed, that it is a miserable, bad book, and in 3 Burr. 1326, the court said they treated it with the contempt it deserved.

Modern Reports. Select Cases in the K. B., C. P., Ch., and Exch., 1669-1755. 12 vols. By various hands, and of various degrees of excellence; some are very inferior. See much learning on the subject in Wallace, Report. 347-390. See Modern Cases in Law and Equity.

Moore (Edmund F.). Cases in Privy Council. New Series, 1862-73. 9 vols. Vol. 3, p. 347 to the end, and vols. 4-9 are identical word for word with 1-4 Law Reports. Privy Council.

Moore (Francis). K. B., C. P., Exch., and Ch., 1512-1613. 1 vol. Moore's Reports are printed from a genuine manuscript, and are esteemed valuable and accurate.

Mosely (William). High Court of Ch., time of King, 1728-30. 1 vol. Condemned by Lord Mansfield, but perhaps on insufficient ground. Lord Eldon, a better judge of the merits of a Chancery Reporter, spoke well of it (19 Ves. 488, n.), as did also Mr. Hargrave. Wallace, Report. 504.

New Reports. See Bosanquet & Puller.

Noy (William). K. B. and C. P., 1559-1649. 1 vol. This is an abridgment by Serjeant Noy, who when a student borrowed Noy's Reports and abridged them for his own use. *Vide* Ventr. 51; 2 Keb. 652; for a full account see Wallace, Report. 154.

Plowden (Edmund). K. B., C. P., and Exch., 1550-80. 1 vol. Probably the most full, finished, and thoroughly accurate of the old reporters; always highly esteemed. For an amusing illustration of subtle argumentation, see the case of *Hales v. Petit*, as quoted by Wallace, Report. 147, where he shows it to be the original of the grave-digger's scene in Hamlet.

Raymond (Lord Robert). K. B. and C. P., 1694-1734. 3 vols. Some of the earlier cases in Lord Raymond, having been taken when he was a young man, or copied from the papers of his different young friends, have not been so highly esteemed, perhaps, as his other cases, which are, generally speaking, his own. As a whole, his reports are highly respected, and often cited, even in this day and country. Wallace, Report. 401.

Ridgeway (William). K. B. and Ch., at

the time Lord Hardwicke presided in those courts. King's Bench, 1736, Chancery, 1744-45.

Salkeld (William). K. B., Ch., C. P., and Exch., 1 Will. III. to 10 Anne. 3 vols. The third volume having been published from notes less carefully prepared than the first two, is not accounted as of the highest authority.

Saville (Sir John). C. P. and Exch., 1580-94. This book, says Wallace (Report. 197), appears to be in the condition of Pope's "most women," and to have no character at all. I have not found a word upon it, either of censure or of praise.

Sayer (Joseph). K. B., 1751-56. 1 vol. "An inaccurate reporter." 1 Sugd. Vend. 80.

Select Chancery Cases. High Court of Ch. Containing the great cases of the Duke of Norfolk, and of the Earls of Bath and Montague. (This is part 3 of Chancery Cases, and is usually bound with parts 1 & 2.)

Strange (Sir John). Ch., K. B., C. P., and Exch. 2 vols. Authoritative, though too brief in the style of reporting. Mr. Nolan, in 1795, published a new edition, which has rendered Strange more valuable than he was. Wallace, Report. 420.

Style (William). K. B., "now Upper Bench," 1646-1655. Printed from a genuine manuscript, and esteemed.

Taunton (William P.). C. P. and other Cts., 1807-19. 8 vols. The eighth volume of Taunton is not very highly esteemed, having been made up from his notes and not supervised by him. Wallace, Report. 533, note; 9 Lond. Law Mag. 339.

Vaughan (Sir J.). C. P., 1665-74. 1 vol. Edited by Edward Vaughan. Containing some cases from his own perfected manuscript, very well reported, but some others not fully prepared, and not so much esteemed. Vaughan was an interesting character, upon whose merits the author of *The Reporters* dwells with interest. See page 334.

Vernon (Thomas). High Ct. of Ch., 1680-1719. 2 vols. Vernon was a very eminent chancery lawyer; but his reports were posthumously published from notes found in his study after his death. They were loose, and on that account unsatisfactory and inaccurate. A very highly improved edition was published in 1803, 1807, by Mr. Raithby, under the auspices of Lord Eldon. The manuscript reports of Vernon were the subject of an entertaining chancery suit between his widow, his heir-at-law, and his residuary legatees. No one of the parties, however, succeeded; and the case was ended by the lord chancellor's keeping the manuscript himself. See Wallace, Report. 493.

West (Martin, J.). High Court of Ch., 1736-39. 1 vol. A book published only of recent time, though from ancient and genuine manuscripts. It is a good work so far as it goes, but, unfortunately, includes but a short term of Lord Hardwicke's administration in Chancery.

Willes (John). C. P., Exch. Chamb., Ch., and House of Lords, 1737-58. 1 vol. Edited by Charles Durnford. Posthumously published, but quite authoritative and useful.

Year-Books. Cases in different Courts, 1307-1537. 11 vols. See YEAR-BOOKS.

Year-Books of Edward I. K. B., 1292-1307. 5 vols. Edited and translated by A. J. Horwood. Published by the authority of the Lords Commissioners of the Treasury, under the direction of the Master of the Rolls.

Yelverton (Sir Henry). K. B., 1603-13. 1 vol. Excellent reports of a first-rate old-school English lawyer, and admirably edited in America by Judge Metcalf. See Wallace, Report. 211, where a full biographical sketch of the gifted and unfortunate reporter is given.

REPRESENT. To exhibit, to expose before the eyes. To represent a thing is to produce it publicly. Dig. 10. 4. 2. 3.

REPRESENTATION. In Insurance. The stating of facts by either of the parties to a policy of insurance, to the other, whether in writing or orally, expressly or by plain implication, preliminary and in reference to making the insurance, obviously tending to influence the other as to entering into the contract. 12 Md. 348; 11 Cush. 324; 2 N. H. 551; 6 Gray 221.

A statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is made. May, Ins. 190. It may be *affirmative* or *promissory*.

The distinction between representation and warranty must be carefully observed; the latter is a part of the contract, the former is but a statement incidental thereto. In an action on the policy the plaintiff must show facts sufficient to bring him within the terms of the warranty, while the burden of proving the untruthfulness of representations, if any, is on the defendant. Further, representations need not be literally complied with; 49 Neb. 811; but only in *material* points; while in cases of warranty, the question of materiality does not arise; May, Ins. § 183. All reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the assured; 58 Ark. 528. Representations in writing are, *ipso facto*, material; 4 H. L. C. 484; 98 Mass. 381; 31 Ia. 216. Representations are material though the fact represented may not relate directly to the risk; 20 N. Y. 32.

Doctrines respecting representation and concealment usually have reference to those by the assured, upon whose knowledge and statement of facts the insurance is usually made; but the doctrine on the subject is equally applied to the underwriter, so far as facts are known to him; 3 Burr. 1905.

In the absence of fraud, deceit, or misrepresentation, the assured cannot be protected by claims of ignorance of the contents of the application, since it is his duty to inform himself of its contents before signing; 45 Mo. App. 426; and it is the duty of the assured to communicate all material facts, and he cannot urge as an excuse for his omission to do so that they were actually known to the underwriters, unless the knowledge of the latter was as full and particular as his own information; 107 U. S. 485.

A misrepresentation though made unintentionally, or through mistake, makes the insurance void, notwithstanding its being free from fraud; 1 Du. 747; 18 Eng. L. & Eq. 427. See 87 Ky. 541.

The material falsity of an oral promissory representation, without fraud, is no defence in an action on a policy. If made with the intent to deceive, the policy may be thereby avoided. Promissory representations, reduced to writing and made a part of the contract, become substantial warranties; May, Ins. § 182. See 9 Allen 540.

A substantial compliance with a representation is sufficient,—the rule being less strict than in case of a warranty; 3 Metc. Mass. 114; 4 Mas. 439; 31 Ia. 216; 34 Md. 582. See 98 Mass. 381. The validity of the policy does not depend on the literal truth of the assertion; 49 Neb. 811. The substantial truth of the statement is for the jury, but not its *materiality*; May, Ins. § 187.

Insurance against fire and on life rests upon the same general conditions of good faith as marine insurance; but in the first two classes the contract is usually based mainly upon statements by the applicant in written replies to numerous inquiries expressly referred to in the policy, which answers are thus made express warranties and must, accordingly, be strictly true whether their being so is or is not material

to the risk. The inquiries are intended to cover all material circumstances, subject, however, to the principle, applicable to all contracts, that fraud by either party will exonerate the other from his obligations, if he so elects; 7 Barb. 570; 10 Pick. 535; 6 Gray 288; 2 Rob. La. 266; 24 Pa. 320; 3 Md. 341; 2 Ohio 452; 21 Conn. 19; 6 Humphr. 176; 6 McLean 324; 8 How. 235; 2 M. & W. 505. 36 Fed. Rep. 118; 119 Ill. 483; 80 Ala. 470. See 10 L. R. A. 666; CONCEALMENT; INSURANCE; MISREPRESENTATION; WARRANTY.

In Scotch Law. The name of a plea or statement presented to a lord-ordinary of the court of session, when his judgment is brought under review.

REPRESENTATION OF PERSONS. A fiction of the law, the effect of which is to put the representative in the place, degree, or right of the person represented.

The heir represents his ancestor; Bac. Abr. *Heir and Ancestor* (A); the devisee, his testator; the executor, his testator; the administrator, his intestate; the successor in corporations, his predecessor; and, generally speaking, they are entitled to the rights of the persons whom they represent, and bound to fulfil the duties and obligations which were binding upon them in those characters.

Representation was unknown to the Romans, and was invented by the commentators and doctors of the civil law. Toulhier, *Dr. Civ. Fr.* liv. 3, t. 1, c. 3, n. 180. See Ayliffe, Pand. 397; Dalloz, *Dict. Succession*, art. 4, § 2.

REPRESENTATIVE. One who represents or is in the place of another.

In the law of decedents' estates any person who has succeeded to the rights of the decedent, whether by purchase descent, or operation of law. 67 N. W. Rep. (Neb.) 771.

A representative of a deceased person, sometimes called a "personal representative," or "legal personal representative," is one who is executor or administrator of the person described. 6 Madd. 159; 5 Ves. 403. See 118 Mass. 200; 139 *id.* 504.

A gift in a will to the "representative" of a person is a gift to his legal personal representatives, in the absence of any context in the will showing that the word is to have a different meaning; 45 Ch. Div. 269.

See **PERSONAL REPRESENTATIVES**; **LEGAL PERSONAL REPRESENTATIVE**.

In **legislation**, it signifies one who has been elected a member of that branch of the legislature called the house of representatives.

The securing of fair apportionment of representatives in legislative bodies is one of the most serious problems in modern constitutional law, there being no subject as to which the legislation is more frequently affected by partisan bias. In many of the states there has been an effort to control the matter by constitutional provisions under which it is usually required that the districts shall be formed of contiguous territory and contain as nearly as possible an equal number of inhabitants. These are the principal provisions in the constitution of Illinois, in which state it was held that an apportionment act was valid which was a substantial compliance with the constitution, though the rule of compactness was only applied to a limited extent; 155 Ill. 451. The subject has been very carefully considered in Indiana. Among the conclusions reached there are: that under the state constitution requiring a sexennial enumeration of the male inhabitants over twenty-one years and an apportionment at the next legislative session thereafter, the legislature, having once made a valid apportionment after an enumeration, is prohibited from making a reapportionment and from repealing such valid apportionment during the enumeration period; that if the first apportionment is invalid, even before it has been declared so by the courts, a second may be passed; that the

question of the validity of such a law is not a political one, to be determined only at the discretion of the legislature, but that it is entirely within the jurisdiction of the courts to determine its constitutionality; that where the question of constitutionality has been determined by a lower court in an action between the citizens, and an appeal is dismissed, the subject is not *res judicata* as against the state; and that the state is not estopped from objecting to the constitutionality of an apportionment by the fact that a legislature has been elected under an unconstitutional act; 144 Ind. 593.

In New Jersey it was held that the constitutionality of such acts is a subject of judicial inquiry and not a mere political question, but that the courts cannot overturn a law passed within constitutional limitations on the ground that it is unwise, impolitic, unjust, or oppressive, or even that it was procured by corporate means; 56 N. J. L. 126, where it was held that mandamus to compel officers to proceed under prior laws in respect to elections instead of following an unconstitutional statute is not premature because no demand and refusal has been made or the time arrived when it is the duty of the officers to act.

In a Virginia case it was said that the laying off and defining of districts under a constitutional requirement that they should be of contiguous counties, etc., compact, and, as nearly as may be, equal in population, was an exercise of political and discretionary power of the legislature for which they are amenable to the people; 79 Va. 269; but this, it is remarked, "was a mere declaration of the court without discussion of the question and without any facts reported which show any attempt at a gerrymander"; 15 L. R. A. 561, note.

Any clear violation of the constitutional provisions will make an apportionment invalid; as, the division of a county or district where the constitution forbids it; 81 Wis. 440; or the allotment of a greater number of representatives than the constitution directs; 26 Kan. 724; and glaring inequalities either of representation or of population in the districts will be considered a sufficient indication that the legislature has exceeded its discretion; 83 Wis. 90; 93 Mich. 1; 2 Idaho 1208; 73 N. C. 193; 133 Ind. 178; *contra*, 135 N. Y. 473, as to which see 31 Am. Law Reg. 851. The opinion by Peckham, J., in the New York case takes a radically different view of the nature of the power involved in the apportionment of a state for representatives from that expressed in the other cases cited, particularly those from Indiana and New Jersey. He says: "From the formation of government under written constitutions in this country the question of the basis of representation in the legislative branch of the government has been one of the most important and most frequently debated. It is not true that equality of numbers in representation has been the leading idea at all times in regard to republican institutions. . . . The power to readjust the political divisions of a sovereignty with the view of representation of those divisions or of the inhabitants thereof, in the legislature, resides, of course, in the first instance, with the people, who in this country are the source of all political power. The essential nature of the power itself is not, however, altered by that fact. In its nature it is political as distinguished from legislative or judicial."

If the discretion of the legislature is fairly exercised, the apportionment will be sustained even if not mathematically correct; 48 Ohio St. 435; 11 Kan. 235, per Brewer, J.; 18 Me. 453; but there can be no legislative discretion to give a county of less population than another greater representation under a constitution requiring representative districts to contain "as nearly as may be" an equal number of inhabitants; 92 Mich. 638.

These principles have been also applied to apportionments made by minor administra-

tive bodies to which the power is granted; 142 N. Y. 523, 531; 138 *id.* 95. In the case last cited a distinction was made by Peckham, J., between the legislative power of apportionment and that confided to an inferior body. The former, it was said, might reasonably be considered a power to divide according to the legislative discretion, "but in the case of inferior bodies, like boards of supervisors, who have no legislative power excepting what is specifically granted, the power to divide being given, the implication would be strong that it was only a power to divide equally." Nevertheless, as some discretion was necessarily involved, it must be an honest and a fair discretion arising out of the circumstances of the case and reasonably effecting the exercise of the power of equal division. But it was not to be considered "that every trifling deviation from equality of population would justify or warrant an application to a court for redress. . . . It must be a grave, palpable, and unreasonable deviation from the standard," making it apparent "that very great and wholly unnecessary inequality has been intentionally provided for." 138 N. Y. 95.

As to the apportionment of representatives in congress among the states, see **APPORTIONMENT**; and see, generally, **JUDICIAL POWER**; **LEGISLATIVE POWER**; **LEGAL REPRESENTATIVES**.

REPRESENTATIVE DEMOCRACY. A form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation. 1 Bouvier, *Inst.* n. 31.

REPRESENTATIVE PEERS. See **PEERS**.

REPRIEVE (from Fr. *repandre*, to take back). In **Criminal Practice**. The withdrawing of a sentence for an interval of time, which operates in delay of execution. 4 Bla. Com. 394.

It is granted by the favor of the pardoning power, or by the court who tried the prisoner. Reprieves are sometimes granted *ex necessitate legis*; for example, when a woman is convicted of a capital offence, after judgment she may allege pregnancy in delay of execution. In order, however, to render this plea available, she must be *quick with child* (*q. v.*), the law presuming—perhaps wrongly enough—that before that period life does not commence in the foetus; Co. 3d Inst. 17; 1 Hale, Pl. Cr. 368; 2 *id.* 413; 4 Bla. Com. 395. See **JURY OF WOMEN**.

The judge is also bound to grant a reprieve when the prisoner becomes insane; 4 Hargr. St. Tr. 205, 206; Co. 3d Inst. 4.

The president, under the constitution, Art. II, § 2, has the power to grant reprieves. A reprieve is said to be a withdrawal or withholding of punishment for a time after conviction and sentence, in the nature of a stay of execution. Cooley, *Const.*, 2d ed. 104. See Bish. Cr. Proc. 1299. When a reprieve is granted in a capital case to a day certain, the warden should execute the sentence on the day the reprieve expires, and the time of execution need not be again fixed by the court; 40 N. E. Rep. (N. Y.) 883. See 29 Ohio St. 457; 13 Wend. 159; **PARDON**.

REPRIMAND. The censure which in some cases a public officer pronounces against an offender.

This species of punishment is used by legislative bodies to punish their members or others who have been guilty of some impropriety of conduct towards them. The reprimand is usually pronounced by the speaker.

REPRISALS. The forcibly taking a thing by one nation which belonged to another, in return or satisfaction for an injury committed by the latter on the former. Vattel, b. 2, c. 18, s. 342; 1 Bla. Com. c. 7.

General reprisals take place by virtue of commissions delivered to officers and citizens of the aggrieved state, directing them to take the persons and property belonging

to the offending state wherever found.

Negative reprisals take place when a nation refuses to fulfil a perfect obligation which it has contracted, or to permit another state to enjoy a right which it justly claims.

Positive reprisals consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.

Special reprisals are such as are granted in times of peace to particular individuals who have suffered an injury from the citizens or subjects of the other nation.

Reprisals are used between nation and nation to do themselves justice, when they cannot otherwise obtain it.

Where an individual is injured by a foreign state he must first apply to its courts, if possible, and it is only when refused redress there that his own government can claim to interfere. Similarly where the injury is to a state, compensation should be demanded before recourse is had to reprisal. Risley, Law of War 57. An instance of reprisal occurred in December, 1897, when Germany threatened bombardment at Hayti unless the government within eight hours saluted the German flag and made compensation to an injured German subject. See LETTERS OF MARQUE.

Reprisals are made in two ways, either by embargo, in which case the act is that of the state, or by letters of marque and reprisals, in which case the act is that of the citizen, authorized by the government. See 2 Brown, Civ. Law 334. Such letters are generally granted for a refusal to pay debts, for an unwarrantable suspension of treaty obligations, denial of evident justice, or a refusal to pay indemnity for losses. One of the last instances of a letter of reprisal was in 1778 when the King of France gave authority of reprisal to certain people whose vessels had been seized by the British government for carrying contraband of war; Snow, Int. Law 76. Congress has the power to grant letters of marque and reprisal. U. S. Const. art. 1, s. 8, cl. 11.

The property seized in making reprisals is preserved while there is any hope of obtaining satisfaction or justice; as soon as that hope disappears, it is confiscated, and then the reprisal is complete; Vattel, b. 2, c. 18, § 349. See Boyd's Wheat. Int. Law. See POSTLIMINIUM.

REPRISES. The deductions and payments out of lands, annuities, and the like are called reprises, because they are *taken back*; when we speak of the clear yearly value of an estate, we say it is worth so much a year *ultra reprises*, besides all reprises.

In Pennsylvania, lands are not to be sold under an execution when the rents can pay the debt and interest and costs in seven years, beyond all reprises.

REPROBATION. In Ecclesiastical Law. The propounding exceptions either against facts, persons, or things; as, to allege that certain deeds or instruments have not been duly and lawfully executed; or that certain persons are such that they are incompetent as witnesses; or that certain things ought not, for legal reasons, to be admitted.

REPROBATUS, ACTION OF. An action in Scotch law for the purpose of convicting a witness of perjury. Bell.

REPUBLIC. A commonwealth; that form of government in which the administration of affairs is open to all the citizens. In another sense, it signifies the state, independently of its form of government. 1 Toullier 28 and n., 202, note.

REPUBLICAN GOVERNMENT. A government in the republican form; a government of the people; a government by representatives chosen by the people. Cooley, Const. 194. It is usually put in opposition to a monarchical or aristocratic government. But it is said to be, strictly speaking, by no means inconsistent with monarchical forms; Cooley, Const. 194; there can be no doubt that in the light of

the fact that the Revolution was intended to throw off monarchical forms, a republican form of government in the constitution means a government in which the people choose, directly or indirectly, the executive.

The fourth section of the fourth article of the constitution directs that "the United States shall guarantee to every state in the Union a republican form of government." Mill. Const. U. S. 640. The form of government is to be *guaranteed*, which supposes a form already *established*; and this is the republican form of government the United States have undertaken to protect. See Story, Const. § 1807.

A republican government, once established, may be endangered so as to call for the action of congress: 1. By the hostile action of some foreign power, and taking possession of the territory of some state, and setting up a government therein not established by the people. 2. By the revolutionary action of the people themselves in forcibly rising against the constituted authorities and setting the government aside, or attempting to do so, for some other. In either of the above cases, it will be the duty of the federal government to protect the people of the state by the employment of military force. Cooley, Const., 2d ed. 203; see 7 Wall. 700; 7 How. 1, 3. Even in strict accordance with the forms prescribed for amending a state constitution, it would be possible for the people of the state to effect such changes as would deprive it of its republican character. It has been suggested that it would then be the duty of congress to intervene. In any case there could probably be no appeal from the decision of congress. Cooley, Const. 196. See GOVERNMENT.

REPUBLICATION. An act done by a testator, from which it can be concluded that he intended that an instrument which had been revoked by him should operate as his will. Schoul. Wills 441; or it is the re-execution of a will by the testator, with a view of giving it full force and effect.

The republication is *express* when there has been an actual re-execution of it; 1 Ves. 440; 2 Rand. 193; 9 Johns. 312; it is *implied* when, for example, the testator by a codicil executed according to the statute of frauds, reciting that he had made his will, added, "I hereby ratify and confirm my said will, except in the alterations after mentioned." 3 Bro. P. C. 85. See 30 Neb. 149; 16 Ves. Jr. 167. The will might be at a distance or not in the power of the testator, and it may be thus republished; 1 Ves. Sen. 437; 1 Ves. 486; 4 Bro. C. C. 2.

The republication of a will has the effect—*first*, to give it all the force of a will made at the time of the republication; Beach, Wills 143; if, for example, a testator by his will devise "all his lands in A." then revokes his will, and afterwards buys other lands in A, the republication, made after the purchase, will pass all the testator's lands in A; Cro. Eliz. 498. See 1 P. Wms. 275. *Second*, to set up a will which had been revoked. See, generally, Will. Exec.; Jarm. Wills; Schoul. Ex; Schoul. Wills.

REPUDIATE. To express in a sufficient manner a determination not to accept a right, when it is offered.

He who repudiates a right cannot by that act transfer it to another. Repudiation differs from renunciation in this, that by the former he who repudiates simply declares that he will not accept; while he who renounces a right does so in favor of another. Renunciation is, however, sometimes used in the sense of repudiation. See RENOUNCE; RENUNCIATION; Wolf, Inst. § 339.

REPUDIATION. In Civil Law. A term used to signify the putting away of a wife or a woman betrothed.

Properly, divorce is used to point out the separation of married persons; repudiation, to denote the separation either of married people, or those who are only affianced. *Divortium est repudium et separatio maritorum; repudium est renunciatio sponsalium, vel etiam est divortium.* Dig. 50. 16. 101.

A determination to have nothing to do with any particular thing; as, a repudiation of a legacy is the abandonment of such legacy, and a renunciation of all

right to it.

In Ecclesiastical Law. The refusal to accept a benefice which has been conferred upon the party repudiating.

As to repudiation of a contract before the time of performance, see ELECTION OF RIGHTS AND REMEDIES; PERFORMANCE.

REPUGNANCY (Lat. *re, back*, against, *pugnare*, to fight). In Contracts. A disagreement or inconsistency between two or more clauses of the same instrument. In deeds, and other instruments *inter vivos*, the earlier clause prevails, if the inconsistency be not so great as to avoid the instrument for uncertainty; 2 Taunt. 109; 15 Sim. 118; 2 C. B. 830; 13 M. & W. 534.

In wills, the latter clause prevails, under the same exceptions; Co. Litt. 113 b; Plowd. 541; 6 Ves. 100; 2 My. & K. 149; 1 Jarm. Wills 411. See, however, 18 Ch. Div. 17.

Repugnancy in a condition renders it void; 2 Mod. 285; 11 d. 191; 1 Hawks 20; 7 J. J. Marsh. 192; 6 Ch. Div. 549. And see, generally, 3 Pick. 272; 4 d. 54; 6 Cow. 677; Schoul. Wills 498; Beach, Wills 521.

In Pleading. An inconsistency or disagreement between the statements of material facts in a declaration or other pleading; as, where certain timber was said to be for the completion of a house already built; 1 Salk. 213. Repugnancy of immaterial facts, or of redundant and unnecessary matter, if it does not contradict material allegations, will not, in general, vitiate the pleadings; Co. Litt. 303 b; 10 East 142; 1 Chitty, Pl. 233. See Steph. Pl. 378; Gould, Pl. § 172.

REPUGNANT. Contrary to; in conflict with.

REPUTABLE. Worthy of repute or distinction, held in esteem, honorable, praiseworthy. 123 Ill. 245.

REPUTATION (Lat. *reputo*, to consider). The opinion generally entertained in regard to the character or condition of a person by those who know him or his family. The opinion generally entertained by those who may be supposed to be acquainted with a fact.

In general, reputation is evidence to prove a man's reputation in society; a pedigree; 14 Camp. 416; 1 S. & S. 153; certain prescriptive or customary rights and obligations; matters of public notoriety. But as such evidence is in its own nature very weak, it must be supported, when it relates to the exercise of a right or privilege, by proof of acts of enjoyment of such right or privilege within the period of living memory; 1 Maule & S. 679; 5 Term 32. Afterwards, evidence of reputation may be given. The fact must be of a public nature; it must be derived from persons likely to know the facts; 9 B. Monr. 88; 4 B. & Ald. 58. Evidence of the reputation of a man for truth and veracity in the neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon a dispassionate judgment, or upon warm admiration for habitual truthfulness or natural indignation at habitual falsehood, and whether his neighbors are virtuous or immoral in their own lives; 164 U. S. 221. The facts must be general, and not particular; they must be free from suspicion; 1 Stark. Ev. 54. An existing reputation is a fact to which any one may testify who knows it; he knows it because he hears it, and what he hears constitutes the reputation; 50 Mich. 642.

Formerly, and until the middle of this century, witnesses in England could testify as to their personal knowledge and opinion of a defendant's or witness's character. At present the question to be asked is whether the witness knows the witness's reputation, what it is, and whether, from such knowledge, he would believe him on oath. Tayl. Ev. § 1324. In America, as to the character of a defendant, reputation is in most states made the exclusive mode of proof; and as to a witness's character, reputation

is the sole source of proof. See an interesting article by Prof. John H. Wigmore, in 52 Am. L. Rev. 713.

Injuries to a man's reputation by circulating false accounts in relation thereto are remediable by action and by indictment. See LIBEL; SLANDER; CHARACTER.

REPUTE. Character, as distinguished from reputation. 3 Dist. Rep. (Pa.) 271. See GOOD REPUTE.

REPUTED. Accepted by general, or public opinion.

REPUTED OWNER. In English Practice. A bankrupt trader who has in his apparent possession goods, which he holds with the consent of the true owner, is called the reputed owner. The Bankruptcy Act of 1869, sec. 15, § 5, provides that such goods in his possession at the commencement of his bankruptcy pass to his trustee; but things in action, other than debts due to him in the course of his trade or business, are not deemed goods and chattels within the meaning of that clause; Whart. Dict.; 2 Steph. Com. 166.

By the English Bankruptcy Act of 1883, the trustee is entitled to such goods as are, at the commencement of the bankruptcy (the date of the earliest act of bankruptcy), in the possession, order, or disposition of the bankrupt, by the consent of the true owner, in such a way that the former is the reputed owner of them; provided they are with the bankrupt in his trade or business. The ownership may be rebutted by showing a custom in the trade to take goods on hire, as in the case of a hotel-keeper having hired furniture; 18 Ch. D. 30; or of pianos; 18 *id.* 601; and perhaps of furniture in general; 41 L. J. Q. B. 20; but see, *contra*, 23 Ch. D. 261.

In mechanic's lien law, where the remedy is usually *in rem*, liens are commonly filed of record against the "owner or reputed owner."

REQUEST (Lat. *requiro*, to ask for). Within the provision of the constitution of a religious society providing that a change therein cannot be granted except at the request of two-thirds of the society, a vote was held not a request. 81 Pac. Rep. (Ore.) 216.

In Contracts. A notice of a desire on the part of the person making it, that the other party shall do something in relation to a contract. Generally, when a debt is payable immediately, no request need be made; 10 Mass. 230; 3 Day 327; 1 Johns. Cas. 319.

In some cases, the necessity of a request is implied from the nature of the transaction; as, where a horse is sold to A, to be paid for on delivery, A must show a request; 5 Term 409; or impossibility on the part of the vendor to comply, if requested; 5 B. & Ad. 712; previous to bringing an action; and on a promise to marry; 2 Dowl. & R. 55. See DEMAND. And if the contract in terms provides for a request, it must be made; 1 Johns. Cas. 327. It should be in writing, and state distinctly what is required to be done; 1 Chitty, Pr. 497.

In Pleading. The statement in the plaintiff's declaration that a demand or request has been made by the plaintiff of the defendant to do some act which he was bound to perform, and for which the action is brought.

A general request is that stated in the form "although often requested so to do" (*licet sæpe requisitus*), generally added in the common breach in the money counts. Its omission will not vitiate the declaration; 1 B. & P. 59; 1 Johns. Cas. 100.

A special request is one provided for by the contract, expressly or impliedly. Such a request must be averred; 5 Term 409; 3 Camp. 549; 2 B. & C. 685; and proved; 1 Saund. 32, n. 2. It must state time and place of making, and by whom it was made, that the court may judge of its sufficiency; 1 Stra. 89. See Com. Dig. PLEADER (C 69, 70); 1 Saund. 38, n.; DEMAND.

REQUEST NOTES. In English Law. Certain notes or requests from persons amenable to the excise laws, to obtain a permit for removing any excisable goods or articles from one place to another.

REQUESTS, COURTS OF. See COURTS OF REQUESTS. Vol. 12 (1898) of the publications of the Selden Society contains Select Cases in this court.

REQUISITION. The act of demanding a thing to be done by virtue of some right. See MILITARY OCCUPATION.

The demand made by the governor of one state on the governor of another for a fugitive, under the provision of the United States constitution. See EXTRADITION; FUGITIVE FROM JUSTICE.

REQUISITIONS OF TITLE. Written inquiries made by the solicitor of an intending purchaser of land, to the vendor's solicitor, in respect of some apparent insufficiency in the abstract of title. Moz. & W.

RERE FIEFS. Inferior feudatories in Scotland. Whart.

RES (Lat. things). The terms *Res*, *Bona*, *Biens*, used by jurists who have written in the Latin and French languages, are intended to include movable or personal, as well as immovable or real, property. 1 Burge, Conf. L. 19. See BIENS; BONA; THINGS; JUS AD REM.

RES ACCESSORIA (Lat.). An accessory thing; that which belongs to a principal thing, or is in connection with it.

RES ADIRATAE. One of the two old remedies of the 12th century for an involuntary loss of possession. One might either bring the appeals of robbery or larceny (called respectively the *actio vi bonorum raptorum* and *actio furti*) or one might omit the charge of larceny and claim the goods as *res adiratae*, i. e., as his goods which have gone from his possession against his will. (Bracton f. 150). A person who elected this latter remedy might abandon it and proceed by appeal of larceny; but the converse course could not be pursued. The gist of the old action for *res adiratae* was the fact that the plaintiff had lost his goods, that they had come into the hands of the defendant, and that the defendant on request refused to give them up. 3 Holdsw. Hist. E. L. 3rd ed., 320 *et seq.*

RES ADJUDICATA. See RES JUDICATA.

RES COMMUNES (Lat.). In Civil Law. Those things which, though a separate share of them can be enjoyed and used by every one, cannot be exclusively and wholly appropriated; as, light, air, running water. Mackelvey, Civ. Law § 156; Erskine, Inst. 1. 1. 5. 6.

RES CONTROVERSA (Lat.). A matter controverted. A matter in controversy; a point in question; a question for determination.

RES CORPORALES. Corporeal things; things which can be touched, or are perceptible to the senses. Burrill; Dig. 1. 8. 1. 1. Called by Cicero, *res quæ sunt* (things which are), as distinguished from incorporeal things, which are understood, or mentally perceived. *Id.*; Cic. Topic. 5. See RES INCORPORALES.

RES GESTÆ (Lat.). Transaction; thing done; the subject-matter.

Those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible in evidence when illustrative of such act. Whart. Ev.; 96 Cal. 125.

Events speaking for themselves through the instructive words and acts of participants, not the words and acts of participants when narrating the events. 18 Colo. 170.

When it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person

who did the act, proof of what the person said at the time of doing it is admissible evidence as a part of the *res gestæ*, for the purpose of showing its true character. On an indictment for a rape, for example, what the girl said so recently after the fact as to exclude the possibility of practising on her, has been held to be admissible evidence as a part of the transaction; 2 Stark. 241; 1 Phill. Ev., 4th Am. ed. 185.

Declarations or acts, accompanying the fact in controversy and tending to illustrate or explain it, as conversations contemporaneous with the facts; 112 Mo. 374; 18 Fed. Rep. 156; 143 Pa. 533; or the complaints of the injured party, both as to bodily suffering and the circumstances of the occurrence; 79 Pa. 433; 95 N. Y. 274; 86 Wis. 518; 24 U. S. App. 384; 116 Ind. 583; 158 U. S. 271; or the declarations and conduct of third persons at the time; 107 Mo. 240; 49 Ohio St. 25; 63 Tex. 318; see 21 How. St. Tr. 514; are admissible; also declarations of a party at the time of taking possession of personal property as to the nature of his possession; 35 Mo. 533; statements made by the parties at the time of the sale of personal property, when such statements bear upon the question of good faith or other fact in issue; 19 N. Y. 464; 36 N. H. 353; statements as to the conditions of an execution sale; 1 Rawle 233; or of an officer or other persons interested at the time of levying on property; *id.*; 47 Barb. 243; of a person at the time of making an entry upon land, when they explain the character and purpose of making such entry; 3 Bla. Com. 174; by a bondsman when signing a bond; 182 Ind. 387; declarations accompanying the payment of money, to show the purpose or application of such payment; 25 Vt. 308; statements of a grantor at the time of making a conveyance; 16 N. H. 168; 33 Barb. 491; 31 Mo. 62. Declarations of a wife showing maltreatment on the part of her husband are part of the *res gestæ* in an action by him for the alienation of her affections; 64 Vt. 432. Declarations made by one officer of a steamboat while engaged in violently removing a passenger from a part of the vessel in which his contract for transportation did not entitle him to be, were admitted as part of the *res gestæ*; 121 U. S. 637.

A mere narrative of a past occurrence is inadmissible as part of the *res gestæ*; 9 Cush. 42; 41 Conn. 55; 70 Miss. 874; the declaration must so harmonize with the fact as to form one transaction; 123 N. Y. 85. In a case frequently criticised, a statement made immediately after the act and whilst running from the room, where her throat had been cut, was held inadmissible; 14 Cox, Cr. C. 341. The length of the interval of time between the main facts and the statements cannot be important if sufficient time elapsed to make the statements, having regard to their form and substance, mere narrative; 71 Ind. 66; and that only a minute elapsed, does not alter the rule; 65 Miss. 576; but see 8 Wall. 397; 3 Cush. 181, where the declarations are considered part of the *res gestæ*, if there is neither time nor motive for misrepresentation or invention; and see 25 Gratt. 921; and if they are voluntary and spontaneous and made within so short a time after the occurrence as to preclude the idea of deliberate design; 35 Cal. 49; 116 Ind. 566; 82 Tex. 657; 77 Va. 681. In an action for personal injury, a physician's written statement concerning the injury made at the time and annexed to his deposition, is not admissible as part of the *res gestæ*; 119 U. S. 99; nor were the declarations of an officer of a corporation that a note on which it had brought suit was indorsed to it only for the purpose of suing on it, where there were no circumstances connected with the declaration which would raise an estoppel; 35 Fed. Rep. 644. In Georgia, it is provided by the code that declarations accompanying the act or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence;

Georgia Code § 3733. See 14 Am. L. Rev. 817; 15 id. 1; 11 Eng. Rul. Cas. 298; Taylor, Evidence; Jones, Evidence; EVIDENCE.

RES IMMOBILES (Lat.). Immovable things. Such things as, by their nature, are physically incapable of a change of place; such as lands; or which cannot be removed to another place without injury to their substance; such as buildings.

RES INCORPORALES. Things incorporeal; fixed relations in which men stand to things or to other men; relations giving them power over things or claims against persons. Inst. 2. 2.

RES INTEGRA (Lat. an entire thing; an entirely new or untouched matter). A term applied to those points of law which have not been decided, which are untouched by dictum or decision. 3 Mer. 269; 1 Burgo, Conf. L. 241.

RES INTER ALIOS ACTA (Lat.). A technical phrase which signifies acts of others of transactions between others.

Neither the declarations nor any other acts of those who are mere strangers, or, as it is usually expressed any *res inter alios acta*, are admissible in evidence against any one; when the party against whom such acts are offered in evidence was privy to the act, the objection ceases; it is no longer *res inter alios*; 1 Stark. Ev. 53; 3 id. 1300; 4 Mann. & G. 382. See 1 Metc. Mass. 55; MAXIM.

RES IPSA LOQUITUR (Lat. the thing speaks for itself). A phrase often used in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence. See 5 Ex. 787. Where contractual relations existed between the parties, and the plaintiff shows actual negligence or conditions so obviously dangerous as to admit of no other inference, the burden thus thrown on the defendant is not that of satisfactorily accounting for the accident, but of showing that he used due care; 184 Pa. 519. See NEGLIGENCE.

For cases in which this doctrine has been applied or considered, see 167 Mass. 388; 9 App. D. C. 60; 78 Fed. Rep. 442; 79 id. 125; 90 Me. 110; 56 Alb. L. J. 96; 17 App. Div. N. Y. 403; 18 id. 22; 89 Tex. 168.

RES JUDICATA (Lat. the matter has been decided). In Practice. A legal or equitable issue which has been decided by a court of competent jurisdiction.

When one is barred in any action, real or personal, by judgment, demurrer, confession, or verdict, he is bound as to that or a like action forever; 14 Q. B. D. 146; XII B. L. R. 304.

When a question is necessarily decided in effect though not in express terms between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form; 3 Atkins 626. This definition of Lord Hardwicke, in Gregory v. Molesworth, has been by some writers considered the best.

The doctrine of *res judicata* is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal; 100 Mass. 409.

Estoppel rests on equitable principles, while *res judicata* does not rest upon equitable principles, but on the two maxims which were its foundation in the Roman Law (see *infra*); Ind. L. R. VIII. All. 332; it is rather a principle of public policy than the result of equitable considerations. Thus it is also a matter of private right; 34 N. J. Eq. 535.

It is a general principle that a decision by a court of competent jurisdiction, of matters put in issue by the pleadings, is binding and conclusive upon all other courts of concurrent power, and between

parties and their privies; 168 U. S. 48, reviewing the federal cases. This principle pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law, founded on the soundest policy, and is necessary for the repose and peace of society and the maintenance of civil order; *id.* See also 125 id. 703; 7 Wall. 107.

It has been characterized as a "fundamental concept in the organization of civil society;" 22 How. 352.

It was derived from Roman law, being founded on the maxims *nemo debet bis vexari pro eadem causa*, and *interest reipublice ut sit finis litium*.

It was commonly said by the civilians *res judicata facit ex albo nigrum, ex nigro album, ex curro rectum, ex recto curram* (a decision makes white black; black, white; the crooked, straight; the straight, crooked).

It was said by Blackburn, L. J., that the doctrine was not received in England, as it was on the continent, directly from the Roman law; L. R. 2 App. Cas. 530.

But in order to make a matter *res judicata* there must be a concurrence of the four conditions following:

1. *Identity in the thing sued for*; 5 M. & W. 109; 7 Johns. 20; 1 Hen. & M. 449; 1 Dana 434.

2. *Identity of the cause of action*; Whart. Ev. 763; 6 Wheat. 109; 2 Gall. 216; 17 Mass. 237; 2 Leigh 474; 8 Conn. 268; 1 N. & McC. 329; 16 S. & R. 282; 3 Pick. 429; 1 Tex. Civ. App. 611.

An action for breach of covenant of seisin is not a bar to an action for the breach of a covenant in the same deed against incumbrances; the action not being founded on the same cause of action, and the rule prohibiting the splitting of a single cause of action having, therefore, no application; 18 So. Rep. (Ala.) 825. A person who obtains an order from a police magistrate for the delivery of goods improperly detained, is not thereby precluded from subsequently bringing an action for special damage arising out of the same detention. It is not *res judicata*, since the matter of damage was one with which the magistrate had no power to deal; [1893] 2 Q. B. 172.

A judgment against an administrator for moneys due the estate is not a bar to a subsequent action for a further sum not known by the plaintiff at the time of the former action, to be due; 23 S. E. Rep. (N. C.) 259.

But the estoppel arising from a finding in a previous suit between the same parties extends to a decision of the legal rights of the parties on a state of facts common to both suits, although the causes of action are different; 55 Fed. Rep. 690.

3. *Identity of persons and of parties to the action*; 7 Cra. 271; 1 Wheat. 6; 14 S. & R. 435; 4 Mass. 441; 2 Yerg. 10; 5 Me. 410; 8 Gratt. 63; 16 Mo. 168; 12 Ga. 271; 21 Ala. N. S. 813; 23 Barb. 464; 83 Va. 862; 82 id. 172; 50 Kan. 342.

A judgment in favor of plaintiffs in an action upon notes which they had previously transferred to a bank, is not conclusive that they owned the cause of action at the time of recovery, or that it was due at the commencement of the action as against other creditors of the maker not parties or privies to the action, and does not bar them from asserting their rights to precedence; 95 Wis. 169.

4. *Identity of the quality in the persons for or against whom the claim is made*; 5 Co. 32 b; 6 Mann. & G. 164; 4 C. B. 884.

A judgment is only presumptively conclusive against parties in the character in which they sue or are sued; 114 Ind. 993. As a rule it must be a final decision of a cause on the merits to constitute *res judicata*; 92 Mo. 120. The following have been held not to be a bar to a subsequent suit: A final judgment on a third demurrer to the second amended petition; 61 Mo. App. 237; a judgment of dismissal entered upon the plaintiff's failure to appear; 42 Pac. Rep. (Nev.) 11; an order of "judgment reversed," but without an award of a *venire de novo*, entered in the

supreme court on a writ of error; 98 Pa. 142; a suit which was dismissed under the rule as to dismissal for want of prosecution and was not heard on the merits; 23 S. E. Rep. (W. Va.) 789; a judgment of peremptory nonsuit against the plaintiff; 66 N. W. Rep. (Wis.) 253. See NONSUIT. The findings of the court do not constitute a bar in a subsequent action between the same parties unless followed by a judgment based thereon; 86 Hun 411.

Cases to which the doctrine of *res judicata* has been applied are: The decision of a referee on a point properly determined by him and reviewable on appeal; 8 East 346; 4 Cow. 539; 14 N. Y. 329; a judgment rendered on a compromise; 39 La. Ann. 803; a decision on *habeas corpus* as to the custody of a child; 99 Mo. 484; a judgment upon the ownership of property where that is the material point in issue; 29 N. Y. St. Rep. 569; judgment by default; 122 U. S. 336; 111 N. Y. 177; or on demurrer; 91 U. S. 526; 124 id. 225; 10 Col. 599; or by an equally divided court; 68 Md. 516; a judgment of dismissal entered under an agreement reciting a settlement that nothing is due; 120 U. S. 89; or upon a hearing where the entry is not "expressly without prejudice"; 125 id. 698; or a simple dismissal with taxation of costs and award of execution; 30 Fed. Rep. 525; or dismissal for want of prosecution; 81 Va. 709; or dismissal for failure in the proof of execution of a contract for breach of which an action is brought, even where the words, *without prejudice*, are added to the decree; 33 W. Va. 464; judgments in other states; 63 Me. 346; 69 Md. 211; 97 U. S. 331; but where the state is a party it is not estopped from denying the constitutionality of an act which it is claimed was a contract between the state and an individual, where that question was not raised in a previous adjudication of the state court upon the meaning of the statute; 94 U. S. 645.

A judgment on a plea in abatement in an action of attachment for rent is not *res adjudicata* on the trial on the merits; 58 Mo. App. 181; nor is a judgment in another state on *habeas corpus* for the custody of a child conclusive, where there has been a material change of conditions and circumstances; 30 Wkly. Law Bul. 164. A judgment ordering that the cause be filed away for want of prosecution is not final or a bar to a subsequent action; 23 S. W. Rep. (Ky.) 366. A judgment abating an action entered upon a verdict finding that plaintiff's powers as administrator had ceased pending the action, is not a bar to the subsequent revival of the action on plaintiff's reinstatement as administrator; 61 Ark. 203.

The decision of a motion or summary application is not to be regarded in the light of *res judicata*, or as so far conclusive upon the parties as to prevent their drawing the same matter in question again in the more regular form of an action; 128 U. S. 489. An adjudication sustaining a demurrer going to the merits is *res judicata* as to the whole matter in controversy; 117 Mo. 261; 126 Ind. 477; 5 Ind. App. 369.

In determining whether a decision of a court of competent jurisdiction operates as an estoppel, the court in a subsequent case is entitled to consider what facts were before the court in the former case, and to give effect to any fresh facts that subsequently take place; [1894] 2 Q. B. 108. Its conclusiveness does not depend upon the question whether there is the same demand in both cases, but it exists even where there are different demands, if the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies; 167 U. S. 371. Where the causes of action are different, but the parties the same, the former judgment is conclusive as to matters, in fact, necessarily decided and as to matters which might have been, but which were not, presented and decided; 32 Fed. Rep. 632. A judgment, when introduced in evidence as an estoppel, can-

not be explained or varied by parol; 45 Ill. App. 355.

The fact that a court is composed of several divisions does not prevent the judgment of one of the divisions from being *res judicata*; 167 U. S. 371. A change in a person holding an office does not destroy the effect of a judgment against such officer as *res judicata*; 167 U. S. 371.

A judgment in a civil action is not admissible in a criminal proceeding, for the reason that the parties "are necessarily different, and the objects and results of the two proceedings are equally diverse;" 69 Conn. 212; 25 *id.* 185; 77 Ala. 202; 35 Vt. 457; *contra*, 83 Ind. 357, where, in a prosecution for the unlawful removal of a fence, a judgment in a civil action between the defendant and the prosecuting witness was admitted in evidence. But this case was criticised in 69 Conn. 212, as founded upon an error which was not relieved by the instruction of the court to the jury that the evidence was not conclusive, but merited serious consideration. The Connecticut court cite a former decision of their own to the effect that, "a judgment is conclusive or is nothing. If not conclusive, there is no rule by which courts can measure and determine its effect;" 51 Conn. 494.

Where there is concurrent jurisdiction at law and in equity, a decision in one court is *res judicata* as to the other; 1 Johns. Ch. 91; 18 Johns. 534; 5 Mass. 207; 70 N. Y. 11. Where there is jurisdiction both of the cause and the parties a judgment of a court of general jurisdiction is conclusive, even though erroneous, until it is reversed upon appeal or vacated; 7 Co. 76; 1 Pet. 340; 9 Cow. 237; 3 Binn. 410; 6 Pick. 435; 4 Johns. Ch. 460; 103 N. Y. 604; 81 Va. 677; 82 Ga. 168. See 7 L. R. A. 577; 1 *id.* 155. 308.

A decree on a bill by a stockholder for the benefit of himself and all other stockholders who come in, to enjoin the consummation of an agreement by the corporation, is conclusive in a subsequent suit by another stockholder for the same purpose and involving the same question, in the absence of fraud or collusion; 50 N. J. Eq. 656, citing 15 R. I. 75; 23 Am. Rep. 44; 6 Metc. 546; 60 Vt. 1; 11 Fed. Rep. 97; 123 Ill. 122.

The doctrine of *res judicata* applies even though the amount in controversy in the former suit was so small that the party was not entitled to a review in an appellate court; 152 U. S. 252.

What might be an extension of the doctrine of *res judicata*, though not technically within the definition of the subject, is the rule that obtains among the circuit courts of the United States by which a decision in one circuit court is followed in the other upon like facts although between different parties. This practice is more common in patent litigation. It can hardly be sustained on principle. It is a convenient rule which saves litigation and tends towards unity of decision among the federal courts other than the supreme court; 67 Fed. Rep. 928. Thus, a circuit court should follow the decision of another circuit court upholding a patent, except when new evidence of invalidity is introduced, and in such case, confine its investigation to the new evidence; 53 Fed. Rep. 791; on a motion for a preliminary injunction even greater effect is given to the prior adjudication; the new evidence must be so conclusive as to lead the court to believe that, if introduced before, it must have changed the result; 75 *id.* 609. This is usually spoken of as a rule of comity. While the circuit court should follow the decision in another circuit, the circuit court of appeals will re-examine the whole case anew and not follow the earlier adjudication in the circuit court; 53 *id.* 792.

As analogous to this subject the following may be cited: The decision of the supreme court upon questions of fact in a suit determining the validity of a patent, did not operate strictly as *res judicata* or as a technical estoppel in a subsequent suit in the circuit court, upon the same patent between different parties, but operated

merely upon the conscience of the inferior tribunal, and therefore in applying the conclusions of the superior court the circuit court should first inquire what facts are proven in the pending case by independent evidence, and, second, examine the opinions of the superior court and the line of reasoning and conclusion which they exhibited, and from these or otherwise, but not by formal evidence, become satisfied whether or not the proofs of which the latter court took cognizance were substantially the same as those in the case at bar; 55 Fed. Rep. 516.

See, generally, Wells, *Res Judicata*, etc.; Herman, *Estoppel and Res Adjudicata*; Chand, *Res Judicata*; Van Fleet, *Former Adjudication*; *Duchess of Kingston's Case*, and notes, 8 Sm. L. Cas., 9th Am. ed. 2008; JUDGMENT; FORMER JUDGMENT; AUTREFOIS ACQUIT; LAW OF THE CASE.

RES MANCIPI. In Roman Law. Those things which might be sold and alienated, or of which the property might be transferred from one person to another.

The division of things into *res mancipi* and *res nec mancipi* was one of ancient origin, and it continued to a late period in the empire. *Res mancipi* (Ulp. Frag. xix.) are *prædia in italico solo*, both rustic and urban; also, *jura rusticorum prædiorum* or *servitutes*, as *via, iter, aqueductus*; also slaves, and four-footed animals, as oxen, horses, etc., *quæ collo dorsove domantur*. Smith, Dict. Gr. & Rom. Antig. To this list may be added children of Roman parents, who were, according to the old law, *res mancipi*. The distinction between *res mancipi* and *nec mancipi* was abolished by Justinian in his Code. *Id.*; Cooper, Inst. 442.

RES NOVA (Lat.). Something new; something not before decided.

RES NULLIUS (Lat.). A thing which has no owner. A thing which has been abandoned by its owner is as much *res nullius* as if it had never belonged to any one.

The first possessor of such a thing becomes the owner; *res nullius fit primi occupantis*. Bowry, Com. 97.

RES PERIIT DOMINO (Lat. the thing is lost to the owner). A phrase used to express that when a thing is lost or destroyed it is lost to the person who was the owner of it at the time. For example, an article is sold; if the seller has perfected the title of the buyer so that it is his, and it is destroyed, it is the buyer's loss; but if, on the contrary, the title has not vested in the buyer, then the loss falls on the seller. See SALE.

RES PRIVATÆ (Lat.). In Civil Law. Things the property of one or more individuals. Mackeldey, Civ. Law § 157.

RES PUBLICÆ (Lat.). In Civil Law. Things the property of the state. Mackeldey, Civ. Law § 157; Erskine, Inst. 2. 1. 5. 6.

RES RELIGIOSÆ (Lat.). In Civil Law. Things pertaining to religion. Thævenot Dessaules, *Dict. du Dig. Chose*.

RES SACRÆ (Lat.). In Civil Law. Those things which had been publicly consecrated.

RES SANCTÆ (Lat.). In Civil Law. Those things which were especially protected against injury of man.

RES UNIVERSITATIS (Lat.). In Civil Law. Those things which belonged to cities or municipal corporations. They belonged so far to the public that they could not be appropriated to private use; such as public squares, market-houses, streets, and the like. Inst. 2. 1. 6.

RESALE. A second sale made of an article; as, for example, when A, having sold a horse to B, and the latter, not having paid for him, and refusing to take him away, when by his contract he was bound to do so, again sells the horse to C. The effect of a resale is, in this case, that B

would be liable to A for the difference of the price between the sale and resale; 4 Bingh. 723; 4 Mann. & G. 898; Blackb. Sales 463. See SALE.

RESCIT, RECEIT. The admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons: as, when an action is brought against a tenant for life or years, or any other particular tenant, and he makes default, in such case the reverser may move that he may be received to defend his right and to plead with the defendant. Jacob, Law Dict.; Cowel.

The admittance of a plea when the controversy is between the same two persons. Co. Litt. 192.

RESCISSION OF CONTRACTS. The abrogation or annulling of contracts.

It may take place by mutual consent; Ans. Contr. 258; and this consent may be inferred from acts; 4 Mann. & G. 898; 1 Pick. 57; 5 Me. 277; 156 Pa. 276. It may take place as the act of one party, in consequence of a failure to perform by the others; 2 C. B. 905; 4 Wend. 285; 2 Pa. 454; 28 N. H. 561; 9 La. Ann. 81; 63 Hun 439; 76 Ga. 3; not so, ordinarily, where the failure is but partial; 4 Ad. & E. 599. 1 M. & W. 231; on account of fraud, even though partially executed; 5 Cush. 126; 15 Ohio 200; 23 N. H. 519; 129 U. S. 86. See 25 Alb. L. J. 69. Misrepresentations not a part of the same transaction are no cause for rescinding the contract; 83 Va. 504.

A contract cannot, in general, be rescinded by one party unless both parties can be placed in the same situation and can stand upon the same terms as existed when the contract was made; 2 Y. & J. 278; 4 Mann. & G. 903; 1 M. & W. 231; 3 Me. 30; 1 Denio 69; 22 Pick. 283; 4 Blackf. 515; 2 Watts 433; 10 Ohio 142; 3 Vt. 442; 1 N. H. 17; 73 Ia. 749; 39 Kan. 105; 73 Tex. 619. It must be done at the time specified, if there be such a time; otherwise, within a reasonable time; 2 Camp. 530; 14 Me. 57; 22 Pick. 546; in case of fraud, upon its discovery; 1 Den. 69; 5 M. & W. 83; 141 U. S. 429; 45 N. J. Eq. 186; 87 Fed. Rep. 418; 39 Kan. 105. The right may be waived by mere lapse of time; 8 Story 612; see 6 Cl. & F. 234; or other circumstances; 9 B. & C. 59; 4 Den. 554; 4 Mass. 502; Baldw. 331.

In case of a conditional sale or exchange the party desiring to rescind must return or tender a return of all the property received by him under the terms of the sale or exchange, and within a reasonable time; 1 Marvel Del. 156. In that case it was held that the question as to what is a reasonable time is a question for the court under the circumstances of each case; *id.*; in another case, however, it is said that the question whether the defendants delayed for an unreasonable time in asserting a right to rescind is for the jury; 3 C. C. App. 600.

If a party means to rescind a contract because of the failure of the other party to perform he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties; 137 U. S. 78.

The equity for the rescission and cancellation of agreements, securities, deeds, and other instruments arises when a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation; Bisp. Eq. 31; 128 U. S. 315. The jurisdiction of the court of equity is exercised upon the principle of *quia timet*; that is, for fear that such agreements, securities, deeds, and other instruments may be vexatiously or injuriously used against the party seeking relief, when the evidence to impeach them may be lost; or that they may throw a cloud or suspicion over his interest or title; or where he has a defence good in equity which cannot be made available at law. The cases in which this relief will be granted on account of misrepresentation and fraud may be divided into four classes: first, where there is actual

fraud in the party defendant in which the party plaintiff has not participated; 13 Pet. 26; *secondly*, where there is constructive fraud against public policy and the party plaintiff has not participated therein; see 4 Munf. 316; *thirdly*, where there is a fraud against public policy and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand; *fourthly*, where there is a constructive fraud by both parties,—that is, where both parties are *in delicto*, but not *in pari delicto*; see 2 Story, Eq. Jur. § 694; 3 Jones, Eq. 494; 2 Mas. 378; 25 Ga. 89; 1 Pat. & H. 307; Bisp. Eq. § 31. The court will decree that a deed or other solemn instrument shall be delivered up and cancelled, not only when it is avoidable on account of fraud, but also when it is absolutely void, unless its invalidity appears upon the face of it, so that it may be defeated at any time by a defence at law; 2 Story, Eq. Jur., 13th ed. § 698; 6 Du. 597. To cancel an executed contract for alleged false representations, fraud must be made clearly to appear, and it must be shown that the complainant has been injured and deceived thereby; 124 U. S. 173.

The ignorance or mistake which will authorize relief in equity must be an ignorance or mistake of material facts; 1 Stor. 173; 11 Conn. 134; 6 Wend. 77; 6 Harr. & J. 500; 10 Leigh 37; and the mistake must be mutual; 3 Green, Ch. 103; 3 Sumn. 387; 11 Pet. 63; 24 Me. 82; 10 Vt. 570; 6 Mo. 16; 153 Pa. 134; 89 Ga. 619. If the facts are known but the law is mistaken, the same rule applies in equity as at law, that a mere mistake or ignorance of law, where there is no fraud or trust, is immaterial: *ignorantia legis neminem excusat*; Adams, Eq., 8th ed. 188. See 99 N. C. 30; IGNORANCE; MISTAKE.

Instruments may also be rescinded and cancelled when they have been obtained from persons who were at the time under duress or incapacity; 2 Root 216; 8 Ohio 214; 3 Yerg. 537; 36 Miss. 685; or by persons who stood in a confidential relation and took advantage of that relation; 5 Sneed 593; 31 Ala. N. S. 299; 3 Cow. 537; 2 A. K. Marsh. 175; 9 Md. 248; 3 Jones, Eq. 152, 186; 30 Miss. 369; 9 Beav. 437; 151 Pa. 593; 115 Mo. 465; 96 Mich. 562.

Gross inadequacy of consideration; 17 Vt. 9; 22 Ga. 637; 19 How. 303; 82 Va. 394; 119 U. S. 499; fraudulent misrepresentation and concealment; 3 Pet. 210; 2 Ala. N. S. 251; 10 Yerg. 206; 1 A. K. Marsh. 235; 2 Mo. 126; 84 Ala. N. S. 596; 6 Wisc. 295; 74 Ia. 161; 85 Ky. 160; 116 Md. 367; hardship and unfairness; 17 Vt. 542; 2 Root 216; 2 Green, Ch. 357; 2 Harr. & J. 285; 3 Yerg. 537; 3 Ohio 214; 81 Vt. 101; undue influence; 2 Mas. 378; are among the causes for a rescission of contracts in equity.

See, generally, 9 L. R. A. 607; ELECTION OF RIGHTS AND REMEDIES; PERFORMANCE.

RESCISSORY ACTIONS. In Scotch Law. Actions which are brought to set aside deeds. Patterson, Comp. 1058, n.

Proper improbation is an action brought for declaring writing false or forged.

Reduction - improbation is an action whereby a person who may be hurt or affected by a writing insists upon producing or exhibiting it in court, in order to have it set aside, or its effects ascertained under the certification that the writing, if not produced, shall be declared false and forged.

In an action of *simple reduction* the certification is only temporary, declaring the writings called for null until they be produced; so that they recover their full force after their production. Erskine, b. 4, tit. 1, §§ 5, 8.

RESCOUS. An old term, synonymous with *rescue*, which see.

RESCRIPT. In Canon Law. A term including any form of apostolical letter emanating from the pope. The answer of the pope in writing. *Dict. Droit Can.*

In Civil Law. The answer of the

prince, at the request of the parties, respecting some matter in dispute between them, or to magistrates, in relation to some doubtful matter submitted to him.

The rescript was differently denominated according to the character of those who sought it. They were called *annotations* or *subnotations*, when the answer was given at the request of private citizens; *letters* or *epistles*, when he answered the consultation of magistrates; *pragmatic sanctions*, when he answered a corporation, the citizens of a province, or a municipality. See CODE.

At Common Law. A counterpart.

In Massachusetts it is used to denote the statement of the decision of the supreme judicial court as an appellate tribunal, and the accompanying brief statement of the reasons for the decision sent to the court from which the case was brought.

RESCRIPTION. In French Law. A rescription is a letter by which the maker requests some one to pay a certain sum of money, or to account for him to a third person for it. Pothier, *Contr. de Change*, n. 225.

According to this definition, bills of exchange are a species of rescription. The difference appears to be this,—that a bill of exchange is given when there has been a contract of exchange between the drawer and the payee; whereas the rescription is sometimes given in payment of a debt, and at other times it is lent to the payee.

RESCUE. In Criminal Law. The forcibly and knowingly freeing another from arrest or imprisonment. 4 Bla. Com. 131.

A deliverance of a prisoner from lawful custody by a third person. 2 Bish. Cr. Law § 1065; 1 Russ. Cr. § 597.

Taking and setting at liberty, against law, a distress taken for rent, services, or damage feasant. Bacon, *Abr. Rescous*.

If the rescued prisoner was arrested for felony, then the rescuer is a felon; if for treason, a traitor; 3 P. Wms. 468; Cro. Car. 583; and if for a trespass, he is liable to a fine as if he had committed the original offence; Hawk. Pl. Cr. b. 5, c. 21. See 2 Gall. 313; Russ. & R. 432. If the principal be acquitted, the rescuer may nevertheless be fined for the misdemeanor in the obstruction and contempt of public justice; 1 Hale, Pl. Cr. 538. See T. U. P. Charlt. 13.

In order to render the rescuer criminal, it is necessary he should have knowledge that the person whom he sets at liberty has been apprehended for a criminal offence, if he is in the custody of a private person; but if he be under the care of a public officer, then he is to take notice of it at his peril; 1 Hale, Pl. Cr. 608. See further, 1 Stor. 83; 2 Gall. 313; 1 Car. & M. 299; 1 Ld. Raym. 35, 589.

A departure from an unlawful imprisonment or custody is not an escape, within the meaning of the law; and one who, without violence, assists a person who is confined without authority or process of law to depart from his place of confinement, is not guilty of the crime of assisting a prisoner to escape; 92 Cal. 421; 7 Conn. 452. See BREACH OF PRISON; ESCAPE.

The rescue of cattle and goods distrained by pound-breach is a common-law offence and indictable; 7 C. & P. 233; 5 Pick. 714.

In Maritime Law. The retaking by a party captured of a prize made by the enemy. There is still another kind of rescue which partakes of the nature of a recapture: it occurs when the weaker party, before he is overpowered, obtains relief from the arrival of fresh succors, and is thus preserved from the force of the enemy. 1 C. Rob. 224, 271; Halleck, *Int. Law* cxxxv.

Rescue differs from recapture. The rescuers do not by the rescue become owners of the property, as if it had been a new prize; but the property is restored to the original owners by the right of postliminium.

RESCUSSOR. The party making a rescue is sometimes so called; but more properly he is a rescuer.

RESEALING WRIT. The second sealing of a writ by a master so as to continue it, or cure it of an irregularity. Whart. Dict.

RESERVATION. That part of a deed or instrument which reserves a thing not *in esse* at the time of the grant, but newly created. 2 Hilliard, *Abr.* 359.

The meaning of a reservation in a contract must be determined in every case by the particular facts of the case, such as the character of the conveyance, the nature and situation of the property conveyed and of the property excepted, and the purpose of such exception; 143 U. S. 596.

The creation of a right or interest which had no prior existence as such in a thing or part of a thing granted, by means of a clause inserted by the grantor in the instrument of conveyance.

A reservation is distinguished from an exception in that it is of a new right or interest: thus, a right of way reserved at the time of conveying an estate, which may have been enjoyed by the grantor as owner of the estate, becomes a new right. 42 Me. 9. An easement may be acquired by the grantor of a deed poll by a clause of reservation; and the technical distinction between reservation and exception will be disregarded, and the language used so construed as to effectuate the intention of the parties; 50 N. J. Eq. 464.

A reservation may be of a life-estate; 28 Vt. 10; 33 N. H. 18; 23 Mo. 373; 3 Md. Ch. Dec. 230; of a right of flowage; 41 Me. 298; right to use water; 41 Me. 177; 9 N. Y. 423; right of way; 25 Conn. 331; 6 Cush. 254; 10 id. 313; 10 B. Monr. 483; 5 Wash. St. 509; a ground rent, in Pennsylvania, and of many other rights and interests; 33 N. H. 507; 9 B. Monr. 163; 5 Pa. 317; 29 Ohio 568; 107 Mass. 290.

The public land laws of the United States provide for reservations or "reserves" of government land for certain public purposes; such as Indian reservations (see INDIAN TERRITORY); and those for military posts. The jurisdiction of a circuit court over crimes committed on military reservations extends to the whole of such reservations, whether used for military purposes or not; 146 U. S. 325. See 66 Fed. Rep. 671.

The land department of the United States has authority to withdraw or reserve public lands from sale, etc., and a grant by congress does not operate upon lands theretofore reserved for any purpose whatever. Lands withdrawn from sale by the land department are considered as reserved within the terms of this rule; 34 U. S. App. 66. An act for the sale of desert lands does not embrace alternate sections reserved to the United States along the lines of railroads for the construction of which congress has made grants of lands; 160 U. S. 136. See LANDS, PUBLIC; LAND GRANT.

RESERVE. The National Bank Act directs that all national banks in the sixteen largest cities shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per cent. of the aggregate amount of its notes in circulation and deposits. Fifteen per cent. is required of all other national banks. When the reserve falls below the proper limit, the bank must not increase its liability, otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend, till the limit is reached. On a failure to make good the reserve for thirty days after notice by the comptroller of the currency, the latter may, with the concurrence of the secretary of the treasury, appoint a receiver to wind up the bank. R. S. § 5191.

In Insurance Law. In general it means a sum of money, variously computed or estimated, which with accretions from interest, is set aside, *reserved*, as a fund with which to mature or liquidate, either by pay-

ment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment. 251 U. S. 350. See **RESERVE FUND**. Under the statutes of many states insurance companies are required to deposit in each state where they do business securities approved by some state officer, usually an insurance commissioner, to an amount specified over and above the capital stock of the company, which is termed the reserve fund. Such statutes usually prescribe rules for its investment and also the percentage at which it shall be accumulated; Biddle, Ins. § 66. They are held not to apply to relief associations where the assessments are purely voluntary; 11 Ins. L. J. N. Y. 859; or mutual insurance companies; 9 Colo. 73. The securities which compose a reserve fund are in the nature of a trust fund for the policy holders, and not a security for the general creditors; 43 Ohio St. 359; 76 Mo. 594; 13 R. I. 259; and a receiver appointed in case of the insolvency of a company is not entitled to control it, but securities are held in trust for distribution by the trustee; 56 Conn. 234. After the policy holders are satisfied, the securities, if the property of the company, may be applied for the benefit of general creditors; 12 R. I. 359.

In many states such fund is required as a prerequisite to permission to a foreign insurance company to do business in the state, and ordinarily the deposits required by such laws are for the benefit of domestic policy holders; 91 Mo. 177; 77 Va. 85; 25 Neb. 334; 17 U. C. Ch. 160.

Another use of the term is its application to a fund sometimes called the safety fund and sometimes a reserve fund in policies issued by companies which provide for an assessment to meet the losses. Such fund is intended for the protection of living members by the use of the income for the payment of dues and assessments; 2 Joyce, Ins. § 1287. Where a reserve fund and the mortuary and benefit fund were to be raised by assessments, the latter being for the payment of death claims only and the former for the exclusive use of members, except that it might be used in payment of death claims when they exceed the experience table of mortality, it was held, upon dissolution, that the reserve fund was to be distributed exclusively among the holders of certificates in force, and that death claims had no right to share in it; 65 N. Y. 887; 131 N. Y. 354. See 92 Hun 592.

In a policy on the Tontine system (see **INSURANCE**, subtitle, *Tontine*), where, in addition to the provision for the payment of death claims, it was provided that in case the policy holder survived the specified period and the policy remained in force, there should be a payment in cash or annuity bonds from a fund created by a certain class of policy holders consisting of those effecting insurance on the same plan and in the same year, the surplus and profits to be equitably apportioned among survivors of that class, it was held that the policy did not require a separate investment of these funds and that the consent of the assured to placing the dividends in a reserve fund did not extend its obligations in that respect; 101 N. Y. 328.

Where a policy recited that it was upon the "reserve dividend plan," and that if premiums were paid for ten years the company would pay to the person designated his equitable proportion of the "reserve dividend fund," it was held that the meanings of the terms employed must be ascertained by recourse to contemporary insurance literature, and as the only reserve dividend plan then known was the one devised and copyrighted by W. P. Stewart, who was engaged as actuary by the defendant and his plan used by it, the liability must be determined by reference thereto; 37 Fed. Rep. 163.

The term reserve in life insurance is also applied to the fund accumulated out of premiums after the payment of expenses and other charges properly apportioned to

each policy, and where a life policy provides that, in case of lapse for non-payment of premium, the net reserve, less indebtedness, shall be applied to the purchase of extended insurance, or, if the assured shall so elect within three months, to the purchase of a paid-up policy, and also that said indebtedness may be paid in cash, and the entire net reserve so applied, such indebtedness must be paid within the three months; 81 Fed. Rep. 935.

For *point reserved*, see that title.

RESERVE FUNDS. In the Excise Act of 1909, and the Income Tax Act of 1913. Words include an "unearned premium reserve," to meet future liabilities on policies; a "liability reserve," to satisfy claims indefinite in amount and as to time of payment, but accrued, on liability and workmen's compensation policies; and a "reserve for loss claims," accrued on other policies; but not to include funds required by state authority to be maintained to meet ordinary running expenses, such as taxes, salaries, re-insurance and unpaid brokerage. 251 U. S. 350. See also **RESERVE**.

RESET. The receiving or harboring an outlawed person. Cowel.

RESET OF THEFT. In Scotch Law. The receiving and keeping stolen goods, knowing them to be stolen, with a design of feloniously retaining them from the real owner. Alison, Cr. Law 328.

RESETTER. In Scotch Law. A receiver of stolen goods, knowing them to have been stolen.

RESIANCE. A man's residence or permanent abode. Such a man is called a resiant. Kitch. 33.

RESIANT ROLLS. Those containing the resiants in a tithing, etc., which were called over by the steward on holding courts leet.

RESIDENCE (Lat. *resideo*). Personal presence in a fixed and permanent abode. 20 Johns. 208; 1 Metc. Mass. 251.

The abode where one actually lives, not the legal domicile. 69 Hun 617.

A residence is different from a domicile, although it is a matter of great importance in determining the place of domicile. The essential distinction between residence and domicile is that the first involves the intent to leave when the purpose for which one has taken up his abode ceases. The other has no such intent; the abiding is *animo manendi*. One may seek a place for the purposes of pleasure, of business, or of health. If his intent be to remain, it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his residence; 53 Fed. Rep. 311. See 13 Mass. 501; 2 Gray 490; 19 Wend. 11; 11 La. 175; 5 Me. 143; 50 Hun. 454; 59 L. J. 67; **DOMICIL**. But he has been held synonymous with domicile; 15 Co. Ct. Rep. Pa. 312. It is an element of domicile. See 97 Pa. 74; 21 Wall. 350; Dicey, Dom. 1. Residence and habitancy are usually synonymous; 2 Gray 490; 2 Kent 574, n. Residence indicates permanency of occupation, as distinct from lodging, or boarding, or temporary occupation, but does not include as much as domicile, which requires an intention combined with residence; 19 Me. 293; 2 Kent 576. See 5 Sandf. 44; 16 N. Y. S. 834. In a statute it was held not to mean business residence, but the fixed home of the party; 13 Repr. 430 (S. C. of Md.). See 15 M. & W. 433; 69 Hun 308.

Residence has been held to be more restricted than domicile as applied to homestead laws; 113 N. C. 421.

An averment of residence is not equivalent to an allegation of citizenship; 21 U. S. App. 45.

It was held that within the meaning of the statute against kidnapping, any place where a child has a right to be is its residence; 147 Ind. 621. See **KIDNAPPING**; **DOMICIL**; **PERMANENT**.

See, generally, 105 Mass. 93; 117 N. Y. 159; 24 Q. B. Div. 29; 134 U. S. 351.

RESIDENT. One who has his residence in a place.

One is a resident of a place from which his departure is indefinite as to time, definite as to purpose; and for this purpose he has made the place his temporary home; 53 Fed. Rep. 311. See **NON-RESIDENT**.

RESIDENT MINISTER. In international Law. See **MINISTER**.

RESIDUARY ACCOUNT. In English Practice. The account which every executor and administrator, after paying the debts and particular legacies of the deceased, and before paying over the residuum, must pass before the Board of Inland Revenue. 2 Steph. Com., 11th ed. 221, n.; Moz. & W.

RESIDUARY CLAUSE. The clause in a will by which that part of the property is disposed of which remains after satisfying previous bequests and devises. 4 Kent 541*; 2 Will. Exec., 7th Am. ed. *1316.

RESIDUARY DEVISEE. The person to whom the residue of a testator's real estate is devised after satisfying previous devises.

RESIDUARY ESTATE. What remains of a testator's estate after deducting the debts and the bequests and devises.

RESIDUARY LEGATEE. He to whom the residuum of the estate is devised or bequeathed by will. Rop. Leg.; Powell, Mortg. See **LEGACY**.

RESIDUE. That which remains of something after taking away a part of it; as, the residue of an estate, which is what has not been particularly devised by will.

What is left; the rest. 63 Hun 352. What is left after all liabilities are discharged, and the objects of the testator carried into effect. 48 Fed. Rep. 3.

A will bequeathing the general residue of personal property passes to the residuary legatee everything not otherwise effectually disposed of; and it makes no difference whether a legacy falls into the estate by lapse or as void at law, the next of kin is equally excluded; 15 Ves. 416; 2 Mer. 392. See 40 Conn. 264.

Where a residuary legacy lapses, there is a *pro tanto* intestacy; 82 Pa. 428. Where the residue is not expressly disposed of and it does not appear by the will that the executors were intended to take it beneficially, they are to be deemed trustees for the next of kin; 8 Beav. 475; though previous to 1830, it was considered in the English courts that if the testator had named in his will an executor, but no residuary legatee, the executor should retain the residue of the personal estate for his own benefit; Schoull, Ex. & Ad. § 494. Under the statutes 2 Geo. IV. and 1 Wm. IV. c. 40, the executor is a trustee for the next of kin, unless it shall appear from the will that he is to take the residue beneficially; L. R. 7 H. L. 606; and he is not entitled to it by implication of law; *id.* See 12 Eng. Rul. Cas. 20; **LEGACY**. A legacy to the next of kin does not exclude his claim to the residue; Amb. 566; 12 Ves. 298.

RESIGNATION (Lat. *resignatio*; *re*, back, *signo*, to sign). See **OFFICER**.

RESIGNATION BOND. In Ecclesiastical Law. A bond given by an incumbent to resign on a certain contingency. It may be conditioned to resign for good and sufficient reason, and therefore lawful, *e. g.* to resign if he take a second benefice, or on request, if a patron present his son or kinsman when of age to take the living, etc. Cro. Jac. 249, 274. But equity will generally relieve the incumbent; 1 Rolle, Abr. 443.

RESIGNEE. One in favor of whom a resignation is made. 1 Bell, Com. 125, n.

RESIST. To oppose by direct, active, and quasi-forcible means. 37 Wis. 261.

RESISTANCE (Lat. *re*, back, *sisto*, to stand, to place). The opposition of force to force. See **ARREST**; **ASSAULT**; **OFFI-**

CER; PROCESS; RESIST.

RESISTING. See RESIST.

RESOLUTION (Lat. *re*, again, *solto*, to loose, to free). A solemn judgment or decision of a court. This word is frequently used in this sense in Coke and some of the more ancient reporters.

An agreement to a law or other thing adopted by a legislature or popular assembly. See *Dict. de Jurisp.*; ORDINANCE; JOINT RESOLUTION; MUNICIPAL ORDINANCE.

In Civil Law. The act by which a contract which existed and was good is rendered null.

Resolution differs essentially from rescission. The former presupposes the contract to have been valid, and it is owing to a cause posterior to the agreement that the resolution takes place; while rescission, on the contrary, supposes that some vice or defect annulled the contract from the beginning. Resolution may be by consent of the parties or by the decision of a competent tribunal; rescission must always be by the judgment of a court; 7 Troplong, *de la Vente*, n. 689; 7 Toullier 551.

RESOLUTIVE CONDITION. In Scotch Law. A condition of which the obligation comes to an end on the occurrence of the uncertain event. Ersk. Prin. 3. 1. 3.

RESOLUTORY CONDITION. One which has for its objects, when accomplished, the revocation of the principal obligation; for example, I will sell you my crop of cotton if my ship America does not arrive in the United States within six months; my ship arrives in one month; my contract with you is revoked. 1 Bouvier, Inst. n. 764.

RESOURCES. Money or any property that can be converted into supplies, capabilities of producing wealth, or to supply necessary wants; available means or capabilities of any kind. 3 Mont. 386.

RESPECTIVE, RESPECTIVELY.

Words of severance. Occurring in a testamentary gift to more persons than one, their effect is to sort out the devisees or legatees so that they take as tenants in common; 31 L. J. Ch. 368. In court or in chambers *respectively*, as used in the Judicature Act, means *either* in court or in chambers; 53 L. J. Q. B. 428; 13 Q. B. D. 218.

RESPECTU COMPUTI VICECOMITIS HABENDO. A writ for respecting a sheriff's account addressed to the treasurer and barons of the exchequer. Reg. Orig. 139.

RESPIRATION (Lat. *re*, back, *spiro*, to breathe). Breathing, which consists of the drawing into, inhaling, or, more technically, *inspiring*, atmospheric air into the lungs, and then forcing out, expelling, or, technically, *expiring*, from the lungs the air therein. Chitty, Med. Jur. 92, 416, note n.

RESPITE. In Civil Law. An act by which a debtor who is unable to satisfy his debts at the moment transacts (*i. e.* compromises) with his creditors and obtains from them time or delay for the payment of the sums which he owes to them. La. Code 9501.

A forced respite takes place when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by judicial authority, to consent to what the others have determined in the cases directed by law.

A voluntary respite takes place when all the creditors consent to the proposal of the debtor to pay in a limited time the whole or a part of his debt.

A delay, forbearance, or continuation of time.

In Criminal Law. A reprieve. A temporary suspension of the execution of a sentence. See 62 Pa. 60. It differs from a pardon, which is an absolute suspension. See PARDON; REPRIEVE.

RESPIRE OF HOMAGE. To dispense with the performance of homage by tenants who held their lands in consideration of performing homage to their lords. Cowell.

RESPONDE BOOK. In Scotch Law. A book of record of the chancery, in which are entered all non-entry and relief duties payable by heirs who take precepts from chancery. Stair, Inst. p. 296, § 28; Erskine, Inst. 11. 5. 50.

RESPONDEAT OUSTER (that he answer over). See ABATEMENT; JUDGMENT; OUSTER.

RESPONDEAT SUPERIOR. A phrase often used to indicate the responsibility of a principal for the acts of his servant or agent. MASTER AND SERVANT; PRINCIPAL; AGENT.

RESPONDENT. The party who makes an answer to a bill or other proceeding in chancery.

In Civil Law. One who answers or is security for another; a fidejussor. Dig. 2. 8. 6.

RESPONDENTIA. In Maritime Law. A loan of money, on maritime interest, on goods laden on board of a ship, upon the condition that if the goods be wholly lost in the course of the voyage, by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon. See Newb. 514.

The contract is called *respondentia* because the money is lent mainly, or most frequently, on the personal responsibility of the borrower. It differs principally from bottomry, which see, in the following circumstances: bottomry is a loan on the ship; *respondentia* is a loan upon the goods. 1 Pet. 386. The money is to be repaid to the lender, with maritime interest, upon the arrival of the ship in the one case, and of the goods in the other. In most other respects the contracts are nearly the same, and are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable, as well as the borrower; in the latter, the lender has, in general, it is said, only the personal security of the borrower; Marsh. Ins. 734.

If any part of the goods arrive safely at the end of the voyage, the lender is entitled to have the proceeds applied to the payment of his debt. If the loan is made to the master, and not to the owners of the goods, the necessity for the loan and for the hypothecation of the cargo must be clearly shown, or the owners of the goods, and, consequently, the goods themselves, will not be bound. The ship and freight are always first to be resorted to to raise money for the necessity of the ship or the prosecution of the voyage; and it seems that a bond upon the cargo is considered by implication of law a bond upon the ship and freight also, and that unless the ship be liable in law the cargo cannot be held liable; The *Constanca*, 4 Notes of Cas. 255, 512, 677; 10 Jur. 845; 3 W. Rob. 83; 14 Jur. 96. See MASTER OF A SHIP.

If the contract clearly contemplates that the goods on which the loan is made are to be sold or exchanged, free from any lien, in the course of the voyage, the lender will have no lien on them, but must rely wholly upon the personal responsibility of the borrower. It has frequently been said by elementary writers, and without qualification, that the lender has no lien; 2 Bla. Com. 458; 3 Kent 354; but the form of bond generally in use in this country expressly hypothecates the goods, and thus, even when there is no express hypothecation, if the goods are still on board at the end of the voyage, it is not doubtful that a court of admiralty will direct the arrest of the goods and enforce against them the maritime lien or privilege conferred by the *respondentia* contract. There is, perhaps, no common-law lien, but this maritime lien only; but the latter will be enforced

by the proper admiralty process. See the authorities cited in note to Abb. Shipp., 13th ed. 152, 154, 175; 4 Wash. C. C. 663; form of *respondentia* bonds in Conkl. Adm. 263; 1 Pars. Mar. Law 437, and n. 5; Abb. Shipp. 455. See ADMIRALTY; MARITIME CAUSE; LIEN; NAUTICA PECUNIA.

RESPONDERE NON DEBET (Lat. ought not to reply). In Pleading. The prayer of a plea where the defendant insists that he ought not to answer, as when he claims a privilege; for example, as being a member of congress or a foreign ambassador. 1 Chitty, Pl. *438.

RESPONSA PRUDENTUM (Lat.). In Roman Law. Opinions given by Roman lawyers.

Before the time of Augustus, every lawyer was authorized, *de jure*, to answer questions put to him; and all such answers, *responsa prudentum*, had equal authority—not the force of law, but the opinion of a lawyer. Augustus was the first prince who gave to certain distinguished jurists the particular privilege of answering in his name; and from that period their answers acquired greater authority. Adrian determined in a more precise manner the degree of authority which these answers should have, by enacting that the opinions of such authorized jurists, when unanimously given, should have the force of law (*legis vicem*) and should be followed by the judges, and that when they were divided the judge was allowed to adopt that which to him appeared the most equitable. The opinions of other lawyers held the same place they had before: they were considered merely as the opinions of learned men. Mackeldey, *Man. Introduct.* § 48; Mackeldey, *Hist. du Dr. Rom.* §§ 40, 49; Hugo, *Hist. du Dr. Rom.* § 313; Inst. 1. 2. 8; *Institutes Explicées*, n. 39.

RESPONSALIS. In Old English Law. One who appeared for another.

A person, without restrictions as to character, permitted by the judge to act for a party in his presence. Such a person was sometimes allowed by a justice to act on the appearance of the defendant, which, according to the old writs, was always in proper person. Lord Coke calls special attention to the difference between a *responsalis* and an attorney; 3 Co. Inst. 249; 23 N. Y. 68, per T. W. Dwight, *arguendo*.

In Ecclesiastical Law. A proctor.

RESPONSIBILITY. The obligation to answer for an act done and to repair any injury it may have caused.

One person—as, for example, a principal, master, or parent—is frequently responsible, civilly, for the acts of another.

Penal responsibility is always personal; and no one can be punished for the commission of a crime but the person who has committed it, or his accomplice.

RESPONSIBLE. Able to pay the sum which may be required of him; able to discharge an obligation. Webster, Dict.; 26 N. H. 537; 55 How. Fr. 119. A promise “to be responsible” for the debt of another is merely a guaranty, and not a suretyship; 9 Phila. 499; 30 Pa. 209.

In an act directing municipal officers to award contracts to the lowest responsible bidder, responsible applies not only to pecuniary ability but also to judgment and skill; 164 Pa. 477. See 160 Ill. 655.

RESPONSIBLE GOVERNMENT. A term used in England and her colonial possessions to indicate an obligation to resign, on the part of the ministry, upon the declaration of a want of confidence by vote of the legislative branch of the colonial government. Mills, Col. Const. 27.

RESSEISER. The taking of lands into the hands of the crown, where a general livery or *ouster le main* was formerly misused. Whart.

REST. (v). To rely upon, trust to the sufficiency of. Anderson. “To rest a case,” and for a party “to rest,” is to adduce

what is thought to be sufficient testimony to make out an apparent case in chief, or to rebut the adversary's *prima facie* case. *Id.* (n). A pause made by an accountant in his entries, in order to strike a balance upon which to allow interest. *Id.* Spoken of as annual and semi-annual rests; and made by an administrator, executor, guardian, or other trustee. *Id.*; 1 Cowp. 566. Also, peace, quiet. *Id.*

RESTAUR, or RESTOR. The remedy or recourse which assurers have against each other, according to the date of their assurances; or against the master, if the loss arise through his default; also the remedy or recourse a person has against his guarantor, or other person, who is to indemnify him from any damage sustained. Whart.

RESTAURANT. As currently understood, an eating house. 10 Fed. Rep. 6. See INN; INNKEEPER.

RESTITUTIO IN INTEGRUM (Lat.). In Civil Law. A restoring parties to the condition they were in before entering into a contract or agreement, on account of fraud, infancy, force, honest mistake, etc. Calvinus, Lex. The going into a cause anew from the beginning. *Id.*

RESTITUTION. In Maritime Law. The placing back or restoring articles which have been lost by jettison: this is done, when the remainder of the cargo has been saved, at the general charge of the owners of the cargo; but when the remainder of the goods is afterwards lost, there is not any restitution. Stevens, Av. pt. 1, c. 1, s. 1, art. 1, n. 8. As to restitution of captured vessels, see RECAPTURE; Desty, Sh. & Adm. § 446.

In Practice. The return of something to the owner of it or to the person entitled to it.

After property has been taken into execution, and the judgment has been reversed or set aside, the party against whom the execution was sued out shall have restitution; and this is enforced by a writ of restitution; Cro. Jac. 698; 13 S. & R. 294. When the thing levied upon under an execution has not been sold, the thing itself shall be restored; when it has been sold, the price for which it is sold is to be restored; Bacon, Abr. *Execution* (Q); 1 Maule & S. 425.

"Pending an appeal from an order of the common pleas striking off the satisfaction of a judgment, the plaintiff in the judgment issued an execution, and the terre-tenant of the land was compelled to pay to the sheriff a large sum of money to prevent a sale of the land; the supreme court subsequently reversed the order striking off the satisfaction of the judgment; held, that the terre-tenant was entitled to a writ of restitution." 170 Pa. 170. Whether restitution should be made in the progress of judicial procedure if the interest of the parties defendant are diverse, is a question of fact; 33 U. S. App. 393.

RESTITUTION OF CONJUGAL RIGHTS. In Ecclesiastical Law. A compulsory renewal of cohabitation between a husband and wife who have been living separately. Unknown in the United States.

A suit may be brought in the divorce and matrimonial court for this purpose whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without sufficient reason, by which the party injured may compel the other to return to cohabitation; 3 Bla. Com. 94; 3 Steph. Com. 11; but a woman cannot take proceedings for the restitution of conjugal rights until she has used reasonable means to induce her husband to take her back; 14 P. Div. 26; and the rule requires a written demand for cohabitation, of a conciliatory character; *id.* A wife whose husband had refused to receive her because she had left her home on account of a disagreement with his children by a former marriage, was held entitled to

a decree for the restitution of conjugal rights; [1896] P. 175; 1 Add. Eccl. 805; 8 Hagg. 619. Formerly a deed of separation afforded no bar to this suit, even though it in terms forbade such proceedings. But this rule is now changed, and to one separated spouse chancery will now grant an injunction, to restrain the other from suing for restitution of conjugal rights; Schoul. Hus. & Wife § 482. See CRUELTY.

RESTITUTION EDICT. An edict issued in 1629, by Emperor Ferdinand II., requiring Protestants to restore to the Roman Catholic authorities all ecclesiastical property which they had appropriated at the peace of Passau in 1552.

RESTITUTION OF MINORS. In Scotch Law. A minor on attaining majority may obtain relief against a deed previously executed by him, which may be held void or voidable, according to circumstances. This is called restitution of minors. Bell.

RESTITUTION OF STOLEN GOODS. At common law there was no restitution of goods upon an indictment, because it was at the suit of the crown only, therefore the party was compelled to bring an appeal of robbery in order to have his goods again; but a writ of restitution was granted by 21 Hen. VIII. c. 11, and it became the practice of the crown to order, without any writ, immediate restitution of such goods. The Larceny Act, 24 & 25 Vict. c. 96, § 100, gives power to the court from time to time to issue writs of restitution for stolen property or to order the restitution thereof in a summary manner upon a conviction of the guilty party upon an indictment on behalf of the owner, and this notwithstanding the guilty party may have sold them for value to an innocent purchaser; but by 30 & 31 Vict. c. 35, § 9, a sum not exceeding the proceeds of such sale out of moneys taken from the guilty party on his apprehension may be delivered to such innocent purchaser. Whart. Lex.

RESTITUTION, WRIT OF. A writ which lies, after the reversal of a judgment, to restore a party to all that he has lost by occasion of the judgment. 2 Tidd, Pr. 1186.

RESTITUTIONE EXTRACTI AB ECCLESIA. A writ which formerly lay to restore a man to the church, which he had recovered for a sanctuary being suspected of a felony. Reg. Orig.; Cowel.

RESTITUTIONE TEMPORALIUM. A writ addressed to the sheriff to restore the temporalities of a bishopric to the bishop elected and confirmed. Fitz. N. B. 169.

RESTRAINING. Narrowing down; making less extensive. For example, a *restraining statute* is one by which the common law is narrowed down or made less extensive in its operation. *Restraint powers* are the limitations or restrictions upon the use of a power imposed by the donor. *Restraint order* is an order granted on motion or petition, restraining the Bank of England or other public company from allowing any dealing with certain specified stock or shares. Hunt, Eq. pt. iii. c. 3, s. 2.

In the United States a restraining order is an interlocutory order made by a court of equity upon an application for an injunction and as part of the motion for a preliminary injunction, by which the party is restrained pending the hearing of the motion.

RESTRAINT. The effect of restraint in the law is to be considered mainly with respect to trade, marriage, princes, and alienation, all of which are herein separately considered. As to restraint upon anticipation, see MARRIED WOMAN; and as to the execution of deeds or other documents under restraint, see DURESS.

RESTRAINT ON ALIENATION. A provision in a settlement to the special

use of a married woman without power of alienation, which is valid as an exception to the general rule against any restraint on alienation. It is in force only during marriage; Snell, Eq. 200; 11 Ch. D. 645.

A restriction, by way of devise over, against all alienation during a limited time upon an estate in fee, is void; 141 U. S. 396. See PERPETUITY; SPENDTHRIFT TRUST; MARRIED WOMAN.

RESTRAINT OF MARRIAGE. Conditions attached to gifts or bequests to a person who has never been married, in general restraint of marriage, are void; Chit. Const. 619; so is an agreement not to marry any one except a particular person; 4 Burr. 2325. The gift or bequest is good and the condition fails, but if the restraint is partial, with a gift over in case of marrying a Roman Catholic or a particular person or without the consent of a particular person, the condition is good, and so is a condition in restraint of a second marriage. See Allen v. Jackson, 1 Ch. D. 399; 1 Q. B. D. 279; 16 Ch. D. 183.

It is said that a condition in restraint of marriage is valid if it is a condition precedent; 2 Dick. 712. In 1 Q. B. D. 279, it was held to be the intention of the testator not to restrain marriage but to make provision for the devisee until marriage. See Poll. Contr. 307.

A limitation until marriage is good; Wats. Comp. Eq. 1139; being construed as a provision until marriage and not a restraint on marriage.

RESTRAINT OF PRINCES AND RULERS. A phrase used in the exceptions to bills of lading, importing a limitation upon the liability of a ship-owner under the contract.

The words apply only to the ruling power of a country and not to pirates or any lawless power; 4 Term 783; they apply not only to hostile acts, but to those committed by the government of which the assured is a subject, as the seizure of a vessel for use as a fire-ship; 2 Ld. Raym. 840; or the wrongful seizure of an English ship and cargo by a British ship of war; 2 E. & E. 160; L. R. 5 Q. B. 599; to a temporary embargo by a friendly government; 6 Term 413; 3 B. & S. 163; 32 L. J. Q. B. 50; a detention of a neutral vessel in a blockaded port; 7 L. R. Q. B. 404; or a siege; L. R. 9 C. P. 518. A reasonable apprehension of capture will justify delay under the usual exception of restraint of princes, etc.; L. R. 5 P. C. 301; L. R. 3 A. & E. 425; 1 Maule & S. 352.

It does not include a seizure of the cargo by an armed mob; 4 Term 783, n.; or a remote danger of capture; 10 East 530; nor, it seems, a restraint sanctioned by municipal law of the ship-owner's country; 3 B. & S. 163; nor the process of a court of law; 23 L. T. 251.

Where goods contraband of war were shipped under a bill of lading containing this exception, it was held that the risk of the goods being seized amounted to a restraint of princes; [1866] 2 Q. B. 326.

Enforced obedience to lawfully prescribed quarantine regulations is a restraint of natural liberty of action devised by and proceeding from the people, and detention at quarantine is fairly included within an exception in a charter party which has reference to restraint of princes or rulers and people; 3 U. S. App. 147.

See CHARTER PARTY; PERILS OF THE SEA; QUARANTINE.

RESTRAINT OF TRADE. Contracts operating for the restraint of trade are presumptively illegal and void on the ground of the policy of the law favoring freedom of trade; but the presumption of illegality may be rebutted by the occasion and circumstances; 2 Pars. Contr. 870. See 7 C. C. App. 15. Thus in agreements for the sale of the good-will of a firm, or the formation or dissolution of a partnership, provisions operating in restraint of trade are frequently inserted. Their validity depends upon whether the restraint is such only as to afford a fair protection to the in-

terests of the party in whose favor it is imposed; *Leake*, Contr. 633; 49 N. J. Eq. 217. Whatever restraint is larger than is necessary for the protection of this party is void; therefore, the restraint must be limited in regard to space; 5 M. & W. 562; L. R. 15 Eq. 59. An agreement reasonable in regard to space may be unlimited in regard to the duration of time provided for; but where the question is as to whether the space is unlimited, the duration of the restraint in point of time may become an important matter; *Leake*, Contr. 634; 2 M. & G. 20. It has been said generally that where a covenant in restraint of trade is general, that is, without qualifications, it is bad, as being unreasonable and contrary to public policy. Where it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable; and if reasonable, it is good in law; [1892] 3 Ch. 447.

There are cases where an unlimited restraint is justified; e. g. the sale of a secret process of manufacture of an article in general demand, which it is agreed shall be communicated for the exclusive benefit of the buyer; see L. R. 9 Eq. 45; 131 U. S. 88; so of the sale of a patent right, the restraint may be unlimited while the patent continues; 1 H. & N. 189.

Some cases have required the presence of a sufficient and reasonable consideration to support a contract in restraint of trade; 8 Mass. 223; 21 Wend. 158; see 3 Ohio St. 275; but in England a legally valid consideration only is required; 6 A. & E. 438. See, generally, 1 Sm. L. C. 724; 35 Am. Rep. 209.

The decision in *Mitchell v. Reynolds*, 1 P. Wms. 181, may be regarded as the first announcement of the rule in relation to the invalidity of contracts in restraint of trade.

Mitchell v. Reynolds contains much more in the way of legal statement than is required for the decision of the precise point involved, which was that a reasonable restraint agreed to for a good consideration is valid, and it was afterwards remarked by Tindal, C. J., that when it was said by Parker, C. J., in *Mitchell v. Reynolds*, that "a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good," those are only examples and not limits of the application of the rule which can only be, "What is a reasonable restraint with reference to the particular case?"; 7 Bing. 735. More than sixty years after this case the English rule is stated in the same terms, and it is said that the true test of validity is whether the contract is or is not reasonable; [1894] App. Cas. 535; and a more comprehensive statement is that a general covenant in restraint of trade, without qualifications, is bad, because unreasonable and contrary to public policy, but if partial, that is, subject to some qualification either as to time or place, then the question is whether it is reasonable, and if it is, it is legally valid; [1892] 3 Ch. 447. In *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, the existence of an absolute rule with respect to restraint unlimited as to space, was denied, but that question was left somewhat in doubt by the English court of appeal in 36 *id.* 351; see also 4 App. Cas. 674; so that by way of summing up a review of the English decisions, it is said the question "whether there is an inflexible rule that contracts, the restraint of which extends throughout England, are null and void, is still a mooted one"; *Patterson, Restr. of Trade* 16. See, also, [1893] 1 Ch. 630; [1898] 1 Ch. 676. In the United States it was early held that a covenant not to pursue an occupation in the state was in total restraint of trade and void; 21 Wend. 157; 10 Barb. 641; 13 Allen 375; 36 Cal. 312; *contra*, 31 Mich. 490; 17 R. I. 3; see 103 N. Y. 473, where it was held that the question as to what is a general restraint of trade does not depend on state lines, and a restraint is not necessarily general which embraces an entire state. The United States supreme court took

the view that a restraint co-extensive with the state was not necessarily void; 20 Wall. 64, where the subject was ably discussed by Bradley, J., and in a later case it was said by Fuller, C. J., "The question is whether under the particular circumstances of the case, the nature of the particular contract involved in it, the contract is or is not unreasonable;" 130 U. S. 396. In 2 Ohio St. 519, a covenant not to manufacture candles in the United States was held void, and in 51 Hun 157, a similar contract as to space but limited to ten years in time, for the manufacture of thermometers, was held valid as a reasonable restriction. An agreement in a contract not to engage in the business of manufacturing or dealing in certain articles of commerce for a period of five years, and without any limitation of space, is held to be unlawful; 146 Mass. 469; as was a contract excluding the obligor from engaging in a useful trade everywhere and for all time; 19 Pick. 51; and a contract of sale of fire alarm or police telegraph machines, with a covenant not to enter into competition with the purchaser for ten years without restriction as to place; 160 Mass. 50; see 45 Cal. 152; but a contract unlimited territorially save by the words so far as the law allows, is not void as being in conflict with public policy, nor as being too uncertain to be capable of being enforced; 47 Ia. 137.

"The general rule can then best be stated as follows: Contracts in restraint of trade are in themselves, if nothing more appear to show them reasonable, bad in the eye of the law, but if from the peculiar circumstances of each case they appear to be reasonable and are founded upon a good consideration, they are valid." *Patterson, Restr. of Trade* 5, and cases cited; 68 Pa. 173.

Contracts in general restraint of trade are void unless natural and not unreasonable for the protection of the parties; 21 Wend. 157; 4 Daly 168; 47 Ia. 137; as such contracts impose too great a restraint on trade and are oppressive to one party without being of benefit to another; 3 G. Green 506; 5 Fed. Rep. 119. Contracts for limited restraint are valid if entered into for good reasons, such as to afford fair protection to the purchaser of a business; 7 Cow. 307; 52 Ia. 241; 39 Ga. 655. A contract not to carry on a trade in a particular town or county is valid; 7 J. J. Marsh. 368. Contracts in restraint of trade held to be valid are: Not to practise medicine within twelve miles of a place; 58 Pa. 51; not to engage in a certain business within sixty miles of a place for ten years; 40 Me. 224; not to run a stage on a certain route; 8 Mass. 223; not to set up the business of an apothecary within twenty miles of a place; 6 Ad. & El. 438. A contract relating to a compound involving a secret in its preparation and based upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which the restraint is to operate, is reasonable and enforceable; 131 U. S. 88.

An agreement never to engage in a certain trade in the city and county of San Francisco or state of California, was held too extensive in its restriction and therefore void; 40 Cal. 251; as was a covenant not to run a steamboat belonging to a certain corporation or allow its machinery to be used on any other boat in any of the waters of certain states; 1 Wash. 283. But the contract by the owner of a line of vessels running between New York and the West Indies, who had sold the goodwill thereof, to do no business with such ports within any place in the United States east of the Mississippi River, is not an unreasonable restraint of trade; 51 N. Y. Suppl. 572.

The conclusion from the cases is stated to be that the weight of authority in this country as in England is opposed to a fixed limit beyond which the restraint under a contract cannot extend; *Patterson, Restr. of Trade* 25. That there is no limitation as to time is no objection; 5 M. & W. 548 (where Parke, B., states

clearly the reasons for applying a different rule to time from that relating to space); 6 Ind. 200; 47 Conn. 175; 44 Ill. App. 441; 23 Atl. Rep. (N. J.) 977.

An agreement to relinquish a business and not to carry it on thereafter, limited as to place but unlimited as to time, is not void; 61 N. H. 40; 57 Mich. 362; and the limit of space may be according to the nature of the contract; L. R. 1 Ch. 463.

It has been held that no contracts are void as being in general restraint of trade when they operate simply to prevent a party from engaging or competing in the same business; 110 N. Y. 519.

Agreements to restrain rivalry and competition in bidding for public work are void, but an honest co-operation is not within the rule against combinations to stifle competition; 83 Fed. Rep. 372.

The tendency of recent adjudications is now clearly marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances; 106 N. Y. 473. It has of late years been denied that a hard and unjust rule of that kind has ever been the law of England; L. R. 14 Ch. D. 251.

Courts will not lend their aid to enforce the performance of a contract which they hold to be in restraint of trade, as contrary to public policy, on the ground that one side has performed the agreement, but will leave the parties in the plight in which their own illegal action placed them; 27 U. S. App. 1. See 9 *id.* 96; 3 *id.* 16.

The reasonableness of such covenants, and consequently whether they are in restraint of trade or not, is a question of law for the court and not of fact for the jury; 11 M. & W. 548; *id.* 653; 3 Chand. 133; 7 Bing. 743.

Covenants of this character have been held divisible, partly valid and partly void; 11 M. & W. 553; 2 Ohio 519; 113 Pa. 579; 20 Wall. 64; 40 Cal. 251.

Where the restriction of a business is in accordance with public policy, the rule against such covenants does not apply, upon the ground that the reason ceasing, the rule also ceases. This is true in the case of patents, the object of granting which is to create a monopoly; 103 Mass. 73; 32 Mo. 265; 133 U. S. 88; trade secrets; L. R. 9 Eq. 345; 19 Pick. 523; intoxicating liquors; 25 Ind. 112; but in case of a business in which competition is particularly beneficial to the public interest, the tendency is to view with disfavor any restrictions. This principle has been applied to the manufacture of gas; 121 Ill. 530; pipe lines; 22 W. Va. 660; telegraphing; 65 Ga. 160. It is this principle which underlies the legislation against limitations upon railroad competition. See *infra*. But it has been held that a statute which prohibits companies doing business in a state from combining with other persons in the state for the creation of a monopoly, or the unlawful restraint of trade, or the prevention of competition, applies to a combination to control the price of a certain article, though its manufacture is protected by patents; 47 N. Y. Suppl. 462; and that the fact that several patentees are exposed to litigation does not justify the creation by them of combinations to public disadvantage; 83 Fed. Rep. 36.

While the strictness of the ancient rule with respect to what was then termed restraint of trade has thus been relaxed, the mischief against which that rule was directed has taken a new form, and the creation of monopolies and restrictions upon competition are now accomplished under the guise of what are termed trusts, pooling agreements, and the like. The distinguishing feature of these attempts to stifle competition is a combination of persons engaged in any particular business under agreements for controlling and limiting the output of manufacturing establishments, lessening the amount of goods placed upon the market, and stipulating for uniform minimum prices of

goods sold. The term *trust* is derived from the means employed to carry out the designs of these combinations, the stock of the various corporations or the property of the various concerns which become parties to a combination being in some cases assigned to trustees to control and manage in execution of the agreement.

It has been maintained that the rules governing contracts in restraint of trade are not applicable to trusts because persons constituting trusts become partners, and, as is well known, partners are not subject to these rules; see 3 Political Sci. Quart. 592; and the same writer is doubtful whether the offence of engrossing, forestalling, or regrating ever existed independently of the statutes 5 & 6 Edw. IV. ch. 14, and when these statutes were repealed courts had no authority to punish offenders; *id.* See 4 Harv. L. Rev. 128.

In modern state constitutions, following generally that of Illinois, 1870, there are efforts to prevent combinations to suppress competition. Most of these are directed against such attempts by railroad companies either through unjust discriminations or consolidation of competing lines. There are constitutional provisions on this subject in Alabama, Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Michigan, Massachusetts, Nebraska, Pennsylvania, Texas, and West Virginia. A summary of them will be found in Spelling, Trusts & Monopolies § 89, note. They are usually considered as declaratory of the common law, as that of Colorado was expressly decided to be; 102 U. S. 667. Of the same character are state statutes directed against restraint of trade generally, which add but little to the limitations of the common law. The difficulty in dealing with the subject by state legislation is inherent. The great trusts cannot be reached by legislation within the states, inasmuch as their operations are not circumscribed by state boundaries. On the other hand attempts to deal with the subject by congress are hampered and obstructed by the constitutional limitation that federal legislation can deal only with interstate and foreign commerce; nevertheless an attempt was made by what was known as the anti-trust act of July 2, 1890, 26 Stat. L. 209, which is generally admitted to deal very unsatisfactorily with the acknowledged evil which it was intended to reach. The most peculiar feature of this law is that, as construed, it expressly fails to prevent the combinations of capital and affords very drastic remedies against combinations of labor whenever they affect interstate commerce, which is the fact in almost every case of railroad strikes. See STRIKE; LABOR UNION.

Where an effort has been made under the anti-trust act to prosecute attempts to create a monopoly they have usually failed by reason of the vague and general terms in which the offences are described by the act; 50 Fed. Rep. 469; 52 *id.* 104, where the construction of the statute and the common-law principles involved are elaborately discussed by Jackson, J.; *id.* 146.

A bill was introduced in the senate in 1893 to repeal the anti-trust act of 1890 and "to defeat, punish, and restrain acts, contracts and combinations in restraint of trade and interstate commerce." This bill, which was referred and never passed, is characterized as comprehensive and specific and covering the necessities of the situation; Spell. Tr. & Mon. § 134, n.

In New York, the act of 1897, ch. 384, prohibits combinations for the creation of a monopoly or unlawful restraint of trade. The Texas constitution forbids perpetuities and monopolies, and the Texas act of 1889, ch. 117, makes void any contract whereby a combination of capital or goods of two or more persons is effected to create restrictions in trade or to prevent competition in the sale of commodities. In California, a contract restraining a profession, trade, or business except in the sale of good-will, as for a county or city or dissolution of partnership, is void by statute; Civ. Code § 1673; and in Georgia one in general re-

straint of trade is void; Code § 2750.

The decisions on the subject of these trusts and combinations are usually under the constitutional provisions or statutes on the subject, either state or federal, but most of them have been made in view of the common-law doctrine concerning restraint of trade and the creation of monopolies, and they need to be read and considered in connection with both the common and local statute law.

It has been said that "the nearest to a definite proposition which may be advanced is that any compact between two or more persons or corporations affecting any article or commodity of which the public must have a constant supply, the sole intent and direct tendency of such arrangement being the creation of a scarcity or the enhancement of the price, will be nullified by the courts, or specific enforcement refused." Spelling, Trusts & Monopolies § 52.

This principle has been applied to the case of agreements for combinations of manufacturers to control the market for many articles of general consumption. The usual features of such agreements are substantially the same, and the method adopted is the formation of a trust through which the objects of the combination are affected (see *supra*). Such trusts have been held illegal in the case of: coal mining companies; 68 N. Y. 588, where the principles involved are well stated; manufacturers of grain bags; 90 Cal. 110; of lumber; 76 Cal. 387; of wire cloth; 14 N. Y. S. 277; persons engaged in the transportation of freight and passengers on New York canals; 5 Den. 534; 4 *id.* 349; or in the business of manufacturing and selling preserves; 157 Ill. 284; in the manufacture and sale of distillery products; 156 *id.* 448; brewers who combined to lease "all the cooling room capacity for cooling beer" in a town, to prevent competition and in this case it was held that the parties could not recover for non-performance of the contract; 88 Tex. 184; dealers in mineral waters; 63 L. T. 455; a combination of local milk dealers for buying and selling milk, wholesale and retail, but which only acted as the seller's agent to find purchasers and charged to commission, and acted under a by-law giving the directors the power to fix the price to be paid for milk; 145 N. Y. 267; a combination to control the tooth and production of a floating-spring tooth harrow which is held to be an instrument of such general use and utility as to render such a combination a violation of public policy; 21 App. Div. N. Y. 290. See also 67 Fed. Rep. 131; 76 *id.* 667; 47 U. S. App. 166; s. c. 77 Fed. Rep. 293.

A similar combination between a corporation and its stockholders, although it did not combine with any other corporation, was void within the Illinois anti-trust act; 155 Ill. 166, reversing 46 Ill. App. 576. An agreement for buying and selling coal at prices fixed by an association organized to control them is void so far as it is not executed, but not so as to deny to the seller his remedy for non-payment for coal delivered under the contract; 81 Hun 178. A contract for the sale of good-will and agreeing not to do the business of carpet beating in several counties is void as to all but the county in which the business is carried on, under the California Code; 102 Cal. 506. An association, the object of which is to prevent competition in a certain business and pay dues of an officer thereof, is illegal, and the parties cannot recover the amount so paid; 55 Ill. App. 213. A railroad pooling contract, the manifest purpose of which is to stifle competition and raise rates, is void as against public policy; 61 Fed. Rep. 993; s. c. 27 U. S. App. 1. An agreement between sheep brokers, to form an association and pay the treasurer so much for every head sold and receive an arbitrary proportion of the sum accumulated, which is made to carry out a contract with a similar butchers' association, simultaneously formed,—under which the brokers were to slaughter no sheep and the butchers were to buy only of the brokers' association—is void as a contract to enhance the price of

food and not enforceable against a member of the association; 139 N. Y. 105. A contract not to sell or be interested in the sale of beer except to one company, which, in its turn, contracts not to sell or consign beer to any other party in the vicinity, is a combination in violation of the Texas statute; 90 Tex. 298, 277. Where a masons and builders' association, by its laws or rules, required all who competed for any contract or job to bring their bids for examination and have six per cent. added to the lowest before it should be submitted in competition, is contrary to public policy; 95 Wis. 129.

In Montana, where water rights are of great importance in connection with mining, a contract to control them is void; 7 Mont. 89. What are known as "corners" in the necessities of life have been held void as violating the law against the creation of monopolies; 40 Mich. 447; 78 Ind. 487; 101 Mass. 145; and this is true whether the agreement on which they are based is temporary or permanent; *id.*; so the courts have held invalid a combination of grain-dealers; 79 Ill. 346; of cotton bagging; 66 N. Y. 288. So also the courts hold void expedients for buying up or cornering particular stocks in the market, by whatever means the result is accomplished; 19 Abb. N. C. 460; 30 Fed. Rep. 91; and see 5 Blatchf. 535; 6 Paige 337. An agreement of a large number of stenographers to raise the price and force the increase by penalties, was held invalid, though the combination did not include all the stenographers in the city; 41 Ill. App. 164; as was also the agreement by the grocers of a town with a firm about to open a butter store, that they would not buy any butter for two years; 83 Ia. 156; and a combination of mill-owners designed to control the output of cotton seed oil; 83 Tex. 650.

There are other cases in which the courts have held combinations of this general character valid, as in 143 Mass. 353; but there the manufactured article was shade-rollers, which possibly would not be enumerated among the necessities of life, as to the enhancement of the price of which the law is so jealous.

A corporation organized for the purpose of acquiring patents and granting licenses thereunder covering machines relating to a certain art, is not subject to the anti-trust laws of Illinois; 53 Fed. Rep. 592; 51 *id.* 819; 69 *id.* 333; 71 *id.* 302, disapproving 67 *id.* 131. The purchase of the stock of sugar refining companies for the purpose of acquiring control of the business in the United States, does not involve a monopoly or restraint of interstate or foreign commerce within the meaning of the federal anti-trust act, since the business of refining and selling sugar is not commerce; 156 U. S. 1, affirming 60 Fed. Rep. 934.

A contract to refrain from forming a corporation for the construction of water-works in a specified city and from carrying on such work in order that the other party to the contract might obtain a corporation for such purpose and conduct the business without competition, is not void as against public policy; 143 N. Y. 430. An agreement by manufacturers of watch cases to fix an arbitrary price on them, and not to sell them to persons buying watch cases of a rival manufacturer, was held not to be a violation of the federal anti-trust act or to be a cause of action in favor of the rival manufacturer; 58 Fed. Rep. 851.

A contract by which three out of four persons engaged in manufacturing oleomargarine consolidate, in order to stop sharp competition and agree not to engage separately in the business for five years, is not void; 18 R. I. 484.

It was held by the circuit court that what was known as the railroad freight pooling association to maintain rates and regulate freight traffic was not a contract in restraint of trade under the federal anti-trust act, where the rates maintained were reasonable and the tendency was to diminish rather than to enhance them, and no monopoly of trade or attempt at such is

proved by such contract: 58 Fed. Rep. 58, affirming 53 *id.* 44; but this decision was reversed by the supreme court which held that any contract or combination made in violation of law is void, without respect to previous decisions as to what was the public policy of the country on the subject, and the right of a railroad company to charge reasonable rates does not include the right to enter into a combination with competing roads to maintain reasonable rates; 166 U. S. 200.

An arrangement by which a company promised all persons who would purchase from its distributing agents for six months exclusively and would permit the company to regulate their prices, that it would pay them a rebate on the amount of their purchases, was not a contract in restraint of trade or an attempt to monopolize it; 52 Fed. Rep. 104, where it was held that the restraint was only partial, and reasonable for the protection of the particular business; *id.*, approving [1892] App. Cas. 25.

An agreement to raise the price of lumber fifty cents a thousand feet is not a restraint upon trade unless it involves the absorption of the entire traffic; 52 Fed. Rep. 646. The by-law of the Associated Press, which provides that no member of it "shall receive or publish the regular news dispatches of any other news association covering a like territory and organized for a like purpose," is not void as unreasonable and in restraint of trade; 130 N. Y. 333, 632. In California it is held that the law against unlawful restraint of trade is not violated by an agreement by an association of stevedores to control prices, unless it appears that the entire business of the city is controlled by it, and that the prices are unreasonable or the restriction prevents fair competition; 115 Cal. 16.

A contract with an independent manufacturer for the entire product of his plant is not in itself a contract in illegal restraint of trade; and if made without knowledge of similar contracts made by the buyer with other manufacturers, and without any knowledge that such contract was intended as a step in a general scheme of monopoly, there is no conspiracy against freedom of commerce, or contract in illegal restraint of trade; 86 Fed. Rep. 439.

To constitute the offence of "monopolizing or attempting to monopolize" trade or commerce among the states, within the meaning of the federal anti-trust act, it is necessary to acquire or attempt to acquire an exclusive right in such commerce by such means as are adequate to prevent others from engaging therein; 53 Fed. Rep. 104.

The federal anti-trust act of July 2, 1890, confers no right upon private individuals to sue in equity to restrain the acts forbidden by the statute. That right is vested only in the district attorneys of the United States and the only remedy of private persons injured is an action at law for damages; 64 Fed. Rep. 821.

It is not a legal defence to an action for goods sold and delivered or service rendered, that the seller or person rendering service is a member of an illegal trust or combination, since the illegality is collateral to the contract of sale and does not taint it; 86 Wis. 352; 74 Fed. Rep. 802; and it is no defence to an action by a milk-shippers' association for goods sold that it is an illegal corporation under the Illinois act of June 11, 1891; 46 Ill. App. 576.

It is no defence to an action for compensation due from the federal government for mail service over a leased line that the leases were void because operated by a combination intended to prevent competition; 28 Ct. Cl. 77.

In the *U. S. v. Trans-Missouri Freight Association*, it was held (four justices dissenting), that the prohibitory provisions of the federal anti-trust act of July 2, 1890, applied to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation, and are not confined to those in which the restraint is unreasonable. In that case it was applied to a contract between competing railroads

forming an association for maintaining and regulating transportation rates, and it was held that such an agreement is within the act; 166 U. S. 290, reversing the circuit court of appeals which held the agreement reasonable; 19 U. S. App. 86. After the decision of the circuit court of appeals and before that of the supreme court, two other cases were decided holding such agreements not contracts in unlawful restraint of trade or in violation of the act; 73 Fed. Rep. 433; 76 *id.* 495.

See *TRUST* for the decision in the Joint Traffic case just handed down.

The federal anti-trust act was held not applicable to the case of a state which by its laws assumed a monopoly of the traffic in intoxicating liquors; 69 Fed. Rep. 908. So the act was held not to apply where members of a business exchange sought to enjoin the board of directors from enforcing against them by-laws which were alleged to be illegal as in restraint of trade and commerce; 77 Fed. Rep. 1.

See report on the federal anti-trust law in Report of Amer. Bar Assn., 1897; Patterson, Contracts in Restraint of Trade; Spelling, Trusts and Monopolies; Beach, Monopolies and Industrial Trusts.

RESTRICTED LANDS. In the Act of 1912, c. 33, 37 Stat. 86, § 6: Lands the alienation of which is subject to restrictions imposed by Congress to protect the Indians from their own incompetency. 250 U. S. 61.

In the Act of 1908, c. 199, 35 Stat. 312, § 2: Lands of a deceased full-blood Indian allottee, descended to a full-blood heir and not conveyed with the approval of such court. 250 U. S. 238.

RESTRICTIVE INDORSEMENT. See *INDORSEMENT*.

RESTS. A term used in computing interest especially on mortgages and in trust accounts. It consists in striking a balance of the account, at the end of any fixed period, upon which interest is allowed, thus giving the benefit of compound interest. 3 Fars. Contr. § 151.

RESULTING TRUST. A trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction.

All trusts created by implication or construction of law are often included under the general term implied trusts; but these are commonly distinguished into implied or resulting and constructive trusts; resulting or presumptive trusts being those which are implied or presumed from the supposed intention of the parties and the nature of the transaction; constructive trusts, such as are raised independently of any such intention, and which are forced on the conscience of the trustee by equitable construction and the operation of law. Story, Eq. Jur. § 1095; 1 Spence, Eq. Jur. 510; 2 *id.* 198; 3 Swanst. 585; 1 Ohio 321; 6 Conn. 285; 2 Edw. Ch. 373; 6 Humphr. 93.

Where upon a purchase of property the conveyance of the legal estate is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting or presumptive trust immediately arises by virtue of the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds; 30 Me. 126; 8 N. H. 187; 5 Cush. 435; 10 Paige, Ch. 618; 2 Green, Ch. 480; 13 Pa. 283; 2 Harr. Del. 225; Beach, Mod. Eq. Jur. 218; 75 Cal. 106; 83 Ala. 135; 64 Vt. 326; 112 Mo. 412; and if he conveys the property to the *cestui que trust*, such conveyance is good as against the creditors of the trustee; 151 U. S. 420.

Resulting trusts are raised by the law from the presumed intention of the parties, and the natural equity that one who furnishes the means for the acquisition of property should enjoy its benefits. But it cannot arise where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his

wife, or a father for his child, as under such circumstance the relation to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, for in such cases arises the contrary presumption of an advancement for the grantee's benefit; 91 U. S. 125.

Where land is bought by a husband with the separate property of a married woman, and the title is taken in his name, a trust results to her, in the absence of any agreement to the contrary; 110 N. C. 403; 176 Pa. 67. But where a wife gives to her husband money from her father's estate, without any agreement for its investment, or that he should be accountable to her for it, and he subsequently informed her that he has invested it in land for her, when, in fact, he has not done so, but has taken the title in his own name, it was held that, under the proof in that case, no resulting trust therein was created in favor of the wife; 36 S. W. Rep. (Tenn.) 977.

To establish a resulting trust in one person of land purchased in the name of another, to whom title is conveyed, it is essential that the party setting up the trust shall have paid, or become bound for the purchase-money on his own account, and as part of the original transaction of purchase; 4 Del. Ch. 445; payment by way of loan to the nominal purchaser raises no resulting trust; *id.* It is a latent equity, which cannot prejudice a *bona fide* holder for value; *id.* 135.

The fact that a conveyance is voluntary, especially when accompanied by other circumstances indicative of such an intention, it is said, may raise a resulting trust. See 2 Vern. 473; 23 Pa. 243; 29 Me. 410; 1 Johns. Ch. 240; 1 Dev. Eq. 456; 14 B. Monr. 585.

Where a voluntary; 1 Atk. 188; disposition of property by deed; 1 Dev. Eq. 493; or will is made to a person as trustee, and the trust is not declared at all; 10 Ves. 527; 3 Sim. 538; or is ineffectually declared; 1 Myl. & C. 286; 13 Sim. 496; 2 Dev. Eq. 255; or does not extend to the whole interest given to the trustee; 8 Pet. 326; 14 B. Monr. 585; 3 H. L. C. 492; or it fails either wholly or in part by lapse or otherwise; 5 Harr. & J. 392; 5 Paige, Ch. 318; 6 Ired. Eq. 187; 7 P. Monr. 481; 15 Pa. 500; 10 Harv. 204; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir at law or next of kin, according to the nature of the estate.

A resulting trust must arise at the time the title is taken. No subsequent oral agreement or payment will create it; 32 W. Va. 14; 85 Va. 740; 84 *id.* 813; 65 N. H. 39; 149 Mass. 400; 138 U. S. 587. Where a father was induced to execute an absolute deed of his land to one of his children, by fraudulent representations that the grantee would hold it in trust for the other children, and subsequently without fraud executed another deed to the same grantee for the same land, the latter deed passed the title free from any trust in favor of the other children, as the fraud in procuring the first deed created a resulting trust in favor of the father, the express trust being void, as not being in writing, and the second deed carried the father's equitable interest; 60 N. W. Rep. (Mich.) 976.

The property may be personal or real; 8 Humphr. 447; 1 Ohio St. 10; 26 Miss. 615; 2 Beav. 454. Parol evidence is admissible to prove a resulting trust in land; 34 N. E. Rep. (Ind.) 810; 37 W. Va. 507; 52 Kan. 469. One who buys shares of stock with his own money does not become trustee for another, though he tells him that the purchase is made for his benefit and he expects to be reimbursed by him; 18 U. S. App. 293. Resulting trusts cannot be declared upon doubtful evidence, nor upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon to establish the trust; 90 Mo. 361; 76 Ia. 192; 5 Tex. Civ. App. 367.

The statute of frauds has no application to a trust resulting from the purchase of property with funds of another; 126 Ill. 58; 69 Tex. 685.

Consult Story, Bispham, Spence; Adams, on Equity Jur.; Hill, Lewin, Sanders, on Trusts. See CONSTRUCTIVE TRUST.

RESULTING USE. A use raised by equity for the benefit of a feoffee who has made a voluntary conveyance to uses without any declaration of the use. 2 Washb. R. P. 100.

The doctrine, at first limited to the case of an apparently voluntary conveyance with no express declaration, became so extended that a conveyance of the legal estate ceased to imply an intention that the feoffee should enjoy the beneficial interest therein; and if no intent to the contrary was expressed, and no consideration proved or implied, the use always resulted to the feoffee; 2 Washb. R. P. 100. And if part only of the use was expressed, the balance resulted to the feoffee; 2 Atk. 150; 2 Rolle, Abr. 781. Co. Litt. 23 a. And, under the statute, where a use has been limited by deed and expires, or cannot vest, it results back to the one who declared it; 4 Wend. 494; 15 Me. 414; 5 W. & S. 323. And see Cro. Jac. 200; Tudor, Lead. Cas. Eq. 258; 2 Washb. R. P. 132.

RESUME WORK. To begin work anew with a *bona fide* intention of prosecuting it. 104 Cal. 227.

RESUMMONS. A second summons calling upon a person to answer an action where the first summons is defeated. 2 Chitty, Arch. Pr. 1847.

RESUMPTION. The taking again by the crown of land or tenements, which, on false suggestion, had been granted by letters patent. Whart. Dict.

RETAIL. To sell by small parcels, and not in the gross. 5 Mart. La. N. s. 297; 7 Metc. 808.

Selling, bartering or loaning liquors in quantities of less than five gallons shall be deemed "retailing." Kentucky Statutes, § 4199.

RETAILER OF MERCHANDISE. One who deals in merchandise by selling it in smaller quantities than he buys, generally with a view to profit. 1 Cra. C. C. 228.

RETAIN. To continue to hold; to keep in possession. To keep is a synonym for retain. 84 Va. 269.

In Practice. To engage the services of an attorney or counsellor to manage a cause. See RETAINER.

RETAINER. The act of withholding what one has in one's own hands, by virtue of some right. See ADMINISTRATOR; EXECUTOR; LIEN.

In Practice. The act of a client by which he engages an attorney or counsellor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant.

The retaining fee.

A general retainer merely gives a right to expect professional service when requested. It binds the person retained not to take a fee from another against his retainer; but to do nothing except what he is asked to do, and for this he is to be distinctly paid; 6 R. I. 206.

In English practice a much more formal retainer is usually required than in America. Thus it is said by Chitty, 3 Pr. 116, note m, that, although it is not indispensable that the retainer should be in writing, unless required by the other side, it is very expedient. It is therefore recommended, particularly when the client is a stranger, to require from him a written retainer, signed by himself; and, in order to avoid the insinuation that it was obtained by connivance, it should be witnessed by one or more respectable persons. When there are several plaintiffs, it should be signed by all, and not by one for himself and the others, especially if they are trustees or assignees of a bankrupt or insolvent. The retainer should also state whether it is for a general or a qualified authority. See 9 Wheat. 738, 830; 6 Johns. 84, 206; 11 id. 404; 1 N. H. 23; 28 id. 302; 7 Harr. & J. 275; 27 Miss. 557. The existence of the relation of solicitor and client between parties may be inferred from their acts, although the solicitor has not received any express retainer; [1861] 1 Ch. 387.

The effect of a retainer to prosecute or defend a suit is to confer on the attorney

all the powers exercised by the forms and usages of the courts in which the suit is pending; 2 M'Cord, Ch. 409; 13 Metc. 269. He may receive payment; 18 Mass. 320; 4 Conn. 517; 39 Me. 386; may bring a second suit after being nonsuited in the first for want of formal proof; 12 Johns. 315; may sue a writ of error on the judgment; 16 Mass. 74; may discontinue the suit; 6 Cow. 385; may restore an action after a *non pros.*; 1 Binn. 469; may claim an appeal, and bind his client in his name for the prosecution of it; 1 Pick. 462; may submit the suit to arbitration; 1 Dall. 164; 16 Mass. 396; 6 McLean 190; 7 Cra. 436; 89 Ga. 83; may sue out an alias execution; 2 N. H. 376; may receive livery of seisin of land taken by an extent; 13 Mass. 363; may waive objections to evidence, and enter into stipulation for the admission of facts or conduct of the trial; 2 N. H. 520; and for release of bail; 1 Murph. 146; may waive the right of appeal, review, notice, and the like, and confess judgment; 5 N. H. 398; 4 T. B. Monr. 377; 5 Pet. 99; may agree to the entry of a judgment; 3 Ind. App. 379; 66 Hun 151; may waive a jury trial; 99 N. C. 58. But he has no authority to execute a discharge of a debtor except upon the actual payment of the full amount of the debt; 8 Dowl. 656; 8 Johns. 361; 10 Vt. 471; 32 Me. 110; 21 Conn. 245; 3 Md. Ch. Dec. 392; 14 Pa. 87; 13 Ark. 644; 1 Pick. 347; 35 W. Va. 323; nor to satisfy a judgment for a less sum than is due; 66 Tex. 366; and that in money only; 16 Ill. 272; 1 Ia. 360; see 6 Barb. 201; nor to release sureties; 3 J. J. Marsh. 532; 4 McLean 87; nor to enter a *retraxit*; 3 Blackf. 137; nor to act for the legal representatives of his deceased client; 2 Penn. N. J. 699; and ordinarily one retained to collect a debt has no right to compromise it; 85 Ia. 643; 47 Mo. App. 1; 122 Pa. 1. An attorney's authority to appear for his client ceases after the entry of final judgment, except that he may take the necessary steps to collect the judgment; 66 Hun 626.

There is an implied contract on the part of an attorney who has been retained, that he will use due diligence in the course of legal proceedings; but it is not an undertaking to recover a judgment; Wright Ohio 446. See 3 Camp. 17; 7 C. & P. 239; 16 S. & R. 368; 2 Cush. 316; 73 Mich. 331. An attorney is bound to act with the most scrupulous honor; he ought to disclose to his client if he has any adverse retainer which may affect his judgment or his client's interest; but the concealment of the fact does not necessarily imply fraud; 3 Mas. 305. See Weeks, Att. at Law.

RETAINING A CAUSE. Under the English Judicature Acts of 1873 and 1875, a cause brought in a wrong division of the High Court of Justice may be retained therein, at the discretion of the court or a judge.

RETAINING FEE. A fee given to counsel on being consulted, in order to insure his future services. See RETAINER.

RETAKING. The taking one's goods, wife, child, etc., from another, who without right has taken possession thereof. See RECAPTION; RESCUE.

RETALIATION. See LEX TALIONIS.

RETENEMENTUM. Detaining, withholding, or keeping back. Cowel.

RETENTION. In Scotch Law. The right which the possessor of a movable has of holding the same until he shall be satisfied for his claim either against such movable or the owner of it; a lien.

General retention is the right to withhold or detain the property of another, in respect of any debt which happens to be due by the proprietor to the person who has the custody, or for a general balance of accounts arising on a particular train of employment. 2 Bell, Com. 90.

Special retention is the right of withholding or retaining property or goods which are in one's possession under a contract, till indemnified for the labor or

money expended on them.

RETIRE. As applied to bills of exchange, this word is ambiguous. It is commonly used of an indorser who takes up a bill by handing the amount to a transferee, after which the indorser holds the instrument with all his remedies intact. But it is sometimes used of an acceptor, by whom, when a bill is taken up or retired at maturity, it is in effect paid, and all the remedies on it extinguished; Byles, Bills, 15th ed. 93, 195, 263, 296; Dan. Neg. Inst. 12.

RETIRED FROM ACTIVE SERVICE. An officer of the army who is retired from active service is still in the military service of the United States, and, in addition to the per centum of the pay of the rank on which he was retired, is entitled to the ten per centum allowed by law for each term of five years' service. 105 U. S. 244.

RETIREMENT. To be retired from active service under the sections from 1448 to 1455, Rev. Stats., inclusive, means retired with pay and has had this meaning for several years. (113 U. S. 568, 572.) To be wholly retired means to be removed from the service entirely on payment of a lump sum and to become a civilian. (19 Ct. Clms. 338, 353; 29 Ops. Atty. Gen. 401) No form of retirement is a removal by way of punishment. It is very clear, therefore, that a mere change of status from active service to inactive duty in the Naval Reserve Force is not a "retirement" in the meaning of § 1455, Rev. Stats., the Act of July 1, 1918, or that of June 4, 1920.

Officers in the Regular Navy who have become unfit for service before the retiring age are subject to three methods of retirement. One is when the disability is in the line of duty and their retirement pay is three-fourths of the pay of their rank on active duty. The other two are when the disability is not incurred in line of duty; and in one the retirement pay is furlough or one-half of leave of absence pay of their rank in active service, and in the other there is full retirement to civilian life on a year's full pay of their rank. § § 1453, 1454, Rev. Stats. 263 U. S. 35.

See RETIRED FROM ACTIVE SERVICE.

RETIRING BOARD. A board of army or navy officers, who report on the incapacity of officers for active service. Stand. Dict.

RETORNA BREVIVM. In Old English Law. The return of writs by sheriffs and bailiffs, which is only a certificate delivered to the court on the day of return, of that which he hath done touching the execution of their writ directed to him: this must be indorsed on back of writ by officer; 2 Lilly, Abr. 476. Each term has return days, fixed, as early as 51 Hen. III., at intervals of about a week, on which all original writs are returnable. The first return day is regularly the first day in the term; but there are three days' grace. 3 Bla. Com. 278.

RETORNO HABENDO. In Practice. A writ issued to compel a party to return property to the party to whom it has been adjudged to belong, in an action of replevin. See DE RETORNO HABENDO; REPLEVIN.

RETORTION, RETORSION. An act employed by a government to impose the same hard treatment on the citizens or subjects of a state that the latter has used towards the citizens or subjects of the former, for the purpose of obtaining the removal of obnoxious measures. Vattel, liv. 2, c. 18, § 841. An act of retaliation in kind when a nation has failed in courtesy or friendship. Instances of retortion usually arise in discriminating duties or restrictions upon commercial intercourse; Snow, Int. Law 78. It is equivalent to retaliation and may be either amicable or vindictive. The former, *retorsion de droit*, is a remedy for a departure from any international courtesy, done in an unfriendly,

but not an illegal manner. The latter, *re-tornio facti*, implies the infliction of the same amount of evil on an aggressive state that it has inflicted on the state aggrieved; Risley, Law of War 57. This is a purely belligerent act; *id.*

RETOUR SANS PROTET. A request or direction by the drawer of a bill of exchange, that in case the bill should not be honored by the drawee, it may be returned without protest, by writing the words "*retour sans protet*" or "*sans pais*." Should such request be made, it is said that a protest as against the drawer, and perhaps as against the indorsers, is unnecessary; Byles, Bills, 15th ed. 216.

RETOUR OF SERVICE. In Scotch Law. An authenticated copy of the verdict of a jury, taken under a brief of succession, by which the legal character of a party as heir is judicially established.

RETRACT (Lat. *re*, back, *traho*, to draw). To withdraw a proposition or offer before it has been accepted. See **LETTER**; **OFFER**.

After pleading guilty, a defendant will, in certain cases where he has entered that plea by mistake or in consequence of some error, be allowed to retract it. But where a prisoner pleaded guilty to a charge of larceny, and sentence has been passed upon him, he will not be allowed to retract his plea and plead not guilty; 9 C. & P. 346; Dig. 12. 4. 5.

RETRACTO O TANTEO. In Spanish Law. The right of revoking a contract of sale; the right of redemption of a thing sold.

RETRAXIT (Lat. he has withdrawn). In Practice. The act by which a plaintiff withdraws his suit. It is so called from the fact that this was the principal word used when the law entries were in Latin.

A *retraxit* differs from a *nonsuit*—the former being the act of the plaintiff himself, for it cannot even be entered by attorney; 8 Co. 58; 8 Pa. 157, 163; 68 Ind. 305; 31 Ala. 108; and it must be after declaration filed; 8 Pa. 163; while the latter occurs in consequence of the neglect merely of the plaintiff. A *retraxit* also differs from a *nolle prosequi*. The effect of a *retraxit* is a bar to all actions of a like or a similar nature; Bac. Abr. *Nonsuit* (A); 31 Ala. 108; 79 Va. 333; 120 U. S. 95; a *nolle prosequi* is not a bar even in a criminal prosecution; 2 Mass. 172. See 2 Sell. Pr. 338; Com. Dig. *Pleader* (X 2).

RETRIBUTION. That which is given to another to recompense him for what has been received from him: as, a rent for the hire of a house.

A salary paid to a person for his services. The distribution of rewards and punishments.

RETROACTIVE. See **RETROSPECTIVE**.

RETROCESSION. In Civil Law. When the assignee of heritable rights conveys his rights back to the cedent, it is called a retrocession. -Erskine, Inst. 3. 5. 1.

RETROSPECTIVE (Lat. *retro*, back, *spectare*, to look). Looking backward. Having reference to a state of things existing before the act in question.

This word is usually applied to those acts of the legislature which are made to operate upon some subject, contract, or crime which existed before the passage of the acts; and they are therefore called *retrospective laws*. These laws are generally unjust, and are to a certain extent forbidden by that article in the constitution of the United States which prohibits the passage of *ex post facto* laws, or laws impairing contracts. See **EX POST FACTO LAW**; **IMPAIRING THE OBLIGATION OF CONTRACTS**.

A general law for the punishment of offenses, which endeavors to reach, by its retrospective operation, acts previously committed, as well as to prescribe a rule of conduct for the citizen in future, is void in

as far as it is retrospective; but such invalidity will not affect its operation in regard to future cases; 128 U. S. 189; but statutes affecting remedies are entirely at the discretion of the legislature.

A statute of limitations which provides that in all civil suits in which the cause of action shall have arisen within the state, the defendant, who shall have become a non-resident of the state after such cause of action shall have arisen, shall not have the benefit of any statute of this state for the limitation of actions during the period of such residence without the state, if retrospective in its effect, is constitutional and applies to the trial of issues pending when the act was passed; 177 Pa. 693.

Legislation which concerns merely modes of procedure, applies to pending suits whether the act so specify or not; 140 Pa. 69.

A statutory amendment allowing, as of right, but one new trial in ejectment is not unconstitutional as retrospective legislation, when applied to a pending action in which there has been one new trial long after the date of the act; 83 Fed. Rep. 643.

In the absence of constitutional prohibition against it, retrospective legislation is usually valid if not subject to the objection that it impairs vested rights. Where there is a constitutional prohibition, much legislation otherwise valid will fail; as, for example, the deed of a person of unsound mind could not in such case be ratified; 85 Mo. 174. Retrospective statutes which have been held valid are: One validating a married woman's power of attorney; 80 Cal. 138; authorizing the insertion in a deed of the name of a married woman which was omitted by mistake; 11 Ohio St. 641; or validating an unauthorized conveyance of a married woman of her separate estate; 57 Pa. 369; prohibiting the defence to a suit on a contract that it was made on Sunday, unless the defendant restores whatever of value he received under the contract; 77 Me. 482; rendering a bond valid which when executed was invalid because not bearing the proper stamp; 12 Md. 195.

It has been held that the legislature has power to cure a defective conveyance by retroactive legislation; 17 Ia. 528; or to confirm conveyances defectively executed; 6 Gill & J. 461.

The right to pass retrospective laws, with the exceptions above mentioned, exists in the several states, according to their own constitutions, and they become obligatory if not prohibited by the latter: 4 S. & R. 364; 1 Bay 179; 7 Johns. 477. See 2 Cra. 272; 2 Pet. 414; 18 Ind. 287; 19 Ia. 388; 52 Pa. 474; 57 N. J. L. 180.

An instance may be found in the laws of Connecticut. In 1795, the legislature passed a resolve setting aside a decree of a court of probate disapproving of a will, and granted a new hearing: it was held that the resolve, not being against any constitutional principle in that state, was valid; 8 Dall. 386. And in Pennsylvania a judgment was opened by the act of April 1, 1837, which was held to be constitutional; 2 W. & S. 271.

Under a New York statute which provides that no person should practise medicine in the state who had ever been convicted of a felony, it was held that the statute applied to persons convicted before its passage, and that as to such of them at least as were not engaged in the practice of medicine at the time of its passage, it was not an *ex post facto* law; 46 N. E. Rep. (N. Y.) 607. See **PHYSICIAN**.

Laws should never be considered as applying to cases which arose previously to their passage, unless the legislature have clearly declared such to be their intention; 12 La. 352. See Barrington, Stat. 466, n.; 7 Johns. 477; 1 Kent 455; Code 1. 14. 7; Story, Const. § 1893; 1 McLean 40; 12 S. & R. 330.

The English courts also hold that a statute should not be construed so as to make it retrospective; 8 C. B. 551. Nothing but clear and express words will give such effect to it; 4 H. & N. 76; so of

criminal acts; [91] 2 Q. B. 148.

The power of congress to pass a retrospective tariff act is discussed in 55 Alb. L. J. 248, in connection with the tariff act of 1897, and the conclusion reached that if it is desired to make a law retrospective, all that is necessary is that congress shall express its intention to that effect in unambiguous terms. The writer contends that the only decision bearing upon the subject is *Burr v. United States*, in which the question of the constitutionality of retrospective legislation would naturally have arisen, but it was assumed both by counsel and the court that the only question was as to the intent of congress in fixing a date from which the act should take effect. The court said, "No question exists, or is really made, but that this whole subject was within the law-making power; but that a law should not have any retrospective application unless that is plainly intended is more strenuously urged;" 66 Fed. Rep. 642. It had been previously declared by the supreme court with respect to such a tax that "congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to re-act the law by a simple reference to sections; 20 Wall. 332; and this case was determined as one merely of intent. The same court in another case treated the case from the same standpoint of intent, but arrived at a different conclusion. The main point made by Chief Justice Fuller was that the new act comprised a saving clause to the effect that "all rights and liabilities under said law shall continue, and may be enforced in the same manner as if said repeal or modification had not been made." "If," it was argued, "congress intended that this section should relate back to August 1, still the intention is quite apparent that the act of 1890 should remain in full force and effect until the passage of the new act, on August 28, and that all acts done, rights accrued, and liabilities incurred under the earlier act, prior to the repeal, should be saved from the effect thereof as to all parties interested, the United States included." 159 U. S. 78. This principle of construction appears also to have been accepted by the supreme court in a very early case, where it was said that "words in a statute ought not to have a retrospective application, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied." 3 Cra. 398, 413; 15 How. 423; 112 U. S. 559. See, also, 52 Pa. 315; 31 N. J. L. 133; 54 Md. 486; 16 Pa. 63; 17 How. 456; 60 N. C. 361. See, generally, 4 Wall. 277, 333; 129 U. S. 114; Pom. Const. L. § 530, 525-533. See **STATUTE**; **REMEDY**; **EX POST FACTO LAW**; **IMPAIRING THE OBLIGATION OF CONTRACTS**; **WADE, RETROSP. LEG.**

RETURN. An official statement by an officer of what he has done in obedience to a command from a superior authority, or why he has done nothing, whichever is required. 61 Conn. 287.

Persons who are beyond the sea are exempted from the operation of the statute of limitations of some states, till after a certain time has elapsed after their *returning*. See 14 Mass. 203; 3 Johns. 263; 2 W. Bla. 723; 3 Litt. 49; 1 Harr. & J. 89, 350.

When a member of parliament has been elected to represent a certain constituency, he is said to be *returned*, in reference to the return of the writ directing the proper officer to hold the election. In this country, election returns are the statements or reports of the balloting at an election, by the proper officers.

To come or go back to the same place; to revisit. 12 Conn. 186.

RETURN-DAY. A day appointed by law when all writs are to be returned which have issued since the preceding return-day. The sheriff is, in general, not required to return his writ until the return-day. After

that period he may be ruled to make a return. See **RULE DAY**.

RETURN OF PREMIUM. In Insurance. A repayment of a part or the whole of the premium paid. Policies of insurance, especially those on marine risks, not unfrequently contain stipulations for a return of the whole or a part of the premium in certain contingencies; 2 Phill. Ins. xxii. sect. xi.; but in the absence of any such stipulation, in a case free of fraud on the part of the assured, if the risk does not commence to run, he is entitled to a return of it, if paid, or an exoneration from his liability to pay it, subject to deduction settled by stipulation or usage; and so, *pro rata*, if only a part of the insured subject is put at risk; 2 Phill. Ins. ch. xxii. sect. i.; and so an abatement of the excess of marine interest over the legal rate is made in hypothecation of ship or cargo in like case; *id.* sect. vii.

RETURN OF WRITS. In Practice. A short account, in writing, made by the sheriff, or other ministerial officer, of the manner in which he has executed a writ. Steph. Pl. 24.

It is the duty of such officer to return all writs on the return-day: on his neglecting to do so, a rule may be obtained on him to return the writ, and if he do not obey the rule he may be returned for contempt. See 19 Com. Dig. *Return*; 1 Rawle 520.

RETURNUM AVERIORUM. A judicial writ, similar to the *retorno habendo*. Cowel.

RETURNUM IRREPLEGIABILE. A judicial writ addressed to the sheriff for the final restitution or return of cattle to the owner when unjustly taken or distrained, and so found by verdict; it is granted after a nonsuit in a second deliverance. Reg. Judic. 27.

REUS (Lat.). In Civil Law. A party to a suit, whether plaintiff or defendant. *Reus est qui cum altero litum contestatum habet, sive id egit, sive cum eo actum est.*

A party to a contract. *Reus credendi* is he to whom something is due, by whatever title it may be: *reus debendi* is he who owes, for whatever cause. Pothier, Pand. lib. 5c. *Reus stipulandi*, a party to a stipulation; *reus promittendi*, the debtor or obligor to the stipulation. Where there were several creditors or several debtors jointly entitled to, or jointly liable under, a stipulation they were respectively called *correi*.

See **MENS REA**.

REVE. The bailiff of a franchise or manor; an officer in parishes within forests who marks the commonable cattle. Cowel.

REVELAND. In Domesday Book we find land put down as *thane-lands*, which were afterwards converted into *revelands*, i. e. such lands as, having reverted to the king upon death of his *thane*, who had it for life, were not since granted out to any by the king, but vested in charge upon account of the *reve* or bailiff of the manor. Spelm. Feuds, c. 24. Coke was mistaken in thinking it was land held in *socage*.

REVELS. Sports of dancing, masking, etc., formerly used in princes' courts, the *inns of court*, and noblemen's houses, commonly performed by night; there was an officer to order and supervise them, who was entitled the "*master of the revels*." Cowel.

REVENDECATION. In Civil Law. An action by which a man demands a thing of which he claims to be owner. It applies to immovables as well as movables, to corporeal or incorporeal things. Merlin, *Répert.*

By the civil law, he who has sold goods for cash or on credit may demand them back from the purchaser if the purchase-money is not paid according to contract. The action of *revendication* is used for this purpose. See an attempt to introduce the principle of *revendication* into our law, in

2 Hall, Law Journ. 181.

Revendication, in another sense, corresponds very nearly to the *stoppage in transitu* of the common law. It is used in that sense in the *Code de Commerce*, art. 577. *Revendication*, says that article, can take place only when the goods sold are on the way to their place of destination, whether by land or water, and before they have been received into the warehouse of the insolvent (*failli*) or that of his factor or agent authorized to sell them on account of the insolvent. See Dig. 14. 4. 15; 18. 1. 19. 53; 19. 1. 11.

REVENUE. The income of the government arising from taxation, duties, and the like; and, according to some correct lawyers, under the idea of revenue is also included the proceeds of the sale of stocks, lands, and other property owned by the government. Story, Const. § 877. *Internal revenue.* The revenue raised by the United States from all sources of taxation except duties on imports. By revenue is also understood the income of private individuals and corporations.

See **TAXATION; BILL**.

A bill establishing rates of postage is not a bill for raising revenue, within the meaning of the constitution; but post-office laws may be revenue laws without being laws for raising revenue; 13 Blatchf. 207. See 15 Wall. 390; 4 Blatchf. 311; 15 Int. Rev. Rec. 30.

REVENUE LAWS. Laws made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the government. 1 Gall. 398. See 123 U. S. 686.

No country ever takes notice of the revenue laws of another; 1 Cowp. 343, per Lord Mansfield; 3 D. & R. 190.

Under the constitution of the United States revenue bills must originate in the house of representatives; Const. art. 1, § 7. In the sense of this clause, revenue bills are not those which create revenue incidentally, or those which are intended primarily for other purposes, but those which upon their face are plainly designed to raise revenue; 4 Biss. 188; those which levy taxes in the strict sense of the word; 1 Sto. Const. § 880. See 41 Cal. 165. "An act of congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking association organized under statute, is clearly not a revenue bill which the constitution declares must originate in the house of representatives." 167 U. S. 196.

The existing revenue laws of the United States under which the funds necessary for the expenses and disbursements of the government are raised, are the tariff laws and the internal revenue laws. The existing tariff law is what is commonly known as the Dingley tariff bill, being the act passed July 24, 1897. The internal revenue taxes are provided for by what is known as the war revenue bill, being an act to provide ways and means to meet war expenditures, passed June 13, 1898.

REVENUE SIDE OF THE EX-CHEQUER. That jurisdiction of the court of exchequer, or of the exchequer division of the high court of justice, by which it ascertains and enforces the proprietary rights of the crown against the subjects of the realm. The practice in revenue cases is not affected by the orders and rules under the Judicature Act of 1875. Moz. & W.

REVERSAL. In International Law. A declaration by which a sovereign promises that he will observe a certain order, or certain conditions, which have been once established, notwithstanding any changes that may happen to cause a deviation therefrom; as, for example, when the French court consented for the first time, in 1745, to grant to Elizabeth, the Czarina of Russia, the title of empress,

it exacted as a *reversal* a declaration purporting that the assumption of the title of an imperial government by Russia should not derogate from the rank which France had held towards her.

Letters by which a sovereign declares that by a particular act of his he does not mean to prejudice a third power. Of this we have an example in history: formerly the emperor of Germany, whose coronation, according to the golden bull, ought to have been solemnized at Aix-la-Chapelle, gave to that city, when he was crowned elsewhere, reversals, by which he declared that such coronation took place without prejudice to its rights, and without drawing any consequences therefrom for the future.

In Practice. The decision of a superior court by which the judgment, sentence, or decree of the inferior court is annulled.

After a judgment, sentence, or decree has been rendered by the court below, a writ of error may be issued from the superior to the inferior tribunal, when the record and all proceedings are sent to the supreme court on the return to the writ of error. When, on the examination of the record, the superior court gives a judgment different from the inferior court, they are said to reverse the proceeding. As to the effect of a reversal, see 9 C. & P. 513. See **REVERSE; JUDGMENT; RES JUDICATA**.

REVERSE, REVERSED. A term frequently used in the judgments of an appellate court, in disposing of the case before it. It then means "to set aside, to annul, to vacate." 7 Kans. 254.

REVERSER. In Scotch Law. A reversioner.

REVERSION. The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. The return of land to the grantor and his heirs after the grant is over. Co. Litt. 142 b; 2 Bla. Com. 175; 4 Kent 354. See **CONDITION; CONDITIONAL FEE; BASE FEE**.

The reversion is a vested interest or estate and arises by operation of law only. In this latter respect it differs from a remainder, which can never arise except either by will or deed; Chall. Real Pr. 68; Cruise, Dig. tit. 17; 4 Kent 345; 19 Vin. Abr. 217. A reversion is said to be an incorporeal hereditament; 4 Kent 354; 1 Washb. R. P. 37, 47; 38 N. J. Eq. 124. The possibility of reverter in the grantor of a qualified or determinable fee is not void for remoteness; 130 Mass. 448; 106 *id.* 479; 155 *id.* 171; as to the reversion or remainder in lands confiscated by the United States because of the owners engaging in the rebellion, see 145 U. S. 546. See **REMAINDER; LIMITATION**.

In some cases land taken under the right of eminent domain for a specific purpose reverts to the former owner when that purpose has ceased. See **EMINENT DOMAIN**; 6 Am. & E. Corp. Cas. 586.

REVERSIONARY INTEREST. The interest which one has in the reversion of lands or other property. The residue which remains to one who has carved out of his estate a lesser estate. See **REVERSION**. An interest in the land when possession shall fail. Cowel.

REVERSIONARY LEASE. One to take effect in *future*. See **LEASE**.

A second lease to commence after the expiration of a former lease. All leases where a particular estate subsists are leases in reversion. R. & L. Dict.

REVERSIONER. A person having the reversion of an estate; a person entitled to a reversion. See 2 Bl. Com. 176.

REVERSOR. In Scotch Law. A debtor who makes a wadset, and to whom the right of reversion is granted. Erskine, Inst. 2. 8. 1. A reversioner. Jacob, Law Dict.

REVERTER. Reversion. A possibil-

ity or reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate. See 1 Washb. R. P. 63.

REVEST. To replace one in the possession of anything of which he has been divested, or put out of possession. 1 Rob. H. & W. 353.

REVIEW. In Practice. A second examination of a matter. For example, by the laws of Pennsylvania, the courts having jurisdiction of the subject may grant an order for a view of a proposed road: the reviewers make a report, which, when confirmed by the court, would authorize the laying out of the same. After this, by statutory provision, the parties may apply for a review or second examination, and the last viewers may make a different report. For the practice of reviews in chancery, see **BILL OF REVIEW**. A bill of review is the appropriate mode of correcting errors apparent on the face of the record. 103 U. S. 766; 125 *id.* 1.

The criticism of a publication. See **CRITICISM**; **LIBEL**.

REVIEW, COURT OF. In England. A court of appeal in bankruptcy cases, established in 1882 and abolished in 1847. Robson, Bkcy.

REVLING CHURCH ORDINANCES. An offence against religion punishable in England by fine and imprisonment. 4 Steph. Com. 208. See **BLASPHEMY**.

REVISED STATUTES OF THE UNITED STATES. The Revised Statutes were enacted June 23, 1874, and, when printed in 1875, embraced the laws, general and permanent in their nature, in force December 1, 1873. A second edition was completed in the latter part of 1878, and includes only the specific amendments, passed by the forty-third and forty-fourth congresses, with references to some other acts. The period from 1874 to 1880 is provided for by a supplement published in 1881. See Preface to Supplement to Rev. Stat. A second edition of the supplement, covering the legislation from 1874 to 1891, and embracing the matter in the Supplement to the Revised Statutes of 1881, was prepared and published under the direction of congress by Chief Justice Wm. A. Richardson of the Court of Claims. Volume 2 of the Supplement has since been published, covering legislation down to 1891.

Transactions subsequent to the enactment of the Revised Statutes must be determined by the law as there found, and not by the earlier statutes incorporated therein. In cases of ambiguity or uncertainty, the previous statutes may be referred to to elucidate the legislative intent, but where the language is clear, the Revised Statutes must govern. The second edition is neither a new revision nor a new enactment; it is only a new publication, a compilation containing the original law with certain specific alterations and amendments made by subsequent legislation incorporated therein according to the judgment of the editor, who had no discretion to correct errors or supply omissions; 15 Ct. Cl. 80. Sections of a statute re-enacted in the Revised Statutes are to be given the same meaning they had in the original, unless a contrary intention is clearly manifested; 121 U. S. 278; the Revised Statutes are merely a compilation of the statutes of the United States, and resort may be had to the original statute to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law; 134 U. S. 626; and this is specially so where the act authorizing the revision directs marginal references as in this case; 169 U. S. 227, where some historical matter relating to the subject is found. "They must be treated as the legislative declaration of the statute law on the subjects embraced, on the first day of December, 1873. When the meaning is plain, the

courts cannot look to the statutes which have been revised, to see if congress erred in that revision, but may do so when necessary to construe doubtful language." 157 U. S. 1; 74 Fed. Rep. 145.

The act of June 4, 1897, appointed a commission to revise the Criminal Code of the United States.

See **STATUTES AT LARGE**.

REVISING ASSESSORS. In English Law. Two officers formerly elected to assist the mayor in revising the parish burgess lists, but now abolished and the duties transferred to the revising barristers.

REVISING BARRISTERS. In English Law. Barristers appointed to revise the list of voters for county and borough members of parliament, and who hold courts for that purpose throughout the country.

REVIVAL OF CONTRACTS. An agreement to renew the legal obligation of a just debt after it has been barred by the act of limitation or lapse of time is called its revival.

In Practice. The act by which a judgment which has lain dormant or without any action upon it for a year and a day is, at common law, again restored to its original force.

When a judgment is more than a day and a year old, no execution can issue upon it at common law; but till it has been paid, or the presumption arises from lapse of time that it has been satisfied, it may be revived and have all its original force, which was merely suspended. This may be done by a *scire facias* or an action of debt on the judgment. See **SCIRE FACIAS**.

REVIVE. To bring again to life, to reanimate, to renew; to bring into action after a suspension. 37 Ia. 207.

REVIVOR, BILL OF. A bill filed to revive and continue the proceedings, whenever there is an abatement of a suit, before its final consummation.

REVOCATION (Lat. *re*, back, *vocare*, to call). The recall of a power or authority conferred, or the vacating of an instrument previously made.

An act of the mind demonstrated by some outward and visible sign. 47 Minn. 171.

Revocation of grants. Grants may be revoked by virtue of a power expressly reserved in the deed, or where the grant is without consideration or in the nature of a testamentary disposition; 3 Co. 25.

Voluntary conveyances, being without pecuniary or legal consideration, may be superseded or revoked, in effect, by a subsequent conveyance of the same subject-matter to another for valuable consideration. And it will make no difference that the first conveyance was meritorious, being a voluntary settlement for the support of one's self or family, and made when the grantor was not indebted, or had ample means besides for the payment of his debts. And the English cases hold that knowledge of the former deed will not affect the rights of the subsequent purchaser; 9 East 59; 4 B. & P. 332; 18 Ves. 84. See, also, the exhaustive review of the American cases, in note to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 36.

In America, it is generally held that a voluntary conveyance which is also fraudulent, is void as to subsequent *bona fide* purchasers for value with notice; but if not fraudulent in fact, it is only void as to those purchasing without notice. See Bisp. Eq. 257; 18 Pick. 131; 2 B. Monr. 345; 10 Ala. N. S. 348, 352; 12 Johns. 536, 557; 4 McCord 295; **FRAUDULENT CONVEYANCE**.

The fact that the voluntary grantor subsequently conveys to another, is regarded as *prima facie* evidence that the former deed was fraudulent as to subsequent purchasers without notice, or it would not have been revoked; 5 Pet. 265; 4 McCord 295; 8 Strobb. 59; 1 Rob. Va. 500, 544.

In some of the states, notice of the voluntary deed will defeat the subsequent purchaser; 1 Rawle 231; 6 Md. 242; 4 McCord

295; 2 M'Mull. 508; 1 Ball. 575; 15 Ala. 525; 5 Pet. 265. But in other states, the English rule prevails; 1 Yerg. 13; 1 A. K. Marsh. 208; 1 Dana 531; 3 Ired. Eq. 81.

There is a distinction between the creditors of the grantor by way of family settlement (he being not insolvent or in embarrassed circumstances), and a subsequent purchaser for value. The claim of the latter is regarded as superior to a mere creditor's, whether prior or subsequent to the voluntary conveyance,—especially if he buy without notice. Some of the foregoing cases do not advert to this distinction; 3 Ired. Eq. 81; 4 Vt. 389.

So, too, if one bail money or other valuables to another, to be delivered to a third person on the day of marriage, he may countermand it at any time before delivery over; 1 Dy. 49. But if such delivery be made in payment or security of a debt, or for other valuable consideration, it is not revocable; 1 Stra. 165. And although the gift be not made known to the donee, being for his benefit, his assent will be presumed until he expressly dissents; 3 Co. 26 b; 2 Salk. 618.

Powers of appointment to uses are revocable if so expressed in the deed of settlement. But it is not indispensable, it is said, that this power of revocation should be repeated in each successive deed of appointment, provided it exist in the original deed creating the settlement; 4 Kent 336; 1 Co. 110 b; 2 Bla. Com. 339.

It has been said that the power of revocation does not include the appointment of new uses; 2 Freem. 61; Pr. in Ch. 474.

A voluntary deed of trust, without power of revocation, made with a nominal consideration, and without legal advice as to its effect, when there was evidence that its effect was misunderstood by the grantor, will be set aside in equity; 13 Am. L. Reg. N. S. 345, and note. In a similar case it was held that the mere omission of counsel to advise the insertion of a power of revocation is not a ground to set aside the deed; but that this omission and the absence of the power are circumstances tending to show that the act was not done with a deliberate intent. The deliberate intent of a party to tie up his hands should clearly appear. In the absence of such an intent the omission of a power to revoke is *prima facie* evidence of mistake. The mistake being one of fact mixed with legal effects, equity will relieve; 75 Pa. 269; the earlier English cases seem to have insisted upon the presence of a power of revocation in voluntary settlements; L. R. 8 Eq. 555; 14 *id.* 365; but in a later case it was held that the absence of such a power was merely a circumstance of more or less weight, according to the other circumstances of each case; L. R. 8 Ch. App. 430. A reserved right of revocation is not inconsistent with the creation of a valid trust; 1 Mo. App. 99.

A quitclaim deed from a trustee to the donor of the trust will not revoke the trust, though made solely for that purpose, since a completed trust, without reservation of power to revoke, can only be revoked by the consent of all the beneficiaries; 113 Mo. 188. See 70 Cal. 449.

As to the revocation of powers conferred upon agents, see **AGENCY**. It is a general rule that a principal may revoke the agent's authority at his own will; 141 U. S. 627.

The American courts, following the case of *Brown v. M'Gran*, 14 Pet. 479, hold that the consignee of goods for sale, who has incurred liability or made advances upon the faith of the consignment, acquires a power of sale which, to the extent of his interest, is not revocable or subject to the control of the consignor. But if orders are given by the consignor, contemporaneously with the consignment and advances, in regard to the time and mode of sale, and which are, either expressly or impliedly, assented to by the consignee, he is not at liberty to depart from them afterwards. But if no instructions are given at the time of the consignment and advances, the legal presumption is that the consignee

has the ordinary right of factors to sell, according to the usages of the trade and the general duty of factors, in the exercise of a sound discretion, and reimburse the advances out of the proceeds, and that this right is not subject to the interference or control of the consignor. See 52 Miss. 7; 45 Ind. 115.

The right of the factor to sell in such case is limited to the protection of his own interest, and if he sell more than is necessary for that purpose contrary to the order of his principal, he is liable for the loss incurred; 37 Conn. 378.

The case of *Parker v. Branker*, 22 Pick. 40, seems to go to the length of holding that where the consignment is to sell at a limited price the consignee may after notice sell below that price, if necessary, to reimburse advances. But to this extent the American rule has not gone; 1 Pars. Contr., 8th ed. 70. See, also, 12 N. H. 239; 3 N. Y. 78.

The English courts do not hold such a power irrevocable in law; 3 C. B. 380; 5 id. 895. In the last case, *Wilde, C. J.*, thus lays down the rule. It may furnish a ground for inferring that the advances were made upon the footing of an agreement that the factor shall have an irrevocable authority to sell in case the principal made default. But it would be an inference of fact, not a conclusion of law. The fact that the agent has incurred expense in faith of the authority being continued, and will suffer loss by its revocation, is a ground of recovery against the principal, but does not render the power irrevocable. A pledge of personal property to secure liabilities of the pledgor, with an express power of sale, confers such an interest in the subject-matter that it will not be revoked by his death; 10 Paige, Ch. 205. But a power to pledge or sell the property of the constituent and from the avails to reimburse advances made on liabilities incurred by the appointee is not so coupled with an interest as to be irrevocable; 8 Wheat. 174; 6 Conn. 559. The interest must exist in the subject-matter of the power, and not merely in the result of its exercise, to become irrevocable; 15 N. H. 468; 20 Ohio St. 185. Hence, if one give a letter of credit agreeing to accept bills to a certain amount within a limited time, the letter is revoked by death, and bills drawn after the death and before knowledge thereof reaches the drawer cannot be enforced against the estate of such deceased party; 28 Vt. 209.

All contracts which are to be executed in the name of the constituent by virtue of an agency, although forming an essential part of a security upon the faith of which advances have been made, are of necessity revoked by the death of the constituent. Even a warrant of attorney to confess judgment, although not revocable by the act of the party, is revoked by his death. The courts, however, allow judgment in such cases to be entered as of a term prior to the death of the constituent; 2 Kent 646; 9 Wend. 452; 8 Wheat. 174. See 75 Cal. 349; see, also, 2 Ld. Raym. 766, 849, where the form of procedure is discussed; 7 Mod. 93; Stra. 103. A warrant of attorney to confess judgment, executed by a *feme sole*, is revoked by her marriage; but if executed to a *feme sole*, the courts will allow judgment to be entered up in the name of the husband and wife; 3 Harring. 411.

Where one is not notified of the revocation of the authority of an agent, he is justified in acting upon the presumption of its continuance; 128 U. S. 374; 75 Cal. 159; 82 Va. 712.

The powers of arbitrators. These are revocable by either party at any time before final award; 20 Vt. 198; 156 Mass. 113; 136 Ill. 72; 58 Mo. App. 283; 23 S. E. Rep. (Va.) 165. It is not competent for the parties to deprive themselves of this power by any form of contract; 8 Co. 80; 16 Johns. 205. But where the submission releases the original cause of action, and the adversary revokes, the party so releasing may recover the amount so released by

way of damages caused by the revocation; 13 Vt. 97.

Where the submission is made a rule of court, it becomes practically irrevocable, since such an act would be regarded as a contempt of court and punishable by attachment; 7 East 608. This is the only mode of making a submission irrevocable "when the fear of an attachment may induce them to submit." 6 Bingh. 443.

In the American courts a submission by rule of court is made irrevocable by the express provisions of the statutes in most of the states, and the referee is required, after due notice, to hear the case *ex parte*, where either party fails to appear; 12 Mass. 47; 1 Conn. 498; 4 Mo. 459; 5 Pa. 497; 3 Ired. 333. In Ohio, a submission under the statute is irrevocable after the arbitrators are sworn; 19 Ohio St. 245; and it has been held that a naked submission is not revocable after the arbitrator has made his award and published it to one of the parties; 6 N. H. 36. But while a statute requisite, as being witnessed, is not complied with, it is incomplete and so the submission is revocable; 5 Paige, Ch. 575.

When one party to the submission consists of several persons, one cannot revoke without the concurrence of the others; Rolle, Abr. *Authority* (H); 12 Wend. 578. But the text-writers are not fully agreed in this proposition; see Russ. Arb. 141; 2 Chitty, Bail. 452, where it was held that the death of one of several parties on one side of the submission operates as a revocation as to such party at least, and that an award made in the name of the survivors and the executor of the deceased party is void. It is here intimated by way of query whether, that where the cause of action survives, the award might not legally be made in the name of the surviving party. See Russ. Arb. 155.

An award made after the revocation of the submission is entirely void; 1 Sim. 134.

The power of the arbitrator is determined by the occurrence of any fact which incapacitates the party from proceeding with the hearing. The marriage of a *feme sole* is a revocation of the arbitrator's power; 11 Vt. 525; without notice to the arbitrators; Russ. Arb. 152. So, also, if she be joined with another in the submission, her marriage is a revocation as to both; W. Jones, 228; Rolle, Abr. *Authority*.

Insanity in either party, or in the arbitrator, will determine his authority. The death of either party, or of the arbitrator, or one of them, or where the arbitrators decline to act, will operate as a revocation of the submission; 4 T. B. Monr. 3; 1 B. & C. 66; 36 Fed. Rep. 408; 58 Mo. App. 283.

It is competent to make provision in the submission for the completion of the award, notwithstanding the death of one of the parties, by proceedings in the name of the personal representative. This seems to be the general practice in England in late years; 3 B. & C. 144; 8 M. & W. 878. And in some of the American states it is held that a submission by rule of court is not determined by the death of the party, where the cause of action survives, but may be revived and prosecuted in the name of the personal representative; 15 Pick. 79; 3 Halst. 116; 3 Gill 190. *Bankruptcy of the party* does not operate to revoke a submission to arbitration; Cald. Arb. 89. But it seems to be considered in 9 B. & C. 659, that the bankruptcy of one party will justify the other in revoking. But see 2 Chitt. Bail. 43; 1 C. B. 131.

The time when the revocation becomes operative. Where it is by the express act of the party, it will be when notice reaches the arbitrator; 5 B. & Ald. 507; 8 Co. 80. But in the case of death, or marriage, or insanity, the act itself terminates the power of the arbitrator at once, and all acts thereafter done by him are of no force; 11 Vt. 525; 5 East 266.

The form of the revocation is not important, if it be in conformity with the submission, or if, when it is not, it be acquiesced in by the other party; 7 Vt. 287.

It is said in the books that the revocation must be of as high grade of contract

as the submission. This seems to be assumed by the text-writers and judges as a settled proposition; 8 Co. 82; 8 Johns. 125. Where the submission is in writing, the revocation "ought to be in writing"; 18 Vt. 91. But see 7 Vt. 237, 240; 15 N. H. 468. It seems questionable whether at this day a submission by deed would require to be revoked by deed, since the revocation is not a contract, but a mere notice, and no special right is conferred upon such an act by the addition of wax or wafer: 8 Ired. 74. But see 26 Me. 251, *contra*. But it is conceded the party may revoke by any act which renders it impracticable for the arbitrators to proceed; 7 Mod. 8; Story, Ag. 474.

So a revocation imperfectly expressed, as of the bond instead of the submission, will receive a favorable construction, in order to effectuate the intention of the party; 1 Cow. 325.

It has been held, too, that bringing a suit upon the same cause of action embraced in the submission, at any time before the award, was an implied revocation; 6 Dana 107; 136 Ill. 72.

The power of a partner to contract in the name of the firm may be revoked, by injunction out of chancery, where there is a wanton or fraudulent violation of the contract constituting the association; Bisp. Eq. 428; 1 Story, Eq. Jur. § 673. This will sometimes be done on account of the impracticability of carrying on the undertaking; 1 Cox, Ch. 213; 2 V. & B. 299. So, too, such an injunction might be granted on account of the insanity or permanent incapacity of one of the partners; 1 Story, Eq. Jur. § 673. But insanity is not alone sufficient to produce a dissolution of the partnership; 2 My. & K. 125. See PARTNERSHIP.

An oral license to occupy land is, where the statute of frauds prevails, revocable at pleasure, unless permanent and expensive erections have been paid by the licensee in faith of the permission. In such case a court of equity will decree a conveyance on equitable terms, in conformity with the contracts of the parties, or else require compensation to be made upon equitable principles; 1 Stockt. 471; Red. Railw. 106; 13 Vt. 150; 10 Conn. 375.

For the law in regard to the revocation of wills, see WILLS.

REVOCATIONE PARLIAMENTI.

An ancient writ for recalling a parliament. 4 Inst. 44.

REVOCATUR (Lat. it is recalled).

A term used to denote that a judgment is annulled for an error in fact. The judgment is then said to be recalled, *revocatur*; not *reversed*, which is the word used when a judgment is annulled for an error in law; Tidd, Pr. 1126.

REVOLT. The endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person. 11 Wheat. 417.

According to Wolff, revolt and rebellion are nearly synonymous; he says it is the state of citizens who unjustly take up arms against the prince or government. Wolff, *Droit de la Nat.* § 1232. See REBELLION.

By R. S. § 5559, if any one of the crew of an American vessel, on the high seas or other waters, within the admiralty and maritime jurisdiction of the U. S., endeavors to make a revolt, etc., or conspires, etc., so to do, or incites, etc., any other of the crew to disobey lawful orders, or to neglect their duty, or assemblies such orders in a mutinous manner, or makes a riot, or unlawfully confines the master, etc., he is punishable by a fine of not over \$1,000, or imprisonment for not over five years, or both. By § 5580, if any one of the crew, etc., usurps the command of the vessel, or deprives the master of authority, or resists his authority, or transfers the same to one not entitled thereto, he is punishable by a fine of not over \$2,000, and imprisonment for not over ten years. Foreign seamen on American vessels are punishable under this section; 1 N. Y. Leg.

Obs. 88. If, before a voyage is begun, the seamen for good reason believe that the vessel is unseaworthy, they may resist an attempt to compel them to go to sea in her, without being guilty of revolt; 1 Sprague 75.

Revolts on shipboard are to be considered as defined by the last-mentioned act; 1 W. & M. 306.

A confederacy or combination must be shown; 2 Sumn. 582; 1 W. & M. 305; Crabbe 558. The vessel must be properly registered; 3 Sumn. 342; must be pursuing her regular voyage; 2 Sumn. 470. The indictment must specifically set forth the acts which constitute the crime; Whart. Prec. § 1061, n. And see 1 Mas. 147; 5 *id.* 402; 1 Sumn. 448; 4 Wash. C. C. 402, 528; 2 Curt. C. C. 225; 1 Pet. C. C. 213. See SEAMEN.

REWARD. The offer of recompense given by authority of law for the performance of some act for the public good, which, when the act has been performed, is to be paid. The recompense actually so paid.

The offer may be made to an individual; 6 Blatch. 426; or by public, oral statement, poster, or newspaper; 56 Ind. 46; 14 Cal. 134; 6 Mass. 244; and its acceptance and performance create a valid contract; Poll. Contr. 11; Ans. Contr. 31; 82 N. Y. 503; 71 Tex. 584; 52 Pa. 484; such performance being sufficient consideration; 7 N. H. 549; 73 Am. Dec. 634; 4 B. & Ad. 621. The offer, not being a contract until performance, may be withdrawn prior thereto; 16 Ind. 140; 79 Ga. 658; 5 Metc. 57; 14 Cal. 137. See 92 U. S. 75. As to what information will constitute a performance, see 3 C. B. 254; L. R. 2 Q. B. 301. The offer of a reward may contain such terms as the party sees fit to prescribe; 43 Ark. 337; 7 Metc. 412; provided they are lawful; Bish. Contr. § 467; 106 Mass. 269; 68 Me. 142; 61 Pa. 415; and substantial performance is usually sufficient; 9 Allen 152; 85 Am. Dec. 747.

A reward may be offered by the government or by a private person; 21 N. J. L. 310; by a railroad company; 19 Am. Rep. 80; 85 Ala. 48; but not by the District of Columbia; 7 D. C. 134; nor by municipal corporations, unless authorized by statute; 32 Ill. App. 397; 41 Mich. 387; 51 Me. 174; 48 Ia. 472; 14 Bush 324; 18 Fla. 318; 72 Ind. 455; *contra*, 23 Pa. 391. But where the selectmen of a town offered a reward in excess of that authorized by statute, it was held good for the lawful amount; 39 Conn. 159; and such officials are personally liable for the excess; 30 N. E. Rep. (Mass.) 95; 7 Dana 29; *contra*, 2 McCrary 152.

Any one who complies with the terms of the offer, if not guilty of fraud, may recover the reward; 38 Me. 45; 133 Mass. 283; 69 Tex. 74; 24 Ia. 78; although not embraced in the description of the persons to whom it was originally proposed; 55 Ill. 62; 64 L. T. 594; but not for apprehending a person who has been admitted to bail; 8 Bush 22; nor one discharged from arrest by the committing magistrate; 62 Miss. 193.

One may recover a reward offered by his employers; 16 Ill. App. 181; but not if he is morally bound to furnish the information; 50 Cal. 218; or it is his official duty to do so; 79 Tex. 141; 10 Pa. 39. And a reward offered by the state for the capture of a criminal cannot be claimed by an officer whose official duty it is to make the arrest; the rule being founded on public policy, it is opposed to opening the door to any inducement for public officers to delay arrests until rewards are offered; 45 S. W. Rep. (Ky.) 515. In that case it was also decided that no one could have any property right in a reward until it was earned by making the arrest, so that where, by sharp practice in making use of information derived over the telephone, one person secured the reward and prevented another, who really gave the information, from obtaining the benefit of it, the latter had no right of action. But it is held that a promise to pay a reward to a police constable is binding because there might be some information which he was not bound, in the discharge of his ordinary duty, to give; 11 A. & E. 856.

An offer of a reward is not void as

against public policy, because made for conviction of offences afterwards to be committed; 151 Pa. 200.

It is held to be necessary that the person performing the service should know of the offer when he did so; 51 N. Y. 604; 16 Ill. App. 181; 2 Handy 193; 7 Dana 123; *contra*, 3 Ind. App. 459; 9 Bush 453; 44 Vt. 170; 12 C. B. N. S. 740; 104 E. C. L. 740.

The person first complying with the terms of the offer is entitled to the reward; 4 B. & Ad. 631; 24 E. C. L. 126; 7 Fed. Rep. 709; 6 Blatch. 406; and where the offer is for information, the whole of which is furnished in fragments by different persons, the reward may be equitably apportioned; 48 N. H. 86; 43 How. Pr. 193; 28 Md. 147; and so as to the recovery of property; 43 Ia. 472; 25 Am. Dec. 187; 6 Mass. 344.

The finder of lost property is not entitled to a reward, if there was no promise of one by the owner; 1 Ore. 88. See REASONABLE REWARD.

REX. The king. As the king is the source of authority, honor, and power, in a monarchical government, the word often stands for the sovereign power. In particular, during a king's reign, criminal prosecutions, and decisions in criminal cases, and suits on behalf of the crown, are entitled *Rex v. The Defendant*. Abbott.

RHANDIR. A part in the division of Wales before the Conquest; every township comprehended four gavels, and every gavel had four rhandirs, and four houses or tenements constituted every rhandir. Tayl. Hist. Gav. 69.

RHODE ISLAND. One of the original thirteen states of the United States of America; its full style being, "The State of Rhode Island and Providence Plantations."

Its territory lies between Massachusetts and Connecticut, in the southwest angle of that portion of the territory of the former state which was known as the colony of New Plymouth, and is situated at the head and along both shores of the Narragansett Bay, comprising the islands in the same, the principal of which is Rhode Island, placed at the mouth of the bay. The settlement was commenced as early as June, 1636, on the present site of the city of Providence, by five men under Roger Williams. Williams founded his colony upon a compact which bound the settlers to obedience to the major part "only in civil things"; leaving to each perfect freedom in matters of religious concernment, so that he did not, by his religious practices, encroach upon the public order and peace. A portion of the Massachusetts colonists, who were A. of the antinomian party, after their defeat in that colony, settled on the island of Aquinet, now Rhode Island, where they associated themselves as a colony on March 7, 1638. These settlements, together with one "at Shawomet, now Warwick, made by another sect of religious outcasts, under Gorton, in 1614-3, remained under separate voluntary governments until 1647, when they were united under one government, styled "The Incorporation of Providence Plantations in the Narragansett Bay in New England," by virtue of a charter granted in 1643.

This colony remained under this charter, which, upon some divisions, was confirmed by Cromwell in 1655, until after the restoration, when a new charter was procured from Charles II., in the fifteenth year of his reign, under which a new colonial government was formed on the 24th of November, 1663, which continued, with the short interruption of the colonial administration of Sir Edmund Andros, down to the period of the American revolution.

In the general assembly of the colony, on the first Wednesday of May, 1776, in anticipation of the declaration of independence, an act was passed which absolved the colonists from their allegiance to the king of Great Britain, and which ordered that in future all writs and processes should issue in the charter name of "The Governor and Company of the English Colony of Rhode Island and Providence Plantations." Instead of the name of the king. The old colonial charter, together with a bill of rights adopted by the general assembly, remained the sole constitution of state government until the first Tuesday in May, 1843, when a state constitution framed by a convention assembled in November, 1842, and adopted by the people of the state, went into operation.

RHODIAN LAW, THE. See LEX RHODIA DE JACTU.

RHODIAN LAWS. A code of maritime laws adopted by the people of Rhodes, who had by their commerce and naval victories obtained the sovereignty of the sea, about nine hundred years before the Christian era. There is reason to suppose this code has not been transmitted to posterity, at least not in a perfect state.

See CODE.

RIAL. A piece of gold coin current for ten shillings in the reign of Henry VI, at which time there were half-rials, and quarter-rials, or rial-farthings. In the beginning of Queen Elizabeth's reign, golden rials were coined at 15s. a piece; and in James I. there were rose-rials of gold at 30s., and spur-rials at 15s. Wharton; Lownd. Ess. Coins 38.

RIBAUD. A rogue; a vagrant.

RIBBONMEN. Associations or secret societies formed in Ireland, having for their object the dispossession of landlords and political purposes. See Whart. Law Lex.

RIDER. A schedule or small piece of paper or parchment added to some part of a record or policy of insurance; as, when on the reading of a bill in the legislature a new clause is added, this is tacked to the bill on a separate piece of paper, and is called a rider.

RIDING. In English Law. An ascertained district; part of a county. This term has the same meaning in Yorkshire that division has in Lincolnshire. 4 Term 459.

RIDING ARMED. The offence of riding or going armed with dangerous or unusual weapons. It is a misdemeanor; 4 Steph. Com., 11th ed. 203.

RIDING CLERK. One of the Six Clerks in chancery, who, in his turn, for one year kept the controlment books of all grants that passed the Great Seal. Whart. Dict.

RIENS. A French word which signifies nothing. It has generally this meaning: as, *riens en arriere*; *riens passe per le fait*, nothing passes by the deed; *riens per descent*, nothing by descent; it sometimes signifies not, as, *rien culpable*, not guilty.

RIENS EN ARRIERE (L. Fr. nothing in arrear). In Pleading. A plea which alleges that there is nothing remaining due and unpaid of the plaintiff's demand. It is a good plea, and raises the general issue in an action for rent. 2 Wm. Saund. 297, n. 1; 2 Chitty, Pl. 486; 2 Ld. Raym. 1505; Gould, Pl. 286; McKeiv. Pl. 38.

RIENS PER DESCENT. A plea by an heir sued for the debt of his ancestor that he had no lands by descent from the ancestor. Chitty, Prec. 433.

RIENS PASSE PER LE FAIT (L. Fr. nothing passed by the deed). In Pleading. A plea which avoids the effect of a deed where its execution cannot be denied, by asserting that nothing passed thereby; for example, an allegation that the acknowledgment was before a court which had not jurisdiction.

RIER, or REER-COUNTY. Close county, in opposition to open county. It appears to be some public place which the sheriff appoints for the receipt of the king's money after the end of the county court. Fleta says it is *dies crastinus post comitalum*. Encyc. Lond.

RIFFLARE. To take away anything by force.

RIGGING THE MARKET. A term of the stock exchange denoting the practice of inflating the price of given stocks or enhancing their quoted value by a system of pretended purchasers, designed to give the air of an unusual demand for such stocks. L. R. 13 Eq. 447.

RIGHT. A well-founded claim. If people believe that humanity itself establishes or proves certain claims, either upon fellow-beings, or upon society or government, they call these claims human rights; if they believe that these claims inhere in the very nature of man himself, they called them inherent, inalienable rights; if people believe that there inhere

in monarchs a claim to rule over their subjects by divine appointment; they call the claim divine right, *jus divinum*; if the claim is founded or given by law, it is a legal right. The ideas of claim and that the claim must be well founded always constitute the idea of right. Rights can only inhere in and exist between moral beings; and no moral beings can coexist without rights, consequently without obligations. Right and obligation are correlative ideas. The idea of a *well-founded* claim becomes in law a claim founded in or established by the law: so that we may say a right in law is an *acknowledged* claim.

Men are by their inherent nature moral and social beings; they have, therefore, mutual claims upon one another. Every well-grounded claim on others is called a right, and, since the social character of man gives the element of mutuality to each claim, every right conveys along with it the idea of obligation. Right and obligation are correlative. The consciousness of all constitutes the first foundation of the right or makes the claim well grounded. Its incipency arises instinctively out of the nature of man. Man feels that he has a right of ownership over that which he has produced out of appropriated matter, for instance, the bow he has made of appropriated wood; he feels that he has a right to exact obedience from his children, long before laws formally acknowledge or protect these rights; but he feels, too, that if he claims the bow which he made as his own, he ought to acknowledge (as correlative obligation) the same right in another man to the bow which he may have made; or if he, as father, has a right to the obedience of his children, they have a corresponding claim on him for protection as long as they are incapable to protect themselves. The idea of rights is coexistent with that of authority (or government); both are inherent in man; but if we understand by government a coherent system of laws by which a state is ruled, and if we understand by state a sovereign society, with distinct authorities to make and execute laws, then rights precede government, or the establishment of states, which is expressed in the ancient law maxim: *Ne ex regula jus sumatur, sed ex jure quod est, regula fiat*. See GOVERNMENT. We cannot refrain from referring the reader to the noble passage of Sophocles, *Œdyp. Tyr.* 876 *et seq.*, and to the words of Cicero, in his oration for Milo: *Est enim hæc, judices, non scripta sed nata lex; quam non didicimus, accepimus, legimus; verum ex natura ipsa arripimus, hausimus, expressimus; ad quam non docti sed facti; non instituti sed imbuti sumus*.

As rights precede government, so we find that now rights are acknowledged above governments and their states, in the case of international law. International law is founded on rights, that is, well-grounded claims which civilized states, as individuals, make upon one another. As governments come to be more and more clearly established, rights are more clearly acknowledged and protected by the laws, and right comes to mean a claim acknowledged and protected by the law. A legal right, a constitutional right, means a right protected by the law, by the constitution; but government does not create the idea of right or original rights; it acknowledges them; just as government does not create property or values and money, it acknowledges and regulates them. If it were otherwise, the question would present itself, whence does government come? whence does it derive its own right to create rights? By compact? But whence did the contracting parties derive their right to create a government that is to make rights? We would be consistently led to adopt the idea of a government by *jus divinum*,—that is, a government deriving its authority to introduce and establish rights (bestowed on it in particular) from a source wholly separate from human society and the ethical character of man, in the same manner in which we acknowl-

edge revelation to come from a source not human.

Rights are claims of moral beings upon one another; when we speak of rights to certain things, they are, strictly speaking, claims of persons on persons,—in the case of property, for instance, the claim of excluding others from possessing it. The idea of right indicates an ethical relation, and all moral relations may be infringed; claims may be made and established by law which are wrong in themselves and destitute of a corollary obligation; they are like every other wrong done by society or government; they prove nothing concerning the origin or essential character of rights. On the other hand, claims are gradually more clearly acknowledged, and new ones, which were not perceived in early periods, are for the first time perceived, and surrounded with legislative protection, as civilization advances. Thus, original rights, or the rights of man, are not meant to be claims which man has always perceived or insisted upon or protected, but those claims which, according to the person who uses the term, logically flow from the necessity of the physical and moral existence of man; for man is born to be a man,—that is, to lead a human existence. They have been called inalienable rights; but they have been alienated, and many of them are not perceived for long periods. Lieber, in his *Political Ethics*, calls them primordial rights: he means rights directly flowing from the nature of man, developed by civilization, and always showing themselves clearer and clearer as society advances. He enumerates, as such especially, the following: the right of protection; the right of personal freedom,—that is, the claim of unrestricted action except so far as the same claim of others necessitates restriction: these two rights involve the right to have justice done by the public administration of justice, the right of production and exchange (the right of property); the right of free locomotion and emigration, the right of communion in speech, letter, print, the right of worship, the right of influencing or sharing in the legislation. All political civilization steadily tends to bring out these rights clearer and clearer, while in the course of this civilization, from its incipency, with its relapses, they appear more or less developed in different periods and frequently wholly in abeyance: nevertheless, they have their origin in the personality of man as a social being.

Publicists and jurists have made the following further distinction of rights:—

Rights are *perfect* and *imperfect*. When the things which we have a right to possess, or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the thing or the actions are vague and indeterminate, the right is an imperfect one. If a man demand his property which is withheld from him, the right that supports his demand is a perfect one, because the thing demanded is or may be fixed and determinate; but if a poor man ask relief from those from whom he has reason to expect it, the right which supports his petition is an imperfect one, because the relief which he expects is a vague, indeterminate thing. Rutherford, *Inst. c. 2, § 4*; Grotius, *lib. 1. c. 1, § 4*.

Rights are also *absolute* and *qualified*. A man has an absolute right to recover property which belongs to him; an agent has a qualified right to recover such property when it has been intrusted to his care and which has been unlawfully taken out of his possession.

Rights might with propriety be also divided into *natural* and *civil* rights; but as all the rights which man has received from nature have been modified and acquired anew from the civil law, it is more proper, when considering their object, to divide them into political and civil rights.

Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by

the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses.

Civil rights are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights,—which is not the case with political rights; for an alien, for example, has no political, although in the full enjoyment of his civil, rights.

These latter rights are divided into *absolute* and *relative*. The absolute rights of mankind may be reduced to three principal or primary articles: the *right of personal security*, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation; the *right of personal liberty*, which consists in the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct, without any restraint unless by due course of law; the *right of property*, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land. 1 Bla. Com. 124-139.

The *relative* rights are *public* or *private*: the first are those which subsist between the people and the government; as, the right of protection on the part of the people, and the right of allegiance which is due by the people to the government; the second are the reciprocal rights of husband and wife, parent and child, guardian and ward, master and servant.

Rights are also divided into *legal* and *equitable*. The former are those where the party has the legal title to a thing; and in that case his remedy for an infringement of it is by an action in a court of law. Although the person holding the legal title may have no actual interest, but hold only as trustee, the suit must be in his name, and not, in general, in that of the *cestui que trust*; 8 Term 332; 1 Saund. 158, n. 1; 2 Bing. 20. The latter, or equitable rights, are those which may be enforced in a court of equity by the *cestui que trust*.

RIGHT OF ACTION. The right to bring suit in a case. Also sometimes used in the same sense as right in action, which is identical with chose in action (q. v.).

RIGHT OF APPEAL. This is not limited to a right of appeal by statute, but includes a case where a judge has given leave to appeal. 46 L. J. Q. B. 226; 2 Q. B. D. 125.

RIGHT TO BEGIN. In Practice. The party who asserts the affirmative of an issue has the right to begin and reply, as on him is the burden of proof. The substantial affirmative, not the verbal, gives the right; 1 Greenl. Ev. § 74; 18 B. Monr. 136; 6 Ohio St. 307; 2 Gray 260; Tay. Ev. 356. See OPENING and CLOSING.

RIGHT CLOSE, WRIT OF. An abolished writ which lay for tenants in ancient demesne, and others of a similar nature, to try the right of their lands and tenements in the court of the lord exclusively. 1 Steph. Com. 224.

RIGHT OF COMMON. See COMMON.

RIGHT OF DISCUSSION. In Scotch Law. The right which the cautioner (surety) has to insist that the creditor shall do his best to compel the performance of the contract by the principal debtor, before he shall be called upon. 1 Bell, Com. 347.

RIGHT OF DIVISION. In Scotch Law. The right which each of several cautioners (sureties) has to refuse to answer for more than his own share of the debt. To entitle the cautioner to this right,

the other cautioners must be solvent, and there must be no words in the bond to exclude it. 1 Bell, Com. 347.

RIGHT OF HABITATION. In Louisiana. The right of dwelling gratuitously in a house the property of another. La. Civ. Code, art. 623; 3 Toullier, c. 2, p. 335; 14 *id.* n. 279, p. 330; Pothier, n. 23-25.

RIGHT HEIRS. The heirs of the testator at common law, who, if more than one, take as tenants in common. 47 L. J. Ch. 714; 35 W. R. 356.

Direct, nearest; lineal; legal heirs. Anderson, "Right heirs," in a will, was held to mean children. *Id.*; 42 N. J. Eq. 557. A limitation to one and his "right heirs" is the same as to his "heirs" simply; and a limitation directly to the "right heirs" of one carries a fee, without the addition of the words "and his heirs." *Id.*; 1 Washb. Real Prop. * 57. To limit an estate to one's "right heir," excepting A, who actually is that heir, is palpably inconsistent. *Id.*; 132 Mass. 529.

RIGHT HONOURABLE. In England. A title given to privy counsellors, earls, viscounts, barons, and to certain mayors who bear the title of "Lord" *ex officio*. Stand. Dict. See HONORABLE.

RIGHT TO JURY TRIAL. The "right to jury trial" is the right to the submission to a jury of all the issues of fact in the case on the law given by the court, and the jury determines the rights of the litigants under the law. 131 Ky. 46, 114 S. W. 308.

RIGHT OF LIEN. The word lien is of the same origin as the word liable, and the right of lien expresses the liability of certain property for a certain legal duty, or a right to resort to it in order to enforce the duty. 30 Pa. 277. See LIEN.

RIGHT PATENT. The name of an ancient writ, which Fitzherbert says, "ought to be brought of lands and tenements, and not of an advowson, or of common, and lieth only of an estate of fee-simple, and not for him who has a lesser estate, as tenant in tail, tenant in frankmarriage, or tenant for life." Fitzh. N.B.1.

RIGHT, PETITION OF. See PETITION OF RIGHT.

RIGHT OF POSSESSION. The right to possession which may reside in one man, while another has the actual possession, being the right to enter and turn out such actual occupant: *e. g.* the right of a disseisee. An apparent right of possession is one which may be defeated by a better; an actual right of possession, one which will stand the test against all opponents. 2 Bla. Com. *196.

RIGHT OF PROPERTY. The abstract right (*merum jus*) which remains after the actual possession has been so long gone that the right of possession is also lost, and the law will only allow recovery of the land by a writ of right. It, together with possession and right of possession, makes a perfect title; *e. g.* a disseisor has naked possession, the disseisee has right of possession and right of property. But after twenty years without entry the right of possession is transferred from the disseisee to the disseisor; and if he now buys up the right of property which alone remains in the disseisee, the disseisor will unite all three rights in himself, and thereby acquire a perfect title. 2 Bla. Com. *197.

RIGHT OF SALE. A contractual right of sale of an article constitutes the taker of such right an agent for the sale of the article, but does not bind the giver to supply the article; 6 L. R. Ir. 319.

RIGHT OF SEARCH. See SEARCH, RIGHT OF; PRISONER.

RIGHT OF SUCCESSION TO THE CROWN. See HEREDITARY RIGHT TO THE CROWN.

RIGHT OF VISITATION. See

VISIT, RIGHT OF; VISITATION; Cf. SEARCH, RIGHT OF.

RIGHT OF WAY. See EASEMENT; WAY.

RIGHT, WRIT OF. See WRIT OF RIGHT.

RIGHTS. See IMPRESCRIPTIBLE; NATURAL RIGHTS.

RIGHTS, BILL OF. See BILL OF RIGHTS.

RIGHTS OF PERSONS. Rights which concern and are annexed to the persons of men. 1 Bl. Com. 122.

RIGHTS OF THINGS. Rights which may be acquired over external objects or things unconnected with the person. 1 Bl. Com. 122.

RIGOR JURIS (L. Lat.). Strictness of law.

RIGOR MORTIS. Rigor of death. Death stiffening; the rigidity of the muscles that occurs at death and lasts till decomposition sets in. It is due to the formation of myosin by the coagulation of the contents of the individual muscle fibers. Webster.

RING. A combination of persons, usually for the attainment of a selfish aim or purpose; especially a clique formed for controlling a market, or local or state politics. See RESTRAINT OF TRADE.

RING-DROPPING. In Criminal Law. A phrase applied in England to a trick frequently practised in committing larcenies. It is difficult to define it; it will be sufficiently exemplified by the following cases. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring wrapped up in a paper, appearing to be a jeweller's receipt for "a rich brilliant diamond ring." They offered to leave the ring with the prosecutor if he would deposit some money and his watch as a security. The prosecutor, having accordingly laid down his watch and money on a table, was beckoned out of the room by one of the confederates, while the others took away his watch and money. This was held to amount to a larceny; 1 Leach 273. In another case, under similar circumstances, the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving the false jewel with him. This was also held to be larceny; 1 Leach 314; 2 East, Pl. Cr. 679.

RING SETTLEMENT. The ring settlement, where there is no physical handing over of commodities in buying and selling transactions, *e. g.* in the grain pit, is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B five thousand bushels of May wheat, and B has sold the same amount to C, and C to D and D to A. Substituting D for B by novation, A's sale can be set against his purchase, on simply paying the difference in price. 198 U. S. 247. Cf. DIRECT SETTLEMENT.

RINGING THE CHANGE. A trick practised by a criminal, by which, on receiving a good piece of money in payment of an article, he pretends it is not good, and, changing it, returns to the buyer a spurious coin. See 2 Leach 786.

RINGS - GIVING. The giving of golden rings by a newly-created sergeant-at-law to every person of rank at court, from the princes of the blood, through the lords in parliament and the justices and barons of the courts, down to the meanest clerk of common pleas, to each one according to his dignity. The expense was not less than forty pounds English money. Fortesque 190; 10 Co. Intro. 23.

RIOT. In Criminal Law. A tu-

multuous disturbance of the peace by three persons or more, assembling together of their own authority with an intent mutually to assist each other against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. Hawk. Pl. Cr. c. 65, § 1. See 3 Blackf. 209; 3 Rich. 337; 5 Pa. 83; 78 Ga. 258.

"An unlawful assembly which has actually begun to execute the purpose for which it is assembled, by a breach of the peace, and to the terror of the public or a lawful assembly, may become a riot if the persons assembled form and proceed to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled." Steph. Dig. Cr. Law, art. 77.

In this case there must be proved—*first*, an unlawful assembling; 15 N. H. 169; for if a number of persons lawfully met together, as, for example, at a fire, or in a theatre or a church, should suddenly quarrel and fight, the offence is an affray, and not a riot, because there was no unlawful assembling; but if three or more being so assembled, on a dispute occurring, form into parties with promises of mutual assistance, which promises may be express, or implied from the circumstances, then the offence will no longer be an affray, but a riot; the unlawful combination will amount to an assembling within the meaning of the law. In this manner any lawful assembly may be converted into a riot; 18 Me. 346; 1 Camp. 338; 24 Hun 562. Any one who joins the rioters after they have actually commenced is equally guilty as if he had joined them while assembling.

Secondly, proof must be made of actual violence and force on the part of the rioters, or of such circumstances as have an apparent tendency to force and violence, and calculated to strike terror into the public mind; 2 Camp. 369. See 60 Ga. 126; 26 Mo. 429. The definition requires that the offenders should assemble of their own authority, in order to create a riot: if, therefore, the parties act under the authority of the law, they may use any necessary force to enforce their mandate, without committing this offence. See 1 Hill S. C. 362; 72 N. C. 25.

Thirdly, evidence must be given that the defendants acted in the riot and were participants in the disturbance; 1 Morr. Tenn. 142. It is sufficient if they be present encouraging or giving countenance, support, or acquiescence to the act; 9 Miss. 270. See 1 Russ. Cr. *333; Co. 3d Inst. 176; 4 Bla. Com. 146; Com. Dig.; Ros. Cr. Ev. Women and infants above, but not those under, the age of discretion are punishable as rioters; 1 Russ. Cr. *387.

In a case growing out of the riots in Pittsburg in 1877, under a statute making a county liable for the property "situated" therein, when destroyed by a mob, the liability was held to attach to property owned by a non-resident of the state, in transit in possession of a common carrier; 90 Pa. 397; S. C. 35 Am. Rep. 670.

In the absence of a statute giving a remedy, municipal corporations are not liable for damages resulting in loss of life from the acts of a mob or riotous assemblage, no matter what the negligence of the city officials may have been; 23 U. S. App. 533. See RIOT; MOB; UNLAWFUL ASSEMBLY; PUBLIC MEETING; AFFRAY.

RIOT ACT. The stat. 1 Geo. I. st. 2, c. 5. It forbade the unlawful assembling of twelve persons or more to the disturbance of the peace. If they continue together for one hour after the sheriff, mayor, etc., has commanded them to disperse, such contempt shall be felony. Stat. 24 & 25 Vict. c. 97, s. 11, requires that, in order to constitute felony, the riotous act must consist in demolishing, or beginning to demolish, some building; Moz. & W.; Cox & S. Cr. Law 104.

By statute 1 Geo. I., the Riot Act, which is directed to be read in a loud voice by a justice of the peace or other person authorized by the act, is to be in the following words or in words of like effect:—"Our Sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George for preventing tumults and riotous assemblies. God save the King."

Persons who wilfully obstruct or hinder the reading of the proclamation are guilty of felony, and if the proclamation would have been read had it not been prevented by the interference of any person or persons, any twelve or more persons who remain together after the proclamation would have been read, are guilty of felony, as if the act had been read. See 21 St. Tr. 485.

RIOTOUSLY. In Pleading. A technical word, properly used in an indictment for a riot, which of itself implies violence. 2 Sess. Cas. Sc. 13; 2 Stra. 884; 2 Chitty, Cr. Law 489.

RIPA (Lat.). The banks of a river, or the place beyond which the waters do not in their natural course overflow.

An extraordinary overflow does not change the banks of the river. Pothier, Pand. lib. 50. See BANKS; RIVER.

RIPARIAN. Belonging to or relating to the bank of a river.

RIPARIAN NATIONS. In International law, those who possess opposite banks or different parts of banks of one and the same river. R. & L. Diet.

RIPARIAN PROPRIETORS. Those who own the lands bounding upon a watercourse. 4 Mass. 397.

Each riparian proprietor owns that portion of the bed of the river (not navigable) which is adjoining his land *usque ad flum aquae*; or, in other words, to the thread or central line of the stream; Hargr. Tracts 5; Holt 499; 3 Dane, Abr. 4; 7 Mass. 496; 5 Wend. 428; 2 Conn. 482; 11 Ohio St. 188; Ang. Wat. Courses 3; 28 Am. Law Reg. 147, 337; 47 Ill. App. 258; 142 U. S. 254. Where the middle of a stream is the boundary between states or private landowners, that boundary follows any changes in the stream which are due to a gradual accretion or degradation of its banks; 143 U. S. 359; but where a navigable stream suddenly changes its course, the owner of the shore does not acquire title to the abandoned channel; 117 Mo. 33.

Where one had obtained title by adverse possession of land bounded by a stream, it was held that he had not acquired title to the middle line of the stream; 89 S. W. Rep. (Ky.) 495. See RIVER; WATER-COURSE; TIDE-WATER; WHARF; ALLUVION; AVULSION; FISHERY; RELICTION; LAKE; ACCRETION.

As to the rights of riparian owners over the bed of navigable waters between high and low water-mark, the decisions are somewhat conflicting, although the general rule is that the riparian owner holds the right of access to the water, subject to the right of the state to improve navigation; Wood, Nuisances, 8d ed. 413, 592 *et seq.*; 81 Pa. 80; 7 W. N. C. Pa. 322; 122 Pa. 191. That the riparian owner has a right of action where his access to the water is cut off by a structure erected between high and low water mark, by a corporation acting under its charter, see L. R. 5 H. L. 418; 10 Wall. 497; 25 Wend. 463; 42 Wisc. 214; s. c. 24 Am. Rep. 394, n.; *contra*, 32 Ia. 106; s. c. 7 Am. Rep. 176; 8 Cow. 146; 34 N. J. 533; 3 Am. Rep. 269. Where, by the action of the sea, the sea front was cut off between certain points, and a beach formed outside the main-land, divided from it by a navigable bay, the title to the new formation was held to be in the owners of the part cut off; 61 How. Pr. 197. See 95 Ill. 84; 85 Ia.

341. An owner does not lose his property in the soil by submersion or avulsion if he afterwards reclaims it by natural or artificial means, nor does the length of time during which the soil was submerged bar his rights; 169 Ill. 392.

Where the land of the riparian owner ended in an almost perpendicular bank from five to six feet high, to the foot of which the bed of the river reached, often rising some height above it, and by accretion caused by the planting of trees in the river a short distance from the bank by one who owned the bed of the river and a separate fishery, the accretion was held to be the property of the latter, and not of the riparian owner; [1896] 2 Ch. 1, practically reversing [1896] 1 Ch. 78. In the leading cases of Gould v. Hudson River R. Co., 6 N. Y. 522, it was held, Edmonds, J., dissenting, that "whatever rights the owner of the land has in the river, or in its shore below high-water mark, are public rights, which are under the control of the legislative power, and any loss sustained through the act of the legislature affecting them is *damnum abeque injuria*." Government grants for lands bordering upon navigable waters extend only to high-water mark; 85 Fed. Rep. 45. One riparian owner cannot build out into the stream, so as to injure the land of another riparian owner, even when armed with a license granted under act of parliament; L. R. 1 App. Cas. 662. The owner of lands situated on the sea cannot maintain ejectment for that portion of a wharf constructed on his land, which extends below low-water mark; 52 Cal. 385. The owner of both sides of a stream above tide-water has a right to the ice formed between his boundaries; 14 Chic. Leg. News 83. The intervention of a public road between an estate and a river does not prevent the owner of the estate from being considered as the front or riparian proprietor, when nothing susceptible of private ownership exists between the road and river; 44 La. Ann. 1043. A riparian proprietor of land bordering upon a running stream has a right to the flow of its waters as a natural incident to his estate, and they cannot be lawfully diverted against his consent; 133 U. S. 541.

As to riparian rights, see 10 L. R. A. 207, n.; 3 Kent [427]; RIVER; LAKES.

RIPTOWELL, or REAPTOWEL. A gratuity or reward given to tenants after they had reaped their lord's corn, or done other customary duties. Cowell.

RIPUARIAN LAW. A code of laws of the Franks, who occupied the country upon the Rhine, the Meuse, and the Scheldt, who were collectively known by the name Ripuarians, and their laws as Ripuarian law.

RISE. Used in the phrase "rising of the court" which has been held equivalent to "final adjournment" or "the last day of the term." 24 Am. & Eng. Encyc. 2nd ed., 983; 11 Neb. 165.

RISING OF THE COURT. See RISE.

RISK OF EMPLOYMENT. See ASSUMPTION OF RISK.

RISKS AND PERILS. In Insurance. Those causes against loss from which the insurer is to be protected in virtue of the contract for insurance.

The risk or peril in a life policy is death; under a fire policy, damage by fire; and under a marine policy, by perils of the seas, usually including fire; and under a policy upon subjects at risk in lake, river, or canal navigation, by perils of the same. See INSURABLE INTEREST; INSURANCE; POLICY; WARRANTY.

Under a marine insurance the risks are from a certain place to a certain other, or from one date to another. The perils usually insured against as "perils of the seas" are—fire, lightning, winds, waves, rocks, shoals, and collisions, and also the perils of hostile capture, piracy, theft, arrest, bar-

ratry, and jettisons. 1 Phill. Ins. § 1099. But a distinction is made between the extraordinary action of perils of the seas, for which underwriters are liable, and wear and tear and deterioration by decay, for which they are not liable; 1 Phill. Ins. § 1105. See PERILS OF THE SEA.

Perils of lakes, rivers, etc., are analogous to those of the seas; 1 Phill. Ins. § 1099, n.

Underwriters are not liable for loss occasioned by the gross misconduct of the assured or imputable to him; Biddle, Ins. 981; but if a vessel is seaworthy, with suitable officers and crew, underwriters are liable for loss though occasioned through the mistakes or want of assiduity and vigilance of the officers or men; 1 Phill. Ins. § 1049; Beach, Ins. 923. Underwriters are not answerable for loss directly attributable to the qualifications of the insured subject, independently of the specified risks; 1 Phillips, Ins. c. xiii. sect. v.; or for loss distinctly occasioned by the fraudulent or gross negligence of the assured.

Insurance against illegal risks—such as trading with an enemy, the slave-trade, piratical cruisers, and illegal kinds of business—is void; 1 Phill. Ins. §§ 210, 691. Policies usually contain express exceptions of some risks besides those implicitly excepted. These may be—in *maritime insurance*, contraband and illicit, interloping trade, violation of blockade, mobs and civil commotions; in *fire policies*, loss on jewelry, paintings, sculpture, by hazardous trades, etc.; in *life policies*, loss by suicide, risk in certain climates or localities, and in certain hazardous employments without express permission; 1 Phill. Ins. §§ 55, 63, 64. See LOSS; TOTAL LOSS; AVERAGE; ASSUMED RISK; ASSUMPTION OF RISK.

RIVAGE. In French law, the shore, as of the sea. In English law, a toll anciently paid to the crown for the passage of boats or vessels on certain rivers. Cowell.

RIVER. A natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and reflows with the tide. Woolrych, Wat. 40; 16 N. H. 467.

A body of flowing water; a running stream of no specific dimensions, larger than a brook or rivulet, and pent on either side by walls or banks; 7 Ind. App. 309.

Rivers are either public or private. Public rivers are divided into navigable and non-navigable,—the distinction being that the former flow and reflow with the tide, while the latter do not. Both are navigable in the popular sense of the term; Ang. Tide-Wat. 74; 7 Pet. 324; 5 Pick. 199; 26 Wend. 404; 4 B. & C. 602.

At common law, the bed or soil of all rivers subject to the ebb and flow of the tide, to the extent of such ebb and flow, belongs to the crown; and the bed or soil of all rivers above the ebb and flow of the tide, or in which there is no tidal effect, belongs to the riparian proprietors, each owning to the centre or thread,—*ad flum aquae*, which see,—where the opposite banks belong to different persons; Ang. Tide-Wat. 20; Daves 149; 5 B. & Ald. 268. In this country the common law has been recognized as the law of many of the states,—the state succeeding to the right of the crown; 4 Pick. 268; 26 Wend. 404; 31 Me. 9; 1 Halst. 1; 2 Conn. 481; 2 Swan 9; 16 Ohio 540; 4 Wis. 486; 117 Mo. 33. See 146 U. S. 387. But in some states the common-law distinction founded on the tide is not recognized, and it is held that the ownership of the bed of soil of all rivers navigable for any useful purpose of trade or agriculture, whether tidal or fresh-water, is in the state; 2 Binn. 475; 14 S. & R. 71; 3 Ired. 277; 1 McCord 590; 3 Ia. 1; 29 Miss. 21; 11 Ala. 436; 71 Hun 153; 122 Pa. 191. See 152 U. S. 1. At common law, the ownership of the crown extends to high-water mark; Ang. Tide-Wat. 69; 3 B. & Ald. 967; and in several states this rule has been followed; 12 Barb. 616; 3 Zab. 624; 7 Cush. 53; 7 Pet. 324; 3 How. 221; 25 Conn. 346; 44 N. J. Eq. 398; 124

U. S. 656; but in others it has been modified by extending the ownership of the riparian proprietor, subject to the servitudes of navigation and fishery, to low-water mark; 28 Pa. 206; 14 B. Monr. 367; 11 Ohio 138; 95 Ala. 116; see 122 Pa. 191; 84 Ky. 372; unless these decisions may be explained as applying to fresh water rivers; 2 Smith, Lead. Cas. 224.

In Wisconsin the riparian ownership extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels; 142 U. S. 254.

In Michigan, a grant of land bounded by a stream, whether navigable or not, carries with it the bed of the stream to the centre line thereof; 159 U. S. 87.

So in Ohio it was held that the ownership of a riparian proprietor to the middle of a navigable river does not carry with it the right to the exclusive use of the water over land ordinarily covered by water, but is subordinate to the paramount easement of navigation by the public, which includes the right to use such water for navigation and commerce, and such uses as may be reasonably incident thereto; Pollock v. Cleveland Ship Building Co., Ohio Sup. Ct., June 22, 1897. Among the rights of the public is that of mooring vessels for repairs and of putting in engine, boilers, and machinery, after such vessels have been launched; *id.* The right of the public does not extend to the use of lands not covered by water, and such use may be prevented by injunction, although the land may be unimproved and there is no present damage; *id.*

Upon the acquisition of territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the title and dominion over land under tide water passes to the United States for the benefit of the whole people and in trust for the several states; 152 U. S. 1.

In England, many rivers originally private have become public, as regards the right of navigation, either by immemorial use or by acts of parliament; Woolf, Wat. 40. In this country, all rivers, whether tidal or fresh-water, are, of common right, navigable highways, if naturally capable of use for the floating of vessels, boats, rafts, or even logs, or "whenever they are found of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market;" 8 Barb. 289; 31 Me. 9; 3 N. H. 321; 10 Ill. 351; 2 Swan 9; 2 Mich. 519; 5 Ind. 8. As to the navigability of rivers. See NAVIGABLE WATERS. The state has the right to improve all such rivers, and to regulate them by lawful enactments for the public good; 4 Rich. 69; 31 Me. 361; 5 Ind. 13; 29 Miss. 21. Any obstruction of them without legislative authority is a nuisance, and any persons having occasion to use the river may abate the same, or, if injured thereby, may receive his damages from its author; 28 Pa. 195; 4 Wisc. 454; 4 Cal. 180; 10 Mass. 70; 1 McCrary 281; 80 N. Y. 239; 53 Md. 422; 8 Mo. App. 266. See BRIDGE. One who seeks to abate an obstruction in a navigable stream and for an injunction must allege and show that the commerce for which he would utilize the stream is lawful; 50 Fed. Rep. 429. By the ordinance of 1787, art. 4, relating to the northwestern territory, it is provided that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between the same, shall be common highways and forever free; 29 Miss. 21; 2 Mich. 519.

Congress has absolute power over the navigable waters of the United States and may declare what constitutes obstruction thereto. The act of March 1, 1893, created a California *débris* commission and prohibited hydraulic mining "directly or indirectly injuring the navigability" of the Sacramento and San Joaquin river systems; the commission may, on petition, grant permission to mine. The act is intended to prohibit such mining until such

permission is granted; 81 Fed. Rep. 243, affirmed in 49 U. S. App. 2; s. c. 83 Fed. Rep. 2. See 7 Yale L. J. 385.

To bring obstructions and nuisances in navigable waters within a state within the cognizance of the federal courts, there must be a federal statute directly applicable to such streams; 81 Fed. Rep. 658.

Rivers, when naturally unfit for public use, as above described, are called private rivers. They are the private property of the riparian proprietors, and cannot be appropriated to public use, as highways, by deepening or improving their channels, without compensation to their owners; 16 Ohio 540; 6 Barb. 265; 8 Pa. 379; 10 Me. 278; 1 McCord 580. And see WATER-COURSE.

A river, then, may be considered—as private in the case of shallow and obstructed streams; as private property, but subject to public use, when it can be navigated; and as public, both with regard to its use and property. Some rivers possess all these qualities. The Hudson is mentioned as an instance; in one part it is entirely private property; in another, the public have the use of it; and it is public property from the mouth as high up as the tide flows; 6 Barb. 265. See, generally, La. Civ. Code 444; Bac. Abr. *Prerogatives* (B 3); Jacobsen, Sea Laws; 8 Kent 411; Woolf, Waters; Schultes, Aquatic Rights; Washb. R. P.; Cruise, Dig., Greenl. ed.; BOUNDARIES; FISHERY; RIPARIAN PROPRIETORS; POLLUTION.

In International Law. A river which is entirely within a state is part of its territory. Where a river forms a boundary between two states and flows to the ocean, it is "now generally considered that the right of navigation, for commercial purposes, is common to all the states inhabiting the different parts of its banks; but this is a right of innocent passage only, subject to the regulations of the abutting state. These rights have usually been adjusted by treaty; the Rhine is free in its whole navigable length, under the Congress of Vienna; and so of most of the other large rivers of Europe. In 1795, the free navigation of the Mississippi was secured to the United States by treaty. After much controversy, the St. Lawrence was, in 1871, stipulated to be free to the United States for the purposes of commerce, from the point where it ceased to be a boundary between it and Canada, to the sea, subject to the regulations of Great Britain or Canada, not inconsistent with such privilege. See 1 Halleck, Int. L., Baker's ed. 171.

Levees. The construction and maintenance of levees is an important subject of legislation in the states bordering on the Mississippi river and its tributaries. Such statutes usually provide for the construction of levees by some public authorities or under delegated power of eminent domain, and provide for a charge on the land benefited thereby for making and repairing the same. This tax is usually a lien on the land and applies to all lands lying within a certain specified distance of the Mississippi river. It has been held that such taxation is constitutional, and that the power, whether exercised for general or local purposes, belongs to the legislature and is not subject to interference from the court; 27 Miss. 209. The legislature has power to impose local taxation for such purposes, and laws imposing taxes upon certain districts, whether the citizens affected are of the same political division, subdivision, or district or not, are constitutional; 88 Miss. 652.

The building of the levees is a proper subject of legislation and a general tax may be levied therefor; 26 La. Ann. 564; 22 *id.* 58. In Louisiana, it has been made a criminal offence to cut levees; Laws 1875, 49. Crevasse in the district, do not release the owner of the land from the levee tax; there is in such case a greater necessity for its payment; 16 La. Ann. 440.

RIXA (Lat.). In Civil Law. A dispute; a quarrel. Dig. 48. 8. 17.

RIXATRIX (Lat.). A common scold.

ROAD. A passage through the country for the use of the people. 3 Yeates 421; and it is frequently used as a synonym of railroad; 46 N. J. L. 292; 33 Fed. Rep. 699; as when a charter power to take stock in companies for making "roads" to a city was held to authorize a subscription to the stock of a railroad; 161 U. S. 494.

A state statute imposing a duty of two days' labor in every year on each person for the purpose of keeping roads in repair is not unconstitutional; 91 Ga. 770; 36 N. E. Rep. (Ohio) 832. As to the constitutionality of an act authorizing the establishment of a private way over property of another, see EMINENT DOMAIN, where the cases are collected, and see also 4 Ore. 818, where such an act was held unconstitutional. See HIGHWAY; WAY; STREET; DEDICATION; EASEMENT.

In Maritime Law. An open passage of the sea, which, from the situation of the adjacent land and its own depth and width, affords a secure place for the common riding and anchoring of vessels. Hale, *de Port. Mar.* p. 2, c. 2. This word, however, does not appear to have a very definite meaning; 2 Chitty, Com. Law 4, 5. Often called "roadstead"; 2 Hugh. 17.

ROADBED, ROADWAY. The roadbed of a railroad "is the foundation upon which the superstructure of a railroad rests;" the roadway is the right of way which has been held to be the property liable to taxation; 32 Cal. 499, cited in 118 U. S. 413. See 25 Md. 353. The roadbed does not include ends of ties of unusual length; 60 Ark. 681. A space of 10 ft. between railroad tracks is not the roadbed; 31 S. W. Rep. (Mo.) 578.

ROBBATOR. A robber. Bract.

ROBBER. One who commits a robbery. One who feloniously and forcibly takes goods or money to any value from the person of another by violence or putting him in fear.

ROBBERY. In Criminal Law. The felonious and forcible taking from the person of another, goods or money to any value, by violence or putting him in fear. 4 Bla. Com. 243; Baldw. 103. See 12 Ga. 293; 33 Neb. 354; 2 N. Dak. 510; 29 N. E. Rep. (Ind.) 868.

"Whoever, by force and violence, or by putting in fear, shall feloniously take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years." § 284 Federal Criminal Code. 258 U. S. 420.

Taking property from the presence of another feloniously and by putting him in fear is equivalent to taking it from his personal protection and is, in law, a taking from the person. *Id.*

In this offence the kind and value of the property taken is not material, but it must be of some value, however little, to the person robbed; 61 Ala. 287; 73 N. C. 83; 58 Mo. 581.

Robbery, by the common law, is larceny from the person, accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence, or by putting in fear, in addition to the averments that are necessary in indictments for other larcenies; Jebb 62; 1 Leach 195; 7 Mass. 242; 17 *id.* 539; 8 Cush. 215.

By "taking from the person" is meant not only the immediate taking from his person, but also in his presence when it is done with violence and against his consent; 1 Hale, Pl. Cr. 533; 2 Russ. Cr. 61; 3 Wash. C. C. 209; 11 Humphr. 167; Whart. C. L. 847. The taking must be by violence or putting the owner in fear; but both these circumstances need not concur; for if a man should be knocked down, and then robbed while he is insensible, the offence is still a robbery; 4 Binn. 379. And if the party be put in fear by threats and then robbed, it is not necessary there should be any greater violence; 17 Mass. 539.

The violence or putting in fear must be at the time of the act or immediately preceding; 1 C. & P. 304. See 53 Kan. 324.

A person taking property from another under a *bona fide* claim of right, and with the purpose of applying it to the payment of a debt from the latter to himself, is not guilty of robbery, for in such case the *animus furandi* is lacking; 90 Ga. 701.

One who is present and aids and abets a robbery is punishable as a principal, though he receives none of the money, and the amount taken is immaterial; 104 Mo. 365.

ROCK GAS. See GAS.

ROE, RICHARD. See EJECTMENT; PLEDGES.

ROGATION DAYS. See ROGATION WEEK.

ROGATION WEEK. The second week before Whit Sunday, thus called from the three fasts observed therein, the Monday, Tuesday, and Wednesday, called *Rogation days*, because of the extraordinary prayers then made for the fruits of the earth, or as a preparation for the devotion of Holy Thursday. R. & L. Dict. See GANG-WEEK; GRASS WEEK.

ROGATORY LETTERS. See LETTERS ROGATORY.

ROGUE. A French word, which in that language signifies proud, arrogant. In some of the ancient English statutes it means an idle sturdy beggar, which is its meaning in law. Rogues are usually punished as vagrants. Although the word *rogue* is a word of reproach, yet to charge one as a *rogue* is not actionable; 5 Binn. 219. See 2 Dev. 162; Hard. 529.

ROGUES' GALLERY. A collection of the photographs of criminals. English. See PRISONER.

ROLE D'EQUIPAGE. The list of a ship's crew; the muster roll.

ROLL. A schedule of parchment which may be turned up with the hand in the form of a pipe or tube. Jacob, Law Dict.; 2 Hun 502.

In early times, before paper came in common use, parchment was the substance employed for making records, and as the art of bookbinding was but little used, economy suggested as the most convenient mode the adding of sheet to sheet, as was found requisite, and they were tacked together in such a manner that the whole length might be wound up together in the form of spiral rolls. Rolls of the exchequer are kept in that court relating to the revenue. The ancient manuscript registers of the proceedings in parliament were called *Rolls of Parliament*. A *Roll of the Temple* is kept in each of the two temples, called the *clerk's head roll*, wherein every bench, barrister, and student is taxed yearly.

The records of a court or offices.

ROLL OF A MANOR. See COURT ROLLS; COPYHOLD.

ROLLING STOCK. Rolling stock has been held in some cases to be a fixture, so far as to pass under a mortgage of the realty; 25 Ill. 357; 12 Bush 233; 3 Dill. 412. Where essential to the operation of the road, it is held to pass under a mortgage of the railroad; 56 Me. 458; 18 Md. 498; 6 Wall. 142. A mortgage of a railroad afterwards to be built, and of the rolling stock appurtenant to such road, attaches to the rolling stock as soon as it is acquired; 23 How. 117; 6 Biss. 529; 11 Wall. 459; Jones, Railr. Sec. 147. It is not essential that the rolling stock should be especially mentioned in the mortgage; general words are enough. For instance, a mortgage of a line of a railroad "with all the revenue or tolls thereof" covers rolling stock; 18 Md. 183. See also 53 Ala. 237; 4 Biss. 35. See FUTURE ACQUIRED PROPERTY.

Rolling stock has been held to be subject to execution as a chattel; 130 Ind. 97; and to attachment; 140 Mass. 131; so, when not in use; 37 N. H. 410; but where a company is insolvent or the equipment is mortgaged, it has been held not subject to execution; 3 Grant, Cas. 384. It is held that it may be sold for

taxes as personal property, notwithstanding a statute declaring it to be a fixture; 31 Wis. 44; and see 51 Ia. 184, 714. It is held to be a chattel in 29 N. J. 307, reversing 28 *id.* 277. The better opinion is said to be that it is personalty; 3 Wood, Rys. 1961, citing 39 Ia. 56; 53 Mo. 17; 54 N. Y. 315; 87 N. H. 410; 29 N. J. Eq. 811.

It is held that a mortgage of rolling stock should be recorded as a chattel mortgage; 29 N. J. Eq. 811; but it has also been held that chattel mortgage acts do not apply; 105 U. S. 77; 8 Dill. 412. The constitutions of some states provide that rolling stock shall be considered personal property and shall be liable to execution and sale. Such is the case in Arkansas, Illinois, Kentucky, Mississippi, Missouri, Nebraska, South Dakota, Texas, Washington, and West Virginia.

Of late years railroad companies have secured large quantities of rolling stock on deferred periodical payments, commonly known as the "car trust" plan. The contracts in some instances are drawn as *leases* from the builder or owner to the railroad company. In other cases they take the form of conditional sales. The earliest car trust was created in Pennsylvania in 1868. It is probable that the form of a lease or hiring of the cars, with a reservation of title in the former owner, was rendered necessary in that state because of the well-established rule there that a reservation of title under a conditional sale of a chattel is void as against the vendee's creditors, when the vendee is in possession. See SALES. The weight of authority would seem to hold that such contracts, though drawn in the form of bailments, if the aggregate of all the instalments is really the purchase price and the contract gives the "bailee" an option to purchase when all the payments have been made, are, in legal effect, conditional sales. It was said in 93 U. S. 664, in holding such a contract to be a conditional sale: "Nor is the transaction changed by giving it the form of a lease. In determining the real character of a contract, courts will always look to its purpose rather than to the name given it by the parties." So in 54 Vt. 544, the "hire" of an organ was held to be a conditional sale. To the same effect is 102 U. S. 235. See *id.* 1. In 102 U. S. 1, the court considered it unnecessary to decide the question. In 3 Super. Ct. Rep. (Pa.) 149, a "lease" or purchase on the instalment plan was held to be a conditional sale. So of the sale of a clock upon weekly payments, the aggregate of which amounted to the price of the article; 166 Pa. 89; s. c. 27 L. R. A. 388; but see 115 Pa. 487. In 84 Fed. Rep. 582, it was held that whether a contract for the sale of fixed machinery was a bailment or a conditional sale depended upon the intent of the parties. The contract there was held a bailment.

Statutes have been passed in nearly all the states and territories providing that conditional sales or contracts of leasing or hiring of railroad equipment shall be valid if duly acknowledged and recorded, and the name of the vendor, etc., placed on both sides of each car. Most of these acts are substantially uniform in their language. There is some diversity among them as to the place of record, some specifying the county where the principal office of the vendee is, others the counties through which its line runs, and still others the office of the secretary of state. Many of these acts were passed through the instrumentality of Joseph I. Doran, Esq., in 1881 to 1883, and others were passed in 1891 and subsequently, by the efforts of the present editor. An existing statute in Utah covers the necessary ground for the protection of these contracts. No acts exist in California, Idaho, or Nevada.

The lien on, or title to, cars thus sold is not subordinate to the lien of the company's mortgage; 99 U. S. 256; even if the contract has not been recorded; 102 U. S. 1.

Contracts of this kind usually contain a clause that the vendor or lessor may retake the property on default in the payment of instalments. Statutes in some of the states

forbid the retaking of chattels sold under the instalment plan except upon the condition of refunding the purchase-money paid, less a certain proportion to cover the depreciation. See 46 Ohio St. 450.

There is a conflict of authority as to the right of the vendor to collect unpaid purchase-money after retaking the property. Some cases hold that the retaking excludes further recovery; other cases hold that the remedies are not inconsistent. See 32 L. R. A. 455, where the cases are collected. The fact that the property has been destroyed after possession has passed to the conditional vendee or lessee does not relieve him from making the periodical payments; 107 N. C. 47; 66 Miss. 48; 58 Ill. 248; *contra*, 2 Tex. App. 153. See also 111 Mass. 355.

Usually a clause is inserted covering this ground, and the contract provides that the vendor, upon retaking, shall sell the property and credit the proceeds on the unpaid instalments, holding the vendee for the residue then remaining unpaid.

The usual lease notes or warrants given to cover the periodical payments have been held to be negotiable instruments; 136 U. S. 268.

A car trust association is an association of capitalists formed to buy and sell rolling stock, usually for a particular road. The members furnish the funds to buy the property and the association transfers it to the railroad company, usually through the intervention of a trustee, under a conditional sale (sometimes in the form of a lease), the purchase-money being payable in a series of years, by instalments, and the title to pass in the railroad company upon the payment of the final instalment. The trustee issues certificates to the members of the association indicating the amount of their investment. The railroad company pays the instalments with interest to the trustee, who distributes to the holders of the certificates. Such an association has been held to be a partnership; 140 U. S. 346; but in 29 Fed. Rep. 410, such an association was held to be an unincorporated association resembling those partnerships which are not dissolved by the death or bankruptcy of a member, or by the assignment of a member's interest, and such as are referred to in 102 U. S. 64; 114 *id.* 252. They are analogous to mining partnership; 23 Cal. 206. See PARTNERSHIP. They are said to be unincorporated joint stock associations with transferable shares; Poll. Contr. 222.

As to the status of car trust cars under railroad receiverships, see LEASE; MORTGAGE; RECEIVER; RECEIVERS' CERTIFICATES.

See a pamphlet by Davis & Browne, and a paper by the present editor in Am. Bar Assn. Reports (1895).

Cars of other companies in use on a railroad are materials furnished for its operation, and claims for their loss when destroyed are properly payable by the receivers as operating expenses; 83 Fed. Rep. 636.

A railroad company receiving the cars of other companies to be hauled in its trains is bound to inspect such cars before putting them on its trains, and is responsible for the consequence of defects in them which might have been discovered by a reasonable inspection; 157 U. S. 72.

See LEX REI SITÆ.

ROLLING STOCK (OF RAILWAYS) PROTECTION ACT. The act of 35 & 36 Vict. c. 50, passed to protect the rolling stock of railways from distress or sale in certain cases.

ROLLS, MASTER OF THE. See MASTER OF THE ROLLS; JUDICATURE ACTS.

ROLLS OFFICE. See RECORD OFFICE.

ROLLS OFFICE OF THE CHANCERY. An office in Chancery Lane, London, which contains rolls and records of the high court of chancery, of which the master of the rolls is keeper.

ROMAN CATHOLIC CHARITIES ACT. The stat. 23 & 24 Vict. c. 134, providing a method for enjoying estates given upon trust for Roman Catholics, but invalidated by reason of certain of the trusts being superstitious or otherwise illegal. 3 Steph. Com. 76. See **SUPERSTITIOUS USES**; **CHARITIES**.

ROMAN CATHOLIC CHURCH. The legal personality of the Roman Catholic Church, and its capacity to hold property in its insular possessions, is recognized; and the fact that such property was acquired from gifts, even of public funds, is held not to affect the absoluteness of its right. 212 U. S. 465; 210 U. S. 296. See **PAPACY**.

ROMAN LAW. See **CIVIL LAW**.

ROME-FEOH. See **PETER-PENCE**.

ROME PENNY, ROME SCOT, or ROME FEOH. See **PETER PENCE**.

ROME-PENNYING. See **PETER-PENCE**.

ROME-SCOT. See **PETER-PENCE**.

ROMNEY MARSH. A tract of land in the county of Kent, England, containing twenty-four thousand acres, governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of king Henry III.; from which laws all commissioners of sewers in England may receive light and direction. 3 Steph. Com. 442; 3 Bla. Com. 73.

ROOD OF LAND. The fourth part of an acre.

ROOT. The part of a tree or plant under ground from which it draws most of its nourishment from the earth. See **TREE**.

In a figurative sense, *root* is used to signify the person from whom one or more others are descended. See **CONSAQUINITY**; **LINE**.

ROPER. "Ropers" are persons, who by improper inducements, induce people to gaming houses in order that they may lose their money. 11 R. (Ky.) 282.

ROSE-RIAL. See **RIAL**.

ROTA (Lat.). A court. A celebrated court of appeals at Rome, of which one judge must be a German, one a Frenchman, two Spaniards, and eight Italians. Encyc. Brit. Its decisions had great weight, but were not law, although judged by the law. There was also a celebrated rota at Genoa about the sixteenth century, or before, whose decisions in maritime matters form the first part of *Straccha de Merc.* See **INGERSOLL'S ROCCUS**.

ROTULISCACCIARI. The rolls of the Exchequer. English.

ROTURIER. In Old French Law. One not noble. *Dict. de l'Acad. Franc.* A free commoner; one who did not hold his land by homage and fealty, yet owed certain services. Howard, *Dict. de Normandie*.

ROUP. In Scotch Law. Sale by auction. Auction. Bell, *Dict. Auction*.

ROUT. A disturbance of the peace by persons assembled together with an intention to do a thing which if executed would have made them rioters, and actually making a motion towards the execution of their purpose. Hawk. Pl. C. 516.

It generally agrees in all particulars with a riot, except only in this: that it may be a complete offence without the execution of the intended enterprise; *id.* c. 65, s. 14; 1 Russ. Cr. 253; 4 Bla. Com. 140. Where a number of persons met, staked money, and agreed to engage in a prize-fight, it was held a rout; 2 Speers 599. Not less than three assembled persons are sufficient to constitute the offence; 2 Bish. Cr. L. § 1186. See **RIOT**.

ROUTE. See **THROUGH ROUTE**.

ROUTOUSLY. A technical word, properly used in indictments for a rout as descriptive of the offence. 2 Salk. 593.

ROYAL ASSENT. See **LE ROI LE VEUT**; **VETO**.

ROYAL BURGHS. Boroughs incorporated in Scotland by royal charter. Bell.

ROYAL COURTS OF JUSTICE. The buildings, together with all the additions thereto, erected under the statute 28 & 29 Vict. c. 48, 49.

ROYAL FISH. See **FISH ROYAL**.

ROYAL GRANTS. Conveyances of record in England. They are of two kinds: letters patent and letters close; 2 Bla. Com. 846. See **PATENT**.

ROYAL HIGHWAYS. See **HIGHWAYS**, **ROYAL**.

ROYAL HONORS. In diplomatic language, by this term is understood the rights enjoyed by every empire or kingdom in Europe, by the pope, the grand duchies of Germany, and the Swiss confederation, to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other states public ministers of the first rank, as ambassadors, together with other distinctive titles and ceremonies. Vattel, *Law of Nat.* b. 2, c. 3, § 88; Wheat. *Int. Law* pt. 2, c. 3, § 2.

ROYAL HORSE GUARDS. In England, a part of the King's body-guard. See **HORSE GUARDS**.

ROYAL MARRIAGES ACT. See **MARRIAGES ACT**, **ROYAL**.

ROYAL MINES. See **MINES AND MINING**.

ROYALTY. A payment reserved by the grantor of a patent, mining lease, etc., and payable proportionately to the use made of such right, 1 Ex. Div. 810. See **PATENT**, **RENT**, *Rent and Royalty*.

RUBRIC. The title or inscription of any law or statute; because the copyists formerly drew and painted the title of laws and statutes in red letters (*rubro colore*). Ayliffe, *Pand.* b. 1, t. 8; *Dict. de Jur.*

RUDENESS. An impolite action, contrary to the usual rules observed in society, committed by one person against another. This is a relative term, which it is difficult to define, and must be considered with reference to the station in life which the parties occupy; 2 Hagg. Eccl. 731. See **BATTERY**.

RULE. A regulation or formula to which conduct must be conformed. See **GENERAL RULES**.

An order or direction. See **ORDER**. To establish by direction; to determine; to decide.

RULE ABSOLUTE. If, upon the hearing of a rule to show cause, the cause shown should be decided insufficient, the rule is made absolute, *i. e.* the court makes final order for the party to perform the requirements of the rule. See **RULE NISI**.

RULE, CONSENT. See **CONSENT RULE**.

RULE OF COURSE. A rule which a court authorizes their officers to grant without formal application to a judge.

RULE OF COURT. An order made by a court having competent jurisdiction. Rules of court are either general or special; the former are the laws by which the practice of the court is governed; the latter are special orders made in particular cases.

Disobedience to these is punished by giving judgment against the disobedient party, or by attachment for contempt. See **RULES OF PRACTICE**; **GENERAL ORDERS**.

RULE DAY. The regularly appointed

day on which to make orders to show cause returnable.

In the United States circuit court it is the first Monday of each month, on which subpoenas are to be made returnable, and answers and replications filed.

RULE DISCHARGED. A rule set aside, either on an application made for that purpose to the court in which the proceeding is pending, or to a court of appeal. 9 Am. & Eng. Encyc., 2nd ed., 466.

RULE OF LAW. A general principle of law, recognized as such by authorities. It is called a rule because in new cases it is a rule for their decision; it embraces particular cases within general principles; 1 Bla. Com. 44; Ram, *Judgm.* 30; 8 B. & Ad. 34; 1 B. & C. 86; 4 Maule & S. 348. See **MAXIM**.

RULE NISI. In Practice. A rule obtained on motion *ex parte* to show cause against the particular relief sought. Notice is served on the party against whom the rule is obtained, and the case is then heard like other motions, except that the party showing cause is entitled to open and reply. The rule is made absolute unless (*nisi*) good cause is shown against it; 8 Steph. Com. 680.

RULE, OFFICE. See **RULE OF COURSE**.

RULE TO PLEAD. A rule of court requiring defendant to plead within a given time, entered as of course by the plaintiff on filing his declaration, or thereafter. On defendant's failure to put in his plea accordingly, a judgment in the nature of a judgment by default may be entered against him. In England, under the common-law Procedure Act of 1853, the rule to plead is abolished, a notice to plead indorsed on the declaration being sufficient. The Judicature Act of 1875 allows the defendant eight days for his defence after the delivery of the statement of claim.

RULE OF THE ROAD. See **NAVIGATION RULES**; **HIGHWAY**; **BICYCLES**.

RULE OF 1793. Where a commerce which had previously been considered a nominal monopoly is thrown open, in time of war, to all nations, by a general regulation, neutrals have no right to avail themselves of the concession, and their entrance on such trade is a breach of the impartiality they are bound to observe. 2 Halleck, *Int. L.* 302.

RULE IN SHELLEY'S CASE. See **SHELLEY'S CASE**, **RULE IN**.

RULE TO SHOW CAUSE. An order made by the court, in a particular case, upon motion of one of the parties calling upon the other to appear at a particular time before the court, to show cause, if any he have, why a certain thing should not be done.

This rule is granted generally upon the oath or affirmation of the applicant; but upon the hearing the evidence of competent witnesses must be given to support the rule, and the affidavit of the applicant is insufficient. See **RULE ABSOLUTE**; **RULE NISI**.

RULE, SIDE-BAR. See **RULE OF COURSE**.

RULE OF THE WAR OF 1756. A rule relating to neutrals, practically established in 1756, and universally promulgated, providing that "neutrals are not to carry on in times of war a trade which was interdicted to them in times of peace." Chitty, *Law of Nat.* 166; 2 C. Rob. 186; 4 *id.* App.; 1 Kent 82.

RULES. Certain limits without the actual walls of the prisons, where the prisoner, on proper security previously given to the proper authority, may reside. These limits are considered, for all legal and practical purposes, as merely a further ex-

tension of the prison walls. So used in America. See 3 Bibb 202. The rules or permission to reside without the prison may be obtained by any person not committed criminally; 2 Stra. 845; nor for contempt; *id.* 817; by satisfying the marshal or warden or other authority of the security with which he may grant such permission. See CROSS-RULES.

Proceedings in an action out of court, and in vacation time. See 12 Gratt. 812.

RULES OF PRACTICE. Certain orders made by the courts for the purpose of regulating the practice of members of the bar and others.

Every court of record has an inherent power to make rules for the transaction of its business; which rules they may from time to time change, alter, rescind, or repeal. While they are in force, they must be applied to all cases which fall within them; they can use no discretion, unless such discretion is authorized by the rules themselves. Rules of court cannot, of course, contravene the constitution or the law of the land; 3 Pick. 512; 2 Harr. & J. 79; 1 Pet. 604; 3 S. & R. 253. See **RULE OF COURT**; **GENERAL ORDERS**.

RULES OF PROCEDURE. "Rules of procedure" are rules made by any legislative body as to the mode and manner of conducting the business of the body. They are intended for the orderly and proper disposition of the matters before it. 50 S. W. 859.

RUM. See INTOXICATING LIQUOR.

RUMOR. A general public report of certain things, without any certainty as to their truth.

In general, rumor cannot be received in evidence; but when the question is whether such rumor existed, and not its truth or falsehood, then evidence of it may be given. See **LIBEL**; **EVIDENCE**.

RUMP PARLIAMENT. The remnant of the Long Parliament after the expulsion by Cromwell in 1648 of those who opposed his purposes. It was dissolved by Cromwell in 1653, but twice revived for brief sessions, ending finally in 1659. Webster.

RUN. A watercourse of a small size. 2 Bibb 354. The word is sometimes used interchangeably with creek. 7 Wheat. 162.

RUN. To take effect in point of place, as of a writ running in given localities; or in point of time, as of the running of the Statute of Limitations. R. & L. Dict.

To stroll without restraint or confinement; as, for an animal "to run at large." Anderson.

To pass, spread, communicate; as, in a statute providing for the payment of damages by a person who set a fire that "run upon the land" of another. *Id.*; 30 Conn. 306.

A covenant "runs with land" when the liability to perform it, or the right to take advantage of it, passes to the assignee or purchaser. *Id.*; 1 Sm. L. C. 137-228.

Warrants of commitment and indictment "run in the name" of a state when they bear upon their face the name of the proper state as the nominal actor or prosecutor. *Id.*

RUNCINUS (Lat.). A nag. 1 Thomas, Co. Litt. 471.

RUNNING ACCOUNT. An open account. See 2 Para. Contr. 351; **ACCOUNT**; **MERCHANTS' ACCOUNTS**; **LIMITATIONS**.

RUNNING AT LARGE. A term applied to animals estray, wandering apparently without owner or keeper, and not confined to any certain place. The phrase has been judicially construed in a number of recent cases. In 50 Vt. 130, a hound, in close pursuit of a fox, and out of sight and hearing of its master, was held not to be within the meaning of a statute permitting any one to kill a dog "running at large off the premises of the owner or keeper, without a collar with the keeper's name on it." Animals escaping from the owner's premises cannot be said to be running at large; the phrase implies permission or assent, or at least some fault, on the owner's part; 21 Hun 249; but *contra*, 53 Ia. 632. See 52 Cal. 653; 23 Alb. L. J. 504. An animal running on the range where it was permitted to run by its owner has been held not an estray, especially where the owner was known to the person taking it up; 4 Oreg. 206; 27 Wisc. 422; 29 Ia. 487. See **ESTRAY**; **POUND**.

RUNNING DAYS. Days counted in succession, without any allowance for holidays. The term is used in settling lay-days or days of demurrage, which see.

RUNNING WITH THE LAND. A technical expression applied to covenants real which affect the land. See **COVENANT**.

RUNNING LANDS. In Scotch Law. Lands where the ridges of a field belong alternately to different proprietors. Bell, Dict.

RUNNING POLICY. One which contemplates successive insurance and provides that the object of the policy may be from time to time defined by additional statements or indorsements. Cal. Civ. Code § 2597.

It covers such goods, at such amounts of insurance, in such storehouses and places, and at such rates of premiums, as from time to time shall be agreed upon and indorsed on the policy or in a book attached thereto, the purpose being to obviate the necessity of executing a fresh policy for every transaction. Richards, Insur. Law, 3rd ed., 22; 169 N. Y. 143; 138 N. Y. 16.

RUNNING OF THE STATUTE OF LIMITATIONS. A metaphorical expression, by which is meant that the time mentioned in the statute of limitations is considered as passing. See **LIMITATIONS**.

RUNNING SWITCH. A "running switch" is made by first starting the train with sufficient speed to give it momentum, and by uncoupling the engine and the car or cars, and turning the switch that led onto a parallel track, at the proper time, so that the engine would pass onto the parallel track; and by a quick throwing of the switch, the car that had been detached from the front of the engine would pass down the main line. 149 Ky. 55, 147 S. W. 942.

RURAL DEAN. Rural deans, or *decani rurales*, certainly existed during the Anglo-Saxon period. It was then their duty to exercise many of the functions subsequently exercised by the archdeacon. About the thirteenth century, the archdeacon took over most of the work of the rural deans, and comparatively little was heard of them until within the last hundred years. Now they form part of the machinery of every diocese. The preparation of children for confirmation is the most important part of their work. They are required also to execute all processes and writs directed to them by the bishop, and to report to him on the lives of the clergy of the various parishes within the respective rural deaneries; but these latter duties are largely theoretical. Every archdeaconry is an aggregation of rural deaneries. Byrne. See **RURAL DEANERY**.

RURAL DEANERY. The circuit of the jurisdiction of a rural dean. Every diocese is divided into archdeaconries, each archdeaconry into rural deaneries, and each rural deanery into parishes. Abbott; Cowel. See **RURAL DEAN**.

RURAL SANITARY AUTHORITIES. See **SANITARY AUTHORITIES**.

RURAL SERVITUDE. See **SERVITUDE**.

RUSE DE GUERRE (Fr.). Literally, a trick in war. A stratagem. It is said to be lawful among belligerents, provided it does not involve treachery and falsehood. Grotius, *Droit de la Guerre*, liv. 3, c. 1, § 9.

RUSTICUM JUDICIUM. A rough judgment or decision, applied in maritime law when the blame for a collision is undiscoverable. 3 Kent 231.

RUTA (Lat.). In Civil Law. The name given to those things which are extracted or taken from land: as, sand, chalk, coal, and such other things. Pothier, Pand. l. 50.

RYOT. In India. A peasant, subject, or tenant of house or land. Whart. Dict.

S.

S. C. Abbreviation for same case; select cases; or supreme court. *Anderson*.

S. S. A collar formerly worn on state occasions by the Lord Chief Justice of England, and of the Common Pleas and the Lord Chief Baron—now only by the first named of these (*q. v.*).

SABBATH. A name sometimes used for Sunday (*q. v.*).

Sabbath and Sunday are used indiscriminately to denote the Christian Sabbath, Sunday; 64 N. C. 591.

SABBATH-BREAKING. The desecration of the Lord's day. 45 Md. 432. See **SUNDAY**.

SABBULONARIUM. A gravel pit, or liberty to dig gravel and sand; money paid for the same. *Cowel*.

SABINIANS. A sect of lawyers whose first chief was Attius Capito, and the second Cælius Sabinus, from whom they derived their name. *Clef des lois Rom.*

SABLE. The heraldic term for black. It is called *Saturn* by those who blazon by planets, and *Diamond* by those who use the names of jewels. Engravers commonly represent it by numerous perpendicular and horizontal lines crossing each other. *Whart. Law Lex.*

SAC, SAK (Lat. *saca* or *sacha*). An ancient privilege, which a lord of a manor claimed to have in his court, of holding plea in causes of trespass arising among his tenants, and imposing fines touching the same.

SACABURTH, SACABERE (from *sac*, cause, and *burh*, pledge). He that is robbed and puts in surety to prosecute the felon with fresh suit. *Britton*, c. 15, 29; *Bracton*, l. 3, c. 32; *Cowel*.

SACCUS CUM BROCHIA. A service or tenure of sending a sack and a broach (pitcher) to the sovereign for the use of the army. *Bract*, l. 2, c. 16.

SACQUIER. In Maritime Law. The name of an ancient officer, whose business was to load and unload vessels laden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise. *Laws of Oleron*, art. 11, published in an English translation in 1 Pet. Adm. xxv. See **ARRAMEUR**; **STEVEDORE**.

SACRAMENTALES (L. Lat. *sacramentum*, oath). *Compurgatores*, which see. *Jurors. Law Fr. & Lat. Dict.*

SACRAMENTUM (Lat.). In Civil Law. A gage in money laid down in court by both parties that went to law, returned to him who had the verdict on his side, but forfeited by the party who was cast, to the exchequer, to be laid out in *sacris rebus*, and therefore so called. *Varro*, lib. 4. *de Ling. Lat.* c. 36.

An oath, as a very sacred thing. *Ainsworth, Dict.*; *Vicat, Voc. Jur.*

Sacramentum Fidei *tutatis*. The oath of fealty. See **FEALTY**.

The oath taken by soldiers to be true to their general and country. *Id.*

SACRAMENTUM DECISIONIS (Lat.). The voluntary or decisive oath of the civil law, where one of the parties to a suit, not being able to prove his case, offers to refer the decision of the cause to the oath of his adversary, who is bound to accept or make the same offer on his part,

or the whole is considered as confessed by him. 8 Bla. Com. 342.

SACRILEGE, SACRILEGIUM. The act of stealing, from the temples or churches dedicated to the worship of God, articles consecrated to divine uses. *Ayliffe, Parerg.* 476; *Cowell*. Also, the alienation to laymen of property given to pious uses. *Par. Ant.* 390.

SADISM. Active algolagnia or the gratification of sexual desire by inflicting pain. It is to be distinguished from masochism or passive algolagnia which is the gratification of the sexual instinct by suffering pain. In religion, Sadism is shown in religious sacrifices, persecutions, hell-fire doctrines, the puritanical suppression of harmless pleasures, and in many hymns that dwell on suffering, etc. *Bridges, Outline Abn. Psych.* 73, 83. See **MASOCHISM**.

SÆMEND. An umpire, arbitrator. *Anc. Inst. Eng.*

SEVITIA (Lat.). Cruelty. To constitute *sevitia* there must be such a degree of cruelty as to endanger the party's suffering bodily hurt. 1 Hagg. Cons. 35; 2 Mass. 150; 4 *id.* 587.

SAFE. (n). A place for keeping things in safety. Specifically, a strong and fireproof receptacle (as a movable chest of steel, etc., or a closet or vault of brickwork) for containing money, valuable papers, or the like. Also, a ventilated or refrigerated chest or closet for securing provisions from noxious animals or insects. *Webster*.

(adj.) Free from danger of any kind, as safe from enemies, safe from disease, safe from storms, safe from the malice of foes, etc. 14 Bush (Ky.) 590. See **REASONABLY SAFE**.

SAFE-CONDUCT. A written permission given by a belligerent government, or one of its naval or military commanders, enabling an enemy subject to go to a particular place for a particular object. *Risley, Law of War* 156.

According to common usage, the term *passport* is employed on ordinary occasions for the permission given to persons when there is no reason why they should not go where they please; and *safe-conduct* is the name given to the instrument which authorizes certain persons, as enemies, to go into places where they could not go without danger unless thus authorized by the government.

A safe-conduct is said to be a name given to an instrument which authorizes an enemy or an alien to go into places where he could not go without danger, or to carry on trade forbidden by the laws of war; it may cover either persons or things, while a passport usually is given to a friend and applies only to persons. 2 Halleck, *Int. L.*, Baker's ed. 323.

They may be given for a certain time only and revoked for cause, the holder being allowed to withdraw in safety.

The grantor of the safe-conduct tacitly pledges himself to protect the holder of it and to punish any person subject to his command who may violate it. Should the holder be detained beyond the time limited, by illness or some cause over which he has no control, he should still be protected, but if he otherwise exceeds the limited time, he is subject to the ordinary rules of war or to penalties, if such are imposed by the law of the place; *Risley, L. of War* 156.

For a limited territory, they may be framed by a commander; but when general, they must proceed from the supreme authority.

The name of an instrument given to the captain or master of a ship to proceed on a particular voyage: it usually contains his name and residence, the name, description, and destination of the ship, with such other matters as the practice of the place requires. This document is indispensably necessary for the safety of every neutral ship.

The act of congress of April 30, 1790, s. 27, punishes the violation of any safe-conduct or passport granted under the authority of the United States, on conviction, with imprisonment, not exceeding three years, and a fine at the discretion of the court.

See **PASSPORT**; 18 *Viner*, Abr. 272.

SAFE DEPOSIT COMPANY. A company which maintains vaults for the deposit and safekeeping of valuables in which compartments or boxes are rented to customers who have exclusive access thereto, subject to the oversight and under the rules and regulations of the company. It was formerly the custom for banks to accept gratuitously the custody of boxes containing securities for their customers; but this custom has been discontinued since the establishment of companies making that their special business. The relation of the company to the depositor is rather that of bailor and bailee, though it has been said that there is a resemblance to the relation of landlord and tenant, but that it exists merely in form; 9 *Harv. L. Rev.* 131; but a case of joint renting, cited *infra*, seems to the contrary. The reasons given for the relation of bailor and bailee are that by analogy to the case of an agreement for board and lodging, there is no interest acquired by the depositor in the real estate, and the agreement of the company for safekeeping established the relation of bailor and bailee; *id.* 132. This view has been sustained in the courts; 123 N. Y. 57; 90 *id.* 4. In the latter case the plaintiff had an allotment of space in a storage house for the safekeeping of household furniture under an agreement that the same would be securely kept and guarded. The action was brought to recover damages for the loss of the property by theft committed by persons in charge of the building, and the relation of the parties was described by Earl, J., as "a species of bailment like that existing in the case of a depositor in a safe deposit company who hires a box for his valuables and keeps the key." In such case he says further, that the company, without special contract, would be held to at least ordinary care, the duty of which would arise from the nature of the business and the relation of the parties.

From this relation springs naturally the obligation and liability of the company, and where the contract was that the depositor was to "keep a constant and adequate guard and watch over and upon the safe," and the bonds were stolen, there being no evidence that the vault was broken or the lock tampered with, it was held to throw upon the company the burden of showing whether it was guilty of negligence, and that question was properly left to the jury; 85 Pa. 391.

Where property was taken from the safe under a search warrant against the depositor, the description in which did not actually correspond with the property taken, the company was held liable for not resisting so far as it was able to do, and contenting itself with a mere protest; 153 N. Y. 57. The burden of proof in actions against such companies for damages on account

of negligence is, in accordance with the general rule in similar cases, upon the plaintiff unless, as in the Pennsylvania case above cited, there is *prima facie* evidence of negligence on the part of the defendant which demands an explanation and a *prima facie* case is made by the bailor when he shows such loss or damage to the chattels as ordinarily does not happen if such care as the law requires has been exercised; *Edw. Bailm. § 399; 14 Mo. App. 431; 46 N. Y. 490; 9 Harv. L. Rev. 134.*

An important question arises as to the position and duty of the company where legal proceedings are taken against the property of the depositor, and the conclusion from an examination of the subject is thus stated: "The extent of their duty is reached in satisfying themselves beyond question that the process is legal and regular; and that, this being so, the company is exempt from all responsibility for the subsequent acts of the officer under it; . . . that the company cannot be subjected to garnishment or trustee process; that the only process by which property deposited with it can be reached is through seizure by the sheriff under direct attachment; also that the company is not liable for property of third persons taken from the safe of the debtor, either as his property or because confused with this property." *9 Harv. L. Rev. 135.* That there can be no garnishment in such case would seem to arise from the principle that to be subjected to it, a bailee must have more than constructive possession; as, in the case of baggage in transportation, horses in a livery stable, etc.; *Waples, Attachment § 453.* The point was directly decided with respect to a safe deposit company in *8 Phila. 91*; and as to a locked trunk deposited in a bank vault in *7 Cush. 487.*

The property in the safe may be seized under a direct attachment; *67 Barb. 304; 123 N. Y. 57.* The officer may be directed in the order of attachment to open the safe, and the company's officers may be required to give such assistance as will not lead to a breach of trust; *9 Harv. L. Rev. 139.* It has been held that an officer may force the door of a warehouse if refused admittance by those in charge of it; *18 Vt. 186*; and in the case of a safe deposit company the officers and representatives of the company were not allowed to be present at the time of the opening of the safe by the sheriff; *67 Barb. 304.*

In case of a joint rental of a safe by two or more persons, they were treated as co-tenants of real estate, and a renewal of the lease obtained by one of the renters in his own name was held to inure to the benefit of the co-tenants; *40 N. Y. St. 813.* Where one co-tenant abstracted, without authority, a stock certificate and transferred it to an innocent purchaser for value, it was held that it had not been intrusted to the possession of the wrongdoer either directly or by implication, and he was not authorized to remove it from the box and the transfer passed no title; *53 Fed. Rep. 520.*

SAFE LOADING PLACE. A place where a vessel can be rendered safe for loading by reasonable measures of precaution. *14 Q. B. D. 105; 54 L. J. Q. B. 121.*

SAFE PLACE DOCTRINE. In *Mine.* The duty to make safe the place where the miner is extracting coal, being a duty not fixed by law, but by the mining contract, or, in the absence of a contract, by the rule or custom in force in the mine at the time, it is possible for the respective duties of the miner and the mine operator to vary in different mines.

Generally speaking, however, the making safe of the miner's working place, i. e., the place where he is extracting coal, may be divided into three duties: (1) the duty of examining the roof and of determining when protection must be provided against possible falling of the roof, and whether ordinary props will be sufficient protection, or whether timbering is necessary; (2) the duty of

placing the props in position, when ordinary props have been deemed insufficient protection. By "prop" is meant an upright post surmounted by a square block wedged between the top of the post and the roof. *161 Ky. 335, 170 S. W. 960.*

SAFE-PLEDGE. A surety given that a man shall appear upon a certain day. *Bracton, l. 4, c. 1.*

SAFEGUARD. A protection of the king to one who is a stranger, who fears violence from some of his subjects for seeking his right by course of law. *Reg. Orig. 26.*

Protection granted by an officer commanding belligerent forces, for persons or property within the limits of their commands, and against the operations of their own troops. *3 Halleck, Int. L., Baker's ed. 325.*

SAFELY. "Safely and securely" in a declaration in bailment means with due care. *15 L. J. C. P. 182.*

SAFETY APPLIANCE ACT. Act of March 2, 1893, c. 196, 27 Stat. 531, as amended by Act of March 2, 1903, c. 976, 32 Stat. 943. The act requires that all locomotives, cars, and similar vehicles used on any railway engaged in interstate commerce shall be equipped with certain designated safety appliances, regardless of whether such vehicles are used in moving intrastate or interstate traffic. *4 Michie, Carriers, 3450.*

SAID. Before mentioned.

In contracts and pleadings it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate them by the term *said* or *aforesaid*, or by some similar term; otherwise the latter description will be ill for want of certainty. *Com. Dig., Pleader (C. 18); Gould, Pl. § 63.* Adopted in *28 Tex. App. 379.*

The reference of the word *said* is to be determined, in any given case, by the sense. The relative *same* refers to the next antecedent, but in the interpretation of a written instrument, the word *said* does so only when the plain meaning requires it; *2 Kent 555; 10 Ind. 373.* See *97 Ind. 503.*

SAILING. It is sometimes important, in the construction of a charter party, or marine insurance policy, to know when a vessel commenced her voyage, and to this end to determine what constitutes a *sailing*. It has been held that *complete* readiness for the sea, with the intention of proceeding at once on the voyage, is sufficient, though head winds should prevent any actual progress; *20 Pick. 275*; see *32 Fed. Rep. 842*; but the word *sail* is held to be a technical word and to mean to start on a voyage; *34 L. J. C. P. 195*; so a ship which drew out from its wharf and anchored in a river, whence it proceeded the next day, sailed on the latter day; *[1898] 1 Q. B. 27.* It has also been held that some measurable progress, though by towboat, is also necessary; *4 W. N. C. Pa. 415.* See **NAVIGATION, RULES OF.**

If the vessel quits her moorings and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is, nevertheless, a sailing; *3 B. & Ad. 514.* There can be no "sailing" without a clear intention on the part of the master to proceed directly on his voyage; *[1898] 1 Q. B. 27.* Moving from the wharf into the stream may be enough; *id.* See *37 Am. L. Reg. N. S. 201*, an article by Erskine Hazard Dickson.

As advanced freight is frequently made payable at or within a certain time after *final sailing* from the port of loading, there has been much discussion as to the meaning of both of these terms. In the leading English case, *Parke, B.*, considered that *final sailing* "meant more than if the word sailing were used alone," that it had reference to the particular port of Cardiff, out of which the vessel sailed, meaning a final departure and being out of the limits of

the artificial port, at sea, ready to proceed upon her voyage; *23 L. J. Ex. 169.* Where the ship left the harbor to anchor in the roadstead and lie there until the crew should be completed, without the intention of returning to the harbor, it was held that she had not sailed; *34 L. J. Q. B. 340*; so also where the master took the vessel out of the port and left her in the roads under easy sailing, while he returned ashore to complete her papers; *28 id. 239.* "Final sailing I apprehend means getting clear of the port for the purpose of proceeding on the voyage;" *Lindley, L. J., in 9 Q. B. D. 679.*

SAILING INSTRUCTIONS. In *Maritime Law.* Written or printed directions, delivered by the commanding officer of a convoy to the several masters of the ships under his care, by which they are enabled to understand and answer his signals, to know the place of rendezvous appointed for the fleet in case of dispersion by storm, by an enemy, or by any other accident.

Without sailing instructions no vessel can have the full protection and benefit of convoy. *Marsh. Ins. 368.*

SAILORS. Seamen; mariners. See **SEAMEN; SHIPPING ARTICLES.**

ST. MARTIN LE GRAND, COURT OF. An ancient court in London, of local importance, formerly held in the church from which it took its name.

SAIO. A tip-staff or sergeant-at-arms. *Cowel.* In *Gothic Law.* The ministerial officer of a court or magistrate, who brought parties into court, and executed the orders of his superior. *Spelman* thinks the word may be derived from the Sax. *sagol*, or *saiol*, a staff, giving it the sense of the modern tipstaff. *Burnell.*

SAISIE-ARRET. In *French Law.* An attachment of property in the hands of a third person.

SAISIE-EXECUTION. In *French Law.* A writ of execution by which the creditor places under the custody of the law the movables of his debtor, which are liable to seizure, in order that out of them he may obtain payment of the debt due by him. *La. Code of Pract. art. 641; Dalloz, Dict.* It is a writ very similar to the *fiery facias* of the common law.

SAISIE-FORAINNE. In *French Law.* A permission given by the proper judicial officer to authorize a creditor to seize the property of his debtor in the district which he inhabits. *Dalloz, Dict.* It has the effect of an attachment of property, which is applied to the payment of the debt due.

SAISIE-GAGERIE. In *French Law.* A conservatory act of execution, by which the owner or principal lessor of a house or farm causes the furniture of the house or farm leased, and on which he has a lien, to be seized, in order to obtain the rent due to him. It is similar to the *distress* of the common law. *Dalloz, Dict.*

SAISIE-IMMOBILIERE. In *French Law.* A writ by which the creditor puts in the custody of the law the immovables of his debtor, that out of the proceeds of their sale he may be paid his demand.

SALADIN'S TENTH. A tax imposed in England and France, in 1188, by Pope Innocent III., to raise a fund for the crusade undertaken by Richard I. of England and Philip Augustus of France, against Saladin, Sultan of Egypt, then going to besiege Jerusalem. *Encyc. Lond.; Whart.*

The tax was one-tenth of all goods and chattels; it did not extend to land. *Juries* were employed to assist in the assessment. It was the first tax on personal property. *Byrne.*

SALARY. A reward or recompense for services performed.

It is usually applied to the reward paid to a public officer for the performance of his official duties. (Adopted in *24 Fla. 29.*)

Salary is also applied to the reward paid for the performance of other services; but if it be not fixed for each year it is called honorarium. Pothier, Pand. According to M. Duvergier, the distinction between honorarium and salary is this. By the former is understood the reward given to the most elevated professions for services performed; and by the latter the price of hiring of domestic servants and workmen; 19 Toulhier, n. 268, p. 292, note.

There is this difference between salary and price; the former is the reward paid for services or for the hire of things; the latter is the consideration paid for a thing sold; *Leq. Elem.* § 907. Salary seems to denote a higher degree of employment and is suggestive of a larger compensation for more important services than wages, which indicates inconsiderable pay; 69 Hun 291. See also 42 Alb. L. J. 332; 99 Pa. 542; 10 Md. 85, where salary is regarded as a per annum compensation, while wages are defined as compensation paid or to be paid by the day, week, etc.

SALE. An agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser who, on his part, agrees to pay such price. 2 Kent 363; Pothier, *Vente*, n. 1.

Ordinarily a transfer of property for a fixed price in money or its equivalent. 110 U. S. 471; 47 Fed. Rep. 604.

An executed sale is both a contract and a conveyance.

This contract differs from a barter or exchange in this; that in the latter the price or consideration, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. 12 N. H. 390; 43 La. 194; 65 Ind. 409; 21 Vt. 520. See PRICE. It differs from accord and satisfaction, because in that contract the thing is given for the purpose of quieting a claim, and not for a price; and from bailment, because there the agreement is for the return of the subject-matter, in its original or an altered form, while in sale it is for the return of an equivalent in money; L. R. 3 P. C. 101; 81 Tex. 505; and see 100 Mass. 198; 79 Pa. 488; 39 Conn. 70; 55 Ill. 45; 150 U. S. 312.

An onerous gift, when the burden it imposes is the payment of a sum of money, is, when accepted, in the nature of a sale. When partition is made between two or more joint owners of a chattel, it would seem the contract is in the nature of a barter. See 11 Pick. 311.

An absolute sale is one made and completed without any condition whatever.

A conditional sale is one which depends for its validity upon the fulfillment of some condition.

A forced sale is one made without the consent of the owner of the property, by some officer appointed by law, as by a marshal or a sheriff, in obedience to the mandate of a competent tribunal. This sale has the effect to transfer all the rights the owner had in the property, but it does not, like a voluntary sale of personal property, guarantee a title to the thing sold; it merely transfers the rights of the person as whose property it has been seized. This kind of a sale is sometimes called a judicial sale.

A private sale is one made voluntarily, and not by auction.

A public sale is one made at auction to the highest bidder. Auction sales sometimes are voluntary, as when the owner chooses to sell his goods in this way, and then as between the seller and the buyer the usual rules relating to sales apply; or they are involuntary or forced, when the same rules do not apply.

A voluntary sale is one made freely without constraint by the owner of the thing sold: this is the common case of sales, and to this class the general rules of the law of sale apply.

A sale in gross is one without regard to quantity. 77 Va. 616.

An offer to sell imposes no obligations until accepted according to its terms; and an offer rejected cannot be afterward accepted; 119 U. S. 149. See OFFER.

Parties. As a general rule, all persons *sui juris* may be either buyers or sellers; Story, Sales § 9. See PARTIES. But no one can sell goods and convey a valid title to them unless he be owner or lawfully represent the owner; *nemo dat quod non habet*; Benj. Sales § 6; 2 Ad. & E. 495; 89 Ill. 540; 56 N. H. 158; 115 Mass. 129. And even an innocent purchaser from one not the owner, or his proper representative, acquires no valid title; 13 M. & W. 603; Benj. Sales § 6; 54 Ind. 141; 61 N. Y. 477.

An innocent purchaser of property from a bailee for hire acquires no title, and on disposing of the property is liable to the bailor for its value; 155 Pa. 208. But see MARKET OVERT. Another exception is that one not the owner, even a thief, may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery, provided the buyer has been guilty of no fraud in taking them. The *bona fide* holder of such negotiable instruments, and also of bank-notes, or money, lost or stolen, who has paid a valuable consideration or furnished an equivalent, can retain title against any former owner; even against one from whom such chattel has been stolen; 20 Pick. 545; 32 Vt. 125; 8 Conn. 336; 6 Tex. 515; 3 Burr. 1516; 5 B. & Ad. 909; 10 Ad. & E. 784; Benj. Sales (4th ed.) § 15. So (*arguendo*) of coupon bonds of the ordinary kind; 2 Wall. 110, disapproving Gill v. Cubit, 3 B. & C. 466; and approving Goodman & Harvey, 4 Ad. & E. 870; also a lost or stolen bill or note; *arguendo* in 101 U. S. 357; but otherwise of a lost or stolen bill of lading; *id.*

Where two parties in good faith buy the same property, the one first receiving possession is entitled to hold it; 47 Mo. App. 84.

There is a class of persons who are incapable of purchasing except *sub modo*, as infants and married women, insane persons and drunkards; Benj. Sales § 21; and another class, who, in consequence of their peculiar relation with regard to the owner of the thing sold, are totally incapable of becoming purchasers while that relation exists; such as trustees, guardians, assignees of insolvents, and, generally, all persons who, by their connection with the owner, or by being employed concerning his affairs, have acquired a knowledge of his property, as attorneys, conveyancers, and the like.

Mutual assent. The consent of the contracting parties, which is of the essence of a sale, consists in the agreement of the will of the seller to sell a certain thing to the buyer for a certain price, and in the will of the buyer to purchase the same thing for the same price. It must, therefore, be mutual, intended to bind both parties, and must co-exist at the same moment of time; Benj. Sales § 89. Thus, if a condition be affixed by the party to whom an offer is made, or a modification requested, this constitutes a rejection of the offer, and a new proposal, which must be accepted by the first proposer, otherwise there would be no assent by the parties to the same thing, at the same time; 4 De G. J. & S. 646; 34 U. C. Q. B. 410; 1 Bradw. 153. It follows that the assent must correspond with the offer in every particular; 8 C. E. Green 512; 14 Pet. 77; 43 Vt. 161; 118 Mass. 232.

Goods delivered to one for examination, with an option to buy, may be retaken by the owner before the exercise of the option; 4 Misc. Rep. 88.

When there has been a mistake made as to the article sold, there is no sale, because no mutual agreement upon the subject of the sale; as, for example, where a broker, who is the agent of both parties, sells an article and delivers to the seller a sold note describing the article sold as "St. Petersburg clean hemp," and a bought note to the buyer as "Riga Rhine hemp," there is no sale; 4 Q. B. 747; 112 Mass. 32; 49

N. Y. 588.

The consent is certain when the parties expressly declare it. This, in some cases, it is requisite should be in writing. By the statute of frauds no sale of goods, etc., for the price of £10 sterling and upwards, is valid, except the buyer shall accept part of the goods and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum be made, signed by the party to be charged. This applies to both executed and executory contracts of sale.

The writing may be a letter. See LETTER; 4 Bingh. 653; 3 Metc. Mass. 207; 16 Me. 458.

See ACCEPTANCE; EARNEST; PART PAYMENT; PARTY TO BE CHARGED; GOODS, WARES, AND MERCHANDISE; NOTE OR MEMORANDUM; FRAUDS, STATUTE OF.

When a party, by his acts, approves of what has been done, as if he knowingly uses goods which have been left at his house by another who intended to sell them, he will by that act confirm the sale.

One who has accepted and used goods cannot refuse to pay for them on the ground that he never ordered them; 152 U. S. 200.

Care must be taken to distinguish between an agreement to enter into a future contract of sale, which would be called an executory contract of sale, and pass no title until executed, and a present actual agreement to make a sale, which passes the title immediately.

The distinction between executed and executory contracts of sale depends upon the intention of the parties. When the vendor appropriates goods to the vendee, or, in other words, signifies his intention that the right of property shall pass at once, and the vendee assents, the law will give effect to the intention and the title will pass immediately; 104 Mass. 262; 64 N. Y. 167; 14 B. Monr. 413. This principle remains the same,—whether the goods are sold for cash or on credit, whether they are to be delivered forthwith or at a future time; whether they have yet to be weighed, measured, or set apart, or whether they are still unfinished; and by the terms of the agreement, the vendor has either to complete them, or in some way add to their value. These circumstances may be reason for supposing that the parties do not mean to pass the title, but will not defeat the intention to do so if it exists; Lectures on Contracts, by Prof. Hare; 1 Q. B. 389; 2 B. & C. 540; 102 Mass. 443; 13 Pick. 175; 6 Rand. 473.

The thing sold. There must be a thing which is the object of the sale; for if the thing sold at the time of the sale had ceased to exist, it is clear there can be no sale; Benj. Sales § 76; 5 Maule & S. 228; 11 Pet. 63; 20 Pick. 139; if, for example, you and I being in Philadelphia, I sell you my house in Cincinnati, and at the time of the sale it be burned down, it is manifest there was no sale as there was not a thing to be sold. Where the thing does not exist at the date of the contract the sale is void: as where, unknown to the parties, corn on a vessel not yet arrived, had, before the sale, been sold at an intermediate port; 5 H. L. C. 673. Where, after the sale, and without fault of the seller, the thing sold perished, the seller is released; 107 Mass. 514; 70 Me. 288; but it is otherwise if property has passed, though the goods were left in the seller's possession; 32 L. J. Q. B. 164. On a contract of future sale, if the subject-matter perish before property has passed, the contract is avoided. It is evident, too, that no sale can be made of things not in commerce: as, the air, the water of the sea, and the like.

In general, there must be an agreement as to the specific goods which form the basis of the contract of sale; in other words, to make a perfect sale the parties must have agreed, the one to part with the title to a specific article, and the other to acquire such title.

In an unconditional contract of sale of specific goods, title passes at once, with-

out delivery; 143 U. S. 354; 3 B. & C. 363, though it is said that no title vests in the buyer under a cash sale till the price is paid; 141 Mass. 423. Other cases hold that title passes, but the vendor has a lien for the price. Where no time is agreed upon for payment, it is presumed to be a cash sale; 58 Cal. 431; 111 Mass. 499; 76 Ill. 338. If the seller delivers possession upon the understanding of immediate payment, he may reclaim the goods in case he is not paid; 31 Wis. 176; 53 N. Y. 426; 18 Pa. 91. Where goods sold have to be selected from a larger mass of uniform quality, some cases hold that title passes when the sale is made; 19 N. Y. 330; 137 Ill. 393; 39 Conn. 413; this is approved as the true rule in Hare, Contr. 425. Other cases hold that the property does not pass till the separation is complete; 11 Cush. 573; 80 Ind. 268; 9 Ore. 66. If the larger mass consists of units of varying quality or value, it is held that the property does not pass till selection; Tiff. Sales 95.

Where the seller is to do anything to the goods to put them in shape to deliver under the contract, this is a condition precedent to the vesting of the property in the buyer; Blackb. Sales 151; and so where anything is to be done for the purpose of ascertaining the price, as weighing, testing, etc., where the price depends on quantity, etc.; *id.* But it is said that the latter rule is too broad and that the property is presumed to pass to the buyer; when weighing, testing, etc., alone remain to be done by the buyer; Graves, Title to Pers. Prop. 50. This presumption is stronger when the buyer receives possession; *id.*

Where a brewer's carter took orders for jars of beer, and delivered the jars to the customers' houses, making his collections the following week, there being no mark to show that any particular jar had been appropriated to any particular customer, until delivery, it was held that the sale was made at the customers' house; [1895] 2 Q. B. 229.

Where a contract provides for the sale, delivery, and setting up of machinery and for payment of part of the price on receipt of the bill of lading, and the residue at stated times thereafter, it was held that the delivery of the machinery completed the sale; 146 U. S. 42.

The thing sold must have an actual or potential existence and be specifically identified and capable of delivery; otherwise it is not strictly a sale, but an executory agreement; 2 Kent 468.

In the sale of non-existent chattel, at law, if the seller has a potential interest in it, the sale is a valid sale in *presenti* to take effect in *future*; but if the contract concerns a mere possibility or expectation, the transaction will not take effect unless the seller, after the chattel has come into existence, ratifies the contract, or the buyer, with his consent, gets possession; Graves, Title to Pers. Prop. 41. A potential interest would include the wool to grow upon a man's own sheep, but not on those of another. A sale of fish to be caught did not pass the property in them when caught; 108 Mass. 547. An assignment of future wages, there being no existing contract of service, is invalid; 1 Gray 105; otherwise if the wages are to accrue under an existing contract of service; 2 Gray 265.

One may sell a crop of hay to be grown on his field or wool from his sheep or the milk that his cows will yield the coming month, and the sale is valid; but he can only make a contract to sell, and not an actual sale, where the subject is something to be afterwards acquired, as the sale of any sheep, etc., or any goods, which he may attain the title to within the next six months; Benj. Sales § 78.

The statutes as to the assignment of an invention before patent embraces only perfected inventions. There can, properly speaking, be no assignment of an incomplete invention, although a contract to convey a future invention may be valid; Curt. Pat. § 160. A contract to transfer inventions not yet in being is not an assignment; 2 Rob. Pat. § 771.

But in equity the sale takes effect as soon as the chattel comes into existence, without further act of the parties; 10 H. L. C. 209. See 3 Pom. Eq. § 1298; but see 46 Am. Dec. 718; 76 *id.* 781.

As to mortgages or sales of unplanted crops, some cases hold them invalid; 9 Bush 318; others hold them valid to transfer a legal title; 61 Cal. 620; others hold them valid only to transfer an equitable title; 69 Ala. 403; 48 Miss. 513. See 4 Am. Dec. 559.

The delivery of crops to be grown is not essential to pass title, crops being an exception to the rule that no title can vest in property not in existence; 143 U. S. 346.

The sale of grain in an elevator, part of a mass, passes the title of the vendor without separation; 111 Mass. 490; 4 Ill. 344.

In case of unascertained goods, part of a larger quantity, the seller usually has the right to select the particular goods. The selection is fixed and title passes on delivery to the buyer, and, usually, upon the delivery to a carrier, unless the contract is for a delivery to the buyer at the place of destination.

It is held that where delivery is made to a carrier C. O. D. (*q.v.*), the property does not pass; 146 Mass. 68; 3 Colo. 176; 58 Vt. 140; *contra*, 130 Pa. 138; 73 Me. 278; 104 N. C. 25. When goods are delivered by the seller to the postoffice the title vests in the buyer; [1898] A. C. 204.

In shipbuilding contracts, where payments are to be made as the work progresses, property does not pass till the work is complete; 99 Mass. 397; 81 Pa. 18; 1 Houst. 506, 546. But in England it passes when the first instalment is paid, and subsequent additions to the work become the property of the buyer; 5 B. & Ald. 942; 4 Ad. & E. 448; so also in 1 Cliff. 370; 27 Ind. 523.

Where goods are delivered to a carrier, but the bill of lading is made out to the seller's order, the property does not pass to the buyer; 74 N. Y. 568; 84 Ala. 173; so where the seller ships the goods consigned to himself; 56 Ill. 494.

A buyer has a right to a reasonable opportunity to inspect the goods before he accepts them; Tiff. Sales 197.

When goods are to be paid for on delivery at a certain place, title will not pass till delivery; 153 Pa. 440; 89 *id.* 147; 113 Mass. 391.

The price. To constitute a sale, there must be a price agreed upon. The presumption is that where the price is not definitely ascertained, the title remains in the vendor until a computation has been made; Blackb. Sales 122; 24 N. H. 836; 11 Cush. 573; 78 Ga. 66. But this may be rebutted by proof that the parties intended to have the right of property vest in the purchaser at once; 39 Conn. 413; 55 Ga. 638; 19 N. Y. 330. Upon the maxim *id. certum est quod reddi certum potest*, a sale may be valid although it is agreed that the price for the thing sold shall be determined by a third person; 4 Pick 179. See 10 Bingh. 382, 487; 11 Ired. 166. A contract of sale, is valid though no time of payment is agreed on, the law implying payment on delivery; 96 Mich. 175.

The price must be an actual or serious price, with an intention on the part of the seller to require its payment; if, therefore, one should sell a thing to another, and by the same agreement he should release the buyer from the payment, this would not be a sale, but a gift; because in that case the buyer never agreed to pay any price, the same agreement by which the title to the thing is passed to him discharging him from all obligations to pay for it. As to the quantum of the price, that is altogether immaterial unless there has been fraud in the transaction. The price must be certain or determined; but it is sufficiently certain if, as before observed, it be left to the determination of a third person; 4 Pick. 179. And an agreement to pay for goods what they are worth is sufficiently certain; Coxo N. J. 261. The title to property may pass to the vendee without fixing an absolute price, if the circum-

stances attending the transaction show the same to be the intention of the parties; 85 Ala. 221; 100 N. C. 60.

If the passing of property is made to depend upon doing some act as a condition, such as paying the price, the property remains in the seller, though possession may be in the buyer. Apart from statute, the buyer, in most states, takes no title which can be reached by creditors or which he can transfer even to a bona fide purchaser, except subject to the seller's rights; 118 U. S. 663; though in Pennsylvania the rule is otherwise, and also in Illinois, Kentucky, and Maryland. In Pennsylvania transactions which are in legal effect conditional sales on the instalment plan, have been sustained when drawn in the language of bailments with an option of purchase, but the rule there seems uncertain.

The buyer in conditional sales ordinarily acquires an interest which he may sell or which may be attached; and may maintain trover if his possession is wrongfully invaded. The seller may mortgage his interest and it is subject to attachment by his creditors.

Upon breach of condition, the seller may retake or replevin the goods or sue to recover their value. In some states, in a suit to recover their value, he need not allow for payments on account; and if he reclaim the goods, the buyer is not entitled to recover instalments paid; 69 Ill. 233; 7 Daly 297; in others, the buyer is held to be entitled to an account for instalments paid; 23 Mich. 260; 61 Ga. 230; 25 Minn. 530. In some states by statute he must repay the instalments less a proportion for wear and use. An action will not lie for the residue of the purchase-money after the properties have been retaken by the vendor; 43 Minn. 409.

Where there is a contract for leasing property with an option of buying it, with a provision allowing its return to the seller, upon such return of the property, equity will decree a return of the money paid on account of its purchase, less the amount of damages to the property and reasonable pay therefor; 142 U. S. 313. The cases are collected in 32 L. R. A. 455.

Statutes exist in many states which provide that conditional sales of chattels with a reservation of title in the vendor are void as against third parties purchasing from the vendee or against his creditors, unless recorded. In nearly all the states there are similar statutes relating specially to the conditional sale of railroad rolling stock. See ROLLING STOCK.

A common transaction is the hire of furniture and other like chattels, on the instalment plan, called hire-purchase in England, by which "an intending purchaser of goods is put into immediate possession thereof and agrees to pay a fixed sum by fixed periodical instalments; the amount payable for each instalment is expressly declared to be nothing more than hire-money for the use of the goods during the period intervening between two consecutive instalments, and the lender agrees that on a certain number of instalments, making up the total sum, being paid, the hirer shall become the owner of the goods. On default in the payment of any instalment, power is reserved to the lender to resume possession of the goods." Law Mag. & Rev., Feb. 1896.

Where one had hired a piano on this plan and after paying some instalments on it, pledged it to a third party, against whom the lender brought suit, the house of lords sustained the lender's title; 11 L. T. R. 416.

A contract for the hire-purchase of a chattel, the title to pass when the last instalment is paid, is a conditional sale; 85 Ga. 741; s. c. 9 L. R. A. 373; 46 Ill. 47; the court will look to the purpose of the contract rather than to the name given to it; 93 U. S. 684; *contra*, 115 Pa. 487, where the cases are somewhat at variance with other decisions, due to the necessity of sustaining conditional sales, held invalid in that state, by calling them bailments. See ROLLING STOCK.

A conditional vendee under an installment purchase contract cannot return the goods when not fully paid for and escape liability for the future instalments; 53 Conn. 4.

Sale to arrive. A sale of goods to arrive per Argo, or on arrival per Argo, is construed to be a sale of goods subject to a double condition precedent: that the ship arrives and the goods are on board; 5 M. & W. 639; Ry. & M. 406. In such case, title to the goods does not pass till their arrival; 16 N. Y. 597.

Sale for illegal purpose. A sale of goods for the purpose of smuggling is invalid; 3 Term 454; but not when a foreigner sold the goods abroad having no concern in the smuggling; 1 Cowp. 34. See 50 N. H. 253. The mere knowledge of the vendor that the goods sold would be used for an illegal purpose does not render the sale illegal; 50 N. H. 253; 32 Vt. 110; 3 Cliff. 494. See Benj. Sales § 511, n.

Where a buyer is insolvent and has no intention to pay for goods, the sale may be avoided by the seller; 98 U. S. 631; 67 N. Y. 1; but the mere knowledge on the buyer's part that he will be unable to pay for them, will not alone form a fraudulent intent; Tiedm. Sales § 170; there must be other facts of a suspicious nature, such as re-selling them at a reduced price; *id.* In Pennsylvania, it is not enough to show that the buyer was insolvent and did not intend to pay for the goods; some artifice must be shown; 21 Pa. 367.

A Massachusetts act of 1884 makes it a crime for any one to sell any property under representation that anything other than what is specifically stated to be the subject of the sale is to be delivered, etc., as a part of the transaction. In a case under this act it appeared that a retail dealer in tobacco offered to each purchaser a selection of a photograph among a number exposed for his choice. A conviction under this act was set aside upon the ground that what was sold in this case was specifically understood to be the subject of the sale. In a case under a like act in New York, the buyer purchased coffee and received a present as a part of the transaction. It appeared that the presents were lying in full view of the purchasers who could make their choice if they bought as much as two pounds of coffee. The act was held to be unconstitutional; 109 N. Y. 389. A Maryland act was held to be unconstitutional only so far as related to transactions which were dependent upon chance; 74 Md. 565. See **LOTTERY**.

A New York act (1898) provides that a seller who publicly advertises statements with respect to quantity, quality, value, price, method of production, or manufacture, which are untrue or calculated to mislead, shall be guilty of a misdemeanor. See **DECEIT**; **MISREPRESENTATION**.

Real estate. The above rules apply to sales of personal property. The sale of real estate is governed by other rules. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor, and it does not become vested in the vendee until he shall have received a lawful deed of conveyance from the vendor to him; and the only remedy of the purchaser at law is to bring an action on the contract and recover pecuniary damages for a breach of the contract. In equity, however, after a contract for the sale, the lands are considered as belonging to the purchaser, and the court will enforce his rights by a decree for a specific performance; and the seller will be entitled to the purchase-money; Wms. R. P. 127. See **SPECIFIC PERFORMANCE**.

In general, the seller of real estate does not guarantee the title; and if it be desired that he should, this must be done by inserting a warranty to that effect.

Section 3 of the statute of frauds provides that no interest in land shall be created unless by deed or note in writing signed by the party or his agent, authorized by writing, or by act of operation of law.

The question whether sales of standing timber involves any interest in land has been much mooted. The majority of cases seem to support the following propositions:

1. Where the vendor has expressly stipulated that the trees may remain standing on the land a given number of years if the purchaser elects. Here, as they derive more or less growth and increase from the soil, there is some reason to hold that the sale involves an interest in land. It has in fact been considered a sale, not only of the trees as they then are, but as they will be at the end of the stipulated period with all the additions to them subsequently acquired by the soil. See 6 Seld. 114; 50 Barb. 302; 57 *id.* 243; 45 N. H. 318; 40 *id.* 304. 2. Where the trees are to stand for an indefinite time and to be severed solely at the pleasure of the buyer, the statute of frauds requires a written agreement. See 27 Vt. 157; 43 *id.* 309.

See **ACCEPTANCE**; **CONTRACT**; **DELIVERY**; **PARTIES**; **STOPPAGE IN TRANSIT**; **WARRANTY**; **EARNEST**; **FRAUDS**; **STATUTE OF CONSIDERATION**; **PRICE**; **GOODS**; **WARES**; **AND MERCHANDISE**; **NOTE OR MEMORANDUM**; **SAMPLE**; **MORTGAGE**; **ROLLING STOCK**; **TRADING STAMPS**; **OPENING BIDDINGS**.

Under the civil law, in a contract of sale the seller was not bound to make the buyer absolute master (*dominus*) of the thing sold, as he would have been in a stipulation. What he was bound to do was this: 1. To deliver the thing itself (*prestare, tradere*), to give free and undisturbed possession of it (*possessionem vacuum tradere*), and to give lawful possession of it (*prestare licere habere*). 2. If the buyer was disturbed in his possession by the real owner (*evictio*), to recompense him for what was lost. 3. To secure the buyer against secret faults; if such faults were discovered, either compensation might be claimed by an *actio estimatoria*, reducing the price to a greater or less amount, according as the seller had or had not knowledge of the defect, or at the option of the buyer, the contract might be rescinded by an action *actio redhibitoria*, and the thing returned (which was termed *redhibitio*: *redhibere est facere ut rursus habeat venditor quod habuerat*). Just. Inst., 8th ed. 365.

Sale and Barter—Distinguished. To sell property is, in the strict signification of the word "sell," to transfer it from one to another, in consideration of a price paid or agreed to be paid in current money. A "sale" differs from a "barter" in this, that in the latter, the consideration instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. 12 Bush (Ky.) 241. See **CASH**; **FORCED SALE**; **SOLD OR REMOVED FOR SALE**.

SALE ON APPROVAL. See **SALE**.

SALE-NOTE. A memorandum given by a broker to a seller or buyer of goods, stating the fact that certain goods have been sold by him on account of a person called the seller to another person called the buyer. Sale-notes are also called *bought and sold notes*. See **BOUGHT NOTE**.

SALE OR RETURN. When goods are sent from a manufacturer or wholesale dealer to a retail trader, in the hope that he may purchase them, with the understanding that what he may choose to take he shall have as on a contract of sale, and what he does not take he will retain as a consignee for the owner, the goods are said to have been sent on sale and return.

The goods taken by the receiver as on sale will be considered as sold, and the title to them is vested in the receiver of them: the goods he does not buy are considered as a deposit in the hands of the receiver of them, and the title is in the person who sent them. 1 Bell, Com. 268.

Contracts of sale or return exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return; and the title passes to the purchaser subject to his option to return the

property; 150 U. S. 312; upon return the title reverts (a condition subsequent); Tiff. Sales 93.

SALESMAN. One who in addition to procuring orders for weather strips, also supervised their being placed in position, held to be a salesman, his principal business being that of procuring orders. 180 Fed. 498. See **TRAVELING SALESMAN**, **MERCHANT** AND **SALESMAN**.

SALFORD HUNDRED COURT OF RECORD. An inferior and local court of record having jurisdiction, if the cause of action arise wholly or in part within the Hundred of Salford. Its jurisdiction and procedure correspond to those of a county court. Byrne.

SALIC OR SALIQUE LAW. The name of a code of laws, so called from the Salians, a people of Germany who settled in Gaul under their king Pharamond.

The most remarkable law of this code is that which regards succession. *De terra vero salica nulla portio hereditatis transit in mulierem, sed hoc virilis sexus acquirit; hoc est, filii in ipsa hereditate succedunt*: no part of the salique land passes to women, but the men alone are capable of taking; that is, the sons succeed to the inheritance. This has always excluded women from the throne of France.

SALINE LAND. Land containing salt deposits. Stand. Dict. See 221 U. S. 452 for construction of § 8 of the Utah Enabling Act concerning saline lands.

SALISBURY COURT. See **PRIVATE PLACES**.

SALMANNUS. In the Law of the Salian Franks of the 5th century. A person, later (A. D. 1108) named the salmannus—the salesman—was a third person who was called in to aid in completing the transfer of property in certain cases. The donor handed to him a symbolic staff which he in due season handed over in solemn form to the donee. 12 Harv. L. R. 445-6.

SALOON. A place of refreshment. 26 Mich. 325. An apartment for a specified public use. 45 N. W. Rep. (Ia.) 408; 20 Nev. 282. In common parlance, the word is used to designate a place where intoxicating liquors are sold, and this restricted meaning may be given to saloons, where the context or other circumstances requires it; 13 Neb. 434; 40 Mich. 401; 105 Mass. 40; but it is held that it does not necessarily import a place where liquors are sold; 26 Mich. 328; 23 Tex. App. 364. The word has a much broader meaning than dram shop. To constitute a saloon it is not necessary that ardent spirits should be offered for sale and that it should be a business requiring a license under the revenue laws of the state; 50 Ark. 561. See **LIQUOR LAWS**.

SALOON KEEPER. Insurance. The inhibition in a policy refers only to the personal occupation of the deceased at the time of his death, and although a person was the owner of a half interest in a saloon, but did not render any personal service therein for six months prior to his death, he was not the "keeper" of the "saloon." 110 Ky. 26, 60 S. W. 850.

SALT. In an insurance policy salt does not include saltpetre. 1 Park. 245.

SALUTE. A coin made by Henry V., after his conquests in France.

In the army and navy an honor paid to a distinguished personage, when troops or squadrons meet, when officers are buried, or to celebrate an event or show respect to a flag and on many other ceremonial occasions. Cent. Dict.

Upon the arrival of a man of war in a foreign port the salutes and other ceremonials toward the port and its authorities are prescribed in full detail by the naval regulations. A ship of war entering a harbor or passing by a port or castle should pay the first salute except when the sov-

ereign or his ambassador is on board, in which case the salute should be made first on the shore; Woolsey, *Introd. Int. Law*, 4th ed. § 85.

No salute is to be fired in honor of any nation, or official of any nation not formally recognized by the United States; Snow, *Lect. Int. Law* 70. See 2 Phill. *Int. Law*.

SALVAGE. In Maritime Law. A compensation given by the maritime law for service rendered in saving property or rescuing it from impending peril on the sea or wrecked on the coast of the sea, or, in the United States, on a public navigable river or lake, where interstate or foreign commerce is carried on. 1 Sumn. 210, 416; 12 How. 466; 1 Blatchf. 420; 5 McLean 359.

The property saved. The only proper subjects of salvage are vessels or ships used for the purpose of being navigated, and goods which at one time formed the cargoes of such vessels, whether found on board, or drifting, or cast on shore; [1897] A.C. 347. It has been held that there can be no salvage against a floating dry dock intended to be permanently moored to the shore; 119 U. S. 825; nor against coal barges on the Mississippi river, which were mere boxes without tackle, apparel, furniture, master, or crew, and which were sold with the coal or broken up for old lumber; 46 Fed. Rep. 204; nor a floating structure intended to be moored alongside a wharf for carts containing refuse to drive over it to a dumping boat; 35 Fed. Rep. 158; nor a pile-driving machine erected on a floating platform; 69 Fed. Rep. 1005; nor a gas-float fifty feet long by twenty wide moored in a river to give light to vessels; [1897] A. C. 337; as to rafts of timber, *quære*; see *id.*

When a ship was almost becalmed on the high seas a floating chest was found and with but little trouble taken on board. It contained seventy doubloons. It was held that the finders were not entitled to the whole property, though there were no marks of ownership, but should be compensated by a moiety as for salvage services. The other moiety was directed to be paid into court; Fed. Cas. 6620. Passengers' lives may be the subject of salvage services, by statute. See 55 Alb. L. J. 404.

A person who offers useful services to a vessel in distress without any previous contract, is a salvor; 24 U. S. App. 559.

Salvage, after actual compensation for the services rendered, is a gratuity for the benefit of commerce, as an encouragement for like services and efforts; no amount of reward to owners and machinery will so stimulate efforts to save life and property as will moderate awards to master and crew who are the effective agents to set the machinery in motion; 13 U. S. App. 662.

"Salvage consists (1) of an adequate compensation for the actual outlay of labor and expense made in the enterprise; and (2) of the reward as bounty allowed from motives of public policy, as a means of encouraging such exertions. In determining the amount of an award the leading considerations are: the degree of danger from which the rescue is made; value of the property saved; risk to the salvors; the value of property risked by salvors and the dangers to which it was exposed; the skill shown and the time and labor spent." 23 U. S. App. 435.

Moral considerations and questions of policy enter largely into salvage cases. 2 Hagg. 3.

The peril. In order to found a title to salvage, the peril from which property was saved must be real, not speculative merely; 1 Cra. 1; 1 Ben. Adm. 166; but it need not be such that escape from it by any other means than by the aid of the salvors was impossible. It is sufficient that the peril was something extraordinary, something differing in kind and degree from the ordinary perils of navigation; 1 Curt. C. C. 353; 2 *id.* 350. See 9 C. C. App. 292; 40 Fed. Rep. 909; 41 *id.* 103. All services rendered at sea to a vessel in distress are salvage services; 1 W. Rob. 174; 8 *id.* 71. But the peril must be present and pending,

not future, contingent, and conjectural; 1 Sumn. 216; 3 Hagg. Adm. 344. It may arise from the sea, rocks, fire, pirates, or enemies; 1 Cra. 1; see 22 Ct. Cls. 408; or from the sickness or death of the crew or master; 1 Curt. C. C. 376; 2 Wall. Jr. 59; 1 Swab. 84.

The saving. In order to give a right to salvage, the property must be effectually saved; it must be brought to some port of safety, and it must be therein a state capable of being restored to the owner, before the service can be deemed completed; 1 Sumn. 417; 1 W. Rob. 329, 406; 35 Fed. Rep. 796; 57 *id.* 661. The salvage services must be performed by persons not bound by their legal duty to render them; 1 Hagg. Adm. 227; 2 Spinks, Adm. 253. The property must be saved by the instrumentality of the asserted salvors, or their services must contribute in some certain degree to save it; 4 Wash. C. C. 651; Olo. 462; though, if the services were rendered on the request of the master or owner, the salvor is entitled to salvage though the services were slight and the property was saved mainly by a providential act; 5 McLean 359; 1 Newb. 130; 2 W. Rob. 91; Bee 90.

Towage services are sometimes the subject of compensation as salvage. Mere expediting the voyage of a vessel, by towing, is not salvage; but salvage was allowed in the case of a steamship who had broken her main shaft, but could sail fairly well, the weather also being favorable, in which condition she was towed ninety miles; 1 Spinks, A. & E. 169, said to be the extreme case; Kennedy, *Civil Salvage* 23; courts are liberal to such claims in respect of the amount of danger necessary to render towage a salvage source; *id.*

The place. In England it has been held that the services must be rendered on the high seas, or, at least, *extra corpus comitatus*, in order to give the admiralty court jurisdiction to decree salvage; but in this country it is held that the district courts of the United States have jurisdiction to decree salvage for services rendered on tide waters and on the lakes or rivers where interstate or foreign commerce is carried on, although *infra corpus comitatus*; 12 How. 466; 1 Blatchf. 420; 5 McLean 359.

The amount. Some foreign states have fixed by law the amount or proportion to be paid for salvage services; but in England and the United States no such rule has been established. In these countries the amount rests in the sound discretion of the court awarding the salvage, upon a full consideration of all the facts of the case. It generally far exceeds a mere remuneration *pro opere et labore*, the excess being intended, upon principles of sound policy, not only as a reward to the particular salvor, but also as an inducement to others to render like services; 2 Cra. 240; 1 C. Rob. 312, n.; 3 *id.* 335; 3 Hagg. Adm. 95. But it is equally the policy of the law not to provoke the salvor's appetite of avarice, nor encourage his exorbitant demands, nor teach him to stand ready to devour what the ocean has spared; Gilp. 75. Adequate rewards encourage the tendering and acceptance of salvage services; exorbitant demands discourage their acceptance and tend to augment the risk and loss of vessels in distress. 7 Notes of Cas. 579. Salvage viewed as a reward is not properly the subject of a binding contract in advance. Courts of admiralty fully examine into the circumstances of the service in the interest of the property saved, and award no more than a reasonable sum, and are not bound by the amount agreed on beforehand; 48 Fed. Rep. 923. But a salvage agreement for services to be performed on the high seas will not be set aside merely because only one of the contracting parties was at a disadvantage. But, if in addition to that circumstance, the sum required by the intending salvor appears to the court exorbitant, the agreement will be set aside as inequitable; [1891] P. 175. The amount is determined by a consideration of the peril to which the property was exposed, the value saved, the risk to life or property incurred by the

salvors, their skill, the extent of labor or time employed, and the extent of the necessity that may exist in any particular locality to encourage salvage services; 3 Hagg. Adm. 121; 1 Gall. 133; 1 Sumn. 413; 2 Sprague 102. An ancient rule of the admiralty allowed the salvors one-half of the property saved, when it was absolutely derelict or abandoned; but that rule has been latterly distinctly repudiated by the high court of admiralty and our supreme court, and the reward in cases of derelict is now governed by the same principles as in other salvage cases; 20 E. L. & E. 607; 4 Notes of Cas. 144; 19 How. 161. While there is no rule of giving salvors of a derelict a moiety, or other specific proportion of the value of the property saved, and the award is to be assessed as in other cases of salvage, still there are usually present three special elements which tend to increase the award: the high degree of danger to which the property is exposed; the difficulty of approaching a derelict vessel without any aid in boarding her; and the necessity of supplying men to steer her; [1897] Pr. Div. 59. But it is usual to give half of the value, and even seven-eighths have been given. See 2 Blatch. 323.

Risking life to save the lives of others is an ingredient in salvage service which will enhance the salvage upon the property saved; Daves 61; 3 Hagg. Eccl. 84. No salvage was formerly due for saving life merely, unaccompanied by any saving of property; 1 W. Rob. 330; unless it was the life of a slave; Bee 226, 260. But the saving of life in addition to property was held to increase the award of salvage on the property; Br. & L. 344. By statute 17 & 18 Vict. salvage was extended to the saving of life and the award therefor was given priority over other salvage. If the vessel is not of large enough value to pay the award, it is payable out of the Mercantile Marine Fund.

"It is the value of the property which is restored to the owner that is to be considered, and of which a proportion is to be awarded as salvage in salvage cases, and not the original value imperilled. The exact value of the property saved, when large, is but a minor element in computing salvage, and as it increases, the rate per cent. given is rapidly reduced." 13 U. S. App. 662.

Where part of a cargo saved consists of specie, it must bear its share of the common burden; 86 Fed. Rep. 340; up to the time when it was removed, but not of the expense of getting the ship aloft after the specie was removed; 82 *id.* 104. There is no distinction in the proportion of salvage charges against different parts of a cargo; 4 Asp. 385.

The fact that a vessel receives injuries in the course of salvage operations will tend to reduce the amount of compensation; 83 Fed. Rep. 715.

A salvage award will not be set aside as too large, unless so grossly excessive as to shock the conscience of the appellate court; 82 Fed. Rep. 751.

The property saved. Salvage is properly a charge apportionable upon all the interests and property at risk in the voyage which derive any benefit from the salvage service; 1 Stor. 469. *Qui sentit commodum sentire debet onus.* It follows that salvage expenses incurred in saving ship, cargo, and freight in one common and continuous service are apportionable upon them all, according to their respective values; but expenses incurred for any one interest separately, or any two interests only, are chargeable wholly to it or to them; 2 W. Rob. 315; 7 E. & B. 523; 2 Pick. 1; 11 *id.* 90; 4 Whart. 301; 5 Du. 310. Goods of the government pay the same rate as if owned by individuals; 3 Sumn. 808; Edw. Adm. 79; but not the mails; Marv. Salv. 132. But, it is said, no proceedings *in rem* can be instituted against public ships or stores on them, or against property of the state on a private ship; though the question is not always raised, and the British Admiralty usually appeals and submits to the judgment of the

court in the case of claims for saving public stores, and foreign governments have sometimes requested the British Admiralty to award as an arbitrator in respect of their property when salvaged; Kennedy, Civil Salvage 61. See 5 P. D. 197, where the subject was reviewed. Vessels of war belonging to a foreign neutral power cannot be arrested in our ports for salvage; 7 Cra. 116.

Salvage is not allowed on the clothing left by the master and crew on board the vessel which they abandon, but this should be returned free of charge; Ware 378; or for saving from a wreck bills of exchange or other evidences of debt, or documents of title; Daves 20.

The wearing apparel of passengers is not liable for salvage services; L. R. 3 A. & E. 490; this extends only to apparel with the usual changes for the voyage and not to trunks in the hold; 36 Fed. Rep. 705.

Wreck was formerly limited to those portions of ship or cargo which are stranded. But by the Merchant Shipping Act, 1854, it includes jetsam and derelict, and, in salvage law, it includes any part of a ship or cargo aground or afloat; Kennedy, Civil Salvage 53.

The right to salvage for saving life depends upon something—ship, cargo, or freight—having been preserved; 8 P. D. 117; and such salvage can be recovered only against the party to whom the property belonged; 15 P. D. 146; *i. e.* from the ship if the cargo was lost; or from the cargo, if the ship was lost. The value of the property saved is the limit of recovery; 2 P. D. 157. Life salvors may claim against the property saved, although its preservation was not due to salvage services; 2 P. D. 145. Taking passengers from a burning vessel at sea is not the subject of salvage under the British act; L. R. 3 A. & E. 487.

Liability to pay salvage is not confined to the actual legal owners of the property saved, but extends to those who have an interest in the property, and whose interests have been saved by the placing of the property itself in security; 15 Prob. Div. 142.

A tug being partly in fault in colliding with a schooner, is not entitled to salvage for towing the schooner into port; 52 Fed. Rep. 323.

Bar to salvage claim. An express explicit agreement, in distinct terms, to pay at all events, whether the property shall be saved or not, a sum certain, or a reasonable sum, for work, labor, and the hire of a vessel in attempting to save the property, is inconsistent with a claim for salvage; and when such agreement is pleaded in bar and proved, any claim for salvage will be disallowed; 2 Curt. C. C. 350; 2 W. Rob. 177. See 123 U. S. 40. An agreement fairly made and fully understood by the salvors, to perform a salvage service for a stipulated sum or proportion to be paid in the event of a successful saving, does not alter the nature of the service as a salvage service, but fixes the amount of compensation. But such an agreement will not be binding upon the master or owner of the property unless the court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable; 1 Stor. 323; 1 Sumn. 207; 1 Blackf. 414. A custom in any particular trade that vessels shall assist each other without claiming salvage is legal, and a bar to a demand for salvage in all cases where it properly applies; 1 W. Rob. 440. See *supra*.

Forfeiture or denial of salvage. Embezzlement of any of the goods saved works a forfeiture of the salvage of the guilty party; Ware 380; 1 Sumn. 328; and, in general, fraud, negligence, or carelessness in saving or preserving the property, or any gross misconduct on the part of the salvors in connection with the property saved, will work a total forfeiture of the salvage, or a diminution of the amount; 2 Cra. 240; 1 W. Rob. 497; 3 id. 122; 2 E. L. & E. 554; 6 Wheat. 152; 6

Wall. 543; [1892] Prob. 58, 70.

Salvors rescuing a derelict property are bound to care for its preservation while they retain possession; 84 Fed. Rep. 202.

Distribution. The distribution of salvage among the salvors, like the amount, rests in the sound discretion of the court. In general, all persons, not under a pre-existing obligation of duty to render assistance, who have contributed by their exertions to save the property, and who have not forfeited their rights by their misconduct, are entitled to share in the salvage, as well those who remain on board the salvor vessel in the discharge of their duty, but are ready and willing to engage in the salvage enterprise, as those who go on board and navigate the wreck; Ware 483; 2 Dods. 132; 2 W. Rob. 115; 2 Cra. 240. The apportionment between the owners and crew of the salvor ship depends upon the peculiar circumstances of each case: such as, the character, size, value, and detention of the vessel, its exposure to peril, and like considerations, and the number, labor, exposure, and hazard of the crew. In ordinary cases, the more usual proportion allowed the owners of a salvor sail-vessel is one-third; 2 Cra. 240; 1 Sumn. 425; 3 id. 579. The owner of a steam-vessel, if of considerable value, is often allowed a larger proportion; Marv. Wreck & Salv. 247. The master's share is usually double that of the mate, and the mate's double that of a seaman, and the share of those who navigate the derelict into port, or do the labor, double that of those who remain on board the salvor vessel. But these proportions are often varied according to the circumstances, so as to reward superior zeal and energy and discourage indifference and selfishness; 3 Hagg. Adm. 121. See Abb. Shipp., 13th ed. 1021.

In marine insurance, the salvage is to be accounted for by the assured to underwriters in an adjustment of a total or salvage loss, or assigned to the underwriters by abandonment or otherwise; 2 Phill. Ins. § 1726. And so, also, the remnant of the subject insured or of the subject pledged in bottomry, and (if there be such) in that of a fire insurance, and of the interest in the life of a debtor (if so stipulated in this case), is to be brought into the settlement for the loss in like manner; 2 Dutch. 541; 15 Ohio 81; 2 N. Y. 285; 4 La. 289; 2 Sumn. 157.

The liability to pay salvage is not confined to the actual legal owners of the property saved, but it extends to all those who have an interest in the property and whose interests have been saved; 15 Prob. Div. 142.

Provision is made in R. S. § 4652 for salvage for the recapture of vessels or other property captured by any force hostile to the United States, before the capture. See the next titles; WRECK; RECAPTURE.

SALVAGE CHARGES. In Insurance. All those costs, expenses, and charges necessarily incurred in and about the saving and preservation of the property imperilled, and which, if the property be insured, are eventually borne by the underwriters. Stevens, Av. c. 2, § 1.

SALVAGE CORPS. In Insurance. A corps controlled and paid by insurance companies to attend fires and protect property. 151 Ky. 644, 152 S. W. 799.

SALVAGE LOSS. That kind of loss which it is presumed would, but for certain services rendered and exertions made, have become a total loss. It also means, among underwriters and average-adjusters, a mode of settling a loss, under a policy, in cases where the goods have been necessarily sold at a port short of the port of destination, in consequence of the perils insured against. In such cases, though the property be not abandoned to the underwriter, the principle of abandonment is assumed in the adjustment of the loss. The underwriter pays a total loss. The net proceeds of the sale of the goods, after deducting all the expenses, are retained by the assured, and he credits the

underwriter with the amount; 2 Phill. Ins. § 1480.

SALVOR. In Maritime Law. A person who saves property or rescues it from impending peril on the sea or when wrecked on the coast of the sea, or, in the United States, on a public navigable river or lake where interstate commerce is carried on, and who is under no pre-existing contract or obligation of duty by his relation to the property to render such services. 1 Hagg. Adm. 236; 1 Curt. C. C. 378.

In general the crew cannot claim as salvors of their own ship or cargo, they being under a pre-existing obligation of duty to be vigilant to avoid the danger, and when in it to exert themselves to rescue or save the property, in consideration of their wages merely; 1 Hagg. Adm. 236; 2 Mas. C. C. 319. But if their connection with the ship be dissolved, as by a capture, or the ship or cargo be voluntarily abandoned by order of the master, *sine spe revertendi aut recuperandi*, such abandonment taking place *bona fide* and without coercion on their part, and for the purpose of saving life, their contract is put an end to, and they may subsequently become salvors; 16 Jur. 573; 8 Sumn. 270; 2 Cra. 240; Daves 121. A passenger; 3 B. & P. 612, n.; 1 W. N. C. (Pa.) iv. 48 Fed. Rep. 479; 33 id. 884; a pilot; 10 Pet. 108; Gilp. 65; Lloyd's agent; 8 W. Rob. 181; an agent; [1892] Prob. 366; official persons; 3 Wash. C. C. 567; 1 C. C. Rob. 46; officers and crews of naval vessels; 2 Wall. Jr. 67; 1 Hagg. Adm. 158; 15 Pet. 518; coast guards; Bened. Adm. § 300 a; may all become salvors, and, as such, be entitled to salvage for performing services in saving property, when such services are not within or exceed the line of their proper official duties. But it is said that neither crew, pilot, ship's agent, nor public servants can, under ordinary circumstances, be salvors; Kennedy, Civil Salvage 25; nor can passengers; 2 Hagg. 3.

The fact that a part owner in a salving ship also has an interest in the salvaged property, will not prevent him from sharing in the salvage; 51 Fed. Rep. 916. An incorporated wrecking and salvage company may be granted salvage awards as liberally as natural persons so engaged; 40 Fed. Rep. 301.

The finders of a derelict (that is, a ship or goods at sea abandoned by the master and crew without the hope or intention of returning and resuming the possession) who take actual possession with an intention and with the means of saving it, acquire a right of possession which they can maintain against all the world, even the true owner, and become bound to preserve the property with good faith and bring it to a place of safety for the owner's use. They are not bound to part with the possession until their salvage is paid, or the property is taken into the custody of the law preparatory to the amount of salvage being legally ascertained; Davies 20; Olc. 462; Ware 339. If they cannot with their own force convey the property to a place of safety without imminent risk of a total or material loss, they cannot, consistently with their obligations to the owner, refuse the assistance of other persons proffering their aid, nor exclude them from rendering it under the pretext that they are the finders and have thus gained the right to the exclusive possession. But if third persons unjustifiably intrude themselves, their services will inure to the benefit of the original salvors; 1 Dods. 414; 3 Hagg. Adm. 156; Olc. 77. See SALVAGE.

If a first set of salvors fall into distress, and are assisted by a second or third set, the first or second do not lose their claim to salvage, unless they voluntarily and without fraud or coercion abandon the enterprise, but they all share together according to their respective merits; 1 Sumn. 400; 1 W. Rob. 406; 2 id. 70. When a vessel stands by and renders services to another, upon request, even though no benefit result from her doing so, she is entitled

to salvage; 8 Asp. Mar. L. Cas. 268. In cases of ships stranded or in distress, not derelicts, salvors do not acquire an exclusive possession as against the owner, the master, or his agent. While the master continues on board, he is entitled to retain the command and control of the ship and cargo and to direct the labor. The salvors are assistants and laborers under him; and they have no right to prevent other persons from rendering assistance, if the master wishes such aid; 3 Hagg. Adm. 383; 2 W. Rob. 307; 2 E. L. & E. 551. When the ship has been relieved from its peril, salvors forfeit no right and impair no remedy by leaving the ship; 1 Hagg. Adm. 156; 1 Newb. 275. Their remedy to recover salvage is by libel or suit in the district court of the United States, sitting as a court of admiralty.

SALVUS PLEGIUS. A safe pledge; called, also, "*certus plegius*," a sure pledge. Bract. 160 b.

SAME. Same does not always mean identical. It frequently means of the kind or species, not the specific thing. 40 Ia. 487, 493. See Stroud, Dict.

In the expression "dictive policies and receive premiums on the same," means them—the policies. Anderson; 40 Iowa 493.

Same Offense. In the Fifth Amendment to the Constitution, an offense which is the same in law and in fact. *Id.*; 1 Hughes 560.

Same Property. The tenant of a stock farm was to draw out the "same property" he put into the business. Held, that the same description of stock, of equivalent value, was meant. *Id.*; 66 Ill. 99.

Same v. Same. The same plaintiff against the same defendant; the same case as first cited. *Id.*

SAMPLE. A small quantity of any commodity or merchandise, exhibited as a specimen of a larger quantity called the bulk.

A part shown as a specimen. 83 Gratt. 909.

When a sale is made by sample, the vendor warrants the quality of the bulk to be equal to that of the sample; Benj. Sales § 648; and if it afterwards turn out that the bulk does not correspond with the sample, the purchaser is not, in general, bound to take the property on a compensation being made to him for the difference; 1 Camp. 113. See 4 Camp. 22; 5 Johns. 395; 13 Mass. 139; 3 Rawle 37; 14 M. & W. 651. It is held that the vendor does not warrant goods, as fit for a particular purpose; 37 S. C. 7.

To constitute a sale by "sample," the contract must be made solely with reference to the sample; 13 Mass. 139; 40 N. Y. 113. Not every sale where a sample is shown is a sale by sample; there must be an understanding, expressed or implied, that the sale is by sample; 10 Wall. 383; 19 Md. 157. The mere exhibition of a sample is but a representation that it has been fairly taken from the full; 5 N. Y. 73. In Pennsylvania it has been held that in the absence of fraud or representation as to the quality, a sale by sample is not in itself a warranty of the quality of the goods, but simply a guaranty that the goods shall be similar in kind and merchantable; 83 Pa. 319; but the rule was changed by statute in 1887, the decision having been unsatisfactory to the profession and the public.

Although goods sold by sample are not in general deemed to be sold with an implied warranty that they were merchantable, the facts and circumstances may justify the inference that this implied warranty is super-added to the contract; L. R. 4 Ex. 49. If a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection, and unknown to both parties; L. R. 7 C. P. 433; but if the sale is made by a merchant, who is not a manufacturer, there is no implied warranty against secret defects; 7 Allen 29. It is an implied condition in a sale by sample that the buyer

shall have a fair opportunity of comparing the bulk with the sample, and an improper refusal by the vendor to allow this will justify the buyer in rejecting the contract; 1 B. & C. 1. See Benj. Sales § 649.

SAN SALVADOR. A republic of Central America. The president is elected for four years and has a ministry. The national assembly is elected for two years by universal suffrage. There is a high court and a court of appeal. The code of laws is adopted from the Spanish and Napoleonic Codes.

SANCTION. That part of a law which inflicts a penalty for its violation or bestows a reward for its observance. Sanctions are of two kinds,—those which redress civil injuries, called civil sanctions, and those which punish crimes, called penal sanctions. 1 Hoffm. Leg. Outl. 279; Ruth. Inst. b. 2, c. 6, s. 6; Toull. tit. pré. 86; 1 Bla. Com. 56. See LAW.

SANCTUARY. A place of refuge, where the process of the law cannot be executed.

Sanctuaries may be divided into religious and civil. The former were very common in Europe,—religious houses affording protection from arrest to all persons, whether accused of crime or pursued for debt. This kind was never known in the United States, and was abolished in England by statute 21 Jac. I. c. 28.

Civil sanctuary, or that protection which is afforded to a man by his own house, was always respected in this country. The house protects the owner from the service of all civil process in the first instance, but not if he is once lawfully arrested and takes refuge in his own house. See DOOR; HOUSE; ARREST.

No place affords protection from arrest in criminal cases: a man may, therefore, be arrested in his own house in such cases, and the doors may be broken for the purpose of making the arrest. See ARREST.

SANÆ MENTIS. Of sound mind. Fleta, lib. 3, c. 7, § 1.

SANE. Whole; sound; in healthful state. It is applicable equally to the mind and to the body. 5 N. J. L. 661.

SANE MEMORY. That understanding which enables a man to make contracts and his will, and to perform such other acts as are authorized by law. See LUNACY; MEMORY; NON COMPOS MENTIS.

SANG, SANC. Blood. These words are nearly obsolete.

SANGUINEM EMERE. A redemption by villeins, of their blood or tenure, in order to become freemen.

SANGUIS. The right or power which the chief lord of the fee had to judge and determine cases where blood was shed. Mon. Ang. t. i. 1021.

SANIS. A kind of punishment among the Greeks; inflicted by binding the malefactor fast to a piece of wood. Encyc. Lond.

SANITARY AUTHORITIES. Persons having jurisdiction over their respective districts in regard to sewerage, drainage, supply of water, prevention of nuisances, etc. See HEALTH; QUARANTINE.

Sanitary authorities also have jurisdiction in matters coming under the head of "local government." Urban sanitary authorities are the corporations or the district councils which respectively have jurisdiction in boroughs, towns, and urban districts. Rural sanitary authorities are the rural district councils which have jurisdiction in poor law parishes and unions not being within an urban district. A port sanitary authority is one having jurisdiction over a port. London is subject to special acts. Byrne.

SANITY. The state of a person who has a sound understanding; the reverse of insanity.

The sanity of an individual is always

presumed; 5 Johns. 144; 1 Pet. 163; 1 Hen. & M. 476; 4 Wash. C. C. 262. See INSANITY.

SANS CEOQUE. The same as *Absque hoc*, which see.

SANS FRAIS. Without expense.

SANS IMPEACHMENT DE WASTE. Without impeachment of waste. Litt. § 152.

SANS NOMBRE (Fr. without number). In English Law. A term used in relation to the right of putting animals on a common. The term common *sans nombre* does not mean that the beasts are to be innumerable, but only indefinite, not certain; Willis. 227; but they are limited to the commoner's own commonable cattle, *levant et couchant*, upon his lands, or as many cattle as the land of the commoner can keep and maintain in winter. 5 Term 48; 1 Wms. Saund. 28, n. 4.

SANS PLUS (L. Fr.). Without more; without further words.

SANS RECOURS (Fr. without recourse). Words which are sometimes added to an indorsement by the indorsee to avoid incurring any liability. 7 Taunt. 160; 3 Cra. 193; 7 id. 159; 12 Mass. 172; 14 S. & R. 325. See INDORSEMENT.

SANS WASTE (L. Fr.). Without waste.

SASINE. In Scotch Law. The ceremony of the symbolical tradition of land, answering to livery of sasine of the English law. 4 Kent 459.

SATISDATIO (Lat. *satis*, and *dare*). In Civil Law. Security given by a party to an action to pay what might be adjudged against him. It is a satisfactory security in opposition to a naked security or promise. Vicat, Voc. Jur.; 3 Bla. Com. 291.

SATISFACTION (Lat. *satis*, enough, *facio*, to do, to make). In Practice. An entry made on the record, by which a party in whose favor a judgment was rendered declares that he has been satisfied and paid.

In many states provision is made by statute, requiring the mortgagee to discharge a mortgage upon the record, by entering satisfaction in the margin, or by separate instrument, to be recorded on the margin. The refusal or neglect to enter satisfaction after payment and demand renders the mortgagee liable to an action after the time given him by the respective statutes for doing the same has elapsed, and subjects him to the payment of damages, and, in some cases, treble costs. In Indiana and New York, the register or recorder of deeds may himself discharge the mortgage upon the record on the exhibition of a certificate of payment and satisfaction signed by the mortgagee or his representatives, and attached to the mortgage, which shall be recorded. See MORTGAGE. As to accord and satisfaction, see ACCORD.

In Equity. The donation of a thing, with the intention, expressed or implied, that such donation is to be an extinguishment of some existing right or claim in the donee. See LEGACY; CUMULATIVE LEGACY.

SATISFACTION, CONTRACTS TO. A term used to express a class of contracts in which one party agrees to perform his promise to the satisfaction of the other. The cases have been recently classified by an able writer (Prof. Lawson, in 46 Cent. L. J. 360) as follows:—1. Where the fancy, taste, sensibility, or judgment of the promisor are involved. 2. Where the question is merely one of operative fitness or mechanical utility. In the first class the courts refuse to say that where a man agrees to pay if he is satisfied with the performance, he should be compelled to pay if some one else is satisfied with it. The courts recognize that in matters of taste or opinion there is no absolute standard as to what is good or

bad. Hence, where the subject-matter is a suit of clothes; 113 Mass. 136; a bust of the defendant's husband; 44 Conn. 218; a portrait of the defendant's daughter; 39 Mich. 49; a cabinet organ; 3 Atl. Rep. (Va.) 533; a set of artificial teeth; 7 Pitts. L. J. 140; a carriage; 2 C. B. n. s. 779; a steam-heater for a house; 26 Atl. Rep. (Pa.) 745; a play to be written by an author for an actor; 34 N. Y. Supp. 292; a design for a bank-note; 10 N. Y. Supp. 5; 14 id. 155; the question is not one for the court or jury to decide, but for the promisee alone.

So where the contract gives the master a right to discharge a servant if he is satisfied that the servant is incompetent; 54 Am. Rep. 714; or to employ him so long as he is satisfactory; 24 Hun 115; 6 Lans. 280; or to pay for services if they are satisfactory; 8 N. Y. Supp. 485.

In the second class of cases, the writer maintains that the same principle of law should be applied, and gives a number of cases where it has been applied; where the subject-matter of the agreement was the making of a book-case; 7 Gray 171; the sale of a harvesting machine; 50 Mich. 565; the sale of a steam fire engine; 24 Fed. Rep. 893; of a cord binder; 33 Minn. 32; a steamboat; 11 Hun 70; an elevator; 103 Pa. 297; steam fans; 66 Wis. 218; a printing press; 36 Fed. Rep. 414; a grain binder; 35 N. W. Rep. (Mich.) 841; a gas machine; 99 Mass. 183; a fanning mill; 43 Ill. 445.

The promisee, to come under the rules in the above cases, must act in good faith; his dissatisfaction must be actual, not feigned; real, not merely pretended; 49 Vt. 345; 108 Pa. 297; 43 Vt. 528. He must not act from caprice; 130 Pa. 66. He must, if a test is necessary to determine its fitness, give that test or allow it to be made; 65 Md. 193; 66 Wis. 218; 38 Pac. Rep. (Wash.) 763; 80 Fed. Rep. 705; 26 Atl. Rep. (Pa.) 745, holding that where the promisor dies before the test is made, the right to reject vests in his executor.

So an article to be manufactured cannot be rejected before it is substantially completed, so that the promisee will be able fairly to determine whether it was or would be satisfactory to him; 108 Pa. 297.

In a contract to furnish ventilating machinery, to the buyer's satisfaction, in order to justify a refusal of the work, some reasonable ground of dissatisfaction must be shown, and the existence of such ground is for the jury; 18 N. Y. L. J., following 103 N. Y. 289.

That the goods are not satisfactory does not give the purchaser the right to reject them and to claim damages for the breach of contract of the seller; 15 Atl. Rep. (Conn.) 405; nor to keep them and recover damages in an action for the contract price; 36 Fed. Rep. 414; 19 Me. 147.

If one agrees to perform to the satisfaction of another, he cannot recover without fulfilling the terms of the contract.

But, (1) in matters of personal taste the promisee is the sole judge as to whether he is or ought to be satisfied; 113 Mass. 136; 44 Conn. 218; 155 Pa. 394.

(2) In sales of goods where the promisor can be put substantially *in statu quo* the promisee is the sole judge; 50 Mich. 565; 66 Wis. 218.

(3) In contracts for work and labor other than such as are to satisfy a matter of personal taste, where the work and labor would be wholly lost to the promisor if refused, the courts tend to the view that the promisee must be satisfied when he ought to be; 101 N. Y. 387; 149 Mass. 284. See Huffcutt's Ans. Contr. 348.

There are a few cases which are apparently discordant, but which will be found, as Prof. Lawson observes, to rest on the difference between executory contracts of sale, and contracts for work and labor which have been done on the house or land of the promisee; 149 Mass. 284; 116 N. Y. 230; 108 id. 292; 9 N. W. Rep. (Mich.) 427; 81 Fed. Rep. 943; 21 So. Rep. (Ala.) 983; 14 Mo. App. 503. The cases in 127 Mo. 138; 2 Johns. 395; 45 Hun 75, appear to be

really discordant.

SATISFACTION PIECE. In English Practice. An instrument of writing in which it is declared that satisfaction is acknowledged between the plaintiff and defendant. It is signed by the attorney, and on its production and the warrant of attorney, to the clerk of the judgments, satisfaction is entered on payment of certain fees. Lee, Dict of Pract. Satisfaction.

SATISFACTORY. The word "satisfactory" used in a contract where the buyer was to pay for the article if "satisfactory," leaves the decision in the matter to the purchaser. 133 Ky. 351, 117 S. W. 950; 161 Ky. 627, 171 S. W. 198. See SUCCESSFUL AND SATISFACTORY MANNER.

SATISFACTORY EVIDENCE. That which is sufficient to induce a belief that the thing is true; in other words, it is credible evidence. 8 Bouvier, Inst. n. 3049.

SATISFACTORY LEASE. Under an agreement to pay commissions for negotiating a "satisfactory lease" the lessor cannot arbitrarily refuse to accept a lease negotiated; 29 S. W. Rep. (Mo.) 1001.

SATISFACTORY PROOF. Where a city charter authorized contracts for street improvements to be given to the lowest bidder "who shall give satisfactory proof of his" ability to properly perform the work, it was held that the board of public works could not exercise an arbitrary discretion in awarding the contract, but must base their discretion on facts reasonably tending to support its determination. 31 Atl. Rep. (N. J.) 613.

That amount of proof, as applied to evidence, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. Anderson; 1 Greenl. Ev. § 2.

SATISFIED. When applied to a note or bond, paid. 1 Root 306.

Supplied fully, with what is required; freed from doubt or uncertainty; convinced. *Id.* "Entirely satisfied" implies a firm and thorough assent of the mind and judgment to the truth of a proposition. This may exist notwithstanding a possibility that the fact may be otherwise. Anderson; 39 Cal. 335.

SATISFIED TERMS ACT. The stat. 8 & 9 Vict. c. 112, passed to abolish satisfied outstanding terms of years in land. By this act, terms which shall henceforth become attendant upon the inheritance, either by express declaration or construction of law, are to cease and determine. This in effect abolishes outstanding terms; 1 Steph. Com., 11th ed. 296, 297; Wms. R. P. pt. iv. c. 1; Moz. & W.

SATURDAY'S STOP. A space of time from evensong on Saturday till sunrise on Monday, in which it was not lawful to take salmon in Scotland and the northern parts of England. Cowel.

SAVING CLAUSE. In a legal instrument a clause exempting something which might otherwise be subjected to the operation of the instrument. In an act of parliament, a saving clause which is repugnant to the body of such act is void. 1 Co. 118. See CONSTRUCTION.

SAVING THE STATUTE OF LIMITATIONS. The saving or preserving a debt from being barred by the operation of the statute.

SAVINGS BANK. An institution in the nature of a bank, established for the purpose of receiving deposits of money, for the benefit of the persons depositing, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of such deposit, and the produce thereof to the depositors, their executors or administrators, deducting out of such produce so much as shall be required for the necessary expenses attending

the management of such institution, but deriving no benefit whatever from any such deposit or the produce thereof. Grant, Bank, 5th ed. 262; Bolles, Banks & Dep. 177.

Savings banks are not banking institutions in the commercial sense of that phrase and are not to be classed as national banks in determining the validity of state taxation of the latter; 125 U. S. 60.

Savings banks cannot do business as banks of discount unless by statute; 12 Blatch. 209. It has been considered that savings banks are trustees for depositors; 68 Me. 396; 32 N. J. Eq. 163; and therefore subject to the jurisdiction of equity; 28 N. J. Eq. 552; they have been held to be agents for the depositor; 38 Conn. 203; and debtors; 92 N. Y. 7; 122 id. 135; 130 Mass. 443. That the rights of the depositors are of a two-fold character and occupy a position similar to that of stockholders in an ordinary corporation, see 1 Moraw. Corp. § 391; but as long as the institution is solvent the depositors are mere creditors; *id.*

Where the by-laws require the presentation of the pass-book, as a condition precedent to the withdrawal of the deposit and this regulation is printed in the book, it becomes a part of the contract between the parties; 91 Pa. 315; 141 Mass. 33. In case of the loss of the pass-book, the depositor has the right to receive his money without producing it; 14 R. I. 68.

It has been held that after payment to one who was apparently in lawful possession of the pass-book, the real depositor cannot recover unless upon proof of want of care on the part of the officers of the savings banks. See 101 N. Y. 58. And even where the pass-book contains a stipulation that the deposit may be paid to any one who presents the book, the officers are still bound to use reasonable care; 59 N. H. 1.

A by-law that a savings bank shall not be liable to pay a depositor when it has already paid the holder of his pass-book which had been stolen, is not binding unless the depositor has notice of it; 68 N. W. Rep. (Mich.) 118.

In case of insolvency the assets are distributable among the depositors; 98 Mo. 503. In 28 N. J. Eq. 552, the court made an order scaling down the deposits and authorized the savings bank to continue business. By statute in New York courts may scale down deposits of insolvent savings banks and authorize them to continue business.

The surplus of a savings bank belongs in equity to its depositors, and is a part of its deposits in the same sense as the stipulated interest is; 154 N. Y. 22; and is exempt from taxation as much as deposits; 18 N. Y. L. J. 1341 (S. C. of N. Y., since affirmed).

Postoffice saving banks were established in England in 1861. The act authorized the postmaster-general, with the consent of the treasury, to cause his officers to receive deposits in all towns in which a branch office for that purpose was appointed, for remittance to the principal office, and to repay the same, under such regulations as should be prescribed. Deposits are payable ten days after demand, with interest at the rate of two pounds ten shillings per cent. per annum. The deposits are paid over to the national debt commissioners and by them invested in such securities as are lawful for the funds of other savings banks. Any deficiency is made good out of the consolidated fund; 3 Steph. Com. 88.

SAVOY. One of the ancient privileged places or sanctuaries. 4 Steph. Com. 227, n. See PRIVILEGED PLACES.

SAXON LAGE. The laws of the West Saxons. Cowel.

SAY ABOUT. Words frequently used in contracts to indicate an uncertain quantity. They have been said to mark emphatically the vendor's purpose to guard himself against being supposed to have made an absolute promise as to quantity;

31 W. R. 609. There a sale of all the spars manufactured, say about 600, was held to be complied with by tender of 496 spars. See 2 B. & Ad. 106; 5 Gray 589; 8 Pet. 181.

SCAB. See **BLACKLEG.**

SCACCARIUM. A chequered cloth resembling a chess-board which covered the table in the Exchequer, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters. Hence the court of exchequer or *curia scaccarii* derived its name. 8 Bla. Com. 44.

SCALA. Scale; the scale. Burrill. See **SCALAM.**

SCALAM. The old way of paying money into the Exchequer. Cowel.

SCALING LAWS. A term used to signify statutes establishing the process of adjusting the difference in value between depreciated paper money and specie. Such statutes were rendered necessary by the depreciation of paper money necessarily following the establishment of American independence. And, more recently, to discharge those debts which were made payable in Confederate money. The statutes are now obsolete.

SCANDAL. A scandalous verbal report or rumor respecting some person.

SCANDALOUS MATTER. In Equity Pleading. Unnecessary matter criminating of the defendant or any other person, alleged in the bill, answer, or other pleading, or in the interrogatories to or answers by witnesses. Adams, Eq. 306. Matter which is relevant can never be scandalous; Story, Eq. Pl. § 270; 15 Ves. 477; see 43 N. J. Eq. 248, and the degree of relevancy is of no account in determining the question; Cooper, Eq. Pl. 19; 2 Ves. 24; 15 *id.* 477. Where scandal is alleged, whether in the bill; 2 Ves. 631; answer; Mitf. Eq. Pl. 313; or interrogatories to or answer of witnesses; 2 Y. & C. 445; it will be referred to a master at any time; 2 Ves. 631; and, by leave of court, even upon the application of a stranger to the suit; 6 Ves. 514; 5 Beav. 82; and matter found to be scandalous by him will be expunged; Story, Eq. Pl. §§ 266, 832; 4 Hen. & M. 414; at the cost of counsel introducing it, in some cases; Story, Eq. Pl. § 266. The circuit court has an inherent power to strike out scandalous matter on their own motion and in the absence of pleading, and may order a bill to be struck from its files and to permit the complainant to file a new bill excluding such matter; 85 Fed. Rep. 53. The presence of scandalous matter in the bill is no excuse for its being in the answer; 19 Me. 214. Parts of an answer, though immaterial as a defence and scandalous, will not be suppressed when intended to meet charges of bad faith in the bill; 84 Fed. Rep. 379.

SCANDALUM MAGNATUM (L. Lat. slander of great men). Words spoken in derogation of a peer, a judge, or other great officer of the realm. 1 Vent. 60. This was distinct from mere slander in the earlier law, and was considered a more heinous offence. Bull. N. P. 4; Webb's Poll. on Torts 283 b.

It depended on early English statutes which after being long obsolete in practice were repealed in 1887. See 3 Bla. Com. 124.

SCAUSAGE, SCHEWAGE, SCHEWAGE, or SHEWAGE. A kind of toll or custom, exacted by mayors, sheriffs, etc., of merchant strangers, for wares showed or offered for sale within their liberties. Prohibited by 19 Hen. VII. c. 7. Cowel.

SCHEDULE. In Practice. When an indictment is returned from an inferior court in obedience to a writ of certiorari, the statement of the previous proceedings sent with it is termed the schedule. 1 Saund. 309 a, n. 2.

Schedules are also frequently annexed to answers in a court of equity, and to de-

positions and other documents, in order to show more in detail the matter they contain than could otherwise be conveniently shown.

The term is frequently used instead of inventory.

SCHIREMAN. A sheriff; the ancient name of an earl.

SCHIRRENS-GELD. A tax paid to sheriffs for keeping the shire or county court. Cowel.

SCHISM—Division. A "schism" is a division or separation in a church or denomination of Christians, occasioned by diversity of opinions; breach of unity among the people of the same religious faith. And it is used in the statute in connection with the word "division," which certainly imports no more than a separation of the society into two parts, without any change of faith or ulterior relations. 5 Bush (Ky.) 401.

SCHISM-BILL. An act passed in the reign of Queen Anne to restrain Protestant dissenters from educating their own children, and forbade all tutors and schoolmasters to be present at any dissenting place of worship.

SCHOOL. An institution of learning of a lower grade than a college or a university. A place of primary instruction. Webster, Dict. As used in the American reports, the term generally refers to the common or public schools existing under the laws of each state and maintained at the expense of the public.

Public school is synonymous with common school; 103 Mass. 97; but the term is not limited to a school of the lowest grade; it includes all schools from those lower than grammar schools to high schools, but not one founded by a charitable bequest which vests the order and superintendence of it in a board of trustees; *id.*

When the legislature has placed the management of public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what book shall be used therein; 23 Ohio St. 211; s. c. 13 Am. Rep. 233. A statute establishing separate systems of schools for white and colored children is not in violation of the fourteenth amendment of the constitution of the United States. And where appropriate schools for colored children are maintained, such children may be lawfully excluded from schools established for white children; 48 Col. 36; s. c. 17 Am. Rep. 405; 48 Ind. 327; s. c. 17 Am. Rep. 738; 93 Ind. 303; 45 Ark. 121; 95 U. S. 504; nor did such exclusion violate any constitutional right before the fourteenth amendment was adopted; 5 Cush. 106. But it has been held that unless the legislature clearly confers upon boards of education the power to establish separate schools for white and colored children, the power does not exist; 25 Pac. Rep. (Kan.) 616. A Chinese pupil cannot be excluded from a public school; 66 Cal. 478. A mandamus will lie compelling trustees to admit colored children to public schools where separate schools are not provided for them; 7 Nev. 342; s. c. 8 Am. Rep. 718.

Reading the Bible in the public schools is sectarian instruction; 76 Wis. 177 (under the language of the constitution and laws); *contra*, 38 Me. 379; 12 Allen 127; 95 Ill. 263; 64 Ia. 367; 23 Ohio St. 211.

In Ohio, the constitution of the state does not enjoin or require religious instruction or the reading of religious books in the public schools of the state.

The legislature having placed the management of the public schools under the exclusive control of directors, trustees and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given or what books read therein; 23 Ohio St. 211.

In that case an injunction was granted by the court below to restrain the Board of Education of Cincinnati from prohibiting the reading of the Bible in the public

schools and the decree was reversed. For the history of the case, arguments, and opinions, see "The Bible in the Public Schools," published in Cincinnati, 1870.

A writ of mandamus to compel the discontinuance of Bible reading in the common schools was granted by a unanimous court, upon the ground that it was sectarian instruction, forbidden by the state constitution; 76 Wis. 177; s. c. 7 L. R. A. 330.

This case was followed by Carpenter, J., in a case in Detroit, Pfeiffer v. School Board, May, 1897.

In a Pennsylvania case it was held by Edwards, J., that the reading of the Holy Scriptures, in either version, as a part of the opening exercises in our public schools, does not violate any constitutional provision. It is not in contravention of art. 1, 3, nor art. 10, 2; 7 Dist. Rep. Pa. 596.

The argument of Richard H. Dana, Jr., in the case in 38 Me. 376, has been published in pamphlet form.

In an action by a father for the expulsion of his child from school for a refusal to comply with the orders of her instructor to read the Bible as a part of the course of instruction, a non-suit was granted and confirmed on the ground that an action could not be maintained by a parent, for want of direct pecuniary injury; 38 Me. 376; and an action by the child by her next friend was not sustained upon the ground that the action by the school committee was discretionary and could not be reviewed.

A student of the University of Illinois, after six years' acquiescence in the regulations requiring attendance at chapel, absented himself, disclaiming any conscientious scruples on the subject and was dismissed; an application for a mandamus to reinstate him was denied upon the ground that the rule requiring attendance upon chapel was not a violation of the constitutional provision that "no person shall be required to attend on or support any ministry or place of worship, against his consent;" 137 Ill. 296.

A bill by a taxpayer for an injunction to restrain school directors from allowing the schoolhouse to be used by any society or organization for the purpose of a religious meeting-house, was dismissed on demurrer; 93 Ill. 61. But it has been held that school directors have no authority to permit public school buildings to be used for holding sectarian religious meetings or public lyceum meetings, or for any other purpose than school purposes, but they may permit them to be used for lectures of an educational nature; 182 Pa. 251.

A public school teacher has no authority to compel a pupil to pursue a certain study against the wishes of its parent; 35 Wis. 59; 79 Ill. 567; 87 Ill. 303; *contra*, 108 Ind. 31; 105 Mass. 475; 48 Vt. 444; 38 Me. 379; 59 N. H. 473; 29 Ohio St. 89. A teacher has no right to punish a child for neglecting or refusing to study certain branches from which the parents of the child have requested that it might be excused, or which they have forbidden it to pursue, if those facts are known to the teacher. The proper remedy is to exclude the pupil from the school; -59 Ia. 145; 85 Wis. 59.

Directors; 105 Mass. 475; and teachers; 48 Vt. 444; may expel or suspend pupils for sufficient cause, as for breach of discipline; 46 Vt. 452; or for general immoral character; 8 Cush. 160; for refusal to take part in musical exercises; 108 Ind. 31; for refusal to write English compositions; 82 Vt. 224; for absence contrary to rules; 48 *id.* 444; for refusal on the part of the parents to sign and return periodical written reports of the pupil's standing; 52 N. W. Rep. (Neb.) 710; for misbehavior outside of the school tending to injure the school and subvert the master's authority; 52 Vt. 114; for a father's refusal to permit the master to whip the child or to correct him himself; 30 S. W. Rep. 269; by reason of the parent visiting the school when in session and using offensive language to the teacher; 28 S. E. Rep. (Ga.) 896, in which

case the court cited a letter from Bleckley, C. J., to the court relating to the case. In 71 Mo. 628, it was held that the proper remedy for truancy was not expulsion, but it is also held that the conduct of a pupil at a boarding school, in continually playing truant, and finally leaving for his home, is ground for expulsion; 30 S. W. Rep. (Tex.) 268.

Truancy is an offence not known to the common law, but it is held that boys between the ages of twelve and fifteen who refuse to attend school and wander about public places during school hours are truants under a statute; 36 Atl. Rep. (Me.) 1001, which case see as to correction for that offence. Where the rules of a boarding school provide that there will be no reduction in case of withdrawals, and that all payments will be forfeited on expulsion, there can be no recovery; 30 S. W. Rep. (Tex.) 268.

It is usually provided by constitution or statute that school facilities must be provided for children of the proper age, and compulsory education has been established in Connecticut, New Hampshire, New Jersey, New Mexico, Massachusetts, Montana, Vermont, Washington, Wyoming, Wisconsin, Rhode Island, Ohio, and Pennsylvania.

School directors cannot terminate a contract with a teacher by doing away with the particular school; 1 Ind. App. 138.

In the absence of any express stipulation to that effect there is no contract to give a scholarship to the candidate who obtains the highest marks in the scholarship examination; [1895] 1 Ch. 480.

A college has no right to refuse arbitrarily to examine a student for a degree. See N. Y. L. J., June 27, 1891.

Within the scope of his powers the decision of a state superintendent of schools is conclusive and will be enforced by mandamus; 31 Atl. Rep. (N. J.) 168.

See Am. & E. Encyc. Law; Taylor, Public Schools; VACCINATION; LANDS, PUBLIC; EDUCATION; CORRECTION; ASSAULT; BATTERY. And as to correction, see also 35 Am. L. Reg. 88.

See COMPULSORY SCHOOL ATTENDANCE ACTS; GRADED SCHOOLS; PUBLIC SCHOOLS.

SCHOOL DISTRICT. See GRADED SCHOOL DISTRICT.

SCHOOL FUND. The words "school fund" under § 186, Constitution of Kentucky, do not embrace escheated property. 140 Ky. 789, 131 S. W. 797.

SCHOOLMASTER. One employed in teaching a school. See SCHOOL.

The schoolmaster is entitled to be paid for his services, by those who employ him. See 1 Bingh. 357; 8 J. B. Moore 388. His duties are to teach his pupils what he has undertaken, and to have a special care over their morals. See 1 Stark. 421; ASSAULT. The salary of a public school teacher is not attachable by trustee process while in the hands of city officials whose duty it is to pay it; 54 Ga. 21; s. c. 21 Am. Rep. 273.

SCHOULT. Belg. (from *schuld*, debt). In Dutch Law. An officer of a court who convenes the judges and demands from them justice for litigating parties. Usually translated *sheriff*. Burrill; O'Callaghan's New Netherlands, i. 101.

The *schout fiscal* was an important officer in New Netherlands. His duties were equivalent to those performed among us by a sheriff and an attorney-general. *Id. ibid.* 102.

SCENERY. Where a contract provided for the furnishing of scenery and fixtures for a theatre it was held that painting the walls did not fall within the denomination either of scenery or fixtures. 4 R. I. 364.

SCIENCE. The knowledge of many, methodically digested and arranged, so as to be attainable by one; a body of principles and deductions to explain the nature

of some matter. 33 La. Am. 637. See 13 Wend. 205; BOOKS OF SCIENCE.

Depends upon abstract or speculative principles. "Art" relates to practice or performance—is practical skill as directed by theory or science; the more application of knowledge. Rifle-shooting is not a "science." Anderson; 33 La. An. 637. The term "science" cannot, with propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere temporary use. Prices-current, catalogues of merchandise, a scoring-sheet for games, a chart of patterns for dresses, blank account-books, and the like are not subjects of the copyright laws passed in execution of the foregoing power. *Id.*; 2 Paine 392.

Scientific Works. A medical expert may cite standard authorities as sustaining his views, and then they may be used by the opposite side to discredit him; but they may not be read as evidence or argument. *Id.*; 77 N. C. 58, 59.

SCIENDUM (L. Lat.). In English Law. The name given to a clause inserted in the record by which it is made "known that the justice here in court, in this same term, delivered a writ thereupon to the deputy sheriff of the county aforesaid, to be executed in due form of law." Lee, Dict. Record.

SCIENTER (Lat. knowingly). The allegation in a pleading of knowledge; Webb's Poll. Torts 614; on the part of a defendant or person accused, which is necessary to charge upon him the consequence of the crime or tort.

A man may do many acts which are justifiable or not, as he is ignorant or not ignorant of certain facts. He may pass a counterfeit coin, when he is ignorant of its being counterfeit, and is guilty of no offence; but if he knew the coin to be counterfeit, which is called the *scienter*, he is guilty of passing counterfeit money.

Where evidence of the *scienter* has been given, it may be rebutted, as where the charge is passing counterfeit money, the defendant may show that the bill was genuine or that under the circumstances he had reason to suppose it was, or that he examined a counterfeit detector in regard to it; 8 Wis. 167. Proof of a conspiracy to put forth counterfeit bills is admissible to show the *scienter* as against one of the parties to it; 19 Conn. 238.

In an action against the owner of a dog, alleged to be a dangerous animal, the fact that it is a watch-dog, chained during the day and loosed at night, is sufficient without further proof of *scienter*; 35 La. Ann. 1091.

The averment of a *scienter* in an indictment is not sufficient to supply omission of the positive statement that the defendant did the act; 2 McCord 377; and a charge in an indictment that the defendant passed, etc., a counterfeit, without alleging that he knew it to be such, is insufficient even after verdict; 105 U. S. 611.

SCILICET (Lat. scire, to know, licet, it is permitted; you may know; translated by to wit, in its old sense of to know). That is to say; to wit; namely.

It is a clause to usher in the sentence of another, to particularize that which was too general before, distribute what was too gross, or to explain what was doubtful and obscure. It neither increases nor diminishes the premises or *habendum*, for it gives nothing of itself; it may make a restriction when the preceding words may be restrained; Hob. 171; 1 P. Wms. 18; Co. Litt. 180 b, n. 1.

When the scilicet is repugnant to the precedent matter, it is void: for example, when a declaration in trover states that the plaintiff on the third day of May was possessed of certain goods which on the fourth day of May came to the defendant's hands, who afterward, to wit, on the first day of May, converted them, the scilicet was rejected as surplusage; Cro. Jac. 428. And see 6 Binn. 15; 3 Saund. 291, note 1.

Stating material and traversable matter under a scilicet will not avoid the consequences of a variance; 1 M'Cl. & Y. 277; 2 B. & P. 170, n. 2; 4 Johns. 450; 2 Pick. 323; nor will the mere omission of a scilicet render immaterial matter material; 2 Saund. 206 a; even in a criminal proceeding; 2 Camp. 307, n. See 3 Term 68; 3 Maule & S. 173.

SCINTILLA (Lat.). A spark; a remaining particle; the least particle.

SCINTILLA OF EVIDENCE. The doctrine that where there is any evidence, however slight, tending to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence. 43 Ga. 328; 106 Mass. 271; 40 Mo. 151; 87 *id.* 462; 85 Ia. 585; 48 Vt. 358. In the United States courts and in England, it has been decided that the more reasonable rule is, "that before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden or proof is imposed;" 94 U. S. 278; 11 How. 373; 9 Wall. 197; 13 C. B. 916; 3 C. B. n. s. 150.

The old rule is likewise exploded in several of the states, whose courts are now in the constant habit of ordering nonsuits against the complaint of the plaintiff; 49 N. J. L. 671; 76 Me. 132; 1 Greene 494; 9 Gill 331; 26 N. H. 351; 49 N. Y. 671; or giving peremptory instructions to the jury to find for one party or the other; 71 N. C. 451; 13 Kan. 244; or of sustaining demurrers to the evidence, in cases where there is confessedly some evidence supporting a material issue. This is done under the guise of various expressions, which seem to leave the ancient prerogative of the jury intact. In Maryland, the judge achieves this result by determining the legal sufficiency of the evidence; 7 Gill & J. 20; and in Missouri by determining its legal effect; 9 Mo. 113. See Thompsons. Charg. Jury § 30; Thompsons. Jur. § 2246.

SCINTILLA JURIS (Lat. a spark of law or right). A legal fiction resorted to for the purpose of enabling feoffees to uses to support contingent uses when they come into existence, thereby to enable the statute of uses, 27 Hen. VIII., to execute them. For example, a shifting use: a grant to A and his heirs to the use of B and his heirs, until C perform an act, and then to the use of C and his heirs. Here the statute executes the use in B, which, being coextensive with A's seisin, leaves no actual seisin in A. When, however, C performs the act, B's use ceases, and C's springs up, and he enjoys the fee-simple; upon which the question arises, out of what seisin C's use is served. It is said to be served out of A's original seisin; for upon the cesser of B's use it is contended that the original seisin reverted to A for the purpose of serving C's use, and is a possibility of seisin, or *scintilla juris*. See 4 Kent 238, and the authorities there cited, for the learning upon this subject; Burton, R. P. 48; Wilson, Springing Uses 59; Washb. R. P.

SCIRE FACIAS (Lat. that you make known). The name of a writ (and of the whole proceeding) founded on some public record. Fost. Fed. Pr. 801.

Public records, to which the writ is applicable, are of two classes, *judicial* and *non-judicial*.

Judicial records are of two kinds, judgments in former suits, and recognizances which are of the nature of judgments. When founded on a judgment, the purpose of the writ is either to revive the judgment, which because of lapse of time—a year and a day at common law, but now varied by statutes—is presumed in law to be executed or released, and therefore execution on it is not allowed without giving notice, by *scire facias*, to the defendant to come in, and show if he can, by release or otherwise, why execution ought

not to issue; or to make a person, who derives a benefit by or becomes chargeable to the execution, a party to the judgment, who was not a party to the original suit. In both of these classes of cases, the purpose of the writ is merely to continue a former suit to execution. When the writ is founded on a recognizance, its purpose is, as in cases of judgment, to have execution; and though it is not a continuation of a former suit, as in the case of judgments, yet, not being the commencement and foundation of an action, it is not an original, but a judicial, writ, and at most is only in the nature of an original action. When founded on a judicial record, the writ must issue out of the court where the judgment was given or recognizance entered of record, if the judgment or recognizance remains there, or if they are removed out of the court where they are; 3 Bla. Com. 416, 421; 3 Gill & J. 359; 2 Wms. Saund. 71, notes. See 78 Ill. 78; 58 Tex. 472.

Scire facias to revive a judgment being a continuation of the suit, jurisdiction thereon is in the court where the judgment was rendered, regardless of the residence of the parties; 71 Tex. 103. A *scire facias* to revive a judgment being regarded in Pennsylvania as a substitute for an action of debt on the judgment, a judgment so revived without service or appearance has no binding force as against a defendant who resides in another state; 161 U. S. 642; and in Vermont it is held that when judgment is thus revived the plaintiff cannot recover in another state thereon after the limitation has run against the original judgment; 35 Atl. Rep. (Vt.) 489. A judgment may be revived at common law on a writ and alias writ of *sci. fa.* with return of *nil* as to each; 52 Mo. App. 251; but such revival on two returns of *nil* operates merely to keep in force the local lien and does not stop the running of the statute of limitations in another state where the defendant resides; 161 U. S. 642.

Non-judicial records are letters patent and corporate charters. The writ, when founded on a non-judicial record, is the commencement and foundation of an original action; and its purpose is always to repeal or forfeit the record. *Quo warrant* is the usual and more appropriate remedy to forfeit corporate charters and offices; and *scire facias*, though used for that purpose, is more especially applicable to the repeal of letters patent. When the crown is deceived by a false suggestion, or when it has granted anything which by law it cannot grant, or where the holder of a patent office has committed a cause of forfeiture, and other like cases, the crown may by its prerogative repeal by *scire facias* its own grant. And where by several letters patent the self-same thing has been granted to several persons, the first patentee is of right permitted, in the name and at the suit of the crown by *scire facias*, to repeal the subsequent letters patent; and so, in any case of the grant of a patent which is injurious to another, the injured party is permitted to use the name of the crown in a suit by *scire facias* for the repeal of the grant. This privilege of suing in the name of the crown for the repeal of the patent is granted to prevent multiplicity of suits; 2 Wms. Saund. 72, notes. A state may by *scire facias* repeal a patent of land fraudulently obtained; 1 H. & M.H. 102. See REPEAL; PATENT.

Scire facias is also used by government as a mode to ascertain and enforce the forfeiture of a corporate charter; 3 Wood, Ry. L. 208, n.; where there is a legal existing body capable of acting, but who have abused their power; it cannot, like *quo warrant* (which is applicable to all cases of forfeiture), be applied where there is a body corporate *de facto* only, who take upon themselves to act, but cannot legally exercise their powers. In *scire facias* to forfeit a corporate charter, the government must be a party to the suit; for the judgment is that the parties be ousted and the franchises be seized into the hands of the

government; 2 Kent 313; 10 B. & C. 240; 5 Mass. 230; 16 S. & R. 140; 4 Gill & J. 1; 9 id. 365; 4 Gill 404. See *Quo WARRANTO*.

Scire facias is also used to suggest further breaches on a bond with a condition, where a judgment has been obtained for some but not all of the breaches and to recover further instalments where a judgment has been obtained for the penalty before all the instalments are due; 1 Wms. Saund. 53, n. 1; 4 Md. 375.

By statute, in Pennsylvania, *scire facias* is the method of proceeding upon a mortgage.

The pleadings in *scire facias* are peculiar. The writ recites the judgment or other record, and also the suggestions which the plaintiff must make to the court to entitle him to the proceeding by *scire facias*. The writ, therefore, presents the plaintiff's whole case, and constitutes the declaration, to which the defendant must plead; 1 Blackf. 297. And when the proceeding is used to forfeit a corporate charter, all the causes of forfeiture must be assigned in distinct breaches in the writ, as on a bond with a condition is done in the declaration or replication. And the defendant must either disclaim the charter or deny its existence, or deny the facts alleged as breaches, or demur to them. The suggestions in the writ, disclosing the foundation of the plaintiff's case, must also be traversed if they are to be avoided. The *scire facias* is founded partly upon them and partly upon the record; 3 Inst. 470, 679. They are substantive facts, and can be traversed by distinct pleas embracing them alone, just as any other fundamental allegation can be traversed alone. All the pleadings after the writ or declaration are in the ordinary forms. There are no pleadings in *scire facias* to forfeit a corporate charter to be found in the books, as the proceeding has been seldom used. There is a case in 1 P. Wms. 207, but no pleadings. There is a case also in 9 Gill 379, with a synopsis of the pleadings. Perhaps the only other case is in Vermont; and it is without pleadings. A defendant cannot plead more than one plea to a *scire facias* to forfeit a corporate charter: the statutes of 4 & 5 Anne, ch. 16, and 9 Anne, ch. 20, allowing double pleas, do not extend to the crown; 1 Chitty, Pl. 479; 1 P. Wms. 220.

SCIRE FACIAS AD AUDIENDUM ERRORES (Lat.). The name of a writ which is sued out after the plaintiff in error has assigned his errors. Fitzh. N. B. 20; Bac. Abr. Error (F). Where a *scire facias ad audiendum errores* describes correctly, in its recital, the parties to the judgment complained of, but in the citing part brings in parties whose names do not appear in the writ of error, the irregularity in the *scire facias* may be cured by amendment; 30 Fla. 210.

SCIRE FACIAS AD DISPROBANDUM DEBITUM (Lat.). The name of a writ in use in Pennsylvania, which lies by a defendant in foreign attachment against the plaintiff, in order to enable him, within a year and a day next ensuing the time of payment to the plaintiff in the attachment, to disprove or avoid the debt recovered against him. Act, June 13, 1836.

SCIRE FACIAS FOR THE CROWN. The summary proceeding by extent is only resorted to when a crown debtor is insolvent, or there is good ground for supposing that the debt may be lost by delay. Whart. Law Lex.

SCIRE FACIAS QUARE RESTITUTIONEM NON. A writ which lies where execution on a judgment has been levied, but the money has not been paid over to the plaintiff, and the judgment is afterwards reversed in error or on appeal; in such a case a *scire facias* is necessary before a writ of restitution can issue. Chit. 582.

SCIRE FECI (Lat. I have made known). In Practice. The return of

the sheriff, or other proper officer, to the writ of *scire facias*, when it has been served.

SCIRE FIERI INQUIRY. In English Law. The name of a writ formerly used to recover the amount of a judgment from an executor.

The history of the origin of the writ is as follows: When on an execution *de bonis testatoris* against an executor the sheriff returned *nuda bona* and also a *devastavit*, a *fieri facias de bonis propriis* might formerly have been issued against the executor, without a previous inquisition finding a *devastavit* and a *scire facias*. But the most usual practice upon the sheriff's return of *nuda bona* to a *fieri facias de bonis testatoris* was to sue out a special writ of *fieri facias de bonis testatoris*, with a clause in it, "*et si tibi constare poterit*," that the executor had wasted the goods, then to levy *de bonis propriis*. This was the practice in the king's bench till the time of Charles I.

In the common pleas a practice had prevailed in early times upon a suggestion in the special writ of *fieri facias de devastavit* by the executor, to direct the sheriff to inquire by a jury whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was issued out against him, and, unless he made a good defence thereto, an execution *de bonis propriis* was awarded against him.

The practice of the two courts being different, several cases were brought into the king's bench on error, and at last it became the practice of both courts, for the sake of expedition, to incorporate the *fieri facias* inquiry, and *scire facias* into one writ, thence called a *scire fieri inquiry*, a name compounded of the first words of the two writs of *scire facias* and *fieri facias*, and that of inquiry, of which it consists.

This writ recites the *fieri facias de bonis testatoris* sued out on the judgment against the executor, the return of *nuda bona* by the sheriff, and then, suggesting that the executor had sold and converted the goods of the testator to the value of the debt and damages recovered, commands the sheriff to levy the said debt and damages of the goods of the testator in the hands of the executor. If they could be levied thereof, but if it should appear to him by the inquisition of a jury that the executor had wasted the goods of the testator, then the sheriff is to warn the executor to appear, either if the judgment had been either by or against the testator or intestate, or both, the writ of *fieri facias* recites that fact, and also that the court had adjudged, upon a *scire facias* to revive the judgment, that the executor or administrator should have execution for the debt, etc. Clift, Ent. 650; Lilly, Ent. 664.

Although this practice is sometimes adopted, yet the most usual proceeding is by action of debt, on the judgment, suggesting a *devastavit* because in the proceeding by *scire fieri inquiry* the plaintiff is not entitled to costs unless the executor appears and pleads to the *scire facias*: 1 Saund. 219, n. 8. See 2 Archb. Pr. 934.

SCIREWYTE. The annual tax or prestation paid to the sheriff for holding the assizes or county courts. Par. Ant. 573.

SCOLD. See COMMON SCOLD.

SCOPE. Design, aim, or purpose. 75 Ill. 246. As ordinarily used, extent, limits, etc.

Scope of Authority. The terms "scope of authority" and "course of employment" as applied to a servant's acts, are not susceptible of accurate definition, since what acts are within the scope of the servant's employment so as to render the master liable therefor must be gathered from the surrounding circumstances, the master's liability depending upon his consent, express or implied, to the servant's acts. 130 Ky. 380, 113 S. W. 429.

The term "scope of authority" is not susceptible of accurate definition. Where authority is conferred to act for another, without special limitation it carries with it by implication, authority to do all things necessary to its execution, and hence where a servant's employment involves the exercise of discretion or use of force becomes, as to third persons, the discretion and act of the master, though the servant abused his authority and disregarded the master's private instructions, if he was acting within the general scope of his employment. 130 Ky. 381, 113 S. W. 429.

Scope of Business. "Scope of business," as the term is used, with relation to the power of partners to bind the firm, generally includes what is reasonably necessary to the successful conduct of the business in which they are actually engaged. 53 S. W. 41.

SCOT AND LOT. In English Law. See LOT AND SCOT.

SCOTALE. An extortion by officers of the forests who kept ale-houses and compelled people to drink there under fear of their displeasure. Manw. For. Laws, pt. 1, 216.

SCOTCH MARRIAGES. See GRETNA GREEN.

SCOTCH PEERS. Peers of the kingdom of Scotland; of these sixteen are elected by the rest and represent the whole body. They are elected for one parliament only. See PEERS.

SCOTLAND. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

SCOUNDREL. An opprobrious title, applicable to a person of bad character. General damages will not lie for calling a man a scoundrel, but special damages may be recovered when there has been an actual loss; 2 Bouvier, Inst. n. 2250; 1 Chitty, Pr. 44.

SCRAP. See WASTE.

SCRAWL. A mark which is to supply the place of a seal. 2 Pars. Contr., 8th ed. 589. See SCROLL.

SCRIBE. See CANCELLARIUS.

SCRIP. A certificate or schedule. Evidence of the right to obtain shares in a public company; sometimes called scrip certificate, to distinguish it from the real title to shares. Whart. L. Dict.; 15 Ark. 12. Sometimes, in this country, it indicates a substitute for a cash dividend, usually payable out of future earnings. Land scrip is a certificate that the holder is entitled to take up so much (usually government) land. The possession of such scrip is *prima facie* evidence of ownership of the shares therein designated; Add. Contr. 203*. It is not goods, wares, or merchandise within the statute of frauds; 16 M. & W. 66. Scrip certificates have been held negotiable; L. R. 10 Ex. 337; Dos Passos, Stockbrokers 488. Where the interest of a mortgage bond may, at the option of the mortgagor, be paid in scrip, if he allows the day for payment to pass without exercising such option, the interest must be paid in money; 122 U. S. 687. See DIVIDEND; STOCK.

SCRIP DIVIDEND. See STOCK; DIVIDEND.

SCRIP STOCK. See STOCK.

SCRIPT. The original or principal instrument, where there are part and counterpart.

SCRIVENER. A person whose business it is to write deeds and other instruments for others; a conveyancer.

Money scriveners are those who are engaged in procuring money to be lent on mortgages and other securities, and lending such money accordingly. They act also as agents for the purchase and sale of real estates.

An attorney, *qua* attorney, is not a scrivener; 18 E. L. & Eq. R. 402.

To be considered a money scrivener, a person must be concerned in carrying on the trade or profession as a means of making a livelihood. He must in the course of his occupation receive other men's money into his trust and custody, to lay out for them as occasion offers; 3 Camp. 538.

SCROLL. A mark intended to supply the place of a seal made with a pen on a deed or other instrument of writing. Mitch. R. E. & Conv. 454, 455. In Mississippi and Florida it has been held, that "a scroll attached to a written instrument has the effect of a seal, whenever it appears from the body of the instrument, the scroll itself, or the place where affixed, that such scroll was intended as a seal;" 43 Miss. 304; 9 Sm. & M. 34. In Tennessee and Minnesota the word "seal" affixed to the name has been held equivalent to a seal or scroll; 1 Swan 333; 57 Minn. 499; and so where the word

seal is printed and appears opposite the name; 156 Pa. 329; otherwise in Virginia and Indiana. In Wisconsin and Pennsylvania a printed "L. S.," inclosed in brackets, in the usual place of a seal, is sufficient; 5 Wis. 549 (see 140 N. Y. 249); or in the latter state a seal made with a flourish of the pen; 1 S. & R. 72; 121 Pa. 192. In Georgia a printed "L. S." annexed to the maker's signature constitutes a seal by adoption where the instrument recites that it is executed under the maker's hand and seal; 81 Ga. 453. An expression in the body of the instrument denoting that it is sealed is sufficient, whatever the scroll may be; 5 Mo. 79; 1 Morris (La.) 43; 5 Harr. (Del.) 351; 13 La. Ann. 524. See Martindale, Conveyancing; SEAL.

SCRUET ROLL (called, also, *Scruet Finium*, or simply *Scruet*). In Old English Law. A record of the bail accepted in cases of *habeas corpus*. The award was set down in the remembrance roll, together with the cause of commitment, the writ and return were put on file, the bail was recorded in the *scruet*. 3 Howell, St. Tr. 134, arg. For remembrance roll, see Reg. Mich. 1654, § 15.

SCRUTATOR (Lat. from *scrutari*, to search). In Old English Law. A bailiff whom the king of England appointed in places that were his in franchise or interest, whose duty was to look after the king's water-rights: as, *flotsam, jetsam, wreck*, etc. 1 Hagr. Tracts 23; Pat. 27 Hen. VI. parte 2, m. 20; Pat. 8 Ed. IV. parte 1, m. 22.

SCUTAGE (from Lat. *scutum*, a shield). Knight-service. Littleton § 90. The tax which those who, holding by knight-service, did not accompany the king, had to pay on its being assessed by parliament. Scutage certain was a species of socage where the compensation for service was fixed. Littleton § 97; Reg. Orig. 88.

SCYREGEOTE. The name of a court among the Saxons. It was the court of the shire, in Latin called *curia comitatus*, and the principal court among the Saxons. It was holden twice a year for determining all causes both ecclesiastical and secular.

SE DEFENDENDO (Lat.). Defending himself. Homicide *se defendo* may be justifiable.

SEA. The ocean; the great mass of water which surrounds the land, and which probably extends from pole to pole, covering nearly three-quarters of the globe. Waters within the ebb and flow of the tide are to be considered the sea. Gilp. 526.

A large body of salt water communicating with the ocean is also called a sea; as, the Mediterranean sea, etc.

Very large inland bodies of salt water are also called seas: as, the Caspian sea, etc.

"A sea," in nautical language, may mean a general disturbance of the surface of the water occasioned by a storm, and breaking it up into the roll and lift of waves following or menacing each other; some particular wave or surge, separate from its fellows; 101 N. Y. 468.

As a boundary in a conveyance, includes the beach to low water mark; 84 Me. 14.

The high seas include the whole of the seas below high water mark and outside the body of the county. Couls. & F. on Waters. See 2 Ex. Div. 62; HIGH SEAS.

The open sea is public and common property, and any nation or person has ordinarily an equal right to navigate it or to fish therein; 1 Kent 27; Ang. Tide-Waters 44; and to land upon the sea-shore. Bened. Adm. 224-257.

Every nation has jurisdiction over the person of its own subjects in its own public and private vessels when at sea; and so far territorial jurisdiction may be considered as preserved; for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs. The extent of jurisdiction over adjoining seas

is often a question of difficulty, and one that is still open to controversy. As far as a nation can conveniently occupy, and that occupation is acquired by prior possession or treaty, the jurisdiction is exclusive; 1 Kent 29-31. This has been heretofore limited to the distance of a *cannon-shot*, or marine league, over the waters adjacent to its shore; 2 Cra. 187, 284; 1 Cra. C. C. 63; Bynkershoek, Qu. Pub. Juris. 61; 1 Azuni, Marit. Law 165, 204; Vattel 207. See LEAGUE; SEAMAN; ADMIRALTY; ARM OF THE SEA; LOW WATER MARK; LITUS MARIS; TERRITORIAL WATERS; SEA-SHORE; LEGISLATIVE POWER; MARITIME BELT.

SEA BATTERIES. Assaults by masters in the merchant service upon seamen, at sea.

SEA DAMAGED. In a contract for sale of goods shipped or to be shipped, the phrase, "Sea damaged, if any, to be taken at a fair valuation," contemplates the risk of damage to the goods by perils of the sea, and does not restrict to any particular ship the subsequent transportation of such goods to their destination. 161 U. S. 57. See PERILS OF THE SEA.

SEA-GREENS. In Scotch Law. Grounds overflowed by the sea in spring tides. Bell, Dict.

SEA-LETTER. SEA-BRIEF. In Maritime Law. A document which should be found on board of every neutral ship; it specifies the nature and quantity of the cargo, the place from whence it comes and its destination. Chitty, Law of Nat. 197; 1 Johns. 192. See SHIP'S PAPERS.

SEA POSTAGE. The difference reached by subtracting inland postage from the total postage. 28 Ct. Cl. 1.

SEA-SHORE. That space of land on the border of the sea which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space of land between high and low water mark. Hargrave, St. Tr. 12; 6 Mass. 435; 1 Pick. 180; 5 Day 23; 15 Me. 237; 2 Zab. 441; 4 De G. M. & G. 206; 40 Conn. 382; s. c. 16 Am. Rep. 51, n.; 123 Mass. 361; 23 Tex. 358; 70 Cal. 206; 34 Miss. 21. See TIDE; TIDE-WATER.

At common law, the sea-shore, in England, belongs to the crown; in this country, to the state; Ang. Tide-Wat. 20; 3 Kent 347; 27 E. L. & E. 242; 6 Mass. 435; 1 Pick. 180; 60 N. Y. 56; 16 Pet. 367; 3 How. 221; 3 Zab. 624. In England, the sovereign is not the absolute proprietor, but holds the sea-shore subject to the public rights of navigation and fishery; and if he grants it to an individual, his grantee takes subject to the same rights; Phear, Rights of Water 45-55; Ang. Tide-Wat. 21. So in this country it has been held that the rights of fishery and navigation remain unimpaired by the grant of lands covered by navigable water; 6 Gill 121. But the power of the states, unlike that of the crown, is absolute except in so far as it is controlled by the federal constitution; Ang. Tide-Wat. 59. The states, therefore, may regulate the use of their shores and the fisheries thereon, provided such regulations do not interfere with the laws of congress; 4 Wash. C. C. 371; 18 How. 71; 4 Zab. 80; 2 Pet. 245. And see TIDE-WATER; RIVER; FISHERY.

The public right of fishing includes shrimping and gathering all shell-fish or other fish whose natural habitat is between high and low water mark; 5 Day 22; 2 B. & P. 472; 22 Me. 353.

In Massachusetts and Maine, by the colony ordinance of 1641, and by usage arising therefrom, the proprietors of the adjoining land on bays and arms of the sea, and other places where the tide ebbs and flows, go to low water mark, subject to the public easement, and not exceeding one hundred yards below high water mark; 6 Mass. 439; 19 Pick. 191; 3 Kent 429; Dane, Abr. c. 63, a. 3, 4. It was a question whether this ordinance extended to New Hampshire; 17 N. H. 527. A description

of lands extending to the sea-shore will not include the shore itself; 6 Mass. 439; 13 Gray 257; 31 Me. 134; but it is the general rule that the owner of land holds to low water mark, although bounded by stakes and stones on the bank of the river; 1 Whart. 131; 5 Dana 181; 6 Humphr. 358.

A conveyance of a wharf has been held to include flats in front of it; 6 Mass. 332; 7 Cush. 66; and as an incident sea weed cast upon them is *prima facie* an appurtenant belonging to the owner of the soil; 6 Hun 257; 7 Metc. 323. See LAKE; WHARF.

By the Roman law, the shore included the land as far as the greatest wave extended in winter: *est autem litus maris, quatenus hibernus fluctus maximus excurrit*. Inst. l. 2, t. 1, s. 3. *Litus publicum est eatenus qua maxime fluctus excurrit*. Dig. 50, 16, 112.

The Civil Code of Louisiana seems to have followed the law of the Institutes and the Digest; for it enacts, art. 443, that the "sea-shore is that space of land over which the waters of the sea are spread in the highest water during the winter season." See 5 Rob. 193; Dougl. 425; 1 Holst. 1; 2 Rolle, Abr. 170; Dy. 326; 5 Co. 107; Bacon, Abr. Courts of Admiralty (A); 16 Pet. 234, 367; Ang. Tide-Waters; 5 M. & W. 327; 22 Me. 350; Coul. & F. Waters; Hale's *De Jure Maris*, given in full in Hale, Sea Sh. and for the most part in 16 Am. Rep. 54.

SEA WEED. A species of grass which grows in the sea.

When cast upon land, it belongs to the owner of the land adjoining the sea-shore, upon the grounds that it increases gradually, that it is useful as manure and a protection to the ground, and that it is some compensation for the encroachment of the sea upon the land; 3 B. & Ad. 967; 2 Johns. 313, 323. See 5 Vt. 223; 84 N. Y. 215; 2 R. I. 218. But when cast upon the shore between high and low water mark it belongs to the public and may be lawfully appropriated by any person; 40 Conn. 382; s. c. 16 Am. Rep. 54.

SEA WORTHY. In Insurance Law. In a condition to perform a voyage.

SEAL. An impression upon wax, wafer, or some other tenacious substance capable of being impressed. 5 Johns. 239; 4 Kent 452. It does not seem necessary that an impression be made; 6 C. P. 411; Sugd. Powers 232.

Lord Coke defines a seal to be wax, with an impression. 3 Inst. 169. "*Sigillum*," says he, "*est cera impressa, quia cera sine impressione non est sigillum*." The definition given above is the common-law definition of a seal; Perkins 129, 134; Brooke, Abr. *Faits* 17, 30; 2 Leon. 21; 5 Johns. 239; 21 Pick. 417; but any other material besides wax may be used; 1 Am. L. Rev. 639; 5 Cush. 359.

Where the seal of a public officer does not contain the name of the state, but it is written in a blank left for that name, a verification authenticated by such a seal is insufficient; 68 N. W. Rep. 393.

Merlin defines a seal to be a plate of metal with a flat surface, on which is engraved the arms of a prince or nation, or private individual, or other device with which an impression may be made on wax or other substance on paper or parchment, in order to authenticate them; the impression thus made is also called a seal; Répert. mot *Seeau*; 3 M'Cord 583; 5 Whart. 563.

A person may adopt any seal as his own, or anything in place of a seal; 35 Fed. Rep. 337; it is not necessarily of any particular form or figure, and may consist of an outline without an enclosure, or of a single dash or flourish of the pen; and its precise form in each case depends wholly upon the taste or fancy of the person who makes it; 121 Pa. 192.

In many states, a scroll or similar device may constitute a valid seal: California, Connecticut, Florida, Illinois, Indiana, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Pennsylvania,

Virginia, West Virginia, and Wisconsin. In several states the distinction between sealed and unsealed instruments is abolished; Arkansas, California, North Dakota, South Dakota, Mississippi, Indiana, Kentucky, and Tennessee. The use of seals by private persons is unnecessary in Arizona, Colorado, Idaho, Iowa, Kansas, Mississippi, Nebraska, Nevada, Ohio, Tennessee, Utah, and Washington. In some states official or corporate seals may be impressed on the paper itself: California, Connecticut, Dakota, Kansas, New York, Rhode Island, and Virginia. By U. S. R. S. § 6, an impression on the paper of any common process or instrument is sufficient.

When a seal is affixed to an instrument it makes it a specialty, and consideration is presumed; 2 Bla. Com. 446; 94 U. S. 76; but the presumption does not extend to contracts in restraint of trade where actual consideration is wanting; 3 Bing. 327; or where the real consideration is illegal; Whart. Contr. § 495; but where the distinction between sealed and unsealed instruments is abolished by statute, any failure of consideration may be shown; 27 Ia. 231; 21 Ala. 88. One seal may serve for a number of signers; 47 Am. Rep. 521; 36 Am. Dec. 511; although the contrary was held in 7 Gill & J. 248; 54 Md. 327. It is said the burden is upon a party to prove the adoption of another's seal; and the question of the adoption of a seal has been held to be for the jury; 3 Dev. 420. The same contract may be the specialty of one and the parol agreement of another party to it; 20 Ill. 389; whether a mark or character is a seal depends upon the intention of the executant, as shown by the paper; 100 U. S. 514.

It is not necessary to recite in a deed that it is under seal; 34 Am. Dec. 559; 22 Cal. 157; 20 Ill. 389; although the contrary is held in Virginia and Alabama; 1 Wash. C. C. 170; 4 Ala. 140; and is recognized in New Jersey; 16 N. J. L. 324; and in many jurisdictions, conclusions are expressed as to what language in an instrument is a recognition of the seal, it being held that the use of the technical language of specialties is sufficient; 15 Ala. 43; 12 Johns. 197; or if the fact of the seal appears in the attestation clause; 5 Sawy. 510. The word "seal" written or printed within a scroll is held to be a sufficient seal; 43 Miss. 304; 28 Pa. 489; *contra*, 2 Rand. 446; 1 E. D. Smith 335. A recital in an instrument that it is sealed, will not make it a specialty; 66 Ill. 501; 68 Me. 160.

When an instrument concludes with the words, "witness our hands and seals," and is signed by two persons, with only one seal, the jury may infer from the face of the paper that the person who signed last adopted the seal of the first; 6 Pa. 302.

An executory contract under seal, ignorantly made in pursuance of a parol authority, will be sufficient to maintain an action, the seal being disregarded as mere excess; 60 Pa. 214.

Where a corporation executed a promissory note, payable to the order of its president, attaching thereto, before delivery, its corporate seal, it was held that the note was not a negotiable note under the law merchant, but was a specialty; 8 Fed. Rep. 534. See 1 Ohio 386; PROMISSORY NOTE; as to the origin and use of seals, see Addison, Contr. 6; SCROLL. The affixing of his private seal by a corporate officer to a contract of the corporation binds the latter only by simple contract; 14 Pet. 19; Ang. & Ames, Corp. § 295.

The public seal of a foreign state proves itself; 4 Dall. 416; and public acts, decrees, and judgments exemplified under this seal are received as true and genuine; 2 Cra. 187, 238; 7 Wheat. 273, 335; 2 Conn. 85; 6 Wend. 475; 35 Fed. Rep. 184. See 2 Munf. 53. But to entitle its seal to such authority the foreign state must have been acknowledged by the government within whose jurisdiction the forum is located; 3 Wheat. 610; 9 Ves. 347.

While an action of covenant will lie on

an unsealed instrument in the state where executed, it will not lie in the state requiring a sealed instrument to support such action; 8 Pet. 362; nor is the rule different where, by the *lex loci contractus*, a scroll or other device is recognized as a seal, but is not in the state of the forum; 8 How. 471. Whether any seal is required upon a protest of a bill of exchange is determined by the *lex loci contractus*; 13 How. 472; 106 U. S. 546. A scroll does not amount to a seal of office; 15 Neb. 470; or a corporate seal; 10 Allen 251.

The seal of a notary public is taken judicial notice of the world over; 2 Esp. 700; 5 Cra. 535; 6 S. & R. 484; 3 Wend. 173; 1 Gray 175; but it must not be a scroll; 4 Blackf. 159. Judicial notice is taken of the seals of superior courts; Com. Dig. *Evidence* (A. 2); not so of foreign courts; 3 East 221; 9 *id.* 192; except admiralty or marine courts; 2 Cra. 187; 4 *id.* 232, 435; 3 Conn. 171. See STORA, Confl. Laws § 648; 2 Phill. Ev. 454, notes.

In Louisiana and other civil-law jurisdictions the effects of a deceased person are taken into public custody by being sealed, and the details of the action of officials in connection therewith are carefully regulated by statute.

SEAL DAYS. In English Practice. Motion days in the court of chancery, so called because every motion had to be stamped with the seal, which did not lie in court in the ordinary sittings out of term. Whart. Dict.

SEAL FISHERIES. The controversy concerning the sealing interest in Bering sea between the United States and Great Britain has involved an elaborate discussion with respect to the characteristics and habits of the seals, and the question whether their custom of going in herds through the open sea to certain islands at stated periods of the year for breeding purposes, made them the lawful prey of any captor, or whether the United States could assert over them a property right growing out of the fact that unquestionably the home of the animal was in the territory of the United States. This subject occupied the attention of the Paris tribunal under the treaty for the settlement of claims growing out of the seizure of vessels engaged in the seal fishery. The discussions were of great interest and extended to the general question so much mooted by writers on the subject, whether international law had any real basis other than the mere consent of nations to specific propositions. That particular controversy was decided against the United States and the proceedings may be referred to for information on the subject. See INTERNATIONAL LAW.

Rev. St. § 1956 prohibits the killing within the limits of Alaska Territory of fur seals and various other fur-bearing animals under penalty of fine and imprisonment, and forfeiture of vessels found engaged in violating the section, but power is given to the secretary of the treasury to make regulations authorizing the killing of such animals.

Rev. St. § 1957 provides for the prosecution of offences under the preceding section in the United States district courts of California, Oregon, and Washington.

Rev. St. § 1953 authorizes the secretary of the treasury to remit the fine where in his opinion it was incurred without wilful negligence or fraud.

By act of Feb. 21, 1893, it was provided that when any international arrangement for the protection of fur seals should be concluded, the provisions of R. S. § 1956 should be extended over all that portion of the Pacific ocean included in such international arrangement; 2 Sup. 89. By act of Dec. 21, 1897, all citizens of the United States or owing an allegiance thereto are prohibited from killing, capturing, or hunting fur seals in the waters of the Pacific ocean north of Lat. 35° N. and including Bering sea and the sea of Okhotsk, or from equipping vessels for that purpose under penalty of fine and imprisonment and forfeiture of the vessel. Any seals

found in any vessel of the United States within the waters specified are presumed to have been unlawfully killed, and the importation into the United States of fur seals' skins is prohibited under penalty of being seized and destroyed; Stat. 55 Cong. 2d Sess. 236.

It has been held by United States courts that the waters of Bering sea are those within the three-mile zone from Alaska; 75 Fed. Rep. 513; 143 U. S. 472. R. S. § 1956 is violated though the animals are taken by boats sent out to a distance from the vessel seized; 60 Fed. Rep. 914. See 50 *id.* 108. A vessel is liable to forfeiture if her boats take seals within the prohibited zone though she does not go there; 77 Fed. Rep. 908, under act of 1894. R. S. § 1958 does not authorize the secretary of the treasury to remit forfeiture of a vessel condemned by the United States district court for Alaska for being engaged in killing fur seals; 18 Op. Atty. Gen. 584.

See FISHERY.

SEAL OFFICE. In English Practice. The office at which certain judicial writs are sealed with the prerogative seal, and without which they are of no authority. The officer whose duty it is to seal such writs is called "sealer of writs."

SEAL OF THE UNITED STATES. The seal used by the United States in congress assembled shall be the seal of the United States, viz.: ARMS, paleways of thirteen pieces argent and gules; a chief azure; the escutcheon on the breast of the American eagle displaying proper, holding in his dexter talon an olive-branch, and in his sinister a bundle of thirteen arrows, all proper, and in his beak a scroll, inscribed with this motto, "*E pluribus unum.*" For the CREST: over the head of the eagle which appears above the escutcheon, a glory, or breaking through a cloud, proper, and surrounding thirteen stars, forming a constellation argent on an azure field. REVERSE, a pyramid unfinished. In the zenith, an eye in a triangle, surrounded with a glory proper: over the eye, these words, "*Annuit cœptis.*" On the base of the pyramid, the numerical letters MDCCCLXXVI; and underneath, the following motto: "*Novus ordo seclorum.*" Resolution of Congress, June 20, 1782; R. S. § 1793. See 1 Cra. 153. It is in the custody of the secretary of state; R. S. § 1794.

SEAL-PAPER. A document issued by the lord chancellor previously to the commencement of the sittings, detailing the business to be done for each day in his court, and in the courts of the lords justices and vice-chancellors. The master of the rolls in like manner issued a seal-paper in respect to the business to be heard before him. Sm. Ch. Pr. 9.

SEALED AND DELIVERED. The common formula of attestation of deeds and other instruments, written immediately over the witnesses' names.

SEALER. An officer in chancery who sealed the writs and instruments.

According to the Sealer of the year 1798, his attendance was "Perpetual"; he did business at "all Hours" and he had "No Holidays"; but nevertheless he, along with the Deputy Sealer and the Chaff Wax and the Deputy Chaff Wax, was abolished by s. 23 of the Court of Chancery Act, 1852. Byrne.

SEALING A VERDICT. In Practice. The putting a verdict in writing, and placing it in an envelope, which is sealed. To relieve jurors after they have agreed, it is not unusual for the counsel to agree that the jury shall seal their verdict and then separate. When the court is again in session, the jury come in and give their verdict in all respects as if it had not been sealed; and a juror may dissent from it if since the sealing he has honestly changed his mind; 8 Ohio 405; 1 Gilm. 333.

SEAMAN. A sailor; a mariner; one whose business is navigation. 2 Boulay-Paty, Dr. Com. 232; Laws of Oleron, art.

7; Laws of Wisbuy, art. 19; Bened. Adm. 377.

The term seamen, in its most enlarged sense, includes the captain as well as other persons of the crew; in a more confined signification, it extends only to the common sailors; 3 Pardessus, n. 607. But the mate; 1 Pet. Adm. 246; the cook and steward; 2 *id.* 268; and engineers, clerks, carpenters, firemen, deck-hands, porters, and chamber-maids, on passenger-steamers, when necessary for the service of the ship; 1 Conkl. Adm. 107; 2 Pars. Marit. Law 582; are considered, as to their rights to sue in the admiralty, as common seamen; and persons employed on board of steamboats and lighters engaged in trade or commerce on tide-water are within the admiralty jurisdiction; while those employed in ferry-boats are not; Gilp. 203, 632. Persons who do not contribute their aid in navigating the vessel or to its preservation in the course of their occupation, as musicians, are not to be considered as seamen with a right to sue in the admiralty for their wages; Gilp. 516. Persons employed upon a flat boat with an engine erected thereon, mainly employed in constructing bulkheads and to assist in moving materials to and fro, are to be regarded as rendering maritime services, so as to give them a lien on the vessel for their wages; 84 Fed. Rep. 200. One who brings a vessel to her home port, and lays her up there, i. e. anchors her out of the channel, pumps her out, dries her sails, sees to her fastenings, and renders other services usually performed by mariners, is entitled to a lien for his compensation; 59 Fed. Rep. 297. See LIEN.

Seamen are employed either in merchant-vessels for private service, or in public vessels for the service of the United States.

Seamen in the merchant-vessels are required to enter into a contract in writing, commonly called shipping articles, which see. This contract being entered into, they are bound, under severe penalties, to render themselves on board the vessel according to the agreement; they are not at liberty to leave the ship without the consent of the captain or commanding officer; and for such absence, when less than forty-eight hours, they forfeit three days' wages for every day of absence; and when the absence is more than forty-eight hours at one time, they forfeit all the wages due to them, and all their goods and chattels which were on board the vessel, or in any store where they may have been lodged at the time of their desertion, to the use of the owners of the vessel; and they are liable for damages for hiring other hands. They may be imprisoned for desertion until the ship is ready to sail.

A consular officer of the United States may discharge a seaman on the application of the master, for any cause sanctioned by the usages and principles of maritime law, as recognized in the United States, on the payment of the wages then earned; and all claims for wages for the remainder of the voyage is thereby cut off and barred; 36 Fed. Rep. 442.

On board, a seaman is bound to do his duty to the utmost of his ability; and when his services are required for extraordinary exertions, either in consequence of the death of other seamen or on account of unforeseen perils, he is not entitled to an increase of wages, although it may have been promised to him; 2 Camp. 817; 38 U. S. App. 219. For disobedience he could formerly be imprisoned or punished with stripes; but the correction must be reasonable; 4 Mas. 508; 2 Day 294; 1 Wash. C. C. 316; but see CORRECTION; ASSAULT; BATTERY; and, for just cause, may be put ashore in a foreign country; 1 Pet. Adm. 186; 3 *id.* 268; 2 East 145. By act of congress, Sept. 28, 1850, it is provided that flogging in the navy and on board of vessels of commerce be abolished. And this prohibits corporal punishment by stripes inflicted with a cat, and any punishment which in substance amounts thereto; 1 Curt. C. C. 501. See 35 Fed. Rep. 152. A

master may punish a seaman who refuses to do his duty, and may, if he is incorrigible, discharge him, confine him, or deprive him of privileges; but forfeiture of wages cannot be superadded to corporal punishment, and it is not within the ordinary powers of a master to imprison a sailor on shore; 54 Fed. Rep. 533.

Seamen are entitled to their wages, of which one-third is due at every port at which the vessel shall unlade and deliver her cargo before the voyage be ended; and at the end of the voyage an easy and speedy remedy is given them to recover all unpaid wages. When taken sick, a seaman is entitled to medical advice and aid at the expense of the ship, such expense being considered in the nature of additional wages and as constituting a just remuneration for his labor and services; Gilp. 435; 2 Mas. 541; 40 Fed. Rep. 904. In case of sickness preventing a performance of duty, if the malady be not occasioned by the mariner's misconduct, the full wages are payable; and if a sailor dies on the voyage, his heirs shall have his full wages; 41 Fed. Rep. 224; Bee 134.

The right of seamen to wages is founded not in the shipping articles, but in the services performed; Bee 395; and to recover such wages the seaman has a triple remedy,—against the vessel, the owner, and the master; Gilp. 592; Bee 254. But he cannot claim wages to the end of the voyage when he has obtained his discharge at his own solicitation, and against the advice and even against the expostulation of the master; 40 Fed. Rep. 903. The legislation of most maritime countries, ancient and modern, established that the contract of a seaman always involved, to a certain extent, the surrender of his personal liberty during the life of the contract, and the necessities, and perhaps the safety, of navigation have called into existence legislation, by nearly all maritime nations, for the purpose of securing the personal attendance of the crew on board and for their criminal punishment for their desertion or absence without leave; and it is, therefore, a natural and equitable result that the expenses of their confinement and the wages of their substitutes whilst they are refusing to work should be deducted from their wages; 85 Fed. Rep. 978. In cases of desertion of seamen, the proper expenses for their arrest and detention, and the cost of supplying substitutes whilst so detained, and also the cost of any damage to property by them, may be deducted from their wages; *id.*

When destitute in foreign ports, American consuls and commercial agents are required to provide for them, and for their passage to some port of the United States, in a reasonable manner, at the expense of the United States; and American vessels are bound to take such seamen on board at the request of the consul, but not exceeding two men for every hundred tons of the ship, and transport them to the United States, on such terms, not exceeding ten dollars for each person, as may be agreed on. See R. S. §§ 4554-4591: SEAMEN'S FUND.

A seaman becomes one of the crew of a merchant vessel from the time he signs the shipping articles, and of a man of war from the time he is detailed to her service. 183 U. S. 424.

Seamen in the public service are governed by particular laws. See NAVY; NAVAL CODE; LIEN; DESERTION OF A SEAMAN; SHIPS; PARTIES.

SEAMEN'S FUND. By the act of July 16, 1798, a provision is made for raising a fund for the relief of disabled and sick seamen: the master of every vessel arriving from a foreign port into the United States is required to pay to the collector of customs at the rate of twenty cents per month for every seaman employed on board of his vessel, which sum he may retain out of the wages of such seamen; vessels engaged in the coasting trade, and boats, rafts, or flats navigating the Mississippi with intention to proceed to New Orleans, are also laid under similar

obligations. The fund thus raised is to be employed by the president of the United States, as circumstances shall require, for the benefit and convenience of sick and disabled American seamen. Act of March 3, 1802, s. 1.

By R. S. § 4584, it is provided that when a seaman is discharged in a foreign country with his own consent, or when the ship is sold there, he shall, in addition to his usual wages, be paid three months' wages into the hands of the American consul, two-thirds of which are to be paid to such seamen on his engagement on board any vessel to return home, and the remaining one-third is retained in aid of a fund for the relief of distressed American seamen in foreign ports. See 11 Johns. 66; 12 *id.* 143; 1 Mas. 45; 4 *id.* 541; Edw. Adm. 230.

SEARCH. In Criminal Law. An examination of a man's house, premises, or person, for the purpose of discovering proof of his guilt in relation to some crime or misdemeanor of which he is accused. See **SEARCH WARRANT**.

By act of March 2, 1790, s. 68, it is enacted that every collector, naval officer, and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel or any dwelling-house in the daytime, upon taking proper measures, to search for goods forfeited for non-payment of duties; R. S. § 3066.

In England a prisoner arrested for an indictable offence may be searched for the purpose of finding upon him any property which will afford material evidence for the prosecution or any weapon or instrument which might be used for the purpose of escape or of inflicting injury on himself or others. There does not appear to be any authority permitting the search of prisoners for other purposes than the above, and there have been cases in which the court has directed property taken from an unconvicted person and not necessary to be used for the purpose of evidence, to be returned to him. It is said that money not connected with the offence charged should not be taken from a prisoner. Women should be employed to search female prisoners. The person's lodgings and effects may also be searched. In England special statutory provisions as to searching are made in the case of numerous specified crimes; see Haycraft, *Ex. Pow. in Rel. to Crime*.

Where one was fined for drunkenness and the mayor, as a committing magistrate, found certain money on his person and applied it, against his protest, to the payment of the fine, and the prisoner insisted upon his right to accept imprisonment in place of a fine, it was held that the mayor was justified; 19 Co. Ct. Rep. Pa. 669.

Officers making arrests may seize articles on a prisoner and retain them for the purposes of evidence against him, though they belong to other parties; 36 Wash. L. Rep. 421. See **PRISONER**.

An English (1897) act provides that police magistrates may order the return of such articles, or, if not claimed, may make such order as to their disposal as they deem proper. See **RES JUDICATA**, as to this act.

In Practice. An examination made in the proper lien office for mortgages, liens, judgments, or other incumbrances against real estate. The certificate given by the officer as to the result of such examination is also called a search.

Conveyancers and others who cause searches to be made ought to be very careful that they should be correct with regard to the time during which the person against whom the search has been made owned the premises; to the property searched against, which ought to be properly described; and to the form of the certificate of search. In England, by the act of 1897, a search may be ordered by telegraph.

See **JUDGMENT**; **LIEN**.

See **CORPORATION**.

SEARCH, RIGHT OF. In International Law. The right existing in a belligerent to visit and search a neutral vessel at sea. On the continent of Europe this is called the right of visit. A distinc-

tion was formerly maintained by England between visitation and search. The former was claimed in time of peace, to ascertain whether a merchant vessel was justly entitled to the protection of the flag she had hoisted. The distinction was repudiated by Mr. Webster and by Wheaton and Kent (who concede the right of *approach* for the same purpose) and by Story, J., in 11 Wheat. 42. Visitation and search are no longer permissible in time of peace; 3 Whart. Dig. Int. L. § 327; except where a cruiser is sent in pursuit of a merchant vessel which has left its port under the suspicion of having committed a fraud upon the revenue, or some other crime; Snow, Lect. Int. L. 159.

The right does not extend to examine the cargo, nor does it extend to a ship of war, it being strictly confined to the searching of merchant-vessels. The exercise of the right is to prevent the commerce of contraband goods. Although frequently resisted by powerful neutral nations, yet this right appears now to be fixed beyond contravention; 1 C. Rob. 340; 11 Wheat. 42. Unless in extreme cases of gross abuse of his right by a belligerent, the neutral has no right to resist a search; 1 Kent 154.

The right of search does not exist in time of peace except upon reasonable ground to believe that the vessel is a pirate. By the Treaty of Washington, 1862, Great Britain and the United States concede a mutual right of search in certain latitudes where there is reasonable ground to believe that the flag of either country is being used to cover the African slave trade.

The right, in time of war, can be exercised by a belligerent's war-vessel or a privateer. It exists even though the neutral vessel have a government mail on board; 5 Wall. 28; neutral public ships are not subject to it; 1 Kent 156.

In making a search the ship papers are first examined, and if anything suspicious appear, the ship and cargo may be examined. If the search is resisted, or if the ship's papers (*q. v.*) are unsatisfactory or are absent or are destroyed or concealed, the ship may be captured. The right does not extend to persons on board. A neutral when searched is bound to have and produce proper papers. If a neutral ship resists search, both ship and cargo are liable to confiscation; 4 C. Rob. 408.

In treaties made by the United States it has generally been stipulated that the declaration of the commander of the convoy that the vessels under his charge belong to his flag and, when bound to an enemy's port, that they carry no contraband of war, shall be sufficient, and European nations, except England, have generally excepted from search merchant vessels under the convoy of public ships of the same state; and such is the opinion of most continental writers. Lord Stowell and English writers have held the opposite opinion as to the right of search in such case; 2 Halleck, Int. L., Baker's ed. 264; and so Kent holds; 1 Kent 157, and Story, J., in 2 Cra. 438. Sailing under an enemy's convoy is conclusive ground of confiscation in England; 2 Halleck, Int. L. 266; so also 2 Cra. 438 (a *dictum* by Story, J.), and 1 Kent 157.

By the navy regulations, 1876, United States vessels of war are not to take under their convoy the vessels of any power at war with another, with which we are at peace, nor vessels of a neutral, unless for some special reason. Commanding officers are forbidden to permit vessels under their protection to be searched or detained by a belligerent.

The exercise of search is not a trespass; but if the cruiser capture the vessel as prize, and upon adjudication there is no probable cause, the cruiser is responsible; 2 Mas. 439.

As to the right of search—or rather of visitation—in time of peace, especially in its connection with the suppression of the slave-trade, see Wheat. Right of Search; Webster, Works, vol. 6, 329; 3 Phillimore, Int. Law, *Visit and Search*; Morse, Citizenship 75.

SEARCH WARRANT. In Practice. A warrant requiring the officer to whom it is addressed to search a house, or other place, therein specified, for property therein alleged to have been stolen, and, if the same shall be found upon such search, to bring the goods so found, together with the body of the person occupying the same, who is named, before the justice or other officer granting the warrant, or some other justice of the peace, or other lawfully authorized officer.

It should be given under the hand and seal of the justice, and dated.

Originally search warrants were used almost exclusively for the discovery of stolen property, but of late years their use has been extended to searches for intoxicating liquors; 54 N. H. 164; 150 Mass. 164; gaming implements; 119 *id.* 332; and the like. The United States laws provide for the search in the daytime only, by any custom-house officer under a search warrant; Rev. Stat. § 3066. Ownership in some specific person must be alleged in the information; 64 Ia. 300.

The constitution of the United States, Amendm. art. 4, declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." See 11 Johns. 500; 3 Cra. 447; Story, Const. 1900; 116 U. S. 616.

Hale, 2 Pl. Cr. 149, recommends great caution in granting such warrants:—*first*, that they be not granted without oath made before a justice of a felony committed, and that the complainant has probable cause to suspect that the goods are in such a house or place, and his reason for such suspicion, see 2 Wils. 283; 1 Dowl. & R. 97; 13 Mass. 236; 5 *Id.* 45; 1 R. I. 464; *second*, that such warrants express that the search shall be made in the daytime (but in this country this limitation is not observed; 25 Conn. 278; 145 Mass. 182; *third*, that they ought to be directed to a constable or other proper officer, and not to a private person; *fourth*, that they ought to command the officer to bring the stolen goods, and the person in whose custody they are, before some justice of the peace. See 6 B. & C. 332; 5 Metc. Mass. 98. They should designate the place to be searched; 1 M. & W. 255; 2 Metc. 329; 2 J. J. Marsh. 44; 6 Blackf. 249; 1 Conn. 40; 10 Johns. 263. The description "suspected place" is not sufficient; 3 Par. Cr. C. 656. It has been said that "the description of the place to be searched should be as certain in a warrant as would be necessary in a deed to convey such place;" 41 Me. 254. Trespass will not lie against a party who has procured a search warrant to search for stolen goods, if the warrant be duly issued and regularly executed; 6 Wend. 382; but if the warrant itself shows that the magistrate had no jurisdiction, the officer who serves it will be a trespasser; 19 How. St. Tr. 1029; 5 *Id.* 45. And see 6 Me. 421; 2 Conn. 700; 11 Mass. 500; 2 Litt. 231; 6 Gill & J. 377.

Search warrants are available only in public prosecutions and not to enforce private rights; 13 Gray 454, where it was said: "Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established, on the ground of public necessity; because, without them, felons and other malefactors would escape detection." At common law they were confined to places, but in California it is held that a search warrant may be authorized by law for the person; 68 Cal. 284. See Cooley, Const. Lim., 6th ed. 364; 1 Archb. Cr. Pr. & Pl. 126, note; 1 Bish. New Cr. Proc. ch. 16; **GENERAL WARRANT**.

SEARCHER. See **LAND WAITER**.

SEAT OF JUSTICE. The county seat; the place where the courthouse, jail, and county offices are located; the place where the chancery, circuit, and county courts are held, and where the county records are kept. 20 S. W. Rep. (Tenn.) 502.

SEATED LANDS. In the early land legislation of some of the United States, seated is used, in connection with improved, to denote lands of which actual possession was taken. 5 Pet. 408.

Lands which are actually resided upon, cultivated, or occupied. Residence without cultivation or cultivation without residence, or both together, constitute seated lands. 6 Watts 269; 4 Pa. 214; 55 id. 98; 73 id. 418. See **UNSEATED LANDS**.

SEAWORTHINESS. In Maritime Law. The sufficiency of the vessel in materials, construction, equipment, officers, men, and outfit, for the trade or service in which it is employed.

It is that quality which fits a ship for carrying safely the particular cargo which it takes on board for the voyage for which it is destined. 3 U. S. App. 580.

Under a marine policy on ship, freight, or cargo, the fitness for the service of the vessel, if there is no provision to the contrary at the outset, is an implied condition, non-compliance with which defeats the insurance; 2 Johns. 231; 1 Whart. 399; 1 Camp. 1; 5 Pick. 21; 2 Ohio 211; 2 B. & Ald. 73; 6 Cow. 270; 3 Hill N. Y. 250; 4 Mas. 499; 20 Wend. 287; 1 Pet. C. C. 410; 1 Wall. Jr. 273; 1 Curt. C. C. 278; 26 Pa. 192; 4 H. L. C. 253; Olc. 110; 12 Md. 348.

It is of no consequence whether the insured was aware of the condition of the ship, or not. His innocence or ignorance is no answer to the fact that the ship was not seaworthy. When the want of seaworthiness arises from justifiable ignorance of the cause of the defect, and is discovered and remedied before any injury occurs, it is not to be considered as a defect; 1 Johns. 241; 1 Pet. 183; 2 B. & Ald. 73. See 138 U. S. 408.

The warranty of seaworthiness is absolute and extends to latent defects; 10 P. D. 103. Seaworthiness varies with the place of voyage, the class of ship, and the nature of the cargo; 2 F. & F. 263.

It includes a master having competent skill in navigation; 3 C. & P. 18; and a sufficient and competent crew; 7 B. & C. 798; and proper equipment, including proper medicines and necessaries for the voyage; 3 Esp. 257.

A vessel is not seaworthy if the cargo is so badly stowed that it is difficult and dangerous to navigate the ship; 2 F. & F. 663; or if she is not properly disinfected for the carriage of cattle; 12 Q. B. Div. 297; or has a defective crank-shaft; 10 P. D. 103; as to unseaworthiness by reason of not employing a pilot, it is said that if a vessel sails from a port where there is a pilot and the navigation requires one, the master must employ one; 3 B. & Ad. 383; but in entering a port, if the master uses due diligence to obtain a pilot but cannot find one, and, being competent himself, attempts to enter a harbor without one, it is not a breach of the warranty of seaworthiness; 3 B. & Ad. 383.

The warranty of seaworthiness in a time policy is complied with if the vessel be seaworthy at the commencement of the risk; 124 U. S. 405. Where a vessel sprung a leak, and was lost without encountering any sea peril, it was held that she was not seaworthy, heavy seas not being a sea peril within the meaning of a policy of marine insurance; 42 Fed. Rep. 861.

The opinion of carpenters who have repaired the vessel, however they may strengthen the presumption that the ship is seaworthy, when it is favorable, is not conclusive of the fact of seaworthiness; 4 Dowl. 209. The presumption *prima facie* is for seaworthiness; 1 Dowl. 336. See 40 Fed. Rep. 847. And it is presumed that a vessel continues seaworthy if she was so

at the inception of the risk; 20 Pick. 389. See 1 Brev. 252. Where nothing is said on the subject, seaworthiness is an implied condition of a hiring of shipping; 76 Mich. 153. Any sort of disrepair left in the ship, by which she or the cargo may suffer, is a breach of the warranty of seaworthiness. A deficiency of force in the crew, or of skill in the master, mate, etc., is a want of seaworthiness; 1 Camp. 1; 4 Du. N. Y. 234; 36 Fed. Rep. 784. See 48 Fed. Rep. 463. But if there was once a sufficient crew, their temporary absence will not be considered a breach of warranty; 2 B. & Ald. 73; 1 Johns. Cas. 184; 1 Pet. 183. A charge of unseaworthiness by reason of the pilot's intoxication is not sustained when there is no evidence that he was not perfectly capable when the vessel left port, or, if he was not, that the master knew the fact, and where the pilot, when sober, was one of the best; 44 Fed. Rep. 374. A vessel may be rendered not seaworthy by being overloaded; 2 B. & Ald. 330; or by having a defective compass; 136 U. S. 408. The burden of the proof of seaworthiness is on the one who alleges it; 3 Q. B. Div. 594. The fact that a ship after being eleven hours at sea in fair weather began to leak so that she was obliged to run for a harbor of refuge, is sufficient to throw the burden of proof on the carrier even if it is not sufficient proof of unseaworthiness; 75 Fed. Rep. 74.

It can never be settled by positive rules of law how far this obligation of seaworthiness extends in any particular case, for the reason that improvements and changes in the means and modes of navigation frequently require new implements, or new forms of old ones; and these, though not necessary at first, become so when there is an established usage that all ships of a certain quality, or those to be sent on certain voyages or used for certain purposes, shall have them; 2 Pars. Marit. Law 134. Seaworthiness is, therefore, in general, a question of fact; 1 Pet. 170, 184; 9 Wall. 536; 116 N. Y. 539.

SEAWORTHY FOR THE VOYAGE. The words in the Merchant Shipping Act, 1876, mean that the ship must be "in a fit state, as to repairs, equipment, and crew, and in all other respects, to encounter ordinary perils of the voyage." They do not include "a neglect properly to use the appliances on board a vessel well equipped and furnished." [1894] App. Cas. 222, approving 5 M. & W. 405.

SEBASTOMANIA. In Medical Jurisprudence. Religious insanity or monomania.

SECESSION. The act of withdrawing; separation.

The attempted secession of eleven of the states from the United States government led to the civil war of 1861-65, and gave rise to many important decisions affecting the mutual relations of the national and state governments, and the rights of citizens under contracts made before and during the war. And first, as to the *Power or Right of Secession*.

The union of the states was never a purely artificial relation. By the articles of confederation the union was declared to be perpetual, and the constitution was ordained to form a more perfect union. But this by no means implies the loss of individual existence on the part of the states; the constitution looks throughout to an indestructible union of indestructible states; and the more recent states are no less subject to this principle than the original ones. Considered as transactions under the constitution, the ordinance of secession adopted by any one of the seceding states, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null and without operation in law. The seceding state ceased to be a state, nor her citizens, citizens of the union. The war of secession was therefore treason. It is the practice of modern governments when attacked by formidable rebellion to concede belligerent rights: this establishes no rights except during the war. Legal rights could neither be created nor defeated by the action of the government of the Confederate States. Neither the pretended acts of secession nor the magnitude of the war could constitute a confederate state government *de facto*, so as to create civil rights which could outlast the war, except that acts necessary to peace and good order among citizens, such as those relating to private relations and private property, which would be valid if emanating from a lawful government, must be regarded in

general as valid when proceeding from an actual, though unlawful, government; 7 Wall. 700; 1 Abb. U. S. 50; Chase's Dec. 186.

As to the validity of contracts. Where one engaged actively in the service of the rebel government purchased cotton which was afterwards seized by the military forces of the United States, sold, and the proceeds paid into the treasury, held, that his purchase of the cotton was illegal and void and gave him no title thereto; 93 U. S. 405; 21 Wall. 350. The Confederate government had no corporate power to take, hold, or convey a valid title to property, real and personal, and a purchaser of cotton from said government during the rebellion acquired no title thereto; 8 Ct. Cls. 499.

Confederate bonds. The bonds issued by the seceding states do not constitute a valid consideration for a promissory note; 15 Wall. 488; and so of the securities known as Confederate treasury notes; 1 Abb. U. S. Rep. 261; but a promise to pay in "Confederate notes" in consideration of the receipt of such notes and of drafts payable by them, is neither a *nudum pactum* nor an illegal contract; 16 Wall. 483.

Validity of statutes. When the military forces of the Confederate government were overthrown, it perished, and with it all its enactments. But the legislative acts of the several states forming the confederacy stand on different grounds, and so far as they did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the constitution, they are in general to be treated as valid and binding; 96 U. S. 177; 97 id. 594; 1 Chase's Dec. 107; 7 Wall. 733; 33 id. 99.

Payments made under the Confederate sequestration acts were void and gave no title. See 96 U. S. 193.

Decisions of the Confederate courts. Judgments of such courts merely settling the rights of private parties, actually within their jurisdiction, not tending to defeat the just rights of citizens of the United States, nor in furtherance of laws passed in aid of the rebellion, are valid; 1 Woods 437; 97 U. S. 509; and a judgment of a court of Georgia in November, 1861, for the purchase-money of slaves, was held a valid judgment when entered, and enforceable in 1871; 10 Am. L. Reg. 8, p. 641. But for the war, the courts of states in rebellion had no jurisdiction of parties residing in states which adhered to the national government; 10 Am. L. Reg. n. s. 53. See further, 15 Wall. 610; 12 Op. Att. Gen. 141, 182; 13 id. 149; 45 Ga. 370; 20 Gratt. 31; 13 Wall. 646; Hurd's Theory of Nat. Govt.; RECONSTRUCTION; CONFEDERATE STATES; CONFEDERATE MONEY; WAR.

SECK. A want of remedy by distress. Littleton, s. 218. See **RENT**. Want of present fruit or profit, as in the case of the reversion without rent or other service, except fealty. Co. Litt. 151 b, n. 5.

SECOND-CLASS MATTER. See MAIL MATTER.

SECOND COUSINS. Those who are related, being descended from the same great-grandfather, or great-grandmother. L. R. 19 Ch. Div. 204. See **LEGACY**.

SECOND DELIVERANCE. The name of a writ given by statute of Westminster 2d, 13 Edw. I. c. 2, founded on the record of a former action of replevin. Co. 2d Inst. 341. It commands the sheriff, if the plaintiff make him secure of prosecuting his claim and returning the chattels which were adjudged to the defendant by reason of the plaintiff's default, to make deliverance. On being nonsuited, the plaintiff in replevin might, at common law, have brought another replevin, and so *ad infinitum*, to the intolerable vexation of the defendant. The statute of Westminster restrains the plaintiff when nonsuited from so doing, but allows him this writ, issuing out of the original record, in order to have the same distress delivered again to him, on his giving the like security as before; 3 Bla. Com. 150.

SECOND DISTRESS. See **DISTRESS**.

SECOND-HAND EVIDENCE. This term is sometimes applied to *hearsay* evidence, and should not be confounded with secondary evidence. See **POW. EV.**

SECOND SURCHARGE, WRIT OF. The name of a writ issued in England against a commoner who has a second time surcharged the common. 3 Bla. Com. 239.

SECONDARY. An officer who is second or next to the chief officer; as, secondaries to the prothonotaries of the courts of king's bench or common pleas; secondary of the remembrancer in the exchequer, etc. Jacob, L. Dict.

SECONDARY BOYCOTT. See **BOYCOTT**.

SECONDARY CONVEYANCES, or derivative conveyances, are those which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 2 Sharsw. Bla. Com. 234.

SECONDARY EVIDENCE. That evidence which is admissible after proof which accounts satisfactorily for the absence of the evidence. The rule which requires the production of the best evidence of which the case in its nature is susceptible, is adopted for the prevention of fraud and is essential to the administration of justice; 31 Fed. Rep. 313. For discussion of this subject see **EVIDENCE**.

Secondary evidence includes:

1. Examined copies, exemplifications, office copies, and certified copies.
2. Other copies made from the original and proved to be correct.
3. Counterparts of documents as against the parties who did not execute them.
4. Oral accounts of the contents of a document given by some person who has himself seen it; Steph. Dig. Ev. art. 70. A good illustration of the rule respecting such evidence is that in an action to recover a stock subscription, the subscription paper is primary evidence; the stock ledger is secondary; 51 Fed. Rep. 409.

SECONDARY USE. A use limited to take effect in derogation of a preceding estate, otherwise called a "shifting use" as a conveyance to the use of A and his heirs, with a proviso that when B returns from India, then to the use of C and his heirs. 1 Steph. Com. 546.

SECONDS. In Criminal Law. Those persons who assist, direct, and support others engaged in fighting a duel.

Where the principal in deliberate duelling would be guilty of murder, the second is considered equally guilty. It has been contended that the second of him who is killed is equally guilty with the second of the successful principal; but this is denied by Hale, who considers such a one guilty only of a great misdemeanor; 2 Bish. Cr. Law § 311.

SECRET COMMITTEE. A secret committee of the house of commons is a committee especially appointed to investigate a certain matter, and secrecy being deemed necessary in furtherance of its objects, its proceedings are conducted with closed doors. All other committees are open to members of the house, although they may not be serving upon them. Brown.

SECRET OFFICIAL BALLOT. One furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited. 154 Ky. 520, 157 S. W. 1147.

SECRET PARTNERSHIP. One where the existence of certain persons as partners is not avowed to the public. 49 N. H. 225. See **PARTNERS**.

Generally used in contradistinction to notorious and open partnership. Whether the business is carried on in the name and firm of one partner only, or of him and company, would in this respect, make no difference. 5 Pet. (U. S.) 555; 49 N. H. 225.

SECRET SERVICE. A branch of government service concerned with the detection of counterfeiting and other offences, civil or political, committed or threatened by persons who operate in secrecy. It is under the charge and direction of the treasury department.

SECRETARY. An officer who, by order of his superior, writes letters and other instruments. He is so called because he is possessed of the *secrets* of his employer. This term was used in France in 1343, and in England the term secretary was first applied to the clerks of the king, who being always near his person were called *clerks of the secret*, and in the reign of Henry VIII. the term secretary of

state came into use.

In the United States the term is used to denote the head of a department: as, secretary of state, etc. See **DEPARTMENT**.

SECRETARY OF EMBASSY. An officer appointed by the sovereign power to accompany a minister of the first or second rank, and sometimes, though not often, of an inferior rank.

He is, in fact, a species of public minister; for, independently of his protection as attached to an ambassador's suite, he enjoys in his own right the same protection of the law of nations, and the same immunities, as an ambassador. But private secretaries of a minister must not be confounded with secretaries of embassy or of legation. Such private secretaries are entitled to protection only as belonging to the suite of the ambassador.

SECRETARY OF LEGATION. An officer employed to attend a foreign mission and to perform certain duties as clerk.

He is considered a diplomatic officer; R. S. § 1674. The salary of a secretary of embassy, or the secretary of a minister plenipotentiary, is the same as that of a secretary of legation.

SECRETARY OF STATE. In the United States. The chief officer of the State Department of the Federal Government. He is subordinate to the President and subject, like heads of other branches of the Executive, to the direction of Congress. He also has charge of the United States Seal. Each State has a similar official. English.

In England. Acts of Parliament frequently speak of the "Secretary of State" as if there were only one. But the expression means "one of His Majesty's principal Secretaries of State for the time being," unless a contrary intention appears. The principal Secretaries of State are those for the Home Department, for Foreign Affairs, for the Colonies, for the War Department, for Air, and for India. Not more than five of them, and not more than five of their under-secretaries—each of them has a parliamentary under-secretary—may sit in the House of Commons at the same time. Each Secretary of State can do anything which any one of the others is empowered to do; but for purposes of administrative convenience each of them confines himself to such matters as properly appertain to his own department. Byrne.

SECRETS OF STATE. A judge at *Nisi Prius* has no power to compel a witness to produce documents connected with affairs of State, if their production would be injurious to the public service; and that question must be determined, not by the Judge, but by the head of the department having the custody of the documents.

The case, however, is different, where the head of the department does not personally attend at the trial, but sends a subordinate with the documents, to be produced or not as the Judge may think proper: Per Pollock, C. B., Bramwell, B., and Wilde, B.

Whenever the Judge is satisfied that the document may be made public without prejudice to the public service he ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. 5 H. & N. 838.

SECTA (Lat. *sequor*, to follow). The persons, two or more in number, whom the plaintiff produced in court, in the ancient form of proceedings, immediately upon making his declaration, to confirm the allegations therein, before they were called in question by the defendant's plea. Bracton 214 a. The word appears to have been used as denoting that these persons followed the plaintiff into court; that is, came in a matter in which the plaintiff was the leader or one principally concerned. The actual production of *suit* was discontinued very early; 3 Bla. Com. 295; but the formula "*et inde producit sectam*" (for which in more modern pleadings "and thereupon he brings suit" is substituted) continued till the abolition of the Latin form of pleadings. Steph. Pl., And. ed. 171. The count in *dower* and *writs of right* did not so conclude, however; 1 Chitty, Pl. 399. A suit or action. Hob.

20; Bracton 399 b. A suit of clothes. Cowel; Spelman, Gloss.

SECTA AD CURIAM. A writ that lay against him who refused to perform his suit either to the county court or the court-baron. Cowel.

Ad Furnum. Suit due a public bake-house.

Ad Molendrinum. A service arising from the usage, time out of mind, of carrying corn to a particular mill to be ground. 3 Bla. Com. 235. A writ adapted to the injury lay at the old law. Fitzh. N. B. 123.

Ad Torrale. Suit due a man's kiln or malt-house. 3 Bla. Com. 235.

Curis. Suit at court. The service due from tenants to the lord of attending his courts-baron, both to answer complaints alleged against themselves, and for the trial of their fellow-tenants. 2 Bla. Com. 54.

SECTA FACIENDA PER ILLAM QUÆ HABET ENICIAM PARTEM. A writ to compel the heir, who has the elder's part of the co-heirs, to perform suit and services for all the coparceners. Reg. Orig. 177.

SECTA REGALIS. A suit or service by which all persons were bound twice in a year to attend the sheriff's tourn.

SECTA UNICA TANTUM FACIENDA PRO PLURIBUS HÆREDITATIBUS. A writ for an heir who was distrained by the lord to do more suits than one, that he should be allowed to do one suit only in respect of the land of divers heirs descended to him. Cowel.

SECTARIAN. A Roman Catholic orphanage where the pupils are instructed in the doctrines of their church is a sectarian institution within a constitutional provision forbidding the use of public funds for sectarian purposes. 16 Nev. 273. See **RELIGION**.

A religious sect is a body of number of persons united in tenets, but constituting a distinct organization or party by holding sentiments or doctrines different from those of other sects or people. In the sense intended by the constitution of Nevada, every sect of that character is "sectarian." Anderson; 16 Nev. 385.

SECTATORES. A man's followers. Sutors of court among the Saxons. 1 Reeve's Hist. Eng. L. 22.

SECTION. A part separated from the rest, a division, a portion, as, specifically, a distinct part of a book or writing; the subdivision of a chapter; the division of a law or other writing, a paragraph, an article. 23 Neb. 128. The smallest numbered subdivision of a statute, code, textbook, etc., which contains a distinct subject. A paragraph (*q. v.*); an article. 23 Neb. 128.

SECTION OF LAND. A parcel of government land containing six hundred and forty acres. The lands of the United States are surveyed into parcels of six hundred and forty acres; each such parcel is called a section.

These sections are divided into half-sections, each of which contains three hundred and twenty acres, and into quarter-sections of one hundred and sixty acres each. See 2 Washb. R. P.

SECTIS NON FACIENDIS. A writ for a woman, who, for her dower, ought not to perform suit of court. Reg. Orig. 174.

SECTORES (Lat.). In Roman Law. Bidders at an auction. Babington, Auct. 2.

SECULAR. Temporal things; of the world; worldly. 14 N. H. 139.

SECURITATIS PACIS. A writ that lay for one who was threatened with death or bodily harm by another, against him who so threatened. Reg. Orig. 98.

SECURITIES. See **VALUABLE SECURITIES**.

SECURITY. That which renders a

matter sure; an instrument which renders certain the performance of a contract. A person who becomes the surety for another, or who engages himself for the performance of another's contract. See 3 Blackf. 431. See FIRST-CLASS; HERITABLE SECURITY.

SECURITY FOR COSTS. In Practice. In some courts there is a rule that when the plaintiff resides abroad he shall give security for costs, and until that has been done, when demanded, he cannot proceed in his action.

This is a right which the defendant must claim in proper time; for if he once waives it he cannot afterwards claim it: the waiver is seldom or perhaps never expressly made, but is generally implied from the acts of the defendant. When the defendant had undertaken to accept short notice of trial: 2 H. Bla. 573; or after issue joined, and when he knew of plaintiff's residence abroad, or, with such knowledge, when the defendant takes any step in the cause, these several acts will amount to a waiver; 5 B. & Ald. 702; 3 Wash. Ty. 518. It is never too late, however, if the motion do not delay the trial; 1 Yeates 176. See 1 Johns. Ch. 202; 1 Ves. 396; Bright, Costs 257.

The fact that the defendant is out of the jurisdiction of the court will not alone authorize the requisition of security for costs; he must have his domicile abroad; 1 Ves. 396. A wife petitioning for a writ of *habeas corpus* to obtain from her husband, who resides in the state, the custody of their child, cannot be required without proofs to give bond as a non-resident, since her domicile is *prima facie* the same as her husband's; 181 Ind. 489. When the defendant resides abroad, he will be required to give such security although he is a foreign prince. See 11 S. & R. 121; 1 Miles, Pa. 331; 2 id. 402. A general affidavit is sufficient on moving for security for costs; the particulars of the defence need not be specified; 1 W. N. Cas. (Pa.) 134; a rule of court requiring non-residents to enter security for costs does not violate article iv. sec. 2 of the constitution, which provides that citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states; 19 Pa. Co. Ct. Rep. 339; 9 Md. 194; 13 W. Va. 299.

SECUS (Lat.). Otherwise.

SEDERUNT, ACTS OF. Ancient ordinances of the court of session in Scotland, by which authority is given to the court to make regulations equivalent to the *Regule Generales* of the English courts. Various modern acts give the court such power; Whart. Dict.

SEdge FLAT. A tract of land below high water mark. 34 Conn. 421.

SEDITION. In Criminal Law. The raising commotions or disturbances in the state: it is a revolt against legitimate authority. Erskine, Inst. 4. 4. 14.

The distinction between sedition and treason consists in this: that though the ultimate object of sedition is a violation of the public peace, or at least such a course of measures as evidently engenders it, yet it does not aim at direct and open violence against the laws or the subversion of the constitution. Alison, Crim. Law 580.

The obnoxious and obsolete act of July 14, 1798, 1 Story, Laws 543, was called the *sedition law*, because its professed object was to prevent disturbances.

SEDUCED. Means that a virtuous woman has been corrupted, deceived, and drawn aside from the path of virtue which she was pursuing, by such acts and wiles, in connection with a promise of marriage, as were calculated to operate upon a virtuous woman. 106 Mo. 585; 108 id. 658.

SEDUCING TO LEAVE SERVICE. See ENTICE.

SEDUCTION. The act or crime of persuading a female, by flattery or deception, to surrender her chastity. Webster.

The wrong of inducing a female to consent to unlawful sexual intercourse, by enticements and persuasions overcoming her reluctance and scruples. 111 N. C. 215. See 17 Or. 283; 98 Mo. 368. And seduction may occur whether the woman is conscious or not; 98 Cal. 55. In civil cases, seduction and debauching are generally used as substantially similar terms; 73 Mich. 588.

Mere illicit intercourse is not seduction, although a promise of marriage be made; 33 Mich. 112; there must be some promise, deception, art, or influence of the seducer whereby chastity is surrendered; 55 Am. Dec. 542; 97 Mo. 668. Force is not an element of seduction, although force is used after consent is obtained; 31 N. W. Rep. 585.

The complainant must be chaste at the time of the seduction, and a reasonable doubt as to such fact is fatal to a recovery; 51 Ia. 467. Chastity, in the civil or criminal action, means actual personal virtue, and not reputation; 68 Am. Dec. 708; and requires specific acts of lewdness for impeachment; 26 N. Y. 203. Previous chastity is presumed; 42 N. W. Rep. 933. As to what may be shown to establish lack of chastity, see 7 S. W. Rep. 103; 5 Ia. 389; 7 N. W. Rep. 707; 42 N. W. Rep. 562; 11 S. W. Rep. 732; 88 Mo. 88. Chastity must be affirmatively shown where the statute requires that the person seduced be of good repute; 101 Pa. 215. Although a woman may have fallen, if she repent and reform, she is the object of seduction; 87 Am. Dec. 401; 73 Ia. 527.

Most states have enacted statutes making seduction a crime. What allegations are sufficient to constitute seduction, is for the jury to determine; 32 Ia. 262; and the courts allow considerable latitude in the evidence; 37 Mich. 518; 79 Ia. 703.

The indictment should allege the essential elements of the crime as defined by statute; 73 Ala. 527. Where there are several counts the prosecution cannot be compelled to elect; 70 N. Y. 38.

The statutes generally require—that seduction be accomplished by promise of marriage; 102 Pa. 408; which need not be valid; 63 Ind. 198; provided the seduced was ignorant of its invalidity; 106 Mass. 339; and it may have been made some time prior to the seduction; 70 N. Y. 38; and the defendant may have intended to fulfil it; 27 Conn. 319; and he need not be of lawful age to marry; 48 Am. Rep. 17. Chastity of character must be alleged; 13 Md. 585; the previous character of the prosecutrix is to be determined by the jury; 18 Ia. 372. Chastity is always an issue; 86 Ala. 34; but is always presumed, and the burden of impeaching it is on the defendant; 73 Ia. 663.

The statutes generally require the evidence of the complainant to be corroborated; 104 Mo. 644; but as to what must be corroborated there is much confusion; 4 Minn. 325; 110 N. Y. 188; 73 Ala. 527.

The seduction of a married woman is known as criminal conversation, for which the husband has an action against the seducer; 2 Greenl. Ev. § 40. In England the statute 20 & 21 Vict. ch. 85, § 59, deprives the husband of the action but allows him damages in a suit for divorce where the seducer is made co-respondent. See CRIM. CON.

As to the seduction or alienation of a husband's affections, see ENTICE.

At common law the woman herself has no action for damages, though practically the end is reached by a suit for breach of promise of marriage, in many cases, but in some states the rule has been altered by statute. The parent, as being entitled to the services of his daughter, may maintain an action in many cases grounded upon that right, but only in such cases; 6 M. & W. 55; 7 Ired. 408; 4 N. Y. 38; 14 Ala. N. S. 235; 11 Ga. 603; 13 Gratt. 726; 3 Sneed 237; 6 Ind. 262; 10 Mo. 634; 130 N. Y. 239. In England the parent's right of action terminates when the child leaves the parent's house without the intention of returning; 5 East 45; but in America the right

of action depends on the will of the parent, not the child; if he has not divested himself of a right to require his child's services, he may recover, even though at the time of the injury she was in another's service with his permission; 9 Johns. 387; 6 C. Big. L. C. Torts 286; 16 S. W. Rep. 4; otherwise if his power over the child was gone at the time of the seduction. If the control was divested by fraud, the parent has still a right of action; 2 Stark. 493. Specific acts of service are not necessary to a right of action: the right to the service is enough; Big. Torts 146. The right of action continues after the majority of the child, if the relation of master and servant continues; 3 Vroom 53; 84 Wis. 629; 48 Ill. App. 371. See 111 N. C. 215. It is not necessary that pregnancy should ensue; Big. Torts 147; *contra*, 1 Exch. 61; where the proper consequence of the defendant's act was a loss of the child's health, resulting in an incapacity for service, an action lies; 104 Mass. 222; especially where sexual disease is communicated to the child; Big. Torts 147. The daughter's consent does not affect the parent's right to recover; 5 Lans. 454. If the mother, after the father's death, is the child's guardian, she has a right of action; Big. Torts 149; apart from the mother's guardianship, she has a right of action so long as the daughter continues to give her services to her mother. See 51 N. Y. 424. Where the daughter in her illness returns to her mother and is taken care of by her, the mother may sue for the seduction; 5 Cow. 106; *contra*, 2 Watts 474; 14 Ala. 235. See, generally, as to the mother's right of action, Big. L. C. Torts 302. Any one standing *in loco parentis*, and entitled to, or receiving, in his own right, the services of a minor, is entitled to maintain the action; Big. Torts 152; 2 C. & P. 303. If the parent consented to the seduction, or rendered it easy by his misconduct or neglect, he cannot recover; Peake 240; Big. Torts 151.

It is competent to show that the seduced yielded to defendant's solicitations under promise of marriage; 91 Mich. 611; but the mere promise of marriage as the inducement is not sufficient, where she was not seduced by any arts, wiles, or blandishments; 97 Mo. 668.

While the loss of services is the gist of the action, yet, when that has once been established, the jury may give damages commensurate with the real injury inflicted on the plaintiff. See Big. L. C. Torts 294. By statutes, seduction has been made a criminal offence in some states.

SEE. The diocese of a bishop.

SEED-GRAIN LOANS. This phrase applies to loans made under the Minnesota Laws, 1893, cc. 225, 226. Chapter 225 is entitled "An act to appropriate money for seed-grain loans to farmers in this state whose crops were destroyed by hail or storms last year." The act appropriates \$75,000 out of the state treasury for such purpose, and provides that any person desiring to avail himself of the benefits of the act shall file his application with the town clerk, who shall forward it to the county auditor, who shall publish a notice that the board of county commissions will meet at his office on a day named for the purpose of considering the allowance of relief to such applicants, etc. Chapter 226 amends chapter 225 in several particulars, and declares the seed-grain loan a lien on the land for which the loan was made, "and upon the crop of grain raised each year by the person receiving such loan until such amount is fully paid." 75 Minn. 118.

SEEDS. The substance which nature prepares for the reproduction of plants or animals.

Seeds which have been sown in the earth immediately become a part of the land in which they have been sown: *quæ sata solo cedere intelliguntur*. Inst. 2. 1. 32.

SEEM. The word "seem" is synonymous with the word "appear." 46 S. W.

217. See APPEAR.

SEIGNIOR, SEIGNEUR. Among the feudists, this name signified lord of the fee. Fitzh. N. B. 23. It is still used in French Canada. The most extended signification of this word includes not only a lord or peer of parliament, but is applied to the owner or proprietor of a thing: hence the owner of a hawk, and the master of a fishing vessel, is called a seigneur. 37 Edw. III. c. 19; Barrington, Stat. 258. *Seignior in gross*, a lord without a manor.

SEIGNIORAGE. In England. The profit made at the mint on the coinage of money. The levying of a duty on all coined money was anciently one of the royal prerogatives. The statute 18 Car. 2, c. 5, s. 1 put an end to seigniorages by providing that all gold and silver brought to the mint should be coined without any charge of assaying and coining. Since then no seigniorage has been charged on gold: but the statute 56 Geo. 3, c. 68, s. 9, provided that for the coining of every pound weight of silver the mint should charge four shillings. The acts of Charles II. and George III. were repealed by s. 20 of the Coinage Act, 1870, which, while providing that all gold coin brought to the mint should be assayed and coined free of charge, provided that the mint might issue silver coins of the weight and fineness set out in Schedule I., the effect being that down to recent years the mint could purchase silver at such a price in the open market that there was always a profit on the silver coinage. But the war of 1914-1918 caused such an increase in the price of silver that silver coin was being coined at a very heavy loss to the mint. The Coinage Act, 1920, put an end to that state of things by providing that silver coins instead of being, as they were under the Act of 1870, thirty-seven parts of silver to three parts of alloy, should be half silver and half alloy; and this has had the effect of again giving the mint a profit on the coinage of silver.

Bronze coinage has always been merely token money, and there has always been a profit on it to the mint. It was unknown before 1660. The question of the prerogative right to seigniorage never arose in connection with it. Byrnes.

SEIGNIORY. In English Law. The rights of a lord, as such, in lands. Swinb. Wills 174.

SEISIN. The completion of the feudal investiture, by which the tenant was admitted into the feud and performed the rights of homage and fealty. Stearns, Real Act. 2; Mitchell, R. E. & Conv. 225.

Possession with an intent on the part of him who holds it to claim a freehold interest. 8 N. H. 58; 1 Washb. R. P. 35.

Ex termini, the whole legal title. 48 Minn. 462.

"Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass." 1 Burr. 110, per Lord Mansfield.

This definition is said to be more applicable to the ceremony of livery of seisin than to seisin itself, while the definition of seisin as possession, does not lay sufficient stress on what is really the most important element in seisin—the element of title; 12 L. Quart. Rev. 240.

It is said that seisin is of practical importance at the present day in England in those rare cases where land is conveyed by an infant under the custom of gavelkind, and where a man claims an estate by curtesy. If feoffments were abolished and the law of curtesy made similar to that of dower, seisin would be completely obsolete, as it is in all other respects; 12 L. Quart. Rev. 246, 251.

Immediately upon the investiture or livery of seisin the tenant became tenant of the freehold; and the term seisin originally contained the idea of possession derived from a superior lord of whom the tenant held. There could be but one seisin, and the person holding it was regarded for the time as the rightful owner; Littleton § 701; 1 Spence, Eq. Jur.

136. In the early history of the country, livery of seisin seems to have been occasionally practised. See 1 Washb. R. P., 4th ed. § 344; Colony Laws (Mass.) 85, 88; Smith, Landl. & T. 6, n.

In Connecticut, Massachusetts, Pennsylvania, and Ohio, seisin means merely ownership, and the distinction between seisin in deed and in law is not known in practice; 4 Day 306; 14 Pick. 224.

A patent by the commonwealth, in Kentucky, gives a right of entry, but not actual seisin; 3 Bibb 57.

Seisin in fact is possession with intent on the part of him who holds it to claim a freehold interest.

Seisin in law is a right of immediate possession according to the nature of the estate. Cowel; Com. Dig. *Seisin* (A 1, 2).

If one enters upon an estate having title, the law presumes an intent in accordance, and requires no further proof of the intent; 12 Metc. 337; 4 Wheat. 218; 8 Cra. 229; but if one enters without title, an intent to gain seisin must be shown; 5 Pet. 403; 9 id. 52. Seisin once established is presumed to continue till the contrary is shown; 5 Metc. Mass. 173. Seisin will not be lost by entry of a stranger if the owner remains in possession; 1 Salk. 246; 9 Metc. 418. Entry by permission of the owner will never give seisin without open and unequivocal acts of disseisin known to the owner; 10 Gratt. 305; 9 Metc. 418. Simple entry by one having the freehold title is sufficient to regain seisin; 4 Mass. 416; 25 Vt. 316; 10 Pet. 412; 3 Cra. 247. The heir is invested with the seisin by law upon descent of the title; 24 Pick. 78. As a general proposition, by the law in this country, the making, delivery, and recording of a deed of lands passes the seisin without any formal entry being necessary. This is generally by force of the statutes of the several states,—in some such a deed being in terms declared to be equivalent to livery of seisin, and in others dispensing with any further act to pass a full and complete title; 4 Greenl. Cruise, Dig. 45, n., 47, n.; Smith, Landl. & T. 6, n.; 3 Dall. 489.

The seisin could never be in abeyance; 1 Prest. Est. 255; and this necessity gave rise to much of the difficult law in regard to estates enjoyable in the future. See 1 Spence, Eq. Jur. 156.

SEISIN OX. In Scotch Law. A perquisite formerly due to the sheriff when he gave possession to an heir holding crown lands. It was long since converted into a payment in money proportioned to the value of the estate. Bell, Dict.

SEISINA HABENDA. A writ for delivery of seisin to the lord, of lands and tenements, after the sovereign, in right of his prerogative, had had the year, day, and waste, on a felony committed, etc. Reg. Orig. 165.

SEIZING OF HERIOTS. Taking the best beast, etc., where an heriot is due, on the death of the tenant. 2 Bla. Com. 422; Whart. Dict.

SEIZURE. In Practice. The act of taking possession of the property of a person condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff, constable, or other officer lawfully authorized thereto, by virtue of an execution, for the purpose of having such property sold according to law to satisfy the judgment. 54 N. W. Rep. (Wis.) 20. The taking possession of goods for a violation of a public law; as, the taking possession of a ship for attempting an illicit trade; 2 Cra. 187; 4 Wheat. 100; 1 Gall. 75; 2 Wash. C. C. 127, 567; 6 Cow. 404.

The seizure is complete as soon as the goods are within the power of the officer; 16 Johns. 287; 2 Wats. & M'C. 392; 2 Rawle 142; 3 id. 401; N. S. Sher. 173, approved 84 Wis. 80.

The taking of part of the goods in a house, however, by virtue of a *fiery facias* in the name of the whole, is a good seizure of all; 8 East 474. As the seizure must be made by virtue of an execution, it is evident that it cannot be made after the return-day; 2 Caines 243; 4 Johns. 450. See DOOR; HOUSE; SEARCH WARRANT; CORPORATION.

SEIZURE QUOUSQUE. When a

copyhold tenant dies intestate, his heir is bound to come to the lord for admittance within a certain time, and pay the fine on admittance; if he does not appear, the lord may seize the land quousque (i. e. "until" he does appear), and enjoy the rents and profits in the meantime. Seizure quousque is rather in the nature of a forfeiture, but in some manors there are customs that, after neglect or refusal to appear within a certain time, the land shall be absolutely forfeited. R. & L. Dict.; Elt. Coph. 140.

SELECT. See APPOINT.

SELECTI JUDICES (Lat.). In Roman Law. Judges who were selected very much like our juries. They were returned by the prætor, drawn by lot, subject to be challenged and sworn. 3 Bla. Com. 366.

SELECTION OR ELECTION. Doctrine of. When a chattel mortgage is given upon a certain number of cattle of a certain description without specifying or identifying the particular cattle mortgaged, and the mortgagor owns more of the kind described than the number mortgaged, the mortgagor impliedly invests his grantee with the right to select the stated number or quantity and this is called the "doctrine of selection or election." 115 Ky. 470, 78 S. W. 171.

SELECTMEN. The name of certain town officers in several states of the United States, who are invested by the statutes of the states with extensive powers for the conduct of the town business.

SELF-CRIMINATION. See IN-CRIMINATION.

SELF-DEFENCE. In Criminal Law. The protection of one's person and property from injury. Whart. Crim. Law 97. A man may defend himself, and even commit a homicide for the prevention of any forcible and atrocious crime which if completed would amount to a felony; 17 Ala. n. s. 587; 5 Ga. 85; 1 Jones N. C. 190; 30 Miss. 619; 14 B. Monr. 103, 614; 3 Wash. C. C. 515; and, of course, under the like circumstances, mayhem, wounding, and battery would be excusable at common law; 4 Bla. Com. 180. A man may repel force by force even to the taking of life; 45 Vt. 308; 134 Ind. 46; in defence of his person, property, or habitation, or of a member of his family, against any one who manifests, intends, attempts, or endeavors, by violence or surprise, to commit a forcible felony, such as murder, rape, robbery, arson, burglary, and the like; 88 Pa. 265; 8 Bush 451. In these cases he is not required to retreat; 57 Ind. 80; but he may resist, and even pursue his adversary, until he has secured himself from all danger; 7 J. J. Marsh. 478; 4 Bingh. 628; 45 La. Ann. 969; but see 7 N. Y. 396. A man may defend his dwelling to any extremity; and this includes whatever is within the curtilage of his dwelling-house; 8 Mich. 150. Where one finds another trying to break into his house in the night-time he may employ such force as to prevent his doing so, and if the other threatens to kill him and makes a motion as if to do so and puts him in fear of his life, he is not bound to retreat, but may use such force as is necessary to repel the assault; 162 U. S. 499. In deciding what force is necessary, a person need only act upon the circumstances as they appear to him at the time. See 24 Tex. 454; 23 Ill. 17.

In the case of homicide the law permits the resistance of force or seriously threatened force, actually impending or reasonably apparent, by force sufficient to repel the actual or apparent danger, and no more; 98 Ala. 81. The law of self-defence justifies an act done "in an honest and reasonable belief of immediate danger;" 142 U. S. 18. To justify a homicide, however, on the ground of self-defence, there must have been not only the belief but also reasonable ground for believing that at the time of killing the deceased, he was in

imminent or immediate danger of his life or great bodily harm; 80 Fla. 234; 99 Cal. 1; 37 Tex. App. 532; 28 S. C. 201; and to justify shooting, on apparent necessity, the circumstances must have been such as to induce the mind of a reasonably prudent person to entertain the belief that the defendant was in imminent peril of his life or great bodily harm; 97 Ala. 54; there must be a reasonable apprehension of immediate danger justified by the circumstances; 89 Va. 619.

Reasonable fear does not mean the fear of a coward, but the fear of a reasonably courageous man; 92 Ga. 463; 89 Mont. 77; 79 Ga. 696; fear that one's life is in danger will not excuse a homicide in the absence of an overt act or hostile demonstration on the part of the deceased.

A question whether a homicide is committed in repelling an attack is a question of fact not necessarily dependent upon the duration or quality of the reflection by which the act may have been preceded; 151 U. S. 803. One assailed on his own grounds, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat and may defend himself with such means as are within his control; 158 U. S. 550; 95 Ky. 623; 86 *id.* 99. So a person who has had an angry altercation with another person may be justified in arming himself for self-defence; and if, on meeting his adversary afterwards, he kills him, but not in necessary self-defence, his crime may be manslaughter or murder, according to the circumstances on the occasion of the killing, and is not necessarily murder by reason of his having previously armed himself; 155 U. S. 271. Accordingly it is wrong to charge that the intentional arming of himself with a pistol by a defendant, even if with a view to self-defence, would make a case of murder unless the actual affray developed a case of self-defence; 157 U. S. 675.

Where the accused embarks in the quarrel with no felonious intent or malice or purpose of doing bodily harm or killing, and, under reasonable belief of imminent danger, inflicts a deadly wound, it is not murder; 162 U. S. 466; but where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defence; 162 U. S. 466.

What is or what is not an overt demonstration of violence sufficient to justify a resistance which ends in the death of the party making the demonstration varies with the circumstances and is a question for the jury; 160 U. S. 203.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defence is restored when the person assaulted, in violation of law, pursues him with a deadly weapon, and seeks to take his life, or do him great bodily harm; 164 U. S. 546; 88 Ala. 4; Whart. Hom. § 488; 158 U. S. 550, 564; but there must be a real and *bona fide* surrender and withdrawal on the part of the original aggressor, otherwise he will continue to be so regarded; Whart. Cr. L., 9th ed. § 486. The meaning of the principle is that the law will always leave the original aggressor an opportunity to respond before he takes the life of his adversary; Bish. Cr. L., 7th ed. § 871; 1 Bish. N. Cr. L. § 702. It is "for the jury to say whether the withdrawal was not in good faith or was a mere device by the accused to obtain some advantage of his adversary"; 164 U. S. 546. It is said of the two United States cases cited that they "consistently united in expressing a judicial policy on the subject of self-defence which is not only logical in principle, but commends itself to the practical sense of justice"; 55 Alb. L. J. 269; to the same effect in substance are recent cases in state courts; 124 Mo. 397;

141 Ind. 236.

The possession of a good conscience is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation upon the right to repel it; 153 U. S. 614.

The doctrine of constructive self-defence comprehends the principal civil and domestic relations; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each, respectively, are excused, the act of the relation being construed the same as the act of the party himself; 4 Bla. Com. 186; 32 Fla. 56; strangely enough, there seems to be no authority for placing a brother or sister in this category, though they doubtless occupy as good a position as a stranger; 25 Alb. L. J. 187. See 2 Bish. Cr. L. 877.

A man may defend himself when no felony has been threatened or attempted. First, when the assailant attempts to beat another and there is no mutual combat: as where one meets another and attempts to commit or does commit an assault and battery on him, the person attacked may defend himself; 4 Den. 448; 24 Vt. 218; 3 Harring. Del. 22; 3 Brev. 515; 5 Gray 475; 3 C. & P. 31; but it is not true as a general proposition, that one who is assaulted by another with a dangerous weapon is justified in taking the life of the person so assaulting him; 45 La. Ann. 14; and in case of an offer or attempt to strike another, when sufficiently near, so that there is danger, the person assailed may strike first, and is not required to wait until he has been struck; Bull. N. P. 18. Second, when there is a mutual combat upon a sudden quarrel. In these cases both parties are the aggressors; and if in the fight one is killed, it will be manslaughter at least, unless the survivor can prove two things, viz.: that before the mortal stroke was given he had refused any further combat, and had retreated as far as he could with safety; 8 N. Y. 396; 4 D. & B. 491; 15 Ga. 117; 1 Ohio St. 66; 21 Hawks 78, 210; and that he killed his adversary from necessity, to avoid his own destruction; 33 Me. 279; 2 Halst. 230; 11 Humphr. 200; 2 N. Y. 193; Cox, N. J. 424; 25 Ala. N. S. 15.

A person assaulted by another, whom he kills, cannot set up the plea of self-defence if he could have safely retreated or have disarmed the other without danger to himself, and believed himself able to do so; 96 Ala. 13; *id.* 595; 83 *id.* 33; 74 Ia. 653.

The settled rule that where a person having authority to arrest and using the proper means for that purpose is resisted, he can repel force with force, and, if the party making the resistance is unavoidably killed, the homicide is justifiable, may be invoked by a person who resists and kills the officer, if he was ignorant of the fact that he was an officer; 153 U. S. 614.

A man may defend himself against animals, and he may during the attack kill them, but not afterwards; 1 C. & P. 106; 10 Johns. 365; 13 *id.* 12. See Horr. & T. Cas. on Self-Defence, where cases are collected. See JUSTIFICATION; MURDER; HOMICIDE.

SELF-DESTRUCTION. This term in an insurance policy is synonymous with, not more comprehensive than, suicide. It does not include an intentional though insane killing of one's self. "The act, whether described by words of Saxon or of Latin origin, or partly of the one and partly of the other, 'dying by his own hand,' 'self-killing,' 'self-slaughter,' 'suicide,' 'self-destruction,' without more, cannot be imputed to a man who, by reason of insanity (as is commonly said), 'is not himself';" 150 U. S. 468. See SUICIDE.

SELF-DISSERVING EVIDENCE. See SELF-REGARDING EVIDENCE.

SELF-EXECUTING PROVISIONS. See CONSTITUTIONAL; and also Thomps. Corp. § 3004.

SELF-INCRIMINATION. See FORMER TRIAL.

SELF-REGARDING EVIDENCE. That evidence for or against a party which is afforded by the language or demeanor of himself or of those who represent him. When in favor of the party supplying it, the evidence may be said to be "self-serving," when otherwise, "self-disserving," and these terms are also applicable to the statement and demeanor of witnesses.

Self-serving evidence is not originally admissible except where part of the document is used against the party, who is entitled to have the whole of it laid before the jury who may consider such statements as are self-serving, and give such weight to them as they see fit; 5 Taunt. 245; 2 D. & Ry. 358. See CONFESSION.

Self-disserving statements are termed "admissions" in civil cases and "confessions" in criminal cases. See those titles. They are also classified as "plenary" when the statements are not absolutely inconsistent with the existence of fact differently from those indicated by it. See, generally, Best, Evidence §§ 518-577.

SELF-SERVING EVIDENCE. See SELF-REGARDING EVIDENCE.

SELION OF LAND. A ridge of ground rising between two furrows, containing no certain quantity, but sometimes more and sometimes less. *Termes de la Ley.*

SELL. Affecting Real Estate.

The word "sell" in an agreement, affecting, but not in terms granting or conveying, real estate, will not be given any more effect upon the title than is necessary to accomplish the purpose of the transaction stated in the agreement. 203 U. S. 120.

Selling by Sample. The words, "selling by sample," mean taking orders for future delivery as a commercial traveler. 129 Ky. 744, 112 S. W. 903.

Selling Race. A "selling race" is one in which the owner of every horse entered as a contestant places a price on it before the race takes place, and when the race is over the winning horse is sold at auction at not less than the price previously fixed. If the price thus obtained is greater than that set by the owner, the surplus constitutes a fund for the contesting owner of one or more of the defeated horses. 8 Ky. R. 432.

SELLER. One who disposes of a thing in consideration of money; a vendor.

This term is more usually applied in the sale of chattels, and that of vendor in the sale of estates. See SALE.

SELLING FOR THE ACCOUNT. See FOR THE ACCOUNT.

SELLING PUBLIC OFFICES. Buying or selling any office in the gift of the crown, or making any negotiation relating thereto, was deemed a misdemeanor under *stat. 5 & 6 Edw. VI. c. 16*, and 49 Geo. III. c. 126. 2 Steph. Com., 11th ed. 631.

SEMBLE (Fr. it seems). A term frequently used before the statement of a point of law which has not been directly settled, but about which the court have expressed an opinion and intimated what a decision would be.

SEMPERITIA. The collected decisions of the emperors in their councils. Whart. Dict.

SEMI-COLON. According to well-established grammatical rules, this is a point only used to separate parts of a sentence more distinctly than a comma. 76 N. Y. 220.

SEMI-MATRIMONIUM. Half-mar-

riage. Concubinage was so called in the Roman law. *Tayl. Civ. L.* 278.

SEMI-PROOF. In Civil Law. Presumption of fact. This degree of proof is thus defined: "*Non est ignorandum probationem semiplenam eam esse, per quam rei gestae fides aliqua fit iudici; non tamen tanta ut iure debeat in pronuncianda sententia sequi.*" *Marscardus, de Prob.* vol., 1 *Quest.* 11, n. 1, 4.

SEMI-TONTINE DIVIDEND. See *INSURANCE, Tontine Insurance.*

SEMI-TONTINE INSURANCE. See *INSURANCE.*

SEMINARY. A place of education. Any school, academy, college, or university in which young persons are instructed in the several branches of learning which may qualify them for their future employments. *Webster, Dict.*

The word is said to have acquired no fixed and definite legal meaning. *12 N. Y.* 239.

SEMINAUFRAGIUM (Lat.). A term used by Italian lawyers, which literally signifies *half-shipwreck*, and by which they understand the jetsam, or casting merchandise into the sea to prevent shipwreck. *Loaré, Esp. du Code de Com.* art. 409. The state of a vessel which has been so much injured by tempest or accident that to repair the damages, after being brought into port, and prepare her for sea, would cost more than her worth. *4 Bost. L. Rep.* 120.

SEMPER PARATUS (Lat. always ready). The name of a plea by which the defendant alleges that he has always been ready to perform what is demanded of him. *3 Bla. Com.* 803. The same as *Tout temps prist*.

SEN. This is said to be an ancient word which signified justice. *Co. Litt.* 61 a.

SENAGE. Money paid for synodals.

SENATE. The name of the less numerous of the two bodies constituting the legislative branch of the government of the United States, and of the several states.

The Senate of the United States is composed of two senators from each state, chosen by the legislature thereof for six years; and each senator has one vote. The equal suffrage of the states in the senate is secured to them beyond the ordinary power of amendment; no state can be deprived thereof without its consent. *Art. 5.* The senate has been, from the first formation of the government, divided into three classes. The rotation of the classes was originally determined by lot, and the seats of one class are vacated at the end of the second year, so that one-third of the senate is chosen every second year. *Const. art. 1, s. 3.* This provision was borrowed from a similar one in some of the state constitutions, of which Virginia gave the first example.

The qualifications which the constitution requires of a senator are that he should be thirty years of age, have been nine years a citizen of the United States, and, when elected, be an inhabitant of that state for which he shall be chosen. *Const. art. 1, s. 3.* See *CONGRESS.*

SENATORS OF THE COLLEGE OF JUSTICE. The judges of the court of session in Scotland are so called.

SENATUS. In Roman Law. The senate. Also the place where the senate met. *Calv. Lex.*

SENATUS CONSULTUM (Lat.). In Roman Law. A decree or decision of the Roman senate, which had the force of law.

When the Roman people had so increased that there was no place where they could meet, it was found necessary to consult the senate, instead of the people, both on public affairs and those which related to individuals. The opinion which was rendered on such an occasion was called *senatus consultum*. *Inst. 1. 2. 5; Clef. des Lois Rom.; Merlin, Répert.* These decrees frequently derived their titles from the names of the consuls or magistrates who proposed them; as *senatus consultum Claudianum, Libonianum, Velleianum*, etc., from *Claudius, Libonius, Velleius*.

Ayliffe, Pand. 30.

SENATUS DECRETA. (Decisions of the senate.) Private acts concerning particular persons merely.

SENESCHAL. A steward; also one who has the dispensing of justice. *Co. Litt.* 61 a.

SENESCHALLO ET MARESHALLO QUOD NON TENEAT PLACITA DE LIBERO TENEMENTO. A writ addressed to the steward and marshal of England, inhibiting them to take cognizance of an action in their court that concerns freehold. *Reg. Orig.* 185.

SENESCHALLUS (Lat.). A steward. *Co. Litt.* 61 a.

SENILE DEMENTIA. See *DEMENTIA; DOTAGE.*

SENILITY. The state of being old. When on account of senility the party is unable to manage his affairs, a committee will be appointed as in case of lunacy; *1 Collier, Lun.* 66; *2 Johns. Ch.* 232; *4 Call* 423; *13 Ves. Jr.* 443; *8 Mass.* 129; *19 Ves. Jr.* 285.

SENIOR. The elder. This addition is sometimes made to a man's name, when two persons bear the same, in order to distinguish them. In practice, when nothing is mentioned, the senior is intended; *3 Miss.* 59. See *NAME.*

One older in office, or whose entrance upon an office was anterior to that of another. *44 Ohio St.* 6. See *126 Mass.* 603.

SENTENCE. A judgment, or judicial declaration made by a judge in a cause. The term judgment is more usually applied to civil, and sentence to criminal, proceedings.

Sentences are final, when they put an end to the case; or interlocutory, when they settle only some incidental matter which has arisen in the course of its progress. See *Asso & Man. Inst.* b. 3, t. 8, c. 1.

A sentence exceeding the term allowed by law will be reversed upon *certiorari*; *8 Brown.* 30. Under some circumstances a sentence may be suspended after conviction; *48 N. J. L.* 113; *115 Mass.* 138. But a single sentence exhausts the power of the court to punish the offender, after the term is ended or the judgment has gone into operation; *18 Wall.* 163; *124 Mass.* 517; *57 Pa.* 391. See *ACCUMULATIVE SENTENCE.*

The court may set a day for the execution of a prisoner after the time originally fixed has elapsed. The prisoner may be held in confinement after the first day fixed for execution has passed; *146 U. S.* 271. Upon the affirmance of a judgment, sentencing a prisoner to death, there is nothing which requires that he shall be sentenced anew by the trial court; *143 U. S.* 442.

Where a court has jurisdiction of the person and the offence, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void, but only such part as may be in excess; *153 U. S.* 48; so, on a plea of guilty, if the court had authority to impose the punishment actually adjudged on a conviction of a higher grade of the offence; *42 Pac. Rep. (Kan.)* 373.

Where the judgment on the first count is reversed and there is arrest of judgment under the second, a term of imprisonment under the third may be made to commence on the day fixed for the first count; *153 U. S.* 396.

Failure in the sentence to name the crime for which the prisoner was sentenced may be supplied by reference to the rest of the record; *151 U. S.* 396.

Where a verdict against one for embezzling money received by him as an assistant postmaster, was taken on embezzlement alone, without, as required by law, finding the amount embezzled as a fine, and was reversed for that reason, the trial court was without authority to fix the fine without the finding of a jury, and as he could not be put in jeopardy again, he was discharged; *68 Fed. Rep.* 536.

When a sentence different from that au-

thorized by law has been imposed and the judgment has been reversed for that error, and the cause remanded to the trial court with instructions to proceed therein according to law, the trial court resumes jurisdiction of the cause at the point where the error supervened and may resentence the defendant and impose the penalty provided by law, although part of the void sentence has been executed; *68 Fed. Rep.* 472.

Statutes providing for a severer punishment when a criminal is convicted of a second or third offence are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence; *159 U. S.* 678. The doctrine is that the subsequent punishment is not for the first offence, but for persistence in crime; *47 Cal.* 113; *115 Ill.* 583; *158 Mass.* 598; *48 Wis.* 647. For the same reason, they are not open to the objection that they are *ex post facto*, even when the prior convictions occurred before the passage of the act imposing the additional penalty; *45 Cal.* 429; *155 Mass.* 163; *50 Ohio St.* 428; *9 Gratt.* 738. Such statutes cannot apply to the case of a conviction for an offence committed after that for which the prisoner is on trial, but for which he is first tried; *9 Gratt.* 738.

The indictment must allege that the defendant had been previously convicted, sentenced, and imprisoned (once or twice, as the case may be) in some penal institution for felonies (as such penalties are usually only prescribed for felonies or penitentiary offences), describing each separately; *190 Mass.* 35; *158 Mass.* 598; *113 Mo.* 538; *50 Ohio St.* 428. As a general rule the courts have no discretion in the matter of imposing sentence under the habitual criminal acts; *158 Mass.* 598; *50 Ohio St.* 428. It is not necessary, unless required by statute, that the subsequent conviction or convictions should be for the same identical offence or character of offence. It is sufficient if the accused has been convicted of any one of the offences of the grade named; *115 Ill.* 583. The previous offences must have been penitentiary offences, and not merely made so by repeated convictions for what would otherwise have been misdemeanors; *22 S. E. Rep. (Va.)* 874.

See *ACCUMULATIVE SENTENCES; JUDGMENT; HABITUAL CRIMINALS' ACT.* See *CUMULATIVE SENTENCE.*

As to parole and indeterminate sentences, see *PRISONER*; *81 Am. L. Rev.* 744.

SENTENCE OF DEATH RECORDED. A custom in the English courts, now disused, of entering sentence of death on the record which is not intended to be pronounced. The effect was the same as if it had been pronounced and the offender reprieved.

SENTENTIA. See *MAXIM.*

SEPARALITER (Lat. separately). A word sometimes used in indictments to show that the defendants are charged separately with offences which without the addition of this word would seem, from the form of the indictment, to be charged jointly; as, for example, when two persons are indicted together for perjury, and the indictment states that A and B came before a commissioner, etc., this is alleging that they were both guilty of the same crime, when by law their crimes are distinct, and the indictment is vicious; but if the word *separaliter* is used, then the affirmation is that each was guilty of a separate offence. *2 Hale, Pl. Cr.* 174.

SEPARATE ACTION. An action is so called which each of several persons must bring when they are denied the privilege of joining in one suit. See *JOINDER.*

SEPARATE ESTATE. That which belongs to one only of several persons; as, the separate estate of a partner, which does not belong to the partnership. *2 Bouver, Inst. n.* 1519.

The separate estate of a married woman is that which belongs to her and over which her husband has no right in equity. It may consist of lands or chattels. *4 Barb.*

400; 1 Const. 452.

See MARRIED WOMAN.

SEPARATE GENERAL VERDICT

A "separate-general verdict" is the finding, upon any of the issues, in favor of the plaintiff or the defendant. 83 Ky. 27.

SEPARATE MAINTENANCE.

The allowance made by a husband to his wife for her separate support and maintenance. In general, if a wife is abandoned by her husband, without fault on her part, and left without adequate means of support, a bill in equity will lie to compel the husband to support her, without asking for or procuring a decree of divorce; Schoul. Hus. & W. § 485; 50 Miss. 694; 30 N. J. Eq. 359.

When this allowance is regularly paid, and notice of it has been given, no person who has received such notice will be entitled to recover against the husband for necessities furnished to the wife, because the liability of the husband depends on a presumption of authority delegated by him to the wife, which is negated by the facts of the case; 2 Stark. Ev. 699.

SEPARATE PROPERTY.

"Separate property" of a *feme covert* is that of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases, and is imparted to it by the instrument by which it is held. 14 B. Mon. (Ky.) 198.

SEPARATE TRIAL. See JOINDER.

SEPARATION.

A cessation of cohabitation of husband and wife by mutual agreement.

Contracts of this kind are generally made by the husband for himself and by the wife with trustees; 3 Paige, Ch. 483; 4 *id.* 516; 5 Bligh N. S. 339; 1 Dow & C. H. L. 519. This contract does not affect the marriage, and the parties may at any time agree to live together as husband and wife. The husband who has agreed to a *total* separation cannot bring an action for criminal conversation with the wife; 4 Viner, Abr. 173; 2 Stark. Ev. 698; Shelf. Marr. & D. 608. Articles of separation are no bar to proceedings for divorce for subsequent cause; 4 Paige 516; 33 Md. 401. Under recent legislation, separation deeds are legalized in England; L. R. 11 Ch. D. 508; Schoul. Hus. & W. §§ 476, 479; Bish. M. D. & S. 1489.

Reconciliation after separation supercedes special articles of separation, in courts of law and equity; 1 Dowl. P. C. 245; 11 Ves. 532; 9 Cal. 479. Public policy forbids that parties should be permitted to make agreements for themselves to hold good whenever they choose to live separate; 5 Bligh N. S. 367. And see 1 C. & P. 36; 11 Ves. 526; 2 S. & S. 372; 1 Y. & C. 28; 3 Johns. Ch. 521; 1 Des. Eq. 45, 198; 8 N. H. 350.

SEPARATION A MENSA ET THORO.

A partial dissolution of the marriage relation.

By the ecclesiastical or canon law of England, which had exclusive jurisdiction over marriage and divorce, marriage was regarded as a sacrament and indissoluble. This doctrine originated with the church of Rome, and became established in England while that country was Catholic; and though after the reformation it ceased to be the doctrine of the church of England, yet the law remained unchanged until the recent statute of 20 & 21 Vict. (1857) c. 85, and amendments; Bish. Marr. & D. §§ 65, n. 225; 1 Bish. M. Div. & S. § 1377. Hence, as has been seen in the article on divorce, a valid marriage could not be dissolved in England except by what has been termed the omnipotent power of parliament.

This gave rise, in the ecclesiastical courts, to the practice of granting divorces from bed and board, as they used to be called, or judicial separation, as they are called in the recent statute 20 & 21 Vict. c. 85, § 7; Bish. Marr. & D. §§ 65, n. 225; 1 Bish. M. D. & S. § 1377. From England this practice was introduced into this country; and though in some of the states it has entirely given way to the divorce *a vinculo matrimonii*, in others it is still in use, being generally granted for causes which are not sufficient to authorize the latter.

The only causes for which such a divorce is granted in England are adultery and cruelty. In this country it is generally granted also for wilful desertion, and in some states for other causes.

The legal consequences of a separation from bed and board are much less extensive than those of a divorce *a vinculo matrimonii* or a sentence of nullity. Such a separation works no change in the relation of the parties either to each other or to third persons, except in authorizing them to live apart until they mutually come together. In coming together, no new marriage is required; neither, it seems, under the general law, are any new proceedings in court necessary; but the reconciliation, of its own force, annuls the sentence of separation; 5 Pick. 461; 4 Johns. Ch. 187; 2 Dall. 128; Cro. Eliz. 908.

Nor does such a separation, at common law and without statutory aid, change the relation of the parties as to property. Thus, it neither takes away the right of the wife to dower, nor the right of the husband to the wife's real estate, either during her life or after her death, as tenant by the curtesy; neither does it affect the husband's right in a court of law to reduce into possession the choses in action of the wife; though in equity it may be otherwise; 2 Pick. 316; 5 *id.* 61; 6 W. & S. 85; Cro. Eliz. 908; 4 Barb. 295.

It should be observed, however, that in this country the consequences of a judicial separation are frequently modified by statute. See Bishop, Marr. & D. §§ 660-695, Bish. M. D. & S. § 1832.

Of those consequences which depend upon the order and decree of the court, the most important is that of alimony. See ALIMONY. In respect to the custody of children, the rules are the same as in case of divorce *a vinculo matrimonii*; Bish. Marr. & D. c. 25. See DIVORCE; 2 Bish. M. D. & S. § 1185; Macq. Husb. & W. 220; Browne, Div. 29.

SEPTENNIAL ACT. In England, stat. 1, Geo. I, st. 2, c. 38, giving Parliament the right to continue in session seven years but no longer. English.

SEPTUM. An enclosure; any place paved in. Cowel.

SEPULCHRE. The place where a corpse is buried. The violation of sepulchres is a misdemeanor at common law.

The right of a widow to remove the body of her husband from its place of original sepulchre is dependent on her consent to the first interment; 26 Atl. Rep. (R. I.) 42. See DEAD BODY; CEMETERY.

SEQUATUR SUB SUO PERICULO. (Let him come or take the consequences.)

A writ that lay where a summons *ad warrantandum* was awarded, and the sheriff returned that he had nothing whereby he might be summoned, then issued an *alias* and a *pluries*, and if he came not in on the *pluries*, this writ issued. O. N. B. 163.

A writ anciently used where three successive summonses *ad warrantandum* (to warranty) had been ineffectual. Byrne.

SEQUEL. A small quantity of meal given to the servants at a mill where corn was ground, under the names of knaveship, bannock, and lock or gowpen. Ersk. Prin. 211. See THIRLAGE.

SEQUELA CAUSÆ. The process and depending issue of a cause for trial. Cowel.

SEQUELA CURIE. Suit of court. Cowel.

SEQUELA VILLANORUM. The family retinue and appurtenances to the goods and chattels of villeins, which were at the absolute disposal of the lord. Par. Ant. 216.

SEQUESTER. In Civil and Ecclesiastical Law. To renounce. Example: when a widow comes into court and disclaims having anything to do or to intermeddle with her deceased husband's estate, she is said to sequester. Jacob, Law Dict.

SEQUESTRATIO. The separating or setting aside of a thing in controversy from the possession of both the parties that contend for it; it is twofold—voluntary,

done by consent of all parties; and necessary, when a judge orders it.

SEQUESTRATION. In Chancery Practice. A writ of commission, sometimes directed to the sheriff, but usually to four or more commissioners of the complainant's own nomination, authorizing them to enter upon the real or personal estate of the defendant, and to take the rents, issues, and profits into their own hands, and keep possession of or pay the same, as the court shall order or direct, until the party who is in contempt shall do that which he is enjoined to do and which is especially mentioned in the writ. Newl. Ch. Pr. 18; Blake, Ch. Pr. 103.

A process for contempt, used by chancery courts, to compel a performance of their orders and decrees. 88 Ga. 361.

Upon the return of *non est inventus* to a commission of rebellion, a sergeant-at-arms may be moved for; and if he certifies that the defendant cannot be taken, a motion may be made upon his certificate for an order for a sequestration; 2 Madd. Ch. Pr. 203; Blake, Ch. Pr. 103. It is the process formerly used instead of an attachment to secure the appearance of persons having the privilege of peerage or parliament, before a court of equity; Adams, Eq. 326.

Under a sequestration upon *mesne* process, as in respect of a contempt for want of appearance or answer, the sequestrators may take possession of the party's personal property and keep him out of possession, but no sale can take place, unless perhaps to pay expenses; for this process is only to form the foundation of taking the bill *pro confesso*. After a decree it may be sold. See 3 Bro. C. C. 72, 372; 2 Cox, Ch. 224; 1 Ves. 86.

A judgment of sequestration does not dissolve the corporation against which it is rendered, but it may appeal from an adverse judgment in an action brought by it and pending when the judgment of sequestration was rendered; 68 Hun 401.

See, generally, as to this species of sequestration, 19 Viner, Abr. 325; Bac. Abr. *Sequestration*; Com. Dig. *Chancery* (D 7, Y 4); 1 Hov. Suppl. to Ves. 25; 7 Vern., Raithby ed. 58, n. 1, 431, n. 1.

In Contracts. A species of deposit which two or more persons, engaged in litigation about anything, make of the thing in contest with an indifferent person, who binds himself to restore it, when the issue is decided, to the party to whom it is adjudged to belong. La. Code, art. 2942; Story, Bailm. § 45. See 19 Viner, Abr. 325; 1 Vern. 58, 420; 2 Ves. 23.

In Louisiana. A mandate of the court, ordering the sheriff, in certain cases, to take in his possession, and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing. This is what is properly called a judicial sequestration. See 1 Mart. La. 79; 1 La. 439; La. Civ. Code 2941, 2948.

SEQUESTRATOR. One to whom a sequestration is made.

A depositary of this kind cannot exonerate himself from the care of the thing sequestered in his hands, unless for some cause rendering it indispensable that he should resign his trust. La. Civ. Code, art. 2947.

Officers appointed by a court of chancery and named in a writ of sequestration. As to their powers and duties, see 2 Madd. Ch. Pr. 205; Blake, Ch. Pr. 103.

SEQUESTRE. In Roman Law, a deposit made with a stakeholder or middleman pending the decision of a certain event, or dispute. R. & L. Dict.; Dig. 16, 3, 17, 1. See SEQUESTRE; SEQUESTRATION; SEQUESTRATOR; SEQUESTRATIO; SEQUESTER; DÉPÔT; DEPOSIT.

SEQUESTRE. The French for the Roman *sequestre* (q. v.). See DÉPÔT; SEQUESTRATION; SEQUESTRATIO; SEQUESTER; DEPOSIT.

SERF. In Feudal Law. A term applied to a class of persons who were bound to perform very onerous duties towards others. Pothier, *Des Personnes*.

There is this essential difference between a serf and a slave: the serf was bound simply to labor on the soil where he was born, without any right to go elsewhere without the consent of his lord; but he was free to act as he pleased in his daily life: the slave, on the contrary, was the property of his master, who might require him to act as he pleased in every respect, and who might sell him as a chattel. Lepage, *Science Du Droit*, c. 3, art. 2, § 2.

SERGEANT-AT-ARMS. An officer appointed by a legislative body, whose duties are to enforce the orders given by such bodies, generally under the warrant of its presiding officer.

SERIATIM (Lat.). In a series; severally: as, the judges delivered their opinions *seriatim*.

SERIOUS. Important, weighty, momentous, and not trifling. 74 Ill. 231. A *serious injury* is defined by statute in Ohio to be any such injury as shall permanently or temporarily disable a person receiving it from earning a livelihood by manual labor; Ohio L. 1892, 136, and *serious bodily injury* is held to be one which gives rise to apprehension, or is attended with great danger. 21 Tex. App. 317.

Serious Disease or Complaint. In a life insurance policy, the words "serious disease or complaint" mean that, any permanent or material impairment of health is serious, one attended by danger, giving rise to apprehension, a grave, important, weighty trouble. 149 Ky. 717, 149 S. W. 998.

SERJEANTS-AT-LAW. A very ancient and the most honorable order of advocates at the common law.

They were called, formerly, *countors*, or *serjeant-countors*, or *countors of the bench* (in the old law-Latin phrase, *banci narratores*), and are mentioned by Matthew Paris in the life of John I., written in 1235. They are limited to fifteen in number, in addition to the judges of the courts of Westminster, who were always admitted before being advanced to the bench.

The most distinctive feature in the Serjeant's dress in olden times was the "coif," a close-fitting head-covering of lawn or silk. He was invested with this on the day of his call by the chief justice of the king's bench, and it was not doffed even in the presence of the sovereign. It is supposed that the coif was invented for the purpose of hiding the clerical tonsure. This concealment became desirable after the law of 1217, which debarred churchmen from their lucrative practice in the courts.

The most valuable privilege formerly enjoyed by the serjeants was the monopoly of the practice in the court of common pleas. A bill was introduced into parliament for the purpose of destroying this monopoly, in 1755, which did not pass. In 1833, a warrant under the sign manual was directed to the judges of the common pleas, commanding them to open that court to the bar at large. The order was received and complied with. In 1839, the matter was brought before the court and decided to be illegal; 10 Bingh. 571; 6 Bingh. N. C. 187, 232. The statute 9 & 10 Vict. c. 54, has since extended the privilege to all barristers; 3 Sharsw. Bla. Com. 27, n. Upon the Judicature Act coming into operation, the institution and office of serjeant-at-law virtually came to an end; Weeks, Att. at Law § 33. See *Experiences of Serjeant Ballantine*, Lond. 1882; Pulling, *Order of Coif*; *INNS OF COURT*; *FARYNDON INN*.

SERJEANTS' INN. The Inn to which the serjeants-at-law belonged, near Chancery Lane, formerly called Faryndon Inn. See *INNS OF COURT*; 3 Steph. Com. 11th ed. 292, n. It no longer exists.

SERJEANTY. In English Law. A species of service which cannot be due or performed from a tenant to any lord but the king, and is either grand or petit.

"The exact idea of serjeanty as conceived in the thirteenth century," says a recent writer on this subject, "is not one

easily defined." Several different classes of men were grouped together under one heading, the bond between them being very slight, and the distinction between serjeanty and knight's service on the one hand and socage on the other is hard to determine; 1 Pol. & Maitl. 262.

Grand serjeanty consisted in some service immediately respecting the person or dignity of the sovereign; as, to carry the king's standard or to be his constable or marshal, his butler or chamberlain, or to perform some military service; Litt. § 153. The honorable parts of this tenure were retained and its oppressive incidents swept away by stat. 12 Car. II. c. 24. *Termes de la Ley*; 2 Bla. Com. 73; while *petit serjeanty* required some inferior service, not strictly military or personal, to the king; as, the annual tender of a bow, a sword, a lance, or an arrow; Litt. § 159; and this service, Littleton continues, is but socage in effect, as it was no personal service but a certain rent. It has, however, been overlooked by this writer that, whilst it is clearly not a predial service or service of the plough, and in all respects *liberum et commune socagium*, it was, nevertheless, held of the king, and by way of eminence was dignified by the title of *parvum servitium regis*, and in this light was respected by *Magna Charta* when it enacted that no wardship of lands or body should be claimed by the king in virtue of a tenure by *petit serjeanty*; 2 Bla. Com. 82.

SERVAGE. Where a tenant, besides his rent, finds one or more workmen for his lord's service. King John brought the Crown of England in servage to the see of Rome; 2 Inst. 174; Whart. Dict.

SERVANTS. In Louisiana. A term including slaves and, in general, all free persons who let, hire, or engage their services to another in the state, to be employed therein at any work, commerce, or occupation whatever, for the benefit of him who has contracted with them, for a certain sum or retribution, or upon certain conditions. La. Civ. Code, art. 155.

Personal Relations. Domestic; those who receive wages, and who are lodged and fed in the house of another and employed in his service. Such servants are not particularly recognized by law.

One who serves, or does service, voluntary or involuntary; a person who is employed by another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper. Webster, approved in 115 Mo. 1. They are called menial servants, or domestics, from living *infra mœnia*, within the walls of the house. 1 Bla. Com. 324; Wood, Inst. 53.

The right of the master to their services in every respect is grounded on the contract between them.

Laborers or persons hired by the day's work or any longer time are not considered servants; 3 S. & R. 351. See 12 Ves. 114; 16 *id.* 486; 2 Vern. 546; 3 Deac. & C. 332; 2 Mart. La. N. S. 652; DOMESTIC; OPERATIVE; MASTER AND SERVANT.

SERVANT'S LIABILITY. (1) The liability of a servant to his master for any damage or expense caused by his negligence or misconduct, whether such damage be directly to the property of the master, or whether it arises from the compensation or reparation which the master has been obliged to make to third persons to satisfy his liability for the acts of the servant. 20 A. & E. Ency. L. (2nd ed.) 51.

(2) His liability for an injury occurring to a fellow servant by reason of his neglect to use proper care and skill. *Id.* vol. 12, p. 903.

(3) His liability, in conjunction with his master, directly to a third person for injury resulting from actual misfeasance or tort on his part. *Id.* vol. 20, p. 52. See ASSUMPTION OF RISK; ASSUMED RISK; MASTERS' LIABILITY.

SERVE. In practice. To deliver with

judicial effect; to deliver so as to charge a party, in law, with such delivery; to execute.

SERVI. Bondmen or servile tenants.

SERVICE. In Contracts. The being employed to serve another.

In cases of seduction, the gist of the action is not the injury which the seducer has inflicted on the parent by destroying his peace of mind and the reputation of his child, but for the consequent inability to perform those services for which she was accountable to her master or her parent, who assumes this character for the purpose. See SEDUCTION; 2 M. & W. 539; 7 C. & P. 528.

In Feudal Law. That duty which the tenant owed to his lord by reason of his fee or estate.

The services, in respect of their quality, were either free or base, and in respect of their quantity, and the time of exacting them, were either certain or uncertain. 2 Bla. Com. 62.

In Civil Law. A servitude.

In Practice. The execution of a writ or process. Thus, to serve a writ of *capias* signifies to arrest a defendant under the process; Kirb. 48; 2 Aik. 338; 11 Mass. 181; to serve a summons is to deliver a copy of it at the house of the party, or to deliver it to him personally, or to read it to him: notices and other papers are served by delivering the same at the house of the party, or to him in person.

But where personal service is impossible, through the non-residence or absence of a party, constructive service by *publication* is, in some cases, permitted, and is effected by publishing the paper to be served in a newspaper designated in the order of court and by mailing a copy of the paper to the last known address of the party.

Substituted service is a constructive service made upon some recognized representative, as where a statute requires a foreign insurance company doing business in the state of Massachusetts to appoint the insurance commissioner of the state their attorney, "upon whom all lawful processes in any proceeding against the company may be served with like effect as if the company existed in that commonwealth;" 16 Am. L. Rev. 421. Questions are constantly arising as to the validity of service on some particular agent of a foreign corporation within state statutes giving jurisdiction in suits against such corporations. It was held in Louisiana that any service sufficient as against a domestic corporation might be, by law, sufficient against a foreign one, and consequently, that such service might be made upon the president of the latter while temporarily within the jurisdiction of the court in which the suit was commenced; 47 La. Ann. 389; but the rule laid down by the federal courts is that such service is insufficient; 156 U. S. 518; 53 Fed. Rep. 850. See FOREIGN CORPORATION. But it was held by the circuit court that when the manager of a corporation goes into another state on business of the corporation, service of summons against the corporation in a suit relating to that business may be made on him there; 85 Fed. Rep. 757.

"It is useful in all cases to consult the careful opinion in *U. S. v. American Bell Tel. Co.*, 29 Fed. 17, and to re-state the three conditions which it is there said must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created in another state:

"(1) It must appear as a matter of fact that the corporation is carrying on its business in the state where it is served with process; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition, express or implied, of doing business in the state." 83 Fed. Rep. 823.

Service of a subpoena in New York on a

foreign steamship company may be made on its financial agent who is the head of a firm which is the general agent of the company; 150 U. S. 653.

A salaried agent, empowered to solicit advertisements for a non-resident newspaper corporation, and to make contracts therefor, and receive payment, and who carries on business at an office having the name of the newspaper on its windows, is a "managing agent," on whom valid service of process against the corporation may be made under the New York Code; 82 Fed. Rep. 694.

In an action against a foreign corporation service on an officer who is also the attorney in fact of the plaintiff to institute and prosecute the action is invalid and confers no jurisdiction; 46 S. C. 1.

Service by publication is in general held valid only in proceedings *in rem*, where the subject-matter is within the jurisdiction of the court, as in suits in partition, attachment, for the foreclosure of mortgages, and the enforcement of mechanics' liens. In many of the states statutes have been passed to meet this class of cases. In purely personal actions, service by publication is invalid, upon the well-settled principle that the person or thing proceeded against must be within the jurisdiction of the court entertaining the cause of action. 27 Am. L. Reg. 92; 95 U. S. 704; 103 *id.* 439; Story, Conf. L. § 539. See 144 U. S. 41.

No court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears; 149 U. S. 194.

Where suit was brought in Massachusetts against a non-resident, and he, in Pennsylvania, accepted service of process, it was held that this did not give the court jurisdiction; 72 Pa. 110.

A notice served in another state upon a person alleged to be a stockholder in a Missouri corporation must be personally made upon him within the territorial jurisdiction of the court which issued it; 144 U. S. 41. The process does not run outside of the state; 25 U. S. App. 70.

Substituted service will be allowed upon a defendant who was within the jurisdiction when the writ issued, but had left the country (though not to evade service), before service could be made; 77 L. T. R. 835.

Where a suit is brought to enforce a lien on real estate in the district to remove a cloud on the title, the plaintiffs are entitled to get substituted service on a non-resident party in order to bring him within the jurisdiction of the court; 81 U. S. App. 486.

The fact that duly qualified officers of a township live outside the township, but within the county, does not necessarily render invalid the service of a notice upon them as officers of the township; 4 U. S. App. 616.

Some states, however, have gone so far as to allow suits in chancery to be maintained against non-residents upon constructive service of process by publication; 15 Am. L. Reg. 2. Proceedings in divorce are sometimes recognized as forming an exception to the rule; 1 Bish. Marr. Div. & Sep. § 837; Bish. Mar. & D. § 159.

A suit in equity in the federal court is commenced by suing out process and a *bona fide* attempt to serve it; 85 Fed. Rep. 827.

Priority of jurisdiction between two courts of concurrent jurisdiction is determined by the date of the service of process; 86 N. Y. 271; 84 Fed. Rep. 638; as to criminal cases, see 16 Wall. 366. As to the effect of service in relation to the commencement of actions see LIMITATION.

See DIVORCE; FOREIGN JUDGMENT; NON-RESIDENT.

When the service of a writ is prevented by the act of the party on whom it is to be served, it will, in general, be sufficient if the officer do everything in his power to serve it; 1 Mann. & G. 238.

If the service of a summons is not illegal,

but slightly irregular, and the irregularity does not appear on the face of the return, it will not be set aside on motion, but the objection must be raised by plea; 15 U. S. App. 400.

As to what constitutes the being in the service of the United States within the meaning of an act relating to longevity pay, see that title.

See PUBLIC SERVICE; INVOLUNTARY SERVITUDE; MARITIME SERVICE; PEONAGE; PERSONAL SERVICE; EXCHANGE OF SERVICES.

SERVICE OF AN HEIR. An old form of Scotch law, fixing the right and character of an heir to the estate of his ancestor. Bell, Dict. Abolished in 1874.

SERVICES, BUSINESS. See BUSINESS SERVICES.

SERVICES FONCIERS. In French Law. Easements.

SERVIENT. In Civil Law. A term applied to an estate or tenement by or in respect of which a servitude is due to another estate or tenement.

SERVIENT TENEMENT. See TENEMENTS, DOMINANT AND SERVIENT.

SERVIENTIBUS. Certain writs touching servants and their masters violating the statutes made against their abuses. Reg. Orig. 189.

SERVILE. The service of a writ has been held to be servile labor. 6 Conn. 49.

SERVITUS ACQUJETANDIS. A judicial writ for a man distrained for services to one, when he owes and performs them to another, for the acquittal of such services. Reg. Jud. 27.

SERVITIUM FEODALE ET PRÆDIALE. A personal service, but due only by reason of lands which were held in fee. Bract. l. 2, c. 16.

SERVITIUM FORINSECUM. A service which did not belong to the chief lord, but to the king. Mon. Angl. ii. 48. See INTRINSECUM SERVITIUM.

SERVITIUM INTRINSECUM. See INTRINSECUM SERVITIUM.

SERVITIUM LIBERUM. See FREEHOLD.

SERVITIUM REGALE. Royal service, or the prerogatives that within a royal manor, belonged to the lord of it, viz.: power of judicature in matters of property; of life and death in felonies and murders; right to waifs and estrays; remitting of money; assize of bread and beer, and weights and measures. Whart. Dict.

SERVITORS OF BILLS. Such servants or messengers of the marshal belonging to the king's bench as were heretofore sent abroad with bills or writs to summon men to that court, being now called "tip-staves." Blount; 2 Hen. IV. c. 28.

SERVITUDE. In Civil Law. The subjection of one person to another person, or of a person to a thing, or of a thing to a person, or of a thing to a thing.

A right which subjects a land or tenement to some service for the use of another land or tenement which belongs to another master. Domat, Civ. Law, Cushing's ed. § 1018.

A *mixed* servitude is the subjection of persons to things, or things to persons.

A *natural* servitude is one which arises in consequence of the natural condition or situation of the soil.

A *personal* servitude is the subjection of one person to another: if it consists in the right of property which a person exercises over another, it is slavery. When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do or not to do: this right arises from all kinds of contracts or *quasi*-contracts. *Lois des Bat.* p. 1, c. 1, art. 1.

A *real* or *predial* servitude is a charge laid on an estate for the use and utility of another estate belonging to another proprietor. La. Code, art. 648. When used without any adjunct, the word servitude means a real or predial servitude. *Lois des Bat.* p. 1, c. 1; Mitch. R. E. & Conv. 49. Real servitudes are divided into rural and urban.

Rural servitudes are those which are due by an estate to another estate, such as the right of passage over the serving estate, or that which owes the servitude, or to draw water from it, or to water cattle there, or to take coal, lime, and wood from it, and the like.

Urban servitudes are those which are established over a building for the convenience of another, such as the right of resting the joists in the wall of the serving building, of opening windows which overlook the serving estate, and the like. Dalloz, Dict. *Servitudes*.

This term is used as a translation of the Latin term *servitus* in the French and Scotch Law, Dalloz, Dict.; Paterson, Comp., and by many common-law writers, 3 Kent 484; Washb. Easem., and in the Civil Code of Louisiana. Service is used by Wood-Taylor, Harris, Cowper, and Cushing in his translation of Domat. Much of the common-law doctrine of easements is closely analogous to, and probably in part derived from, the civil-law doctrine of servitudes.

In common law the use of the word servitude is as a correlative of easement; where one person has an easement which creates a burden upon the property of another, the latter is said to be burdened with a servitude. See also HIGHWAYS; WAYS; RAILROADS; PIPE LINES; SEWER; ELEVATED RAILWAYS; POLES; WIRES; JONES; EASEMENTS; INVOLUNTARY SERVITUDE; PEONAGE; TERRITORIAL PROPERTY.

SERVITUS (Lat.). In Roman Law. Servitude; slavery; a state of bondage; a disposition of the law of nations by which, against common right, one man has been subjected to the dominion of another. Inst. 1. 2, 3; Bracton 4 b; Co. Litt. 116.

A service or servitude; a burden imposed by law, or the agreement of parties, upon one estate for the advantage of another, or for the benefit of another person than the owner.

Servitus actus, a right of way on horseback or in a carriage. Inst. 2. 3, pr.

Servitus altius non tollendi, a servitude preventing the owner of a house from building higher than his neighbor. Inst. 2. 3, 4; Paterson, Comp.

Servitus aquæ ducendæ, a right of leading water to one's own land over that of another. Inst. 2. 3, pr.

Servitus aquæ educendæ, a right of conducting water from one's own land unto a neighbor's. Dig. 8. 3, 29.

Servitus aquæ hauriendæ, a right of drawing water from another's spring or well. Inst. 2. 3, 2.

Servitus cloacæ mittendæ, a right of having a sewer through a neighbor's estate. Dig. 8. 1, 7.

Servitus fumi immitendi, a right of conducting smoke or vapor through a neighbor's chimney or over his ground. Dig. 8. 5, 8.

Servitus itineris, a right of way on horseback or in a carriage. This includes a *servitus actus*. Inst. 2. 3.

Servitus luminis, a right to have an open place for receiving light into a chamber or other room. Domat, l. 1. 4; Dig. 8. 2, 4.

Servitus oneris ferendi, a servitude of supporting a neighbor's building.

Servitus pascendi, a right of pasturing one's cattle on another's lands. Inst. 2. 3, 2.

Servitus pectoris ad aquam adpulsam, a right of driving one's cattle on a neighbor's land to water.

Servitus prædii rustici, a rural servitude. *Servitus prædii urbani*, an urban servitude.

Servitus prædiorum, a servitude on one estate for the benefit of another. See PRÆDIAE.

Servitus proficiendi, a right of building a projection into the open space belonging to a neighbor. Dig. 8. 2, 2.

Servitus prospectus, a right of prospect.

Fig. 8. 2. 15. This may be either to give one a free prospect over his neighbor's land, or to prevent a neighbor from having a prospect over one's own land. Domat, 1. 1. 6.

Servitus stillicidii, a right of having the water drip from the eaves of one's house upon a neighbor's house or ground.

Servitus tigni immittendi, a right of inserting beams in a neighbor's wall. Inst. 2. 8. 1. 4; Dig. 8. 2. 2.

Servitus viae, a right of way on foot or horseback, or with a loaded beast or wagon, over a neighbor's estate. Inst. 2. 8.

See, generally, Inst. 2. 3; Dig. 8. 2; *Dict. de Jur.*; Domat. Civ. Law; Bell. Dict.; Washb. Easem.; Gale, Easem.; Jones, Easem.

SERVUS (Lat.). A slave.

The institution of slavery is traced to the remotest antiquity. It is referred to in the poems of Homer; and all the Greek philosophers mention it without the slightest censure. Aristotle justified it on the ground of a diversity of race. The Roman jurists rest the institution of slavery on the law of nations: in a fragment of Florentinus copied in the Institutes of Justinian, servitude is defined, *Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subicitur*. D. 1. 5. 4. 1; Inst. 1. 3. 2. The Romans considered that they had the right of killing their prisoners of war, *manu capti*; and that by preserving their lives, *serviti*, they did not abscond but only postponed the exercise of that right. Such was, according to their ideas, the origin of the right of the master over his slave. Hence the etymology of the words *servi*, from *servari*, and *mancipia*, from *manu capti*, by which slaves were designated. It is, however, more simple and correct to derive the word *servus* from *servire*. Inst. 1. 3. 8. Children born of a woman who was a slave followed the condition of their mother; *servi nascuntur aut fiunt*.

A free person might be reduced to slavery in various ways: by captivity, *ex captivitate*. The Roman who was taken prisoner by the enemy lost all his rights as a citizen and a freedman: thus, when Regulus was brought to Rome by the Carthaginian ambassadors he refused to take his seat among the senators, saying that he was nothing but a slave. But if he had made his escape and returned to Rome, all his rights would have been restored to him by the *jus postliminii*; and the whole period of his captivity would have been effaced, and he would have been considered as if he had never lost his freedom. According to the law of the Twelve Tables, the insolvent debtor became the slave of his creditor, by a judgment rendered in a proceeding called *manus injectio*,—one of the four *leges actiones*. The thief taken in the act of stealing, or while he was carrying the thing stolen to the place where he intended to conceal it, was deprived of his freedom, and became a slave. So was a person, who, for the purpose of defrauding the state, omitted to have his name inscribed on the table of the *census*. The illicit intercourse of a free woman with a slave without the permission of his master, the sentence to a capital punishment and the sentence to work perpetually in the mines,—*in metallum dati*,—made the culprit the slave as his punishment (*servi poenae*). The ingratitude of the emancipated slave towards his patron or former master and the fraud of a freeman who had suffered himself to be sold by an accomplice (after having attained the age of twenty years) in order to divide the price of the sale, were so punished.

Liberty being inalienable, no one could sell himself; but in order to perpetrate a fraud on the purchaser, a freeman was offered for sale as a slave and bought by an innocent purchaser: after the price had been paid and divided between the confederates, the pretended slave claimed and, of course, obtained his freedom. To remedy this evil and punish this fraud, a *senatus consultum* issued under Claudius provided that the person who had thus suffered himself to be sold should lose his liberty and remain a slave. In the social and political organization slaves were not taken into consideration; they had no status. *Quod attinet ad jus civile, servi pro nullis habentur. Servitutem mortalitatis fere comparamus*. With regard to the master there was no distinction in the condition of slaves: they were all equally sub-

ject to the *domini potestas*. But the master some times established a distinction between the *servi vicarii* and the *servi ordinarii*: the former exercised a certain authority over the latter. But there was a marked difference between those slaves of whom we have been speaking and the *coloni censili, adscripti et tributarii*, who resembled the serfs of the middle ages. 1 Ortolan 27; 1 Etienne 68 *et seq.*; Lagrange 93. See SLAVE.

SESSION. The time during which a legislative body, a court, or other assembly, sits for the transaction of business: as, a session of congress, which commences on the day appointed by the constitution, and ends when congress finally adjourns before the commencement of next session; the session of a court which commences at the day appointed by law, and ends when the court finally rises. Approved 64 Ill. 86.

A term.

SESSION COURT. See COURT OF SESSION.

SESSION LAWS. A term used to designate the printed statutes as passed at the successive legislative sessions of the various states. In Pennsylvania they are usually called pamphlet laws. See PAMPHLET.

SESSIONAL ORDERS. Certain orders agreed to by both houses of parliament at the commencement of each session, and in force only during that session. May, P. L.

SESSIONS OF THE PEACE. In English Law. Sittings of justices of the peace for the execution of the powers which are confided to them as such.

Petty sessions (or *petit sessions*) are sittings held by one or more justices for the trial of minor offences, admitting to bail prisoners accused of felony, and the like purposes.

When sitting for purposes of preliminary inquiry, the public cannot claim admittance; but it is otherwise when sitting for purposes of adjudication.

Special sessions are sittings of two or more justices on a particular occasion for the exercise of some given branch of their authority, upon reasonable notice given to the other magistrates of the hundred or other division of the county, city, etc., for which they are convened. See stat. 7 & 8 Vict. c. 33.

The counties are distributed into divisions, and authority given by various statutes to the justices acting for the several divisions to transact different descriptions of business, such as licensing alehouses, or appointing overseers of the poor, surveyors of the highways, etc., at special sessions. 3 Steph. Com., 11th ed. 37.

General sessions of the peace are courts of record, holden before the justices, whereof one is of the *quorum*, for execution of the general authority given to the justices by the commission of the peace and certain acts of parliament.

See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

SET ASIDE. To annul; to make void; as, to set aside an award.

When proceedings are irregular, they may be set aside on motion of the party whom they injuriously affect. See ASIDE.

SET OF EXCHANGE. The different parts of a bill of exchange, taken together. Each part is a perfect instrument by itself; but the parts are numbered successively, and upon payment of any one the others become useless. See Chitty, Bills 175; Pars. Notes & B.

SET-OFF. In Practice. A demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim. See 7 Fla. 320.

A set-off was unknown to the common law, according to which mutual debts

were distinct, and inextinguishable except by actual payment or release; Waterm. Set-Off; 1 Rawle 298; Babingt. Set-Off 1.

The statute 2 Geo. II. c. 22, which has been generally adopted in the United States, with some modifications, in cases of mutual debts, however, allowed the defendant to set his debt against the other, either by pleading it in bar, or giving it in evidence, when proper notice had been given of such intention, under the general issue. The statute, being made for the benefit of the defendant, is not compulsory; 8 Watts 39; the defendant may waive his right, and bring a cross-action against the plaintiff; 2 Camp. 594; 9 Watts 170.

It seems, however, that in some cases of intestate estates and of insolvent estates, perhaps owing to the peculiar wording of the law, the statute has been held to operate on the rights of the parties before action brought or an act done by either of them; 2 Rawle 298; 3 Binn. 135; Bac. Abr. Bankrupt (K). See 7 Gray 191, 425.

Set-off takes place only in actions on contracts for the payment of money; as, assumpsit, debt, and covenant; and where the claim set off grows out of a transaction independent of the contract sued on; 31 Conn. 398; the claims to be set off against each other must both be due. In a suit by a railroad company, the company's coupons which had matured during the suit are admissible under a set-off, but not those that had matured after the appointment of a receiver of the plaintiff company; 25 U. S. App. 306. An unliquidated claim cannot be set off against one which is for a stipulated amount. Damages for malicious prosecution cannot be set off in an action for rent; 24 U. S. App. 21. A set-off is not allowed in actions arising *ex delicto*; as, upon the case, trespass, replevin, or detinue; Bull. N. P. 181; 4 E. D. Sm. 162. And an independent tort cannot be made a defence against another tort, either by way of set-off or counter-claim; 117 Ind. 556; 39 Kan. 183; nor is a set-off available as a defence to an action of tort; 14 So. Rep. (Ala.) 790. Nor can there be a set-off to a set-off; 86 Ala. 523. The right of set-off, except in equity, is a matter of local legislation, and the federal court will follow the rules established by the tribunals of the state in which it is sitting; 73 Fed. Rep. 980.

In Pennsylvania, if it appear that the plaintiff is overpaid, then defendant has a certificate of the amount due to him, which has the effect of a verdict against the plaintiff; Purd. Dig. 487; 10 Pa. 426. But the plaintiff may suffer a nonsuit, notwithstanding a plea of set-off; 7 Watts 496.

The matters which may be set off may be mutual liquidated debts or damages; but unliquidated damages cannot be set off; 3 Bosw. 560; 34 Pa. 239; 44 Ala. N. S. 659; 20 Tex. 31; 2 Head 467; 3 Ia. 163; 1 Blackf. 394; 6 Halst. 397; 5 Wash. C. C. 232. Damages for malicious prosecution cannot be set off in an action for rent; 24 U. S. App. 21. There must be a mutuality in claims to authorize a set-off; 62 Mich. 517. The statutes refer only to mutual unconnected debts; for at common law, when the nature of the employment, transaction, or dealings necessarily constitute an account consisting of receipts and payments, debts and credits, the balance only is considered to be the debt, and therefore in an action it is not necessary in such cases either to plead or give notice of set-off; 4 Burr. 2221. By joining his wife in a suit for her legacy, a husband exercises his election to treat it as joint property; and in such case her debt, *dum sola*, may be set off, but not his own debt; if he sues alone, his debt may be set off, but not hers *dum sola*; 4 Del. Ch. 117.

A purchaser of goods from the agent of a known principal cannot set off a sum owing to him from the agent; 88 Fed. Rep. 66.

A claim, an action to recover which would be barred by statute, is also barred as a set-off; 61 Vt. 65; but a plea of set-off cannot be defeated by the statute of limitations, where the claim offered to be set off was a legal subsisting claim at the

time the right of action accrued to the plaintiff on the claim in the suit; 83 Ala. 420.

Set-off against the government will only be allowed after the claim has been rejected by the accounting department, or where a statute permits it; 9 Cra. 213. There can be no recovery on an independent claim against a state; 4 Dall. 503.

A depositor in an insolvent bank, who had indorsed a note that was subsequently discounted by said bank, can, in a suit by the bank to recover the amount of the note, set off his deposit against this amount, when the note matured after the insolvency of the bank; 49 Fed. Rep. 837. See 146 U. S. 499. A debt from an insolvent not due at the time of his making an assignment for the benefit of creditors, may be set off by the creditor against a debt due from him to the insolvent at the time of the assignment; 42 Hun 73; 65 *id.* 619. Where mutual obligations have grown out of the same transaction insolvency on the one hand justifies the set-off of the debt due upon the other; 146 U. S. 499. A stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him by the corporation; 139 U. S. 417.

Judgments in the same rights may be set off against each other, at the discretion of the court; 3 Bibb 233; 3 Watts 78; 3 Halst. 172; 18 Tex. 541; 30 Ala. n. s. 470; 4 Ohio 90; 7 Mass. 140, 144; 8 Cow. 126; 112 N. Y. 655. Equitable set-off cannot be pleaded by way of answer, but the relief sought must be invoked by bill or cross-bill; 36 S. W. Rep. (Tenn.) 960. See Montague, Babington, Set-Off; 10 L. R. A. 378; DEFALCATION; LIEN; RECOURSEMENT.

Set-Off and Discount—Distinguished. A "set-off" and a "discount" are separate and distinct matters. The first is an independent debt or demand, which the debtor has against the creditor, and which he can use to counter-balance the demand of the latter against him, either in whole or in part. The second is a right which the debtor has to an abatement of the demand against him, in consequence of a partial failure of the consideration or on account of some equity arising out of the transaction on which the demand is founded. 1 Met. (Ky.) 598.

SET ON FOOT. Arrange; place in order; set forward; put in the place of being ready. 53 Fed. Rep. 598. See NEUTRALITY.

SETI. As used in mining laws, lease. Brown

SETTLE. To adjust or ascertain; to pay.

Two contracting parties are said to settle an account when they ascertain what is justly due by one to the other; when one pays the balance or debt due by him, he is said to settle such debt or balance. 11 Ala. n. s. 419.

SETTLED CASE ON APPEAL. That power of the record of appeal which consists of a statement prepared by the appellant's counsel setting forth so much of the testamentary proceedings had in the court below as may be material to the questions intended to be required of the appellate court, subject to amendments of the opposing counsel and to a statement of the trial judge. In other states the word appeal book or paper book is applied. 15 Alb. L. J. 242.

SETTLEMENT. A residence under such circumstances as to entitle a person to support or assistance in case of becoming a pauper.

It is obtained in various ways, to wit: by birth; by the legal settlement of the father, in the case of minor children; by marriage; by continued residence; by the payment of requisite taxes; by the lawful exercise of a public office; by hiring and service for a specified time; by serving an apprenticeship; and perhaps some others, which depend upon the local statutes of the different states. See 1 Bla. Com. 363; 1 Dougl. 9; 6 S. & R. 103, 565; 10 *id.* 179.

In Contracts. An agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other; payment in full.

The conveyance of an estate for the benefit of some person or persons. See ANTE-NUPTIAL CONTRACT; WIFE'S EQUITY.

Settlement and Entry.

The words "settlement and entry" apply only to the act of settling upon the soil and making entry at a land office, as, for example, under the homestead laws; mining lands are acquired, not by settlement and entry, but by location and development. 260 U. S. 553.

See DIRECT SETTLEMENT; FINAL SETTLEMENT; RING SETTLEMENT.

SETTLEMENT, DEED OF. A deed made for the purpose of settling property, i. e. arranging the mode and extent of the enjoyment thereof. The party who settles property is called the settler; Brown. See SETTLEMENT. In England, the term was used prior to 1862, indicating in relation to a corporation the same things as articles or memorandum of association. Cook, St. & Stockh. § 15.

Also, the instrument whereby formerly, in England, a joint stock company was formed; this is now achieved by articles of association (*q. v.*). R. & L. Dict.

SETTLEMENT ESTATE DUTY. See DEATH DUTIES.

SETTLER. A person who, for the purpose of acquiring a pre-emption right, has gone upon the land in question, and is actually resident there. See 27 Minn. 222. See LANDS, PUBLIC; SETTLEMENT, DEED OF; ACTUAL SETTLER.

SETTLING A BILL OF EXCEPTIONS, or a CASE. When an appellant has prepared and served on respondent a bill of exceptions, or a case, such as he proposes should be submitted to the appellate court, if the respondent considers it in any respect incorrect, he prepares and serves amendments. If the appellant will not consent to these, the questions on which they differ are carried before the judge who tried the cause, and he decides them according to his minutes and recollection of what took place. This decision, which forms a final adjustment of the bill or case, is called settling it, or the settlement of it. Abbott.

SETTLING DAY. The day on which transactions for the "account" are made up on the Stock Exchange. Whart. Dict. The settling days for English and foreign stocks and shares occur twice a month, the middle and the end. Those for consols are once in every month, generally near the commencement of the month; Moz. & W. A conspiracy to obtain a settling day by fraudulent means in order to defraud buyers of shares, or a conspiracy by fraudulent means to raise or lower the price of shares with intent to defraud buyers or sellers, is an indictable offence; 1 Q. B. D. 730; 3 M. & S. 67; 2 Lind. Part. *711, 816.

SETTLING A DECREE. See SETTLING A BILL OF EXCEPTIONS.

SETTLING ISSUES. In English Practice. Deciding the forms of the issues to be determined in a trial, according to the provisions of the Judicature Act of 1875. Sched. I. ord. 26; 3 Steph. Com., 11th ed. 549.

SEVER. In Practice. To separate; to insist upon a plea distinct from that of other co-defendants.

SEVERAL. Separate; distinct. Exclusive, individual, appropriated. In this sense it is opposed to common; and it has been held that the word could not be construed as equivalent to respective; 67 N. Y. 348; though it has been construed to mean all; 42 N. J. Eq. 501.

More than two, but not very many. 53 Ala. 153; several hundred dollars includes seven hundred dollars. *Id.* See JOINT

AND SEVERAL; ENTIRE.

SEVERAL CONTRACTS. See ENTIRE AND SEVERAL CONTRACTS.

SEVERAL FISHERY. See FISHERY.

SEVERAL ISSUES. This occurs where there is more than one issue involved in a case. 3 Steph. Com. 560.

SEVERAL OBLIGATION. See OBLIGATION.

SEVERAL TAIL. An entail severally to two; as, if land is given to two men and their wives, and to the heirs of their bodies begotten; here the donees have a joint estate for their two lives, and yet they have a several inheritance, because the issue of the one shall have his moiety, and the issue of the other the other moiety. Cowel.

SEVERAL TENANCY. A tenancy which is separate, and not held jointly with another person.

SEVERALLY. Distinctly, separately, apart from others. 124 Ill. 471. When applied to a number of persons the expression *severally liable* usually implies that each one is liable alone. 21 N. Y. 301.

SEVERALTY, ESTATE IN. An estate which is held by the tenant in his own right only, without any other being joined or connected with him in point of interest during the continuance of his estate. 2 Bla. Com. 179.

SEVERANCE. The separation of a part of a thing from another; for example, the separation of machinery from a mill is a severance, and in that case the machinery, which while annexed to the mill was real estate, becomes by the severance personalty, unless such severance be merely temporary. Mitch. R. E. & Conv. 20; 8 Wend. 587.

In Pleading. When an action is brought in the name of several plaintiffs, in which the plaintiffs must of necessity join, and one or more of the persons so named do not appear, or make default after appearance, the other may have judgment of severance, or, as it is technically called, judgment *ad sequendum solum*.

But in personal actions, with the exception of those by executors, and of detinue for charters there can be no summons and severance; Co. Litt. 139.

After severance, the party severed can never be mentioned in the suit nor derive any advantage from it.

When there are several defendants, each of them may use such plea as he may think proper for his own defence; and they may join in the same plea, or sever, at their discretion; Co. Litt. 303 a; except, perhaps, in the case of dilatory pleas; Hob. 245, 250. But when the defendants have once united in the plea they cannot afterwards sever at the rejoinder, or other later stage of the pleading. See, generally, Brooke, Abr. *Summ. and Sev.*; 2 Rolle 488.

Of Estates. The destruction of any one of the unities of a joint tenancy. It is so called because the estate is no longer a joint tenancy, but is severed.

A severance may be effected in various ways, namely: by *partition*, which is either voluntary or compulsory; by *alienation* of one of the joint tenants, which turns the estate into a tenancy in common; by the *purchase* or descent of all the shares of the joint tenants, so that the whole estate becomes vested in one only. Comyns, Dig. *Estates by Grant* (K. 5); 1 Binn. 175.

SEVERE. Within the meaning of a life insurance policy, *severe illness* means such an illness as has, or ordinarily does have, a permanent, detrimental effect upon the physical system. 20 Fed. Rep. 569; 64 N. Y. 236.

SEWAGE PURPOSES. Where the effluent water from a sewage farm flows into a pool, the cleansing, levelling, and

concreting the bottom of that pool to prevent the accumulation of sewage is a work for "sewage purposes." 56 L. J. Ch. 159; 32 Ch. D. 421; Stroud.

SEWER. A subterranean passage for drainage, usually constructed and maintained by a municipal corporation.

A drain or passage to carry off water and filth underground. Webst. Dict.

A conduit or canal constructed, especially in a town or city, to carry off superfluous water, soil, and other matters; a public drain. Cent. Dict.

A fresh-water trench or little river, encompassed with banks on both sides, to carry the water into the sea and thereby preserve the lands against inundation, etc. See Callis, Sew. 80, 99; Cowel. Properly, a trench artificially made for the purpose of carrying water into the sea, river, or some other place of reception. Crabb, R. P. s. 113; 110 Mass. 433. A ditch or trench through marshy places to carry off water. Spelman, Gloss. See Washb. Easem.

The general corporation act in Pennsylvania provides for the construction of sewerage systems by private corporations by consent of the local authorities.

The authority to construct public sewers is not incident to corporate powers, if ample provision is made by general statutes; 82 Me. 352; but permission may be granted to a private person to lay an under-drain in the street from his premises, without the consent of abutting lot-owners; 150 Pa. 451.

Where general laws place the duty of constructing sewers on municipal officers, the municipality cannot be held liable for negligence; 82 Me. 352; or for injuries to one who falls into a sewer which they negligently leave unguarded.

Damages for the negligent construction of a sewer must be confined to actual, not prospective, damages at time of suit; 88 Tenn. 415.

A municipal corporation owes to the public a duty in the construction of its sewers not to injure the gas mains or other under-ground conveniences and is responsible to any one injured in consequence of a breach of that duty, although the performance of it had been delegated to an independent contractor; [1896] 1 Q. B. 335, where it was held that when a gas main was broken by the negligence of the contractors, and an explosion took place in a private house because of the escape of the gas from the broken main, the municipality was liable, the damages not being too remote.

Generally a city will be enjoined from using or building a sewer so as to create a nuisance; 142 Ill. 197; 127 N. Y. 261; and a license for discharge of sewage from a particular district will not authorize the discharge from a larger one; 127 *id.* 591; but an injunction was refused to restrain the discharge of sewage from one district into another, where the first district had private connections with the sewer, the remedy being a suit against the inhabitants; [1891] 3 Ch. 527. Authority to carry a sewer under a highway does not grant power to discharge it into a river; 1 Hen. & M. 299; at a place that destroys navigation or the use of a dock; 126 Mass. 367; or into a private canal; 117 Mass. 396.

A borough has a right to make a sewer which empties into a natural stream, though it increased the flowage; 40 Pa. 864; and may permit citizens to lay a drain pipe into it to carry off their surplus water; 150 Pa. 451.

A landlord making a sewer under his tenant's land, without his consent, is liable for damages caused by the tenant stopping the sewer; 40 L. T. N. s. 130; but if the nuisance is created by a tenant, a grantee subject to the tenancy is not liable to third persons; 157 Mass. 117.

A drain passing through private ground, but receiving the drainage of more than one building, is held to be a sewer; [1894] 1 Q. B. 233.

The construction of sewers does not impose an additional burden on a highway;

83 Vt. 367; 28 Conn. 363; 27 N. Y. 204; 13 Allen 159, 211, 291; see 99 U. S. 635; but in Pennsylvania it is *contra* as to country roads; 18 Co. Ct. Rep. (Pa.) 670. And the consent of abutting owners is required, where they are constructed by private corporations; 160 Pa. 372. See POLLUTION.

SEX. The physical difference between male and female in animals.

In the human species the male is called *man*, and the female *woman*. Some human beings whose sexual organs are somewhat imperfect have acquired the name of *hermaphrodite*.

SEXHINDMEN. See HINDEN HOMINES.

SEXTERY LANDS. Lands given to a church for maintenance of a sexton or sacristan. Cowel.

SEXTON. The name of this functionary is a corruption of sacristan, the person who in pre-Reformation times had charge of the sacred vessels, the vestments and the like. In some of the cathedrals, the office of sacristan or sexton, in its ancient sense, is still held by a minor canon. Now, the sexton is sometimes merely a person who has charge of the church and its contents, and who rings the church bell, in which case the appointment generally lies with the churchwardens; but the incumbent generally appoints if, as is sometimes the case, the sexton is clerk as well as sexton, or if, as happens in some parishes, the sexton merely looks after the church yard and digs graves. In many places, however, the sexton, without regard to the particular nature of his duties, is elected by the parishioners in select vestry or by the churchwardens and the parishioners. His tenure of office, like everything else connected with him, also depends upon local custom; in some cases he holds merely during pleasure, while in others it is a freehold for life except in case of proved misconduct. In 1729 it was decided in England that a woman could hold the office. Byrne.

SHACK. See COMMON.

SHADE TREES. Trees standing upon the land of an owner on the border of a public highway, are "shade trees," within the meaning of a statute. 109 S. W. 340.

SHADOW. To follow or attend closely like a shadow; to keep close to and watch without being observed. Stand. Dict. Commonly used with reference to activities of detectives (q. v.).

SHALL. The various meanings of this word range under two general classes according as it is used as implying futurity or implying a mandate, as the words *shall be born* in a will in the absence of a context are words of futurity; 6 App. Cas. 471; and where a statute declares a thing *shall* be done, the natural and proper meaning is that a peremptory mandate is enjoined; Stroud, L. Dict., which see for classifications of cases in which the word has been held to be used in a directory and others in which it is used in a peremptory sense. It is held in the United States that it is to be construed as *may*, unless a contrary intention is shown. 95 U. S. 170.

Shall Go. It is well settled that the use of the words "shall go" or "descend" do not import a contingency, or make anything necessary to precede the vesting of a remainder, but only express the time when a remainder shall take effect in possession, not when it shall become vested. 43 S. W. 677.

SHAM PLEA. See PLEA.

SHANGHAING OF SAILORS. To ship as a sailor when drugged or drunk. Stand. Dict.

Whoever, with intent that any person shall perform service or labor of any kind on board of any vessel engaged in trade and commerce among the several States or with foreign nations, or on board of any vessel of the United States engaged in navigating

the high seas or any navigable water of the United States, shall procure or induce or attempt to procure or induce, another, by force or threats or by representations which he knows or believes to be untrue, or while the person so procured or induced is intoxicated or under the influence of any drug, to go on board of any such vessel, or to sign or in any wise enter into any agreement to go on board of any such vessel to perform service or labor thereon; or whoever shall knowingly detain on board of any such vessel any person so procured or induced to go on board thereof, or to enter into any agreement to go on board thereof, or by any means herein defined; or whoever shall knowingly aid or abet in the doing of any of the things herein made unlawful, shall be fined not more than \$1000, or imprisoned not more than one year, or both. Criminal Code of U. S. § 82.

SHANTIES. Double-boxed buildings 30 by 15 feet with an ell attachment, and four or five other buildings appurtenant thereto, such as smoke-houses, privies, stables, and woodhouses, are "shanties," within the meaning of a covenant in a deed not to erect "shanties" on the land conveyed. 123 S. W. 1195.

SHARE. A portion of anything. Sometimes shares are equal, at other times they are unequal.

As to shares in corporation law, see CORPORATION; PERSONAL PROPERTY; STOCK; STOCKHOLDER.

The proportion which descends to one of several children from his ancestor is called a share. The term share and share alike signifies in equal proportions. See PART.

See FOUNDERS' SHARES; PREFERRED SHARE.

Share and Share Alike. "Share and share alike" indicate a severance of interest. 15 B. Mon. (Ky.) 551.

See CAPITAL STOCK.

SHARE CERTIFICATE. See STOCK.

SHARE AND SHARE ALIKE. In equal shares or proportions.

SHAREHOLDER. See STOCKHOLDER.

SHARPING CORN. A customary gift of corn which, at every Christmas, the farmers in some parts of England give to their smith for sharpening their plough-irons, harrow-tines, etc. Blount.

SHAVE. To buy any security for money at a discount. 2 Den. 293; also, to obtain the property of another by oppression and extortion. *Id.*

SHEADING. A riding, tithing, or division in the Isle of Man, where the whole island is divided into six sheadings, in each of which there is a coroner or chief constable appointed by a delivery of a rod at the Tinwald court or annual convention. King, Isle of Man 7.

SHEEP. A wether more than a year old. 4 C. & P. 216.

SHEEP SILVER. A service turned into money which was paid because anciently the tenants used to wash the lord's sheep.

When applicable it is not affected by the testator's intention; 28 Atl. Rep. (N. J.) 587. It is usually applicable to conveyances by deed and limitations by will; 4 Kent *217. If applied to real estate, it enlarges the estate for life into an inheritance, and makes the tenant for life a tenant in fee; it makes the tenant for life of personality an absolute owner; 4 Kent 237.

SHELLEY'S CASE, RULE IN. "When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase." 1 Co. 104.

This rule has been the subject of much comment. Its origin can be deduced from feudal tenure; 4 Kent 217. It is given by Mr. Preston, *Estates*, pp. 383, 419, as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." See 15 B. Monr. 282; Hargr. Law Tracts 490, 551; 2 Kent 514.

If the limitation be to one and the *heirs of the body*, he takes an estate tail; if to one and his *heirs* generally, a fee-simple; 1 Day 299; 2 Yeates 410.

It does not apply where the ancestor's estate is equitable and that of the heirs legal; 1 Curt. C. C. 419.

The rule was adopted as part of the common law of this country, and in many of the states still prevails. It has been abolished in most of them. The subject has been exhaustively treated in Pennsylvania, and the numerous decisions will be found analyzed and arranged in tabular form in an essay by J. P. Gross, Esq. (Harrisburg, 1877). The rule has been held applicable to instruments in which the words, "heir" or "heirs;" 8 W. & S. 38; "issue;" 3 W. & S. 190; 30 Pa. 158; 45 id. 179; "child" or "children;" 7 W. & S. 288; 50 Pa. 483; "son" or "daughter;" 3 S. & R. 433; 70 Pa. 335; "next of kin;" "offspring;" 36 Pa. 117; "descendants," and similar expressions are used in the technical sense of the word heirs. Chief Justice Gibson states the operation of the rule as follows: "It operated only on the intention (of the devise) when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills. . . . It gives the ancestor an estate for life, in the first instance, and, by force of the devise to his heirs generally, the inheritance also, by confining the remainder on him, as the stock from which alone they can inherit;" 13 Pa. 344, 354. Although a fee is given in the first part of a will, it may be restrained by subsequent words, so as to convert it into a life estate; 86 Pa. 380. See 75 id. 839; 83 id. 242, 377; 87 id. 144; id. 248; 91 id. 30; Hayen on Est. Tail 453. See 9 Yerg. 202; 77 L. J. Rep. (H. of L.) 170.

SHEPWAY, COURT OF. See COURTS OF THE CINQUE PORTS.

SHERIFF (Sax. *scyre*, shire, *reve*, keeper). A county officer representing the executive or administrative power of the state within his county.

The office is said by Camden to have been created by Alfred, when he divided England into counties; but Lord Coke is of opinion that it is of still greater antiquity, and that it existed in the time of the Romans, being the deputy of the earl (*comes*), to whom the custody of the shire was originally committed, and hence known as *vicecomes*; Camden 136; Co. Litt. 168 a; Dalt. Sheriff 5.

At the common law the office of sheriff might be granted to one in fee, and the grant was not void although the office should descend to an infant; 9 Co. 97 b; and the reason for the validity of such grants was that responsible deputies might be appointed on behalf of infants; 5 B. & Ald. 81. An infant cannot be appointed general deputy sheriff, but might be deputed to serve a particular writ; 1 Kan. 169.

The selection of sheriffs in England was formerly by an election of the inhabitants of the respective counties, except that in some counties the office was hereditary, and in Middlesex the shrievalty was and still is vested by charter in the city of London. But now the lord chancellor, in conjunction with the judges of the courts, nominates suitable persons for the office, and the king appoints. See 22 & 23 Vict. c. 21, § 42.

In this country the usual practice is for the people of the several counties to elect sheriffs.

It is the sheriff's duty to preserve the peace within his bailiwick or county. To this end he is the first man within the county, and may apprehend and commit to prison all persons who break or attempt to break the peace, or may bind them over in a recognizance to keep the peace. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and rioters; has the safekeeping of the county jail, and must defend it against all rioters; and for this, as well as for any other purpose, in the execution of his duties he may command the inhabitants of the county to assist him, which is called the *posse comitatus*. And this summons every person over fifteen years of age is bound to obey,

under pain of fine and imprisonment; Dalt. Sheriff 355; 2d Inst. 454.

In his ministerial capacity he is bound to execute, within his county, all processes that issue from the courts of justice, except where he is a party to the proceeding, in which case the coroner acts in his stead. On *meeme* process he is to execute the writ, to arrest and take bail; when the cause comes to trial he summons and returns the jury, and when it is determined he carries into effect the judgment of the court. In criminal cases he also arrests and imprisons, returns the jury, has the custody of the prisoner, and executes the sentence of the court upon him, whatever it may be.

It is a settled principle of the common law that every man's house is his castle; accordingly, in the service of civil process, an officer may not break open the outer door of a dwelling-house. He must await his opportunity to enter peaceably without force or violence; 5 Co. 91; 19 Vt. 151; 24 Wend. 369; but having, without force, obtained admission to the house, he may go from one room to another and forcibly open any inner doors, chests, trunks, or other places where property is kept, in order to make a levy; Cowp. 1; 2 Harring. 494; 5 Johns. 352; 1 Bay 358. Where a building was kept by several tenants and had an outer door through which they all passed to gain their several apartments, it was held that an officer who entered this door might enter any other; 6 Daly 449. A building occupied for business as a work-shop, any other building not being a dwelling-house, but connected therewith, may be entered by breaking through the outer door; [1895] 2 Q. B. 668. Where a building is occupied partly as a dwelling and partly for business, a common outer door through which both parties are approached may be broken to make a levy in the store; 50 Mich. 209; but where a milliner carried on her business and resided in one room, it was held to be a trespass, when an officer made an entry by breaking; 34 Minn. 92.

In England it was formerly held that although an officer who forced the outer door of a dwelling was a trespasser, the levy made by him was good; 5 Co. 93; Year Book 18 Edw. IV. fol. 4, pl. 19; but it is now doubtful; 7 Ex. 72; 6 H. L. Cas. 443; and in the United States the doctrine is said to have met with no favor; Freem. Ex. 256; and it is held that such a levy is void; 12 Pick. 270; 24 Wend. 369; 4 Hill 439; 47 N. H. 482.

He also possesses a judicial capacity, and may hold a court and summon a jury for certain purposes; this jurisdiction, in this respect, is at common law quite extensive. This branch of his powers, however, is circumscribed in this country by the statutes of the several states, and is generally confined to the execution of writs of inquiry, of damages, and the like, sent to him from the superior courts of law; 1 Bla. Com. 389.

He has no power or authority out of his own county, except when he is commanded by a writ of *habeas corpus* to carry a prisoner out of his county; and then if he conveys him through several counties the prisoner is in custody of the sheriffs of each of the counties through which he passes; Plowd. 37 a; 2 Rolle 163; 26 Tex. App. 7. If, however, a prisoner escapes and flies into another county, the sheriff or his officers may, upon fresh pursuit, take him again in such county. But he may do mere ministerial acts out of his county, if within the state, such as making out a panel or return, or assigning a bail-bond, or the like; 2 Ld. Raym. 1455; 2 Stra. 727.

To assist him in the discharge of his various duties, he may appoint an under-sheriff, and as many general or special deputies as the public service may require, who may discharge all the ordinary ministerial duties of the office, such as the service and return of process and the like, but not the execution of a writ of inquiry, for this is in the nature of a judicial duty,

which may not be delegated. All acts of the under-sheriff or of the deputies are done in the name of the sheriff, who is responsible for them, although such acts should amount to a trespass or an extortion on the part of the officer; for which reason he usually takes bonds from all his subordinates for the faithful performance of their duties; Cro. Eliz. 294; Dougl. 40. But a deputy sheriff cannot, as such, engage to guard the property of a private person not in the custody of the law; 58 Ark. 381.

The sheriff also appoints a jailer, who is usually one of his deputies. The jailer is responsible for the escape of any prisoner committed to his charge, and is bound to have sufficient force at his disposal to prevent a breach of the prison by a mob or otherwise; and nothing will excuse him but an act of God or the public enemy. He must not be guilty of cruelty, without sufficient cause; but he may defend himself at all hazards if attacked. In a case where a prisoner, notwithstanding his remonstrances, was confined by the jailer in a room in which was a person ill with the small-pox, which disease he took and died, it was held to be murder in the jailer; Viner, *Abr. Gaol* (A); 4 Term 789; 4 Co. 84; Co. 3d Inst. 34; 2 Stra. 856.

A deputy cannot depute another person to do the duty intrusted to him; although it is not necessary that his should be the hand that executes the writ; it is sufficient if he is present and assists. A deputy sheriff's return of process in his own name, with the words "deputy sheriff" added, is void; 31 Fla. 147; but a return of a levy may properly be indorsed on an execution by a third person at the discretion and in the presence of the sheriff; 98 Ala. 479. In the execution of criminal process, he may, after demanding admittance, break open the outer door of a house; but in civil actions he may not forcibly enter a dwelling-house, for every man's house is said to be his castle and fortress, as well for defence as for repose. But a warehouse, store, or barn, or the inner door of a dwelling-house after the officer has peaceably entered, is not privileged. Process or writs of any description may not be served on Sunday, except in cases of treason, felony, or breach of the peace; nor may the sheriff on that day retake a prisoner who has escaped from custody; 6 Wend. 454; 4 Taunt. 619; Cro. Eliz. 908; Cro. Car. 587; W. Jones 429; 3 B. & P. 228.

In the absence of representations of title made at a sheriff's sale of property on execution, the purchaser has no remedy against the plaintiff or sheriff for failure of title; 117 Ind. 206.

A sheriff is not liable on his bond, but is personally liable, for acts done under process void on its face; and the order of a criminal court in excess of its jurisdiction, directing him to redeliver a certain person to prison, is no protection to a sheriff, no matter what the decision of the court having jurisdiction of the *habeas corpus* proceeding might be; 92 Tenn. 520; but he is not liable for acts done by order of a court of competent jurisdiction; 45 La. Ann. 1221; or by a court in excess of its jurisdiction, if the process does not show that fact on its face; 61 Am. Dec. 470. He is not required to question apparently regular process; 66 Mich. 181. He is bound to serve voidable process; 11 S. E. Rep. (S. C.) 383; if the error may be amended; 2 Col. 388. See FALSE IMPRISONMENT.

If a court having jurisdiction issues a writ against specific property, the sheriff is protected in seizing it; 50 N. Y. 355; whoever owns it; 87 Ill. 617; if he take it from the defendant in the writ; 114 Mass. 570; although the plaintiff had no claim; 39 Conn. 507. See *infra*.

A levy on the goods of a stranger to an execution amounts to a trespass, although the goods are not touched and there is no actual taking, and to maintain the action the plaintiff must have the right of, or be in actual possession of the property at the time of the levy; and the sheriff may

abandon or restrict the levy to the defendant's interests, and be thereby discharged, even though the return was not altered until after the action of trespass is begun; 128 Pa. 397.

A sheriff may not serve a writ to which he is a party; 17 Pick. 166; or in which he is interested; 43 N. H. 238.

Where there are several writs, it is the sheriff's duty to serve them in the order of their receipt; Freeman, Exec. § 197; 18 Wis. 406. Where the judgment is a lien, it is his duty to apply the proceeds to the oldest lien; 85 Am. Dec. 568; but if the defendant gives him money to apply to a junior execution, he must so apply it; 85 Pa. 166.

A sheriff cannot arrest in civil proceedings without a writ; 8 Term 187; which the person arrested is entitled to see; 13 Mass. 321; and the writ must contain the correct name of the person arrested; 9 Wend. 319; unless he is known by either name; 1 Wend. 132; but the officer is liable for arresting the wrong person, whose name is the same as that in the writ; 14 Mass. 184. Misnomer in an execution in which the same mistake occurred as in the original writ, does not affect the officer; 1 Mass. 76. See ARREST.

Where a person in custody on civil process escapes, the sheriff is liable to the plaintiff for the value of the claim; 63 N. C. 188. At common law, voluntary escape made the sheriff liable for the plaintiff's claim, and discharged the defendant; 78 Pa. 396; but if the escape was through negligence, or was involuntary, recaption before suit by the plaintiff was a bar; 16 Gratt. 529.

The sheriff must act with diligence; 38 Ala. 315; and, in the absence of instructions, execute the process according to its terms; 60 N. H. 127; 18 Barb. 56. Special instructions regarding a general writ should be followed; 34 N. H. 261; in the absence of which he should make reasonable search for the defendant and his property; Freeman, Exec. § 252. If he has doubt as to the title of the defendant, he may require indemnity; 8 Ala. 685; which is implied by instructions to proceed in a special manner; 83 Mo. 323. If he seizes the property of one not named in the writ he is liable as a trespasser; 24 Ill. 56; if he remain in a house a long time in possession of goods taken in execution, he becomes a trespasser *ab initio*; 8 Ex. 287.

An officer may continue to levy until the return day in order to satisfy the writ; 26 N. J. L. 124; but is liable for an excessive levy; 40 Cal. 406; and must take due care to preserve the lien on the property attached; 16 Mass. 5; in moving goods; 2 La. Ann. 162; but if the property attached perishes without his fault, he is not liable; 20 Me. 266.

See EXECUTION; ARREST; ESCAPE; LEVY; SERVICE; PROCESS.

SHERIFF-DEPUTY. The judge of a Scotch county. Bell.

SHERIFF-GELD. A rent formerly paid by a sheriff, and it is prayed that the sheriff in his account may be discharged thereof. Rot. Parl. 50 Edw. III.

SHERIFF-TOOTH. 1. A tenure by the service of providing entertainment for the sheriff at his county courts. 2. An ancient tax on land in Derbyshire. 3. A common tax levied for the sheriff's diet. Cowel; Moz. & W.

SHERIFF'S COURT. In Scotch Law. A court having an extensive civil and criminal jurisdiction.

Its judgments and sentences are subject to review by the court of session and court of judicatory. Alison, Pract. 25; Paterson, Comp. 941, n. See COMMUNAL COURTS.

SHERIFF'S COURT IN LONDON. A tribunal having cognizance of personal actions under the London (city) Small Debts Act of 1852.

The sheriff's court in London is one of the chief of the courts of limited and local

jurisdiction in London. 3 Steph. Com., 11th ed. 801, 449, note (1); 3 Bla. Com. 80, note (j).

By the County Courts Act, 1887, 30 & 31 Vict. c. 142, this court is now classed among the county courts, so far as regards the administration of justice; 3 Steph., 11th ed. 80, n.

SHERIFF'S JURY. In Practice. A jury composed of no determinate number, but which may be more or less than twelve, summoned by the sheriff for the purposes of an inquisition or inquest of office. 3 Bla. Com. 258.

SHERIFF'S OFFICERS. Bailiffs who are either bailiffs of hundreds or bound-bailiffs.

SHERIFF'S SALE. A sale of property by a sheriff or his deputy, in execution of the mandate of legal process. Anderson, L. Dict.; 2 Vt. 172.

SHERIFF'S TOURN. A court of record in England, held twice every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county.

SHERIFFALTY, or SHRIEVALTY. The office of sheriff.

SHERIFFE. A word used by the authorities of the Roman church, to specify contemptuously the technical parts of the law, as administered by non-clerical lawyers. Bacon.

SHIFT MARRIAGE. A mock marriage. Stand. Dict.

SHIFTING CLAUSE. In a settlement, a clause by which some other mode of devolution is substituted for that primarily prescribed.

SHIFTING USE. Such a use as takes effect in derogation of some other estate, and is limited expressly by the deed or is allowed to be created by some person named in the deed. Gilb. Uses 152, n.; 2 Washb. R. P. 284.

For example, a feoffment in fee is made to the use of W and his heirs till A pays £40 to W, and then to the use of A and his heirs. A very common application is in the case of marriage settlements. Wms. R. P., 16th ed. 330. The doctrine of shifting uses furnished a means of evading the principle of law that a fee could not be limited after a fee. See 2 Washb. R. P. 284; Wms. R. P., 16th ed. 330; 1 Spence, Eq. Jur. 452; 1 Vern. 402; 1 Edw. Ch. 34. See SECONDARY USE.

SHILLING. In English Law. The name of an English coin, of the value one-twentieth part of a pound. In the United States while they were colonies there were coins of this denomination; but they varied greatly in their value.

SHIN-PLASTER. Formerly a jocosse term for a bank-note greatly depreciated in value; also for paper money of a denomination less than a dollar. Webster.

The terms shin-plasters, small bills, small notes, have no established definitions. The object of the legislature, in passing an act to prohibit the issue and circulation of bills or notes so designated, may be supposed to be to prevent the circulation of any or all bills and notes intended and issued to be used as a circulating medium, in place of, or as a substitute for, bank-notes. Abbott; 2 Ind. 483.

SHIP. A vessel employed in navigation; Ben. Ad. § 215; for example, the terms the ship's papers, the ship's husband, shipwreck, and the like, are employed whether the vessel referred to be a brig, a schooner, a sloop, or a three-masted vessel.

The word comprehends every description of vessel navigating on any sea or channel, lake or river, to which the provisions of revised statutes, title "Merchant Marine," may be applicable; R. S. § 4612; 48

Fed. Rep. 812. See 119 U. S. 629. See 46 Fed. Rep. 204, as to what is not a ship.

A vessel with three masts, employed in navigation; 4 Wash. C. C. 530; the boats and rigging; 2 Marsh. Ins. 727, together with the anchors, masts, cables, and such-like objects, are considered as part of the ship; Pardessus, n. 599.

As to what passes by a bill of sale under the general term ship, or ship and her appurtenances, or ship, apparel, and furniture, see 1 Pars. Marit. Law 71, n. 3; AP-PAREL. The capacity of a ship is ascertained by its tonnage, or the space which may be occupied by its cargo. A majority of the owners cannot change the ownership by forming themselves into a limited company; [1895] P. 384; admiralty will authorize a majority in value of the owners of a ship to employ the ship, taking a bond for the protection of the minority; 3 Kent 151; a dissenting part-owner, receiving securities, cannot claim compensation or a share of the profits; 4 Sim. 439; and is not liable for a collision; 18 Fed. Rep. 547.

Carriers by water are to a certain extent common carriers, in all the strictness of the common-law rule; 3 Kent *217; 19 How. 312; like common carriers, apart from express contract, they are absolutely responsible for the goods intrusted to them, and insure them against all contingencies excepting only the act of God and the enemies of the Queen. Per Lopes, L. J., in 16 Q. B. D. 633. See, also, L. R. 9 Ex. 342; 1 C. P. D. 19; this rule is said to have been established in the seventeenth century; 1 C. P. D. 430. The master of a general ship is liable where his goods were stolen by robbers; 1 Mod. 85; and an action will lie against the owners as well as the master; Carth. 58. It has been held that the owner of a private ship is subject to the same rule; L. R. 9 Ex. 638.

Lord Cockburn has denied that a carrier by sea is subject to the same liability as a common carrier by land; 1 C. P. D. 426; and Brett, J., was of opinion that he is not a common carrier, but that his liability to carry at his absolute risk arises from recognized custom; L. R. 9 Ex. 338; 7 id. 267. See article in 5 L. Q. Rev. 15. It is said that they are not common carriers, because not bound to receive all goods offered. See 1 Pars. Ship. 248.

Ships are of different kinds: as, ships of war and merchant-ships, steamships and sailing-vessels. Merchant-ships may be devoted to the carriage of passengers and property, or either alone. When propelled in whole or in part by steam, and employed in the transportation of passengers, they are subject to inspection and certain stringent regulations imposed by act of congress passed 28th Feb., 1871; R. S. §§ 4468-4500; and steam-vessels not carrying passengers are likewise subject to inspection and certain regulations; R. S. §§ 4390-4462.

Stringent regulations in regard to the number of passengers to be taken on board of sailing-vessels, and the provisions to be made for their safety and comfort, are also prescribed by R. S. § 4465.

Numerous acts of congress have been passed from time to time in reference to the registering, enrolling, licensing, employment, and privileges of the vessels of commerce owned in the United States. See R. S. §§ 4399, 4500.

Construction of the Harter Act. The act of Feb. 13, 1893, known as the Harter Act (see that title), was not intended as general legislation concerning the rights or liabilities of ship-owners, but only to deal with the carrying vessel and her own cargo. And all principles and rules of decisions previously applicable, as to the apportionment of damages in case of mutual fault, should still be followed as closely as possible and no more changes admitted than the evident intent of the act necessitates; 60 Fed. Rep. 296; 74 id. 899; s. c. 33 U. S. App. 510. In determining the effect of the statute in restricting the operation of general and well-settled principles, the course of decision has been to treat those principles as still existing, and limit the relief from

their operation afforded by the statute to precisely that called for by the language of the statute, and no more. It is said that the intent of the act is that damages to the cargo arising from negligence in navigation shall be borne by the cargo owner and not by the ship, and that the act was not designed to increase or diminish the liability of the other vessel in cases of mutual fault and a division of damages; 77 Fed. Rep. 329. The requirement in the act of due diligence to exempt the owner from liability to cargo owners means not only the personal diligence of the owner but also of his agents employed to fit the vessel for sea; 83 Fed. Rep. 664. Such diligence is not exercised where no inspection is made of the cement covering the bottom of an iron steamship; 51 U. S. App. 100; s. c. 79 Fed. Rep. 973. The word management in the act relates to management on the voyage and not to the master's acts in stowing the ship; 83 Fed. Rep. 665. Insufficiency of the mechanical fog-horn on the sailing vessel because of failure to provide any means for repairing it is a lack of proper equipment under the act; 77 Fed. Rep. 329. Diligent care of the ship for the purposes of the act does not require re-docking more than once a year; 79 *id.* 371.

The provisions of the Harter Act relieving vessel owners from liability do not extend to foreign vessels; 33 U. S. App. 510; s. c. 74 Fed. Rep. 899; and no restrictive operation can be given to it; 73 *id.* 239; s. c. 44 U. S. App. 434.

The words "ex ship" are not restricted to any particular ship; and by the usage of merchants, simply denote that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of lading. They do not constitute a condition of the contract but are inserted for the benefit of the seller; 161 U. S. 57; L. R. 1 C. P. 684. See PRIZE.

As to limited liability of owners in cases of collisions, see ABANDONMENT. As to statute regarding overcrowding of steamers, see 1 U. S. App. 147.

In regard to collisions at sea where both are to blame, see paper by F. W. Raikes, 17th Rep. Int. Law Assn. 193. See COLLISION.

A vessel is deemed a part of the territory of the country to which she belongs; 150 U. S. 249; 154 U. S. 152; and although the deck of a private American vessel is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions of the constitution as to the indictment and trial by jury, until brought within the actual territorial boundaries of the United States; 140 U. S. 453. A ship becomes such when she is launched, and continues to be such so long as her identity is preserved: From the moment she takes the water, she becomes the subject of admiralty jurisdiction. 183 U. S. 424. See FOREIGN-GOING SHIP; HULL AND MACHINERY; PASSENGER SHIP.

SHIP-BROKER. One who transacts business relating to vessels and their employment between the owners of vessels and merchants who send cargoes.

SHIP-MONEY. An imposition formerly levied on port towns and other places for fitting out ships; revived by Charles I. and abolished in the same reign. 17 Car. I. c. 14; Whart. Dict.

SHIP'S BILL. The copy of the bill of lading retained by the master. In case of a variance between this and the bill delivered to the shipper, the latter must control; 14 Wall. 98.

SHIP'S HUSBAND. An agent appointed by the owner of a ship, and invested with authority to make the requisite repairs and attend to the management, equipment, and other concerns of the ship. He is the general agent of the owners in relation to the ship, and may be appointed in writing or orally. Abb.

Sh. 90. He is usually, but not necessarily, a part-owner; 1 Pars. Mar. Law 97. He must see to the proper outfit of the vessel in the repairs adequate to the voyage and in the tackle and furniture necessary for a seaworthy ship; must have a proper master, mate, and crew for the ship, so that in this respect it shall be seaworthy; must see to the due furnishing of provisions and stores according to the necessities of the voyage; must see to the regularity of the clearances from the custom-house and the regularity of the registry; must settle the contracts and provide for the payment of the furnishings which are requisite to the performance of those duties; must enter into proper charter-parties, or engage the vessel for general freight under the usual conditions, and settle for freight and adjust averages with the merchant; and must preserve the proper certificates, surveys and documents, in case of future disputes with insurers and freighters, and keep regular books of the ship; 4 B. & Ad. 375; 1 Y. & C. 326; 8 Wend. 144; 16 Conn. 12. These are his general powers; but, of course, they may be limited or enlarged by the owners; and it may be observed that without special authority he cannot borrow money generally for the use of the ship; though, as above observed, he may settle the accounts for furnishings, or grant bills for them, which form debts against the concern whether or not he has funds in his hands with which he might have paid them; 1 Bell, Com. § 499. Although he may, in general, levy the freight which is by the bill of lading payable on the delivery of the goods, it would seem that he would not have power to take bills for the freight and give up the possession of the lien over the cargo, unless it has been so settled by the charter-party.

He cannot insure or bind the owners for premiums; 17 Me. 147; 2 Maule & S. 485; 7 B. Monr. 595; 11 Pick. 85; 5 Burr. 2627.

As the power of the master to enter into contracts of affreightments is superseded in the port of the owners, so it is by the presence of the ship's husband or the knowledge of the contracting parties that a ship's husband has been appointed; 2 Bell, Com. 199. The ship's husband, as such, has no lien on the vessel or proceeds; 2 Curt. C. C. 427; 31 Fed. Rep. 923. See EXERCITOR MARIS.

SHIP'S PAPERS. The papers or documents required for the manifestation of the ownership and national character of a vessel and her cargo, and to show her compliance with the revenue and navigation laws of the country to which she belongs.

The want of these papers or any of them renders the character of a vessel suspicious; 2 Boulay-Paty, *Droit Com.* 14: and the use of false or simulated papers frequently subjects the vessel to confiscation; 15 East 46, 70, 364; or avoid an insurance, unless the insurer has stipulated that she may carry such papers; *id.*

The absence of any one of a ship's proper papers is not conclusive against the good faith of the ship; 1 Kent *157. Spoliation of ship's papers is an aggravated ground of suspicion and is said to be almost conclusive of guilt; 1 Dods. 480; but it is not of itself a ground of condemnation; 2 Wheat. 227.

A ship's papers are of two sorts: first, those required by the law of the particular country to which the ship belongs: as, the certificate of registry or of enrolment, the license, the crew-list, the shipping articles, clearance, etc.; and, second, such as are required by the law of nations to be on board of neutral ships as evidence of their title to that character: as, the sea brief or letter, or passport; the proofs of property in the ship, as bills of sale, etc.; the charter-party; the bills of lading; the invoices; the crew-list or muster-roll; the log-book, and the bill of health. McCulloch, Com. Dict.

The following constitute a ship's papers according to 1 Kent *157: a certificate of registry, sea-letter, muster-roll, log-book,

charter-party, invoice, and bill of lading. As to what are ship's papers under the rules of various foreign nations, see 2 Hallock, Int. L., Baker's ed. 98.

The register, or other document in lieu thereof, together with the clearance and other papers granted by the officers of the customs to any foreign vessel, at her departure from the port from which she may have arrived, are required to be produced to the collector of any United States port previous to her entry. The master is required, within forty-eight hours after entry, to deposit the papers with the consul or vice-consul of the nation to which the vessel belongs, and to deliver to the collector of the port the certificate of such consul or vice-consul that he has done so; R. S. § 4209.

An application by a vice-consul for a permit for a vessel to depart, a bill of lading signed by the captain, a license to sail, a certificate of the custom-house official that the vessel had paid its tax for hospital dues, and a bill of health signed by the maritime sub-delegate; the bill of lading being identified by the mate and the other papers being official documents under seal executed by the Chilean authorities, are entitled to confidence and should be admitted in evidence as documents of a public nature; 86 Fed. Rep. 156. It is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth; *id.*, citing 1 Greenl. Ev. § 423.

SHIPMENT. The delivery of the goods within the time required on some vessel destined to the particular port which the seller has reason to suppose will sail within a reasonable time. It does not mean a clearance of the vessel as well as putting the goods on board where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel or of her subsequent management; 121 N. Y. 179. See L. R. 2 App. Cas. 455; 97 N. Y. 221; 7 Mass. 453; 105 N. Y. 404.

SHIPPER. One who ships or puts goods on board of a vessel, to be carried to another place during her voyage. In general the shipper is bound to pay for the hire of the vessel or the freight of the goods; 1 Bouvier, Inst. n. 1030.

SHIPPING. Ships in general: ships or vessels of any kind intended for navigation. Relating to ships; as, shipping interests, shipping affairs, shipping business, shipping concerns. Putting on board a ship or vessel, or receiving on board a ship or vessel. Webster, Dict.; Worcester, Dict. See SHIP; SHIP'S PAPERS.

SHIPPING ARTICLES. An agreement, in writing or print, between the master and seamen or mariners on board his vessel (except such as shall be apprenticed or servant to himself or owners), declaring the voyage or voyages, term or terms of time, for which such seamen or mariners shall be shipped. It is also required that at the foot of every such contract there shall be a memorandum, in writing, of the day and the hour on which each seaman or mariner who shall so ship and subscribe shall render himself on board to begin the voyage agreed upon. Provision is made in the R. S. of U. S. for shipping articles, and a penalty is imposed for shipping seamen without them; R. S. § 4509 *et seq.*

The shipping articles ought not to contain any clause which derogates from the general rights and privileges of seamen; and, if they do, such clause will be declared void; 2 Sumn. 443; 2 Mas. 541.

A seaman who signs shipping articles is bound to perform the voyage; and he has no right to elect to pay damages for non-performance of the contract; 2 Va. Cas. 276.

See, generally, Gilp. 147, 219, 452; 1 Pet. Adm. 212; 1 Mas. 443; 5 *id.* 272; 14 Johns. 260; SEAMEN.

SHIPPING COMMISSIONER. An officer appointed by the several circuit courts of the United States for each port

of entry, which is also a port of ocean navigation within their respective jurisdictions, which, in the judgment of such court, may require the same. His duties are: to facilitate and superintend the engagement and discharge of seamen; to secure the presence on board of the men engaged at the proper times; to facilitate the making of apprenticeship to the sea service; and such other like duties as may be required by law; R. S. §§ 4501-4508.

SHIPS OF WAR. The ports of every nation are considered as open to the ships of war of other powers with whom it is at peace. They are exempt from all forms of process in private suit and cannot be seized or interfered with by judicial proceedings to punish violation of the public laws; 7 Op. A. G. 122. Such violations are to be remedied by the offended state appealing directly to the other sovereign. But such ships must not appear as a disturbing agency in the port of a friendly state. They must conform to the rules of quarantine and anchorage, and a ship of war which refuses to comply with such local regulations may be refused admittance, or her stay limited. If any of her crew while on land infringe the laws of the country, they are subject to the local authorities, but if an offender escapes to his vessel, he cannot be pursued there; Snow, Lect. Int. Law 83. They are probably not subject to salvage claims; 1 Halleck, Int. L., Baker's ed. 217.

In international law a state has jurisdiction over its property and citizens on the high seas when carried under its own flag. This jurisdiction is sometimes based on the theory that the ships of a country are a prolongation of its territory and sometimes on the theory that the jurisdiction arises from the mere fact of property; Snow, Lect. Int. L. 147.

Woolsey says of public ships: "They are not only public property, built or bought by the government, but they are, as it were, floating barracks, a part of the public organism and represent the national dignity, and on these accounts even foreign ports are exempt from the local jurisdiction. . . . However, it is on account of the crew rather than on account of the ship itself that they have any territorial quality. Take the crew away, let the abandoned hulk be met at sea; it now becomes property, nothing more." Wheaton says: "A public vessel belonging to an independent sovereign is exempt from every species of visitation and search, even within the territorial jurisdiction of another state." The principle is universally admitted.

Public ships of a friendly nation, coming into ports of the United States, and demeaning themselves in a friendly manner are exempt from the jurisdiction of the country; 7 Cr. 116. See NEUTRALITY.

SHIRE. In English Law. A district or division of country. Co. Litt. 50a. A county.

The ancient English states, though degraded to the rank of shires, preserved their autonomy to the utmost practicable extent. They retained the state assembly, which was the supreme court of law, the king himself sitting in it as in the national assembly. In the absence of the king, the ealdorman presided in it. The shire government was not royal, but ducal. The king, in appointing the ealdorman, appointed, not a servant of his will, but a prince and lord of the shire. The Anglo-Saxon shire constitution, in spite of the establishment of the empire, was an expression of still undeveloped royalty. See Essays Ang. Sax. Law 21.

SHIRE-GEMOT (spelled, also, *Scire-gemote*, *Scir-gemot*, *Scyre-gemote*, *Shire-mote*; from the Saxon *scir* or *scyre*, county, shire, and *gemote*, a court, an assembly).

The Saxon county court. It was held twice a year before the bishop and aldermen of the shire, and was the principal court. Spelman, Gloss, *Gemotum*; Crabb, Hist. Eng. Law 38.

SHIRE-MAN, or SCYRE-MAN. Before the conquest the judge of the county, by whom trials for land, etc., were determined. Toml.; Moz. & W.

SHIRE RIEVE, or SHIRE REVE A sheriff (q. v.).

SHOOTERS. See SHOVELERS AND SHOOTERS.

SHOOTING AT RANDOM. One who intentionally shot a dog, was not in any sense, guilty of "shooting at random." 50 S. W. 843.

SHOP. A place kept and used for the sale of goods. 14 Gray 378. A building as distinguished from a place of sale which is open like a stall. 60 Mich. 426. In order to constitute a shop there must be some structure of a more or less permanent character; 6 B. & S. 303.

As used in a statute it is a house or building in which small quantities of goods, wares, or drugs and the like are sold, or in which mechanics labor, and sometimes keep their manufactures for sale. 96 N. C. 643.

In this country shops for the sale of goods are frequently called "stores." Anderson; 15 Gray 199. But strictly, a shop is a place where goods are sold by retail, and a store a place where goods are deposited. Abbott; *ibid.* See STORE.

SHOP-BOOKS. The books of a retail dealer, mechanic, or other person, in which entries or charges are made of work done, or goods sold and delivered to customers, commonly called "account-books," or "books of account." The party's own shop-books are in certain cases admissible in evidence to prove the delivery of goods therein charged, where a foundation is laid for their introduction. The following are the general rules governing the production of this kind of evidence. First, that the party offering the books kept no clerk; second, that the books offered by the party are his books of account, and that the entries therein are in his handwriting; third, it must appear, by some of those who have dealt with the party and settled by the books offered, that they found them correct; fourth, it must be shown that some of the articles charged have been delivered. Where entries are made by a clerk who is dead, such entries are admissible in evidence on proof of the handwriting; Steph. Ev. art. 84; 4 Ill. 120; 19 id. 393; 8 Johns. 212; 11 Wend. 588; 1 Greenl. Ev. § 117; 1 Smith, Lead. Cas. 282. Where memoranda made during the day by one, are at night transcribed to a book by another, who did not know the truth of the facts recorded by the former, the book is not competent testimony and cannot be used to refresh his memory; 22 U. S. App. 646. See ORIGINAL ENTRY; MEMORANDUM; ACCOUNT BOOK.

SHOP LIFTING. See LARCENY; KLEPTOMANIA.

SHOP RIGHT. See PATENT.

SHORE. Land on the side of the sea, a lake, or a river. Strictly speaking, when the water does not ebb and flow in a river, there is no shore. See 6 Mass. 435; 23 Tex. 349; 23 N. J. L. 624, 633; 88 id. 543; RIVER; SEA.

SHORT CAUSE. A suit in the chancery division of the high court of justice, where there is only a simple point for discussion, which will probably occupy not more than ten minutes in the hearing. A suit may often be greatly accelerated by being placed on the list of short causes, which are heard one day in each week (generally Saturday) during the sittings of the court; Dan. Ch. Pr., 5th ed. 836; Hunt. Eq. Pt. I. ch. 4, s. 4. A similar provision is familiar to the practice of the courts of several of the states, but its operation is not restricted to chancery cases, and the time allowed for the hearing varies in the different courts.

SHORT ENTRY. A term used among bankers to denote the fact which takes place when a note has been sent to a bank for collection, and an entry of it is made in the customer's bank-book, stating the amount in an inner column, and carrying it out into the accounts between the parties when it has been paid.

SHORT-FORD. An ancient custom of the city of Exeter, similar to that of *gavellet* in London, which was in effect a foreclosure of the right of the tenant by the lord of the fee, in cases of non-payment of rent; Cowel.

SHORT HAUL. See INTERSTATE COMMERCE COMMISSION.

SHORT NOTICE. In English Practice. Four days' notice of trial. Wharton, Law Dict. *Notice of trial*; 1 Cr. & M. 499. Where short notice has been given, two days is sufficient notice of continuance; Wharton, Lex.

SHORT YEARLINGS. In stockmen's parlance, cattle about, or approximately near, one year of age, are called "short yearlings." 115 Ky. 461, 74 S. W. 185.

SHORTAGE. No allowance for shortage can be made where the contents of missing bags of sugar had been put into new bags by seamen and actually delivered; 1 U. S. App. 14.

SHOVELERS AND SHOOTERS. In Mining. "Shovelers and shooters" are men employed in coal mines whose business it is to come in and bore holes in the face of the coal for blasting, and to pull down and carry away overhanging slate. 131 Ky. 196, 114 S. W. 785.

SHOW. To make apparent or clear by evidence, to prove. 104 Pa. 133.

SHRUB. A low, small plant, the branches of which grow directly from the earth without any supporting trunk or stem. 70 Miss. 406.

SHUT DOWN. Within the meaning of an insurance policy, a saw mill which has stopped running for the winter, is shut down, though men are employed about the premises and the machinery has not been dismantled. 44 Pac. Rep. (Cal.) 922.

SHYSTER. A trickish knave; one who carries on any business, especially a legal business, in a dishonest way. 34 Minn. 343; see 40 Mich. 251.

Has reference to the professional character and standing of a lawyer. Hence, in an action for libeling one, as respects his character as a lawyer, by the use of the word, an issue as to whether the plaintiff is a lawyer or not is material. Anderson.

SI ACTIO. The conclusion of a plea to an action when the defendant demands judgment, if the plaintiff ought to have his action, etc. Obsolete.

SI ITA EST. If it be so. Emphatic words in the old writ of mandamus to a judge, commanding him, if the act alleged be truly stated (*si ita est*), to affix his seal to a bill of exceptions. 5 Pet. 192.

SI PRIUS. If before. Formal words in ancient writs for summoning juries. Fleta, l. 2, c. 65, § 12.

SI TE FECERIT SECURUM (Lat. if he make you secure). Words which occur in the form of writs, which originally required, or still require, that the plaintiff should give security to the sheriff that he will prosecute his claim, before the sheriff can be required to execute such writ.

SICKNESS. By sickness is understood any affection of the body which deprives it temporarily of the power to fulfil its usual functions. It has been held to include insanity. L. R. 8 Q. B. 295.

Sickness is either such as affects the body generally, or only some parts of it. Of the former class a fever is an example; of the latter, blindness. When a process has been issued against an individual for his arrest, the sheriff or other officer is authorized, after he has arrested him, if he be so dangerously sick that to remove him would endanger his life or his health, to let him remain

where he found him, and to return the facts at large, or simply *lauguibus*.

SIDE-BAR RULES. In English Practice. Rules which were formerly moved for by attorneys on the side-bar of the court, but now may be had of the clerk of the rules, upon a *procepe*. These rules are, that the sheriff return his writ, that he bring in the body, for special imparlance, to be present at the taxing of costs, and the like. As to side-bar applications, see Mitchell, Rules 20.

See RULE OF COURSE.

SIDESMEN (*testes, synodales*). In Ecclesiastical Law. A kind of impanelled jury, consisting of two, three, or more persons, in every parish, who were upon oath to present all heretics and irregular persons. In process of time they became standing officers in many places, especially cities. They were called synodsmen,—by corruption sidesmen; also questmen. But their office has become absorbed in that of church-warden. 1 Burn, Eccl. Law 399.

SIDEWALK. That part of a public street or highway designed for the use of pedestrians.

As used in this country it does not mean a walk or way constructed of any particular kind of material, or in any special manner, but ordinarily is used to designate that part of the street of a municipality which has been set apart and used for pedestrians, as distinguished from that portion set apart and used for animals and vehicles. 48 Minn. 201.

Generally the sidewalk is included with the gutters and roadway in the general term *street*; 42 Ill. 503; 76 N. Y. 174; 50 Wis. 429. It was so held in the construction of a statute providing for compensation for damages caused by changing the grade of streets; 100 Ind. 242; and in one authorizing the improvement of streets; 114 Ind. 371; but in many cases of municipal ordinances and contracts, the word *street* is held not to include sidewalks; 52 Cal. 440; 138 Mass. 555.

It is the duty of a municipal corporation to keep the sidewalks, as well as the roadway of the street, in repair; 74 N. Y. 264; 76 id. 174; 136 Pa. 533; but it has been held that where the absolute duty is not imposed by the charter, the obligation of the city with respect to keeping the sidewalks free from defects is less imperative than the same obligation with respect to the roadway; 51 Barb. 396; 36 id. 226; but these decisions have been questioned; 44 id. 385. One who knows of a defect in the sidewalk is bound to use particular care to avoid injury; 14 Hun 544; but the injury does not defeat recovery, if due care is used; 2 N. Y. St. 351.

The duty imposed on municipal corporations of keeping highways safe and convenient includes obstructions from ice and snow; 12 Vt. 338; 13 Pick. 343; 17 How. 161, where it was held that it was for the jury to say whether treading down and not removing the snow was a safe and convenient method of removing the obstruction.

Ice formed by melting snow and ice falling from a building simply as the result of natural laws, is not a defect for which the municipality is liable; 85 Wis. 187. There must be a breach of duty on the part of the city, such as an unusual or dangerous obstruction to travel from snow and ice, and such time must have elapsed after the creation of the obstruction as to afford a presumption of knowledge; 121 N. Y. 147. The duty of removing such obstructions is a qualified one, becoming imperative only under the circumstances mentioned; 100 id. 134. Where, however, there is by statute an absolute liability for injuries resulting from a defective sidewalk, no question of want of notice or the exercise of care is a defence; 31 W. Va. 384. The remedy for an injury resulting from a defective sidewalk is exclusively against the city, and its liability cannot be avoided by the existence of any ordinance on the subject; 105 N. Y. 202; 14 Gray 249. The

right of action arises solely from negligence; 122 Ind. 39; the fact that an accident occurs is not sufficient, there must be a neglect of duty; 89 N. Y. St. 603. In order to hold the city liable for negligence in permitting an obstruction, it must have notice, but this may be constructive through the elapse of sufficient time for the presumption of notice to arise; 27 Can. 545; 18 Hun 167; 22 W. N. C. 132.

Where an awning over the sidewalk was permitted to remain in an unsafe condition by the accumulation of snow and ice, the city was held liable for injuries sustained by the fall of the awning; 13 Metc. 292; but where an accident was occasioned by ice formed by water dripping from the awning, it was held that the city was not liable and the action should have been against the owner; 22 W. N. C. Pa. 133.

In actions for damages from defective sidewalks, it was a question for the jury whether, under the circumstances, the corporation is liable; 48 Conn. 460; 185 Pa. 32. A question for their decision was whether ordinary care was used and whether the sidewalk was reasonably safe; 40 id. 134; 10 Cush. 260; or whether there was negligence in not removing the obstruction; 100 N. Y. 15; 25 Neb. 133; or whether there was a sufficient lapse of time to be considered constructive notice; 39 N. Y. St. 744.

Even if the city were negligent, a person injured by a defective sidewalk cannot recover unless he show himself in the exercise of due care; 133 Ill. 177; and if the accident occurred by reason of the plaintiff's being intoxicated, he cannot recover; 76 Wis. 499.

Where the sidewalk is manifestly dangerous it is the duty of a pedestrian to walk on the roadway; 130 Pa. 123; and he cannot recover for an injury which his own observation, prudently exercised, ought to have enabled him to avoid; 31 W. Va. 342.

A municipal corporation may require its citizens to clean the snow from their sidewalks; 105 N. Y. 202. A law requiring the abutting owners to keep sidewalks in repair is a duty cast directly upon the property owner and is in the nature of a police regulation; it is not a tax or municipal assessment; 131 Pa. 109.

Where the abutting owners permitted the sidewalk to be obstructed for an unreasonable time in loading and unloading a truck with skids so that a pedestrian was injured in passing over it, the owner was held liable; 29 App. Div. N. Y. 462; id. 309.

Where the proprietor of a theatre invites an unusual crowd to occupy his sidewalk, he is bound to greater precaution and owes a duty to pedestrians that they are not injured through any lack of care; 5 Super. Ct. Rep. (Pa.) 609. See STREET; HIGHWAY.

SIGHT. Presentment. Bills of exchange are frequently drawn payable at sight or certain number of days or months after sight.

Bills payable at sight are said to be entitled to days of grace by the law merchant; Big. Bills & N. 92; Dan. Neg. Instr. § 617; 13 Gray 597; 42 Ala. 156; 28 Mo. 396; *contra*, 1 E. D. Sm. 503. Statutes have settled the question in some states.

The holder of a bill payable at sight is required to use due diligence to put it into circulation, and, if payable after sight, have it presented in reasonable time; 20 Johns. 146; 13 Pick. 399; 28 E. L. & E. 131; 13 Mass. 137; 4 Mas. 336; 5 id. 118; 1 M'Cord 322; 1 Hawks 195.

After sight in a bill means after acceptance; in a note, after exhibition to the maker; Dan. Neg. Instr., 4th ed. § 619. It is usual to leave a bill for acceptance one whole day; but the acceptance is dated as on the day it was left; Sewell, Bank.

A bill drawn payable a certain number of days after sight, acceptance waived, must be presented to fix the time at which the bill is to become due, and the term of the bill begins to run from the date of pre-

sentment. See 4 Montreal L. Rep. 249.

Sight drafts and sight bills are bills payable at sight.

SIGILLUM (Lat.). A seal.

SIGN. To affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting. Webster; 131 Pa. 230.

In legal contemplation, "to sign" means to attach a name, or cause to be attached, by any of the known methods of impressing the name on paper with the intention of signing it. 143 Ky. 228, 136 S. W. 217.

Although in general understanding refers to writing the name at the foot or bottom of a document, is not confined to that meaning. Anderson. The primary meaning is to write one's name on paper or to show or declare assent or attestation by some sign or mark. Id.; 6 N. Y. 12-13. A "signing" may be at the beginning of a document,—within the meaning of the Statute of Frauds. Id.; 14 Johns * 486. Within the meaning of that statute, also, a memorandum is "signed" if the name is printed in a letter-head, with the contract underwritten. Id.; 58 Md. 546. But it may be that a will cannot be considered as "signed" unless the testator's name is affixed at the bottom, or otherwise outside the body. Id.; 55 Mo. 339-41. See SUBSCRIBE.

SIGN MANUAL. In English Law. The signature of the king to grants or letters patent, inscribed at the top. 2 Sharsw. Bla. Com. 347.

Any one's name written by himself. Webster, Dict.; Wharton, Law Dict. The sign manual is not good unless countersigned, etc.; 9 Mod. 54.

SIGNA (Lat.). In Civil Law. Those species of indicia which come more immediately under the cognizance of the senses: such as, stains of blood on the person of one accused of murder, indications of terror at being charged with the offence, and the like.

SIGNAL. A means of communication between vessels at sea or between a vessel and the shore. The international code of signals for the use of all nations assigns arbitrary meanings to different arrangements of flags or displays of lights. Where a steamer did not hear the signal but should have heard it, she is as culpable as if she had heard and disregarded it; 1 U. S. App. 72. Where a collision results through the failure of one of two colliding steamers to conform to her own signals, she is responsible for the collision; 35 U. S. App. 161. See COLLISION; VESSEL; NAVIGATION, RULES OF; FALSE LIGHTS AND SIGNALS.

Given by Conductor. Where it is customary for the conductor to give the signal to a brakeman, and for the brakeman to pass it on to the engineer, if the engineer receives the signal from the brakeman and believes that it came from the conductor, the "signal was given by the conductor." 126 S. W. 120.

SIGNATORY. A term used in diplomacy to indicate a nation which is a party to a treaty.

SIGNATURE. In Ecclesiastical Law. The name of a sort of rescript, without seal, containing the supplication, the signature of the pope or his delegate, and the grant of a pardon. Dict. Dr. Can.

In Practice. By signature is understood the act of putting down a man's name at the end of an instrument, to attest its validity. The name thus written is also called a signature.

A person's name as set down by himself. 2 N. Dak. 30.

It is not necessary that a party should write his name himself, to constitute a signature: his mark is now held sufficient, though he was able to write; 8 Ad. & E. 94; 7 L. R. Fr. 590; 8 Nev. & P. 228; 3 Curt. C. C. 752; 5 Johns. 144; see 96 Cal. 598; 138 N. C. 134; and the signature to a note may be by initials only; 14 L. T. 433; 1 Ames, B. & N. 145. A signature by pencil is valid; 5 B. & C. 284; or on a telegraph

message given to an operator; L. R. 5 C. P. 295. The printed name of the vendor on the heading of a bill of parcels sent by him to the vendee is a sufficient signature to bind the vendor under the statute of frauds. A signature made by a party, another person guiding his hand with his consent, is sufficient; 4 Wash. C. C. 262, 269.

It is not necessary in the execution of a note, that the person executing it, if unable to write, touch the pen while the person authorized signs his name; 9 Md. App. 624; and the signature of the grantor affixed to a deed by another in the presence and at the request of the grantor is as binding as if he had personally affixed his signature; 98 Ala. 479. A person who is *sui juris*, will not, in the absence of a fraud, be permitted to avoid his written obligation by showing that he did not read it or hear it read; 16 Mo. App. 527. And where a promissory note was signed under the impression that it was one of some unimportant papers, the signature was held valid in the hands of an innocent third party; 43 S. W. Rep. (Ky.) 690.

One who cannot read a contract which he is about to execute is bound to procure it to be read and explained to him before he signs it, and is chargeable with knowledge of its contents whether he does so or not; 83 Fed. Rep. 437.

The signature is usually made at the bottom of the instrument; but in wills it has been held that when a testator commenced his will with these words, "I, A. B., make this my will," it was a sufficient signing; 3 Lev. 1. And see *Sudg. Vend.* 71; 2 Stark. Ev. 605, 613. But this decision is said to be absurd; 1 Brown, Civ. Law 278, n. 16; *Schoul. Wills* 315. The initials "A. B." are not the signature of the judge, or a sufficient authentication of the bill of exceptions, or sufficient evidence of its allowance by the judge; 125 U. S. 240. The possession of a rubber stamp of his signature by a depositor in a bank, kept without negligence, but without notice to the bank, does not relieve the latter for having paid out money on a forged check, made from the stamp. Here an employee used the stamp to obtain a tracing of the depositor's signature; 186 Pa. 458. See *Merlin, Répert. Signature*, for a history of the origin of the signature; and, also, 4 Cruise, Dig. 32, c. 2, s. 73 *et seq.* See, generally, 8 Toulhier, n. 94; 1 Dall. 64; 5 Whart. 286; 2 B. & P. 238; 2 Maule & S. 286; *MONOGRAM*; *MARK*.

SIGNET. A seal commonly used for the sign manual of the sovereign. Whart. Lex. The signet is also used for the purpose of civil justice in Scotland; Bell. See *WRITERS TO THE SIGNET*.

SIGNIFICANCE. See *CONSTRUCTION*; *MEANING*.

SIGNIFICATION (Lat. *signum*, a sign, *facere*, to make). In *French Law*. The notice given of a decree, sentence, or other judicial act.

SIGNIFICAVIT (Lat.). In *Ecclesiastical Law*. When this word is used alone, it means the bishop's certificate to the court of chancery in order to obtain the writ of excommunication; but where the words *writ of significavit* are used, the meaning is the same as *writ de excommunicato capiendo*. 2 Burn, *Ecc. Law* 248; Shelf. *Marr. & D.* 502. Obsolete.

SIGNING JUDGMENT. In *English Practice*. The plaintiff or defendant, when the cause has reached such a stage that he is entitled to a judgment, obtains the signature or allowance of the proper officer; and this is called signing judgment, and is instead of the delivery of judgment in open court. Steph. Pl., *And. ed.* 196. It is the leave of the master of the office to enter up judgment, and may be had in vacation. 3 B. & C. 817; Tidd, *Pr.* 616.

In *American Practice*, it is an actual signing of the judgment on the record, by the judge or other officer duly authorized. Graham, *Pr.* 841.

SIGNING OF WILL. See *CLOSE THEREOF*.

SIGNUM (Lat.). A sign; a mark; a seal.

SILENCE. The state of a person who does not speak, or of one who refrains from speaking.

Pure and simple silence cannot be considered as a consent to a contract, except in cases where the silent person is bound in good faith to explain himself; in which case silence gives consent; 14 S. & R. 398; L. R. 6 Q. B. 597; 102 Mass. 135; 6 Pa. 336. But no assent will be inferred from a man's silence unless he knows his rights and knows what he is doing, nor unless his silence is voluntary.

When any person is accused of a crime or charged with any fact, and he does not deny it, in general, the presumption is very strong that the charge is correct; 5 C. & P. 332; 7 *id.* 882; Joy, *Conf.* p. 77.

The rule does not extend to the silence of the prisoner when, on his examination before a magistrate, he is charged by another prisoner with having joined with him in the commission of an offence; 8 Stark. 33; Steph. *Ev.* art. 7.

When an oath is administered to a witness, instead of expressly promising to keep it, he gives his assent by his silence and kissing the book.

The person to be affected by the silence must be one not disqualified to act, as, *non compos*, an infant, or the like; for even the express promise of such a person would not bind him to the performance of any contract.

SILENTIARIUS. One of the privy council; an usher who saw that good rule and silence were kept in the court.

SILK. Under a statute referring to silk in a manufactured or unmanufactured state, any fabric which contains silk will not necessarily be included, but silk watch-guards and silk dresses; 28 L. J. C. P. 265; silk hose; *id.*; and elastic webbing composed of one-third silk; 33 L. J. Ex. 187, will be so considered.

SILK GOWN. Used especially of the gowns worn by queen's counsel; hence, "to take silk" means to attain the rank of queen's counsel. Moz. & W.

SILVA CÆDUA (Lat.). By these words, in England, is understood every sort of wood, except gross wood of the age of twenty years. Bac. *Abr. Tythes* (C).

SILVER. The legislation on the subject of silver coinage is stated up to that date in a note to R. S. 1 Supp. 774, which with the addition of legislation subsequent to that date is as follows: Laws on silver coinage are as follows: By R. S. §§ 3513, 3516, the silver coins of the United States are limited to a trade dollar, a half dollar, a quarter dollar, and a dime. By § 3526 silver bullion is to be purchased with the bullion fund. By § 3586 the silver coins of the United States are legal tender in amounts not exceeding \$5. By act of 1875, Jan. 14, ch. 15, fractional silver is to be issued in redemption of fractional currency. By act of 1876, April 17, ch. 63, this is repeated with some amendments. By Res. No. 17, of 1876, July 22, the silver coin in the treasury is to be issued in exchange for legal tender notes. The issue of fractional silver to fifty million dollars is authorized. By act of 1878, Feb. 28, ch. 20, the coinage of the standard silver dollar and the issuance of silver certificates of \$10 or over is authorized. By act of 1879, June 9, ch. 12, fractional silver and lawful money of the United States may be reciprocally exchanged at the treasury or any sub-treasury in sums of \$20, and fractional silver is made legal tender up to \$10. By act of 1882, August 7, ch. 433, par. 5, free transportation of silver coins is authorized. By act of 1887, March 3, ch. 362, the issuance of silver certificates of one, two, and five dollars is authorized in lieu of

higher denominations.

By act of July 14, 1890, the purchasing clause of the act of 1878 was repealed and the secretary of the treasury was authorized to purchase not to exceed 4,500,000 ounces of silver per month and to issue in payment therefor treasury notes. By act of 1890, Sept. 26, ch. 944, changes in the design of coins are authorized. The trade dollar was declared not a legal tender by Res. No. 17, of 1876, July 22, and by act of 1887, March 8, ch. 396, § 2 (24 Stat. L. 643), its coinage was terminated and its redemption and recoinage into standard dollars was directed. By act of 1893, Nov. 1, repeal of the purchasing clause of the act of July 14, 1890.

SIMILAR. Denotes partial resemblance, and also sameness in all essential particulars; 127 Mass. 454. Similar offence may mean an offence identical in kind. *Id.*

SIMILAR DESCRIPTION. Such words as used in a tariff act import that the goods are similar in product and adopted to similar uses; not necessarily that they have been produced by similar methods of manufacture; 1 Hask. 586.

SIMILITER (Lat. *likewise*). In *Pleading*. The plaintiff's reply, that, as the defendant has put himself upon the country, he, the plaintiff, does the like. It occurs only when the plea has the conclusion to the country, and its effect is to join the plaintiff in the issue thus tendered by the defendant; Co. Litt. 126 a. The word *similiter* was the effective word when the proceedings were in Latin; 1 Chitty, Pl. 519; Archb. Civ. Pl. 250; See Steph. Pl. 255; 2 Saund. 319 b; Cowp. 407; 1 Stra. 551; 11 S. & R. 82.

SIMONY. In *Ecclesiastical Law*. The selling and buying of holy orders or an ecclesiastical benefice. Bacon, *Abr. Simony*. By simony is also understood an unlawful agreement to receive a temporal reward for something holy or spiritual. Code 1. 3. 81; Ayliffe, *Parerg.* 496.

The crime of buying or selling ecclesiastical preferment or the corrupt presentation of any one to an ecclesiastical benefice for money or reward. 40 Neb. 167.

SIMPLE. Pure; unmixed; unqualified; composed of the fewest elements.

SIMPLE AVERAGE. Particular average. See *AVERAGE*.

SIMPLE CONTRACT. A contract the evidence of which is merely oral or in writing, not under seal nor of record. 1 Chitty, *Contr.*, 12th ed. 6. See 11 Mass. 30; 4 B. & Ald. 588; 2 Bla. Com. 472. See *CONTRACT*; *PAROL*.

Under the act of 33 & 34 Vict. c. 46, s. 1, in the administration of the estate of a deceased after Jan. 1, 1870, his simple contract debts are placed on an equal footing with those secured by specialty. But this does not prejudice any lien or other security, which any creditor may hold.

SIMPLE LARCENY. The felonious taking and carrying away the personal goods of another, unattended by acts of violence; it is distinguished from compound larceny, which is stealing from the person or with violence. *LARCENY*.

SIMPLE OBLIGATION. An unconditional obligation; one which is to be performed without depending upon any event provided by the parties to it.

SIMPLE (OR COMMON) TOOL DOCTRINE. The "simple or common tool doctrine" may be said to be a relaxation of the general rule, which makes it the duty of a master to exercise reasonable care to provide reasonably safe tools and appliances for his servants, since the general rule has no application where the tools and appliances furnished are of a simple nature, easily understood, and in which the defects, if any, can be easily and readily observed by the servant. 159 Ky. 41, 160 S. W. 625.

The "simple tool rule" will not be applied to a state of case in which it appears that a

servant is injured by a piece of metal flying from defective implements, such as a hammer or anvil, when the foreman is present, using the hammer in striking a piece of hot iron for the purpose of putting it into shape.

This rule is confined to cases in which the injured employee is himself actually using the tool that caused the injury complained of. 163 Ky. 158, 173 S. W. 357.

Tools of ordinary and everyday use, which are simple in structure and requiring no skill in handling—such as hammers and axes—not obviously defective, do not impose a liability upon employer for injuries resulting from such defects. 151 N. C. 315 citing 128 N. C. 264.

SIMPLE TRUST. A simple trust corresponds with the ancient use, and is where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the settler, is left to the construction of law. It differs from a *special trust*. 2 Bouvier, Inst. n. 1896.

SIMPLE WARRANTICE. See WARRANTICE.

SIMPLEX (Lat.). Simple or single; as, *charta simplex* is a deed-poll or single deed. Jacob, Law Dict.

SIMPLEX DICTUM (L. Lat.). Simple averment; mere assertion without proof.

SIMPLEX JUSTICIARIUS. A style formerly used for any *puisse* judge who was not chief in any court.

SIMPLEX LOQUELA (L. Lat.). Simple speech; the mere declaration or plaint of a plaintiff.

SIMPLEX OBLIGATIO. A single unconditional bond.

SIMPLICITER (Lat.). Simply; without ceremony; in a summary manner.

SIMUL ET SEMEL (Lat.). Together and at one time.

SIMULATED FACT. A fabricated fact; an appearance given to things by human device, with a view to deceive and mislead.

SIMULATIO LATENS. A species of feigned disease in which disease is actually present, but where the symptoms are falsely aggravated. Beck, Med. Jur. 3.

SIMULATION (Lat. *simul*, together). In French Law. The concert or agreement of two or more persons to give to one thing the appearance of another, for the purpose of fraud. Merlin. *Répert.*

SIMULCUM (Lat. together with). In Pleading. Words used in indictments and declarations of trespass against several persons, when some of them are known and others are unknown.

In cases of riots, it is usual to charge that A B, together with others unknown, did the act complained of; 2 Chitty, Cr. Law 488; 2 Salk. 593.

When a party sued with another pleads separately, the plea is generally entitled in the name of the person pleading, adding, "sued with —," naming the other party. When this occurred, it was, in the old phraseology, called pleading with a *simulcum*.

SINCE. The proper signification is after, and in its apparent sense includes the whole period between the event and the present time; 79 Me. 195; *since* the day named, does not necessarily include that day; 41 N. H. 201.

SINE (Lat.). Without.

SINE ANIMO REVERTENDI (Lat.). Without the intention of returning. 1 Kent's Com. 78.

SINE CONSIDERATIONE CURIAE (L. Lat.). Without the judgment of the

court.

SINE CURA (L. Lat.). Without cure or charge; without any duty attached.

SINE DECRETO (Lat.). Without authority of a judge.

SINE DIE (Lat.). Without day. A judgment for a defendant in many cases is *quod eat sine die*, that he may go without day. While the cause is pending and undetermined, it may be continued from term to term by *dies datus*. See CONTINUANCE; Co. Litt. 362 b. When the court or other body rise at the end of a session or term, they adjourn *sine die*.

SINE HOC. A phrase formerly used in pleading as equivalent to *absque hoc* (q. v.).

SINE JUDICIO (L. Lat.). Without judgment; without a judicial sentence.

SINE NUMERO (L. Lat.). Without stint or limit.

SINE PROLE. Without issue. Used in genealogical tables, and often abbreviated into "s. p."

SINECURE. In Ecclesiastical Law. A term used to signify that an ecclesiastical officer is without a charge or cure.

In common parlance, it means the receipt of a salary for an office when there are no duties to be performed.

SINGLE BILL. One without any condition, which does not depend upon any future event to give it validity.

SINGLE BOND. A deed whereby the obligor obliges himself, his heirs, executors, and administrators to pay a certain sum of money to the obligee at the day named.

SINGLE COMBAT. See WAGER OF BATTLE.

SINGLE ESCHEAT. The reversion of a person's movables to the crown because of his being declared a rebel.

SINGLE STAMP SPIRITS. "Single stamp spirits," within a statute is not confined to whiskey, but includes any distilled alcoholic spirits used as a beverage whether single or double stamped. 133 Ky 580, 118 S. W. 381.

SINGLE WOMAN. The words include a widow; 12 L. J. W. C. 74; and a married woman living apart from her husband; 12 Q. B. D. 681.

SINGULAR. In grammar, the singular is used to express only one; not plural. Johnson.

In law, the singular frequently includes the plural. A bequest to "my nearest relation," for example, will be considered as a bequest to all the relations in the same degree who are nearest to the testator; 1 Ves. Sen. 357; 1 Bro. C. C. 298. A bequest made to "my heir," by a person who had three heirs, will be construed in the plural; 4 Russ. Cr. Cas. 384.

Under the 13 & 14 Vict. c. 21, s. 4, words in acts of parliament importing the singular shall include the plural, and *vice versa*, unless the contrary is expressly provided; Whart. Lex.

SINGULAR SUCCESSION. See UNIVERSAL SUCCESSION.

SINGULAR SUCCESSOR. A phrase in Scotch law, applied to the purchase of a specific chattel or specific land, as e. g. an executor or administrator, in contradistinction to the heir. Bell.

SINKING FUND. A fund arising from particular taxes, imposts, or duties, which is appropriated towards the payment of the interest due on a public loan and for the gradual payment of the principal. This definition was quoted and approved in 9 Neb. 453. A fund created for extinguishing or paying a funded debt. 14 N. Y. 379, cited in 30 Fed. Rep. 89. Formerly corporation mortgages usually contained a provi-

sion for a sinking fund. They are now less common.

The constitution of Pennsylvania provides that every city shall create a sinking fund which shall be inviolably pledged for the payment of the public debt. Under this provision commissioners of the sinking fund may apply the money in the sinking fund to the purchase of the funded debt of the city, and the debt to that extent is thereby paid, and it is immaterial in determining the actual debt that the commissioners of the sinking fund have no authority immediately upon purchase to cancel or destroy the obligation of the city which they have bought. Securities other than those of the city held by the sinking fund are merely an asset of the city and do not operate to the reduction of the funded debt. If payments are not made into the sinking fund as required by law the commissioner must see to it that they are made, even to the institution of legal proceedings against the city to compel payment; 162 Pa. 123. See FUNDING SYSTEM.

SIST ON A SUSPENSION. A Scotch phrase equivalent to "stay of proceedings." Bell.

SISTER. A woman who has the same father and mother with another, or has one of them only. In the first case, she is called sister, simply; in the second, half-sister. Approved in 61 How. Fr. 48.

SITIO. A measure used in Mexican land grants, equivalent to 4388.464 acres. A *sitio de ganado menor* or sheep ranch is equivalent to 1928.133 acres. 161 U. S. 219.

SITTINGS IN BANK, or BANC. The sittings which the respective superior courts of common law hold during every term for the purpose of hearing and determining the various *matters of law* argued before them.

They are so called in contradistinction to the sittings at *nisi prius*, which are held for the purpose of trying issues of fact.

In America, the practice is essentially the same, all the judges, or a majority of them usually, sitting *in banc*, and but one holding the court for jury trials; and the term has the same application here as in England. See LONDON AND MIDDLESEX SITTINGS.

SITTINGS IN CAMERA. See CHAMBERS.

SITUS (Lat.). Situation; location. 5 Pet. 524.

Real estate has always a fixed situs, while personal estate has no such fixed situs: the law *rei sita* regulates real but not personal estate; Story, Confl. Laws, 8th ed. §§ 363-365. See PROPERTY; LEX LOC; TAX; Waples, Debtor and Creditor, where the subject of the location of property is treated.

SIX ACTS, THE. The popular title of the group of English acts 60 Geo. 3, and 1 Geo. 4, cc. 1, 2, 4, 6, 8, 9; portions of c. 1 (the Unlawful Drilling Act, 1819), c. 4 (the Pleading in Misdemeanor Act, 1819), and c. 8 (the Criminal Libel Act, 1819), are still unrepealed. The "Gagging Acts" was another popular title.

The six acts in effect prohibited the training of persons to arms; authorized general searches and seizure of arms; prohibited meetings of more than fifty persons for the discussion of public grievances; repressed with heavy penalties and confiscation seditious and blasphemous libels; and checked pamphleteering by extending the newspaper stamp duty to political pamphlets. Byrne.

SIX ARTICLES, LAWS OF. A celebrated act entitled "An act for abolishing diversity of opinion," 31 Hen. VIII. c. 14; enforcing conformity to six of the strongest points in the Roman Catholic religion, under the severest penalties; repealed by 1 Eliz. c. 1; 4 Reeve, Eng. L. 378.

SIX CLERKS IN CHANCERY. Officers who received and filed all proceedings, signed office copies, attended court

to read the pleadings, etc. Abolished by 5 Vict. c. 5. 3 Sharsw. Bla. Com. 448*; Spence, Eq. Jur.

SIX MONTHS' RULE. See MORTGAGE; RECEIVER.

SIXTEEN HOUR LAW. Another name for the Hours of Service Law of March 4, 1907 (chapter 2939, 34 St. pp. 1415, 1416). Section 2 of this law states: "That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been on duty for sixteen consecutive hours he shall be relieved and not required to go on duty until he has had at least ten consecutive hours off duty." 197 Fed. 630.

SKELETON BILL. In Commercial Law. A blank paper, properly stamped, in those countries where stamps are required, with the name of the person signed at the bottom.

In such case the person signing the paper will be held as the drawer or acceptor, as it may be, of any bill which shall afterwards be written above his name, to the sum of which the stamp is applicable; 1 Bell, Com. 390.

SKIAGRAPH. A permanent shadow-picture produced by Roentgen rays passing through the object and falling upon a sensitive photographic film, instead of a fluorescent screen, as in the fluoroscope. Also, the plan of a building showing its interior structure. Stand. Dict.

SKILL. The art of doing a thing as it ought to be done.

Every person who purports to have skill in a business, and undertakes for hire to perform it, is bound to do it with ordinary skill, and is responsible civilly in damages for the want of it; 11 M. & W. 483; and sometimes he is responsible criminally. See PHYSICIAN; 2 Russ. Cr. 288.

The degree of skill and diligence required rises in proportion to the value of the article and the delicacy of the operation; more skill is required, for example, to repair a very delicate mathematical instrument, than upon a common instrument; Jones, Bailm. 91; 2 Kent 458, 463; Ayliffe, Pand. 466; 1 Rolle Abr. 10; Story, Bailm. § 431; 2 Greenl. Ev. § 144.

SKIN. See FUR

SLANDER. In Torts. Words falsely spoken, which are injurious to the reputation of another.

False, defamatory words spoken of another. See ODGER, LIBEL & S. *7.

There is a distinction, probably the result of some historical accident, between slander and libel; in libel any defamatory matter is *prima facie* libellous while the same matter when spoken would require proof of special damage, excepting in the classes of cases mentioned *infra*, which are actionable *per se*.

Verbal slander. Actionable words are of two descriptions: first, those actionable in themselves, without proof of special damages; and, secondly, those actionable only in respect of some actual consequential damages.

Words of the first description must impute.

First, the guilt of some offence for which the party, if guilty, might be indicted and punished by the criminal courts; as, to call a person a "traitor," "thief," "highwayman," or to say that he is guilty of "perjury," "forgery," "murder," and the like. And although the imputation of guilt be general, without stating the particulars of the pretended crime, it is actionable; Cro. Jac. 114, 142; 6 Term 694; 5 B. & P. 335; 56 Ark. 100; 43 La. Ann. 967; 82 Va. 239; it is enough if the offence charged be a misdemeanor involving moral turpitude; Bigel. Torts 44. If the charge

is that the plaintiff has already suffered the punishment, the words, if false, are actionable; *ibid.*; see 5 Pa. 273; 50 Ohio St. 71.

Second, that the party has a disease or distemper which renders him unfit for society; Bac. Abr. Slander (B. 2). An action can, therefore, be sustained for calling a man a leper; Cro. Jac. 144. Imputations of having at the present time a venereal disease are actionable in themselves; 8 C. B. N. s. 9; 7 Gray 181; 22 Barb. 396; 2 Ind. 82; 2 Ga. 57. But charging another with having had a contagious disease is not actionable, as he will not on that account be excluded from society; 2 Term 473, 474; 2 Stra. 1189.

Third, unfitness in an officer, who holds an office to which profit or emolument is attached, either in respect of morals or inability to discharge the duties of the office; in such a case an action lies; 4 Co. 16 a; 5 *id.* 135; 1 Stra. 617; 2 Ld. Raym. 1369; Bull. N. P. 4. The holder of an office, not being an office of profit, cannot, in the absence of special damage, maintain an action of slander for words imputing to him misconduct and consequent unfitness for the office, unless the imputation relates to his conduct in the office, or unless, if true, it would lead to his removal therefrom; [1892] 1 Q. B. 797; or where the office is not one of profit, and whether there is a power of removal from the office for such misconduct or not; [1895] 1 Q. B. 571.

Fourth, the want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade, or business, in which the party is engaged, is actionable; as, to accuse an attorney or artist of inability, inattention, or want of integrity; 3 Wils. 187; 2 W. Bla. 750; or a clergyman of being a drunkard; 1 Binn. 178, is actionable. Words spoken of a butcher, charging him with slaughtering diseased cattle for sale for human food are actionable *per se*; 70 Md. 328.

Fifth. Bigelow (Torts 48) gives as a fifth class words tending to defeat an expected title: as to call an heir apparent to estates a bastard. See Cro. Car. 469.

Of the second class are words which are actionable only in respect of special damages sustained by the party slandered. Though the law will not permit in these cases the inference of damage, yet when the damage has actually been sustained the party aggrieved may support an action for the publication of an untruth; 1 Lev. 53; unless the assertion be made for the assertion of a supposed claim; Com. Dig. Action upon the Case for Defamation (D 30); Bac. Abr. Slander (B); but it lies if maliciously spoken. In this case special damage is the gist of the action, and must be particularly specified in the declaration. For it is an established rule that no evidence shall be received of any loss or injury which the plaintiff had sustained by the speaking of the words unless it be specially stated in the declaration. And this rule applies equally where the special damage is the gist of the action and where the words are in themselves actionable; Heard, Libel & S. § 51.

The charge must be false; 5 Co. 125. The falsity of the accusation is to be implied till the contrary is shown; 2 East 436; 1 Saund. 242. The instance of a master making an unfavorable representation of his servant, upon an application for his character, seems to be an exception, in that case there being a presumption, from the occasion of speaking, that the words were true; 3 B. & P. 587.

The slander must, of course, be published,—that is, must be communicated to a third person,—and in a language which he understands; otherwise the plaintiff's reputation is not impaired; 1 Rolle, Abr. 74; Cro. Eliz. 857; 1 Saund. 242, n. 3; Bac. Abr. Slander (D 3). There is no publication if the words were not understood by the persons present, nor repeated by them; 48 Ill. App. 435. The slander must be published respecting the

plaintiff.

It is not enough to say that by some person or other the words used might be understood in a defamatory sense; [1897] A. C. 68. "Because some persons may choose, not by reason of the language itself, but by reason of some fact to which it refers, to draw an unfavorable inference, it does not follow that such matter is libellous; 5 C. P. D. 541.

It will afford no justification that the defamatory matter has been previously published by a third person, that the defendant at the time of his publication disclosed the name of that third person and believed all the statements to be true; Heard, Libel & S. § 143. And a repetition of oral slander already in circulation, without expressing any disbelief of it or any purpose of inquiring as to its truth, though without any design to extend its circulation or credit, or to cause the person to whom it is addressed to believe or suspect it to be true, is actionable; 5 Gray 3. It is no defence in an action of slander that the words were used to and not of plaintiff, when others were present and heard the words spoken; 89 Ga. 829.

To render the words actionable, they must be uttered without legal occasion. On some occasions it is justifiable to utter slander of another; in others it is excusable, provided it be uttered without express malice; Bac. Abr. Slander (D, 4); Rolle, Abr. 87; 1 Viner, Abr. 540. It is justifiable for an attorney to use scandalous expressions in support of his client's cause and pertinent thereto; 1 Maule & S. 280; 1 Holt 531; 1 B. & Ald. 252. See 2 S. & R. 469; 11 Vt. 536. The *bona fide* statements of one church member, on the trial of another before a church tribunal, that such other had committed adultery with plaintiff, not a member of the church, are privileged communications; 88 Ga. 620. Members of congress and other legislative assemblies cannot be called to account for anything said in debate. See PRIVILEGED COMMUNICATIONS.

Malice is essential to the support of an action for slanderous words. Odgers, Lib. & SL 271. But malice is, in general, to be presumed until the contrary be proved; 4 B. & C. 247; 1 Saund. 242, n. 2; 1 East 563; 5 B. & P. 385; Bull. N. P. 8; see 55 Fed. Rep. 240; except in those cases where the occasion *prima facie* excuses the publication; 4 B. & C. 247. See 14 S. & R. 359; 48 Ill. App. 294. Repetition of the slander after suit begun may be shown to prove malice and aggravate damages; 48 Ill. App. 418. Defendant is not required, in an action for slander in charging plaintiff with theft, to prove the truth of the charge beyond a reasonable doubt, but a preponderance of evidence is sufficient; 67 Hun 543. An admission by defendant at plaintiff's request and in the presence of a third party that on a previous occasion he had used the alleged slanderous words, is no ground of action when it does not appear that the language was originally used in the presence of a third party; 86 Fed. Rep. 96.

The word "malicious" in defining the intent with which a slander is spoken, is not to be considered in the sense of spite or hatred against a person, but as meaning that the party is actuated by improper and indirect motives other than interest of the public; 70 Md. 328; 57 Conn. 73. See MALICE.

See as to slander of a physician, 28 Am. L. Reg. 465. As to the admissibility of evidence of the defendant's pecuniary means, see 23 Alb. L. J. 44.

Libel. If a written or printed publication tends to degrade the person about whom it is written or printed—that is, if it tends to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, from a higher to a lower grade, or if it tends to disgrace him—that is, if it tends to deprive him of the favor and esteem of his friends or acquaintances or the public, or tends to render him odious, ridiculous, or contemptible in the estimation of his

friends or acquaintances or the public, it is *per se* actionable "libel."

Spoken words are only actionable "slander" *per se* when they clearly and unequivocally import that the person accused is guilty of some felony or other crime of such turpitude as to render him liable upon indictment to some infamous punishment. 163 Ky. 145, 173 S. W. 380.

Slanderous Per Se. Words are "slanderous" or actionable "*per se*" only in cases where they are falsely spoken, and (1) impute turpitude; (2) infectious disease; (3) unfitness to perform the duties of an office or employment; (4) prejudice one in his profession or trade; (5) tend to disinherit him. 155 Ky. 2, 159 S. W. 610.

See, generally, *Comyns, Dig.; Bacon, Abr.; 1 Viner, Abr. 187; Starkie, Slander; Heard, Libel & Slander; Odger, Slander; Bigelow, L. C. Torts; 1 Marvel, Del. 408; JUSTIFICATION; PUBLICATION; LIBEL.*

SLANDER OF TITLE. A statement tending to cut down the extent of one's title.

"An action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." 3 Bing. N. C. 871.

Malice, that is absence of good faith, is an essential condition of liability; 19 Ch. Div. 386; or actual malice, as well as special damage; Poll. Torts 294.

The action formerly applied only to real property; but now extends to chattels and to property rights, such as those under patents. See **LIBEL**, where the subject is discussed.

An assertion of title made by way of self-defence or as a warning to others, is not actionable, though the claim be mistaken, if made in good faith; Poll. Torts 295; L. R. 4 Q. B. 730.

An action for *slander of title* is not properly an action for words spoken, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. The property may be either real or personal, and the plaintiff's interest therein may be anything that has a market value. It makes no difference whether the defendant's words be spoken, written, or printed, save as affecting the damages, which should be larger when the publication is more permanent or extensive, as by advertisement. The action is ranged under that division of actions in the digests and other writers on the text law, and is so held by the courts of the present day. The slander may be of such a nature as to fall within the scope of ordinary slander. It is essential, to give a cause of action, that the statement *should* be false. It is essential, also, that it should be malicious,—not malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie however malicious the defendant's intention might be; Heard, Libel & S. 88 10, 59; Poll. Torts 389. See 90 Cal. 332.

Where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and in common fairness bound, to give the intended purchaser warning of his intention; and no action will lie for giving such preliminary warning, unless it can be shown either that the threat was made *mala fide*, only with intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful; L. R. 4 Q. B. 730; 14 Cent. L. J. 187; Odger, Libel & S. 138. The denial of a complaining party's title made *bona fide* in assertion of the title (real or honestly believed to exist) of the party making such denial, will not sustain an action for slander of title; 101 N. C. 273.

SLANDERER. A calumniator who maliciously and without reason imputes a

crime or fault to another of which he is innocent. See **SLANDER**.

SLAVE. One over whose life, liberty, and property another has unlimited control.

Every limitation placed by law upon the absolute control modifies and to that extent changes the condition of the slave. In every slaveholding state of the United States the life and limbs of a slave were protected from violence inflicted by the master of third persons.

Among the Romans the slave was classed among things (*res*). He was *homo sed non persona*. Heliconius, Elem. Jur. l. 1, § 75. He was considered *pro nullo et mortuo, quia nec status familiae nec civitatis nec libertatis gaudet*. Id. § 77. See, also, 4 Dev. 340; 9 Ga. 582. In the United States, as a person, he was capable of committing crimes, of receiving his freedom, of being the subject of homicide, and of modifying by his position very materially the rules applicable to other species of property. His existence as a person being recognized by the law, that existence was protected by the law; 1 Hawks 217; 1 Ala. 8; 1 Miss. 83; 5 Hand. 678; 1 Yerg. 156.

In the slaveholding states the relations of husband and wife and parent and child were recognized by statutes in relation to public sales, and by the courts in all cases where such relations were material to elucidate the motives of their acts.

A slave had no political rights. His civil rights, though necessarily more restricted than the free men's, were based upon the law of the land. He had none but such as were by that law and the law of nature given to him. The civil-law rule, "*parvus sequitur ventrem*," was adopted in all the slaveholding states, the status of the mother at the time of birth deciding the status of the issue; 2 Rand. 240; 1 Hayn. 324; 1 Code Ann. Del. 482; 2 Mo. 71; 14 S. & R. 448; 3 H. & M. 139; 20 Johns. 1; 12 Wheat. 568; 2 How. 265, 496.

The slave could not acquire property: his acquisitions belonged to his master; 5 Cow. 397; 1 Bail. 683; 3 Hill. Ch. 397; 6 Humphr. 299; 3 Ala. 320; 3 B. Monr. 198; 9 S. 37. The peculium of the Roman slave was *ex gratia*, and not of right; Inst. 2, § 3. In like manner, negro slaves in the United States were, as a matter of fact, sometimes permitted by their masters *ex gratia*, to obtain and retain property. The slave could not be a witness, except for and against slaves or free negroes. This was, perhaps, the rule of the common law. None but a free man was *othesworth*. In the United States the rule of exclusion which we have mentioned was enforced in all cases where the evidence was offered for or against white persons; 6 Leigh 74. In most of the states this exclusion was by express statutes, while in others it existed by custom and the decision of the courts; 10 Ga. 519. In the slaveholding states, and in Ohio, Indiana, Illinois, and Iowa, by statute, the rule was extended to include free persons of color or emancipated slaves; 14 Ohio 193; 3 Harr. & J. 97. The slave could be a witness in court only for his freedom. For all other wrongs he appeared through his master, for whose benefit the recovery was had; 9 Gill & J. 19; 1 Mo. 608; 4 Yerg. 303; 3 Brev. 11; 4 Gill 249; 9 La. 158; 4 T. B. Monr. 169. The suit for freedom was favored; 1 Han. & M. 143; 8 Pet. 44; 2 A. K. Marsh. 467. Lapse of time worked no forfeiture by reason of his dependent condition; 8 B. Monr. 631; 1 Hen. & M. 141. The master was bound to maintain, support, and defend his slave, however helpless or impotent. If he failed to do so, public officers were provided to supply his deficiency at his expense.

Cruel treatment was a penal offence of a high grade. Emancipation of the slave was the consequence of conviction in Louisiana; and the sale of the slave to another master was a part of the penalty in Alabama and Texas.

It will be presumed that a person who was a slave before 1865 in this country is a negro; 107 N. C. 609.

The enfranchisement of a slave was called *manumission*. See **BONDAGE**; **MANUMISSION**; **SERVUS**; **FREEDOM**. Slavery was abolished in the United States by the thirteenth amendment to the constitution.

SLAVE-TRADE. The traffic in slaves, or the buying and selling of slaves for profit. It is either foreign or domestic.

The history of the slave-trade is as old as the authentic records of the race. Joseph was sold to Ishmaelish slave-traders, and Egypt has been a mart for the traffic from that day to this. The negro early became a subject of it. In every slave-market he has been found, and never as a master except in Africa. The Roman mart, however, exhibited a variety of all the conquered races of the world. At Bristol, in England, for many years about the eleventh century, a brisk trade was carried on in purchasing Englishmen and exporting them to Ireland for sale. And William of Malmsbury states that it seems to be a natural custom with the people of Northumberland to sell their nearest relations.

The African slave-trade on the eastern coast has been carried on with India and Arabia from a period difficult to be established, and was continued with British India while British ships-of-war hovered on the western coast to capture the pirates engaged in the same trade. In the western coast the trade dates from 1482, the Spaniards for a time monopolized it. The Portuguese soon rivaled them in its prosecution. Sir John Hawkins, in 1563, was the first Englishman who engaged in it; and queen Elizabeth was the first Englishwoman known to share in the profits.

Immense numbers of African negroes were transported to the New World, although thousands were landed in England and France and owned and used

as servants. The large profits of the trade stimulated the avarice of bad men to forget all the claims of humanity; and the horrors of the middle passage, though much exaggerated, were undoubtedly very great.

The American Colonies raised the first voice in Christendom for the suppression of the slave-trade, but the interests of British merchants were too powerful with the king, who stifled their complaints. The constitution of the United States, in 1789, was the first governmental act towards its abolition. By it, congress was forbidden to prohibit the trade until the year 1808. This limitation was made at the suggestion of South Carolina and Georgia, aided by some of the New England states. Yet both of those states, by state action, prohibited the trade many years before the time limited,—Georgia as early as 1778. In 1807, an act of congress was passed which prohibited the trade after 1808, and by subsequent acts it was declared piracy. The federal legislation on the subject will be found in acts of congress passed respectively March 22, 1794, May 10, 1800, March 3, 1807, April 30, 1816, March 3, 1819, and May 15, 1820. In the year 1817, the British parliament also passed an act for the abolition of the slave-trade,—the consummation of a parliamentary struggle continued for nineteen years, and fourteen years after a similar act had been adopted by Great Britain. Great efforts have been made by Great Britain, by treaties and otherwise, to suppress this trade, one being entered into at Brussels in 1860. As to the present condition of the slave trade throughout the world, see Rep. Int. L. Assn. (1885) 155. See Buxton's Slave-Trade, etc.; Carey's Slave-Trade; Cobb's Historical Sketch of Slavery.

SLAVERY. See **INVOLUNTARY SERVITUDE**; **PEONAGE**.

SLAY. When not used in relation to battle the word is synonymous with kill. 32 La. Ann. 351.

SLEDGE. A hurdle used to draw traitors to execution. 1 Hale, P. C. 82.

SLEEPING-CAR. The servants and employes in charge of sleeping or drawing-room cars are considered in the same light as if they were employed by the railroad company, notwithstanding the existence of a separate agreement between the railroad and the sleeping-car company, whereby the latter furnishes its own servants and conductors, and has exclusive control of the cars used on the former company's road; Beach, Rail. 1007; 19 Alb. L. J. 471; 125 Mass. 54. See 52 Fed. Rep. 262.

Sleeping-car companies are not liable as innkeepers; 73 Ill. 360; 16 Abb. Pr. (N. S.) 352; 6 Ohio Dec. 85; 24 Am. L. Reg. N. S. 95; 28 Neb. 239; nor as common carriers; 73 Ill. 360; 143 Mass. 267; 40 La. Ann. 87; 151 N. Y. 163; 3 Penny. 73; 124 N. Y. 63; 60 Tex. 120; 24 Mo. App. 29; 63 Miss. 609; 52 Fed. Rep. 262; 74 *id.* 499; nor as a carrier providing state-rooms for his passengers; 43 How. Pr. 466.

A sleeping-car company impliedly undertakes to keep a reasonable watch on the passenger and his property; but no more; 23 Am. L. Reg. N. S. (Ky.) 788; whether the passenger is in his berth or in the wash-room; 28 Mo. App. 199; 23 S. E. Rep. (Ga.) 186; while he is asleep; 73 Ill. 360; 24 Mo. App. 29; or while occupying his berth; 143 Mass. 267. The company is liable for the watch and money of a passenger stolen while he was asleep, where it appeared that the company's servant disobeyed a regulation which required him to keep a continuous watch during the night; 16 Am. & Eng. R. Cas. 324. It is the duty of a sleeping-car company to keep reasonable guard over the persons and property of passengers; 84 Ind. 474; 74 Tex. 654; 143 Mass. 267; it is liable only where there is a lack of ordinary care; 6 Ohio Dec. 85.

It is not liable for a pocket-book, containing money, negligently left by a passenger, if stolen by some one not in the company's employ, unless an agent of the company knew, before the theft, that the property had been so left; 63 Miss. 609. It is not ordinarily liable for property stolen by another passenger; 84 Ind. 474. Where a porter, acting under the rules of the company, takes charge of baggage to aid in removing it from the car, it is within the scope of his employment, and the company is liable for its loss; 44 N. E. Rep. (Ind. App.) 1010.

The company is liable—in any case—only for a reasonable amount of money and personal belongings appropriate to the circumstances of the plaintiff; 51 Fed. Rep. 796; 143 Mass. 267; 28 Mo. App. 199; 72 Ia. 238; 49 N. Y. S. 1111. In the absence

of evidence of what is a reasonable amount, it has been held that the verdict must be for nominal damages only; 82 Mo. App. 682.

The duty of a sleeping-car company to protect its passengers from thieves cannot be waived by words printed upon the passenger's ticket or notices posted in the car; 26 S. W. Rep. (Tex.) 112. It cannot avoid its liability by posting in the car a notice disclaiming responsibility for personal property left in berths, if such notice is not known to the passenger; 143 Mass. 287.

Though a passenger negligently leave his property exposed, if it is stolen by a servant of the sleeping-car company, the company is liable; 74 Tex. 754; 23 S. W. Rep. Tenn. 70; but it is not liable where a passenger's satchel is carelessly left, during his absence from his seat, within the reach of persons outside; 143 Mass. 243; if a passenger leave a large sum of money under his pillow while he goes to the wash-room, he cannot recover; 37 Mo. App. 600; unless it was left with the porter; 50 id. 474.

Negligence on the part of the sleeping-car company's servants is not to be presumed from the mere fact of the loss, but must be shown; 28 Mo. App. 199; 6 Ohio Dec. 85; 124 N. Y. 53; 72 Ia. 228; 69 Tex. 120. Contributory negligence on the part of plaintiff may defeat his recovery; 143 Mass. 267; 51 Fed. Rep. 796; 63 Miss. 609. The presumption of negligence arising from proof of loss is rebutted by the porter's uncontradicted evidence that he watched the car till after the loss; 3 Colo. App. 340.

The railroad company is liable to a passenger who is injured through the negligence of a servant of a sleeping-car company; 88 Ohio St. 461; 102 U. S. 451; though riding in a different car from the one in which he has purchased a seat; 102 U. S. 451; even though he knew that the sleeping-car was operated by a separate corporation; see 102 U. S. 451; Wood, Ry. 1700; though the question of his knowledge was deemed important in 38 Ohio St. 461.

For an unjustifiable and wanton assault by a porter on a passenger on a railroad train who had not purchased a sleeping-car ticket, it was held that the railway company was liable, but that the sleeping-car company was not; 40 La. Ann. 87, 417. Whether the latter is to be held liable, for the violent act of a porter depends upon whether the act came within the scope of his employment; 20 Fed. Rep. 100. The porter was held to be the servant of the railroad company in 120 N. Y. 117 (8 L. R. A. 224); 102 U. S. 451. Where a passenger is ejected from a sleeping-car by train hands, their act is the act of the railroad company, not of the sleeping-car company; 49 Mo. App. 75.

It has been held that where a passenger is wrongfully expelled from a sleeping-car by a servant of the railroad company, the sleeping-car company is not liable, and if expelled by a servant of the latter, the railroad company is not liable; 37 Fed. Rep. 841.

It cannot be said on demurrer that a company is not liable for injury to a passenger caused by the excessively low temperature of a car; 74 Fed. Rep. 499.

A railroad company cannot, by an arrangement with a sleeping-car company, evade the duty of providing proper means for the safe carriage of passengers; 102 U. S. 457; 16 Lea 380; 125 Mass. 54; 108 N. Y. 80.

A passenger travelling on a free pass, by which he waived action for injuries, purchased a seat in a sleeping-car, and while riding in it was injured; it was held that he was still bound by his waiver; 108 N. Y. 80.

A rule of a railroad company requiring a passenger to have a first-class ticket for his transportation before he can be assigned to a berth in a sleeping-car, is a reasonable one and can be legally enforced; 49 Ill. App. 75.

A sleeping-car company is bound to afford equal facilities to all travellers who apply for them in compliance with reasonable regulations; 106 Ill. 232; 45 Fed. Rep. 330; but it has a right to sell a section to one passenger and is not liable to a passenger to whom it has refused to sell one of the berths in such section, though it was not occupied; 45 Fed. Rep. 339. And it is not bound to furnish a berth to one who by the rules of the railroad company is not entitled thereto; 144 Mass. 6; 52 Fed. Rep. 262.

A purchaser of a section may share its use with any proper person whom he invites into it; 45 Fed. Rep. 330; and he may, on leaving the train, transfer the use of his section to another first-class passenger for the rest of the trip; 34 Am. L. Reg. 709 (Super. Ct. of Baltimore).

A passenger is entitled to occupy only the berth he pays for and which his ticket specifies; 14 S. W. Rep. (Tex.) 855.

One who has paid for a berth from one point to another is entitled to a continuous passage in it, or in one equally good, and cannot be transferred to another berth or another car at the arbitrary discretion of the company; 65 Ind. 153.

In the contract for the use of the berth there is directly involved an obligation to awaken and notify the passenger in time for him to prepare safely and comfortably to leave the train at his destination; 79 Tex. 468.

See 3 Beach, Railways § 1007; Hutchinson, Carriers, 2d ed. § 617 d; 2 Rorer, Railroads; Bishop, Non-Contract Law § 1162; 31 L. R. A. 289; 9 L. R. A. 173.

SLEEPING RENT. A fixed rent, as opposed to one varying with the profits. 2 Harr. & W. 43.

SLIP. In negotiations for a policy of insurance the "slip" is a memorandum between the parties containing the terms of the proposed insurance, and initialled by the underwriters.

Although, under the English Marine Insurance Act, 1906, s. 22 (which requires every contract of marine insurance to be expressed in a policy) the slip itself is not enforceable, it is for many other purposes of legal effect; thus, where a slip has been initialled, the assured need not communicate to the insurer facts which afterwards come to his knowledge material to the risk insured against, and the non-disclosure of those facts will not vitiate the policy afterwards executed, although it would do so if there were no slip. The slip is in fact a binding contract for the issue of the policy. Byrne.

SLIPPA. A stirrup. There is a tenure of land in Cambridgeshire by holding the sovereign's stirrup.

SLOUGH. An arm of a river flowing between islands and the main land. 55 Ia. 565.

Slough Silver. An old rent paid instead of harvest work at the castle of Wigmore, England. English.

SLUT. See BITCH.

SMALL BILLS. See SHIN-PLASTERS.

SMALL DEBTS COURTS. The several county courts established by 9 & 10 Vict. c. 95, for the purpose of bringing justice home to every man's door.

SMALL NOTES. See SHIN-PLASTERS.

SMART-MONEY. Vindictive or exemplary damages given beyond the actual damage, by way of punishment and example, in cases of gross misconduct of defendant. 15 Conn. 225; 14 Johns. 352; 10 Am. L. Reg. n. s. 566. That it cannot be given by jury, see 2 Greenl. Ev. § 253, n. See EXEMPLARY DAMAGES.

SMELTING. Smelting, though by derivation synonymous with melting, has come to mean a melting of ores in the presence of some re-agent which operates to separate the metallic element by combining with a non-metallic element. 68

Fed. Rep. 354.

SMOKE. Ordinances relating to the emission of smoke have been enacted in nearly every city and village. There is a great difference in the smoke, dirt and soot-producing qualities of fuel and in the furnaces where consumed and in the manner of stoking fires, and as the careless and unrestrained use of some fuels tends to produce and discharge into the atmosphere surrounding the places where such fuels are so carelessly used, dirt and soot-laden smoke that is injurious and disagreeable, the production and discharge of such smoke is a proper subject for reasonable police regulation. 199 N. Y. 212-13.

Explosions or Combustions. "Smoke explosions or combustions" are caused by the accumulation of smoke or gas in mines resulting from the want of pure air; such explosions never occur when the air is good. 143 Ky. 351, 136 S. W. 620.

SMOKE-SILVER. A modus of sixpence in lieu of tithe-wood. Twisdale, Hist. Vindicat. 77.

SMUGGLING. The fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited.

This definition was quoted and approved by Brewer, J., in 156 U. S. 185.

"Smuggling consists in the bringing on shore, or carrying from the shore, goods and merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited." 6 Bac. Abr. 258; so, in almost precisely the same words in 1 Hawk. Pl. Cr. 661; 1 Russ. Cr. 172; Gabb. Cr. L. 848.

In the Anti-Moiety Act, June 22, 1874, it was provided:

"That for the purpose of this act, smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom-house, or submitting them to the officers of the revenue, for examination." 18 U. S. Statutes at Large, ch. 391, p. 186.

SO. The terms "hence" and "therefore" are sometimes the equivalent of "so," and the latter word is thus understood whenever what follows is an illustration of or conclusion from what has gone before. 33 Ind. 431.

SO HELP YOU GOD. See OATH.

SOC. See SOCAGE.

SOCAGE. A species of tenure, whereby the tenant held his lands of the lord by any certain service in lieu of all other services, so that the service was not a knight's service. Its principal feature was its certainty: as, to hold by fealty and a certain rent, or by fealty-homage and a certain rent, or by homage and fealty without rent, or by fealty and certain corporal service, as ploughing the lord's land for a specified number of days. 2 Bla. Com. 80.

The term socage was afterwards extended to all services which were not of a military character, provided they were fixed: as, by the annual payment of a rose, a pair of gilt spurs, a certain number of capons, or of so many bushels of corn. Of some tenements the service was to be hangman, or executioner of persons condemned in the lord's court; for in olden times such officers were not volunteers, nor to be hired for lucre, and could only be bound thereto by tenure. There were three different species of these socage tenures—one in frank tenure, another in ancient tenure, and the third in base tenure: the second and third kinds are now called, respectively, tenure in ancient demesne, and copyhold tenure. The first is called free and common socage, to distinguish it from the other two; but, as the term socage has long ceased to be applied to the two latter, socage and free and common socage now mean the same thing. Bracton; Co. Litt. 17, 86. See TENURE.

By the statute of 12 Car. II. c. 24, the ancient tenures by knight's service were abolished, and all lands, with the exception of copyholds and of ecclesiastical lands, which continued to be held in free alms (frankalmoigne), were turned into free and common socage and the great bulk of real property in England is now held under this ancient tenure. Many grants of land in the United States, made previous to the revolution, by the British Crown, created the same tenure among us, until they were formally abolished by the legislatures of the different states. In 1787, the state of New York converted all feudal tenures within its boundaries into a tenure by free and common socage; but in 1830 it abolished this latter tenure, with all its incidents, and declared that from thenceforth all lands in the state should be held upon a uniform allodial tenure, and vested an absolute property in the owners according to their respective estates. Similar provisions have been adopted by other states; and the ownership of land throughout the United States is now essentially free and unrestricted. See TENURE; SOKA.

SOCER (Lat.). The father of one's wife; a father-in-law.

SOCIAL CONTRACT, or COMPACT. The reciprocal obligations of civil society and its members; conceived of by philosophers of the period preceding the French Revolution as a form of agreement, and opposed to the state of nature. According to them, the individual gives up the right of redressing his own wrongs and yields obedience and support to the state. In return he receives public protection and defense. Stand. Dict.

SOCIAL ENJOYMENT. These words are too comprehensive to state as the object for which a corporation is to be formed, as some social enjoyments are unlawful. 2 D. R. Pa. 702.

SOCIDA (Lat.). In Civil Law. The name of a contract by which one man delivers to another, either for a small recompense or for a part of the profits, certain animals, on condition that if any of them perish they shall be replaced by the bailor or he shall pay their value.

A contract of hiring, with the condition that the bailee takes upon him the risk of the loss of the thing hired. Wolff § 638.

SOCIETAS (Lat.). In Civil Law. A contract in good faith made to share in common the profit and loss of a certain business or thing, or of all the possessions of the parties. Calvinus, Lex.; Inst. 3. 26; Dig. 17. 21. See PARTNERSHIP.

SOCIETAS LEONINA (Lat.). In Roman Law. That kind of society or partnership by which the entire profits should belong to some of the partners in exclusion of the rest.

It was so called in allusion to the fable of the lion and other animals who having entered into partnership for the purpose of hunting, the lion appropriated all the prey to himself; Dig. 17. 2. 20. 3; Poth. *Traité de Société*, n. 12. See 2 M'Cord 421; 6 Pick. 372.

SOCIETE. In French Law. Partnership.

Every société is either *universelle*, being either of all present property, or of all future gains; or *particulière*, being a particular contract for one definite enterprise. Generally, the modes and consequences of a dissolution of a société are the same as for that of a partnership in English law. Abbott; Brown.

SOCIETE ANONYME. An association where the liability of all the partners is limited. It had, in England, until lately no other name than that of "chartered company," meaning thereby, a joint stock company whose shareholders, by a charter from the crown, or a special enactment of the legislature, stood exempted from any liability for the debts of the concern, beyond the amount of their subscriptions. R. & L. Dict.; 2 Mill Pol. Ec. 485.

SOCIETE EN COMMANDITE. In Louisiana. A partnership formed by a contract by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more. La. Civ. Code, art. 2810; *Code de Comm.* 26, 33; 4 Pardessus, *Dr. Com.* n. 1027; Dalloz, *Dict. Société Commerciale*, n. 166. See Goirand, *Code*; COMMENDAM; PARTNERSHIP.

SOCIETIES. See INDUSTRIAL AND PROVIDENT SOCIETIES.

SOCIETY. A society is a number of persons united together by mutual consent, in order to deliberate, determine, and act jointly for some common purpose.

Societies are either incorporated and known to the law, or unincorporated, of which the law does not generally take notice.

By civil society is usually understood a state, a nation, or a body politic. Rutherford, *Inst. c. 1, 2.*

SODOMITE. One who has been guilty of sodomy. Formerly such offender was punished with great severity, and was deprived of the power of making a will.

SODOMY. A carnal copulation by human beings with each other against nature, or with a beast. See 2 Bish. Cr. Law § 1191; Whart. Cr. Law 579.

It may be committed between two persons both of whom consent, even between husband and wife; 8 C. & P. 604; and both may be indicted; 1 Den. Cr. Cas. 464; 2 C. & K. 869. Penetration of the mouth is not sodomy; Russ. & K. 831; 81 Tex. Cr. R. 551. As to emission, see 12 Co. 36; 1 Va. Cas. 307. See 1 Russ. Cr. 698; 1 Mood. Cr. Cas. 34; 8 C. & P. 417; 3 Harr. & J. 154; 94 Mich. 27.

A minor 12 years of age cannot consent to an act of sodomy committed on his person; and if he submits to it without resistance the act is still done by force; 61 Conn. 50.

A domestic fowl is an "animal" within 24 & 25 Vict. c. 100, punishing unnatural offences. 24 Q. B. Div. 357. But see 1 Russ. Cr. 698.

SOFT DRINKS. "Soft drinks" include all non-intoxicating beverages, but are commonly understood to mean such beverages as contain a small per cent of alcohol but not a sufficient quantity to produce intoxication when drunk in the largest practicable quantity. 142 Ky. 821, 135 S. W. 290.

SOIL. The superficies of the earth on which buildings are erected or may be erected.

The soil is the principal, and the building, when erected, is the accessory.

SOIT DROIT FAIT AL PARTIE. In English Law. Let right be done to the party. A phrase written on a petition of right, and subscribed by the king. See PETITION OF RIGHT.

SOIT FAIT COMME IL EST DESIRE. Let it be as it is desired. The royal assent to private acts of parliament.

SOKA, SOC, SOK. Jurisdiction; a power or privilege to administer justice and execute the laws; also a shire, circuit, or territory. Cowel.

In the Domesday Book and the Leges Henrici distinction between "*sake* and *soke*" is obliterated. *Soke* means jurisdiction and "*sake* and *soke*" is but a pleonastic phrase, which means no more than *soke*. Before the Norman times the idea of jurisdiction was expressed by a technical word, the meaning of which was rigorously observed. This is *sacv* and the word has strangely vanished from our legal vocabulary, but is still preserved even in its

technical sense by the German *sache*; Maitl. Domesd. 259. The same writer says that of the two words *soke* is by far the commoner, and that *sake* is rarely found except in connection with *soke*, and when so found it seems to be merely an equivalent for the latter word. *Sake* originally signified a matter, a thing; hence, a matter or cause in the lawyers' sense of these terms. A "*matter*" in dispute between litigants, a "*cause*" before a court. While *soke*, *socna*, *soka*, is the Anglo-Saxon *socn*, and has for its primary meaning a seeking. The phrase "*holding with sake and soke*" seems to be equivalent after the Conquest with "*he held freely*;" Maitl. Domesd. 80; which see for a learned discussion as to the distinction between the two words.

SOKEMANS, SOCMEN. Freeholders whose holdings might be no larger than those of the villans, but who would generally, instead of the heavy services, pay fixed and not heavy rent; 1 Soc. Eng. 360. Those who held their land in socage 2 Bla. Com. 100.

SOLAR DAY. That period of time which begins at sunrise and ends at sunset; the same as "*artificial day*." Co Litt. 155 a.

SOLAR MONTH. A calandar month. Co Litt. 135 b; 1 W. Bla. 450; 1 Maule & S. 111; 1 Bingh. 307.

SOLARES. In Spanish Law. Lots of ground. This term is frequently found in grants from the Spanish government of lands in America. 2 White, Recop. 474.

SOLATIUM. Compensation.

Especially the compensation allowed by the law for injury done to the feelings, as distinguished from the indemnification awarded for pecuniary loss sustained, or physical injury inflicted. Abbott.

SOLD NOTE. The name of an instrument in writing, given by a broker to a buyer of merchandise, in which it is stated that the goods therein mentioned have been sold to him. 1 Bell, Com. 435; Story, Ag. § 28. Some confusion may be found in the books as to the name of these notes: they are sometimes called *bought notes*.

SOLD OR REMOVED FOR SALE. In an act (Oct. 22, 1914) which levies a tax upon things "manufactured, sold, or removed for sale," the words "*sold, or removed for sale*" mean that the tax falls due in some cases before a sale is complete. 256 U. S. 448. Removal for the purpose of forwarding a sale is a removal for sale within the meaning of the act. *Id.*

SOLDIER. A military man; a private in the army. See TROOPS.

Soldiers re-enlisted "for clerical service and messenger duty," under act of congress of July 29, 1886, are still in the service, and under U. S. Rev. St. § 1285, are entitled to the additional pay for certificates of merit. 28 Ct. Cl. 462. See LONGEVITY PAY.

SOLE. Alone, single; used in contradistinction to *joint* or *married*. A sole tenant, therefore, is one who holds lands in his own right, without being joined with any other. A *feme sole* is a single woman; a sole corporation is one composed of only one natural person.

SOLEMN FORM. There are two kinds of probate; namely, probate in common form, and probate in solemn form. Probate in common form is granted in the registry, without any formal procedure in court, upon an ex parte application made by the executor. Probate in solemn form is in the nature of a final decree pronounced in open court, all parties interested having been duly cited. The difference between the effect of probate in common form and probate in solemn form is, that probate in common form is revocable, whereas probate in solemn form is irrevocable, as against all persons who have been cited to see the proceedings, or who can be proved to have been

privity to those proceedings, except in the case where a will of subsequent date is discovered, in which case probate of an earlier will, though granted in solemn form, would be revoked. Abbott; Coote Prob. Pr. 5th ed., 237-239.

SOLEMNITY. The formality established by law to render a contract, agreement, or other act valid.

As the solemnization of a marriage is the consummation of a valid marriage; 83 L. J. Ch. 139; 49 *id.* 193; and an oath to be taken solemnly does not merely mean religiously, but with all due solemnities; 14 Q. B. D. 687. See **MARRIAGE**.

SOLICITATION. Solicitation to commit a crime is usually held to be punishable as a misdemeanor, though the offence solicited may not be committed; 135 Mass. 545; 27 N. J. 112; but it has been held otherwise, as, where a letter was written requesting one to commit murder, which never reached the person to whom it was addressed; 19 W. R. 109. See 29 Mich. 50; 11 Ga. 253. If the offence requires the concurrent action of two or more persons, it is doubtful whether a solicitation of one person by another to commit the offence is in itself criminal; 1 McClain, Cr. Law § 220.

The offence of this character most frequently mentioned in criminal law books is what is termed solicitation of chastity. The asking a person to commit adultery or fornication of itself is not an indictable offence; Salk. 382; 2 Chitty, Pr. 478; 54 Pa. 209; *contra*, 7 Conn. 267; Bish. N. Cr. L. §§ 767, 768. The distinction is sharply drawn by the Pennsylvania case and the Connecticut case. In the latter, solicitation to commit adultery, which was a statutory felony; was held indictable, in the former where the offence was a misdemeanor, it was not. See also Whart. Cr. L., 9th ed. § 179, and a criticism thereon in 146 Pa. 89. In England, the bare solicitation of chastity is punished in the ecclesiastical courts; 2 Chitty, Pr. 478. See Whart. Cr. Law 1738; 2 Ld. Raym. 809; Bish. Cr. Law § 767.

The civil law punished arbitrarily the person who solicited the chastity of another; Dig. 47. 11. 1.

The term solicitation is also used in connection with other offences, as, solicitation to larceny, sodomy, bribery, threatening notice. 1 Bish. Cr. L. § 767. Under the stat. of 24 & 25 Vict. c. 100, § 4, whoever shall solicit any one to murder any other person, shall be guilty of a misdemeanor. Under this act the editor of a German paper in London was indicted and found guilty, for having published an article commending the assassination of the emperor of Russia; 7 Q. B. Div. 244; 1 Bish. Cr. L. 768 a. Solicitation and an offer of money to commit murder, meet the test of a common-law crime (see *Mispraeur*), constituting an act done, a step in the direction of that crime; 146 Pa. 89. On an indictment for solicitation to commit arson, evidence that the prisoner solicited other parties to burn the same building is admissible; 19 Co. Ct. Rep. Pa. 360.

SOLICITOR. A person whose business is to be employed in the care and management of suits depending in courts of chancery.

A solicitor, like an attorney, will be required to act with perfect good faith towards his clients. He must conform to the authority given him. It is said that to institute a suit he must have a special authority, although a general authority will be sufficient to defend one. The want of a written authority may subject him to the expenses incurred in a suit; 3 Mer. 12. See 1 Phil. Ev. 193; 2 Chitty, Pr. 2. In a recent English case it was held that a compromise entered into before the issue of a writ is not binding on the client; 16 L. T. N. S. 333; the English court of appeal has just held that the same rule applies where a solicitor before action accepted a small sum in discharge of his client's claim without the latter's sanction; 55 Alb. L. J. 404. See **ATTORNEY AT LAW**; **COUNSELLOR AT LAW**; **PROCTOR**.

Solicitors have hitherto been regarded as officers of the court of chancery; and it has been the usual course that, as soon as any one has been admitted an attorney, he should apply to be admitted a solicitor, which is done by the Master of the Rolls as a matter of course. Hunt, *id.* Pl. III. c. 6. But now by the Judicature Act of 1873, s. 87,

all solicitors, attorneys, and proctors are to be henceforth called solicitors of the supreme court; Moz. & W.

SOLICITOR-GENERAL. The solicitor-general of the United States is appointed by the president to assist the attorney-general in the performance of his duties, and in case of a vacancy in the office of attorney-general, or of his absence or disability, the solicitor-general has the power to exercise all the duties of that office. Except when the attorney-general in particular cases otherwise directs, he and the solicitor-general argue cases in the supreme court, in which the United States is interested. R. S. §§ 347, 359.

In English Law. A law officer of the crown, appointed by patent during the royal pleasure, who assists the attorney-general in managing the law business of the crown. Selden 1. 6. 7. He is first in right of precedence; 3 Sharsw. Bl. Com. 28, n. (a), n. 9; Encyc. Brit.

SOLICITOR OF THE SUPREME COURT. The solicitors before the supreme courts, in Scotland, are a body of solicitors entitled to practise in the court of session, etc. Their charter of incorporation bears date August 10, 1797.

SOLICITOR OF THE TREASURY. The title of one of the officers of the United States, created by the act of May 29, 1830; he is appointed by the president, by and with the advice and consent of the senate, and is under the supervision of the department of justice. R. S. § 349.

SOLIDO, IN. See **IN SOLIDUM**.

SOLITARY CONFINEMENT. See **PENITENTIARY**; **PUNISHMENT**.

This phrase has reference to the former system of imprisonment by complete isolation of a prisoner from all human society, his confinement in a cell, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. In later years, this system of confinement has been modified in some instances by allowing the prisoner to see his attendants, religious adviser, legal counsel, and members of his family, such access, however, being in accordance with prison regulations. Solitary confinement has been held an additional punishment to the punishment of death, even when it has such statutory mitigations as those mentioned above. 134 U. S. 167 *et seq.*

SOLUTIO (Lat. release). **In Civil Law.** Payment. By this term is understood every species of discharge or liberation, which is called satisfaction, and with which the creditor is satisfied. Dig. 46. 3. 54; Code 8. 43. 17; Inst. 3. 30. This term has rather a reference to the substance of the obligation than to the numeration or counting of the money. Dig. 50. 16. 176.

SOLUTIO INDEBITI (Lat.). **In Civil Law.** The case where one has paid a debt, or done an act or remitted a claim because he thought that he was bound in law to do so, when he was not. In such cases of mistake there is an implied obligation (*quasi ex contractu*) to pay back the money, etc.; Poll. Contr. 439; MacKeldey, Civ. Law § 458.

SOLVENCY. The state of a person who is able to pay all his debts: as also such attitude of his property as that it may be reached and subjected by process of law, without his consent, to the payment of such debts. 116 Mo. 226; 32 *id.* 369; 4 Cush. 127. The opposite of *insolvency* (q. v.).

SOLVENDUM IN FUTURO. To be paid at a future time. English.

SOLVENT. One who has sufficient to pay his debts and all obligations. Dig. 50. 16. 114.

A person is solvent who owns property enough and so situated that all his debts can be collected from it by legal proceedings; 13 Wend. 377; 53 Barb. 547. But

other cases hold that to be solvent one must be able to pay all his debts in the ordinary course of trade. See 2 N. B. R. 149; 79 Ia. 432. See **INSOLVENCY**.

SOLVERE (Lat. to unwind; to untie). To release; to pay; *solvere dicimus eum qui fecit quod facere promissit*. 1 Bouvier, Inst. n. 307.

SOLVIT AD DIEM (Lat. he paid at the day). The name of a plea to an action on a bond, or other obligation to pay money, by which the defendant pleads that he paid the money on the day it was due. See 1 Stra. 652; Rep. temp. Hardw. 133; Comyns, Dig. Pleader (2 W. 29).

This plea ought to conclude with an averment, and not to the country; 1 Sid. 215; 12 Johns. 253. See 2 Phill. Ev. 92; Coxo N. J. 487.

SOLVIT POST DIEM (Lat. he paid after the day). The name of a special plea in bar to an action of debt on a bond, by which the defendant asserts that he paid the money after the day it became due. 1 Chitty, Pl. 480, 555; 2 Phill. Ev. 93.

SOMNAMBULISM (Lat. *somnium*, sleep; *ambulo*, to walk). Sleep-walking.

The mental condition in this affection is not very unlike that of dreaming. Many of their phenomena are the same; and the former differs from the latter chiefly in the larger number of the functions involved in the abnormal process. In addition to the mental activity common to both, the somnambulist enjoys the use of his senses in some degree, and the power of locomotion. He is thereby enabled to perform manual operations as well, frequently, as in his waking state. Usually, however, the action of the senses is more or less imperfect, many of the impressions being incorrectly or not at all perceived. The person walks against a wall, or stumbles over an object in his path; he mistakes some projections for a horse, strides across it, and imagines himself to be riding; he hears the faintest sound connected with what he is doing, while the voices of persons near him, and even the blast of a trumpet, are entirely unnoticed. Occasionally the power of the senses is increased to a degree unknown in the waking state. Jane Rider, whose remarkable history was published some thirty years ago, could read the almost obliterated dates of coins in a dark room, and was able to read and write while her eyes were covered with several folds of handkerchief. For the most part, however, the operations of the somnambulist consist in getting up while asleep, groping about in the dark, or, of what he calls his way out of the house through doors or windows, making some inarticulate sounds, perhaps, and all the while unconscious of persons or things around him. The power of the perceptive faculties, as well as that of the senses, is sometimes increased in a wonderful degree. It is related of the girl just mentioned that in the fit she would sing correctly, and play at backgammon with considerable skill, though she had never done either when awake.

The somnambulist always awakes suddenly, and has but a faint conception of any of what he has been thinking and doing. If conscious of anything, it is of an unpleasant dream imperfectly remembered. This fact, not being generally known, will often enable us to detect simulated somnambulism. The person on waking continues to pursue the same train of thought and pursues the same plans and purposes which he did while asleep, there can be no doubt that he is feigning the affection. When a real somnambulist, for some criminal purpose, undertakes to simulate a paroxysm, he is not at all likely to imitate one of his own previous paroxysms, for the simple reason that he knows less than others how he appeared while in them. If, therefore, somnambulism is alleged in any given case, with no other proof than the occurrence of former paroxysms unquestionably genuine, it must be viewed with suspicion if the character of the alleged paroxysm differs materially from that of the genuine ones. In one way or another, a case of simulation would generally be detected by means of a close and intelligent scrutiny, so difficult is it to imitate that mixture of consciousness and unconsciousness, of dull and sharp perceptions, which somnambulism presents. The history of the individual may throw some light on the matter. If he has had an opportunity of witnessing the movements of a somnambulist in the course of his life, this fact alone would rouse suspicion, which would be greatly increased if the alleged paroxysm presented many traits like those of the paroxysms previously witnessed.

The legal consequences of somnambulism should be precisely those of insanity, which it so nearly resembles. The party should be exempt from punishment for his criminal acts, and be held amenable in damages for torts and trespasses. Somnambulism, though possibly not technical insanity, will sometimes have the same effect as excusing crime; 78 Ky. 183; 1 Bish. N. Cr. L. § 395; "simply because the person committing it would not know what he was doing," Stephen, J., in 23 Q. B. D. 168. The only possible exceptions to this principle is to be found in those cases where the somnambulist, by medi-

tating long on a criminal act while awake, is thereby led to commit it in his next paroxysm. Hoffbauer contends that, such being generally the fact, too much indulgence ought not to be shown to the criminal acts of the somnambulist. *Die Psychologie*, etc., c. 4, art. 2. But surely this is a rather refined and hazardous speculation, and seems like punishing men solely for bad intentions,—because the acts, though ostensibly the ground of punishment, are actually those of a person deprived of his reason. The truth is, however, that criminal acts have been committed in a state of somnambulism by persons of irreproachable character. *Tayl. Med. Jur.* 744. See *Gray, Med. Jur.* 265; *Whart. & S. Med. Jur.* § 492; *Rush on the Mind* 302; 18 *Am. Journ. of Ins.* 236. *Tirrell's Case*, Mass.

SON. An immediate male descendant. In its technical meaning in devises, this is a word of purchase; but the testator may make it a word of descent. Sometimes it is extended to more remote descendants. 2 *Des.* 123, n.

SON ASSAULT DEMESNE (L. Fr. his own first assault). In Pleading. A form of a plea to justify an assault and battery, by which the defendant asserts that the plaintiff committed an assault upon him and the defendant merely defended himself.

When the plea is supported by evidence, it is a sufficient justification, unless the retaliation by the defendant were excessive and bore no proportion to the necessity or to the provocation received; 1 *East, Pl. Cr.* 406; 4 *Denio* 448.

SON-IN-LAW. The husband of one's daughter.

SONTICUS (Lat.). That which tends to delay or put off; that which authorizes or excuses delay.

SOON. Within a reasonable time. 14 *Kan.* 232.

As Soon As. A contract to deliver cotton "as soon as it can be picked out and shipped" was held to allow the lapse of a reasonable time, and until the usual mode of transportation could be employed. *Anderson*; 2 *Ired. L.* 429. The charter of a railroad company authorized it "as soon as it conveniently can" to construct a road, with tracks, works, appendages, etc. Held, that the company was not bound to exercise its whole authority in the beginning, when the demands of business are few. *Id.*; 54 *Pa.* 107.

SORCERY. Witchcraft (*q. n.*). English.

SOREHON, or SORN. An arbitrary exaction, formerly existing in Scotland and Ireland. Whenever a chieftain had a mind to revel he came down among the tenants with his followers, by way of contempt called "*Gillwittits*," and lived on free quarters. *Bell, Dict.*

SORS (Lat.). In *Civil Law*. A lot; chance; fortune. *Calvinus, Lex.*; *Ainsworth, Dict.* Sort. Kind. The little scroll on which the thing to be drawn by lot was written. *Carpentier, Gloss.* A principal or capital sum; e. g. the capital of a partnership. *Calvinus, Lex.*

In Old English Law. A principal lent on interest, as distinguished from the interest itself. *Pryn. Collect.* p. 161; *Cowel.* See *INTERESSE*.

SORTITIO. A casting of lots. *Sortitio iudicum*, a drawing of judges, on criminal trials, similar to the modern practice of drawing a jury. 3 *Bla. Com.* 366.

SOUL SCOT. A mortuary, or customary gift due ministers, in many parishes of England, on the death of parishioners. It was originally voluntary and intended as amends for ecclesiastical dues neglected to be paid in the lifetime. 2 *Sharsw. Bla. Com.* 425*.

SOUND MIND. That state of a man's

mind which is adequate to reason and comes to a judgment upon ordinary subjects like other rational men. 2 *Hamilton, Syst. Leg. Med.* 28.

The law presumes that every person who has acquired his full age is of sound mind, and, consequently, competent to make contracts and perform all his civil duties; and he who asserts to the contrary must prove the affirmation of his position by explicit evidence, and not by conjectural proof; 2 *Hagg. Eccl.* 434; 3 *Add. Eccl.* 86; 8 *Watts* 66; *Ray, Med. Jur.* § 22; 3 *Curt. Eccl.* 671.

According to law, "soundness of mind" in making a will is for the testator to have such mental capacity as to enable him to know the objects of his bounty, the character and value of his estate, and to make a rational survey of his estate, and dispose of it according to a fixed purpose of his own. 109 *Ky.* 325, 58 *S. W.* 773.

SOUND MIND AND MEMORY. This phrase does not mean a mind without a flaw, or a memory without a fault. 16 *Daly* 540. See *WILL*.

SOUNDING IN DAMAGES. When an action is brought, not for the recovery of lands, goods, or sums of money (as is the case in real or mixed actions or the personal action of debt or detinue), but for damages only, as in covenant, trespass, etc., the action is said to be *sounding in damages*. *Steph. Pl.* 126.

SOUNDNESS. General health; freedom from any permanent disease. 1 *Carr. & M.* 291. To create unsoundness, it is requisite that the animal should not be useful for the purpose for which he is bought, and that inability to be so useful should arise from disease or accident. 2 *Mood. & R.* 113, 137; 9 *M. & W.* 670.

In the sale of animals they are sometimes warranted by the seller to be sound; and it becomes important to ascertain what is soundness. Horses affected by roaring; a temporary lameness, which rendered the horse less fit for service; 4 *Camp.* 271; but see 2 *Esp. Cas.* 573; a cough, unless proved to be of a temporary nature; 2 *Chitty, Bail.* 245, 416; and a nerved horse; *Ry. & M.* 290; have been held to be unsound. But crib-biting is not a breach of a general warranty of soundness; *Holt, Cas.* 630; but see 8 *Gray* 430; 43 *Vt.* 603. The true test is whether the defect complained of renders the horse less than reasonably fit for present use; 9 *M. & W.* 668. See *Oliph.*; *Hanover, on Horses*; *Benj. Sales* § 619.

An action on the case is the proper remedy for a verbal warrant of soundness; 1 *H. Bla.* 17; 9 *B. & C.* 259; 2 *Dowl. & R.* 10; 1 *Taunt.* 566; *Bac. Abr. Action on the Case* (E).

SOURCES OF THE LAW. The authority from which the laws derive their force. A term used to include all the reliable testimonials of what constitutes the law.

The power of making all laws is in the people or their representatives, and none can have any force whatever which are derived from any other source. But it is not required that the legislator shall expressly pass upon all laws, and give the sanction of his seal, before they can have life or existence. The laws are, therefore, such as have received an express sanction, and such as derive their force and effect from implication.

The *express laws* are,—first, the constitution of the United States; secondly, the treaties made with foreign powers; thirdly, the acts of congress; fourthly, the constitutions of the respective states; fifthly, the laws made by the several state legislatures; sixthly, the laws made by inferior legislative bodies, such as the councils of municipal corporations, and the general rules made by the courts.

The constitutions of the respective states, if not opposed to the provisions of the constitution of the United States, are of binding force in the states respectively; and no act of the state legislature has any force which is made in contravention of the state constitution.

The laws of the several states constitutionally made by the state legislatures have full and complete authority in the respective states.

Laws are frequently made by inferior legislative bodies which are authorized by the legislature; such are the municipal councils of cities or boroughs. Their laws are generally known by the name of ordinances, and when lawfully ordained they are binding on the people. The courts, perhaps by a necessary usurpation, have been in the practice of making general rules and orders, which sometimes affect suitors and parties as much as the

most regular laws enacted by congress. These apply to all future cases. There are also rules made in particular cases as they arise; but these are rather decrees or judgments than laws.

The *fact laws*, which derive their authority from the consent of the people without any legislative enactment, may be subdivided into,—

The *common law*, which is derived from two sources, the common law of England, and the practice and decisions of our own courts. In some states it has been enacted that the common law of England shall be the law, except where the same is inconsistent with our constitutions and laws. See *LAW*.

Customs which have been generally adopted by the people have the force of law.

The principles of *Roman law*. See *CIVIL LAW*. The *Canon law*, which was adopted by the ecclesiastical courts, figures in our laws respecting marriage, divorces, wills and testaments, executors and administrators, and many other subjects.

The *jurisprudence*, or decisions of the various courts, have contributed their full share of what makes the law. These decisions are made by following precedents, and borrowing from the sources already mentioned, and sometimes by the less excusable disposition of the judges to legislate on the bench.

The monument where the common law is to be found are the records, reports of cases adjudicated by the courts, and the treatises of learned men. The books of reports are the best proof of what is the common law; but, owing to the difficulty of finding out any systematic arrangement, recourse is had to treatises upon the various branches of the law. The records, owing to their being kept in one particular place and therefore not generally accessible, are seldom used.

See *LAW*; *PRECEDENT*; *JUDGE-MADE LAW*; *JUDICIAL POWER*; *LEGISLATIVE POWER*; *STARE DECISIS*; *CONSTITUTIONAL*; *TREATY*; *STATUTE*; *COMMON LAW*; *CIVIL LAW*; *PRIZE COURT*.

SOUS SEING PRIVE. In Louisiana. An act or contract evidenced by writing under the *private signature* of the parties to it. The term is used in opposition to the *authentic act*, which is an agreement entered into in the presence of a notary or other public officer.

SOUTH CAROLINA. One of the original thirteen United States.

This state was originally part of the British province of Carolina, then comprehending both North Carolina and South Carolina. That province was granted by Charles II., by charter issued to eight lord proprietors, in 1663, and amended in 1665 so as to extend it between twenty-nine and thirty-six degrees thirty minutes, north latitude, drawn from the Atlantic to the Pacific ocean. The first permanent settlement in South Carolina was effected in 1670 by emigrants from England who landed at Beaufort, then Port Royal, in the same year and removed to the point on the river Ashley nearly opposite the present site of Charleston; but, abandoning this position, they again removed, in 1680, to Oyster Point, at the confluence of the Ashley and Cooper, where they founded Charleston.

In 1719, the colonial legislature disowned the proprietary government and threw the colony into the hands of the king, who, accordingly, assumed the control of it, but not until 1733 was the charter surrendered. In that year the shares of seven out of the eight lords proprietors were ceded. The eighth share, which belonged to the family of Lord Granville, formerly Cartaret, was retained, and laid off in North Carolina,—which was about the same time finally divided from South Carolina.

In 1733, that part of South Carolina lying west of the river Savannah was granted by the crown to the Georgia Company, under Oglethorpe. Thus South Carolina was reduced in extent, and, in consequence of subsequent arrangements, made with Georgia in 1751 in the treaty of Beaufort, and with North Carolina in the early part of the present century, the present boundaries were established.

On March 26, 1776, the first constitution was adopted,—the earliest it is believed, of the American constitutions.

SOUTH DAKOTA. One of the states of the United States.

It was admitted to the Union under the act of Feb. 22, 1889, which included also North Dakota, Montana, and Washington, which together constituted the territories of Dakota, Montana, and Washington. See *NORTH DAKOTA*.

SOVEREIGN. A chief ruler with supreme power; a king or other ruler with limited power. An action is not maintainable against a foreign sovereign. 44 *L. T. Rep. N. S.* 199.

Courts of England will take judicial notice of the status of a foreign sovereign and will not take jurisdiction over him, unless he voluntarily submits to it; [1894] 1 *Q. B.* 149.

A foreign sovereign brought suit to restrain the defendants from using a fund in a certain way, and the defendants set up a claim for damages; it was held that the court had no jurisdiction over such claim; [1893] 1 *Ch.* 190.

"When a foreign sovereign comes into court for the purpose of obtaining a remedy, then, by way of defence to that

proceeding (by counter-claim, if necessary), to the extent of defeating that claim, the person sued may file a cross claim . . . for the purpose of enabling complete justice to be done between them." 29 W. R. 125, per James, L. J.

It is a general rule that the sovereign cannot be sued in his own court without his consent; and hence no direct judgment can be rendered against him therein for costs, except in the manner and on the condition he has prescribed: 40 La. Ann. 856. See STATE.

In English Law. A gold coin of Great Britain, of the value of a pound sterling.

SOVEREIGN DE JURE OR DE FACTO. Who is sovereign *de jure* or *de facto* of territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government. 205 U. S. 257.

SOVEREIGN POWER. See SOVEREIGNTY. The sovereign or supreme power in every state resides in the people. Blackstone supposes the *jura summi imperii*, or the right of sovereignty, to reside in those hands in which the exercise of the power of making laws is placed. Our simple and more reasonable idea is that the government is a mere agency established by the people for the exercise of those powers which reside in them. The powers of government are not, in strictness, granted, but delegated powers. They are then trust powers, and may be revoked. It results that no portion of sovereignty resides in government. Anderson; 1 Sharsw. Bl. Com. 49.

SOVEREIGN STATE. One which governs itself independently of any foreign power. See SOVEREIGNTY; STATE.

SOVEREIGNTY. The union and exercise of all human power possessed in a state: it is a combination of all power; it is the power to do everything in a state without accountability,—to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like. Story, Const. § 207.

Abstractly, sovereignty resides in the body of the nation and belongs to the people. But these powers are generally exercised by delegation.

When analyzed, sovereignty is naturally divided into three great powers; namely, the legislative, the executive, and the judiciary; the first is the power to make new laws and to collect and repeal the old; the second is the power to execute the laws, both at home and abroad; and the last is the power to apply the laws to particular facts, to judge the disputes which arise among the citizens, and to punish crimes. See EXECUTIVE POWER; LEGISLATIVE POWER; JUDICIAL POWER.

Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state; 2 Dall. 471.

In international law a state is considered sovereign when it is organized for political purposes and permanently occupies a fixed territory. It must have an organized government capable of enforcing law and be free from all external control. A wandering tribe of savages, or nomads, or people united merely for commercial purposes or under control of another state cannot be considered as a sovereign state. Until a state becomes sovereign in the sense above described, it is not subject to international law. The states of the American Union are each, in a certain sense, sovereign in their domestic concerns, but not in international law, and Norway is an instance of a community not sovereign in international law because bound in a union with

Sweden. The fact of sovereignty is usually established by general recognition of other states, and, until such recognition is universal, no community can be considered as sovereign; Snow, Int. Law 19. See INTERNATIONAL LAW.

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. 168 U. S. 250.

"The transactions of independent states between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make." 13 Moore, P. C. 75. And the same is the case with their dealings with the subjects of other states; Poll. Torts 105. See JURISDICTION, *Between States*.

Public agents, military or civil, or foreign governments, whether such governments be *de jure* or *de facto*, cannot be held responsible in any courts of the United States for things done in their own states in the exercise of the sovereignty thereof, in pursuance of the directions of their governments. 65 Fed. Rep. 577. See TORT.

As to the jurisdiction of English courts over foreign subjects and ambassadors, see 20 Law Mag. & Rev. 23.

A judgment for plaintiffs in an action against army officers in possession of land used as a fort in which the plaintiff claimed a one-third interest, was a judgment directly against the United States and will be set aside; 162 U. S. 255, reversing 8 Tex. Civ. App. 679.

SOWMING AND ROWMING. The apportioning or placing of cattle on a common, according to the rights of the different persons interested. See Bell, Dict.

SOWNE. A corruption of the French *souvenn*, remembered. Estreats that *sowne* are such as the sheriff may gather. Cowel. See ESTREATS.

SPADONES (Lat.). In Civil Law. Those who, on account of their temperament or some accident they have suffered, are unable to procreate. Inst. 1. 11. 9; Dig. 1. 7. 2. 1. And see IMPOTENCE.

SPARSIM (Lat.). Here and there, in a scattered manner; sparsely; dispersedly. It is sometimes used in law: for example, the plaintiff may recover the place wasted, not only where the injury has been total, but where trees growing *sparsim* in a close are cut. Bac. Abr. Waste (M); Brownl. 240.

SPEAKER. The title of the presiding officer of the house of representatives of the United States. The position is one of great importance, as the speaker appoints the standing committees of the house. The presiding officer of either branch of the state legislature generally is called the speaker.

Both houses of parliament are presided over by a speaker. That of the house of lords is commonly the lord chancellor, or lord keeper of the great seal, though the latter office is practically merged in that of lord chancellor. In the commons the speaker never votes, except when the votes are equal; in the lords he has a vote with the rest of the house; see May, P. L. ch. 7. See QUORUM; PACIFIC; MacConchle, Congressional Committees; Follett, The Speaker.

SPEAKING DEMURRER. In Pleading. One which alleges new matter in addition to that contained in the bill as a cause for demurrer. 4 Bro. C. C. 254; 2 Ves. 83; 4 Paige, Ch. 374; 85 Ala. 589.

SPEAKING WITH PROSECUTOR. A kind of impanance, allowed in English practice, where the court permits a defendant convicted of a misdemeanor to speak with the prosecutor before judgment is pronounced; if the prosecutor declares himself satisfied, the court may inflict a trivial punishment. 4 Steph. Com., 11th ed. 260.

SPECIAL. That which relates to a

particular species or kind; opposed to general: as, special verdict and general verdict; special impanance and general impanance; special jury, or one selected for a particular case, and general jury; special issue and general issue, etc.

The meaning of special, as used in a constitutional provision authorizing the legislature to confer jurisdiction in *special cases*, has been the subject of much discussion in the court of appeals of the state of New York. See 12 N. Y. 593; 18 id. 57.

SPECIAL. Metallic money issued by public authority. See also IN SPECIE.

This term is used in contradistinction to paper money, which in some countries is issued by the government, and is a mere engagement which represents specie.

In cases of salvage, specie on board is treated like any other cargo; 1 Pet. Adm. 416; 44 L. T. Rep. n. s. 324; 80 Fed. Rep. (C. C. A.) 340. See 15 Am. L. Rev. 416; SALVAGE.

SPECIAL ACCEPTANCE. The qualified acceptance of a bill of exchange, as payable at a particular place, and there only. Byles, Bills, 15th ed. 260, 1891. See ACCEPTANCE.

SPECIAL ACT. See STATUTE.

SPECIAL AGENT. One authorized to do one or two special things. Ross, Cont. 44. One appointed only for a particular purpose, and vested with limited powers. Chit. Cont. 285; 94 Ala. 346.

It is a general rule that he who is invested with a special authority must act within the bounds of his authority, and he cannot bind his principal beyond what he is authorized to do; 15 Johns. 44; 1 Wash. C. C. 174; Story, Ag. 17. See AGENT.

SPECIAL APPEARANCE. See COMMON APPEARANCE.

SPECIAL ASSESSMENTS. They differ from general taxation, in that they are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds. 35 Neb. 133.

SPECIAL ASSUMPSIT. An action of assumpsit brought on a special contract, which the plaintiff declares upon setting out its particular language or its legal effect.

It is distinguished from a general assumpsit, where the plaintiff, instead of setting out the particular language or effect of the original contract, declares as for a debt arising out of the execution of the contract, where that constitutes the debt. 3 Bouvier, Inst. n. 8426.

SPECIAL BAIL. See BAIL.

SPECIAL BAILIFF. A bound bailiff (q. v.).

SPECIAL BASTARD. One whose parents afterwards intermarry. 3 Bla. Com. 335.

SPECIAL CARRIER. See PRIVATE CARRIER.

SPECIAL CASE. See AGREED CASE; CASE STATED.

SPECIAL CHARGE. A charge to a jury made, at the request of counsel for a party, upon one or more points in the case. Anderson. See CHARGE; GENERAL CHARGE.

SPECIAL COMMISSION. An extraordinary commission of oyer and terminer and gaol delivery, issued by the crown to the judges when it is necessary that offences should be immediately tried and punished. Whart. Law Lex.

SPECIAL CONSTABLE. One who has been appointed a constable for a particular occasion, as in the case of an actual tumult or a riot, or for the purpose of serving a particular process.

SPECIAL COUNT. As opposed to the common counts, in pleading, a special

count is a statement of the actual facts of the particular case.

SPECIAL CUSTOM. A particular or local custom. 23 Me. 95. See CUSTOM.

SPECIAL DAMAGES. See MEASURE OF DAMAGES.

SPECIAL DEMURRER. See DEMURRER.

SPECIAL DEPOSIT. A deposit made of a particular thing with the depository: it is distinguished from an irregular deposit.

A deposit made with the understanding that the identical money deposited shall be returned to the depositor. 43 Ill. App. 340.

When a thing has been specially deposited with a depository, the title to it remains with the depositor, and if it should be lost the loss will fall upon him. When, on the contrary, the deposit is irregular, as where money is deposited in a bank, the title to which is transferred to the bank, if it be lost, the loss will be borne by the bank. This will result from the same principle: the loss will fall in both instances, on the owner of the thing, according to the rule *res perit domino*. See 1 Bouvier, Inst. n. 1054; Edw. Bailm. 48; BAILMENT DEPOSIT IRREGULAR DEPOSIT.

SPECIAL ELECTION. An election for a particular emergency; out of the regular course, as one held to fill a vacancy caused by death. Abbott. See ELECTION; GENERAL ELECTION.

SPECIAL ERRORS. Special pleas in error are those which assign for error matters in confession and avoidance, as a release of errors, the act of limitations, and the like, to which the plaintiff in error may reply or demur. See PLEA.

SPECIAL EXAMINER. An examiner appointed by a court of equity in a particular case. See EXAMINERS IN CHANCERY.

Any fit person may be a special examiner. The taking of testimony by a special examiner is conducted in the same manner as before a standing examiner in chancery. The examination should take place in the presence of the parties and their attorneys; the testimony is, under the English chancery practice, taken in the narrative form, and the examiner may take down the questions and answers if he thinks fit; he cannot pass upon the materiality or relevancy of any question. When there is an objection, it should be noted, and the examiner will state his opinion thereon to the attorney and refer to it in the depositions.

The depositions should not be prepared beforehand; 35 Vt. 476. Formerly it was considered that the whole of the deposition should be written down by the examiner, with his own hand; 1 Dan. Ch. Pr. *906; but such is not now the usual practice. An examiner is a ministerial officer and has no power to lay down rules as to the most convenient time of taking examinations; L. R. 16 Eq. 102. He may exclude the public from the hearings; 1 Dan. Ch. Pr. *906. Subpoenas may issue to bring witnesses before him. If an examiner in England dies, his successor may sign the deposition; 1 Dan. Ch. Pr. *910. If the witness refuse to sign his deposition, the examiner signs it. See EXAMINERS IN CHANCERY.

SPECIAL EXECUTION. A copy of a judgment with a direction to the sheriff indorsed thereon to execute it. 47 Minn. 581.

SPECIAL FINDING. Where a jury find specially a particular fact, presumably material to the general question before them, but which does not involve the whole of that question. Moz. & W. The special findings referred to in the Revised Statutes, § 700, is not a report of the evidence, but it must be like the special verdict of a jury, a finding of the ultimate facts which the evidence establishes; 19 U. S. App. 567.

SPECIAL GRAVITY. The ratio of the weight of a body to the weight of an equal volume of some other body, taken as the standard or unit. This standard is usually water for liquids and solids, and air for gases. 6 U. S. App. 53.

SPECIAL IMPARLANCE. In Pleading. An imparlance which contains the clause, "saying to himself all advantages and exceptions, as well to the writ as to the declaration aforesaid." 2 Chitty, Pl. 407. See IMPARLANCE.

SPECIAL INDORSEMENT. An indorsement in full, which, besides the signature of the indorser, expresses in whose favor the indorsement is made; thus "Pay C D, or order, A B." See Byles, Bills, 15th ed. 172; Tiedm. Com. Paper 266.

In English practice, under the Judicature Act of 1875, a special indorsement on a writ of summons is one which may be made in all cases where a definite sum of money is claimed. When the writ is thus indorsed and the defendant does not appear within the time appointed, the plaintiff may then sign final judgment for any sum not exceeding that indorsed on the writ. See 3 Steph. Com., 11th ed. 530; Lush. Pr. 356. See INDORSEMENT.

SPECIAL INJUNCTION. An injunction obtained only on motion, usually with notice to the other party. It is applied for sometimes on affidavit before answer, and frequently upon merits disclosed in the defendant's answer. 4 Bouvier, Inst. n. 3756. See INJUNCTION.

SPECIAL ISSUE. In Pleading. A plea to the action which denies some particular material allegation, which is in effect a denial of the entire right of action. It differs from the general issue which traverses or denies the whole declaration or indictment. Gould, Pl. c. 2, § 38. See GENERAL ISSUE; ISSUE.

SPECIAL JURY. One selected in a particular way by the parties. See JURY.

SPECIAL LAWS. See STATUTE; GENERAL LAWS.

SPECIAL LEGISLATION. See GENERAL LAWS; STATUTE.

SPECIAL LICENSE. One granted by the Archbishop of Canterbury to authorize a marriage at any time or place. 2 Steph. Com. 247.

SPECIAL MATTER. Under a plea of the general issue, a defendant may, instead of pleading specially, give the plaintiff notice, that on the trial he will give some special matter, of such and such a nature, in evidence.

Such notice is not required in an action on a sealed instrument where consideration need not be averred in the declaration, except when a failure of consideration is set up as an equitable defence.

Notice of special matter is required by R. S. § 4920 in actions at law on letters patent, in some cases. It must be given thirty days "before trial," which is said to be before the opening of the term. See 3 Rob. Pat. § 1019.

See PLEA; PLEADING.

SPECIAL NONEST FACTUM. The name of a plea by which the defendant says that the deed which he has executed is not his own or binding upon him, because of some circumstance which shows that it was not intended to be his deed, or because it was not binding upon him for some lawful reason.

SPECIAL OCCUPANT. When an estate is granted to a man and his heirs during the life of *cestui que vie*, and the grantee die without alienation, and while the life for which he held continues, the heir will succeed, and is called a special occupant. 2 Bla. Com. 259. In the United States the statute provisions of the different states vary considerably upon this subject. In New York and New Jersey, special occupancy is abolished. Virginia, and probably Maryland, follow the English statutes. In Massachusetts and other states, where the real and personal estates of intestates are distributed in the

same way and manner, the question does not seem to be material; 4 Kent 27.

SPECIAL ORDERS. See RULE OF COURT.

SPECIAL OWNER. See OWNER.

SPECIAL PAPER. A list kept in the courts of common law, and afterwards in the Queen's Bench Division of the High Court, in which list special cases, etc., to be argued are set down. Whart. Law Lex.

SPECIAL PARTNER. A partner with a limited or restricted responsibility; a limited partner. Baldwin; 3 Kent's Com. 34. There is perhaps some distinction between a special partner and special partnership. Special partner usually means the partner who, under laws authorizing formation of limited partnerships, puts in a definite capital, assumes no part (or only such as the statute permits) in the business management, and is liable only to loss of the capital contributed. But the partnership thus formed is commonly called limited partnership; and special partnership may well mean one formed for a single branch of business or subject. Abbott. See PARTNERSHIP.

SPECIAL PARTNERSHIP. See PARTNERSHIP; SPECIAL PARTNER.

SPECIAL PLEA IN BAR. See PLEA.

SPECIAL PLEADER. In English Practice. A lawyer whose professional occupation is to give verbal or written opinions upon statements submitted to him, either in writing or verbally, and to draw pleadings, civil or criminal, and such practical proceedings as may be out of the general course. 2 Chitty, Pr. 42.

Special pleaders are not necessarily at the bar; but those that are not are required to take out annual certificates under stat. 33 & 34 Vict. c. 97, ss. 60, 63; Moz. & W.

SPECIAL PLEADING. The allegation of special or new matter to avoid the effect of the previous allegations of the opposite party, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Pl. c. 1, § 18; 3 Wheat. 246; Com. Dig. PLEADER (E 15); Steph. Pl., And. ed. 240, n. See PLEADING, SPECIAL.

SPECIAL POWER. See POWER.

SPECIAL PROPERTY. That property in a thing which gives a qualified or limited right. See PROPERTY.

SPECIAL REQUEST. A request actually made, at a particular time and place; this term is used in contradiction to a general request, which need not state the time when nor place where made. 3 Bouvier, Inst. n. 2843.

SPECIAL RULE. See RULE OF COURT.

SPECIAL SESSIONS. See SESSIONS OF THE PEACE.

SPECIAL TAIL. See ESTATE TAIL.

SPECIAL TERM OR TERMS. See TERM.

SPECIAL TRAVERSE. See TRAVERSE.

SPECIAL TRUST. A special trust is one where a trustee is interposed for the execution of some purpose particularly pointed out, and is not, as in case of a simple trust, a mere passive depository of the estate, but is required to exert himself actively in the execution of the settler's intention: as, where a conveyance is made to trustees upon trust to reconvey, or to sell for the payment of debts. Lew. Tr. 3, 16; 2 Bouvier, Inst. n. 1896. See TRUST.

SPECIAL VERDICT. In Practice. A special verdict is one by which the facts of the case are put on the record, and the

law is submitted to the judges. See *VERDICT*; *BAC. ABR. VERDICT* (D).

See *AGREED CASE*; *CASE STATED*.

SPECIALTY. A writing sealed and delivered, containing some agreement or promise. 2 S. & R. 503; 1 P. Wms. 180. A writing sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified. *BAC. ABR. OBLIGATION* (A).

Although in the body of the writing it is not said that the parties have set their hands and seals, yet if the instrument be really sealed it is a specialty, and if it be not sealed it is not a specialty, although the parties in the body of the writing make mention of a seal. 2 S. & R. 504; 2 Co. 5 a; Perkins § 120. See *BOND*; *DEBT*; *OBLIGATION*; *SEAL*.

SPECIFIC. Having a certain form or designation; particular; precise.

SPECIFIC GRAVITY. See *SPECIAL GRAVITY*.

SPECIFIC LEGACY. See *LEGACY*.

SPECIFIC PERFORMANCE. The actual performance of a contract by the party bound to fulfil it. As the exact fulfilment of an agreement is not always practicable, the phrase may mean, in a given case, not literal, but substantial performance; *WATERM. SPEC. PERF.* § 1.

Many contracts are entered into by parties to fulfil certain things, and then the contracting parties neglect or refuse to fulfil their engagements. In such cases the party aggrieved has generally a remedy at law, and he may recover damages for the breach of the contract; but in many cases the recovery of damages is an inadequate remedy, and the party seeks to recover a specific performance of the agreement.

It is a general rule that courts of equity will entertain jurisdiction for a specific performance of agreements, whenever courts of law can give but an inadequate remedy; and it is immaterial whether the subject relate to real or personal estate; 2 Story, Eq. § 717; *POM. CONTR.* 28, 34; 1 S. & S. 607; 1 P. Wms. 570; 1 Sch. & L. 553; 84 Me. 195. But the rule is confined to cases where courts of law cannot give an adequate remedy; 1 Grant, Cas. 83; 18 Ga. 473; 2 Story, Eq. Jur. § 718; if there is an adequate legal remedy, the court will refuse specific performance, unless under all the circumstances it would be inequitable and unjust to do so; 84 Ky. 157; 30 W. Va. 790; and a decree is to be granted or refused in the discretion of the court; 38 N. H. 400; 2 La. 126; 9 Ohio St. 511; 8 Wisc. 392; 5 Harring. 74; *HEMPST.* 245; 2 Jones, Eq. 267; 6 Ind. 259; 51 Fed. Rep. 860; 152 Pa. 529. Specific performance is not of absolute right, but one which rests entirely in judicial discretion; exercised according to the settled principles of equity and with reference to the facts of the particular case, and not arbitrarily or capriciously; 144 U. S. 224; 128 id. 438; 127 id. 668; 82 Va. 269; 99 N. C. 215; 23 Neb. 795.

A vendor of real estate may either sue at law for the purchase-money or resort to equity for specific performance; 10 U. S. App. 601.

As the doctrine of a specific performance in equity arises from the occasional inadequacy of the remedy at law upon a violated contract, it follows that the contract must be such a one as is binding at law; 33 Ala. N. s. 449; 37 U. S. App. 185; and where the existence of a contract is in doubt, equity will not, as a rule, decree specific performance, especially when it appears that the property in question was rapidly rising in value; 158 U. S. 216; and it must be executory, certain in its terms, and fair in all its parts. It must also be founded upon a valuable consideration, and its performance in *specie* must be practicable and necessary; and, if it be one of the contracts which is embraced in the statute of frauds, it must be evidenced in writing;

2 Story, Eq. Jur. § 751; *ADAMS, EQ.* 77; *BUSH, EQ.* 80. The first requisite is that the contract must be founded upon a valuable consideration; 19 Ark. 51; either in the way of benefit bestowed or of disadvantage sustained by the party in whose favor it is sought to be enforced; 1 Beasl. Ch. 498; and this consideration must be proved even though the contract be under seal; 12 Ind. 539; 14 La. Ann. 606; 17 Tex. 397; a promise against a promise is not such a consideration as will support a decree of specific performance, nor does the presence of seals import such a consideration; 2 Colo. App. 259. The consideration must be strictly a valuable one, and not one merely arising from a moral duty or affection, as towards a wife and children; although it need not necessarily be an adequate one; *ADAMS, EQ.* 78. See 6 Ia. 279; 6 Mich. 364.

The second requisite is that the mutual enforcement of the contract must be practicable; for if this cannot be judicially secured on both sides, it ought not to be compelled against either party. Among the cases which the court deems impracticable is that of a covenant by a husband to convey his wife's land, because this cannot be effectuated without danger of infringing upon that freedom of will which the policy of the law allows the wife in the alienation of her real estate; 2 Story, Eq. Jur. § 731; 63 Pa. 335; 3 Bush 694. See 3 Wash. St. 554. To justify a decree, the proof must be clear both as to the existence of the agreement and the terms. Equity will not enforce a contract in favor of an employer as against an employee which is against conscience; 149 U. S. 315. And the actual performance of personal services by an employee will not be enforced in equity; 24 U. S. App. 239. And the contract must be mutual at the time it is entered into; 29 W. Va. 577; and specific performance of a contract will not be enforced, unless the remedy as well as the obligation is mutual, and alike attainable by both parties to the agreement; 83 Ala. 498; 73 Cal. 415.

The third requisite is that the enforcement in *specie* must be necessary; that is, it must be really important to the plaintiff, and not oppressive to the defendant; 1 Baasl. Ch. 497. However strong, clear, and emphatic a contract may be, and however plain the right at law, specific performance will not be decreed if it would cause a result harsh, inequitable, or contrary to good conscience; 81 Me. 365; see 144 U. S. 224; and the court is not bound to shut its eyes to the evident character of the transaction; it will never lend its aid to carry out an unconscionable bargain, but will leave a party to his remedy at law; 135 U. S. 457. Specific performance was refused of a contract for an unexpired term of years by which one party agreed to perform continuous mechanical services (in the generation of electricity), demanding the highest degree of skill, and the other to maintain costly machinery and the daily use of cars moved by electricity on the line of its railway; 109 Ala. 190. Mere inadequacy of consideration is not necessarily a bar to a specific performance of a contract; but if it be so great as to induce the suspicion of fraud or imposition, the court of equity will refuse its aid to the party seeking to enforce, and leave him to his remedy at law; 2 Jones, Eq. 267. This is upon the ground that the specific enforcement of the contract would be oppressive to the defendant. The court will equally withhold its aid where such enforcement is not really important to the plaintiff, as it will not be in any case where the damages which he may recover at law will answer his purpose as well as the possession of the thing which was contracted to be conveyed to him; *ADAMS, EQ.* 83. As a general rule, a contract to convey real estate will be specifically enforced; unless the title thereto is not marketable; 15 Cent. L. J. 8; 40 Minn. 312; 40 La. Ann. 845; while one for the transfer of personal chattels will be ordinarily denied any relief in

equity; *WATERM. SPEC. PERF.* § 16; 40 Miss. 119. An instrument defective as a deed will not be enforced as a contract to convey, if no valuable consideration passed between the parties; 49 N. J. Eq. 210. But even in the case of personal property, if the plaintiff has not an adequate remedy at law, equity will take jurisdiction; and more willingly in America than in England; *STORY, EQ. JUR.* § 724; *BISHP. EQ.* 368. When goods were sold and there were no other similar goods in the market, a disposal of them by the seller has been enjoined; 33 L. J. Q. B. 335. Equity will decree the specific delivery of goods of a peculiar value; as heirlooms; 10 Ves. 139; an ancient silver altar; 8 P. Wms. 390; the celebrated Pusey horn; 1 Vern. 273; the decorations of a lodge of Freemasons; 6 Ves. 773; a faithful family slave; 3 Murrephy 74. Contracts for the sale of stock will not, usually, be enforced, but the rule has been departed from; 23 Cal. 390; L. R. 3 Ch. 388; 1 S. & S. 174. A covenant for a renewal of a lease, which is indefinite as to the length of the term and rental to be paid, cannot be enforced specifically; 65 Hun 39; nor will a contract which is perpetual; 136 U. S. 393. A right to use a right of way under a traffic agreement between two railroad companies will be enforced in equity; 138 U. S. 1; and a contract between railroad companies for the joint use of a bridge and seven miles of track; 51 Fed. Rep. 309; or a contract by which one had acquired the right to use a part of the other party's railroad line for 999 years; 10 U. S. App. 98. Option contracts for the purchase or sale of land may be enforced; 12 U. S. App. 274; and the rule of non-enforcement for want of mutuality has no application to such an option contract; *id.* Where time is of the essence of a contract, specific performance will not be decreed after the lapse of the time specified; but it is otherwise when time is not of the essence of the contract; 23 U. S. App. 401.

A court of equity will not refuse to enforce a contract specifically which was fair when made, by reason of the increase in value of the subject-matter; 145 U. S. 459. Where the vendee bought property for \$300, and paid one dollar down and then did nothing for nine years, and it appeared that the property had reached a value of \$15,000, specific performance was refused; 155 U. S. 550.

Equity will enforce a contract for the exclusive rights under letters patent, and will enjoin the breach of a negative covenant; 23 Fed. Rep. 86; 147 Mass. 185; 4 Del. Ch. 337; 34 Conn. 325. See 149 U. S. 315; including a contract to assign all future inventions relating to a certain art; 122 Pa. 392; although the agreement be oral; 73 Ia. 367; but not if the contract be unconscionable; 34 Fed. Rep. 877.

When the statute of frauds requires that a contract shall be evidenced in writing, that will be a fourth requisite to the specific execution of it. In such case the contract must be in writing and certain in its terms; but it will not matter in what form the instrument may be, for it will be enforced even if it appear only in the consideration of a bond secured by a penalty; 6 Gray 25; 2 Story, Eq. Jur. § 751. The specific performance of a parol contract to convey land cannot be enforced if defendant urges the statute of frauds; 99 N. C. 85.

Equity will not decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title; 138 U. S. 671. If it appear that the want of title was known to the plaintiff when he began suit, the bill will not be retained for the assessment of damages, but the plaintiff will be left to his remedy at law; *id.*

In applying the equity of specific performance to real estate, there are some modifications of legal rules, which at first sight appear inconsistent with them and repugnant to the maxim that equity follows the law. The modifications here referred to are those of enforcing parol con-

tracts relating to land, on the ground that they have been already performed in part; of allowing time to make out a title beyond the day which the contract specifies; and of allowing a conveyance with compensation for defects; Adams, Eq. 85; Bishp. Eq. 364.

The principle upon which it is held that part-performance of a contract will in equity take a case out of the operation of the statute of frauds, is that it would be a fraud upon the opposite party if the agreement were not carried into complete execution; Pom. Contr. 103; 11 Cal. 28; 30 Barb. 633; 24 Ga. 402; 23 Mo. 134; 40 Me. 94. The act which is alleged to be part-performance must be done in pursuance of the contract and with the assent of the defendant. What will be a sufficient part-performance must depend on circumstances. The taking possession of the land and making improvements thereon will answer; 10 Cal. 156; 8 Mich. 463; 6 Ia. 279; 30 Vt. 516; 5 R. I. 149; 33 N. H. 32; 4 Wisc. 79; 76 Ia. 565; 82 Va. 269; though the payment of a part or even the whole of the purchase-money will not; 14 Tex. 373; 22 Ill. 643; 4 Kent 451; 103 Mass. 404; 63 N. Y. 499. See, however, 1 Harr. Del. 532; 26 Md. 37. If the purchaser have entered and made improvements upon the land, and the vendor protect himself from a specific performance by taking advantage of the statute, the plaintiff shall be entitled to a decree for the value of his improvements; 14 Tex. 331; 1 D. & B. 9. The doctrine of part-performance is not recognized in some of the states; 37 Mo. 388; 40 Me. 187; 8 Cush. 223; 13 Sm. & M. 93.

Where several parcels of land are included in one parol contract of sale, part payment of the purchase-money and the delivery of one of those parcels is sufficient to enable the purchaser to enforce specific performance of the contract as to all the parcels; 95 U. S. 96.

The doctrine of allowing time to make out a title beyond the day which the contract specifies, and which is embodied in the maxim that time is not of the essence of a contract in equity, has no doubt been generally adopted in the United States; 1 D. & B. Eq. 237; 3 Jones, Eq. 84, 240; 2 McLean 495; 57 Ill. 480. But to entitle the purchaser to a specific performance he must show good faith and a reasonable diligence; 4 Ired. Eq. 386; 3 Jones, Eq. 321. If during the vendor's delay there has been a material change of circumstances affecting the rights and interests of the parties, equity will not relieve; 15 Pa. 429.

The third equity, to wit, that of allowing a conveyance with compensation for defects, applies where a contract has been made for the sale of an estate, which cannot be literally performed *in toto*, either by reason of an unexpected failure in the title to part of the estate; 34 Ala. N. S. 633; 1 Head 251; 6 Wisc. 127; or of inaccuracy in the terms of the description, or of diminution in value by a liability to a charge upon it. In any such case, the court of equity will enforce a specific performance, allowing a just compensation for defects, whenever it can do so consistently with the principle of doing exact justice between the parties; Adams, Eq. 89. This doctrine has also been adopted in the United States. See 2 Story, Eq. Jur. 794; 1 Ired. Eq. 299; 1 Head 251; 76 Cal. 299.

A contract for the sale of land entered into under the belief by both parties that the vendor has title, when in fact he has none, will not be specifically enforced in equity; 140 Ill. 588. The fact that vendor's title is disputed by a third person gives him no right to refuse to convey such title as he has; and the fact will not prevent a decree for specific performance; 128 Ill. 540.

When a vendor files a bill he must show a tender of the title and an offer to perform; 46 Ill. 113; 39 Mich. 175; that is a tender of a deed; 63 Ind. 213; Tiedm. Eq. Jur. 499; but it has been held that an offer of a deed in the bill is enough; 63 N. Y. 361, *supra* Ia. 295; 52 N. W. Rep. (S. Dak.) 586. Where a vendee announces that he will not comply with his contract, the

vendor need not tender a deed before suing for specific performance; 114 Ill. 388. See PERFORMANCE. And a vendee must show a tender of the purchase-money; 67 Pa. 24; 21 Gratt. 29; 142 Ill. 258. And such tender must not be delayed till circumstances have changed; 4 Brewst. 49. The vendee need not tender the purchase-money where the vendor refuses to consider the question of sale under the contract and denies any obligation thereunder; 87 Tenn. 4.

A decree for specific performance will not be made against a vendor whose wife refuses to join in the conveyance; 75 Pa. 141.

In a suit for specific performance, the plaintiff must show that he has performed, or was ready to perform, his part of the contract, and that he has not been guilty of laches or unreasonable delay, and, where the proof leaves the case doubtful, the plaintiff is not entitled to a decree; 76 Md. 229. See 48 N. J. Eq. 638; 140 Ill. 583. Specific performance will not be decreed after an unreasonable delay; 127 U. S. 668; or where a party has been backward in claiming the relief, and has held off until circumstances have changed, so as to give him an opportunity to enforce or abandon the contract, as events might prove most advantageous; 86 Va. 75; 35 Fed. Rep. 174; 76 Cal. 590.

Specific performance of a contract to leave property by will will not be decreed, where the contract is made by a mere donee of a testamentary power of appointment; [1892] 3 Ch. 510.

Specific performance should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or where it is left in doubt whether the party against whom the relief is asked in fact made such an agreement; 128 U. S. 438; 127 *id.* 663; and performance will not be decreed unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms; 149 U. S. 315.

A *feme covert* cannot maintain a bill for specific performance; 4 Brewst. 49. A decree for the specific performance of a contract for the sale of a real estate is granted or withheld according as equity and justice seems to demand; 155 U. S. 550. See, generally, Fry; Waterman, on Specific Performance.

SPECIFIC RELIEF. See RELIEF.

SPECIFICATIO (Lat.). In Civil Law. The process by which, from material either of one kind or different kinds, either belonging to the person using them or to another, a new form or thing is created; as, if from gold or silver a cup be made, or from grapes wine. Calvinus, Lex. Whether the property in the new article was in the owner of the materials or in him who effected the change was a matter of contest between the two great sects of Roman lawyers. Stair, Inst. p. 204, § 41; Mackelvey, Civ. Law § 241.

SPECIFICATION. A particular and detailed account of a thing. When used in the patent law without the word *claim*, it means the description and claims. 6 Fed. Rep. 611. See PATENT.

In Military Law. The clear and particular description of the charges preferred against a person accused of a military offence. Tyler, Courts-Mar. 109.

SPECULATION. The hope or desire of making a profit by the purchase and resale of a thing. Pardessus, *Droit Com.* n. 12. The profit so made.

SPEECH. A formal discourse in public. The liberty of speech is guaranteed to members of the legislature, in debate, and to counsel in court.

The reduction of a speech to writing and its publication is a libel if the matter contained in it is libellous; and the repetition of it upon occasions not warranted by law, when the matter is slanderous, will be slander; and the character of the speaker will be no protection to him from an action;

1 Maule & S. 273; 1 Esp. 226. See DEBATE; LIBERTY OF SPEECH; SLANDER; LIBEL.

SPEED. The test of safe speed is whether it is such as allows the vessel to comply with the duty imposed on her and to avoid collision with other vessels in the situations in which she may reasonably expect to find them. 8 U. S. App. 9.

In a fog a vessel is bound to observe unusual caution and to maintain only such rate of speed as will enable her to come to a standstill by reversing her engines at full speed, before she shall collide with a vessel which she may see; 8 U. S. App. 312.

A vessel running fifteen knots an hour, when she strikes a fog bank, has not complied with the statutory requirements to go at moderate speed; 24 U. S. App. 164. See MODERATE SPEED.

SPEEDY TRIAL. The right to a speedy trial in all criminal prosecutions is given under the United States constitution.

The speedy trial to which a person charged with crime is entitled under the constitution is a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for trial, and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial, and in such case a party confined, upon application by *habeas corpus*, is entitled to a discharge from custody; 3 Mont. 512.

SPELLING. The art of putting the proper letters in words in their proper order.

It is a rule that bad spelling will not vitiate a contract when it appears with certainty what is meant; for example, where a man agreed to pay *threty* pounds he was held bound to pay *thirty* pounds; and *seutene* was held to be *seventeen*; Cro. Jac. 607; 10 Co. 133 a; 2 Rolle, Abr. 147. Even in an indictment *undertood* has been held as *understood*; 1 Chitty, Cr. Law. A misspelling of a name in a declaration will not be sufficient to defeat the plaintiff, on the ground of variance between the writing produced and the declaration, if such name be *idem sonans*; as, *Kay* for *Key*; 16 East 110; 2 Stark. 29; *Segrave* for *Seagrave*; 2 Stra. 889. See IDEM SONANS; ELECTION.

SPENDTHRIFT. A person who, by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or expose the town to charge or expense for the support of himself or family. Vt. Rev. Stat. c. 65, § 9.

A person having the entire right to dispose of property may settle it or give it by will in trust for another, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be taken by his creditors in advance of its payment to him, although there is no cesser or limitation over of the estate in such an event; 133 Mass. 170; 146 *id.* 369; 91 U. S. 716; 94 *id.* 523; 8 B. Mon. 56; 2 Rawle 33; 134 Pa. 114; 30 Vt. 338; 87 Va. 753; 111 Ill. 247; 4 Fed. Rep. 136; 84 Me. 325; 86 Tenn. 81; 20 Mo. App. 616. See also 1 Perry, Trusts 495.

In a very recent case in the New York court of appeals, it was held that a party could not by conveying his property in trust, reserving to himself the income thereof during his life, with remainder over, place his beneficial interest beyond the reach of creditors. Notwithstanding the life beneficiary was solvent and free from debt at the time he created the trust, the interest in the estate which he has reserved to himself is subject to a judgment upon a debt incurred subsequently to the creation of the trust; 156 N. Y. 316.

One cannot create a spendthrift trust of

his own property for his own benefit; 42 Pa. 330. Nor can there be a valid spendthrift trust where the trustee is also the *cestui que trust*, with the absolute ownership of the subject of the trust; 42 Pa. 330; 177 *id.* 208; 133 Mass. 175.

A trust to place one's property beyond the reach of creditors, while retaining full enjoyment of the income, through the instrumentality of a trustee, cannot be created by a married woman or a woman in contemplation of marriage; 39 L. R. A. (Md.) 806. A married woman may, however, make a valid spendthrift trust in favor of her husband; 177 Pa. 208.

The rule has prevailed in the English courts that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation over of the estate itself, can protect it from his debts or control; 18 Ves. 429; 6 Sim. 524; 1 Russ. & Myl. 395; 9 Hare 475.

Spendthrift trusts, there called alimentary funds, are upheld in Scotland; Gray, *Restr. on Alienation* 158. The English rule has been adopted in several courts of this country; 5 R. L. 305; 4 *Ired. Eq.* 131; 83 Ga. 703; 73 N. C. 119; 4 *Rich. Eq.* 46; 1 *Dev. & Bat. Eq.* 480.

In Arkansas; 8 Ark. 302; Indiana; 82 *Ind.* 383; and New Hampshire; 58 N. H. 155, the question has been raised, but not decided. Apart from statute, the rule in New Jersey is the same as the English rule; See 3 *Stockt.* 172; 12 C. E. Green 308; 41 N. J. *Eq.* 100. In Wisconsin, the question is in doubt. See 35 *Wis.* 687; 87 *id.* 449; 84 *id.* 210. In Connecticut, the status of such trusts is undecided; 21 *Conn.* 1; 36 *id.* 18.

By statute, in Kentucky, one cannot vest property or funds in trustees for the use of another without subjecting it to the debts of the *cestui que trust*; 14 S. W. Rep. 423; 13 *Bush* 344. In New York a statute excludes from proceedings in equity to reach beneficial interests, all cases of trusts for maintenance and support where the trust has proceeded from some person other than the debtor, but makes available to the creditor any surplus beyond what may be necessary for the maintenance and support of the beneficiary; 70 N. Y. 270; 42 *Hun* 636.

Where property is devised in trust for a testator's son and his family, the profits to be applied to the extent the trustee sees fit, judgment creditors of the son cannot reach the property or its income; 59 *Fed. Rep.* 923.

An absolute discretion vested in trustees to make payments out of trust property confers no interest on the beneficiary that can be asserted by him or his assignee in bankruptcy; 91 U. S. 716, where the court proceeded to sustain the doctrine of trusts of this class in a forcible argument.

A spendthrift trust may be created for a term of years with the remainder to the *cestui que trust* in fee; 13 W. N. C. (Pa.) 282.

See, Gray, *Restr. on Alienation*, where the cases are fully considered and an able protest made against the validity of such trusts.

SPERATE (Lat. *spero*, to hope). That of which there is hope.

In the accounts of an executor and the inventory of the personal assets, he should distinguish between those which are sperate and those which are desperate: he will be *prima facie* responsible for the former and discharged for the latter; 1 *Chitty*, Pr. 520; 2 *Will. Exec.* 644; *Toller*, *Exec.* 248. See **DESPERATE**.

SPES RECUPERANDI (Lat. the hope of recovery). A term applied to cases of capture of an enemy's property as a booty or prize, while it remains in a situation in which it is liable to be recaptured. As between the belligerent parties, the title to the property taken as a prize passes the

moment there is no longer any hope of recovery; 2 *Burr.* 683. See **INFRA PRÆSIDIA**; **POSTLIMINY**; **BOOTY**; **PRIZE**.

SPHERE OF INFLUENCE. Territorial property in which a state has but a partial title. To protectorates and spheres of influence the dominant or protecting state has a title which is good as against all other states but not complete as against the protected community. The powers of internal sovereignty are still possessed by the protected community except in so far as they have surrendered them by treaty with the protecting state. The extent of power possessed by the protecting state and hence the nearness of its approach to a complete title, depends therefore upon the character of the protectorate, which in turn depends upon the character of the people over which the protectorate is exercised. The minimum of responsibility resting upon a protecting state in return for the title thus acquired is the maintenance of a reasonable degree of order and the administration of justice as regards citizens of other civilized states within the protectorate.

A sphere of influence is a very weak form of protectorate. It is frequently one stage in the evolution of a protectorate. Here also the extent of the rights of the dominant state is by no means a fixed quantity. There is always the claim of a negative right to keep other states from doing certain things within the sphere, but no positive right of internal control. The dominant state assumes no legal responsibility for the maintenance of order or administration of justice within the sphere. The main difference between this and a protectorate is, then, the degree of responsibility of the dominant state in return for its title. In the case of the protectorate this responsibility is legal as well as moral, while in the case of the sphere of influence it is wholly moral. Maxey, *Intern. Law* 147, 148.

SPIGURNEL. The sealer of the royal writs.

SPINNING HOUSE. This was a prison at Cambridge used by the university authorities for the detention of light women convicted of associating for immoral purposes with undergraduates. This jurisdiction was taken away in 1894 by a statute which applied to Cambridge a second act which up to then had applied only to Oxford. The latter act brought such women as formerly were detained in the Spinning House under the class of idle and disorderly persons, punishable only under the Vagrancy Act. Byrne.

SPINSTER. An addition given, in legal writings, to a woman who never was married. *Lovelace*, *Wills* 269. So called because she was supposed to be occupied in spinning.

SPIRITS. See **ARDENT SPIRITS**.

SPIRITUAL CORPORATIONS. See **ECCLESIASTICAL CORPORATIONS**.

SPIRITUAL COURTS. Ecclesiastical courts (*q. v.*).

SPIRITUAL LORDS. The archbishops and bishops of the house of peers. 2 *Steph. Com.*, 11th ed. 341.

SPIRITUALISM. The belief that the spirits of the dead in various ways communicate with and manifest their presence to men, usually through the agency of a person called a medium; also, the doctrines and practices of those so believing. *Stand. Dict.*

SPIRITUALITIES, GUARDIAN OF THE. See **GUARDIAN OF THE SPIRITUALITIES**.

SPIRITUOUS LIQUORS. A statute making it unlawful, after a local option election resulting in a vote against sale of "spirituous, vinous or malt liquors," to sell any such liquors, is not, in view of prior judicial construction of the words in prior statutes on the subject, violated by sale of malt liquor containing less than 2 per cent

of alcohol, and non-intoxicating in the largest quantity in which it may be drunk. 134 Ky. 742, 122 S. W. 823. See **LIQUOR LAWS**.

SPLITTING A CAUSE OF ACTION. The bringing an action for only a part of the cause of action. This is not permitted either at law or in equity. 4 *Bouvier*, *Inst.* n. 4167.

SPOILIATION. In English Ecclesiastical Law. The name of a writ sued out in the spiritual court to recover for the fruits of the church or for the church itself. *Fitzh.* N. B. 85.

A waste of church property by an ecclesiastical person. 3 *Bla. Com.* 90.

In Torts. Destruction of a thing by the act of a stranger: as, the erasure or alteration of a writing by the act of a stranger is called spoliation. This has not the effect to destroy its character or legal effect. 1 *Greenl. Ev.* § 566. See **IN ODIIUM SPOLIATORIS**.

In Admiralty Law. By spoliation is also understood the total destruction of a thing: as, the spoliation of papers by the captured party is generally regarded as a proof of guilt; but in America it is open to explanation, except in certain cases where there is a vehement presumption of bad faith; 2 *Wheat.* 227, 241; 1 *Dods.* *Admr.* 480, 486. *Bened. Adm.* 310. See **ALTERATION**; **FRENCH SPOILIATION CLAIMS**.

SPONSALIA STIPULATIO SPONSALITIA (Lat.). A promise lawfully made between persons capable of marrying each other, that at some future time they will marry. See **ESPOUSALS**; *Ersk.* *Inst.* 1. 6. 3.

SPONSIO JUDICIALIS (Lat.). A judicial wager. This corresponded in the Roman law to our feigned issue.

SPONSIONS. In International Law. Agreements or engagements made by certain public officers, as generals or admirals, in time of war, either without authority or by exceeding the limits of authority under which they purport to be made.

Before these conventions can have any binding authority on the state, they must be confirmed by express or tacit ratification. The former is given in positive terms and in the usual forms; the latter is justly implied from the fact of acting under the agreement as if bound by it, and from any other circumstance from which an assent may be fairly presumed; *Wheat. Int. Law*, 3d *Eng. ed.* § 355; *Grotius, de Jur. Bel. de Pac.* l. 2, c. 15, § 16; *id.* l. 3, c. 23, § 1; *Vattel, Law of Nat.* b. 2, c. 14, § 209; *Wolff, Inst.* § 1556.

SPONSOR. In Civil Law. He who intervenes for another voluntarily and without being requested. The engagement which he enters into is only accessory to the principal. See *Dig.* 17. 1. 18; *Nov.* 4. 1; *Code de Comm.* art 158, 159; *Code Nap.* 1236; *Wolff, Inst.* § 1556.

SPOUSE BREACH. Adultery. *Cowel*.

SPRAG. In Mining. "Sprag" means to put a stick in between the spokes, so that when the stick by the revolution of the wheel came in contact with the bed of the car it would check the wheel. 148 Ky. 28, 145 S. W. 1131.

SPREADING FALSE NEWS. See **FALSE NEWS**.

SPRING. A fountain.

A natural source of water, of a definite and well-marked extent. 6 *Ch. Div.* 264 (C. A.). A natural chasm in which water has collected, and from which it either is lost by percolation, or rises in a defined channel. 41 L. T. Rep. n. s. 457. The water issuing by natural forces out of the earth at a particular place. It is not a mere place or hole in the ground, nor is it all the water that can be gathered or caused to flow at a particular place. A well is not necessarily a spring, nor is water which by the expenditure of labor can be

gathered into a reservoir. 185 N. Y. 50.

The owner of the soil has the exclusive right to use a spring arising on his grounds. When another has an easement or right to draw water from such a spring, acquired by grant or prescription, if the spring fails the easement ceases, but if it returns the right revives.

The owner of land on which there is a natural spring has a right to use it for domestic and culinary purposes and for watering his cattle, and he may make an aqueduct to another part of his land and use all the water required to keep the aqueduct in order or to keep the water pure; 15 Conn. 366. He may also use it for irrigation, provided the volume be not materially decreased; Ang. Waterc. 34. See 1 Root 535; 9 Conn. 291; 2 Watts 327; 2 Hill S. C. 634; Cox N. J. 460; 2 D. & B. 50; 8 Mass. 106; 3 Pick. 269; 8 Me. 253.

The owner of a spring cannot lawfully turn the current or give it a new direction. He is bound to let it enter the inferior estate on the same level it has been accustomed to, and at the same place, for every man is entitled to a stream of water flowing through his land without diminution or alteration; 6 East 206; 2 Conn. 584. See 3 Rawle 84; 12 Wend. 330; 10 Conn. 213; 14 Vt. 239.

Where one conveyed a spring or well to be enjoyed without interruption, and afterwards conveyed contiguous property to a railway company whose works drained the water from the land before it reached the spring, on an action for breach of agreement, *held*, that the grantor had only conveyed the flow of the water after it had reached the spring, and therefore there was no breach; 41 L. T. N. S. 455 (C.A.). See Gould, Waters 286; 15 L. J. N. S. Ex. 315. Where the value of land was enhanced by a spring, it was held ratable for taxation at such improved value; 1 M. & S. 503. See Coul. & F. Waters.

The owner of the superior inheritance, or of the land on which there is a spring, has no right to deprive the owner of the estate below him; 5 Pick. 175; 3 Harr. & J. 231; 12 Vt. 178; 13 Conn. 303; 4 Ill. 492; nor can he detain the water unreasonably; 17 Johns. 906; 2 B. & C. 910. See 1 Dall. 211; 3 Rawle 256; 13 N. H. 360; IRRIGATION; SUBTERRANEAN WATER; SURFACE WATER; WATER-COURSE.

SPRING-BRANCH. A branch of a stream flowing from a spring. 12 Gratt. 196.

SPRING GUN. Setting spring-guns, man-traps, or other engines calculated to destroy human life or to inflict grievous bodily harm is a misdemeanor if done with the intent that grievous bodily harm shall be inflicted upon any person coming in contact therewith. 4 Steph. Com. 67.

SPRING TIDES. Tides in which the rise and fall is greatest, which occur directly after a new and full moon. English.

SPRINGING USE. A use limited to arise on a future event where no preceding use is limited, and which does not take effect in derogation of any other interest than that which results to the grantor or remains in him in the meantime. Gilbert, Uses, Sugden ed. 153, n.; 2 Crabb, R. P. 498.

A future use, either vested or contingent, limited to arise without any preceding limitation. Cornish, Uses 91.

It differs from a remainder in not requiring any other particular estate to sustain it than the use resulting to the one who creates it, intermediate between its creation and the subsequent taking effect of the springing use; Dy. 274; Pollexf. 65; 1 Ed. Ch. 34; 4 Drur. & W. 27; 1 Me. 271. It differs from an executory devise in that a devise is created by will, a use by deed; Fearn, Cont. Rem. 335, Butler's note; Wilson, Uses. It differs from a shifting use, though often confounded therewith. See, generally, 2 Washb. R. P., 5th ed. 281*.

SPIULZIE (spoliatio). In Scotch Law. The taking away movables without

the consent of the owner or order of law. Stair, Inst. 96, § 16; Bell, Dict.

SPUR-RIAL. See RIAL.

SPY. One who enters the enemy's lines secretly or in disguise, or upon false pretences, for the purpose of obtaining information. The punishment, if captured, *flagrante delicto*, is death. But if a spy rejoins his own army and is afterwards captured, he cannot be treated as a spy.

The employment of spies in time of war is recognized as a military necessity. The Brussels Conference admitted no distinction between a merely mercenary spy and one who acts from purely patriotic motives. See Risley, Law of War 121.

SQUARE. Each subdivision of territory bounded on all sides by principal streets should be deemed a "square." 161 Ky. 548, 171 S. W. 396; 8 Bush (Ky.) 508.

SQUARE YARD. A "square yard," when applied to a surface, means, of course, superficial measure, but when applied to a solid, it might and generally would import solid measure or a yard every way, according to the subject of mensuration. 2 B. Mon. (Ky.) 182.

SQUATTER. One who settles on the lands of others without any legal authority; this term is applied particularly to persons who settle on the public land. 3 Mart. La. N. S. 293. See PRE-EMPTION RIGHT.

STAB. To make a wound with a pointed instrument. A stab differs from a cut or a wound. Russ. & R. 356; Russ. Cr. 597; Bac. Abr. *Maihem* (B).

STABILIA. A writ called by that name, founded on a custom of Normandy, that where a man in power claimed lands in the possession of an inferior, he petitioned the prince that it might be put into his hands till the right was decided, whereupon he had this writ. Whart. Law Lex.

STABLE. See BARN.

STAGE COACH. An automobile used in the place of a "stage coach" for the carriage of the mails, freight or passengers is a "stage coach" within the meaning of a statute. 163 Ky. 795, 173 S. W. 144.

A "stage coach" is one that is not hired out, but which remains in the possession of the owner. 109 S. W. 319.

STAGNUM (Lat.). A pool. It is said to consist of land and water; and therefore by the name of *stagnum* the water and the land may be passed. Co. Litt. 5.

STAINS OF BLOOD. See BLOOD STAINS.

STAKE LANDS. Tide lands belonging to the state are held not to be stake lands. 7 Wash. 150.

STAKE RACE. See SWEEPSTAKES.

STAKEHOLDER. A third person chosen by two or more persons to keep in deposit property the right or possession of which is contested between them, and to be delivered to the one who shall establish his right to it. Thus, each of them is considered as depositing the whole thing. This distinguishes this contract from that which takes place when two or more tenants in common deposit a thing with a bailee. Domat, *Lois Civ.* liv. 1, t. 7, s. 4; 1 Vern. 44, n. 1.

A person having in his hands money or other property claimed by several others is considered in equity as a stakeholder. 1 Vern. 144.

A mere depositary for both parties of the money advanced by them respectively with a naked authority to deliver it over upon the proposed contingency. He is not regarded as a party to the illegal contract. 117 Mass. 562.

The duties of a stakeholder are to deliver the thing holden by him to the person en-

titled to it on demand. It is frequently questionable who is entitled to it. In case of an unlawful wager, although he may be justified in delivering the thing to the winner, by the express or implied consent of the loser; 8 Johns. 147; yet if before the event has happened he has been required by either party to give up the thing deposited with him by such party, he is bound so to deliver it; 3 Taunt. 377; 4 id. 493; or if, after the event has happened, the losing party give notice to the stakeholder not to pay the winner, a payment made to him afterwards will be made in his own wrong, and the party who deposited the money or thing may recover it from the stakeholder; 16 S. & R. 147; 7 Term 536; 8 id. 575; 2 Marsh. 542. See 5 Wend. 250; 1 Bail. 486, 508; WAGER; HORSE RACE.

A deposit of stakes by one of the parties in a match may be recovered back on demand from the stakeholder, as upon a void contract; 1 Q. B. D. 189; 5 App. Ca. 342, overruling 5 C. B. 818.

STALE DEMAND. A claim which has been for a long time undemandable; as, for example, where there has been a delay of twelve years unexplained. 3 Mas. 161.

STALLAGE (Sax. *stal*). The liberty or right of pitching or erecting stalls in fairs or markets, or the money paid for the same. Blount; Whart. Dict.; 6 Q. B. 31.

STALLARIUS (Lat.). In Saxon Law. The *praefectus stabuli*, now master of the horse (Sax. *stalstafubulum*). Blount. Sometimes one who has a stall in a fair or market. Fl. lib. 4, c. 28, p. 13.

STAMP. An impression made by order of the government, on paper, which must be used in reducing certain contracts to writing, for the purpose of raising a revenue. See Stark. Ev.; 1 Phill. Ev. 444.

A paper bearing an impression or device authorized by law and adopted for attachment to some subject of duty or excise.

The term in American law is used often in distinction from stamped paper, which latter meaning, as well as that of the device or impression itself, is included in the broader signification of the word.

Stamps or stamped paper are prepared under the direction of officers of the government, and sold at a price equal to the duty or excise to be collected. The stamps are affixed and cancelled; and where stamped paper is used, one use obviously prevents a second use. The Internal Revenue acts of the United States of 1862 and subsequent years required stamps to be affixed to a great variety of subjects, under severe penalties in the way of fines, and also under penalty of invalidating written instruments and rendering them incapable of being produced in evidence. The statutes under which these stamps were required had been repealed from time to time, and that method of raising revenue was discontinued except in the case of tobacco and possibly some other articles. The necessity of raising additional revenue to meet the expenditures required for the Spanish-American war of 1898 led to the passage of what was known as the War Revenue Act of June 13, 1898, under which stamps are now required on almost every kind of document. The stamp taxes imposed by this act will be found in schedule A of the act, stat. 55 Cong. 2d Sess. 458.

Instruments not duly stamped are not void or inadmissible in evidence, in the absence of a fraudulent intent; 39 Vt. 412; 53 Pa. 176; 26 Wis. 163; s. c. 7 Am. Rep. 51; 47 N. Y. 467; 7 Am. Rep. 468; see 83 Pa. 280; in the absence of affirmative proof, a fraudulent intent will not be presumed; cases *supra*. See PORTAGE.

If a foreign instrument is, by the laws of the country where it is made, void for want of a stamp, it cannot be enforced in England. But if those laws merely require that it must be stamped before it can be received in evidence there, it is admissible in England without a stamp; 5 Exch. 279. The revenue act of 1898 is too recent to have been the subject of finished litigation

at the time this title goes to the press. One question raised in the courts, but not yet decided, is whether the stamp tax on express receipts are to be paid by the carrier or whether they may be added by him to his charges for freight or expressage.

Under the previous revenue acts imposing stamp taxes the question arose as to the exact legal effect of the requirement that an instrument should be stamped, and whether if an unstamped instrument was wholly invalid the law made it necessary to have certain contracts in writing which would otherwise be valid by parol, as for instance, the contract of insurance. The suggestion that the passage of these laws requiring a stamp might make it necessary that such contracts should be in writing was made in 2 Kan. 347; but this doctrine is said not to be well founded; 1 May, Ins., 5d ed. § 25; and in New York it was held that the validity of a parol contract for insurance was not affected by the stamp act, that, if in writing, it would require to be stamped, but it might be oral; 44 N. Y. 538. The power of congress to declare unstamped instruments wholly void was seriously doubted; 1 Bush 238; 45 Ill. 29; and the doubt went so far as to deny the constitutional right of the federal government to determine rules of evidence by which the state courts should be governed; May, Ins. § 85; 101 Mass. 243. Some of the cases hold that congress cannot prohibit the making of contracts permitted by state laws, and that to declare them void is not a proper penalty for the enforcement of tax laws; Cooley, Const. Lim., 6th ed. 592; 50 Mich. 505; 105 Mass. 49; 22 Ind. 276; 40 Ala. 385; 19 Wis. 369. See, also, 1 Joyce, Ins. § 33.

STAND. To abide by a thing; to submit to a decision; to comply with an agreement.

STANDARD. In War. An ensign or flag used in war.

In Measures. A weight or measure of certain dimensions, to which all other weights and measures must correspond; as, a standard bushel. Also, the quality of certain metals, to which all others of the same kind ought to be made to conform: as, standard gold, standard silver. See DOLLAR; EAGLE.

STANDARD POLICY. See POLICY.

STANDING ASIDE JURORS. In order to mitigate the effect of the statute 33 Edw. I. which forbade the challenging of jurors by the crown excepting for cause shown, a rule of practice gradually arose of permitting the prosecution to direct jurors to stand aside until the whole panel was exhausted, without showing cause. The validity of this practice has been repeatedly upheld in England; 26 How. St. Tr. 1231.

In the United States this statute became a part of the fundamental law after the revolution; Baldw. 78, 82; 8 Phila. 440; 22 Pa. 94; 7 Watts 585; and notwithstanding statutes of various states granting to the prosecution a number of peremptory challenges, the custom of standing aside has been preserved. This practice has been opposed where the statutes allowing peremptory challenges are in force, but where the number allowed is very small, it has heretofore been allowed to continue. See Thomp. & Mer. Juries 147; 14 Cent. L. J. 402.

The practice applies in misdemeanors as well as felonies, although there is a peremptory right of challenge; 39 Leg. Int. 384.

STANDING BY. This term, as so often used in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but it means silence where there is knowledge and a duty to make a disclosure. 93 Ind. 573; 6 id. 239.

Sanctioning by silence and inaction. R. & L. Dict. In law implies knowledge, under such circumstances as rendered it the duty of the possessor to communicate it; and it is

such knowledge, and not the mere fact of "standing by," that lays the foundation of responsibility. Abbott; 8 Blackf. 45.

STANDING MUTE. See MUTE; PEINE FORTE ET DURE.

STANDING ORDERS. General regulations of the procedure of the two houses of the parliamentary body, respecting the manner in which its business shall be conducted.

They are of equal force in every Parliament, except so far as they are altered or suspended from time to time. Byrne.

STANDING TREES. "Standing trees" are ordinarily, at least, to be regarded, as between the co-tenants, as part of the real estate, and severing and removing them without consent of other co-tenants is a destruction to that extent of the realty. After the severance they are the property of the co-tenants, and by a conversion of them the co-tenant converting them becomes liable to his co-tenants as in case of other personal property. 108 Ky. 552, 56 S. W. 969.

STANNARY COURTS (*stannary*,—from Lat. *stannum*, Cornish *stean*, tin,—a tin mine).

In English Law. Courts of record, in Devonshire and Cornwall, England, for the administration of justice among the tinners therein. They are of the same limited and exclusive nature as those of the counties palatine.

By 9 & 10 Vict. c. 95, the plaintiff may choose between the stannary court and the county court of the district in which the cause of action arises.

STAPLE. In International Law. The right of staple, as exercised by a people upon foreign merchants, is defined to be that they may not allow them to set their merchandises and wares to sale but in a certain place.

This practice is not in use in the United States. 1 Chitty, Com. Law 108; Co. 4th Inst. 238; Bac. Abr. *Execution* (B1). See STATUTE STAPLE.

STAPLE INN. An inn of chancery. See INNS OF COURT.

STAR-CHAMBER. See COURT OF STAR-CHAMBER.

STAR PAGE. The line and word at which the pages of the first edition of a book began are frequently marked by a star in later editions, and always should be.

STARE DECISIS (Lat.). To abide by, or adhere to, decided cases. *Stare decisis et non quæta movere.* It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The rule as stated is "to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferently, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land,—not delegated to pronounce a new law, but to maintain and expound the old one—*ius dicere et non ius dare.*" Broom, Leg. Max., 7th ed. 147. As it was said more briefly by Alderson, B., "My duty is plain. It is to expound and not to make the law to decide on as I find it, not as I may wish it to be;" 7 Exch. 543, quoted by Colman, J., in 4 C. B. 560.

Stare decisis is a wholesome doctrine, and, while not of universal application, is especially applicable to decisions affirming the validity of securities authorized by statute. Such decisions should be regarded as conclusive even as to those not strictly parties

so as to prevent wrong to innocent holders who purchased in reliance thereon. 207 U. S. 201.

The doctrine of *stare decisis* is not always to be relied upon; for the courts find it necessary to overrule cases which have been decided contrary to principle. It should not be pressed too far; 8 Gr. Bag 257. Many hundreds of such overruled cases may be found in the American and English reports. It is held that it should require very controlling considerations to induce any court to break down a former decision, and lay again the foundations of the law; 7 How. (Miss.) 569.

The doctrine of *stare decisis* is a salutary one and is to be adhered to on proper occasions, in respect of decisions directly upon points in issue; but the supreme court should not extend any decision upon a constitutional question if it is convinced that error in principle might supervene; 157 U. S. 429; and there are cases in which a court of last resort has felt constrained by a sense of duty to disregard all precedents, even their own. This is particularly so in constitutional questions involving the validity of statutes affecting public interests, but where no right of property or contract *inter partes* is involved. In such a case, said Blackley, C. J., the maxim for a supreme court "supreme in the majesty of duty as well as in the majesty of power," is not *stare decisis*, but *fiat justitia ruat cælum*; 87 Ga. 691, and it was said by Howard, J., in quoting this language: "Let this decision be right whether other decisions were right or not;" 144 Ind. 593 (involving the validity of statutes of apportionment of legislative representatives). And a court when asked to do so should consider how far its action would affect transactions entered into and acted upon, under the law as it exists; 11 Tex. 455. Where there have been a series of decisions by the supreme judicial tribunal of a state, the rule of *stare decisis* may usually be regarded as impregnable, except by legislative act; 29 Ind. 470. Especially is this the case where the law has become settled as a rule of property, and titles have become vested on the strength of it; 44 Mo. 206; and even an isolated decision will not be reversed when it has remained undisputed for a long time, and rights to land have been acquired under it; 31 Cal. 402; 22 Cal. 110. The court will not overrule cases upon which conveyancers may have relied, even though the court does not consider the case a sensible decision; [1891] 1 Ch. 258. It has been said that the doctrine of *stare decisis* has greater or less force according to the nature of the question decided, those questions where the decisions do not constitute a business rule, *e. g.* as where personal liberty is involved, will be met only by the general considerations which favor certainty and stability in the law; but where a decision relates to the validity of certain modes of transacting business, and a change of decision must necessarily invalidate everything done in the mode prescribed by the former case, as in the manner of executing deeds or wills, the maxim becomes imperative, and no court is at liberty to change it; 15 Wisc. 691. An erroneous decision subsequently overruled, though the law of the particular case, and binding on the parties, does not conclude other parties having rights depending on the same question; 52 Minn. 59. The United States courts will follow the decisions of those of the several states in interpreting state laws; but when the decisions of the state courts are unsettled and conflicting the rule does not apply; 1 Wall. 205; 5 Wall. 772; 37 Fed. Rep. 323; 35 id. 357. When titles to real estate depend on any compact between states, the rule of decision will not be drawn from either of the states; 11 Pet. 1; but where any principle of law is laid down by a state court regarding a sale of real property; 6 Wall. 728; or concerning the title to land; 37 Fed. Rep. 767; 125 U. S. 309; 128 id. 212; the violation of a charter by a state corporation; 7 How. 198; that a particular corporation is a corporation of that state; 45 Fed. Rep. 612; the pay-

ment of taxes; 7 Wall. 71; the United States courts will follow it in analogous cases; 7 How. 738. In matters relating to the construction of treaties, constitutional provisions, or laws of the United States, the authority of the federal courts is paramount, while *e converso* in the construction of state constitutions and state laws, the decisions of the state courts are final within their jurisdiction; 23 Miss. 498; Wells, Res. Adj. & Stare Decisis 593. The doctrine of *stare decisis* will not be applied by the circuit court of appeals to those decisions of the circuit courts from which no appeal has been taken; 29 U. S. App. 12. A decision of one of the circuit courts of the United States is not necessarily binding on the others; 47 Fed. Rep. 604; but see 46 Fed. Rep. 854; 53 *id.* 791; 40 *id.* 677. See RES JUDICATA. On a question of jurisprudence the circuit court of appeals is bound by a decision of the United States supreme court, but not the highest courts of the various states; 35 U. S. App. 67. See Cooley, Const., 2d ed. 137; Greenl. Overruled Cases; 1 Kent 477; Livingston, Syst. of Pen. Law 104; 35 Cent. L. J. 322; 32 *id.* 486. See Jenkins, Century vi., for a list of curious aphorisms on this subject; AUTHORITIES; PRECEDENTS; JUDGE-MADE LAW; JUDICIAL LEGISLATION; JUDICIAL POWER.

STARE IN JUDICIO (Lat.). To appear before a tribunal, either as plaintiff or defendant.

START. This term is not limited to setting out upon a journey or a race; it means, as well, the commencement of an enterprise or an undertaking. 54 La. 721.

STATE (Lat. *stare*, to place, establish). A body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength. Cooley, Const. Lim. 1. A self-sufficient body of persons united together in one community for the defence of their rights and to do right and justice to foreigners. In this sense, the state means the whole people united into one *body politic*; and the state, and the people of the state, are equivalent expressions. 2 Dall. 425; 3 *id.* 95; 2 Wilson, Lect. 120; 1 Story, Const., 5th ed. §§ 208, 209. So, frequently, are state and nation; 7 Wall. 720. See Morse, Citizenship; Wheat, Int. L. 17; but it is said that "a state is distinguished from a nation or a people, since the former may be composed of different races of men all subject to the same supreme authority. . . . The same nation or people may be subject to, or compose, several distinct and separate states. . . . The terms nation and people are frequently used by writers on international law as synonymous terms for state." 1 Halleck, Int. L. 66.

Another writer commenting on the definition of Cicero which is substantially that first above given, says: "This definition is not complete without some additions and restrictions. A state must be an organization of people for political ends; it must permanently occupy a fixed territory; it must possess an organized government capable of making and enforcing law within the community; and, finally, to be a sovereign state it must not be subject to any external control. Thus a company of men united for commercial purposes cannot be a state in the sense held in international law; neither can a tribe of wandering people, nor a community, be so considered if their government is permanently incapable of enforcing its own laws or its obligations toward other states.

So long as a state possesses the requisite attributes mentioned in the preceding paragraphs, international law does not concern itself with the form of its government; it may be an absolute monarchy, a limited monarchy, or a republic; it may be a centralized state or a federal union; or it may change from one to another of these forms at will, without in the least affecting its position in the view of international law; Snow, Int. L. 19.

A state neither loses any of its rights nor is discharged from any of its duties, by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication. So if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common; Snow, Cas. Int. L. 21. The same writer also thus states the distinctions between a state and a nation: "Though the terms are frequently used interchangeably, strictly speaking, a nation is composed of people of the same race, whereas a state may be composed of several nations. The Jews are considered to be a nation, while Austria-Hungary, as a state, is composed of three distinct races: Germanic, Slavic, and Magyar. This distinction has in recent years become of importance from the fact of the movements towards the unity of races, each under one state. Thus we have the Pan-Slavic movement, the Irredentist party in Italy, and various other minor cases." Snow, Int. L. 20. This distinction, however, cannot be said to be at present recognized to the extent here suggested.

The actual organization of governmental powers; thus, the actual government of the state is designated by the name of the state; hence the expression, the state has passed such a law or prohibited such an act.

The section of territory occupied by a state: as, the state of Pennsylvania.

A union of two or more states under a common sovereign is called a personal union where there is no incorporation, but the component parts are united with equality of rights, as in the case, by way of illustration, when Great Britain and Ireland and Hanover were under one prince but without any interdependence. On the other hand, a real union of different states is where there is a merging of the separate sovereignties in a new and general one, at least as to all international relations; as, in the case of the union of Hungary, Bohemia, and other states prior to 1849. An incorporate union is where there is one sovereign government, though there may be a separate subordinate administration; Halleck, Int. L. §§ 11, 12, 13.

One of the commonwealths which form the United States of America.

As to the relation between the state and the United States, see UNITED STATES OF AMERICA.

The District of Columbia and the territorial districts of the United States are not states within the meaning of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts; 2 Cra. 445; 1 Wheat. 91; 15 C. L. J. 303. But the District of Columbia is a "State of the Union," within the meaning of the treaty of 1833 between the United States and France relieving Frenchmen from the disability of alienage in disposing of and inheriting property; 133 U. S. 258.

The several states composing the United States are sovereign and independent in all things not surrendered to the national government by the constitution, and are considered, on general principles, by each other as foreign states; yet their mutual relations are rather those of domestic independence than of foreign alienation; Miller, Const. 103; 7 Cra. 481; 3 Wheat. 324.

A state can be sued only by its own consent; 82 Va. 721; 134 U. S. 1. See 40 La. Ann. 856. But under the constitution of the United States the supreme court has original jurisdiction of suits by one state against another, and this jurisdiction has been frequently exercised, particularly in cases involving boundary disputes between the states.

A suit by a non-resident insurance company which seeks an injunction to restrain the state superintendent of insurance from revoking its license to do business in the state, is a suit against the state, and a federal court has no jurisdiction; 81 Fed.

Rep. 888. So it was held that an effort to enjoin state officers charged with the collection of taxes, and seeking to establish exemption from taxation under the state laws and the repayment of amounts previously collected, was, to all intents and purposes, a suit against the state, and in part for the recovery of money, and that the state court had no jurisdiction; 35 Fla. 625. Suits to enjoin state officers either from assessing or enforcing taxes, without authority or warrant under the state laws, is not a suit against the state within the prohibition of the eleventh amendment to the constitution of the United States; 58 Fed. Rep. 620; neither is a suit against the railroad commissioners of the state to restrain the enforcement of their regulations as unjust and unreasonable, at least if the state has no pecuniary interest in the railroad; 154 U. S. 362; 57 Fed. Rep. 436; nor a suit in equity against state land commissioners to restrain them from acts alleged to be in violation of the plaintiff's contract of purchase of the lands from the state; 140 U. S. 1; 43 Fed. Rep. 196, 338. An injunction may be granted against a state board of officers to restrain them from proceeding against a corporation engaged in interstate commerce, for failure to comply with state and statutory regulations, and this is held not to be against the state; 60 Fed. Rep. 186. Nor is a proceeding for contempt in the federal courts against a state officer who has seized property in the hands of a receiver in attempting to collect a tax alleged to be illegal and attacked by proceeding in the federal court, in any sense a suit against the state; 149 U. S. 164.

A state cannot be sued to recover the amount due to the holders of its bonds; 184 U. S. 1; nor will a suit be maintained against a state auditor to compel the levying of a special tax for the benefit of holders of its bonds, since that is in effect a suit against the state; *id.* 22. Actions held to be properly suits against the state and therefore not maintainable, are, against the state board of agriculture to recover money alleged to be wrongfully collected by it as a license tax; 111 N. C. 135; a suit by a private citizen to enjoin the erection of a public building at a place other than that prescribed by law; 24 Ore. 553; a suit to determine the rights of conflicting claimants to a fund granted by congress to the states for agricultural colleges; 56 Fed. Rep. 55.

The rights and immunities of a foreign state belong to her only within her own jurisdiction and territory, and, when she becomes a suitor in the courts of a foreign state, she is treated as a foreign private corporation; 29 W. Va. 326. See SOVEREIGN.

When a state brings a suit against citizens, she thereby voluntarily accepts all the conditions which affect ordinary suitors, except that no affirmative judgment, as for the payment of costs, can be rendered against her; and if the cause is removed to a federal court it will proceed in the same manner as a suit between individuals; 56 Fed. Rep. 329. So where the state has brought a suit in equity and the cause has been removed to a federal court, the defendant may there file a cross bill against the state; 60 Fed. Rep. 552; but if the cross bill seeks any affirmative relief against the state, it cannot be filed, under a constitutional provision that the state shall not be made a defendant in any court of law or equity; 100 Ala. 80; nor can a cross demand be maintained against a state; 46 La. Ann. 431; *id.* 55; 87 *id.* 623.

While a state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void; 134 U. S. 1.

As to whether states can be compelled to pay their debts, see 12 Am. L. Rev. 625; 15 *id.* 519.

In Society. That quality which belongs to a person in society; and which secures

to and imposes upon him different rights and duties in consequence of the difference of that quality.

In Practice. To make known specifically; to explain particularly: as, to state an account or to show the different items in an account; to state the cause of action in a declaration.

STATE'S EVIDENCE. See **KING'S EVIDENCE**; **PROVER**.

STATE INSURANCE. See **INSURANCE**.

STATE LANDS. The words "public lands" are habitually used in the United States to describe those lands belonging to the federal government or to a state which are open to acquisition as private property under general land laws. The term "state lands" is sometimes used in the same sense of lands owned by a state. (92 U. S. 761; 7 Wash. 156.) The words "public domain" frequently have the same meaning. (181 U. S. 481.) Equivalent words in common use in the general land legislation and decisions of the original states were "unappropriated lands," "vacant lands," and "waste lands." The expressions "public lands" and "state lands" are, however, often used in a broader sense, including lands belonging to the nation, state, or other sovereignty which are not subject to the operation of the general land laws. (8 Mont. 20.) As a rule there is no statutory definition of the words, and they are not always used in the same sense in statutes passed for different purposes. In each case that meaning should be given which comports with the intention. (8 Mont. 20.) 26 Am. & Eng. Ency. 2nd ed., 212, 213.

STATE OFFICER. Presidential electors are "State officers." 149 Ky. 110, 148 S. W. 21.

STATE PAPER OFFICE. See **PAPER OFFICE**; **PAPER MILL**.

STATE AND PUBLIC LANDS. See **TOWN SITES**.

STATE TAXES. The term "State taxes," referred to in a statute are only such as go into the State Treasury when collected, and is not intended there to embrace school taxes, which never reach the State Treasury. 154 Ky. 44, 156 S. W. 865.

STATED CASE. See **CASE STATED**; **AGREED CASE**.

STATEMENT. The act of stating, reciting, or presenting verbally or on paper. 91 Tenn. 168. See **PARTICULAR STATEMENT**.

STATEMENT OF AFFAIRS. In English bankruptcy practice, the giving by the debtor of a list of creditors, secured and unsecured with the value of the securities, a list of bills discounted, and a statement of his property. Bank. Act 1869, § 19.

Now, under the Bankruptcy Act, 1914, every debtor against whom a receiving order is made must furnish a like statement, verified by affidavit, to the Official Receiver. Making a material omission in a statement of affairs is a misdemeanor, punishable with imprisonment for two years. Byrne.

STATEMENT OF CLAIM. The specification of the plaintiff's cause of action. See **DECLARATION**. The term is now used in Pennsylvania under the Practice Act of 1887.

It is not a legitimate function of a statement of claim to reply to an anticipated affirmative defence; 84 Fed. Rep. 102.

This is to be distinguished from the statement of the nature of the claim which is required in every writ of summons by Ord. 2, r. 1. It is a written or printed statement by the plaintiff in an action in the High Court of England, showing the facts on which he relies to support his claim against the defendant, and the relief which he claims. It is delivered to the defendant or his solicitor. Byrne. See **STATEMENT OF DEFENSE**.

STATEMENT OF DEFENSE. In

the practice of the High Court of England, the defendant delivers in reply to the statement of claim a pleading called a statement of defense. The statement of defense deals with the allegations contained in the statement of claim (or the indorsement on the writ if it be specially indorsed and leave to defend be given under Ord. 14), admitting or denying them, and, if necessary, stating fresh facts in explanation or avoidance of those alleged by the plaintiff. If the defendant wishes to set up a counter-claim he adds it to his defense, and the pleading is then called a statement of defense and counter-claim.

In commercial cause the notification termed "points of defense" corresponds to the statement of defense. Byrne.

STATING-PART OF A BILL. See **BILL**.

STATION. In Civil Law. A place where ships may ride in safety. Dig. 49. 12. 1. 13; 50. 15. 59.

A place where railroad trains regularly come to a stand, for the convenience of passengers, taking in fuel, discharging freight, or the like. Webster.

A railroad company may exclude from its stations all persons except those using or desirous of using the railway, and may impose upon the rest of the public any terms it may deem proper as the condition of admittance; [1897] A. C. 479; to the same effect, 18 C. B. 46.

Discrimination between competing omnibus lines at a railroad depot, by giving one of them a more favorable stand than is allowed to the other, where both are given access to the grounds, is insufficient to constitute any legal ground of complaint against the railroad company; 37 L. R. A. (Ind.) 376. See **RAILROAD**.

STATIONER'S COMPANY. The Stationers of the city of London, a guild incorporated in 1557, by whom prior to the passing of the Copyright Act, 1842, every English publication was required to be "entered" or registered in Stationers' Hall (q. v.). Stand. Dict.

STATIONERS' HALL. The hall of the Stationers' Company at which every person claiming copyright must register his title, and without such registration no action shall be commenced against persons infringing it.

The Copyright Act 1911, repealed all enactments referring to Stationers' Hall: it contains no reference to Stationers' Hall; and no registration there is now required for any purpose. Byrne.

STATIST. A statesman; a politician; one skilled in government.

STATU LIBERI (Lat.). In Louisiana. Slaves for a time, who had acquired the right of being free at a time to come, or on a condition which was not fulfilled, or in a certain event which had not happened, but who in the meantime remained in a state of slavery. La. Civ. Code, art. 37. See 3 La. 176; 6 id. 571; 4 Mart. La. 102; 8 id. 219. This is substantially the definition of the civil law. *Hist. de la Jur.* l. 40; Dig. 40. 7. 1; Code 7. 2. 13.

STATUS (Lat.). The condition of persons. The movement of progressive societies has been from status to contract; Maine, Anc. Law 170. It also means estate, because it signifies the condition or circumstances in which the owner stands with regard to his property.

STATUS QUO. The existing state of things at any given date.

STATUS QUO ANTE BELLUM. A phrase used in international law to indicate the condition of the territory of a belligerent and the ownership of the property of the subjects of such belligerent, as they existed prior to the breaking out of war, which, under the stipulations of some treaties of peace are restored to their former ownership. In other treaties, a belligerent who has possession of an enemy's ter-

ritory or property at the end of the war retains it. See **TREATY OF PEACE**; **UTI POSSIDETIS**.

STATUTE. A law established by the act of the legislative power. An act of the legislature. The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.

This word is used to designate the written law in contradistinction to the unwritten law. See **COMMON LAW**.

Among the civilians, the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits, or prohibits anything is designated a statute, without considering from what source it arises. Sometimes the word is used in contradistinction to the imperial Roman law, which, by way of eminence, civilians call the common law. Wharton.

A negative statute is one expressed in negative terms, and so controls the common law that it has no force in opposition to the statute. Bac. Abr. *Statute* (G).

An affirmative statute is one which is enacted in affirmative terms.

Such a statute does not necessarily take away the common law; Co. 2d Inst. 200; if, for example, a statute without negative words declares that when certain requisites shall have been complied with, deeds shall have a certain effect as evidence, this does not prevent their being used in evidence, though the requisites have not been complied with, in the same manner they might have been before the statute was passed; 2 Caines 189; or a custom; 6 Cl. & F. 41. Nor does such an affirmative statute repeal a precedent statute if the two can both be given effect; Dwaris, *Statute* 474. The distinction between negative and affirmative statutes has been considered inaccurate; 13 Q. B. 33.

A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been.

Penal statutes are those which command or prohibit a thing under a certain penalty. Bac. Abr. A statute affixing a penalty to an act, though it does not in words prohibit it, thereby makes it illegal; 14 Johns. 273; 1 Binn. 110; 37 E. L. & E. 475; 14 N. H. 294; 4 Ia. 490; 7 Ind. 77. See, as to the construction of penal statutes, 2 Cr. L. Mag. Jan. 81; 49 Fed. Rep. 360; 120 U. S. 678; 134 id. 624; Bish. *Stat.* Cr. 226; **PENAL STATUTES**.

A perpetual statute is one for the continuance of which there is no limited time, although it be not expressly declared to be so.

If a statute which did not itself contain any limitation is to be governed by another which is temporary only, the former will also be temporary and dependent upon the existence of the latter. Bac. Abr. *Statute* (D).

Private statutes or acts are those of which the judges will not take notice without pleading; such as concern only a particular species or person. See 1 Bla. Com. 86. Special or private acts are regarded as "rather exceptions than rules, being those which only operated on particular persons and private concerns" (cited with approval in 104 U. S. 447, where it was held that where an act amends a general act it is a public act).

Private statutes may be rendered public by being so declared by the legislature; 1 Bla. Com. 85; 4 Co. 76. And see 1 Kent 459. In England private statutes are said not to bind strangers; though they should contain any saving of their rights. A general saving clause used to be inserted in all private bills; but it is settled that, even if such saving clause be omitted, the act will bind none but the parties. But this doctrine does not seem to be applicable to this country.

Public statutes are those of which the courts will take judicial notice without pleading or proof.

They are either general or local,—that is, have operation throughout the state at large, or within a particular locality. It is not easy to say what degree of limitation will render an act local. Thus, it has been held that a public act relating to one county only is not local within the meaning of a constitutional provision which forbids enactments of local bills embracing more than one subject; 5 N. Y. 285; 2 Sandf. 355.

A remedial statute is one made to supply such defects or abridge such superfluities in the common law as may have been discovered. 1 Bla. Com. 86.

These remedial statutes are themselves divided into *enlarging* statutes, by which the common law is made more comprehensive and extended than it was before, and into *restraining* statutes, by which it is narrowed down to that which is just and proper. The term *remedial statute* is also applied to those acts which give the party injured a remedy; and in some cases such statutes are penal; Esp. Pen. Acts 1.

A temporary statute is one which is limited in its duration at the time of its enactment.

It continues in force until the time of its limitation has expired, unless sooner repealed. A statute which by reason of its nature has only a single and temporary operation—e. g. an appropriation bill—is also called a temporary statute.

There is also a distinction in England between *general* and *special* statutes. The former affect the whole community, or large and important sections, the interest of which may be identical with those of the whole body. *Special* statutes relate to private interests, and deal with the affairs of persons, places, classes, etc., which are not of a public character. Wilb. Stat. 218. See 104 U. S. 447.

Local statute is used by Lord Mansfield as opposed to *personal statute*, which relates to personal transitory contracts; whereas a local statute refers to things in a certain jurisdiction alone; e. g. the statute of frauds relates only to things in England; 1 W. Bla. 246.

As to *mandatory* and *directory* statutes, it is said that when the provision of a statute is the essence of the thing required to be done, it is mandatory; otherwise, when it relates to form and manner; and where an act is incident, or after jurisdiction acquired, it is directory merely; 58 N. H. 17. See, also, 2 Ky. L. Rep. 166.

Expository statutes. Acts passed for the purpose of affecting the construction to be placed upon prior acts. They are often expressed thus: "The true intent and meaning of an act passed . . . be and is hereby declared to be;" "the provisions of the act shall not hereafter extend"; or "are hereby declared and enacted not to apply," and the like. This is a common mode of legislation. "It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate on future cases it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future." Cooley, Const. Lim. 94; such acts are binding upon the courts, although the latter, without such a direction, would have understood the language to have meant something different. They have the same effect upon the construction of former acts, in the absence of intervening rights, as if they had been embodied in the former act at the time of its passage; Endlich, Interpr. Stat. 365. See Pomeroy's Sedgw. Constr. Stat. Law 214; Sutherl. Stat. Constr. sec. 402.

A statute declaring the meaning of a prior act, etc., will not be construed to be an invasion of the judicial function, but will be treated as a direct enactment controlling the meaning of the prior act; 24 Fed. Rep. 667. But it has been held that the legislature cannot pass an act so as to compel the courts in the future to adopt a particular construction of an earlier statute; 172 Pa. 140, Mitchell, J., dissenting; but see 122 id. 627; 68 id. 45, where the doctrine

seems to have been, confined to retrospective legislation.

See an article in 35 Am. L. Reg. & Rev. 25, by William M. Meigs.

It is a general rule that when the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law; Co. Litt. 235; Co. 2d Inst. 222; and when a power is given by statute, everything necessary for making it effectual is given by implication; *quando lex aliquid concedit, concedere videtur et id sine quo res ipsa esse non potest*; 12 Co. 130.

The provisions of a statute cannot be evaded by any shift or contrivance; 2 B. & C. 655. Whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance; 7 Cl. & F. 540.

The mode of enacting laws in the United States is regulated by the constitution of the Union and of the several states respectively. The advantage of having a law officer, or board of officers, to revise bills and amendments of bills during their progress through the legislature, has been somewhat discussed. See Reports of Eng. Stat. Law Com. 1856, 1857; Street, Council of Revision; 5 Rep. Am. Bar Assn.

Enacting legislation. As to formalities required it has been held that a statute which the legislative journals showed was never passed, was valid because signed by the presiding officers of the legislature; 22 S. E. Rep. (N. C.) 16, 120; and that it is not admissible to prove that an act signed by the governor was in fact passed by the legislature and sent to him within two days next preceding the final adjournment of the legislature in violation of the constitution; 40 N. E. Rep. (Ind.) 1030.

The signing by the speaker of the United States house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses that such bill has passed congress, and when the bill thus attested, receives the approval of the president, and is deposited in the department of state its authentication as a bill that has passed congress is complete and unimpeachable; 143 U. S. 649.

See JOURNALS, where this subject is treated.

Evidence that individual members were mistaken as to facts is inadmissible to effect legislative action; 36 Atl. Rep. (Conn.) 1019.

As to whether the president has the power to sign bills after the adjournment of congress, Attorney-General Wirt was of the opinion that he had not, and President Monroe acted on his opinion. President Lincoln signed the act of March 12, 1863, after the adjournment of congress. A house committee subsequently reported that in their opinion the act was not in force, but the house never acted upon their report. The court of claims holds that this act has been recognized by the supreme court, and was therefore valid; see 32 Amer. Law Rev. 211; 29 Ct. Cl. 549.

Attorney-General Garland advised President Cleveland that he was without authority to sign a bill after adjournment. In 29 Ct. Cl. 523, it was held that the president had the power to sign bills after the adjournment of congress. In cases arising under state constitutions, it was held in 2 Cal. 165; 50 Miss. 802, that the power to sign a bill ceased with the adjournment, but under the language of the Illinois constitution, a signature after adjournment was held valid; 103 U. S. 423.

In 21 N. Y. 517, it was held, under a constitutional provision almost identical with that of the constitution of the United States, that a signature after adjournment was valid. And this was followed in 22 La. Ann. 545.

Much interesting discussion has arisen on the question whether a statute which appears to be contrary to the laws of God and nature, and to right reason, is void. Earlier dicta in the affirmative (see 8 Co. *118 a; 12 Mod. 687) are not now considered to be law; 1 R. 6 C. P. 582. See

Dwarris, Stat. 483. The question as applicable to this country is treated under CONSTITUTIONAL. It being historically true that the American people are a religious people, as shown by the religious objects expressed by the original grants and charters of the colonies, and the recognition of religion in the most solemn acts of their history, as well as in the constitutions of the states and the nation, the courts, in construing statutes, should not impute to any legislature a purpose of action against religion; 143 U. S. 457.

In the United States, a statute which contravenes a provision of the constitution of the state by whose legislature it was enacted, or of the constitution of the United States, is in so far void. See CONSTITUTIONAL. The presumption, however, is that every state statute the object and provision of which are among the acknowledged powers of legislation is valid and constitutional; and such presumption is not to be overcome unless the contrary is clearly demonstrated; 6 Cra. 87; 1 Cow. 564; 7 N. Y. 109. Where a part only of a statute is unconstitutional, the rest is not void, if it can stand by itself; 1 Gray 1; Bish. Writ. Law 34.

Where a statute contains some provisions that are constitutional and some that are not, effect may be given to the former by separating them from the latter, but this rule does not apply where the provisions of the statute are dependent upon each other and are indivisible, or where it does not plainly appear that Congress would have enacted the constitutional legislation without the unconstitutional provisions. 207 U. S. 463.

By the common law, statutes took effect by relation back to the first day of the session at which they were enacted; 4 Term 660. The injustice which this rule often worked led to the statute of 33 Geo. III. c. 13, which declared that, except when otherwise provided, statutes should take effect from the day of obtaining the royal assent, unless otherwise ordered therein. This rule, however, does not obviate the hardship of holding men responsible under a law before its promulgation. By the Code Napoléon, a law takes effect in each department of the empire as many days after its promulgation in that department as there are distances of twenty leagues between the seat of government and the place of promulgation. The general rule in America is, that an act takes effect from the time when the formalities of enactment are actually complete, unless it is ordered otherwise or there is some constitutional or statutory rule on the subject; Cooley, Const. Lim. 187; 7 Wheat. 164.

The constitutions of many states contain provisions that acts shall not take effect till a certain time after their passage, or after adjournment of the legislature, but such constitutions usually contain also a provision that the legislature may, in a case of emergency, provide that an act shall take effect immediately, and it has become a common practice so to provide even in ordinary acts. Where an act was passed May 16, which declared that it should take effect May 14, it went into effect on its passage; 30 Atl. Rep. (N. J. Sup.) 543.

The Tariff Act of 1897 took effect at the moment it was approved by the president, which was six minutes past 4 o'clock P. M., Washington time, on July 24, 1897, and goods imported and entered for consumption on that day, but prior to such approval, were dutiable under prior legislation; 87 Fed. Rep. 194. So held, also, by Colt, J., in U. S. C. C., 1st Circ. (Boston Herald, Oct. 12, 1898).

An act increasing taxes and denouncing penalties, falls within the first article of the constitution prohibiting *ex post facto* laws, and giving effect to statutes only from the time of their receiving the president's signature; 1 Hughes 356. "The law is an entirety. If, as to its penal features, it cannot be held to have gone into effect until 9 P. M. of the day of its enactment, neither can it be held to have

gone into effect before that hour as to its other provisions." *Id.* See, also, 159 U. S. 78, as to the tariff act of 1894.

Local and special legislation. In all but a few states constitutional provisions are found forbidding the passage of local or private or special laws. While these provisions were not unknown at an earlier date, the principle was fully developed in the Illinois constitution of 1870, and has become more fixed as a part of American constitutional law since then. In some states, such prohibited legislation is specified as "local or special," and in some "special or private," and in some "private, local, or special." The act of congress of July 30, 1886, prohibited local and special legislation in the territories. See Binney, *Restrict. upon Loc. and Spec. Legis.* 180. The subject-matter of legislation to which this prohibition applies varies in different states. Mr. Binney has grouped them in a general way. See *id.* 132. Among the subject-matters most usually found are: changing names of persons; legitimization and adoption of children; divorce; granting charters; changing laws of descent; providing for the sale or conveyance of real estate of persons under disability; granting the right of eminent domain; regulating legal procedure; incorporating municipalities; creating offices; or regulating the fees of officers; laying out highways; providing for the management of public schools; taxation. In some states special laws are permitted only when a general law cannot be made applicable.

A general law is defined as "neither for one or more particular persons, nor to operate exclusively in any particular part or parts of the state"; Binney, *Restr.* etc. 22. Such an act is not necessarily universal and need not be one which operates on all persons or all things; a law which effects a class of persons or things may be a general law; 87 Cal. 375; 40 N. J. L. 1. A law is to be regarded as such when its provisions apply to all objects of legislation, distinguished alike by quality and attribute which necessitate the enactment as manifest relation. Such laws must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class; 49 N. J. L. 88. See GENERAL LAWS.

A special law is one which relates either to particular persons, places, or things, or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applicable. Binney, *Restr.* etc. 26.

A local law is one whose operation is confined within territorial limits, other than those of the whole state or any properly constituted class or locality therein.

The features of local and special legislation overlap, but they are not continuous. The matter to which a local law relates may be either general or special, but in either case the law itself is not in force outside of the locality for which it is passed.

The following are held special acts and invalid: An act for holding primary elections made applicable, only to counties casting a certain number of votes at the last election, which makes it applicable only to two counties; 43 Pac. Rep. (Cal.) 975; an act, though general in form, regulating the re-location of county seats which was in fact applicable to but a single county; 143 Ind. 306; an act for the extension of corporate limits of cities having a certain population which can be applicable only to one city; 65 N. W. Rep. (Ia.) 818; an act relating to the collection of taxes, cities of the first, second, and fourth class being excepted, and it not being confined to municipal matters; 171 Pa. 157.

The following are not within the constitutional prohibition: An act amending a city charter granted previously to the adoption of the constitution; 45 Pac. Rep. (Col.) 356; an act relating to a subject as to which there was already a local law; 96 Ga. 403; an act providing a *per diem* pay for jurors although it only applied to a

single county in which there was already a special law, it being at the time of the passage of the act the existing rate in the remaining counties; 64 N. W. Rep. (Minn.) 813; an act making it a misdemeanor to work as a barber on Sunday, exempting from its operation New York and Saratoga; 13 Misc. 587; an act providing a different and better system of education for cities of ten thousand or more inhabitants than is enjoyed by the rest of the state; 18 Wash. 696.

A territorial act classifying counties according to the equalized assessed valuation of property and graduating salaries of county officers in reference to population is not a local special law under the act of congress; 162 U. S. 547.

The proviso of a general act that it shall not apply to suits pending at its passage does not render it special; 169 Pa. 359.

An act offering a reward for the first to obtain in each county an artesian well is void; 44 Pac. Rep. (Ari.) 299. At least two individuals, actual or potential, are necessary to constitute a class which may be the subject of an act on the subject concerning which special acts are forbidden; such a class cannot be created by statute, however general, which takes as a class characteristic, to designate the members of a class, peculiarities of a single individual; 42 W. Va. 587. An act forbidding a sale of stocks of bonds and provisions, cotton, etc., on margin without delivering the property is not a special act; 194 Mo. 512; but an act prohibiting book-making and pool-selling excepting on a race course is a special act; 136 Mo. 400; and so is an act permitting a limited divorce instead of an absolute divorce when asked by a person holding conscientious scruples against absolute divorce; 36 L. R. A. (N. J.) 221.

When there is a general act for the incorporation of companies with the right of amendment reserved to the state, any amendment thereto must affect all corporations incorporated under the act; 83 Fed. Rep. 1; and where it is limited to cities of a certain size whereby it can be applicable only to a certain city, it is special legislation and void; *id.*

Classification. Under modern constitutions which prohibit special legislation, it has been found necessary to permit of the classification of certain subjects of legislation, chiefly in relation to municipalities or what may be termed home rule.

Mr. Binney, in the work quoted, gives five rules as, in his opinion, supported by judicial decisions.

1. All classification must be based upon substantial distinctions which make one class really different from another.

2. The classification adopted in any law must be germane to the purpose of the law.

3. Classification must not be based upon existing circumstances only, or those of limited duration, except where the object of the law is itself a temporary one.

4. To whatever class a law may apply, it must apply equally to each member thereof, except only where its application is affected by the existence of prior unpealed local or special laws.

5. If the classification be valid, the number of members in a class is wholly immaterial.

While the classification of municipalities is permitted, it is held that not more than three classes can lawfully be made in cities in Pennsylvania; 122 Pa. 266; and that a classification, which is in effect legislation for certain cities to the exclusion of others which are really of the same class, is invalid; 96 Pa. 422.

A classification act may furnish a precedent for the legislature in future cases, but cannot control its action. The constitutionality of each law which establishes or adopts a classification must be judged of separately, and the mere fact that a classification has constitutionally been employed in one case does not bind the legislature to employ it again, even in a similar case; 25 Atl. Rep. (N. J.) 269.

Wheeler v. Philadelphia, 77 Pa. 338 (1875), is an early and leading case on

classification. It holds that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special; that the necessity for classification is recognized in the constitution by the creation of courts on a basis of population and that classification is incident to legislation and necessary to the promotion of the public welfare; that the question is not whether it is authorized but whether it is expressly prohibited in the constitution. It further holds that, for the purpose of taxation, real estate may be classified; as into timber lands, mineral lands, farm lands, etc., and that the act of 1874, which classifies cities according to their population, is constitutional.

Where a federal statute has been taken from a state statute the settled construction of the latter before the enactment of the former must be considered as having been adopted by congress; 171 U. S.—not reported. So also of the Interstate Commerce Act, so far as it is based on English acts; 145 U. S. 263.

In a statute the words "it shall be lawful" are usually only permissive; they confer a faculty or power; but there may be something in the act imposing a duty to exercise such power, in which case the words become obligatory; 5 App. Cas. 222.

As to referring proposed legislation to a vote of the citizens, and as to the initiation of legislation by citizens, see REFERENDUM.

See CONSTRUCTION; INTERPRETATION; EX POST FACTO LAWS; CONSTITUTIONAL; CONSTITUTION; FOREIGN LAW; PUNCTUATION; PROVISIO; OBSOLETE; REPEAL; REVISED STATUTES; STATUTES AT LARGE; RETROSPECTIVE LEGISLATION; PROMULGATION; PROCLAMATION; DIRECTORY; IMPERATIVE; VALIDITY OF AUTHORITY.

See 3 Binney for a list of British statutes in force in Pennsylvania. See Sanderson, *Validity of Statutes in Pennsylvania*; Endlich, *Interp. of Statutes*.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

The statute of frauds "is a weapon of defence, not of offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intentions of the parties." Lord Selborne, C., in L. R. 8 Ch. 351.

STATUTE OF LABORERS. See LABORERS, STATUTES OF.

STATUTE LAW. Used as a general term, is synonymous with legislation, and refers to positive rules of conduct which are intended to be precisely worded and established by legislative bodies, or bodies or persons having legislative authority. Hicks, *Mater. & Meth. Leg. Res.* 51. Every word, phrase and sentence contained in a legislative enactment is supposed to have been chosen to express the exact intention of the law-maker. A statute, however, is rarely if ever complete in itself. It forms part of the whole mass of the law, both other statutes and case law (*q. v.*), and usually regulates part of a wider subject already governed by other laws with which it must not conflict. *Id.* See CASE LAW; COMMON LAW.

STATUTE OF LIMITATIONS. See LIMITATIONS.

STATUTE MERCHANT. A security entered before the Mayor of London, or some chief warden of a city, in pursuance of 13 Ed. I. stat. 3, c. 1, whereby the lands of the debtor are conveyed to the creditor till out of the rents and profits of them his debt may be satisfied. 2 Bla. Com. 160.

STATUTE STAPLE. The statute of the staple, 27 Ed. III. stat. 2, confined the sale of all commodities to be exported to certain towns in England, called *estaple* or *staple*, where foreigners might resort. It authorized a security for money, commonly called statute staple, to be taken by traders for the benefit of commerce; the mayor of the place is entitled to take recognizance of a debt in proper

form, which had the effect to convey the lands of the debtor to the creditor till out of the rents and profits of them he should be satisfied. 2 Bla. Com. 160; 2 Rolle, Abr. 446; Bac. Abr. *Execution* (B. 1); Co. 4th Inst. 238.

STATUTES AT LARGE. Statutes in full or at length as originally enacted, in distinction from abridgments, compilations, and revisions. In particular, the title of the publication containing, chiefly, the acts of congress—the United States, *Statutes at Large*. Anderson, L. Dict.

If there is any variance between an act of congress, as found in the printed volume of statutes, and the original, as enrolled and deposited with the secretary of state, the latter will prevail; 38 Pac. Rep. (Cal.) 973.

The United States *Statutes at Large* exhibit the legislation of the several Congresses from March 4, 1789, the day of the organization of the government and of the first meeting of the First Congress. Each volume after the eighth contains all matters in the nature of legislation ordained or enacted by the Congress or Congresses in session, or by the Administration in power, during the periods covered by the volumes respectively—general or public statutes, private acts, treaties with the Indian tribes and with foreign nations, postal, consular and other conventions, public proclamations by the President and by the heads of departments, Executive orders, resolutions by the Senate and House, etc. Anderson. See PAMPHLET LAWS.

STATUTI (Lat.). In Roman Law. Those advocates whose names were inscribed in the registers of matriculation, and formed a part of the college of advocates. The number of advocates of this class was limited. They were distinguished from the supernumeraries, from the time of Constantine to Justinian. See Calvinus, Lex.

STATUTORY OBLIGATION. An obligation arising under a statute. See OBLIGATION.

It may be either to pay money or to perform certain acts. The obligation does not usually attach until the happening of some event or the doing of some act by the party obliged. R. & L. Dict. See OBLIGATION.

STATUTORY STAPLE. An ancient writ that lay to take the body of a person and seize the lands and goods of one who had forfeited a bond called statute staple. Reg. Orig. 151.

STATUTUM DE MERCATORIBUS. The statute of Acton Burnell (q. v.).

STATUTUM DE NOVA CUS TUMA. See CARTA MERCATORIA.

STATUTUM HIBERNIÆ DE COHEREDIBUS. The third public act in the statute book. It appears to be an instruction given by the king to his justices in Ireland, directing them how to proceed in a certain point where they entertained doubt. 1 Reeve, Hist. Eng. L. 259.

STATUTUM SESSIONUM. The Statute Sessions. A meeting in every hundred of constables and householders, by custom, for the ordering of servants, and debating of differences between masters and servants, rating of wages, etc., 5 Eliz. c. 4.

STAY AND TRADE. Within the meaning of an insurance policy, covering a ship during her stay and trade at a place these words were held to mean during her stay there for the purpose of trade; a stay for a purpose unconnected with trade is a deviation. 42 L. J. Ex. 60. See DEVIATION.

STAY LAWS. Acts of the legislature prescribing a stay in certain cases, or a stay of foreclosure of mortgages, or closing the courts for a limited period, or otherwise suspending legal remedies. See STAY OF EXECUTION.

STAY OF EXECUTION. In Practice. A term during which no execution can issue on a judgment.

It is either conventional, when the parties agree that no execution shall issue for a certain period, or it is granted by law, usually on condition of entering bail or security for the money.

An execution issued before the expiration of the stay is irregular and will be set aside; and the plaintiff in such case may be liable to an action for damages. What is said above refers to civil cases.

In criminal cases, when a woman is capitally convicted and she is proved to be *enfeinte* there shall be a stay of execution till after her delivery. See PREGNANCY; JURY OF WOMEN.

A statute which authorizes stay of execution for an unreasonable and indefinite period, on judgments rendered on pre-existing contracts, is void; 41 Pa. 441; 31 Mo. 205; a law permitting a year's stay upon judgments where security is given has been held invalid; 6 Heisk. 93; s. c. 19 Am. Rep. 593. See Cooley, Const. Lim., 2d ed. 354, n.

STAYING PROCEEDINGS. The suspension of an action.

Proceedings are stayed absolutely or conditionally.

They are peremptorily stayed when the plaintiff is wholly incapacitated from suing; as, for example, when the plaintiff is not the holder, nor beneficially interested in a bill on which he has brought his action; 2 Cr. & M. 416; 3 Chitty, Pr. 628; or when the plaintiff admits in writing that he has no cause of action; 3 Chitty, Pr. 370, 630; or when an action is brought contrary to good faith; Tidd, Pr. 515, 529, 1184; 3 Chitty, Pr. 633.

Proceedings are sometimes stayed until some order of the court shall have been complied with; as, when the plaintiff resides in a foreign country or in another state, or is insolvent, and he has been ruled to give security for costs, the proceedings are stayed until such security shall be given; 3 Chitty, Pr. 633, 635; or until the payment of costs in a former action; 1 Chitty, Bail. 195.

STEALING. This term imports, *ex vi termini*, nearly the same as larceny; but in common parlance it does not always import a felony. 3 Wheel. Cr. Cas. 183.

In slander cases, it seems that the term stealing takes its complexion from the subject-matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject-matter; 12 Johns. 239; 3 Binn. 546. The word steal is held synonymous with theft. 9 Tex. App. 463. See 12 Tex. 450.

STEAMBOAT CHANNEL. Deepest part of the stream. 202 U. S. 49.

STEAMSHIP. A vessel, the principal motive power of which is steam and not sails. L. R. 7 Q. B. 569. See 32 Pa. 352. The owner of a steamboat is not an innkeeper so as to be liable for personal property stolen from a passenger. 118 Mass. 275. See SLEEPING-CAR; SHIP; VESSEL.

STEELBOW GOODS. Instruments of husbandry, cattle, corn, etc., delivered by a landlord to his tenant on condition that the like number of goods of like quality should be returned on expiration of the lease. Bell, Dict.; Stair, Inst. 285, § 81; Ersk. Inst. 2, 4, 2.

STELLIONATE. In Civil Law. A name given generally to all species of frauds committed in making contracts.

This word is said to be derived from the Latin *stellio*, a kind of lizard remarkable for its cunning and the change of its color, because those guilty of frauds used every art and cunning to conceal them. But more particularly it was the crime of a person who fraudulently assigned, sold, or engaged the thing which he had before assigned, sold, or engaged to another, unknown to the person with whom he was dealing. Dig. 47, 20, 3; Code 9, 34, 1; Merlin, Répert. l. a. Civ. Code, art. 2069; 1 Brown, Civ. Law 426. As a punishment those persons who granted double conveyances were declared infamous and their lives and goods were at the mercy

of the king. Ersk. Prin. 441.

STELLIONATUS (Lat. from *stellio*, a lizard). A general term used to denote all kinds of fraud and imposition which were not designated by any more special appellation. Burrill; Dig. 47, 20. The mortgaging or selling another's property as one's own, or the mortgaging one's property a second time without notice of the first mortgage, were acts of *stellionatus*, or *stellionate* (q. v.), as it is rendered in Scotch law. *Id.*

STENOGRAPHER. One who writes in short-hand, by using abbreviations or characters for words.

He does not come within the common-law definition of the word "clerk." 25 Neb. 662.

The depositions of witnesses taken in short-hand, and transcribed, will be suppressed, if not read to and signed by the witness, though the witness's subsequent attendance for the purpose could not be procured; 9 Fed. Rep. 754; but see *contra*, 79 Ill. 576, where it is held that the transcript of evidence taken in short-hand is admissible, where the stenographer testifies that he transcribed the testimony, and that the transcript is correct; that the witnesses were sworn and testified as therein stated. See also 43 Mich. 257. Where it is sought to impeach a witness's testimony by proving his testimony at a former trial, the stenographer is not the only witness who may be called, but any one who heard the testimony may be; 65 Me. 466; 35 S. C. 587.

A stenographic report of the testimony of an absent witness, at a former trial, may be admitted if complete and correct; 80 Fed. Rep. 361; or a copy of testimony compared with a stenographic report thereof, by a person who was present at the trial and remembers the testimony as given; 21 So. Rep. (Ala.) 328.

In Pennsylvania, where a stenographer is appointed under the provisions of an act of legislature authorizing the appointment of stenographers in the several courts of the commonwealth, the stenographer who actually takes the testimony must certify to the correctness of the transcript which he files, and the trial judge should order the transcript filed and certify to its correctness; 180 Pa. 161.

The charges of a stenographer are not taxable for costs in a suit in equity; 7 Fed. Rep. 42; but the agreement of the parties may make them taxable costs, though not so by statute; 1 Bingh. 345. See 10 Wash. L. Rep. 7; 61 Ill. 271; 44 Mich. 438.

Compensation for testimony taken before a referee is the subject of contract, as a stenographer is not then an officer of the court; 41 N. Y. S. 583; and the expense of a transcript of a stenographer's notes, for convenience, instead of use on the trial, is not taxable as costs; 8 U. S. App. 129.

An association of stenographers, whose leading object is to control the prices charged by its members, is an illegal combination, and its rules will not be enforced; 140 Ill. 69.

STEP-DAUGHTER. The daughter of one's wife by a former husband, or of one's husband by a former wife.

STEP-FATHER. The husband of one's mother by virtue of a marriage subsequent to that of which the person spoken of is the offspring.

STEP-MOTHER. The wife of one's father by virtue of a marriage subsequent to that of which the person spoken of is the offspring.

STEP-SON. The son of one's wife by a former husband, or of one's husband by a former wife.

STERE. A French measure of solidity, used in measuring wood. It is a cubic metre. See MEASURE.

STERILITY. Barrenness; incapacity to produce a child. It is curable and incurable; when of the latter kind at the time of the marriage, and arising from

impotency, it is a good cause for dissolving a marriage. 1 Foderé, *Méd. Lég.* § 251. See **IMPOTENCY**.

STERLING. Current money of Great Britain, but anciently a small coin worth about one penny, and so called, as some suppose, because it was stamped with the figure of a small star, or, as others suppose, because it was first stamped in England in the reign of king John by merchants from Germany called Esterlings. Pounds sterling originally signified so many pounds in weight of these coins. Thus, we find in Matthew Paris, A. D. 1242, the expression *Acceptit a rege pro stipendio tredecim libras esterlingorum*. The secondary or derived sense is a certain value in current money, whether in coins or other currency. Lowndes 14; Watts, Gloss. *Sterling*.

STET PROCESSUS (Lat.). In Practice. An order made, upon proper cause shown, that the process remain stationary. As, where a defendant having become insolvent would, by moving judgment in the case of nonsuit, compel a plaintiff to proceed, the court will, on an affidavit of the fact of insolvency, award a *stet processus*. See 7 Taunt. 180; 1 Chitty, Bail. 738; 10 Wentw. Pl. 43.

STEVEDORE. A person employed in loading and unloading vessels. Dunlap, Adm. Pract. 98. See **LIENS**.

STEWARD. Formerly an officer of disputes, namely, a keeper of the courts. Co. Litt. 61. See **COURT OF MARSHALSEA**.

Formerly was a term used to denote an officer of the English Crwn, or of a feudal lord, who acted as keeper of a Court of justice; as, for example, the Lord High Steward; and there is still the Lord Steward of the Royal Household. At the present day, the only other important example of the office occurs in the case of manors, for every manor has a steward, appointed by the lord, who theoretically acts as judge of the Customary Court Baron and the Court Leet, and as registrar of the freeholders' Court Baron. Practically, however, his duties are rather ministerial than judicial, for his chief function is to receive surrenders and grant admittances to the copyhold lands of the manor, and keep the Court roll. Byrne.

Generally, a man appointed in the place or stead of another. It usually denotes a principal officer within his jurisdiction. Abbott.

STEWARD OF A MANOR. An officer who transacts all the legal and other business connected with the estate, and takes care of the court rolls. In royal manors he is appointed by patent. See 10 George IV. c. 40, § 14.

STEWARD OF ALL ENGLAND. In Old English Law. An officer who was invested with various powers; among others, to preside on the trial of peers.

STEWARD OF THE HOUSEHOLD. See **MARSHALSEA**.

STEW. Places formerly permitted in England to women of professed lewdness, who for hire would prostitute their bodies to all comers.

These places were so called because the dissolute persons who visited them prepared themselves by bathing,—the word *stews* being derived from the old French *estuves*, stove, or hot bath. Co. 3d Inst. 205.

STILL BEER. "Still beer," made of corn meal and molasses, is a primary mixture ordinarily for the production of a secondary product, like whisky. But still beer is fermented liquor, and may be used as a beverage, and in fact is sometimes so used by "moonshiners" while working around an illicit still. Thorpe, National and State Prohibition 157; 24 Ga. App. 239.

STILLICIDIUM (Lat.). In Civil Law. The rain-water that falls from the roof or eaves of a house by scattered drops. When it is gathered into a spout, it is

is called *flumen*. See **SERVITUS**; Inst. 3. 2. 1; Dig. 8. 2. 2.

STINT. The proportionable part of a man's cattle which he may keep upon the common. The general rule is that the commoner shall not turn more cattle upon the common than are sufficient to manure and stock the land to which his right of common is annexed. There may be such a thing as common without stint or number; but this is seldom granted, and a grantee cannot grant it over. 3 Bla. Com. 239; 1 Ld. Raym. 407.

STIPEND. A provision made for the support of the clergy. Salary; settled pay. In a bequest of £100 for masses for the repose of the testator's soul, at a stipend of five shillings each, it was held to mean price and not to involve any attempt to create a perpetuity; 19 L. R. Q. B. 177.

STIPENDIARY ESTATES. Estates granted in return for services, generally of a military kind. 1 Steph. Comm. 174.

STIPENDIARY MAGISTRATES. Paid magistrates, appointed in London and some other municipal boroughs with the authority and jurisdiction of justices of the peace. 21 & 22 Vict. c. 73.

STIPULATED DAMAGE. See **Liquidated Damage**.

STIPULATIO (Lat.). In Roman Law. A contract made in the following manner: the person to whom the promise was to be made proposed a question to him from whom it was to proceed, fully expressing the nature and extent of the engagement; and, the question so proposed being answered in the affirmative, the obligation was complete. No consideration was required.

STIPULATIO AQUILIANA. In Civil Law. A particular application of the *stipulatio*, which was used to collect together into one verbal contract all the liabilities of every kind and quality of the debtor, with a view to their being released or discharged by an *acceptilatio*, that mode of discharge being applicable only to the verbal contract. Brown.

STIPULATION. A material article in an agreement.

The term appears to have derived its meaning from the use of *stipulatio* above given; though it is applied more correctly and more conformably to its original meaning to denote the insisting upon and requiring any particular engagement. 2 Pothier, Obl., Evans ed. 19.

In Practice. An agreement between counsel respecting business before a court. Anderson, L. Dict.

A case may be reversed on stipulation; 181 U. S. 428; 123 id. 619; 124 id. 369.

In Admiralty Practice. A recognition of certain persons (called in the old law *fide jussores*) in the nature of bail for the appearance of a defendant. 3 Bla. Com. 108.

These stipulations are of three sorts: namely, *judicatum solvi*, by which the party is absolutely bound to pay such sum as may be adjudged by the court; *de judicio sisti*, by which he is bound to appear from time to time during the pendency of the suit, and to abide the sentence; *de ratio*, or *de rato*, by which he engages to ratify the acts of his proctor: this stipulation is not usual in the admiralty courts of the United States.

The securities are taken in the following manner: namely, *cautio fide jussoria*, by sureties; *pignoratitia*, by deposit; *juratoria*, by oath: this security is given when the party is too poor to find sureties, at the discretion of the court; *nuda promissoria*, by bare promise: this security is unknown in the admiralty courts of the United States. Dunl. Adm. Pr. 150.

STIPULATOR. In Roman law, the person who asked the question in the contract of stipulation, and to whom the promise was made. Hunter's Rom. L. 2nd ed., 460. See **STIPULATIO**; **ADSTIPULATOR**;

PROMITTOR.

STIRPES (Lat.). Descents. The root-stem, or stock of a tree. Figuratively, it signifies in law that person from whom a family is descended, and also the kindred or family.

STOCK. In Mercantile Law. The capital of a merchant, tradesman, or other person, including his merchandise, money, and credits. The goods and wares he has for sale and traffic.

In Corporation Law. A right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company. Ang. & A. Corp. § 557.

The capital stock of a corporation is that money or property which is put into a fund by those who, by subscription therefor, become members of the corporate body. 75 N. Y. 211. The phrase *capital stock* has been objected to, as the two words have separate meanings, *capital* being the sum subscribed and paid into the company, and *stock* being the thing which the subscriber receives for what he pays in; Dos Passos, St. Brokers 579. See 23 N. Y. 192. The interest which each person has in the corporation is termed a share, which is the right to participate in the profits of the corporation, and, upon its dissolution, in the division of its assets. See 75 N. Y. 211. "Capital stock" has been held to mean the amount contributed by the shareholders, and not the property of the company; 23 N. J. L. 195.

Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors. Cook, St. & Stockh. § 9. It is to be clearly distinguished from the amount of property possessed by the corporation; *id.*

The property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed. 21 Wall. 284. See definitions in 126 N. Y. 433; 30 Ark. 693; 10 Mo. App. 146. Capital stock is a different thing from shares of stock; the latter are evidences of ownership; 24 Atl. Rep. (Pa.) 111. Stock is commonly used to mean shares of stock, and it has been so held in a tax statute; 23 Atl. Rep. (Conn.) 9.

The capital stock of a corporation differs widely in legal import from the aggregate shares into which it is divided by its charter (95 U. S. 636; 126 N. Y. 437); while the former includes only the fund of money or other property derived by it from the sale or exchange of its shares of stock, the latter represents the totality of the corporate assets and property; 84 Fed. Rep. 396.

A share of stock is a right which its owner has in the management, profits, and ultimate assets of the corporation. Cook, St. & Stockh. § 12. So, also, 92 N. Y. 592; 3 Wall. 585. It is the right to participate in stockholders' meetings, and in the profits of the business, and to require that the corporate property shall not be diverted from the original purposes; 2 Woods 331.

The number of shares depends upon the statutory regulations, or in their absence the agreement of the parties forming the corporation; 45 Me. 524. Shares may be arranged in classes, one class being preferred to another in the distribution of profits; 78 N. Y. 159. Voting may be restricted to a certain class.

The ownership of shares is usually attested by a certificate issued under the corporate seal; and when a new transfer is effected, such certificate is surrendered and cancelled, and a new one is issued to the transferee. A certificate need not be under seal; 103 U. S. 409. But a person may be the owner of shares in a corporation without holding such certificate; 103 Mass. 261; see 64 Cal. 117; 46 Mo. 248; and, strictly speaking, a company need not issue any certificates or muniments of title, if not required to do so by law or its charter; 24 Me. 256. The presence of a

party's name on the stock books of the company is evidence of his ownership of shares; 73 Pa. 59. The possession of a corporate certificate of stock, duly issued, is a continuing affirmation of ownership of the stock by the person named therein; 11 Wall. 369; which generally creates an estoppel against the company in favor of the holder; 57 N. Y. 616; though in England it is said to be merely a solemn affirmation that the specified amount of stock stands on the stock books in the name of the person specified in the certificate; L. R. 7 H. L. 496. Every stockholder is entitled to a certificate of his shares; 105 U. S. 217.

The stock of a national bank is said to be a species of chose in action, or an equitable interest which the shareholder possesses, and which he can enforce against the corporation. See 53 N. Y. 161, 237. "If a share in a bank is not a chose in action, it is in the nature of a chose in action, and is personal property;" per Shaw, C. J., in 12 Metc. 421. Shares are not, strictly speaking, chattels; they bear a greater resemblance to choses in action; or, in other words, they are merely evidence of property; Ang. & A. Corp. § 560. They are now universally considered to be personal property; Ang. & A. Corp. § 557; Moraw. Priv. Corp. 119, 200; though in some earlier cases it was held otherwise. See Cook, St. & Stockh. § 12, n. They are not a debt; Dos Passos, St. Brokers 590. Shares in a corporation are said to be incorporeal personal property; 16 la. 173, per Dillon, J. In Louisiana, stock is property and not a credit; 10 Fed. Rep. 330.

It is settled in England that shares in a joint-stock company are not goods, wares and merchandise within the statute of frauds; 11 A. & E. 205; it has been otherwise decided in Massachusetts; 20 Pick. 9, uniformly followed in this country; Cook, St. & Stockh. § 339.

Stock is issued for money, in payment for property or labor, or as a stock dividend. It is established in England that stock may be issued for property, and such was the common law; 106 Ill. 43. See 91 U. S. 60. The subject is usually regulated by statute in this country. Stock can be issued by way of a stock dividend, which "is lawful when an amount of money or property equal in value to the stock distributed as a dividend has been accumulated and is permanently added to the capital stock of the corporation." Cook, St. & Stockh. § 336.

It is generally held that stock cannot be issued at a discount, and made full paid; 139 U. S. 429; [1897] A. C. 299; 38 Ch. Div. 415; 2 De G. F. & J. 295; 11 Manitoba 629; but it has been held that an agreement with the company that the holders should never be called upon to pay any further assessment upon stock is valid as between the parties; 105 U. S. 143. See 86 N. Y. 384; L. R. 14 Ch. Div. 394.

Directors issued stock at a discount; its market price went above par. It was held that the issue was unlawful and that the directors were liable, but only for the difference between the price at which they issued it and its par value; [1894] A. C. 654.

Where stock is issued for property which is overvalued, the transaction may be set aside for fraud; 3 Dill. 45; 59 Md. 1; 14 Fed. Rep. 12. The corporation, after issuing its stock as full paid cannot complain; 105 U. S. 143; unless the entire transaction is such that equity will rescind it for actual fraud. See, as to overvaluing property, 7 Am. & E. Corp. Cas. 652; 92 Ala. 407.

It has been held that a railroad company in need of funds may settle with a contractor by issuing stock to him as full-paid at twenty cents on the dollar, and that creditors of the company could not afterwards collect the difference between that and par; 139 U. S. 96. This decision has been much criticised. The same court said subsequently, in 144 U. S. 104, that "the trust arising in favor of creditors by subscription to the stock of a corporation can be defeated by a stipulated payment by a subscription nor by any device of actual payment in good faith."

While any settlement might be good between the corporation and the stockholders it is unavailing against creditors. As against creditors, a corporation cannot give away its stock or distribute it among shareholders, without receiving a fair equivalent therefor; 139 U. S. 417.

A contract by which directors of a street-railway company, acting in the name of a third person, are to construct the road, and divide between them the stock and bonds not required therefor, is fraudulent, and bonds issued pursuant thereto are void; 82 Fed. Rep. 355.

A corporation has no power, in the absence of statutory authority, to increase or diminish its capital stock; 105 U. S. 148; 6 Pick. 23; 73 Ala. 325; 37 Fed. Rep. 508.

As to overissue of corporation shares, see 36 Cent. Law J. 52; OVERISSUE.

Transfer. A certificate of stock is transferable on the books of the company by the owner in person or by his attorney under written authority, which is commonly executed in blank and which may be filled up by the transferee; Ang. & A. Corp. § 564; Beach, Priv. Corp. 648; 84 N. Y. 30; 50 Pa. 67. A transfer in blank is deemed sufficient in some jurisdictions to pass the legal title to the stock subject to the claims of the company upon the registered stockholders; 2 Ames, B. & N. 784; 76 N. Y. 365; 10 Ala. 82; in other cases such a transfer has been held to give the holder merely an equitable interest; 3 How. 483; 5 Biss. 181. Prof. Ames is of opinion that the true view is that such a transfer does not pass the legal title, but that it passes the equitable interest, coupled with an irrevocable power of attorney to acquire the legal title; 2 Ames, B. & N. 784. This irrevocable power may, in some cases, by the doctrine of estoppel, be acquired by the delivery of the certificate from one who has no such power himself; 48 Cal. 99; 14 Nev. 362; 86 Pa. 80; 46 N. Y. 325. A seal is not necessary; 10 Mass. 476; though usually employed.

Shares of stock are non-negotiable instruments, but through the doctrine of estoppel, stock certificates, with a power to transfer them, can be dealt in with nearly the same immunity as bills and notes; Dos Passos, Stock Brokers 596; and the same writer is of opinion that the time has come for the court to receive evidence of the general usage of the business world, so as to raise stock certificates to the dignity of negotiable instruments; *id.* 597; but see 2 W. N. C. (Pa.) 322, where evidence of such a usage was rejected; see, also, 38 Pa. 98. Professor Ames says (2 Bills & Notes 784): "Whether the custom of merchants will ever lead the courts to give those instruments (certificates of stock) the quality of negotiability may be an open question; but that they have not done so is clear." See 28 N. Y. 600; 86 Pa. 83; 14 Am. L. Reg. n. S. 163, n. In 11 Wall. 369, the court said that certificates, "although neither in form or character negotiable paper, approximate it as nearly as practicable."

In case of the sale of the stock this power of attorney becomes irrevocable; 14 Md. 299; but if such a power of attorney is forged or is made by a person not competent to make it, the corporation is liable for allowing the transfer; 14 Md. 299. See 86 Pa. 80; 123 Mass. 110. A company may refuse to allow a transfer until satisfied of the party's right to make it; L. R. 9 Eq. 181; 52 Pa. 233; 5 S. C. 379.

A company is bound to require the surrender of the old certificate before allowing a transfer, and may refuse to act till it is surrendered; 21 Ohio St. 221; where a certificate cannot be found the company may refuse a new one or to make a transfer without proper indemnity, unless it be a clear case of loss; 53 Tex. 269.

In a joint stock corporation, each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, to introduce others in his stead; 131 U. S. 246.

In a wrongful refusal to transfer the party may apply for a *mandamus* to make the transfer, or sue in equity for a decree of transfer, or for damages if a transfer is impossible, or bring an action at law for damages.

It is said that the rules for the protection of *bona fide* purchasers are based on estoppel, which extends not only against previous owners, but against the corporation itself. It is said that the doctrine is being extended and that it may in time render certificates of stock more negotiable than negotiable instruments themselves; Cook, St. & Stockh. § 416; but it is also held that, as a certificate of stock is not negotiable either in form or character, whoever takes it, does so subject to its equities and burdens like every non-negotiable paper; and though ignorant of such equities and burdens, his ignorance does not enable him to hold it discharged therefrom; 134 U. S. 401.

English courts will not follow the American rule as to the negotiability of certificates transferred in blank, and a purchaser is not protected till the transfer is made on the books of the company; L. R. 22 Ch. D. 890; even after deposit of the certificate with the company for transfer, and its acceptance by the company the owner may reclaim the stock; 64 L. T. Rep. 456.

Where the registered owner of shares delivered his certificate to a broker with a blank transfer signed by him, and the broker improperly deposited the certificate and blank transfer with a third party as security for his debt; and the third party filled up the blank transfer and had the stock transferred on the books of the company, which latter had no notice of any irregularity, it was held that such third party had acquired no title to the shares as against the owner; 64 L. J. Ch. 473.

A business corporation cannot make it a condition of transferring stock that the holder shall first have offered it to the directors, and shall have paid all its indebtedness to the corporation; 118 Mo. 447.

The unregistered pledgee of stock has priority over a subsequent attaching creditor; 43 S. W. Rep. (Tex.) 896; the same rule obtains in New York, Pennsylvania, New Jersey, South Carolina, Kentucky, Louisiana, Minnesota, and most other states except Connecticut; and in the federal courts, see Cook, St. & Stockh. § 487; 5 Fed. Rep. 369; 15 *id.* 494; but see 5 Blatch. 59.

Stock certificates may be attached in a state other than the home state of the company; 79 Fed. Rep. 228.

Preferred stock entitles the holder to a priority in the dividends or earnings, over common stock. **Guaranteed stock** is the same thing; 3 R. I. 310.

A corporation may issue preferred stock, in the absence of any prohibition; 86 Fed. Rep. 290; [1897] 1 Ch. 861; 81 Mich. 76; 78 N. Y. 159; provision therefore is often contained in the by-laws. If there is no provision in the charter or the law, unanimous consent of stockholders is required; Lind. Comp. 896; 31 Mich. 76. After a company has been organized, and all or a part of the stock issued, preferred stock cannot be issued against the objection of minority holders of common stock; 4 De G. J. & S. 672; 78 N. Y. 159; Cook, St. & Stockh. § 268; its issue will be enjoined in such case; 33 L. J. Ch. 711. But see 2 De G. & S., where an injunction was refused at the suit of five dissenting stockholders, the court declining, however, to declare the issue legal. An objecting stockholder must seek relief promptly; 78 N. Y. 159; 13 Fed. Rep. 152. Legislative power to issue preferred stock may be granted subsequently to the organization of the corporation; 10 Bush 69; 35 Vt. 536. The terms or provision under which preferred stock is issued are matters of contract, to be gathered from the charter, by-laws, votes of stockholders, or directors, etc.; 17 Wall. 96; L. R. 20 Eq. 556; 134 N. Y. 197; 78 Va. 501.

There is no condition implied in a mem-

orandum of association of a company that all shareholders are to be on an equality and a company whose memorandum and original articles do not authorize the issue of preference shares, can alter its articles so as to do so; [1897] 1 Ch. 361.

The holder of preferred stock is not a creditor of the corporation; 23 Wall. 136; 78 Fed. Rep. 624; 77 Me. 445; 24 N. E. Rep. (Ohio) 496; 61 L. J. Rep. 621; creditors have a priority over preferred stockholders; 108 U. S. 389; 55 Vt. 110. Preferred stock cannot be given a lien on the property; 1 Ohio 321. But it seems to have been held that a mortgage to secure preferred stock is valid. See 78 Va. 501; 24 N. E. Rep. (Ohio) 486.

Preferred stockholders are entitled to dividends only from net earnings; 31 Mich. 76; 108 U. S. 389; Moraw. Pr. Corp. 457; an engagement to pay dividends when not earned, or out of capital, is void; L. R. 22 Ch. D. 349; 63 Pa. 136; though they may be paid out of gross earnings, if the statute so directs; 78 Va. 501.

But dividends may be paid though the company have a floating debt; 79 Me. 461; but see 55 Vt. 110. The directors may ordinarily exercise a reasonable discretion as to declaring dividends, even though there be net earnings applicable thereto; 119 U. S. 296; but if they act oppressively, equity will interfere; 79 Me. 411.

Undeclared dividends (arrearages of net earnings) pass with the transfer of preferred stock to the transferee; Cook, St. & Stockh. § 275; 24 Hun 360.

In the absence of anything to the contrary, preferred stock shares equally with common, upon a dissolution of the corporation; L. R. 5 Eq. 510; otherwise, if provided by the charter, a statute, or by the contract; L. R. 20 Eq. 59. See 33 N. J. Eq. 181, where a preference was given by statute.

Where the memorandum of association provided that preference shares should receive "out of the net profits of each year" a dividend of ten per cent., it was held that they were not entitled to cumulative dividends; [1896] 2 Ch. 203.

In the absence of anything to the contrary, dividends will be taken to be cumulative; 77 Pa. 321; 84 N. Y. 157; L. R. 3 Eq. 356; 1 De G. & J. 606.

As to a peculiar issue of deferred stock, see 39 Leg. Int. 98 (S. C. Pa.). The term is sometimes used in contra-distinction to preferred stock to indicate stock which receives a dividend only after the payment of a dividend on preferred stock.

"Special stock" is issued by corporations in Massachusetts. It is limited to two-fifths of the actual capital; it is subject to redemption at a fixed time; the holder is entitled to a half-yearly dividend, as upon a debt; the holders are not liable for the debts of the company, and the general stockholders are liable for all the debts until the special stock is redeemed. See Cook, St. & Stockh. §§ 13, 276.

Interest bearing stock has been recognized by the courts. The contract to pay interest is lawful only when interest is to be paid out of net earnings; 40 Pa. 237; 89 Mass. 572; and in this view is merely a species of preferred stock.

See DIVIDENDS; VOTING TRUST; OVER-ISSUE; STOCKHOLDER; CORPORATIONS; FOUNDERS' SHARES; PARTNERS; CAPITAL STOCK; CERTIFICATES OF STOCK; DEBENTURE STOCK; FOR THE ACCOUNT, SELLING.

Bond Dividend. A dividend paid by a corporation in the form of bonds. 6 Fletch. Corp. § 3679. See DIVIDEND.

Bonus Stock. Stock that is issued gratuitously, but as an inducement, rather than as a gift. The term is sometimes applied to shares of stock that are actually donated, but strictly speaking, it designates stock offered as an inducement to the purchasers either of bonds or loan money or other stock of a corporation. 4 Thomp. Corp. 2nd ed. § 3444. See Bonus Bonds.

Common Stock. The stock generally issued by private corporations entitling its

owners to an equal pro rata division of profits, if there are any, and to a pro rata participation in the management of the corporation. 4 Thomp. Corp. 2nd ed., § 3426.

Convertible Stock. A type of preferred stock (*q. v.*) which is redeemable either in bonds, common stock, or in cash, at the option of the holder. 4 Thomp. Corp. 2nd ed., § 3433.

Deferred Stock. That upon which payment of dividends or interest is expressly postponed until the owners of some other class or classes of stocks have been paid. The opposite of preferred stock (*q. v.*). 4 Thomp. Corp. 2nd ed., § 3438.

Descents. A metaphorical expression which designates in the genealogy of a family the person from whom others are descended; those persons who have so descended are called branches. See 1 Roper, Leg. 103; 2 Belt. Suppl. Ves. 307; BRANCH; DESCENT; LINE; STIRPES.

Dividend Stock. Surplus shares of stock issued by a corporation as dividends, called stock dividends; legal if an amount of money or property equivalent in value to the full par value of the stock so issued has been accumulated and permanently added to the capital of the corporation; may be illegal if the issue is a mere inflation, with no corresponding values to answer to the stock distributed. 4 Thomp. Corp. 2nd ed., § 3437. See under this head, WATERED STOCK; see also DIVIDEND.

English Law. In reference to the investment of money, the term "stock" implies those sums of money contributed towards raising a fund whereby certain objects, as of trade and commerce, may be effected. It is also employed to denote the moneys advanced to government, which constitute a part of the national debt, whereupon a certain amount of interest is payable. Since the introduction of the system of borrowing upon interminable annuities, the meaning of the word "stock" has become gradually changed; and, instead of signifying the security upon which loans are advanced, it has for a long time signified the principal of the loans themselves. In this latter sense we speak of the sale, purchase, and transfer of stock; Moz. & W. See Cavanaugh, Money Securities.

Stock, in England, signifies a number of paid-up shares, so united that the owner may subdivide it and transfer it in large or small quantities, irrespective of the number and par value of the shares; Cook, St. & Stockh. § 12. Stock can only exist in the paid-up state; L. R. 7 H. L. 717.

Debenture stock "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being part of one large loan." Lindl. Companies 195. It has no connection with stock as commonly used in this country. See Simonson, Deb. & Deb. St.

Farm Stock. See FENCES; RUNNING AT LARGE.

Fictitious Stock. A type of watered stock (*q. v.*). Stock that is issued as fully paid when in fact only a small part of the par value has been paid; the difference between the stock actually paid for and the sum total of the stock issued. Void under constitutional and statutory provisions. 4 Thomp. Corp. 2nd ed., § 3445.

Founders' Stock. Common in England. Such stock as is issued to promoters or founders of a corporation, commonly used as compensation to the promoters, or to others who have given their names and influence in assisting in putting the corporation on its feet. 4 Thomp. Corp. 2nd ed., § 3440.

Analogous to our promotion stock (*q. v.*).

Full-Paid Stock. Stock, of any class, that is fully paid for. 4 Thomp. Corp. 2nd ed., § 3431.

Guaranteed Stock. Stock of one cor-

poration the dividends on which are guaranteed by another corporation.

Or it may be used simply as a synonymous term for preferred stock (*q. v.*). 4 Thomp. Corp. 2nd ed. § 3430.

Interest-Bearing Stock. Stock issued by a corporation under an agreement to pay a certain rate of interest thereon; closely related in meaning to preferred stock (*q. v.*), for which it might be said to be simply another name. 4 Thomp. Corp. 2nd ed. § 3429.

Issued and Outstanding Stock. That part of the capital stock of a corporation which has been bought and paid for, whether certificates have been issued or not, including both common and preferred stock, or any other class of stock that has been actually issued. 4 Thomp. Corp. 2nd ed. § 3434.

Overissued Stock. Such as is issued beyond the authorized amount, the certificates representing which are spurious and void, whether the overissue is a result of accident, mistake, or ignorance, or whether it is done with fraudulent intent. 4 Thomp. Corp. 2nd ed. § 3442.

Promotion Stock. Of a mining company, "such stock as is issued to those who may originally own the mining ground or valuable rights connected therewith, in consideration of their deeding the same to the mining company when the company is incorporated, or it may mean such stock as is issued to promoters or those in some way interested in the company, for incorporating the company, or for services rendered in launching or promoting the welfare of the company, such as advancing the fees for incorporating, attorney's fees, surveying, advertising, etc." 5 Fletch. Corp. § 3422; 32 Nev. 474.

Analogous to founders' stock (*q. v.*) of English corporations.

Scrip. A writing or certificate issued to shareholders of a corporation in lieu of a dividend, entitling them to money, stock, bonds, land, or other benefit at some future time, resorted to when a company has profits, but not in cash. 6 Fletch. Corp. § 3679. Called scrip dividend or scrip stock. 4 Thomp. Corp. 2nd ed. § 3439. See DIVIDEND.

Stock Dividend. See under this head, DIVIDEND STOCK; see also DIVIDEND.

Treasury Stock. That which is returned by the person to whom it is issued to the corporation as a gift to sell the same and put the proceeds in the corporate treasury as working capital. 5 Fletch. Corp. § 3421 n.; 156 Ill. App. 517.

Underwriting of Stock. Either a guaranty on the part of some responsible person to take stock that may not be subscribed by the public within a required time, or an agreement with the subscriber that under certain contingencies, or at the option of the subscriber, the underwriter will at some future time relieve him of a part or all the shares taken by him. 4 Thomp. Corp. 2nd ed. § 3441.

Unissued Stock. That part of the authorized capital stock of a corporation which has not been exchanged for a consideration, and in which no person has yet acquired property rights. It merely represents the right to admit new stockholders, and has no value in itself. It has no active stock rights, and is not an asset of a corporation. 4 Thomp. Corp. 2nd ed. § 3435.

Watered Stock. Stock that does not represent money or its equivalent actually received or secured to a corporation as capital. Issued in various ways, either gratuitously under an agreement that nothing at all shall be paid into the corporation therefor; or upon payment of, or an agreement to pay, less than its par value in money, or for cash at a discount; or in payment for property, labor or services, the value of which is less than the par value of the shares; or in the guise of a stock dividend (*q. v.*), supposed to represent surplus profits

or an increase in the value of property, when there are not sufficient profits or a sufficient increase in values to justify it. 5 Fletch. Corp. § 3517.

STOCK ASSOCIATION. A "joint-stock association" or "company" is a union of persons owning a capital stock devoted to a common purpose, under an organization analogous to that of a corporation; or, it is a body upon which some of the privileges or powers of a corporation have been conferred. A "joint-stock corporation" is a fully incorporated body, owning and managing a stock capital. Anderson.

A "joint-stock company" is a partnership with shares of capital transferable without the express consent of all the partners; that is no *delictus personarum* exists. *Id.*; 1 Pars. Cont. 121. See JOINT STOCK COMPANY.

STOCK-BROKER. See BROKER.

STOCK CERTIFICATE. See STOCK.

STOCK DIVIDEND. See STOCK; DIVIDEND.

STOCK EXCHANGE. A building or room in which stock-brokers meet to transact their business of purchasing or selling stocks.

A voluntary association (usually unincorporated) of persons who, for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their business. See Dos Passos, St. Brok. 14; Biddle, St. Brok. 40, 43; 2 Brewst. 571; 2 Daly 329. It is usually not a corporation, and in such case it is not a partnership. In the absence of a statute its real estate is held by all the members in the same way as partnership real estate. At common law, all the members had to be joined in a suit; Dicey, Parties, 2d Am. ed. 148, 266; 44 Conn. 259; though actions have been sustained against the exchange as a body; 2 Brewst. 571; 9 W. N. C. (Pa.) 441.

The members may make such reasonable regulations for the government of the body as they may think best; see 24 Barb. 570; such rules bind the members assenting to them; 4 Abb. Pr. n. s. 162; but their personal assent must appear; 16 N. Y. 112; it may be inferred from circumstances, as from their admissions and acting as members; L. R. 5 Eq. 63; 25 Mo. 593; and a member is bound by a by-law passed during his membership, whether he votes for it or not; 8 W. N. C. (Pa.) 461. It is said that the courts will prevent the interference with a member's rights in an unincorporated association where the latter is acting under a by-law which is unreasonable or contrary to public policy; Dos Passos, St. Brok. 36; 4 Abb. Pr. n. s. 162; 47 Wisc. 670; but see 80 Ill. 184.

Stock Exchange, seat in. Members of a stock exchange are entitled to what is known as a seat. Seats are held subject to the rules of the exchange. They are a species of incorporeal property—a personal, individual right to exercise a certain calling in a certain place, but without the attributes of descendibility or assignability, which are characteristic of other species of property; Dos Passos, St. Brok. 87; Biddle, St. Brok. 50. There has been much controversy as to whether a seat can be reached by an execution. A late writer considers the following as settled: "1. In the disposition of a seat or the proceeds thereof, the members of the exchange will be preferred to outside creditors. 2. The seat is not the subject of seizure and sale on attachment and execution. 3. The proceeds of the seat, in the hands of the exchange, are capable of being reached, after members' claims have been satisfied, to the same extent and in the same manner as any other money or property of a debtor. 4. A person owning a seat in the exchange can be compelled, by proceedings subsequent to execution, or under the direction of a receiver, to sell his seat to a person acceptable to the exchange, and devote the proceeds to the satisfaction of

his judgment debts." Dos Passos, St. Brok. 96. See 5 W. N. C. (Pa.) 36; 94 U. S. 525; 20 Alb. L. J. 414; 9 Reporter 305; 78 Cal. 351. In 143 U. S. 1, it was held that a seat in a stock exchange is property, and passes to assignees in bankruptcy subject to the rules of the stock board. See 105 U. S. 126; 89 N. Y. 328; 109 id. 593; 110 Ill. 146.

Stock exchange rules usually provide that seats are liable first to pay the members' debts to a fellow-member, or a firm of which the latter is a member; and also for arbitration committees to settle differences between members; 180 Pa. 289.

A regular register of all the transactions and questions arising between the members are generally decided by an arbitration committee. The official record of sales is the best evidence of the price of any stock on any particular day. The stocks dealt in at the sessions of the board are those which are placed on the list by a regular vote of the association; and when it is proposed to add a stock to the list, a committee is appointed to examine into the matter, and the board is generally guided by the report of such committee.

See Brodhurst, Law & Pr. of Stock Exchange (London).

STOCK INSURANCE COMPANIES. See MUTUAL INSURANCE COMPANY.

STOCK-JOBBER. A dealer in stock; one who buys and sells stock on his own account on speculation.

According to English writers, the members of the stock exchange are called "jobbers" and "brokers." The jobber is the dealer, who buys and sells at the market prices, and acts as an intermediary between the broker who buys and the broker who sells. The broker, on behalf of his principal, deals with the jobber. Abbott. See BROKER.

STOCK NOTES. This term has no technical meaning and may as well apply to a note given on the sale of stock which the bank had purchased or taken in the payment of doubtful debts as to a note given on account of an original subscription to stock. 12 Ill. 402.

STOCK ORDER. The order in chancery to prevent drawing out a fund in court to the prejudice of an assignee or lienholder. See STOP ORDER.

STOCK YARDS. A stock yard is primarily an inclosure in which cattle are temporarily confined for the purpose of either sale or shipment. The immense business carried on in the great stock yards of the United States is of recent growth, and the law relating thereto is still in rather a crude and formative state. 26 Am. & Eng. Encyc. 2nd ed., 1074; 43 N. J. Eq. 71. Some of the earlier cases were based upon the assumption that there was a close resemblance between a stock yard and railroad or canal company in their character as common carriers, both in respect of the powers which each might exercise and the duties which they were bound to perform for the public. But later cases have denied the existence of any such resemblance and have considered the legal principles commonly applied to warehousemen, rather than those governing common carriers, as applicable to the business done by stock yards. *Id.*; 43 N. J. Eq. 71. It has been held that the fact that the business of a given stock yard has become so great as to influence the trade of a large section of country does not make it a public market or impress it with a public use, in the absence of a declaration by the legislature that it is of such public character. *Id.*; 143 Ill. 210.

Because of the immense proportions to which the business has attained in some of the larger cities of the United States and because of the very extensive area of country affected thereby, attempts have been made to bring stock yards within the purview of the acts regulating commerce between the states. But it has been held that the fact that a stock yard is located in two

adjoining states and that cattle are herded on both sides of the state line and are driven to and fro across the line does not make the business of such stock yard interstate commerce. *Id.*; 171 U. S. 573; and that a live-stock exchange, the business of whose members is to receive consignments of cattle and other live stock from owners in various states and territories, is not engaged in interstate commerce merely because the cattle traded in come from several states into the state where the exchange does business. *Id.* p. 1075.

STOCKHOLDER. One who has property interests in the assets of a corporation and who is entitled to take part in its control and receive its dividends. 67 Fed. Rep. 816. The word includes all members having a direct financial interest in the business of the corporation with power to participate in the profits and in the conduct of its affairs, though they hold no shares; 52 Mo. App. 194. The government may be a stockholder, and when it assumes this relation, it divests itself to that extent of its sovereign character; the same is true of a state; Field, Corp. § 52; and of a municipal corporation, if it has legislative power; *id.* At common law the members of a corporation are not liable for the debts of a corporation; 10 Wall. 575; 24 Cal. 540; Thomp. Liab. of Stockh. § 4; nor liable on their subscriptions, it is said, until the full capital stock is subscribed; 6 Wash. 124. After shares are legally full paid, no further payments can be required; 63 Mass. 192; 24 Cal. 540; unless provided by statute, as is done to a certain extent in some states. The holders of full-paid stock in an insolvent national bank are liable to creditors for a further assessment to the extent of the par value of the stock.

The legislature cannot, after the purchase of stock, impose any additional liability unless it has reserved the power to alter the charter. Statutes have been passed in many states by which stockholders are liable under certain circumstances. The statutes are too various to be treated here. They may be liable in equity when they have assets of the corporation which they ought not to retain. So they may be liable when they have subscribed to the capital stock of the corporation which they have not paid in. The capital stock in such cases is usually said to be a trust fund for the benefit of creditors; 91 U. S. 56. The cases in which this doctrine has most frequently been applied have arisen out of suits brought to compel stockholders to pay the amounts unpaid upon their stock subscriptions.

The original holder of stock in a corporation is liable for unpaid instalments of stock without an express promise to pay, and a contract between him and the corporation or its agent limiting his liability is void as to creditors for the assignee in bankruptcy of the corporation. Representations made to the stockholder by an agent of the corporation as the non-assessability of stock beyond a certain per cent. of its par value, constitute no defence to an action against the stockholder to enforce payment of the amount subscribed. The legal effect of the word "non-assessable" in the certificate is at most a stipulation against further assessments after the face value of the stock is paid; 91 U. S. 45. The transferee of stock, when the transfer was duly registered, is liable in the same way upon his implied promise; 91 U. S. 65. So where the holder of shares had procured a transfer to his name, he was held liable for unpaid instalments, though he held the stock only as collateral security for debts due him by the transferor of the stock; 96 U. S. 338. Where certificates of stock had on their face a condition that the residue of eighty per cent. unpaid to the stock was to be paid on the call of the directors, when ordered by a vote of a majority of the stockholders, it was held that the absence of a call was no defence to an action for the residue by an assignee of the corporation in bankruptcy; 3 Biss. 417. Agreements of members among themselves

that stock shall be considered as "fully paid" are invalid; L. R. 15 Eq. 407. A corporation may, however, take in payment of its shares any property which it may lawfully purchase; *Thomps. Liab. of Stockh.* § 134; *Moraw. Priv. Corp.* 425; and stock issued therefor as full paid will be so considered; 7 Cent. L. J. 490 (C. U. S.).

A call by the proper authorities is ordinarily held to be necessary to fix the liability of a stockholder for unpaid installments; 43 N. J. L. 442; 21 Ill. 276; L. R. 1 Ch. App. 535; but it is held that a suit may be brought without a call; 67 N. Y. 300; and when a receiver has been appointed the call is made by a decree of the court; 103 U. S. 143.

"Ever since the case of *Sawyer v. Hoag*, 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock, who did not pay for it in money or other property, to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefore, is void as against creditors." 139 U. S. 417. Cases to the same effect are 99 N. C. 501; 76 Ga. 360; 139 U. S. 118; 144 id. 104; 146 id. 618; 148 id. 608; but in 139 id. 96 it was said, quoting from *Sawyer v. Hoag*, that the capital stock of a corporation is a trust fund only *sub modo*. In 150 U. S. 371, the expression "trust fund" was qualified by a statement that it had not been intended "to convey the idea that there was any direct and express trust attached to the property." In 154 Ill. 44, it was called a quasi-trust fund, and *Pomeroy* [Eq. Jur. 1046] says that such assets do not in any true sense constitute a trust and are called so only through analogy or metaphor.

In an able article in 34 Am. L. Reg. 446 [1895], George Wharton Pepper strongly objects to the expression "trust fund" and considers that the trust theory is untenable. He quotes Mr. Justice Bradley in 103 U. S. 148, where he says that the conception is at war with notions which we derive from English law with regard to the nature of corporate bodies.

The same writer is of the opinion that the expression "trust fund" is one which is applied by American courts to the judicial recognition of the demand of the commercial world, which is in substance that the liability of a stockholder shall be unlimited up to the par value of his shares and he shall not be entitled to any legal principle which would entitle him to advantage against corporate creditors.

The trust fund doctrine as to the assets of an insolvent corporation appears to have been first announced by Judge Story in 3 Mas. 308. Judge Thompson considers it "the only doctrine worthy of respect"; 5 *Thomp. Corp.* § 515. It was repudiated in 14 N. E. Rep. (Ind.) 810; 21 S. E. Rep. (N. C.) 951; 17 S. E. Rep. (Ala.) 525.

A holder of stock in trust is subject to assessment; 44 Conn. 582; L. R. 9 Eq. 175, 363 (but the *cestui que trust* is not; *id.*; even if he is a trustee of the corporation itself; 18 N. Y. 226; 46 Pa. 48); but it is otherwise as to the holder of national bank stock; R. S. § 5152; if his name appears on the books as trustee; 36 Fed. Rep. 568. It is held that a *cestui que trust* is bound to indemnify his trustee; L. R. 18 Eq. 16; but this cannot be generally true.

A pledgee who has transferred the stock to his own name is liable to assessment; 96 U. S. 328; but not, it is held, when he has placed it in the name of an irresponsible third party; 111 U. S. 479.

A pledgee of national bank stock is not liable for assessments, except by estoppel; 86 Fed. Rep. 1006; 58 id. 666.

Where stock stands in the name of an agent, either the principal or the agent may be assessed; *Cook, St. & Stockh.* § 249.

Where one has been induced by fraud to buy national bank stock, takes a transfer,

and, upon discovering the fraud, takes steps, at once, to rescind the transaction, he is not liable to assessment except as to one who extended credit to the bank without notice of the fraud; 83 Fed. Rep. 449.

A corporate creditor cannot proceed directly against stockholders to recover unpaid subscriptions till he shall have obtained a judgment against the corporation and an execution thereon shall have been returned unsatisfied; 95 U. S. 628; 85 N. J. Eq. 501; 55 Wis. 598. The remedy may be in some states by garnishment under the judgment against the company; but more commonly it is by bill in equity and a receiver. It is held that the remedy of a creditor against a stockholder is in equity alone; 53 Ala. 191; 101 U. S. 216. In equity the court decrees a call and the receiver collects the amount. The court may decree payment in full, leaving the stockholders to seek contribution among themselves; *Cook, St. & Stockh.* § 211.

In an action to enforce the payment of an assessment on unpaid stock, on behalf of creditors, a stockholder cannot set off a claim against the corporation; 139 U. S. 417; L. R. 1 Ch. 528; 110 Ill. 316; otherwise, if the corporation itself sues; L. R. 19 Eq. 449. In New York there is a right of set-off at law against a corporation creditor, but not in equity; 43 Hun 362.

A subscriber cannot set up against an action for calls that the corporation was not lawfully organized, if he is a director and was one of the original incorporators; 18 N. Y. L. J. (Dec. 9, 1897); s. c. 22 N. Y. App. Div. 1.

The better opinion is said to be that the statute of limitation begins to run only when a call has been made and payment thereunder is due; *Cook, St. & Stockh.* § 195; or from the order of court making the assessment; 145 U. S. 507. It is held to run from the date of an assignment for creditors by the company; 7 Atl. Rep. (Pa.) 611; and in 50 N. W. Rep. (Ia.) 891, when the subscription is made; so also 41 Hun 545; though where a creditor sues it does not run till he secures judgment; 36 Hun 334.

Statutes in various states provide for a forfeiture of stock for non-payment of subscriptions, and a sale. This right does not exist without a statute; nor can it be created by a mere by-law; but it may be by the consent of the stockholder if expressed on the face of his certificate; *Cook, St. & Stockh.* § 122; the remedy by forfeiture, when given, is in addition to the ordinary common-law remedies; *id.* § 124.

See *Thomp. Liab. of Stockh.*; 81 Am. Rep. 88; 15 Am. L. Reg. n. s. 648.

In order to constitute one a shareholder, it is not necessary that a certificate should have been issued to him; 32 Ind. 393; 46 Mo. 248.

A married woman, under the common-law disabilities, cannot be a competent party to an original subscription for shares of a corporation, or to a transfer to her of such shares, so as to make her a shareholder; 38 Fed. Rep. 700.

Where a director is required to be the holder of a certain number of shares as a qualification, he is presumed, on winding up, to have been the holder of that number of shares; [1892] 2 Ch. 158.

A railroad corporation purchasing the stock of a competing corporation cannot obtain control of its affairs, divert the income of its business, refuse business which would enable it to pay its interest, and then institute proceedings in equity to enforce the interest-bearing obligations for the avowed purpose of obtaining control of its property to the injury of the minority stockholders. The controlling company will become, for all practical purposes, the corporation which it controls, and bears the same trust relations to the minority stockholders of the latter that usually exists between stockholders of a corporation and the corporation itself; *Farmers' L. & T. Co. v. N. Y. & No. R. Co.*, 54 Alb. L. J. 311 (Ch. of App. N. Y.).

The holders of a majority of the stock of

a corporation may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests to the injury of other stockholders. They cannot by their votes in a stockholders' meeting lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose and exclusively owned by them, unless such lease is made in good faith and is supported by an adequate consideration; and, in a suit properly prosecuted to set aside such a contract, the burden of proof, showing fairness and adequacy, is upon the parties claiming thereunder. All doubts will be resolved in favor of the corporation for whom such stockholders assumed to act; 17 Fed. Rep. 48, and note by Dr. Francis Wharton.

It is said that a stockholder may deal with his company at arm's length as a stranger might; 184 Pa. 102. See *PREFERENCE*.

The rights of a stockholder are to attend stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purposes, and if the company becomes insolvent, to have its property applied to the payment of its debts. For the invasion of these rights by the officers of a company, a stockholder may sue at law or in equity, according to the nature of the case. All remedies for injury to the property or rights of such a corporate body must be prosecuted in the name of the company; all demands against the company must be prosecuted against it by name. But where the officers and managers of a company, by fraud and collusion with third persons, are sacrificing, or are about to betray or sacrifice, the interests of the corporation, a stockholder may, for such breaches of trust and conspiracy, call the guilty parties to an account in a court of equity; 2 Woods 323, per Bradley, J.

A shareholder may interpose and set the machinery of law in motion for the protection of corporate rights or the redress of corporate wrongs, when the corporate management, after proper demand, fails to act in the matter; 36 Fed. Rep. 627; but equity will not entertain a bill by stockholders to remedy wrongs committed by the officers of the corporation, where such stockholders have not applied to the corporate authorities to remedy such wrongs; 87 Tenn. 771; 81 W. Va. 798; 127 U. S. 489; 54 Fed. Rep. 985. A stockholder may maintain an action to restrain the corporation from acts in excess of its corporate authority; 75 Ia. 722; but he cannot maintain a bill to enjoin the wasting of corporate property unless the corporation itself refuses to bring the action, in which case it must be made a party defendant; 54 Fed. Rep. 216. A corporation is a necessary party to a suit by stockholders for the enforcement of its rights; 149 U. S. 473.

It has been held that if a corporation has power to reduce its capital stock, it may do so by purchasing a portion of its own shares; 48 Vt. 266; 17 N. Y. 507; *contra*, 56 N. H. 262; but it is held to be *ultra vires* for a corporation to dispose of any part of its property other than its surplus or net profits, in the purchase of shares of its own stock; 84 Fed. Rep. 398, per Bradford, J. A corporation cannot buy its own stock if the rights of creditors are thereby prejudiced; 104 Ill. 26; 8 Bradw. 554; but apart from the rights of creditors, it is held in some states that such a transaction is lawful; 14 S. E. Rep. (N. C.) 501; 39 Fed. Rep. 89; 84 Ill. 145; 104 Mass. 37. Accepting its own stock in payment of land sold by it is not necessarily invalid; 90 Atl. Rep. (N. J.) 854; where the company is perfectly solvent; 8 Bradw. 554. In England it is held that a corporation cannot pur-

chase its own shares; 13 App. Cas. 409; and a stockholder may enjoin such purchase; L. R. 4 Ch. Div. 337.

The books of a corporation are said to be "the common property of all the stockholders;" 105 Pa. 111; and are subject to their inspection for proper purposes and at proper times; 51 Fed. Rep. 81; 40 N. J. Eq. 392; the right may be enforced by mandamus; 105 Pa. 111. Mandamus will be granted, at the discretion of the court, which "will be exercised with great discrimination and care;" 70 N. Y. 220; and will not be granted where the applicant seeks to "accomplish personal or speculative ends;" 70 N. Y. 220; or to "gratify idle curiosity;" 9 Mich. 328; or at the "caprice of the curious or suspicious;" 105 Pa. 111. The petition should aver a demand for inspection and a refusal by the corporation; 6 D. R. (Pa.) 266. The stockholder may take off a list of stockholders; *id.* The statutory right of a creditor or a member of a company to inspect the register of its mortgages carries with it the right to take copies; [1897] 1 Ch. 130. See RECORDS; PRODUCTION OF BOOKS.

A stockholder has no right, by the inherent powers of a court of equity, to bring suit to wind up the business of a corporation; 60 How. 280.

A suit in equity may be maintained by a creditor of a corporation against a stockholder only in the courts of the state in which the corporation is created, and the corporation is a necessary party defendant 86 Fed. Rep. 45.

STOCKS. In Criminal Law. A machine, commonly made of wood, with holes in it, in which to confine persons accused of or guilty of crime.

It was used either to confine unruly offenders by way of security, or convicted criminals for punishment. This barbarous punishment had been generally abandoned in the United States.

STOLE. A robe of honour. Jacob. See GROOM OF THE STOLE.

STOLE, GROOM OF THE. See GROOM OF THE STOLE.

STOLEN GOODS. See RECENT POSSESSION OF STOLEN GOODS; RECEIVER OF STOLEN GOODS.

STOP, LOOK, AND LISTEN. One crossing a railroad or street railway track in Pennsylvania is guilty of contributory negligence in law if he does not first stop, look, and listen. It is an absolute and unbending rule of public policy. 172 Pa. 383. See GRADE CROSSING.

STOP ORDER. In Chancery practice, when a fund (in cash, stock or other securities) is in court in a cause or proceeding, any person claiming an interest in it may apply to the court for an order to prevent it from being paid out or otherwise dealt with, without notice to the applicant. The application is made by petition where a fund exceeding £1,000 has been paid into court under the Trustee Act, 1893, and in other cases is made by summons, which (if opposed) must be supported by an affidavit showing the applicant's interest in the fund. Stop orders differ from restraining orders and distinguis notices in being applicable only to funds in court. Stop orders are also applicable to documents or securities deposited with an officer of the court. Byrne.

STOPPAGE IN TRANSITU. A presumption by the seller of the possession of goods not paid for, while on their way to the vendee and before he has acquired actual possession of them. 15 Me. 314.

Chancellor Kent has defined the right of stoppage *in transitu* to be that which the vendor has, when he sells goods on credit to another, of resuming the possession of the goods while they are in the possession of a carrier or middleman, in the transit to the consignee or vendee, and before they arrive into his actual possession, or the designation he has appointed for them, on his becoming bankrupt and insolvent;

2 Kent 702.

The right of stoppage *in transitu* is an equitable extension recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. This right is paramount to any lien created by usage or by agreement between the carrier and the consignee, for a general balance of account, but not to the lien of the carrier for freight; 131 Mass. 457.

For most purposes, the possession of the carrier is considered to be that of the buyer; but by virtue of this right, which is an extension of the right of lien, the vendor may reclaim the possession before they reach the vendee, in case of the insolvency of the latter; 4 Gray 336; 2 Caines 98; 8 M. & W. 341, which gives a history of the law.

The vendor, or a consignor to whom the vendee is liable for the price; 3 East 93; 6 id. 17; 13 Me. 103; 1 Binn. 106; or a general or special agent acting for him; 9 M. & W. 518; 5 Whart. 189; 13 Me. 93; 43 N. H. 589; 105 Mass. 275; see 4 Gray 367; 1 Hill N. Y. 302; 5 Mass. 157; 123 id. 12; may exercise the right.

The vendor can bring suit for the price of the goods after he has caused them to be stopped *in transitu*, and while they are yet in his possession, provided he be ready to deliver them upon payment of the price; 1 Camp. 109; but the right of the vendor after stoppage exceeds a mere lien; for he may resell the goods; 6 Mod. 152.

There need not be a manual seizure: it is sufficient if a claim adverse to the buyer be made during their passage; 2 B. & P. 457; 9 M. & W. 518; 13 Me. 93; 5 Denio 333.

The goods sold must be unpaid for, either wholly or partially; 15 Me. 314; 2 Exch. 702. As to the rule where a note has been given, see 2 M. & W. 375; 7 Mass. 453; 4 Cush. 33; 7 Pa. 301; where there has been a pre-existing debt, 4 Camp. 31; 16 Pick. 475; 3 Paige, Ch. 373; 1 Binn. 106; 1 B. & P. 563; where there are mutual credits, 7 Dowl. & R. 126; 16 Pick. 467; where the vendee gives a draft, 63 Hun 376. The vendee must be insolvent; 4 Ad. & E. 332; 20 Conn. 54; 8 Pick. 198; 14 Pa. 51. 102 N. C. 390; 63 Ala. 243; 84 Mich. 612. A seller cannot stop goods in transit simply because the buyer absconded before they reached him, where the buyer's insolvency is not shown; 15 So. Rep. (Ala.) 340.

The goods must be in transit; 3 Term 466; 15 B. Monr. 270; 16 Pick. 474; 20 N. H. 154. Where goods sold are shipped by rail and a transfer company, under a previous general order of the buyer, receives the goods at the depot to convey them to the buyer's place of business, the goods are still in transit and the seller may still exercise his right of stoppage; 48 Mo. App. 521. In order to preclude the right the goods must have come actually into the hands of the vendee or some person acting for him; 2 M. & W. 633; 1 Pet. 336; 3 Mas. 107; 23 Wend. 611; 54 Fed. Rep. 308; or constructively, as, by reaching the place of destination, 9 B. & C. 432; 3 B. & P. 320, 469; 7 Mass. 457; 20 N. H. 154; 2 Curt. C. C. 259; 3 Vt. 49; 103 N. C. 390; or by coming into an agent's possession; 4 Camp. 181; 7 Mass. 453; 4 Dana 7; 33 Pa. 254; see 22 Conn. 473; 17 N. Y. 249; 7 Cal. 213; 53 Mo. App. 139; or by being deposited for the vendee in a public store or warehouse; 5 Denio 631; 7 Pa. 301; 4 Camp. 251; 113 N. C. 36; or by delivery of part for the whole; 14 M. & W. 28; 14 B. Monr. 324.

The right can be defeated, where there is no special legislation on the subject, only by a transfer of the bill of lading; 37 U. S. App. 266; but the assignment, unindorsed, of a bill of lading will not defeat the right, if the goods are still in transit; 7 U. S. App. 544. The right expires when the goods have been delivered; *id.*

Where goods are in the hands of a carrier, they may be stopped, although the purchaser has handed to the shipping agent the bills of lading received by him from the vendor and received a bill of lading for them, and the purchaser is himself

a passenger on the vessel on which they are shipped; L. R. 15 App. Cas. 891.

The delivery of goods at the buyer's store which was at the time in the possession of the sheriff under an attachment, is not a delivery to the consignee; 85 Tex. 254. See 160 Pa. 527.

Where there is no contract to the contrary, express or implied, the employment of a carrier by a vendor of goods on credit constitutes all middlemen into whose custody they pass for transportation and delivery, agents of the vendor; and until the complete delivery of the goods, they are deemed *in transitu*; 21 Ohio St. 281. The right cannot be superseded by an attachment at the suit of a general creditor, levied while the goods are *in transitu*; 50 Miss. 500, 590. If the vendor attach the goods while in transit, his right of stoppage will be destroyed; 15 Conn. 335. Where goods are to be delivered a part at a time, and various deliveries are so made, the right to stop the remaining portion is not lost; nor will the fact that the entire lot of goods was transferred on the books of the warehouse affect the right; 106 Mass. 76; 17 Wend. 504. The right of stoppage *in transitu* is looked upon with favor by the courts; 2 Eden 77; 21 Ohio St. 281.

The effect of the exercise of this right is to repossess the parties of the same rights which they had before the vendor resigned his possession of the goods sold; 1 Q. B. 389; 10 B. & C. 99; 14 Me. 314; 5 Ohio 98; 20 Conn. 53; 10 Tex. 2; 19 Am. Rep. 87.

See, generally, Benjamin; Story; Long, on Sales; Parson, on Contracts; Cross, Lien; Whittaker, Stopp. in Tr.; 5 Wait, Action & Def. 612; 32 Cent. L. J. 384.

STORE. A place where goods are kept on deposit, especially in large quantities—a warehouse; and, also, a place where goods are kept for sale in large or small quantities. 72 Miss. 184. See SHOP.

(v.) To keep merchandise for safe custody, to be delivered in the same condition as when received, where the safe-keeping is the principal object of deposit, and not the consumption or sale. Abbott; 3 N. Y. 122.

(n.) In England, is never applied to a place where goods are sold, only to a place where they are deposited. In the United States, denotes both of these places. Anderson; 13 Conn. * 440. A shop for the sale of goods of any kind, by wholesale or retail. That is, we use "store" for store-house, a word properly meaning the quantity of a thing accumulated or deposited, for the place of deposit. But "shop" may refer to a place where a mechanic art is carried on. *Id.*; 19 N. H. 137. "Store" is of a larger signification than "shop." The latter word frequently designates the place in which a mechanic pursues his trade. *Id.*; 53 Ala. 483. The common use of "store," when applied to a building, is to designate a place where traffic is carried on in goods, wares and merchandise, and not to designate a "store-house." *Id.*; 135 Mass. 259.

STORE-HOUSE. A building for the storage of goods, grain, food-stuffs, etc. A livery-stable has been held a store-house. 35 S. W. Rep. (Ky.) 1028.

STORE ORDERS. In some states the maintaining of general supply stores by companies or individual employers is forbidden. Thus, in New Jersey and Tennessee it is unlawful for any manufacturer, firm, or corporation, who owns or controls a store for the sale of general goods or merchandise in connection with their business, to attempt to control their employees in the purchase of goods at such stores, by withholding the payment of wages longer than the usual time. In Maryland, the statute applies to railways and mines only; in Pennsylvania only to mining and manufacturing corporations. In some other states (Ohio, Indiana, Iowa, Kansas, Missouri, and Washington), the company may have such stores, but it is made a penal offence to compel or coerce an employee to deal at such company stores or with any particular person or corporation.

In some states (Ohio, Virginia, and In-

diana) the prohibition is only against selling goods to employees at a higher profit than to others, or than to cash customers, or at prices higher than their market value; and debts thus incurred are made not collectible, or (in Ohio) the employee may recover back double such excess in price.

But in Illinois and West Virginia, statutes forbidding certain corporations to maintain company stores have been held invalid; 33 W. Va. 179; 10 S. E. Rep. 285; 31 N. E. Rep. 395; but see 48 Pac. Rep. (Col.) 512, where it was held that the legislature might prohibit the issuance of store orders in payment of wages. See Stimson, Lab. Laws § 24; LIBERTY OF CONTRACT; POLICE POWER.

STORES. The supplies for the subsistence and accommodation of a ship's crew and passengers. Under the words stores, tackle, apparel, etc., will not pass. 2 Stark. 103.

STOUTHRIEFF. In Scotch Law. Formerly this word included in its signification every species of theft accompanied with violence to the person; but of late years it has become the *cor signata* for forcible and masterful depredation within or near the dwelling-house; while robbery has been more particularly applied to violent depredation on the highway, or accompanied by house-breaking. Alison, Prin. Scotch Law 257.

STOWAGE. In Maritime Law. The proper arrangement in a ship of the different articles of which a cargo consists, so that they may not injure each other by friction, or be damaged by the leakage of the ship.

The master of the ship is bound to attend to the stowage, unless by custom or agreement this business is to be performed by persons employed by the merchant; Abb. Shipp. 13th ed. 391; Pardessus, Dr. Com. n. 721.

Merchandise and other property must be stored under deck, unless a special agreement or established custom and usage authorizes their carriage on deck. See SEAWORTHY.

STOWAWAY. One who conceals himself on board of a vessel about to leave port, in order to obtain a free passage. 26 Am. & Eng. Encyc. 2nd ed., 1126; 48 Fed. Rep. 551.

Within rule 23 of the Commissioner General of Immigration, stowaway is one who steals his passage. 193 Fed. 228.

STRADDLE. See OPTION.

STRAND. The shore or bank of a sea or river. Cowel. That portion of the land lying between ordinary high and low water mark. 47 N. Y. Supp. 280.

STRANDING. In Maritime Law. The running of a ship or other vessel on shore; it is either accidental or voluntary. Accidental stranding takes place where the ship is driven on shore by the winds and waves and remains stationary for some time.

Voluntary stranding takes place where the ship is run on shore either to preserve her from a worse fate or for some fraudulent purpose. Marsh. Ins. b. 1, c. 13, s. 1.

It is of great consequence to define accurately what shall be deemed a stranding; but this is no easy matter. In one case, a ship having run on some wooden piles, four feet under water, erected in Wisbeach river, about nine yards from shore, which were placed there to keep up the banks of the river, and having remained on these piles until they were cut away, was considered by Lord Kenyon to have been stranded; Marsh. Ins. b. 7, s. 3. In another case, a ship arrived in the river Thames, and upon coming up to the pool, which was full of vessels, one brig ran foul of her bow and another vessel of her stern, in consequence of which she was driven aground, and continued in that situation an hour, during which period several other vessels ran foul of her. As to this, Lord Kenyon told the jury that, unskilled as he was in nautical affairs, he thought he

could safely pronounce to be no stranding; 1 Camp. 181; 3 id. 431; 4 Maule & S. 508; 5 B. & Ald. 225; 4 B. & C. 736; 7 id. 224. See PERILS OF THE SEA.

When a vessel takes the ground in the ordinary course of navigation, from a natural deficiency of water, or from the ebb of the tide, it is not a stranding; 11 C. B. 876; 73 E. C. L. 875; 2 Sumn. 197. But where a ship was fastened at the pier of a dock basin against the advice of the master, and when the tide ebbed, took the ground and fell over on her side, in consequence of which, when the tide rose, she filled with water, it was held to be a stranding; 4 M. & S. 77. See, also, 5 B. & A. 235; 73 E. C. L. 455; 1 E. & B. 456.

It may be said, in general terms, that in order to constitute a stranding, the ship must be in the course of prosecuting her voyage when the loss occurs; there must be a settling down on the obstructing object; and the vessel must take the ground by reason of extraordinary casualty, and not from one of the ordinary incidents of a voyage. Arn. Ins. §§ 297, 318. And see Phill. Ins.; 31 N. Y. 106; 88 Am. Dec. 242; 42 id. 188; 18 Ohio 66.

STRANGER. A person born out of the United States; but in this sense the term alien is more properly applied until he becomes naturalized.

A person who is not privy to an act or contract: example, he who is a *stranger* to the issue shall not take advantage of the verdict; Brooke, Abr. Record, pl. 3; Viner, Abr. 1. And see Com. Dig. Abatement (H 54). See 118 N. Y. 158.

When a man undertakes to do a thing, and a stranger interrupts him, this is no excuse; Com. Dig. Condition (L 14). When a party undertakes that a stranger shall do a certain thing, he becomes liable as soon as the stranger refuses to perform it: Bac. Abr. Conditions (Q 4).

STRATAGEM. A deception either by words or actions, in times of war, in order to obtain an advantage over an enemy.

Stratagems, though contrary to morality, have been justified unless they have been accompanied by perfidy, injurious to the rights of humanity, as in the example given by Vattel of an English frigate, which during a war between France and England appeared off Calais and made signals of distress in order to allure some vessel to come to its relief, and seized a shallow and its crew who had generously gone out to render it assistance. Vattel, Droit des Gens. liv. 3, c. 9, § 178.

STRATOCRACY. A military government; government by military chiefs of an army.

STRAW BAIL. See BAIL.

STRAW MEN. See MEN OF STRAW.

STRAW SHOES. See MEN OF STRAW.

STREAM. A current of water. A body of water having a continuous flow in one direction. 34 L. R. Sc. 174. The right to a water-course is not a right in the fluid itself, so much as a right in the current of the stream. 2 Bouvier, Inst. n. 1612. The owner of the land on both sides of a navigable stream, above the ebb and flow of the tide, is the owner of the bed of the stream, and entitled to all the ice that forms within the extent of his lands; 14 Chl. L. News 83. See RIVER; WATER-COURSE; ICE; MIDDLE OF THE STREAM; THALWEG.

STREET. A public thoroughfare or highway in a city or village. It differs from a country highway; 21 Alb. L. J. 45; 4 S. & R. 106; 11 Barb. 399. It means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. L. R. 4 Q. B. D. 121. A street is not an easement, but a dedication to the public of the occupation of the surface for passing and repassing; L. R. 3 Ch. 306; 1 Q. B. D. 703. See HIGHWAY.

A street, besides its use as a highway for

travel, may be used for the accommodation of drains, sewers, aqueducts, water, and gas-pipes, lines of telegraph, and for other purposes conducive to the general police, sanitary, and business interests of a city; 17 Barb. 435; 2 R. I. 15; 106 Ill. 337; 39 Hun 245; 79 Ind. 491. Its use belongs, from side to side and end to end, to the public; 73 Ind. 193. A street may be used by individuals for the lading and unlading of carriages, for the temporary deposit of movables or of materials and scaffolding for building or repairing, provided such use shall not unreasonably abridge or incommode its primary use for travel; 6 East 427; 8 Camp. 230; Hawk. Pl. Cr. c. 76, s. 49; 4 Ad. & E. 405; 4 Ia. 199; 1 Den. 524; 1 S. & R. 219; 107 N. Y. 360; 59 Ia. 65; 58 Me. 56; 36 L. R. A. 805. As to playing organs on a street, see [1897] 1 Q. B. 84. The mere fact that a person is engaged in what is known as play on a public street does not necessarily make him a trespasser; 10 U. S. App. 546. A sidewalk which is part of a street may be excavated for a cellar, pierced by an aperture for the admission of light, or overhung by an awning. But if the highway becomes more unsafe and a passenger is injured by reason thereof, the individual so using the street will be responsible for the damages; 18 N. Y. 79; 3 C. & P. 262; 23 Wend. 446; 6 Cush. 524. See 107 Mass. 234; 66 Ia. 219; 104 N. Y. 268. But an individual has no right to have an auction in a street; 13 S. & R. 403; or to keep a crowd of carriages standing therein; 8 Camp. 290; or to attract a disorderly crowd of people to witness a caricature in a shop-window; 6 C. & P. 636. Such an act constitutes a nuisance; Ang. High. c. 6. An encroachment upon a street, the dedication and acceptance of which is established, is nothing more or less than a nuisance, which cannot be aided by lapse of time; 84 Va. 337. In a suit by abutting owners to enjoin obstruction, no other parties defendant are necessary than the alleged trespasser; 54 Fed. Rep. 925.

The owners of lands adjoining a street are not entitled to compensation for damages occasioned by a change of grade or other lawful alteration of the street; 2 B. & A. 403; 1 Pick. 417; 4 N. Y. 185; 33 Atl. Rep. 756; 14 Mo. 20; 2 R. L. 154; 6 Wheat. 593; 20 How. 185; 75 Mo. 213; 75 Wis. 9; 100 Ind. 545; unless such damages result from a want of due skill and care or an abuse of authority; 5 B. & Ald. 337; 16 N. Y. 158. See EMINENT DOMAIN.

Under the statutes of several of the states, assessments are levied upon the owners of lots specially benefited by opening, widening, or improving streets, to defray the expense thereof; and such assessments have been adjudged to be a constitutional exercise of the taxing power; 4 N. Y. 419; 8 Wend. 85; 18 Pa. 26; 31 id. 147; 3 Watts 293; 23 Conn. 189; 5 Gill 383; 27 Mo. 209; 4 R. I. 230; Ang. High. c. 4. See DILL. MUN. CORP. As to what notice to an owner is necessary to create a lien on his property for street improvements, see 40 Pac. Rep. 1042.

SEE RAILROAD; HIGHWAY; POLES; WIRES; NUISANCE; OBSTRUCTING A STREET; OBSTRUCTING A STREET; PRINCIPAL STREET; USE BY THE PUBLIC.

STREET RAILWAY. See RAILROADS.

STREPITUS. Estrepement. Spelling.

STRICKEN FROM THE DOCKET. "Stricken from the docket" is used as synonymous with "discontinued," "fled away," so that an order striking a cause from the docket amounts to a "dismissal." 164 Ky. 426, 175 S. W. 662.

STRICT CONSTRUCTION. See CONSTRUCTION; INTERPRETATION.

STRICT SETTLEMENT. A settlement of lands to the parent for life, and after his death to his first and other sons in tail, with an interposition of trustees to

preserve the contingent remainders.

STRICTISSIMI JURIS (Lat. the most strict right or law). In general, when a person receives an advantage, as the grant of a license, he is bound to conform strictly to the exercise of the rights given him by it, and in case of a dispute it will be strictly construed. See 3 Stor. C. C. 159.

STRICTO JURE (Lat.). In strict law. 1 Kent's Com. 65.

STRICTUM JUS (Lat.). Mere law, in contradistinction to equity.

According to strict law; without equitable interpretation, or enlargement of application. See **STRICTISSIMI JURIS**.

STRIFE. Does not necessarily imply blows. It may be evidenced by passionate words, looks and gestures. 34 Conn. 279.

STRIKE. A combined effort by workmen to obtain higher wages or other concessions from their employers, by stopping work at a preconcerted time. Where this is peaceably effected without positive breach of contract, it is not unlawful, but it sometimes amounts to conspiracy. Most of the decisions bear upon questions arising more or less indirectly from the strike.

A conspiracy to obtain from a master mechanic money which he is under no legal obligation to pay, by inducing his workmen to leave him and by deterring others from entering his employment, or by threatening to do this, so that he is induced to pay the money demanded, is an illegal conspiracy; 106 Mass. 1. See 9 Neb. 390.

It is no answer to a suit against a common carrier for failure to deliver goods with reasonable promptness, that a strike among their employes prevented; 20 N. Y. 48; 18 Ill. 488. But otherwise if the employes are discharged and afterwards interfere unlawfully with the business of the road; 15 Alb. L. J. 39; Cooley, Torts 640, n. Where a railroad company receives freight for shipment, it is not liable for delay in its delivery which is caused by a strike of its employes, accompanied by violence and intimidation of such a character as cannot be overcome by the company or controlled by the civil authorities when called upon; 81 Ga. 792; 74 Tex. 8; 84 Ill. 36.

In L. R. 6 Eq. 555, the president and secretary of a trades-union, and a printer employed by them, were restrained by injunction from posting placards and publishing advertisements, urging workmen to keep away from plaintiff's factory, where a strike against the reduction of wages was in progress; but in L. R. 10 Ch. 142, this case was overruled.

An attempt has been made to derive some of the authority for the use of an injunction in such cases to an extent not before recognized in the settled principles of equity jurisprudence from the English Judicature Act of 1873 as a consequence of the union of law and equity procedure. In 20 Ch. Div. 501, it is said that "the courts have interpreted this act as giving them power to restrain one man from persuading another to break his contract with a third person, when the object of such persuasion is the malicious injury to the third person."

Where a trades-union ordered a strike and posted pickets to persuade workmen from entering the employ of the plaintiff, such conduct was held to come within the terms of the act prescribing a penalty against every person who, with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority . . . watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place." [1896] 1 Ch. 811.

The circuit court of the United States had jurisdiction to restrain the unlawful

acts of persons engaged in a strike where they interfere with the operations of interstate commerce or with the transmission of the mails, and may enforce its injunction by proceedings in contempt which are not open to review on *habeas corpus* in the supreme court or any other court; 158 U. S. 564.

A "boycott" by the members of trades-unions or assemblies is unlawful, and may be enjoined; but in such suits a federal court has no jurisdiction over defendants who are citizens of the same state with the complainant, nor can the association be used as a body or its members who are not parties to the record be enjoined; 72 Fed. Rep. 695.

There is no authority for issuing an injunction to prevent one individual from quitting the personal service of another; "equity will not compel the actual affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service in that character." 63 Fed. Rep. 310 (Harlan, J.).

A display of force by strikers against laborers who wish to work, such as surrounding them in large numbers, applying opprobrious epithets to them, and urging them in a hostile manner not to go to work, though no force be actually used, is as much intimidation as violence itself. Such conduct will be restrained by injunction, and the actors will be liable in damages to the employer of the laborers. Where new men employed to take the place of strikers are on their way to work, their time cannot be lawfully taken up and their progress interfered with by the strikers on any pretence or under any claim of right to argue or persuade them to break their contracts. Where a bill has been filed against strikers for an injunction and for damages for injuries caused by their illegal conduct, the plaintiff has a right to proceed with the case after the strike is over, for the purpose of recovering damages, and it is improper for a judge to express from the bench an opinion that the case should have been dropped; 182 Pa. 236. See **BOYCOTT**; **COMBINATION**; **CONSPIRACY**; **INJUNCTION**; **LABOR UNION**; **MALICE**; **RESTRAINT OF TRADE**.

STRIKE INSURANCE. See **INSURANCE**.

STRIKING A DOCKET. In English Practice. Entering the creditor's affidavit and bond in bankruptcy. 1 Deac. Bank. 106.

STRIKING A JURY. In English Practice. Where, for nicety of the matter in dispute, or other cause, a special jury is necessary, upon motion and rule granted thereon, the sheriff is to attend the prothonotary or proper officer with the book of freeholders, and to take indifferently forty-eight of the principal freeholders, when the attorneys on each side, being present, are to strike off twelve respectively, and the remaining twenty-four are returned. 3 Bla. Com. 357. Essentially the same practice prevails in New York, Pennsylvania, and other states; Tr. & H. Pr. § 636. See **JURY**; **Graham**, Pr. 277. In some of the states a *special* or *struck* jury is granted as of course upon the application of either party; but more generally it must appear to the court that a fair trial cannot be otherwise had, or that the intricacy and importance of the case require it. One of the parties being a citizen of color, the judge cannot properly direct a special jury to be impanelled, one-half of whom are of African descent; 3 Baxt. 373; 100 U. S. 213. The statutory method of striking is held to be mandatory; 26 Wis. 423; 78 Pa. 303. See **Abb. N. Y. Dig. tit. Trial** §§ 196-203; **Thomp. & Merr. Jur.** § 14.

STRIKING OFF THE ROLL. Removing the name of a solicitor from the rolls of the court and thereby disintitling

him to practise. See **DISBAR**.

STRIP. The act of spoiling or unlawfully taking away anything from the land, by the tenant for life or years, or by one holding an estate in the land less than the entire fee. Pub. St. Mass. [1882] 1295.

STRUCK. In Pleading. A word essential in an indictment for murder, when the death arises from any wounding, beating, or bruising. 1 Bulstr. 184; 5 Co. 122; Cro. Jac. 655; 6 Binn. 179.

STRUCK JURY. See **STRIKING A JURY**.

STRUCK OFF. A term applied to a case which the court, having no jurisdiction over, and not being able to give judgment, order to be taken off the record. This is done by an entry to that effect.

As to the meaning of the words as used at an auction sale, see **KNOCKED DOWN**.

STRUCTURE. That which is built or constructed;—an edifice or building of any kind. Poles connected by wires for the transmission of electricity; 19 Ore. 61; a mine or pit; 60 Cal. 271; a railroad track; 46 Conn. 213; see 43 Fed. Rep. 470 (*contra*, 35 Ohio St. 559); are structures. Swings or seats are not; 55 Cal. 159. See **MECHANICS'** **LIEN**.

STRUMPET. A harlot, or courtesan. Jacob, Law, Dict.

STUDENTS. Students living in a place merely for the purpose of attending college have not such residence as will entitle them to vote there. 71 Pa. 303; 40 N. E. Rep. (N. Y.) 769, Affg. 31 N. Y. Supp. 1043; *contra*, 10 Mass. 488. See **McCr. Elect.** § 34; **CHANCELLOR'S COURTS** **IN THE TWO UNIVERSITIES**; **DOMICIL**.

STUFF GOWN. The professional robe worn by barristers of the outer bar; viz. those who are not queen's counsel. Brown.

STULTIFY (Lat. *stultus*, stupid). To make one out mentally incapacitated for the performance of an act.

It has been laid down by old authorities; Littleton § 405; 4 Co. 123; Cro. Eliz. 398; that no man should be allowed to stultify himself, i. e. plead disability through mental unsoundness. This maxim was soon doubted as law; 1 Hagg. Ecol. 414; 2 Bla. Com. 292; and has been completely overturned; 2 Kent 451.

STUMPAGE. The sum agreed to be paid to an owner of land for trees standing upon his land, the purchaser being permitted to enter upon the land and to cut down and remove the trees; in other words it is the price paid for a license to cut. 67 Mo. 478.

STUPRUM (Lat.). In Roman Law. The criminal sexual intercourse which took place between a man and a single woman, maid, or widow, who before lived honestly. Inst. 4. 18. 4; Dig. 48. 5. 6; 50. 16. 101.

STURGEON. See **ROYAL FISH**.

SUABLE. Capable of being, or liable to be, sued. A suable cause of action is the matured cause of action. 82 N. Y. 218.

SUB-AGENT. A person appointed by an agent to perform some duty, or the whole of the business relating to his agency.

A sub-agent is generally invested with the same rights, and incurs the same liabilities in regard to his immediate employers, as if the latter were the real principal. To this general rule there are some exceptions: for example, where, by the general usage of trade or the agreement of the parties, sub-agents are ordinarily or necessarily employed to accomplish the ends of the agency, there, if the agency is avowed and the credit is exclusively given to the principal, the intermediate agent may be entirely exempted from all liability to the sub-agent. The agent, however, will be liable to the sub-agent unless

such exclusive credit has been given, although the real principal or superior may also be liable; Story, Ag. § 386. When the agent employs a sub-agent to do the whole or any part of the business of the agency, without the knowledge or consent of his principal, either express or implied, the latter will only be entitled to recover from his immediate employer, and his sole responsibility is also to him. In this case the superior or real principal is not responsible to the sub-agent, because there is no privity between them; Story, Ag. §§ 18, 217, 387.

Where, by an express or implied agreement of the parties, or by the usages of trade, a sub-agent is to be employed, a privity exists between the principal and the sub-agent, and the latter may justly maintain his claim for compensation both against the principal and his immediate employer, unless exclusive credit is given to one of them; and in that case his remedy is limited to that party; 1 Livermore, Ag. 64; Mich. Ag. 690; 6 Taunt. 147. See AGENT.

SUB CONDITIONEM. Upon condition.

The proper words to express a condition in a conveyance, and to create an estate upon condition. Abbott.

SUB-CONTRACT. A contract by one who has contracted for the performance of labor or service with a third party for the whole or part performance of that labor or service. 9 M. & W. 710; 3 Gray 382; 17 Wend. 550. See INDEPENDENT CONTRACTOR.

SUB-CONTRACTOR. One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance. Phill. Mech. Liens § 44; 101 N. C. 611. See 127 Ind. 257.

SUB DISJUNCTIONE. In the alternative. Fleta.

SUB JUDICE. Under or before a judge or court; under judicial consideration; undetermined. 12 East 409.

SUB-LEASE. A lease by a tenant to another person of a part of the premises held by him; an under-lease. See LEASE.

SUB MODO (Lat.). Under a qualification. A legacy may be given *sub modo*, that is, subject to a condition or qualification.

SUB NOMINE. In the name of.

SUB PEDE SIGILI (Lat.). Under the foot of the seal; under seal. This expression is used when it is required that a record should be certified under the seal of the court.

SUB POTESTATE (Lat.). Under, or subject to, the power of another; as, a wife is under the power of her husband; a child is subject to that of his father; a slave to that of his master.

SUB SALVO ET SECCURO CONDUCTO. Under safe and secure conduct. 1 Strange 430.

SUB SIGILLO (Lat.). Under seal.

SUB SILENTIO (Lat.). Under silence; without any notice being taken. Sometimes passing a thing *sub silentio* is evidence of consent. See SILENCE.

SUB SPE RECONCILIATIONIS. Under hope of reconciliation. 2 Kent 127.

SUB SUO PERICULO. At his own risk.

SUB-TENANT. An under-tenant.

SUBALTERN. An officer who exercises his authority under the superintendence and control of a superior.

SUBDITUS. A vassal; a dependent; one under the power of another. Spelman.

SUBDIVIDE. To divide a part of a thing which has already been divided. For example, when a person dies leaving

children, and grandchildren, the children of one of his own who is dead, his property is divided into as many shares as he had children, including the deceased, and the share of the deceased is subdivided into as many shares as he had children.

SUBINFEUDATION. The act of an inferior lord by which he carved out a part of an estate which he held of a superior, and granted it to an inferior tenant to be held of himself.

It was an indirect mode of transferring the fief, and resorted to as an artifice to elude the feudal restraint upon alienation. This was forbidden by the statute of Quia Emptores, 18 Ed. I.; 2 Bla. Com. 91; 3 Kent 406. See Cadw. Gr. Rents § 7; Chal. R. P. 18; QUIA EMPTORES; FEUDAL LAW; TENURE.

SUBJECT. An individual member of a nation, who is subject to the laws. This term is used in contradistinction to *citizen*, which is applied to the same individual when considering his political rights.

In monarchical governments, by subject is meant one who owes permanent allegiance to the monarch. See Greenl. Ev. § 286; Phill. Ev. 732; Morse, Citizenship; ALLEGIANCE; CITIZENSHIP; NATURALIZATION.

SUBJECT TO INSURANCE. A provision in a charter-party, that the freight should be payable, subject to insurance, does not make the insurance by the ship-owner a condition precedent to his right to recover the freight, but means that the insurance premium is to be deducted from the freight. 27 L. J. Ex. 392.

SUBJECT-MATTER. The cause; the object; the thing in dispute.

It is a fatal objection to the jurisdiction of the court when it has not cognizance of the subject-matter of the action; as, if a cause exclusively of admiralty jurisdiction were brought in a court of common law, or a criminal proceeding in a court having jurisdiction of civil cases only; 10 Co. 68, 76; 8 Mass. 87. In such case, neither a plea to the jurisdiction nor any other plea would be required to oust the court of jurisdiction. The cause would be dismissed by the court.

SUBJECTION (Lat. sub, under, jacio, to put, throw). The obligation of one or more persons to act at the discretion or according to the judgment and will of others. *Private* subjection is subjection to the authority of private persons. *Public* subjection is subjection to the authority of public persons.

SUBMARINE TELEGRAPHS. See TELEGRAPH.

SUBMISSION (Lat. submissio,—sub, under, mittere, to put,—a putting under). Used of persons or things. A putting one's person or property under the control of another. 10 Barb. 218. A yielding to authority. A citizen is bound to submit to the laws, a child to his parents, a guardian to his ward. A victor may enforce the submission of his enemy.

Every consent involves a submission, but it does not follow that a mere submission involves a consent. 9 C. & P. 722.

In Maritime Law. Submission on the part of the vanquished, and complete possession on the part of the victor, transfer property as between belligerents; 1 Gall. 532.

In Practice. An agreement, parol (oral or written) or sealed, by which parties agree to submit their differences to the decision of a referee or arbitrators. It is sometimes termed a reference; Kyd, Arb. 11; 3 M. & W. 816; 6 Watts 359; 16 Vt. 663; 4 N. Y. 157.

It is the authority given by the parties to the arbitrators, empowering them to inquire into and determine the matters in dispute.

It may be *in pais*, or by rule of court, or under the various statutes; 1 Dev. 82.

It may be oral, but this is inconvenient, because open to disputes; by written agreement not under seal (in Louisiana and California the submission must be in writing; 5 La. 133; 2 Cal. 93); by indenture, with mutual covenants to abide by the decision of the arbitrator; by deed-poll, or by bond, each party executing an obligation to the other conditioned to be void respectively upon the performance of the award; Cald. Arb. 16; 6 Watts 357. A parol submission followed by a valid award, though not in writing, may be binding and conclusive upon the parties, if the arbitrators act fairly, but before a party is so bound, the agreement to arbitrate must be duly established; 97 Ala. 52.

An offer to arbitrate not accepted by the other party cannot affect his right to sue; 67 Mo. App. 559; where a submission was provided for in a lease, and by failure of the parties to agree upon arbitrators, nothing had been done and suit was brought, the action could be defeated by an offer at the trial to proceed with the arbitration; 12 App. Div. N. Y. 421. A statutory provision for arbitration has been held not to be exclusive of the common-law right to arbitrate; 50 Neb. 553. See also, as to the effect of statutory provisions upon common-law arbitration, 119 N. Y. 475; 80 Ala. 118.

When to be made. A submission may be made at any time of causes not in court, and at common law, where a cause was depending, submission might be made by rule of court before the trial, or by order of *nisi prius* after it had commenced, which was afterwards made a rule of court; 2 B. & Ald. 395; 3 S. & R. 262; 4 Halst. 198.

Who may make. Any one capable of making a disposition of his property or release of his right, or capable of suing or being sued, may make a binding submission to arbitration; but one under civil or natural incapacity cannot be bound by his submission; Russ. Arb. 20; 2 P. Wms. 45; 9 Ves. 350; 3 Me. 315; 2 N. H. 484; 8 Vt. 472; 16 Mass. 396; 5 Conn. 367; 1 Barb. 584; 2 Rob. Va. 761; 6 Munf. 458; Paine 646; 5 How. 83.

In general, in cases of incapacity of the real owner of property, as well as in many cases of agency, the person who has the legal control of the property may make submission, including a husband for his wife; 5 Ves. 846; a parent or guardian for an infant; Freem. 62, 139; 11 Me. 326; 12 Conn. 376; 3 Caines 253 (but not a guardian *ad litem*; 9 Humphr. 129); a trustee for his cestui que trust; 3 Esp. 101; an attorney for his client; 1 Ld. Raym. 246; 12 Ala. 253; 9 Pa. 101; 2 Hill, N. Y. 271; 4 T. B. Monr. 375; 7 Cra. 436 (but see 6 Weekl. Rep. 10); an agent duly authorized for his principal; 8 B. & C. 16; 8 Vt. 472; 11 Mass. 449; 5 Green N. J. 38; 29 N. H. 405; 8 N. Y. 160; an executor or administrator at his own peril, but not thereby necessarily admitting assets; 20 Pick. 584; 6 Leigh 62; 5 T. B. Monr. 240; 5 Conn. 621; 1 Barb. 419; 8 Harr. N. J. 442; assignees under bankruptcy and insolvency laws, under the statutory restrictions, stat. 6 Geo. IV. c. 16, and state statutes; the right being limited in all cases to that which the person acting can control and legally dispose of; 6 Mass. 78; 6 Munf. 458; 4 T. B. Monr. 240; 21 Miss. 133; but not including a partner, for a partnership; 1 Cr. M. & R. 681; 1 Pet. 221; 19 Johns. 137; 2 N. H. 284; 5 Gill & J. 412; 12 S. & R. 243; Lind. Partn. 129, 272; 3 Kent 49; the *administratrix* of a public contractor may join in a submission to arbitration of a controversy arising out of the contract; 9 App. D. C. 360.

What may be included in a submission. Generally, any matter which the parties might adjust by agreement, or which may be the subject of an action or suit at law, except perhaps actions (*qui tam*) on penal statutes by common informers; for crimes cannot be made the subject of adjustment and composition by arbitration, this being against the most obvious policy of the law; 5 Wend. 111; 2 Rawle 341; 7 Conn. 345;

6 N. H. 177; 16 Miss. 296; 16 Vt. 450; 10 Gill & J. 193; 5 Munt. 10; 120 Mass. 403; 59 Me. 121; 70 Mo. 417; including a debt certain on a specialty, any question of law, the construction of a will or other instrument, any personal injury on which a suit will lie for damages, although it may be also indictable; 9 Ves. 967; 8 Me. 119, 289; 6 Pick. 143. All controversies of a civil nature, including disputes concerning real estate, may be the subject of a submission for arbitration; 35 Kan. 668.

An agreement to refer future disputes will not be enforced by a decree of specific performance, nor will an action lie for refusing to appoint an arbitrator in accordance with such an agreement; 2 B. & P. 135; 2 Stor. 800; 15 Ga. 473. It is considered against public policy to exclude from the tribunals of the state disputes the nature of which cannot be foreseen; 4 Bro. C. C. 312, 315. See 31 Pa. 306.

Effect of. A submission of a case in court works a discontinuance and a waiver of defects in the process; 18 Johns. 22; 10 Yerg. 439; 2 Humphr. 516; 5 Gray 492; 4 Hen. & M. 363; 5 Wisc. 421; 4 N. J. 647; 41 Me. 353; 30 Vt. 610; 2 Curt. C. C. 28; and the bail or sureties on a replevin bond are discharged; 1 Pick. 192; 4 Green N. J. 277; 1 Ired. 9; 8 Ark. 214; 2 B. & Ad. 774. But see 6 Taunt. 379; 10 Bingh. 118. But this rule has been modified in England by stat. 17 & 18 Vict. c. 125, § 11; 8 Exch. 337.

The submission which defines and limits, as well as confers and imposes, the duty of the arbitrator must be followed by him in his conduct and award; but a fair and liberal construction is allowed in its interpretation; 1 Wms. Saund. 65; 11 Ark. 477; 3 Pa. 144; 13 Johns. 187; 2 N. H. 126; 2 Pick. 534; 3 Halst. 195; 1 Pet. 222. If general, it submits both law and fact; 7 Ind. 49; if limited, the arbitrator cannot exceed his authority; 11 Cush. 37.

The statutes of many of the states of the United States provide for submissions by the parties before a justice of the peace, in which case the award will be enforced as if it had been made under rule of court; and statutes also regulate submissions made under rule of court.

Revocation of a submission may take place at any time previous to the award, though it be expressed in the agreement to be irrevocable. The remedy of the injured party is by an action for breach of the agreement; Morse, Arb. & Aw. 230; 8 Co. 81; 4 B. & C. 103; 12 Wend. 578; 12 Mass. 49; 20 Vt. 198; 26 Me. 251, 459; 3 Day 118; 28 Pa. 393; 4 Sneed 462; 6 Dana 307; 128 Ill. 72; 35 Fed. Rep. 22. See also 36 *id.* 408; 111 N. Y. 310; 82 Cal. 42; 59 Minn. 290. A submission by deed must be revoked by deed; 8 Co. 72, and cases above.

A submission under rule of court is generally irrevocable, by force of statutory provisions, both in England and the United States; 5 Burr. 497; 12 Mass. 47; 4 Me. 459; 1 Binn. 42; 6 N. H. 36; 4 Conn. 498; 5 Paige 575; 3 Halst. 116; 3 Ired. 333; 19 Ohio 245. Where there is a contract of agreement, upon sufficient consideration, and rights have accrued to either party so that the *status quo* cannot be restored, the submission is not revocable; 6 D. R. Pa. 131, where it was held that a submission under the Pennsylvania compulsory arbitration act could not be revoked although some proceedings were waived. A right of revocation must be exercised before the publication of the award; 49 Neb. 280; but where the arbitration agreement provides for a written award, it may be revoked after the arbitrators have communicated to strangers their views, but before they have signed an award; *id.* 280.

A submission at common law is generally revoked by the death of either party (unless it be stipulated otherwise), or of the arbitrator, or his refusal to act; 2 B. & Ald. 394; 40 N. H. 130; but see 15 Pick. 79; 3 Halst. 116; 2 Gill & J. 479; 3 Swan 90; 15 Ga. 473; by marriage of a *feme sole*, and the husband and wife may then be sued on her arbitration bond; 5 East 266.

It is not revoked by the bankruptcy of the party or by the death of the arbitrator after publication of the award; 4 B. & Ald. 250; 9 B. & C. 629; 21 Ga. 1. A submission in a pending action at law falls where the award fails for misconduct of the arbitrators; 74 Miss. 305.

As to arbitration as a condition precedent, see 11 Harv. L. Rev. 234; JURISDICTION; ARBITRATOR; ARBITRATION

SUBMISSION BOND. The bond by which the parties agree to submit the matter in controversy to arbitration, and to abide by the award of the arbitrator. See SUBMISSION.

SUBMISSION OF A CONTROVERSY. See AGREED CASE.

SUBNOTATIONS (Lat.). In Civil Law. The answers of the prince to questions which had been put to him respecting some obscure or doubtful point of law. See RESCRIPT.

SUBORNATION OF PERJURY. In Criminal Law. The procuring another to commit legal perjury, who in consequence of the persuasion takes the oath to which he has been incited. Hawk. Pl. Cr. b. 1, c. 69, s. 10.

To complete the offence, the false oath must be actually taken, and no abortive attempt to solicit will complete the crime; 2 Show. 1; 5 Metc. Mass. 241; Clark, Cr. L. 330.

But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law; 2 East 17; 6 *id.* 464; 1 Hawk. Pl. C. 435; 2 Bish. N. Cr. L. § 1197; 26 U. C. Q. B. 297. In fact it has been said: "There appears to have been a period in our law when the unsuccessful solicitation was deemed to constitute, without more, the full subornation of perjury; for as such it and other indictable attempts corruptly to influence a witness are treated of in some of the old books." 2 Bish. N. Cr. L. § 1197. In order to constitute the crime the false swearing procured must be itself perjury; 40 La. Ann. 460. As to what constitutes perjury, see that title. An attempt at subornation of perjury may be shown in evidence at the trial of the cause to which the attempt relates against the guilty party. So also concealment of facts or documents such as a will, accounts, etc., which were in the power of the party to produce and which presumably he would produce; 186 Pa. 197; L. R. 5 Q. B. 314, approved in 130 Mass. 76. See also 103 Ill. 485; 56 Wis. 156; 82 Pa. 537.

For a form of an indictment for an attempt to suborn a person to commit perjury, see 2 Chitry, Cr. Law 480. There must be knowledge that the testimony is false on the part of both, he who solicits and he who is solicited; 2 Bish. N. Cr. L. § 1197 a; 10 Sawy. 135; 124 Ill. 17; 19 Fed. Rep. 912.

Provision is made for the punishment of this crime when committed against the administration of justice by the federal government; E. S. §§ 5392, 5393.

SUBPENA (Lat. sub, under, poena, penalty). In Practice. A process to cause a witness to appear and give testimony, commanding him to lay aside all pretences and excuses, and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned. This is called distinctively a *subpoena ad testificandum*.

On proof of service of a subpoena upon the witness, and that he is material, an attachment may be issued against him for a contempt, if he neglect to attend, as commanded.

In Chancery Practice. A mandatory writ or process directed to and requiring one or more persons to appear at a time to come and answer the matters charged against him or them. The writ of subpoena was originally a process in the courts of common law, to enforce the attendance of a witness to give evidence; but this writ

was used in the court of chancery for the same purpose as a citation in the courts of civil and canon law, to compel the appearance of a defendant, and to oblige him to answer upon oath the allegations of the plaintiff.

It was invented by John Waltham, bishop of Salisbury, and chancellor to Rich. II., under the authority of the statutes of Westminster II. and 13 Edw. I. c. 34, which enabled him to devise new writs; Cruise, Dig. t. 11, c. 1, § 12. See Vin. Abr. *Subpoena*; 1 Swanst. 209; Spence, Eq. Jur.

SUBPENA DUCES TECUM. In Practice. A writ or process of the same kind as the *subpoena ad testificandum*, including a clause requiring the witness to bring with him and produce to the court books, papers, etc., in his hands, tending to elucidate the matter in issue. 2 Bla. Com. 382.

This is the only method in most cases, of obtaining the production of a document in the hands of a person not a party to the action. The use of such processes seems to be, as suggested by Lord Ellenborough, C. J., "essential to the very existence and constitution of a court of common law"; 9 East 483, where he states that such writs cannot be traced earlier than the time of Charles II., but it is impossible to conceive that the courts should not have immemorially acted upon written as well as oral evidence, and if so, there must have been some method of requiring the production of the former other than the voluntary favor of those in whose custody it might be.

It can only be used to compel the production of books, papers, accounts, and the like which are comprehended under the term documentary evidence, and not to bring in court such things as stove patterns, for example; 3 Fed. Rep. 12; 48 *id.* 191.

The writ may issue to a party to the action where he is competent as a witness notwithstanding a statute providing for an order for production to enable an inspection by the adverse party; 8 How. Pr. 24; *id.* 223; *contra*, 7 *id.* 261; 23 N. J. Eq. 212.

The writ is compulsory and must be obeyed by the party to whom it is addressed; 4 Dowl. 275; 7 *id.* 693; 15 Fed. Rep. 712; and it is a question for the court whether there is any valid reason why the paper shall not be produced and upon what conditions; *id.*; 2 Jones & Sp. 28; 5 Sm. & M. 198. That the papers are private is not of itself ground for refusal; 9 Mo. App. 261; 14 Gray 240. He must bring them into court for its inspection, though he need not permit them to be given in evidence, if this would prejudice his rights; 10 Pick. 9.

"No witness, however, who is not a party to a suit, can be compelled to produce his title-deeds to any property, or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture; 2 Taunt. 115; 21 How. Pr. 50; but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action (3 Q. B. D. 618), or because he has a lien upon it." Steph. Dig. Ev. art. 118.

This is stated as the English rule, but in this country it is said that the weight of authority confines the excuse for not producing the document to the exposure to penalty or forfeiture or criminal prosecution; 10 Pick. 9.

A custodian of public documents will not be required to bring them into court under a *subpoena ducet tecum* where official copies can be had; 1 Yeates 430; 2 *id.* 260; or where their production would result in injury to the public; 2 S. & R. 23; 7 Dowl. 693. Papers which are confidential communications are protected as oral statements of the same character would be, as, for example, papers of a client in the hands of his attorney; 4 Vt. 612; 9 M. & W. 609. "Although a paper should be in the legal custody of one man, yet if a *subpoena ducet tecum* is served on another who has the means to produce it, he is

bound to do so;" Lord Ellenborough in 1 Campb. 17.

Telegrams are not privileged, and the officers of a telegraph company must produce them under a *subpoena duces tecum* without respect to rules of the company to the contrary; 8 Dill. 566; 15 Fed. Rep. 712; 72 Mo. 88; or notwithstanding statutes forbidding the disclosure of such messages; 72 Mo. 88; 2 Pars. Sel. Cas. 74. Corporations generally may be required to produce their books and papers which are essential to the rights of litigants; L. R. 9 C. P. 27; 15 Fed. Rep. 718. See an extended note on this subject in 15 Fed. Rep. 718. See DISCOVERY; PRODUCTION OF DOCUMENTS; CORPORATION.

SUBPOENA AD TESTIFICANDUM. See SUBPOENA.

SUBREPTIO (Lat.). In Civil Law. Obtaining gifts of escheat, etc., from the king by concealing the truth. Bell, Dict.; Calv. Lex. Subripere.

SUBREPTION. In French Law. The fraud committed to obtain a pardon, title, or grant, by alleging facts contrary to truth.

SUBROGATION. The substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. That change which puts another person in the place of the creditor, and which makes the right, the mortgage, or the security which the creditor has pass to the person who is subrogated to him,—that is to say, who enters into his right. Domat, Civ. Law, pt. i. l. iii. t. i. § vi.

It is the substitution of another person in place of the creditor, so that the person substituted will succeed to all the rights of the creditor, having reference to a debt due him. It is independent of any mere contractual relations between the parties to be affected by it, and is broad enough to cover every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and conscience ought to be discharged by the latter; 117 Ind. 551.

It is a legal fiction by force of which an obligation extinguished by payment made by a third party is considered as continuing to subsist for the benefit of this third person, who makes but one and the same person with the creditor in the view of the law.

Subrogation gives to the substitute all the rights of the party for whom he is substituted; 4 Md. Ch. Dec. 253. Among the earlier civil-law writers, the term seems to have been used synonymously with *substitution*; or, rather, *substitution* included subrogation as well as its present limited signification. See Domat, Civ. Law, *passim*; Pothier. Obl. *passim*. The term *substitution* is now almost altogether confined to the law of devises and chancery practice. See SUBSTITUTION.

The word subrogation is originally found only in the civil law, and has been adopted, with the doctrine itself, thence into equity; but in the law as distinguished from equity it hardly appears as a term, except perhaps in those states where, as in Pennsylvania, equity is administered through the forms of law. The doctrine of marshalling assets is plainly derived from the Roman law of subrogation or substitution; and although the word is, or, rather, has been used sparingly in the common law, many of the doctrines of subrogation are familiar to the courts of common law.

It is one thing to decide that a surety is entitled, on payment, to have an assignment of the debt, and quite another to decide that he is entitled to be subrogated or substituted as to the equities and securities to the place of the creditor, as against the debtor and his co-sureties; Story, Eq. Jur. § 498; 2 McLean 451; 1 Dev. Ch. 137.

Convention subrogation results, as its name indicates, from the agreement of the parties, and can take effect only by agreement. This agreement is, of course, with

the party to be subrogated, and may be either by the debtor or creditor. La. Civ. Code 1249.

"The doctrine of subrogation is derived from the civil law (48 Pa. 518). In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed than in England (44 Mo. 838). It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form (*id.*), and is independent of any contractual relations between the parties to be effected by it (6 Neb. 219). It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter (83 Gratt. 527; 43 Conn. 244." See 117 Ind. 551). Sheld. Subr. § 1; Har. Subr. 1, 22.

Subrogation does not take place until the payment of the whole debt; 22 U. S. App. 54.

A principle which lies at the bottom of the doctrine is that the person seeking it must have paid the debt under grave necessity to save himself a loss. The right is never accorded to a volunteer; 124 U. S. 534; Sheld. Subr. § 240; 14 N. J. Eq. 284; 52 Pa. 522; Spears, Eq. 37; in which is a statement of the doctrine by Johnson, Ch., of which Miller, J., said in 124 U. S. 549: "This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere."

But under the Louisiana code the payment of a mortgage debt by an ordinary creditor subrogates him to the rights of the mortgagee; 49 La. Ann. 1046; so also of a grantee of the premises who has paid the mortgage in good faith relying on representations that there were no junior liens; 14 Utah 482; but a mortgagee, who, for his own convenience, with knowledge of the facts, accepts several mortgages in discharge of the original one, is not entitled to subrogation; 50 Neb. 601.

Where a bank lent money to a contractor to be used in carrying out his contract and some of it was used by him for paying laborers and material men, the bank was not entitled to subrogation to the claims of the latter; 71 Fed. Rep. 238. As to subrogation to rights of labor, etc., claims, see 42 S. W. Rep. (Tenn.) 53; RECEIVER.

Persons are not entitled to the right of subrogation where such alleged right arises from tortious conduct of their own. A person who invokes the doctrine of subrogation must come into court with clean hands; 149 U. S. 573.

Legal subrogation takes place to its full extent—

First, for the benefit of one who being himself a creditor pays the claim of another who has a preference over him by reason of his liens and securities. For in this case, it is said, it is to be presumed that he pays for the purpose of securing his own debt; and this distinguishes his case from that of a mere stranger. Domat, Civ. Law. And so, at common law, if a junior mortgagor pays off the prior mortgage, he is entitled to demand an assignment thereof; 56 Pa. 76; 36 Me. 577.

Second, for the benefit of the purchasers of an immovable, who uses the price which he paid in paying the creditors to whom the inheritance was mortgaged.

Third, for the benefit of him who, being held with others or for others for the payment of the debt, has an interest in discharging it.

Subrogation takes place for the benefit of co-promisors or co-guarantors, as between themselves, and for the benefit of sureties against their principals. But between co-guarantors and co-promisors subrogation benefits him who pays the debt only to the extent of enabling him to recover from each separately his portion of the debt. As against his co-sureties, the surety increasing the value of their joint security is entitled to subrogation only to the amount actually paid; 6 Ind. 857; 12 Gratt. 642. Any arrangement by one co-surety with the principal enures to

the benefit of all the co-sureties; 26 Ala. N. S. 230, 728.

If one tenant pays a mortgage, tax lien, or other incumbrance upon the property, he may be subrogated to such lien to secure contribution from his co-tenants. A person who has lent money to a debtor for the purpose of discharging a debt may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for the purpose employs it himself in paying the debt and discharging the incumbrance on land given for its security, he is not to be regarded as a volunteer. After such an agreement with the debtor, he is not a stranger in relation to the debt, but he may in equity be entitled to the benefit of the security which he has satisfied with the expectation of receiving a new mortgage or lien upon the land for the money paid; 180 Pa. 522.

When a mortgage is taken upon land with the understanding that it shall be a first lien thereon, and that the money lent is to be applied by the mortgagee to the payment of a prior lien, and it is so applied, the mortgagee is subrogated to the rights of the prior incumbrancer when it is equitable to do so, although there was an antecedent second mortgage of which the subsequent mortgagee had no actual knowledge or notice; 3 Kan. App. 636.

Most of the cases of subrogation so called in the common law arise from transactions of principals and sureties. Courts of equity have held sureties entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt; Story, Eq. Jur. § 499; Har. Subr. 221.

"A surety who completes a contract with the United States on the contractor's default is subrogated to the rights which the United States might assert against a fund created by the retention of 10 per cent. of the sums estimated from time to time as the value of the work done, in order to insure its completion; and this right relates back to the making of the contract, and is superior to any equitable lien asserted by a bank for moneys advanced to the contractor without the surety's knowledge before he began to complete the work." 17 Sup. Ct. Rep. 142.

Where the creditor's right to subrogation depends on the existence in the surety of the rights to which subrogation is sought, after the surety has parted with the thing given him for his protection, the creditor can have no subrogation; 156 U. S. 400.

It is a settled rule that in all cases where a party only secondarily liable on an obligation is compelled to discharge it, he has a right in a court of equity to stand in the place of the creditor, and be subrogated to all his rights against the party previously liable; 4 Johns. Ch. 123; 4 Pick. 505; 3 Stor. 392; 1 Gill & J. 346; 10 Yerg. 310. This is clearly the case where the surety takes an assignment of the security; 2 Me. 341.

If a surety on a debt secured by mortgage pays the debt, he is entitled to the mortgage as security; 2 Sim. 155. In all cases, the payment must have been made by a party liable, and not by a mere volunteer; 3 Paige, Ch. 117; 2 Brock. 252; 4 Bush 471; 124 U. S. 534; see 87 Ky. 667; but it will be applied whenever the person claiming its benefits has paid a debt for which another was primarily answerable, and which he was compelled to pay in order to protect his own rights or save his own property; 29 W. Va. 490; 124 U. S. 534. The creditor must have had his claim fully satisfied; 1 Gill & J. 347; and the surety claiming subrogation must have paid it; 6 Watts 231; 3 Barb. Ch. 625; 11 Red. 118; 13 Ill. 68; and is subrogated, where he has paid to redeem a security, only to the amount he has paid, whatever be the value of the security; 19 Miss. 632; 11 Gratt. 523. But giving a note is payment within this rule; 8 Tex. 66. One who advances money to the mortgage creditor of his debtor, in the payment of interest accum-

ulations on the mortgage debt, becomes legally subrogated, *pro tanto* to the mortgage creditor's right: 44 La. Ann. 537. When a mortgagor fails to protect junior incumbrancers against a prior lien when it is his duty to do so, they may pay it and be subrogated to the rights of the holder thereto: 130 U. S. 287. The surety after paying the debt is entitled to enforce every security which the creditor has against the principal: 82 Va. 65.

To prevent a satisfaction when a surety pays the money to the creditor, to preserve the security for the benefit of the surety so paying, it must be assigned to a trustee, and in no other way can it be kept alive; 101 N. C. 589.

Judgment obtained against the principal and surety does not destroy the relation as between themselves; 2 Ga. 239; 11 Barb. 159. If a judgment is recovered against a debtor and surety separately for the same amount, the surety can enforce the judgment against his principal when assigned to him after he paid the amount of the judgment; 10 Johns. 524; 3 Rich. Eq. 139.

A surety in a judgment to obtain a stay of execution is not entitled to be substituted on paying the judgment, as against subsequent creditors; 5 W. & S. 352. Nor can the surety be subrogated, although he has paid a judgment, if he has sued his principal and failed to recover; 8 Watts 324.

If a judgment is recovered and the sureties pay, they are entitled to be subrogated; 1 W. & S. 155; 14 Ga. 674; 5 B. Monr. 398; 3 Sandf. Ch. 431; even where a mortgage had been given them, but which turned out to be invalid; 4 Hen. & M. 436. This seems to be contradicted in 3 Gratt. 343.

Entry of satisfaction on a judgment does not destroy subrogation, if the entry was not made at the instance of the surety; 20 Pa. 41.

Where the surety has become liable on the contract of his principal, when the principal fails to perform the contract, the surety may pay and be subrogated; 3 Gill & J. 243; 15 N. H. 119; thus, where the surety was held on a bond which he was obliged to pay; 1 Ired. Eq. 340; 22 Vt. 274; and this even where the bond was given to the United States to pay duties on goods belonging to a third person; 4 Rand. 438. And where the bond was given for the payment of the price of land, he was allowed to sell the land; 2 D. & B. 390; 2 B. Monr. 50.

But it is said the mere payment does not *ipso facto* subrogate him; 6 W. & S. 190.

If the surety be also a debtor, there will be no substitution, unless expressly made; 2 Pa. 296; and the person who claims a right of subrogation must have superior equities to those opposing him; 3 Pa. 200.

Sureties of a surety, and his assignee, are entitled to all the rights of the surety, and to be substituted to his place as to all remedies against the principal or his estate; 5 Barb. 398; 22 Vt. 274.

A surety cannot compel the creditor to exhaust his security before coming on the surety; 37 N. J. L. 370.

The debt of the acceptor of a bill is not extinguished by the payment of the bill by the indorser or drawer; for the same rights will remain against him, in their favor, which the holder had himself, unless he is a mere accommodation acceptor; Story, Bills § 422. See a limitation in 19 Barb. 562.

But if payment is made by an indorser who had not received due notice, it is at his own risk, and he can ordinarily have no recourse over to third persons; Chitty, Bills, c. 9; Har. Subr. 174.

An accommodation acceptor is not entitled on payment to a security given to an accommodation indorser; 1 Dev. Eq. 205.

An accommodation indorser who is obliged to pay the note is subrogated to the collateral securities; 12 La. Ann. 733. This subrogation in the civil law operates for the benefit of a holder by intervention (*i. e.* who pays for the honor of the drawer).

Payment of a note by an indorser actually bound, produces the legal effect of subrogating him to the rights of the last holder; 40 La. Ann. 351.

This species of subrogation (by indorsement) is to be distinguished from that which a surety on a note has when he is compelled to pay. Such surety is entitled to the benefit of all the securities which the holder has; 4 Ired. Eq. 22; 22 Pa. 68; 7 N. H. 286.

In the civil law, an agent who buys goods for his principal with his own money is so far subrogated to the principal's rights that if he fails the agent may sell his goods as if they were his own; Cour. de Cass. Nov. 14. 1810.

An insurer of real property is subrogated to the rights of the insured against third parties who are responsible for the loss at common law; 2 B. & C. 254; 13 Metc. 99; 73 N. Y. 399; 39 Me. 253; 25 Conn. 265. And it is well settled in Pennsylvania, New York, New Jersey, and Illinois, that the mortgagee cannot, after payment of his debt by the underwriter, enforce his claim against the mortgagor, but that the underwriter is subrogated to the rights of the mortgagee; 17 Pa. 253; 70 N. Y. 19; 52 Ill. 442; 2 Dutch. 541; 45 Me. 354. So in Canada; 1 Low. Can. 222. The contrary view, however, has been consistently maintained in Massachusetts; 7 Cush. 1; 10 Allen 283.

But an insurance company is not subrogated to the rights of a mortgagee who has paid the premiums himself, so as to demand an assignment of the mortgage before paying his claim when the buildings were burned; 2 Gray 216; 8 Hare 216.

The insurer upon paying to the assured the amount of the loss, total or partial, of the goods insured, becomes, without any formal assignment or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss, and in a court of admiralty may assert in his own name that right of the shipper; 129 U. S. 397. As between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss is primarily upon the carrier, while the liability of the insurer is only secondary; 150 U. S. 99.

Ordinarily as between the insurer, claiming subrogation, and the insured, the amount of the recovery against the person whose tort caused the loss represents the entire loss suffered by the insured; 165 Pa. 428.

Under a statute directing, through its standard form of insurance policy, the subrogation of the insurer to the rights of the insured against the party primarily responsible for the loss, such subrogation is a legal right, which must prevail unless a stronger equity be shown against it; and, where the insured recovers a judgment against such party, the insurer is subrogated to his rights therein; 165 Pa. St. 423; 35 W. N. C. 519.

"An insurance company which has paid a loss upon partnership goods is not prevented, by the subsequent death of one of the partners and the resulting dissolution of the firm, from maintaining a suit in admiralty in the partnership name to recover the amount of the loss from the carrier." 78 Fed. Rep. 155.

An insurer upon paying a loss to the assured can take nothing by subrogation but the rights of the assured, and if the assured has no right of action, none passes to the insurer; 139 U. S. 223; 150 id. 99.

The doctrine of subrogation does not apply to life insurance; 25 Conn. 265; 79 N. Y. 72. But see 3 Dill. 1; 43 Vt. 536.

An executor who is liable for the default of another is entitled to be subrogated to whatever compensation he has a right to; 93 Ky. 685.

An original stockholder compelled to pay calls on stock after its assignment, is entitled to be subrogated to the rights of the corporation against the delinquent as-

signee only upon clear proof of acceptance of the transfer by the latter; 85 Fed. Rep. 19.

In the civil law, whoever paid privileged debts, such, for example, as the funeral expenses, had by subrogation the prior claim: *Eorum ratio prior est creditorum quorum pecunia ad creditoris privilegium pervenit*. Dig. de reb. anc. jud. pos. l. 24, § 3.

So, if during the community of goods arising from the relation of husband and wife an annuity which was due from one of them only was redeemed by the money belonging to both, the other was subrogated *pleno jure* as to that part of the claim; Pothier, Obl. pt. 3, c. 1, art. 6, § 2.

In the civil law, the consignee of goods who pays freight is said to be subrogated to the rights of the carrier and forwarder; Cour. de Cass., 7th Dec. 1826. The common law does not recognize this right as a subrogation. But see LIEN.

In marshalling assets, where a mortgagee has a lien on two funds, if he satisfy himself out of one which is mortgaged to a junior mortgagee so as to extinguish the fund, the junior mortgagee is subrogated to the other fund; 4 Sandf. Ch. 510.

This right of subrogation is a personal right, but may be assigned; 3 Pa. 300; and the creditors of the surety may claim the benefit of the right; 8 Pa. 347; 22 Miss. 87. As to which of two parties liable for the debt shall be subrogated, see 23 Vt. 169.

Where one is subrogated to a mortgage, it is not necessary that it be assigned to him; 45 Vt. 525; though such assignment would only strengthen his position; 10 Minn. 376. The right of subrogation to a prior incumbrance is sometimes enforced by a court of equity by compelling the holder of it to assign it to the party entitled to subrogation; 51 N. Y. 333; 61 Pa. 16. One who is liable to contribute to the payment of a prior lien on property on which he holds security, who is obliged to pay the whole of such claim to protect his own interest, may be subrogated thereto for the purpose of compelling contribution from the other persons liable for a part thereof; 61 Vt. 516.

The creditor need not be made a party to a bill to obtain subrogation; 10 Yerg. 310. See LIEN; MARSHALLING ASSETS.

SUBSCRIBE. To write underneath; 45 Ind. 213; to affix a signature; 16 N. Y. S. 104; see 45 N. H. 481. It may sometimes be construed to mean to give consent to or to attest. 24 L. J. Q. B. 171.

The purpose of a law requiring the subscription to a will to be at the end of the paper is to prevent fraudulent additions before or after execution, and a statute of wills should be so construed as to accomplish this purpose. Anderson; 94 N. Y. 539. The subscribing witnesses to a deed being dead, the execution is to be established by proof of their handwriting. *Id.*; 108 U. S. 44. A summons issued by an attorney with his name printed at the end of the paper, is subscribed by him. *Id.*; 49 Barb. 62.

SUBSCRIBING WITNESS. One who subscribes his name to a writing in order to be able at a future time to prove its due execution. An attesting witness.

In order to make a good subscribing witness, it is requisite he should sign his name to the instrument himself, at the time of its execution, and at the request or with the assent of the party; 6 Hill 303; 11 M. & W. 168; 1 Greenl. Ev. § 969 a; 5 Watts 399.

SUBSCRIPTIO. That kind of imperial constitution which was granted in answer to the prayer of a petitioner who was present. Calvinus.

A writing under, or under-writing; a writing of the name under or at the bottom of an instrument by way of attestation or ratification; subscription. The *subscriptio testium*, (subscription of witnesses), was one of the formalities in the execution of wills, being required by the imperial constitutions in addition to the seals of the witnesses. Burdill; Inst. 2. 10. 3.

SUBSCRIPTION (Lat. *sub*, under, *scribo*, to write). The placing a signature at the bottom of a written or printed engagement; or it is the attestation of a witness by so writing his name; but it has been held that the attestation of an illiterate witness by making his mark is a sufficient subscription. 2 Ves. Sen. 454; 3 P. Wms. 253.

The act by which a person makes an agreement over his signature in writing, to furnish a sum of money for a particular purpose; as, a subscription to a charitable institution, a subscription for a book, for a newspaper, and the like.

One who subscribes, agreeably to the statute and by-laws of a chartered company, acquires a right to his shares, which is a sufficient consideration to make the subscription obligatory on him; but otherwise where the organization was not yet effected; 87 Pa. 333; 90 *id.* 169. A subscription for the payment of certain sums of money to a contemplated corporation, to be formed for a purpose for which the subscribers were to derive benefits, may be enforced by the corporation when formed; and no formal acceptance of the subscription or notice of such acceptance is necessary to make it binding; 140 Ill. 248. The question, how far voluntary subscriptions for charitable objects are binding, is not thoroughly settled.

A subscription of a certain sum towards paying off a church debt made long after the debt was contracted and the church built, is without consideration and cannot be enforced; 17 C. C. R. (Pa.) 614. A mere subscription for a charitable object cannot be enforced; 118 N. Y. 517; 117 *id.* 601; 11 Mass. 113; 121 *id.* 528; 93 Ill. 475; 57 Ia. 307. A gratuitous subscription to promote the object for which a corporation is established, cannot be enforced unless the promisee has, in reliance on the promise sued on, done something or incurred or assumed some liability or obligation; it is not sufficient that others were led to subscribe by the subscription sought to be enforced; 121 Mass. 528; 117 N. Y. 601; 57 Ia. 307. The consideration which supports the promise of a subscriber to an enterprise is expenditure by the promisee on the faith of the subscription and not advantage to be gained by the promisor; 41 Ill. App. 259; 57 Ia. 307; 69 *id.* 184. See 41 Ohio St. 527. Until liability has been incurred or acts have been done on the strength of the subscription, it may be withdrawn, and it is revoked by the insanity or death of the subscriber; 96 Ill. 177; 93 *id.* 475; 77 Pa. 328.

It has been held that the subscription, to be binding, should be a promise to some particular person or committee; and there should be an agreement on the part of such person or committee to do something on their part; as, to provide materials or erect a building; 11 Mass. 114; 24 Vt. 189; 9 Barb. 202; 9 Gratt. 633; 4 Me. 382; 1 N. Y. 581.

If advances were fairly authorized, and have been made on the strength of the subscriptions, it will be deemed sufficient to make them obligatory; 12 Mass. 190; 14 *id.* 172; 1 Metc. Mass. 570; 5 Pick. 238; 19 *id.* 73; 4 Ill. 198; 2 Humph. 335; 2 Vt. 48; 5 Ohio 58; they form a consideration for each other; 37 Pa. 210.

The subscriptions to a common object are not usually *mutual* or really *concurrent*, and can only be held binding on grounds of public policy. See 4 N. H. 533; 6 *id.* 164; 7 *id.* 435; 5 Pick. 506; 2 Vt. 48; 9 *id.* 289; 5 Ohio 58.

Payment by a subscriber of a part of his subscription which was not legally enforceable does not make the residue of the subscription valid; 112 N. Y. 517.

See **ATTESTATION AND SUBSCRIPTION**; **CLOSE THEREOF**.

SUBSCRIPTION LIST. A list of subscribers to some agreement with each other or a third person.

The subscription list of a newspaper is an incident to the newspaper, and passes with the sale of the printing materials; 2 Watts

111.

SUBSELLIA. Lower seats or benches occupied by the *judices* and by inferior magistrates when they sat in judgment, as distinguished from the *tribunal* of the praetor. Calvin.

SUBSEQUENT ACTION. A second action commenced after the issue of a writ, but before judgment obtained in a first action, is held to be a subsequent action. 51 L. J. Q. B. 279.

SUBSEQUENT CONDITION. See **CONDITION**.

SUBSEQUENTLY. See **SINCE**.

SUBSIDY. In English Law. An aid, tax, or tribute granted by parliament to the king for the urgent occasions of the kingdom, to be levied on every subject of ability, according to the value of his lands or goods. Jacob, Law Dict.

In International Law. The assistance given in money by one nation to another to enable it the better to carry on a war, when such nation does not join directly in the war. Vattel, liv. 3, § 82. See **NEUTRALITY**.

Aid given by the government to some commercial enterprise, as to a steamship line. See **SUGAR BOUNTY**.

SUBSOIL. The word includes, *prima facie*, all that is below the actual surface, down to the centre of the earth. 17 L. J. C. P. 162. It is a wider term than mines, quarries, or minerals; 2 L. R. Ir. 339.

SUBSTANCE (Lat. *sub*, under, *stare*, to stand). That which is essential: it is used in opposition to form.

It is a general rule that on any issue it is sufficient to prove the substance of the issue. For example, in a case where the defendant pleaded payment of the principal sum and all interest due, and it appeared in evidence that a gross sum was paid, not amounting to the full interest, but accepted by the plaintiff as full payment, the proof was held to be sufficient; 2 Stra. 699; 1 Phil. Ev. 161.

See **MATTER OF FORM**; **MATTER OF SUBSTANCE**.

SUBSTANTIAL DAMAGES. Damages, assessed by the verdict of a jury, which are worth having, as opposed to nominal damages (*q. v.*).

SUBSTANTIVE. Dependent upon itself. 29 Me. 89. See **SUBSTANTIVE LAW**.

SUBSTANTIVE LAW. One of the two kinds of rules constituting law, namely, those rules which give recognition to rights and duties, which rules are the very foundation and substance of the law. These are static, immobile and lifeless until set in motion by genetic remedial rules embodied in adjective law (*q. v.*). Hicks, Mater. & Meth. Leg. Res. 35.

In Statute Law; All statutes of a general nature, *i. e.*, all except those regulating administrative and court procedure. *Id.* 52.

In Case Law; The greater part of case law is substantive law, *i. e.*, all except those decisions interpreting administrative regulations, codes of procedure and court rules. *Id.* 77.

SUBSTITUTE. One placed under another to transact business for him. In letters of attorney, power is generally given to the attorney to nominate and appoint a substitute.

Without such power, the authority given to one person cannot, in general, be delegated to another, because it is a personal trust and confidence, and is not, therefore, transmissible. The authority is given to him to exercise his judgment and discretion, and it cannot be said that the trust and confidence reposed in him shall be exercised at the discretion of another; 2 Ves. 645. But an authority may be delegated to another when the attorney has express power to do so; T. Jones 110. See Story, Ag. § 13.

SUBSTITUTED EXECUTOR. One

appointed to act in the place of another executor, upon the happening of a certain event.

SUBSTITUTED SERVICE. Service of process upon another than the person upon whom it should be made, where the latter is impossible. Hunt, Eq. pt. i. ch. 2, § 1; Lush. Pr. 867. But an order must be obtained from the court to allow of substituted service, the application for which must be supported by affidavit; Moz. & W.

It is usually applied to cases where property is within the jurisdiction (*q. v.*) of the court and process of some sort or notice of the proceeding is required to be given out of the jurisdiction; and so in divorce proceedings where service on the respondent outside of the jurisdiction is necessary or permitted by the rules.

SUBSTITUTES. In Scotch Law. Where an estate is settled on a long series of heirs, substituted one after another, in tailzie, the person first called in the tailzie is the institute; the rest, the heirs of tailzie, or the substitutes. Erskine, Inst. 3. 8. 8. See **TAILZIE**.

SUBSTITUTIO HEREDIS. See **HERES**.

SUBSTITUTION (Lat. *substitutio*). In Civil Law. The putting of one person in the place of another, so that he may, in default of ability in the former, or after him, have the benefit of a devise or legacy. Direct substitution is merely the institution of a second legatee in case the first should be either incapable or unwilling to accept the legacy. *Fidei commissary substitution* is that which takes place when the person substituted is not to receive the legacy after the first legatee, and, consequently, must receive the thing bequeathed from the hands of the latter. Merlin, Répert. See **SUBROGATION**.

SUBSURFACE STREAMS. See **WATERS**.

SUBTERRANEAN WATER-COURSES. See **WATERS**.

SUBTERRANEAN WATERS. Subterranean streams, as distinguished from subterranean percolations, are governed by the same rules, and give rise to the same rights and obligations, as flowing surface streams; 25 Pa. 528; 2 H. & N. 186. But see 12 M. & W. 374. The owner of the land under which a stream flows can, therefore, maintain an action for the diversion of it, if such diversion took place under the same circumstances as would have enabled him to recover, if the stream had been wholly above ground; 25 Pa. 528; 45 *id.* 518; 5 H. & N. 982; 1 Sawy. 270. But in order to bring subterranean streams within the rules governing surface streams, their existence and their course must be, to some extent, known or notorious; 20 Conn. 533; 45 Pa. 518; and it must be proved that there was a well defined and discerned stream, and not merely a percolation; 161 Pa. 283. Where there is nothing to show that the waters of a spring are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolations of water through the soil; 42 Cal. 303. As these percolations spread themselves in every direction through the earth, it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land; the law does not therefore forbid their disturbance; 79 Pa. 81.

The question has arisen how far one has the right to gather in his well or reservoir water which otherwise would have percolated through the soil of his property. It is suggested by Judge Cooley as a satisfactory principle, that it may lawfully be done for the actual use of the proprietor inasmuch as the waters belong to no one until they are collected and they may be appropriated by the one who collects and puts them to use; but one will not be per-

mitted to dig a hole to injure his neighbor; 14 Alb. L. J. 68. The writer just cited considers it impracticable to apply to subterranean waters percolating through the soil the same rules which are used to regulate the rights of the proprietor in a running stream. "Such a rule," he adds, "would raise questions of unreasonable use and cause difficulties both of evidence and application that would make the right of such waters more troublesome than valuable." *Id.* This precise question was considered in an English case, *Acton v. Blundell*, 12 M. & W. 324, by Tindal, C. J., who drew a distinction between such cases and those which concerned surface streams, and held the defendant liable in damage for drawing off a supply of water from a well used to run a mill, by a coal-pit three quarters of a mile from the well. This case was afterward referred to as making for the first time a distinction between underground and surface waters; 7 Exch. 282, 300; it is recognized as settling the rule in England, and is followed in many of the American courts; 7 H. L. Cas. 349; 2 El. & El. 445; 12 Q. B. 753; 4 Const. 195; 12 Ohio St. 310; 62 Me. 175; 38 Vt. 473; 25 Conn. 538. See Ang. Waters § 114, where the cases are collected.

But it is held that subterranean waters, flowing in known, definite channels, are subject to the same rule as surface waters; 161 Pa. 283; 17 L. R. Ir. 459; otherwise they may be drained; 7 H. L. C. 349; 50 Barb. 316; 62 Me. 175 (though done with malice; 72 N. Y. 39; [1895] A. C. 557; but see 60 N. H. 439); but not, it is held, if the supply of water in surface streams on the land of adjoining owners is thereby diminished; L. R. 6 Ch. 488. See 141 N. Y. 521; 8 Wash. 144; 65 N. W. Rep. (N. D.) 911. As between two corporations pumping water from their respective premises for sale, one cannot complain of the diversion of percolating water by the other; 53 N. Y. S. 10.

See Ang. Waterc. § 109; Gould, Waters 280; Bainbr. Mines 85; LAND. As to a prescriptive claim to direct such waters, see 20 Conn. 533; 32 Vt. 724.

SUBTRACTION (Lat. *sub*, away, *trahō*, to draw). The act of withholding or detaining anything unlawfully.

The principal descriptions of this offence are: (1) Subtraction of suit, and service, consisting of a withdrawal of fealty, suit of court, rent, or customary services, from the lord or landlord; 2 B. & C. 827. (2) Of titles. (3) Of conjugal rights. (4) Of legacies, which is the withholding of legacies by an executor. (5) Of church rates, a familiar class of cases in England, consisting in the refusal to pay the amount of rate at which any individual parishioner has been assessed for the necessary repairs of the parish church. Brown, Dict.

SUBTRACTION OF CONJUGAL RIGHTS. See RESTITUTION OF CONJUGAL RIGHTS.

SUBVENTION. A subsidy; a grant, usually from the government. See SUBSIDY.

SUCCESSFUL AND SATISFACTORY MANNER. "Successful and satisfactory manner," in the performance of work, means in a good, efficient and workmanlike manner. 144 Ky. 483, 139 S. W. 750.

SUCCESSION. In Louisiana. The right and transmission of the rights and obligations of the deceased to his heirs. The estate, rights, and charges which a person leaves after his death, whether the property exceed the charges or the charges exceed the property, or whether he has left only charges without property. The succession not only includes the rights and obligations of the deceased as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also of the new charges to which it becomes subject. That right by which the heir can take possession of the estate of the deceased, such as it may be.

Irregular succession is that which is established by law in favor of certain persons or of the state in default of heirs either legal or instituted by testament.

Legal succession is that which is established in favor of the nearest relations of the deceased.

Testamentary succession is that which results from the constitution of the heir, contained in a testament executed in the form prescribed by law. See HEIR; DESCENT; Pothier, *des Successions*; Toullier, l. 3, tit. 1.

In Common Law. The mode by which one set of persons, members of a corporation aggregate, acquire the rights of another set which preceded them. This term in strictness is to be applied only to such corporations; 2 Bla. Com. 430.

In Scotch Law. "Heritable rights descend by succession to the heir properly so called; movable rights to the executors, who are sometimes said to be heirs in movables. Succession is either by special destination, which descends to those named by the proprietor himself, or legal, which devolves upon the persons whom the laws mark out for successors, from the presumption that the proprietor would have named them had he made a destination. The first is in all cases preferred to the other, as presumption must yield to truth." Ersk. Prin. III. 8. 1.

See INTESATE SUCCESSION; PERPETUAL SUCCESSION; UNIVERSAL SUCCESSION.

SUCCESSION TO THE CROWN. See HEREDITARY RIGHT TO THE CROWN.

SUCCESSION DUTY. A duty payable, in England, under the Succession Duties Act of 16 & 17 Vict. c. 51, amended by 22 & 23 Vict. c. 21, upon succession to property. An excise or duty upon the right of a person to receive property by devise or inheritance from another under the regulations of the state. 45 S. W. Rep. (Mo.) 245. It is of the nature of the collateral inheritance tax of Pennsylvania, and like the English legacy duty, which is levied on a sliding scale, according as the successor is more or less nearly related to the decedent. See Brown, Dict. See LEGACY DUTY; TAX; DEATH DUTIES.

SUCCESSION, SINGULAR. See UNIVERSAL SUCCESSION.

SUCCESSOR. One who follows or comes into the place of another.

This term is applied more particularly to a sole corporation, or to any corporation. The word heir is more correctly applicable to a common person who takes an estate by descent. 12 Pick. 322; Co. Litt. 8 b.

A person who has been appointed or elected to some office after another person.

Where electrolyte plates belonged to two firms and "their heirs and successors," and they passed to one of the firms, and thence to one of its members, who sold them to a third firm, the latter was held not a "successor," 164 Mass. 457.

SUCCINCT. Brief, compressed, terse; hence, compressed in narrow shape; concise. 2 Ind. App. 549.

SUCESION LEGITIMA. The words *sucesion legitima* in the will of a Porto Rican held to mean "issue," and not "lawful heirs." 201 U. S. 31.

SUCKEN, SUCHEN. In Scotch Law. The whole of the lands restricted to a mill,—that is, whose tenants are bound to grind there. The possessors of these lands are called suckeners. Bell, Dict.

SUDDER. In Hindu Law. The chief seat of government contra-distinguished from *mofussil*, or interior of the country. Whart.

SUE. To commence or to continue legal proceedings for the recovery of a right. See 11 Fed. Rep. 251; ACTION; SUIT.

The words "to sue and be sued" as used in § 7 of the Organic Act of Porto Rico, when

construed in connection with the grant of governmental powers therein contained, amount only to a recognition of a liability to be sued in case of consent duly given. 227 U. S. 270.

SUE OUT. To secure by petition or by request. English. To obtain judicially; to issue. Applied only to process; particularly such as is granted specially. To sue out a writ is to obtain and issue it; to issue it on leave obtained for the purpose. Burrill.

SUED OUT. A summons is not sued out till it passes from the clerk to a proper officer with a *bona fide* intention to have it served. 14 So. Rep. (Ala.) 383.

SUERTE. In Spanish Law. A small lot of ground. 5 Tex. 83.

SUFFER. To approve; to consent to; to permit and not to hinder. 19 Conn. 505; 17 Blatchf. 330. See PERMIT.

Synonymous with permit; as, in a statute against "suffering" an animal to go at large. To suffer an act to be done, by a person who can prevent it, is to permit or consent to it, to approve it, not to hinder it. It implies willingness. Anderson; 19 Conn. 505-6. Includes knowledge of what is to be done, and intention that what is done is what is to be done. *Id.*; 17 Blatch. 331. As used in the Bankrupt Act of 1867, differs from the word "procure." To suffer implies a passive condition. It is like "to allow," "to permit," and does not import a demonstrative, active course, like the word procure. It is an apt word to apply to the case of pressure and powerful motives brought to bear upon a party. Under the influence of this pressure, and the operation of these motives, he suffers a thing to be done; that is, allows or permits it. *Id.*; 2 Biss. 423.

The use of the words "suffered greatly" in instructions in a personal injury case were held to be error. 137 Ky. 696, 126 S. W. 362.

"Suffering games of cards to be played" means the allowing or permitting games of cards to be played, with the knowledge that money or property was or is to be won or lost thereon. 141 Ky. 585, 133 S. W. 219.

SUFFERANCE. Consent given one from a failure to object; negative permission; toleration; allowance.

See ESTATE BY SUFFERANCE.

Passive consent. Sufferance should be distinguished from assent, consent, leave, and permission, which may import affirmative action, expressed volition, while sufferance is negative. Thus a tenant by sufferance is one who came lawfully into possession of lands, but whose right has expired, and who is now occupying merely by the permission implied from the owner's not having given notice to quit. Abbott. See SUFFERANCE, TENANT AT.

SUFFERANCE, TENANCY BY. A tenancy by sufferance arises when a person comes into possession of land by lawful title and occupies it afterwards without any title at all. 11 Am. & Eng. Encyc. 2nd ed. 381; 2 Bla. Com. 150; 25 Cal. 31 *et al.* By the common law, a tenant by sufferance was not liable for rent as such although liable for the fair value of the premises in an action for use and occupation. *Id.*; 115 Mass. 367. The landlord was entitled to resume possession or the tenant to quit the premises at any time. *Id.*; *ibid.*

In general, a tenancy at sufferance is said to exist where a person comes into possession of lands lawfully, and after his estate is ended holds over wrongfully. *Id.*, vol. 18, p. 177; Co. Litt. 57 b. Want of consent to the continued occupancy of the tenant is the distinguishing characteristic between a tenancy at sufferance and a tenancy at will. *Id.*; 16 Mass. 443. To render one a tenant at sufferance it is necessary that he be actually in possession of the land. There can be no such thing as a tenant at sufferance out of possession. *Id.*; 80 Ala. 416. The tenancy arises only out of the laches of the owner, and therefore a person whose original possession was lawful cannot, after his right to possession has terminated, claim

the rights of a tenant at sufferance if the owner has not been guilty of laches. *Id.*; 28 Cal. 551. To create a tenancy at sufferance it is not necessary that any privity of contract or of estate exist between the parties. *Id.* 27 Mich. 26. The holding of a tenant at sufferance was the most shadowy estate recognized at common law, and practically the only distinction between such a tenant's holding and the possession of a trespasser was that the landlord could, by his acquiescence, at any time base upon the tenancy at sufferance the relation of landlord and tenant, which he could not establish at law against a mere trespasser, and that the tenant could not be subjected to an action in trespass before entry or demand for possession. *Id.*; 14 Ct. Cl. 493.

SUFFERANCE WHARF. A place appointed by order under the hands of the English Commissioners of Customs and Excise for the lading and unloading of goods liable to customs duties. *Byrne.*

SUFFICIENTLY. In a statute requiring the carrier to sufficiently water and feed live stock in transit the word is not too indefinite to carry a penalty. 24 S. W. Rep. (Tex.) 387.

SUFFRAGAN (L. Lat. *suffraganeus*). A titular bishop ordained to assist the bishop of the diocese in his spiritual functions, or to take his place. The number was limited to two to each bishop by 26 Hen. VIII. c. 14. So called because by his suffrage ecclesiastical causes were to be judged. *T. L.*

SUFFRAGE. Vote; the act of voting. Participation in the suffrage is not of right, but is granted by the state on a consideration of the state; Cooley, Const., 2d ed. 752; 1 MacArth. 169; 1 Blatch. 200. The grant of suffrage makes it a legal right until it is recalled, and it is protected by the law as property is. The states establish rules of suffrage except as shown below. Suffrage is never a necessary accompaniment of state citizenship, and the great majority of citizens are always excluded from it. On the other hand, suffrage is sometimes given to those who are not citizens; as has been done by no less than twelve of the states, in admitting persons to vote, who, being aliens, have merely declared their intentions to become citizens.

By the constitution of the United States the qualifications for electors of members of the house of representatives are to be the same as those for the most numerous branch of the state legislature. The fifteenth amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." The fourteenth amendment was intended mainly to effect the same object by a voluntary action on the part of the state, but was practically superseded by the fifteenth amendment.

It has been said that the constitution of the United States confers the right to vote upon no one. That right comes to the citizens of the United States when they possess it at all, under state laws. But the fifteenth amendment confers upon them a new exemption; from discrimination in elections on account of race, color, or previous condition of servitude; 92 U. S. 214, 542. See Cooley, Const., 2d ed. 14; Hare, Am. Const. L. 524; **ELECTION: VOTER; CIVIL RIGHTS; CONSTITUTION OF THE UNITED STATES; Nineteenth Amendment.**

SUGAR BOUNTY. The appropriation of money by the act of March 2, 1895, to be paid to certain manufacturers and producers of sugar is within the power of congress. 168 U. S. 427.

SUGGESTIO FALSI (Lat.). A statement of a falsehood. This amounts to a fraud whenever the party making it was bound to disclose the truth.

The following is an example of a case where chancery will interfere and set

aside a contract as fraudulent, on account of the *suggestio falsi*; a purchaser applied to the seller to purchase a lot of wild land, and represented to him it was worth nothing, except for a sheep pasture, when he knew there was a valuable mine on the lot, of which the seller was ignorant. The sale was set aside; 3 Paige, Ch. 390. See **CONCEALMENT; MISREPRESENTATION; REPRESENTATION; SUPPRESSIO VERI.**

SUGGESTION. In Practice. Information. It is applied to those cases where, during the pendency of a suit, some matter of fact occurs which puts a stop to the suit in its existing form, such as death or insolvency of a party; the counsel of the other party announces the fact in court or enters it upon the record; the fact is usually admitted, if true, and the court issues the proper order thereupon. See 2 Sell. Pr. 191.

In wills, when suggestions are made to a testator for the purpose of procuring a devise of his property in a particular way, and such suggestions are false, they generally amount to a fraud; Bac, Abr. *Wills* (G 3).

SUGGESTIVE INTERROGATION. A phrase which has been used by some writers to signify the same thing as *leading question*. 2 Bentham, Ev. b. 3, c. 3. It is used in the French law.

SUI GENERIS. Of its own kind or class.

SUI HEREDES. In Civil Law. One's own heirs; proper heirs. Inst. 2, 19, 2.

SUI JURIS (Lat. of his own right). Possessing all the rights to which a freeman is entitled; not being under the power of another, as a slave, a minor, and the like.

To make a valid contract, a person must, in general, be *sui juris*. Every one of full age is presumed to be *sui juris*. Story, Ag. 10.

SUICIDE (Lat. *suus*, himself, *cædere*, to kill). Self-destruction.

This was once regarded by the common law as exclusively a felonious act; of late, however, it has been often treated as the result of insanity, to be followed by all the legal consequences of that disease, so far as it is practicable. That suicide may be committed by a person in the full enjoyment of his reason, there can be no doubt; nor can there be any doubt that it is often the result of unquestionable insanity. Between the two kinds of suicide here indicated, the medical jurist is obliged to discriminate, and in performing this duty the facts on the subject should be carefully considered.

The instinct of self-preservation is not so strong as to prevent men entirely from being tired of life and seeking their own destruction. They may have exhausted all their sources of enjoyment, their plans of business or of honor may have been frustrated, poverty or dishonor may be staring them in the face, the difficulties before them may seem utterly insurmountable, and, for some reason like these, they calmly and deliberately resolve to avoid the evil by ending their lives. The act may be unwise and presumptuous, but there is in it no element of disease. On the other hand, it is well known that suicidal desires are a very common trait of insanity,—that a large proportion of the insane attempt or meditate self-destruction. It may be prompted by a particular delusion, or by a sense of irresistible necessity. It may be manifested in the shape of a well-considered, persistent intention to seize upon the first opportunity to terminate life, or of a blind, automatic impulse acting without much regard to means or circumstances. As the disease gives way and reason is restored, this propensity disappears, and the love of life returns.

Besides these two forms of the suicidal propensity, there are other phases which cannot be referred with any degree of certainty to either of them. Persons, for instance, in the enjoyment of everything calculated to make life happy, and exhib-

iting no sign of mental disease, deliberately end their days. Another class, on approaching a precipice or a body of water, are seized with a desire, which may be irresistible, to take the fatal plunge. Many are the cases of children who, after some mild reproof, or slight contradiction, or trivial disappointment, have gone at once to some retired place and taken their lives. Now, we are as little prepared to refer all such cases to mental disease as we are to free voluntary choice. Every case, therefore, must be judged by the circumstances accompanying it, always allowing the benefit of the doubt to be given to the side of humanity and justice.

By the common law, suicide was treated as a crime, and the person forfeited all chattels real or personal, and various other property; 4 Bla. Com. 190. This result can be avoided by establishing the insanity of the party; and in England, of late years, courts have favored this course whenever the legal effect of suicide would operate as a punishment. On the other hand, where the rights and interests of other parties are involved, the question of insanity is more closely scrutinized; and ample proof is required of the party on whom the burden of proof lies.

To be guilty of this offence, the deceased must have had the will and intention of committing it, or else he committed no crime; but he also has been so considered who occasions his own death whilst maliciously attempting to kill another; Hawk. Pl. Cr. b. 1, c. 37, s. 4. As he is beyond the reach of human laws, he cannot be punished. The English law, indeed, attempted to inflict a punishment by a barbarous burial of his body, and by forfeiting to the king the property which he owned which would belong to his relations; Hawk. Pl. Cr. c. 9; 4 Bla. Com. 189; but forfeiture in this species of felony, as in other kinds, has been wholly abolished by the Felony Act of 1870, 33 & 34 Vict. c. 23; 4 Steph. Com. 62; one who kills another at his request incurs the same guilt as if not requested; 8 C. & P. 418; so of killing one in a duel; 3 East 581; 31 Ga. 411; in Massachusetts, an attempt to commit suicide is not punishable, but one who, in attempting it, kills another, commits an indictable homicide; 123 Mass. 422; one who counsels a suicide which is committed in his presence is guilty as principal; 8 C. & P. 418; 70 Mo. 412; 13 Mass. 359; Russ. & R. 523.

Evidence of an intention to commit suicide is material in a murder case, where deceased was found dead under circumstances not inconsistent with the theory of suicide; 157 Mass. 180.

See **FELO DE SE; SELF-DESTRUCTION; INSURANCE; PERSUADE.**

In regard to wills made just before committing suicide, the prevalent doctrine on this point, both in the United States and in England, is that the act of self-destruction may not necessarily imply insanity, and that if the will is a rational act, rationally done, the sanity of the testator is established; 7 Pick. 94; 1 Hagg. Eccl. 109; 2 Harring. 583; 2 Eccl. 415; 46 La. Ann. 773.

It has been held that when the owner of a deposit receipt gives it to another, the gift to take effect at the death of the donor, under such circumstances that the jury find it to have been done in contemplation of suicide, it is not a good *donatio mortis causa*; [1896] 2 I. R. 204.

In regard to life insurance, it is the law of England, at present, that in every case of intentional suicide, whatever may have been the mental condition, the policy becomes void; 3 Mann. & G. 437; 88 L. J. N. S. Ch. 53. In 1 F. & F. 22, the court told the jury the question was, did the assured know he was throwing himself out of the window. If he did, no recovery could be had under the policy. Otherwise, if he did not. Such appears to be the rule in Ohio, Maryland, and Massachusetts; 4 Ins. L. J. 159; 42 Md. 414; 103 Mass. 227; and, it is said, in Germany, Holland, and France; 6 Ins. L. J. 719; May, Ins. § 312. But, although it has been a much vexed question,

the American cases generally construe the phrases "die by his own hand," "commit suicide," or "die by suicide," as including only criminal acts of self-destruction, and not acts not done under the control of the will; Biddle, Ins. 831; 54 Me. 224; 4 Seld. 299; 15 Wall. 580; 7 Heike. 567; Law of Suicide in Life Ins., by William Shradley, 1869. But the supreme court has decided that a condition in the policy that it shall be void if the insured should die by suicide, "sane or insane," avoids the policy, notwithstanding he was of unsound mind and wholly unconscious of the act; 93 U. S. 284; 64 Vt. 78; and the same has been held with reference to a provision in a policy against suicide, "felonious or otherwise, sane or insane;" 34 Wis. 389; 75 Ia. 346; by his "own act or intention, whether sane or insane;" 70 Mo. 27; or "die by his own hand, sane or insane;" 65 Mich. 199; or "shall die by his own hand or act, sane or insane;" 65 N. Y. 233; but death by the suicide of the insured, although insane, is not "death by his own hand," whereby the policy is to be void in that event; 33 U. S. App. 37; and the provision in a policy that if the insured shall "die by his own hand while insane," the insurer shall pay the amount of the premiums and interest, applies only in case the self-destruction is intentional; but where the insured killed himself while incapable of knowing the effect of his act, the whole amount of the policy can be recovered; 87 Ky. 541; or if death is accidental; 29 Fed. Rep. 198; and the same is held with respect to the death of the "insured by his own hand, sane or insane;" 7 Chi. L. N. 421.

The words "felonious or otherwise," used in a policy, are held equivalent to "sane or insane;" 25 Fed. Rep. 315; but not the words, "die by his own hand or act, voluntary or otherwise;" 1 McArthur. 632; or the words, "under any circumstances die by his own hand;" 40 Ohio St. 217.

A by-law of an insurance company making a certificate void if a member, "sane or insane," should take his life, is valid as to a prior certificate which provided that any violation of "the requirements of the laws now in force or hereafter to be enacted," should render the certificate null and void; 71 Ala. 436.

The full amount of the policy is recoverable under a statute which provides that suicide shall be no defence to an action on an insurance policy, unless it was contemplated at the time of obtaining the policy that the suicide, whether sane or insane, shall only be entitled to recover the amount of the premiums paid; 50 Fed. Rep. 511. Where a statute provides that "all companies, after having received three annual premiums, are estopped from defending on any other ground than fraud," . . . the defendant may set up the defence of suicide; 134 Pa. 45.

Where the insured, while insane and unable to realize the consequences of his act, and without intending thereby to take his life, cuts his throat, his death comes within the terms in the policy providing that death shall be by "external, violent, and accidental means;" 74 Mich. 532.

Where one secured a policy of life insurance, and, being financially embarrassed, killed himself in order to secure money for the payment of his debts, the policy was held void, although it was silent as to suicide; 169 U. S. 139; but if a policy is made payable to the wife of the insured, she may recover on it although her husband committed suicide; 39 Atl. Rep. (Pa.) 53.

Where suicide was the defence to an action on an insurance policy, it was not error to charge that "the law does not presume murder; it must be proved;" and, if the evidence is equal as between murder and suicide, the jury must find for the defendant; 84 Fed. Rep. 411; and in an action on such a policy where the evidence is conflicting and quite evenly balanced as to whether death was caused by the intentional or accidental act of the deceased, it will be presumed that death resulted from accident; 47 Fed. Rep. 272. It has been said that the question is not precisely

whether a party is insane or not, but whether he understood the physical nature and consequences of his act, and had sufficient will to make the act voluntary; 10 Am. L. Reg. n. s. 101, 679. See 150 U. S. 468; Wharton, Mental Unsoundness; Phill. Ins.

The burden of showing a suicide rests with the company; 46 Ill. App. 307; 71 Hun 146; 46 La. Ann. 1189. In making the proof necessary to establish the liability of an insurer, the plaintiff is entitled to the presumption that a sane man would not commit suicide, as well as of other rules of law established for the guidance of courts and juries in the investigation and determination of facts; 150 U. S. 468; and while proofs of loss, stating suicide as the cause of death, are admissible, they are not conclusive; 24 L. R. A. 589; and, where the defence is fraud, suicide may be shown to be the agency by which the fraud was accomplished, although by the policy suicide was no defence; 123 N. Y. 85.

SUIT (L. Lat. *secta*; from Lat. *sequi*, to follow. French, *suite*). In Practice. An action.

It is more general than "action," which is almost exclusively applied to law, and denotes any legal proceeding of a civil kind brought by one person against another. 84 Me. 72; 83 Ia. 471.

Suit is a generic term, of comprehensive signification, and applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the recovery of a right. 10 Ill. App. 333.

The word suit in the twenty-fifth section of the Judiciary Act of 1789 applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him. An application for a prohibition is, therefore, a suit; 2 Pet. 449. According to the Code of Practice of Louisiana, art. 86, a suit is a real, personal, or mixed demand made before a competent judge, by which the parties pray to obtain their rights and a decision of their disputes. In that acceptance, the words suit, process, and cause are in that state almost synonymous. See **SECTA**; Steph. Pl. 427; 3 Bla. Com. 395; 1 Chitty, Pl. 399; Wood, Civ. Law, b. 4, p. 315; 4 Mass. 263; 18 Johns. 14; 4 Watts 154; 3 Story, Const. § 1719. In its most extended sense, the word suit includes not only a civil action, but also a criminal prosecution, as, indictment, information, and a conviction by a magistrate; Hamm. N. P. 270. Suit is applied to proceedings in chancery as well as in law; 1 Sm. Ch. Dec. 26; and is, therefore, more general than *action*, which is almost exclusively applied to matters of law; 10 Paige, Ch. 516.

The witnesses or followers of the plaintiff. 3 Bla. Com. 295. See **SECTA**.

Suit of court, an attendance which a tenant owes to his lord's court. Cowel.

Suit covenant, where one has covenanted to do suit and service in his lord's court.

Suit custom, where service is owed time out of mind.

Suithold, a tenure in consideration of certain services to the superior lord.

The following one in chase; as, fresh suit.

A petition to a king, or a great person, or a court.

SUIT IN CONCURSO. See **CONCURSO**.

SUIT SILVER. A small sum of money paid in lieu of attendance at the court barons. Cowel.

SUITE (French). Those persons who by his authority follow or attend an ambassador or other public minister.

In general, the suite of a minister are protected from arrest, and the inviolability of his person is communicated to those who form his suite; Batel, lib. 4, c. 9, § 120. See 1 Dall. 177; Vattel. 240; **AMBASSADOR**.

SUITOR. One who is a party to a suit or action in court. One who is a party to

an action. In its ancient sense, suitor meant one who was bound to attend the county court; also one who formed part of the *secta*.

SUITORS' FUND IN CHANCERY. In England. A fund consisting of moneys which, having been paid into the court of chancery, are placed out for the benefit and better security of the suitors, including interest from the same. By stat. 32 & 33 Vict. c. 91, sec. 4, the principal of this fund, amounting to over £3,000,000, was transferred to the commissioners for the reduction of the national debt. Moz. & W.

SUM. The sense in which it is most commonly used is "money"; a quantity of money or currency; any amount indefinitely, a sum of money, a small sum, or a large sum. 96 U. S. 368.

Sum of the Locals. See **THROUGH ROUTE**.

SUMMARY ACTIONS. In Scotch Law. Those which are brought into court not by summons, but by petition, corresponding to summary proceedings in English courts. Bell; Brown.

SUMMARY CONVICTION. A phrase applied to proceedings which result in the sentence of an accused person without jury trial. At common law it was applied only in cases of contempt. Such proceedings are now frequently provided for by statute, either for trial by a court without a jury, or a final disposition of criminal cases by the committing magistrate. Such statutes are, in derogation of the right of trial by jury, secured by the state and federal constitutions and therefore must provide a right of appeal to a court having a jury. They usually apply only to lesser offences and to hardened offenders.

Summary proceedings as enumerated by Blackstone comprehend: 1. All trials of offences and frauds contrary to the laws of the excise and other branches of revenue which are to be determined by the commissioners of the respective departments and justices of the peace in the country; such convictions are absolutely necessary for due collection of the public money. 2. Convictions before justices of the peace in order to inflict divers petty, pecuniary mulcts and corporal penalties for such disorderly offences as common swearing, drunkenness, vagrancy, idleness, etc. 3. Attachments for contempt and the subsequent proceedings thereon. 4. Bla. Com. 280. See **SUMMARY PROCEEDING**; **CONVICTION**.

SUMMARY JURISDICTION. The jurisdiction of a court to give a judgment or make an order itself forthwith. See **CONTEMPT**.

SUMMARY PROCEEDING. A form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury. See 8 Gray 329.

In no case can the party be tried summarily unless when such proceedings are authorized by legislative authority, except perhaps in cases of contempts; for the common law is a stranger to such a mode of trial; 4 Bla. Com. 280. See 2 Kent 73; 2 Conn. 819; 37 Me. 172; 4 Hill 145; 8 Gray 329; 4 Dev. 15; 10 Yerg. 59. See Gill & Doug. Sum. Jur.

The term summary proceedings is applied to proceedings under statute for enabling landlords promptly to dispossess tenants who hold over after default in payment of rent, or after expiration of the term. See **PROCEEDING**.

SUMMING UP. In Practice. The act of making a speech before a court and jury, after all the evidence has been heard, in favor of one of the parties in the cause, is called summing up. When the judge delivers his charge to the jury, he usually sums up the evidence in the case. See **CHARGE**; **OPENING AND CLOSING**.

SUMMON. In Practice. To notify

the defendant that an action has been instituted against him, and he is required to answer to it at a time and place named. This is done by a proper officer either giving the defendant a copy of the summons, or leaving it at his house, or by reading the summons to him.

SUMMONEAS. In Old Practice. A writ by which a party was summoned to appear in court.

SUMMONEAS AD AUXILIANDUM. (You summon to aid.) A writ to summon a prayee in aid. Burrill; Roscoe's Real Act. 280.

SUMMONEAS AD WARRANTIZANDUM. (You summoned to warranty.) A writ which issued to summon a party who had been vouched to warranty. Burrill; Roscoe's Real Act. 265.

SUMMONERS. Petty officers who cite men to appear in any court.

SUMMONS. In Practice. The name of a writ commanding the sheriff, or other authorized officer, to notify a party to appear in court to answer a complaint made against him and in the said writ specified, on a day therein mentioned. 3 Bla. Com. 279.

SUMMONS AND ORDER. In English Practice. In this phrase the summons is the application to a common-law judge at chambers in reference to a pending action, and upon it the judge or master makes the order. Moz. & W.

SUMMONS AND SEVERANCE. See SEVERANCE.

SUMMUM JUS (Lat.). Extreme right, strict right. See MAXIMS, *Summum jus*, etc.

SUMPTUARY LAWS. Laws relating to the expenses of the people, and made to restrain excess in apparel, food, furniture, etc.

They originated in the view that luxury is, in some of its degrees, opposed to public policy, and that the state is bound to interfere against it. Montesquieu, *Esprit des Loix*, b. 7, c. 2, 4, and Tacitus, Ann. b. 2, ch. 33, b. 3, ch. 52.

In England, in 1336, it was enacted, 10 Edw. III. c. 3, that inasmuch as many mischiefs had happened to the people of the realm by excessive and costly meats, by which, among other things, many who aspired in this respect beyond their means were impoverished and unable to aid themselves or their liege lord in time of need, all men were forbidden to have served more than two courses at a meal, each of but two sorts of victual, except on the principal feasts of the year, and then only three courses were allowed. 4 Com. 170. Subsequent statutes, 1363, 1463, 1482, regulated the dress, and to some extent the diet, of the people, with careful regard to their rank. The substance of these statutes will be found in Knight's History of Eng. p. 272. They were repealed by 1 Jac. I. c. 25. An act of 30 Car. II. c. 3, which ordered the dead to be buried in woollen shrouds; was not repealed until 53 Geo. III. c. 108.

In modern times legislation is not resorted to in respect to this object; but the subject is frequently discussed in connection with the laws for the prevention or punishment of intemperance. See POLICE POWERS.

SUNDAY. The first day of the week. In some of the New England states it begins at sunset on Saturday, and ends at the same time the next day. But in other parts of the United States it generally commences at twelve o'clock on the night between Saturday and Sunday, and ends in twenty-four hours thereafter; 6 Gill & J. 268. See 4 Strobb. 493 (a very learned case); 37 Mo. 466; 39 Me. 193; 3 Cush. 137. *The Sabbath, the Lord's day, and Sunday*, all mean the same thing; 6 Gill & J. 268; 89 Ga. 341.

The stat. 5 & 6 Edw. V. c. 3, enacted that

Sunday should be strictly observed as a holy day, provided that in case of necessity it should be lawful to labor, ride, fish, or work at any kind of work. The Book of Sports (1618) declared that, after divine service, the people should not be disturbed from any lawful recreation. The stat. 29 Car. II. c. 7, provided that no tradesman, artificer, workman, laborer, or other person whatsoever, should exercise any worldly business, etc., upon the Lord's day, works of necessity and charity alone excepted. It also forbade the execution of legal process on that day. This has been followed substantially in America, with a tendency to greater strictness. This includes all business, public or private, done in the ordinary calling of the person; 5 B. & C. 406; ordinary calling means that which the ordinary duties of the calling bring into continued action; 7 B. & C. 596; 55 Ga. 245. Many statutes except those who observe the seventh day; others do not; and such legislation is constitutional; 52 Pa. 126; 69 N. Y. 557; 122 Mass. 40; the fact that an individual believes the seventh day is the Sabbath, but does not observe it as such, does not bring him within the exception; 26 Neb. 464. Jews are bound to observe the civil regulations for keeping Sunday; 52 Pa. 125. In New York writs against Jews cannot be made returnable on Saturday; 39 N. Y. S. 254. Cases of necessity are determined by the moral fitness of the work; 34 Pa. 409. Charity includes everything which proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the comfort and relief of another, and not for one's own pleasure and benefit; 118 Mass. 197. Necessity may arise out of particular occupations; 23 How. 219; 14 Wall. 494; 25 Tex. App. 597; but not when it is a work of mere convenience or profit; 97 Mass. 404; 30 Ind. 476. Shaving a man is not a work of necessity; 54 Mo. App. 310; 23 Wkly. Law Bul. 450; 140 Pa. 89; 143 Mass. 28. See *infra*. Reaping a field of oats on Sunday in order to prevent the loss thereof is a work of necessity; 42 Ill. App. 594. Running street railways on Sunday is illegal; 54 Pa. 401; *contra*, 72 N. Y. 196; 14 Repr. 364 (Ky. Ct. of App.); and see 55 Ga. 126. When statutes forbid travelling on Sunday, there can be no recovery for injuries from defective streets; 117 Mass. 64; 51 Me. 423; 47 Vt. 32; but see 39 Wisc. 21; unless the party was travelling from motives of necessity or charity; 121 Mass. 301; 84 Me. 433; as riding to a funeral or for health; 36 Atl. Rep. (Me.) 1048; or walking for exercise; 65 Me. 34. But in actions for torts against individuals by common carriers, it is no defence that the injury occurred upon Sunday; 26 Pa. 342; 48 Ia. 652; 116 Ind. 566; *contra*, 124 Mass. 387. Most of the cases are otherwise; Big. L. C. Torts 711; see 125 U. S. 555, and the law in Massachusetts was altered in 1877.

Except as to judicial acts, which are void when done on Sunday; 1 W. Bl. 526; 140 U. S. 118; 41 Kan. 336; see DIES NON; the common law makes no distinction between Sunday and any other day. The English cases decided after the act of Charles II., *supra*, merely avoided contracts made in pursuance of one's ordinary calling; see 1 Cr. & J. 180; 31 Barb. 41; 4 M. & W. 270; but in most of the states contracts made on Sunday are invalid; see 85 Me. 143; 19 Vt. 358; 6 Watts 231; 3 Wisc. 343; and if not executed, cannot be enforced; 87 Ga. 483; 84 Me. 11; 97 Ala. 700; 98 Mich. 117. In New York any business but judicial may be done on Sunday; 44 Barb. 618. Generally speaking executory contracts made on Sunday will not be enforced, while executed contracts will not be disturbed; 78 Pa. 473; 105 Mass. 399; 57 Ga. 179; 47 N. J. Eq. 201; but see 2 Ohio St. 388; 13 Kans. 529, as to executory contracts. Delivery on Sunday passes title against the vendor; 26 Cal. 514; 13 Ind. 203; but see 12 Mich. 378; a church subscription on Sunday is valid in Pennsylvania; 12 Repr. 665; and Michigan; 21 Alb. L. J. 293. See 62 Ind. 365. A contract

of sale made on Sunday is not saved from being a Sunday contract by the fact that the purchase-money was not paid until Monday; 56 Conn. 333. A contract dated on Sunday may be shown to be erroneously dated; 97 Mass. 166; and it may be shown that a contract bearing a secular date was actually dated on Sunday; 48 Me. 193; but not against a *bona fide* holder without notice; 48 Ia. 228. When a contract takes effect on delivery, the date is not material; 6 Bush 185; 43 Ia. 297; and a note executed on Sunday but delivered on another day is valid; 24 Vt. 189; 35 Me. 143; a contract made on Sunday may be ratified; 7 Gray 164; 24 Vt. 317; 79 Ia. 101; see 87 Ga. 483; but see 11 Ala. 885; but only by an express agreement and not by mere acquiescence; 79 Fed. Rep. 826; a will executed on Sunday is valid; 9 Allen 118; 1 Am. L. Rev. 750 (N. H.); 124 Ind. 36. A contract for an advertisement in a Sunday paper is invalid; 24 N. Y. 553; *contra*, 52 Mo. 474. A verdict in a homicide case submitted to the jury on Saturday may be received and the jury discharged on Sunday; 163 U. S. 662. Laws requiring all persons to refrain from their ordinary callings on Sunday have been held not to encroach on the religious liberty of the people; Cooley, Const. Lim., 2d ed. 534, 725; they may be sustained as police regulations; 8 Pa. 312; 33 Mich. 279; 40 Ala. 725.

Under an act making it unlawful to open a shop on Sunday, for the sale of goods, etc., a barber cannot be convicted; 38 Pac. Rep. (Wash.) 1001.

A statute forbidding barbers to carry on their trade on Sunday is constitutional, under the police power; 149 N. Y. 195; s. c. 31 L. R. A. 689; notwithstanding the act allows barbers in the cities of New York and Saratoga to work till one o'clock; but in Illinois (43 N. E. Rep. 1108), it is held that an act forbidding barbers to work at their trade on Sunday is a taking of property without due process of law; and that it is not a proper exercise of the police power. See, also, 44 Pac. Rep. (Cal.) 843.

Any act forbidding railroad trains to run on Sunday does not constitute a regulation of, and an obstruction to, interstate commerce, and is valid; 88 Va. 95; 163 U. S. 299; 24 W. Va. 783; 90 Ga. 396; but an act forbidding all manner of servile labor on Sundays, etc., is held to be void, so far as it affects interstate traffic; 65 How. Pr. 72. The running of trains is within the prohibition of a statute which punishes any person who labors in his calling on Sunday, or employs his servants in so doing, except in works of necessity or charity; 24 W. Va. 783; but it has been held that running an excursion train on Sunday is a work of necessity; 30 S. W. Rep. (Ky.) 878; so is delivery of milk to customers; 49 Pac. Rep. (Kan.) 87.

Acts have been passed forbidding baseball playing on Sunday. The cases differ as to their constitutionality. See 56 Alb. L. J. 202; 57 id. 258.

No one is bound to do work in performance of his contract on Sunday, unless the work by its very nature or by express agreement is to be done on that day and can be then done without a breach of law; 18 Conn. 181; 6 Johns. 326; 10 Ohio 426; 7 Blackf. 479.

Sundays are computed in the time allowed for the performance of an act; 10 M. & W. 331; but if the last day happen to be a Sunday, it is to be excluded, and the act must, in general, be performed on Monday; 3 Pa. R. 201; 3 Chitty, Pr. 110; 133 U. S. 299; 147 id. 47. Notes and bills, when they fall due on Sunday, are payable on Saturday, unless a statute provides otherwise. The indorsement of a note creates a new contract, and is an act within the statute prohibiting secular business on Sunday; 84 Me. 111. See, as to the origin of keeping Sunday as a holiday, Story, Pr. Notes § 220; Story, Bills § 223. See, generally, 17 Am. L. Reg. n. s. 285; 3 Rep. Am. Bar Association (1880); 2 Am. L. Rev. 224; 21 Alb. L. J. 424 (Sabbath-

breaking); 28 Am. L. Reg. 137, 209, 273; 32 Am. Rep. 557; 30 *id.* 417; 17 *id.* 123 (legality of labor on Sunday); 3 *id.* 371, n.; 54 Pa. 401; 3 Cr. L. Mag. 632 (Sabbath-breaking; works of necessity). The Massachusetts law on this subject depends more on its peculiar legislation and customs than any general principles of justice or law; 23 How. 209.

As to execution of legal process on Sunday, see *DIES NON*.

See *HOLIDAY*; *POLICE POWER*.

SUNKEN WRECK. Where part of the frame of a ship was sunk beneath the surface of the sea and partially imbedded in the ground, as was also a quantity of iron ore that formed a part of the cargo of the ship, it was held to be a sunken wreck within the meaning of the collision clause of a policy of insurance; [1893] Prob. 248.

SUPER ALTUM MARE (Lat.). Upon the high sea. See *HIGH SEAS*.

SUPER-JURARE. A term anciently used, when a criminal, who tried to excuse himself by his own oath or that of one or two witnesses, was convicted by the oaths of many more witnesses. Moz. & W.

SUPER PRÆROGATIVA REGIS. A writ which formerly lay against the king's tenant's widow for marrying without the royal license. Fitzh. N. B. 174.

SUPER STATUTO. A writ that lay against the king's tenant, holding in chief, who aliened the king's land without his license.

SUPER STATUTO FACTO POUR SENESCHAL ET MARSHAL DE ROY. A writ which lay against a steward or marshal for holding plea in his court, or for trespass or contracts not made or arising within the king's household. Whart.

SUPER STATUTO VERSUS SERVANTES ET LABORATOIRES. A writ which lay against him who kept any servants who had left the service of another contrary to law.

SUPER VISUM CORPORIS (Lat.). Upon view of the body. When an inquest is held over a body found dead, it must be *super visum corporis*. See *CORONER*; *INQUEST*.

SUPERCARGO. In Maritime Law. A person specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes and to receive freight, as he may be authorized.

Supercargoes have complete control over the cargo and everything which immediately concerns it, unless their authority is either expressly or impliedly restrained; 12 East 381. Under certain circumstances they are responsible for the cargo; 4 Mass. 115; see 1 Gill & J. 1; but the supercargo has no power to interfere with the government of the ship; 3 Pardessus, n. 646.

SUPERFICIARIUS (Lat.). In Civil Law. He who has built upon the soil of another, who he has hired for a number of years or forever, yielding a yearly rent. This is not very different from the owner of a lot on ground-rent in Pennsylvania. Dig. 43. 18. 1.

SUPERFICIES (Lat.). In Civil Law. Whatever has been erected on the soil.

SUPERFLUOUS LANDS. Lands acquired by a railroad company under its statutory powers and not required for the purpose of the undertaking. See 10 Jur. Rev. 281.

Slips of land above and below a tunnel; 51 L. J. Q. B. 172; land under arches which carry a railway; 48 L. J. Ch. 258; mines under a surface required or which may be required for the undertaking; 46 L. J. Q. B. 509; are not superfluous lands; but the whole of the land beyond the boundary wall of a railway is superfluous, even

though that wall be also a retaining wall thicker at the base than at the surface, and though part of such land would be within a line drawn on the surface vertically above the line of the footings of the wall; 53 L. J. Ch. 198.

SUPERFETATION. The conception of a second embryo during the gestation of the first, or the conception of a child by a woman already pregnant with another, during the time of such pregnancy.

This doctrine, though doubted, seems to be established by numerous cases; 1 Beck, Med. Jur. 193; Cassan, *Superfetation*; New York Medical Repository; 1 Briand, Méd. Lég. prem. partie, c. 3, art. 4; 1 Fodéré, Méd. Lég. § 299; Buffon, *Hist. Nat. de l'Homme, Puberté*.

SUPERINDUCTIO (Lat.). In the Civil Law. A species of obliteration. Dig. 28. 4. 1. 1.

SUPERINSTITUTION. The institution of one upon another, as where two persons are admitted and are instituted to the same benefice, under adverse titles. Cowel.

SUPERINTENDENT. One who has the power of direction and control over the acts or labor of others. See *MASTER AND SERVANT*.

SUPERINTENDENT REGISTRAR. An officer who superintends the registration of births, deaths, and marriages in England and Wales. Whart.

The clerk to the guardians may be the superintendent registrar (Births and Deaths Registration Act, 1836, s. 7); but he has no absolute right to be appointed, although he in fact always holds the office. Byrne.

SUPERIOR. One who has a right to command; one who holds a superior rank; as, a soldier is bound to obey his superior.

In estates, some are superior to others: an estate entitled to a servitude or easement over another estate is called the superior or dominant, and the other the inferior or servient estate. 1 Bouvier, Inst. n. 1612.

SUPERIOR CIVIL COURTS OF ENGLAND. See *COURTS OF ENGLAND*.

SUPERIOR COURT. A term applied collectively to the three courts of common law at Westminster: namely, the king's bench, the common pleas, the exchequer; and so in Ireland.

It denotes a court of intermediate jurisdiction between the courts of inferior or limited jurisdiction and the courts of last resort.

In American Law. A court of intermediate jurisdiction between the inferior courts and those of last resort. See the several states.

SUPERIOR AND VASSAL. In Scotch Law. A feudal relation corresponding with the English lord and tenant.

SUPERNUMERARI (Lat.). In Roman Law. Those advocates who were not *statuti*, which title see.

The *statuti* were inscribed in the matriculation books, and formed a part of the college of advocates in each jurisdiction. The supernumeraries were not attached to any bar in particular, and could reside where they pleased: they took the place of advocates by title as vacancies occurred in that body.

SUPERONERATIO (L. Lat. *superonere*). Surcharging a common: i. e. putting in beasts of a number or kind other than the right of common allows. It can only be of a common appendant or appurtenant. Bracton 229. Fleta, lib. 4, c. 23, § 4, gives two remedies, novel disseisin and writ of admeasurement, by which latter remedy no damages are recovered till the second offence. Now, distraining, trespass, and case are used as remedies. 3 Sharsw. Bla. Com. 238.

SUPERONERATIONE PASTURA. A writ that formerly lay against him who

was impleaded in the county court for the surcharge of a common for his cattle and the cause was removed into one of the superior courts.

SUPERSEDEAS (Lat. *that you set aside*). In Practice. The name of a writ containing a command to stay the proceedings at law.

An auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by writ of error for review. 102 U. S. 249. Originally it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands. In modern times the term is often used synonymously with a "stay of proceedings," and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment; 93 Cal. 306.

It is granted on good cause shown that the party ought not to proceed; Fitzh. N. B. 238. There are some writs which, though they do not bear this name, have the effect to supersede the proceedings: namely, a writ of error when bail is entered operates as a *superseas*; and a writ of *certiorari* to remove the proceeding of an inferior into a superior court has, in general, the same effect; 8 Mod. 373; 6 Binn. 461. But under special circumstances, the *certiorari* has not the effect to stay the proceeding, particularly where summary proceedings, as to obtain possession under the landlord and tenant law, are given by statute; 6 Binn. 460. See Bacon, Abr.; Comyns, Dig. Yelv. 6, n.

SUPERSTITIOUS USE. In English Law. When lands, tenements, rents, goods, or chattels are given, secured, or appointed for and toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest or other man to pray for the soul of any dead man in such a church or elsewhere; to have and maintain perpetual obits, lamps, torches, etc., to be used at certain times to help to save the souls of men out of purgatory; in such cases the king, by force of several statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable; Bac. Abr. *Charitable Uses* and *Mortmain* (D); Duke, Char. Uses 105; 6 Ves. 567; 4 Co. 104.

The doctrine has no recognition in this country; 18 W. N. C. (Pa.) 276; 108 N. Y. 30; and a bequest to support a Catholic priest, and perhaps certain other uses in England, would not be considered as superstitious uses; 1 Pa. 49; 8 *id.* 327; 17 S. & R. 378; 1 Wash. C. C. 224. Yet many of the superstitious uses of the English law would fail to be considered as charities, and would undoubtedly come under the prohibition against perpetuities. See *CHARITIES*; *CHARITABLE USES*; 1 Jar. Wills, ch. ix. In England there are three classes of persons who have been held obnoxious to the law against superstitious uses: 1. Roman Catholics. 2. Protestant dissenters. 3. Jews. Their various disabilities have been almost wholly removed, and Catholics and Jews have been put on the same footing as Protestant dissenters in reference to their schools and places of religious worship; Lew. Tr., 9th ed. 110. See *MASS*.

SUPERVISOR. An overseer; a surveyor.

An officer whose duty it is to take care of the highways.

The chief officer of a town or organized township in the states of Michigan, Illinois, Wisconsin, and Iowa. He has various duties assigned him by the statutes as a town officer, and likewise represents his town in the general assembly, or county board of supervisors. See *BOARD OF SUPERVISORS*.

SUPERVISORS OF ELECTION. Persons appointed and commissioned by the United States circuit judge to supervise the registration of voters and the holding of elections for representatives in

congress under Rev. Stat. §§ 2011-2081. The law for the appointment of supervisors was repealed by the act of Feb. 8, 1894, 28 Stat. L. 36. As to what was the registration of voters under this act, see **REGISTRATION**. While this legislation was in force it was held that in case of a question as to what political organization should be recognized by the court in appointing supervisors, the body which was recognized by the last state convention of the party should be considered as its representative organization; subject, however, to modification by change of circumstances; 9 Fed. Rep. 14.

The legislation of congress in vesting the appointment of supervisors in the courts was constitutional, and in the exercise of its supervisory power over elections for senators and representatives, new duties may be imposed by congress on the officers of election and new penalties for breach of duty; 100 U. S. 371, 399. See **ELECTION**.

SUPPLEMENTAL. That which is added to a thing to complete it.

SUPPLEMENTAL AFFIDAVIT. In practice. An affidavit made in addition to a previous affidavit, for the purpose of supplying some deficiency in it.

SUPPLEMENTAL ANSWER. One filed in chancery for the purpose of correcting, adding to, and explaining an answer already filed. Sm. Ch. Pr. 334. In New York and states having similar practice it is an additional answer to the complaint. It may be to allege a release after issue joined; 3 Misc. Rep. 54; or to set up facts excusing non-payment where the defence of payment was relied on, until the time of trial; 53 N. W. Rep. (Minn.) 708.

In chancery practice, also in civil actions under the codes of reformed procedure, matters of fact which have arisen since the answer was served, and which, therefore, are not proper to be introduced by an amended answer, may be brought to the knowledge of the court by an answer made in aid of the original answer, and therefore called supplemental. It answers the same end as the *plea puis darrein continuance* in actions according to common-law practice. Abbott.

SUPPLEMENTAL BILL. In Equity Practice. A bill brought as an addition to an original bill to supply some defect in its original frame or structure which cannot be supplied by amendment. See 1 Paige, Ch. 200; 15 Miss. 456; 22 Barb. 161; 14 Ala. N. S. 147. It may be brought by a plaintiff or defendant; 2 Ball & B. 140; 1 Sto. 218; and as well after, as before, a decree; 8 Md. Ch. Dec. 306; 1 Macn. & G. 409; Story, Eq. Pl. § 338; 41 Fed. Rep. 735; but must be within a reasonable time; 2 Halst. Ch. 465.

If there has been a change of interest in a pending equity suit, the proper method to introduce another party or to substitute one party for another, is by a supplemental bill or by an original bill in the nature of a supplemental bill; 24 U. S. App. 113.

A supplemental bill in the nature of a bill of review cannot be entertained where no new facts pertinent to the litigation are discussed except such as were known to the complainants at the date of the original decree; 27 U. S. App. 204.

It may be filed when a necessary party has been omitted; 6 Madd. 369; 4 Johns. Ch. 605; 85 Tenn. 171; to introduce a party who has acquired rights subsequent to the filing of the original bill; 3 Ia. 472; when, after the parties are at issue and witnesses have been examined, some point not already made seems to be necessary, or some additional discovery is found requisite; 1 Paige 200; when new events referring to and supporting the rights and interests already mentioned have occurred subsequently to the filing of the bill; Story, Eq. Pl. 336; 5 Beav. 253; for the statement only of facts and circumstances material and beneficial to the merits, and

not merely matters of evidence; 3 Sto. 299; when, after a decision has been made on the original bill, it becomes necessary to bring other matter before the court to get the full effect of it; Story, Eq. Pl. § 336; when a material fact, which existed before the filing of the bill, has been omitted, and it can no longer be introduced by way of amendment; 2 Md. Ch. Dec. 303; Mitf. Ch. Pl. 55, 61, 325; but only by special leave of court, when it seeks to change the original structure of the bill and introduce a new and different case; 4 Sim. 76, 628; 4 Paige, Ch. 259. Where, after a final decree, a person who has succeeded to the interest of the complainant in such manner as to entitle him to the full benefit of the decree, finds it necessary to invoke further action to obtain such benefit, he may file a supplemental bill in the original suit; 41 Fed. Rep. 725; but when an executor is substituted as a party in place of his decedent, he need not file a supplemental pleading; 83 Fed. Rep. 85. After a decree disposing of the issues, the filing of a new bill by other parties, involving other issues, although connected with the subject-matter of the original litigation, is to be considered a new litigation, although styled a "supplemental bill" and permitted to be filed in the original cause, and the complainant in the original cause is entitled to notice, and will not be bound without it; 162 U. S. 329. And a supplemental bill filed upon leave granted and notice, which makes an essentially different case from that contemplated in the order granting leave to file it, will be ordered to be taken from the files; 32 Atl. Rep. (N. J.) 261.

The bill must be in respect to the same title, in the same person as the original bill; Story, Eq. Pl. 339; and no relief can be had under it upon a cause of action, which did not exist when the original bill was filed; 57 Ill. App. 339; 19 So. Rep. (Fla.) 625. If the original bill shows no title to relief, a supplemental bill cannot be filed based on facts afterwards occurring; but if the original bill is well founded, a supplemental bill may be filed showing a further title to relief; 74 Fed. Rep. 67; 66 id. 385. After a decree has been directed for complainant, a stranger will not be permitted to file a supplemental bill based on his purchase of the cause of action, until a decree is actually entered in the original cause; 72 id. 325. A bill by a surviving partner, to settle the partnership affairs, is separate, and distinct from a bill to subject real estate of the deceased partner to firm debts, and the statute of limitations cannot be avoided by styling the second suit a supplemental bill; 158 U. S. 128. When a patent was assigned to a stranger pending a suit for infringement, the assignee cannot obtain the benefit of the suit brought by the assignor, by a supplemental bill, but he may do it by an original bill in the nature of a supplemental bill; 58 Fed. Rep. 404. In a suit to remove a cloud from a title, a decree establishing such title in the complainant, which carries a right to possession, a supplemental bill may be filed to enforce that right; 150 U. S. 401.

It must state the original bill, and the proceedings thereon; and, when it is occasioned by an event which has occurred subsequently to the original bill, it must state that event and the consequent alteration with regard to the parties. In general, the supplemental bill must pray that all defendants appear and answer the charges it contains; Story, Eq. Pl. § 343. In the English supreme court of judicature, amendments of the pleadings may now be allowed at any stage of the proceedings in an action.

SUPPLEMENTARY PROCEEDINGS. Proceedings supplementary to an execution, directed to the discovery of the debtor's property and its application to the debt for which the execution is issued. They are purely statutory, and the statute limits the power of the courts to existing rights and things *in esse* at the time of their institution; 18 N. Y. L. J. 1517. The

New York statute entitles the judgment creditor to an order of examination "upon proof . . . that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, etc." And where it appears from the examination "that the judgment debtor has, in his possession or under his control, money or other personal property belonging to him," the judge may order such money to be paid over and such other personal property to be delivered up; such proceedings are directed against property which, at the time of the order for his examination, the judgment debtor has in his possession or under his control, or which is actually due to him. No property subsequently acquired, no future earnings of any kind, and no earnings for personal services rendered within sixty days preceding such order, if necessary for the use of his family, can be reached; *id.*; 2 Abb. N. C. 357; 16 How. Pr. 549. They do not affect money coming to the debtor, unless it is actually due when the order is obtained; *id.*; 11 Abb. N. S. 384; 1 Hilt. 503; 3 N. Y. St. 287; or earnings due after the service of the order; 3 Abb. N. S. 264; or the salary of a public officer, while in the hands of a disbursing officer in common with other money; 57 How. Pr. 215, 217; 3 N. Y. St. 287. Proof as to the possession or control by the judgment debtor must be clear; 22 How. Pr. 3; and doubts whether the money was earned before or after the order should be resolved in favor of the debtor; 16 How. Pr. 549. If the debtor have a family dependent upon him, he may, if necessary, have sixty days' back earnings exempt; Code Civ. Proc. N. Y. § 2463; and this is held to be a humane provision which should be construed liberally in favor of the debtor; 19 Hun 394. But this does not include money received by a saloon-keeper in his business; 21 App. Div. N. Y. 190.

The return of an execution unsatisfied is sufficient to authorize a resort to supplementary proceedings; 51 Pac. Rep. (Wash.) 352; 42 Misc. Rep. 87.

The appointment of a receiver in such proceedings dissolves a partnership of which the judgment debtor is a member; 34 Atl. Rep. (N. J.) 959.

Where the judgment is against a married woman she may be examined as to her separate estate; [1892] 2 Q. B. 626.

The enforcement of orders in such proceedings is by treating the defendant as in contempt, and a debtor is liable thereto for collecting rent; 13 App. Div. N. Y. 312; or drawing out a savings bank deposit held in trust for another; 18 N. Y. L. J. 1520.

An act (1879) which enables the plaintiff to examine the defendant on oath as to his property, fraudulently concealed, is unconstitutional, because no one is obliged to give evidence which may incriminate himself; 97 Pa. 147.

SUPPLETORY OATH. In Ecclesiastical Law. An oath given by the judge to the plaintiff or defendant upon half proof, as by one witness, already made. The oath added to the half proof enables the judge to decide. It is discretionary with the judge; Stra. 80; 3 Sharsw. Bla. Com. 370*.

SUPPLICATIO (Lat.). In Civil Law. A petition for pardon of a first offence; also, a petition for reversal of judgment; also, equivalent to *duplicatio*, which is our rejoinder. Calvinus, Lex.

SUPPLICAVIT (Lat.). In English Law. The name of a writ issuing out of the king's bench or chancery for taking surties of the peace; it is commonly directed to the justices of the peace, when they are averse to acting in the affair in their judicial capacity. 4 Bla. Com. 233.

SUPPLICIUM (Lat.). In Civil Law. A corporal punishment ordained by law; the punishment of death; so called because it was customary to accompany the guilty man to the place of execution and there offer supplications for him.

SUPPLIES. In English Law. Ex-

traordinary grants to the king by parliament to supply the exigencies of the state. Jacob.

Means of provision or relief; stores. See NECESSARY SUPPLIES.

SUPPLY CLAIMS. See MORTGAGE; RECEIVERS.

SUPPORT. The right of support is an easement which one man, either by contract or prescription, enjoys, to rest the joists or timbers of his house upon the wall of an adjoining building owned by another person. 3 Kent 435. See Washb. Easem.

A right to the support of one's land so as to prevent its falling into an excavation made by the owner of adjacent lands.

This support is of two kinds, *lateral* and *subjacent*. Lateral support is the right of land to be supported by the land which lies next to it. Subjacent support is the right of land to be supported by the land which lies under it. See LATERAL SUPPORT; MINES AND MINING.

Support is also generally used to mean articles for the sustenance of the family, as food, etc. 19 Kan. 389. See FAMILY.

SUPPRESS. To put a stop to when actually existing. The word does not extend to preventing by suppressing what may lead to a thing. 34 L. J. M. C. 9.

To prevent; never, therefore, to license or sanction. Anderson; 63 Ill. 443.

SUPPRESSIO VERI (Lat.). Concealment of truth.

In general, a suppression of the truth when a party is bound to disclose it vitiates a contract. In the contract of insurance, a knowledge of the facts is required to enable the underwriter to calculate the chances and form a due estimate of the risk; and, in this contract perhaps more than any other, the parties are required to represent everything with fairness; 1 W. Bla. 594.

Suppressio veri, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution; 1 Ball & B. 241; 3 Munf. 232; 1 Pet. 383; 2 Paige, Ch. 390; 1 Story, Eq. Jur., 13th ed. § 204. See CONCEALMENT; MISREPRESENTATION; REPRESENTATION; SUGGESTIO FALSI.

SUPPRESSION OF EVIDENCE. Where evidence in an equity case on letters patent is taken out of order, the court will usually entertain a motion to suppress it, though where no harm can result, it is sometimes allowed to stand till the hearing. If no such motion be made, the testimony will stand; Rob. Pat. § 1128; when the evidence is fled that which is inadmissible will sometimes be stricken out on motion; *id.*; but more commonly it stands over for final hearing. Where, in equity, in a patent case, a witness not named in the answer, testified to prior use, it will be considered at the hearing unless a motion be made to suppress it, even though it was taken under objection; 6 Fish. 452.

SUPRA (Lat.). Above; over.

SUPRA PROTEST. Under protest. See ACCEPTANCE; ACCEPTOR; BILLS OF EXCHANGE; PROTEST; PAYMENT UNDER.

SUPREMACY. Sovereign dominion, authority, and pre-eminence; the highest state. In the United States the supremacy resides in the people, and is exercised by their constitutional representatives, the president and congress. See SOVEREIGNTY.

SUPREMACY, ACT OF. See ACT OF SUPREMACY.

SUPREME. That which is superior to all other things.

SUPREME COURT. A court of superior jurisdiction in many of the states of the United States.

The name is properly applied to the court of last resort, and is so used in most of the states. In nearly all the states there is a supreme court, but in one or two there is

a court of appellate jurisdiction from the supreme court.

See the articles on the respective states; UNITED STATES COURTS.

SUPREME COURT OF ERRORS. An appellate tribunal, and the court of last resort, in the state of Connecticut. See CONNECTICUT.

SUPREME COURT OF JUDICATURE. See JUDICATURE ACTS.

SUPREME COURT OF THE UNITED STATES. See UNITED STATES COURTS.

SUPREME JUDICIAL COURT. An appellate tribunal, and the court of last resort, in the states of Maine, Massachusetts, and New Hampshire. See those titles.

SUPREME LAW OF THE LAND. The Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the supreme law of the land. 219 U. S. 282. See CONSTITUTIONAL LAW, FUNDAMENTAL PRINCIPLES OF.

SUPREME POWER. The highest authority in the state. Ruth. Nat. L. b. 2, c. 4, p. 67.

SURCHARGE. To put more cattle upon a common than the herbage will sustain or than the party hath a right to do. 3 Bla. Com. 237. In case of common without stint it could only happen when insufficient herbage was left for the lord's own cattle; 1 Rolle, Abr. 399. The remedy was by distraining the beasts beyond the proper number; an action of trespass which must have been brought by the lord of the manor; an action on the case, or a writ of admeasurement of pasture. 2 Sharsw. Bla. Com. 238, n.

In Equity Practice. To prove the omission of an item from an account which is before the court as complete, which should be inserted to the credit of the party surcharging; Story, Eq. Jur. § 525; 2 Ves. 565; 11 Wheat. 237. It is opposed to *falsify*, which see. Leave to surcharge and falsify is granted in preference to opening an account, in case of an account stated by the parties or reported by an auditor, where the party obtaining the liberty would be concluded by the account were it not granted. See ACCOUNT; AUDITOR.

SURETY. A person who binds himself for the payment of a sum of money, or for the performance of something else, for another. See SURETYSHIP.

SURETY COMPANY. An association of persons, usually incorporated, which makes a business of acting as surety for persons occupying positions of trust, for a compensation which varies with the amount of the bond or security required. Such companies are sometimes also called "guaranty companies." Anderson. See INSURANCE; TRUST COMPANIES.

SURETY OF THE PEACE. See PEACE.

SURETYSHIP. An undertaking to answer for the debt, default, or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound.

It is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not. 43 La. Ann. 738. It differs from guaranty in this, that suretyship is a primary obligation to see that the debt is paid, while guaranty is a collateral undertaking, essentially in the alternative, to pay the debt if the debtor does not pay it; 24 Pick. 252. And accordingly a surety may be sued as a promisor to pay the debt, while a guarantor must be sued specially on his contract; 8 Pick. 423. The subjects are,

however, nearly related, and many of the principles are common to both. See GUARANTY. There must be a principal debtor liable, otherwise the promise becomes an original contract; and, the promise being collateral, the surety must be bound to no greater extent than the principal. Suretyship is one of the contracts included in the statute of frauds; 29 Car. II. c. 3.

The contract must be supported by a consideration, like every other promise. Without that, it is void, apart from the statute of frauds, and whether in writing or not; 4 Taunt. 117; 17 Pa. 469; 43 Ill. App. 584; 36 Kans. 205.

Kent, C. J., divides secondary undertakings into three classes: 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor. Here there is not, and need not be, any other consideration than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. Here there must be some further consideration shown, having an immediate respect to such liability; for the consideration for the original debt will not attach to this subsequent promise. 3. When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statute of frauds; the last is not; 8 Johns. 29. This classification has been reviewed and affirmed in numerous cases; 21 N. Y. 415; 15 Pick. 159.

The rule that the statute does not apply to class third has, however, been doubted; and it appears to be admitted that the principle is there inaccurately stated. The true test is the nature of the *promise*, not of the *consideration*; 50 Pa. 39; 94 E. C. L. R. 835. But see *infra*.

A simpler division is into two classes. Where the principal obligation exists before the collateral undertaking is made. Where there is no principal obligation prior in time to the collateral undertaking. In the last class the principal obligation may be contemporaneous with or after the collateral undertaking. The first class includes Kent's second and third, the second includes Kent's first, to which must be added cases where the guaranty referring to a present or future principal obligation does not share the consideration thereof, but proceeds on a distinct consideration. Moreover, there are other original undertakings out of the statute of frauds and valid though by parol, besides his third class. These are where the credit is given exclusively to the promisor though the goods or consideration pass to another. Under this division, undertakings of the first class are original: 1. When the principal obligation is thereby abrogated. 2. When without such abrogation the promisor for his own advantage apparent on the bargain undertakes for some new consideration moving to him from the promisee. 3. Where the promise is in consideration of some loss or disadvantage to the promisee. 4. Where the promise is made to the principal debtor on a consideration moving from the debtor to the promisor; Theob. Sur. 37, 49. The cases under these heads will be considered separately.

First, where the principal obligation is pre-existent, there must be a new consideration to support the promise; and where this consideration is the discharge of the principal debtor, the promise is original and not collateral, as the first requisite of a collateral promise is the existence of a principal obligation. This has been held in numerous cases. The discharge may be by agreement, by novation or substitution, by discharge on final process, or by forbearance under certain circumstances; 4 B. & P. 124; 21 N. Y. 412; 8 Gray 233.

But the converse of this proposition, that where the principal obligation remains, the promise is collateral, cannot be sustained, though there have been repeated dicta to that effect; *Browne, Stat. Fr. § 193*; *13 Johns. 291*; denied in *21 N. Y. 415*; *7 Ala. n. s. 54*; *33 Vt. 132*.

The main question arising in cases under this head is whether the debtor is discharged; and this is to a great extent a question for the jury. But if in fact the principal debt is discharged by agreement and the new promise is made upon this consideration, then the promise is original, and not collateral; *1 Allen 405*.

But where there is an existing debt, for which a third party is liable to the promisee, and the promisor undertakes to be responsible for it, still the contract need not be in writing if its terms are such that it effects an extinguishment of the original liability; *160 Mass. 225*.

A discharge of the debtor from custody, or surrender of property taken on an execution, is a good discharge of the debt; *11 M. & W. 857*; *9 Vt. 137*; *4 Dev. 261*; *21 N. Y. 415*; *34 Barb. 97*.

Where the transaction amounts to a sale of the principal debt in consideration of the new promise, the debtor is discharged, and the promise is original; *3 B. & C. 853*. So where a purchaser of goods transfers them to another, who promises the vendor to pay for them, this is a substitution and an original promise; *5 Taunt. 450*; *9 Cow. 266*; *11 Ired. 298*; *21 Me. 545*.

A mere forbearance to press the principal debt is not such a discharge of the debtor as will make the promise original; *1 Sm. L. C. 387*; *21 N. Y. 412*; *13 B. Monr. 356*; but where the forbearance is so protracted as to discharge the debtor, it may be questioned whether the promise does not become original; *33 Vt. 132*.

Second, the promise will be original if made in consideration of some new benefit moving from the promisee to the promisor; *3 Dutch. 371*; *4 Cow. 432*; *Bull. N. P. 281*.

Third, the promise is original where the consideration is some loss to the promisee or principal creditor; but it is held in many such cases that the loss must also work some benefit to the promisor; *6 Ad. & E. 564*; *3 Strobb. Eq. 177*; *20 N. Y. 268*. As to merely refraining from giving an execution to the sheriff, see *14 Me. 140*.

There have been decisions which hold that the mere relinquishment of a lien by the plaintiff takes the case out of the statute; *7 Johns. 464*; *1 McCord 575*. It would seem that a surrender of a lien merely is not sufficient consideration; *3 Metc. 396*; but it must appear that the surrender is in some way beneficial to the promisor, as when he has an interest in the property released; *77 N. Y. 91*; *45 Ind. 180*; *5 Cush. 488*.

The rule is well settled that when the leading object of a promisor is to induce a promisee to forego some lien, interest, or advantage, and thereby to confer on the promisor a privilege or benefit which he would not otherwise possess or enjoy, an agreement made under such circumstances and upon such a consideration is a new, original, and binding contract, although the effect of it may be to assume the debt and discharge the liability of another; *6 Maule & S. 204*; *1 Gray 391*. The advantage relinquished by the promisee must directly enure to the benefit of the promisor, so as in effect to make it purchase by the promisor; *5 Cush. 488*; *12 Johns. 291*. It is stated in many cases (under classes third and fourth, above) that the promise is original where the consideration moves to the promisor. The true test, however, must be found not in the consideration, but in the nature of the promise. Whenever the new promisor undertakes for his own default; where his promise is virtually to pay his own debt in a peculiar way, or if, by paying the debt, he is really discharging a liability of his own, his promise is original. The only case in which consideration can affect the terms of the promise is where the consideration of the

promise is the extinguishment of the original liability; *17 Mass. 229*; *18 Tex. 446*; *22 How. 28*.

Fourth, the promise is original if made on a consideration moving from the debtor to the promisor; *10 Johns. 412*; *9 Cal. 92*; *30 Ala. n. s. 599*; *5 Me. 31*; *1 Gray 391*; *22 How. U. S. 28*; *33 Neb. 260*.

For the rule in a class of cases quite analogous, see *9 Ill. 40*; *3 Conn. 272*.

Where the guaranty relates to a contemporaneous or future obligation, the promise is original, and not suretyship, (a) if credit is given exclusively to the promisor, (b) if the promise is merely to indemnify.

In the first of these cases the question to whom credit was given must be ultimately for the jury in each case. If there is any primary liability, and the creditor resorts to the principal debtor first, the promise is collateral. Thus, if the promisor says, "Deliver goods to A, and I will pay you," there is no primary obligation on the part of A, and the promise is original; *3 Metc. 396*. But if he says, "I will see you paid," or, "I promise you that he will pay," the promise would be collateral; *1 H. Bla. 120*; *7 Fed. Rep. 477*; *3 Col. 176*; *13 Gray 613*; *148 Pa. 220* (where it was left to the jury to decide whether it was an original undertaking).

A promise to indemnify merely against contingent loss from another's default is original; *15 Johns. 425*. A doubt is expressed by *Browne, Stat. of Frauds § 158*, whether the fact that mere indemnity is intended, makes the promise original, because in many cases—those where the indemnity is against the default of a third person—there is an implied liability of that person, and the promise is collateral thereto. Now, there are three classes of cases. *First*, it is clear that where the indemnity is against the promisor's default or debt he is already liable without his promise; and to use this as a defence and make the promise collateral thereto would be using the law as a cover to a fraud; *1 Conn. 519*; *46 Me. 41*; *6 Bingh. 506*; *10 Johns. 42*; *17 Pick. 538*. *Second*, so where the only debt against which indemnity is promised is the promisee's, this, being not the debt of another, but of the promisee, is clearly not within the statute, but the promise is original. And even if the execution of such a promise would discharge incidentally some other liability, this fact does not make the promise collateral; *13 M. & W. 561*; *1 Gray 391*; *25 Wend. 243*; *10 Gill & J. 404*; *31 Vt. 142*. *Third*, but where there is a liability implied in another person, and the promise refers to his liability or default, and if executed will discharge such liability or default, the promise would seem on reason to be collateral and binding like a suretyship for future advances—that is, when accepted; *9 Ired. 10*; *1 Ala. 1*; *1 Gill & J. 424*; *10 Ad. & E. 453*; *4 Barb. 131*. But in many cases the rule is broadly stated that a promise to indemnify merely is original; *8 B. & C. 728* (overruled, *10 Ad. & E. 453*); *1 Gray 391*; *10 Johns. 242* (overruled, *4 Barb. 131*); *1 Ga. 294*; *10 N. H. 175*; *1 Conn. 519*; *5 Me. 504*. In other cases the distinction is made to rest on the fact that the engagement is made to the debtor; *9 Gray 76*; *11 Ad. & E. 438*; and in other cases, on the futurity of the risk or liability; *12 Mass. 297*.

The last ground is untenable; future guarantees binding when accepted or acted upon, and those against torts are expressly to the contrary. The first ground is too broad, as shown above; and the second seems to ignore the clear primary liability of the principal debtor.

It is said that "a mere promise of indemnity which is not collateral to any liability on the part of another, either express or implied, is not within the statute, and such a case illustrates the rule that when there is no principal, the promise need not be in writing. On the other hand, when the promise to indemnify is in fact a promise to pay the debt of another, then clearly such promise is within the statute, and the fact that it is in form a promise to indemnify will make no differ-

ence." *Brandt, Sur. & Guar. § 59*. See *4 B. & S. 414*.

When the principal obligation is void, voidable, not enforceable, or unascertained, the promise is original, there being in this case no principal obligation to sustain the promise as collateral; *Browne, Stat. Fr. § 156*. It may be questionable, however, whether the promise will in such case be original unless the promisor knows the principal liability to be void or voidable; *Burge, Surety § 6*; but this question may be settled by the principle that where credit is given to the principal, notwithstanding his obligation is void or voidable, the promise of the surety is collateral; *4 Bingh. 470*; *7 N. H. 368*; but if no such credit is given or implied, the promise is collateral. See *15 N. Y. 576*; *33 Ala. n. s. 106*; *6 Gray 90*. Such would be the guaranty of an infant's promise; *7 N. H. 368*; and this is accordingly so held; *20 Pick. 467* (but see *11 Allen 365, contra*, as to the promise of a father to pay the debt of a minor son); *4 Me. 521*; though a distinction has been made in the case of a married woman; *4 Bingh. 470*; *84 Pa. 135*; *43 Ind. 103*; but the promise is collateral where the married woman has separate property which she can charge with the payment of her debts, and the credit is given exclusively to her; *6 Ga. 14*.

Where the liability is unascertained at the time of the promise, the promise is original; as the liabilities must concur at the time of the undertaking to make a guaranty; *Browne, Stat. Fr. § 196*; *1 Salk. 27*; *contra, Anbl. 330*. Under this head would come a promise to pay damages for a tort, there being no principal liability until judgment; *1 Wils. 305*; or where the liability rests upon a future award; *2 Allen 417*; and liability upon indefinite executory contracts in general. It is, however, said that the liability may be prospective at the time the promise is made. See *Huffcut's Ans. Contr. 72*.

The promise is clearly original where the promisor undertakes for his own debt. The rule is, unless the promisor himself or his property is ultimately to be made liable in default of the principal debtor, the statute does not apply; *Browne, Stat. Fr. § 177*. Thus, an engagement by one who owes the principal debtor to retain the principal debt, so that it may be attached by trustee or garnishee process, is not a collateral promise; *9 Pick. 306*; *63 Barb. 321*; *50 Ia. 310*.

So an agreement by a purchaser to pay part of the purchase-money to a creditor of the vendor is an agreement to pay his own debt; *55 Miss. 365*; *2 Lea 543*; *49 Ia. 574*; *58 Ill. 232*; or to pay a debt due a promisee by a third person out of moneys owing by a promisor to such third person; *32 Ohio 415*; *9 Cow. 266*; *53 Ill. 233*; or for the application of a fund due a promisor by a third party; *86 Pa. 147*; *18 How. 31*. Such an agreement is a trust, or an original promise.

Under the statute of frauds. At common law, a contract of guaranty or suretyship could be made by parol; but by the statute of frauds, *29 Car. II. c. 3*, "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized;" so that under the statute all contracts of guaranty and suretyship must be in writing and signed. The words debt and default in the statute refer to contracts; *2 East 325*; and debt includes only pre-existing liability; *12 Mass. 297*; miscarriage refers to torts; *2 B. & Ald. 613*. Torts are accordingly within the statute, and may be guaranteed against; *2 B. & Ald. 613*; *2 Day 457*; though this has been doubted in regard to future torts; *1 Wils. 305*. Perhaps a guaranty against future torts might be open to objections on the ground of public policy. But the unchallenged con-

tracts of modern indemnity companies would seem to show that such an objection would not prevail.

A guaranty of indemnity to a surety is within the statute of frauds; 45 Ill. App. 155.

The doctrine that a future contingent liability on the part of the principal is not within the statute; 1 Salk. 27; 12 Mass. 297; is not tenable; and it is clear, both by analogy and on authority, that such a liability may support a guaranty, although such cases must be confined within very narrow limits, and the mere fact of the contingency is a very strong presumption that the promise is original; Browne, Stat. Fr. § 196; 6 Vt. 668; 88 Ill. 561.

Where the promise is made to the debtor, it is not within the statute; Reed, Stat. Fr. 76; 7 Halst. 188; 2 Den. 162. "We are of opinion that the statute applies only to promises made to the person to whom another is answerable;" 11 Ad. & E. 446; 1 Gray 391. The word *another* in the statute must be understood as referring to a third person, and not to a debt due from either of the contracting parties; 6 Cush. 552. False and deceitful representations of the credit or solvency of third persons are not within the statute; Browne, Stat. Fr. § 181; 4 Camp. 1.

The English rule required the consideration to be expressed; 5 East 10. It could not be proved by parol; 4 B. & Ald. 595. But by 19 & 20 Vict. no such promise shall be deemed invalid by reason only that the consideration does not appear in writing or by necessary inference from a written instrument; 7 C. B. N. S. 361. The rule varies in different states, and in some states is settled by statute. See Brandt, Sur. & Guar. § 82. In some states there are statutes similar to the English statutes. In other states the consideration is required by statutes to be expressed. Of states where statutes are silent, some have accepted and some rejected the English construction of statutes of frauds in *Wain v. Walters*, 5 East 10, *supra*.

The courts lay hold of any language which implies a consideration; 21 N. Y. 31. So where the guaranty and the matter guaranteed are one simultaneous transaction, both will be construed in connection, and the consideration expressed in the latter applied to the support of the former, if these are words of reference in the guaranty; 36 N. H. 73.

Formation of the obligation. In construing the language of the contract to decide whether it constitutes an original promise or a guaranty, it is difficult to lay down a general rule: the circumstances of particular cases vary widely. See GUARANTY; [1894] 1 Q. B. 288. One test is if the promisor is totally unconnected with the transaction except by means of his promise to pay the loss, the contract is a guarantee; if he is to derive some benefit from it, his contract is an indemnity." *Id.* The word guaranty or surety may or may not indicate correctly the contract, and the circumstances of the case may make an indorser liable as a guarantor or surety, without any words to indicate the obligation; 24 Wend. 456.

In general, if a promissory note is signed or indorsed when made by a stranger to the note he becomes a joint promisor and liable on the note; 44 Me. 433; 9 Cush. 104; 14 Tex. 275; 20 Mo. 571; and this will be true if indorsed after delivery to the payee in pursuance of an agreement made before the delivery; 7 Gray 284; but parol evidence may be introduced to show that he is a surety or guarantor; 23 Ga. 368; 89 Ill. 550. If the third party indorses after delivery to the payee without any previous agreement, he is merely a second indorser; 11 Pa. 466; 82 N. C. 313; and he is liable as a maker to an innocent holder; 20 Mo. 591. But it was held otherwise where the signature was on the face of the note; 19 N. H. 572; and the same is held where he signs at inception of the note, in pursuance of a custom, leaving a blank for the payee's signature above his name; 12 La. Ann. 517. In Connecticut,

such an indorser is held to guaranty that the note shall be collectible when due; 46 Conn. 410. The time of signing may be shown by parol evidence; 9 Ohio 139.

A payee or subsequent party who executes a guarantee upon a bill or note is not liable as indorser; 8 Stew. 319; 19 Me. 359; 2 Const. 225; *contra*, 31 Ga. 210; 20 Vt. 499.

It has been held that a third person indorsing a blank at the making of the note may show his intention by parol; 11 Mass. 436; but not if he describes himself as guarantor, or if the law fixes a precise liability to indorsements in blank; 2 Hill, N. Y. 80. But this has been doubted; 33 E. L. & E. 282. In New York the cases seem to take the broad ground that an indorser in blank, under all circumstances, is an indorser merely, and cannot be made a guarantor or surety; 1 N. Y. 324. See 95 U. S. 90.

The consideration to support a parol promise to pay the debt of another must be such as would be good relating to the payment of that particular debt or of any other of equal amount; 33 Md. 373. It need not be necessarily a consideration distinct from that of the principal contract. An executed or past consideration to the principal is not sufficient; 121 Mass. 116; 51 Miss. 482.

The giving of new credit where a debt already exists has been held a sufficient consideration to support a guaranty of the old and new debt; 15 Pick. 159; 15 Ga. 321; but the weight of authority would seem to require that there should be some further consideration; Reed, Stat. Fr. 70; 1 Pet. 476; 3 Johns. 211; 7 Harr. & J. 457. A consideration that will take a case out of the statute of frauds must be such a consideration as will make the collateral debt, agreed to be paid, the debt of the promisor. It must be an original undertaking; 45 Ill. App. 155.

Forbearance to sue the debtor is a good consideration, if definite in time; 92 Ind. 337; 45 Wis. 466; 1 Kebl. 114; or even if of considerable; Cro. Jac. 683; or reasonable time; 3 Bulstr. 206; 4 Wash. 148. But there must be an actual forbearance, and the creditor must have had a power of enforcement; 4 East 465. But the fact that it is doubtful whether such a power exists, does not injure the consideration; 5 B. & Ad. 123. Forbearance has been held sufficient consideration even where there was no well-grounded claim; 18 L. J. C. P. 222; 34 Pa. 60; *contra*, 3 Pick. 83. A short forbearance, or the deferment of a remedy, as postponement of a trial, or postponement of arrest, may be a good consideration; and perhaps an agreement to defer indefinitely may support a guaranty; 4 Johns. 257; 6 Conn. 81. A mere agreement not to push an execution is too vague to be a consideration; 4 McCord 409; and a postponement of a remedy must be made by agreement as well as in fact; 3 Cush. 85; 6 Conn. 81; 11 C. B. 172.

The contract of suretyship may be entered into absolutely and without conditions, or its formation may be made to depend on certain conditions precedent. But there are some conditions implied in every contract of this kind, however absolute on its face. In the case of bonds, as in other contracts of suretyship, it is essential that there should be a principal, and a bond executed by the surety is not valid until executed by the principal also. One case, 10 Co. 100 *b*, sometimes cited to the contrary, is not clear to the point. The argument that the surety is bound by his recital under seal fails, especially in all statute bonds, where one important requisite of the statute, that the bond should be executed by the principal, fails; 2 Pick. 24; 4 Beav. 383.

Where the surety's undertaking is conditional on others joining, and this condition is known to the creditor, he is not ordinarily liable until they do so; 4 B. & Ad. 440; 58 Ind. 321; 4 Biss. 288; 35 Miss. 618; 124 Ill. 200; *contra*, if the obligee is ignorant of the condition; 2 Metc. Ky. 608; 16 Wall. 1; 61 Me. 505. So the surety is not bound if the signatures of his co-sureties

are forged, although he has not made his signature expressly conditional on theirs; 2 Am. L. Reg. 349; but see 8 *id.* N. S. 665. Where a bond to a sheriff: 1 La. 41; and an administration bond; 119 Ind. 503; were signed in expectation by the party signing that other sureties would sign, and the bond was delivered without such other signatures, the surety was held liable. If a condition upon which a surety signs be known to the creditor and be not complied with, the surety is not liable; 30 Ga. 93.

The acceptance of the contract by the promisee by words or by acts under it is often made a condition precedent to the attaching of the liability of the surety. The general rule is that where a future guaranty is given, absolute and definite in amount, no notice of acceptance is necessary; but if it is contingent and indefinite in amount, notice must be given; 4 Me. 521; 8 Conn. 438; 16 Johns. 67; but the promisee has a reasonable time to give such notice; 8 Gray 211.

A distinction is to be made between a guaranty and an offer to guaranty. No notice of acceptance is requisite when a guaranty is absolute; 3 N. Y. 212; 2 Mich. 511; but an offer to guaranty must have notice of acceptance; and till accepted it is revocable; 12 C. B. N. S. 784; 6 Dow. H. L. C. 239; 32 Pa. 10; and where acceptance is required, it may be as well implied by acts as by words; as, by receiving the written guaranty from the promisor; 8 Gray 211; or by actual knowledge of the amount of sales under a guaranty of the purchase-money; 28 Vt. 160.

The rule requiring notice is said to be based upon "the nature and definition of a contract, which requires the assent of a party to whom a proposal is made, to be signified to the party making it, in order to constitute a binding promise. . . . The rule proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become binding as an obligation until accepted by the party to whom it is made; that, until then, it is inchoate and incomplete and may be withdrawn by the proposer." 104 U. S. 159. When the guaranty is contemporaneous with the principal contract, notice is unnecessary; 121 Ind. 465; 26 S. W. Rep. Tex. 941; so, where there has been a precedent request; 27 N. E. Rep. Ind. 318; *contra*, 9 Pa. 320. See 34 Am. L. Reg. & Rev. 257. Notice must be given of an offer to guarantee advances to be made by another to a third party, in order to bind the guarantor; 1 M. & S. 557. Knowledge that a guaranty is being acted upon is sufficient in the case of guaranties of existing debts, or of contemporaneous debts; 104 U. S. 159. But in case of guaranties of the repayment of future advances, the cases are in conflict as to whether notice is necessary. That notice is necessary, see 104 U. S. 159; that it is generally unnecessary, see 3 N. Y. 203; 46 Mich. 70; that it is necessary where the amount of the proposed advance is uncertain, but unnecessary where it is certain, see 112 Ind. 293. See, generally, Huffcut's Ans. Contr. 27. One who, as surety, executes a bond with another, conditioned for the payment of the moneys advanced the other, is not entitled to notice of the acceptance of the bond by the obligee; 84 Fed. Rep. 104.

Where a contract of guaranty is signed by the guarantor without any previous request of the other party, and in his absence and for no other consideration between them, except future advances to be made to the principal debtor, there must be an acceptance of the guaranty by the other party in order to complete the contract; 115 U. S. 527; 84 Fed. Rep. 605; 110 Pa. 235, 366.

Construction and extent of obligation. The liability of a surety cannot exceed, in any event, that of the principal, though it may be less. The same rule does not apply to the remedies, which may be greater against the surety. But, whatever may be the liability imposed upon the surety, it is clear that it cannot be extended by implication beyond the terms of the contract.

His obligation is *strictissimi juris*, and cannot be extended beyond the precise terms of the contract; 10 Johns. 180; 2 Pa. 27; 9 Utah 260. Sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings, and presumptions and equities are never allowed to enlarge, or in any degree to change, their legal obligations; 21 How. 66. And this rule has been repeatedly reaffirmed; 11 N. Y. 598; 30 Pa. 460; 2 Wall. 235. "It is quite true, that in one sense, the contract of a surety is *strictissimi juris*, and it is not to be extended beyond the express terms in which it is expressed. The rule, however, is not a rule of construction of a contract, but a rule of application of the contract after the construction of it has been ascertained. Where the question is as to the meaning of the language of the contract, there is no difference between the contract of the surety and that of anybody else; 47 N. Y. Supp. 48.

The remedies against the surety may be more extensive than those against the principal, and there may be defenses open to the principal, but not to the surety,—as, infancy or coverture of the principal,—which must be regarded as a part of the risks of the surety; 30 Vt. 122.

The liability of the surety extends to and includes all securities given to him by the principal debtor, the converse of the rule stated below in the case of collateral security given to the creditor; 26 Vt. 308. Thus a creditor is entitled in equity to the benefit of all securities given by the principal debtor for the indemnity of his surety; 18 Mo. 136. If the surety receives money from the principal to discharge the debt, he holds it as trustee of the creditor; 6 Ohio 80.

A payment made by the principal before the claim is barred by the statute of limitations, keeps the debt alive as to the surety; otherwise, if made after the statute has run; 114 U. S. 528.

In the common case of bonds given for the faithful discharge of the duties of an office, it is of course the rule that the bond covers only the particular term of office for which it is given, and it is not necessary that this should be expressly stated; nor will the time be extended by a condition to be bound "during all the time A (the principal) continues," if after the expiration of the time A holds over merely as an acting officer, without a valid appointment; 3 Sandf. 408. The circumstances of particular cases may extend the strict rule stated above, as in the case of officers annually appointed. Here, although the bond recites the appointment, if it is conditioned upon his faithful accounting for money received before his appointment, the surety may be held; 9 B. & C. 35; 9 Mass. 267. But the intention to extend the time, either by including past or future liabilities, must clearly appear; 4 B. & P. 175. See 101 Cal. 483; 76 Md. 136. Generally the recital cannot be enlarged and extended by the condition; Theob. Surety 86. And where the recital sets forth an employment for twelve months, this time is not controlled by a condition, "from time to time annually, and at all times thereafter during the continuance of this employment," although the employment is actually continued beyond the year; 2 B. & Ald. 431; 7 Gray 1.

So the obligation may cease by a change in the character of the office or employment; 8 Wils. 530; but an alteration in the character of the obligees, by taking in new partners, does not necessarily terminate the obligation; 10 B. & C. 122. But where an essential change takes place, as the death of the obligee, the obligation, is terminated, although the business is carried on by the executors; 1 Term 18. Where one becomes surety for two or either of them, the obligation is terminated by the death of one of the principals; 1 Bingham 453; but this is where the obligation is essentially personal; and where a bond for costs was given by two as "defendants," the surety was not discharged by the death of one; 5 B. & Ald. 261. So a surety for a

lessee is not liable for rent after the term, although the lessee holds over; 1 Pick. 332.

If the law provides that a public officer shall hold over until a successor is appointed, the sureties on the official bond are liable during such holding over; 87 Miss. 518; 2 Metc. Mass. 532; *contra*, in the case of officers of corporations; 7 Gray 1; but the liability of such surety extends only for such reasonable time as would enable the successor to be appointed; 40 La. Ann. 241. And this provision is not controlled by an alteration of the law extending the term but leaving the provision intact; 15 Gratt. 1. But when the term of an office created by statute or charter is not limited, but merely directory for an annual election, it seems the surety will be liable, though after the year, until his successor is qualified; 3 Del. Ch. 225.

In bonds, the penalty is the extreme amount of liability of the surety; but various circumstances may reduce the liability below this; 3 Cow. 151; 6 Term 303. If the engagement of the surety is general, the surety is understood to be obligated to the same extent as his principal, and his liability extends to all the accessories of the principal obligation; 14 La. Ann. 183.

A surety on a cashier's bond is not liable for money collected by the cashier as an attorney-at-law, and not accounted for to the bank; 4 Pick. 314. So also where one was surety, and the bond was conditioned on the accounting by the principal for money received by him in virtue of his office as parish overseer, the surety was held not liable for money borrowed by the principal for parochial purposes; 7 B. & C. 491. But a surety on a collector's bond is liable for his principal's neglect to collect, as well as failure to pay over; 6 C. & P. 106.

As the surety is only liable to the obligations fairly intended at the execution of the bond, he cannot be held for a breach of new duties attached to his principal's office; 4 Pick. 314; or if any material change is made in the duties; 2 Pick. 228. A surety on an official bond is said to be liable generally for the faithful performance of duties imposed upon the officer, whether by laws enacted before or after the execution of the bond, where such duties are properly within the scope of the office; Brandt, Sur. & Guar. § 548.

If one guarantees payment for services, and the promisee partly performs the services, but fails of completing them from no fault of his own, the guarantor is liable to the amount of the part-performance; 12 Gray 445.

A bond for faithful performance of duties renders the sureties responsible for ordinary skill and diligence, as well as for integrity; 12 Pick. 303.

A continuing guaranty up to a certain amount covers a constant liability of that amount; but if the guaranty is not continuing, the liability ceases after the execution of the contract to the amount limited; 3 B. & Ald. 593.

A guaranty may be continuing or may be exhausted by one act. It is said that there is no general rule for determining the question; Brandt, Sur. & Guar. § 156. The general principle may be thus stated: When by the terms of the undertaking, by the recitals in the instrument, or by a reference to the custom and course of dealing between the parties, it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend; 7 Pet. 113; 3 B. & Ald. 593. Thus, a guaranty for any goods to one hundred pounds is continuous; 12 East 227; or for "any debts not exceeding," etc.; 2 Camp. 413; or, "I will undertake to be answerable for any tallow not exceeding," etc., but "without the word any it might perhaps

have been confined to one dealing;" 8 Camp. 230. The words, "I do hereby agree to guaranty the payment of goods according to the custom of their trading with you, in the sum of £200," are held to constitute a continuing guaranty; 6 Bingham 244; so of the words, "I agree to be responsible for the price of goods purchased at any time, to the amount of," etc.; 1 Metc. Mass. 24. The words "answerable for the amount of five sacks of flour" are clearly not continuous; 6 Bingham 276. The court will look at the surrounding circumstances, in order to determine; L. R. 4 C. P. 595.

The contracts of guaranty and suretyship are not negotiable or assignable, and in general can be taken advantage of only by those who were included as obligees at the formation of the contract; 3 McLean 279. See GUARANTY. Accordingly, the contract is terminated by the death of one of several obligees; 4 Taunt. 673; or by material change, as incorporation; 3 B. & P. 34. But where a bond is given to trustees in that capacity, their successors can take advantage of it; 12 East 399. The fact that a stranger has acted on a guaranty does not entitle him to the benefits of the contract; 20 Vt. 499; and this has been held in the case of one of two guaranteees who acted on the guaranty; 8 Tex. 199. A guaranty is not negotiable, whether made by a payee or subsequent party to a bill or note; 8 Watts 361.

It is held that a guaranty addressed to no one in particular may be acted on by any one; 22 Vt. 160; but the true rule would seem to be that in such cases a party who had acted on the contract might show, as in other contracts, that he was a party to it within the intention at the making; the mere fact that no obligee is mentioned does not open it to everybody.

In an action against sureties for violation of a bond by the principals, it is not necessary to allege any violation on the part of the sureties; 31 Pac. Rep. (Cal.) 153.

The rule of construction applied to ordinary sureties is not applicable to the bonds of fidelity and casualty companies; any doubtful language should be construed most strongly against the surety and in favor of the indemnity which the insured had reasonable ground to expect; 23 U. S. App. 439.

Enforcement of the obligation. As the surety cannot be bound to any greater extent than the principal, it follows that the creditor cannot pursue the surety until he has acquired a full right of action against the principal debtor. A surety for the performance of any future or executory contract cannot be called upon until there is an actual breach by the principal. A surety on a promissory note cannot be sued until the note has matured, as there is no debt until that time. All conditions precedent to a right of action against the principal must be complied with. Where money is payable on demand, there must have been a demand and refusal. But it is not necessary that the creditor should have exhausted all the means of obtaining his debt. In some cases it may be requisite to notify the surety of the default of the debtor, or to sue the debtor; but this depends upon the particular conditions and circumstances of each case, and cannot be considered a condition precedent in all cases. Even where the creditor has a fund or other security to resort to, he is not obliged to exhaust this before resorting to the surety; he may elect either remedy, and pursue the surety first. But if the surety pay the debt, he is entitled to claim that the creditor should proceed against such fund or other security for his benefit; 4 Jones, Eq. 212; 33 Ala. n. s. 261. And if the creditor having received such collateral security, avail himself of it, he is bound to preserve the original debt; for in equity the surety will be entitled to subrogation; 33 Pa. 98. A judgment against the principal may be assigned to the surety upon payment of the debt; 1 Metc. 489; 4 Jones, Eq. 262; 77 Hun 580. But an assignment of the debt must be for the

whole; the surety cannot pay a part and claim an assignment *pro tanto*; 30 N. H. 150.

In general, it is not requisite that notice of the default of the principal should be given to the surety, especially when the engagement is absolute and for a definite amount; 14 East 514. The guarantor on a note is not entitled to notice as an indorser; 33 Ia. 293; 74 Pa. 351, 445; 56 Mo. 273. Laches in giving notice to the surety upon a draft of the default of the principal can only be set up as a defence in an action against the surety, in cases where he has suffered damage thereby, and then only to the extent of that damage; 3 N. Y. 203; it is no defence to an action against a surety on a bond that the plaintiff knew of the default of the principal, and delayed for a long time to notify the surety or to prosecute the bond; 1 Zabr. 100. Mere passive delay in prosecuting a remedy against a principal does not release a surety; 37 Minn. 431; 30 S. C. 177; 99 N. C. 531; not even if prolonged until the statute of limitations has run; 69 Fed. Rep. 798. Sureties on a supersedeas bond are not entitled to have a suit thereon stayed till attached lands of the principal are sold and the security exhausted; 57 Fed. Rep. 909.

A judgment against a principal is at least *prima facie* evidence against the surety, though he was not notified of the action; 66 Fed. Rep. 265.

Discharge of obligation. The obligation may be discharged by acts of the principal, or by acts of the creditor. Payment, or tender of payment, by the one, and any act which would deprive the creditor of remedies which in case of default would enure to the benefit of the surety, are instances of discharge. In the first place, a payment by the debtor would of course operate to discharge the liability. The only questions which can arise upon this point are, whether the payment is applicable to the payment in question, and as to the amount. Upon the first of these, this contract is governed by the general rule that the debtor can apply his payment to any debt he chooses. The surety has no power to modify or direct the application, but is bound by the election of the principal; 2 Bingh. N. C. 7. If no such election is made by the debtor, the creditor may apply the payment to whichever debt he sees fit; 7 Wheat. 20; 1 Pick. 336. This power, however, only applies to voluntary payments, and not to payments made by process of law; 10 Pick. 129. A surety on a promissory note is discharged by its payment, and the note cannot be again put in circulation; 12 Cush. 163; so also, extension of time by the holder of a note at the request of one maker without the knowledge of the other who signed as a surety, releases the latter though the holder did not know of the relation between the two makers at the time the note was given; 23 U. S. App. 280.

Where one of two sureties to a contract assented to a change which altered his liability to his prejudice, it was held that the other surety was released but the former was bound for the whole liability; 17 U. S. App. 443, 463. Whatever will discharge the surety in equity will be a defence at law; 7 Johns. 337; 2 Pick. 223.

A release of the principal debtor operates as a discharge of the surety; [1893] A. C. 313; though the converse is not true; 17 Tex. 123; [1893] App. Cas. 313; 63 Ill. 272; unless the obligation is such that the liability is joint only, and cannot be severed. But if the creditor, when releasing the principal, reserves his remedies against the surety, the latter is not discharged; L. R. 7 C. P. 9; 4 Ch. App. Cas. 204; and "a creditor who is fully indemnified is not discharged by the release of the principal." Brandt, Sur. & Guar. § 147. The release of one of several sureties is said to release the others only so far as the one released would have been liable for contribution to the co-sureties; 47 Ala. 390; but see 32 Ind. 433. Other cases hold such a release to be a discharge of the co-sureties; 40 Ind. 225; 2 Ala. 694. When the discharge of one

surety varies the contract; 2 Head 613; or increases the risk of the co-sureties, they are released also.

Fraud or alteration avoids a contract of suretyship. Fraud may be by the creditor's misrepresentation or concealment of facts. Unless, however, the contract between the debtor and creditor is unusual, the surety must ask for information; 12 Cl. & F. 109; 15 W. Va. 21. The creditor has been held bound to inform a surety of debtor's previous default; 33 Pa. 358; L. R. 7 Q. B. 666; *contra*, 21 W. R. 499; 91 Ill. 518; though not of his mere indebtedness; 17 C. B. N. S. 482. But to accept a surety relying on the belief that there are no unusual circumstances increasing his risk, knowing that there are such, and neglecting to communicate them, is fraud; 36 Me. 179; 81 N. Y. 518. The fraud must be practised on the surety; 9 Ala. 42. The forgery of the signature of a surety on a constable's bond will release another surety, signing the same upon the representation that such signature is genuine; 37 Ill. App. 460.

Any material alteration in the contract without the assent of the surety, or change in the circumstances, will discharge the surety; even though trivial, or to the advantage of the surety; 164 U. S. 238; 3 B. & C. 605. Such are the cases where the sureties on a bond for faithful performance are released by a change in the employment or office of the principal; 6 C. B. N. S. 550. But it seems that an alteration by the legislature in an official's duties will not discharge surety as long as they are appropriate to his office; 36 N. Y. 459. If the principal and obligee change the terms of the obligation without the consent of the surety, the latter is discharged; 4 Wash. C. C. 26. A change in the amounts of payments to be made under the principal contract releases the surety who had no knowledge of the change and did not consent; 61 Fed. Rep. 77.

If the creditor, without the assent of the surety, gives time to the principal, the surety is discharged; 3 Y. & C. 187; 2 B. & P. 61; 8 Bingh. 156. So where he agrees with the principal to give time to the surety; L. R. 7 Ch. App. 142. But not if without consideration; 46 Ill. App. 418; 144 U. S. 97; nor does the reducing the rate of interest on a debt and allowing it to run along after maturity on payment of interest, without any binding contract for an extension for a definite time; 148 Ill. 654. And not where a creditor reserves his rights against the surety; 16 M. & W. 128; 4 H. L. C. 997. The rule applies where a state is a creditor; 75 N. C. 515.

The contract must be effectual, binding the creditor as well as the debtor; and it is not enough that the creditor merely forbears to press the debt; 5 Gray 457; 15 Ind. 45. See, also, 17 Johns. 176; 9 Tex. 615; 9 Cl. & F. 45; 87 S. C. 463; 98 N. C. 111; 84 Va. 772; 71 Tex. 241; 140 U. S. 220. Mere forbearance or delay of a creditor in enforcing his rights against the principal does not release the surety, who may, if he chooses, pay the debt, and becoming subrogated to the creditor's rights, control the claim to his own satisfaction; 45 La. Ann. 814.

The receipt of interest on a promissory note, after the note is overdue, is not sufficient to discharge the surety; 6 Gray 319; nor is taking another bond, as collateral security to the original, having a longer time to run; 41 N. Y. 474.

As a requisite to the binding nature of the agreement, it is necessary that there should be some consideration; 2 Dutch. 191; 30 Miss. 424; a part payment by the principal is held not to be such a consideration; 31 *id.* 664. Prepayment of interest is a good consideration; 30 *id.* 432; but not an agreement to pay usurious interest, where the whole sum paid can be recovered back; 10 Md. 227; though it would seem to be otherwise if the contract is executed, and the statutes of usury only provide for a recovery of the excess; 2 Patt. & H. 504.

It has been questioned how far the receipt of interest in advance shows an agreement to extend the time: it may undoubtedly be a good consideration for such an

agreement, but does not of itself constitute it. At the most it may be said to be *prima facie* evidence of the agreement; 30 Vt. 711; 1 Y. & C. 630.

The surety is not discharged if he has given his assent to the extension of the time; 6 Bosw. 600; 16 Pa. 112. Such assent by one surety does not bind his co-surety; 10 N. H. 318; and subsequent assent given by the surety without new consideration, after he has been discharged by a valid agreement for delay, will not bind him; 12 N. H. 320. He need not show notice to the creditor of his dissent; 12 Ga. 271.

Where one surety consents to a change in the original contract and the other does not, the former is bound and the latter is not; 61 Fed. Rep. 77.

The burden of showing a surety's consent to an alteration in the contract is on the plaintiff, when set up by him; 61 Fed. Rep. 77.

Where an execution against a principal is not levied, or a levy is postponed without the consent of the surety, he is discharged from his liability as surety, unless he has property of the principal in his hands at the time; if he has property in his hands liable for the principal's debts, the creditors of the principal may insist on an application of the property to the payment of their debts; 9 B. Monr. 235. A creditor must not only fail, but negligently fail, to enforce a lien, in order to exonerate sureties; 37 Ia. 56. Marriage of the principal and creditor discharges the surety, destroying the right of action; 30 Ark. 667.

If the creditor releases any security which he holds against the debtor, the surety will be discharged; 8 S. & R. 452; 23 Fed. Rep. 573; 80 Ill. 122; 84 Ind. 594; but if the security only covers a part of the debt, it would seem that the surety will be released only *pro tanto*; 9 W. & S. 36; 127 Mass. 386; so of an execution levied and afterwards relinquished; the surety is discharged to the extent to which he has been injured; 50 Ala. 340; 23 Cal. 94; but the surety is not discharged unless he is injured by the release of the levy; 2 G. & J. 243; 83 Pa. 157. Nor will it matter if the security is received after the contract is made; Brandt, Sur. & Guar. § 426; *contra*, 1 Drewry 333. A creditor who has the personal contract of his debtor, with a surety, and has also or takes afterwards property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself, and if he parts with it without the knowledge or against the will of the surety he shall lose his claim against the surety to the amount of the property so surrendered, in equity; 43 Me. 381; 8 Pick. 121; 4 Johns. Ch. 129; 5 N. H. 353; or at law; 8 S. & R. 457. The fact that other security, as good as, or better than, that surrendered, was substituted for it, will not preclude the surety from availing himself of the discharge; 15 N. H. 119; 80 Ill. 122.

A creditor who has given up a lien on the debtor's property must prove that the surety was not injured thereby; 23 Fed. Rep. 573. If the relinquishment of the lien materially alters the contract, the surety is wholly discharged; 1 Q. B. Div. 669; when the creditor has, by way of compromise, given up a lien of doubtful validity, and applied the money received, as far as it would go, in payment of the principal debt, the creditor must show that an attempt to realize on the property against which the lien existed would have been successful; 67 La. 44. But a creditor is not under any obligation to take active steps to obtain a lien by execution. Generally, where a creditor has, by negligence, lost security held by him for the debt or undertaking, the surety is discharged. In some cases he has been held to diligence in realizing on such security; in other cases his inaction has been held not to discharge the surety; Brandt, Sur. & Guar. § 440.

But a surety is not discharged by the fact that the creditor has released or compounded with his co-surety; much less if his co-surety has been released by process of law. The only effect of such a release or composition is that the surety is then not liable for the proportion which would properly fall on his co-surety; 6 Ves. 605. This at least is the doctrine in equity; although it may be questioned whether it would apply at law where the obligation is joint; 4 Ad. & E. 675.

But if the obligation is joint and several, a surety is not released from his proportion by such discharge of his co-surety; 31 Pa. 460.

The death of a surety on a bond conditioned for the repayment of advances to the principal does not terminate the liability, and his estate is liable for advances made after his death; 34 Fed. Rep. 111.

Rights of surety against principal. Until default, the surety has, in general, no rights against the principal, except the passive right to be discharged from the obligation on the conditions stated before. But after default on the part of the principal, and before the surety is called upon to pay, the latter has a remedy against the further continuance of the obligation, and he cannot in all cases compel the creditor to proceed against the debtor; but the English courts of equity allow him to bring a bill against the debtor, requiring the latter to exonerate him; 2 Bro C. C. 579. So a surety for a debt which the creditor neglects or refuses to enforce by proper proceedings for that purpose, may, by bill in equity, bring both debtor and creditor before the court, and have a decree to compel the debtor to make payment and discharge the surety; 3 E. D. Smith 432; and in courts having full equity powers there can be no doubt of the right of a surety, after a debt has become due, to file a bill to compel the principal debtor to pay, whether the surety has himself been sued or not; 2 Md. Ch. Dec. 442; 4 Johns. Ch. 123; 107 Ill. 241; 41 N. J. Eq. 519. Where there is an accrued debt and the surety's liability is admitted, he has a right to compel the principal to relieve him, by paying off his debt. In sustaining such an action he need not prove that the creditor has refused to sue the principal debtor; 31 L. R. Ir. 181.

The surety, after payment of the debt, may recover the amount so paid of the principal, the process varying according to the practice of different courts; 2 Term 104; 4 Mo. 200; 1 Pick. 121; 13 Ill. 63. A promise to pay the surety is implied, where there is no express promise; 70 Ala. 326; and assumpsit will lie; 6 M. & W. 153. But before a surety can recover of his principal because of his suretyship, he must have first paid the debt of his principal or some part of it; 41 Neb. 516. But he may pay the debt before it is due, without the request of the principal, and, after it is due, sue the principal; 47 Ind. 85; 125 *id.* 432.

And such payment refers back to the original undertaking, and overrides all intermediate equities, as of the assignee of a claim against the surety assigned by the principal before payment; 23 Vt. 391.

The payment must not be voluntary, or made in such a manner as to constitute a purchase; for the surety, by purchasing the claim, would take the title of the creditor, and must claim under that. By an involuntary payment is intended only a payment of a claim against which the surety cannot defend. It is not necessary that a suit should be brought. But a surety who pays money on a claim which is absolutely barred has no remedy against the principal; 3 Rand. 490.

A surety, having in his hands funds or securities of the principal, may apply them to the discharge of the debt; 10 Rich. Eq. 557; but where the fund is held by one surety he must share the benefit of it with his co-surety; 3 Jones, Eq. 170; 23 Vt. 65. But a surety who has security for his liability may sue the principal on his implied promise, unless it was agreed that

he should look to the security only; 4 Pick. 444. A surety need not account to his co-surety for the simple indebtedness by himself to the principal; 77 N. Y. 280.

Payment of a note by a surety by giving a new note is sufficient payment, even if the new note has not been paid when the suit is commenced; 14 Pick. 296; 8 N. H. 396; *contra*, where judgment had been rendered against the surety; 3 Md. 47; or by conveyance of land; 9 Cush. 218.

If the surety pays too much by mistake, he can recover only the correct amount of the principal; 1 Dane, Abr. 197. If a surety discharges his obligation for a less sum than its full amount, he can only claim against the principal the actual sum paid; 4 Tex. Civ. App. 526; with interest; 82 Mo. 660; and costs; 12 W. Va. 611.

Extraordinary expenses of the surety, which might have been avoided by payment of the money, or remote and unexpected consequences, are never considered as coming within the contract; 17 Mass. 169; 5 Rawle 106. Costs incurred and paid by the surety in litigating in good faith the claim of the creditor can be recovered of the principal; 30 Vt. 467; 5 Barb. 398; 12 W. Va. 611; but not so if the litigation is in bad faith; 24 Barb. 546; 26 W. Va. 412; or where the surety, being indemnified for his liability, incurred expenses in defending a suit contrary to the expressed wishes of the principal, and after being notified by him that there was no defence to such action; 22 Conn. 299. A surety cannot recover indirect or consequential damages from the principal; Brandt, Sur. & Guar. § 213; or damages for the sacrifice of his property; 1 Hayw. 130; or for his failure in business due to his incurring the liability in question; 17 Mass. 169.

Joint sureties who pay the debt of the principal may sue jointly for reimbursement; 3 Metc. Mass. 169; 63 Vt. 609; and if each surety has paid a moiety of the debt, they have several rights of action against the principal; 20 N. H. 418.

Bail. "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once they may imprison him until it can be done. They may exercise their rights in person or by an agent. They may pursue him into another state, arrest him on the Sabbath, and, if necessary, may break and enter his house for that purpose." 16 Wall. 371; 85 Fed. Rep. 959.

Rights of surety against creditor. It is not quite clear whether a surety can enforce any remedies on the part of the creditor before actual payment by the surety; and, of course, as connected with this, what is the effect of a request by the surety to the creditor to proceed against the debtor, and neglect or refusal to comply by the creditor. The objection to discharging the surety on account of such neglect is the fact that the surety may pay the debt and at once become subrogated to all the rights of the creditor; 6 Md. 210. But where there are courts in the exercise of full equity powers, the surety may insure a prompt prosecution either by discharging the obligation and becoming by substitution entitled to all the remedies possessed by the creditor, or he may coerce the creditor to proceed (by an application to a court of equity); 2 Johns. Ch. 554; 3 Sto. 393; though in the latter case he would probably be required to indemnify the creditor against the consequences of risk, delay, and expense; 2 Md. Ch. Dec. 442. The same indemnity would in general be required where a request is made; but it has been held that a simple request to sue the principal debtor, without a tender of expenses, or a stipulation to pay them, or an offer to take the obligation and bring suit, is sufficient to discharge the surety, unless the creditor at the time of the notice expressly puts his refusal to sue on the ground of the trouble and expense, and offers to proceed if that objection be

removed; 18 Pa. 460. A creditor is not bound to make use of active diligence against a principal debtor on the mere request of a surety; 13 Ill. 376. There must be an express declaration by the surety that he would otherwise hold himself discharged; 20 Ohio St. 663; 90 Pa. 363.

There is a line of cases which hold that if the surety, after the principal debt is due, calls upon the creditor to bring suit against the principal who is then solvent, and the creditor fails to do so, and the principal becomes insolvent, the surety is discharged; Brandt, Sur. & Guar. § 239; 17 Johns. 386; 8 S. & R. 110; 2 Col. 614. So where the creditor has sufficient mortgage security, and, after request to sue and refusal, the property depreciates in value; 25 N. Y. 552. The request to sue must be clear and distinct; Brandt, Sur. & Guar. § 240; and must be made after the debt matures; 44 Pa. 105. That such request must be in writing, see 76 Mo. 70. The great majority of cases hold that the surety cannot be discharged by a request to the creditor to sue, etc.; Brandt, Sur. & Guar. § 242; 79 Ill. 62; 25 Neb. 448; 2 McLean 451.

In an able opinion in 4 Del. Ch. 258, Bates, Ch., reviews the cases and sustains this view. He points out that the contrary decision in 17 Johns. 386 was made by the casting vote of a lay senator, against the opinion of Kent, C. J., and that, while followed in New York, it has not been favorably regarded even there.

The surety who pays the debt of the principal in full is entitled to have every advantage which the creditor has in pursuing the debtor, and for this purpose may have assignment of the debt, or be subrogated either in law or equity; 39 N. H. 150. Whether the remedy will be by subrogation, or whether the suit must be in the name of the creditor, will depend upon the rules of practice in the different states; 38 Pa. 98. The right of subrogation does not depend upon any contract or request by the principal debtor, but rests upon principles of equity; 1 N. Y. 595; 4 Ga. 343; and, though originating in courts of equity, is now fully recognized as a legal right; 11 Barb. 159. In equity, payment of a debt by a surety does not extinguish it, but operates as an assignment to the surety, with all the creditor's rights; 100 Mo. 250. A surety may apply to the court by motion to compel the assignment of a judgment against him and his principal on his offer to pay the judgment; 77 Hun 580.

A surety of a defaulting government contractor who completes the work may sue to recover a balance due his principal in his own name. 27 Ct. Cls. 185.

Rights of surety against co-surety. The co-sureties are bound to contribute equally to the debt they become liable to pay when their undertaking is joint, or joint and several, not separate and successive; 3 Pet. 470; but the creditor may recover the whole amount of one surety; 1 Dana 355. To support the right of contribution, it is not necessary that the sureties should be bound by the same instrument; 30 Minn. 503; 14 Ves. 160. But where two sureties are bound by separate and distinct agreements for distinct amounts, although for equal portions of the same debt, there is no right of contribution between them; 3 Pet. 470. The right of contribution rests only on the principle of equity, which courts of law will enforce, that where two persons are subject to a common burden it shall be borne equally between them; 66 N. Y. 225; in such cases the law raises an implied promise from the mutual relation of the parties; 3 Allen 566. If contribution would, as between co-sureties, be inequitable, it will not be awarded; 24 Miss. 581. The right of a surety to seek contribution arises on making payment which discharges the sureties from action; 71 Miss. 426. Where a surety pays the debt of his principal, he cannot enforce contribution from one who signed simply as his surety; 62 Conn. 459.

It is not necessary that the co-sureties should know of the agreements of each other, as the principle of contribution rests

only on the equality of the burden, and not on any privity; 2 B. & P. 270; 23 Pa. 294; 61 Ala. 440; but a volunteer is not entitled to contribution; there must be a contract of suretyship; 56 Pa. 80. See 22 Am. L. Reg. 529 (a full article).

A surety may compel contribution for the costs and expenses of defending a suit, if the defence were made under such circumstances as to be regarded as prudent; 23 Vt. 581; see 83 N. C. 189; 7 Ill. App. 192; this has been held to include attorney fees; 87 Tenn. 226 (see 68 Tex. 423); whether the attorney employed was successful or not; 45 Mich. 584. And where the suit is defended at the instance or request of the co-surety, costs would be a subject of contribution, both on equitable grounds and on the implied promise; 1 Mood. & M. 406.

A claim for contribution extends to all securities given to one surety; 30 Barb. 408. If one of several sureties takes collaterals from the principal, they will enure to the benefit of all; 3 Dutch. 503. Where one of several sureties is secured by mortgage, he is not bound to enforce his mortgage before he pays the debt or has reason to apprehend that he must pay it, unless the mortgagor is wasting the estate; and if the mortgagor be squandering the mortgaged property, and the surety secured by the mortgage fails to enforce his rights, he is chargeable between himself and his co-sureties with the fair vendible value of the mortgaged property at a coercive sale; 11 B. Monr. 399. The surety in a suit for contribution can recover only the amount which he has actually paid. Any reduction which he has obtained must be regarded as for the benefit of all the co-sureties; 12 Gratt. 642. And see 11 B. Monr. 297. But he is not obliged to account for a debt due by him to the principal; 10 W. N. C. (Pa.) 225.

The right of contribution may be controlled by particular circumstances; thus, where one becomes surety at the request of another, he cannot be called on to contribute by the person at whose request he entered into the security; 37 N. H. 567.

One of several co-sureties cannot obtain contribution against the others until he has actually paid more than his own share, but he is entitled to a declaration of his right to contribution, and to a prospective order that on paying his own share he shall be indemnified against further liability; [1893] 2 Ch. 514.

The relation between co-sureties may be shown by parol evidence; 12 N. Y. 462; 43 Ind. 126; 62 Ga. 73.

A surety who is fully indemnified by his principal cannot recover contribution from his co-surety for money paid by him, but must indemnify himself out of the means placed in his hands; 21 Ala. n. s. 779, n. A co-surety has the same responsibility for keeping alive securities in favor of his co-surety, from whom he claims contribution, as a creditor has on behalf of sureties; 8 J. & Sp. 424. Ordinarily any indemnity, by way of a lien on property, obtained by one surety, after he became such, enures to the benefit of all, and if he loses it by his neglect, it bars contribution. See Brandt, Sur. & Guar. § 271.

The remedy for contribution may be either in equity or at law. The result reached either in law or in equity is the same, with one important exception: in the case of the insolvency of one of the sureties. In such cases the law takes no notice of the insolvency, but awards the paying surety his due proportion as if all were solvent. But equity does not regard the insolvent surety, but awards contribution as if he had never existed; 68 Tex. 493; 7 Dana 307; 6 B. & C. 689. One surety cannot by injunction arrest the proceedings at law of his co-surety against him for contribution unless he tenders the principal and interest due such co-surety, who has paid the principal, or alleges that he is ready and willing to bring the same into court to be paid to him as a condition of the court's interference; 4 Gill 225. Where surety has been compelled to pay the debt of his principal, and one of his

co-sureties is out of the jurisdiction of the court, and others are within it, the surety who has paid is at liberty to proceed in a suit in equity for contribution against those co-sureties only who are within the jurisdiction, by stating the fact in his bill, and the defendants will be required to make contribution without regard to the share of the absent co-surety; 59 Vt. 365; 6 Ired. Eq. 115. See, generally, 1 Lead. Cas. Eq. *100. A bill in equity will lie, by one surety against a co-surety, before the principal debt is paid, to compel him to contribute. A surety who consents to the creditor's giving time to the principal loses his right of contribution as against one who does not consent; 8 Yerg. 168. In equity, in proceeding for contribution, it must be shown that the principal was insolvent; 2 Dana 296; but not at law; 84 Ala. 529; 50 Ind. 158; contra, 7 Dana 307; 99 N. C. 559.

The statute of limitations does not run as against a surety claiming contribution until his own liability is ascertained; [1893] 2 Ch. 514. It runs against partial payments on the debt, from the time he pays the creditor more than his proportion of the debt; 77 Wis. 435.

Conflict of laws. The contract of suretyship, like other contracts, is governed by the *lex loci contractus*; but the *locus* is not necessarily the same as that of the principal contract. Thus, the contract made by the indorser of a note is, not to pay the note where it is payable, but that if not paid there he will pay it at the place where the indorsement is made; 13 Johns. 142; 13 Mass. 20. The *lex loci* applies as well to the interest as to the principal amount. A question has been made in the case of bonds for faithful performance given by public officers; and in these it has been held that the place of performance is to be regarded as the place of making the contract, and sureties are bound as if they made the contract at the seat of the government to which the bonds are given. And under this rule the obligation of all on the bond is governed by the same law, although the principal and sureties may sign in different states; 6 Pet. 172. A letter of guaranty written in the United States and addressed to a person in England must be construed according to the laws of England; 1 How. 161. See BOND; GUARANTY; OFFER; PROMISSORY NOTES.

SURFACE WATERS. Waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course; 34 Minn. 489. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channel in the soil; and include waters which are diffused over the surface of the ground and are derived from rains and melting snows, occasional outbursts of water which in time of freshet or melting of snows descended from the mountains and inundate the country, and the moisture of wet, spongy, springy, or boggy ground. See 44 Ohio St. 232; 63 Wis. 114; 108 Mass. 221; 86 N. Y. 147.

Where water, whether coming from springs or rains or melting snows, has flowed over lands of the complainant, in a well-defined channel, for a period of time so long that the memory of men runneth not to the contrary, to and upon lands of an adjoining proprietor, the court will, by its mandatory injunction, require such adjoining proprietor to remove any obstruction placed upon his lands to prevent such water from flowing to and over his lands; 48 N. J. Eq. 409. The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural water course with well defined banks; 95 Mich. 686. See 97 Mich. 282.

Overflow from a river in time of high water is surface water; 9 Ind. App. 56; but the superabundant waters of a river at times of ordinary floods, spreading beyond its banks, but forming one body and flowing within their accustomed boundaries in

such floods, are not surface waters which a riparian owner may turn off as he will; 63 Fed. Rep. 129. In agricultural land the natural flow of water from lands of a higher upon those of a lower level cannot be made the subject of an action of damages; but a different rule applies in towns and cities; 8 W. & S. 40; 5 Super. Ct. Pa. 502. See WATERS.

SURGEON. One who applies the principles of the healing art to external diseases or injuries, or to internal injuries or malformations, requiring manual or instrumental intervention. One who practises surgery.

This definition is imperfect, it being impossible to define the term surgeon or surgery. The term *surgery*, or *chirurgery*, comes from two Greek words signifying *the hand and work*, meaning a manual procedure by means of instruments, or otherwise, in the healing of injuries and the cure of disease. The practice of medicine, in contradistinction to the practice of surgery, denotes the treatment of disease by the administration of drugs or other sanative substances. There cannot be a complete separation between the practice of medicine and surgery as they are developed by modern science, and understood by the most learned in the profession of medicine: the principles of both are the same throughout, and no one is qualified to practise either who does not completely understand the fundamental principles of both.

The general principles of law defining the civil responsibilities of physicians and surgeons are the same as those that apply to and govern the conduct of lawyers, ship-builders, and other classes of men whose employment requires them to transact business demanding special skill and knowledge; 37 N. H. 468; Whart. & Stille, Med. Jur. 750. The surgeon does not warrant or insure as to the result, ordinarily; 7 C. & P. 81. The surgeon or physician may bind himself by an express contract to cure; 27 N. H. 468; 2 Ld. Raym. 909.

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable, fair, and competent degree of skill; 8 C. & P. 475. This degree of skill is what is usually termed *ordinary* and *reasonable*; Story, Bailm. 438. In addition to the application of ordinary skill in the treatment of disease and injuries, the physician and surgeon undertake to give to their cases ordinary care and diligence, and the exercise of their best judgment; McClel. Malp. 18, 32; 5 B. & Ald. 820; 15 Greenl. 97. See PHYSICIAN.

SURGERY. The practice of medicine is a pursuit very generally known and understood, and so, also, that of "surgery." The former includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the functions of the latter are limited to manual operations, usually performed by surgical instruments or appliances. 108 Ky. 779, 57 S. W. 504. See MEDICINE, PRACTICE OF.

SURMISE. In Ecclesiastical Law. An allegation in a libel. Phill. Ecc. Law 1445. Formerly where a defendant pleaded a local custom it was necessary for him to surmise, that is to suggest, that such custom should be certified to the court by the mouth of the reporter. Without such a surmise the issue was to be tried by the country as other issues of fact. 1 Burr. 251.

SURNAME. A name which is added to the Christian name. In modern times these have become family names. They are called surnames, because originally they were written over the name in judicial writings and contracts. See NAME.

SURPLUS. That which is left from a fund which has been appropriated for a particular purpose; the remainder of a thing; the overplus; the residue. See 18 Ves. 466. It has an appropriate application to personal property or money, but, when

used in a will, may include real estate; 86 N. Y. 210; 131 *id.* 237. See SAVINGS BANKS; RESERVE.

The excess in value of the assets in the State (where the corporation employs part of its "capital stock" in business elsewhere) over the capital stock employed in the State. 256 U. S. 231.

SURPLUS EARNINGS. See EARNINGS.

SURPLUSAGE. In Accounts. A greater disbursement than the charges amount to. A balance over. 1 Lew. 219.

In Pleading. Allegations of matter wholly foreign and impertinent to the cause. All matter beyond the circumstances necessary to constitute the action is surplusage; 5 East 275; 2 Johns. Cas. 53; 16 Tex. 656. Generally, matter of surplusage will be rejected and will not be allowed to vitiate the pleading; Co. Litt. 303 b; 2 Saund. 306, n. 14; 7 Johns. 462; 1 Root 456; 21 N. H. 535; as new and needless matter stated in an innuendo; 7 Johns. 272; even if repugnant to what precedes; 10 East 142; but if it shows that the plaintiff has no cause of action, demurrer will lie; 2 East 451; 2 W. Bla. 842; 3 Cra. 193. Where the whole of an allegation is immaterial to the plaintiff's right of action, it may be struck out as surplusage; 1 Mas. 57. Matter laid under a *videlicet*, inconsistent with what precedes, may be rejected as surplusage; 4 Johns. 450; and when the unnecessary matter is so connected with what is material that it cannot be separated, the whole matter may be included in the traverse; Dy. 365; 2 Saund. 206 a, n. 21; and the whole must be proved as laid; 1 Ohio 438; Steph. Plead. 422.

SURPRISE. In Equity Practice. The act by which a party who is entering into a contract is taken unawares, by which sudden confusion or perplexity is created, which renders it proper that a court of equity should relieve the party so surprised. 1 Story, Eq. Jur. § 120, n.

The situation in which a party is placed without any default of his own, which will be injurious to his interests. 8 Mart. La. N. S. 407.

Mr. Jeremy, Eq. Jur. 366, 383, note, seems to think that the word surprise is a technical expression, and nearly synonymous with fraud. It is sometimes used in this sense when it is deemed presumptive of, or approaching to, fraud. 1 Fonbl. Eq. 123; 3 Ch. Cas. 56, 74, 103, 114.

In Law. The general rule is that when a party or his counsel is taken by surprise, in a material point or circumstance which could not have been anticipated, and when want of skill, care, or attention cannot be justly imputed, and injustice has been done, a new trial should be granted; Hill, New Tri. 521. Surprise may be good ground for a new trial in criminal as in civil cases; 10 E. L. & E. 105; but in neither case is surprise arising after verdict sufficient to warrant an application to the discretion of the court; 2 Parker 673. Nor will a new trial be granted where the ground of the surprise is evidence which was clearly within the issues presented by the pleadings; 1 Tex. Civ. App. 345; or unless one made application for a postponement of the trial in order that he might repair the injury done him by the unexpected testimony; 57 Ark. 60. See NEW TRIAL; PLEADING.

SURREBUTTER. In Pleading. The plaintiff's answer to the defendant's rebutter. It is governed by the same rules as the replication. See 6 Com. Dig. 185; 7 *id.* 389.

SURREJOINDER. In Pleading. The plaintiff's answer to the defendant's rejoinder. It is governed in every respect by the same rules as the replication. Steph. Pl. 77; 7 Com. Dig. 389. See PLEADING.

SURRENDER. A yielding up of an estate for life or years to him who has an immediate estate in reversion or re-

mainder, by which the lesser estate is merged in the greater by mutual agreement. Co. Litt. 337 b. See 90 Cal. 507.

The deed by which the surrender is made. A surrender is of a nature directly opposite to a release; for, as the latter operates by the greater estate descending upon the less, the former is the falling of a less estate into a greater, by deed. A surrender immediately divests the estate of the surrenderor, and vests it in the surrenderee, even without the assent of the latter; Shepp. Touchst. 300.

The technical and proper words of this conveyance are, surrender and yield up; but any form of words by which the intention of the parties are sufficiently manifested will operate as a surrender; 1 Term 441; Com. Dig. Surrender (A).

The surrender may be express or implied. The latter is when an estate incompatible with the existing estate is accepted, or the lessee takes a new lease of the same lands; 16 Johns. 28; 1 B. & Ald. 50. See 94 U. S. 389; 52 Ia. 347; LANDLORD AND TENANT.

To yield; render up. 48 Minn. 13.

SURRENDER OF CRIMINALS. The act by which the public authorities deliver a person accused of a crime, and who is found in their jurisdiction, to the authorities within whose jurisdiction it is alleged the crime has been committed. In England the crown has the option of either surrendering or refusing to surrender a British subject accused of an extradition offence in a foreign country; [1896] 1 Q. B. 230. See EXTRADITION; FUGITIVE FROM JUSTICE.

SURRENDER OF A PREFERENCE. The surrender by a preferred creditor, to the assignee in bankruptcy, of all that he has received under such preference, as a necessary step, under the bankrupt law, to obtaining a dividend of the estate. 1 Dill. 544.

SURRENDER TO USES OF WILL. Formerly a copyhold interest would not pass by will unless it had been surrendered to the use of the will. By 55 Geo. III. this is no longer necessary; 1 Steph. Com. 639.

SURRENDEREE. One to whom a surrender has been made.

SURRENDEROR. One who makes a surrender; as, when the tenant gives up the estate and cancels his lease before the expiration of the term. One who yields up a freehold estate for the purpose of conveying it.

SURROGATE (Lat. *surrogatus*, from *subrogare*, or *surrogare*, to substitute). In English Law. A deputy or substitute of the chancellor, bishop, ecclesiastical or admiralty judge, appointed by him. He can grant licenses, hold courts, and adjudicate cases, to the same extent and with the same authority as his principal, provided his grant of powers has been coextensive with those possessed by his principal. The office has arisen by usage, but is sanctioned by canon 128, and recognized by statute.

In American Law. A term used in some states to denote the judge to whom jurisdiction of the probate of wills, the grant of administration and of guardianship is confided. In some states he is called surrogate, in others, judge of probate, register, judge of the orphans' court, etc. He is ordinarily a county officer, with a local jurisdiction limited to his county.

SURROGATE'S COURT. In the United States, a state tribunal, with similar jurisdiction to the court of ordinary, court of probate, etc., relating to matters of probate, etc. See 2 Kent 409; New York.

SURVEY. The act by which the quantity of a piece of land is ascertained; the paper containing a statement of the courses, distances, and quantity of land is also called a survey.

A survey made by authority of law, and

duly returned into the land office, is a matter of record, and of equal dignity with the patent; 3 A. K. Marsh. 226. See 3 Me. 126; 14 Mass. 149; 1 Harr. & J. 201; 39 Fed. Rep. 66; 1 Dev. & B. 76; and is not open to any collateral attack in the courts; 153 U. S. 253. Where a survey was made in good faith and has been unchallenged for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented; 133 U. S. 193.

In construing maps of official surveys, courts give effect to the meaning expressed by their outlines, as well as by their language; 114 Mo. 13.

By survey is also understood an examination; and in this sense it is constantly employed in insurance and in admiralty law.

SURVEY OF A VESSEL. A public document looked to both by underwriters and owners as affording the means of ascertaining at the time and place the state and condition of the ship and other property at hazard.

SURVEYOR OF THE PORT. A revenue officer appointed for each of the principal points of entry, whose duties chiefly concern the importations at his station and the determination of their amount and valuation. U. S. R. S. § 2637.

SURVIVOR. The longest liver of two or more persons.

There is no presumption as to survivorship in England; 8 H. L. C. 133; see [1892] P. 142; or Scotland; Ersk. III. 8. 1; a child, who, when last heard of six years before, had consumption, is presumed to have died before his father; 95 Ia. 611. See DEATH.

In cases of partnership, the surviving partner is entitled to have all the effects of the partnership, and is bound to pay all the debts owing by the firm; Gow, Partn. 157. He is, however, bound to account for the surplus to the representatives of his deceased partners, agreeably to their respective rights. See PARTNERSHIP.

A surviving trustee is generally vested with all the powers of all the trustees, and the surviving administrator is authorized to act for the estate as if he had been sole administrator.

The right of survivorship among joint-tenants has been abolished, except as to estates held in trust in many states. For the statutes and the present condition of the law in the United States, see Demb. Land Tit. 27. See ESTATES OF JOINT-TENANCY. In Connecticut it never existed; 1 Swift, Dig. 102; Washb. R. P.; nor has it ever been recognized in Ohio, Kansas, Nebraska, or Idaho; Demb. Land Tit. 198. As to survivorship among legatees, see 1 Turn & R. 413; 3 Russ. 217.

"Survivors" is a flexible term, not necessarily meaning the testator's surviving children only; but, when molded by the context and spirit of the will, may consistently with the literal import comprehend all his surviving descendants who were intended to be beneficiaries. 7 Bush (Ky.) 113.

When a bequest is made to the "survivors" of one of several children dying without issue, the testator should be understood to mean, by "survivors," his other children unless they also had died without issue, because his presumed object was that all who should have issue should be entitled to an equal interest, and that nothing but death without issue should disturb that equality. 97 Ky. 655, 31 S. W. 485.

The words "children surviving" as used in a will, mean the children surviving at the death of the testator. 10 Ky. Opin. 588.

SUS' PER COLL'. In English Law. In the English practice, a calendar is made out of attainted criminals, and the judge signs the calendar with their separate judgments in the margin. In the case of a capital felony it is written opposite the prisoner's name, "let him be hanged by the neck," which, when the proceedings were in Latin, was "*suspendatur per collum*," or, in the abbreviated form, "*sus'*

per coll." 4 Bla. Com. 408.

SUSPENDER. In Scotch Law. He in whose favor a suspension is made. In general, a suspender is required to give caution to pay the debt in the event it shall be found due. Where the suspender cannot, from his circumstances, procure unquestionable security, the lords admit juratory caution; but the reasons of suspension are in that case to be considered with particular accuracy at passing the bill. Ersk. Inst. 4. 3. 6.

SUSPENSE. When a rent, profit & prebend, and the like, are, in consequence of the unity of possession of the rent, etc., of the land out of which they issue, not in esse for a time, they are said to be in suspense, *tunc dormiunt*; but they may be revived or awakened. Co. Litt. 313 a.

SUSPENSION. A temporary stop of a right, of a law, and the like.

In times of war the right of *habeas corpus* may be suspended by lawful authority. There may be a suspension of an officer's duties or powers when he is charged with crimes; Wood, Inst. 510. As to an attorney or solicitor, see DISBAR. The Stock Exchange and many corporations provide for the suspension as well as expulsion of members under certain circumstance; 47 Wisc. 670; 2 Brews. 571. See Dos Passos, St. Brok.; EXPULSION; AMOTION; STOCK EXCHANGE.

Suspension of a right in an estate is a partial extinguishment, or an extinguishment for a time. It differs from an extinguishment in this: a suspended right may be revived; one extinguished is absolutely dead; Bac. Abr. *Extinguishment* (A).

The suspension of a statute for a limited time operates so as to prevent its operation for the time; but it has not the effect of a repeal; 8 Dall. 865. For *plea in suspension*, see PLEA; ABATEMENT. Pleas in suspension are not specifically abolished in England by the Judicature Acts, though Ord. xix. rule 13, directs that no plea or defence shall be pleaded in abatement. Moz. & W.

In Ecclesiastical Law. An ecclesiastical censure, by which a spiritual person is either interdicted the exercise of his ecclesiastical function or hindered from receiving the profits of his benefice. It may be partial or total; for a limited time, or forever, when it is called deprivation or amotion. Ayliffe, Parerg. 501.

SUSPENSION OF ARMS. An agreement between belligerents, made for a short time or for a particular place, to cease hostilities between them. See ARMISTICE; TRUCE.

SUSPENSION, PLEAS IN. See PLEAS; SUSPENSION.

SUSPENSION OF A RIGHT. The act by which a party is deprived of the exercise of his right for a time.

When a right is suspended by operation of law, the right is revived the moment the bar is removed; but when the right is suspended by the act of the party, it is gone forever. See 1 Rolle, Abr. *Extinguishment* (L, M).

SUSPENSIVE CONDITION. One which prevents a contract from going into operation until it has been fulfilled.

SUSPENSORY CONDITIONS. Conditions precedent in a contract which merely suspend the operation of a promise till they are fulfilled. They differ from those conditions precedent the non-fulfilment of which works a breach of the contract. Tiff. Sales 153. See 171 U. S. 312.

SUSPICION. The act of suspecting, or the state of being suspected; imagination, generally of something ill; distrust, mistrust, doubt. 66 Ga. 343.

"Suspicious" is also applied to an act, thing, or occurrence which, from its nature or from some circumstance attending it, may well put a man of ordinary caution upon his guard against deception. Ander-

son.

"Suspicious" is also applied to cases in which a party fails or omits to produce evidence within his exclusive possession, and which, being introduced, would have changed the result, presumably against his interest.

The words are likewise applied to the case of a person who is believed to have committed a crime, or whose actions fairly indicate an intention to commit crime. *Id.*

SUTLER. A man whose employment is to sell provisions and liquor to a camp.

By the articles of war no sutler is permitted to sell any kind of liquor or victuals, or to keep his house or shop open for the entertainment of soldiers, after nine at night, or before the beating of the reveille, or upon Sundays during divine service or sermon, on penalty of being dismissed all future sutling; all sutlers are subject to orders according to the rules and discipline of war.

SUUS HÆRES. See HÆRES.

SUZERAIN (Norman Fr. *suz*, under, and *re* or *rey*, king). A lord who possesses a fief whence other fiefs issue. A tenant *in capite* or immediately under the king. Note 77 of Butler & Hargrave's notes, Co. Litt. 1. 3.

In International Law. The word has no clear or precise signification. It has been extended to the Mussulman world, and to the control of European Powers through their colonies over imperfectly civilized people; 12 L. Quart Rev. 223; [1896] P. 122.

SWAIN-GEMOTE. See COURT OF SWEINMOTE.

SWEAR. To take an oath administered by some officer duly empowered.

One may swear who is not duly sworn; and in such case the oath is not administered, but self-imposed, and the swearer incurs no legal liability thereabout; 33 Fed. Rep. 168. See JURY; OATH.

To use such profane language as is forbidden by law. This is generally punished by statutory provisions in the several states. 7 Lea 410; 85 N. C. 528. See BLASPHEMY.

The term "sworn to" implies that the subscriber shall have declared upon oath the truth of the statement to which his name is subscribed. 158 Ky. 416, 165 S. W. 422.

A certificate reciting that it has been "acknowledged" is not sufficient to show that same was "sworn to" as required by law. 158 Ky. 415, 165 S. W. 422.

SWEATING. In an act entitled "an Act to prevent sweating of prisoners arrested for crime, etc.," the word "sweating" is defined as the questioning of a person in custody charged with crime, in an attempt to obtain information from him concerning his connection with crime or knowledge thereof, after he has been arrested and in custody as stated, by plying him with questions, or by threats, or other wrongful means, extorting from him information to be used against him as testimony upon his trial for such alleged crime. 156 Ky. 754, 162 S. W. 94.

SWEEPSTAKES. The sum of the stakes for which the subscribers agree to pay for each horse nominated. 61 Fed. Rep. 889. A free handicap sweepstake is not a stake race; *id.* See HORSE-RACE.

SWINDLER. A cheat; one guilty of defrauding divers persons. 1 Term 748.

Swindling is usually applied to a transaction where the guilty party procures the delivery to him, under a pretended contract, of the personal property of another, with the felonious design of appropriating it to his own use; 2 Russ. Cr. 130; 2 Mass. 406; as where a purchaser tendered a twenty-dollar gold-piece in payment for goods, supposing it was a silver dollar and the seller knowing his mistake returned him change for a dollar, the offence was held to be swindling; 25 S. E. Rep. (Ga.)

318.

The terms cheat and swindler are not actionable unless spoken of the plaintiff in relation to his business; Ogd. Lib. & Sl. 61; 6 Cush. 185; 10 How. Pr. 128. The words "you are living by imposture," spoken of a person with the intention of imputing that he is a swindler, are not actionable *per se*; 8 C. B. 142. See LIBEL.

SWITCH. See RUNNING SWITCH.

SWORN BROTHERS. In Old English Law. Persons who, by mutual oaths, covenanted to share in each other's fortunes.

SWORN CLERKS IN CHANCERY. Officers who had charge of records, and performed other duties in connection with the court of chancery. Abolished in 1842.

SYB AND SOM. A Saxon form of greeting, meaning peace and safety. T. L.

SYLLABUS. An abstract; a head note. The brief statement of the point or points decided, prefixed to the printed report of a case. The head note of a reported case is a thing upon which much skill and thought is required to express in clear, concise language the principle of law to be deduced, or the decision to which it is prefixed, or the facts and circumstances which bring the case in hand within the same principle or rule of law or of practice. 17 C. B. 459. See COPYRIGHT; INFRINGEMENT; PARAGRAPH.

SYLVA CÆVUA. In Ecclesiastical Law. Wood of any kind which was kept on purpose to be cut, and which being cut grew again from the stem or root. 4 Reeve, Hist. Eng. L. 90.

SYMBOLIC DELIVERY. The delivery of some thing as a representation or sign of the delivery of some other.

Where an actual delivery of goods cannot be made, a symbolical delivery of some particular thing, as standing for the whole, will vest the property equally with an actual delivery; 1 Pet. 445; 8 How. 399; 6 Md. 10; 19 N. H. 419; 39 Me. 496; 11 Cush. 282; 3 Cal. 140. See 1 Sm. L. C. 33.

SYNALLAGMATIC CONTRACT. In Civil Law. A contract by which each of the contracting parties binds himself to the other: such are the contracts of sale, hiring, etc. Pothier, Obl. 9.

SYNDIC. In French Law. The assignee of a bankrupt. So in Louisiana.

One who is chosen to conduct the affairs and attend to the concerns of a body corporate or community. In this sense the word corresponds to director or manager. Rodman Notes to Code de Com. p. 551; La. Civ. Code. art. 429; Dalloz, Dict. *Syndic*.

SYNDICATE. A university committee. A combination of persons or firms united for the purpose of enterprises too large for individuals to undertake; or a group of financiers who buy up the shares of a company in order to sell them at a profit by creating a scarcity. Moz. & W.

An association of individuals, formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested. 84 Md. 456. It is said to be, as respects the persons composing it, a partnership. *Id.* But this is rather too broadly expressed. See 40 L. R. A. 216; PROMOTERS.

SYNDICOS (Gr. *σύν*, with, *δική*, cause). One chosen by a college, municipality, etc., to defend its cause. Calv. Lex. See SYNDIC.

SYNGRAPH (Gr. *σύν*, with, *γράφω*, to write). A deed, bond, or other instrument of writing, under the hand and seal of all the parties. It was so called because the parties wrote together.

Formerly such writings were attested by the subscription and crosses of the wit-

nesses; afterwards, to prevent frauds and concealments, they made deeds of mutual covenant in a script and rescript, or in a *part* and *counterpart*, and in the middle between the two copies they wrote the word *syngraphus* in large letters, which, being cut through the parchment and one being delivered to each party, on being afterwards put together proved their authenticity.

Deeds thus made were denominated *syn-*

graphs by the canonists, and by the common-lawyers *chirographs*. 2 Bla. Com. 296.

SYNOD. An ecclesiastical assembly, which may be general, national, provincial, or diocesan. See JUDICATORIES.

SYNODAL. Relating to a synod. A collection of ordinances of diocesan synods. A contribution of money to a bishop at Easter by the clergy. English.

SYNODALES TESTES. See SIDESMEN.

SYSTEMATIZED DELUSION. A delusion in which there is habitual correlation to the subject's surroundings, but in which the reasoning and deductions are false, a condition of the chronically insane. Opposed to unsystematized delusion, in which there is no such correlation. Stand. Dict.

T.

T. Every person convicted of felony short of murder, and admitted to benefit of clergy, was at one time marked with this letter upon the brawn of the thumb. Abolished by 7 & 8 Geo. IV. Whart. Dict.

TABELLA (Lat.). In Civil Law. A small table on which votes were often written. Cicero, in Rull. 2. 2. Three tables were given to the judges, one with the letter A for *Absolutio*, one with C for *Condemnatio*, and one with N. L. for *Non Liqueat*, not proven. Calvinus, Lex.

TABELLIO. In Roman Law. An officer among the Romans, who reduced to writing, and into proper form, agreements, contracts, wills, and other instruments, and witnessed their execution.

The term *tabellio* is derived from the Latin *tabula*, seu *tabella*, which, in this sense, signified those tables or plates covered with wax which were then used instead of paper. 8 Toullier, n. 53.

Tabelliones differed from notaries in many respects: they had judicial jurisdiction in some cases, and from their judgments there were no appeals. Notaries were then the clerks or aids of the *tabelliones*; they received the agreements of the parties, which they reduced to short notes; and these contracts were not binding until they were written in *extenso*, which was done by the *tabelliones*. Jacob, Law Dict. *Tabellion*.

TABLE-RENTS. Rents paid to bishops and other ecclesiastics, appropriated to their table or housekeeping. Jacob.

TABLEAU OF DISTRIBUTION. In Louisiana. A list of creditors of an insolvent estate, stating what each is entitled to. 4 Mart. La. N. S. 535.

TABLES. A synopsis in which many particulars are brought together in a general view. See LIFE TABLES. As to the law of the Twelve Tables, see CODE.

TABULA IN NAUFRAGIO (Lat. a plank in a wreck). In English Law. A figurative term used to denote the power of a third mortgagee, who, having obtained his mortgage without any knowledge of a second mortgage, may acquire the first incumbrance, and squeeze out and have satisfaction before the second. 2 Ves. Ch. 573; Beach, Eq. Jur. 383; TACKING.

TABULE. In Civil Law. Contracts and written instruments of all kinds, especially wills. So called because originally written on tablets and with wax. Calvinus.

TAC. A kind of customary payment by a tenant. Blount, Ten. 155.

TAC FREE. Free from payments, etc.; e. g. "*tac free de omnibus propriis porcis suis infra metas de C.*" i. e. paying nothing for his hogs running within that limit. Jacob.

TACIT (from Lat. *taceo*, to be silent). That which, although not expressed, is understood from the nature of the thing or from the provision of the law; implied.

TACIT LAW. A law which derives its authority from the common consent of the people without any legislative enactment. 1 Bouvier, Inst. 120.

TACIT RELOCATION. In Scotch Law. The tacit or implied renewal of a lease when the landlord instead of warning a tenant has allowed him to continue without making a new agreement. Bell,

Dict. *Relocation*.

TACIT TACK. See TACIT RELOCATION.

TACITURNITY. In Scotland this signifies laches in not prosecuting a legal claim, or in acquiescing in an adverse one. Moz. & W.

TACK. In Scotch Law. A contract of location by which the use of land or any other immovable subject is set to the lessee or tacksman for a certain yearly rent, either in money, the fruits of the ground, or services. Ersk. Inst. 2. 6. 8. This word is nearly synonymous with lease.

TACKING. In English Law. The union of securities given at different times, so as to prevent any intermediate purchaser's claiming title to redeem or otherwise discharge one lien which is prior, without redeeming or discharging other liens also which are subsequent, to his own title. Jeremy, Eq. Jur. 188-191; 1 Story, Eq. Jur., 13th ed. § 412.

It is an established doctrine in the English chancery that a *bona fide* purchaser without any notice of a defect in his title at the time of the purchase may lawfully buy any statute, mortgage, or incumbrance, and if he can defend by those at law his adversary shall have no help in equity to set those incumbrances aside, for equity will not disarm such a purchaser. And as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine has extended to them, and a mortgagee who has advanced his money without notice of any prior incumbrance may, by getting an assignment of a statute, judgment, or recognizance, protect himself from any incumbrance subsequent to such statute, judgment, or recognizance, though prior to his mortgage; that is, he will be allowed to tack or unite his mortgage to such old security, and will by that means be entitled to recover all moneys for which such security was given, together with the money due on his mortgage, before the prior mortgagees are entitled to recover anything; 2 Cruise, Dig. t. 15, c. 5, s. 27; 1 Vern. 188. The source and origin of the English doctrine is the case of Marsh v. Lee, 2 Ventr. 337; 1 Ch. Cas. 162; 1 Wh. & T. L. C. Eq. 611, notes. This case and the doctrine founded upon it has been the subject of severe criticism; Langd. Eq. Pl. 191. Lord Ch. J. Holt is said to have been one of the first to benefit by the right of tacking; see Holt v. Mill, 2 Vern. 279.

Tacking was abolished by sec. 7 of the Vendor and Purchaser Act, stat. 37 & 38 Vict. c. 78, but that section is repealed by sec. 129 of the Land Title and Transfer Act of 38 & 39 Vict. c. 87; Moz. & W. See 1 Pinger. Mortg. § 477.

In England a mortgagee who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the equity of redemption, may, within certain limits and against certain persons, consolidate them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all; 6 App. Cas. 698. See Brett's L. Cas. Mod. Eq. 216. It is there termed consolidation of mortgages, and the principle is laid down that the courts lean against any extension of the doctrine; 6 App. Cas. 698, which is cited as the leading case, and as practically overruling L. R. 4 Eq. 537, which was overruled in 14 Ch. D. 699.

The high-water mark of the doctrine is said to be at the present day represented

by Vint v. Padget, where it was held that if mortgages of different lands to secure different debts are made to, or come into the hands of, the same person, the mortgagee cannot redeem either without redeeming both, or he may enforce the payment of the amount of both debts out of the land covered by either; and this is true though he bought the mortgages with notice of an outstanding second mortgage; 2 De G. & J. 611. This case is said to have been cited but not approved in [1896] App. Cas. 187, affirming [1895] 1 Ch. 51, which affirmed [1894] 2 Ch. 328, where it was held that when the owner of different properties mortgages them to different persons, and the mortgages afterward become united under one title, the holder of the mortgages has a right to refuse to be redeemed as to one without payment of all, not only as against the mortgagor, but also as against a person in whom the equities of redemption of all the properties have been vested by one deed, whether from the mortgagor or mesne assignee, although the assignment is made before the mortgages become united in title.

This doctrine is inconsistent with the laws of the several states, which require the recording of mortgages; and does not exist to any extent in the United States; 1 Caines, Cas. 112; 2 Pick. 517; 12 Conn. 195; 14 Ohio 318; 11 S. & R. 208; Walk. Mich. 175; 37 Vt. 375; 1 Johns. Ch. 399; Bisph. Eq. § 159. A rule apparently analogous may, however, be found in those cases where a mortgage is given to secure future advances, and where the mortgagee is allowed to recover sums subsequently advanced, as against a *mesne* mortgage; Bisph. Eq. § 159, where the cases are collected; but the future advances to be protected must be without notice of the intervening incumbrance; *id.*; 7 Cra. 45; 5 Johns. Ch. 320; unless the advances are made under a binding agreement; 7 Conn. 387; 24 Pa. 372; 21 N. J. Eq. 87; and the recording of the latter is a sufficient notice; 17 Ohio 371; 7 Cra. 45.

To tack different adverse possessions to make up the period of bar, the persons holding such possessions must be connected by priority of title or claim; 86 W. Va. 445; and where several persons enter upon land in succession, the several possessions cannot be tacked together so as to make a continuity of possession under the law of adverse title, unless there is priority of estate, or the several titles are connected; 24 Or. 239.

TAIL. See ESTATE TAIL.

TAILAGE. See TALLAGE.

TAILLE. In Old French Law. An imposition levied by the king or any other lord, on his subject. Burrill; Brande. The royal taille was a tax imposed at once *in rem* and *in personam*; that is, each contributor was rendered personally liable to pay a sum proportionate to the estimated value of his immovable property. It was a property tax affecting the *roturier* exclusively. *Id.*; Steph. Lect. 358.

TAILZIE. A term chiefly used in the case of a land estate, which is settled on a long series of heirs substituted one after another; whereas heirs pointed out in contracts of marriage, or in bonds containing clauses of substitution, are more commonly called heirs of provision. Ersk. Prin. III. 8. 8.

In Scotch Law. A tailzied fee is that which the owner, by exercising his inherent right of disposing of his property, settles upon others than those

to whom it would have descended by law.

TAINT. A conviction of felony, or the person so convicted. Cowel. See **ATTAIN.**

TAKE. A technical expression which signifies to be entitled to: as, a devisee will take under the will.

To seize: as, to take and carry away, either lawfully or unlawfully.

In an indictment for larceny, a charge that defendant did feloniously take implies a trespass; 47 Minn. 449. Under a statute making it an offence to take up and use a horse without the consent of the owner, the taking a horse bridled, saddled, and hitched to a tree will not constitute the offence. 7 Tex. Cr. Rep. 115.

The word may be synonymous with arrest; 9 Gray 267; but take and steal were held not to be synonymous; 12 Conn. 229. It has been held equivalent to require. 29 Ala. 542. A devisee takes under a will only when the possession and control of the deviser has ceased. 41 N. J. L. 70. In its usual signification the word taken implies a transfer of dominion, possession, or control. *Id.*

To choose: e. g. *ad capiendas assisas*, to choose a jury.

To obtain: e. g. to take a verdict in court, to get a verdict.

Taken Back. Under a contract for commission on sales, where it was provided that no commission was to be paid on machinery sold and "taken back," machinery that had not been paid for, and upon which a lien had to be enforced for the purchase price was "taken back." 89 S. W. 266.

TAKE UP. An indorser or acceptor is said to take up, or retire, a bill when he discharges the liability upon it. In such a case, the indorser would hold the instrument with all his remedies intact; while the acceptor would extinguish all the remedies on it. One who accepts a lease is also said to take it up.

TAKING. The act of laying hold upon an article, with or without removing the same. See **LARCENY**; **ROBBERY**.

It implies a transfer of possession, dominion, or control. A thing is not taken unless such a change of status is effected. In trespass, trover, or replevin the taking is not accomplished until the goods are within the power or control of the defendant. See **CONVERSION**; **TRESPASS**; **TROVER**; **REPLEVIN**.

See **EMINENT DOMAIN**; **ROBBERY**.

TALE. In English Law. The ancient name of the declaration or count. 3 Bla. Com. 293.

TALES (Lat. *talīs*, such, like). A number of jurors added to a deficient panel sufficient to supply the deficiency. 36 Pac. Rep. (Cal.) 221. See 3 Hun 479.

A list of such jurymen as were of the tales, kept in the king's bench office in England.

TALES DE CIRCUMSTANTIBUS (Lat. a like number of the bystanders). A sufficient number of jurors selected from the bystanders to supply a deficiency in the panel.

The order of the judge for taking such bystanders as jurors.

Whenever from any cause the panel of jurors is insufficient, the judge may issue the above order, and the officer immediately executes it; see 2 Hill S. C. 381; Cox v. N. J. 233; 1 Blackf. 65. See **JURY**.

TALTER PROCESSUM EST. "So it has proceeded;" words formerly used in pleading, by which a defendant, in justifying his conduct by the process of an inferior court, alleged the proceedings in such inferior court. Steph. Pl., 5th ed. p. 369; Moz. & W.

TALLAGE, or TALLIAGE (Fr. *tailleur*, to cut). In English Law. A term used to denote subsidies, taxes, customs, and, indeed, any imposition whatever by

the government for the purpose of raising a revenue. Bacon, Abr. *Smuggling*, etc. (B); Fort. De Laud. 26; Madd. Exch. c. 17; Co. 2d Inst. 581.

TALLAGIUM (perhaps from Fr. *taille*, cut off). A term including all taxes. Co. 2d Inst. 533; Stat. de tal. non concedendo, temp. Edw. I.; Stow, Annals 445; 1 Sharsw. Bla. Com. 311*. Chaucer has tallagers for "tax-gatherers."

TALLY (Fr. *tallier*; It. *tagliare*, i. e. *scindere*, to cut off). A stick cut into two parts on each whereof is marked, with notches or otherwise, what is due between debtor and creditor. Hence the tallier of the exchequer is now called the teller. Lex. Constit. 205; Cowel. One party must have one part, and the other the other, and they must match. Tallies in the exchequer were abolished by 23 Geo. III. c. 82, and were ordered to be destroyed in 1834. They were thereupon used in such quantities to heat the stoves in the house of lords that it is supposed they were the cause of the fire which destroyed both houses of parliament.

There was the same usage in France. Dict. de l'Acad. Franc.; Pothier, Obl. pt. 4, c. 1, art. 2, § 8; 2 Reeves, c. 11, p. 253.

TALMUD. The body of the Jewish civil and canonical law not comprised in the Pentateuch. The Talmud consists of two parts, the Mishna, or text, and the Gemara, or commentary. Sometimes, however, the name Talmud is restricted, especially by Jewish writers, to the Gemara. There are two Talmuds, the Palestinian, commonly, but incorrectly, called the Talmud of Jerusalem, and the Babylonian Talmud. They contain the same Mishna, but different Gemaras. The Babylonian Talmud is about three times as large as the other, and is more highly esteemed by the Jews. Webster.

TALZIE. See **TAILZIE**.

TAME. Domesticated; reclaimed from a natural state of wildness. See **ANIMAL**.

TANGIBLE PROPERTY. That which may be felt or touched: it must necessarily be corporeal, but it may be real or personal.

TANISTRY (*a thanis*). In Irish Law. A species of tenure founded on immemorial usage, by which lands, etc., descended, *seniori et dignissimo viro sanguinis et cognominis*, i. e. to the oldest and worthiest man of the blood and name. Jacob, Law Dict.

TANK. A "tank" of any kind is an artificial receptacle for liquids; a large basin or cistern. The word tank as used in a statute unquestionably had reference to the class of large metal tanks holding many hundreds, or many thousands, of barrels of oil which producers of oil have adopted for storing their product. 82 S. W. 1020.

TANTEO. In Spanish Law. Preemption. Burrill; White's New Recop. 2. 3.

TANTO. In Mexican Law. The right enjoyed by an usufructuary of the property, of buying property at the same price at which the owner offers it to any other person, or is willing to take from another. Civil Code, Mex. art. 902.

TARDE VENIT (Lat.). In Practice. The name of a return made by the sheriff to a writ; when it came into his hands too late to be executed before the return day.

The sheriff is required to show that he has yielded obedience to the writ, or give a good excuse for his omission; and he may say, *quod breve adeo tarde venit quod exequi non potuit*. It is usual to return the writ with an indorsement of *tarde venit*. Com. Dig. Return (D) 1.

TARIFF. Customs, duties, toll, or tribute payable upon merchandise to the general government is called tariff; the rate of customs, etc., also bears this name, and the list of articles liable to duties is

also called the tariff. As to the meaning of terms, see 79 Fed. Rep. 813. See also **COURT OF APPRAISERS OF THE UNITED STATES**; **RECIPROCITY**; **TAX**.

As to the present act and when it went into effect, see **STATUTE**.

TAVERN. A place of entertainment; a house kept up for the accommodation of strangers. Webster. Originally, a house for the retailing of liquors to be drunk on the spot. Webster. A house licensed to sell liquors in small quantities. 11 Ore. 288.

In almost all the states the word has come to mean the same as inn, with no particular reference to the sale of liquors. See 2 Kent 597*, note a; 84 Ala. 451. Tavern has been held to include "hotel"; 46 Mo. 598; *contra*, 7 Ga. 296.

For the liability of tavern-keepers, see Story, Bailm. § 7. See Wandell, Inns 91; Inn.

TAX. A pecuniary burden imposed for the support of the government. 17 Wall. 323. The enforced proportional contribution of persons and property, levied by the authority of the state for the support of government, and for all public needs. 58 Me. 591; Cooley, Tax. 1. Burdens or charges imposed by the legislative power of a state upon persons or property, to raise money for public purposes. 20 Cal. 318. A sum or rate imposed by governmental authority for a public object or purpose. 150 Pa. 118; 107 Mo. 464. A tax is a demand of sovereignty; a toll is a demand of proprietorship; 15 Wall. 278. Taxes are not "debts"; 20 Cal. 318; 23 Atl. Rep. (Pa.) 799; 34 S. C. 541; nor do they embrace local assessments; 92 Ky. 89; 60 Conn. 112; 2 Wash. 667; nor are fees required by a statute for filing articles of incorporation a tax; 49 Ohio St. 504.

Taxes differ from subsidies, in being certain and orderly, and from forced contributions, etc., in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government; Cooley, Tax. 2. See 51 Pa. 9. No matter how equitable a tax may be, it is void unless legally assessed; 3 Cush. 567; and, on the other hand, the injustice of a particular tax cannot defeat it when it is demanded under general rules prescribed by the legislature for the general good; Cooley, Tax. 3.

Taxes are classified as *direct*, which includes "those which are assessed upon the property, person, business, income, etc., of those who pay them; and *indirect*, or those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity." Cooley, Tax. 61. The latter includes duties upon imports and stamp duties levied upon manufactures; *ibid.* The term "direct taxes" in the federal constitution is used in a peculiar sense, and such taxes are perhaps limited to capitation and land taxes; 3 Dall. 171; 7 Wall. 433; 8 id. 533.

Direct taxes within the meaning of the constitution are only capitation taxes and taxes on real estate; 102 U. S. 586.

It was suggested by Oliver Ellsworth and Roger Sherman in a letter to the governor of Connecticut, and afterwards by Madison, that a state might collect and pay its quota of any federal direct tax and so prevent a federal collection. The same view appears as a *dictum* in the opinion of the supreme court of the United States by Fuller, C. J., in the Income Tax Case. See 34 Am. L. Reg. N. S. 733.

By a majority of one, after a re-argument, it was held that the income tax law of 1894 was a direct tax and unconstitutional. The first decision left the constitutional question in doubt, the court being equally divided; 157 U. S. 429. On re-argument before a full court the decision was by a majority of one only. The points settled by the opinion of the court were, substantially, these: Direct taxes must be apportioned among the several states in accord-

ance with numbers. Taxes on real estate are direct taxes, and taxes on the rent or income of real estate are the same. Taxes on personal property or on the income of personal property are likewise direct taxes. The act of 1894, so far as it falls on the income of real estate and of personal property, is a direct tax on the property and therefore void, because not apportioned according to representation; 153 U. S. 601.

States may tax circulating notes of national banks and United States legal tender notes and other notes used as currency; gold, silver, or other coin are subject to taxation as money; U. S. R. S. § 296. See 4 Wheat. 316; 9 *id.* 739; 2 Black. 630; 2 Wall. 200; 6 *id.* 594; 7 *id.* 16; the provisions of this act do not change existing laws.

Where an act directs a corporation to retain a percentage of interest due on its indebtedness and to pay it to the state, it is a tax on the bondholder; 134 U. S. 232; an act which directs employers of aliens to retain a certain sum from their daily wages and pay it to the state is a tax on the alien and void; 82 Fed. Rep. 257.

The state may undoubtedly require the payment of taxes *in kind*, that is, in products, or in gold or silver bullion, etc.; Cooley, Tax. 12. See 20 Cal. 318; 7 Wall. 71.

Legacy and inheritance taxes are constitutional, and are not arbitrary; they are not prohibited by the equal protection of the laws given by the federal constitution; they are taxes not on property, but on the succession, which is not a natural right but a privilege, and may be conferred subject to conditions; 170 U. S. 283. But an act taxing only estates over \$30,000 was held unequal and therefore void; 53 Ohio St. 314. See an article by Luther E. Hewitt in 34 Am. Law Reg. n. s. 179.

The power to tax is vested entirely in the legislative department. No matter how oppressive taxation may be, the judiciary cannot interfere on that account; 8 Wall. 583; 18 *id.* 206; 47 Miss. 367. See 83 Ala. 608. It can only check excess of authority. The right to lay taxes cannot be delegated by the legislature to any other department of the government; 53 Mo. 133; 47 Cal. 456; 4 Bush 464; except that municipal corporations may be authorized to levy local taxes; Cooley, Tax. 63; 49 Mo. 559, 574; 73 Pa. 448.

The constitutional guaranty which declares that no person shall be deprived of property, etc., except by the judgment of his peers or the law of the land does not necessarily apply to the collection of taxes; 23 Ga. 566; Cooley, Tax. 37; Miller, Const. 105; taxes have been said to be recoverable, not only without a jury, but without a judge; 6 T. B. Monr. 641. Though differing from procedure in courts of justice, the general system of procedure for the levy and collection of taxes established in this country is due process of law; 104 U. S. 78; 96 *id.* 97.

Taxes become a lien on property only by statute; 55 N. J. L. 58; 18 Fed. Rep. 344; 19 Wall. 659. There are many taxes which may be levied without notice to the taxpayer; 111 U. S. 701.

A sovereign power has the unlimited power to tax all persons or property within its jurisdiction; 20 Wall. 46; 66 N. C. 361. But its power is limited to such as is within its jurisdiction; 153 U. S. 628; but when a person is resident within a state, his personal property may be taxed wherever it is; 16 Pick. 572; 3 Ore. 13; personal property may be separated from its owner and he may be taxed on its account, at the place where it is, although not the place of his own domicile; 141 U. S. 18; and the stock of a foreign corporation may be taxed to the resident owner. 82 N. C. 420; a franchise tax on a foreign corporation covering all contracts made in a state, does not apply to a contract of a corporation signed by its local agent and by the other party within the state and stipulating that the contract is not valid unless countersigned by its manager in the state and approved at its home office in another state, even if it is to be performed within the

state; 160 U. S. 81. See 2 App. Div. N. Y. 590. The mere right of a foreign creditor to receive from his debtor within the state the payment of his demand cannot be subjected to taxation within the state; 15 Wall. 300. See *supra*. Shares in a corporation are the shares of the stockholder wherever he may have his domicile, and can only be taxed by the jurisdiction to which his person is subject; 16 Pick. 572; 49 Pa. 526; subject to the qualification that a foreign corporation must always accept the privilege of doing business in a state on such terms as the state may see fit to exact; Cooley, Tax. 16. Under a statute providing for taxation of all personal property within the state owned by non-residents, a tax cannot be imposed on choses in action, owned by a non-resident and left with an attorney in the state for collection, nor on municipal bonds so owned and temporarily on deposit in a bank in the state for safekeeping; 59 Ind. 472. Where the legal title to choses in action is in a trustee, they are subject to taxation at his domicile; 17 S. E. Rep. (Ga.) 61.

Tangible personal property situated within a state may be taxed there without regard to the residence of the owner; 48 N. Y. 390; 53 Pa. 140; and the real estate of a non-resident may be taxed where it is situated; 4 Wall. 210; 16 Mass. 208.

It is the general rule to assess personalty to the owner where he has his domicile; 17 Nev. 393; and sometimes, wherever it may be located in the state, either to the owner, his agent, or person having charge of it, whether the owner is a resident or not; 66 Pa. 446; 85 N. Y. 359; and this rule is sometimes applicable to choses in action; 69 Mo. 454; vessels are usually assessed at the port where they are registered; 58 N. Y. 242; 17 How. 713; ferryboats, where owned; 67 Ala. 63; property in a partnership, usually where the business is carried on; 24 Vt. 9; and where one carries on a business at a place other than his domicile, it is held to be proper to assess the property to one in charge of the business; 88 Ill. 170. Personalty in the hands of a trustee is assessed to him at his domicile; 10 Ohio St. 431; but sometimes to the beneficiary, if a resident of the state; 124 Mass. 193; and if the fund is in charge of a court, in the jurisdiction in which it is controlled; 39 N. J. 653. The personalty of a decedent is sometimes assessed to the estate at the place of *situs*, if the decedent was a non-resident, or at his last domicile, if a resident; 24 Ia. 436; and sometimes to the personal representative at his domicile; 30 N. J. 650; and continues to be so assessed until distributed; 53 Mich. 554. The personalty of persons under guardianship is sometimes assessed where the ward has his domicile; 38 Pa. 157; or to the guardian; 80 Ky. 71; and this would probably be the rule if the guardian, living in the state, had possession of the property, and the ward were a non-resident; 88 Pa. 157. The place for the assessment of the personalty of a corporation is its principal office, unless otherwise directed by statute; 60 Me. 196. It is customary for the states to tax so much of the property of foreign corporations as lies within the state limits.

Shares in a corporation are properly assessed as the owner's personal estate in the jurisdiction to which his person is subject, whether the corporation be foreign or domestic; 49 Pa. 526; 16 Pick. 572; but the state may give stock, held by individuals, any *situs* for the purpose of taxation; 59 Md. 185; and it may provide that the shares of stockholders shall be assessed at the place of corporate business and the tax paid by the corporation for its members; 57 Md. 31. A tax laid in California upon corporate stock, owned exclusively by a non-resident, and with all its property in another state, was held void; 22 Fed. Rep. 602.

A tax imposed by a state upon tangible property within its limits, the owner of which is a non-resident, is not a personal charge against the owner, but must be enforced against the property; 11 N. Y. 563;

5 Met. 73; and such personalty cannot be taxed unless it has an actual *situs* within the state so as to be under the protection of its laws; 50 Ga. 337. See ROLLING STOCK.

The rule or fiction of law that personal property, more especially choses in action, has no *situs* away from the domicile of the owner at which it is deemed to be present, originated, according to Savigny, in Rome, and acquired the designation of *mobilia personam sequuntur*; but its applicability to property was never held to extend beyond Roman territory. Subsequently it became a device of international comity which, it is declared in 12 Vt. 152, was subsequently "adopted from considerations of general convenience and policy and for the benefit of commerce." It was never invented with a view to its being used as a rule to govern and define the application and scope of taxation, nor was it intended to have any other meaning than that, for the purpose of the sale and distribution of property, any act, agreement, or authority which is sufficient in law where the owner resides, shall pass the property in the place where the property is, more especially to facilitate the distribution of decedents' estates by enabling owners to dispose of their property without embarrassment from their ignorance of the laws of the country where it is; David A. Wells in 53 Pop. Sci. Monthly 356.

Two states cannot tax at the same time the same property, nor can a state tax property and interests lying outside of its jurisdiction; 7 Wall. 262.

As to foreign-held bonds, "the power of taxation of a state is limited to persons, property, and business within her jurisdiction; all taxation must relate to one of these subjects." 15 Wall. 300.

"Bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state in which the company was incorporated, they are property beyond the jurisdiction of the state." 15 Wall. 300.

As to the *situs* of choses in action, see 11 Harv. Law Rev. 95.

It has been held in Indiana that life insurance policies are not taxable as personal property, such tax being against public policy; 55 Alb. L. J. 294. Patent rights are not taxable; 29 L. R. A. (Ky.) 786; so in New York court of appeal in a case yet unreported (Oct. 15, 1898); and in Pennsylvania; 151 Pa. 265; and Tennessee.

A poll or capitation tax is so called because it is a tax on the poll or person merely, without regard to property or other circumstances; 18 Fed. Rep. 135; 61 N. C. 21. It is used in some states, as Pennsylvania, to establish a qualification for voting. It was abolished in Massachusetts and in Delaware (by the constitution of 1898) and a registration fee adopted in its stead. See REGISTRATION. It is a direct tax within the meaning of the federal constitution; 7 Wall. 433; 8 *id.* 533; and cannot be laid by the United States except in proportion to population; 102 U. S. 587. The domicile of the taxable is the place of the imposition of the poll tax; 23 N. J. L. 517. One person cannot have two domicils for the purpose of taxation; 4 Mass. 534; nor can one be abandoned until another is acquired; 132 *id.* 89. See DOMICIL.

A state may bind itself by a contract, based upon a consideration, to refrain from exercising the right of taxation in a particular case; 15 Wall. 460; 16 *id.* 244; 6 Conn. 223; s. c. 16 Am. Dec. 46, n.

The agencies selected by the federal government for the exercise of its functions cannot be taxed by the states; for instance, a bank chartered by congress as the fiscal agent of the government; 4 Wheat. 316; the loans of the United States; 2 Wall. 220; 7 *id.* 16, 26; see 134 U. S. 594; the bonds or obligations of the United States for the payment of money; 134 U. S. 594; 133 *id.* 660; on United States revenue stamps; 101 Mass. 329; the salary of a federal officer; 16 Pet. 435; the property of the United States; 135 U. S. 496. But government agencies are only exempt from

state taxation so far as it interferes with their efficiency in performing the functions by which they serve the government; 125 U. S. 530. On the other hand, the federal government cannot tax the corresponding agencies of the states; 12 Wall. 418; 105 Mass. 49; including the salary of a state officer; 11 Wall. 113; and a state municipal corporation; 17 Wall. 322; but railroad corporations are not included in this exemption; 9 Wall. 579. For a letter from Taney, C. J., to Secretary Chase protesting against a tax on the salaries of judges, see 157 U. S. 701. The states have no power to tax the operations of the Union Pacific R. R. Company, which was chartered by congress, but may tax its property; 18 Wall. 5; nor have they power to tax franchises conferred by congress, without its permission; 127 U. S. 1.

A state tax on telegraphic messages sent out of the state is unconstitutional as a regulation of interstate commerce, and so taxes on government messages are void, as burdens upon the agencies of the federal government; 4 Morr. Transcr. 447; see 127 U. S. 640; a state tax on freights transported from state to state is a regulation of commerce, and therefore void; 15 Wall. 232. A statute taxing a telegraph company upon its property within the state, at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting the value of its real estate and machinery subject to local taxation within the state, is constitutional; 163 U. S. 1.

A state has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not; 145 U. S. 1; 141 U. S. 18.

A state tax upon the gross receipts of a railroad company is not repugnant to the federal constitution, although they are made up in part from articles transported from state to state; there is a distinction between a tax upon freights carried between states and a tax upon the fruits of such transportation after they have become mingled with the other property of the carrier; 15 Wall. 284; nor is such a tax a tax upon exports or imports or upon interstate transportation; *id.*

The federal constitution provides that no state shall, without consent of congress, (1) lay any imposts or duties on exports or imports, except what may be necessary for executing its inspection laws. See 8 Wall. 123; (2) lay any duties of tonnage. Under this clause a tax on vessels at a certain sum per ton is forbidden; 20 Wall. 577. The states cannot tax the commerce which is regulated by congress; 4 Wheat. 316; but a tax may be laid upon merchandise in the original packages that has been the subject of commerce and has been sold by the importer; 5 Wall. 475; 8 *id.* 110. See TONNAGE; COMMERCE; ORIGINAL PACKAGE.

The constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state constitutions and state laws; 143 U. S. 192.

No tax is valid which is not laid for a public purpose; Miller, Const. 104, n.; 20 Wall. 655; 58 Me. 590; 2 Dill. 353; such are (according to Cooley, Tax. 81); to preserve the public order; to make compensation to public officers, etc.; to erect, etc., public buildings; to pay the expenses of legislation, and of administering the laws, etc.; also, to provide secular instruction; Cooley, Tax., 2d ed. 119-124; 104 U. S. 81; but not in a school founded by a charitable bequest, though a majority of the trustees were to be chosen (but from certain religious societies) by the inhabitants of the town; 103 Mass. 94. A town may tax itself for the erection of a state educational institution within its limits; 12 Allen 500. The support of public charities is a public purpose, and money raised by taxation may be applied to private charitable institutions. Taxation for the purpose of giving or loaning money

to private business enterprises is illegal; 111 Mass. 454; 60 Me. 124. In some cases, governments have applied public funds to pay equitable claims (upon which no legal right exists), such as for the destruction of private property in war, or for loss incurred in a contract for the construction of a public work; Cooley, Tax. 91. Taxes may be levied for the construction and repair of canals, railroads, highways, roads, etc.; Cooley, Tax. 94; and the construction of a free bridge in a city; 58 Pa. 320; and for the payment of the public debt, if lawfully incurred; and for protection against fire; 104 U. S. 81. Taxation to provide municipal gas and water works is lawful; 43 Ga. 67; 27 Vt. 70; and for the preservation of the public health; 31 Pa. 175; Cooley, Tax. 101. Municipalities may pay money by way of bounties to those who volunteer as soldiers in time of actual or threatened hostility; 50 Pa. 150; 52 Me. 590; but not to provide amusements for the people, or to celebrate the declaration of independence, etc.; 1 Allen 103; 2 Den. 110; though the purchase and support of public parks is lawful; Cooley, Tax. 61, 129, 615.

The power of taxation is limited to public purposes; 69 Pa. 352; 92 Cal. 324. A railroad is a public purpose; 16 Wall. 667. See 168 U. S. 651. A statute providing for a special tax on corporations to establish free scholarships in a state university is unconstitutional; 45 S. W. Rep. (Mo.) 245, where the cases as to what is a public purpose are collected. So of loans to aid in rebuilding parts of a city destroyed by fire; 111 Mass. 454; 23 S. C. 57; a city water plant; 38 S. W. Rep. (Ky.) 826; loans by cities in aid of private manufacturing enterprises; 60 Me. 124; 20 Wall. 655; aid of private educational enterprises; 24 Wis. 350; 103 Mass. 94; though no tuition fee is charged; 6 Sup. Ct. Pa. 1; a bounty for growing forest trees; 107 Mo. 464. Public purpose in this connection "has no relation to the urgency of the public mind, or to the extent of the public benefit to follow." 20 Mich. 452.

It is an essential rule of taxation that the purpose for which a tax is levied "should be one which in an especial manner pertains to the district within which it is proposed that the contribution shall be collected. . . . A state purpose must be accomplished by a state taxation, a county purpose by a county taxation, etc." Cooley, Tax. 104.

Apportionment, which is a necessary element of taxation, is a matter of legislation; Cooley, Tax. 175. Judge Cooley classifies the taxes as specific, *ad valorem*, and those apportioned by special benefit. He suggests as general principles, that while the districts are discretionary, the basis of apportionment must be applied throughout the district and cannot embrace persons or property outside of it. There may be a diversity in methods of collection; the tax does not fail because the rule of apportionment cannot in all cases be enforced, and exemptions, though permissible, must not be in the nature of special and invidious discriminations against individuals.

While perfect equality is unattainable, only statutes based upon false and unjust principles or producing gross inequality will justify the interposition of the courts; 5 Allen 426. See 57 Pa. 433; 73 *id.* 370; 3 Bland, Ch. 186; 85 Ky. 413. The 14th amendment of the constitution of the United States was not intended to compel the states to adopt an iron rule of equality or prevent classification; it is enough that there is no discrimination in favor of one as against another of the same class; 148 U. S. 657. The scope of the 14th amendment is treated in 113 U. S. 27 and 118 *id.* 56. It is carried into effect by R. S. §§ 1977, 1979.

A tax is uniform when it operates with the same effect in all places where the subject of it is found, and is not wanting in such uniformity because the thing is not equally distributed in all parts of the United States; 112 U. S. 580. Accordingly a dif-

ferent rule of taxation may be prescribed for railroad companies from that for individuals; 92 U. S. 575.

"The whole argument of a right under the federal constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in Bell's Gap R. R. Co. v. Pa. (184 U. S. 232)." 167 U. S. 461.

There may be a tax upon occupations even if it duplicates taxes; Cooley, Tax. 385. They are usually by way of license, as distinguished from a tax upon the business authorized by the license to be carried on; 50 Ga. 590.

Such taxes have been laid on bankers, auctioneers, lawyers; 12 Mo. 263; 23 Gratt. 464; clergymen; 29 Pa. 226; peddlers, etc. See 5 Wall. 462 as to federal license taxes.

Tax on a bicycle under a municipal ordinance of Chicago was held to be void as a license, because it was not an occupation tax under the charter. As a tax, it was not imposed according to assessed valuation, not being uniform in its operation, but was objectionable as double taxation because all pleasure vehicles were already taxed; 56 Alb. L. J. 129.

There is a wide difference between a tax or assessment prescribed by a legislative body, and one imposed by a municipal corporation, and a still wider difference where the assessment is the act of mere functionaries with authority derived from municipal ordinances; 170 U. S. 45.

It is generally agreed that the authority to require property specially benefited to bear the expense of local improvements is a branch of the taxing power. Whether it shall be paid out of the general treasury, or assessed upon abutting property or other property especially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or only upon abutters, according to frontage or area, are considered to be questions of legislative expediency; 2 Dill. Mun. Corp. § 752, quoted in 18 Sup. Ct. Rep. 525.

The distinction between taxes and municipal assessments frequently arises in cases involving the construction of agreements by tenants to pay taxes. In such a case it was held in Illinois that an assessment for sidewalk and street improvements was not a tax within such agreement; 167 Ill. 215; but it was held that the term tax may be so used in legal instruments as to render it a debatable question whether it includes local assessments or not; 13 App. Div. N. Y. 140.

A legislature can authorize a city or town to tax its inhabitants only for public purposes; 150 Mass. 593; 113 U. S. 1; 37 Wis. 400; 114 Ill. 659.

Municipal assessments made for local improvements, though resting for their foundation upon the taxing power, are distinguishable in many ways from taxes levied for general state or municipal purposes. A local assessment upon the property benefited by a local improvement may be authorized by the legislature, but such an assessment must be based upon benefits received by the property owner over and above those received by the community at large. The legislature may make provision for ascertaining what property will be specially benefited and how the benefits shall be apportioned. The assessments may be made upon all the property specially benefited according to the exceptional benefit which each parcel of property actually and separately receives. Where the property is urban and plotted into blocks with lots of equal depth, the frontage rule of assessment is generally, but not always, a competent one for the legislature to provide. This rule is, in the long run, a just one, especially as to sidewalks, sewers, grading, and paving. See 30 Mich. 24; but see *contra*, 82 Pa. 360. The legislature may, under some circumstances, authorize the assessment of the lots benefited, in proportion to their area (but see 35 Mich. 155). Whether it is competent for the legislature to declare that the whole of an improve-

ment of a public nature shall be assessed upon the abutting property, and other property in the vicinity, is in doubt. The earlier cases so held; but since many state constitutions have made provision for equality of taxation, several courts have held that the cost of a local improvement can be assessed upon particular property only to the extent that it is especially and particularly benefited, and that as to the excess, it must be borne by the public. See 82 Pa. 360; 69 *id.* 352; 18 N. J. Eq. 519.

As to exemptions from taxation: In the absence of any constitutional provision, the right to make exemptions is included in the right to apportion taxes; 73 Pa. 449; 24 Ind. 391; and when made on grounds of public policy they may be recalled; 13 Wall. 373; 47 Cal. 222; and all exemptions are strictly construed; 18 Wall. 225; 127 Pa. 435; being in derogation of the sovereign and common right; 132 U. S. 174, 190; they are not favored by the courts; 76 N. Y. 64; property exempted from taxation must be of a public nature and for a public purpose. Where the general use is of a public nature the right to exemption is not impaired by the fact that part of the property is used for producing revenue, as in the case of a public library, and statutory exemption is not impaired by the fact that part of a library building is a theatre or hall occasionally let to outside parties; 23 Misc. Rep. 1.

An exemption of "institutes of purely public charity" was held to include private institutions of purely public charity not administered for private gain; 86 Pa. 306; essential features of a public use are that it is not confined to privileged individuals but open to the indefinite public; 86 Pa. 306. The residence of a clergyman is not exempt as a "building for religious worship," because it contains one room set apart as a religious chapel; 12 R. I. 19. See 34 Am. L. Reg. N. S. 169.

Immunity from taxation is not in itself transferable. It must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise expressly declared; 130 U. S. 637.

It has been held that the legislature of a state may grant to a corporation a perpetual exemption from taxation; 13 Vt. 525; 11 Conn. 251; 24 Miss. 386; but privileges which may exempt a corporation from the burdens common to individuals do not necessarily flow from their charter, but must be expressed in it or they do not exist; Marshall, C. J., in 4 Pet. 514. As to exemption from taxation by charter grant, see 35 Cent. Law J. 172.

Equity will restrain the collection of taxes illegally imposed, but there must be some equitable ground for relief besides the illegality of the tax; 139 U. S. 658. Such ground may be liability to irreparable injury or to vexatious litigation; 113 *id.* 625. Where there is a statutory remedy, it is exclusive; but if the statute leaves open to judicial inquiry all jurisdictional questions, the decision of an administrative board does not preclude a resort to judicial remedies; 168 *id.* 239. If a remedy is provided, as by a board of equalization, redress there must first be sought; 86 Fed. Rep. 200.

Federal courts may issue a mandamus against counties or municipal corporations, to compel the levy of a tax to pay their judgments; 86 Fed. Rep. 264.

Rolling stock continuously used in a state acquires a *situs* therein for taxation, and even though it is used exclusively in interstate commerce, it may be subjected in the state to an equal property tax; 29 Fed. Rep. 653; 18 Wall. 5. It is within the legislative power to establish a *situs* for personal property elsewhere than at the place in which it is found, and rolling stock used continuously in two states may have a *situs* in each, but can be taxed in each only upon a fair proportion of the value; 29 Fed. Rep. 658. The continuous use in one state necessary for taxation is not prevented by frequent change of cars from one road to another and the fact that the identical cars are not continuously used

in one state; *id.* For the purpose of taxation the *situs* of rolling stock is where it is habitually used; 39 Am. & Eng. Ry. Cas. (Ariz.) 543. It has also been held that its *situs* for the purpose of taxation is the place where the manager or agent would be taxed in contemplation of law; 89 Ia. 56. In Maryland rolling stock is taxable only at the home office of the company; 50 Md. 274.

The valuation of rolling stock may be apportioned by the court for taxation among the counties through which the road runs, with an assignment to each county of a share proportionate to the length of the road therein; 84 N. C. 504. Rolling stock held under a car trust company is taxable where the car trust association has its place of business; 24 Am. & Eng. R. Cas. 626.

See PROPERTY; SURPLUS; MERGER. See HEAD MONEY; UNIFORM; WINDOW TAX.

In Bankruptcy Law. Section 64 of the bankruptcy law is very broad and covers all taxes, including yearly license fees imposed by the State on corporations organized under its laws for the privilege of doing business, whether such business is carried on in that or in other States. 203 U. S. 483.

The word "taxes" must, in the absence of any clear indication to the contrary, be understood to refer exclusively to the ordinary public taxes. 94 Ky. 444, 22 S. W. 757.

Taxes are a "liability created by statute." 145 Ky. 485, 140 S. W. 647.

"Taxes" are not demands against which a set-off is admissible; their assessment does not constitute a technical judgment, nor are they contracts between party and party, either express or implied; but they are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent, individually, is not required.

If the rule were otherwise the machinery of government would be liable to interruption. The nature of a municipal tax, the purpose of it, forbids the assertion of a demand as a set-off, unless expressly authorized by statute. This rule is necessary to the continuance of the government. 93 Ky. 234, 19 S. W. 598.

See BONIFICATION OF TAX; FRANCHISE TAX; INHERITANCE TAX; PROPERTY TAX.

TAX DEED. An instrument whereby the officer of the law undertakes to convey the title of the rightful proprietor to the purchaser at a tax sale, or sale of the land for non-payment of taxes.

This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government or deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, every condition essential in its character, then the deed becomes conclusive evidence of the title in the grantee, according to its extent and purport. See Blackw. Tax Titles 430.

The legislature may make a tax deed *prima facie* evidence of title in the purchaser, but cannot make it conclusive evidence of his title to the land; 143 U. S. 172.

TAX, IMPOSED. Word "imposed," in Act of April 12, 1902, includes all of the steps necessary to the collection of a tax, making it tantamount to "accrued." A tax is not "imposed" by the simple declaration of a law that property shall be subject to it, but "imposed" only when the tax becomes due and payable. 254 U. S. 391, citing 104 U. S. 689, and 218 U. S. 205.

TAX LAW, CORPORATION. See CORPORATION TAX LAW.

TAX LEVY. The total sum to be raised by a tax. Also, the bill, enactment, or measure of legislation by which an annual or general tax is imposed. Abbott.

TAX LIEN. A statutory lien in favor of the state or municipality, upon the lands of a person charged with taxes, binding the same either for the taxes assessed upon the specific tract of land, or for all the taxes due from the individual, and which may be foreclosed for non-payment, by judgment of a court or sale of the land.

All other liens or incumbrances are inferior to it and all property is taken subject to it. English.

TAX SALE. A sale of lands for the non-payment of taxes assessed thereon.

The power of sale does not attach until every prerequisite of the law has been complied with; 9 Miss. 627. The regularity of the anterior proceedings is the basis upon which it rests.

There are important details connected with the auction itself and the duties of the officer intrusted with the conducting thereof. The sale must be a *public*, and not a *private*, one. The sale must take place at the precise time and place fixed by the law or notice.

A tax sale is vitiated by a failure to give the notice required by law of the place where the sale will occur; 69 Tex. 103.

The sale must be made to the highest bidder. This is the rule in Pennsylvania; but in most of the states the highest bidder is he who will pay the taxes, interest, and costs due upon the tract offered for sale for the least quantity of it. The sale must be for cash and must be according to the parcels and descriptions contained in the list and the other proceedings.

When a tract of land is assessed against tenants in common, and one of them pays the tax on his share, the interest of the other may be sold to satisfy the residue of the assessment.

Where several parcels of land belonging to the same person are separately assessed, each parcel is liable for its own specific tax and no more.

A tax sale is void if any portion of the tax for which it was made was illegal; 96 Mich. 144; 83 Fla. 356. See 127 U. S. 826.

TAX TITLE. The title by which one holds land which he purchased at a tax sale. That species of title which is inaugurated by a successful bid for land at a collector's sale of the same for the non-payment of taxes, completed by the failure of those entitled to redeem within the specified time, and evidenced by the deed executed to the tax purchaser, or his assignee, by the proper officer. Black's L. Dict.

It is not a derivative title. If valid, it is a breaking up of all other titles, and is antagonistic to all other claims to the land; 85 Ia. 247; but in Pennsylvania tax sales do not always cut out existing liens.

The owner of land can acquire a tax title by purchasing it at a tax sale; 75 Ia. 250.

To make out a valid tax title there must be a substantial compliance with the provisions of the law authorizing the sale; 148 U. S. 172.

TAXABLE. Applied to persons or property, signifies subject to taxation; liable to some common exaction levied by government to provide a revenue.

Applied to costs in a cause, it means legally chargeable; warranted by law; allowable by officers appointed to adjust costs. Abbott.

TAXABLE ACCOUNT. A "taxable account" is an existing and enforceable demand and not evidenced in writing signed by the person to be charged, arising out of a contract expressed or implied. 143 Ky. 314, 136 S. W. 1032.

TAXABLE INCOME. As the result

of transactions disclosed in 257 U. S. 156 and 257 U. S. 176, certain corporate assets not exceeding accumulated surplus were segregated and passed to individual stockholders. The value of the segregated thing so received was held to constitute taxable income. 265 U. S. 252.

TAXABLE PERSON. A trustee is a taxable person under the Act of Oct. 3, 1917, which requires that "trustees, executors and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals." 255 U. S. 516.

TAXABLE PROPERTY. See LIST OF TAXABLE PROPERTY.

TAXATION. The process of taxing or imposing a tax. Webster, Dict.

In Practice. Adjustment. Fixing the amount: *e. g.* taxation of costs. 3 Chitty, Gen. Pr. 602.

TAXATION OF COSTS. **In Practice.** Fixing the amount of costs to which a party is entitled.

It is a rule that the jury must assess the damages and costs separately, so that it may appear to the court that the costs were not considered in the damages; and when the jury give costs in an amount insufficient to answer the costs of the suit, the plaintiff may pray that the officer may tax the costs, and such taxation is inserted in the judgment. This is said to be done *ex assensu* of the plaintiff, because at his prayer. Bac. Abr. Costs (K). The costs are taxed in the first instance by the prothonotary or clerk of the court. See 2 Wend. 244; 1 Pick. 211. A bill of costs, having been once submitted to such an officer for taxation, cannot be withdrawn from him and referred to another; 2 Wend. 252. See COSTS.

TAXES. See STATE TAXES.

TAXING OFFICER. An officer in each house of parliament, whose duty it is to tax the costs incurred by the promoters or opponents of private bills. May, Parl. Pr. 843.

TAXPAYER. One who is assessed and pays a tax; or a person chargeable with a tax; one from whom the government demands a pecuniary contribution towards its support. 164 Ky. 511, 175 S. W. 996.

The word "taxpayers" used in a statute is construed to mean voters who pay taxes, and does not include those whose wives only, pay taxes. 49 S. W. 337.

TAXT-WARD. An annual payment formerly made to a superior in Scotland, instead of the duties due him under the tenure of ward-holding. Whart.

TEACHER. See SCHOOLS.

TEAM. Within the meaning of an exemption law, one or more horses, with their harness and the vehicle to which they are customarily attached for use. Anderson; 32 Barb. 291. The animals which a householder or the head of a family uses in the business of providing for his family. *Id.*; 31 N. Y. 553. In a statute allowing damages for injury from the condition of a highway, was held to include a horse driven with other horses unharnessed. *Id.*; 57 N. H. 29, 30. Referring to turning out on meeting in a highway, may mean a vehicle, with animals drawing it, and used for loads instead of persons. *Id.*; 41 Conn. 577. In another statute, held to mean two or more horses, oxen or other beasts, harnessed together to the same vehicle for driving. *Id.*; 60 Iowa 462. See THEME.

TEAM WORK. Work done by a team as a substantial part of a man's business. 49 Vt. 375. It has been held to extend to other than agricultural work, as hauling coals; 9 Q. B. D. 636, overruling 8 Q. B. D. 1. A covenant to provide team work does

not oblige a lessee to find the instruments necessary for its performance; *id.*

TEAMSTER. One who drives horses in a wagon for the purpose of carrying goods for hire. 16 Nev. 416; 34 Cal. 306. He is liable as a common carrier. Story, Bailm. § 496. A teamster is a laborer; 25 N. E. Rep. (Ind.) 272. See CARRIER.

TECHNICAL. That which properly belongs to an art.

In the construction of contracts it is a general rule that technical words are to be taken according to their approved and known use in the trade in which the contract is entered into or to which it relates, unless they have manifestly been understood in another sense by the parties; 2 B. & P. 164. See CONSTRUCTION.

TEDDING. Spreading. Tedding grass is spreading it out after it is cut in the swath. 10 East 5.

TEDING-PENNY, TETHING-PENNY, or TITHING-PENNY. A small duty or payment to the sheriff, from each tithing, towards the charge of keeping courts, etc., from which some of the religious were exempted by royal charter. Wharton.

TEEP. A promissory note given by a native banker or money lender to *zemindars* to enable them to furnish government with security for the payment of their rents. Whart.

TEIND COURT. In Scotch Law. A court which has jurisdiction of matters relating to *teinds* (*q. v.*).

TEINDS. In Scotch Law. Tithes.

TELEGRAPH. An apparatus, or a process for communicating rapidly between distant points, especially by means of preconcerted visible signals representing words or ideas, or by means of words and signs transmitted by electro-magnetism. Webster, Dict. The term, as generally used, applies distinctively to the electro-magnetic telegraph.

In the United States all telegraph lines are operated by companies, either under the authority of general laws, or by express charter; Scott & J. Telegr. § 8. The telegraph is an instrument of commerce; 127 U. S. 411; 122 *id.* 347; and telegraphic communication between states is interstate commerce; 127 U. S. 840. Telegraph companies are quasi-public agencies, and their rights, duties, and obligations are matters arising under the general law. Questions arising in connection with them are not controlled in the federal courts by state decisions; 156 *id.* 210; 148 *id.* 92. An indictment of a telegraph operator in Connecticut who transmitted a message to New Jersey directing a bet on a horse-race, was upheld under a statute prohibiting betting on horse races, and the statute was held not to be in violation of the commerce clause in the constitution; 40 Atl. Rep. (Conn.) 179. Exclusive franchises may be granted, but will not be implied; 11 Pet. 420; 11 Leigh 42. By a federal statute, companies are authorized to construct their lines upon any public road or highway, and across navigable streams, but so as not to interfere with their public use or navigation; 46 Me. 483. The telegraph is a public use authorizing the exercise of the right of eminent domain; 43 N. J. L. 381. Under the general police power, municipal corporations may regulate the manner in which the lines are to be constructed in cities, so as not to interfere with the comfort and safety of the inhabitants; Scott & J. Telegr. § 54. But the power of the municipality is to regulate, not to prohibit; 42 U. S. App. 686; and in the absence of evidence that a proposed method of laying the wires by a company will impede or endanger the use of the streets by the public, a court of equity will enjoin the town from interfering with the wires; 19 Am. L. Reg. N. S. 325. Unless under the sanction of legislative enactment the erection of telegraph posts or the laying of tubes in any highway is a nuisance at common law; 9 Cox, C. C. 174; 30 Beav. 287. See POLES; WIRES.

It has been generally held that the obligations of telegraph companies are not the same as those of common carriers of goods; 41 N. Y. 544; 45 Barb. 274; 18 Md. 341; 15 Mich. 525; see Laws, Carr. 3; but this language has been thought to be too broad, and it has been said that these companies are common carriers of messages, subject to all the rules which are in their nature applicable to all classes of common carriers; Shearm. & R. Negl. § 554. The better opinion would seem to be that since these companies perform a quasi-public employment, under obligations analogous to those of common carriers, the rules governing the latter should be applied to them, but modified to meet the changed conditions of the case; 1 Daly 547; 35 Pa. 298; 13 Allen 226; 58 Ga. 433. They were held to be common carriers in 17 C. B. 3; 13 Cal. 422; 3 U. S. App. 80. They resemble common carriers in that they are instruments of commerce and exercise a public employment, and must serve all customers alike, but they are not common carriers in that their duties are different and are performed in different ways, and they are not subject to the same liabilities; 154 U. S. 14, citing 21 Wall. 264; 105 U. S. 460. They are not bailees. They cannot contract with their employers against their own negligence, although they can make reasonable rules limiting the measure of their responsibility. What is reasonable must be determined with reference to public policy; 21 Wall. 264.

Due and reasonable care is required of telegraph companies in the performance of their duties; 13 Allen 226; 78 Pa. 238; 48 N. Y. 132; 15 Mich. 525; and the necessity for such care is made the greater by the delicacy of the instrument and the skill required to manage it; 15 Mich. 525; 60 Ill. 421.

Telegraph companies may limit their liability by notice to the sender of the message; 35 Ind. 429; 74 Ill. 168; 30 How. Pr. 413; 113 Mass. 299; 17 C. B. 3. A company may make reasonable rules relative to its business, and thereby limit its liability. A rule that the company will not be responsible for the correct transmission of despatches, beyond the amount received therefrom, unless repeated at an additional expense, is reasonable; 11 Neb. 87; 154 U. S. 1; 17 C. B. 3; 17 U. C. Q. B. 470; 15 Mich. 525; whether the sender read the contract or not; 78 Pa. 238; 137 Mass. 463; but such regulations were held void in 60 Ill. 421; 74 *id.* 168; 79 Me. 498; 37 Ohio St. 301; 33 Kan. 679, 685; which cases are cited but not approved in 154 U. S. 1; but no regulations or device will avail to avoid liability in case of negligence or fraud; 34 Wis. 471; 37 Mo. 472; nor from injury which the repetition would not have prevented; 70 Ill. App. 273; nor is the company relieved from liability for delay in delivery not referable to any mistake in the tenor of the telegram; 50 Pac. Rep. (Nev.) 438; nor where the company failed to put the message on its transit; 18 Md. 341; and failure to transmit and deliver a message correctly is *prima facie* evidence of negligence; 53 Ark. 434. Such regulations have been held not to apply to the receiver of the message; 35 Pa. 298; 109 Ill. 610; but the cases on this point are very conflicting; they may be found collected in 61 Am. St. Rep. 214.

The current of authority favors the rule that the usual conditions in the blanks of telegraph companies exempt them only from the consequences of errors arising from causes beyond their control, whether the message be repeated or unrepeatable; 78 Pa. 238; 27 Ia. 433; 1 Col. 230; 5 S. C. 358; 95 U. S. 655; 2 Am. L. Rev. 615. See 107 N. C. 449. Notice of regulations must be brought home to the sender of the despatch, if they are to be regarded as incorporated in his contract; 1 Daly 547. His signature to the printed conditions is sufficient evidence of knowledge, and he will not be heard to say that he did not read them; 113 Mass. 299; 15 Mich. 525; see 85 Tenn. 529; 97 N. C. 57; they are part of the contract; 154 U. S. 1.

Telegraph companies are not allowed to show any preference in the transmission of despatches, except as regulated by statute; 23 Ind. 377; 56 Barb. 46. They may refuse to send obscene messages, but they cannot judge of the good or bad faith of the senders in the use of language not in itself immoral; 57 Ind. 495. They may refuse to communicate a message which is to furnish the means of carrying on an illegal business; and this, regardless of the motive by which they are actuated in refusing to communicate the message; 84 Ky. 664; they need not supply reports to bucket shops; *id.*; nor supply market or stock reports; *Crow.* Electr. § 291.

In England, it is held that the receiver of a message, not being party to the contract for despatching it, can claim no rights under it; L. R. 4 Q. B. 706; 3 C. P. Div. 1, 62; *Poll. Torts* 522; so in Canada; 23 U. C. C. P. 150; but in the United States the right of action in such cases has been conceded; 1 Am. L. Reg. 685; *Crow.* Electr. § 483; and this right has been based upon the "misfeasance" of the company upon which the receiver acted to his injury; 35 Pa. 298; 53 Ind. 1. There is no liability in tort to the sender where there is an express contract; *Crow.* Electr. § 458; except perhaps in cases where the stipulations on the telegraph blanks are considered rather as regulations of the business than as contracts; *id.* If the sender of the message is the agent of the addressee, either disclosed or undisclosed, the latter may maintain an action against the company; 110 Ill. 403; whether the company had knowledge of the fact or not; *Crow.* Electr. § 454.

Telegraph companies are bound to receive and transmit messages from other companies, but are not held responsible for their defaults; 45 N. Y. 744. But a recent text writer is of opinion that they are not, at common law, bound to receive messages for points not on their own lines; *Crow.* Electr. § 445. In many states statutes provide otherwise; see *id.* § 385; but if a company accepts a message for transmission over a connecting line, it is liable to the same extent as over its own lines; 2 Tex. Civ. App. 429; 1 Daly 554; but it is held that its only obligation in such case is to deliver the message correctly to the connecting line; 16 U. C. Q. B. 530; 18 *id.* 60.

They may not unjustly discriminate in their rates, although they may make different rates to different customers if the conditions of the business require it; 62 N. W. Rep. 506.

A railroad company cannot grant a telegraph company the exclusive right to establish telegraph lines along its way, such contracts being void as in restraint of trade; 11 Fed. Rep. 1.

Employees of telegraph companies cannot refuse to answer questions as to messages transmitted by them; and they must, if called upon, produce such messages; 20 L. T. N. s. 421; 15 Fed. Rep. 712; 3 Dill. 567; 72 Mo. 83; 70 Cal. 683; an operator may be required to testify to the contents of a telegram addressed and delivered to a defendant on trial under indictment; 58 Me. 267; 7 W. Va. 544; 3 Dill. 567. And even when a statute forbids the divulging of the contents of a telegram, it has been held not to apply when the testimony of an operator is required in a court of justice; 2 Pars. Eq. Cas. 274. See *Allen*, Tel. Cas. 496, n. The power of the court to compel the local manager of a company to search for and produce private telegrams has been enforced in Missouri by *subpoena duces tecum*, notwithstanding a statute similar to that referred to above; 72 Mo. 83; 53 Me. 267; 15 Fed. Rep. 712; 70 Cal. 683; 55 La. 168. The doctrine of these decisions has been severely criticised, but they have not been overruled; *Cooley*, Const. Lim., 6th ed. 371, note; 18 Am. L. Reg. N. s. 85. See 5 So. L. Rev. 473.

The Home Secretary of England has the power to order telegrams to be detained and opened for reasons of state or public justice; which power is exercised by ex-

press warrant under his signature, by statute.

In estimating the measure of damages for the failure to transmit a message properly, the general rules upon the subject of damages *ex contractu* are applied; *Gray*, Com. by Tel. 80; 98 Mass. 232; 18 U. C. Q. B. 60; 15 Gratt. 122. Where a telegraph company is sued for negligence in transmitting a message, the measure of damages, unless special damages are alleged and proved, is the sum paid for transmission; 71 Wis. 46. Speculative damages are not recoverable for error in transmitting a message; 39 Kan. 580. Unless the despatch shows on its face the importance of the matter to which it relates, or information on this point is communicated to the company's agents, only nominal damages can be recovered for the default of the company; 9 Bradw. 283; 29 Md. 232; 21 Minn. 155; 45 N. Y. 744; 16 Nev. 222. If the sender of a cipher message does not inform the company of the nature of the transaction to which it relates, or what might happen if it were not correctly transmitted, he can recover only the sum paid for sending it, in case of a mistake in its transmission or delivery; 154 U. S. 1; 131 Ill. 575; 34 Wis. 471; 16 Nev. 222; 32 Fl. 527; either nominal damages or the cost of sending it, at most; 178 Pa. 377. Abbreviations in a telegram may render it unintelligible; but if they represent well-known trade abbreviations which the operator may be presumed to understand, the company will be put on information and become liable for negligence in its transmission; 33 Ill. 400; 68 Ga. 299; if the abbreviations are understood by the company, it is not a cipher despatch, and the company is liable for negligent alteration in transmission; 87 Tenn. 554; 75 Tex. 535. Orders to agents to buy and sell stocks, though briefly expressed, have been held to impart information sufficiently as to their importance; 55 Pa. 262; 60 Ill. 421; 44 N. Y. 263; *contra*, 29 Md. 232. And the company is liable for the losses sustained, the fluctuations in the market being the measure of damages; *supra*. See, also, 41 Ia. 458; 27 La. Ann. 49. If the default of the company arises from the dishonesty of some third person, the company will not be held liable for such remote damages; 30 Ohio St. 555; 60 N. Y. 198. As to mental suffering as an element of damages, see MENTAL SUFFERING.

It is for the jury to decide whether the failure of a telegraph company to transmit a message whereby a physician was prevented from early attendance, was the proximate cause of an injury resulting from a surgical operation, there being evidence to show that the operation might have been avoided had the surgeon reached the patient earlier; 83 Fed. Rep. 992.

A company is bound to use reasonable efforts to ascertain where the persons are to whom a message is sent and to deliver the same; 9 Bradw. 283.

The leading principle as to delivery is that the message is to be delivered to the person primarily and not to the place, and if the person cannot be found at the specified place it may be negligence for the company to leave the telegram at the place without making further efforts to find the person; *Crow.* Electr. § 412; 82 Tex. 561; 39 Fed. Rep. 181. And the message should not be left at the office till called for; 62 Ind. 371. Delivery at a hotel is sufficient. If the addressee is absent from his residence or place of business the company must use reasonable efforts to find him; 9 Ill. App. 283.

It has been held that the delivery of a message to a telegraph company for transmission raises an inference that it was received by the addressee; 7 Allen 556.

Where a telegraph message, sent from a place outside of the state, is to be delivered in a state, the contract between the sender and the telegraph company is to be performed there, and will be construed in accordance with the laws of the state of delivery; 70 Ill. App. 275.

Where a telegraph operator accepts a

telegram for transmission, the fact that there is no office at the place to which it is to be sent does not relieve the company from its liability for failure to transmit and deliver; 69 Miss. 653. If a telegram is addressed to X, "in care of Y," the company may deliver it to Y, without being guilty of any negligence even if it fails to reach X; 77 Tex. 215; 30 S. W. Rep. 70.

A telegraph company has the right to choose its own agencies for the delivery of its messages, and may refuse to deliver telegrams by telephone and to receive telephone messages to be telegraphed; 43 N. E. Rep. (Ill.) 731. But where the company permits its employees to receive, by telephone, messages for transmission, it consents to send a message so received; 49 S. W. Rep. (Tex.) 138.

A telegraph company was not negligent in not delivering a warning message before the person to whom it was addressed was killed by his pursuers, where it could have delivered the message only by sending out messengers to watch for his arrival; 81 Fed. Rep. 676.

A contract may be made and proved in court by telegraphic despatches; 20 Mo. 254; 41 N. Y. 544; 103 Mass. 327; L. R. 6 Ex. 7; and the same rules apply in determining whether a contract has been made by telegrams as in cases of a contract made by letter; 36 N. Y. 807; 31 U. C. Q. B. 18; 4 Dill. 431; 20 Q. B. D. 640. Real estate may be leased or sold by telegram if the despatch was duly signed; 4 Bush 261. Contracts by telegraph satisfy the statute of frauds in England; *Chit. Contr.*, 13th ed. 15. Messages are instruments of evidence, and are governed by the same rules as other writings; *Scott & J. Telegr.* § 340; the original message is said to be the best evidence; if this cannot be produced, then a copy should be produced; *id.* § 341; see 40 Wisc. 440; 127 Ill. 652. As to which is the original, is said to "depend upon which party is responsible for its transmission across the line, or, in other words, whose agent the telegraph company is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination." 29 Vt. 140. See 36 N. Y. 807; 40 Wisc. 440. See on this subject, an article in 14 Cent. L. J. 262. See CIPHER.

The signature of a clerk of a telegraph company to a despatch was held to be sufficient, under the statute of frauds, where the original instructions had been signed by the party; *Gray*, Com. by Tel. 138; 54 Md. 138; 11 Col. 103; L. R. 5 C. P. 295. See 6 U. C. C. P. 221.

Statutes in Oregon, Washington, and Nevada provide that when any notice, information, or intelligence, written or otherwise, is required to be given, it may be given by telegraph, and powers of attorney or other instruments in writing duly proved or acknowledged for record may, with the proper certificate, be sent by telegraph and the telegraph copy recorded; and so of checks, due bills, promissory notes, and bills of exchange. And in the same states writs and processes in legal proceedings can be transmitted by telegraph.

Notice of issue of an injunction may be transmitted by telegraph; 13 Ch. D. 110; 59 Ill. 58; 85 N. J. Eq. 422.

By act of congress of July 24, 1866, any telegraph company organized under the laws of any state is granted the right, under certain restrictions, to construct and operate lines through and over any portion of the public domain, and along any of the military or post roads of the United States, and under or across navigable streams or waters, provided that they do not obstruct their navigation, or interfere with ordinary travel; R. S. § 5263.

A telegraph company acquires no right, under this act, to occupy the public streets of a city without compensation; 148 U. S. 92; 156 U. S. 210. See 71 Wis. 560. This act, so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its

terms and conditions, and that a telegraph company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commerce and is appropriate legislation to execute the powers of commerce over the postal service; 96 U. S. 1. It applies equally to telephone companies. The privileges granted must be exercised subject to the police power of the state, provided regulations are not oppressive and such as show an intent to control and perhaps defeat the company's existence; 85 Fed. Rep. 19. Since this act a railroad company, operating a post road over which interstate commerce is carried, cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other companies which have accepted the provisions of the said act, the lines of which would not obstruct the business of the first company; 160 U. S. 1. Cables laid across navigable streams or waters must not obstruct navigation; 20 U. S. App. 247.

Submarine telegraph lines are subordinate to navigation and must be so laid and maintained as not to interfere therewith, and the company is liable in damages to vessels injured by them; 59 Fed. Rep. 365; 43 *id.* 85; 60 N. Y. 510; but in England injury resulting from submarine telegraph lines is held to be a question of negligence; 15 C. B. N. s. 759. See 15 Am. L. Rev. 211.

An opinion of the attorney-general given at the request of the secretary of state in January, 1898, holds that, in the absence of legislation, the president may control the landing of foreign submarine cables, either preventing it, if necessary, or permitting it on conditions demanded by the public interest.

See, generally, Allen, *Telegraph Cases*; Scott & Jarnagin, *Telegraphs*; Sherman & Redfield, *Negligence*; 35 *Amer. & Eng. Corp. Cas.* 1-94; 26 *Wkly. Law Bul.* 147; *COMMERCE*; *EVIDENCE*; *POLES*; *WIRES*.

Telegraph Corporations. The highest court of California construed "telegraph" corporations as used in § 536 of the Civil Code of that State as not including "telephone" corporations. § 536 Civil Code of California. 224 U. S. 330.

TELEGRAPH COMPANIES. See TELEGRAPH.

TELEGRAPH COMPANIES, DISTRICT. See DISTRICT TELEGRAPH COMPANIES.

TELEPHONE. An instrument for transmitting spoken words. See 105 *Ind.* 261.

In law the owners and operators of telephones are in much the same position as telegraph companies. There appears to be no distinction between telephonic and telegraphic communication; 6 Q. B. Div. 244, approved in 62 *Wis.* 32; 66 *Md.* 410; 58 N. J. L. 341; 42 *Fed. Rep.* 278. They have been called "common carriers of articulate speech," that is to say, even though their liabilities do not in all respects resemble the liabilities of ordinary common carriers, yet, like common carriers, they are engaged in a semi-public occupation, and have duties and privileges accordingly; 24 *Alb. L. J.* 283; 22 *id.* 363. They are subject to the rules governing common carriers; 2 C. C. A. 1; 50 *Fed. Rep.* 677, affirming 47 *id.* 633; and are bound to furnish equal facilities to all persons or corporations belonging to the classes which they undertake to serve; 50 *Fed. Rep.* 677. See 61 *Vt.* 241; 76 N. W. Rep. (Neb.) 171; even to a rival company; 3 U. S. App. 30.

Statutes in some states provide that telephone companies shall serve all who apply as subscribers. Prior to the passage of such acts there was much litigation as to whether they could refuse their service under any circumstances. It was held that telephone companies are bound to furnish equal facilities to all telegraph companies; 66 *Md.* 399; see, also, 47 *Fed. Rep.* 633; 23

id. 539; 36 *Ohio St.* 296; but in 49 *Conn.* 352, the court held otherwise, upon the ground that the telephone company, a local company, was restricted under its license on the patents used by it and must be considered as doing business only within the lines of such restriction. Telephone companies are bound to furnish telephones to private individuals under ordinary circumstances; 105 *Ind.* 250. See 114 *Pa.* 592.

It has been held that the remedy against a subscriber for refusal to pay is to bring suit for the amount due; 17 *Neb.* 126.

It has been held that a telephone company must transmit despatches impartially for all who choose to send them; and may make no discriminations in favor of or against particular individuals. So a contract between a telephone company and the owner of patented telephone instruments, that in the use of such instruments by the telephone company discriminations should be made against certain telegraph companies was declared void; 36 *Ohio St.* 296.

In England, a message sent by telephone has been held to come within a statute placing the transmission of telegraphic messages and telegrams under the control of the postmaster-general, though the telephone was not invented or contemplated in 1869; 6 Q. B. Div. 244. Where the lessees of a tramway discharged electricity into the ground by uninsulated wires and the current interfered with the instruments of a telephone company; the tramway company was held liable; 68 *L. T.* 283. But an injunction will not lie at the suit of a telephone company to restrain an electric railway company from permitting the escape of electricity from its wires, where it appears that the former could obviate the trouble by the use of a return wire, and at a less expense than any the railway company could adopt; 42 *Fed. Rep.* 273.

A telephone company may enjoin the proprietor of a hotel from permitting his boarders to use an instrument in the hotel, for their private business, though they may use it to call for a carriage and such like; 32 *Am. L. Rev.* 736 (S. C. of D. C.).

A telephone company maintaining a line between different cities and towns with public stations therein is required to maintain a messenger service to notify persons at a reasonable distance when they are wanted, and is liable for the negligence of its messengers and a regulation to the contrary is void; 42 N. E. Rep. (Ind.) 1035. Such a company is also liable in damages to a traveller, who, during an electric storm, comes in contact with one of its wires, charged with electricity from the atmosphere, and is injured thereby; 2 U. S. App. 205.

An affidavit taken over the telephone has been made the basis of an attachment, but the question how far a telephone may be used for such purpose is at this date (1898) by no means settled. So far as indicated by litigation on the subject, the matter seems to turn upon the thorough identification of the voice; 56 *Alb. L. J.* 233.

A statute fixing the maximum rates which telephone companies may charge is constitutional; 105 *Ind.* 250. The power to determine what compensation it may exact is a legislative not a judicial function; 76 N. W. Rep. (Neb.) 171; and the power of state control is not lost by reason of the fact that the company's lines extend into another state; 118 *Ind.* 194. As to admissibility of telephone communications as evidence, see 24 *Wkly. Law Bul.* 245.

See, generally, 35 *Am. & E. Corp. Cas.* 1-94; 42 U. S. App. 636. See *RATES*.

Telephone Company. A "telephone company" is a common carrier of intelligence engaged in a public service, holding itself out to the public, in consideration of certain fees exacted, as able, ready and willing to enter into contracts that will place persons in direct communication with each other, and enable them to talk one to the other. It may also hold itself out as willing to render other services, such as the transmission of

messages. 140 *Ky.* 165, 130 *S. W.* 995.

TELL-TALES. An instrument or device, usually automatic, for giving information as to number, position, condition, etc. For example, a row of dangling straps or ropes suspended above a railway-track so as to warn any one standing on a car-roof of the approach of a low overhead structure; also, a fender or other device to warn track-walkers of dangers, such as cavities, in the permanent way. *Stand. Dict.*

TELLER (*tallier*, one who keeps a tally). An officer in a bank or other institution. A person appointed to receive votes. A name given to certain officers in the English exchequer.

The duties of tellers in banks consist of the receiving of all sums of money paid into the bank, and the paying of all sums drawn out. The position ranks next in importance to that of cashier. The authority of a teller to certify that a cheque is "good," so as to bind the bank, has been denied; 9 *Metc.* 306; but is supported by the weight of decisions; 39 *Pa.* 92; 52 *N. Y.* 96; *Morse*, Bk. 201. See *OFFICERS*.

TEMPERANCE. It has no fixed legal meaning as contradistinguished from its usual import. It is habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or moderate indulgence; moderation; as temperance in eating and drinking; temperance in the indulgence of joy or mirth. *Web. Dict.* in 84 *Cal.* 123. See *LIQUOR LAWS*.

TEMPEST. Strictly speaking, a storm of extreme violence, a current of wind rushing with great velocity. *Anderson.* Damage done by ice, at the time of high water, but in ordinary wind and weather, is not then the result of a tempest. *Id.*; 29 U. C. C. P. 84. See *ACT OF GOD*; *LIGHTNING*.

TEMPLE. See *INNS OF COURT*.

TEMPORAL LORDS. See *PEERS*; *PARLIAMENT*.

TEMPORALIS. (Lat.). Temporary; limited to a certain time.

TEMPORALITIES. Revenues, lands, tenements, and lay fees which bishops have from livery of the king, and in virtue of which they sit in parliament. 1 *Rolle*, Abr. 881.

See *GUARDIAN OF THE TEMPORALITIES*; *GUARDIAN OF THE SPIRITUALITIES*.

TEMPORALITIES, GUARDIAN OF THE. See *GUARDIAN OF THE TEMPORALITIES*.

TEMPORALITY. The laity.

TEMPORARY. That which is to last for a limited time. Approved in 70 *Ill.* 399. See *PERMANENT*.

TEMPORARY ESTATE DUTY. See *DEATH DUTIES*.

TEMPORIS EXCEPTIO (Lat.). In *Civil Law*. A plea of lapse of time in bar of an action, like our statute of limitations.

TEMPUS (Lat.). Time in general. A time limited; a season; e. g. *tempus personis*, most time in the forest.

TEMPUS PINQUEDINIS. See *FERMISONA*.

TEMPUS SEMESTRE. In *Old English Law*. The period of six months or half a year consisting of one hundred and eighty-two days. *Cro. Jac.* 166.

TEMPUS UTILE (Lat.). In *Civil Law*. A period of time which runs beneficially; i. e. feast-days are not included, nor does it run against one absent in a foreign country, or on business of the republic, or detained by stress of weather. But one detained by sickness is not protected from its running; for it runs where there is power to act by an agent as well

as where there is power to act personally; and the sick man might have deputed his agent. Calvinus.

TEN YEAR PLAN. The adoption of a "ten year plan" for the payment of street improvements by the owner of abutting property did not extend the period of limitation beyond five years from acceptance of the work in the absence of an agreement therefor. 138 Ky. 392, 128 S. W. 104.

TENANCY. The state or condition of a tenant; the estate held by a tenant.

See GENERAL TENANCY; JOINT TENANCY.

TENANCY IN COMMON. The holding of an estate in lands by several persons, by several and distinct titles, but by unity of possession. 2 Bl. Com. 191. A tenant in common, though owner of an undivided share only in the land, differs from a joint tenant (*q. v.*) in having a several and distinct estate therein, and, except for the fact that he has not the exclusive possession, he has the same rights in respect to his share as a tenant in severalty. (Litt. § 304; 2 Bl. Com. 186.) So distinct are the interests of tenants in common that if they join in a lease, it is regarded as the distinct lease of each, and a conveyance by one tenant to another must be made as if to a stranger, a deed of release being by the common law authorities, insufficient to convey his title. (Freeman, Cotenancy, § 189.)

It is immaterial, for the purpose of creating a tenancy in common, whether the cotenants obtain their titles simultaneously, or from the same person, as it is whether they have each the same quantum of estate; this class of tenancy differing in this respect from a joint tenancy. Accordingly, one tenant in common may have an estate in fee and another for life, and one may have acquired his title from one person by conveyance, and the other from another person by descent, and the title of one may have vested yesterday, and that of the other fifty years ago. (2 Bl. Com. 191.) Further, tenants in common, since they hold separate interests, need not have equal shares in the property. (2 Preston, Abstracts 76.) 1 Tiffany, Real Prop. 2nd ed., 640. See JOINT TENANCY; CO-OWNERSHIP; COPARCENARY; TENANCY BY ENTIRETIES; COMMUNITY PROPERTY; PARTNERSHIP PROPERTY; ESTATE IN COMMON.

TENANCY BY ENTIRETIES. Tenancy by entireties (or by the entirety), is the tenancy by which husband and wife at common law hold land conveyed or devised to them by a single instrument, which does not require them to hold it by another character of tenancy. It is essentially a joint tenancy, modified by the common law theory that husband and wife are one person. (Litt. § 291.)

The most important incident of tenancy by entireties is that the survivor of the marriage, whether the husband or the wife, is entitled to the whole, which right cannot be defeated by a conveyance by the other to a stranger, as in the case of a joint tenancy, nor by a sale under execution against such other. (31 Ind. 1.) 1 Tiffany, Real Prop. 2nd ed., 645. See ENTIRETY; CO-OWNERSHIP; JOINT TENANCY; TENANCY IN COMMON; CO-PARCENARY; COMMUNITY PROPERTY; PARTNERSHIP PROPERTY.

TENANCY BY SUFFERANCE. See SUFFERANCE, TENANCY BY.

TENANCY AT WILL. See SUFFERANCE, TENANCY BY.

TENANT. (Lat. *tenere*, to hold). One who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. In a popular sense, he is one who has the temporary use and occupation of lands or tenements which belong to another, the duration and other terms of whose occupations are usually defined by an agreement called a lease, while the parties thereto are placed in the relation of landlord and tenant. See LANDLORD AND TENANT; 5 M. & G. 54. The term is applied generally in con-

nection with the names of the various estates in land to indicate the person entitled to a particular estate, as tenant in common, by the curtesy, in dower, in fee, for life, in severalty, at sufferance, in tail, at will, for years, from year to year, and joint tenants. See the several titles relating to these estates. *Tenant of the demesne* is one who is tenant of a *mesne* lord; Hamm. N. P. 392. *Tenant by the manner* is one who has a less estate than the fee in the land which remains in the reversion. He is so called because in avowries and pleadings it is specially shown in what manner he is tenant in contradistinction to *veray* tenant, who is called *simple* tenant. See Hamm. N. P. 393; *VERAY*. As to *tenant paravail*, see *PARAVAIL*. See ESTATE; LEASE; NOTICE TO QUIT; UNDER TENANT.

TENANT IN CAPITE. See IN CAPITE; TENANT, TENANT IN FEE.

TENANT BY THE COURTESY OF ENGLAND. A man who marries a woman seised of an estate of an inheritance, that is, of lands and tenements in fee-simple or fee-tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England. 2 Bl. Com. 127. See ESTATE BY THE CURTESY; INITIATE TENANT BY THE CURTESY.

TENANT TO THE PRÆCIPUE. See RECOVERY.

TENANT RIGHT. In leases from the crown, corporations, or the church, it is usual to grant a further term to the old tenants in preference to strangers; and as this expectation is seldom disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term; and this interest is called the *tenant right*. Bacon, *Abr. Leases and Terms for Years* (U).

TENANT FROM YEAR TO YEAR. One who holds lands or tenements under a lease from year to year. See ESTATE FOR YEARS.

TENDER. (Lat. *tenere*, to offer). An offer to deliver something, made in pursuance of some contract or obligation, under such circumstances as to require no further act from the party making it to complete the transfer.

Legal tender, money of a character which by law a debtor may require his creditor to receive in payment, in the absence of any agreement in the contract or obligation itself. See LEGAL TENDER.

In Contracts. It may be either of money or of specific articles.

Tender of money must be made by some person authorized by the debtor; 2 Maule & S. 86; to the creditor, or to some person properly authorized, and who must have capacity to receive it; 1 Camp. 477; 14 S. & R. 307; 11 Me. 475; 1 Gray 600 (but necessity will sometimes create exceptions to this rule; thus any one may make a tender for an idiot; 1 Inst. 206 b; an uncle, although not appointed guardian, has been permitted to make a tender on behalf of an infant whose father was dead; 1 Rawle 408); in lawful coin of the country; 5 Co. 114; 13 Mass. 235; 4 N. H. 296; or paper money which has been legalized for this purpose; 2 Mas. 1; as, U. S. treasury notes or "greenbacks;" 12 Wall. 457; 27 Ind. 426; or foreign coin made current by law; 2 Nev. & M. 519; but a tender in bank notes will be good if not objected to on that account; 2 B. & P. 526; 9 Pick. 539; 1 Johns. 476; 1 Rawle 408; 6 Harr. & J. 53. He who tenders must be ready to pay or have within his reach the means to pay and actually offer to pay; 10 East 101; 5 Esp. 43; 5 N. H. 440. The money need not always be brought forward as well as offered, especially if the party to whom the offer is made refuses to receive it; 2 M. & S. 88; 6 Pick. 356. The person making

the tender need not have the money in his possession; 2 C. & P. 77; 12 E. C. L. 35. A refusal to accept a check for the sole reason that it was insufficient in amount, is a waiver of all objection to the form of the tender; 12 Colo. 430. A corporation is not bound to tender a certificate before it can maintain an action on a subscription for its stock; 46 Minn. 463. As to what has been held objection, see 2 Caines 116; 13 Mass. 235; 5 N. H. 296; 10 Wheat. 333. The exact amount due must be tendered; 5 Mass. 385; 41 Vt. 66; 23 Ia. 430; though more may be tendered, if the excess is not to be handed back; 5 Co. 114; 4 B. & Ad. 546; and asking change does not vitiate unless objection is made on that account; 1 Camp. 70; 5 Dowl. & R. 289; see 140 Ill. 123; and the offer must be unqualified; 1 M. & W. 310; 9 Metc. 163; 20 Wend. 47; 18 Vt. 324; 1 Wisc. 141. A tender accompanied with conditions which the party has no right to impose is of no avail; 94 Ala. 488. Though a conditional tender is not good, a tender under a protest, reserving the right of the debtor to dispute the amount due, is a good tender, if it does not impose any conditions on the creditor; [1892] 1 Ch. 1. Where a decree directed complainant to pay defendant, or into court, a certain sum, and defendant thereupon to deliver to the complainant, or into court, certain stock, held that the tender of the same with interest coupled with a demand for the surrender of the stock and a settlement of the pending appeal was bad as a conditional tender and did not stop the running of the interest; 86 Fed. Rep. 16. One who makes a tender in order to stop the running of the interest must show that he has kept on hand, so as to be constantly ready and able to pay, the amount of the tender in lawful money at any time the creditor should elect to take it; *id.* See 74 Fed. Rep. 52.

When a larger sum than is due is tendered, it is not necessary that the debtor pay or keep good the whole amount; for, although the tender of money is supposed to be an admission by the debtor that the entire sum tendered is due and payable, yet it is not *conclusive* evidence to that effect; 24 Ind. 250. But where tender was made after suit brought, and the amount supposed by defendant to be due was paid into court, it was decided that the full amount must be paid over to the plaintiff, notwithstanding a much less sum was found by arbitrators to be due; 82 Pa. 64.

It is said that the amount must be stated in making the offer; 30 Vt. 577. It must be made at the time agreed upon; 1 Saund. 33 a, n.; 5 Pick. 187, 240; but may be given in evidence in mitigation of damages, if made subsequently, before suit brought; 1 Saund. 33 a, n.; statutes have been passed in many of the states, permitting the debtor to make a tender at any time before trial, of the amount he admits to be due, together with all costs accrued up to date of tender, and compelling plaintiff, in case he do not recover more than the sum tendered, to pay all costs subsequently incurred. See 53 Fed. Rep. 153; 45 Ill. App. 151. In Pennsylvania, by statute of 1705, in case of a tender made before suit, the amount tendered must in the event of a suit be paid into court; 10 S. & R. 14; otherwise, the plea of tender is a nullity. If so paid, tender is a good plea in bar, and if followed up, protects the defendant; 66 Pa. 158. Tender may be made after suit brought by paying the amount tendered into court with the costs up to the time of payment; 1 T. & H. Pr. 744. At common law the tender of a mortgage debt on the day it falls due and at the appointed place discharges the mortgage; but if made after the maturity of the debt, it must be kept good, in order to have that effect; 86 Ill. 431; 27 Me. 237; 50 Cal. 650; but in New York and Michigan mere tender is sufficient to discharge the mortgage; 21 N. Y. 343; 12 Mich. 270. It must be at a suitable hour of the day, during daylight; 7 Me. 31; at the place agreed upon, or, if no place has been agreed upon, wherever the per-

son authorized to receive payment may be found; 2 M. & W. 228; and, in general, all the conditions of the obligation must be fulfilled. Where a chattel mortgage runs to several mortgagees jointly, to secure a joint debt, a tender to either mortgagee is good; 53 Minn. 28. The money must have been actually produced and offered, unless the circumstances of the refusal amount to a waiver; 3 C. & P. 342; 15 Wend. 637; 6 Pick. 356; 1 Wisc. 141; or at least be in the debtor's possession ready for delivery; 5 N. H. 440; 3 Pa. 381. As to what circumstances may constitute a waiver, see 2 Maule & S. 86; 1 A. K. Marsh. 321; 57 Conn. 105. An actual tender is dispensed with if the party is ready and willing to pay it, but is prevented by the other's declaring that he will not receive it; 94 Ala. 488. Presence of the debtor with the money ready for delivery is enough, if the creditor be absent from the appointed place at the appointed time of payment; 4 Pick. 258; or if the tender is refused; 18 Conn. 18.

A tender may be made in the case of unliquidated damages, but it must be kept good, especially where there is a dispute as to the amount due; 44 Ill. App. 615.

Tender of specific articles must be made to a proper person, by a proper person, at a proper time; 2 Pars. Contr. 158. The place of delivery is to be determined by the contract, or, in the absence of specific agreement, by the situation of the parties and circumstances of the case; 7 Barb. 472; for example, at the manufactory or store of the seller on demand; 2 Den. 145; at the place where the goods are at the time of sale; 7 Me. 91; 3 W. & S. 295; 6 Ala. N. S. 326; 1 Wash. C. C. 328; the creditor's place of abode, when the articles are portable, like cattle, and the time fixed; 4 Wend. 377; 2 Pa. 63; 1 Me. 120. When the goods are cumbersome, it is presumed that the creditor was to appoint a place; 5 Me. 192; 3 Dev. 78; or, if he fails to do so upon request, the debtor may appoint a place, giving notice to the creditor, if possible; 13 Wend. 95; 1 Me. 120. Whether a request is necessary if the creditor be without the state, see 5 Me. 192; 2 Greenl. Ev. § 611. The articles must be set apart and distinguished so as to admit of identification by the creditor; 4 Cow. 452; 7 Conn. 110; 1 Miss. 401. It must be made during daylight, and the articles must be at the place till the last hour of the day; 19 Vt. 587; 5 T. B. Monr. 372; unless waived by the parties.

In Pleading. If made before action brought; 5 Pick. 106; 53 N. J. L. 41; tender may be pleaded in excuse; 2 B. & P. 550; 5 Pick. 291; it must be on the exact day of performance; 1 Saund. 33 a, n.; and if a tender is relied on as a defence, it must be pleaded; 7 D. C. 66. It cannot be made to an action for general damages when the amount is not liquidated; 2 Burr. 1120; as, upon a contract; 2 B. & P. 234; *covenant* other than for the payment of money; 1 Ld. Raym. 566; *tort*; 2 Stra. 787; or *trespass*; 2 Wils. 115. It may be pleaded, however, to a *quantum meruit*; 1 Stra. 576; accidental or involuntary *trespass*, in the United States; 13 Wend. 390; 2 Conn. 659; 36 Me. 407; *covenant* to pay money; 7 Taunt. 438.

The effect of a tender is to put a stop to accruing damages and interest, and to entitle the defendant to judgment for his costs; 3 Bingh. 290; 3 Johns. Cas. 243; 17 Mass. 389; 10 S. & R. 14; 9 Mo. 697; and it may be of effect to prevent interest accruing, though not a technical tender; 5 Pick. 106.

It admits the plaintiff's right of action as to the amount tendered; 1 Bibb 272; 14 Wend. 221; 2 Dall. 190; 28 Neb. 587; at the date of the suit; 48 Mo. App. 185; but nothing more, and does not prevent the making of any defence inconsistent with the admissions of the original contract or cause of action, as to any claim beyond that of the sum tendered; 110 N. Y. 101; 74 Ia. 436. The benefit may be lost by a subsequent demand and refusal of the amount due; 5 B. & Ad. 630; 24 Pick. 168; but not

by a demand for more than the sum tendered; 22 Vt. 440; or due; 8 Q. B. 915.

See **LEGAL TENDER**; **PAYMENT INTO COURT**.

A plea of tender, if defective, should be demurred to, and plaintiff cannot question its sufficiency after accepting the money paid into court under such plea; 98 Ala. 638.

TENDER OF AMENDS. See **AMENDS**.

TENDER OF ISSUE. A form of words in a pleading, by which a party offers to refer the question raised upon it to the appropriate mode of decision.

TENEMENT (from Lat. *teneo*, to hold). Everything of a permanent nature which may be holden.

House, or homestead. Jacob. Rooms let in houses.

Property held by a tenant. 37 W. Va. 778.

In its most extensive signification, tenement comprehends everything which may be holden, provided it to be of a permanent nature; and not only lands and inheritances which are holden, but also rents and profits *a prendre* of which a man has any frank tenement, and of which he may be seised *ad liberum tenementum*, are included under this term; Co. Litt. 6 a; 2 Bla. Com. 17; 1 Wash. B. P. 10. In its technical sense it will include an advowson; 3 Atk. 460; 4 Bing. 290; tithes; 1 Stra. 100; 6 Ad. & El. 388; a dignity; 30 Ch. Div. 136; 2 Salk. 508. It includes a wharf; 14 Abb. Pr. 372. The word *tenementa* simply, without other circumstances has never been construed to pass a fee; 10 Wheat. 204. See 1 B. & Ad. 161; Com. Dig. *Grant* (E 2), *Trespass* (A 2).

TENEMENTAL LAND. Land distributed by a lord among his tenants, as opposed to the demesnes which were occupied by himself and his servants. 2 Bla. Com. 90.

TENEMENTS, DOMINANT AND SERVIENT. In Real Property Law. The land in favor of which the privilege exists is called the dominant tenement, and that upon which the burden of servitude is imposed is called the servient tenement. Both have reference to the land, and not to the person, of the owner. 33 Cal. 111; Thomp. Real Prop. 367. Relation to EASEMENT, see *id.*, 367, 368.

TENENDAS (Lat.). In Scotch Law. The name of a clause in charters of heritable rights, which derives its name from its first words, *tenendas predictas terras*, and expresses the particular tenure by which the lands are to be holden. Erskine, Inst. b. 2, t. 3, n. 10.

TENENDUM (Lat.). That part of a deed which was formerly used in expressing the tenure by which the estate granted was holden; but since all freehold tenures were converted into socage, the tenendum is of no further use even in England, and is, therefore, joined to the *habendum* in this manner,—to have and to hold. The words "to hold" have now no meaning in our deeds. 2 Bla. Com. 298. See **HABENDUM**.

TENERI (Lat.). That part of a bond where the obligor declares himself to be held and firmly bound to the obligee, his heirs, executors, administrators, and assigns, is called the *teneri*. 3 Call 350.

TENET (Lat. he holds). In Pleading. A term used in stating the tenure in an action for waste done during the tenancy.

When the averment is in the *tenet*, the plaintiff on obtaining a verdict will recover the place wasted, namely, that part of the premises in which the waste was exclusively done, if it were done in a part only, together with treble damages. But when the averment is in the *tenuit*, the tenancy being at an end, he will have judgment for his damages only. 2 Greenl. Ev. § 652.

TENNESSEE. The name of one of the United States of America.

It was originally a part of North Carolina. In April, 1784, North Carolina passed an act ceding to the United States, upon certain conditions, all her territory west of the Appalachian or Alleghany Mountains. Before the cession was accepted by

Congress, it was repealed by another act passed in October, 1784. In December, 1789, the legislature again ceded the territory to the United States; and the cession was accepted by Congress by act, April 2, 1790. A convention was called, and a constitution established on February 6, 1796. Tennessee was admitted by an act approved June 1, 1796. Prior to this time a legislature had been elected, the state government organized, and many important laws enacted.

The constitution of 1796 was not submitted to the people for ratification. The authority of the convention established it as the constitution of the state. A new constitution went into effect in 1835. Amendments were made in 1853 and 1860. The present constitution was framed, submitted to the people, and ratified in 1870, and went into effect May 5, 1870.

TENOR. A term used in pleading to denote that an exact copy is set out. 1 Chitty, Cr. Law 235; 1 Mass. 203; 1 East 180.

The tenor of an instrument signifies the true meaning of the matter therein contained. Cowell. In Scotland an action for proving the purport of a lost deed is called the action of proving the tenor.

In Chancery Pleading. A certified copy of records of other courts removed into chancery by *certiorari*. Gresl. Ev. 309.

TENORE INDICTAMENTI MITTENDO. A writ whereby the record of an indictment and the process thereupon was called out of another court into the Queen's bench. Reg. Orig. 69; Whart.

TENSE. A term used in grammar to denote the distinction of time.

The acts of a court of justice ought to be in the present tense; but the acts of the party may be in the perfect tense; and the continuances are in the perfect tense; 1 Mod. 81. The contract of marriage should be made in language of the present tense; 6 Binn. 405. See 1 Saund. 393, n. 1.

TENT. A pavilion; or canvas house enclosed with walls of cloth and covered with the same material. 2 Tex. App. 222.

TENTERDEN'S ACT, LORD. Statute of 9 Geo. IV, c. 14, a supplement to the statute of frauds (*q. v.*), requiring the following promises and engagements to be in writing: (1) An acknowledgment of a debt barred by the statute of limitations; (2) a promise to pay a debt incurred, or a ratification of a contract made, during infancy; (3) a representation as to a person's character, ability, etc., made to enable him to obtain money or goods on credit; (4) executory contracts for the sale of goods. 28 A. & E. Ency. L. 2nd ed. 47. "Ability" held to mean pecuniary ability. 1 M. & W. 101. See **FRAUDS, STATUTE OF**.

TENUIT (Lat. he held). A term used in stating the tenure in an action for waste done after the termination of the tenancy. See **TENET**.

TENURE (from Lat. *tenere*, to hold). The mode by which a man holds an estate in lands.

Such a holding as is coupled with some service, which the holder is bound to perform so long as he continues to hold.

The thing held is called a tenement; the occupant, a tenant; and the manner of his holding constitutes the tenure. Upon common-law principles, all lands within the state are held directly or indirectly from the king, as lord paramount or supreme proprietor. To him every occupant of land owes fidelity and service of some kind, as the necessary condition of his occupation. If he fails in either respect, or dies without heirs upon whom this duty may devolve, his land reverts to the sovereign as ultimate proprietor. In this country, the people in their corporate capacity represent the state sovereignty; and every man must bear true allegiance to the state, and pay his share of the taxes required for her support, as the condition upon which alone he may hold land within her boundaries; Co. Litt. 65 a; 2 Bla. Com. 105; 3 Kent 487.

In the earlier ages of the world the condition of land was probably *allodial*, that is, without subjection to any superior,—every man occupying as much land found unappropriated as his necessities required. Over this he exercised an unqualified dominion; and when he parted with his ownership the possession of his successor was equally free and absolute. An estate of this character necessarily excludes the idea of any tenure, since the occupant owes no service or allegiance to any superior as the condition of his occupation. But when the existence of an organized society became desirable to secure certain blessings only by its means to be acquired, there followed the establishment of gov-

ements, and a new relation arose between each government and its citizens,—that of protection on the one hand and dependence on the other,—necessarily involving the idea of service to the state as a condition to the use and enjoyment of lands within its boundaries. This relation was of course modified according to the circumstances of particular states; but throughout Europe it early took the form of the feudal system. See *ALLodium*.

The principal species of tenure which grew out of the feudal system was the tenure by knight's service (*q. v.*). Many arbitrary and tyrannical incidents or lordly privileges were attached to this tenure, which was abolished by statute 12 Charles II. c. 24, which declared that all such lands should thenceforth be held in free and common socage.

Tenure in socage is where a tenant holds his tenement by any certain service, in lieu of all other services, so that they be not services of chivalry or knight's service: as, to hold by fealty and twenty shillings rent, or by homage, fealty, and twenty shillings rent, or by homage and fealty without any rents, or by fealty and a certain specified service, as, to plough the lord's land for three days. Littleton 117; 2 Bla. Com. 72. See *Socage*.

Other tenures have grown out of the two last mentioned species of tenure, and are still extant in England, although some of them are fast becoming obsolete.

Among these are tenures by *copyhold* and in *frankalmoigne*, in *burgage* and *gavelkind*, and *gravel* and *petit serjeanty*; but their nature, origin, and history are explained in the several articles appropriated to those terms.

Tenures were distinguished, according to the quality of the service, into *free or base*; the former were such as were not becoming a soldier or a freeman to perform, as, to serve the lord in the wars; while the latter were only considered fit for a peasant, as to plough the land, and the like. They were further distinguished with reference to the person from whom the land was held, as a tenure by *capite*, where the holding was of the person of the king, and tenure in *grosse*, where the holding was of a subject. By the statute of *Quia Emptores*, 18 Edw. I., it was provided that if any tenant should alien any part of his land in fee, the alienor should hold immediately of the lord of the fee, and should be charged with a certain part of the service due in respect of the quantity of land held by him. The consequence of which was that upon every such alienation the services upon which the estate was originally granted became due to the superior lord, and not to the immediate grantee; 4 Term 443; 4 East 271; Crabb, E. P. § 735.

In the United States every estate in fee-simple is held as absolutely and unconditionally as is compatible with the state's right of eminent domain. Many grants of land made by the British government prior to the revolution created socage tenures, which were subsequently abolished or modified by the legislatures of the different states. Thus, by the charter of Pennsylvania, the proprietary held his estate of the crown in free and common socage, his grantees being thereby also authorized to hold of him directly, notwithstanding the statute of *Quia Emptores*. The act of Pennsylvania of November 27, 1770, substituted the commonwealth in place of the proprietaries as the ultimate proprietor of whom lands were held. Pennsylvania titles are allodial not feudal; 44 Pa. 492. In New York there was supposed to have been some species of military tenure introduced by the Dutch previously to their surrender to the English, in 1664; but the legislature of that state in 1787 turned them all into a tenure in free and common socage, and finally, in 1830, abolished this latter tenure entirely, and declared that all lands in that state should thenceforth be held upon a uniform allodial tenure.

See Parliamentary Report (1870) on Tenures in the countries of Europe.
See *MILITARY FEUDS*; *MILITARY TENURE*.

TENURE OF OFFICE. By R. S. § 1765, etc., it was provided that federal officers appointed with the consent of the senate should only be removed during their terms with like consent or by a new appointment made by the consent of the senate; but it did not apply to certain suspensions during a recess of the senate. The law was repealed by act of March 3, 1887. See, as to the effect of the repeal, 167 U. S. 324; *OFFICE*.

TENURE BY THEGNAGE. See *THEGNAGE*.

TERCE. In Scotch Law. A life-tenant competent by law to widows who have not accepted of special provisions in the third part of the heritable subjects in which the husband died infertile. It thus corresponds to *dower*.

TERM. In Estates. The limitation of

an estate: as a term for years, and the like. The word *term* does not merely signify the term specified in the lease, but the estate, also, and interest that passes by that lease: and therefore the *term* may expire during the continuance of the time: as by surrender, forfeiture, and the like. 2 Bla. Com. 145; 8 Pick. 339.

In Practice. The space of time during which a court holds a session. Sometimes the term is a monthly, at others it is a quarterly period, according to the constitution of the court.

The whole term is considered as but one day: so that the judges may at any time during the term revise their judgments. In the computation of the term, all adjournments are to be included; 9 Watts 200. Courts are presumed to know judicially when their terms are required to be held by public law; 4 Dev. 427. A term of the circuit court may extend from the beginning of one term to the opening of the succeeding statutory term, and the beginning of another term in another district of the same circuit does not necessarily end the term of the first court; 37 U. S. App. 129. A court has power to extend the term until a trial can be concluded; 21 Pa. 109. In England Hilary term began January 3d, and ended February 12th; Easter term began the Wednesday fortnight after Easter Sunday and ended the Monday next after Ascension Day; Trinity term began the Friday next after Trinity Sunday and ended the Wednesday fortnight after; Michaelmas term began October 9th and ended November 28th. The long vacation was formerly from August 10th to October 24th, and to October 28th, in chancery; now it is from August 13th to October 23d. By the Judicature Acts (*q. v.*), the division of the legal year into the four terms of Hilary, Easter, Trinity, and Michaelmas has been abolished, so far as relates to the administration of justice.

TERM FEE. In English Practice. A certain sum which a solicitor is entitled to charge to his client, and the client to recover, if successful, from the unsuccessful party; payable for every term in which any proceedings subsequent to the summons shall take place. Whart. Lex.

TERM FOR YEARS. An estate for *years* and the time during which such estate is to be held are each called a term: hence the term may expire before the time, as, by a surrender.

See *ESTATE FOR YEARS*.

TERM IN GROSS. An estate for years which is not held in trust for the party entitled to the land on the expiration of the term.

TERM PROBATORY. In an ecclesiastical suit, the time during which evidence may be taken. Cootes' Eccl. Pr. 240.

TERMINAL CHARGES. Demurrage charged for the detention of cars in loading or unloading is a terminal charge, required to be shown by the schedules of rates filed and published by an interstate railroad company by the terms of the interstate commerce act of June 29, 1906. 188 Fed. 879.

TERMINARE (Lat.). To end or determine; to dispose of judicially; to decide.

TERMINUS (Lat.). A boundary or limit, either of space or time. A bound, goal, or borders parting one man's land from another's. It is used also for an estate for a term of years: e. g. "*interesse termini*." 2 Bla. Com. 143. See *TERM*.

Terminus a quo. The starting-point of a private way is so called. Hamm. N. P. 193.

Terminus ad quem. The point of termination of a private way is so called. In common parlance, the point of starting and that of termination of a line of railway are each called the terminus.

TERMOR. One who holds lands and

tenements for a term of years, or life. Littleton § 100; 4 Tyrwh. 561.

TERMS OF COURT. Those stated periods of the year, during which courts sit for the dispatch of business.

TERMS, TO BE UNDER. A party is said to be *under terms*, when an indulgence is granted to him by the court in its discretion, on certain conditions. Thus, when an injunction is granted *ex parte*, the party obtaining it is put *under terms* to abide by such order as to damages as the court may make at the hearing. Moz. & W.

TERRA DOMINICALIS REGIS. Demesne land belonging to the crown. Abbott.

TERRA EXTENDENDA. Land to be valued. This phrase was the name of a writ addressed to an escheator, etc., that he inquire and find out the true yearly value of any land, etc., by the oath of twelve men, and to certify the extent into the chancery. Abbott; Reg. Orig. 293.

TERRA HYDATA. Land subject to the payment of hydragage. Seld.

TERRA LUCRABILIS. Land that might be gained from the sea, or enclosed out of a waste, to particular use. Burrill; 1 Mon. Ang. 406.

TERRA NOVA. Land newly converted from wood ground or arable. Cowel.

TERRA FUTURA. Land in forests, held by the tenure of furnishing food to the keepers therein. 4 Inst. 307.

TERRA TESTAMENTALIS. Land held by charter or writing; boc-land. Burrill; Spelman. Land that might be disposed of by will; devisable land. *Id.*; Cowell.

TERRÆ DOMINICALES REGIS. The demesne lands of the crown.

TERRAGES. An exemption from all uncertain services. Cowel.

TERRE-TENANT. One who has the actual possession of land; but, in a more technical sense, he who is seised of the land; and in the latter sense the owner of the land, or the person seised, is the terre-tenant, and not the lessee. 4 W. & S. 256; Bac. Abr. *Uses and Trusts*. It has been held that mere occupiers of the land are not terre-tenants. See 16 S. & R. 432; 2 Bla. Com. 91, 328; 114 Pa. 146.

Contribution among Terre-tenants. The question whether purchasers, at different times, of land bound by an incumbrance created by the grantor, stand in equal equity as regards this incumbrance, and if so, must each contribute proportionately to its discharge, has been settled in England in the affirmative, following the rule laid down in the Year Books and repeated in Coke's Reports; 2 Wms. Saund. p. 10, n. 3; 3 Rep. 14 b. In this country, the opposite view has been taken; 1 Johns. Ch. 447; 5 id. 235; 10 S. & R. 450; 20 Pa. 222. See Lecture before Phila. Law Acad. 1863, by G. W. Biddle, LL.D.

TERRIER. In English Law. A roll, catalogue, or survey of lands, belonging either to a single person or a town, in which are stated the quantity of acres, the names of the tenants, and the like.

One of the old records in the office of the recorder of deeds of Philadelphia County is still called the *Germanatown Terrier*. In it will be found the Latin Dedication of Pastorius, quoted by Whittier, in the Pennsylvania Pilgrim.

By the ecclesiastical law, an inquiry is directed to be made from time to time of the temporal rights of the clergymen of every parish, and to be returned into the registry of the bishop; this return is denominated a terrier. 1 Phill. Ev. 602.

TERRITORIAL COURTS. The courts established in the territories of the United States. See *UNITED STATES COURTS*.

TERRITORIAL PROPERTY. The territorial property of a state consists of all land and water within its geographical boundaries, including all rivers, lakes, bays,

gulfs and straits lying wholly within them. As incidents to such territorial possessions must be added a state's jurisdiction over its marginal waters when its territory abuts upon the sea, and the right of its people to navigate such rivers as form boundaries between two or more states, or such as rising within one state traverse the territories of others on their way to the sea. The legal title to such territorial property may rest either upon (1) prescription, (2) conquest, (3) occupation, (4) accretion, or (5) cession.

The **non-territorial property** of a state consists of such possessions as it may hold in its public capacity beyond its own limits, whether within or without the jurisdiction of other states; of such as it may hold as a private individual within the jurisdiction of another state; of its public vessels; of its private vessels, covered by the national flag; and of the goods of its subjects embarked in foreign ships.

From their very nature and situation the right to use and enjoy certain classes of state property depends exclusively upon municipal law, while for a like reason the right to use and enjoy certain other classes depends entirely upon international law. A state may limit or qualify its sovereignty and jurisdiction over its territorial property by permitting a foreign state to perform within its bounds certain acts otherwise prohibited; or by surrendering the right to exercise certain parts of its domestic jurisdiction as a protection to others. Restrictions thus imposed upon the sovereignty of a state are known as servitudes which may be either positive or negative. Taylor, *Int. Pub. Law*, 263.

TERRITORIAL WATERS. It is difficult to draw any precise conclusion as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbors, etc., over which it has unquestioned jurisdiction. All that can reasonably be asserted is that it extends as far as may be requisite for its safety, and for some lawful end. According to the current of modern authority, it extends as far as a cannon shot will reach—*i. e.* a marine league; 1 Kent 29; this limit was fixed when that was the range of a cannon; 41 Ohio St. 81; it is said that it can be extended as the range of cannon increases; Hall, *Int. L.* 157. It may be extended for protection in time of war, or for revenue purposes; 139 U. S. 240; 41 Fed. Rep. 109. It has been said that the United States can attach to its coast an extent into the sea beyond the reach of cannon shot; 1 Kent 29; and congress has recognized this limit by legislation as to captures made within a marine league of the shore; *id.*

State legislation in Massachusetts which extends the territorial limit of a state three miles seaward from the shore is valid; 139 U. S. 240; *z. i.* it may extend its territorial limits and the boundaries of its counties to the extent of the limits of the United States. So of a California act relating to a crime committed within the same limit; 60 Fed. Rep. 42. Parliament "may extend the realm how far soever it may please;" 2 Ex. D. 152. Under the Behring Sea Arbitration, it was decided that the United States cannot protect seals in the open sea beyond the three-mile limit.

It would not be unreasonable for the United States to assume control of the waters on the coast included within distant headlands, as from Cape Ann to Cape Cod, Nantucket to Montauk Point, and from the latter to the Capes of the Delaware; 1 Kent 30.

"As between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from the coast, and bays wholly within its territory which do not exceed two marine leagues at the mouth are within this limit." 139 U. S. 240. The Gulf of Mexico is part of the Atlantic Ocean; 121 U. S. 67; but, on the other hand, the exclusive right of

the British crown to the Bristol Channel, to the channel between Ireland and Great Britain, and between Scotland and Ireland, is uncontested; 1 Phill. *Int. L.* § 189; and Chesapeake Bay and Delaware Bay are not a part of the high sea; 1 Whart. *Int. L.* § 23; Narragansett Bay is claimed, by usage, to be within the jurisdiction of Rhode Island; 16 Wall. 532; 9 R. I. 419; and Conception Bay in Newfoundland, though more than 20 miles wide at its mouth and nearly 50 miles long, is British territory; 2 App. Cas. 394. It is probable that the Delaware and Chesapeake bays are the property of the United States, and England claims complete jurisdiction over the bays of Chaleur, Fortune, and Conception, and some other bays of Newfoundland, as closed seas; Snow, *Int. Law* 27. The Zuyder Zee and Hudson's Bay are probably parts of the territory of the nations which surround them; while the bays of Fundy and Chaleur are public; 3 Whart. *Int. L.* 28, 304, 305 a. The claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude has been considered by the United States as against the rights of other nations; 1 Kent 29. See 1896 Rep. Society for Reform and Codif. of the Laws, 17th meeting; 5 Eng. Rul. Cas. 946; **PILOT; JURISDICTION.**

TERRITORY. A part of a country separated from the rest and subject to a particular jurisdiction.

The regional areas—of land and adjacent water—over which the United States claims and exercises dominion and control as a sovereign power. 262 U. S. 122; 3 Wheat, 336, 390.

A portion of the country subject to and belonging to the United States which is not within the boundary of any state or the District of Columbia.

Relation to the United States. (1) The territories are not States, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States. (2) They are not States, within the meaning of Revised Statutes, § 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question. (3) They are States, as that word is used in treaties with foreign powers, with respect to the ownership, disposition and inheritance of property. 182 U. S. 270. The same applies to the District of Columbia (*q. v.*).

The constitution of the United States, art. 4, s. 3, provides that the congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States; and nothing in this constitution shall be construed so as to prejudice any claims of the United States or of any state.

The United States has supreme sovereignty over a territory, and congress has full and complete legislative authority over its people and government; 186 U. S. 1.

Congress possesses the power to erect territorial governments within the territory of the United States: the power of congress over such territory is exclusive and universal, and their legislation is subject to no control, unless in the case of ceded territory, as far as it may be affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled; Story, *Const.* § 1322; Rawle, *Const.* 237; 1 Kent 243, 359; 1 Pet. 511. Congress has plenary legislative power over the territories of the United States, and upon the admission of a territory into the Union, may, if it so desires, effect a collective naturalization of its foreign-born inhabitants as citizens of the United States; 143 U. S. 135.

The power of the United States to acquire territory by any means known to international law would seem to be beyond question. An interesting historical reference to the subject was made by Henry Hitchcock in an address before the University of Michigan in 1889.

"It is a matter of history that when Mr. Jefferson, in 1803, purchased the Louisiana territory from France, his own belief was that he had (in his own words) 'done an act beyond the constitution,' and he was not only anxious that the acquisition of Louisiana should be sanctioned and the future annexation of Florida authorized by an amendment to the constitution, but privately submitted to his party friends the draft of such an amendment, though in his message to congress submitting the treaty for ratification he did not mention the constitutional difficulty. But the popularity of the measure secured the ratification of the treaty and all necessary legislation to enforce it without further question. Twenty-five years later, the question was presented in the supreme court in the American Insurance Company v. Canter, with reference to the validity and effect of the treaty of 1819, by which Spain had ceded Florida to the United States. Marshall answered it in these brief words: 'The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty;' 1 Peters 511, 542."

In the case of the Alaska liquor laws the question was recently (1898) before the circuit court of appeals in the ninth circuit, and it was held as a "well-established doctrine" that "the territories of the United States are entirely subject to the legislative authority of congress. They are not organized under the constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation, exclusively, of the legislative department, and subject to its supervision and control. . . . It [congress] may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. . . . In a territory all the functions of government are within the legislative jurisdiction of congress, and may be exercised though a local government or directly;" 86 Fed. Rep. 456, citing 16 How. 164; 101 U. S. 129; 114 *id.* 15; 136 *id.* 1; 141 *id.* 174; 152 *id.* 1.

When New Mexico was conquered by the United States it was only the allegiance of the people that was changed, their relation to each other and their property rights remained unchanged. The executive of the United States properly established a provincial government which ordained laws and instituted a judicial system, which continued in force until modified by the direct action of congress or by the territorial government established by it; 20 How. 176. See the articles on the various territories; 12 Harv. L. Rev. 205; **STATE; SOVEREIGNTY; UNITED STATES.**

TERROR. The state of the mind which arises from an event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger.

See **RIOT; ROBBERY; PUTTING IN FEAR.**

TERTIUS INTERVENIENS (Lat.). In Civil Law. One who, claiming an interest to the subject or thing in dispute in action between other parties, asserts his right to act with the plaintiff, to be joined with him, and to recover the matter in dispute, because he has an interest in it; or to join the defendant, and with him oppose the interest of the plaintiff, which it is his interest to defeat. He differs from the intervenor, or him who interpleads in equity. 4 Bouvier, *Inst.* n. 3819, note.

TEST. Something by which to ascertain the truth respecting another thing. 7 Pa. 428.

TEST ACT. The act of 25 Car. II. c. 2, by which it was enacted that all persons holding any office, civil or military (excepting some very inferior ones), or receiving pay from the crown, or holding a place of trust under it, should take the oath of alle-

giance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England, under a penalty of £500 and disability to the office. 4 Bla. Com. 59. Abolished 9 Geo. IV. c. 17, so far as taking the sacrament is concerned, and a new form of declaration substituted. Mozl. & W.

TESTA DE NEVIL. An ancient and authentic record in two volumes, in the custody of the Queen's Remembrancer in the Exchequer, said to be compiled by Jollan de Nevil, a justice itinerant, in the eighteenth and twenty-fourth years of Henry III. Burrill; Cowell. These volumes were printed in 1807, under the authority of the commissioners of the Public Records; and contain an account of fees held either immediately of the king, or of others who held of the king in capite. *Id.*; Cowell.

TESTACY. The state or condition of leaving a will at one's death, as opposed to intestacy. See **INTESTACY**.

TESTAMENT. In Civil Law. The appointment of an executor or testamentary heir, according to the formalities prescribed by law. Domat, liv. 1, tit. 1, s. 1.

At first there were only two sorts of testaments among the Romans—*testamentum calatis comitiis*, and another called *in procinctu*. (See below.) In the course of time, these two sorts of testament having become obsolete, a third form was introduced, called *per aes et libram*, which was a fictitious sale of the inheritance to the heir apparent. The inconveniences which were experienced from these fictitious sales again changed the form of testament; and the praetor introduced another, which required the seal of seven witnesses. The emperors having increased the solemnity of these testaments, they were called written or solemn testaments, to distinguish them from nuncupative testaments, which could be made without writing. Afterwards military testaments were introduced, in favor of soldiers actually engaged in military service.

A testament *calatis comitiis*, or made in the comitia,—that is, the assembly of the Roman people,—was an ancient manner of making wills used in times of peace among the Romans. The comitia met twice a year for this purpose. Those who wished to make such testaments caused to be convoked the assembly of the people by these words, *calatis comitiis*. None could make such wills that were not entitled to be at the assemblies of the people. This form of testament was repealed by the law of the Twelve Tables.

A civil testament is one made according to all the forms prescribed by law, in contradistinction to a military testament, in making which some of the forms may be dispensed with. Civil testaments were more ancient than military ones; the former were in use during the time of Romulus, the latter were introduced during the time of Coriolanus. See *Hist. de la Jurispr. Rom. de M. Terrason*, p. 119.

A common testament is one which is made jointly by several persons. Such testaments are forbidden in Louisiana, Civ. Code of La. art. 1855, and by the laws of France, Code Civ. 908, in the same words, namely: "A testament cannot be made by the same act, by two or more persons, either for the benefit of a third person, or under the title of a reciprocal or mutual disposition."

A testament *ab irato* is one made in a gust of passion or hatred against the presumptive heir, rather than from a desire to benefit the devisee. When the facts of unreasonable anger are proved, the will is annulled as unjust and as not having been freely made. See **AB IRATO**.

A mystic testament (called a solemn testament, because it requires more formality than a nuncupative testament) is a form of making a will which consists principally in enclosing it in an envelope and sealing it in the presence of witnesses.

A nuncupative testament was one made verbally. See **NUNCUPATIVE WILL**.

An *olographic testament* is one which is written wholly by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form. See *La. Civ. Code*, art. 1881.

See **MILITARY TESTAMENT**.

TESTAMENTARY. Belonging to a testament; as, a testamentary gift; a testamentary guardian.

TESTAMENTARY CAPACITY. Mental capacity sufficient for making a valid will. As to what constitutes, see **WILLS**; **UNDUE INFLUENCE**; 12 Am. L. Reg. 385.

TESTAMENTARY CAUSES. Causes relating to probate of testaments and administration and accounts upon the same. They are enumerated among ecclesiastical causes by Lord Coke, 5 Co. 1. See **JUDICATURE ACTS**.

TESTAMENTARY GUARDIAN. A guardian appointed by last will of a father to have custody of his child and his

real and personal estate till he attains the age of twenty-one. In England, the power to appoint such guardian was given by 12 Car. II. c. 34. The principles of this statute have been generally adopted in the United States.

TESTAMENTARY PAPER. A document which is not in form a will, but is of that nature, and may, if allowed and acted on, regulate the disposal of the writer's property after death. Under modern statutes of wills, which preclude a paper from being admitted to probate at all unless fully and formally a will, the phrase has lost importance. Abbott.

TESTAMENTARY POWER. The power to make a will is neither a natural nor a constitutional right, but depends wholly upon statute. 100 Mass. 234. Such power has been expressly conferred by statute in most of the states, in some cases unrestricted, in others with various restrictions by reason of dower and homestead rights, and for other reasons; 3 Jarm. Wills 721, 731.

TESTAMENTI FACTIO (Lat.). In the Civil Law. The ceremony of making a testament, either as testator, heir, or witness.

TESTATE. The condition of one who leaves a valid will at his death.

TESTATOR. One who has made a testament or will.

See **DEVISOR**; **DURESS**; **FEME COVERT**; **IDIO**; **WILL**.

TESTATRIX. A woman who has made a will or testament.

TESTATUM (Lat.). The name of a writ which is issued by the court of one county to the sheriff of another county in the same state, when the defendant cannot be found in the county where the court is located: for example, after a judgment has been obtained, and a *ca. sa.* has been issued, which has been returned *non est inventus*, a *testatum ca. sa.* may be issued to the sheriff of the county where the defendant is. See *Viner, Abr. Testatum* 259.

In Conveyancing. That part of a deed which commences with the words "This indenture witnesseth."

TESTE MEIPSO. (Witness myself.) In Old English Law and Practice.

A solemn formula of attestation by the sovereign, used at the conclusion of charters, and other public instruments, and also of original writs out of chancery. Burrill; Spelman. *Teste meipsa*, were the words used by a queen. The first writ in the Register is a writ of right patent, running in the name of Queen Elizabeth, and concluding with the clause, *Teste meipsa apud Westmonasterium*, etc. *Id.*; *Reg. Orig.* 1.

TESTE OF A WRIT. In Practice. The concluding clause, commencing with the word *witness*, etc. A signature in attestation of the fact that a writ is issued by authority. A writ which bears the teste is sometimes said to be *tested*.

The act of congress of May 8, 1792, directs that all writs and process issuing from the supreme or a circuit court shall bear teste of the chief justice of the supreme court, or, if that office be vacant, of the associate justice next in precedence; and that all writs of process issuing from a district court shall bear teste of the judge of such court, or, if the said office be vacant, of the clerk thereof. See *R. S.* §§ 911, 912.

TESTES. Witnesses.

TESTIFY. To give evidence according to law. A witness testifying in regard to conversations had with a party must state either the language used, or the substance of it. The impression left upon his mind by the conversation is not evidence. 33 Md. 185.

TESTIMONIAL PROOF. In Civil Law. A term used in the same sense as *parol evidence* is used at common law and

in contradistinction to *literal proof*, which is written evidence.

TESTIMONIO. See **EXPEDIENTE**.

TESTIMONIUM CLAUSE. The last clause of an instrument writing, usually containing the words "In witness whereof," English.

TESTIMONY. The statement made by a witness under oath or affirmation.

The word "testimony" more properly refers to oral evidence than to documentary, and it is reasonable that a distinction should be made between the two. 227 U. S. 592.

The statement of a witness under oath; yet it need not necessarily be made to a judicial tribunal. Thus, a deposition may contain testimony, although never used in the cause pending; 134 Ind. 35. It is a species of evidence by means of witnesses; 43 La. Ann. 1078, 1194.

Testimony and evidence are synonymous, but evidence includes testimony, as well as all other kinds of proof. It seems settled, both in England and this country, that a prisoner may be convicted on the testimony of an accomplice alone, though the court may, at its discretion, advise an acquittal unless such testimony is corroborated on material points; *Tay. Ev.* 830-832. See 11 Harv. L. Rev. 169; *Whart. Cr. Ev.* § 441. See **EVIDENCE**; **EXPERTS**.

TESTIS. A witness. *Testari*: to be a witness, bear witness to; to be witnessed, shown, certified. Anderson, L. Dict.

TESTMOIGNE. This is an old and barbarous French word, signifying, in the old books, evidence. Comyns, Dig. *Testmoigne*.

TEXAS. The name of one of the states of the American Union.

It was a province of Mexico until 1836, when the inhabitants established a separate republic. On March, 1845, the congress of the United States, by a joint resolution, submitted to the new republic a proposition providing for the erection of the territory of Texas into a new state, and for its annexation under the name of the state of Texas. This proposition was accepted by the existing government of Texas on the 3d of June, 1845, and was ratified by the people in convention on the 6th of July. On the 29th of December following, by a joint resolution of congress, the new state was formally admitted into the Union.

TEXTUS ROFFENSIS. The Rochester Text. An ancient manuscript containing many of the Saxon laws, and the rights, customs, tenures, etc. of the church of Rochester, drawn up by Ernulph, bishop of that see, from A. D. 1114, to 1124. Burrill; Cowell. Blount gives it a much greater antiquity. *Id.*

THAINLAND. In Old English Law. The land which was granted by the Saxon kings to their thains or thanes was so called.

THALWEG. In International Law. In definition of water boundaries between States, the middle or deepest or most navigable channel. Often styled "fairway" or "midway" or "main channel." 202 U. S. 49.

THANE. In Saxon Law. A word which sometimes signifies a nobleman, at others a freeman, a magistrate, an officer, or minister. A tenant of the part of the king's lands called the king's "thaneage." *Termes de la Ley*.

THAT. See **THIS**.

THAVIES INN. See **INNS OF COURT**.

THE. An article which particularizes the subject spoken of. "Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the.' The most unlettered persons understand that 'a' is indefinite but 'the' refers to a certain object." 2 Binn. 516, per Tilghman, C. J. It will not be construed as equivalent to "this"; 24 S. W. Rep. (Tex.) 290.

THEATRE. A house for the exhibition of dramatic performances. 121 Pa. 225.

See 4 St. L. 126.

An edifice used for the purpose of dramatic, operatic, or other representations, plays, or performances for admission to which entrance money is received. The word does not import necessarily anything but the stage on which the actors play and the room in which the acting is done and seen.

Any edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance-money is received, not including halls rented or used occasionally for concerts or theatrical representations. *Id.*; 14 St. L. 126. 56 Ga. 477. Although the term has an extended signification and comprehends a variety of performances, yet it is conceived that all which it does legitimately comprehend partake more or less of the character of the drama. 22 Ala. 73. A music hall is not a theatre: 21 Q. B. D. 569. Theatrical performances are called negro minstrel performances; 4 Lea 812; but not tumbling or fencing; 6 T. R. 286. Where a statute prohibits the obstruction of passage-ways in a theatre, it should be literally construed, and does not give the proprietor any discretion to allow persons to stand in the passage-ways, even though the number be not so great as to prevent free exit in case of danger; 14 Daly 125. That a number of seats for a performance were sold after knowledge that the seats were filled is sufficient proof to sustain a judgment, in the absence of evidence that such sale was in opposition to defendant's wishes; *id.* A theatre ticket is a mere license to enter the house and witness the performance and may be revoked at the pleasure of the manager; 12 Gray 221; 51 N. Y. 246; 13 M. & W. 838; but see 98 Pa. 234, where it was held that the purchaser of a particular seat in a theatre acquired more than a mere license; that his right was more in the nature of a lease, entitling him to peaceful ingress and egress and exclusive possession of the designated seats during the performance.

Spectators may express their feelings by applause or hissing, but if any number of persons come to a theatre with a preconcerted design of making a disturbance, though no personal violence is offered, they are guilty of a riot; Wandell, Theatres 235.

A visitor is entitled to a seat. This right depends on the nature of his ticket. If it is for a reserved seat, he has a right to that particular seat; if not reserved, then to any one which he may find unoccupied and which has not been previously sold to another; 10 Phila. 180. A return check given to one after the performance commences may be transferred by the spectator to some other person; 12 Cent. L. J. 359; but the holder of a return check cannot transfer the same if the original ticket of admission was non-transferable; Wandell, Theatres 246. The proprietor has the right to annex to tickets of admission the condition that they shall not be transferable, and if transferred, that they shall be worthless; 19 Abb. N. C. 301; for a license is personal to the licensee and is not salable nor transferable; 51 N. Y. 250. It has been held that the proprietor is not liable to a patron for property left in his private box which was stolen; 39 N. Y. Supp. 1039.

THEFT. A popular term for larceny. Acts constituting embezzlement or swindling may be properly so called. 21 Tex. App. 133. See 1 *id.* 63.

In Scotch Law. The secret and felonious abstraction of the property of another for sake of lucre, without his consent. Alison, Cr. Law 250.

THEFT-BOTE. The act of receiving a man's goods from the thief, after they had been stolen by him, with the intent that he shall escape punishment. This is an offence punishable at common law by fine and imprisonment. Hale, Pl. Cr. 130.

THEGN. A thane (*q. v.*). English.

THEGNAGE, TENURE BY. A Northumbrian tenure of the thirteenth century and beyond. 2 Holdsw. Hist. E. L. 3rd. ed., 168.

THEIR. In certain will, not rigidly given plurality to the pronoun "their." 203 U. S. 368.

THELONMANNUS. The toll-man or officer who receives toll. Cowel.

THELUSSON ACT. The stat. 39 & 40 Geo. III., passed in consequence of objections to a Mr. Thelusson's will for the purpose of preventing the creation of perpetuities. See PERPETUITY; 4 Ves. 221.

THEM. Another form of "theme" (*q. v.*).

THEME. The power of having jurisdiction over naifs or villains, with their suits or offspring, lands, goods and chattels. Burrill; Co. Litt. 116 a. Otherwise written 'them' and 'team.' The word occurs in old Scotch law, and is defined by Skene, the power of having servants and slaves. *Id.*; De Verb. Signif.

THEMMAGIUM. A duty or acknowledgment paid by inferior tenants in respect of theme or team (*q. v.*). Wharton; Cowel.

THEN. As an adverb of time, means "at that time," referring to a time specified, past or future. It has no power of itself to fix a time; it refers to time already fixed. Anderson; 16 S. C. 329. As an adverb of contingency, means "in that event." *Id.*; 20 N. J. L. 505. Although, strictly, an adverb of time, it often intends an event or contingency, and is equivalent to "in that event," or "in that case." In this sense it designates a limitation of an estate, or a future contingency on which it is made to depend. Thus employed, it is a word of reference, not indicating any particular point of time. *Id.*; 6 Gray 24.

THEN AND THERE. In an indictment, refer to some foregone averment by which their effect is determined. If that is a single act, and the indictment avers that "then and there" another act occurred, the necessary import is that the two acts were precisely co-existent, and the word "then" refers to a precise time. When the antecedent averment fixes no precise time, "then" used afterward, of course fixes no definite time. Anderson; 19 Pick. 126. When time and place have once been named with certainty it is sufficient to refer to them afterward by the words "then and there"; the effect being the same as if the time and the place were repeated. *Id.* Words of reference, and when the time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words. 24 N. H. 146. Where an averment merely declares a legal conclusion, the words "then and there" need not be repeated to it. 78 Me. 74.

THENCE. In surveying, and in description of land by courses and distances, this word preceding each course given, imports that the following course is continuous with the one before it. 141 Mass. 66; 6 N. E. Rep. 702.

THEOCRACY. A species of government which claims to be immediately directed by God.

THEOWES, THEOROMEN, THEWS. Slaves, captives, or bondmen. Spelm. Feuds.

THEREUPON. Without delay or lapse of time; as, in a minute that a committee, having made its announcement, a motion was "thereupon made" and carried. Anderson; 133 Mass. 205. In a declaration, was taken to mean "in consideration thereof," where the context seemed to require it. *Id.* Immediately 9 L. J. Ex. 273; 6 M. & W. 492. See 3 Q. B. 79, where the terms thereupon and thereby are distinguished.

THEREUNDER. "Thereunder" means

under this or that. 152 Ky. 167, 153 S. W. 232.

THERewith. As used in the reform act; 2 W. IV. c. 45; referring to house, etc. That any land occupied, therewith has reference to time and not to locality. 23 L. J. C. P. 88; 50 *id.* 117.

THESAURUS. Treasure; a sum of money hidden or buried. Burrill; Inst. 2. 1. 39. A deposit or concealment of money made so long ago that no memory of it exists, so that it is now without an owner. *Id.*; Calv. Lex. In Old English Law. Treasury, or exchequer. *Id.*; Cowell.

THESAURUS INVENTUS. Treasure found; treasure-trove. Burrill; Bract. fol. 119 b, 122.

THESE OTHERS. See THIS.

THESMOTHETE. A law-maker; a law-giver. R. & L. Dict.

THIEF. One who has been guilty of larceny or theft. The term covers both compound and simple larceny. 1 Hill 25.

THINGS. By this word is understood every object, except man, which may become an active subject of right. *Code du Canton de Berne*, art. 332. In this sense it is opposed, in the language of the law, to the word persons. See CHOSE; PROPERTY; RES.

THINGS REAL (REALTY). Such things as are permanent, fixed and immovable, which cannot be carried out of their place, as lands and tenements. 2 Bl. Com. 16.

THINGS PERSONAL. Goods, money and all other movables, which may attend the owner's person wherever he thinks proper to go. 2 Bl. Com. 16.

THINGUS. In Saxon Law. A thane or nobleman; knight or freeman. Cowel.

THINK. To believe, consider, esteem. Anderson. A finding by a jury that they "think" that certain horses were not struck by a particular train was held to sufficiently express the finding of the fact. *Id.*; 59 Iowa 414.

THIRD-BOROW. In Old English Law. A constable. Lombard, Duty of Const. 6; 23 Hen. VIII. c. 10.

THIRD-CLASS MATTER. See MAIL MATTER.

THIRD-NIGHT-AWN-HINDE. By the laws of St. Edward the Confessor, if any man lay a third night in an inn, he was called a "third-night-awn-hinde," and his host was answerable for him if he committed any offence. The first night he was reckoned a stranger; the second night a guest; and the third night an awn-hinde. Bract. l. 3; Whart.

THIRD PARTIES. A term used to include all persons who are not parties to the contract, agreement, or instrument of writing by which their interest in the thing conveyed is sought to be affected. 1 Mart. La. n. s. 384.

But it is difficult to give a very definite idea of *third persons*; for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered third persons. See 1 Bouvier, Inst. n. 1335.

THIRD PENNY. Of the fines and other profits of the county courts (originally, when those courts had superior jurisdiction, before other courts were created) two parts were reserved to the king, and a third part or *penny* to the earl of the county. See Kennett, Paroch. Antiq. 418.

THIRD PERSON. A person who is a stranger to a transaction or proceeding; in other words, someone who is not a party at all. Byrne. One not a party or privy to a suit or instrument writing. English.

Contracts for the Benefit of. The right

of a third person to sue on a contract made for his benefit between others, to the consideration of which he is a stranger, is a subject of great conflict in the authorities. 7 A. & Eng. Ency., 2nd ed., 104.

English Doctrine. It was early held that, whatever the general rule, where the person to be benefited was the child of the promisee the child could maintain an action against the promisor upon the contract. *Id.*; 2 Lev. 210. This general rule was reiterated in later cases, and has become the firmly established doctrine in England, admitting of no exception even in the case of parties nearly related to each other. *Id.*; 4 B. & Ad. 433.

American Doctrine. The doctrine that a third party for whose benefit a contract is made may sue upon it, is adopted in most of the United States, and is frequently referred to, therefore, as the "American doctrine." This principle has been most completely developed in New York, whereas in some of the states the English rule obtains. *Id.*, 106.

The daughter of a donor, having only an expectancy in his estate, is not a "third person" in the meaning of a statute. 141 Ky. 816, 133 S. W. 1001.

THIRDED. The direction that she be "thirded" should be understood to mean that the wife should be entitled to a life estate in one-third of the estate. 4 Dana (Ky.) 162.

THIRLAGE. In Scotch Law. A servitude by which lands are astricted or thirled to a particular mill and the possessors bound to grind their grain there, for the payment of certain miltures and sequels as the agreed price of grinding. Erskine, Inst. 2, § 18.

THIS. Used of things before state, refers to the thing last mentioned, while "that" refers to the thing first mentioned; but "these others" refers to others than those just mentioned. Anderson: 66 Pa. 251 It is a simple word of relation and its ordinary grammatical meaning will not be extended so as to include something else than that to which it relates. 14 Q. B. D. 720.

THOED AN ASSIZE. A plea in bar in Scotland in a criminal case to the effect that the accused has once been tried for the offence charged. 35 Am. L. Reg. 629

THOROUGHFARE. A street or way opening at both ends into another street or public highway, so that one can go through and get out of it without returning. It differs from a *cul de sac*, which is open only at one end.

Whether a street which is not a thoroughfare is a highway seems not fully settled; 1 Vent. 189. In a case tried in 1790 where the *locus in quo* had been used as a common street for fifty years, but was not a thoroughfare, Lord Kenyon held that it would make no difference; for otherwise the street would be a trap to make people trespassers; 11 East 375. This decision in several subsequent cases was much criticised, though not directly overruled; 5 Taunt. 128; 5 B. & Ald. 456; 3 Bingh. 447; 1 Camp. 260; 4 Ad. & E. 698. But in a recent English case the decision of Lord Kenyon was affirmed by the unanimous opinion of the court of queen's bench. The doctrine established in the later case is that it is a question for the jury on the evidence, whether a place which is not a thoroughfare is a highway or not; 14 E. L. & E. 69. And see 28 *id.* 30. The United States authorities seem to follow the English; 8 Allen 242; 24 N. Y. 559 (overruling 23 Barb. 103); 87 Ill. 189; s. c. 29 Am. Rep. 49 and note; *contra*, 2 R. I. 173. See HIGHWAY; STREET.

THOUSAND. This word may by custom or usage of trade acquire a peculiar meaning, as when applied to rabbits it has been held to denote one hundred dozen; 3 B. & Ad. 728.

THREAD. A figurative expression used to signify the central line of a stream or watercourse. See FILUM AQUÆ; WATERCOURSE; RIVER.

THREAT. A menace of destruction or injury to the lives, character, or property of those against whom it is made. To extort money under threat of charging the prosecutor with an unnatural crime has been held to be robbery; 1 Park. Cr. R. 199; but to extort money or other valuable thing by threat of prosecution for passing counterfeit money, or any prosecution except that for an unnatural crime, is not robbery; 7 Humph. 45; though it is a criminal offence; 11 Mod. 137; 2 Dall. 399, n. It must be under such circumstances as to operate, to some extent at least, on the mind of the one whom it is expected to influence. The meaning of the word implies that it is a menace of some kind, which in some manner comes to the knowledge of the one sought to be affected; 84 Ia. 473. See THREATENING LETTER.

In Evidence. Menace. See CONFESSION.

THREATENING LETTER. Sending threatening letters to persons for the purpose of extorting money is said to be a misdemeanor at common law. 4 Bla. Com. 126. The threat must be of a nature calculated to overcome a firm and prudent man; but this rule has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed; 1 Den. Cr. Cas. 512. The party who makes a threat may be held to bail for his good behavior. See Com. Dig. *Battery* (D).

By act of congress of Sept. 26, 1888, the sending of any postal card or mail matter with threatening language on the outside thereof is forbidden and made punishable by fine and imprisonment; R. S. 1 Supp. 631. Postal cards held within the act were: One from a creditor threatening to "place the claim with our law agency for collection;" 40 Fed. Rep. 664; demanding payment and threatening to place it in the hands of a lawyer for collection; *id.* Held not within the act: notice that a debt is past due and that a collector has called several times; *id.*; and notice that rent was due and if not paid would be placed in the hands of an officer; 51 *id.* 817. Extraneous evidence is not admissible to show that the language of a postal card on its face threatening or abusive, was not so intended by the sender, and not so understood by the recipient; 2 Mo. App. Rep. 980.

"Statutes exist in many of the United States, though they vary somewhat in their provisions, some of them requiring the threatening to have been done "maliciously," others "knowingly." The indictment for this offence need not specify the crime threatened to be charged, for the specific nature of the crime which the prisoner intended to charge might intentionally be left in doubt; 3 Heisk. 262; 8 Barb. 547. The threat need not be to accuse before a judicial tribunal; 2 M. & R. 14; 30 Mich. 460. A person whose property has been stolen has himself no power to punish the thief without process of law, and cannot claim the right to obtain compensation for the loss of his property by maliciously threatening to accuse him of the offence, or to do an injury to his person or property, with intent to extort property from him; 24 Me. 71; 128 Mass. 55. A mere threat that the prosecutor would be indicted or complained of has been held to be within the statute, even though no distinct crime was spoken of in the letter, because of the likelihood of threatening letters being written with as much disguise and artifice as possible, but still being sufficient to accomplish the purpose intended; 68 Me. 473; 63 Mo. 66. See 3 Cr. L. Mag. 720; WHIPPING.

THREE-DOLLAR PIECE. A gold coin of the United States, of the value of three dollars.

The three-dollar piece was authorized by the seventh section of the act of Feb. 21, 1863, 10 Stat. at L. It is of the same fineness as the other gold coins of the United States. The weight of the coin is 77.4 grains.

The three-dollar piece is a legal tender in payment of any amount; R. S. § 3511.

THREE-MILE LIMIT. The effect of the Volstead Act upon shipping is modified by the terms of the Convention between the United States and Great Britain, ratified May 22, 1924, which recognizes the historic three-mile limit (low-water mark) as defining the territorial margin for ordinary purposes. Thorpe, National and State Prohibition, §63, p. 79. See SEAL FISHERIES; TERRITORIAL WATERS.

THREE-WEEKS COURT. What practically amounts to forfeiture is found in the Kentish custom of *gavelkind*. If the tenant of land held in *gavelkind* falls into arrears with his services and rents, the lord is to get permission of his own Three-Weeks Court to distrain the chattels of his tenant found upon the tenement. This attempt to distrain is to be continued for four sessions of this court of the lord, and if before the fourth court sufficient chattels cannot be found, the court then awards that the lord may take the tenement into his hands *en noun de dis-tresse auct cum boef or vache*, etc. 18 Harv. L. R. 40.

THRESHING MACHINE. The term includes the horse power by means of which the separator is propelled. 15 Neb. 428.

THRIFTING. A third part of a county; a division of a county consisting of three or more hundreds. Burrill; Cowell. Corrupted to the form "riding," which was used later in Yorkshire. *Id.*

THROAT. In Medical Jurisprudence. The anterior part of the neck. Dunlison, Med. Dict.; 1 Chitty, Med. Jur. 97, n.

The word *throat*, in an indictment which charged the defendant with murder by cutting the throat of the deceased, does not mean, and is not to be confined to, that part of the neck which is scientifically called the throat, but signifies that which is commonly called the throat. 6 C. & P. 401.

THROUGH. Its primary meaning is from end to end, or from side to side; but its meaning is often qualified by the context, to mean simply "within". 170 U. S. 602, 603. In an act providing that no road shall be laid out "through" the grounds of a cemetery company, held to mean "over." Anderson; 119, 111. 147. See INTRO.

THROUGH CARRIAGE. See THROUGH ROUTE.

THROUGH RATE. See THROUGH ROUTE.

THROUGH ROUTE. A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." It may merely be an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. 12 I. C. C. 163. Ordinary "through rates" lower than the "sum of the locals" are "joint rates." Prior to the amendment of the Act to Regulate Commerce (1906, c. 3591, § 4, 34 Stat. 584, 590) authorizing the Commission to establish through routes and joint rates, all "joint rates" were (as most still are) the result of agreements between carriers, which fix also the "divisions"; that is, the share of the "joint rate" to be received by each. 7 I. C. C. 323, 329. The bases of such divisions differ greatly in practice. Sometimes all the carriers participate in the joint rate in the proportions which their local rates bear to the sum of the locals; in other words, the percentage of reduction from the local rate is the same for each. The share of each being a matter of bargain, it may be fixed at an arbitrary amount. 21 I. C. C. 553, 567-8. In constructing the joint rates the charge per mile ordi-

narily decreases with the increase of the length of haul. But even where the through route and through rates are matters of express agreement between the carriers, a continuous "joint rate" does not always extend from the point of origin to point of destination. There may be, on the "through route," an intermediate point at which, in common railroad practice, the rate "breaks." That is, the "joint rate" from the point of origin ends at this "rate-breaking point" and there is charged for the distance beyond the same local rate or joint rate that would have been charged had the business originated at this intermediate point. That is, instead of a "joint through rate," there is a "combination." The so-called "Ohio River crossings" or "gateways" are among the "rate-breaking points." 245 U. S. 139.

THROW OUT A BILL. To ignore a bill, as a charge or bill of indictment. English.

THURINGIAN CODE. See CODE.

TICK. Credit: as, if a servant usually buy for the master upon tick, and the servant buy something without the master's order, yet if the master were trusted by the trader he is liable; 3 Kebl. 625; 10 Mod. 111.

TICKET. A railroad ticket may be a receipt or voucher, rather than a contract; 5 L. R. A. 818; 77 Mo. 663; 41 Ohio St. 560; it is the evidence of a contract, but does not constitute the whole contract; 34 Am. & Eng. R. R. Cas. 219; Wheeler, Carriers 263; 15 Pac. Rep. (Kan.) 899; it may contain some condition or limitation which becomes a part of the contract; 13 Hun 359; 113 Pa. 519; 1 Harv. Law Rev. 17. The actual contract may be shown by parol testimony; 143 U. S. 60; 80 Ia. 92. The purchaser of a railroad ticket has a right to rely upon the statements of the agent; 21 Oreg. 121; 52 Fed. Rep. 197; 106 Mass. 153. Agents at intermediate stations and gatekeepers cannot vary the terms of the contract; 137 Mass. 293; 63 Md. 106.

A ticket good between two designated stations, upon trains which stop at such points, entitles the holder thereof to ride from intermediate stations to either of said stations, or from such stations to intermediate stations, regardless of conditions in the ticket to the contrary; 26 S. E. Rep. (Ga.) 353. But where a ticket provided that it should be forfeited if used for any other station than the one named, it was held that a passenger who rode on to a point beyond the station named, paying his fare for the additional distance, was liable for the fare for the entire distance travelled; [1895] 1 Q. B. 862. One who takes the wrong train by mistake can leave it at the first stopping-place, without payment of fare; this rule does not apply to one who has a season ticket and takes a train believing that it is good on that train; 40 N. E. Rep. (Mass.) 20. Where a mileage book purchased by one person is sold to another who presents it, the conductor cannot take it up, but may collect full fare; 55 Alb. L. J. 164. As between a conductor and a passenger, a ticket is conclusive as to the right of the latter to travel; 15 Ill. App. 100; 50 Fed. Rep. 496; 15 Ind. App. 886. As a rule a passenger has a right to presume that a ticket agent will perform his whole duty and is not bound to examine his ticket to see that it is correct, unless put upon his inquiry; 70 Fed. Rep. 585; 166 Pa. 4; 77 Ga. 678. When a carrier has notified a connecting carrier that it will not recognize the tickets of the latter, it may refuse to accept such tickets; 157 U. S. 225.

A ticket defaced by a passenger so as to be unintelligible, may be refused; 76 Md. 207. A carrier may specify upon what trains a ticket is good; 61 Vt. 378; or charge fare for the actual distance travelled, if a passenger takes a wrong train; 40 Ind. 37; it must stop at a station for which it has sold a ticket; 79 Va. 130. A purchaser for value and without notice, of a ticket fraudulently obtained from a

carrier, acquires no title thereto; 36 Ohio St. 647. A passenger who accepts a ticket and signs it is bound by the conditions expressed in it; 133 U. S. 146; 47 Ind. 79; if such conditions are reasonable; 100 U. S. 24; but not if he is unable to read, and no explanation is made by the agent who sells it; 23 Fed. Rep. 765; or if he is misled by the carrier; 30 N. W. Rep. (Ind.) 424. There is no presumption that the passenger has read a notice on his ticket; 12 Gray 383; 43 N. Y. 212. See 60 Fed. Rep. 624; but see 46 L. J. C. P. 768.

Where the conditions of a ticket are such that an innocent holder thereof may use it, it is the subject of embezzlement; 43 N. E. Rep. (Mass.) 499.

A passenger having lost his ticket cannot show by others that he purchased it; 14 Lea 128. The rule which requires the production of a ticket is reasonable; 97 Mich. 432; 15 N. Y. 455; 81 Ill. App. 435; [1896] 1 Q. B. 253; reasonable time to produce one should be given; 81 Ill. App. 435; a conductor is not bound to search the pockets of a passenger to find his ticket; 14 Lea 128. A passenger may be required to exhibit his ticket before entering a train; 1 Ill. App. 472, 449; 2 Tex. App. 206; and if he exhibits his ticket and demands a seat he has a right to a seat before he surrenders it; 53 Mo. 317.

A passenger cannot stop over at an intermediate station unless such right is conferred by his contract; 51 Cal. 425; 24 N. J. L. 435; 13 Hun 359; 34 Md. 532. A purchaser of a limited ticket over connecting lines is only bound to make a continuous trip over the part of the route covered by each coupon of the ticket, but must complete the trip within the time limited in the ticket; 43 Ark. 529; 87 Ill. 393; 18 L. R. A. 55.

When a carrier furnishes facilities, it may require a passenger to purchase a ticket before entering a train; 75 Ill. 125; 53 Me. 279; 17 Mo. App. 153; 46 Ind. 239; 132 Mass. 116. It must keep a ticket office open for a reasonable time before the departure of trains; 90 Ia. 562; 67 Ill. 316; 15 Minn. 496.

A statute regulating the issuance and taking up of tickets by carriers is an exercise of the police power; 63 Ind. 552; and does not impair the obligation of contracts nor interfere with commerce between the states; *id.*

A statute limiting the sale of passage tickets and tickets for sleeping accommodations on vessels and railway trains to authorized agents is not in violation of the provisions of the constitution of the United States prohibiting the depriving of citizens of the rights of liberty, property, or the equal protection of the law, nor does it confer a special privilege upon any class of persons; 145 U. S. 263; 18 N. Y. L. J. 1541; 149 Ill. 600; 57 Minn. 845; 63 Ind. 552; 14 Phila. 584; nor does it create a monopoly; 50 N. Y. S. 56; but see Tiedm. Lim. Pol. Pow. 293.

The Michigan supreme court holds that a railroad company cannot be compelled to sell mileage books at a flat two-cent rate; the company's right to fix its tolls is a vested right which the state must pay for if it takes it away; Asso. Press Despatch, Oct. 3, 1898.

A ticket sold at a reduced rate on condition that it is not transferable is not valid in the hands of a transferee; 43 S. W. Rep. (Tex.) 901.

The holder of a ticket from Trenton to Elmira was injured in Pennsylvania through defendant's negligence; it was held that his right to recover was governed by the law of Pennsylvania; 176 Pa. 45.

See BAGGAGE; PASSENGER; COMMON CARRIERS OF PASSENGERS; INTERSTATE COMMERCE COMMISSION; RATES.

TICKET OF LEAVE. In English Law. The colloquial name of the "license to be at large," which the Home Secretary may at any time grant, upon such condition as he may think fit and with power of revocation, to anyone undergoing penal servitude.

The conditions usually imposed are those specified in the Penal Servitude Act, 1864. They are merely such as are calculated to make the released convict lead a useful and honest life. Property acquired by the convict while on license does not vest in the administrator, if any, appointed by the crown to manage his property; and he can sue or contract like any ordinary person. He must keep the police informed of his residence for the time being; but even this condition is not onerous, as it may be complied with through the post. A well conducted convict can obtain a ticket of leave when he has served three-fourths of his sentence. Byrne.

TIDE LANDS. Lands covered and uncovered by the flow and ebb of the tide. The United States may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union; 153 U. S. 273.

The words "public lands," as used in legislation, mean such as are subject to sale or other disposal under general laws, and not tide lands; 92 U. S. 761; 125 U. S. 618. Tide lands are not subject to the location of land scrip under the act of 1872; 153 U. S. 273, 287.

TIDE-WATER. Water which flows and reflows with the tide. All arms of the sea, bays, creeks, coves, or rivers, in which the tide ebbs and flows, are properly denominated tide-waters.

The term tide-water is not limited to water which is salt, but embraces, also, so much of the water of fresh rivers as is propelled backwards by the ingress and pressure of the tide; 5 Co. 107; 108 Mass. 496; which might be said to be within the ebb and flow; 7 Pet. 324. The flowing, however, of the waters of a lake into a river do not constitute such a river a tidal or, technically, navigable river; 20 Johns. 98.

The bed or soil of all tide-waters belongs, in England, to the crown, and in this country to the state in which they lie; and the waters themselves are public; so that all persons may use the same for the purpose of navigation and fishery, unless restrained by law; 5 B. & A. 304; 1 Macq. Hou. L. 49; 152 U. S. 1. See 22 Or. 410; *id.* 438. In England, the power of parliament to restrain or improve these rights is held to be absolute; 4 B. & C. 598. In this country, such a power is subject to the limitations of the federal constitution; and while both the general and state governments may adopt measures for the improvement of navigation; 4 Rawle 9; 9 Conn. 436; and the states may grant private rights in tide-waters, provided they do not conflict with the public right of navigation; 21 Pick. 344; yet neither the general nor the state governments have the power to destroy or materially impair the right of navigation. See BRIDGE; FISHERY; RIVER; RIPARIAN PROPRIETORS; TERRITORIAL WATERS; WHARF.

TIDES. See NEAP TIDES; SPRING TIDES.

TIE. When two persons receive an equal number of votes at an election, there is said to be a tie. Neither is elected. When the votes are given on any question to be decided by a deliberative assembly, and there is a tie, the question is lost. See MAJORITY.

TIEL. An old manner of spelling *tel*: such as, nul tiel record, no such record.

TIEMPO INHABIL. In Louisiana. A time when a man is not able to pay his debts.

TIERCE. A liquid measure, containing the third part of a pipe, or forty-two gallons.

TIGNI IMMITTENDI (Lat.). In Civil Law. A servitude which confers the right of inserting a beam or timber from the wall of one house into that of a neighboring house, in order that it may rest on the latter and that the wall of the latter may bear this weight. Dig. 8. 2. 36; 8. 5. 14.

TIMBER. The body, stem, or trunk of a tree, or the larger pieces or sticks of wood which enter the frame-work of a building or other structure, excluding the plank, boards, shingles, or lath which may be used to complete the structure. 47 Wis. 192. The term now seems to include all sorts of wood from which any useful articles can be made or which may be used to advantage in any class of manufacture or construction; 14 Fed. Rep. 824.

Railroad ties are held to be timber; 52 Wis. 393; fence rails are not; 43 Tex. 374; nor are trees, when suitable only for firewood; 51 Me. 417.

Generally, only such trees as are used in building ships or dwellings. When the trunk of a tree is severed from the root and felled to the earth it becomes "timber" or "lumber" according to the use to which it can be applied. Anderson; 6 McL. 37. The body, stem or trunk of a tree, or the larger pieces or sticks of wood which enter the frame-work of a building or other structure, excluding the plank, boards, shingles or lath used to complete the structure. *Id.*; 47 Wis. 192.

Does not mean "trees" when applied to a grant for purposes of railroad construction. 250 U. S. 21.

A federal act of 1897 makes it a penal offense to set fire to timber on the public domain.

TIMBER TREES. Oak, ash, elm, in all places, and, by local custom, such other trees as are used in building; 2 Bla. Com. 281; also beech, chestnut, walnut, cedar, fir, aspen, lime, sycamore, and birch trees; 6 George III. ch. 48; and also such as are used in the mechanical arts; Lewis, Cr. L. 506. Timber-trees, both standing, fallen, and severed and lying upon the soil, constitute a portion of the realty, and are embraced in a mortgage of the land; 1 Washb. R. P. 13; 19 Me. 53; and pass, by a judicial sale under such mortgage, to the purchaser; 1 Wall. 53; 54 Me. 313; 1 Den. 554; 61 Pa. 294. Some contracts for the sale of timber trees are contracts for the sale of an interest in lands; 10 N. Y. 117; 53 Pa. 206; 119 Ind. 7; and, as such, within the statute of frauds; 33 Pa. 266; 50 Ohio St. 57. The better action for damages for cutting and carrying away timber trees seems to be that of trespass *quare clausum fregit et de bonis asportatis* (unless otherwise designated by statute); 2 Greenl. 173, 387. See WASTE; SALE; TREE.

TIMBERING. Mining. By "timbering" is meant the protection against falls of the roof formation, by means of horizontal timbers or caps extending across the passageway just under the roof, the ends of such timbers resting upon vertical timbers or posts. 161 Ky. 335, 170 S. W. 960.

TIME. The measure of duration. Lapse of time often furnishes a presumption, stronger or weaker according to the length of time which has passed, of the truth of certain facts, such as the legal title to rights, payment of or release from debts.

Time in Great Britain, in any statute or legal instrument, means, by statute, Greenwich mean time, and in Ireland, Dublin time. The only standard of time recognized by the courts is the meridian of the sun; not any arbitrary standard; 84 Ga. 159; 8 H. & N. 866.

The general rule of law is that the performance of a contract must be completed at or within the time fixed by the contract; Leake, Contr., 8d ed. 772. Wherever, in cases not governed by particular customs of trade, the parties bind themselves to the performance of duties within a certain number of days, they have to the

last minute of the last day to perform their obligations; 6 M. & G. 598. See PERFORMANCE.

Generally, in computing time, the first day is excluded and the last included; 4 T. B. Monr. 464; 26 Ala. N. S. 547; see 2 Harr. Del. 461; 5 Blackf. 319; 16 Ohio 408; 10 Rich. 395; 12 Colo. 285; excluding the day on which an act is done, when the computation is to be made from such an act; 15 Ves. Ch. 248; 16 Cow. 659; 1 Pick. 485; 19 Mo. 60; including it, according to Dougl. 463; 417; 15 Mass. 193; 18 How. 151; except where the exclusion will prevent forfeiture; 2 Camp. 294; 4 Me. 298. The rule which excludes the *terminus a quo* is not absolute, it may be included when necessary to give effect to the obvious intention; 147 U. S. 640. Time from and after a given day excludes that day; 1 Pick. 485; 1 N. & M'C. 563; 153 Pa. 465. But see 94 U. S. 560. A policy of insurance includes the last day of the term for which it is issued; L. R. 5 Exch. 290. Particular words, *e. g. at, on, or upon* a certain time, will be construed according to a reasonable interpretation of the contract; 10 A. & E. 870. The use of the word *until* generally implies an intention to exclude the day to which it refers, except it appears otherwise from the context; 10 Neb. 524; 120 Mass. 94; 37 Am. Dec. 692; *till* is held to include the day referred to; 16 Barb. 332.

Sunday is a *dies non*, and a power that maybe exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day; 133 U. S. 299; 147 *id.* 47. Sunday is said to be included in the computation when the time exceeds days and excluded when less than seven; 2 Mich. N. P. 108. See SUNDAY; DIES NON.

Deeds, bills of exchange, letters, and other written instruments are generally construed to have been made and issued at the time of their date, but the execution of a deed may be averred and proved according to the fact; 10 Exch. 40. Courts will always adopt that construction in the computation of time which will uphold and enforce, rather than destroy, *bona fide* transactions and titles, and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties, the *dies a quo* will be included; otherwise it will be excluded; 5 Dak. 325.

The construction of contracts with regard to the time of performance is the same in equity as at law; but in case of mere delay in performance, a court of equity will in general relieve against the legal consequences and decree specific performance upon equitable terms notwithstanding the delay, if the matter of the contract admits of that form of remedy. In such cases it is said that in equity time is not considered to be of the essence of the contracts; L. R. 3 Ch. 67. Ordinarily time is not of the essence of the contract, but it may be made so by express stipulation of the parties; see 128 U. S. 403; or it may be so by implication, because of the nature of the property involved; 144 U. S. 394; or because of the avowed object of the seller or purchaser; 134 U. S. 68; 144 *id.* 394; or from the nature of the contract itself; or by one party giving the other notice that performance must be made within a certain reasonable time fixed in the notice; 2 Ohio St. 326; 5 C. E. Green 367; time is always of the essence of unilateral contracts; 51 N. Y. 629; 35 Md. 352; 50 Ill. 298. Completion of a contract within a reasonable time is sufficient, if no time is stipulated; 122 U. S. 300.

In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court will seek to discover the real intention of the parties in deciding whether time is of the essence of the contract; Benj. Sales § 593. If a thing sold is of greater or less value according to the lapse of time, stipulations with regard to it must be literally complied with both at law and in equity; 42 Barb. 320; 10 Allen 239. As to whether

in English bicycle law requiring the use of a lamp "during the period between one hour after sunset and one hour before sunrise," has led to a controversy as to whether this is local or Greenwich time; see 58 Alb. L. J. 103. See YEAR.

In Pleading. A point in or space of duration at or during which some fact is alleged to have been committed.

In criminal actions, both the day and the year of the commission of the offence must appear; but there need not be an express averment, if they can be collected from the whole statement; 5 S. & R. 315. The prosecutor may give evidence of an offence committed on any day which is previous to the finding of the indictment; 5 S. & R. 316; but a day subsequent to the trial must not be laid; Add. Pa. 36.

In mixed and real actions, no particular day need be alleged in the declaration; 3 Chitty, Pl. 620; Gould, Pl. c. 3, § 99.

In personal actions, all traversable affirmative facts should be laid as occurring on some day; Steph. Pl. 292; but no day need be alleged for the occurrence of negative matter; Com. Dig. Pleader (C19); and a failure in this respect is, in general, aided after verdict; 13 East 407. Where the cause of action is a trespass of a permanent nature of constantly repeated, it should be laid with a *continuando*, which title see. The day need not, in general, be the actual day of commission of the fact; 12 Johns. 237; 3 N. H. 299; if the actual day is not stated, it should be laid under a *videlicet*; Gould, Pl. c. 3, § 63. The exact time may become material, and must then be correctly laid; 10 B. & C. 215; 4 S. & R. 576; 1 Stor. 528; as, the time of execution of an executory written document; Gould, Pl. § 67. The defence must follow the time laid in the declaration, if time is not material; 1 Chitty, Pl. 509; 1 Saund. 14, 82; need not when it becomes material; 2 Saund. 5 a, b (n. 8); or in pleading matter of discharge; 2 Burr. 944; 2 Stra. 944; or a record; Gould, Pl. § 83. See AT LEAST; INDEFINITE TIME; LOST TIME.

TIME BARGAIN. A contract for sale and delivery of stocks at a future day. Abbott. A time bargain is a contract for the sale of a certain amount of stock at a certain price on a future day, the vendor not in general having such stock to sell at the time of the contract, but intending to purchase it before the time appointed for the execution of the contract. *Id.*; M. & W. See FUTURES; OPTION; MARGIN.

TIME IMMEMORIAL, or OUT OF MIND. Time beyond legal memory.

See 14 L. R. A. 120, n.; OLD STYLE; REGNAL YEARS; PRESCRIPTION; MEMORY; LIMITATIONS; MONTH; DAY; STATUTE.

TIME OUT OF MIND. See TIME IMMEMORIAL.

TIME POLICY. In Insurance. A policy in which the risk is limited to a certain fixed term or period of time specified.

TIME-TABLES. See PUNCTUALITY.

TIPLING-HOUSE. A place where spirituous liquors are sold and drunk in violation of law. Sometimes the mere selling is considered as evidence of keeping a tippling-house, 47 Ill. 370.

A public drinking-place, where liquor or other intoxicating drink is sold, to be drunk on the premises. 1 Colo. App. 289.

See KEEPING A TIPLING HOUSE.

TIPS. Small donations given and intended as personal gifts, in addition to the regular charge for the services rendered. 149 Ky. 377, 149 S. W. 828.

TIPSTAFF. An officer appointed by the marshal of the court of king's bench, to attend upon the judges with a kind of rod or staff tipped with silver.

In the United States, the courts sometimes appoint an officer who is known by this name, whose duty it is to attend on the court. Similar officers employed in the courts of Pennsylvania are so called.

TITHES. In English Law. A right to the tenth part of the produce of lands, the stock upon lands, and the personal industry of the inhabitants. These tithes are raised for the support of the clergy. Almost all the tithes of England and Wales are now commuted into rent charges, under 6 & 7 Will. IV. c. 71, and the various statutes since passed; 3 Steph. Com. 731. In the United States there are no tithes.

TITHING. In English Law. Formerly, a district containing ten men, with their families. In each tithing there was a tithingman, whose duty it was to keep the peace, as a constable now is bound to do.

TITHINGMAN. In Saxon Law. The head or chief of a decannary of ten families; he was to decide all lesser causes between neighbors. Now tithingmen and constables are the same thing. Jacob, Law Dict.

In New England, a parish officer to keep good order in church. Webster, Dict.

TITLE. Estates. The means whereby the owner of lands hath the just possession of his property. Co. Litt. 345; 2 Bla. Com. 195. See 1 Ohio 349. This is the definition of title to lands only.

Either a naked possession, which is the most imperfect; a right of possession, either apparent or actual; or the mere right of property. Possession, the right of possession and the right of property joined, form a complete title. 2 Bla. Com. 195-198.

A *bad* title is one which conveys no property to the purchaser of an estate.

A *doubtful* title is one which the court does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it a *bad* title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it; 1 J. & W. 568; 9 Cow. 344.

A *good* title is one which entitles a man by right to a property or estate, and to the lawful possession of the same.

A *marketable* title is one which a court of equity considers to be so clear that it will enforce its acceptance by a purchaser.

The doctrine of marketable titles is purely equitable and of modern origin; Atk. Tit. 26. At law every title not *bad* is marketable; 5 Taunt. 625; 6 id. 263; 1 Marsh. 258. See 2 Pa. L. J. 17.

Paramount Title. See EVICTION.

There are several stages or degrees requisite to form a complete title to lands and tenements. The lowest and most imperfect degree of title is a *presumptive title* or the *mere possession*, or actual occupation of the estate, without any apparent right to hold or continue such possession: this happens when one man disposes another. The next step to a good and perfect title is the *right of possession*, which may reside in one man while the actual possession is not in himself, but in another. This right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better, and an *actual* right of possession, which will stand the test against all opponents. The *mere right of property*, the *jus proprietatis*, without either possession or the right of possession. 2 Bla. Com. 195.

Title to real estate is acquired by two methods, namely, by *descent* and by *purchase*. See these words.

Title to personal property may accrue in three different ways: by *original acquisition*; by *transfer by act of law*; by *transfer by act of the parties*.

Title by original acquisition is acquired by *occupancy*, see OCCUPANCY; by *accession*, see ACCESSION; by *intellectual labor*. See PATENT; COPYRIGHT; TRADE-MARK.

The title to personal property is acquired and lost by transfer by act of law, in various ways: by *forfeiture*; *succession*; *marriage*; *judgment*; *insolvency*; *intestacy*. See those titles.

Title is acquired and lost by transfer by the act of the party, by *gift*, by *contract* or *sale*. See those titles.

In general, possession constitutes the criterion of title of *personal property* (*q. v.*), because no other means exist by which a knowledge of the fact to whom it belongs can be attained. A seller of a chattel is not, therefore, required to show the origin of his title, nor, in general, is a purchaser, without notice of the claim of the owner, compellable to make restitution; but it seems that a purchaser from a tenant for life of personal chattels will not be secure against the claims of those entitled in remainder; Cowp. 438; 1 Bro. C. C. 274.

As an exception to the rule that possession is the criterion of title of property may be mentioned the case of ships, the title of which can be ascertained by the register; 15 Ves. Ch. 60; 17 id. 251; 8 Price 256.

To convey a title, the seller must himself have a title to the property which is the subject of the transfer. But to this general rule there are exceptions. See SALE.

In Legislation. That part of an act of the legislature by which it is known and distinguished from other acts; the name of the act. While the title of a statute cannot be used to add to or take from the body thereof, yet in cases of doubt, it may be referred to as a help to the interpretation; 143 U. S. 457. See CONSTRUCTION.

Formerly the title was held to be no part of a bill, though it could be looked to when the statute was ambiguous; 8 Wheat. 610; 81 Wis. 431; see 144 U. S. 550; 143 id. 447; 9 Q. B. D. 104; but it could not enlarge or restrain the provisions of the act itself; 5 Wall. 107. In later years constitutional provisions have required that the title of every legislative act shall correctly indicate the subject-matter of the act; Cooley, Const. Lim. 172. The object of this was mainly to prevent surprise in legislation. An act must have but one general object, which is fairly indicated by the title; a title may be general if it does not cover incongruous legislation; Endl. Interp. Stat. 59; 7 Ind. 631; 50 N. Y. 553; the use of the words "other purposes" have no effect; 22 Barb. 642; 8 Colo. App. 223. It is said that the courts will construe these provisions liberally rather than embarrass legislation by a construction, the strictness of which is unnecessary to the attainment of the beneficial purposes for which they were adopted; Cooley, Const. Lim. 173. In construing an act, the court will strike from it all that relates to the object not indicated by the title, and sustain the rest if it is complete in itself; id. 181; 92 Ala. 94. These provisions are usually considered mandatory, though they were held to be directory in 4 Cal. 388; 6 Ohio N. S. 187. In Pennsylvania, where an act of assembly is entitled a supplement to a former act, and the subject thereof is germane to that of the original act, its subject is sufficiently expressed; 77 Pa. 429; 83 id. 42.

See a paper in Rep. Am. Bar Association (1882) by U. M. Rose.

Personal Relations. A distinctive appellation denoting the rank to which the individual belongs in society. See RANK; NOBILITY.

Titles are assumed by foreign princes, and among their subjects they may exact these marks of honor; but in their intercourse with foreign nations they are not entitled to them as a matter of right; Wheat. Int. Law, 3d Eng. ed. § 159.

In Pleading. The right of action which the plaintiff has. The declaration must show the plaintiff's title, and if such title be not shown in that instrument the defect cannot be cured by any of the future pleadings. Bacon, Abr. Plead. etc. (B 1).

In Rights. The name of a newspaper, a book, and the like. See TRADE-MARK.

TITLE OF ACT—Difference in Title Of and Body Of. Where the language of a statute in its ordinary meaning and grammatical construction leads to manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the

words, and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words, sometimes by altering their collocation or by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention. The ascertainment of the latter is the cardinal rule, or rather the end and object of all construction; and where the real design of the Legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect even if in so doing the exact letter of the law be sacrificed or though the construction be, indeed, contrary to the letter. 159 Ky. 194, 166 S. W. 1008. See FIRST-CLASS.

TITLE OF A CAUSE. The peculiar designation of a suit, consisting usually of the name of the court, the venue, and the parties. The method of arranging the names of the parties is not everywhere uniform. The English way, and that formerly in vogue in this country, and still retained in many of the states, is for the actor in each step of the cause to place his name first, as if he were plaintiff in that particular proceeding, and his adversary's afterwards. Thus the case of *Upton v. White* would, if taken from a county court to the supreme court on a writ of error by defendant, be entitled *White v. Upton*. In New York and many other states which have enacted codes of procedure, the rule now is that the original order of names of parties is retained throughout. See AD SECTAM.

TITLE, COVENANTS FOR. See COVENANT.

TITLE DEEDS. Those deeds which are evidences of the title of the owner of an estate. The person who is entitled to the inheritance has a right to the possession of the title-deeds; 1 Carr. & M. 653. As to a lien created by deposit of title-deeds, see LIEN.

TITLE OF ENTRY. The right to enter upon lands. Cowel. See ENTRY.

TITLE INSURANCE. See INSURANCE.

TITLE, SUFFICIENCY OF. It is not necessary for the title to an act of the legislature to embrace an abstract of its contents. It is sufficient if the title contains a reasonable intimation of the matters under legislative consideration, to state the subject of the bill in general terms, and with fewest words, in accordance with the general custom, to which the framers of the Constitution intended the legislature to conform. Where there are numerous provisions having one general object, the title is sufficient if it fairly indicates the general purpose of the act. The details providing for the accomplishment of such purpose are to be regarded as necessary incidents. 6 Okl. Cr. 495.

TITULARS OF ERECTION. Persons who in Scotland, after the Reformation, obtained grants from the crown of the monasteries and priories then erected into temporal lordships. These grants were called "lords of erection" (*q. v.*) and "titulars of the lands." Bell.

TITULUS (Lat. from *tueri*, to protect). Title; the source or ground of possession; the means whereby possession of a thing is acquired, whether such possession be lawful or not; Burrill; 1 Mack. Civ. Law, 243.

In old English Law. Title; ground of ownership of land. A lawful cause or ground of possession. *Id.*; 8 Co. 153 b.

In old Ecclesiastical Law. A temple or church; the material edifice. *Id.*; Spelman. So called because the priest in charge of it derived therefrom his name and title.

TO. The word "to" has not a precise, fixed, legal meaning, but may signify within or into; as where a railroad is chartered to run to a city designated. Abbott; 52 Ga. 244. But generally "to" is a word of exclusion, unless the context clearly shows a different sense intended. *Id.*; 13 Me. 198. As commonly used, conveys the idea of moving toward and reaching a specified point; and the meaning is not satisfied unless the point or object is actually attained. But the word sometimes embraces a part of this idea only, or it is simply a word of direction, as we say "to the north" when we mean in that direction merely. In many cases the meaning is nearly synonymous with "toward." *Id.*; 54 Mich. 87.

An order extending the time for signing a bill of exceptions to a certain day, is inclusive of such day; 75 Md. 126; but "from" an object "to" an object excludes the terminus referred to; 84 Me. 459; 52 *id.* 252. See **FROM**.

TO WIT. That is to say; namely; scilicet; videlicet.

TOBACCO. In Iowa, Tennessee, Nebraska, and North Dakota the manufacture or sale of cigarettes and cigarette paper is absolutely prohibited. In Indiana, Minnesota, Maine, and Wisconsin the sale or gift of cigarettes, or any substitute therefor, to any minor is forbidden. In West Virginia, Nevada, and Maryland the method adopted is to impose a special license fee for selling cigarettes or cigarette paper at retail. In Washington a license is required and the sale is prohibited to minors under eighteen years of age. In Missouri any city or village is authorized to prohibit the sale to minors. In Iowa an act prohibiting the sale of cigarettes within the state by all persons save jobbers doing an interstate business, was held unconstitutional, so far as it amounts to a regulation of interstate commerce; 73 N. W. Rep. (la.) 1014. See **ORIGINAL PACK-AGE**; **UNMANUFACTURED TOBACCO**.

TOBACCONIST. Any person, firm, or corporation whose business it is to manufacture cigars, snuff, or tobacco in any form. Act of Congress, July 13, 1886, § 9.

TOFT. A place or piece of ground on which a house formerly stood, which has been destroyed by accident or decay. 2 Broom & H. Com. 17.

TOGATI (Lat.). In Roman Law. Under the empire, when the *toga* had ceased to be the usual costume of the Romans, advocates were nevertheless obliged to wear it whenever they pleaded a cause. Hence they were called *togati*.

TOKEN. A document or sign of the existence of a fact.

Tokens are either public or general, or privy tokens. They are either true or false. When a token is false and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating; 12 Johns. 293; but if it is a mere privy token, as, counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable; 9 Wend. 182; 1 Dall. 47. In England, this name is given to pieces of metal, made in the shape of money, passing among private persons by consent at a certain value. 2 Chitty, Com. Law 182. They are no longer permitted to pass as money.

TOKEN-MONEY. A tablet of metal once used in England by tradesmen and others as evidence of a sum due, the amount of which was specified thereon. English. See **TOKEN**.

TOLERATE. To allow so as not to hinder; to permit as something not wholly approved of; to suffer; to endure. 17 Blatchf. 330.

TOLERATION. In some countries, where religion is established by law, certain sects who do not agree with the established religion are nevertheless per-

mitted to exist; and this permission is called toleration. They are permitted and allowed to remain rather as a matter of favor than a matter of right. By the Toleration Act of 1 W. & M. c. 18, and subsequent statutes down to the 35 & 36 Vict. c. 26, enabling any person to take any degree (other than a divinity degree) in the universities of Oxford, Cambridge, or Durham, the disabilities of the Roman Catholics, Jews, and Dissenters have been almost wholly removed; 2 Steph. Com. 707. See **CATHOLIC EMANCIPATION ACT**.

In the United States there is no such thing as toleration; all men have an equal right to worship God according to the dictates of their consciences. See **CHRISTIANITY**; **RELIGION**; **RELIGIOUS TEST**.

TOLERATION ACT. The statute 1 W. & M. exempting Protestant dissenters from the penalties of certain laws. Brown.

TOLL. A sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature.

The compensation paid to a miller for grinding another person's grain. Cited 93 U. S. 458.

The rate of taking toll for grinding is regulated by statute in most of the states. See 2 Washb. R. P.; 6 Q. B. 31. See **RATES**.

A state has no power to regulate tolls upon a bridge connecting it with another state without the assent of congress and without the concurrence of such other state in the proposed tariff; 125 U. S. 1.

To bar, defeat, or take away: as, to toll an entry into lands is to deny or take away the right of entry.

To toll the statute of limitation is to show facts which remove its bar of the action. See **REASONABLE REWARD**.

TOLLBOOTH. A house or booth for collection of tolls or market charges; a custom-house; a prison; also the place where goods are weighed; a place where merchants met; a local tribunal for small civil cases held at the Guild Hall Bristol. It has been conjectured that the word toll-booth, originally signifying a place of custom, was transferred in its application to the place of confinement for those who refused to pay custom, and thence to prisons generally. The Tollbooth of Edinburgh was built by the citizens in the year 1561, for the accommodation of the parliament and courts of justice, and for the confinement of debtors and malefactors. From the year 1640 this building was used solely for a jail, till its removal in 1817. *Id.*; M. & W.

TOLL-GATE. A gate where toll is taken. Webster. The proprietors of a Turnpike road have no authority to erect a gate upon an existing highway, unless specially authorized by the Legislature. 2 Mass. 143.

TOLL-TRAVERSE. A toll for passing over a private man's ground; a toll for passing over the soil of another or over soil which though now a public highway was once private and which was dedicated subject to a toll. It can be claimed by prescription. 87 L. J. Q. B. 209; 8 Q. B. 521.

TOLLS. In a general sense, tolls signify any manner of customs, subsidy, prestation, imposition, or sum of money demanded for exporting or importing of any wares or merchandise, to be taken of the buyer. Co. 2d Inst. 58.

TOLT. (Lat. *tolta*, from *tolle*, to remove). An ancient writ by which a cause pending in a court-baron was removed to the county court. Burrill; Cowell. So called, because it takes away and removes the cause from the court-baron. It was a precept directed by the sheriff to his bailiff, commanding him to go to the lord's court, and take away the plaintiff which was there into his county court. *Id.*; F. N. B.

TOLZEY COURT. This, originally, was the court of the bailiffs of the Hundred of Bristol. Subsequently it became merged

in the court of the Lord Steward of the King's Household; Richard II. in 1395 revived its separate jurisdiction by charter; and it now sits under the authority of a charter of Anne, dated 24th July, 1710. Its jurisdiction includes mixed and personal actions to any amount, provided the cause of action arises within the city. Its procedure has been modernized by Orders in Council made 1871, 1873, 1878, 1883, and 1890. The recorder is *ex officio* the judge. Byrne.

TOMAD DE RAZON. See **EXPEDIENTE**; **TOMAR RAZON**.

TOMAR RAZON. To register, to take a memorandum of, to make a record of a thing. A term used in connection with Mexican land grants. 161 U. S. 219. See **EXPEDIENTE**.

TOMBSTONE. A gift or bequest to keep perpetually, a tombstone in repair offends against a rule as to perpetuities and is void, but such a condition to that effect attached to a bequest to a charity in case of failure to comply with condition is good. L. R. 3 Ch. 252. See **MONUMENT**.

TON. Twenty hundredweight, each hundredweight being one hundred and twelve pounds avoirdupois. See **MEASURE**.

TONNAGE. The capacity of a ship or vessel.

This term is most usually applied to the capacity of a vessel in tons as determined by the legal mode of measurement; in England reckoned according to the number of tons burden a ship will carry, but here to her internal cubic capacity; and, as a general rule, in the United States the official tonnage of a vessel is considerably below the actual capacity of the vessel to carry freight. 40 N. Y. 259. The duties paid on the tonnage of a ship or vessel.

For the rule for determining tonnage in the United States, see R. S. § 4150 *et seq.*

A foreign built vessel purchased by a citizen of the United States and brought into the waters thereof is not so taxable; 166 U. S. 110. The constitution of the United States provides art. I, § 10, n. 2, that no state shall, without the consent of congress, lay any duty on tonnage; 12 Wall 204; 94 U. S. 238. But a municipal corporation situated on a navigable river can, consistently with the constitution of the United States, charge and collect from the owner of licensed steamboats, which moor at a wharf constructed by it, wharfage proportioned to their tonnage; 96 U. S. 80; 45 la. 196. See **COMMERCE**.

The duty of tonnage prohibited by the constitution is a charge upon a vessel according to its tonnage as the instrument of commerce, for the privilege of entering or leaving a port or navigating public waters. 119 U. S. 543.

See **TUNNAGE**.

TONNAGE-RENT. When the rent reserved by a mining lease or the like consists of a royalty on every ton of minerals gotten in the mine, it is often called a "tonnage-rent." There is generally a dead rent in addition. R. & L. Dict.

TONNAGE TAX. See **TONNAGE**; **OYSTERS**.

TONNAGIUM. A custom or impost upon wines and other merchandise exported or imported, according to a certain rate per ton. Burrill; Spelman.

TONNETIGHT. The quantity of a ton or tun, in a ship's freight or bulk, for which tonnage or tunnage was paid to the king. Burrill; Cowell.

TONTINE INSURANCE.

A tontine contract of insurance is more than a policy of life insurance. In addition, it is an agreement on the part of the insurer to hold all the premiums collected on the policies forming that class for the specified period, which is called the tontine period or period of distribution, and, after paying death losses, expenses, and other losses out of the fund so accumulated, to divide the remainder among those who are alive at the end of the tontine period, and who have maintained their policies in force. 137 Ky 641, 126 S. W. 155. See **INSURANCE**.

TONTINE PERIOD. See **TONTINE INSURANCE**.

TOOK AND CARRIED AWAY. Technical words necessary in an indictment for simple larceny. Bac. Abr. *Indictment* (G 1). See **CEPIT ET ASPORTAVIT**; **LARCENY**.

TOOLS. The implements which are commonly used by the hand of one man in some manual labor, necessary for his subsistence. 18 S. Car. 241. It includes patterns used in manufacturing; 51 N. W. Rep. (Ia.) 1149; a mill-saw; 1 Fairf. 185; an instrument called a billy and jennie; 2 Vt. 402; a gin and grist mill; 66 Tex. 494; a threshing machine; 23 Ia. 359. As used in exemption laws, it includes any instrument necessary for the prosecution of trade, including a lathe; 99 Cal. 202; sewing machines; 50 Minn. 327; a piano; 69 Ill. 337; a violin; 2 Allen 395; a cornet; 123 Mass. 95; a gun; 18 Tex. 581; a net and boat; 1 Th. & C. 444; cheese vats, presses, and knives; 27 Kan. 270; the surgical instruments of a physician; 3 Abb. Fr. 416; and the office furniture of a lawyer; 73 Ia. 111; an iron safe used by an insurance agent; 33 S. W. Rep. (Tex.) 71; 87 Colo. 292. It does not include the apparatus of a printing office; 10 Pick. 423. See **TRADE**; **EXEMPTION**.

TORRENS SYSTEM. A name commonly applied to the system of government registration of titles to land, so called from Sir Robert Torrens. The subject is treated under **LAND TITLE AND TRANSFER**. A Massachusetts act passed since that title was written is referred to under **REGISTRATION**. See 36 L. R. A. 105.

TORT (Fr. *tort*, from Lat. *torquere*, to twist, *tortus*, twisted, wrested aside). A private or civil wrong or injury. A wrong independent of contract. 1 Hill. Torts 1. The breach of a legal duty. Big. Torts 3. In admiralty it includes wrong suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case; 46 Fed. Rep. 733; 10 App. Dec. 469.

The right of action is very broad in France. Thus:

"Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer."

"Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence." Civil Code of France, secs. 1382, 1383.

The law recognizes certain rights as belonging to every individual, such as the right to personal security, to liberty, to property, to reputation, to the services of a daughter or servant, to the companionship of a wife, etc. Any violation of one of these rights is a tort. In the like manner the law recognizes certain duties as attached to every individual, as the duty of not deceiving by false representations, of not persecuting another maliciously, of not using your own property so as to injure another, etc. The breach of any of these duties coupled with consequent damages to any one is also a tort. Underhill, Torts 4.

The performance of an act forbidden by a statute or the omission or failure to perform any act specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury; Poll. Torts 23. No action will lie for doing that which the legislature has authorized, if it be done without negligence; *id.* 121.

The word torts is used to describe that branch of the law which treats of the redress of injuries which are neither crimes nor arise from the breach of contracts. All acts or omissions of which the law takes cognizance may in general be classed under the three heads of *contracts*, *torts*, and *crimes*. *Contracts* include agreements and the injuries resulting from their breach. *Torts* include injuries to individuals, and *crimes* injuries to the public or state. 1 Hill. Torts 1.

This division of the redress of injuries by civil suit into actions of tort and actions of contract is not thoroughly accurate. For often the party injured has his election whether he will proceed by tort or by contract, as in the case of a fraudulent sale or the fraudulent recommendation of a third person; 10 C. B. 83; 24 Conn. 392. But for general usage this division has been found sufficient, and is universally adopted;

Cooley, Torts 2.

As the same act may sometimes constitute the breach of a contract as well as a tort, so the same act may often constitute a tort and also a crime. For a tort may amount to, or may be likely to lead to, a breach of the peace, and thus become a matter of public concern. The torts which are usually at the same time crimes are assault, libel, and nuisance. In such cases it is the general rule of law that a public prosecution and a private action for damages can both be maintained either at the same or at different times; 1 B. & P. 191; 3 Bla. Com. 122. See 28 Fla. 90.

As to the doctrine of the merger of a tort in a crime, see **MERGER**.

The infringement of a right of the violation of a duty are necessary ingredients of a tort. If neither of these is present the act is not a tort, although damage may have resulted. Hence the maxim: *Ex damno sine injuria non oritur actio*.

A street railway company not having the right of eminent domain, is liable for special injury to another's property by the lawful operation of its works on its own land: the case of the negligent operation of a powerhouse; 182 Pa. 475. Where a corporation has no right of eminent domain, the operation of its works, causing special physical injury to another's property, is held an actionable nuisance: in the case of a gas company; 39 Pa. 257; and the case of a natural oil pipe company; 153 Pa. 366.

A wrongful or malicious intent is an essential element in some torts. As, for example, deceit, slander, and libel, malicious prosecution, and conspiracy. In general, however, it may be stated as a prominent distinction between torts and crimes, that in the former the party's intent is immaterial, while in prosecutions for the latter a criminal purpose must always be alleged and proved; Cooley, Torts 688. Thus one may be made liable in damages for what is usually called a mere accident. So insane persons and minors, under the age of discernment, are in general liable for torts. See **MALICE**.

A tort sounding in exemplary damages is one when there is an evasion of some right of person or property, maliciously, violently, wantonly, or with reckless disregard of social or civil obligations; 35 S. C. 493.

In general, it may be said that whenever the law creates a right, the violation of such right will be a tort, and wherever the law creates a duty, the breach of such duty coupled with consequent damage will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute; Cooley, Torts 630.

Torts may also arise in the performance of the duties of a ministerial officer, when such duties are due to individuals and not to the state; Cooley, Torts 376; but the act of a British officer in excess of his authority (burning certain barracoons in Africa and releasing slaves therefrom), when approved by the government, becomes an "act of state" and is not a ground of action against him; 2 Ex. 167.

As to torts committed against property or in the relations of master and servant, husband and wife, parent and child, bailor and bailee, landlord and tenant, mortgagee and mortgagee, see these several titles.

In order to maintain an action of tort the relation of cause and effect between the act and the injury must be clearly shown. The damage must not be remote or indirect. See **CAUSA PROXIMA**, etc.

All who aid, advise, command, or countenance the commission of a tort, or approve of it after it is done, are liable, if done for their benefit, in the same manner as if done with their hands; 61 Vt. 399; but where two or more are acting lawfully together to make an arrest, one is not liable for the unlawful act of another done in furtherance of the common purpose, without his concurrence; 76 Ia. 612.

A child injured before birth has no right of action for the tort; 138 Mass. 14; 23 L. R. (Ir.) 69; 30 Chic. Leg. N. 333. Where

there are several wrongdoers, each is liable for the entire damage; all are equal. But where the injured party has elected to sue one or more and obtains judgment, he cannot sue the others, even though his judgment remains unsatisfied; L. R. 7 C. P. 647; but it is held generally in this country that a judgment without satisfaction is not a bar; Cooley, Torts 138; 11 Harv. L. Rev. So a recovery by a husband for injuries sustained to himself is not a bar to a subsequent action for injuries to his wife sustained at the same time, as a result of the same negligence; 29 S. W. Rep. 78; but judgment is held to be a bar if satisfaction has been tendered; 39 Atl. Rep. (Md.) 502; *contra*, 12 Lea 598; 1 Barb. 379. But the recovery of damages for the killing of one horse is a bar to the recovery of damages for another, killed at the same time and place; 9 Tex. Civ. App. 6.

A party injured cannot generally maintain an action for the injury if caused in any degree by his own contributory negligence. See **NEGLIGENCE**.

When a workman employed by a shipowner is injured by the combined negligence of himself and those in charge of the ship, he may recover half damages; 87 Fed. Rep. 849.

Where a tort is committed partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the locus of the damage and not that of the origin of the tort; as where the plaintiff working in the hold of a vessel was injured by a piece of lumber negligently sent down through a chute by a person working on the pier, it was held to be a case of admiralty jurisdiction; 69 Fed. Rep. 646.

See also **OBLIGATION OF TORT**; **MARITIME TORTS**.

TORTFEASOR. A wrong-doer; one who commits or is guilty of a tort. See **JOINT TORTFEASOR**.

TORTIOUS. Wrongful; having the quality of a tort.

TORTURE. The rack, or question, or other mode of examination by violence to the person, to extort a confession from supposed criminals, and a revelation of their associates. It is to be distinguished from punishment, which usually succeeds a conviction for offences; as it was inflicted *in limine*, and as part of the introductory process leading to trial and judgment. It was wholly unknown to the common and statute law of England, and was forbidden by Magna Charta, ch. 29; 4 Bla. Com. 326.

It prevailed in Scotland, where the civil law which allowed it obtained; Dig. 48. 18. It was, however, declared contrary to the claim of right, and was expressly prohibited; 7 Anne, c. 21, § 5, A. D. 1708. Several instances of its infliction may be found in Pitcairn's Criminal Trials of Scotland.

Although torture was confessedly contrary to the common law of England, it was, nevertheless, often employed as an instrument of state to wring confessions from prominent criminals,—especially in charges of treason. It was usually inflicted by warrant from the privy council. Jardine, Torture 7, 15, 42.

Mr. Jardine proves from the records of the privy council that the practice was not infrequent during the time of Elizabeth, and continued to the close of the reign of the first two Stuarts. There is positive evidence that Guy Fawkes was directed to be tortured in regard to the Gunpowder Plot, in the warrant in the king's handwriting authorizing the commissioners, of whom Coke was one, to examine him upon the rack, "using the gentler tortures first, *et sic per gradus ad ima tenditur*;" 1 Jardine, Cr. Tr. Int. 17; 2 *id.* 106.

An attempt to torture a person to extort a confession of crime is a criminal offence. 2 Tyl. 380. See **QUESTION**; **PEINE FORTE ET DURE**; **MUTE**.

This absurd and cruel practice has never obtained in the United States, except in a few instances in New York under the

Dutch rule.

TOTAL LOSS. See **LOSS**; and also a recent English case where it was held by the house of lords that a ship is totally lost when she goes to the bottom, no matter whether she is brought up again or not; [1898] A. C. 593. See 12 Harv. L. Rev. 213.

Under a policy insuring against "absolute total loss only," a partial loss cannot be converted into a constructive total loss, and evidence of abandonment is immaterial; 5 U. S. App. 179.

TOTIDEM VERBIS. In so many words.

TOTIES QUOTIES (Lat.). As often as the thing shall happen.

TOTTED. A good debt to the crown, i. e. a debt paid to the sheriff, to be by him paid over to the king. Cowel; Moz. & W. See **FOREIGN APPOSER**.

TOUCH AND STAY. Words frequently introduced in policies of insurance, giving the party insured the right to stop and stay at certain designated points in the course of the voyage. A vessel which has the power to touch and stay at a place in the course of the voyage must confine herself strictly to the terms of the liberty so given; for any attempt to trade at such a port during such a stay, as, by shipping or landing goods, will amount to a species of deviation which will discharge the underwriters, unless the ship have also liberty to trade as well as to touch and stay at such a place; 1 Marsh. Ins. 275.

TOUJOURS ET UNCORE PRIST (L. Fr.). Always and still ready. This is the name of a plea of tender: as, where a man is indebted to another, and he tenders the amount due, and afterwards the creditor brings a suit, the defendant may plead the tender, and add that he has always been and is still ready to pay what he owes, which may be done by the formula *toujours et uncore prist*. He must then pay the money into court; and if the issue be found for him the defendant will be exonerated from costs, and the plaintiff made liable for them: 3 Bouvier, Inst. n. 2923. See **TOUT TEMPS PRIST**; **TENDER**.

TOUR D'ECHELLE. In French Law. A right which the owner of an estate has of placing ladders on his neighbor's property to facilitate the reparation of a party-wall or of buildings which are supported by that wall. It is a species of servitude. *Lois des Bât.* part 1, c. 3, sect. 2, art. 9, § 1.

The space of ground left unoccupied around a building for the purpose of enabling the owner to repair it with convenience: this is not a servitude, but an actual corporeal property.

TOURN. See **SHERIFF'S TOURN**.

TOURNAMENTS. See **JURTS**, or **JOUSTS**.

TOUT TEMPS PRIST (L. Fr. always ready). A plea by which the defendant signifies that he has always been ready to perform what is required of him. The object of the plea is to save costs: as, for example, where there has been a tender and refusal. 3 Bla. Com. 303. So, in a writ of dower, where the plea is detinue of charters, the defendant might reply, *always ready*; Rast. Entr. 229 b. See **TOUJOURS ET UNCORE PRIST**.

TOW-BOATS. According to the weight of authority, the owners of steamboats engaged in the business of towing are not common carriers; Lawson, Carriers 3. So held in 2 N. Y. 204; 18 Pa. 40; 14 Bush 698; 12 Fed. Rep. 446; 94 U. S. 494; 95 id. 297. See **TOWAGE**; *contra*, 5 Jones N. C. 174; 11 La. 46.

TOWAGE. The act of towing or drawing ships and vessels, usually by means of a small steamer called a tug.

Towage service is confined to vessels who have received no injury or damage; 9 Fed. Rep. 53.

Where towage is rendered in the rescue or relief of a vessel from imminent peril, it becomes *salvage* service, entitled to be compensated as such; 6 N. Y. Leg. Obs. 223. A tug sometimes called towing or tow-boat, while not held to the responsibility of a common carrier, is bound to exercise reasonable care and skill in everything pertaining to its employment; 9 Fed. Rep. 614; 10 id. 667; 84 Fed. Rep. 500; 14 U. S. App. 39; 10 id. 603; 24 U. S. App. 49. Proof of a loss suffered by tow does not raise a presumption of negligence on the part of the tug; 14 Wall. 406; 57 Fed. Rep. 667. See **TOW-BOATS**; **TUGS**; **SALVAGE**.

Where two vessels, each in charge of a tug, came in collision from the faulty navigation of the tugs, whose masters gave directions to the vessels which were obeyed, the tugs alone were held liable; 11 U. S. App. 129. In every contract of towage there is an implied engagement that each party will use proper skill and diligence. Tugs cannot abandon their tows for slight causes; 13 id. 489; 14 id. 410. See **TUG**.

That which is given for towing ships in rivers. *Guidon de la Mer*, c. 16; Pothier, *Des Avaries*, n. 147; 3 Chitty, Com. Law. 16.

The burden of proving that a contract of towage was at the owner's risk, is on the tug; 54 Fed. Rep. 1010; 18 id. 178; 24 id. 292.

TOWARD. The word has been held to mean not simply "to" but to include "about." In the expression "insulting language toward a female relation," does not mean to, but about, respecting. Anderson; 6 Tex. Ap. 575. See **TO**.

TOWN. A term of somewhat varying signification, but denoting a division of a country next smaller in extent than a county.

It is generic, and includes cities; 132 Ind. 54; 117 Cal. 451.

In Pennsylvania and some other of the Middle states, it denotes a village or city. In the New England states, it is to be considered for many purposes as the unit of civil organization, the counties being composed of a number of towns. Towns are regarded as corporations or quasi-corporations; 13 Mass. 193. In New York and Wisconsin, towns are subdivisions of counties; and the same is true of the townships of most of the Western states. In Ohio, Michigan, and Iowa, they are called townships. In Illinois it is synonymous with village; 119 U. S. 680. In England, the term *town* or *vill* comprehends under it the several species of cities, boroughs, and common towns. 1 Bla. Com. 114.

TOWN CAUSE. In English Practice. A cause tried at the sittings for London and Middlesex. 3 Steph. Com., 11th ed. 556.

TOWN-CLERK. A principal officer who keeps the records, issues calls for town meetings, and performs generally the duties of a secretary to the political organization.

TOWN MEETING. An assemblage of the voters of a town to select town officers and discuss other business of the town. R. & L. Dict.

TOWN-PLAT. The acknowledgment and recording of a town-plat vests the legal title to the ground embraced in the streets and alleys in the corporation of the town; therefore it is held that the proprietor who has thus dedicated the streets and alleys to the public cannot maintain trespass for an injury to the soil or freehold. The corporation alone can seek redress for such injury; 11 Ill. 534; 13 id. 54, 308. This is not so, however, with a highway; the original owner of the fee must bring his action for an injury to the soil; 13 Ill. 54. See **HIGHWAY**. If the streets or alleys of a town are dedicated by a different mode from that pointed out by the statute, the fee remains in the proprietor, burdened with the public easement; 13 Ill. 312. See **DEDICATION**.

TOWN RECORD. Matter written on the margin of a "town record" is a part

of the record when duly signed, just as much as matter which is written on the page horizontally, and a town ordinance thus shown to have been adopted is valid. 145 Ky. 649, 140 S. W. 1043.

TOWN SITES. The federal statutes now in force as to town sites provide (1) for the reservation of town sites by the President from the public lands on the shores of harbors, etc. (U. S. Rev. Stat., § 2380); (2) for the entry of public lands by parties who have already founded or hereafter desire to found a city or town, and for the sale of such lands under prescribed regulations, and at a prescribed price (U. S. Rev. Stat., § 2382); (3) and for the entry of public lands not subject to entry under the agricultural pre-emption laws by the corporate authorities of an incorporated town, or by the judge of the county court for the county in which such town is situated, if it is not incorporated in trust for the several use and benefit of the occupants thereof. (U. S. Rev. Stat., § 2387.)

The original town site act of May 23, 1844, was repealed by the act of July 1, 1864. The subsequent acts are practically amendments of this act. 26 Am. & Eng. Encyc. 2nd ed., 308.

TOWNSHIP. The public lands of the United States are surveyed first into tracts called townships, being in extent six miles square. The subdivisions of a township are called sections, each a mile square and containing six hundred and forty acres; these are subdivided into quarter-sections, and from that into lots of forty acres each. This plan of subdividing the public lands was adopted by act of congress of May 18, 1796.

TOXICOLOGY. The science of poisons (q. v.).

TRACING. A tracing is a mechanical copy or *fac simile* of an original, produced by following its lines, with a pen or pencil, through a transparent medium, called tracing paper. 18 Fed. Rep. 540.

TRACT. A lot, piece, or parcel of land, of greater or less size, the term not importing in itself any precise dimensions. 28 N. J. L. 45.

TRADAS IN BALLIUM. You deliver to bail. The name of a writ which might be issued in behalf of a party who, upon the writ of *odio et atia*, had been found to have been maliciously accused of a crime; commanding the sheriff that if the prisoner found twelve good and lawful men of the county who would be mainpernors for him, he should deliver him in bail to those twelve, until the next assize. Burrill; 1 Reeve, Eng. L. 252.

TRADE. Any sort of dealings by way of sale or exchange; commerce, traffic. 101 U. S. 231; 47 Kan. 89. The dealings in a particular business: as, the Indian trade; the business of a particular mechanic; hence boys are said to be put apprentices to learn a trade: as, the trade of a carpenter, shoemaker, and the like. Bac. Abr. *Master and Servant* (D 1). Trade differs from art.

In exemption laws it is usually confined to the occupation of a mechanic; 44 Conn. 98; but in its broader sense it is generally construed as equivalent to any occupation, employment, handicraft, or business; 101 U. S. 231; 47 Kan. 89. One cannot by multiplying his pursuits claim cumulatively several exemptions, but the fact that he carries on two or more pursuits concurrently does not deprive him of all exemptions, but the article exempted must belong to his principal business; 27 Kan. 582.

The term is also construed in cases arising under the "anti-trust" act forbidding trusts and combinations in restraint of trade, and it is held in that connection to have the broader sense; 47 Kan. 89, where the definition of the word is much discussed. The word is held to apply to the business of insurance; *id.*; 33 S. W. Rep. (Tex.) 710; of a telegraph company; 3 Exch. Div. 108; transportation of mer-

chandise for hire; 2 Gall. 4; 7 Cra. 113; a blacksmith, who also builds wagons; 82 Mich. 59; a harness-maker, painter, and carriage-builder; 9 Allen 156; a dealer in ice who was also a farmer; 7 Gray 67; a tinner who owned and partly supported himself by playing a cornet; 123 Mass. 194; a saddle and harness-maker; 26 S. W. Rep. (Tex.) 859; keeping a home for working girls even though it appeared that no profits were made; 25 Ch. Div. 206; but maintaining a private lunatic asylum is held not a trade; 2 Ad. & El. 161. See TOOLS; EXEMPTION; RESTRAINT OF TRADE; TRADER; TRADESMAN; FOREIGN TRADE; ILLEGAL TRADE; ILLICIT; USAGE OF TRADE.

TRADE ACCEPTANCE. A trade acceptance is a draft or bill of exchange drawn by the seller on the purchaser of goods sold and accepted by such purchaser. 241 N. Y. 231. Cf. BANKERS' ACCEPTANCE.

TRADE DOLLAR. See DOLLAR.

TRADE-MARK. A symbol, emblem, or mark, which a tradesman puts upon or attaches in some way to the goods he manufactures or has caused to be manufactured, so that they may be identified and known in the market. Brown, Trade-Marks, 2d ed. § 87.

"A particular mark or symbol used by a person for the purpose of indicating that the article to which it is affixed is sold or manufactured by him or his authority, or that he carries on business at a particular place." 35 L. J. Ch. 61.

Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. 12 Fed. Rep. 707.

The office of a trade-mark is to point out distinctly the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer; 138 U. S. 537; 128 *id.* 598; 139 *id.* 540.

It may consist of a name, a device, or a peculiar arrangement of words, lines, or figures, or any peculiar mark or symbol not theretofore in use, adopted and used by a manufacturer, or a merchant for whom goods may be manufactured, to designate them as those which he has manufactured or sells. It may be put either upon the article itself or its case, covering, or wrapper, and is assignable with the business; 86 Ky. 331.

It may be in any form of letters, words, vignettes, or ornamental design. Newly-coined words may form a trade-mark; Brown, Trade-Marks 151.

The exclusive right to a trade-mark or device rests not on invention, but on such use as makes it point out the origin of the claimant's goods and must be early enough for that, but absolute priority of invention is not required; 85 Fed. Rep. 774.

Property in a trade-mark is acquired by the original application to some species of merchandise manufactured of a symbol or device not in actual use, designating articles of the same kind or class; 13 Wall. 222.

The ownership of trade-marks is considered as a right of property; Upton, Trade-Marks 10. It is on this ground that equity protects by injunction against their infringement. Proof of fraud is not necessary, the mere fact of violating a right of property being sufficient; 1 De G. J. & S. 185.

Trade names should be distinguished from trade-marks. A trade-mark owes its existence to the fact that it is affixed to a commodity; a trade name is more properly allied to the good will of a business; Browne, Tr. Marks § 91. The same author divides the latter into classes: 1. of men, their business or their pseudonyms; 2. places famed for manufactures, etc.; 3. coaches and other vehicles for the transportation of passengers or merchandise.

The trade name of a firm, a corporate name, and the name of a publication, though not strictly trade-marks, are nevertheless a species of property of the same nature as trade-marks, and will be pro-

tected in like manner; 83 Am. Rep. 885; 9 *id.* 331. See NAME.

So a tradesman may adopt a fictitious name, and sell his goods under it as a trade-mark, and the property right he thus acquires in the fanciful name will be protected; 6 Thomp. & C. 133.

Equity will protect a corporation in the exclusive possession of its name. State authorities will ordinarily not grant a charter to a new corporation under the name of an existing corporation. But equity will not restrain a corporation of the state of the *forum* from the use of its corporate name at the suit of a foreign corporation; Thomp. Corp. §§ 206, 7903; 142 Ill. 494. See 10 L. R. A. 758.

In a bill by the "Sun Life Assurance Company," long established in London, to enjoin the "Sun Life Assurance Company of Canada" from doing business under that name in London, it was held that the defendant's use of its full name was lawful, but that the use of the "Sun Life" alone could be enjoined; [1894] 1 Ch. 537.

The names of hotels and stores are protected; 21 Cal. 445; L. R. 13 Ch. D. 512; 3 Sandf. 725; as, the "Mechanic's Store," against "Mechanical Store"; 42 Pac. Rep. (Cal.) 142.

In the following the titles of newspapers and periodicals have been protected (the name in italics being held to infringe): Hagerstown Almanac—*Hagerstown Town and Country Almanac*; 50 Md. 591; The Real John Bull—*The Old Real John Bull*; Cox, Man. 33; Minnie—*Minnie Dale and Minnie Dear Minnie*; 2 K. & J. 123; 8 DeG. M. & G. 1; Payson, Dunton & Scribner's National System of Penmanship—*Independent National System of Penmanship*; 21 Hun 559; Our Young Folks—*Our Young Folks' Illustrated Paper*; Fed. Cas. 10, 603; Birthday Scripture Textbook—*The Children's Birthday Textbook*; L. R. 14 Eq. 431; Chatterbox—*Chatterbox*; 31 Fed. Rep. 154; 21 *id.* 189; 27 *id.* 22; The United States Investor—*The Investor*; 72 *id.* 603; Social Register—*Howard's Social Register*; 60 *id.* 270; Good Things of Life—*Spice of Life*; 2 N. Y. S. 643; Bell's Life in London and Sporting Chronicle—*Penny Bell's Life and Sporting News*; 1 Giff. 98; The National Police Gazette—*The United States Police Gazette*; 2 Abb. Pr. n. s. 459; The Times—*Times*; 25 Sol. Jour. 742.

Protection has been refused in the following cases:

Old Sleuth Library—*New York Detective Library*; 129 N. Y. 83, 619, reversing 13 N. Y. S. 79; Electric World—*Electric Age*; 14 N. Y. S. 803; Good Things of Life—*The Spice of Life*; 9 N. Y. S. 846; The New North West—*The Northwest News*; 11 Ore. 322; Republican New Era—*New Era*; 8 Paige 75; Splendid Misery or East End and West End, by C. H. Hazlewood—*Splendid Misery*, by the author of Lady Audley's Secret, Vixen, etc., published as a serial in periodicals; 18 Ch. D. 76; Mail—*Morning Mail*; 54 L. J. Ch. 1059; Morning Post—*Evening Post*; 37 Ch. D. 449; The Canadian Bookseller—*The Canada Bookseller and Stationer*; 27 Ont. 325; Punch—*Punch and Judy*; 39 L. J. Ch. 57; The American Grocer—*The Grocer*; 51 How. Pr. 402.

Where the title of a book shows that it is adopted for unfair competition with another work, though the conflicting titles are not identical, it will be restrained; 84 Fed. Rep. 224.

The names of springs are protected, even against those who are rightfully selling the genuine product under the true name; 24 Am. Rep. 395; 45 N. Y. 291; 95 Ky. 503; 78 Fed. Rep. 469; but there are other cases in which an injunction against the honest use of a geographical name has been refused; 13 Wall. 311; 54 Ill. 439; 75 Pa. 467; 128 *id.* 1. While a geographical name is not a good trade-mark, technically speaking, yet where one has been used to indicate the goods of a particular maker, no one else may employ such name even truthfully in a geographical sense, in connection with the sale of the same class of goods; L. R. 5 H. L. 508; 64 L. T. 748; Fed.

Cas. 13, 784; 90 N. Y. 457; 28 Atl. Rep. 788. A manufacturer will be protected in the use of a geographical name as against one who does not carry on business in the district; 85 Fed. Rep. 896; 86 Ky. 331; 31 N. Y. S. 103; so of "Chicago Waists" as against one who makes similar waists in a different state; 83 Fed. Rep. 213.

See a note on geographical names in 17 C. C. A. 657.

A number of competing millers in Minneapolis can maintain a joint bill on behalf of themselves and others similarly situated, to enjoin a grocer from selling flour made in Wisconsin, and marked with his own name and the word "Best Minnesota Patent, Minneapolis, Minn.," 86 Fed. Rep. 603, reversing 82 *id.* 816.

Generic names, or names merely descriptive of an article, are not valid trade-marks; Browne, Trade-Marks § 34. Thus: Club-house Gin; 7 Bos. 222; Desiccated Codfish; 8 Daly 53; Liebig's Extract of Meat; 28 How. Pr. 206; Cough Remedy; 122 Mass. 139; Rock and Rye; 82 N. Y. 630.

Nor can the name of the party be a valid trade-mark, as others may, under some circumstances, use the same name; but see *infra*.

No property can be acquired in words, marks, or devices which denote the mere nature, kind, and quality of articles; 101 U. S. 51; L. R. 17 Eq. 29; see 35 Fed. Rep. 150; 128 U. S. 598; 138 *id.* 537; and where a device, mark, or symbol is adopted for any purpose other than a reference to, or indication of its ownership, it cannot be sustained as a valid trade-mark; 150 U. S. 460.

Numerals can be used as trade-marks; 12 Fed. Rep. 717; *contra*, 81 Ky. 73; but not if they indicate quality or grade; 138 U. S. 537; and the same is true of letters when used as trade-marks. See 138 U. S. 537.

Marks that simply indicate the quality of articles do not constitute a valid trade-mark; so of words, etc., which indicate the peculiar excellence of goods, for instance "Ne Plus Ultra" for needles; 13 L. T. n. s. 746; "Nourishing" Stout; L. R. 17 Eq. 59. Words which indicate the purpose and character of medicines or articles cannot be exclusive property for a trade-mark, thus: "Cramp" Cure; 46 Fed. Rep. 625; "Microbe Killer"; 77 Tex. 530. Words which are simply descriptive of the quality or appearance of an article or the place where it was manufactured cannot be monopolized as a trade-mark; 139 U. S. 540. Thus, "Acid Phosphate"; 35 Fed. Rep. 524; "Cherry Pectoral"; 7 Daly 9.

The color of a label or package does not constitute a valid trade-mark. See 140 U. S. 562; 87 Ch. Div. 112; nor can a form of package be a trade-mark; 138 N. Y. 245; 4 Hughes 449.

The following are instances of valid trade-marks: "Celluloid"; 47 Fed. Rep. 712; "Kaiser," beer; 74 *id.* 222; "Royal Baking Powder"; 70 *id.* 876; "Bromo-Caffeine"; 142 N. Y. 467; "La Favorita," flour; 128 U. S. 514; "Star," shirts; 51 Fed. Rep. 823; "Saponifier," soap; 79 *id.* 87; "Vulcan," matches; 139 N. Y. 364; "Ideal," pens; 130 *id.* 301; "Elk," cigars; 37 Fed. Rep. 359; "Bromidia"; 50 *id.* 106; "Swans Down," complexion powder; 85 *id.* 774; "Moxie," nerve food; 33 Fed. Rep. 138; "Charter Oak," for a stove; 16 Blatchf. 876; "Nickle In," cigars; 63 Hun 330; "Valvoline," lubricating oil; 38 Fed. Rep. 922; "Tin Tag," tobacco; 28 Fed. Rep. 434; "Sapolio," soap; 55 How. Pr. 87; "Syrup of Figs," of a medicinal preparation; 7 U. S. App. 588.

The following have been held invalid: "Instantaneous," tapioca; 65 Fed. Rep. 505; "Black Package Tea"; 138 N. Y. 244; "International Banking Company"; 122 N. Y. 65; "Sarsaparilla and Iron"; 100 Cal. 672; "Taffy Tolu," chewing gum; 35 Fed. Rep. 150; "Imperial," beer; 20 C. C. A. 405; acid phosphate; 35 Fed. Rep. 524; "Goodyear Rubber Company"; 128 U. S. 598; "Snowflake," as applied to bread; 67 Ga. 561.

A few instances may be given of the use

of words which have been held to infringe existing trade-marks:

Shrimpton & Hoover is infringed by *Shrimpton Turvey*; 18 Beav. 164; *Julicks* by *Josephs*; L. J., Notes of Cases (1867), 184; *Stephens* by *Steelepen's* for ink; 16 L. T. N. S. 145; *Cocaine* by *Cocaine*; 3 Keyes 594; *The Hero* by *The Heroine*; 7 Phila. 39; *Bovilene* by *Bovina*; 2 Daly 521; *Hostetter & Smith* by *Holsteter & Smyte*; 1 Dill. 329; *Cuticura* soap by *Curative* (the package being also imitated); 75 Fed. Rep. 676; but "No-to-bac" is not infringed by "Baco-Curo"; 82 Fed. Rep. 105.

In technical trade-mark cases, if the plaintiff proves that the defendant has used his trade-mark or a colorable imitation of it, he has established his right to relief.

Numerous cases have arisen where a party, by imitating the labels and packages used in connection with an article already on the market, has attempted to "pass off" his spurious goods on the public as the real article. In this country this is usually called *unfair competition*; in England, *passing off*, and in France, *concurrence déloyale*. The doctrine has been thus stated: The grounds on which unfair competition in trade will be enjoined are either that the means used are dishonest, or that, by false representation or imitation of a name or device, there is a tendency to create confusion in the trade, and work a fraud upon the public, by inducing it to accept a spurious article; 83 Fed. Rep. 30.

The only difference between such cases and technical trade-mark cases lies in the proof required to make out a case. Where a technical trade-mark is imitated there is a presumption of an intent to deceive the public. Where a label or style of package is imitated, it is necessary to show by evidence an intent to deceive the public and to steal the plaintiff's market. This intent may be shown by proof of actual deception, but it may be inferred from an examination of the real and spurious labels, etc.

Under this doctrine will come most of the cases referred to above where geographical names were used. In this class of cases it is held that it is not necessary to show actual deception. That the defendant's method of doing business tends to deceive the public, or that there is a probability of deception, is sufficient; 52 Mo. App. 10; 56 Fed. Rep. 830; 76 id. 959; 96 U. S. 245.

A fraudulent intent is presumed whenever a false statement is used in order to approximate the mark of the competitor; 77 Fed. Rep. 180; 74 id. 225; and also when a word identical with or resembling an important word is placed in the same position on a label or wrapper of the same shape; 26 Fed. Rep. 410; 41 N. W. Rep. 56; or catch words are printed in conspicuous type; L. R. 5 H. L. 508.

If the intent to deceive is established, it will be inferred that the mark is calculated to deceive; 52 Mo. App. 10; L. R. 18 Eq. 138.

The placing of spurious goods upon the market is *prima facie* evidence of damage to the plaintiff; 5 D. G. & S. 126; 6 Hare 325.

It is not necessary to prove that any customer or plaintiff had been deceived; it is sufficient to show that defendant knowingly put it in the power of retail dealers to deceive their customers; 70 Mo. App. 424. The fact that the defendants, who formerly used a label not imitative of complainant's, adopted a new one much resembling his, shortly after a former infringer of complainant's trade-mark came into their employ, is most suggestive of an intentional imitation; 74 Fed. Rep. 225. The similarity must be such as to mislead the ordinary purchaser; 150 U. S. 460. The test of infringement is whether the alleged infringing article is so dressed up as to be likely to deceive persons of ordinary intelligence, exercising the slight care ordinarily used, into purchasing one man's

goods for the goods of another; 80 Fed. Rep. 105.

Cases of passing off frequently involve the use of a person's own name on his goods.

It is generally said that every man has an inherent, natural right to the free employment of his own name in his business; 78 Fed. Rep. 472; 64 id. 841; 76 id. 959; 77 id. 181; 70 id. 1017; 22 id. 41; 13 Beav. 209; 7 id. 84; 13 How. Fr. 453; 147 Ill. 462; 39 N. Y. S. 903; 80 Fed. Rep. 889; 6 L. R. A. 828. But the doctrine has its limitations. Where one uses his own name to identify the origin of his goods which are made at a particular place, no other person by the same name will be permitted to use his name on his own goods if he does it in such a way as to injure the trade and business of another, or so as to represent his goods as the goods of another; 6 L. R. A. (Fla.) 823; 122 Mass. 139. And one who uses his name in competition with an established business carried on by another of the same name, must avoid putting up his goods in such a way as to resemble the goods of the other; 80 Fed. Rep. 889. And one is not entitled to use his name as part of the name of a corporation in order to compete with another of the same name; 70 Fed. Rep. 1017; 78 Fed. Rep. 473; 37 N. Y. S. 203; 66 Fed. Rep. 56. One who uses his name will be protected against the use of that name, even by a person bearing it, in such form as to constitute a false representation of the origin of the goods; 22 Fed. Rep. 41. One cannot use his own name to deceive the public; 64 Fed. Rep. 841; 1 Ch. App. 192. One may trade honestly in his own name, but he must be careful not to trade under his own name in such a manner as to take away that which lawfully belongs to another; he must be careful not to deceive; 4 R. P. C. 215.

One should not, it is submitted, be allowed to lend his name to a firm for the purpose of competing with another of the same name, for, it being settled that he cannot lend it to a corporation (which is merely an association with limited liability), there is no reason why he should associate himself with others under a partnership and lend his name to the concern.

Where the long and successful use of a trade-mark or name is clearly established, the fact that the owner has recognized and permitted the limited use thereof by another which does not appear to have misled anybody, is not sufficient to defeat the owner's right to prevent others from using it; 85 Fed. Rep. 774.

A party may affect his right to a trade-mark by non-use, by a forbearance in suing protectively, and by adopting a new one. But the question of abandonment is always a question of intention; Brown, Trade-Marks 536; equity, however, will not in general refuse an injunction on account of delay in seeking relief where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits; 31 L. T. 285; 45 L. Jour. 505.

An injunction against the use of terms which cannot be protected as trade-marks, will not be granted, where the defendant has persistently warned the public that it has no connection with the plaintiff; 128 U. S. 598. But it is obvious that such a "warning" might be a more efficient cause of injury to the plaintiff.

A foreigner selling medicinal preparations in his own country, under a registered trade-mark, has no common-law right to such trade-mark here, as against a domestic firm which had an established business under a similar trade-mark, adopted in good faith, before the other had sold any goods in this country; 52 Fed. Rep. 455.

Where a patent was obtained for a medical preparation called "Castoria," under which it had attained a large sale, upon the expiration of the patent, the word "Castoria" became the property of the public; 84 Fed. Rep. 955 (C. C. A.).

So of a patented article of manufacture to which the name "Linoleum" had been given; 7 Ch. Div. 834; and of a patented article known as "Granite"; 33 N. Y. Suppl. 443. See PATENT.

Trade-mark treaties with various countries will be found in the official gazette of the patent office.

An act of March 3, 1881, provides for the registration of trade-marks, if the article is used in commerce with foreign nations or Indian tribes. It reserves to the owner all common-law rights; R. S. § 4946. The general trade-mark act of congress was declared unconstitutional in 100 U. S. 83.

In England all trade-marks must be registered, and after five years the registration is conclusive evidence of the title.

The members of a voluntary union of cigar-makers are entitled to protection in the exclusive use of a label to designate the exclusive product of their labor, though they are only employed for wages; 43 S. W. Rep. 180; *contra*, 144 Pa. 235; and so in a recent decision by the Vice-Chancellor in New Jersey, holding an act unconstitutional.

The courts will not grant relief where there is a false representation, calculated to deceive the public, as to the manufacture of an article, and the place where it is manufactured; 96 Cal. 518. See *supra*. Where a complainant uses a geographical name to represent untruthfully the place of his manufacture he cannot obtain relief; 108 U. S. 218; 123 Mass. 477; 8 Fed. Rep. 29; 70 id. 376; [1891] 2 Ch. 166.

A trade-mark is not subject to execution, unless under authority of statute; 20 N. Y. Sup. 462.

See Brown, Trade Marks; as to unfair competition, 4 Harv. L. Rev. 321, by Grafton D. Cushing.

TRADE NAME. See TRADE-MARK.

TRADE, RESTRAINT OF. See RESTRAINT OF TRADE.

TRADE SECRETS. An employee who, in consideration of an increase in his wages, agrees not to reveal the secrets of his master's trade which are revealed to him, has no right to reveal the secrets so obtained, for his own private use, or reveal them to others. In such case equity will interfere to protect the master; 165 Pa. 24. See PRIVACY; INJUNCTION.

TRADER. One who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. See 80 N. C. 481; 76 Me. 500. The *quantum* of dealing is immaterial, when an intention to deal generally exists; 2 C. & P. 135; 1 Term 572. The principal question is whether the person has the intention of getting a living by his trading; if this is proved, the extent or duration of the trading is not material; 3 Camp. 233.

Questions as to who is a trader most frequently arise under the bankrupt laws; and the most difficult among them are those cases where the party follows a business which is not that of buying and selling principally, but in which he is occasionally engaged in purchases and sales.

A farmer who, in addition to his usual business, occasionally buys a horse not calculated for his usual occupation, and sells him again to make a profit, and who in the course of two years had so bought and sold five or six horses, two of which had been sold, after he had bought them, for the sake of a guinea profit, was held to be a trader; 1 Term 537, n.; 1 Price 20. Another farmer, who bought a large quantity of potatoes, not to be used on his farm, but merely to sell again for a profit, was also declared to be a trader; 1 Stra. 513. See 5 B. & P. 78; 11 East 274. A butcher who kills only such cattle as he has reared himself is not a trader, but if he buy them and kill and sell them with a view to profit, he is a trader; 4 Burr. 21, 47. A brick-maker who follows the business for the purpose of enjoying the profits of his real estate merely is not a trader; but when he buys the earth by the load or otherwise, and

manufactures it into bricks, and sells them with a view to profit, he is a trader; 7 East 442; 3 C. & P. 500; so is a brewer; 47 Minn. 71; and one who is engaged in the manufacture and sale of lumber is a trader; 1 B. R. 281; so is one engaged in buying and selling goods for the purpose of gain, though but occasionally; 2 id. 15; but the keeper of a livery stable is not; 3 N. Y. Leg. Obs. 282; nor is one who buys and sells shares; 2 Ch. App. 466.

TRADESMAN. Primarily, one who trades. But usually means a shopkeeper. Anderson; 7 Biss. 155. In England, a shopkeeper; in the United States, a mechanic or artificer of any kind, whose livelihood depends on the labor of his hands; 4 Pa. 472; a farmer is not a tradesman; 83 L. J. M. C. 80; a laundryman is not; 5 D. R. (Pa.) 43.

TRADES UNIONS. See LABOR UNION.

TRADING PARTNERSHIP. Whenever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation. 145 U. S. 516, citing 22 How. (U. S.) 268, 5 Pet. (U. S.) 561. See NON-TRADING PARTNERSHIP; PARTNERSHIP.

TRADING STAMPS. The current name for a scheme which consists of "an agreement between a number of merchants and a corporation that the latter shall print the names of the former in its subscribers' dictionary and circulate a number of copies of the book, and that the merchants shall purchase of the corporation a number of so-called trading stamps, to be given to purchasers with their purchases, and by them preserved and pasted in the books aforesaid until a certain number have been secured, when they shall be presented to the corporation in exchange for the choice of certain articles kept in stock by the corporation." 56 Alb. L. J. 488. In a case brought upon an act of congress of February 17, 1873, which forbids the sale of real estate or any article of merchandise or taking of payment with a promise to give any article or thing, in consideration of the purchase by any person of any other article or thing, etc., it was held that the business was nothing more nor less than a gaming device; *id.*

TRADITIO BREVIS MANUS (Lat.). In Civil Law. The delivery of a thing by the mere consent of the parties.

TRADITIO LONGA MANU. A species of delivery which takes place where the transferor places the article in the hands of the transferee. Mackeld. Rom. L. § 284.

TRADITION (Lat. *trans*, over, *do*, dare, to give). The act by which a thing is delivered by one or more persons to one or more others.

The delivery of possession by the proprietor with an intention to transfer the property to the receiver. Two things are, therefore, requisite in order to transmit property in this way: the *intention* or *consent* of the former owner to transfer it, and the *actual delivery* in pursuance of that intention.

Tradition is either real or symbolical. Real tradition takes place where the *ipsa corpora* of movables are put into the hands of the receiver. *Symbolical tradition* is used where the thing is incapable of real delivery, as, in immovable subjects, such as lands and houses, or such as consist in *jura* (things incorporeal), as, things of fishing, and the like. The property of certain movables, though they are capable of real delivery, may be transferred by symbol. See DELIVERY; SYMBOLICAL DELIVERY.

TRADITOR (Lat. from *tradere*, to betray). A traitor; one guilty of high treason. Burrill; Fleta, 1. 21. 8.

TRAFFIC. Commerce; trade; sale or

exchange of merchandise, bills, money, and the like. The passing of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who traffics or a trader, a merchant. 44 Ohio St. 673.

TRAFFIC RATES. See RATES.

TRAHENS (Lat. from *trahere*, to draw). In French Law. The drawer of a bill. Burrill; Story on Bills, § 12, n.

TRAJECTITIA. See NAUTICA PECUNIA.

TRAIL-BASTON. See JUSTICE OF TRAIL-BASTON.

TRAIN. A number of cars coupled together and moving from point to point, under an impetus imparted by a locomotive which had been detached, is a train. 164 Mass. 23. In the Hours of Service Act, § 1: A locomotive and seven or eight cars moving at one time by switching crews between the docks and the warehouses or team tracks of a terminal company constitute a train. 249 U. S. 307.

In the Safety Appliance Acts: A moving locomotive with cars attached is not a train where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains. 254 U. S. 254, 255.

TRAIN-WRECKING. A conviction is not justified, where no actual wrecking occurred, unless the intention of the defendant to do so is shown; 21 S. E. Rep. 591. The indictment need not specify the passengers who were endangered; 13 S. W. Rep. 783. See CRIMES.

TRAITOR. One guilty of treason. See TREASON.

TRAITOROUSLY. In Pleading. A technical word, which is essential in an indictment for treason in order to charge the crime, and which cannot be supplied by any other word or any kind of circumlocution. Having been well laid in the statement of the treason itself, it is not necessary to state every overt act to have been traitorously committed.

TRAJECTITIA PECUNIA. See PECUNIA TRAJECTITIA.

TRAMP. One who roams about from place to place, begging or living without labor or visible means of support; a vagrant. Many of the states have recently adopted suitable legislation upon the subject, corresponding to the English vagrant acts. The object of these statutes is accomplished by arresting offenders and setting them to work on municipal improvements, or hiring them out to private employers, for a limited time, in Delaware for a month, for which they receive food, lodging, and reasonable wages. In some states the punishment is by imprisonment. It is doubtful if mere vagrancy was indictable at common law; 1 Bish. Cr. L. § 515. Where there is no statutory definition of vagrancy, it will depend upon the common-law meaning; 90 Mich. 3.

TRANSACT. In common parlance, equivalent to *carry on*, when used with reference to business. 8 Mont. 140. In Scotch Law, to compound. English.

TRANSACTIO. The settlement of a suit or matter in controversy, by the litigating parties, between themselves, without referring it to arbitration. Burrill; Halifax, Anal. 3. 8. 14. An agreement by which a suit, either pending or about to be commenced, was foreborne or discontinued on certain terms. *Id.*; Calv. Lex.

One of the in nominate contracts of the Roman Law, equivalent to the transaction of French law. R. & L. Diet.

TRANSACTION (from Lat. *trans*, and *ago*, to carry on). The doing or performing of any business; the management of an affair. 91 Tenn. 173. The term transaction is a broader one than contract; 70 Cal. 118.

In Civil Law. An agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their difference, by mutual consent, in the manner which they agree on. In Louisiana this contract must be reduced to writing. La. Civ. Code, art. 3088.

To transact, a man must have the capacity to dispose of the things included in the transaction. In the common law this is called a compromise. See COMPROMISE.

TRANSCRIPT. A copy of an original writing or deed.

TRANSCRIPT OF RECORD. The printed record as made up in each case for the supreme court of the United States is so called.

TRANSFER (Lat. *trans*, over, *fero*, to bear or carry). The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter. See 16 Neb. 238; 1 Ala. 669; STOCK; ELECTION.

TRANSFERABLE. The word includes every means by which property may be passed from one person to another. 17 Ch. Div. 9.

TRANSFEE. He to whom a transfer is made.

TRANSFEROR. One who makes a transfer.

TRANSGRESSION (Lat. *trans*, over, *gressus*, a stepping). The violation of a law.

TRANSGRESSIONE. In Old English Law. A writ or action of trespass.

TRANSHIPMENT. The act of taking the cargo out of one ship and loading it in another.

When this is done from necessity, it does not affect the liability of an insurer on the goods; Abbott Shipp. 240. But when the master transships goods without necessity, he is answerable for the loss of them by capture by public enemies; 1 Gall. 443.

TRANSIENT. Going or passing over; moving about. Within the meaning

of a poor-law a "transient person" is not exactly a person on a journey from one place to another, but rather a wanderer ever on the tramp. 51 Vt. 423. A transient foreigner is one who visits the country, without the intention of remaining; 10 Tex. 170. A doctor's office is not merely "transient," where he rents it by the year, and there keeps regular hours on three certain days per week; 7 D. R. Pa. 413.

Transient foreigner. One who visits a country without intention of remaining. *Id.*; 10 Tex. 170.

Transient person. Not exactly a person on a journey from one known place to another, but rather a wanderer ever on the tramp. *Id.*; 6 Vt. 203.

TRANSITIVE COVENANT. An obligation which devolves also upon the covenantor's representatives. Anderson.

TRANSIRE. A warrant for the custom-house to let goods pass; a permit. See for a form of a *transire*, Hargr. L. Tr. 104.

TRANSITIVE COVENANT. An obligation which binds not only the covenantor, but also his representatives.

TRANSITORY ACTION. An action the cause of which might have arisen in one place or county as well as another.

In general, all personal actions, whether *ex contractu*; 5 Taunt. 25; 2 Johns. Cas. 335; 3 S. & R. 500; or *ex delicto*; 1 Chitty, Pl. 243; are transitory; and may be maintained in a state other than the one in which the injuries were inflicted, where the cause of action is grounded on the principles of the common law, recognized in both states; 68 N. W. Rep. (Wis.) 664.

Such an action may at common law be

brought in any county which the plaintiff elects. See JURISDICTION; LOCAL ACTIONS.

TRANSITUS (Lat.). A transit. See STOPPAGE IN TRANSITU.

TRANSLATION. The reproduction in one language of what has been written or spoken in another.

In pleading, when a libel or an agreement written in a foreign language must be averred, it is necessary that a translation of it should also be given.

"Making a translation [of a contract in a foreign language] is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the words used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you want a competent translator, competent to translate in that way, and if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what was that meaning. Amongst those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert." [1891] 1 Q. B. 82, per Lord Esher, M. R.

In evidence, when a witness is unable to speak the English language so as to convey his ideas, a translation of his testimony must be made. In that case an interpreter should be sworn to translate to him, on oath, the questions propounded to him, and to translate to the court and jury.

See INTERPRETER.

The bestowing of a legacy which had been given to one, on another: this is a species of ademption; but it differs from it in this, that there may be an ademption without a translation, but there can be no translation without an ademption. Bacon, *Abr. Legacies* (C).

The transfer of property; but in this sense it is seldom used. 2 Bla. Com. 294.

In Ecclesiastical Law. The removal from one place to another; as, the bishop was translated from the diocese of A to that of B.

In the Civil Law, translation signifies the transfer of property. *Clef des Lois Rom.*

See COPYRIGHT.

TRANSMISSION (Lat. *trans*, over, *mittere*, to send) In Civil Law. The right which heirs or legatees may have of passing to their successors the inheritance or legacy to which they were entitled, if they happen to die without having exercised their rights. Domat, liv. 3, t. 1, s. 10; 4 Toullier, n. 186.

TRANSPORTATION. In the Interstate Commerce Act of 1887 as amended 1906: Includes all the instrumentalities and facilities of shipment and all services in connection with the receipt, delivery, and handling of property transported. **In English Law.** A punishment inflicted by virtue of sundry statutes; it was unknown to the common law. 2 H. Blackst. 238.

Transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another; nor that it be incidental to a transfer of the possession or title. If one carries in his own conveyance for his own purposes it is transportation no less than when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. 262 U. S. 122; 252 U. S. 465.

Definition as enlarged by the Hepburn Act. Includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and

transfer in transit, ventilation, refrigeration, or icing, storage, and hauling of property transported. 250 U. S. 467.

Transportation of a commodity prohibited "into" a State does not preclude transportation of it through such a State to another, 249 U. S. 374.

Transportation means not only the physical instrumentalities, but all services in connection with receipt, delivery and handling of property transported. 222 U. S. 440.

TRANSVAAL. A Republic of South Africa. The president is elected for five years, and has a council of four members. The legislature is in a dual chamber, the first Volksraad and second Volksraad. The Dutch Reformed Church is the dominant religion.

TRASH. Railroad ties would not fall within the meaning of the term "trash," as it is usually understood, nor would iron or steel rails be understood to pass by this term, trash. 149 Ky. 580, 149 S. W. 960.

TRAVAIL. The act of child-bearing. A woman is said to be in her travail from the time the pains of child-bearing commence until her delivery. 5 Pick. 68.

TRAVELING AGENT. A "traveling agent" is not a "peddler." 150 Ky. 634, 150 S. W. 814. Cf. PEDDLER.

TRAVELING SALESMAN. A traveling salesman has been held not to be a clerk, laborer, or tradesman within an act giving preference to wages. 28 Am. & Eng. Encyc. 2nd ed., 455; 12 Pa. Co. Ct. 363.

The term "traveling salesman" used in the act of Dec. 14, 1896, means to include only that class of persons engaged in selling goods, either by sample or otherwise, who travel on this business from city to city and from town to town, and whose business relations are connected with those who in such cities or towns are likewise engaged in business which contemplates a resale of the goods sold, or consumption in large quantities. The provisions of that act do not contemplate another and entirely different class of persons who, in a given town, city, or county, go from house to house in their effort to take orders for goods. *Id.*; 105 Ga. 367.

It was held that an agent of a firm or corporation who goes from town to town in the state exhibiting samples of goods, and taking orders on his employer or employers for such goods from consumers, was a traveling salesman. *Id.*; 110 Ga. 312. See COMMERCIAL TRAVELLER.

TRAVELLER. One who passes from place to place, whether for pleasure, instruction, business, or health; 47 Ala. 45; 5 C. B. n. s. 442; 10 *id.* 429. The term is used to designate those who patronize inns; the distance which they travel is not material; 85 Conn. 185.

The question whether one is or is not a *bona fide* traveller is one of fact; [1893] 1 Q. B. 522. One would be a traveller if he came abroad from any legitimate motive and needed refreshment, but not if he came abroad merely to go to a public house and obtain a drink; 17 C. B. n. s. 539. Walking for exercise is not travelling; 14 Allen 475. Within the meaning of a policy of insurance, one who has been carried by a steamboat and walked eight miles from the landing to his home is not, whilst walking, a traveller by public or private conveyance; 16 Wall. 336. Within the meaning of a law allowing a person travelling to carry concealed weapons, the travelling must be on a journey beyond the ordinary habit, business, or duties of a person, and beyond the circle of his friends and acquaintances; 53 Ala. 520; 42 Tex. 464. See SUNDAY.

Traveler's Insurance. "Traveler's insurance" is a distinct branch of insurance relating to the insurance of lives of persons engaged in traveling. It is a generic term. 142 Ky. 529, 134 S. W. 877.

TRAVERSE (L. Fr. *traverser*, to turn over, to deny). To deny; to put off.

In Civil Pleading. To deny or controvert anything which is alleged in the previous pleading. Lawes, Pl. 116. A denial. Willes 234. A direct denial in formal words: "Without this, that, etc." (*absque hoc*). 1 Chitty, Pl. 523, n. a. A traverse may deny all the facts alleged; 1 Chitty, Pl. 525; or any particular material fact; 20 Johns. 406.

A common traverse is a direct denial, in common language, of the adverse allegations, without the *absque hoc*, and concluding to the contrary. It is not preceded by an inducement, and hence cannot be used where an inducement is requisite; 1 Saund. 103 b.

A general traverse is one preceded by a general inducement and denying all that is last before alleged on the opposite side, in general terms, instead of pursuing the words of the allegation which it denies; Pepper, Pl. 17. Of this sort of traverse the replication *de injuria sua propria absque tali causa*, in answer to a justification, is a familiar example; Steph. Pl. 171.

A special traverse is one which commences with the words *absque hoc*, and pursues the material portion of the words of the allegation which it denies; Lawes, Pl. 116. It is regularly preceded by an inducement consisting of new matter; Steph. Pl. 188. A special traverse does not complete an issue, as does a common traverse; 20 Viner. Abr. 839.

A traverse upon a traverse is one growing out of the same point or subject-matter as is embraced in a preceding traverse on the other side; Gould, Pl. c. 7, § 42, n. It is a general rule that a traverse well intended on one side must be accepted on the other. And hence it follows, as a general rule, that there cannot be a traverse upon a traverse if the first traverse is material. The meaning of the rule is that when one party has tendered a material traverse the other cannot leave it and tender another of his own to the same point upon the inducement of the first traverse, but must join in that first tendered; otherwise the parties might alternately tender traverses to each other in unlimited succession, without coming to an issue; Gould, Pl. c. 7, § 42. The rule, however, does not apply where the first traverse is immaterial, nor where it is material if the plaintiff would thereby be ousted of some right or liberty which the law allows; Cro. Eliz. 99, 418; Bacon, *Abr. Pleas* (H 4).

In Criminal Practice. To put off or delay the trial of an indictment till a succeeding term. More properly, to deny or take issue upon an indictment. 4 Bla. Com. 351.

TRAVERSE JURY. See JURY.

TREASON. In Criminal Law. This word imports a betraying, treachery, or breach of allegiance. 4 Bla. Com. 75. In England, treason was divided into high and petit treason. The latter, originally, was of several forms, which, by 25 Edw. III. st. 5, c. 2, were reduced to three: the killing by a wife, of her husband; by a servant, of his master; and the killing of a prelate by an ecclesiastic owing obedience to him. These kinds of treason were abolished in 1828. In America they were unknown; here treason means high treason.

"Treason it has been said is not felony but a grade of crime by itself." 29 N. J. L. 453, 464.

The constitution of the United States, art. 3, s. 3, defines treason against the United States to consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. By the same article of the constitution, no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

It is "the only crime defined by the constitution. . . . The clause was borrowed from an ancient English statute, enacted in the year 1352. Previous to the passage of that statute there was great uncer-

tainty as to what constituted treason. Numerous offences were raised to its grade by arbitrary construction of the law. The statute was passed to remove this uncertainty and to restrain the power of the crown to oppress the subject by constructions of this character. It comprehends all treason under seven distinct branches. The framers of our constitution selected one of these branches, and declared that treason against the United States should be restricted to the acts which it designates. 'Treason against the United States,' is the language adopted, 'shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort.' No other acts can be declared to constitute the offence. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment. Field, J., in 4 Sawy. 465.

By the same article of the constitution, no 'attainder of treason shall work corruption of blood except during the life of the person attainted.' Every person owing allegiance to the United States who levies war against them, or adheres to their enemies giving them aid and comfort within the United States or elsewhere, is guilty of treason; R. S. § 5331. The penalty is death, or, at the discretion of the court, imprisonment at hard labor for not less than five years and a fine of not less than ten thousand dollars; and every person convicted of treason is rendered incapable of holding any office under the United States; R. S. § 5332.

The term *enemies*, as used in the constitution, applies only to subjects of a foreign power in a state of open hostility with us. To constitute a 'levying of war' there must be an assemblage of persons with force and arms to overthrow the government or resist the laws. All who aid in the furtherance of the common object of levying war against the United States, in however minute a degree, or however remote from the scene of action, are guilty of treason; 4 Sawy. 457.

Treason may be committed against a state; 4 Story 614; 11 Johns. 549.

See, generally, 3 Story, Const. § 1796; Sergeant. Const. c. 30; Cooley, Const. Lim. 380; Rawle, Const. § Bish. Cr. Law; 20 Wall. 92; 16 id. 147; 92 U. S. 202; 93 id. 274.

As to the Law of Treason under the Roman Empire, see 22 Law Mag. and Rev. 23; 15 Cr. Law Mag. 191; 46 Alb. Law J. 345.

TREASURE. A thing hidden or buried in the earth which no one can prove as his property, and which is discovered by chance. La. Civ. C. art. 3423, par. 2.

TREASURE TROVE. Found treasure.

This name is given to such money or coin, gold, silver, plate, or bullion, which, having been hidden or concealed in the earth, or other private place, so long that its owner is unknown, has been discovered by accident. Should the owner be found, it must be restored to him; and in case of not finding him, the property, according to the English law, belongs to the king. In the latter case, by the civil law, when the treasure was found by the owner of the soil, he was considered as entitled to it by the double title of owner and finder; when found on another's property, one-half belonged to the owner of the estate and the other to the finder; when found on public property, it belonged one-half to the public treasury and the other to the finder. *Arrears du Dr. Rom.* § 320-322. This includes not only gold and silver, but whatever may constitute riches: as vases, urns, statues, etc.

If the owner is known it is not technically treasure-trove; 74 Me. 456. The crown is *prima facie* entitled to treasure trove and there need not be an inquest to inform the crown of its rights; 41 W. R. 294.

TREASURER. An officer intrusted with the treasures or money either of a private individual, a corporation, a company, or a state. See OFFICER; SURETSHIP; LORD HIGH TREASURER; LORD TREASURER.

TREASURER OF THE UNITED STATES. An officer is appointed by the president by and with the advice and con-

sent of the senate. He is required to give bond, with sufficient sureties, approved by the secretary of the treasury and the first comptroller, in the sum of \$150,000, payable to the United States, for the faithful performance of the duties of his office and for the fidelity of the persons by him employed.

His principal duties are—to receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the secretary of the treasury, countersigned by either comptroller and recorded by the register; to take receipts for all moneys paid by him; to render his account to the first comptroller quarterly, or oftener if required, and transmit a copy thereof, when settled, to the secretary of the treasury; to lay before each house, on the third day of every session of congress, fair and accurate copies of all accounts by him from time to time rendered to and settled with the first comptroller, and a true and perfect account of the state of the treasury; to submit at all times to the secretary of the treasury and the comptroller, or either of them, the inspection of the moneys in his hands. R. S. §§ 301-311. See DEPARTMENT.

TREASURER'S REMEMBRANCE. An official of the Exchequer who prepared the financial business which was to be brought before the barons at the time when they and the treasurer managed the king's revenues. He whose charge was to put the lord treasurer and the rest of the judges of the exchequer in remembrance of such things as were called on and dealt in for the sovereign's behoof. There is still one in Scotland. Whart.

TREASURY. The place where treasure is kept; the office of a treasurer. The term is more usually applied to the public than to a private treasury. The word is held not to be understood in the sense of locality as descriptive of a particular building, but whenever and where ever moneys are in the official custody of the treasurer or subject to his direction they are to be considered as in the state treasury. 10 Mich. 86. See DEPARTMENT.

TREASURY CHEST FUND. A fund in England originating in the unusual balances of certain grants of public money, and which is used for the purpose of banking and loan companies by the commissioners of the treasury. Whart. A fund not exceeding £1,000,000, which the treasury may employ to make advances for any public service, to be repaid out of moneys appropriated by parliament to such service. Byrne.

TREASURY NOTES. The treasury notes of the United States payable to holder or to bearer at a definite future time are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character. Where such a paper is overdue a purchaser takes subject to the rights of antecedent holders to the same extent as in other paper bought after its maturity; 21 Wall. 138. See LEGAL TENDER.

TREASURY STOCK. See STOCK.

TREATY. A compact made between two or more independent nations with a view to the public welfare. Treaties are for a perpetuity, or for a considerable time. Those matters which are accomplished by a single act and are at once perfected in their execution are called agreements, conventions, and pactions.

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. With all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer

certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute 112 U. S. 598, 599.

Personal treaties relate exclusively to the persons of the contracting parties, such as family alliances, and treaties guaranteeing the throne to a particular sovereign and his family. As they relate to the persons, they expire of course on the death of the sovereign or the extinction of his family.

Real treaties relate solely to the subject-matters of the convention, independently of the persons of the contracting parties, and continue to bind the state, although there may be changes in its constitution or in the persons of its rulers. Boyd's Wheat. Int. Law § 29.

On the part of the United States, treaties are made by the president, by and with the consent of the senate, provided two-thirds of the senators present concur. Const. art. 2, s. 2, n. 2.

No state shall enter into any treaty, alliance, or confederation; Const. art. 1, s. 10, n. 1; nor shall any state, without the consent of congress, enter into any agreement or compact with another state or with a foreign power; id. art. 1, sec. 10, n. 2.

A treaty is declared to be the supreme law of the land, and is, therefore, obligatory on courts; 1 Cra. 103; 1 Paine 55; 124 U. S. 190; 119 id. 407; whenever it operates of itself without the aid of a legislative provision; but when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial, department, and the legislature must execute the contract before it can become a rule of the court; 2 Pet. 814. A treaty is a law of the land whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; 143 U. S. 472. So an award by arbitrators under a treaty between the United States and another nation, by which the contracting nations agree that the decision of the tribunal of arbitration shall be a final settlement of all questions submitted, becomes the supreme law of the land and is as binding on the courts as an act of congress; 75 Fed. Rep. 513, reversing 45 id. 575.

It need hardly be said that a treaty cannot change the constitution or be held valid if it be in violation of that instrument. A treaty may supersede a prior act of congress, and an act of congress may supersede a prior treaty; and this is true both of treaties with Indians and foreign nations; 11 Wall. 620; 8 Op. Atty-Gen. 354; 43 Fed. Rep. 17; 55 id. 80; 148 U. S. 427; 149 id. 698; 18 Sup. Ct. Rep. 340.

A treaty providing that aliens may inherit lands is controlling, though in conflict with the laws of a state; 71 N. W. Rep. (Ia.) 204.

The question whether the United States is justified in disregarding its engagements with another nation is not one for the determination of the courts; 130 U. S. 581.

Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them; 133 U. S. 258.

So far as a treaty can be made the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal; 124 U. S. 190; 130 *id.* 238, 581, 143 *id.* 570.

Treaties are agreements between nations of a general nature bearing upon political or commercial questions, and are distinguished from conventions which are agreements relating to minor or specific subjects, such as consular conventions and postal conventions. The right to negotiate treaties is one of the tests of sovereignty. The king is usually the treaty-making power in a monarchy, though in modern times more or less restricted, and in a republic, the chief executive or some part of the legislature. After treaties have been negotiated and signed they must be ratified by the proper authorities of each state. Treaties usually provide for their own termination, but independently of that it has been held that when a treaty becomes dangerous to the life or incompatible with the independence of a state or a permanent obstacle to the development of its constitution or the rights of its people, it can be abdicated, and also when the condition of affairs which formed the basis of the treaty has become so modified by time that its execution has become contrary to the nature of things and the original intention of the parties; 22 Ct. Cls. 408. When war is declared between two states all treaties of specific relations between them cease. Snow, Int. L. 72. A treaty with a state is considered by the United States as abrogated when such state is conquered by or incorporated into another state. But England has taken an opposite position. War may affect existing treaties in various ways, but only those binding upon one or both belligerents; where they expressly provide for matters that relate only to a condition of war, they are not affected. Such was the Geneva Convention, 1864, as to the treatment of the wounded. Similarly those which create some permanent state affairs by an act done once for all; e. g. the settlements made by the Treaty of Vienna, 1815. So of a treaty ceding territory. But treaties which regulate commercial and social relations between the belligerents are at least suspended and possibly annulled by a war between them. That which relates to a continuous course of conduct, binding upon one or more belligerents and one or more third powers, will be continued, suspended, or annulled, according to the provisions. Risley, Law of War 85. But the practice has been so various and inconsistent that there is no basis for any general rule as to the effect of war on treaties; *id.* On breach of a treaty by one party to it, the other may declare a breach, or waive the breach and let the treaty remain in force; 1 Kent 175. Unless otherwise stipulated the breach of any one article of a treaty is a violation of the whole; *id.* Private rights may be sacrificed by treaty, for the public safety, but the government should compensate the individuals whose rights are affected; 1 Kent 167; 3 Dall. 199.

As affecting the rights of contracting governments, a treaty is binding from the date of its signature, and the exchange of signatures has a retroactive effect, confirming the treaty from its date; but a different rule prevails when the treaty operates on individual rights; 9 Wall. 32.

The law of the interpretation of treaties is substantially the same as in the case of other contracts; Wools. Int. L. 185. See 22 Ct. Cls. 1.

See Herstlet, collection of Commercial Treaties; PRECEDENCE; SIGNATORY.

TREATY OF PEACE. A treaty of peace is an agreement or contract made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace and reg-

ulate the manner in which it is to be restored and supported. Vattel, b. 4, c. 2, § 9.

Peace may be restored between belligerents by the cessation of hostilities; by the submission of one belligerent to another; and by a treaty of peace between the belligerents; 3 Phill. Int. L. 772; a formal declaration that war has ceased is not necessary; *id.* The belligerents may agree that possession shall be restored as it was before the war, that is, according to the *status quo ante bellum*; or that they shall remain as they were at the end of the war, which is expressed by the formula, *uti possidetis (q. v.)*.

Overtures of peace may be made by either belligerent; or by a neutral; or by a state acting as a passive ally of either belligerent; or a neutral power may act as a mediator or interpose its good offices; 3 Phill. Int. L. 775.

Peace renders unlawful every act of force or violence between the states, and a capture, though made by a person ignorant of the completion, must be restored; 3 Phill. Int. L. 777; but it is said not to bind the subjects of the belligerent states until it is notified to them; Vattel 24. Where a period has been fixed by the treaty of peace for the cessation of hostilities, there is a difference of opinion as to whether a capture made before that period, but with knowledge of the peace, is lawful; that it is, see 1 Kent *172; 3 Phill. Int. L. 779. Where a capture was made before the period fixed for a cessation of hostilities, and in ignorance of the peace, and after the period, but in ignorance of the peace, there was a recapture, the recapture was held unlawful; the intervention of peace barred the title of the owner; 1 Kent 173; 6 C. Rob. 138.

TREBLE COSTS. In English Practice. The taxed costs and three-fourths the same added thereto. It is computed by adding one-half for double costs, and in addition one-half of one-half for treble costs. 1 Chitty, Pr. 27.

In American Law. In Pennsylvania the rule is different: when an act of assembly gives treble costs, the party is allowed three times the usual costs, with the exception that the fees of the officers are not to be trebled when they are not regularly or usually payable by the defendant; 2 Rawle 201.

And in New York the directions of the statute are to be strictly pursued, and the costs are to be trebled; 2 Dunl. Pr. 731.

TREBLE DAMAGES. See MEASURE OF DAMAGES.

TREBUCKET. The name of an engine of punishment, said to be synonymous with *tumbrel*.

TREE. A woody plant, which in respect of thickness and height grows greater than any other plant.

A woody plant, the branches of which spring from, and are supported upon, a trunk or body. It may be young or old, small or great; 70 Miss. 411.

Trees are part of the real estate while growing and before they are severed from the freehold; but as soon as they are cut down they are personal property. Some trees are timber trees, while others do not bear that denomination. See TIMBER.

Trees belong to the owner of the land where they grow; but if the roots go out of one man's land into that of another, or the branches spread over the adjoining estates, such roots or branches may be cut off by the owner of the land into which they thus grow; Rolle 394; 6 Ves. Ch. 109; 78 Cal. 611. See 107 Mass. 234; Wood, Nuis. § 112.

When the roots grow into the adjoining land, the owner of such land may lawfully claim a right to hold the tree in common with the owner of the land where it was planted; but if the branches only overshadow the adjoining land, and the roots do not enter it, the tree wholly belongs to the owner of the estate where the roots grow; 1 Ld. Raym. 737. See 1 Pick. 224;

6 N. H. 430. When the tree grows directly on the boundary-line, so that the line passes through it, it is the property of both owners, whether it be marked as a boundary or not; 12 N. H. 454; 83 Ia. 801; 34 Barb. 547; 38 Vt. 115. As to sales of standing timber, see 8 Harv. L. Rev. 367; SALE. See TIMBER TREES; NUISANCE.

An electric company may, in the observance of a statute, trim trees, if necessary, but not so as to do unnecessary damage; Crosw. Electr. 209; 39 La. Ann. 996. The subject is regulated by statute in Connecticut, Maryland, Michigan, New Hampshire, and Vermont.

Where the branches of a tree growing upon the land of one person overhang that of his neighbor, one may, without notice, cut off so much of a tree as overhangs his land, if he can do so without going upon the land of the owner, and such owner cannot acquire, either by prescription or the statute of limitations, the right to overhang his neighbor's land; [1895] App. Cas. 1, affg. [1894] 3 Ch. 1; and where a tree stands on the dividing line between adjoining lots, either owner may cut off branches or roots extending over his own land; 65 Conn. 365, distinguishing 11 *id.* 177; but it has been held that an injunction will lie to restrain an adjoining owner of a rural lot from destroying a tree growing on the division line; 35 W. N. C. Pa. 364. The owner of land on which a partially decayed tree is permitted to stand in such position that by falling it would damage the house of another, is liable for damages caused by its falling after he has been notified that it was dangerous; 4 App. Div. N. Y. 198. See STANDING TREES.

TRESAILE, or TRESAYLE. The grandfather's grandfather. 1 Bla. Com. 186.

TRESPASS. Any misfeasance or act of one man whereby another is injuriously treated or damaged. 7 Conn. 125.

Any unlawful act committed with violence, actual or implied, to the person, property, or rights of another.

Any unauthorized entry upon the realty of another to the damage thereof.

The word is used oftener in the last two somewhat restricted significations than in the first sense here given. In determining the nature of the act, neither the amount of violence or the intent with which it is offered, nor the extent of the damage accomplished or the purpose for which the act was committed, are of any importance: since a person who enters upon the land of another without leave, to lead off his own runaway horse, and who breaks a blade of grass in so doing, commits a trespass; 35 John. 385; 3 Johns. 5.

It is said that some damage must be committed to make an act a trespass. It is undoubtedly true that damage is required to constitute a trespass for which an action will lie; but, so far as the tort itself is concerned, it seems more than doubtful if the mere commission of an act affecting another, without legal authority, does not constitute trespass, though until damage is done the law will not regard it, inasmuch as the law does not regard trifles.

The distinction between the different classes of trespass is of importance in determining the nature of the remedy.

A trespass committed with force is said to be done *vi et armis*; one committed by entry upon the realty, by breaking the close.

In Practice. A form of action which lies to recover damages for the injury sustained by the plaintiff, as the immediate consequence of some wrong done forcibly to his person or property, against the person committing the same.

The action lies for injuries to the person of the plaintiff, as, by assault and battery, wounding, imprisonment, and the like; 9 Vt. 352; 6 Blackf. 375.

It lies, also, for forcible injuries to the person of another, whereby a direct injury is done to the plaintiff in regard to his rights as parent, master, etc.; 2 Caines 292; 8 S. & R. 86. It does not lie for mere non-feasance, nor where the matter affected was not tangible.

An action of trespass at common law will lie in a state court by the owner of one vessel against the owner of another for damages by fire at a wharf; 128 U. S. 182.

The action lies for injuries to personal property, which may be committed by the several acts of unlawfully striking,

chasing if alive, and carrying away to the damage of the plaintiff, a personal chattel; 1 Wms. Saund. 84; Cro. Jac. 362; of which another is the owner and in possession; 5 Vt. 97; and for the removal or injury of inanimate personal property; 13 Pick. 139; 5 Johns. 345; of which another has the possession, actual or constructive; 21 Pick. 369; 13 Johns. 141; 6 W. & S. 823; without the owner's assent. A naked possession or right to immediate possession is sufficient to support this action; 7 Johns. 585; 17 S. & R. 251; 11 Mass. 70; 10 Vt. 165.

An action lies for an unintentional act of trespass, even if there is no malice; 19 Johns. 88; but a man who accidentally shoots another, without negligence, is not liable in an action of trespass; [1891] 1 Q. B. 86. See 153 U. S. 39; TRESPASSER.

The action lies also for injuries to the realty consequent upon entering without right upon another man's land (breaking his close). The inclosure may be purely imaginary; 1 D. & B. 371; but reaches to the sky and to the centre of the earth; 19 Johns. 381.

In an action of trespass, or trespass on the case, on land, the courts cannot try the title to the land; 86 Fed. Rep. 269. An action for trespass on land is a local action and can be brought only within the state in which the land lies; 153 U. S. 105.

An injunction will lie to restrain a trespass when the injury is irreparable, or when the trespass is a continuing one, as by cutting trees on forest land; 84 Fed. Rep. 546; Pom. Eq. Jur. 185, § 1857. See INJUNCTION.

The plaintiff must be in possession with some title; 5 East 485; 9 Johns. 61; 4 Watts 377; 4 Pick. 803; 31 Pa. 304; 5 Harring. 320; 11 Ired. 417; see 45 Mo. App. 270; though mere title is sufficient where no one is in possession; 1 Wend. 496; 1 Vt. 485; as in case of an owner to the centre of a highway; 4 N. H. 96; and mere possession is sufficient against a wrongdoer; 9 Ala. 82; or a stranger; 38 Minn. 122; 71 Wis. 276; and the possession may be by an agent; 3 M'Cord 422; but not by a tenant; 3 Pick. 235; other than a tenant at will; 15 Pick. 102. But a person holding lands under a contract of sale without any possessory rights before payment, cannot maintain an action; 95 Mich. 140.

An action will not lie unless some damage is committed; but slight damage only is required; 2 Johns. 357; 65 Vt. 673. Some damage must have been done to sustain the action; 2 Bay 421; though it may have been very slight; as, breaking glass; 4 Mass. 140; 50 Ark. 65; 11 Colo. 223.

The action will not lie where the defendant has a justification sufficient to excuse the act committed, though he acted without authority from the owner or the person affected; 8 Lav Rep. 77. See JUSTIFICATION; TRESPASSER. Accident may in some cases excuse a trespass; 7 Vt. 62; 4 M'Cord 61; 12 Me. 67.

The declaration must contain a concise statement of the injury complained of, whether to the person, personal or real property, and it must allege that the injury was committed *vi et armis* and *contra pacem*. See CONTINUANDO.

The plea of not guilty raises the general issue, and under it the defendant may give in evidence any facts which show that the property was not in possession of the plaintiff rightfully as against the defendant at the time of the injury, or that the injury was not committed by the defendant with force.

Other matters must, in general, be pleaded specially. See TRESPASS QUARE CLAUSUM. Matters in justification, as, authority by law; 4 Mo. 1; defence of the defendant's person or property, taking a distress on premises other than those demised, etc.; 1 Chitty, Pl. 439; custom to enter; 4 Pick. 145; right of way; 7 Mass. 385; etc., must be specially pleaded. In trespass at common law the declaration need not describe the close on which the trespass was committed; 43 Ill. App. 180.

Judgment is for the damages assessed by the jury when for the plaintiff, and for

costs when for the defendant.

See JUSTIFICATION.

TRESPASS DE BONIS ASPORTATIS (Lat. *de bonis asportatis*, for goods which have been carried away).

A form of action brought by the owner of goods to recover damages for unlawfully taking and carrying them away. 1 Me. 117. It is no answer to the action that the defendant has returned the goods; 1 Bouvier, Inst. n. 36 (H).

TRESPASS ON THE CASE. The form of action by which a person seeks to recover damages caused by an injury unaccompanied with force or which results indirectly from the act of the defendant. It is more generally called, simply, case. See CASE.

TRESPASS FOR MESNE PROFITS. A form of action supplemental to an action of ejectment, brought against the tenant in possession to recover the profits which he has unlawfully received during the time of his occupation. 3 Bla. Com. 205; 4 Burr. 1668. See MESNE PROFITS.

TRESPASS QUARE CLAUSUM FREGIT (Lat. *quare clausum fregit*, because he had broken the close). The form of action which lies to recover damages for injuries to the realty consequent upon entry without right upon the plaintiff's land.

Close means the interest a person has in any piece of ground, whether enclosed or not; when the plaintiff had not an interest in the soil, but an interest in the profits only, trespass may be maintained; 2 Wheat. Selw. [1340].

Mere possession is sufficient to enable one having it to maintain the action; 12 Wend. 488; 22 Me. 350; 133 Ind. 147; 61 Vt. 119; except as against one claiming under the rightful owner; 6 N. H. 9; 2 Ill. 181; 7 Mo. 333; 8 Utah 406; and no one but the tenant can have the action; 19 Wend. 507; except in case of tenancies at will or by a less secure holding; 8 Pick. 333. It cannot be maintained if defendant was in possession of the *locus in quo* at the time of the alleged trespass, and for some years before; 143 Pa. 65. See CLOSE.

The action lies where an animal of the defendant breaks the plaintiff's close, to his injury; 7 W. & S. 367; 31 Pa. 328.

TRESPASS TO TRY TITLE. The name of the action used in South Carolina for the recovery of the possession of real property and damages for any trespass committed upon the same by the defendant.

TRESPASS VI ET ARMIS (Lat. *vi et armis*, with force and arms). The form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property; 2 Const. 294. It is distinguished from case in this, that the injury in case is the indirect result of the act done. See CASE.

TRESPASSER. One who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another. Any act which is injurious to the property of another renders the doer a trespasser, unless he has authority to do it from the owner or custodian; 14 Me. 44; or by law; 2 Conn. 700; 10 Johns. 138; 13 Me. 250; 6 Ill. 401; and in this latter case any defect in his authority, as, want of jurisdiction by the court; 11 Conn. 95; 3 Cow. 206; defective or void proceedings; 16 Me. 38; 2 Dev. 370; misapplication of process; 6 Monr. 296; 14 Me. 312; renders him liable as a trespasser.

So, too, the commission of a legal act in an illegal manner, as, the execution of legal process illegally; 2 Johns. Cas. 27; abuse of legal process; 16 Ala. 67; exceeding the authority conferred by the owner; 13 Me. 115; or by law; 13 Mass. 520; 10 S. & R. 399; renders a man a trespasser. A ministerial officer, where it is his duty to act, cannot be made a tres-

passer; 137 U. S. 43; and acting in obedience to process regular on its face, and issued by a tribunal having jurisdiction and power to issue the process, is not liable for its regular enforcement, although errors may have been committed by the tribunal which issued it; 142 U. S. 298. See FALSE IMPRISONMENT.

In all these cases where a man begins an act which is legal by reason of some authority given him, and then becomes a trespasser by subsequent acts, he is held to be a trespasser *ab initio* (from the beginning), *q. v.*

A person may be a trespasser by ordering such an act done as makes the doer a trespasser; 14 Johns. 406; or by subsequently assenting, in some cases; 1 Rawle 121; or assisting, though not present; 2 Litt. 240.

It seems that a verdict for the plaintiff in *quare clausum fregit* does not operate as an estoppel in a subsequent action of ejectment; 31 Pa. 381.

TRESPASSER AB INITIO. A term applied to denote that one who has commenced a lawful act in a proper manner, has performed some unlawful act, or some lawful act in an unlawful manner, so connected with the previous act that he is to be regarded as having acted unlawfully from the beginning. See 6 Carpenters' Case, 8 Co. 146; s. c. 1 Sm. L. C. *216; Webb's Poll. Torts. See AB INITIO.

TRIAL. In Practice. The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue. 4 Mas. 232.

The examination of the matter of fact in issue in a cause. The decision of the issue of fact; Steph. Pl. 77; 22 Or. 167.

(*f.*) TENANCY BY SUFFERANCE.

The word "trial" as used in § 724, Rev. Stat., refers to the final examination and decision of matter of law as well as facts, for which every antecedent step is a preparation. 221 U. S. 533. See RIGHT TO JURY TRIAL.

"Trial," as used in the acts of congress of July 27, 1866, and March 2, 1867, appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and "final hearing," in contradistinction to hearings upon interlocutory matters, the hearing of a cause upon its merits by a judge sitting in equity; 112 Mass. 343; 19 Wall. 214.

Trial by certificate is a mode of trial allowed by the English law in those cases where the evidence of the person certifying is the only proper criterion of the point in dispute.

Trial by grand assize is a peculiar mode of trial allowed in writs of right. See ASSIZE; GRAND ASSIZE.

Trial by inspection or examination is a form of trial in which the judges of the court upon the testimony of their own senses decide the point in dispute.

This trial takes place when, for the greater expedition of a cause, in some point or issue being either the principle question or arising collaterally out of it, being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it,—who are properly called in to inform the conscience of the court in respect of dubious facts; and, therefore, when the fact from its nature must be evident in the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on its judgment alone.

Judges of courts of equity frequently decide facts upon mere inspection. The most familiar examples are those of cases where the plaintiff prays an injunction on an allegation of piracy or infringement of a patent or copyright; 5 Ves. Ch. 709, and the cases there cited.

To insure fairness, this mode of trial must be in public; the parties to the suit, or, in a criminal trial, the prisoner, must be present; but the continuance of the trial and the taking of testimony during the brief absence of the prisoner from the court-room on business connected with the trial, has been held not to be error; 25 Alb. L. J. 303; 43 N. Y. 1; but the absence of the trial judge from the court-room for any considerable time during the trial of a cause or the arguments to the jury without the consent of the parties is a material error for which the judgment will be reversed and a new trial ordered; 95 Wis. 558. Suggestions by the trial judge to the jury that in default of agreement they be kept to the end of the term, to save expense to the county, are ground for reversal; 35 S. W. Rep. (Tex.) 1080. There ought to be no communication between a judge and a jury after the latter have retired unless in open court and if practicable, in the presence of counsel. 4 U. S. App. 290. See PRESENCE.

It is within the discretion of the trial court to allow the introduction of evidence out of the usual order, and in the absence of gross abuse its exercise of this discretion is not reviewable; 160 U. S. 70. It is also discretionary with the court to admit evidence to prove a point after the testimony is closed; 10 U. S. App. 98; and to refuse to allow the examination of witnesses for the purpose of elaborating previous testimony; 16 U. S. App. 30.

Where objection is made in a criminal trial to comments on facts not in evidence or exaggerated expressions of the prosecuting officer, the court should interfere and put a stop to them if they are likely to be prejudicial to the accused; 150 U. S. 118.

An objection of disorderly conduct of a trial is within the sound discretion of the trial court; and it is only when such discretion has been abused to the prejudice of the complaining party that the appellate court will interfere; 27 U. S. App. 663.

It is generally held that the prosecuting attorney has the power to enter a *nolle prosequi* in a criminal case without the consent of the court; 23 Colo. 466. It is properly said, however, that "the power is not unlimited."

The stages in a criminal prosecution: (1) The inauguration or preliminary stage, when the indictment is absolutely under the control of the prosecuting officer; (2) The trial of the cause and its incidents, during which the court has control, and the power of the prosecuting officer is suspended; and (3) The period between the verdict of the jury and sentence by the court; when the pardoning power of the governor attaches. *State v. Moise* (La.), 18 So. Rep. 943, 1895. Accordingly, the power of the district attorney to enter a *nolle prosequi* is subject to the following limitations: (1) After the jury has been impaneled and the charge read, he cannot discontinue if the defendant insists upon a verdict; and (2) After verdict and refusal to grant a new trial, he cannot dismiss the prosecution without the leave of the court. 18 So. Rep. (La.) 942; 34 Am. L. Reg. N. S. 7.

Trial at nisi prius. Originally, a trial before a justice in eyre. Afterwards, by Westm. 2, 13 Edw. I. c. 80, before a justice of assize; 3 Bla. Com. 353. See NISI PRIUS.

Trial by the record. This trial applies to cases where an issue of *nul tiel* record is joined in any action.

The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue; and the parties cannot put themselves upon the country; Steph. Pl., And. ed. 171; 2 Bla. Com. 380.

Trial by wager of battle. See WAGER OF BATTLE.

Trial by wager of law. See OATH DECEITORY; WAGER OF LAW.

Trial by witnesses is a species of trial by witnesses, or *per testes*, without the intervention of a jury. This is the only method

of trial known to the civil law.

In England, when a widow brings a writ of dower and the tenant pleads that the husband is not dead, this, being looked upon as a dilatory plea, is in favor of the widow, and, for greater expedition, allowed to be tried by witnesses examined before the judges; and so, says Finch, shall no other case in our law; Finch, Law 423. But Coke mentions others: as, to try whether the tenant in a real action was duly summoned; or, the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues.

Trial at bar. A species of trial now seldom resorted to, and, as to civil causes, abolished by the Judicature Act, 1875, was one held before all the judges of one of the supreme courts of Westminster, or before a quorum representing the full court. The celebrated case of *Reg. v. Castro*, otherwise *Tichborne v. Orton*, L. R. 9 Q. B. 350, was a trial at bar; Brown, Dict. See POSTULATION; OPEN COURT; PUBLIC TRIAL; WITNESS.

See, for an elaborate article on the conduct of counsel at trial, 45 Cent. L. J. 292.

See FORMER TRIAL.

TRIAL LIST. A list of cases marked down for trial for any one term.

TRIBES. See FIVE CIVILIZED NATIONS.

TRIBUNAL. The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction. The jurisdiction which the judges exercise.

The term is Latin, and derives its origin from the elevated seat where the tribunals administered justice.

Any court, forum, or judicial body. *Anderson's L. Dict.*

TRIBUNAL OF THE HAGUE. See HAGUE CONFERENCE.

TRIBUNAUX DE COMMERCE. In French Law. Certain courts composed of a president, judges, and substitutes, which take cognizance of all cases between merchants, and of disagreements among partners. Appeals lie from them to the courts of justice. Brown, Dict.

TRIBUTARY. All streams flowing directly or indirectly into a river. [1895] 1 Q. B. 237.

TRIBUTARY. Offered as a tribute. Inferior. Subordinate. One paying tribute. English.

TRIBUTE. A contribution which is sometimes raised by the sovereign from his subjects to sustain the expenses of the state. It is also a sum of money paid by one nation to another under some pretended right. Wolff § 1145.

TRIENNIAL ACT. An act passed by the Long Parliament, 1640-1, and repealed by the Convention Parliament, 1660, and more particularly the Act 6 Will. & M. c. 2, whereby every parliament, unless sooner dissolved, came to an end in three years. It was repealed on the accession of Geo. I by the Septennial Act. R. & L. Dict.

TRIGAMUS. In Old English Law. One who has been thrice married; one who, at different times and successively, has had three wives.

TRIGILD (Sax. from *thry*, three, and *gelde*, a payment). A triple gild, gold or payment; three times the value of a thing, paid as a composition or satisfaction. Burrill; Spelman.

TRINA ADMONITIO. A triple admonition. Chase's Blackstone, App. This was given, for instance, to a prisoner before the infliction of the old English punishment, *peine forte et dure*. 4 Bla. Com. 325.

TRINEPOS (Lat.). In Roman Law. Great-grandson of a grandchild.

TRINEPTIS (Lat.). Great-granddaughter of a grandchild.

TRINITY HOUSE. See ELDER BRETHREN.

TRINITY SITTINGS. See LONDON AND MIDDLESEX SITTINGS.

TRINITY TERM. See TERM.

TRINIUMGELDUM (Sax. *tri-nigon-geld*). An extraordinary kind of composition for an offense, consisting of three times nine, or twenty-seven times the single geld or payment. Burrill; Spelman.

TRINKETS. Small articles of personal adornment or use when the object is essentially ornamental. 28 L. J. C. P. 626. See JEWELRY.

TRINODA NECESSITAS (Lat.). The threefold necessary public duties to which all lands were liable by Saxon law,—viz. for repairing bridges, for maintaining castles or garrisons, and for expeditions to repel invasions. 1 Bla. Com. 263.

TRIOBS. In Practice. Persons appointed according to law to try whether a person challenged to the favor is or is not qualified to serve on the jury. They do not exceed two in number, without the consent of the prosecutor and defendant, or unless some special case is alleged by one of them, or when only one juror has been sworn and two triors are appointed with him. Co. Litt. 158 a; Bacon, Abr. *Juries* (E 12).

The method of selecting triors is thus explained. Where the challenge is made to the first juror, the court will appoint two indifferent persons to be triors; if they find him indifferent, he shall be sworn and join the triors in determining the next challenge. But when two jurors have been found impartial and have been sworn, then the office of the triors will cease, and every subsequent challenge will be decided upon by the jurymen. If more than two jurymen have been sworn, the court may assign any two of them to determine the challenges. To the triors thus chosen no challenges can be admitted.

The triors examine the jurymen challenged, and decide upon his fitness; 3 Park. Cr. Cas. 467. Their decision is final. They are liable to punishment for misbehavior in office; 4 Sharsw. Bla. Com. 353; 15 S. & R. 156; 21 Wend. 509. The office is abolished in many of the states, the judge acting in their place; 23 Ga. 57; 43 Me. 11; 98 U. S. 157.

The lords also chosen to try a peer, when indicted for felony, in the court of the Lord High Steward, *q. v.*, are called triors. Moz. & W.

TRIPARTITE. Consisting of three parts: as, a deed *tripartite*, between A of the first part, B of the second part, and C of the third part.

TRIPLE ALLIANCE. The alliance between England, Holland and Sweden, formed by Sir William Temple on January 23, 1668, in order to check the aggressive policy of Louis XIV, whose purpose to invade the Netherlands was then manifest. Taylor, Int. Pub. Law. 102.

An Alliance between Germany, Austria, and Italy, formed in 1882. This powerful combination caused France to form a Dual Alliance with Russia, and later a Triple Entente (*q. v.*) with Russia and England. Charles Downes Hazen—Fifty Years of Europe, 325.

TRIPLICATIO (Lat.). In Civil Law. The reply of the plaintiff (*actor*) to the rejoinder (*duplicatio*) of the defendant (*reus*). It corresponds to the surrejoinder of common law. Inst. 4, 14; Bracton, G. l. 5. t. 5. c. 1.

TRIPPLICATION. A pleading in admiralty, second in order after a replication; now obsolete. In Civil Law, the surrejoinder; In Canon Law, the rejoinder. English. See FLEADING.

TRISTIS SUCCESSIO. See HERED-

ITAS LUCTUOSA.

TRITAVUS (Lat.). In Roman Law. The male ascendant in the sixth degree. For the female ascendant in the same degree the term is *tritavia*. In forming genealogical tables this convenient term is still used.

TRITHING (Sax. *triþinga*). The third part of a county, consisting of three or four hundreds.

A court within the circuit of the trithing, in the nature of a court-leet, but inferior to the county court. Camd. 102. The ridings of Yorkshire are only a corruption of trythings. 1 Bla. Com. 116; Spelm. Gloss. 52.

TRIUMVIRCAPITALES, or TREVIRI, or TRESVIRI. In Roman Law. Officers who had charge of the prison, through whose intervention punishments were inflicted. Sallust, in *Catilin*.

TRIVIAL. Of small importance. It is a rule in equity that a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. 4 Bouvier, Inst. n. 4237. See **MAXIMS**, *De minimis*, etc.

TRONAGE. A customary duty or toll for weighing wool: so called because it was weighed by a common *trona*, or beam. Fleta, lib. 2, c. 12.

TROOPS. Soldiers collectively; a body of soldiers. The term does not embrace any of the following classes of persons, when traveling separately and not as part of a moving body or detachment of soldiers, viz: Discharged soldiers, discharged military prisoners, and rejected applicants for enlistment; applicants for enlistment, provisionally accepted, but subject to final examination and not sworn in; retired enlisted men; and furloughed soldiers en route back to their stations. 249 U. S. 354.

Land-Grant Acts. The military force of the United States is, and always has been a unit, although divided for purposes of administration into several branches; and there is nothing in the land-grant acts to indicate an intention on the part of Congress to differentiate between the several branches in respect to transportation charges. It was held that the term "troops" is not confined to land forces, and that it includes men and officers in every branch. Since those in the Navy and Marine Corps are to be deemed troops within the meaning of those acts, members of the Coast Guard should also be deemed such when serving as part of the Navy. But at other times members of the Coast Guard are not troops; for then it operates under, and at the expense of, the Treasury Department. 258 U. S. 376.

See **FOREIGN TROOPS**.

TROUBLE MAN. The business of a "trouble man" imposes on him the duty of inspection and examination, and he has no right to assume that wires at places where he is sent to repair telephones are properly insulated or protected when he knows, or has reasonable grounds to know, that the trouble he is sent to adjust was caused by the fact that the wires were not properly insulated at a point where they were liable to come in contact with heavily charged electric wires. 156 Ky. 331, 160 S. W. 1061.

TROVER (Fr. *trouver*, to find). In Practice. A form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property.

A generic name, applied to those torts, arising from the unlawful conversion of any particular piece of personal property owned by another; 35 S. C. 475.

In form it is a fiction: in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. 1 Burr. 31.

The action was originally an action of trespass on the case where goods were found by the defendant and retained against the plaintiff's rightful claim. The manner of gaining possession soon

came to be disregarded, as the substantial part of the action is the conversion to the defendant's use; so that the action lies whether the goods came into the defendant's possession by finding or otherwise, if he fails to deliver them upon the rightful claim of the plaintiff. It differs from *detinue* and *replevin* in this, that it is brought for damages and not for the specific articles; and from *trespass* in this, that the injury is not necessarily a forcible one, as trover may be brought in any case where trespass for injury to personal property will lie; but the converse is not true. In case possession was gained by a trespass, the plaintiff by bringing his action in this form waives his right to damages for the taking, and is confined to the injury resulting from the conversion; 17 Pick. 1; 17 Me. 434.

The action lies for one who has a general or absolute property; Bull. N. P. 33; 25 Me. 220; 23 Ga. 484; together with a right to immediate possession; 1 Ry. & M. 99; 22 Pick. 585; 19 N. H. 419; 6 Houst. 344; see 82 Ill. 409; 97 Mass. 37; 105 Ind. 81; as, for example, a vendor of property sold upon condition not fulfilled; 1 Meigs 76; or a special property, including actual possession as against a stranger; 2 Saund. 47; 6 Johns. 195; 15 Mass. 242; 4 Blackf. 395; as, for example, a sheriff holding under rightful process; 7 Johns. 32; 2 Murph. 19; a mortgagee in possession; 5 Cow. 323; a simple bailee; 15 Mass. 252; Wright, Ohio 744; see 76 N. C. 402; 95 Pa. 243; 61 Ga. 147; or even a finder merely; 9 Cow. 670; 2 Ala. 320; and including lawful custody and a right of detention as against the general owner of the goods or chattels; 8 Wend. 445; 3 Blackf. 419. An executor or administrator is held an absolute owner by relation from the death of the decedent; 2 Greenl. Ev. § 641; 7 Metc. 503; and he may maintain an action for a conversion in the lifetime of the decedent; T. U. P. Charlt. 261; 6 Mass. 394; and is liable for a conversion by the decedent; 1 Hayw. 21, 308, 362.

Trustees having title to chattels with an immediate right of possession may sue in trover for the chattels, although they may never have taken actual possession, but have allowed the goods to remain in the occupation of their *cestui que trust*; [1891] 2 Ch. 172.

The property affected must be some personal chattel; 3 S. & R. 513; specifically set off as the plaintiff's; 4 B. & C. 948; 3 Pick. 38; including title deeds; 2 Yeates 537; a copy of a record; 11 Pick. 492; money, though not tied up; 4 E. D. Smith 162; negotiable securities; 3 B. & C. 45; 3 Johns. 432; 1 Root 125, 221; 3 Vt. 99; 27 Ala. n. s. 238; animals *feræ nature*, but reclaimed; 10 Johns. 102; trees and crops severed from the inheritance; 3 Mo. 137, 393; 15 Mass. 204; 4 Cal. 184. It will lie by a surviving partner to recover possession of the firm assets as against the representatives of the deceased partners; 17 R. I. 679. It will not lie for property in custody of the law; 9 Johns. 381; if rightfully held; see 2 Ala. 576; or to which the title must be determined by a court of peculiar jurisdiction only; 1 Cam. & N. 115; or where the bailee has lost the property, or had it stolen, or it has been destroyed by want of due care; 2 Ired. 98. Unless an actual conversion by bailee be shown, an action of trover against him will not lie without a previous demand for the goods; 79 Ga. 134. See **CONVERSION**.

There must have been a conversion of the property by the defendant; 8 Ark. 204. And a waiver of such conversion will defeat the action; 20 Pick. 90. Non-delivery of goods by a vessel is not a conversion of the goods; 35 U. S. App. 369. See **CONVERSION**; 15 Am. L. Rev. 363; 6 So. L. Rev. 822.

The declaration must state a rightful possession of the goods by the plaintiff; Hempst. 160; but need not show the nature or evidence of plaintiff's title; 91 Mich. 414; it must describe the goods with convenient certainty, though not so accurately as in *detinue*; Bull. N. P. 33; 5 Gray 12; must formally allege a finding by the defendant, and must aver a conversion; 12 N. Y. 313. It is not indispensable to state the price or value of the thing converted; 2 Wash. Va. 192; and where there is an actual conversion of property, demand before action is not necessary; 155 Mass. 376; 107 Mo. 685.

The plea of not guilty raises the general issue.

Judgment, when for the plaintiff, is that he recover his damages and costs, or, in some states, in the alternative, that the defendant restore the goods or pay, etc.; 19 Ga. 579; when for the defendant, that he recover his costs. The measure of damages is the value of the property at the time of the conversion, with interest; 26 Ala. n. s. 213; 30 Vt. 307; 19 Mo. 467. 133 Mass. 153, 273; see 6 Houst. 344; 64 Vt. 286.

TROY WEIGHT. See **MEASURES**; **WEIGHT**.

TRUCE. In International Law. An agreement between belligerent parties by which they mutually engage to forbear all acts of hostility against each other for some time, the war still continuing. Burlamaqui, N. & P. Law 1.

There is said to be no authoritative distinction between a truce and an armistice; perhaps the latter is generally considered a truce of a restricted character, limited as to the forces and the local area to which it applies. It may be entered into by a general or an admiral in command of an army or fleet; while a general truce can be entered into only by a commander-in-chief and requires the ratification of the state for its validity; Risley, Law of War 153.

Truces are of several kinds: *general*, extending to all the territories and dominions of both parties; and *particular*, restricted to particular places: as, for example, by sea, and not by land, etc. *Id.* They are also *absolute*, *indeterminate*, and *general*; or *limited* and *determined* to certain things: for example, to bury the dead. *Id.* See 1 Kent 159; Halleck, Int. Law 654.

A particular or partial truce may be made by a subordinate commander; a general truce only by the sovereign power or by its authority; 1 Kent *159.

During the continuance of a truce, either party may do within his own territory or the limits prescribed by the armistice, whatever he could do in time of peace, *e. g.* levy and march troops, collect provisions, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged; but neither party can do what the continuance of hostilities would have prevented him from doing, *e. g.* repair fortifications of a besieged place; and all things, the possession of which was especially contested when the truce was made, must remain in their antecedent places; Hall, Int. Law 500; Vattel, *Dr. des Gens* §§ 245, 251; Boyd's Wheat. Int. Law § 408.

TRUCE. See **FLAG OF TRUCE**.

TRUCE OF GOD (Law L. *treuza Dei*; Sax. *treuge* or *trewa*, from Germ. *treu*; Fr. *trêve de Dieu*). In the middle ages, a limitation of the right of private warfare introduced by the church. This truce provided that hostilities should cease on holidays, from Thursday evening to Sunday evening of each week, the whole season of Advent and Lent, and the octaves of great festivals. The penalty for breach of the truce was excommunication. The protection of this truce was also extended constantly to certain places, as, churches, convents, hospitals, etc., and certain persons, as, clergymen, peasants in the field, crusaders, and, in general, all defenceless persons. It was first introduced into Aquitaine in 1041, and into England under Edward the Confessor. 1 Rob. Charles V. App. n. xxi.

TRUCK ACTS. The Truck Act, 1831, was passed to abolish what is commonly called the "truck system." Under that system employers were in the practice of paying the wages of their employees in goods, or of requiring them to purchase goods at certain shops, which led to laborers being compelled to take goods of inferior quality at a high price. The act made payment in money compulsory; and it applied to all artificers, workmen and laborers, except

those engaged in certain trades, especially iron and metal works, quarries, cloth, silk and glass manufactories. It did not apply to domestic or agricultural servants. The Truck Act Amendment Act, 1887, s. 2, now, however, provides that the Act of 1831 shall apply to workmen as defined by the Employers and Workmen Act, 1875, s. 10, that is to say, to all persons (other than domestic servants) under a contract to perform manual labor. This brought in agricultural laborers, but s. 4 of the act of 1887, provides that a contract may be made with an agricultural laborer "for giving him food, drink, not being intoxicating, a cottage or other allowances or privileges in addition to money wages." Byrne. See **LIBERTY OF CONTRACT; POLICE POWER.**

TRUE. That only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense, the word "true" is often used as a synonym of honest, sincere, not fraudulent. 111 U. S. 345. *Prima facie* "untrue" means inaccurate, not necessarily wilfully false. 113 E. C. L. *929.

TRUE BILL. In Practice. Words indorsed on a bill of indictment when a grand jury, after having heard the witnesses for the government, are of opinion that there is sufficient cause to put the defendant on his trial. Formerly the indorsement was *Billa vera* when legal proceedings were in Latin; it is still the practice to write on the back of the bill *Ignoramus* when the jury do not find it to be a true bill; the better opinion is that the omission of the words a true bill does not vitiate an indictment; 11 Cush. 473; 18 N. H. 488. See **GRAND JURY.**

TRUE COPY. A true copy, does not mean an absolutely exact copy but means that the copy shall be so true that anybody can understand it. 51 L. J. Ch. 905.

TRUE, PUBLIC, AND NOTORIOUS. These three qualities used to be formally predicated in the libel in the ecclesiastical courts, of the charges which it contained, at the end of each article, severally. Whart.

TRUNK RAILWAY. An electric railroad company authorized to perform the duties of a carrier of freight and passengers between two cities in different States and all intermediate points is a "trunk railway." 117 Ky. 146, 77 S. W. 674.

TRUST. A right of property, real or personal, held by one party for the benefit of another.

In its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another. 7 J. C. R. 90, cited by Bispham, *Prin.* of Eq. 83.

A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now which were formerly applied to uses; 10 Johns. 506. A trust is a use not executed under the statute of Hen. VIII.; 3 Md. 505. The words *use* and *trust* are frequently used indifferently. See 3 Jarm. Wills, 6th Am. ed. *1139-1140.

Trust implies two estates or interests,—one equitable and one legal; one person as trustee holding the legal title, while another as the *cestui que trust* has the beneficial interest. 48 Minn. 174.

Sometimes the equitable title of the beneficiary, sometimes the obligation of the trustee, and, again, the right held, is called the trust.

But the right of the beneficiary is in the trust; the obligation of the trustee results from the trust; and the right held is the *subject-matter* of the trust. Neither of them is the trust itself. All together they constitute the trust.

An equitable right, title, or interest in property, real or personal, distinct from its legal ownership.

A personal obligation for paying, delivering, or performing anything where the person trusting has no real right or secur-

ity, for by that act he confides altogether to the faithfulness of those intrusted.

An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence. Tiedm. Eq. Jur. § 253; 4 Kent 295; 1 Saunders, Uses & Tr. 6; 3 Bla. Com. 431.

A late writer shows clearly the distinction between the *fidei commissum* and a trust, that in the former there was no separation of the equitable and legal title, but there was simply a request, which afterwards became a duty imposed upon the *gravatus* to convey the inheritance to another person, either immediately or after a certain event; whereas, in the trust, the perfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time. Besides the *fidei commissum* arose out of testamentary dispositions; whereas English trusts, until the statute of wills, were created only by conveyances *inter vivos*; Bisph. Eq. 883, § 50. See 15 How. 367.

Active or special trusts are those in which the trustee has some duty to perform, so that the legal estate must remain in him or the trust be defeated.

Express trusts are those which are created in express terms in the deed, writing, or will. The terms to create an express trust will be sufficient if it can be fairly collected upon the face of the instrument that a trust was intended. Express trusts are usually found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of land; in formal conveyances, such as marriage settlements, terms for years, mortgages, assignments for the payment of debts, raising portions, or other purposes; and in wills and testaments, when the bequests involve fiduciary interests for private benefit or public charity. They may be created even by parol; 6 W. & S. 97; except so far as forbidden by the statute of frauds.

A written instrument though inefficacious as a will, from a want of compliance with statutory requisitions, may yet operate as a declaration of a trust; 149 U. S. 608.

Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties. The term is used in this general sense, including *constructive* and *resulting* trusts (*q. v.*), and also in a more restricted sense, excluding those classes.

Implied trusts do not come within the statute of frauds; 66 Pa. 237.

Constructive trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. Such trusts have not, technically, any element of fraud in them; Bisph. Eq. § 91. Under this branch of trusts it has been said that "wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him, or interested with him in any subject of property or business; he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated." 1 Lead. Cas. Eq. 62. The rule as to such trusts applies not only to persons standing in a direct fiduciary position towards others, such as trustees, attorneys, etc., but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise: as against partners; 4 Seld. 236; tenants in common, 72 Pa. 442; mortgages; 43 Mo. 231; as against agent, buying goods with the principal's money; 6 Mackey 421; Bisph. Eq. § 93.

If one obtains a title to land by artifice or concealment, equity will enforce a trust in favor of the party justly entitled thereto; 145 U. S. 817. Whoever comes into possession of trust property, with notice of the trust, is bound to the execution of the trust; 25 Ill. 73.

A trustee who buys at his own sale, even if public, will still be considered, at the option of the *cestui que trust*, a trustee.

See 1 Lead. Cas. Eq. 248. This is not upon the ground of fraud, but of public policy. See 18 Allen 419. So if a person obtains from a trustee trust property without paying value for it, although without notice of the trust, he will in such case be held a trustee by construction; Bisph. Eq. § 95; Tiedm. Eq. Jur. § 312. And in case of a contract for the sale of land, equity considers the vendor as a trustee of the legal title for the purchaser; *ibid.*

A *passive* or *dry* or *simple* trust is one which requires the performance of no duty by the trustee to carry out the trust, but by force of which the mere legal title rests in the trustee.

As to *executory* and *executed trusts*, see those titles.

An *executed trust* is one explicitly declared in writing, duly signed, stating the conditions upon which the legal title is held, and the final intention of the creditor, so that the trustee can carry that intention into effect. 115 Ind. 423.

Trusts may also be distinguished as *public* and *private* trusts. The former are constituted for the benefit either of the public at large or some particular portion of it answering to a particular description; while the latter are those wherein the beneficial interest is vested absolutely in one or more individuals who are, or may be within a certain time, definitely ascertained. Bisph. Eq. § 59.

A trust arises when property has been conferred upon one person and accepted by him for the benefit of another. The former is a trustee, and holds the legal title, and the latter is called the *cestui que trust*, or beneficiary. In order to originate a trust, two things are essential,—*first*, that the ownership conferred be connected with a right, or interest, or duty for the benefit of another; and, *second*, that the property be accepted on these conditions.

The modern trust includes not only those technical *uses* which were not executed by the statute of uses, but also equitable interests which never were considered *uses*, and did not, therefore, fall within the provisions of this statute. These equitable interests, in common with the unexecuted *uses*, received the name of trusts; Bisph. Eq. § 52. The statute of uses provided that where one was seized to the use of another, the *cestui que use* should be deemed to be in lawful seisin and possession of the same estate in the land itself as he had in the use.

A trust which at the time of its creation is a passive trust will be executed by this statute, although the word *trust* instead of *use* is employed. But where a trust which has once been active becomes passive, such a trust is not necessarily executed by the statute. If the mere fact that the trustee had active duties to perform was the only circumstance that prevented the statute from operating, the trust will be executed when the active duties have ceased. But if the non-execution of the trust by the statute did not originally and solely depend upon the activity of the trust, the fact that the trust has ceased to be active will not of itself cause the statute to apply; but the trustee is then bound to convey the legal estate at the request of the *cestui que trust*; and after a great lapse of time, and in support of long-continued possession on the part of the person holding the beneficial interest, such a conveyance will be presumed; Bisph. Eq. § 55. A bequest of personality to a trustee for the use and benefit of another, without words of restriction, vests the absolute property of the fund in the beneficiary; 83 Fed. Rep. 19.

When active duties are to be performed by the trustee, it will, generally, not be executed; Bisph. Eq. § 56; 5 Wall. 119, 163; though where there was a separate use for a *feme sole* not in contemplation of marriage, it was held that as this separate use was void, the trust fell, although the trustee had active duties to perform; 70 Pa. 201. Where an estate is given in trust to pay one-half the income to each of two persons, it is not a gift of one-half the

principal to be held for each, but of all to be held jointly for both, and it should remain intact until the period of distribution arises; 119 Pa. 52; 105 Md. 121.

Before the statute of frauds, a trust, either in regard to real or personal estate, might have been created by parol as well as by writing. The statute required all trusts as to real estate to be in writing; 4 Kent 305; Adams, Eq., 8th ed. 27.

Trusts as to partnership interests in real estate are not within the statute of uses and trusts. See 111 N. Y. 428.

No particular form of words is requisite to create a trust. The court will determine the intent from the general scope of the language; Beach, Eq. Jur. § 161; 10 Johns. 496; 4 Kent 305; 127 U. S. 800.

The facts, however, to warrant the inference of a trust, must be more than loose and general declarations; but, on the other hand, parol declarations will not be received to contradict the inference of a trust in land fairly deducible from written declarations; 5 Johns. Ch. 3.

A party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property; 151 U. S. 1.

A trust, as to personal property, may be proved by parol evidence; 1 Har. 158; 3 Bla. Com. 431; 148 Mass. 289; and parol evidence is admissible against the face of a deed itself to show all the facts out of which a resulting trust arises; 87 W. Va. 507. A *cestui que trust* cannot, generally, hold the beneficial enjoyment of property free from the rights of his creditors; 1 Sm. L. C. 119; though a limitation over to another in case of the insolvency of the *cestui que trust* is valid; Bisp. Eq. 61; 5 Wall. 441. See SPEND-THrift.

Equity will follow trust moneys as far as they can be identified; 19 U. S. App. 256; but the right fails when the means of ascertainment fail; 23 Pa. 16. See EARMARK.

Trust funds held for a charitable object are not liable for the torts of a trustee; 120 Pa. 624.

If a trustee dies, or fails or refuses to execute or accept the trust, or no trustee is named, the trust does not for that reason fail. It is a settled rule that the court of chancery will provide a trustee or attend to the execution of the trust; 10 Sim. 256; Adams, Eq. 36.

Trusts are interpreted by the ordinary rules of law, unless the contrary is expressed in the language of the trust; 15 Ind. 269; 3 Des. 256.

The rules for the devolution of equitable estates are the same as those for the descent of legal titles, and fall under the operation of the various intestate acts; Bisp. Eq. § 60. If the legal title to real estate cannot be taken by an alien, the beneficial ownership cannot be enjoyed by him; 5 How. 270. In some states, as New York, Michigan, and Louisiana, the operation of trusts has been much narrowed; Bisp. Eq. § 56.

An assignment in trust for the benefit of creditors is valid without assent on the part of the creditors; 25 Wash. L. Rep. 823; *contra*, in England, [1897] 2 Q. B. 19; and in Massachusetts; 3 Mass. 144. In [1897] 2 Q. B. 19, it was held that an assignment in trust for particular persons is irrevocable, while one for creditors in general is revocable. See TRUSTEE.

As to those combinations of capital now known as "Trusts," see RESTRAINT OF TRADE.

Since the title RESTRAINT OF TRADE was in print the supreme court has handed down a decision in *United States v. Joint Traffic Association*. The court was of opinion that the contract in suit was substantially the same as that involved in the *Trans-Missouri Case*, 166 U. S. 200; and also that the latter case had decided that the contract involved was in restraint of trade. It further held that the anti-trust act is valid and a proper exercise of the powers of congress.

In Sherman Act. Contract, combination, confederation or undertaking, express or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly. *Thorn., Anti-Tr. Act 93*, citing 152 Mo. 1. Any form of combination between corporations, or corporations and natural persons, for the purpose of regulating production and repressing competition by means of the power thus centralized. *Id.*, citing 29 Mont. 428.

TRUST. See NAKED TRUST.

TRUST COMPANY. The business of such companies consists largely in the administration of trusts of various kinds, and particularly those arising under corporate mortgages. It is a common practice for them to become surety on bonds in legal proceedings and in various other ways, and they usually also transact a safe deposit business. See SAFE DEPOSIT COMPANIES. As to the administration of trusts by such companies in England, see 5 L. Quart. Rev. 395. It has been held in the orphans' court of Philadelphia that an act was unconstitutional which permits an accountant to pay a trust company for becoming surety on his official bond, and charges the cost to the estate.

TRUST DEED. A deed given to a trustee for the purpose of securing a numerous class of creditors, as the bondholders of a railroad corporation, with power to sell on failure of the payment of their bonds, notes, or other claims.

It is the practice in many states to secure loans by a trust deed instead of a mortgage. See DEED OF TRUST.

TRUST ESTATES AS BUSINESS COMPANIES. Voluntary associations organized or doing business under written instruments or declarations of trust. Mass. Acts and Resolves 1911, 1058, c. 55.

General Nature of Trusts. "Trustees" take the place of "directors" in corporations; "*cestui que trust*" or "beneficiaries" occupy the nearly relative position of "stockholders"; the "declaration" or "agreement of trust" supplants the certificate of incorporation or charter. *Sears' Trust Estates as Business Companies* 1912, 1.

There are four essential elements of a valid trust of personal property: (1) "A designated beneficiary; (2) a designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) the actual delivery of the fund or other property, or of a legal assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee." *Id.* 364; 180 N. Y. 201, 73 N. E. 14.

Advantages. "The advantages which it claimed accrue to the industrial and real estate trusts have principally to do with the greater freedom of managing the affairs of the trust. They may be stated generally as follows: (1) These associations have been found by the experience of twenty-five years to be a convenient, safe and unobjectionable method of co-operative ownership and management. They are for the interest alike of the investor and the public. (2) The form of organization insures a continuity of management and control, which appeals strongly to investors in real estate, which cannot be secured by a corporation with changing officers. The trustees who are the managing officers of a trust are not so likely to be changed as are the officers of a corporation. (3) It affords a more economical and more convenient and flexible form of management than does a corporation. Trustees can transact business with more ease and rapidity than directors." Report of tax commissioner in 1912 to the Senate and House of Representatives of Massachusetts. Quoted by *Sears*, 360.

TRUST FUND DOCTRINE. See STOCKHOLDER.

TRUST POWER. See BENEFICIAL POWER.

TRUSTEE. A person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.

One to whom property has been conveyed to be held or managed for another.

To a certain extent, executors, administrators, guardians, and assignees are trustees, and the law of trusts so far is applicable to them in their capacity of trustees; Hill, Trust. 49.

Trusts are not strictly cognizable at common law, but solely in equity; 16 Pet. 25.

Any reasonable being may be a trustee. The United States or a state may be a trustee; 15 How. 387; 15 Fla. 455, 690; 87 Fed. Rep. 743. So may a corporation; 7 Wall. 1; Perry, Trusts § 42.

"Whoever is capable of taking the legal title or beneficial interest in property may take the same trust for others." Perry, Trusts § 39. Non-resident natural persons are not disqualified from acting as trustee; 4 Am. Ry. Rep. 291; an act which declares such person disqualified is in conflict with the federal constitution; 27 Fed. Rep. 146, *arguendo*; 3 N. E. Rep. (Ind.) 1093; 52 Fed. Rep. 857; but this constitutional provision does not extend to foreign corporations.

A foreign corporation may be a trustee; Cook, Stock, etc. § 813.

A foreign corporation must comply with local statutes; 68 Ill. App. 666; *contra*, 49 Pac. Rep. (Wash.) 1068; 37 Atl. Rep. (R. I.) 943. See 150 Mass. 271; 147 Ind. 224. In 63 Fed. Rep. 412, where a statute of Illinois declared any trust unlawful when vested in a foreign trust company unless it had complied with certain requirements of the statute, it was held that a trust under a railroad mortgage vested in such a company merely a naked legal title, while the beneficial title was in the bondholders; and that the court would enforce the security by a judicial sale. But a non-resident trust company was removed as trustee under an Illinois railroad mortgage; 173 Ill. 439.

A mortgage upon railroad property in Illinois executed to a foreign trust corporation as trustee, to secure bonds made payable outside of the state, is not prohibited by the laws or public policy of that state; 28 Fed. Rep. 169.

The legislature of a state alone has the power to accept a bequest to the state in trust; 69 Conn. 64.

The trustee of a railroad mortgage represents the bondholders who are bound by his assent; 65 Fed. Rep. 351. See MORTGAGE: INTERVENTION.

A trustee after having accepted a trust cannot discharge himself of his trust or responsibility by resignation or a refusal to perform the duties of the trust; but he must procure his discharge either by virtue of the provisions of the instrument of his appointment, or by the consent of all interested, or by an order of a competent court; 4 Kent 311.

Trustees are not allowed to speculate with the trust property, or to retain any profits made by the use of the same, or to become the purchasers upon its sale. See TRUST. If beneficial to the parties in interest, the purchase by the trustee may be retained or confirmed by the court. And the trustee may be compelled to account for and pay over to the *cestui que trust* all profits made by any use of the trust property; 4 Kent 438. A trustee cannot become a purchaser at his own sale, without special permission; 127 U. S. 589. A purchase by a trustee of trust property for his own benefit is not absolutely void, but voidable; and may be confirmed by the parties interested either directly or by long acquiescence; 143 U. S. 224.

A court of equity never allows a trust to fail for want of a trustee; 5 Paige, Ch. 46; 6 Whart. 571; 5 B. Monr. 113; 2 How. 188; 75 Ia. 429. See 116 Ind. 139.

Whenever it becomes necessary, the court will appoint a new trustee, and this

though the instrument creating the trust contain no power for making such appointment. The power is inherent in the court; 7 Ves. Ch. 480; 2 Sandf. Ch. 336; 1 Beav. 467; 85 Me. 79. See 44 N. J. Eq. 349. So the court may create a new trustee on the resignation of the former trustee; 11 Paige, Ch. 814; 8 Barb. Ch. 76; Hill, Trust. 190. A court will not allow a trustee to fail or to be defeated by the refusal or neglect of the trustee to execute a power, if such a power is so given that it is reasonably certain that the donor intended it to be exercised; 85 Va. 966.

The power of equity to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that trusts are properly executed, and may properly be exercised whenever his continuance in office would be detrimental to the trust, and even if for no other reason than that human infirmity would prevent the co-trustees or their beneficiaries from working in harmony, and although charges against him are either not made out or are greatly exaggerated; 167 U. S. 810. A trustee is entitled to all reasonable expenses in carrying out the trust and all expenses reasonably necessary for the security, protection, and preservation of the property as well as for the prevention of a failure of the trust; 142 *id.* 326.

The mere naming a person trustee does not constitute him such. There must be an acceptance, express or implied; see 14 Wall. 189; as the acceptance is essential to the vesting of title in the trustee; 119 Mo. 572. But if the person named trustee does not wish to be held responsible as such, he should, before meddling with the duties of a trustee, formally disclaim the trust; 7 Gill & J. 157; 1 Pick. 370.

Ordinarily, no writing is necessary to constitute the acceptance of a trust in writing; 12 N. H. 432.

The duties of trustees have been said, in general terms, to be: "to protect and preserve the trust property, and to see that it is employed solely for the benefit of the *cestui que trust*." Bisp. Eq. § 138.

He must take possession of the trust property, and call in debts, and convert such securities as are not legal investments. Personal securities are not legal investments although the investment was made by the testator himself; 40 N. Y. 76; 18 Pa. 303; unless, by the terms of the trust, they are allowed; Bisp. Eq., 5th ed. (1893) § 139.

He will not be liable for the failure of a bank in which he has deposited trust funds, unless he has permitted them to be there for an unreasonable length of time; 29 Beav. 211; or has deposited them in his own name; 119 Ind. 593; as he must not mix them with his own funds; 8 Pa. 431; 41 Ala. 709. The addition of the word "trustee" to the signature of the drawer of a check constitutes such notice of a trust as to put the payee upon inquiry; 26 App. Div. N. Y. 615.

Investments by executors contrary to the requirements of the will, upon mere personal security, are at their risk; 48 N. J. Eq. 559. A trustee is personally liable for trust funds invested in personal securities; 2 Con. Sur. 458, and if invested in his own business, or for his own benefit, he becomes an insurer of the fund; 85 Me. 129; and is guilty of neglect if he loans money on an unsecured note; 36 S. C. 322. See 9 L. R. A. 279.

A trustee should not invest trust funds in trade or speculation; nor in bank stock, or stock of public companies; 4 Barb. 626; 18 Pa. 303; but see 9 Pick. 446; or in personal securities; 2 Con. Sur. (N. Y.) 458; he may invest in mortgages.

A trustee, though remunerated for his services, is not liable to the trust estate for loss caused by the thefts of a servant employed by him, where he has exercised due care in the selection of the servant; [1893] 1 Ch. 71.

Ordinarily the law will not permit a trustee to contract with his *cestui que trust* for a pecuniary advantage; to do so, he must

first dissolve the fiduciary relation; 138 Ill. 480; and every such contract is open to suspicion; 70 Ind. 508.

A writer has deduced the following rules as to investments by trustees (13 Am. L. Reg. N. S. 210): Where there is no express power of sale in the instrument creating a trust, and none is necessarily implied, and the discretion of the trustee is the sole restriction upon investments, he will generally be protected where he has acted *bona fide* and with reasonable diligence and prudence. But in a state where the trustee is protected from loss which may arise from certain specified and so-called legal investments, the rule is much more stringent, and extraordinary care and diligence are required of the trustee as well as *bona fides*, and it is dangerous to invest trust funds in any other securities than those thus indicated.

But where there is no express power of sale given, and where none such can necessarily be implied from the nature of the trustee's duties, the only safe means of changing an insecure investment, left so by the creator of the trust, is to make the change under the direction of the proper court, and if done without such authority, the trustee will be liable to the *cestui que trust* for breach of trust.

Where there is no such power of sale and the trustee leaves unchanged an investment made by the testator and loss ensues, he will generally be protected if acting with *bona fides*, even in cases where, if there had been a power of sale and he had neglected to sell, he would have been liable under the first rule laid down above.

A trustee will not be surcharged for a loss which has occurred to the estate if he has exercised common skill, prudence, and caution, but he will be held responsible for supine negligence or wilful default; 182 Pa. 407. Where a trustee held on to mortgages on agricultural land in hopes that an apparently temporary depression would pass away, it was held that he had committed only an error of judgment and was not liable for loss; [1896] 1 Ch. 323.

An act of 1896 in England provides that if a trustee acts honestly and reasonably, he may be relieved wholly or partly from personal liability for loss through investments; [1897] 1 Ch. 536.

The office and duties of trustees being matters of personal confidence, they are not allowed to delegate these powers unless such a power is expressly given by the authority by which they were created; and where one of several trustees dies, the trust, as a general rule, in the United States, will devolve on the survivor, and not on the heirs of the deceased; 3 Mer. 412; 11 Paige, Ch. 314; but a trustee may appoint an agent where it is usual to do so in the ordinary course of business; 10 Pa. 285; 8 Cow. 543. Where a trustee has delegated his trust, there is no question of primary and secondary liability in respect of a breach of trust, but all are equally liable; 68 Law T. 18.

While the law allows any person named as trustee to disclaim or renounce, he cannot, if he has by any means accepted and entered upon the trust, rid himself of the duties and responsibilities after such acceptance, except by a legal discharge by competent authority; 4 Johns. Ch. 136; 1 My. & K. 195. Disclaimer of a trust may be established by acts, or by non-action long continued; 119 Mo. 572. Where trustees who hold church property have seceded from the church, and also been expelled, they have divested themselves of all control of the church property and cannot maintain a bill to enjoin any one from doing anything which affects the property; 5 Super. Ct. Pa. 475.

The trustee is in law generally regarded as the owner of the property, whether the same be real or personal; Hill, Trust. 229. Yet this rule is subject to material qualifications when taken in connection with the doctrines of powers and uses, and the legislation of the several states; 1 How. 134; 4 Kent 321.

The quality and continuance of the estate of a trustee will be determined by the purpose and exigency of the trust, rather than by the phraseology employed in the description of the estate conveyed; and, therefore, if the language be that the estate goes to the trustee and his heirs, it may be limited to a shorter period, if thereby the purposes of the creation of the trust are satisfied; 8 Hare 156; 4 Den. 385.

Where there are several trustees, they are considered to hold as joint-tenants, and on the death of any one the property remains vested in the survivor or survivors; and on the death of the last, the property, if personal (at common law), went to the heir or personal representative of the last-deceased trustee. But the rule as to trust property going to heirs and executors is changed in most of the states, so that in theory the court of chancery assumes the control, and it appoints a new trustee on the decease of former trustees. If power be committed to two or more trustees, it is regarded as coupled with an interest, and will still exist in the surviving trustee on the death of any or all of the co-trustees. 2 Prob. Rep. Ann. (Ind.) 28. If the power is confided to several trustees, *nominatim*, it imports a personal discretion or confidence of a personal nature, and on the death of one of these donees the power dies with him and cannot be exercised by the survivors; *id.*; 13 Sim. 91; 4 Kent 311; Beach, Eq. Jur. § 240.

Each trustee has equal interest in and control over the trust estate; and hence, as a general rule, they cannot (as executors may) act or bind the trust separately, but must act jointly; 4 Ves. Ch. 97; 3 Ark. 384; 8 Cow. 544; 20 Me. 504; 11 Barb. 527.

Unlike joint executors, joint trustees cannot act separately, but must join both in conveyances and receipts; for one cannot sell without the others, or receive more of the consideration-money or be more a trustee than his partner. The trust having been given to the whole, it requires their joint act to do anything under it. They are not responsible for money received by their co-trustees, if the receipt be given for the mere purposes of form. But if receipts be given under circumstances purporting that the money, though not received by both, was under the control of both, such a receipt shall charge, and the consent that the other shall misapply the money, particularly where he has it in his power to secure it, renders him responsible; 11 S. & R. 71.

A trustee is, generally, not responsible for the conduct of his co-trustee; see 2 Lead. Cas. Eq. 838; where several trustees join in a receipt, *prima facie*, all will be considered to have received the money, but one of them may show that he did not in fact receive the money, but joined in the receipt for conformity; Bisp. Eq. § 146. A trustee who stands by and sees a fraud on the trust committed by his co-trustee will be held responsible for it; 17 Pa. 268. But trustees are not liable for the conversion of money collected by their co-trustee, in course of administration of the trust, without their knowledge or consent; 72 Hun 272.

Where there are several trustees, all must concur in any business of the trust; otherwise if it be a public trust, where the acts of a majority are binding; Bisp. Eq. § 147.

A trustee may come into equity to obtain advice and assistance in the execution of his trust; Hill, Trust. 298.

One trustee may be held responsible for losses which he has enabled a co-trustee to cause, though there was no actual participation by him; 18 Ohio 509; 5 How. 233. It is the duty of each trustee to carry out the trust, and a trustee cannot relieve himself of the duty by agreement with his co-trustees to look after only certain parts of the trust property; 147 U. S. 557.

Where the legal estate is vested in trustees, all actions at law relative to the trust property must be brought in their name, but the trustee must not exercise his legal

powers to the prejudice of a *cestui que trust*, and third persons must take notice of this limitation of the legal rights of a trustee; 2 Vern. 197.

The trustee (and also his personal representatives to the extent of any property received from the trustee) is responsible in suit for any breach of trust, and will be compelled to compensate what his negligence has lost of the trust estate. He is not only chargeable with the principal and income of the trust property he has received, but is liable for an amount equal to what, with good management, he might have received; and this includes interest on a sum he has needlessly allowed to remain where it earned no interest; 2 Beav. 480; 4 Russ. 195.

A court of equity has power to remove a trustee, independently of any statutory provisions or of directions contained in the instrument of appointment; 8 Ind. App. 27. The rule as to the right of a trustee to contribution from his co-trustee for loss by a breach of trust for which both are equally to blame, does not apply where one of the trustees is also a *cestui que trust* and has received an exclusive benefit by the breach of trust; in that case the rule to be applied is that under which the share or interest of a *cestui que trust* who has assented to, and profited by a breach of trust has to bear the whole loss; and the trustee who is a *cestui que trust* must, therefore, indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received; [1896] 1 Ch. D. 685.

On the death of a trustee, the legal title passes to his heirs, and it becomes their duty to care for trust property, or have a new trustee appointed; 113 Mo. 188.

Commissions upon the corpus of a trust estate are never allowed except when the fund is in course of distribution; 161 Pa. 457; except under extraordinary circumstances; *id.*

See BARE TRUSTEE; PUBLIC TRUSTEE.

TRUSTEE PROCESS. A legal process used in the New England states, and similar to the garnishee process of others.

All goods, effects, and credits so intrusted or deposited in the hands of others that the same cannot be attached by ordinary process of law, may, by an original writ or process, the form of which is given by the statute, be attached in whose hands or possession soever they may be found, and they shall, from the service of the writ, stand bound and be held to satisfy such judgment as the plaintiff may recover against the principal defendant; Cushing, Trustee Pr. 2. It is issued as part of the original writ.

TRUSTEES OF CHARITIES. See OFFICIAL TRUSTEES OF CHARITIES.

TRUSTING AND WHOLLY CONFIDING. In Will. The phrase "trusting and wholly confiding" as used in a will is considered sufficient to raise a trust where the subject and object are sufficiently certain. 73 Ky. 128.

TRY. To examine or investigate judicially; counsel are frequently said to try the causes in which they are engaged. Courts are said to "try prisoners" charged with crimes.

TUAS RES TIBI HABETO (Lat.). Have (or take) your things to yourself.

TUB. A measure containing sixty pounds of tea, and from fifty-six to eighty-six pounds of camphor. Jacob.

TUB-MAN. In Old English Law. A barrister who has a pre-audience in the exchequer, and also one who has a particular place in court, is so called.

TUCKER ACT. The act of March 3, 1887, relating to the jurisdiction of the court of claims. Garl. & Ralston, Fed. Pr. 418. See UNITED STATES COURTS.

TUG. A steam vessel built for towing; practically synonymous with *towboat*. Tugs are subject to the ordinary rules of navigation touching collisions. Where a schooner was being towed by a tug lashed

to her port side, the fact that the schooner had a pilot on board did not make the tug the more servant of the schooner, so as to exempt the tug from responsibility; 11 Fed. Rep. 319; 93 U. S. 802.

A tug is not a common carrier or insurer, and is bound only to reasonable care and skill; 80 Fed. Rep. 153; 63 Pa. 51; 94 U. S. 494. See TOWBOAT.

A tug and tow while being slowly navigated are held not to blame in a collision with a steam ship in a fog, although they do not stop where there are indications of danger. It is not subject to the same rule as two steamships approaching each other under like circumstances; [1897] P. 28. A contribution in general average cannot be had against a steam tug for casting off the tow of barges in order to save the tug; the tug and barges do not constitute a single maritime adventure; 167 U. S. 599. Towage contracts are within admiralty jurisdiction; 5 Bened. 720. See TOWAGE.

TUMBREL. An instrument of punishment made use of by the Saxons, chiefly for the correction of scolding women by ducking them in water, consisting of a stool or chair fixed to the end of a long pole.

TUMULTUOUS PETITIONING. Under stat. 18 Car. II. st. 1, c. 5, this was a misdemeanor, and consisted in more than twenty persons signing any petition to the crown or either house of parliament for the alteration of matters established by law in church or state, unless the contents thereof had been approved by three justices, or the majority of the grand jury at assizes or quarter sessions. No petition could be delivered by more than ten persons. 4 Bla. Com. 147; Moz. & W.

TUN. A measure of wine or oil, containing four hogsheds.

TUNGREVE. A reeve or bailiff. Spelman, Gloss.

TUNNAGE, OR TONNAGE. Anciently a duty in England on imported wines, imposed by parliament, in addition to prisage. The duty was at the rate of so much for every ton or cask of wine. It was first levied in the fourteenth century and was granted for life to several kings. It became practically a fixed tax in the reign of Anne. It was finally abolished by 27 Geo. 3, c. 13. The present duties on wines are regulated by the Customs Acts. Byrne.

TUNNEL. A municipal corporation, authorized by law to improve a street by building on the line thereof a tunnel under a navigable river, incurs no liability for damages unavoidably caused to adjoining property by obstructing the street or river, unless such liability be imposed by statute. 99 U. S. 635.

TURBARY. In English Law. A right to dig turf; an easement. It cannot be dug for sale; Noy 145.

TURF AND TWIG. Formerly, in a delivery of land, the *feoffor* delivered to the *feoffee* as a symbol a clod or turf, or a twig or bough growing on the land, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." 2 Bl. Com. 315.

TURN, or TOURN. See SHERIFF'S TOURN.

TURN TABLE DOCTRINE. The "Turn Table Doctrine" was established upon the idea that something dangerous to children had been constructed at a place where children were in the habit of passing or congregating, or at a place easy of access and inviting to children, and that these facts were known to the owner of the dangerous structure. 151 Ky. 335, 151 S. W. 941.

TURNKEY. A person under the superintendence of a jailor, whose employment is to open and fasten the prison-doors and to prevent the prisoners from escaping.

It is his duty to use due diligence; and

he may be punished for gross neglect or wilful misconduct in permitting prisoners to escape.

TURNOUT. A short side-track on a railroad which may be occupied by one train while another is passing on the main track; a siding. 19 Atl. Rep. (Pa.) 356. See RAILROAD.

TURNPIKE. See TURNPIKE ROAD.

TURNPIKE-ROAD. A road or highway over which the public have the right to travel upon payment of toll, and on which the parties entitled to such toll have the right to erect gates and bars to insure its payment. 6 M. & W. 428; 85 Ky. 244.

Turnpike-roads are usually made by corporations under legislative authority; and, the roads being deemed a public use, such corporations are usually armed with the power to take private property for their construction. The title to the soil remains in the owners of the adjoining land; 27 N. J. L. 76; and, after the franchise for the construction of the turnpike has expired, the road reverts to the public; 104 Pa. 583; 10 Nev. 155. The legislature may authorize the conversion of an existing highway into a turnpike-road; 18 Conn. 32; 3 Barb. 159; without any pecuniary equivalent to the owner of the fee, such road still remaining a public highway; 2 Ohio St. 419; but no matter how bad the condition of a public road, its condition is no justification to a turnpike company for taking it as the line of a turnpike; 128 Pa. 621. A turnpike-road being a highway, any obstruction placed thereon renders the author of it liable as for a public nuisance; 16 Pick. 175; 8 Wend. 555.

A turnpike company cannot be deprived of its road or its franchise by the extension of the limits of a municipal corporation to include the road; 182 Ind. 90. It is held that municipal authorities may require the grade of a turnpike within its limits to be changed to conform to that of a street; 39 N. J. L. 500; and the municipality may require the turnpike to be kept in repair, but the city is not liable for a failure to do so; 82 N. J. L. 548; and a municipality may, by legislative authority, tax itself in aid of a turnpike company; 1 Wall. 175; 20 Gratt. 661; 41 Conn. 211.

A statute attempting to authorize a court, without a jury, to declare a turnpike-road abandoned and its franchise forfeited because the road has been out of repair for six months, violates the constitution guaranty of trial by jury and against the deprivation of property without due process of law; 50 Ohio St. 568.

Turnpike companies, so long as they continue to take toll, are bound to use ordinary care in keeping their roads in suitable repair, and for any neglect of this duty are liable to action on the case for the damages to any person specially injured thereby; 6 Johns. 90; 10 Pick. 85; see 29 Atl. Rep. (Pa.) 721; and to an indictment on the part of the public; 4 Ired. 16; 10 Humphr. 97; 26 Ala. n. s. 88; 1 Harr. N. J. 222; 9 Barb. 161; 2 Gray 58.

Travellers are liable for toll though they avoid the gates; 2 Root 524; 10 Vt. 197; but not for travel between the gates without passing the same; Elliot, Roads 70; 2 B. Monr. 30; 10 Ired. 30; 11 Vt. 281. In an action by a company to enforce the statutory penalty for illegally passing its tollgate, it is no defence that the road was not in good condition; 95 Mich. 372. Exemptions from toll are construed most liberally in favor of the community; Ang. High. § 359; and are usually created by special statute in relation to different kinds of vehicles; 24 N. Y. 658; going to or from mills; 15 Johns. Ch. (N. Y.) 510; in favor of husbandry; 24 N. J. L. 205; going to church; 2 B. & Ald. 208; ordinary domestic business of family concerns; 12 Vt. 212. Mail coaches are subject to toll, but may not be delayed for non-payment; 2 W. & S. 163.

A turnpike company authorized to collect toll from designated carriages, etc.,

may collect toll from bicycles, although the amount of toll cannot be exactly determined by the method designated for other vehicles; 167 Pa. 582; a contrary result has recently been reached in New Jersey in a case noted in the public press.

A "shunpike" is a road or turnpike laid out by an individual or by the selectmen of the town to facilitate the evasion of toll by travellers upon a turnpike road and will entitle the turnpike company to an action on the case for the damages, or to an injunction ordering the same to be closed; Elliot, Roads, p. 74; 10 N. H. 183; 18 Conn. 451; 1 Johns. Ch. 815; 36 S. W. Rep. 979; unless made necessary by the lay of the land and the wants of the community; 11 Pet. 420. And such company has been held entitled to compensation for the injury to their franchise by a highway which intersects their road at two distinct points and thereby enables travellers to evade the payment of tolls, though such highway be regularly established by the proper authorities to meet the necessities of public travel; 1 Barb. 286.

TURPILLIANUM See LEX PETRONIA.

TURPIS CAUSA (Lat.). A base or vile consideration, forbidden by law, which makes the contract void: as, a contract the consideration of which is the future illegal cohabitation of the obligee with the obligor.

TURPIS CONTRACTUS (Lat.). An immoral or iniquitous contract.

TURPITUDE (Lat. *turpitudō*, from *turpis*, base). Everything done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude.

TUTELA (Lat.). A power given by the civil law over a free person to defend him when by reason of his age he is unable to defend himself. Women by the civil law could only be tutors of their own children. A child under the power of his father was not subject to tutela, because not a free person, *caput liberum*.

Legitima tutela was where the tutor was appointed by the magistrate.

TUTELAGE. See TUTELA.

TUTEUR OFFICIEUX. In French Law. A person whose duties are analogous to those of a guardian in English law; he must, however, be over fifty years of age, and appointed with the consent of the parents, or, in their default, of the *conseil de famille*, and is only appointed for a child over fifteen years of age.

TUTEUR SUBROGE. In French Law. The title of a second guardian ap-

pointed for an infant under guardianship; his functions are exercised in case the interests of the infant and his principal guardian conflict. Code Nap. 420; Brown, Dict.

TUTOR. In Civil Law. One who has been lawfully appointed to the care of the person and property of a minor.

By the laws of Louisiana, minors under the age of fourteen years, if males, and under the age of twelve years, if females, are, both as to their persons and their estates, placed under the authority of a tutor. Above that age, and until their majority or emancipation, they are placed under the authority of a curator.

TUTOR ALIENUS (Lat.) In English Law. The name given to a stranger who enters upon the lands of an infant within the age of fourteen, and takes the profits.

He may be called to an account by the infant and be charged as guardian in socage; Littleton, s. 124; Co. Litt. 89 b, 90 a.

TUTOR PROPRIUS (Lat.). The name given to one who is rightly a guardian in socage, in contradistinction to a *tutor alienus*.

TUTORSHIP. The power which an individual, *sui juris*, has to take care of the person of one who is unable to take care of himself. Tutorship differs from curatorship. See PROCURATOR; PROTUTOR.

TUTRIX (Lat.). A woman who is appointed to the office of a tutor.

TWELFHINDI. The highest rank of men in the Saxon government, who were valued at 1,200s. For any injury done to them, satisfaction was to be made according to their worth. Cowel; Whart. Dict.

TWELF HINDMEN. See HINDENI HOMINES.

TWELVE-DAY WRIT. A writ for summary procedure on bills of exchange and promissory notes. Whart. The popular title for the writ issued in pursuance of Keating's Act. The plaintiff was entitled to judgment unless the defendant within twelve days from service obtained leave to defend. Byrne.

TWELVE O'CLOCK IN THE DAY TIME. "Twelve o'clock in the day time" means "noon," "mid-day," "twelve o'clock at noon." 120 Ky. 764, 87 S. W. 1155, 98 S. W. 3.

TWELVE TABLES, LAWS OF THE. Laws of ancient Rome, composed in part from those of Solon and other Greek legislators, and in part from the unwritten laws and customs of the Romans. See CODE; 1 Kent 522.

TWELVEMONTH, in the singular, includes the whole year, but in the plural, twelve months of twenty-eight days each. 6 Co. 62; Bish. Writ. Laws 97. See MONTH.

TWICE IN JEOPARDY. See JEOPARDY.

TWYHINDI. The lower order of Saxons, valued at 200s. Cowel. See TWELFHINDI.

TWYHINDMEN. See HINDENI HOMINES.

TYBURN TICKET. In English Law. A certificate given to the prosecutor of a felon to conviction. By the 10 & 11 Will. III. c. 23, the original proprietor or first assignee of such certificate is exempted from all and all manner of parish and ward offices within the parish or ward where the felony shall have been committed; Bacon, Abr. Constable (C).

TYPEWRITING. In the administration of the post-office department typewriting is treated as writing, and letter postage is charged therefor. So in some states where wills are required to be "in writing" a typewritten paper is treated as sufficient. Such is a constant practice in Delaware. A typewritten memorial presented to the house of commons (1897) was refused, and it is not to be received in British courts or in some British offices. Typewriting is not used between the state department and foreign legations, nor in the important original documents of the department. It is expressly legalized by statute in New York, by all state and municipal officers in all records (March 23, 1894); in Connecticut, for taking evidence in courts of common pleas in the same way as stenographers (May 7, 1895); in Oregon for wills (April 17, 1896); while in Pennsylvania it is more comprehensively declared to be of equal force with writing except for signatures (June 18, 1895). The implication from these few statutes and the instances given, where as mere matter of conservative custom, uncontrolled by law, its use is not permitted, are entirely insufficient to countervail the fact of its general, it may be said universal, use without question as a substitute for and equivalent of writing, indicated by the fact that a diligent search of digests, law dictionaries, and encyclopedias and annotated cases fails to disclose any judicial rejection of it.

TYRANNY. The violation of those laws which regulate the division and the exercises of the sovereign power of the state. It is a violation of its constitution. See DESPOTISM.

UBERRIMA FIDES (Lat. most perfect good faith). A phrase used to express the perfect good faith, concealing nothing with which a contract must be made; for example, in the case of insurance, the insured must observe the most perfect good faith towards the insurer. 1 Story, Eq. Jur. § 817. See **GOOD FAITH**.

UBI JUS, IBI REMEDIUM. See **MAXIM; REMEDY**.

UDAL. Allodial. See **ALLodium**.

UFFER. See **HUISSENUM**.

UKAAS, UKASE. The name of a law or ordinance emanating from the czar of Russia.

ULNAGE. Alnage. See **ALNAGER**.

ULTIMATE FACTS. Facts in issue as opposed to probative or evidential facts, the latter being such as serve to establish or disprove the issue. 2 Utah 379.

ULTIMATUM (Lat.). The last proposition made in making a contract, a treaty, and the like; as, the government of the United States has given its *ultimatum*, has made the last proposition it will make to complete the proposed treaty. The word also means the result of a negotiation, and it comprises the final determination of the parties concerned in the object in dispute.

ULTIMUM SUPPLICIUM (Lat.). The last or extreme punishment; the penalty of death.

ULTIMUS HÆRES (Lat.). The last or remote heir; the lord. So called in contradistinction to the *hæres proximus* and the *hæres remotior*. Dair. Feud. Pr. 110.

ULTRA MARE. Beyond seas (*q. v.*). One of the old *essons* or excuses for not appearing in court at the return of process. Burrell; Bract. fol. 338.

ULTRA VIRES. The modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation.

A term used to express the action of a corporation which is beyond the powers conferred upon it by its charter, or the statutes under which it was instituted. 13 Am. L. Rev. 632.

This doctrine is of modern growth; its appearance dates from about the year 1845, being first prominently mentioned in 10 Beav. 1 and 11 C. B. 775. See Green's Brice, *Ultra Vires* v 729.

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the state, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel; but where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing whatever may fairly be regarded as incidental to, or consequential upon, these things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*; 163 U. S. 564.

When acts of corporations are spoken of

as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, etc.; 63 N. Y. 63. A corporate act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose; or, with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or, with reference to some specific purpose, when it is not authorized to perform it for that purpose, though fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose; 43 Ia. 48. See 35 L. J. Ch. 156; 125 Mass. 333; 37 Cal. 543.

As a general rule, such acts are void, and impose no obligation upon the corporation although they assume the form of contracts; inasmuch as all persons dealing with a corporation, especially in the state or country in which and under whose laws it was created, are chargeable with notice of the extent of its chartered powers. It is otherwise as to laws imposing restraints upon it not contained in its charter where the contract is made or the transaction takes place without the limits of the state or country under whose laws the corporation exists; 8 Barb. 233.

Perhaps the most general statement of the doctrine of *ultra vires* is that a contract of a corporation which is unauthorized by, or in violation of, its charter or other governing statute, or entirely outside of the scope of the purpose of its creation, is void in the sense of being no contract at all, because of a total want of power to enter into it; such a contract will not be enforced by any species of action in a court of justice; being void *ab initio*, it cannot be made good by ratification, or by any succession of renewals; and no performance on either side can give validity to the unlawful contract, or form the foundation of any right of action upon it; 5 Thomp. Corp. § 5963.

The artificial body—the corporation—is liable to be proceeded against by *quo warranto* for the usurpation of powers in its name by its officers and agents, and its charter may be taken away as a penalty for permitting such acts—the defence of a want of power to bind the corporation not being available in such cases, since it would lead to entire corporate irresponsibility; Moraw. Pri. Corp. § 649.

A corporation has all the capacities for engaging in transactions and for management which are given it expressly by its charter, etc., or impliedly given it by reasonable implication from the language thereof. Capacities or powers for management may be given by wide general language. Beyond these powers, they have no capacities or powers, and cannot legally engage in other transactions.

In the United States the defence of *ultra vires* interposed against a contract wholly or in part executed has very generally been looked upon with disfavor. The result has been that in some cases a liberal construction has been applied so as to destroy the foundation of the defence; in others the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases, the doctrine of estoppel *in pais* has been applied to exclude the defence. The courts may be said, gener-

ally, to be tending towards the doctrine—certainly so far as business corporations are concerned—that corporations are to be held liable upon executed contracts, where the contracts involved are not expressly or by necessary implication prohibited by their charters or the general law; Brice *Ultra Vires* 729.

There is said to be a tendency of the courts, based upon the strongest principles of justice, to enforce contracts against corporations, although in entering into them they have exceeded their chartered powers, where they have received the consideration and the benefit of the contract; 7 Wall. 392; 98 U. S. 621; see 51 Fed. Rep. 1; 46 Kan. 524; and the rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation became insolvent; 57 Fed. Rep. 47; 47 *id.* 22. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong; 96 U. S. 258. The executed dealings of corporations should be allowed to stand for and against both parties, when good faith so requires; 22 N. Y. 258, 494; 63 N. Y. 63. Where a corporation has entered into a contract which has been fully executed on the other part, and nothing remains but the payment by the corporation of the consideration, it will not be allowed to set up that the contract was *ultra vires*; 83 Pa. 160. Corporations should be restricted so far as courts can, in the exercise of their powers, limit them; but the plea is not a gracious one, that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it.

A contract of a corporation which is *ultra vires* is not voidable only, but wholly void; 160 U. S. 514, citing 139 *id.* 24. The *ultra vires* contracts of corporations when *malum in se* or *malum prohibitum* will not be enforced,—but as to contracts not thus objectionable justice requires that the doctrine of *ultra vires* should be limited, and when a corporation, *ultra vires*, leases its property and the lessee has occupied the same, the lessee is liable for the rent for the time of his occupation; though, as to the public, such lease would be void; N. Y. Ct. of App., in 54 Alb. L. J. 389. It is a much disputed question whether unauthorized contracts neither *malum in se* nor *malum prohibitum*, or where the restriction is implied from the grant of specified powers, are absolutely void and non-enforceable, even where the other party has received the consideration for his promise. It is held in special English cases that *ultra vires* contracts are under no circumstances enforceable; 11 C. B. 775; L. R. 18 Q. B. 618; 7 Eng. & Ir. App. 652. It has also been held that where leases of railroads were made without legislative sanction they were void as between the parties, and no action could be maintained to recover the rent even during the occupation by the lessee under the lease; 101 U. S. 71; 118 U. S. 290.

A corporation may not avail itself of the defence of *ultra vires* where a contract which it has entered into has been in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance of the contract; 182 Pa. 206. As where a bank caused property

owned by it to be conveyed by a deed, regular in form, to a worthless corporation organized by its own directors and then lent money to such corporation and took its notes and discounted them with strangers, by representing them as prime paper and on the strength of such corporation's apparent ownership of such property, it was held to be thereafter estopped as against the holders of the notes to assert that the conveyance was *ultra vires*; 73 Fed. Rep. 946.

In no way and through no channels, directly or indirectly, will courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to the contract; recovery must rest upon a disaffirmance of the contract and the recovery of what in justice should be recovered, but without breaking this rule. Where a sleeping-car company made a void lease of its property and business to another sleeping-car company, it was held that the value of the property transferred to the lessee when the lease took effect, with interest, could be recovered by the lessor, as that had substantially disappeared and could not now be returned. But that the value of contracts with railroad companies transferred by the lease and the value of the expired patents formed no part of the sum which the lessor was entitled to recover for the breaking up of its business by reason of the contract being adjudged illegal; 171 U. S. 138. See 8 Harv. L. Rev. 15.

It has been held *ultra vires* for a railway company to guarantee to the shareholders of a steam packet company a dividend upon capital; 10 Beav. 1; to engage in the coal trade; 6 Jur. N. S. 1006; for a company to assume the debt of another; 34 Vt. 144; or to make or indorse accommodation paper; 11 Ind. 104; or to engage as surety for another in a business in which it has no interest; 26 Barb. 568, or to guaranty, for accommodation, the obligations of another corporation; 57 Fed. Rep. 47; for one railroad company to unite with another like company, and both conduct their business under one management; 21 How. 441; or to run a line of steamboats in connection with its road; 39 Mo. 451; or for a mutual benefit society to undertake to pay the death losses of another insurance company; 70 Ia. 542; 87 id. 733; but a railway company may contract to carry beyond its own lines; Wood, Railr. 619; 54 Pa. 77; 96 U. S. 258; but see 22 Conn. 502. Where a corporation is incompetent to take real estate, a conveyance to it is only voidable; Morawetz, Corp., 2d ed. 678. A railroad company has implied authority to erect a refreshment room; L. R. 7 Eq. 116; a corporation authorized to erect a market has authority to purchase land for that purpose; Dill. Mun. Corp. § 447; where a corporation had authority to keep steam vessels for the purposes of a ferry, they could use these vessels, when otherwise unemployed, for excursion trips; 30 Beav. 40; 11 Allen 326. Corporations generally have authority to borrow money to carry out the objects for which they were created, and to execute their obligations therefor; Field, Corp. § 249; including irredeemable bonds; 21 Am. L. Reg. N. S. 713; they may, generally, by virtue of implied powers, make promissory notes; 13 Am. L. Rev. 641; 15 Wall. 566; 35 N. Y. 503. Where a railroad company, without legislative authority, leased its road to three persons, for twenty years, this was held *ultra vires*; 101 U. S. 71. See LEASE. A railroad company cannot guarantee the expense of a musical festival; 131 Mass. 258; the same ruling applies to a company organized to manufacture and sell organs; *ibid*.

It is said to be now well settled that a power granted to a corporation to engage in certain business carries with it the authority to act precisely as an individual would act in carrying on such business, and that it would possess for this purpose the usual and ordinary means to accom-

plish the objects of its creation, in the same manner as though it were a natural person; Field, Corp. § 271. A manufacturing corporation may purchase a large tract of land for the purpose of erecting thereon its factories and residences for its employes, and contribute toward the establishment thereof of a church, a school, a free library, and a free bath for its employes; 17 Misc. Rep. 43. The contrary has just been decided in the Pullman's Company case in Illinois.

The doctrine of *ultra vires* ought to be reasonably understood and applied; and whatever may be fairly regarded as incidental to and consequential upon those things which are authorized by the charter of the company, ought not, unless expressly prohibited, to be held by judicial construction, to be *ultra vires*; 49 N. J. Eq. 217.

The result of the English authorities is, that corporations—certainly those for commercial purposes, and probably all corporations to which the doctrine applies—have by implication all capacities and powers which, being reasonably incidental to their enterprise or operations, are not forbidden, either expressly by their constituting instruments or by necessary inference therefrom; Green's Brice, *Ultra Vires* 40. The American decisions seem to be tending towards this doctrine; *id.* note a. *Prima facie*, all the contracts of a corporation are valid, and it lies on those who impeach any contract to make out that it is void; 96 U. S. 267; 8 Macq. 382; 49 N. J. Eq. 217.

A court of equity, at the suit of the stockholders of the corporation, will restrain the commission of acts beyond the corporate power, by injunction operating upon the individual officers and directors as well as the corporation. This is now an acknowledged head of equity jurisdiction; Wood, R. R. 633; Redf. Railw. 400; 18 Wall. 626; 10 Beav. 1; creditors are said to have the same right in this respect as stockholders; 13 Am. L. Rev. 659.

Acquiescence for any considerable time in the exercise of excessive powers, after they come to the knowledge of the stockholders, would, however, be a decisive objection to such a remedy; 19 E. L. & E. 7.

In regard to municipal corporations, the rule is stricter against the validity of *ultra vires* contracts. See Dill. Mun. Corp. § 381.

It has been said that a corporation is liable for the negligence and other torts of its agents and servants, even when related to and connected with the acts of the corporation that are *ultra vires*; even if done in the execution of usurped powers and of purposes clearly *ultra vires*; Beach, Pr. Corp. § 444; but as to whether a corporation is liable for such wrongs by its agents as are beyond the scope of corporate authority, see L. R. 2 Q. B. 534; 7 H. & N. 172; 47 N. Y. 122.

ULTRONEUS WITNESS. A witness who offers his testimony without being regularly cited. Bell, Dict. Evidence.

UMPRAGE. The decision of an umpire. 4 Lea 288.

UMPIRE. A third person appointed to decide between two other judges or referees who differ in opinion. 1 Harr. Del. 260. The jurisdiction of the umpire and arbitrators cannot be concurrent; Morse, Arb. & Aw. 241; if the arbitrators make an award, it is binding; if not, the award of the umpire is binding; T. Jones 167. If the umpire sign the award of the arbitrators, it is still their award, and *vice versa*; 6 Harr. & J. 403. He determines the issue submitted to the arbitrators on which they have failed to agree, which is his sole award; and neither of the original arbitrators is required to join in the award; 11 Allen 384; 75 Ill. 30. Arbitrators may appoint an umpire after their term of service has expired, if the time is not gone within which the umpire was to make his award; 2 Johns. 57. Subsequent

dissent of the parties, without just cause, will have no effect upon the appointment; but they should have notice; 12 Metc. 293. If an umpire refuse to act, another may be appointed *toties quoties*; 11 East 367.

UNA CUM OMNIBUS ALIIS (Lat.). Together with all other things.

UNA VOCE (Lat.). With one voice; unanimously.

UNADJUSTED. Uncertain; not agreed upon. 43 Me. 214.

UNALIENABLE. Incapable of being transferred.

Things which are not in commerce, as, public roads, are in their nature unalienable. Some things are unalienable in consequence of particular provisions in the law forbidding their sale or transfer; as, pensions granted by the government. The natural rights of life and liberty are unalienable.

UNANIMITY (Lat. *unus*, one, *animus*, mind). The agreement of all the persons concerned in a thing, in design and opinion. See JURY; MAJORITY.

UNAPPROPRIATED LANDS. See STATE LANDS.

UNASCERTAINED DUTIES. Payment in gross on an estimate as to amount. 5 Blatchf. 374.

Where the merchant, on a final liquidation, will be entitled by law to allowances or deductions which do not depend on the rate of duty charged, but on the ascertainment of the quantity of the article subject to duty. Abbott; 5 Blatchf. 274.

UNAVOIDABLE. See UNAVOIDABLE DELAY.

UNAVOIDABLE ACCIDENT. Does not mean an accident which it is physically impossible in the nature of the things to prevent; but an accident not occasioned in any degree, remotely or directly, by the want of such care or skill as the law holds every man bound to exercise. Anderson; 8 Wend. 473.

UNAVOIDABLE CASUALTY. Events or accidents which human prudence, foresight, and sagacity cannot prevent. 6 U. S. App. 42; 3 Gray 325. If by any care, prudence, or foresight a thing could have been guarded against, it is not unavoidable; 50 Ga. 509. An *unavoidable accident* is synonymous with inevitable accident. See INEVITABLE ACCIDENT; ACT OF GOD; FORTUITOUS EVENT.

UNAVOIDABLE CAUSE. An accidental or unavoidable cause which cannot be avoided by the exercise of due diligence and foresight (in the meaning of Twenty-eight Hour Law, Act June 29, 1906) is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and whose effects under similar circumstances they do not and would not ordinarily avoid. 194 Fed. 344, citing 61 Fed. 120 *et al.* See DUE DILIGENCE AND FORESIGHT.

UNAVOIDABLE DELAY. A delay caused by negligence is not "unavoidable." "Unavoidable" means inevitable; a condition of affairs, impossible to avert. To delay without cause, or, when the cause is completely within the control of the party charged with the duty to act, the failure to so act is neglect, and negligence is antithetical to unavoidableness. 186 Fed. 518, 520.

UNBORN CHILD. See EN VENTRE SA MERE; TORT; 12 Harv. L. Rev. 209.

The mother's right to the damages she suffers for the defendant's wrongful act in causing her to bring forth a deformed and sickly child, instead of a well developed and healthy one, does not depend on the question whether at the time of the injury the foetus is deemed in law a person, or whether after birth it may maintain an action, to recover for the wrong done to it before its birth. She cannot recover in her own right for the

child's injuries for which, if it were deemed a person in law, it would have a right of action; and if it is deemed not to be a person at the time of the injury, but *pars viscerum matris*, she suffers no damage for its deformity merely; that is, the fact alone that it is deformed is a misfortune to the child, for which she is not entitled to damages, unless it causes her special physical pain and suffering. If the child cannot recover, it does not follow she can. There is no legal connection between their rights of action for their respective damages. But while the injuries suffered by each are distinct and independent, the mother's anxiety before the birth of the child, in view of the reasonable probability that the defendant's act will cause her to produce an abnormal child, is peculiarly an element of damage to her. 74 N. H. 463. See COMPENSATORY DAMAGES, *Doctrine of*.

UNCERTAIN EVENT. An event depending on mere efflux of time is not an "uncertain event" for the period fixed is sure to be reached whether the person attain it in living or not. 110 Ky. 889, 62 S. W. 1036.

UNCERTAINTY. That which is unknown or vague. See CERTAINTY.

UNCIA TERRÆ (Lat.). This phrase often occurs in charters of the British kings, and denotes some quantity of land. It was twelve *modii*, each *modius* possibly one hundred feet square. Mon. Ang. tom. 8, pp. 198, 205.

UNCIARIUS HERES. In Civil Law. An heir to one-twelfth of an estate or inheritance. Calv. Lex.

UNCLE. The brother of a father or mother. See AVUNCULUS; PATRUS.

UNCONDITIONAL OWNERSHIP. Ownership is unconditional when the quality of the estate is not limited or affected by any condition. Richards, Ins. Law., 3rd ed., 336, n; 179 Pa. St. 381.

UNCONSCIONABLE BARGAIN. A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other. 2 Ves. 125; 4 Bouv. Inst. n. 8848. See USURY; EXPECTANCY; POST ORBIT.

UNCONSTITUTIONAL. See CONSTITUTIONAL; STATUTE.

UNCORE PRIST (L. Fr. still ready). A plea or replication that the party pleading is still ready to do what is required. Used in connection with the words *tout temps prist*, the whole denotes that the party always has been and still is ready to do what is required, thus saving costs where the whole cause is admitted, or preventing delay where it is a replication, if the allegation is made out. 3 Bla. Com. 808.

UNDE NIHIL HABET. See DOWER.

UNDEFENDED. A term sometimes applied to one who is obliged to make his own defence when on trial, or in a civil cause. A cause is said to be undefended when the defendant makes default, in not putting in an appearance to the plaintiff's action; in not putting in his statement of defence; or, in not appearing at the trial either personally or by counsel, after having received due notice. Lush's Prac. 548.

UNDER. The term is sometimes used in its literal sense of "below in position," but more frequently in its secondary meaning of "inferior" or "subordinate." 8 How. 356.

Elected Under the Constitution. The phrase, "elected under the Constitution," means "elected since the adoption of the Constitution." 132 Ky. 54, 116 S. W. 313.

UNDER CHAMBERLAINS OF THE EXCHEQUER. Two officers who cleaved the tallies written by the clerk of the tallies and read the same. They also made searches for records in the treasury, and had the custody of the domesday book. Cowel.

UNDER AND SUBJECT. Words frequently used in conveyances of land which is subject to a mortgage, to show that the grantee takes subject to such mortgage. See MORTGAGE; 27 Am. L. Reg. n. s. 387, 401.

UNDER TENANT. One who holds by virtue of an under lease, from a lessee.

UNDER WAY. It was held that a steam tug was under way when she was fast alongside of a vessel which she was moving up to her anchor preparatory to towing her away. 29 Am. & Eng. Encyc. 2nd ed., 99; The Romance (1901), p. 15. It was held that a vessel with her anchor down, but not actually held by or under control of it, was under way. Id.; L. R. 2 A. & E. 350.

UNDERGROUND BODIES OF WATER. See WATERS.

UNDERGROUND WATER COURSES. See WATERS.

UNDERGROUND WATERS. See SUBTERRANEAN WATERS.

UNDERGROWTH. A term applicable to plants growing under or below other greater plants. 70 Miss. 411.

UNDERLEASE. An alienation by a tenant of a part of his lease, reserving to himself a reversion; it differs from an assignment, which is a transfer of all the tenant's interest in the lease. 3 Wils. 234; W. Blackst. 766. And even a conveyance of the whole estate by the lessee, reserving to himself the rent, with a power of re-entry for non-payment, was held to be not an assignment, but an underlease; 1 Stra. 405; Woodf. L. & T. 731. The transfer of a part only of the lands, though for the whole term, is an underlease; 2 Ohio 216; contra, 4 Bibb 538. See LEASE; ASSIGNMENT.

UNDERLIE THE LAW. In Scotch criminal procedure, an accused person, in appearing to take his trial, is said "to compear and underlie the law." Moz. & W.

UNDERSTANDING. It may denote an informal agreement or a concurrence as to its terms. 47 Wis. 507. A valid contract engagement of a somewhat informal character. 32 Minn. 238. In the law of contracts it is a loose and ambiguous term, unless accompanied by some expression to show that it constituted a meeting of the minds of the parties upon something respecting which they intended to be bound. 25 Conn. 529.

UNDERSTOOD. Agreed. 14 Gray 165. It falls short of alleging a distinct express contract; 19 S. C. 419. See UNDERSTANDING.

UNDERTAKER. A contractor. A bondsman. One who undertook to collect the revenue or supply the necessities of the English royal family. One who undertook to elect members of the parliament of 1614 favorable to the king. A Scotch adventurer of the 17th century who undertook to hold crown lands in Ireland. One who undertakes to bury the dead. English.

UNDERTAKING. An engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other: a promise. 5 East 17; 2 Leon. 224; 4 B. & Ald. 595, followed in 28 Tex. App. 186. It does not necessarily imply a consideration; 3 N. Y. 335.

UNDERTOOK. Assumed; promised. This is a technical word which ought to be inserted in every declaration of assumpsit charging that the defendant undertook to perform the promise which is the foundation of the suit; and this though the promise be founded on a legal liability or would be implied in evidence. Bacon, Abr. *Assumpsit* (F); 1 Chitty, Pl. 68, note p.

UNDERWRITER. The party who agrees to insure another on life or property, in a policy of insurance. He is also called the insurer.

The title is almost exclusively confined to insurers of marine risks, and is derived from the method of obtaining such insurance formerly in vogue, usually as follows: A premium having been agreed upon between the insured and an insurance broker, a statement of such premium and of the ship or cargo, and the voyage or time, was written at the head of a sheet which was laid on the broker's table. Then such merchants as were willing to insure such property on such terms subscribed their names to the statement above mentioned, stating the amount they were willing to insure; and so on until the desired amount of insurance was obtained 1 Pars. Mar. Ins. 14.

UNDERWRITING. An agreement made in forming a company and offering its stocks or bonds to the public, that if they are not all taken up, the underwriter will take what remains. An underwriter is held liable in England on the stock subscribed for by him. See 42 Ch. D. 1.

Underwriting contract. An agreement to take shares in a company forming, so far as the same are not subscribed to by the public. Palmer, Company Precedents 107.

UNDERWRITING OF STOCK. See STOCK.

UNDISPOSED OF. "Undisposed of," used in a will, means what remains after paying a legacy. 7 Ky. Opinions 401.

UNDIVIDED. Held by the same title by two or more persons, whether their rights are equal as to value or quantity, or unequal. See 16 Pick. 98.

UNDUE INFLUENCE. The use by one, in whom a confidence is reposed by another who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage of his weakness of mind, or of his necessities or distress. 94 Cal. 642; or to constrain him to do that which he would not have done without the exercise of such control. 50 N. J. Eq. 439.

That influence which compels one to do that which is against his will from fear, the desire of peace, or some feeling which is tantamount to force or fear. 95 Ala. 495; 86 Md. 494.

Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practised, even though it induce one to make an unequal and unjust distribution of his property, if such disposition is voluntarily made; 135 U. S. 167; 88 N. Y. 357; but the question of the boundary of legitimate influence must be determined by the consideration of the relation between the parties, the character, strength, and condition of each of them, and the application of sound sense to each given case; 44 N. J. Eq. 154; 82 Va. 225; the mental and physical condition of the testator, the provisions of the will itself; 98 Mo. 433; 117 Ill. 14; 23 App. Div. 411; 83 Fed. Rep. 33; and the conduct of the testator after its execution; 66 Pa. 288. The questions of capacity and undue influence are closely connected and must be considered together; 29 Ark. 151.

On principles of public policy, there is a presumption of undue influence in voluntary settlements between parent and child; 1 Ves. 401; 34 Beav. 457; 15 id. 278; guardian and ward; 10 L. R. Eq. 405; trustee and *certain que trust*; 30 Beav. 39; legal adviser and client; 2 Atk. 25; or between one and his spiritual adviser; 2 L. C. Eq. 597, n.; s. c. 14 Ves. 273; and so there is said to be a presumption of undue influence in case of wills made where these relations exist between the parties; 14 Fed. Rep. 905; 88 N. Y. 871; but see 71 Hun 27, where it was held that undue influence could not be presumed from the fact that the beneficiary stood in a confidential relation to the testator. See 5 Misc. Rep. 63; 114 Mo. 35; 85 Ala. 267.

Undue influence will not invalidate a will if, at the time of making it, the tes-

tator's freedom of will was not overcome; 118 Pa. 259; 184 U. S. 47; but it is held that where it is exercised by any one, even if not a beneficiary, undue influence is ground for setting the will aside; 74 Cal. 53. See DURESS; FRAUD; INFLUENCE.

UNFAIR COMPETITION. See COMPETITION, UNFAIR; TRADE-MARK.

UNFORESEEN REASON. The words "unforeseen reason" in a contract, permitting one of the parties for any "unforeseen reason" to excuse himself from performance, left it with him to assign any reason, he might see proper for declining to perform the contract. It was not necessary that the reason should be a good reason or a reasonable reason. 156 Ky. 7, 160 S. W. 777.

UNGELD. An outlaw. Toml.

UNGOVERNABLE PASSIONS. The phrase, excite "ungovernable passions," is substantially the same as the expression "excite the passions beyond control"; for, if "ungovernable passions" have been excited, they are necessarily beyond control. If the passions are beyond control, they are certainly ungovernable. 72 S. W. 284.

UNICA TAXATIO (Lat.). The ancient language of a special award of *venire*, where of several defendants one pleads, and one lets judgment go by default, whereby the jury who are to try and assess damages on the issue are also to assess damages against the defendant suffering judgment by default. Lee, Dict.

UNIFORM. A tax is uniform when it operates with the same force and effect in every place where the subject of it is found. 112 U. S. 594. See GENERAL LAW.

UNIFORM RATES. See INTERSTATE COMMERCE ACT.

UNIFORMITY OF LAWS. Commissions have been appointed by the legislatures of nearly all states and territories who hold annual conferences in connection with the American Bar Association. See the recent reports of the American Bar Association. See ROLLING STOCK, as to an instance of uniform laws in almost all the states.

UNIFORMITY OF PROCESS ACT. An act providing for uniformity of process in personal actions in the courts of law at Westminster, 28d May, 1832. The improved system thus established was more fully amended by the Procedure Acts of 1852, 1854, and 1860, and by the Judicature Acts of 1873 and 1875.

UNILATERAL CONTRACT. In Civil Law. When the party to whom an engagement is made makes no express agreement on his part, the contract is called unilateral, even in cases where the law attaches certain obligations to his acceptance. La. Civ. Code, art. 1758. A loan of money and a loan for use are of this kind. Pothier, Obl. part 1, c. 1, s. 1, art. 2; Lec. Elémén, § 781.

In the Common Law. According to Professor Langdell, every binding promise not in consideration of another promise is a unilateral contract. For example, simple contract debts, bonds, promissory notes, and policies of insurance. A bilateral contract, which consists of two promises to give in exchange for and consideration of each other, becomes a unilateral contract when one of the promises is fully performed; Langdell, Sum. Cont. § 183.

UNINTELLIGIBLE. That which cannot be understood. See CONSTRUCTION.

UNIO PROLIUM (Lat. union of offspring). A species of adoption used among the Germans, which takes place when a widower having children marries a widow who also has children. These parents then agree that the children of both marriages shall have the same rights to their succession as those which may be the fruits of their marriage. Lec. Elém. § 187.

UNION. A popular term for the United States of America.

In English Poor Law. Two or more parishes that have been consolidated for the better administration of the poor law therein.

UNION LABEL LAWS. See TRADE-MARK.

UNISSUED STOCK. See STOCK.

UNITED STATES OF AMERICA. The republic whose organic law is the constitution adopted by the people of the thirteen states which declared their independence of the government of Great Britain on the fourth day of July, 1776.

When dealing with foreign sovereignties, the term "United States" has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so not because the territories comprised a part of the government established by the people of the States in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as of the States, in their foreign relations. 182 U. S. 263.

When they are said to constitute one nation, this must be understood with proper circumspection. Our motto, *E pluribus unum*, expresses the true nature of that composite body which foreign nations regard and treat with in all their communications with our people. No state can enter into a treaty, nor make a compact with any foreign nation. To foreigners we present a compact unity, an undivided sovereignty. No state can do a national act nor legally commit the faith of the Union.

In our interstate and domestic relations we are for some purposes one. We are, so far as our constitution makes us, one, and no further; and under this we are so far unity that one state is not foreign to another. Art. 4, § 2. A constitution, according to the original meaning of the word, is an organic law. It includes the organization of the government, the grant of powers, the distribution of these powers in legislative, executive, and judicial, and the names of the officers by whom these are exercised. And with these provisions a constitution, properly so-called, terminates. But ours goes further. It contains restrictions on the powers of the government which it organizes.

The writ of *habeas corpus*, the great instrument in defence of personal liberty against the encroachment of the government, shall not be suspended but in case of rebellion or invasion, and when the public safety requires it. No bill of attainder or *ex post facto* law shall be passed; no money shall be drawn from the treasury where there is not a regular appropriation; no title of nobility shall be granted; and no person holding office shall receive a present from any foreign government. Art. 1, § 9. To these, which are in the original constitution, may be added the eleven first amendments. These, as their character clearly shows, had their origin in a jealousy of the powers of the general government. All are designed more effectually to guard the rights of the people, and would properly, together with the restrictions in the original constitution, have a place in a bill of rights. Any act or law of the United States in violation of these, with whatever formality enacted, would be null and void, as an excess of power.

The restrictions on state sovereignty, besides those which relate to foreign nations, are that no state shall coin money, emit bills of credit, make anything but gold and silver a tender in the payment of debts, pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. These prohibitions are absolute. In addition to these restrictions, the results of the rebellion of 1861-1865 caused the adoption of the 13th, 14th, and 15th amendments, which lay still further restrictions upon the power of the states, so far as relates to slavery and the regulation of the right of suffrage. The 13th amendment provides that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to its jurisdiction, and confers power upon congress to enforce this article by appropriate legislation; the 14th amendment provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and the party shall have been duly convicted; the 15th amendment specifically provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude.

Without the consent of congress no state shall lay any duties on imports or exports, or any duty on tonnage, or keep troops or ships of war in time of peace, or enter into any agreement or compact with another state, or engage in war unless actually invaded, or in imminent danger of being so.

What constitutes a duty on exports or imports has been a matter of frequent litigation in the supreme court. It has been finally decided that the term "import" as used in the constitution does not refer to articles imported from one state to another, but only to articles imported from foreign

states; 8 Wall. 122; but the prohibition contained in those provisions of the constitution which ordain that congress shall have power to regulate commerce with foreign nations, among the several states; that no state shall levy any imposts or duties on imports or exports; that the citizens of each state shall be entitled to all the immunities and privileges of citizens of the several states, have been construed together by the supreme court; and various statutes of the different states have been declared unconstitutional because they violated them. Thus a statute allowing an additional fee to port-wardens for every vessel entering a port; 6 Wall. 31; a tax on passengers introduced from foreign countries; 7 How. 296; a tax on passengers going out of a state; 6 Wall. 35; a tax levied upon freight brought into or through one state into another; 15 Wall. 232; a tonnage tax on vessels entering the harbors of a state, either from foreign or domestic ports; 12 Wall. 204; 19 id. 581; 20 id. 577; 100 U. S. 434; have all been so decided. It is said that wherever subjects, in regard to which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of congress. But the mere grant of the commercial power to congress does not forbid the states from passing laws to regulate pilotage. The power to regulate commerce includes various subjects upon which there should be some uniform rule, and upon others different rules in different localities. The power is exclusive in congress in the former, but not so in the latter class; 12 How. 297. See COMMERCE.

While the laws never these are, they operate on all states alike, and if any state laws violate them, the laws are void; and without any legislation of congress the supreme court has declared them so; 6 Cra. 100; 4 Wheat. 122, 518; 10 How. 304; cases *supra*; Cooley, Const. Lim. 729.

The United States have certain powers, the principal of which are enumerated in art. 1, § 8, running into seventeen specific powers. Others are granted to particular branches of the government: as, the treaty-making power to the president and senate. These have an equal effect in all the states, and so far as the authority is vested in the government of the Union or in any department of it, and in as far as the states are prohibited from the exercise of certain powers, so far in our domestic affairs we are a unity.

The United States is a sovereign and independent nation vested with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective; 149 U. S. 698; and see 130 id. 606.

Within these granted powers the sovereignty of the United States is supreme. The constitution, and the laws made in pursuance of it, and all treaties, are the supreme law of the land. Art. 6. And they not only govern in their words, but in their meaning. If the sense is ambiguous or doubtful, the United States, through their courts, in all cases where the rights of an individual are concerned, are the rightful exponents of the law. For without the authority of explaining this meaning, the United States would not be sovereign.

In these matters, particularly in the limitation put on the sovereignty of the states, it has been sometimes said that the constitution executes itself. This expression may be allowed; but with much propriety these may be said to be laws which the people have enacted themselves, and no laws of congress can either take from, add to, or confirm them. They are rights, privileges, or immunities which are granted by the people, and are beyond the power of congress to legislate against, or they require no law to give them force or efficacy. The members of congress are exempted from arrest, except for treason, felony, and breach of the peace, in going to and returning from the seat of government. Art. 1, § 5. It is obvious that no law can effect this immunity. In these subjects all laws are purely nugatory, because if they go beyond or fall short of the provisions of the constitution, that may always be appealed to. An individual has just what that gives him,—no less and no more. It may be laid down as a universal rule, admitting of no exception, that where a constitution has established a disability or immunity, a privilege or right, these are precisely as that instrument has fixed them, and can be neither augmented nor curtailed by any act or law either of congress or a state legislature. We are more particular in stating this principle because it has sometimes been forgotten both by legislatures and theoretical expositors of the constitution.

It has been justly thought a matter of importance to determine from what source the United States derive their authority. 4 Wheat. 402. When the constitution was framed, the people of this country were not an unformed mass of individuals. They were united into regular communities under state governments, and to these had confided the whole mass of sovereign power which they chose to in trust out of their own hands. The question here proposed is whether or not the union is a compact entered into by the states, or a privilege established as an organic law established by the people. To this question the preamble gives a decisive answer: *We, the people*, ordain and establish this constitution. The members of the convention which formed it were indeed appointed by the states. But the government of the states is not a *delegated power*, and, if they had an inclination, had no authority to transfer the allegiance of the people from one sovereign to another. The great men who formed the constitution were sensible of this want of power, and recommended it to the people themselves. They considered the original conventions and adopted it, acting in their original capacity as individuals, and not as representing states. The state governments are passed by in silence. They had no part in making it, and, though they have certain duties to perform, as the appointment of senators, are purely not parties to it. The people in their capacity as sovereign made and adopted it; and it binds the state governments without their consent. The United States as a

whole, therefore, emanates from the people, and not from the states, and the constitution and laws of the states, whether made before or since the adoption of that of the United States, are subordinate to it and the laws made in pursuance of it. See Fisher, *Evolution of Const.*

It has very truly been said that out of the mass of sovereignty in the United States was carved a part and deposited with the states. But this was taken by the people, and not by the states as organized communities. The people are the fountain of sovereignty. The whole was originally with them as their own. The state governments were but trustees acting under a derived authority, and had no power to delegate what was delegated to them. But the people, as the original fountain, might take away what they had lent and intrust it to whom they pleased. They had the whole title, and, as absolute proprietors, had the right of using or abusing.—*Jus utendi et abutendi.*

As a consequence of great importance flows from this fact. The laws of the United States act directly on individuals, and they are directly responsible and not mediately through the state governments. This is the most important improvement made by our constitution over all previous confederations. As a corollary from this, it is not more properly a part of it, the laws act only on states through individuals. They are supreme over persons and cases, but do not touch the state: they act through them: 1 Wheat. 368. If a state passes an *ex post facto* law, or passes a law impairing the obligation of contracts, it makes anything but gold or silver alterable in payment of debts, congress passes no law which touches the state: it is sufficient that these laws are void, and when a case is brought before the court, it, without any law of congress, will declare them void. They give no person an immunity, nor deprive any of a right. Again, should a state pass a law declaring war against a foreign nation, grant letters of marque and reprisal, arm troops or keep ships of war in time of peace, individuals acting under such laws would be responsible to the United States. They might be treated and punished as traitors or pirates. Again, if congress should pass no law to regulate the state; and for this simple reason, because the state is sovereign. And it is a maxim consecrated in public law as well as common sense and the necessity of the case, that a sovereign is answerable for his acts only to his God and to his own conscience.

The constitution and laws made in pursuance of it,—that is, laws within their granted powers,—and all treaties, are the supreme law of the land, art. 6; and the judicial power, art. 3, § 1, gives to the supreme court the right of interpreting them. But this court is but another name for the United States, and this power necessarily results from their sovereignty; for the United States would not be truly sovereign unless their interpretation as well as the letter of the law governed. But this power of the court is confined to cases brought before them, and does not embrace principles independent of these cases. They have no power analogous to that of the Roman prætor of declaring the meaning of the constitution by edicts. Any opinion, however strongly expressed, has no authority beyond the reasoning by which it is supported, and binds no one. But the point embraced in the case is as much a part of the law as the reasoning by which it is supported, and it binds public functionaries, whether of the states or United States, as well as private persons; and this of necessity, as there is no authority above a sovereign to which an appeal can be made.

Another question of great practical importance arose at an early period of our government. The natural tendency of concentrated power is to augment itself. Limitations of authority are not to be expected from those to whom power is intrusted; and such is the infirmity of human nature that those who are most jealous when out of power and seeking office are quickest to embrace and usurp it as an enemy. A general abrogation commonly precedes a real usurpation, to lull suspicion if for no other purpose. When the constitution was new, and before it had been fully considered, this diversity of opinion was not unnatural, and what the subject has earned is, that it is now settled, now settled, now settled, both on technical reasoning and on that of expediency. The question is between incidental and constructive or implied powers. The government of the United States is one of delegated power. No general words are used from which a general power can be inferred. Incidental and implied are sometimes used as synonymous; but in accurate reasoning there is a plain distinction between them, and the latter, in common use, comes nearer to constructive than to incidental.

The interpretation of powers is familiar to courts of justice, as a great part of landed property in England and much in this country is held under powers. A more frequent example is that of common agency, as every agent is created by a power. Courts whose professed object is to carry into effect the intentions of parties have, on this subject, established general rules. Among these one is more immovable than any other, that the interpretation is strict and not liberal. 2 Kent 617; 4 *id.* 830. But this strictness does not exclude incidental powers. These are included in a general and express power, both in the common and technical use of language. To take a familiar example. A merchant of Philadelphia has a cargo of tea arrive at New York, and by letter authorizes his correspondent to sell it. This is the whole extent of the power. But it necessarily and properly includes that of advertising, of removing and exhibiting the goods, etc. But it would not authorize the sale of sugar, a horse, and such a store or real estate. These powers are not incidental to the general power, nor included in it. Or we may take an example directly from the constitution itself. The United States has power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and

general welfare of the United States." This includes the power to create and appoint all inferior officers, and to do all subordinate acts necessary and proper to execute the general power; as, to appoint assessors, collectors, keepers, and disbursers of the public treasures. Without these subordinate powers the general power could not be executed. And when there is more than one mode by which this general power may be executed, it includes all the modes, and is not confined to any one, unless a particular mode is pointed out. 4 Wheat. 410. All that the constitution requires is that it should be necessary and proper. One consequence of this doctrine is that there must be a power expressly granted as a stock to bear this incidental power, or otherwise it would be ingrafted on nothing.

A constructive power is one that is inferred, not from an express power, but from the general objects to be obtained from the grant, and, perhaps, in private powers sometimes from the general language in which they are granted. It is a broad distinction between them may be illustrated by two cases that came before the United States Court. The first is one we have already quoted, 4 Wheat. 317. The question in that case was whether the act incorporating the Bank of the United States was constitutional, whether it lay beyond the limits of the delegated powers and was, therefore, merely void as usurped or an excess of power. The authority to create a corporation is nowhere expressly given, and if it exists it must be sought as incidental to some power that is specifically granted. The court decided that it was incidental to the power of laying taxes as a keeper and disbursing of the public treasure. This power could be executed only by the appointment of agents; and the United States might as well create an agent for receiving, keeping, and disbursing the public money as appoint a natural person, and the power was already created. In the case of *Osborn v. The United States Bank*, 9 Wheat. 839, the general question was presented again, and reargued, and the court reaffirmed their former decision, but, more distinctly than before, adding an important qualification. They might not only create an artificial person, but clothe it with such powers and enable it to perform its duties. The taxes are collected at one end of the country and paid out at another, and the bank instead of removing the specie might pay it where collected, and repay themselves by purchasing a bill of exchange in another place, and this could be conveniently and economically done only by a power of dealing in exchange generally, which when reduced to its last analysis is merely buying specie at one place and paying for it at another. It is in this way, and this only, that the bank got its general power of doing what it is essential to its service and proper to enable it to perform its principal duty, that of transferring the funds of the United States. Thus, the authority to create a bank is incidental to that of receiving, keeping, and paying out the taxes, and is comprehended under the general power of doing what is essential to the service. The power of the United States is derived from Hamilton's report on a bank, which proved satisfactory to Washington, as that of Chief-Justice Marshall has to the public at large.

This is very different from a constructive power which is inferred not as included in any special grant, but from the general tenor of the power and the general object of the power. The object of the constitution are stated in the preamble, and they are to promote the common weal. But this is followed by the grant of specific powers. And it is the dictate of common sense as well as technical reasoning that this object is to be obtained by the exercise of the powers so given. Where they are short, none are granted; and if they are inadequate, the same consequence follows. No one would infer from a power to sell a ship one to sell a store, though the interest of the principal would thereby be promoted. The general power to regulate commerce of the United States is given, and it may be carried to its whole extent by having incidental powers ingrafted upon it. A general power to regulate the descent and distribution of intestate estates and the execution and proof of wills would be on many accounts useful, but it is not granted. The exercise of a power to regulate commerce must be expressly granted, or incidental to an express power,—that is necessary and proper to carry into execution one expressly granted,—or it does not exist.

Another illustrative case is that of 16 Pet. 539. It will be found on a careful examination that in this a constructive power only is claimed. The only point involved in the case was the constitutionality of the statute of Pennsylvania under which Prigg was indicted as a kidnapper. The court decided that this power was expressly given, and hence its judicial functions properly terminated. But to arrive at this conclusion it was deemed necessary to determine that the general power of arresting and returning fugitives from labor and service was intrusted to the United States. It was not pretended that this power was expressly given, nor that it was incidental to any that was expressly given,—that is, conducive or proper to the execution of such a power. The court say that "in the exposition of this part of the constitution we shall limit ourselves to the considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature." 16 Pet. 610. They do not, as in *McCulloch's* case, quote the express authority to which this is incidental; but a general argument is offered to prove that this power is most safely lodged with the United States, and that, therefore, it has been placed there exclusively. If the canon of criticism which we have endeavored to establish, and which is generally admitted, is correct, the existence of such a power cannot be inferred from its utility.

It will be seen, also, that this case stands in strong contrast with that of *Martin v. Hunter*, 1 Wheat. 304, in which the opinion was delivered by the same judge. This was on the validity of the

twenty-ninth section of the Judiciary Act, authorizing an appeal from a final judgment of a state court to the supreme court of the United States; and perhaps in no case has the extent of the powers granted by the constitution been more fully and profoundly examined. In this case the court say that "the government of the United States can claim no powers which are not granted by the constitution; and the powers actually granted must be ascertained, and are expressly given, or given by necessary implication." This is to say, as the reasoning of the court in the whole opinion proves, such as are included in the express powers, and are necessary and proper to carry them into execution. Such was the uniform language of the court whenever the question was presented previously to the rebellion. The doctrine as now held, however, is somewhat broader, finding its exposition in the decision of the supreme court in the *Legal Tender Cases*, 12 Wall. 457. It is there said that it is not indispensable to the existence of any power claimed for the federal government, that it can be found specified in the words of the constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantial powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Before any act of congress can be held to be unconstitutional, the court must be convinced that the means adopted are not appropriate to the end, and that the execution of any or all of the powers of congress or of the government,—not appropriate in any degree; and of the degree, the court is not to judge, but to Congress.

We have seen that the constitution of the United States and the laws made in pursuance of it, are the supreme law of the land, and that of the meaning of these the supreme court, which is nothing else than the United States, is the rightful expositor. This necessarily results from their sovereignty. But the United States government is one that is not a power, but a person, and its authority is established, both by technical reasoning and common sense, than this,—that a delegate can exercise only that power which is delegated to him. All acts beyond are simply void, and create no obligation. It is a maxim also of common law that the powers of sovereignty not delegated to the United States are reserved to the states. But in so complex an affair as that of government, controversies will arise as to what is given and what is reserved,—doubts as to the dividing line. When this is the case, who is to decide? This is a difficulty which the convention did not undertake to settle. To avoid all controversy as far as possible, the plainest words in granting powers to the United States were used which the language affords. Still further to preclude doubts, the convention added, at the close of the close of the express powers given, this clause: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States or in any department or officer thereof." Art. 1, § 8. This clause contains no grant of power. But in the Articles of Confederation, which was a compact between the states as independent sovereignties, the word *expressly* was used; and a doubt troubled congress how far incidental powers were included. Articles of Confederation were struck off. This clause was introduced to remove that doubt. It covered incidental, but not constructive, powers.

Strange as it may appear, both those who wished larger powers granted to the United States, and, in the language of that day, thought that the states would be worsted, were not without those who honestly feared that too much power was granted, fixed their eyes on this clause; and perhaps no part of the constitution gave greater warmth to the controversy than this. To disarm the designing and to purchase the fears of the friends of the states, the text amendment was proposed by the friends of the constitution. But so jealous were parties of each other that it was offered in the convention of Massachusetts by Governor Hancock, who favored and had the confidence of the opposition to the constitution, and was signed by Mr. Parsons, afterwards chief-justice. Life of Chief-Justice Parsons. That amendment is these words: "The powers not delegated to the United States by the constitution, nor prohibited to the states, are reserved to the states respectively, or the people." Were the words of the original constitution and the amendment both stricken out, it would leave the true construction unaltered. Story, *Const.* § 1232. Both are equally nugatory as fact; but they have an important popular use. The amendment formally admits that certain rights are reserved to states, and these rights must be sovereign.

We have seen that, within their limited powers, the United States are the natural expositors of the constitution and laws; that when a case affecting individual rights arises, the supreme court stands forth the United States, and that they have the sole right to explain and enforce the laws and constitution. But their power is confined to the facts before them, and they have no power to explain them in the form of an edict to affect other rights and cases. Beyond these powers the states are sovereign, and their acts are not subject to the hands of the United States. The separating line between the powers granted and the powers withheld, the constitution provides no judge. Between sovereigns there can be no common judge, but an arbiter mutually agreed upon. If that power is given to one party, that may draw all power to itself, and it exercises it, without regard to equal sovereignties, but of sovereign and subject. On this subject the constitution is silent. The great men who formed it did not undertake to solve a question that in its own nature could not be solved. Between equals it made neither superior, but trusted to the mutual confidence of the parties. A larger confidence was placed in an enlightened public opinion as the final umpire; and not until the war of the rebellion was this conflict

between the two sovereignties finally settled by the *ultima ratio regum*. The status of the states and their political rights under the constitution have been considered at large by the supreme court in the case of *Texas v. White*, 7 Wall. 700. It is there held that authority to suppress rebellion is found in the constitutional power to suppress insurrection, and carry on war; authority to provide for the restoration of state governments under the constitution when suspended and overthrown is derived from the obligation of the United States to guarantee to every state in the Union a republican form of government. The unity of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to be perpetual; and when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained "to form a more perfect Union." But the perpetuity and indissolubility of the Union by no means imply the loss of distinct and individual existence, or of the right of self-government by the states. On the contrary, it may, not unnecessarily, be said that the preservation of the states and the maintenance of their government are as much within the design and care of the constitution as the preservation of the union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union composed of indestructible states.

The United States is not a corporation under the New York statutes, in the sense that it will be exempted from an inheritance tax on personal property bequeathed to it by will; 163 U. S. 625.

If the nation comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals therein. It assumes the position of an ordinary citizen and it cannot recede from the fulfillment of its obligations; 74 Fed. Rep. 145, following 91 U. S. 398.

See SOVEREIGNTY; ARTICLES OF CONFEDERATION; STATE; TERRITORY; COMMERCE; CONSTITUTIONAL; titles of the several states; Fisher, *Evol. of the Const.*

UNITED STATES COMMISSIONERS. Each district court of the United States may appoint, in different parts of the district for which it is held, as many discreet persons as it may deem necessary, who shall be called "commissioners of the district court," and shall exercise the powers which are or may be conferred upon them; R. S. § 627.

Officers, formerly appointed by each United States circuit court, now by each district court, to whom are committed some of the preliminary duties which must otherwise be performed by the court itself, or the judge thereof, each of whom has the functions of an arresting, examining, and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in the district assigned to him, to cause the offender to be arrested, to examine into the matters charged, to summon witnesses for both sides, and to commit for trial or discharge from arrest according as the evidence tends or fails to support the accusation. 29 A. & E. Ency. L. 2nd ed., 182, 183; 2 Abb. (U. S.) 523.

These officers are authorized to hold to security of the peace and for good behavior in cases arising under the constitution and laws of the United States; R. S. § 737. They have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration, or decree of any consul, vice-consul, or commercial agent, to sit as judges or arbitrators in such differences as may arise between the captains and crews of vessels, application for the exercise of such power being first made by petition of such consul, etc.; R. S. § 738.

They have also power to take bail and affidavits when required or allowed in any circuit or district court of the United States; R. S. § 945. They may imprison or bail offenders; R. S. § 1010; may discharge poor convicts imprisoned; R. S. § 1042; may administer oaths and take acknowledgments; R. S. § 1178; may institute proceedings under the civil rights laws; R. S. 1 Supp. 63; may issue warrants for the arrest of foreign seamen, in case of dispute or desertion; R. S. § 4079; may summon the master of a vessel in cases of seamen's wages; may apprehend fugitives from justice; R. S. § 5270.

The district court of the United States may appoint commissioners before whom the appraisement of vessels or goods and merchandise seized for breaches of any law of the United States may be sworn; and such oaths so taken are as effectual as if taken before the judge in open court; R. S. § 570.

The court of claims has power to appoint com-

missioners, before whom examinations may be made upon oath of witnesses touching all matters pertaining to claims; R. S. §§ 1071, 1080.

UNITED STATES, CONSTITUTION OF. See CONSTITUTION OF THE UNITED STATES.

UNITED STATES COURTS. Except in the case of impeachments the judicial power of the United States is vested by the constitution in a supreme court and such other inferior courts as may be from time to time established by congress. All the judges are appointed by the president, with the advice of the senate, to hold office during good behavior, and their compensation cannot be diminished during their terms of office. The judges, other than those of the supreme court, are circuit judges and district judges, by whom are held the inferior courts of law and equity.

[For a detailed description of the various courts and their rules of practice, jurisdiction, etc., it is suggested that reference be made to some recent book on the subject such as Dewhurst's *Rules of Practice in the United States Courts*, Montgomery's *Federal Procedure*, or Foster's *Federal Practice*. Ed. Note.]

The judicial power under the constitution shall extend to:—1. Cases arising under the federal constitution, laws, or treaties. 2. Those affecting ambassadors and other public ministers and consuls. 3. Admiralty and maritime cases. 4. Controversies to which the United States is a party. 5. Those between two or more states. 6. Or between a state and a citizen of another state. (By the 11th amendment this grant of power was so limited as not to permit a state to be sued by citizens of another state, but a state may sue citizens of another state; 10 Wall. 553; 91 U. S. 667.) 7. Or between citizens of different states. 8. Or between a state or its citizens and foreign states, citizens, or subjects. This is construed to be an absolute grant of power; 1 Wheat. 308.

The nature of the federal government which distributes the functions of government between two powers, each being sovereign within its sphere, but operating within the same territorial jurisdiction and upon the same persons and property, makes necessary the adjustment of two classes of independent tribunals with great care, both in legislation and the administration of justice, to avoid conflicts of jurisdiction. That such have occurred is true, but their rare occurrence in more than a century bears testimony as well to the tact and discretion of the judiciary, federal and state, as to the perfection of the system which they administer under the constitution.

As respects criminal proceedings, the courts of each jurisdiction generally confine themselves to the administration of the laws of the government which created them. In civil cases, however, as the constitution has conferred jurisdiction upon the federal courts in cases, for example, where a citizen of one state sues a citizen of another state, it is manifest that the court which tries such a case must administer the laws of the state in which the action is brought, subject to the constitution of the United States in cases which conflict with its provisions.

In the organization of the federal system of courts, there were two objects to be accomplished. The first was to prevent a clashing between the state and United States courts, by imposing restrictions upon the United States courts. The second was to carry out the mandates of the constitution, by clothing the latter with all the powers necessary to execute its provisions. This organization was commenced by the act of 1789, familiarly known as the Judiciary Act; 1 Stat. at Large 921.

To accomplish the first object, the right to issue writs of *habeas corpus* was by the fourteenth section limited to cases arising under the federal constitution and laws; R. S. § 753. See *HABEAS CORPUS*.

This important restriction was intended to leave to the state authorities the ab-

solute and exclusive administration of the state laws in all cases of imprisonment; and no instance has ever occurred in which this act has been disregarded. On the contrary, its observance has been emphatically enjoined and enforced; 21 How. 523. See 4 Dill. 329; 24 Am. L. Reg. 523. See *infra*.

By the thirty-fourth section of the same act (R. S. § 721), it was enacted that the laws of the several states, except where the constitution, treaties, or statutes of the United States should otherwise require or provide, were to be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they applied. This provision has received examination and interpretation in the following, among the many cases: 7 How. 40; 8 id. 169; 14 id. 504; 17 id. 476; 18 id. 502, 507; 20 id. 393, 584; 18 Wall. 71; 17 id. 44; 98 U. S. 176, 242, 470; 3 Wash. C. C. 813; 17 Fed. Rep. 721. In all cases depending upon the construction of a state statute, federal courts will follow the construction of the court of last resort of the state, when that construction is well settled, without respect to its original soundness; 9 Cra. 87; 100 U. S. 47; 60 Fed. Rep. 718; 22 id. 26; even when, in ignorance of a decision by the state court, the supreme court had construed the statute differently; 100 U. S. 47; or when, if it were an original question, the federal court would be of a different opinion; 154 id. 177.

And while the United States courts follow the interpretation given to the laws of the state by their highest tribunals, yet in case of conflicting decisions, or in the absence of decisions at the time of consideration by the United States courts, the rule is, of course, modified; 5 How. 139; 18 id. 599. In the leading case of *Burgess v. Seligman* the limitations of the doctrine were thus stated by Bradley, J.: "The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the

very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." 107 U. S. 20, approved *id.* 341. See, also, for a good statement of the doctrine, 134 *id.* 348. Ordinarily, they will follow the latest settled decisions; 1 Dill. 555; 6 Pet. 291; 2 Black 599. But a change of decision by a state court in regard to the construction of a statute will not be allowed to affect rights acquired under the former decision; 101 U. S. 677; 133 *id.* 538; otherwise, when no rights have been acquired under the former decision; 100 U. S. 47; 107 *id.* 20; 147 *id.* 91; or where the decision of the state court was made long after the rights in question accrued; 120 U. S. 759; 119 *id.* 680; 148 *id.* 393. The federal courts will not follow the decision of an inferior court; 2 Woods 395.

In controversies concerning the title to real property, the federal court always administers the law as if it were sitting as a local court; 17 Wall. 44, 98 U. S. 244; 39 Fed. Rep. 719; 153 U. S. 17. So also of statutes of limitation; 157 U. S. 177.

Questions of international law must be decided as matters of general law, uncontrolled by local decisions; 146 U. S. 657. Decisions of the state court on questions of local law, affecting solely the internal police of the state or the construction of a municipal ordinance, must control; 145 U. S. 421.

Local law or custom, established by repeated decisions of the highest courts of the state, becomes also the law governing courts of the United States sitting in that state; 135 U. S. 555; 185 *id.* 492. This is particularly true as to decisions which establish a rule of property, and the rule is observed even as to points upon which the states are at variance among themselves; 133 U. S. 670; 135 *id.* 457; 136 *id.* 233; 148 *id.* 60; and where the same statute receives a different interpretation in different states, each will be followed by the federal courts as the true interpretation for the particular state in question; 62 Fed. Rep. 368. The supreme court will follow the construction given by the state court to a state statute of limitations, even in a case decided the other way by the circuit court before the decision of the state court; 147 U. S. 647; and the lower federal courts will reverse their decision holding a state statute unconstitutional, when the state subsequently decides that it is constitutional, if a final decree had not been entered in the federal court; 64 Fed. Rep. 9. In 71 Fed. Rep. 443, however, the circuit court of appeals declined to follow the supreme court of Indiana where the decision of the latter was rendered after argument and before decision in the federal court. As to the organization or composition of a tribunal established by the fundamental law of the state, the settled course of decisions in its highest court is at least entitled to great weight; 120 U. S. 354.

The provision of § 721 making the state law the rule of decision embraces state rules of evidence in civil cases at common law; 1 Black 427; 18 Wall. 436; 98 U. S. 1; 16 Fed. Rep. 435; but not in equity cases; 3 Blatch. 11; it does not apply to questions of general jurisprudence; 147 U. S. 101; or of general commercial law; 18 How. 520; 16 Pet. 1; 2 Fed. Rep. 285, 843; 4 Biss. 473; 100 U. S. 299; see *COMMERCIAL LAW* (but they should have due weight given to them; 52 Fed. Rep. 191); or to the general principles of equity; 13 How. 271; 12 *id.* 361; or to criminal cases; *id.*; or questions of a general nature, not based upon a local statute; 100 U. S. 213; 107 *id.* 109. It is sometimes said, somewhat vaguely, that questions of general law are to be uncontrolled by decisions of the state

courts, except to give them such weight as may be deemed proper, with due respect to their character as co-ordinate tribunals. It is difficult to deduce from the cases any general rule or principle, but among cases thus held to be questions of general law are:—what is or is not a navigable stream; 67 Fed. Rep. 285; whether a carrier may stipulate for exemption from liability for its own negligence; 53 *id.* 903; whether two employees of the same master are fellow-servants; 149 U. S. 368. In the section last referred to, the word "laws" does not include the decisions of the local tribunals, for these are only evidence of what the laws are; 16 Pet. 1.

If a contract when made is valid under the laws of the state as then interpreted by the courts of the state, subsequent decisions putting a different interpretation upon such laws are not binding on the federal courts as to that contract; 1 Wall. 175; 16 *id.* 678. And where contracts are based upon laws then believed to be constitutional, there being at the time no adjudication on such laws in the state courts declaring them invalid, the federal courts will not follow subsequent decisions of state courts thereon, but will construe such statute for themselves; 19 Wall. 66.

In clothing the United States courts with sufficient authority to carry out the mandates of the constitution, their powers are made in certain cases to transcend those of the state courts; various provisions exist for the removal of causes from the state to the federal courts. See *REMOVAL OF CAUSES*.

And while the rule is thoroughly settled that remedies in the courts of the United States are, at common law or in equity, according to the essential nature of the case, uncontrolled in that particular by the practice of the state courts; 129 U. S. 45, 46; yet an enlargement of equitable rights by the state statute may be administered by federal courts as well as by the courts of the state; and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction; 21 Wall. 503, 530; 110 U. S. 15, 25; 121 *id.* 552, 557.

The original jurisdiction of the circuit court in certain cases, and the appellate jurisdiction of the supreme court to review the decisions of state courts, depend upon the existence in the case of what is termed a *federal question*. This is a question arising in a litigated case, and necessary to its decision, involving the construction of the constitution, or a law or treaty of the United States.

If, from the questions involved in a case, it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution, or of a law or treaty of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, and involves a federal question; 115 U. S. 257; 114 *id.* 641; 113 *id.* 416; 111 *id.* 462.

The supreme court has no jurisdiction of a writ of error to review the judgment of a state court unless a real, and not a fictitious, federal question is involved; 142 U. S. 79; 147 *id.* 531; 6 Wall. 258; and where it does not appear from the record that a federal question was actually presented or in any way relied on before final judgment below, the supreme court is without jurisdiction; 116 U. S. 54; as it must appear on the record that it was raised and decided, or that its decision was necessary to the judgment or decree rendered; 114 U. S. 133; 91 *id.* 578; 111 *id.* 200; 171 *id.* 98. See 142 *id.* 254. If another question, not federal, has also been raised and decided against the same party, and the decision of the latter question is sufficient to sustain the judgment, the supreme court will not review it; 171 *id.* 38; 150 *id.* 633. It has been held that federal questions are involved in suits brought by corporations created by acts of congress; 115 U. S. 2; to determine the validity of a railroad con-

solidation authorized by act of congress; 111 U. S. 449; to enjoin the erection of a bridge across a navigable river authorized by act of congress; 18 Blatch. 479; whether full faith and credit were given to a judgment in another state; 146 U. S. 157; where the supreme court of a state failed to give proper effect to a decree of the circuit court of the United States; 152 *id.* 327; where a federal officer is sued in trespass to real estate which he claims to have possession for and under authority of the United States; 147 *id.* 508. So, of course, are suits for infringement of patents and copyrights, cases in which it is claimed that a state law is invalid because in conflict with the constitution or laws of the United States, or as depriving one of some right, privilege, or immunity thereby guaranteed, and criminal prosecutions for violations of federal laws.

The judicial power of the federal government is administered under existing laws, by four courts. The supreme court, which is created by the constitution, from which it derives its original jurisdiction; the circuit court of appeals; the circuit court; and the district court.

There are also various administrative tribunals, such as the court of claims; see *infra*; the interstate commerce commission; and the private land claims court; which titles see. There are also separate judicial systems provided by congress for the territories and the District of Columbia. The system of appeals, as at present organized, provides for the review of decisions on questions of law in most, if not all, of the federal tribunals either by the supreme court or the circuit court of appeals, as the case may be.

As to the *Senate* as a court of impeachment, see *IMPEACHMENT*.

The *Supreme Court* now consists of the chief justice and eight associates, of whom six constitute a quorum. They have precedence according to date of appointment, or of two appointed at the same time, then according to their ages. In the absence of the chief justice, the associate first in precedence performs his duties. There is a single term which begins on the second Monday of October. In the absence of a quorum, any of the judges may adjourn from day to day for twenty days, but if at the expiration of that period no quorum attends, the business shall be set aside until the next appointed session. The clerk, marshal, and reporter are appointed by the court.

The jurisdiction is original and appellate, civil and criminal, defined by the constitution, which establishes the court; 11 Wheat. 467.

By the act of September 24, 1789, sect. 13, the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. It shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party; R. S. § 687. The court has no jurisdiction except that given it by the constitution or law; 4 Cra. 93.

Many cases have occurred of controversies between states, amongst which may be mentioned that of *Rhode Island v. Massachusetts*, 4 How. 591, in which the attorney-general of the United States was authorized by act of congress, 11 Stat. at Large 382, to intervene; *Missouri v. Iowa*, 7 How. 660, and 10 How. 1; *Alabama v. Georgia*, 23 How. 505; *Florida v. Georgia*, 17 How. 478; *Pennsylvania v. Wheeling & Belmont Bridge Company*, 18 How. 421. See 136 U. S. 479; s. c. 163 *id.* 520; 147 *id.* 1; 148 *id.* 503; 165 *id.* 118; 12 Pet. 167. In a

pending case the state of New Jersey on bill filed obtained a preliminary injunction against the enforcement by the state of Delaware of certain laws regulating fisheries in the river Delaware, the question involved being one of boundary.

To give jurisdiction a state must be a party on the record; 9 Wheat. 804; or substantially a party; 3 Dall. 411; it must have a direct interest in the controversy; 13 How. 518. A state may bring an original action against a citizen of another state, but not against one of its own; 10 Wall. 553. A question of boundary between states is within its original jurisdiction; 7 How. 660; 17 *id.* 478; 23 *id.* 505; 15 Pet. 233; 1 Kent 323, 350.

The court has no jurisdiction over questions of a political and not judicial nature; 6 Wall. 50; a state cannot maintain a bill to enjoin the president in his official duties; 4 Wall. 475. It has no original jurisdiction over suits brought by any other political communities than states; 7 Wall. 700. An Indian tribe cannot institute original proceedings in it; 5 Pet. 1. Service on the governor and attorney-general of a state is sufficient; 3 Dall. 320. The bill should be filed by the governor on behalf of the state; 24 How. 66. When a state is a party the practice in chancery is adopted; 17 How. 478. In cases of boundary a bill and cross-bill is the appropriate mode of procedure; 7 How. 660. Leave of the court to file a bill must first be obtained; 4 Wall. 497; Phil. Pr. 21; 17 How. 478.

In consequence of the decision in the case of *Chisholm v. Georgia*, where it was held that assumpsit might be maintained against a state by a citizen of another state, the eleventh article of the amendments of the constitution was adopted; 3 Dall. 378.

The supreme court has power to issue writs of prohibition to the district courts as courts of admiralty; and writs of mandamus to any inferior federal courts, or to persons holding office under the authority of the United States, where a state, or an ambassador or other public minister, or a consul, or vice-consul is a party; R. S. § 688. This does not apply to bankruptcy; 3 How. 202.

The supreme court has also the power to issue writs of *habeas corpus*; R. S. § 751; *scire facias*, and all other writs not especially provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the principles and usages of law; R. S. § 716; and the justices have, individually, the power to grant writs of *habeas corpus*, of *ne exeat*, and of injunction; R. S. §§ 717, 719, 752.

As to whether the grant of original jurisdiction to this court precludes a grant of jurisdiction over like cases to other courts, is a mooted question, not yet fully decided. See 2 Dall. 297; 1 Cra. 137; 11 Wheat. 467. In 111 U. S. 449, the court said: "We are unable to say that it is not within the power of congress" to grant such jurisdiction to the inferior courts; and in 123 *id.* 32, it is said that it is competent for congress to authorize suits by a state to be brought in the inferior federal courts. See 1 Garland & Ralston, Fed. Pr. 9.

Congress cannot vest in the supreme court original jurisdiction in a case in which the constitution has clearly not given that court original jurisdiction; 1 Cra. 137. See 5 Pet. 1, 284; 12 *id.* 657; 6 Wheat. 264; 9 *id.* 738.

The appellate jurisdiction was first regulated by the act of Sept. 24, 1789, but radical changes were effected in it by the act of March 3, 1891, which created the circuit court of appeals. See *infra*. The appellate jurisdiction now includes:

1. (1) "The final judgment" or decree in any suit in the highest court of a state in which a decision could be had where the validity of the treaty, or statute of, or authority exercised under, the United States is in question and the decision is against their validity. (2) Where the validity of a statute of, or authority exercised under, a state is in question on the ground

of being repugnant to the constitution, treaties, or laws of the United States and the decision of the state court is in favor of its validity. (3) Where any title, right, privilege, or immunity is claimed under the constitution under any treaty or statute of, or commission held or authority exercised under, the United States and the decision of the state court is against such claim. The act of March 3, 1891, expressly provides that nothing contained in it shall affect this jurisdiction of the supreme court for the review of decisions of state courts.

2. The review on appeal or writ of error of decisions of the district and circuit courts of the United States in the following cases: (1) Cases in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court for decision. (2) Final sentences and decrees in prize causes. (3) Cases of conviction of a capital crime. (See 2 Supp. 541.) (4) Cases which involve the construction or application of the constitution of the United States. (5) Cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6) Cases in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

In all cases in which the decision of the circuit court of appeals is not made final there is a writ of error or appeal to the supreme court, if taken within one year, and the matter in dispute exceeds one thousand dollars.

To give the supreme court jurisdiction in cases determined by the state court, the jurisdiction must appear from the record itself in the court below and the appellate court, and the point which gives jurisdiction must have been decided or necessary to the decision; 7 How. 744; 91 U. S. 578; 96 *id.* 432; the question need not have been raised in the subordinate court; 99 U. S. 291; the federal question must have been controlling in the cause; 98 U. S. 140. It need not appear that the state court erred in its judgment; it is enough if a federal question was in the case, as the ground of decision, and that the decision was adverse to the party claiming under the statute, etc.; 8 Wall. 44. No writ of error lies where the decision is in favor of the right, privilege, etc.; 4 Wall. 603; nor where a case is decided on general principles of commercial law; 98 U. S. 332. An allowance of the writ by a judge of the state or supreme court must first be obtained; 9 Wall. 779.

It is no objection to this appellate jurisdiction that one party is a state and the other a citizen of that state; 6 Wheat. 264. A writ of error is the foundation of this jurisdiction; 9 Wall. 779; no appeal can be taken from the state court; 23 How. 192; it applies as well to criminal as to civil suits; 7 Wall. 321; the judgment must be final; 91 U. S. 1, 487; 94 *id.* 514; 93 *id.* 320, 108. The writ of error issues to the highest court in which a decision of the cause can be had, though it be not the highest court of the state; 9 Wall. 659; 93 U. S. 274; 94 Mass. 201; if the record remains in the inferior court, the writ of error will issue to that court instead of to the appellate court; if the first writ of error does not succeed in reaching the record, a second will issue; 91 U. S. 143. The criminal jurisdiction of the supreme court is derived from the constitution and the act of September 24, 1789, sect. 13, which gives the supreme court exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations. But the act of April 30, 1790, sections 25 and 26, declares void any writ or process whereby the person of any ambassador, or other public minister, their domestics or domestic servants, may be arrested or imprisoned; R. S. § 4063.

The Circuit Court of Appeals. This

court was created by act of March 3, 1891, R. S. 1 Supp. 901. Its jurisdiction is appellate merely, and includes the right of review by appeal or writ of error of final decisions in the district courts and the existing circuit courts in all cases other than those in which the same act provides an appeal or writ of error direct to the supreme court. See *supra*. It may also of its own motion certify to the supreme court questions or propositions of law arising in a pending case "concerning which it desires the instruction of the supreme court for its proper decision;" and the decision thereon is binding on it. The supreme court may also in its discretion issue *certiorari* to the circuit court of appeals to cause the review and determination of any case pending before the latter court in which its decision would be final. This power may be exercised in cases of *habeas corpus*; 144 U. S. 47. These two provisions were designed to secure uniformity in the final decision of questions of law in the federal courts, and to avoid the disadvantage which would otherwise result from the existence of nine co-ordinate courts of last resort.

Among the subjects of jurisdiction which authorize an appeal or writ of error directly to the supreme court are all cases involving the construction or application of the constitution or the question whether any statute, state or federal, is contrary to the federal constitution; 68 Fed. Rep. 726; and in such cases the circuit court of appeals has no jurisdiction; 19 U. S. App. 233. In such case an appeal or writ of error can only be taken from a final judgment on the merits, and then the defeated party may elect to take the question of jurisdiction alone to the supreme court or the whole case on the merits to the circuit court of appeals; 141 U. S. 661; but if the case has been taken to the circuit court of appeals and the only question is that of jurisdiction of the court below, it will be dismissed for want of jurisdiction; 24 U. S. App. 571.

UNITY. An agreement or coincidence of certain qualities in the title of a joint-estate or an estate in common.

In a joint-estate there must exist four unities: that of *interest*, that of *title*, and, therefore, their estates must be created by one and the same act; that of *time*, for their estates must be vested at one and the same period; and, lastly, the unity of *possession*; hence joint-tenants are seised *per my et per tout*, or by the *half or moiety* and by *all*; that is, each of them has an entire possession as well of every *parcel* as of the *whole*; 2 Bla. Com. 170. Coparceners must have the unities of interest, title, and possession. In tenancies in common, the unity of possession is alone required; 2 Bla. Com. 192. See ESTATE IN COMMON; ESTATE IN COPARCENARY; ESTATE OF JOINT-TENANCY; TENANT.

UNITY OF POSSESSION. This term is used to designate the possession by one person of several estates or rights. For example, a right to an estate to which an easement is attached, or the dominant estate, and to an estate which an easement incumbers, or the servient estate, in such case the easement is extinguished; 3 Mas. 172; see Cro. Jac. 121. But a distinction has been made between a thing that has its being by prescription, and one that has its being *ex jure nature*: in the former case unity of possession will extinguish the easement; in the latter, for example, the case of a watercourse, the unity will not extinguish it; Pothier, Contr. 166.

UNIVERSAL AGENT. One appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an agency may potentially exist; but it is difficult to conceive of its practical existence, since it puts the agent completely in the place of the principal; Story, Ag. § 21.

UNIVERSAL LEGACY. In Civil Law. A testamentary disposition by

which the testator gives to one or several persons the whole of the property which he leaves at his decease. La. Civ. Code, art. 1606.

UNIVERSAL MALICE. See PARTICULAR MALICE.

UNIVERSAL PARTNERSHIP. The name of a species of partnership by which all the partners agree to put in common all their property, *universorum bonorum*, not only what they then have, but also what they shall acquire. Pothier, *Du Contr. de Société*, n. 29. See PARTNERSHIP.

UNIVERSAL REPRESENTATION. In Scotch Law. The heir universally represents his ancestor, i. e. is responsible for his debts. Originally, this responsibility extended only to the amount of the property to which he succeeded; but afterwards certain acts on the part of the heir were held sufficient to make him liable for all the debts of the ancestor. Bell, Dict. *Passive Titles*.

UNIVERSAL SUCCESSION. Succession implying the acquirement of the entire property, rights, and duties of a deceased person is called universal succession, as distinguished from singular succession which implies the acquirement merely of some particular object or objects. Stand, Dict.

UNIVERSITAS. A universitas or corporate body exists when a number of persons are so united that the law takes no notice of their separate existence, but recognizes them only under a common name, which is not the name of any one of them. Hunter, Rom. L. 2nd ed., 314.

UNIVERSITAS FACTI. A plurality of corporeal things of the same kind, which are regarded as a whole; e. g. a herd of cattle, a stock of goods. Burrill; 1 Mackeld. Civ. Law, 154, § 149.

UNIVERSITAS JURIS (Lat.). In Civil Law. A quantity of things of various kinds, corporeal and incorporeal, taken together as a whole, e. g. an estate. It is used in contradistinction to *universitas facti*, which is a whole made up of corporeal units. Mackeldey, Civ. Law § 149.

UNIVERSITAS RERUM (Lat.). In Civil Law. Several things not mechanically united, but which, taken together, in some legal respects are regarded as one whole. Mackeldey, Civ. Law § 149.

UNIVERSITY. The name given to certain societies or corporations which are seminaries of learning where youth are sent to finish their education. Among the civilians, by this term is understood a corporation. See CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES; STUDENTS.

UNJUST. That which is done against the perfect rights of another; that which is against the established law; that which is opposed to a law which is the test of right and wrong. Hein. *Lec. El.* § 1080.

UNJUST ENRICHMENT. The prevention of the unjust enrichment of one person at the expense of another is said to be the equitable principle which lies at the foundation of the great bulk of quasi-contracts. Ames, Lectures on Leg. Hist. 162.

UNKNOWN. When goods have been stolen from some person unknown, they may be so described in the indictment; but if the owner be really known, an indictment alleging the property to belong to some person unknown is improper. 8 C. & P. 773; 12 Pick. 174.

In an indictment, where the name of the defendant is unknown, and he refuses to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison; 7 *Ired.* 37; but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, will be insufficient; R. & R. 499. The practice is to indict the defendant by a specific name, as, John No-name, and if he pleads in abatement, to send in a new bill, inserting the real name, which he then discloses, by which he is bound. This course is in some states

prescribed by statute; 5 *In.* 484.

UNLAGE (Sax.). An unjust law. Cowel.

UNLAW. In Scotch Law. A witness was formerly inadmissible who was not worth the king's *unlaw*,—i. e. the sum of £10 Scots, then the common fine for absence from court and for small delinquencies. Bell, Dict.

UNLAWFUL. That which is contrary to law. See CONDITION; VOID.

UNLAWFUL ASSEMBLY. A disturbance of the public peace by three or more persons who meet together with an intent mutually to assist each other in the execution of some unlawful enterprise of a private nature, with force and violence.

An assembly of three or more persons:—1. With intent to commit a crime by open force. 2. With intent to carry out a common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it. Steph. Dig. Cr. Law, art. 75. If they move forward towards its execution, it is then a riot; and if they actually execute their design, it amounts to a riot; 4 *Bla. Com.* 140.

In England public meetings held for political purposes are not unlawful as such, but may, by their conduct when assembled, become unlawful, and will be so from the outset if held for purposes of sedition. In such cases all those who use seditious words or openly applaud those who use them will be participants in the unlawful assembly, but not those who attend a meeting which they suppose to be lawful and who take no part in the unlawful conduct. Magistrates and the police may use whatever force is necessary to disperse an unlawful assembly. The degree of force to be exercised will depend on the circumstances of each case; 9 C. & P. 431.

See RIOT; ROUT; PUBLIC MEETING.

UNLAWFUL IMPRISONMENT. Unlawful deprivation of an alien's right to enter the country constitutes "unlawful imprisonment" to obtain freedom from which habeas corpus lies. 193 *Fed.* 228.

UNLAWFULLY. Illegally; wrongfully. 92 *N. Y.* 584. See 97 *N. C.* 465. This word is frequently used in indictments in the description of the offence; it is necessary when the crime did not exist at common law, and when a statute, in describing an offence which it creates, uses the word; 1 *Mood. C. C.* 339; but is unnecessary whenever the crime existed at common law and is manifestly illegal; 1 *Chit. Cr. L.* *241.

UNLAWFULLY DETAINING. In order to constitute the offense of "unlawfully detaining" a woman against her will, it must be against the will of the woman and for the purpose of carnally knowing her. 145 *Ky.* 450, 140 *S. W.* 658.

UNLIMITED OWNER. See LIMITED OWNER.

UNLIQUIDATED DAMAGES. Such damages as are unascertained. In general, such damages cannot be set off. No interest will be allowed on unliquidated damages. See LIQUIDATED DAMAGES.

UNMAILABLE MATTER. See MAILABLE.

UNMANUFACTURED TOBACCO. "Unmanufactured tobacco," as used in the Tariff Act of 1883, included sweepings of factories and warehouses used after importation in manufacturing cigarettes and stogies. 223 *U. S.* 501.

UNMARRIED. Its primary meaning is "never having been married;" 9 *H. L.* Cas. 601; 87 *L. J.* Ch. 376; but the term is a word of flexible meaning and it may be construed as not having a husband or wife at the time in question. 9 *H. L.* Cas. 601; 22 *Beav.* 328.

UNMARRIED AND WITHOUT ISSUE. "Unmarried and without issue" should be construed as synonymous with "without lawful issue." 3 *Ky.* Opin. 466.

UNOCCUPIED. A house cannot be said to be "unoccupied" though the family be absent for some time, if they left with the intention of returning. The absence must not extend beyond a reasonable time. 53 *S. W.* 298.

UNOCCUPIED TERRITORY. In International Law. That territory which is not in the possession of any civilized people. Maxey, *Int. Law* 138.

UNQUES (L. Fr.). Still; yet. This barbarous word is frequently used in pleas; as, *Ne unques executor*, *Ne unques guardian*, *Ne unques accouple*, and the like.

UNREASONABLE SEARCHES. See CORPORATION.

UNSEATED LAND. A phrase used in Pennsylvania to designate uncultivated land subject to taxation. A tract of land ceases to be unseated as soon as it is actually occupied with a view to permanent residence; 7 *W. & S.* 248; 5 *Watts* 382.

UNSEAWORTHY SHIP. See SEAWORTHINESS.

UNSHIPMENT. Throwing goods overboard protected in such manner that they may be recovered, may constitute unshipment. 1 *Heisk.* 146.

UNSOLENN WAR. That war which is not carried on by the highest power in the states between which it exists, and which lacks the formality of a declaration. Grotius, *de Jure Bel. ac Pac.* l. 1, c. 3, § 4. A formal declaration to the enemy is now disused, but there must be a formal public act proceeding from a competent source; with us, it must be an act of congress; 1 *Kent* 55. See WAR.

UN SOUND MIND, UNSOUND MEMORY. See INSANITY; PERSON OF UNSOUND MIND.

UN SOUNDNESS. See SOUNDNESS.

UNSYSTEMATIZED DELUSION. See SYSTEMATIZED DELUSION.

UNTIL. When a charter contains the incorporation of a company until a day named, *until* is exclusive in its meaning, unless the context show that the contrary is intended; 17 *N. Y.* 503; 120 *Mass.* 94. It is inclusive of the date; 18 *N. J.* Eq. 315; 70 *Ga.* 717; *contra*, 118 *Mass.* 502; 91 *N. Y.* 631; 87 *Ind.* 139.

UNTRUE. *Prima facie* inaccurate, but not necessarily wilfully false. 8 *B. & S.* 929. See TRUE.

UNVALUED POLICY. In Insurance Law. An unvalued policy, sometimes called an open policy, is one in which the value of the subject insured is not specified but is left to be ascertained in case of loss. 3 *Richards*, Law of Ins. 21. *Cf.* VALUED POLICY.

UNWHOLESOME FOOD. Food not fit to be eaten; food which if eaten would be injurious. See ADULTERATION; HEALTH; POLICE POWER.

UNWRITTEN LAW. See *LEX NON SCRIPTA*.

UPLIFTED HAND. When a man accused of a crime is arraigned, he is required to raise his hand, probably in order to identify the person who pleads. Perhaps for the same reason when a witness adopts a particular mode of taking an oath, as when he does not swear upon the gospel, but by Almighty God, he is to hold up his hand.

UPON AND ACROSS. The words "upon and across," as used in a statute relating to use of streets by railroads, are to be construed as synonymous terms when applied to a railroad company's occupation and use of a street or sidewalk with its tracks. 158 *Ky.* 136, 164 *S. W.* 329.

UPPER BENCH. The king's bench was so called during Cromwell's protectorate, when Rolle was chief-justice. 8 Bla. Com. 202.

UPSET PRICE. The price at which any subject, as lands or goods, is exposed to sale by auction, below which it is not to be sold. In a final decree in foreclosure, the decree should name an upset price large enough to cover costs and all allowances made by the court, receiver's certificates and interest, liens prior to the bonds, amounts diverted from the earnings, and all undetermined claims which will be settled before the confirmation and sale; 25 Fed. Rep. 232.

URBAN SERVITUDES. All servitudes are established either for the use of houses or for the use of lands. Those of the first kind are called urban servitudes, whether the buildings to which they are due be situated in the city or in the country. Those of the second kind are called rural servitudes.

The principal kinds of urban servitudes are the following: the right of support; that of drip; that of drain, or of preventing the drain; that of view or of lights, or of preventing the view or lights from being obstructed; that of raising buildings or walls, or of preventing them from being raised; that of passage; and that of drawing water. See 3 Toullier 441.

URBS (Lat.). A walled city. Often used for *civitas*. Ainsworth, Dict. It is the same as *oppidum*, only larger. *Urbs*, or *urbs aurea*, meant Rome. Du Cange. In the case of Rome, *urbs* included the suburbs. Dig. 50. 16. 2. pr. It is derived from *urbum*, a part of the plough by which the walls of a city are first marked out. Ainsworth, Dict.

USAGE. Uniform practice.

This term and custom are now used interchangeably, though custom seems to have been originally confined to local usages immemorially existing; Browne, Us. & Cust. 13.

A usage must be established; that is, it must be known, certain, uniform, reasonable, and not contrary to law; but it may be of very recent origin; 2 Greenl. Ev. § 251; 9 Pick. 426; 4 B. & Ald. 210; 69 Pa. 374; 80 Ill. 493; 49 N. Y. 464; 3 N. Dak. 107; 100 Ala. 355; and no usage is good which conflicts with an established principle of law; 85 Ala. 565; 159 Mass. 522. Parties who contract on a subject-matter concerning which known usages prevail incorporate such usages by implication into their agreements, if nothing is said to the contrary; 137 U. S. 30.

The usages of trade afford ground upon which a proper construction may be given to contracts. By their aid the indeterminate intention of parties and the nature and extent of their contracts arising from mere implications or presumptions, and acts of an equivocal character may be ascertained; and the meaning of words and doubtful expressions may become known; 13 Pick. 182; 5 Wheat. 326; 2 C. & P. 523; 1 N. & M'C. 519; 5 Ohio 436; 15 Ala. 123; 126 Ind. 176; 48 Fed. Rep. 921. Among commercial and business men in a locality, it need not be so ancient "that the memory of man runneth not to the contrary," nor that it should contain all the other elements of a common-law custom, as defined in the books; 3 Ind. App. 299. One seeking to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it; 139 N. Y. 416.

A local usage must be one known to both contracting parties; 144 U. S. 476. See 75 Ala. 596; 54 Mich. 609; 65 Me. 105; 51 Wis. 224; 16 Mo. App. 383.

Modern English cases incline to extend the functions of usages, but in America the authorities vary greatly; Lawson, Us. & Cust. 25; 7 E. & B. 266; 82 Vt. 616; 10 W. N. C. (Pa.) 347.

See CUSTOM; Lawson; Browne, Us. & Cust.; IMMEMORIAL USAGE.

USAGE OF TRADE. A course of dealing; a mode of conducting transactions of a particular kind. 115 Mass. 535.

The custom or usage of a trade is the law of that trade, and obligatory if ancient (sufficiently old to be generally known), certain, uniform, and reasonable. Anderson; 3 Wash. 150.

USANCE. In Commercial Law. The time which, by usage or custom, is allowed in certain countries for the payment of a bill of exchange. Pothier, *Contr. du Change*, n. 15.

The time of one, two, or three months after the date of the bill, according to the custom of the places between which the exchanges run.

Double or treble is double or treble the usual time, and half usance is half the time. Where it is necessary to divide a month upon a half usance (which is the case when the usance is for one month or three), the division, notwithstanding the difference in the length of the months, contains fifteen days. Byles, Bills § 80, *205.

USE. A confidence reposed in another, who was made tenant of the land, or tenant, that he would dispose of the land according to the intention of the *cestui que use*, or him to whose use it was granted, and suffer him to take the profits. Plowd. 352; Gilb. Uses 1; Saund. Uses 2; 2 Bla. Com. 328.

A right in one person, called the *cestui que use*, to take the profits of land of which another has the legal title and possession, together with the duty of defending the same and of making estates thereof according to the direction of the *cestui que use*.

Uses have been said to have been derived from the *fidei commissum* of the Roman law; but see Trusts. It was the duty of a Roman magistrate, the *prætor fidei commissarius*, whom Bacon terms the particular chancellor for uses, to enforce the observance of this confidence. Inst. 2. 23. 2. They were introduced into England by the ecclesiastics in the reign of Edward III., before 1377, for the purpose of avoiding the statutes of mortmain; and the clerical chancellors of those times held them to be *fidei commissum*, and binding in conscience. To obviate many inconveniences and difficulties which had arisen out of the doctrine and introduction of uses, the Statute of 27 Henry VIII. c. 10, commonly called the Statute of Uses, or, in conveyances and pleadings, the statute for transferring uses into possession, was passed. It enacts that "when any person shall be seized of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seized or possessed of the land, etc. of and in the like estate as they have in the use, trust, or confidence; and that the estates of the persons so seized to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus executes the use,—that is, it conveys the possession to the use, and transfers the use to the possession, and, in this manner, making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity; 2 Bla. Com. 333.

A modern use is an estate of right which is acquired through the operation of the statute of 27 Henry VIII. c. 10; and which, when it may take effect according to the rules of the common law, is called the legal estate, and when it may not be designated a use, with a term descriptive of its modification; Cornish, Uses 35.

The common-law judges decided, in the construction of this statute, that a use could not be raised upon a use; Dy. 135 (A); and that on a feoffment to A and his heirs to the use of B and his heirs in trust for C and his heirs, the statute executed only the first use, and that the second was a mere nullity. The judges also held that as the statute mentioned only such persons as were seized to the use of others, it did not extend to a term of years, or other chattel interests, of which a term is not seized but only possessed; 2 Bla. Com. 338. Tien, Eq. Jur. § 260. The rigid literal construction of the statute by the courts of law again opened the doors of the chancery courts; 1 Madd. Ch. Pr. 448.

Uses and trusts are often spoken of together by the older and some modern writers, the distinction being those trusts which are of a permanent nature and required no active duty of the trustee being called uses; those in which the trustee had an active duty to perform, as, the payment of debts, raising portions, and the like, being called special or active trusts, or simply trusts; 1 Spence, Eq. Jur. 448.

For the creation of a use, a consideration either valuable, as, money, or good, as relationship in certain degrees, was necessary; 3 Swanst. 591; 7 Co. 40; 17 Mass. 257; 14 Johns. 210. See RESULTING USE. The property must have been in *esse*, and such that seisin could be given; Cro. Eliz. 401. Uses were alienable, although in

many respects resembling choices in action, which were not assignable at common law; 2 Bla. Com. 381; when once raised, it might be granted or devised in fee, in tail, for life, or for years; 1 Spence, Eq. Jur. 455.

The effect of the statutes of uses was much restricted by the construction adopted by the courts: it practically resulted, it has been said, in the addition of these words, to the use, to every conveyance; Will. R. P. 133. The intention of the statute was to destroy the estate of the feoffee to use, and to transfer it by the very act which created it to the *cestui que use*, as if the seisin or estate of the feoffee, together with the use, had, *uno flatu*, passed from the feoffor to the *cestui que use*. A very full and clear account of the history and present condition of the law of uses is given in 3 Wash. R. P. 91. 156. See, as to a use upon a use, Tud. L. Cas. R. Pr. 335. Consult Spence, Eq. Jur.; Bisph. Eq. See CHARITABLE USES; TRUSTS.

It is said that the word used is not derived from the Latin *usus* but comes from the Latin *opus*; 3 L. Quart. Rev. 115.

In its untechnical sense, the word use has been variously constructed; 20 Ind. 398; 59 Me. 532; 107 Mass. 290, 324; 11 Rich. 621; thus, "to use a port" means to enter it, so as to derive advantage from its protection; 48 N. Y. 624.

In Civil Law. A right of receiving so much of the natural profits of a thing as is necessary to daily sustenance. It differs from usufruct, which is a right not only to use, but to enjoy. 1 Bro. Civ. Law 184.

See PUBLIC USE; PUBLIC UTILITY; SECONDARY USE.

USE AND MANAGE. The words "use and manage," considered in connection with the right to sell and invest the proceeds for the interest of a testator's family conferred upon her no right to consume and sell the property for her own support and maintenance alone. The only right to sell is for the purpose of reinvestment. 161 Ky. 394, 170 S. W. 950.

USE AND OCCUPATION. When a contract has been made, either by express or implied agreement, for the use of a house or other real estate, where there was no amount of rent fixed and ascertained, the landlord can recover a reasonable rent in an action of assumpsit for use and occupation; 2 Aik. 252; 4 Day 238; 13 Johns. 240, 297; 15 Mass. 270; 10 S. & R. 251. This is under the Stat. of Westm. 2. See 2 Harv. L. Rev. 377.

The action for use and occupation is founded not on a privity of estate, but on a privity of contract; Wood, L. & T. 1383; 3 S. & R. 500; therefore it will not lie where the possession is tortious; 2 N. & M'C. 156; 3 S. & R. 500; 6 Ohio 371; 149 U. S. 595; or where the party is in possession by the license of the owner; 48 Minn. 397. It will lie for the occupation of land in another state; 3 S. & R. 502.

USE BY THE PUBLIC. Streets. "Use by the public" means all the uses to which the public, including pedestrians, have a right to put them, and to which the city may reasonably expect the public, including pedestrians, to put them. 157 Ky. 648, 163 S. W. 1101.

USE OF WORD. Where Congress has not expressly declared a word to have a particular meaning, it will be presumed to have used the word in its well-understood public and judicial meaning, and cases based on a declaration made by Parliament that the word has a certain meaning are not in point in determining the intent of Congress in using the word. 216 U. S. 439.

USEFUL. That which may be put into beneficial practice. See PATENT.

USEFULNESS. Capabilities for use. The word pertains to the future as well as to the past. 11 S. W. Rep. (Tenn.) 943.

USER. The enjoyment of a thing.

USES, STATUTE OF. See TRUSTS; USE.

USHER. This word is said to be derived from *huissier*, and is the name of an inferior officer in some English courts of law. Archb. Fr. 25. The office of usher of the court of chancery was abolished in 1852.

USING FOR HIRE. "Using for hire" was intended to apply to cases where persons, the hirers, did not take temporary possession, but where the owners handled the wagon and team for pay. 82 S. W. 386.

USQUE AD MEDIUM FILUM VIE (Lat.). To the middle thread of the way. See AD MEDIUM FILUM; 7 Gray 22.

USUAL TERMS. A phrase in the common-law practice, which meant pleading issuably, rejoining gratis, and taking short notice of trial. When a defendant obtained further time to plead, these were the terms usually imposed. Wharton.

USUCAPION, or USUCAPTION. In Civil Law. The manner of acquiring property in things by the lapse of time required by law.

It differs from prescription, which has the same sense, and means, in addition, the manner of acquiring and losing, by the effect of time regulated by law, all sorts of rights and actions. Merila, *Rept. Prescription*. See PRESCRIPTION.

USUFRUCT. In Civil Law. The right of enjoying a thing the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing. 18 Tex. 28; 79 Cal. 6.

Perfect usufruct is of things which the usufructuary can enjoy without altering their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied; as, a house, a piece of land, animals, furniture, and other movable effects.

Imperfect or quasi usufruct is of things which would be useless to the usufructuary if he did not consume and expend them or change the substance of them; as, money, grain, liquors. In this case the alteration may take place; Pothier, *Tr. du Douaire*, n. 194.

USUFRUCTUARY. In Civil Law. One who has the right and enjoyment of a usufruct.

Domat points out the duties of the usufructuary, which are—to make an inventory of the things subject to the usufruct, in the presence of those having an interest in them; to give security for their restitution when the usufruct shall be at an end; to take good care of the things subject to the usufruct; to pay all taxes and claims which arise while the thing is in his possession as a ground rent; and to keep the thing in repair at his own expense.

USURA MARITIMA. See FENUS NAUTICUM.

USURIOUS CONTRACT. See USURY.

USURPATION. The unlawful assumption of the use of property which belongs to another; an interruption or the disturbing a man in his right and possession. Toml.

According to Lord Coke, there are two kinds of usurpation: first, when a stranger, without right, presents to a church and his clerk is admitted; and, second, when a subject uses a franchise of the king without lawful authority. Co. Litt. 277 b.

In Governmental Law. The tyrannical assumption of the government by force, contrary to and in violation of the constitution of the country.

Of Office. For one to be a usurper, of an office, he must have assumed not only to exercise some of the functions of the office, but must have assumed to do so as an officer entitled to do the act in question. 131 Ky.

385, 115 S. W. 249.

USURPED POWER. In Insurance. An invasion from abroad, or an internal rebellion, where armies are drawn up against each other, when the laws are silent, and when the firing of towns becomes unavoidable. These words cannot mean the power of a common mob; 2 Marsh. Ins. 390. By an article of the printed proposals which are considered as making a part of the contract of insurance, it is provided that "no loss of damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

USURPER. One who assumes the right of government by force, contrary to and in violation of the constitution of the country. Toul. Droit. Civ. n. 32.

One who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever; his acts are void in every respect; 83 Gratt. 518; 48 Me. 80.

USURY. The excess over the legal rate charged to a borrower for the use of money. Originally, the word was applied to all interest reserved for the use of money; and in the early ages taking such interest was not allowed. In the later Roman law, usury was sanctioned; and it is said that taking usury was not an offence at common law; Tyler, Usury 64; but see Ord. Usury 17.

Unless there is a law limiting the rate of interest that can be charged for money, there can be no usury; 31 Ark. 484; 91 Ga. 609; 148 Mass. 231. The enactment of a usury law cannot affect prior contracts; 76 Ga. 322; 84 Neb. 181. If a contract is usurious, no custom can legalize it; 85 Ala. 379. A note void for usury in its inception cannot be enforced by an innocent purchaser for value; 19 U. S. App. 455.

"The shifts and devices of usurers to evade the statutes against usury have taken every shape and form that the wit of man could devise, but none have been allowed to prevail. Courts have been astute in getting at the true intent of the parties and giving effect to the statute." 62 N. Y. 346.

There must be a loan in contemplation of the parties; 7 Pet. 109; 14 N. Y. 93; 6 Ind. 232; and if there be a loan, however disguised, the contract will be usurious, if it be so in other respects. Where a loan was made of depreciated bank-notes, to be repaid in sound funds, to enable the borrower to pay a debt he owed, dollar for dollar, it was considered as not being usurious; 1 Meigs 685. The bona fide sale of a note, bond, or other security at a greater discount than would amount to legal interest is not per se a loan, although the note may be indorsed by the seller and he remains responsible; 1 Ia. 30; 6 Ohio St. 19; 29 Miss. 212. But if a note, bond, or other security be made with a view to evade the laws of usury, and afterwards sold for a less amount than the interest, the transaction will be considered a loan; 15 Johns. 44; 12 S. & R. 46; 6 Ohio St. 19; and a sale of a man's own note indorsed by himself will be considered a loan. Usury cannot arise from the purchase from brokers of a note at a discount; 72 Hun 373. Nor is there usury in a transaction for the sale and repurchase of securities, where there is no loan; 122 U. S. 457. It is a general rule that a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction; 7 Pet. 109; 10 Md. 57. On the other hand, when the contract was originally usurious, and there is a substitution by a new contract, the latter will generally be considered usurious; 15 Mass. 96; but a note or other contract for the payment of money is not usurious and void for providing for the payment of more than the statutory interest after maturity; 22 Misc. Rep. 279.

There must be a contract for the return of the money at all events; for if the return of the principal with interest, or the

principal only, depend upon a contingency, there can be no usury; 1 Wall. 604; but if the contingency extend only to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury if he receive interest beyond the amount allowed by law. Where the principal is put to hazard in insurances, annuities, and bottomry, the parties may charge and receive greater interest than is allowed by law in common cases, and the transaction will not be usurious; 2 Pet. 537. See 18 Wall. 375.

To constitute usury, the borrower must not only be obliged to return the principal at all events, but more than lawful interest: this part of the agreement must be made with full consent and knowledge of the contracting parties; 3 B. & P. 154. The fact that the usurious interest is paid in notes of another party, instead of money, is immaterial; 98 N. C. 244; 99 Ga. 291.

When the contract is made in a foreign country, the rate of interest allowed by the laws of that country may be charged, and it will not be usurious, although greater than the amount fixed by law in this; Story, Conf. of Laws § 292. Parties may contract for interest according to the place of the contract or the place of performance; 1 Wall. 296; 64 N. C. 33. Where there is no agreement made, the law of the place of the contract governs, in the absence of any intent to evade the usury laws; 72 N. Y. 472; 82 Ind. 16. A note made, dated, and payable in New York, without intent of maker that it should be elsewhere discounted, if negotiated in another state at a rate of interest lawful there, but excessive in New York, is usurious; Rorer, Int. St. Law 119; 77 N. Y. 573. See CONFLICT OF LAWS.

To constitute usury, both parties must be cognizant of the facts which make the transaction usurious; 44 Barb. 621; see 80 S. C. 61; but a mistake in law will not protect the parties; 9 Mass. 49; though a miscalculation will, it seems; 2 Cow. 770. If a contract be usurious in itself it must be taken to have been so intended; 100 N. C. 389. An agreement by a mortgagor to pay taxes on the mortgage debt is not necessarily usurious; 24 Md. 63; nor is a clause in a bill of exchange, providing attorney fees for collection; 84 Ind. 149; and so of a mortgage; 80 Ia. 131; and so of a note; 142 Ill. 589. See 80 Ga. 65. In some states the usurious excess above the lawful rate, alone, is void; 8 Phila. 84; Bisph. Eq. § 232.

A bona fide sale by one person of a bond of another, at an exorbitant rate of discount, is not illegal; 3 Stockt. 362. A sale of a note or mortgage for less than its face, with a guarantee of payment in full, is not usurious; 85 Barb. 484; nor is a contract to pay a bushel and a half of corn within a year, for the loan of a bushel; 12 Fla. 552. An agreement to pay interest on accrued interest is not invalid; 10 Allen 83; 55 N. Y. 621; but it has been held that compounding interest on a note is usurious; 76 N. C. 314; but see 46 Ill. App. 189.

Interest may be collected on coupons; 84 Neb. 181. See 36 id. 148; 5 Tex. Civ. App. 187.

The ordinary commissions allowed by the usages of trade may be charged without tainting a contract with usury; but it must plainly appear that the commissions are charged for other services, and are not merely a device to evade the law; 2 Pat. & H. 110. A bonus paid to an agent in addition to legal interest renders the loan usurious, when it ensures to the benefit of the principal under the agent's contract; 153 U. S. 318. Commission may be charged by a merchant for accepting a bill; 18 Ark. 456; but a commission charged in addition to interest for advancing money is usurious; 13 La. Ann. 660. Where a banker discounts a bill payable in a distant place, he may charge the usual rate of exchange on that place; but if such charge be an excess of the usual rate it will be considered a device to cover usurious interest; 3 Ind. 53. See 93 U. S. 344. Where a gratuity is given to influence the making of a loan, it will be considered usurious; 7 Ohio St. 387.

The fact that an agent, authorized to lend money for lawful interest, exacts for his own benefit, and without his principal's knowledge, more than the lawful rate, does not render the loan usurious; 53 Fed. Rep. 410; 116 U. S. 98. The burden of proof is on the person pleading usury; 22 Ga. 193; 57 Ark. 251; and where the contract is valid on its face, affirmative proof must be made that the agreement was corruptly made to evade the law; 97 U. S. 13. Where parties exchange their notes for mutual accommodation, and both or either are sold at a higher than the legal rate, they are usurious; Hill & D. 65.

The common practice of reserving the interest on negotiable paper at the time of making the loan is very ancient, and is sanctioned by law; Sewell, Banking. An agreement to pay annually in advance is not usurious; 36 Neb. 148; 49 Ill. App. 564.

The offence of taking usury is not condoned by the absence of *intent* to violate the statute; 50 N. Y. 437; but see 20 Wisc. 407.

The one who has contracted to pay usury may set up the defence; 55 Ind. 341; 17 Kans. 355; and so may his privies; 49 N. Y. 636; 47 Ala. 302; and his legal representatives; 100 Ala. 465; and his surety; 39 Ind. 106 (but see 50 Vt. 105; 35 N. J. L. 285); or a guarantor; 20 Me. 28; but one who buys an equity of redemption cannot set up the defence against the mortgagee; 24 N. J. Eq. 120; nor can a second mortgagee set up usury as a defence to a prior mortgage; 17 Kans. 355 (but see 26 Ind. 94; 59 Barb. 239).

The defence of usury must be supported by clear proof; Perl. Int. 282; 57 Ill. 183; 36 Wisc. 390; 188 N. Y. 623; which may be extrinsic to the contract; 9 Pet. 418; an express agreement for usury need not be proved; 2 Pick. 145.

Usurious interest does not render a mortgage void; 92 Ga. 675; 81 *id.* 276; and where a loan is originally usurious, the defence of usury applies to all renewals; and when action is brought on any renewal note, no matter how remote, all payments of interest on such usurious loan may be applied on the principal; 39 Neb. 485; 24 *id.* 630; 87 Minn. 441; *id.* 182; and a second note renewing a former one, but including an additional sum, is usurious; 101 N. C. 99. National banks may charge interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, they may charge such rate. When no rate is fixed by the laws of the state, territory, or district, the bank may

charge a rate not exceeding seven per centum, and such interest may be taken in advance. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as usurious; R. S. § 5197.

The charging a rate of interest greater than is allowed when knowingly done shall be deemed a forfeiture of the entire interest. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, provided such action is commenced within two years from the time the usurious action occurred; R. S. § 5198.

It is now conclusively settled that the penalty declared in R. S. § 5198 is superior to and exclusive of any state penalty; 91 U. S. 29; 72 Pa. 309; 44 Ind. 298; 115 Mass. 539; *contra*, 57 N. Y. 100. A national bank is not justified in charging a usurious rate of interest because the statutes of the state permit usurious interest to be taken only by certain specified banks; 11 Bank. Mag. 787. See also 141 U. S. 384; 3 U. S. App. 7; 18 Sup. Ct. R. 390.

See INTEREST. 9 L. R. A. 292.

UTAH. One of the states of the United States, to which it was admitted July 4, 1896, under the act of January 16, 1896.

UTERINE (Lat. *uterus*). Born of the same mother.

UTERINUS (Lat.). Uterine; born of the same mother; a sister or brother from one and the same mother, but a different father, may be called a uterine sister and uterine brother. See UTERINE.

UTFANGENETHEF, UTFANG-THEF. The right of a lord to punish a thief dwelling out of his liberty, and committing theft without the same, if taken within the jurisdiction of the manor. Cowel. See INFANGENETHEF.

UTI POSSIDETIS (Lat. as you possess). A phrase used to signify that the parties to a treaty are to retain possession of what they have acquired by force during the war. Boyd's Wheat. Int. Law § 545.

A treaty which terminates a war may adopt this principle or that of the *status quo ante bellum* (*q. v.*), or a combination of the two. In default of any treaty stipulation, the former doctrine prevails. See TREATY OF PEACE.

UTILITY. See PUBLIC UTILITY PATENT.

UTRUBL In Scotch Law. An interdiction as to movables, by which the colorable possession of a *bona fide* holder is continued until the final settlement of a contested right: corresponding to *uti possidetis* as to heritable property. Bell. Dict.

UTRUMQUE NOSTRUM (L. Lat.). Both of us.

UTTER. In Criminal Law. To offer; to publish.

To utter and publish a counterfeit note is to assert and declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary that it should be passed in order to complete the offence of uttering; 2 Binn. 388; Cl. Cr. L. 391. It seems that reading out a document, although the party refuses to show it, is a sufficient uttering; Jebb, Cr. Cas. 282. The merely showing a false instrument with intent to gain a credit, when there was no intention or attempt made to pass it, it seems, would not amount to an uttering; Russ. & R. 200. Using a forged instrument in some way, in order to get money or credit upon it, or by means of it, is sufficient to constitute an uttering; 2 Den. Cr. Cas. 475.

The word *uttering*, used of notes, does not necessarily import that they are transferred as genuine; it includes any delivery of a note for value (as by a sale of the notes as spurious) with the intent that they should be passed upon the public as genuine; 1 Abb. U. S. 185.

The offence is complete when a forged instrument is offered; it need not be accepted; 2 Bish. Cr. L. § 605. Recording a forged deed is uttering it; 27 Mich. 386; so is bringing suit on a forged paper; 20 Gratt. 733. The legal meaning of the word *utter* is in substance to *offer*; Bish. Cr. L. § 607.

Forged Check. To constitute the offence of "uttering a forged check," the check must be a forgery and be also put into circulation. 151 Ky. 517, 152 S. W. 574.

UTTER BARRISTER. In English Law. Those barristers who plead without the bar, and are distinguished from benchers, or those who have been readers and who are allowed to plead within the bar, as the king's council are. See BARRISTER.

UTTOL. See INTOL AND UTTOL.

UXOR (Lat.). In Civil Law. A woman lawfully married.

UXORCIDE. The killing of a wife by her husband; one who murders his wife. It is not a technical term of the law. Black, L. Dict.

V.

V. A common abbreviation of *versus*, in the titles of causes, and reported cases.

V. L. O. L. *Violating Local Option Law.* The letters were held to be sufficient when used in an indictment, instead of the words they represent. 73 S. W. 1028.

VACANCY. A place which is empty. The term is principally applied to cases where the office is not filled. As applied to an office, it has no technical meaning; 93 Cal. 153; 96 Ind. 874.

By the constitution of the United States, the president has the power to fill vacancies that may happen during the recess of the senate. See **TENURE OF OFFICE**; **OFFICER**; **RESIGNATION**; 1 So. L. Rev. N. S. 184.

VACANT. See **OFFICER.**

VACANT LANDS. See **STATE LANDS.**

VACANT POSSESSION. A term applied to an estate which has been abandoned by the tenant: the abandonment must be complete in order to make the possession vacant, and, therefore, if the tenant have goods on the premises it will not be so considered. 2 Chitty, Bail. 177; 2 Stra. 1064.

A dwelling-house furnished throughout, from which the owner has removed for a season, intending to return and resume possession, was held not vacant, within the meaning of a policy of insurance; 81 N. Y. 184.

VACANT SUCCESSION. An inheritance for which the heirs are unknown.

VACANTIA BONA. In Civil Law. Goods without an owner. Such goods escheat.

VACATE. To annul; to render an act void: as, to vacate an entry which has been made on a record when the court has been imposed upon by fraud or taken by surprise.

VACATION. That period of time between the end of one term and beginning of another. During vacation, rules and orders are made in such cases as are urgent, by a judge at his chambers. See **TERM.**

VACATION BARRISTER. See **BARRISTER.**

VACCARIA (Lat. *vacca*, a cow). A dairy-house. Co. Litt. 5 b.

VACCINATION. The Vaccination Act of 1898 requires that every child born in England shall be vaccinated within six months of its birth. But if a parent within four months from the birth of the child satisfies two justices that he conscientiously believes that vaccination would be prejudicial to the health of the child, and delivers within seven days thereafter a certificate from such justices to the vaccination officer, he is exempted from the penalties provided in the act for non-compliance therewith. See 42 Sol. Jour. 815.

It is within the police power of the state to compel the vaccination of children attending the public schools; 187 Ill. 67; and an act requiring compulsory vaccination is not in conflict with the provisions of the federal constitution; 32 Atl. Rep. 848. Pupils may be excluded for refusing to be vaccinated during a smallpox scare; 162 Pa. 476; they may be denied admission to the schools; 82 N. Y. Suppl. 322; but it has been held that a rule of the

board of health excluding a pupil who is not vaccinated is void in the absence of a statute authorizing it; 87 L. R. A. (Wis.) 157; 187 Ill. 67. See 25 L. R. A. 152; 28 id. 820; 47 Am. St. Rep. 546; **POLICE POWER.**

VADIMONIUM. In the Roman Law. Bail or security; the giving of bail for appearance in court; a recognizance. Burrill; Calv. Lex.

VADIUM MORTUUM (Lat.). A mortgage or *dead pledge*; it is a security given by the borrower of a sum of money, by which he grants to the lender an estate in fee, on condition that if the money be not repaid at the time appointed, the estate so put in pledge shall continue to the lender as dead or gone from the mortgagor. 2 Bla. Com. 257.

VADIUM PONERE. To take bail for the appearance of a person in a court of justice. Toml.

VADIUM VIVUM (Lat.). A species of security by which the borrower of a sum of money made over his estate to the lender until he had received that sum out of the issues and profits of the land; it was so called because neither the money nor the lands were lost, and were not left in dead pledge, but this was a *living pledge*, for the profits of the land were constantly paying off the debt. Littleton § 206; 1 Powell, Mortg. 3.

VAGABOND. One who wanders about idly, who has no certain dwelling. It is not synonymous with *vagrant*. 28 Tex. App. 562.

VAGRANCY. When not defined by a statute, it must be considered such a vagabondage as fairly comes within the common-law meaning of the word. 41 Mich. 299; 90 id. 3.

VAGRANT. A person who lives idly, without any settled home. A person who refuses to work, or goes about begging. This latter meaning is the common one in statutes punishing vagrancy. See 1 Wils. 331; 8 Term 26; 90 Mich. 3. See **TRAMP.**

VAGRANT ACT. In English Law. The statute 5 Geo. IV. c. 89, which is an act for the punishment of idle and disorderly persons. 2 Chit. Stat. 145.

VAGUENESS. Uncertainty. Certainty is required in contracts, wills, pleadings, judgments, and, indeed, in all the acts on which courts have to give a judgment, and if they be vague so as not to be understood, they are, in general, invalid; 5 B. & C. 583. A charge of frequent intemperance and habitual indolence is vague and too general; 2 Mart. La. N. S. 530. See 36 Ch. Div. 348; **CERTAINTY**; **NONSENSE**; **UNCERTAINTY.**

VALESHERIA. See **ENGLESHIRE.**

VALID. Having force, of binding force; legally sufficient or efficacious; authorized by law. Anderson, L. Dict.

VALIDITY. Legal sufficiency in contradistinction to mere regularity. An official sale, an order, judgment, or decree may be regular; the whole practice in reference to its entry may be correct, but still invalid for reasons going behind the regularity of its forms. 1 Elipp. 487.

VALIDITY OF AUTHORITY. In 130 U. S. 210, Mr. Chief Justice Fuller said: "Whenever the power to enact a statute as it is by its terms, or made to read by con-

struction, is fairly open to denial and denied the validity of such statute is drawn in question, but not otherwise. "And the Chief Justice added upon the authority of 6 Wall. 258, 261, 262, that the word "authority" stands upon the same footing. 252 U. S. 6.

VALLEY. The common understanding of the word "valley" as applied to a mountainous country is as meaning lowlands in contradistinction to mountain slopes and ridges. 167 Fed. 669.

VALOR BENEFICIORUM (Lat.). The value of every ecclesiastical benefice and preferment, according to which the first-fruits and tenths are collected and paid. The valuation by which the clergy are at present rated was made 26 Hen. VIII., and is commonly called *The King's Books*. 1 Sharsw. Bla. Com. *284.

VALOR MARITAGII (Lat.). The amount forfeited under the ancient tenures by a ward to a guardian who had offered her a marriage without disparagement, which she refused. It was so much as a jury would assess, or as any one would give *bona fide*, for the value of the marriage. Littleton 110. A writ which lay against the ward, on coming of full age, for that he was not married by his guardian, for the *value of the marriage*, and this though no convenient marriage had been offered. *Termes de la Ley*.

VALUABLE CONSIDERATION. See **CONSIDERATION.**

VALUABLE PAPERS. Papers of some value; worthy of preservation. Anderson; 5 Coldw. 135.

VALUABLE SECURITY. Every valuable security is a valuable thing, but many valuable things are not valuable securities. The words "other valuable things" include everything of value; 35 N. J. L. 452; as a promissory note; 29 id. 13. Ice has been held a *valuable article*; 33 Ind. 402. *Valuable papers* are not papers having a money value, but only such as are kept and considered worthy of being taken care of by the particular person; 2 Head (Tenn.) 306. They have been defined to be such as are regarded by a testator as worthy of preservation: in his estimation, of some value. The term is not confined to deeds for lands or slaves, obligations for money or certificates of stock; 5 Coldw. 129.

See **VALUABLE THING.**

VALUABLE THING. As distinguished from 'valuable security': 'Valuable thing' is more comprehensive than 'valuable security.' Every valuable security is a valuable thing, but many valuable things are not valuable securities. 29 Am. & Eng. Encyc. 2nd ed., 575; 35 N. J. L. 452.

VALUATION. The act of ascertaining the worth of a thing. The estimated worth of a thing. 7 Nev. 99. See **VALUE.**

VALUATION LIST. In English Law. A list of all the ratable hereditaments in a parish.

VALUE. The utility of an object. The worth of an object in purchasing other goods. The first may be called value in use; the latter, value in exchange.

When applied without qualification to property of any description, necessarily means the price which it will command in the market; 17 Wend. 399. See 80 W. Va. 102. In an indictment, it has been

held to be a synonym of "effect" or "import." 25 Ohio St. 438.

Value differs from price, *q. v.* The latter is applied to live cattle and animals; in a declaration, therefore, for taking cattle, they ought to be said to be of such a price; and in a declaration for taking dead chattels, or those which never had life, it ought to lay them to be of such a value; 2 Lilly, Abr. 629. See 119 Mass. 126.

It is also distinguished from income when applied to property; 45 Barb. 247. As used in reference to lands taken under eminent domain, it is a relative term, depending on the circumstances. Salable value, actual value, and cash value all mean the same thing and are designed to effect the same purpose; Burr. Tax. 227. See 101 U. S. 162. See INTRINSIC VALUE. Upon the question of the value of an article evidence of its original cost is relevant; 83 Fed. Rep. 95. See FAIR VALUE; INTRINSIC VALUE. NET VALUE.

VALUE RECEIVED. A phrase usually employed in a bill of exchange or promissory note, to denote that a consideration has been given for it. These words are not necessary; 11 A. & E. 702; 21 Wisc. 607; though it is otherwise in some states if the bill or note be not negotiable; 19 Conn. 7; 29 Ill. 104; extrinsic evidence is admissible between immediate parties to prove absence, failure, or illegality of consideration; 5 Allen 589; 9 id. 45, 253.

The expression value received, when put in a bill of exchange, will bear two interpretations; the drawer of the bill may be presumed to acknowledge the fact that he has received value of the payee; 3 Maule & S. 351; 2 McLean 213; or when the bill has been made payable to the order of the drawer and accepted, it implies that value has been received by the acceptor; 5 Maule & S. 65; 19 Barb. 409. In a promissory note, the expression imports value received from the payee; 5 B. & C. 360; and sufficiently expresses a consideration; 149 U. S. 298; although not necessarily in money; 32 Ia. 265.

VALUED POLICY. See POLICY. IN SURANCE, *Rental Insurance.*

VARA. A measure used in Mexican land grants equal to 32.9927 inches. 161 U. S. 219.

VARIANCE. A disagreement or difference between two parts of the same legal proceeding which ought to agree together. Variances are between the writ and the declaration, and between the declaration, or bill in equity, and the evidence.

Variance in matter of substance is fatal to the action; 4 Ala. 319; 10 Johns. 141; and is ground for demurrer or arrest of judgment; 3 Den. 356; 7 T. B. Monr. 290; but if in matter of form merely, must be pleaded in abatement; 1 Ill. 298; 1 McLean 319; or special demurrer; 2 Hill S. C. 585; and a variance between the allegations and evidence upon *some material* points only is as fatal as if upon all; 7 Taunt. 385; but, if it be merely formal or immaterial matter, will be disregarded; 7 Cra. 408; 11 Ala. 542. The court may allow a technical variance between the pleadings and proofs to be cured by an amendment not introducing any other cause of action or affecting the merits of the case between the parties; 138 U. S. 623. Slight variance from the terms of a written instrument which is professedly set out in the words themselves is fatal; Hampst. 294.

It is too late after plea to take advantage of a variance between the description in the writ and the declaration of property replied; 95 Mich. 594.

Where, in an action on contracts, the pleader did not set out the exact words of the contract, and a different contract expressed in different words was proved, there is no real variance, as the difference between the declaration and the proofs must be real and tangible to constitute a variance; 25 U. S. App. 53. Where the plaintiff declared that his cattle died of "Texas cattle fever," and that it was con-

tagious, and the court found that the cattle died of "Texas fever," and it was infectious, held that the variance was immaterial; 163 U. S. 468. So where in an indictment the name of the "National State Bank," "carrying on a national banking business at the City of Exeter," was used instead of "The National Granite State Bank of Exeter"; 163 U. S. 87.

VASSAL. In Feudal Law. The name given to the holder of a fief bound to perform feudal service: this word was then always correlative to that of lord, entitled to such service.

The vassal himself might be lord of some other vassal.

In after-times, this word was used to signify a species of slave who owed servitude and was in a state of dependency on a superior lord. 2 Bla. Com. 53.

VAVASOUR (diminutive from *vasallus*, or, according to Bracton, from *vas sortitus ad valitudinem*). One who was in dignity next to a baron. Britton 109; Bracton, lib. 1, c. 8. One who held of a baron. Encyc. Brit.

VECTIGALIA. In Roman Law. Duties which were paid to the prince for the importation and exportation of certain merchandise. They differed from tribute, which was a tax paid by each individual. Code 4. 61. 5. 13.

VEHICLE. The word includes every description of carriage or other artificial contrivance used or capable of being used as a means of transportation on land; U. S. Rev. Stat. § 4; a street sprinkler is a vehicle; 71 Mo. 92; but not a street car; 14 Pa. 484; or a ferry boat; 25 Ind. 286. See BICYCLE; TEAM.

VEIN. See LODE.

VEJOURS. An obsolete word, which signified viewers or experts.

VENAL. Something that is bought. The term is generally applied in a bad sense; as, a venal office is an office which has been purchased.

VEND AND VENDING. The words "vend" and "vending," as used in § 4952, Rev. Stat., in regard to the copyright protection afforded authors and as used in § 4884 Rev. Stat., in regard to the protection accorded inventors for their patented articles, are substantially the same, and the protection intended to be secured to authors and inventors is substantially identical. 229 U. S. 2.

VENDEE. A purchaser; a buyer.

VENDITION. A sale; the act of selling.

VENDITIONI EXPONAS (Lat.). That you expose to sale.

In Practice. The name of a writ of execution, directed to the sheriff, commanding him to sell goods or chattels, and in some states, lands, which he has taken in execution by virtue of a *feri facias*, and which remain unsold.

Under this writ the sheriff is bound to sell the property in his hands, and he cannot return a second time that he can get no buyers; Cowp. 406.

VENDOR REGIS (Lat.). The king's salesman, or person who exposes to sale goods or chattels seized or distrained to answer any debt due to the king. Cowel. This office was granted by Edw. I. to Philip de Lordiner, but was seized into the king's hands for abuse thereof. 2 Edw. II.

VENDOR. The seller; one who disposes of a thing in consideration of money.

VENDOR'S LIEN. An equitable lien allowed the vendor of land sold for the unpaid purchase-money. 3 Pom. Eq. Jur. § 1260. See LIEN.

VENIA AETATIS (Lat.). A privilege granted to a person not of age, by the sovereign, whereby the party is entitled to act, and to have all the powers to act, as if he were of full age.

VENIRE (Lat.). (To come.) The name of a writ by which a jury is summoned. Otherwise termed a *venire facias*.

VENIRE FACIAS (Lat.). That you cause to come. According to the English law, the proper process to be issued on an indictment for any petit misdemeanor, on a penal statute, is a writ called *venire facias*.

It is in the nature of a summons to cause the party to appear; 4 Bla. Com. 18, 351. See Thomp. & M. Juries 62.

VENIRE FACIAS JURATORES (Lat.). (Frequently called *venire* simply.)

The name of a writ directed to the sheriff, commanding him to cause to come from the body of the county, before the court from which it issued, on some day certain and therein specified, a certain number of qualified citizens who are to act as jurors in the said court. Steph. Pl. 104. See 6 S. & R. 414; 3 Chitty, Pr. 797; JURY.

VENIRE FACIAS DE NOVO (Lat.). The name of a new writ of *venire facias*; this is awarded when, by reason of some irregularity or defect in the proceeding on the first venire, or the trial, the proper effect of the venire has been frustrated, or the verdict become void in law; as, for example, when the jury has been improperly chosen, or an uncertain, ambiguous, or defective verdict has been rendered. Steph. Pl. 120; or when a judgment is reversed on a writ of error.

A motion for a *venire de novo* is properly denied, where there is no defect, ambiguity, or uncertainty in the verdict; 6 Ind. App. 268; 8 id. 590; and upon reversal of a judgment, the awarding the writ is controlled by the character of the case and the sound discretion of the appellate court; 98 Pa. 142. See RES JUDICATA.

VENIT ET DICIT (L. Lat.). Comes and says.

VENIT ET DEFENDIT (L. Lat.). Comes and defends.

VENTE. (Fr. from *vendre*, to sell.) Sale. Burrill; Britt. c. 26.

VENTE A REMERE. In French Law. A sale made, reserving a right to the seller to repurchase the property sold by returning the price paid for it.

The term is used in Canada and Louisiana. The time during which a repurchase may be made cannot exceed ten years, and, if by the agreement it so exceed, it shall be reduced to ten years.

VENTER, VENTRE (Lat. the belly). The wife; for example, a man has three children by the first and one by the second venter. A child is said to be *en ventre sa mere* before it is born; while it is a foetus. See UNBORN CHILD.

VENTRE INSPICIENDO. See DE VENTRE INSPICIENDO; JURY OF WOMEN; PHYSICAL EXAMINATION.

VENUE (L. Lat. *visnetum*, neighborhood. The word was formerly spelled *visne*. Co. Litt. 125 a).

The county in which the facts are alleged to have occurred, and from which the jury are to come to try the issue. Gould, Pl. c. 3, § 102; 1 How. 241. Some certain place must be alleged as the place of occurrence for each traversable fact; Com. Dig. Pleader (C. 20). Generally, in modern pleading, in civil practice, no special allegation is needed in the body of the declaration, the venue in the margin being understood to be the place of occurrence till the contrary is shown; Hempst. 236.

In local actions the true venue must be laid; that is, the action must be brought in the county where the cause of action arose, where the property is situated, in actions affecting real property; 2 Zab. 204; and there can be no change of venue in such cases; 3 N. Y. 204. Thus, in actions on a lease at common law, founded on privity of contract, as debt or covenant by lessor or lessee; 1 Saund. 241 b; 3 S. & R. 500;

venue is transitory, but when founded in privity of estate, as in case of assignment, the venue is local; 1 Saund. 257. By various early statutes, however, actions on leases have become generally transitory. In such action, some particular place, as, a town, village, or parish, must formerly have been designated; Co. Litt. 125. But it is said to be no longer necessary except in replevin; 2 East 503; 1 Chitty, Pl. 251. As to where the venue is to be laid in case of a change of county lines, see 18 Ga. 690; 16 Pa. 3; 102 Cal. 501.

In transitory actions the venue may be laid in any county the plaintiff chooses; that is, he may bring suit wherever he may find the defendant, and lay his cause of action to have arisen there, even though the cause of action arose in a foreign jurisdiction; Steph. Pl. 306; 18 Ga. 690; 1 How. 241. In case the cause was to be tried in a different county from that in which the matter actually arose, the venue was anciently laid by giving the place of occurrence, with a scilicet giving the place of trial; 1 How. 241; 3 Zab. 279. In some cases, however, by statutes, the venue in transitory actions must be laid in the county where the matter occurred or where certain parties reside; 3 Bla. Com. 294. And generally, by statute, it must be in the county where one of the parties resides, when between citizens of the same state.

In criminal proceedings the venue must be laid in the county where the occurrence actually took place; 4 C. & P. 363; and the act must be proved to have occurred in that jurisdiction; 26 Pa. 513; 4 Tex. 450; 6 Cal. 202. Where the offence is committed by letter, the sender may be tried at the place where the letter is received by the person to whom it is addressed; 136 U. S. 256. See 49 Fed. Rep. 643. An indictment for murder charging that an offence was committed on board of an American vessel on the high seas within the jurisdiction of the court and within the admiralty jurisdiction of the United States, sufficiently avers the locality of the offence; 154 U. S. 184. One who obtains goods from a salesman under false pretences may be tried in the county from which the goods were shipped; 167 Pa. 225.

Statement of venue in the margin and reference thereto in the body of an indictment is a sufficient statement of venue; 39 Me. 78; 8 Mo. 283; and the venue need not be stated in the margin if it appears from the indictment; 5 Gray 478; 25 Conn. 48; 2 McLean 580.

Want of any venue is a cause for demurrer; 5 Mass. 94; or abatement; Archb. Civ. Pl. 78; or arrest of judgment; 4 Tex. 450. So defendant may plead or demur to a wrong venue; 13 Me. 130. Change of venue may be made by the court to prevent, and not to cause a defeat of justice; 3 Bla. Com. 294; 2 Wisc. 397; 20 Ill. 259; both in civil; 7 Ind. 110; 31 Miss. 490; and criminal cases; 7 Ind. 160; 28 Ala. n. s. 28; 5 Harring. 512; and such change is a matter of right on compliance with the requirements of the law; 9 Tex. 358; 2 Wisc. 419; 15 Ill. 511; 8 Mo. 606. That such change is a matter of discretion with the court below, see 28 Ala. n. s. 28; 31 Miss. 490; 8 Cal. 410; 8 Ind. 439; 50 Kan. 773; 75 Ia. 50; 91 Tenn. 617; 181 U. S. 22.

See JURISDICTION.

VERAY. An ancient manner of spelling *veri*, true. In the English law there are three kinds of tenants: *veray*, or true tenant, who is one who holds in fee-simple; *tenant by the manner* (see TENANT); and *veray tenant by the manner*, who is the same as tenant by the manner, with this difference only, that the fee-simple, instead of remaining in the lord, is given by him or by the law to another. Hamm. N. P. 394.

VERBAL. Parol; by word of mouth: as verbal agreement; verbal evidence. Sometimes incorrectly used for oral.

VERBAL ACTS. The *res gestae* in-

cluded statements made by a car inspector to appellant who was injured and together with the inspection itself, constituted what are known in law as "verbal acts." 152 Ky. 183, 153 S. W. 206.

VERBAL ADMONITIONS. "Verbal admonitions" of the court made during the progress of the trial in reference to questions of evidence are not instructions within the meaning of Code provisions, requiring all instructions to be in writing. 143 Ky. 587, 137 S. W. 205.

VERBAL NOTE. In diplomatic language, a memorandum or note, not signed, sent when an affair has continued a long time, without any reply, in order to avoid the appearance of an urgency which perhaps the affair does not require, and, on the other hand, not to afford any ground for supposing that it is forgotten, or that there is no intention of prosecuting it any further, is called a *verbal note*.

VERBAL PROCESS. In Louisiana. A written account of any proceeding or operation required by law, signed by the person commissioned to perform the duty, and attested by the signature of witnesses. See PROCES VERBAL.

VERDEROR (fr. French *verdeur*, fr. *vert* or *verd*, green; Law L. *viridarius*). An officer in king's forest, whose office is properly to look after the *vert*, for food and shelter for the deer. He is also sworn to keep the assizes of the forest, and receive and enrol the attachments and presentments of trespasses within the forest, and certify them to the swanimator or justice-seat; Cowel; Manwood, For. Law 332.

VERDICT. The unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of a trial of a cause.

A general verdict is one by which the jury pronounce at the same time on the fact and the law, either in favor of the plaintiff or defendant. Co. Litt. 238; 4 Bla. Com. 461. See DECISION.

A general verdict is a finding by the jury in the terms of the issue referred to them. 8 Ga. 208; Tidd, P. 798.

A general verdict must be regarded as affirming the truth of every fact necessary to support the general conclusion arrived at, and every reasonable presumption arises in its favor, while nothing will be presumed in aid of the special findings as against the general verdict; 118 Ind. 5. If there is any reasonable hypothesis whereby a general verdict and the special finding can be reconciled, judgment must follow the general verdict; 117 id. 234; 119 id. 218; and a general verdict on an indictment is sufficient if supported by any one of the counts; 101 N. C. 680; 85 Ala. 14; 34 Fed. Rep. 873.

The jury may find such a verdict whenever they think fit to do so.

A partial verdict in a criminal case is one by which the jury acquit the defendant of a part of the accusation against him, and find him guilty of the residue.

A *privy* verdict is one delivered privily to a judge out of court. A verdict of this kind is delivered to the judge after the jury have agreed, for the convenience of the jury, who, after having given it, separate. This verdict is of no force whatever; and this practice, being exceedingly liable to abuse, is seldom, if ever, allowed in the United States. The jury, however, are allowed in some states, in certain cases, to seal their verdict and return it into court, as, for example, where a verdict is agreed upon during the adjournment of the court for the day. When this is done in criminal cases it is usually the right of the defendant to have the jury present in court when the verdict is opened; 10 Fed. Rep. 269. See PRESENCE; SEALING A VERDICT.

A private verdict must afterwards be given publicly in order to give it any effect.

A public verdict is one delivered in open court.

A special verdict is one by which the

facts are found, and the law is submitted to the judges. 4 Rand. 504; 1 Wash. C. 499; 2 Mas. 31. The jury may find a special verdict in criminal cases, but they are not obliged in any case to do so; Cooley, Const. Lim. 393. The special verdict or findings of a jury in order to sustain a judgment, must pass upon all the material issues made in the pleadings so as to enable the court to say upon the pleadings and verdict, without looking at the evidence, which party is entitled to judgment; 40 Minn. 375; 43 id. 397; 38 id. 260; 150 U. S. 597. A special verdict need only find such facts as are alleged in the pleadings upon one side and denied upon the other; 69 Tex. 124.

The jury have an option, instead of finding the negative or affirmative of the issue, as in a general verdict, to find all the facts of the case as disclosed by the evidence before them, and, after so setting them forth, to conclude to the following effect: That they are ignorant, in point of law, on which side they ought upon those facts to find the issue. In practice they have no right to do with the opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, etc.; but if the court are of an opposite opinion, they find for defendant. This form of finding is called a *special verdict*. In practice they have no right to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled upon the correction of the finding by the court on either side, according to the state of the facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and, with respect to other particulars, according to the state of facts which it is agreed that they ought to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered on record; and the question of law, arising on the facts found, is argued before the court in banc; 3 Bla. Com. 377.

There is another method of finding a special verdict: this is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judges or the court above on a special case, stated by the counsel on both sides, with regard to a matter of law; 3 Bla. Com. 378. See 10 East 354; 14 id. 355.

A juror may dissent at any time from a verdict to which he had before agreed until the same is recorded; 15 Am. L. Rev. 423. A mistake in the verdict may be corrected before it is recorded and the jury discharged; 38 N. C. 673.

When a jury being equally divided in opinion come to an agreement by lot, it was formerly held that its verdict was legitimate; 1 Kettle 81; but such verdicts are now held to be illegal, and will be set aside. The "quotient" verdict is so called from the fact that the jurors, having agreed to find for the plaintiff, further agreed that their verdict should be in such sum as is ascertained by each juror privately marking down the sum of money to which he thinks the plaintiff entitled, the total of these sums being divided by twelve. This method is almost universally condemned, the ground being that such an agreement cuts off all deliberation on the part of the jurors, and places it in the power of one of their number by naming a sum extravagantly high or ridiculously low to make the quotient unreasonably large or small; 6 Sm. & M. 55; 1 Wash. Ty. 329; 134 Ind. 168; so of a verdict in a criminal case fixing the term of imprisonment; 30 Tex. Cr. Rep. 166; *contra*, in the case of a fine in a criminal case for libel; 95 Ky. 332. But where the calculation is purely informal, for the purpose of ascertaining the sense of the jury, the objection is of no avail, and the verdict will stand; 1 Humph. 32; 38 Ill. 410; 74 Ia. 639; 23 Neb. 633; 77 Cal. 583; 40 Kan. 583; 3 Misc. Rep. 322. A verdict obtained by taking one-twelfth of the aggregate amount of the several estimates of the jurors is not objectionable when there was no antecedent agreement to be bound by the result, and when each juror deliberately accepted the amount thus ascertained; 67 Fed. Rep. 636; 37 Neb. 742; but if in pursuance of an agreement to be bound by the result, the verdict must be set aside; 1 Col. App. 250; 55 Tenn. 246; 23 Cal. 399; 112 Ill. 636; 170 Ia. 1. So a verdict being of the jurors agree that if one places a coin and the other guesses heads or tails, and the guess is right, they will agree with the majority; 23 Cal. 47; or where a verdict is reached by drawing lots it will be set aside; 39 Cal. 469; 63 Ga. 132; 20 Ia. 195; 160 Mass. 335. See JURY.

A verdict allowing a larger sum than is claimed in the petition must be set aside; 73 Ia. 300. Where a verdict in an action for breach of covenant is larger than the plaintiff's claim a remittitur is properly allowed; 69 Ia. 486; and a remittitur of part of the verdict, followed by a judgment for the remaining sum, as a condition of the denial of a new trial, does not deprive the defendant of his constitutional right to have the question of damages tried by a jury, or constitute a re-examination of the facts tried by the jury in violation of the amendment of the U. S. constitution; 190 U. S. 69.

A verdict received on Sunday is valid; 99 U. S. App. 32; a third successive verdict was set aside in 164 U. S. 222.

See NEW TRIAL; TRIAL; AFFORE THE ASSIZE.

VERDICT CONTRARY TO LAW. A "verdict" is "contrary to law" when it is contrary to the instructions whether they

are right or wrong. 132 Ky. 241, 116 S. W. 693.

VERDICT, SPECIAL. See AGREED CASE; CASE STATED.

VERGE. An uncertain quantity of land, from fifteen to thirty acres. Toml. See COURT OF THE MARSHALSEA; VIRGA.

VERIFICATION (Lat. *verum*, true, *facio*, to make). An averment by the party making a pleading that he is prepared to establish the truth of the facts which he has pleaded.

Whenever new matter is introduced on either side, the plea must conclude with the verification or averment, in order that the other party may have an opportunity of answering it; 1 Saund. 108, n. 1. This applies only to pleas.

In one instance, however, new matter need not conclude with a verification, and then the pleader may pray judgment without it: for example, when the matter pleaded is merely negative; Lawes, Pl. 145. The reason of it is evident: a negative requires no proof; and it would, therefore, be impertinent or nugatory for the pleader, who pleads a negative matter, to declare his readiness to prove it.

The usual form of verification of a plea containing matter of fact is, "And this he is ready to verify," etc. See 3 Bla. Com. 809.

See BILL; INJUNCTION.

In Practice. The examination of the truth of a writing; the certificate that the writing is true. See AUTHENTICATION.

VERIFY. Sometimes to confirm and substantiate by oath; and sometimes by argument. 3 How. Pr. 284.

VERMONT. One of the United States. At the outbreak of the Revolution the people of Vermont joined their brethren in the contest, though independent of the federal government. In 1777 they declared their territory to be "a free independent jurisdiction," and adopted a constitution which with subsequent amendments is still the constitution of the state. Under this constitution the state maintained its government and its independence for fourteen years, until its admission to the Union in 1791. The institutions of Vermont were modelled in large part from those of Connecticut (Art. 25).

VERSIO VULGATA. See LIBER AUTHENTICARUM.

VERSUS. Against; as, A B versus C D. This is usually abbreviated *v.* or *vs.*

Vs. and *versus* have become ingrafted upon the English language; their meaning is as well understood and their use quite as appropriate as the word *against* could be; 25 N. H. 523. See TITLE.

VERT. Everything bearing green leaves in a forest. Manwood, For. Law 146.

VERTIGO. "Vertigo" is "swimming in the head." 87 Ky. 541, 9 S. W. 812.

VERY LORD AND VERY TENANT. They that are immediate lord and tenant one to another. Cowel.

VESSEL. In Maritime Law. A ship, brig, sloop, or other craft used in navigation. 1 Boulay-Paty, tit. 1, p. 100. The term is rarely applied to any water craft without a deck; 8 Mas. 137; but has been used to include everything capable of being used as a means of transportation by water; 27 La. Ann. 607.

By R. S. § 3, "the word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water. See 48 Fed. Rep. 703.

A floating elevator towed from place to place, and used to transfer grain, has the characteristics of a vessel; 8 Bened. 506. So of a scow adapted only for use in port in carrying ballast to and from vessels, having neither steam power nor sails nor rudder, and moving by steam tugs; 3 Fed. Rep. 411; so of canal boats; *id.*; so of a scow built for carrying a steam shovel worked by the steam engine of the scow; 30 Fed. Rep. 206; and a barge having no sails, masts, or rudders and used only for the transportation of bricks, suitable only

to be towed by a tug; 86 *id.* 607; so of a floating scow fitted with steam appliances for deepening channels; 40 *id.* 353; a steam dredge; 53 *id.* 607; 80 *id.* 208; 83 *id.* 840; a barge and scow; 61 *id.* 502; 77 *id.* 476. The means of propulsion makes no difference; 8 Sawy. 211. An open boat is not a vessel; 5 Mas. 120; nor a raft; 14 Fed. Rep. 236; nor a canal boat; 5 Wend. 564.

Vessels navigated to a port are subject to distinct duties and obligations, and are not dutiable as imported merchandise; 166 U. S. 110.

Vessels must have their names marked on them; 2 Supp. R. S. 541.

See SHIP; PART-OWNERS; FOREIGN VESSEL SURVEY OF A VESSEL.

VESSEL OR OTHER CONVEYANCE. Not appropriate to describe the plant of a toll-bridge. 257 U. S. 512.

VEST. To give an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment. Fearn, Cont. Rem. 2.

VESTED ESTATE. A vested estate, whether present or future, may be absolutely or defeasibly vested. 89 Mich. 428.

VESTED INTEREST.

See VESTED ESTATE, OR INTEREST; VESTED REMAINDER.

VESTED LEGACY. A legacy, the right to which vests permanently in the legatee, though the legacy is not payable until a future time.

VESTED IN POSSESSION. An estate is vested in possession when there exists a right of present enjoyment.

The interest in a fund transferred from an estate to a trustee for ascertained persons is vested in possession no less than when it is conveyed directly to them, for the purposes of the tax-refunding Act of June 27, 1902. 251 U. S. 395. See VEST.

VESTED REMAINDER. An estate by which a present interest passes to the party, though to be enjoyed in *futuro*, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent. 2 Bouvier, Inst. n. 1831. It imports, *ex vi termini*, a present title in the remainderman; 112 N. C. 1. See REMAINDER; Tudor, L. Cas. R. P. 820.

VESTED RIGHT. See RIGHT.

VESTIGIAL WORDS. Those contained in a statute which by reason of a succession of statutes on the same subject-matter, amending or modifying previous provisions of the same, are rendered useless or meaningless by such amendments. 164 U. S. 70.

VESTIMENTUM (L. Lat.). A figurative expression denoting the character, quality or circumstance of right.

VESTING ORDER. An order which may be granted by the chancery division of the high court of justice (and formerly by chancery) passing the legal estate in lieu of a conveyance.

VESTIRE (L. Lat.). To deliver full possession of land or of an estate.

VESTRY. The place in a church where the priest's vestments are deposited. Also, an assembly of the minister, church wardens, and parishioners, held in the vestry of the church. In America, a body elected by a church congregation to administer the affairs of the church. See Baum, Church Law.

VESTURE OF LAND. A phrase including all things, trees excepted, which grow upon the surface of the land and clothe it externally.

He who has the vesture of land has a right, generally, to exclude others from entering upon the superficies of the soil.

Co. Litt. 4 b; Hamm. N. P. 151. See 7 East 200.

VETERA STATUTA (Lat.). The name of *vetera statuta*—ancient statutes—has been given to the statutes commencing with Magna Charta and ending with those of Edward II. Crabb, Eng. Law 222.

VETERINARY SURGEON. One who treats domestic animals for injuries or diseases. The same rules are applicable to the case of a veterinary surgeon bringing an action to recover for the value of his services as are applicable to other surgeons; 69 Hun 428. He must possess and exercise a reasonable degree of learning and skill, and use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge; 69 Hun 428; 10 *id.* 358; 29 Neb. 352; 48 Vt. 557. See PHYSICIAN.

VETITUM NAMUM (Law Lat. *vetitum*, forbidden, *namum*, taking). Where the bailiff of a lord distrains beasts or goods of another, and the lord forbids the bailiff to deliver them when the sheriff comes to make replevin, the owner of the cattle may demand satisfaction in *placitum de vetito namio*. Co. 2d Inst. 140; 2 Bla. Com. 148. See WITHERNAM; 2 Poll. & Maitl. 575.

VETO (Lat. I forbid). A term including the refusal of the executive officer whose assent is necessary to perfect a law which has been passed by the legislative body, and the message which is usually sent, stating such refusal and the reasons therefor. See EXECUTIVE POWER.

By the constitution of the United States government, the president has a power to prevent the enactment of any law, by refusing to sign the same after its passage, unless it be subsequently enacted by a vote of two-thirds of each house. U. S. Const. art. 1, § 7. When a bill is engrossed, and has received the sanction of both houses, it is transmitted to the president for his approbation. If he approves of it, he signs it. If he does not, he sends it, with his objections, to the house in which it originated, and that house enters the objections on the journal and proceeds to reconsider the bill. See Story, Const. § 878; 1 Kent, Comm. 289. Similar powers are possessed by the governors of many of the states. See STATUTE.

The veto power of the British sovereign has not been exercised for more than a century. It was exercised once during the reign of Queen Anne, 10 Edinburgh Rev. 411; Parks, Lect. 128. But anciently the king frequently replied, *Le roi s'avisa*, which was in effect withholding his assent. In France the king had the initiative of all laws, but not the veto. See 1 Toullier, nn. 39, 42, 52, note 8.

VEXATION. The injury or damage which is suffered in consequence of the tricks of another.

VEXATIOUS ACTIONS ACT. An act of parliament of 1896, authorizing the high court to order, on the application of the attorney-general, that a person shown to be habitually and vexatiously litigious, without reasonable ground, shall not institute legal proceedings in that or any other court, without leave of that court or a judge thereof, upon satisfactory proof that such legal proceedings are not an abuse of the process of the court and that there is a *prima facie* ground therefor. The order when made is published in the Gazette. See 76 L. T. 351.

VEXATIOUS INDICTMENTS ACT. See VEXATIOUS.

VEXATIOUS SUIT. Torts. A suit which has been instituted maliciously, and without probable cause, whereby a damage has ensued to the defendant.

The *suit* is either a criminal prosecution, a conviction before a magistrate, or a civil action. The suit need not be altogether without foundation: if the part which is groundless has subjected the party to an inconvenience to which he would not have been exposed had the valid cause of complaint alone been insisted on, it is injurious; 4 Co. 14; 1 Pet. C. C. 210; 4 S. & R. 19, 23.

To make it vexatious the suit must have been instituted maliciously. See MALICIOUS PROSECUTION; FALSE IMPRISONMENT.

VEXED QUESTION. A question or point of law often discussed or agitated, but not determined or settled.

VI ET ARMIS (Lat.). With force and arms. See **TRISPASS**.

VI AUT CLAM (Lat.). By force, or covertly.

VIBONORUM RAPTORUM (Lat.). Of goods taken away by force.

VI BONORUM RAPTORUM, AC-TIO. See **RES ADIRATAE**.

VI METUQUE. See **FORCE AND FEAR**.

VIA (Lat.). A cart-way,—which also includes a foot-way and a horse-way. See **WAY**.

VIABILITY (from the French *vie*). Capability of living. A term used to denote the power a new-born child possesses of continuing its independent existence.

That a child may be viable, it is necessary that not only the organs should be in a normal state, but likewise all the physiological and pathological causes which are capable of opposing the establishment or prolongation of its life be absent.

Although a child may be born with every appearance of health, yet, from some malformation, it may not possess the physical power to maintain life, but which must cease from necessity. Under these circumstances, it cannot be said to exist but temporarily,—no longer, indeed, than is necessary to prove that a continued existence is impossible.

It is important to make a distinction between a viable and a non-viable child, although the latter may outlive the former. The viable child may die of some disease on the day of its birth, while a non-viable child may live a fortnight. The former possesses the organs essential to life, in their integrity; while the latter has some imperfection which prevents the complete establishment of life.

As it is no evidence of non-viability that a child dies within a few hours of its birth, neither is it a proof of viability if a child appears to be well and the function of respiration be fully established.

There are many affections which a child may have at birth, that are not necessarily mortal: such as transposition of some of the organs, and other malformations. There are also many diseases which, without being necessarily mortal, are an impediment to the establishment of independent life, affecting different parts of the system: such as inflammation, in addition to many malformations. There is a third class, in which are many affections that are necessarily mortal: such as a general softening of the mucous membrane of the stomach and intestines, developed before birth, or the absence of the stomach, and a number of other malformations. These distinctions are of great importance; for children affected by peculiarities of the first order must be considered as viable; affections of the second may constitute extenuating circumstances in questions of infanticide; while those of the third admit of no discussion on the subject of their viability.

The question of viability presents itself to the medical jurist under two aspects: first, with respect to infanticide, and second, with respect to testamentary grants and inheritances. Billard on Infants, translation by James Stewart, M. D., Appendix 2, Brand, *Med. Leg. des parties*, c. 6, art. 3. See 2 Savigny, *Dr. Rom.* Append. III, for a learned discussion of this subject.

VIALE. See **VIABILITY**.

VICAR. One who acts in the place of another. See **PARISH PRIEST**.

VICARAGE. In Ecclesiastical Law. The living or benefice of a vicar: usually consisting of the small tithes. 1 Burn, *Ecc. Law* 75, 79.

VICARIUS (Lat. from *vici*, place or stead.). A deputy; a substitute; one who acts in the place of another. Burrill.

In the Civil Law. The slave of a slave. *Id.*, Dig. 33. 8. 6. 3.

In Old European Law. The deputy of a count; a viscount. *Id.*

VICARIUS APOSTOLICUS. An officer through whom the Pope exercises authority in parts remote, and who is sometimes sent with episcopal functions into provinces where there is no bishop resident or there has been a long vacancy in the see, or into infidel or heretical countries. 2 Phill. *Int. L.* 529.

VICE. A term used in the civil law and in Louisiana, by which is meant a defect in a thing; an imperfection. For example, epilepsy in a slave, roaring and crib-biting in a horse. Redhibitory vices are those for which the seller will be compelled to annul a sale and take back the thing sold. Pothier, *Vente* 203; *La. Civ. Code*, art. 2498.

VICE-ADMIRAL. The title of a naval officer next in rank after an admiral. Under R. S. § 1982 it was provided that the grades

of admiral and vice-admiral in the United States navy should not be filled and that when a vacancy occurred the grades should cease to exist.

VICE-ADMIRAL OF THE COAST. A county officer in England appointed by the admiral "to be answerable to the high admiral for all the coasts of the sea, when need and occasion shall be." He also had power to arrest ships, when found within a certain district, for the use of the king. His office was judicial as well as ministerial. The appointment to the office is still made for a few counties of England. For a detailed account of this office and its functions, see "The Office of Vice-Admiral of the Coast," by Sir G. Sherston Baker.

VICE-ADMIRALTY COURTS. Courts established in the queen's possessions beyond the seas, with jurisdiction over maritime causes, including those relating to prize. 3 Bl. *Com.* 69.

VICE-CHANCELLOR. A judge, assistant to the chancellor.

He held a separate court, and his decrees were liable to be reversed by the chancellor. He was first appointed 53 Geo. III. In 1841 two additional vice-chancellors were appointed; and there were then three vice-chancellors' courts. 3 Sharsw. *Bl. Com.* 54, 5.

There is also a vice-chancellor of the county palatine of Lancaster; 3 Steph. *Com.* 331. By the Judicature Act of 1873, the vice-chancellors were transferred to the high court of justice and appointed judges of the chancery division, and on their death or retirement their successors were styled judges of her majesty's high court of justice. There is one vice-chancellor in Ireland. The office exists in New Jersey. See **CHANCELLOR**; **CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES**.

VICE-CONSUL. An officer who performs the duties of a consul within a part of the district of a consul, or who acts in the place of a consul. He is not a deputy, but an acting consul; 38 Fed. Rep. 165. See 1 Phil. *Ev.* 506; **CONSUL**.

VICE-PRESIDENT OF THE UNITED STATES. The title of the second officer, in point of rank, in the government of the United States.

As to his election, see **PRESIDENT OF THE UNITED STATES**. His office in point of duration is coextensive with that of the president. The constitution of the United States, art. I, s. 3, clause 4, directs that "the vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided." And by article 2, s. 1, clause 6, it is provided that "in case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president."

When the vice-president exercises the office of president, he is called the President of the United States.

VICE-PRINCIPAL. See **MASTER AND SERVANT**.

VICE VERSA (Lat.). On the contrary; on opposite sides.

VICECOMES. The sheriff.

VICECOMES NON MISIT BREVE (Lat. the sheriff did not send the writ). An entry made on the record when nothing has been done by virtue of a writ which has been directed to the sheriff.

VICINAGE. The neighborhood; the venue. See 36 W. Va. 84; **JURY**; **JURY OF THE VICINAGE**.

VICINETUM (Lat.). The neighborhood; vicinage; the venue. Co. Litt. 158 b.

VICINITY. Etymologically, by common understanding, it admits of a wider latitude than proximity or contiguity, and may embrace a more extended space than that lying contiguous to the place in question; and, as applied to towns and other territorial divisions, may embrace those not adjacent; 12 Gray 545; 63 N. H. 246. In a statute authorizing the extension of the street and an appointment of benefits upon lots in the vicinity the term is a relative one and does not denote any particular definite distance from the extension of the street but must be construed according to the circumstances of each case; 18 Pa. 26. The meaning of vicinity of a city must depend upon the size of the city, etc., and its particular surroundings; 52

Mich. 36. See **NEIGHBORHOOD**.

VICIOUS INTROMISSION. In Scotch Law. A meddling with the movables of a deceased, without confirmation or probate of his will or other title. Whart. *Lex*.

VICONTIEL. Belonging to the sheriff.

VICTORIA. A British colony in Australia. It became a distinct colony in 1851. It has a governor appointed by the crown and a parliament of two houses, one of ninety-five members and one of forty-eight, both elected by the people. It has a supreme court presided over by a chief justice and five puisne judges, a court of insolvency, courts of assize and general sessions, county courts, and courts of mines. See **AUSTRALIA**.

VIDELICET (Lat.). A Latin adverb, signifying to wit, that is to say, namely; *scilicet*. This word is usually abbreviated viz.

The office of the videlicet is to mark that the party does not undertake to prove the precise circumstances alleged; and in such cases he is not required to prove them; Steph. Pl. 509; 7 Cow. 42; 8 Taunt. 107; Greenl. *Ev.* § 60; 1 Litt. Ky. 209. See *Yelv.* 94; 8 Saund. 291 a, note; 4 B. & P. 485; 2 Pick. 214; 47 Ill. 175.

VIDIMUS (L. Lat.). We have seen.

VIDUITY. Widowhood.

VIEW. Inspection; a prospect. See **ANCIENT LIGHTS**; **NUISANCE**; **VIEWERS**; 16 Am. L. Rev. 628; 63 Me. 385.

VIEW, DEMAND OF. In most real and mixed actions, in order to ascertain the identity of land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, to demand a view of the land in question, or, if the subject of claim be rent, or the like, a view of the land out of which it issues. *Com. Dig. View*; 2 Saund. 45 b.

This right, however, is confined to real or mixed actions; for in personal actions the view does not lie. In the action of *dower unde nihil habet*, it has been much questioned whether the view be demandable or not; 2 Saund. 44, n. 4; and there are other real and mixed actions in which it is not allowed. The view being granted, the course of proceeding was to issue a writ commanding the sheriff to cause the defendant to have a view of the land. The duty of suing out the writ lies upon the demandant; and when the sheriff causes view to be made, the demandant is to show to the tenant in all ways possible, the thing in demand, with its metes and bounds. On the return of the writ into court, the demandant must count *de novo*—that is, declare again; *Com. Dig. Plead.* (3 Y 3); and the pleadings proceed to issue. This proceeding of demanding view is, in the present rarity of real actions, unknown in practice. It is said in 141 U. S. 261, that there are only two cases in the books [1 Am. 246; 3 Dowl. Pr. c. 201] where orders to inspect a building were requested. Both were refused.

The right to grant an application for the jury to view the premises during the trial of a case rests in the discretion of the trial judge; 82 Wis. 81; 17 Colo. 448; 110 N. C. 433; 95 Mich. 586; 41 Ill. App. 584; 4 Wash. 436. Where the facts are such that they can be accurately described to the jury the court may properly deny a request to view the premises; 4 Ind. App. 100; also where a motion is made to have the jury view the scene of an accident several years after it happened, and where the condition of the premises had changed in the meanwhile; 89 Mich. 315. In Pennsylvania (act of 1895), in proceedings under eminent domain, either party may require a view of the premises.

Where, on a trial for murder, the jury viewed the *locus* of the crime, but the accused, at his special request, did not accompany them, the court held that the view was not a part of the trial, and the conviction was affirmed. Authority and reason are said to be the other way; 12 Harv. L. Rev. 212, citing 43 Hun 401; 68 Cal. 623. See **PHYSICAL EXAMINATION**.

VIEW OF FRANKPLEDGE. An examination to see if every freeman within the district had taken the oath of allegiance, and found nine freemen pledges for

his peaceable demeanor. 1 Reeve, Hist. Eng. Law 7. It took place, originally, once in each year, after Michaelmas, and subsequently twice, after Easter and Michaelmas, at the sheriff's tourn or court-leet at that season held. See COURT-LEET; SHERIFF'S TOURN.

VIEWERS. Persons appointed by the courts to see and examine certain matters and make a report of the facts, together with their opinion, to the court. In practice, they are usually appointed to lay out roads, and the like.

VIFGAGE. See **VADIUM VIVUM**.

VIGILANCE. Proper attention in proper time.

The law requires a man who has a claim to enforce it in proper time, while the adverse party has it in his power to defend himself; and if by his neglect to do so he cannot afterwards establish such claim, the maxim *vigilantibus non dormientibus leges subveniunt* acquires full force in such case. See **LACHES**.

VIIS ET MODIS (L. Lat.). By ways and means.

VILL. In England this word was used to signify the parts into which a hundred or wapentake was divided. Fortescue, *de Laud.* c. 24. See Co. Litt. 115 b. It also signifies a town or city. Barrington, Stat. 133.

VILLAGE. Any small assemblage of houses for dwellings or business, or both, in the country, whether they are situated upon regularly laid out streets and alleys, or not. 27 Ill. 43, approved in 71 *id.* 569. See 80 Mich. 410; 35 L. R. A. 396, n.; Town.

VILLAGER. An actual settler driven into a station for safety is not to be considered a "villager." Hughes (Ky.) 42.

VILLAIN. An epithet used to cast contempt and contumely on the person to whom it is applied. To call a man a villain in a letter written to a third person will entitle him to an action without proof of special damages. 1 B. & P. 331.

VILLEIN (*vilis*, base or *villa*, estate). A person attached to a manor, who was substantially in the condition of a slave, who performed the base and menial work upon the manor for the lord, and was, generally, a subject of property and belonging to him. 1 Washb. R. P. 26.

The feudal villein of the lowest order was unprotected as to property, and subject to the most ignoble services. But his circumstances were very different from the slave of the Southern states, for no person was in the eye of the law a villein except as to his master; in relation to all other persons he was a freeman. Littleton, Ten. ss. 189, 190.

VILLEIN IN GROSS. A villein annexed to the person of the lord, and transferable by deed from one person to another. Littleton § 181.

VILLEIN REGARDANT. A villein annexed to the manor or land; a serf.

VILLEIN SOCAGE (Sax. *soc*, free, or Lat. *soca*, a plough). The villeins, from living on one piece of land, came at last to be allowed to hold it by tenure of *villeinage*, *e. g.* uncertain menial services. These services at last became fixed; the tenure was then called *villein socage*. 1 Washb. R. P. 26.

VILLEINAGE. See **VILLEIN SOCAGE**.

VILLENIOUS JUDGMENT. In Old English Law. A judgment given by the common law in attain, or in cases of conspiracy. Its effects were to make the object of it lose his *liberam legem* and become infamous. He forfeited his goods and chattels, and his lands during life; and this barbarous judgment further required that his lands should be wasted, his

houses razed, his trees rooted up, and that his body should be cast into prison. He could not be a juror or witness. 4 Bla. Com. 138.

VINCULO MATRIMONII. See **A VINCULO MATRIMONII**; **DIVORCE**.

VINCULUM. A chain; a connected series; a connection or relation. A bond; a band; a tie. Burrill. A binding force of law. *Id.*; Bract. fol. 99. See **JURIS VINCULUM**.

VINCULUM JURIS. See **JURIS VINCULUM**.

VINCULUM MATRIMONII. The bond or tie of marriage; the matrimonial obligation. Burrill. See **JURIS VINCULUM**.

VINDICTIVE. See **PUNITIVE**.

VINDICTIVE DAMAGES. See **DAMAGES**; **EXEMPLARY DAMAGES**.

VINOUS LIQUORS. See **SPIRITUOUS LIQUORS**.

VINTNER. One who sells wine. A covenant prohibiting the trade of a vintner includes a person selling wines not to be drunk on the premises. 25 L. T. N. S. 812.

VIOLATION. An act done unlawfully and with force. In the English statute of 25 Edw. III. st. 5, c. 2, it is declared to be high treason in any person who shall violate the king's companion; and it is equally high treason in her to suffer willingly such violation. This word has been construed under this statute to mean carnal knowledge. 3 Inst. 9; Bacon, Abr. *Treason* (E).

VIOLENCE. The abuse of force. That force which is employed against common right, against the laws, and against public liberty. Merl. *Réperi.*

Violence is synonymous with physical force, and the two are used interchangeably, in relation to assaults, by elementary writers on criminal law. 31 Conn. 212. See **ASSAULT**; **ROBBERY**.

VIOLENT. Not natural or spontaneous, not intentional, voluntary, expected or usual. 44 Hun 606.

VIOLENT OR ACCIDENTAL DEATH. See **DEATH**.

VIOLENT PRESUMPTION. Evidence, whether written or oral, is either positive or presumptive. Positive evidence is the direct proof of the fact or point at issue; presumptive evidence consists in the proof of some other fact or facts, from which the point in issue may be inferred. If the connection be found by experience and observation to be invariable in all instances, the "presumption" is what in law is denominated "violent," and is equal to full proof. 2 Bibb. (Ky.) 239.

VIOLENT PROFITS. In Scotch Law. The gains made by a tenant holding over are so called. Erskine, Inst. 2. 6. 54.

VIOLENT, UNUSUAL AND NECESSARY. In describing the negligent movement of a train the instruction should have used the terms "violent, unusual and unnecessary," which are commonly used in such instructions, instead of the terms quick, and violent and sudden and unusual. 156 Ky. 415, 161 S. W. 246.

VIOLENTLY. In Pleading. This word was formerly supposed to be necessary in an indictment, in order to charge a robbery from the person; but it has been held unnecessary; 1 Chitty, Crim. Law *244. The words "feloniously and against the will," usually introduced in such indictments, seem to be sufficient. It is usual, also, to aver a *putting in fear*; though this does not seem to be requisite.

VIRES. See **INTRA VIRES**; **ULTRA VIRES**.

VIRGA. An obsolete word, which signifies a rod or staff, such as sheriffs, bailiffs, and constables carry as a badge or ensign of their office. More commonly, spelled verge, *g. v.* Hence *verger*, one who carried a white wand before the judges. Toml. A verger now commonly signifies an inferior officer in a cathedral or parish church. Moz. & W.

The stick or wand with which persons are in England admitted as tenants.

VIRGATA TERRAE. A yard-land; a measure of land of variable quantity, containing in some places twenty, in others, twenty-four, in others, thirty, and in others, forty acres. Burrill; Cowell.

VIRGINIA. One of the thirteen original United States.

The name was given to the colony in honor of Queen Elizabeth. In 1606, James I. granted letters patent for planting colonies in Virginia. The government prescribed was that each should have a council, consisting of thirteen persons, appointed by the king, to govern and order all matters according to laws and instructions given them by the king. There was also a council in England, of thirteen persons, appointed by the crown to have the supervising, managing, and direction of all matters that should concern the government of the colonies. This charter was followed by royal instructions dated the 20th November, 1606. See 1 Henr. 8, c. 13, Stat. 78. Under this charter a settlement was made at Jamestown in 1607, by the first colony. Upon the petition of the company, a new charter was granted by king James, on the 23d May, 1609, to the treasurer and company of the first (or southern) colony for the further enlargement and explanation of the privileges of that company. 1 Henr. Stat. 80.

This charter granted to the company in absolute property the lands extending from Cape or Point Comfort (at the mouth of James River) along the sea-coast two hundred miles to the northward, and from the same point along the sea-coast two hundred miles to the southward, and up into the land throughout, from sea to sea, west and northwest, and, also, all islands lying within one hundred miles of the coast of both seas of the precinct aforesaid. A new council in England was established, with power to the company, to fill all vacancies therein by election.

On the 12th of March, 1614, king James granted a third charter to the first company, enlarging its domain so as to include all islands within three hundred leagues from its borders on the coast of either sea. In 1612, a considerable proportion of lands was previously held and cultivated in common was divided into three-acre lots and a lot appropriated in absolute right to each individual. Not long afterwards, fifty acres were surveyed and delivered to each of the colonists. In 1618, by a change of the constitution of the colony, burgesses elected by the people were made a branch of the legislature. Up to that time the settlement had been gradually increasing in number, and in 1624, upon a writ of *habeas corpus*, a judgment was obtained dissolving the company and vesting its power in the crown. In 1631 the plantation of Virginia came, by formal act, under the obedience and government of the commonwealth of England, the colony, however, still retaining its former constitution. A new charter was to be granted, and many important privileges were secured. In 1689 a change was made in the colonial government, divesting the burgesses of the exercise of judicial power in the last resort, as well before that time, the practice by that body and allowing appeals from judgments of the general courts, composed of the governor and council, to the king in council, where the matter in controversy exceeded the value of £300 sterling. Marshall, Col. 163; 1 Campb. 337.

By the treaty of 1763, all the conquests made by the French in North America, including the territory east of the Mississippi, were ceded to Great Britain.

The constitution of the colonial government of Virginia seems never to have been precisely fixed and accurately adjusted in any written memorials that are now accessible. The powers exercised by the burgesses varied at different periods. The periods of their election and the length of time they continued in office it is difficult to ascertain from the records of colonial history, and the qualifications of voters to elect them varied much at different periods. See Ray, Code 38. Leigh's note; 2 Burk. App. 1. On the 12th of June, 1776, a declaration of rights pertaining to the people, as a basis and foundation of government, was adopted by the convention. This declaration still remains a part of the Virginia Code. On the 29th of June, 1776, Virginia adopted a constitution by a unanimous vote of the convention. The Articles of Confederation were not finally adopted by congress until the 15th of November, 1777, and were adopted, subject to the ratification of the states. These articles were laid before the Virginia Assembly on the 9th of December, 1777, and on the 15th unanimously assented to. In compliance with the recommendation of congress, by a resolution of September 6, 1780, Virginia, by an act passed the 2d of January, 1781, proffered a cession of her western lands. The cession was finally completed and accepted in 1784. Virginia as early as 1785 prepared to erect Kentucky into a state, and this was finally effected in June, 1792.

The state constitution framed and adopted by

Virginia in 1776 gave way to a second that was framed in convention, adopted by the people, and went into operation in 1830. This second constitution was superseded by a third, which was framed in convention of 1851, and, being adopted by the people, took effect in 1852.

A convention assembled at Alexandria February 13, 1864, composed of delegates from such portions of Virginia as were then within the lines of the Union army and had not been included in the recently formed state of West Virginia. This convention adopted a constitution April 11, 1864, but it was not submitted to the people for ratification. The present constitution of the state was framed by a convention called under the reconstruction act of congress which met at Richmond and completed its labors April 10, 1869. The authority of an act of congress approved April 10, 1869, the instrument was submitted to the vote of the people and adopted.

VIRILIA (Lat.). The privy members of a man, to cut off which was felony at common law, though the party consented to it. Bract. lib. 3, p. 144.

VIRTUTE CUIUS (Lat.). By virtue whereof.

VIRTUTE OFFICII (Lat.). By virtue of his office. A sheriff, a constable, and some other officers may *virtute officii* apprehend a man who has been guilty of a crime in their presence.

VIS (Lat. force). Any kind of force, violence, or disturbance relating to a man's person or his property.

VIS COMPULSIVA. Compulsive force; that which is exerted to compel another to do an act against his will.

VIS DIVINA (Lat.). Divine or super-human force; the act of God.

VIS EXPULSIVA (Lat.). Expulsive force; force used to expel another, or put him out of his possession.

VIS IMPRESSA (Lat.). Immediate force; original force. This phrase is applied to cases of trespass when a question arises whether an injury has been caused by a direct force or one which is indirect. When the original force, or *vis impressa*, had ceased to act before the injury commenced, then there is no force, the effect is mediate, and the proper remedy is trespass on the case.

When the injury is immediate consequence of the force, or *vis proxima*, trespass *vi et armis* lies; 3 Bouvier, Inst. n. 3483.

VIS MAJOR (Lat.). A superior force. In law it signifies inevitable accident.

This term is used in the civil law in nearly the same way that the words *act of God* (q. v.) are used in the common law, but for some purposes it is a wider phrase; 1 C. P. Div. 429. Generally, no one is responsible for an accident which arises from the *vis major*; but a man may be so where he has stipulated that he would, and when he has been guilty of a fraud or deceit; 2 Kent 448.

A loss by *vis major* is one that results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care. 17 U. S. App. 526. See UNFORSEEN EVENT; ACT OF GOD; PERIL OF THE SEA.

VISA. In Civil Law. The formula put upon an act; a register; a commercial book, in order to approve of it and authenticate it.

VISCOUNT (Lat. *vice-comes*). This name was made use of as an arbitrary title of honor, without any office pertaining to it, by Henry VI. for the first time. The sheriff or earl's deputy holds the office of *vice-comes*, of which viscount is a translation, but used, as we have just seen, in a different sense. The dignity of a viscount is next to an earl. 1 Bla. Com. 397.

WISE. To endorse officially. The endorsement by an official certifying that a document has been examined and is correct. English.

VISIGOTHORUM, LEX ROMANA.

See LEX ROMANA VISIGOTHORUM.

VISIT, RIGHT OF. In International Law. A term used on the continent of Europe as synonymous with the right of search (q. v.). See 11 Wheat. 42.

VISITATION. The act of examining into the affairs of a corporation.

Inspection; direction; regulation. In the law of nations the right of visitation is sometimes called the right of visit. The right of visit is conceded for the sole purpose of ascertaining the real national character of a vessel sailing under suspicious circumstances, and is wholly distinct from the right of search.

The power of visitation is applicable only to ecclesiastical and eleemosynary corporations. 1 Bla. Com. 480. The visitation of civil corporations is by the government itself, through the medium of the courts of justice. See 2 Kent 240. In the United States, the legislature is the visitor of all corporations founded by it for public purposes; 4 Wheat. 518. See VISIT; SEARCH, RIGHT OF.

VISITATION BOOKS. Compilations made out or collected by the heralds in the circuits which their commissions authorized them to make, for the purpose of inquiring into the state of families and registering marriages and descents which were verified to them by oath. They are good evidence of pedigree. 8 Bla. Com. 105.

VISITER, or VISITOR. An inspector of the government, of corporations, or bodies politic. 1 Bla. Com. 482.

VISNE. The neighborhood; a neighboring place; a place near at hand; the venue.

The district from which juries were drawn at common law. 36 W. Va. 84.

Formerly the visne was confined to the immediate neighborhood where the cause of action arose, and many verdicts were disturbed because the visne was too large, which becoming a great grievance, several statutes were passed to remedy the evil. The 21 James I. c. 13, gives aid after verdict, where the visne is partly wrong,—that is, where it is warded out of too many or too few places in the county named. The 16 & 17 Charles II. c. 8, goes further, and cures defects of the visne wholly, so that the cause is tried by a jury of the proper county. See VENUE.

VITAE AMISSIONIS. See JUDICIUM CAPITALE.

VITAL STATISTICS. Numerical facts, collectively, pertaining to birth, marriage, mortality, and other conditions attending the perpetuation of life. Stand. Dict.

VITIOUS INTROMISSION. In Scotch Law. An unwarrantable intermeddling with the movable estate of a person deceased, without the order of law.

VIVA VOCE (Lat. with living voice). Verbally. It is said a witness delivers his evidence *viva voce* when he does so in open court; the term is opposed to deposition. It is sometimes opposed to ballot: as, the people vote by ballot, but their representatives in the legislature vote *viva voce*.

VIVARY. A place where living things are kept: as, a park on land; or, in the water, as a pond.

VIVISECTION. No person employed in any school, except medical or dental schools in the State of Washington, shall practise vivisection upon any vertebrate animal in the presence of any pupil, or any child or minor, nor, in such presence, exhibit any vertebrate animal upon which vivisection has been practised. And the dissection of dead animals shall be confined to the class-room and the presence of these pupils engaged in the study to be illustrated thereby, the penalty is by fine of not less than fifty nor more than one hundred dollars. Act, February 17, 1897.

In Massachusetts, by the act of March 22, 1894, vivisection in the public schools is prohibited, and dissection is confined to

certain classes, under penalty of a fine.

In England, by 39 & 40 Vict. c. 77, public exhibitions of vivisection are forbidden, and stringent rules are given under which it may be done for the benefit of science if the subject is under the influence of some anæsthetic.

VIVUM VADIUM. See VADIUM VIVUM.

VOCARE AD CURIAM (L. Lat.). To summon to court.

VOCATIO IN JUS (Lat.). In Roman Law. According to the practice in the *legis actiones* of the Roman law, a person having a demand against another verbally cited him to go with him to the praetor: *in jus eamus; in jus te voco*. This was denominated *vocatio in jus*. If a person thus summoned refused to go, he could be compelled by force to do so, unless he found a *vindex*,—that is, *procurator*, or a person to undertake his cause. When the parties appeared before the praetor, they went through the particular formalities required by the action applicable to the cause. If the cause was not ended the same day, the parties promised to appear again at another day, which was called *vadimonium*.

VOCIFEROUS. In a statute forbidding the use of loud and vociferous language, making a loud outcry; clamorous; noisy. Webst.; 20 S. W. Rep. (Tex.) 859.

VOID. That which has no force or effect. This word is often used in its effect meaning "voidable" only; 110 Ind. 202; and is seldom, unless in a very clear case, to be regarded as implying a complete nullity, but is to be taken in a legal sense, subject to a large qualification in view of all the circumstances calling for its application and the rights and interest to be affected in a given case; 50 N. H. 552. See 50 Mo. 287. In formal instruments it has been held to mean voidable; 4 B. & Ald. 401; 4 Bing. N. C. 395; and in contracts of infants; 14 Ir. C. L. 61. The distinction between void and voidable transactions is a fundamental one, though it is often obscured by carelessness of language. An act or agreement void from the beginning has no legal effect at all except so far as any party to it incurs penal consequences. A voidable act on the contrary takes its full and proper legal effect unless, and until it is disputed, and set aside by some tribunal entitled so to do; Poll. Contr. 8. A voidable contract has been defined to be such an agreement as that one of the parties is entitled at his option to treat as never having been binding on him; *id.* 9. As applied to contracts the distinction between the terms void and voidable is often one of great practical importance, and wherever technical accuracy is required, the term void can only be properly applied to such contracts as are a mere nullity and incapable of ratification or confirmation; 6 Metc. 417. Agreements to hinder, delay, and defraud creditors are not void but merely voidable against the creditors, while valid between the parties; Pom. Contr. § 282.

The distinction between contracts which are illegal and those which are void has never been precisely worked out, but where a contract is merely void, its defect in this respect cannot affect collateral transactions otherwise in themselves valid, while an unlawful purpose taints collateral and innocent transactions; 7 L. Quart. Rev. 339. The general rule of law is that a contract made in violation of a statute is void; 145 U. S. 428, and cases cited. Contracts which are void at common law, because they are against public policy, like contracts prohibited by statute, are illegal as well as void; 150 Mass. 1. An illegal contract is as a rule not merely voidable but void, and can be the basis of no judicial proceeding. See ULTRA VIRES.

Among the contracts made illegal by statute are: those relating to usury; 5 Johns. Ch. 122; gaming contracts (see GAMING); wager contracts (see WAGER);

those which tend to promote champerty and maintenance (q. v.), or those compounding felonies or suppressing public prosecution of criminals; 3 P. Wms. 276. See 31 Am. L. Rev. 19, as to the validity of contracts of foreign corporations, where by statute they are prohibited from doing business in the state.

A contract binding the maker to do something opposed to the public policy of the state or nation, or which conflicts with the wants, interest, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, is void, however solemnly the same may be made; Greenh. Pub. Pol. Rule II., citing 30 Maine 402; 17 Vt. 105; and though made in another country where its validity is undoubted; L. R. 14 Ch. D. 351 (see LEX LOCI). The assignor of a contract has no better rights therein than the party to it, even if he had no notice of its illegality; 127 Mass. 123.

Among those contrary to public policy and illegal at common law are contracts in restraint of marriage or of trade, or of bidding at public auctions, or relating to marriage brokerage, to hinder legislation, whether public or private (see LOBBYING), or to promote the appointment of a party to an office, to influence public elections to office, or to remunerate officers in addition to their lawful fees for acts which they are bound to do by virtue of their office or to assign fees and profits of official positions requiring personal supervision (see OFFICER); or any contract involving the sale of personal influence; 103 U. S. 276; 66 Fed. Rep. 427; a contract by a mother surrendering her child to a charitable institution; 6 Dist. Rep. Pa. 256; contracts where the consideration is the commission of some crime or some flagrantly immoral act (see CONSIDERATION); Pom. Contr. § 282. See the various subjects enumerated for cases. As to the effect of war upon contracts, see WAR.

As to particular cases, see the several titles upon the subjects involved.

See BECOME VOID; NULL AND VOID.

VOID AND VOIDABLE SALES. Distinction. There is no distinction between "void" and "voidable" judgments where the purchaser is asking to be released from his bid before his bond is paid, as the court will not compel the purchaser to accept title under a judgment that can thereafter be set aside. 12 Bush (Ky.) 202.

VOIDABLE. See VOID.

VOIR. Truth; the truth.

VOIR DIRE. A preliminary examination of a witness to ascertain whether he is competent.

When a witness is supposed to have an interest in the cause, the party against whom he is called has the choice to prove such interest by calling another witness to that fact, or he may require the witness produced to be sworn in his *voir dire* as to whether he has an interest in the cause or not; but the party against whom he is called will not be allowed to have recourse to both methods to prove the witness's interest. If the witness answers he has no interest, he is competent, his oath being conclusive; if he swears he has an interest, he will be rejected.

Though this is the rule established beyond the power of the courts to change, it seems not very satisfactory. The witness is sworn on his *voir dire* to ascertain whether he has an interest which would disqualify him, because he would be tempted to perjure himself if he testified when interested. But when he is asked whether he has such an interest, if he is dishonest and anxious to be sworn in the case, he will swear falsely he has none, and, his answer being conclusive, he will be admitted as competent; if, on the contrary, he swears truly he has an interest, when he knows that he will exclude him, he is told that for being thus honest he must be rejected. A suitable inquiry is permissible in order to as-

certain whether a juror has any bias and this must be conducted under the supervision of the court and be largely left to its sound discretion. There is no objection in not allowing a juror to be asked as to his political affiliations and whether they would bias his judgment, in the absence of any statement tending to show a special reason for asking; 158 U. S. 408; a juror may be asked whether he is a member of certain secret societies; 30 S. W. Rep. (Tex.) 1110; or has ever belonged to "the committee of 100"; 158 U. S. 408. The court may assume an exclusive examination of jurors, though it is the better practice to allow counsel to examine; 17 So. Rep. (Fla.) 284.

See 1 Dall. 375; INTEREST; JURY.

VOLENTINON FIT INJURIA. To the consenting no injury is done. A person who consents to a thing cannot complain of it as an injury. The law regards such person as doing the act himself, and will hold him responsible for the consequences equally with others directly concerned. This maxim applies principally to those cases where a man suffers an injury for which he has a claim for compensation, but which claim he is considered as waiving, by acquiescing in, or not objecting to, the injury committed. The rule also covers those cases where any one receives an injury through his own want of prudence or foresight. Abbott; Whart. Max.

The import of the maxim is, that that which, unauthorized, would amount to wrongful injury, subjecting the doer of it to an action for damages by the person injured, loses such character if the person suffering the disadvantage or injury consents to the act. The peculiar signification of the word "injuria"—implying a wrong—should be borne in mind in considering the application of the maxim. *Id.*

VOLSTEAD ACT. See NATIONAL PROHIBITION ACT.

VOLUNTARILY. See CONSTRAINT.

VOLUNTARY. Willingly; done with one's consent; negligently. Wolff § 5.

To render an act criminal or tortious, it must be voluntary. If a man, therefore, kill another without a will on his part while engaged in the performance of a lawful act, and having taken proper care to prevent it, he is not guilty of any crime. And if he commit an injury to the person or property of another, he is not liable for damages, unless the act has been voluntary or through negligence; as, when a collision takes place between two ships without any fault in either. 2 Dods. Adm. 88; 3 Hagg. Adm. 320, 414.

When the crime or injury happens in the performance of an unlawful act, the party will be considered as having acted voluntarily.

VOLUNTARY ACT OF THE WILL. "Voluntary act of the will" necessarily implies liberty and self-control. 6 Bush (Ky.) 271.

VOLUNTARY ASSIGNMENT. See VOLUNTARY CONVEYANCE; 22 Neb. 514.

VOLUNTARY ASSOCIATION. In most states, a voluntary association is not a legal entity. It is not a person who can be sued in courts. It is simply a collection of individuals. 71 Conn. 613 *et al.* See COLLEGE FRATERNITY.

VOLUNTARY CONVEYANCE. A conveyance without any valuable consideration.

Voluntary conveyances are discussed most frequently with reference to the statutes 13 Eliz. c. 5 (for the protection of creditors) and 27 Eliz. c. 4 (for the protection of subsequent purchasers). A voluntary conveyance, however, is not within these statutes unless it is fraudulent; Cowp. 434. And as between the parties a voluntary conveyance is generally good.

In determining whether a voluntary conveyance is fraudulent and within the stat. 13 Eliz. c. 5, a distinction is made between existing (or previous) and subsequent creditors. An existing creditor, so called, is one who is a creditor at the time of the conveyance; and it was at one time held that, as against him, every voluntary conveyance by the debtor is fraudulent; 8 Wheat. 229; without regard to the amount of the debts, the extent of the property in settlement, or the circumstances of the debtor; 3 Johns. Ch. 500; but this rule is now subject to great modifications both in England and in the United States; see 1 Am. L. Cas. 37-40; and the conclusion to be drawn from the more recent cases is that the whole question depends in great measure on the ratio of the debts, not so much to the property the debtor parts with, as to that which he retains; 24 Pa. 511; 2 Beav. 344; 4 Drew. 632. A subsequent creditor is one who becomes a creditor after the conveyance, and, as against him, a voluntary conveyance is not void unless actually fraudulent; 1 Am. L. Cas. 40; but there is great diversity in the definition of the fraud of which he may avail himself; see 3 De G. J. & S. 298; L. R. 5 Ch. Ap. 518; 3 Johns. Ch. 501; 39 Pa. 499; 9 W. N. C. (Pa.) 353.

Whenever a voluntary conveyance is made, a presumption of fraud properly arises upon the statute of 27 Eliz. c. 4, which presumption may be repelled by showing that the transaction on which the conveyance was founded virtually contained some conventional stipulations, some compromise of interests, or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcilable with the supposition of intent to deceive a purchaser. But, unless so repelled, such a conveyance, coupled with a subsequent negotiation for sale, is conclusive evidence of statutory fraud.

The principles of these statutes, though they may not have been substantially reenacted, prevail throughout the United States. General reference may be made to Hunt, Fraud. Conv.; May, Stats. of Eliz.; Bump, Fraud. Conv.; Note to Twyne's Case, 1 Sm. L. Cas. (cases to 1879 discussed in 18 Am. L. Reg. N. s. 137); Note to Sexton v. Wheaton, 1 Am. L. Cas.; Story, Eq. Jurisp. §§ 350-436.

VOLUNTARY DEPOSIT. See DEPOSIT.

VOLUNTARY ESCAPE. See ESCAPE.

VOLUNTARY EXPOSURE TO UNNECESSARY DANGER. Where the insured was shot when unarmed, in the course of an altercation, it was held that there could be recovery, though the insured may have been the aggressor, if he had no reason to believe that his opponent was armed. The court held that the test was whether the assured "had voluntarily or intentionally done some act which reasonable prudence would have pronounced dangerous and in which death had followed as a consequence;" 40 S. W. Rep. (Tenn.) 1080. Where a party going home at night voluntarily left other and safe paths of travel and used a dangerous railway trestle; 80 Ga. 541; and where the assured sat down on a railway track when an engine moving toward him was only 25 feet away; 133 N. Y. 366; and where the assured jumped in the dark from a freight train in rapid motion; 94 Wis. 180; the exception in the policy was held to apply. But it must be shown that there is on the part of the insured some degree of consciousness of the danger which results in the accidental death of the insured; 92 Tenn. 167; 58 Wis. 13; 34 *id.* 389; 126 Mo. 104; 61 N. W. Rep. (Ia.) 485. See also 102 Pa. 262.

A voluntary exposure to unnecessary danger implies a conscious, intentional exposure, something of which one is conscious but willing to take the risk. By taking a policy against accident one natu-

rally understands that he is to be protected against accident resulting in whole or in part from his own inadvertence. The phrase means something more than contributory negligence or want of ordinary care on the part of the assured; 62 N. W. Rep. (Ia.) 807. The phrase is not the entire equivalent of ordinary negligence; a degree of consciousness of danger is necessary; 92 Tenn. 167. See **INSURANCE**.

VOLUNTARY JURISDICTION. In Ecclesiastical Law. That kind of jurisdiction which requires no judicial proceedings; as, the granting letters of administration and receiving the probate of wills.

VOLUNTARY MANSLAUGHTER. See **MURDER**; **MANSLAUGHTER**; **HOMICIDE**.

VOLUNTARY NONSUIT. In Practice. The abandonment of his cause by a plaintiff, and an agreement that a judgment for costs be entered against him. 3 Bouvier, Inst. n. 3906.

VOLUNTARY OATH. In practice. An oath taken in some extra-judicial matter, or before some magistrate, or officer who cannot compel it to be taken. 4 Bl. Com. 137.

VOLUNTARY PAYMENT. A payment made from choice. A voluntary payment is made by the debtor on his own motion, without compulsory process. A payment made upon execution is not, therefore, a voluntary payment. Anderson; 3 McCrary 478.

Payment of an illegal demand with full knowledge of the facts rendering it illegal, without an immediate and urgent necessity therefor, or unless to release or prevent immediate seizure of person or property, is a voluntary payment and not one under duress. 200 U. S. 488.

VOLUNTARY SALE. See **SALE**.

VOLUNTARY WASTE. See **WASTE**.

VOLUNTEERS. Persons who receive a voluntary conveyance.

It is a general rule of the courts of equity that they will not assist a mere volunteer who has a defective conveyance. Fonbl. Eq. b. 1, c. 5, s. 2; and see the note there for some exceptions to this rule. See, generally, 1 Madd. 271; 1 Supp. to Ves. Ch. 390; 2 id. 321; Powell, Mortg.

In Military Law. Persons who, in time of war, offer their services to their country and march in its defence.

One who freely enlists in the place of another, and becomes his substitute of his own free will and accord, is a volunteer within the spirit and intent of the statutes; 43 Barb. 239. See **MILITIA**.

VOTE. Suffrage; the voice of an individual in making a choice by many. The total number of voices given at an election; as, the presidential vote.

In a *visa voce* election for a public officer, a voter cannot change his vote, once made, after subsequent votes have been made and recorded; 37 S. W. Rep. (Ky.) 155.

In cumulative voting the voter must put opposite the name of the candidate on whom he intends to cumulate something to indicate the number of votes he intends to cast for him, in default of which he will be taken to have cast but a single vote for the candidate against whom he has made a mark, although he has marked but a few names or only one; [1897] 1 Q. B. 449.

See **ELECTION**; **BALLOT**; **SUFFRAGE**; **VOTER**.

VOTER. One entitled to a vote; an elector. The right to fix the qualifications of voters is in the states, except so far as it is limited by the 15th amendment to the constitution of the United States, which provides that the right of the citizens to vote shall not be denied or abridged by the United States or any state, on account of

race, color, or previous condition of servitude. The qualifications of voters are similar in all the states, but not uniform. They have been summarized as follows: 1. Citizenship, either by birth or naturalization; 2. Residence for a given period of time in the state, county, and voting precinct; 3. Age, the limit is twenty-one years in all the states; 4. The payment of taxes, in some states, and in many states, registration; 5. Freedom from infamy, of having committed an infamous crime; 6. Freedom from idiocy or lunacy; McCrary, Elect. § 4. Residence means actual settlement within the state; 23 Colo. 99. See also 35 Am. L. Reg. N. S. 780. The legislature cannot require a longer residence for voters at primary elections than the constitution prescribes for voters at elections "authorized by law," which term includes primary elections; 41 L. R. A. (Cal.) 196. A person who is capable of transacting the ordinary business of life, even though laboring under some hallucination or delusion, unless it be shown to extend to political matters, cannot be denied the privilege of voting on the ground of want of mental capacity; 88 Ill. 499. See **LOYAL VOTES**.

VOTE BEARER. See **REGISTRATION CERTIFICATE**.

VOTER. See **QUALIFIED VOTER**.

VOTING. See **CUMULATIVE VOTING**.

VOTING MACHINE. In Rhode Island, upon the application of the governor, the justices gave an opinion that a statute authorizing the use of a voting machine would be constitutional. 19 R. I. 729, Rogers, J., dissenting. The New York constitution does not interfere with the existing legislation authorizing the use of voting machines. See 150 N. Y. 242.

VOTING TRUST. A term applied to the accumulation in a single hand or in a few hands of shares of corporate stock belonging to several or many owners in order, thereby, to control the business of the company. In some instances the certificates are placed in the hands of a single holder or of a committee, accompanied by irrevocable proxies to vote on them. In other instances the stock is placed in the name of such committee. Certificates are usually issued to the beneficial owners of the stock, and these certificates are bought and sold in the market. It has been held that all agreements to tie up stocks by irrevocable proxies or by placing them in the hands of trustees are illegal, and any beneficial owner may withdraw his stock from them at pleasure; 35 Hun 641; 43 N. Y. Sup. 506; 84 Ala. 608; whether he be a party to the agreement or an assignee of the stock of such party; 60 Conn. 553; 65 Hun 606; 52 N. J. Eq. 178; 6 Co. Ct. E. Pa. 193.

An agreement not to sell stock except by consent of all parties to the agreement is held to be in restraint of trade and void; 35 Hun 461. It has, however, been held that an agreement among the stockholders to hold the stock together and to sell it together is valid; 11 Jones & Sp. 507.

A by-law which provides that if any stockholder shall desire to dispose of his stock, he shall give written notice to the president, and that the stockholders shall then have the option to purchase it at the price named, with an option to the corporation to purchase if the other stockholders decline, is a restraint on the power of alienation and void; 84 Atl. Rep. (Md.) 1127.

Where stock is transferred to a trustee under a contract by which he agrees to hold and vote it for the benefit of two other persons and himself jointly, to dispose of it when and as agreed upon by himself and one of the other parties, the other parties have no such title or right of possession thereof as would give either of them a right of action against the trustee for conversion upon his refusal to transfer to such party one-third of the stock; 75 Fed. Rep. 62.

Where a statute forbade a consolidation of competing lines, the purchase by a railroad company of the stock of a competing line which was then vested in a third party as trustee, was held void and the trustee was enjoined from voting thereon; 50 Fed. Rep. 338.

Where stock was vested in a trustee under an agreement that it was to remain with such trustee for four years, certain stockholders agreeing not to sell their holdings without first offering them to the remaining parties to the agreement, and the trustee holding an irrevocable power of attorney to vote the stock, it was held that the trust agreement was not void *per se*, and that as long as the beneficial owners did not make any effort to withdraw from the trust there was no reason why the trustee should not vote upon it; 5 Blatch. 525.

The holders of a majority of the stock of a railroad company agreed that it should be vested in the name of the president of another railroad company, who should deliver to an appointee of the directors of the company in question an irrevocable proxy to vote upon such stock; certificates were issued to the stockholders who were parties to the agreement. Certain parties purchased a minority of the trust certificates and requested the return of the stock, which was refused. The court enjoined the trustee from voting on the stock and compelled a transfer to the beneficial owners thereof, holding that the right was vested in the latter and the trustee could not lawfully refuse it to them; 14 Wkly. L. Bull. (Ohio) 68. See 15 id. 419, 423. See also 80 Fed. Rep. 91, substantially to the same effect.

In the Reading railroad trust, reported in 47 Leg. Int. (Phila. C. P.) 26, on the reorganization of the company, certain securities and stock were vested in a reconstruction board under a voting trust, by which certificates of beneficial interest were issued. On a bill by a stockholder to restrain the trustees from voting upon the stock held by them at an election soon to occur, an injunction was refused because the interests were too complicated to permit of interference upon such short notice. The court (Hare, P. J.) was of opinion that the voting trust was necessary to sustain and carry out the provisions of the reorganization and that the voting trustees represented not only the stock but the other securities and liens on the property, under the reorganization.

In 13 So. Rep. 723, the court was of opinion that the cases in which voting trusts were considered illegal were based rather upon the ground of the unlawful purpose for which they were created than upon their intrinsic illegality, and it reached substantially the same result as the Reading railroad case cited above.

Where certain stock was deposited by various stockholders with a firm of bankers for the purpose of arranging differences between preferred and common stockholders and to aid in the adjustment of the affairs of the company generally, it was held that such depositary was entitled to vote on such stock; 49 Ohio St. 669.

See 44 Am. L. Reg. & Rev. 413, where a form of certificate is given and the cases are collected by Charles H. Burr, Jr., who finds a definite formulation of conclusions to be impossible.

VOUCH. To call to warranty; to call upon a person who has warranted a title, to defend the title which he so warranted. 2 Bl. Com. 358.

VOUCHEE. In common recoveries, the person who is called to warrant or defend the title is called the vouchee. 2 Bouvier, Inst. n. 2093.

VOUCHER. In Accounts. An account-book in which are entered the acquittances or warrants for the accountant's discharge. Any acquittance or receipt which is evidence of payment or of the debtor's being discharged. See 3 Halst. 299; 8 N. J. L. 299; 1 Metc. Mass. 218. A

merchant's books are the vouchers of the correctness of his accounts and a receipt is voucher of payment, but neither is conclusive. 12 Abb. Pro. 202.

When used in connection with the disbursement of money, voucher means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. 54 N. W. Rep. (Neb.) 866; 107 Ill. 495.

In Old Conveyancing. The person on whom the tenant to the *præcipe* calls to defend the title to the land, because he is supposed to have warranted the title to him at the time of the original purchase.

The person usually employed for this purpose is the crier of the court, who is therefore called the common voucher. See Cruise, Dig. tit. 36, c. 3, s. 1; 22 Viner, Abr. 26; RECOVERY.

VOUCHER TO WARRANTY. The calling one who has warranted lands, by the party warranted, to come and defend

the suit for him. Co. Litt. 101 b.

VOYAGE. In Maritime Law. The passage of a ship upon the seas from one port to another, or to several ports. The term includes the enterprise entered upon and not merely the route. 113 Mass. 326. Where a loss was occasioned whilst loading the cargo, it was held to be during the voyage; L. R. 15 P. D. 208.

Every voyage must have a *terminus a quo* and a *terminus ad quem*. When the insurance is for a limited time, the two extremes of that time are the *termini* of the voyage insured. When a ship is insured both outward and homeward, for one entire *premium*, this, with reference to the insurance, is considered but one voyage, and the *terminus a quo* is also the *terminus ad quem*; Marsh. Ins. b. 1, c. 7, s. 1-5. As to the commencement and ending of the voyage, see RISK.

The voyage, with reference to the legality of it, is sometimes confounded with the traffic in which the ship is engaged, and is frequently said to be illegal only because

the trade is so; but a voyage may be lawful, and yet the transport of certain goods on board the ship may be prohibited; or the voyage may be illegal, though the transport of the goods be lawful; Marsh. Ins. b. 1, c. 6, s. 1. See DEVIATION.

In the French Law, the *voyage de conserve* is the name given to designate an agreement made between two or more sea-captains that they will not separate in their voyage, will lend aid to each other, and will defend themselves against a common enemy or the enemy of one of them in case of attack. This agreement is said to be a partnership. 3 Pardessus, Dr. Com. n. 656; 4 *id.* 984; 20 Toullier, n. 17.

VULGARIS OPINIO (Lat.). Common opinion.

VULGO CONCEPTI (Lat.). In Civil Law. Bastards whose father was unknown. Leg. 53, ff. de statu hominum. Those, also, whose fathers, though known, could not lawfully be recognized as such: viz., the offspring of incest and adultery. Code Civ. 3. 7. 1.

WADSET. In Scotch Law. The old term for a mortgage. A right by which lands or other heritable subjects are impignorated by the proprietor to his creditor in security of his debt. Like other heritable rights, it is protected by seisin.

Wadsets are commonly made out in the form of mutual contracts, in which one party sells the land and the other grants the right of reversion. Erskine, Inst. 2. 8. 1. 2.

Wadsets are *proper*, where the use of the land shall go for the use of the money; *improper*, where the reversor agrees to make up the deficiency; and where it amounts to more, the surplus profit of the land is applied to the extinction of the principal. Erskine, Inst. 2. 8. 12. 13.

WAGE. To give a pledge or security for the performance of anything: as, to wage or gage deliverance, to wage law, etc. Co. Litt. 294. This word is but little used. See MINIMUM WAGE.

WAGE-EARNER. As used in a bankruptcy act: An individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year. 29 Am. & Eng. Encyc. 2nd ed., 1082; 114 Fed. Rep. 232.

WAGER. A bet; a contract by which two parties or more agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event. See 85 Tenn. 572; 75 Ill. 560.

A contract upon a contingency by which one may lose but cannot gain, or the other can gain but cannot lose, is a wager; 15 Gratt. 653; but there must be a risk by both parties; 5 Humph. 561. In 1 Bosw. 207, it was said: "A wager is something hazarded on the issue of some uncertain event; a bet is a wager, though a wager is not necessarily a bet."

At common law, wagers were not, *per se*, void; 2 Term 610; 37 Cal. 670; 3 McLean 100; 25 Tex. 586. By an English statute passed in 1845, wagers were prohibited, and similar statutes have been passed in many of the states. See Dos Passos, St. Br. 409; MARGINS.

Where a contract is a mere device to avoid the statute, it is illegal, but the burden of proving its illegality is upon the defendant; 70 N. Y. 202; and the intention of the parties is for the jury; 20 E. L. & E. 290; 72 Pa. 155. See 48 Ill. App. 59; 89 Pa. 250.

The principle which determines whether the sale of stocks is a wagering contract, is that a *bona fide* contract to buy and sell will be sustained, but where there is no actual sale and the transaction is to be settled by the payment of differences it will be set aside; 79 Ill. 328; Dos Passos, St. Br. 410; even where the principals may not be able to enforce the contract and the broker through whom the transaction is made is ignorant of their intention, he may recover for money paid out in commissions; *id.* 410; *contra*, 119 Mo. 126; the same principle applies to contracts for the sale and delivery of grain; 52 Wis. 593; and indeed to any contract for the sale or purchase of any personal property to be delivered at a future date, which is intended by both parties as a wager on the rise and fall of prices and to be settled by payment of differences; 85 Tenn. 572, 581; 38 Fed. Rep. 635; 46 Ohio St. 951; 85 Ky. 230; 131 U. S. 386; 38 Mo. App. 383; see 82 Fed. Rep. 833; but an agreement to sell grain for future delivery is not necessarily a

gambling transaction; 37 Neb. 766.

A purchase, with an option to the seller to deliver on a certain day, is not a wager; 79 Ill. 351; 47 Minn. 238; and the usage allowing merchants to settle such contracts by "differences" does not necessarily render such contracts void; Gresham, J., in 12 Chic. L. N. 241. See 41 Fed. Rep. 174. Margins advanced to brokers on contracts made to be settled on differences may be recovered; 43 Ill. App. 439. Contracts of sales for future delivery are subject to the same principle; they are valid if there is a *bona fide* intention to deliver, even if the seller is not the owner of the property sold, at the time of the contract; 74 Ia. 468; 34 Mo. App. 302; otherwise they are void; 11 Fed. Rep. 193; 54 Mo. App. 606; 47 Minn. 238; see 77 Md. 504; 36 Ill. App. 179; but where purchases and sales are actually completed by delivery to the holder, who obtained the money to pay advances by hypothecating the stock, the transactions are valid; [1895] A. C. 318. See a note in 33 Am. L. Reg. N. s. 436. A case varying from the general rule that where accounts are to be settled by differences, the transaction is a gambling one, confines it to cases where neither party expects any delivery at any time and holds the transaction valid if the final balance is to be by delivery, though intermediate balances were otherwise settled; 88 Me. 230. The law looks at the intention of the parties, which is a fact for the jury, and oral evidence may be given of the circumstances, without respect to the form of the transaction; 47 Fed. Rep. 574; but a transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further and show that this understanding was mutual; 149 U. S. 431. See Dos Passos, St. Br. 477. See also OPTION; FUTURES; MARGIN.

It has been held that contracts between the purchaser of futures and a broker, made without the state, though valid where made, could not be enforced in the state where it was invalid by statute; 71 Miss. 514; the same principle applies to notes given in settlement of gambling transactions; 155 Ill. 617. Where a note which was delivered to a broker to secure him against loss in stock transactions was transferred to an innocent purchaser without notice, equity would not compel its return, because given for a gambling debt; 173 Pa. 525; and a mortgage securing advances for margins on a contract for future delivery was held valid where the advances were made in good faith to save loss; 32 Fed. Rep. 833; but the original payee cannot recover on a note, for money advanced upon or in execution of a contract of wager, to which he is a party or direct participant in the name of or on behalf of the parties; 131 U. S. 336. See 25 App. Div. N. Y. 228.

The English statute prohibiting the recovery of money, etc., deposited to abide the event of a wager, applies only to a deposit as the stake to abide the event of a wager and not to deposits as security for the observance by the loser, of the terms of the wagering contract, and the authority to return the latter may be revoked and the securities recovered at any time before their appropriation; [1891] 2 Q. B. 339.

If all options were prohibited, all conditional contracts would have to be prohibited. See Dr. Wharton's note to 11 Fed. Rep. 193; also 70 N. Y. 202.

When one loses a wager and gets another

to pay the money for him, an action lies for the recovery of the money; 15 C. B. N. s. 316; but see 97 Pa. 202, 298. So it is said that where an agent advances money to his principal to pay losses incurred in an illegal transaction, the contract between them, made after the illegal contract is closed, is binding; 2 Woods 554. See 98 Mass. 161. Where a broker sued his principal for advances and commissions on the purchase of property, it was held that the fact that persons from whom the broker bought the property for his principal had not the goods on hand when the contract was made, and that they had no reasonable expectation of acquiring them except by purchase, did not defeat the broker's right to recover; 14 Bush 727. See, also, 5 M. & W. 462.

See Biddle, Stock Brokers; Lewis, Stocks; article by Dr. Wharton in 3 Cr. L. Mag. 1, on Political Economy and Criminal Law.

Wagers on the event of an election laid before the poll is open; 1 Term 56; 4 Johns. 426; 4 H. & McH. 284; or after it is closed; 8 Johns. 147, 454; are unlawful. See McCreary, Elect. § 149. And wagers are against public policy if they are in restraint of marriage; 10 East 23; if made as to the mode of playing an illegal game; 2 H. Bla. 43; 1 N. & M'C. 180; or on an abstract speculative question of law or judicial practice, not arising out of circumstances in which the parties have a real interest; 12 East 247. But see 1 Cowp. 37.

Wagers, though on indifferent subjects, are inconsistent with good morals, and as such, are void, as against public policy; 23 Or. 419.

Wagers as to the sex of an individual; Cowp. 729; or whether an unmarried woman had borne or would have a child; 4 Camp. 153; are illegal, as necessarily leading to painful and indecent considerations. Every bet about the age, or height, or weight, or wealth, or circumstances, or situation of any person, is illegal; and this, whether the subject of the bet be man, woman, or child, married or single, native or foreigner, in this country or abroad; 1 Rawle 42. And it seems that a wager between two coach-proprietors, whether or not a particular person would go by one of their coaches, is illegal, as exposing that person to inconvenience; 1 B. & Ald. 683.

In the case even of a legal wager, the authority of a stakeholder, like that of an arbitrator, may be rescinded by either party before the event happens. And if, after his authority has been countermanded and the stake has been demanded, he refuse to deliver it, trover or assumpsit for money had and received is maintainable; 1 B. & Ald. 683. And where the wager is in its nature illegal, the stake may be recovered, even after the event, on demand made before it has been paid over; 4 Taunt. 474. But see 12 Johns. 1; 29 Neb. 812; 9 Colo. 212. Where the stakeholder of a wager void as between the parties is notified by one of them not to pay over the money to his adversary, even after the result of the event has become known, but before payment has been made, he cannot defeat an action by such party for its recovery; 5 Tex. Civ. App. 293; 48 Mo. App. 319. See STAKEHOLDER; MARGIN; HORSE RACE; BET; HAZARD.

WAGER OF BATTLE. A superstitious mode of trial, at one time common throughout Christendom, introduced into England by William the Conqueror.

It was resorted to in three cases only: in the court martial or court of chivalry; in appeals of felony and upon approvements; and upon issue joined in a writ of right. Co. Litt. § 294. On appeals parties fought in their own proper persons, on a writ of right by their champions. If the appellant or approval were a woman, a priest, an infant, or of the age of sixty, or lame or blind, or a peer of the realm, or a citizen of London; or if the crime were notorious; in such cases wager of battle might be declined by the appellant or approver. But where the appellant was allowed, the appellee pleaded not guilty, and threw down his glove, declaring he would defend the same with his body. The appellant took up the glove, replying that he was ready to make good his appeal, body for body. Thereupon the appellee, taking the Bible in his right hand, and in his left the right hand of his antagonist, swore to this effect: "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am anywise guilty of the said felony; so help me God and the saints; and this I will defend against thee by my body, as this court shall award." The appellant replied with a like oath, declaring also that the appellee had perjured himself. Then followed oaths by both parties against amulets and sorcery as follows: "Hear this, ye justices, that I have this day neither eat, drank, nor have upon me neither boots, stones, nor grass, nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abused, or the law of the devil exalted; so help me God and his saints." The battle was then begun; and if the appellee were so far vanquished as not to be able or willing to fight any longer, he was adjudged to be hanged immediately; but if he killed the appellant, or could maintain the fight from sunrise till the stars appeared in the evening, he was acquitted. Also if the appellant became recreant, and pronounced the word *craver*, he lost his *liberum legem*, and became infamous (see *Craver*). The appellee recovered his damages, and was forever quit of any further proceedings for the same offence. The proceedings in wager of battle in a writ of right were similar to the above except that the battle was by champions. It was the only mode of determining a writ of right until Henry II. introduced the *grand assize*, *q. v.* The prevalence of judicial combats in the Middle Ages is attributed by Mr. Hallam to systematic perjury in witnesses, and want of legal discrimination on the parts of judges. Moz. & W. It was not abolished in England till the enactment of stat. 39 Geo. III. c. 3. See 1 & 2 A. & E. 409; 3 Bla. Com. 438; 4 id. 347; *Appeal*. This mode of trial was not peculiar in England. The emperor Otho, 963, held a diet at Verona, at which several sovereigns and great lords of Italy, Germany, and France were present. In order to put a stop to the frequent perjuries in judicial trials, this diet substituted in all cases, even in the which followed the course of the Roman law, proof by combat for proof by oath. Henric de Pansey, *Auth. Judic*. Intro. c. 3. And for a detailed account of this mode of trial see Herbert, *Inns of Court* 119. The last case in which the right was asserted was Ashton vs. Thornton, 1 E. & A. 405, where Lord Ellenborough declared that it was part of the general law of the realm and must be enforced, no matter how much disapproved. See *Wills*, Circ. Ev. 290, for a detailed statement of the facts. At the next session of the British parliament an act was passed to abolish appeals of murder, treason, felony, or other offences, and wager of battle, or joining issue or trial by battle, in writs of right. 50 Geo. III. c. 46. In the Statutes of South Carolina, Edition of 1857, it is said to be in existence in that state. For the history of this species of trial, see 3 Bla. Com. 438; 4 id. 347; *Encyclopédie, Gage de Bataille*; Steph. Pl. 123, and App. note 35. The *Laws Lumber Room*, by Francis Watt.

WAGER OF LAW. In Old Practice. An oath taken by a defendant in an action of debt that he does not owe the claim, supported by the oaths of eleven neighbors.

When an action of debt is brought against a man upon a simple contract, and the defendant pleads *nil debet*, and concedes his plea with this plea, with this formula, "And this he is ready to defend against him the said A. B. and his suit, as the court of our lord the king here shall consider," etc., he is then put in sureties (*vadios*) to wage his law on a day appointed by the judge. The *wager of law* consists in an oath taken by the defendant on the appointed day, and confirmed by the oaths of eleven neighbors or *compurgators*. This oath had the effect of a verdict in favor of the defendant, and was only allowed in the actions of debt on simple contract, and detinue; nor was it allowed to any one not of good character. In consequence of this privilege of the defendant, *assumpsit* displaces debt as a form of action on simple contracts, and instead of detinue, trover was used. But in England wager of law was abolished by 3 & 4 Will. IV. c. 42, § 13. And even before its abolition it had fallen into disuse. It was last used as a method of defence in 2 B. & C. 536, where the defendant offered to wage his law, but the plaintiff abandoned the case. This was in 1824. If it ever had any existence in the United States, it is now completely abolished; 8 Wheat. 642.

The name (in law Latin, *vadiatio legis*) comes from the defendant's being put in pledges (*vadios*) to make his oath on the appointed day. There was a similar oath in the Roman law, and in the laws of most of the nations that conquered Rome. It was very early in use in England, as Glanville distinctly describes it. Glanville, lib. i. c. 9, 12. See Steph. Pl. 124, 250; Co. 2d Inst. 119; 3 Chitty, Pl. 467; 13 Vinet. Abr. 68; Bac. Abr. For the origin of this form of trial, see Steph. Pleas, notes xxxix.; Co. Litt. 394, 395; 8 B. Com. 341.

See OATH DECISORY.

WAGER POLICY. One made when the insured has no insurable interest. See INSURABLE INTEREST; POLICY.

WAGES. A compensation given to a hired person for his or her services. See MASTER AND SERVANT; SEAMEN; STORE ORDERS.

WAGON. A common vehicle for the transportation of goods, wares, and merchandise of all descriptions. The term does not include a hackney coach; 5 Cal. 418; but a "buggy" is a wagon; 7 Kan. 325; *contra*, 27 Mo. 507; as is a hearse, within the meaning of an exemption law; 65 Wis. 431.

The phrase, "hailed by wagon," does not mean transportation by rail or steamboat. 6 S. W. 337.

WAIFS. Stolen goods waived or scattered by a thief in his flight in order to effect his escape.

Such goods, by the English common law, belong to the king; 1 Bla. Com. 296; 5 Co. 109; Cro. Eliz. 694. This prerogative has never been adopted here against the true owner, and never put in practice against the finder, though against him there would be better reason for adopting it; 2 Kent 292.

WAINAGIUM (Sax. *wæg*, Lat. *uagina*). That which is necessary to the farmer for the cultivation of his land. Barrington, Stat. 12; Magna Charta, c. 14. According to Selden and Lord Bacon, it is not the same as *contentement*, used in the same chapter of Magna Charta, meaning the power of entertaining guests or, contentance, as common people say.

WAITING CLERKS IN CHANCERY. It was the duty of these officers to wait in attendance on the court of chancery. The office was abolished in 1843.

WAIVE. A term applied to a woman as *outlaw* is applied to a man. A man is an outlaw; a woman is a waive. Crabb, Tech. Dict.

To abandon or forsake a right. To abandon without right: as, "if the felon waives that is, leaves any goods in his flight from those who either pursue him, or are apprehended by him so to do,—he forfeits them, whether they be his own goods, or goods stolen by him." Bac. Abr. *Forfeiture* (B).

WAIVER. The relinquishment or refusal to accept of a right. Cited 4 Misc. Rep. 58.

The intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. 33 Pac. Rep. (Or.) 689. See 32 Conn. 40; 143 Mass. 374; 76 Va. 314; 105 U. S. 859.

In practice, it is required of every one to take advantage of his rights at a proper time; and neglecting to do so will be considered as a waiver. If, for example, a defendant who has been misnamed in the writ and declaration pleads over, he cannot afterwards take advantage of the error by pleading in abatement; for his plea amounts to a waiver. Failure of counsel, either in brief or oral argument, to allude to an assignment of error, is a waiver thereof; 72 Fed. Rep. 508.

In seeking for a remedy, the party injured may, in some instances, waive a part of his right and sue for another: for example, when the defendant has committed a trespass on the property of the plaintiff by taking it away, and afterwards he sells it, the injured party may waive the trespass and bring an action of assumpsit for the recovery of the money thus received by the defendant; 1 Chitty, Pl. 90. A delay of two years in bringing an action in rem on a maritime lien, the vessel meantime having passed into other hands, is a waiver of the lien; 84 Fed. Rep. 830; but when objections are seasonably and appropriately made there can be no waiver; 116 Ind. 578; and mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver, unless

some element of estoppel can be invoked; *id.*

In contracts, if, after knowledge of a supposed fraud, surprise, or mistake, a party performs the agreement in part, he will be considered as having waived the objection; 1 Bro. P. C. 289.

When a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will; Cooley, Const. Lim. 219. See 3 N. Y. 511; 6 Hill 147. In criminal cases this doctrine must be true only to a very limited extent; Cooley, Const. Lim. 220. See JURY.

As to what will amount to a waiver of a forfeiture, see 1 Conn. 79; 7 id. 45; 1 Johns. Cas. 125; 14 Wend. 419; 8 Pick. 292; 2 N. H. 120, 163; 1 Ohio 21; CONDITION.

WAKENING. In Scotch Law. The revival of an action.

An action is said to sleep when it lies over, not insisted on for a year, in which case it is suspended. Erskine, Inst. 4. 1. 33. With us a revival is by *scire facias*.

WAND OF PEACE. In Scotch Law.

The wand which the messenger carries along with his blazon, in executing a caption, and with which he touches the prisoner. A sliding along this staff of a movable ring, or the breaking of the staff, is a protest that the officer has been resisted or deforced. Bell, Dict. *Imprisonment*.

WANT. "Want," used in a will, is synonymous with "wish." It is as imperative as the word "desire." 5 Ky. Opin. 314.

WANTED. In a statute for condemning land, "wanted" for the construction of a railroad, does not mean desired, but is synonymous with necessary. 80 Ky. 267. The term is frequently used to mean need or require. 34 Conn. 403.

WANTON AND FURIOUS DRIVING. An offence against public health, which under the stat. 24 & 25 Vict. c. 100, s. 56, is punishable as a misdemeanor by fine or imprisonment. In this country the offence is usually provided for by state, county, or municipal legislation.

WANTON NEGLECT. See WILFUL NEGLECT.

WANTON NEGLIGENCE. The failure of one charged with a duty to exercise an honest effort in the employment of all available means to prevent injury. 21 Am. & Eng. Encycy. 478; 124 Ala. 372.

WANTONLY. Done in a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice. 98 N. C. 641; 97 id. 465; 35 Fed. Rep. 282.

See CARELESSLY AND WANTONLY.

WANTONLY AND MALICIOUSLY. The words "wanton and maliciously" mean an evil and unlawful purpose, as distinguished from that of promoting the law, when used in a prosecution for assault in making an arrest. 156 Ky. 212, 160 S. W. 928.

WANTONNESS. A licentious act by one man towards the person of another, without regard to his rights: as, for example, if a man should attempt to pull off another's hat against his will, in order to expose him to ridicule, the offence would be an assault, and if he touched him it would amount to a battery. See 94 N. C. 888. See CARELESSLY AND WANTONLY.

WAPENTAKE (from Sax. *wapen*, *i. e.* *armatura*, and *tac*, *i. e.* *tactus*). A Saxon court held monthly by the alderman for the benefit of the hundred.

It was called a *wapentake* from *wapon*, arms, and *tac*, to touch; because when the chief of the hundred entered upon his office he appeared in the field on a certain day, on horseback, with a pike in his hand, and all the principal men met him with lances. Upon this he alighted, and they all touched his pike with their lances, in token of their submission to his authority. In this court causes of great moment were heard and determined, as Mr. Dugdale has shown from several records. Besides which it took cognizance of theft,

trials by ordeal, view of frankpledge, and the like; whence after the conquest it was called the sheriff's tourn, and, as regarded the examination of the pledges, the court of the view of frankpledge. These pledges were no other than the freemen within the liberty, who, according to an institution of King Alfred, were mutually pledged for the good behavior of each other. *Fortescue, de Laud. c. 94*; *Dugdale, Orig. Jur. 27*; 4 *Blac. Com. 273*. Sir Thomas Smith derives it from the custom of taking away the arms at the muster of each hundred, from those who could not find sureties for good behavior. *Rep. Angl. lib. 2, c. 18*.

WAR. An armed contest between nations. *Grotius, de Jur. Bell. l. 1, c. 1*. The state of nations among whom there is an interruption of all pacific relations, and a general contention by force, authorized by the sovereign. *Mann, Comm. 98*; 1 *Kent* *81, n. (h.).

An armed contest to maintain the rights of a nation or to bring about a settlement of its disputes with other nations. It is also defined as a hostile contest with armies between two or more states claiming sufficient rights. *Snow, Lect. Int. L. 82*.

A civil war is one confined to a single nation. It is public on the part of the established government, and private on the part of the people resisting its authority, but both the parties are entitled to all the rights of war as against each other, and even as respects neutral nations; *Wheat. Int. L. § 296*.

The right of making war belongs in every civilized nation to the supreme power of the state. The exercise of this right is regulated by the fundamental laws in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation. A contest by force between independent sovereign states is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. The Romans declared war with religious ceremony; and an invasion without a declaration was unlawful; 1 *Kent* *53. The present usage is to publish a manifesto within the territory of the state declaring war, announcing the existence of hostilities and the motives for commencing them, usually to warn neutral states; *Snow, Lect. Int. L. 82*. A civil war is never declared; *Poyd's Wheat. Int. L. § 294*. It dates from the time the insurgents are declared belligerents; *Snow, Lect. Int. L. 82*. Even where there is a formal declaration of war, there is said to be strong tendency to date the war from the first act of hostility; *id.* That the recent tendency is to consider a declaration of war desirable and necessary, see 28 *Am. L. Rev. 754*. Since the time of Bynkershoek it has been the settled practice in Europe that war may lawfully exist by a declaration which is unilateral, or without a declaration on either side; it may begin by mutual hostilities; 1 *Kent* 54; at least as to subjects of a belligerent state; *L. R. 3 Adm. & Ecc. 390*; but some public act should be done to announce to the people a state of war, and to apprise neutrals of its existence; 1 *Halleck, Int. Law, Baker's ed. 543*. A state of war may exist without any formal declaration of it by either party, and this is true of both civil and foreign war; 2 *Black 635*. A state of civil war exists whenever the regular course of justice is interrupted by insurrection; *id.*

The war between Great Britain and the United States was a civil war until the declaration of independence, when it became a public war between independent governments; 3 *Dall. 199, 224*. So the late war of secession in this country was a civil war after the president's proclamation of August 16, 1861. See 37 *Ga. 482*; 23 *Am. L. Reg. 129*; *SECESSION*. The general doctrines applicable to the subjects of belligerent natives have been held to be applicable to the hostile parties in that war; 2 *Black 635*. In a civil war the sovereign has belligerent as well as sovereign rights against his rebel subjects, and may exercise either at his discretion; 2 *Wall. 419*; 100 *Mass. 576*.

The constitution of the United States (art. 1, sec. 8) provides that congress shall have power to declare war. See 2 *Wall. 404*; 11 *id. 268, 331*. An act of congress is necessary to the commencement of a foreign war and is in itself a declaration; 1 *Kent* 55. It fixes the date of the war; *Thayer, Const. Cas. 2352*. After congress has acted, it is not necessary to communicate the action to the enemy; 1 *Kent* 55; but an Indian war may exist without act of congress; 28 *Ct. of Cl. 147*. Actual hostilities may determine the date of the commencement of a war; a formal proclamation is unnecessary; 87 *Fed. Rep. 927*.

Belligerent states not infrequently adopt the rule of reciprocity in the conduct of war, but this usage has not yet assumed the character of a positive law. Frequently an opposing belligerent applies the rule of reciprocity and metes out to his adversary the same measure of justice that he receives from him. But it is said that where one belligerent exceeds his extreme rights and becomes barbarous and cruel in his conduct, the other should not, as a general thing, follow and retort upon its subjects by treating them in like manner; 2 *Halleck, Int. Law 55*.

Under the regulations of the United States, the army is not allowed to use the enemy's flag or uniform for purposes of deceit, but the navy may use a foreign flag to deceive the enemy if it is hauled down before a gun is fired; *Snow, Lect. Int. Law 82*. See **WEAPONS**; **FLAG**.

When war exists between two nations, every individual of the one is at war with every individual of the other; though it is said that modern international law has attempted, with some success, to confine the contest to the armies of the contending powers and relieve non-combatants from loss and suffering as much as possible; *Snow, Lect. Int. Law 82*.

War gives this government full right to take the persons and confiscate the property of the enemy wherever found in the United States, and while the humane policy of modern times may have mitigated this rigid rule, it cannot impair the right itself; 8 *Cra. 110*. The right to take enemy's property found in the United States requires an act of congress; *id.*, *Story, J. diss.* This rule applies to the property of a neutral within the enemy's lines; 97 *U. S. 60*; but it was held in 2 *Wall. 419*, that the right to take the property of an enemy on land is substantially restricted "to special cases dictated by the necessary operations of the war;" "the seizure of private property of pacific persons for the sake of gain is excluded." See 143 *U. S. 356*.

A belligerent may, by express law or edict, confiscate the property or even the land of an alien enemy, within its territory or occupation; 6 *Wall. 759*; 100 *Mass. 574*.

The right of a belligerent to confiscate debts due by its subjects to enemy's subjects is usually recognized, but seldom exercised; 1 *Kent* *62; and this is more especially true in relation to the public debt of a belligerent state to an enemy's subject; 1 *Halleck, Int. L. 535*. The seizure by the United States of enemy's property on land cannot be authorized by the law of nations; it can be upheld only by an act of congress; 5 *Blatch. 231*. Vessels and cargo belonging to trading concerns in the enemy's country, or corporations organized under its laws, are subject to capture, regardless of the domicile of the partners or stockholders; 87 *Fed. Rep. 927*.

A belligerent has a right to seize and retain as prisoners of war all subjects of an enemy state found within its territory; but this right has usually been modified by treaty, usage, or municipal regulations, and is seldom enforced; 1 *Halleck, Int. L., Baker's ed. 530*.

Territory conquered during a war is part of the domain of the conqueror for all commercial and belligerent purposes, so long as he continues in possession; 9 *Cra. 191*; but it is not incorporated into the domain of the conqueror except by a treaty of peace under which the former

owner renounces it, or by long possession; 2 *Gall. 485*.

It is a general practice to permit alien residents to remain in the country during a war and to protect their property from seizure, or, if they return to their own state, to allow them to take it with them. Even property of the enemy found afloat in ports at the breaking out of the war is usually allowed safe conduct to a home port with time to finish loading cargo. The president's proclamation of April 26, 1898, fixed April 21 as the beginning of the Spanish war, and gave Spanish merchant vessels found in United States ports till May 21, inclusive, to load and depart with safe conduct to their destination, except vessels carrying military or naval officers, or coal in excess of their own needs, or contraband, or despatches; and permitted any such vessels which, prior to April 21, had sailed from any foreign port to any United States port, to reach their destination, unload, and return to any port not blockaded.

Congress declared on April 25, 1898, that a state of war had existed from and after April 21, 1898, and this fixed the latter date as the beginning of that war; 87 *Fed. Rep. 925*.

War suspends all commercial intercourse between the citizens of belligerent states, except so far as may be allowed by the sovereign authority. The only exceptions are contracts for ransom and other matters of absolute necessity and the payment of debts to an agent of an alien enemy where such agent resides in the same state with the debtor; but even such payments to an agent of an alien enemy must not be done with a view of transmitting the funds to the principal during the continuance of war; 95 *U. S. 429*.

The doctrine of the renewal of contracts suspended by a war is based on considerations of equity and justice and cannot be invoked to revive a contract which it would be inequitable to revive, as where time is of the essence of the contract or the parties cannot be made equal; 93 *U. S. 24*. In a learned opinion by Gray, J., in 100 *Mass. 57* (quoted with approval in 95 *U. S. 429*, and 169 *U. S. 72*), it was said:—

"The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries, and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

The trading or transmission of property or money which is prohibited by international law during war, is from or to one of the countries at war. An alien enemy residing in this country may contract and sue as a citizen can; 100 *Mass. 573*. Where a creditor, though the subject of the enemy, remains in the country of the debtor, or has an agent there, payment to the creditor or his agent is not a violation of the duties imposed by a state of war upon the debtor; *id.*

The breaking out of a war does not necessarily and as a matter of law revoke every agency; it depends upon the circumstances and the nature of the agency; 169 U. S. 73. A contract of agency of an insurance company is revoked; 95 *id.* 425, citing 93 *id.* 24. In order to the subsistence of an agency during the war, it must have the assent of the parties; 95 *id.* 429.

Contracts between parties within the Confederacy made during the civil war were valid; 143 *id.* 346.

War suspends the capacity of an alien enemy to sue in our courts; 7 Cra. 603; 2 Paine 639. But see 4 Am. L. T. 68. An assignee of an alien enemy cannot sustain a claim in a prize court; 1 Gall. 563; but an alien enemy may come into admiralty and defend his property seized as prize on the high seas; 5 Blatch. 231. The right to proceed in an action begun before the war is only suspended; Woolw. 102. Neither interest nor the statute of limitations run during a war.

As to the effect of war on life insurance contracts, the authorities vary; that the failure to pay premiums avoids the policy, see 93 U. S. 24; 95 *id.* 425; but the contract is not annulled by war, but only suspended, see 7 Bush 179; 37 N. J. L. 444; 20 Gratt. 614; 9 Blatch. 234; 45 Miss. 531. In most of the latter cases either the insured had made a tender of the premiums or the company's agent had removed during the war; 1 Biddle, Ins. § 489. There seems to be authority that a fire insurance policy is not annulled by war; see 9 Heisk. 399; as to a marine policy, see 50 N. Y. 619. And see, generally, 23 Am. L. Reg. 129; 25 *id.* 651; 11 Am. L. Rev. 221; 1 Biddle, Ins. § 489.

No civil liability attached to officers or soldiers for an act done in accordance with the usages of civilized warfare, in the late rebellion under and by military authority of either party; 131 U. S. 405. The legal condition of a Confederate soldier was that of a soldier serving against the United States under a hostile power. His legal condition subsequent to May, 1865, was that of a prisoner of war upon parole; 23 Ct. Cls. 326.

The following has recently been adjudicated in cases arising out of the Spanish-American war:

Vessels of war have the right, in the absence of any declaration of exemption by the political power, to capture enemy's property wherever found afloat, and the burden is on the claimant to show that it comes within the exemption of any such proclamation; 87 Fed. Rep. 927.

Cargo shipped from this country in an enemy's vessel to residents of a neutral country is presumably neutral cargo; but if so shipped to the enemy's country it is presumptively enemy's property, but the latter presumption may be overcome; *id.*

See BELLIGERENCY; BLOCKADE; BOOTY; CAPTURE; CONTRABAND; MANIFESTO; MEDIATION; MILITARY OCCUPATION; NEUTRALITY; PAROLE; PARTIES; PEACE; POSTLIMINIUM; PRISONER OF WAR; PRIVATEER; PRIZE; QUARTER; RANSOM; RECAPTURE; REPRISAL; RETORSION; SEARCH; SAFE-CONDUCT; SPY; TREATY OF PEACE; TRUCE; UTI POSSIDETIS; WEAPONS; CIVIL WAR; PACIFIC BLOCKADE

WAR CLAIMS. As to federal legislation on this subject, see 163 U. S. 244. The act of 1875, Feb. 18, provided that the court of claims should have no jurisdiction over claims growing out of the destruction of property during the civil war; and the act of March 3, 1897, excludes such claims from the jurisdiction of the said court and of the district and circuit courts. Decisions under the act of 1864 will be found in 163 U. S. 253, which holds that the court of claims has no jurisdiction over a claim for railroad iron appropriated by the army "while suppressing the rebellion." The United States is not responsible for the destruction of private property by their military operations during the civil war, committed by either army; nor, where they rebuild the property

(a railroad bridge), can it recover from the owner for the cost; 130 U. S. 237. See UNITED STATES COURTS.

WAR OFFICE. In England. A department of state from which the sovereign issues orders to his forces. Whart. Lex.

WARD. An infant placed by authority of law under the care of a guardian.

While under the care of a guardian, a ward can make no contract whatever binding upon him, except for necessities. When the relation of guardian and ward ceases, the latter is entitled to have an account of the administration of his estate from the former. During the existence of this relation the ward is under the subjection of his guardian, who stands in *loco parentis*. See GUARDIAN.

The English Judicature Act of 1873 assigns the wardship of infants and the care of infants' estates to the chancery division of the high court of justice. Whart. Lex.

A subdivision of a city to watch in the daytime, for the purpose of preventing violations of the law. It is the duty of all police officers and constables to keep ward in their respective districts. It now indicates a subdivision of a city.

WARD IN CHANCERY. An infant who is under the superintendence of the chancellor. See WARD; COURT OF CHANCERY.

WARD-HOLDING. In Old Scotch Law. Military tenure by which lands were held. It was so called from the yearly tax in commutation of the right to hold vassals' lands during minority. It was abolished in 1747. Bell, Dict.

WARDEN. A guardian; a keeper. This is the name given to various officers: as, the warden of the prison, the wardens of the port of Philadelphia, church-wardens. As to the latter, see Baum, Church Law.

WARDEN OF THE CINQUE PORTS. See CINQUE PORTS.

WARDMOTE (from *ward*, and Sax. *mote*, or *gemote*, a meeting).

In English Law. A court held in every ward in London, with power to inquire into and present all defaults concerning the watch and police doing their duty, that engines, etc., are provided against fire, that persons selling ale and beer be honest and suffer no disorders, nor permit gaming, etc., that they sell in lawful measures, and searches are to be made for beggars, vagrants, and idle persons, etc., who shall be punished. Chart. Hen. II.; Cunningham; Wharton.

WARDSHIP. In English Law. The right of the lord over the person and estate of the tenant, when the latter was under a certain age.

Wardship was incident to a tenure by knight's service (see FEUDAL LAW), and to a tenure in socage; by the latter the nearest relation to whom the inheritance could not descend was entitled to the custody of the person and estate of the heir till he attained the age of fourteen years; at which period the wardship ceased, and the guardian was bound to account. Wardship in copyhold estates partook of that in chivalry and that in socage. Like the former, the lord was the guardian; like the latter, he was required to account. 2 Bla. Com. 67, 87, 97; Glanville, lib. 7, c. 9; Grand Cout. c. 33; Reg. Maj. c. 42.

WARDS AND LIVERIES, COURT OF. An English court erected by Hen. III. and abolished by 12 Car. II. c. 24.

WAREHOUSE. A place adapted to the reception and storage of goods and merchandise. 23 Me. 47.

A radical change was made in the revenue laws of the United States by the establishment, under the act of congress of Aug. 6, 1846, of the warehousing system. This statute is commonly called the Warehousing Act. Its evident object is to facilitate and encourage commerce by ex-

empting the importer from the payment of duties until he is ready to bring his goods into market; 13 How. 295. Previous to the passage of that act, no goods chargeable with cash duties could be landed at the port of delivery until the duties were paid at the port of entry. The importer had no right to land them anywhere until they had passed through the custom-house. Before that act, the only provisions existing in relation to the warehousing of goods were merely applicable to special cases, such as where the vessel in which the goods were imported was subject to quarantine regulations, or where the entry might have been incomplete, or the goods had received damage, or where a landing was compelled at a port other than the one to which the vessel was destined, on account of distress of weather or other necessity, or in case of the importation of wines, etc.

The warehousing system was extended by the establishment of private bonded warehouses. Act of Mar. 28, 1854, R. S. §§ 2964, 2965.

Merchandise arriving at certain ports, destined for certain other ports, may be shipped to destination in bond without appraisement and liquidation of duties. See 2 Supp. R. S. 3, note.

Where warehouses are situated in a state, and their business carried on therein exclusively, a state statute prescribing regulations for their governance is not unconstitutional, it being a matter of purely domestic concern, and even where their business affects interstate as well as state commerce, such a statute can be enforced until congress acts in reference to their interstate relations; 94 U. S. 113.

Goods stored in a United States bonded warehouse on which duties remain unpaid are in possession of the United States, and an order directing a warehouseman to deliver them to a vendee, even though accepted by the warehouseman, does not constitute a constructive or symbolical delivery, or a receipt or an acceptance of the goods sufficient to satisfy the statute of frauds; 2 Sawy. 428.

Every distiller of spirits shall provide a warehouse on his distillery premises to be used only for storage of distilled spirits of his own manufacture under an internal revenue storekeeper and to be considered a bonded warehouse of the United States; R. S. § 3271 *et seq.*

The word "warehouse," when used alone, means a bonded warehouse; 154 U. S. 51, 87.

See POLICE POWER; RATES; WAREHOUSE-MAN.

WAREHOUSE, BONDED. See BONDED WAREHOUSE.

WAREHOUSEMAN. A person who receives goods and merchandise to be stored in his warehouse for hire. He is not a guarantor of the title of property placed in his custody, although his receipts therefor are by statute negotiable; 103 U. S. 352.

He is bound to use ordinary care in preserving such goods and merchandise, and his neglect to do so will render him liable to the owner; 1 Esp. 315; Story, Bailm. § 444; 12 Johns. 232; 2 Wend. 593; 2 Ala. 284; 13 Fed. Rep. 69; 115 Mass. 332; 20 Hun 438; 70 Ill. 121; 85 Ind. 201. The warehouseman's liability commences as soon as the goods arrive and the crane of the warehouse is applied to raise them into the warehouse; 4 Esp. 262. See 103 N. C. 390; 51 Barb. 148. He cannot have possession of another man's property, with its accompanying duties and responsibilities forced upon him against his will; 45 N. J. Eq. 50.

A common carrier in providing a place where packages may be checked and kept for a fee is a warehouseman and may limit its liability for loss of a package by stipulation on the back of the receipt. 81 S. C. 279.

Warehousemen have a lien on property left in their custody, for their hire, labor, and services; 1 Esp. 109; 7 W. & S. 466;

Jones; *Liens* § 967; being due on all goods stored under a single contract; 53 Fed. Rep. 401; though in some cases this lien has been looked upon only as specific, and not general; 13 Ark. 446. See *Story, Bailm.* 453; 3 Kent § 635; 14 Am. L. Reg. N. S. 465. A warehouseman cannot recover storage for property stored for a certain time for a definite sum, where it is destroyed within the time, without his negligence; 58 Pac. Rep. (Cal.) 635; 36 Hun 194; but under a custom to collect charges when the goods are ordered out, their accidentally burning will not release the owner from paying storage; 15 S. Rep. (Ala.) 143. Grain delivered to a warehouseman upon the agreement that it may be mixed with other of like grade, and held for the owner is a bailment not a sale; 38 Ill. App. 98.

A statute requiring warehousemen operating public elevators to insure grain at their own expense is valid; 153 U. S. 391. See *WHARFINGER*; *RATES*.

Warehouse Receipts. Receipts given by a warehouseman for chattels placed in his possession for storage purposes. 40 Ill. 320. They are not in a technical sense negotiable instruments, but have been made so in many of the states by special statute; 2 Ames, Bills & N. 782. It has been held, that, even where no statute has been enacted on this subject, inasmuch as these instruments have come to be considered the representatives of property, and an assignment is equivalent to the delivery of property, the warehouseman is estopped, as against an assignee for value without notice, to set up facts or agreements contradictory to their terms; 14 Cent. L. J. 432 (Tenn.). In order that receipts should be construed as warehouse receipts the special statutes on the subject must be strictly complied with; 9 Biss. 396; 101 U. S. 557. The holder of such receipts takes the same title to the goods as if the goods themselves had been delivered to him; 19 Am. L. Reg. N. S. 303 (Ky.). See 43 Wisc. 267; 78 Ga. 574; 6 Colo. 356; 11 Or. 277.

See *LIEN*; *BILL OF LADING*; *RATES*; *IMPAIRING THE OBLIGATION OF CONTRACTS*.

WARRANTICE. In Scotch Law. A clause in a charter of heritable rights, by which the grantor obliges himself that the right conveyed shall be effectual to the receiver. It is either personal or real. A warranty. *Erskine, Inst.* 2. 3. 11.

WARRANT. A writ issued by a justice of the peace or other authorized officer, directed to a constable or other proper person, requiring him to arrest a person therein named, charged with committing some offence, and to bring him before that or some other justice of the peace.

Warrant and commission, outside of naval technicality, are synonymous words. There is no difference in force between a commission and a warrant as used in the navy, except that one recites that the appointment is made by and with the advice and consent of the senate, and the other does not. Both are signed by the president; 18 Cl. Cls. 543.

A *bench-warrant* is a process granted by a court, authorizing a proper officer to apprehend and bring before it some one charged with some contempt, crime, or misdemeanor. See *BENCH-WARRANT*.

A *search-warrant* is a process issued by a competent court or officer authorizing an officer therein named or described to examine a house or other place for the purpose of finding goods which it is alleged have been stolen. See *SEARCH-WARRANT*.

Under the English Extradition Act of 1870, 33 & 34 Vict. c. 52, § 26, a warrant is defined as "any judicial document authorizing the arrest of a person accused or convicted of crime." 51 L. J. Q. B. 419; 9 Q. B. D. 93.

A warrant should regularly bear the hand and seal of the justice, and be dated. It should contain a command to the officer to make a return thereof and of his doings thereon. But the want of such a command

does not excuse him from the obligation of making a proper return; 3 Cush. 438. And it is no ground for discharging a defendant that the warrant does not contain such a command; 2 Gray 74. No warrant ought to be issued except upon the oath or affirmation of the witness charging the defendant with the offence; 3 Binn. 88. A warrant will not justify the arrest of one not named therein, by reason of the fact that the name used was supposed to be his; 153 U. S. 78. It is competent to show that the affidavit was not filed until after the arrest; 136 Ind. 105. Under a statute authorizing a *habeas corpus* to determine the identity of the person arrested, the inquiry may embrace the sufficiency of the papers; 15 Misc. Rep. 303. In England a person riding a bicycle without a light at night cannot be arrested or even stopped to ascertain his name and address, without a warrant; [1897] 2 Q. B. 452.

The reprehensible practice of issuing blank warrants, which once prevailed in England, was never adopted here. 2 Russ. Cr. 512; Ld. Raym. 546; 1 H. Bla. 13. See *SEARCH-WARRANT*; *ARREST*; *MILITARY BOUNTY LAND*.

WARRANT OF ATTORNEY. An instrument in writing, addressed to one or more attorneys therein named, authorizing them, generally, to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him.

This general authority is usually qualified by reciting a bond which commonly accompanies it, together with the condition annexed to it, or by a written defeasance stating the terms upon which it was given and restraining the creditor from making immediate use of it. In *form*, it is, generally, by deed; but it seems it need not necessarily be so; 5 Taunt. 264. This instrument is given to the creditor as a security. Possessing it, he may sign judgment, without its being necessary to wait the termination of an action. See 14 East 576; 2 Term 100.

A warrant of attorney given to confess a judgment is not revocable, and notwithstanding a revocation, judgment may be entered upon it; 2 Ld. Raym. 766, 850. The death of the debtor is, however, generally speaking, a revocation; Co. Litt. 52 b. In Pennsylvania, judgment may be entered by the prothonotary on such a warrant without the intervention of an attorney; 4 Sm. L. 278; the instrument must show on its face the amount due, unless it can be rendered certain by mere calculation; 73 Pa. 354. The general power ceases with the entry of judgment; 8 Johns. 361; 9 Minn. 55; *contra*, 1 Me. 257; 18 Wis. 575.

The virtue of a warrant of attorney is spent by the entry of one judgment, and a second judgment entered on the same warrant is irregular; 6 S. & R. 296; 3 Wash. C. C. 558. See *POWER OF ATTORNEY*.

WARRANTEE. One to whom a warranty is made. Sheppard, Touchst. 181.

WARRANTIA CHARTÆ. An ancient and now obsolete writ which was issued when a man was enfeoffed of land with warranty and then he was sued or impleaded in assize or other action, in which he could not vouch or call to warranty.

It was brought by the feoffor pending the first suit against him, and had this valuable incident, that when the warrantor was vouched, and judgment passed against the tenant, the latter obtained judgment simultaneously against the warrantor, to recover other lands of equal value. 2 Rand. 141, 156; 11 S. & R. 115.

WARRANTIES AND REPRESENTATIONS. Distinction. The difference between the terms as used in an insurance policy is this: In case of "warranties," the answers must be literally true, and an answer

that is not literally true will avoid the policy. Where the statements are "representations," however, the answers must be substantially true, and a misrepresentation that is not material or fraudulent will not prevent a recovery on the policy. 148 Ky. 557, 146 S. W. 1121.

WARRANTOR. One who makes a warranty. Shepp. Touchst. 181.

WARRANTY. In Insurance. A stipulation or agreement on the part of the insured party, in the nature of a condition.

An *express warranty* is a particular stipulation introduced into the written contract by the agreement of the parties.

An *implied warranty* is an agreement which necessarily results from the nature of the contract: as, that the ship shall be seaworthy when she sails on the voyage insured.

An *express warranty* usually appears in the form of a condition, expressed or directly implied in the phraseology of the policy, stipulating that certain facts are or shall be true, or certain acts are or shall be done by the assured, who by accepting the insurance ratifies the stipulation.

Where the stipulation relates wholly to the future, it is a promissory condition or warranty; 1 Phill. Ins. § 754.

An *express warranty* must be strictly complied with; and the assured is not permitted to allege, in excuse for non-compliance, that the risk was not thereby affected, since the parties have agreed that the stipulated fact or act shall be the basis of the contract; 1 Phill. Ins. § 755; unless compliance is rendered illegal by a subsequent statute; *id.* § 769. All reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the assured; 58 Ark. 528; 51 N. J. L. 175.

A breach of warranty vitiates the insurance, though the insured made the warranty without knowledge of its falsity; 181 N. Y. 485; 48 Mo. App. 1; 20 U. S. App. 337; 9 L. R. Q. B. 328.

In a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure of non-performance of which the party aggrieved may repudiate the whole contract. 115 U. S. 188. See *IMPLIED WARRANTY*.

The doctrine of the divers warranties and conditions in the different species of insurance has been the subject of a great mass of jurisprudence: viz.—

In *fire policies*, with reference to assignments of the insured property, or the policy; 17 N. Y. 424, 509; 6 Gray 160; 30 Pa. 311; 26 Conn. 165; 25 Ala. 355; 78 Ia. 216; 64 Miss. 1; conformity to charter; 32 N. H. 313; 8 Cush. 393; 1 Wall. 278; condition of the premises, including construction, locality, and manner of using; 18 N. Y. 168, 385; 8 Cush. 79; 31 N. H. 231; 2 Curt. 610; 4 Ohio St. 235; 27 Pa. 325; 4 E. I. 141; distance of other buildings; 7 N. Y. 153; 6 Gray 105; 81 Ia. 496; frauds; 28 N. H. 149, 157; 2 Ohio St. 452; 40 Mo. App. 276; kind of risk; 25 N. H. 590; 3 Md. 341; 6 McLean 324; 37 Minn. 300; smoking on premises; 127 U. S. 399; limiting right of action; 5 Gray 432; 6 Ohio 599; 5 R. I. 394; 24 Ga. 97; notice and demand; 18 Barb. 69; and proof of loss; 2 Gray 490; 11 N. Y. 81; 29 Pa. 198; 18 Ill. 553; 6 Ind. 137; other insurance; 13 N. Y. 79, 253; 22 Conn. 575; 5 Md. 165; 37 Me. 137; 9 Cush. 479; 4 N. J. 447; 21 Mo. 97; 86 Ala. 424; 71 Mich. 414; 98 N. C. 143; 31 Ill. App. 398; payment of premium; 18 Barb. 541; suspension of risk; 11 N. Y. 89; 43 Me. 393; title; 1 Curt. 193; 1 Cush. 280; 17 Mo. 247; 23 Pa. 50; 17 Mo. 247; 14 N. Y. 253; value; 11 Cush. 324; waiver of compliance with a warranty; 4 N. J. 67; 6 Gray 192; concealment of facts as to title; 150 Pa. 270; 16 Or. 283; 24 Neb. 858.

In *life policies*, with reference to assignment; 5 Sneed 259; representation, or other stipulations; 3 Gray 180; 1 Bosw.

338; 3 Md. 341; 21 Pa. 134; 13 La. Ann. 504; 19 Mo. 506; 74 Hun 885; 58 Ark. 528; 60 Fed. Rep. 727; 56 Conn. 528; that the insured is alive and in sound health; 14 App. Div. N. Y. 142. Where an application for life insurance is to be treated as a warranty it is to that extent a part of the policy; 75 Fed. Rep. 637. A warranty that the insured will not die by his own hand is valid; *id.* 637.

In marine policies, with reference to assignments; 83 La. 338; contraband trade; 43 Me. 460; other insurance; 17 N. Y. 401; seaworthiness; 3 Ind. 23; 1 Wheat. 399; 1 Binn. 592; 1 Johns. 241; 7 Pick. 259; 4 Mas. 439; 1 Camp. 1; 2 B. & Ald. 320; 5 M. & W. 414; Rocous, n. 22; 85 Me. 215; 124 U. S. 405; 136 *id.* 408; suspension of risk; 3 Gray 415; title; 19 N. Y. 179.

Waiver of the right to insist upon the performance of a condition may occur under a policy of this description; as, of the condition relative to assignment; 32 N. H. 95; or answers to questions; 7 Gray 261; or distance of buildings; 6 Gray 175; going out of limits; 33 Conn. 244; additional insurance; 1 Ind. App. 411; limitation of action; 14 N. Y. 253; 142 Pa. 393; offer of arbitration; 6 Gray 192; payment of premium or assessment; 25 Conn. 442; 33 Me. 439; 31 Pa. 438; proof of loss; 21 Mo. 81; seaworthiness; 87 Me. 137; title; 35 N. H. 328; 83 Me. 362. An insurance company cannot set up a forfeiture for a condition broken, against one whom its conduct has induced to believe that such provision would not be insisted upon; 134 Ill. 583; so an insurer is estopped to set up a breach of a warranty written by its agent for an illiterate person; 117 N. Y. 310; or made by the error of the agent; 79 Fed. Rep. 245.

A clause in a policy of insurance against fire, that nothing but a distinct specific agreement clearly expressed and indorsed on the policy shall operate as a waiver of any printed or written condition, warranty, or restriction thereon, is construed to refer to those conditions which enter into and form a part of the contract of insurance, and not to these stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proof of loss; 36 Ind. 102; May, Ins. 626.

See **DEVIATION; POLICY; REPRESENTATION; SEAWORTHINESS.**

In Sales of Personal Property. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, *collateral to the express object of it.* Benj. Sales § 600. See 60 N. Y. 450.

An express warranty is one by which the warrantor covenants or undertakes to insure that the thing which is the subject of the contract is or is not as there mentioned; as, that a horse is sound; that he is not five years old.

Where there is an express warranty on the sale of goods to be delivered, the buyer is not estopped by accepting the goods; but he can retain the same, stand on his warranty, and recover for the breach. See 81 Wis. 399.

To create an express warranty, the word "warrant" need not be used, nor are any particular words necessary; 75 Cal. 558.

An implied warranty is one which, not being expressly made, the law implies by the facts of the sale. Cro. Jac. 197.

In general, there is no implied warranty of the quality of the goods sold; 2 Kent 374; Co. Litt. 102 a; 1 Pet. 317; 1 Johns. 274; 4 Conn. 428; 18 Pick. 59; 72 Pa. 229; 4 Hayw. 227; especially in cases of a specific chattel already existing which the buyer has inspected; 4 M. & W. 64; 42 N. H. 165.

But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is fit for the purpose for which it is ordinarily used, or for which it has been specially made; Benj. Sales § 645; 53 N. Y. 515; 37 Neb. 68; 50 Mo. App. 121; 21 Or. 289. Thus where a party conveyed a ship to

another by deed, but at the time of the conveyance the ship was ashore in a wrecked and ruinous condition, it was held that there was an implied warranty that the article conveyed should be a ship, and not a mere "bundle of timber"; 3 M. & W. 390. Another exception is in the sale of goods by sample. There is a warranty that their quality is equal to the sample; 13 Mass. 139; 3 Rawle 37; 44 N. Y. 289; 64 Hun 634; 73 Ia. 712; but a sale of goods by sample only binds the vendor to supply goods equal to sample, and not goods fit for a particular purpose; 37 S. C. 7. See **SAMPLE.** An implied warranty may also result from the usage of a particular trade; 2 Disney 482; 4 Taunt. 847. In a sale by description of goods not inspected by the buyer, there is an implied warranty that the goods are salable or merchantable; 24 Wisc. 508; 21 Ia. 508; 53 N. Y. 518; 4 Camp. 144; 76 Ga. 629; 16 Or. 381; but see 23 Me. 212; and an express warranty of quality excludes any implied warranty that the articles sold are merchantable or fit for their intended use; 134 U. S. 306. It has been held that words of description constitute a warranty that the articles sold are of the quality and description so described; 11 Pick. 99; 3 Rawle 23; but the better opinion has been said to be that the words of description constitute not a warranty of the description, but a condition precedent to the seller's right of action, that the thing which he offers to deliver, or has delivered, should answer the description; 4 M. & W. 39. Where the buyer relies on the seller's skill and judgment to supply him an article, there is an implied warranty that the article will suit the desired purpose; 2 M. & G. 279; Benj. Sales § 661. Finally, it is said that there is always an implied warranty in sales of provisions for household use; 18 Pick. 67; 18 Mich. 51; 50 Barb. 116. But see Benj. Sales § 670.

In the sale of commercial paper without indorsement or express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it as between vendor and vendee are governed by the common law relating to the sale of goods and chattels; and the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends on whether he has delivered that which he contracted to sell, this rule being designated in England as a condition of the principal contract, and in this country being generally termed an implied warranty of identity of the thing sold; 163 U. S. 385.

The rule of the civil law was that a fair price implied a warranty of quality; Dig. 21. 2. 1. This rule has been adopted in Louisiana; 1 La. Ann. 27; and in South Carolina; 1 Bay 324. There may be an implied warranty as to character; 13 Mass. 139; 2 Harr. & G. 495; 20 Johns. 204; 4 B. & C. 108; and even as to quality, from statements of the seller; 40 Me. 9; 24 Barb. 549. See 2 Misc. Rep. 295.

A purchaser may examine an article and exercise his judgment upon it, and at the same time protect himself by a warranty; 158 Mass. 178; but if he elects not to accept the property as not answering the warranty, there is no duty imposed upon either party thereafter to make further tests or experiments to see whether the property complies with the warranty; 9 U. S. App. 530.

It is settled that in an executory agreement the vendor warrants, by implication, his title to the goods which he promises to sell, and that in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel is his is equivalent to a warranty of title, and that this affirmation may be implied from his conduct as well as his words. It is further said that the present rule in England is, in the absence of such implication or affirmation, that the sale of a personal chattel implies an affirmation by the vendor that the chattel is his, and, therefore, he warrants the title, unless it be shown by the facts and

circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold; Benj. Sales §§ 627, 639.

As to the goods in the possession of the vendor, there is an implied warranty of title; but where the goods sold are in possession of a third party at the time of the sale, then there is no such warranty; 36 Me. 501; 23 Miss. 772; 2 Kent 478; 8 Mont. 380; 25 Neb. 360; 39 Kan. 365; 47 Minn. 500; 122 Pa. 7; *contra*, 3 Term 58; 17 C. B. n. s. 708.

An implied warranty of quality exists in cases of the sale of food provisions on grounds of public policy, but the exception is limited to sales for immediate consumption; 73 N. W. Rep. (Minn.) 163; 145 Mass. 439; 49 N. E. Rep. (Ill.) 210. See 18 N. Y. L. J. (Feb. 18, 1898).

A vendor knowing he has no title, and concealing the fact from the vendee, is liable on the ground of fraud; Benj. Sales § 637.

Antecedent representations, made as an inducement to the buyer, but not forming part of the contract when concluded, are not warranties; it is not, however, necessary that the representation should be made simultaneously with the bargain, but only that it should enter into it; 15 C. B. 130; Benj. Sales § 610. No special form of words is necessary to constitute a warranty; 45 Cal. 573; 75 *id.* 358; 75 Ill. 81; 4 Daly 277; 3 Mod. 261. The question is for the jury, to be inferred from the sale and the circumstances of the particular case; 8 Cow. 25; 9 N. H. 111; 149 Pa. 458; 63 Hun 636; 75 Cal. 558; even if the contract is written; Benj. Sales § 614; but see 10 Allen 242. The rule is *simplex commendatio non obligat*. See 2 Esp. 572. A warranty made after a sale requires a new consideration; 3 Q. B. 234; 100 Mass. 532. See 148 Mass. 608; representations made after a sale is complete and after delivery, and not entering into the consideration, cannot amount to a warranty; 62 Mich. 157.

Where one orders a specific article, there is only an implied warranty that the article supplied shall correspond with the designation and no implied agreement that it shall be fit for the purpose for which the buyer designed it; 28 U. S. App. 87.

Where a known, described, and definite article is ordered of a manufacturer, though he has notice that it is required for a particular purpose, there is no implied warranty that it shall answer that purpose; 141 U. S. 510. Affirmations of the essential qualities of goods made by the vendor and relied upon by the vendee, constitute an express warranty; 15 U. S. App. 218.

Proposals made by an equipment company to a street railway company to furnish electric equipment which should comply with certain conditions of performances, are affirmations of quality amounting to a warranty; 27 U. S. App. 364. Where there is a complete contract of sale in writing, there can be no implied warranty as to the subject-matter; 43 Ill. App. 175; 33 Cent. L. J. 70. As to implied warranty in a manufacturer's executory contract of sale, see 36 Cent. L. J. 192. In the sale of a patent there is an implied warranty of title, without regard to the form of the instrument of transfer; 3 Fed. Rep. 898. In Louisiana a warranty, while not of the essence, is of the nature of a contract of sale, and is implied in every such contract; 163 U. S. 386.

In Sales of Real Property. A real covenant, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and, either upon voucher or by judgment in a writ of *warrantia chartae*, to yield other lands to the value of those from which there has been an eviction by a paramount title. Co. Litt. 365 a.

Collateral warranty existed when the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the land by any collateral title, upon the presumption that he might thereafter have assets by descent from or through the ancestor; and it im-

posed upon him the obligation of giving the warrantee other lands in case of eviction, provided he had assets. 2 Bla. Com. 301.

Lineal warranty existed when the heir derived title to the land warranted, either from or through the ancestor who made the warranty.

The statute of 4 Anne, c. 16, annulled these collateral warranties, which had become a great grievance. Warranty in its original form has never, it is presumed, been known in the United States. The more plain and pliable form of a covenant has been adopted in its place; and this covenant, like all other covenants, has always been held to sound in damages, which, after judgment, may be recovered out of the personal or real estate, as in other cases. And in England the matter has become one of curious learning and of little or no practical importance. See 4 Kent 469; 3 Rawle 67, n.; 2 Wheat. 45: 1 Sumn. 358; 17 Pick. 14; 1 Ired. 509; 2 Saund. 38, n. 5.

Mr. Rawle, in his work on Covenants for Title 205, says there is no evidence that the covenants of warranty as employed in the United States ever had a place in English conveyancing. In the earlier conveyances which remain on record in the colonies are to be found some or all of the covenants which were coming into use in the mother country, together with a clause of warranty, sometimes with and sometimes without the addition of words of covenant. Later the words of covenant became more general, and at the present day their use is almost universal. As to the extent and scope of the American covenant of warranty, the sounder view is that it is merely a covenant for quiet enjoyment, the only difference being that under the latter, a recovery may sometimes be had where it would be denied under the former. See COVENANT.

Implied Warranty. Such as is imputed in law upon the whole transaction: as, that the seller has title, that the goods are fairly merchantable, or will fairly answer the purpose for which they are known to be bought; that the bulk of the goods, sold by sample, corresponds with the sample; that there are no defects, where the buyer defers to the seller's judgment, except as to obvious defects. Anderson; Story, Contr. 329 *et al.*

WARRANTY, VOUCHER TO. In Old Practice. The calling a warrantor into court by the party warranted (when tenant in a real action brought for recovery of such lands), to defend the suit for him; Co. Litt. 101 b; 2 Saund. 32, n. 1; and the time of such voucher is after the demandant has counted.

It lies in most real and mixed actions, but not in personal. Where the voucher has been made and allowed by the court, the vouchee either voluntarily appears, or there issues a judicial writ (called a summons ad warrantizandum), commanding the sheriff to summon him. Where he, either voluntarily or in obedience to this writ, appears and offers to warrant the land to the tenant, it is called entering into the warranty; after which he is considered as tenant in the action, in the place of the original tenant. The demandant then counts against him *de novo*, the vouchee pleads to the new count, and the cause proceeds to issue.

WARREN (Germ. *wahren*, French *garrenne*). A place privileged by prescription or grant of the king for the preservation of hares, conies, partridges, and pheasants, or any of them. An action lies for killing beasts of warren inside the warren; but they may be killed *damage feasant* on another's land; 5 Co. 104. It need not be inclosed; Co. 4th Inst. 318.

WASHINGTON. One of the states of the United States of America.

By the act February 22, 1889, the people of Washington were enabled to form a constitution and state government, and be admitted into the Union on an equal footing with the original states. Accordingly, after all the requirements had been complied with on November 11, 1889, the president by pro-

clamation announced the admission of Washington into the Union.

WASTE. Spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof to the prejudice of the heir or of him in reversion or remainder.

"Any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance." Poll. Torts 327.

Permissive waste consists in the mere neglect or omission to do what will prevent injury: as, to suffer a house to go to decay for the want of repair. And it may be incurred in respect to the soil, as well as to the buildings, trees, fences, or live stock on the premises. See *infra*.

Voluntary waste consists in the commission of some destructive act: as, in pulling down a house or ploughing up a flower-garden. 1 Paige, Ch. 573.

Equitable waste may be defined as such acts as at law would not be esteemed to be waste under the circumstances of the case, but which in the view of a court of equity are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. 2 Story, Eq. Jur. § 915.

Voluntary waste is committed upon cultivated fields, orchards, gardens, meadows, and the like, whenever a tenant uses them contrary to the usual course of husbandry or in such a manner as to exhaust the soil by negligent or improper tillage; 6 Ves. Ch. 323; 2 Hill 157; 2 B. & P. 86. It is, therefore, waste to convert arable into wood land, or the contrary; Co. Litt. 53 b. Cutting down fruit-trees, although planted by the tenant himself, is waste; 2 Rolle, Abr. 817; and it was held to be waste for an outgoing tenant of garden-ground to plough up strawberry-beds which he had bought of a former tenant when he entered; 1 Camp. 227. When lands are leased on which there are open mines of metal or coal, or pits of gravel, lime, clay, brick, earth, stone, and the like, the tenant may dig out of such mines or pits; but he cannot open any new mines or pits without being guilty of waste; Co. Litt. 53 b; 110 Pa. 478. See 64 Cal. 134; MINES; OIL. Any carrying away of the soil is also waste; Comyns, Dig. Waste (D) 4; 6 Barb. 13; Co. Litt. 53 b; 1 Sch. & L. 8. And so is the taking of clay from the soil and manufacturing it into bricks and selling the same; 31 W. Va. 621; 13 Q. B. 591. A tenant in common who quarries stone from the common property is guilty of waste; 117 Mo. 414; and a life tenant who unlawfully removes petroleum; 39 W. Va. 231.

Waste need not consist in loss of market value; it may be an injury in the sense of destroying identity; L. R. 20 Eq. 539.

It is committed in houses by removing things once fixed to the freehold, although they may have been erected by the lessee himself, unless they are mere fixtures. See FIXTURES. It may take place not only in pulling down houses or parts of them, but also in changing their forms; as, if the tenant pull down a house and erect a new one in its place, whether it be larger or smaller than the first; 2 Rolle, Abr. 815; 4 Utah 107; 13 Q. B. 588; or convert a parlor into a stable, or a grist-mill into a fulling-mill; *ibid.*; or turn two rooms into one; *ibid.*. See 13 Q. B. 572; 14 Ves. 526. The placing of an excessive weight in a building, by reason of which it falls, is waste; 152 Mass. 567. The building of a house where there was none before was, by the strict rules of the common law, said to be waste; Co. Litt. 53 a; and taking it down after it was built was waste also; 1 B. & Ad. 161; 4 Pick. 810; 19 N. Y. 234; 16 Conn. 323; 2 McCord 329; 1 Harr. & J. 289; 1 Watts 378.

Voluntary waste may also be committed upon timber. The law of waste accommodates itself to the varying wants and conditions of different countries: that will

not, for instance, be waste in an entire woodland country which would be so in cleared one. The clearing up of land for the purpose of tillage in a new country where trees abound is no injury to the inheritance, but, on the contrary, is a benefit to the remainderman, so long as there is sufficient timber left and the land cleared bears a proper relative proportion to the whole tract; 4 Kent 316; 5 Watts 463; 6 T. B. Monr. 342; 26 Wend. 123; see 99 N. C. 583; 81 Mich. 332; where timber is grown for sale, cutting timber would be a "mode of cultivation." See L. R. 18 Eq. 309; [1891] 3 Ch. 206.

The extent to which wood and timber on such land may be cut without waste is a question of fact for a jury; 7 Johns. 227. A tenant may always cut trees for the repair of the houses, fences, hedges, stiles, gates, and the like; Co. Litt. 53 b; 100 N. C. 41; 91 Ky. 533; and for making and repairing all instruments of husbandry; Wood, Inst. 344. See ESTOVERS. He may fell dead or dying timber; 110 Pa. 473; 11 Vt. 293. And he may, when unrestrained by the terms of the lease, cut timber for firewood, if there be not enough dead timber for such purposes; Com. Dig. Waste (D) 5. But not ornamental trees or those planted for shelter; 6 Ves. Ch. 419; or to exclude objects from sight; 16 Ves. Ch. 375; 7 Ired. Eq. 197; 6 Barb. 9. He cannot promiscuously cut trees to make staves to be sold; 71 Wis. 336; nor railroad ties; 40 Mo. App. 515.

It is waste for a tenant for life to neglect to pay the interest on a mortgage whereby the land was sold to the prejudice of the remainderman; 16 Hun 226; and so of a failure to pay taxes; 51 Me. 434; 59 Miss. 289; 59 Wis. 557; 25 *id.* 679.

Windfalls are the property of the landlord; for whatever is severed by inevitable necessity, as, by a tempest, or by a trespasser, and by wrong, belongs to him who has the inheritance; 3 P. Wms. 268; 11 Co. 81.

In general, a tenant is answerable for waste although it is committed by a stranger; for he is the custodian of the property, and must take his remedy over; 2 Dougl. 745; 1 Taunt. 198; 1 Denio 104.

Permissive waste to buildings consists in omitting to keep them in tenantable repair; suffering the timbers to become rotten by neglecting to cover the house; or suffering the walls to fall into decay for want of plastering, or the foundation to be injured by neglecting to turn off a stream of water, and the like; Co. Litt. 53 a. See 41 N. J. Eq. 130; 59 Miss. 289; LANDLORD AND TENANT. Permissive waste in houses, however, as a general rule, is now only punishable when a tenant is bound to repair, either expressly or by implication; 4 B. & P. 298; 10 B. & C. 312. See 107 N. C. 630.

The redress for this injury is of two kinds, preventive and corrective. A reversioner or remainderman, in fee, for life, or for years, may now recover, by an ordinary action at law, all damages he has sustained by an act of voluntary waste committed by either his tenant or a stranger, provided the injury affects his reversion. But as against a tenant for years, or from year to year, he can only sustain an action for damages for permissive waste if his lease obliges the tenant to repair; 2 Saund. 252 d, note; 10 B. & C. 312; 41 Ch. D. 352. Where a particular course of user has been carried on for a considerable course of time, with the apparent knowledge and consent of the owner of the inheritance, all lawful presumptions will be made in favor of the lawfulness of the acts complained of; Poll. Torts 328; 4 App. Cas. 465. The statutes of the several states also provide special relief against waste in a great variety of cases, following, in general, the Statute of Gloucester, which not only forfeits the premises, but gives exemplary damages for all the injury done. The rules as to waste are less stringent in the western states than in the east.

These legal remedies, however, are still

so inadequate, as well to prevent future waste as to give redress for waste already committed, that they have in a great measure given way to the remedy by bill in equity, by which not only future waste, whether voluntary or permissive, will be prevented, but an account may be decreed and compensation given for past waste in the same proceeding; 2 Mer. 408; 2 Story, Eq. Jur. 179. Complainant in an action for waste must either have actual possession, or must show in himself an actual, valid, subsisting title; 85 Tenn. 154.

A contingent remainderman may maintain an injunction to restrain waste by the life tenant; 81 W. Va. 621.

An action on the case in the nature of waste, will lie by the holder of a mortgage on lands, against a purchaser from the mortgagor of the equity of redemption, for acts of waste committed with a knowledge that the value of the security will be injured thereby. This was a case of new impression (so stated in both courts) and was decided on general principles; 4 N. Y. 110, affirming 4 Barb. 347.

The reversioner need not wait until waste has actually been committed before filing his bill; for if he ascertains that the tenant is about to commit any act which would operate as a permanent injury to the estate, or if he threatens or shows any intention to commit waste, the court will at once interfere and restrain him by injunction from doing so; 18 Ves. Ch. 355; 1 Johns. Ch. 485; 1 Jac. & W. 653.

Sometimes a tenant, whether for life or for years, by the instrument creating his estate, holds his lands *without impeachment of waste*. This expression is equivalent to a general permission to commit waste, and at common law would authorize him to cut timber, or open new mines and convert the produce to his own use; Co. Litt. 220; 11 Co. 81 b; 15 Ves. 425. But equity puts a limited construction upon this clause, and only allows a tenant those powers under it which a prudent tenant in fee would exercise, and will, therefore, restrain him from pulling down or dilapidating houses, destroying pleasure-houses, or prostrating trees planted for ornament or shelter; 2 Vern. 739; 6 Ves. 110.

As to remedy by writ of estrepement to prevent waste, see ESTREPEMENT; 2 Yeates 281; 3 Bla. Com. 226.

As to remedies in cases of fraud in committing waste, see *Hov. Frauds* 226-238.

Scrap-distinction. "Waste" as used in a tariff act generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material. "Scrap" does retain the name and quality. 223 U. S. 501.

WASTE-BOOK. A book used among merchants. All the dealings of the merchants are recorded in this book in chronological order as they occur.

WASTEL. The finest sort of bread. Burrell; Britt. c. 30.

WASTE LANDS. See STATE LANDS.

WASTING OF HIS ESTATE.

"Wasting of his estate," where he has no property, should be deemed to apply to and embrace a man's health, time, and labor, all of which, for the purpose of supporting himself and family, are essentially his estate. 18 B. M. (Ky.) 9; 7 Bush (Ky.) 307.

WATCH. To stand sentry and attend guard during the night-time. Certain officers called watchmen are appointed in most of the United States, whose duty it is to arrest all persons who are violating the law or breaking the peace. See 1 Bla. Com. 356; 1 Chitty, Cr. Law 14, 20.

WATCH AND WARD. A phrase used in the English law to denote the superintendence and care of certain officers whose duties are to protect the public from harm.

WATCHMAN. An officer in many cities and towns, whose duty it is to watch during the night and take care of the property of the inhabitants. He possesses,

generally, the common-law authority of a constable to make arrests, where there is reasonable ground to suspect a felony, though there is no proof of a felony having been committed; 1 Chitty, Cr. Law 24; 1 B. & Ald. 227. See ARREST.

WATER. That liquid substance of which the sea, the rivers, and creeks are composed.

A pool of water, or a stream or water-course, is considered as part of the land; hence a pool of twenty acres would pass by the grant of twenty acres of land, without mentioning the water; 2 Bla. Com. 18; 2 N. H. 255, 391; 1 Wend. 255; 5 Conn. 497; 8 Pa. 13. A mere grant of water passes only a fishery; Co. Litt. 4 b; 5 Cow. 216. But the owner of land over which water flows may grant the land, reserving the use of all the water to himself, or may grant the use of all or a portion of the water, reserving the fee of the land to himself; 26 Vt. 64; 3 Hill N. Y. 418; 6 Metc. 131. See THALWEG; MARITIME BELT.

WATER BAILIFF. In English Law. An officer appointed to search ships in ports. 10 Hen. VII. 30.

WATER COMPANY. A municipality has no implied power, from the mere fact of its creation, to engage in the business of supplying its citizens water for pay. It cannot do so except by virtue of express legislative authority. A municipality having such legislative authority, which has entered into a contract with an existing water company to supply the citizens with water, has thereby exhausted its power and cannot subsequently erect its own water works for the same purpose; 177 Pa. 643; 180 *id.* 509. See 186 Pa. 74; *contra*, in Rhode Island; 60 Fed. Rep. 611.

In Pennsylvania a water company under a statute which provides that water companies shall furnish pure water, will be enjoined from collecting water rents when it has supplied water utterly unfit for domestic use or for steam purposes. The courts cannot decree that the company must obtain a supply of pure water. They can only enjoin it from collecting water rents for impure water; 172 Pa. 489.

A water company which has a contract with a city to furnish water to extinguish fires is not liable to the owners of private property destroyed by fire through its failure to furnish water according to the contract; 88 Tex. 233; there is no privity of contract between the parties to the action; 46 Conn. 24; 83 Ga. 219; 139 Ind. 214; 54 Ia. 59; 37 Neb. 546; 78 Hun 146; 11 Atl. Rep. (Pa.) 300; 3 Lea (Tenn.) 49; 81 Wis. 48; nor does the fact that the ordinance granting the franchise requires the company to supply the city and its inhabitants with sufficient water to put out fires, or to maintain the water at a certain pressure, create the necessary privity of contract; 83 Ga. 219; 37 Neb. 546; 81 Wis. 48; nor even a statute, requiring the pipes to be kept charged at a certain pressure, will give the right of action; 2 Exch. Div. 441, reversing 6 L. R. Exch. 404. Such owner cannot maintain an action, even though the city has raised by taxation a special fund, to which the plaintiff contributed, to pay for a sufficient supply of water for use in case of fire; 79 Ia. 419; or though the citizens pay a special tax to the company, under its contract with the city; 119 Mo. 304. Nor has a municipality such an interest in the property destroyed as to give it a right of action, and the owner of the property destroyed cannot maintain an action as assignee of the right of action of the municipality; 16 Nev. 44. An action of tort will not lie; 83 Ga. 219. But it has been held that when the contract of a water company with the city declares that it is made, *inter alia*, for the protection of private property against destruction by fire, the owner of property which is taxed for water rent, and is destroyed by fire through the failure of the company to supply a sufficient quantity of water, may, in his

own name, sue the company on its contract with the city; 89 Ky. 340.

A company for furnishing water to the public is subject to the visitatorial power of the state; 173 Pa. 508.

An existing system of water supply in a municipality which is the property of private individuals and is operated under a contract with the municipal corporation, is private property which may be acquired by eminent domain, on the payment of a just compensation, including compensation for the termination of the contract; 166 U. S. 685.

The right which a water company acquires by a lease from a riparian owner and not by the exercise of eminent domain is no greater than the right of the riparian owner; 182 Pa. 418.

A regulation by which the company refuses to turn on the water for a building until unpaid rates of previous owners are paid is unreasonable and void unless authorized by statute; 40 L. R. A. (Mass.) 637.

See WATER RENTS; RATES.

WATER-COURSE. This term is applied to the flow or movement of the water in rivers, creeks, and other streams.

It is a more comprehensive word than "river." In its most general sense, it means a course or channel in which water flows. In its legal sense, it consists of bed, banks, and water; a living stream confined in a channel, but not necessarily flowing all the time; 7 Ind. App. 309.

A water-course is a stream *usually* flowing in a particular direction, in a definite channel, and discharging into some other stream or body of water; and the term does not include surface-water conveyed from a higher to a lower level for limited periods during the melting of snow, or during or soon after the fall of rain, through hollows or ravines, which at other times are dry; 27 Wisc. 556. See 100 Mich. 424.

It must be a stream in fact, as distinguished from mere surface drainage rendered necessary by freshets or other extraordinary causes, though the flow of water need not be constant; 33 Neb. 406. See 118 Ind. 125; 21 Or. 35. A stream does not cease to be a water course and become mere surface water, because at certain points it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again into a definite channel; 16 Or. 165.

In a legal sense, property in a water-course is comprehended under the general name of *land*: so that a grant of land conveys to the grantee not only fields, meadows, and the like, but also all the rivers and streams which naturally pass over the surface of the land; 1 Co. Litt. 4; 2 N. H. 255; 5 Wend. 428. See WATER.

The right of a riparian proprietor to the flow of a stream over his land, may be severed from the land by grant, and where such right has been conveyed without reservation, the grantor cannot maintain an action to enjoin a diversion of water; 91 Cal. 146; 85 *id.* 219. See 16 Colo. 16.

Those who own land bounding upon a water-course are denominated by the civilians *riparian* proprietors; and this convenient term has been adopted in the common law; Ang. Wat.-Courses 3; 8 Kent 354; 55 Fed. Rep. 854.

In the United States all navigable water-courses are a species of highway, and come under the control of the states, except when they are used in foreign or interstate commerce, and then congress has authority over them; Cooley, Const. Lim. 589. See NAVIGABLE WATERS. States within which lands bordering on a river are situated have the right, not only to control and levee its banks, to prevent the adjoining country from overflow, but to compel riparian owners to maintain such levees at their own expense; 73 Cal. 125. See RIVER.

The public cannot, in the United States, gain any proprietary right in streams of inland water too small to be used for the transportation of property; Ang. Water-

C. § 2; 11 Me. 278. In the case of navigable waters used as a highway of commerce between the states or with foreign nations, no state can grant a monopoly for the navigation of any portion of such waters; 9 Wheat. 1; 146 U. S. 387; 85 Wis. 445; 144 N. Y. 88; 64 Fed. Rep. 436. A state has the same power to improve such waters as it has in the case of any highway; Cooley, Const. Lim. 738; 29 Fla. 1; 145 U. S. 312; 152 U. S. 1; 87 Wis. 151; and, having expended money for such improvement, it may impose tolls upon the commerce which has the benefit of the improvement; 3 McLean 326; 8 Bush 447. See 119 U. S. 548. The states may authorize the construction of bridges over such waters, for railroads and other species of highways, notwithstanding they may to some extent interfere with navigation. See Hare, Am. Const. L. 457, 487, 497; 4 Pick. 460; 38 Ill. 467; 50 Fed. Rep. 16; 83 Me. 419; 125 U. S. 1; 53 Fed. Rep. 549; BRIDGE. A state may establish ferries over such waters; 1 Black 603; 41 Miss. 37; and authorize the construction of dams; Cooley, Const. Lim. 740. A state may also regulate the speed and general conduct of ships and other vessels navigating its water highways, provided its regulations do not conflict with any regulations made by congress; 1 Hill N. Y. 469. See Cooley, Const. Lim. 737, 741.

The riparian proprietor owns to high-water mark on all navigable rivers; 21 Am. Dec. 707; and that mark is limited by the outflow of the medium high tide, between the spring and neap tides; 44 N. J. Eq. 398. See NAVIGABLE WATERS. The beds of navigable rivers between the lines of ordinary low water on their opposite sides belong to the state, to be held and controlled by and for the public; 122 Pa. 191. Water-courses above the flow of the tide are private, but, if sufficiently large to be of public use in transporting property, are highways over which the public have a common right in subservience to which the private ownership of the soil is to be enjoyed; 26 Am. Dec. 525.

By the rules of the common law, all proprietors of lands have precisely the same rights to waters flowing through their domains, and one can never be permitted so to use the stream as to injure or annoy those situated on the course of it, either above or below him. They have no property in the water itself, but a simple usufruct; *aqua currit et debet currere ut currere solebat*, is the language of the law. Accordingly, while each successive riparian proprietor is entitled to the reasonable use of the water for the supply of his natural wants and for the operation of mills and machinery; 86 Ala. 587; 86 Ky. 44; 50 Me. 602; 44 N. H. 580; L. R. 2 Ex. 1; 24 Pa. 302; he has no right to flow the water back upon the proprietor above; Cro. Jac. 556; 20 Pa. 85; 1 B. & Ald. 874; 3 Green N. J. 116; 4 Ill. 452; 38 Me. 243; 62 Ala. 369; 50 Conn. 346; nor to discharge it so as to flood the proprietor below; 17 Johns. 306; 5 Vt. 371; 3 Harr. & J. 231; nor to divert the water; 17 Conn. 288; 13 Johns. 212; 24 Ala. N. S. 130; 28 Vt. 670; 22 Am. Dec. 745; 2 Disn. 400; 93 Cal. 407; 66 Hun 632; 29 N. Y. Sup. 729; 79 Wis. 334; 133 U. S. 541; 40 N. Y. 191; 31 Vt. 358; 182 Pa. 418; even for the purpose of irrigation, unless it be returned without essential diminution; 5 Pick. 175; 8 Me. 253; 12 Wend. 330; 4 Ill. 496; 75 Cal. 426; 24 Pa. 298; 3 Kent 440; nor to obstruct or detain it, except for some reasonable purpose, such as to obtain a head of water for a mill and to be again discharged, so as to allow all on the same stream a fair participation; 10 Cush. 367; 6 Ind. 324; 28 Vt. 459; 4 Mas. 401; 17 Johns. 306; 13 Conn. 303; 155 Pa. 523; 112 Mo. 6; 69 Tex. 617; 10 Ch. Div. 707; see DAM; nor to pollute the quality of the water by unwholesome or discolored impurities; 22 Barb. 297; 3 Rawle 397; 8 E. L. & E. 217; 4 Ohio 833; 62 Hun 306; 57 Fed. Rep. 1000; [1898] App. Cas. 691; 77 Ia. 490; 83 Ga. 187; but see, where the pollution results from a reason-

able use, 73 Me. 297; 44 N. H. 580; 185 Ind. 547; 77 Ia. 576; as to turning surface-water off one's own land on to a neighbor's, see 31 Am. Rep. 216; 35 id. 431; 44 Ark. 380; 184 Ill. 96; 142 Mass. 110; 92 N. Y. 10; 193 Pa. 226. But, while such are the rights of the riparian proprietors when unaffected by contract, these rights are subject to endless modifications on the part of those entitled to their enjoyment either by grant; 3 Conn. 373; 13 Johns. 525; 17 Me. 281; 6 Metc. 131; 7 Pa. 348; 18 E. L. & E. 164; 9 N. H. 282; 3 N. Y. 253; or by reservation; 6 N. Y. 33; 20 Vt. 250; or by a license; 2 Gill 221; 18 Conn. 303; 14 S. & R. 267; or by agreement; 19 Pick. 449; Ang. Water-C. § 141; 3 Harr. & J. 282; 17 Wend. 136; see 110 Pa. 45; or by twenty years' adverse enjoyment from which a grant or contract will be implied; 1 Camp. 463; 4 Mas. 397; 6 Scott 167; 9 Pick. 251; Ang. Water-C. § 200; 47 Hun 333; 62 N. H. 233; 72 Ala. 277; in such a way as to adapt the uses of the water to the complex and multiplying demands and improvements of modern civilization. But there can be no prescriptive right to maintain an obstruction to the navigation of a public stream; 86 Ala. 88. It is not appurtenant to the land or taxable as part thereof or in itself, but only indirectly in connection with the value of the mill with which it is used; 37 Atl. Rep. (Me.) 331; *contra*, 64 N. H. 337.

Wherever a water-course divides two estates, each estate extends to the thread or central line of the stream; but the riparian owner of neither can lawfully carry off any part of the water without the consent of the other opposite, each riparian proprietor being entitled not to half or other proportion of the water, but to the whole bulk of the stream, undivided and undivisible, or *per my et per tout*; 8 Me. 253; 3 Sumn. 189; 13 Mass. 507; 1 Paige, Ch. 447; 2 Am. Dec. 574; 16 id. 342. If the bed of a water-course is suddenly changed, former boundaries and possessions are at altered; but if the stream gradually gain on a person's land, the loser of the soil has no remedy; 2 Bla. Com. 262; 17 Vt. 387; Ang. Water-C. § 57; see 35 Fed. Rep. 188; [1896] 1 Ch. 73. A grant bounded by a navigable water-course extends only to high-water mark; but one bounded by a non-navigable stream extends to the middle thereof; 16 Am. Dec. 447; 30 id. 278, 286. See 140 U. S. 371; 152 id. 1; 4 Ia. 199; 44 U. S. 324; 11 Fed. Rep. 384. When an island is on the side of a river, so as to give the riparian owner of that side only one-fourth of the water, he has no right to place obstructions at the head of the island to cause one-half of the stream to descend on his side of the river, but the owner opposite is entitled to the flow of the remaining three-fourths; 10 Wend. 260.

The appropriation of the water of an un-navigable stream by a riparian owner in such quantities as to diminish unreasonably the supply of other riparian owners is a private nuisance, for which an injunction will lie; 58 Fed. Rep. 133; 2 Johns. Ch. 162.

Artificial water-courses, canals, sewers, water-works, etc., are wholly the creatures of statute, except when a man has a drain across another's land, and there it is generally a question of grant or easement. See 31 Atl. Rep. (Vt.) 291.

As to under-ground flow of water, see SUBTERRANEAN WATER; and see, also, 111 Cal. 639; 93 Ia. 297; 46 N. Y. Supp. 141; 161 Pa. 283; [1895] App. Cas. 587; 40 Pac. Rep. 709; 8 Ohio Cir. Ct. E. 194; 20 So. Rep. (Fla.) 780. And see, generally, Washburn, Easements; Angell, Water-Courses; Woolrych, Waters; Schultes, Aquatic Rights; Coulson & Forbes, Law of Waters; RIVER; STREAM; LAKE; GREAT LAKES; ADMIRALTY; POOL; POND; RIPARIAN PROPRIETORS; SURFACE WATERS; IRRIGATION; POLLUTION.

WATER MARK. See HIGH WATER MARK; TIDE.

WATER ORDEAL. See ORDEAL.

WATER RENTS. Water rents in a borough which owns the water-works and licenses those who desire to use its water to do so at rates fixed by its ordinance, are not in the nature of taxes, but are licenses, and not, therefore, collectible by the borough tax collector as such, but their collection may be delegated to the appointee of the borough council. 19 C. C. R. (Pa.) 414. As to legislative control of, see RATES.

Under a covenant by a lessor to pay "all water rents imposed or assessed upon the premises or on the lessor or lessees in respect thereof," the lessor is not bound to pay for water supplied by a water company to the lessees for trade purposes; (C. A.) [1897] 1 Ch. 633.

WATERCOURSES. See WATERS.

WATERED STOCK. See STOCK.

WATERGANG (Law Lat. *watergangium*). A Saxon word for a trench or course to carry a stream of water, such as are commonly made to drain water out of marshes. *Ordin. Marisc. de Romn. Chart.* Hen. III.

WATERGAVEL. A rent paid for fishing in, or other benefit from, some river. *Chart. 15 Hen. III.*

WATERS. Percolating Waters: As distinguished from sub-surface streams, are the waters beneath the earth's surface which do not have a known and defined channel. 30 Am. & Eng. Encyc. 2nd ed., 310; 111 Cal. 639. It has been held that underground bodies of water, though having defined channels, will be deemed percolating waters if their existence and location are unknown and not reasonably ascertainable. *Id.*; 80 Miss. 535. Hence, in order to prevent the classification of underground waters as percolating waters, they must be known or easily ascertainable and discoverable from the surface of the ground without subsurface explorations, (L. R. 9 Ir. 172), and underground waters are presumed to be percolating waters until it is shown that they flow in a well-known and defined channel. *Id.*; L. R. 17 Ir. 459. After percolating waters have reached the waters of a water-course they lose their character as percolating waters. *Id.*; 37 Oregon 256.

Underground Watercourses: Subterranean watercourses which flow in known and defined channels are governed by the same rules, with regard to their diversion and the correlative rights of the landowners through whose land they run, as are applied to surface watercourses. *Id.*; 6 Exch. 353. In order, however, that the rules applicable to surface watercourses shall be applied to subterranean streams, the channels of such streams must be known and defined, otherwise they will be considered as percolating waters and will be governed by the rules applicable to the latter class of waters. *Id.*; 7 H. L. Cas. 349.

Surface Waters: Waters on the surface of the ground which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence, and which are lost by being diffused over the surface of the ground, through percolation into the soil and by evaporation. *Id.*; L. R. 6 Ch. 486; 108 Ind. 13 *et al.* They are to be distinguished from watercourses, to wit, streams usually flowing in definite channels, and from lakes and ponds, to wit, bodies of water confined in depressions of the earth and having a substantial as distinguished from a vagrant existence. Thus, waters from rain or melting snow, having no banks or channel in the flow in a known direction or course (21 Iowa 166), as in the case of valleys and depressions accustomed to find their way. *Id.*; 86 N. Y. 140. Whether water is or is not surface water must be determined from the peculiar facts in the case in which the question is presented. *Id.*; 53 Neb. 237. After waters which in their first instance were surface waters have reached and become a part of a watercourse, or a permanent lake or pond, they lose their character as surface

waters. *Id.*; 11 Exch. 602. See WATER-COURSE.

WAVESON. Such goods as appear upon the waves after shipwreck. Jacob, Law Dict.

WAY. A passage, street, or road.

A right of way is the privilege which an individual, or a particular description of individuals, as, the inhabitants of a village or the owners or occupiers of certain farms, have of going over another's ground. It is an incorporeal hereditament of a real nature, entirely different from a common highway. Cruise, Dig. tit. xxiv. s. 1.

A right to pass over another's land more or less frequently according to the nature of the use to be made of the easement, and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. 105 Mass. 819.

A right of way may arise: *By prescription* and immemorial usage, or by an uninterrupted enjoyment for twenty years under a claim of right; Co. Litt. 118; 4 Gray 177, 547; 20 Pa. 331, 458; 4 Mas. 402; 24 N. H. 440; 130 Ind. 31; 75 Fed. Rep. 520; 86 Hun 384; 93 Ga. 300. *By grant*; as, where the owner grants to another the liberty of passing over his land; 1 Ld. Raym. 75; 19 Pick. 250; 7 B. & C. 257. (See 93 Mich. 599.) If the grant be of a freehold right it must be by deed; 5 B. & C. 221; 4 R. 1. 47. *By necessity*; as, where a man purchases land accessible only over land of the vendor, or sells, reserving land accessible only over land of the vendee, he shall have a way of necessity over the land which gives access to his purchase or reservation; 5 Taunt. 311; 23 Pa. 338; 2 Mass. 203; 11 Mo. 513; 29 Me. 499; 27 N. H. 448; 19 Wend. 507; 15 Conn. 89; 126 Mass. 445; 55 Cal. 350; 102 Cal. 362; 40 Kan. 203; 85 Cal. 131; and this may exist even after the vendor has conveyed his land to a third person; 123 Ind. 372; but a way of necessity is not created by the fact that a road over grantor's land would be of less distance to a highway than a road already established; 116 Mo. 379. The necessity must be absolute, not a mere convenience; 2 McCord 445; 24 Pick. 102; 69 Me. 333; 91 id. 227; 107 N. C. 63; 98 Mass. 50; 126 id. 445; 11 Ch. Div. 968; 2 Allen 543; L. R. 9 Ch. 111; *contra*, 7 Barb. 309; and when it ceases the way ceases with it; 18 Conn. 321; 1 Barb. Ch. 553. *By implication*; 90 Tenn. 556. *By reservation* expressly made in the grant of the land over which it is claimed; 10 Mass. 183; 25 Conn. 331. *By custom*; as where navigators have a right of this nature to tow along the banks of navigable rivers with horses; 3 Term 253. *By acts of legislature*; though a private way cannot be so laid out without the consent of the owner of the land over which it is to pass; 15 Conn. 39, 88; 4 Hill 47, 140; 4 B. Monr. 57.

A right of way may be either a right in gross, which is a purely personal right incommunicable to another, or a right appurtenant or annexed to an estate, and which may pass by assignment with the estate to which it is appurtenant; 3 Kent 420; 1 Watts 85; 19 Pick. 250. A right of way appurtenant to land is appurtenant to all and every part of the land, and if such land be divided and conveyed in separate parcels, a right of way thereby passes to each of the grantees; 1 Cush. 285; 1 S. & R. 229. A way is never presumed to be in gross when it can be construed to be appurtenant to land; 82 Va. 462; 1 Wood, Ry. Law 697. Where a way appurtenant to land granted is not located by the grant, the parties may locate it by parol agreement at any point on the premises over which the right is granted; 65 Vt. 333.

Ways may be abandoned by agreement, by evident intention, or by long non-user. Twenty years' occupation of land adverse to a right of way and inconsistent therewith bars the right; 2 Whart. 123; 16 Barb. 184; 5 Gray 409. Where a way of necessity once existed it will be presumed to exist until some fact is shown establishing non-existence; 102 Cal. 362.

Ways may be assigned, except when they

are in gross, which is a mere personal right, and cannot be granted to another; 19 Ill. 553.

A person cannot acquire a prescriptive right of way over his own lands, or the lands of another which he occupies as tenant; 116 Mo. 379; and where one has uninterruptedly used a way over another's land for the necessary length of time to establish an easement by adverse user, it will be presumed that the user was adverse, and under claim of title, and the burden is on one claiming that it was by virtue of a license to prove that fact; 63 Hun 269.

The owner of a right of way may disturb the soil to pave and repair it. But a way granted for one purpose cannot be used for another; 10 Gray 61; 11 id. 150.

A person having a right of way which is obstructed by a house erected upon the way may, after notice and request to remove it, pull it down, although it is actually inhabited; [1891] 3 Ch. 411.

Lord Coke, adopting the civil law, says there are three kinds of ways: a footway, called *iter*; a footway and horseway, called *actus*; a cartway, which contains the other two, called *via*; Co. Litt. 56 a. To which may be added a *driftway*, a road over which cattle are driven; 1 Taunt. 279.

See 3 Kent 419; Washb.; Jones, Easem.; Crabb, R. P.; Cruise, Dig.; HIGHWAY; STREET; EASEMENT; THOROUGHFARE.

WAY-BILL. A writing in which are set down the names of passengers who are carried in a public conveyance, or the description of goods sent with a common carrier by land.

WAY-GOING CROP, In Pennsylvania. By the custom of the country, a tenant for a term certain is entitled, after the expiration of his lease, to enter and take away the crop of grain which he had put into the ground the preceding fall. This is called the *way-going crop*; 5 Binn. 289; 2 S. & R. 14; 1 Pa. 224. See AWAY-GOING CROP; EMBLEMENTS.

WAYS AND MEANS. In legislative assemblies, there is usually appointed a committee whose duties are to inquire into and propose to the house the ways and means to be adopted to raise funds for the use of the government. This body is called the committee of ways and means.

WEAPON. An instrument of offensive or defensive combat. Statutes have been passed in many of the states prohibiting the carrying of concealed weapons. They are merely police regulations; 13 La. Ann. 399. To constitute the offence locomotion is not necessary, the possession is sufficient; 31 Ala. 387; even if the weapon is not in perfect order and ready for use; 53 id. 508; 6 Blackf. 31; 45 Miss 658. Persons on their own premises; 45 Ark. 536; or on a journey (see TRAVELLER); or having good reasons to fear bodily harm; 89 Ala. 61; are exempted from the operation of such statutes; as are officers of the law; 18 Tex. App. 57. See ARMS; CONCEALED WEAPONS.

The ordinary implements of war are lawful: swords, fire-arms, and cannon, and even those which are secret or concealed, such as pits and mines. But this does not include poisoned weapons of any kind. Great Britain, France, Prussia, Russia, and other nations united in a declaration at St. Petersburg in 1868, by which they agreed to renounce, in case of war among themselves, the employment of any projectile of a weight less than 400 grammes, charged with fulminating or inflammable substances. 1 Halleck, Int. L., Baker's ed. 563.

WEAR, WEIR. A dam made across a river accommodated for the taking of fish or to convey a stream to a mill. Jacob. See DAM.

WEAR AND TEAR. Destruction to some extent, e. g. destruction of surface by ordinary friction, but the words do not include total destruction by a catastrophe which was never contemplated by either party. 5 C. P. Div. 507.

Natural and reasonable wear and tear covers only such decay or depreciation in value of the property as may arise from ordinary and reasonable use; and injury by a freshet is not within the exception; 20 N. J. L. 547.

WEARING APPAREL. As generally used in statutes, refers not merely to a person's outer clothing, but covers all articles usually worn, and includes underclothing. 147 U. S. 494. It may include a gold watch; 2 Flipp. 325; 12 Cr. 481; but see 16 Ga. 479; 33 Me. 535; but not a travelling trunk or a breastpin; 32 N. H. 345; and under the revenue laws shoes are not included; 37 Fed. Rep. 782. See BAGGAGE.

WEATHER BUREAU. Predictions of the weather bureau are not to be given the character of established facts, the failure to observe which shall constitute negligence in any of the business relations of life. The science of forecasting the weather has not reached the degree of exactness which will justify the court in saying that men in their every day avocations are bound to take notice of and be guided by its local forecasts, and that it is negligence not to observe them. The case is different where storms are of great violence and extent such as frequently occur on our Atlantic coast, and where information of their existence, course, and the probable time at which they will reach designated points is given by telegraphic communication and by storm signals. 104 Fed. 903.

WED. A covenant or agreement: thus, a wedded husband.

WEEDS. Weed is defined as "any one of those herbaceous plants which are useless and without special beauty, or especially which are positively troublesome. The application of this general term is somewhat relative. Handsome but pernicious plants, as the ox-eye daisy, corn flower, and the purple cow-wheat of Europe, are weeds to the agriculturist, flowers to the aesthetic. There are also plants that are cultivated for use or beauty, as grasses, hemp, carrot, parsnip, morning-glory, which become weeds when they spring up where they are not wanted. The exotics of cool countries are sometimes weeds in the tropics. 30 Am. & Eng. Encyc. 2nd ed., 446; 179 Mo. 13, quoting Cent. Dict. In this case a city ordinance prohibited lot owners from allowing weeds on their lots to the height of over one foot, and defined weed as follows: "The word weeds, as used herein shall be held up to include all rank vegetable growth which exhale unpleasant and noxious odors, and also high and rank vegetable growth that may conceal filthy deposits." It was held that weeds in this sense meant weeds as they were commonly known to mankind and to lexicographers. *Id.*; *ibid.*

WEEK. Seven days of time. The week commences immediately after twelve o'clock on the night between Saturday and Sunday, and ends at twelve o'clock, seven days of twenty-four hours each, thereafter. See 4 Pet. 361; 24 L. J. Ch. 368; or it may mean a period of time of seven days duration without reference to when that period commences; 5 Nev. 430.

The first publication of a notice of a sale, under a power contained in a mortgage, which requires the notice to be published "once each week for three successive weeks," need not be made three weeks before the time appointed for the sale; 117 Mass. 480. See 4 Pet. 361; TIME.

WEEKLY PAYMENT LAWS. See LIBERTY OF CONTRACT.

WEIGHAGE. In English Law. A duty or toll paid for weighing merchandise: it is called *tronage* for weighing wool at the king's beam, or *pesage* for weighing other avoirdupois goods. 2 Chitty, Com. Law 16.

WEIGHT. A quality in natural bodies

by which they tend towards the centre of the earth.

Under the police power, weights and measures may be established and dealers compelled to conform to the fixed standards under a penalty; Cooley, Const. Lim. 749.

Under the article *Measure*, it is said that by the constitution congress possesses the power "to fix the standard of weights and measures," and that this power has not been exercised.

The weights now generally used in the United States are the same as those of England; they are of two kinds.

AVOIRDUPOIS WEIGHT.

First, used in almost all commercial transactions, and in the common dealings of life.

60 grains = 1 dram.
8 drams = 1 ounce.
16 ounces = 1 pound (lb.).
25 or 28 pounds = 1 quarter (qr.).
4 quarters = 1 hundredweight (cwt.).
20 hundredweight = 1 ton.

Second, used for meat and fish.

8 pounds = 1 stone.

Third, used in the wood-trade.

7 pounds = 1 clove.	Cwt. gr. lb.
14 pounds = 1 stone.	= 0 0 14
3 stones = 1 tod.	= 0 1 0
64 tods = 1 wey.	= 1 2 14
2 weys = 1 sack.	= 3 1 0
12 sacks = 1 last.	= 39 0 0

Fourth, used for butter and cheese.

8 pounds = 1 clove.
56 pounds = 1 firkin.

TROY WEIGHT.

24 grains = 1 pennyweight.
20 pennyweights = 1 ounce.
12 ounces = 1 pound.

These are the denominations of troy weight when used for weighing gold, silver, and precious stones, except diamonds. Troy weight is also used by apothecaries in compounding medicines; but by them the ounce is divided into eight drams, and the dram into three scruples, so that the latter is equal to twenty grains. For scientific purposes (when the metric system is not employed, as it now usually is), the grain only is used, and sets of weights are used constructed in decimal progression from 10,000 grains downward to one-hundredth of a grain. The carat used for weighing diamonds is three and one-sixth grains. See *GRAMME*.

A short account of the French weights and measures is given under the article *MEASURE*.

WEIGHT OF EVIDENCE. This phrase is used to signify that the proof on one side of a cause is greater than on the other.

When a verdict has been rendered against the weight of the evidence, the court may, on this ground, grant a new trial; but the court will exercise this power not merely with a cautious but a strict and sure judgment, before they send the case to a second jury.

The general rule, under such circumstances, is that the verdict once found shall stand: the setting aside is the exception, and ought to be an exception of rare and almost singular occurrence. A new trial will be granted on this ground for either party: the evidence, however, is not to be weighed in golden scales; 2 Bingham, N. C. 109; 3 Me. 276; 8 Pick. 122; 5 Wend. 595. See *NEW TRIAL*.

WELL. A hole dug in the earth in order to obtain water.

In a deed, well designates the portion of land under and occupied by the excavation, and its surrounding retaining walls, and by any structures or appliances built upon the land to facilitate its use, and also the

water actually at any time in the excavation; 157 Mass. 431.

The owner of the estate has a right to dig in his own ground at such a distance as is permitted by law from his neighbor's land; he is not restricted as to the size or depth, and is not liable to any action for rendering the well of his neighbor useless by so doing. See 74 Me. 170; 69 Ga. 290; *SUBTERRANEAN WATERS*.

WELL KNOWING. In Pleading. Words used in a declaration when the plaintiff sues for an injury which is not immediate and with force, and the act or nonfeasance complained of was not *prima facie* actionable. Not only the injury, but the circumstances under which it was committed, ought to be stated: as, where the injury was done by an animal. In such case the plaintiff, after stating the injury, continues, the defendant, *well knowing* the mischievous propensity of his dog, permitted him to go at large. See *SCIENTER*.

WELSH MORTGAGE. In English Law. A species of security which partakes of the nature of a mortgage, as there is a debt due, and an estate is given as security for the repayment, but differs from it in the circumstances that the rents and profits are to be received without account till the principal money is paid off, and there is no remedy to enforce payment, while the mortgagor has a perpetual power of redemption. It is now rarely used.

It is a species of *vivum vadium*. Strictly, however, there is this distinction between a Welsh mortgage and a *vivum vadium*: in the latter the rents and profits of the estate are applied to the discharge of the principal after paying the interest; while in the former the rents and profits are received in satisfaction of his interest only; 1 Powell, Mortg. 373 a; Jones, Mtg. 1153. See *MORTGAGE*.

WELSHING. One who receives a sum of money or valuable thing, undertaking to return the same or the value thereof together with other money, if an event (for example, the result of a horse-race) shall be determined in a certain manner and at the time of receiving the deposit intends to cheat and defraud the depositor. Coldr. & Hawks. Gambling 393. The crime is larceny at common law.

WELSHING. See *WELSER*.

WEOTUMA. In the primitive form of marriage among the Anglo-Saxons, weotuma was the name of the price given by the bridegroom to the parents or guardians of the bride for the transfer of the rights of protection (or "mund") of the bride to the bridegroom. 2 Holdsworth, Hist. E. L. 3rd ed., 88. See *MORNING GIFT*.

WERE. The name of a fine among the Saxons imposed upon a murderer.

The life of every man, not excepting that of the king himself, was estimated at a certain price, which was called the *were* or *estimatio capitis*. The amount varied according to the dignity of the person murdered. The price of wounds was also varied according to the nature of the wound, or the member injured.

WERGILD, WEREGLD. In Old English Law. The price which, in a barbarous age, a person guilty of homicide or other enormous offence was required to pay, instead of receiving other punishment. 4 Bla. Com. 188.

See, for the etymology of this word, and a tariff which was paid for the murder of the different classes of men, Guizot, *Essais sur l'Histoire de France, Essai 1^{er}ème*, c. 2, § 2.

WEST SAXON LAGE. The law of the West Saxons, which was observed in the counties in the south and west of England, from Kent to Devonshire, in the beginning of the eleventh century; supposed by Blackstone to have been much the same as the laws of Alfred. 1 Bla. Com. 65.

WEST VIRGINIA. The name of one of the United States of America.

This state was formed in 1861 of the western counties of Virginia, owing to their non-concurrence in

the ordinance of secession passed by the legislature of that state. A constitution was framed by a convention which met at Wheeling on November 20, 1861. This was submitted to the people on April 3, 1862, and ratified almost unanimously. The consent of the body, recognized by the federal government as the legislature of Virginia, was given, and congress then passed an act approved December 31, 1862, providing for the admission of the new state into the Union upon condition of the adoption of an amendment to the constitution providing for emancipation of slaves. This was done, and the state was admitted to the Union. The first constitution remained in force until 1872, when the present constitution was framed by a convention which met on January 16, 1872, and completed its labors on April 9 of that year. It was submitted to the people and ratified by them on August 22, 1872.

WESTERN RESERVE. See *OHIO*.

WESTMINSTER THE FIRST, STATUTE OF. This is the name of the fifty-one chapters (each corresponding to what is now called an Act of Parliament) passed in 1275. Byrne.

WESTMINSTER 2nd, STATUTE OF. A statute of 13 Edw. I. c. 24 (1283), under which it was provided that where in one case a writ was found and in a like case no writ was to be found, the clerks of the chancery should agree in making a writ, or adjourn the complaint until the next parliament and refer to it the cases in which they could not agree; Steph. Pl. *7. See *CONSIMILI CASU*.

WETHER. A castrated ram, at least one year old: in an indictment it may be called a sheep. 4 C. & P. 216.

WHALE. A vessel employed in the whale fishery.

It is usual for the owner of the vessel, the captain, and crew, to divide the profits in just proportions, under an agreement similar to the contract *Di Colona*, which see.

WHARF. A space of ground artificially prepared for the reception of merchandise from a ship or vessel, so as to promote the convenient loading and discharge of such vessel.

A wharf occupied by a ferry company, to which access can only be had through a gate controlled by the ferry company, or over private property of another, is a private wharf; 78 Hun 166; but a public quay in a city, dedicated to public use, does not cease to be *locus publicus* and become private property because it is leased by the public authorities for a purpose subservient to the public use; 140 U. S. 654.

At common law, the soil of all tide-waters below high-water mark being vested in the crown, the erection of a wharf thereon without the consent of the crown is an encroachment upon the royal domain of that kind which has been denominated a *purpresture*, and, as such, may be either abated, or, if more beneficial to the crown, the party arrested, unless it be a public nuisance; 10 Price 350, 378; 18 Ves. 214; 2 Story, Eq. Jur. § 920. But if it obstruct navigation to such a degree as to be a public nuisance, neither the crown nor its grantee has authority to erect or maintain it without the sanction of an act of parliament; 8 Ad. & E. 336; 5 M. & W. 327; Phear, Rights of Water 54. It is not every wharf erected in navigable water which is a nuisance, for it may be a benefit rather than an injury to the navigation; and it is for the jury to determine, in each particular case, whether such a wharf is a nuisance or not; 1 C. & M. 496; 4 Ad. & E. 384; 6 id. 143; 15 Q. B. 276.

A riparian owner has, at common law, a qualified interest in the water frontage belonging by nature to his land, and the right to construct thereon wharves, piers, or landings; 107 N. C. 139. But this certainly can only be by consent of the authorities, and so as not to interrupt navigation unduly.

In this country, the several states, being the owners of the soil of the tide waters within their respective territories, may by law authorize and regulate the erection of wharves thereon, at least until the general government shall have legislated upon the subject; 4 Ga. 26; 7 Cush. 58; 2 H. &

M.H. 244; 11 Gill & J. 351; and may grant to a municipal corporation the exclusive right to make and control wharves on the banks of a navigable river; 95 U. S. 80. The riparian proprietor is entitled to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe; 146 U. S. 445; 10 Wall. 504. In Massachusetts and Maine, by a colonial ordinance, the provisions of which are still recognized as the law of those states, the property of the shores and flats between high and low water mark, for one hundred rods, subject to the rights of the public, was transferred to the owners of the upland, who may, therefore, wharf out to that distance, if by so doing they do not unreasonably interrupt navigation; 1 Cush. 313, 395; 36 Me. 16; 42 *id.* 9. If without legislative sanction they extend a wharf beyond that distance, such extension is *prima facie* a nuisance, and will be abated as such, unless it can be shown that it is no material detriment to navigation; 20 Pick. 186; 10 R. I. 477. In Connecticut, and probably in other states, by the law of the state founded upon immemorial usage, the proprietor of the upland has the right to wharf out to the channel,—subject to the rights of the public; 9 Conn. 38; 25 *id.* 345; 16 Pet. 369; 1 Dutch. 525; 6 Ind. 223; 62 Conn. 132; 23 Minn. 18; 55 Fed. Rep. 854. In Pennsylvania, the riparian proprietor is held to be the owner of the soil between high and low water mark, and to be entitled to erect wharves thereon; 1 Whart. 131; 2 *id.* 589; but not without express authority from the state; 61 Pa. 21. In the same state it has been held that wharves are not the private property of him who erects them, and persons who go upon and fasten vessels to them are not trespassers; 39 Leg. Int. 32; and that in an action for the use and occupation of a wharf, a contract express or implied must be proved; 28 Am. L. Reg. 145.

The owner of a wharf is liable for damages caused to a vessel by concealed obstructions which he might have ascertained by reasonable diligence; 37 Fed. Rep. 160; see 36 *id.* 927; and such claims are within the jurisdiction of admiralty; and a libel *in personam* will lie; 45 Fed. Rep. 588. The wharfinger was also held liable for damages to vessels caused by the insufficiency of the wharf; 79 Fed. Rep. 118.

Owners of land abutting on a lake, the title to which is in the state, have the right to build wharves in aid of navigation, but not obstructing it, far enough to reach water navigable for such boats as are in use; 40 L. R. A. (Wis.) 635. See an extended note to this case on the right of the riparian owner to erect wharves, where the English and American cases are collected and classified.

See, generally, 2 Sandf. 258; 3 How. 212; 1 Gill & J. 249; 11 *id.* 351; 8 Term 606; RIPARIAN PROPRIETORS; WATER-COURSE; RIVERS.

WHARFAGE. The money paid for landing goods upon, or loading them from, a wharf. Dane, Abr. Index; 4 Cal. 41.

Wharfingers in London are not entitled to wharfage for goods unloaded into lighters out of barges fastened to their wharves; 3 Burr. 1409; 1 W. Bla. 243. And see 5 Sandf. 48. It has been held that, owing to the interest which the public have in the matter, rates of wharfage may be regulated by statute; 11 Ala. N. S. 586. And see 5 Hill 71; 2 Rich. 370; 8 B. & C. 42; 2 Mann. & R. 107.

Claims for wharfage are cognizable in admiralty, and, if the vessel is a foreign one or from another state, the claim of the wharfinger is a maritime lien against the vessel, which may be enforced by a proceeding *in rem*, or by a libel *in personam* against the owner of such vessel; 95 U. S. 18; 56 Fed. Rep. 609. A state statute conferring a remedy for such claims by proceedings *in rem* is void; 43 N. Y. 554. But as to domestic vessels, the lien of the wharfinger is only enforceable as a common-law lien; 1 Newb. 553; 9 Phila. 364. See

60 Fed. Rep. 766. In the absence of any agreement between the parties, reasonable wharfage will be allowed; 95 U. S. 68. A lease giving the lessee "the sole and exclusive right to use the public wharf for his ferry boat," does not authorize the collection of toll for wharfage; 1 Newb. 541. A municipal corporation cannot exact a charge upon vessels for entering or leaving a port or remaining therein and using the wharves or landings, for the general revenue of such corporation; 20 Wall. 577; 95 U. S. 80; but it may collect from parties using its wharves, such reasonable fee as will fairly remunerate it for the use of its property; 100 U. S. 423; *id.* 430; 95 *id.* 80; 40 Fed. Rep. 392. That such fees are regulated by the tonnage of the vessel will not constitute them a tonnage tax under the constitution, art. 1, paragraph 3, § 10; 20 Gratt. 419. See 9 Fed. Rep. 679; 25 Alb. L. J. 254. A ship compelled by stress of weather to moor to a wharf for safety, is not liable to a charge for wharfage, where the wharf is a private one, and no fixed rate of charge is in use; 42 Fed. Rep. 173. Vessels which have made use of a wharf, whether under express or implied contract, are not entitled to refuse payment of wharfage on the ground that the wharfinger is not the legal owner of the property; 59 Fed. Rep. 628.

WHARFINGER. One who owns or keeps a wharf for the purpose of receiving and shipping merchandise to or from it for hire.

A wharfinger stands in the situation of an ordinary bailee for hire, and therefore, like a warehouseman, he is responsible for ordinary neglect, and is required to take ordinary care of the goods intrusted to him as such; 2 Barb. 328; 4 Ind. 368; 10 Vt. 56; 4 Term 581. The wharfinger is not an insurer of the safety of his dock, but he must use reasonable care to keep it in safe condition, for vessels which he invites to enter it; 127 Mass. 236; 7 Blatch. 290; 15 Wall. 649; Poll. Torts 483; [1891] A. C. 11. He is not, like an innkeeper or carrier, to be considered an insurer unless he superadd the character of carrier to that of wharfinger; 5 Burr. 2825; 13 Johns. 232; 7 Cow. 497; 5 Mo. 97. The responsibility of a wharfinger begins when he acquires and ends when he ceases to have the custody of the goods in that capacity.

When he begins and ceases to have such custody depends, generally, upon the usages of trade and of the business. When goods are delivered at a wharf, and the wharfinger has agreed, expressly or by implication, to take the custody of them, his responsibility commences; but a mere delivery at the wharf, without such assent, does not make him liable; 3 Camp. 414; 6 Cow. 757; 10 Vt. 56; 14 M. & W. 28. When goods are in the wharfinger's possession to be sent on board of a vessel for a voyage, as soon as he delivers the possession and the care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usages of trade, deemed exonerated from any further responsibility; 1 M. & W. 174; 1 Gale 420; 99 Mass. 220. The wharfinger does not, however, discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board of it; 1 C. & P. 638. And see 2 C. & M. 531; 7 Scott 876; 4 Q. B. 511.

A wharfinger has a general lien upon all goods in his possession for the balance of his account; 4 B. & Ald. 50; 12 Ad. & E. 639; 7 B. & C. 212; 95 U. S. 68; and in respect to the right of lien there is no distinction between the wharfinger and the warehouseman; 23 Am. L. E. Eq. 465, 468. A wharfinger has equally a lien on a vessel for wharfage; Ware 354; Gilp. 101. See WHARFAGE.

WHEEL. The punishment of the wheel was formerly to put a criminal on a wheel, and then to break his bones until he expired. This barbarous punishment was never used in the United States; and

it has been abolished in every civilized country.

WHELPS. The young of certain animals of a base nature or *feræ naturæ*.

It is a rule that when no larceny can be committed of any creatures of a base nature which are *feræ naturæ*, though tame and reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den; Co. 3d Inst. 109; 1 Russ. Cr. 153.

The owner of the land is, however, considered to have a qualified property in such animals, *ratione impotentia*; 2 Bla. Com. 394.

WHEN. At which time. At that time. 90 Mo. 646.

In wills, standing by itself unqualified and unexplained, this is a word of condition denoting the time at which the gift is to commence; 6 Ves. Jr. 243; 10 Co. 50; 16 C. B. 59.

The content of a will may show that the word is to be applied to the possession only, not to the vesting of a legacy; but to justify this construction there must be circumstances, or other expressions in the will, showing such to have been the testator's intent; 7 Ves. 422; 3 Bro. C. C. 471. See 2 Jar. Wills 417. See DEVISE; TIME.

WHEN AND WHERE. Technical words in pleading, formerly necessary in making full defence to certain actions. See 1 Chit. Pl. *445; DEFENCE.

WHENEVER. Though often used as equivalent to "as soon as," is also often used where the time intended by it is, and will be, until its arrival, or for some uncertain period at least, indeterminate. 14 R. I. 188.

WHEREAS. This word implies a recital, and, in general, cannot be used in the direct and positive averment of a fact in a declaration or plea. Those facts which are directly denied by the terms of the general issue, or which may, by the established usage of pleading, be specially traversed, must be averred in positive and direct terms; but facts, however material, which are not directly denied by the terms of the general issue, though liable to be contested under it, and which, according to the usage of pleading, cannot be specially traversed, may be alleged in the declaration by way of recital, under a whereas; 2 Chitty, Pl. 151, 178, 191.

WHEREUPON. Sequence; succession; order of action; relation. A thing done with reference to something previously done. It is interchangeable with the words upon which, and after which. 1 Wyo. 419.

WHIPPING. The infliction of stripes. This mode of punishment, which is still practised in several states, has yielded in most of the states to the penitentiary system. It is still used in Maryland for wife-beating, and in Delaware for all felonies (but not for women).

Whipping has been held to be punishment worse than death; 7 Tex. 69; but see 2 Rich. 418. It is not a "cruel or unusual punishment"; 59 Md. 264.

The punishment of whipping, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 28, 1830, s. 5. See CORRECTION; SEAMEN.

This punishment has never been altogether abolished in England. At common law it was inflicted on inferior persons for petty larceny, etc.; but by the usage of the star chamber, never on a gentleman. By 1 Geo. IV. c. 57, it was abolished as to women. By 5 & 6 Vict. striking or firing at the queen is punishable with whipping thrice or fewer times. The Criminal Law Consolidation Acts of 1861 authorize the whipping of males below 16 who have been convicted of sending letters threatening to kill; placing explosives near a house, ship, etc.; defiling a girl under 13 years of age; robbing with violence (not over twenty-five stripes); but it must be done in private and only once, and the court

must specify the number of strokes and the instrument. By 25 Vict. c. 18, for boys under 14, the number of stripes shall not exceed twelve with a birch rod. For the offences of robbery accompanied with personal violence, and of attempting by any means to strangle or to render insensible any one with intent to enable himself or others to commit an indictable offence, in addition to imprisonment, the 24 & 25 Vict. c. 100, and 26 & 27 Vict. c. 96, direct that the offender, if a man, be once, twice, or thrice privately whipped. See *Whart. Lex.*

It is forbidden by the constitution of South Carolina and Georgia, except that in Georgia convicts can be so punished. It is in use in some penal institutions as a means of discipline. The latter subject has of late years been examined by a commission in connection with the Elmira Reformatory.

WHISKEY. Within the purview of the Food and Drugs Act June 30, 1906 it means the product of sound grain, distilled at a low temperature so as to retain in the distillate the congenic properties of the grain, which give to the liquor, when matured by aging in charred casks, its desirable potable character.

Neutral spirits, which are distilled at a high temperature, may be made from different materials and do not contain such properties, and which are not rendered potable by aging, although reduced by water to potable strength and from which most of the fusil oil has been removed, are not whiskey nor a like substance with whiskey. 170 Fed. 662-3.

A spirit distilled from corn. 30 Am. & Eng. Encyc. 2d ed., 516; 21 Mo. 498. It was held that whiskey is a spirituous liquor distilled from corn and vegetables, and is highly intoxicating. *Id.*; 49 S. W. Rep. 385. The selling of a compound in which whiskey is the predominant ingredient was held to be selling whiskey. *Id.*; 23 Tex. App. 398.

See **BRANDY; INTOXICATING LIQUOR; LIQUOR LAWS.**

WHITE BONNET. In Scotch Law. A fictitious bidder at an auction. Where there is no upset price, and the auction is not stated to be without reserve, there is no authority for saying that employment of such person is illegal. *Burton, Law of Scotl.* 362.

WHITE CAP. One of a band of men who secretly commit lawless acts under the pretense of regulating the morals of a community. *English.*

WHITE DAMP. See **BLACK DAMP.**

WHITE PERSON. As used in the naturalization laws, a person of the Caucasian race. 5 Sawy. 155. It does not include a Mongolian; *id.*; it includes a person nearer white than black or red; 11 Ohio 375. In the legislation of the slave period it referred to a person without admixture of colored blood, whatever the actual complexion might be; 39 Ark. 192. The words white and colored as used in the statutes providing for the maintenance of schools are held to be used in the ordinary acceptance; 9 Ohio St. 407.

"Free white persons," as used in section 2169 Rev. Stat. are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. 261 U. S. 214; 260 U. S. 178.

WHITE RENTS. In English Law. Rents paid in silver, and called *white rents*, or *redditus albi*, to distinguish them from other rents which were not paid in money. Co. 2d Inst. 19. See **ALBA FIRMA.**

WHITE SLAVERY. Systematic enticement to and the enslavement in prostitution and debauchery of women, and more insistently of girls. 227 U. S. 308.

WHITEFRIARS. See **PRIVILEGED PLACES.**

WHOLE BLOOD. Being related by both the father and mother's side; this phrase is used in contradistinction to *half blood*, which is relation only on one side. See **BLOOD.**

WHOLESALE. To sell by wholesale is to sell by large parcels, generally in original packages, and not by retail.

WHOLESALE PRICE. The price fixed on merchandise by one who buys in large quantities of the producer or manufacturer, and who sells the same to jobbers or to retail dealers therein. 88 Ia. 169.

WIDOW. An unmarried woman whose husband is dead.

In legal writings, widow is an addition given to a woman who is unmarried and whose husband is dead. A widow who has married again cannot be a widow; 20 Q. B. D. 103. A woman surviving a man to whom she has been married, but with regard to whom she had obtained a declaration of nullity of marriage, is not a widow; 53 L. J. Ch. 239. The addition of spinster is given to a woman who never was married. *Lovelace, Wills* 209. See **ADDITION.** As to the rights of a widow, see **DOWER; QUARANTINE.**

WIDOW'S BENCH. The share of her husband's estate which a widow is allowed besides her jointure. *Whart. Lex.*

WIDOW'S CHAMBER. In London, the apparel of a widow and the furniture of her chamber, left by her deceased husband, is so called, and the widow is entitled to it. 2 Bla. Com. 518.

WIDOWER. A man whose wife is dead. A widower has a right to administer to his wife's separate estate, and, as her administrator, to collect debts due to her, generally, at common law, for his own use.

WIDOWHOOD. The state of a man whose wife is dead, or of a woman whose husband is dead. In general, there is no law to regulate the time during which a man must remain a widower, or a woman a widow, before they marry a second time. The term widowhood is mostly applied to the state or condition of a widow.

WIFE. A woman united to a man by marriage. See **MARRIED WOMAN; HUSBAND AND WIFE.**

WIFE'S EQUITY. The equitable right of a wife to have settled upon her and her children a suitable provision out of her estate whenever the husband cannot obtain it without the aid of a court of equity. *Shelf, Marr. & D.* 605.

By the marriage the husband acquires an interest in the property of his wife, in consideration of the obligation which he contracts by the marriage of maintaining her and their children. The common law enforces this duty thus voluntarily assumed by him, by an action, and, therefore, allows him to alien the property to which he is thus entitled *jure mariti*, or in case of his bankruptcy or insolvency it would vest in his assignee for the benefit of his creditors, and the wife would be left, with her children, entirely destitute, notwithstanding her fortune may have been great. To remedy this evil, courts of equity, in certain cases, give a provision to the wife, which is called the wife's equity.

The principle upon which courts of equity act is, that he who seeks the aid of equity must do equity; and that will be withheld until an adequate settlement has been made; 1 P. Wms. 459. See 5 My. & C. 105.

Where the property is equitable and not recoverable at law, it cannot be obtained without making a settlement upon a wife and children, if one be required by her; 2 P. Wms. 639; and where, though the property be legal in its nature, it becomes from collateral circumstances the subject of a suit in equity, the wife's right to a settlement will attach; 5 My. & C. 97. See 5 Madd. 149; 13 Me. 124; 9 Watts 90; 5

Johns. Ch. 464; 2 Bland, Ch. 545.

The wife's equity to a settlement is binding not only upon the husband, but upon his assignee, under the bankrupt or insolvent laws; 3 Ves. 607; 6 *Johns. Ch.* 25; 4 *Metc.* 486; 4 *Gill & J.* 283; 5 T. B. Monr. 338; 10 Ala. n. s. 401; 1 Ga. 637. And even where the husband assigned the wife's equitable right for a valuable consideration, the assignee was considered liable; 4 Ves. 19. When the property of the husband is settled upon his wife and children, the settlement will be valid against subsequent creditors if at the time of the settlement being made he was not indebted; 8 *Wheat.* 229; 4 *Mas.* 443; 21 N. H. 34; 28 *Miss.* 717; 25 *Conn.* 154; but if he was then indebted it will be void as to the creditors existing at the time of the settlement; 3 *Johns. Ch.* 481; 5 *Md.* 68; 13 B. Monr. 496; 8 *Wheat.* 229; unless in cases where the husband received a fair consideration in value for the thing settled, so as to repel the presumption of fraud; 10 *Ves.* 139; 6 *Ind.* 121; 28 Ala. n. s. 432; 7 *Pick.* 533.

As to the amount of the rights of the wife, the general rule is that one-half of the wife's property shall be settled upon her; 2 *Atk.* 423; 3 *Ves. Ch.* 166. But it is in the discretion of the court to give her an adequate settlement for herself and children; 5 *Johns. Ch.* 464; 6 *Id.* 25; 3 *Cow.* 591; 1 *Des. Eq.* 263; 2 *Bland, Ch.* 546; 1 *Cox N. J.* 153; 5 B. Monr. 81; 3 Ga. 193; 9 S. & S. 597.

Whenever the wife insists upon her equity, the right will be extended to her children; but the right is strictly personal to the wife, and her children cannot insist upon it after her death; 2 *Ed. Ch.* 337; 1 *J. & W.* 472; 1 *Madd.* 467; 11 *Bligh N. S.* 104; 2 *Johns. Ch.* 206; 3 *Cow.* 591; 10 Ala. n. s. 401.

The wife's equity will be barred by an adequate settlement having been made upon her; 2 *Ves. Ch.* 675; by living in adultery apart from her husband; 4 *Ves. Ch.* 146; but a female ward of court, married without its consent, will not be barred although she should be living in adultery; 1 *Ves. & B. Ch.* 802.

See **White & T. L. C. Eq.**

WIGGLESWORTH'S TABLES. Life tables framed by a Dr. Wigglesworth, from observations made in New England. *Anderson.* See **LIFE TABLES, CARLISLE TABLES, NORTHAMPTON TABLES.**

WILD ANIMALS. Animals in a state of nature; animals *ferae naturae*. See **WHELP; ANIMALS; FERAE NATURAE.**

WILDCAT COMPANY. A "wild-cat company" is understood to mean an irresponsible predatory concern. 141 Ky. 582, 133 S. W. 575.

WILFUL. The voluntary act of a party, as distinguished from coercion. 76 S. W. 185. Intentional, not accidental. 62 S. W. 877.

In an instruction for murder means intentional, not accidental. 112 S. W. 660.

The word "wilful" need not be used in the accusatory proof in an indictment for murder. 9 S. W. 707.

"Wilful" is not to be taken as synonymous with "gross," a word which applied to negligence, has a well-defined legal meaning. 11 *Bush (Ky.)* 381.

WILFUL NEGLECT. "Wilful neglect" is intentional neglect or such recklessness as evidences a purpose to injure. * * * It is a higher degree of neglect than "gross neglect," and was unknown to the common law. 4 *J. J. Mar. (Ky.)* 866.

"Wilful neglect" and "wanton neglect" are nearly synonymous—each implying either actual or anti-social recklessness. 2 *Duvall (Ky.)* 576.

"Gross negligence" is not necessarily the same with "wilful neglect." 11 *Bush (Ky.)* 380.

WILFUL NEGLIGENCE. "Wilful negligence" is equivalent to intentional wrong, or a recklessness evidencing the

absence of all care and precaution for the safety and protection of others. It is quasi-criminal. 9 Bush (Ky.) 523.

WILFULLY. Intentionally.

In charging certain offenses, it is required that they should be stated to be wilfully done. Archb. Cr. Pl. 51, 58; Leach 556. In an indictment charging a wilful killing, it means intentionally and not by accident; 116 Mo. 96.

It is distinguished from maliciously in not implying an evil mind; L. R. 2 Cr. Cas. Res. 161.

It implies that the act is done knowingly and of stubborn purpose, but not with malice; 97 N. C. 465; and in penal statutes, it means with evil intent, or with legal malice; 98 Cal. 263; or with a bad purpose; 20 Mass. 220, quoted in 155 U. S. 446. It is frequently understood as signifying an evil intent without justifiable excuse; 1 Bish. Cr. Law 428.

In Pennsylvania it has been decided that the word *maliciously* was an equivalent for the word *wilfully*, in an indictment for arson. 5 Whart. 427. When applied to violation of a law means purposely or obstinately and describes the attitude of one who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. 194 Fed. 346, citing 169 Fed. 69 et al. See MENS REA.

WILL. The disposition of one's property, to take effect after death. Swinb. Wills pt. 1, § 2; Godolphin pt. 1, c. 1, s. 2.

The term will, as an expression of the final disposition of one's property, is confined to the English laws and those countries which derive their jurisprudence from that source. The term *testamentum*, or *testament*, is exclusively used in the Roman civil law and by the continental writers upon that subject. Some controversy seems to exist whether the word *testamentum* is strictly derived from *testatur* or from that in combination with *mentis*. There does not seem to be much point in this controversy, for in either view the result is the same. It is the final declaration of the person in regard to the disposition of his property. It is his *testimony* upon that subject, and that is the expression of his *mind* and *will* in relation to it.

The practice of allowing the owner of property to direct its destination after his death is of very ancient date. Genesis, xlviii. 22; Gal. iii. 15; Plutarch's Life of Solon; Roman Laws of the Twelve Tables. But wills are not like succession, a law of nature. A stage where they are not recognized always, in every society, precedes the time when they are allowed; their early growth they were not regarded as a method of distributing a dead man's goods, but as a means of transferring the power and authority of a family to a new chief. It is not until the latter portion of the middle ages that they become a mode of diverting property from the family or of distributing it according to the fancy of the owner. Maine, Anc. Law 171-217. Nor is the power to dispose of property by will a constitutional right. It depends almost wholly upon statute; 100 Mass. 234. See Tax.

The right of disposing of property by will did not exist in early times among the ancient Germans, or with the Spartans under the laws of Lycurgus, or the Athenians before the time of Solon. 4 Kent 502, and note.

And in England, until comparatively a recent period, this right was to be exercised under considerable restrictions, even as to personal estate. 2 Bla. Com. 492.

Until the statute of 32 & 34 Henry VIII., called the statute of wills, the wife and children were each entitled to claim of the executor their reasonable portion of the testator's goods, i. e. each one-third part. So that if one had both a wife and children, he could only dispose of one-third of his personal estate, and if he had either a wife or child, but not both, he could dispose of one-half; Fitzh. N. B. 123 H (b), 9th ed.; 2 Saund. 66, n. (9); 2 Bla. Com. 492. All restrictions are now removed from the disposition of property by will, in England, whether real or personal, by the statute of 1 Vict. c. 26; 3 Jarm. Wills (Randolph & Talcott's ed.) 781. As to the history of the rise of the English will, see 11 Harv. L. Rev. 69. And in the Roman civil law the children were always entitled to their share, or legitime, being one-fourth part of the estate, of which they could not be deprived by the will of their father. The legitime was by the emperor Justinian increased to one-third part of the estate where there were four or a less number of children, and if more than four then they might claim one-half the estate, notwithstanding the will. No. reg. 18, c. 1; 2 Domat, Civil Law 11. See LEGITIME.

And by the existing law of the state of Louisiana, one is restrained of disposing of his whole estate if he have children. One child may claim one-third of the estate, two may claim half, and three two-thirds as the legitime, or reasonable part of the estate. See Louisiana Code.

According to the civil law the naming of an executor was of the essence of a will; and that constituted the essential difference between a will and a codicil; the latter, not making any such appointment (*absque executoris constitutione*), was, on that account, called an *unsolemn* last will. Swinb. Wills 29. The executor under a Roman will succeeded to the entire legal position of the deceased.

He continued the legal personality of the testator, taking all the property as his own, and becoming liable for all the obligations. Maine, Anc. Law 126.

In the United States the homestead laws in some states affect the validity of wills by making void a husband's devise of homestead land; 3 Jarm. Wills (Randolph & Talcott's ed.) 740. See same citation for regulations in various states as to devises to corporations, or for charitable purposes.

A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the state; 77 Ga. 636; 84 Ala. 48.

An instrument testamentary in form, which contains no disposition of property, is no will and should not be admitted to probate. So held of a writing merely making a declaration of legitimacy of two children, and revoking all previous testamentary dispositions; 5 Ohio Leg. News 505; and a letter to an undertaker authorizing the cremation of the writer's body, and saying, "My brother will be sole administrator and take charge of the estate," was held not to appoint an executor, or make a devise, or be entitled to probate; 118 Cal. 428.

Wills are unwritten or nuncupative, and written. See NUNCUPATIVE WILL.

A will may be written in pencil. But it is a strong indication that the will so written was not a final act, but merely a deliberative one. This indication may, however, be overcome by proof; 84 Pa. 510; 1 Hagg. 219; 3 Moo. P. C. 223; 23 Beav. 195. It was held in Pennsylvania that writing on a slate is insufficient; 11 Phila. 541; but in a note to the citation of this case a *quære* is suggested whether a slate and pencil might not be used in an extreme case; Schoul. Wills § 258, note.

One may bind himself to dispose of his property in a certain way, and such contract will, in a proper case, be specifically enforced; but if it respects realty it must be in writing under the statute of frauds; 90 Va. 728. Where a will was executed by the testator *in extremis* upon the assurance of one of three residuary legatees that a bequest intended by the testator to be made, but omitted from the will, should be executed as if made; it was held that the share of the legatee making the promise should contribute its ratable proportion of the omitted bequest, and the question whether such a promise by one of a class of legatees or devisees was binding on the others was left undecided; 37 Atl. Rep. (N. J.) 735.

THE TESTATOR'S CAPACITY. He must be of the age of discretion, which, by the common law of England, was fixed at twelve in females, and fourteen in males; Swinburne, pt. 2, § 2, pl. 6; Godolphin, pt. 1, c. 8, § 1; 1 Will. Ex. 13; 1 Jarm. Wills 29.

This is now regulated by statute, both in England and most of the United States. The period of competency to execute a will, in England, is fixed at twenty-one years, and the same rule is adopted in many of the United States, and the disposition is strongly manifested in that direction throughout the states; 3 Jarm. Wills (Randolph & Talcott's ed.) 748, note.

"Sound mind and memory," which constitute testamentary capacity, may be properly described as that condition which would render the testator capable of transacting the ordinary business of life; 126 Ill. 507.

Though a will be dictated by testator when entirely competent, it is none the less invalid if executed by him at a time when he was not of sound and disposing mind; 19 D. C. 495.

Aliens. By the common law in England, an alien could not devise or take by devise, real estate; and an alien enemy could not devise personally until 33 Vict. c. 14, § 2. This rule is now, in the United States, much altered by statute; 1 Redf. Wills 8-14; 3 Jarm. Wills (Randolph & Talcott's ed.) 743, note. **Indians,** in the absence of statute on the subject, are governed by the same law as resident aliens; p. 745 of

last citation. See same citation as to *convicts*, for whom the regulations are mostly statutory. **Coverture** was a disability in the execution of a will, unless by the consent of the husband; 2 Bla. Com. 498; 4 Kent 505; 1 Will. Ex. 42. But a married woman could not, even with her husband's consent, devise land, because she would thereby exclude her heir; otherwise with chattels; 12 Mass. 525; 16 N. H. 194; 10 S. & R. 445; 15 N. J. Eq. 384. In the United States the disability as to coverture has been largely changed by statute; 1 Redf. Wills 22-29; 3 Jarm. Wills (Randolph & Talcott's ed.) 752, note. **Blindness** is so far an incapacity that it requires express and satisfactory proof that the testator understood the contents of the will, in addition to what is required in other cases; 1 Rob. Eccl. 278; 8 Strobb. 297; 1 Jarm. Wills 49. **Deaf and dumb** persons will labor under a similar inconvenience, and especially in communicating with the witnesses, unless they have been educated so as to be able to write; Whart. & St. Med. Jur. § 13. But the witnesses must, to be present with the testator, be within the possible cognizance of his remaining senses; Richardson, J., in 1 Spears 256. Persons deaf, dumb, and blind were formerly esteemed wholly incapable of making a will; but that class of persons are now placed upon the same basis as the two former, with only the additional embarrassment attending the defect of another sense; 1 Will. Ex. 17, 18; 1 Redf. Wills 53. A *speechless paralytic*, who retained his interest in and knowledge of the details of his business, and whose mind was unimpaired up to the time of his death, was held capable of making a will where his wishes as to the disposition of his property were communicated by negative and affirmative replies to questions asked him, and, after it had been written, it was read to him item by item, and his assent given by nods of his head; 22 Ore. 551.

Idiots are wholly incapable of executing a will, whether the defect of the understanding is congenital or accidental. **Lunatics** are incapable of executing a last will and testament, except during such a lucid interval as allows the exercise of memory and judgment. It must be an absolute, to reason and reflection, and not a mere temporary remission; Tayl. Med. Jur. 642; 3 Bro. C. C. 441; 3 Add. Eccl. 79; Pothier, Obl., Evans ed. At. 579; Whart. & St. Med. Jur. § 255; Rush, Mind 163; Ray, Med. Jur. § 279; Combe, Ment. Der. 241; 9 Ves. Ch. 611; 13 id. 87; 12 Am. L. Reg. 885; 1 Phila. 90; 81 N. J. Eq. 633; 94 Ill. 560; 26 Wend. 255; 1 Redfield on Wills 107, 120. But mere weakness of understanding is not sufficient to invalidate a will, if the testator is capable of comprehending the object in view; 17 Ark. 292; 2 Bradf. 42; 2 J. J. Marsh. 340; 10 S. & R. 84. Nor as a matter of law is a testator of unsound mind, if he mistakenly believed that his relatives had mistreated him, and therefore made no provision for them in his will; 94 Cal. 406. See 67 Hun 408; 37 W. Va. 38.

When a testator has the legal capacity to make a will he has the legal right to make an unequal, unjust, or unreasonable will; 29 W. Va. 784; 32 id. 119; 84 Ala. 58. The fact that a will is unreasonable is not enough to render it invalid; 96 Cal. 448; but it tends to prove invalidity; 63 Conn. 365.

A belief in spiritualism does not constitute incapacity to make a will; 53 Md. 876; 96 Cal. 448; 161 Ill. 114; see 81 Am. L. Reg. n. s. 569; especially if the views held thereon had nothing to do with making the will; *id.*; nor moral insanity; 25 N. Y. S. 109; nor delusions, except so far as they concern the person to whom they relate; 62 Wis. 216; 20 Oreg. 239; see 121 N. Y. 406 (unless they are insane delusions; 53 Md. 876); nor partial unsoundness; L. R. 5 Q. B. 549; 62 Barb. 250; nor does incapacity to manage one's ordinary affairs; 136 Mass. 145; nor advanced age, nor enfeebled condition; 72 N. Y. 269; nor failure of memory alone; unless it be total or

extend to the members of his family or property; 4 Kent 510; if the testator comprehends the nature and extent of his property and the nature of the claims of those he is excluding, he is competent: 71 Mo. 553; L. R. 5 Q. B. 549; 5 N. Y. Surr. 204; 3 Redf. 384; 75 Ill. 280; L. R. 3 P. & D. 64; 21 Vt. 163; 37 W. Va. 38; 85 Va. 546; 50 N. J. Eq. 428, 439; 88 Mich. 567; 162 Pa. 567; 114 Mo. 35; 134 Ind. 437; 94 Cal. 406. The nature and character of the will are generally irrelevant; 28 Barb. 653; 39 N. Y. 153; though unreasonable or unnatural provisions are evidence of mental defect; 104 Pa. 199; 105 Ind. 456; 126 N. Y. 423.

A finding that a testator was insane at any time prior to the making of the will does not support a presumption that the insanity continued to the making of the will, unless it is also found that the insanity is habitual and fixed; 97 Ala. 731; 65 Vt. 370. When it appears that the will is the direct offspring of monomania it should be held invalid, notwithstanding the general soundness of the testator; 6 Ga. 324; 7 Gill 10; 8 Watts 70. See, also, 5 Moore, P. C. 841, 349; 12 Jurist 947, where Lord Brougham contends for the extreme notion that every person laboring under any form of partial insanity or monomania is incompetent to execute a valid will, because the mind being one and entire, if unsound in any part it is an unsound mind. This extreme view will scarcely gain final acceptance in the courts; Whart. & St. Med. Jur. § 18, *contra*.

As to the burden of proof in contests of wills, on the ground of mental incapacity of the testator, see 36 Cent. Law J. 408; 93 Mich. 234; 129 Ill. 392; 146 *id.* 337; 110 Mo. 456; 95 Ala. 486.

Delirium from disease or stimulus. This, while the paroxysm continues to such an extent as to deprive a person of the right exercise of reason, is a sufficient impediment to the execution of a will; Ray, Ins. §§ 253, 254, 390; Tayl. Med. Jur. 626; Rush, Mind 282; 18 Ves. Ch. 12; 17 Jur. 1045; 1 Ves. Sen. 19. See, also, 2 Aik. Vt. 167; 1 Bibb 163. But there is not the same presumption of the continuance of this species of mental perversion, whether it proceed from the intoxication of stimulus or the delirium of fever, as in ordinary insanity; 3 Hill, So. C. 68; 4 Metc. Mass. 545. See **DELIRIUM FEBRILE**; **DELIRIUM TREMENS**; **DRUNKENNESS**; **DEMENTIA**; **IDIOT**. **Fraud.** If a person is induced by fraud or undue influence to make a will or legacy, such will or legacy is void; 4 Ves. 803; 6 H. L. Cas. 2; 35 N. Y. 559; 50 Md. 466, 480; 1 Jarm. Wills (5th ed.) 35; 1 Redf. Wills 507-537. See **UNDUE INFLUENCE**.

THE MODE OF EXECUTION. This depends upon the particular form of the statutory requirements; 3 Jarm. Wills (Randolph & Talcott's ed.) 763, note, *et seq.*

In New York an attorney may be a witness to the preparation and execution of the will in case he is one of the subscribing witnesses thereto; Laws, 1892, ch. 514.

Under the English statute of frauds, 29 Car. II., as "signing" only was required, it was held that a mark was sufficient; 3 Nev. & P. 228; 8 Ad. & E. 94; 10 Paige. Ch. N. Y. 85. And under the statute of 1 Vict. c. 26, the same form of execution is required so far as signing is concerned. But sealing seems not to be sufficient where signing is required; 1 Wils. 313; 1 Jarm. Wills 69, 70, and cases cited. So, it was immaterial in what part of the will the testator signed. It was sufficient if the instrument began, I, A B, etc., and was in the handwriting of the testator, and he treated that as signing or did not regard the instrument as incomplete, as it evidently would be so long as he intended to do some further act to authenticate it; 3 Lev. 1; Freem. 538; 1 Eq. Cas. Abr. 403, pl. 9; Prec. in Chanc. 184; 21 Vt. 256. But, if it appear from the form of attestation at the close, or in any other way, that the testator did not regard the instrument as complete, the introduction of the testator's name at the beginning, in

his own handwriting, is not a sufficient signing; Dougl. 241; 1 Gratt. 454; 13 *id.* 664; 10 Paige, Ch. 85. See 7 Q. B. 450. Where the whole of the disposing portion of a will was written on the first side of a sheet of foolscap, the second and third sides being blank, while the attestation clause, with the signatures of the testator and the witnesses, was on the fourth side, the will was held to be duly executed; [1892] Prob. 377. It was not held necessary under the statute of frauds of Charles II. that the witnesses should subscribe in the presence of each other. They might attest the execution at different times; Prec. in Chanc. 184; 1 Ves. Ch. 13; 1 Will. Ex. 79. But the statute 1 Vict. requires both the witnesses to be present when the testator signs the will or acknowledges his signature; and they must afterwards attest in the presence of the testator, although not of each other; 3 Curt. Eccl. 659; 1 Will. Ex. 79, and note; 84 Ala. 53; 64 Md. 138.

In Wisconsin by act of April 3, 1895, it is provided that the signature of the testator made by another shall be attested and subscribed by witnesses in the presence of each other; Laws, 1895, c. 120.

The term "presence" in a statute requiring the subscription of witnesses to a will, to be made in the presence of a testator, means "conscious presence"; 85 Va. 546.

A joint will, executed by two brothers, revocable at the will of either, is valid; 92 Ky. 76.

Olograph wills in general require no attestation; 3 Jarm. Wills (Randolph & Talcott's ed.) 767, note.

The statutes in the different states differ to some extent, but agree substantially with the English statute of Charles II. In Pennsylvania no subscribing witnesses are required except to a will containing a gift to charity. In Louisiana upon the probate of an olographic will the judge is required to interrogate witnesses and make sure that they know the handwriting; Laws, 1896, c. 119. Olographic wills are valid in Nevada; Laws, 1895, c. 111.

The testator must sign before the witnesses subscribe; L. R. 2 P. & D. 97; 39 N. Y. 153. But if the testator acknowledge his signature, so that the witnesses can see it at the time, it is enough; 7 P. D. 102. A will may be signed by another, if done in the testator's presence and at his request, when he cannot write; 58 N. H. 7; or is physically incapacitated; 46 S. C. 299; but see 94 Tenn. 538.

The competency of witnesses and the validity of devises to witnesses, or to the husband or wife of a witness, are questions usually controlled by statute; 3 Jarm. Wills (Randolph & Talcott's ed.) 775, note, *et seq.*

PUBLICATION. The best-considered cases, under statutes similar to that of Charles II., only require the production of the instrument by the testator for the purpose of being attested by the witnesses, if it bear his signature; 11 Cush. 532; 1 Burr. 421; 3 *id.* 1775; 4 Burn. Eccl. Law 103; 6 Bingh. 310; 7 *id.* 457; 7 Taunt. 361; 1 Cr. & M. 140; 3 Curt. Eccl. 181; 30 Ga. 808; 2 Barb. 395; 46 Ill. 31; 34 Me. 163; 3 Redf. 74; 44 Wisc. 392; 50 N. J. Eq. 742. Where a will or codicil refers to an existing unattested will or other paper, it thereby becomes a part of the will; 2 Ves. Ch. 228; 1 Ad. & E. 423; 1 Will. Ex. 86, and note; 1 Rob. Eccl. 81; but a document referred to in a will, which is not in existence at the time of its execution, does not constitute a part of the will, and is not entitled to probate as such; 74 Cal. 144. Witnesses may attest by a mark; 8 Ves. Ch. 185, 504; 5 Johns. 144; 4 Kent 514, n.; 51 Ark. 48.

REVOCATION. The mode of revocation of a will provided in the statute of frauds, Car. II., is by "burning, cancelling, tearing, or obliterating the same." See 47 Minn. 171. In the present English statute of wills, the terms used are "burning, tearing, or otherwise destroying." If the testator has torn off or effaced his seal and signature at the end of a will, it will be presumed to have been done *animo revo-*

candi; 1 Add. Eccl. 78; 25 N. J. Eq. 501. So, too, where lines were drawn over the name of the testator; 64 Hun 635; 83 Ala. 432. So, also, where the instrument had been cut out from its marginal frame, although not otherwise defaced, except that the attestation clause was cut through, it was held to amount to a revocation; 1 Phill. Eccl. 375, 406.

It is not requisite in order to effect the revocation that the testator should effect the destruction of the instrument. It is sufficient if he threw it upon the fire with the intention of destroying it, although some one snatched it off after it is slightly burned, and preserve it without his knowledge; 2 W. Blackst. 1043. But it would seem that it must be an actual burning or tearing to some extent,—an intention merely to do the acts not coming within the statute; 6 Ad. & E. 209; 2 Nev. & P. 615. See 47 Minn. 171. But, aside from the statute, a mere intention to revoke evidenced by any other act, will be effectual to revoke: as, burning or tearing, etc.; 8 Ad. & E. 1. How much the will must be burned or torn to constitute a revocation under the statute of frauds was left by the remarks of the different judges in *Doe v. Harris*, 6 Ad. & E. 209, in perplexing uncertainty; 1 Williams, Ex. 121.

If the testator is arrested in his purpose of revocation before he regards it as complete, it will be no revocation, although he tore the will to some extent; 3 B. & Ald. 499.

It is held in England that a letter, duly signed and attested, requesting a third person to destroy the testator's will, is sufficient to revoke it; 2 P. & D. 406.

A will may be revoked in part; 2 Rob. Eccl. 562, 572. But partial revocations which were made in anticipation of making a new will and intended to be conditional upon that, are not regarded as complete until the new will is executed; 1 Add. Eccl. 409; 2 *id.* 316. See 8 Sim. 73. Thus a "memorandum of my intended will" was upheld as a will, and held not to be revoked by the drawing up of a new will which was not signed; 2 Hagg. Eccl. 225; 14 C. L. J. 248.

Parol evidence is inadmissible to show that a testator wanted his will to be revoked in the event of a certain contingency happening before his death; 13 Rept. (Md.) 526; but see, *contra*, 3 Sw. & Tr. 282.

By the present English statute, every obliteration or interlineation or alteration of a will is required to be complete so that the words obliterated or their effect are not apparent, and they must be authenticated in the same mode that the execution of the will is required to be. Hence, unless such alterations are signed by the testator, and attested by two witnesses, they are not to be regarded as made, however obvious the intention of the testator may be. But if the words are so obliterated as to be no longer legible, they are treated as blanks in the will; 3 Curt. Eccl. 761.

The mere act of defacing a will by accident and without the intention to revoke, or under the misapprehension that a later will is good, will not operate as a revocation; 1 P. Wms. 345; Cowp. 52; 1 Saund. 279 b, c; 1 Add. Eccl. 53. The revocation of a will is *prima facie* a revocation of the codicils; 4 Hagg. Eccl. 361. But it is competent to show that such was not the testator's intention; 2 Add. Eccl. 230; 1 Curt. Eccl. 289; 4 Will. Ex. 134. The same capacity is requisite to revoke as to make a will; 7 Dana 94; 11 Wend. 227; 9 Gill 169; 7 Humphr. 82. A testator who is insane cannot revoke an existing will; 65 Cal. 19; [1893] P. 283; 73 Mo. 595; and tearing a will while suffering from delirium tremens is not a revocation; L. R. 3 P. & D. 37.

Revocation induced by fraud or undue influence is not effectual; 73 Me. 595; 68 Md. 203.

The making of a new will purporting on its face to be the testator's last will, and containing no reference to any other paper, and being a disposition of all the testator's

property, and so executed as to be operative, will be a revocation of all former wills, notwithstanding it contain no express words of revocation; 2 Curt. Eccl. 468; 18 Jur. 560; 4 Moore, P. C. 29; 2 Dall. 266. So the appointment of an executor is a circumstance indicating the exclusiveness of the instrument; 1 Maq. Hou. L. 163, 173. And the revocation will become operative, notwithstanding the second will becomes inoperative from the incapacity of the devisee; 1 Pick. 535, 543.

It is regarded as the *prima facie* presumption from the revocation of a later will, a former one being still in existence and uncanceled, that the testator did intend its restoration without any formal republication; 4 Burr. 2512; Cowp. 92; 3 Phill. Eccl. 554; 2 Dall. 266. But it is still regarded as mainly a question of intention to be decided by all the facts and circumstances of the case: 1 How. Miss. 336; 2 Add. Eccl. 125; 3 Curt. Eccl. 770; 1 Moore, P. C. 299, 301; 1 Will. Ex. 155, 156; 2 Dall. 266; 86 Tenn. 173. The revocation of a will by intentionally destroying it will not revive a former will which was expressly revoked by the later one; 72 Tex. 281; and revocation by the mere execution of a subsequent will without a clause of revocation is denied, but it is held that the destruction of the later will revives the former one; 37 L. R. A. (Mich.) 561; 142 Mass. 515, in which case the testator had made three successive wills, intending to choose one of them and then cancelled the first and third; but it will not where the testator intended to make a new one; 86 Tenn. 173. The probability of there having been a revocation can be shown by proving the testator's verbal statements concerning his will; 11 Biss. 256; but a declaration of an intent to make a will at a future time, even when made as a formal recital in a deed, is not a revocation of an earlier will; 110 Pa. 232. Where there has been an act sufficient to constitute a revocation, it would seem that a verbal statement as to the intent of such act would be evidence. See 63 N. H. 485. An express revocation must be made in conformity with the statute, and proved by the same force of evidence requisite to establish the will in the first instance; 8 Bingh. 479; 1 Will. Ex. 160. If one republish a prior will, it amounts to a revocation of all later wills or codicils; 1 Add. Eccl. 38; 7 Term 138. A subsequent will containing a clause revoking former wills is not evidence of revocation until it is admitted to probate; 139 Mass. 164; 138 id. 116.

When a will, once known to exist, and to have been in the custody of the testator, cannot be found after his decease, the legal presumption is that it was destroyed by the testator with the intention of revoking it; 47 Ohio St. 323; where a will was executed in duplicate and the one retained by testatrix was not forthcoming at her decease, it was held that she was presumed to have destroyed it, *animo revocandi*; 53 L. T. R. 60.

Implied revocations were very common before the statute of frauds. But since the new statute of 1 Vict. c. 26, § 19, as to all estates real and personal, it is provided that no will shall be revoked on the ground of a presumed intention resulting from change of circumstances. Before that, it was held under the statute of frauds, by a succession of decisions, that, even as to lands, the marriage of the testator and the birth of children who were unprovided for was such a change of circumstances as to work an implied revocation of the will; 2 Show. 242; 4 Burr. 2171, 2182, in note; and, finally, by all the judges in England in the exchequer chamber; 8 Ad. & E. 14; 2 Nev. & P. 504. This latter case seems finally to have prevailed in England until the new statute; 2 Moore, P. C. 51, 63, 64; 2 Curt. Eccl. 854; 1 Rob. Eccl. 690. And the subsequent death of the child or children will not revive the will without republication; 1 Phill. Eccl. 342; 2 id. 266. See 63 Ia. 124.

The marriage alone or the birth of a child alone is not always sufficient to oper-

ate a revocation; 4 Burr. 2171; Ambl. 487, 557, 721; 5 Term 53, and note. The marriage alone of a woman will work a revocation; 4 Rep. 61. See 181 N. Y. 620; 90 Va. 728; 88 Pac. Rep. (Col.) 427. Not so the marriage alone of a man. See statutes providing for revocation of will on the marriage of the testator; Mass. Laws, 1892, ch. 118; Arizona Laws, 1891, ch. 92. But the birth of a child, with circumstances favoring such a result, may amount to an implied revocation; 5 Term 53, and note; 1 Phill. Eccl. 147. See 50 Fed. Rep. 310; 63 Ia. 124. A will not made in contemplation of matrimony is revoked by the marriage of the testator and the birth of a posthumous child; 31 Fla. 189; 70 Ga. 464. For the history of the common law on this subject, see 4 Johns. Ch. 510 *et seq.* In the absence of statute this rule of the common law may be considered abrogated in those states which give a married woman unrestricted testamentary powers. This matter is controlled in most of the American states, more or less, by statute; 3 Jarm. Wills (Randolph & Talcott's ed.) 783, note. In many of them a posthumous child unprovided for in the will of the father inherits the same as if no will had been made; 160 Pa. 433. In others, all children born after the execution of the will, and in some states all children not provided for in the will, are placed on the same ground as if no will existed; 1 Will. Ex. 170, n. 1, 171, n. 1.

By the express provisions of the act of 1 Vict. the marriage of the testator, whether man or woman, amounts to a revocation; 1 Jarm. Wills 106-173. See 89 Law T. 20. Subsequent marriage revokes the antenuptial will made by a wife; 141 Mass. 75; *contra*, 60 N. H. 439. The adoption of a child does not revoke an antecedent will of the adopting parent; 124 Ind. 1.

Where a will is executed in duplicate, only one part of which the testator retains, if he destroys that one, an intention to revoke is presumed; 84 Ala. 53.

REPUBLICATION. This, under the statute of frauds, could only be done in the same manner a will of lands was required to be first executed. And the same rule obtains under the statute of 1 Vict., and in many, perhaps most, of the American states. The general rule may be said to be, that a will can be republished only by an instrument of as high a nature as that which revoked it. Thus a will once revoked by written declaration cannot be republished by parol; 2 Conn. 67; 9 Johns. 312; 12 Ired. L. 355; 7 Jones (N. C.) L. 134. In Pennsylvania, a parol republication is allowed. But the intention of the testator to republish must be clearly proved; 1 Grant, Cas. 75; 2 Whart. 103. It is doubtful, however, if parol evidence alone is sufficient; 10 Ired. L. 459. A codicil ratifying and confirming a will, in whole or in part, will amount to a republication of the will, as of the date of the codicil; 30 Neb. 149.

Constructive republication is effected by means of a codicil, unless neutralized by internal evidence of a contrary intention; 1 Eq. Cas. Abr. 406, D, pl. 5; 1 Ves. Sen. 437; 1 Jarm. Wills 175, and notes; 3 Pick. 218.

PROBATE OF WILLS. The proof of a will of personal property must always be made in the probate court. But in England the probate of the will is not evidence in regard to real estate. In most of the American states the same rule obtains in regard to real as to personal estate—as the probate court has exclusive jurisdiction, in most of the states, in all matters pertaining to the settlement of estates; 9 Co. 36, 38 a; 4 Term 260; 1 Jarm. Wills 118; 8 N. H. 124; 12 Metc. 421; 8 Ohio 5. An executor who offers a will for probate in Maryland is required to be examined on oath whether or not he knows of any other will or codicil; Laws, 1890, ch. 416.

In New York on petition for probate of will the surrogate must cite all persons in being who would take an interest in any portion of the property, executors, and trustees; Laws, 1891, ch. 174.

In Vermont there is a provision by

statute for notice to legatees on the admission to probate of a will containing bequests to associations; Laws, 1892, ch. 47.

In Oregon wills must be recorded in all counties in which the testator left real property; Laws 1891, p. 8. A will refused probate for want of testamentary capacity in the state of testator's domicile has been admitted to probate in another state where lands passed under it; 4 Cal. 89; and see 45 La. Ann. 1237. See **PROBATE OF WILLS.**

The probate of a will has no effect out of the jurisdiction of the court before which probate is made, either as to persons or property in a foreign jurisdiction; 8 Ves. Ch. 44; 1 Johns. Ch. 153; 12 Vt. 589; Story, Conf. Laws §§ 512-517. In regard to the probate of wills passing realty, the *lex rei sitae* governs; personality is controlled by the *lex domicilii*; Whart. Conf. Laws §§ 570, 587, 592; 3 Bradf. 379; Story, Conf. Laws §§ 69, 481; 10 Moore, P. C. 306. But the indorsement of negotiable paper by the executor or administrator in the place of his appointment will enable the indorsee to maintain an action in a foreign state upon the paper in his own name; 9 Wend. 425. But see 5 Me. 261; 2 N. H. 291, where the rule is held otherwise. The executor may dispose of bankshares in a foreign state without proving the will there; 12 Metc. 421.

Any person interested in the will may compel probate of it by application to the probate court, who will summon the executor or party having the custody of it; 4 Pick. 83; 3 Bacon, Abr. 84, *Executors*. The judge of probate may cite the executor to prove the will at the instance of any one claiming an interest; 4 Pick. 83; 1 Will. Ex. 201; 1 Jarm. Wills 224. The attesting witnesses are indispensable, if the contestants so insist, as proof of the execution and authenticity of the will and the competency of the testator, when they can be had; 2 Greenl. Ev. § 691; 1 Jarm. Wills 226, and note. But if all or part of the subscribing witnesses are absent from the state, deceased, or disqualified, then their handwriting must be proved; 9 Ves. Ch. 381; 19 Johns. 186; 1 Jarm. Wills 226, and notes. And see 17 Ga. 364; 9 Pick. 350; 6 Rand. 83. It will be presumed that the requisite formalities were complied with when the attestation is formal, unless the contrary appear; 8 Md. 15; 11 N. Y. 220; 30 Pa. 218; 1 Jarm. Wills 228, and notes; 36 S. C. 428. But it has sometimes been held that no such presumption will be made in the absence of a subscribing witness who might be called; 19 Johns. 386. While the probate of a will settles the question of due execution, it does not establish validity, or determine its force and effect upon titles to real estate claimed under it; 50 Fed. Rep. 310. Wills over thirty years old, and appearing regular and perfect, and coming from the proper custody, are said to prove themselves; 1 Greenl. Ev. §§ 21, 670. See **LAST INSTRUMENT.**

In most of the United States statutory provision has been made for proving foreign wills by exemplified copy; 3 Jarm. Wills (Randolph & Talcott's edition) 725, note.

GIFTS VOID FOR UNCERTAINTY. Where the subject-matter of the gifts is not so defined in the will as to be ascertained with reasonable certainty; 25 Pa. 460; 12 Gratt. 196; 1 Jarm. Will 317; 1 Swanst. 201; the person intended to be benefited may not be so described or named that he can be identified. But, in general, by rejecting obvious mistakes, this kind of uncertainty is overcome; 1 Jarm. Wills 330-348, and notes. Determinate meanings have now been assigned to numerous doubtful words and phrases, and rules of construction adopted by the courts, which render devises void for uncertainty less frequent than formerly; 1 Jarm. Wills 356-383. A will otherwise effective, should not be refused probate because certain bequests contained therein are void for uncertainty; 74 Cal. 144; 27 Abb. N. C. 429; 4 Misc. Rep. 232; 76 Hun 469; 89 Tenn. 219. By statute in California when the

validity of a gift, devise, or trust under a will is involved in an action, the will is admissible as evidence, and the validity of the gift, devise, or trust shall be determined; *Laws*, 1895, p. 77.

The testator's body cannot be disposed of by his will, because the law recognizes no property in a dead body, and it is the duty of the executor to bury it; 21 *Am. L. Reg.* N. S. 508.

PAROL EVIDENCE, HOW FAR ADMISSIBLE. The rule in regard to the admissibility of parol evidence to vary, control, or to render intelligible the words of a will, is not essentially different from that which obtains in regard to contracts. It may be received to show the state of the testator, the nature and condition of his property, his relation to the contestants, and all the surrounding circumstances. But this is done to place the court in the condition of the testator, in order as far as practicable to enable them the more fully to understand the sense in which he probably used the language found in his will; 1 *Nev. & M.* 524; 15 *Pick.* 400; 1 *Phill. Ev.* 532-547; 1 *Greenl. Ev.* §§ 287-289; 1 *Jarm. Wills* 349, and notes; 2 *Ired.* 192. To ascertain the intention of testator, circumstances existing at the date of the execution of a will, but not those subsequent thereto, are admissible in evidence; 133 *N. Y.* 456; 164 *Pa.* 523; 92 *Ga.* 216. Letters and oral declarations of the testator are not admissible to show the intention of the testator; 2 *Vern.* 625; 14 *Johns.* 1; 2 *W. & S.* 455. But see 22 *Wend.* 148. Parol evidence is not admissible to supply any word or defect in the will; 7 *Gill & J.* 127; 8 *Conn.* 254; 23 *Barb.* 285; 27 *Ala. N. S.* 489. Parol declarations of the testator about the time of making the will are often admitted to show the state of mind, capacity, and understanding of the testator; but they are not to be used to show his intention; that must be learned from the language used; 8 *Conn.* 254; 156 *Mass.* 379; *id.* 265. Parol evidence is inadmissible to prove that a gift to a nephew was really intended for the wife's nephew of the same name; 187 *Pa.* 118; but see 12 *Harv. L. Rev.* 210. See, generally, *Tud. Lead. Cas. R. P.* 918; *Wigram*, *Wills*.

As to construction of wills—see **DEVISE**; **LEGACY**. See also **Schouler**; **Jarman**; **Theobald**, **Wills**; **CANCELLATION**; **LATENT AMBIGUITY**; **AMBIGUITY**; **LEGACY**; **MURDER**; **NUNCUPATIVE WILL**. As to conditions in restraint of marriage, see **CONDITION**; **RESTRAINT OF MARRIAGE**.

See, generally, as to statutory provisions, the very full and learned note, at the end of *Randolph & Talcott's* edition of *Jarm. Wills* (vol. 3). As to what is necessary to constitute a devise by implication, see 10 *Lawy. Rep. Ann.* 816, n.

Foreign Wills. Where a German testator specially appointed a person in England to realize on his English estate and transmit the proceeds to the German executor, the court declined to grant probate to these persons as executors according to the tenor of the will; [1894] 2 *Q. B.* 260.

Where property was settled upon English trustees with power of appointment, the owner of the power exercised the power it gave by will made in English form but invalid by French law. It was held that the appointment was valid; *L. R.* 1 *P. D.* 90.

There may be independent wills in different jurisdictions; [1894] *P.* 9; [1896] *P.* 65.

Where a testator made two separate wills dealing separately with English and Scotch assets, the court being satisfied that no creditor would be prejudiced, granted letters under the English will without requiring the Scotch will to be incorporated, upon condition that a copy thereof should be filed and a note to that effect made on the probate; [1891] *P.* 285.

Where an executor was absent and expected to be absent for two years and had given X a power of attorney to act for him, administration with the will annexed was granted to X for the benefit of the executor; [1891] *P.* 251.

In Georgia no more witnesses are required to prove a foreign will of personality than for its execution; *Laws*, 1892, p. 112. A New York statute of May 14, 1892, *Laws*, c. 591, provides how the validity of a will may be tested in court, and a South Carolina act of Dec. 24, 1891, *Laws*, c. 722, prescribes the proceedings where a person producing a will is a non-resident.

In Criminal Law. The power of the mind which directs the action of a man.

In criminal jurisprudence, the necessity of the concurrence of the will is deemed so far indispensable that, in general, those persons are held not amenable as offenders against the law who have merely done the act prohibited, without the concurrence of the will. This has reference to different classes of persons who are regarded as laboring under defect of will, and are, therefore, incapable of committing crime.

Infants, who, from want of age, are excused from punishment. The age of discretion, or capacity for crime, is fixed, by the common law of England, at fourteen years; 1 *Hale*, *Pl. Cr.* 25-29; 1 *Russ. Cr.* 2; and between males and females, no distinction is made in regard to capacity for crime; 1 *Hale*, *Pl. Cr.* 25-29.

Below the age of seven years, infants are presumed so incapable of any malicious design as not to incur the guilt of felony or of any other crime; 1 *Hale*, *Pl. Cr. supra*.

Between the ages of seven and fourteen years, an infant, although presumed, *prima facie*, incapable of incurring the guilt of crime, is, nevertheless, liable to trial and to be proved guilty upon the facts of the particular case evincing guilty consciousness. The reports abound with cases where clear evidence of criminal consciousness was shown, and of very marked atrocity, from the age of nine years and upward; 1 *Russ. Cr.* 2-6; 1 *Hale*, *Pl. Cr.* 25-29. See **INFANT**; **DISCRETION**.

Persons laboring under *mental imbecility* are not amenable for crime. See **INSANITY**; **LUcid INTERVALS**.

Persons subject to the power of others. This exemption from crime, in the English common law, extends to the wife while in the immediate presence and under the power of the husband, but not to a child or servant. And in respect of the enormity of the offences of treason and murder, the wife even is not excused by the command of the husband; 1 *Hale*, *Pl. Cr.* 44, 516; 1 *Hawk. Pl. Cr.* c. 1, s. 14. The wife is liable, too, for all offences committed not in the presence of the husband, and also where she is the principal party concerned; 1 *Hawk. Pl. Cr.* c. 1, § 14; 1 *Hale*, *Pl. Cr.* 44, 516. The distinction between the wife and the child and especially the servant, where the relation of master and servant is of a permanent character, or where the law gives the master unlimited control over the acts of the servant, seems not to rest upon any well-founded basis in present social relations. The English law does not regard one in the power of robbers or of an armed force of rebels as responsible, *criminaliter*, for his acts. No more should one be who is wholly under the power of another, as a child or servant may be; 1 *Russ. Cr.* 14. See *Ch. J. Howe*, 18 *St. Trials* 293. These questions should, in strictness, be referred to the jury as matters of fact. See **DURESS**; **COERCION**.

Ignorance of law will not excuse any one. But ignorance of fact sometimes renders that innocent which would otherwise be a crime: as, where one kills an innocent person, mistaking him for an assassin or robber; 1 *Hale*, *Pl. Cr.* c. 6; 1 *Russ. Cr.* 19, 20. See **IGNORANCE**; **INFLUENCE**; **MANCIPATORY WILL**.

WILL AND CONVEY. "Will and convey" are construed as equivalent to "give and convey." 23 *Ky. R.* 1341.

WILL, ESTATES AT. See **ESTATES AT WILL**.

WILL, SIGNING OF. See **CLOSE THEREOF**.

WINCHESTER. STATUTE OF. An English statute, 13 *Edw. I.* relating to

the internal police of the kingdom. It required every man to provide himself with armor to aid in keeping the peace; and if it did not create the offices of high and petty constables, it recognized and regulated them, and charged them with duties answering somewhat to those of our militia officers. The statute took its name from the ancient capital of the kingdom. It was repealed by the statute of 7 & 8 *Geo. IV.* c. 27.

WIND SHOT. A "wind shot" is caused by a failure to make the holes for a blast of sufficient depth, or to sufficiently tamp the powder in the holes so that when touched off it flashes out of the drill holes instead of tearing out the coal. 143 *Ky.* 350, 136 *S. W.* 620.

WINDFALL. See **TIMBER**; **WOODS**.

WINDING UP. The process of liquidating the assets of a partnership or corporation, for purposes of distribution. In England a number of statutes, known as the Winding-up Acts, have been passed to facilitate the settlement of partnership affairs; *Lind. Part. book iv.* c. 3.

WINDOW. An opening made in the wall of a house to admit light and air, and to enable those who are in to look out. Cited in 46 *Mo. App.* 508.

The owner has a right to make as many windows in his house, when not built on the line of his property, as he may deem proper, although by so doing he may destroy the privacy of his neighbors; *Bacon, Abr. Actions in General* (B).

In cities and towns it is evident that the owner of a house cannot open windows in the party wall, *q. v.*, without the consent of the owner of the adjoining property, unless he possesses the right of having *ancient lights*, which see. The opening of such windows and destroying the privacy of the adjoining property is not, however, actionable; the remedy against such encroachment is by obstructing them, without encroaching upon the rights of the party who opened them, so as to prevent a right from being acquired by twenty years' use, 3 *Camp.* 82; 4 *Misc. Rep.* 48. A bay or bow-window that projects over the land of another is a nuisance, and actionable as though it was an actual invasion of the soil; 107 *Mass.* 234; 16 *S. & R.* 390; *Wood, Nuisance* 118. Where it projects beyond the street line, it has been held in Pennsylvania a *purpresture*, and the erection of it may be restrained by injunction, although authorized by a special city ordinance; 10 *W. N. C. Pa.* 10; see 100 *Pa.* 182; whether the window reached to the ground; *id.*; or was built out of the second story; 89 *Leg. Int. Pa.* 106. See **AIR**; **ANCIENT LIGHTS**; **HIGHWAY**; **BAY WINDOW**; **LIGHT**.

WINDOW, BOW. See **WINDOW**, **BAY**; **WINDOW**.

WINDOW, ORIEL. See **WINDOW BAY**.

WINDOW TAX. A tax formerly levied, in England, upon the occupants of houses with more than a certain number of windows and increased as the number of windows in the house rose. Finally abandoned in 1851, when the Inhabited House Duty (*q. v.*) was substituted. *Byrne's L. Dict.* See **FUMAGE**.

WINE. The fermented juice of the grape. 5 *Blackf.* 118. See **LIQUOR LAWS**.

A fruit juice. *Thorpe, National and State Prohibition*, 158; 68 *Cong. Rec.* 4848. A fermented grape juice. *Id.*; 191 *Ind.* 319. It includes all commercial brands of wine. *Id.*; 85 *W. Va.* 261. Wine of pepsin may be a beverage, as well as a medicine. *Id.*; 151 *Minn.* 340. Wine is a well-known form of vinous liquor, and it is common knowledge that it contains alcohol.**** Its character is so well known that the court takes judicial notice of these qualities, and also that it contains considerably more than 1 per cent. of alcohol by volume, that it is intoxicating when taken into the stomach, and that it

may be used as a beverage. *Id.*; 168 Cal. 521. See INTOXICATING LIQUOR.

WINNER. The proprietor of a gaming house who receives a certain per cent of the winnings of each game, called the take-out, is interested in the winnings to that extent, and is, therefore, a "winner" within the meaning of a statute which gives a right of action to the loser to recover from the "winner" what he may have lost. 91 Ky. 30, 14 S. W. 949.

WINTER. When we speak of "winter" we mean the cold season of the year, and it necessarily includes a part of two years, the latter part of one and the early part of the following. 116 S. W. 260.

WIRELESS TELEGRAPHY. An electric telegraph system by which signals may be conveyed from one station to another without the use of connecting wires. *Stand. Dict.*

In England. Under the Merchant Shipping (Convention) Act, 1914, all British ships ordinarily carrying more than fifty persons in all must be provided with wireless apparatus of the prescribed efficiency unless they be ships not going more than 150 miles from land or sailing ships incapable of working the apparatus, both of which classes of ships may be exempted under rules made by the Board of Trade. Under the Merchant Shipping (Wireless Telegraphy) Act, 1919, every British steamer carrying more than 12 passengers, and every British ship of 1,600 tons gross, must have wireless installed unless the Board of Trade gives her an exemption on the ground that such installation is unnecessary or unreasonable. *Byrne.*

WIRES. By the provisions of the Revised Statutes § 5263, electrical companies must so construct and maintain their lines as not to obstruct ordinary travel or navigation. This act grants to the companies which accept its provisions a species of easement or right of way; 38 Fed. Rep. 552. It does not prevent state legislatures from enacting statutes requiring telegraph wires to be placed underground; 125 N. Y. 641; 145 U. S. 175; and when declared a nuisance, they may be forcibly removed, although the subways are not in a condition to receive them; 125 N. Y. 641.

The attachment of wires to the roof of a building may be prohibited by municipal ordinance in the exercise of the police power; 45 Fed. Rep. 493; and the company is liable to the owner of the premises for making such attachment without permission; 114 Mass. 149.

Although not an insurer of safety to travellers all reasonable precautions must be taken in *stringing wires*; 2 Col. 145; 91 U. S. 495; and in investigating promptly detached or grounded wires; 161 Mass. 598; 27 S. W. Rep. (Tex.) 66; and in removing dead wires in the case of fire or accident; 33 Minn. 340; but the mere fact that one was killed by a hanging wire does not prove negligence; 34 Atl. Rep. (N. J.) 1069; *contra*, 114 N. C. 203.

In many of the states the insulation of the wire is made the subject of statutory provision, and even in the absence of such provision, it has been held that non-insulation is negligence; 161 Mass. 598.

The company will be liable for damages if a dead wire, coming into contact with a live wire of another company, becomes charged and causes injury or death; 27 S. W. Rep. (Tex.) 66.

One whose occupation requires his proximity to an electric wire may presume it to be insulated; 44 La. Ann. 602; and he is not required to make an examination in order to ascertain if such be the case; 107 Cal. 120. A traveller may pick up a wire from the street and throw it outside the regular line of travel without being guilty of contributory negligence; 156 Mass. 393; 114 N. C. 203; 27 S. W. Rep. (Tex.) 66. For injuries so received damages may be recovered either from the city; 156 Mass. 393; or from the company; 27 S. W. Rep. (Tex.) 66. But in order to sustain an action for damages, it must be clearly shown that

there was no contributory negligence; 9 So. Rep. (La.) 433. It has been considered contributory negligence to step on a live wire after a warning; 9 Houst. 306.

The wires of electric light and electric railway companies, unlike those of telegraph and telephone companies, carry a strong and dangerous current, and such companies are bound to the highest degree of care in the pursuit of their business; 114 N. C. 203.

If a telephone wire has been negligently allowed to drop across a trolley wire, the owner of the latter is jointly liable with the owner of the telephone wire for injuries to a third person caused by electricity conveyed through it from the trolley wire; 33 S. W. Rep. (Ark.) 426. See 31 L. R. A. 566; 9 Harv. L. Rev. 505; Keasbey, *Electric Wires*; Crosswell, *Electricity*; *ELECTRIC LIGHT*; *TELEGRAPH*; *TELEPHONE*; *NEGLIGENCE*; *MASTER AND SERVANT*.

WIRTA. A measure of land among the Saxons, containing sixty acres.

WISBUY, LAWS OF. See *CODE*.

WISCONSIN. One of the states of the United States.

It was originally part of the Northwest Territory. See *OHIO*. It was made a separate territory, with the name of Wisconsin, by act of April 20, 1836. The territory was afterwards divided, and the territory of Iowa set off, June 12, 1838. It was admitted into the Union May 23, 1848.

WISERS. See *HUISSENUM*.

WISH. See *HOPE*; *WANT*.

WISH AND REQUEST. In *Will*. The words "wish" and "request" as used in a will are considered sufficient to raise a trust where the subject and object are sufficiently certain. 78 Ky. 128.

WIT. Know. To know. To-wit; to know.

WITCHCRAFT. Under 33 Hen. VIII, c. 8 and 1 Jac. I. c. 12, the offence of witchcraft, or supposed intercourse with evil spirits, was punishable with death. These acts were not repealed till 1736. 4 Bla. Com. 60.

WITENA-GEMOTE (spelled, also, *witena-gemot*, *gewitena-gemote*; from the Saxon *wita*, a wise man, *gemote*, assembly,—the assembly of wise men).

An assembly of the great men of the kingdom in the time of the Saxons, to advise and assist in the government of the realm.

It was the grand council of the kingdom, and was held, generally, in the open air, by public notice or particular summons, in or near some city or populous town. These notices or summonses were issued upon determination by the king's select council, or the body met without notice, when the throne was vacant, to elect a new king. Subsequently to the Norman conquest it was called *commune concilium regni*, *curiam agna*, and finally *parliament*; but its character had become considerably changed. It was a court of last resort, more especially for determining disputes between the king and his thanes, and, ultimately, from all inferior tribunals. Great offenders, particularly those who were members of or might be summoned to the king's court, were here tried. The casual loss of title-deeds was supplied, and a very extensive equity jurisdiction exercised. 1 Spence, *Eq. Jur.* 73; 1 Bla. Com. 147; 1 Reeve, *Hist. Eng. Law* 7; 9 Co. Pref.

The principal duties of the *witena-gemote*, besides acting as high court of judicature, was to elect the sovereign, assist at his coronation, and co-operate in the enactment and administration of the laws. It made treaties jointly with the king, and aided him in directing the military affairs of the kingdom. Examination into the state of churches, monasteries, their possessions, discipline, and morals, were made before this tribunal. It appointed magistrates, and regulated the coin of the kingdom. It also provided for levying upon the people all such sums as the public necessities required; and no property of a

freeman was, in fact, taxable without the consent of the *gemote*. Bede, lib. 2, c. 5; 3 Turner, *Angl. Sax.* 202; 1 Dugdale, *Mon.* 20; Sax. Chron. 128, 140.

The deliberations of their body had great weight; all important actions, such as law-making, were done by their advice; but they could not and did not pretend to do without the consent of the freeholders when a capital decision—such as the voting of a tax, the election of a king, the passing of a law—was in question. At first the king of the English would go around with his proposed laws to the several folk-mote, getting the separate consent of each, but in the tenth century the kings bethought them of summoning the moots of the various shires to meet them at some convenient central spot, as Oxford or London, and what this collective moot or *Mycel-gemot* agreed to need not be confirmed again, since men from every shire were present. The *Mycel-gemot* was the *Magnum Concilium* of the Normans and developed into the High Courts and Parliaments of the thirteenth century. 1 Social England 136. See Stevens, *Sources of the Constitution* 62.

WITH. The preposition "with" is in general use, as noting connection, appendage, company of, and concomitance. 6 T. B. Mon. (Ky.) 51.

WITH ALL FAULTS. See *ALL FAULTS*.

WITH STRONG HAND. In *Pleading*. A technical phrase indispensable in describing a forcible entry in an indictment. No other word or circumlocution will answer the same purpose. 8 Term 357.

WITHDRAW. To take away what has been enjoyed; to take from. 54 Ga. 409.

WITHDRAWING A JUROR. An agreement made between the parties in a suit to require one of the twelve jurors impelled to try a cause to leave the jury-box; the act of leaving the box by such a juror is also called the withdrawing a juror.

This arrangement usually takes place at the recommendation of the judge, when it is obviously improper the case should proceed any further. And it seems now settled that in civil cases the court has power to do this, in the exercise of a sound discretion, without the consent of the parties, instead of nonsuiting the plaintiff; 8 Cow. 127.

The effect of withdrawing a juror puts an end to that particular trial, and each party must pay his own costs; 3 Term 657; 2 Dowl. 721; 1 Cr. M. & E. 64. In Pennsylvania, the costs abide the event of the suit; Tr. & H. Pr. § 689.

But the plaintiff may bring a new suit for the same cause of action; Ky. & M. 402; 3 B. & Ad. 349. See 3 Chitty, Pr. 917.

In American practice, however, the same cause goes over, or is continued, without impairing the rights of either party, until the next term.

Where the plaintiff, at the suggestion of the judge, withdraws a juror, with the understanding of bringing the matter to a final conclusion, it amounts to an undertaking not to bring an action for the same cause; and if a second action be commenced, the court will stay the proceedings as against good faith; 1 Chit. Arch. Pr. 285. If, after a prisoner has pleaded to an indictment, and after the jury have been sworn and evidence offered, the public prosecutor, without the consent of the prisoner, withdraw a juror merely because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the same indictment; 2 Cal. Cas. 804; Arch. Cr. Pr. & Pl. 347.

WITHDRAWING RECORD. The withdrawing by plaintiff's attorney of the *nisi prius* record filed in a cause, before a jury is sworn, has the same effect as a motion to postpone. 2 C. & P. 185; 3 Camp. 333.

WITHERNAM. The name of a writ

which issues on the return of *elongata* to an alias or pluries writ of replevin, by which the sheriff is commanded to take the defendant's own goods which may be found in his bailiwick, and keep them safely, not to deliver them to the plaintiff until such time as the defendant chooses to submit himself and allow the distress, and the whole of it to be replevied; and he is thereby further commanded that he do return to the court in what manner he shall have executed the writ. Hamm. N. P. 453; Co. 2d Inst. 140; Fitzh. N. B. 68, 69.

WITHHOLD. Withholding property is not equivalent to concealing property. To withhold commissions implies a temporary suspension rather than a total and final denial or rejection of the same. 149 U. S. 278.

WITHIN. In the limits or compass of. 54 Ala. 531. In may be used in the sense of in or at the end of. 4 Cush. 420.

"Within one month from the return day" is equivalent to "for space of one month after the return day." 7 T. B. Mon. (Ky.) 521.

WITHOUT. Outside; beyond. 91 U. S. 277; 9 Mass. 456.

WITHOUT DAY. This signifies that the cause or thing to which it relates is indefinitely adjourned: as, when a case is adjourned without day it is not again to be inquired into. When the legislature adjourn without day, they are not to meet again. This is usually expressed in Latin, *sine die*.

WITHOUT IMPEACHMENT OF WASTE. When a tenant for life holds the land without impeachment of waste, he is, of course, punishable for waste, whether wilful or otherwise. But still this right must not be wantonly abused so as to destroy the estate; and he will be enjoined from committing malicious waste; Bac. Abr. Waste (N); 2 Eq. Cas. Abr. Waste (A, pl. 8). See IMPEACHMENT OF WASTE; WASTE.

WITHOUT PREJUDICE. See COMPROMISE.

WITHOUT RECOURSE. See SANS RECOURS; INDORSEMENT.

WITHOUT RESERVE. These words are frequently used in conditions of sale at public auction, that the property offered, or to be offered, for sale, will be sold *without reserve*. When a property is advertised to be sold without reserve, if a puffer be employed to bid, and actually bid at the sale, the courts will not enforce a contract against a purchaser, into which he may have been drawn by the vendor's want of faith; 5 Madd. 84. See PUFFER; AUCTION.

WITHOUT STINT. Without limit; without any specified number.

WITHOUT THIS, THAT. In Pleading. These are technical words used in a traverse (*q. v.*) for the purpose of denying a material fact in the preceding pleadings, whether declaration, plea, replication, etc. The Latin term is *absque hoc* (*q. v.*). Com. Dig. Pleader (G1); 1 Chitty, Pl. 576, note a.

WITNESS (Anglo-Saxon *witan*, to know). One who testifies to what he knows. One who testifies under oath to something which he knows at first hand. 1 Greenl. Ev. §§ 98, 328.

One who is called upon to be present at a transaction, as, a wedding, or the making of a will. When a person signs his name to a written instrument to signify that the same was executed in his presence, he is called an attesting witness.

The principal rules relating to witnesses are the same in civil and in criminal cases, and the same in all the courts, as well in those various courts whose forms of proceeding are borrowed from the civil law, as in those of the common law; 3 Greenl. Ev. §§ 249, 402; 2 Ves. Ch. 41; 17 Mass. 303.

AS TO THE COMPETENCY OF WITNESSES. The question of the competency of a witness is for the court, and not for the jury; 37 W. Va. 565; 107 Mo. 37; and an objection to competency is not necessarily waived if not taken before his examination in chief; 17 S. E. Rep. (Va.) 946.

All persons, of whatever nation, may be witnesses; Bacon, Abr. Evidence (A). But in saying this we must, of course, except such as are excluded by the very definition of the term; and we have seen it to be essential that a witness should qualify himself by taking an oath. Therefore, all who cannot understand the nature and obligation of an oath, or whose religious belief is so defective as to nullify and render it nugatory, or whose crimes have been such as to indicate an extreme insensibility to its sanctions, are excluded. And, accordingly, the following classes of persons have been pronounced by the common law to be incompetent. See OATH.

Infants so young as to be unable to appreciate the nature and binding quality of an oath. A child under the age of fourteen is presumed incapable until capacity be shown, but the law fixes no limit of age which will of itself exclude. Whenever a child displays sufficient intelligence to observe and to narrate, it can be admitted to testify; 7 C. & P. 320; 2 Brewst. 404; 44 Mich. 436; 88 Ala. 151; 88 Wis. 180; 159 U. S. 523. A child five years old has been admitted to testify; 1 Greenl. Ev. § 367; 3 C. & P. 588; 1 Mood. 86; 10 Mass. 225; 8 Johns. 98; 88 Wis. 180; 159 U. S. 523. But if the child is not sufficiently instructed on this "point," the trial may be put off, in order to give the necessary instruction; 2 Leach, C. C. 86; but only in the discretion of the court; 2 C. & K. 246. The law presumes that all witnesses tendered in a court of justice are not only competent but credible. If a witness is incompetent, this must be shown by the party objecting to him; if he is not credible, this must be shown either from his examination, or by impeaching evidence *abundant*; 1 Whart. Ev. § 392. See DISCRETION.

Idiots, lunatics, intoxicated persons, and, generally, those who labor under such privation or imbecility of mind that they cannot understand the nature and obligation of an oath. The competency of such is restored with the recovery or acquisition of this power; 10 Johns. 362; 28 Conn. 177; 16 Vt. 474; 7 Wheat. 453; but the question of their credibility should be left to the jury; 97 Ala. 85. And so a lunatic in a lucid interval may testify; 1 Greenl. Ev. § 365; even though an inmate of an insane asylum; 36 Atl. Rep. (Del.) 458; 82 Fed. Rep. 720; or one who has been adjudged insane; 80 Id. 85. Persons deaf and dumb from their birth are presumed to come within this principle of exclusion until their competency is shown; 1 Greenl. Ev. § 366; but such a person is not deemed to be an idiot; 118 Mo. 127. A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; Steph. Ev. art. 107. See 1 Cush. 417. A person in a state of intoxication cannot be admitted as a witness; 15 S. & R. 235. See Ray, Med. Jur. c. 22, § 800; 16 Johns. 143. Deficiency in perception must go to the incapacity of perceiving the matter in dispute, in order to operate as an exclusion, hence a blind man can testify to what he has heard, and a deaf man to what he has seen; 1 Whart. Ev. § 401.

Such as are *insensible to the obligation of an oath, from defect of religious sentiment or belief*. Atheists, and persons disbelieving in any system of divine rewards and punishments, are of this class. It is reckoned sufficient qualification in this particular if one believe in a God and that he will reward and punish us according to our deserts. It is enough to believe that such punishment visits us in this world only; 1 Greenl. Ev. § 369; 5 Mass. 18; 14 Mass. 184; 26 Pa. 274; 16 Ohio 121; 7 Conn. 66; 22 So. Rep. (La.) 841.

It matters not, so far as mere competency is concerned, that a witness should believe in one God, or in one God rather than another, or should hold any particular form of religious belief, provided only that he brings himself within the rule above laid down. And, therefore, the oath may be administered in any form whatever, and with any ceremonies whatever, that will bind the conscience of the witness; 1 Greenl. Ev. § 371; 1 Sm. L. Cas. 739. By statute in England and in most of the United States, religious disbelief no longer disqualifies, provision being made for an affirmation instead, and the witness, if testifying falsely, being subject to the penalties of perjury; Whart. Ev. § 395, n. See ATHEIST.

Persons infamous, i. e. those who have committed and been legally convicted of crimes the nature and magnitude of which show them to be insensible to the obligation of an oath. See INFAMY. Such crimes are enumerated under the heads of treason, felony, and the *crimen falsi*; 1 Greenl. Ev. § 373; 2 Dods. Adm. 191. See CRIMEN FALSI.

The only method of establishing infamy is by producing the record of conviction. It is not even sufficient to show an admission of guilt by the witness himself; 9 Cow. 707; 2 Mass. 108; 97 Id. 587; but in England a witness may be asked whether he has been convicted, etc.; Steph. Ev. art. 130. Pardon or the reversal of a sentence restores the competency of an infamous person, except where this disability is annexed to an offence by a statute; 1 Greenl. Ev. § 378; 2 Salk. 513; 2 Hargr. Jurid. Arg. 231. See 53 Fed. Rep. 852; 144 U. S. 263; 21 Tex. App. 1; even if granted for the reason, among others, that his testimony was desired by the government in a cause then pending; 142 U. S. 450. See PARDON.

This exclusion on account of infamy or defect in religious belief applies only where a person is offered as a witness; 1 Greenl. Ev. § 374; 2 Q. B. 721. But wherever one is a party to the suit, wishing to make affidavit in the usual course of proceeding, and, in general, wherever the law requires an oath as the condition of its protection or its aid, it presumes conclusively and absolutely that all persons are capable of an oath; Stark. Ev. 393; 1 Ashm. 57. There is a conflict of authority as to how far a foreign judgment of an infamous offence disqualifies a witness. In New York, he is not disqualified; 77 N. Y. 400. In Pennsylvania, he is held not to be disqualified unless the record of conviction be produced, and not then if he has served out his term of imprisonment; 3 Brewst. 461. In Massachusetts, the record is admitted merely to affect his credibility; 17 Mass. 575. In New Hampshire, the witness will be disqualified if the laws of his own state make him so, and the crime, if committed in New Hampshire, would have had the same effect; 10 N. H. 22. In Alabama; 23 Ala. 44; and Virginia; 6 Gratt. 706; the record is rejected altogether; but not so in North Carolina; 3 Hawks 393. He is disqualified in Nevada; 15 Nev. 64. See Whart. Conf. Laws §§ 107, 769. A conviction and sentence can have no such effect beyond the limits of the state in which the judgment is rendered unless the statute of another state give such effect to them; 144 U. S. 263. If a statute permits a defendant in a criminal case to testify on his own behalf, he may do so, though infamous, but not against a co-defendant; 35 S. C. 279.

Slaves were generally held incompetent to testify, by statutory provisions, in the slave states, in suits between white persons; 7 T. B. Monr. 91; 4 Ohio 335; 5 Litt. 171.

When it is said that all persons may be witnesses, it is not meant that all persons may testify in all cases. The testimony of such as are generally qualified and competent under other circumstances or as to other matters is sometimes excluded out of regard to their special relations to the cause in issue or the parties, or from some other

circumstances not working a general disqualification.

Parties to the record were not competent witnesses, at common law, for themselves or their co-suitors. Nor were they compellable to testify for the adverse party; 7 Bingh. 395; 20 Johns. 143; 21 Pick. 57; 11 Conn. 543; but they were competent to do so; although one of several co-suitors could not thus become a witness for the adversaries without the consent of his associates; 1 Greenl. Ev. § 354; 5 How. 91; 6 Humph. 405. Regard was had not merely to the nominal party to the record, but also to the real party in interest; and the former was not allowed to testify for the adverse side without the consent of the latter; 1 Greenl. Ev. § 339; 16 Pick. 501; 20 Johns. 143. Persons who have no interest in the matter in controversy are not incompetent merely because parties to the action; 118 Ind. 237; 184 U. S. 650.

In some jurisdictions a party had the right of compelling his adversary to answer interrogatories under oath, as also to appear and testify. And, in equity, parties could require and use each other's testimony; and the answer of a defendant as to any matters stated in the bill was evidence in his own favor; 1 Greenl. Ev. § 329; 2 Story, Eq. Jur. 1528.

There were other exceptions to this rule. Cases where the adverse party had been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence than that of the complainant himself could be had of the amount of damage,—cases, also, where evidence of the parties was deemed essential to the purposes of public justice, no other evidence being attainable,—were exceptions; 1 Greenl. Ev. § 348; 1 Me. 27.

On this same principle, *persons directly interested in the result of the suit* (see INTEREST), or in the record as an instrument of evidence, were excluded; and where the event of the cause turned upon a question which if decided one way would have rendered the party offered as a witness liable, while a contrary decision would have protected him, he was excluded; Stark. Ev. 1730. But to this rule, also, there were exceptions: Stark. Ev. 1731; of which the case of agents testifying as to matters to which their agency extended, forms one: 1 Greenl. Ev. § 386; so also an employee of a charitable institution; 105 Pa. 155; or a taxpayer of a town to which a library was given by will; 160 Mass. 140; were not incompetent for interest.

In both England and the United States, the rules of exclusion on the ground of interest have been abrogated. The object of the statutes has been to remove all artificial restraints to competency so as to put the parties upon a footing of equality with other witnesses, both in their admissibility to testify for themselves, and in their being compellable to testify for others; 21 Wall. 488. In most of the statutes, however, cases are excepted where a suit is brought by or against executors or administrators. In these cases where one of the parties to a contract is dead, the survivor is not permitted to testify; 86 Pa. 297; but this exception does not exclude directors or stockholders of a corporation which is a party, when the other party is dead; 82 S. W. Rep. (Mo.) 654; 24 S. E. Rep. (Ga.) 409. But the exception does not make the surviving party incompetent, it only precludes him from testifying to communications with the deceased; 59 Me. 239; 64 Ill. 121. The test is the nature of the communications. The witness cannot testify to personal communications with the deceased party; 64 Barb. 189; 12 Gray 459; 76 Ia. 101; 100 N. C. 150; but it has been held that if documents can be proved by independent evidence, the case is not within the exception; 21 Mich. 864. A husband may testify to conversation between his wife and the decedent, in which he took no part; 83 S. C. 158; but one who is interested in the contest of a will cannot testify as to conversations between testator and another in which the witness took no part; 78 Hun

43. If the suit is brought against co-defendants, of whom only one is dead, when the contract was made either with the living co-defendants, or with the living and dead concurrently, the case is not within the exception; 9 Allen 144; 22 Ohio St. 208. But where an action was brought against three partners, one of whom subsequently died, and his executors were substituted, the plaintiff is not a competent witness as to anything which occurred during the lifetime of the deceased partner although the latter may have taken no part in the contract on which the action was brought; 87 Pa. 111. In an action by a surviving partner on a book account, the defendant is competent to testify to payments by him to the deceased partner; 9 Ind. App. 321.

Under these statutes, which confine the exception to suits against executors and administrators, the death of an agent of one party, through whom the contract was made, does not prevent the surviving party from testifying to the contract; 2 W. N. C. (Pa.) 665; but under statutes which exclude the surviving party to a contract, the death of a contracting agent excludes the surviving party who contracted with him; 26 Wisc. 500. See 113 N. C. 551. An agent who makes a sale of goods for his principal is not incompetent to testify to the circumstances of the transaction because of the death of the buyer; 50 Ohio St. 648. Unless the exception expressly covers all suits against executors and administrators, it does not exclude the plaintiff from proving matters occurring since the death of the party of whom the defendant is executor; 48 N. H. 90. The exception in statutes where the exclusion relates only to the surviving party in contracts does not include torts; 60 Mo. 214. When the deposition of a deceased party afterwards is put in evidence, the other party being still living, such other party should be admitted as a witness in reply; 52 Ga. 385; 114 Mo. 66. See, generally, 12 L. R. A. 836. As to exclusion of testimony against a decedent on the ground of interest, see 12 Lawy. Rep. Ann. 836.

Husband and wife were excluded at common law from giving testimony for or against each other when either was a party to the suit or interested. And neither was competent to prove a fact directly tending to criminate the other. This rule was founded partly on their identity of interest, and partly, perhaps chiefly, on the policy of the law which aims to protect the confidence between man and wife that is essential to the comfort of the married relation, and, through that, to the good order of society. Whether or not the disability of husband or wife may be removed by consent of the other is matter of dispute; 3 C. & P. 551; 1 Greenl. Ev. § 340. In England, by stat. 16 & 17 Vict. c. 83, consent removes the disability; Whart. Ev. § 428. But it is not removed by death, nor by the dissolution of the marriage relation, so far as respects information derived confidentially during marital intercourse; 47 N. H. 100. She may, however, testify as to matters which transpired subsequently to a divorce; 86 Ala. 36.

The wife of a member of a partnership is not competent as a witness in a suit against the partnership; 64 Vt. 583.

The rule is not ordinarily affected by statutes permitting husband or wife to testify for or against each other; 60 Barb. 527; nor does the statute as to the evidence of parties in interest generally affect their common-law incapacity to testify; 18 Wall. 453.

Some exceptions to this rule; 1 Greenl. Ev. § 343; are admitted out of necessity for the protection of husband and wife against each other, and for the sake of public justice, as in prosecutions for violence committed by either of them upon the other. See Bac. Abr. *Evidence* (A); 1 Greenl. Ev. § 334; 1 Ves. Ch. 49; Ry. & M. 253; 137 U. S. 496. It is not error to receive the testimony of the wife of a person on trial for murder by consent of his counsel if she is advised by the court that

she need not testify unless she desires to do so; 146 U. S. 325.

Parties to negotiable instruments are, in some jurisdictions, held incompetent to invalidate these instruments to which they have given currency by their signature. Such seems to be the prevailing, but not universal, rule in the United States; while in England such testimony is admitted, the objection going only to its credibility; 1 Greenl. Ev. § 383; 1 Term 296; 9 Metc. 471; 8 How. 73; 5 N. H. 147; 20 Pa. 469; 24 Vt. 459; 18 Ohio 579; 1 Miss. 541; 1 Conn. 260; 4 Tex. 371; 3 Harr. & J. 172.

And, finally, there are certain *confidential communications*; 1 Greenl. Ev. § 236; to which the recipient of them, from general considerations of policy, is not allowed to testify. But the privilege may be waived by the party entitled to claim the benefit of it, as when two physicians were in consultation, a party by calling one waives the right to object to the testimony of the other against her; 42 N. E. Rep. (N. Y.) 410. See CONFIDENTIAL COMMUNICATIONS.

Judges are not compellable to testify to what occurred in their consultations; but they may be examined as to what took place before them on the trial in order to identify the case, or prove the testimony of a witness; 1 Whart. Ev. § 600; see 4 Sandf. 120; but in England there is a doubt as to the latter proposition; Steph. Ev. art. 111; and it is said that in England a barrister cannot be compelled to testify as to what he said in court in his character of barrister; *id.*

The fact that one is counsel in the case does not disqualify him from testifying; 32 Tex. Cr. R. 102.

Persons in possession of secrets of state or matters the disclosure of which would be prejudicial to the public interests, are not allowed to testify thereto; 1 Greenl. Ev. § 250.

Grand jurors and persons present before a grand jury; 1 Greenl. Ev. § 252; are not permitted to testify to the proceedings had before that body; 1 Phill. Ev. 177. See CONFIDENTIAL COMMUNICATIONS.

THE MEANS OF SECURING THE ATTENDANCE AND TESTIMONY OF WITNESSES. In general, all persons who are competent may be compelled to attend and testify. As to compelling expert witnesses to attend, see EXPERTS.

Provision has been made by statute, in most if not in all of the states, for the case of persons living at an inconvenient distance from the place of trial, as well as for the case of such as are sick or about to leave the state, or otherwise likely to be put to great inconvenience by a compulsory attendance, and also for such as are already in a foreign jurisdiction, by allowing the taking of their deposition in writing before some magistrate or officer near at hand, to be read at the trial; 1 Greenl. Ev. § 321.

In criminal cases, all persons are compellable to appear and testify without any previous tender of their fees; and any bystander in court may be compelled to testify without a previous summons or tender of fees; 1 Greenl. Ev. § 311; 4 Cow. 49; 13 Mass. 501; 4 Cush. 249.

But in civil suits which are between man and man, a party is allowed to compel the attendance and testimony of a witness only on condition of a prepayment or tender of his fees for travel to the place of trial, and for one day's attendance there. This seems, as a general rule, to be the least that can be tendered; 1 Greenl. Ev. § 310; 4 Johns. 811; 1 Metc. Mass. 293; 8 Mo. 288; 41 N. H. 121. See 40 Ill. App. 628; and a witness who attends without the payment or tender of his fees, waives their tender or payment in advance; 87 Wis. 525. In the courts of the United States, as well as in England, a witness may require his fees for travel both ways; 1 Greenl. Ev. § 310; 6 Taunt. 88. And in civil cases a person cannot be compelled to testify, although he chance to be present in court, unless regularly summoned and tendered his fees; 1 Phill. Ev. 393.

Being in attendance in obedience to a summons, he may, nevertheless, refuse to testify from day to day, unless his daily fees are paid or tendered; 2 Phill. Ev. § 376. Whether or not he may refuse to attend from day to day without the prepayment or tender of his daily fees, is a matter about which there are different decisions; 1 Greenl. Ev. § 310; 10 Vt. 493; 14 East 15. A witness may maintain an action against the party summoning him for his fees; Stark. Ev. 1727. Federal courts allow mileage and *per diem* fees, although no subpoena was issued; 54 Fed. Rep. 464; 36 *id.* 113; 37 *id.* 844. As to additional compensation to experts, see EXPERTS, and also 48 N. E. Rep. (Ill.) 103, and comments thereon in 18 N. Y. L. J. (Dec. 3, 1897).

Witnesses are also compellable to produce papers in their custody to which either party has a right as evidence, on the same principle that they are required to testify what they know; 1 Greenl. Ev. § 558. See DISCOVERY; SUBPENA DUCES TECUM.

This rule as to title-deeds appears to be peculiar to England. In this country, it is said that a witness, not a party, may be compelled to produce any of his private papers. Whether the court, on inspection, will require them to be put in evidence may be a matter of discretion; Steph. Ev. art. 113, n. See 14 Gray 226.

The attendance of witnesses is ordinarily procured by means of a writ of subpoena; sometimes, when they are in custody, by a writ of *habeas corpus ad testificandum*; and sometimes, in criminal cases, by their own recognizance, either with or without sureties; 1 Greenl. Ev. §§ 309, 312; 2 Phill. Ev. 370, 374. If a witness disobey the summons, process of attachment for contempt will issue to enforce his attendance and an action also lies against him at common law; 1 Greenl. Ev. § 819; 1 Stark. Ev. 1727.

Nor can any third party intervene to prevent the attendance of a witness. Neither can he take advantage of a witness's attendance at the place of trial, to arrest him on civil process. See PRIVILEGE FROM ARREST.

Where a non-resident is in attendance on a trial in a circuit court of the United States as a witness in a case therein pending, he is privileged from service of summons in a civil action issued from a state court of such state, and the privilege extends to a reasonable time after the disposition of the cause to enable him to return to his own state; 11 Fed. Rep. 532. See 25 Alb. L. J. 424; 53 Vt. 694; and this is the general rule.

AS TO THE EXAMINATION OF WITNESSES. In the common-law courts, examinations are had *viva voce*, in open court, by questions and answers. The same course is now adopted to a great extent in equity and admiralty courts, and other proceedings according to the forms of the civil law. But the regular method of examining in these last-named courts, as also in the court of claims, is by deposition taken in writing out of court; 2 Story, Eq. Jur. § 1537; 3 Greenl. Ev. § 251.

A trial court may ask a witness such questions as it deems necessary for its own information and that of the jury; 122 Mo. 607.

On motion, in civil and criminal cases, witnesses will generally be excluded from the court-room while others are undergoing examination in the same case; this, however, is not matter of right, but within the discretion of the court; 1 Greenl. Ev. § 432; 4 C. & P. 585; 2 Swan 237; 3 Wisc. 214.

Witnesses are required to testify from their own knowledge and recollection. Yet they are permitted to refresh their memory by reference, while on the stand, to papers written at or very near the time of the transaction in question. See MEMORANDUM.

Being once in attendance, a witness may, in general, be compelled to answer all questions that may legally be put to him. See EVIDENCE.

Yet there are exceptions to this rule.

He is not compellable where the answer would have a tendency to expose him to a penal liability or any kind of punishment, or to a criminal charge or a forfeiture of his estate; 1 Greenl. Ev. § 451. See PRIVILEGE.

The court, it is said, decides as to the tendency of the answer, and will instruct the witness as to his privilege; 2 Phill. Ev. 417; 4 Cush. 594; 1 Den. 319. It has been held that the question whether an answer would have this tendency is to be determined by the oath of the witness; 17 Jur. 393. And in point of fact, out of the necessity of the case, it is a matter which the witness may be said practically to decide for himself. The witness may answer if he chooses; and if he do answer after having been advised of his privileges, he must answer in full; and his answer may be used in evidence against him for all purposes; 1 Greenl. Ev. §§ 451, 453; 4 Wend. 232; 11 Cush. 437; 12 Vt. 491; 20 N. H. 540. It is held that a defendant who voluntarily offers himself as a witness on his own behalf waives this privilege of refusing to answer a question because it may tend to criminate him; 98 N. C. 599. The objection that the answer may tend to criminate can only be made by the witness himself; 16 Colo. 250. See 28 Fla. 90.

Whether a witness be compellable to answer to his own degradation or infamy is a point as to which some distinctions are to be taken: a witness cannot refuse to testify simply because his answer would tend to disgrace him; it must be seen to have that effect certainly and directly; 1 Greenl. Ev. § 456. He cannot, it would seem, refuse to give testimony which is material and relevant to the issue, for the reason that it would disgrace him, or expose him to civil liability. A witness is not the sole judge whether a question put to him, if answered, may tend to criminate him. The court must see from the circumstances of the case that there is reasonable ground to apprehend danger to the witness from his being compelled to answer, in order to excuse him. But if the fact once appear that the witness is in danger, great latitude will be allowed him in judging for himself the effect of any particular question; 26 Ch. Div. 294; 1 Greenl. Ev. § 454; 1 Mood. & M. 103; 4 Wend. 250; 2 Ired. 346. See 8 Misc. Rep. 159. A witness may, however, be compelled to testify concerning his criminal acts, when prosecution therefor is barred; 66 Vt. 302; but only after it is shown affirmatively that no prosecution is pending against him; 43 N. E. Rep. (Ill.) 781.

But it would appear that he may refuse where the question (being one put on cross-examination) is not relevant and material, and does not in any way affect the credit of the witness; 3 Camp. 519; 13 N. H. 92; 1 Gray 103. Whether a witness, when a question is put on the cross-examination which is not relevant and material to the issue, yet goes to affect his credit, will be protected in refusing to answer, simply on the ground that his answer would have a direct and certain effect to disgrace him, is a matter not clearly agreed upon. There is good reason to hold that a witness should be compelled to answer in such a case; 1 Stark. Ev. 144; 1 C. & P. 85; 2 Swanst. 216; 2 Camp. 637; 3 Yeates 429. But the whole matter is one that is largely subject to the discretion of the courts; 1 Greenl. Ev. § 431, 449.

There seems no doubt that a witness is in no case competent to allege his own turpitude, or to give evidence which involves his own infamy or impeaches his most solemn acts, if he be otherwise qualified to testify; Stark. Ev. 1737. See 15 Cent. L. J. 343.

The privilege given by the 5th amendment to the constitution, that no person shall be compelled in any criminal case to be a witness against himself, extends to a proceeding before a grand jury; 143 U. S. 547. The provision of the Interstate Commerce Commission Act, compelling parties to testify even though the evidence

may tend to criminate them, is not in conflict with the fifth amendment, since the statute itself protects them from punishment; 161 U. S. 591, affirming 70 Fed. Rep. 46; Field, Gray, Shiras, and White, JJ., dissenting. See INTERSTATE COMMERCE COMMISSION.

The course of examination is, first, a direct examination by the party producing the witness; then, if desired, a cross-examination by the adverse party, and a re-examination by the party producing; 1 Starkie, Ev. 123, 129. As to the direct examination, the general rule is that leading questions, *i. e.*, such as suggest the answer expected or desired, cannot be put to a witness by the party producing him. But this rule has some reasonable exceptions; 1 Greenl. Ev. § 434. See 35 Neb. 351; 97 Ala. 681; as, where a witness is hostile, leading questions are proper; 43 Ill. App. 180; 62 Mich. 451; also when the answers of a witness have taken by surprise the party calling him; 154 U. S. 184. A court of error will not reverse because a leading question was allowed; 87 Pa. 124; 22 N. J. 372; 3 Allen 466; 139 Ill. 644; 1 Misc. Rep. 354; *contra*, 99 Ill. 368. As the allowance of leading questions is largely in the discretion of the trial judge, the appellate court will reverse for such cause only where there has been an abuse of discretion; 91 Mich. 611. See 75 Hun 17; 85 Wis. 615; 91 Ga. 319; 154 U. S. 184; 53 Mo. App. 102; 75 Ia. 742. See LEADING QUESTION.

Leading questions, however, are allowed upon cross-examination. See, generally, CROSS-EXAMINATION.

The right of re-examination extends to all topics upon which a witness has been cross-examined; but the witness cannot at this stage, without permission of the court, be questioned as to any new facts unconnected with the subject of the cross-examination and not tending to explain it; 1 Greenl. Ev. § 467.

But the court may in all cases permit a witness to be called either for further examination in chief, or for further cross-examination; Steph. Ev. art. 126; and may itself recall a witness at any stage of the proceedings, and examine or cross-examine, at its discretion; 6 C. & P. 653. If new matter is introduced on the re-examination, by permission of the court, the adverse party may further cross-examine upon that matter; Steph. Ev. art. 127.

A party cannot impeach the credit of his own witness. But he is sometimes, in cases of hardship, permitted to contradict him by other testimony; 1 Stark. Ev. 147; 1 Greenl. Ev. § 442. And a party *bona fide* surprised at the unexpected testimony of his witness may be permitted to interrogate him, as to previous declarations alleged to have been made by him inconsistent with his testimony, the object being to prove the witness's recollection, and to lead him, if mistaken, to review what he has said; 1 Whart. Ev. § 549. See *infra*.

The credit of an adversary's witness may be impeached by cross-examination, or by general evidence affecting his reputation for veracity (but not by evidence of particular facts which otherwise are irrelevant and immaterial), and by evidence of his having said or done something before which is inconsistent with his evidence at the trial. Also, of course, he may be contradicted by other testimony; 1 Greenl. Ev. § 401. But he cannot be contradicted as to collateral and irrelevant matter on which he was cross-examined; 66 Miss. 196; 75 Cal. 103; 76 Ia. 87; 89 Kan. 115; 97 N. C. 443; 58 Ark. 125. In some states evidence may be given of a witness's general reputation (*q. v.*); 4 Wend. 237; 2 Dev. 209; 115 Mo. 419. See 29 Mich. 173; 97 *id.* 484. But the testimony of a witness cannot be impeached by evidence of particular crimes; 98 Ala. 45; nor can a woman be impeached by evidence of the lack of chastity; 94 Mich. 630. See IMPEACHMENT.

In order to test a witness's accuracy, veracity, or credibility, he may be cross-

examined as to "his relations to either of the parties or the subject-matter in dispute; his interest, his motives, his way of life, his associations, his habits, his prejudices, his physical defects and infirmities, his mental idiosyncrasies, if they affect his capacity; his means of knowledge and powers of discernment, memory, and description—may all be relevant." May's Steph. Ev. art. 129. But it has been said that questions otherwise irrelevant cannot be asked for the purpose of testing his moral sense; 4 Cush. 593. He cannot be discredited by asking him if he has not been impeached as a witness upon the trial of another action; 76 Cal. 192.

Generally, where proof is to be offered that a witness has said or done something inconsistent with his evidence, a foundation must first be laid and an opportunity for explanation offered, by asking the witness himself whether he has not said or done what it is proposed to prove, specifying particulars of time, place, and person; 1 Greenl. Ev. § 463; 2 Br. & B. 313; 16 How. 38; 76 Pa. 83; 132 U. S. 394; 96 N. C. 708; 97 Mo. 165; 77 Ga. 781; 23 Neb. 683; 74 Ia. 623; 86 Ala. 110; 137 U. S. 507; but in other cases it has been held that no foundation need first be laid; 17 Mass. 160; 59 Mo. 35; 22 Conn. 622; 31 Vt. 442. Such statements made on other occasions must be material to the cause; 32 W. Va. 177. Statements introduced for contradictions must be those of the witness; 160 U. S. 70. The failure to lay a proper foundation cannot avail on appeal, where it was apparent that the witness understood the occasion referred to and had full opportunity to explain deficiencies; 83 Fed. Rep. 147.

In England and Massachusetts, by statute, the same course may be taken with a witness on his examination in chief, if the judge is of opinion that he is hostile to the party by whom he was called, and permits the question. Apart from statute such evidence has not generally been considered as admissible; May's Steph. Ev. art. 131; 66 N. Y. 585; 49 Cal. 384; if the sole effect is to discredit; but if the purpose be to show the witness he is in error, it is admissible; 15 Ad. & E. 378; 53 N. Y. 230.

Proof of declarations made by a witness out of court in corroboration of the testimony given by him at the trial, is, as a general rule, inadmissible. See 83 Ala. 5; 27 Tex. App. 347. But when a witness is charged with having been actuated by some motive prompting him to a false statement, or that the story is a recent fabrication, it may be shown that he made similar statements before any such motive existed; 68 Ill. 514; 48 Cal. 85; 11 How. 480; 74 Cal. 1. See 98 N. C. 629; 103 id. 419.

Evidence of general good reputation may be offered to support a witness, whenever his credit is impeached, either by general evidence affecting his reputation, or on cross-examination; 1 Greenl. Ev. § 469; 77 Ga. 563.

A party cannot attack the credibility of his own witness in the case, even after he has become the witness of his adversary; 5 So. Rep. (Ala.) 829; except where the witness does not testify as he did on the preparatory examination and his testimony is unfavorable; 42 Ill. App. 178; 151 U. S. 305; the contradiction of such witness may be allowed; 79 Ga. 605; 111 N. C. 314.

MODIFICATIONS OF THE COMMON LAW. There have been various important modifications of the common law as to witnesses, in respect of their competency and otherwise, as well in England as in this country. A general and strong tendency is manifest to do away with the old objections, to the competency of witnesses, and to admit all persons to testify that can furnish any relevant and material evidence,—leaving these to judge of the credibility of the witnesses. Such is the law and practice in most English and American jurisdictions. The statutes vary in their terms, and the decisions should be read in connection with them.

WITNESS, HOSTILE. See HOSTILE WITNESS.

WITNESS. See INCRIMINATION; ULTRONEOUS WITNESS.

WITWORD. Witword is explained in Anglo-Saxon dictionaries as applying to testaments and bequests, but the word is a peculiar and well-authenticated Northern term made out to mean a legally allowed claim, more especially the right to vindicate ownership or possession by one's affirmation under oath. Vinogradoff, 9.

WOLF'S HEAD. In Old English Law. See CAPUT LUPINUM.

WOMAN'S SUFFRAGE. See CONSTITUTION OF THE UNITED STATES, Nineteenth Amendment.

WOMEN. All the females of the human species. All such females who have arrived at the age of puberty. *Mulieris appellatione etiam virgo viri potens continetur.* Dig. 50. 16. 13.

A woman by the fact of marriage invests herself with the nationality of her husband; 13 Op. Att. Gen. 128; 14 id. 402; *contra*, 2 Knapp, P. C. 364. See DOMICIL.

Single or unmarried women have all the civil rights of men; they may, therefore, enter into contracts or engagements; sue and be sued; be trustees or guardians; they may be witnesses, and may for that purpose attest all papers; but they are, generally, not possessed of any political power; and are not as citizens eligible to public office or entitled to vote; 16 How. 287; 21 Wall. 163; but in many of the states they may vote at school elections as in Colorado, Montana, The Dakotas, Idaho, Wisconsin, Massachusetts, Illinois, Kansas, Nebraska, Washington, and Wyoming.

As to the right of a woman to practise law, see ATTORNEY.

If the constitution of a state prevents a woman from being a member of a school committee, it must be by force of some express provision thereof or else by necessary implication arising from the nature of the office itself; 115 Mass. 602; and where an office is created and regulated by statute and the constitution confers upon the general court authority to name and settle all civil officers within the commonwealth, the election and constitution of whom are not otherwise provided for in the constitution, a woman may fill a local office of an administrative character; *id.*; but see 83 Ky. 464, where it was held that when a woman is excluded from the right to vote for any particular office, she is also excluded from the right to hold the office voted for. In California they may pursue any lawful business or profession; Cons. of Cal. art. 20, § 18. In Illinois, a woman may be a master in chancery; 99 Ill. 501; and in Iowa, a county recorder; Laws of 1880, c. 40. See 25 Alb. L. J. 104. In Colorado, a deputy clerk; 11 Colo. 191; a policeman; 19 Co. Cl. Rep. (Pa.) 657.

It has been held that a woman may not be a justice of the peace; 107 Mass. 604; 62 Me. 596; or a jailer; 83 Ky. 457; or a superintendent of a medical hospital for the insane; 29 Ohio St. 347; or a member of a board of workhouse directors; 4 Ohio C. C. 329 (*contra*, 136 Mass. 578); or county superintendent of schools; 29 Ore. 464 (*contra*, 13 Wash. 360; 115 Mass. 602; 16 Kan. 601; 33 Minn. 345); or school director; 39 S. W. Rep. (Mo.) 81; or a notary public; 51 N. E. Rep. (Ohio) 135; 150 Mass. 586. In England a woman may be elected to the office of sexton; 7 Mod. 263; or governor of a workhouse; 2 Ld. Raym. 1014; or overseer; 2 Term 395; or a commissioner of sewers; 13 Vin. Abr. 159; but a woman is not entitled to vote at elections for members of parliament; 38 L. J. C. P. 25; Whart. Lex.; Morse on Citizenship; she may act as postmistress in the United States. See MARRIED WOMAN; NATURALIZATION; 38 L. R. A. 208.

WOODGELD. In Old English Law. To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 a. The same as PUZZELD.

WOODMOTE. The court of attachment. Cowell.

WOODS. A piece of land on which forest-trees in great number naturally grow. According to Lord Coke, a grant to another of *omnes boscos suos*, all his woods, will pass not only all his trees, but the land on which they grow. Co. Litt. 4 b. See 72 Me. 459. A field grown up in wire-grass surrounded by a fence and used for pasturing is not a woods. 84 N. Car. 264; but see 5 Jones 4. See TIMBER; SALE.

WOODWARD. An official who looked after the vert, venison and wood in a forest. He was permitted to carry the weapon known as a forest bill, but not a bow and arrows. Byrnes.

WOOL. The word "Merino" as applied to wool "means primarily and popularly" a fine long-staple wool, which commands the highest price. The words "Australian wool" mean a distinct commodity, a fine grade of wool grown in Australia. The word "wool" when used as an adjective means made of wool. The word "worsted" means primarily and popularly a yarn or fabric made wholly of wool. A substantial part of the consuming public, and also some buyers for retailers and sales people, understand the words "Merino," "Natural Merino," "Gray Merino," "Natural Wool," "Gray Wool," "Australian Wool," and "Natural Worsted," to mean all wool. 258 U. S. 491.

WOOLSACK. The seat of the lord chancellor in the house of lords, being a large square bag of wool, without back or arms, covered with red cloth. The judges, king's counsel-at-law, and masters in chancery sit also on woolsacks. The custom arose from wool being a staple of Great Britain from early times. Encyc. Amer.

WORDS.

In a Will. Remote explanation as to the use and meaning of a word will be rejected when the will offers upon its face a different and more obvious one. 201 U. S. 371. See EFFECT OF WORDS; NOSCITUR A SOCIIS; USE OF WORD.

Actionable Per Se. At common law, "actionable words per se" were such as imported a felony. 78 Ky. 118. See ACTIONABLE PER SE.

See GENERAL WORDS; CONSTRUCTION; INTERPRETATION; LIBEL; SLANDER.

WORDS OF LIMITATION. See LIMIT.

WORK. (v.) To 'work' a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. 252 U. S. 307.

WORK AND LABOR. In actions of assumpsit it is usual to put in a count, commonly called a common count, for work and labor done and material furnished by the plaintiff for the defendant; and when the work was not done under a special contract the plaintiff will be entitled to recover on the common count for work, labor, and materials. 4 Tyrwh. 43; 2 Carr. & M. 214. See ASSUMPSIT; QUANTUM MERUIT.

WORKHOUSE. A prison where prisoners are kept in employment; a penitentiary. A house where the poor are taken care of and kept in employment.

WORKING CONTRACT. See BUILDING CONTRACT.

WORKING DAYS. Working days include all days except Sundays and legal holidays and do not include days on which, by the custom of the port, baymen stop work on the day of the funeral of one of their deceased members; 84 Fed. Rep. 688. In settling laydays, or days of demurrage, sometimes the contract specifies "working days"; in the computation, Sundays and custom-house holidays are excluded; 1 Bell, Com. 577. See DEMURRAGE; LAY-DAYS.

Running or calendar days on which the

law permits work to be done. The term excludes Sundays and legal holidays, but not stormy days; 2 U. S. App. 297; 14 Fed. Rep. 422; 20 *id.* 144; 19 *id.* 459.

Working or lay-days, by the general rule, do not commence until the vessel has arrived at the usual place for unloading; 1 H. & C. 388. But where such place is a dock, it has been held that they begin when she enters the dock, and not when she reaches her place of discharge in the dock; 1 Bing. N. C. 283. The parties may, however, stipulate as they please as to the time when they shall commence; 5 Bing. N. C. 71. And it sometimes depends on the usage of the port; 24 E. L. & Eq. 305. Usage, however, cannot be admitted to vary the express terms of the contract; Pars. Ship. & Adm. 313. See DEMURRAGE; LAY-DAYS.

WORKMAN. One who labors; one who is employed to do business for another. See MASTER AND SERVANT.

WORKMEN'S COMPENSATION ACTS. Acts providing for the compensation of a workman by his employer in case of accident, conferring on the workman the right to compensation for injury received, whether negligence on the part of the employer is proved or not. Stand. Dict.

Various states have many different provisions concerning employments covered. It is practically impossible to make a general statement about this phase of the acts and it is difficult to even group them with any degree of accuracy. The statute of each State must be examined to determine whether acceptance of the act in a particular employment is compulsory or elective or whether the employment is specifically exempted from the operation of the law.

In a number of States only the hazardous employments are directly subject to the act, but in most of those States the non-subject employer can agree with the employees to accept its provisions. Dosker's Manual Compensation Law 1917, 3.

In a majority of the States having these laws, all employments are subject to the act unless they are especially exempted. Generally domestic, agricultural and casual employments are excepted, and often those having less than a stipulated number of employees. *Id.*

The acts generally exclude employments when the laws of the United States have provided a rule of liability for injuries received in them. Thus accidents to employees of railroads engaged in interstate commerce are not within the acts. But in some States employees engaged in an interstate business are covered if the act by which the injury was received was of a purely intrastate nature. *Id.* 4. See INSURANCE.

WORKMEN'S INDUSTRIAL INSURANCE. See INSURANCE.

WORSHIP. Honor and homage rendered to God. 59 N. H. 536. See CHRISTIANITY; DISTURBANCE OF PUBLIC WORSHIP; RELIGION.

In English Law. A title or addition given to certain persons. Co. 2d Inst. 666; Bacon, Abr. *Misnomer* (A 2).

WORSTED. See WOOL.

WORTHIST OF BLOOD. An expression used to designate that in descent the sons are to be preferred to daughters, which is the law of England. See some singular reasons given for this, in Plowd. 805.

WOULD, COULD. The substitution of "would" for "could" in an instruction to the jury in this case held not to have affected the minds of the jurors. 218 U. S. 87.

WOUND. Any lesion of the body. In this it differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity; while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations, and the like. Cooper, Surg. Dict.; Dunglison, Med. Dict.

Under the statute 9 Geo. IV. c. 21, s. 13, it has been held in England that to make a wound, in criminal cases, there must be an injury to the person by which the skin is broken; 6 C. & P. 684. See DEATH.

WOUNDING. The offense of inflicting a wound. An aggravated species of battery, consisting in giving another some dangerous hurt. 3 Bl. Com. 121.

WRECK (called in law *Latin wreccum maris*, and in law French *wrec de mer*).

Such goods as after a shipwreck are cast upon the land by the sea, and left there within some country so as not to belong to the jurisdiction of the admiralty, but to the common law. Co. 2d Inst. 167; 1 Bla. Com. 290. A ship becomes a wreck when, in consequence of injuries received, she is rendered absolutely un navigable, or unable to pursue her voyage, without repairs exceeding the half of her value; 6 Mass. 479. A sunken vessel is not a wreck, but derelict; wreck applies to property cast upon land by the sea; 7 N. Y. 555; 38 Fed. Rep. 503. See SUNKEN WRECK.

Goods found at low water, between high and low water mark, and goods between the same limits partly resting on the ground, but still moved by the water, are wreck; 3 Hagg. Adm. 257, 294. Wreck, by the common law, belongs to the king or his grantee; but if claimed by the true owner within a year and a day the goods, or their proceeds, must be restored to him, by virtue of stat. Westm. I. 3 Edw. I. c. 4. Ships and goods found derelict or abandoned at sea belonged until lately to the office of the lord high admiral, by a grant from the crown, but now belong to the national exchequer, subject, however, to be claimed by the true owner within a year and a day; 1 Hagg. 383.

But in America the king's right in the sea-shore was transferred to the colonies, and therefore wreck cast on the sea-shore belongs to the owner of the shore, as against a mere stranger, if not reclaimed; 13 Pick. 255. See, also, 113 Mass. 377.

In this country, the several states bordering on the sea have enacted laws providing for the safekeeping and disposition of property wrecked on the coast. In one case, it was held that the United States succeeded to the prerogative of the British crown, and are entitled to derelict ships or goods found at sea and unclaimed by the true owner; but in the southern district of Florida it is held that such derelicts, in the absence of any act of congress on the subject, belong to the finder or salvor, subject to the claim of the true owner for a year and a day. Marv. Wreck. Stealing from a wrecked or distressed ship, etc., wilfully obstructing the escape of any person endeavoring to save his life therefrom, showing false lights, or extinguishing any true one, with intention to bring any vessel, etc., into danger, distress, or shipwreck, are made felony, punishable by fine and imprisonment, by act of congress of March 3, 1825; R. S. § 5358; 12 Pet. 72. Wrecked goods upon a sale or other act of voluntary importation become liable to duties; 9 Cra. 387. See SALVAGE; TOTAL LOSS.

WRIT. A mandatory precept, issued by the authority and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned.

It is issued by a court or other competent jurisdiction, and is returnable to the same. It is to be under seal and tested by the proper officer, and is directed to the sheriff or other officer lawfully authorized to execute the same. Writs are divided into—original, of mesne process, of execution. See 3 Bla. Com. 273; Gould, Pl. c. 2, s. 1.

The list of original writs was not the reasoned scheme of a provident legislator, calmly devising apt remedies for all conceivable wrongs, rather it was the outcome of the long and complicated struggle whereby the king drew into his court all the litigation of the realm. The statute of Westminster 2d (1285) allowed the chancery to vary the old forms so as

to suit new cases, but only new cases which fall under old law.

This gave in time one new form of action—trespass upon the special case—and this again threw out branches which came to be considered distinct forms of action, namely, assumpsit and trover. Equity, again, met some of the new wants, but others had to be met by a stretching and twisting of the old forms which were made to serve many purposes for which they were not originally intended; Poll. Torts, 5th ed. 535, note by F. W. Maitland; and see 3 Harv. L. Rev. 217. As to the history of assumpsit, see 2 Harv. L. Rev. 1, 53, by Prof. J. B. Ames. See WESTMINSTER 2d, STATUTE OF; CONCURRENT.

WRIT DE BONO ET MALO. See DE BONO ET MALO; ASSIZE.

WRIT DE CERTIFICANDO. A writ for certifying, or requiring a thing to be certified. A species of *certiorari* (q. v.). Burrill.

WRIT DE CONTUMACE CAPIENDO. See DE CONTUMACE CAPIENDO.

WRIT DE EJECTIONE CUSTODIAE. See EJECTIONE CUSTODIAE.

WRIT DE EJECTIONE FIRMÆ. See EJECTIONMENT.

WRIT DE EXCOMMUNICATO CAPIENDO. See DE EXCOMMUNICATO CAPIENDO.

WRIT DE HÆRETICO COMBURENDO. See DE HÆRETICO COMBURENDO.

WRIT DE HOMINE REPLEGIANDO. See DE HOMINE REPLEGIANDO.

WRIT DE ODIS ET ATIA. See DE ODIS ET ATIA; ASSIZE.

WRIT DE PROCEDENDO, AD JUDICIUM. See PROCEDENDO.

WRIT DE RATIONABILI PARTE BONORUM. A writ which was sued out by a widow when the executors of her deceased husband refused to let her have a third part of her late husband's goods, after the debts were paid. Fitzh. N. B. 284.

WRIT OF ASSISTANCE. A writ issuing out of chancery in pursuance of an order, commanding the sheriff to eject the defendant from certain lands and to put the plaintiff in possession. Cowel; 3 Steph. Com. 602; 18 Ill. 67. An ancient writ issuing out of the exchequer. Moz. & W.

A writ issuing from the court of exchequer to the sheriff commanding him to be in aid of the king's tenants by knight's service, or the king's collectors, debtors, or accountants, to enforce payment of their own dues, in order to enable them to pay their own dues to the king. 1 Madox, Hist. Exch. 675.

A writ commanding the sheriff to assist a receiver, sequestrator, or other party in chancery to get possession of land withheld from him by another party to the suit. Quincy, Mass. Appx.; 3 Dan. Ch. Pr. 1062.

These writs which issue from the equity side of the court of exchequer or from any court of chancery are at least as old as the reign of James I., and were formerly in common use in England, Ireland, and some of the United States; 1 Ves. 454; 3 Swanst. 299, n.; but whether from the odium attached to the name in Massachusetts or from the practice in that state to conform processes in equity to those at law, no instance is known of such a writ having been issued in that commonwealth. Quincy, Mass. Appx. 369.

A writ of assistance is founded on the general principle that a court of equity will, when it can do so justly, carry its own decrees into full execution without relying on the co-operation of any other tribunal; 27 N. J. Eq. 482, where it was remarked that it was of comparatively recent use in that state, the first instance being in 1853. It can issue only against

parties affected by the decree; 101 U. S. 849; the right to it may be lost by laches; 69 Ala. 484. The order granting this writ is not appealable; 3 MacArthur 403.

It will not issue in favor of a purchaser at an execution sale, where there is a bona fide contest as to the right of possession; 71 Wis. 585.

Writs of assistance to seize uncustomed goods were introduced by statute 12 Charles II., c. 19, and were perhaps copied from the sheriff's patent of assistance; 4 Doug. 347; these writs authorized the person to whom they were issued, with the assistance of the sheriff, justice of the peace, or constable, to enter into any house where the goods were suspected to be concealed. One acting under this writ and finding nothing was not justified; 4 Doug. 347. See Quincy, Mass. Rep. Appx.: 1 Thayer, Cas. Const. L.; 2 Dan. Ch. Pr. 1063.

WRIT OF ASSOCIATION. In English Practice. A writ whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and sergeants; and they are required to admit the said persons into their society in order to take the assizes. 3 Bla. Com. 59. See ASSIZE.

WRIT OF CONSPIRACY. The name of an ancient writ now superseded by the more convenient remedy of an action on the case, which might have been sued against parties guilty of a conspiracy. Fitzh. N. B. 260.

It did not lie at common law, in any case, except when the conspiracy was to indict the party either of treason or felony; all the other cases of conspiracy in the books were but actions on the case; 7 Hill N. Y. 104.

WRIT OF COVENANT. A writ which lies where a party claims damages for breach of covenant, i. e. of a promise under seal.

WRIT OF DEBT. A writ which lies where the party claims the recovery of a debt, i. e. a liquidated or certain sum of money alleged to be due to him.

This is debt in the *debet*, which is the principal and only common form. There is another species mentioned in the books, called the debt in the *detinet*, which lies for the specific recovery of goods under a contract to deliver them. 1 Chitty, Pl. 101.

WRIT OF DECEIT. The name of a writ which lies where one man has done anything in the name of another, by which the latter is damaged and deceived. Fitzh. N. B. 217.

The modern practice is to sue a writ of trespass on the case to remedy the injury. See DECEIT.

WRIT OF DETINUE. See DETINUE.

WRIT OF DOWER. A writ which lies for a widow claiming the specific recovery of her dower, no part having been yet assigned to her. It is usually called a writ of dower *unde nihil habet*. 3 Chitty, Pl. 398. There is another species, called a writ of right of dower, which applies to the particular case where the widow has received a part of her dower from the tenant himself; and of land lying in the same town in which she claims the residue. This latter writ is seldom used in practice. See DOWER.

WRIT OF EJECTMENT. See EJECTMENT.

WRIT OF ENTRY. See ENTRY, WRIT OF.

WRIT OF ERROR. A writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and commanding them, in some cases, themselves to examine the record, in others to send it to another court of appellate jurisdiction, therein named, to be examined, in order that some alleged error in the proceedings may be corrected. Steph.

Pl. 138; 2 Saund. 100, n. 1; Bac. Abr. Error.

The first is called a writ of error *coram nobis* or *vobis*. When an issue in fact has been decided, there is not, in general, any appeal except by motion for a new trial; and although a matter of fact should exist which was not brought into the issue, as, for example, if the defendant neglected to plead a release, which he might have pleaded, this is no error in the proceedings, though a mistake of the defendant; Steph. Pl. *118. But there are some facts which affect the validity and regularity of the proceeding itself; and to remedy these errors the party in interest may sue out the writ of error *coram vobis*. The death of one of the parties at the commencement of the suit, the appearance of an infant in a personal action by an attorney and not by guardian, the coverture of either party at the commencement of the suit, when her husband is not joined with her, are instances of this kind; 1 Saund. 101; Steph. Pl. *119; 1 Browne, Pa. 75. The writ of error *coram vobis* is used to correct errors of fact and not of law; 37 Ill. App. 311.

The second species is called, generally, writ of error, and is the more common. Its object is to review and correct an error of the law committed in the proceedings, which is not amendable or cured at common law or by some of the statutes of amendment or jeofail. See, generally, 1 Vern. 169; 1 Salk. 322; 2 Saund. 46, 101; 3 Bla. Com. 405.

It lies only to remove causes from a court of record. It is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive; 3 Story, Const. § 1731. And it is considered, generally, as a new action; 15 Ala. 9.

If a writ of error can ever be issued *nunc pro tunc*, after the lapse of the time allowed by law for bringing suits in error, the default must be attributable solely to official delinquency; 32 Fla. 273.

A party cannot pursue the remedies of appeal and writ of error simultaneously. He is not entitled to his writ of error at least until the appeal is dismissed; 30 Mo. App. 503.

A writ of error does not vacate the judgment of the court below; that continues in force until reversed; 100 U. S. 81. See APPEAL; BILL OF EXCEPTION.

WRIT OF EXECUTION. A writ to put in force the sentence that the law has given. See EXECUTION.

WRIT OF EXIGI FACIAS. See EXIGENT; EXIGI FACIAS; OUTLAWRY.

WRIT OF FORMEDON. This writ lies where a party claims the specific recovery of lands and tenements as issue in tail, or as remainder-man or reversioner, upon the determination of an estate in tail. Co. Litt. 236 b. See FORMEDON.

WRIT OF INQUIRY. See INQUISITION; INQUEST.

WRIT OF MAINPRISE. A writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence and bail has been refused, or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, commonly called mainpennors, and to set him at large. 3 Bla. Com. 128. See MAINPRISE.

WRIT OF MANDAMUS. See MANDAMUS.

WRIT OF MESNE. In Old English Law. A writ which was so called by reason of the words used in the writ, namely, *Unde idem A qui medius est inter C et prefatum B*; that is, A, who is mesne between C, the lord paramount, and B, the tenant paravail. Co. Litt. 100 a.

WRIT OF PRECIPUE. This writ is also called a writ of covenant, and is sued out by the party to whom lands are to be conveyed by fine,—the foundation of which is a supposed agreement or covenant that

the one shall convey the land to the other. 3 Bla. Com. 349.

WRIT OF PREVENTION. This name is given to certain writs which may be issued in anticipation of suits which may arise. Co. Litt. 100. See QUIA TIMET.

WRIT OF PRIVILEGE. See PRIVILEGE, WRIT OF.

WRIT OF PROCESS. See PROCESS; ACTION.

WRIT OF PROCLAMATION. A writ which issues at the same time with the *exigi facias*, by virtue of stat. 31 Eliz. c. 8, s. 1, by which the sheriff is commanded to make proclamations in the statute prescribed.

When it is not directed to the same sheriff as the writ of *exigi facias* is, it is called a foreign writ of proclamation. 4 Reeve, Hist. Eng. Law 261.

WRIT OF PROHIBITION. See PROHIBITION.

WRIT OF QUARE IMPEDIT. See QUARE IMPEDIT.

WRIT OF RECAPTION. A writ which lies where, pending an action of replevin, the same distrainer takes, for the same supposed cause, the cattle or goods of the same distrainee. See Fitzh. N. B. 169.

This writ is nearly obsolete, as trespass, which is found to be a preferable remedy, lies for the second taking; and, as the defendant cannot justify, the plaintiff must necessarily recover damages proportioned to the injury.

WRIT OF REPLEVIN. See REPLEVIN.

WRIT OF RESTITUTION. A writ which is issued on the reversal of a judgment commanding the sheriff to restore to the defendant below the thing levied upon, if it has not been sold, and, if it has been sold, the proceeds. See RESTITUTION.

WRIT OF RIGHT. The remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee-simple, founding his title on the right of property, or mere right, arising either from his own seisin or the seisin of his ancestor or predecessor. Fitzh. N. B. 1 (B); 3 Bla. Com. 391.

At common law, a writ of right lies only against the tenant of the freehold demanded; 8 Cra. 239.

This writ brings into controversy only the rights of the parties in the suit; and a defence that a third person has better title will not avail; 7 Wheat. 27; 3 Pet. 133; 3 Bingham. N. S. 434; 6 Ad. & E. 103.

WRIT OF SUMMONS. See SUMMONS.

WRIT OF TOLL. In English Law. The name of a writ to remove proceedings on a writ of right patent from the court-baron into the county court. 3 Bla. Com. App. No. 1, § 2.

WRIT OF TRIAL. In English Law. A writ directing an action brought in a superior court to be tried in an inferior court or before the under-sheriff, under stat. 3 & 4 Will. IV. c. 42. It is now superseded by the County Courts Act of 1867, c. 142, s. 6, by which a defendant in certain cases is enabled to obtain an order that the action be tried in a county court; 3 Steph. Com. 515, n.

WRIT OF WASTE. The name of a writ to be issued against a tenant who has committed waste of the premises. See WASTE.

WRIT PRO RETORNO HABENDO. In Practice. The name of a writ which recites that the defendant was summoned to appear to answer the plaintiff in a plea whereof he took the cattle of the said plaintiff (specifying them), and that the said plaintiff afterwards made default, wherefore it was then considered that the said plaintiff and his pledges of

prosecuting should be in mercy, and that the said defendant should go without day, and that he should have return of the cattle aforesaid. It then commands the sheriff that he should cause to be returned the cattle aforesaid to the said defendant without delay, etc. 2 Sell. Pr. 168.

WRITER OF THE TALLIES. In England. An officer of the exchequer whose duty it was to write upon the tallies the letters of tellers' bills. The office has long been abolished. See TALLY.

WRITERS TO THE SIGNET. In Scotch Law. Anciently, clerks in the office of the secretary of state, by whom writs passing the king's signet were prepared. Their duty now is to prepare the warrants of all lands flowing from the crown, and to sign almost all diligencies of the law affecting the person or estate of a debtor, or for compelling implement of decree of superior court. They may act as attorneys or agents before the court of sessions and have various privileges. Bell, Dict. Clerk to Signet.

WRITING. The act of forming by the hand letters or characters of a particular kind, on paper or other suitable substance, and artfully putting them together so as to convey ideas.

The word "writing," when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments nor in common intercourse are the two terms "letter" and "writing" equivalent expressions. In law the term "writing" is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds, and notes, etc. In the statute of frauds the word occurs in that sense in nearly every section. But in its most frequent and most familiar sense the term "writing" is applied to books, pamphlets, and the literary and scientific productions of authors; 185 U. S. 258.

It differs from printing, which is the formation of words on paper or other proper substance by means of a stamp. Sometimes by writing is understood printing, and sometimes printing and writing mixed.

See 9 Pick. 312. A theatre ticket is the subject of forgery. "Printing" is "writing" in the legal sense of the term, and an instrument, the words of which are printed either wholly or in part, is equally valid with an instrument written by a pen; 84 Fed. Rep. 652; 127 U. S. 467.

Many contracts are required to be in writing; all deeds for real estate must be in writing, for it cannot be conveyed by a contract not in writing, yet it is the constant practice to make deeds partly in printing and partly in writing. Wills, except nuncupative wills, must be in writing, and signed by the testator; and nuncupative wills must be reduced to writing by the witnesses within a limited time after the testator's death.

Records, bonds, bills of exchange, and many other engagements must, from their nature, be made in writing.

The notes of a stenographer, taken when the witness gives his oral testimony in court, is a "taking in writing," as required by a statute; 32 La. Ann. 648.

As to a writing being in lead pencil, see, generally, 45 La. Ann. 651; 183 Pa. 245; 84 id. 510; 12 Johns. 102; WILL.

See ALTERATION; FORGERY; FRAUDS, STATUTE OF; LANGUAGE; SALE; TYPE-WRITING; STENOGRAPHER.

WRITING OBLIGATORY. A bond; an agreement reduced to writing, by which the party becomes bound to perform something, or suffer it to be done.

WRITTEN INSTRUMENT. A judgment and a tax duplicate have been held not to be written instruments, within the meaning of a statute requiring a copy to be filed with the pleadings; 38 Ind. 48; 39 id. 172.

WRITTEN LAW. Statute law; law deriving its force from express legislative enactment. 1 Bl. Com. 62, 85.

WRONG. An injury; a tort; a violation of right.

In its broad sense, it includes every injury to another, independent of the motive causing the injury; 36 Kan. 570.

A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical

capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only; 143 N. Y. 447.

In its most usual sense, wrong signifies an injury committed to the person or property of another, or to his relative rights unconnected with contract; and these wrongs are committed with or without force. But in a more extended signification, wrong includes the violation of a contract; a failure by a man to perform his undertaking or promise is a wrong or injury to him to whom it was made; 3 Bla. Com. 158.

A public wrong is an act which is injurious to the public generally, commonly known by the name of crime, misdemeanor, or offence; and it is punishable in various ways, such as indictments, summary proceedings, and, upon conviction, by death, imprisonment, fine, etc.

Private wrongs, which are injuries to individuals, unaffecting the public; these are redressed by actions for damages, etc. See REMEDIES; TORT.

WRONG-DOER. One who commits an injury; a *tort-feasor*. See Dane, Abr.

WRONGFUL ACT. The words "wrongful act" held to denote any and all kinds of acts from which negligence could arise. 24 S. W. 619.

WRONGFULLY. In a wrong manner; unjustly; in a manner contrary to the moral law, or to justice. Webster, cited 91 Ind. 586.

WRONGFULLY INTENDING. In Pleading. Words used in a declaration when in an action for an injury the motive of the defendant in committing it can be proved; for then his malicious intent ought to be averred. This is sufficiently done if it be substantially alleged, in general terms, as wrongfully intending. 3 Bouvier, Inst. n. 2875.

WYOMING. One of the states of the United States.

Wyoming became one of the states of the Union by virtue of the act of congress of July 10, 1890. By act of congress, approved July 25, 1898, the territory of Wyoming was constituted. See MONTANA; NEW MEXICO.

X, Y, Z.

X-RAY. While a picture produced by an "X-ray" cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, the rule in regard to the use of ordinary photographs on the trial of a cause applies to photographs of the internal structure and conditions of the human body taken by the aid of "X-rays" when verified by proof that they are a true representation. 157 Ky. 107, 162 S. W. 536.

Y.

YACHT. A light sea-going vessel for the purpose of pleasure, racing, and the like. See **VESSEL.** A steam pleasure yacht is an "ocean going vessel" and not a coasting vessel; 150 U. S. 674.

By the act of January 25, 1897, foreign-built yachts thereafter purchased by American citizens are subject to tonnage duties; 166 U. S. 110. See 142 U. S. 479; [1897] A. C. 59; **VESSEL**; **SHIP**; **NAVIGATION RULES.**

YARD. A measure of length, containing three feet, or thirty-six inches.

A piece of land inclosed for the use and accommodation of the inhabitants of a house. In England it is nearly synonymous with backside. 1 Chitty, Pr. 176; 1 Term 701.

YARDLAND. In Old English Law. A quantity of land containing twenty acres. Co. Litt. 69 a.

YEAR. The period in which the revolution of the earth round the sun, and the accompanying changes in the order of nature, are completed.

The civil year differs from the astronomical, the latter being composed of three hundred and sixty-five days, five hours, forty-eight seconds and a fraction, while the former consists sometimes of three hundred and sixty-five days, and at others, in leap-years, of three hundred and sixty-six days.

The year is divided into half-year, which consists, according to Co. Litt. 135 b, of one hundred and eighty-two days; and quarter of a year, which consists of ninety-one days. *Id.*; 2 Rolle, Abr. 521, l. 40. It is further divided into twelve months.

The civil year commences immediately after twelve o'clock at night of the thirty-first day of December, that is, the first moment of the first day of January, and ends at midnight of the thirty-first day of December twelve months thereafter. See Com. Dig. *Annus*; 2 Chitty, Bla. Com. 140. Before the alteration of the calendar from old to new style in England (see **BISSEXTILE**) and the colonies of that country in America, the year in chronological reckoning was supposed to commence with the first day of January, although the legal year did not commence until March 25, the intermediate time being doubly indicated; thus February 15, 1724, and so on. This mode of reckoning was altered by the statute 24 Geo. II. c. 23, which gave rise to an act of assembly of Pennsylvania, passed March 11, 1752, 1 Smith, Laws, 217, conforming thereto, and also to the repeal of the act of 1710.

In New York it is enacted that whenever the term "year" or "years" is or shall be used in any statute, deed, verbal or written contract, or any public or private instrument whatever, the year intended shall be taken to consist of three hundred and sixty-five days; half a year, of a hundred and eighty-two days; and a quarter of a year, of ninety-two days;

and the day of a leap year, and the day immediately preceding, if they shall occur in any period so to be computed, shall be reckoned together as one day. Rev. Stat. vol. 2; c. 19, t. 1, § 3. The meaning of the term "year," as used in a contract, is to be determined from the connection in which it is used and the subject-matter of the contract; 77 Cal. 236; 73 Ind. 54. See **AGE**; **ALLOWANCE**; **TIME**; **REGNAL YEARS**; **OLD STYLE.**

The omission of the word "year" in an indictment is not important, provided the proper numerals are written after the month and day of the month; 22 Minn. 67. An indictment which states the year of the commission of the offence in figures only, without prefixing "A. D.," is insufficient; 5 Gray 91; but it has been held otherwise in Maine under a statute; 47 Me. 388. See **YEAR OF OUR LORD.**

YEAR AND DAY. A period of time much recognized in law.

It is not in all cases limited to a precise calendar year. In Scotland, in computing the term, the year and day is to be reckoned, not by the number of days which go to make up a year, but by the return of the day of the next year that bears the same denomination; 1 Bell, Com. 721. See *Bac. Abr. Descent* (13). In the law of all the Gothic nations, it meant a year and six weeks.

It is a term frequently occurring; for example, in case of an estray, if the owner challenged it not within a year and a day, it belonged to the lord; 5 Co. 108. So of a wreck; Co. 2d Inst. 168. This time is given to prosecute appeals and for actions in a writ of right, and, after entry or claim, to avoid a fine; *Plowd.* 357 a. And if a person wounded die in that time, it is murder; Co. 8d Inst. 53; 6 Co. 107. So, when a judgment is reversed, a party, notwithstanding the lapse of time mentioned in the statute of limitations pending that action, may commence a fresh action within a year and a day of such reversal; 3 Chitty, Pr. 107. Again, after a year and a day have elapsed from the day of signing a judgment no execution can be issued till the judgment be revived by *scire facias*; *Bac. Abr. Execution* (H).

Protection lasted a year and a day; and if a villein remain from his master a year and a day in an ancient demesne, he is free; *Cunningham, Dict.* If a person is afraid to enter on his land, he may make claim as near as possible,—which is in force for a year and a day; 3 Bla. Com. 175. In case of prize, if no claim is made within a year and a day, the condemnation is to captors as of course; 2 Gall. 388. So, in case of goods saved, the court retains them till claim, if made within a year and a day, but not after that time; 8 Pet. 4.

Coke gives various rules as to the proposition that the common law has often limited year and day as a convenient time. See Co. Litt. 254 b; 5 Rep. 218.

See **Possession for Year and Day**, by F. W. Maitland, in 5 L. Q. Rev. 253, containing much learning.

The same period occurs in the Civil Law, in the Book of Feuds, the Laws of the Lombards, etc.

YEAR-BOOKS. Books of reports of cases in a regular series (the first one being written in 1292; 1 Poll. & Maitl. 195), from the reign of the English King Edward II., 1292, inclusive, to the time of Henry VIII., which were taken by the prothonotaries or chief scribes of the courts, at the expense of the crown, and published annually—

whence their name Year-Books. They consist of eleven parts, namely:—Part 1. Maynard's Reports *temp.* Edw. II.; also divers Memoranda of the Exchequer *temp.* Edward I. Part 2. Reports in the first ten years of Edw. III. Part 3. Reports from 17 to 39 Edward III. Part 4. Reports from 40 to 50 Edward III. Part 5. Liber Assisarum; or, Pleas of the Crown *temp.* Edw. III. Part 6. Reports *temp.* Hen. IV. & Hen. V. Parts 7 and 8. Annals; or, Reports of Hen. VI. during his reign, in 2 vols. Part 9. Annals of Edward IV. Part 10. Long Quinto; or, Reports in 5 Edward IV. Part 11. Cases in the reigns of Edward V., Richard III., Henry VII., and Henry VIII. A reference to them by a learned judge as mere "lumber garrets of obsolete feudal law," indicates their practical value in modern times. Wallace, Reporters; 2 Wall. Jr. 309. See **REPORTS.**

Their usefulness is now, however, considered rather greater than that. Professor Wambaugh (Study of Cases § 98) says they "are the work of skilled lawyers; and the reports of cases, when complete, present an adequate view of the pleadings." They were Court Rolls, intended for the preservation of the results in order to fix the rights of the parties, but not adapted for use as precedents. *Id.* See 1 Dougl. v. 1 Co. XXVI.

YEAR, DAY, AND WASTE (Lat. annus, dies, et vastum) is a part of king's prerogative, whereby he takes the profits of the lands and tenements of those attainted of petty treason or felony, for a year and a day, but, in the end, may waste the tenements, destroy the houses, root up the woods, gardens, and pasture, and plough up the meadows (except the lord of the fee agree with him for redemption of such waste); after which the lands are to be restored to the lord of the fee. Staundford, Prerog. c. 16, fol. 44. By Magna Charta, it would appear that the profits for a year and a day were given in lieu of the waste. 9 Hen. III. c. 22. But 17 Edw. II. declares the king's right to both.

YEAR OF OUR LORD. In England the time of an offence may be alleged as that of the sovereign's reign, or as that of the year of our Lord. The former is the usual mode. Hence there "year" alone might not indicate the time intended, but as we have no other era, therefore, any particular year must mean that year in our era. 14 Gray 38. The abbreviation A. D. may be omitted; and the word year is not fatal; 47 Me. 393; 22 Mo. 71; *contra*, 5 Gray 92. See **REGNAL YEARS.**

YEARS, ESTATE FOR. See **ESTATE FOR YEARS.**

YEAS AND NAYS. The list of members of a legislative body voting in the affirmative and negative of a proposition.

The constitution of the United States, art. 1, s. 5, directs that "the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal." See 2 Story, Const. 301.

Constitutional provisions in some states require the yeas and nays to be entered on the journal on the final passage of every bill. See 63 Ill. 160; 22 Mich. 104; 54 N. Y. 276. These directions are clearly imperative; Cooley, Const. Lim. 171.

The power of calling the yeas and nays is given by all the constitutions of the several states; and it is not, in general,

restricted to the request of one-fifth of the members present, but may be demanded by a less number; and, in some, one member alone has the right to require the call of the yeas and nays.

YEOMAN. In the United States this word does not appear to have any very exact meaning. It is usually put as an addition to the names of parties in declarations and indictments. In England it signifies a free man who has land of the value of forty shillings a year. Co. 2d Inst. 668; 2 Dall. 92. The local volunteer militia raised by individuals with the approbation of the queen are also called yeomen. The term *yeomanry* is applied to the small freeholders and farmers in general. Hallam, Cons. Hist. c. 1.

YIELD. To give as claimed of right; to resign.

YIELDING AND PAYING. These words, when used in a lease, constitute a covenant on the part of the lessee to pay the rent; Platt, Cov. 50; 3 Pa. 464; 2 Lev. 206; 3 Term 402; 1 B. & C. 416; 2 Dowl. & R. 670; but whether it be an express covenant or not seems not to be settled; 2 Lev. 206; T. Jones 102; 3 Term 402.

In Pennsylvania, it has been decided to be a covenant running with the land; 3 Pa. 464. See 1 Saund. 233, n. 1; 9 Vt. 191.

YORK-ANTWERP RULES. Certain rules relating to uniform bills of lading formulated by the Association for the Reform and Codification of the Laws of Nations, now the International Law Association.

YORK, CUSTOM OF, is recognized by 22 & 23 Car. II. c. 10, and 1 Jac. II. c. 17. By this custom, the effects of an intestate are divided according to the anciently universal rule of *pars rationabilis*. 4 Burn, Eccl. Law 342.

YORK, STATUTE OF. The name of an English statute, passed at York, 12 Edw. II. 1318. It contains many wise provisions and explanations of former statutes. Barrington, Stat. 174. There were other statutes made at York in the reign of Edward III., but they do not bear this name.

YOUNG ANIMALS. It is a rule that the young of domestic or tame animals belong to the owner of the dam or mother, according to the maxim, *Partus sequitur ventrem*. Dig. 6. 1. 5. 2; Inst. 2. 1. 9. See **WHELP**.

YOUNGER CHILDREN. When used with reference to settlements of land in England, this phrase signifies all such

children as are not entitled to the rights of an eldest son, including daughters who are older than the eldest son. Moz. & W.

YOUTH. This word may include children and youth of both sexes. 2 Cush. 519, 528.

Z.

ZAMINDAR, or ZEMINDAR. A landholder in India, who is the responsible collector of revenues on behalf of the government. Wilson's Gloss.

ZINC ORE. A mineral body, containing so much of the metal of zinc as to be worth smelting. 55 N. J. L. 350.

ZOLL-VEREIN. A union of German states for uniformity of customs, established in 1819. It continued until the unification of the German Empire, including Prussia, Saxony, Bavaria, Wurtemberg, Baden, Hesse-Cassel, Brunswick, and Mecklenberg-Strelitz, and all intermediate principalities. It has now been superseded by the German Empire; and the Federal Council of the empire has taken the place of that of the Zoll-verein. Whart. Lex. See Miller, Const. 439.

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